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

IN RE DUCTILE IRON PIPE FITTINGS ("DIPF") DIRECT PURCHASER ANTITRUST LITIGATION	Civil Action No.: 12-711 (AET)(LHG)

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

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I. INTRODUCTION

Direct Purchaser Plaintiffs seek preliminary approval under Federal Rule of Civil Procedure 23(e) of a settlement with McWane, Inc. and its divisions Clow Water Systems Co., Tyler Pipe Company, and Tyler Union (collectively, "McWane"). This settlement 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.[1]

At the preliminary approval stage, the Court only determines if the settlement is "within the range of settlements worthy of final approval as fair, reasonable, and adequate." *Glaberson v. Comcast Corp.*, Civ. A. No. 03-6604, 2014 WL 7008539, at *5 (E.D. Pa. Dec. 12, 2014). As detailed below, the settlement is well within the range for possible approval and should be preliminarily approved by this Court under Rule 23(e).

II. BACKGROUND

A. The Litigation

This case is brought on behalf of direct purchasers of ductile iron pipe fittings ("DIPF") from Defendants McWane, Star, and SIGMA. The plaintiffs

[1] Defendants SIGMA Corporation and its owned subsidiary SIGMA Piping Products Corporation (collectively, "SIGMA") and Star Pipe Products, Ltd. ("Star") entered into settlement agreements with Direct Purchaser Plaintiffs on May 21, 2015 and July 2, 2015, respectively, and those settlements were granted final approval on January 28, 2016.

challenge actions by McWane to monopolize the domestic DIPF Market from at least September 22, 2009 to December 31, 2013. Plaintiffs also challenge two alleged unlawful conspiracies: (a) a price-fixing conspiracy between McWane, SIGMA and Star (who collectively sell more than 90% of DIPF in the United States) from at least January 11, 2008 through September 21, 2009; and (b) a conspiracy between McWane and SIGMA to monopolize and fix prices in the domestic DIPF Market from September 22, 2009 to December 31, 2013.

B. Settlement Negotiations

Direct Purchaser Plaintiffs' Interim Co-Lead Counsel and McWane's counsel engaged in extensive arm's length negotiations over many months to reach the proposed settlement. *See* Declaration of Robert N. Kaplan in Support of Direct Purchaser Plaintiffs' Motion for Preliminary Approval of Settlement With Defendant McWane, sworn to December 4, 2017 ("Kaplan Decl."). Interim Co-Lead Counsel and McWane's counsel, both highly experienced and capable, vigorously advocated their respective clients' positions in the settlement negotiations. Kaplan Decl. ¶ 8.

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.* ¶ 2. At that time, the parties were too far apart and these attempts to mediate were unsuccessful. *Id.*

On October 19, 2016, this Court stayed the proceedings to provide the parties an additional opportunity to settle their dispute. *Id.* ¶ 3. 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 and plaintiffs' counsel in a separate antitrust litigation involving Cast Iron Soil Pipes. *Id.* ¶ 4. The parties felt that Judge Phillips' familiarity with the parties would facilitate the mediation. *Id.* Judge Phillips held an in-person mediation session on December 15, 2016, which was followed up by several additional weeks of continued efforts by telephone. *Id.* ¶ 5. Although Judge Phillips brought the parties closer together, ultimately these efforts were unsuccessful. *Id.*

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. On June 23, 2017, while these motions were pending, the Court ordered the parties to renew their attempts to mediate. *Id.* ¶ 6. 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. 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.* ¶ 7.

Both sides vigorously negotiated their respective positions on all material terms of the Settlement Agreement, and the negotiations were non-collusive. *Id.* ¶ 8. In connection with these settlement negotiations, Direct Purchaser Plaintiffs' 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.* ¶ 9.

