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

HIGHLY CONFIDENTIAL-TO BE FILED UNDER SEAL
SUBJECT TO PROTECTIVE ORDER

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

CLASS PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

Plaintiffs submit this memorandum in support of their renewed motion for class certification. In its October 30, 2018 Opinion on class certification, this Court found that: (1) Plaintiffs satisfied the requirements of Rule 23(a);[1] (2) a class action would be superior to alternative methods of adjudication;[2] and (3) Plaintiffs may present classwide proof of aggregate damages at trial.[3] The Court rejected all but one of Celgene's Rule 23(b)(3) predominance arguments (identification of brand loyalists)[4] and similarly rejected all but one of Celgene's ascertainability arguments (identification of consumers with a flat copay for the purpose of exclusion).

Plaintiffs address the issues raised by the Court by providing further support to certify the classes as originally proposed, while also providing one alternative class definition that minimizes,[5] and another that eliminates,[6] these concerns. As a threshold matter, none of the issues raised by the Court impact the certification of a subset of the originally proposed Damages Classes – *i.e.,* a class composed only of third party payors (the "entities" in the original class definition). Thus, Plaintiffs respectfully submit that at a minimum, a third party payor class should be certified.

With regard to brand loyalists, Plaintiffs provide further support for the originally proposed classes (in that all consumers suffered antitrust injury through lack of choice, and most brand

---

[1] Op. at 15-20 (finding that numerosity, commonality, typicality, and adequacy were met).
[2] Op. at 37-38.
[3] Op. at 30.
[4] "'The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:49, 195–196 (5th ed. 2012)).
[5] The alternative Consumer Delay Damages Classes discussed at Section II.B.5 push back the class period for consumers to minimize the likelihood that a consumer purchased only branded Thalomid or Revlimid.
[6] The alternative Third Party Payor Damages Classes discussed at Section II.A include only "entities" that paid some or all of the purchase price of Thalomid or Revlimid for their members, insureds, etc. (excluding all flat-copayers and all brand loyalists by excluding all consumers).

purchases after generic entry are the result of distribution issues, not true brand-preferent consumers). In the alternative, Plaintiffs offer two other responses with solutions: (1) the class period could start later in time for consumers in order to ensure that the number of brand loyalists is indisputably *de minimis* (less than 2.5%) (*see* Section II.B.5);[7] or (2) certify a class limited to entities (third party payors) to remove all consumers from the class, so that no brand loyalists need to be identified (*see* Section II.A).

With respect to the flat copay issue, Plaintiffs offer two solutions: (1) remove the exclusion so that any consumers with flat copays become class members (making all consumers who paid for Thalomid or Revlimid class members), because they are *de minimis*, were injured by lack of choice, and would be bound by any judgment, eliminating any due process concerns (*see* Section II.B.2); or (2) certify a class limited to entities (third party payors) to remove all consumers from the class, so that no flat copayers need to be identified (*see* Section II.A).

Further, in response to this Court's reasoning regarding Plaintiffs' state law consumer protection claims, Plaintiffs voluntarily withdraw Count III of their Consolidated Amended Complaint and propose certifying an Antitrust Damages Class that is solely composed of Plaintiffs' state law antitrust claims (Counts I and II). As conceded by Celgene, because state antitrust laws mirror the Sherman Act, they are generally uniform across jurisdictions, effectively neutralizing any concern over material variations in the applicable state laws. *See* Section II.C.[8]

Finally, Plaintiffs provide a comprehensive analysis of the Rule 23(b)(2) requirements warranting certification of the Injunction Class, and offer proposed solutions regarding the potential

[7] Unlike consumers with flat copays (who must simply be defined as in or out of the class), the percentage of so-called brand loyalists can be tailored to any percentage of the class less than 10% by adjusting the class period for consumers.

[8] This Court has already found that there are no material variations in Plaintiffs' state law unjust enrichment claims that would preclude a finding of predominance. Op. at 33.

preclusive effect of an Injunction Class on those class members' damages claims. *See* Section II.D.

Plaintiffs seek recourse through this class action and offer the alternative class definitions described herein because it is in the interest of justice to ensure that someone, rather than no one, receive compensation for Celgene's wrongdoing. *See Byrd v. Aaron's Inc.,* 784 F.3d 154, 176 (3d Cir. 2015) (Rendell, J., concurring) (policy goals of class actions are to ensure compensation of at least some of the injured and deterrence of wrongdoing). Following Plaintiffs' initial motion for class certification, FDA Commissioner Scott Gottlieb has spoken out against branded drug companies "gam[ing] the system… to delay generic approval – and thereby extend a drug's monopoly beyond what Congress intended."[9] He specifically railed against companies (like Celgene) using REMS to prevent generic firms from obtaining samples, thereby "upend[ing] the generic drug framework created by Hatch Waxman."[10] Indeed, he announced that the FDA was "making public a list of companies… that have potentially been blocking access to the samples of their branded products."[11] Celgene leads the pack.[12] Celgene's experts respond to these statements by testifying that Dr. Gottlieb's statements were "political messaging"[13] [redacted] Celgene has indeed maximized its profits through its misconduct, causing the Damages Classes to pay *billions* more for

[9] *Remarks by Dr. Gottlieb at the FTC*, Speech by Scott Gottlieb, M.D., Commissioner of the Food and Drug Administration (Nov. 8, 2017), https://www.fda.gov/newsevents/speeches/ucm584195.htm.
[10] *See id.* ("Branded companies' use of REMS – which FDA adopts as a way to ensure the safe use of certain drugs – is also sometimes being used as a way to frustrate the ability of generic firms to purchase the doses of a branded drug that they need to run their studies. This needs to stop.")
[11] *Statement from FDA Commissioner Scott Gottlieb, M.D., on new agency efforts to shine light on situations where drug makers may be pursuing gaming tactics to delay generic competition*, FDA Statement, (May 17, 2018), https://www.fda.gov/newsevents/newsroom/pressannouncements/ucm607930.htm.
[12] *See Reference Listed Drug (RLD) Access Inquiries,* FDA (Aug. 13, 2018), https://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/AbbreviatedNewDrugApplicationANDAGenerics/ucm607738.htm.
[13] Ex. 128, Deposition of Dr. Burlington (Oct. 12, 2018), 173:23-25
[14] Ex. 129, Deposition of Dr. Nicholson (Oct. 15, 2018), 63:17-66:19.

Thalomid and Revlimid than they would have in a competitive market.

II. ARGUMENT

A. At a Minimum, the Court's Previous Findings Support Certification of a Class of Third Party Payors (a Subset of the Original Class that by Excluding All Consumers, Excludes All Brand Loyalists and Flat Copayers)

Plaintiffs respectfully submit that the Court's opinion on class certification has already made all findings necessary to certify a class of third party payors. By definition, such a class excludes all brand loyalists and flat copayers by excluding all consumers. An Antitrust Third Party Payor Damages Class would be defined as:

> All entities that purchased and/or paid for some or all of the purchase price for thalidomide in any form after November 6, 2010 or lenalidomide in any form after December 28, 2012, in California, Florida, Kansas, Maine, Massachusetts, Michigan, Nebraska, New York, North Carolina, Oregon, Rhode Island, or Tennessee, for consumption by their members, employees, insureds, participants, or beneficiaries.[15]

The requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy) would still be met. *See* Op. at 15-20. The pharmacy data that Plaintiffs obtained in discovery shows that more than 100 third party payors paid for some or all of the price of Thalomid and Revlimid during the class period (sufficient to meet the numerosity requirement). "A putative class satisfies Rule 23(a)'s commonality requirement if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 408-09 (3d Cir. 2015). As a subset of the original classes, a class consisting of only third party payors retains its commonality with many common questions, for example:

- Whether Celgene refused to sell samples of Thalomid or Revlimid to potential competitors to prevent generic entry;
- Whether Celgene's conduct prevented generic competition (and thus lower prices) for Thalomid and Revlimid; and,
- When generic Thalomid and Revlimid would have been available for purchase in the United

[15] The Unjust Enrichment Third Party Payor Class would be the same, with the addition of Pennsylvania. The exclusions are listed in Ex. 130.

