IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

IN RE DUCTILE IRON PIPE FITTINGS ("DIPF") DIRECT PURCHASER ANTITRUST LITIGATION	Civ. No. 12-711 (AET)(LHG) Hearing Date: May 10, 2018

MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT WITH DEFENDANT MCWANE, INC. AND ITS DIVISIONS CLOW WATER SYSTEMS CO., TYLER PIPE COMPANY, AND TYLER UNION

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iii

I. INTRODUCTION 2

II. BACKGROUND 3

A. The Litigation 3

B. The Settlement Negotiations 3

III. PROVISIONS OF THE SETTLEMENT AGREEMENTS 5

A. The Settlement Classes 5

B. The Terms of the Settlement Agreement 6

IV. PRELIMINARY APPROVAL ORDER AND CERTIFICATION OF SETTLEMENT CLASS 10

V. THE NOTICE PLAN MEETS THE REQUIREMENTS OF RULE 23(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND DUE PROCESS 10

A. The Notice 11

B. Summary Notice, Website, and Toll-Free Telephone Number 12

C. The Notice Plan and Claim Procedures Meet the Requirements of Due Process 13

D. The CAFA Notice Requirement Has Been Satisfied By McWane 14

VI. THE PROPOSED SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL BECAUSE IT IS FAIR, REASONABLE, AND ADEQUATE 14

A. The Settlement Is Entitled to an Initial Presumption of Fairness 15

B. The Girsh Factors Favor Approval of the Settlement 18

1. The complexity, expense, and duration of the litigation. 18

2. The reaction of the class to the settlement. 21

3. The stage of the proceedings..22

4. The risks of establishing liability. 23

5. The risk of establishing damages. 24

6. The risks of maintaining a class action through trial. 25

7. The ability of the defendants to withstand a greater judgment...26

8. The range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation 26

VII. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE...28

VIII. CONCLUSION...29

TABLE OF AUTHORITIES

Page(s)

Cases

Austin v. Pa. Dep't Corr.,
876 F. Supp. 1437 (E.D. Pa. 1995)....................15

Carlough v. Amchem Prods., Inc.,
158 F.R.D. 314 (E.D. Pa. 1993)....................14

Girsh v. Jepson,
521 F.2d 153 (3d Cir. 1975).................... *passim*

Hegab v. Family Dollar Stores, Inc.,
No. 11-1206(CCC), 2015 WL 1021130 (D.N.J. Mar. 9, 2015)....................26

In re Aetna, Inc. Sec. Litig.,
MDL No. 1219, 2001 WL 20928 (E.D. Pa. Jan. 4, 2001)....................27

In re Air Cargo Shipping Servs. Antitrust Litig.,
MDL No. 06-1775(JG)(VVP), 2012 WL 3138596
(E.D.N.Y. Aug. 2, 2012)....................29

In re Am. Family Enters.,
256 B.R. 377 (D.N.J. 2000)....................17

In re AremisSoft Corp. Sec. Litig.,
210 F.R.D. 109 (D.N.J. 2002)....................13

In re Auto. Refinishing Paint Antitrust Litig.,
617 F. Supp. 2d 336 (E.D. Pa. 2007)....................26

In re Baby Prods. Antitrust Litig.,
708 F.3d 163 (3d Cir. 2013)....................28

In re Cardizem CD Antitrust Litig.,
218 F.R.D. 508 (E.D. Mich. 2003)....................29

In re Cendant Corp. Litig.,
264 F.3d 201 (3d Cir. 2001).................... 24, 26, 28

In re Cendant Corp. Sec. Litig.,
109 F. Supp. 2d 235 (D.N.J. 2000)....................27

In re Fasteners Antitrust Litig.,
MDL No. 08-1912, 2014 WL 285076 (E.D. Pa. Jan. 24, 2014) 17

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995) .... *passim*

In re Ikon Office Solutions, Inc.,
194 F.R.D. 166 (E.D. Pa. 2000) 28

In re Lease Oil Antitrust Litig. (No. II),
186 F.R.D. 403 (S.D. Tex. 1999) 18

In re Linerboard Antitrust Litig.,
292 F. Supp. 2d 631 (E.D. Pa. 2003).................... 15, 20

In re Linerboard Antitrust Litig.,
296 F. Supp. 2d 568 (E.D. Pa. 2003)....................18

In re NASDAQ Market-Makers Antitrust Litig.,
187 F.R.D. 465 (S.D.N.Y. 1998)....................19

In re Nat'l Student Mktg. Litig.,
68 F.R.D. 151 (D.D.C. 1974) 27

In re Packaged Ice Antitrust Litig.,
MDL No. 08-01952, 2011 WL 717519 (E.D. Mich. Feb. 22, 2011)............ 19, 20

In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions,
148 F.3d 283 (3d Cir. 1998) 15, 21, 22

In re Remeron End-Payor Antitrust Litig.,
No. 02-2007(FSH)/04-5126(FSH), 2005 WL 2230314 (D.N.J. Sept. 13, 2005) 21

In re Safety Components, Inc. Sec. Litig.,
166 F. Supp. 2d 72 (D.N.J. 2001)....................23

In re Warfarin Sodium Antitrust Litig.,
391 F.3d 516 (3d Cir. 2004) 18, 20, 25, 27

