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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

IN RE DUCTILE IRON PIPE FITTINGS ("DIPF") INDIRECT PURCHASER ANTITRUST LITIGATION	Civ. No. 12-169 (AET)(LHG)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF FINAL APPROVAL OF THE CLASS ACTION SETTLEMENTS AND FOR CREATION OF A FUND TO PAY LITIGATION EXPENSES

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Settlement Class Plaintiffs respectfully submit this Memorandum in Support of their Motion for Final Approval of Settlements with Defendant SIGMA Corporation and its subsidiary SIGMA Piping Products Corporation (collectively hereinafter referred to as "SIGMA"), and with Defendant Star Pipe Products ("Star"), for final certification of the Settlement Classes pursuant to Federal Rule of Civil Procedure Rule 23(b)(3),[1] and for an award to cover litigation expenses. This Court preliminarily approved the Settlements by Orders entered June 25, 2015 (Dkt. 223) (SIGMA), and August 26, 2015 (Dkt. 231) (Star).[2]

I. INTRODUCTION

After intense arm's-length negotiations, conducted with the assistance and under the direction of Hon. Joel B. Rosen, United States Magistrate Judge (Ret.) over a period of many months, Plaintiffs successfully obtained settlements with SIGMA and Star that provide significant benefits to the Settlement Class Members for each of the three Settlement Classes. In light of the excellent and timely result obtained, and the uncertainty, complexity, and expense inherent in litigation, as detailed below, Plaintiffs respectfully submit that the Settlement is fair, reasonable and adequate, and in the best interests of the Settlement Classes, and warrants final approval.

[1] Unless otherwise noted, all capitalized terms in this motion will have the same meaning as set forth in the Settlement Agreement.
[2] This Court appointed Kirby McInerney LLP, Kohn Swift & Graf P.C., and Weinstein Kitchenoff & Asher as Settlement Class Counsel. (Dkt. 231).

II. STATEMENT OF THE CASE

A. Factual Background

This case concerns an alleged conspiracy among manufacturers of ductile iron pipe fittings ("DIPF"). Plaintiffs allege that Defendants, Sigma Corporation, McWane, Inc., and Star Pipe Products, Ltd. and other unnamed co-conspirators violated the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, by engaging in (i) an unlawful conspiracy to raise and fix the prices for ductile iron pipe fittings ("DIPF") sold throughout the United States (all Defendants) and (ii) an unlawful conspiracy to monopolize the domestic DIPF market (McWane and SIGMA), as well as (iii) violating a number of state antitrust, consumer protection and unfair competition statutes as a result of the same behaviors. As a result of Defendants' conduct, Plaintiffs and members of the Class paid prices for DIPF that were higher than they should have been absent the conspiracy. The lawsuit seeks damages, injunctive relief, attorneys' fees and costs from Defendants. SIGMA denies all allegations of wrongdoing in this action.

Procedurally, this action was commenced January 2012. (ECF No. 1.) An amended complaint was filed in July 2012 (ECF No. 85), and motions to dismiss were filed by Defendants in September 2012 (ECF Nos. 89-90). The Court granted the motions to dismiss but gave Plaintiffs leave to amend. (ECF Nos. 105-106). Plaintiffs filed their second amended complaint in May 2013. (ECF No. 110.) Defendants filed motions to dismiss the second amended complaint (ECF Nos. 116-117), which were granted in part and denied in part in October 2013 (ECF No. 133). Defendants answered to the second amended complaint in October 2013 as well. (ECF Nos. 137-139.)

Discovery commenced at the end of 2013. In October 2014, the Court stayed the litigation so that the parties could mediate the case before the Honorable Joel B. Rosen, U.S.M.J.

(Ret.). (ECF No. 207.) The stay was extended on a several occasions as the parties, with the assistance of Judge Rosen continued to negotiate with defendants.

A. The Settlement Negotiations

1. The SIGMA negotiations

The settlement discussions with SIGMA took place over the course of many months. In the early fall of 2014, SIGMA provided counsel with certain information regarding SIGMA's financial position.[3] An extensive investigation of SIGMA's financial information was performed, including multiple telephone calls and in-person meetings. *Id.*

The Court referred all parties to mediation on October 15, 2015 (ECF No. 207). On January 27 and 28, 2015, all plaintiff groups (Indirect Purchaser Plaintiffs, Direct Purchaser Plaintiffs, and the State of Indiana) engaged in a global mediation before the Honorable Joel B. Rosen, U.S.M.J. (Ret.). As a result of that mediation, Indirect Purchaser Plaintiffs and SIGMA reached an agreement in principle and negotiated a term sheet.

The negotiation of the final Settlement Agreement took almost an additional four months, and involved multiple calls and exchanges of drafts between IPP Counsel and SIGMA. The SIGMA Agreement was finally executed on May 21, 2015.

2. The Star negotiations

The settlement discussions with Star took place over the course of many months. Preliminary settlement discussions were held in August 2014, but the parties were too far apart.[4]

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[3] *See, e.g.*, Declaration of Robert N. Kaplan, in support of Direct Purchaser Plaintiffs' Motion for Preliminary Approval of Settlement with SIGMA Corporation and Its Owned Subsidiary SIGMA Piping Products Corporation, in the matter of *In re Ductile Iron Pipe Fittings ("DIPF") Direct Purchaser Antitrust Litigation*, Civ. No. 12-711 (D.N.J.), ECF No. 321-1) at ¶¶ 2-3.

[4] *See, e.g.*, Declaration of Robert Kaplan, filed in support of Direct Purchase Plaintiffs' Motion for Preliminary Approval of Settlement with Star Pipe Products, ltd., in the matter of *In re*

The Court referred all parties to mediation on October 15, 2014 (ECF No. 207). On January 27 and 28, 2015, all plaintiff groups (Indirect Purchaser Plaintiffs, Direct Purchaser Plaintiffs, and the State of Indiana) engaged in a global mediation before the Honorable Joel B. Rosen, U.S.M.J. (Ret.). Following the mediation, the parties continued their settlement discussions and engaged in a second mediation before Joel Rosen on May 22, 2015, at which time the Indirect Purchaser Plaintiffs reached an agreement in principle with Star.

