UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

In re WELLBUTRIN XL ANTITRUST LITIGATION	)	Civil Action No.: 2:08-cv-2433
THIS DOCUMENT RELATES TO:	)	Honorable Mary A. McLaughlin
INDIRECT PURCHASER ACTIONS	)	

[PROPOSED] FINAL ORDER AND JUDGMENT APPROVING SETTLEMENT AND AWARDING INCENTIVE PAYMENTS, FEES, AND REIMBURSEMENT OF EXPENSES

The Court, having considered (a) Plaintiffs'[1] motion for preliminary approval of settlement (Dkt. No. 452); (b) Plaintiffs' memorandum in support of the motion for preliminary approval (Dkt. No. 453); (c) the Declaration of Peter St. Phillip, Jr., with exhibits, in support of Plaintiffs' motion for preliminary approval (Dkt. No. 454); (d) Plaintiffs' motion for final approval of settlement; (e) Plaintiffs' memorandum in support of the motion for final approval; (f) Plaintiffs' motion for an award of attorneys' fees and expenses; (g) Plaintiffs' memorandum in support of the motion for an award of attorneys' fees and expenses and for awards of incentive payments; (h) the Declaration of Peter St. Phillip, Jr., with exhibits, in support of Plaintiffs' motion for final approval and Plaintiffs' motion for an award of attorneys' fees and expenses; and all other prior proceedings herein; and having held a hearing on June 18, 2013, considered all of the submissions and arguments made therein; pursuant to Federal Rules of Civil Procedure 23 and 54(b), and in accordance with the terms of the settlement agreement between Plaintiffs and Valeant Pharmaceuticals International, Inc. f/k/a Biovail Corp., Biovail Laboratories, Inc., and Valeant International Bermuda f/k/a Valeant International (Barbados) SRL f/k/a Biovail

[1] Aetna of California, Inc., Plumbers and Pipefitters Local 572 Health and Welfare Fund, and Painters District Council No. 30 Health and Welfare Fund.

Laboratories International SRL (collectively, "Valeant") dated February 7, 2013 (the "Settlement Agreement") (Dkt. No. 454-1), it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. This final order and judgment incorporates by reference the definitions in the Settlement Agreement, and all terms used herein shall have the same meanings set forth in the Settlement Agreement. As set forth in the Court's February 22, 2013, Order (Dkt. No. 456) ("Preliminary Approval Order"), the "Class" is defined as follows:[2]

> (1) All persons or entities who purchased an AB-rated generic bioequivalent of Wellbutrin XL ("generic XL") at any time during the "Class Period" (hereafter defined) in California, Florida, Nevada, New York, Tennessee and Wisconsin; and
>
> (2) All entities that purchased 150 mg or 300 mg Wellbutrin XL before an AB-rated generic bioequivalent was available for such dosages AND purchased generic XL in the same state after generic XL became available in California, Florida, Nevada, New York, Tennessee and Wisconsin.
>
> For purposes of the Class definition, persons and entities purchased Wellbutrin XL or generic XL if they paid some or all of the retail purchase price.
>
> Excluded from the Class are "flat co-payers" meaning natural persons whose only purchases of generic XL were made pursuant to contracts with third party payers ("TPP") whereby the amount paid by the natural person for generic XL was the same regardless of the retail purchase price.
>
> The Class Period begins November 14, 2005 and ends on April 29, 2011.

2. This Court has jurisdiction over this action and over each of the parties and all members of the Class. As set forth in more detail in the Settlement Agreement, defendant Valeant has agreed to pay a total of $11.75 million dollars in cash plus the lesser of $500,000 or 50% of the actual costs of notifying the Class members of the settlement, in order to settle this action as to Valeant only.

[2] This is the same litigation Class certified by the Court on August 15, 2010. Dkt. No. 354; *In re Wellbutrin XL Antitrust Litig.*, 282 F.R.D. 126 (E.D. Pa. 2011).

