IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE STOP & SHOP SUPERMARKET COMPANY, ET AL.	:	CIVIL ACTION
v.	:	
SMITHKLINE BEECHAM CORP.	:	NO. 03-4578

MEMORANDUM

Padova, J. **May 19, 2005**

Plaintiffs, direct purchasers of Paxil brand paroxetine hydrochloride ("Paxil"), have brought this class action antitrust suit pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, against SmithKline Beecham Corporation, d/b/a/ GlaxoSmithKline ("GSK" or "Defendant"), alleging, individually and on behalf of a class of all others similarly situated, that GSK has violated Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, by stockpiling and causing patents to be listed with the Food and Drug Administration ("FDA") in a manner which delayed FDA approval of generic paroxetine hydrochloride and enabled Defendant to unlawfully extend its market monopoly for Paxil. Plaintiffs have reached a settlement of their claims against GSK in the amount of $100 million, and the Court approved the Settlement following a Fairness Hearing held on January 28 and February 9, 2005. Before the Court is Plaintiffs' Motion for Award of Attorneys' Fees and Costs. For the reasons that follow, the Court grants the Motion and awards attorneys' fees and costs to counsel for Plaintiffs in the total amount of $20 million.

I. BACKGROUND

Plaintiffs claim that GSK unlawfully excluded competition in the market for Paxil and generic paroxetine hydrochloride[1] by engaging in the following unlawful acts: (1) conducting sham patent infringement litigation against generic manufacturers which triggered automatic 30 month regulatory stays of generic competition; (2) making intentional misrepresentations to the Patent and Trademark Office ("PTO") in order to obtain patents related to paroxetine hydrochloride; and (3) making intentional misrepresentations to the Food & Drug Administration ("FDA") which enabled GSK to exclude competition by generic manufacturers. On January 26, 1988, GSK was issued U.S. Patent No. 4,721,723 (the "'723 Patent"), which claims crystalline paroxetine hydrochloride hemihydrate and its use in treating depression. On December 29, 1992, the FDA approved GSK's New Drug Application ("NDA") for a drug containing paroxetine hydrochloride hemihydrate, which GSK markets as Paxil. In connection with its NDA for Paxil, GSK submitted to the FDA a list of all patents it owned that claimed

[1]Generic drugs are drugs which the Food and Drug Administration ("FDA") has found to be bio-equivalents of previously approved brand name drugs. Pursuant to the Hatch-Waxman Act, 21 U.S.C. § 355, to obtain approval of their generic bio-equivalents, generic drug manufacturers submit Abbreviated New Drug Applications to the FDA which incorporate the safety and effectiveness data previously submitted by the company that obtained approval of the brand name drug, and which include detailed information proving that the drug is the bio-equivalent of the brand name drug.

paroxetine hydrochloride, or a method of using that drug. The FDA lists patents for approved drugs in the Approved Drug Products with Therapeutic Equivalence Evaluations publication (the "Orange Book") once an NDA is approved.

Pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301, *et seq.*, once the FDA approved GSK's NDA for Paxil, GSK obtained a five-year statutory monopoly in the market for that drug. In accordance with 21 U.S.C. § 355(c)(2), after GSK obtained approval of its NDA, it was obligated to submit information on any new patent it obtained that claimed paroxetine hydrochloride or methods of its use to the FDA within 30 days of such patent's issuance. The FDA would then list the new patent in a supplement to the Orange Book.

Plaintiffs maintain that, in 1995, GSK began to apply for patents on new anhydrous polymorphs of paroxetine hydrochloride, which patents began to issue in 1999 and which were then submitted by GSK to the FDA for listing in the Orange Book. Patent No. 5,872,132 ("the '132 Patent") was approved by the PTO on February 16, 1999, and claimed an allegedly new crystalline form of paroxetine hydrochloride anhydrate designated as Form C. Patent No. 4,900,423 ("the '423 Patent") was approved on May 4, 1999 and claimed a second anhydrate crystalline form of paroxetine hydrochloride. GSK submitted both of these patents to the FDA for listing in the Orange Book in 1999. On June 27, 2000, the PTO

approved GSK's Patent No. 6,080,759 ("the '759 Patent") for an invention titled Paroxetine "Hydrochloride Form A." The '759 Patent claims a paroxetine hydrochloride anhydrate Form A made according to the process for making paroxetine hydrochloride anhydrate Form A. GSK then submitted this patent to the FDA for listing in the Orange Book. On September 5, 2000, the PTO approved Patent No. 6,113,944 ("the '944 Patent") for "Paroxetine Tablets and Process to Prepare Them" which patent claims a pharmaceutical composition in tablet form containing paroxetine hydrochloride produced on a commercial scale. GSK then submitted the '944 Patent to the FDA for listing in the Orange Book.

As part of their Abbreviated New Drug Applications ("ANDAs"), manufacturers of generic pharmaceuticals must certify that the generic drug will not infringe on any valid, unexpired patent which claims the brand name drug. See 21 U.S.C. § 355(j)(2)(A)(vii). Generic competitors of GSK began to file ANDAs seeking approval of generic bioequivalents of Paxil in 1998. Those ANDAs contained the requisite certifications that they did not infringe on any valid, unexpired patent claiming Paxil. Plaintiffs claim that, after receiving these certifications of noninfringement, GSK filed baseless patent infringement actions against those competitors, alleging that the bioequivalent drugs infringed on the '723 Patent and the other, more recently issued, patents on forms of paroxetine hydrochloride owned by GSK. Pursuant to the Hatch-Waxman Act, 21

U.S.C. § 355, the filing of a patent infringement suit by a branded drug patent owner against a generic competitor automatically blocks the FDA's approval of the competitor's ANDA for up to 30 months. Plaintiffs allege that GSK violated the antitrust laws by filing these baseless patent infringement actions against generic competitors in order to block FDA approval of its competitors' ANDAs and, thus, indefinitely extend its market monopoly for Paxil.

The first such suit was brought against Apotex Corporation ("Apotex"), after Apotex submitted ANDA No. 75-356 to the FDA on March 31, 1998, seeking approval of a paroxetine hydrochloride anhydrous drug. On June 26, 1998, GSK sued Apotex in the United States District Court for the Northern District of Illinois for infringement of the '723 Patent. On March 3, 2003, Judge Posner, sitting by designation, ruled that Apotex's generic product did not infringe the '723 Patent and dismissed SmithKline's suit with prejudice. See SmithKline Beecham Corp. v. Apotex Corp., 247 F. Supp. 1011 (N.D. Ill. 2003) (Posner, J.), aff'd 365 F.3d 1306 (Fed. Cir. 2004). On April 23, 2004, the United States Court of Appeals for the Federal Circuit (the "Federal Circuit") affirmed Judge Posner's decision on other grounds. See SmithKline Beecham Corp. v. Apotex Corp., 365 F.3d 1306 (Fed. Cir. 2004). The Federal Circuit found that Apotex's anhydrous paroxetine hydrochloride would infringe on the '723 Patent, but found that the '723 Patent was invalid as a result of public use of the product claimed in

claim 1 of the '723 Patent prior to GSK's application for the '723 Patent. Id. at 1315, 1320.

