





approved on April 11, 2003. Upon careful consideration of the motion and the affidavits, declarations, and reports filed in support thereof, the representations made by all parties at the fairness hearing held on June 16, 2003, having received no objections to the settlement by any class members, and the entire record herein, the Court will grant the motion.

## I. BACKGROUND<sup>1</sup>

Class Representatives commenced these Direct Purchaser Actions on April 16, 1999 against Corporate Defendants and SST Corporation ("SST"), filing a consolidated amended complaint on November 22, 1999,<sup>2</sup> and a separate Complaint on June 17, 2002 against Milan Puskar (overall, the "Complaints"), charging the Defendants with entering illegal agreements to monopolize the markets for the generic anti-anxiety drugs, lorazepam and clorazepate, in violation of various federal and state antitrust laws.<sup>3</sup>

After extensive and vigorous litigation, the parties began to explore the possibility of

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<sup>1</sup> The underlying alleged antitrust violations in this case have been thoroughly discussed in previous decisions of this Court, e.g., Fed. Trade Comm'n ("FTC") v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 32–35 (D.D.C. 1999); In re Lorazepam & Clorazepate Antitrust Litig., 202 F.R.D. 12, 14–17 (D.D.C. 2001), and thus will not be reiterated in full measure here.

<sup>2</sup> The Settlement Agreement states that the Amended Complaint was filed on November 19, 1999. See Settlement Agreement at 2. However, that is the date on which the document was signed by Plaintiffs' Counsel, but the date that the Amended Complaint was actually filed was November 22, 1999.

<sup>3</sup> As defined by the Court in its Order of July 2, 2001, and modified by Order of August 28, 2001, the Direct Purchaser Class consists of all persons and entities in the United States who purchased generic Lorazepam and/or generic Clorazepate tablets directly from Defendants Mylan and UDL during the period January 12, 1998 through July 2, 2001, excluding Defendants, their respective parents, subsidiaries and affiliates, any co-conspirators of Defendants, and all governmental entities.

settlement in late 2002.<sup>4</sup> The Direct Purchaser Plaintiffs, the Class Representatives, and the Defendants reached an agreement in principle in March 2003, under which the Defendants would pay a total of \$35,000,000 in cash (plus any interest earned or accrued thereon) in settlement of these Direct Purchaser Actions. Such money was wire transferred into the Direct Purchaser Settlement Fund Account. The Direct Purchaser Settlement Fund also includes the funds received, under a prior partial settlement of the Direct Purchaser Actions, from SST Corporation ("SST"), as discussed *infra*. The pertinent parties now seek final approval of this Settlement Agreement.

## II. DISCUSSION

The Direct Purchasers, the Class representatives, and the Defendants moved for final approval of their Settlement Agreement on May 30, 2003, specifically seeking: (1) final approval of the Settlement Agreement; (2) final approval of the Proposed Allocation and Distribution Plan ("Plan of Distribution"); (3) final approval of the payment of attorneys' fees and litigation costs; and (4) final approval of payment of incentive awards for the named Plaintiffs. See generally 05/30/03 Mot.

### (1) Final Approval of Settlement Agreement

Approval of a proposed class action settlement lies within the discretion of this Court. In re: Vitamins Antitrust Litig., 2001-2 Trade Cas. ¶ 73,361, 2001 WL 856290, at \*1 (D.D.C. July 19, 2001) (citing United States v. District of Columbia, 933 F. Supp. 42, 47 (D.D.C. 1996)). Federal Rule of Civil Procedure 23(e) provides that "[a] class action shall not be dismissed or

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<sup>4</sup> The Court would be remiss in not noting the steadfast and effective efforts of Magistrate Judge John M. Facciola in assisting the parties to resolve their differences and arrive at an agreement in this case.

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." Fed. R. Civ. P. 23(e). The Rule 23 requirements are fully consistent with the long-standing judicial attitude favoring class action settlements. Mayfield v. Barr, 985 F.2d 1090, 1092 (D.C. Cir. 1993). While the Court should "scrutinize the terms of the settlement carefully," the discretion to reject a settlement is thus "restrained by the 'principle of preference' that encourages settlements." Pigford v. Glickman, 185 F.R.D. 82, 103 (D.D.C.1999); see also United States v. District of Columbia, 933 F. Supp. at 47 ("The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties.") (quoting Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983)).

