TAB 11

LEXSEE 2000 US DIST LEXIS 304

Analysis
As of: Sep 26, 2008

IN RE: NASDAQ MARKET-MAKERS ANTITRUST LITIGATION

M.D.L. No. 1023, 94 Civ. 3996 (RWS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2000 U.S. Dist. LEXIS 304*; *2000-1 Trade Cas. (CCH) P72,773

January 12, 2000, Decided
January 18, 2000, Filed

SUBSEQUENT HISTORY: Application denied by *In re NASDAQ Market-Makers Antitrust Litig., 2003 U.S. Dist. LEXIS 7218 (S.D.N.Y., Apr. 30, 2003)*

PRIOR HISTORY: *In re Nasdaq Market-Makers Antitrust Litig. v. Herzog, Heine, Geduld, Inc., 189 F.3d 461, 1999 U.S. App. LEXIS 22360 (2d Cir. N.Y., 1999)*

DISPOSITION: [*1] Plaintiffs application for final approval of proposed plan of distribution granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs in a class action applied for final approval of a proposed plan of distribution of settlement.

OVERVIEW: Plaintiffs' notice of pendency of class action and of proposed settlements advised potential class members of proposed settlements with all defendants. The class notice also advised potential class members that the settlement fund would be distributed pursuant to a plan of distribution to be approved by the court. Approval of the settlement, including the plan of distribution, rested in the sound discretion of the district court. The proposed plan with the modifications recommended by co-lead counsel was considered in light of the various objections raised and in light of more general concerns of equity and fairness to the class as a whole. The proposed plan of distribution with modifications indicated was fair and equitable, and was approved.

OUTCOME: The proposed plan with the modifications recommended by co-lead counsel was considered in light of the various objections raised and in light of more general concerns of equity and fairness to the class as a whole. The proposed plan of distribution with the modifications indicated was fair and equitable, and was approved.

LexisNexis(R) Headnotes

Civil Procedure > Class Actions > Compromises
Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Settlements > Settlement Agreements > General Overview
[HN1] Approval of a settlement, including a plan of distribution, rests in the sound discretion of the district court. District courts enjoy broad supervisory powers over the administration of class action settlements to allocate the proceeds among the class members equitably.

Civil Procedure > Settlements > General Overview
[HN2] Allocation formulas are recognized as an appropriate means to reflect the comparative strength and value of different categories of claim. An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel. The court's principal obligation is simply to ensure that the fund distribution is fair and reasonable.

Civil Procedure > Class Actions > Class Counsel > General Overview
Civil Procedure > Settlements > General Overview
[HN3] A court's principal obligation is simply to ensure that a fund distribution is fair and reasonable.

COUNSEL: For PLAINTIFFS: ARTHUR M. KAPLAN, ESQ., Of Counsel, FINE KAPLAN AND BLACK, Philadelphia, PA.

For PLAINTIFFS: CHRISTOPHER LOVELL, ESQ., Of Counsel, LOVELL & STEWART, New York, NY.

For PLAINTIFFS: ROBERT A. SKIRNICK, ESQ., Of Counsel, MEREDITH COHEN GREENFOGEL & SKIRNICK, New York, NY.

For PLAINTIFFS: LEONARD B. SIMON, ESQ., Of Counsel, MILBERG, WEISS, BERSHAD, HYNES & LERACH, San Diego, CA.

JOHN GENINS, Class Member, Pro se, Atlanta, GA.

LIAISON COUNSEL FOR DEFENDANTS: HOWARD SCHIFFMAN, ESQ., R. BRUCE HOLCOMB, ESQ., Of Counsel, DICKSTEIN SHAPIRO MORIN & OSHINSKY, Washington, DC.

LIAISON COUNSEL FOR DEFENDANTS: JOHN L. WARDEN, ESQ., Of Counsel, SULLIVAN & CROMWELL, New York, NY.

LIAISON COUNSEL FOR DEFENDANTS: JAY N. FASTOW, ESQ., Of Counsel, WEIL, GOTSHAL & MANGES, New York, NY.

JUDGES: ROBERT W. SWEET, U.S.D.J.

OPINION BY: ROBERT W. SWEET

OPINION

Sweet, D.J.

Plaintiffs have applied for final approval of the proposed plan of distribution of the settlement in this action. For the reasons set forth below, approval is granted.

Facts and Prior Proceedings

[*2] The parties, facts and prior proceedings in this action have been set forth more fully in several prior opinions of the Court, familiarity with which is assumed. *See In re Nasdaq Market-Makers Antitrust Litig., 894 F. Supp. 703 (S.D.N.Y. 1995)*; *In re Nasdaq Market-Makers Antitrust Litig., 164 F.R.D. 346 (S.D.N.Y. 1996)*; *In re Nasdaq Market-Makers Antitrust Litig., 1996 U.S. Dist. LEXIS 4969, 1996-1 Trade Cas. (CCH) P 71,407 (S.D.N.Y. 1996)*; *In re Nasdaq Market-Makers Antitrust Litig., 929 F. Supp. 723 (S.D.N.Y. 1996)*; *In re Nasdaq Market-Makers Antitrust Litig., 929 F. Supp. 174 (S.D.N.Y. 1996)*; *In re Nasdaq Market-Makers Antitrust Litig., 938 F. Supp. 232 (S.D.N.Y. 1996)*; *In re Nasdaq Market-Makers Antitrust Litig., 169 F.R.D. 493 (S.D.N.Y. 1996)*; *United States v. Alex. Brown & Sons, 169 F.R.D. 532 (S.D.N.Y. 1996)*; *In re Nasdaq Market-Makers Antitrust Litig., 172 F.R.D. 119 (S.D.N.Y. 1997)*; *In re Nasdaq Market-Makers Antitrust Litig., 176 F.R.D. 99, 1997 WL 639240 (S.D.N.Y. 1997)*; *United States v. Alex. Brown & Sons, 963 F. Supp. 235 (S.D.N.Y. 1997)*; [*3] *In re Nasdaq Market-Makers Antitrust Litig., 176 F.R.D. 99 (S.D.N.Y. 1997)*; *In re Nasdaq Market-Makers Antitrust Litig., 1997 U.S. Dist. LEXIS 20835, 1997-2 Trade Cas. (CCH) P 72,028 (S.D.N.Y. 1997)*; *In re Nasdaq Market-Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y. 1998)*; *In re Nasdaq Market-Makers Antitrust Litig., 184 F.R.D. 506 (S.D.N.Y. 1999)*. Those facts and prior proceedings relevant to the instant opinion are set forth below.

Plaintiffs' May 15, 1998 Notice of Pendency of Class Action and of Proposed Settlements ("May 15, 1998 Class Notice") advised potential Class members of the proposed settlements with all defendants totalling approximately $ 1,027,000,000 (before fees and expenses, and including interest through July 1999). The May 15, 1998 Class Notice also advised potential Class members that the Settlement Fund would be distributed pursuant to a plan of distribution to be approved by the Court after further notice to Class members and an opportunity for interested Class members to be heard.

This Court preliminarily approved Plaintiffs' Proposed Plan of Distribution ("Proposed Plan") on March 9, 1999. Plaintiffs then proceeded [*4] with a program of Class Notice. The Notice Regarding Proposed Plan of Distribution, Hearing, and Proof of Claim dated June 11, 1999 ("June 11, 1999 Class Notice") informed potential Class members of a hearing on the Proposed Plan scheduled for October 6, 1999, and advised them of their right to appear and be heard by submitting a Notice of Intention to be Heard by August 10, 1999.

The Proposed Plan provides three methods for Class members to seek recovery: a traditional Basic Proof of Claim Form, and two innovations: a Preprinted Proof of Claim Form, and an electronic Positional Proof of Claim Form. These innovations are likely to substantially increase the participation in the settlement by Class members over what would normally be anticipated in an antitrust class action, thereby helping to make the distribution fair and equitable. The Proposed Plan also applies a weighing factor of 1.0 to claims filed by institutional

Class members, and a factor of 1.5 to claims filed by non-institutional Class members. As explained in more detail below, these weighing factors were arrived at after careful analysis by highly regarded economists to account for the fact that institutions were somewhat [*5] less affected by the alleged conspiracy than non-institutional traders.

Discussion

[HN1] Approval of this settlement, including the plan of distribution, rests in the sound discretion of the district court. *See, e.g., In re Ivan F. Boesky Sec. Litig., 948 F.2d 1358, 1368 (2d Cir. 1991)*. District courts enjoy "broad supervisory powers over the administration of class action settlements to allocate the proceeds among the class members . . . equitably." *Beecher v. Able, 575 F.2d 1010, 1016 (2d Cir. 1978)*.

[HN2] Allocation formulas (such as the 1.0 and 1.5 weighing factors in the Proposed Plan) are recognized as an appropriate means to reflect the comparative strength and value of different categories of claim. *See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 78 (2d Cir. 1982)*. An allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" Class Counsel. *White v. National Football League, 822 F. Supp. 1389, 1420-24 (D. Minn. 1993)*, *aff'd 41 F.3d 402 (8th Cir. 1994)*. "The [HN3] court's principal obligation is simply to ensure that the fund distribution [*6] is fair and reasonable . . ." *Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 964 (3d Cir. 1983)*. As this Court has previously indicated, Plaintiffs' class counsel includes "some of the most experienced lawyers in the United States in the prosecution of antitrust and securities class actions." *In re Nasdaq Market-Makers Antitrust Litig., 169 F.R.D. 493, 515 (S.D.N.Y. 1996)*. The Proposed Plan was developed by class counsel in combination with a working group of Deputy State Attorneys General, economists, and an experienced Settlement Administrator.

Of substantial weight is the small number of objections to the Proposed Plan. There are over a million class members. Only ten Class members filed Notices of Intention to be Heard, and of those ten only four actually raise objections to the Proposed Plan of Distribution. In previously approving the $ 1.027 billion settlement of this action, this Court also considered the small number of objections to the proposed settlement to be relevant. *See In re Nasdaq Market-Makers Antitrust Litig., 187 F.R.D. 465, 478 (S.D.N.Y. 1998)*.

Plaintiffs' Co-Lead Counsel ("Co-Lead Counsel") now seek [*7] to modify the Proposed Plan, following certain objections raised by Class members. First, Co-Lead Counsel recommend that each claimant who has filed one or more valid claims be entitled to a minimum recovery of $ 25, to reflect the effort involved in filing valid claims. According to the affidavit of Martin Rudolph, C.P.A. and Edward Radetich, Jr., C.P.A., setting a $ 25 floor will not cause reallocation of more than 1% to 2% of the Settlement Fund. Thus, the effect on other claimants will be minimal. The Settlement Administrators do not believe that a floor of this kind will create a substantial administrative burden, increase the cost of the Settlement Administration, or delay the distribution of the fund to claimants.

The Court is cognizant that Class members who executed few trades are likely to spend substantially more time per dollar of recovery due to the necessity of reading through and filling out the claims forms. A $ 25 floor is thus a reasonable means of compensating such Class members.

Co-Lead Counsel have also recommended two other changes: (1) that the $ 15 charge for obtaining a data disk be reduced, when necessary, so that no claimant, with one or more valid claims, [*8] will receive less than the $ 25 minimum net recovery; and (2) that claimants be permitted to file Basic Proof of Claim Forms for more than 70 transactions, rather than an Electronic Proof of Claim Form, if the claimant credibly certifies that he or she is unable to prepare an Electronic Proof of Claim. These changes have been recommended in order to assure a reasonable minimum net recovery for those claimants, filing valid claims, who ordered a data disk, and to avoid hardship for claimants who do not have access to a computer or who lack computer training. The Settlement Administrators have represented that these proposed changes likewise will not create any substantial administrative burden, nor increase the cost of the settlement administration, nor delay the distribution of the fund to claimants.

These adjustments to the Proposed Plan should help to insure that Class members who had little trading activity, or who do not have access to a computer or have computer training, will nevertheless be able to participate in the settlement.

Of the ten Notices of Intention To Be Heard, [1] those of Loretta Chen and Marvin Wooden do not actually state any objections. Those of Richard A. [*9] Wong-Kew, Joseph McGrath, and Herbert W. Jones seek compensation for alleged wrongs which fall outside the scope of this litigation and cannot be considered here. The objection of Joe Auerbach -- that the settlement amount is too small -- is untimely. The settlement has already been approved by this Court for the reasons discussed in the opinion issued forthwith, *See In re Nasdaq, 187 F.R.D. 465*, and Auerbach offers no basis for reconsideration.

1 An additional objection was submitted by Class member John Genins on October 6, 1999. Genins, however, who has repeatedly sought to disrupt the proceedings in this action, has been barred from filing any further papers without prior permission of the Court. *See In re Nasdaq, 187 F.R.D. 124, 132 (1999)*. He has not sought such permission for the most recent objection. In addition, Genins has not paid the $ 15,000 monetary sanction ordered from the bench on June 22, 1999. His objections will not be considered.

Bernard Soloway's objection to the [*10] requirement that a Class member must file electronically if he or she has more than 70 trades has been adopted in the modification of the Proposed Plan which Co-Lead Counsel are seeking, and which this Court approved above.

Morris J. Baller's objection proposed a $ 50 minimum recovery. This objection has been addressed above in the adoption of a $ 25 minimum, a more reasonable figure to balance the costs of the small trader against those of the large institutions.

The two remaining objections for which the Co-Lead Counsel have not proposed modification of the Proposed Plan are those of (1) Ecu Trust Ltd. and Ishik Kubali-Camoglu, and (2) Edward H. Sonn. These objections are addressed at greater length.

Ecu Trust Ltd. and Ishik Kubali-Camoglu ("Ecu")

Ecu proposes that institutions be required to segregate and exclude their Instinet and Posit trades, and that the weighed ratio for non-institutions/institutions be changed from the proposed 1.5/1.0 to 3.0/1.0. The rationale behind this proposal is that trading on Instinet and Posit -- proprietary trading systems to which non-institutions do not have access -- did not subject institutions to the conspiracy at the heart of [*11] the allegations in this action and therefore such trades should not be included in any recovery by institutions. Moreover, the doubling of the ratio is assertedly based on differences in size between commissions paid by institutional as compared to non-institutional Class members.

However, the evidence marshalled by Ecu in support of its assertions is scanty and extrapolates largely from current figures taken from the Instinet and Posit web sites. By contrast, the 1.5/1.0 ratio was developed principally by Professors Michael J. Barclay of the University of Rochester and Haim Mendelson of Stanford University based on an extensive analysis of effective bid-ask spreads for each and every Class Security. These spreads were compared for benchmark purposes with bid-ask spreads for other Nasdaq National Market securities. Then, the inflation in effective spreads for "retail-size" trades was compared with the inflation in effective trades for "institutional-size" trades in Class Securities in order to develop appropriate weighing factors.

In addition, Barclay and Mendelson took into account the inclusion of Instinet and Posit trades, and expressly considered the issue of commissions. The [*12] decision to include Instinet and Posit trades vastly simplifies the claims filing process for Class members, because it would be difficult, if not impossible, in most cases for institutions and defendants (whose computerized records are being accessed to identify trades) to segregate Instinet and Posit trades.

Moreover, the 1.5/1.0 ratio already accounts for the institutional discount from Instinet and Posit trades. Were the Instinet and Posit trades to be excluded, the ratio would have to be recalculated.

Finally, with regard to the effect of commissions on the ratio, Ecu has provided no economic basis for suggesting a 3.0/1.0 ratio. The issue of commissions was considered by Barclay and Mendelson, who concluded that there was no evidence to establish that any offset or waiver of commissions resulting from the conspiracy alleged in this action affected institutions differently from other Class members. Thus, Barclay and Mendelson gave this factor little weight.

For these reasons, the affidavits and reasoning of Barclay and Mendelson are far more persuasive than the objections put forth by Ecu, which are rejected.

Edward H. Sonn

Mr. Sonn, predicting that relatively few [*13] members of the Class will file a claim, thus resulting in a windfall distribution for those members who do file, proposes that recovery by each claimant be capped at the amount that the claimant would have received if all potential claimants had filed a claim. The balance would then be paid over to a new "Market-Makers Charitable Trust" ("Trust") to be administered by nine trustees. Sonn points out that the typical investor has already benefitted from the smaller spreads brought about by this litigation and will continue to do so.

This proposal, however well-intentioned, would violate the terms of the Settlement Agreements, under which the Co-Lead Counsel must propose a Plan of Distribution that in their opinion will fairly and adequately allocate the Settlement Fund among the participating Class in satisfaction of the Class' claims in the litigation. The Settlement Agreements expressly contemplate that any residue of the Settlement Fund resulting from uncashed checks, following a good faith effort to distribute the fund to Class members, may, in the discretion of the Court, be awarded to a suitable proposed charitable organization that provides educational, health, or legal ser-

vices [*14] to persons of inadequate means. From this provision can be drawn the inference that a larger contribution to charity was not contemplated in the Agreements.

Additionally, the innovative use of preprinted and electronic claim forms is likely to contribute to a far larger number of claims, thereby reducing any potential "windfall."

Conclusion

The Proposed Plan with the modifications recommended by Co-Lead Counsel has been considered in light of the various objections raised and in light of more general concerns of equity and fairness to the Class as a whole. For the reasons set forth above, the Proposed Plan of Distribution with the modifications indicated above is fair and equitable, and is thereby approved.

It is so ordered.

New York, N. Y.

January 12, 2000

ROBERT W. SWEET

U.S.D.J.

TAB 12

LEXSEE 1994 US DIST LEXIS 6621

IN RE: PRUDENTIAL-BACHE ENERGY INCOME PARTNERSHIPS SECURITIES LITIGATION

MDL DOCKET NO. 888 SECTION: "E"

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

1994 U.S. Dist. LEXIS 6621

May 18, 1994, Decided
May 18, 1994, Filed, Entered

JUDGES: [*1] LIVAUDAIS, JR.

OPINION BY: MARCEL LIVAUDAIS, JR.

OPINION

FINDINGS AND CONCLUSIONS ON AWARD OF ATTORNEY'S FEES AND EXPENSES

The Court fully incorporates herein its earlier Memorandum to the Record (Record Document - R. D. 334) and its First Partial Findings and Conclusions on Award of Attorney's Fees and Expenses (R. D. 354).

The settlement pool or common fund amounts to approximately $ 90 million. The Court will award 25% thereof, attorney's fees and expenses inclusive (the Award) to participating counsel. The Court has considered, *inter alia,* that the settlement notice which was mailed to some 130,000 class members stated that counsel would apply for a fee award of up to 30% of the settlement pool and that any class member could object to the fee application. No member of the class has, to the Court's knowledge, filed any meaningful objection to this amount.

Initially counsel sought an Award based on a 30% calculation (R. D. 271), but now seek and have stipulated [1] to an Award in the sum equal to 25% of the final settlement pool, fees and expenses inclusive. (R. D. 373).

1 Former Objector's counsel, the firm of Fleming, Hovenkamp & Grayson, P.C. (Fleming) was not a party to this stipulation.

[*2] Though a percentage method has been utilized in making this Award, the Court also undertakes a lodestar/multiplier analysis considering the 12 factors set forth in *Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)*. [2] Each approach results in a near identical result.

2 The *Johnson* factors are: (1) time and labor required, (2) novelty and difficulty of the issues, (3) skill required to perform the legal services properly, (4) preclusion of other employment, (5) customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) amount involved and results obtained, (9) experience, reputation and ability of the attorneys, (10) undesirability of the case, (11) nature and length of the professional relationship with the client, and (12) awards in similar cases. *Johnson, 488 F.2d at 717-19*.

A review of the requests as of December 1993 for attorney's fees and reimbursement [*3] of expenses made by the various class counsel law firms (R.D. 271) reveals:

Firm	Lodestar Fees	Hours	Attorney Rates	Expenses
Bernstein Litowitz	$ 1,870,863.75	5,919.75	$ 425-170	$ 652,826.49
Gainsburgh Benjamin	92,769.50	717.40	250-125	28,487.51
Simon Peragine	719,630.00	3,589.00	250-150	92,807.17

Firm	Lodestar Fees	Hours	Attorney Rates	Expenses
Lieff Cabraser	593,797.00	2,781.00	450-200	123,746.87
Milberg Weiss	497,941.25	2,015.75	425-125	43,184.10
Wechsler Skirnick	589,335.50	1,750.40	450-210	61,985.60
Spector Roseman	86,388.75	440.75	365-175	9,183.50
Kantor Bernstein	285,020.65	955.41	330-125	35,670.52
Goodkind Labaton	841,426.50	2,839.85	425-150	50,182.88
Rudolph Seidner	4,231.25	15.75	275-195	14.00
Levin Fishbein	14,211.25	36.25	400-235	222.66
Garwin Bronzaft	31,166.25	158.25	395-175	8,499.90
Gilman Pastor	117,337.50	396.50	300-180	14,219.36
Beigel Schy	256,731.25	882.00	400-225	27,288.89
TOTAL	$ 6,000,850.40	22,498.06	---	$ 1,148,319.43

And a review of the similar requests made by former objectors law firms, excluding Fleming, Hovenkamp and Grayson, P.C. (Fleming), (R.D. 276 through 281) reveals:

Monroe Lemann	$ 331,770.95	1,987.27	$ 235-120	51,776.08
Krislov	485,683.00	1,935.25	310-175	55,175.00
Murray	205,314.00	867.05	250-125	11,772.82
Karen	353,832.00	1,933.10	225-175	18,232.17
Cohen Malad	342,629.25	1,369.20	300-175	31,869.52
Cin Schwachman	232,274.00	988.40	235	9,636.33
TOTAL	$ 1,951,503.20	9,080.27	----	$ 178,461.92
COMBINED TOTAL	$ 7,952,353.60	31,578.33	----	$ 1,326,781.35

[*4] The Court is aware that subsequent to the above requests not insignificant time and expense has been incurred by most counsel. Most significant is the preparation for and participation in the three day settlement fairness hearing in January of this year. The record reflects other activity in addition. The Court is further aware that having chosen the reasonable percentage method as opposed to the lodestar method of arriving at this Award, it is unnecessary for the Court to delve the intricacies of the fee paying market. The Award is not paid by the defendant as a losing party, instead the class members shoulder the burden of paying out of the common fund which the attorneys have created on their behalf. Additionally, a contingency enhancement is reasonable in this instant Award to the attorneys whose skill and effort helped create the fund. Were this not a class action, attorney's fees would range between 30% and 40%, the percentages commonly contracted for in contingency cases. Had the same skill and effort produced a much greater settlement pool, whether the result of a larger number of class members or otherwise, this Award would, of course, be calculated on a reduced percentage. [*5] What the Court seeks to do here is to fashion an Award which is reasonable in light of the circumstances.

In accord with *Longden v. Sunderman, 979 F.2d 1095 (5th Cir. 1992)*, the Court undertakes a *Johnson* factors analysis. First considered is the time and labor required, the lodestar, which begins with a calculation of "the number of hours reasonably expended multiplied by the prevailing hourly rate in the community for similar work." *Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1093 (5th Cir. 1982)*. Here the lodestar for all Class Counsel and Objectors' Counsel in this action excluding Fleming is $ 7,952,353.60. The breakdown of information with respect to the total lodestar is contained in individual firm affidavits for each petitioning firm. (R.D. 271, 276-281). Those affidavits set forth the names of the lawyers or paralegals of each firm who worked on

the litigation, the hourly rates currently chargeable by each such professional, the lodestar value of the time, the hours, the major categories of work, the disbursements, the activities performed and the background and experience of each firm.

In considering [*6] this lodestar information, several factors should be considered. First, as the history of the litigation and the accompanying affidavits of counsel make clear, the services they performed were of the highest quality to produce the substantial recovery for the Class.

Second, counsel have provided their services for the reasonable hourly rates charged to their clients for non-contingent cases or otherwise charged in similar litigation. Here, "the 'requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation,'" and, therefore, those rates are presumptively reasonable. *Powell v. C.I.R., 891 F.2d 1167, 1173 (5th Cir. 1990)* (quoting *Blum v. Stenson, 465 U.S. 886, 895-96 n. 11, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984)). See also Major v. Treen, 700 F. Supp. 1422, 1434 (E. D. La. 1988)* ("As the Supreme Court decisions have also made clear, experienced and expert attorneys who exhibit a high degree of skill have the right to have those factors calculated into the hourly rates"). [*7] As stated by the Fifth Circuit:

> When an attorney's customary billing rate is the rate at which the attorney requests the lodestar be computed and that rate is within the range of prevailing market rates, the court should consider this rate when fixing the hourly rate to be allowed. When that rate is not contested, it is *prima facie* reasonable.

Islamic Center of Miss., Inc. v. City of Starkville, Miss., 876 F.2d 465, 469 (5th Cir. 1989).

The next step in the process to arrive at a final fee award is to adjust the lodestar amount on the basis of any of the remaining *Johnson* factors that are applicable to the particular case and that were not taken into account when calculating the initial lodestar, *Cooper Liquor, Inc., 684 F.2d at 1092-93*. Here, illustratively, counsel seek a multiplier of perhaps 2.5 - 3 as an adjustment to the lodestar amount, which they submit, is reasonable given, among other things, the contingent nature of the case, the results obtained and plaintiffs' counsel's experience in complex securities class actions such as the present litigation.

In accordance with the *Manual for Complex* [*8] *Litigation,* the Court's Case Management Order No. 1, entered on August 19, 1991, (R.D. 2), established a Plaintiffs' Executive Committee, with Edward Grossmann as Chair, and established a Committee of the Whole. Two local firms were appointed as Liaison Counsel. The Executive Committee, through its Chair, was responsible for coordinating and organizing the plaintiffs in the conduct of the litigation and coordinating and communicating with defendants' counsel. The Court has perceived that throughout this litigation Class Counsel operated in accordance with its order and attempted to avoid duplication and unnecessary effort.

Though it is often difficult to determine duplication from time records, in the two instances where objective data is available -- depositions and court conferences -- Class Counsel appear to have attempted to be judicious in their use of legal resources. For the most part, only one or two Class attorneys attended the status conferences, and a local and an out-of-town class attorney attended the depositions. It does not appear from the information available that Class Counsel inflated their lodestars through unnecessary duplication of work. Further, time records [*9] were properly kept contemporaneously.

Pursuant to the form of Order Approving Award of Attorney's Fees and Expenses attached as Exhibit "C" to the Court's Second Preliminary Order in Connection with Settlement Proceedings, (R. D. 258), Class Counsel's fee award is to be made to Class Counsel as a group, and not to the particular Class Counsel firms. The approved order provides that the "attorney's fees shall be allocated among the Class Counsel in a fashion which, in the opinion of the Chair of Plaintiffs' Executive Committee, fairly compensates Class Counsel for their respective contributions in the prosecution of the Consolidated Actions." For this reason, the Court addresses the fee application of Class Counsel as a group, and not with respect to particular firms. The Court's review does, however, reflect some deficiencies.

First, the class firms spent approximately 286 hours doing work relating to their attorneys' fee applications. Work relating to attorneys' fees applications is not compensable from a common fund since it only benefits counsel, not the fund. Thus a reduction in Class Counsel's aggregate lodestar to account for the time spent on fee applications must be considered.

[*10] Second, the class firms spent a number of hours on work related to a potential lawsuit against Parker & Parsley, which time is obviously not compensable in this case. They also seek compensation for an excessive amount of time reviewing documents and materials relating to the sale of the partnerships to Parker

& Parsley, which time is also not compensable. Thus a further reduction in their aggregate lodestar must be considered.

Third, there are numerous instances in the time records of various Class Counsel where vague and nonspecific descriptions such as "work on file," "review of file," and "attention to file" are used excessively. While these deficiencies cannot be quantified in dollars, they warrant consideration of a further reduction in the aggregate lodestar of Class Counsel.

Other criticisms that could be made of Class Counsel's fee applications are largely subjective -- that too much time was spent reviewing documents, that there were too many intrafirm conferences, etc. Such problems are noted but not quantified as specific deductions to be made from lodestars.

Excluding the Fleming firm, six former objectors law firms have submitted fee and expense applications for their [*11] efforts. All of these firms were aligned in interest and were in a position to act in concert and coordinate their efforts from at least the date this Court entered its February 19, 1993, Order neither approving nor disapproving the initial proposed settlement. (R. D. 127). These firms seek an aggregate of $ 2,129,965.12 in fees and expenses.

These firms had a duty to the class and to the Court to act efficiently and, where possible, in concert to minimize cost to the class. The "traditional procedures -- which assume that all papers and documents are served on all attorneys and that each attorney will file motions, present arguments, and conduct examinations" -- must be reshaped in a complex case in the interest of economy and efficiency particularly for class cases where there is no client pressure to minimize cost. *See Manual For Complex Litigation, Second,* § 20.22 (1985). Scrutiny is needed to ensure that counsel act efficiently to avoid wasteful duplication which provides no benefit to the class. The Court should exclude from a fee request hours that are excessive.

Inasmuch as these six former objectors firms have agreed on the manner in which their portion of the attorney's [*12] fee award would be allocated amongst themselves, the Court addresses their fee application as a group as it did that of Class Counsel. Their agreement sets forth this division:

Monroe Lemann	20%
Krislov	21 1/4%
Murray	20%
Karen	7%
Cohen Malad	20%
Cin Schwachman	11 3/4%

A review of the documentation submitted in support of this fee application reveals that there was insufficient effort to avoid duplication in several instances. Multiple lawyers performed certain tasks when perhaps one or two would have been sufficient. These instances involve document analysis, motion practice, court conferences, depositions, and analysis of the partnership sales process and stands in contrast to the coordination exhibited by Class Counsel.

The Court does not and cannot second guess counsel's work or say that particular tasks need not have been done or took too long, nor does the Court perceive a pattern of duplication. It does appear, however, that counsel might have better coordinated their work with respect to depositions. In contrast to Class Counsel, which generally sent one or two representatives to each deposition, these counsel usually had three to five in attendance.

Similarly, on [*13] many occasions, multiple counsel travelled to New Orleans to attend the status conferences before the Court, when perhaps one or two would have been sufficient. For example, for the April 30, 1993 and May 17, 1993 conferences, there were five in attendance, three travelling from out of town. For no apparent reason, there were eight in attendance for the July 18, 1993, August 13, 1993, and October 26, 1993, conferences. In each case, six had travelled from out of town for the conference. At times, two from the same firm travelled to New Orleans for a conference. In almost all instances, those who attended were affiliated with local counsel. And, generally, it was the same few who addressed the Court, while the rest were for the most part silent.

As a further example, seven took a trip to Houston in March of 1993 to meet with Parker & Parsley. Counsel also spent a significant amount of time doing other

work related to the partnership sales process, a matter somewhat outside of the scope of their proper role. Although it is difficult to quantify the amount of time spent on the partnership sales process, it is questionable whether any of this work resulted in significant benefit to the [*14] Class. The successful bid by Parker & Parsley for the partnerships may have resulted from the Company's longstanding interest in the Income Funds and from the hostile offer by George Kaiser.

The fee applications submitted by counsel are to a degree out of line with their contribution to this case. As a group, counsel basically had one significant idea: the original settlement was unfair because of the amount of cash paid and the reorganization of the partnership into a new corporate entity. The Court does not dispute counsel's entitlement to reasonable fees for their efforts in connection with the initial fairness hearing in February of 1993 and thereafter.

Awarding of attorneys' fees is a matter within the Court's discretion. However, some of the lodestars for both the former objectors and Class Counsel should be reduced were the Court to make a lodestar award. Even in making a percentage-of-the-fund award, this has been taken into account.

Considering the remaining *Johnson* factors the Court observes that the issues, though not necessarily novel, posed difficulties which counsel overcame. In confronting the complex issues presented, Class Counsel were required to agree among [*15] themselves on a plan for the efficient coordination and management of class actions filed throughout the United States. Class Counsel put aside their differences and developed a case management structure which has resulted in effective coordination of what might have otherwise been almost unmanageable litigation. Significant and difficult questions were involved in this case, including substantive issues involved in the claims asserted and questions relating to the statute of limitations and class certification. Counsel were obviously possessed of the requisite skill to perform the requisite legal services properly.

The magnitude of this litigation has demanded prosecution on a priority basis. The Executive Committee, its Chairman, and all counsel have devoted themselves to the prosecution of this matter to the preclusion to some degree of other employment throughout the pendency of the litigation. The magnitude of losses, the exigencies of the litigation, the need of the Class for prompt relief, and the effort required to successfully implement the settlement have mandated that counsel devote their utmost priority to the prosecution of this litigation.

Customary fees in common fund [*16] cases appear to range from 20% to 40%. Counsel have provided numerous citations in this regard. (R. D. 271 Memorandum at pp. 25-30).

This action was prosecuted by counsel entirely on a contingent fee basis. Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

The Court does not perceive any time limitations imposed by the class members or the circumstances. What with much publicity and client solicitation occurring on an increasing basis as the matter progressed, class members obviously became anxious to see the matter concluded.

The amount involved and the results obtained are given added weight in this case since the efforts of counsel were instrumental in realizing [*17] a recovery on behalf of the class. Here, counsel have achieved a substantial benefit considering that the present settlement consists of an all cash Settlement Fund of up to $ 120 million. This result was obtained only after extensive efforts and hard-fought negotiations by counsel on behalf the class in order to secure the most beneficial settlement. Moreover, those class members who, for their own reasons, chose to pursue claims against defendants through counsel of their own choosing or through the SEC procedure did so by simply "opting out" of the settlement.

Counsel were all experienced, possessed high professional reputations and were known for their abilities. Their cooperative effort in efficiently bringing this litigation to a successful conclusion is the best indicator of their experience and ability.

The Chairman of the Executive Committee, Edward A. Grossman and Bernstein, Litowitz, Berger & Grossman, has 19 years experience in litigation under the federal securities laws. The Bernstein Litowitz firm served as co-lead counsel and Chairman of the Executive Committee in the *Washington Public Power Supply System Litig.,* (MDL 551), which achieved the largest securities [*18] class action recovery of over $ 800 million for class members. The firm also served as lead or co-lead counsel in a number of other significant class actions, as detailed in the Bernstein Litowitz fee affidavit. Bernstein Litowitz's selection to chair the Executive Committee is evidence of the firm's professional standing among its peers.

The attorneys appointed by the Court to serve as liaison counsel also bring distinguished reputations and outstanding abilities to bear on behalf of the Class. Robert Redfearn and the firm of Simon, Peragine, Smith & Redfearn bring extensive experience in both prosecution and defense of complex litigation, including securities actions, as well as in-depth experience not only in oil and gas litigation but also in the development and structuring of oil and gas investment partnerships such as those in this matter. Jack C. Benjamin of Gainsburgh, Benjamin, Fallon, David & Ates has a similarly distinguished record of advocacy and extensive experience in civil litigation in Louisiana's state and federal courts and is lead counsel in the *Taxable Municipal Bond Securities Litig.,* (MDL 863).

The Executive Committee is comprised of law firms with national [*19] reputations in the prosecution of securities class action and derivative litigation. The biographical summaries submitted by each member of the Executive Committee attest to the accumulated experience and record of success these firms have compiled. (R.D. 271).

The Court would be remiss not to also recognize the obvious skill, competence and cooperation demonstrated by all other counsel. Their biographical summaries also attest to their experience and achievements and the Court has noted and appreciated this during the course of the litigation.

The last *Johnson* factors may be briefly commented on. The case was not undesirable. The relationship of the class representative and class members to Class Counsel worked well. Neither the class representatives nor any class members were required to advance costs or fees to Class Counsel. Awards in similar class action securities cases have, of course, varied depending on their respective circumstances.

The Court perceives that the combined lodestar of all counsel, except Fleming, amounts to $ 7.9 million. If reduced, say 10% by the Court, and a reasonable multiplier applied, [3] and then some $ 1.3 million expenses added and, finally, an [*20] award of fees and expenses to Fleming is added, the result is nearly identical to the 25% of the $ 90 million common fund approach.

3 The jurisprudence reflects that the average multiplier is 3.

In summary, counsel have achieved a result which is fair and reasonable under the circumstances. Moreover, the all cash Settlement Fund is substantial and all counsel have prosecuted the case in an efficient, cooperative and diligent manner, bringing the litigation to a swift and successful conclusion for the benefit of all members of the proposed class. Further, the relationship between counsel and the members of the class is contingent in nature and, in light of the alternatives, suggests that the fee sought is eminently fair and reasonable and consistent with awards of attorneys' fees in this and other Circuits around the country. The award of fees and expenses requested by Class Counsel and objectors' counsel is, in the context of this litigation, fair and reasonable and will be granted as heretofore stated.

In complex [*21] securities class actions and shareholder derivative litigation, able counsel for plaintiffs can be retained only on a contingent basis. A large segment of the investing public would be denied a remedy for violations of the securities laws and breaches of fiduciary duty by public companies and those entrusted with their stewardship if contingent fees awarded by the courts did not fairly and adequately compensate counsel for the services provided, the serious risks undertaken and the delay before any compensation is received. Filing of contingent lawsuits in this connection should not be chilled by the imposition of fee awards which fail to adequately compensate counsel for the risks of pursuing such litigation and the benefits which would not otherwise have been achieved but for their persistent and diligent efforts.

The Settlement Fund in this litigation has been placed in an interest bearing account. Accordingly, counsel are appropriately granted interest on the fees and expenses awarded until such fees and expenses are actually paid, at the same rate as interest is earned by the Settlement Fund.

As earlier mentioned, Fleming unfortunately could not reach an agreement as all other [*22] counsel did with regard to fee and expenses. It falls on the Court to make this award separate and apart from the rest, notwithstanding these earlier admonitions by the Court:

> The award of attorneys' fees is to be allocated among Counsel in a fashion which, in the opinion of the Chair of Class Counsel's Executive Committee and the Court, fairly compensates counsel for their respective contributions in the prosecution of this matter. (R.D. 334 at p. 6).
>
> This Court is mindful that the Fifth Circuit stated its approval of leaving apportionment of the fees awarded up to the attorneys themselves. *Longden, 979 F.2d at 1101*. Class Counsel and Objectors' Counsel should seriously attempt to agree on such an apportionment among themselves. Similarly, Class Counsel should agree to apportion any fee award to Class Counsel among themselves. (R.D. 354 at p. 11).

In the recommendation and stipulation filed by all counsel, except Fleming, it is stated:

> The Chair and Liaison for Class Counsel met with authorized representatives of Former Objectors' Counsel and the Fleming Firm on April 27, 1994, as suggested by this Court. The Chair of Class Counsel, after [*23] a review of all the time records, his personal knowledge of the respective roles of counsel, and the observations and comments of Defendants' Counsel, agreed with Former Objectors' Counsel to an apportionment among themselves and a recommendation for the Fleming Firm, as follows:
>
> > The Fleming Firm receive a total of fees and expenses from the Award totaling in the aggregate the sum of $ 350,000.00 for the reasons set forth hereinafter.

(R.D. 373 at pp. 1,2).

The Court is in general agreement with the reasons set forth by counsel in their recommendation and stipulation, as follows:

> The underlying basis for an award to the Fleming Firm differs from that of all other Plaintiffs' counsel in this matter. As the Court is aware, the Fleming Firm represented over 7,000 individual investors in the Energy Income Fund Limited Partnerships * * * as well as approximately 2,000 arbitration proceedings and actively sought to represent more. During the course of this litigation, the Fleming Firm did not act solely in the interest of the Class, as did other Plaintiffs' counsel, but proceeded on two fronts with its efforts being given to its "Texas litigation." From the outset when the [*24] Fleming Firm sought to deny certification to the Class through the Notice in which the Fleming Firm insisted that the Notice state that it "continues to object to the settlement and deems it inadequate," the Fleming Firm's first and only concern was for its own clients. On many issues, its advocacy for its clients resulted in actions adverse to the interest of the Class.

In our opinion, there are three potential approaches the Court might adopt as to what, if any, award to make to the Fleming Firm for its contributions to the Class.

The first would be to award the Fleming Firm nothing on the basis that (i) its efforts were primarily on behalf of its Texas clients in direct opposition to the best interest of the Class; (ii) it actively sought to dissuade investors from remaining members of the Class; and (iii) its records are so deficient that awarding any fee would be inappropriate.

The second approach would follow the reasoning of the Defendants as to the fee request of the Fleming Firm which resulted in a suggested reduction of the Fleming Firm's lodestar from $ 1,889,675 to $ 290,000; *i.e.,* an 84% reduction. We suggest that the Fleming Firm's request for costs be reduced [*25] by the same percentage, which would result in a total award of fees and costs of approximately $ 350,000.00. As pointed out by Defendants, the reasons for such reduction are (1) the Fleming Firm's inadequate documentation of its fees and costs; (2) its improper claims for work done in connection with the Texas litigation; (3) its improper request for time spent prior to entering the case; and (4) its duplicative and copy-cat time entries. In short, work that was not undertaken for the purposes of benefitting the Class (as opposed to the lawyers' private clients), or which did not actually result in such a benefit, may not be the basis of a fee award. *In re Washington Public Power Supply System Securities Litigation, 779 F. Supp. 1063, 1223-25 (D. Ariz. 1990)*; *In re Agent Orange Product Liability Litigation, 611 F. Supp. 1296 (E.D.N.Y. 1985)*, *aff'd in part* and *rev'd in part on other grounds, 818 F.2d 226 (2nd Cir. 1987)*.

The third approach would be based partially on the second approach as urged by the Defendants but would not exclude

time claimed by the Fleming Firm prior to September [*26] 1992. The Fleming Firm represented at the Settlement Fairness Hearing, which resulted in the Court approving the settlement, that 2,000 of its clients elected to remain in the Class with the others opting-out. As the Fleming Firm stated at the Settlement Fairness Hearing:

> We have recommended that the majority of our clients opt-out of the settlement and pursue their claims as they are entitled to do.

Having recommended to the majority of its clients that they opt-out of the Class, it ill becomes the Fleming Firm to now argue that such advice was beneficial to the Class, even though it might have been beneficial to their individual clients.

Accordingly, since only 30% of the Fleming Firm's activities benefitted the Class, its lodestar and cost reimbursement should be so reduced resulting in a total award to the Fleming Firm of fee and expenses of $ 700,000.00.

It is the position of the Chair of Class Counsel, concurred with by Former Objectors' Counsel, that the Court should follow the second suggested approach in its determination of what, if anything, the Fleming Firm is entitled to be paid for its efforts on behalf of the Class. Accordingly, we recommend that the Fleming [*27] Firm be paid an aggregate of $ 350,000.00 for fees and costs.

(R. D. 373 at pp. 3-6, footnotes omitted).

In its joint application for fees and expenses Fleming presents a lodestar fee in the sum of $ 1,889,675.00 [4] representing 10,842.75 hours at attorney rates ranging from $ 250 - $ 175 and legal assistant rates of $ 65.00. (R. D. 282, MDL 888 F H & G fee summary). The Court is, to say the least, befuddled. The fee and hours both exceed that of Chair of Class Counsel, Bernstein Litowitz. The fee exceeds the combined fees of all former objectors counsel, as do the hours. The hours alone would suggest three lawyers working full time for more than a year.

4 Changed to $ 1,886,525.00 in its memorandum regarding fees and expenses recently filed. (R. D. 372 at p. 11).

The Court is of the opinion that most of the work performed by Fleming was not performed for the benefit of the class so much as it was performed for the benefit of its over 7000 clients in the Texas litigation. Much of the work was irrelevant to [*28] this litigation and Fleming's opposition (R. D. 37) to certification of a class, either for litigation or for settlement, was detrimental to the class.

A portion of Fleming's fee request is proper but the records Fleming has submitted in no way justify the enormous fee it has requested. Fleming has admitted that it kept no contemporaneous time records, and the monthly summaries it created after the fact are for the Court's purposes entirely inadequate. (R. D. 282). From these summaries it can be seen that Fleming seeks to charge the class for almost all of its work in the Texas case -- even projects which had nothing to do with this litigation and could not have benefitted the class. Moreover, the summaries as created imply that the Fleming lawyers consistently duplicated each other's work and that of other counsel. Fleming's efforts on behalf of its Texas clients are admirable, but cannot be rewarded at the expense of this class.

The fact that Fleming is seeking fees for work done all the way back to April 1991 shows that the firm is seeking to have the class pay in part the bill for the Texas case. Fleming did not become involved in this case as one of the objectors' counsel until [*29] September 1992 at the earliest. Before then, its only similar litigation was the Texas matter. Moreover, Fleming's summaries for the months before September 1992 make clear that it is, in fact, seeking fees for its work on the Texas case. The narratives are replete with references to Texas discovery matters, Texas causes of action, Texas motions, and even Texas court appearances.

The question of whether, and to what extent, a firm that represents private parties in separate litigation can recover attorney's fees in a class action covering the same matter has arisen in connection with previous settlements. Courts have held that work that was not undertaken for the purpose of benefitting the class (as opposed to the lawyers' private clients), or which did not actually result in such a benefit, could not be the basis for a fee award.

Fleming is entitled to recover, at most, only a fraction of the fees it is seeking for September 1992 and thereafter. In this later period, it did perform some work which, helpful or not, might be seen as directed in part

toward the interests of the class. But even during this period, much of Fleming's work did not involve this litigation, some of it may [*30] have actually hurt the class, for example the objection to class certification, and most of it benefitted its Texas case. Moreover, as noted above, the time summaries reveal substantial duplication of effort.

Because of the inadequate records submitted by Fleming, there is no reliable way to calculate with any precision how much of Fleming's work was intended to benefit, and did benefit, the class. It appears that some 20 to 25% of Fleming's Texas clients have chosen not to opt out of this class settlement. The remainder will proceed with their actions in Texas. Fleming's fee award should reflect this and it is apparent that its fee arrangements with those non-opt-out parties should provide it with appropriate compensation.

Fleming seeks reimbursement of expenses totaling $ 452,921.47 (R. D. 282, MDL 888 F H & G Expense Summary and R. D. 375 at p. 11) as follows:

Telephone Charges	$ 8,407.05
Reproduction of Documents	82,974.17
Technical Investigative Services	198,451.80
Experts	36,348.52
Court Reporters	20,787.57
Travel Expenses	54,770.57
Demonstrative Evidence	51,182.42
	$ 452,921.47

The Court is also befuddled by some of these itemizations but need not comment [*31] thereon inasmuch as its overall evaluation of this claim is the same as that of the fee claim.

Considering the recommendation of the Chair of Class Counsel, the Fleming matter in its entirety and in context with the totality of every aspect of this litigation and the Fleming role in it, an award of $ 525,000.00, fee and expense inclusive, together with accrued interest thereon, will be made.

Judgment will be entered in accord herewith and with the aforementioned stipulation of all counsel except Fleming. (R. D. 373).

New Orleans, Louisiana, this 18th day of May, 1994.

MARCEL LIVAUDAIS, JR.

United States District Judge

SUPPLEMENTAL JUDGMENT

Considering the record, the Court's February 2, 1994 judgment, (R. D. 312), and for the reasons this date assigned, the Court supplements the said judgment by making this addendum thereto:

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiffs' counsel are hereby awarded attorneys fees and expense reimbursement in an amount representing 25% of the final settlement amount, after reduction for opt-outs and inclusive of costs and expenses, to be paid with interest from date of judgment, February 2, 1994, at the rate the settlement [*32] amount earns, according to the terms of the Settlement Agreement. This award shall be allocated as follows:

1. The firm of Fleming, Hovenkamp & Grayson, P.C. to receive a total of fees and expenses from the Award totaling in the aggregate the sum of $ 525,000.00;

2. Out of the then balance of the Award, the costs and expenses of Class Counsel and Former Objectors' Counsel be paid in full;

3. Out of the then balance of the Award, the sum of $ 400,000.00 be paid as a partial fee to Class Counsel;

4. The then remaining balance of the Award be paid 75% to Class Counsel and 25% to Former Objectors' Counsel to be divided amongst them pursuant to their agreements.

New Orleans, Louisiana, May 18, 1994.

MARCEL LIVAUDAIS, JR.

United States District Judge

TAB 13

LEXSEE 2001 U.S. DIST. LEXIS 21942

In re OLD CCA SECURITIES LITIGATION; This Document Relates To All Actions Consolidated with Cartwright; In re PRISON REALTY SECURITIES LITIGATION; This Document Relates To All Actions Consolidated with Charles; JOHN NEIGER, On Behalf of Himself And All Others Similarly Situated, Plaintiff, vs. DOCTOR CRANTS, ROBERT CRANTS, AND PRISON REALTY TRUST, INC., Defendants.

Civil Action No. 3:99-0458 CLASS ACTION, Civil Action No. 3:99-0452 CLASS ACTION, Civil Action No. 3:99-1205 CLASS ACTION

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

2001 U.S. Dist. LEXIS 21942

February 9, 2001, Decided
February 9, 2001, Entered

DISPOSITION: [*1] ORDER AWARDED REPRESENTATIVE PLAINTIFFS' COUNSEL ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES.

COUNSEL: For JOHN CARTWRIGHT, BEN F. MORGAN, JR., plaintiffs (99-CV-458): Lawrence Edward Levine, Levine, Mattson, Orr & Geracioti, Nashville, TN.

For JOHN CARTWRIGHT, plaintiff (99-CV-458): Stanley M. Chernau, Linda F. Burnsed, Chernau, Chaffin & Burnsed, PLLC, George Edward Barrett, Douglas S. Johnston, Jr., Barrett, Johnston & Parsley, Nashville, TN.

For JOHN CARTWRIGHT, BEN F. MORGAN, JR., plaintiffs (99-CV-458): Steven E. Cauley, Cauley, Geller, Bowman & Coates, LLP, Little Rock, AR.

For JOHN CARTWRIGHT, BEN F. MORGAN, JR., plaintiffs (99-CV-458): Glen DeValerio, Jeffrey C. Block, Michael M. Sullivan, Berman, DeValerio & Pease, Boston, MA.

For JOHN CARTWRIGHT, plaintiff (99-CV-458): Darren J. Robbins, William J. Doyle, II, Milberg, Weiss, Bershad, Hynes & Lerach LLP, San Diego, CA.

For JOHN CARTWRIGHT, BEN F. MORGAN, JR., plaintiffs (99-CV-458): William S. Lerach, II, Laura M. Andracchio, Tor Gronborg, Milberg, Weiss, Bershad, Hynes & Lerach LLP, San Diego, CA.

For JOHN CARTWRIGHT, plaintiff (99-CV-458): Ted B. Edwards, Smith, Mackinnon, Greeley, Bowdoin & Edwards, [*2] P.A., Orlando, FL.

For JOHN CARTWRIGHT, plaintiff (99-CV-458): Kenneth J. Vianale, Milberg, Weiss, Bershad, Hynes & Lerach, LLP, Boca Raton, FL.

For JOHN CARTWRIGHT, plaintiff (99-CV-458): Patrick V. Dahlstrom, Pomerantz, Haudek, Block, Grossman & Gross, LLP, Chicago, IL.

