UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE OPANA ER ANTITRUST LITIGATION	MDL No. 2580 Lead Case No. 14-cv-10150
THIS DOCUMENT RELATES TO: ALL END-PAYOR ACTIONS	Hon. Harry D. Leinenweber

END-PAYOR CLASS PLAINTIFFS' MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT

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End-Payor Plaintiffs ("EPPs")[1] respectfully move for final approval of the proposed settlement ("Settlement") with Defendant Impax Laboratories, Inc. ("Impax").

I. INTRODUCTION

As the Court is aware, on the fifth day of trial, Co-Lead Counsel for the EPPs reached an agreement in principle to resolve its claims against Impax in this matter for a $15 million cash payment. The parties submitted the signed settlement agreement to the Court on August 12, 2022, ECF No. 1060-2 ("Settlement Agreement"), and the Court granted preliminary approval on August 24, 2022, ECF No. 1069 ("Preliminary Approval Order").

Pursuant to the Preliminary Approval Order, notice of the Settlement was sent to all Class members[2] by First Class mail on September 13, 2022. *See* accompanying Declaration of Eric J. Miller ("Miller Decl."), ¶ 4. On October 11, 2022, Class Counsel filed a Motion for Payment of Attorneys' Fees, Reimbursement of Expenses, and Class Representative Service Awards. ECF No. 1077 ("Fee Brief"), seeking reimbursement of litigation expenses in the amount of $4,005,833.95, service awards for the Class Representative totaling $65,000, and an award of attorneys' fees in the amount of $5,000,000, plus a *pro rata* share of accrued interest.

No objections to either the Settlement or Class Counsel's Fee Brief were filed by the November 7, 2022 deadline set by the Court, and no late-filed objections have been received to date. *See* Miller Decl., ¶ 14.[3] As set forth in both the Fee Brief and EPPs' motion for preliminary

[1] The Class Representatives for the End-Payor Plaintiffs are the following entities: Plumbers and Pipefitters Local 178 Health & Welfare Trust Fund; Louisiana Health Service & Indemnity Company, d/b/a Blue Cross and Blue Shield of Louisiana; Fraternal Order of Police, Miami Lodge 20, Insurance Trust Fund; Wisconsin Masons' Health Care Fund; Pennsylvania Employees Benefit Trust Fund; and International Union of Operating Engineers, Local 138 Welfare Fund (together, "Plaintiffs" or "Class Representatives").

[2] The Classes were previously defined in the Court's August 24, 2022 Order preliminarily approving the Settlement. *See* ECF No. 1069 at 2-4.

[3] As set forth in the Notice of Clarification filed by EPP Co-Lead Counsel on November 11, 2022 (ECF No. 1086), one of the EPP Class Representative Plaintiffs, Pennsylvania Employees Benefit Trust Fund

approval, ECF No. 1060, the $15 million Settlement is fair, adequate and reasonable, and merits final approval under both Rule 23(e)(2) and the six factors articulated in *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863 (7th Cir. 2014). The Settlement represents an excellent result after more than eight years of hard-fought litigation, which included exhaustive fact and expert discovery, significant motion practice, a Rule 23(f) appeal to the Seventh Circuit, and a three-week jury trial. Given the jury's ultimate verdict in favor of Defendants Endo Health Solutions Inc., Endo Pharmaceuticals Inc., and Penwest Pharmaceuticals Co. (collectively, "Endo"), and Endo's subsequent bankruptcy petition,[4] the Settlement is even more valuable to members of the Classes, as they would not otherwise be receiving any compensation.

For these reasons, EPPs respectfully request that the Court (a) grant final approval to the Settlement pursuant to Federal Rule of Civil Procedure 23(e); (b) approve Plaintiffs' plan of allocation, which provides a fair and reasonable method of determining each class member's allocated share based upon each class member's purchases of brand and generic Opana ER from Endo and Impax; (c) approve awards of attorneys' fees and reimbursement of expenses to Class Counsel; (d) approve service awards for the Class Representatives; and (e) enter a Final Judgment and Order terminating the litigation between EPPs and Impax.