The Settlement Agreement, attached to the Kaplan Declaration as Exhibit 1, includes the following material terms:

1. The Settlement Classes

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

a. <u>The Price-Fixing Class:</u> 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. <u>The Monopolization Class:</u> All persons or entities in the United States that purchased Domestic DIPF directly from McWane from September 22, 2009, through December 31, 2013.

c. <u>The McWane/Sigma Conspiracy Class:</u> 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.[2]

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 who, as of the Execution Date, previously agreed with McWane to opt-out of any litigation or settlement class certified in the Action. Settlement Agreement, *Id.* ¶ 9. These Known Opt-Outs are listed on Appendix A to the Settlement Agreement.

2. The Settlement Fund

Pursuant to the terms of the Settlement Agreement, McWane will pay the Settlement Amount into an escrow account on or before 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.

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

3. The 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 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 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.[3] *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;

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

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*.

4. Rescission Based on Opt-Outs

The Settlement Agreement permits McWane to rescind the agreement based upon the level of opt-outs from the Settlement Classes. Specifically, if the dollar amount of purchases by Class Members who elect to opt-out of the Settlement Classes 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.[4] 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 and supporting data for Opt-Out Purchases.

[4] 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.,* No.04-md-15861, 2010 WL 2342413 (D. Md. May 19, 2010) (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 Classes. Rather, what is relevant is the amount being paid and the release terms.

Id. ¶ 43(a)-(b). If the Opt-Out Percentage equals or exceeds the amount agreed to 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).

III. ARGUMENT

A. The Settlement of Complex Litigation Is Favored

Plaintiffs and McWane have reached an agreement that maximizes Direct Purchaser Plaintiffs' recovery. Direct Purchaser Plaintiffs have avoided the potential risks inherent in complex antitrust class action litigation and secured significant benefits for the Settlement Classes. Further, the Court should be mindful of the "strong presumption in favor of voluntary settlement agreements," which "lighten the increasing load of litigation faced by the federal courts" and allow the parties to "gain significantly from avoiding the costs and risks of a lengthy and complex trial." *In re Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010). "This presumption is especially strong in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *Ehrheart*, 609 F.3d at 594 (internal citation omitted); *see also In re Ins. Brokerage Antitrust Litig.*, Case No. 04-6184, 2013 WL 3956378 (D.N.J. Aug. 1, 2013) (holding that "the law favors settlement, particularly in class actions

and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation").

B. <u>The Proposed Settlement Exceeds the Standards for Preliminary Approval</u>

When parties to a class action seek to settle, they must proceed before the court in two steps – first, they must seek preliminary approval of the proposed settlement as well as certification of the proposed settlement classes, and then, should such preliminary approval and settlement class certification be granted, they must provide notice to the settlement classes and appear at a fairness hearing, after which the court may grant final approval to the settlement. *See Manual for Complex Litigation* (Fourth) § 21.63 (2004); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 562 (D. N.J. 1997); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, at *1 (E.D. Pa. May 11, 2004).

"The court's preliminary approval is not binding and is granted unless the proposed settlement is obviously deficient." *Weissman v. Philip C. Gutworth, P.A.*, Civ. No. 2:14-cv-00666, 2015 WL 333465, at *2 (D. N.J. Jan. 23, 2015); *see also Jones v. Commerce Bancorp, Inc.*, No. 05–5600, 2007 WL 2085357, at *2 (D.N.J.2007). In determining whether preliminary approval should be granted, the Court is required to determine only whether "the proposed settlement disclose[s] grounds to doubt its fairness or other obvious deficiencies such as unduly

preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval." *Mylan Pharms., Inc. v. Warner Chilcott Public Ltd.*, Civ. No. 12-3824, 2014 WL 631031, at *4 (E.D. Pa. Feb. 18, 2014); *see also Mazon v. Wells Fargo Bank, N.A.*, Civ. No. 10-700, 2011 WL 6257149, at *1 (D. N.J. Dec. 14, 2011). The "analysis often focuses on whether the settlement is the product of arm's-length negotiations." *Curiale v. Lenox Grp. Inc.*, No. 07-1432, 2008 WL 4899474, *4 (E.D. Pa. 2008).