The negotiation of the final Settlement Agreement took an additional six weeks, and involved multiple calls and exchanges of drafts between IPP Counsel and Star. The Star Agreement was finally executed on July 2, 2015.

I. TERMS OF THE PROPOSED SETTLEMENT

A. The SIGMA Settlement Class

The SIGMA Settlement defines the proposed Settlement Class as follows:

> All persons or entities that reside or have a place of business in the States of Arizona, Arkansas, California, District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin who or that purchased DIPF indirectly from any Defendant at any time from January 11, 2008, through June 30, 2011 or who or that purchased Domestic DIPF indirectly from McWane or SIGMA at any time from September 17, 2009, through December 31, 2013.

SIGMA Agreement at ¶ 19. Excluded from the Settlement Class are Defendants and their parents, subsidiaries and affiliates, whether or not named as a Defendant in this Action, federal governmental entities, and instrumentalities of the federal government. *Id.*

Ductile Iron Pipe Fittings ("DIPF") Direct Purchaser Antitrust Litigation, Civ. No. 12-711 (D. N.J.), ECF. No. 324 at ¶ 2.

B. The Star Settlement Class

The Star Settlement defines the proposed Settlement Class as follows:

> All persons or entities that reside or have a place of business in the States of Arizona, Arkansas, California, District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin who or that purchased DIPF indirectly from any Defendant at any time from January 11, 2008, through June 30, 2011.

Star Agreement at ¶ 15. Excluded from the Settlement Class are Defendants and their parents, subsidiaries and affiliates, whether or not named as a Defendant in this Action, federal governmental entities, and instrumentalities of the federal government. *Id.* The settlement is drawn to benefit the residents of 28 states, including all those set forth in the original consolidated indirect purchaser complaint.

C. The Settlement Amount and Rescission Provisions

Under the terms of the SIGMA Agreement, SIGMA is to pay $1,805,000.00 ("Settlement Amount") into a settlement fund for distribution to the Class in three equal installments (on July 1, 2015, July 1, 2016, and May 31, 2017). SIGMA Agreement at ¶ 36. In the event that SIGMA fails to make timely payment (and fails to cure its default within 15 business days), the entire unpaid balance of the Settlement Amount (along with interest) shall become due immediately. SIGMA Agreement at ¶ 36. The money is being maintained in an escrow account at Citibank, and is being treated as a qualified settlement fund pending approval of the settlement by the Court.

SIGMA and Plaintiffs have the right and option to rescind the SIGMA Agreement for the reasons described in Paragraphs 44-45 of the Agreement, including in the event that the Court refuses to approve the Agreement or any material part thereof, or if such approval is modified or

set aside on appeal. SIGMA also has the right and option to rescind the Agreement if the amount of Opt-Out Purchases (defined in ¶ 12) or the resulting Opt-Out Percentage (defined in ¶ 13)[5] exceeds the amount set forth in a Confidential Side Letter. SIGMA Agreement at ¶ 45.[6] The SIGMA Agreement also provides that, after the expiration of the time during which this Agreement could be rescinded, Interim Co-Lead Counsel may submit a motion seeking approval of the payments of attorneys' fees and expenses from the Settlement Fund. SIGMA Agreement at ¶ 40. Interim Co-Lead Counsel may also seek an incentive award from the Settlement Fund for named Class Representatives. SIGMA Agreement at ¶ 40.

Pursuant to the terms of the Star Agreement, Star has paid $641,250.00 ("Settlement Amount") into a settlement fund, $150,000.00 of which may be used for notice and notice administration costs. Star shall pay the balance, in three equal installments on September 30, 2015 (reduced by the $150,000.00 separately paid), July 30, 2016, and May 31, 2017. Star Agreement at ¶¶ 29-30. As with the SIGMA settlement, in the event that Star fails to make timely payment (and fails to cure its default within 15 business days), the entire unpaid balance of the Settlement Amount (along with interest) shall become due immediately. Star Agreement at ¶ 30. The money is being maintained in an escrow account at Citibank, as approved by the Court, and is being treated as a qualified settlement fund pending approval of the settlement by the Court. Star Agreement at ¶ 31.

Star and Plaintiffs have the right and option to rescind the Star Agreement for the reasons described in Paragraphs 39-40 of the Agreement, including in the event that the

[5] The date for class members to exclude themselves from the settlement has passed, and no requests to opt out have been received by the Settlement Administrator. See Declaration of Lori L. Castaneda, ¶ 17, attached hereto as Exhibit 1.

[6] Plaintiffs respectfully request that, should the Court desire to review the Confidential Side Letter regarding the opt-out provision, Plaintiffs be permitted to submit it *in camera* due to the highly confidential nature of the document.

Court refuses to approve the Agreement or any material part thereof, or if such approval is modified or set aside on appeal. Star also has the right and option to rescind the Agreement if two or more state attorneys General (not including Indiana) opt-out or if Star terminates its settlement with the Direct Purchaser Settlement class in *In re Ductile Iron Pipe Fittings ("DIPF") Direct Purchaser Antitrust Litigation*, Civ. No. 12-711 (AET-LHG) (D. N.J.). Star Agreement at ¶ 40. The Star Agreement also provides that, after the expiration of the time during which this Agreement could be rescinded, Interim Co-Lead Counsel may submit a motion seeking approval of the payments of attorneys' fees and expenses from the Settlement Fund. Star Agreement at ¶ 35. Interim Co- Lead Counsel may also seek an incentive award from the Settlement Fund for named Class Representatives. Star Agreement at ¶ 40.

