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-SRF

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARD TO NAMED PLAINTIFF

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INTRODUCTION

Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, Plaintiff Hartig Drug Company Inc. ("Plaintiff" or "Hartig") respectfully moves for an award of attorneys' fees, reimbursement of litigation expenses, and an incentive award to the named plaintiff. The Court has previously preliminarily approved a settlement with all defendants with a total cash value of $9,000,000.[1] In undertaking this litigation, counsel faced numerous challenges to proving both liability and damages that posed the serious risk of no recovery, or a lesser recovery than the Settlement, for the Settlement Class. The significant recovery obtained was achieved through the skill, tenacity, and effective advocacy of Settlement Class Counsel, which litigated this action on a fully contingent fee basis against well-funded defendants and experienced defense counsel.

The Settlement achieved through Settlement Class Counsel's efforts is a particularly favorable result when juxtaposed against the significant procedural and substantive hurdles that Plaintiff would have had to overcome to prevail in this complex antitrust litigation. In undertaking this litigation, Settlement Class Counsel faced numerous challenges to establishing liability, impact, and damages. The risk of losing was very real, and it was greatly enhanced by the fact that Settlement Class Counsel would be litigating against large corporate defendants, represented by highly skilled defense counsel. Despite these risks, Plaintiff's counsel collectively dedicated more than 1,800 hours of time to this litigation over the course of approximately four years, on a fully contingent basis.

Plaintiff and Class Counsel respectfully move for an award from the Settlement Fund of attorneys' fees in the amount of 33-1/3% of the Settlement Fund, totaling $3,000,000;

[1] *See* D.I. 56 (Order Granting Preliminary Approval of Class Settlement with Senju Pharmaceutical Co. Ltd. ("Senju"), Kyorin Pharmaceutical Co., Ltd. ("Kyorin"), and Allergan, Inc. ("Allergan," and with Senju and Kyorin, "Defendants")).

reimbursement of all accrued litigation expenses in the amount of $93,483.23 incurred over that period; and an incentive award of $10,000 to the named Plaintiff, Hartig. In light of the recovery obtained, the time and effort devoted by Plaintiff's counsel, the work performed, the skill and expertise required, and the risks that counsel undertook, Settlement Class Counsel submit that the requested fee award and the reimbursement of incurred expenses are fair and reasonable. The percentage fee requested is well within the range of fees that courts in this Circuit have awarded in antitrust class actions with comparable recoveries. Further, the requested fee represents a multiplier of 2.62 on Settlement Class Counsel's lodestar, which is well within the range of multipliers typically awarded in class actions with substantial contingency risks such as this one. In addition, the expenses for which Settlement Class Counsel seek reimbursement were reasonable and necessary for the successful prosecution of the case, and the incentive award is reasonable given the effort Hartig put forth to advance this case on behalf of the Settlement Class.

Accordingly, Plaintiff and Settlement Class Counsel respectively request that the Court grant their request for attorney's fees, expense reimbursement, and an incentive award for Hartig.

I. SETTLEMENT CLASS COUNSEL HAVE VIGOROUSLY PROSECUTED THIS CASE.

From the beginning of this action, Settlement Class Counsel effectively maneuvered this case through investigation, discovery, motion practice, and settlements with the Defendants. Settlement Class Counsel obtained the $9,000,000 million settlement through a diligent and thorough prosecution of this case. These efforts required substantial investment of human and financial resources by Settlement Class Counsel given the complexity of the facts and legal issues.

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, Plaintiff's counsel conducted a thorough investigation and ultimately filed a complaint on behalf of Hartig 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 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 Drug Co. Inc. v. Senju Pharm. Co Ltd., et al.*, 122 F. Supp. 3d 202 (D. Del. 2015). 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. *Hartig Drug Co. Inc. v. Senju Pharm. Co. Ltd., et al.*, 836 F.3d 261 (3d Cir. 2016). 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.) (the "Apotex litigation"). 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 Federal Drug Administration 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. As a result of that mediation—held before David A. Rotman, a nationally recognized mediator of complex class actions and commercial matters—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* Joint Decl. at ¶¶ 5-7.

