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

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| **IN RE THALOMID AND REVLIMID ANTITRUST LITIGATION** | **Civ. No. 14-6997 (MCA) (MAH)** |

# MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT

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## I. INTRODUCTION

Following extensive arm's-length negotiations, including a mediation conducted by the nationally-recognized mediator Jed D. Melnick, Plaintiffs[1] have reached a proposed Settlement[2] with Defendant Celgene Corp.

Because the proposed Settlement was the result of good faith negotiations, has no obvious deficiencies, and falls within the range of reasonableness, Plaintiffs respectfully submit that the Court should preliminarily approve the Settlement. *See Block v. RBS Citizens, Nat'l Ass'n*, No. 15-cv-1524, 2016 WL 8201853, at *4 (D.N.J. Dec. 12, 2016); *Smith v. Prof'l Billing & Mgmt. Servs., Inc.*, No. 06-cv-4453, 2007 WL 4191749, at *1 (D.N.J. Nov. 21, 2007). At this preliminary approval stage, the Court must only determine if, on its face, the proposed Settlement is at least "sufficiently fair, reasonable and adequate to warrant sending notice of the action and settlement agreement to settlement class members and holding a full hearing on the settlement," or put differently, to ensure that the settlement falls within the range of possible approval. *In re Aetna UCR Litig.*, No. 07-cv-3541, 2013 WL 4697994, at * 11 (D.N.J. Aug. 30, 2013) (internal citation

[1] Plaintiffs are International Union of Bricklayers and Allied Craft Works Local 1 Health Fund, the City of Providence, International Union of Operating Engineers Local 39 Health and Welfare Trust Fund, The Detectives' Endowment Association, New England Carpenters Health Benefits Fund, and David Mitchell.

[2] The Settlement Agreement between Plaintiffs and Celgene is attached as Exhibit 1 to the Declaration of Melinda R. Coolidge (the "Coolidge Decl."). All definitions in the Settlement Agreement are incorporated herein by reference.

omitted). As discussed herein, the proposed Settlement, which provides substantial monetary relief to the Settlement Class, easily satisfies this requirement.

Accordingly, Plaintiffs respectfully request that the Court enter the Preliminary Approval Order submitted herewith preliminarily approving the settlement and appointing Huntington National Bank as Escrow Agent.

## II. BACKGROUND & PROCEDURAL HISTORY

### a. Claims and Allegations

In 2014, the first of Plaintiffs' lawsuits against Celgene was filed, alleging that Celgene engaged in a multi-faceted scheme to maintain a monopoly and unlawfully interfere with potential competitors' efforts to enter the market with generic versions of Celgene's brand cancer treatment drugs Thalomid and Revlimid, in violation of §16 of the Clayton Act, §2 of the Sherman Act, and various antitrust, unfair and deceptive trade practices, and unjust enrichment claims under the laws of several states. *See* ECF No. 1. On August 1, 2017, Plaintiffs filed their operative Consolidated Amended Complaint (ECF No. 143). Plaintiffs brought the action on behalf of themselves and a proposed class of end payors of Thalomid and Revlimid.

Specifically, Plaintiffs alleged that Celgene monopolized the market for Thalomid and Revlimid, with price increases for both drugs from their launch dates through present. Plaintiffs further alleged that at least eleven different generic drug

manufacturers attempted to enter the market. Plaintiffs alleged that Celgene's alleged anticompetitive scheme included: (1) listing in the Orange Book and suing to enforce invalid patents; (2) refusing to sell samples of Thalomid and Revlimid necessary to develop generics; (3) encouraging the FDA to reject generics' applications based on sham safety concerns; and (4) entering into anticompetitive settlement agreements with generic manufacturers.

Plaintiffs therefore alleged that generic equivalents of Thalomid and Revlimid were delayed years because of Celgene's misconduct. Plaintiffs contended that, absent Celgene's anticompetitive conduct, generic versions of Thalomid and Revlimid would have been available during the class period. Plaintiffs alleged that these delays caused class members to pay more for Thalomid and Revlimid than they would have in a competitive market.

