

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

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ROBERT NICHOLS, et al.,	:	CIVIL ACTION
	:	
v.	:	No. 00-CV-6222
	:	
SMITHKLINE BEECHAM CORP.	:	
_____	:	
	:	
THIS DOCUMENT RELATES TO:	:	
ALL ACTIONS	:	
_____	:	

ORDER

This Court, having certified a settlement class by Order dated October 18, 2004, and now having considered End-Payor Plaintiffs' Motion For Final Approval of Settlement and Plan of Distribution, seeking final approval of the proposed settlement of this class action lawsuit against Defendant SmithKline Beecham Corporation d/b/a/ GlaxoSmithKline ("defendant" or "GSK"), End-Payor Class Counsel's Motion for Award of Attorney Fees and Reimbursement of Expenses, and the Proposed Plan of Allocation; finding that Notice of Settlement has been mailed and published; finding that all members of the End-Payor Settlement Class ("Settlement Class") have been provided the opportunity to file timely objections to the proposed Settlement Agreement between the parties, as described in the Notice of Proposed Settlement and Summary Notice; and having considered the matter and all of the submissions filed in connection therewith, and the oral presentations of counsel at the

final approval hearing held on March 9, 2005; and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. This Court has jurisdiction over this End-Payor action and each of the parties to the Settlement Agreement.

2. Terms used in this Final Order and Judgment that are defined in the Settlement Agreement are, unless otherwise defined herein, used in this Final Order and Judgment as defined in the Settlement Agreement.

3. As required by this Court in its Preliminary Approval Order and as described in extensive detail in the Affidavit of Todd B. Hilsee on Design Implementation and Analysis of Settlement Notice Program and the Affidavit of Thomas R. Glenn, attached as exhibits to End-Payor Plaintiffs' Motion for Final Approval of Settlement and Plan of Distribution: (a) Notices of the proposed settlements were mailed by First-class mail to all Class Members whose addresses could be obtained with reasonable diligence, and to all potential Class Members who requested a copy; and (b) Summary Notice of the proposed Settlement was published in numerous national magazines and newspapers and posted continuously on the Internet at the website <http://www.paxilclaims.com>. Such notice to members of the Class is hereby determined to be fully in compliance with requirements of Fed. R. Civ. P. 23(e) and due process and is found to be the best notice practicable under the circumstances and

to constitute due and sufficient notice to all entities entitled thereto. See *In re Prudential Ins. Co. of America Sales Practice Litig.*, 962 F. Supp. 450, 526 (D.N.J. 1997); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231 (D. Del. 2002).

4. 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 who timely requested exclusion and are identified in the Declaration of Thomas R. Glenn, dated January 31, 2005, as opting out of the Settlement, are bound by this Final Order and Judgment.

5. As set forth more fully in the Settlement Agreement, defendant has agreed to pay a total of sixty-five million dollars (\$65,000,000) in settlement of this action (the "Settlement Fund"). The defendant has deposited, by wire transfer, this amount into an escrow account designated by Lead Counsel.

6. The Court held a hearing on March 9, 2005, to consider the fairness, reasonableness, and adequacy of the proposed Settlement. In determining the fairness of the Settlement, the Court considered the following factors:

- (1) the complexity, expense, and likely duration of the litigation;
- (2) the reaction of the Class to the Settlement;
- (3) the stage of the proceedings and the amount of discovery completed;

- (4) the risks of establishing liability;
- (5) the risks of establishing damages;
- (6) the risks of maintaining the class action through the trial;
- (7) the ability of the defendants to withstand a greater judgment;
- (8) the range of reasonableness of the Settlement fund in light of the best possible recovery; and
- (9) the range of reasonableness of the Settlement fund to a possible recovery in light of all the attendant risks of litigation.

See *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534-35 (3d Cir. 2004); *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975).

7. By Order dated October 18, 2004, this Court, pursuant to FED. R. CIV. PROC. 23(g), appointed Miller Faucher and Cafferty LLP, Roda Nast, P.C., and The Wexler Firm LLP as Co-Lead Counsel for the Settlement Class. This Court has given significant weight to the "belief of experienced counsel that settlement is in the best interest of the class." *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 184 (E.D. Pa. 1997), quoting *Austin v. Pennsylvania Dept. of Corrections*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995). In fact, this Court recognizes that the Settlement was not achieved until after intense, arm's length negotiations in lengthy litigation involving these nationally-recognized members of the class action bar, with particular experience in antitrust litigation. See *Warfarin*, 391 F.3d at 535. Based on the facts of

the case and Class Counsel's experience in these types of cases, it was Class Counsel's' considered opinion that the immediate benefits represented by the Settlement far outweighed the possibility, perhaps a remote possibility, of obtaining a better result at trial, especially given the hurdles inherent in proving liability on behalf of the Class and the additional expense and delay inherent in any trial and the inevitable appeals.