1. The Proposed Settlement Is the Result of Arm's Length Negotiations Conducted by Highly Experienced Counsel and Mediators.

The process that led to this proposed settlement was fairly conducted with the aid of an experienced mediator by highly-qualified counsel who sought to obtain the best possible result for their clients and the Settlement Classes. When experienced counsel engage in an arm's-length negotiation that results in a settlement, courts find that the settlement is entitled to a presumption of fairness. *See, e.g., Weissman*, 2015 WL 333465, at *2; *Glaberson*, 2014 WL 7008539, at *4 (a settlement is presumed to be fair "when the negotiations were at arm's length, there was sufficient discovery, and the proponents of the settlement are experienced in similar litigation."). The process that led to this settlement confirms that the initial presumption of fairness is correct.

As set forth in their motions for appointment as Interim Co-Lead Counsel (ECF Nos. 15 and 16), Direct Purchaser Plaintiffs' counsel are highly capable and have the requisite qualifications and experience to handle this litigation. Moreover, counsel engaged in settlement negotiations with the utmost good faith and due diligence. In this case, settlement negotiations involved numerous telephone conferences, face-to-face meetings, and emails. *See* Kaplan Decl. ¶¶ _-_.

By the time negotiations with McWane concluded, Interim Co-Lead Counsel had completed fact discovery and had briefed their class certification motion, and thus had a fully developed factual record to assist in their evaluation of the strengths and weaknesses of the case against McWane. In particular, Interim Co-Lead Counsel reviewed well over 450,000 documents produced by the defendants, including those documents produced during the related Federal Trade Commission ("FTC") investigation into Defendants' alleged unlawful conduct, as well as additional documents produced for the first time in this litigation. Interim Co-Lead Counsel also have reviewed the voluminous record of the related FTC proceedings, which included the transcripts and exhibits of a full trial against Defendant McWane, and a 464-page Initial Decision by Administrative Law Judge Chappell. In addition, Interim Co-Lead Counsel took numerous key defendant and nonparty percipient depositions. Depositions were also taken of both plaintiffs' and McWane's expert economists.

Finally, by the time negotiations commenced, the FTC Administrative Law Judge had found, and the FTC subsequently affirmed, that McWane had engaged in an "unlawful exclusive dealing policy to maintain its monopoly power in the domestic fittings market." *In re McWane, Inc. and Star Pipe Products Ltd.*, FTC Dkt. No. 9351, 2014 WL 556261, at *41 (FTC Jan. 30, 2014), *aff'd*, *McWane, Inc. v. F.T.C.*, 783 F.3d 814 (11th Cir. 2015). However, the FTC staff was not successful in proving its price-fixing claims. *Id.* at *32-38.

Thus, Interim Co-Lead Counsel were well-informed of the facts of the case and the strength of the claims asserted when the terms of the Settlement Agreement were negotiated.

2. The Proposed Settlement Falls Within the Range of Possible Approval.

To preliminarily approve this settlement, the Court must decide that the proposed settlement falls within the range of settlement that could *possibly* be approved as fair, adequate and reasonable. Under this standard, this settlement is reasonable in light of the risks of moving forward with litigation towards summary judgment and trial. In addition, plaintiffs' motion for class certification and defendants' motion to exclude the opinions of plaintiffs' expert economist remained pending at the time the settlement was reached, and the outcome of each of those motions were uncertain. *See, e.g., In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631 (E.D. Pa. 2003) ("[a]n antitrust class action is arguably the most

complex action to prosecute"); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475-76 (S.D.N.Y. 1998) ("the 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."); *Weseley v. Spear*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (noting that antitrust class actions are "notoriously complex, protracted, and bitterly fought"). Continuing this action against McWane would entail an even lengthier and more expensive legal battle with an uncertain outcome. The degree of uncertainty supports preliminary approval of the proposed settlement. *See In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995).