**b. Motion to Dismiss**

On February 3, 2015 and April 20, 2015, Celgene moved to dismiss the lawsuit pursuant to Fed. R. Civ. P. 12(b)(6). ECF Nos. 20, 35. On October 29, 2015, Judge Hayden denied Celgene's motions to dismiss. ECF Nos. 67, 68. On April 4, 2016, the Court appointed Hausfeld LLP, Block & Leviton LLP, and Hach Rose Schirripa & Cheverie LLP as Interim Co-Lead Counsel. ECF No. 92. Celgene answered Plaintiffs' complaints on January 11, 2016. ECF Nos. 81, 82.

**c. Related Litigation**

As discussed *supra*, Celgene has either sued or been sued by many of the generic drug manufacturers that sought (or seek) to bring generic versions of Thalomid and/or Revlimid to market.[3] As part of the formal discovery in this action, the parties stipulated that Celgene and the other parties in the related lawsuits would make the extensive discovery records in several of those lawsuits available to Plaintiffs, including document productions, deposition transcripts, expert reports, and confidential court filings, in light of the substantial overlap of relevant facts and issues with this case. Plaintiffs' counsel reviewed and analyzed tens of thousands of documents, dozens of deposition transcripts, and numerous expert reports from those other lawsuits. Through this and the formal discovery

[3] *See, e.g.*, *Celgene Corp. v. Dr. Reddy's Labs., Inc.*, No. 16-cv-07704 (D.N.J. Oct. 20, 2016); *Celgene Corp. v. Lannett Holdings, Inc.*, No. 15-cv-00697 (D.N.J. Jan. 30, 2015); *Celgene Corp. v. Natco Pharma, Ltd.*, No. 10-cv-05197 (D.N.J. Oct. 8, 2010); *Celgene Corp. v. Barr Labs., Inc.*, No. 07-cv-00286 (D.N.J. Jan. 18, 2007); *Celgene Corp. v. Lannett Holdings, Inc.*, No. 15-cv-00697 (D.N.J. Jan. 30, 2015); *Mylan Pharm., Inc. v. Celgene Corp.*, No. 14-cv-02094 (D.N.J. Apr. 3, 2014); *Celgene Corp. v. Barr Labs., Inc.*, No. 08-cv-03357 (D.N.J. July 3, 2008); *Celgene Corp. v. Barr Labs., Inc.*, No. 07-cv-04050 (D.N.J. Aug. 23, 2007).

Plaintiffs engaged in discussed below, Plaintiffs gained a detailed understanding of the strengths and weaknesses of their case.

**d. Discovery**

Plaintiffs first served written discovery requests on Celgene on February 2, 2016. Plaintiffs would ultimately serve four sets of interrogatories and two sets of requests for production on Celgene. On May 11, 2016, Celgene served its first set of written discovery requests on Plaintiffs. Celgene ultimately served three sets of interrogatories on Plaintiffs, as well as requests for production. Beginning in autumn 2016 and continuing through spring 2018, Plaintiffs served dozens of third party subpoenas in this litigation, including on specialty pharmacies and some of the generic drug manufacturers attempting to bring generic versions of Thalomid and/or Revlimid to market. Plaintiffs also took a third party fact deposition.

In June 2018, Plaintiffs served seven expert reports (not including additional expert reports Plaintiffs submitted in support of their class certification motions). These included experts concerning, *inter alia*, several patent issues, damages, "but for" entry dates, the structure and function of the pharmaceutical market, the FDA's regulatory process, and relevant markets. In August 2018, Celgene submitted 10 responsive expert reports. In October and November 2018, Plaintiffs served 7 rebuttal expert reports. All told, the parties exchanged reports by 19

experts on class and/or merits issues, all of whom were deposed at least once, while certain experts sat for multiple depositions.

**e. Class Certification Motions**

On October 2, 2017, Plaintiffs filed a motion for class certification. ECF No. 149.[4] On October 30, 2018, the Court denied Plaintiffs' motion without prejudice, thereby allowing Plaintiffs to renew their motion with additional support. ECF Nos. 250, 251. On December 14, 2018, Plaintiffs filed a renewed motion for class certification. ECF No. 264. This renewed motion was fully briefed at the time the parties entered into the Settlement Agreement.

