

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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In re TERAZONSIN HYDROCHLORIDE
ANTITRUST LITIGATION

CLARENCE MADDUX
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This Document Relates to:
Louisiana Wholesale Drug Co., Inc.
v. Abbot Laboratories, et al.
Case No. (S.D. Fla.) 98-3125
Valley Drug Company v. Abbott
Laboratories, et al.
Case No. (S.D. Fla.) 99-7143

Rec'd in MIA Dkt

**SHERMAN ACT CLASS PLAINTIFFS' MOTION FOR FINAL APPROVAL OF
SETTLEMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

I. INTRODUCTION

Sherman Act Class Plaintiffs Louisiana Wholesale Drug Co., Inc. and Valley Drug Company (collectively "Plaintiffs"), as representatives of the Sherman Act Class (the "Class"), respectfully submit this memorandum in support of their request for final court approval, pursuant to FED. R. CIV. P. 23(e), of the proposed settlement ("Settlement") with Defendants Abbott Laboratories ("Abbott") and Geneva Pharmaceuticals, Inc., now known as Sandoz, Inc. ("Geneva") of this antitrust class action, as embodied in the Settlement Agreement dated February 24, 2005. As detailed below, the Settlement provides for a cash payment of \$72.5 million plus interest, and combined with the proceeds of the settlement previously achieved with defendant Zenith Goldline Pharmaceuticals, Inc., now known as Ivax Pharmaceuticals, Inc. ("Zenith"), amounts to almost \$75 million.¹ This an excellent recovery for the Class and should be approved as fair, adequate and reasonable.

¹In addition to the Abbott/Geneva Settlement, the Sherman Act Class earlier settled with Zenith for \$2,072,327 plus interest. The Zenith Settlement was finally approved by the Court on June 13, 2002, and interest has been accruing on (Cont'd)

12/18/05

This Settlement is the culmination of nearly six and one-half years of vigorously contested litigation. A final agreement to settle this litigation was reached only after Class Counsel,² under the direction of Co-Lead Counsel (Garwin Gerstein & Fisher LLP and Boies, Schiller & Flexner LLP), had (1) obtained a ruling on summary judgment on remand from the Eleventh Circuit Court of Appeals, which had reversed an earlier such ruling, that the April 1998 agreement between Defendants Abbott and Geneva (“Abbott/Geneva Agreement”) – under which generic drug manufacturer Geneva agreed to delay market entry of its generic bioequivalent of Abbott’s brand name drug, Hytrin, in exchange for \$4.5 million per month – was a per se violation of the Sherman Act. In re Terazosin Hydrochloride Antitrust Litig., 352 F. Supp. 2d 1279 (S.D. Fla. 2005); (2) participated in numerous court arguments and hearings over the six plus years this case has been pending; (3) conducted exhaustive discovery over many years, including review of hundreds of thousands of discovery documents, and taking and defending over 50 depositions; (4) engaged in extensive motion practice, including briefing and argument on motions for summary judgment and class certification before this Court and the Eleventh Circuit Court of Appeals; (5) worked closely with expert witnesses in assessing damages to the Class, as well as rebutting Defendants’ highly technical and complicated economics, production, and regulatory defenses; (6) devoted enormous resources to working with Class members to produce so-called “downstream discovery”; (7)

(Cont’d)

the Zenith Settlement Funds for nearly three years. Thus, the total recovery in this case is \$74,572,327.00 plus interest. As described in the court-approved Notice Of Proposed Class Action Settlement And Hearing Regarding Settlement, the proceeds of the Zenith Settlement are being applied to the reimbursement of out-of-pocket expenses only. Class Counsel are seeking no attorneys’ fees from the Zenith Settlement proceeds.

²In its Order Preliminarily Approving the Settlement and Certifying the Sherman Act Class in light of settlement, the Court reappointed, pursuant to FED. R. CIV. P. 23(g), as Class Counsel the following firms: Co-Lead Counsel (Garwin Gerstein & Fisher LLP and Boies, Schiller & Flexner LLP), as well as: The Calvin Law Firm, P.C.; Odom & Des Roches; Percy, Foote & Gadel; Berger & Montague, P.C.; Berger Singerman.

prepared the case for imminent trial; and (8) engaged in protracted, difficult, arms'-length negotiations to achieve a final Settlement Agreement, including numerous mediation sessions with Professor Eric Green over several years.

The Court, after conducting a hearing on February 24, 2005, preliminarily approved the proposed Settlement on February 25, 2005. On March 1, 2005, copies of the Notice Of Proposed Class Action Settlement and Hearing Regarding Settlement (the "Notice") were timely disseminated by first-class mail to all Class members.³ The Notice informed Class members, among other things, that they could object to any or all terms of the Settlement or opt-out of the Class entirely. The deadline for submitting objections is April 8, 2005, and the deadline for receipt of requests to opt out was March 31, 2005. To date, no Class member has objected or opted out.