There is no single test in this Circuit for determining whether a proposed class action settlement should be approved under Rule 23(e), and the relevant factors may vary depending on the factual circumstances. Pigford, 185 F.R.D. at 98 & n.13 (citing Thomas v. Albright, 139 F.3d 227, 231 (D.C. Cir. 1998)). Generally, in determining whether a settlement should be approved, courts consider whether the proposed settlement "is fair, reasonable, and adequate under the circumstances and whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." Manual for Complex Litigation (Third), § 30.42 at 238 (1995). In making this determination, courts in this Circuit have examined the following factors: (a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strength of plaintiffs' case; (c) the stage of the litigation proceedings

at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel. See Thomas, 139 F.3d at 231–33; Pigford, 185 F.R.D. at 98-101; Osher v. SCA Realty I, 945 F. Supp. 298, 304 (D.D.C. 1996); Stewart v. Rubin, 948 F. Supp. 1077, 1087 (D.D.C. 1996), aff'd, 124 F.3d 1309 (D.C. Cir. 1997); Pray v. Lockheed Corp., 644 F. Supp. 1289, 1290 (D.D.C. 1986); In re Nat'l Student Marketing Litig., 68 F.R.D. 151, 155 (D.D.C. 1974); see also Moore v. Nat'l Ass'n of Sec. Dealers, Inc., 762 F.2d 1093, 1106 (D.C. Cir. 1985). As set forth below, the Court finds the Settlement Agreement fair, reasonable, and adequate, and accordingly will approve that agreement.

***(a) Arm's-Length Negotiations***

"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.'" In re: Vitamins, 2001 WL 856290, \*2 (quoting Manual for Complex Litigation (Third) § 30.42 (1995)). No one has challenged the parties' representation to the Court that the settlement before it is the product of extensive arms-length negotiations by experienced counsel, undertaken in good faith after substantial factual investigation and discovery. Indeed, experienced counsel on all sides conducted lengthy and adversarial negotiations. This Settlement was achieved only after 86 depositions, production, review and analysis of substantially more than a half-million pages of documents and approximately 91 CDs of data in electronic form, the filing by Class Counsel of at least 44 memoranda of law, an appeal to the D.C. Circuit, and protracted and difficult settlement negotiations. See Declaration of Michael Hausfeld in Support of Final Settlement Approval ("Hausfeld Dec.") at ¶¶ 5, 7–8, 12. The Court thus finds that the settlements were ultimately reached through arms-length negotiations.

***(b) Terms of Settlement in Relation to Strength of Plaintiffs' Case***

Under the Settlement Agreement, Defendants have paid \$35,000,000 (plus any interest earned or accrued thereon) in exchange for the release of the claims alleged against them in this matter by the Direct Purchaser Class. Such money was wire transferred into the Direct Purchaser Settlement Fund Account. The Direct Purchaser Settlement Fund also includes the funds received, under a prior partial settlement of the Direct Purchaser Actions, from SST, which remain in the SST Direct Purchaser Account, plus any interest earned or accrued thereon, after previous distribution of the amounts of the SST Settlement allocated to Indirect Purchaser Plaintiffs and the Plaintiff States in related actions, as well as payment to Class Counsel of incurred actual costs associated with the distribution of the Notice of Partial Settlement, pursuant to Order of this Court dated June 21, 2002. See Settlement Agreement § II.C. The \$35,000,000 (plus any interest earned or accrued thereon) contributed by Defendants pursuant to the Settlement Agreement, together with the funds from SST which remain in the SST Direct Purchaser Account, are collectively referred to herein as the "Direct Purchaser Settlement Funds." Specifically, to achieve the total payment of \$35,000,000, certain of the Defendants were to wire the following amounts into the Direct Purchaser Settlement Fund Account: Mylan: \$28,084,000; Cambrex: \$4,415,000; and Gyma: \$2,501,000. See Settlement Agreement §§ II.B.

The costs associated with printing, distributing, and publishing the Notice of Proposed Settlement and Summary Notice, and the costs of administering the Proofs of Claims to be submitted by Class Members, shall be paid from the Direct Purchaser Settlement Fund Account.

Such costs shall include the reasonable fees and costs incurred by the Class Administrator<sup>5</sup> in this regard. See Settlement Agreement §§ II.D.

A cursory review of the overall history of this case demonstrates the significance of the \$35,000,000 paid by Defendants to settle the claims of the Direct Purchaser Class because that amount is in addition to the prior settlements by the Defendants of \$100,000,000 with the FTC, States Attorneys General, and consumers, in addition to the Mylan Defendants' settlements of \$25,000,000 and \$10,000,000 respectively with the two Third-Party Payor Classes. Additionally, the Direct Purchaser Class previously settled with SST for \$2,000,000.

