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

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

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT

PLEASE TAKE NOTICE that the undersigned, Interim Co-Lead Counsel for Plaintiffs and the Proposed Classes, pursuant to Fed. R. Civ. P. 23(e), individually and on behalf of a proposed settlement class, will move before the Hon. Madeline Cox Arleo, U.S.D.J., at the Martin Luther King, Jr. Federal Building and Courthouse, 50 Walnut Street, Newark, New Jersey, on a date and time to be set by the Court, for an Order preliminarily approving the proposed settlement entered into with Celgene Corporation ("Celgene"), as set forth in the Settlement Agreement attached as Exhibit 1 to the Declaration of Melinda R. Coolidge, filed herewith. Celgene does not oppose this motion.

The grounds for this motion are set forth more fully in the Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of

Proposed Settlement, as well as the Declaration of Melinda R. Coolidge and the accompanying exhibit, filed herewith. A proposed form of Order is also attached.

Respectfully submitted,

Dated: April 3, 2020

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

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I. INTRODUCTION

As the Court is aware, last year, following extensive arm's length-negotiations, including a mediation conducted by the nationally-recognized mediator Jed D. Melnick, Plaintiffs[1] had reached a settlement with Defendant Celgene Corporation ("Celgene") which the Court preliminarily approved. ECF No. 290. The Court-approved administrator disseminated the Court-approved notice to the settlement class. ECF No. 292. No class member objected to the settlement. However, a number of class members chose to opt out of the settlement, which resulted in Celgene exercising its right to terminate the settlement agreement on December 23, 2019. *See* ECF No. 300.

Within days, the parties began to reassess the status of the litigation, as well as a potential new settlement class definition, and resumed good faith negotiations. Following several months of analysis and negotiation, the parties reached an agreement (the "Settlement"), under which Celgene will pay $34,000,000 in exchange for a release from a smaller Settlement Class.[2] The new proposed

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

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

Settlement Class definition expressly excludes a list of entities that opted out of the first proposed settlement.[3]

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

Accordingly, Plaintiffs respectfully request that the Court enter the Preliminary Approval Order submitted herewith preliminarily approving the

[3] The list of these entities is included as Attachment A to the Settlement Agreement, filed contemporaneously herewith.

Settlement, appointing the proposed Class Representatives, and appointing Huntington National Bank as Escrow Agent. In addition, Interim Co-Lead Counsel respectfully request that the Court appoint them as Settlement Class Counsel pursuant to Rule 23(g).

II. BACKGROUND & PROCEDURAL HISTORY

a. Claims and Allegations

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

Specifically, Plaintiffs alleged that Celgene successfully monopolized the market for Thalomid and Revlimid, despite at least eleven different generic drug manufacturers attempting to enter the market. Plaintiffs alleged that Celgene's anticompetitive scheme included: (1) listing in the Orange Book and suing to

enforce allegedly invalid patents; (2) refusing to sell samples of Thalomid and Revlimid necessary to develop generics; (3) encouraging the FDA to reject other manufacturers' applications to market and sell generic Thalomid based on sham safety concerns; and (4) entering into an allegedly anticompetitive settlement agreement with a generic manufacturer.

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

b. Motion to Dismiss, Appointment of Interim Co-Lead Counsel, and Celgene's Answers

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

c. Related Litigation

As discussed *supra*, Celgene has either sued or been sued by many of the

generic drug manufacturers that sought (or seek) to bring generic versions of Thalomid and/or Revlimid to market.[4] As part of the formal discovery in this action, the parties stipulated that Celgene and the other parties in the related lawsuits would make the extensive discovery records in several of those cases available to Plaintiffs, including document productions, deposition transcripts, expert reports, and confidential court filings, in light of the substantial overlap of relevant facts and issues with this case. Plaintiffs' counsel reviewed and analyzed tens of thousands of documents, dozens of deposition transcripts, and numerous expert reports from those other lawsuits. Through this and the formal discovery Plaintiffs engaged in discussed below, Plaintiffs gained a detailed understanding of the strengths and weaknesses of their case.

d. Discovery

Plaintiffs first served written discovery requests on Celgene on February 2, 2016. Plaintiffs would ultimately serve four sets of interrogatories and two sets of requests for production on Celgene. On May 11, 2016, Celgene served its first set

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

of written discovery requests on Plaintiffs. Celgene ultimately served three sets of interrogatories on Plaintiffs, as well as requests for production. Beginning in autumn 2016 and continuing through spring 2018, Plaintiffs served dozens of third party subpoenas in this litigation, including on specialty pharmacies and some of the generic drug manufacturers attempting to bring generic versions of Thalomid and/or Revlimid to market. Plaintiffs also took fact depositions and sent multiple Freedom of Information Act requests, including to the FDA.

In June 2018, Plaintiffs served seven affirmative merits expert reports (not including additional expert reports Plaintiffs submitted in support of their class certification motions). These included experts concerning, *inter alia*, several patent issues, relevant market, monopoly power, classwide damages (amount and methodology), "but for" entry dates for generic versions of Thalomid and Revlimid, the structure and function of the pharmaceutical market, pharmacy benefit managers, and the FDA's regulatory process. In August 2018, Celgene served 10 responsive expert reports. In October and November 2018, Plaintiffs served 7 rebuttal expert reports. All told, the parties exchanged reports by 19 experts on class and/or merits issues, all of whom were deposed at least once, while certain experts sat for multiple depositions.

e. Class Certification Motions

On October 2, 2017, Plaintiffs filed a motion for class certification. ECF No. 149.[5] On October 30, 2018, the Court denied Plaintiffs' motion without prejudice, and Plaintiffs renewed their motion with a modified class definition and additional support. ECF Nos. 250, 251. On December 14, 2018, Plaintiffs filed a renewed motion for class certification. ECF No. 264. This renewed motion was fully briefed at the time the parties entered into the first proposed settlement, and remains pending.

f. Mediation and Prior Proposed Settlement

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

On August 1, 2019, the Court entered the Order Granting Preliminary

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

Approval of Class Settlement. ECF No. 290. On August 22, 2019, the Court entered the Order Granting Plaintiffs' Unopposed Motion to Distribute Notice to the Settlement Class, Appoint Notice and Claims Administrator, and for Approval of the Plan of Allocation. ECF No. 292. In these Orders, the Court, *inter alia*, preliminarily approved the first settlement as fair, reasonable, and adequate, approved the form and manner of notice to be provided to the Class, approved the Plan of Allocation, and appointed KCC, LLC ("KCC") as Notice and Claims Administrator. The Court specifically determined that the thorough notice distribution program comported with due process and Rule 23 of the Federal Rules of Civil Procedure.

Pursuant to these Orders, Co-Lead Counsel and KCC directed timely distribution of notice in the form and manner approved by the Court. Class members had until December 2, 2019 to opt out of the first proposed settlement or to object to Co-Lead Counsel's application for attorneys' fees, expenses, and service awards. ECF No. 292.

No class members objected to the first proposed settlement. However, a number of class members chose to opt out of the first settlement, which resulted in Defendant Celgene exercising its right to terminate the settlement on December 23, 2019 pursuant to a provision in the settlement. ECF No. 300.

g. The New Proposed Settlement

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

1. The Settlement Class

The proposed Settlement Class is defined as:

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

immediate families.

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

2. Consideration Provided by the Settlement Agreement

In exchange for the release described *infra*, Celgene shall pay $34,000,000 into an escrow account held at Huntington National Bank. *Id.* at ¶12. Plaintiffs request that the Court appoint Huntington National Bank to serve as Escrow Agent.

3. Release for Celgene

Plaintiffs and members of the Settlement Class agree to release Celgene from all claims they have or may have concerning the purchase, reimbursement for and/or payment for some or all of the purchase price for Thalomid or Revlimid, including, *inter alia*, claims arising out of the alleged delay of generic competition thereto, but not including product liability, breach of warranty, breach of contract, or tort of any kind (other than a breach of contract, breach of warranty or tort based on any factual predicate in this Action), a claim arising out of violation of Uniform Commercial Code, or personal or bodily injury. *Id.* at ¶23.