8. The anticipated duration and expense of additional litigation if this case had not settled is significant. The parties would have had to conduct additional discovery and extensive preparations for trial. This would have included significant time and expense in preparing expert witness reports and expert witnesses for deposition and trial. Thus, bringing this case to trial would likely have been a very long and costly proposition, the outcome of which would not have been certain. This factor supports the adequacy of the Settlement.

9. The Settlement of this End-Payor action is the result of *bona fide* and arm's length negotiations conducted in good faith between End-Payor Class Counsel and Defendants.

10. A review of all relevant factors supports the Settlement. Therefore, the Settlement Agreement is hereby approved and found to be, in all respects, fair, reasonable, adequate, and in the best interest of the Class as a whole and in satisfaction of Rule 23 of

the Federal Rules of Civil Procedure and due process requirements, and it shall be consummated pursuant to its terms.

11. The Court approves the Corrected Plan of Distribution of Settlement Proceeds as proposed by Class Counsel and summarized in the Notice and as amended in accordance with the accompanying Memorandum. The Third Circuit has endorsed the very type of structural safeguards Class Counsel had here governing the allocation of the proceeds of the Settlement. *Warfarin*, 391 F.3d at 535. Thus, the proceeds of the Settlement Fund shall be distributed as described therein and in accordance with the Settlement Agreement. The objections of the Blue Plans, Community Care Plus and Gary and Rhonda Marcus as to the treatment of residual funds in the Corrected Plan of Distribution are hereby sustained. All other objections to terms of the Settlement, the notice, and the fee requested by Counsel for the End-Payor Class are hereby overruled.

12. All claims in the captioned action are hereby dismissed with prejudice, and without costs except as expressly provided herein, with such dismissal subject only to compliance by the parties with the terms and conditions of the Settlement Agreement and this Final Order and Judgment.

13. (a) Upon this Settlement Agreement becoming final in accord with paragraph 6 of the Settlement Agreement and subject to the reservations contained in paragraph 17 of the Settlement

Agreement, Defendants and their present and former direct and indirect parents, subsidiaries, divisions, partners and affiliates, and their respective present and former stockholders, officers, directors, employees, managers, agents, attorneys and any of their legal representatives (and the predecessors, heirs, executors, administrators, trustees, successors and assigns of each of the foregoing) (the "Releasees") shall be released and forever discharged from all manner of claims, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, known or unknown, suspected or unsuspected, in law or equity that End Payor Plaintiffs or any of the Settlement Class members who have not timely excluded themselves from the Settlement, whether or not they object to the Settlement and whether or not they make a claim upon or participate in the Settlement Fund, ever had, now has, or hereafter can, shall or may have, directly, representatively, derivatively or in any other capacity, arising out of any conduct, events or transactions, prior to the date of the Settlement Agreement alleged or which could have been alleged in these actions against the Releasees concerning the purchase, marketing, sale, manufacture, pricing of, or the enforcement of intellectual property related to Paxil or generic paroxetine, or in any way related to defendant's agreement with Par Pharmaceuticals pursuant to which Par is selling paroxetine. The

claims covered by the release are referred to herein collectively as the "Released Claims."

(b) In addition, each End Payor Class Member hereby expressly waives and releases, upon the Stipulation becoming effective, any and all provisions, rights and benefits conferred by § 1542 of the California Civil Code, which reads:

Section 15.42. 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 by any law or 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 End Payor Class Member may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are the subject matter of this paragraph, but each End Payor Class Member hereby expressly waives and fully, finally and forever settles and releases, upon this Stipulation becoming effective, any known or unknown, suspected or unsuspected, contingent or non-contingent Released Claims with respect to the subject matter of the provision of this paragraph whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each End Payor Class Member also hereby expressly waives and fully, finally and forever settles and releases any and all Released Claims it may

have against Defendants under § 17200, *et seq.*, of the California Business and Professions Code, which claims are expressly incorporated into this paragraph.

(c) Notwithstanding the above, the Settlement Class members are hereby deemed to have settled with and released only the Released Parties that such Settlement Class members have released pursuant to this paragraph, and neither the Settlement Agreement, any part thereof, nor any other aspect of the Settlement or release, shall be deemed to release or otherwise affect in any way any rights a Settlement Class member has or may have against any other party or entity whatsoever other than the Released Parties with respect to the Released Claims pursuant to this paragraph. In addition, the releases set forth in this paragraph shall not release any claims between Settlement Class members and the Released Parties concerning product liability, breach of contract, breach of warranty, or personal injury. Furthermore, the releases set forth in this paragraph shall not act as a release of any claim Settlement Class members have or may have as a class member in the putative class action captioned *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456, pending in the United States District Court for the District of Massachusetts, or any related claim that Settlement Class members have or may have as a Class member, Opt-Out or otherwise apart from such putative class action, or any litigation alleging similar

claims; provided, however, that in such litigation defendant preserves its right to assert that any recovery by Settlement Class members in such litigation related to the drug Paxil should be set off by their pro rata share of the Settlement Fund. Moreover, the releases set forth in this paragraph shall only apply to a governmental entity's purchases of, or reimbursement for, Paxil made by the governmental entity as part of a health benefit plan for its employees and the releases in this paragraph shall not act as a release of any claim the governmental entity has or may have with respect to any other purchases of, or reimbursement for, Paxil by the governmental entity, including claims arising from the marketing, sale, manufacture, pricing, or enforcement of intellectual property related to the governmental entity's other purchases of, or reimbursement for, Paxil.

