IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: BLOOD REAGENTS ANTITRUST LITIGATION	**MDL Docket No. 09-2081**
THIS DOCUMENT RELATES TO ALL ACTIONS	**HON. JAN E. DUBOIS**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF (A) THE SETTLEMENT WITH ORTHO-CLINICAL DIAGNOSTICS, INC., AND (B) THE PLAN OF DISTRIBUTION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs F. Baragaño Pharmaceuticals, Inc., Community Medical Center Health Care System, Professional Resources Management of Crenshaw LLC d/b/a Crenshaw Community Hospital, Douglas County Hospital, Health Network Laboratories L.P., Larkin Community Hospital, Legacy Health System, Mary Hitchcock Memorial Hospital, Inc., Regional Medical Center Board d/b/a Northeast Alabama Regional Medical Center, Hospital Sisters Health System,[1] Schuylkill Medical Center,[2] and Warren General Hospital (collectively, "Plaintiffs") submit this Memorandum in support of their motion for (a) final approval of the settlement with Ortho-Clinical Diagnostics, Inc. ("Ortho"); and (b) final approval of the proposed plan of distribution of the combined settlement proceeds from both of the settlements in this action.[3]

The $19.5 million proposed Ortho Settlement is in addition to the $22 million obtained from the Plaintiffs' settlement with Immucor, Inc. ("Immucor"). For the reasons set forth herein, Plaintiffs respectfully submit that the proposed Ortho Settlement is an excellent result that is fair, reasonable, and adequate and should receive final approval. The proposed plan of distribution is also fair, reasonable, and adequate, because it establishes a straightforward procedure for

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[1] Hospital Sisters Health System ("HSHS") is comprised of the following hospitals: Sacred Heart Hospital of the Hospital Sisters of the Third Order of St. Francis, St. Anthony's Memorial Hospital, of the Hospital Sisters of the Third Order of St. Francis, St. Elizabeth's Hospital of the Hospital Sisters of the Third Order of St. Francis, St. Francis Hospital, of the Hospital Sisters of the Third Order of St. Francis, St. John's Hospital of the Hospital Sisters of the Third Order of St. Francis, St. Joseph's Hospital, Breese, of the Hospital Sisters of the Third Order of St. Francis, St. Joseph's Hospital of the Hospital Sisters of the Third Order of St. Francis (Chippewa Falls), St. Joseph's Hospital, of the Hospital Sisters of the Third Order of St. Francis (Highland), St. Mary's Hospital Medical Center of Green Bay, Inc., St. Mary's Hospital, Streator, of the Hospital Sisters of the Third Order of St. Francis, St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, St. Nicholas Hospital of the Hospital Sisters of the Third Order of St. Francis, and St. Vincent Hospital of the Hospital Sisters of the Third Order of St. Francis.

[2] Schuylkill Medical Center ("SMC") is comprised of Schuylkill Medical Center – East Norwegian Street and Schuylkill Medical Center – South Jackson Street.

[3] Unless otherwise noted, all capitalized terms in this Memorandum have the same meaning as set forth in the Ortho Settlement Agreement. A copy of that agreement is attached to this Memorandum as Exhibit 1. A copy of the proposed order granting final approval of the Ortho Settlement is attached as Exhibit 2, and a copy of the proposed order granting final approval to the plan of distribution is attached as Exhibit 3.

submitting claims and values claims in a manner consistent with their relative strength in the litigation.

BACKGROUND

A. History of the Litigation

This Court is well familiar with the history of this complex antitrust class action, which has been pending for over nine years. During that time, the Court has, *inter alia*, studied the extensive briefing and examined the evidence in connection with Plaintiffs' motion for class certification (including Plaintiffs' renewed motion on remand from the Third Circuit), Ortho's motion for summary judgment and the parties' *Daubert* motions. In addition, the Declaration of Jeffrey J. Corrigan, submitted in support of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards for the Class Representatives, sets forth in detail the history of this complex litigation.

B. The Ortho Settlement and Notice Program

The Ortho Settlement is the result of arm's length negotiations between Class Counsel and Ortho's counsel, including mediation with Hon. Diane Welsh (ret.) of JAMS, which was conducting telephonically on the eve of trial over the course of two weeks in May 2018. The mediation was preceded by at least two unsuccessful attempts to reach an agreement between Plaintiffs and Ortho, first in October 2015 with the assistance of Judge Welsh, and then in August 2017 after the Court's summary judgment decision.