II. PLAINTIFF'S COUNSELS' APPLICATION FOR AN AWARD OF FEES AND REIMBURSEMENT OF EXPENSES SHOULD BE APPROVED.

Settlement Class Counsel seek Court approval of an award of $3,000,000 in attorneys' fees and $93,483.23 in reimbursement of expenses in connection with their work on behalf of the Class Members in this litigation. Settlement Class Counsel have provided Class Members with reasonable notice of their intention to make this request (and, in fact, told Class Members that they would seek up to 33-1/3%), and Class Members will have an adequate opportunity to comment on this Motion after its filing. The attorneys' fees requested represent 33-1/3% of the value of the "common fund" created by the cash portion of the settlement.

A. Reasonable Notice of the Requested Fees, Litigation Expenses, and Incentive Award and An Opportunity to Object Has Been Given to the Class.

Federal Rule of Civil Procedure 23(h) provides that "[n]otice of the motion [for attorneys' fees and costs] 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). Settlement Class Counsel have provided reasonable notice of Plaintiff's Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Award to Named Plaintiff, and have afforded Class Members an opportunity to object to such motion.

1. Summary of the Notice Period.

Through GCG, the Court-appointed Claims Administrator, Settlement Class Counsel effectuated a notice program that ensured Class Members are apprised of their rights. Pursuant to the Court's May 3, 2018 Order granting Plaintiff's motion to distribute notice to the Class, D.I. 61, and the Court's May 10, 2018 Order revising certain deadlines regarding the same, D.I. 63, on June 11, 2018, GCG mailed notice to Class Members. *See* Joint Decl. at ¶ 5. GCG also established a case website that contained a more detailed notice. *Id*. at ¶ 7. GCG also published notice in accordance with the requirements in the Court's notice order of May 3, 2018. *See id*. at ¶ 6.

The notice expressly notified potential Class Members that Settlement Class Counsel would be seeking Court approval of (i) attorneys' fees of up to 33-1/3% of the $9 million settlement amount, (ii) reimbursement of litigation expenses, and (iii) an incentive award for Hartig of up to $10,000. *See* D.I. 60-1 at 5-6. The notice also explains the process of, and sets deadlines for, opting out of the settlement as well as objecting to the settlement. *Id*.

2. **Time of Motion for Fees and Expenses and Opportunity to Object.**

The schedule approved by the Court requires Plaintiff to file its Motion for Fees, Expenses, and Incentive Award in advance of the deadline for asserting objections consistent with Rule 23(f). *See* D.I. 61 at ¶ 9 (setting forth relevant portion of schedule). Objections to the settlement or this motion for fees are due no later than October 5, 2018. *See id.* at ¶ 7. Accordingly, Class Members have sufficient time after the filing of this motion to lodge their objections to Plaintiff's proposed fee, expense, and incentive award.

B. The Fees Requested by Settlement Class Counsel Are Fair and Reasonable.

Where counsel have recovered funds for the benefit of a class, they are entitled to move for an award of attorneys' fees and reimbursement of litigation expenses from the fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *In re Warfarin Antitrust Litig.*, 212 F.R.D. 231, 261 (D. Del. 2002); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 590 (E.D. Pa. 2005); *In re ATI Techs., Inc. Sec. Litig.*, No. 01-2541, 2003 WL 1962400, at *2 (E.D. Pa. Apr. 28, 2003); *In re U.S. Bioscience Sec. Litig.*, 155 F.R.D. 116, 118-20 (E.D. Pa. 1994). Courts recognize that fee awards out of a common fund in an antitrust case are particularly important because "[i]n the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced." *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir. 1973). Such private litigation is essential to the enforcement of the antitrust laws. *See, e.g.*, *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 334 (1979). Plaintiff

respectfully submits that its requested fee is appropriate, given the nature and extent of Settlement Class Counsel's efforts in creating settlements beneficial to the Class in this hard-fought litigation and the risks assumed by counsel in prosecuting this complex matter with no guarantee of recovery.

