

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

Present: The James V. Selna
Honorable

Karla J. Tunis
Deputy Clerk

Sharon Seffens
Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Eric L. Cramer Gretchen M. Nelson
Russell Burke Brent Landau
Christopher Cormier Gordon Ball

John W. Treece

Proceedings: Plaintiff’s Motion for Final Approval of Class Action Settlement (Fld 4-27-09)
Plaintiff Delaware Valley Surgical Supply’s Application for an Incentive Award for its Role as Lead Distributor Plaintiff for Nearly all of the Case (Fld 4-27-09)
Class Counsel’s Application for Attorneys’ Fees, Expenses and Incentive Award (Fld 4-27-09)

Cause called and counsel make their appearances. The Court’s tentative ruling is issued. Counsel submit on the Court’s tentative ruling. The Court GRANTS the plaintiff’s Motion for Final Approval of Class Action Settlement and Plaintiff Delaware Valley Surgical Supply’s Application for an Incentive Award for its Role as Lead Distributor Plaintiff for Nearly all of the Case. The Court GRANTS IN PART Class Counsel’s Application for Attorneys’ Fees, Expenses and Incentive Award. All rulings are in accordance with the tentative ruling as follows:

Plaintiffs Niagara Falls Memorial Medical Center (“Niagara”) and Bamberg County Memorial Hospital and Nursing Center (“Bamberg”) (collectively, “Class Representatives”), individually and on behalf of classes of direct and indirect purchasers, respectively, seek final approval of a proposed settlement with defendants Johnson & Johnson, Johnson & Johnson Health Care Systems, Inc., Ethicon, Inc., and Ethicon Endo-Surgery, Inc. (“Defendants”). The complaint alleges that Defendants violated antitrust laws by bundling endosurgical products with other products and by including anticompetitive provisions in their contracts with hospitals and group purchasing organizations. Hausfeld LLP and Cohen, Milstein, Sellers & Toll, P.L.L.C., as co-lead counsel for Indirect Purchasers, and Ball & Scott, as class counsel for Direct Purchasers

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

(collectively, “Class Counsel”),¹ seek attorneys’ fees of \$3.5 million, reimbursement of expenses of \$769,663.39, and incentive awards of \$10,000 each for Niagara and Bamberg. Delaware Valley Surgical Supply Co., Inc. (“Delaware”) also seeks an incentive award of \$10,000. The Court grants final approval of class certification, the settlement, and the plan of allocation. The Court finds that notice accords with due process. Finally, the Court awards the requested attorneys’ fees and expenses, an incentive award of \$10,000 each to Niagara and Bamberg, and a \$5,000 incentive award to Delaware.

I. CLASS CERTIFICATION

All class actions in federal court must meet the following four prerequisites for class certification:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). If these prerequisites are satisfied, an action may be maintained as a class action if common questions of law and fact predominate over questions affecting individual members and a class action is superior to other means to adjudicate the controversy. Fed. R. Civ. P. 23(b)(3).

Certification of a class for the purpose of settlement is similar to certification for purposes of trial, except the Court “need not inquire whether the case, if tried, would present intractable management problems” under Rule 23(b)(3)(D). Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997). However, the settlement context “demand[s] undiluted, even heightened, attention” to “unwarranted or overbroad class definitions.” Id. The decision to grant or deny class certification is within the trial court’s discretion. Yamamoto v. Omiya, 564 F.2d 1319, 1325 (9th Cir. 1977).

¹ “Direct Purchasers” and “Indirect Purchasers” are defined in Part I below.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

Here, the Settlement Agreement defines two settlement classes: (1) “Direct Purchasers” including “[a]ll persons and entities who made purchases of Defendants’ Relevant Endosurgical Products in the United States directly from Defendants at any time during the Class Period”; and (2) “Indirect Purchasers” including “[a]ll persons and entities who made purchases of Defendants’ Relevant Endosurgical Products in the United States other than directly from Defendants at any time during the Class Period.” (Settlement Agreement ¶ 2.1) Both classes exclude “Defendants, Defendants’ parents, subsidiaries, and affiliates, and the federal government.” (*Id.*) The Class Period is December 19, 2001 through October 20, 2008.

A. Rule 23(a)

1. Numerosity

In determining whether a plaintiff has satisfied the numerosity requirement of Rule 23(a)(1), a court may consider factors including the size of the class, geographical diversity, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought. *Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982); *see Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980). Here, the proposed classes, consisting of over 4,000 Direct Purchasers and over 9,000 Indirect Purchasers, are sufficient to satisfy the numerosity requirement, as joinder of this many parties would clearly be impracticable. Moreover, the class members are geographically dispersed. (Prelim. Approval Order, Docket No. 181, at 3.)

2. Commonality

Rule 23(a)(2) requires that questions of law or fact be common to the class. This requirement is permissively construed. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). “The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.” *Id.* In this case, the primary questions of law and fact central to the claims against Defendants are whether (1) Defendants possessed monopoly power in the relevant market; (2) Defendants maintained their monopoly through willful, anticompetitive, or unlawful activity; and (3) Defendants’ anticompetitive conduct

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

injured class members. (Prelim. Approval Order at 3.) These questions of law and fact are common to all of the class members' claims against Defendants. Accordingly, the Court finds that the proposed class members share sufficient factual and legal commonalities to satisfy Rule 23(a)(2).

3. Typicality

In order for a class representative to satisfy the typicality requirement of Rule 23(a)(3), he or she must show that his or her claims do "not differ significantly from the claims or defenses of the class as whole." In re Computer Memories, 111 F.R.D. 675, 680 (N.D. Cal. 1986). The class representative's claims and the claims of the class must arise from the same events or course of conduct and must be based on the same legal theory. In re United Energy Corp. Solar Power Modules Tax Shelter Invs. Sec. Litig., 122 F.R.D. 251, 256 (C.D. Cal. 1985). Here, Niagara's claims are typical of those of Direct Purchasers, and Bamberg's claims are typical of those of Indirect Purchasers. Specifically, each class member has a claim that arises from the same course of events – Defendants' alleged anticompetitive conduct – and would make similar legal arguments to establish liability and damages. (Prelim. Approval Order at 3.)