States, absent Celgene's conduct.

"Because the requirement may be satisfied by a single common issue, it is easily met." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994).

"The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Baby Neal*, 43 F.3d at 57 (citations omitted). David Mitchell would not be a member of the Antitrust Third Party Payor Class (or the Unjust Enrichment Third Party Payor Class), and thus would not serve as a class representative.[16] The other named plaintiffs would remain class representatives, and their claims would still be typical of the class and aligned with absent class members.

As a subset of the original named plaintiffs (and the same attorneys), the requirements that the class representatives and class counsel must "fairly and adequately protect the interests of the class" are still met. Fed. R. Civ. P. 23(a)(4). Further, the Third Circuit's ascertainability requirements are still met. This more limited class definition (a subset of the original definition) is still defined with reference to objective criteria. Op. at 42. And Plaintiffs would still be able to identify third party payors as the Court approved: using the substantial transaction data from pharmacies along with transaction data that the third party payors themselves can submit, in conjunction with documents showing they are not fully insured. Op. at 46.

The Court has already found that the superiority requirement of Rule 23(b)(3) (that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy") is met. Op. at 37. A class of only third party payors (with more than 100 class members) would similarly "achieve economies of time, effort, and expense, and promote… uniformity of decision

[16] Because David Mitchell is the only class representative to have purchased Revlimid in the District of Columbia, Plaintiffs would withdraw D.C. from the list of jurisdictions included in the definition.

without sacrificing procedural fairness or bringing about other undesirable results." Op. at 37 (quoting *In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 234 (E.D. Pa. 2012).

Rule 23(b)(3) "does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 469 (2013) (emphasis in original) (internal quotations omitted). To certify a class under Rule 23(b)(3), a court must find that common questions predominate. The requirement is met because every aspect of Celgene's conduct is common to the class. Celgene did not block generic Thalomid and Revlimid from coming to market only for some class members – it succeeded in preventing generic entry entirely, for all class members. And there is no dispute that generic Thalomid and Revlimid would be less expensive than Celgene's branded Thalomid and Revlimid.

Further, in a third party payor class, all or virtually all class members will have been impacted by Celgene's conduct. Expert Report of Jeffrey J. Leitzinger, Ph.D. (Oct. 2, 2017) ("Leitzinger Report") at n.64 ("The probability that a TPP would pay for a generic is 90 percent as to one prescription, 99 percent for two prescriptions and 99.9 percent for three prescriptions"). The third party payors in the class provided prescription benefits to thousands of their members/insureds, and only needed to have been impacted by *one* overcharge to have suffered economic antitrust injury. Thus, as Dr. Leitzinger explained, the chance that a third party payor avoided injury (by only insuring brand loyalists) is extremely unlikely. Leitzinger Report at ¶ 37 ("For the TPP members of the Classes who paid a large portion of the cost across multiple prescriptions, the prospect that they somehow avoided any inflated prices by coincidentally paying only for prescriptions that all fell within the small minority that would not have converted to generics in the but-for world is diminishingly small."). Celgene has never argued that any third party payor entirely escaped impact by serving only brand loyalists (nor would such a health plan be very successful). Dr. Leitzinger has provided aggregate damages calculations of $2.1 billion for the Antitrust TPP Damages Class and

$3.1 billion for the Unjust Enrichment TPP Class. Supplemental Report of Jeffrey J. Leitzinger, Ph.D. (Dec. 14, 2018) ("Leitzinger Supp.") at Ex. 3.

For these reasons, Plaintiffs respectfully submit that the Court's Opinion established that all criteria for certifying the proposed Antitrust Third Party Payor Class (and Unjust Enrichment Third Party Payor Class) have been met and therefore – at a minimum – these classes should be certified.

B. The Original Damages Classes (Including Entities and Consumers) Should Be Certified Regardless of the Potential Existence of a Small Number of Potential Brand Loyalists or Flat Copayers, Because Certification Is Consistent with the Federal Rules and Binding Law and in the Interest of Justice

But the Court need not deny consumers the opportunity to participate in this case. With the definitions originally proposed, the Court has already found that the requirements under Rule 23(a), and the superiority requirement of Rule 23(b)(3), have been met. Under Rule 23(b)(3), plaintiffs must also show that "questions common to the class" *predominate* – "not that those questions will be answered, on the merits, in favor of the class." *Amgen*, 568 U.S. at 459; *see also Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir. 1974); *McClendon v. Cont'l Grp., Inc.*, 113 F.R.D. 39, 43 (D.N.J. 1986). "Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *see also Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 299 (3d Cir. 2011). At trial, the classes will present evidence that Celgene acted to delay generic versions of Thalomid and Revlimid from coming to market. If any class member brought an individual lawsuit against Celgene, they would use this same evidence to show Celgene's liability.

Plaintiffs can demonstrate antitrust impact and injury by common proof that (1) Celgene's conduct reduced choice in the market, and (2) all class members would use a common methodology to demonstrate injury in the form of higher prices. When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3)." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting

7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, pp. 123–124 (3d ed. 2005) (footnotes omitted in *Tyson*)).

1. Common Questions Predominate Because All Consumer Class Members (Even Brand Loyalists and Flat Copayers) Are Injured by Lack of Choice

"Antitrust injuries come in two basic forms. *First*, anticompetitive conduct is injurious if it results in higher prices. *Second*, anticompetitive conduct is injurious if it limits consumer options." *Laumann v. Nat'l Hockey League*, 105 F. Supp. 3d 384, 396-97 (S.D.N.Y. 2015) (emphasis in original). Here, where every consumer was denied the choice between brand and generic Thalomid and Revlimid, *every* consumer (whether or not a "brand loyalist" or a flat copayer) was injured.

Antitrust statutes are intended to "protect[] the supply of choices on the market. . . . The conduct at issue can distort the supply of options, in the sense of imposing restrictions on the variety of prices and products that the free market would offer. The antitrust laws have therefore banned this conduct."[17] The Supreme Court has recognized that antitrust injury arises from denial of consumer choice. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (finding a horizontal agreement to restrain trade which limited "consumer choice by impeding the 'ordinary give and take of the market place'" violates the Sherman Act) (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610 (1985) (finding defendant's behavior to have precluded "consumers [from making] their own choice on these matters of quality"); *cf. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 102 (1984) (conduct is deemed procompetitive where "[defendant's] actions widen consumer choice").

The Third Circuit similarly has recognized the importance of this established principle of antitrust law. *See, e.g., United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 194 (3d Cir. 2005) ("An additional anti-competitive effect is seen in the exclusionary practice here that limits the choices of

[17] Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. Pitt. L. Rev. 503, 505 (2001) (citations omitted).

products open to . . . the ultimate users"); *United States v. Brown Univ.*, 5 F.3d 658, 675 (3d Cir. 1993) (noting that "[e]nhancement of consumer choice is a traditional objective of the antitrust laws"); *Tunis Bros. Co., v. Ford Motor Co.*, 952 F.2d 715, 728 (3d Cir. 1991) (actual anticompetitive effects can be shown through reduced output, increased prices, decreased quality, and loss of consumer choice); *Deborah Heart & Lung Ctr. v. Penn Presbyterian Med. Ctr.*, No. 11-cv-1290 (RMB) (KMW), 2011 U.S. Dist. LEXIS 149664, at *23-24 (D.N.J. Dec. 30, 2011) (collecting cases; finding plaintiff alleged meaningful competitive harms to consumer choice).