Ins. Brokerage Antitrust Litig.,
297 F.R.D. 136 (D.N.J. 2013) 24

Lake v. First Nationwide Bank,
900 F. Supp. 726 (E.D. Pa. 1995)....................17

Martina v. L.A. Fitness Int'l, LLC,
No. 12-2063(WHW), 2013 WL 5567157 (D.N.J. Oct. 8, 2013) 23

McCoy v. Health Net, Inc.,
569 F. Supp. 2d 448 (D.N.J. 2008)....................21

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 10

Rouse v. Comcast Corp.,
No. 14-1115, 2015 WL 1725721 (E.D. Pa. Apr. 15, 2015) 15

Saini v. BMW of N. Am., LLC,
No. 12-6105(CCC), 2015 WL 2448846 (D.N.J. May 21, 2015) 26

In re Mut. Funds Inv. Litig.,
MDL No. 04-15861(CCB), 2010 WL 2342413 (D. Md. May 19, 2010) 9

Stoetzner v. U.S. Steel Corp.,
897 F.2d 115 (3d Cir. 1990) 15, 21

Sullivan v. DB Invs., Inc.,
667 F.3d 273 (3d Cir. 2011) 28

Varacallo v. Mass. Mutual Life Ins. Co.,
226 F.R.D. 207 (D.N.J. 2005) 21

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,
396 F.3d 96 (2d Cir. 2005) 19

Wallace v. Powell,
288 F.R.D. 347 (M.D. Pa. 2012) 23

Weiss v. Mercedes–Benz of N. Am., Inc.,
899 F. Supp. 1297 (D.N.J. 1995)....................26

Zimmer Paper Prods. Inc. v. Berger & Montague, P.C.,
758 F.2d 86 (3d Cir. 1985) 13

Statutes

28 U.S.C. § 1715 2

28 U.S.C. § 1715(b) 14

28 U.S.C. § 1715(d) 14

Rules

Fed. R. Civ. P. 23 .... 14, 28

Fed. R. Civ. P. 23(a)....................15

Fed. R. Civ. P. 23(b) 15

Fed. R. Civ. P. 23(c)(2)....................14

Fed. R. Civ. P. 23(e)....................1, 10

Fed. R. Civ. P. 23(e)(1)(c) 15

Pursuant to Fed. R. Civ. P. 23(e), Direct Purchaser Plaintiffs ("DPPs" or "Plaintiffs") respectfully submit this memorandum of law in support of their motion for final approval of a settlement between DPPs and McWane, Inc. and its divisions Clow Water Systems Co., Tyler Pipe Company, and Tyler Union (collectively, "McWane").[1] The Settlement Agreement was preliminarily approved on January 10, 2018 (ECF No. 473), and provides for a single lump-sum payment of $8,787,500 (the "Settlement Amount"), including up to $150,000 to be used to pay notice and administration costs.

The definition of each Settlement Class excludes 53 large companies, referred to as the "Known Opt-Outs," which previously agreed with McWane to either: (i) release their claims against McWane; or (ii) opt-out of any litigation or settlement class certified in the Action. The Known Opt-Outs represent about 68.1% of net purchases of Open-Spec DIPF during the relevant period and 76.7% of the net purchases of Domestic DIPF. The Settlement Fund will be shared only among Settlement Class Members; the Known Opt-Outs cannot participate in the Settlement Fund distribution.

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[1] All capitalized terms not otherwise defined have the definitions set forth in the Settlement Agreement Between DPPs and Defendant McWane, executed on October 26, 2017 ("Settlement Agreement").

If approved by the Court, the Settlement Agreement will fully resolve this litigation.[2]

I. INTRODUCTION

The proposed Settlement with McWane fits well within the criteria for final approval by this Court. The Settlement is the product of hard-fought litigation as well as extensive settlement negotiations, which included formal mediation sessions presided over by the Honorable Layn Phillips, United States District Court Judge (Ret.), and his colleague, Gregory Lindstrom, both highly respected and experienced mediators.

The Court preliminarily approved the Settlement Agreement on January 10, 2017, and certified the Settlement Classes for settlement purposes. The notice approved by the Court was mailed to the class on February 9, 2018.

McWane has declared its compliance with the notice requirements of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, by filing a notice of service with the Court. ECF. No. 483.

As of April 9, 2018, no Settlement Class Member had objected to the proposed

[2] Former Defendants SIGMA Corporation and its owned subsidiary SIGMA Piping Products Corporation (collectively, "SIGMA") and Star Pipe Products, Ltd. ("Star") entered into settlement agreements with DPPs on May 21, 2015 and July 2, 2015, respectively, and those settlements were granted final approval on January 28, 2016. The settlement funds recovered by the classes as a result of those settlements have been distributed.

Settlement or the Settlement Classes. The deadline to object to the Settlement is April 20, 2018.

In light of the uncertainty, complexity, and expenses inherent in litigation, this proposed Settlement is fair, reasonable, and adequate and should be finally approved.