4. No Rescission or Reduction Based on Opt Outs

In contrast to the first settlement, Celgene will not have the right to rescind the agreement even if members of the Settlement Class choose to exclude themselves from the Settlement. The parties may only rescind the agreement if it is

not approved and effectuated by the courts. *Id.* at ¶34. Nor will there be any reduction of the Settlement Amount based on opt outs.

III. THE SETTLEMENT SATISFIES THE CRITERIA FOR PRELIMINARY APPROVAL

The proposed Settlement, which involves a $34 million payment from Celgene, more than satisfies the liberal standard for preliminary approval of a class settlement. Having negotiated for this substantial cash payment from Celgene, Plaintiffs have avoided the potential risks inherent in complex antitrust class litigation and secured a favorable settlement for the Settlement Class.

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

Block, 2016 WL 8201853, at *4 (same). "Preliminary approval of a proposed class action settlement 'establishes an initial presumption of fairness.'" *Myers v. Jani-King of Phila., Inc.*, No. 09-cv-1738, 2019 WL 2077719, at * 2 (E.D. Pa. May 10, 2019) (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995)).

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

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

The Settlement is the result of extensive arm's length negotiations undertaken in good faith by highly-experienced plaintiffs' and defense counsel. *See* Rule 23(e)(2)(A)-(B). These negotiations included a mediation before a nationally-

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

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

the relative strengths and weaknesses of their claims").

Throughout every stage in the mediation and negotiation process, Plaintiffs weighed the strengths and weaknesses of Plaintiffs' claims and Celgene's defenses, including consideration of, among other issues, liability, causation, and damages. The parties engaged in intensive bargaining over the merits and value of Plaintiffs' claims, which discussions were fully informed by completed expert discovery, including on the issue of alleged damages. Because of the extensive, arm's-length bargaining involved, there is no issue (or even a suggestion) of any collusive aspect to the proposed Settlement. Balancing the risks and resources, the proposed $34 million cash payment is a fair, reasonable, and just result.

The principal attorneys for the Class are each highly experienced antitrust attorneys who have litigated numerous complex antitrust actions. Their judgment that the Settlement is fair and reasonable is entitled to considerable weight. *See Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness."); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 543 (D.N.J. 1997) (court is "entitled to rely upon the judgment of experienced counsel for the parties") (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)), *aff'd*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d. Cir. 1998). Courts have explicitly deferred to the judgment of

experienced counsel who have conducted arm's-length negotiations in approving class action settlements. *See, e.g.*, *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 452 (E.D. Pa. 1985) ("[T]he professional judgment of counsel involved in the litigation is entitled to significant weight.").

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

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

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

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

1. the complexity, expense and likely duration of the litigation;
2. the reaction of the class to the settlement;
3. the stage of the proceedings and the amount of discovery completed;
4. the risks of establishing liability;
5. the risks of establishing damages;
6. the risks of maintaining the class action through the trial;
7. the ability of the defendants to withstand a greater judgment;
8. the range of reasonableness of the settlement fund in light of the best possible recovery; [and]
9. the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)); *see also* Rule 23(e)(2).[6] All

[6] Under Rule 23(e)(2), at the final approval stage, courts must consider the following factors in determining whether a settlement is fair, reasonable, and adequate: whether (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other. These factors are similar to and largely overlap with the *Girsh* factors.

relevant factors weigh in favor of approving the Settlement.[7]

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

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

This factor weighs in favor of approval. In *Sheinberg v. Sorensen*, the court

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

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

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

As to the seventh *Girsh* factor, although Celgene has assets to pay more than

a settlement of $34 million, the fact that a defendant can pay more does not make an otherwise reasonable settlement unreasonable. *See Henderson v. Volvo Cars of N. Am., LLC*, No. 09-cv-4146, 2013 WL 1192479, at *11 (D.N.J. Mar. 22, 2013) ("Plaintiffs acknowledge that 'there is currently no indication that Volvo here would be unable to withstand a more significant judgment,' but 'to withhold approval of a settlement of this size because it could withstand a greater judgment would make little sense where the [settlement agreement] is within the range of reasonableness and provides substantial benefits to the Class.'") (citing cases where settlement was approved despite defendants' ability to withstand a greater judgment); *In re Johnson & Johnson Derivative Litig.*, 900 F. Supp. 2d 467, 484 (D.N.J. 2012) ("But even assuming there are sufficient funds to pay a greater judgment, the Third Circuit has found that a defendant's ability to pay a larger settlement sum is not particularly damaging to the settlement agreement's fairness as long as the other factors favor settlement") (internal quotations and citations omitted).

"'According to *Girsh*, courts approving settlements should determine a range of reasonable settlements in light of the best possible recovery (the eighth *Girsh* factor) and a range in light of all the attendant risks of litigation (the ninth factor).'" *In re Schering-Plough/Merck Merger Litig.*, No. 09-cv-1099, 2010 WL 1257722, at *12 (D.N.J. Mar. 26, 2010) (quoting *GMC Pick-Up Truck*, 55 F.3d at

806). As always, "settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and [courts should] guard against demanding to[o] large a settlement based on the court's view of the merits of the litigation." *Johnson & Johnson*, 900 F. Supp. 2d at 484-85 (alteration in original) (quoting *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 92 (D.N.J. 2001)).

While the potential recovery on behalf of the Class, assuming Plaintiffs had prevailed at trial, could theoretically be higher than the Settlement amount, that is virtually always true in settled cases. In fact, Celgene has proffered expert testimony with damages measurements much lower than Plaintiffs' experts' calculations. Put simply, when weighed against the time, expense, and potential risk of further litigation, including an adverse ruling on class certification, summary judgment, or *Daubert*, or losing at trial or on appeal, the Settlement is a reasonable compromise that gives Settlement Class members certain recovery. *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 263 (D.N.J. 2000) ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.") (quoting *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985); *see also Sheinberg*, 2016 WL 3381242, at *9 (same).

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

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

Certification of a settlement class is appropriate where the four prerequisites of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—are satisfied. *See* Fed. R. Civ. P. 23(e). Notably, the Court has already concluded that the numerosity, commonality, typicality, and adequacy requirements of Rule 23(e) have been satisfied. *See* ECF No. 250 at 15-20; *see also* ECF No. 290 at 3. In addition, as discussed further below, certification of a settlement class is appropriate under Rule 23(b)(3) because common questions predominate, and certification of a settlement class is superior to other methods of adjudication. Likewise, the Court has already concluded, at the preliminary approval stage, that certification of a settlement class is warranted here because common issues predominate over any individual issues and settlement on a class basis is superior to other means of resolving this matter. *See* ECF No. 290 at 3.

a. Members of the Settlement Class Are Numerous

The proposed Settlement Class satisfies Rule 23(a)'s numerosity requirement. "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). Here, based on data obtained during discovery and evaluated by Plaintiffs' experts, the Settlement Class consists of at least hundreds of persons and entities.[8] The numerosity requirement is easily satisfied. *Zinberg v. Wash. Bancorp, Inc.*, 138 F.R.D. 397, 405 (D.N.J. 1990); ECF No. 290 at 3.

b. Common Questions of Law and Fact Exist

The proposed Settlement Class also satisfies the commonality requirement imposed by Rule 23(a). "[A] finding of commonality does not require that all class members share identical claims." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 530 (3d Cir. 2004) (quotation marks omitted). "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Stewart*, 275 F.3d at 227 (quotation marks and emphasis omitted).