As demonstrated in this memorandum, the \$72.5 million Settlement easily satisfies the criteria established by courts in this Circuit for evaluating the fairness, adequacy and reasonableness of class action settlements. Indeed, in the February 24, 2005 Preliminary Approval Hearing, Transcript at 7-8, this Court recognized that based on the Memorandum of Law In Support of Preliminary Approval of Settlement, the procedural posture of the case, the experience of counsel, and the work of the mediator, Prof. Green, "the Court believes that this is a fair, adequate, and reasonable settlement."

Moreover, this recovery was achieved despite the fact that Defendants have potential defenses which, if successfully proven, would preclude Plaintiffs from recovering anything. Despite

³Pursuant to the Court's request at the Preliminary Approval Hearing, on March 22, 2005, Sherman Act Class Plaintiffs filed the Affidavit of Edward J. Sincavage of Heffler Radetich & Saitta, L.L.P. Regarding Dissemination of Notice to the Class. This Affidavit from the Claims Administrator detailed the process by which Class Notice was timely mailed. In addition, Sherman Act Class Counsel also separately transmitted copies of the Notice to outside counsel for the five largest Class members on March 1, 2005.

this Court's favorable ruling that the Abbott/Geneva Agreement constituted a per se violation of Section 1 of the Sherman Act – a ruling which, absent the Settlement, undoubtedly would have been appealed to the Eleventh Circuit – Plaintiffs and the Class would nonetheless have had to overcome significant legal and factual hurdles in establishing causation and damages at trial in order to realize any monetary damages under Section 4 of the Clayton Act. Specifically, if this case went to trial, Defendants contend that, with or without the Abbott/Geneva Agreement: (1) Geneva would not have come to market any earlier than it actually did (August 13, 1999) because Geneva possibly faced enormous potential liability in Abbott's patent infringement suit, which was still pending when, Plaintiffs claim, Geneva would have entered the market "but for" the Agreement (in or around October 1998); and (2) even if Geneva was willing to come to market in the face of potential patent liability, it could not have done so any earlier than it actually did because of, inter alia, various purported technical problems in validating its generic product and building sufficient quantities for a timely commercial launch.

If Defendants had convinced a jury that either of its causation defenses were valid, then Plaintiffs could have recovered nothing at trial. Moreover, as detailed below, even if Plaintiffs succeeded in proving fact of damage, the jury could award an amount of damages that is far less than Plaintiffs sought (if, for example, the jury finds that generic entry was delayed, but not for as long as Plaintiffs claim).

Additionally, had Defendants appealed any judgment after trial, there would have been delay and the possibility of an adverse ruling. Furthermore, without this Settlement, there is a chance that absent class members would receive an amount lower than that provided for in the Settlement, or nothing at all, because of various factors. For example, absent the Settlement, the hundreds of absent Class members that purchased Hytrin directly from Abbott on or after the date when Plaintiffs claim

that generic entry would have occurred absent the Agreement (October 1998) would have faced the same risks detailed above as Plaintiffs in establishing causation and damages. Absent this Settlement, however, many of these absent Class members likely would have recovered nothing because, inter alia, many of their respective individual claims would likely have been too small to justify the significant expenditure of time and resources necessary to bring individual suits.⁴

In sum, as detailed in the Co-Lead Counsel Affidavit, submitted as an exhibit to Plaintiff's Memorandum in Support of the Motion for Attorneys' Fees and Reimbursement of Expenses. Defendants' various defenses are complex and multi-faceted. Class Counsel are confident that they have developed persuasive evidence and legal arguments to refute these defenses – as shown by the magnitude of the Settlement achieved. Nevertheless, there is no assurance that Plaintiffs' (or absent Class members') claims would have succeeded at trial, or in any subsequent appeals. These risks highlight the fairness of the Settlement, which was achieved, again, only after years of litigation, on the brink of trial, and with the assistance and support of a nationally respected mediator, Prof. Green.

For the foregoing reasons, as expanded upon in this memorandum, Class Counsel respectfully request that this Court approve the Settlement as fair, adequate and reasonable and in the best interests of the Class.

⁴Similarly, the absent class members that purchased Hytrin directly during the period March 31, 1998 – September 30, 1998, but did not have any direct purchases of terazosin during the period October 1998 - June 2001, would have great difficulty proving causation and damages, because (in Class Counsel's view) in the absence of Defendants' alleged restraint of trade, it is unlikely that generic versions of terazosin would have been on the market prior to October 1, 1998. Moreover, the Eleventh Circuit's decision reversing this Court's initial per se ruling in light of the exclusionary effect of Abbott's '207 patent made it more difficult for these Class members to successfully establish that the Abbott/Geneva Agreement had an anti-competitive effect for a period of time prior to the date when Abbott's '207 patent was declared invalid (i.e., before September 1998). Nevertheless, the Settlement provides some recovery even for these Class members to compensate them for the value of releasing their claims in light of Defendants' desire to achieve "peace" and finality through the Settlement. Under the circumstances, the Settlement is clearly fair and reasonable to these Class members. Pursuant to the proposed Plan of Allocation, these Class members would receive \$0.138 per Hytrin capsule purchased during that period. Since these Class members bought less than 0.025% of all Class terazosin capsules during the Class Period, the total portion of the Settlement proceeds allocated to them totals less than \$43,000.