GSK filed additional patent infringement actions against Apotex in 1999, 2000 and 2001 in the United States District Court for the Eastern District of Pennsylvania, for infringement of the '423 Patent, the '759 Patent, and the '944 Patent. See SmithKline Beecham Corp. v. Apotex Corp., et al., Civ.A.No. 99-cv-4304 (E.D. Pa.); SmithKline Beecham Corp. v. Apotex Corp., et al., Civ.A.No. 00-cv-4888 (E.D. Pa.); SmithKline Beecham Corp. v. Apotex Corp., et al., Civ.A.No. 01-cv-0159 (E.D. Pa.). GSK also filed two patent infringement actions against Geneva Pharmaceuticals, Inc. ("Geneva") in the United States District Court for the Eastern District of Pennsylvania in 1999 and 2000, for infringement of the '723, '132, '759 and '944 Patents, after Geneva submitted ANDA No. 75-566 to the FDA for approval of paroxetine hydrochloride tablets. See SmithKline Beecham Corp. v. Geneva Pharm., Inc., et al., Civ.A.No. 99-cv-2926 (E.D. Pa.) and SmithKline Beecham Corp. v. Geneva Pharm., Inc., et al., Civ.A.No. 00-cv-5953 (E.D. Pa.). GSK filed a patent infringement action against Zenith Goldline Pharmaceuticals, Inc. ("Zenith") in the Eastern District of Pennsylvania in 2000, claiming infringement of the '723, '423, and '132 Patents after Zenith submitted ANDA No. 75-691 to the FDA seeking approval of paroxetine hydrochloride tablets. See SmithKline Beecham Corp. v. Zenith Goldline Pharm., Inc., et al.,

Civ.A.No. 00-cv-1393 (E.D. Pa.). GSK also filed a patent infringement action against Pentech Pharmaceuticals, Inc. ("Pentech"), in 2000, after Pentech submitted ANDA No. 75-771 to the FDA for approval of paroxetine hydrochloride capsules. This lawsuit was filed in the Northern District of Illinois and claimed that Pentech infringed the '723 and '132 Patents. See SmithKline Beecham Corp. v. Pentech Pharm., Inc., et al., Civ.A.No. 1:00-02855 (N.D. Ill.). GSK sued Alphapharm PTY, Ltd. ("Alphapharm") for infringement of '723, '132, '759, and '423 Patents in the United States District Court for the Eastern District of Pennsylvania in 2001, after Alphapharm submitted ANDA No. 75-716 to the FDA for approval of paroxetine hydrochloride tablets. See SmithKline Beecham Corp. v. Alphapharm PTY, Ltd., et al., Civ.A.No. 01-cv-1027 (E.D. Pa.).

Plaintiffs claim that the filing of these baseless lawsuits enabled GSK to unreasonably restrain, suppress and eliminate competition in the market for paroxetine hydrochloride; illegally maintain its monopoly on the market for paroxetine hydrochloride; fix, raise, maintain or stabilize the price for Paxil to supra-competitive prices; and overcharge Plaintiffs and other direct purchasers of Paxil many millions of dollars by depriving them of the benefits of competition from lower-priced generic versions of paroxetine hydrochloride. On July 1, 2003, following Judge Posner's March 2003 decision in SmithKline Beecham Corp. v. Apotex

Corp., GSK announced that it had asked the FDA to delist the '759 Patent, along with its patent no. 6,172,233 (which claims a new process for preparing pharmaceutically active compounds, including paroxetine)[2] and its patent no. 6,063,927 (which claims a novel salt of paroxetine which may be used as an alternative to hydrochloride)[3] from the Orange Book. On September 8, 2003, Apotex began to market its generic paroxetine hydrochloride product.

Plaintiffs have asserted one claim of monopolization in violation of Section 2 of the Sherman Act on behalf of a nationwide class of persons or entities who purchased Paxil directly from GSK between December 29, 1997 and the present (the "Class"). (Compl. Count I.) Plaintiffs allege that GSK knowingly, willfully and wrongfully maintained its monopoly power over the market for paroxetine hydrochloride in the United States and its territories by prosecuting baseless, sham patent lawsuits against potential generic competitors, and by knowingly and willfully making false and misleading representations to the FDA to obtain multiple listings in the Orange Book. (Id.) In connection with this claim, the Complaint seeks monetary damages and injunctive relief pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

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[2]See U.S. Patent No. 6,172,233 (issued Jan. 9, 2001).

[3]See U.S. Patent No. 6,063,927 (issued May 26, 2000).

A. Litigation History

Prior to filing the Complaint, Plaintiffs' counsel investigated all of GSK's patents related to Paxil (including the '723, '423, '132, '759, '944 and '233 Patents); reviewed fifteen New Drug Applications ("NDAs") filed by GSK with the FDA with respect to the various forms of Paxil; reviewed the Abbreviated New Drug Applications ("ANDAs") filed by potential generic competitors Apotex, Geneva, Zenith, Alphapharm, Pentech, and Teva Pharmaceuticals USA, Inc. relating to paroxetine hydrochloride; and reviewed the patent infringement actions which GSK brought against these generic competitors. (Kodroff Decl. ¶¶ 11-13.) Plaintiffs The Stop & Shop Supermarket Company, Giant of Maryland, L.L.C., and American Sales Company, Inc. filed the Complaint in this action on August 6, 2003. It was not, however, the first class action antitrust suit brought against GSK in connection with Paxil. The first such suit was brought by indirect purchasers Robert Nichols and Edith Cousins on December 8, 2000. See Robert Nichols, et al. v. SmithKline Beecham Corp., Civ.A.No. 00-6222 (E.D. Pa.). That action was later consolidated with four other class action antitrust suits brought by indirect purchasers.[4]

[4]The cases which were consolidated with the Nichols action are: Dorothy L. Tyminski-Porter v. SmithKline Beecham Corp., Civ.A.No. 00-cv-6231 (E.D. Pa.), filed on December 8, 2000; Lynda Willits v. SmithKline Beecham Corp., Civ.A.No. 01-cv-0423 (E.D. Pa.), filed on January 26, 2001; Terry Kirchoff v. SmithKline Beecham Corp., Civ.A.No. 01-cv-6974 (E.D. Pa.), filed on December 26, 2001; and County of Suffolk, New York, John Kelly and Olivia

Defendant filed its Answer to the Complaint on October 3, 2003. Following status conferences held on October 10 and November 18, 2003, the Court entered a comprehensive Case Management and Scheduling Order on December 2, 2003. Pursuant to this Order, Co-Lead Counsel were appointed to represent the Class and a schedule was established for discovery and merits issues, including expert discovery, class certification, and dispositive motions.[5] The Case Management and Scheduling Order also directed the parties to coordinate the proceedings in this case with the proceedings in the Nichols action to the extent practicable.

Plaintiffs filed their Motion for Class Certification on December 10, 2003. Prior to filing the Motion, Co-Lead Counsel retained Dr. Charles King III of Greylock McKinnon Associates as an expert to address whether the alleged antitrust violations had a common impact on members of the Class, and to identify possible methods for measuring damages on a classwide basis. Dr. King provided Plaintiffs with a Declaration opining that all Class members would have been injured by illegal conduct on the part of GSK which delayed the entry of generic competition for Paxil into

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Haeberger v. Smithkline Beecham Corp., Civ.A.No. 03-cv-5620 (E.D. Pa.), filed on October 8, 2003.

[5]Thomas M. Sobol, Esq. of Hagens Berman, L.L.P. and Jeffrey L. Kodroff of Spector, Roseman & Kodroff, P.C. were appointed as Plaintiffs' Co-Lead Counsel.

the market and that accepted methodologies exist to establish such impact and antitrust damages on a classwide basis.

Following the filing of Plaintiffs' Motion for Class Certification, the parties began extensive discovery relevant to class certification. GSK served substantial interrogatories and requests for production of documents on Plaintiffs, which Plaintiffs answered, and sought discovery from absent class members. GSK also took the deposition of a corporate designee for each named Plaintiff. The parties had disagreements with respect to the extent of class certification discovery, and motions were filed and extensively briefed with respect to that discovery during the winter and early spring of 2004. GSK filed its response in opposition to the Motion for Class Certification on May 21, 2004, after which the parties exchanged expert reports and both parties' experts were deposed. Plaintiffs filed a reply memorandum in support of their Motion for Class Certification on June 28, 2004 and a hearing on the Motion for Class Certification was scheduled for August 4, 2004.