C. <u>The Proposed Settlement Classes Should Be Certified Pursuant to Rule 23</u>

The propriety of certifying a class solely for purposes of settlement is well established in the Third Circuit, and this Court has done so with regard to the Sigma and Star Settlements. *See, e.g., In re Pet Food Prods. Liability Litig.*, No. 07-2867, 2008 WL 4937632, at *3 (D.N.J. Nov. 18, 2008) ("Class actions certified for the purposes of settlement are well recognized under Rule 23"). A court may grant certification where, as here, the proposed settlement class satisfies the four prerequisites of Rule 23(a) (numerosity, commonality, typicality and adequacy), as well as one of the three subsections of Rule 23(b).

The factual and legal support for certification of the Settlement Classes are set forth below.

1. The Proposed Settlement Classes Meet the Requirements of Rule 23(a)

a. The Settlement Classes Are So Numerous That It Is Impracticable to Bring All Class Members Before the Court

First, Rule 23(a) requires that the class be so numerous that joinder of all members would be "impracticable." Fed. R. Civ. P. 23(a)(1). There is no threshold number required to satisfy the numerosity requirement, and the most important factor is whether joinder of all the parties would be impracticable for any reason. *See Stewart v. Abraham*, 275 F.3d 220, 227-28 (3d Cir. 2001) (noting that there is no minimum number to satisfy numerosity and observing that generally the requirement is met if the number of class members exceeds 40). In addition, numerosity is not determined by the size of the class alone, but also by the geographic location of class members. *Marsden v. Select Med. Corp.*, 246 F.R.D. 480, 484 (E.D. Pa. 2007).

Defendants have each produced transaction data that can objectively identify the purchasers of Open-Spec and Domestic DIPF during the relevant class periods. Plaintiffs have used that data to identify over 560 distinct members of the Price-Fixing Class, 296 distinct members of the McWane/Sigma Conspiracy Class, and

219 distinct members of the Monopolization Class, less the Known Opt-Outs identified in Appendix A to the Settlement Agreement.

b. Plaintiffs and the Settlement Classes Share Common Legal and Factual Questions.

Second, Rule 23(a) requires the existence of questions of law or fact common to the Settlement Class. Fed. R. Civ. P. 23(a)(2). Questions are common to the Settlement Class if class members' claims "depend upon a common contention" that is "of such a nature that it is capable of class wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The commonality element "'does not require an identity of claims or facts among class members; instead, [t]he 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.'" *In re Global Crossing Sec. and Erisa Litig.*, 225 F.R.D. 436, 451 (S.D.N.Y. 2004); (quoting *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 184 (3d Cir. 2001)); *see also In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79, 83-84 (E.D. Pa. 2003) ("The members need not have identical claims to have common or factual issues that satisfy commonality. Instead, all that is required is that the litigation involve some common questions and that plaintiffs allege harm under the same theory.").

In addition, courts in this Circuit have found the commonality requirement to be easily met in antitrust class actions. *See, e.g., In re K-Dur Antitrust Litig.*, No. 01-1652, 2008 WL 2699390, at *4 (D.N.J. Apr. 14, 2008); *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 141 (D.N.J. 2002) (holding that conspiracy to restrain trade is subject to common proof); *In re OSB Antitrust Litig.*, 2007 WL 2253418, at *4 (E.D. Pa. Aug. 3, 2007).

Here, Direct Purchaser Plaintiffs' allegations raise questions of law and fact common to the proposed Settlement Classes, including, for example:

(a) Whether Defendants engaged in a combination and conspiracy to fix, raise, maintain, or stabilize prices of DIPF sold in the United States;

(b) Whether this alleged conspiracy violated Section 1 of the Sherman Act;

(c) Whether Defendants McWane and SIGMA engaged in a combination and conspiracy to monopolize and restrain trade in the Domestic DIPF Market;

(d) Whether the alleged McWane/SIGMA conspiracy violated Sections 1 and 2 of the Sherman Act;

(e) Whether Defendants McWane and SIGMA engaged in exclusive dealing, and other exclusionary, anticompetitive conduct;

(f) Whether Defendant McWane illegally monopolized the Domestic DIPF Market;

(g) The duration of the alleged conspiracies and conduct;

(h) Whether Defendants' conduct caused injury to the business and property of the members of the Classes;

(i) The effect of the alleged conspiracies and monopolization on the prices of DIPF sold in the United States; and

(j) The appropriate measures of damages.