**f. Mediation and Settlement**

During the pendency of Plaintiffs' Renewed Class Certification Motion, Plaintiffs and Celgene agreed to engage in mediation, to be held before a nationally-recognized mediator of complex class actions and complex matters, Jed D. Melnick, a member of JAMS ADR. After an in-person mediation attended by Celgene's in-house counsel and several weeks of follow-up negotiations and discussions involving Mr. Melnick, the parties reached a settlement-in-principle on May 24, 2019. Following additional negotiations, the parties executed the Settlement Agreement on July 16, 2019.

[4] During the pendency of Plaintiffs' initial class certification motion, Celgene filed a motion for judgment on the pleadings (ECF No. 183), which the Court denied on October 31, 2018. ECF No. 252.

The proposed Settlement resolves all claims against Celgene for its conduct alleged to have delayed the entry of generic versions of Thalomid and Revlimid from coming to market. The terms of the Settlement are outlined below.

**1. The Settlement Class**

The proposed Settlement Class is defined as:

> All persons or entities who purchased and/or paid for some or all of the purchase price of Thalomid or Revlimid in any form, before the Preliminary Approval Date, in California, the District of Columbia, Florida, Kansas, Maine, Massachusetts, Michigan, Nebraska, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, or Tennessee, for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries, but excluding the following:
>
> a. Celgene and its officers, directors, management, employees, subsidiaries, or affiliates;
>
> b. All federal or state governmental entities, except cities, towns, or municipalities with self-funded prescription drugs plans;
>
> c. All persons or entities who only purchased Revlimid or Thalomid for purposes of resale directly from Celgene or its affiliates;
>
> d. Fully insured health plans;
>
> e. Stop-loss insurers; and
>
> f. The judges in this case and any members of their immediate families.

The Class Period is defined as ending on the date on which the Court enters preliminary approval. *See* Coolidge Decl. Ex. 1 at ¶17.

**2. Consideration Provided by the Settlement Agreement**

In exchange for the release described *infra*, Celgene shall pay $55,000,000 into an escrow account held at Huntington National Bank. *Id.* at ¶12. Plaintiffs request that the Court appoint Huntington National Bank to serve as Escrow Agent.

**3. Release for Celgene**

Plaintiffs and members of the Settlement Class agree to release Celgene from all claims they have or may have arising out of the alleged conduct concerning generic competition for Thalomid and Revlimid. *Id.* at ¶23.

**4. Rescission Based on Opt-Outs**

The Settlement Agreement permits Celgene to rescind the agreement under certain conditions based on opt-outs, but does not provide for any reduction of the Settlement Amount based on opt-outs. Specifically, and as set forth in a separate side letter agreement between the parties, if certain entities opt out of the Settlement Class, Celgene has the right and option (but will not be obligated) to rescind the Agreement. Coolidge Decl. Ex. 1 at ¶ 35.[5]

[5] The opt out rescission provisions are reflected in a confidential letter agreement between the parties and can be made available to the Court if requested. *See In re Mut. Funds Inv. Litig.*, No. 04-md-15861, 2010 WL 2342413, at *11 (D. Md. May 19, 2010) (granting preliminary approval of settlement with confidential side letter reflecting terms of opt-out rescission agreement).

## III. THE SETTLEMENT SATISFIES THE CRITERIA FOR PRELIMINARY APPROVAL

The proposed Settlement, which involves a $55 million payment from Celgene, more than satisfies the liberal standard for preliminary approval of a class settlement. Having negotiated for this substantial cash payment from Celgene, Plaintiffs have avoided the potential risks inherent in complex antitrust class litigation and secured a favorable settlement for the Settlement Class.

