IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HARTIG DRUG COMPANY INC., Plaintiff, v. SENJU PHARMACEUTICAL CO. LTD., KYORIN PHARMACEUTICAL CO., LTD., AND ALLERGAN, INC., Defendants.	)	C.A. No. 14-719-JFB

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
UNOPPOSED MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION.

Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, Plaintiff Hartig Drug Company Inc. ("Plaintiff" or "Hartig") respectfully moves for final approval of its Settlement with Senju Pharmaceutical Co., Ltd., Kyorin Pharmaceutical Co., Ltd., and Allergan Inc. (together, "Defendants"). The Court has already preliminarily approved the Settlement, which has a total cash value of $9,000,000. *See* D.I. 56 (Order Granting Preliminary Approval of Class Settlement with Defendants).

The Settlement is eminently fair, reasonable, and adequate. It resulted from extensive arm's-length negotiations by experienced counsel committed to the interests of their respective clients after counsel obtained a thorough appreciation of the strengths and weaknesses of the case from, among other things, their independent investigation, counsel's collective experience litigating antitrust class actions, and the discovery record in *Apotex Inc. v. Allergan, Inc*., No. 12-00196-SLR (D. Del.) (the "*Apotex* litigation"). The Settlement provides immediate and significant benefits to Members of the Settlement Class and removes the risks that continued litigation of this matter would have entailed.

Notice was disseminated in accordance with the Court's orders of May 3, 2018 and May 10, 2018, D.I. 61 & 63, and the form and method of dissemination of the notice satisfy Rule 23 and due process, as the Court also previously determined.

Accordingly, Plaintiff respectfully requests that the Court grant final approval of the Settlement and find that the notice as disseminated meets the requirements of Rule 23 and due process. Plaintiff further respectfully requests that the Court finally approve the certification of the Settlement Class and the Plan of Allocation, both of which the Court preliminarily approved. *See* D.I. 56.

II. FACTUAL AND PROCEDURAL BACKGROUND.

A. Investigation and Complaint.

After Settlement Class Counsel learned of facts suggesting that Defendants were engaged in conduct meant to delay the introduction of generic equivalents of gatifloxacin ophthalmic solution, which Defendants sold under the brand names Zymar and Zymaxid, in violation of antitrust laws, Settlement Class Counsel conducted a thorough investigation and ultimately filed a class action complaint on behalf of Hartig and all others similarly situated on June 6, 2014. D.I. 1, Complaint. The complaint alleged that Defendants engaged in product hopping and other unlawful anticompetitive conduct in violation of Sections 1 and 2 of the Sherman Act. *Id*. at ¶¶ 153-92. Hartig brought the action on behalf of itself and a proposed class of direct purchasers of Zymar or Zymaxid for the period from June 15, 2010 "until the anticompetitive effects of Defendants' unlawful conduct cease." *See id*. at ¶ 140.

Plaintiff alleged that generic equivalents of Zymar/Zymaxid were delayed years because of Defendants' actions. *Id.* at ¶ 139. Plaintiff argued that, absent Defendants' anticompetitive conduct, a generic equivalent of Zymar could have been on the market as early as November 2011, but because of the alleged conduct, the first generic equivalent (generic Zymaxid) was not available until October 2013. This nearly two-year delay caused Hartig and other Zymar and Zymaxid purchasers to pay millions more for gatifloxacin ophthalmic solution than they would have paid in a competitive market.

B. Motion to Dismiss and Third Circuit Appeal.

In September 2014, Defendants filed motions to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). D.I. 14 & 17. On August 19, 2015, the Court granted Defendants' motions to dismiss for lack of subject matter jurisdiction and denied as moot Defendants' motions to dismiss for failure to state a claim. Hartig appealed. The Third Circuit Court of Appeals then reversed the

District Court's decision, holding that the question Defendants had raised (Hartig's standing) was not one of subject matter jurisdiction. The case thus remanded to the District Court.