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

Here, common questions of law and fact exist that go to the central issue in this matter—whether Celgene engaged in anticompetitive behavior to foreclose generic versions of Thalomid and Revlimid from reaching the market, thereby injuring Plaintiffs and members of the Class when they paid more for these drugs than they would have paid for a generic equivalent absent Celgene's alleged misconduct. Thus, the proposed Settlement Class satisfies the commonality requirement; *see also* ECF No. 290 at 3.

c. Plaintiffs' Claims Are Typical

The proposed Settlement Class also satisfies the typicality requirement of Rule 23(a). The commonality and typicality requirements of Rule 23(a) "tend to merge." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Rule 23(a)(3)'s "typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *In re Warfarin*, 391 F.3d at 531 (quotation marks omitted). "A named Plaintiff's claims are typical where each class member's claims arise from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Commerce Bancorp*, 2007 WL 2085357, at *3.

Here, Plaintiffs' claims are typical of the claims of the proposed Settlement Class members because they all arise from the same alleged misconduct by

Celgene that gives rise to the claims of the Settlement Class. Plaintiffs assert the same legal claims on behalf of themselves and the proposed Settlement Class, namely, that they paid more for Thalomid and Revlimid as a result of Celgene's conduct. Rule 23(a)'s typicality requirement is satisfied. *See* ECF No. 290 at 3.

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

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

Plaintiffs, as end payors of Thalomid and Revlimid, are incentivized to seek the maximum recovery possible. Plaintiffs' claims are based on the same alleged anticompetitive conduct as the claims of every other member of the Settlement Class. By proving their own claims, Plaintiffs would necessarily help to prove the claims of their fellow putative Settlement Class members. In addition, Plaintiffs have no interests that are antagonistic to the Settlement Class. Furthermore, Plaintiffs' counsel are experienced class action litigators familiar with the legal and factual issues involved, and they have competently prosecuted this complex case. For settlement purposes, the adequacy requirement is satisfied. ECF No. 290 at 3.

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

The proposed Settlement Class also satisfies the requirements of Rule 23(b)(3)—predominance and superiority. *See* ECF No. 290 at 3. Rule 23(b)(3) provides that a class may be certified if the Court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The few issues the Court previously raised with regard to Rule 23(b)(3), which were largely centered around manageability of identifying certain class members, should not preclude certification of a settlement class. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial."); *see also Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d. Cir. 2011), cert. denied, 132 S. Ct. 1876 (2012) (class action settlements avoid an inquiry into the merits of individual class member's claims, because the defendant seeks "global peace" – a release of every class member's claims). "From a practical standpoint… achieving global peace is a valid, and valuable, incentive to class action settlements. Settlements avoid future litigation with all potential plaintiffs – meritorious or not." *Id.*

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

1. Common Questions of Law and Fact Predominate

First, common questions predominate over individual questions in this case. "Predominance," under Rule 23(b)(3), "is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem Prods.*, 521 U.S. at 625; *see also Shapiro*, 2018 WL 3158812, at *6 (same). "[T]he focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan*, 667 F.3d at 298.

Plaintiffs would necessarily focus on the conduct of Celgene, rather than the conduct of individual class members, to demonstrate that Celgene acted contrary to federal and state law. Proof of how Celgene allegedly implemented its plan to foreclose generic equivalents of Thalomid and Revlimid from coming to market is common to all Settlement Class members, because it is predicated on establishing the actions that Celgene took – actions that allegedly impacted the entire market for Thalomid and Revlimid and their generic equivalents – during the relevant

class period. *See, id* (common questions, like whether defendants' conduct caused prices to be maintained at higher levels than would exist in a competitive market, predominated over individual issues); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 268 (3d Cir. 2009) (finding predominance by determining that the elements of a Sherman Act violation for concerted anticompetitive activity focused on "the conduct of the defendants"); *see also In re Linerboard Antitrust Litig.*, 305 F.3d 145, 163 (3d Cir. 2002) ("[C]ommon issues [ ] predominate here because the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did.") (citation omitted). *See also Sullivan*, 667 F.3d at 299 ("*Dukes* actually bolsters our position, making clear that the focus [of the predominance prong] is on whether the defendant's conduct was common as to all of the class members, not on whether each plaintiff has a 'colorable' claim."). As a result, common issues predominate over any questions arguably affecting individual class members alone. *See* ECF No. 290 at 3.

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

Rule 23(b)(3) also requires a showing that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Class adjudication of Plaintiffs' claims here would be superior to individual trials (avoiding the risk of inconsistent results), and joinder of all Settlement Class members is impracticable. *See O'Brien v. Brain Research Labs, LLC*, No. 12-cv-

204, 2012 WL 3242365, at *9 (D.N.J. Aug. 9, 2012) (finding superiority because, *inter alia*, "denying certification would require each consumer to file suit individually at the expense of judicial economy"). And "[i]f common questions are found to predominate in an antitrust action, then courts generally have ruled that the superiority prerequisite of Rule 23(b)(3) is satisfied." 7AA FED. PRAC. & PROC. CIV. § 1781 (3d ed. 2005).

Absent approval of the Settlement, many members of the proposed Settlement Class here would go uncompensated because they would lack adequate monetary incentives to pursue their claims individually. *See O'Brien*, 2012 WL 3242365, at *9 (finding superiority because, *inter alia*, it was "not apparent that the money potentially recoverable by an individual class member as compared to the cost to pursue recovery through a lawsuit is sufficient to make individual litigation a realistic possibility"). The prosecution of separate actions by individual members of the proposed class would impose heavy burdens on the courts and the parties, and would create a risk of inconsistent rulings, which further favors class treatment. Moreover, the interests of class members in individually controlling the prosecution of separate claims are outweighed by the efficiency of the class mechanism. Therefore, a class action is the superior method of adjudicating the claims raised in this case.

Because the proposed Settlement Class meets the requirements of Rule 23(a)

and 23(b)(3), it should be certified for settlement purposes. *See* ECF No. 290 at 3.

V. APPOINTMENT OF NAMED PLAINTIFFS AS CLASS REPRESENTATIVES

The Named Plaintiffs should be appointed as representatives of the Settlement Class. The Named Plaintiffs' claims are typical of claims of the proposed Settlement Class within the meaning of Rule 23(a)(3). As set forth above, the Named Plaintiffs allege, on behalf of the Settlement Class, the same manner of injury from the same course of conduct that they complain of themselves, and assert on their own behalf the same legal theory that they assert for the Settlement Class. Moreover, in accordance with Rule 23(a)(4), the Named Plaintiffs have and will continue to fairly and adequately protect the interests of the Settlement Class. The Named Plaintiffs' interests do not conflict with the interests of absent members of the Settlement Class. All of the members of the Settlement Class share a common interest in recovering the overcharge damages sought in the Complaint. Finally, the Settlement Class is made up of business entities and individual consumers and any member of the Settlement Class that wishes to opt out will be given an opportunity to do so. Thus, the Named Plaintiffs and their Counsel are well qualified to represent the Settlement Class in this case, given their experience in prior cases, and the vigor with which they have prosecuted this action thus far.

VI. APPOINTMENT OF SETTLEMENT CLASS COUNSEL

The Court previously appointed the proposed Settlement Class Counsel as Interim Co-Lead Counsel, *see* ECF No. 92 (Apr. 4, 2016), and they have committed substantial resources to prosecuting this action and negotiating both settlements. *See, e.g.*, ECF 293. Rule 23(g) provides that "[u]nless a statute provides otherwise, a court that certifies a class must appoint class counsel," and it sets out the factors a court should consider in doing so. Those factors include: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions [] and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1). Proposed Settlement Class Counsel have substantial experience in the prosecution of complex litigation cases, including antitrust class actions on behalf of indirect purchasers, and they have demonstrated the necessary expertise to fairly and adequately represent the Settlement Class and successfully manage a class action to its conclusion. ECF No. 66; 250; ECF 293-1. Thus, Interim Co-Lead Counsel are highly qualified to represent the Settlement Class and respectfully request that they continue in their role as Settlement Class Counsel.