By Order dated July 12, 2018 ("Ortho Preliminary Approval Order"), the Court: (1) preliminarily approved the Ortho Settlement; (2) found that the proposed plan of distribution was sufficiently fair, reasonable, and adequate to authorize the dissemination of Notice to the Class;[4]

[4] The Class includes all members of the Immucor Settlement Class.

and (3) authorized the dissemination of Notice by mail and publication. Pursuant to the terms of the Ortho Settlement Agreement, within thirty (30) business days of the Court's Preliminary Approval Order, Ortho paid $19,500,000 into a Qualified Settlement Account accruing interest. Ortho Settlement Agreement ¶ 35.

As required by the Ortho Preliminary Approval Order, Notice of the Ortho Settlement and proposed plan of distribution was mailed to over 15,000 potential members of the Class. The Notice also advised potential members of the Class regarding the proposed plan of distribution, including that members of the Class that only made purchases between January 1, 2005 and April 30, 2009 will be compensated at a set amount of $250, and that, based upon the Court's summary judgment decision and Plaintiffs' expert's analysis, members of the Class that only made purchases after April 30, 2009 would not receive any compensation.[5] In addition, banner advertisements for the Ortho Settlement and proposed plan of distribution were published in the August 6, 2018 and August 10, 2018 editions of the *AABB News Smart Brief*, a blood banking industry newsletter. The Notice was also posted on www.bloodreagentsantitrustlitigation.com, a website dedicated to this litigation. Objections to the Ortho Settlement or the proposed plan of distribution must be postmarked no later than September 27, 2018. To date, no objections have been received.

C. The Proposed Plan of Distribution

Pursuant to the proposed plan of distribution, the Net Combined Settlement Fund (the Combined Settlement Fund less any Court-awarded attorneys' fees, expenses, and service awards) will (subject to the limited exceptions described below) be distributed *pro rata* in accordance with each Class Member's Traditional Blood Reagents ("TBR") purchases from January 1, 2001

[5] As explained below, this is because membership in the Class extends into 2015, but the Damages Period for the Class only includes purchases from January 2001 through December 2004, and Dr. Beyer concluded that to the extent the effects of the conspiracy continued beyond 2004, they would have ceased by April 2009.

through December 31, 2004 (the "Damages Period"). Purchases during the Damages Period from either Ortho or Immucor are eligible for claim submission, and each Class Member who purchased during the Damages Period is guaranteed a minimum distribution of $250. In determining *pro rata* purchases during the Damages Period, the settlement administrator will take the following adjustments into account:

- Exclusion from the Immucor Settlement:[6] If a Class Member opted out of the Immucor Settlement, its purchases during the Damages Period will be reduced accordingly. Approximately 53% of the Combined Settlement Fund is attributable to the Immucor Settlement. If a Class Member opted out of the Immucor Settlement, its purchases during the Damages Period would be valued at approximately $0.47 (i.e., $1 minus $0.53) on the dollar.

The proposed plan of distribution also provides for limited payments to Combined Settlement Class Members who *only* purchased TBR between January 1, 2005 and April 30, 2009. The Immucor Settlement and the Class specified class periods extending after the Damages Period, with the Immucor Settlement Class including purchases through February 23, 2012 and the Class including purchases through October 19, 2015. Thus, the Class includes some entities that only purchased TBR after 2004 (and not during the Damages Period). Subsequent events in the litigation, however, have substantially diminished the value of claims after the Damages Period. First, the Court's summary judgment decision dismissed claims based upon the 2005 and 2008 price increases. The Court later concluded that Plaintiffs' expert's testimony did not provide a reliable basis to estimate any damages from the 2001 price increase that may have continued after 2004. Nevertheless, Class Counsel believe it is appropriate to allocate some recovery based on purchases for the period January 1, 2005 through and including April 30, 2009, to reflect the release provided by these Settlement Class Members and Plaintiffs' expert's opinion that, to the

[6] The parties agree that no member of the Class elected to be excluded.

extent damages from the 2001 price increase did continue, they would have stopped at that point. Accordingly, each Combined Settlement Class Member who purchased TBR from January 1, 2005 through and including April 30, 2009, but not during the Damages Period, will receive $250.

Within 60 days following final approval of the plan of distribution, the settlement administrator will send each member of the Class a claim form via first class mail.[7] A sample claim form is attached as Exhibit 4, and it includes a detailed explanation of the claims process and answers to questions that Class Members may have. Each mailed claim form will contain a summary of that Class Member's purchases, which, for claims for purchases during the Damages Period, will be calculated using the transactional data produced in the litigation. The summary will show that Class Member's TBR purchases during the Damages Period, net of shipping, rebates, credits, and other adjustments, with the total amount purchased from each Defendant listed separately.[8] In the event the Class Member only purchased Wallboard from January 1, 2005 through April 30, 2009, but not during the Damages Period, the claim form will indicate as much but will not give a calculated dollar value of such purchases.[9] Each Class Member will have the option of accepting that calculation for the years 2001 through 2004 as the basis of its claim, or providing its own information regarding its relevant purchases. Blank claim forms will also be

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[7] Claim forms will be mailed within 60 days of final approval if there is no appeal regarding the final approval order. If the final approval order is appealed, claim forms will be mailed within 30 days of the final approval order becoming final.