C. The *Apotex* Litigation.

Two years before Hartig brought its action against Defendants, generic pharmaceutical manufacturer Apotex Inc. brought suit against the same Defendants for the same anticompetitive conduct Hartig would ultimately allege in its case. *See Apotex Inc. v. Allergan, Inc*., No. 12-00196-SLR (D. Del.). All three Defendants settled with Apotex. Senju settled in May 2016, Kyorin in February 2017, and, finally, Allergan in April 2017. The terms of the settlements in the *Apotex* litigation are confidential and have not been disclosed to Plaintiff.

D. Informal Discovery.

On October 31, 2016, before either Kyorin or Allergan had reached settlements in the *Apotex* litigation, the parties here stipulated to a stay of proceedings in this case until the Court decided motions for summary judgment that were anticipated in the *Apotex* litigation. D.I. 39. In connection with that stay, Defendants and the other parties to the *Apotex* litigation agreed to make the extensive discovery record from that litigation available to Plaintiff, including document production, deposition transcripts, expert reports, and confidential court filings. The Court Ordered the stay on November 1, 2016. Because the *Apotex* litigation was resolved through settlement prior to the submission of summary judgment motions, Defendants and Hartig entered into additional agreements to stay the current proceedings until at least November 27, 2017, to allow Plaintiff time to complete its review of the record from the *Apotex* litigation and the parties time to develop a reasonable pre-trial plan.

During the stay, Hartig extensively analyzed the record in the *Apotex* litigation, which involved substantial overlap of relevant facts and issues with the present litigation. That analysis included a review of thousands of documents, several deposition transcripts, and numerous

expert reports concerning issues related to the process Defendants undertook to obtain FDA approval for Zymar/Zymaxid, the extent to which Defendants could be considered to have monopoly power in a properly defined relevant product market, whether Defendants' conduct had an antitrust impact on consumers, as well as the damages that resulted from that impact, and other topics. Through this analysis, Plaintiff gained a detailed understanding of the strengths and weaknesses of its case.

Further, Plaintiff hired an expert consultant with substantial experience testifying in generic delay cases very much like this one, including product hopping cases. *See* D.I. 55 at ¶ 7. That expert analyzed Allergan's transaction data, reviewed the documentary record, and examined publicly available data to determine potential damages should the litigation proceed. *See id*.

E. Mediation and Settlement.

After the *Apotex* litigation settled, Hartig and Defendants agreed to engage in mediation before David A. Rotman, a nationally recognized mediator of complex class actions and commercial matters. As a result of that mediation, the parties reached a settlement in principle on October 18, 2017. Following additional negotiations, the parties executed the Settlement Agreement on January 17, 2018. The proposed Settlement resolves all claims against the Defendants for their alleged participation in a scheme to delay the entry of generic versions of Zymar/Zymaxid from coming to market.

F. Preliminary Approval and Notice

Plaintiff engaged Garden City Group, LLC ("GCG") to assist with the preparation of notice to Class Members. After working to draft notice documents that would fairly inform Class Members about the details of the proposed Settlement, Settlement Class Counsel secured approval of the notice from the Court, D.I. 61 & 63, and then distributed notice to Class

Members through mail, publication, and online means. *See* Declaration of Eric Kierkegaard, Oct. 24, 2018, ("Kierkegaard Decl.") ¶¶ 5-8.

G. Class Action Fairness Act Compliance.

Following preliminary approval of the Settlement on February 27, 2018, Defendants, through their counsel, complied with their requirements under the Class Action Fairness Act of 2005, 28 U.S.C. § 1715 ("CAFA"). Specifically, on March 2, 2018, Defendants' counsel served CAFA notices upon the Attorney General for the United States of America and the Attorney General or appropriate government official in each state or territory in which a class member resides via Certified Mail. *See* Declaration of Rosanna K. McCalips, Oct. 19, 2018, ¶ 4. Defendants' counsel has received no objection in response to the CAFA notices and has not been notified by the United States Postal Service that any of the CAFA notices could not be delivered. *Id*. ¶ 6.

