

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

NICHOLS, et al., v. SMITHKLINE
BEECHAM CORPORATION

:
:
Master File No. 00-CV-6222
:
:

THIS DOCUMENT RELATES TO:
ALL ACTIONS

**ORDER CERTIFYING SETTLEMENT CLASS AND PRELIMINARILY
APPROVING SETTLEMENT**

Upon consideration of the End-Payor Plaintiffs' Motion for Certification of a Settlement Class and for Preliminary Approval of Settlement, and supporting Memorandum (the "End-Payor Plaintiffs' Memorandum"), and being satisfied that the proposed Settlement Class fulfills all requirements for certification in the settlement context, that the proposed Settlement Agreement meets the applicable criteria for preliminary approval, and that the proposed forms of notice and the plan for dissemination of notice satisfy all applicable requirements, the Court hereby finds and ORDERS as follows:

1. Settlement Class. The Court has considered the submissions of the parties with regard to class certification and has analyzed the proposed Settlement Class pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. The Court finds that:

- a. *Numerosity*. The Settlement Class, consisting of thousands of members located throughout the United States, satisfies the numerosity requirement of Fed. R. Civ. P. 23(a). Joinder of these widely-dispersed, numerous Class Members into one suit would be impracticable.

- b. *Commonality.* Common questions of law and fact with regard to the alleged anticompetitive activities of Defendant exist for each of the Settlement Class Members in this case. These issues are central to this case and are sufficient to establish commonality.
- c. *Typicality.* Plaintiffs claim that GSK violated section 2 of the Sherman Act, and various state law antitrust and consumer protection statutes, as well as the common law of unjust enrichment, by unlawfully maintaining its monopoly over Paxil[®] and its A-B rated generic equivalents. Specifically, Plaintiffs allege that GSK misled the United States Patent and Trademark Office (“PTO”) into issuing invalid patents that purportedly protected Paxil[®] and unlawfully listed those invalid patents for publication in Approved Drug Products with Therapeutic Equivalence Evaluations (the “Orange Book”), which listings provided GSK with the ability to wrongfully exclude competition by generic manufacturers; and prosecuted a series of sham litigations against generic manufacturers intended to wrongfully exclude generic competition. Plaintiffs allege that the existence of the invalid patents, wrongfully listed patents, and the lawsuits related to them, prevented generic manufacturers from bringing less expensive generic versions of Paxil[®] to market. As a result, Class Members paid more for Paxil[®] than they would have in the absence of the alleged anticompetitive conduct. These claims are typical of every Settlement Class Members’ claims. Therefore, the element of typicality is satisfied.

- d. *Adequate Representation.* The Plaintiffs' interests do not conflict with absent members of the settlement class and Plaintiffs' interests are co-extensive with absent Class Members. Additionally, this Court recognizes the experience of Co-Lead Counsel and finds that the requirement of adequate representation of the Class has been fully met.
- e. *Predominance of Common Issues.* Plaintiffs commonly assert that Defendants' actions delayed the marketing of generic Paxil®, in turn delaying the ability of all End-Payers to substitute purchases of Paxil® with purchases of lower-priced generic equivalents and pay lower prices for generic equivalents in a competitive generics market. In the context of this Settlement, these issues predominate over any individual questions, favoring class treatment.
- f. *Superiority of the Class Action Mechanism.* The class action mechanism is ideally suited for treatment of the settlement of this matter. Class certification promotes efficiency and uniformity of judgment because the many Class Members will not be forced to separately pursue claims or execute settlements in various courts around the country.

Therefore, this Court having found that all of the requirements of Fed. R. Civ. P. 23(a) and (b)(3) have been satisfied, this Action shall be certified as a Settlement Class on behalf of the following Class of plaintiffs:

All persons or entities in the United States who purchased or paid for Paxil and/or its generic alternatives (known as paroxetine) during the period January 1, 1998 through September 30, 2004 for consumption by themselves, their families, members, employees, insureds, participants, or beneficiaries. Excluded from the class are governmental entities (provided, however, a governmental entity is included only to the extent it makes prescription drug purchases as part of a health benefit plan for its employees);

Defendants and their officers, directors, management, employees, subsidiaries, and affiliates; persons or entities who purchased Paxil or its generic alternatives for purposes of resale; any person or entity whose only purchase(s) of Paxil were made directly from Defendants or their affiliates and/or whose purchases of generic paroxetine were made directly from the manufacturer thereof (the “End-Payor Class”).

The following claims are included: Any claims for damages or injunctive relief for violations of state and federal antitrust and consumer protection laws, as well as the laws of unjust enrichment concerning the purchase, marketing, sale, manufacture, pricing of and/or the enforcement of intellectual property relating to Paxil® and its generic equivalent, paroxetine during the period January 1, 1998 through September 30, 2004. (Claims for product liability, breach of warranty, breach of contract or personal injury are not included.)