VII. NOTICE STANDARD

Plaintiffs intend to move the Court to approve a notice plan for the

Settlement Class that will follow the notice plan that the Court approved with respect to the first proposed settlement. *See* ECF No. 292. This notice plan will comply with Rule 23's requirements for notice. Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal . . . ." Fed. R. Civ. P. 23(e)(1). Furthermore, under Rule 23(c)(2)(B), "the court must direct to class members the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). The purpose of notice is to "afford members of the class due process which, in the context of the Rule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment." *Peters v. Nat'l R.R. Passenger Corp*., 966 F.2d 1483, 1486 (D.C. Cir. 1992) (internal citation omitted); *see also Varacallo*, 226 F.R.D. at 225 ("[t]he notice of the Proposed Settlement, to satisfy both Rule 23(e) requirements and constitutional due process protections, need only be reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections.") (quoting *Prudential*, 962 F. Supp. at 527).

Plaintiffs will develop their notice program in conjunction with an experienced notice provider, KCC, who the Court already approved. ECF No 292.

VIII. CONCLUSION

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

Respectfully submitted,

Dated: April 3, 2020

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Additional Plaintiffs' Counsel

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

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

DECLARATION OF MELINDA R. COOLIDGE IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT

I, Melinda R. Coolidge, declare as follows:

1. I am a partner at Hausfeld LLP, counsel for International Union of Bricklayers and Allied Craft Works Local 1 Health Fund, the City of Providence, International Union of Operating Engineers Local 39 Health and Welfare Trust Fund, The Detectives' Endowment Association, New England Carpenters Health Benefits Fund, and David Mitchell (collectively, "Plaintiffs") in the above-captioned matter. I am a member in good standing of the bar of the District of Columbia. I am admitted *pro hac vice* in this matter. I submit this Declaration in support of Plaintiffs' Unopposed Motion for Preliminary Approval of Proposed Settlement with Celgene Corporation ("Celgene").

2. Attached as Exhibit 1 to this Declaration is a true and correct copy of the Settlement Agreement between Plaintiffs and Celgene.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 3, 2020 in Maryland.

By: Melinda R Coolidge

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EXHIBIT 1

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

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

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is made and entered into as of this 30th day of March 2020 (the "Execution Date"), by and between Celgene Corporation ("Celgene") and plaintiff class representatives International Union of Bricklayers and Allied Craft Workers Local 1 Health Fund, the City of Providence, International Union of Operating Engineers Local 39 Health and Welfare Trust Fund, The Detectives' Endowment Association, New England Carpenters Health Benefits Fund, and David Mitchell (collectively, "Plaintiffs"), both individually and on behalf of a class of persons and entities defined below.

WHEREAS, Plaintiffs are prosecuting the Action on their own behalf and on behalf of the Settlement Class (as defined below);

WHEREAS, Plaintiffs allege that Celgene participated in an anticompetitive scheme to delay entry of generic thalidomide and lenalidomide in the United States, which caused members of the Settlement Class to pay supracompetitive prices for Thalomid and Revlimid;

WHEREAS, Celgene denies Plaintiffs' allegations and has asserted a number of defenses;

WHEREAS, Plaintiffs and Celgene agree that neither this Agreement nor any statement made in the negotiation thereof shall be deemed or construed to be an admission by or evidence against Celgene or evidence of the truth of any of Plaintiffs' allegations;

WHEREAS, arm's-length settlement negotiations have taken place between Settlement Class Counsel (as defined below) and counsel for Celgene, and this Agreement has been reached as a result of those negotiations;

WHEREAS, Plaintiffs have conducted an investigation into the facts and the law regarding the Action and have concluded that a settlement with Celgene according to the terms set forth below is in the best interest of Plaintiffs and the Settlement Class; and

WHEREAS, Celgene, despite its belief that it committed no wrongdoing, has nevertheless agreed to enter into this Agreement to avoid the expense, inconvenience, and the distraction of potentially burdensome and protracted litigation;

NOW, THEREFORE, in consideration of the mutual promises, covenants, agreements and releases set forth herein and for other good and valuable consideration, and incorporating the above recitals herein, it is agreed by and among the undersigned that the claims that have been asserted in the Action be settled, without costs as to Plaintiffs, the Settlement Class, or Celgene, subject to the approval of the Court (as defined below), on the following terms and conditions.

A. Definitions

The following terms, as used in this Agreement have the following meanings:

1. "Action" means the action captioned *In re Thalomid and Revlimid Antitrust Litigation*, 2:14-cv-06997 (MCA) (MAH), which is currently pending in the United States District Court for the District of New Jersey.

2. "Affiliates" means with regard to a particular party, all entities controlling, controlled by or under common control with such party.

3. "Celgene's Counsel" shall refer to the law firm Williams & Connolly LLP, 725 12th Street NW, Washington, DC 20005.

4. "Claims Administrator" means a third party retained by the Plaintiffs to manage and administer the process by which Settlement Class Members are notified of and paid pursuant to this Agreement, all consistent with this Agreement and any order by the Court.

5. "Court" means the United States District Court for the District of New Jersey.

6. "Effective Date" means the date on which all of the following have occurred: (a) the Settlement Agreement is approved by the Court as required by Fed. R. Civ. P. 23(e); (b) the Court enters a final approval order and enters a final judgment of dismissal with prejudice against Plaintiffs and members of the Settlement Class who have not timely excluded themselves from the Settlement Class; and (c) the time for appeal or to seek permission to appeal from the Court's approval of this Agreement and entry of a final judgment has expired or, if appealed, approval of this Agreement and the final judgment has been affirmed in its entirety by the court of last resort to which such appeal has been taken and such affirmance has become no longer subject to further appeal or review. Neither the provisions of Rule 60 of the Federal Rules of Civil Procedure nor the All Writs Act, 28 U.S.C. § 1651, shall be taken into account in determining the above-stated times so long as any filing or challenge made to any final judgment under these provisions is initiated after the dates set forth in (a)-(c) above.

7. "Escrow Account" is the account referenced in Paragraph 27 to maintain the Settlement Fund (as defined below) established pursuant to the terms and conditions set forth in

an escrow agreement to be entered into with Huntington Bank, as Escrow Agent (as defined below), subject to the approval of Plaintiffs and Celgene.

8. "Escrow Agent" means the third party responsible for managing and administering the Escrow Account in accordance with this Agreement, any agreement establishing the Escrow Account and any order by the Court.

9. "Preliminary Approval Date" means the date on which the Court enters an order granting preliminary approval of this Agreement.

10. "Released Claims" shall refer to the claims described in Paragraph 23 of this Agreement.

11. "Released Parties" shall refer jointly and severally, individually and collectively, to Celgene, its predecessors, successors, subsidiaries, parents, Affiliates, divisions, and departments (including but not limited to the Bristol-Myers Squibb Company), and each of their respective officers, directors, employees, agents, attorneys, servants, and representatives, and the predecessors, successors, heirs, executors, administrators, and assigns of each of the foregoing.

12. "Releasing Parties" shall refer jointly and severally, and individually and collectively, to the Plaintiffs, the Settlement Class Members, their predecessors, successors, subsidiaries, parents, Affiliates, divisions, and departments, and each of their respective officers, directors, employees, agents, attorneys, servants, and representatives, and the predecessors, successors, heirs, executors, administrators, and assigns of each of the foregoing.

13. "Settlement Amount" means $34,000,000.00 (thirty-four million dollars) in United States currency.

14. "Settlement Class" means all persons or entities who purchased and/or paid for some or all of the purchase price of Thalomid or Revlimid in any form, before the Preliminary

Approval Date, in California, the District of Columbia, Florida, Kansas, Maine, Massachusetts, Michigan, Nebraska, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, or Tennessee, for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries, but excluding the following:

a. Celgene and its officers, directors, management, employees, parents, subsidiaries, or Affiliates;

b. All federal or state governmental entities, except cities, towns, or municipalities with self-funded prescription drug plans;

c. All persons or entities who only purchased Revlimid or Thalomid for purposes of resale directly from Celgene or its Affiliates;

d. The entities on Attachment A hereto;

e. Fully insured health plans;

f. Stop-loss insurers; and

g. The judges in this Action and any members of their immediate families.