II. BACKGROUND

A. The Litigation

This case was brought on behalf of putative classes of direct purchasers of ductile iron pipe fittings ("DIPF") from defendants McWane, SIGMA, and Star. The Second Consolidated Amended Complaint ("SCAC") alleges two unlawful conspiracies: (a) a price-fixing conspiracy among McWane, SIGMA, and Star (which collectively sold more than 90% of DIPF in the United States) from at least January 11, 2008, through June 30, 2011; and (b) a conspiracy between McWane and SIGMA to monopolize and fix prices in the domestic DIPF Market from September 17, 2009, through at least December 31, 2013. Plaintiffs also challenged actions by McWane to monopolize the domestic DIPF Market from at least February 2009 through at least December 31, 2013. McWane denied all allegations of wrongdoing.

B. The Settlement Negotiations

The Settlement Agreement with McWane arises from extensive arm's-length and good-faith negotiations. Kaplan Decl. ¶ 3. The scope and details of the

negotiations are described in the accompanying Kaplan Declaration. Interim Co-Lead Counsel and McWane's Counsel, all highly experienced and capable, vigorously advocated their respective clients' positions in the settlement negotiations. Kaplan Decl. ¶ 11.

On January 28, 2015, and May 22, 2015, the parties participated in two Court-ordered mediation sessions before the Honorable Joel B. Rosen, U.S.M.J. (Ret.), a highly respected and experienced mediator. *Id.* ¶ 4. At that time, the parties were too far apart, and these attempts to mediate were unsuccessful. *Id.* ¶ 4.

On October 19, 2016, after fact discovery had been completed, this Court stayed the proceedings to provide the parties an additional opportunity to settle their dispute. *Id.* ¶ 5. The parties selected the Honorable Layn Phillips, United States District Court Judge (Ret.), to mediate, as Judge Phillips had recently concluded a successful mediation involving McWane's and Plaintiffs' counsel in a separate antitrust litigation involving cast iron soil pipes and fittings. *Id.* ¶ 6. The parties believed that Judge Phillips' familiarity with the parties would facilitate the mediation. *Id.* ¶ 6. Judge Phillips held an in-person mediation session on December 15, 2016, which was followed by several additional weeks of continued efforts by telephone. *Id.* ¶ 7. Although Judge Phillips was able to bring the parties closer together, ultimately these efforts were unsuccessful. *Id.* ¶ 7.

In the months that followed, the parties concluded briefing Plaintiffs' motion for class certification and McWane's motion to exclude the report and opinions of Plaintiffs' expert economist, Dr. Russell Lamb. *Id.* ¶ 8. After oral argument on these pending motions, on June 23, 2017, the Court ordered the parties to renew their attempts to mediate. *Id.* ¶ 9. Because Judge Phillips was not available, the parties selected Gregory Lindstrom, an experienced mediator who had assisted Judge Phillips in the December 15, 2016 session. *Id.* ¶ 9. The parties attended sessions before Mr. Lindstrom on July 27, 2017, and September 13, 2017. During the September 13 session, an agreement-in-principle was reached, which was subsequently formalized into a final settlement agreement. *Id.* ¶ 10.

Both sides vigorously negotiated their respective positions on all material terms of the Settlement Agreement, and the negotiations were non-collusive. *Id.* ¶ 11. In connection with these settlement negotiations, DPPs' Interim Co-Lead Counsel were well-informed of the facts concerning liability and damages issues and the relative strengths and weaknesses of each side's litigation position. *Id.* ¶ 12.

III. PROVISIONS OF THE SETTLEMENT AGREEMENTS

A. The Settlement Classes

The Settlement Agreement defines the Settlement Classes to collectively include the following:

a. The Price-Fixing Class: All persons or entities in the United States that purchased Open-Spec DIPF directly from any Defendant at any time from January 11, 2008, through September 21, 2009.

b. The Monopolization Class: All persons or entities in the United States that purchased Domestic DIPF directly from McWane from September 22, 2009, through December 31, 2013.

c. The McWane/SIGMA Conspiracy Class: All persons or entities in the United States that purchased Domestic DIPF directly from McWane or SIGMA from September 22, 2009, through December 31, 2013.

Settlement Agreement, ¶ 19.[3]

Excluded from the Settlement Classes are the 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.* Also excluded from the Settlement Classes are entities which, as of the Execution Date, had previously agreed with McWane either to: (i) release their claims against McWane; or (ii) opt-out of any litigation or settlement class certified in the Action. Settlement Agreement, ¶ 9. These Known Opt-Outs are listed on Appendix A to the Settlement Agreement.

B. The Terms of the Settlement Agreement

The Settlement Agreement includes the following relevant provisions:

Settlement Amounts: Pursuant to the terms of the Settlement Agreement, McWane paid the Settlement Amount of $8,787,500 into an escrow account on

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[3] As defined in the Settlement Agreement, the term "Defendants" collectively means (a) McWane, (b) SIGMA, and (c) Star. *See* Settlement Agreement, ¶ 2.

December 8, 2017. *Id.* ¶ 33. All income earned on the Settlement Fund shall become and remain part of the Settlement Fund. *Id.* ¶ 38. The Settlement Agreement provides that $150,000 of the Settlement Fund may be used to pay for all reasonable costs of disseminating notice of the settlement, including the cost of settlement administration. *Id.* ¶¶ 34-35.