III. FINAL APPROVAL OF THE SETTLEMENT IS WARRANTED.

Settlement spares litigants the uncertainty, delay and expense of a trial, and reduces the burden on judicial resources. As a result, "[c]ompromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank,* 216 U.S. 582, 595 (1910). This is "particularly [true] in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995); *see also Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-95 (3d Cir. 2010) (similar); *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged.").

There is generally "an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class is presented for court approval."

Alba Conte & Herbert B. Newberg, 4 *Newberg on Class Actions* §11:41 at 90 (4th Ed. 2002). Counsel's judgment that the settlement is fair and reasonable is entitled to great weight. *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness."); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 543 (D.N.J. 1997) (citation omitted) (court is "entitled to rely upon the judgment of experienced counsel for the parties"), *aff'd*, 148 F.3d 283 (3d Cir. 1998).

Here, Settlement Class Counsel strongly approve of the Settlement. Continued litigation of this case would be long, complex, expensive, and a burden to this Court's docket, yet another factor favoring approval. Approving the Settlement will reduce that litigation burden. *Weiss v. Mercedes-Benz of N. Am. Inc.*, 899 F. Supp. 1297, 1300-01 (D.N.J. 1995) (burden on crowded court dockets to be considered), *aff'd*, 66 F.3d 314 (3d Cir. 1995).

A. The Settlement Is Fair, Reasonable, and Adequate.

Before a settlement of a class action can be finally approved, the Court must determine "after a hearing" that it is "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2); *In re Prudential,* 148 F.3d at 316. "Acting as a fiduciary responsible for protecting the rights of absent class members, the Court is required to 'independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished.'" *In re Philips/Magnavox TV Litig*., 2012 WL 1677244, at *8 (D.N.J. May 14, 2012) (quoting *In re Cendant Corp. Litig*., 264 F.3d 201, 231 (3d Cir. 2001)). The Court must also have "direct[ed] notice in a reasonable manner to all class members who would be bound by the proposal." *See* Fed. R. Civ. P. 23(e)(1).

The Third Circuit has directed the district courts to consider the following non-exhaustive list of factors in deciding whether to approve a proposed class action settlement:

> (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 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 recovery in light of all the attendant risks of litigation . . . .

In re Prudential, 148 F.3d at 317 (quoting *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)).

In *Prudential*, the Third Circuit cited some additional factors to be considered "when appropriate." *Id*. at 323. The *Prudential* factors relevant here include "the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages," "whether class or subclass members are accorded the right to opt out of the settlement," "whether any provisions for attorneys' fees are reasonable," and "whether the procedure for processing individual claims under the settlement is fair and reasonable." *Id*.

Applying the *Girsh* and *Prudential* factors to the Settlement here, Plaintiff respectfully submits that the Court should find it fair, reasonable, and adequate. Accordingly, the Court should grant final approval.

1. *Complexity, Expense and Likely Duration of the Litigation.*

The first *Girsh* factor assesses "'the probable costs, in both time and money, of continued litigation.'" *In re Cendant*, 264 F.3d at 233 (quoting *In re GMC*, 55 F.3d at 812). The antitrust claims advanced on behalf of the Settlement Class here are, by definition, complex. *E.g*., *In re Processed Egg Prods. Antitrust Litig*., 302 F.R.D. 339, 356 (E.D. Pa. 2014) ("[A]ntitrust suits, like this one, are often complex."). Plaintiff has litigated the case vigorously, including up to the Third Circuit, since 2014. Absent the Settlement, Defendants would surely have opposed class

certification and moved for summary judgment on the merits. The parties would also have needed to engage in lengthy fact and expert discovery.

Continued litigation would be complex, time-consuming, and expensive, with no certainty of a favorable outcome. *See, e.g.*, *Weber v. Gov't Employees Ins. Co*., 262 F.R.D. 431, 444 (D.N.J. 2009) (where discovery and dispositive motions would have "consume[d] no insubstantial amount of the parties' resources," this factor favored settlement approval). The Settlement offers substantial benefits for Settlement Class Members, with none of the delay, risk, and uncertainty of ongoing litigation.

Thus, this *Girsh* factor strongly favors final approval of the Settlement. *In re Philips/Magnavox,* 2012 WL 1677244, at *8-9.

