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

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

MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENTS WITH DEFENDANTS (i) SIGMA CORPORATION AND ITS OWNED SUBSIDIARY SIGMA PIPING PRODUCTS CORPORATION AND (ii) STAR PIPE PRODUCTS, LTD.

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Pursuant to Fed. R. Civ. P. 23(e), Direct Purchaser Plaintiffs ("DPPs" or "Plaintiffs") respectfully submit this memorandum of law in support of their motion for final approval of settlements between DPPs and (i) SIGMA Corporation and its owned subsidiary SIGMA Piping Products Corporation (together "SIGMA"); and (ii) Star Pipe Products, Ltd ("Star") (collectively, "the Settling Defendants").[1,2] The Settlement Agreements were preliminarily approved on June 9, 2015 and July 27, 2015, respectively (ECF Nos. 322 and 328), and provide for the resolution of the claims against SIGMA and Star in return for monetary compensation totaling $8,528,750, and cooperation in the DPPs' ongoing litigation against Defendant McWane, Inc. ("McWane").[3]

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[1] The SIGMA and Star settlement agreements were negotiated and executed separately and independently from one another with the assistance of a Court-appointed mediator. DPPs file one brief in support of final approval of both settlements for purposes of efficiency and because the same legal standards apply to both settlements.

[2] All capitalized terms not otherwise defined have the definitions set forth in the Settlement Agreement Between Direct Purchaser Plaintiffs and Defendant SIGMA, executed on May 21, 2015 ("SIGMA Agreement"), and Settlement Agreement Between Direct Purchaser Plaintiffs and Defendant Star ("Star Agreement"), executed on July 2, 2015.

[3] Two proposed Orders approving the Star and SIGMA Settlement Agreements have been contemporaneously filed by Interim Co-Lead Counsel on December 29, 2015. The Orders include as "Exhibit A" a list of entities that have requested exclusion from the Settlements. Because the postmark deadline to submit a Request for Exclusion is December 29, 2015, Interim Co-Lead Counsel anticipates that additional timely Requests may be received after this submission. Updated "Exhibit As" will be submitted to the Court as necessary.

I. INTRODUCTION

The proposed Settlements with SIGMA and Star fall well within the criteria for final approval by the Court. These Settlements are the product of hard-fought litigation as well as extensive settlement negotiations, which included formal mediation sessions presided over by the Honorable Joel B. Rosen, U.S.M.J. (Ret.), a highly respected and experienced mediator. Under the SIGMA Settlement, SIGMA has agreed to pay $4,895,000, which includes up to $250,000 to be used to pay notice and administration costs. Under the Star Settlement, Star has agreed to pay $3,633,750, which includes up to $150,000 to be used to pay notice and administration costs. In addition to the monetary payments, each Settlement Agreement requires the Settling Defendants to provide cooperation related to their respective transactional data and documents and to produce up to six (6) fact witnesses each for Plaintiffs to depose. *See* SIGMA Agreement ¶¶ 47-49; Star Agreement ¶¶ 46-48.[4] The Star Settlement also entitles DPPs to interview up to three fact witnesses. *See* Star Agreement ¶ 49.

The Court preliminarily approved the SIGMA Agreement on June 9, 2015 and the Star Agreement on July 9, 2015, and certified the Settlement Classes for

[4] The SIGMA and Star Settlement Agreements are attached as Exhibits 1 and 2 to the Declaration of Robert N. Kaplan in Support of Direct Purchaser Plaintiffs' Motion for Final Approval of Settlements ("Kaplan Decl."), dated December 28, 2015.

settlement purposes. The notice approved by the Court on October 1, 2015 [Dkt. No. 331] was mailed to the class on October 30, 2015.[5]

Each Settling Defendant has declared their compliance with the notice requirements of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715 by filing a notice of service with the Court. Dkt. Nos. 339, 340.

As of December 29, 2015, no Settlement Class Member has objected to the proposed Settlements or Settlement Classes. The deadline to object to the settlement is January 8, 2016.

In light of the uncertainty, complexity, and expenses inherent in litigation, these proposed Settlements are fair, reasonable, and adequate and should be finally approved.