Release: In exchange for McWane's consideration, upon the Effective Date and in consideration of payment of the Settlement Amount into the Escrow Account, Releasors[4] shall be deemed to and do completely remise, release, acquit, and forever discharge Releasees from any and all claims, demands, actions, suits, injuries, and causes of action, damages of any nature, whenever or however incurred (whether actual, punitive, treble, compensatory, or otherwise), including claims for costs, fees, expenses, penalties, and attorneys' fees, whether class or individual, known or unknown, or otherwise, that Releasors, or any of them, ever had, now has, or hereafter can, shall, or may have, directly, representatively, derivatively, or in any other capacity against any of the Releasees, whether in law or equity or otherwise, arising out of or relating to any conduct, act, or omission of any of the Releasees from January 11, 2008, until the Execution Date, concerning any of the conduct alleged against McWane, including, without limitation, any claim based on those

[4] The terms "Releasors" and "Releasees" are defined in the Settlement Agreement at Paragraphs 15 and 16.

allegations that could have been brought under any federal or state antitrust, unfair competition, unfair practices, fraud, racketeering, price discrimination, unjust enrichment, unitary pricing or trade practice law.[5] *Id.* ¶ 29. However, there is no release of any claims (a) made with respect to any indirect purchase of DIPF; (b) made by the State of Indiana through its Attorney General; or (b) arising in the ordinary course of business for any product defect, breach of contract, product performance, or warranty claims relating to DIPF. *Id.*

Known Opt-Outs: The Settlement Classes exclude 53 large companies, referred to as the "Known Opt-Outs," which previously agreed with McWane to either: (i) release their claims against McWane; or (ii) opt-out of any litigation or settlement class certified in the Action. The Known Opt-Outs include McWane's largest customers and represent about 68.1% of net purchases of Open-Spec DIPF during the relevant period, and 76.7% of the net purchases of Domestic DIPF.

By excluding the Known Opt-Outs from the definition of the Settlement Classes, the agreement negotiated by Interim Co-Lead Counsel ensures that these large entities do not dilute the recoveries of the relatively small Settlement Class Members with their much larger claims.

This is consistent with the policies underlying class actions, which are intended

[5] The full language of the release provisions is found at ¶¶ 29-31 of the Settlement Agreement.

as a mechanism to seek redress for wrongdoing that gives rise to claims too small to be pursued in individual litigation.

***Rescission based on Opt-Outs*:** The Settlement Agreement permits McWane to rescind the agreement based upon the level of opt-outs.[6] Specifically, if the dollar amount of purchases by Class Members who elect to opt-out of the Settlement Class exceeds a threshold amount set forth in a separate side letter agreement between the parties, McWane has the option to rescind the agreement. *Id.* ¶ 46.[7] Within ten business days after the date set by the Court as the date by which Settlement Class members must elect whether to remain in the Settlement Classes or opt out, Interim Co-Lead Counsel will provide McWane with a list of all potential Settlement Class members who have opted out and, based upon the database maintained by Plaintiffs containing McWane's sales data, will provide McWane with the total amount of Opt-Out Purchases and the resulting Opt-Out Percentage for each Opt-Out Purchaser

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[6] Because Known-Opt-Outs have been excluded from the class by agreement, their sales are not included in this calculation.

[7] The Opt-Out Percentage is reflected in a confidential letter between the parties and can be made available to the Court if requested. *See In re Mut. Funds Inv. Litig.*, MDL No. 04-15861(CCB), 2010 WL 2342413 (D. Md. May 19, 2010) (keeping confidential side letter reflecting terms of opt-out rescission agreement). The percentage amount of purchases represented by Opt-Out Plaintiffs that triggers the right to rescind the agreement is often referred to as a "blow percentage." The exact blow percentage is not relevant to Class members' decisions as to whether to remain in or exclude themselves from the Settlement Class. Rather, what is relevant is the amount being paid and the release terms.

and supporting data for Opt-Out Purchases. *Id.* ¶ 43(a)-(b). If the Opt-Out Percentage equals or exceeds the amount agreed by the parties, then McWane will have the option to rescind the Settlement Agreement. *Id.* ¶ 43(c). Plaintiffs may attempt to obtain rescission of any decision by an Opt-Out Purchaser to request exclusion prior to McWane invoking its right to rescind. *Id.* ¶ 43(d).

IV. PRELIMINARY APPROVAL ORDER AND CERTIFICATION OF SETTLEMENT CLASS

On January 10, 2018, this Court preliminarily approved the Settlement and certified the classes for settlement purposes. *See* ECF No. 473. The Court determined that the Settlement Classes satisfied the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy. *Id*. at ¶ 4. The Court also found that the Settlement Classes satisfied the Rule 23(b)(3) requirements of predominance and superiority. *Id*.

In the absence of any objection to certification of the Settlement Classes, there is no need for the Court to revisit any of the Rule 23(a) or (b)(3) requirements with respect to the Settlement.