Review of a class action settlement proceeds in two steps: preliminary approval and a subsequent fairness hearing. *In re Nat'l Football League Players Concussion Injury Litig.*, 775 F.3d 570, 581 (3d Cir. 2014). Preliminary approval requires a court to "make a preliminary evaluation of the fairness of the settlement before directing that notice be given to the settlement class." *Smith*, 2007 WL 4191749, at *1. "Preliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient." *In re Aetna UCR Litig.*, 2013 WL 4697994, at *10. "Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Smith*, 2007 WL 4191749, at *1 (citing *Jones v. Commerce Bancorp Inc.*, No. 05-5600 (RBK), 2007 WL 2085357, at *2 (D.N.J. July 16, 2007)); *see also Block*, 2016 WL 8201853, at *4 (same). "Preliminary approval of a proposed class action settlement 'establishes an initial presumption of fairness.'" *Myers v. Jani-King of Philadelphia, Inc.*, No.

09-cv-1738, 2019 WL 2077719, at * 2 (E.D. Pa. May 10, 2019) (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995)).

Preliminary approval does not require a court to reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute. *See, e.g.*, *Gregory v. McCabe, Weisberg & Conway, P.C.*, No. 13-cv-6962, 2014 WL 2615534, at *7 (D.N.J. June 12, 2014); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, at *1-2 (E.D. Pa. May 11, 2004) (distinguishing between preliminary approval and final approval) (citing MANUAL FOR COMPLEX LITIGATION § 21.632 (2004)). No Class member's substantive rights are prejudiced by preliminary approval. Rather, preliminary approval is solely to obtain authority for notifying the Class of the terms of the Settlement and to set the stage for the final approval of the Settlement after notice to the Class and the Fairness Hearing.

**a. The Settlement Is the Product of Extensive Arm's-Length Negotiations by Experienced Class Counsel**

The Settlement is the result of extensive arm's-length negotiations undertaken in good faith by highly-experienced plaintiffs' and defense counsel. *See* Rule 23(e)(2)(A)-(B). These negotiations included a mediation before a nationally-recognized mediator, Jed D. Melnick, which followed after extensive fact and expert discovery, and two rounds of class certification briefing. *See In re*

*Philips/Magnavox TV Litig.*, No. 09-3072 (CCC), 2012 WL 1677244, at *11 (D.N.J. May 14, 2012) ("Where this negotiation process follows meaningful discovery, the maturity and correctness of the settlement become all the more apparent.") (citing *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 400 (D.N.J. 2006)); *see also Shapiro v. Alliance MMC, Inc.*, No. 17-cv-2583, 2018 WL 3158812, at *2 (D.N.J. June 28, 2018) ("[a] presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery") (internal quotation marks omitted).

The Settlement was reached only after the direct involvement of the mediator, who contributed to the development and scrutiny the parties applied in assessing their position. *See In re Aetna UCR Litig.*, 2013 WL 4697994, at *11 ("[S]essions with a respected and experienced mediator, gave counsel on both sides ample opportunity to adequately assess the strengths of their respective positions and facilitated serious and informed negotiations."); *Lenahan v. Sears, Roebuck & Co.*, No. 02-cv-0045, 2006 WL 2085282, at *14 (D.N.J. July 24, 2006) (rigorous mediation and negotiation processes "gave the parties ample opportunity to assess the relative strengths and weaknesses of their claims").

Throughout every stage in the mediation and negotiation process, the parties weighed the strengths and weaknesses of Plaintiffs' claims and Celgene's defenses,

including consideration of, among other issues, liability, causation, and damages. The parties engaged in intensive bargaining over the merits and value of Plaintiffs' claims, which discussions were fully informed by completed expert discovery, including on the issue of damages. Because of the extensive, arm's-length bargaining involved, there is no issue (or even a suggestion) of any collusive aspect to the proposed Settlement. Balancing the risks and resources, the proposed $55 million cash payment is a fair, reasonable, and just result.

The principal attorneys for the Class are each highly experienced antitrust attorneys who have litigated numerous complex antitrust actions. Their judgment that the settlement is fair and reasonable is entitled to considerable weight. *See Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness."); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 543 (D.N.J. 1997) (court is "entitled to rely upon the judgment of experienced counsel for the parties") (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)), *aff'd*, 148 F.3d 283 (3d. Cir. 1998). Courts have explicitly deferred to the judgment of experienced counsel who have conducted arm's-length negotiations in approving class action settlements. *See, e.g., Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 452 (E.D. Pa. 1985) ("[T]he professional judgment of counsel involved in the litigation is entitled to significant weight.").