While the parties were involved in discovery and briefing relevant to Plaintiff's Motion for Class Certification, they were also engaged in merits discovery. Plaintiffs' Co-Lead Counsel in this action coordinated merits discovery with plaintiffs' counsel in the Nichols action. GSK produced hundreds of thousands of documents both in hard copy and electronically. Co-Lead Counsel

arranged for a document depository and created a document review plan in conjunction with plaintiffs' counsel in Nichols. The coordinated document review continued until the parties signed agreements in principal settling the two cases. In addition to reviewing documents produced by GSK, the coordinated discovery efforts also included third party discovery from the manufacturers of generic pharmaceuticals and additional discovery motion practice.

Co-Lead Counsel began settlement negotiations with counsel for GSK in February and March 2004. After the parties had completed substantial merits discovery, Co-Lead Counsel, together with counsel for the Nichols plaintiffs, used that discovery in a June 15, 2004 presentation to counsel for GSK. Co-Lead Counsel maintain that this presentation allowed counsel for the parties to more easily scrutinize the strengths and weaknesses of their positions, leading to the eventual settlement of both cases. The parties continued to discuss settlement in both cases throughout the summer, and the hearing on the Motion for Class Certification was continued. In mid-August 2004, Co-lead Counsel and GSK reached an agreement in principle to settle this action.[6] On October 22,

[6]Plaintiffs' counsel in the Nichols action also reached an agreement with GSK to settle that action. The Settlement Agreement in Nichols provides that members of the settlement class in that case will release their claims against GSK in exchange for a cash payment of $65,000,000. Robert Nichols, et al. v. SmithKline Beecham Corp., Civ.A.No. 00-6222 (E.D. Pa.) (Apr. 22, 2005 Mem. and Order at 17-19).

2004, Plaintiffs filed a Motion for Certification of a Settlement Class and for Preliminary Approval of Settlement. The Motion was granted on November 3, 2004, and the following Settlement Class was certified by the Court pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3):

> All persons or entities in the United States or its territories who purchased Paxil® directly from SmithKline Beecham Corporation d/b/a GlaxoSmithKline at any time during the period of December 29, 1997 through September 30, 2004. Excluded from the class are SmithKline, and its employees, subsidiaries and affiliates, and all government entities. Also excluded from the Class are claims held by, either directly or through assignment, CVS Meridian, Inc., Rite Aid Corporation, Walgreen Co., Eckerd Corporation, Albertson's, Inc., The Kroger Company, Safeway, Inc. and Hy-Vee, Inc.

(Nov. 3, 2004 Order ¶ 1.)[7]

On January 27, 2005, after notice to the Settlement Class, the Court held a hearing to ascertain the fairness of the settlement. A supplemental hearing was held regarding the Motion for Award of Attorneys' Fees and Costs on February 9, 2005.[8]

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[7]The eight corporations which excluded themselves from the Settlement Class, CVS Meridian, Inc., Rite Aid Corporation, Walgreen Co., Eckerd Corporation, Albertson's, Inc., The Kroger Company, Safeway, Inc. and Hy-Vee, Inc., have reached a separate settlement with GSK. (Kodroff Decl. ¶ 95.) These corporations account for slightly more than one-third of the purchases of Paxil by direct purchasers during the class period. (Id.)

[8]The United States Court of Appeals for the Third Circuit issued an opinion regarding the analysis of applications for attorneys' fees in class actions on January 26, 2005, the day before the Fairness Hearing. See In re Rite Aid Sec. Litig., 396

B. Settlement Terms

The Settlement Agreement outlines the details of the settlement. GSK paid $100 million into an escrow account on behalf of the Settlement Class (the "Settlement Fund"). (Settlement Agreement ¶ 6.) After the Settlement Agreement becomes final, the Settlement Fund, less attorneys' fees and expenses in the amount approved by the Court, and less any modifications allowed under the Settlement Agreement[9], will be distributed to the Settlement Class. (Id. ¶¶ 5, 9.) Plaintiffs' counsel will be paid approved attorneys' fees and expenses from the Settlement Fund within five business days of the Court's order awarding attorneys' fees. (Id. ¶ 10.)

Upon the Settlement Agreement becoming final, Plaintiffs and all members of the Settlement Class who have not timely excluded themselves from this action will release all claims against "Defendant and its present and former parents, subsidiaries,

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F.3d 294, 300 (3d Cir. 2005). Consequently, the Court gave Co-Lead Counsel time to supplement their Motion for Award of Attorneys' Fees and Costs in light of the Rite Aid decision and a Supplemental Hearing on the Motion for Award of Attorneys' Fees and Costs was held on February 9, 2005.

[9]The Settlement Agreement provides that the Settlement Fund will be modified to provide *pro rata* refunds to GSK for members of the Settlement Class who request exclusion from the class ("opt-outs"). (Settlement Agreement ¶ 12.) GSK is entitled to receive a refund from the Settlement Fund in the same proportion as the purchases of Paxil by opt-outs bear to the total purchases by Class Members during the Class period. (Id.) There were no opt-outs from the Settlement Class. (Pohl Aff. ¶ 8.)

divisions, affiliates, stockholders, officers, directors, employees, agents, attorneys and any of their legal representatives (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing)" which relate to "the marketing, sale, manufacture, pricing or purchase of, or the enforcement of intellectual property related to, the drug Paxil® or any form of paroxetine, or in any way arising out of or related to GSK's agreement with Par Pharmaceuticals ("Par") pursuant to which Par is selling paroxetine." (Settlement Agreement ¶ 11.)

C. Fairness Hearing

On January 27 and February 9, 2005, the Court held a hearing to determine the fairness of the proposed Settlement and the Motion for Award of Attorneys' Fees and Costs. Co-Lead Counsel described the notice made to the Settlement Class (the "Notice") and the method of notice. Co-Lead Counsel also outlined the terms of the Settlement Agreement and addressed the Motion for Award of Attorneys' Fees and Costs. In addition, the Court heard the testimony of the Honorable Arlin M. Adams with respect to the reasonableness of the request for attorneys' fees.

II. MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS

Federal Rule of Civil Procedure 23(h) provides that "[i]n an action certified as a class action, the court may award reasonable attorneys fees and nontaxable costs authorized by law or by agreement of the parties . . . ." Fed. R. Civ. P. 23(h).

Plaintiffs seek an award of attorneys' fees and costs in the amount of 30% of the $100 million Settlement Fund. In support of their Motion, Plaintiffs have submitted the Declaration of Jeffrey L. Kodroff, Esq., Co-Lead Counsel for Plaintiffs; the Declaration, and Supplemental Declaration, of the Honorable Arlin M. Adams; the Declaration of Richard Alan Arnold, Esq., who represents direct purchasers Walgreen Co., Eckerd Corporation, Albertson's, Inc., The Kroger Company, Safeway, Inc., and Hy-Vee, Inc., which reached a separate settlement with GSK; the Declaration of Steve D. Shadowen, Esq., who represents direct purchasers CVS Meridian, Inc. and Rite Aid Corporation, which corporations also reached a separate settlement with GSK; and the Declaration of Thomas A. Hippler, General Counsel for Plaintiff The Stop & Shop Supermarket Company.

A. Costs

"Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund." In re Aetna, Inc. Sec. Litig., MDL No. 1219 2001 WL 20928, at *13 (E.D. Pa. Jan. 4, 2001) (citing In re Ikon Office Solutions Inc. Sec. Litig., 194 F.R.D. 166, 192 (E.D. Pa. 2000)). Plaintiffs' request for an award of attorneys' fees of 30% of the Settlement Fund includes reimbursement of litigation costs totaling $372,357.01. (Kodroff Decl. Ex. 11.) The Court finds that the requested litigation expenses are reasonable.

