

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

_____)	
IN RE K-DUR ANTITRUST LITIGATION)	
)	Civil Action No. 01-1652 (JAG)
)	(Consolidated Cases)
This Document Relates To:)	
)	
All Actions)	MDL Docket No. 1419
)	
_____)	

**SPECIAL MASTER’S REPORT AND RECOMMENDATION
ON THE MOTION OF INDIRECT PURCHASER PLAINTIFFS FOR
PRELIMINARY APPROVAL OF SETTLEMENT BETWEEN INDIRECT
PURCHASERS AND DEFENDANTS WYETH AND ESI LEDERLE, INC.**

ORLOFSKY, SPECIAL MASTER

I. INTRODUCTION

This consolidated antitrust action has been transferred to the District of New Jersey by the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407. Pursuant to Rule 53 of the Federal Rules of Civil Procedure¹ and by consent of all parties in the above-captioned action, I have been appointed by order of this Court, dated April 12, 2006, to preside as a Special Master to review and decide all currently pending and future motions directed to Judge Joseph A. Greenaway, Jr. and Magistrate Judge Madeline Cox Arleo including, but not limited to discovery disputes, class certification and summary judgment (the “Appointment Order”) (Doc. No. 316).

¹ (a) **Appointment.**

(1) Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

* * *

(C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

The Appointment Order provides that the decision of the Special Master on any matter before the Special Master will conclusively resolve that matter unless an appropriate objection is filed pursuant to Fed. R. Civ. P. 53(g).

This Report and Recommendation addresses the Indirect Purchaser Plaintiffs' ("IP Plaintiffs") Motion seeking preliminary approval of a proposed settlement between the IP Plaintiffs and Defendants Wyeth (f/k/a American Home Products) and ESI Lederle, Inc. (collectively, "Wyeth") and seeking certification of a nationwide class for purposes of the proposed settlement with Wyeth (the "Settlement Class Motion").² After consideration of the IP Plaintiffs' submissions in support of the Settlement Class Motion, and in light of my determination of the IP Plaintiffs' separate Amended Motion for Class Certification of a litigation class (the "Litigation Class Motion"),³ I conclude that the proposed settlement class does not satisfy the requirements of Fed. R. Civ. P. 23(b)(3). Accordingly, the IP Plaintiffs' Motion for preliminary approval of the proposed settlement with Wyeth and for certification of a settlement class must be denied.

II. BACKGROUND

The factual background of this consolidated action and the underlying motions have been set forth in detail in Judge Greenaway's decision in this case, *see In re K-Dur Antitrust Litig.*, 338 F.Supp.2d 517 (D.N.J. 2004), and my Report and Recommendation on: (1) Defendants

² On October 10, 2007, I issued a Report and Recommendation granting the Motion of Defendants, Schering-Plough Corporation, Key Pharmaceuticals, Inc. and Upsher-Smith Laboratories, Inc. (collectively, "Defendants") to defer the Settlement Class Motion and address it in conjunction with my consideration of the Litigation Class Motion. *See* Oct. 10, 2007 Report (Doc. 551). At the time I deferred consideration of the Settlement Class Motion, the Litigation Class Motion was scheduled to be fully briefed in less than one week, with oral argument on that motion to be held on November 16, 2007. Thus, I deferred determination of the Settlement Class Motion to ensure that I had the benefit of a more complete record upon which to determine both the propriety of settlement class certification and the fairness of the proposed settlement. *Cf. In re General Motors*, 55 F.3d at 787 (lamenting the fact that courts asked to certify settlement classes "perform [their] role as supervisor/protector without the benefit of full adversarial briefing on the certification issues").

³ My Report and Recommendation addressing the Litigation Class Motion (the "Litigation Class Report") has been issued concurrently with this Report.

Schering-Plough Corporation, Key Pharmaceuticals, Inc. and Upsher-Smith Laboratories, Inc.’s Motion for Sanctions against Plaintiff Commonwealth of Pennsylvania; (2) Plaintiff Commonwealth of Pennsylvania’s Cross-Motion to Dismiss; and (3) Motion of James Morgan to Intervene as Class Representative (Docket No. 328). Familiarity with that factual background is presumed and will not be repeated in this Report and Recommendation except where necessary to resolve these motions.