In awarding attorneys' fees, the Court has discretion to apply either the percentage-of-recovery method or the lodestar method. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 (3d Cir. 2011); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006). The percentage-of-recovery method "applies a certain percentage to the [settlement] fund." *In re Diet Drugs Prod. Liab. Litig.*, 582 F.3d 524, 540 (3d Cir. 2009) (internal citation and quotation marks omitted). In common fund cases like this one, "the percentage-of-recovery method is generally favored." *In re Diet Drugs*, 582 F.3d at 540. The lodestar amount is then used to "cross-check" the percentage-of-recovery calculation. S*ee In re Fasteners Antitrust Litig.*, No. 08-md-1912, 2014 WL 296954, at *3 (E.D. Pa. Jan. 27, 2014) ("In practice, courts in the Third Circuit assess requests for attorney's fees in antitrust cases using the percentage-of-recovery method, and then cross-check the result with the lodestar method.").

Here, Settlement Class Counsel are seeking $3,000,000 in attorneys' fees, which is 33-1/3% of the $9,000,000 obtained through the settlement, representing a lodestar multiplier of 2.62. Plaintiff's request for a fee award is reasonable under both the percentage-of-recovery method and the lodestar cross-check.

1. The Requested Fee Award Is Fair and Reasonable under the Percentage-of-Fund Method.

In determining whether the requested fee is appropriate under the percentage-of-recovery method, courts in this Circuit consider the following factors:

> (1) the size of the fund created and the number of beneficiaries, (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 by plaintiffs' counsel, (7) the awards in similar cases, (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained, and (10) any innovative terms of settlement.

See In re Diet Drugs, 582 F. 3d at 541 (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 336-40 (3d Cir. 1998)). The percentage-of-recovery factors "need not be applied in a formulaic way." *Gunter*, 223 F.3d at 195 n.1. Rather, "[e]ach case is different, and in certain cases, one factor may outweigh the rest." *Id.* Here, the factors support awarding the requested attorney fee award.

a. The size of the fund created and the number of persons benefited.

Settlement Class Counsel secured a $9,000,000 settlement fund for the Class. This represents an outstanding recovery for Class Members who have been harmed by the delay the Defendants' conduct caused in the release of generic Zymar/Zymaxid, particularly given the complexity, duration, and expense of ongoing litigation and the risks of certifying the class, proving the liability of each defendant, and establishing damages. This first factor therefore strongly supports Settlement Class Counsel's fee request.

b. The absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel.

The settlement negotiated by Settlement Class Counsel has thus far met with general approval from the Class. The deadline by which Class Members may object or exclude themselves is October 5, 2018. To date, however, no one has opted to either exclude themselves or object to the settlement. *See* Joint Decl. at ¶¶ 9, 11. This urges in favor of approval of Class Counsel's fee request. *See In re AT&T*, 455 F.3d at 170 (upholding district court's reasoning that "the absence

of substantial objections by class members to the fees requested by counsel strongly supports approval"); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (holding that "[t]he class's reaction to the fee request supports approval of the requested fees").

c. The skill and efficiency of the attorneys involved.

Settlement Class Counsel comprise a group of highly skilled attorneys with significant experience prosecuting complex antitrust class action litigation throughout the United States. In appointing Settlement Class Counsel in this matter, the Court observed that "the requirements of Fed. R. Civ. P. 23(g) are fully satisfied by this appointment." *See* D.I. 56 at ¶ 5. The substantial recovery obtained in the settlement demonstrates that Settlement Class Counsel has represented their clients' interests with skill, diligence, and expertise. The declarations from the three firms who serve as Settlement Class Counsel provide an overview of the substantial work counsel undertook and their diligence in investigating the Defendants' violations, defeating dispositive motions, and carrying out complex settlement negotiations. *See* Coolidge Decl. at ¶ 2; Athey Decl. at ¶ 2; Frank Decl. at ¶ 2. Settlement Class Counsel have also been careful to litigate this matter in an efficient manner by taking steps to avoid unnecessary duplication, excessive time, and cost expenditures. Settlement Class Counsel have thus acted both skillfully and efficiently. Accordingly, this factor supports the proposed fee award.

d. The complexity and duration of the litigation.