Other courts beyond the Third Circuit have followed suit. *See, e.g., Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 223 (2d Cir. 2008) (antitrust injury occurs when victims are prevented from making free choices between market alternatives) (citing, *inter alia*, *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 (1983)); *Glen Holly Entm't., Inc. v. Tektronix Inc.*, 352 F.3d 367, 374 (9th Cir. 2003) ("one form of antitrust injury is [c]oercive activity that prevents its victims from making free choices between market alternatives") (internal quotations omitted).

By preventing competitors from coming to market with generic versions of Thalomid and Revlimid, Celgene has injured members of the damages classes by depriving them of their ability to choose between brand and generic versions of those drugs. This deprivation of choice impacts *all* class members (there can be no "brand loyalists" where, due to Celgene's unlawful conduct, there is *no alternative to the brand product*). *See Nat'l Hockey League*, 105 F. Supp. 3d at 400 (certifying class when some consumer class members might have chosen a more expensive option because a "common injury exists in the form of diminished consumer choice").

2. The *De Minimis* Number of Individuals with a Flat Copay Does Not Defeat Certification of a Class Including Consumers

In its Opinion, the Court stated that, "[o]n any renewed motion, Plaintiffs are directed to demonstrate that the excluded, flat copay members of the class can be identified using the proposed records" to show that the class is ascertainable. Op. at 46 (addressing whether there was an

"administratively feasible method for determining class membership"). The Court was "not satisfied… that the proposed methodology [of reviewing individual consumers' documents to identify flat copays] will prove effective." Op. at 45-46.

Plaintiffs are unaware of any one database that would contain the answer as to whether particular consumers have flat copays; determining whether a consumer has a flat copay (to exclude them from the class) would almost certainly entail some review of that consumer's documentation.[18] One option to avoid that review is to remove the flat copay exclusion entirely, thereby including all consumers that paid for Thalomid or Revlimid in the class, which eliminates all ascertainability issues. Because flat copayers have been denied the choice between a generic and a brand, these flat copay consumers are injured under antitrust laws (even though they would not have paid less in the but-for world). There is also substantial evidence that flat copays are uncommon (as insurers incentivize their subscribers to fill prescriptions with generics when available). Op. at 27. Indeed, Dr. Leitzinger estimates that if the exclusion is removed, the percentage of class members with flat copays is less than 4.2%. Because they did not suffer damages, including or excluding flat copayers does not alter the aggregate damages. Leitzinger Supp. at n.11.

Plaintiffs suggest that these numbers are *de minimis*, but they can be further reduced if necessary by excluding all consumers who were covered by Medicaid in California, District of Columbia, Florida, Kansas, Maine, Nebraska, North Carolina, Oregon and Rhode Island (as the Medicaid consumers in these states constitute approximately half of the class members who may have flat copays). Leitzinger Supp. at ¶¶ 11-12; *see* Ex. 130 (class definitions). Ascertaining that a consumer was covered by Medicaid in one of these states is a much simpler inquiry than reviewing

[18] *See* Plaintiffs' Mem. at 34-35, Plaintiffs' Reply Mem. at 6-7 and *infra* Section II.B.4 for reasons why this documentation should be accepted. It is possible that some class members, like David Mitchell, may have incomplete records. Op. at 45-46. But David Mitchell's records did demonstrate that he was an injured member of the class and did not pay a flat copay for *at least one purchase*.

plan documents for flat copays (similar to the straightforward determination of whether a consumer paid for Thalomid or Revlimid).

Given the small number of potential flat copay individuals, Plaintiffs submit that their existence does not pose an impediment to the certification of damages classes including consumers. Plaintiffs propose that these individuals be included in the class definition and bound by the judgment, eliminating any due process concerns through trial.[19]

3. The Potential Existence of "Brand Loyalists" Does Not Defeat Certification of a Class Including Consumers

There is no dispute in this case that brand loyalists constitute fewer than 10% of class members (when consumers are included in the classes).[20] In his Supplemental Report, Dr. Leitzinger

---

[19] As Judge Fuentes stated in *City Select*: "As to a defendant's due process rights, defendants may challenge a class member's inclusion in the class and individual damages later in the litigation." *City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc.*, 867 F.3d 434, 447 (3d Cir. 2017) (Fuentes, J., concurring) (citing *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015), *cert. denied,* 136 S. Ct. 1161 (2016) ("As long as the defendant is given the opportunity to challenge each class member's claim to recovery during the damages phase, the defendant's due process rights are protected."). He continued:

> A defendant may prefer to bring these challenges prior to class certification, long before the damages stage or the settlement claims administration stage. But a defendant does not have a due process right to the most "cost-effective" method for challenging individual claims to class membership and damages, and these challenges are more appropriately addressed after certification . . . This is particularly true in cases where the size of the class does not change the size of the potential award.

867 F.3d at 446-47, fn. 21 (internal citation omitted). "[T]he advisory committee notes to Rule 23 specifically contemplate that certification may be proper 'despite the need, if liability is found, for separate determinations of the damages suffered by individuals within the class.'" *Id.* at 447 (citing advisory committee's note to 1966 amendment); *see also Briseno v. ConAgra Foods, Inc.,* 844 F.3d 1121, 1128 (9th Cir. 2017), *cert. denied ConAgra Brands, Inc. v. Briseno,* 138 S. Ct. 313 (2017) ("The authors of Rule 23 opted not to make the potential administrative burdens of a class action dispositive and instead directed courts to balance the benefits of class adjudication against its costs.").

[20] The industry reports and academic studies on which Dr. Leitzinger relies are common to the class, and are the type of evidence of impact that has been generally accepted by courts in similar cases of generic exclusion. *See* Leitzinger Report § IV(A), "Economic Literature Pertaining to the Effects of Generic Competition." *See, e.g., In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 60, 68–69 (1st Cir. 2013) (allowing plaintiffs to use "aggregate statistical evidence" to prove that a drug company caused injury); *In re Lidoderm Antitrust Litig.*, No. 14-md-02521-WHO, 2017 WL 679367, at *10

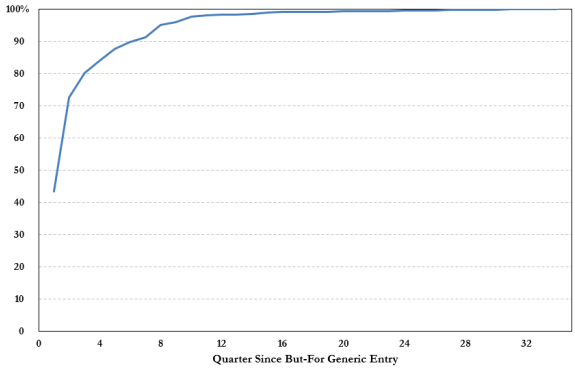
has provided his expert opinion on what the "brand loyalist" percentage actually represents, and explains that if the class period were to start later in time, the number and percentage of brand loyalists would decrease. Leitzinger Supp. at ¶¶ 2-9.

In his first report, Dr. Leitzinger used statistical evidence to estimate generic penetration rates (the rate at which prescriptions would convert from brand to generic) as shown on the left; his supplement shows it another way on the right:

Exhibit 5
But-For Generic Penetration Rate

Quarter Since Generic Entry	Penetration Rate (Percent)
(1)	(2)
1	43.3 %
2	72.4
3	80.1
4	83.9
5	87.5
6	89.7
7	91.2
8	95.0
9	95.9
10	97.5
11	97.9
12	98.2
13	98.3
14	98.5
15	98.9
16	99.0

Figure 1
But-For Generic Penetration Rate



Source: October 2017 Leitzinger Report, Exhibit 5.