D. Payment of Notice and Notice Plan

As part of SIGMA's total payment under the Agreement, SIGMA will pay up to $200,000.00 for notice costs ("Notice Amount"). SIGMA Agreement at ¶ 34. The Notice Amount has been paid by SIGMA into an escrow account in accordance with the terms of the SIGMA Agreement, and may only be used for notice costs. SIGMA Agreement at ¶¶ 34-35. Any amount spent or accrued for notice costs is not refundable to SIGMA in the event that the Agreement is not approved or fails to become effective. SIGMA Agreement at ¶ 35.

As part of Star's total payment under the Agreement, Star will pay up to $150,000.00 for notice costs ("Notice Amount"). Star Agreement at ¶ 34. The Notice Amount has been paid by Star and is being held in an escrow account. Star Agreement, ¶ 34. Any amount spent or accrued for notice costs is not refundable to Star in the event that the Agreement is not approved or fails to become effective. Star Agreement at ¶ 29.

By Order entered February 3, 2016, the Court approved Plaintiffs' proposed Notice Plan. (Dkt.245). In addition, Plaintiffs proposed, and on April 26, 2016, the Court approved (Dkt. 255), additional notice by mail and email. The Plan of Notice has been implemented in accord with the Court's orders. Declaration of Lori L. Castaneda, attached hereto as Exhibit 1.

E. The Cooperation Provisions

The SIGMA Agreement provides for three types of cooperation by SIGMA, all of which will assist Plaintiffs in the continued prosecution of this litigation against the remaining Defendant, McWane. First, and at Plaintiffs' request, SIGMA shall make available for deposition one or more employees (as necessary) to explain or testify about SIGMA's transaction, rebate, and cost data and records. SIGMA Agreement at ¶ 48.

Second, again upon request of Plaintiffs, SIGMA will produce through affidavits, declarations, or a Rule 30(b)(6) declaration representatives qualified to establish admission into evidence of SIGMA's documents (or SIGMA documents produced by another party). SIGMA Agreement at ¶ 49.

Third, SIGMA will produce up to 6 fact witnesses (separate and apart from the transactional data witnesses in Paragraph 48 and the authentication witness in Paragraph 49) for deposition in the litigation by all Plaintiff groups. SIGMA Agreement ¶ 50.

The Star Agreement similarly provides three types of cooperation by Star, all of which will assist Plaintiffs in the continued prosecution of this litigation against the remaining Defendant, McWane. First, and at Plaintiffs' request, Star shall make available for deposition one or more employees (as necessary) to explain or testify regarding Star's transaction, rebate, and cost data and records. Star Agreement at ¶ 43.

Second, again upon request of Plaintiffs, Star will produce through affidavits, declarations, or a Rule 30(b)(6) deposition representatives qualified to establish admission into evidence of Star's documents (or Star documents produced by another party). Star Agreement at ¶ 44.

Finally, Star will produce up to six fact witnesses (separate and apart from the transactional data witnesses in Paragraph 43 and the authentication witness in Paragraph 44) for deposition in the litigation by all Plaintiff groups. Star Agreement ¶ 45.

F. Release Provisions

In exchange for the consideration described above, Plaintiffs have agreed to release SIGMA and Star from any and all claims arising out of or resulting from any of the conduct alleged or that could have been alleged in this action against SIGMA or Star, including under federal or state laws. SIGMA Agreement at ¶ 30; Star Agreement at ¶ 25. The terms of the SIGMA and Star Agreements do not release claims by direct purchaser, claims made by the State of Indiana, or claims arising out of product defect, breach of contract, product performance, or warranty claims relating to DIPF or Domestic DIPF. SIGMA Agreement at ¶ 30; Star Agreement at ¶ 25. The full text of the proposed releases, including the limitations thereof, is set forth in Paragraphs 30-33 of the SIGMA Agreement and at Paragraphs 25-28 of the Star Agreement.

G. Most-Favored-Nation Provision

If a settlement is reached between (i) McWane or Star, on the one hand, and (ii) the Direct Purchaser Plaintiffs in *In re Ductile Iron Pipe Fittings ("DIPF") Direct Purchaser Antitrust Litig.*, Civ. No. 12-711 (AET) (LHG), the Indirect Plaintiffs, and the State of Indiana in *State of Indiana v. McWane, Inc.*, et al., No. 12-6667 (AET) (LHG) (D.N.J.) ("Indiana"), on the

other, in an amount more favorable in the aggregate (as defined in a separate Confidential Global Side Letter)[7] to either or both of McWane or Star than the aggregate amount of the SIGMA Global Settlement, then the SIGMA Global Settlement amount (defined in Paragraph 23 to include this Settlement, as well as SIGMA's settlements with Direct Purchaser Plaintiffs and with the State of Indiana) shall be reduced as determined in the Confidential Global Side Letter. SIGMA Agreement at ¶ 51. There is no similar provision in the Star Settlement Agreement.

III. PRELIMINARY APPROVAL ORDER AND CLASS CERTIFICATION

In its June 25, 2015 (Dkt. 223) and August 26, 2015 (Dkt. 231) Orders, this Court preliminarily approved the Settlement, certified the Classes for settlement purposes. By Order dated February 2, 2016 (Dkt. 244), as supplemented by the Court's April 26, 2016 Order (Dkt. 255), Appointed Counsel were authorized to disseminate Notice and Claim Forms by direct mail, email, publication, and internet banner ads. A final fairness hearing is scheduled for June 8, 2016. (Dkt. 244, ¶ 7.).

IV. THE NOTICE PLAN COMPORTS WITH THE REQUIREMENTS OF RULE 23(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Where parties seek certification of a settlement class pursuant to Rule 23(b)(3) and approval of the settlement pursuant to Rule 23(e), "notice of the class action must meet the requirements of both Rule 23(c)(2) and Rule 23(e)." *In re CertainTeed Roofing Shingle Prods. Liab. Litig*., 269 F.R.D. 468, 480 (E.D. Pa. 2010). The mechanics of the notice process "are left to the discretion of the court subject only to the broad 'reasonableness' standards imposed by due process." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975).