2. *The Reaction of the Settlement Class.*

The second *Girsh* factor "attempts to gauge whether members of the class support the settlement," *In re Prudential*, 148 F.3d at 318, and the Settlement Class's support "creates a strong presumption . . . in favor of the Settlement." *In re Cendant*, 264 F.3d at 235. A "small number of objections by Class Members to the Settlement weighs in favor of approval." *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 103 (D.N.J. Mar. 30, 2012) (citations omitted).

The postmark deadline by which Settlement Class Members were to object to or exclude themselves was October 5, 2018. To date, however, no one has opted to exclude themselves or object. *See* Kierkegaard Decl. ¶¶ 11,13. This factor, therefore, strongly favors approval.

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

The third *Girsh* 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*, 264 F.3d at 235 (quoting *In re GMC,* 55 F.3d at 813). The parties can adequately appreciate the merits of

the case before negotiating when "substantial briefing and research on the [legal] issues has taken place." *McAlaren v. Swift Transp. Co.*, 2010 WL 365823, at *1-2, 7-9 (E.D. Pa. Jan. 29, 2010) (ordering final approval of a class action settlement "before discovery" but after parties had briefed a motion to dismiss and amended the Complaint). Even where settlement occurs "at an early stage in the litigation process," counsel can have a sufficient understanding of the matter to justify settlement. *See, e.g.*, *Weissman v. Philip C. Gutworth, P.A.*, 2015 WL 3384592, at *5 (D.N.J. May 26, 2015); *see also In re Processed Egg Prods. Antitrust Litig*., 284 F.R.D. 249, 267 (E.D. Pa. 2012) (granting final settlement approval and noting that "although no formal discovery was conducted …, [class counsel] conducted informal discovery, including, *inter alia*, independently investigating the merits prior to filing the complaint (with additional investigation prior to filing amended complaints)….").

As an initial matter, Settlement Class Counsel collectively possess extensive experience in litigating antitrust class actions, so they entered settlement negotiations in this case with a keen understanding of the complexities of such cases. Settlement Class Counsel had a detailed appreciation of the claims and defenses in the case, having obtained the entire discovery record from the *Apotex* litigation, having briefed and argued complex dispositive motions, and having participated in settlement discussions with the assistance of an experienced mediator. *See Rossi v. P&G*, 2013 WL 5523098, at *7 (D.N.J. Oct. 3, 2013) (noting that "stage of proceedings" factor favored approval although settlement was reached "in the early stages of discovery," since plaintiffs had done "an extensive pre-suit investigation," received some discovery from defendant and its employees, and had successfully opposed a motion to dismiss).

The substantial informal discovery from the *Apotex* litigation, along with the extensive independent investigation Settlement Class Counsel undertook prior to filing the complaint,

brought the case to a stage where Settlement Class Counsel had a more than adequate understanding of the merits and the risks. *See Prudential*, 962 F. Supp. at 541-42 (rejecting argument that informal discovery was not enough to justify settlement), *aff'd*, 148 F.3d at 319; *O'Brien v. Brain Research Labs, LLC*, 2012 WL 3242365, at *16-17 (D.N.J. Aug. 9, 2012) (approving settlement reached just six weeks after lawsuit was filed; "While class counsel did not engage in formal discovery, the Court is satisfied that his pre-suit investigation and Defendant's informal disclosures were sufficiently comprehensive to enable counsel to review the factual basis for the case and assess the risks of continued litigation."). This factor, too, points to final approval.

4. *The Risk of Failing to Establish Liability.*

In negotiating and reaching the Settlement, Settlement Class Counsel were aware of potential difficulties and risks associated with proving liability. While Settlement Class Counsel believed that their case was meritorious, continued litigation posed significant risks on liability. *See Weber*, 262 F.R.D. at 445 ("a jury trial carries an inherent risk for both sides of a case"). While Settlement Class Counsel believe the case is strong, there are significant risks to the Settlement Class, including risks associated with dispositive motions such as at summary judgment, as well as trial and appeal, and even the risks associated with substantial delay.