14. The Settlement in this case creates a common fund. The Supreme Court has "recognized consistently that 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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). See also *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000) ("[T]here is no doubt that attorneys may properly be given a portion of the Settlement Fund in recognition of the benefit they have bestowed on class members.").

15. Courts in the Third Circuit apply the "Percentage of the Fund" method for calculating attorney fees in common fund cases. See *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722 (3d Cir. 2001); See also *In re Rite Aid Corp. Sec. Litig.*, 2005 U.S. App. LEXIS 1269 (3d Cir. Jan. 26, 2005).

16. The requested award of attorney fees is found to be fair and reasonable. See *In Re Linerboard Antitrust Litig.*, 2004 U.S. Dist. LEXIS 10532 (E.D. Pa. June 2, 2004); *In re Aetna, Inc. Sec. Litig.*, 2001 U.S. Dist. LEXIS 68 (E.D. Pa. January 4, 2001) (Padova, J.).

17. In making its decision, the Court has considered the seven factors set forth in *Gunter v. Ridgewood Energy Corp.*:

- (1) the size of the fund created and the number of persons benefited;
- (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, 223 F.3d at 195 n.1. See also *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at *4 (E.D. Pa. June 2, 2004).

18. The Court awards Class Counsel attorney fees in the amount of 30 percent of the Settlement Fund (with interest earned from the date of the deposit of the funds at the same rate earned by the funds), to be allocated among Class Counsel as reasonably determined by Co-Lead Counsel. The Court further awards Class Counsel \$ 546,480.79 as reimbursement of their reasonable disbursements and expenses, and \$ 22,500.00 in total payments to be distributed to each named Class Plaintiff as set forth in End-Payor Class Counsels' Motion for Award of Attorneys Fees and Reimbursement of Expenses, for their role in bringing about the recovery on behalf of the Class. All of the foregoing amounts are to be paid exclusively out of the Settlement Funds to Co-Lead Counsel without additional contribution or payment by Defendant. Any appeal from this paragraph shall not affect the finality of the remainder of this Final Order and Judgment, including but not limited to the date on which the Settlement will be deemed final under the terms of the Settlement Agreement.

19. The Court finds that the Settlement Fund is a "qualified settlement fund" as defined in section 1.468B-1(c) of the Treasury Regulations in that it satisfies each of the following requirements:

(a) The Settlement Fund is established pursuant to an order of this Court and is subject to the continuing jurisdiction of this Court;

(b) The Settlement Fund is established to resolve or satisfy one or more claims that have resulted or may result from an event that has occurred and that has given rise to at least one claim asserting liabilities; and

(c) The assets of the Settlement Fund are segregated from other assets of GSK, the transferor of payments to the Settlement Fund.

20. Under the "relation-back" rule provided under section 1.468B-1(j)(2)(i) of the Treasury Regulations, the Court finds that:

(a) The Settlement Fund met the requirements of paragraphs 19(b) and 19(c) of this Order prior to the date of this Order approving the establishment of the Settlement Fund subject to the continued jurisdiction of this Court; and

(b) GSK and the Claims Administrator may jointly elect to treat the Settlement Fund as coming into existence as a "qualified settlement fund" on the later of the date the Settlement Fund met the requirements of paragraphs 19(b) and 19(c) of this Order or January 1 of the calendar year in which all of the requirements of paragraph 19 of this Order are met. If such relation-back election is made, the assets held by the Settlement Fund on such date shall be treated as having been transferred to the Settlement Fund on that date.

21. Neither this Final Order and Judgment, the Settlement Agreement, nor any of its terms or the negotiations or papers related thereto shall constitute evidence or an admission by Defendant, that any acts of wrongdoing have been committed, and they shall not be deemed to create any inference that there is any liability therefore. Neither this Final Order and Judgment, the Settlement Agreement, nor any of the terms or the negotiations or papers related thereto shall be offered or received in evidence or used for any purpose whatsoever, in this or any other matter or proceeding in any court, administrative agency, arbitration or other tribunal, other than as expressly set forth in the Settlement Agreement.

22. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court finds that there is no just reason for delay and therefore directs entry of this Final Order and Judgment as a final judgment that is immediately appealable.

23. Without any way affecting the finality of this Final Order and Judgment, the Court hereby retains exclusive jurisdiction over this action until the Settlement Agreement has been consummated and each and every act agreed to be performed by the Parties thereto shall have been performed, and thereafter for all other purposes necessary to effectuate the terms of the Settlement Agreement.

SO ORDERED this the 22nd day of April, 2005.

BY THE COURT:

s/John R. Padova
John R. Padova, J.