4. Adequacy of representation

Representation is adequate if (1) the attorneys representing the class are qualified and competent and (2) the class representatives are not disqualified by conflicts of interest. Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978).

i. competency of counsel

Class counsel must be experienced and competent. See Hanlon, 150 F.3d at 1021. Class Counsel submit evidence that they have substantial experience in handling class actions and antitrust cases. (Prelim. Approval Order at 4.) The Court has no reason to doubt their competence. Moreover, Class Counsel have done substantial work in identifying and investigating Class Representatives' claims, and in negotiating a resolution of this litigation. (Id.)

Accordingly, Class Counsel have the requisite experience and competence.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

ii. adequacy of class representatives

Rule 23(a)(4) also requires that the representative parties fairly and adequately protect the interests of the class. This requirement is thought of as whether the named plaintiff and his counsel will pursue each class member's claim with sufficient "vigor." Hanlon, 150 F.3d at 1021. In the context of a settlement-only class, the Court examines the "rationale for not pursuing further litigation." Id.

Class Counsel assert that Class Representatives have shared interests with the class members in recovering damages and obtaining structural relief from Defendants. (Prelim. Approval Order at 5.) The issue is whether Class Representatives have pursued those interests vigorously. The Court finds that the parties have pursued claims on behalf of the class members with vigor.

Accordingly, the Court finds that the parties have met the requirements of Rule 23(a).

B. Rule 23(b)

The Court now addresses whether the proposed classes fall within the requirements of 23(b). Class Representatives contend that the classes ought to be certified under 23(b)(3).

"Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Kamm v. Cal. City Dev. Co., 509 F.2d 205, 211 (9th Cir. 1975) (quoting Committee notes). A class action may be certified (1) where common questions of law and fact predominate over questions affecting individual members, and (2) where a class action is superior to other means to adjudicate the controversy. Fed. R. Civ. P. 23(b)(3).

1. Predominance of common issues

The "predominance inquiry tests whether proposed classes are sufficiently

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009

Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

cohesive to warrant adjudication by representation.” Amchem, 521 U.S. at 623. The Court must rest its examination on the legal or factual questions of the individual class members. Hanlon, 150 F.3d at 1022.

Here, common issues predominate as to proof of the relevant market, Defendants’ market power, Defendant’s anticompetitive conduct, the effects of that conduct, and damages to Class Representatives and class members. (Prelim. Approval Order at 6.) Thus, although there may be some variation between individual class member’s claims, such as the actual amount of damages, the Court finds that common questions of law and fact predominate.

2. Superior method of adjudication

Next, the Court must consider if the class suit is superior to individual suits. Amchem, 521 U.S. at 615. “A class action is the superior method for managing litigation if no realistic alternative exists.” Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234-35 (9th Cir. 1996).

Although the claims surely vary from one class member to another, it is highly unlikely that the vast majority of the putative class members could economically prosecute their individual claims. Litigation cost would almost certainly surpass the likely recovery for each member. As a result, many litigants would probably not pursue their claims against Defendants because of financial and other burdens in pursuing complex claims. A class action here presents the advantages of increased likelihood of resolution by settlement where claims are aggregated, economies of scale, and a lighter burden on the individual class members and the judiciary. The proposed class action is “inherently superior” to individual actions in an antitrust case such as this one. Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc., 209 F.R.D. 159, 168 (C.D. Cal. 2002).

From the perspective of judicial resources, a class action is clearly superior. There is no reason to believe that any single plaintiff could try the complex core allegations in less time than the month-long trial in Applied Medical Resources Corp. v. Ethicon, Inc. (“AMR”), No. SACV 03-1329 JVS (MLGx), 2006 WL 1381697 (C.D. Cal. Feb. 3, 2006). Such multiple trials would be unduly burdensome on the judicial system.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

Therefore, in accordance with its preliminary certification of the classes, the Court finds that Class Representatives have sufficiently satisfied the requirements of Rule 23 for purposes of final class certification.

II. CLASS SETTLEMENT

Federal Rule of Civil Procedure 23(e) requires the Court to determine whether the proposed settlement is “fundamentally fair, adequate and reasonable.” Officers for Justice v. Civil Serv. Comm’n, 688 F.2d 615, 625 (9th Cir. 1982). The settlement as a whole, rather than the component parts, is the proper level of inquiry. Hanlon, 150 F.3d at 1026. “The settlement must stand or fall in its entirety,” and the Court may not delete, modify, or rewrite particular provisions. Id. “Settlement is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion.” Id. at 1027.

In assessing a settlement proposal, the Court must consider a number of factors, including: (1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003); Hanlon, 150 F.3d at 1026; see also Rodriguez v. West Publishing Corp., --- F.3d ----, 2009 WL 1085270, at *1 (9th Cir. Apr. 23, 2009). “Ultimately, the district court’s determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice.” Officers for Justice, 688 F.2d at 625 (internal quotations omitted).

The private consensual decision of the parties is entitled to deference. Hanlon, 1027 F.3d at 1027. The Court’s role “must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” Officers for Justice, 688 F.2d at 626.

A. Settlement Terms

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009

Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

The proposed settlement includes three components: (1) \$13 million in cash; (2) structural relief estimated to be worth at least \$26.1 million; and (3) up to \$500,000 in notice and other administrative costs.