II. THE FORM AND MANNER OF DISSEMINATION OF NOTICE

On February 25, 2005, the Court approved the form and manner of notice for dissemination to the Class (the "Notice"). Pursuant to the approved Notice, all entities that have been identified as potential Class members from Abbott's sales database have been sent by first-class mail, a copy of the Notice, which sets forth their rights under the Settlement, including their right to exclude themselves from the Class, to object to the settlement, the Plan of Allocation, the award of attorneys' fees and costs, and incentive awards to the named plaintiffs. See Affidavit of Edward J. Sincavage of Heffler Radetich & Saitta, L.L.P. Regarding Dissemination of Notice to the Class, filed with the Court on March 22, 2005.

Additionally, as stated in the Class Notice, Class members who did not exclude themselves from the Class by March 31, 2005, may object to the Settlement in writing and/or appear at the scheduled April 15, 2005 hearing, at which the Court will consider whether to give final approval to the Settlement.

III. ARGUMENT

A. There is a Strong Judicial Policy Favoring Settlement of Antitrust Class Actions

Courts have long favored and encouraged the settlement of lawsuits. Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910). In fact, this Court has recognized that "[t]here is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex." Assn. For Disabled Ams., Inc. v. Amoco Oil Co., 211 F.R.D. 457, 466 (S.D. Fla. 2002); In re Sunbeam Securities Litig., 176 F. Supp. 2d. 1323, 1329 (S.D. Fla. 2001); see also In re U.S. Oil and Gas Litig., 967 F.2d 489, 493 (11th Cir. 1992); Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984); Behrens v. Wometco Enters., Inc., 118 F.R.D. 534, 538

(S.D. Fla. 1988), aff'd 899 F.2d 21 (11th Cir. 1990); Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977).

Permitting disputing parties to determine their respective rights through settlement, particularly in complex litigation, such as this case, promote the interests of judicial economy. Oil and Gas, 967 F.2d at 493 (“Complex litigation ... can occupy a court’s docket for years on end depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive.”); Cotton, 559 F.2d at 1331 (“In these days of increasing congestion within the federal court system, settlements contribute greatly to the efficient utilization of our scarce judicial resources.”); Behrens, 118 F.R.D. at 538 (Settlement “has special importance in class actions with their notable uncertainty, difficulties of proof, and length. Settlements of complex cases contribute greatly to the efficient utilization of scarce judicial resources, and achieve the speedy resolution of justice . . .” (citations omitted)).

In evaluating settlements, this Court has recognized that “the clear policy in favor of encouraging settlements must ... be taken into account ” and that “[a] class action settlement accordingly should be approved as long as it is ‘fair, adequate and reasonable and is not the product of collusion between the parties.’” Assn. For Disabled Ams., Inc., 211 F.R.D. at 466 (quoting Patterson v. Newspaper & Mail Deliverers’ Union, 514 F.2d 767, 771 (2d Cir. 1975)); Bennett, 737 F.2d at 986; Cotton, 559 F.2d at 1330; Behrens, 118 F.R.D. at 537-538.

B. The Proposed Settlement Is Fair, Adequate and Reasonable and Not the Product of Collusion Between the Parties, and Approval is in the Best Interests of the Class

1. Standards for Court Approval of a Settlement

Under FED. R. CIV. P. 23(e)(1)(A), “[t]he court must approve any settlement, *voluntary* dismissal, or compromise of the claims, issues, or defenses of a certified class.” In deciding whether

to approve a proposed class action settlement. “[t]he court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.” FED. R. CIV. P. 23(e)(1)(C); see Bennett, 737 F.2d at 986; Cotton, 559 F.2d at 1330 (the district court must find that the settlement “is fair, adequate and reasonable and is not the product of collusion between the parties”).

2. Factors to be Weighed by the Court

In Bennett v. Behring Corp., 737 F.2d at 986, the Eleventh Circuit identified six factors for a court to consider in evaluating the fairness, adequacy and reasonableness of a proposed class action settlement:

- (1) the likelihood of success at trial;
- (2) the range of possible recovery;
- (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable;
- (4) the complexity, expense and duration of litigation;
- (5) the substance and amount of opposition to the settlement; and
- (6) the stage of proceedings at which the settlement was achieved.

While application of these factors is left to the sound discretion of the court, “the trial judge ought not try the case in the settlement hearings.” Cotton, 559 F.2d at 1330 (citation omitted). Nor should the court “make a proponent of a proposed settlement justify each term of the settlement against a hypothetical or speculative measure of what concessions might have been gained” *Id.* Rather, “the court must be mindful that ‘inherent in compromise is a yielding of absolutes and an abandonment of highest hopes’.” Ruiz v. McKaskle, 724 F.2d 1149, 1152 (5th Cir. 1984) (quoting Milstein v. Werner, 57 F.R.D. 515, 524-525 (S.D.N.Y. 1972)); see also Young v. Katz, 447 F.2d

432, 433 (5th Cir. 1971) (explaining that a mini-trial on the underlying merits for purposes of approving a settlement “would emasculate the very purpose for which settlements are made”). As succinctly put in Young v. Katz:

[i]n examining a proposed compromise for approval or disapproval under FRCP 23(c) the court does not try the case. The very purpose of compromise is to avoid the delay and expense of such a trial. The court seeks only the answers to two inquiries: (a) whether there is any fraud or collusion in arriving at the compromise and (b) whether the compromise is fair, adequate and reasonable[.]