II. BACKGROUND

A. The Litigation

This case is brought on behalf of putative classes of direct purchasers of ductile iron pipe fittings ("DIPF") from defendants McWane, SIGMA, and Star. The Second Consolidated Amended Complaint ("SCAC") challenges two unlawful conspiracies:

[5] A typographical error was detected and corrected prior to mailing. Specifically, Section 12 of the mailed version refers to a release through the effective date of each settlement, rather than through the execution date. *See* Castaneda Decl., Exh. A, p. 7. The correction tracks the actual language in the settlement agreements, as originally intended, and is in compliance with the Court's Order requiring that the notice be mailed "substantially in the form" of the version presented to the Court. Dkt. No. 331 at ¶ 1.

(a) a price-fixing conspiracy between McWane, SIGMA and Star (which collectively sell more than 90% of DIPF in the United States) from at least January 11, 2008 through June 30, 2011; and (b) a conspiracy between McWane and SIGMA to monopolize and fix prices in the domestic DIPF Market from September 17, 2009 through at least December 31, 2013. Plaintiffs also challenge actions by McWane to monopolize the domestic DIPF Market from at least February 2009 through at least December 31, 2013. Both SIGMA and Star deny all allegations of wrongdoing in this action.

B. The Settlement Negotiations

The Settlement Agreements with SIGMA and Star arise from extensive arm's-length and good faith negotiations. Kaplan Decl. ¶ 3. The scope and details of the negotiations are described in the accompanying Kaplan Declaration. Interim Co-Lead Counsel, SIGMA's Counsel, and Star's Counsel, all highly experienced and capable, vigorously advocated their respective clients' positions in settlement negotiations. Prior to the first mediation session, the parties prepared confidential mediation statements and supporting evidence. Kaplan Decl. ¶ 8.

1. The SIGMA Settlement Negotiations

Settlement discussions with SIGMA began in earnest in September 2014, when SIGMA provided extensive information about its financial condition, which was thoroughly vetted by Interim Co-Lead Counsel and their financial consultant. Kaplan Decl. ¶ 9. Preliminary discussions occurred through numerous phone calls

and emails throughout the month, and an in-person meeting on September 15, 2014. Kaplan Decl. ¶ 9.

SIGMA provided additional financial information, and on October 20, 2014, a second meeting between counsel was held and was attended by Direct Purchaser Plaintiffs' financial consultant, who was given the opportunity to directly question a SIGMA executive knowledgeable about SIGMA's finances. *Id.* ¶ 10. Discussions at the meeting focused on the impact of SIGMA's finances on any potential settlement. *Id.* ¶ 10. A third meeting was held on December 12, 2014, which was attended by SIGMA's Chief Financial Officer. *Id.* ¶ 10. Discussions between counsel continued over the following months. *Id.* ¶ 10.

On January 27 and 28, 2015, the parties participated in a Court-ordered mediation before Judge Rosen. *Id.* ¶ 11. Based in part upon the financial information provided by SIGMA, at the end of the second day of mediation, the parties reached an agreement in principle. *Id.* ¶ 11. Following additional negotiations regarding the terms of the settlement, Interim Co-Lead Counsel and SIGMA signed the Settlement Agreement with an execution date of May 21, 2015. *Id.* ¶ 12.

Both sides vigorously negotiated their respective positions on all material terms of the Settlement Agreement, and the negotiations were non-collusive. *Id.* ¶ 13. Interim Co-Lead Counsel were well-informed of the facts concerning liability and

damages issues, the relative strengths and weaknesses of each side's litigation position, and SIGMA's financial position. *Id*. ¶¶ 4-6, 9-10.

2. The Star Settlement Negotiations

Interim Co-Lead Counsel and Star's counsel engaged in extensive arm's length negotiations over many months to reach the proposed settlement. Preliminary settlement discussions were held in August 2014, but the parties were too far apart in their positions for progress to be made at that time. Kaplan Decl. ¶ 14.

Star was a party to the January 27 and 28, 2015 mediation before Judge Rosen. However, while the parties made some progress, an agreement was not concluded until a second mediation session was held on May 22, 2015. Kaplan Decl. ¶¶ 15-17.

As with the SIGMA agreement, both sides to the Star Settlement vigorously negotiated their respective positions on all material terms, and the negotiations were non-collusive. *Id*. ¶ 18. Interim Co-Lead counsel were informed of the facts concerning liability and damages issues, the relative strengths and weaknesses of each side's litigation position, and Star's financial position. *Id*. ¶ 19.