The Direct Purchasers' Consolidated Amended Complaint of November 22, 1999 prayed for, *inter alia*, treble damages, but did not specify a definite dollar amount. See Amended Complaint of 11/22/99 at XXIV ("Prayer for Relief"). In November 1999, the Plaintiffs noted that they "[could not] quantify at this time the precise amount of damages that they have sustained, but [Plaintiffs] allege that such damages are significant." Id. at XXII ("Injury") ¶ 98. However, one gains a complete sense of the terms of the \$35,000,000 settlement in relation to the strength of the Plaintiffs' case by realizing that the total amount that Defendants will have paid arising from their alleged anticompetitive practices in the Lorazepam and Clorazepate markets is \$172,000,000. This amount far exceeds the initial prayer in the FTC's complaint for disgorgement of \$120,000,000. See In re Lorazepam, 205 F.R.D. at 376.<sup>6</sup> Further, it

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<sup>5</sup> The Poorman-Douglas Corporation ("PDC") has been retained as the Class Administrator. See Affidavit of Richard Cody Bland at 2.

<sup>6</sup> Although the Direct Purchasers could potentially recover *treble* damages, the standard for evaluating settlement involves a comparison of the settlement amount with the estimated single damages. In re Ampicillin Antitrust Litig., 82 F.R.D. 652, 654 (D.D.C. 1979) ("The recovery of actual single damages must be the basis for the Court's assessment of monetary

substantially exceeds even the FTC's highest estimate of Defendant's gains from their anticompetitive conduct, which was in the "range of \$150 million." FTC's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss at 7.

Several additional factors should be taken into consideration. Continued litigation of this lawsuit would undoubtedly require substantial additional pretrial preparation and expense, as the Defendants have denied all liability. Such preparation would likely involve dozens of witnesses, including several experts, and thousands of pages of documents. Thus, "bringing this case to trial likely would have been a very complex, long and costly proposition." Pigford v. Glickman, 185 F.R.D. 82, 104 (D.D.C. 1999). Further litigation also entails substantial risks; given the Defendants' denial of liability, monetary recovery certainly cannot be assumed. See In re Ampicillin Antitrust Litig., 82 F.R.D. 652, 654 (D.D.C. 1979). The defendants have further contended that if liable, they can be held responsible only for damages resulting from any challenged exclusive licensing agreements from only 1998, rather than from a larger time period as Plaintiffs have suggested. All of these factors would operate to reduce the total potentially recoverable damages in this case. Indeed, "[g]iven the complexities of proof in antitrust cases, . . . and, the ordinary risks, and delays inherent in complex antitrust litigation, this Settlement appears to provide a significant benefit to the class," and should therefore be given final approval. In re Vitamins Antitrust Litig., Misc. No. 99-197 (TFH), MDL 1285, 2001 WL 1772352, at \*3 (D.D.C. Nov. 30, 2001).

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recovery in an antitrust settlement.") (citing Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)). Moreover, many states do not permit the recovery of treble damages, and in any event, the recovery of treble damages is far from certain in light of the considerations detailed in the Court's Mem. Op. of 02/01/02 (205 F.R.D. 369).

After considering all of these factors and thoroughly reviewing the representations of counsel in the Settlement Agreement, the Court finds the terms of the settlement fair, reasonable, and adequate when juxtaposed to the strength of the Plaintiffs' case.

***(c) Status of the Litigation at the Time of Settlement***

Early settlement of these types of cases is encouraged. See, e.g., In re: Vitamins Antitrust Litig., 1999-2 Trade Cas. ¶ 72,726, 1999 WL 1335318, \*4 (D.D.C. Nov. 23, 1999) ("The pursuit of early settlement is a tactic that merits encouragement; it is entirely appropriate to reward expeditious and efficient resolution of disputes.") (citing In re Cincinnati Gas & Elec. Co. Sec. Litig., 643 F. Supp. 148, 151 (S.D. Ohio 1986), and Muchnick v. First Fed. Sav. & Loan Ass'n of Philadelphia, 1986 WL 10791, at \*3 (E.D. Pa. Sept. 30, 1986)). Courts thus consider whether counsel had sufficient information, through adequate discovery, to reasonably assess the risks of litigation vis-à-vis the probability of success and range of recovery. See, e.g., Ressler v. Jacobson, 822 F. Supp. 1551, 1554–55 (M.D. Fla. 1992) (stating that "[t]he law is clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required to make these determinations" and concluding that "the plaintiffs [had] conducted sufficient discovery to be able to determine the probability of their success on the merits, the possible range of recovery, and the likely expense and duration of the litigation") (citing In re Corrugated Container Antitrust Litig., 643 F.2d 195, 211 (5th Cir. 1981), and Cotton v. Hinton, 559 F.2d 1326, 1332 (5th Cir. 1977)); Luevano v. Campbell, 93 F.R.D. 68, 86 (D.D.C. 1981) ("In evaluating the fairness and adequacy of a settlement, it is important to consider whether the settlement was reached after extensive factual development, so that counsel on both sides would have had information sufficient to make a reasonable assessment of their risks of