For BEN F. MORGAN, JR., plaintiff (99-CV-458): Paul Kent Bramlett, Bramlett Law Offices, Nashville, TN.

For plaintiffs: GEORGE E. BARRETT, DOUGLAS S. JOHNSTON, JR., BARRETT, JOHNSTON & PARSLEY, Nashville, TN.

For R. CRANTS, D. ROBERT CRANTS, III, PRISON REALTY TRUST INC, defendants (99-CV-458): John K. Kim, Bruce D. Angiolillo, Mary Elizabeth McGarry, Stanley Hsue, Simpson, Thacher & Bartlett, New York, NY.

For R. CRANTS, D. ROBERT CRANTS, III, PRISON REALTY TRUST INC, defendants (99-CV-458): Robert Jackson Walker, John C. Hayworth, Walker, Bryant & Tipps, Nashville, TN.

JUDGES: HONORABLE TODD CAMPBELL, UNITED STATES DISTRICT JUDGE. Griffin.

OPINION BY: TODD J. CAMPBELL

OPINION

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

[O>[PROPOSED]<O] ORDER AWARDING REPRESENTATIVE PLAINTIFFS' COUNSEL ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

THIS MATTER having come [*3] before the Court on February 9, 2001, on the application of Representative Plaintiffs' Counsel for an award of attorneys' fees and reimbursement of expenses incurred in the above-captioned actions; the Court, having considered all papers filed and proceedings conducted herein, having found the settlement of this action to be fair, reasonable and adequate and otherwise being fully informed in the premises and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. All of the capitalized terms used herein shall have the same meanings as set forth in the Stipulation of Settlement dated as of October 11, 2000 (the "Stipulation"), as amended by the Amended Stipulation of Settlement dated as of January 7, 2001 (the "Amended Stipulation").

2. This Court has jurisdiction over the subject matter of this application and all matters relating thereto, including all members of the Settlement Classes who have not timely and validly requested exclusion.

3. The Court hereby awards Representative Plaintiffs' Counsel attorneys' fees in *In re Prison Realty Securities Litigation* in the amount of thirty percent of the Settlement Fund plus litigation expenses incurred [*4] in an aggregate amount of $ 625,255.33, together with the interest earned thereon for the same period and at the same rate as that earned on the Settlement Fund until paid. The Court hereby awards Representative Plaintiffs' Counsel attorneys' fees in *In re Old CCA Securities Litigation* in the amount of thirty percent of the Settlement Fund plus litigation expenses incurred in an aggregate amount of $ 205, 405.34, together with the interest earned thereon for the same period and at the same rate as that earned on the Settlement Fund until paid. The Court hereby awards Representative Plaintiffs' Counsel attorneys' fees in *Neiger v. Crants, et al.*, in the amount of thirty percent of the Settlement Fund plus litigation expenses incurred in an aggregate amount of $ 16,915.59, together with the interest earned thereon for the same period and at the same rate as that earned on the Settlement Fund until paid. Said fees and expenses shall be allocated among Representative Plaintiffs' Counsel by Plaintiffs' Settlement Counsel in a manner which, in Plaintiffs' Settlement Counsel's good faith judgment, reflects each such Representative Plaintiffs' Counsel's contribution to the institution, [*5] prosecution and resolution of the litigation. The Court finds that the amount of fees awarded is fair and reasonable under the "percentage-of-recovery" method.

4. The awarded attorneys' fees and expenses shall be paid to Plaintiffs' Settlement Counsel within five (5) business days after the date this Order and the Judgment are executed subject to the terms, conditions and obligations of the Stipulation and in particular P6.2 thereof, which terms, conditions and obligations are incorporated herein.

5. Representative Plaintiffs Gary Nightingale, Jerome Trupp, Gunter Sachs, L. Roland Yates and Meriam Yates, Harold Eugene Hames, Robert Buchanan and Cindie Unger, are hereby awarded respectively, as reimbursement of costs and expenses related to their representation of the Settlement Classes of $ 3,375, $ 3,825, $ 7,300, $ 4,250, $ 6,750, $ 23,065 and $ 16,500. *15 U.S.C. § 78u-4(a)(4)*.

IT IS SO ORDERED.

DATED: 2/9/01

THE HONORABLE TODD CAMPBELL

UNITED STATES DISTRICT JUDGE

TAB 14

LEXSEE 2005 US DIST LEXIS 6680

IN RE: RAVISENT TECHNOLOGIES, INC. SECURITIES LITIGATION

CIVIL ACTION NO. 00-CV-1014

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2005 U.S. Dist. LEXIS 6680*; *Fed. Sec. L. Rep. (CCH) P93,229

April 18, 2005, Decided
April 18, 2005, Filed; April 19, 2005, Entered

PRIOR HISTORY: *In re Ravisent Techs., Inc. Sec. Litig., 2004 U.S. Dist. LEXIS 13255 (E.D. Pa., July 12, 2004)*

COUNSEL: [*1] For MICHAEL FINK, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff: BRUCE G. MURPHY, VERO BEACH, FL; DEBORAH R. GROSS, ROBERT P. FRUTKIN, LAW OFFICES BERNARD M. GROSS, PC, PHILADELPHIA, PA; ROBERT M. ROSEMAN, SPECTOR ROSEMAN & KODROFF, PHILADELPHIA, PA; STUART H. SAVETT, PHILADELPHIA, PA.

For FRANCIS E.J. WILDE, III, JASON C. LIU, Defendants: ALEXANDER D. BONO, BLANK ROME COMISKY & McCAULEY, LLP, PHILADELPHIA, PA; MEREDITH N. LANDY, O'MELVENY & MYERS LLP, MENLO PARK, CA; JAMES J. REYNOLDS, BLANK ROME, PHILADELPHIA, PA.

For RAVISENT TECHNOLOGIES, INC., Defendant: ALEXANDER D. BONO, BLANK ROME COMISKY & McCAULEY, LLP, PHILADELPHIA, PA; DALE EDMONDSON, MEREDITH N. LANDY, O'MELVENY & MYERS LLP, MENLO PARK, CA; JAMES J. REYNOLDS, BLANK ROME, PHILADELPHIA, PA.

For FREDERICK J. BESTE, III, PETER X. BLUMENWITZ, WALTER L. THREADGILL, PAUL A. VAIS, Movants: JAMES J. REYNOLDS, BLANK ROME, PHILADELPHIA, PA; MEREDITH N. LANDY, O'MELVENY & MYERS LLP, MENLO PARK, CA.

JUDGES: R. Barclay Surrick, Judge.

OPINION BY: R. Barclay Surrick

OPINION

SURRICK, J.

APRIL 18, 2005

MEMORANDUM & ORDER

Presently before the Court are Lead Plaintiffs' Motion for Final Settlement Approval (Doc. [*2] No. 43) and Lead Counsel's Joint Application for Attorneys' Fees and Reimbursement of Expenses (Doc. No. 44). After conducting a fairness hearing on the proposed final settlement and disbursement of attorneys' fees, and considering all documents filed in support thereof, we will grant the Motions.

I. BACKGROUND

A. Plaintiffs' Allegations

This litigation arises out of stock purchases made during and after an initial public offering ("IPO") of Ravisent Technologies, Inc. ("Ravisent"), [1] between July 15, 1999, and April 27, 2000. Ravisent was founded in 1994. In 1999, Ravisent began the transition from a privately-owned company to a publicly-traded corporation with the filing of a Registration Statement with the Securities and Exchange Commission ("SEC") on July 13, 1999. (Am. Compl. P 15.) The Registration Statement and accompanying Prospectus stated that the IPO would occur between July 15, 1999, and July 22, 1999, and consist of the sale of 5,000,000 shares of stock at $ 12 each. (*Id.* PP 15-16.) The Registration Statement included audited financial statements from 1996 through 1998, as well as an unaudited financial statement for the first quarter of

1999. At the [*3] conclusion of the IPO, Ravisent's stock price had increased from $ 12 to $ 17.63 per share. (Doc. No. 13 at 3.)

1 Ravisent is currently known as Axeda Systems, Inc. (Doc. No. 43 at 1.)

Pursuant to SEC regulations, Ravisent filed timely financial statements for the second and third quarters of 1999. However, before releasing its audited fourth quarter and year-end financial statements for 1999, Ravisent announced on February 18, 2000, that the remaining 1999 financial statements would be delayed "due to discussions with its auditors about revenue recognition on some of its contracts." (Am. Compl. P 49.) Ravisent's share price declined by $ 9 that day, closing at $ 18.56. (*Id.*) One month later, on March 14, 2000, Ravisent released its fourth quarter and year-end 1999 revenues, stating a large decrease in revenue and substantial increase in pro forma net loss. [2] (*Id.* P 50.) The company also announced that it would be restating its financial statements for the second and third quarters of 1999. [3] (*Id.* [*4]) On April 27, 2000, Ravisent announced its results for the first quarter 2000, and reported a substantial decrease in revenues and increase in pro forma net loss compared to the same period in 1999. [4] (*Id.* P 56.) After the announcement, Ravisent's stock price fell from $ 10.25 to $ 6.875. (*Id.*)

2 For the fourth quarter 1999, Ravisent reported total revenues of $ 5.7 million and a pro forma net loss of $ 1.9 million, compared to $ 12.5 million in revenue and a pro forma net loss of $ 1.2 million in fourth quarter 1998. (Am. Compl. P 50.)

3 On March 30, 2000, the restatements for the second and third quarters of 1999 reported reduced revenues and larger operating and net losses. (Am. Compl. P 53.) For second quarter 1999, total revenues decreased from $ 11.601 million to $ 7.679 million, the operating loss increased from $ 183,000 to $ 1.085 million, and the net loss increased from $ 248,000 to $ 1.15 million. (*Id.*)

4 For first quarter 2000, Ravisent reported revenues of $ 5.7 million, compared to $ 10.8 million during the same period the prior year. (Am. Compl. P 56.) It also reported a pro forma net loss of $ 3.7 million for first quarter 2000, compared to a pro forma net income of $ 100,000 in first quarter 1999. (*Id.*)

[*5] **B. Procedural History**

Beginning on February 25, 2000, eleven putative class actions were filed against Defendants. [5] (Doc. Nos. 1, 7.) The actions alleged that Defendants publicly disseminated a series of false and misleading statements and/or omissions in the Registration Statement and various financial disclosures that caused the market price of Ravisent's securities to be artificially inflated. (Am. Compl. PP 19-24, 39, 42-46; Doc. No. 43 at 1.) On May 26, 2000, the lawsuits were consolidated and, pursuant to the *Private Securities Litigation Reform Act of 1995* ("PSLRA"), Brian Amburgey, Warren L. Burdue, Randy Tai Nin Chan, Nabil Fariq, and Peter Morrissette were named Lead Plaintiffs, and Spector Roseman & Kodroff, P.C. and the Law Offices of Bernard M. Gross (substituted by our August 25, 2003, Order) were appointed as Co-Lead Counsel. (Doc. Nos. 7, 29.)

5 The Defendants named in this action are Ravisent Technologies, Inc.; Francis E. J. Wilde, III, President, Chief Executive Officer, and Director of Ravisent at all times relevant to this litigation; and Jason C. Liu, Chief Financial Officer, Vice President of Finance, and Secretary of Ravisent at all times relevant to this litigation. (Am. Compl. PP 3, 7-8.)

[*6] On June 14, 2000, Lead Plaintiffs filed and served a Consolidated and Amended Class Action Complaint ("Amended Complaint"), alleging violations of: (1) Sections 11, 12, and 15 of the Securities Act of 1933, *15 U.S.C. §§ 77k*, *77l*, *77o*; (2) Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, *15 U.S.C. §§ 78j(b)*, *78t(a)*; and (3) rules and regulations promulgated by the SEC, including Rule 10b-5, *17 C.F.R. § 240.10b-5*. (Am. Compl. PP 1-3.) Defendants filed a motion to dismiss the Amended Complaint, which was denied on July 12, 2004. (Doc. No. 30.)

C. Settlement and Fairness Hearing

The parties then engaged in settlement negotiations, which resulted in a Stipulation and Agreement of Settlement on December 15, 2004. (Doc. No. 41.) The settlement provided that the proposed class, defined as "all persons or entities who purchased the common stock of Ravisent between July 15, 1999 and April 27, 2000, pursuant or traceable to [Ravisent's IPO] Registration Statement," would release all claims against Defendants in consideration for Defendants' payment of $ 7 million into the Settlement Fund. ([*7] *Id.* PP 16-17.) The Settlement Fund would be distributed on a pro rata basis to class members after payment of administrative costs, taxes, and court-approved costs, expenses, and attorneys' fees. (*Id.* PP 21-22, 29-30, 33-35.)

On December 21, 2004, we entered an Order preliminarily approving the settlement as a class action. (Doc. No. 42.) We also approved Lead Plaintiffs' proposed notice and proof of claim forms, finding that they

conformed to the requirements of *Federal Rule of Civil Procedure 23*, and informed the class members of the existence of the action, the terms of settlement, and the class members' rights with respect to the settlement. (*Id.* PP 3-6, Exs. 1, 2.) Specifically, the Preliminary Approval Order and notice informed each class member that they had the right to object to and to request exclusion from the class settlement, including the right to appear at the fairness hearing scheduled for April 6, 2005, and the required procedures for objecting and/or requesting exclusion. (*Id.* PP 8, 10, Exs. 1, 2.) It also informed class members that Co-Lead Counsel intended to apply for an award of attorneys' fees up to one-third [*8] (1/3) of the Settlement Fund, and for reimbursement of expenses incurred in prosecuting the litigation. (*Id.* Ex. 1 at 4-5.) We ordered that copies be mailed to all class members who could be identified with reasonable effort on or before January 3, 2005, and the publication of a summary notice on the Internet within ten (10) days after mailing of the notice. (*Id.* PP 3-5.)

In accordance with the Preliminary Approval Order, Valley Forge Administrative Services, Inc., the Claims Administrator, timely mailed 13,595 copies of the notice and proof of claim to potential class members. (Doc. No. 43 Ex. A ("Miller Aff.") PP 2-3, 5.) A summary form of the notice was also published on numerous financial and news sites on the Internet. (*Id.* P 4.) At the April 6, 2005, fairness hearing, Co-Lead Counsel reported that 961 claims had been filed, and that no potential class members had filed objections or requested exclusion from the class. (Doc. No. 48.) In addition, no potential class members appeared at the fairness hearing to object to the settlement. (Doc. No. 48). Based on the number of claims filed, Co-Lead Counsel estimated that each claimant would be awarded approximately $ 1.30 [*9] per share before attorneys' fees.

II. CLASS CERTIFICATION

On December 21, 2004, we provisionally certified the class for purposes of reaching a settlement. Doc. No. 42 P 2(.) Before we can approve the final settlement, however, Lead Plaintiffs must demonstrate that the class meets the requirements of *Federal Rule of Civil Procedure 23*. *See Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 308 (3d Cir. 1998)* ("[A] district court must first find a class satisfies the requirements of *Rule 23*, regardless whether it certifies the class for trial or for settlement." (citing *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617-18, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997))*). To be certified, the class must meet all four requirements of *Rule 23(a)*--numerosity, commonality, typicality, and adequacy of representation--and at least one of the categories of class actions in *Rule 23(b)*. [6] *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 527 (3d Cir. 2004)*; *In re LifeUSA Holding, Inc., 242 F.3d 136, 143 (3d Cir. 2001)*. [*10]

6 *Federal Rule of Civil Procedure 23(a)* states that:

> One or more members of a class may sue . . . as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). "These four elements are often referred to as numerosity, commonality, typicality, and adequacy of representation, respectively." *In re LifeUSA, 242 F.3d 136, 143 (3d Cir. 2001)*.

A. Numerosity

"Numerosity requires a finding that the putative class is so numerous that joinder of all members is impracticable." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 182 (3d Cir. 2001)*. [*11] "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, 227 (3d Cir. 2001)*; *see also Johnston v. HBO Film Mgmt., 265 F.3d 178, 184 (3d Cir. 2001)* (holding that when there are thousands of potential class members, joinder is impracticable and the numerosity requirement is satisfied). Thousands of stockholders held over five million shares of Ravisent common stock during the class period, and over 13,500 notices were mailed to putative class members. (Doc. No. 43 at 20; Miller Aff. P 5.) The proposed class satisfies the numerosity requirement.

B. Commonality

Second, we must determine whether "there are questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. "Commonality does not require an identity of claims or facts among class members; instead, 'the commonality requirement will be satisfied if the named

plaintiffs share at least one question of fact or law with the grievances of the [*12] prospective class.'" *Johnston, 265 F.3d at 184* (quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Action, 148 F.3d at 310*); *see also Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)*. Courts in this District have found commonality in a "'large variety of factual circumstances[,] including allegations of . . . securities fraud.'" *Snider v. Upjohn Co., 115 F.R.D. 536, 539 (E.D. Pa. 1987)* (citation omitted). Here, common questions of law and fact exist among the class members regarding Defendants' alleged misrepresentations in the IPO Registration Statement and the 1999 quarterly financial statements, whether the market price of Ravisent's common stock was artificially inflated due to these alleged misrepresentations, and whether class members suffered damages as a result. These allegations are sufficient to show questions of law and fact common to the class. *See, e.g.*, *Neuberger v. Shapiro, Civ. A. No. 97-7947, 1998 U.S. Dist. LEXIS 18807, at *5-6 (E.D. Pa. Nov. 24, 1998)* (finding commonality based on allegations that defendants engaged in a fraudulent course of conduct resulting [*13] in artificially inflated stock prices); *Gruber v. Price Waterhouse, 117 F.R.D. 75, 79 (E.D. Pa. 1987)* ("Questions common to the proposed class here include whether the financial statements . . . omitted or misrepresented the true nature of [defendant's] financial condition . . ., whether the price of [defendant's] stock was artificially inflated as a result of defendant's nondisclosures, and whether class members sustained damage."). The proposed class satisfies the commonality requirement.

C. Typicality

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)(3)*. "Typicality ensures the interests of the class and the class representatives are aligned 'so that the latter will work to benefit the entire class through the pursuit of their own goals.'" *Newton, 259 F.3d at 182-83* (quoting *Barnes v. Am. Tobacco Co., 161 F.3d 127, 141 (3d Cir. 1998))*. The central inquiry in a typicality evaluation is whether the "'the named plaintiff's individual circumstances are markedly different or . . . [*14] the legal theory upon which the claims of other class members will perforce be based.'" *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985)* (quoting *Weiss v. York Hosp., 745 F.2d 786, 809 n.36 (3d Cir. 1984))*; *see also Seidman v. Am. Mobile Sys., Inc., 157 F.R.D. 354, 360 (E.D. Pa. 1994)* ("The heart of this requirement is that the plaintiff and each member of the represented group have an interest in prevailing on similar legal claims."). Typicality does not require, however, that the named plaintiffs' claims are identical to the rest of the class in every respect. *Eisenberg, 766 F.2d at 786*.

Lead Plaintiffs' claims are typical of those of the other class members. Like the rest of the class, the Lead Plaintiffs allege that they relied on the market price of Ravisent's common stock as reflecting the true value of their shares and that the market price was artificially inflated by Defendants' misdisclosures in the Registration Statement and third and fourth quarter 1999 financial reports. "The claims of the class and the [class] representatives [thus] arise from the same conduct by defendant: omissions or misstatements [*15] in connection with the public offering." *Gruber, 117 F.R.D. at 79*. In fact, the only issue specific to each class member in this case is the amount of damages each individual member allegedly suffered as a result of Defendants' conduct. This sole difference, however, does not mean that the Lead Plaintiffs' claims are atypical. "'The heart of the [typicality] requirement is that [the lead] plaintiff and each member of the represented group have an interest in prevailing on similar legal claims. Assuming such an interest, . . . differences in the amount of damages claimed . . . may not render [the lead plaintiff's] claims atypical.'" *Stewart v. Assocs. Consumer Disc. Co., 183 F.R.D. 189, 196 (E.D. Pa. 1998)* (quoting *Zeffiro v. First Pa. Banking & Trust Co., 96 F.R.D. 567, 569-70 (E.D. Pa. 1983))*; *see also In re Initial Pub. Offering Sec. Litig., No. 21 MC 92 (SAS) et al., 227 F.R.D. 65, 2004 U.S. Dist. LEXIS 20497, at *90 (S.D.N.Y. Oct. 13, 2004)* ("Where plaintiffs allege a market manipulation scheme, typicality may be satisfied despite . . . differences between class members and class representatives in terms of how much, if [*16] any, of their loss was caused by an alleged scheme."). The typicality requirement is satisfied as well.

D. Adequacy of Representation

A class representative is adequate if: (1) the class representative's counsel is competent to conduct a class action; and (2) the class representative's interests are not antagonistic to the class's interests. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 800-01 (3d Cir. 1995)* ("*In re Gen. Motors Corp.*"); *see also In re Warfarin Sodium Antitrust Litig., 391 F.3d at 532* (stating that the adequacy inquiry "'tests the qualifications of the counsel to represent the class'" and "seeks 'to uncover conflicts of interest between named parties and the class they seek to represent'" (quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Action, 148 F.3d at 313*)). Co-Lead Counsel are very experienced in prosecuting class action cases [7] and have diligently and actively engaged in advancing the interests of the class members since the inception of this action. There is no apparent conflict between Lead Plaintiffs' interests and the interest of the rest [*17] of the class members. Accordingly, the proposed settlement class meets all the requirements in *Rule 23(a)*.

7 *See, e.g.*, *In re Relafen Antitrust Litig., 221 F.R.D. 260, 273 (D. Mass. 2004)* (noting Spector, Roseman & Kodroff, P.C.'s "considerable class action experience"); *In re Abbott Labs. Derivative Litig.*, No. 99 C 7246 (N.D. Ill. filed Nov. 1999) (Robert M. Roseman, Esq.; Robert P. Frutkin, Esq.); *In re Unisys Corp. Sec. Litig.*, Civ. A. No. 99-5333 (E.D. Pa. filed Oct. 28, 1999) (Robert M. Roseman, Esq.); *In re Aetna Inc., Sec. Litig.*, MDL No. 1219 (E.D. Pa. filed Apr. 10, 1998) (Deborah R. Gross, Esq.; Robert P. Frutkin, Esq.); *In re Lowen Group Sec. Litig.*, MDL No. 1100 (E.D. Pa. filed Apr. 18, 1996) (Deborah R. Gross, Esq.).

E. *Rule 23(b)*

After meeting the threshold requirements of *Rule 23(a)*, we must also find that the action meets the requirements of one of the three categories of class actions in *Rule 23(b)*. *In re Warfarin Sodium Antitrust Litig., 391 F.3d at 527*. [*18] We conclude that Plaintiffs meet the requirements of *Rule 23(b)(3)*. To certify a class under *Rule 23(b)(3)*, we must find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other methods for the fair and efficient adjudication of the controversy." *Fed. R. Civ. P. 23(b)(3)*.

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc., 521 U.S. at 623*. This is "a test readily met in . . . cases alleging consumer or securities fraud." *Id. 521 U.S. at 625*; *see also In re Tyson Foods Secs. Litig., Civ. A. No. 01-425, 2003 U.S. Dist. LEXIS 17904, at *9 (D. Del. Oct. 6, 2003)* ("A securities fraud action, based upon false and misleading statements to the market, is a prototypical class action claim."). As discussed above, all class members' claims arise out of the same conduct--Defendants' alleged omissions or misstatements in connection with Ravisent's Registration Statement and third and fourth quarter [*19] 1999 financial reports. If tried separately, each Plaintiff would be required to establish the same omissions or misrepresentations to prove liability. [8] Because common issues of law and fact would be central at trial, the predominance requirement is met. *See, e.g.*, *Neuberger, 1998 U.S. Dist. LEXIS 18807, at *14* (holding that the predominance requirement was satisfied because the "evidentiary issues as to misrepresentations and materiality will be substantially identical for all class members"); *Lerch v. Citizens First Bancorp., 144 F.R.D. 247, 252 (D.N.J. 1992)* (concluding predominance was met because all class members sought determination that defendants misrepresented and omitted material facts in violation of federal securities law).

8 To the extent that Plaintiffs must prove reliance, as in their *Rule 10b-5* claims, *Newton, 259 F.3d at 174*, we conclude that the class could rely on a "fraud on the market" theory. In *Basic, Inc. v. Levinson, 485 U.S. 224, 99 L. Ed. 2d 194, 108 S. Ct. 978 (1998)*, the Supreme Court held that reliance could be presumed "when a fraudulent misrepresentation or omission impairs the value of a security traded in an efficient market." *Newton, 259 F.3d at 175* (citing *Basic, Inc., 485 U.S. at 241-42*). As the Court explained:

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements . . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.

Basic, Inc., 485 U.S. at 241-42 (internal quotations and citation omitted). Here, Plaintiffs are entitled to a presumption of reliance under a "fraud on the market" theory because during the class period, Ravisent common stock was listed on NASDAQ, a highly efficient market, had a trading volume in the range of hundreds of thousand of shares per day, and was required to file periodic public reports with the SEC. (Am. Compl. PP 70-71.)

[*20] We also find that a class action is "superior to other available methods for the fair and efficient adjudication" of this case. *Fed. R. Civ. P. 23(b)(3)*. *Rule 23(b)(3)*'s superiority requirement asks the court to consider the following:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced

> by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

The Third Circuit has stated that "class actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, 'since the effectiveness of the securities laws may depend in large measure on the application of the class action device.'" *Eisenberg, 766 F.2d at 785* (quoting *Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970))*. Part of [*21] the reason is that the class action mechanism overcomes the "problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods. Inc., 521 U.S. at 617* (internal quotations and citation omitted). Here, a class action is superior to individual lawsuits because it provides an efficient alternative to individual claims, and because individual class members are unlikely to bring individual actions given the likelihood that litigation expenses would exceed any recovery. Further, individuals who wished to pursue their own actions would have excluded themselves from the settlement class; the remainder presumably have accepted the efficiencies of class resolution. *In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 454 (S.D.N.Y. 2004)*. We are also unaware of any other individual claims being pressed against Defendants for the wrongs alleged in this action. And finally, when a class is being certified solely for settlement purposes, we need not consider the manageability issues that would arise if the case were to be litigated as a class action. *Amchem, 521 U.S. at 620.* [*22] Lead Plaintiffs have established the superiority requirement of *Rule 23(b)(3)*. We will certify the class and assess the fairness of the proposed settlement.

III. FAIRNESS OF THE SETTLEMENT AGREEMENT

Pursuant to *Federal Rule of Civil Procedure 23(e)*, a district court "may approve a settlement . . . that would bind class members only after a hearing and on finding that the settlement . . . is fair, adequate, and reasonable." *Fed. R. Civ. P. 23(e)(1)(C)*. In assessing whether the proposed settlement is fair, adequate, and reasonable, we must "'independently and objectively analyze the evidence and circumstances . . . to determine whether the settlement is in the best interest of those whose claims will be extinguished.'" *In re Gen. Motors Corp., 55 F.3d at 785* (quoting 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 11.41, at 11-88 to 11-89 (3d ed. 1992)); *see also id.* (stating that "the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members"). We must "make findings that support the conclusion that the settlement [*23] is fair, reasonable, and adequate . . . . in sufficient detail to explain to class members and the appellate courts" the reasons for approving or denying the settlement. *Fed. R. Civ. P. 23(e)(1)* advisory committee note. Although the ultimate determination of fairness is left to the court, there is a presumption of fairness for a proposed settlement when: "'(1) the settlement 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 Warfarin Sodium Antitrust Litig., 391 F.3d at 535* (quoting *In re Cendant Corp. Litig., 264 F.3d 201, 232 n.18 (3d Cir. 2001))*. In this case, the proposed settlement is entitled to a presumption of fairness because settlement negotiations have been conducted at arm's length by capable and experienced counsel, sufficient discovery has occurred so that both sides have been able to adequately explore the strengths and weaknesses of their respective positions, and no class members objected to or requested exclusion from the settlement.

[*24] The Third Circuit has developed a nine-factor test that provides the analytical framework for making the fairness determination. The factors are: (1) the complexity, expense, and likely duration of 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; (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. *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)*. We will consider each factor in turn.

A. Complexity, Expense, and Likely Duration of Litigation

This factor, which "captures 'the probable costs, in both time and money, of continued litigation,'" *In re Cendant Corp. Litig., 264 F.3d at 233* (quoting *In re Gen. Motors Corp., 55 F.3d at 812*), weighs in favor of the proposed settlement. Continuing the litigation would likely require additional discovery, extensive [*25] pretrial motions practice (including summary judgment motions), a trial, and, if Lead Plaintiffs were successful, the delay and expense of an appeal. Absent a settlement, this action likely would not be resolved for several additional years. The case would also be complex, as Co-Lead Counsel "would rely heavily on the development of a

paper trail through numerous public and private documents," *In re Ikon Office Solutions, Inc., 194 F.R.D. 166, 179 (E.D. Pa. 2000)*, to establish liability to a jury. Furthermore, in light of Ravisent's financial condition, a future recovery may be less valuable to the class than the benefits of the present settlement. [9]

9 Ravisent's closing stock price on April 15, 2005 was $ 0.34, and the company reported a market value of about $ 11 million. Summary Quote, Axeda Systems, Inc., NASDAQ.com, *at* http://quotes.nasdaq.com/asp/summaryquote.asp?symbol=XEDAC60&selected=XEDAC60 (last visited Apr. 18, 2005). In addition, NASDAQ has commenced administrative proceedings to delist Ravisent from the stock exchange. Form 8-K, Axeda Systems, Inc. (Jan. 10, 2005).

[*26] **B. The Reaction of the Class to the Settlement**

The second *Girsh* factor "attempts to gauge whether members of the class support the settlement." *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Action, 148 F.3d at 318*. This factor weighs strongly in favor of settlement, since there were no objectors or requests for exclusion. Although the lack of objections to a proposed settlement alone is not dispositive, we believe it to be indicative given the individual notice provided to class members regarding the terms of the proposed settlement. *See, e.g.*, *In re Cendant Corp., 264 F.3d at 235* ("The vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of settlement."); *Fanning v. AcroMed Corp. (In re Orthopedic Bone Screw Prods. Liab. Litig.), 176 F.R.D. 158, 185 (E.D. Pa. 1997)* (stating that a "relatively low objection rate 'militates strongly in favor of approval of the settlement'" (citation omitted)); *Sala v. Nat'l R.R. Passenger Corp., 721 F. Supp. 80, 83 (E.D. Pa. 1989)* [*27] ("The reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.").

C. Stage of the Proceedings and Amount of Discovery Completed

The third factor "'captures the degree of case development that class counsel have accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *In re Cendant Corp. Litig., 264 F.3d at 235* (quoting *In re Gen. Motors Corp., 55 F.3d at 813*). Here, the parties arrived at the settlement after we ruled on Defendants' motion to dismiss and after Lead Plaintiffs reviewed a significant number of documents produced by Defendants and third parties, including the SEC and Ravisent's auditors. (Doc. Nos. 30, 43 at 12.) Co-Lead Counsel also state that during the course of the litigation, they "consulted with experts on matters of accounting, inventory and financial statement presentation, and materiality, causation, and damages to assist with the consideration and analysis of the strengths and weaknesses of their claims." (Doc. No. 43 at 13.) Thus, the settlement [*28] occurred at a stage where "'the parties certainly [had] a clear view of the strengths and weaknesses[]' of their cases." *Bonett v. Educ. Debt Servs., No. 01-CV-6528, 2003 U.S. Dist. LEXIS 9757, at *6 (E.D. Pa. May 9, 2003)* (quoting *In re Warner Communications Sec. Litig., 618 F. Supp. 735, 745 (S.D.N.Y. 1985)*, *aff'd*, *798 F.2d 35 (2d Cir. 1986))*. This factor also favors approval.

D. Risks of Establishing Liability and Damages

The fourth and fifth factors "survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement." *In re Warfarin Sodium Antitrust Litig., 391 F.3d at 537*; *see also In re Cendant Corp. Litig., 264 F.3d at 238* (stating that these factors "attempt[] to measure the expected value of litigating the action rather than settling it at the current time"). Both of these factors weigh in favor of approval of the settlement. Although Lead Plaintiffs believe there is evidence that Ravisent did not follow its stated revenue recognition policies and that its 1999 revenues were artificially [*29] inflated by approximately $ 4.7 million, there are risks that a jury might disagree. Recovery based on a "'fraud on the market' theory . . . requires that 'the complained of misrepresentation or omission have actually affected the market price of the stock.'" *Nathenson v. Zonagen, Inc. (In re Zonagen Secs. Litig.), 322 F. Supp. 2d 764, 775 (D. Tex. 2003)* (quoting *Nathenson v. Zonagen, Inc., 267 F.3d 400, 415 (5th Cir. 2001))*; *see also Sparling v. Daou (In re Daou Sys.), 397 F.3d 704, 722 (9th Cir. 2005)* ("If the [allegedly] improper accounting did not lead to the decrease in [defendant]'s stock price, plaintiffs' reliance on the improper accounting in acquiring the stock would not be sufficiently linked to their damages."). Ravisent's March 14, 2000, announcement that it would restate its second and third quarter 1999 results did not cause a significant decrease in its stock price, however. Lead Plaintiffs recognize that the inconsistency of the market's reaction to bad news underlying the class's claims does not support a clear finding of liability with respect to the Defendants' alleged misrepresentations. (Doc. No. 43 at 13-14.) [*30] Plaintiffs would also have to prove that the amount of claimed damages was the result of the Defendants' alleged misrepresentations and not other market-affecting events, such as changes in the software development market. *See, e.g.*, *In re Initial Pub. Offering Sec. Litig., 2004 U.S.*

*Dist. LEXIS 20497, at *172* (stating that in calculating damages, "a jury may be asked to compute the 'true value' of a stock over time, including fluctuations due to various price-affecting events, and . . . determine by what degree the stock was inflated at any given time during the class period"). Thus, there is a significant risk for Plaintiffs in attempting to establish liability and/or damages if this action proceeded to trial. This factor also weighs in favor of approval.

E. Risks of Maintaining the Class Action Through Trial

Class certification may be amended or reconsidered at any time before judgment. *See Fed. R. Civ. P. 23(c)(1)(C)* ("An order [granting class certification] under *Rule 23(c)(1)* may be altered or amended before final judgment."); *see also In re Warfarin Sodium Antitrust Litig., 391 F.3d at 537* [*31] ("A district court retains the authority to decertify or modify a class at any time during the litigation if it proves to be unmanageable."). There is always some risk that a class certified for settlement purposes would become unmanageable if it became a litigation class. *In re Warfarin Sodium Antitrust Litig., 391 F.3d at 537*. Defendants might also seek to decertify the class prior to trial. *Orloff v. Syndicated Office Sys., Inc., Civ. A. No. 00-CV-5355, 2004 U.S. Dist. LEXIS 7151, at *20 (E.D. Pa. Apr. 20, 2004)*. This factor is also in favor of approval.

F. Defendants' Inability to Withstand a Greater Judgment

This factor addresses whether Ravisent "could withstand a judgment in an amount significantly greater than the [proposed] settlement." *In re Cendant Corp. Litig., 264 F.3d at 240*. There is clearly a substantial risk in this case that Defendants would not be able to withstand a greater judgment, as Ravisent's financial fortunes never recovered after the end of the class period. Ravisent's present market value is less than $ 13 million, and the company's recent financial statement for 2004 indicates that the company [*32] had a net loss of approximately $ 9.7 million ($ 0.30/share) on total revenues of $ 12.9 million. Form 10-K, Annual Report, Axeda Systems, Inc., at 28 (Apr. 12, 2005), *available at* http://www.sec.gov/Archives/edgar/data/1052593/000119312505074874/d10k.htm # tx69626_8. In fact, the proposed settlement is being funded entirely by Ravisent's insurance carriers from the class period, and constitutes almost all the coverage available in the first two layers of insurance. (Doc. No. 43 at 17.) The amount recoverable from the remaining coverage would not justify the necessary expenses incurred by several more years of litigation. Therefore, this factor is in favor of settlement.

G. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and in Light of All Attendant Risks of Litigation

The final two *Girsh* factors consider how the settlement compares to the best and worse case scenarios. In other words, they "evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case. The factors test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the [*33] risks the parties would face if the case went to trial." *In re Warfarin Sodium Antitrust Litig., 391 F.3d at 538*. Here, Co-Lead Counsel believe that there is significant evidence from which a jury could find that Defendants violated various securities laws and regulations, and that if the class can establish causation, the total possible damages in a best-case scenario would be $ 57 million. (Doc. No. 43 at 18.) The proposed settlement is $ 7 million, which is 12.2% percent of the maximum possible damages. This percentage of recovery is within the range of reasonable recovery for a securities class action. As another court in this District has noted, a study by Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law at Columbia University Law School, determined that since 1995, class action settlements have typically recovered "between 5.5% and 6.2% of the class members' estimated losses." *In re Rite Aid Corp. Secs. Litig., 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001)*; *see also In re Baan Co. Secs. Litig., 284 F. Supp. 2d 62, 66 (D.D.C. 2003)* ("'Courts have not identified a precise numerical range within which a settlement must fall [*34] in order to be deemed reasonable; but an agreement that secures roughly six to twelve percent of a potential trial recovery, while preventing further expenditures and delays and eliminating the risk that no recovery at all will be won, seems to be within the targeted range of reasonableness.'" (quoting *In re Newbridge Networks Sec. Litig., Civ. A. No. 94-1678, 1998 U.S. Dist. LEXIS 23238, at *8 (D.D.C. Oct. 23, 1998)*)). Numerous settlements have been approved with percentages of recovery less than the proposed settlement in this case. *See, e.g.*, *In re Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 633 (E.D. Pa. 2004)* (listing various cases where district courts approved settlements less than ten percent of maximum possible recovery). And, as described above, the possibility that the class would actually be able to recover an amount substantially in excess of $ 7 million is questionable in view of Defendants' present financial condition. Accordingly, these factors weigh in favor of approval.

H. Conclusion

All of the *Girsh* factors favor settlement. We therefore conclude that the proposed settlement is fair, adequate, and reasonable. [*35] The plan of allocation,

which reimburses each class member based on the difference between the purchase and sale prices of Ravisent stock at the date of purchase and sale, is also fair and reasonable. (Doc. No. 43 at 19-20, Ex. A at 5, 11.) The proposed settlement will be approved.

IV. AWARD OF ATTORNEYS' FEES AND COSTS

"'A thorough judicial review of fee applications is required for all class action settlements.'" *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 299 (3d Cir. 2005)* (quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Action, 148 F.3d at 333*) (brackets omitted). At the fee determination stage, the district judge must protect the class's interest by acting as a fiduciary for the class. *In re Cendant Corp. Litig., 264 F.3d at 231*. The final decision as to the proper amount of attorneys' fees rests with the court. *In re Ikon Office Solutions, Inc., 194 F.R.D. at 193*.

Here, Plaintiffs' counsel requests an award of $ 2,333,333 for attorneys' fees and expenses, which represents one-third (1/3) of the settlement fund. [10] (Doc. No. 44 at 1.) We must determine whether this request [*36] is fair and reasonable. *Hensley v. Eckerhart, 461 U.S. 424, 433, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)*; *see also Fed. R. Civ. P. 23(h)* ("In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law[.]"). We assess the fairness and reasonableness of this request using the percentage-of-recovery method, and then conduct a cross-check by employing the lodestar method of calculation.

> 10 This amount includes $ 175,890.66 in expenses incurred by Plaintiffs' counsel during the course of litigation. (Doc. No. 44 at 1.)

A. Percentage of Recovery

In this Circuit, "the percentage-of-recovery method is 'generally favored' in cases involving a common [settlement] fund . . . ." *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d 722, 732 (3d Cir. 2001)*. In fact, Congress has explicitly adopted the percentage-of-recovery method for securities class actions by the Private Securities Litigation [*37] Reform Act of 1995. *See 15 U.S.C. § 78u-4(a)(6)* ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."); *see also In re Rite Aid Corp. Sec. Litig., 396 F.3d at 300*. The percentage-of-recovery method "resembles a contingent fee in that it awards counsel a variable percentage of the amount recovered for the class." *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d at 732 n.10* (internal quotations and citation omitted).

The Third Circuit has directed district courts to consider the following seven factors when analyzing a fee award's reasonableness under the percentage-of-recovery method:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case [*38] by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2001) (citing *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Action, 148 F.3d at 336-40*). We note that several of these factors are similar to the *Girsh* factors considered in assessing the fairness of a class settlement. *In re Rite Aid Corp. Sec. Litig., 396 F.3d at 301 n.9*.

Here, we find that all of the *Gunter* factors weigh in favor of approving Plaintiffs' fee request. The settlement fund of $ 7 million is a significant cash benefit to the class, especially in light of the fact that a larger settlement runs the risk of nonpayment due to Ravisent's problematic financial condition. Plaintiffs' attorneys are skilled and experienced advocates, and have successfully prosecuted numerous securities class actions in this District and elsewhere. (Doc. No. 44, Exs. 1-7.) The complexity and difficulty of this litigation is substantial, as it involved numerous legal obstacles to achieving a successful resolution for the class under the PSLRA, including establishing causation, scienter, and [*39] damages. *In re Ikon Office Solutions, Inc., 194 F.R.D. at 194*; *see also id.* ("The Court acknowledges that securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA . . . . The Act imposes many new procedural hurdles. . . . It also substantially alters the legal standards applied to securities fraud claims in ways that generally benefit defendants rather than plaintiffs."). Co-Lead Counsel and the members of the class Executive Committee also have spent a substantial amount of time (1,724.9 hours) litigating this matter. (Doc. No. 44 at 14, Exs. 1-7.) It is also important to note that there have been no objections to the request for attorneys' fees or expenses, or to the settlement itself. This

is significant evidence that the proposed fee request is fair. *See In re Linerboard Antitrust Litig., MDL No. 1261, 2004 U.S. Dist. LEXIS 10532, at *18 (E.D. Pa. June 2, 2004)* ("The absence of objections supports approval of the Fee Petition."); *In re Aetna Inc. Sec. Litig., MDL No. 1219, 2001 U.S. Dist. LEXIS 68, at *48 (E.D. Pa. Jan. 4, 2001)* ("The Class members' view of the attorneys' performance, [*40] inferred from the lack of objections to the fee petition, supports the fee award."). Finally, courts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses. *See, e.g.*, *In re CareSciences, Inc. Sec. Litig.*, Civ. A. No. 01-5266 (E.D. Pa. Oct. 29, 2004) (order approving award of attorneys' fees and expenses) (awarding one-third recovery of $ 3.3 million settlement fund, plus expenses); *In re CareSciences, Inc. Sec. Litig.*, Civ. A. No. 01-5266 (E.D. Pa. Oct. 29, 2004) (order approving award of attorneys' fees and expenses) (awarding 30% of $ 2.3 million settlement fund); *In re Corel Corp. Sec. Litig., 293 F. Supp. 2d 484, 495-98 (E.D. Pa. 2003)* (awarding one-third of $ 7 million settlement fund, plus expenses); *cf. In re Ikon Office Solutions, Inc., 194 F.R.D. at 194* ("In private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."). We therefore conclude that Plaintiffs' attorneys' fees and expense requests are fair and reasonable.

B. Lodestar Cross-Check

In addition to the percentage-of-recovery [*41] approach, the Third Circuit has suggested that it is "'sensible' for district courts to 'cross-check' the percentage fee award against the 'lodestar' method." *In re Rite Aid Corp. Sec. Litig., 396 F.3d at 305* (citing *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Action, 148 F.3d at 333*). "The lodestar award is calculated by multiplying the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the geographic area, the nature of the services provided, and the experience of the attorneys." [11] *Id.* The multiplier takes "into account the contingent nature and risk of the litigation, the results obtained and the quality of service rendered by counsel." *In re General Instrument Secs. Litig., 209 F. Supp. 2d 423, 434 (E.D. Pa. 2001)*; *see also In re Rite Aid Corp. Sec. Litig., 396 F.3d at 305-06* ("The multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work."). "The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier [*42] is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye towards reducing the award." *In re Rite Aid Corp. Sec. Litig., 396 F.3d at 306*.

11 The reasonable billing rate must take into account "a blended billing rate that approximates the fee structure of all the attorneys who worked on the matter." *In re Rite Aid Corp. Sec. Litig., 396 F.3d at 306*; *see also* Manual for Complex Litigation (Fourth) § 21.724 (2004) ("[A] statement of the hourly rates for *all* attorneys and paralegals who worked on the litigation . . . can serve as a 'cross-check' on the determination of the percentage of the common fund that should be awarded to counsel." (emphasis added)).

Co-Lead Counsel and the Executive Committee spent 1,724.9 hours over a period of four years prosecuting this case. (Doc. No. 44 at 18, Exs. 1-7.) Multiplying the total number of hours for each attorney by that attorney's hourly billing rate, the lodestar of Co-Lead [*43] Counsel and the Executive Committee is $ 693,195.50. [12] (Id. at 19, Exs. 1-7.) Using that lodestar, the requested fee of $ 2,157,443 equates to a multiple of 3.1. Lodestar multiples of less than four are well within the range awarded by courts in this Circuit. *See, e.g.*, *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Action, 148 F.3d at 341* (stating that lodestar "multiples ranging from one to four are frequently awarded in common fund cases where the lodestar method is applied" (internal quotations and citation omitted)); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, at *50* (noting that from 2001 to 2003, the average multiplier approved in common fund class actions was 4.35); *In re Aetna Inc. Sec. Litig., 2001 U.S. Dist. LEXIS 68, at *49* (approving a lodestar multiplier at 3.6). The lodestar cross-check supports a percentage fee award of one-third of the settlement amount, including expenses.

12 In making these calculations, we rely on summaries of billing records provided by Plaintiffs' attorneys and filed in support of their fee application. *In re Rite Aid Corp. Sec. Litig., 396 F.3d at 306-07*.

[*44] An appropriate Order follows.

ORDER & FINAL JUDGMENT

AND NOW, this 18th day of April, 2005, after having held a hearing to determine whether the terms and conditions of the Stipulation and Agreement of Settlement dated December 14, 2004 (the "Stipulation") should be approved as fair, adequate, and reasonable to settle the claims raised in the Consolidated and Amended Class Action Complaint ("Complaint"), including the release of the Defendants and the Released Persons, as those terms are defined in the Stipulation; whether judgment should be entered dismissing the Complaint on the merits and with prejudice in favor of Defendants and against all

Class Members who have not requested exclusion therefrom; whether to approve the Plan of Allocation as a fair and reasonable method to allocate the settlement proceeds among the Class Members; whether to approve Plaintiffs' counsels' application for an award of attorneys' fees and reimbursement of expenses; whether a Notice of the hearing substantially in the form approved by the Court was mailed to all persons or entities reasonably identifiable, who purchased Ravisent Technologies, Inc. ("Ravisent") shares on the open market [*45] during the period between July 15, 1999, and April 27, 2000, inclusive (the "Class Period"), pursuant or traceable to Ravisent's IPO Registration Statement, except those persons or entities excluded form the definition of the Class; and whether a summary notice of the hearing substantially in the form approved by the Court was published on the Internet pursuant to the specifications of the Court; IT IS ORDERED AS FOLLOWS:

1. The Court has jurisdiction over the subject matter of this Action, the Plaintiffs, all Class Members, and the Defendants.

2. The prerequisites for a class action under *Federal Rule of Civil Procedure 23(a)* and *(b)(3)* have been satisfied in that:

a. The number of Class Members is so numerous that joinder of all members thereof is impracticable;

b. There are questions of law and fact common to the Class;

c. The claims of the Class Representatives are typical of the claims of the Class they seek to represent;

d. The Class Representatives have and will fairly and adequately represent the interests of the Class;

e. The questions of law and fact common to the members of the Class predominate [*46] over any questions affecting only individual members of the Class; and

f. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

3. This action is certified as a class pursuant to *Federal Rule of Civil Procedure 23* on behalf of all persons who purchased Ravisent shares on the open market during the Class Period, pursuant or traceable to Ravisent's IPO Registration Statement, and who were damaged thereby, excluding the following: Defendants; the officers and directors of Ravisent during the Class Period; any entity in which any Defendant has a controlling interest; the underwriters of the IPO; any officer, director, partner, subsidiary, parent, or affiliate of any of the underwriters of the IPO; and the legal representatives, heirs, successors, or assigns of any such persons.

4. Notice of the pendency of this Action as a class action and of the proposed Settlement was given to all Class Members who could be identified with reasonable effort. The form and method of notifying the Class of the pendency of the action as a class action and of the terms and conditions of the [*47] proposed Settlement met the requirements of *Federal Rule of Civil Procedure 23*, Section 21D(a)(7) of the Securities Exchange Act of 1934, *15 U.S.C. § 78u-4(a)(7)*, as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), due process, and any other applicable law, constituted the best possible notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities entitled thereto.

5. The Settlement is approved as fair, reasonable, and adequate, and the parties are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation.

6. The Complaint, which was filed on a good faith basis pursuant to the PSLRA and *Federal Rule of Civil Procedure 11* and all publicly available information, is hereby dismissed with prejudice and

without costs, except as provided in the Stipulation, as against the Defendants. Upon the Effective Date hereof, Lead Plaintiffs and each of the Class Members shall be deemed to have, and by operation of this judgment shall have, fully, finally, and forever [*48] released, relinquished, and discharged all settlement claims against each and all of the Released Persons, whether or not such Class Member or Lead Plaintiff executes and delivers a Proof of Claim and Release.

7. Plaintiffs and all Class Members, on behalf of themselves, their heirs, executors, administrators, successors, and assigns, upon the Effective Date of the Settlement, shall be deemed to have covenanted not to sue and be permanently barred and enjoined from instituting further legal action based upon all Settled Claims, including Unknown Claims, against the Released Persons, as those terms are defined in the Notice.

8. The Released Persons, upon the Effective Date of the Settlement, are hereby permanently barred and enjoined from instituting, commencing, or suing based upon any and all claims, rights, demands, causes of action, or suits against any of the Plaintiffs, Class Members, or their attorneys, which arise out of or relate to the institution, prosecution, or settlement of the Action, except claims arising out of or related to the obligations of the Plaintiffs, Class Members, or their attorneys embodied in this Stipulation or the implementation or enforcement [*49] of this Stipulation or the Settlement of this Action.