Because there are several common legal and factual questions related to liability, the commonality requirement of Rule 23(a)(2) is easily met.

c. *Plaintiffs' Claims Are Typical of the Claims of the Members of the Settlement Classes.*

Third, Rule 23(a) requires typicality of the class representatives' claims. *See* Fed. R. Civ. P. 23(a)(3). The typicality requirement is satisfied where, as here, the claims of the representative plaintiffs arise from the same course of conduct that gives rise to the claims of the other Settlement Class members, and the claims are based on the same legal theories. *See Baby Neal v. Casey*, 43 F.3d 48, 57-78 (3d Cir. 1994). In *Baby Neal*, the Third Circuit held:

> The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented. The typicality criterion is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees by requiring that the common claims are comparably central to the claims of the named plaintiffs as to the claims of the absentees.

43 F.3d at 57-58.

Here, the claims of the representative plaintiffs are typical when compared to those held by the other members of the Settlement Classes. Direct Purchaser

Plaintiffs allege that Defendant McWane monopolized the Domestic DIPF Market from at least as early as September 22, 2009 through December 31, 2013. The case also alleges two unlawful conspiracies by the Defendants. The first conspiracy was among all Defendants to fix prices for DIPF that they sold directly to the representative plaintiffs and other class members which began at least as early as January 11, 2008 and continued through at least September 21, 2009. The second conspiracy was between Defendants McWane and SIGMA to monopolize and unreasonably restrain trade in the Domestic DIPF Market, which began at least as early as September 22, 2009 and through December 31, 2013. Such claims of the representative plaintiffs, like those of the other members of the Settlement Classes, arise out of the same alleged anticompetitive conduct by the same Defendants and are based on the same legal theories.

d. Interim Co-Lead Counsel, Liaison Counsel and Representative Plaintiffs Will Fairly and Adequately Protect the Interests of the Settlement Classes.

Fourth, Rule 23(a) requires that the representative parties fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(4). As the Third Circuit explained in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977), the adequate representation requirement of Rule 23(a)(4) guarantees "that the representatives and their attorneys will competently, responsibly, and vigorously prosecute the suit and that the relationship of the representative parties'

interest to those of the class are such that there is not likely to be divergence in viewpoint or goals in the conduct of the suit."

Here, Interim Co-Lead Counsel have extensive experience and expertise in antitrust disputes, complex litigation, and class action proceedings throughout the United States. *See* ECF Nos. 15 and 16 (Interim Co-Lead Counsel's briefs and supporting documentation in support of appointment). Counsel has vigorously prosecuted this litigation, including successfully defending their claims against two rounds of motions to dismiss, both of which were denied in their entirety. ECF Nos. 116, 117, 271 and 272. Moreover, the named representatives have adequately represented the interests of the absent members of the Settlement Classes, actively participating in discovery by responding to document requests and interrogatories and sitting for depositions. Nor are there any conflicts between the named representatives and the absent members of the Settlement Classes. Adequate representation under Rule 23(a)(4) is satisfied.

2. The Proposed Settlement Classes Meet the Requirements of Rule 23(b)(3).

Once the four prerequisites of Rule 23(a) are met, as in this case, plaintiffs must also show that the proposed Settlement Classes satisfy one of the requirements of Rule 23(b), in this case Rule 23(b)(3). Under Rule 23(b)(3), class certification is authorized if (i) "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting

only individual members," and (ii) "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). With respect to both requirements, the Court need not inquire whether the "case, if tried, would present intractable management problems, for the proposal is that there be no trial." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (citation omitted).

a. Common Questions of Law and Fact Predominate.