"Antitrust class actions are particularly complex to litigate." *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 743 (E.D. Pa. 2013); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 102 (D.N.J. 2012) ("An antitrust action is a complex action to prosecute."); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2008 WL 63269, at *5 (E.D. Pa. Jan. 3, 2008) ("This litigation, like most antitrust cases, has been exceedingly complex, expensive, and lengthy."). "The legal and factual issues involved are always numerous and uncertain in outcome." *In re Linerboard*

Antitrust Litig., MDL No. 1261, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) (internal quotation marks omitted) (quoting *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)). This case is no exception. Settlement Class Counsel have expended significant time and effort over several years to investigate, prosecute, and eventually settle Plaintiff's claims against Defendants. The complexity of litigating a case involving product swapping and other unlawful conduct designed to delay the entry of generic equivalents to Zymar/Zymaxid, as described above, and difficult issues of valuation led to long and arduous settlement negotiations with the Defendants.

e. The risk of nonpayment.

Settlement Class Counsel have been litigating this matter from the outset with the risk of receiving nothing in return for their efforts. Settlement Class Counsel thus incurred significant risk with the possibility of no additional recovery whatsoever.[2] *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (noting appropriateness of compensating attorneys for accepting the risk of nonpayment); *In re Auto. Refinishing Paint*, 2008 WL 63269, at *5-6 (finding that risk of nonpayment supported award of one-third fee award in antitrust matter). In addition, Settlement Class Counsel have advanced expenses over the past several years that would not have been reimbursed absent a successful result. *See In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 516 (W.D. Pa. 2003) ("Aside from investing their time, counsel had to front copious sums of money. . . . Thus, the risks that counsel incurred in prosecuting this case were substantial and further support the requested fee award."); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05-md-01695, 2007 WL 4115808, at *6 (S.D.N.Y. Nov. 7, 2007) ("[T]he risk of non-payment in complex cases, such as this one, is very real."). Settlement Class Counsel carried this risk despite

[2] Settlement Class Counsel will also continue to incur time and expenses after July 31, 2018.

the fact that "[a]ntitrust litigation in general, and class action litigation in particular, is unpredictable." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998). "The 'best' case can be lost and the 'worst' case can be won, and juries may find liability but no damages. None of these risks should be underestimated." *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 127 (N.D. Ill. 1990). Settlement Class Counsel also faced the risk that class certification would be denied, and that Defendants could prevail on certain of their affirmative defenses at summary judgment. Thus, this factor favors granting Plaintiff's motion for attorneys' fees.

f. The amount of time devoted to the case by Plaintiff's counsel.

Settlement Class Counsel have expended 1813.92 hours in this litigation. *See* Coolidge Decl. at ¶ 2; Frank Decl. at ¶ 2; Athey Decl. at ¶ 3. These hours represent a significant commitment of resources to the litigation, and strongly supports the requested fee award. The time expended by Settlement Class Counsel has been necessary to obtain the outstanding recovery for the Class. This antitrust class action is complex, and Settlement Class Counsel have faced skilled defense counsel throughout the litigation. Absent the diligence and commitment of Settlement Class Counsel, the Class would not be poised to obtain this excellent recovery.

The fact that counsel could have spent those attorney hours and out-of-pocket expenditures litigating other matters further supports the fee request. *See Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 323 (W.D. Pa. 1997) ("In addition to noting the vast amount of work which was required in prosecuting this case, we also note Class Counsels' representation that their involvement in this litigation required them to abstain from working on other matters.").

g. The awards in similar cases.