Plaintiffs' counsel have extensive antitrust class action and complex litigation experience. Each has vast experience with complex litigation generally. Indeed, Plaintiffs' counsel have represented classes in numerous antitrust cases in the pharmaceutical industry. Plaintiffs' counsel are therefore experienced in the prosecution, evaluation, and settlement of this particular type of antitrust litigation.

Plaintiffs' counsel strongly recommend the Settlement, which falls within the range of reasonableness and is fully supported by Plaintiffs and the proposed Class Representatives.

**b. Consideration of the Factors Relevant to Final Approval Also Supports Preliminary Approval**

"Preliminary approval is less demanding than final approval of class action settlement agreements." *Myers*, 2019 WL 2077719, at *3. Nevertheless, "it is important to consider the final approval factors [at the preliminary approval] stage so as to identify any potential issues that could impede [final approval]." *Singleton v. First Student Mgmt. LLC*, No. 13-1744 (JEI/JS), 2014 WL 3865853, at *5 (D.N.J. Aug. 6, 2014); *see also Shapiro*, 2018 WL 3158812, at *3. Those factors are:

1. the complexity, expense and likely duration of the litigation;
2. the reaction of the class to the settlement;
3. stage of the proceedings and the amount of discovery completed;
4. risks of establishing liability;

5. risks of establishing damages;
6. risks of maintaining the class action through the trial;
7. ability of the defendants to withstand a greater judgment;
8. the range of reasonableness of the settlement fund in light of the best possible recovery; and
9. the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

*Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *see also* Rule 23(e)(2). All relevant factors weigh in favor of approving the Settlement.[6]

The first *Girsh* factor—the complexity, expense, and likely duration of the litigation—supports approval. This case was filed nearly five years ago. The parties have litigated a motion to dismiss, fully briefed two class certification motions, and conducted extensive fact and expert discovery. Furthermore, given the stage of the litigation, without a certified class and with the case still requiring summary judgment motions before trial and ultimate judgment, absent settlement, the case is unlikely to conclude for at least several more years.

[6] Because the Settlement has not yet been presented to the Settlement Class, the second *Girsh* factor (reaction of the Class to the settlement), is not ripe for consideration, although Plaintiffs, as the proposed Class Representatives, believe the Settlement to be an excellent result for the Settlement Class.

The third *Girsh* factor requires the Court to "consider the 'degree of case development that Class Counsel have accomplished prior to Settlement,' including the type and amount of discovery already undertaken." *In re Merck & Co., Inc. Vytorin ERISA Litig.*, No. 08-CV-285 (DMC), 2010 WL 547613, at *7 (D.N.J. Feb. 9, 2010) (quoting *GMC Pick-Up Truck*, 55 F.3d at 813). "[U]nder this factor the Court considers whether the amount of discovery completed in the case has permitted 'counsel [to have] an adequate appreciation of the merits of the case before negotiating.'" *Id*. (quoting *Prudential*, 148 F.3d at 319).

This factor weighs in favor of approval. In *Sheinberg v. Sorensen*, the court noted that "the Settlement was reached after extensive arm's-length negotiations and mediation sessions" finding "that Class Counsel had a thorough appreciation of the merits of the case prior to settlement" in supporting its conclusion that this "factor weighs in favor of approval." No. 00-cv-6041, 2016 WL 3381242, at *7 (D.N.J. June 14, 2016). The same reasoning and conclusion apply here. Plaintiffs' counsel have thoroughly analyzed the mountain of relevant evidence obtained in this litigation. The extensive discovery record from both this and the related patent and antitrust lawsuits discussed above assisted Plaintiffs' counsel and experts in evaluating the proposed Settlement in light of the relative strengths and weaknesses of the case and other litigation risks.