First, Defendants will pay class members \$13 million in cash, to be deposited into an interest-bearing escrow account. (Settlement Agreement ¶ 9.1.) These proceeds will be divided among direct purchasers from all states and indirect purchasers from twenty-six states, in proportion to their total purchases of relevant endosurgical products during the Class Period.² (*Id.* ¶¶ 9.2 & 10.4) The relevant distribution factors are: (1) the number of valid claim forms received; (2) the amount of relevant endosurgical products each class member purchased during the Class Period; (3) whether those purchases were direct or indirect; and (4) the state in which those purchases were made.³ (*Id.*) By the settlement terms, Class Counsel will be reimbursed and paid out of these proceeds as well. (*Id.* ¶ 10.5.)

Second, Defendants will implement certain restrictions on their contracting practices. For a period of five years, Defendants will comply with the following restrictions on bundled contracts with hospitals and group purchasing organizations that cover endosurgical and other products: (1) such contracts will include the existing “carve outs” for all non-full line suppliers;⁴ (2) such contracts will be terminable at will by

² The twenty-six jurisdictions are Alabama, Arizona, California, the District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. (Notice Plan, Ex. G.1 at 8; see Docket No. 47 ¶ 30.)

³ Although not as detailed as some proposals, the Court interprets this plan to mean that the \$13 million will be distributed according to the proportionate claim of all eligible class members, direct and indirect, who properly file a claim within the allotted time. (Notice Plan at 8 (“The cash amount of the Settlement Fund will be divided among direct purchasers from all states and indirect purchasers from the twenty-six states listed below, in proportion to their total purchases of Relevant Endosurgical products during the Class Period.”).)

⁴ Beginning in late 2003, Defendants took steps to mitigate the effects of its bundled contracts on single-product suppliers. In determining threshold discount percentage requirements, Defendants carved out purchases from suppliers who did not offer a full line of products. In a related matter, this Court previously found that, as a result of these carve outs, there was no harm to competition resulting

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

customers on thirty days' notice; and (3) such contracts will not prohibit competitive evaluations. (*Id.* ¶ 9.3.) Class Representatives' expert has estimated the value of the carve-out extension alone at approximately \$26.1 million. (Young Decl. ¶ 3.) The Court also finds that the value of other restrictions, though difficult to quantify in monetary terms, will ameliorate the conduct that prompted Class Representatives to bring these actions in the first place.

Third, Defendants will pay up to \$500,000 in costs for notice and administration of the settlement. (Settlement Agreement ¶ 4.4.) In return for these three concessions, class members agree to a full and final release of all claims relating to this action. (*Id.* ¶¶ 8.1-3.)

B. Final Approval Factors

At the outset, the Court notes that Niagra, Bamberg, and Defendants reached this settlement after nearly two years of arms-length negotiations beginning in November 2006. (Prelim. Approval Order at 9.) There is no evidence that the agreement is the result of fraud or collusion. Delaware, a distributor that directly purchased endosurgical products from Defendants, participated in at least one settlement meeting in January 2007. (*Id.*)

The Court considers the merits of the proposed settlement under the Staton/Hanlon factors before addressing the relevant objections of Foundation Healthcare Affiliates LLC ("Foundation").

1. Strength of the plaintiffs' case

The difficulty of proving an antitrust case, and the fact that "there were no government [or, here, even private] coattails for the class to ride," both weigh in favor of final approval in this case. Rodriguez, 2009 WL 1085270, at *10.

Here, unlike in other cases, the competitor cases leading up to this matter were ultimately less successful than Class Representatives anticipated. (Prelim. Approval

from those contracts after late 2003. AMR, 2006 WL 1381697, at *3-4.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009

Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

Order at 11.) AMR, for example, lost a jury verdict before this Court and recovered nothing. AMR, 2006 WL 1381697. ConMed Corporation (“ConMed”), which sued Defendants in the Southern District of New York, alleged pre-trebled damages of \$1.8 billion but settled for just \$11 million and no structural relief following the AMR verdict. (Hausfeld Decl., Ex. 10, at 5.) The prior cases demonstrate that the risk of litigation here is substantial.⁵

Moreover, whereas AMR had the benefit of a relatively favorable jury instruction on the bundling issue, the class members in this case would face a far more difficult burden in light of recent changes in Ninth Circuit law. Compare Jury Instructions at 33, AMR, Case No. 03-1329 (Docket No. 361) (“Bundling contracts can [] be exclusionary if the total discount on the bundle is so high that an equally-efficient competitor selling only one of the bundled products cannot lower its price for that product enough to meet the aggregate bundled discount and still sell at an above-cost level.”), with Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 911 (9th Cir. 2008) (holding that, for exclusionary conduct in bundling cases, “the relevant inquiry is not whether [defendant’s] pricing practices forced [plaintiff] to price below cost, but whether [defendant] priced its own services below an appropriate measure of its cost”). This substantive change significantly heightens the litigation risk and weighs heavily in favor of final approval.

Accordingly, this factor favors the class settlement.

2. Risk, expense, complexity, and likely duration of further litigation

As in Rodriguez, “[t]he class in this case does not have the benefit, like some other antitrust classes, of previous litigation between the defendants and the government.” 2009 WL 1085270, at *12. Further, “[i]nevitable appeals would likely prolong the litigation, and any recovery by class members, for years.” Id.

Defendants’ jury verdict against AMR, as well as their favorable settlement with ConMed, add to the litigation risk. As does the Ninth Circuit’s recently-issued

⁵ Class Representatives also represent, without supporting evidence, that Genico, Inc. settled its claim, brought against Defendants in the Eastern District of Texas, for a confidential sum and no structural relief.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

heightened standard on bundling set forth in Cascade, 515 F.3d at 911. Class members therefore may not prevail at trial, and carve outs may limit damages to a one-year period.

This factor, too, favors the settlement.

3. Risk of maintaining class action status throughout the trial

Unlike in Rodriguez, where the nationwide class was already certified and the Ninth Circuit instead noted the ongoing risk that the “district court may decertify a class at any time,” 2009 WL 1085270, at *12, Direct Purchasers and Indirect Purchasers had not been certified as a class prior to preliminary approval of the proposed settlement.