B. Attorneys' Fees

The Supreme Court explained the basis of counsels' right to move for an award of attorneys' fees from a common fund in Boeing Co. v. Van Gemert, 444 U.S. 472 (1980):

> A litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. The common-fund doctrine reflects the traditional practice in courts of equity, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees. The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit.

Id. at 478. "Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process." Fed. R. Civ. P. 23(h), advisory committee's note. In ruling on a motion for award of attorneys' fees, the district court has two goals. The court seeks to protect the interests of class members by "acting as a fiduciary for the class." In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 307 (3d Cir. 2005) (citing In re Cendant Corp. Litig., 264 F.3d 201, 231 (3d Cir. 2001) ("Cendant I")). The court's fiduciary role arises from a recognition that there is a potential economic conflict of interest between class

members, who seek to maximize recovery from a settlement, and lawyers, who seek to maximize fees. Cendant I, 264 F.3d at 254-55. The United States Court of Appeals for the Third Circuit ("Third Circuit") has explained that the "divergence in [class members' and class counsel's] financial incentives ... creates the 'danger ... that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees.'" In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 730 (3d Cir. 2001) (quoting In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 820 (3d Cir. 1995)). Consequently, "the danger inherent in the relationship among the class, class counsel, and defendants 'generates an especially acute need for close judicial scrutiny of fee arrangements' in class action settlements.'" Id. (quoting In re General Motors, 55 F.3d at 820). In examining a motion for an award of attorneys' fees from a common fund, the Court also seeks to protect the public interest and, with it, the integrity of the judicial system:

> [F]or the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding "windfall fees" and that they should likewise avoid every appearance of having done so. To this end courts must always heed the admonition of the Supreme Court in Trustees v. Greenough, [105 U.S. 527 (1881)], when it advised that fee awards under the equitable fund doctrine were proper only "if made with moderation and a jealous regard to the rights of those who are interested in the fund."

City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974) (quoting Trustees v. Greenough, 105 U.S. 527, 536 (1881)), abrogated on different grounds by Goldberger v. Integrated Resources, Inc., 204 F.3d 43 (2d Cir. 2000)).

Keeping these two goals in mind, the district courts "must thoroughly review fee petitions for fairness. Although the ultimate decision as to the proper amount of attorneys' fees rests in the sound discretion of the court, the court must set forth its reasoning clearly." In re Aetna, 2001 WL 20928, at *13 (citations omitted). Courts typically use either the percentage of recovery method or the lodestar method to assess attorneys' fees. In re Rite Aid, 396 F.3d at 300. The Court will utilize the percentage of recovery method in this case, as that method is "generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" Id. (quoting In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 333 (3d Cir. 1998)). When a district court uses the percentage of recovery method, it "first calculates the percentage of the total recovery that the proposal would allocate to attorneys fees by dividing the amount of the requested fee by the total amount paid out by the defendant; it then inquires whether that percentage is appropriate based on the circumstances of the case." Cendant I, 264 F.3d at 256 (footnote omitted) (citing In re Cendant Corp. PRIDES Litig.,

243 F.3d at 733-35). The Third Circuit has directed the district courts to use the following seven factors in determining whether a percentage of recovery fee award is reasonable:

> (1) the size of the fund created and the number of persons benefitted;
> (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or the fees requested by counsel;
> (3) the skill and efficiency of the attorneys involved;
> (4) the complexity and duration of the litigation;
> (5) the risk of nonpayment;
> (6) the amount of time devoted to the case by plaintiffs' counsel; and
> (7) the awards in similar cases.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000); see also In re Rite Aid, 396 F.3d at 301. Although the district courts should "engage in robust assessments of the fee award reasonableness factors when evaluating a fee request," these factors are not to be applied in a formulaic way. In re Rite Aid, 396 F.3d at 301-02.

1. The size of the fund and number of persons benefitted

Plaintiffs' counsel have obtained a substantial cash settlement of $100 million, plus interest, on behalf of the Settlement Class. The Settlement Class is made up of approximately 90 direct purchasers of Paxil. (Adams Decl. ¶ 36.) Plaintiffs' expert estimated total damages to all direct purchasers of Paxil, including CVS Meridian, Inc., Rite Aid Corporation, Walgreen Co.,

Eckerd Corporation, Albertson's, Inc., The Kroger Company, Safeway, Inc. and Hy-Vee, Inc., at $1,780,251,320. (Mem. in Support of Pls.' Mot. for Certification of a Settlement Class and Prelim. Approval of Settlement, Ex. 1.) However, Plaintiffs recognize that this estimate should be reduced by 20% to account for generic bypass.[10] In addition, Plaintiffs estimate that the direct purchasers who entered into a separate agreement with GSK, CVS Meridian, Inc., Rite Aid Corporation, Walgreen Co., Eckerd Corporation, Albertson's, Inc., The Kroger Company, Safeway, Inc. and Hy-Vee, Inc., account for slightly more than one-third of the total damages. (Kodroff Decl. ¶ 95.) Reducing Plaintiffs' estimate of damages by 20% to account for generic bypass, and reducing the remainder by one-third to account for the corporations which reached a separate settlement with GSK, the estimated total damages to the Settlement Class are approximately $880 million. (Kodroff Decl. ¶ 103.) Consequently, the Settlement Fund amounts to approximately 11.4% of total damages to the Settlement Class. (Id.) This percentage compares favorably with the settlements reached in other complex class action lawsuits. See Cendant I, 264 F.3d at 231 (approving settlement of 36% of total damages and

[10]"'Generic bypass' occurs when, after a generic is introduced, the wholesaler is bypassed completely and the generic manufacturer sells directly to the customer. Thus, the wholesaler suffers a loss of sales to its prior customers." In re Terazosin Hydrochloride Antitrust Litig., 223 F.R.D. 666, 673 n.13 (S.D. Fla. 2004). The Settlement Class in this case includes pharmaceutical wholesalers.

noting that typical recoveries in complex securities class actions range from 1.6% - 14% of estimated damages); In re Linerboard Antitrust Litig., MDL No. 1261, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004) (collecting cases in which courts have approved settlements of 5.35% to 28% of estimated damages in complex antitrust actions); In re Aetna, 2001 WL 20928, at *4 (approving settlement of approximately 10% of total damages of $830 million).

In cases involving common funds of $100 million or more, commonly referred to as "megafund" cases, the size of the fund is generally given less weight in the analysis of the appropriate fee percentage. See Cendant I, 264 F.3d at 283 (citing In re Prudential, 148 F.3d at 339). As the common fund nears the $100 million level, the "application of a normal range of fee awards from a common fund may result in a fee that is unreasonably large as a compensation for the benefits conferred." Alba Conte, Attorney Fee Awards § 2.09 (2d ed. 1993). Indeed, "[i]n final fee awards in cases involving very substantial fund recoveries, courts have recognized the economies of scale inherent in class action recoveries and have awarded fees on a straight percentage basis that fall below the usual range of fund fee awards." Id.

The Third Circuit initially adopted a diminishing sliding scale approach to megafund cases. Following the 1985 Third Circuit Task Force Report on Court Awarded Attorney Fees, 108 F.R.D. 237 (1986), the Third Circuit instructed the district courts that

"ordinarily, the percentage of a recovery devoted to attorneys fees should decrease as the size of the overall settlement or recovery increases." Cendant I, 264 F.3d at 284 n.55 (citing 1985 Task Force Report, 108 F.R.D. at 256; In re Prudential, 148 F.3d at 339; In re Cendant Corp. PRIDES Litig., 243 F.3d at 736). The Third Circuit cautioned district courts weighing attorneys' fee awards in megafund cases to "avoid basing their awards on percentages derived from cases where the settlement amounts were much smaller." In re Cendant Corp. PRIDES Litig., 243 F.3d at 736. In its recent opinion in In re Rite Aid, the Third Circuit reiterated the likelihood that the size of the common fund may require a smaller percentage fee award in megafund cases: "[O]ur jurisprudence confirms that it may be appropriate for percentage fees awarded in large recovery cases to be smaller in percentage terms than those with smaller recoveries." In re Rite Aid, 396 F.3d at 302. However, the Third Circuit advised that "there is no rule that a district court must apply a declining percentage reduction in every settlement involving a sizable fund." Id. at 302 (citing Cendant I, 264 F.3d at 284).