V. THE NOTICE PLAN MEETS THE REQUIREMENTS OF RULE 23(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND DUE PROCESS

The Settlement Class members are entitled to notice of the proposed Settlement and an opportunity to be heard. *See* Fed. R. Civ. P. 23(e); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The Notice was designed to provide members of

the proposed Settlement Classes with (among other things) a clear and detailed description of the terms of the Settlement; the date of this Court's hearing on final approval of the Settlement; the deadlines for opting out of the proposed Settlement Classes or notifying the Court of an objection to the Settlement; and telephone and internet contact information for the Settlement administrator, to permit members of the proposed Settlement Classes to obtain answers to questions or other information. The Notice also advised that, in the event the Court finally approves the Settlement, Interim Co-Lead Counsel will seek an award of attorneys' fee incurred in the prosecution of the lawsuit in an amount not to exceed one-third of the total amount of the McWane Settlement; reimbursement of costs and expenses not to exceed $1,200,000.00, and incentive awards of no more than $15,000.00 for each of the eight entities who served as proposed class representatives while the case was pending. ECF No. 473 at ¶ 7.

A. The Notice

On February 9, 2018, Garden City Group, LLC ("GCG"), the Settlement Claims Administrator, mailed Notice and Claim Forms (the "Notice Packet") to approximately 6,560 addresses associated with Settlement Class members identified using the sales data produced by the Defendants. *See* Declaration of Lori Castaneda Regarding Notice and Settlement Administrator ("Castaneda Decl."), submitted herewith, ¶ 10. GCG had received 7 Notice Packets returned by the U.S. Postal

Service with forwarding address information that were promptly re-mailed to the updated addresses provided. *Id.* ¶ 10. In addition, 2,246 Notice Packets were returned by the U.S. Postal Service without forwarding address information. *Id.* In total approximately 4,557 Class Members were sent Notice Packets that were not subsequently returned to GCG. *Id.* ¶ 11. As of April 9, 2018, GCG was not aware of any objections to the Settlement, although objections are not due until April 20, 2018. *Id.* ¶ 20. As of the same date, GCG received only 3 requests for exclusion from the SIGMA and Star Settlements. *Id.* ¶ 13. As of April 9, 2018, GCG had received 148 Claim Forms.[8]

B. Summary Notice, Website, and Toll-Free Telephone Number

As per the approved Notice Plan, Plaintiffs also supplemented direct mail distribution with publication of a Summary Notice in *The Wall Street Journal*, and have maintained a website and toll-free telephone number. *Id.* ¶ 12. The website,[9] administered by GCG, is dedicated to the current and prior settlements in this action. *Id.* ¶ 13. The website is accessible twenty-four hours a day, seven days a week. *Id.* It provides information, including important deadlines and answers to frequently asked questions. *Id.* Website visitors can also download a Notice Packet, the Court's Preliminary Approval Order, the Settlement Agreement, and other relevant

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[8] Plaintiffs anticipate receipt of additional Claim Forms since the claims submission deadline is June 9, 2018.

[9] http://www.DIPFDirectSettlement.com

documents. As of April 9, 2018, the website had received 333 visits. *Id*.

In addition to the website, GCG maintains an automated toll-free telephone number, [10] with an Interactive Voice Response ("IVR") system, which potential Settlement Class Members can call for information about the Settlements. *Id.* ¶ 14. The number is operational twenty-four hours a day, seven days a week. *Id.* Callers have the ability to listen to important information about the Settlement and to request a copy of the Notice Packet, the Settlement Agreement, and the Preliminary Approval Order. *Id.* If callers have additional questions, they also have the ability to speak to a representative Monday through Friday during business hours. *Id.* GCG will continue to maintain and update the IVR throughout the administration of the Settlements. *Id.*

C. The Notice Plan and Claim Procedures Meet the Requirements of Due Process

DPPs' Notice Plan was constructed to reach potential class members through a combination of direct mail, publication, the website, and the toll-free telephone number and was "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) (internal quotations and citations omitted). *See also Zimmer Paper*

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[10] 1-888-298-6316

Prods. Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir. 1985) ("It is well settled that in the usual situation first-class mail and publication in the press fully satisfy the notice requirement of both Fed. R. Civ. P. 23 and the due process clause."); *Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 325 (E.D. Pa. 1993) (where "names and addresses cannot be determined by reasonable efforts, notice by publication suffice[s] under both Rule 23(c)(2) and the due process clause").

D. The CAFA Notice Requirement Has Been Satisfied By McWane

The Class Action Fairness Act ("CAFA") mandates that "[a]n order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b)." 28 U.S.C. § 1715(d). The responsibility for providing CAFA Notice belongs to settling defendant. 28 U.S.C. § 1715(b). McWane filed a declaration of CAFA compliance on March 16, 2018, 2018. ECF No. 483. The declaration states that McWane satisfied CAFA's notice requirement by serving notice to the appropriate state and federal officials on December 13, 2017.

VI. THE PROPOSED SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL BECAUSE IT IS FAIR, REASONABLE, AND ADEQUATE

Courts in the Third Circuit favor the settlement of class actions. Settlements minimize the litigation expenses of the parties and reduce the strain that litigation imposes upon already scarce judicial resources. *See 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."); *see also Austin v. Pa. Dep't 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 of encouraging settlements to an overriding public interest.") (internal quotation marks omitted).

In its Preliminary Approval Order, this Court determined that the Settlement Classes satisfy the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy, as well as the Rule 23(b) requirements of predominance and superiority. ECF No. 473 at ¶ 4. There is no need for the Court to revisit these requirements. The task now before the Court is to determine whether the Settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(1)(c). *See also In re 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).