The 33-1/3% fee requested by Settlement Class Counsel is a reasonable amount that falls well within the range of similar awards approved in this Circuit in similar cases. *See In re*

Fasteners, 2014 WL 296954, at *7 ("Co-Lead Counsel's request for one third of the settlement fund is consistent with other direct purchaser antitrust actions . . . [and] consistent with attorney's fees awards generally granted in this Circuit."); *In re Flonase*, 951 F. Supp. 2d at 748, 756 (citing cases from various Districts granting one-third fee requests and awarding requested fees of one-third of $150 million settlement fund to plaintiffs' counsel); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 339-40 (E.D. Pa. 2007) (awarding 35% of $39.75 million common settlement fund in Section 2 antitrust action, with a multiplier of 2.5); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085 FSH, 2005 WL 3008808, at *15-16 (D.N.J. Nov. 9, 2005) (finding that "[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" and awarding fees of one third of $75 million settlement fund); *In re Ravisent Techs., Inc. Sec. Litig.*, No. 00-CV-1014, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005) ("courts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses").

Each of the cases cited, while differing in some respects, is similar to the settlement and action here in a number of ways. For example, each was a class action in a court within the Third Circuit involving complex or novel legal or factual matters, most were pending for several years prior to reaching settlement, as is the case here, and, where lodestar multipliers were calculated, the multipliers were close to or greater than the multiplier here. *See In re Flonase*, 951 F. Supp. 2d at 743, 747-51 ("highly complex" antitrust class action litigated for over four years; and multiplier of 2.99); *In re Ravisent Techs.*, 2005 WL 906361, at *11-12 (complex securities class action with difficult matters of proof; pending for five years at the time of settlement; and multiplier of 3.1); *In re Remeron*, 2005 WL 3008808, at *4-8, 17 (complex antitrust class action pending for three years; difficult legal and factual questions remained; and multiplier of 1.8).

Accordingly, an attorneys' fee award of 33-1/3% is well within the range of reasonableness as demonstrated by fee awards in similar cases.

h. The value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations.

No government investigation benefitted the Class. And while there was a predecessor litigation related to Defendants' unlawful conduct, that lawsuit did not benefit members of the Class. Rather, Settlement Class Counsel was able to use the record from the predecessor litigation, after extensive review by Settlement Class Counsel, to negotiate a Settlement that benefitted the Class.

i. The percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained.

Settlement Class Counsel likely would have negotiated a standard 33-1/3% contingent fee had they signed agreements with each member of the Class. A one-third contingency is standard in individual litigation, and could be even higher in antitrust cases, given the complexities and risks involved. *See In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 156 (D.N.J. 2013) (determining that in antitrust class action, "Class Counsel's requested 33% fee amount is within the range of privately negotiated contingent fees"); *Bradburn Parent Teacher Store*, 513 F. Supp. 2d at 340 (holding that a fee award of 35% of the net settlement fund was comparable to the percentage counsel would have negotiated had the case been subject to a private contingency fee agreement when counsel was retained); *In re Remeron*, 2005 WL 3008808, at *16 (observing that "[a]ttorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation" and holding that the "requested 33 1/3% fee reflects the market rate in other litigation of this type").

* * *

Accordingly, Settlement Class Counsel's requested fee award is justified under the Third Circuit factors.

2. The Requested Fee Award is Reasonable under the Lodestar Cross-check.

In order to cross-check the percentage-of-recovery award against the lodestar that contributed to that recovery, the Court initially evaluates (1) the reasonableness of the hourly rate and (2) whether the hours were reasonably expended. *See, e.g.*, *Pub. Interest Research Grp. of N.J., Inc. v. Windall*, 51 F.3d 1179, 1185, 1188 (3d Cir. 1995). The Court then multiplies the hours worked by the applicable hourly rates in order to calculate the lodestar.

Here, the total lodestar attributed to Settlement Class Counsel's work from the case's inception through July 31, 2018 is $1,146,778.50.[3] If the requested fees are awarded, Settlement Class Counsel will have received a multiplier of 2.62 (requested fee award ÷ lodestar), well within the range approved in the Third Circuit.

a. Settlement Class Counsel's Hourly Rates Are Reasonable.