[8] These calculations will be performed by the staff of Dr. John Beyer, Plaintiffs' expert economist in this litigation. Dr. Beyer's staff is already very familiar with the data at issue, and thus can efficiently generate the summary calculations. Dr. Beyer's staff will then transmit the relevant calculations to the settlement administrator to use in the mailed claim forms. Class Counsel estimate that the professional fees associated with preparing these calculations will be approximately $100,000.

[9] Each Defendant produced transactional data covering at least the Damages Period (January 1, 2001 through December 31, 2004). Both Defendants also produced transactional data extending through April 30, 2009. Accordingly, Dr. Beyer's staff can also identify in the transactional data those Class Members that only purchased during that time period as well. Dr. Beyer's staff will then transmit a list of Class Members that only purchased during this post-2004, pre-May 2009 period to the settlement administrator to use in the mailed claim forms and the settlement administrator will send such Class Members a claim form indicating TBR purchases between January 1, 2005 and April 30, 2009, and specifying those Class Members' entitlement to the $250 payment.

available online and upon request for entities that are not included in the transactional data or customer lists but nevertheless believe they have eligible claims. All claim forms must be signed and returned to the settlement administrator, postmarked or emailed no later than 60 days following mailing. After all timely-submitted claim forms are reviewed by the settlement administrator, and any issues concerning those claims have been resolved, the settlement administrator will calculate the payment to each Class Member using the criteria described above and distribute those payments by checks sent via first class mail, after submission of a final accounting to the Court.

THE PROPOSED ORTHO SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE, AND SHOULD BE APPROVED BY THE COURT

Under Federal Rule of Civil Procedure 23(e), a proposed settlement of a class action should be approved if it is "fair, adequate and reasonable." *See also In re Prudential 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., Inc.*, 726 F.2d 956, 965 (3d Cir. 1983). The Ortho Settlement satisfies this standard and should be approved.

D. Public Policy Favors Settlement of Class Actions

Federal courts have consistently recognized the longstanding public policy favoring the settlement of civil actions. *See*, *e.g.*, *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *William v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts"); *Sherin v. Gould*, 679 F. Supp. 473, 474 (E.D. Pa. 1987). Settlements are particularly favored in complex class actions such as this one. *See*, *e.g.*, *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516 at 535 (3d Cir. 2004) ("there is an overriding public interest in settling class action litigation, and it should therefore be encouraged"); *In re General 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").

E. The Ortho Settlement Is Entitled to a Presumption of Fairness

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, courts should "apply an initial presumption of fairness when reviewing a proposed settlement where: '(1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *Warfarin*, 391 F.3d at 535 (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 232 n.18 (3d Cir. 2001)). Courts have noted that "it is appropriate to give substantial weight to the recommendations of experienced attorneys, who have engaged in arms-length settlement negotiations, in making this determination." *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2003 WL 23316645, at *2 (E.D. Pa. Sept. 5, 2003); *see also Petruzzi's, Inc. v. Darling-Delaware Co., Inc.*, 880 F. Supp. 292, 301 (M.D. Pa. 1995) (noting that "[t]he opinions and recommendation of such experienced counsel are indeed entitled to considerable weight").[10]

These elements giving rise to the presumption of fairness are present here:

- The Ortho Settlement was consummated after arm's-length negotiations conducted through a mediator;
- Prior to negotiating the Ortho Settlement, Class Counsel reviewed and analyzed over a million pages of documents produced by Defendants and third parties, including transactional data regarding Defendants' TBR sales, conducted over 20 depositions, had the benefit of the Court's class certification, summary judgment

[10] *See also Carroll v. Stettler*, No. 10-2262, 2011 WL 5008361, at *4 (E.D. Pa. Oct. 19, 2011); *In re CertainTeed Corp. Roofing Shingle Prod. Liab. Litig.*, 269 F.R.D. 468, 484 (E.D. Pa. 2010) ("There is a 'strong presumption in favor of voluntary settlement,' particularly in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'") (citations omitted)); *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)).

and *Daubert* decisions, and had completed nearly all of their trial preparation, as the Ortho Settlement was achieved on the eve of trial;

- Class Counsel and Ortho's counsel have significant experience in antitrust, class action, and other complex litigation; and
- To date, no Class Member has objected to the settlement. The deadline for objecting is September 27, 2018.