447 F.2d at 433.

Furthermore, in evaluating the fairness, adequacy and reasonableness of a proposed settlement, “the trial court is entitled to rely upon the judgment of experienced counsel for the parties.... Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgement for that of counsel.” Cotton, 559 F.2d at 1330 (citation omitted); In re King Res. Co. Securities Litig., 420 F. Supp. 610, 625 (D. Colo. 1976).

Finally, in considering the merits of the proposed settlement, the court should take into account practical considerations such as the complexity of the case and the expense and likely duration of the litigation. Susquehanna Corp. v. Korholz, 84 F.R.D. 316, 322 (E.D. Ill. 1979). One of those practical considerations is the uncertainty of litigation and the benefits of an immediate recovery as compared “to the mere possibility of relief in the future, after protracted and expensive litigation.” King Res. Co., 420 F. Supp. at 625.

The application of the Bennett factors here demonstrates that the proposed Settlement is fair, adequate and reasonable, and should be approved by this Court.

3. Evaluation of the Settlement Under the Bennett Factors

a. Uncertainties of Continued Litigation Support Approval of the Settlement

The first Bennett factor – the likelihood of success at trial – weighs in favor of approving the Settlement. While Plaintiffs have been confident throughout the course of this litigation that they would prevail against Defendants, a favorable result is by no means guaranteed if this litigation is continued through trial and possibly numerous appeals. After all, as recognized by this Court in previous stages of this litigation, this lawsuit is highly complex – involving intricate issues of federal regulatory, antitrust, and patent law.

Uncertainties weigh heavily in favor of settlement. *Sunbeam*, 176 F. Supp. 2d at 1330; see *Bennett*, 737 F.2d at 986-987. In *Sunbeam*, where the issue of causation posed a “significant hurdle” for class plaintiffs to overcome, the court found the “substantial question as to likelihood of complete success at trial” favored approving the settlement. 176 F. Supp. 2d at 1330.

Here, despite this Court’s favorable ruling that the Abbott/Geneva Agreement constituted a per se violation of Section 1 of the Sherman Act, heavily disputed issues of causation and damages still remain. In terms of causation, Defendants contend that, with or without the Agreement: (1) Geneva would not have come to market any earlier than it actually did (August 13, 1999) because Geneva potentially faced enormous potential liability in Abbott’s patent infringement suit, which was still pending when, Plaintiffs claim, Geneva would have entered the market “but for” the Agreement; and (2) even if Geneva was willing to come to market in the face of potential patent liability, it could not have done so because of, inter alia, various purported technical problems in validating its generic product and building sufficient quantities for a commercial launch. In particular, Geneva claimed that its active ingredient supplier, Uetikon, had difficulties: (a) providing Geneva with active ingredient which met the specifications set forth in Geneva’s ANDA; and (b)

“scaling up” to commercial size batches, which purportedly would have delayed Geneva’s ability to build a commercial size inventory.

A likewise highly disputed issue relates to damages. Absent this Settlement, Plaintiffs face the risk of receiving an amount significantly less than that provided under the Settlement, or even nothing, because the amount of damages could vary significantly depending on various factors, including (a) the date the jury determines that Geneva would have resolved its technical issues and come to market, (b) the date the jury decides that the second generic manufacturer (Mylan) could (and would) have come to market, and (c) whether the Court would allow (and the jury would award) Generic-Generic (“G-G”) damages.⁵ For example, if the jury decides that Geneva’s entry was delayed by six months (instead of the almost 12-month delay that Plaintiffs claim), then Class Plaintiffs’ recoverable damages could be reduced proportionately. Similarly, if the jury determines that the second generic competitor, Mylan’s entry was not delayed by the Abbott/Geneva Agreement, or that Mylan would have come to market later than Plaintiffs claim (in October 1999), then Class damages would be significantly reduced.

Finally, without this Settlement, there is a chance that the absent Class members would receive an amount far lower than that provided for in the Settlement, or nothing at all. This is especially true for those Class members who: (a) would have been unwilling or unable to assert individual lawsuits absent the Class Settlement due to, inter alia, the high cost of complex cases like

⁵The G-G overcharge theory measures the overcharge on the direct purchases of the generic caused mainly by the delayed entry of a second generic competitor. Entry of a second generic competitor has the effect of substantially reducing the price of the generic. While Plaintiffs believe this component of aggregate overcharge damages is highly appropriate, the Court has not yet determined whether it is recoverable. Moreover, if the jury were to determine that the second generic was not delayed by Defendants’ conduct, then most of the G-G damages component would evaporate.

this case; and (b) did not have direct purchases of Hytrin during the period that the evidence revealed that generic entry was delayed (i.e., October 1998 - August 1999).⁶

In sum, the outcome of a trial on the merits is uncertain. For example, if taken to trial, Plaintiffs face the risk that the trier of fact would find that the Abbott/Geneva Agreement did not cause the delayed market entry of any generic terazosin manufacturers due to Defendants' defenses – and thus did not cause injury to Plaintiffs or the Class. Alternatively, even if the trier of fact were to find in favor of Plaintiffs on the issue of causation, Plaintiffs face the risk that the fact-finder would find that they suffered only a fraction of the damages they are claiming when considering the various factors affecting damages. Such findings could eliminate Class Plaintiffs' ability to recover even close to the damages amount they seek.