litigation.").

The Court is convinced that the Plaintiffs had sufficient information to adequately assess the risks of this litigation at the time of settlement. This Settlement is the result of more than four years of investigation and litigation by the Direct Purchaser Class, during which time, as the Court found at the preliminary approval hearing, there has been "substantial and vigorous litigation." Transcript of 04/11/03 Hrg. at 8. Indeed, the Court has already found that "[t]here has been voluminous document discovery [and] depositions. Only after an appeal of the class certification and the Court of Appeal's approval of [that] ruling . . . did the litigation go forward after much further discovery and contested motions that are still before the Court . . . ." *Id.* at 8-9.

The instant litigation, however, is still in the discovery stage, and discovery would continue were the case to proceed to trial. By entering a settlement agreement prior to summary judgment motions, moreover, the parties avoided significant expense and guaranteed a cash recovery. *In re Lorazepam*, 205 F.R.D. at 378. "Therefore, this Settlement does not come too early to be suspicious nor too late to be a waste of resources. It is in fact at a desirable point in the litigation for the parties to reach an agreement and to resolve these issues without further delay, expense, and litigation." *In re Vitamins*, 2001 WL 856290, at \*3; *see also Luevano v. Campbell*, 93 F.R.D. 68, 87 (D.D.C. 1981). The Court therefore concludes that the parties had adequate information at the time they entered their settlement agreements.

***(d) Reaction of Class***

The Court finds that the settlement group's reaction to this settlement has been overwhelmingly positive and supports approval. Notice was nationally disseminated through

newspapers, magazines, the Internet, and direct mailings to over 55,000 potential Class Members. See Affidavit of Richard Cody Bland at 2. That Notice expressly stated that

any Class Member who objects to the approval of the Settlement Agreement or Fee Petition or Incentive Awards or Allocation and Distribution Plan may appear at the Fairness hearing and show cause why [said documents] should not be approved . . . except that no such Class Member may appear at the Fairness hearing unless the Class Member, by June 2, 2003, (a) files [*inter alia*] . . . a notice of such person's intention to appear . . . .

04/17/03 Notice of Proposed Settlement at 3. The Court's Order Preliminarily Approving Proposed Settlement provides the same, and also states that "[i]n the absence of the timely filing and timely service of the notice of intention to appear and all other materials required by this paragraph, any objection shall be deemed untimely and denied." Preliminary Approval Order of 04/11/03 at 5. No objections were filed by June 2, 2003. See June 10, 2003 Class Counsel's Report Regarding Absence of Timely Objections to Final Settlement Approval and Approval of the Plan of Distribution at 3. Likewise, as of the Fairness Hearing on June 16, 2003, no timely or untimely objections have been received by Class Counsel.<sup>7</sup>

The existence of even a relatively few objections certainly counsels in favor of approval, see, e.g., New York v. Keds Corp., 1994-1 Trade Cas. ¶ 70,549, 1994 WL 97201, at \*3 (S.D.N.Y. Mar. 21, 1994) ("Given th[e] sales volume, the paucity of objections and statements of preference revealed by the record militates in favor of the settlements . . ."). In this case, however, not a single timely objection has been filed. Thus, "the reaction of the Class members

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<sup>7</sup> The Court notes that a related report was filed on June 10, 2003, entitled "Class Counsel's Report Regarding Absence of Timely Objections to Fee Petition, Reimbursement of Costs, and Incentive Awards to the Class Representatives." Similar to the report regarding final settlement and distribution approval, this report states that no pertinent objections were filed by June 2, 2003. See id. at 3. Further, as of the June 16, 2003 Fairness Hearing, no timely or untimely objections have been received by Class Counsel.

is overwhelmingly in favor of the proposed settlement." Osher v. SCA Realty I, Inc., 945 F. Supp. 298, 305 (D.D.C. 1996). For all these reasons, therefore, the Court ultimately concludes that the reaction of the class favors final approval.