9. Neither this Order and Final Judgment, the Stipulation, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein, shall be:

a. Offered or received against Defendants as evidence of or construed as or deemed to be evidence of any presumption, concession, or admission by any of the Defendants with respect to the truth of any fact alleged by Plaintiffs or the validity of any claim that had been or could have been asserted in the Action or in any litigation, or the deficiency of any defense that has been or could have been asserted in the Action or in any litigation, or of any liability, negligence, fault, or wrongdoing of the Defendants;

b. Offered or received against Defendants as evidence of a presumption, concession, or admission of any fault, misrepresentation, or omission with respect to any statement or written document approved or made by any Defendant, or against Plaintiffs and the Class as evidence of any infirmity in the claims of Plaintiffs and the Class;

c. Offered or received against the Defendants [*50] or against the Plaintiffs or the Class as evidence of a presumption, concession, or admission with respect to liability, negligence, fault, or wrongdoing, or in any way referred to for any other reason as against any of the parties of the Stipulation, in any other civil, criminal, or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation; provided, however, that Defendants may refer to the Stipulation to effectuate the liability protection granted them thereunder;

d. Construed against the Defendants or the Plaintiffs and the Class as an admission or concession that the consideration to be given hereunder represents

the amount which could be or would have been recovered after trial; or

e. Construed as or received in evidence as an admission, concession, or presumption against Plaintiffs of the Class, or any of them, that any of their claims are without merit or that damages recoverable under the Complaint would not have exceeded the Settlement Fund.

10. The Plan of Allocation is approved as fair and reasonable and Co-Lead Counsel and the Claims Administrator are directed to administer [*51] the Stipulation in accordance with its terms and provisions.

11. The Court finds that all parties and their counsel have complied with each requirement of *Federal Rule of Civil Procedure 11* as to all proceedings herein.

12. Co-Lead Counsel, on their own behalf and on behalf of Plaintiffs' counsel, are hereby awarded one-third (1/3) of the Settlement Amount in fees, and in reimbursement of expenses, which the Court finds to be fair and reasonable, which fees and expenses shall be paid directly to Co-Lead Counsel from the Settlement Fund with interest from the date the Settlement Amount was paid to the Escrow Agent to the date of payment pursuant to this Order, at the same interest rate earned by the Settlement Fund. Co-Lead Counsel shall allocate these fees among Plaintiffs' counsel of record in a fashion and amount that, in their sole discretion, fairly compensates all counsel for their respective contributions to the prosecution of this Action.

13. Exclusive jurisdiction is hereby retained over the parties and the Class Members for all matters relating to this Action, including the administration, interpretation, effectuation, [*52] or enforcement of the Stipulation and this Order and Final Judgment, and including any application for fees and expenses incurred in connection with administering and distributing the settlement proceeds to the Class Members.

14. Without further order of the Court, the parties may agree to reasonable extensions of time to carry out any provisions of the Stipulation.

15. The Clerk shall close this case for statistical purposes.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge

TAB 15

LEXSEE 2005 U.S. DIST. LEXIS 27013

Positive
As of: Sep 22, 2008

IN RE REMERON DIRECT PURCHASER ANTITRUST LITIGATION; THIS DOCUMENT RELATES TO: ALL ACTIONS

Civil No. 03-0085 (FSH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2005 U.S. Dist. LEXIS 27013*; *2005-2 Trade Cas. (CCH) P75,061

November 9, 2005, Decided
November 9, 2005, Filed

NOTICE: [*1] NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Judgment entered by, Dismissed by *In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27012 (D.N.J., Nov. 9, 2005)*

PRIOR HISTORY: *In re Remeron Direct Purchaser Antitrust Litig., 367 F. Supp. 2d 675, 2005 U.S. Dist. LEXIS 7193 (D.N.J., 2005)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a class of direct purchasers of an anti-depressant drug, sued defendants, the manufacturers of the drug, alleging various patent and antitrust violations. The parties sought final approval of their settlement agreement, which included a plan of allocation, award of attorneys' fees, reimbursement of litigation expenses, and incentive awards to certain individual plaintiffs in the class.

OVERVIEW: The complaint alleged that the manufacturers violated *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, by using various illegal and deceptive means as part of an overall scheme to improperly create and extend patent protection for a drug. The manufacturers' conduct allegedly delayed the market entry of less expensive generic versions of the drug, thereby forcing direct purchasers to pay artificially inflated prices for both the manufacturers' drug and its generic equivalents. After more than three years of hotly contested litigation, the parties reached a settlement that included the establishment of a $75 million common fund. One third of that fund was to be allocated to the purchasers' attorneys. The court analyzed the settlement, employing a nine-factor test, and concluded that the settlement was fair, adequate, and reasonable under *Fed. R. Civ. P. 23(e)*. The court also found that the attorneys' fees were reasonable and in line with similar cases. Finally, the court found it proper to award two individual plaintiffs $30,000 each for their involvement in the case, noting that no class member had objected to such incentive awards.

OUTCOME: The court approved the final settlement proposed by the parties.

LexisNexis(R) Headnotes

Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Settlements

[HN1] The United States Court of Appeals for the Third Circuit affords an initial presumption of fairness for a settlement 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.

Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Settlements

[HN2] A class action may be settled under *Fed. R. Civ. P. 23(e)* upon a judicial finding that the settlement is fair, reasonable, and adequate. *Fed. R. Civ. P. 23(e)(1)(C)*. Under *Rule 23(e)*, the court must determine whether the settlement is within a range that responsible and experienced attorneys could accept considering all relevant risks and factors of litigation. The range recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.

Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Settlements
[HN3] To determine whether a settlement is fair, reasonable and adequate under *Fed. R. Civ. P. 23(e)*, the United States Court of Appeals for the Third Circuit applies a nine-factor test. These factors are: (a) The complexity, expense, and likely duration of the litigation; (b) the reaction of the class to the settlement; (c) the stage of the proceedings and the amount of discovery completed; (d) the risks of establishing liability; (e) the risks of establishing damages; (f) the risks of maintaining the class action through the trial; (g) the ability of the defendants to withstand a greater judgment; (h) the range of reasonableness of the settlement fund in light of the best possible recovery; and (i) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Settlements
[HN4] Where a class is comprised of sophisticated business entities that can be expected to oppose any settlement they find unreasonable, the lack of objections indicates the appropriateness of the settlement.

Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Settlements
[HN5] An assessment of the reasonableness of a proposed settlement seeking monetary relief requires analysis of the present value of the damages a plaintiff would likely recover if successful, appropriately discounted for the risk of not prevailing. In order to evaluate the propriety of an antitrust class action settlement's monetary component, a court should compare the settlement recovery to the estimated single damages. Although in certain circumstances a plaintiff class may recover treble damages if it prevails at trial, that result is far from certain.

Civil Procedure > Class Actions

Civil Procedure > Settlements
[HN6] A court evaluating a proposed class action settlement should consider whether the settlement represents a good value for a weak case or a poor value for a strong case.

Civil Procedure > Class Actions
[HN7] As with settlement agreements, courts consider whether distribution plans are fair, reasonable, and adequate. In evaluating the formula for apportioning the settlement fund, the court keeps in mind that district courts enjoy broad supervisory powers over the administration of class action settlements to allocate the proceeds among the claiming class members equitably.

Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN8] For purposes of attorneys' fees, the percentage of recovery method is generally favored in cases involving a common fund, and is designed to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.

Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN9] The United States Court of Appeals for the Third Circuit set forth with specificity the factors that a court should consider in evaluating requested attorneys' fees in Gunter v. Ridgewood Energy Corp. The Gunter factors need not be applied in a formulaic way, and their weight may vary on a case-by-case basis. The Gunter factors include (a) the size of the fund created and number of persons benefitting from the settlement, (b) the presence/absence of substantial objections to the fee, (c) the skill of the plaintiffs' counsel, (d) complexity and duration of the litigation, (e) the risk of nonpayment, (f) amount of time devoted to the litigation, (g) awards in similar cases.

Civil Procedure > Class Actions
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN10] A determination of a fair attorney fee must include consideration of the sometimes undesirable characteristics of contingent antitrust actions, including the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high.

Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN11] The percentage-of-the-fund method of awarding attorneys' fees in class actions should approximate the fee which would be negotiated if the lawyer were offering his or her services in the private marketplace. The object is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation. In determining the market price for such services, evidence of negotiated fee arrangements in comparable litigation should be examined.

Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN12] For purposes of attorney fee award, in addition to the percentage-of-the-fund approach, the United States Court of Appeals for the Third Circuit has suggested that it is sensible for district courts to cross-check the percentage fee award against the lodestar method. A lodestar cross-check is not a Gunter factor but is a suggested practice. The Third Circuit has recognized that multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.

Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview
[HN13] Counsel in common fund cases are entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case.

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JUDGES: Hon. Faith S. Hochberg, United States District Judge.

OPINION BY: Faith S. Hochberg

OPINION

OPINION

Hon. Faith S. Hochberg

HOCHBERG, District Judge:

This matter is before the Court upon a settlement agreement between the manufacturers of the antidepressant drug Remeron, Organon U.S.A. and Akzo Nobel N.V. (collectively "Defendants" or "Organon"), and the direct purchasers of Remeron ("Plaintiffs"). The settling parties seek (1) final approval of their class action [*2] settlement agreement and plan of allocation and (2) award of attorneys' fees to Plaintiffs' Counsel, reimbursement of litigation expenses, and incentive awards to named Plaintiffs. The Court preliminarily approved the settlement at a hearing on August 30, 2005. The final Fairness Hearing was conducted on November 2, 2005.

I. BACKGROUND

A. The Litigation

1. The Complaint

In 2003, direct purchasers of Remeron ("Direct Purchasers") filed class action complaints against Defendants. The complaint alleges that Defendants violated Section 2 of the Sherman Act, *15 U.S.C. § 2*, by: (a) using various illegal and deceptive means as part of an overall scheme to improperly create and extend patent protection for the drug mirtazapine, which Defendants sold under the brand-name Remeron, by manipulating the Hatch-Waxman statutory scheme; (b) committing affirmative misrepresentations and failing to disclose material prior art in the prosecution of *U.S. Patent No. 5,977,099* (the *"099 patent*") before the United States Patent and Trademark Office ("PTO"); (c) making false and misleading representations to the Food and Drug Administration ("FDA") to obtain the [*3] listing of the *099 patent* in the FDA's Orange Book in a wrongful manner; (d) submitting the *099 patent* for listing in the

Orange Book approximately 14 months beyond the FDA-mandated deadline for patent listing; and (e) filing and prosecuting sham patent litigation against potential generic competitors.

The complaint alleges that Defendants' conduct delayed the market entry of less expensive generic versions of Remeron, thereby forcing Direct Purchasers to pay artificially inflated prices for both Remeron and its AB-rated generic equivalents (i.e. generic mirtazapine).

2. Extensive Discovery and Litigation Prior to Settlement

Plaintiffs' claims were the subject of extensive and contentious discovery. During three years of hotly contested litigation, Plaintiffs' Counsel composed and propounded four sets of document requests which, as ordered by the Court, were served on behalf of various coordinated direct and indirect purchaser plaintiffs, as well as subpoenas duces tecum directed to multiple third parties. Overall, more than 1 million pages of documents and data were produced by Defendants and third parties. Plaintiffs' Counsel conducted over 45 depositions of witnesses with [*4] knowledge of facts relevant to Plaintiffs' allegations. Subsequently, Plaintiffs' Counsel retained and worked closely with nearly a dozen experts in the areas of (i) patent prosecution process before the PTO and patent interpretation, (ii) the FDA regulatory regime regarding prescription drugs, (iii) the pharmaceutical industry, and (iv) antitrust economics and the calculation of damages. The opinion of these experts were necessary both to support the complex theories of liability and damages advanced by Plaintiffs, and to rebut the numerous defenses raised by Defendants.

On September 8, 2004, the Court ruled on Defendants' motion to dismiss the complaints filed by Plaintiffs. Based on a prior opinion issued in the separate antitrust litigation between Defendants and generic drug manufacturers Mylan, Teva and Alphapharm (the "Generics"), the Court held that Plaintiffs were collaterally estopped from asserting claims arising from the alleged wrongful Orange Book listing and sham litigation. The Court also dismissed Plaintiffs' Walker Process claim for lack of standing. Following this opinion, every plaintiff group other than the Direct Purchasers, including the Generics and all [*5] other direct and indirect purchasers, chose to settle their claims.

This litigation further engendered significant dispositive motion practice in the form of motions for summary judgment filed by both sides. Plaintiffs filed three separate motions for partial summary judgment, including motions seeking findings that: (a) Defendants were estopped from relitigating certain findings from the prior patent litigation and, therefore, that the patent litigation was objectively baseless; (b) that the *099 patent* was not eligible for listing in the Orange Book; and (c) that Defendants possessed monopoly power over mirtazapine.

In opinions dated September 7, 2004 and February 18, 2005, the Court denied the first and third of these motions, determining, respectively, that (i) Defendants would not be estopped from litigating the objective bases for the prior patent litigation, and (ii) that Plaintiffs could not prove Defendants' monopoly power based solely on "direct" evidence of Defendants' control over the price of mirtazapine.

On October 1, 2004, Defendants filed a single, omnibus motion for summary judgement, which attacked both the legal and factual bases for the "overarching scheme" and [*6] "late listing" claims. Defendants' motion also questioned Plaintiffs' ability to demonstrate the existence of monopoly power in a properly defined relevant market. Defendants' motion was pending at the time the Settlement was preliminarily approved, and even a partial finding in Defendants' favor could have severely limited, or barred entirely, the ability of the Direct Purchasers to recover.

On October 27, 2003, Plaintiffs filed their motion for class certification, together with a memorandum of law explaining, *inter alia*, Plaintiffs' theory of class-wide antitrust injury and proposed method of calculating Class damages, supported by the testimony of an expert economist. In preparation for and in furtherance of the class certification motion, Plaintiffs' Counsel engaged in a comprehensive review of numerous issues specific to the pharmaceutical industry, including the economic structure, pricing, and distribution practices of branded and generic manufacturers. Such preparations were necessary in order to support Plaintiffs' motion and rebut numerous defenses to class certification raised by Defendants, including their reliance on the Eleventh Circuit's decision in *Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 350 F.3d 1181 (11th Cir. 2003)*, [*7] which came down during the pendency of this case, and engendered significant supplemental briefing and arguments on the issue of class certification. See id. Class certification was granted here only after the Settlement had been proposed, and the Defendants stipulated not to oppose Plaintiffs' certification request.

B. Mediation and Settlement

In March 2003, the parties began to explore the possibility of settlement. This process eventually resulted in the Settlement now before the Court, but progress toward this agreement was slow, as each party had strong conviction in their respective claims or defenses. Additionally, throughout the course of this case, the parties participated in a lengthy and complex mediation procedure utilizing both skilled mediators and the good offices of

the Court. This process encompassed multiple hearings and mediation sessions, the first of which was held in January 2004 before Judge Politan.

On August 24, 2005, after full discovery, significant motion practice and a lengthy negotiation process, Plaintiffs' Counsel entered into the Settlement with Defendants. The Settlement will settle all claims arising out of or relating in any way to any [*8] conduct alleged or which could have been alleged in the Class Action relating to any alleged delay in the marketing or selling of Remeron or its generic equivalents, in exchange for payment of $ 75 million in cash.

The Court preliminarily approved the Settlement and certified the class at a hearing on August 30, 2005. On September 19, 2005, copies of the Notice Of Proposed Class Action Settlement and Hearing Regarding Settlement (the "Notice") were timely disseminated by first-class mail to all Class members. The Notice informed Class members, among other things, that they could object to any or all terms of the Settlement, or opt-out of the Class entirely. The deadline for opting out was October 19, 2005. No Class member has objected to, or opted-out of the Settlement.

II. ANALYSIS

A. Final Approval of Class Action Settlement

1. Settlements That Meet Certain Conditions Are Presumed Fair

[HN1] The Third Circuit affords an initial presumption of fairness for a settlement "if the courts 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 [*9] a small fraction of the class objected." *In re Remeron End-Payor Antitrust Litigation, 2005 U.S. Dist. LEXIS 27011, 2005 WL 2230314, *15 (D. N.J. Sep 13, 2005)* (hereinafter "End-Payor Opinion"), quoting *In re Cendant Corp. Litig., 264 F.3d 201, 233 n. 18 (3d Cir. 2001)*.

Each of these factors weighs in favor of this presumption in the instant case. First, settlement negotiations were lengthy and formal, and included both formal presentations to the Court and to skilled mediators, as well as private mediation sessions attended by members of the Class. Second, as discussed in Part I above, both fact and expert discovery in this case was completed before the Settlement was reached, and included over one million pages of document discovery, and numerous expert reports. Third, both Plaintiffs' Counsel and Defendants' Counsel are skilled and experienced litigators. Fourth, not a single member of the Class has objected to, or opted-out of, the proposed Settlement. Thus, this Court determines that an initial presumption of fairness attaches, although such finding is not dispositive.

2. Standard for Court Approval of Settlement

[HN2] A class action may be settled under *Rule 23(e)* upon [*10] a judicial finding that the settlement is "fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(1)(C)*. Under *Rule 23(e)*, this Court must determine whether the settlement is within a range that responsible and experienced attorneys could accept considering all relevant risks and factors of litigation. See *Walsh v. Great Atlantic and Pacific Tea Co., 96 F.R.D. 632, 642 (D.N.J. 1983)*. The range "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972)*.

Because a settlement represents an exercise of judgment by the negotiating parties, cases have consistently held that the function of a court reviewing a settlement is neither to rewrite the settlement agreement reached by the parties nor to try the case by resolving issues left unresolved by the settlement. *Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir. 1974)*; *Bullock v. Administrator of Kircher's Estate, 84 F.R.D. 1, 4 (D.N.J. 1979)*. "The temptation to [*11] convert a settlement hearing into a full trial on the merits must be resisted." *Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1315 (3d Cir. 1993)*.

[HN3] To determine whether the settlement is fair, reasonable and adequate under *Rule 23(e)*, courts in the Third Circuit apply the nine-factor test enunciated in *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)*, and recently reaffirmed in *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534-35*. These factors are:

> (a) The complexity, expense, and likely duration of the litigation;
>
> (b) the reaction of the class to the settlement;
>
> (c) the stage of the proceedings and the amount of discovery completed;
>
> (d) the risks of establishing liability;
>
> (e) the risks of establishing damages;
>
> (f) the risks of maintaining the class action through the trial;

> (g) the ability of the defendants to withstand a greater judgment;
>
> (h) the range of reasonableness of the settlement fund in light of the best possible recovery; and
>
> (i) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. (quoting *Girsh, 521 F.2d at 156-57*). [*12]

3. Evaluation of the Settlement Under Applicable Standards

a. The Complexity, Expense and Likely Duration of the Litigation

This factor requires examination of the additional cost, in time, money and judicial resources, of continued litigation. Courts must balance a proposed settlement against the enormous time and expense of achieving a potentially more favorable result through further litigation. See, e.g., *In re Sunbeam Securities Litigation, 176 F. Supp. 2d 1323, 1332 (S.D. Fla. 2001)* (more than three years of complex litigation before settlement reached).

The settlement of this complex antitrust action is clearly favored in view of the long litigation road yet to be traveled. See, e.g., *Behrens v. Wometco Enters., Inc., 118 F.R.D. 534, 543 (S.D. Fla. 1988)*, aff'd *899 F.2d 21 (11th Cir. 1990)* ("The law favors compromises in large part because they are often a speedy and efficient resolution of long, complex and expensive litigations.").

This case has already been long and hard-fought. Prior to the Settlement, the parties completed significant and voluminous fact and expert discovery, and fully litigated [*13] Defendants' motion to dismiss. Still pending are Plaintiffs' motion for class certification, and multiple motions for summary judgment. As this Court observed with respect to the end-payor settlement, "thousands of pages of materials were filed with this Court on summary judgment issues such as market definition, market power, and improper / late listing in the FDA Orange Book." End-Payor Opinion at *17. Absent the Settlement, these motion would have required considerable additional work on the part of the parties and the Court to fully litigate.

Further, if the case were not concluded on summary judgment, a lengthy and expensive trial on liability and damages allegedly caused by Defendants' alleged violations of Sherman Act *§ 2* would likely have followed. Trial preparation on both sides would be necessary. Given Defendants' vigorous advocacy of their contention that they did not violate the Sherman Act, and the complex theories advanced for liability, it would be likely to expect appeals from any result reached on the question of liability or of damages. Avoidance of this expenditure of time and resources clearly benefits all parties. See *In re General Motors Pick-Up Trust Fuel Tank Products Liab. Litig., 55 F.3d 768, 812 (3d Cir. 1995)* [*14] (concluding that lengthy discovery and ardent opposition from the defendant with "a plethora of pretrial motions" were facts favoring settlement, which offers immediate benefits and avoids delay and expense); *Rolland v. Cellucci, 191 F.R.D. 3, 10 (D. Mass. 2000)* (prospect of two week trial "would have imposed significant preparatory time on everyone and would likely have required the court several months to issue an opinion.").

Finally, even if a trial resulted in a judgment for Plaintiffs, such judgment might not equal the amount of the Settlement, while Plaintiffs would have incurred additional expense and delay, as well as the risk of non-recovery based on a verdict for Defendants or reversal of a verdict for Plaintiffs on appeal. Therefore, this factor weighs in favor of approving the Settlement.

b. The Reaction of the Class to the Settlement

The response of the Class to the proposed Settlement also supports approval. As described above in Part I, the Settlement Notice included a description of: (a) the allegations of the Class Action; (b) the Class certified by the Court; (c) Class members' rights to opt-out or object under *Rule 23*; (d) the proposed plan of [*15] allocation; (e) the attorneys' fees, reimbursement of expenses and incentive award that would be sought, and (f) the process for Court approval. All Class members were sent copies of the Notice. The deadline for serving objections to the Settlement was October 26, 2005. No Class members have objected to, or have chosen to opt out of, the Settlement. Moreover, as noted above, the three largest Class members have closely monitored the Class Action, with the assistance of their own outside counsel, by attending meditation sessions and court hearings. These Class members were informed of, and agreed to, the material terms of the Settlement Agreement prior to its execution.

Such acceptance of the Settlement on the part of the Class is convincing evidence of the Settlement's fairness and adequacy. See *Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 118-119 (3d Cir. 1990)* ("only" 29 objections in 281 member class "strongly favors settlement"); see generally *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 318 (3d Cir. 1998)* (affirming conclusion that class reaction was favorable where 19,000 policyholders out of 8 million opted [*16] out and 300 objected). These factors weigh in favor of the Settlement.

[HN4] Furthermore, where, as here, a class is comprised of sophisticated business entities that can be expected to oppose any settlement they find unreasonable, the lack of objections indicates the appropriateness of the Settlement. See *In re M.D.C. Holdings Securities Litigation, 1990 U.S. Dist. LEXIS 15488, 1990 WL 454747, *10 (S.D.Cal. Aug 30, 1990)* (lack of objections "is significant since the class includes sophisticated financial institutions . . . who have counsel available to advise and represent them and submit objections to either the settlement or the fees and expenses"). The absence of objections from the sophisticated Class is particularly significant here because many Class members here have also been members of classes certified in other pharmaceutical antitrust actions (see, e.g., *In re Relafen Antitrust Litigation, 231 F.R.D. 52, 2005 WL 2386119 (D.Mass. 2005)*; In re Cardizem CD Antitrust Litig., No. 99-73259 (E.D. Mich. Nov. 25, 2002); *In re Buspirone Patent and Antitrust Litigation, 210 F.R.D. 43 (S.D.N.Y. 2002))*, and are therefore well suited to evaluate a proposed settlement [*17] in an action of this type.

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

The purpose of this *Girsh* factor is to ensure that Class Counsel has an "adequate appreciation of the merits of the case before negotiating" a settlement. *In re Prudential, 148 F.3d at 319*, quoting *In re General Motors, 55 F.3d at 813*. In the present case, the Settlement comes only after the parties had sufficient time to understand and evaluate their respective positions.

As discussed in Part I, discovery in this case spanned more than a year, is complete, and has been extensive. This discovery included the entire record in the underlying patent litigation, numerous interrogatories and document requests, as well as third-party subpoenas to pharmaceutical manufacturers and consultants to the pharmaceutical industry. Direct Purchasers Plaintiffs reviewed over one million pages of documents and data produced by Defendants and third parties. Plaintiffs also answered extensive interrogatories and produced voluminous records, and both Plaintiffs' and Defendants' experts have been extensively deposed.

Given this vast amount of discovery obtained, and [*18] the volume of motion practice that enabled Plaintiffs' Counsel to preview some of the defenses that Defendants would advance, Plaintiffs' Counsel had a valid basis to negotiate a settlement. See *In re Lucent Technologies, Inc., Securities Litigation, 307 F. Supp. 2d 633, 638 (D. N.J. 2004)*. Moreover, the mediation and negotiation process was itself rigorous and involved, giving the parties ample opportunity to assess the strengths of their respective claims and defenses before both learned mediators and the Court. See *In re Linerboard Antitrust Litig., 296 F. Supp.2d 568, 578 (E.D. Pa. 2003)* (noting positively that settlement talks involved "a number of face to face meetings and telephone conferences.").

As a result of the parties' efforts, the litigation had reached the stage where "the parties certainly [had] a clear view of the strengths and weaknesses of their cases." *Bonett v. Educational Debt Service, Inc., 2003 U.S. Dist. LEXIS 9757, 2003 WL 21658267, *6 (E.D. Pa. May 9, 2003)*, quoting *In re Warner Communications Sec. Litig., 618 F. Supp. 735, 745 (S.D.N.Y. 1985)*. Thus, the final Settlement occurred only after the parties and the [*19] Court were able to assess its fairness adequately.

d. The Risks of Establishing Liability

This factor surveys the possible risks of litigation in order to balance the likelihood of success and potential damages against benefit of settlement. *In re Prudential, 148 F.3d at 319*. The history and current status of the litigation indicate that Plaintiffs face significant risk even before reaching trial. In an opinion dated September 8, 2004, this Court dismissed Plaintiffs' claims arising from allegations of fraud in connection with the prosecution of the *099 patent*, wrongful listing of that patent in the Orange Book, and subsequent sham litigation. Therefore, without this Settlement, Plaintiffs would have to proceed on two claims: (1) the claim relating to the Defendants' decision to list the *099 patent* 14 months after the deadline to do so established by FDA regulations (the "late listing claim"); and (2) Plaintiffs' claim that Defendants had engaged in an overarching scheme to delay competition, the net effect of which was anticompetitive, even if the individual acts of the scheme were not actionable under *Section 2* of the Sherman Act (the "overarching scheme claim"). [*20] The risk to those surviving claims was immediate: pending before the Court at the time the Settlement was proposed was Defendants' omnibus motion for summary judgment, wherein Defendants argued that the late listing and overarching scheme claims were barred entirely by the Court's prior findings and Supreme Court precedent.

Finally, if Plaintiffs had succeeded in reaching trial, Plaintiffs would have had to prove that Defendants (1) possessed monopoly power, and (2) willfully acquired or maintained that power as distinguished from the growth or development of such due to a superior product, business acumen, or historic accident. *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. Defendants raised numerous legal and factual defenses, including, *inter alia*, assertions that Direct Purchasers' claims: (1) involved no cognizable antitrust injury or damage; (2) were barred by the Noerr-Pennington doctrine; (3) were barred for failure to define properly an antitrust market; (4) described harm that was

effectively "passed-on" to third parties; and (5) were time-barred by the applicable statute of limitations. Moreover, the Court's February 18, 2005 opinion denying Plaintiffs' [*21] motion for partial summary judgment on the issue of monopoly power would require Plaintiffs to prepare a complex and detailed analysis of the "relevant market" in which Remeron competed, in order to demonstrate the existence of antitrust liability. These risks of proving liability weigh in favor of approving this settlement.

e. The Risks of Establishing Damages

The fifth Girsh factor to be analyzed when considering the fairness of a settlement is "the risk of establishing damages." *Girsh, 521 F.2d at 157*. This factor "attempts to measure the expected value of litigating the action rather than settling it at the current time." *In re Cendant, 264 F.3d at 239*. To the extent that establishing damages is contingent upon liability, many of the same risks discussed in the previous section are also present here. Furthermore, there are substantial risks in proving damages, which the parties have avoided by virtue of the proposed settlement.

The determination of damages is a complicated and uncertain process. In the present case, the parties offered competing expert reports which included significantly different estimates of overcharge damages to which [*22] Plaintiffs would be entitled assuming liability could be proven at trial. Plaintiffs' expert economist estimates that the maximum antitrust damages (prior to trebling) ranged from $ 108 million to $ 133 million, while Defendants' expert, relying on a similar damage model but disagreeing on certain material assumptions, estimated the same range as $ 23.9 million to $ 29.7 million. It is by no means certain that Plaintiffs would have succeeded in recovering the maximum measure of damages estimated by Plaintiffs' expert. See, e.g., *In re Aetna Inc. Sec. Litig., 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, *10 (E.D. Pa. Jan 4, 2001)* ("Plaintiffs' damages theories rested primarily on the testimony and reports of expert witnesses. Such experts would likely have been challenged on Daubert or other grounds. Plaintiffs, therefore, risked the rejection of its experts first by the Court pursuant to *Federal Rule of Evidence 104(a)*, or by the jury in assessing credibility."); *In re Prudential Ins. Co. of America Sales Practices Litigation, 962 F.Supp. 450, 539 (D.N.J. 1997)* ("a jury's acceptance of expert testimony is far from certain, regardless of the [*23] expert's credentials"); *In re Safety Components, Inc. Securities Litigation, 166 F. Supp. 2d 72, 90 (D. N.J. 2001)*. Therefore, the risks of proving damages weigh in favor of approving the settlement.

f. The Risks of Maintaining the Class Action Through Trial

"Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *End-Payor Opinion at *23*, quoting *In re Warfarin Sodium Antitrust Litigation, 391 F.3d 516, 537 (3d Cir. 2004)* (internal quotes and citation omitted). The Settlement here comes after Plaintiffs' motion for class certification has been fully briefed. The briefing submitted indicates that this is a hotly contested issue, with Defendants raising multiple factual and legal arguments in opposition to certification. Class certification was granted here only after the Settlement had been proposed, and the Defendants had stipulated not to oppose Plaintiffs' certification request. Thus, the risks faced by Plaintiffs with regard to class [*24] certification weigh in favor of approving the Settlement.

g. The Ability of the Defendants to Withstand a Greater Judgment The parties do not contend that Defendants could not withstand a larger judgment. However, as this Court has noted, "many settlements have been approved where a settling defendant has had the ability to pay greater amounts." *End-Payor Opinion at *23*, citing *Warfarin Sodium, 391 F.3d at 538* ("The fact that DuPont could afford to pay more does not mean that it is obligated to pay any more than what the . . . class members are entitled to under the theories of liability that existed at the time the settlement was reached."); *Young Soon Oh v. AT & T Corp., 225 F.R.D. 142, 150-51 (D.N.J. 2004)*; *In re Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 632 (E.D.Pa. 2004)*; *Erie County Retirees Assoc. v. County of Erie, Pennsylvania, 192 F. Supp. 2d 369, 376 (W.D. Pa. 2002)*; *Lazy Oil Co. v. Witco Corp., 95 F. Supp.2d 290, 318 (W.D. Pa. 1997)*. This factor does not favor nor disfavor the Settlement.

h. The Range of Reasonableness of the Settlement In Light of the Best Possible Recovery

[*25] [HN5] An assessment of the reasonableness of a proposed settlement seeking monetary relief requires analysis of the present value of the damages a plaintiff would likely recover if successful, appropriately discounted for the risk of not prevailing. See *In re Prudential, 148 F.3d at 322*. As this Court previously noted, "in order to evaluate the propriety of an antitrust class action settlement's monetary component, a court should compare the settlement recovery to the estimated single damages. Although in certain circumstances a plaintiff class may recover treble damages if it prevails at trial, that result is far from certain." *End-Payor Opinion at *24*, citing *In re Ampicillin Anttitrust Litigation, 82 F.R.D. 652, 654 (D.D.C.1979)*; *Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)*.

In the present case, Plaintiffs' expert economist estimates that the maximum antitrust single damages ranged from $ 108 million for the "late listing" claim, to $ 133 million for the "overarching scheme" claim. Accordingly, the Settlement represents 56% to 69% of the maximum single damages Plaintiffs could hope to recover, provided that liability was proven [*26] at trial. This is above the range of settlements routinely granted final approval. See *End-Payor Opinion at *24* ("An antitrust class action settlement may be approved even if the settlement amounts to a small percentage of the single damages sought, if the settlement is reasonable relative to other factors"); see also *In re Cendant Corp. Litig., 264 F.3d 201, 231 (3d Cir. 2001)* (approving settlement of 36% of total damages and noting that typical recoveries in complex securities class actions range from 1.6% -- 14% of estimated damages); In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350,*5 (E.D. Pa. June 2, 2004) (collecting cases in which courts have approved settlements of 5.35% to 28% of estimated (single) damages in complex antitrust actions); *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, *4* (approving settlement of approximately 10% of total damages of $ 830 million); *Stop & Shop Supermarket Co. v. Smithkline Beecham Corp., 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926 (E.D. Pa. May 19, 2005)* (Recovery of 11.4% of estimated single damages "compares favorably with the settlements reached in other complex class action lawsuits.")

Moreover, in light of the [*27] highly contested nature of liability, it is likely that any judgment entered would have been the subject of post-trial motions and appeals, further prolonging the litigation and reducing the value of any recovery. See, e.g., *Parks v. Portnoff Law Associates, Ltd., 243 F.Supp.2d 244, 253 (E.D. Pa. 2003)*. An appeal of a damage award could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself. See *Backman v. Polaroid Corp., 910 F.2d 10 (1st Cir. 1990)* (class won a jury verdict and a motion for judgment N.O.V. was denied, but on appeal the judgment was reversed and the case dismissed); *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)* (reversal of multimillion dollar judgment obtained after protracted trial); *Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 485 (S.D.N.Y. 1970)*, modified, *449 F.2d 51 (2d Cir. 1971)*, rev'd *409 U.S. 363, 366, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973)* ($ 145 million judgment overturned after years of litigation and appeals). Thus, the range of reasonableness of the settlement in light of the best possible recovery favors the Settlement.

[*28] i. The Range of Reasonableness of the Settlement to a Possible Recovery In Light of all the Attendant Risks of Litigation

This factor requires the Court to examine the terms of settlement from a "slightly different vantage point[]" than reasonableness in light of the best recovery. *In re General Motors, 55 F.3d at 806*. As this Court noted, [HN6] "a court evaluating a proposed class action settlement should also consider whether the settlement represents a good value for a weak case or a poor value for a strong case.'" *End-Payor Opinion at *23*, quoting *Warfarin Sodium, 391 F.3d at 538*; see also *Girsh, 521 F.2d at 157* (court must examine the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation).

As discussed above, this litigation involves difficult legal and factual issues regarding a claim for damages resulting from Defendants' alleged violation of *Section 2* of the Sherman Act. Thus, in light of the significant size of the settlement fund relative to the potential recoverable damages, the Settlement represents a good value for a strong case, albeit one where numerous [*29] critical legal issues have not been determined and are therefore uncertain. In addition, even if Plaintiffs successfully prevailed on those issues at trial, Defendants would likely appeal, resulting in further delaying any recovery for the Class. The Court is satisfied that the Settlement accounts for the risks inherent in this complex litigation and provides appropriate relief in light of these risks.

j. Conclusion

Given this Court's analysis, the Court concludes that the nine-factor test utilized by the Third Circuit is satisfied. The settlement is fair, adequate, and reasonable under *Federal Rule of Civil Procedure 23(e)*.

B. Approval of the Plan of Allocation

[HN7] "As with settlement agreements, courts consider whether distribution plans are fair, reasonable, and adequate." *FTC v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 205 F.R.D. 369, 381 (D.D.C. 2002)*; see also *In re Vitamins Antitrust Litig., 2000 U.S. Dist. LEXIS 8931, 2000 WL 1737867, at *6 (D.D.C. Mar. 31, 2000)*. "In evaluating the formula for apportioning the settlement fund, the Court keeps in mind that district courts enjoy broad supervisory powers over the administration [*30] of class action settlements to allocate the proceeds among the claiming class members equitably." *Hammon v. Barry, 752 F. Supp. 1087, 1095 (D.D.C. 1990)* (internal quotation marks and citations omitted); accord *In re "Agent Orange"Prod. Liability Litig., 818 F.2d 179, 181 (2d Cir. 1987)*.

Plaintiffs propose to allocate the Settlement funds, net of Court approved attorneys' fees, incentive award, and expenses ("Net Settlement Fund"), in proportion to the overcharge damages incurred by each Class member due to Defendants' alleged conduct in restraint of trade.

Such a method of allocating the Net Settlement Fund is inherently reasonable. See *In re Lucent Technologies, Inc., Securities Litigation, 307 F. Supp. 2d 633, 649 (D. N.J. 2004)* ("A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable."); *In re Corel Corp. Inc. Securities Litigation, 293 F. Supp. 2d 484, 493 (E.D. Pa. 2003)* (Courts "generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable.") quoting *Aetna Inc. Sec. Litig., 2001 U.S. Dist. LEXIS 68, 2001 WL 20928,* [*31] **12 (E.D. Pa. Jan.4, 2001)*.

The Plan of Allocation provides a method for determining each Class member's pro-rata share of the Net Settlement Fund. Specifically, the Plan of Allocation describes: 1) the method of calculating each Class member's overcharge damages and pro-rata share of the Net Settlement Fund; 2) the contents and method of disseminating a Claims Notice form; 3) the manner in which claims will be initially reviewed and processed; 4) the method of notifying Class members of the amount that each Class member will receive from the Net Settlement Fund ("Notice of Class Member Distribution Amount"); and 5) the process for handling and resolving challenged claims.

The Plan of Allocation also includes the deadlines for completing the following tasks related to distributing each Class member's pro-rata share of the Net Settlement Fund: 1) preparation and dissemination of the Claims Notice form; 2) receipt by Claims Administrator of completed Claims Notice form and supporting documentation; 3) curing deficiencies in any Claims Notice form or supporting documentation submitted by Class member; 4) disseminating the Notice of Class Member Distribution Amount; and, 5) challenging [*32] and resolving disputes over the Claims Administrator's determination of each Class member's distribution amount.

As the Plan of Allocation appears fair based on Plaintiffs' expert economist's calculations, and the three largest Class members support it, and the lack of any objections to it, this Court gives the plan final approval.

C. Plaintiffs' Motion for Award of Attorneys' Fees, Interest, Reimbursement of Expenses and Incentive Awards

Class Counsel requests that the Court award attorneys' fees in the amount of $ 25 million plus interest accrued on that amount since it has been held in escrow. The $ 25 million requested fee represents 33 1/3 % of the $ 75 million Settlement Fund. Class Counsel also requests recovery of litigation expenses and incentive awards to named Plaintiffs.

1. Attorneys' Fees and Interest

This Court first finds that the percentage of fund method is the proper method for compensating Plaintiffs' Counsel in this common fund case. See, e.g., *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 333 (3d Cir. 1998)* (stating[HN8] "the percentage of recovery method is generally favored in cases involving a common fund, [*33] and is designed to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure"); *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d 722, 734 (3d Cir. 2001)* (stating "the percentage-of-recovery method has long been used in this Circuit in common-fund cases").

[HN9] The Third Circuit set forth with specificity the factors that a court should consider in evaluating such requested attorneys' fees in *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 (3d Cir. 2000)* (overturning a decision that reduced a requested fee of 25% of the recovered fund to 18%). The Gunter factors "need not be applied in a formulaic way, and their weight may vary on a case-by-case basis." *Oh v. AT & T Corp., 225 F.R.D. 142, 146 (D.N.J. 2004)* (citing *Gunter, 223 F.3d at 195*). The Gunter factors include (a) the size of the fund created and number of persons benefitting from the settlement, (b) the presence/absence of substantial objections to the fee, (c) the skill of Plaintiffs' counsel, (d) complexity and duration of the litigation, (e) the risk of nonpayment, (f) amount of time devoted to the litigation, (g) [*34] awards in similar cases. See *Gunter, 223 F.3d at 195*; *In re Aremissoft Corp. Sec. Litig., 210 F.R.D. 109, 129 (D.N.J. 2002)*.

a. The Size and Nature of the Common Fund Created, and the Number of Class Members Benefitted by the Settlement

The Class here is comprised of approximately 70 business entities, as identified from Defendants' sales records. These entities will share in a settlement worth $ 75 million in cash, less attorneys' fees, expenses and incentive award as granted by the Court. The magnitude of this recovery is significant when measured against the estimates as to the potential values of Plaintiffs' claims made by the parties' experts during the course of this litigation. See, e.g., *In re General Instrument Securities Litig., 209 F. Supp.2d 423 (E.D. Pa. 2001)* (awarding a one-third fee, and finding that a $ 48 million fund to be shared by a class of thousands is "quite large" and exceeds "twice the amount that defendants' expert claimed plaintiffs could recover under the best circumstances."); In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 (E.D. Pa. June 2, 2004) ($ 202 million settlement valued [*35] at 42 percent of dam-

ages (prior to trebling) is "highly favorable" factor in granting counsel's 30% fee request).

b. The Absence of Objections

Following preliminary approval of the Settlement and the form and manner of notice to the Class, individual notice was mailed to Class members and posted on Co-Lead Counsel's websites. The notice informed potential Class members that Class Counsel would be seeking fees of up to 33 1/3% of the Settlement Fund, reimbursement of expenses, plus interest thereon, and incentive awards for each of the named plaintiffs in the Class Action.

Class Counsel have received no objections from the Class. [1] The lack of objections from the Class supports the reasonableness of the fee request. See *Stoetzner v. United States Steel Corp., 897 F.2d 115, 11-19 (3d Cir. 1990)* (even when 29 members of a 281 person class (i.e. 10% of the class) objected, the response of the class as a whole "strongly favors [the] settlement"); *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 305* (stating that the fact that only two class members objected to the fee request supports approval of the fee); *In re Rent-Way Secs. Litig., 305 F. Supp. 2d 491, 514 (W.D. Pa. 2003)* [*36] ("the absence of substantial objections by other class members to the fee application supports the reasonableness of Lead Counsel's request"). thus indicating the strong support of the Class for the award of fees and expenses requested.

1 The support of the fee request by Class members here is even more significant. When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of objections "indicates the appropriateness of the [fee] request." *Cimarron Pipeline Constr., Inc. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19969, 1993 WL 355466, *1-2 (W.D. Ok. June 8, 1993)*; In re Sequoia Systems, Inc. Sec. Litig., 1993 WL 616694, *1 (D. Mass. Sept. 10, 1993) (finding "influential" the fact that no class member had objected to the fee request of one-third); *In re M.D.C. Holdings, 1990 U.S. Dist. LEXIS 15488, 1990 WL 454747 at *10 n. 5* (lack of objections "is significant since the class includes sophisticated financial institutions . . . who have counsel available to advise and represent them and submit objections to either the settlement or the fees and expenses"). Courts have reasoned that favorable responses by sophisticated Class members is persuasive, since those class members are capable, independent of the assistance of Class Counsel, of evaluating the reasonableness of all aspects of a class action settlement. See, e.g., *Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1374 (D. Minn. 1985)* ("The turkey growers in this class are sophisticated businesspeople, who possessed the degree of knowledge and ability sufficient to raise an objection if they believed the fee application was excessive").

[*37] c. The Skill and Efficiency of Plaintiffs' Counsel

Class Counsel include some of the preeminent antitrust firms in the country with decades of experience in prosecuting and trying complex actions. Class Counsel also include firms with extensive patent experience, who are intimately involved in numerous lawsuits involving antitrust violations based on the improper use of patents. Class Counsel have significant experience in FDA regulatory matters. The settlement entered with Defendants is a reflection of Class Counsel's skill and experience. See *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 261 (D. Del. 2002)* (class counsel "showed their effectiveness through the favorable cash settlement they were able to obtain"); see also *In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 194 (E.D. Pa. 2000)* (awarding 30% fee and stating "the most significant factor in this case is the quality of representation, as measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted [*38] the case and the performance and quality of opposing counsel") (internal quotes omitted).

d. The Complexity and Duration of the Litigation

"As to the complexity of the case, an antitrust class action is arguably the most complex action to prosecute.'" *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 at *10*, quoting *In re Motorsports Merchandise Antitrust Litig., 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)*. This antitrust action is no different. As discussed above, this matter is extremely complicated, involving the patent, regulatory and antitrust laws, including interpretation of complex provisions of the Hatch-Waxman Act.

The discovery process was lengthy and difficult. Class Counsel (a) reviewed over one million pages of documents, (b) conducted over 45 depositions of fact witnesses, and (c) spent thousands of hours researching, analyzing and consulting with experts on the complex issues of fact and law put at issue in this case.

Finally, as noted by this Court in the End-Payor Opinion, "the circumstances surrounding a difficult settlement increase the complexity of a case." See *End-Payor Opinion at *29*, citing *Larrison v. Lucent Techs.,*

Inc., 327 F. Supp. 426, 434,2004 U.S. Dist. LEXIS 27246 (D. N. J. 2004). [*39] Here, the Court is well aware of the long and difficult road that led to the proposed Settlement, as the Court itself frequently lent its good offices to settlement hearings and mediation sessions. Thus, the complexity of the issues involved in Class Counsel's prosecution of this litigation supports the requested fee.

e. The Risk of Nonpayment

[HN10] A determination of a fair fee must include consideration of the sometimes undesirable characteristics of a contingent antitrust actions, including the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high. See, e.g., *The Stop & Shop Supermarket Company v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, *11 (E.D. Pa. 2005)* (risk of overcoming Noerr-Pennington defense, among others, "favors approval of the percentage of recovery requested as a fee in this case"); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 at *12* (risk posed by Defendants' vigorous legal and factual defenses counsel in favor of 30% fee award).

This case is no exception to the rule. When Class Counsel [*40] undertook the representation of the named plaintiffs and the Class, there were no assurances that any fees would be received. The outcome of various motion practice in this case further increased Plaintiffs' risks. In its September 8, 2004 decision on Defendants' motion to dismiss, the Court dismissed (a) Plaintiffs' claims arising from the alleged Walker-Process fraud, (b) wrongful Orange Book listing and (c) sham litigation associated with the prosecution and enforcement of the *099 Patent*. Following this opinion, every plaintiff group other than the Direct Purchaser Class, including the Generics and all other direct and indirect purchasers, chose to settle their claims.

Thereafter, Plaintiffs proceeded against Defendants on two theories of liability: (1) claims arising from the late-listing of the *099 patent* in the Orange Book; and (2) Defendants' alleged overarching scheme to delay generic competition. The risk to those surviving claims was immediate: pending before the Court at the time the Settlement was proposed was Defendants' omnibus motion for summary judgment, wherein Defendants argued that the late listing and overarching scheme claims were barred entirely by the [*41] Court's prior findings and Supreme Court precedent, and refuted by documentary evidence and testimony from Defendants' own employees. The prospect of prosecuting such untested theories through to trial presented undeniable risk. Accordingly, the risk of non-payment in this case weigh heavily in favor of approving the fee requested.

f. The Time Devoted to this Case by Plaintiffs' Counsel was Significant

Class Counsel has expended over 35,000 hours and advanced over $ 1.9 million in expenses on this case. Class Counsel has analyzed over a million pages of document discovery and has taken dozens of depositions. Class Counsel also retained and worked closely with multiple experts in the complex areas of patent law, FDA regulation and the pharmaceutical industry implicated in this case. Class Counsel fought Defendants' motion to dismiss, prepared Plaintiffs' motion for class certification, and represented the Class in the multiple mediation sessions and settlement conferences necessary to reach the Settlement. See *End Payor Opinion at *29* ("Class Counsel's efforts in posturing this case for trial . . . played a role in spurring the settlement [and] produced a substantial payout [*42] to the class.'") quoting *In re Newbridge Networks Sec. Litig., 1998 U.S. Dist. LEXIS 23238, 1998 WL 765724, *3 (D. D.C. Oct 23, 1998)*.

Moreover, Class Counsel will likely incur hundreds of additional hours in connection with administering the settlement, without prospect for further fees. See *Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 252* (fee award will be sole compensation for counsel "despite the continuing responsibilities [counsel] will have in responding to Class Member inquiries, assisting the Claim Evaluator, consulting on individual cases, and any post-judgment proceedings and appeals.").

g. Awards in Similar Cases

The seventh and final *Gunter* factor -- a comparison with attorneys' fees awarded in similar cases -- also supports the fee requested by Class Counsel in the present case.

i. The requested 33 1/3% fee is within the applicable range of percentage-of-the-fund awards

"Courts within the Third Circuit often award fees of 25% to 33% of the recovery." *End-Payor Opinion at *30*, citing In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 (E.D. Pa. June 2, 2004) (approving 30% fee of a $ 202 million settlement in an antitrust class action); *Nichols v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616 (E.D. Pa. 2005)* [*43] (approving 30% fee of the $ 65 million settlement in similar pharmaceutical antitrust action). A one third fee from a common fund has been found to be typical by several courts within this Circuit which have undertaken surveys of awards within the Third Circuit and others. *End-Payor Opinion at *30*, citing *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 306-07 (3d Cir. 2005)* (review of 289 settlements demon-

strates "average attorney's fees percentage [of] 31.71%" with a median value that "turns out to be one-third"). See also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir. 1995)* (In common fund cases "fee awards have ranged from nineteen percent to forty-five percent of the settlement fund"); *Cullen v. Whitman Medical Corp., 197 F.R.D. 136, 150 (E.D. Pa. 2000)* ("the award of one-third of the fund for attorneys' fees is consistent with fee awards in a number of recent decisions within this district"); In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 at *14 (citing with approval "a recent Federal Judicial Center study that found that in federal class actions generally [*44] median attorney fee awards were in the range of 27 to 30 percent.").