Moreover, even if Class Plaintiffs were to obtain a favorable outcome at trial, they face the risk of being awarded an amount less than the nearly \$75 million recovered in the Abbott/Geneva and Zenith settlements. Additionally, as Defendants would likely appeal any decision in favor of Plaintiffs, Plaintiffs face the risk that it may take many years before they realize the benefits of any

⁶As the Court is aware, Plaintiffs originally alleged that, but for Abbott's illegal agreements, generic entry would have occurred as early as March 31, 1998. However, based on: (a) the evidence uncovered in discovery regarding when Geneva would have resolved its technical problems absent the Abbott/Geneva Agreement; and (b) the Eleventh Circuit's decision reversing this Court's initial *per se* ruling, Plaintiffs were forced to change their alleged initial "but for" generic entry date from March 31, 1998 to October 1, 1998. Thus, in Plaintiffs' view, those entities who were Class members solely by virtue of direct purchases of Hytrin between March 31, 1998 and September 30, 1998 (*i.e.*, they had no direct purchases after October 1998) would likely have been unable to prove that generic entry was delayed during the period that they directly purchased Hytrin, and thus likely would have been unable to establish antitrust injury or damages. As it turned out, many of the likely original 1,900 Class members fell within this category. However, the total aggregate number of these entities' purchases is very small, amounting to less than 0.025% of the total Class terazosin purchases. As a result, the Settlement is clearly fair to this group of Class members, since the Settlement provides for a nominal recovery for these entities (because Defendants wanted to include them and thus they added value to the Settlement in helping Defendants come closer to their goal of "total peace") despite their apparent lack of injury. Moreover, because the total number of purchases attributable to these entities is small, their aggregate recoveries will not dilute the Settlement.

monetary award. Finally, there is a risk that this Court's per se ruling is subject to possible reversal on appeal.⁷

In light of the highly contentious issues of causation and damages in this case, there is no guarantee that a trial on the merits would result in a reasonable recovery for each Class member. By contrast, through the Settlement, Class Counsel have obtained an immediate and certain recovery of \$72.5 million for Class Plaintiffs.

Since the outcome of a trial on the merits is far from certain, the first Bennett factor weighs in favor of approving the Settlement.

The Proposed Settlement is Well Within the Range of Possible Recovery that is Fair, Adequate and Reasonable, and Should be Approved.

The second and third Bennett factors – the range of possible recovery and the point within the range of possible recovery at which a settlement is fair, adequate and reasonable – weigh in favor of approving the Settlement.⁸ While there is a possibility that Plaintiffs might prevail at trial and win a significant monetary award, Plaintiffs (and absent Class members) also face the risk that they will receive nothing after trial and possibly numerous appeals.

Even if Plaintiffs succeeded in establishing fact of damage, there is a wide range as to the amount of damages a jury could award to Plaintiffs. According to Plaintiffs' economic expert, a reasonable range of potential aggregate Class damages range from \$128 million - \$190 million,

⁷While Plaintiffs believe that the Eleventh Circuit's recent opinion in Schering-Plough Corp. v. FTC, No. 04-10688, 2005 WL 528439, at *7 n. 14 (11th Cir. March 8, 2005), supports this Court's per se ruling, Defendants have already argued to the Eleventh Circuit (in connection with their pending mandamus petition seeking immediate reversal of the per se opinion) that the Schering-Plough decision supports Defendants' petition.

⁸"The second and third considerations of the Bennett test are easily combined." Behrens, 118 F.R.D. at 541; Sunbeam, 176 F. Supp. 2d at 1331.

depending on such factors as: (1) when the jury finds that Geneva would have – and could have in light of Geneva’s technical problems in validating its generic product and building sufficient quantities for a commercial launch – entered the market absent the Agreement; (2) when the jury finds that Mylan would have – and could have – entered the market absent the Agreement; and (3) whether the Court permits, and the jury awards, damages under Plaintiffs’ G-G overcharge theory.

In contrast, Defendants’ economic expert, Dr. Rubinfeld, contended that the Class’s aggregate damages are zero (because Plaintiffs allegedly could not prove causation, fact of damages, or appropriately assess damages at all on a class-wide basis), but even if Plaintiffs could overcome these objections, “overcharges to the Class could not be reasonably estimated to exceed \$17.1 million.”⁹

While Plaintiffs strongly believe that we can establish a violation of Section 1 and fact of damage, the amount of damages that a jury would award in light of the above-described risks, is uncertain. As a result, the \$72.5 million Settlement achieved here is clearly fair and reasonable.