Therefore, the proposed Ortho Settlement is entitled to a presumption of fairness. *See Warfarin*, 391 F.3d at 535; *Linerboard*, 292 F. Supp. 2d at 640; *Lake v. First National Bank*, 156 F.R.D. 615, 628 (E.D. Pa. 1994).

F. The *Girsh* Factors Strongly Support Approval of the Ortho Settlement

The Third Circuit has established a nine-factor test for determining whether a proposed settlement is "fair, adequate and reasonable." *See Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *In re Baby Prods. Antitrust Litig.*, 708 F. 3d 163, 174 (3d Cir. 2013). These factors, referred to as the *Girsh* factors, are:

(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 the trial;

(7) the ability of 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 in light of all the attendant risks of litigation.

Cendant, 264 F.3d at 232 (citing *Girsh*, 521 F.2d at 157). These factors are satisfied here, demonstrating that the Ortho Settlement is fair, reasonable, and adequate, and that final approval of the Ortho Settlement should be granted.

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

The first *Girsh* factor is the amount of recovery obtained through the settlement compared to the complexity, expense, and likely duration of the litigation. *See Girsh*, 521 F.2d at 157. "This factor captures 'the probable costs, in both time and money, of continued litigation.'" *Cendant*, 264 F.3d at 233 (quoting *GM Corp.*, 55 F.3d at 812). This factor weighs strongly in favor of approval of the Ortho Settlement.

As an initial matter, "[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." *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) (quoting *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)) (internal quotations and citations omitted); *see also McDonough v. Toys R Us, Inc.*, 80 F. Supp. 3d 626, 640 (E.D. Pa. 2015), *appeal dismissed*, No. 15-1455 (3d Cir. Nov. 2, 2015) ("Antitrust class actions are particularly complex to litigate and therefore quite expensive."); *In re Shopping Carts Antitrust Litig.*, MDL No. 451-CLB, M-21-29, 1983 WL 1950, at *7 (S.D.N.Y. Nov. 18, 1983) (observing that "antitrust price fixing actions are generally complex, expensive and lengthy").

This action involves complex legal and factual issues relating to TBR pricing, as well as the tolling of the statute of limitations. The parties engaged in lengthy discovery, including the review and analysis of over a million pages of documents produced by Defendants and third parties, analyses and reports by economic experts, and depositions of Defendants' former and current officers and employees. The parties provided extensive briefing and analysis, including

from expert economists, regarding class certification. The parties also prepared substantial factual and legal submissions regarding the existence of a conspiracy in the summary judgment briefing.

Even though Plaintiffs secured a favorable ruling at class certification and a partially favorable ruling on summary judgment, a considerable portion of the litigation remains. If this case continued to trial, it would be lengthy, complex and very expensive. And, even if Plaintiffs prevailed during Phase 1 of the trial, the Phase 2 trial proceedings on individual fraudulent concealment issues (and the procedure to address absent Class Members' fraudulent concealment claims) could extend the trial even further (not to mention increase the Class's risk), and even then the litigation could continue through post-trial proceedings and appeals. *Warfarin*, 391 F.3d at 536 ("[I]t was inevitable that post-trial motions and appeals would not only further prolong the litigation but also reduce the value of any recovery to the class."). By settling the claims instead of continuing to litigate, Plaintiffs have avoided the expense and the attendant uncertainty of trial and any post-trial proceedings. In addition, the members of the Combined Settlement Class will receive their portion of the funds much sooner.

In sum, the Ortho Settlement guarantees significant recovery while avoiding the delay and uncertainty that would result from continuing the litigation. The complexity, expense, and duration of the litigation favor approval of the Settlement.

2. Reaction of the Class to the Joint Settlement

This factor "attempts to gauge whether members of the class support the settlement." *Prudential Agent Actions*, 148 F.3d at 318. A lack of significant objections by class members weighs in favor of approving the settlement. *See Linerboard*, 296 F. Supp. 2d at 577-78; *see also Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993) (noting that "silence constitutes tacit consent to the agreement" where 30 objectors out of approximately 1.1 million shareholders was considered an "infinitesimal number"). However, it is not uncommon for some class members

to object to a proposed settlement, and class settlements are often approved over the objections of many class members. *See*, *e.g.*, *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D. Ga. 1993) (approving settlement notwithstanding a large number of objectors).

Based on Defendants' transactional sales data, direct notice of the Joint Settlement was disseminated to over 15,000 potential Class Members on August 2, 2018. Exhibit 8, Declaration of Markham Sherwood Regarding Dissemination of Notice of Proposed Settlement with Ortho-Clinical Diagnostics, Inc. and Proposed Distribution Plan ¶ 9. There were 2,319 undeliverable Notices that were returned by the U.S. Postal Service as addressee unknown, where efforts to obtain a forwarding address were unsuccessful. *Id.* ¶ 12. In addition, banner advertisements were published in the August 6, 2018 and August 10, 2018 editions of the *AABB News Smart Brief*, an industry newsletter that focuses on the blood banking industry. *Id.* ¶ 10. The Notice was also published on an informational website for Class Members (www.bloodreagentsantitrustlitigation .com), and a toll-free information telephone line was established to provide information to Class Members. *Id.* ¶¶ 7-8.