III. DISCUSSION

A. The Settlement Class Motion

The IP Plaintiffs’ Motion seeks certification for settlement purposes of the following nationwide class pursuant to Fed. R. Civ. P. 23(b)(3):

All persons or entities in the United States of America and Puerto Rico, who from June 17, 1997 to the present (the “Class Period”) indirectly purchased, paid for and/or reimbursed for K-Dur 20 and/or K-Dur 10 for consumption by themselves, their families, or their members, employees, insureds, participants or beneficiaries (the “Class”).

Excluded from the Class are all Defendants, their subsidiaries and affiliates; all government entities (except for government-funded employee benefit plans); and all person or entities that purchased K-Dur 10 and/or K-Dur 20 for purposes of resale, or directly from any of the Defendants or their affiliates.

The IP Plaintiffs seek certification of the foregoing settlement class as to Plaintiffs’ claims for violations of the state antitrust and consumer protection laws of Arizona, California, the District of Columbia, Florida, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Utah, Vermont, West Virginia and Wisconsin, including all elements of liability and all defenses to such claims. The IP Plaintiffs further seek certification as to Plaintiffs’ claims for violations of the common law of unjust enrichment in every state and

the District of Columbia, including all elements of liability and all defenses to such claims.⁴ See IP Pl. Br. at 13-14.⁵

Concurrently with the request for settlement class certification, the Settlement Class Motion requests preliminary approval of the proposed settlement between the IP Plaintiffs and Wyeth.⁶ The terms of the proposed settlement provide for the payment by Wyeth of \$1 million to be used to fund the ongoing litigation against the non-settling Defendants and to offset the costs of notice and administration of the settlement with Wyeth. See Pl. Br. at 6 and Lieverman Decl. at ¶¶ 7, 9-12. The proposed settlement further requires Wyeth to provide certain cooperation to the IP Plaintiffs in their continued prosecution of this case, pursuant to a separately executed Confidential Cooperation Agreement. See Pl. Br. at 6 and Lieverman Decl. at ¶ 21. In exchange for the foregoing, the proposed settlement provides that the IP Plaintiffs will release, as to Wyeth only, all claims related to this action. See Pl. Br. at 6 and Lieverman Decl. at ¶ 13.

None of the parties to this action has filed any opposition to the Settlement Class Motion. See *In re School Asbestos Litig.*, 921 F.2d 1330, 1332 (3d Cir. 1990) (“[a]s a general rule, a non-settling defendant is not prejudiced by [a] settlement and therefore has no standing to contest the settlement”); *Eichenholtz v. Brennan*, 52 F.3d 478, 482 (3d Cir. 1995) (“non-settling defendants,

⁴ The proposed settlement class is nearly identical to the class proposed in the IP Plaintiffs’ Litigation Class Motion. The proposed litigation and settlement classes differ only with respect to the Class Periods and the state antitrust and consumer protection laws applicable to the proposed class claims. The Class Period of the proposed settlement class covers June 17, 1997 to the present, whereas the Class Period for the proposed litigation class extends from September 5, 1989 to the present. With respect to certification of claims under state antitrust and unfair competition laws, the proposed settlement class includes the laws of New Jersey, but excludes Hawaii; the proposed litigation class excludes New Jersey, but includes Hawaii. See IP Plaintiffs’ Memorandum of Law in Support of Litigation Class Motion (Doc. No. 407) at 2.

⁵ References to the IP Plaintiffs’ Memorandum of Law in support of their Settlement Class Motion shall be cited as “Pl. Br. at ___.”

⁶ A copy of the Settlement Agreement between the IP Plaintiffs and Wyeth is attached as Exhibit 1 to the Declaration of Theodore M. Lieverman (the “Lieverman Decl.”) in Support of the Settlement Class Motion.

in general, lack standing to object to a partial settlement, because they are ordinarily not affected by such a settlement.”).

B. Analysis

1. Legal Standards Governing Settlement Class Certification and Approval of Class Settlements

Federal Rule of Civil Procedure 23 prescribes the framework for determination of a motion seeking certification of a settlement class and approval of a proposed class action settlement. To be certified, a class must satisfy the four general prerequisites of Fed. R. Civ. P. 23(a):

(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).