The fourth, fifth, and sixth *Girsh* factors (risks of establishing liability, damages, and maintaining the class action through trial) are appropriately considered together for purposes of preliminary approval. *Singleton*, 2014 WL 3865853, at *6. While Plaintiffs' counsel believe the case is strong, there are significant risks to the Class. These risks include the fact that the Court denied Plaintiffs' initial class certification motion and that a decision on Plaintiffs' renewed class certification motion has not yet been rendered, as well as the risks associated with dispositive motions at summary judgment, trial, appeal, and even the risks associated with substantial delay.

As to the seventh *Girsh* factor, although Celgene has assets to pay more than a settlement of $55 million, the fact that a defendant can pay more does not make an otherwise reasonable settlement unreasonable. *See Henderson v. Volvo Cars of N. Am., LLC*, No. 09-cv-4146, 2013 WL 1192479, at *11 (D.N.J. Mar. 22, 2013) ("Plaintiffs acknowledge that 'there is currently no indication that Volvo here would be unable to withstand a more significant judgment,' but 'to withhold approval of a settlement of this size because it could withstand a greater judgment would make little sense where the [settlement agreement] is within the range of reasonableness and provides substantial benefits to the Class.'") (citing cases where settlement was approved despite defendants' ability to withstand a greater judgment); *In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 484

(D.N.J. 2012) ("But even assuming there are sufficient funds to pay a greater judgment, the Third Circuit has found that a defendant's ability to pay a larger settlement sum is not particularly damaging to the settlement agreement's fairness as long as the other factors favor settlement") (internal quotations and citations omitted).

"According to *Girsh*, courts approving settlements should determine a range of reasonable settlements in light of the best possible recovery (the eighth *Girsh* factor) and a range in light of all the attendant risks of litigation (the ninth factor)." *In re Schering-Plough/Merck Merger Litig.*, No. 09-cv-1099, 2010 WL 1257722, at *12 (D.N.J. Mar. 26, 2010). As always, "settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and [courts should] guard against demanding to[o] large a settlement based on the court's view of the merits of the litigation." *Johnson & Johnson*, 900 F. Supp. 2d at 484-85 (alteration in original) (quoting *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 92 (D.N.J. 2001)).

While the potential recovery on behalf of the Class, assuming Plaintiffs had prevailed at trial, could theoretically be higher than the Settlement amount, that is virtually always true in settled cases. In fact, Celgene has proffered expert testimony with damages measurements much lower than Plaintiffs' experts' calculations. Put simply, when weighed against the time, expense, and potential

risk of further litigation, including an adverse ruling on class certification, summary judgment, or *Daubert*, or losing at trial or on appeal, the Settlement is a reasonable compromise that gives Settlement Class members certain recovery. *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 263 (D.N.J. 2000) ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.") (quoting *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985)); *see also Sheinberg*, 2016 WL 3381242, at *9 (same). Here, the Settlement of $55 million represents an excellent recovery for the Settlement Class.

## IV. THE COURT WILL BE ABLE TO CERTIFY THE SETTLEMENT CLASS

Under Rule 23(e)(1)(B), the Court must direct notice in a reasonable manner to all class members if, after notice issues and a hearing is held, the Court will likely be able to certify the class for purposes of judgment. Here, the Court should grant preliminary approval of the settlement (and direct Plaintiffs to propose a specific plan to notify class members of the settlement), because the Court will be able to certify the settlement class for purposes of judgment.

Certification of a settlement class is appropriate where the four prerequisites of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—are satisfied. *See* Fed. R. Civ. P. 23(e). Notably, the Court has

already concluded that the numerosity, commonality, typicality, and adequacy requirements of Rule 23(e) have been satisfied. *See* ECF No. 250 at 15-20. In addition, as discussed further below, certification of a settlement class is appropriate under Rule 23(b)(3) because common questions predominate, and certification of a settlement class is superior to other methods of adjudication.

**a. Members of the Settlement Class Are Numerous**

The proposed Settlement Class satisfies Rule 23(a)'s numerosity requirement. "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). Here, based on data obtained during discovery and evaluated by Plaintiffs' experts, the Settlement Class consists of at least hundreds of persons and entities.[7] The numerosity requirement is easily satisfied. *Zinberg v. Wash. Bancorp, Inc.*, 138 F.R.D. 397, 405 (D.N.J. 1990).