15. "Settlement Class Counsel" shall refer to the law firms of Hausfeld LLP, 1700 K Street NW, Suite 650, Washington, DC 20006; Block & Leviton LLP, 100 Pine Street, Suite 1250, San Francisco, CA 94111; and Hach Rose Schirripa & Cheverie LLP, 112 Madison Ave, 10th Floor, New York, NY 10016.

16. "Settlement Class Member" means each member of the Settlement Class who does not timely and validly elect to be excluded from the Settlement Class.

17. "Settlement Fund" shall be the amount paid by Celgene in settlement of the Action pursuant to Paragraph 13 of this Agreement and any income earned on amounts in the fund.

B. Stipulation to Settlement Class Certification

18. The parties to this Agreement hereby stipulate for purposes of this settlement only that the requirements of Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure are satisfied, and, subject to Court approval, the following class shall be certified for settlement purposes as to Celgene:

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

C. Approval of this Agreement, Notice, and Dismissal of Claims

19. Plaintiffs and Celgene shall use all reasonable efforts to effectuate this Agreement, including cooperating in Plaintiffs' effort to obtain the Court's approval of procedures (including the giving of class notice under Rules 23(c) and 23(e) of the Federal Rules of Civil Procedure) and to secure certification of the Settlement Class for settlement purposes and the prompt, complete, and final dismissal with prejudice of the Action as to the Released Parties.

20. Promptly after the Execution Date of this Agreement, Plaintiffs shall submit to the Court a motion for preliminary approval of the settlement. The motion shall

i. seek certification of the Settlement Class solely for settlement purposes, pursuant to Fed. R. Civ. P. 23(a) and Fed. R. Civ. P. 23(b)(3);

ii. request preliminary approval of the settlement set forth in this Settlement Agreement as fair, reasonable, and adequate;

iii. seek the appointment of Plaintiffs as representatives of the Settlement Class, and Hausfeld LLP; Block & Leviton LLP, and Hach Rose Schirripa & Cheverie LLP as Settlement Class Counsel under Fed. R. Civ. P. 23(g);

iv. seek approval, or explain that Plaintiffs will submit a separate application seeking approval of the form and method of dissemination of notice to the Settlement Class, which the parties intend to be the best notice practicable under the circumstances and which shall be given in such manner and scope as is reasonable, and consistent with the requirements of Fed. R. Civ. P. 23;

v. seek appointment of a qualified Settlement Administrator;

vi. seek appointment of Huntington Bank as a qualified Escrow Agent;

vii. stay all proceedings in the Action until the Court renders a final decision on approval of the settlement set forth in this Settlement Agreement; and

viii. attach a proposed form of order, which includes such other provisions as are typical in such orders, including: (1) setting a date for a fairness hearing, and (2) a provision that, if final approval of the settlement is not obtained, the settlement is null and void, and the parties will revert to their positions *ex ante* without prejudice to their rights, claims, or defenses.

21. If the Court preliminarily approves this Agreement, Plaintiffs shall seek entry of an order and a final judgment, the text of which shall be agreed upon by Plaintiffs and Celgene before submission to the Court:

(a) approving this Agreement and its terms as being a fair, reasonable, and adequate settlement as to the Settlement Class within the meaning of Rule 23 of the Federal Rules of Civil Procedure, and directing its consummation according to its terms;

(b) reserving to the Court exclusive jurisdiction over the settlement and this Agreement, including the administration and consummation of this settlement;

(c) attaching a record of potential members of the Settlement Class who timely and validly excluded themselves from the Settlement Class; and

(d) dismissing the Action with prejudice as to the Released Parties.

22. This Agreement shall become final only upon occurrence of the Effective Date.

D. Release and Discharge

23. Upon the occurrence of the Effective Date and in consideration of the payment by Celgene of the Settlement Amount, the Releasing Parties shall be deemed to and do hereby completely, finally and forever release, acquit, and discharge the Released Parties from any and all claims, counterclaims, demands, actions, potential actions, suits, and causes of action, losses, obligations, damages, matters and issues of any kind or nature whatsoever, and liabilities of any nature, including without limitation claims for costs, expenses, penalties, and attorneys' fees, whether class, individual, or otherwise, that the Releasing Parties, or any of them, ever had or now has directly, representatively, derivatively or in any other capacity against any of the Released Parties, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, accrued or unaccrued, matured or unmatured, disclosed or undisclosed, apparent or unapparent, liquidated or unliquidated, or claims that have been, could have been, or in the future might be asserted in law or equity, on account of or arising out of or resulting from or in any way related to any conduct regardless of where it occurred at any time prior to the Effective Date concerning the purchase, reimbursement for and/or payment for some or all of the purchase price for Thalomid or Revlimid in any form, including without limitation, claims based in whole or in part on the facts, occurrences, transactions, or other matters alleged in the Action, or otherwise the subject of the Action, which arise under any antitrust, unfair competition, unfair practices, price discrimination, unitary pricing, trade practice, consumer protection, unjust enrichment, civil conspiracy law, or any other law, code, rule, or regulation of any country or jurisdiction worldwide, including under federal or state law, and regardless of the type or amount of damages claimed, from the beginning of time through the Effective Date (the "Released Claims"). However, nothing herein

shall release any claims for product liability, breach of warranty, breach of contract, or tort of any kind (other than a breach of contract, breach of warranty or tort based on any factual predicate in this Action), a claim arising out of violation of Uniform Commercial Code, or personal or bodily injury.

24. The Releasing Parties hereby covenant and agree that they shall not, hereafter, sue or otherwise seek to establish liability against any of the Released Parties based, in whole or in part, upon any of the Released Claims.

25. In addition, the Releasing Parties hereby expressly waive and release any and all provisions, rights, benefits conferred by § 1542 of the California Civil Code, which reads:

> **Section 1542. General Release--Claims Extinguished. A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.**

or by any law of any state or territory of the United States or other jurisdiction, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. The Releasing Parties may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are the subject matter of this Paragraph, but the Releasing Parties hereby expressly waive and fully, finally and forever settle and release any known or unknown, suspected or unsuspected, accrued or unaccrued, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of any such additional or different facts. The parties acknowledge that the foregoing waiver was separately bargained for and is a key and integral element of the Agreement of which the release is a part.

26. In addition, no Plaintiff shall, directly or indirectly, provide assistance, support, advice, or information to any person or entity asserting, considering asserting, or seeking to assert claims against Celgene based on or related to the Released Claims. No Plaintiff will cause or release any agent, employee, or contractor retained by any Plaintiff in connection with the Action to assist or cooperate with any person or entity asserting, considering asserting, or seeking to assert claims against Celgene based on or related to the Released Claims or grant any waivers with respect to any such assistance or cooperation, and shall not release any attorney who represented any Plaintiff in the Action from maintaining the confidentiality of non-public information to which such attorney had access in connection with the Action or grant any waivers with respect to such maintenance unless so ordered by the Court or compelled by law. Nothing in this Paragraph shall be read to conflict with the provisions of New Jersey Rule of Professional Conduct 5.6.

E. Payments

27. Within thirty (30) calendar days of the Execution Date, Celgene shall pay or cause to be paid the Settlement Amount by wire transfer into an Escrow Account established pursuant to the terms and conditions set forth in an escrow agreement to be entered into with Huntington Bank as Escrow Agent, subject to the approval of Plaintiffs and Celgene. The Escrow Account shall be administered in accordance with the provisions of this Agreement.

28. Settlement Class Counsel may at an appropriate time submit a motion seeking approval of the payment of attorneys' fees and expenses, and incentive awards from the Settlement Fund. Celgene shall take no position on any motion by Settlement Class Counsel seeking approval of payment of attorneys' fees, expenses, or incentive awards, from the

Settlement Fund. Celgene shall have no obligation to pay any amount of Settlement Class Counsel's attorneys' fees, expenses, or incentive awards.