***(e) Opinion of Experienced Counsel***

Counsel for the Direct Purchaser Plaintiffs and the Defendants have considerable expertise in complex antitrust and class action litigation. Indeed, counsel for all of the pertinent parties are among the best and most experienced antitrust litigators in the country. Opinion of such experienced and informed counsel should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement. In re Lorazepam, 205 F.R.D. at 380; accord In re National Student Marketing Litig., 68 F.R.D. at 155. Given counsels' experience, the extensive discovery and lengthy arms-length negotiations conducted in this case, and the information known to counsel at the time they reached the settlement agreement, the Court will credit counsels' opinion that these settlements are fair, reasonable, and adequate.

**(2) Final Approval of the Proposed Plan of Distribution**

The Direct Purchaser Plaintiffs have proposed a Plan of Distribution, under which the Direct Purchaser Settlement Funds, net of all administrative and litigation costs and expenses, attorneys' fees, and incentive awards to the Class Representatives, will be distributed to Class Members on the basis of their dollar amounts of Lorazepam and Clorazepate tablets purchased from Mylan Laboratories, Inc., Mylan Pharmaceuticals, Inc., or UDL Laboratories, during 1998 and 1999. See Plan of Distribution at 3. The plan also states:

This period covers the year 1998, which is the year during which the challenged exclusive licensing agreement was in force, as well as economic

aftereffects for a full year thereafter. The years 1998 and 1999 constitute the same "Relevant Period covered by the FTC and States Attorneys General's settlement distribution to consumers, which this Court previously approved. See In re Lorazepam, 205 F.R.D. at 380–82.<sup>8</sup>

Contract customers (i.e., customers with an individual or group contract with Mylan) may file claims for the Lorazepam and Clorazepate tablets purchased in 1998 and 1999 pursuant to their group or individual contracts with Mylan, regardless of whether delivery was taken directly from Mylan or through a wholesaler. Invoice customers (i.e., customers invoiced directly by Mylan) may file claims for the Lorazepam and Clorazepate tablets purchased in 1998 and 1999 for their own account. Claims by wholesalers must exclude tablets sold to Mylan's contract customers for which chargebacks were received by the wholesalers from Mylan.

Persons who previously signed or filed requests for exclusion from the Class or releases of claims may withdraw those exclusions from the Class or releases by filing a timely Proof of Claim Form. However, the Class Administrator shall (i) reduce by up to 10% the claims of those Class Members who filed requests for exclusion from the class, and (ii) reduce by up to 25% the claims of those Class Members who signed agreements releasing Defendants from liability and did not challenge the releases' validity, unless the Class Administrator recommends to the Court a lesser reduction due to mitigating circumstances shown by a Class Member. The claims of Class Members who signed releases, but who previously challenged those releases, shall not be reduced.

Id. at 3–5.

As with settlement agreements, courts consider whether distribution plans are fair, reasonable, and adequate. In re Lorazepam, 205 F.R.D. at 381; see also In re Vitamins Antitrust Litig., 2000 WL 1737867, at \*6; In re Chicken Antitrust Litig., 669 F.2d 228, 238 (5th Cir. 1982). The reductions of the amount to be paid to Class Members who previously opted out of the class or who signed releases appropriately accounts for the possibility that, were the Court to

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<sup>8</sup> Although the Class Period extends until July 2, 2001, that was simply the date of the class certification decision, and does not reflect any analysis of the period for liability and damages. In view of the fact that the exclusive licenses that form the basis for Plaintiffs' claims terminated in 1998, it is reasonable to include no more than one year thereafter as the basis for compensating Class Members for the exclusive licenses' economic aftereffects, which as noted is the same period approved by this Court in connection with the FTC's and the State Attorneys General's settlement for consumers.

rule on the pending motions challenging such opt-outs and releases, the Court might hold them valid, and that they therefore would not be entitled to share at all in any of the settlement.

"Ideally of course, all plaintiffs should share equally in the settlement, but variances among plaintiffs in their response to litigation that skew the ideal should be expected." In re Chicken, 669 F.2d at 240. A plan of distribution is thus sufficient where, as here, there is "a rough correlation" between the settlement distribution and the relative amounts of damages recoverable by Class Members. Id. Settlement distributions, such as this one, that thus apportion funds have been repeatedly deemed fair and reasonable. See, e.g., In re Lorazepam, 205 F.R.D. at 381 (citing Beecher v. Able, 575 F.2d 1010, 1013–14 (2d Cir. 1978), and In re Chicken, 669 F.2d at 240–41); In re Vitamins, 2000 WL 1737867, at \*6. Having carefully considered all of the above, the Court will approve the Plan of Distribution.