III. PROVISIONS OF THE SETTLEMENT AGREEMENTS

A. The Settlement Classes

The SIGMA Settlement Agreement defines the Settlement Classes as follows:

(a) [A]ll persons or entities in the United States that Purchased DIPF directly from any Defendant at any time from January 11, 2008, through June 30, 2011; and

(b) [A]ll persons or entities in the United States that purchased Domestic DIPF directly from McWane or SIGMA at any time from September 17, 2009, through December 31, 2013.

SIGMA Settlement Agreement, ¶ 18.

The Star Settlement Agreement defines the Settlement Class as follows:

> [A]ll persons or entities in the United States that purchased DIPF directly from any Defendant at any time from January 11, 2008, through June 30, 2011.

Star Settlement Agreement, ¶ 17.

Excluded from the SIGMA and Star Settlement Classes are Defendants and their parents, subsidiaries and affiliates, whether or not named as a Defendant in this Action, federal governmental entities, and instrumentalities of the federal government. SIGMA Settlement Agreement, ¶ 18; Star Settlement Agreement, ¶ 17.[6]

B. The Terms of the Settlement Agreements

The Settlement Agreements include the following relevant provisions:

***Settlement Amounts*:** SIGMA has agreed to pay a settlement amount of $4,895,000, which includes up to $250,000 to be used to pay notice and

[6] As defined in the Settlement Agreement, the term "Defendants" collectively means (a) McWane, Inc. and its divisions Clow Water Systems, Tyler Pipe Company and Tyler Union, and (b) SIGMA, and (c) Star Pipe Products, Ltd.

administration costs, and Star has agreed to pay a settlement amount of $3,633,750, including up to $150,000 to be used to pay notice and administration costs. *See* SIGMA Agreement ¶¶ 17, 33-34; Star Agreement ¶¶ 16, 32-33. Both Settlement Agreements call for the settlement amount to be paid in three installments, with the final payment due on May 31, 2017. SIGMA Agreement ¶ 34; Star Agreement ¶ 33.

***Cooperation*:** SIGMA and Star have agreed to provide certain forms of cooperation to the Direct Purchaser Plaintiffs to aid them in the prosecution of the claims against McWane. This cooperation includes Star and SIGMA's agreement to produce up to six fact witnesses each for deposition. SIGMA Agreement ¶ 49; Star Agreement ¶ 48. Each Settling Defendant has agreed to make available for interview and deposition one or more employees as necessary to answer questions or testify concerning their transaction, rebate and cost data and records. SIGMA Agreement ¶ 47; Star Agreement ¶ 46. Each settling defendant has also agreed to produce, through affidavits or declarations, or, if necessary, through deposition, representatives who are qualified to establish admissibility into evidence of any information or documents they have provided in this action, and, to the extent possible, any documents produced by any other party or non-party to the action. *Id*. SIGMA Agreement ¶ 48; Star Agreement ¶ 47.

Star has also agreed to produce up to three fact witnesses for interviews at mutually convenient times and at a location or locations of Star's choice within the United States and at Star's expense. Star Agreement ¶ 49.

Releases: In exchange for the consideration described above, Direct Purchaser Plaintiffs have agreed to release SIGMA and Star from any and all claims "arising out of or relating to any conduct, act, or omission of any of the Releasees from the beginning of the World until the Effective Date, concerning any of the conduct alleged or that could have been alleged in the Action against [Settling Defendants]," except indirect purchaser claims, claims based on purchases by the State of Indiana, or "claims arising in the ordinary course of business for any product defect, product performance, or breach of warranty or for breach of contract based on product defect, product performance, or warranty, relating to DIPF."[7]

***Rescission based on Opt-Outs*:** The Settlement Agreements permit SIGMA and Star to rescind their respective agreement based upon the level of opt-outs. Specifically, if the dollar amount of purchases by Class Members who elect to opt-out of the Settlement Class exceeds a threshold amount set forth in separate side letter agreements between the parties, the Settling Defendants have the option to rescind their respective agreements. SIGMA Settlement Agreement ¶ 44; Star

[7] The full language of the release provisions is found at ¶¶ 29-32 of the SIGMA Settlement Agreement and ¶¶ 27-30 of the Star Settlement Agreement.

Settlement Agreement ¶ 43.[8]

IV. PRELIMINARY APPROVAL ORDERS AND CERTIFICATION OF SETTLEMENT CLASSES

On June 9, 2015, this Court preliminarily approved the SIGMA Settlement and certified the classes for settlement purposes. *See* Dkt. No. 322. The Court determined that the SIGMA Settlement Classes satisfied the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy. *Id*. at ¶ 4. The Court also found that this Settlement Classes satisfied the Rule 23(b)(3) requirements of predominance and superiority. *Id*.