As of September 11, 2018, Class Counsel have received no objections to the Ortho Settlement. *Id.* ¶ 15. The deadline for submitting objections to the Ortho Settlement is September 27, 2018. On October 9, 2018, Plaintiffs will file a response to any objections filed by Class Members. *See* Ortho Preliminary Approval Order at ¶¶ 16-17.

To date, the reaction of the Class has been highly favorable, which supports final approval of the Ortho Settlement.

3. Stage of the Proceedings and Amount of Discovery Completed

The third *Girsh* factor is the stage of the proceedings and the amount of discovery completed. This factor "captures the degree of case development that class counsel have accomplished prior to settlement. Through this lens, courts can determine whether counsel had an

adequate appreciation of the merits of the case before negotiating." *Cendant*, 264 F.3d at 235 (quoting *GM Corp.*, 55 F.3d at 813). "Generally, post-discovery settlements are viewed as more likely to reflect the true value of a claim as discovery allows both sides to gain an appreciation of the potential liability and the likelihood of success." *In re Auto. Refinishing Paint Antitrust Litig*, MDL No. 1426, 2004 WL 6248154, at *3 (E.D. Pa. Sept. 27, 2004) (citing *Bell Atl. Corp.*, 2 F.3d at 1314).

Prior to the Ortho Settlement, Plaintiffs' counsel concluded fact discovery, including analyzing over a million pages of documents produced by Defendants and third parties, conducting nearly 20 depositions, and submitted expert reports regarding liability and class certification. Also, prior to the Ortho Settlement, the parties briefed and argued, and the Court ruled on, Plaintiffs' motion for class certification (including a renewed motion on remand from the Third Circuit), Ortho's motion for summary judgment and the parties' *Daubert* motions, and Plaintiffs' Counsel had completed nearly all of their trial preparation. As a result, Class Counsel have developed a thorough understanding of the strengths and weaknesses of the case and are in an excellent position to make an informed judgment as to the merits of the litigation and the likelihood of its success. *See*, *e.g.*, *Rivera v. Lebanon Sch. Dist.*, No. 1:11-CV-00147, 2013 WL 4498817, at *2 (M.D. Pa. Aug. 20, 2013) (after discovery and a decision on the parties' motions for summary judgment, "both parties had an adequate appreciation of the merits of the case before entering settlement negotiations") (internal quotation and citation omitted); *In re Lucent Techs., Inc., Sec. Litig.*, 307 F. Supp. 2d 633, 644 (D.N.J. 2004) (discovery, outside investigation, and settlement negotiations shed light "on the strengths and weaknesses of the case, the risks of litigation, and the issues the Class would face at trial. The parties had more than a sufficient basis for assessing the strengths

and weaknesses of the claims when they submitted the Settlement to the Court for approval. This factor thus weighs in favor of the Settlement.”).

Accordingly, this factor strongly supports final approval.

4. Risks of Establishing Liability

The fourth *Girsh* factor attempts to measure “‘what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them.’” *Cendant*, 264 F.3d at 237 (quoting *GM Corp.*, 55 F.3d at 814). “In examining this factor, 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 class 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. 2005) (quoting *Lachance v. Harrington*, 965 F. Supp. 630, 638 (E.D. Pa. 1997)).

While Plaintiffs believe that their case against Ortho is strong, Plaintiffs also recognize that all complex antitrust class actions 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). Plaintiffs also recognize that Ortho is a large entity with extensive resources and is represented by talented and experienced counsel. “As is true in any case, the proposed Settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution.” *Int’l Union, UAW v. Ford Motor Co*., No. 05-74730, No. 06-10331, 2006 WL 1984363, at *23 (E.D. Mich. July 13, 2006) (*aff’d sub nom*, *Int’l Union, UAW v. GM Corp.*, 497 F.3d 615 (6th Cir. 2007)) (internal quotation marks and citation omitted); *see also In re Aetna Inc. Sec. Litig.*, MDL No. 1219, 2001 WL 20928, at *9 (E.D. Pa. Jan. 4, 2001) (“If further litigation presents a realistic risk

of dismissal on summary judgment or an exonerating verdict at trial, the plaintiffs have a strong interest to settle the case early.").

Given these uncertainties and the very real risks of establishing liability, the fourth *Girsh* factor supports final approval of the Ortho Settlement.