### **(3) Final Approval of Attorneys' Fees and Costs**

Class Counsel have requested that this Court grant them a fee award of 30% of the Direct Purchaser Settlement Funds, plus \$1,075,076.81 in costs, disbursements, and expenses, with interest from the date of the deposit of the Funds at the same rate earned by the Funds. See Petition for Counsel Fees and Reimbursement of Expenses ("Petition for Fees") at 1–2.

Courts have a duty to ensure that claims for attorneys' fees are reasonable. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1265 (D.C. Cir. 1993).<sup>9</sup> The D.C. Circuit has joined other circuits in "concluding that a

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<sup>9</sup> As the D.C. Circuit has explained:

Special problems exist in assessing the reasonableness of fees in a class action suit since class members with low individual stakes in the outcome often do not file

percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases." Swedish Hosp., 1 F.3d at 1271.<sup>10</sup> Proponents find the percentage-of-recovery method attractive "because it directly aligns the interests of the Class and its counsel and it provides a powerful incentive for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." In re Am. Bank Note Holographics, Inc. Sec. Litig., 127 F. Supp. 2d 418, 431–32 (S.D.N.Y. 2001). While fee awards in common fund cases may range from fifteen to forty-five percent, the normal range of fee recovery in antitrust suits is twenty to thirty percent of the common fund. In re Lorazepam, 205 F.R.D. at 383; accord Swedish Hosp. Corp., 1 F.3d at 1271–72; see also In re Aetna Inc., MDL No. 1219, 2001 WL 20928 (E.D. Pa. Jan. 4, 2001) (finding thirty percent to constitute a reasonable award); In re Ampicillin Antitrust Litig., 526 F. Supp. 494, 498 (D.D.C. 1981) (noting that while the bulk of fee awards in antitrust cases are less than twenty-five percent, several courts have awarded more than forty percent of the settlement fund). In cases regarded as "mega-fund" cases—that is, recoveries of \$100,000,000 or more—fees of fifteen percent are common. See Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp 2d 942, 989 (E.D. Tex. 2000) (surveying cases decided between 1993 and 1999).

While this Circuit has not yet developed a formal list of factors to be considered in

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objections, and the defendant who contributed to the fund will usually have no interest in how the fund is divided between the plaintiffs and class counsel. Swedish Hosp., 1 F.3d at 1265.

<sup>10</sup> "The 'common fund' doctrine is designed to spread the costs of litigation among all the beneficiaries of an identifiable fund over which a court can exercise legitimate control, in effect guarding against the unjust enrichment of passive beneficiaries at the expense of the active beneficiary." Bebchick v. Washington Metro. Area Transit Comm'n, 805 F.2d 396, 402 (D.C. Cir. 1986).

evaluating fee requests under the percentage-of-recovery method, other jurisdictions have delineated factors that courts should consider in evaluating fee requests. For example, the court in Gunter v. Ridgewood Energy Corp., 223 F.3d 190 (3d Cir. 2000), set forth several factors including: “(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 by plaintiffs' counsel; and (7) the awards in similar cases.” Id. at 195 n.1 (citing In re Prudential, 148 F.3d 283, 336–40 (3d Cir. 1998)); In re GM Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819–22 (3d Cir. 1995)). And the Tenth Circuit considers what has been called “the twelve Johnson factors,” namely:

[T]he time and labor required, the novelty and difficulty of the question presented by the case, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorneys due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, any time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation and ability of the attorneys, the 'undesirability' of the case, the nature and length of the professional relationship with the client, and awards in similar cases.

Rosenbaum v. MacAllister, 64 F.3d 1439, 1445 (10th Cir. 1995) (listing factors from Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974)).

As noted above, Class Counsel have requested that this Court grant them a fee award of 30% of the Direct Purchaser Settlement Funds, plus \$1,075,076.81 in costs, disbursements, and expenses, with interest from the date of the deposit of the Funds at the same rate earned by the

Funds.<sup>11</sup> The Court finds the requests reasonable and will accordingly approve it for the following reasons.