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

In the Third Circuit, "a settlement is entitled to an initial presumption of fairness where it resulted from arm's length negotiations between experienced counsel, there was sufficient discovery, and there were no objectors and only a small percentage of opt-outs." *Rouse v. Comcast Corp.*, No. 14-1115, 2015 WL 1725721, at *6 (E.D. Pa.

Apr. 15, 2015). *Accord Gen. Motors*, 55 F.3d at 785; *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 arm's length negotiations between experienced, capable counsel after meaningful discovery.").

The Settlement is entitled to a presumption of fairness. The settlement resulted from years of arms-length negotiations between experienced counsel, and included several sessions with highly experienced, Court-appointed and party-selected mediators. Kaplan Decl. ¶¶ 4-9. By the time settlement negotiations concluded, fact discovery had closed, and the parties had fully briefed DPPs' class certification motion, and McWane's motion to exclude the testimony of DPPs' expert economist. Both motions had been argued at a hearing before the Court on May 24, 2017, although an evidentiary hearing remained to be scheduled by the time settlement negotiations resumed shortly thereafter.

To assist in their evaluation of the strengths and weaknesses of the case, Interim Co-Lead Counsel had access to over 567,000 documents produced by the Defendants, including those documents produced during the related investigation by the Federal Trade Commission, as well as documents produced for the first time in this litigation. Interim Co-Lead Counsel reviewed the voluminous record of the related FTC proceedings, which included the transcripts and exhibits of a full trial against McWane, a 464-page Initial Decision by Administrative Law Judge

Chappell, and the Opinion of the FTC Commissioners.

Interim Co-Lead Counsel Robert N. Kaplan of Kaplan Fox & Kilsheimer LLP and Kit A. Pierson of Cohen Milstein Sellers & Toll PLLC have decades of experience in litigating antitrust class actions. Their judgment that these settlements are in the best interest of the Settlement Classes should be given significant weight. *See, e.g. In re Fasteners Antitrust Litig.*, MDL No. 08-1912, 2014 WL 285076, at *4 (E.D. Pa. Jan. 24, 2014) ("in light of the overriding public interest in settling class actions, weight should be given to the recommendations of experienced attorneys who have engaged in arms-length settlement negotiations.") (internal quotations omitted); *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.") (internal quotations omitted); *Lake v. First Nationwide* Bank, 900 F. Supp. 726, 732 (E.D. Pa. 1995) ("[s]ignificant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class") (internal quotations omitted).

As of this filing, Interim Co-Lead Counsel are aware of no objectors and 3

requests for exclusion by direct purchasers.[11]

In light of these considerations, the Settlement is entitled to an initial presumption of fairness.

B. The *Girsh* Factors Favor Approval of the Settlement

District courts have broad discretion in determining whether to approve a settlement. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). The Third Circuit's decision in *Girsh v. Jepson*, 521 F.2d 153, 156-57 (3d Cir. 1975), sets forth nine factors to be considered by a court in evaluating the fairness of a proposed settlement: (1) the complexity, expense, and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a 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 recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. 521 F.2d at 157.

These factors strongly favor a finding that the Settlement is fair, reasonable, and adequate.

1. The complexity, expense, and duration of the litigation.

Antitrust class actions are “long, complex and expensive” to prosecute. *In re*

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[11] The Known Opt-Outs had reached agreements with McWane prior to the Settlement and thus were excluded from the Settlement Classes.

Lease Oil Antitrust Litig. (No. II), 186 F.R.D. 403, 424 (S.D. Tex. 1999); *Linerboard*, 296 F. Supp. 2d at 639 ("[a]n antitrust class action is arguably the most complex action to prosecute. . . . The legal and factual issues involved are always numerous and uncertain in outcome"); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("Federal antitrust cases are complicated, lengthy, and bitterly fought.").

Antitrust class action litigation has "undeniable inherent risks, such as whether the class will be certified and upheld on appeal, whether the conspiracy as alleged in the Complaint can be established, whether Plaintiffs will be able to demonstrate class wide antitrust impact and ultimately whether Plaintiffs will be able to prove damages." *In re Packaged Ice Antitrust Litig.*, MDL No. 08-01952, 2011 WL 717519, at *10 (E.D. Mich. Feb. 22, 2011).

The case against McWane was and would have continued to be expensive, lengthy, and uncertain. The FTC's Complaint Counsel prevailed on its monopolization claim against McWane, but it was not required to prove impact or damages, nor was it required to overcome McWane's argument that an arbitration clause precluded its customers from challenging its conduct on a class basis. Further, the FTC's Complaint Counsel did not prevail against McWane on the price-fixing and conspiracy-to-monopolize claims. Interim Class Counsel believes the price-fixing and conspiracy claims were incorrectly decided on the law and many of the

underlying facts found by the Administrative Law Judge support liability. Nonetheless, obtaining a more favorable outcome for Settlement Class members was and would be risky and resource-intensive. *See In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475–76 (S.D.N.Y. 1998) ("Antitrust litigation in general, and class action litigation in particular, is unpredictable . . . . [T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal.").