5. Risks of Establishing Damages

The fifth *Girsh* factor—the risk of establishing damages—looks at the "expected value of litigating the action rather than settling it at the current time." *Cendant*, 264 F.3d at 238 (quoting *GM Corp.*, 55 F.3d at 816). Here, even if Plaintiffs overcame the obstacle of establishing liability at trial against Ortho, absent the Ortho Settlement, Plaintiffs would still have to prove damages against Ortho. At trial, each side would present divergent testimony regarding the existence and measure of damages, and the jury may award lower damages than Plaintiffs seek. *See*, *e.g.*, *Lucent*, 307 F. Supp. 2d at 646 (noting potential for battle of the experts, the outcome of which is "never predictable"). "The dispute over damages would likely have resulted in an expensive battle of the experts and there was no way to anticipate a jury's response to intricate economic data." *McDonough*, 80 F. Supp. 3d at 644; *see also In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 506 (W.D. Pa. 2003) (competing expert opinions add uncertainty as to how much money, if any, the class might recover at trial). "[C]ourts have recognized the need for compromise where divergent testimony would render the litigation an expensive and complicated 'battle of experts.'" *Lazy Oil*, 95 F. Supp. 2d at 337; *see also In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) (recognizing the risk plaintiffs face in not establishing damages in class action antitrust cases).

More specifically, prior to agreeing to the Ortho Settlement, Plaintiffs were preparing for a lengthy trial, which featured even more uncertainty regarding damages than the usual antitrust class action, given that even if Plaintiffs successfully established Ortho's liability and the amount

of class-wide damages during Phase 1 of the trial, the Phase 2 trial proceedings on individual fraudulent concealment issues (and the procedure to address absent Class Members' fraudulent concealment claims) could have extended the trial even further and substantially increased Plaintiffs' risk of establishing any recoverable damages.

Accordingly, the fifth *Girsh* factor weighs strongly in favor of approval.

6. Risks of Maintaining the Class Action Through Trial

The sixth *Girsh* factor looks at the risks of maintaining class certification through trial. On October 19, 2015, this Court certified a class of direct purchasers of TBR. ECF Nos. 262, 263. However, a district court "may decertify or modify a class at any time during the litigation if it proves to be unmanageable." *Prudential Agent Actions*, 148 F.3d at 321; *see also McDonough*, 80 F. Supp. 3d at 644 ("[C]lass certification is subject to review and modification at any time during the litigation."); *Perry*, 229 F.R.D. at 116 ("What the district court giveth, the district court may taketh away . . . ."). While the Third Circuit rejected Ortho's most recent petition for an interlocutory appeal under FRCP Rule 23(f), it had accepted Ortho's initial petition and vacated the Court's initial class certification decision. ECF Nos. 199, 200, 240. Thus, class certification remains an issue for a final appeal.

Accordingly, with respect to the sixth *Girsh* factor, "[t]here will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." *Prudential Agent Actions*, 148 F.3d at 321; *see also Rent-Way*, 305 F. Supp. 2d at 506-07 ("[A]s in any class action, there remains some risk of decertification in the event the Propose[d] Settlement is not approved. While this may not be a particularly weighty factor, on balance it somewhat favors approval of the proposed Settlement.").

Consequently, the sixth *Girsh* factor weighs in favor of approval.

7. Ability of Ortho to Withstand a Greater Judgment

The seventh *Girsh* factor "is concerned with whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240.

First, courts accord this factor little weight in assessing fairness, reasonableness, and adequacy of a proposed settlement. *See Auto. Refinishing*, 2004 WL 6248154, at *7 (courts have not given this factor great weight where the settlement at issue represents a substantial sum in light of the risks involved in proceeding with the litigation); *Lazy Oil*, 95 F. Supp. 2d at 318 (concluding that defendant's ability to pay a larger judgment did not weigh against settlement "in light of the risks that Plaintiffs would not be able to achieve any greater recovery at trial[.]").

Second, courts in the Third Circuit "'regularly find a settlement to be fair even though the defendant has the practical ability to pay greater amounts.'" *McDonough*, 80 F. Supp. 3d at 645, at *11; *see also In re Processed Egg Prod. Antitrust Litig.*, 302 F.R.D. 339, 359 (E.D. Pa. 2014) ("[W]here the settlement is otherwise fair, reasonable, and adequate, a defendant's ability to withstand a greater judgment will not alone defeat final approval."); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, MDL No. 1203, 2000 WL 1222042, *62 (E.D. Pa. Aug. 28, 2000) (citing *Prudential Agent Actions*, 148 F.3d at 321-22) ("This factor does not require that the defendant pay the maximum it is able to pay.").

Accordingly, to the extent it is considered, the seventh *Girsh* factor is neutral.