The Rule 23(b)(3) predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 614-15. The mere existence or possibility of some individual issues does not defeat class certification. *In re Mercedes Benz Antitrust Litig.*, 213 F.R.D. 180, 186 (D.N.J. 2003).

A plaintiff seeking certification of an antitrust class action must show that common or class-wide proof will predominate with respect to: "(1) a violation of the antitrust laws . . . , (2) individual injury resulting from that violation, and (3) measurable damages." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008). The Supreme Court has recognized that the Rule 23(b)(3) predominance test can be "readily met" in antitrust cases. *Amchem*, 521 U.S. at 624-25; *see also In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008) (predominance is readily met because "proof of the conspiracy is a common

question thought to predominate"); NEWBERG ON CLASS ACTIONS, § 18.26, 86-89 (4th ed. 2002) ("In antitrust suits, the issues of conspiracy, monopolization, and conspiracy have been viewed as central issues which satisfy the predominance requirement."); *In re Buspirone Patent Litig.,* 210 F.R.D. 43, 58 (S.D.N.Y. 2002) (finding predominance requirement satisfied where "[p]roof of the allegedly monopolistic and anti-competitive conduct at the core of the alleged liability is common to the claims of all the plaintiffs" (citing *Amchem*, 521 U.S. at 625)); *Mercedes Benz*, 213 F.R.D. at 186-87 (holding that common issues predominated on issue of alleged antitrust violation).

In addition, the predominance standard is met by a showing that the existence of individual injury resulting from the alleged antitrust violation is capable of proof at trial through evidence that is common to the class rather than individual to its members. *See Comcast Corp. v. Behrand*, 133 S. Ct. 1426, 1430 (2013). The plaintiffs' damages model must be tied to and consistent with the plaintiffs' particular theory of antitrust impact. *Id.* at 1433.

Here, representative plaintiffs and the members of the Settlement Classes allegedly paid supracompetitive prices for DIPF, prices higher than they would have been absent Defendants' alleged unlawful conduct. The representative plaintiffs and the members of the Settlement Classes have the same interest in establishing liability, and they all seek damages for the ensuing overcharge. They

all will rely on the same evidence of Defendants' antitrust violations and will rely on class-wide damages models offered by their expert economist to show the fact and amount of harm that they incurred. The predominance requirement is easily satisfied.

b. A Class Action Is the Superior Method to Adjudicate These Claims.

The Court must balance, in terms of fairness and efficiency, the advantages of class action treatment against alternative available methods of adjudication. *In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998). In evaluating the superiority of a class action, the Court should inquire as to the class members' interest in individually controlling the prosecution of separate actions, the extent and nature of any litigation concerning the controversy already commenced by members of the class, and the desirability or undesirability of concentrating the litigation of the claims in the particular forum. Fed. R. Civ. P. 23(b)(3).

Here, a class action is superior to other available methods of adjudication "because litigating all of these claims in one action is far more desirable than numerous separate actions litigating the same issues." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d at 259. By proceeding as a class action, resolution of common issues will lead to an efficient use of judicial resources and a result that is binding on all members. In addition, the members of the Settlement Classes, like

the representative plaintiffs, are geographically dispersed, which poses the risk of multiple scattered lawsuits with contradictory results. These issues led the Supreme Court to acknowledge that the unique qualities of antitrust litigation mean that a class action is often superior to individual lawsuits. *Amchem*, 521, U.S. at 617.

IV. REQUEST TO APPOINT GARDEN CITY GROUP, LLC AS CLAIMS ADMINISTRATOR AND CITIBANK AS ESCROW AGENT

Interim Co-Lead Counsel have selected Garden City Group, LLC and seek for approval of it as the claims administrator for the proposed Settlement. Garden City Group is also the Court-approved claims administrator for the Sigma and Star Settlements, and thus has proven experience handling similar settlements in this very case.