Moreover, the requested fee is consistent with awards in other complex antitrust actions involving the pharmaceutical industry. In re Relafen Antitrust Litig., No. 01-12239-WGY (D. Mass. April 9, 2004)) (awarding 33 a % fee of a $ 175 million settlement); In re Buspirone Antitrust Litig., No. 01-CV-7951 (JGK) (S.D.N.Y. April 1, 2003) (awarding a 33 a % fee of a $ 220 million settlement); North Shore Hematology-Oncology Associates, P.C. v. Bristol Myers Squibb Co., No. 1:04cv248 (EGS) (D. D.C. Nov. 30, 2004) (awarding a 33 a % fee of a $ 50 million settlement); In re Terazosin Hydrochloride Antitrust Litig., No. 99-MDL-1317 (S.D. Fla. Apr. 19, 2005); (awarding a 33 a % fee of a $ 72.5 million settlement). Cf. In re Cardizem CD Antitrust Litig., No. 99-73259 (E.D. Mich. Nov. 26, 2002) (awarding 30% of a $ 110 million settlement).

ii. The requested 33 1/3% fee reflects the market rate in other litigation of this type

[HN11] The percentage-of-the-fund method of awarding attorneys' fees in class actions should approximate the fee which would be negotiated if the lawyer were offering his or her services [*45] in the private marketplace. "The object . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation." *In re Continental Illinois Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992)*; see also *Missouri v. Jenkins, 491 U.S. 274, 285-86, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989)*; *In re Synthroid Marketing Litig., 264 F.3d 712, 718 (7th Cir. 2001)* ("when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time"); see also *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 307*; *In re RJR Nabisco, Inc. Sec. Litig., 1992 U.S. Dist. LEXIS 12702, 1992 WL 210138, *7 (S.D.N.Y. Aug. 24, 1992).*

In determining the market price for such services, evidence of negotiated fee arrangements in comparable litigation should be examined. See *Continental Illinois Sec. Litig., 962 F.2d at 573* (the judge must try to simulate the market "by obtaining evidence about the terms of retention in similar suits, suits that differ only because, since they are not class actions, the market [*46] fixes the terms"); *Synthroid Marketing Litig., 264 F.3d at 719* (court should evaluate fee contracts and other data from similar cases where fees were privately negotiated). Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation. See, e.g., *In re Ikon Office Solutions, Inc., 194 F.R.D. at 194* ("In private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."); *In re Orthopedic Bone Screws Products Liability Litig., 2000 U.S. Dist. LEXIS 15980, 2000 WL 1622741, *7 (E.D. Pa. Oct. 23, 2000)* (". . . the court notes that plaintiffs' counsel in private contingency fee cases regularly negotiate agreements providing for thirty to forty percent of any recovery"); *Durant v. Traditional Invest., Ltd., 1992 U.S. Dist. LEXIS 12273, 1992 WL 203870, *4 n. 7 (S.D.N.Y. Aug. 12, 1992)* ("contingent fee agreements up to 40 percent have been held reasonable"); *Phemister v. Harcourt Brace Jovanovich, Inc.., 1984 U.S. Dist. LEXIS 23595, 1984 WL 21981, *15 (N.D. Ill. Sept. 14, 1984)* ("the percentages agreed on [in contingent [*47] fee arrangements in non-class action damage lawsuits] vary, with one-third being particularly common").

h. Lodestar Cross-Check

[HN12] In addition to the percentage-of-the-fund approach, the Third Circuit has suggested that it is "sensible" for district courts to "cross-check" the percentage fee award against the "lodestar" method. *Prudential, 148 F.3d at 333*. A lodestar cross-check is not a Gunter factor but is a "suggested practice." *In re Cendant Corp., PRIDES Litig., 243 F.3d at 735 (3d Cir. 2001)*. The Third Circuit has recognized that "'multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" *Id., at 341*, quoting 3 Herbert Newberg & Albert Conte, Newberg on Class Actions, § 14.03 at 14-5 (3d ed. 1992). "The district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Rite Aid, 396 F.3d at 306-07* (footnote omitted).

The records demonstrates that Class Counsel's lodestar in this case is $ 13,419,645.71, resulting in a multiplier of 1.8. An examination of recently approved multipliers reveals that the multiplier [*48] requested here "is on the low end of the spectrum." *End-Payor Opinion at *33*, (approving multiplier of 1.73) citing *Nichols v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 7061,*

*2005 WL 950616, *24 (E.D. Pa. Apr. 22, 2005)* (approving multiplier of 3.15); In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, *4 (E.D. Pa. June 2, 2004) (approving a 2.66 multiplier); *Weiss v. Mercedes-Benz of N. Am., Inc., 899 F. Supp. 1297, 1304 (D. N.J. 1995)*, aff'd, *66 F.3d 314 (3d Cir. 1995)* (approving a 9.3 multiplier); *In re Rite Aid Corp. Secs. Litig., 146 F. Supp. 2d 706, 736 (E.D. Pa. 2001)* (multiple of over 6). This lodestar cross-check corroborates the result of the percentage-of-the-fund method.

i. Conclusion

Taking into consideration the above factors, this Court awards Plaintiffs' Counsel $ 25 million of the Settlement Fund, plus 33 1/3 % of the accrued interest on the Settlement Fund.

2. Reimbursement of Reasonable Expenses

In addition to their request for attorneys' fees, Plaintiffs' Counsel seeks reimbursement of $ 1,925,667.53 in expenses. [HN13] "Counsel in common fund cases is entitled to reimbursement of expenses that were [*49] adequately documented and reasonably and appropriately incurred in the prosecution of the case." *In re Cendant Corp., 232 F. Supp. 2d 327, 343 (D. N.J. 2002)*, quoting *In re Safety Components Int'l, Inc., 166 F. Supp. 2d 72, 104 (D. N.J. 2001)*.

Upon review of the affidavits submitted in support of this request, the Court finds the requested amount to be fair and reasonable. Plaintiffs' Counsel's expenses reflect costs expended for purposes of prosecuting this litigation, including substantial fees for experts; substantial costs associated with creating and maintaining an electronic document database; travel and lodging expenses; copying costs; and the costs of court reporters and deposition transcripts. Reimbursement of similar expenses is routinely permitted. See *End-Payor Opinion at *32*, citing *Oh v. AT & T Corp., 225 F.R.D. 142, 154 (D. N.J. 2004)* (finding the following expenses to be reasonable: "(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) [*50] overtime and temp work, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund-pro hac vice.").

3. Incentive Awards to Named Plaintiffs

Finally, Plaintiffs' Counsel request the approval of an incentive award in the amount of $ 60,000, in total, for the two named plaintiffs, LWD and Meijer. The named plaintiffs spent a significant amount of their own time and expense litigating this action for the benefit of the Class. As recognized by numerous courts, such efforts should not go unrecognized. See *End-Payor Opinion at *32*, citing *FTC v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 205 F.R.D. 369, 400 (D. D.C. 2002)* ("Incentive awards are not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class. . . . In fact, courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation") (internal quotations and citation omitted).

The Settlement Notice advised Class members that Class Counsel would apply for such an incentive award. No Class member objected. [*51] Moreover, the amount requested here is similar to amounts awarded in comparable settlements. See *End-Payor Opinion at *33* (granting incentive awards of $ 30,000 each to two third party payor plaintiffs); In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 at *18 (approving $ 25,000 to each representative of the classes); see also, *Yap v. Sumitomo Corp. of America, 1991 U.S. Dist. LEXIS 2124, 1991 WL 29112, *9 (S.D.N.Y. Feb. 22, 1991)* ($ 30,000 incentive awards to the named plaintiffs); *Van Vraken v. Atlantic Richfield Co., 901 F. Supp. 294, 300 (N.D. Cal. 1995)* ($ 50,000 incentive award to named plaintiff); *In re Dun & Bradstreet Credit Services Customer Litig., 130 F.R.D. 366, 373-74 (S.D. Ohio 1990)* (two incentive awards of $ 55,000 and three incentive awards of $ 35,000); Revco Sec. Litigation, Arsam Co. v. Salomon Bros., Inc., 1992 U.S. Dist. LEXIS 7852, 1992 WL 118800, *7 (N.D. Ohio May 6, 1992) ($ 200,000 incentive award to named plaintiff); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250-51 (S.D. Ohio 1991)* ($ 50,000 incentive awards to each of the six named plaintiffs); *Bogosian v. Gulf Oil Corp., 621 F. Supp. 27, 32 (E.D. Pa. 1985)* [*52] (incentive awards of $ 20,000 to each of two named plaintiffs). The requested incentive awards are both appropriate and reasonable.

III. CONCLUSION

For the foregoing reasons, (a) Direct Purchasers Plaintiffs' motion for final approval of the Settlement, and (b) Class Counsel for Direct Purchasers Plaintiffs' motion for attorneys' fees of $ 25 million (plus accrued interest), litigation expenses, and incentive awards to Named Plaintiffs are granted.

November 9, 2005

Hon. Faith S. Hochberg, U.S.D.J.

TAB 16

LEXSEE 2006 US DIST LEXIS 35943

Analysis
As of: Sep 22, 2008

MARVIN SIMON, as Authorized Representative For the Marvin Simon Trust, as amended, for Palm Investors, LLC and for the Jeffrey Markman 1993 Irrevocable Trust, MARILYN SIMON, CLAUDE HARRIS, ANN HARRIS, BEN SIMON, HEIDI SIMON, BRITT SIMON, KIM FINK, ANDREW FINK, AMY GOLDBERG, STEFAN RESSING, Individually and as Trustee of the S. Ressing 1999 Trust, FITZROY VENTURES, LLC, MICHAEL LE, Individually and as Trustee of the ML Lee 1999 Trust, and MACKENZIE VENTURES LLC, Plaintiffs, v. KPMG LLP and SIDLEY AUSTIN BROWN & WOOD LLP, f/k/a BROWN & WOOD, LLP, Defendants

Civil Action No. 05-CV-3189 (DMC)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2006 U.S. Dist. LEXIS 35943*; *97 A.F.T.R.2d (RIA) 2806

June 2, 2006, Decided

NOTICE: [*1] NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Related proceeding at *Arnold v. KPMG LLP, 543 F. Supp. 2d 230, 2008 U.S. Dist. LEXIS 25855 (S.D.N.Y., 2008)*
Motion granted by, in part, Motion denied by, in part *Simon v. KPMG LLP, 2008 U.S. Dist. LEXIS 51286 (D.N.J., July 2, 2008)*

PRIOR HISTORY: *Simon v. KPMG LLP, 2006 U.S. Dist. LEXIS 10482 (D.N.J., Feb. 23, 2006)*

COUNSEL: For MARVIN SIMON, as Authorized Representative for The Marvin Simon Trust, as amended, for Palm Investors, LLC and for The Jeffrey Markman 1993 Irrevocable Trust, MARILYN SIMON, CLAUDE HARRIS, ANN HARRIS, BEN SIMON, HEIDI SIMON, BRITT SIMON, KIM FINK, ANDREW FINK, AMY GOLDBERG, STEFAN RESSING, Individually and as Trustee of The S. Ressing 1999 Trust, FITZROY VENTURES LLC, MICHAEL LE, Individually and as Trustee of the ML Le 1999 Trust, MACKENZIE VENTURES LLC, Plaintiffs: JAMES E. CECCHI, CARELLA BYRNE BAIN GILFILLAN CECCHI STEWART & OLSTEIN, PC, ROSELAND, NJ.; MELISSA E. FLAX, CARELLA, BYRNE, BAIN, GILFILLAN, ROSELAND, NJ.

For BCTS LLC, Becnel Family Trust, Thomas Becnel, CST Trust, Jardine Ventures LLC, Edward Arnold, Karen Long, Robert E. Long, Intervenors Plaintiffs: J. ERIK SANDSTEDT, BERNSTEIN, LITOWITZ, BERGER & GROSSMANN, LLP, NEW YORK, NY.; JOHN DAVID TORTORELLA, MARINO & ASSOCIATES, P.C., NEWARK, NJ.

For KPMG LLP, Defendant: ANTHONY J. MARCHETTA, PITNEY HARDIN, LLP, MORRISTOWN, NJ.

For SIDLEY AUSTIN BROWN & WOOD LLP, formerly known as BROWN & WOOD LLP, Defendant: DENNIS J. DRASCO, KEVIN J. O'CONNOR, LUM, DANZIS, DRASCO & POSITAN, LLC. [*2] , ROSELAND, NJ.

For Robert L. Hechler, Defendant: DAVID EVAN ROSS, KELLOGG HUBER HANSEN TODD EVANS & FIGEL, WASHINGTON, dc, US.

For Mark Kottler, Intervenor: J. ERIK SANDSTEDT, BERNSTEIN, LITOWITZ, BERGER & GROSSMANN, LLP, NEW YORK, NY.; DANIEL S. SOMMERS, COHEN, MILSTEIN, HAUSFELD & TOLL, PLLC,

WASHINGTON, DC.; JOHN DAVID TORTORELLA, MARINO & ASSOCIATES, P.C., NEWARK, NJ.

For William and Donna Eacho, Lawrence L Gaslow, Intervenors: MICHAEL V. GILBERTI, EPSTEIN & GILBERTI, LLC, RED BANK, NJ.

For ALM Inc., Bloomberg LLP, NORTH JERSEY MEDIA GROUP INC., Intervenors: BRUCE S. ROSEN, MCCUSKER, ANSELMI, ROSEN, CARVELLI & WALSH, PC, CHATHAM, NJ.

JUDGES: DENNIS M. CAVANAUGH, U.S.D.J.

OPINION BY: DENNIS M. CAVANAUGH

OPINION

DENNIS M. CAVANAUGH, U.S.D.J.:

This matter comes before the Court upon motion by Representative Plaintiffs Marvin Simon, et al. pursuant to *Fed. R. Civ P. 23(e)* for Final Class Certification of this Action for Settlement Purposes and Final Approval of the Settlement Agreement with Defendants KPMG LLP and Sidley Austin Brown & Wood ("Defendants"). A hearing on the application for Class Certification and Final Approval [*3] was held by this Court on May 26, 2006. For the reasons set forth below, the Court grants Representative Plaintiffs' motions and approves the Settlement Agreement.

I. BACKGROUND [1]

A. Initial and Amended Complaint

On June 24, 2005, Plaintiffs brought this class action against Defendants, seeking redress for damages caused to a class of taxpayers who purchased abusive tax shelter strategies. Plaintiffs filed an amended class action complaint on September 27, 2005. Pursuant to the Amended Complaint, Plaintiffs seek redress for a class of taxpayers who purchased tax strategies known as Foreign Leveraged Investment Program (FLIPS), Offshore Portfolio Investment Strategy ("OPIS"), Bond Linked Issue Premium Structure ("BLIPS"), or Short Option Strategy ("SOS") (collectively, the "Tax Strategies"), from January 1, 1996 through and including September 14, 2005 (the "Class Period"), and who either (a) consulted with, relied upon, or received an oral or written opinion or advice from both of the Defendants (or any current or former partner, principal, or employee of either of them) concerning a Tax Strategy and who in whole or in part Implemented, directly or indirectly, [*4] such Tax Strategy; or (b) filed a tax return (joint or otherwise) relating to participation in the same Transaction and Tax Strategy described in (a). The proposed Class also includes all Persons that were formed in connection with or were utilized by a Class member in Implementing a Tax Strategy, but excludes any Person who has released all Released Claims against Sidley Austin and KMPG or for whom all such Released Claims have otherwise been dismissed, and also excludes any Person who is or was a partner, principal or employee of either the Defendants, and any Third Party. A Third Party is any Person who actually or allegedly participated, directly or indirectly, in any aspect of the design, marketing, review or Implementation of or decision to enter into a Tax Strategy, other than the Defendants and the Defendants' Related Parties. (See Stipulation of Settlement at 2-3.)

1 Unless otherwise specified herein, capitalized terms have the meanings set forth in the Stipulation of Settlement, Amended Stipulation of Settlement, and Plaintiffs' Memorandum of Law in Support of Representative Plaintiffs' Motion for Final Class Certification of this Action for Settlement Purposes.

[*5] In the Amended Complaint, Plaintiffs allege that Defendants and certain other parties engaged in a scheme to defraud Plaintiffs and others similarly situated in connection with certain Tax Strategies by fraudulently misrepresenting that the Tax Strategies would reduce tax liability and were "more likely than not" to be approved by the Internal Revenue Service ("IRS") when in fact Defendants knew that the Tax Strategies were abusive tax shelters that would not pass IRS scrutiny. (Am Comp. P2.) Plaintiffs paid substantial fees for these tax products to Defendants and Non-Parties, but now have been subjected to audits of their state and federal tax returns, and have been, or will be assessed millions of dollars in back taxes that they were told they would be able to avoid through the Tax Strategies. (Am. Comp. P4.) Plaintiffs allege the Defendants are liable on multiple theories, including fraud, civil conspiracy, breach of fiduciary duty, breach of contract, professional malpractice, unjust enrichment, and the charging of unethical, excessive and illegal fees. (Am. Comp.).

Defendants contend, *inter alia:* (a) the claims against Defendants by a significant number of the proposed [*6] Class Members are time-barred; (b) proposed Class Members worked cooperatively and knowingly with the Defendants in Implementing the Tax Strategies; (c) the proposed Class Members are sophisticated individuals, many with their own tax advisors, who were well aware of the risks involved in participating in Tax Strategies; (d) the proposed Class Members understood that they might be audited by the IRS and that the IRS might challenge the Tax Strategies; and (e) proposed

Class Members were given written disclosures informing them that the opinions given with respect to the Tax Strategies were not guarantees and that no promise or representation was being made that the Tax Strategies would be upheld if challenged by the IRS. Defendants further contend that even if the Plaintiffs or proposed Class Members could establish liability against them, any damage recovery would be limited because: (a) Class Members would be found contributorily negligent for their knowing participation in the Tax Strategies; (b) a trier of fact would have little sympathy for successful, high-net worth individuals who sought to reduce or eliminate significant tax obligations; and (c) Class Members would not be able [*7] to recover back taxes, interest or penalties as a matter of law.

B. Settlement Negotiations

The Parties [2] first exchanged phone calls about arranging a meeting in the Summer of 2004. On August 17, 2004, the parties held their first meeting in New York. From this date through March 30, 2005, the Parties engaged in numerous in-person meetings and telephone conferences and exchanges of information, during which they identified and discussed issues in dispute and the mechanics of a possible class-wide resolution. On January 5, 2005, the parties began to discuss mediation as a possible means to resolve their differences, and subsequently hired the Hon. Nicholas H. Politan (ret.) and the Hon. Daniel Weinstein (ret.) to assist in the effort to determine whether a class action settlement could be reached. Thereafter, Plaintiffs' counsel and Defendants' counsel participated in four in-person sessions with the Mediators, on April 4, April 5, May 11 and September 14, 2005, and numerous telephonic sessions with the Mediators both before and after the in-person mediation sessions, and continued to exchange information. The Parties also met on June 22 and June 23, 2005, with the [*8] Mediators participating by telephone, and had numerous subsequent discussions. As a result of this process, the Parties reached the Initial Proposed Settlement, which was based on a proposal by the Mediators. Due to the large number and transaction costs of Class Members who initially elected to opt-out, the Parties requested further assistance from the Mediators in amending the Initial Proposed Settlement. These further discussions included in-person negotiation sessions between the Parties under the supervision of the Mediators, as well as written and oral communication between the Parties. The discussions resulted in an Amended Proposed Settlement. This Court preliminarily approved the Amended Settlement on March 22, 2006.

2 "Parties" means Plaintiffs and Defendants but does not include the intervenors, Thomas R. Becnel, individually and as trustee of the Becnel Family Trust and CST Trust, BCTS LLC and Jardine Ventures LLC, Mark Kottler, Karen Long and Robert E. Long (collectively, the "Intervenors").

[*9] **C. The Proposed Settlement**

The proposed Settlement provides for a total recovery for the Class of $ 153,920.847.60, including certain administrative and related expenses of the Settlement, plus an additional fund of $ 24,624,750.00 for any award of attorneys' fees and the reimbursement of Plaintiffs' counsels' costs and expenses, in exchange for release of the Class' claims concerning or relating to Tax Strategies. Monies are allocated to individual Class members by Special Masters already preliminarily appointed by the Court (and whose fees and expenses will be paid from the Settlement Payment Amount) based upon their Transaction Costs. Transaction Costs are defined in the Settlement to mean (i) fees paid by or on behalf of a Class Member in connection with participation in the Tax Strategy, (ii) plus losses sustained in connection with the related investments, (iii) less gains sustained in connection with the related investments, (iv) less any Tax Benefits, and (v) less the net amount received from either Defendant in any prior Settlement of a Released Claim. It does not include (i) any back taxes, penalties or interest, (ii) any fees, costs or expenses incurred in connection [*10] with any IRS or other taxing authority's audit or any litigation in connection with, arising out of, or relating to the Tax Strategy, or (iii) any exemplary damages or consequential damages, except that any of these may be considered by the Special Masters in awarding Special Relief.

Special Masters, based upon information provided by the Parties, will initially place Claimants who do not opt out into three categories:

. Category I: Those whose Transaction Costs are greater than zero and all of whose Core Claims appear to be time-barred;

. Category II: All others whose Transaction Costs are greater than zero;

. Category III: Those whose Transaction Costs are zero or less than zero.

Category I claimants who believe an error was made may petition the Special Master to be moved to Category II, and Category III Claimants who believe an error was made may petition the Special Master to be moved to Category I or Category II, as appropriate.

Category I Claimants will be paid an amount equal to 25% of their Transaction Costs. Category II Claimants will be paid an amount equal to 65% of their Transaction Costs, and will be entitled to seek Special Relief of up to a total [*11] of 130% of their Transaction Costs based upon special circumstances. Category III Claimants will receive 10% of the mathematical average of the sum of the amounts the Special Master determines should be distributed to each Claimant from Category II who participated in the same Tax Strategy as the Category III claimants. If funds remain at the end of the process, then the remaining monies will be distributed to Claimants on a pro rata basis after payment of any unpaid costs or fees incurred in administering such re-distribution. In no event are any Settlement Payment Amount funds to be returned to Defendants.

II. Final Certification of the Class for Settlement Purposes

In the Preliminary Approval Order entered on October 31, 2005 (amended by the Court's entry of the Amended Settlement Stipulation on March 22, 2006), this Court preliminarily certified this Class for settlement purposes pursuant to *Rules 23(a)* and *23(b)(1)* and *(b)(2)*. Class Counsel now ask this Court for final certification of the Class [3] for settlement purposes.

3 The "Class" includes:

> All persons who, at any time during the period from January 1, 1996, through and including September 14, 2005, either (a) consulted with, relied upon, or received an oral or written opinion or advice from both KPMG (or any current or former partner, principal or employee of KPMG who at the time was a partner, principal or employee of KPMG) and Sidley Austin Brown & Wood LLP, or its predecessor Brown & Wood, LLP (or any current or former partner or employee of either of them who at the time was a partner or employee of the firm) concerning a Tax Strategy and who in whole or in part Implemented, directly or indirectly, such Tax Strategy; or (b) filed a tax return (joint or otherwise) relating to participation in the same Transaction and the same Tax Strategy described in (a); and (c) the administrator, executors, personal representatives, heirs, successors, beneficiaries, and assigns of all Persons described in (a) and (b); and all Persons that were formed in connection with or were utilized by a Class Member in Implementing a Tax Strategy.
>
> The Class excludes, however, any Person, described in (a), (b) or (c) above who as of September 14, 2005 has released, or reached a settlement agreement in principle to release, all Released Claims against KPMG and Sidley Austin Brown & Wood LLP (including its predecessor Brown & Wood LLP) or for whom all Released Claims have otherwise been dismissed with prejudice against KPMG and Sidley Austin Brown & Wood LLP (and, to the extent applicable, its predecessor Brown & Wood LLP). The Class also excludes any Person who is or was a partner, principal or employee of either of the Defendants, and excludes any Third Party.

[*12] **A. Standard**

When deciding whether to certify a class, a court's decision must be based on a rigorous analysis of the facts of the particular case. See *Gen.Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 155, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*. However, courts should not examine the merits of the underlying claims presented by the class representatives. See *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*. A District Court judge does have the discretion to "probe behind the pleadings" before making a determination on whether a motion for class certification should be granted. *Gen. Tel. Co., 457 U.S. at 161*. A District Court may only certify a proposed class if the class meets all four requirements of *Rule 23(a) of the Federal Rules of Civil Procedure. Fotta v. Trs. of the UMW Health & Ret. Fund of 1974, 319 F.3d 612, 618 (3d Cir. 2002)*.

1. The Four Requirements of *Rule 23(a)*

Pursuant to *Rule 23*, a plaintiff must show: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) common questions of law and fact exist as to the whole class [*13] ("commonality"); (3) the claims of representative parties are typical

of the claims of the class as a whole ("typicality"); and (4) representative parties will fairly and adequately protect the interests of the class ("adequacy of representation"). *Fed. R. Civ. P. 23(a)*; *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 308-09 (3d Cir. 1998)*. Additionally, once all four elements of *Rule 23(a)* are established, a plaintiff must then demonstrate that the proposed class satisfies one of the three subsections of *Rule 23(b) of the Federal Rules of Civil Procedure.*

2. The Requirements of *Rule 23(b)*

Here, Plaintiffs seek class certification pursuant to *subsection (3) of Rule 23(b)*. *Rule 23(b)(3)* requires a moving party to first show that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other methods for the fair and efficient adjudication of the controversy" before a court may certify a class. Questions of law or fact will be considered "predominate" if the [*14] common issues constitute a "significant part" of the individual cases. *In re Chiang, 385 F.3d 256, 273 (3d Cir. 2004)*. The existence of individual questions of fact as to each class member does not mean that "common questions of law and fact do not predominate over questions affecting individual members as required by *Rule 23(b)(3)*." Id., quoting *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985)*. "Common issues predominate when the focus is on the defendant's conduct and not on the conduct of the individual class members." See *In re Mercedes-Benz Antitrust Litig., 213 F.R.D. 180, 187 (D.N.J. 2003)*.

Second, pursuant *Rule 23(b)(3)*, a court must consider: (A) the interest of class members in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

B. Plaintiff Meets the Requirements of *Rule 23(a)* [*15]

The party seeking class certification carries the burden of showing the requirements of *Rule 23* are met. See *Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. 1974)*. Here, Plaintiff carries this burden and satisfies all four prongs of *23(a)* and *subsection (3) of Rule 23(b)*. The Court will address each requirement of *23(a)* in turn.

1. Numerosity

The first requirement is numerosity. While no minimum number of plaintiffs is required, "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 propose a class consisting of approximately 250 members, located throughout the United States. This number of geographically diverse plaintiffs supports an inference that joinder would be impracticable. In addition, the Court notes that no party has objected that the numerosity requirement has not been satisfied. Therefore, Plaintiffs satisfy the numerosity requirement.

2. Commonality

In order to show commonality exists, the moving party must demonstrate questions of law and [*16] fact exist that are common to the whole class. *Fed. R. Civ. P. 23(a)*. To do so it is only necessary to show that the named plaintiffs share at least one question of law or fact with the grievances of the prospective class. *Johnston v. HBO Film Management, INC., 265 F.3d 178, 184 (3d Cir. 2001)*, citing *In re Prudential Ins. Co. of Am. Sales Practices, 148 F3d at 310*. In this case commonality is present in more than one respect. Members of the class share common legal theories such as whether Defendants and others conspired to create, approve and market the Tax Strategies to the Plaintiffs and the Class, whether Defendants were aware that the Tax Strategies lacked economic substance and that therefore any losses attributable to the Tax Strategies would be disallowed by the IRS, and whether Defendants took advantage of a relationship of trust and confidence and used their knowledge of Plaintiffs' finances to solicit Plaintiffs to purchase the Tax Strategies. Common issues of fact also exist because Plaintiffs claims arise out of the same nucleus of operative facts relating to the purchase of various tax shelters. [*17] Plaintiffs only need to show that they share either a common issue of law or fact with the class and because they have demonstrated both exist, Plaintiffs satisfy the commonality requirement.

3. Typicality

The typicality requirement of *23(a)* requires courts to determine whether "the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Baby Neal, 43 F.3d at 57*. Typicality refers to the nature of the claim or defense the class representatives have put forth and not to the specific facts from which the claim or defense arose or to the relief sought. *In re Prudential Ins. Co. Am. Sales Practices Litig., 148 F.3d at 311-12*. Factual differences existing between parties' claims will not render a claim atypical if the

claim arises from the same event, practice, or course of conduct, and it is based on the same legal theory. Id.

Here, Plaintiffs satisfy the typicality requirement because the named Plaintiffs' claims and the claims of the proposed class are all based on the same legal [*18] theories. The central inquiries of the case concern the same events and practices alleged to have been perpetrated by the Defendants, specifically that Class Members were injured as a direct result of fraudulent Tax Strategies developed by Defendants. Therefore, Plaintiffs' claims are typical of the entire class and this requirement for class certification is satisfied.

4. Adequate Representation Requirement

Pursuant to *Rule 23*, adequate representation hinges on two factors: (1) the plaintiff's attorney must be qualified; and (2) the plaintiff must not have interests antagonistic to those of the class. *Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir. 1975)*. Here, Plaintiffs have retained highly competent and qualified attorneys. Milberg Weiss Bershad & Schulman, LLP has significant experience in class action litigations. Co-Counsel to the Class includes 1) Carella, Byrne, Baine, Gilfillan, Checci, Stewart & Olstein, 2) McCutchen, Blanton Johnson & Barnette, LLP, 3) the Gilreath Law Firm, P.A., and 4) Wilks, Alper & Harwood, P.C. Each of these firms are highly competent, with experience in a wide variety of relevant areas. In particular, the McCutchen [*19] Blanton and the Gilreath Law Firm, P.A. have represented several different individuals with tax strategy-related claims against KPMG and Sidley Austin.

It is clear to the Court that the Plaintiffs' interests are aligned with those of the class. Plaintiffs, like the absent class members, were damaged as a result of Defendants' alleged actions, and Plaintiffs would have to prove the same wrongdoing as the absent Class members to establish Defendants' liability. Therefore, Plaintiffs have satisfied the final requirement of *Rule 23(a)*.

C. Plaintiff Meets Requirements of *Rule 23(b)*

Once the requirements set forth in *Rule 23(a)* are met, Plaintiffs must satisfy the requirements set forth in at least one of the subsections of *Rule 23(b)* for a court to certify the class. Here, Plaintiffs satisfy the requirements set forth in *23(b)(3)*. *Rule 23(b)(3)* states that a court will certify a class action if the court finds "that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fair and efficient adjudication." *Fed. R. Civ. P. 23(b)(3)* [*20] . *Rule 23(b)(3)* requirements are often referred to as "predominance" and "superiority." The factors a court must consider when performing this analysis are: (a) the interest of the class members in individually controlling the prosecution or defense of separate actions; (b) whether members of the class have already commenced litigation on any issue concerning the controversy; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the difficulties likely to be encountered in the management of a class action. (Id.)

This Court finds that *Rule 23(b)(3)* is satisfied. First, Plaintiffs' case is founded upon the same legal theories and factual predicate as the other members of the class. Further, a class action settlement in this matter serves as an efficient use of judicial resources. Absent certification in this action, the Court would be faced with the potential burden of litigating numerous individual lawsuits, all of which arise from the same operative facts. Also, class certification will allow certain Plaintiffs who may not otherwise be able to participate in individual actions the ability to assert claims against the [*21] Defendants. For these reasons, the Court finds that *Rule 23(b)(3)* is satisfied. Therefore, Plaintiffs' motion for final certification of the class for settlement purposes is granted.

III. Approval of the Settlement Agreement

"The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh v. Jepson, 521 F.2d 153, 156 (3d Cir.1975)*. In exercising that discretion, the Court is guided by *Federal Rule of Civil Procedure 23(e)*. That rule provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs." *Fed.R.Civ.P. 23(e)*. In determining whether to approve a class action settlement under *Rule 23(e)*, "'the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members'" *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 785 (3d Cir.1995)* (quoting *Grunin v. Int'l House of Pancakes, 513 F.2d 114, 123* [*22] *(8th Cir.)*, cert. denied, *423 U.S. 864, 96 S. Ct. 124, 46 L. Ed. 2d 93 (1975)* (citation omitted));see also *In re Linerboard Antitrust Litigation, 321 F.Supp.2d 619, 628 (E.D.Pa. 2004)*.

Before giving final approval to a proposed class action settlement, the Court must determine that the settlement is "fair, adequate, and reasonable." *Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 588 (3d Cir. 1999)*; *Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 965 (3d Cir. 1983)*. The Third Circuit has identified nine factors that a district court should consider when making this determination:

> (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;

(9) the range of reasonableness of the settlement fund to a possible [*23] recovery in light of all the attendant risks of litigation.

In re Prudential Ins. Co. of America Sales Practices Litig., 148 F.3d 283, 317 (3d Cir.1998), quoting *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir.1975)*. "These factors are a guide and the absence of one or more does not automatically render the settlement unfair." *In re American Family Enterprises, 256 B.R. 377, 418 (D.N.J. 2000)*. Rather, the court must look at all the circumstances of the case and determine whether the settlement is within the range of reasonableness under Girsh. *Fanning v. AcroMed Corp. (In re Orthopedic Bone Screw Prods. Liab. Litig.), 176 F.R.D. 158, 184 (E.D.Pa. 1997)*.

(1) The Complexity, Expense and Likely Duration of the Litigation

The first factor "is intended to capture the probable costs, of both time and money, of continued litigation." *In re Lucent Technologies, Inc., Securities Litigation, 307 F. Supp. 2d 633, 642 (D.N.J. 2004)* (quotation omitted). This litigation, were it to continue, would involve intricate legal questions including whether Defendants acted knowingly or recklessly; whether Defendants were aware that [*24] the Tax Strategies lacked economic substance and that therefore any losses attributable to the Tax Strategies would be disallowed by the IRS; whether Defendants and others conspired to create, approve and market the Tax Strategies to Plaintiffs and the Class; whether Defendants took advantage of a relationship of trust and confidence and used their knowledge of Plaintiffs' finances to solicit Plaintiffs to purchase the Tax Strategies, whether Defendants failed to disclose that the opinion letter provided in connection with the transactions were not issued independently; and whether members of the Class have sustained damages and, if so, the appropriate measure of damages. (Am. Comp. P216.) Further, because the Tax Strategies at issue are highly technical in nature, a layperson on a jury may have difficulty comprehending all of the legal theories and operative facts of this litigation. The parties to this litigation have already expended a great deal of time and energy in this case. Nonetheless, the parties anticipate that if the litigation were to proceed there would be more discovery, extensive motion practice, including the likelihood of interlocutory and other appeals, and lengthy [*25] trial preparation. The Court notes that such circumstances could extend the litigation for at the very least another few years, a factor that weighs in favor of approval.

(2) The Reaction of the Class to the Settlement

The second factor "attempts to gauge whether members of the class support the settlement." *In re Lucent at 643* (quotation omitted). On November 7, 2005, a Court-approved Notice of Initial Proposed Settlement was distributed via first class mail to each of approximately 246 potential members of the Class and to sixty-eight attorneys then-known to represent various Class Members. See Cirami Aff. dated January 9, 2006 Aff. at PP3 and 5. Notice of Settlement was also posted on Class Counsel and the Claims Administrator's respective websites. A Court-approved Summary Notice of the Initial Proposed Settlement was published in the national edition of The Wall Street Journal on November 9, 2005 and in The Newark Star Ledger on November 10, 2005. After the parties entered into the Amended Settlement, on March 30, 2006, Class Counsel (via the Claims Administrator) caused individual copies of the Notice of the Amended Settlement to be mailed, by [*26] first class mail, to all potential members of the Class and to attorneys known to represent various Class Members. See Cirami Aff. dated April 24, 2006, P6. An Amended Notice of Settlement was published in The Wall Street Journal and in The Newark Star Ledger on April 3, 2006. The Notice of Amended Settlement informed Class Members of a second opt-out and objection period, in which Class Members could elect to opt-out of the Amended Settlement or object to the Amended Settlement until April 20, 2006.

Three groups of class members raised objections to the Initial Proposed Settlement [4], including Class Members John S. Koo ("Koo"), Allan Abrams ("Abrams") and the Becnel Plaintiffs. However, no class member has objected to the Amended Settlement or the proposed

award of attorneys' fees. Only the Becnel Plaintiffs take issue with the fairness and adequacy of the settlement as a whole. Koo and Abrams challenge certain isolated provisions of the Initial Proposed Settlement, all of which have been addressed and amended by the Amended Settlement. All of the above opt-outs and objections were reviewed and considered by this Court. (See Tr. of Fairness Hearing May 26, 2006.)

4 Bayerische Hypo-un Vereinsbank, AG (HVB) also objected to the Initial Proposed Settlement. On April 20, 2006, HVB withdrew its objection on the grounds that it was mooted by the Amended Settlement.

[*27] Koo objected to three provisions in the Initial Proposed Settlement: 1) reduction of a Claimant's recovery if he or she unsuccessfully sought reconsideration of the Special Master's categorization of his or her claim, 2) confidentiality provisions relating to the Special Master's determination concerning categorization and Special Relief, and 3) that the Special Master's decisions are final and unappealable. Koo's objections are mooted by the Amended Settlement, which eliminates any penalty for moving from Category I to Category II, allows for appeal of the Special Master's determination to the Court, and permits the Special Masters to disclose aggregate information concerning their determination.

Abrams objected to the Initial Proposed Settlement's provision that penalizes Claimants who unsuccessfully petition the Special Master for Special Relief. This objection is also mooted by the Amended Settlement, which eliminated the penalty for unsuccessfully petitioning for Special Relief.

The Becnel Plaintiffs raised several objections to the Initial Proposed Settlement. First, they objected on the grounds that Milberg Weiss did not represent any client when it entered into settlement [*28] negotiations with Defendants. This objection was addressed in detail at the Preliminary Approval Hearing conducted by this Court on October 28, 2005 and October 31, 2005. At that hearing, the Court found that Mr. Kottler, the witness presented by the Becnel Plaintiffs, was in fact aware that settlement discussions were being conducted by Milberg Weiss on his behalf, and rejected the Becnel Plaintiff's theory that Milberg Weiss did not represent any clients during the negotiation process. Other objections raised by the Becnel Plaintiffs include the contention that Class Counsel failed to protect Class Members from the running of the applicable statute of limitations, that Class Members who purchased FLIPS and OPIS were inadequately represented, and that the Settlement is inadequate because it limits Class Members' recovery to their Transaction Costs. The Court is not impressed with the Becnel Plaintiff's arguments. They have failed to present any new credible evidence that would warrant reconsideration of this Court's findings at the October 31, 2005 hearing and its November 3, 2005 Supplemental Opinion, wherein it denied the Becnel Plaintiff's motion to disqualify Milberg Weiss as [*29] lead counsel. Other objections raised by the Becnel Plaintiffs are mooted by the Amended Settlement.

In light of the above, the Court finds that the reaction of the class to the settlement weighs in favor of settlement approval.

(3) The Stage of the Proceedings and the Amount of Discovery Completed

Next, "[p]arties should have an 'adequate appreciation' of the merits in settling a case." *In re Prudential, 148 F.3d at 319* (quoting *In re Gen. Motors Corp., 55 F.3d at 813*). This litigation is still in the pre-trial stage. However, settlements reached at earlier stages of proceedings are favored. *In re AremisSoft Corp. Securities Litigation, 210 F.R.D. 109, *124 (D.N.J. 2002)* (citing *In re Computron Software, Inc., 6 F.Supp.2d 313, 318*; *Weiss v. Mercedes-Benz of North Am., Inc., 899 F.Supp. 1297, 1301 (D.N.J.1995)* (settlement approved while the "case is still in the early stages of discovery"); *In re Novacare Sec. Litig., 1995 U.S. Dist. LEXIS 15049, [1995-1996 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 98,930 at 93,500, 1995 WL 605533 (E.D.Pa. Oct. 13, 1995)* ("[O]ne of the benefits of settlement [*30] at an early stage is avoidance of the expense of extended discovery that might well effect [sic] plaintiffs' proof at trial. When the parties reach an early settlement, it must be fair, adequate, and reasonable but not necessarily identical with the results that might be reached at trial.")).

Class Counsel has already engaged in extensive discovery, and has done so in a very short period of time. The Initial Complaint filed by Class Counsel was in excess of 100 pages in length, and demonstrates that Class Counsel expended considerable time and effort with the underlying factual and legal issues in this case before even filing this lawsuit. After filing the Complaint, Class Counsel engaged in significant document discovery, including the review and analysis of over 200,000 documents produced to Plaintiffs by Defendants. Settlement discussions were conducted over a period of some fourteen months with the supervision and guidance of Judges Politan and Weinstein, and are evidence of Class Counsel's appreciation of the merits and complexity of this litigation. In sum, the Court finds that it is evident from the submissions of the parties and the issues raised by the parties at the Fairness [*31] Hearing that the parties had a full appreciation of the merits during negotiations. As such, this factor weighs in favor of approval.

(4)(5) The Risks of Establishing Liability and Damages

In considering the fourth and fifth factors, a court should "survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of immediate settlement." *In re Prudential, 148 F.3d at 319*. Class Counsel submits that they were able to evaluate the relative merits of each side's case and enter into a Settlement with a full view of the case's strengths and weaknesses. (Pl. Mem in Support of Approval of Settlement at 20.) Although they believe that Plaintiffs have a strong case for liability and damages, they concede that the outcome of the litigation is not certain. Plaintiffs would have to overcome numerous legal hurdles, including:

> . Plaintiffs must prove that the Tax Strategies were indeed unlawful,
>
> . Certain Class Members' claims may be time-barred and thus subject to no recovery at all,
>
> . Class Members would be subject to the risk that they would be found [*32] contributorily negligent for their part in implementing Tax Strategies,
>
> . The prospect that a jury would not sympathize with the plight of the high net worth individuals who make up the Class, thereby leading them to limit damages or deny liability,
>
> . Defendants' argument that many Class Members suffered no cognizable damages at all,
>
> . Risk that evidence used against Class Members at trial could be later used against them in criminal proceedings relating to violations of tax laws,
>
> . Ability of a jury of laypersons to understand these complicated Tax Strategies
>
> . Likelihood that even if Plaintiffs were to succeed, Defendants would appeal.

There are substantial risks in litigating this action, and they are clearly outweighed by the benefits of an immediate settlement. In light of the above, the Court finds that the risks of establishing liability and damages weigh in favor of approval of the proposed settlement.

(6) The Risks of Maintaining the Class Action Through the Trial

The sixth factor evaluates the risks of maintaining the class throughout the trial. Here, the Court has only certified the class for settlement purposes. Under *Fed .R.Civ. P 23(a)*, the [*33] Court can decertify or modify a class at any time during litigation if it proves to be unmanageable, and proceeding to trial would entail the risk of decertification. As such, this factor weighs heavily in favor of settlement.

(7) The Ability of the Defendants to Withstand a Greater Judgment

The seventh factor "is concerned with whether the defendants could withstand a judgment for an amount significantly greater than the settlement." Girsch at 336. Class Counsel submit that there is substantial reason to believe that Defendants could not withstand a significantly higher judgment than $ 178 million (the combined total of the Settlement Payment Amount and the Revised Fee and Cost Application Amount). In particular, Class Counsel points out that KPMG has already agreed to pay $ 456 million to the government as part of its Deferred Prosecution Agreement. However, even if Defendants could withstand a greater judgment, the request for a greater judgment would make Plaintiffs' case more difficult and less likely to be settled. The Court finds that this factor weighs in favor of approval.

(8)(9) The Range of Reasonableness of the Settlement Fund in Light of the [*34] **Best Possible Recovery and in Light of Litigation Risks**

Finally, for the eighth and ninth factors, a court should consider how "the present value of the damages the plaintiffs would likely recover if successful, appropriately discounted for the risks of not prevailing,...compare[] with the amount of the proposed settlement." *In re Lucent, 307 F. Supp. 2d at 647*. Class Counsel has negotiated a significant recovery for the class: a cash settlement of over $ 153 million, plus the additional payment of over $ 24 million for Plaintiffs' attorneys' fees and reimbursement of out of pocket expenses. Importantly, Class Counsel also notes that based upon reports from lawyers who have settled numerous similar cases on an individual basis, and based upon reports from Judge Weinstein, who has mediated numerous similar cases, on a per-Claimant basis the proposed Settlement will pay Class Members more than most individuals have been receiving, net of attorneys' fees, in individual settlements. If Plaintiffs had chosen to proceed with litigation, they would have faced significant legal obstacles and judgment in their favor was in no way guaranteed. The settlement provides [*35] immediate and substantial benefits for the class members and is a much better option than proceeding with a potentially

smaller or. Thus, the reasonableness of the settlement weighs in favor of approval.

In sum, the Court finds that the balance of factors weigh in favor of approval. The Court further finds that the settlement is fair, reasonable, and adequate. Accordingly, the Court approves the settlement agreement. The fee applications will be considered and ruled upon in a separate Opinion after receipt of Class Counsel's supplemental documents.

III.CONCLUSION

For the reasons expressed above, Plaintiffs' motion for final certification of the class for settlement purposes is **granted.** Plaintiffs' motion for Final Approval of the Settlement Agreement is **granted.** The Settlement Agreement is hereby **approved.** An appropriate Order accompanies this Opinion.

S/ DENNIS M. CAVANAUGH, U.S.D.J.

Date: June 2, 2006

ORDER

DENNIS M. CAVANAUGH, U.S.D.J.:

This matter comes before the Court upon the motion of Representative Plaintiffs Marvin Simon, et al. pursuant to *Fed. R. Civ P. 23(e)* for Final Class Certification [*36] of this Action for Settlement Purposes and Final Approval of the Settlement Agreement with Defendants KPMG LLP and Sidley Austin Brown & Wood ("Defendants"); and the Court having considered the papers submitted by Plaintiffs in support thereof; and oral argument in open court; and the Court having been satisfied that the proposed Settlement is fair, reasonable and adequate; and for the reasons stated in the Court's Opinion issued on this day;

IT IS on this 2nd day of June, 2006;

ORDERED that Plaintiffs' motion for final class certification of this action for settlement purposes is **granted,** and it is further

ORDERED that Plaintiffs' motion for final approval of settlement is **granted,** and the Settlement Agreement is **approved.**

S/ DENNIS M. CAVANAUGH, U.S.D.J.

Date: June 2, 2006

TAB 17

H

United States District Court, District of Columbia.
SWEDISH HOSPITAL CORPORATION, et al.
v.
SULLIVAN.
No. 89-1693.

Dec. 20, 1991.

Memorandum on Attorneys' Fees

I.

OBERDORFER, District Judge:
***1** This matter is before the Court on plaintiffs' petition for approval of its proposal to charge $5,774,229 for services rendered, and costs and expenses incurred, by its counsel, in representing plaintiffs and a class of similarly situated hospitals. The relevant litigation was resolved, after discovery, by a settlement pursuant to which defendant paid $27,881,482 into a fund for distribution among the members of the class. *See* Order of September 16, 1991. Thus, the proposed fee is 20 percent of the gross recovery.

Plaintiffs initiated this action through a Complaint filed June 12, 1989, in the wake of the Court of Appeals' decision in *Beverly Hospital v. Bowen,* 872 F.2d 483 (D.C.Cir.1989). The *Beverly* decision established that hospitals were entitled to reimbursement from the government for the costs incurred by them from April 1, 1987 to provide photocopies of medical records to peer review organizations. The *Beverly* decision had remanded the case to this Court with instructions to

assure that the agency affords the hospitals a fair opportunity to recover photocopying costs they were made to pay due to the Secretary's unlawful regulation....

Id. 872 F.2d at 487. There being no objection by the government, the plaintiffs' Motion for Class Certification was granted. Thereafter, apart from discovery, which was remarkably open and free from controversy, the matter was resolved through negotiations rather than by litigation. The negotiations in this case centered on the per page cost basis for reimbursement and the method to be used to estimate the number of pages which had been reproduced. As to the former, the government, in effect, framed the issues to be negotiated by publishing a Notice of Proposed Rulemaking for which it solicited comment not only from plaintiff, but the interested public as well. *See*53 Fed.Reg. 8654 (March 16, 1988). This original proposal suggested a rate of $.0498 per page. The settlement was apparently based on a net reimbursement of $.07 per page-a dramatic increase. The method of estimating the number of pages affected appears to have been the product of face to face negotiations in which the government suggested that the parties arrive at page numbers by extrapolation; this was the concept finally agreed to as the basis for other key factors in the settlement.

There was no fee agreement between plaintiffs and their counsel. However, plaintiffs have furnished notice of the fee request to all of the beneficiaries of the fund and none has objected to payment of the full 20 percent fee. The government, as defendant, has, however, vigorously objected.

In an earlier phase of the fee matter, plaintiffs demonstrated, and the defendant agreed, that through application of the so-called “lodestar” method of calculating fees, accepting counsel's account of its hourly rates, time and expenses, plaintiffs were entitled to a fee of $619,267. An Order of November 6, 1991 approved and awarded this amount to plaintiffs' counsel as an interim fee, to be paid by the fund. The question remains, however, whether and to what extent plaintiffs are entitled to additional compensation (1) by adjustments to the lodestar for risk, exceptional expertise or results achieved, (2) adjustments using the common fund approach by which attorneys for a class may be awarded a percentage of the fund measured by the mores of the profession in class actions, or (3) whether the fee awarded should be a function of both concepts. *See generally* *Friends For All Children, Inc. v. Lockeed Aircraft Corp.,* 567 F.Supp. 790 (D.D.C.1983).

II.

A.

***2** Plaintiffs first challenge defendant's standing to oppose, or even comment on a fee award from a fund for which he has already surrendered control. However, the contrary is well established by authority and based on sound reason. *See* Freeman v. Ryan, 408 F.2d 1204, 1206 (D.C.Cir.1968); *see also* Allen v. United States, 606 F.2d 432 (4th Cir.1989). This is not a private, commercial dispute. The fund was, and, in an important sense, still is, public money. Even if the government, although plainly a party to the case, had no legal standing with respect to the fee issue, the Court's responsibility is obvious. Moreover, it might be remiss if a fee were awarded in these circumstances without eliciting from the government its version of the facts and its view of the applicable legal principles.

B.

Plaintiffs have not established entitlement to a fee of 20 percent of the approximately $27,000,000 in the fund. As defendant points out, such a figure would be nine times the lodestar. Counsel were never exposed to any risk of zero recovery. *But see King v. Palmer,* No. 89-7028 slip op. (D.C.Cir. Dec. 13, 1991) (*en banc*) (*Silberman,* Buckley, Williams, D.H. Ginsburg, Sentelle, Henderson, and Randolph, JJ.; dissenting: *Edwards,* Mikva, Chief Judge, Wald and Ruth B. Ginsburg, JJ). The Court of Appeals had already ruled, before the complaint in the instant case was ever filed, that the government was obligated to pay to plaintiffs the photocopying costs that they had incurred; the remaining issue was the amount due. *See* Beverly, 872 F.2d at 487. Nor is this a collection action in which the ability to pay is at risk; the defendant here is ultimately, the United States. Moreover, the clients were not paupers, unable to pay counsel for their time in the remote event of no recovery beyond the $.0498 per page at which the government independently arrived. Also the government acquiesced early in the treatment of the dispute as a class action, thereby enhancing the clients' ability to pay beyond what counsel might ordinarily charge. In any event, at most, counsel can claim credit only for enhancing the fund from that which would be produced by a payment at the rate of roughly $.07 per page instead of the approximately $.0498 per page, an amount which was apparently on the table when negotiations opened. Thus, the fund for which plaintiffs' counsel is responsible is more like $10,000,000 than the approximately $28,000,000 from which counsel seeks 20 percent. Twenty percent of $10,000,000 would produce a fee of $2,000,000.