The parties seeking class certification must further show that the action is maintainable under one of the three subsections of Fed. R. Civ. P. 23(b). In this case, the IP Plaintiffs seek class certification pursuant to Fed. R. Civ. P. 23(b)(3), which requires a finding that:

[Q]uestions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

With one exception, a proposed settlement class must satisfy the same certification requirements as a litigation class. “Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable, management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997). However, the “other specifications of the Rule – those designed to protect absentees by blocking unwarranted or overbroad class definitions – demand undiluted, even heightened attention in the settlement context.” *Id.*

In addition to the above criteria for class certification, Fed. R. Civ. P. 23 requires court approval of any settlement in a class action and the provision of notice to all class members who may be bound by such settlement. Fed. R. Civ. P. 23(e). Approval is warranted only if the proposed settlement is “fair, reasonable and adequate.” *Id.* *See also Girsh v. Jepsen*, 521 F.3d 153, 156 (3d Cir. 1975) (identifying factors to be considered in determining whether to approve a proposed class action settlement).⁷ Thus, the court must “independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished.” *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (quoting 2 Newberg & Conte § 11.41 at 11-88-11-89).

⁷ In *Girsh*, the Third Circuit developed a nine-factor test “which provides the analytic structure for determining whether a class action settlement is fair, reasonable, and adequate under Rule 23(e).” *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir 2001) (citation omitted). The nine factors are:

- (1) The complexity, expense, and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the risks of establishing liability;
- (5) the risks of establishing damages;
- (6) the risks of maintaining the class action through the trial;
- (7) the ability of the defendants to withstand a greater judgment;
- (8) the range of reasonableness of the settlement fund in light of the best possible recovery;
- and (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.

Id. at 232 (citing *Girsh*, 521 F.2d at 157).

In determining whether to certify a settlement class and approve a proposed class settlement, “the court plays the important role of protector of the absentees’ interests, in a sort of fiduciary capacity. . . .” *In re Gen. Motors Corp.*, 55 F.3d at 784-85. To fulfill this role, the court “should make whatever factual and legal inquiries are necessary under Rule 23,” *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001), and ““may delve beyond the pleadings to determine whether the requirements for class certification are satisfied.”” *Beck v. Maximus, Inc.*, 457 F.3d 291, 297 (3d Cir. 2006) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir. 2001)).

2. Application of Rule 23 Requirements

As noted above, the proposed settlement class is virtually identical to the litigation class proposed in IP Plaintiffs’ Litigation Class Motion. Concurrently with the issuance of this Report, I have issued a Report in which I analyzed the proposed litigation class under the requirements of Rule 23. To summarize my conclusions, I found that the proposed litigation class satisfied the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy. *See* Litigation Class Report at 3-14. However, I ultimately concluded that the proposed class could not be certified because individual issues of impact predominate over issues common to the class and, thus, the requirements of Rule 23(b)(3) were not satisfied.. *Id.* at 14-27. The analysis set forth in the Litigation Class Report applies equally to the Settlement Class Motion and is incorporated herein by reference. Based on that analysis, the IP Plaintiffs’ Motion for certification of the settlement class will be denied. Having denied certification of the settlement class, I need not determine whether the proposed settlement between the IP Plaintiffs and Wyeth is “fair, reasonable and adequate” under Rule 23(e) and the factors identified in *Girsh, supra*.

IV. CONCLUSION

For the reasons set forth above, I conclude that the Indirect Purchaser Plaintiffs' Motion for Preliminary Approval of Settlement between IP Plaintiffs and Defendants Wyeth and ESI Lederle, Inc. and for certification of a settlement class should be denied.

As provided in the Order entered by Magistrate Judge Arleo in this matter, the Special Master's decision on any motion can be appealed to Judge Greenaway in the manner, and subject to the standards of review set forth in Rule 53 of the Federal Rules of Civil Procedure and applicable Local Rules.

ENTERED this
27th day of March, 2008

s/ Stephen M. Orlofsky
STEPHEN M. ORLOFSKY
SPECIAL MASTER