Having considered the size of the Settlement Fund and the number of persons benefitted, the Court finds that the size of the Settlement Fund in this case weighs against the percentage of recovery sought as an award of attorneys' fees in this case. However, the Court also finds that the facts of this case do not

require the formulaic application of a declining percentage reduction to the award of attorneys' fees.

2. Objections

The Notice provided in this case informed members of the Settlement Class that Plaintiffs' counsel sought an award of up to 33⅓% of the Settlement Fund as attorneys' fees in this case. (Pohl Aff., Ex. A at 10.) Although the Settlement Class in this case is relatively small and consists of sophisticated businesses, not one member of the Settlement Class objected to the requested fee. Indeed, Thomas A. Hippler, Esq., General Counsel for The Stop & Shop Supermarket Company, has submitted a Declaration on behalf of the three named Plaintiffs supporting the fee request. Mr. Hippler states in his Declaration as follows:

> Stop & Shop, Giant and ASC understand that class counsel seek an attorneys' fee award in the amount of 30% of the settlement fund. Based upon all of the relevant considerations (which include the risks of this complex antitrust litigation, the recovery involved, the efficiency and timeliness of counsels' work, counsels' qualifications and experience in such matters and other factors), we assent to the request that is being made by class counsel for a fee and request that the Court enter an order approving it.

(Hippler Decl. ¶ 11.)

The Court finds that the absence of objections, and the support of the three named Plaintiffs, weighs in favor of approval of the requested fee in this case. See In re Rite Aid, 396 F.3d at 305 (finding that the "District Court did not abuse its discretion

in finding the absence of substantial objections by class members to the fee requests [sic] weighed in favor of approving the fee request" where objections had been made by only two of 300,000 class members who had received mailed notice); see also In re Linerboard, 2004 WL 1221350, at *5 ("The absence of objections supports approval of the Fee Petition.") (citing In re Cell Pathways, Inc. Sec. Litig. II, Civ.A.No. 01-cv-1189, 2002 U.S. Dist. LEXIS 18359, at *24 (E.D. Pa. Sept. 23, 2002)); In re Aetna, 2001 WL 20928, at *15 (noting that "the Class Members's view of the attorneys' performance, inferred from the lack of objections to the fee petition, supports the fee award").

3. The skill and efficiency of Plaintiffs' counsel

The skill and efficiency of Plaintiffs' counsel is "measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." In re Ikon, 194 F.R.D. 166 at 194 (citation omitted). Here, Plaintiffs' counsel are highly experienced in complex antitrust class action litigation, as evidenced by the attorney biographies filed with the Court. (Kodroff Decl. Ex. 12, Adams Decl. ¶¶ 38-41.) They have obtained a significant settlement for the Class despite the complexity and difficulties of this case. Defense counsel are also very experienced in complex class action

antitrust litigation, and displayed great skill in defending this suit. Accordingly, the Court finds that this factor favors approval of the percentage of recovery requested as a fee in this case.

4. Complexity and duration of the litigation

This litigation presented enormously complex legal and factual issues. An antitrust class action is "arguably the most complex action to prosecute" as "[t]he legal and factual issues involved are always numerous and uncertain in outcome." In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) (citations and internal quotation marks omitted). Although the parties have been actively litigating this action for more than a year, in the absence of settlement complex legal and factual issues would remain to be decided in this case, including certification of the putative class, the validity of GSK's patents relating to Paxil, the time at which generic competitors would have been ready to enter the market for paroxetine hydrochloride, and the pricing of Paxil and its generic competitors at various times. In addition, even though the parties have completed substantial merits discovery, the Court recognizes that significant costs would still be incurred in the absence of settlement. At the time the parties first informed the Court they had arrived at a settlement, the parties had not concluded merits discovery, the Motion for Class Certification had not yet been heard, the parties would likely have

filed dispositive motions, and this case would have required a lengthy trial. Given the enormous amounts of money at stake, and the vigorous advocacy of counsel for both parties over the course of this litigation, it can reasonably be expected that whichever party did not prevail at trial would file post-trial motions and an appeal. Consequently, it is reasonable to expect that this case would have continued for several more years absent settlement. Accordingly, the Court finds that this factor favors approval of the percentage of recovery requested as a fee in this case.

5. Risk of nonpayment

This action also presented considerable risk of non-payment. Plaintiffs recognize that they faced potentially insurmountable barriers to establishing liability in this case. Plaintiffs claimed that GSK violated Section 2 of the Sherman Act by engaging in sham patent litigation against generic manufacturers of paroxetine hydrochloride in order to prevent or delay their entry into the market. GSK, however, claims that its actions are protected by the Noerr-Pennington doctrine, pursuant to which the Supreme Court recognized that the Sherman Antitrust Act does not restrain "attempts to influence the passage or enforcement of laws." Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-36 (1961); see also United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965) ("Noerr shields from the Sherman Act a concerted effort to influence public officials

regardless of intent of purpose.") (underscore added). In Cal. Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508 (1972), the Supreme Court extended the Noerr-Pennington doctrine to the right to access the courts, but noted that the filing of sham litigation would not be immune from suit under the Sherman Act. Id. at 510-11 (citing Noerr, 365 U.S. at 144). In order to prevail on their claim that GSK's patent infringement suits constituted sham litigation, Plaintiffs would have to demonstrate that GSK's actions were both "objectively baseless" and "an attempt to interfere directly with the business relationships of a competitor." Prof. Real Estate Investors, Inc. v. Columbia Picture Indus., Inc., 508 U.S. 49, 60-61 (1993) (citations omitted). As Judge Adams has noted, Plaintiffs would have faced significant hurdles in demonstrating that the patent infringement suits filed by GSK constitute sham litigation. (Adams Decl. ¶ 47.) Indeed, Judge Posner has stated, with respect to GSK's filing of a patent infringement suit against Pentech in connection with the '723 patent, that "there is nothing to suggest that [GSK's] claim of infringement was frivolous." Asahi Glass Co. v. Pentech Pharm., Inc., 289 F. Supp. 2d 986, 992 (N.D. Ill. 2003) (Posner, J.). Furthermore, Plaintiffs would also have had to overcome a Noerr-Pennington defense to their claim that GSK's listings of patents claiming Paxil in the Orange Book were fraudulent.

Moreover, this action was riskier than many other antitrust class actions because there was no prior government investigation, or prior finding of civil or criminal liability based on antitrust violations, in this case. (Adams Decl. ¶ 48.) In addition, unlike typical antitrust class actions, in which many lawsuits are filed and the risks of litigation are spread across many law firms, this is the only direct purchaser antitrust class action which was filed against GSK pertaining to Paxil, and only three law firms were involved in prosecuting this action on behalf of the Class. (Id. ¶ 49, Kodroff Decl. Ex. 11.) The Court, therefore, finds that this factor favors approval of the percentage of recovery requested as a fee in this case.