If, as plaintiffs contend, appellate authority requires payment of 20 percent on the common fund theory, the suggested fee of over $5,000,000 might be in order. However, the cases on which plaintiffs ultimately rely involve very different circumstances. Bebchik v. Washington Metropolitan Area Transit Com., 805 F.2d 396 (D.C.Cir.1986) (award given under "common fund doctrine" after plaintiff met heavy burden of exceptionality); Puerto Rico v. Heckler, 745 F.2d 709 (D.C.Cir.1984) (permitting modest recovery under "common fund doctrine" in an especially "hard-fought contest"). Specifically, in *Bebchik,* the percentage of the fund award occurred where counsel had no assurance that they would prevail, no prospect of a fee if they lost, and endured years of contentious litigation before they achieved their result. Nor was their percentage fee grossly disproportionate to that which would have been awarded on a lodestar basis. Moreover, unlike counsel here, who were only one of many involved in implementing the *Beverly* mandate by way of comment on a proposed regulation, counsel in *Bebchik* apparently fought their battle single-handed. *See* Bebchik, 805 F.2d at 403-10. Thus, in the instant case, neither the risk of a total loss nor the risk of nonpayment are relevant risk factors. Accordingly, the recent decision by our Court of Appeals in *King v. Palmer, supra,* is not germane.[FN1] There, a majority of a divided *en banc* court announced a rule, tailor-made for this Circuit only, that:

***3** a reasonable lodestar fee awarded under federal fee-shifting statutes may not be enhanced to compensate a prevailing party for his initial risk of loss.

King v. Palmer, slip op. at 8. The *King* opinion is specific for fee-shifting statutes and has no binding application to an equitable decision with respect to fees appropriate for charging to a fund created to benefit a class of plaintiffs.

Plaintiffs emphasize that all class members acquiescence in the fee requested by counsel, as well as the 25 percent or $4,000 ceiling per claim set forth

in the Social Security Act (42 U.S.C. § 406(a)) as the upper limit on fees for successful Medicaid claims. With respect to this limit, it should be noted that Congress may well have been focussing on contingent fees on claims by indigent individuals, as distinguished from the solvent going-concerns which constitute the plaintiffs' class. Moreover, defendant's do not effectively challenge plaintiffs' contention that its counsel possessed and exhibited specialized skill in the intricacies of medical accounting and administrative regulations and procedure. Plaintiffs also emphasize that the government vigorously contested the seminal *Beverly* claim and could have been resisting this fee claim so intensely in order to discourage these and other counsel from similar endeavors in the future. Finally, they point to the ultimate purpose of the decisions governing fee awards in class actions which produce a common fund: to avoid unjustly enriching persons who enjoy recoveries based on the efforts of others. *See Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980). Further, the Supreme Court has admonished litigants and courts not to complicate fee reviews into a second full-scale litigation. *See Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983).

The ultimate objective in a situation like this is to determine a "reasonable" fee. *See Copeland v. Marshall,* 641 F.2d 880 (D.C.Cir.1980) (en banc) (determining appropriate modifications for fees in civil cases). It is appropriate, therefore, to apply some of the factors relied upon by courts to determine whether a lodestar figure should be enhanced. While the assumption of risk of nonpayment is no longer relevant here, *see King v. Palmer supra,* such a claim would be unfounded as plaintiffs have not shown that their counsel assumed the risk normally associated with class representation on a contingent fee basis. Their role here, where liability and a minimum recovery were "given," has some of the characteristics of a so-called "piggy back" civil antitrust claim in which a judgment against, or criminal conviction of, a defendant is admissible as *prima facie* evidence of defendant's liability. A reasonable contingent fee in such a case should be considerably less than that allowable to counsel who prosecuted such a claim unaided by a prior judgment. *See generally Pennsylvania v. Delaware Valley Citizen's Council for Clean Air,* 483 U.S. 711, 730-31 (1987). Nor have they displayed, or had occasion to display, extraordinary litigating skill or exceptional success and effort. *See Blum,* 465 U.S. at 899; *see also Hensley v. Eckerhart,* 461 U.S. at 435.

***4** On the other hand, their effort has contributed, along with those commenting on the proposed regulations, to a dramatically enhanced recovery for the class members. It is also quite apparent that plaintiffs' counsel brought to the successful negotiations special experience and skill in the legal, administrative and unique accounting aspects of [Medicare] reimbursement. While these considerations do not justify the fee, sought by counsel, of over $5,000,000, they do justify a total fee of $2,000,000, representing 20 percent of the approximately $10,000,000 addition to the fund for which plaintiffs' counsel are entitled to credit, taking into consideration, among other things, plaintiffs' special experience and skill, and the value of the results that they achieved. Accordingly, an accompanying Order will approve a fee for services of $1,380,732 plus the expenses and costs of administration claimed to be incurred in connection with the representation of plaintiffs and the class, including those incurred in connection with the fee petition. This sum, when added to the lodestar amount of $619,267 that plaintiffs' counsel received as an interim fee, results in a total award of $2,000,000. *Cf. Camden I Condominium Assoc., Inc. v. Dunkle,* 946 F.2d 768, 774-75 (11th Cir.1991).

> FN1. In any event, the decision by a dividend *en banc* court is in apparent conflict with those of all 12 other federal circuits, as recognized by the dissent and, inferentially, by the majority, both of whom make a unique plea to the Supreme Court to resolve the self-inflicted conflict. *King v. Palmer,* slip op. at 16 (dissent).

D.D.C.,1991.
Swedish Hosp. Corp. v. Sullivan
Not Reported in F.Supp., 1991 WL 319154 (D.D.C.), Med & Med GD (CCH) P 39,730

END OF DOCUMENT

TAB 18

LEXSEE 2005 U.S. DIST. LEXIS 27011

Positive
As of: Sep 22, 2008

IN RE: REMERON END-PAYOR ANTITRUST LITIGATION; STATES AND COMMONWEALTHS OF TEXAS, et al., Plaintiffs, v. ORGANON USA INC. AND AKZO NOBEL N.V., Defendants.

Civil No. 02-2007 (FSH), Civil No. 04-5126 (FSH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2005 U.S. Dist. LEXIS 27011*; *2005-2 Trade Cas. (CCH) P74,966

September 13, 2005, Decided
September 13, 2005, Filed

PRIOR HISTORY: *In re Remeron Direct Purchaser Antitrust Litig., 367 F. Supp. 2d 675, 2005 U.S. Dist. LEXIS 7193 (D.N.J., 2005)*
Walgreen Co. v. Organon, Inc. (In re Remeron Antitrust Litig.), 335 F. Supp. 2d 522, 2004 U.S. Dist. LEXIS 18364 (D.N.J., 2004)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, the end-payor purchasers of an antidepressant drug, filed class action complaints against defendants, pharmaceutical companies, for violations of the Sherman Act, *15 U.S.C.S. § 2*, and violations of state antitrust and/or unfair competition statutes. Plaintiff States also sued the companies. The purchasers and the States moved for final approval of a settlement. Class counsel moved for attorneys' fees, expenses, and incentive awards.

OVERVIEW: The class members' and the States' claims were based on the companies' alleged actions of improper listing and late listing of a patent in the U.S. Food and Drug Administration's Orange Book, fraud on the U.S. Patent & Trademark Office, and the filing of allegedly baseless patent infringement lawsuits against generic manufacturers. By various rulings, the court determined that the late listing claim was the only remaining claim in the case. The court certified the proposed class for purposes of the settlement as the purchasers and the States satisfied all of the requirements under *Fed. R. Civ. P. 23(a)* and the requirements of *Fed. R. Civ. P. 23(b)(3)*. Additionally, the court found that the settlement notice that was given was sufficient under *Fed. R. Civ. P. 23(c)(2)*. Further, the court found that the common-fund settlement was fair, adequate, and reasonable under *Fed. R. Civ. P. 23(e)*. Furthermore, the court gave final approval to the plan as the plan of distribution was fair, all the plaintiff parties supported the plan, and the few objections that were made were overruled. Finally, the court found that the attorney's fee award, the costs, and the incentive award were reasonable.

OUTCOME: The motion for final approval of the proposed settlement was granted. The motion for an award of attorneys' fees, litigation expenses, and an incentive award to the class representatives was granted.

LexisNexis(R) Headnotes

Civil Procedure > Class Actions > Prerequisites > General Overview
Civil Procedure > Settlements > Settlement Agreements
[HN1] Under *Fed. R. Civ. P. 23*, a court must engage in a two-step analysis in order to determine whether it should certify a class action for settlement purposes. First, the court must determine whether the plaintiffs have satisfied the prerequisites for maintaining a class action as set forth in *Fed. R. Civ. P. 23(a)*. If the plaintiffs can satisfy these prerequisites, the court must then determine whether the alternative requirements of *Fed. R. Civ. P.*

23(b)(2) or *23(b)(3)* are met. *Fed. R. Civ. P. 23(a)*, advisory committee's note.

Civil Procedure > Class Actions > Prerequisites > General Overview
Civil Procedure > Settlements > Settlement Agreements
[HN2] Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *Fed. R. Civ. P. 23(b)(3)(D)*, for the proposal is that there be no trial.

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN3] *Fed. R. Civ. P. 23(a)* provides that class members may maintain a class action as representatives of a class if they show a court that: (1) the class members are so numerous that joinder of all members is impracticable; (2) the action addresses questions of law or fact common to the class; (3) the claims or defenses of the class representatives are typical of the claims or defenses of the class; and (4) the class representative parties will fairly and adequately protect the interests of the class.

Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Class Actions > Prerequisites > General Overview
[HN4] Courts will ordinarily discharge the prerequisite of numerosity in a class action if a class is so large that joinder of all members is impracticable. The plaintiff need not precisely enumerate the potential size of the proposed class, nor is the plaintiff required to demonstrate that joinder would be impossible. Moreover, it is proper for the court to accept common sense assumptions in order to support a finding of numerosity.

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN5] Numbers in excess of 40, particularly those exceeding 100 or 1,000 have sustained the numerosity requirement for a class action.

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN6] The threshold commonality inquiry under *Fed. R. Civ. P. 23(a)(2)* is whether there are any questions of fact or law that are common to the class. Commonality does not require an identity of claims or facts among class members. Rather, the commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class. Even where individual facts and circumstances do become important to the resolution, class treatment is not precluded. The threshold of commonality is not high.

Antitrust & Trade Law > Private Actions
Civil Procedure > Class Actions
Civil Procedure > Class Actions > Prerequisites > General Overview
[HN7] Antitrust actions often present common questions of law and fact, and are, therefore, frequently certified as class actions.

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN8] The United States Court of Appeals for the Third Circuit has set a low threshold for satisfying the typicality requirement holding that if the claims of the named plaintiffs and class members involve the same conduct by the defendant, typicality is established.

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN9] The typicality requirement for a class action does not mandate that all putative class members share identical claims. Plainly, there is nothing in *Fed. R. Civ. P. 23(a)(3)* which requires named plaintiffs to be clones of each other or clones of other class members.

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN10] A requirement of *Fed. R. Civ. P. 23(a)* is that the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)(4)*. The United States Court of Appeals for the Third Circuit has held that adequate representation depends on two factors: (i) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (ii) the plaintiff must not have interests antagonistic to those of the class.

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN11] Once the requirements of *Fed. R. Civ. P. 23(a)* are met, *Fed. R. Civ. P. 23(b)(3)* permits the maintenance of a class action if a court finds (1) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (2) that a class action is superior to other

available methods for the fair and efficient adjudication of the controversy.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN12] The *Fed. R. Civ. P. 23(b)(3)* predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.

Antitrust & Trade Law > Private Actions
Civil Procedure > Class Actions > Prerequisites > General Overview

[HN13] Antitrust actions involving common questions of liability for monopolization have frequently been held to predominate for the preliminary stage of class certification. The presence of individual questions does not mean that the common questions of law and fact do not predominate.

Civil Procedure > Class Actions
Civil Procedure > Class Actions > Prerequisites > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN14] To satisfy due process, notice to class members must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections.

Civil Procedure > Class Actions
Civil Procedure > Class Actions > Prerequisites > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN15] In *Fed. R. Civ. P. 23(b)(3)* actions, class members must receive the best notice practicable under the circumstances.

Civil Procedure > Class Actions
Civil Procedure > Class Actions > Prerequisites > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN16] In a class action, for those whose names and addresses cannot be determined by reasonable efforts, notice by publication suffices under both *Fed. R. Civ. P. 23(c)(2)* and under the Due Process Clause.

Healthcare Law > Business Administration & Organization > Patient Confidentiality > Health Insurance Portability & Accountability Act

[HN17] The privacy of consumers who purchase prescription medication is protected under the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), *42 U.S.C.S. § 1320d-2*. HIPAA protects protected health information from disclosure. "Protected health information" means individually identifiable health information that is maintained and/or transmitted in any form or medium. *45 C.F.R. § 160.103 (2004)*. Pharmacists are health care providers covered by the Act. Patient authorization is required for disclosure of protected health information. Improper disclosure may subject the provider to civil and/or criminal penalties. *42 U.S.C. §§ 1320d-5* and *1320d-6*.

Civil Procedure > Settlements > Settlement Agreements
Governments > State & Territorial Governments
Governments > State & Territorial Governments > Employees & Officials
Governments > State & Territorial Governments > Police Power

[HN18] States, by their Attorneys General, have the authority to settle and release indirect purchaser claims in a parens patriae or other representative capacity. A state has a quasi-sovereign interest in the health and well being -- both physical and economic -- of its residents in general. That federal authority is supplemented by state statutory provisions and case law.

Civil Procedure > Class Actions

[HN19] All Attorneys' General have authority to represent consumers, depending on the state, in at least one of the following four ways: (1) parens patriae authority expressly conferred by the state legislature, (2) authority expressly conferred by the state legislature that is the functional equivalent of parens patriae authority, (3) judicially recognized authority to represent consumers, or (4) authority to proceed as a class representative of consumers pursuant to *Fed. R. Civ. P. 23*.

Civil Procedure > Settlements > Settlement Agreements
Civil Procedure > Settlements > Settlement Agreements > Validity

[HN20] The United States Court of Appeals for the Third Circuit affords an initial presumption of fairness for a settlement if a 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.

Antitrust & Trade Law > Consumer Protection
Antitrust & Trade Law > Private Actions > Purchasers
Civil Procedure > Settlements > Settlement Agreements
Governments > State & Territorial Governments > Employees & Officials
[HN21] The participation of State Attorneys General in a settlement furnishes extra assurance that consumers' interests are protected.

Civil Procedure > Settlements > Settlement Agreements > Validity
[HN22] A class action may be settled under *Fed. R. Civ. P. 23(e)* upon a judicial finding that the settlement is fair, reasonable, and adequate. *Fed. R. Civ. P. 23(e)(1)(C)*. Under *Fed. R. Civ. P. 23(e)*, a court must determine whether the settlement is within a range that responsible and experienced attorneys could accept considering all relevant risks and factors of litigation. The range recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.

Civil Procedure > Settlements > Settlement Agreements
[HN23] Because a settlement represents an exercise of judgment by the negotiating parties, cases have consistently held that the function of a court reviewing a settlement is neither to rewrite the settlement agreement reached by the parties nor to try the case by resolving issues left unresolved by the settlement. The temptation to convert a settlement hearing into a full trial on the merits must be resisted.

Civil Procedure > Settlements > Settlement Agreements > Validity
[HN24] To determine whether a settlement is fair, reasonable and adequate under *Fed. R. Civ. P. 23(e)*, courts in the Third Circuit apply a nine-factor test. These factors are: (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.

Civil Procedure > Class Actions
Civil Procedure > Settlements > Settlement Agreements
[HN25] When providing notice of a proposed settlement to class action members, the law does not require that a charity that may receive left over funds be disclosed in the notice to the class.

Civil Procedure > Class Actions
Civil Procedure > Settlements > Settlement Agreements
[HN26] Information regarding conditions that may terminate a class action settlement need not be detailed in the notice to the class.

Civil Procedure > Class Actions
Civil Procedure > Settlements > Settlement Agreements > Modifications
[HN27] Minor modifications may be necessary to a proposed class action settlement agreement (indeed may be favorable to the class), and additional class notice is not always required because, e.g., of the cost of notice that would take recovered money from the class.

Civil Procedure > Class Actions
Civil Procedure > Settlements > Settlement Agreements > Validity
[HN28] The United States Court of Appeals for the Third Circuit has approved proposed class action settlement allocations based on expenditures rather than damages.

Civil Procedure > Class Actions
Civil Procedure > Settlements > Settlement Agreements
Civil Procedure > Settlements > Settlement Agreements > Validity
[HN29] In examining the stage of the litigation at which a proposed class action settlement is reached, the proper question for approval of a settlement is whether counsel had an adequate appreciation of the merits of the case before negotiating.

Civil Procedure > Class Actions
Civil Procedure > Settlements > Settlement Agreements
Civil Procedure > Settlements > Settlement Agreements > Validity
[HN30] The pursuit of early settlement is a tactic that merits encouragement; it is entirely appropriate to reward expeditious and efficient resolution of disputes. Early settlements benefit everyone involved in the process and everything that can be done to encourage such settlements, especially in complex class action cases, should be done.

Civil Procedure > Class Actions
Civil Procedure > Settlements > Settlement Agreements
Civil Procedure > Settlements > Settlement Agreements > Validity
[HN31] The risks of establishing liability and damages factors in a proposed class action settlement survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement.

Civil Procedure > Class Actions
Civil Procedure > Class Actions > Prerequisites > General Overview
Civil Procedure > Settlements > Settlement Agreements
Civil Procedure > Settlements > Settlement Agreements > Validity
[HN32] Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from a class action, this factor in a proposed class action settlement measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial.

Civil Procedure > Settlements > Settlement Agreements
Civil Procedure > Settlements > Settlement Agreements > Validity
[HN33] Many settlements are approved where a settling defendant has the ability to pay greater amounts.

Civil Procedure > Class Actions
Civil Procedure > Settlements > Settlement Agreements
Civil Procedure > Settlements > Settlement Agreements > Validity
[HN34] A court evaluating a proposed class action settlement should consider whether the settlement represents a good value for a weak case or a poor value for a strong case. In the process, however, a court must avoid deciding or trying to decide the likely outcome of a trial on the merits.

Antitrust & Trade Law > Private Actions
Civil Procedure > Class Actions
Civil Procedure > Settlements > Settlement Agreements
Civil Procedure > Settlements > Settlement Agreements > Validity
[HN35] To evaluate the propriety of an antitrust class action settlement's monetary component, a court should compare the settlement recovery to the estimated single damages. Although in certain circumstances a plaintiff class may recover treble damages if it prevails at trial, that result is far from certain.

Civil Procedure > Class Actions
Civil Procedure > Class Actions > Judicial Discretion
Civil Procedure > Settlements > Settlement Agreements
Civil Procedure > Settlements > Settlement Agreements > Validity
[HN36] As with settlement agreements, courts consider whether distribution plans are fair, reasonable, and adequate. In evaluating the formula for apportioning a settlement fund, a court keeps in mind that district courts enjoy broad supervisory powers over the administration of class action settlements to allocate the proceeds among the claiming class members equitably.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN37] The United States Court of Appeals for the Third Circuit has set forth with specificity the factors, known as the Gunter factors, that a court should consider in evaluating requested attorneys' fees in a common fund case. The Gunter factors need not be applied in a formulaic way, and their weight may vary on a case-by-case basis. The Gunter factors include (1) the size of the fund created and number of persons benefitting from the settlement, (2) the presence/absence of substantial objections to the fee, (3) the skill of Plaintiffs' counsel, (4) complexity and duration of the litigation, (5) the risk of nonpayment, (6) amount of time devoted to the litigation, and (7) awards in similar cases.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > General Overview
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN38] The courts do not hesitate to grant attorneys' fees despite the presence of objections when the rationale for awarding fees outweighs the objections.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN39] The absence of meaningful class member objection to a proposed counsel fee in a proposed class action settlement ordinarily supports the reasonableness of the request.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees

[HN40] The circumstances surrounding a difficult settlement increase the complexity of a case for a counsel fee.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN41] In comparing a requested attorney's fee award in a class action with amounts awarded in similar actions, a court's analysis is two-pronged. First, the court compares the actual award requested to other awards in comparable settlements. Second, the court ensures that the award is in line with what an attorney would have received if the fee was negotiated on the open market.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN42] A district court may not rely on a formulaic application of the appropriate range in awarding attorney's fees but must consider the relevant circumstances of the particular case. A comparison of awards in similar cases is only a factor in determining the appropriateness of a fee award. In considering this factor, a court notes the survey of fee awards that have occurred in similar cases.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN43] Courts within the Third Circuit often award attorney's fees of 25 percent to 33 percent of the recovery.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN44] When deciding on appropriate attorney's fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time. The object is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation. Consequently, courts should look to the private market when assessing the reasonableness of the percentage fee.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN45] A one-third contingency fee for attorneys is generally standard in individual cases.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Reasonable Fees
[HN46] A lodestar crosscheck for attorney's fees is not a Gunter factor but is a suggested practice. When performing the lodestar crosscheck, the United States Court of Appeals for the Third Circuit has recognized that multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview
[HN47] Counsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case.

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JUDGES: Honorable Faith S. Hochberg, United States District Judge.

OPINION BY: Faith S. Hochberg

OPINION

OPINION

This matter is before the Court upon a settlement agreement between the manufacturers of the antidepressant drug Remeron, Organon USA Inc. and Akzo Nobel N.V. (Defendants or Organon), and the end-payor

purchasers of Remeron along with all Attorney Generals of the United States of America and territories. The settling parties seek (1) final approval of their class action settlement agreement and plan of distribution, (2) final certification of an end-payor settlement class pursuant to *Fed. R. Civ. P. 23*, and (3) award of attorneys' fees to Plaintiffs' Counsel, reimbursement of litigation expenses, and incentive awards to named Plaintiffs. The Court preliminarily approved the settlement on January 25, 2005 after a preliminary fairness hearing on December 1, 2004. The final Fairness Hearing was conducted on June 28, 2005.

I. BACKGROUND

[*2] **A. The Litigation**

1. The Complaint

In 2002, end-payor purchasers of Remeron filed class action complaints against Defendants. Complaints were filed by United Food and Commercial Workers Local 56 Health & Welfare Fund, Board of Trustees of United Food and Commercial Workers Local 56 Health & Welfare Fund, Vista Healthplan, Inc., Gayle Taylor, Dianne Mason and Robert Kapella (End-Payor Plaintiffs or Plaintiffs). These complaints were followed by a Consolidated Class Action Complaint on September 11, 2002, and thereafter by an Amended Consolidated Class Action Complaint (Complaint) in *In re Remeron End-Payor Antitrust Litigation*, Master Docket No. 02-CV-2007 (D.N.J.), filed January 5, 2004.

The Complaint alleges violations of the Sherman Act, *15 U.S.C. § 2*, and violations of state antitrust and/or unfair competition statutes. It alleges that Defendants (a) obtained *United States Patent No. 5,977,099* (*'099 patent*) through fraud on the United States Patent and Trademark Office (PTO), (b) improperly listed the *099 patent* in the United States Food and Drug Administration's (FDA's) "Approved Therapeutic Equivalence Evaluations" (Orange Book) to preserve [*3] their monopoly, (c) improperly delayed the listing of that patent in the Orange Book to prolong their monopoly, and (d) thereafter improperly commenced lawsuits asserting sham claims of patent infringement under the Hatch-Waxman Act, *21 U.S.C. § 355*, and the United States patent laws against generic drug companies (Generic Manufacturers), which sought permission to market generic versions of Organon's antidepressant drug, Remeron.

The Complaint alleges that Defendants took these several actions in order to forestall the market entry of FDA-approved generic versions of Remeron (i.e. generic mirtazapine). As a result, end-payor purchasers -- composed of Third-Party Payors (such as health benefit funds, HMOs, health insurers and hospitals), governmental entities, and individual consumers -- were allegedly required to purchase brand-name Remeron at monopoly prices instead of being able to purchase generic mirtazapine at a fraction of the price. Absent Defendants' illegal activities, it is alleged that patients would have been able to purchase lower-priced generic mirtazapine earlier, resulting in a savings of millions of dollars.

2. Extensive Discovery and Litigation [*4] Prior to Settlement

This litigation was complex and hotly contested from the outset, beginning with Defendants' initial unsuccessful efforts to obtain a stay from the Magistrate Judge. On December 18, 2002, this Court granted summary judgment in favor of certain Generic Manufacturers with respect to Organon's patent claims against them. Following that decision, class action complaints and individual complaints were filed by various direct purchasers of Remeron (Direct Purchasers), who are not a part of this litigation or settlement.

The Court then entered a case management Order on June 18, 2003, coordinating discovery in the End-Payor class actions, the Direct Purchaser cases, and the antitrust counterclaims filed by the Generic Manufacturers. Additional coordination and case management Orders were issued on July 16, 2003; August 11, 2003; and December 11, 2003, and several Orders regarding discovery were issued September 26, 2003; December 23, 2003; January 15, 2004; January 16, 2004; February 3, 2004; February 10, 2004; and February 13, 2004.

On December 3, 2003, the Court granted Defendants' motion to dismiss several antitrust counterclaims by Generic Manufacturers including [*5] the (a) allegation that the *099 patent* had been improperly listed by Defendants in the FDA's Orange Book for anticompetitive reasons, and (b) allegation that the Defendants' patent litigation against the Generic Manufacturers was baseless and brought for anticompetitive purposes to prolong Defendants' monopoly.

Overall, discovery was extensive. Approximately 800,000 pages of documents and data were produced by Defendants and third parties. Documents produced included hundreds of thousands of pages relating to Defendants' various anti-generic strategies for Remeron; Defendants' internal patent planning and life cycle management strategy; Defendants' regulatory and Orange Book listing strategies; Defendants' clinical development files, which contained additional documentation regarding other regulatory exclusivity strategies for Remeron; Defendants' patent files, including file wrapper and patent prosecution history documentation; and numerous scientific and medical articles and other publications which impacted upon the issues of non-infringement and

invalidity of the *099 patent*. End-Payor Plaintiffs' briefs revealed extensive research into the various legal and regulatory issues [*6] in this case, including an analysis of various FDA regulations and the case law interpreting those regulations.

End-Payor Plaintiffs' counsel pressed Defendants on the adequacy of their document production at a hearing on December 19, 2003, through a Notice of Deposition of Corporate Defendants Pursuant to *Fed. R. Civ. P. 30(b)(6)*, and through a letter brief on February 2, 2004. They took depositions of numerous current or former employees of the Defendants. These included many high-level executives and employees, who were deposed on complicated and highly technical issues relating to Defendants' various legal, regulatory, marketing and other anti-generic strategies for Remeron. Plaintiffs also consulted heavily with counsel for the Direct Purchasers, counsel for the Generic Manufacturers, and the State Attorneys General. In all, over 50 depositions were taken.

The End-Payor Plaintiffs also provided extensive discovery, including *Rule 26* Initial Disclosures on October 15, 2002, answers to interrogatories on September 8, 2003, supplemental voluminous document production, and deposition testimony by the two institutional End-Payor Plaintiff Class [*7] Representatives (Vista Healthplan, Inc. and United Food & Commercial Workers Local 56 Health & Welfare Fund). End-Payor Plaintiffs also engaged and met extensively with economic and other experts to develop support for theories of liability and to measure the monetary harm suffered by End-Payors of Remeron.

Defendants moved to dismiss or stay the End-Payor Plaintiffs' Consolidated Amended Complaint on November 14, 2002. End-Payor Plaintiffs filed a comprehensive Memorandum in Opposition to Defendants' Motion to Dismiss or Stay on January 17, 2003, and a Notice of Supplemental Authority in opposition on February 6, 2003, as well as a letter brief regarding subsequent authority on April 25, 2003, and a letter brief on further supplemental authority on June 3, 2003. Defendants filed their Reply Memorandum in Support of Motion to Dismiss or Stay on February 21, 2003, and filed a response to End-Payor Plaintiffs' April 25 letter brief on May 8, 2003, and a response to End-Payor Plaintiffs' June 3 letter brief on June 5, 2003.

Defendants opposed End-Payor Plaintiffs' motion for leave to file the End-Payor Plaintiffs' Consolidated Amended Complaint. End-Payor Plaintiffs filed an extensive [*8] Memorandum of Law in Support of Plaintiffs' Motion for Leave to Amend on November 18, 2003. After briefing and oral argument, the Court granted End-Payor Plaintiffs' motion for leave to amend on December 31, 2003. Following oral argument, Defendants' initial motion to dismiss was denied as moot in light of End-Payor Plaintiffs' Amended Consolidated Complaint, by Order dated January 15, 2004.

Defendants thereafter moved to dismiss End-Payor Plaintiffs' Amended Consolidated Class Action Complaint on January 20, 2004. End-Payor Plaintiffs moved to certify a nationwide class of End Payors, including consumers as well as public (non-federal) and private institutional End Payors, on October 27, 2003. End-Payor Plaintiffs filed a comprehensive Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, together with a detailed and extensive Declaration from Harvard University health economist Professor Richard G. Frank in support of class certification. The Court had not issued a ruling on these two motions at the time of the proposed settlement.

As the End-Payor Plaintiffs were developing their case, the working group of State Attorneys General were conducting their own [*9] economic and factual investigation relating to the claims, underlying events, and conduct alleged by the End-Payor Plaintiffs and others. Beginning in March 2003, the Office of the Attorney General of Texas issued Civil Investigative Demands (CIDs) for documents and answers to written interrogatories to the Defendants and to third parties, including the Generic Manufacturers. A multi-state working group of State Attorneys General that was formed during the summer of 2003 conducted a targeted review of the 200 CD-ROMs of document images produced in response to the CIDs. The working group also reviewed transcripts of depositions and hearings from the patent litigation and the End-Payor and Direct Purchaser litigation. The State Attorneys General also researched and analyzed may legal and regulatory issues involving patents, the FDA and the Hatch-Waxman process. In addition, the State Attorneys General gathered data relating to purchases of Remeron from their state agencies, including their state Medicaid programs, as well as sales and pricing data from the Defendants and the Generic Manufacturers, and retained economists to analyze the data and create damages estimates. The State Attorneys [*10] General undertook extensive legal research and analysis and consulted with economic and intellectual property law experts regarding the theories of liability at issue in this case.

B. Mediation and Settlement

In December 2003, the parties began to explore the possibility of settlement with the working group of State Attorneys General. The settlement negotiations included a multi-day global settlement mediation before Judge Politan in January 2004. This was followed by a series of settlement discussions between Defendants' and End-Payor Plaintiffs' counsel in coordination with the work-

ing group of State Attorneys General. These discussions laid the groundwork, but settlement was not achieved until the end of a two-day settlement conference before this Court. The broad outlines of this agreement were discussed with the Court in chambers on February 18, 2004.

For the next half year, the End-Payor Plaintiffs and the States together engaged in further negotiations with Defendants to craft and finalize the detailed written settlement agreement. Other negotiations included crafting and finalizing the escrow agreement, the proposed preliminary approval order, the proposed final judgment, [*11] and the class notice of the proposed settlement. The working group of State Attorneys General, in conjunction with the Federal Trade Commission, engaged in many further negotiations with Defendants to draft and finalize the Stipulated Injunction. State Attorneys General who were not involved in the working group were later invited to join the settlement.

C. Preliminary Approval of the Settlement and Execution of the Notice Plan

On October 20, 2004, End-Payor Plaintiffs and the Plaintiff States filed their Memorandum in Support of End-Payor Plaintiffs' and States' Motion for Preliminary Approval of Proposed Settlement. Contemporaneous with the filing of that M emorandum, a Complaint including all of the 50 States, the District of Columbia, and all U.S. territories was filed with the Court, along with the fully executed settlement agreement. [1]

1 *States and Commonwealths of Texas, Florida, Oregon, et al. v. Organon USA Inc. and Akzo Nobel N. V.*, Civil Action No. 04-5126 (FSH) (Complaint filed Oct. 20, 2004).

[*12] On November 17, 2004, the Court issued an Order requesting End-Payor Plaintiffs and Plaintiff States submit a brief addressing in further detail their proposed Notice Plan. On November 24, 2004, End-Payor Plaintiffs and Plaintiff States submitted a Supplemental Memorandum in Further Support of Plaintiffs' Motion for Preliminary Approval that addressed the issues raised. On December 1, 2004, the Court held a hearing on the proposed preliminary approval of the settlement. At that hearing, the Court requested that the parties develop a proposed Plan of Distribution and include details regarding that plan in the notices, which the parties did. On January 14, 2005, the End-Payor Plaintiffs and Plaintiff States submitted a Second Supplemental Memorandum in Further Support of Plaintiffs' Motion for Preliminary Approval, setting forth the proposed Plan of Distribution and revised notices. On January 24, 2005, the Court followed up with an e-mail to the parties seeking additional information regarding certain language in the proposed order and the notice. End-Payor Plaintiffs and Plaintiff States responded to the Court's questions by return e-mail and revised the long-form and summary notices [*13] in response to the Court's inquiries.

On January 25, 2005, the Court entered an Order Conditionally Certifying Settlement Class, Preliminarily Approving Proposed Settlement, and Preliminarily Approving Representation of Attorneys General. In compliance with the settlement agreement and the Court's January 25, 2005 Order, Defendants paid $ 35 million into escrow on February 1, 2005.

Then the Notice Plan was carried out. The claims administrator, Complete Claim Solutions (CCS), mailed 13,431 notice packages to Third-Party Payor (TPP) class members. As of May 25, 2005, with the cooperation of the pharmacies, CCS had caused to be mailed 854,046 notice packets to potential consumer class members. The media consultant retained by CCS published the summary notice in national publications, such as *Reader's Digest, Parade, USA Today* and *USA Weekend.* To provide adequate coverage for class members residing in one of the United States Territories, the media consultant published summary notice in El Nuevo Dia, the Pacific Daily News and the Virgin Islands Daily News. The media consultant also published the summary notice in an industry periodical, National Underwriter, to reach TPP class [*14] members. Additionally, CCS contacted 22,643 physicians, and numerous mental health, senior and women's organizations soliciting their assistance in notifying their members of the settlement. CCS distributed Public Service Announcements (PSAs) to 1,000 radio stations. As of May 25, 2005, 60 radio stations reported airing the PSAs a total of 11,179 times. CCS designed and developed a website for potential class members to obtain information and for consumer class members to file a claim online; and CCS set up and operates a toll-free 800 telephone number to answer class members' questions. As of May 25, 2005, over 40,000 visits have been made to the website and nearly 30,000 calls have been made to the toll-free telephone number.

D. The Settlement Terms

A copy of the settlement agreement and its exhibits were filed with the Court on October 20, 2004 with the motion by End-Payor Plaintiffs and States for preliminary settlement approval.

1. Monetary Payments And Distributions

The settlement provides for settlement payments by Defendants in a total amount of up to Thirty-Six Million Dollars ($ 36,000,000.00) (Settlement Consideration) consisting of: (1) Thirty-Three Million [*15] Dollars ($ 33,000,000.00) that Defendants paid into an escrow ac-

count on February 1, 2005, plus any interest, dividends and other distributions and payments earned on that sum while in escrow (Settlement Fund); (2) Two Million Dollars ($ 2,000,000.00) that Defendants paid on February 1, 2005 into a separate escrow account to pay for costs and expenses of settlement class notice and future costs of settlement administration, plus any interest, dividends and other distributions and payments earned on that sum while in escrow (Notice Fund); and (3) up to One Million Dollars ($ 1,000,000.00) that the Defendants will pay to the States following the effective date of the settlement agreement for their reasonable attorneys' fees and expenses incurred in their investigations of Defendants relating to this matter and in connection with the approval and administration of this settlement.

a. The Settlement Fund

On February 1, 2005, Defendants deposited into escrow the sum of Thirty-Three Million Dollars ($ 33,000,000.00). This Settlement Fund may be used for purposes of distribution to the members of the settlement class and the Plaintiff States, payment of further notice or administrative [*16] costs in excess of the amount of the Notice Fund up to $ 500,000.00, and payment of End-Payor Plaintiffs' attorneys' fees and costs, and incentive awards for the class representatives.

Under the Plan of Distribution, the net settlement amount (the settlement fund less notice and claims administration costs, attorneys' fees, expenses, and incentive awards) will be allocated as follows: 32.8% to consumers, 16.5% to state governmental purchasers, and 50.7% to TPPs. End-Payor Plaintiffs' Co-Lead Counsel have applied to the Court for an attorneys' fees award from the Settlement Fund equal to $ 7.8 million (23.6% of the Settlement Fund) plus 23.6% of interest that has accrued on the Settlement Fund, as well as reimbursement of almost $ 500,000.00 in expenses (including expert fees and costs). Attorneys' fees and expenses will be distributed by End-Payor Plaintiffs' Co-Lead Counsel among the ten law firms that initiated and litigated these End Payor cases. In addition, End-Payor Plaintiffs seek an award of incentive awards to the Class Representatives in the amount of Seventy-Five Thousand Dollars ($ 75,000.00).

b. The Notice Fund

Defendants deposited into escrow a separate amount of Two [*17] Million Dollars ($ 2,000,000.00) used exclusively for the payment of notice and administrative fees and costs reasonably incurred for the purpose of providing notice of settlement to members of the settlement class, processing claims and administering the settlement, paying any taxes and tax expenses with respect to the escrow accounts, and paying reasonable fees and costs to the escrow agent.

c. Payment to State Attorneys General

After the effective date of the settlement agreement, Defendants will reimburse the Plaintiff States for their reasonable attorneys' fees and expenses incurred in connection with their investigations of Defendants relating to this matter, as well as their future reasonable attorneys' fees and expenses to be incurred in connection with settlement approval and administration. The aggregate amount of all such fees and expenses of all Plaintiff States that shall be reimbursable shall not exceed One Million Dollars ($ 1,000,000.00).

d. Any Unclaimed Money

Any amount in the Settlement Fund that remains after payment of all claims, Court-approved fees, costs, expenses, and incentive awards, and any supplemental distribution to settlement class members and Court-approved [*18] supplemental fees and costs, will be distributed to charitable organizations or state agencies that provide health or legal services to settlement class members, as recommended by End-Payor Plaintiffs' Co-Lead Counsel and/or State Liaison Counsel and approved by the Court.

2. Injunctive Relief

Defendants have agreed to an injunction prohibiting certain future conduct (Injunction), which will become effective when the settlement agreement becomes effective. The Injunction, which was negotiated by the Plaintiff States in conjunction with the Federal Trade Commission states, *inter alia*, that Defendants (a) "shall not seek, maintain, certify to, or take any other action in furtherance of, the listing or continued listing of any Patent in the Orange Book where the listing of such Patent in the Orange Book violates Applicable Law" and (b) "shall not" provide to the FDA "Listing Information that [is] false or misleading."

3. Release of Claims

Members of the settlement class (who have not made valid and timely elections to exclude themselves from the settlement class) release and discharge forever the Defendants from all claims which could have been asserted from the facts [*19] and circumstances giving rise to this case, from the beginning of time through January 25, 2005 (the date this Court preliminarily approved the Settlement Agreement).

II. ANALYSIS

A. Class Certification for Purposes of Settlement

In its Order preliminarily approving the settlement agreement, the Court conditionally certified the Settlement Class, defined in the settlement agreement as:

> All End Payors (including any assignees of such End Payors) who purchased and/or paid all or part of the purchase price of Mirtazapine Products in the United States during the period beginning June 15, 2001 through January 25, 2005 (the date of the Preliminary Approval Order). Excluded from the Settlement Class are (i) Defendants and any of their subsidiaries and affiliates, (ii) all federal governmental entities, agencies and instrumentalities, and (iii) all wholesalers and retailers and all persons or entities that purchased Mirtazapine Products primarily for purposes of resale.

The Court also preliminarily approved the following as Class Representatives:

> United Food and Commercial Workers Local 56 Health & Welfare Fund, and Board of Trustees of United Food and [*20] Commercial Workers Local 56 Health & Welfare Fund, a health benefit fund operated for the benefit of present and retired members of the union local and their families;
>
> Vista Healthplan, Inc., a health maintenance organization that provides comprehensive healthcare benefits to its members; and
>
> Gayle Taylor, Dianne Mason, and Robert Kapella, all of whom are consumers who purchased Remeron during the Class Period.

[HN1] Under *Rule 23 of the Federal Rules of Civil Procedure*, the Court must engage in a two-step analysis in order to determine whether it should certify a class action for settlement purposes. First, the Court must determine whether the End-Payor Plaintiffs and Plaintiff States have satisfied the prerequisites for maintaining a class action as set forth in *Fed. R. Civ. P. 23(a)*. If the End-Payor Plaintiffs and Plaintiff States can satisfy these prerequisites, the Court must then determine whether the alternative requirements of *Rule 23(b)(2)* or *23(b)(3)* are met. *See Fed. R. Civ. P. 23(a)* advisory committee's note. [HN2] "Confronted with a request for [*21] settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see Fed. Rule Civ. Proc. 23(b)(3)(D)*, for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*.

1. The Requirements of *Rule 23(a)*

[HN3] *Rule 23(a)* provides that class members may maintain a class action as representatives of a class if they show the court that:

> (a) the class members are so numerous that joinder of all members is impracticable;
>
> (b) the action addresses questions of law or fact common to the class;
>
> (c) the claims or defenses of the class representatives are typical of the claims or defenses of the class; and
>
> (d) the class representative parties will fairly and adequately protect the interests of the class.

a. Numerosity

[HN4] Courts will ordinarily discharge the prerequisite of numerosity if the class is so large that "joinder of all members is impracticable." *Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)*. "The plaintiff need not precisely enumerate the potential size of the proposed [*22] class, nor is the plaintiff required to demonstrate that joinder would be impossible." *Cannon v. Cherry Hill Toyota, Inc., 184 F.R.D. 540, 543 (D.N.J. 1999)*; *accord Wachtel v. Guardian Life Ins. Co., 223 F.R.D. 196, 211 (D.N.J. 2004)*. Moreover, "it is proper for the court to accept common sense assumptions in order to support a finding of numerosity." *Cumberland Farms, Inc. v. Browning-Ferris Indus., 120 F.R.D. 642, 646 (E.D. Pa. 1988)* (citation omitted); *accord In re Nasdaq Market-Makers Antitrust Litig., 169 F.R.D. 493, 509 (S.D.N.Y. 1996)*.

Here, the plaintiff class consists of End Payors, including consumers, who paid all or part of the price of Remeron in the United States during the class period. "There can be no serious question that joinder of all these parties, geographically dispersed throughout the United States, would be impracticable." *In re Corrugated Container Antitrust Litig., 80 F.R.D. 244, 247 (S.D. Tex. 1978)*. Hundreds of thousands of class members have received notice and tens of thousands have filed proofs

of claim across. The class thus easily fulfills the numerosity requirement. [*23] [HN5] "Numbers in excess of forty, particularly those exceeding one hundred or one thousand have sustained the [numerosity] requirement." *Weiss v. York Hosp., 745 F.2d 786, 808 n.35 (3d Cir. 1984)*.

b. Commonality

[HN6] The threshold commonality inquiry is whether there are any questions of fact or law that are common to the class. *Fed. R. Civ. P. 23(a)(2)*. "Commonality does not require an identity of claims or facts among class members." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183 (3d Cir. 2001)*. Rather, "the commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." "Even where individual facts and circumstances do become important to the resolution, class treatment is not precluded." *Baby Neal for & by Kanter v. Casey, 43 F.3d 48, 57 (3d Cir. 1994)*. *Id. at 57*. "The threshold of commonality is not high." *In re School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986)*.

In this case, many common questions exist. They include, *inter alia*, (1) what is the relevant [*24] product market?; (2) did Defendants have market power in that market?; and (3) did Defendants unlawfully monopolize that market? [HN7] Antitrust actions often present common questions of law and fact, and are, therefore, frequently certified as class actions. *See, e.g., Transamerican Ref. Corp. v. Dravo Corp., 130 F.R.D. 70, 73 (S.D. Tex. 1990)* (antitrust price-fixing claims and common law fraud); *Cusick v. NVNederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022, 1024 (E.D. Pa. 1970)* (consumer class action charging monopolization). The commonality requirement is satisfied here.

c. Typicality

[HN8] The Third Circuit has "set a low threshold for satisfying" the typicality requirement holding that "if the claims of the named plaintiffs and class members involve the same conduct by the defendant, typicality is established." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183-84 (3d Cir. 2001)*; *accord Baby Neal v. Casey, 43 F.3d 48, 58 (3d Cir. 1994)* (stating "cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality [*25] requirement").

[HN9] The typicality requirement "does not mandate that all putative class members share identical claims." *Newton, 259 F.3d at 184*; *see also Hassine v. Jeffes, 846 F.2d 169, 176-77 (3d Cir. 1988)*. Plainly, "there is nothing in *Rule 23(a)(3)* which requires named plaintiffs to be clones of each other or clones of other class members." *Advocate Health Care v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 202 F.R.D. 12, 27 (D.D.C. 2001)*; *accord In re Catfish Antitrust Litig., 826 F.Supp. 1019, 1036 (N.D. Miss. 1993)*.

In this case, the Class Representatives' and the class members' claims are identically predicated upon Defendants' alleged actions of improper listing and late listing of the *099 Patent* in the Orange Book, fraud on the PTO, and filing of allegedly baseless patent infringement lawsuits against Generic Manufacturers. Thus, "there are no differences as to the type of relief sought or the theories of liability upon which plaintiffs will proceed." *In re Corrugated Container Antitrust Litig., 80 F.R.D. 244 (S.D. Tex. 1978)*. The Class Representatives' claims and those of the class members arise from the same [*26] course of conduct. "Since the various claims alleged appear to stem from a single course of conduct . . . we cannot conclude that the district court abused its discretion in holding that the typicality requirement was met." *Grasty v. Amalgamated Clothing and Textile Workers Union, 828 F.2d 123, 130 (3d Cir. 1987)*. Accordingly, the Class Representatives' claims are typical of those of the class members.

d. Adequacy of Representation

[HN10] The final requirement of *Rule 23(a)* is that "the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. The Third Circuit has held that "adequate representation depends on two factors: (i) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (ii) the plaintiff must not have interests antagonistic to those of the class." *Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 923 (3d Cir. 1992)*; *accord In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 532 (3d Cir. 2004)*; *Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247 (3d Cir. 1975)*. [*27]

As to the first factor, End-Payor Plaintiffs' counsel have successfully prosecuted numerous antitrust class actions. Plaintiffs' Co-Lead Counsel, Arthur M. Kaplan, is a graduate of the Harvard Law School (J.D., *cum laude*, 1970) and has been active in antitrust and other complex litigation. Mr. Kaplan was Co-Lead Counsel for plaintiffs in the *In re Nasdaq Market-Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y. 1998)*, in which plaintiffs achieved settlements totaling $ 1.027 billion. [2] End-Payor Plaintiffs' Co-Lead Counsel Joseph H. Meltzer likewise is experienced. Mr. Meltzer is a graduate of the Temple University School of Law (J.D., *cum laude)* and has focused his practice exclusively on antitrust and complex class action litigation. In addition to prominent roles in prosecuting several major antitrust class actions to successful conclusions, including *In re Sorbates Di-*

rect Purchaser Antitrust Litig., C98-4886 (N.D. Cal. 2001) (settlements exceeding $ 92 million), Mr. Meltzer was appointed Co-Lead Counsel in *Ryan-House v. GlaxoSmithKline plc*, C.A. 2:02cv442 (E.D. Va.), a pharmaceutical antitrust class action brought on behalf of end payors of the [*28] prescription medication Augmentin which recently settled for $ 29 million. End-Payor Plaintiffs' Acting Co-Lead Counsel Jeffrey S. Istvan is a 1992 graduate of the University of Virginia School of Law, where he was a Hardy Cross Dillard Scholar. Following a federal judicial clerkship, he has been active in antitrust and consumer class actions. Mr. Istvan was sole lead counsel in *Parsky v. Wachovia Bank, N.A.*, 2001 WL 535786 (C.C.P. Phila. May 8, 2001), a consumer class action that recently settled for approximately than $ 23 million and worked on several large antitrust class actions, including *In re Copper Antitrust Litig.*, M.D.L. No. 1303 (7th Cir. 2004) (appeal pending); *In re Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348 (N.D. Ga. 2000)* (settlements totaling $ 50 million); *and In re Commercial Explosives Antitrust Litig., 945 F. Supp. 1489 (D. Utah 1996)* (settlements totaling $ 77 million).

> 2 In *In re Nasdaq Market-Makers Antitrust Litig., 187 F.R.D. at 474*, the court in approving that settlement stated, "it is difficult to conceive of better representation than the parties to this action achieved." Likewise, in *Advocate Health Care v. Mylan Labs. Inc. (In re Lorazepam & Clorazepate Anittrust Litig.), 2003 U.S. Dist. LEXIS 12344, 2003 WL 22037741, at *6 (D.D.C. June 16, 2003)*, in which Mr. Kaplan was co-counsel for the class of direct purchasers, the Court in approving settlement characterized counsel as "among the best and most experienced antitrust litigators in the country."

[*29] The State Attorneys General, as counsel for the Plaintiff States, have considerable expertise in complex antitrust *parens patriae* and class action litigation. State Liaison Counsel Patricia A. Conners, Director of the Antitrust Division of the Florida Attorney General's Office and past Chair of the National Association of Attorneys General ("NAAG") Multistate Antitrust Task Force. She was an Assistant Attorney General in the Antitrust Division, working on such notable cases as *Florida v. Borden, Inc.*, the 1989 school milk bid-rigging cases that resulted in a $ 36 million recovery for Florida school boards and *Florida v. Abbott Laboratories, Inc.*, the first of the so-called Infant Formula cases, and the *Disposable Contact Lens Litigation*, which settled in 2002 for $ 80 million. She has practiced antitrust law exclusively since 1987. State Liaison Counsel Kim Van Winkle is an Assistant Attorney General in the Office of the Attorney General of Texas, where she has practiced antitrust law exclusively since 1998. Ms. Van Winkle graduated in 1997 with honors from the University of Texas School of Law, with a joint Master of Public Affairs degree from the Lyndon B. Johnson [*30] School of Public Affairs. She has participated in the investigation and litigation of numerous complex, multistate antitrust cases, including *In re Buspirone Antitrust Litigation*, No. 01-CV-1 1401, MDL 1413 (S.D.N.Y. Mar. 7, 2003) (final approval granted for $ 100 million settlement of end-payor action alleging monopolization of drug markets through patent abuse). These attorneys are qualified, experienced, and have skillfully worked on this litigation.