Accordingly, the risk of not being certified as a class, to say nothing of the risk of maintaining the class throughout trial, favor the settlement even if the risk here is likely remote.

4. Amount offered in settlement

The proposed settlement appears fair on its face, providing valuable consideration in the form of \$13 million in cash, carve outs worth at least \$26.1 million, and up to \$500,000 in notice and other administrative costs. In sum, the total settlement is valued at over \$39.6 million.⁶ (Prelim. Approval Order at 10.) In assessing this settlement value, the most relevant time period is from December 19, 2001, when the Class Period begins, through late 2003, when Defendants’ contracts began to include carve outs mitigating subsequent harm from those contracts.

⁶ The \$26.1 million figure represents the estimated value of the first provision for structural relief, but does not include the value of the second and third provisions. Although their value is difficult to quantify in monetary terms, these other provisions “will ameliorate the conduct that prompted Class Representatives to bring these actions in the first place.” (Prelim. Approval Order at 9.) Thus, the value of structural relief is likely to exceed \$26.1 million in light of the benefits class members will receive from the competitive evaluation and contract termination provisions. Moreover, the Court declines to discount the value of the structural relief because Defendants had implemented certain changes on their own. Defendants might well have withdrawn the carve outs in hope of finding less restrictive safe harbors.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009

Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

The settlement, conservatively valued at \$39.6 million, represents approximately 2.2% of Defendants' sales during this relevant time period. (Hausfeld Decl., Ex. 5 ¶ 4.) This percentage is within the range of settlements approved in similar cases when alleged monopolists were sued first by competitors, and then by purchasers. (Prelim. Approval Order at 10-11 (discussing Meijer, Inc. v. 3M, Civ. No. 04-5871, 2006 WL 2382718, at *15 (E.D. Pa. Aug. 14, 2006), and In re Smokeless Tobacco Antitrust Litig., Civ. A. Nos. 1:00CV01415, 1:00CV01454, 1:03CV00875 (D.D.C.)).)

Since "courts generally determine fairness of an antitrust class action settlement based on how it compensates the class for past injuries, without giving much, if any, consideration to treble damages," this factor also weighs in favor of the settlement. Rodriguez, 2009 WL 1085270, at *10.

5. Extent of discovery completed and the stage of the proceedings

This is a relatively early settlement. Trial is not set to begin until June 2010. (Docket No. 117.) Before that date, Class Counsel would have to litigate class certification, complete merits discovery, retain experts and serve expert reports, and so forth, expending substantial time, resources, and effort. Therefore, the timing of the settlement supports final approval, as antitrust class actions "are notoriously complex, protracted, and bitterly fought." In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 510 (E.D.N.Y. 2003) (citation omitted); see also Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation.").

Despite early settlement, Class Counsel have thoroughly reviewed and analyzed Defendants' transactional sales data as well as the summary judgment and trial records in the AMR litigation before beginning substantive settlement negotiations. (Hausfeld Decl. ¶ 5; Prelim. Approval Order at 15 ("[A]ll Class Counsel have long had hospital data from the AMR and ConMed litigation covering the period 1996 to the second quarter of 2006.")). As such, "counsel had a good grasp on the merits of their case before settlement talks began." Rodriguez, 2009 WL 1085270, at *13.

6. Experience and views of counsel

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

Absent fraud or collusion, the Court “should be hesitant to substitute its own judgment for that of counsel.” Nat’l Rural Telecommc’ns Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 528 (C.D. Cal. 2004) (internal quotations and citations omitted). Here, Class Counsel “believe that this Settlement is not only fair and reasonable, but is an excellent result for the classes.” (Mot. at 22, citing Hausfeld Decl. ¶ 4.)

7. Presence of governmental participant

As discussed above, “[t]he class in this case does not have the benefit, like some other antitrust classes, of previous litigation between the defendants and the government.” Rodriguez, 2009 WL 1085270, at *12.

8. Reaction of the class members to the proposed settlement

“[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.” DIRECTV, 221 F.R.D. at 529. In Churchill Village, L.L.C. v. General Electric, 361 F.3d 566, 577 (9th Cir. 2004), for example, the Ninth Circuit affirmed a settlement where, out of approximately 90,000 notified class members, only 45 objected and 500 opted out. This breaks down to an objection rate of approximately .05%⁷ and an opt-out rate of around .56%.⁸ See also Rodriguez, 2009 WL 1085270, at *13 (“The court had discretion to find a favorable reaction to the settlement among class members given that, of 376,301 putative class members to whom notice of the settlement had been sent, 52,000 submitted claims forms and only fifty-four submitted objections.”).

The objection and opt-out rates in this case are within the range approved by the Ninth Circuit in Churchill and other cases. Notice was mailed to approximately 13,000 potential class members, and published in five widely read healthcare purchasing trade publications and in The Wall Street Journal. (Sartory Aff. ¶¶ 3-7; Kinsella Aff. ¶¶ 6, 9-10.) A website concerning the settlement also was established. (Sartory Aff. ¶¶ 7, 10;

⁷ 45 objections / 90,000 notified class members = .05%.

⁸ 500 opt-outs / 90,000 notified class members = .56%.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

Prelim. Approval Order at 19.) As of April 20, 2009, the deadline for submitting claim forms, the claims administrator received 1,183 claims. (Sartory Aff. ¶ 14.) Only one class member, Foundation, has objected to the settlement. (Foundation Obj., Docket No. 190; Sartory Aff. ¶ 12.) This amounts to an objection rate of approximately .0077% of all mailed class members,⁹ not including additional class members who may have been reached through trade publications or online. Additionally, only 20 requests for exclusion have been filed, or around .15% of the two classes combined.¹⁰ (Id. ¶ 13.) The weight of these low objection and opt-out rates is bolstered by the fact that the class members are “sophisticated” entities that would have “voiced their position” had they believed the settlement to be inadequate. (Hausfeld Decl., Ex. 9, at 45.)