Though all litigation has risks, and even the most seemingly solid cases can be and have been lost, antitrust litigation is especially fraught with pitfalls for plaintiffs. *See, e.g.*, *In re Elec. Carbon Prods. Antitrust Litig*., 447 F. Supp.2d 389, 400 (D.N.J. 2006) ("As in any antitrust case, this one presents substantial risks of non-recovery, even after preliminary victories were achieved."). The Settlement avoids all of those potential snares and delivers immediate and substantial benefits.

In assessing the Settlement, the Court should balance the benefits afforded the Settlement Class, including the immediacy and certainty of a recovery for a definitive Settlement Class, against the risks of continued litigation. *See In re Prudential*, 148 F.3d at 317 (noting that "settlement provide[s] class members the opportunity to file claims immediately after court approval of the settlement, rather than waiting through what no doubt would be protracted litigation") (citation omitted). In light of the risks associated with ultimately proving liability, this *Girsh* factor supports approval of the Settlement.

5. *The Risk of Establishing Damages.*

Even if Plaintiff were to establish liability, it still would have likely met substantial challenges in proving damages. Especially in antitrust cases, the presentation of damage testimony is a complex matter. *In re Carbon Prods.*, 447 F. Supp. 2d at 401 (proving damages at trial "can become an esoteric exercise with unpredictable results"). This factor, like the one before it, "'attempts to measure the expected value of litigating this action rather than settling it at the current time.'" *In re Cendant*, 264 F.3d at 238 (quoting *In re GMC*, 55 F.3d at 816).

While Settlement Class Counsel believe that convincing testimony on damages could have been provided and that a judgment might ultimately have been obtained for the full amount of damages available under the law, it is certainly possible that, in the unavoidable "battle of experts," a jury might have disagreed with Plaintiff's position. *See In re Cendant*, 264 F.3d at 239 ("establishing damages at trial would lead to a 'battle of experts,' with each side presenting its figures to the jury and with no guarantee whom the jury would believe"). Accordingly, this *Girsh* factor supports approval of the Settlement. *See In re Philips/Magnavox*, 2012 WL 1677244, at *11-12.

6. *The Risks of Maintaining the Class Action Through Trial.*

Although Plaintiff believes that its antitrust claims are well-suited for treatment on a class-wide basis, Defendants would almost certainly argue that certification would be inappropriate because individual issues predominate over common issues. Class certification would have been, at best, a "battle of the experts." *See In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305, 323-24 (3d Cir. 2008) (requiring courts to weigh competing expert testimony in ruling on motion for class certification). It is clear that class certification would have been vigorously disputed, and whether Plaintiff would have obtained, and thereafter maintained, certification was unclear. Accordingly, the sixth *Girsh* factor counsels in favor of final approval of the Settlement.

7. *The Range of Reasonableness of the Settlement to a Possible Recovery in Light of All the Attendant Risks of Litigation*

The eighth and ninth *Girsh* factors— the range of reasonableness considering the best possible recovery and the risks of litigation— also support approval of the Settlement. The determination of a "reasonable" settlement is not susceptible to a mathematical equation yielding a particularized sum. Rather, this inquiry evaluates the recovery "in light of all the risks considered under *Girsh*." *In re Cendant Corp. Sec. Litig*., 109 F. Supp. 2d 235, 263 (D.N.J. 2000).

While the potential recovery on behalf of the Class, assuming Plaintiff had prevailed at trial, could theoretically be higher than the Settlement amount, that fact is virtually always true in settled cases. As they did in the *Apotex* litigation, Defendants would no doubt have advanced expert testimony with proffered damages measurements that returned much lower results than the amount in the Settlement, regardless of the damages amount Plaintiff advanced in litigation. Put simply, when weighed against the time, expense and potential risk of further litigation,

including an adverse ruling on summary judgment or *Daubert*, or losing at trial, the Settlement is a reasonable compromise that gives Settlement Class Members certain recovery. *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. at 263 ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.") (quoting *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985). Here, the Settlement of $9 million represents an excellent recovery for the Settlement Class.