F. Settlement Fund

29. The Settlement Fund is intended by the parties to this Agreement to be treated as a "qualified settlement fund" for federal income tax purposes pursuant to Treas. Reg. § 1.468B-1, and to that end the parties to this Agreement shall cooperate with each other and shall not take a position in any filing or before any tax authority that is inconsistent with such treatment. At the request of Celgene, a "relation back election" as described in Treas. Reg. § 1.468B-1(j) shall be made so as to enable the Settlement Fund to be treated as a qualified settlement fund from the earliest date possible, and the parties shall take all actions as may be necessary or appropriate to this end.

30. To the extent practicable, the Settlement Fund shall be invested in short-term instruments backed by the full faith and credit of the United States Government or fully insured by the United States Government or any agency thereof, or money market funds invested substantially in such instruments, and shall reinvest any income from these instruments and the proceeds from these instruments as they mature in similar instruments at their then current rates. All interest and income earned on the Settlement Fund or any portion thereof shall become and remain part of the Settlement Fund.

31. Celgene shall not have any responsibility, financial obligation, or liability whatsoever with respect to the investment, distribution, or administration of the Settlement Fund, including, but not limited to, the costs and expenses of such investment, distribution and administration, except as expressly otherwise provided in this Agreement.

32. All costs associated with the Settlement Class notification and claims administration process shall be paid out of the Settlement Fund.

33. Subject to Court approval, Plaintiffs and Settlement Class Counsel shall be reimbursed and paid solely out of the Settlement Fund for all expenses and claims including, but not limited to, attorneys' fees and past, current, or future litigation expenses. Attorneys' fees and expenses awarded by the Court shall be payable from the Settlement Fund upon award, notwithstanding the existence of any timely-filed objections thereto, or potential for appeal therefrom, or collateral attack on the settlement or any part thereof, subject to Settlement Class Counsel's obligation to make appropriate refunds or repayments to the Settlement Fund, if and when, as a result of any appeal and/or further proceedings on remand, or successful collateral attack, the fee or cost award is reduced or reversed. Celgene shall not be liable for any costs, fees, or expenses of any of Plaintiffs' respective attorneys, experts, advisors, agents, or representatives, but all such costs, fees, and expenses as approved by the Court may be paid out of the Settlement Fund.

G. Rescission of the Agreement

34. If the Court refuses to approve this Agreement or any part hereof, or if such approval is modified or set aside on appeal, or if the Court does not enter the final judgment provided for in Paragraph 21 of this Agreement, or if the Court enters the final judgment and appellate review is sought and, on such review, such final judgment is not affirmed, then Celgene and the Plaintiffs shall each, in their sole discretion, have the option to rescind this Agreement in its entirety with ten (10) calendar days of the action giving rise to such option.

35. In the event of rescission, if final approval of this Agreement is not obtained, or if the Court does not enter the final judgment provided for in Paragraph 21 of this Agreement,

Plaintiffs and Celgene agree that this Agreement, including its exhibits, and any and all negotiations, documents, information and discussions associated with it shall be without prejudice to the rights of Celgene and shall not be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing, or of the truth of any of the claims or allegations made in this Action in any pleading.

H. Taxes

36. Plaintiffs shall be solely responsible for filing all informational and other tax returns necessary to report any net taxable income earned by the Settlement Fund or any portions thereof and shall file all informational and other tax returns necessary to report any income earned by the Settlement Fund or any portions thereof and shall be solely responsible for taking out of the Settlement Fund or any portions thereof, as and when legally required, any tax payments, including interest and penalties due on income earned by the Settlement Fund or any portions thereof. All taxes (including any interest and penalties) due with respect to the income earned by the Settlement Fund or any portions thereof, and all expenses incurred in connection with filing tax returns, shall be paid from the Settlement Fund.

J. Miscellaneous

37. Celgene and its present and future directors, officers, and employees, Plaintiffs, and each Class Member hereby submit to the exclusive jurisdiction of the United States District Court for the District of New Jersey solely for the purpose of any suit, action, proceeding or dispute arising out of or relating to this Agreement or the applicability of this Agreement.

38. This Agreement contains an entire, complete, and integrated statement of each and every term and provision agreed to by and between the parties hereto with respect to the subject matter of this Agreement.

39. The parties shall maintain the terms of this Agreement as confidential until such time as Plaintiffs move for preliminary approval of the settlement.

40. This Agreement may be modified or amended only by a writing executed by Plaintiffs' counsel and Celgene or Celgene's Counsel and, after the Preliminary Approval Date, with approval by the Court.

41. Neither this Agreement nor any negotiations or proceedings connected with it shall be deemed or construed to be an admission by any party to this Agreement or any Released Party or evidence of any fact or matter in this Action or in any related actions or proceedings, and evidence thereof shall not be discoverable or used, directly or indirectly, in any way, except in a proceeding to interpret or enforce this Agreement.

42. Neither Celgene nor Plaintiffs shall be considered to be the drafter of this Agreement or any of its provisions for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Agreement.

43. This Agreement shall be construed and interpreted to effectuate the intent of the parties which is to provide, through this Agreement, for a complete resolution of the Released Claims with respect to the Released Parties.

44. Nothing expressed or implied in this Agreement is intended to or shall be construed to confer upon or give any person or entity other than Settlement Class Members, Releasing Parties, and Released Parties any right or remedy under or by reason of this Agreement.

45. The undersigned counsel for Plaintiffs warrant that all of the named Plaintiffs in the Action are parties to this Settlement Agreement even if one or more of them is mistakenly

identified in this Settlement Agreement by an incorrect name.

46. This Agreement shall be binding upon, and inure to the benefit of, the Releasing Parties and the Released Parties.

47. If any provision of this Agreement is found by a court of competent jurisdiction to be illegal, invalid or unenforceable for any reason, the remainder of this Agreement will not be affected, and, in lieu of each provision that is found illegal, invalid or unenforceable, a provision will be added as a part of this Agreement that is as similar to the illegal, invalid or unenforceable provision as may be legal, valid and enforceable.

48. All terms of this Agreement shall be governed and interpreted according to the substantive laws of the State of New Jersey without regard to its choice of law or conflict of laws principles.

49. This Agreement may be executed in counterparts by counsel for Plaintiffs and Celgene, and a facsimile signature shall be deemed an original signature for purposes of executing this Agreement.

50. Each of the undersigned attorneys represents that he or she is fully authorized to enter into the terms and conditions of and to execute this Agreement, subject to Court approval.

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Settlement Class Counsel

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725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Counsel for Celgene Corporation

ATTACHMENT A

Accountable Care Options, LLC, c/o MSP Recovery Claims, Series LLC
Aetna, Inc.
Aetna, Inc. Self-Funded Groups
All Savers Insurance Company
All Savers Life Insurance Company of California
AmeriChoice of New Jersey, Inc.
AMERIGROUP Community Care of New Mexico, Inc.
AMERIGROUP District of Columbia, Inc.
AMERIGROUP Florida, Inc.
AMERIGROUP Insurance Company (TX)
AMERIGROUP Iowa, Inc.
AMERIGROUP IPA of New York, LLC
AMERIGROUP Kansas, Inc.
AMERIGROUP Louisiana, Inc.
AMERIGROUP Maryland, Inc.
AMERIGROUP Nevada, Inc.
AMERIGROUP New Jersey, Inc.
AMERIGROUP Partnership Plan, LLC
AMERIGROUP Tennessee, Inc.
AMERIGROUP Texas, Inc.
AMERIGROUP Washington, Inc.
AMGP Georgia Managed Care Company, Inc.
Anthem Blue Cross Life and Health Insurance Company
Anthem Health Plans, Inc.
Anthem Health Plans of Kentucky, Inc.
Anthem Health Plans of Maine, Inc.
Anthem Health Plans of New Hampshire, Inc.
Anthem Health Plans of Virginia, Inc.
Anthem, Inc.
Anthem, Inc. Self-Funded Group
Anthem Insurance Companies, Inc.
Anthem Kentucky Managed Care Plan, Inc.
Arizona Physicians IPA, Inc.
ATH Holding Company, LLC
AvMed, Inc., c/o MSP Recovery Claims, Series LLC
Better Health, Inc.
Blue Cross and Blue Shield Association
Blue Cross and Blue Shield of Florida, Inc.
Blue Cross and Blue Shield of Florida, Inc. Self-Funded Groups
Blue Cross and Blue Shield of Georgia, Inc.
Blue Cross and Blue Shield of North Carolina
Blue Cross and Blue Shield of North Carolina Self-Funded Groups
Blue Cross and Blue Shield of Rhode Island
Blue Cross and Blue Shield of Rhode Island Self-Funded Groups
Blue Cross and Blue Shield of Vermont
Blue Cross and Blue Shield of Vermont Self-Funded Groups