Garden City Group will handle all aspects of providing notice to the Settlement Classes and claims administration including mailing and publishing the notice, managing a call center and website to handle all questions regarding completion and submission of the claim forms, physically processing the claims and inputting the data on computers, reviewing claims, informing class members whether or not their claims are deficient or complete, and ultimately, distributing the Settlement Fund subject to Court approval.

Garden City Group is one of the country's largest and most experienced settlement administration firms, and has personnel well-versed in antitrust matters. Since its inception nearly 30 years ago, Garden City Group has administered over

1,700 settlements, processed over 52 million claims, disbursed over $35 billion in recoveries, issued more than 30 million checks and wires, disseminated approximately 300 million notices, sent hundreds of millions of emails, handled millions of calls, and designed and launched hundreds of settlement websites.

Interim Co-Lead Counsel have also selected and nominate for approval Citibank as escrow agent for the proposed settlement. Citibank had previously served as the Court-approved escrow agent for the Sigma and Star settlements.

V. NOTICE TO THE CLASSES

Plaintiffs respectfully move the Court to schedule a fairness hearing for a date at least 120 days after the date of entry of the Proposed Preliminary Approval Order submitted herewith to consider (i) the fairness, reasonableness, and adequacy of the McWane settlement; (ii) an award of attorneys' fees not to exceed $2,929,166.67 (one-third of the total amount of the McWane Settlement), and unreimbursed costs and expenses of up to $1,200,000.00; and (iii) 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.

In addition, plaintiffs respectfully move the Court to approve the dissemination of a Notice of Proposed Class Action Settlement and a Publication Notice, as well as a claim form, in the forms annexed as Exhibit 1-3 to the accompanying Proposed Order.

A. A Fairness Hearing Should Be Scheduled By the Court.

Plaintiffs respectfully request that the Court schedule a single fairness hearing in connection with the McWane settlement. At the hearing, the Court should consider whether the proposed settlement is fair, reasonable, and adequate and whether to approve the plaintiffs' request for attorneys' fees, the reimbursement of costs and expenses, and incentive awards for the proposed class representatives.

The Proposed Order provides that settlement class members requesting exclusion from the settlement class must mail a request in written form by first class mail, postmarked no later than 60 days, after the Notice of Proposed Class Action Settlement is mailed. Proposed Order ¶ 11. Papers in support of final approval are to be submitted 30 days prior to the fairness hearing. *Id.* ¶ 14. Class members who intend to object to the fairness, reasonableness, and adequacy of the settlement, or appear at the fairness hearing, must file and serve a signed statement 20 days or more prior to the fairness hearing. *Id.* ¶ 15.

Plaintiffs respectfully suggest that the scheduling of a fairness hearing for a date at least 120 days after the entry of the Proposed Order will provide parties and class members sufficient time to comply with each of these deadlines.

B. <u>Plaintiffs' Request Authorization to Disseminate A Class Notice.</u>

Rule 23 requires that notice be given in a reasonable manner to all settlement class members who would be bound by a proposed settlement prior to final approval of the settlement. *See* Fed. R. Civ. P. 23. Where, as here, notice of certification of the settlement class and notice of a proposed settlement are combined, the more detailed provisions contained in Rule 23(c)(2)(B) apply: "The Court must direct to the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. Proc. 23(c)(2)(B); *see also Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 324-25 (E.D. Pa. 1993) (citing 5 H. Newberg and A. Conte, *Newberg on Class Actions* §§ 8.04, 8.21 (3d ed. 1992)).