8. *The Prudential Factors.*

As discussed above, the *Prudential* factors relevant here include "the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages," "whether class or subclass members are accorded the right to opt out of the settlement," "whether any provisions for attorneys' fees are reasonable," and "whether the procedure for processing individual claims under the settlement is fair and reasonable." *Prudential*, 148 F.3d at 323. All of them favor approval of the settlement.

The extent of discovery and other factors bearing on the Court's ability to assess the outcome of a trial largely overlap with the *Girsh* factors involving the stage of the proceedings, the amount of discovery obtained, and the risks attendant to the issues of liability, damages, and class certification. For the reasons stated in connection with those *Girsh* factors, this *Prudential* factor weighs in favor of Settlement approval.

Settlement Class Members were afforded the right to opt out of the Settlement. *See* D.I. 61, ¶ 7. That *Prudential* factor thus supports approval of the Settlement.

The Settlement also provides that whatever award of attorneys' fees and reimbursement of expenses to Settlement Class Counsel is made by this Court will be paid out of the Settlement Fund. No fixed percentage that will go toward attorneys' fees and expenses has been specified in

the Settlement. Rather, Settlement Class Counsel has applied for fees in accordance with Third Circuit precedent, and the Court has made an award that it finds appropriate. *Id.*; *see* D.I. 70 (approving attorneys' fees, expenses, and an incentive award for Hartig, to be paid "immediately upon entry of final approval in this matter"). Providing for a fee application in accordance with existing standards is certainly reasonable, and this *Prudential* factor thus likewise supports final approval. *See also* D.I. 65.

Finally, the procedure for processing claims for settlement benefits is fair and reasonable. A claim form, in as simple a form as possible given the nature of the case, is being required in order to obtain cash from the Settlement Fund. *See* Kierkegaard Decl., ¶ 9 (describing the use of claim forms). Claim forms are routinely used in class action settlements. *Prudential*, 148 F.3d at 323. Accordingly, this factor, like all the other applicable *Prudential* factors, counsels in favor of final approval of the Settlement.

Given the potential benefits available, and the risks in proving liability and damages and in obtaining class certification, the Settlement fairly and adequately rewards the Settlement Class. Accordingly, the Settlement is fair, adequate and reasonable under the *Girsh* factors.

Thus, Plaintiff respectfully requests that the Court grant final approval of the Settlement.

IV. THE NOTICE GIVEN WAS APPROPRIATE, AS IT FULLY COMPLIED WITH THIS COURT'S PREVIOUS ORDER.

Rule 23(c)(2) provides that class members must receive the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Similarly, Rule 23(e)(1) requires a court to "direct notice in a reasonable manner to all class members who would be bound by the propos[ed] [settlement]." "First-class mail and publication have consistently been considered sufficient to satisfy the notice requirements of Rule 23[(c)] and Rule 23(3) for advising class members of a proposed settlement

and of their right to file claims." *Zimmer Paper Prod's, Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir. 1985).

The Court-appointed claims administrator, GCG, followed the notice program the Court mandated when it granted preliminary approval. Namely, GCG caused mail notice to be sent to all identifiable Settlement Class Members. *See* Kierkegaard Decl. ¶ 5. The Defendants supplied the addresses, but GCG then confirmed that those addresses were correct. *Id*. at ¶ 6. Because the Defendant transaction data was complete, it is highly likely that all Settlement Class Members were directly notified of the Settlement. GCG nevertheless arranged for publication notice in *Pharmacy Purchasing & Products* and *Drug Topics* and created a settlement website for Settlement Class Members to obtain additional information. *Id*. at ¶¶ 7-8. Because the notice program was fully and timely carried out as required by the Court, the Court should reaffirm its prior ruling that the notice program satisfies the requirements of Rule 23 and due process.

V. CONCLUSION

For the foregoing reasons, Settlement Class Counsel respectfully request that the Court grant Plaintiff's Motion and grant final approval to the proposed Settlement and enter Final Judgment in this matter.

Dated: October 26, 2018

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