6. The amount of time devoted to this case

Plaintiffs' counsel had expended 4,239.8 hours on this action as of January 10, 2005. (Kodroff Decl. ¶ 109, Ex. 11.) The amount of attorney time devoted to this litigation is quite small in relationship to the requested fee of $30 million. Indeed, plaintiffs' counsel in Nichols requested only $19.5 million in fees although they had invested approximately 17,000 hours of attorney time in that case. The Court recognizes that Plaintiffs' counsel should not be penalized for prosecuting this case in an efficient manner, or for keeping down the number of hours which they were required to devote to this case by coordinating merits discovery with plaintiffs' counsel in Nichols. Nonetheless, in considering

whether a particular percentage of the common fund is an appropriate fee, the Court may consider the amount of time devoted to a case by counsel as disfavoring the requested fee. In this case, the 4,239.8 hours expended by Plaintiffs' counsel in prosecuting this case is dwarfed by request for fees amounting to 30% of the $100 million Settlement Fund. Consequently, the Court finds that the amount of time devoted to this case weighs against the percentage of recovery requested as a fee in this case.

7. Awards in similar cases

This factor requires the Court to compare the percentage of recovery requested as a fee in this case against the percentage of recovery awarded as a fee in other common fund cases in which the percentage of recovery method, rather than the lodestar method, was used. In re Cendant Corp. PRIDES Litig., 243 F.3d at 737. This Court awarded a fee of 30% of the common fund as attorneys fees in Nichols. See Robert Nichols, et al. v. SmithKline Beecham Corp., Civ.A.No. 00-6222 (E.D. Pa.) (Apr. 22, 2005 Mem. and Order). Although, at first glance, Nichols would appear to be the most comparable common fund case against which the fee award in this case should be measured, there are significant differences between the cases which strongly counsel against the automatic application of the same percentage in this case. The most obvious difference is that Nichols is not a megafund case. The common fund in Nichols is $65 million, substantially less than the common fund in this

case. In addition, plaintiffs' counsel in Nichols prosecuted that action for nearly four years prior to reaching a settlement with GSK and devoted more than 17,000 hours to that case as of February 1, 2005, approximately four times the number of hours expended by Plaintiffs' counsel in this action. Consequently, the Court must also look to other common fund cases to determine whether the percentage of recovery fee award requested in this case is appropriate.

The Court has, therefore, examined three previously published surveys of fee awards in common fund class actions, as well as recently reported fee awards in megafund cases in this judicial district and in other courts which were not included in those surveys. Many cases appear in more than one of the previously published surveys of attorneys' fee awards. Combining the cases identified in the three surveys, and the Court's own review of recent fee awards, the Court has identified 80 cases in which percentage based attorneys' fees were awarded in megafund cases.

In 2003, the Class Action Reporter published a survey of fee awards in common fund class actions. See Stuart J. Logan, Dr. Jack Moshman & Beverly C. Moore, Jr., Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 167-234 (2003). Sixty-four of the cases included in the survey involved common funds over $100 million. Id. at 169-70. The average percentage of recovery awarded as attorneys' fees and costs in cases with common funds

over $100 million was 15.1%. Id. The percentage of recovery awarded as a fee alone was 30% or more in only six of those cases, and 25% or more in sixteen of those cases. Id. The Class Action Reporter survey also lists the hours for which fees were awarded in 40 of the 64 megafund cases. Id. Of those 40 cases, there were seven in which less than 10,000 attorney hours were expended. Id. The award of attorneys' fees and costs did not exceed 5.5% of the common fund in any of those cases. Id.

In 2002, the United State Court of Appeals for the Ninth Circuit (the "Ninth Circuit") surveyed percentage based attorneys' fee awards in thirty-four common fund cases. See Vizcaino v. Microsoft Corp., 290 F.3d 1043 (9th Cir. 2002) (surveying percentage of recovery attorneys' fee awards granted between 1996 and 2001 in cases with common funds of $50-200 million). The awards included in the survey ranged from 2.8% to 40% of the common fund. Id. at 1052-54. Eighteen of the thirty-four cases analyzed by the Ninth Circuit involved settlements of $100 million or more. Attorneys' fees of 30% of the common fund were awarded in only three of those cases.[11] Id. Percentage based fees of 25% or more were awarded in nine of the eighteen megafund cases surveyed. Id.

[11]One of those three cases, In re Merry-Go-Round Enter., Inc., 244 B.R. 327 (Bankr. D. Md. 2000), was not a class action, but an adversary proceeding against the debtor's former accountant which was prosecuted in accordance with a previously approved contingent fee agreement. Id. at 330. Consequently, the Court does not consider In re Merry-Go-Round comparable to the instant litigation.

The Vizcaino court affirmed a fee award of 28% of a common fund of approximately $97,000,000. Id. at 1052.

The Third Circuit examined the percentage based fee awards in eighteen megafund cases in In re Cendant Corp. PRIDES Litig., 243 F.3d at 737-38. The "attorneys' fee awards ranged from 2.8% to 36% of the common fund in those cases." Id. at 738. Percentage based fees of 30% or more were awarded in only three of the cases reviewed by the Third Circuit. Id. The fee award was more than 25% of the common fund in five of the eighteen cases. Id.

In its own review of reported megafund cases, this Court has found one additional case in which attorneys' fees of less than 10% of the common fund were awarded,[12] three additional cases in which attorneys' fees amounting to 30% or more of the settlement fund were approved,[13] and one additional case in which attorneys' fees

[12] Attorneys fees in the amount of $220 million, or 6.5% of the settlement fund of $3.3 billion were awarded in In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003), aff'd Walmart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96 (2d Cir. 2005).

[13] Thirty-three percent of a common fund of $220 million was awarded as fees in In re Buspirone Antitrust Litig., Civ.A.No. 01-MD-1410 (S.D.N.Y. Apr. 11, 2003). See In re Visa, 297 F. Supp. 2d at 525 n.33 (collecting cases). Thirty percent of a common fund of $110 million was awarded as fees in In re Cardizem CD Antitrust Litig., Civ.A.No. 99-MD-1278 (E.D. Mich. Nov. 26, 2002). See In re Visa, 297 F. Supp. 2d at 525 n.33. Attorneys' fees of approximately 30% of the common fund were approved in this judicial district in In re Linerboard. 2004 WL 1221350, at *5 (approving attorney's fee award of 30% of a settlement fund of approximately $200,000,000).

of 25% of the common fund were approved.[14] All together, attorneys' fees amounting to 25% or more of the common fund were awarded in 21 of the 80 individual megafund cases reviewed by the Court. Attorneys' fees amounting to 30% or more of the common fund were awarded in only nine of those 80 cases.[15]

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[14]Attorneys' fees of 25% of the common fund of $126.6 million were awarded to plaintiffs' counsel in In re Rite Aid. In re Rite Aid Sec. Litig., 362 F. Supp. 2d 587 (E.D. Pa. 2005).

[15]Those cases are:
(1) In re Vitamins Antitrust Litig., MDL No. 1285 (D.D.C. July 16, 2001) (awarding fees of $123,188,000, which amounted to 34% of common fund of $365,188,000). See Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 169-70.
(2) Weatherford Roofing Co. v. Employers Nat. Ins. Co., No. 91-05637 (Tex. Dist. Ct. Dallas Co. Ct.) (awarding fees of $60,075,000, which amounted to 31.6% of common fund of approximately $190 million). See Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 169.
(3) In re Combustion, Inc., 968 F. Supp. 1116, 1136 (W.D. La. 1997) (setting a maximum cap reserve for attorneys fees of 36% of common fund of $127 million).
(4) Kurzweil v. Philip Morris Co., Inc., Civ.A.Nos. 94 Civ. 2373(MBM), 94 Civ. 2546(BMB), 1999 WL 1076105, at *1 (S.D.N.Y Nov. 30, 2000) (awarding fees of 30% of common fund of approximately $124 million).
(5) In re Ikon, 194 F.R.D. 166, 192-196 (E.D. Pa. 2000) (awarding attorneys' fees of 30% of common fund (less costs) of $108 million with in excess of 45,000 attorney hours).
(6) In re Buspirone Antitrust Litig., Civ.A.No. 01-MD-1410 (S.D.N.Y. Apr. 11, 2003) (awarding fees of 33% of common fund of $220 million). See In re Visa, 297 F. Supp. 2d at 525 n.33 (collecting cases).
(7) In re Cardizem CD Antitrust Litig., Civ.A.No. 99-MD-1278 (E.D. Mich. Nov. 26, 2002) (awarding attorneys fees of 30% of common fund of $110 million). See In re Visa, 297 F. Supp. 2d at 525 n.33.
(8) In re Linerboard, 2004 WL 1221350, at *5 (awarding fees of 30% of settlement fund of $202,572,489).
(9) In re Informix Corp. Sec. Litig., No. 9701289 (N.D. Cal. Nov. 23, 1999) (awarding attorneys fees of 30% of common fund of $137 million). See Vizcaino, 290 F.3d at 1052.