Respecting the attorneys' fees petition, it is undisputed that this complex litigation was vigorously litigated over a protracted period of time. "[D]uring the four years of this litigation counsel have, without receiving compensation, engaged in extensive motions practice and conducted considerable discovery." In re Newbridge Networks Sec. Litig., No. CIV. A. 94-1678-LFO, 1998 WL 765724, at \*3 (D.D.C. Oct 23, 1998). "[T]he risk of nonpayment through either an award of summary judgment to Defendants or loss at trial was significant and real in this case." In re Aetna, 2001 WL 20928, at \*15 n.15. Further, as the Court noted above regarding the arm's length negotiations that took place, this Settlement was achieved only after 86 depositions, production, review and analysis of substantially more than a half-million pages of documents and approximately 91 CDs of data in electronic form, the filing by Class Counsel of at least 44 memoranda of law, an appeal to the D.C. Circuit, and protracted and difficult settlement negotiations. See Hausfeld Dec. at ¶¶ 5, 7-8, 12. As the Court is also well aware, the "Defendants mounted an aggressive and vigorous defense throughout the course of this litigation." In re Aetna Inc. Securities Litig., No. Civ. A. MDL 1219, 2001 WL 20928, at \* 15 (E.D. Pa. Jan. 4, 2001). Plaintiffs therefore "faced substantial factual and legal hurdles in establishing their core allegations." Maley v. Del Global Techs. Corp., 186 F. Supp. 2d 358, 372 (S.D.N.Y. 2002) (awarding 33% of the common fund as attorney's fees).

Additionally, Plaintiffs Counsel "are experienced antitrust litigators, and they have

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<sup>11</sup> The requested fee award of 30%, as of April 30, 2003, amounts to \$10,698,115.69. Petition for Fees at 22.

detailed their efforts . . . in affidavits filed with the Court." In re Lorazepam, 205 F.R.D. at 400; see also generally Affidavits of Michael D. Hausfeld, Arthur M. Kaplan, Thomas Campbell, and Marc I. Gross. "The caliber of opposing counsel was clearly of the highest order and required that counsel for plaintiffs and the Class be capable of providing comparable services." In re Prudential Sec. Inc. Ltd. P'ships Litig., 912 F. Supp. 97, 101 (S.D.N.Y. 1996).

In sum, although the requested fee award falls at the high end of the previously noted normal range of fee recovery of twenty to thirty percent of the common fund, the award is warranted here by the factors discussed above. Accordingly, because this class action was vigorously litigated for a protracted period of time, raised novel and complex issues, involved a substantial risk of absolute non-payment, and demonstrated the quality of Class Counsel's reputation, an award of 30% of the common fund in attorneys' fees is appropriate. Cf. In re Aetna Inc. Sec. Litig., 2001 WL 20928, at \*14 (awarding counsel 30% of the common fund and observing that "[t]he course of this litigation was prolonged, having been actively litigated for nearly three years, and involved complex issues"); Maywalt v. Parker & Parsley Petroleum Co., 963 F. Supp. 310, 313 (S.D.N.Y. 1997) (awarding counsel 33.4% of the common fund in litigation that "was relatively complex and involved the usual risks for plaintiff's counsel attendant upon such complex actions").

Class Counsel have also detailed the lodestar approach they used to arrive at their total lodestar, at historic rates, of \$7,859,622, and at current rates of \$9,309,117. See generally Petition for Fees at 21–23; see also Hausfeld Dec. ¶ 14; Affidavit of Michael D. Hausfeld ¶¶ 7, 11; Affidavit of Arthur M. Kaplan ¶ 6; Affidavit of Thomas Campbell ¶¶ 7–8; Affidavit of Marc I. Gross ¶ 6. The requested award therefore is the result of applying a multiplier of

approximately 1.36 to Class Counsels' lodestar, calculated according to their historic billing rates. If the lodestar is calculated according to Class Counsels' current rates, the multiplier is even less, amounting to 1.15. Cf. In re Lorazepam, 205 F.R.D. at 385 (noting that if the requested fee is awarded, "the resulting multiplier would be less than a modest 1.3").

In contrast to the multipliers of 1.15 or 1.36 in this case, multiples ranging up to "four are frequently awarded in common fund cases when the lodestar method is applied." In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 341 (3d Cir. 1998); accord In re Combustion, Inc., 968 F. Supp. 1116, 1133 (W.D. La. 1997). The multiplier included in the requested fee award thus falls near the low end of normal multipliers. See In re Medical X-Ray Film Antitrust Litig., 1998 WL 661515, at \*7 (noting that a multiplier of 1.67 "is at the low end of multipliers used in other cases"). The Court finds this as further evidence that the fee of 30% is reasonable.