Likewise, on July 27, 2015, this Court preliminarily approved the Star Settlement and certified the class for settlement purposes. *See* Dkt. No. 328. The Court determined that the Settlement Class satisfied the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy. *Id*. at ¶ 4. The Court also found that this Settlement Class satisfied the Rule 23(b)(3) requirements of predominance and superiority. *Id*.

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[8] The Opt-Out Percentages relevant to each agreement is reflected in confidential letters between the parties, which will 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 Class. Rather, what is relevant is the amount being paid, the cooperation terms, the release terms, and the fact that the sales by SIGMA and Star remain in the case.

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

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

The Settlement Class Members are entitled to notice of the proposed Settlement and an opportunity to be heard. See Fed. R. Civ. P. 23(e); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Notice of the Settlements and proposed Settlement Classes was made jointly, per the Court's October 1, 2015 Order. *See* Dkt. No. 331. The Notice was designed to provide members of the proposed Settlement Classes with (among other things) a clear and detailed description of the terms of the Settlements; the date of this Court's hearing on final approval of the Settlements; the deadlines for opting out of the proposed Settlement Classes or notifying the Court of an objection to the Settlements; phone and internet contact information for the Settlements administrator, to permit members of the proposed Settlement Classes to obtain answers to questions or other information; and notice that, in the event the Court finally approves the Settlements, Settlement Class Counsel will seek from the Court reimbursement of costs and expenses the amount not to exceed one-third of each Settlement. The Notice was accompanied by a Claim Form, the format of which was approved by the Court (Dkt. No. 331 at ¶ 1).

A typographical error in the Court-approved notice was detected and corrected prior to mailing. Specifically, Section 12 of the mailed version refers to a release through the effective date of each settlement, rather than through the execution date. *See* Castaneda Decl., Exh. A, p. 7.[9] The correction tracks the actual language in the settlement agreements, as originally intended, and is in compliance with the Court's Order requiring that the notice be mailed "substantially in the form" of the version presented to the Court. Dkt. No. 331 at ¶ 1.

A. The Notice

On October 30, 2015, Garden City Group, LLC ("GCG"), the Settlements Claims Administrator retained by Class Counsel, mailed the Notice and Claim Forms (the "Notice Packet") to approximately 5,539 addresses associated with Settlement Class Members identified using the sales data produced by the Defendants. *See* Castaneda Decl., ¶ 7. As of December 29, 2015, GCG received seven Notice Packets returned by the U.S. Postal Service with forwarding address information that were promptly re-mailed to the updated address provided. *Id*. ¶ 8. In addition, 1,619 Notice Packets were returned by the U.S. Postal Service without forwarding address information. *Id*. In total approximately 3,920 Class Members were sent Notice Packets that were not subsequently returned to GCG. *Id*. ¶ 9. As

[9] The "Castaneda Declaration" or "Castaneda Decl." refers to the Declaration of Lori Castaneda Regarding Notice and Settlement Administration, dated November 29, 2015.

of December 29, 2015, Plaintiffs are not aware of any objections to the SIGMA and Star Settlements, although objections are not due until January 8, 2016. *Id*. ¶ 18. GCG has received only 38 requests for exclusion from the SIGMA and Star Settlements, 31 of which are different locations of a single entity, EJ Prescott. *Id*. ¶ 17.[10] As of December 29, 2015, GCG has received 246 Claim Forms. *Id*. ¶ 13.[11]

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

As per the approved Notice Plan, Plaintiffs also supplemented direct mail distribution with publication of a Summary Notice in the *Wall Street Journal*, and maintain a website and toll-free telephone number. *Id*. ¶ 10. DPPs also maintain a website,[12] administered by GCG, dedicated to the SIGMA and Star Settlements. *Id*. ¶ 11. The website has been operational since October 30, 2015, and is accessible twenty-four hours a day, seven days a week. *Id.* The website provides information, including important deadlines and answers to frequently asked questions. *Id*. Website visitors can also download a Notice Packet, the Court's Preliminary

[10] EJ Prescott also requested exclusion for a related company, Quality Water Products. Thus, EJ Prescott entities account for 32 of the 36 requests for exclusion. Three locations of Minnesota Pipe & Equipment account for three of the remaining six requests for exclusion. *See* Castaneda Decl., Exhibit A. An erroneous request for exclusion was also received from an *indirect* purchaser. That request is not included in Exhibit A to the Castaneda Declaration.