II. RELEVANT PROCEDURAL BACKGROUND

On July 19, 2022, Co-Lead Counsel for the certified EPP Classes and Impax entered into

("PEBTF"), advised Co-Lead Counsel that while it agrees to Class Counsel's request for fees equal to one-third of the Settlement fund, it takes the position that the fee should be calculated after litigation expenses are deducted from the fund. For the reasons set forth in the Notice of Clarification, EPP Co-Lead Counsel, with agreement from the other five Class Representative Plaintiffs, contend that the fee request is not limited by a retainer agreement entered into between PEBTF and one Class Counsel firm in 2014.

[4] The trial verdict is subject to a pending Post-Trial Motion for Judgment as a Matter of Law or for a New Trial (ECF No. 1048), which is stayed due to Endo's bankruptcy filing (ECF No. 1064).

the Settlement Agreement, pursuant to which Impax agreed to pay $15 million cash in exchange for dismissal of Plaintiffs' claims against Impax with prejudice. This amount was paid by Impax into an escrow account on July 6, 2022. Plaintiffs filed the Settlement Agreement with the Court on August 12, 2022, and requested the Court grant preliminary approval of the Settlement and order that the notice of Settlement be provided to the Classes. *See* ECF No. 1060.

On August 24, 2022, the Court held a hearing on EPPs' motion for preliminary approval of the Settlement. At the hearing, the Court stated: "Obviously, I think it's an excellent settlement. Having sat through the trial, I think it's pretty obvious that you are better off having settled the case than having [completed trial against Impax]." Aug. 24, 2022 Hr'g Tr., at 6:3-6. That same day, the Court preliminarily approved the terms of the Settlement Agreement. ECF No. 1069. The Court found that the Settlement "was concluded after arm's-length negotiations by experienced counsel" and that it was "fair, reasonable, and adequate, and in the best interests of the End-Payor Classes." *Id.* at 4. Additionally, the Court ordered that notice of the Settlement be provided to members of the Classes. *Id.* at 6.

Subsequently, EPP Co-Lead Counsel, through the Court-appointed claims administrator, in fact caused notice of the Settlement to be provided to Class members in the manner approved by the Court. The notice detailed, among other things: (a) the terms of the Settlement; (b) the procedures and deadline for objecting to the Settlement and/or Class Counsel's fee submission; and (c) the date and time of the Court's final fairness hearing. *See* exhibits attached to Miller Decl. The deadline for members of the Classes to object to the Settlement and/or Class Counsel's fee submission was November 7, 2022.

III. THE PROPOSED SETTLEMENT MEETS THE STANDARD FOR FINAL APPROVAL UNDER RULE 23(e)

"Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75

F.3d 1191, 1196 (7th Cir. 1996); *Young v. Rolling in the Dough, Inc.*, 2020 WL 969616, at *3 (N.D. Ill. Feb. 27, 2020) (same) "Although . . . settlements must be approved by the district court, its inquiry is limited to the consideration of whether the proposed settlement is lawful, fair, reasonable, and adequate." *Isby*, 75 F.3d at 1196. Under Rule 23(e)(2), a court should conclude that a settlement is "fair, reasonable, and adequate" after finding that: (a) the class representatives and class counsel adequately represented the class; (b) the proposal was negotiated at arm's length; (c) the relief is adequate for the class; and (d) the proposal treats class members equitably to each other. Rule 23(e)(2)(A)-(D). Each of these factors is satisfied here.

First, the EPP Class Representatives and Class Counsel more than adequately represented the Classes. Class Counsel aggressively litigated this case for more than eight years, including through the conclusion of trial—a rarity for antitrust class action cases. Additionally, each of the Class Representatives made significant contributions to the prosecution of the case. All Class Representatives produced a substantial number of documents and prepared for and sat for depositions; a representative of Wisconsin Masons' Health Care Fund also prepared for and testified at trial.