The Class Representatives' interests are not antagonistic to those of the absent class members. The central issues in this case are critical to the claims of both groups. In proving these common issues, the Class Representatives further the absent class members' claims no less than their own. *Cf. In re Cardizem CD Antitrust Litig., 218 F.R.D. 508, 518 (E.D. Mich. 2003)* ("Each Class member . . . has a common interest in establishing that he, she, or it was financially injured by Defendants' conduct and in an aggregate damages computation"); *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 251 (D. Del. 2002)*, *aff'd*, *391 F.3d 516 (3d Cir. 2004)* ("The named plaintiffs share [*31] a strong interest in establishing liability of defendant, seeking the same type of damages (compensation for overpayment) for the same type of injury (overpayment for warfarin sodium)"). Further, "it is difficult to imagine a better representative of the retail consumers within a state than the state's attorney general." *In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 280 (S.D.N.Y. 1971)*; *accord FTC v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 205 F.R.D. 369, 387 (D.D.C. 2002)* (stating the plaintiff states "have evidenced a genuine interest in this litigation, and are qualified and experienced."). States, acting through their attorneys general, have frequently been held to be the "best representatives of the consumers residing within their jurisdictions." *In re Ampicillin Antitrust Litig., 55 F.R.D. 269, 274 (D.D.C. 1972)*; *see also West Virginia v. Chas Pfizer & Co., Inc., 440 F.2d 1079, 1089-91 (2d Cir. 1971)*. Thus, the adequacy requirement has been met.

2. The Requirements of *Rule 23(b)(3)*

[HN11] Once the requirements of *Rule 23(a)* are met, *Rule 23(b)(3)* permits the maintenance of a class action if "the court [*32] finds [a] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and [b] that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

[HN12] "The *Rule 23(b)(3)* predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. As the Supreme Court has observed, "predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem, 521 U.S. at 625*. In particular, [HN13] "antitrust actions involving common questions of liability for monopolization . . . have frequently been held to predominate for the preliminary stage of class certification." *Lorazepam & Clorazepate, 202 F.R.D. at 29*. "The presence of individual questions . . . does not mean that the common questions of law and fact do not predominate." *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985)*.

a. Questions of Law and Fact Common to the Class Predominate

"As is true in many [*33] antitrust cases, the alleged violations of the antitrust laws at issue here respecting . . . monopolization relate solely to Defendants' conduct, and as such proof for these issues will not vary among class members." *Lorazepam & Clorazepate, 202 F.R.D. at 29* (internal quotation marks and citation omitted). As the Third Circuit held in *In re Linerboard Antitrust Litig., 305 F.3d 145 (3d Cir. 2002)*, *cert. denied*, *538 U.S. 977, 123 S. Ct. 1786, 155 L. Ed. 2d 666 (2003)* that "common issues . . . predominate here because the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did." *Id. at 163* (citation omitted); *see also Warfarin Sodium, 391 F.3d at 528*. "The common questions of law, the elements of the monopolization claim fully enumerated, . . . dwarf, rather than merely predominate over, any individual questions." *Sollenbarger v. Mountain States Tel. and Tel. Co., 121 F.R.D. 417, 427 (D.N.M. 1988)*; *see also Davis v. Southern Bell Tel. Co., 1993 U.S. Dist. LEXIS 20033, 1993 WL 593999, *7 (S.D. Fla. Dec. 23, 1993)* ("The issues of antitrust violation, injury, and damages all turn [*34] on class-wide proof").

In this case, the claims of all class members arise from the same facts giving rise to the same legal claims, as discussed in the above sections on commonality and typicality. Accordingly, the predominance requirement is satisfied.

b. A Class Action is Superior to Other Available Methods

"In the case of consumers, the class members here have little interest in individually controlling the prosecution or defense of separate actions,' *Fed. R. Civ. P. 23(b)(3)(A)*, because each consumer has a very small claim in relation to the cost of prosecuting a lawsuit." *Warfarin Sodium, 212 F.R.D. at 251*. Indeed, "where it is not economically feasible to obtain relief . . . aggrieved persons may be without any effective redress unless they employ the class action device." *Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)*.

In contrast to the inefficiency of duplicative individual lawsuits, "the efficacy of resolving all plaintiffs' claims in a single proceeding is beyond discussion." *Sollenbarger v. Mountain States Tel. and Tel. Co., 121 F.R.D. 417, 436 (D.N.M. 1988)*. "The [*35] class action mechanism offers substantial economies of time, effort and expense for the litigants as well as the Court." *In re Terazosin Hydrochloride, 220 F.R.D. 672, 700 (S.D. Fl. 2004)*.

In this very expensive litigation involving hundreds of thousands documents, it would not have been economically feasible for many plaintiffs to seek individual redress. Judicial economy as well as fairness to Defendants makes the litigation of such claims in one action far more desirable than numerous separate actions litigating the same issues.

Because the End-Payor Plaintiffs and Plaintiff States have satisfied all of the requirements under *Fed. R. Civ. P. 23(a)* and the requirements of *Fed. R. Civ. P. 23(b)(3)*, this Court certifies the proposed class for purposes of this settlement.

B. The Notice of Settlement

The settlement class members are entitled to notice of the proposed settlement and an opportunity to be heard. *See Fed. R. Civ. P. 23(e)*; *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)*. The notice period in this case [*36] began on March 14, 2005, and continued for forty-five (45) calendar days until April 27, 2005. Under the settlement agreement and Preliminary Approval Order, settlement class members had that Notice Period of 45 days to submit any requests to opt-out of the class and until May 28, 2005 to submit objections.

1. Notice Plan

The Notice Plan consisted of multiple components designed to reach consumers through paid print and broadcast media through Public Service Announcements, earned media, and direct mailed notice (to the extent that information could be obtained) to purchasers of Remeron. The media plan provided an estimated reach of more than 90 percent, and frequency realized may have been as much as 2.5 times. [3]

3 Measurement of the notice program is provided in terms *of reach and frequency. Reach* is the estimated percentage of a target audience reached through a specific media vehicle or com-

bination of media vehicles. *Frequency* is the estimated average number of times an audience is exposed to advertising vehicles carrying the message.

[*37] a. Published Notice

Syndicated data, audited data and proprietary research from the National Mental Health Association and the National Foundation for Depressive Illness were reviewed to identify the media vehicles that would most effectively deliver the message to potential class members in the U.S. and its territories (specifically, Guam, U.S. Virgin Islands, and Puerto Rico). The resulting plan was that the summary notice (about 1 page) be placed in a combination of national Sunday Supplements, *USA Today*, and *Reader's Digest* to reach consumers, plus an insertion in *National Underwriter* to reach Third-Party Payors. The Notice Plan's consumer published media schedule was based upon techniques specifically designed for legal notification.

The long-form notice (several pages) provides detailed information about the proposed settlement, including a summary of the monetary and injunctive terms, the allocation percentages, the requested attorneys' fees, litigation costs and incentive awards, and detailed information on the terms of the releases. In addition, the long-form notice provides information about the fairness hearing date, and Settlement Class members' rights to [*38] object or opt out (and deadlines and procedures). Finally, the long-form notice included a Claim Form to be completed and returned by Class members. The Claim Form also is available on a dedicated website, www.RemeronSettlement.com, or by calling a toll-free 800 telephone number provided in the long-form notice and the summary notice.

b. Mailed Notice

Direct mail notices consisted of mailing the settlement notice packet (including the long-form notice and a Claim Form) to inform potential class members of their rights and how they could participate in the class action. This direct mail settlement notice packet was sent to all potential TPP class members included in CCS' proprietary TPP mailing database, which includes 13,431 TPPs (e.g., insurance companies, healthcare and welfare funds, self-insureds, etc.) and record keepers (e.g., third-party administrators and pharmacy benefit managers).

In addition, potential consumer class members were contacted by direct mail with the assistance of pharmacies and psychiatrists. Many potential class members were mailed a settlement notice packet by their pharmacy and/or psychiatrist. Twenty-six large national pharmacies participated in mailing [*39] settlement notice packets to their customers who purchased Remeron and mirtazapine during the claim period, including 14 of the top 25 drug chains, 6 of the top 7 mass merchant pharmacies, and 3 of the top 6 supermarket pharmacies. In all, more than 850,000 settlement notice packets were mailed to potential class members through this program. This direct mail program provided an opportunity to reach those class members who may have missed the summary notice in their newspapers.

c. News Media

CCS implemented a campaign to expand notice through free or "earned" media which included contacting consumer groups such as AARP, mental health groups such as the National Alliance for the Mentally Ill, National Federation for Depressive Illnesses, National Mental Health Association, National Community Pharmacists Association, and issuing a press release over Businesswire. The State Attorneys General have undertaken further efforts to expand notice through the news media. A number of Attorneys General issued press releases about the settlement, notice and claims process, including the toll-free telephone numbers and website address. These press releases were run in newspapers and broadcast on [*40] the radio.

d. Toll-Free Telephone Number

Complete Claims Solutions has obtained a toll-free telephone number that allows callers to request the notice of settlement and obtain a Claim Form. It also allows them to find out other information about the settlement. This number was included in the summary notice, the notice of settlement, and on the website, www.RemeronSettlement.com.

e. Internet Website

In addition to the media outlets described above, Complete Claims Solutions developed and maintains a website at www.RemeronSettlement.com, which can be accessed by the settlement class members. This website includes the summary notice and long-form notice and a Claim Form.

f. Results of Notice Effort

CCS received nearly 65,000 individual consumer claims and 1,156 TPP claims. In addition, over 40,000 visits have been made to the settlement website, and approximately 30,000 telephone calls have been made to the toll-free number.

2. The Notice Plan Meets the Requirements of Due Process

"In order [HN14] to satisfy due process, notice to class members must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an [*41] oppor-

tunity to present their objections." *In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109, 119 (D.N.J. 2002)* (internal quotations and citation omitted). [HN15] In *Rule 23(b)(3)* actions, "class members must receive the best notice practicable under the circumstances." *Id. at 119-20* (quoting *Fed. R. Civ. P. 23(c)(2)(B)*); *see also Varacallo v. Massachusetts Mut. Life Ins. Co., 226 F.R.D. 207, 225 (D.N.J. 2005)*.

The notice forms are similar to those successfully used in numerous other class settlements. *See, e.g., In re Toys "R" Us Antitrust Litig., 191 F.R.D. 347 (E.D.N.Y. 2000)*; *In re Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 627 (E.D. Pa. 2004)*. This Court reviewed the summary notice and the long-form notice in detail and suggested several changes, which were made, prior to the preliminary approval of the settlement. The final product is clear and comprehensive, and is written in simple terminology. The notices "fairly, accurately, and neutrally describe the claims and parties in the litigation, the terms of the proposed settlement and the identity of persons [*42] entitled to participate in it," and apprise affected class members of their options with regard to the proposed settlement. *Foe v. Cuomo, 700 F. Supp. 107, 113 (E.D.N.Y. 1988)*.

[HN16] For those whose names and addresses cannot be determined by reasonable efforts, notice by publication suffices under both *Rule 23(c)(2)* and under the *Due Process Clause*. *Carlough v. Amchem Products, Inc., 158 F.R.D. 314, 325 (E.D. Pa. 1993)* (citing *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317-18, 70 S. Ct. 652, 94 L. Ed. 865 (1950)*). Under the circumstances of this case, where End-Payor Plaintiffs, Plaintiff States and Defendants have limited and/or incomplete access to the names or addresses of End-Payors who purchased Remeron during the Class Period, [4] the law requires reasonably feasible notice by publication coupled with such mailed notice. The plan is allocated $ 2 million for this task and for processing returned Claims Forms, spending over $ 750,000 on publication notice alone. The Notice Plan meets the requirements of due process.

> 4 [HN17] The privacy of consumers who purchase prescription medication is protected under the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-91. *42 U.S.C. § 1320d-2*. HIPAA protects "protected health information" from disclosure. "Protected health information" means individually identifiable health information that is maintained and/or transmitted in any form or medium. *45 C.F.R. § 160.103 (2004)*. Pharmacists are health care providers covered by the act. Patient authorization is required for disclosure of "protected health information." Improper disclosure may subject the provider to civil and/or criminal penalties. *42 U.S.C. § 1320d-5* and *6*. Thus, End-Payor Plaintiffs and Plaintiff States were unable to obtain a list of potential class members for a direct mail campaign and instead had to rely on pharmacies and psychiatrists to forward notices to their customers and patients.

[*43] **C. Final Approval of Class Action Settlement**

1. State Attorneys' General Authority to Settle All Consumer Claims

Plaintiff [HN18] States, by their Attorneys General, have the authority to settle and release indirect purchaser claims in a *parens patriae* or other representative capacity. "A State has a quasi-sovereign interest in the health and well being -- both physical and economic -- of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)*. That federal authority is supplemented by state statutory provisions and case law. [HN19] All Attorneys' General have authority to represent consumers, depending on the state, in at least one of the following four ways: (1) *parens patriae* authority expressly conferred by the state legislature, (2) authority expressly conferred by the state legislature that is the functional equivalent of parens patriae authority, (3) judicially recognized authority to represent consumers, or (4) authority to proceed as a class representative of consumers pursuant to *Fed. R. Civ. P. 23*. *See, e.g., In re Lorazepam & Clorazepate Antitrust Litig.* ("Lorazepam"), *205 F.R.D. at 386-87*. [*44]

2. Settlements That Meet Certain Conditions Are Presumed Fair

[HN20] The Third Circuit affords an initial presumption of fairness for a settlement "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 201, 233 n.18 (3d Cir. 2001)*. As discussed in Part I above, this case has seen heated litigation between the parties and the review of hundreds of thousands of documents and dozens of depositions. The Plaintiffs' lawyers involved have a great deal of experience in antitrust litigations such as these, as discussed in Part II(A)(1)(d), and favor settlement. Defendants' Counsel, including Dean Ringel of Cahill, Gordon, & Reindel and Joseph Rebein of Shook, Hardy & Bacon, are prominent litigators from successful law firms and also favor settlement.

The Court is also satisfied with the qualifications of State Attorneys General who also favor settlement. Furthermore, [HN21] "the participation of the State Attorneys General furnishes extra assurance that consumers' [*45] interests are protected." *In re Toys "R" Us Antitrust Litig., 191 F.R.D. 347, 351 (E.D.N.Y. 2000)*; *accord New York v. Reebok Int'l. Ltd., 96 F.3d 44, 48 (2d Cir. 1996)* (noting that Attorneys General in *parens* actions are motivated by concern for the public interest); *Wellman v. Dickinson, 497 F. Supp. 824, 830 (S.D.N.Y. 1980)*.

Finally, there have been few objectors to the settlement, as discussed in Part II(C)(4)(b). This Court determines that an initial presumption of fairness attaches, although such finding is not dispositive.

3. Standard for Court Approval of Settlement

[HN22] A class action may be settled under *Rule 23(e)* upon a judicial finding that the settlement is "fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(1)(C)*. Under *Rule 23(e)*, this Court must determine whether the settlement is within a range that responsible and experienced attorneys could accept considering all relevant risks and factors of litigation. *See Walsh v. Great Atlantic and Pacific Tea Co., 96 F.R.D. 632, 642 (D.N.J. 1983)*. The range "recognizes the uncertainties of law and fact in any [*46] particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972)*.

[HN23] Because a settlement represents an exercise of judgment by the negotiating parties, cases have consistently held that the function of a court reviewing a settlement is neither to rewrite the settlement agreement reached by the parties nor to try the case by resolving issues left unresolved by the settlement. *Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir. 1974)*; *Bullock v. Administrator of Kircher's Estate, 84 F.R.D. 1, 4 (D.N.J. 1979)*. "The temptation to convert a settlement hearing into a full trial on the merits must be resisted." *Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1315 (3d Cir. 1993)*.

[HN24] To determine whether the settlement is fair, reasonable and adequate under *Rule 23(e)*, courts in the Third Circuit apply the nine-factor test enunciated in *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)*, and recently reaffirmed in *Warfarin Sodium, 391 F.3d at 534-35*. These factors are:

> (a) The complexity, [*47] expense, and likely duration of the litigation;
>
> (b) the reaction of the class to the settlement;
>
> (c) the stage of the proceedings and the amount of discovery completed;
>
> (d) the risks of establishing liability;
>
> (e) the risks of establishing damages;
>
> (f) the risks of maintaining the class action through the trial;
>
> (g) the ability of the defendants to withstand a greater judgment;
>
> (h) the range of reasonableness of the settlement fund in light of the best possible recovery; and
>
> (i) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. (quoting *Girsh, 521 F.2d at 156-57*). [5]

> 5 When evaluating settlements in *parens patriae* actions brought by state Attorneys General under either the *Clayton Act* or comparable state laws, courts have generally utilized the standards used to analyze private class action settlements under *Rule 23*. *See, e.g., In re Toys "R" Us Antitrust Litig., 191 F.R.D. at 352*; *New York by Vacco v. Reebok Int'l, 903 F. Supp. 532, 535 (S.D.N.Y. 1995)*; *In re Minolta Camera Prod. Antitrust Litig., 668 F. Supp. 456 (D. Md. 1987)*.

[*48] 4. Evaluation of the Settlement Under Applicable Standards

a. The Complexity, Expense and Likely Duration of the Litigation

By reaching a favorable settlement prior to dispositive motions or trial, the End-Payor Plaintiffs and Plaintiff States avoided significant expense and delay, and ensured recovery. An "antitrust action is arguably the most complex action to prosecute." *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004)* (citations omitted); *see also Nichols v. Smithkline Beecham Corp., 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, at *12 (E.D. Pa. Apr. 22, 2005)* (same). This litigation involves complicated patent, regulatory, and antitrust laws, including interpretation of provisions of the *Hatch Waxman Act* and their application to antitrust law.

Although the End-Payor Plaintiffs have conducted a substantial amount of discovery, significant additional work would be necessary if this case proceeded beyond the current 12b6 and class certification stages. First, expert witness reports and depositions would need to be

undertaken. Then, summary judgment motions would need to be resolved. In the Direct Purchaser case, which recently came to [*49] a preliminary settlement, thousands of pages of materials were filed with this Court on summary judgment issues such as market definition, market power, and improper / late listing in the FDA Orange Book. These issues would most likely come up again in the End-Payor Plaintiffs' litigation.

Furthermore, a trial on the merits of the action would entail considerable expense: Market definition alone would require dozens of hours of testimony at this stage. Finally, trial would likely not end the litigation, given the right to appeal. This factor weighs in favor of the settlement. *See In re Linerboard Antitrust Litig., 292 F. Supp. 2d 631, 642 (E.D. Pa. 2003)* (noting that the "protracted nature of class action antitrust litigation means that any recovery would be delayed for several years," and thus settlement's "substantial and immediate benefits" to class members favors settlement approval); *Slomovics v. All for a Dollar, Inc., 906 F. Supp. 146, 149 (E.D.N.Y. 1995)* (where litigation is potentially lengthy and will result in great expense, settlement is in the best interest of the class members).

b. The Reaction Of The Settlement Group

As described [*50] above in Part II(B)(1)(b), CCS sent out 13,431 notices to third-party payors, and caused the mailing of more than 850,000 notices to potential consumer class members across the country. In addition, CCS developed and maintained a website and a toll-free telephone "hotline" to provide information about the settlement and arranged for publication of the summary notice over a period of approximately six weeks in selected publications throughout the country.

In response, no TTP excluded itself from the settlement, [6] and about 70 individual consumers timely submitted Requests for Exclusion. Given that the TPP portion of the class is made up largely of sophisticated managed care companies, the fact that not one of them wishes to exclude itself is strong evidence of a positive reaction to the settlement. Equally strong evidence is the very low number of consumer opt-outs relative to the hundreds of the thousands notified and the tens of thousands who submitted claims forms.

6 Five TPPs did initially opt out, but they soon entered into an agreement with the parties to request that the Court permit them to rescind their notices of exclusion. That agreement is reflected in a Memorandum of Understanding filed with the Court that guaranteed $ 450,000 more to the Settlement Fund, instead of going to Plaintiffs' Attorneys' Fees. The Court granted the request.

[*51] Also relevant is the number of objections. Eight individuals and two TPPs filed objections. [7] This Court has considered all of the objectors' written submissions [8] and the three oral arguments that were made at the Fairness Hearing. The non-monetary objections that have been filed are the following: (1) the name of the charity that would receive left over funds has not been disclosed, (2) Rider A, a confidential attachment to the settlement agreement containing provisions regarding the number of opt-outs that would lead to termination of the settlement, was not disclosed, (3) consumer information should have been subpoenaed from the ten largest retail pharmacies and those consumers should have received direct payments without having to file Claims Forms, and (4) the settlement should not contain a boilerplate provision that allows for modification of the settlement without notice to the class, despite agreement by the settling parties and Court approval, and (5) 30 days after the 45-day notice period was an insufficient amount of time to object to the settlement and the 45-day notice period was an insufficient amount of time to opt-out of the settlement.

7 Two objections were filed on behalf of TPPs, Health Care Service Corporation and certain Blue Cross entities; and eight were filed by consumers, Eugene Clasby, Roberta Geha, Rhonda Marcus, Nadine Street, William L. Bedford, Susan Ruth Hall, Dot K. Kensinger, and Robert L. Kensinger. The objections by the latter five individuals were filed by the same attorney, Stephen Tsai, who spoke at the Fairness Hearing.

[*52]

8 As some objection points are entirely unsupported, too vague to comprehend, or clearly without merit, the Court only writes on those objections that require some explanation.

These objections are considered in turn. First, [HN25] when providing notice, the law does not require that the charity that may receive left over funds be disclosed in notice to the class. *See Mangone v. First USA Bank, 206 F.R.D. 222, 230 (S.D. Ill. 2001)* ("Courts have broad discretion in distributing unclaimed class funds, and where the parties agree on the distribution of unclaimed class funds, the court should defer to that method of distribution.") (citing *Wilson v. Southwest Airlines, Inc., 880 F.2d 807, 815-16 (5th Cir. 1989)* (where parties agree to distribution of unclaimed class fund, and agreed distribution is equitable, court will defer to such agreement)). More importantly, this objection is moot as the claims administrator has advised that there are no surplus funds because of the high response to the notice.

Second, Courts have held that [HN26] information regarding conditions that [*53] may terminate a settle-

ment need not be detailed in the notice to the class. *See In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 253 (D. Del. 2002)* (stating that notice did not need to include details on "the confidential opt-out' threshold beyond which defendant reserved the right to withdraw from the settlement"). The Court, the Attorneys General, and Class Counsel know the contents of Rider A and agreed to its sealing in the interest of consummating the settlement. The Rider has no legitimate bearing on a class member's decision to opt-out of the settlement, object, or file a claims form.

Third, the suggested subpoenas of the top 10 retail pharmacies is unnecessary given that 14 of the top 25 pharmacy chains, 3 of the top 6 supermarket, and 6 of the top 7 mass merchant retailers voluntarily participated in searching their databases for Remeron purchasers and sending notices with Claims Forms to them. This process led to 800,000 notices being sent and nearly 65,000 consumer claims being filed. As to the objector's additional suggestion to automatically distribute money to those who purchased Remeron through a top 10 pharmacy, this Court will not favor one [*54] group of class members over another. *See, e.g., In re Diet Drugs Prods. Liab. Litig., 93 Fed. Appx. 338, 343 (3d Cir. 2004)* ("a class action settlement cannot arbitrarily prefer one group of plaintiffs over another -- because such a rule would be inimical to the very principles of class advocacy"). In addition, there are practical problems with the suggestion, including those associated with blindly sending checks to addresses that may be outdated.

Fourth, the boilerplate provision that allows for modification of the settlement without notice to class is satisfactory and necessary. The class is protected from adverse modifications by *Rule 23* and the requirements of due process, regardless of what the provision says, and the Court is charged with enforcing these protections. [HN27] Minor modifications may be necessary to a settlement agreement (indeed may be favorable to the class), and additional class notice is not always required because, e.g., of the cost of notice that would take recovered money from the class. *See In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 473 n.10* ("Class members need not be informed of the [amendment [*55] to the settlement agreement] because the [settlement] is only more valuable with these changes"). In this case, the adjustment that was made to the settlement that favored the class, after notice went out, was followed by additional notice and by opportunity for any opt-outs to return to the class in order to partake in the additional recovery. [9]

9 *See supra* note 6.

Fifth, 30 days after a 45-day notice period is a sufficient amount of time to object to the settlement. This Court suggested this deadline to Plaintiffs' Counsel shortly after the preliminary fairness hearing. Many district courts have set a similar deadline in antitrust class action settlements. In *In re Augmentin Antitrust Litig.* (Case No. 02-CV-442, E.D. Va.), Judge Morgan approved a forty-five day notice period and set the opt-out and objection deadline two weeks from the close of the notice period. In *In re Buspirone Antitrust Litig.* (Case No. 01-CV-7951-JGK, S.D.N.Y), Judge Koeltl set the opt-out and objection deadline forty-five [*56] days after the notice date. And in *In re Lorazepam & Clorazepate Antitrust Litig.* (Case No. 99-276-TFH/JMF, D.D.C.), Judge Hogan also set the objection deadline forty-five days after the notice date. Indeed, the objector Health Care Service Corporation, submitted its objection on May 16, 2005, two weeks before the May 28, 2005 objection deadline, thus revealing the adequacy of the objection period.

As to the opt-out deadline, this Court passes no judgment because the issue is moot. Of over 800,000 notices only two objections were made stating insufficient time to opt-out during the 45-day notice period. On the other hand, at least 65,000 class members chose not to opt-out, as evidenced by their filing of claims forms. At the Fairness Hearing, both objectors on this issue took the opportunity to be heard. Counsel to Health Care Service Corporation informed the Court at the Fairness Hearing that, despite objecting, the company did not wish to opt-out. Counsel to Nadine Street, the other objector in this regard, also spoke at the Fairness Hearing. Rather than expressing a desire to opt-out of the settlement, the lawyer requested additional time to forge an objection to Plaintiffs' [*57] motion for attorneys' fees, which the Court granted, as discussed in Part II(E)(1)(b). Thus, the issue is moot.

Six additional objection points were made pertaining to the class's compensation. They are the following: (1) one group in the class (TPPs or individual consumers) is getting more than its fair share than the other group, (2) the Plan of Distribution's reliance on "expenditures" rather than "damages" is inappropriate and unfairly benefits TPPs, (3) claim rates of the TPPs or individual consumers should not be considered in distributing monies between the two groups, (4) money should "spill over" from the individual consumers' allocation to the TPPs' allocation before any money is made available for a *cy pres* distribution, (5) the individual consumers are not receiving sufficient compensation, and (6) class members from states whose antitrust laws do not provide for the recovery of damages to indirect purchasers should not receive compensation.

These objections are also considered in turn. First, both the TPP group and the individual consumer group make the same argument that the other group is getting

more than it should. Two (of two) TPP objectors contend that they [*58] are entitled to more than the Plan of Distribution's dedicated 50.7%, while at the same time five (of seven) individual consumers contend that the individuals are entitled to more than the Plan of Distribution's dedicated 32.8%. As discussed in Part II(D), the Court finds the Plan of Distribution to be fair. These conflicting objections are without merit. [10]

10 Several objectors also objected that they did not have access to the economic reports that were the basis of the Plan of Distribution, and objector Eugene Clasby made a motion to this effect. As a result, the Court ordered that End-Payor Plaintiffs make this underlying information available prior to the Fairness Hearing, which they did. The objection was not pursued at the Fairness Hearing and one TPP objector, the Blue Cross entities, withdrew its relevant objections.

Second, the reasons put forth as to why reliance on "expenditures" would be inappropriate is inapplicable here. The objector, Eugene Clasby, is concerned that damages based on the end-payors [*59] "expenditures" would be skewed in favor of TPPs because such a measurement would not discount for co-payments paid by individual consumers or for certain rebates received by TPPs. However, the "expenditures" data used in this case in fact does factor in these offsets. Furthermore, [HN28] the Third Circuit has approved settlement allocations based on expenditures rather than damages, *see In re Warfarin Sodium Antitrust Litig., 391 F.3d at 539*, and this precise objection by Eugene Clasby was overruled in *Nichols v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, *18 (E.D. Pa. Apr. 22, 2005)*.

Third, claim rates were not a factor in determining the Plan of Distribution's distribution percentages. The allocation is based on each group's expenditures. That TPPs might be more likely to claim their damages did not give them a higher percentage of the Settlement Fund.

Fourth, the issue of "spill over" from individual consumers to TPPs prior to any *cy pres* distribution is moot. The claims administrator has reported that consumer claims already exceed the amount available to them by a very wide margin, thus no funds remain for a *cy pres* distribution or a transfer [*60] to the TPPs.

Fifth, the individual consumers are receiving adequate compensation. They are receiving an estimated $ 8.1 million in the aggregate which, based on the estimated number of claims filed, will result in each claiming consumer receiving approximately 34 cents for every dollar spent on Remeron. Discounting for litigation risk, cost, and delay, as discussed in Part I and Part II(C)(4), this Court cannot find that such a recovery is inadequate.

Sixth, class members from states whose antitrust laws do not provide for the recovery of charges to indirect purchasers should still receive compensation if the parties agreed to it. An important part of a settlement like this one is that Defendants achieve "total peace," thus all potential plaintiffs must be compensated in order to preclude future litigation attempts and allow such a settlement to consummate. *See In re Chicken Antitrust Litig., 669 F.2d 228, 238 (5th Cir. 1982)*. Furthermore, Plaintiffs are being compensated not just for state antitrust law violations but also for the common law claim of unjust enrichment. These two objectors, both represented by Stephen Tsai, provide no legal authority for their position [*61] nor do they at all consider that the Settlement Fund would likely have been much smaller if end-payors from certain states were barred from compensation (assuming the settlement would still have been consummated at all). The objection is without merit.

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

[HN29] In examining the stage of the litigation at which a settlement was reached, the proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *Warfarin Sodium, 391 F.3d at 537*. Under this standard, End-Payor Plaintiffs and the Plaintiff States were clearly in a position to make the necessary risk assessments in the context of settlement negotiations. As discussed in Part I, End-Payor Plaintiffs conducted an extensive economic and factual investigation, including review hundreds of thousands of pages of documents and data produced by Defendants and third parties, taking depositions of many current or former employees of the Defendants, and consultation with counsel for the Direct Purchasers, counsel for the Generic Manufacturers, the State Attorneys General, and others.

The Office of the Attorney General [*62] of Texas also began an investigation into Defendants' alleged Remeron monopoly maintenance practices in March 2003, and a multi-state working group was formed in July 2003 with several other State Attorneys General to pursue that investigation. The investigation included issuance of Civil Investigative Demands to Defendants and third parties, and review of documents produced. In cooperation with the Federal Trade Commission, the Plaintiff States conducted interviews of experts, potential experts, and potential witnesses. The Plaintiff States reviewed and analyzed thousands of documents from the Defendants' voluminous production, and read numerous deposition and hearing transcripts.

[HN30] "The pursuit of early settlement is a tactic that merits encouragement; it is entirely appropriate to reward expeditious and efficient resolution of disputes." *In re Vitamins Antitrust Litig., 1999 U.S. Dist. LEXIS 21963, 1999 WL 1335318, at *4 (D.D.C. Nov. 23, 1999)*. "Early settlements benefit everyone involved in the process and everything that can be done to encourage such settlements, especially in complex class action cases, should be done." *In re M.D.C. Holdings Sec. Litigation, 1990 U.S. Dist. LEXIS 15488, 1990 WL 454747, at *7 (S.D. Cal. Aug. 30, 1990)* [*63] . Given the extensive amount of time devoted to this case, End-Payor Plaintiffs and Plaintiff States have obtained sufficient information to adequately evaluate the merits of their claims.

d & e. The Risks of Establishing Liability and Damages

[HN31] These two factors "survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement." *Warfarin Sodium, 391 F.3d at 537*. End-Payor Plaintiffs and the Plaintiff States initially proceeded against Defendants on four theories of antitrust liability: (1) Fraud on the PTO in connection with the prosecution and obtaining of the *099 patent*; (2) wrongful listing of the *099 patent* in the Orange Book; (3) sham patent litigation against generic competitors based on the *099 patent*; and (4) late listing of the *099 patent*.

This Court issued a series of rulings that limited the possibility of Plaintiffs achieving ultimate success on the merits. First, regarding the Generic Manufacturers' claims against Organon, the Court on December 3, 2003 dismissed those antitrust claims that were based on the theory that the *099 Patent* [*64] was improperly listed in the Orange Book. The Court held that "the then existing statute and regulation, *21 U.S.C. §§ 355(b)(1)* and *(c)(2)* and *21 C.F.R. § 314.53(b)*, gave Organon a reasonable basis for listing in the Orange Book." *Organon Inc. v. Mylan Pharms., Inc., 293 F. Supp. 2d 453, 459 (D.N.J. 2003)*. The Court also dismissed the allegations that Organon initiated sham patent infringement lawsuits against the Generic Manufacturers, ruling that Organon's infringement theory was reasonable, in large part because of the existence at the time of three district court decisions allowing such claims against Generic Manufacturers.

Although these rulings were made in the litigation involving the Generic Manufacturers, this Court applied those rulings to the Direct Purchaser litigation (and, by inference, to this litigation) under the doctrine of collateral estoppel or the doctrine of law of the case. *Walgreen Co. v. Organon, Inc. (In re Remeron Antitrust Litig.), 335 F. Supp. 2d 522, 526, n.4 (D.N.J. 2004)*. This Court also dismissed the Direct Purchasers' antitrust claims based on fraud on the PTO in that Opinion.

As a result of [*65] these rulings, the late listing claim is, for practical purposes, the only remaining claim in End-Payor Plaintiffs' and the Plaintiff States' case. [11] Without this settlement, this final claim would need to survive summary judgment, where the definition of the relevant antitrust market would be the dominant threshold issue. In the Direct Purchaser case, this Court denied the Direct Purchaser class's motion for summary judgment regarding their proposed antitrust market definition and whether the Defendants had monopoly power in that market. *In re Remeron Direct Purchaser Antitrust Litig., 367 F.Supp.2d 675 (D.N.J. 2005)*. This Court held that the "direct evidence" the plaintiffs put forth was, on its own, insufficient to establish monopoly power. Thus, unless End-Payor Plaintiffs could perhaps put forth more convincing direct evidence than that of the Direct Purchaser plaintiffs, End-Payor Plaintiffs would need to use the traditional market definition approach in order to demonstrate monopoly power, thus increasing the risk of losing of merits and significantly increasing the amount of discovery and expert analysis needed.

11 To the extent End-Payor Plaintiffs and the Plaintiff States would advance an "overall scheme" claim, finding such a scheme would likely be predicated upon proving the late listing claim.

[*66] Finally, trial itself would be risky to Plaintiffs on their one surviving claim. *See e.g., In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 785 (7th Cir. 1999)* (plaintiff class suffered directed verdict after eight weeks of trial); *United States Football League v. Nat'l Football League, 644 F.Supp. 1040 (S.D. N.Y. 1986)*, *aff'd*, *842 F.2d 1335 (2d Cir. 1988)* (antitrust jury awarded $ 1.00 in nominal damages to successful plaintiffs). These risks of proving liability and damages weigh in favor of approving this settlement.

f. Risks of Maintaining Class Action Status Through Trial

[HN32] "Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *Warfarin Sodiu, 391 F.3d at 537* (internal quotes and citation omitted). The End-Payor Plaintiffs moved for class certification on October 27, 2003. As a result of the settlement discussions that began shortly thereafter, the Defendants' response to the class [*67] certification motion was extended to April 12, 2004. The Defendants never filed their response, as the settlement had been tenta-

tively reached by the time their response was due. Consequently, the record does not reflect vigorous opposition, but class certification throughout trial is not guaranteed. This factor neither favors nor disfavors settlement.

g. Defendants' Ability to Withstand a Greater Judgment

The parties do not contend that Defendants could not withstand a larger judgment. However, [HN33] many settlements have been approved where a settling defendant has had the ability to pay greater amounts. *See, e.g., Warfarin Sodium, 391 F.3d at 538* ("The fact that DuPont could afford to pay more does not mean that it is obligated to pay any more than what the . . . class members are entitled to under the theories of liability that existed at the time the settlement was reached."); *Young Soon Oh v. AT & T Corp., 225 F.R.D. 142, 150-51 (D.N.J. 2004)*; *In re Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 632 (E.D. Pa. 2004)*; *Erie County Retirees Assoc. v. County of Erie, Pennsylvania, 192 F. Supp. 2d 369, 376 (W.D. Pa. 2002)*; [*68] *Lazy Oil Co. v. Witco Corp., 95 F. Supp. 2d 290, 318 (W.D. Pa. 1997)*. This factor does not favor nor disfavor settlement.

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

[HN34] A court evaluating a proposed class action settlement should also consider "whether the settlement represents a good value for a weak case or a poor value for a strong case." *Warfarin Sodium, 391 F.3d at 538*; *Girsh, 521 F.2d at 157* (court must examine the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation); *see also Hammon v. Barry, 752 F. Supp. 1087, 1095 (D.D.C. 1990)* (court must "evaluate the strengths and weaknesses of class members' claims within the framework of their likelihood of establishing liability and damages at trial"). In the process, however, a court must "avoid deciding or trying to decide the likely outcome of a trial on the merits." *In re National Student Marketing Litigation, 68 F.R.D. 151, 155 (D.D.C. 1974)*.

Continued litigation of this lawsuit would require further [*69] decisions by the Court on (a) End-Payor Plaintiffs' pending class certification motion, (b) Defendants' pending motion to dismiss the End-Payor Plaintiffs' Amended Consolidated Complaint, (c) future summary judgment motions, and (d) at trial.

(i) Estimated Damages

On the basis of estimates by End-Payor Plaintiffs' expert economists, the maximum antitrust single damages totaled $ 109,704,738.00. Economists retained by the Plaintiff States reached a similar estimate of antitrust single damages for settlement purposes. These estimates likely overstate the amount of damages that would be available to Plaintiffs absent this settlement, because they were compiled before the Court issued its decisions that effectively limited End-Payor Plaintiffs' and Plaintiff States' claims to only a late listing claim. This claim has a shorter period of antitrust injury than some of the others.

(ii) Comparison of the Settlement Amount to Estimated Damages and Weighed Against the Risks of Non-Recovery

In order [HN35] to evaluate the propriety of an antitrust class action settlement's monetary component, a court should compare the settlement recovery to the estimated single damages. *In re Ampicillin Anttitrust Litigation, 82 F.R.D. 652, 654 (D.D.C. 1979)* [*70] (citing *Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974))*. Although in certain circumstances a plaintiff class may recover treble damages if it prevails at trial, that result is far from certain. Moreover, in the present case, End-Payor Plaintiffs and Plaintiff States represent consumers pursuant to state laws that provide for varying levels of recovery -- some provide only for recovery of equitable relief, and many do not provide for recovery of treble damages.

As the Second Circuit emphasized in *Detroit v. Grinnell Corp, 495 F.2d at 455*, an antitrust class action settlement may be approved even if the settlement amounts to a small percentage of the single damages sought, if the settlement is reasonable relative to other factors, such as the risk of no recovery. "In fact there is no reason, at least in theory, why satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.*

Relative to maximum estimated damages of $ 109,704,738, the Settlement Consideration represents about one-third of single damages, quite a substantial recovery, especially given that three of the [*71] initial four theories of antitrust liability can no longer be advanced. This recovery must, of course, be weighed against the substantial risks of continued litigation, including future risks at summary judgment and trial. The Court is satisfied that the settlement agreement accounts for the risks inherent in this complex litigation and provides appropriate relief in light of these risks.

j. Conclusion

Given this Court's analysis, the Court concludes that the nine-factor test utilized by the Third Circuit is satisfied. The settlement is fair, adequate, and reasonable under *Federal Rule of Civil Procedure 23(e)*.

D. Approval Of The Plan of Distribution

[HN36] "As with settlement agreements, courts consider whether distribution plans are fair, reasonable, and adequate." *FTC v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 205 F.R.D. 369, 381 (D.D.C. 2002)*; *see also In re Vitamins Antitrust Litig., 2000 U.S. Dist. LEXIS 8931, 2000 WL 1737867, at *6 (D.D.C. Mar. 31, 2000)*. "In evaluating the formula for apportioning the settlement fund, the Court keeps in mind that district courts enjoy broad supervisory powers over the administration of class [*72] action settlements to allocate the proceeds among the claiming class members equitably." *Hammon v. Barry, 752 F. Supp. 1087, 1095 (D.D.C. 1990)* (internal quotation marks and citations omitted); *accord In re "Agent Orange" Prod. Liability Litig., 818 F.2d 179, 181 (2d Cir. 1987).*

At the Court's request, End-Payor Plaintiffs' Co-Lead Counsel and State Liaison Counsel jointly proposed a Plan of Distribution to the Court. As described in the long form notice, the Plan of Distribution is as follows:

> 32.8% of the Net Settlement Fund will be allocated to consumers ("Consumer Fund"), 16.5% of the Net Settlement Fund will be allocated to state governmental purchasers ("State Fund"), and 50.7% of the Net Settlement Fund will be allocated to Third-Party Payors ("TPP Fund"). Consumers who submit valid claims will receive a *pro rata* share of the Consumer Fund based on the amount he or she paid for Mirtazapine Products during the Class Period, and on how many other consumers file valid claims, and the amount they paid for Mirtazapine Products during the Class Period. Third-Party Payors who submit valid claims will receive a *pro rata* share of the [*73] TPP Fund based on the amount paid by that entity for Mirtazapine Products during the Class Period and on how many other Third-Party Payors file valid claims, and the amount they paid for Mirtazapine Products during the Class Period. The maximum payment to any Class Member may be limited to 100% of the amount that Class Member paid for Mirtazapine Products during the Class Period.

This distribution plan was based on Plaintiffs' expert economists' findings, using data produced by defendants and the Plaintiff States, as well as CMS statistics and data from other reliable sources. These calculations were performed in anticipation of the mediation of this case, and they were used in the mediation and submitted to the Court confidentially during the mediation.

Kim Van Winkle, Liaison Counsel for the Plaintiff States, informed the Court by affidavit and orally at the Fairness Hearing that she reviewed the proposed allocation on behalf of consumers and the Plaintiff States and concluded it is fair, reasonable and adequate for consumers and Plaintiff States. Similarly, Kevin Love, counsel for Vista Healthplan Inc., informed the Court that he reviewed the proposed allocation, and also concluded [*74] that it is fair, reasonable and adequate for TPPs. Mr. Love retained and consulted with a separate expert economist for TPPs only in reaching his conclusion.

As the Plan of Distribution appears fair based on the experts' calculations, and all three groups of Plaintiffs including the Attorneys General support it, and the few related objections that have been made were overruled in Part II(C)(4)(b), this Court gives the plan final approval.

E. Plaintiffs' Motion for Award of Attorneys' Fees, Interest, Reimbursement of Expenses, and Incentive Awards.

Class Counsel request that the Court award attorney fees in the amount of $ 7.8 million plus interest accrued on that amount since it has been held in escrow. The $ 7.8 million requested fee represents 23.6% of the $ 33 million Settlement Fund. [12] Class Counsel also request recovery of reasonable litigation expenses and incentive awards to named Plaintiffs.

> 12 Class Counsel initially indicated they would request up to 25% of the Settlement Fund, as indicated in the notice that was sent to the class. They later reduced that number by providing $ 450,000 more to the class in order to prevent the terms of Rider A from terminating, as described in footnote 6.

[*75] 1. Attorneys' Fees and Interest

This Court first finds that the percentage of fund method is the proper method for compensating Plaintiffs' Counsel in this common fund case. *See, e.g., Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 333 (3d Cir. 1998)* (stating "the percentage of recovery method is generally favored in cases involving a common fund, and is designed to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure"); *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d 722, 734 (3d Cir. 2001)* (stating "the percentage-of-recovery method has long been used in this Circuit in common-fund cases").

[HN37] The Third Circuit set forth with specificity the factors that a court should consider in evaluating such requested attorneys' fees in *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 (3d Cir. 2000)* (overturning a decision that reduced a requested fee of 25% of the recovered fund to 18%). The *Gunter* factors "need not be applied in a formulaic way, and their weight may vary on a case-by-case basis." *Oh v. AT & T Corp., 225 F.R.D. 142, 146 (D.N.J. 2004)* [*76] (citing *Gunter, 223 F.3d at 195*). The *Gunter* factors include (a) the size of the fund created and number of persons benefitting from the settlement, (b) the presence/absence of substantial objections to the fee, (c) the skill of Plaintiffs' counsel, (d) complexity and duration of the litigation, (e) the risk of nonpayment, (f) amount of time devoted to the litigation, (g) awards in similar cases. *See Gunter, 223 F.3d at 195*; *In re Aremissoft Corp. Sec. Litig., 210 F.R.D. 109, 129 (D.N.J. 2002)*.

a. The size of the fund created and the number of persons benefitted by the settlement

Pursuant to the parties' settlement agreement, the class will obtain an immediate and certain benefit of $ 33 million plus accrued interest, less attorneys fees, expenses and incentive award payments as awarded by the Court. Over 65,000 individuals and entities will receive significant financial benefit, without having to go through the time, expense, and risk of continued litigation.

b. The presence or absence of substantial objections to the request for fees

In response to the Notice Plan, only one TPP and seven individual consumers objected to the [*77] payment of the requested attorneys' fees. Of the seven individuals, four are represented by the same counsel and filed near verbatim statements. [13] The presence of a handful of objections does not mean that the requested fee should be denied. *Cf. In re Lloyd's American Trust Fund Litig., 2002 U.S. Dist. LEXIS 22663, 2002 WL 31663577, *3, *38 (S.D.N.Y. Nov. 26, 2002)* (approving fee request of 28% of settlement fund, even though 18% of class members filed objections to the settlement on one or more grounds); *In re Auto. Refinishing Paint Antitrust Litig., 2004 U.S. Dist. LEXIS 29162 (E.D. Pa. Oct. 13, 2004)* (stating that, where nearly 60,000 notices sent out and only three objections were received, the vast majority of the class members had no objection, which counseled in favor of a 32% fee award).

13 These are the objections of Dot K. Kensigner, William L. Bedford III, Susan Ruth Hall, and Robert L. Kensinger, represented by Stephen Tsai.

The single TPP objection was filed by Health Care Service Corporation. In its papers, it objected that 30 [*78] days after the close of the 45-day Notice Period was an insufficient amount of time to file its objections and that Class Counsel do not deserve their fee request. These objections were made without any legal support and were made in a total of three sentences. The TPP's objections are overruled. 30 days after the close of the 45-day Notice Period is a sufficient amount of time to forge an objection, as discussed in Part II(C)(4)(b). Further, Plaintiffs' Counsel did provide support in the record for their time spent litigating case and their contribution to the litigation process has been explained throughout this Opinion.

Objector Nadine Street initially objected that the (a) distribution to Plaintiffs' Counsel should be reduced to 15%, and that (b) Ms. Street did not have sufficient information to further support its objection because the deadline for filing objections coincided with Plaintiffs' deadline for filing its motion for attorneys' fees. As a result, at the Fairness Hearing, the Court granted an extension of time to file objections regarding attorneys' fees so that End-Payor Plaintiffs' brief in support of attorneys' fees could be more fully considered by objectors.

Only [*79] Ms. Street took this opportunity, filing a second objection which further explained her claim that only a 15% distribution to Plaintiffs' Counsel was warranted. The bases were essentially that several law firms were not necessary to litigate Plaintiffs' claims and that Plaintiffs' papers in favor of their fee request were deficient. Based on the complexity of this case as explained in Part I and Part II(C)(4), and based on the supporting documentation in favor of granting Plaintiffs' attorney fees request, this Court finds Ms. Streets's objections to be without merit. [14]

14 Ms. Street also objected to the agreement between the litigating parties and five TPPs that initially opted out of the settlement which stated that, *inter alia*, Defendants would advance up to $ 500,000 of if they rescinded their notices of exclusion. By Order dated June 24, 2005, this Court rejected that part of the agreement, and the five TPPs were afforded absolutely no special treatment in exchange for returning to the class. Thus, Ms. Street's objection as to this point had been resolved before the objection was filed. *See also supra* notes 6 and 9 and accompanying text.

[*80] The nearly identical objections of Dot K. Kensigner, William L. Bedford III, Susan Ruth Hall, and Robert L. Kensinger claimed that Class Counsel should not be allowed a percentage of the $ 33 million Settlement Fund that was created but rather such fund should first be discounted by the 16.5% portion going to the

State Attorneys General. The objections state that the State Attorneys General "are already being paid $ 1 million in fees for their recovery of the 16.5% that is being paid to the states."

The Court understands the thrust of the objection; however, Plaintiffs' Counsel were largely responsible for creating a $ 35 million benefit for the class ($ 33 million Settlement Fund and $ 2 million Notice Fund). Class Counsel took the lead in creating that fund for the states. The States Attorneys General have not objected to Class Counsel's fees and have endorsed the settlement. The objection is without merit.

The remaining objectors are Rhonda Marcus and Robert Geha. Both of them take issue with the percentage of recovery counsel requests but provide little substantiation of why the percentage is excessive. In light of the consideration of the below factors that consider Plaintiffs' [*81] Counsel fee award, these two objections are also without merit. [HN38] The courts do not hesitate to grant attorneys' fees despite the presence of objections when the rationale for awarding fees outweighs the objections. *See e.g., Nichols v. Smithkline Beecham Corp., 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, at *21 (E.D. Pa. Apr. 22, 2005)* (awarding 30% fee despite six substantive objections to settlement, three of which mentioned attorneys' fees); *Oh, 225 F.R.D. at 152* (awarding fee despite three objections); *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 305 (3d Cir. 2005)* (affirming district court's finding that only two objections weighed in favor of awarding fee); *Varacallo, 226 F.R.D. at 251* (awarding fee despite almost 50 objections in large class case).

[HN39] The absence of meaningful class member objection to the proposed fee ordinarily supports the reasonableness of the request. *See In re Rite Aid Corp. Secs. Litig., 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001)*; *In re Orthopedic Bone Screw Prods. Liab. Litig., 2000 U.S. Dist. LEXIS 15980, 2000 WL 1622741, at *6 (E.D. Pa. 2000)*. Further, a working group of State Attorneys General, who worked alongside Class Counsel, [*82] have concluded that the proposed settlement terms, including Class Counsel's request for attorneys' fees, is fair and appropriate.

c. The skill of Plaintiffs' counsel

This settlement was achieved by Class Counsel who include some of the preeminent antitrust firms in the country with decades of experience in prosecuting and trying complex actions, as described in Part II(A)(1)(d). Class Counsel have considerable experience in FDA regulatory matters through other generic drug litigations. The settlement result achieved is a reflection of counsel's skill and expertise. *See In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 261 (D. Del. 2002)* (class counsel "showed their effectiveness through the favorable cash settlement they were able to obtain"); *see also In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 194 (E.D. Pa. 2000)* (awarding 30% fee and stating "the most significant factor in this case is the quality of representation, as measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with [*83] which counsel prosecuted the case and the performance and quality of opposing counsel'").

d. The complexity and duration of the litigation

"As to the complexity of the case, an antitrust class action is arguably the most complex action to prosecute.'" *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004)* (quoting *In re Motorsports Merchandise Antitrust Litig., 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000))*. This matter is extremely complicated, involving the patent, regulatory and antitrust laws, including interpretation of complex provisions of the *Hatch Waxman Act*, as discussed throughout this Opinion.