[11] Plaintiffs anticipate receipt of additional Claim Forms since claims submission deadline is January 29, 2016.

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

Approval Orders, the Settlement Agreements, and other relevant documents. *Id.* As of December 29, 2015, the website received 1,441 visits. *Id.*

In addition to the website, GCG maintains an automated toll-free telephone number, with an Interactive Voice Response ("IVR") system, that potential Settlement Class Members can call for information about the Settlements.[13] *Id.* ¶ 12. The number is operational twenty-four hours a day, seven days a week. *Id.* Callers have the ability to listen to important information about the Settlements and to request a copy of the Notice Packet, the Settlement Agreements, and the Preliminary Approval Orders. *Id.* If callers have additional questions, they also have the ability to speak to a representative Monday through Friday. *Id.* GCG has and will continue to maintain and update the IVR throughout the administration of the Settlements. *Id.*

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

DPPs' Notice Plan was constructed to reach potential class members through a combination of direct mail, publication, a website, and a toll-free telephone number, and was "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 119 (D.N.J. 2002) (internal quotations and citations omitted). *See also Zimmer Paper*

[13] 1-888-298-6316

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

D. The CAFA Notice Requirement Has Been Satisfied By Both of The Settling Defendants

The Class Action Fairness Act ("CAFA") mandates that "[a]n order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b)." 28 U.S.C. § 1715(d). The responsibility for providing CAFA Notice belongs to settling defendants. 28 U.S.C. § 1715(b). Both of the Settling Defendants have satisfied the CAFA notice requirement. SIGMA filed a declaration of CAFA compliance on December 14, 2015. Dkt No. 339. Star filed a declaration of CAFA compliance on December 22, 2015. Dkt. No. 340. The Declarations state that SIGMA and Star satisfied CAFA's notice requirement by serving notice to the appropriate state and federal officials on July 24, 2015 and July 15, 2015, respectively.

VI. THE PROPOSED SETTLEMENTS SHOULD BE GIVEN FINAL APPROVAL BECAUSE THEY ARE FAIR, REASONABLE, AND ADEQUATE

Courts in the Third Circuit favor the settlement of class actions. Settlements minimize the litigation expenses of the parties and reduce the strain that litigation imposes upon already scarce judicial resources. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."); *see also Austin v. Pa. Dep't Corr.*, 876 F. Supp. 1437, 1455 (E.D. Pa. 1995) ("[T]he extraordinary amount of judicial and private resources consumed by massive class action litigation elevates the general policy of encouraging settlements to an overriding public interest.") (internal quotation marks omitted).

In its Preliminary Approval Orders, this Court determined that the Settlement Classes satisfy the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy, as well as the Rule 23(b) requirements of predominance and superiority. Dkt Nos. 322 at ¶ 4 and 328 at ¶ 4. There is no need for the Court to revisit these requirements. The task now before the Court is to determine whether the SIGMA and Star Settlements are fair, reasonable and adequate. Fed. R. Civ. P. 23(e)(1)(c). *See also In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent*

Actions, 148 F.3d 283, 316 (3d Cir. 1998); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118 (3d Cir. 1990).

A. The SIGMA and Star Settlements Are Entitled to an Initial Presumption of Fairness

In the Third Circuit, "a settlement is entitled to an initial presumption of fairness where it resulted from arm's length negotiations between experienced counsel, there was sufficient discovery, and there were no objectors and only a small percentage of opt-outs." *Rouse v. Comcast Corp.*, C.A. 14-1115, 2015 WL 1725721, at *6 (E.D. Pa. Apr. 15, 2015). *Accord In re Gen. Motors*, 55 F.3d at 785; *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) ("A presumption of correctness is said to attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery.")

The SIGMA and Star Settlements are each entitled to a presumption of fairness. Both settlements resulted from months of arms-length negotiations between experienced counsel, and included sessions with a highly experienced, Court-appointed mediator. Kaplan Decl. ¶¶ 3-19. By the time settlement negotiations began, Interim Co-Lead Counsel had the benefit of an extensively developed record from the underlying Federal Trade Commission proceeding to assist in their evaluation of the strengths and weaknesses of the case against SIGMA and Star. Interim Co-Lead Counsel had access to well over 567,000 documents produced by the defendants, including those documents produced during the related 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 reviewed the voluminous record of the related FTC proceedings, which included the transcripts and exhibits of a full trial against Defendant McWane, a 464-page Initial Decision by Administrative Law Judge Chappell, and the Opinion of the FTC Commissioners. Finally, Co-Lead Counsel were provided with additional information concerning SIGMA's and Star's financial condition.