[7] Plaintiffs respectfully request that, should the Court desire to review the Global Confidential Side Letter regarding the Most-Favored-Nation provision, Plaintiffs be permitted to submit it *in camera* due to the highly confidential nature of the document.

A. The Notice Program.

The Notice plan approved by the Court under Rule 23(c)(2)(B) has been carried out.[8] *See* Orders dated February 3, 2016 (Dkt. 244) and April 26, 2016 (Dkt. 255); *see also* Castaneda Declaration, attached hereto as Exhibit 1. The parties have made available multiple channels through which class members can learn about the settlement. The notice plan provides for both individual and media notice through an extensive combination of direct mail, email, internet publication, print publication, English and Spanish press releases, a website, and a toll-free telephone number. *See generally* Castaneda Decl. at ¶¶ 5-16.

B. The Notice Plan and Claims Procedures Meet the Requirements of Due Process.

The requirements of due process are straightforward in the settlement context: "In order to satisfy due process, notice to class members must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 119 (D.N.J. 2002) (quotation marks omitted); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). For those whose names and addresses cannot be determined by reasonable efforts, notice by publication suffices under both Rule 23(c)(2) and the due process clause. *Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 325 (E.D. Pa. 1993) (*citing Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317-18 (1950)). Significantly, compliance with Rule 23(c)(2) itself can satisfy the Due Process Clause. *See In re Enron Corp. Secs., Derivs., & "ERISA" Litig.*, No. MDL-1446, 2008 U.S. Dist. LEXIS 84656, at *41 (S.D. Tex. Sept. 8, 2008). Here,

[8] In addition, both SIGMA and Star have provided the required CAFA notice under 28 U.S.C. § 1715 to the Attorney General of the United States, the Department of Justice Antitrust Division, the Federal Trade Commission, and the Attorney General of each state where it reasonably is believed that class members reside. CAFA Notice by SIGMA (Dkt.239) , dated December 14, 2015; CAFA Notice by Star (Dkt. 240), dated December 22, 2015.

the parties agreed upon a comprehensive, nationwide paid media effort that included publication in leading trade outlets, internet banner advertising, a settlement website, and an automated toll-free telephone line. The Court-approved Notice Program, designed and implemented for this case, provided the best practicable notice of the Settlement, consistent with the requirements of Rule 23(c)(2)(B) to members of the classes.

V. THE PROPOSED SETTLEMENT CLASSES SATISFY RULE 23 AND SHOULD BE CERTIFIED.

In its preliminary approval orders, this Court determined that the Settlement Classes satisfied the requirements of Rule 23(a) and 23(b)(3) and certified the three Settlement Classes for the limited purpose of this Settlement. *See* Preliminary Approval Orders (Dkt. 223 and 231). Nothing has changed since the Court's Orders that would make the Class uncertifiable, or that changes the bases on which it may be certified. Therefore, Plaintiffs will not repeat the discussion of the reasons making certification of the settlement classes appropriate here. *See* Plaintiffs' Motions for Preliminary Approval of Class Action Settlement (Dkt. 221 and 226).

VI. THE SETTLEMENT IS FAIR, REASONABLE, ADEQUATE, AND IN THE BEST INTEREST OF THE CLASSES.

The Supreme Court has identified the "important principle that settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 401 (1977) (quotation and alteration marks omitted). Class action settlements minimize the litigation expenses of the parties and reduce the strain that litigation imposes upon already scarce judicial resources. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d. Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."); *Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1455 (E.D. Pa. 1995) ("[T]he

extraordinary amount of judicial and private resources consumed by massive class action litigation elevates the general policy encouraging settlements to an overriding public interest." (quotation marks omitted)).

A. The Settlement is Entitled to an Initial Presumption of Fairness.

Under Federal Rule of Civil Procedure 23(e), a settlement must be "fair, reasonable and adequate" to be approved. Fed. R. Civ. P. 23(e); *see also In re The Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118 (3d Cir. 1990); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 965 (3d Cir. 1983). In evaluating the settlement, the court acts as a fiduciary responsible for protecting the rights of the absent class members and 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 Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001) (quoting *General Motors*, 55 F.3d at 785).

The Third Circuit affords an initial presumption of fairness to a settlement "if the court finds that: (1) the negotiations occurred at arm's-length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; (4) only a small fraction of the class objected." *Cendant*, 264 F.3d at 233 n.17; *see also In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 267 (E.D. Pa. 2012) (attaching a presumption of fairness even where there was no formal discovery because plaintiffs' counsel "investigat[ed] the merits prior to filing the complaint . . . and exercise[ed] opportunities to review records provided by [defendant], all of which enabled counsel to have sufficient background in the facts of the case"); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) ("A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between

experienced, capable counsel after meaningful discovery.") (citing *Hanrahan v. Britt*, 174 F.R.D. 356, 366 (E.D. Pa. 1997)). As demonstrated below, these criteria are readily satisfied here.

There can be no doubt that the negotiations that led to this Settlement were undertaken at arm's length. The extensive Settlement negotiations in this case spanned the course of several months and included numerous sessions mediated by retired Judge Rosen in Philadelphia and in-person meetings between Defendants' counsel and Appointed Counsel. Numerous settlement offers were proposed and rejected, and only after countless proposals, counterproposals, extensive negotiations, and multiple drafts did the Parties come to a mutually agreeable resolution. The best interests of the Settlement Classes were of paramount importance throughout the negotiation process.

As described above, Appointed Counsel conducted their own extensive and in-depth investigation of the facts of this case, including examining the extensive FTC record and other data and documents garnered not only from defendants but from numerous third-parties.