Blue Cross Blue Shield Healthcare Plan of Georgia, Inc.
Blue Cross Blue Shield of Kansas City
Blue Cross Blue Shield of Kansas City Self-Funded Groups
Blue Cross Blue Shield of Massachusetts
Blue Cross Blue Shield of Massachusetts Self-Funded Groups
Blue Cross Blue Shield of Minnesota
Blue Cross Blue Shield of Minnesota Self-Funded Groups
Blue Cross Blue Shield of Tennessee, Inc.
Blue Cross Blue Shield of Tennessee, Inc. Self-Funded Groups
Blue Cross Blue Shield of Wisconsin
Blue Cross of California
Blue Cross of California Partnership Plan, Inc.
Blue Shield of California
Blue Shield of California Self-Funded Groups
Biocon Limited
Broward Primary Partners, LLC, c/o MSP Recovery Claims, Series LLC
CareFirst BlueChoice, Inc.
CareFirst of Maryland, Inc.
CareFirst of Maryland, Inc. BlueChoice Self-Funded Groups
Care Improvement Plus of Texas Insurance Company
Care Improvement Plus South Central Insurance Company
Care Improvement Plus Wisconsin Insurance Company
CareMore Health Plan
CareMore Health Plan of Nevada
CareMore, LLC
Centene Corporation
CFA, LLC
Cigna Health and Life Insurance Company
Cigna Health and Life Insurance Company Self-Funded Groups
Clinica Las Mercedes, c/o MSP Recovery Claims, Series LLC
Communuty Health Providers, Inc., c/o MSP Recovery Claims, Series LLC
Community Insurance Company
Compcare Health Services Insurance Corporation
Dental Benefit Providers of California, Inc.
Dental Benefit Providers of Illinois, Inc.
EmblemHealth
EmblemHealth Self-Funded Groups
Empire HealthChoice Assurance, Inc.
Empire HealthChoice HMO, Inc.
Fallon Community Health Plan, Inc., c/o MSP Recovery Claims, Series LLC
Family Physicians Group, Inc. d/b/a Family Physicians of Winter Park, Inc., co/o MSP Recovery Claims, Series LLC
Golden Rule Insurance Company
Government Employees Health Association
Group Health Inc., c/o MSP Recovery Claims, Series LLC
Group Hospitalization and Medical Services, Inc.

Harken Health Insurance Company
Harvard Pilgrim Health Care, Inc.
Harvard Pilgrim Health Care, Inc. Self-Funded Groups
Hawaii Medical Service Association
Hawaii Medical Service Association Self-Funded Groups
Health Care Advisor Services, Inc., c/o MSP Recovery Claims Series LLC
Health Care Service Corporation
Health Care Service Corporation Self-Funded Groups
Health First Health Plans, Inc., c/o MSP Recovery Claims, Series LLC
Health Insurance Plan of Greater NY, c/o MSP Recovery Claims, Series LLC
HealthKeepers, Inc.
HealthPartners, Inc.
HealthPartners, Inc. Self-Funded Groups
Health Plan of Nevada, Inc.
HealthPlus, LLC
HealthSun Health Plans, Inc.
Healthy Alliance Life Insurance Company
Highmark Blue Cross Blue Shield
HMO Colorado, Inc.
HMO Missouri, Inc.
Horizon Blue Cross Blue Shield of New Jersey
Humana, Inc.
Humana, Inc. Self-Funded Groups
Hygea Health Holdings, Inc., c/o MSP Recovery Claims, Series LLC
Independent Health
Interamerican Medical Center Group LLC, c/o MSP Recovery Claims, Series LLC
MAMSI Life and Health Insurance Company
Matthew Thornton Health Plan, Inc.
MCCI Group Holdings, LLC, c/o MSP Recovery Claims, Series LLC
MD-Individual Practice Association, Inc.
Medica HealthCare Plans, Inc.
Medica Health Plans of Florida, Inc.
Medical Consultants Management, LLC, c/o MSP Recovery Claims, Series LLC
Medical IPA of the Palm Beaches, Inc., c/o MSP Recovery Claims, Series LLC
Medical Mutual
MVP Health Care
MVP Health Care Self-Funded Groups
National Pacific Dental, Inc.
Neighborhood Health Partnership, Inc.
Nevada Pacific Dental
Optimum Choice, Inc.
Optum360 Services, Inc.
OptumRx Group Holdings, Inc.
OptumRx, Inc.
Oxford Health Insurance, Inc.
Oxford Health Plans (CT), Inc.

Oxford Health Plans (NJ), Inc.
Oxford Health Plans (NY), Inc.
PacifiCare Life Assurance Company
PacifiCare Life and Health Insurance Company
PacifiCare of Arizona, Inc.
PacifiCare of Colorado, Inc.
PacifiCare of Nevada, Inc.
Peninsula Heath Care, Inc.
Peoples Health, Inc.
Physician Access Urgent Care Group, LLC, c/o MSP Recovery Claims, Series LLC
Physicians Health Choice of Texas, LLC
Priority Health Care, Inc.
Preferred Care Partners, Inc.
Preferred Medical Plan, Inc., c/o MSP Recovery Claims, Series LLC
Preferred Primary Care, LLC, c/o MSP Recovery Claims, Series LLC
Premera Blue Cross
Premera Blue Cross Self-Funded Groups
Priority Health
Priority Heath Self-Funded Groups
Professional Health Choice, Inc., c/o MSP Recovery Claims, Series LLC
Risk Watchers, Inc., c/o MSP Recovery Claims, Series LLC
Rocky Mountain HealthCare Options, Inc.
Rocky Mountain Health Maintenance Organization, Incorporated
Rocky Mountain Hospital and Medical Service, Inc.
Sierra Health and Life Insurance Company, Inc.
Simply Healthcare Plans, Inc.
Symphonix Health Insurance, Inc.
Transatlantic Healthcare, LLC, c/o MSP Recovery Claims, Series LLC
Trinity Physicians, LLC, c/o MSP Recovery Claims, Series LLC
Tufts Associated Health Plans, Inc.
Tufts Associated Health Plans, Inc. Self-Funded Groups
UHC of California
UNICARE Health Insurance Company of Texas
UNICARE Health Insurance Company of the Midwest
UNICARE Health Plan of Kansas, Inc.
UNICARE Health Plan of West Virginia, Inc.
UNICARE Health Plans of Texas, Inc.
UNICARE Health Plans of the Midwest, Inc.
Unimerica Life Insurance Company of New York
Unison Health Plans of Delaware, Inc.
United HealthCare Services, Inc.
UnitedHealth Group Incorporated / Optum360 Services, Inc.
UnitedHealthcare Benefits of Texas, Inc.
UnitedHealthcare Benefits Plan of California
UnitedHealthcare Community Plan, Inc.
UnitedHealthcare Community Plan of California, Inc.