Proceeding through summary judgment and a trial on the merits against McWane would entail considerable additional expense, including the cost of experts, and thousands of additional hours of attorney time. Even after trial were concluded, there would likely be one or more lengthy appeals, as McWane unsuccessfully appealed the FTC decision to the Eleventh Circuit and then unsuccessfully sought *certiorari* to the Supreme Court. By reaching a favorable Settlement at a middling stage in the litigation, Plaintiffs have avoided further significant expense and delay and have ensured a meaningful recovery to Class members. *See Warfarin Sodium*, 391 F.3d at 536 ("continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial"); *Packaged Ice*, 2011 WL 717519 at *10 ("Experience proves that, no matter how confident trial counsel may

be, they cannot predict with 100% accuracy a jury's favorable verdict, particularly in complex antitrust litigation."); *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 this settlement's "substantial and immediate benefits" to class members favors settlement approval).

Accordingly, the first *Girsh* factor favors approval of the settlements.

2. The reaction of the class to the settlement.

The second *Girsh* factor "attempts to gauge whether members of the class support the settlement." *Prudential*, 148 F.3d at 318. Notice to the Settlement Class was sent by mail on February 9, 2018, and publication notice was made on February 12, 2018. Approximately 4,557 potential Class members received notice of the settlements. To date, Interim Co-Lead Counsel and its court-appointed claims administrator have not received any objections, and only 3 exclusion requests from direct purchasers. The deadline for objections is April 20, 2018, while requests for exclusion must be postmarked by April 10, 2018.

The reaction of the class favors approval of the Settlement. *See, e.g., Stoetzner v. U.S. Steel Corp.,* 897 F.2d 115, 118–19 (3d Cir. 1990) (29 objectors out of 281 class members "strongly favors settlement"); *Varacallo v. Mass. Mutual Life Ins. Co.,* 226 F.R.D. 207, 237–38 (D.N.J. 2005) (finding low level of exclusion and objection requests indicative of class approval of the settlement)*; McCoy v. Health*

Net, Inc., 569 F. Supp. 2d 448, 459 (D.N.J. 2008) (finding presumption of fairness in case in which 601 potential class members filed requests for exclusion and nine filed objections); *In re Remeron End-Payor Antitrust Litig.*, No. 02-2007(FSH)/04-5126(FSH), 2005 WL 2230314, at *16 (D.N.J. Sept. 13, 2005) (finding that 70 requests for exclusion and eight objections qualified for a presumption of fairness).

3. The stage of the proceedings.

The third *Girsh* factor 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 (internal quotation omitted). 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.

By the time the Court ordered the parties to resume their settlement efforts in June 2017, this action had been pending well over five years. During that time, Plaintiffs had successfully briefed and argued two rounds of motions to dismiss. The Court had also denied without prejudice a motion by McWane to exclude their customers from any potential class prior to certification on the basis of an asserted arbitration clause—the opinion allowed McWane to resubmit its motion to exclude should a class be certified in the case. Fact discovery had concluded, class

certification and a *Daubert* motion had been briefed and argued (although an evidentiary hearing was to be scheduled). Plaintiffs' counsel were well-informed of the relevant facts, and the strengths and weaknesses of each of their claims before the Settlement was entered.

This *Girsh* factor weighs heavily in favor of final approval. *See, e.g. Wallace v. Powell*, 288 F.R.D. 347, 368-69 (M.D. Pa. 2012) (settlement favored where preliminary approval granted almost three years after commencement of litigation and settlement reached after production and review of over 200,000 pages of documents); *Martina v. L.A. Fitness Int'l, LLC*, No. 12-2063(WHW), 2013 WL 5567157, at *6 (D.N.J. Oct. 8, 2013) (exchange of initial disclosures and mediation before a retired judge sufficient to provide counsel an adequate appreciation of the merits of their claims).

4. The risks of establishing liability.

The fourth *Girsh* 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, 89 (D.N.J. 2001) (internal quotation marks omitted).

While Interim Class Counsel believe the claims against McWane are

meritorious and supported by sufficient evidence to support an eventual victory at trial, there are substantial risks to the Settlement Class in pursuing these claims. Complaint Counsel in the FTC proceeding was unsuccessful in persuading the Administrative Law Judge of the merits of the price-fixing claims at issue there, and, while the ALJ found McWane conspired with SIGMA to monopolize the domestic DIPF market, the FTC Commissioners disagreed and reversed the ALJ's finding. The monopolization claim against McWane was upheld by the Eleventh Circuit, but the FTC claim did not require proof of damages or impact – key issues in dispute here. McWane was also expected to renew its motion to exclude members from the Classes based on an asserted arbitration clause and had entered a significant number of separate agreements with their customers requiring them to opt-out of any certified class, significantly reducing any Class remaining after trial. Thus, Interim Co-Lead Counsel respectfully submit that a certain recovery now through settlement with McWane is a substantially preferred result.

5. The risk of establishing damages.

The fifth *Girsh* factor "attempts to measure the expected value of litigating the action rather than settling it at the current time." *In re Cendant Corp. Litig.*, 264 F.3d 201, 238 (3d Cir. 2001). Interim Co-Lead Counsel are confident that damages here are provable, but it will require a sophisticated and complex economic analysis that has been vigorously challenged by McWane during in the course of briefing and

argument of DPPs' still undecided class certification motion and McWane's *Daubert* challenge to DPPs' expert economist. *See In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 146 (D.N.J. 2013) (settlement favored where establishing damages depends on the outcome of a complex "battle of the experts"). Should the Court render an adverse opinion on DPPs' ability to prove damages on a class-wide basis or on the admissibility of their expert economist's opinion, the viability of a class action could be threatened. Thus, this factor strongly favors approval of the Settlement.