Significantly, Delaware, which previously objected that the proposed settlement provides preferential treatment to Indirect Purchasers, has chosen to participate in the Direct Purchaser settlement class without filing an objection.

This factor therefore weighs heavily in favor of final approval.

C. Foundation’s Objections

With this background the Court now turns to Foundation’s objections to final approval. These objections are without merit, as outlined below. With respect to the settlement itself, Foundation merely adopts the objections raised unsuccessfully by Delaware at the preliminary approval stage, failing even to acknowledge this Court’s analysis of the issues. (Foundation Obj. at 2.) Notably, Delaware itself has not raised these same objections in connection with final approval.

Foundation’s objections to the settlement itself fail for the same reasons Delaware’s initial objections failed.

First, Delaware contended that the settlement amount is low relative to both potential recoverable damages and the merits of the case. But the issue is not whether the

⁹ 1 objection / 13,000 notified class members (via mailing) = .0077%.

¹⁰ 20 opt-outs / 13,000 notified class members (via mailing) = .15%.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

settlement could be higher, but whether it is within the range of settlements approved in similar cases. Based on the cases discussed above, 2.2% of sales is well within this range. See supra Subsection II.B.4. Delaware made no attempt to distinguish these cases. As for potential recoverable damages, Delaware conceded that its own estimate is “rough,” “preliminary,” and in need of “further refinement.” (Prelim. Approval Order at 12.) There was also evidence to suggest that this estimate may be inflated because, inter alia, it does not appear to include an offset for the higher suture prices that purchasers would have paid in the absence of the challenged bundles. See Siegel v. Chicken Delight, Inc., 448 F.2d 43, 52-53 (9th Cir. 1971).

Second, Delaware contended that the settlement amount is low relative to analogous cases. But on this point Delaware relied on a single case, Spartanburg Regional Health Services District, Inc. v. Hillenbrand Industries, Inc., C.A. No. 7:03-2141-HFF (D.S.C.) (settling for \$337.5 million in cash and injunctive relief valued at an additional \$150 million), which itself is distinguishable. There are significant differences between that case and the present one: (1) Spartanburg followed a successful suit brought by a competitor plaintiff, while this case follows a competitor plaintiff who lost before a jury; (2) Spartanburg was not subject to the higher standard recently adopted by the Ninth Circuit in Cascade; (3) the Spartanburg defendant had a total monopoly in the hospital bed market, while the Defendants here face substantial competition from Tyco; and (4) the defendant’s documents in Spartanburg were far more damaging than Defendants’ documents here. (Prelim. Approval Order at 13.) The Court agrees that these differences suggest a much lower recovery in this case. Even if potential recoverable damages are high, the measure of damages would be irrelevant unless Class Representatives can win on liability. In light of AMR’s failed litigation and the heightened Cascade standard on bundling, any potential recovery must be substantially discounted for this litigation risk.¹¹

¹¹ Delaware asserted that its case is more attractive than AMR’s because it will stress the role of class members as overcharged purchasers, presumably sympathetic purchasers. (Oppo. at 3.) This ignores the fact that the analytic framework for liability is the same, regardless of whether the plaintiff is a competitor or a customer. There is no reason why AMR’s jury finding that defendants did not engage in anticompetitive conduct would be any different if a purchaser were the plaintiff. Indeed, to the extent that the defendants tout the benefits of bundling to the consumer, the present plaintiffs are the consumers.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

Third, Delaware contended that the proposed settlement provides preferential treatment to Indirect Purchasers (hospitals), as opposed to Direct Purchasers (distributors).¹² Delaware based this argument on prior statements by Defendants regarding Direct Purchasers' lack of interest in structural relief or contractual changes. (*Id.*) Delaware's argument was that the \$26.1 million structural relief is essentially worthless to Direct Purchasers, that the only value to Direct Purchasers comes from the \$13 million cash settlement, and that – “liberally assuming that the direct purchasers account for 60% of the allocated funds” – Direct Purchasers will receive less than \$7 million from this case, or only 20% of the overall settlement. (*Oppo.* at 22.) Even if the Court assumes Delaware's calculations are correct, the premises underlying these calculations are flawed. First, Delaware incorrectly assumed that Direct Purchasers will receive no value from structural relief. The Ninth Circuit has rejected this position:

[T]he distributor is not a completely irrelevant economic actor in this contractual framework. In theory, a demand curve exists for the bundle of goods and services that O & M sells. If the price of the goods is artificially inflated by the anti-competitive practices of J & J, that will affect the attractiveness of the distributor's products in the marketplace. There is no reason to believe that market forces do not work on O & M and other distributors. The presence of another distributor as a plaintiff in this case, DVSS, shows that distributors are indeed affected by J & J's allegedly predatory pricing scheme and do have incentives to bring suit against the manufacturer.

Delaware Valley Surgical Supply Inc. v. Johnson & Johnson, 523 F.3d 1116, 1124 (9th Cir. 2008). Second, Delaware incorrectly assumed that Indirect Purchasers should not be treated the same as Direct Purchasers for purposes of recovery because Indirect Purchasers have “no treble damages claim” and therefore are entitled to less than Direct Purchasers. (*Prelim. Approval Order* at 14.) Delaware's argument that Indirect Purchasers' claims are far inferior to those of Direct Purchasers rested on the false premise that indirect purchasers only have rights to single damages monetary relief. (*Id.*) In fact, numerous states allow Indirect Purchasers to recover treble damages or full

¹² Although Foundation adopted this objection from Delaware, the objection does not apply here because, unlike Delaware, Foundation is not a distributor but rather a hospital group. (*Mot.* at 27 n.7.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

consideration paid.¹³ In any event, “courts generally determine fairness of an antitrust class action settlement based on how it compensates the class for past injuries, without giving much, if any, consideration to treble damages.” Rodriguez, 2009 WL 1085270, at *10 (9th Cir. 2009).¹⁴