3. As required by this Court in the preliminary approval order, notice administrator Heffler Claims Administration ("Heffler") disseminated notice of the proposed settlement by direct mail and published notice online and in widely circulated print publications. The notice was also posted, along with relevant litigation and settlement documents, on the settlement website, www.wxlclassaction.com, created specifically for the purpose of advising Class members of the fact and terms of the settlement. Such notice to members of the Class is hereby determined to be fully in compliance with the requirements of Federal Rule of Civil Procedure 23(e) and due process of law; to be the best notice practicable under the circumstances; and to constitute due and sufficient notice to all entities entitled thereto.

4. [ ] class members requested exclusion from the Class. No individuals or entities, other than those listed on Attachment A, have excluded themselves from the Class. This Order shall have no force or effect on the persons or entities on Attachment A.

5. Due and adequate notice of the proceedings having been given to the Class and a full opportunity having been offered to the Class to participate in the fairness hearing, it is hereby determined that all Class members, except those listed on Attachment A, are bound by this Final Order and Judgment.

6. The settlement of this indirect purchaser class action was not the product of collusion between the representative Plaintiffs, the absent Class members, defendant Valeant, or any of their respective counsel. Rather, it was the result of bona fide and arm's-length negotiations conducted in good faith between Class Counsel and Valeant's counsel. The Court, therefore, finds that the settlement was made in good faith within the meaning of California Code of Civil Procedure § 877.6 and comparable statutes or common law of other applicable jurisdictions.

7. The Court held a hearing on June 18, 2013 to consider the fairness, reasonableness, and adequacy of the proposed settlement. The Court is advised that there have been [ ] objections to the settlement.

8. Pursuant to Federal Rule of Civil Procedure 23, this Court hereby approves the settlement and finds that the settlement is in all respects fair, reasonable, and adequate to Class members. Accordingly, the settlement shall be consummated in accordance with the terms and provisions of the Settlement Agreement. The settlement is fair, reasonable, and adequate in light of the factors set forth in *Girsh v. Jepson*, 521 F.2d 153 (3rd Cir. 1975), as follows:

(a) this case was, is, and will continue to be highly complex, expensive, and time-consuming;

(b) because the case settled near the conclusion of discovery, after more than 300,000 documents had been produced and more than 50 fact and expert witnesses had been deposed, and after this Court issued a partial summary judgment decision, Class Counsel had an appreciation of the strengths and weaknesses of their case;

(c) Class Counsel and the Class would have faced uncertainty in establishing liability and damages if they had decided to continue to litigate against Valeant, rather than settle;

(d) zero [or very few] objections were received from Class members;

(e) the settlement amount is well within the range of reasonableness, considering the best possible recovery and the risks the parties would have faced if the case had continued to verdict, particularly in light of the Court's entry of summary judgment on Plaintiffs' sham petitioning claims and the continuation of the case against co-Defendant SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("GSK");

(f) the settlement also satisfies the additional factors for evaluating class settlements set forth in *In re Prudential Ins. Co. of America Sales Practices Litigation*, 148 F.3d 283 (3d Cir. 1998);

(g) the risk to maintaining class action status through the trial appears slight, so this factor is neutral; and

(h) Valeant's potential ability to withstand a greater judgment is a neutral factor, when viewed in light of the litigation risks facing Plaintiffs and the assured benefits of the proposed settlement.

9. The Court approves the plan of allocation of the settlement proceeds (net of attorneys' fees, reimbursed expenses, and incentive awards) proposed by Plaintiffs. After asrms-length negotiations among counsel advocating for TPPs and consumers, Plaintiffs propose to allocate 10% of the net settlement proceeds to consumers and 90% to third-party payors. Class Action Settlement Services, Inc., the claims administration firm retained by Class Counsel and approved by the Court in the preliminary approval order, will distribute the net settlement proceeds to Class members *pro rata*, based on the amounts they paid for products (brand and generic Wellbutrin XL) in proportion to what was paid by all Class members who submit claims. The Court finds this method of allocation to be fair, efficient, and reasonable and directs Class Action Settlement Services, Inc. to distribute the net settlement proceeds in the manner provided in the plan.

10. All claims in the above-captioned action against defendant Valeant only are hereby dismissed with prejudice and without costs. The action against GSK continues.