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

The eighth and ninth *Girsh* factors assess the reasonableness of the settlement fund in light of the best possible recovery and in light of all the attendant risks of litigation. *See In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 839 (W.D. Pa. 1995). 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." *Aetna*, 2001 WL 20928, at *6; *see also GM Corp.*, 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 an abandoning of highest hopes'") (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)).

Here, the settlement payment by Ortho provides significant benefit to the members of the Class, and eliminates the uncertainty of recovery from Ortho. Whether viewed in terms of a percentage of single damages or as a percentage of Ortho's sales, the Ortho Settlement, in light of the risks of litigation, is more than reasonable.[11]

Thus, taking into consideration all the benefits of the Settlement and the risks of continued litigation, the Ortho Settlement is well within the range of reasonableness. Accordingly, the *Girsh* factors support approval.

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[11] The $19.5 million settlement represents 27.6% of single damages for the period January 1, 2001 through December 31, 2004. *See* Supplemental Report of John C. Beyer, Ph.D., Regarding Damages and Class Certification at Table 4. The $19.5 million settlement also represents 24.2% of the total sales by Ortho during the period January 1, 2001 through December 31, 2004. *See* Corrected Report of John C. Beyer, Ph.D., Regarding Liability and Damages at Table 2. Thus, the Ortho Settlement represents a very substantial recovery, which compares favorably with other settlements approved in antitrust cases in this District. *See, e.g.*, *Linerboard*, 296 F. Supp. 2d at 581 and n.4 (approving settlement representing 36% of damages attributable to the three defendants settling at the time and collecting Third Circuit cases where settlements ranged from 2% to 28% of estimated damages) (citations omitted); *Nichols v. Smithkline Beecham Corp.*, No. Civ.A.00-6222, 2005 WL 950616, at *16 (E.D. Pa. Apr. 22, 2005) (approving settlement amounting to approximately 9-13% of damages); *In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619 (E.D. Pa. 2004) (approving final settlements amounting to 1.62% of the settling defendants' sales); *Fisher Bros., Inc. v. Mueller Brass Co.*, 630 F. Supp. 493, 499 (E.D. Pa. 1985) (approving settlement representing 0.2% of the defendant's sales, and noting that earlier settlements approved in the case represented 2.4, 0.88, 0.65, 0.3, 0.2 and 0.1% of other settling defendants' sales); *see also In re Plastic Tableware Antitrust Litig.*, No. CIV.A.94-3564, 1995 WL 678663, at *1 (E.D. Pa. Nov. 13, 1995) (recovery equal to 3.5 % of total sales).

G. Notice Satisfied Rule 23 and Constitutional Due Process

Before a court determines whether to approve a settlement, it must also conclude that notice was appropriate. *See Carroll*, 2011 WL 5008361, at *3. Under Rule 23(e) of the Federal Rules of Civil Procedure, a court must direct notice in a reasonable manner to class members who would be bound by a proposed class settlement. To satisfy the requirements of Rule 23 and constitutional due process, notice of a proposed class settlement must be "designed to summarize the litigation and the settlement and 'to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation.'" *Prudential Agent Actions*, 148 F.3d at 326-27 (citing 2 *Newberg on Class Actions* § 8.32 at 8-109); *see also In re Prudential Ins. Co. of America Sales Practices Litig.*, 177 F.R.D. 216, 231 (D. N.J. 1997) (citing *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). "The notice need not be unduly specific." *Prudential*, 177 F.R.D. at 231; *see also In re WorldCom, Inc.*, 347 B.R. 123, 140 (Bankr. S.D.N.Y. 2006) (notice not required to be "highly detailed or exact," as notice can only contain a limited amount of information); *In re Wireless Telephone Federal Cost Recovery Fees Litig.*, No. MDL 1559 4:03-MD-015, 2004 WL 3671053, at *8 (W.D. Mo. April 20, 2004) ("There is no one 'right way' to provide notice as contemplated under Rule 23(e).").

The Notice here informed potential members of the Combined Settlement Class of the material terms of the Ortho Settlement; the relief provided under the Ortho Settlement; the proposed plan of distribution; the date, time, and place of the fairness hearing; the procedures and deadlines for submitting comments or objections; and that, if they did not opt out of the Class prior

to April 6, 2016, Class Members were bound by any final judgment in this case, including a release of claims, as required by Rule 23.[12]

The method of notice likewise satisfied the requirements of Rule 23 and due process. Here, individual notice was sent by first-class mail, postage prepaid, to all Class Members whose names and addresses could be derived from the electronic transactional sales information produced by Defendants. In addition, banner advertisements were published in two editions of the *AABB News Smart Brief*, an industry newsletter for the blood banking industry.