Interim Co-Lead Counsel Robert N. Kaplan of Kaplan Fox & Kilsheimer LLP and Kit A. Pierson of Cohen Milstein Sellers & Toll PLLC have decades of experience in litigating antitrust class actions. Their judgment that these settlements are in the best interest of the class should be given significant weight. *See, e.g.*, *In re Fasteners Antitrust Litig.*, Civ. A. No. 08–md–1912, 2014 WL 285076, at *4 (E.D. Pa. Jan. 24, 2014) ("in light of the overriding public interest in settling class actions, weight should be given to the recommendations of experienced attorneys who have engaged in arms-length settlement negotiations.") (internal quotations omitted); *In re Am. Family Enters.*, 256 B.R. 377, 421 (D.N.J. 2000) ("In determining the fairness, adequacy and reasonableness of a proposed settlement, significant weight should also be given to the belief of experienced counsel that settlement is in the best interest of the class, so long as the Court is satisfied that the settlement is the product of good faith, arms-length negotiations.") (internal quotations omitted); *Lake v.*

First Nationwide Bank, 900 F. Supp. 726, 732 (E.D. Pa. 1995) ("[s]ignificant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class") (internal quotations omitted).

As of this filing, Interim Co-Lead Counsel are aware of no objectors and 38 requests for exclusion by direct purchasers.[14]

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

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

District courts have broad discretion in determining whether to approve a settlement. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004). However, the Third Circuit's decision in *Girsh v. Jepson*, 521 F.2d 153, 156-57 (3d Cir. 1975), sets forth nine factors to be considered when evaluating the fairness of a proposed settlement. Those factors are: (1) the complexity, expense, and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of

[14] An erroneous request for exclusion was also received from an *indirect* purchaser. That request is not included in the total.

the settlement in light of all the attendant risks of litigation. 521 F.2d at 157.

These factors favor a finding that the SIGMA and Star Settlements are fair, reasonable and adequate.

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

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

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

The case against SIGMA and Star would have likely been expensive, lengthy and uncertain. Both SIGMA and Star entered consent decrees with the Federal Trade Commission, which settled the FTC's charges that each had participated in a

conspiracy to fix prices of DIPF and that SIGMA had colluded with McWane to exclude Star from the Domestic-DIPF market. However, the FTC's Complaint Counsel proceeded to trial against McWane on these same charges and did not prevail. Neither SIGMA nor Star were implicated by the FTC's successful monopolization claim against McWane. Interim Class Counsel believes that the FTC claims against SIGMA and Star were incorrectly decided on the law, and that many of the underlying facts found by the Administrative Law Judge support liability. Nonetheless, obtaining a more favorable outcome for Class members will be risky and resource-intensive. *See In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475–76 (S.D.N.Y. 1998) ("Antitrust litigation in general, and class action litigation in particular, is unpredictable . . . . [T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal.").

Proceeding through summary judgment and a trial on the merits against SIGMA and Star would entail considerable expense, including the cost of experts, numerous depositions across the country, and thousands of additional hours of attorney time. Even after trial is concluded, there would likely be one or more lengthy appeals. By reaching a favorable Settlement early in the litigation, Plaintiffs have avoided significant expense and delay, and have ensured a meaningful recovery to Class members and cooperation in Plaintiffs' ongoing litigation against McWane. *See*

Warfarin Sodium, 391 F.3d at 536 ("continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial"); *Packaged Ice*, 2011 WL 717519 at *10 ("Experience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict, particularly in complex antitrust litigation."); *Linerboard*, 292 F. Supp. 2d at 642 (noting that the "protracted nature of class action antitrust litigation means that any recovery would be delayed for several years," and this settlement's "substantial and immediate benefits" to class members favors settlement approval).

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

2. The reaction of the class to the settlement.

The second *Girsh* factor "attempts to gauge whether members of the class support the settlement." *Prudential*, 148 F.3d at 318. Notice to the Settlement Class was sent by mail on October 30, 2015, and publication notice was made on November 2, 2015. Approximately 3,945 potential Class members received notice of the settlements. To date, Interim Co-Lead Counsel and its court-appointed claims administrator have not received any objections, and only 38 exclusion requests from direct purchasers. The deadline for objections is January 8, 2015, while requests for exclusion must be postmarked by December 29, 2015.