11. Upon the settlement becoming final in accordance with its terms, all of the claims specified in Paragraphs 18 of the Settlement Agreement shall be released. Specifically:

A. Biovail and its officers, directors, agents, representatives and affiliates (collectively, "Affiliates"), and Biovail's subsidiaries and their respective Affiliates, shall be released by all Settling Plaintiffs for all claims, regardless of legal theory, relating to Wellbutrin XL and/or its generic versions, that were or could have been asserted in the Litigation (excepting claims under Article II of the Uniform Commercial Code or for indemnification, contribution, and/or liability under the law of products liability). Biovail shall release all Settling Plaintiffs for all claims, regardless of legal theory, that would have been a compulsory counterclaim in the Litigation. Neither of the GlaxoSmithKline Defendants shall be released by any Settling Plaintiff by operation of this Settlement Agreement.

B. In addition to, and subject to, the provisions of subparagraph A above, each Settling Plaintiff hereby expressly agrees that, upon Final Approval, it will waive and release with respect to the claims released in subparagraph A above any and all provisions, rights and benefits conferred by either (a) § 1542 of the California Civil Code, which reads:

> Section 1542. General release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor[]

or (b) any law of any state or territory of the United States, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Each Settling Plaintiff may hereafter discover facts other than or different from those that it knows or believes to be true with respect to the subject matter of the released claims, but each Settling Plaintiff hereby expressly agrees that, upon Final Approval, it will have waived and fully, finally and forever settled and released, as to Biovail *only*, any known or unknown, suspected or unsuspected, asserted or unasserted, contingent or non-contingent, accrued or unaccrued claim, loss or damage with respect to the released claims whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. The foregoing release of unknown, unanticipated, unsuspected and unaccrued losses or claims as to Biovail *only* is contractual and not a mere recital.

12. Class Counsel have moved for an award of attorneys' fees and reimbursement of expenses. Pursuant to Federal Rules of Civil Procedure 23(h)(3) and 54(d) and the factors for assessing the reasonableness of a class action fee request set forth in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000) and *In re Prudential Ins. Co. of American Sales Practices Litig.*, 148 F.3d 283, 340 (3d Cir. 1998), this Court makes the following findings of fact and conclusions of law:

(a) the settlement confers a monetary benefit on the Class that is substantial, both in absolute terms and when assessed in light of the risks of establishing liability and damages in this case;

(b) Class Counsel have effectively and efficiently prosecuted this difficult and complex action on behalf of the members of the Class for several years with no guarantee they would be compensated;

(c) Class Counsel undertook numerous and significant risks of nonpayment in connection with the prosecution of this action;

(d) Class Counsel have reasonably expended thousands of hours, with a total lodestar of $14,883,615.50, and incurred $1,279,514.86 in out-of-pocket expenses, in prosecuting this action with no guarantee of recovery;

(e) fee awards similar to that requested by Class Counsel here have been awarded in similar cases, including numerous Hatch-Waxman antitrust class actions similarly alleging impeded entry of generic drugs;

(f) the settlement achieved for the benefit of the Class was obtained as a direct result of Class Counsel's skillful advocacy, and the development of this case depended entirely on the investigation and efforts of Class Counsel;

(g) the settlement was reached following negotiations held in good-faith and in the absence of collusion, and there were [____] objection by class member to the requested fee;

(h) the "percentage-of-the-fund" method is the proper method for calculating attorneys' fees in common fund class actions in this Circuit, *see*, *e.g.*, *In re Rite Aid Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005);

(i) Class members were advised in the notice of proposed settlement, which notice was approved by this Court, that Class Counsel intended to move for an award of attorneys' fees in an amount up to 33-1/3% of the gross settlement fund, in addition to reimbursement of reasonable costs and expenses incurred in the prosecution of this action;

(j) Class Counsel did, in fact, move for an award of attorneys' fees in the amount of 33-1/3% of the gross settlement fund, plus reimbursement of reasonable costs and expenses incurred in the prosecution of this action, which motion has been publicly available since May 15, 2013, through public filing on the docket of this action and also posted on the website created specifically for the purpose of advising Class members of the fact and terms of the settlement at www.wxlclassaction.com;

(k) a lodestar cross-check confirms the reasonableness of the fee request. Class Counsel's lodestar is $14,833,615.50. Based on a 33 1/3% fee ($3,916,275), as detailed in Class Counsel's declarations, a one-third fee award would equate to less than Class Counsel's total lodestar, resulting in a negative multiplier. Third Circuit courts have often been presented with, and approved, lodestar multipliers in the 2-4 range[3]; and

(l) in light of the factors and findings described above, the requested 33 1/3% fee award is within the applicable range of reasonable percentage fund awards.