**b. Common Questions of Law and Fact Exist**

The proposed Settlement Class also satisfies the commonality requirement imposed by Rule 23(a). "[A] finding of commonality does not require that all class

[7] *See* Class Plaintiffs' Memorandum in Support of Class Certification and Appointment of Class Counsel, ECF No. 150, at 26 (Oct. 2, 2017).

members share identical claims." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 530 (3d Cir. 2004) (quotation marks omitted). "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Stewart*, 275 F.3d at 227 (quotation marks and emphasis omitted).

Here, common questions of law and fact exist that go to the central issue in this matter—whether Celgene engaged in anticompetitive behavior to foreclose generic versions of Thalomid and Revlimid from reaching the market, thereby injuring Plaintiffs and members of the Class when they paid more for these drugs than they would have paid for a generic equivalent absent Celgene's alleged misconduct. Thus, the proposed Settlement Class satisfies the commonality requirement.

**c. Plaintiffs' Claims Are Typical**

The proposed Settlement Class also satisfies the typicality requirement of Rule 23(a). The commonality and typicality requirements of Rule 23(a) "tend to merge." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Rule 23(a)(3)'s "typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *In re Warfarin*, 391 F.3d at 531 (quotation marks omitted). "A named Plaintiff's claims are typical where each class

member's claims arise from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Commerce Bancorp*, 2007 WL 2085357, at *3.

Here, Plaintiffs' claims are typical of the claims of the proposed Settlement Class members because they all arise from the same alleged misconduct by Celgene that gives rise to the claims of the Settlement Class. Plaintiffs assert the same legal claims on behalf of themselves and the proposed Settlement Class; namely, that they paid more for Thalomid and Revlimid as a result of Celgene's conduct. Rule 23(a)'s typicality requirement is satisfied.

**d. Plaintiffs Will Fairly and Adequately Represent the Interests of the Settlement Class**

Plaintiffs will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy inquiry "assures that the named plaintiffs' claims are not antagonistic to the class and that the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class." *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006) (quotation marks omitted).

Plaintiffs, as end payors of Thalomid and Revlimid, are incentivized to seek the maximum recovery possible. Plaintiffs' claims are based on the same alleged anticompetitive conduct as the claims of every other member of the Settlement Class. By proving their own claims, Plaintiffs would necessarily help to prove the

claims of their fellow putative Settlement Class members. In addition, Plaintiffs have no interests that are antagonistic to the Settlement Class. Furthermore, Plaintiffs' counsel are experienced class action litigators familiar with the legal and factual issues involved, and they have competently prosecuted this complex case. *See* Part IV.C, *infra*. For settlement purposes, the adequacy requirement is satisfied.

**e. The Proposed Settlement Class Satisfies Rule 23(b)(3)**

The proposed Settlement Class also satisfies the requirements of Rule 23(b)(3)—predominance and superiority. Rule 23(b)(3) provides that a class may be certified if the Court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The few issues the Court previously raised with regard to Rule 23(b)(3), which were largely centered around manageability of identifying certain class members, should not preclude certification of a settlement class. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial."); *see also Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d. Cir. 2011), cert. denied, 132 S. Ct. 1876 (2012)

(class action settlements avoid an inquiry into the merits of individual class member's claims, because the defendant seeks "global peace" – a release of every class member's claims). "From a practical standpoint… achieving global peace is a valid, and valuable, incentive to class action settlements. Settlements avoid future litigation with all potential plaintiffs – meritorious or not." *Id.*

For these reasons, approval of class action settlements "is generally routine and courts are fairly forgiving of problems that might hinder class certification were the case not to be settled." 4 NEWBERG ON CLASS ACTIONS § 13:18 (5th ed. 2017); *see also, e.g.*, *Sullivan*, 667 F.3d at 304 (holding that variations in state law were "largely irrelevant to certification of a settlement class.").

**1. Common Questions of Law and Fact Predominate**

First, common questions predominate over individual questions in this case. "Predominance," under Rule 23(b)(3), "is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem Prods.*, 521 U.S. at 625; *see also Shapiro*, 2018 WL 3158812, at *6 (same). "The focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan*, 667 F.3d at 298.