The Parties have been represented by seasoned litigators throughout the process. Both Appointed Counsel and Defendants' counsel are well-experienced in similar class action litigation. The Parties' Counsel unreservedly recommend this Settlement. Courts recognize "significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class." *Lake v. First Nationwide Bank*, 900 F. Supp. 726, 731 (E.D. Pa. 1995 (quotation marks omitted)); *see also Spring Garden United Neighbors, Inc. v. City of Phila.*, No. 83-3209, 1986 U.S. Dist. LEXIS 29688, at *9-10 (E.D. Pa. Feb. 4, 1986) ("[T]he professional judgment of counsel involved in the litigation is entitled to significant weight."); *In re Am. Family Enters.*, 256 B.R. 377, 421 (D.N.J. 2000) ("In determining the fairness, adequacy, and reasonableness of a proposed settlement, significant weight should also be given to the belief

of experienced counsel that settlement is in the best interest of the class, so long as the Court is satisfied that the settlement is the product of good faith, arms-length negotiations." (quotation marks omitted)); *Austin*, 876 F. Supp. at 1457 ("[C]ourts have accorded significant weight to the view of experienced counsel who have engaged in arm's-length negotiations."); *In re Michael Milken and Assocs. Sec. Litig.*, 150 F.R.D. 57, 68 (S.D.N.Y. 1993) ("Experienced counsel's opinions are entitled to substantial weight by the Court in determining whether to approve [a] Settlement.").

Direct notice of the Settlement was mailed and emailed to Settlement Class Members, and a comprehensive multi-media notice plan published notice in trade publications and on the internet sites of other trade publications. A case website with the Notice and Claim form, the settlement agreements and other relevant pleadings and documents as well as a toll-free automated telephone line to assist class members in making claims determinations. *See generally* Castaneda Decl. No opt-outs were received by the May 3, 2016 deadline. *See* Castaneda Decl. at ¶ 17.While the final deadlines does not run until May 19, 2016, to date no objections have been received.

The lack of opt-outs and objections qualifies for the presumption of fairness. *See McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 459 (D.N.J. 2008) (finding that 601 opt-outs and nine objections qualified for a presumption of fairness); *In re Remeron End-Payor Antitrust Litig.*, No. 02-2007, 2005 U.S. Dist. LEXIS 27011, at *50 (D.N.J. Sept. 13, 2005) (finding that 70 opts outs and eight objections from a class of 850,000 qualified for a presumption of fairness). Accordingly, an initial presumption of fairness should be given to the Settlement because the Parties arrived at the Settlement only after extensive arm's length negotiations by fully informed, experienced and competent counsel—under the direction of Magistrate Judge Rosen—and only

after carefully considering the strengths and weaknesses of the case based on analysis of volumes of factual evidence.

B. Application of the *Girsh* Factors.

District courts have broad discretion in determining whether to approve a proposed class action settlement. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527 (3d Cir. 2004). However, in determining whether the Settlement is fair and reasonable, courts in the Third Circuit must consider the following factors, commonly known as the *Girsh* factors, as set forth in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975):

(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 in light of the best possible recovery; and

(9) The range of reasonableness of the settlement in light of all attendant risks of litigation.

As set forth below, the application of each of these factors to the Settlement demonstrates that the Settlement is fair, reasonable, and adequate.

C. The Proposed Settlement Satisfies the *Girsh* Criteria for Final Approval.

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

The first *Girsh* factor weighs heavily in favor of approving the Settlement. The factor considers the "probable costs, in both time and money of continued litigation." *Cendant*, 264

F.3d at 233 (quotation marks omitted); *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2007 U.S. Dist. LEXIS 65037, at *45 (D.N.J. Sept. 4, 2007); *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663,2007 U.S. Dist. LEXIS 11163, at *48 (D.N.J. Feb. 16, 2007), *aff'd*, 579 F.3d 241 (3d Cir. 2009). Prior to trial, the Parties would, among other things, be required to further examine and analyze sales data, be required to incur significant expenses for experts in connection with class certification, opposed multiple motions for summary judgment, and prepare for a multi-defendant trial.[9] A trial on the merits of this case would entail considerable expense, including numerous experts, and thousands of additional hours of attorney time. *See Egg Prods.*, 284 F.R.D. at 269 (finding settlement favorable where "considerable expenditures of financial resources and hours of attorney time relating to discovery for liability and damages" would be required for trial). Moreover, even after trial is concluded, there would likely be one or more lengthy appeals. Indeed, the likelihood of appeal from any decision on the merits counsels in favor of approving the Settlement. *See, e.g., In re Ikon Office Solutions, Inc., Secs. Litig.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000) ("Finally, the extremely large sums of money at issue almost guarantee that any outcome, whether by summary judgment or trial, would be appealed. This factor thus weighs in favor of the proposed settlement."); *see also Remeron*, 2005 U.S. Dist. LEXIS 27011, at *49 ("Finally, trial would likely not end the litigation, given the right to appeal.").

By reaching a favorable settlement early in the litigation, Plaintiffs have avoided significant expense and delay and have ensured a recovery to the Classes. The settlement benefits available for Settlement Class Members are real and tangible. These factors weigh in

[9] Plaintiffs recognize that some portion of these costs will be unavoidable as they continue to litigate with Defendant McWane. Nevertheless, these settlements will mitigate at least some of the cost that a multi-front battle against three defendants would impose.

favor of the Settlement. *See Egg Prods.*, 284 F.R.D. at 268-69 ("[G]iven that the settlement agreement occurred at an early stage of this litigation, prior to the active commencement of discovery, Plaintiffs have avoided such expense and delay as may have attached to these settling Defendants."); *Warfarin Sodium*, 391 F.3d at 535-36 (acknowledging this factor because "continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial"); *Linerboard*, 292 F. Supp. 2d at 642 (noting that the "protracted nature of class action antitrust litigation means that any recovery would be delayed for several years," and the settlement's "substantial and immediate benefits" to class members favored settlement approval).