13. Accordingly, Class Counsel are hereby awarded attorneys' fees in the amount of

[3] *See, e.g., Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718 (E.D. Pa Aug. 14, 2006), at *24 (approving a percentage fee award that translated to a 4.77 multiplier in case that settled after one year); *Tricor*, No. 05-340 at 9 (D. Del. Apr. 23, 2009) (approving one-third fee where lodestar multiplier was 3.93); *In re Children's Ibuprofen Oral Suspension Antitrust Litig.*, 04-mc-00535-ESH; (D.D.C. Apr. 24, 2006) (multiplier of 2.33); *Remeron*, Civ. 2005 U.S. Dist. LEXIS 27013, at *47-48, (multiplier of 1.86 is on the "low end of the spectrum"). *See also Segen v. OptionsXpress Holdings Inc.*, 631 F. Supp. 2d 645 (D. Del. 2009) (approving a fee award resulting in a lodestar multiplier of 2.06 in securities class action).

$3,916,275 from the settlement fund plus interest accrued thereon, if any. The Court finds this award to be fair and reasonable.

14. Further, Class Counsel are hereby awarded $1,279,514.86 from the settlement fund to reimburse them for the expenses they incurred in the prosecution of this lawsuit, which expenses the Court finds to be fair and reasonably incurred to benefit the Class. The awarded attorneys' fees and expenses shall be paid to Class Counsel from the settlement fund in accordance with the terms of the Settlement Agreement. Class Counsel, in their sole discretion, shall allocate the fees and expenses among all of the Class Counsel in a manner which they believe reflects the contributions of such counsel to the institution, prosecution and settlement of the litigation.

15. Without affecting the finality of this judgment, the Court retains exclusive jurisdiction over the Settlement Agreement, including the administration and consummation of the Settlement Agreement, the plan of allocation, and in order to determine any issues relating to attorneys' fees and expenses, incentive awards, and any distribution to members of the Class. In addition, without affecting the finality of this judgment, defendant Valeant and all members of the Class hereby irrevocably submit to the exclusive jurisdiction of the Court for any suit, action, proceeding, or dispute arising out of or relating to the Settlement Agreement or the applicability of the Settlement Agreement, including, without limitation, any suit, action, proceeding, or dispute relating to the release provisions therein, except that this submission to the Court's jurisdiction shall not prohibit (a) the assertion in the forum in which a claim is brought that the release included in the Settlement Agreement is a defense, in whole or in part, to such claim or, (b) in the event that such a defense is asserted in that forum, the determination of its merits in that forum.

16. The Court hereby approves $60,000 in total incentive awards to Plaintiffs Aetna of California, Inc., Plumbers & Pipefitters Local 572 Health and Welfare Fund, and Painters District Council No. 30 Health and Welfare Fund, to be paid from the settlement fund in order to compensate Plaintiffs for their services on behalf of the Class. The Court finds this amount to be fair and reasonable in light of the significant contributions each Plaintiff made to this lawsuit. These amounts are in addition to whatever monies Plaintiffs will receive from the settlement fund pursuant to the plan of allocation.

17. Pursuant to Paragraph 20 of the Settlement Agreement, in the event the settlement does not become final, the litigation between Plaintiffs and Valeant shall return to the status quo as of May 22, 2012.

18. The Court hereby directs that this judgment be entered by the clerk forthwith pursuant to Federal Rule of Civil Procedure 54(b) as to Valeant only (but not as to GSK). The direction of the entry of final judgment pursuant to Rule 54(b) is appropriate and proper because (1) there are multiple claims and multiple parties in this litigation; (2) for the Class and defendant Valeant, their rights and liabilities will be finally decided within the meaning of 28 U.S.C. § 1291, and; (3) there is no just reason for delay.

SO ORDERED this the ____ day of _____, 2013.

_____

Hon. Mary A. McLaughlin
U.S. District Court
Eastern District of Pennsylvania