The reaction of the class favors approval of the Settlements. *See, e.g.*, *Stoetzner*

v. U.S. Steel Corp., 897 F.2d 115, 118–19 (3d Cir. 1990) (29 objectors out of 281 class members "strongly favors settlement"); *Varacallo v. Mass. Mutual Life Ins. Co.*, 226 F.R.D. 207, 237–38 (D.N.J. 2005) (finding low level of exclusion and objection requests indicative of class approval of the settlement); *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 459 (D.N.J. 2008) (finding presumption of fairness in case in which 601 potential class members filed requests for exclusion and nine filed objections); *In re Remeron End-Payor Antitrust Litig.*, No. 02-2007, 2005 WL 2230314, at *16 (D.N.J. Sept. 13, 2005) (finding that 70 requests for exclusion and eight objections qualified for a presumption of fairness).

3. The stage of the proceedings.

The third *Girsh* factor is intended to ensure "that a proposed settlement is the product of informed negotiations" and that "the parties . . . have an adequate appreciation of the merits of the case before negotiating." *Prudential*, 148 F.3d at 319 (internal quotation omitted). This factor "captures the degree of case development that interim counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *General* Motors, 55 F.3d at 813.

On October 15, 2014, this Court stayed discovery and appointed Judge Rosen to help the parties mediate a potential settlement. ECF 311. By that time, this action had been pending well over two-and-one half years. During that time, Interim Co-

Lead Counsel received and reviewed the record from the related FTC proceeding to assist in their evaluation of the strengths and weaknesses of the case, including the transcripts and exhibits of a full trial against defendant McWane, and a 464-page Initial Decision by Administrative Law Judge Chappell. Interim Co-Lead Counsel also had access to well over 567,000 documents produced by the defendants, as well as hearing, deposition and trial testimony of all of the witnesses in the FTC proceeding. Counsel also reviewed and analyzed additional pages of documents from the post-FTC proceeding period (2012-2013) that McWane and the Settling Defendants produced in this litigation. Plaintiffs had successfully briefed and argued two rounds of motions to dismiss, and were immersed in their preparations to depose key witnesses from each defendant at the time settlement negotiations were opened. Plaintiffs' counsel were well-informed of the relevant facts, and the strengths and weaknesses of each of their claims before these settlements were entered.

This *Girsh* factor thus weighs heavily in favor of final approval. *See, e.g.*, *Wallace v. Powell*, 288 F.R.D. 347, 368-69 (M.D. Pa. 2012) (settlement favored where preliminary approval granted almost three years after commencement of litigation and settlement reached after production and review of over 200,000 pages of documents); *Martina v. L.A. Fitness Int'l, LLC*, No. 2:12-cv-2063 (WHW), 2013 WL 5567157, at *6 (D.N.J. Oct. 8, 2013) (exchange of initial disclosures and mediation before a retired judge sufficient to provide counsel an adequate

appreciation of the merits of their claims).

4. The risks of establishing liability.

The fourth *Girsh* factor "examine[s] what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *General Motors*, 55 F.3d at 814. "The inquiry requires a balancing of the likelihood of success if the case were taken to trial against the benefits of immediate settlement." *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 89 (D.N.J. 2001) (internal quotation marks omitted).

While Interim Class Counsel believes the claims against Star and SIGMA are meritorious and supported by sufficient evidence to support an eventual victory at trial, there are substantial risks to the Settlement Class in pursuing these claims. Complaint Counsel in the FTC proceeding was unsuccessful in persuading the Administrative Law Judge of the merits of the price-fixing claims that were at issue in that case, and while the ALJ did find McWane guilty of conspiring with SIGMA to monopolize the domestic DIPF market, the FTC Commissioners disagreed and reversed that finding. The monopolization claims against McWane was upheld by the Eleventh Circuit, but that claim lies against McWane alone. Thus, Interim Co-Lead Counsel respectfully submit that certain recovery through settlement with SIGMA and Star is the preferred result.