After considering studies of percentage of recovery fee awards in comparable megafund cases, and performing its own examination of percentage of recovery fee awards in reported megafund cases, the Court finds that the percentage requested in this case is among the highest that has ever been awarded in megafund cases. Moreover, the Gunter analysis requires the Court to examine awards in factually similar cases. In order to compare the fee request in the instant action with awards in factually similar megafund cases, the Court has also examined the published data regarding the total attorney hours expended in other megafund cases which was included in the survey published in the Class Action Reporter. See Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 169-70. In megafund cases in which counsel expended less than 10,000 hours, the highest percentage of the common fund awarded as an attorneys' fee was 5.5%. This percentage is considerably less than 30% requested in this case in which counsel expended only 4,239.8 total attorney hours. Id. The Court has also examined the available information regarding the hours expended by counsel in those megafund cases in which fees of 30% or more of the common fund were awarded. Of the four cases in which such data was available, not one involved the expenditure of less than 28,000 hours.[16]

[16]Those cases are: (1) Weatherford Roofing Co. v. Employers Nat. Ins. Co., No. 91-05637 (Tex. Dist. Ct. Dallas Co. Ct.) (50,000 total attorney hours). See Attorney Fee Awards in Common Fund

Plaintiffs have submitted declarations from counsel for the eight direct purchasers of Paxil who entered into a separate settlement with GSK as additional support of their request for a fee award of 30% of the Settlement Fund. Richard Alan Arnold, Esq. represented Walgreen Co., Albertson's, Inc., Eckerd Corp., Hy Vee Inc., Kroger Co. and Safeway, Inc. in connection with their settlement with GSK. He states that he represented his clients in this case on a contingent fee basis and that contingent fees of 30% are usual in cases brought for substantial corporations, with the client paying the ongoing costs of litigation. (Arnold Decl. ¶¶ 3-4.) He also states that this case was riskier than many cases in which major corporate clients entered into contingent fee arrangements providing for counsel to obtain more than 30% of the recovery. (Id. ¶¶ 5-10.) Steve D. Shadowen, Esq. represented CVS Meridian, Inc. and Rite Aid Corporation in connection with settlement of their claims against GSK over the sale of Paxil. (Shadowen Decl. ¶9.) He states that the going contingency rate for experienced counsel representing corporate plaintiffs in complex antitrust matters is one-third of the recovery. (Id. ¶ 4.)

Class Actions, 24 Class Action Rep. 169.
(2) In re Ikon, 194 F.R.D. 166, 192-196 (E.D. Pa. 2000) (in excess of 45,000 attorney hours).
(3) In re Linerboard, 2004 WL 1221350 (51,268 attorney hours).
(4) In re Buspirone, Civ.A.No. 01-MD-1410 (S.D.N.Y. Apr. 11, 2003) (28,727 attorney hours). (Pls. Supp. Mem. Ex. 5 at 35.)

Despite the support provided by these affidavits, the Court finds that the percentage of the Settlement Fund requested as an attorneys' fee in this case does not compare favorably to the percentage based fees awarded in factually similar cases. The fee request in this case is comparable to the highest percentages awarded in megafund cases and is more than five times the highest percentage awarded in cases with a similar investment of attorney time. Consequently, the Court finds that this factor weighs against the percentage of the common fund requested as a fee in this case.

Having exhaustively reviewed the Gunter factors, the Court concludes that three of those factors, the size of the fund, the time devoted to this case, and the awards in similar cases, do not support the attorneys' fees requested in this case. The Court further finds that these factors are not outweighed by the remaining Gunter factors, the absence of objections, the skill and efficiency of counsel, the complexity and duration of the litigation, and the risk of non-recovery. Consequently, the Court concludes that the Gunter factors do not support Plaintiffs' request for an award of 30% of the Settlement Fund as attorneys' fees in this case.

8. Lodestar cross-check

The Third Circuit has suggested that, in addition to reviewing the Gunter factors, "it is 'sensible' for district courts to 'cross-check' the percentage fee award against the 'lodestar' method." In re Rite Aid, 396 F.3d at 305 (citing In re Prudential, 148 F.3d at 333). The purpose of the lodestar cross-check echoes the second goal of the Court's analysis of motions for attorneys' fees: the avoidance of "windfall fees." See Grinnell, 495 F.2d at 469. The lodestar cross-check is performed to "ensure that the percentage approach does not lead to a fee that represents an extraordinary lodestar multiple." In re Cendant Corp. Sec. Litig., 404 F.3d 173, 188 (3d Cir. 2005) ("Cendant II") (citations omitted). "The goal of this practice is to ensure that the proposed fee award does not result in counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a 'windfall' to lead counsel." Cendant I, 264 F.3d at 285.

The lodestar is calculated by "multiplying the number of hours worked by the normal hourly rates of counsel. The court may then multiply the lodestar calculation to reflect the risks of nonrecovery, to reward an extraordinary result, or to encourage counsel to undertake socially useful litigation." In re Aetna, 2001 WL 20928, at *15 (citing In re Ikon, 194 F.R.D. at 195). "The lodestar cross-check calculation need entail neither mathematical

precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records. Furthermore, the resulting multiplier need not fall within any pre-defined range, provided that the District Court's analysis justifies the award." In re Rite Aid, 396 F.3d at 306-07 (footnotes and citations omitted). It is appropriate for the court to consider the multipliers utilized in comparable cases. Id. at 307 n.17.

The lodestar in this case is $1,255,911.14, based on the actual billing rates of all attorneys who worked on this case. (Kodroff Decl. ¶ 109.) Plaintiffs' counsel seek an award of 30% of the $100 million Settlement Fund in attorneys' fees and reimbursement of their costs of litigation. Their costs of litigation in this case total $372,357.01. The portion of the request which represents only attorneys' fees is, therefore, $29,627,642.99. A fee award of $29,627,642.99 would result in a lodestar multiplier of 23.59. The application of such a multiplier in this case would be **unprecedented**.

The Third Circuit has recognized that multipliers "'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" In re Cendant Corp. PRIDES Litig., 243 F.3d at 742 (quoting In re Prudential, 148 F.3d at 341). Of the eighteen megafund cases analyzed in In re Cendant Corp. PRIDES Litig., all but two cases in which lodestar

multipliers were reported had multipliers between 1 and 2.95. Id. at 737-38. The other two cases are In re Cendant Corp. PRIDES Litig., 51 F. Supp. 2d 537 (D.N.J. 1999) (lodestar multiplier of between 7 and 10) and In re Cendant Corp. Litig., 109 F. Supp. 2d 285 (D.N.J. 2000) (lodestar multiplier of 32.7). In re Cendant Corp. PRIDES Litig., 243 F.3d at 737. The awards of attorneys fees were vacated by the Third Circuit in both of those cases. See id. at 744 (finding that the district court had "strayed from all responsible discretionary parameters" by awarding a fee which resulted in a lodestar between 7 and 10 without explaining how such a high multiplier was justified); Cendant I, 264 F.3d at 285-86 (noting that even a lodestar multiplier of 24 would be "extraordinarily high"). On remand, the district court awarded a fee of $55 million in In re Cendant Corp. Litig., which resulted in a lodestar in the mid-single digits. See In re Cendant Corp., 243 F. Supp. 2d 166, 174 (D.N.J. 2003), aff'd Cendant II, 404 F.3d 173 (3d Cir. 2005); see also Cendant II, 404 F.3d at 183 n.4.