Second, the Settlement was negotiated at arm's length. After more than eight years of litigation, the Settlement was only reached on the fifth day of a difficult and complex jury trial and after extensive negotiations between the parties. *Cf. Becker v. Bank of New York Mellon Tr. Co., N.A.,* 2018 WL 6727820, at *4 (E.D. Pa. Dec. 21, 2018) ("[T]he settlement in this case was the product of arm's length negotiations, as evidenced by the fact that although the parties participated in numerous settlement conferences . . . the case did not settle until it was about to go the jury.").

Third, the relief is adequate. The $15 million common fund reflects as much as 33% of

net overcharge damages as estimated by EPPs' expert economist Meredith Rosenthal, which ranged from $44.61 million to $80.06 million. Final Pretrial Order, ECF No. 895, at 18. Such a figure is significant in an antitrust class action where a "settlement may be approved even if the settlement amounts to a small percentage of the single damages sought." *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314, at *24 (D.N.J. Sept. 13, 2005). Moreover, the fact that no Class member has objected to date should give the Court comfort that the relief is adequate.

Finally, the Settlement treats Class members equitably relative to each other, as the proposed Plan of Allocation submitted with the Settlement Agreement ensures that each claimant receives their *pro rata* share of the Net Settlement Fund, as overseen by the Claims Administrator, A.B. Data.

IV. EVALUATION OF THE *WONG* FACTORS SUPPORTS FINAL APPROVAL OF THE SETTLEMENT

Further, the Seventh Circuit set forth a list of six factors for courts to evaluate in deciding whether a settlement warrants final approval: "(1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) stage of the proceedings and the amount of discovery completed." *Wong*, 773 F.3d at 863.

As demonstrated below, consideration of the relevant factors further supports final approval of the Settlement Agreement and distribution of the Net Settlement Fund to the Classes.

A. The Strength of Plaintiffs' Case Compared to the Terms of the Settlement.

The Seventh Circuit "deemed the first factor to be the most important" *Id.* at 864; *Isby*, 75 F.3d at 1199 ("The district court properly recognized that the first factor, the relative strength of plaintiffs' case on the merits as compared to what the defendants offer by way of settlement, is

the most important consideration."). When there are no "suspicious circumstances" surrounding a settlement reached through arms' length negotiations by experienced counsel after the parties have sufficiently explored the merits of the case, a court may approve a settlement without quantifying the value of continued litigation. *Wong*, 773 F.3d at 864.

As the Court is aware, the parties thoroughly explored the merits of the case before reaching the Settlement. As noted herein and in Plaintiffs' prior submissions in support of preliminary approval of this Settlement, ECF No. 1060, and for attorneys' fees, ECF No. 1077, the Settlement was reach on the fifth day of trial, after more than eight years of fiercely contested litigation. The negotiations leading to the Settlement were engaged in at arm's length by highly experienced counsel. No "suspicious circumstances" are present.

Moreover, the $15 million settlement represents, as this Court previously recognized, an "excellent" result for Classes. Aug. 24, 2022 Hr'g Tr., at 6:3. This is particularly true given the jury's verdict in Endo's favor at the conclusion of trial. Absent the Settlement, there would be no recovery for the Classes.[5] Accordingly, this factor weighs in favor of final approval.