Dr. Leitzinger has always excluded the estimated brand purchases from the total damages calculations. Op. at 23. In response, Celgene argued that "[i]n the absence of a method for identifying which consumers would continue to take brand Thalomid or Revlimid and which would not," certification must be denied. *Id.* First, these alleged "brand loyalists" are indeed difficult to identify by name at this stage, in part because we are talking about the "but-for" world – a world that does not exist, in which by now [redacted]

(N.D. Cal. Feb. 21, 2017) (accepting as common evidence of classwide impact Dr. Leitzinger's testimony and citations to academic and industry studies explaining that the introduction of generic drugs creates significant cost savings for consumers); *In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 221 (E.D. Pa. 2012) (accepting as classwide proof of impact historical data and academic studies detailing how the price of generic drugs decline upon market entry and with multiple entrants).

[redacted] But the records we have are from the actual world, in which Celgene has succeeded in ensuring that there are *zero* generic versions of Thalomid or Revlimid on the market. Because of Celgene's conduct, we cannot definitively identify brand loyalists, because *no one had the opportunity to become one.* These problems are not unique to this case. "The vagaries of the marketplace," the Supreme Court has explained, "usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co., v. Chrysler Motors Corp.*, 451 U.S. 557, 567 (1981). But that does not mean that the defendant should be permitted to profit by his wrongdoing at the expense of his victim. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.").

Second, while true "brand loyalists" may exist, the statistics reflecting incomplete immediate 100% conversion of the market to generics (but increasing conversion over time) suggest that distribution logistics, rather than pure "brand loyalty," is at play. With 90% generic penetration in one year, and 99% penetration in four years, "it makes more sense… to understand that part of the market to reflect improving distribution logistics over the generic drug lifecycle," rather than "brand loyalists that changed their minds." Leitzinger Supp. at ¶¶ 6-7.[22] This means that:

> If it is right, as suggested by the patterns of generic conversion… that most of that 10 percent is not brand loyalists—but simply a portion of the ultimate consumers (all alike in

[21] [redacted]

[22] Leitzinger Supp. at ¶ 5 ("[T]here are other reasons for continued brand purchases following generic entry that don't involve brand loyalists. Instead, they reflect various imperfections and friction within the distribution system ('distribution logistics') that cause generic substitution to work less than perfectly. For instance, when a retail outlet is temporarily out of stock on the generic product—inventory management in the industry is very good but not perfect, particularly in the first several quarters following a generic launch—a brand prescription will be filled with the brand product. This has nothing to do with brand preferences.").

> the sense that they benefit from generic product launches and lower prices) who fail for some period in time to realize those benefits because of imperfections in the distribution system—then there is nothing special that identifies those consumers or might be used to single them out of an end-payor class that never experienced generic competition.

Leitzinger Supp. at ¶ 8. It also makes it less likely that certain consumers escaped financial injury.[23]

For these reasons, Dr. Leitzinger had excluded the brand purchases that are projected to potentially take place after generic entry from the total damages calculations, even though he could not identify any particular consumers *today* who would have made those purchases (of course, neither can Celgene). Certifying a class containing potentially uninjured members, while reducing aggregate damages proportionally, has been repeatedly held permissible by the Supreme Court, the Third Circuit, and other federal courts. *See Tyson*, 136 S. Ct. at 1050; *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 367 (3d Cir. 2015) (discussing the "apt" explanation of uninjured class members in *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) ("[A] class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification")).[24]

The potential existence of brand loyalists does not destroy predominance because "[t]he existence of occasional outliers does not defeat predominance of common issues of antitrust

[23] Leitzinger Supp. at ¶ 9 ("[I]f one accepts the implication to be drawn from the pattern of generic penetration over time that most (say 90 percent) of the 10 percent of the market that fails to experience generic penetration initially does not involve brand loyalists, then 99 percent of the class originally proposed in this case involved similarly situated (in terms of potential benefits from generics) buyers who all, but for the challenged conduct, shared about a 90 percent chance of getting lower prices within a year or so from the but-for generic entry date, a 95 percent chance within 2 years, and a nearly 100 percent chance of lower prices within five years.").

[24] The panel in *Asacol* held otherwise, overturning certification due to the existence of potentially uninjured class members. *In re: Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018).

impact." *Castro v. Sanofi Pasteur Inc.,* 134 F. Supp. 3d 820, 847 (D.N.J. 2015) (Arleo, J.) (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014) ("That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate.")). Any dispute over the impact of Celgene's exclusionary conduct as to that tiny fragment of the class does not predominate over the common issues as to whether Celgene's conduct harmed all other class members, who represent nearly all of the class members and 99% of the payments at issue in this litigation.[25]

The First Circuit panel's decision in *Asacol* cannot be squared with binding Supreme Court and Third Circuit case law.[26] *See Tyson*, 136 S. Ct. at 1042-47. In *Tyson*, after class certification, the jury found for the plaintiff class. The defendant appealed to the Supreme Court, arguing that certification was inappropriate because employees could have suffered different amounts of damage and because damages may be distributed "to some persons who did not work any uncompensated overtime." *Tyson*, 136 S. Ct. at 1041. The Court rejected the defendants' arguments, recognizing that "[i]f the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce [the statistical evidence that the plaintiffs' expert compiled] to prove the hours he or she worked. Rather than absolving the employees from proving individual injury, the representative evidence here was a permissible means of making that very showing."[27] *Id.* at 1047.

Similarly here, if individual class members were forced to separately sue Celgene, they would

---

[25] For this reason, this case is not like *Newton v. Merrill Lynch*, in which "the availability of better prices remain[ed] hotly contested," with defendants estimating that as few as 30% of the class would have received a better price in the but-for world. 259 F.3d 154, 172, 178-81 (3d Cir. 2001). Celgene has never contested that the vast majority of class members would have paid less for a generic drug.

[26] A petition for rehearing *en banc* is pending. *In re Asacol Antitrust Litig.*, No. 18-1065 (1st Cir. filed Nov. 11, 2018).

[27] The Supreme Court recognized, as did this Court, that statistical evidence is often used (and found reliable) in lawsuits, particularly in class actions, and the opposing party's "primary defense" is to show that the study is "unrepresentative or inaccurate." *Tyson*, 136 S. Ct. at 1047. Importantly, "that defense is itself common to the claims made by all class members." *Id.*

all use the same evidence of Celgene's liability, and would all rely on the generic entry dates supplied by the class experts, and the statistical evidence of generic penetration rates and generic drug discounting supplied by the class experts, to demonstrate their own injury as a result of Celgene's conduct. Further, each of these class members could individually present this statistical evidence to demonstrate that they have about a 90% chance of getting lower prices within a year of the but-for generic entry, a 95% chance in 2 years, and a nearly 100 percent chance of lower prices within 5 years (far exceeding the 51% required under a preponderance of the evidence standard). Leitzinger Supp. at ¶¶ 9, 19, Table 1. Because this evidence of injury is common to the class, common questions predominate, and certification of the damages classes here, as in *Tyson*, is proper.

4. Identification of Potentially Uninjured Class Members Can Be Completed After Trial

In addition, *Tyson* makes clear that any difficulties in identifying uninjured class members do not preclude class certification, or even a jury verdict on a behalf of a class. *Tyson*, 136 S. Ct. at 1049 (rejecting defendant's argument that plaintiffs "ha[d] not demonstrated any mechanism for ensuring that uninjured class members do not recover damages here."). The Court held that determining the appropriateness of a proposed methodology to disburse the damage award was "premature" because "the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed." *Id.* at 1050. In other words, *identifying* uninjured class members – or deciding on a methodology to identify uninjured class members – is not required prior to class certification, or prior to trial – it should occur when the damages award is ready to be disbursed. *See id.*; *Mullins*, 795 F.3d at 667–68 (holding in this context that "a district judge has discretion to [certify the class and] say let's wait until we know more and see how big a problem this turns out to be").[28]

[28] Plaintiffs acknowledge that the Court, citing *Asacol*, declined to accept a similar argument. *See* Op. at 26 n.3. However, Plaintiffs did not previously have the opportunity to fully respond to the panel's decision in *Asacol*. And as set forth above, Plaintiffs respectfully submit that *Asacol* is inconsistent

Testimony from class members will not cause individualized issues to predominate. As in *Tyson*, individual class member testimony need not be reviewed by a jury. If a class is certified, the jury need *not* be asked:

- "Was class member 1 injured by Celgene's conduct? What damages did class member 1 suffer?" . . .
- "Was class member 760 injured by Celgene's conduct? What damages did class member 760 suffer?"