This Court has recognized that “[a] settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery” and “the fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate.” Behrens, 118 F.R.D. at 542 (citations omitted) (proposed settlement of \$0.20 a share of desired recovery of \$3.50 a share is not indicative of an inadequate compromise); Sunbeam, 176 F. Supp. 2d at 1332 (“the fact that this settlement gives the class members the immediate and concrete opportunity to share in a large pecuniary sum, the proposed

⁹See Expert Report of Daniel L. Rubinfeld, dated March 22, 2002.

settlement of \$110 million [where the highest estimate of aggregate damages was \$1.1031 billion] appears to fall well within the range of what is fair, adequate, and reasonable”).

In light of these standards and the circumstances of this case, the second and third Bennett factors clearly support approval of the Settlement.

b. The Policy Supporting the Swift Resolution of Complex, Costly, and Protracted Litigation Supports Approval of the Settlement

The fourth Bennett factor – the complexity, expense and duration of continued litigation – weighs in favor of approving the Settlement. “The law favors compromises in large part because they are often a speedy and efficient resolution of long, complex and expensive litigations.” Behrens, 118 F.R.D. at 543. “[C]lass actions [] have the well-deserved reputation as being most complex.” and the instant case is certainly no exception. Assn. For Disabled Ams., 211 F.R.D. at 466; Sunbeam, 176 F. Supp. 2d at 1329; see also, Oil and Gas, 967 F. 2d at 493; Bennett, 737 F.2d at 986; Behrens, 118 F.R.D. at 538; Cotton, 559 F.2d at 1331.

Courts must balance a proposed settlement against the enormous time and expense of achieving a potentially more favorable result through further litigation. Sunbeam, 176 F. Supp. 2d at 1332 (more than three years of complex litigation before settlement reached); Behrens, 118 F.R.D. at 543 (over two years of hard-fought litigation prior to settlement).

This Court has already recognized the extreme complexity of this particular lawsuit, which involves intricate issues of federal regulatory, antitrust, and patent law. Furthermore, to date, Plaintiffs have already incurred \$3,131,697.11 in out-of-pocket expenses during this nearly six and one-half year old case, and, absent this Settlement, trial and appeals on the heavily contested issues are likely to cost even more money and take many more years to reach final resolution.

These complex and costly issues include, inter alia, the need to rebut Defendants' technical causation issues. Specifically, one of Plaintiffs' FDA experts, Martha Bennett, has opined that "but for" the dispute between Geneva and its active ingredient supplier (Uetikon) caused by the Abbott/Geneva Agreement, Geneva would have succeeded in validating its generic product no later than August 1998.¹⁰ Plaintiffs also argue that, after validation, Geneva would have been ready, willing and able to commercially market its product by October 1998. Defendants, of course, have their own experts on this issue – William Schwemer and Dr. Allan Myerson – who have taken an opposite view on these technical issues, opining that the Abbott/Geneva Agreement caused no delay whatsoever in Geneva's efforts to validate its generic product and bring it to market.

While Class Counsel believe that Plaintiffs' evidence and experts are more persuasive than Defendants' evidence and experts, there is no guarantee that Plaintiffs would prevail at trial on these issues. Moreover, there is no guarantee that, even if the jury found that the Abbott/Geneva Agreement caused some delay in generic entry, that the jury would find that Geneva's entry would have occurred as early as October 1998, as Plaintiffs claim. If the jury found that Geneva would have entered the market later than October 1998 (but before Geneva actually entered the market on August 13, 1999), then the Class's aggregate damages could be reduced significantly.¹¹ These risks make it clear that the \$72.5 million recovery is certainly within the range of reasonableness.

¹⁰See February 1, 2005 Order Granting In Part And Denying In Part Defendants' Motions to Exclude The Proposed Expert Testimony of Martha Bennett, et al. (Seitz, J.) at 3.

¹¹Similarly, Defendants vigorously contest Plaintiffs' allegation that Mylan, the second ANDA filer, would have entered the market earlier with its generic terazosin product in the "but for" world. If Plaintiffs could not convince the jury that the Abbott/Geneva Agreement delayed Mylan's entry, then Plaintiffs' recoverable damages would decrease significantly, since entry of a second generic competitor generally has the effect of significantly reducing prices. See Terazosin Hydrochloride, 352 F. Supp. 2d at 1315.

Additionally, even if Plaintiffs were to prevail, this would most definitely be after a protracted trial, and possibly numerous appeals, and at considerable expense.

If this case is not settled, Defendants Abbott and Geneva are likely to pursue extensive pretrial and post-trial motions that will cost both sides considerable expense and time. Furthermore, even if Plaintiffs were to prevail at trial, appeals of that decision could extend for several more years before Class members receive any of the benefits of that judgment. Approval of the Settlement that Class Counsel and Defendants' counsel have negotiated will result in a swift resolution to this complex, costly, and already protracted litigation.