B. The Complexity, Length, and Expense of Further Litigation.

When settlement enables the parties to avoid the costs and risks of litigating complex issues, this factor weighs in favor of final approval. *Isby*, 75 F.3d at 1199-1200. "Antitrust actions are often complicated with all parties wishing to have the last word." *Paper Sys. Inc. v. Mitsubishi Corp.,* 967 F. Supp. 364, 366 (E.D. Wis. 1997). That is certainly true of this case. Here, the Settlement allowed the parties to avoid the costs associated with post-trial motion practice and appeal, at least as against each other. Given the size and complexity of the

[5] In addition, Endo's post-trial bankruptcy petition stayed all post-trial proceedings (including Plaintiffs' requests for a directed verdict or new trial, and any appeal) and may ultimately discharge all remaining claims held by members of the Classes, making any further recovery in this action unlikely.

case, the appeals process might even include a petition for certiorari to the U.S. Supreme Court. Such prolonged litigation would require additional time and resources with no certainty of a favorable outcome. By contrast, the Settlement provides the Classes with immediate, substantial, and definite relief and, given the actual outcome at trial, settlement of this case was likely superior "to that which plaintiffs might have achieved at trial." *See Meyenburg v. Exxon Mobil Corp.*, 2006 WL 5062697, at *5 (S.D. Ill. June 5, 2006).

Moreover, although Plaintiffs were unable to avoid the expenses associated with prosecuting the case through trial against Endo, the Settlement did permit Plaintiffs to narrow the number of adversaries at trial and avoid the risk of an adverse jury verdict resulting in no recovery at all for the Classes. Accordingly, this factor weighs in favor of final approval.

C. The Amount of Opposition to the Settlement and Reaction of Class Members.

Out of the tens of thousands of Class members, none objected to the Settlement and only three previously requested to be excluded from the EPP Classes. "Thus, using the number of class members as a metric, there has been almost no opposition to the settlement. This indicates that the class members consider the settlement to be in their best interest." *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, 2012 WL 651727, at *6 (N.D. Ill. Feb. 28, 2012). *See also In re Mexico Money Transfer Litig. (W. Union & Valuta),* 164 F. Supp. 2d 1002, 1021 (N.D. Ill. 2000) ("Nevertheless, 99.9% of class members have neither opted out nor filed objections to the proposed settlements. This acceptance rate is strong circumstantial evidence in favor of the settlements.") *aff'd sub nom. In re Mexico Money Transfer Litig.,* 267 F.3d 743 (7th Cir. 2001). Accordingly, this factor also weighs heavily in favor of final approval

D. The Opinion of Competent Counsel.

The Court is "entitled to rely heavily on the opinion of competent counsel" to evaluate

whether the Settlement is appropriate for final approval. *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982); *see also Isby*, 75 F.3d at 1200 ("[T]he district court was entitled to give consideration to the opinion of competent counsel that the settlement was fair, reasonable and adequate."). Class Counsel, who have significant experience in class action and complex litigation, particularly antitrust class actions, believe that the Settlement with Impax is fair and in the best interests of the EPP Classes.

E. The Stage of Proceedings.

To ensure that a plaintiff has had access to sufficient information to evaluate both the merits of case and the adequacy of a proposed settlement, courts in the Seventh Circuit consider the stage of the proceedings. *See In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 966 (N.D. Ill. 2011). Here, when Plaintiffs and Impax reached the Settlement, the litigation was fully developed, and trial was ongoing. At that point, the only information the parties lacked was the actual trial outcome and were thus well-positioned to make an informed decision concerning settlement. This factor too weighs in favor of final approval.

V. NOTICE WAS PROPER UNDER RULE 23 AND SATISFIED DUE PROCESS

"[U]pon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3) [ ] the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Rule 23(e)(1) provides that a court must direct notice in a "reasonable manner" to all class members who would be bound by a proposed settlement. Rule 23(e) notice must contain a summary of the litigation sufficient "to apprise interested parties of the pendency of the action and to afford them

an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). In addition, the "notice must clearly and concisely state in plain, easily understood language:" (1) the nature of the action; (2) the class definition; (3) the class claims, issues, or defenses; (4) that a class member may enter an appearance through counsel; (5) that the court will exclude from the class any member who requests exclusion; (6) the time and manner for requesting exclusion; and (7) the binding effect of a class judgment on class members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