Fourth, Delaware contended that the proposed settlement arises out of a tainted process by which Class Counsel intentionally excluded Delaware’s own counsel. But Delaware cited no authority to show that the intentional exclusion of counsel from settlement negotiations precludes approval of an otherwise proper settlement. The fact that one counsel was not included in most of the negotiations, without more, does not prove collusion. Cf. Chicken, 669 F.2d at 237 (“Even irregular settlement negotiations may . . . form the basis for a judicially acceptable class action settlement. It is enough if representation of the class during the negotiations was adequate and that the settlement itself is fair.”) (ellipsis in original) (internal quotations and citations omitted). The Court also notes that such exclusion may even be appropriate where, as here, the excluded counsel had such a divergent view of the case from its co-counsel that its continued participation in settlement discussions may well be counterproductive. See Mars Steel Corp. v. Cont’l Ill. Nat. Bank and Trust Co. of Chi., 834 F.2d 677, 684 (7th 1987) (“[T]hree-cornered negotiations are clumsy at best, especially when one of the corners . . . adopts an obdurate negotiating position. Rather than attempt to prescribe the modalities of negotiation, the district judge permissibly focused on the end result of the negotiation . . .”).

Fifth, Delaware contended that the settlement process involves a “reverse auction.” “A reverse auction is said to occur when the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with [] the hope that the district court will approve a weak settlement that will preclude other claims against the

¹³ See, e.g., Ariz. Rev. Stat. § 44-1408(B) (treble); Cal. Bus. & Prof. Code § 16750(a) (treble); Iowa Code § 553.12(3) (double); Kan. Stat. Ann. § 50-115 (full consideration); Mich. Comp. Laws § 445.778(2) (treble); N.M. Stat. § 57-1-3 (treble); Tenn. Code Ann. § 47-25-106 (full consideration).

¹⁴ On that note, Delaware failed to recognize that the starting point for the settlement negotiations was Defendants’ desire to achieve “total peace,” or a global settlement with both Direct Purchasers and Indirect Purchasers alike. See In re Chicken Antitrust Litig. Am. Poultry, 669 F.2d 228, 238 (Former 5th Cir. Unit B 1982).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

defendant.” Negrete v. Allianz Life Ins. Co. of N. Am., 523 F.3d 1091, 1099 (9th Cir. 2008) (internal quotations and citation omitted). Here, Class Counsel cannot be fairly described as “the most ineffectual class lawyers.” See supra Subsection I.A.4. And there is no basis to conclude that Class Counsel – or Defendants’ counsel – did anything improper. Delaware’s reliance on General Motors was also misplaced. (Compare In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1115 (7th Cir. 1979) (involving an “order provid[ing] that the committee could conduct settlement negotiations only with the consent of all counsel for the named plaintiffs”), with Docket No. 62 (including no such limitation in the order appointing counsel).)

Finally, the Court notes that Delaware incorrectly portrayed the proposed settlement’s release as being much broader than implied by the plain meaning of its terms. The release applies only to claims that are “related” to “antitrust or unfair competition laws” and “could have been brought based on the allegations in the Actions.” (Settlement Agreement, Ex. B ¶ 1.21.) While the release language sweeps broadly to cover antitrust and unfair competition claims, it would not affect usual contractual and other dealings with the defendants.

Accordingly, Foundation’s reliance on Delaware’s objections is to no avail. That Delaware did not press its objections a second time in light of the Court’s preliminary approval analysis is significant.

III. PLAN OF ALLOCATION

To the extent Delaware’s previous objections, reasserted by Foundation, fail, Class Representatives assert that the plan of allocation is a fair, adequate, and reasonable distribution of the available proceeds among members of both settlement classes that submit valid claim forms. See Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1285 (9th Cir. 1992). According to Class Representatives, and as noted above, “[t]he distribution would be made on a straight pro rata basis, without regard to whether the purchases were direct or indirect, and with no class members being favored over others.” (Mot. at 24.) In particular, “[t]he cash amount of the Settlement Fund will be divided among direct purchasers from all the states and indirect purchasers from the twenty-six states listed below, in proportion to their total purchases of Relevant Endosurgical Products during the Class Period.” (Prelim. Approval Order at 8 n.4.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

“Settlement distributions, such as this one, that apportion funds according to the relative amount of damages suffered by class members have repeatedly been deemed fair and reasonable.” In re Vitamins Antitrust Litig., No. 99-197 TFH, 2000 WL 1737867, 6 (D.D.C. Mar. 31, 2000) (citing cases). Accordingly, for the reasons cited in the previous Part, the Court finds that the settlement’s plan of allocation is fair, adequate, and reasonable.

IV. NOTICE

“Adequate notice is critical to court approval of a class settlement.” Hanlon, 150 F.3d at 1025; see Fed. R. Civ. P. 23(e)(1)(B). Because the Court certified the class under Rule 23(b)(3), the Court must find that notice was the best

practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). Here, notice included three parts: (1) individually-mailed notice to approximately 13,000 class members who were identified from Defendants’ records; (2) publication in The Wall Street Journal, AHA News, Surgical Products, Hospital & Health Networks, Modern Healthcare, and Materials Management in Healthcare; and (3) establishment of a dedicated website. (Sartory Aff. ¶¶ 3-7, 10; Kinsella Aff. ¶ 6, 9-10.) Notice also explained that class members will be able to submit their claim forms by mail or online, and provided information about their direct and indirect purchases of the relevant products during the Class Period. In addition to summarizing the class members’ rights, notice provided the necessary contact information should class members desire to obtain further information. (Kinsella Aff. ¶ 8.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009

Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

Accordingly, the notice program was extensive and complied with the plain language requirements of Rule 23 and, in turn, due process.

V. ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARDS

A. Attorneys' Fees

The Ninth Circuit “require[s] only that fee awards be reasonable in the circumstances.” Rodriguez, 2009 WL 1085270, at *13. As the Ninth Circuit recently recognized in Rodriguez, “[t]he district court may award fees pursuant to either a lodestar or a straight percentage of the settlement fund.” Id. (citing Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000)).

The lodestar method requires the Court to multiply the “number of hours reasonably expended by a reasonable hourly rate.” Hanlon, 150 F.3d at 1029. That figure, the lodestar, may then be “adjusted upward or downward to account for several factors including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.” Id. Under the percentage of the fund method, “the court simply awards the attorneys a percentage of the fund sufficient to provide class counsel with a reasonable fee.” Id. The percentage is to be set with reference to the Ninth Circuit’s “benchmark” of 25 percent. See Vizcaino, 290 F.3d at 1047 (“Ninth Circuit cases echo this approach [of a 25% benchmark, with 20-30% as the usual range.]”); Torrise v. Tucson Elec. Power Co., 8 F.3d 1370, 1376 (9th Cir. 1993); Paul, Johnson, Alston & Hunt v. Grauly, 886 F.2d 268, 272 (9th Cir. 1989); In re Activision Sec. Litig., 723 F. Supp. 1373, 1375 (N.D. Cal. 1989). The benchmark may be adjusted upward or downward but such an adjustment “must be accompanied by a reasonable explanation of why the benchmark is unreasonable under the circumstances.” Grauly, 886 F.2d at 273. Factors relevant to an adjustment include, inter alia, the benefits obtained for the class, the quality of counsel, the complexity of the issues, and the risk of nonpayment. See In re Oracle Sec. Litig., 852 F. Supp. 1437, 1449 (N.D. Cal. 1994).

Here, Class Counsel assert that the percentage of the fund method is more

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

appropriate than the lodestar method.¹⁵ Class Counsel seek a \$3.5 million fee equal to 26.9% of the cash portion of the settlement fund, slightly higher than the 25 percent benchmark. This calculation is conservative, because it does not include the value of the structural relief provided by the settlement. See Staton, 327 F.3d at 972-73. The percentage falls to 25.9 percent if the \$500,000 maximum in notice and administration costs paid by Defendants is included. See Meijer, 2006 WL 2382718, at *19 (awarding a 27.4 percent fee in a similar case). The Court finds the \$3.5 million requested fee award reasonable given the circumstances of this case. The settlement is worth at least \$39.6 million to the class (Prelim. Approval Order at 10); Class Counsel have substantial experience litigating, trying, and settling complex antitrust actions (Hausfeld Decl., Exs. 7-9); and Class Counsel investigated the factual and legal basis for claims, developed the theory of the case, analyzed the evidence presented in the AMR suit, negotiated the proposed settlement, and prepared and argued motions for preliminary and final approval (id. ¶ 3). Not only are antitrust cases notoriously complex, but the risk of nonpayment here was substantial given the unsuccessful competitor cases leading up to this action, as well as an unfavorable change in Ninth Circuit law. See discussion supra Subsection II.B.1.

Accordingly, the \$3.5 million requested fee is reasonable under the percentage of the fund method.

¹⁵ In State of Florida v. Dunne, 915 F.2d 542, 545 (9th Cir. 1990), the Ninth Circuit endorsed the reasoning below as “extremely persuasive”:

Not only [does the lodestar method] consume an undue amount of court time with little resulting advantage to anyone, but, in fact, it may be to the detriment of the class members. They are forced to wait until the court has done a thorough, conscientious analysis of the attorneys’ fee petition. . . . Most important, however, is the effect the process has on the litigation and the timing of settlement. Where attorneys must depend on a lodestar approach there is little incentive to arrive at an early settlement.

Activision, 723 F. Supp. at 1375; see also Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1050 (9th Cir. 2002) (“[I]t is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement.”).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

However, in granting preliminary approval, the Court requested detailed evidence to calculate the lodestar, and indicated that it would entertain proposals for allocation of attorneys' fees. (Prelim. Approval Order at 17, 20.) Here, Class Counsel address both issues.

First, when the fee award is based on a percentage of the fund, the lodestar may be used as a "cross-check" on the reasonableness of the fee. Vizcaino, 290 F.3d at 1050 & n.5. As outlined in the individual law firm declarations,¹⁶ the total lodestar is \$3,928,302.34 at historical rates and \$4,369,110.39 at current rates. (See Hausfeld Decl. ¶ 17 & Ex. 12A-R; see also Vizcaino, 290 F.3d at 1051 (holding that the Court has discretion to use current hourly rates "to compensate for delay in receipt of payment").)

Although the declarations do not include information about the specific tasks each attorney performed, Class Counsel represent that they are prepared to do so if the Court should require. (Mot. at 15.) The Court finds that such additional information is unnecessary. When coupled with Class Counsel's showing under the percentage method, the above declarations provide ample information for the Court to apply a lodestar cross-check to the attorney fee award from the common fund. See Vizcaino, 290 F.3d at 1051. Notably, the requested \$3.5 million fee represents a multiplier of .89 at historical rates,¹⁷ and .80 at current rates.¹⁸ (See Hausfeld Decl. ¶ 17.) Such a multiplier is significantly below the range approved by the Ninth Circuit in other cases. See, e.g., id. at 1051 (3.65 multiplier); see also Meijer, 2006 WL 2382718, at *24 (4.77 multiplier in a similar case). It also bears mentioning that Class Counsel will likely incur additional hours in administering the settlement and distributing the settlement fund, without the prospect for further fees. See Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 252 (D.N.J. 2005).

Second, the three Class Counsel firms and Berger & Montague, P.C., representing Delaware, have agreed to a procedure for allocating the \$3.5 million attorneys' fees

¹⁶ The declarations provide information on individual billing times, hourly rates, and categories of work performed.

¹⁷ \$3,500,000 (requested attorneys' fees) / \$3,928,302.34 (historical lodestar) = .89.