Accordingly, the fourth Bennett factor supports approval of the proposed Settlement.

c. The Absence of Objections from Class Members Strongly Supports Approval of the Settlement.

The fifth Bennett factor – the substance and amount of opposition to the settlement – strongly supports approval of the Settlement. This Court has recognized that a settlement can be fair even if, unlike this case, there are a large number of objectors. Behrens, 118 F.R.D. at 543; Cotton, 559 F.2d at 1331. Furthermore, even if there are objectors, “a court should focus only on the substance of the objections.” Behrens, 118 F.R.D. at 543. And, “the fact that no class member has objected ... despite a [large] class ... strongly favors approval of the settlement.” Assn. For Disabled Ams., Inc., 211 F.R.D. at 470.

Here, to date, none of the Class members objected to the proposed Settlement (objections are due no later than April 8, 2005), and none have opted out (deadline for opting out was March 31, 2005). As noted above, all entities that have been identified as potential Class members from Abbott's sales database have been sent by first-class mail a notice of their rights under the Settlement, including their right to exclude themselves from the Class, to object to the Settlement,

the Plan of Allocation, the award of attorneys' fees and costs, and incentive awards to the named plaintiffs. As requested by the Court, Class Counsel have proffered affidavits from the court-approved Settlement Administrator, Heffler Radetich & Saitta, L.L.P., detailing the efforts made to mail a copy of the Notice to all Class members. The Notice also indicates that a copy of the Settlement Agreement was posted on the web sites of each Co-Lead Counsel (www.garwingerstein.com and www.bsflp.com). The Notice also informed Class members that they may appear at the scheduled April 15, 2005 hearing, at which the Court will consider whether to give final approval to the Settlement.

In sum., the absence of objections strongly favors approval of the Settlement.

d. The Fact that Settlement Was Reached After Discovery Was Complete, and the Parties Were Well Informed Prior to Compromising This Litigation, Supports Approval of the Settlement

The sixth Bennett factor – the stage of proceedings at which the Settlement was achieved – clearly favors approval of the Settlement. A court must consider whether sufficient discovery has been conducted by the parties prior to settlement to allow them to reach an informed decision on the relative merits of their case. The fact that “the case ha[s] progressed to a point where each side [i]s well aware of the other side’s position and the merits thereof ... weighs in favor of the Court finding the proposed settlement to be fair, adequate, and reasonable.” Sunbeam, 176 F. Supp. 2d at 1332 (settlement reached shortly before trial was approved); Assn. For Disabled Ams., Inc., 211 F.R.D. at 470 (settlement reached after extensive discovery and settlement negotiations was approved); Behrens, 118 F.R.D. at 544 (settlement reached after several months of discovery and settlement negotiations was approved).

Here, the record in this matter amply demonstrates that Class Counsel (as well as counsel for Defendants) have had a sufficient opportunity to assess the strengths and weaknesses of their case prior to settlement. At the time that the parties entered into the Settlement Agreement, after more than six years of intense litigation, trial was imminent. Fact and expert discovery was complete. Specifically, discovery conducted by Class Counsel included review of hundreds of thousands of pages of documents, and taking and defending more than 50 depositions of fact and expert witnesses relating to liability, causation and damages. Plaintiffs also have conducted extensive third-party discovery and conducted a comprehensive independent investigation prior to the settlement negotiations. The facts concerning Defendants' liability and damages have been developed sufficiently to make a highly informed decision regarding the proposed Settlement. Furthermore, the Court had decided all of the parties' summary judgment motions, and had ruled on the Daubert motions that remained relevant after the Court's summary judgment decisions. In short, the Settlement was reached at a time when the parties were preparing for an imminent trial. As a result, the parties were thoroughly familiar with the strengths and weaknesses of the claims and defenses.

Thus, the sixth Bennett factor weights heavily in favor of the approval of the Settlement.

e. The Settlement was a Product of Arms-Length Negotiations, and There is Nothing to Suggest Collusion

In addition, the Eleventh Circuit in Bennett required that the court make "findings of fact that there was no fraud or collusion in arriving at the settlement." 737 F.2d at 986. The Bennett court approved a settlement where "[t]here [wa]s no evidence of unethical behavior, want of skill or lack of zeal on the part of class counsel" and "settlement [w]as been achieved in good faith through arms-length negotiations." *Id.*

Here, there is no evidence in the record to suggest anything but arms-length negotiations in good faith. Throughout the litigation, counsel on both sides have zealously pursued the interests of their respective clients. The settlement was negotiated over several years over numerous mediation sessions monitored by Professor Eric Green, a preeminent and well-respected mediator. All settlement negotiations involved good-faith, arms-length bargaining.

In sum, the Settlement clearly was achieved without collusion.

f. The Judgment of Experienced Counsel Favors Approval of the Settlement

Class Counsel and counsel for Defendants Abbott and Geneva endorse the Settlement before this Court. In evaluating the fairness, adequacy and reasonableness of a proposed settlement, “the trial court is entitled to rely upon the judgment of experienced counsel for the parties.... Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgement for that of counsel.” Cotton, 559 F.2d at 1330; Flinn, 528 F.2d at 1169; King Res. Co., 420 F. Supp. at 625.