For all the reasons set forth in the Court's Preliminary Approval and Notice Order, the Notice Program and forms of notice utilized by EPPs satisfy these requirements. The Notice sets forth all information required by Rule 23(c)(2)(B) and 23(e)(1) and informs the Classes about (1) the settlement terms, (2) the right to object and the manner for objecting to the settlement and Class Counsel's request for fees, expenses, and service awards, (3) the general terms of the proposed Plan of Allocation and that class members can find more information about the proposed Plan of Allocation on the settlement website, and (4) the requirements regarding the filing of a claim to share in the proceeds of the Settlement Fund in accordance with the Plan of Allocation. Class members were also advised that they could obtain a Claim Form by contacting the claims administrator or from the website dedicated to this litigation.

Pursuant to the Preliminary Approval and Notice Order, the Notice was sent via USPS First-Class Mail to 41,642 entities in A.B. Data's TPP Database. These entities include insurance companies, health maintenance organizations, self-insured entities, pharmacy benefits managers ("PBMs"), third-party administrators ("TPAs"), and other entities that represent potential TPP Class Members. In addition, A.B. Data sent 1,535 emails to TPPs and their representatives where email addresses were available. Further, the process of press releases, online banner

advertisements and social media advertising commenced on September 7, 2022 and the Notice was (and remains) posted online at https://opanaerantitrustlitigation.com/.

The content and method for dissemination of notice fulfill the requirements of Federal Rule of Civil Procedure 23 and due process.

VI. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

The Court preliminarily approved the proposed Plan of Allocation in its August 24, 2022, Order. ECF No. 1069. As set forth in Plaintiffs' brief supporting their motion for preliminary approval, the Net Settlement Fund will be distributed in two pools: 44.26% for a Consumer Pool and 55.74% for a Third-Party Payor Pool; claimants will be paid their *pro rata* share of their respective pools. ECF No. 1060 at 18. The proposed Plan of Allocation is fair, reasonable, and efficient. Similar plans of allocation have been repeatedly approved, and the proposed Plan of Allocation here should be approved as well.

"As with all aspects of class action settlements, [the court] must ensure that any allocation plan is reasonable and equitable to all class members." *Summers v. UAL Corp. ESOP Comm.*, 2005 WL 3159450, at *2 (N.D. Ill. Nov. 22, 2005); *Heekin v. Anthem, Inc.*, 2012 WL 5472087, at *3 (S.D. Ind. Nov. 9, 2012) ("As with the approval of a settlement, courts must determine whether the plan for allocation of settlement funds is fair, reasonable, and adequate."). "Federal courts have held that an allocation plan that reimburses class members based on the extent of their injuries is generally reasonable." *Lucas v. Vee Pak, Inc.*, 2017 WL 6733688, at *13 (N.D. Ill. Dec. 20, 2017) (collecting cases).

Here, under the proposed Plan of Allocation, distributions will be made to Eligible Claimants in each Allocation Pool on a *pro rata* basis calculated by each Eligible Claimant's Qualifying Claim amount. To determine each Eligible Claimant's *pro rata* share of an Allocation

Pool, the Settlement Administrator shall multiply the total value of that Allocation Pool by a fraction, for which (a) the numerator is the Qualifying Claim amount for that Eligible Claimant for that Allocation Pool, and (b) the denominator is the sum total of all Qualifying Claim amounts by all Eligible Claimants for that Allocation Pool. ECF No. 1060 at 18-19. This distribution ensures that each claimant receives a *pro rata* share proportionate to the overcharges they paid.