¹⁸ \$3,500,000 (requested attorneys' fees) / \$4,369,110.39 (historical lodestar) = .80.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009

Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

awarded by this Court. (Mot. at 16.) The Court therefore grants them permission to allocate the fees pursuant to this agreement, and will retain jurisdiction in the event that allocation issues arise.

With this background the Court now turns to Foundation's objection to the fee award. Foundation contends that the notice program "fail[ed] to provide any information about the class counsel's lodestar." (Foundation Obj. at 2.) But Foundation offers no authority for the proposition that the notice should have contained information about Class Counsel's lodestar, and there is no support for such a requirement in Rule 23(h). Foundation does not even "specify how knowing [Class Counsel's] precise hourly billing rates or number of hours billed would have altered materially [its] ability to object to the overall amount of attorneys' fees available under the settlement agreement." Wilson v. Airborne, Inc., No. EDCV 07-770-VAP, 2008 WL 3854963, 5 (C.D. Cal. Aug. 13, 2008). Moreover, the Court specifically approved the notice, and directed that lodestar information be submitted at the final approval stage, not in the notice itself or some earlier date, as Foundation contends. (Compare Prelim. Approval Order at 17, 20, with Foundation Obj. at 2.) Contrary to Foundation's claim, the Court did not hold that the lodestar was "the best method for calculating a reasonable fee in this case" (Compare footnote 15, supra, with Foundation Obj. at 2), but rather that it expected a Class Counsel to make a lodestar showing (Prelim. Approval Order at 17, 20). That directive in no way precludes Class Counsel from showing the reasonableness of their requested attorneys' fees under the percentage method, alongside the lodestar method.

Significantly, none of the other settlement class members, all of which are sophisticated entities and some of which are much larger purchasers than Foundation, have joined with Foundation in opposing this reasonable fee request. Foundation's objections, including its objection to the requested attorneys' fees, are therefore not representative of the class. See Cohen v. Chilcott, 522 F. Supp. 2d 105, 123 (D.D.C. 2007).

Accordingly, for the above reasons, the Court grants Class Counsel \$3.5 million in attorneys' fees, to be allocated among the three Class Counsel firms and Berger & Montague, P.C., pursuant to their agreement.

B. Expenses

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

“There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of his reasonable litigation expenses from that fund.” Lachance v. Harrington, 965 F. Supp. 630, 651 (E.D. Pa. 1997) (citing In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 820 n.39 (3d Cir. 1995)). Reasonable litigation expenses include those “expenses that would typically be billed to paying clients in non-contingency matters.” Knight v. Red Door Salons, Inc., No. 08-01520 SC, 2009 WL 248367, at *7 (N.D. Cal. Feb. 2, 2009) (citing Harris v. Marhoefer, 24 F.3d 16, 19 (9th Cir. 1994)).

As documented in the individual firm declarations, the expenses incurred in this litigation total \$769,663.39. (Hausfeld Decl. ¶¶ 18-19 & Ex. 12A-R.) This sum reflects expenses typically billed by attorneys to paying clients in the marketplace, such as fees paid to experts, computer research, and travel connected with litigation. (Hausfeld Decl. ¶¶ 18-19 & Ex. 12A-R.) Such “out-of-pocket costs for telephone, telecopier, air and local couriers, postage, photocopying, WESTLAW research, secretarial overtime, and counsels’ travel expenses are routinely billed to fee-paying clients, and thus are all compensable as part of a reasonable attorney’s fee.” Brown v. Pro Football, Inc., 839 F. Supp. 905, 916 (D.D.C. 1993) (citations omitted).

Accordingly, the Court grants Class Counsel \$769,663.39 in expenses to reimburse Class Counsel for their respective expenses.

C. Incentive Awards

Finally, the notice distributed to the settlement class explained that a \$10,000 incentive award would be requested for each of the two class representatives, Niagara and Bamberg. No class member has objected to this request.

As the Ninth Circuit observed in Rodriguez,

[i]ncentive awards are fairly typical in class action cases. . .[,] are discretionary, and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **CV 05-8809-JVS(MLGx)** Date May 11, 2009
Consolidated with CV 05-8900 and CV 06-3118

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

2009 WL 1085270, at *5 (citations omitted). Because this case could not have proceeded without the participation of Niagara and Bamberg, the Court grants a \$10,000 incentive award for each. This amount seems reasonable to reward Class Representatives for their participation in this action. See, e.g., In re Lorazepam & Clorazepate Antitrust Litig., No. MDL 1290 (TFH), 99MS276 (TFH), Civ. 99-0790 (TFH), 2003 WL 22037741, at *11 (D.D.C. June 13, 2003) (approving incentive awards to four class representatives of \$20,000 each); Meijer, 2006 WL 2382718, at *24 (awarding \$25,000 to the named plaintiff).

Additionally, Delaware seeks a \$10,000 incentive award as “the sole member of the Direct Purchaser Class that rose to defend distributors.” (Mot. at 3.) The Court agrees that Delaware is entitled to some reward for its role in bringing this suit on behalf of distributors, but declines to grant the full amount requested because of Delaware’s initial opposition to the settlement, which it now effectively concedes is fair, adequate, and reasonable.

Accordingly, the Court grants incentive awards of \$10,000 each to Niagara and Bamberg, and a \$5,000 incentive award to Delaware.

VI. CONCLUSION

For the foregoing reasons, the Court GRANTS final approval of class certification, the settlement, and the plan of allocation. The Court finds that the settlement is fair, adequate, and reasonable; notice accords with due process; and the parties have made the requisite showing for reasonable attorney fees, expenses, and incentive awards.

Accordingly, the Court awards Class Counsel \$3.5 million in attorney fees, \$769,663.39 in reimbursement of expenses, and an incentive award of \$10,000 each to Niagara and Bamberg. The Court also awards a \$5,000 incentive award to Delaware.

IT IS SO ORDERED.

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Initials of Preparer

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