Rather, the jury will be asked about Celgene's conduct and liability, and will answer questions like whether the Plaintiffs have proven, by a preponderance of the evidence:

- Was the plaintiff class injured as a result of Celgene's conduct?
- What amount of damages did the Antitrust Damages Class suffer as a result of this conduct?
- What amount of damages did the Unjust Enrichment Class suffer as a result of this conduct?[29]

A judgment issued in a class action is binding on all members of a class certified under Rule 23(b)(3) unless they choose to exclude themselves – whether or not they are injured, and whether or not they have ever been individually identified. The defendant has an interest in ensuring that the greatest number of potential claimants are bound by any judgment (regardless of the amount of the aggregate damages award to which that claimant is entitled). And here, every brand loyalist – and individual with a flat copay, if included in the class – will be bound by the judgment. Consequently, if Celgene prevails, these consumers cannot bring another lawsuit, and if the class prevails, Celgene will not pay a penny more in damages if it turns out that certain class members would still have paid

---

with the Supreme Court's ruling in *Tyson* and *Halliburton*. For the same reasons, *Vista Healthplan* is also inconsistent; of course, the District Court for the Eastern District of Pennsylvania did not have the benefit of the Supreme Court's ruling in *Tyson* (2016) when it decided *Vista Healthplan, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1833, 2015 WL 3623005 (E.D. Pa. June 10, 2015).

[29] *See, e.g.*, Ex. 131, Special Verdict, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-01827, ECF No. 6061 (N.D. Cal. July 3, 2012); Ex. 132, Verdict Form, *In re Urethane Antitrust Litig.*, No. 04-cv-1616, ECF No. 2799 (D. Ks. Feb. 2013); Ex. 133, Special Verdict Form, *In re Vitamin C Antitrust Litig.*, No. 06-md-1738, ECF No. 675 (E.D.N.Y. Mar. 14, 2013).

for the brand drug if given the opportunity to switch to the less expensive generic option (or if they would have had a flat copay).

After a jury awards aggregate damages to a class, there is a claims administration process. Some portion of class members will file claims, in which they would need to provide sufficient information to share in the aggregate damages. Here, it could be "presume[ed] that consumers would purchase the generic if it were available, *i.e.*, a presumption that economically rational consumers faced with two identical products would purchase the less expensive alternative." *In re Nexium Antitrust Litig.*, 777 F.3d 9, 20 (1st Cir. 2015) (citing *Halliburton*, 573 U.S. at 275-76 (class members may be entitled to presumption that is subject to individualized rebuttal by defendants)). Like the Supreme Court, the Third Circuit recognizes that "considerations of fairness, public policy, and probability, as well as judicial economy," often underlie the creation of presumptions. *Malack v. BDO Seidman, LLP*, 617 F.3d 743, 749 (3d Cir. 2010) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988); citing *United States Dep't of Justice v. Landano*, 508 U.S. 165, 174 (1993); Fed. R. Evid. 301 advisory committee's note). "'Common sense' also plays a role." *Id.* at 749 (citing *Basic Inc.*, 485 U.S. at 246). "Courts may also create presumptions to correct an imbalance resulting from one party's superior access to the proof . . . where social and economic policy incline the courts to favor one contention . . . or to avoid a factual impasse." *Malack,* 617 F.3d at 749. (internal citations omitted).

> Generally, however, the most important consideration in the creation of presumptions is probability. Most presumptions have come into existence primarily because judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it.

Id. (quoting McCormick on Evidence § 343 (John W. Strong ed., 5th ed. 1999)). When 99% of Thalomid and Revlimid payments were impacted by Celgene's conduct, and each class member had more than a 90% chance of injury in the form of higher prices (far greater than the 51% required for a preponderance of the evidence), it is difficult to understand why such a presumption should not be

permitted. A presumption supported by aggregate proof particularly makes sense when the alternative is rewarding the defendant for the effectiveness of its anticompetitive conduct (*i.e.,* because no generic competition occurred, there are no identifiable brand loyalists in the actual world).

There is another option to identify class members who would not have paid less for a generic, which has also explicitly been endorsed by the Third Circuit: testimony in the form of an affidavit or declaration. As the Third Circuit held in *City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc.*, answering a factual question as to whether a consumer received a fax (or here, whether a consumer purchased Thalomid or Revlimid) "through affidavits or other available records does not necessarily require individualized fact-finding that would be 'administratively infeasible' or 'a violation of Defendants' due process rights.'" 867 F.3d 434, 442 (3d Cir. 2017) (quoting *Byrd v. Aaron's Inc.*, 784 F.3d 154, 170 (3d Cir. 2015)). True, the Third Circuit was talking about ascertaining who was included in the class. But it is difficult to understand why similar evidence (an affidavit – or claim form – asserting that the consumer would have chosen a less expensive prescription drug if available) would be permissible for the purpose of determining an individual's membership in the class but impermissible to establish an individual's injury, particularly when such affidavits are allowed under the Federal Rules. *See* Fed. R. Civ. P. 56(c) (a party may demonstrate the existence of disputed fact at summary judgment through affidavit or declaration); *see also Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1030 (7th Cir. 2018) (affidavits are permissible in class actions notwithstanding "the defendant's right to challenge them with evidence."). For these same reasons, consumers with flat copays can be included in the class as *de minimis*, and identified in the same way.

Such an affidavit (or claim form) would be signed under penalty of perjury, and could require the consumer class members to answer questions such as:

- Do you always ask your doctor to write "dispense as written" to ensure that your

prescriptions are never filled with generic drugs?[30]

- Would you have switched to generic Thalomid or Revlimid if one was available?
- What other generic drugs do you take?[31]
- Did you always have the same co-pay for brand and generic drugs?[32]

Such "consumer testimony would be sufficient to establish injury in an individual suit." *Nexium*, 777 F.3d at 20. Therefore "it follows that similar testimony in the form of an affidavit or declaration would be sufficient in a class action. There cannot be a more stringent burden of proof in class actions than in individual actions." *Id.* In *Byrd*, Judge Rendell disagreed that proof of class membership by affidavit violated defendants' due process rights:

> The concerns regarding the due process rights of defendants are unwarranted as well, because there is no evidence that, in small-claims class actions, fabricated claims impose a significant harm on defendants. The chances that someone would, under penalty of perjury, sign a false affidavit stating that he or she bought Bayer aspirin for the sake of receiving a windfall of $1.59 are far-fetched at best.

784 F.3d at 175 (Rendell, J., concurring).

Importantly, these individual challenges would have no effect on Celgene's overall liability to the class, because Dr. Leitzinger has already removed the purchases that might have been attributable to brand loyalists from his damage calculations. Thus, Celgene's due process rights are not implicated. *See* Op. at 30 ("aggregate class-wide damages estimates have readily been accepted in

---

[30] Most states have generic substitution laws requiring pharmacists to automatically substitute the generic version for the brand unless the prescribing physician writes "dispense as written." *See* Plaintiffs' Mem. at 42.

[31] The court (or the claims administrator) could also require the claimants to submit evidence that they had taken generic drugs when available in the past as evidence to support their sworn testimony that they would have switched to generic Thalomid or Revlimid if one had been available.