Settlement Class Counsel's hourly rates are reasonable, and similar rates have previously been evaluated and approved by courts in this District and Circuit. *See In re Mercedes-Benz Tele Aid Contract Litig.*, MDL No. 1914, 2011 WL 4020862, at *7 (D.N.J. Sept. 9, 2011) ("These rates reflect the experience and skill of the lawyers involved and are comparable to rates the courts have approved in similar cases in other metropolitan areas."). In assessing the reasonableness of an attorney's hourly rate, courts consider the prevailing market rate in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Barkouras v. Hecker*, No. 06-366, 2007 WL 1797651, at *4 (D.N.J. June 20, 2007) (citing *Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984)). Courts look to the forum in which the District is located to

[3] *See* Coolidge Decl. at ¶ 2; Frank Decl. at ¶ 2; Athey Decl. at ¶ 3.

determine the hourly rates that should apply. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 704 (3d Cir. 2005).

Settlement Class Counsel's rates have been approved in district courts in the Third Circuit and elsewhere. *See* Coolidge Decl. at ¶ 2 (setting forth, under oath, that the hourly rates sought are the current usual and customary hourly rates at the firm, and that that the rates are the same as, or substantially similar to, rates used by the firm in similar types of actions); Frank Decl. at ¶ 2 (same); Athey Decl. at ¶ 3 (same); *see also In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, 2012 WL 5467530, at *6 (E.D. Pa. Nov. 9, 2012) ("[T]he Court finds that the stated hourly rates of these attorneys and staff [including Hausfeld], some of whom are described as national leaders in the field of class action litigation, are reasonable.").

b. The Number of Hours Settlement Class Counsel Worked Is Reasonable.

The number of hours counsel worked is reasonable. Settlement Class Counsel spent 1813.92 hours litigating this case, a more than reasonable amount for a litigation that has spanned more than four years and included a successful appeal to the Third Circuit. *See* Coolidge Decl. at ¶ 3; Frank Decl. at ¶ 3; Athey Decl. at ¶ 4.

c. Settlement Class Counsel's Fee Results in a Reasonable Multiplier.

The fee requested by Settlement Class Counsel represents a multiplier of 2.62. The Third Circuit regularly approves fee awards with multipliers in this range. *See, e.g., Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 (3d Cir. 2011) (affirming lodestar multiplier of approximately 3.3); *Milliron v T-Mobile USA, Inc.*, 423 F. App'x 131, 135 (3d Cir. 2011) (affirming award representing multiplier of 2.21 and commenting that, "[a]lthough the lodestar multiplier need not fall within any pre-defined range, we have approved a multiplier of 2.99 in a relatively simple case") (internal citations omitted); *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 742 (3d Cir. 2001) (approving

a suggested multiplier of three and stating that multipliers "ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied") (internal citations omitted).

Accordingly, the fee requested by Settlement Class Counsel is fair and reasonable under either the percentage-of-recovery or lodestar cross-check method. For that reason, Settlement Class Counsel respectfully request that the Court grant the motion for attorneys' fees.

C. The Request for Reimbursement of Litigation Expenses is Reasonable.

Settlement Class Counsel also request reimbursement of litigation costs and expenses they incurred on behalf of the class in the amount of $93,483.23.[4] *See* Coolidge Decl. at ¶ 3; Frank Decl. at ¶ 3; Athey Decl. at ¶ 4. Attorneys "who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund." *Nichols v. SmithKline Beecham Corp.*, No. 00-6222, 2005 WL 950616, at *24 (E.D. Pa. Apr. 22, 2005) (quoting *In re Aetna Inc. Sec. Litig.*, MDL 1219, 2001 WL 20928, at *13 (E.D. Pa. Jan. 4, 2001)); *see also Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718, at *18 (E.D. Pa. Aug. 14, 2006) (granting plaintiffs' motion for approval of expenses "incurred in connection with the prosecution and settlement of the litigation"). "Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *In re Ins. Brokerage*, 297 F.R.D. at 157-58 (quoting *In re Safety Components Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001)) (internal quotation marks omitted). Reasonable litigation expenses include, *inter alia*, those for experts and consultants. *See, e.g.*, 1 Alba Conte, Attorney Fee Awards § 2.19 (3d ed. 2004). Here, Settlement Class Counsel's expenses were reasonable, and worthy of reimbursement. *See* Coolidge Decl. at ¶ 3; Frank Decl.