The 2003 Class Action Reporter survey found that the average lodestar multiplier was 4.5 for percentage of recovery fee awards in cases with common funds of $100 million or more. Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 170. The lodestar multipliers for the cases surveyed by the Ninth Circuit in Vizcaino ranged from .06 to 8.5. Vizcaino, 290 F.3d at 1052-54. The fee awarded in In re Buspirone resulted in a multiplier of

8.46; the fee awarded in In re Cardizem CD resulted in a multiplier of 3.7; the fee awarded in Kurzweil resulted in a multiplier of 2.46. See In re Visa, 297 F. Supp. 2d at 525 n.33. The fee awarded in In re Visa resulted in a multiplier of 3.5. Id. at 524. The fee awarded in In re Linerboard resulted in a multiplier of 3.67 using counsel's current rates. In re Linerboard, 2004 WL 1221350, at *16 n.9. The lodestar multiplier on the fee ultimately awarded in Rite Aid was 6.96. In re Rite Aid, 2005 WL 697461, at *1.

Plaintiffs' counsel have also asked the Court to consider the following cases, which they contend support a lodestar multiplier of 23.59 in this case: In re R.J.R. Nabisco Sec. Litig., MDL No. 818 (MBM), 1992 U.S. Dist. LEXIS 12702, at *16 (S.D.N.Y. Aug. 24, 1992) (approving request for fees and expenses totaling 25% of the settlement amount, resulting in a lodestar multiplier of 6); Muchnick v. First Fed. Sav. & Loan Assoc., Civ.A.No. 86-1104, 1986 U.S. Dist. LEXIS 19798 (E.D. Pa. Sept. 30, 1986) (approving fee request of $250,000 from a settlement fund of between $4 million and $6.8 million, resulting in a lodestar multiplier of 8); Cosgrove v. Sullivan, 759 F. Supp. 166 (S.D.N.Y. 1991) (approving fee of $1 million, or 1% of medicare benefits paid by HHS pursuant to the settlement; the fee represented a multiplier of 8.75 of the lodestar of $114,398.00); Roberts v. Texaco, Inc., 979 F. Supp. 185, 198 (S.D.N.Y. 1995) (approving attorney's fee award of

$19,154,144.62, which was 16.66% of the $115 million common fund and represented a lodestar multiplier of 5.5); Weiss v. Mercedes-Benz of N. Am., 899 F. Supp. 1297, 1304 (D.N.J. 1995) (awarded fee of $11,250,000 which represented 15% of the present value of the settlement which was calculated as $75,000,000. Plaintiffs state that this represents a lodestar multiplier of 9.3, but the lodestar and multiplier are not cited or discussed in the opinion). The Court notes that the lodestar multiplier which would result from an award of 30% of the Settlement Fund as attorneys' fees in this case is more than twice the highest multiplier in cases supplied by Plaintiffs.

In In re Rite Aid, the Third Circuit explained that:

> The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award. Even when used as a cross-check, courts should "explain how the application of a multiplier is justified by the facts of a particular case."

In re Rite Aid, 396 F.3d at 306 (quoting In re Prudential, 148 F.3d at 340-41). After exhaustive review of the lodestar multipliers in other, similar, megafund cases, the precedent supplied by counsel, and the Supplemental Declaration of Arlin M. Adams, the Court concludes that the percentage of recovery attorneys' fee requested in this case would lead to a lodestar multiplier that is extraordinarily and unjustifiably high. After having thoroughly

reviewed all of the Gunter factors in this case, and having performed the lodestar cross-check, the Court finds that the percentage of the common fund requested as a fee in this case is not fair and reasonable.

III. CONCLUSION

As the Court has determined that the 30% fee award sought by Plaintiffs' counsel is not reasonable, it must reconsider Plaintiffs' request for fees under the percentage-of-recovery method. In re Rite Aid, 396 F.3d at 306. In reconsidering the calculation of attorneys' fees, the Court has re-examined the Gunter factors mindful of the Third Circuit's admonition that "[t]hese fee award factors 'need not be applied in a formulaic way . . . and in certain cases, one factor may outweigh the rest.'" Id. at 301 (quoting Gunter, 223 F.3d at 195 n. 1).

The Court finds that Plaintiffs' counsel obtained an early and excellent result in an extremely complex and risky case. The size of the fund is substantial and, as a percentage of estimated damages, well within the norm for cases which present the degree of risk undertaken by Plaintiffs' counsel in this case. The number of persons benefitted and absence of objections from a small and sophisticated class further supports an attorneys' fee award which provides counsel with an incentive for undertaking complex and risky litigation, particularly in light of the support offered by the three named Plaintiffs. The Court, naturally, recognizes the

skill and experience brought to bear by counsel throughout the year they spent actively litigating this case, and the economy with which they were able to achieve such a noteworthy settlement. Having also considered the time invested in this case by counsel, which resulted in a lodestar of $1,255,911.14, and the awards in comparable cases, the Court finds that 20% percent of the Settlement Fund results in a fair and reasonable award of attorneys' fees and costs in this action. The Court further finds that this award is justified by the high caliber of Plaintiffs' counsels' work in this case, even though the percentage of recovery represented by the fee in this case is greater than the average percentage of recovery awarded as a fee in megafund cases. See Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 170.

The Court further notes that the high lodestar multiplier (15.6) which results from the Court's award of attorneys' fees in this case is neutralized with respect to the reasonableness of a percentage fee award of 20% by the extraordinary support Plaintiffs have shown for counsel's request for fees. Not one member of the Settlement Class, which is made up of approximately 90 sophisticated businesses, objected to the Motion for Award of Attorneys' Fees, even though the Notice informed members of the Settlement Class that Plaintiffs' counsel would apply for an award of fees amounting to 33% of the Settlement Fund. In addition, the

General Counsel of The Stop and Shop Supermarket Company provided a Declaration in support of counsels' request for fees, in which he states that all three named Plaintiffs assent to counsel's request for a 30% fee. (Hippler Decl. ¶ 11.) The Court has taken such support as a clear indicator that the market supports a dramatic bonus for work so timely and well done.

Having thoroughly analyzed the Gunter factors and the lodestar cross-check in this case, and for the reasons stated above, the Court grants Plaintiffs' Motion for Award of Attorneys Fees and Costs and awards attorneys' fees and costs of litigation in this case in the total amount of $20,000,000.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE STOP & SHOP SUPERMARKET COMPANY, ET AL.	:	CIVIL ACTION
v.	:	
SMITHKLINE BEECHAM CORP.	:	NO. 03-4578

O R D E R

AND NOW, this 19th day of May, 2005, upon consideration of Plaintiffs' "Motion for Award of Attorneys' Fees and Costs" (Docket No. 75), the papers filed in support thereof, and the Fairness Hearing held on January 27 and February 9, 2005, and for the reasons stated in the accompanying Memorandum, **IT IS HEREBY ORDERED** that Plaintiffs' Motion is **GRANTED** and Plaintiffs' counsel are hereby awarded attorneys' fees and costs in the total amount of 20% of the Settlement, to be allocated among Class Counsel as reasonably determined by Co-Lead Counsel.

IT IS FURTHER ORDERED that this case is **DISMISSED WITH PREJUDICE**.

BY THE COURT:

_____
John R. Padova, J.