[32] *Byrd*, 784 F.3d at 173-74 (Rendell, J., concurring) ("Records are not the only way to prove that someone is in a class. It is the trial judge's province to determine what proof may be required at the claims submission and administration stage. It is up to the judge overseeing the class action to decide what she will accept as proof when approving the claim form. Could not the judge decide that, in addition to an individual's 'say so' that he is a member of the class, the claimant needs to submit an affidavit from another household member or from his doctor corroborating his assertion that he did, in fact, take Bayer aspirin?").

other similar cases.") (citing *Flonase*, 284 F.R.D. at 226; *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 351 (E.D. Mich. 2001)); *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197 (1st Cir. 2009) (rejecting defendant's argument that "aggregate proof" of antitrust damages "violates [its] due process or jury trial rights to contest each member's claim individually").

If the defendant wants to challenge certain individual recoveries of certain class members, it can seek to do so after trial. But the defendant's desire to rebut the statistical evidence of injury on an individualized basis does not preclude certification. *Halliburton*, 573 U.S. at 276; *Bogosian v. Gulf Oil,* 561 F.2d 434, 456 (3d Cir. 1977) ("it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate") (abrogated on other grounds). Rule 23(b)(3), the Supreme Court explained, permits certification even when "important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson*, 136 S. Ct. at 1045.[33] Finding otherwise would allow defendants to defeat certification simply by saying that they *might* want to challenge affidavits that *might* later be used as evidence of a person's inclusion in the class, or injury, or damage.

Indeed, "[i]f the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013); Rubenstein, 6 Newberg on Class Actions, 20:62 ("The fact that there may be thousands or millions

[33] *See also Reinig v. RBS Citizens, N.A.*, No. 2:15-CV-01042-AJS, 2017 WL 8941219, at *21 (W.D. Pa. Aug. 2, 2017) ("[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues.") (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001) (affirming class certification, and adding that "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored") (Sotomayor, J.)).

of such damage calculations does not defeat the conclusion that common issues predominate; it is black-letter class action law that such damage calculations do not render the common liability issue non-predominant").

5. The Damages Classes Can Be Certified with Later Start Dates for Consumers so that Brand Loyalists Are Indisputably *De Minimis*

Because generic penetration increases over time, if the Court does not agree that the original damages classes can be certified, another option is to exclude just those consumers who purchased Thalomid or Revlimid at the early stages of generic entry (in the but-for world) to participate in the class. By excluding consumers from the class until generic penetration reaches, say, 97.5%, there is a *very* high likelihood that nearly all class members were injured by Celgene's conduct.[34] In these scenarios, the Antitrust Consumer Delay Damages Class would be defined as:

> All entities that purchased and/or paid for some or all of the purchase price for thalidomide in any form after November 6, 2010 or lenalidomide in any form after December 28, 2012 for consumption by their members, employees, insureds, participants, or beneficiaries, and all persons who purchased and/or paid for some or all of the purchase price for thalidomide in any form after May 16, 2012 or lenalidomide in any form after March 28, 2015 for consumption by themselves, their families, or beneficiaries, in California, the District of Columbia, Florida, Kansas, Maine, Massachusetts, Michigan, Nebraska, New York, North Carolina, Oregon, Rhode Island, or Tennessee.[35]

Dr. Leitzinger calculated that this class suffered $2.29 billion in damages, and the Unjust Enrichment Consumer Delay Class suffered $3.22 billion in damages. Leitzinger Supp. at Ex. 3.

C. The Variation of State Law Issue Is Moot

In their initial motion, Plaintiffs sought certification of a combined Antitrust and Consumer Protection Damages Class. This class consisted of Plaintiffs' monopolization and attempted

---

[34] Plaintiffs contend that the remaining 2.5% of uninjured class members is indisputably *de minimis* (particularly as this ensures all consumers in the class have at least a 97.5% chance of having suffered financial injury), but the Court can select a smaller percentage if it so chooses, and the class period can be adjusted to exclude consumers who purchased Thalomid or Revlimid prior to that date.

[35] The Unjust Enrichment Damages Class would be the same, with the addition of Pennsylvania. The exclusions from the class are listed in Ex. 130.

monopolization state law claims (brought pursuant to Counts I and II of the Consolidated Amended Complaint) and Plaintiffs' unfair and deceptive trade practices/consumer protection claims (Count III). Except for Pennsylvania, which does not have an *Illinois Brick* "repealer" statute,[36] the states covered by these claims are identical. Thus, in recognition of this Court's analysis regarding variations among Plaintiffs' consumer protection/unfair trade practices claims, Plaintiffs voluntarily withdraw Count III of their complaint and propose certifying a class that is solely composed of Plaintiffs' state antitrust claims (Counts I and II).

This proposed solution solves the variation of state law issues discussed in this Court's class certification opinion. Op. at 35-37. Most significantly, Celgene has not argued that there are any material variations in Plaintiffs' state law antitrust claims. In fact, in support of its argument that Plaintiffs' consumer protection claims varied by state, Celgene affirmatively relied on an argument by the *Lidoderm* plaintiffs to underscore the uniformity of state indirect purchaser antitrust claims as compared to consumer protection claims, explaining state antitrust laws "are interpreted consistently with federal antitrust law." Celgene Opp. at 43 n.18 (citing *Lidoderm*, 2017 WL 679367, at *27) ("any differences [in state antitrust laws] are not really material because the core elements of the state laws

[36] As explained in Plaintiffs' Mem., *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977) held that only direct purchasers could pursue an overcharge claim arising from an antitrust violation. Following this decision, a number of states adopted *Illinois Brick* "repealer" statutes that mirror the Sherman Act, 15 U.S.C. § 1 *et seq.*, but permit indirect purchaser standing under state law. *See California v. ARC Am. Corp.*, 490 U.S. 93, 105-06 (1989); *Union Carbide Corp. v. Superior Court,* 679 P.2d 14, 17 (Cal. 1984). These state laws have generally been interpreted to be consistent with the Sherman Act, and accordingly do not vary materially by state. *See, e.g., Nirvana, Inc. v. Nestle Waters N. Am. Inc.*, 123 F. Supp. 3d 357, 378 (N.D.N.Y. 2015) ("New York modeled the Donnelly Act after the Sherman Act, and . . . state antitrust claims should be construed in light of federal precedent."); *Fin-S Tech, LLC v. Surf Hardware Int'l-USA, Inc.*, No. 13-CV-80645, 2014 WL 12461350, at *2 (S.D. Fla. Aug. 27, 2014) ("The Florida Antitrust Act is patterned after the Sherman Act; therefore, the Court need not conduct two separate analyses…."); *GTE New Media Servs., Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27, 45 (D.D.C. 1998) (state statute "essentially track[s] the language of § . . . 2 of the Sherman Act").

in play are identical").[37] Indeed, given the legislative history of repealer jurisdictions, the plain language of indirect purchaser statutes often explicitly states that it was the legislature's intent to mirror federal antitrust law.[38] Thus, removing the consumer protection claims from the Antitrust/Consumer Protection Class nullifies any potential concern over material distinctions in the relevant state laws.[39]

Finally, this Court found that Plaintiffs' state law unjust enrichment claims "are universally recognized causes of action that are materially the same throughout the United States," and any variations "can be accommodated without overcoming the efficacy of the class action." Op. at 34-35 (internal citation omitted). In turn, this Court was "satisfied that common questions predominate" as to the unjust enrichment cause of action. *Id.* at 35. Accordingly, based on this Court's reasoning, there are no material variations in the presently proposed state law classes (i.e., the Antitrust Damages Class and the Unjust Enrichment Damages classes), and common issues predominate as to

---

[37] *See also* Plaintiffs' Mem. at App'x E, Monopolization and Attempted Monopolization (Counts I-II); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 530 (3d Cir. 2004) ("recent decisions elsewhere have certified nationwide or multistate classes under state laws in actions alleging overpayment for brand-name prescription drugs"); *In re Wellbutrin XL Antitrust Litig.*, 282 F.R.D. 126, 145 (E.D. Pa. 2011) (certifying end payor class under state antitrust laws and concluding "that variations among the laws at issue here do not present the types of insuperable obstacles which render class action litigation unmanageable.") (internal citations and quotations omitted).