2. Class Reaction to the Proposed Settlement

The second *Girsh* factor also weighs heavily in favor of final approval. This factor "attempts to gauge whether members of the class support the settlement." *Prudential*, 148 F.3d at 318. As noted above, the Court-approved notice plan was carried out and to date there have been no objections to the Settlement, and no requests for exclusion. *See* Castaneda Decl. at ¶¶ 17-18. These numbers are consistent with Third Circuit precedent and the decisions of other federal courts approving settlements. *See Egg Prods.*, 284 F.R.D. at 269 (holding that 150 requests for exclusion were "virtually *di minimis* in light of the over 13,200 Notices of settlement that were sent (as well as published notices and press releases about the settlement)"); *McCoy*, 569 F. Supp. 2d at 459 (finding that 601 opt-outs and nine objections qualified for a presumption of fairness); *Stoetzner*, 897 F.2d at 118-19 (holding that only 29 objections in 281 member class – or 10% – "strongly favors settlement"); *Prudential*, 148 F.3d at 318 (affirming conclusion of district court that class reaction was favorable when 19,000 class members opted out of class of eight million and 300 objected); *Ikon*, 194 F.R.D. at 175 (settlement approved where there were 2,500 requests for exclusion from an original notice to 140,000 class members); *cf. Anderson v. Torrington Co.*,

755 F. Supp. 834, 847 (N.D. Ind. 1991), 755 F. Supp. at 844 (granting final approval over objections from one-third of class members); *League of Martin v. City of Milwaukee*, 588 F. Supp. 1004, 1022 (E.D. Wis. 1984) (108 objectors in class of 200). The complete lack of objectors and opt-outs shows the decisively positive response to the Settlement.

3. The Stage of Proceedings and Amount of Discovery Completed

The third *Girsh* factor also favors settlement. The Third Circuit has found that this factor—considering the stage of proceedings and the amount of discovery completed—is intended to ensure "that a proposed settlement is the product of informed negotiations" and that "the parties . . . have an adequate appreciation of the merits of the case before negotiating." *Prudential*, 148 F.3d at 319 (quotation marks omitted); *see Egg Prods.*, 284 F.R.D. at 271 (granting approval even where there was no formal discovery because counsel "were in such a position prior to negotiating and entering into the Moark Settlement that they had an adequate understanding and appreciation of the strengths and weaknesses of the Plaintiffs' case"). This factor "captures the degree of case development that interim counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Gen. Motors*, 55 F.3d at 813.

The amount of discovery completed in advance of the Settlements supports a finding that class counsel were well informed in their negotiations of the SIGMA and Star Settlements.

First, discovery in this litigation commenced at the end of December 2013. The parties have exchanged written discovery and a large volume of documents, review of which was well underway before the settlement mediation process even started.

Second, and in addition to the documents produced by Defendants, Plaintiffs also had the benefit of being able to review the FTC hearing transcripts and exhibits from *In the Matter of McWane, Inc. and Star Pipe Products, Ltd.*, Docket No. 9351. The litigation testimony and

exhibits utilized in those proceedings have assisted Plaintiffs significantly in the prosecution of this litigation.[10]

Finally, Plaintiffs had a good understanding of Star's financial position, including its ability to pay a settlement or withstand a judgment in this litigation. Accordingly, Settlement Class Counsel were knowledgeable regarding the facts of the case and the strengths and weaknesses of the parties' positions in advance of the settlement negotiations and resulting Settlements.

"Given this vast amount of discovery obtained, and the volume of motion practice that enabled Plaintiffs' Counsel to preview some of the defenses that Defendants would advance, Plaintiffs' Counsel had a valid basis to negotiate a settlement." *McCoy*, 569 F. Supp. 2d at 461 (quotation marks omitted). Thus, the litigation has reached a stage where "the parties certainly had a clear view of the strengths and weaknesses of their case," and favors approval under this factor. *Bonett v. Educ. Debt Servs*., No. 01-6528, 2003 U.S. Dist. LEXIS 9757, at *17 (E.D. Pa. May 9, 2003) (quotation and alteration marks omitted).

4. The Risks of Establishing Liability

The fourth *Girsh* factor also weighs in favor of approval. The fourth factor "examine[s] what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *Gen. Motors*, 55 F.3d at 814. "The inquiry requires a balancing of the likelihood of success if 'the case were taken to trial against the benefits of immediate settlement.'" *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72,

[10] The Eleventh Circuit affirmed an FTC ruling that Defendant McWane had engaged in an "unlawful exclusive dealing policy to maintain its monopoly power in the domestic fittings market." *In re McWane, Inc. and Star Pipe Prods. Ltd.*, FTC Docket No. 9351, 2014 WL 556261, at *41 (FTC Jan. 30, 2014), *aff'd, McWane Inc. v. F.T.C.*, 783 F.3d 814 (11th Cir. 2015). The Supreme Court recently denied *certiorari*.

89 (D.N.J. 2001) (*quoting Prudential*, 148 F.3d at 319). Here, "the Court need not delve into the intricacies of the merits of each side's arguments, but rather may 'give credence to the estimation of the probability of success proffered by [Appointed Counsel], who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.'" *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 115 (E.D. Pa. 2004) (*quoting Lachance v. Harrington*, 965 F. Supp. 630, 638 (E.D. Pa. 1997)).

While Appointed Counsel believe that they would prevail at trial, they recognize that class action cases, like all complex litigation against large companies with highly talented defense counsel, have inherent risks. "Here, as in every case, Plaintiffs face the general risk that they may lose at trial, since no one can predict the way in which a jury will resolve disputed issues." *Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 337 (W.D. Pa. 1997), *aff'd*, 166 F.3d 581 (3d Cir. 1999), *see also State of W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970) ("It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced."), *aff'd*, 440 F.2d 1079 (2d Cir. 1971).