[4] The Court has previously approved expenses for GCG. D.I. 61. Settlement Class Counsel will pay GCG as GCG provides invoices for their work in this matter.

at ¶ 3; Athey Decl. at ¶ 4. Settlement Class Counsel therefore request that the Court reimburse the $93,483.23 that the firms spent in litigating this years-long litigation.

III. AN INCENTIVE AWARD TO THE CLASS REPRESENTATIVE IS APPROPRIATE.

Incentive awards may be provided to class representatives as a reward for efforts that benefit the class. *See Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 220 (E.D. Pa. 2011); *In re Remeron*, 2005 WL 3008808, at *18 ("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."); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000) ("Incentive awards are 'not uncommon in class action litigation and particularly where, as here, a common fund has been created for the benefit of the entire class.'") (quoting *In re S. Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997)). In evaluating the appropriateness of an award, courts consider (i) the financial, reputational, and personal risks to the plaintiff; (ii) the degree of plaintiffs' litigation responsibilities; (iii) the length of litigation; and (iv) the degree to which the plaintiffs benefitted as class members. *See Chakejian*, 275 F.R.D. at 220. Settlement Class Counsel requests that the Class Representative, Hartig, receive an incentive award of $10,000. This modest award is well-deserved.

This litigation commenced on June 6, 2014. Over the four-plus years since, the Class Representative has actively participated in many significant aspects of the litigation. Broadly stated, the Class representative made itself available to Settlement Class Counsel as needed. *See* Joint Decl. at ¶ 12. While the Class representative did not have to participate in burdensome discovery (which is why Settlement Class Counsel are not seeking a larger incentive award), the Class Representative did play an active role in the litigation. The Class Representative monitored the litigation on behalf of the Class, including reviewing pleadings and motions throughout the

course of the litigation. *Id.* at ¶ 13. Hartig also reviewed the terms of the Settlement and was apprised of settlement negotiations as they commenced. *Id.* at ¶ 14. In addition, Hartig had to preserve numerous documents in the event that the case proceeded to the discovery phase. *Id.* at ¶ 13. The representative also placed itself in the public spotlight by filing this high-profile lawsuit. *Id.* at ¶ 15. By agreeing to act as Class Representative in this litigation, Hartig has assisted the Class in achieving a substantial settlement and class relief.

An award of $10,000 to the Class Representative is well within the range of reasonableness and comparable to incentive awards in courts throughout this Circuit and around the country. *See, e.g., In re Remeron,* 2005 WL 3008808, at *18 (awarding $30,000 to each of two class representatives, noting that "the amount requested here is similar to amounts awarded in comparable settlements," and citing numerous cases granting awards of upwards of $30,000); *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at *18-19 (E.D. Pa. June 2, 2004) (approving $25,000 incentive awards to each of five class representatives, noting the award amount "is comparable to incentive awards granted by courts in this district and in other circuits," and citing cases from around the country granting awards of upwards of $20,000).

Additionally, the Class representative was not promised an incentive award by Settlement Class Counsel. Joint Decl. at ¶ 16. Hartig will not receive a windfall in this litigation. The Plan of Allocation previously approved by the Court is a *pro rata* distribution of the Settlement Fund in proportion to the relevant unit purchase total of Zymar and Zymaxid made by each Settlement Class member who files a claim form. Hartig will participate in, and receive its allotted share of, the Settlement, just as any other Class Member who makes a timely claim will. *See id.* ¶ 17.

For these reasons, Settlement Class Counsel respectfully requests that the Court award the reasonable sum of $10,000 to the Class representative.

CONCLUSION

For the foregoing reasons, Settlement Class Counsel respectfully request that the Court grant Plaintiff's Motion for An Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Award to Plaintiff Hartig Drug Company Inc.

Dated: September 25, 2018

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