UnitedHealthcare Community Plan of Georgia, Inc.
UnitedHealthcare Community Plan of Ohio, Inc.
UnitedHealthcare Community Plan of Texas, Inc.
UnitedHealthcare Insurance Company
UnitedHealthcare Insurance Company of Illinois
UnitedHealthcare Insurance Company of New York
UnitedHealthcare Insurance Company of the River Valley
UnitedHealthcare Insurance Designated Activity Company
UnitedHealthcare Integrated Services, Inc.
UnitedHealthcare Life Insurance Company
UnitedHealthcare of Alabama, Inc.
UnitedHealthcare of Arizona, Inc.
UnitedHealthcare of Arkansas, Inc.
UnitedHealthcare of Colorado, Inc.
UnitedHealthcare of Florida, Inc.
UnitedHealthcare of Georgia, Inc.
UnitedHealthcare of Illinois, Inc.
UnitedHealthcare of Kentucky, Ltd.
UnitedHealthcare of Louisiana, Inc.
UnitedHealthcare of Mississippi, Inc.
UnitedHealthcare of New England, Inc.
UnitedHealthcare of New Mexico, Inc.
UnitedHealthcare of New York, Inc.
UnitedHealthcare of North Carolina, Inc.
UnitedHealthcare of Ohio, Inc.
UnitedHealthcare of Oklahoma, Inc.
UnitedHealthcare of Pennsylvania, Inc.
UnitedHealthcare of Texas, Inc.
UnitedHealthcare of the Mid-Atlantic, Inc.
UnitedHealthcare of the Midlands, Inc.
UnitedHealthcare of the Midwest, Inc.
UnitedHealthcare of Utah, Inc.
UnitedHealthcare of Washington, Inc.
UnitedHealthcare of Wisconsin, Inc.
UnitedHealthcare Plan of the River Valley, Inc.
USAble Mutual Insurance Company d/b/a Arkansas Blue Cross and Blue Shield
Verimed IPA, LLC, c/o MSP Recovery Claims, Series LLC
Vidamax Medical Center (Fictious name) for St. Jude Medical Group Corp., c/o MSP Recovery Claims, Series LLC
WellCare Health Plans, Inc.
WellCare Health Plans, Inc. Self-Funded Groups
Wellmark Blue Cross and Blue Shield
Wisconsin Collaborative Insurance Company

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

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

[PROPOSED] ORDER GRANTING
PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Upon consideration of Plaintiffs' Unopposed Motion for Preliminary Approval of Proposed Settlement (the "Motion") with Celgene Corporation ("Celgene") and for certification of the Settlement Class (defined below), it is hereby **ORDERED** as follows:

1. The Motion is hereby **GRANTED**.

Unless otherwise set forth herein, defined terms in this Order shall have the same meaning ascribed to them in the March 30, 2020 settlement agreement between Plaintiffs and Celgene (hereinafter, the "Settlement Agreement").

Preliminary Approval of Settlement Agreement

2. The terms of the Settlement Agreement are hereby preliminarily approved, including the releases contained therein, as being fair, reasonable, and adequate to the Settlement Class, subject to a Fairness Hearing. The Court finds that

the Settlement Agreement was entered into as a result of arm's-length negotiations by experienced counsel, with the assistance of an experienced mediator, and is sufficiently within the range of reasonableness that notice of the Settlement Agreement should be given to members of the proposed Settlement Class, pursuant to a plan Plaintiffs will soon submit to the Court, subject to approval of the Court.

Class Certification

3. Pursuant to Fed. R. Civ. P. 23 ("Rule 23"), and to facilitate the proposed settlement, the Court hereby finds that the prerequisites for a class action have been met, and it will likely be able to certify the following class (the "Settlement Class") for settlement purposes after the Fairness Hearing:

> All persons or entities who purchased and/or paid for some or all of the purchase price of Thalomid or Revlimid in any form, before _____, 2020, [the Preliminary Approval Date] in California, the District of Columbia, Florida, Kansas, Maine, Massachusetts, Michigan, Nebraska, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, or Tennessee, for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries, but excluding the following:
>
> a. Celgene and its officers, directors, management, employees, subsidiaries, or affiliates;
>
> b. All federal or state governmental entities, except cities, towns, or municipalities with self-funded prescription drugs plans;
>
> c. All persons or entities who only purchased Revlimid or Thalomid for purposes of resale directly from Celgene or its affiliates;

d. The entities listed on Attachment A to the Settlement Agreement;

e. Fully insured health plans;

f. Stop-loss insurers; and

g. The judges in this case and any members of their immediate families.

4. The Court finds that certification of the Settlement Class is likely warranted because: (a) the Settlement Class is so numerous that joinder is impracticable; (b) Plaintiffs' claims present common issues and are typical of the Settlement Class; (c) Plaintiffs and Interim Co-Lead Counsel will fairly and adequately represent the Settlement Class; and (d) common issues predominate over any individual issues affecting the members of the Settlement Class. The Court further finds that Plaintiffs' interests are aligned with the interests of all other members of the Settlement Class. The Court also finds settlement of this action on a class basis superior to other means of resolving the matter.

Appointment of Class Representatives, Settlement Class Counsel and Escrow Agent

5. The Court hereby appoints Plaintiffs International Union of Bricklayers and Allied Craft Workers Local 1 Health Fund, the City of Providence, International Union of Operating Engineers Local 39 Health and Welfare Trust Fund, The Detectives' Endowment Association, New England Carpenters Health Benefits Fund, and David Mitchell as class representatives on behalf of the Settlement Class.

6. Pursuant to Rules 23(c)(l)(B) and 23(g), having considered the factors provided in Rule 23(g)(1)(A), the Court appoints Co-Lead Counsel—Hach Rose Schirripa & Cheverie LLP, Hausfeld LLP, and Block & Leviton LLP—as Settlement Class Counsel.

7. The Court hereby appoints Huntington National Bank as the Escrow Agent for the Settlement.

Fairness Hearing

8. Following notice to members of the Settlement Class, the Court shall conduct a Fairness Hearing, the date for which will be set following approval of Plaintiffs' plan for notice, to determine:

a. Whether the proposed settlement is fair, reasonable, and adequate, and should be granted final approval;

b. Whether final judgment should be entered dismissing the claims of the Settlement Class against Defendant with prejudice as required by the Settlement Agreement; and

c. Such other matters as the Court may deem appropriate.

Other Provisions

9. Any member of the Settlement Class who does not properly and timely request exclusion from the Settlement Class shall, upon final approval of the settlement, be bound by the terms and provisions of the Settlement Agreement,

whether or not such person or entity objected to the settlement and whether or not such person or entity makes a claim upon the Settlement Fund.

10. In the event that the Settlement Agreement is terminated in accordance with its provisions, the Settlement Agreement and all proceedings had in connection therewith shall be null and void, except insofar as expressly provided to the contrary in the Settlement Agreement, and without prejudice to the status quo and rights of Plaintiffs, the members of the Settlement Class, and Celgene.

11. The Court approves the establishment of the Settlement Fund pursuant to the Settlement Agreement as a qualified settlement fund ("QSF") pursuant to Internal Revenue Code Section 468B and the Treasury Regulations promulgated thereunder, and retains continuing jurisdiction as to any issue that may arise in connection with the formation and/or administration of the QSF. Interim Co-Lead Counsel are, in accordance with the Settlement Agreement, authorized to expend funds from the QSF to the extent necessary for the payment of the costs of notice, payment of taxes, and settlement administration costs.

12. The litigation against Defendant is stayed except to the extent necessary to effectuate the settlement. All deadlines previously set by the Court are hereby vacated.

13. The Court retains exclusive jurisdiction over this action to consider all further matters arising out of or connected with the Settlement Agreement, except as explicitly agreed otherwise by the parties in the Settlement Agreement.

IT IS SO ORDERED this __ day of _____, 2020.

_____
U.S.D.J.

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

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

CERTIFICATE OF SERVICE

I, Katie R. Beran, counsel for Plaintiffs, do hereby certify that Plaintiffs filed and served on all counsel electronically via the Court's CM/ECF system the following:

- Unopposed Motion for Preliminary Approval of Proposed Settlement;
- Memorandum of Law in Support;
- Declaration of Melinda R. Coolidge and accompanying exhibit; and
- Proposed Order.

Date: April 3, 2020

/s/ Katie R. Beran
Katie R. Beran