Thus, as this Court preliminarily found, "the dissemination of the Notices in the manner set forth herein constitutes the best notice practicable under the circumstances; is valid, due, and sufficient notice to all persons entitled to notice; and complies fully with the requirements of Federal Rule of Civil Procedure 23 and due process." Ortho Preliminary Approval Order at ¶ 12.

THE PROPOSED PLAN OF DISTRIBUTION IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

"Approval of a plan of allocation of a settlement fund in a class action is 'governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000). The proposed distribution plan satisfies this standard.

The proposed distribution plan reflects the considered judgment of experienced counsel who are intimately familiar with this litigation. *Law v. NCAA*, 108 F. Supp. 2d 1193, 1196 (D. Kan. 2000) (observing that the "opinions of experienced counsel" should be accorded "substantial weight" in assessing the fairness of a settlement allocation). In crafting the distribution plan, Class Counsel addressed variations in the relative strength of different claims.

[12] In addition, the banner advertisements directly linked to the case website, where Class Members could review important court documents, access all relevant information about the Ortho Settlement and the proposed plan of distribution, and download a copy of the Notice.

The distribution plan provides for the majority of the Net Combined Settlement Fund to be distributed to compensate claims during the temporal period for which the Court concluded Plaintiffs' claims could go to trial—January 1, 2001 through December 31, 2004. These claims will be paid on a *pro rata* basis.[13] *See In re Urethane Antitrust Litig.*, MDL No. 1616, 2016 WL 4060156, at *3 (D. Kan. July 29, 2016) ("[A] plan of allocation may reflect the relative strengths of the class members' various claims."); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2016 WL 3648478, at *11 (N.D. Cal. July 7, 2016) ("'It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits.'") (quoting *In re Omnivision*, 559 F. Supp. 2d 1036, 1045 (N.D. Cal. 2008)). Claimants with purchases between January 1, 2001 and December 31, 2004 will receive a minimum of $250. Members of the Combined Settlement Class who *only* purchased TBR between January 1, 2005 and April 30, 2009 will receive a set payment of $250 as compensation for their released claims, which reflects the limited value of these claims in light of the Court's summary judgment decision. *See In re Blood Reagents Antitrust Litig.*, No. 09-md-2081, 2017 WL 3048660, at *29 (E.D. Pa. July 19, 2017) (dismissing antitrust claims based on 2005 and 2008 TBR price increases).[14] Class Members with purchases only after April 30, 2009 are not allocated any share

[13] Class Counsel anticipate using Defendants' transactional data to calculate *pro rata* claims. Claimants will have the option of accepting this calculation, or submitting their own calculation of total purchases with accompanying documentation, which will then be reviewed by the settlement administrator.

[14] Courts have approved plans of allocation providing for the payment of a set amount for less valuable claims. *See In re Domestic Drywall Antitrust Litig.*, MDL 2437 (E.D. Pa.), ECF No. 765 at ¶ 12, attached as Exhibit 5 (July 17, 2018 Order Approving Plan of Distribution that provided for a set payment of $250 for claims in a time period after the damages period); *Padan v. West Business Solutions LLC*, Case No. 2:15-cv-00394-GMN-CWH, 2017 WL 6626358, at *1, n.2 (D. Nev. Nov. 16, 2017) (in a settlement in a FLSA action, the court approved a plan of allocation that provided for a "flat payment of $10" for opt-in plaintiffs who did not fall into the class definition or who would not have been affected by the alleged misconduct, while those with stronger claims were compensated at a higher amount); *In re Mercedes Benz Antitrust Litig.*, No. 99-4311 (D.N.J.) ECF No. 712-6 at p. 9, attached as Exhibit 6 (plan of allocation providing for a set payment of $100 for one category of claims and *pro rata* distribution of the net settlement fund for other categories of claims) and ECF No. 731 at ¶ 16, attached as Exhibit 7, (Final Judgment Order providing that the plan of allocation is fair, reasonable, and adequate).

of the Settlement Fund in light of the Court's summary judgment decision and Plaintiffs' expert's conclusion that, to the extent the effects of the conspiracy continued beyond 2004, they would have ceased by April 2009.

Members of the Combined Settlement Class were informed about the proposed plan of distribution in the Notice. To date, no objections regarding the proposed distribution plan have been received.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval of the proposed Ortho Settlement. A proposed Final Judgment Order is attached as Exhibit 2.[15] Plaintiffs also respectfully request that the Court grant final approval of the proposed plan of distribution, and have attached a proposed order approving that plan as Exhibit 3.

Dated: September 12, 2018

Respectfully submitted,

/s/ Jeffrey J. Corrigan

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[15] The proposed final judgment order is almost identical to the one submitted with Plaintiffs' motion for preliminary approval. The only difference is the inclusion of updated dates.