In addition to being entitled to reasonable attorneys fees, "[c]lass counsel in common fund cases are also entitled to reasonable litigation expenses from that fund." In re First Databank Antitrust Litig., 209 F. Supp. 2d at 98 n.4 (internal citation omitted). Class Counsel requests that the Court grant them reimbursement of \$1,075,076.81 in unreimbursed out-of-pocket expenses paid by counsel in the prosecution of this class action. See Hausfeld Dec. at ¶¶ 15–20. This amount equals only about 3% of the total recovery obtained for the Direct Purchaser Class. The Court concurs with Class Counsel's submission that "[t]he fact that petitioners were willing to expend their own money, as an investment whose reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary." Petition for Fees at 25.

After careful review of the Petition for Fees detailing the costs, and the affidavits submitted and representations of counsel in support thereof, the Court finds that Class Counsel reasonably expended the claimed amounts on experts, depositions and transcripts, travel, photocopying and postage, long distance telephone charges, legal research charges, litigation fund assessments, etc.

**(4) Final Approval of Payment of Incentive Awards for the Named Plaintiffs**

Direct Purchaser Plaintiffs request that this Court grant \$20,000 each to Advocate Health Care, St. Charles Hospital and Rehabilitation Center, Dik Drug Company, and Harvard Pilgrim Healthcare, Inc. as incentive awards to compensate them for their contribution to the \$35,000,000 settlement achieved in this case. See Petition for Incentive Awards for the Named Plaintiffs ("Petition for Incentives") at 1. In addition to undergoing lengthy depositions and multiple requests for production and documents in this case, the Direct Purchasers aver that the above named Plaintiffs also suffered significant expense in terms of their executive and administrative time. Id. at 3–4.

This Court has previously determined that incentive awards to named plaintiffs are not uncommon in class action litigation, particularly where a common fund has been created for the benefit of the entire class. See *In re Lorazepam*, 205 F.R.D. at 400. Indeed, "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." Id. (citations and internal quotation marks omitted). "The propriety of allowing modest compensation to class representatives seems obvious . . . ." Bogosian v. Gulf Oil Corp., 621 F. Supp. 27, 32 (E.D. Pa.

1985).

In deciding whether to grant incentive awards and the amounts of such awards, courts consider factors such as "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those action, and the amount of time and effort the plaintiff expended in pursuing the litigation." Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998); see also Van Vranken v. Atlantic Richfield Co., 901 F. Supp 294, 299 (N.D. Cal. 1995); Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250 (S.D. Oh. 1991).

In this case, "[t]he additional payments to the named Plaintiffs are reasonable in light of their investments of time, money, and effort on the part of the class." Collins v. Pension Benefit Guaranty Corp., No. CA 88-3406-AER, 1996 WL 335346, at \*6 (D.D.C. June 7, 1996). Through their affidavits and the Petition for Incentives, Counsel has sufficiently explained that the named Plaintiffs "ultimately played a role in achieving the \$35,000,000 settlement. Thus, '[t]he class has benefitted from the filing of the class action and from the time expended by the class representative[s].'" Petition for Incentives at 6 (quoting In re Revco Sec. Litig., Nos. 851, 89CV593, 1992 WL 118800, at \*7 (N.D. Oh. May 6, 1992)). Further, the total incentive awards requested here amount to only about 0.2% of the Direct Purchaser Settlement Funds. Cf. In re Lorazepam, 205 F.R.D. at 400 ("The aggregate incentive awards respectively represent approximately 0.3% of each class's recovery.") Thus, "these incentive awards are small in relation to the . . . fund from which the awards will be made." Dornberger v. Metro. Life Ins. Co., 203 F.R.D. 118, 125 (S.D.N.Y. 2001).

For the foregoing reasons, the Court will approve the Direct Purchaser Plaintiffs' Petition

for Incentives in the amount of \$20,000 to each of the four named Plaintiffs.

### III. CONCLUSION

For the foregoing reasons, in the Direct Purchaser Actions the Court will grant: (1) final approval of the Settlement Agreement; (2) final approval of the Plan of Distribution; (3) final approval of the payment of attorneys' fees and litigation costs; and (4) final approval of payment of incentive awards for the named Plaintiffs.

An appropriate order will accompany this Memorandum Opinion.

June 16, 2003



Thomas F. Hogan  
Chief Judge