[38] *See, e.g.*, D.C. Stat. § 28-4515 ("It is the intent of the Council of the District of Columbia that in construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes."); Fla. Sta. § 542.32 ("It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes."); Mich. Comp. Laws Ann. § 445.784 ("It is the intent of the legislature that in construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes."). *See also* Kan. Stat. Ann. § 50-163; Mass. Gen. Laws Ann. ch. 93, § 1; Neb. Rev. Stat. § 59-829; Or. Rev. Stat. § 646.715; R.I. Gen. Laws § 6-36-2(b).

[39] As explained previously, Plaintiffs' expert put forth a single damages model for the Antitrust/Consumer Protection Damages Class. Plaintiffs' Reply Mem. at n.45; Leitzinger Report at § V, Exs. 7A-B. Thus, Plaintiffs pleaded the consumer protection claims in the alternative, and represented to the Court that they may not even need to be litigated. Plaintiffs' Reply Mem. at n.45. In turn, there is no practical impact to Plaintiffs' voluntary withdrawal of Count III of the Consolidated Amended Complaint.

Plaintiffs' remaining state law claims. The purported variation of state law issue is moot.

D. The Injunction Class Should Be Certified Under Rule 23(b)(2)

Rule 23(b)(2) supports certification when a single injunction would provide cohesive relief to the entire class. Fed. R. Civ. P. 23(b)(2) (certification is appropriate when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."). "When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362-63 (2011); *Shelton v. Bledsoe*, 775 F.3d 554, 563 (3d Cir. 2015) ("Ascertainability is not a requirement for certification of a Rule 23(b)(2) class."); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) ("While 23(b)(2) class actions have no predominance or superiority requirements, it is well established that the class claims must be cohesive.").

Although ascertainability is not a requirement for a (b)(2) class in the Third Circuit, the proposed class must still be properly defined. *Shelton*, 775 F.3d at 563. A proper class: (1) meets the requirements of Rule 23(a); (2) is sufficiently cohesive under Rule 23(b)(2) and *Barnes*, 161 F.3d at 143; and (3) is defined in a manner where the class parameters are "readily discernible, clear, and precise." *Shelton*, 775 F.3d at 563 (quoting *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of America*, 453 F.3d 179, 187 (3d Cir. 2006)). Based on this Court's class certification decision, Plaintiffs have already put forward sufficient evidence to establish factors (1) and (3). Op. at 15-19, 42, 51. In turn, Plaintiffs focus on the second factor: cohesiveness.

1. The Proposed (b)(2) Class Is Cohesive

Cohesiveness is the core requirement of a (b)(2) class. "To satisfy the cohesiveness test, Plaintiffs must show that the 'class's claims are common ones and that adjudication of the case will

not devolve into consideration of myriad individual issues.'" *In re Pharmacy Benefit Managers Antitrust Litig.*, No. 06-1782, 2017 WL 275398, at *28 (E.D. Pa. Jan. 18, 2017) (quoting 2 Newberg on Class Actions § 4:34); *see also Cave v. Saxon Mortg. Servs., Inc.*, No. 11-cv-4586, 2016 WL 5930846, at *9 (E.D. Pa. Oct. 11, 2016) (same). To demonstrate cohesiveness, "Plaintiffs must show that the following elements are 'susceptible of common proof': (1) actual or threatened injury 'from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur'; (2) causation; and (3) likelihood that the equitable relief will redress the injury." *In re Processed Egg Prod. Antitrust Litig.*, 321 F.R.D. 555, 559 (E.D. Pa. 2017).

The first element of the cohesiveness test is easily satisfied here. The Injunction Class seeks to restore the market to the natural competitive equilibrium that would exist but for Celgene's ongoing anticompetitive conduct. Where a defendant engages in a common course of conduct toward plaintiffs, such as unlawfully monopolizing an economic market, there is "no need for *individualized* determinations of the propriety of injunctive relief." *Baby Neal*, 43 F.3d at 57 ("(b)(2) classes have been certified in a legion of . . . cases where commonality findings were based primarily on the fact that defendant's conduct is central to the claims of all class members"). Celgene's scheme to foreclose generic competition has distorted competitive market forces and caused end-payors to pay supracompetitive prices for thalidomide and lenalidomide. Absent court intervention, Celgene's ongoing violation of antitrust law will continue, satisfying the first part of the test.

Causation, the second element of the cohesiveness test, is similarly satisfied. Because the question of causation focuses on Celgene's conduct, it "can be proven through class-wide, common evidence," as opposed to "the actions of the individual class members." *In re Flonase Antitrust Litig.*, 284 F.R.D. at 219. Here, Celgene's conduct applies equally to all class members, all of whom would use common evidence to prove that Celgene's anticompetitive conduct has precluded generic competitors from entering the market. The causation inquiry does not turn on any individualized facts, but rather

focuses on Celgene's common course of conduct, and whether that conduct caused Plaintiffs' injuries. In turn, the question of causation is susceptible to common proof.

Finally, because all members of the Injunction Class will continue to pay supracompetitive prices for Thalomid and Revlimid absent a court judgment, equitable relief restoring a competitive market would redress the common injury suffered by Plaintiffs, thereby satisfying the third element of the cohesiveness test. Each class member would benefit from an order requiring Celgene to delist its REMS patents from the Orange Book, or requiring it to supply samples within one month of request, for example. "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart*, 564 U.S. at 360; *Weiss v. New York Hosp.,* 745 F.2d 786, 811 (3d Cir. 1984) ("When a suit seeks to define the relationship between the defendant(s) and the world at large ... (b)(2) certification is appropriate."). "The purpose of relief in an antitrust case is 'so far as practicable, (to) cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.'" *United States v. Glaxo Grp. Ltd.*, 410 U.S. 52, 64 (1973).

2. The Proposed Injunction Class Is Not Seeking Monetary Relief

Certification under (b)(2) is limited to classes seeking "injunctive or declaratory relief, and does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." *Cohen v. Chicago Title Ins. Co.*, 242 F.R.D. 295, 300 (E.D. Pa. 2007). This Court rejected Celgene's argument that courts should apply a brightline rule to deny certification to all injunction classes where the overall relief sought in the action is primarily monetary, finding the correct approach is to rigorously analyze the propriety of a (b)(2) class. Op. at 53.

As Plaintiffs explained in their reply brief, the Damages Classes are limited to class members with standing to bring indirect purchaser claims under the laws of thirteen states and the District of Columbia. In contrast, the proposed Injunction Class includes every person and entity nationwide

with a federal claim under Section 16 of the Clayton Act. *See Mid-West Paper Prods. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 592 (3d Cir. 1979) (finding *Illinois Brick* indirect purchaser rule does not preclude claims for injunctive relief brought under Section 16 of the Clayton Act). Thus, just as claims for injunctive relief under the Clayton Act "do not undermine *Illinois Brick*, but rather fall properly outside its scope," the Injunction Class seeks an equitable remedy distinct from the monetary relief sought by the Damages Classes. *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 273 (D. Mass. 2004); *Bland v. PNC Bank, NA.*, No. 2:15-CV-01042-AJS, 2016 WL 10520047, at *23 (W.D. Pa. Dec. 16, 2016) ("PNC responds that 'certification is not appropriate under Rule 23(b)(2) where plaintiffs are seeking primarily monetary damages.' . . . But this rule applies only when a plaintiff seeks to include claims for monetary relief in a Rule 23(b)(2) class."). Frequently in these circumstances, "courts separately certify *both* a (b)(2) class for the portion of the case concerning injunctive and declaratory relief *and* a (b)(3) class for the portion of the case requesting monetary damages." 2 Newberg on Class Actions § 4:38 (5th ed.) (collecting cases); *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253425, at *18 (E.D. Pa. Aug. 3, 2007) (certifying two classes, a Rule 23(b)(3) end payor class with indirect purchasers from eight states and a Rule 23(b)(2) nationwide class, finding that "[a]lthough the classes are represented by the same named Plaintiffs, they are not identical. . . . a significant portion of the nationwide class seeks injunctive relief only. In these circumstances, it is appropriate to certify two separate classes under Rules 23(b)(2) and 23(b)(3).").[40] This case presents the precise