5. The Risks of Establishing Damages

The fifth *Girsh* factor likewise supports approval of the Settlement. This factor, similar to the fourth, "attempts to measure the expected value of litigating the action rather than settling it at the current time." *Cendant*, 264 F.3d at 238-39 (*quoting Gen. Motors*, 55 F.3d at 816). "Because establishing damages will be contingent on establishing liability, the same concerns animate both of these elements of the *Girsh* test." *McCoy*, 569 F. Supp. 2d at 461. Even if Plaintiffs successfully reach trial as a class and establish liability, proof of damages will be provable, but complex. *See, e.g.*, *Lazy Oil*, 95 F. Supp. 2d at 337 ("[C]ourts have recognized the need for compromise where divergent testimony would render the litigation an expensive and

complicated 'battle of experts.'"). However confident Appointed Counsel may be that damages can be proven against SIGMA and Star, Counsel must also recognize the existence of a genuine risk of no recovery or only a limited recovery. Settlement, on the other hand, provides Settlement Class Members with tangible and timely benefits. *See, e.g.*, *Sutton v. Medical Serv. Ass'n*, No. 92-4787, 1994 U.S. Dist. LEXIS 7512, at *18 (E.D. Pa. June 8, 1994) (granting final approval, noting that "even assuming that plaintiffs ultimately would have prevailed on liability, they faced the risk that they could not establish damages or obtain the other prospective relief that is achieved by this Settlement Agreement").

6. The Risks of Maintaining a Class Action Through Trial

The sixth *Girsh* factor, which evaluates the risks of certifying and maintaining a class through a trial, also favors approval of the Settlement. "Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certified if the action were to proceed to trial." *Warfarin Sodium*, 391 F.3d at 537 (quotation and alteration marks omitted). The Classes have been preliminarily certified for settlement purposes only. *See* Preliminary Approval Orders (Dkt. 223 and 231). There is no guarantee that these classes would be certified before or during trial, and this uncertainty further supports approval of the proposed Settlement. *Prudential*, 148 F.3d at 321 (noting that "a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable"); *see Egg. Prods.*, 284 F.R.D. at 273 ("The Court of Appeals for the Third Circuit has recognized: There will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." (quotation marks omitted)).

7. The Ability of the Defendant to Withstand a Greater Judgment

The seventh *Girsh* factor also favors settlement here. The Third Circuit has interpreted this factor as concerning "whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240. Here, defendants provided financial records to Settlement Class Counsel during the medication process, and as the payment over three years indicates, it is unlikely that a significantly larger recovery was possible.

Even assuming that Defendants could withstand a larger judgment, this is not an obstacle to approving the Settlement. Settlements have been approved where a settling defendant has had the ability to pay greater amounts, but the risks of litigation outweigh the potential gains from continuing on to trial. *See Lazy Oil*, 95 F. Supp. 2d at 318 ("The Court presumes that Defendants have the financial resources to pay a larger judgment. However, in light of the risks that Plaintiffs would not be able to achieve any greater recovery at trial, the Court accords this factor little weight in deciding whether to approve the proposed Settlement."); *Perry*, 229 F.R.D. at 116 ("[Defendant] could certainly withstand a much larger judgment as it has considerable assets. While that fact weighs against approving the settlement, this factor's importance is lessened by the obstacles the class would face in establishing liability and damages."); *see also Warfarin Sodium*, 391 F.3d at 538 ("[T]he fact that DuPont could afford to pay more does not mean that it is obligated to pay any more than what the . . . class members are entitled to under the theories of liability that existed at the time the settlement was reached.")

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

The final two *Girsh* factors also weigh in favor of approval of the Settlement. These factors assess the reasonableness of the settlement "in light of its monetary and nonmonetary consideration." *Egg Prods.*, 284 F.R.D. at 274. Both factors "test two sides of the same coin:

reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Warfarin Sodium*, 391 F.3d at 538. A court evaluating a proposed class action settlement should consider "whether the settlement represents a good value for a weak case or a poor value for a strong case." *Id.*; *see also Girsh*, 521 F.2d at 157. In the process, however, a court must "avoid deciding or trying to decide the likely outcome of a trial on the merits." *In re Nat'l Student Mktg. Litig.*, 68 F.R.D. 151, 155 (D.D.C. 1974).

As courts have explained, "[w]hile the court is obligated to ensure that the proposed settlement is in the best interest of the class members by reference to the best possible outcome, it must also recognize that settlement typically represents a compromise and not hold counsel to an impossible standard." *In re Aetna, Inc. Sec. Litig.*, MDL No. 1219, 2001 U.S. Dist. LEXIS 68, at *21 (E.D. Pa. Jan. 4, 2001); *see also Gen. Motors*, 55 F.3d at 806 (noting that "after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution"); *Lazy Oil*, 95 F. Supp. 2d at 338-39 (stating that a court "should not make a proponent of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and abandoning of highest hopes" (quotation marks omitted)).

Plaintiffs are aware of the inherent risks of complex litigation, the challenge of obtaining class certification, the delays that often occur, and the desirability of obtaining prompt and effective relief for the Classes. Continued litigation would be extensive and costly, and would require Plaintiffs to spend significant money on expert evaluation. Litigating the case further would prove exponentially more complex and costly. Further class certification motions, potential appeals, summary judgment motions, and *Daubert* motions would be time-consuming. Especially when balanced against these risks and uncertainties, the economic relief, and other

benefits afforded by the Settlements confers a significant benefit on the Classes. In short, further litigation of this case against these Defendants would create an unnecessary burden on the parties and the Court, but would not be likely to result in greater benefit to the Classes than the Settlements provide. Thus, the eighth and ninth *Girsh* factors are satisfied.

Therefore, for the reasons stated above, the Settlement satisfies the factors set forth in *Girsh*, 521 F.2d at 157, and is fair, reasonable, and adequate.

VII. PLAINTIFFS' REQUEST FOR A FUND TO BE USED TO LITIGATE THE CASE IS APPROPRIATE.

Settlement Class Counsel have been litigating this case since 2012. Nevertheless, Settlement Class Counsel are not presently seeking an award of attorneys' fees from the settlement fund. However, because the case is ongoing, Settlement Class Counsel request that they be permitted to use $459,250 (approximately twenty percent of the SIGMA and Star Settlements) to pay for expenses incurred and that will be incurred in the prosecution of the lawsuit.