The discovery process in this case was difficult. Class Counsel (i) reviewed over 800,000 million documents, (ii) for a time, held regular lengthy conference calls with Defendants that resulted in contentious debate and multiple motions to compel, which were briefed and argued before the Court, and (iii) participated in over fifty depositions, most of which were technical and complicated covering subjects such as Orange Book listing protocol and the science relating to the chemical composition of mirtazapine products.

[*84] Further, [HN40] the circumstances surrounding a difficult settlement increase the complexity of a case. *Cf. Reinhart v. Lucent Techs., Inc. (In re Lucent Techs., Inc., Sec. Litig.), 327 F. Supp. 2d 426, 434 (D.N.J. 2004)*. Here, they were lengthy and difficult. Class Counsel coordinated the settlement on behalf of End-Payor Plaintiffs and among 56 states and territories. Class Counsel also dealt with the negotiation of opt-out members. Class Counsel's ability to successfully navigate these hurdles enabled the settlement to come to fruition.

e. The risk of nonpayment

The instant case was presented with significant obstacles since its filing. If the settlement is not consummated, class members may very well receive nothing. End-Payor Plaintiffs and the Plaintiff States proceeded against Defendants on four theories of liability: (1) Fraud on the U.S. Patent and Trademark Office ("PTO") in connection with the prosecution and obtaining of the *099 patent*; (2) wrongful listing of the *099 patent* in the Orange Book; (3) sham patent litigation against generic

competitors based on the *099 patent*; and (4) late listing of the *099 patent*. As described in Part II(C)(4), three of these claims face dismissal by [*85] this Court due to dismissals of such claims in the Generic Manufacturer and Direct Purchaser cases. The Plaintiffs would most likely have been left with their late listing claim and would still have to defeat summary judgment and win at trial. Accordingly, risk of non-payment in this case weigh heavily in favor of approving the requested fee.

f. The amount of time devoted to the litigation

Plaintiffs' counsel have spent over 12,000 combined hours in prosecuting this case on behalf of the class. The complexity of this action required a significant amount of work by a number of attorneys. Class Counsel performed investigations, filed complaints, fought motions to dismiss, filed briefing in support of class certification, participated in extensive and contentious discovery including the review of hundreds of thousands of documents and the conduct of dozens of depositions. Class Counsel's "efforts in posturing this case for trial . . . played a role in spurring the settlement, [and] produced a substantial payout to the class." *In re Newbridge Networks Sec. Litig., 1998 U.S. Dist. LEXIS 23238, *11 (D.D.C. Oct. 22, 1998)*.

Moreover, counsel worked for the class to finalize [*86] the settlement, to oversee claims administration, and will have to work on any future appellate issues. Work was allocated in this case between several law firms.

g. Awards in similar cases

[HN41] In comparing the award in this action with amounts awarded in similar actions, a court's analysis is two-pronged. First, the court compares the actual award requested to other awards in comparable settlements. Second, the court ensures that the award is in line with what an attorney would have received if the fee was negotiated on the open market.

(i) The fee requested here is similar or lower to fees awarded in comparable settlements

[HN42] "A district court may not rely on a formulaic application of the appropriate range in awarding fees but must consider the relevant circumstances of the particular case." *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d 722, 736 (3d Cir. 2001)*. A comparison of awards in similar cases is only a factor in determining the appropriateness of a fee award. *See Gunter, 223 F.3d at 195*. In considering this factor, the Court notes the survey of fee awards that have occurred in similar cases. *See, e.g., In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 306-07 (3d Cir. 2005)* [*87] (review of 289 settlements demonstrates "average attorney's fees percentage [of] 31.71%" with a median value that "turns out to be one-third"); *Cullen v. Whitman Medical Corp., 197 F.R.D. 136, 150 (E.D. Pa. 2000)* ("the award of one-third of the fund for attorneys' fees is consistent with fee awards in a number of recent decisions within this district"); *Varacallo v. Mass. Mut. Life. Ins. Co., 226 F.R.D. 207, 249 (D.N.J. 2005)* ("'Many courts, including several in the Third Circuit, have considered 25% to be the standard "benchmark" figure for attorney fee awards in class action lawsuits, with adjustments up or down for significant case-specific factors'"); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 at *14* ("The above figures are in accord with a recent Federal Judicial Center study that found that in federal class actions generally median attorney fee awards were in the range of 27 to 30 percent.").

[HN43] Courts within the Third Circuit often award fees of 25% to 33% of the recovery. *See, e.g., In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 (E.D. Pa. 2004)* (approving 30% fee of a $ 202 million settlement in [*88] an antitrust class action); *Nichols v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616 (E.D. Pa. 2005)* (approving 30% fee of the $ 65 million settlement in similar pharmaceutical antitrust action); *In re ATI Technologies Inc. Sec. Litig., 2003 U. S. Dist. LEXIS 7062 (E.D. Pa. Apr. 28, 2003)* (awarding 30% of fund); *In re Cell Pathways, Inc., 2002 U.S. Dist. LEXIS 18359 (E.D. Pa. Sept. 24, 2002)* ("A thirty percent fee is very comparable to awards in similar cases, providing further support for approval of the fee petition"); *Blackman v. O'Brien Envtl. Energy, Inc., 1999 U.S. Dist. LEXIS 7160 (E.D. Pa. May 11, 1999)* (35% fee awarded). The percentage fee requested in this case (23.6% of the fund) is consistent with other cases.

Moreover, Class Counsel's fee request compares favorably to fees awarded in similar pharmaceutical antitrust actions. See *House v. GlaxoSmithKline PLC, 2005 U.S. Dist. LEXIS 33711, No. 2:02cv442 (E.D. Va. Jan. 10, 2005)* (awarding a fee of 25% of the $ 29 million indirect purchaser [*89] settlement fund); *In re Relafen Antitrust Litig., 2004 U.S. Dist. LEXIS 28801, Master File No. 01-12239-WGY, Order and Final Judgment (D. Mass. April 9, 2004)* (awarding fees of 33 1/3% of $ 175 million of settlement fund).

(ii) The fee requested here is consistent with a privately negotiated contingent fee in the marketplace

[HN44] "When deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Marketing Litig., 264 F.3d 712, 718 (7th Cir. 2001)*. "The object . . .

is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation." *In re Continental Illinois Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992)*.

Consequently, courts should look to the private market when assessing the reasonableness of the percentage fee. *See In re RJR Nabisco Sec. Litig., 1992 U.S. Dist. LEXIS 12702, MDL No. 818, 1992 WL 210138, *7 (S.D.N.Y. Aug. 24, 1992)* ("What should govern [fee] awards is . . . what the market pays in similar cases"). [HN45] A one-third contingency fee is generally standard [*90] in individual cases. *See, e.g., In re Copley Pharm., Inc., 1 F. Supp. 2d 1407, 1412 (D. Wyo. 1998)*; *see also In re Aetna Sec. Litig., 2001 U.S. Dist. LEXIS 68 (E.D. Pa. Jan. 4, 2001)* ("thirty percent is in line with what is routinely privately negotiated in contingency fee tort litigation"). The requested fee award of 23.6% is below that general standard.

h. Lodestar Cross-check

[HN46] A lodestar cross-check is not a *Gunter* factor but is a "suggested practice." *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d at 735 (3d Cir. 2001)*. When performing the lodestar cross-check, the Third Circuit has recognized that "'multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d at 341* (quoting 3 Herbert Newberg & Albert Conte, Newberg on Class Actions, § 14.03 at 14-5 (3d ed. 1992)). "The district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Rite Aid Corp. Sec. Litig., 396 F.3d at 306-07* (footnote omitted).

The record demonstrates that Class [*91] Counsel's lodestar in this case is $ 4,506,294.25, resulting in a multiplier of 1.73. An examination of recently approved multipliers reveals that the multiplier requested here is on the low end of the spectrum. *See, e.g., Nichols v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, *24 (E.D. Pa. Apr. 22, 2005)* (approving multiplier of 3.15); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, *4 (E.D. Pa. June 2, 2004)* (approving a 2.66 multiplier); *Weiss v. Mercedes-Benz of N. Am., Inc., 899 F. Supp. 1297, 1304 (D.N.J.)*, *aff'd*, *66 F.3d 314 (3d Cir. 1995)* (approving a 9.3 multiplier); *In re Rite Aid Corp. Secs. Litig., 146 F. Supp. 2d 706, 736 (E.D. Pa. 2001)* (multiple of over 6). This lodestar cross check corroborates the result of the percentage of fund method.

i. Conclusion

Taking into consideration the above factors, this Court awards Plaintiffs' Counsel $ 7.8 million of the Settlement Fund, plus 23.6% of the accrued interest on the Settlement Fund.

2. Reimbursement of Reasonable Expenses

In addition to their request for Attorneys' fees, Plaintffs' Counsel seek reimbursement of $ 494,683.73 in [*92] expenses. [HN47] "Counsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case." *In re Cendant Corp., 232 F. Supp. 2d 327, 343 (D.N.J. 2002)* (quoting *In re Safety Components Int'l, Inc., 166 F. Supp. 2d 72, 104 (D.N.J. 2001))*; *Abrams v. Lightolier, Inc., 50 F.3d 1204, 1225 (3d Cir. 1995)*.

Upon review of the affidavits submitted in support of this request, the Court finds the requested amount to be fair and reasonable. Plaintiffs' Counsels' expenses reflect costs expended for purposes of prosecuting this litigation, including substantial fees for experts; substantial costs associated with creating and maintaining an electronic document database; travel and lodging expenses; copying costs; and the costs of deposition transcripts. Reimbursement of similar expenses is routinely permitted. *See e.g., Oh v. AT & T Corp., 225 F.R.D. 142, 154 (D.N.J. 2004)* (finding the following expenses to be reasonable: "(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and [*93] express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund relating to *pro hac vice"*).

3. Incentive Awards to Named Plaintiffs

Finally, Plaintiffs' Counsel request the approval of $ 75,000 in incentive awards to the five Class Representatives. They seek $ 30,000 for each of the two TPPs and $ 5,000 for each of three individual consumers. "Like the attorneys in this case, the class representatives have conferred benefits on all other class members and they deserve to be compensated accordingly." *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 at *18* (citation omitted). In the instant action, the Class Representatives, spent a significant amount of their own time and expense litigating these cases for the benefit of the absent members of the settlement class, and as is recognized by a multitude of courts, their efforts should not go unrecognized. *See e.g., FTC v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 205 F.R.D. 369, 400 (D.D.C. 2002)* ("Incentive awards are not uncommon in class action litigation and particularly where . . [*94] . a common fund has been created for the benefit of the entire class. . . . In fact,

courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation") (internal quotations and citation omitted).

In the detailed notice sent to Class members, Class Counsel indicated they would seek incentive awards in an amount not to exceed $ 100,000.00. No class members objected. The amounts requested are similar to amounts awarded in similar settlements. *See e.g., Nichols, 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616 at *24* (approving $ 5,000 to each third-party payor named plaintiff, $ 2,500 to each consumer named plaintiff); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, *18 (E.D. Pa. 2004)* (approving $ 25,000 to each representative of the classes). The named Plaintiffs complied with all reasonable demands and provided significant assistance to counsel in the prosecution of this case. The requested incentive awards are both appropriate and reasonable.

III. CONCLUSION

For the foregoing reasons, (a) End-Payor Plaintiffs' and Plaintiff States' motion for final [*95] approval of settlement, and (b) Class Counsel for End-Payor Plaintiffs' motion for attorneys' fees of $ 7.8 million (plus accrued interest), litigation expenses, and incentive award to Class Representatives are granted.

September 13, 2005

Faith S. Hochberg

Hon. Faith S. Hochberg, U.S.D.J.

TAB 19

LEXSEE 2000 U.S. DIST. LEXIS 8931

IN RE: VITAMINS ANTITRUST LITIGATION, This Document Applies To: All Actions.

Misc. No. 99-197 (TFH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2000 U.S. Dist. LEXIS 8931*; *2000-1 Trade Cas. (CCH) P72,862

March 30, 2000, Decided
March 31, 2000, Filed

DISPOSITION: [*1] Plaintiffs' motion for final approval of the class action Settlement Agreement GRANTED. Settlement plan of distribution APPROVED. Tyson plaintiffs' renewed motion to intervene and the additional opt-out plaintiffs' motion for leave to intervene DENIED.

COUNSEL: For LEAD PLAINTIFFS, DONALDSON & HASENBEIN, INC V F. HOFFMAN-LA ROCHE LTD, ET AL 99-762, DONALDSON & HASENBEIN, INC V ROCHE VITAMINS, INC, 98-1116, ANIMAL SCIENCE PRODUCTS, INC V HOFFMANN-LA ROCHE INC, ET AL 98-2947, ANIMAL SCIENCE PRODUCTS INC V CHINOOK GRP LTD, 99-544, DAD'S PRODUCTS CO, INC V F. HOFFMANN-LA ROCHE LTD, ET AL 99-599, PILGRIM'S PRIDE CORP V CHINOOK GRP LTD, ET AL 99-718, PILGRIM'S PRIDE CORP V HOFFMANN-LA ROCHE INC, ET AL 99-720, LIVENGOOD FEEDS, INC V HOFFMANN-LA ROCHE INC, ET AL 99-782, LAKELAND CASH FEED CO V HOFFMAN-LA ROCHE INC., ET AL 99-921, TEXAS FARM PRODUCTS CO V HOFFMAN-LA ROCHE INC., ET AL 99-986, WRIGHT ENRICHMENT, INC V CHINOOK GRP, LTD, ET AL 99-1014, WRIGHT ENRICHMENT, INC V HOFFMANN-LA ROCHE INC, ET AL 99-1015, WRIGHT ENRICHMENT, INC V LONZA INC, 99-1013, CENTRAL CONNECTICUT COOPERATIVE FARMERS ASSOCIATION, plaintiffs: Ann Catherine Yahner, COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, DC.

[*2] For LEAD PLAINTIFFS, DONALDSON & HASENBEIN, INC V F. HOFFMAN-LA ROCHE LTD, ET AL 99-762, DONALDSON & HASENBEIN, INC V ROCHE VITAMINS, INC, 98-1116, ANIMAL SCIENCE PRODUCTS, INC V HOFFMANN-LA ROCHE INC, ET AL 98-2947, ANIMAL SCIENCE PRODUCTS INC V CHINOOK GRP LTD, 99-544, DAD'S PRODUCTS CO, INC V F. HOFFMANN-LA ROCHE LTD, ET AL 99-599, PILGRIM'S PRIDE CORP V CHINOOK GRP LTD, ET AL 99-718, PILGRIM'S PRIDE CORP V HOFFMANN-LA ROCHE INC, ET AL 99-720, LIVENGOOD FEEDS, INC V HOFFMANN-LA ROCHE INC, ET AL 99-782, LAKELAND CASH FEED CO V HOFFMAN-LA ROCHE INC., ET AL 99-921, TEXAS FARM PRODUCTS CO V HOFFMAN-LA ROCHE INC., ET AL 99-986, WRIGHT ENRICHMENT, INC V CHINOOK GRP, LTD, ET AL 99-1014, WRIGHT ENRICHMENT, INC V HOFFMANN-LA ROCHE INC, ET AL 99-1015, WRIGHT ENRICHMENT, INC V LONZA INC, 99-1013, ANIMAL SCIENCE PRODUCTS, INC., DOMAIN INC, MIDWESTERN PET FOODS, INC., AG MARK INC, PILGRIM'S PRIDE CORPORATION, DONALDSON & HASENBEIN, J&R FEED SERVICES, INC., LAKELAND CASH FEED COMPANY, INC., SHAKLEE CORPORATION, UNITED COOPERATIVE FARMERS, INC., plaintiffs: Jonathan David Schiller, BOIES & SCHILLER, L.L.P., Washington, DC.

For LEAD PLAINTIFFS, DONALDSON & HASENBEIN, INC V F. HOFFMAN-LA [*3] ROCHE LTD, ET AL 99-762, DONALDSON & HASENBEIN, INC V ROCHE VITAMINS, INC, 98-1116, ANIMAL SCIENCE PRODUCTS, INC V HOFFMANN-LA ROCHE INC, ET AL 98-2947, ANIMAL SCIENCE PRODUCTS INC V CHINOOK GRP LTD, 99-544, DAD'S PRODUCTS CO, INC V F. HOFFMANN-LA ROCHE LTD, ET AL 99-599, PILGRIM'S PRIDE CORP V CHINOOK GRP LTD, ET AL 99-718, PILGRIM'S PRIDE CORP V HOFFMANN-LA ROCHE INC, ET AL 99-720, LIVENGOOD FEEDS, INC V HOFFMANN-LA ROCHE INC, 99-782, LAKELAND CASH FEED CO V HOFFMAN-LA ROCHE INC., ET AL 99-921, TEXAS

FARM PRODUCTS CO V HOFFMAN-LA ROCHE INC., ET AL 99-986, WRIGHT ENRICHMENT, INC V CHINOOK GRP, LTD, ET AL 99-1014, WRIGHT ENRICHMENT, INC V HOFFMANN-LA ROCHE INC, ET AL 99-1015, WRIGHT ENRICHMENT, INC V LONZA INC, 99-1013, INDIRECT PURCHASER CLASS/COX PLAINTIFFS, RICKY COX, RICHARD K. MYERS, JENNIFER G. WILLIAMS, BERYL D. HALL, HUBERT E. PETRIE, JR., DONALD W. BALES, LARRY L. MCALPINE, JOSEPH CAMINITTI, ERIC S. WILSON, DALEN WEBB, ROBERT SHULTE, JOSHUA P. PRENTICE, AMY KIVENHOVEN, MARIA ANGELES, ELWOOD E. WILLIAMS, SANDRA K. MCCLOUD, ELIZABETH R. CROCKER, SCOTT BAYLENS, JAMES A. BURKE,III, plaintiffs: Steven A. Martino, Stephen L. Klimjack, JACKSON, TAYLOR, MARTINO & HEDGE, Mobile, AL.

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For INDIRECT PURCHASER CLASS/COX PLAINTIFFS, RICKY COX, RICHARD K. MYERS, JENNIFER G. WILLIAMS, BERYL D. HALL, HUBERT E. PETRIE, JR., DONALD W. BALES, LARRY L. MCALPINE, JOSEPH CAMINITTI, ERIC S. WILSON, DALEN WEBB, ROBERT SHULTE, JOSHUA P. PRENTICE, AMY KIVENHOVEN, MARIA ANGELES, ELWOOD E. WILLIAMS, SANDRA K. MCCLOUD, ELIZABETH R. CROCKER, SCOTT BAYLENS, JAMES A. BURKE,III, plaintiffs: M. Stephen Dampier, P. Dean Waite, Jr., Mary Elizabeth Snow, THE SHARBROUGH LAW FIRM, PC, John W. Sharbrough, III, Mobile, AL.

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For NUTRA BLEND, LLC, plaintiff: C. Brooks Wood, MORRISON & HECKLER, LLP, Kansas City, MO.

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For TRAVIS CRANE, plaintiff: Dallas D. Ball, Cayce, SC.

For KELLOGG COMPANY, plaintiff: Jeannine M. Tsukahara, ZELLE, HOFFMAN, VOELBEL & GETTE, L.L.P., San Francisco, CA.

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For BRISTOL MYERS SQUIBB, plaintiff: Colin A. Underwood, SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP, New York, NY.

For HORMEL FOODS CORP, JENNIE-O FOODS, SPARBOE AGRIC [*8] CORP, FORM A FEED INC, BIG GAIN INC, LAND O'LAKES, INC., GOLDEN STATE FEEDS INC, DIAMOND CROSS INC, LAND O'LAKES/HARVEST STATES FEEDS LLC, THOMAS PRODUCTS INC, QUALITY LIQUID FEEDS INC, CENEX HARVEST STATE COOPERATIVES, WILLMAR POULTRY FARMS INC, GESSELL FEED INC, VIKING FEED SERVICE, GOLD'N PLUMP POULTRY INC, MALT O MEAL COMPANY, plaintiffs: Phillip A. Cole, LOMMEN, NELSON, COLE & STAGEBERG, P.A., Minneapolis, MN.

For LEAD DEFENDANTS, DONALDSON & HASSENBEIN, INC V F. HOFFMANN-LA ROCHE LTD, ET AL 98-762, DONALDSON & HASENBEIN, INC V ROCHE VITAMINS INC, ET AL 98-1116, ANIMAL SCIENCE PRODUCTS, INC V HOFFMANN-LA ROCHE INC, ET AL 98-2947, ANIMAL SCIENCE PRODUCTS, INC V CHINOOK GRP LTD, ET AL 99-544, DAD'S PRODUCTS CO, INC V F. HOFFMANN-LA ROCHE LTD, ET AL 99-599, PILGRIM'S PRIDE CORP. V CHINOOK GRP LTD, ET AL 99-718, PILGRIM'S PRIDE CORP V HOFMANN-LA ROCHE INC, ET AL 99-720, LIVENGOOD FEEDS, INC. V HOFFMANN-LA ROCHE, INC, ET AL 99-782, LAKELAND CASH FEED CO V HOFFMANN-LA ROCHE INC, ET AL 99-921, PRODUCTS CO V HOFMANN-LA ROCHE INC, ET AL 99-986, WRIGHT ENRICHMENT INC V CHINOOK GRP LTD, ET AL 99-1014, WRIGHT ENRICHMENT INC V HOFFMANN-LA ROCHE INC, ET AL 999-1015, WRIGHT ENRICHMENT INC [*9] V LONZA INC, 99-1013, defendants: Bruce L. Montgomery, ARNOLD & PORTER, Washington, DC.

For LEAD DEFENDANTS, DONALDSON & HASSENBEIN, INC V F. HOFFMANN-LA ROCHE LTD, ET AL 98-762, DONALDSON & HASENBEIN, INC V ROCHE VITAMINS INC, ET AL 98-1116, ANIMAL SCIENCE PRODUCTS, INC V HOFFMANN-LA ROCHE INC, ET AL 98-2947, ANIMAL SCIENCE PRODUCTS, INC V CHINOOK GRP LTD, ET AL 99-544, DAD'S PRODUCTS CO, INC V F. HOFFMANN-LA ROCHE LTD, ET AL 99-599, PILGRIM'S PRIDE CORP. V CHINOOK GRP LTD, ET AL 99-718, PILGRIM'S PRIDE CORP V HOFMANN-LA ROCHE INC, ET AL 99-720, LIVENGOOD FEEDS, INC. V HOFFMANN-LA ROCHE INC, ET AL 99-782, LAKELAND CASH FEED CO V HOFFMANN-LA ROCHE INC, ET AL 99-921, PRODUCTS CO V HOFMANN-LA ROCHE INC, ET AL 99-986, WRIGHT ENRICHMENT INC V CHINOOK GRP LTD, ET AL 99-1014, WRIGHT ENRICHMENT INC V HOFFMANN-LA ROCHE INC, ET AL 99-1015, WRIGHT ENRICHMENT INC V LONZA INC, 99-1013, RHONE-POULENC S.A., RHONE-POULENC AG COMPANY, INC., ROUSSEL CORP, defendants: George T. Manning, JONES, DAY, REAVIS & POGUE, Washington, DC.

For LEAD DEFENDANTS, DONALDSON & HASSENBEIN, INC V F. HOFFMANN-LA ROCHE LTD, ET AL 98-762, DONALDSON & HASENBEIN, INC V ROCHE VITAMINS INC, ET AL 98-1116, ANIMAL

[*10] SCIENCE PRODUCTS, INC V HOFFMANN-LA ROCHE INC, ET AL 98-2947, ANIMAL SCIENCE PRODUCTS, INC V CHINOOK GRP LTD, ET AL 99-544, DAD'S PRODUCTS CO, INC V F. HOFFMANN-LA ROCHE LTD, ET AL 98-599, PILGRIM'S PRIDE CORP. V CHINOOK GRP LTD, ET AL 99-718, PILGRIM'S PRIDE CORP V HOFMANN-LA ROCHE INC, ET AL 99-720, LIVENGOOD FEEDS, INC. V HOFFMANN-LA ROCHE, INC, ET AL 99-782, LAKELAND CASH FEED CO V HOFFMANN-LA ROCHE INC, ET AL 99-921, PRODUCTS CO V HOFMANN-LA ROCHE INC, ET AL 99-986, WRIGHT ENRICHMENT INC V CHINOOK GRP LTD, ET AL 99-1014, WRIGHT ENRICHMENT INC V HOFFMANN-LA ROCHE INC, ET AL 99-1015, WRIGHT ENRICHMENT INC V LONZA INC, 99-1013, BASF AG, defendants: Tyrone C. Fahner, MAYER, BROWN & PLATT, Chicago, IL.

For LEAD DEFENDANTS, DONALDSON & HASSENBEIN, INC V F. HOFFMANN-LA ROCHE LTD, ET AL 98-762, DONALDSON & HASENBEIN, INC V ROCHE VITAMINS INC, ET AL 98-1116, ANIMAL SCIENCE PRODUCTS, INC V HOFFMANN-LA ROCHE INC, ET AL 98-2947, ANIMAL SCIENCE PRODUCTS, INC V CHINOOK GRP LTD, ET AL 99-544, DAD'S PRODUCTS CO, INC V F. HOFFMANN-LA ROCHE LTD, ET AL 99-599, PILGRIM'S PRIDE CORP. V CHINOOK GRP LTD, ET AL 99-718, PILGRIM'S PRIDE CORP V HOFMANN-LA ROCHE INC, ET AL 99-720, LIVENGOOD FEEDS, INC. [*11] V HOFFMANN-LA ROCHE, INC, ET AL 99-782, LAKELAND CASH FEED CO V HOFFMANN-LA ROCHE INC, ET AL 99-921, PRODUCTS CO V HOFMANN-LA ROCHE INC, ET AL 99-986, WRIGHT ENRICHMENT INC V CHINOOK GRP LTD, ET AL 99-1014, WRIGHT ENRICHMENT INC V HOFFMANN-LA ROCHE INC, ET AL 99-1015, WRIGHT ENRICHMENT INC V LONZA INC, 99-1013, F. HOFFMAN-LAROCHE, LTD., defendants: Scott William Muller, DAVIS, POLK & WARDWELL, Washington, DC.

For LEAD DEFENDANTS, DONALDSON & HASSENBEIN, INC V F. HOFFMANN-LA ROCHE LTD, ET AL 98-762, DONALDSON & HASENBEIN, INC V ROCHE VITAMINS INC, ET AL 98-1116, ANIMAL SCIENCE PRODUCTS, INC V HOFFMANN-LA ROCHE INC, ET AL 98-2947, ANIMAL SCIENCE PRODUCTS, INC V CHINOOK GRP LTD, ET AL 99-544, DAD'S PRODUCTS CO, INC V F. HOFFMANN-LA ROCHE LTD, ET AL 99-599, PILGRIM'S PRIDE CORP. V CHINOOK GRP LTD, ET AL 99-718, PILGRIM'S PRIDE CORP V HOFMANN-LA ROCHE INC, ET AL 99-720, LIVENGOOD FEEDS, INC. V HOFFMANN-LA ROCHE, INC, ET AL 99-782, LAKELAND CASH FEED CO V HOFFMANN-LA ROCHE INC, ET AL 99-921, PRODUCTS CO V HOFMANN-LA ROCHE INC, ET AL 99-986, WRIGHT ENRICHMENT INC V CHINOOK GRP LTD, ET AL 99-1014, WRIGHT ENRICHMENT INC V HOFFMANN-LA ROCHE INC, ET AL 99-1015, WRIGHT ENRICHMENT INC V LONZA [*12] INC, 99-1013, TAKEDA AMERICA INC, TAKEDA VITAMIN & FOOD USA, INC., defendants: Lawrence Byrne, SQUADRON, ELLENOFF, PLESENT & SHEINFELD, LLP, New York, NY.

For REILLY INDUSTRIES, INC., defendant: Karen Natalie Walker, Jeffrey Bossert Clark, KIRKLAND & ELLIS, Washington, DC.

For EM INDUSTRIES, INC., defendant: Theodore V. Cacioppi, Craig M. Walker, ROGERS & WELLS, New York, NY.

For BASF AG, RHONE-POULENC S.A., F HOFFMAN-LA ROCHE, INC., defendants: Jonathan Lee Greenblatt, SHEARMAN & STERLING, Washington, DC.

For DUCOA, L.P., DCV, INC., defendants: James R. Weiss, PRESTON, GATES, ELLIS & ROUVELAS MEEDS, Washington, DC.

For DUCOA, L.P., DCV, INC., defendants: Kurt S. Odenwald, Jim J. Shoemake, Kevin K. Spradling, GUILFOIL PETZALL & SHOEMAKE, LLP, St. Louis, MO.

For CONAGRA, INC., defendant: Paul H. Friedman, DECHERT PRICE & RHOADS, Washington, DC.

For PETER COPLAND, defendant: Donald I. Baker, BAKER & MILLER, PLLC, Washington, DC.

For RHONE-POULENC AG COMPANY, INC., RHONE-POULENC ANIMAL NUTRITION INC, defendants: John M. Majoras, JONES, DAY, REAVIS & POGUE, Cleveland, OH.

For MITSUI & CO., LTD., MITSUI & COMPANY, INCORPORATED (USA), defendants: [*13] Aileen Meyer, WINTHROP, STIMSON, PUTNAM & ROBERTS, Washington, DC.

For AKZO NOBEL, INC., defendant: Laurence Truman Sorkin, CAHILL, GORDON & REINDEL, New York, NY.

For AKZO NOBEL, INC., defendant: S. Benjamin Bryant, ALLEN GUTHRIE & MCHUGH, Charleston, WV.

For BIOPRODUCTS, INC., defendant: Michael E. Nogay, SELLITTI NOGAY & MCCUNE, Weirton, WV.

For VITACHEM COMPANY, defendant: Erin R. Brewster, MACCORKLE LAVENDER & CASEY, PLLC, Charleston, WV.

For DAIICHI PHARMACEUTICALS CORPORATION, DAIICHI FINE CHEMICALS, INC., defendants: Michael Louis Denger, GIBSON, DUNN & CRUTCHER, L.L.P., Washington, DC.

For TANABE SEIYAKU COMPANY LIMITED, TANABE, U.S.A., INC., defendants: Mark Riera, SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP, Los Angeles, CA.

For SUMITOMO CHEMICAL CO., LTD., defendant: Peter Dean Isakoff, WEIL, GOTSHAL & MANGES, L.L.P., Washington, DC.

For TANABE, U.S.A., INC., defendant: William L. Monts, III, WILSON, HAJEK & SHAPIRO, P.C., Virginia Beach.

For BASF AKTIENGESELLSCHAFT, defendant: Stephen Fishbein, SHEARMAN & STERLING, New York, NY.

For KUNO SOMMER, defendant: John Worth Kern, IV, JANIS, SCHUELKE & WECHSLER, Washington, DC.

For [*14] EISAI CORPORATION OF NORTH AMERICA, defendant: Amy L. Bess, SONNENSCHEIN, NATH & ROSENTHAL, Washington, DC.

For E.I. DUPONT DE NEMOURS AND COMPANY, defendant: George J Terwilliger, MCGUIRE, WOODS, BATTLE & BOOTHE, LLP, Washington, DC.

For E. MERCK, defendant: Bret Alan Campbell, Joanne Celia Lewers, CLIFFORD, CHANCE, ROGERS & WELLS, LLP, Washington, DC.

For GIVAUDAN-ROURE FLAVORS, INC., defendant: Jacqueline Ray Denning, ARNOLD & PORTER, Washington, DC.

For MID-AMERICA DAIRYMEN, INC., ASSOCIATED MILK PRODUCERS, INC., MILK PRODUCTS LLC, BORDEN INC, claimants: William W. Kocher, Columbus, OH.

For CALIFORNIA INDIRECT PURCHASER/GARDNER-ROSSI COMPANY PLAINTIFFS, GARDNER/ROSSI COMPANY, LINDA PHILION, JULIA HART-LAWSON, HOWARD GENDLER, CONNE MARIE GRAHAM, HELENE SILVER, LINNEY DICKINSON and ROSS W. GRAHAM, movants: Eric B. Fastiff, LEIFF, CABRASER, HEIMANN & BERNSTEIN, LLP, Guido Saveri, SAVERI & SAVERI, PC, San Francisco, CA.

For STATE PLAINTIFFS/GIRAL, movant: Jeffrey Andrew Bartos, QUERRIERI, EDMOND & CLAYMAN, Washington, DC.

For STEPHEN J. POLLAK, special master: Stephen John Pollak, SHEA & GARDNER, Washington, DC.

JUDGES: Thomas F. Hogan, United States [*15] District Judge.

OPINION BY: Thomas F. Hogan

OPINION

MEMORIALIZING OPINION -- Re: Final Approval of Settlement

In accordance with the Court's March 28, 2000 bench opinion, this Court will grant class plaintiffs' motion for final approval of the class action Settlement Agreement ("Settlement" or "Agreement") and will deny the Tyson plaintiffs' renewed motion for leave to intervene and the additional opt-outs' motion for leave to intervene. The Court will also grant approval of the Settlement plan of distribution.

I. BACKGROUND

Class plaintiffs' counsel initiated their investigation into the bulk vitamin industry in 1997. Co-lead Decl. P 15. In March 1998, the first complaint on behalf of a class of direct purchasers of vitamins was filed, alleging that as early as 1990, and continuing into 1998, the world's largest manufacturers of vitamins, vitamin premixes and other bulk vitamin products had conspired to fix prices, allocate markets, and engage in other illegal conduct with respect to vitamin products, in violation of *section 1* of the Sherman Act, *15 U.S.C. § 1*. *Id.* P 16. In March 1999, the Antitrust Division of the United States Department of Justice [*16] announced the first antitrust guilty pleas in this industry. *Id.* P 21. In following months, several more guilty pleas followed. Settlement negotiations began in May, 1999, before the public an-

nouncement of the guilty pleas of F. Hoffman-La Roche and BASF AG. *Id.* P 27. Settlement negotiations intensified over the summer and continued through most of the fall.

On November 3, 1999, class plaintiffs presented the Court with the Settlement Agreement, along with their motion seeking preliminary approval of this Settlement. The Court set a hearing for preliminary approval on November 22, 1999. On November 12, 1999, several direct action plaintiffs filed motions to intervene for the limited purpose of objecting to the MFN clause. On November 22, 1999, the Court heard arguments on behalf of class plaintiffs' motion for preliminary approval and the direct action plaintiffs' motions to intervene to strike the MFN clause. On November 23, 1999, the Court denied the pending motions to intervene, permitted the opt-outs to participate as *amicus curiae* in the final approval hearing, preliminarily approved the class Settlement, conditionally certified the Vitamins Products and Choline Chloride [*17] classes, authorized the form and manner of class notice, and scheduled a *Rule 23(e)* hearing on the fairness of the Settlement for March 28, 2000.

II. DISCUSSION

A. Standard for Final Approval of a Class Action Settlement

Pending before the Court is class plaintiffs' Motion for Final Approval of the Settlement. [1] *Fed. R. Civ. P. 23(e)* provides that:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

1 The Settling defendants filed a memorandum in support of the class plaintiffs' Motion for Final Approval on March 22, 2000.

Approval of a proposed class action settlement is within the discretion of the court. *United States v. District of Columbia, 933 F. Supp. 42, 47 (D.D.C. 1996)*. "In determining whether a settlement should be approved, the court must decide whether it is fair, reasonable, and adequate [*18] under the circumstances and whether the interests of the class as a whole are being served if the litigation is resolved by the settlement rather than pursued." Manual For Complex Litigation, Third, § 30.42 at p.264 (1999). Although settlement is favored, court review must not be perfunctory. *Id.*

There is no single, obligatory test in this Circuit for determining whether the proposed settlement of a class action should be approved under *Rule 23(e)*. *Pigford v. Glickman, 185 F.R.D. 82, 98 (D.D.C. 1999)*. Instead, courts consider the facts and circumstances of each case, ascertain the factors that are most relevant in the circumstances and exercise their discretion in deciding whether the proposed settlement is "fair, adequate, and reasonable." *Id.* Several factors that have been examined by courts in this Circuit in determining whether to approve settlements in class actions include: (1) whether the settlement is the result of arm's-length bargaining, (2) the terms of the settlement in relation to the strength of plaintiffs' case; (3) the status of the litigation at the time of settlement; (4) the reaction of the class; and (5) the opinion of experienced counsel. [*19] *See Stewart v. Rubin, 948 F. Supp. 1077, 1087 (D.D.C. 1996)*, *aff'd*, *326 U.S. App. D.C. 337, 124 F.3d 1309 (D.C. Cir. 1997)*; *Thomas v. Albright, 139 F.3d 227, 230-33 (D.C. Cir. 1998)*; *Pigford, 185 F.R.D. at 98-101*; *In re National Student Marketing Litig., 68 F.R.D. 151, 155 (D.D.C. 1974)*, *Osher v. SCA Realty I, 945 F. Supp. 298, 304 (D.D.C. 1996)*

The inquiry is perhaps best stated in the recent decision by Judge Ziegler, approving certain partial settlements in *In re Flat Glass Antitrust Litig.*: "The test is whether the settlement is adequate and reasonable and not whether a better settlement is conceivable." *In re Flat Glass Antitrust Litig.*, slip op. at 6 (W.D. Pa. Feb. 9, 2000). As stated in the Manual for Complex Litigation, Third, a "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *Id.* § 30.42.

B. The Settlement Agreement

The Settlement Agreement before this Court achieves for the class a recovery of approximately [*20] 18 to 20 percent of the dollar value of the class purchases of the affected vitamins from the Settling defendants. This Settlement, which had a maximum dollar recovery of $ 1.05 billion, will fully and finally resolve the claims of more than 3,900 class members and will result in a distribution of approximately $ 325 million [2]. In addition, the class Settlement has also resulted in approximately 35 settlements with opt-out plaintiffs representing more than $ 700 million in purchases of vitamin products from Settling defendants. The Settlement is unprecedented for many reasons: the percentage rate on which the Agreement is predicated is in the highest tier of settlements for price-fixing class actions; the total dollar value to the class is the largest settlement of a price-fixing class action; the Settlement is a totally cash settlement and calls for immediate payment by defendants; the Agreement

was reached at a relatively early stage in the litigation; the class purchases from non-settling defendants remain in the case as to the non-settling defendants; the release of claims does not cover foreign sales of vitamins or indirect purchaser claims; the Settlement contains a provision [*21] for three-year injunctive relief barring future collusive behavior by these defendants; the Agreement contains a most-favored-nations clause ("MFN clause") with a two-year duration; and the Settlement provides for a separate fund for attorneys' fees. [3]

2 In addition, the Settlement calls for cash payment to the Choline Chloride class of between $ 5 and $ 25 million. This Choline Chloride Settlement is solely with BASF AG and leaves the class's claims with respect to Choline Chloride against the other defendants intact. BASF's initial cash payment of $ 5 million will not be reduced as a result of exclusions from the class; if class plaintiffs are unable to recover from the other Choline Chloride defendants an amount equal to that part of $ 20 million which represents the percentage of purchases by class members remaining in the Choline Chloride Settlement class, BASF must pay the difference to the class. There have been no objections, from class members or opt-outs, to the Choline Chloride Settlement.

3 The separate fund for attorneys fees provides the class with greater certainty as to what each class member would receive from the Settlement, because the amount that class plaintiffs receive is not reduced by the award of attorneys' fees.

[*22] The MFN clause, which is the subject of all objections to this Settlement, lasts until the earlier of (i) November 3, 2001 (two years after the Settlement Agreement was executed); (ii) the date of a final pretrial order in an opt-out plaintiff's action; or (iii) 30 days prior to a trial date in an opt-out plaintiff's action. Settl. Agr. P 22(g). The MFN clause contains two exceptions: (i) an opt-out plaintiff may settle with a Settling defendant, as many have already done, at the same or a lesser settlement percentage than the percentage at which the particular defendant settled with the Vitamin Products class (i.e. 18-20 percent), plus up to 17.65 percent for attorneys' fees (Settl. Agr. P 22(c), (e)); and (ii) a larger payment to an opt-out plaintiff does not trigger the MFN if it is determined that the opt-out plaintiff is an a materially different situation from class members, a determination with which class plaintiffs' counsel must concur. *Id.* P 22(e).

This Court finds that the Settlement in this case is the product of extensive arm's length negotiations by experienced counsel, undertaken in good faith, and after substantial factual investigation and legal analysis. Moreover, [*23] given the substantial risks inherent in every litigation and the benefits to the class in achieving an early resolution to this dispute, the Court finds that the terms of the Agreement are fair in relation to the strength of the plaintiffs' case. Plaintiffs' expert economist Dr. Beyer has submitted a detailed affidavit summarizing his investigation, statistical analysis and opinion with respect to the probable range of damages that would be presented to a jury if plaintiffs' claims had gone to trial; and the Settlement percentage of 18-20 percent was well within Dr. Beyer's projected range. In addition, the Settlement payments, representing an 18-20 percentage rate, far exceed recoveries approved in other price-fixing antitrust actions. Based upon the representations made by counsel and the Court's own experience with antitrust litigation, this proposed Settlement ranks near the top of the highest tier of antitrust settlements.

Furthermore, courts favor the pursuit of early settlement. *See, e.g., In re M.D.C. Holdings Securities Litig., 1990 U.S. Dist. LEXIS 15488, 1990 WL 454747*, at *7 (S.D. Calif. 1990) ("Early settlements benefit everyone involved in the process and everything that can be [*24] done to encourage such settlements -- especially in complex class action cases -- should be done."). By reaching a large settlement at a relatively early stage in the litigation, plaintiffs avoided significant expense and delay and ensured a guaranteed recovery at a high level. Antitrust price fixing actions are generally complex, expensive, and lengthy. Trial of this matter easily could have lasted months and may not even have started for many years; and any verdict inevitably would have led to an appeal and might well have resulted in appeals by both sides and a possible remand for retrial, thereby further delaying final resolution of this case. These factors weigh in favor of the proposed Settlement. *See Slomovics v. All for a Dollar, Inc., 906 F. Supp. 146, 149 (E.D.N.Y. 1995)* ("The potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interest of the Class.").

The Court has strongly weighed the reactions of both the class members and the opt-out plaintiffs in determining the reasonableness of this Settlement. Considering that more than 5,900 notices of this Court's preliminary approval [*25] of the Settlement were sent to class members, the Court finds it noteworthy that there were only three objections to the Settlement [4] and that of these none were on behalf of a class member [5]. Nevertheless, all concerns raised by the *amicus* participants have been accorded great weight by this Court.

4 Objections were raised by Nutra-Blend, the Cargill plaintiffs, and the Tyson plaintiffs. All three related to the MFN clause. The Cargill and Tyson groups were concerned with the duration

of the clause and Nutra-Blend challenged the scope of the clause.

5 Originally, there was one objection filed on behalf of a class member but that objection, which was filed by the Dairy Farmers of America on February 3, 2000, was withdrawn on March 27, 2000 because the parties reached an agreement in principle to resolve the potential claims related to the Dairy Farmers' purchases of vitamin containing products from Givaudan Roure Flavors, an affiliate of the Roche Settling defendants.

All objections to the [*26] Settlement related to the scope and duration of the MFN clause. Specifically, the Tyson and Cargill plaintiffs were concerned that the two-year MFN clause was unduly restrictive and would impede their ability to resolve their cases with the Settling defendants during the duration of this clause; and Nutra-Blend objected to the class counsels' "veto power" with regard to the "material difference" provision of the clause. After seriously considering these objections to the MFN clause, the Court finds that both the two-year period of this clause and the "material difference" provision are reasonable.

First, the Court notes that the MFN clause is not triggered until an opt-out settlement exceeds the high percentage of recovery (approximately 18-20 percent) achieved by the class plaintiffs. The fact that many opt-outs have already entered into multimillion dollar settlements on this basis [6] and many more are presently negotiating to settle at or below the class amount supports the Court's finding that this recovery is both adequate and reasonable. Second, the two-year time limitation on this clause has already started to run, so the time remaining on this clause is now approximately a [*27] year and a half. Although this is still lengthy, the Court must take into account the projected duration of this litigation, considering that the parties are currently in the beginning stages of discovery. In a case of this magnitude, a year and a half is not outside the range of reasonableness. *See In re Ampicillin Antitrust Litig., 82 F.R.D. 652, 655 (D.D.C. 1979)* (approving a two-year MFN clause that reduced proportionally the settling defendant's payment to plaintiffs if plaintiffs settled with the remaining defendants for less than $ 6.44 million, either before a specified date or more than 30 days before a firm trial date); *see also In re Prescription Brand Name Prescription Drugs Antitrust Litig., 1996-1 Trade Cas. (CCH) P 71,449 at P 77, 317-18* (N.D. Ill. June 21, 1996).

6 A significant portion of the opt-outs -- already numbering 35 companies representing over 12 percent of class purchases -- have entered into settlements with the Settling defendants for the same percentage or slightly less than that in the Settlement Agreement. Co-lead Decl. P 64.

[*28] Furthermore, the Court finds no support for the opt-out plaintiffs' contention that they would be effectively barred from settling their cases during the term of this clause. It is pure speculation that the Settling defendants would be willing to pay more than the class Settlement recovery during the next year and a half or thereafter. It is also pure conjecture that if the Settling defendants were willing to pay more, they would refuse to do so during this period because the MFN clause would then require them to pay the same consideration to the class. The Court has no knowledge of the motivations underlying class defendants' acceptance of the Settlement Agreement, but it is at least conceivable that these defendants settled for an amount less than they would ultimately be willing to pay, with the knowledge that they could then settle with the opt-out plaintiffs and still have sufficient funds to pay the same consideration to the class. The MFN clause is also flexible in that it permits the opt-out plaintiffs to settle for a mix of cash and non-cash consideration. *See Ampicillin, 82 F.R.D. at 655* (approving a MFN clause because it allowed opt-out plaintiffs plenty [*29] of room for "reasonable settlement discussions.")

Finally, as recommended by the Manual for Complex Litigation, the MFN clause permits class counsel and defendants to exempt from the clause a settlement with an opt-out plaintiff if unique circumstances are demonstrated, and allows for access to the Court if the class plaintiffs and class defendants do not agree. This was the substance of Nutra-Blend's objection to the Settlement. Nutra-Blend argued that it should not be bound by the MFN clause because as a blender it was in a unique situation since it suffered not only from the overcharges on the vitamins themselves but also suffered lost profits when it was forced to resell products at a price less than it cost Nutra-Blend to purchase the raw materials. The Court notes that Nutra-Blend's ability to opt out of the settlement, which it has done here, provides an efficient and effective way to deal with the existence of a small group of entities that wish to press unique claims against the Settling defendants. However, once Nutra-Blend elected to opt-out of the Settlement, it no longer had standing to object to the terms of that Agreement. It is firmly established in this Circuit, and [*30] elsewhere, that class members who opt out of the class and are thus not parties to the settlement lack standing to object to the settlement. *Mayfield v. Barr, 300 U.S. App. D.C. 31, 985 F.2d 1090, 1092 (D.C. Cir. 1993)*; *Agretti v. ANR Freight Sys., Inc., 982 F.2d 242, 245, 246-48 (7th Cir. 1992)*; *Pigford, 185 F.R.D. at 103 n.17*; *Ampicillin, 82 F.R.D. at 654*. These decisions rest "on the principle that those who fully preserve their legal rights cannot chal-

lenge an order approving an agreement resolving the legal rights of others." *Mayfield, 985 F.2d at 1093*.

Nutra-Blend argues that it was forced to opt-out of this Settlement by the fact that the Agreement required it to forego its lost profit claims. However, it is well-settled that "in order to achieve a comprehensive settlement that would prevent relitigation of settled questions," in a class action, a court may permit a broad release of claims based on overlapping factual predicates. *City Partnership Co. v. Atlantic Acquisition Limited Partnership, 100 F.3d 1041, 1044 (1st Cir. 1996)*; *In re Corrugated Container Antitrust Litig., 643 F.2d 195, 221 (5th Cir. 1981)* [*31] ("The weight of authority establishes that. . . a court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged by reason of or in connection with any matter or fact set forth or referred to in the complaint"), *cert denied*, *456 U.S. 998 (1982)*. Since other similarly situated blenders, such as Animal Science Products, Inc., have chosen to remain in the class, Nutra-Blend's interests were represented; the class simply decided as a whole that it made sense to waive the small number of lost profit claims in favor of a larger overall recovery to the class. Furthermore, the presence of other blenders in the class shows that some blenders found the total settlement sufficient to warrant the release of claims for lost profits.

After seriously considering all objections, the Court finds that this Settlement is the product of arms' length negotiation by experienced counsel and that it is fair, adequate and reasonable. Therefore, this Court will grant final approval of the Settlement.

C. Settlement Plan of Distribution

The Settlement Agreement provides for a "plan of distribution." *See* Settl. [*32] Agr. PP 16, 17(d). Pursuant to *Fed. R. Civ. P. 23(e)*, therefore, this Court must determine, within its discretion, whether the plan of distribution is fair, adequate and reasonable. *In re Chicken Antitrust Litig., 669 F.2d 228, 238 (5th Cir. 1982)*. Settlement distributions, such as this one, that apportions funds according to the relative amount of damages suffered by class members have repeatedly been deemed fair and reasonable. *See, e.g., Beecher v. Able, 575 F.2d 1010, 1013-14 (2d Cir. 1978)*; *In re Chicken, 669 F.2d at 240-42*. Therefore, since there were no objections to the Settlement plan of distribution and since the Court finds this distribution plan to be fair, adequate, and reasonable, the Court will approve the Settlement plan of distribution.

D. Motions to Intervene

There were two motions to intervene filed for the limited purpose of seeking deletion of the MFN clause in this Settlement: (1) the renewed motion to intervene filed by the Tyson plaintiffs [7] and (2) the motion to intervene brought by 24 additional opt-out companies.

> 7 On November 12, 1999, the Tyson plaintiff-intervenors moved pursuant to *Fed. R. Civ. P. 24(a)(2)* and *24(b)(2)* to intervene for the limited purpose of seeking deletion of the MFN clause from the Settlement Agreement. On November 23, 1999, the Court denied intervention and granted preliminary approval of the Settlement. In its order, the Court reserved discretion to ultimately consider and rule upon the proper scope and duration of the MFN clause and stated that plaintiff intervenors' concerns can be addressed at the fairness hearing. These plaintiffs have appealed the denial of their motions to intervene and oral argument is currently scheduled for April 3, 2000. Accordingly, these plaintiff-intervenors now renew their motions to intervene to pursue their request for participation as parties at the fairness hearing with respect to the MFN clause issue.