[40] *See, e.g.*, *Cohen*, 242 F.R.D. at 301 (rejecting argument that plaintiff sought primarily monetary damages and certifying Rule 23(b)(2) and (b)(3) classes, as "[a]ny remedy could include both money damages and enjoining the conduct"); *Wilson v. Cty. of Gloucester*, 256 F.R.D. 479, 491–92 (D.N.J. 2009) ("certifying the equitable portion of this suit under (b)(2), and the damages portion under (b)(3), allows for the best of both worlds"). *See also Raffin v. Medicredit, Inc.*, No. 15-4912, 2017 WL 131745, at *10 (C.D. Cal. Jan. 3, 2017); *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 117 (E.D.N.Y. 2012); *Seekamp v. It's Huge, Inc.*, No. 09-00018, 2012 WL 860364, at *8 (N.D.N.Y. Mar. 13, 2012); *Easterling v. Connecticut Dep't of Corr.*, 278 F.R.D. 41, 51 (D. Conn. 2011); *Jermyn v. Best Buy Stores, L.P.*, 276 F.R.D. 167, 173–74 (S.D.N.Y. 2011).

scenario where it appropriate to certify separate classes under Rules 23(b)(2) and (b)(3).

3. Any Concerns Over the Preclusive Effect of a (b)(2) Judgment Are Easily Cured

Because notice and the corresponding ability to opt-out is not typically provided to a (b)(2) class, some courts have raised concerns about those class members' potential preclusion from bringing subsequent claims for money damages. *See, e.g.*, *Barnes*, 161 F.3d at 143 ("unnamed members with valid individual claims are bound by the action without the opportunity to withdraw and may be prejudiced by a negative judgment in the class action"). However, "every federal court of appeals that has considered the question has held that a class action seeking *only declaratory or injunctive relief* does not bar subsequent individual suits for damages." *Vitamin C,* 279 F.R.D. at 114 (collecting cases) (emphasis in original). Comparing this hypothetical issue to the practical effects of injunctive relief outside the class context further demonstrates why such a concern is unfounded:

> In (b)(2) situations, an individual litigant's case is likely to have an impact on similarly situated parties [] yet those other parties are neither present for nor required to be joined []. . . . To be sure, [absent parties'] claims will not, therefore, be precluded, but it is nonetheless likely that the initial individual litigation will *practically* dispose of their claims. Class certification *helps* the absent parties – it guarantees that their interests will be adequately represented, and it provides them notice and an opportunity to be heard about any settlement and/or attorney's fees request. Thus, *where (b)(2) certification conditions exist, certification does not punish class members, it assists them*; it is mandatory not out of malice but benefice – an acknowledgement of the real world effect of even individual litigation. For these reasons, *it would make more sense for courts to certify more liberally* – erring on the side of seeing that absent litigants get the protections that certification offers – instead of treating certification as a penalty rarely to be employed.

2 Newberg on Class Actions § 4:34 (5th ed.) (emphasis added).

Nevertheless, if this Court remains concerned about the potential preclusive effect on (b)(2) class members' subsequent claims for monetary damages, it can easily guard against such a result explicitly in the terms of its judgment. For example, the *Vitamin C* court "expressly reserve[d] the right of the indirect purchasers to maintain their damages claims in subsequent proceedings notwithstanding their participation in the Injunction Class." 279 F.R.D. at 116.

In the alternative, Plaintiffs propose limiting the Injunction Class to just the states without *Illinois Brick* repealer statutes,[41] as those purchasers are already precluded from bringing claims for money damages. Thus, should the Injunction Class be narrowed to only include those states, the potential for preclusive effect of any judgment becomes a non-issue.[42]

Based on the foregoing, the Injunction Class should be certified under Rule 23(b)(2).

III. CONCLUSION

Plaintiffs respectfully submit that the Court's Opinion has already established that all requirements have been met to certify a class composed of, at a minimum, a subset of the originally proposed class (a third party payor class). Plaintiffs further submit that certification of a class that includes consumers is also appropriate, either as originally proposed or with the modifications described above. And for the reasons stated above, an Injunction Class should also be certified.

The redress sought here will deter and punish corporate misconduct and provide justice for injured class members. *Byrd,* 784 F.3d at 175-76 (Rendell, J., concurring) (discussing the policy goals of class actions). Certifying the proposed classes is the most just outcome. In fact, it is the *only* outcome that offers a chance of recovery to the vast majority of the victims of Celgene's anticompetitive conduct. *See Reyes v. Netdeposit LLC,* 802 F.3d 469, 491 (3d Cir. 2015).

---

[41] *See supra* n. 36. The non-repealer states are: Colorado, Connecticut, Delaware, Georgia, Indiana, Kentucky, Louisiana, Missouri, Montana, New Hampshire, New Jersey, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Virginia and Wyoming.

[42] Plaintiffs specifically suggest that Pamela Holt of Indiana, who was previously disclosed by Plaintiffs on May 4, 2018 as a potential fact witness at trial, could serve as a class representative for the non-repealer states. *See* Ex. 134, Plaintiffs' Supplemental Initial Disclosures Under Fed. R. Civ. P. 26(A)(1)(A) (May 4, 2018); *see also* Dkt. 252, October 31, 2018 Opinion and Order (denying Celgene's Motion for Judgment on the Pleadings where granting the "instant motion would curtail the rights of potential additional [] class representatives in this action" and "granting Celgene's motion prior to the decision on class certification would unduly prejudice Plaintiffs' ability to alter or amend their class definition, as may be appropriate as the case progresses").

Dated: December 14, 2018

By: Melinda R Coolidge

Melinda R. Coolidge
Walter D. Kelley, Jr.
HAUSFELD LLP
1700 K Street, NW, Suite 650
Washington, DC 20006
(202) 540-7200
mcoolidge@hausfeld.com
wkelley@hausfeld.com

Brent W. Landau
Katie R. Beran
Tamara Freilich
HAUSFELD LLP
325 Chestnut Street, Suite 900
Philadelphia, PA 19106
(215) 985-3270
blandau@hausfeld.com
kberan@hausfeld.com
tfreilich@hausfeld.com

Whitney E. Street
BLOCK & LEVITON LLP
610 16th Street, Suite 214
Oakland, CA 94612
(415) 968-1852
wstreet@blockesq.com

Stephen Teti
BLOCK & LEVITON LLP
155 Federal Street, Suite 400
Boston, MA 02110
(617) 398-5600
steti@blockesq.com

Frank R. Schirripa
Daniel B. Rehns
HACH ROSE SCHIRRIPA & CHEVERIE LLP
112 Madison Avenue, 10th Floor
New York, NY 10016
(212) 213-8311
fschirripa@hrsclaw.com
drehns@hrsclaw.com

Interim Co-Lead Counsel for Plaintiffs and the Proposed Classes

James Notis
Jennifer Sarnelli
GARDY & NOTIS, LLP
560 Sylvan Avenue
Englewood Cliffs, NJ 07632
jnotis@gardylaw.com
jsarnelli@gardylaw.com

Jeffrey A. Barrack
Jeffrey B. Gittleman
BARRACK, RODOS & BACINE
330 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
jgittleman@barrack.com

Todd A. Seaver
Christopher T. Heffelfinger
BERMAN TABACCO
44 Montgomery Street
Suite 650
San Francisco, CA 94104
(415) 433-3200
tseaver@bermantabacco.com

Additional Plaintiffs' Counsel