6. The risks of maintaining a class action through trial.

The sixth *Girsh* factor evaluates the risks of maintaining a class action through trial. "Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *Warfarin Sodium*, 391 F.3d at 537 (internal quotation marks and citation omitted). Plaintiffs' motion for class certification has been vigorously challenged by McWane, as has the admissibility of the opinions of DPP's expert economist. The possibility that a class might not be certified favors approval of the proposed settlement. Moreover, there was every indication that if the classes were certified, McWane would seek to reduce or eliminate the size of those classes by asserting an alleged arbitration clause.

7. The ability of the defendants to withstand a greater judgment

The Third Circuit has interpreted the seventh *Girsh* factor as concerning "whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240. In this case, neither McWane nor DPPs maintain that McWane would have had difficulty withstanding a judgment greater than the Settlement.

However, courts in this district have repeatedly held that "even if Defendant could afford a greater amount, this fact provides no basis for rejecting an otherwise reasonable settlement." *Saini v. BMW of N. Am., LLC*, No. 12-6105(CCC), 2015 WL 2448846, at *11 (D.N.J. May 21, 2015); *Hegab v. Family Dollar Stores, Inc.,* No. 11-1206(CCC), 2015 WL 1021130, at *8 (D.N.J. Mar. 9, 2015); *In re Auto. Refinishing Paint Antitrust Litig.,* 617 F. Supp. 2d 336, 344 (E.D. Pa. 2007); *Weiss v. Mercedes–Benz of N. Am., Inc.,* 899 F. Supp. 1297, 1302–03 (D.N.J. 1995) (concluding the settlement was fair, adequate, and reasonable despite finding defendant could withstand greater judgment).

Because the proposed settlement is otherwise fair, adequate, and reasonable, the seventh *Girsh* factor should be considered neutral.

8. The range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation

The eighth and ninth *Girsh* 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. However,

> [t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved. The percentage recovery, rather, must represent a material percentage recovery to plaintiff in light of all the risks considered under *Girsh*.

In re Cendant Corp. Sec. Litig., 109 F. Supp. 2d 235, 263 (D.N.J. 2000) (internal quotation marks and citation omitted). In addition, the 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).

"While 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 WL 20928, at *6 (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.") (citation omitted).

The significant monetary recovery available for the remaining Class members after more than two-thirds of the volume of purchases have been removed to the Known Opt-Outs, as well as the substantial risks of continued litigation described

above, weighs in favor of a finding that the Settlement is fair reasonable and adequate.

VII. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE

A plan of allocation of settlement proceeds in a class action under Rule 23 must be fair, reasonable, and adequate. *In re Baby Prods. Antitrust Litig.,* 708 F.3d 163, 174 (3d Cir. 2013); *In re Cendant.,* 264 F.3d at 248. In general, where a plan of allocation "reimburses class members based on the type and extent of their injuries," it will be found reasonable. *In re Ikon Office Solutions, Inc.,* 194 F.R.D. 166, 184 (E.D. Pa. 2000). "A district court's 'principal obligation' in approving a plan of allocation 'is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund.'" *Sullivan v. DB Invs., Inc.,* 667 F.3d 273, 326 (3d Cir. 2011).

The plan of allocation set forth in the long-form class notice describes in detail how the settlement funds will be allocated. Under the plan, part of the Settlement Fund will be used to pay any attorneys' fees, expenses, and incentive awards to class representatives after approval by the Court. Additionally, the parties have agreed that Plaintiffs may deduct up to $150,000 from the Settlement Funds for notice and administrative costs.

The Net Settlement Fund will be distributed on a *pro rata* basis among all members of the Settlement Classes who submit valid and timely claim forms for (i)

purchases of Open-Spec DIPF from January 11, 2008, through September 21, 2009 from SIGMA, McWane, or Star and (ii) purchases of Domestic DIPF from September 22, 2009, through December 31, 2013, from SIGMA or McWane. In other words, each Settlement Class member shall be paid a percentage of the Net Settlement Fund that each class member's recognized claim bears to the total of all recognized claims submitted by all Settlement Class members who file claims.

This basic approach is commonly used in antitrust settlements and repeatedly has been approved as fair and reasonable. *See*, *e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 06-1775 (JG)(VVP), 2012 WL 3138596, at *3 (E.D.N.Y. Aug. 2, 2012) (approving an allocation plan that "distributed to class members that submit valid claim forms in proportion to their relevant purchases from defendants of 'Airfreight Shipping Services'"); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 531 (E.D. Mich. 2003) (approving an allocation plan based on "each Class members' pro rata share of the Net Settlement Fund"). Accordingly, the Court should approve the allocation plan as fair, reasonable, and adequate.

VIII. CONCLUSION

For the forgoing reasons, Plaintiffs respectfully submit that the proposed settlement is fair, reasonable, and adequate, and should be given final approval by the Court.

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Respectfully submitted,

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