Plaintiffs are submitting here a form of notice that will include all of the information required by Federal Rule of Civil Procedure 23 and due process. The proposed notice will also provide: (i) a description of the nature of the action; (ii) the definition of the settlement class; (iii) a description of the settlement class's claims; (iv) a description of the settlement agreement, including the monetary consideration provided to the settlement classes; (v) a description of the release provided by the settlement class; (vi) the names of settlement class counsel; (vii) the fairness hearing date; (viii) information about the fairness hearing; (ix) a statement that a member of the settlement classes may enter an appearance through

an attorney if the member so desires; (x) notice of the request for fees, expenses, and incentive awards; (xi) information about the deadline for filing objections to the settlement agreements and the request for expenses; (xii) a statement of the deadline for filing requests for exclusion from the settlement classes; (xiii) the consequences of exclusion; (xiv) the consequences of remaining in the settlement classes; and (xiv) the manner in which to obtain further information about the proposed settlement agreements. And it will do so "clearly and concisely" in "plain, easily understood language," Fed. R. Civ. P. 23(c)(2)(B), using the format suggested by the Federal Judicial Center (www.fjc.gov).

This notice plan shall provide individual and publication notice to potential class members. Specifically, the plan will provide for individual notice, via first-class mail, to each potential member of the settlement classes whose address is reasonably ascertainable from the Defendants' transaction data and to any direct purchaser of ductile iron pipe fittings who requests a copy of the notice by writing to the settlement class administrator or by dialing a toll-free number. *See* 5 Moore's Federal Practice (3d ed. 2003) at §23.63[8][a] ("Notice of the class action is normally sent to the identified class member by first-class mail."); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-77 (1974) (due process is satisfied by mailed notice to all class members who reasonably can be identified).

In addition to individual notice, the program proposed includes publication of a summary notice ("Publication Notice") in the national edition of *The Wall Street Journal*. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317-18 (1950) (publication is an acceptable means of providing adequate notice for those whose names and addresses cannot be determined through reasonable efforts) (quoted in *West Virginia v. Chas. Pfizer & Co.,* 440 F.2d 1079, 1090 (2d Cir. 1971)). The notices also will be published on a website established for the purpose of this settlement, www.DIPFDirectSettlement.com. Notice materials may also be viewed and downloaded from that website.

This type of notice program is frequently used in class action cases. It complies with the requirements of Rule 23 that "the court . . . direct to class members the best notice that is practicable under the circumstances, including individual notice to all member who can be identified through reasonable effort." Rule 23(c)(2)(B). In sum, the notice plan meets the requirements of Rule 23, comports with due process, and will fairly apprise potential settlement class members of the existence of the settlement agreement and their options under it.

Thus, plaintiffs respectfully move the Court to authorize the dissemination of the notices attached to the Proposed Order.

VI. PRELIMINARY APPROVAL ORDER

Direct Purchaser Plaintiffs respectfully submit that the proposed Settlement Agreement with McWane falls within the range of possible approval and that certification of the Settlement Classes is appropriate. Direct Purchaser Plaintiffs therefore request that the Court:

1. Preliminarily approve the Settlement Agreement and find that its terms are sufficiently fair, reasonable, and adequate for notice to be issued to the Settlement Classes as defined in the Settlement Agreement;
2. Certify the Settlement Classes, for purposes of settlement only pursuant to Federal Rule of Civil Procedure 23(c), and authorize plaintiffs to represent the Settlement Class;
3. Approve Garden City Group, LLC as Administrator of the Settlement, and Citibank, N.A. as escrow agent;
4. Directing settlement class counsel to disseminate notices to the Settlement Classes;
5. Setting a deadline for class members to exclude themselves from the settlement;

6. Setting deadlines for class members to serve and file any objections to the settlement and plaintiffs' request for fees, expenses, and incentive awards;

7. Scheduling a Fairness Hearing to (i) determine the fairness, reasonableness, and adequacy of the McWane settlement; (ii) consider an award of attorneys' fees not to exceed $2,929,166.67 (one-third of the total amount of the McWane Settlement), and unreimbursed costs and expenses of up to $1,200,000.00; and (iii) consider 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; and

8. Granting such other and further relief as may be appropriate.

VII. CONCLUSION

For the foregoing reasons, the Court should grant Direct Purchaser Plaintiffs' Motion for Preliminary Approval and certify the Settlement Classes.

Dated: December 4, 2017

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