2. Class Representatives; Class Counsel. Plaintiffs Robert Nichols, Betty Holt, John Kelly, Olivia Haebeger and Dorothy Tyminski-Porter are designated Consumer Class Representatives. Plaintiffs United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund (“UFCW”) and the County of Suffolk, New York are designated Third-Party Payor Class Representatives.

The Court hereby appoints Miller Faucher and Cafferty LLP, RodaNast, P.C., and the Wexler Firm LLP, (previously designated by this Court as Co-Lead Counsel for the End-Payor Plaintiffs in the Case Management and Scheduling Order entered on July 10, 2001) as Co-Lead Settlement Class Counsel for the Settlement Class, having determined that the requirements of Rule 23(g) are fully satisfied by this appointment.

3. Preliminary Approval of Settlement. The proposed Settlement Agreement (attached as Exhibit A to the End-Payor Plaintiffs’ Memorandum) establishes a settlement fund of \$65 million. The Settlement Fund, less Court-approved expenses and fees, will be distributed among Class Members based on their purchases of Paxil® or generic paroxetine (excluding Paxil

CR) during the period of January 1, 1998 through September 30, 2004, as more fully described in the proposed Distribution Plan attached as Exhibit B to the End-Payor Plaintiffs' Memorandum. Reached as a result of arm's length negotiations by counsel experienced in complex litigation, the proposed settlement between the Settlement Class and Defendant appears, upon preliminary review, to be within the range of reasonableness warranting providing notice to the Settlement Class Members and proceeding with a Final Fairness Hearing. In making this determination, the Court has considered the current posture of this litigation and the risks and benefits to the parties involved in both settlement of these claims and continuation of the litigation.

Accordingly, the Court grants preliminary approval of the Settlement Agreement and the Settlement will be submitted to Settlement Class members for their consideration and for a hearing in accordance with Federal Rule of Civil Procedure 23(e).

4. 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.

5. 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 paragraph (4)(b) and (4)(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 paragraph (4)(b) and (4)(c) of this Order or January 1 of the calendar year in which all of the requirements of paragraph (4) of this Order are met. If such a 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.

6. Plan of Distribution. The Court approves the proposed Plan of Distribution attached as Exhibit B to End-Payor Plaintiffs’ Memorandum.

7. Notice to Class Members. The Court has considered the Notice Plan attached as Exhibit C to the End-Payor Plaintiffs’ Memorandum including the proposed forms of notice, summary notice, information releases and claim forms, and finds that the forms and manner of notice proposed by Plaintiffs and approved herein meet the requirements of due process and Fed. R. Civ. P. 23(c) and (e), are the best notice practicable under the circumstances, constitute sufficient notice to all persons entitled to notice, and satisfy the Constitutional requirements of notice. The Court approves the Notice Plan in all respects (including the proposed forms of notice, summary notice, information releases and claim forms) and Orders that notice be given in substantial conformity therewith. The Notice Program described in the Notice Plan shall commence on or about November 18, 2004. The costs of preparing, printing, publishing,

mailing and otherwise disseminating the notice shall be paid from the Settlement Fund in accordance with the Plan of Distribution.

8. Exclusion Requests, Objections and Claims. The Notice to Class Members shall include the following information concerning deadlines:

- a. *Exclusion Requests.* Any Class Member that wishes to be excluded from the Settlement Class must sign a written request to be excluded and send it postmarked no later than January 20, 2005 to the address identified in the Class Notice.
- b. *Objections.* Any Class Member wishing to object to any aspect of the Settlement or the request for attorneys' fees may do so in writing, without the necessity of retaining counsel or making any formal appearance. All objections must be postmarked no later than February 15, 2005, and mailed to the addresses identified in the Class Notice. Class Members wishing to speak at the Final Fairness Hearing in person or through their attorney must submit a written request, including a summary of the issues to be presented at the hearing, postmarked no later than February 15, 2005 and mailed to the addresses identified in the Class Notice.
- c. *Claims.* The postmark deadline for filing Claims under the settlement is April 15, 2005.

9. Motions for Final Approval and Attorneys' Fees. Class Counsel will file its Motions for Final Approval of the Settlement and Motion for Attorneys' Fees and Reimbursement of expenses on or before February 1, 2005.

10. Responses to Objections. Responses to any objections may be filed no later than seven (7) days before the Final Fairness Hearing referred to in Paragraph 9 below.

11. Final Fairness Hearing. A Final Fairness Hearing will be held on _____, 2005, in Courtroom _____, United States Courthouse for the Eastern District of Pennsylvania, at ____ a.m./p.m. to consider whether the settlement should be given final approval and to consider Class Counsel's Motion for Attorney's Fees and Reimbursement of Expenses.

Date: _____

John R. Padova,
United States District Judge