5. The risk of establishing damages.

The fifth *Girsh* factor "attempts to measure the expected value of litigating the

action rather than settling it at the current time." *In re Cendant Corp. Litig.*, 264 F.3d 201, 238 (3d Cir. 2001). Interim Co-Lead Counsel are confident that damages here are provable, but this will require a sophisticated and complex economic analysis that will most certainly be challenged by defendants. *See In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 146 (D.N.J. 2013) (settlement favored where establishing damages depends on the outcome of a complex "battle of the experts"). On the other hand, because liability under the Sherman Act is joint and several, these Settlements in no way prejudice the ability of the Settlement Classes to ultimately recover full treble damages caused by the alleged price-fixing conspiracy or by the conspiracy to monopolize. Thus, this factor strongly favors approval of the Settlements.

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

The sixth *Girsh* factor evaluates the risks of maintaining a class action through trial. "Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *Warfarin Sodium*, 391 F.3d at 537 (internal quotation marks and citation omitted). Plaintiffs are not scheduled to move for class certification until May 27, 2016, but it is a near certainty that their motion will be vigorously challenged by any remaining defendants. The possibility that the class may not be

certified favors approval of the proposed settlements.

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

The Third Circuit has interpreted the seventh *Girsh* factor as concerning "whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240. Prior to entering each settlement, Interim Co-Lead Counsel was provided with information about each Settling Defendant's finances, and believe that the settlement amounts and payment terms are reasonable. *See* Kaplan Decl. ¶¶ 9-10, 19.

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

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

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

The eighth and ninth *Girsh* factors "test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Warfarin Sodium*, 391 F.3d at 538. However,

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

In re Cendant Corp. Sec. Litig., 109 F. Supp. 2d 235, 263 (D.N.J. 2000) (internal quotation marks and citation omitted). In addition, the Court must "avoid deciding or trying to decide the likely outcome of a trial on the merits." *In re Nat'l Student Mktg. Litig.*, 68 F.R.D. 151, 155 (D.D.C. 1974).

"While the court is obligated to ensure that the proposed settlement is in the best interest of the class members by reference to the best possible outcome, it must also recognize that settlement typically represents a compromise and not hold counsel to an impossible standard." *In re Aetna, Inc. Sec. Litig.*, MDL No. 1219, 2001 WL 20928, at *6 (E.D. Pa. Jan. 4, 2001); *see also Gen. Motors*, 55 F.3d at 806 (noting that "after all settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.") (citation omitted).

The significant monetary and non-monetary recovery, as well as the substantial risks of continued litigation, weighs in favor of a finding that these settlements are fair reasonable and adequate.

VII. THE PLAN OF ALLOCATION AND CLAIMS PROCESS ARE FAIR AND REASONABLE

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

The plan of allocation as set forth in the long-form class notice describes in detail how the settlement funds will be allocated. Under the plan, part of the SIGMA and Star Settlement Funds will be used to pay expenses approved by the Court, in proportion to each settlement's contribution to the total amount that the two settlement funds represent. Additionally, the parties have agreed that Plaintiffs may deduct notice and administrative costs, up to $250,000 from the SIGMA Settlement and up to $150,000 from the Star Settlement, out of the settlement funds.

The Net SIGMA Settlement Fund will be distributed on a pro rata basis among all members of the SIGMA Classes who submit valid and timely claim forms for purchases of DIPF from January 11, 2008 through June 30, 2011 from SIGMA, McWane, or Star and for purchases of Domestic DIPF from July 1, 2011 through December 31, 2013 from SIGMA or McWane. In other words, each Settlement class member shall be paid a percentage of the Net SIGMA Settlement Fund that each class member's recognized claim bears to the total of all recognized claims submitted by all SIGMA Settlement class members who file claims.

Similarly, the Net Star Settlement Fund will be distributed on a pro rata basis among all members of the Star Class who submit valid and timely claim forms for purchases of DIPF from January 11, 2008 through June 30, 2011 from SIGMA, McWane, or Star. Each Star Settlement class member shall be paid a percentage of the Net Star Settlement Fund that each class member's recognized claim bears to the total of all recognized claims submitted by all Star Settlement class members who file claims.

This basic approach commonly is used in antitrust settlements and repeatedly has been approved as fair and reasonable. *See, e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG)(VVP), 2012 WL 3138596, at *3 (E.D.N.Y. Aug. 2, 2012) (approving an allocation plan that "distributed to class members that submit valid claim forms in proportion to their relevant purchases from defendants

of 'Airfreight Shipping Services'"); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 531 (E.D. Mich. 2003) (approving an allocation plan based on "each Class members' pro rata share of the Net Settlement Fund"). Accordingly, the Court should approve the allocation plan as fair, reasonable and adequate.

VIII. CONCLUSION

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

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Respectfully submitted,

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