Plaintiffs would necessarily focus on the conduct of Celgene, rather than the conduct of individual class members, to demonstrate that Celgene acted contrary to

federal and state law. Proof of how Celgene allegedly implemented its plan to foreclose generic equivalents of Thalomid and Revlimid from coming to market is common to all Settlement Class members, because it is predicated on establishing the actions that Celgene took – actions that allegedly impacted the entire market for Thalomid and Revlimid and their generic equivalents – during the relevant class period. *See, id* (common questions, like whether defendants' conduct caused prices to be maintained at higher levels than would exist in a competitive market, predominated over individual issues); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 268 (3d Cir. 2009) (finding predominance by determining that the elements of a Sherman Act violation for concerted anticompetitive activity focused on "the conduct of the defendants"); *see also In re Linerboard Antitrust Litig.*, 305 F.3d 145, 163 (3d Cir. 2002) ("[C]ommon issues [ ] predominate here because the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did.") (citation omitted). *See also Sullivan*, 667 F.3d at 299 ("*Dukes* actually bolsters our position, making clear that the focus [of the predominance prong] is on whether the defendant's conduct was common as to all the of the class members, not on whether each plaintiff has a 'colorable' claim."). As a result, common issues predominate over any questions arguably affecting individual class members alone.

### 2. A Class Action Is Superior to Other Methods of Adjudication

Rule 23(b)(3) also requires a showing that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Class adjudication of Plaintiffs' claims here would be superior to individual trials (avoiding the risk of inconsistent results), and joinder of all Settlement Class members is impracticable. *See O'Brien v. Brain Research Labs, LLC*, No. 12-cv-204, 2012 WL 3242365, at *9 (D.N.J. Aug. 8, 2012) (finding superiority because, *inter alia*, "denying certification would require each consumer to file suit individually at the expense of judicial economy"). And "[i]f common questions are found to predominate in an antitrust action, then courts generally have ruled that the superiority prerequisite of Rule 23(b)(3) is satisfied." 7AA FED. PRAC. & PROC. CIV. § 1781 (3d ed. 2005).

Absent approval of the settlement, many members of the proposed Settlement Class here would go uncompensated because they would lack adequate monetary incentives to pursue their claims individually. *See O'Brien*, 2012 WL 3242365, at *9 (finding superiority because, *inter alia*, it was "not apparent that the money potentially recoverable by an individual class member as compared to the cost to pursue recovery through a lawsuit is sufficient to make individual litigation a realistic possibility"). The prosecution of separate actions by individual members of the proposed class would impose heavy burdens on the courts and the parties,

and would create a risk of inconsistent rulings, which further favors class treatment. Moreover, the interests of class members in individually controlling the prosecution of separate claims are outweighed by the efficiency of the class mechanism. Therefore, a class action is the superior method of adjudicating the claims raised in this case.

Because the proposed Settlement Class meets the requirements of Rule 23(a) and 23(b)(3), it should be certified for settlement purposes.

## V. NOTICE STANDARD

If preliminary approval is granted, Plaintiffs intend to move the Court to approve a notice plan for the Settlement Class shortly thereafter. This notice plan will comply with Rule 23's requirements for notice. Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal . . . ." Fed. R. Civ. P. 23(e)(1). Furthermore, under Rule 23(c)(2)(B), "the court must direct to class members the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). The purpose of notice is to "afford members of the class due process which, in the context of the Rule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment." *Peters v. Nat'l R.R. Passenger Corp*., 966 F.2d 1483, 1486 (D.C. Cir. 1992) (internal citation omitted); *see also Varacallo*, 226 F.R.D. at 225 ("[t]he notice of the Proposed

Settlement, to satisfy both Rule 23(e) requirements and constitutional due process protections, need only be reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections.").

Plaintiffs will develop their notice program in conjunction with an experienced notice provider.

## VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Unopposed Motion for Preliminary Approval of the Proposed Settlement, and appoint Huntington National Bank to serve as Escrow Agent.

Respectfully submitted,

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