Here, Class Counsel, who have extensive experience in antitrust and other complex class action litigation (as well as litigation pertaining to the pharmaceutical industry specifically), negotiated the proposed Settlement at arms-length, after extensive discovery and independent analysis of all relevant matters.

Thus, counsel’s conclusion here that the Settlement is fair, adequate and reasonable, provides strong evidence that the Settlement merits the Court’s approval.

g. Approval of the Settlement is in the Best Interests of the Class

As demonstrated above, the application of the Bennett factors here demonstrates that the proposed Settlement is fair, adequate and reasonable, and should be approved by this Court.

The Settlement is in the best interests of the Class in that it provides a significant monetary award to the Class for the overcharges they have incurred. The Settlement is fair as to unnamed members of the Class. As explained above, those Class members who purchased Hytrin directly from Abbott after October 1998 will divide the vast majority of the net Settlement proceeds pro rata, based on the volume and prices of their purchases of Hytrin and generic terazosin hydrochloride during the period that, Plaintiffs allege, these prices were inflated by Defendants' Agreement to delay generic entry. Thus, the Settlement is fair and reasonable to these Class members.

Similarly, as explained above, the Settlement is fair to those Class members who purchased Hytrin directly from Abbott *only* from March 31, 1998 through September 30, 1998, but did *not* purchase any generic terazosin directly from any generic manufacturer from October 1, 1998 through June 30, 2001, since the Settlement provides them with some recovery for each Hytrin capsule purchased¹² despite the lack of substantial evidence that they were injured by Defendants' Agreement.

IV. CONCLUSION

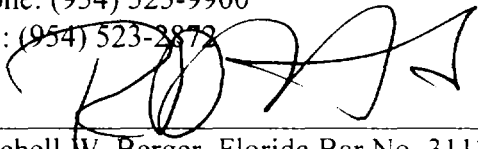
For the foregoing reasons, Sherman Act Class Plaintiffs and Class Counsel respectfully request that this Court grant final approval to the Settlement pursuant to FED. R. CIV. P. 23(e).

¹²Combined Hytrin purchases by Class members who purchased only during this early part of the Class Period amount to only approximately 0.025% of the total terazosin purchases by all Class members during the entire Class Period.

Dated: April 5, 2005

Respectfully submitted.

BERGER SINGERMAN
350 East Las Olas Boulevard, Suite 1000
Fort Lauderdale, FL 33301
Phone: (954) 525-9900
Fax: (954) 523-2872

By: 

Mitchell W. Berger, Florida Bar No. 311340
mberger@bergersingerman.com
René D. Harrod, Florida Bar No. 627666
rharrod@bergersingerman.com

Executed with the Consent of:

Bruce E. Gerstein, Esq.
Barry Taus, Esq.
Co-Lead Counsel
Garwin Gerstein & Fisher, LLP
1501 Broadway
New York, New York 10036
Telephone: (212) 398-0055
Facsimile: (212) 764-6620
E-Mail: Btaus@garwingerstein.com

Richard B. Drubel, Esq.
Co-Lead Counsel
Boies, Schiller & Flexner LLP
26 South Main Street
Hanover, New Hampshire 03755
Telephone: (603) 643-9090
Facsimile: (603) 643-9010
E-mail: rdrubel@boies-schiller.com

Daniel Berger, Esq.
David Sorensen, Esq.
Eric Cramer, Esq.
Executive Committee
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, Pennsylvania 19103-6365
Telephone: (215) 875-3000
Facsimile: (215) 875-4671
E-mail: danberger@bm.net

Aubrey Calvin, Esq.
Executive Committee
Neils Esperson Building
Suite 2300
808 Travis Street
P.O. Box 61586
Houston, TX 77002-1586
Telephone: (713) 224-5771
Facsimile: (713) 225-0038
E-mail: acalvin@crvlaw.com

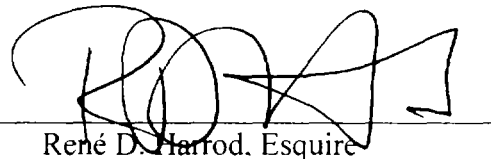
J. Gregory Odom, Esq.
Stuart Des Roches, Esq
Odom & Des Roches, LLP
Suite 2020, Poydras Center
650 Poydras Street
New Orleans, LA 70130
Tel: (504) 522-0077
Fax: (504) 522-0078
E-mail: Stuart@ordlaw.com

David P. Smith, Esq.
Percy, Smith & Foote LLP
P.O. Box 1632
720 Murray Street
Alexandria, Louisiana 71309-1632
Tel: (318) 445-4480
Fax: (318) 487-1741
E-mail: DPSmith@PSFG-law.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail (with all exhibits) and Electronic Mail (without the exhibits) to all Counsel of Record on the 6th day of April, 2005.

By: _____



René D. Harrod, Esquire
Florida Bar No. 627666