[*33] The Court finds that both groups of opt-out plaintiffs lack standing to intervene in the proposed Settlement since they have opted out of the class. *See Building & Constr. Trades Dept. v. Reich, 309 U.S. App. D.C. 244, 40 F.3d 1275, 1282 (D.C. Cir. 1994)* (Article III standing necessary for *Rule 24(a)* standing); *Mayfield, 985 F.2d at 1092* ("those who fully preserve their legal rights cannot challenge an order approving an agreement resolving the legal rights of others."). Permissive intervention under *Rule 24(b)* is not a mechanism for evading the requirements of legal standing. *See EEOC v. National Children's Center, Inc., 331 U.S. App. D.C. 101, 146 F.3d 1042, 1046 (D.C. Cir. 1998)* ("permissive intervention . . . has always required an independent basis for jurisdiction.").

Courts have permitted limited intervention only where the party has standing to advance the legal interest it seeks to protect. *EEOC v. Nevada Resort Ass'n, 792 F.2d 882, 886 (9th Cir. 1986)* (permissive intervention denied in Title VII action in absence of standing); *see also In re Discovery Zone Sec. Litig., 181 F.R.D. 582, 596 (N.D. Ill. 1998)* [*34] (limited intervention to challenge class settlement only appropriate with respect to those with standing to object to the settlement, class members or class members who were excluded from the settlement). The only exception to this rule of standing is one for "plain legal prejudice," which does not include allegations of injury in fact or tactical disadvantage. *Mayfield, 985 F.2d at 1092*; *Agretti, 982 F.2d at 247*; *see*

also Hirshon v. Republic of Bolivia, 979 F. Supp. 908, 912 (D.D.C. 1997) ("The sole factor in determining whether a nonsettling party has standing to object to a settlement agreement is whether the agreement causes him plain legal prejudice. . . . Such prejudice occurs when the settlement strips the party of a legal claim or cause of action."). Both groups of opt-out plaintiffs have failed to meet this standard because there has been no convincing showing that they would be foreclosed from pursuing their claims as a result of this Settlement.

Therefore, since these opt-out plaintiffs cannot show, with any degree of certainty, that they have suffered a legally cognizable impairment of interest and since permissive intervention [*35] would only serve to unduly delay the Settlement, the plaintiff-intervenors' renewed motion to intervene and the additional opt-outs' motion to intervene, both for the limited purpose of seeking deletion of the MFN clause, should be denied. Their concerns were heard by the Court in their capacity as *amicus curiae* and granting intervention would substantially prejudice the class by unnecessarily delaying this Settlement. *See In Re Domestic Air Transportation Antitrust Litig., 148 F.R.D. 297, 337 (N.D. Ga. 1993)* ("The Court has discretion to deny a motion for permissive intervention if intervention would unduly delay or prejudice adjudication of the rights of the original parties. . . . [The objecting class members'] presence through intervention would not accomplish any more than their participation as objectors and would create the possibility of further delay in final disposition of this action.")

III. CONCLUSION

For the foregoing reasons, the Court grants final approval of the Settlement Agreement and approves the plan of distribution of Settlement proceeds. The Court also denies the Tyson plaintiffs' renewed motion to intervene and the additional opt-outs' [*36] motion to intervene. An order will accompany this opinion.

March *30Th*, 2000

Thomas F. Hogan

United States District Judge

MEMORIALIZING ORDER -- Re: Final Approval of Settlement

In accordance with the accompanying memorializing opinion and the Court's March 28, 2000 bench opinion, it is hereby

ORDERED that class plaintiffs' motion for final approval of the class action Settlement Agreement is **GRANTED**. It is further

ORDERED that the Settlement plan of distribution is **APPROVED**. And it is further hereby

ORDERED that the Tyson plaintiffs' renewed motion to intervene and the additional opt-out plaintiffs' motion for leave to intervene are **DENIED**.

March *30Th*, 2000

Thomas F. Hogan

United States District Judge

TAB 20

HOnly the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.
Re: In re WILLIAM LYON HOMES SHAREHOLDER LITIGATION.
C.A. No. 2015-N.

Submitted: Jan. 9, 2007.
Filed: Jan. 18, 2007.

Joseph A. Rosenthal, Esquire, Rosenthal, Monhait & Goddess, P.A., Wilmington, DE.
S. Mark Hurd, Esquire, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, DE.
David C. McBride, Esquire, Young Conaway Stargatt & Taylor, LLP, Wilmington, DE.
Pamela S. Tikellis, Esquire, Chimicles & Tikellis LLP, Wilmington, DE.
Catherine G. Dearlove, Esquire, Richards, Layton & Finger, P.A., Wilmington, DE.
R. Bruce McNew, Esquire, Taylor & McNew LLP, Wilmington, DE.

JOHN W. NOBLE, Vice Chancellor.
***1** Dear Counsel:

Intervenor Alaska Electrical Pension Fund has moved, under Court of Chancery Rule 59, for reconsideration of, or for a new trial following, the Court's denial of its request for an award of attorneys' fees and expenses.[FN1] Alaska raises three contentions: (1) that its attorneys, California Counsel, should be credited with a "causal connection" between their efforts and the settlement approved in the Delaware Action; (2) that an evidentiary hearing should have been held to allow Alaska to develop the record to support its claim for attorneys' fees and expenses; and (3) that the Court should specify that its decision is "without prejudice to Alaska's right to file a separate application" in the California Action.

FN1. *In re William Lyon Homes S'holder Litig.*, 2006 WL 3860916 (Del. Ch. Dec. 21, 2006). The terms defined there will also be used here.

* * *

A party moving for reargument bears the burden of demonstrating that the Court misunderstood a material fact or misapplied the law.[FN2] To obtain a new trial, the disappointed party must show that manifest injustice otherwise would result.[FN3] To the extent that Alaska may be seeking to ask the Court to modify its judgment, even though no judgment has been entered, it is Alaska's obligation to demonstrate "(1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice."[FN4]

FN2. *In re ML/Eq Real Estate P'ship Litig.*, 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000).

FN3. *See, e.g., Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, at *2 (Del. Ch. May 11, 2001).

FN4. *Nash v. Schock*, 1998 WL 474161, at *1 (Del. Ch. July 23, 1998).

* * *

This action involved a challenge to a tender for the publicly-held, minority shares of the Company. The tender consideration increased from $93 per share to $109 per share in two discrete steps. The first, from $93 per share to $100 per share, resulted from the initial agreement negotiated by Delaware Counsel to settle the Delaware Action. Alaska chose not to participate in that settlement and has not demonstrated that its acts (or the acts of California Counsel) aided that settlement. When the Defendants and Delaware Counsel reached their initial understanding, Alaska was asked to join in the settlement. Alaska now argues that the mere fact that it was asked to join in the settlement demonstrates that it must have contributed to (or caused to some extent) the agreement. When defendants settle a dispute that is being litigated in more than one forum,

they obviously want to resolve it on a comprehensive basis. That a plaintiff in another forum is invited to participate in the settlement proves nothing with respect to whether that plaintiff's efforts had any causal connection to the settlement.

After Delaware Counsel had agreed to settle for $100 per share, a third party investor with a sizable holding of stock in the Company balked and approached the Defendants directly. With its economic power, it was able to achieve something that none of the lawyers could achieve: an additional increase of $9 per share. Alaska concedes that its counsel did not directly cause that increase; [FN5] it intimates that its counsel indirectly caused the increase, perhaps by keeping the litigation ongoing in California. That, however, is a contention for which there is no factual basis. The third-party investor, with or without the continuing litigation in California, would have achieved the increase, and the settlement before this Court would have been revised accordingly.

FN5. Alaska's Mot. at ¶ 2.

***2** Alaska and California Counsel are not being penalized, as they suggest, for failing to participate in the initial settlement of the Delaware Action.[FN6] In order to be awarded a fee, California Counsel are required to show a "causal connection." They have not demonstrated that their efforts contributed either to the initial settlement (from $93 to $100 per share) or to the final increase (from $100 to $109 per share). Without a causal connection between their efforts and either of the increases in share price (or any of the other benefits achieved through the settlement of the Delaware Action), they are left with nothing more than having undertaken a parallel action in a different forum. As *Infinity Broadcasting* teaches, the "mere pendency" of litigation that involves the same claims in another jurisdiction is not sufficient to satisfy the burden, held in this instance by California Counsel, [FN7] to show that "their efforts elsewhere conferred a benefit realized as part of the Delaware settlement."[FN8]

FN6. Their suggestion that Delaware Counsel did not achieve the maximum benefit possible for the shareholder class may be fair criticism of the fee award itself. It does not, however, demonstrate that California Counsel should be compensated.

FN7. *In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285, 293 (Del.2002).

FN8. *Id.* at 291.

* * *

Alaska next argues that it did not have "a fair opportunity to develop and present the evidence which the Court's decision has required."[FN9]

FN9. Alaska Mot. at ¶ 3. If Alaska is suggesting that the need for an evidentiary hearing could not be foreseen because the Court applied other than settled law, that suggestion is rejected because no new law is at work here.

At the hearing to consider both approval of the settlement and award of attorneys' fees and expenses, the Court specifically raised with counsel for Alaska the question of whether an evidentiary hearing should be held. Counsel, however, did not accept the Court's invitation; he merely responded that Alaska would be "amenable" to such a hearing.[FN10]When a judge asks whether an evidentiary hearing is necessary and counsel to whom the question is asked does not respond that a hearing is necessary (or requested), the party represented by that counsel cannot later come forward, after receiving a decision with which it is not satisfied, and express its second thoughts. The opportunity to seek a hearing was extended; Alaska could have taken advantage of the opportunity, but it did not. The Court properly went forward to decide the fee application based on the record as it was.[FN11]

FN10. The colloquy, in part, was as follows:

> The Court: I'm-this is a-a question to the committee as a whole, but you're [Counsel for Alaska] at the podium. Is this something that really requires an evidentiary hearing? I don't imagine anybody really likes the affirmative answer to that, but put yourself in my position. How am I supposed to go about resolving it [the question of whether California Counsel conferred a benefit reflected in the settlement] otherwise?

> [Counsel for Alaska]: Well, I do think you have affidavits to support that. I actually would be amenable to an evidentiary hearing, but I do believe ...
>
> Settlement Hr'g Tr. (Aug. 9, 2006) at 69-70.

FN11. It should also be noted that Alaska never sought to take discovery and never asked for an evidentiary hearing.

* * *

Alaska asks that the Court state that its decision is without prejudice to Alaska's rights to pursue a fee application in the related California Action. The Court declines Alaska's invitation. The Court determined the questions presented to it. Specifically, it concluded that Alaska could not establish a causal connection between the efforts of its lawyers and the settlement of the Delaware Action; therefore, it is not entitled to an award of fees by this Court. There is no reason to qualify that decision.[FN12]

FN12. Defendant General William Lyon, in his opposition to Alaska's motion, may be asking-it is not entirely clear-that the Court determine whether its judgment should be given *res judicata* (or, perhaps, collateral estoppel) effect by the courts of California if Alaska should resume its quest for a fee award in that venue. The *res judicata* (or collateral estoppel) effect, however, of a court's judgment is not to be determined in advance by the court in which the judgment is entered. *In re Nat'l Auto Credit, Inc. S'holders Litig.*, 2004 WL 1859825, at *3 (Del. Ch. Aug. 3, 2004).

* * *

For the foregoing reasons, Alaska has not met its burdens under Court of Chancery Rule 59; therefore, its motion for reconsideration or for a new trial is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

Del.Ch.,2007.
In re William Lyon Homes Shareholder Litigation
Not Reported in A.2d, 2007 WL 270428 (Del.Ch.)

END OF DOCUMENT

TAB 21

United States District Court,C.D. California.
David WILSON, individually and on behalf of all others similarly situated, Plaintiff,
v.
AIRBORNE, INC., Airborne Health, Inc., Knight-McDowell Labs, Thomas "Rider" McDowell, Victoria Knight-McDowell, and Does 1-100, inclusive, Defendants.
No. EDCV 07-770-VAP (OPx).

Aug. 13, 2008.

Andrea R. Gold, Jonathan K. Tycko, Lorenzo B. Cellini, Tycko & Zavareei LLP, Washington, DC, David B. Casselman, Melissa M. Harnett, Wasserman Comden Casselman & Pearson, Tarzana, CA, Dina E. Micheletti, Jeffrey Louis Fazio, Fazio Micheletti, San Ramon, CA, Sarah Romero, Stephen Gardner, Dallas, TX, for Plaintiff. Bruce A. Colbath, Weil Gotshal & Manges, Gayle Rosenstein Klein, McKool Smith P.C., New York, NY, Gregory D. Hull, Jill J. Ho, Joseph Richard Wetzel, Weil Gotshal and Manges, Redwood Shores, CA, Kenneth L. Steinthal, Laura J. Protzmann, Weil Gotshal and Manges LLP, New York, NY, Gary W. Nevers, Mark Steven Reusch, Nevers Palazzo Maddux and Packard PLC, Westlake Village, CA, Christopher A. Bandas, Bandas Law Firm P.C., Corpus Christi, TX, Frank C. Liuzzi, Liuzzi Murphy and Solomon LLP, San Francisco, CA, C Benjamin Nutley, J Garrett Kendrick, Kendrick & Nutley, Pasadena, CA, Daniel Y Zohar, Zohar Law Firm Los Angeles, CA, David M. Wacksman, David M Wacksman Esq LLC, Hackensack, NJ, Hassan A. Zavareei, Jonathan K. Tycko, Tycko and Zavareei LLP, Steven M. Skalet, Merhi & Skalet PLLC, Washington, DC, William J. Pinilis, Pinilis Halpern LLP, Morristown, NJ, for Defendants.

ORDER (1) GRANTING MOTION FOR FINAL APPROVAL OF SETTLEMENT, (2) GRANTING IN PART MOTION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES, AND (3) GRANTING IN PART MOTION FOR INCENTIVE AWARD TO PLAINTIFF

VIRGINIA A. PHILLIPS, District Judge.
***1** Plaintiff's Motion for Final Approval of Settlement, Motion for Attorneys' Fees and Litigation Expenses, and Motion for Incentive Award to Plaintiff came before this Court for hearing on June 16, 2008. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court GRANTS the Motion for Final Approval of Settlement, GRANTS in part the Motion for Attorneys' Fees and Litigation Expenses, and GRANTS in part the Motion for Incentive Award to Plaintiff.

I. BACKGROUND

A. Procedural History

Plaintiff David Wilson filed a Complaint in California Superior Court for the County of San Bernardino on May 17, 2006. The Complaint alleged state law claims against Defendants Airborne Inc., Airborne Health, Inc., and Knight-McDowell Labs, based on their allegedly misleading and deceptive advertising for Airborne, a nutritional supplement. According to the Complaint, Airborne's packaging and advertising falsely promised "100% Satisfaction Guaranteed," (Compl.¶ 15), and touted Airborne as a "Miracle Cold Buster," (Compl.¶ 15), that can ward off a cold after its onset. (Compl ¶ 18.) Defendants also were alleged to rely on the results of a clinical study, even though it was conducted by persons who were not scientists or doctors and who were paid by Defendants. (Compl.¶¶ 22-24.)

Plaintiff Wilson brought the Complaint on behalf of a class of persons who "purchased the Airborne Cold Remedy, and who (1) resided in California during the Class Period; (2) purchased the Product while located in California; or (3) purchased the Product from a source in California."(Compl.¶ 30.) The Class Period was defined as the four-year period before the filing of the Complaint, or May 17, 2002, through May 17, 2006. The Complaint alleged causes of action for: (1) violation of the Consumer Legal Remedies Act, Cal. Civ.Code section 1750; (2) violation of the Unfair Competition Act, Cal. Bus. & Prof.Code section 17200; (3) negligent misrepresentation; (4) untrue and misleading advertising in violation of Cal. Bus. & Prof.Code section 17500; (5) unjust enrichment; (6) breach of implied warranty; (7) constructive fraud; and (8) deceit.

Wilson filed a First Amended Complaint ("FAC") on August 30, 2006, continuing to allege claims on behalf of a California class. The FAC narrowed the class definition to include only persons who purchased the Airborne Cold Remedy "while residing in California during the Class Period," between May 17, 2002, and May 17, 2006. (FAC ¶ 33.) The FAC also dropped the claims for negligent misrepresentation, constructive fraud, and deceit. The FAC named as new Defendants Airborne Holdings, Inc., and the founders of Airborne, Thomas Rider McDowell and Victoria Knight-McDowell. Defendants responded by filing a demurrer and a motion to strike on October 10, 2006, and a joinder on January 30, 2007.

***2** On May 24, 2007, Plaintiff filed a Second Amended Complaint ("SAC") in California Superior Court, and for the first time made claims on behalf of a nationwide class of Airborne purchasers. The SAC defined the class as "[a]ll persons who purchased Airborne while residing in the United States, from May 17, 2002, to the present."(SAC ¶ 58.) The SAC also defined a subclass, "comprising all class members who are 'consumers' within the meaning of California Civil Code section 1761(d)." (SAC ¶ 58.) The SAC stated causes of action for: (1) a declaration that the two individual Defendants are not shielded from liability by Airborne's corporate form; (2) violation of the Consumer Legal Remedies Act, Cal. Civ.Code section 1761; (3) violation of the False Advertising Law, Cal. Bus & Prof.Code section 17500; (4) violation of the Unfair Competition Law, Cal. Bus. & Prof.Code section 17200; and (5) unjust enrichment.

Defendants removed the case to this Court on June 22, 2007, under the removal provisions of the Class Action Fairness Act, 28 U.S.C. section 1453. (Docket No. 1.)

On August 29, 2007, the parties filed a Joint Motion for Order Granting Preliminary Approval of Settlement (Docket No. 24), along with supporting declarations and exhibits. On the same day, the parties also filed a Joint Motion for Injunction (Docket No. 30), requesting an order enjoining parallel litigation in the United States District Court for the District of New Jersey. On September 24, 2007, the Court held a hearing on the Motions and requested additional briefing by the parties concerning their settlement agreement. By Order dated November 28, 2007, the Court denied the request to enjoin the New Jersey litigation. (Docket No. 116.)By Order dated November 29, 2007 ("Preliminary Approval Order," Docket No. 117), the Court granted preliminary approval to the parties' settlement agreement, provisionally certified a class for settlement purposes, approved the proposed form and manner of notice to class members, and set a schedule for final approval.

On May 19, 2008, Plaintiff filed a Motion for Attorneys Fees and Litigation Expenses ("Fee Motion," Docket No. 135) and Motion for Incentive Award to Plaintiff ("Incentive Award Motion," Docket No. 132). In support of the Fee Motion, Plaintiff also filed a Memorandum of Points & Authorities ("Fee Mem. P. & A.," Docket No. 135)[FN1] and the declarations of Jeffrey L. Fazio ("Fazio Decl.," Docket No. 136) and Stephen Gardner ("Gardner Decl.," Docket No. 133). In support of the Incentive Award Motion, Plaintiff filed his own declaration ("Wilson Decl.," Docket No. 132). In support of both Motions, Plaintiff filed the declaration of Melissa M. Harnett ("Harnett Decl.," Docket No. 134).

> FN1. On May 21, 2008, Plaintiff filed an "Erratum Re Memorandum of Points and Authorities in Support of Motion for Award of Attorney Fees and Litigation Expenses" (Docket No. 141). The Court's citations herein to Plaintiff's Memorandum of Points and Authorities are to the corrected version filed on May 21.

On May 30, 2008, Plaintiff filed a "Motion and Memorandum of Points and Authorities in Support of Final Approval of Settlement ("Settlement Approval Motion," Docket No. 146), along with the declarations of Katherine Kinsella ("Kinsella Decl.," Docket No. 147), Eric C. Hudgens ("Hudgens Decl.," Docket No. 148), Richard M. Pearl (Docket No. 149), and Dina E. Micheletti (Docket No. 150).[FN2] Also on May 30, 2008, Defendants filed a "Memorandum of Law in Support of Final Settlement Approval" ("Def.'s Brief,"Docket No. 144) and the declaration of Lucy Morris (Docket No. 145).

> FN2. On June 2, 2008, Plaintiff filed an Erratum providing the exhibits to the Pearl Declaration, which had been omitted from the initial filing. (Docket No. 153.)

***3** Two persons have filed with the Court objections to the Settlement Approval Motion and Plaintiff's request for attorneys' fees. On May 19, 2008, objectors Kervin M. Walsh and Joel Shapiro, appearing through their respective counsel, filed objections to approval of the settlement and the award of attorneys' fees ("Walsh

Objections," Docket No. 139, and "Shapiro Objections," Docket No. 140).[FN3]

FN3. On May 21, 2008, objectors Denise Fairbank and Falicia Estep attempted to file their objections, but their filings were rejected for failure to file electronically pursuant to General Order 08-02. (Docket No. 143.)

Plaintiff filed a "Consolidated Response to Objections to Settlement Agreement" ("Pl.'s Response," Docket No. 151) on May 30, 2008.[FN4]On June 13, 2008, objectors Joel Shapiro and Kervin M. Walsh each filed a Reply.[FN5] [Docket Nos. 160, 161 ("Shapiro Reply").]

FN4. On June 2, 2008, Plaintiff filed an Erratum to correct the absence of a table of authorities in his original Response. (Docket No. 153.)

FN5. On June 12, 2008, Denise Fairbank filed a Reply to Plaintiff's Response (Docket No. 159), despite her failure properly to file an objection with the Court. Nevertheless, Plaintiff has responded to Fairbank's objections, and Fairbank's counsel appeared at the June 16, 2008, hearing on the Motions. The Court therefore considers Fairbank's objections as set forth below. Fairbank's objections are included as Exhibit H to the Hudgens Declaration ("Fairbank Objections," Docket No. 148).

B. Terms of Settlement Agreement

The parties' settlement agreement provides that Defendants will create a $23.25 million non-reversionary settlement fund.[FN6](Settlement Agreement at 13, ¶ 2(a).) Eligible class members who submit claims can be reimbursed for the purchase price of any Airborne product with a proof of purchase. (*Id.* at 15.)Class members who do not have proofs of purchase can be reimbursed for the purchase price of up to six packages of Airborne. (*Id.* at 15.)If the claims submitted by the end of the claims period indicate that this initial fund will be depleted, Defendants will deposit an additional $250,000 to pay valid claims. (*Id.* at 13, ¶ 2(b).)

FN6. A copy of the parties' "Stipulation and Agreement of Settlement" was provided to the Court in connection with their joint Motion for preliminary approval of the settlement. [*See* Declaration of Melissa M. Harnett in Support of Joint Motion for Order Granting Preliminary Approval of Settlement (Docket No. 37), Ex. 3 ("Settlement Agreement").]

If the claims made exceed the available settlement funds, the funds are to be distributed pro rata to claimants. (*Id.* at 15.)Conversely, if settlement funds remain after the payment of claims, the parties have agreed to *cy pres* distribution to non-profit organizations suggested by the parties and approved by the Court. (*Id.* at 16.)

The settlement agreement also calls for class counsel's fees and expenses to be paid from the settlement fund. (*Id.* at 26.)The agreement provides that class counsel may apply to the Court for a fee and expense award not to exceed 25 percent of the gross settlement fund, after deduction of tax payments, plus a pro rata share of interest, dividends, and other distributions accrued by the fund. (*Id.* at 26.)Defendants' counsel agreed not to oppose the fee application.

The settlement allows for an incentive payment to the named Plaintiff, David Wilson, in an amount to be approved by the Court, but not to exceed $10,000.(*Id.* at 15.)Defendants will pay this amount separately, and in addition to, the amount deposited in the settlement fund for the payment of claims. (*Id.* at 15.)

Though the SAC sought injunctive relief requiring Airborne to change its packaging and advertising, the settlement agreement makes no provision for such changes. Instead, the parties agreed to defer to any equitable relief that may result from ongoing administrative inquiries by the Federal Trade Commission and various state attorneys general. (*Id.* at 22, ¶ 5(a).) Defendants have represented that they are close to entering into a settlement with government authorities. (Defs.' Brief at 1 n. 1.)

***4** Finally, Defendants agreed to pay for the costs associated with giving notice to class members and administering the settlement fund. (*Id.* at 29.)

II. DISCUSSION

A. Motion for Final Approval of Settlement

Rule 23 of the Federal Rules of Civil Procedure provides that the "claims, issues, or defenses of a certified class

may be settled, voluntarily dismissed, or compromised only with the court's approval ."Fed.R.Civ.P. 23(e).Rule 23(e) further states: "If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."Fed.R.Civ.P. 23(e)(2).

1. Notice to the class

As an initial matter, the Court finds that class members received adequate notice of the pendency of the action and the preliminary approval of the settlement agreement. As set forth in the Declaration of Kathleen Kinsella, notice to the class was disseminated via print media advertisements in large-circulation publications, including in-flight travel magazines, and online advertisements. (Kinsella Decl. ¶¶ 24-35.) Where possible, direct notice was sent to identifiable class members. (*Id.* ¶ 23.)Notice also was provided online at www.AirborneHealthSettlement.com. (*Id.* ¶ 36.)Finally, though it was not part of the plan for disseminating notice, initial media coverage of the settlement agreement provided additional opportunities for class members to learn about the settlement. (*Id.* ¶ 40.)The measurements used to estimate the reach of the print and Internet advertisements suggest that 80 percent of adults learned of the settlement. (Kinsella Decl. ¶ 38.)

The Court finds these notice procedures provided "the best notice that is practicable under the circumstances."Fed.R.Civ.P. 23(c)(2)(B).

Objector Shapiro has raised a concern that the settlement class did not receive adequate notice of the Fee Motion, as required by Rule 23(h). (Shapiro Objections at 3-4.) That Rule provides:

> In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.... A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

Fed.R.Civ.P. 23(h)(1). Here, print media advertisements informed potential settlement class members that the proposed settlement fund included the amount from which court-awarded attorneys' fees would be paid, and that the proposed settlement would come before the Court for a hearing on June 16, 2008. (Kinsella Decl. ¶ 24 & Ex. 2.) Where settlement class members could be contacted directly, the notice they received stated that up to 25 percent of the proposed settlement fund could be approved by the Court for attorneys' fees, and that the Court would consider the amount of any attorneys' fee award at the June 16, 2008, hearing. (Kinsella Decl. ¶ 23 & Ex. 1 at ¶¶ 7, 15.)

***5** The Court finds the parties provided notice of the attorneys' fees request in a "reasonable manner," as required by Rule 23(h) (1). Where, as here, settlement class members are retail purchasers of Defendants' consumer product, whose identities and contact information cannot readily be ascertained, the summary nature of the information provided by the parties in their print media advertisements was reasonable. In the cases Objector Shapiro attempts to distinguish from this one, the classes comprised current and former employees of the defendants and securities investors. (Shapiro Reply at 4-5); *see* *Bessey v. Packerland Plantwell, Inc.*, No. 4:06-cv-95, 2007 WL 3173972, *1 (W.D.Mich. Oct.26, 2007); *In re Bisys Secs. Litig.*, No. 04 Civ. 3840(JSR), 2007 WL 2049726 (S.D.N.Y. July 16, 2007). Contact information for the class members in those cases presumably could be ascertained more readily than the potential class members here. Furthermore, Shapiro's objection does not specify how knowing Plaintiff's counsel's precise hourly billing rates or number of hours billed would have altered materially his ability to object to the overall amount of attorneys' fees available under the settlement agreement.

The Court therefore overrules the objections to the adequacy of the notice made by Shapiro. The Court further overrules the objections to the adequacy of notice made by Objector Walsh, who provided no authority for his assertion that the notice should have included information such as the size of the class or the dollar amount of Defendants' products sold during the class period. (Walsh Objections at 2.)

2. Certification of a settlement class

In its Preliminary Approval Order, the Court provisionally certified a nationwide settlement class for purposes of disseminating notice. No arguments against class certification have been raised, and the Court finds that final certification of the class is appropriate.

The class members satisfy the applicable criteria for class

certification under Federal Rule of Civil Procedure 23(a) and 23(b) (3).*See also* *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (addressing class certification for settlement purposes). The numerosity requirement is met based on the hundreds of thousands of claims made in this case to date. Fed.R.Civ.P. 23(a) (1); Hudgens Decl. ¶ 29. The class members share common issues of law and fact, including the content of Airborne's packaging and its alleged deceptive nature. Fed.R.Civ.P. 23(a)(2). The named Plaintiff's claims, arising from his use of Airborne as set forth in his declaration, are typical of the claims that other class members would raise. Fed.R.Civ.P. 23(a)(3); Wilson Decl. Both the named Plaintiff and his counsel have demonstrated that they will fairly and adequately represent the interests of the class, by their vigorous investigation and litigation of this case. Fed.R.Civ.P. 23(a)(4). Finally, in light of the size of the class, common issues predominate over class members' individual issues, and resolution of the common claims in a class action case provides a superior method of adjudication. Fed.R.Civ.P. 23(b)(3).

***6** Accordingly, the Court certifies the proposed class for settlement purposes.

3. Fairness, reasonableness, and adequacy of settlement agreement

In determining whether a settlement agreement's terms are fair, reasonable, and adequate, courts balance several factors, including:

> the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1291 (9th Cir.1992). The Ninth Circuit has recognized the "overriding public interest in settling and quieting litigation," which is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir.1976). The Court must give "proper deference to the private consensual decision of the parties," *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir.1998), while also fulfilling its role as a guardian for absent class members who will be bound by the settlement. *Ficalora v. Lockheed Cal. Co.*, 751 F.2d 995, 996 (9th Cir.1985).

Based on the analysis of relevant factors set forth below, the Court finds the parties' settlement agreement to be fair, adequate, and reasonable.

a. Arms-length negotiations

The Court finds that the settlement agreement is the result of arms-length negotiations between experienced counsel who thoroughly researched the legal issues and understood the relevant facts. As recounted by Plaintiff's counsel, Jeffrey Fazio, in support of the request for attorney's fees, it was not clear at the outset that the parties would reach a settlement agreement. (Fazio Decl. ¶¶ 96-101, 142.) In the period between execution of a memorandum of understanding and the completion of a final agreement, differences of opinion arose that risked Defendants' rejection of the proposed terms. (*Id.* ¶¶ 150-51.)The mediator who presided over the parties' day-long session also described the hard-fought nature of the negotiations. (Fazio Decl. Ex. 2.) The absence of collusion supports approval of the settlement as fair, adequate, and reasonable.

b. Strength of case, and expense and duration of further litigation

Though Plaintiff's counsel believe they could prevail on the merits at trial, they face some significant legal and procedural hurdles that could preclude a trial. The issue of federal preemption, under the Food, Drug, and Cosmetic Act, remains in flux before appellate courts. (Settlement Approval Mot. at 12-13.) The certification of a nationwide class bringing claims under California law would also have to be addressed. Continuing with the litigation would require Plaintiff's counsel, on behalf of the class, to address complex legal and procedural issues without guarantee of success. This further supports approval of the parties' settlement.

c. Extent of discovery completed

***7** Defendants have produced some 600,000 documents, and Plaintiff's counsel also reviewed information concerning Airborne sales revenue in connection with the settlement negotiations. (Settlement Approval Mot. at 15.)

Plaintiff's counsel provided the revenue information to the Court, under seal, as part of the preliminary settlement approval process. The discovery conducted supports a conclusion that the parties entered into the settlement agreement with enough information concerning the facts of the case to support a fair, adequate, and reasonable compromise.

d. Experience and views of counsel

Counsel for the class have established their experience in class action litigation, and their support of the settlement supports final approval. (Fazio Decl. ¶ 25; Gardner Decl. ¶ 12; Harnett Decl. ¶¶ 14-18.)

e. Reaction of class members

The claims administrator has received 419,606 claims through May 25, 2008, with an aggregate face value of $21.7 million. (Hudgens Decl. ¶ 29.) More than 100,000 of these claims appear to have been made falsely, however, because they are based on the purchase of Airborne products that either were not on the market at the time of the claimed purchase, or were not available in the geographic area of the claimed purchase. (*Id.* ¶¶ 23-26.)An additional group of claims, approximately 40,000, request reimbursement for more than the six boxes of Airborne allowed by the settlement agreement without proofs of purchase. (*Id.* ¶ 28.)Though the claims administrator is still sorting out these issues, it has provided 282,717 as the total number of claims that have not been rejected and are not subject to follow-up auditing. (*Id.* ¶ 29.)When the $6.8 million value of the false claims is subtracted from the initial $21.7 million face value of the claims, the result is $14.9 million in claims made on the $23.25 million initial settlement fund. (*Id.*)

The claims administrator has received 230 timely requests to opt out of the settlement, and 2 requests submitted after the May 12, 2008, deadline. (*Id.* ¶ 17 & Ex. D.) The claims administrator also has received 17 objections submitted personally by potential class members, who did not file their objections with the Court as required by the Preliminary Approval Order. Two objectors have filed their objections with the Court. (*Id.* ¶ 18 & Ex. E; Walsh Objections; Shapiro Objections)

In absolute numbers, the objections and number of potential class members requesting to opt out of the suit are small compared with the 282,717 class members who have filed apparently valid claims to date. Though these numbers indicating support of the settlement by class members weigh in favor of approval of the settlement, the Court also considers the specific objections that have been made.

i. Objections by potential class members without counsel

The majority of the 17 objections submitted by potential class members address the filing of the lawsuit, or the objector's support for Airborne, rather than the fairness or adequacy of the settlement terms. (Hudgens Decl. Ex. E.) One objector, for example, wrote a letter stating, "I object to this suit." (*Id.* at 1.)

***8** Another potential class member objected to the "superfluous class action lawsuit." (*Id* at 3.) The Court therefore overrules all of the objections making similar statements, (Hudgens Decl. Ex. E at 1-16), on the ground that they do not object to the settlement terms, and separately addresses the two remaining objections.

One of the two remaining objections, attached as page 17 to Exhibit E of Mr. Hudgens's declaration, does not include the name of the objector. Moreover, the objections raised appear to be addressed adequately by the settlement agreement and the parties. The objector's first concern that fraudulent claims may be filed, because proofs of purchase are not required for up to six boxes, has been addressed by the use of Rust Consulting, an experienced claims administrator. As set forth in Mr. Hudgens's declaration, the claims administrator used its experience in setting the available refund without proof of purchase at six boxes while cognizant of the risk of fraudulent claims. Rust Consulting also has rejected and audited apparently fraudulent claims and appears to be reviewing the claims with appropriate rigor. (*See* Hudgens Decl. ¶ ¶ 23-26, 28.) Airborne also has responded to the objector's concern that he submitted his proofs of purchase to Airborne for a rebate program, thereby precluding him from using those proofs of purchase to submit a claim to the settlement fund for more than six boxes. The objector, and others in the same position, may obtain copies of their proofs of purchase from Airborne, which has retained those documents. (Pl.'s Response at 5.) The Court therefore overrules these objections.

Another objector, Jarrod Joseph LaMothe, suggests that the maximum recovery per claimant should be one package of Airborne, since each package contains

multiple tablets. (Hudgens Decl. Ex. E at 18.) After purchasing one package, a class member would be able to determine whether he or she had been misled by any allegedly false claims and could then cease using the product. (*Id.*) Mr. LaMothe argues that class members therefore should not be reimbursed for more than one package of Airborne. (*Id.*) The Court overrules this objection. The legal remedies sought by Plaintiff in this case included restitution, disgorgement, and punitive damages. (SAC at 30.) By entering into a settlement agreement to resolve the claims of the SAC, the parties reasonably could have used the purchase price of multiple boxes of Airborne as a measuring stick to determine a fair settlement. In other words, the parties were not limited to a settlement encompassing only the amount of Airborne a class member may have been induced to purchase by allegedly misleading claims.

ii. Objections raised through counsel

Objector Shapiro argues that the settlement is inadequate, because it does not provide for equitable relief and defers to government agencies on this issue. (Shapiro Objections at 2.) The Court raised a similar concern during the preliminary settlement approval process, and has been satisfied that a release of claims on behalf of the class without obtaining equitable relief was reasonable. Defendants represent that they are in the process of negotiating an agreement with the Federal Trade Commission that would include equitable relief. (Def.'s Brief at 1 n. 1.) Shapiro's objection on this ground therefore is overruled.[FN7]

> FN7. Shapiro's remaining objection concerning the award of attorney's fees is addressed separately below.

***9** The Court also overrules the objections filed by Objector Walsh, who argues that the settlement is inadequate in limiting recovery for class members without proofs of purchase to the price of six boxes of Airborne. (Walsh Objections at 1-2.) This is essentially a dispute with the form of compromise Plaintiff and his counsel chose to accept by settling, and not a basis for deeming the settlement agreement's terms unfair or inadequate.

Finally, the Court finds the objections raised by Objector Fairbank to be without merit in this case. Fairbank suggests that the settlement agreement should be altered to (1) withhold part of the claims administrator's fees until the distribution process is completed, (2) withhold part of the fees awarded to Plaintiff's counsel until the distribution process is completed, and (3) require that Plaintiff's counsel post a bond to ensure repayment of their fees should the settlement agreement be rejected on appeal. (Fairbank Objections at 2-3.) While such provisions are supported by a practical concern for ensuring that all class members are remunerated in a timely fashion, the terms of the settlement agreement in this case adequately protect the class members' interests. For example, the agreement provides that class counsel's fees will not be paid until any appeals are resolved, unless such appeals concern only the issues of attorneys' fees or Plaintiff's incentive award. (Settlement Agreement at 25-26, ¶ 8.) In other words, class counsel will not receive their attorneys' fees while the finality of the recovery to class members remains in doubt. In addition, the declaration filed by a representative of the claims administrator illustrates its diligence and good faith in overseeing disbursement of settlement funds. (*See* Hudgens Decl.) The Court thus overrules Fairbank's objections.

In light of the factors set forth above supporting final approval of the parties' settlement agreement, the Court grants the Settlement Approval Motion.

B. Motion for Award of Attorney Fees and Litigation Expenses

Class counsel seek an award of $5,812,500 for attorneys' fees and litigation expenses, which represents the maximum amount the parties' settlement agreement allowed them to request. (Fee Mem. P. & A. at 2:6-9.) The amount represents 25 percent of the $23,250,000 that Defendants initially must deposit into the settlement fund. (*Id.*)

Plaintiff asserted claims under California law, and California law also governs the award of attorneys' fees here. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir.2002). California recognizes the common fund doctrine for the award of attorneys' fees to a prevailing plaintiff whose efforts result in creation of a fund benefitting others. *Serrano v. Priest*, 20 Cal.3d 25, 35, 141 Cal.Rptr. 315, 569 P.2d 1303 (1977). Under both California and Ninth Circuit precedent, a court may exercise its discretion to award attorneys' fees from a common fund by applying either the lodestar method or the percentage-of-the-fund method. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 253, 110 Cal.Rptr.2d 145 (2001); *Fischel v. Equitable Life Assur. Soc'y of U.S.*,

307 F.3d 997, 1006 (9th Cir.2002) (citing *Vizcaino*, 290 F.3d at 1047). In support of their request for fees amounting to 25 percent of the initial settlement fund, Plaintiff's counsel cite Ninth Circuit authority suggesting that the percentage method is favored in common fund cases such as this one, where the value of the benefit to the class is fixed. (Fee Mem. P. & A. at 7, 11.)

***10** Here, the Court finds that the lodestar method and application of a multiplier is a more reasonable approach to the circumstances of the case.[FN8] Plaintiff's counsel settled the case relatively early in the litigation, before seeking class certification and beginning deposition discovery. Though counsel emphasize that 600,000 pages of documents were produced by Defendants, (Fee Mem. P. & A. at 14:18), the relatively modest 3,383.1 hours expended by Plaintiff's counsel, by the standards of complex class action litigation, supports the use of the lodestar method here to prevent a "windfall" award. *See In re Washington Pub. Power Supply Sys. Secs. Litig.*, 19 F.3d 1291, 1298 (9th Cir.1994); *Vizcaino*, 290 F.3d at 1050 (noting that where time spent "is minimal, as in the case of an early settlement, the lodestar calculation may convince the court that a lower percentage is reasonable"). The Court thus begins its analysis with a calculation of the lodestar.

> FN8. The Court's use of the lodestar method addresses one of Objector Shapiro's objections. The Court would have found application of the lodestar method appropriate in the absence of Shapiro's objections, and thus they are overruled.

1. Lodestar amount

To calculate the amount of attorney's fees under the lodestar method, a court must "multiply the number of hours reasonably expended by the attorney on the litigation by a reasonable hourly rate." *McElwaine v. U.S. West, Inc.*, 176 F.3d 1167, 1173 (9th Cir.1999); *PLCM Group v. Drexler*, 22 Cal.4th 1084, 1095, 95 Cal.Rptr.2d 198, 997 P.2d 511 (2000).

Plaintiff's counsel provided a lodestar amount as an alternative to their preferred percentage method of calculating attorneys' fees in this case. (Fee Mem. P. & A. at 22.) Plaintiff has been represented by Jeffrey L. Fazio and Dina E. Micheletti, who are partners in Fazio | Micheletti LLP; Melissa M. Harnett, a partner in Wasserman, Comden & Casselman L.L.P. ("WCC"); and Stephen Gardner of the Center for Science in the Public Interest ("CSPI"). In their declarations, Mr. Fazio, Ms. Harnett, and Mr. Gardner have provided information concerning their hourly rates and the number of hours billed to date.

> Mr. Fazio, a 1989 law graduate, states that his 2008 hourly rate is $575, and his partner, Ms. Micheletti, a 1996 law graduate, bills an hourly rate of $475.[FN9](Fazio Decl. ¶¶ 4, 184.) Based on 826.1 hours billed by Mr. Fazio and 657.8 hours billed by Ms. Micheletti, the lodestar amount they provide for their firm's work is $787,462.50. (Fazio Decl. ¶ 191.)
>
> > FN9. Mr. Fazio has submitted a survey of hourly rates showing that their requested rates are reasonable. (Fazio Decl. ¶ 185 & Ex. 3.)
>
> Ms. Harnett, a 1992 law graduate, states that her hourly rate is $500. (Harnett Decl. ¶ 35.) She also has provided information concerning other attorneys and paralegals at her firm who worked on this case. The rates requested for these other attorneys and staff range from $100 for a law clerk, to $600 for a more senior partner. (Harnett Decl. ¶ 35.) Based on 1,033.1 hours billed by Ms. Harnett, as well as 526.7 hours billed by others in her firm, Ms. Harnett provides a lodestar amount for her firm of $65,8275.50. (*Id.*)
>
> Mr. Gardner, a 1975 law graduate, states that his hourly rate is $700. (Gardner Decl. ¶ 22.) He has billed 404.7 hours to this case and estimates that this figure will increase to 500 hours after the settlement agreement finally is implemented. (*Id.*) He also estimates that another lawyer in his office, Katherine Campbell, a January 2007 law graduate, will spend 23.5 hours at an hourly rate of $270. (*Id.* ¶ 23, 95 Cal.Rptr.2d 198, 997 P.2d 511.) Mr. Gardner thus provides a lodestar amount of $356,245 for his office. (*Id.* ¶ 24, 95 Cal.Rptr.2d 198, 997 P.2d 511.)
>
> ***11** According to counsel's declarations, then, the total lodestar figure for all three firms is $1,802,083.

The Court finds that this amount-roughly $1.8 million-represents the upper limit of a reasonable attorneys' fee award under the lodestar method. Based on its own observation of the conduct of this litigation, a reduction in the hours billed to date is warranted. For example, it is unclear why counsel from all three law firms were necessary for prosecution of this case. The attorney with the highest hourly rate, Stephen Gardner, is described as

having expertise in areas such as food supplements and their regulation by federal authorities. (Fazio Decl. ¶¶ 32-33.) He and his organization, CSPI, joined the litigation to provide their knowledge in these areas. (*Id.* ¶ 33, 95 Cal.Rptr.2d 198, 997 P.2d 511.) While such specialized knowledge may have been helpful in Plaintiff's counsel's initial investigation of the case, it is unclear why such specialized knowledge has been necessary to Plaintiff's counsel's ongoing efforts to obtain final settlement approval and implement the settlement agreement.

Even if it was necessary or prudent for counsel from all three firms to conduct the litigation, Plaintiff's counsel have not established that the division of their labor avoided duplication, or that the hours billed do not include excessive time spent in conferences or corresponding with one another. As a result, even though Plaintiff's counsel have not included time spent at the final settlement approval hearing or time spent after the hearing in their calculation of a lodestar amount, this omission is balanced by the reductions the Court certainly would have made to the hours billed to date. (Fazio Decl. ¶ ¶ 189-190; Harnett Decl. ¶ 35.) Mr. Fazio estimates, based on his past experience, the additional time Plaintiff's counsel will spend on this case to be 350 to 400 hours. (Fazio Decl. ¶ 32.) Moreover, the Court deducts the additional hours Mr. Gardner estimates he and another lawyer with his organization will spend on the case, or 95.3 hours for him and 20 hours for Katherine Campbell. (Gardner Decl. ¶¶ 22-23.) The Court therefore fixes the lodestar attorneys' fees as follows:

Fazio | Micheletti LLP:	$ 787,462.50
WCC:	$ 658,275.50
CSPI:	$ 284,235.00
Total:	**$1,729,974.00**

2. Lodestar multiplier

Though Plaintiff's counsel have not made specific arguments in support of a multiplier for the lodestar amount, the Court finds their arguments concerning the reasonableness of their request for 25 percent of the settlement fund to apply here. Specifically, Plaintiff's counsel argue that (1) their efforts produced "exceptional" and "extraordinary" results, (Fee Mem. P. & A. at 13-17), and (2) they capably dealt with complex issues and the risks presented by those issues, (*Id.* at 17-19, 95 Cal.Rptr.2d 198, 997 P.2d 511).

The lodestar amount may be enhanced by application of a multiplier to account for the contingent nature of the fee award and the extent to which the litigation precluded counsel from pursuing other paid work. *Serrano*, 20 Cal.3d at 49, 141 Cal.Rptr. 315, 569 P.2d 1303. Though a multiplier may be applied where the litigation involved complex legal issues presented by skillful attorneys, such factors should not be considered where they are already encompassed in the calculation of the lodestar. For example, the skill of the lawyers or the difficulty of the legal questions they faced "appear [ ] susceptible to improper double counting," because they are accounted for by a higher hourly rate and more attorney hours. *Ketchum v. Moses*, 24 Cal.4th 1122, 1138-39, 104 Cal.Rptr.2d 377, 17 P.3d 735 (2001).

***12** Here, the Court finds that a multiplier of 2.0 would reasonably account for the particular circumstances faced by Plaintiff's counsel in this case. The most persuasive factor in setting this amount is the risk Plaintiff's counsel faced that they would achieve no recovery, in light of the legal questions concerning class certification and possible federal preemption of their claims. (Fee Mem. P. & A. at 18-19.) Another important consideration is that Plaintiff's case may have been a factor in a subsequent investigation by the Federal Trade Commission and the attorneys general of many states. (Fee Mem. P. & A. at 17.) The hourly rates of Plaintiff's counsel and the hours they billed adequately account for their level of experience and the difficulty of the issues they addressed, however. The Court is not persuaded that the "extraordinary" results obtained by Plaintiff's counsel justifies a higher multiplier. Though the result is "extraordinary" in terms of the total value of the settlement fund, it is not apparent that those funds will redress an injury keenly felt by class members. Several class members were compelled to write letters objecting to the lawsuit itself, and, as discussed above, the number of class members submitting apparently valid claims to date will not deplete the amounts in the settlement fund.

Applying such a multiplier to Plaintiff's counsel's lodestar

calculation would result in an award of $3,459,946 in fees. This amount represents 14.8 percent of the $23.25 million initial settlement fund, a percentage the Court also finds to be reasonable.

3. Litigation expenses

The Court further awards the litigation expenses requested by Plaintiff's counsel, in the amounts of $8,458.64 to Fazio | Micheletti LLP, (Fazio Decl. ¶ 192); $20,993.58 to WCC, (Harnett Decl. ¶ 49); and $3,280.60 to CSPI, (Gardner Decl. ¶ 25.).[FN10] The total amount awarded for litigation expenses is $32,732.82.

> FN10. The amount awarded to Wasserman, Comden & Casselman, L.L.P., reflects the deduction of $2,089.37 in expenses described only as "Other Costs." (Harnett Decl. ¶ 49.)

Accordingly, the Court grants Plaintiff's Fee Motion in part and awards $3,459,946 in attorneys' fees and $32,732.82 in litigation expenses.

C. Motion for Incentive Award to Plaintiff

Plaintiff David Wilson requests a $10,000 incentive award for his contributions as the named plaintiff in this case. (Incentive Award Mot. at 1:1-3.) As set forth in the parties' settlement agreement, any court-approved incentive award to Plaintiff would be paid by Defendants in addition to the amounts they already have agreed to pay to settle this case. (*Id.* at 1:6-9, 104 Cal.Rptr.2d 377, 17 P.3d 735.)

The Court has discretion to grant an incentive award to the class representative. *Van Vraken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299 (N.D.Cal.1995). Factors a court may consider in exercising its discretion include:

> 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

***13** *Id.* (citations omitted).

The Court has reviewed and considered Plaintiff Wilson's declaration, which describes how he came to be involved in this case, the research he conducted before and during the litigation, the time he spent reviewing documents and conferring with counsel during the course of the litigation, and the media attention he endured after announcement of the settlement. (Wilson Decl. ¶¶ 3-9.) Having done so, the Court grants an incentive award of $2,500.

In reducing the requested amount of the incentive award, the Court notes the low degree of risk undertaken by Wilson in commencing the lawsuit, the fleeting nature of the media attention he experienced, and the relatively limited duration of the litigation, including the modest 55 hours he estimates he spent on the case. (Wilson Decl. ¶¶ 6-9.) For example, Mr. Wilson was never deposed and did not testify at a trial, in contrast with the class representatives who have received incentive awards in other cases. *See* *Van Vraken*, 901 F.Supp. at 299-300 (awarding $50,000 to named plaintiff who was deposed twice and testified at trial during litigation lasting more than a decade); *In re Domestic Air Transportation Antitrust Litig.*, 148 F.R.D. 297, 357-58 (N.D.Ga.1993) (awarding $2,500 to class representatives who produced documents and $5,000 to those who were deposed); *see also* *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.1998) (upholding award of $25,000 to named plaintiff who risked workplace retaliation and "spent hundreds of hours with his attorneys").

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff's Motion for Final Approval of Settlement and GRANTS in part Plaintiff's Motion for Attorneys' Fees Litigation Expenses and Plaintiff's Motion for Incentive Award to Plaintiff. The parties shall submit a proposed Judgment and Order of Dismissal forthwith.

C.D.Cal.,2008.
Wilson v. Airborne, Inc.
Not Reported in F.Supp.2d, 2008 WL 3854963 (C.D.Cal.)

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