The Classes were informed that such a request would be made. In the section titled "How will the lawyers be paid", the long-form notice states:

> "You are not personally responsible for payment of attorneys' fees or expenses for Class Counsel. Class Counsel will ask the Court to approve from both the SIGMA Settlement Fund and the Star Settlement Fund an award for costs and expenses incurred and to be incurred in the prosecution of the lawsuit.
>
> At this time, Class Counsel will ask the Court to approve from the SIGMA Settlement Fund and the Star Settlement Fund an award of $459,250 (twenty percent (20%) of the amount of the SIGMA and Star Settlements that are not currently designated for notice costs) for costs and expenses incurred and to be incurred in the prosecution of the lawsuit.
>
> Class Counsel are not seeking payment of attorneys' fees at this time. At a later date Class Counsel will ask the Court for an award of attorneys' fees, reimbursement of any additional litigation expenses,

> as well as payment of incentive awards to the class representatives for their services representing the class. The amount requested for attorneys' fees will not exceed one-third of any settlement funds. When Class Counsel seek payment of attorneys' fees, reimbursement of litigation expenses, and incentive awards from the settlement fund, notice will be provided and you will be given an opportunity to object and be heard by the Court."

The published notice (e.g., Castaneda Decl., Ex. A) likewise advised members of the Settlement Classes that Settlement Class Counsel intended to request an award of expenses from the settlement funds. In the section titled "Who Represents Me?", the notice states:

> "These lawyers will ask the Court to approve an award to pay for expenses incurred and that will be incurred in the prosecution of the lawsuit in the amount of $459,250 (approximately twenty percent of the SIGMA and Star Settlements). The request for expenses will be available for viewing on the website below once it is filed with the Court. The lawyers are not currently seeking an award of attorneys' fees or incentive awards for the class representatives. Any request for attorneys' fees will not exceed one- third of the Settlement funds. You will be given notice if a request for an award of attorneys' fees or incentive awards is made."

No objections in response to the notification regarding Class Counsel's request have been received as of the date of this motion.

Neither Class Counsel's request, nor the granting of such a request, is unusual. In fact, this Court has already concluded that it was reasonable and proper, and thus approved a fund of $1,106,230.92 in the DIPF Direct purchaser case, Case 3:12-cv-711-AET-LHG, "to be kept in a separate escrow account and to be used solely to pay pretrial and trial expenses as they come due in connection with the ongoing litigation against McWane, Inc., and its division Clow Water Systems Co., Tyler Pipe Company, and Tyler Union." Order Approving Reimbursement of Expenses, filed January 28, 2016 (Dkt. 351). Indirect Purchaser Plaintiffs, while seeking to minimize expenses to retain as much money as possible for the member of the Classes, will nevertheless have substantial costs for depositions recently taken, expert expenses incurred and

significant expert expenses to be incurred in connection with Class certification, summary judgment, and trial.

In addition to this Court's own order in the companion case hereto, as set forth below, substantial authority, from courts in the Third Circuit and elsewhere, supports this type of use of funds obtained from a partial settlement.

The *Manual for Complex Litigation, Fourth* §13.21 (2004), provides that "partial settlements may provide funds needed to pursue the litigation…." *See also In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) (noting that a partial "settlement provides class plaintiffs with an immediate financial recovery that ensures funding to pursue the litigation against the non-settling defendants"); *In re Corrugated Container Antitrust Litig.*, 556 F. Supp. 1117, 1146 (S.D. Tex. 1982) ("the non-refundable amount of $187,500 made available to plaintiffs by this settlement provided a substantial sum to help defray plaintiffs' expenses at a time when their trial preparation costs were mounting rapidly"); *In re M.D.C. Holdings Sec. Litig.*, 1990 WL 454747, at *10 n.10 (S.D. Cal., Aug. 30, 1990) ("In recognition of the magnitude of the expenses likely to be incurred in prosecuting the actions against the defendants who have not settled, the Stipulation of Settlement provides for the establishment of a $1 million fund 'to pay the actual expenses incurred in the further prosecution of the Litigation against the Non-Settling Defendants' (Stipulation of Settlement at ¶ 11.1). The establishment of this fund will insure adequate funding for the vigorous ongoing prosecution of the case for the class, is of obvious benefit to the class, and is approved by the Court.").

Many other courts have granted requests to use a portion of settlement proceeds for the continued prosecution of litigation. The Fifth Circuit, in *Newby v. Enron Corp.*, 394 F.3d 296, 302-03 (5th Cir. 2004), affirmed an order providing for the establishment of $15 million

litigation expense fund from the proceeds of a partial settlement. In *In re WorldCom, Inc. Sec. Litig.*, 2004 WL 2591402, at *22 (S.D.N.Y. Nov. 12, 2004) a $5 million fund was authorized for the continuation of the litigation against the non-settling defendants. See also *In re Automotive Parts Antitrust Litigation*, 12-MD-02311 (E.D. MI) (orders totaling $3 million allowed for litigation expenses) Ex. 2; *In re: Chocolate Confectionary Antitrust Litigation*, 1:08-mdl-01935-CCC (Dkt 1106) (M.D.Pa 12/12/2011) Ex. 3.

Accordingly, Plaintiffs respectfully seek authorization for Class Counsel to use up to $459,250 of the settlement funds for expenses incurred in the prosecution of this action against the remaining defendants.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval of the Settlement pursuant to Federal Rule of Civil Procedure 23(e) and certify the requested Settlement Classes for settlement purposes pursuant to Rules 23(a) and 23(b)(3). A proposed Order is filed herewith.

Dated: May 9, 2016

Respectfully submitted,

/s/ Robert S. Kitchenoff

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