Courts generally find that distributing settlement funds on a *pro rata* basis to class members is fair and reasonable. *See e.g.*, *Summers*, 2005 WL 3159450, at *2 ("Given that the settlement funds in the instant action will be disbursed on a *pro rata* basis to all class members, we find that the allocation plan is reasonable"); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6875472, at *20 (E.D.N.Y. Dec. 16, 2019) ("Courts frequently approve plans involving *pro rata* distribution."), *judgment entered*, 2022 WL 2803352 (E.D.N.Y. July 18, 2022). Distributions based on the purchasers' respective *pro rata* shares are commonly used in settlements in pharmaceutical antitrust cases and, in end-payor cases, courts have approved distribution plans that proportionally divide the Settlement Fund into different pools for third-party payors, consumers, or other groups, depending on the circumstances of the case. *See, e.g.*, *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.,* 2022 WL 3043103, at *6 (E.D.N.Y. Aug. 2, 2022) ("[F]unds will be distributed on a *pro rata* basis within three separate pools—one for consumers without insurance, one for insured consumers, and one for TPPs"); *In re Remeron End-Payor Antitrust Litig*., 2005 WL 2230314, at *25 (approving plan where "32.8% of the Net Settlement Fund will be allocated to consumers . . .16.5% of the Net Settlement Fund will be allocated to state governmental purchasers . . . and 50.7% of the Net Settlement Fund will be allocated to Third–Party Payors"); *In re Brand Name Prescription*

Drugs Antitrust Litig., 1999 WL 639173, at *4 (N.D. Ill. Aug. 17, 1999) ("[We endorse the pro rata distribution method").

Finally, The Plan of Allocation was developed in conjunction with Class Counsel and their damages expert, which further supports approval. *See In re Facebook, Inc., IPO Sec. & Derivative Litig*., 343 F. Supp. 3d 394, 414 (S.D.N.Y. 2018) ("Plaintiffs' Plan of Allocation was prepared by experienced counsel along with a damages expert–both indicia of reasonableness."), *aff'd sub nom. In re Facebook, Inc.*, 822 F. App'x 40 (2d Cir. 2020).

VII. THE COURT SHOULD APPROVE PLAINTIFFS' REQUEST FOR ATTORNEY'S FEES, REIMBURSEMENT OF COSTS AND SERVICE AWARDS

A. The Proposed Award of Attorneys' Fees is Fair and Reasonable.

Class Counsel's request for an award of attorneys' fees in the amount of $5,000,000 or one-third of the settlement fund (including a *pro rata* share of the accrued interest), is also fair and reasonable under controlling Seventh Circuit law. *See* ECF No. 1077 at 10-20. In a sign of support, not a single member of the EPP Classes objected to Class Counsel's request for fees equal to one-third of the Settlement (with the caveat described in footnote 3 above). Accordingly, Class Counsel respectfully request that the Court approve the requested attorneys' fees.

B. Class Counsel's Cost and Expenses are Reasonable and Were Necessary for the Result.

There were also no objections to Class Counsel's request for reimbursement of costs and expenses in the amount of $ 4,005,833.95. These expenses were itemized by category for the Court's convenience. *See* ECF No. 1072-2, Exhibit B. Accordingly, Class Counsel respectfully request that the Court approve reimbursement of Class Counsel's expenses in full.

C. Service Awards for the Class Representatives are Appropriate and Reasonable.

There were likewise no objections to Class Counsel's request for service awards of

$15,000 for Wisconsin Masons' Health Care Fund and $10,000 for each of the other five Class Representatives. These awards are appropriate in light of the services performed for the benefit of the Classes. *See* ECF No. 1077-1 at ¶¶ 77-90. Accordingly, Class Counsel respectfully request that the Court approve the requested service awards.

VIII. NOTICE WAS PROVIDED UNDER THE CLASS ACTION FAIRNESS ACT

The Class Action Fairness Act, 28 U.S.C. § 1715 et seq. ("CAFA") requires that Impax notify appropriate state and federal officials of the proposed settlement and to allow 90 days to pass before final approval of the proposed settlement may be entered. *See* 28 U.S.C. § 1715(d). Class Counsel was informed that such notification was sent by counsel for Impax on August 19, 2022. Accordingly, as of the date of the Final Fairness Hearing—December 15, 2022—more than 90 days will have passed.

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval of the proposed Settlement between the EPP Classes and Impax.

Dated: November 15, 2022

Respectfully submitted,

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