

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GOVERNMENT EMPLOYEES HOSPITAL
ASSOCIATION, DISTRICT COUNCIL
37 HEALTH AND SECURITY PLAN TRUST,
and HEALTH NET, INC., individually and on
behalf of all others similarly situated,

Plaintiffs

v.

SERONO INTERNATIONAL, S.A.,
SERONO LABORATORIES, INC.,
SERONO, INC., RJL SYSTEMS, INC., AND
RUDOLPH J. LIEDTKE,

Defendants.

C.A. No. 05-cv-11935 (PBS)

EUGENE FRANCIS, individually and on behalf
of all others similarly situated,

Plaintiffs

v.

SERONO LABORATORIES, INC.,
SERONO, INC., RJL SYSTEMS, INC., AND
RUDOLPH J. LIEDTKE,

Defendants.

C.A. No. 06-cv-10613 (PBS)

~~PROPOSED~~ **FINAL ORDER AND JUDGMENT GRANTING
FINAL APPROVAL TO PROPOSED CLASS ACTION SETTLEMENT**

This Court having considered: (a) the Settlement Agreement and Release dated,
January 31, 2007 as amended in submissions made to the Court on December 12, 2007 following
the Court's hearing conducted on December 6, 2007 (as amended, the "Class Agreement")
between the Class Plaintiffs Government Employees Hospital Association ("GEHA"), District

Council 37 Health & Security Plan Trust (“DC 37 Plan”), and Eugene Francis (“Francis”), individually and on behalf of all others similarly situated (collectively, “Plaintiffs”), and Defendants Serono International, S.A., Serono Laboratories, Inc., and Serono, Inc. (collectively, “Serono Defendants”)¹; (b) the proposed allocation and distribution of the Class Settlement Fund; and (c) Class Counsel’s application for attorneys’ fees, reimbursement of litigation expenses, and incentive awards for the Class Representatives; (d) having held hearings on June 19, 2007, October 9, 2007, and December 6, 2007; and (e) having considered all of the submissions and arguments with respect thereto, and otherwise being fully informed, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

1. This Final Order and Judgment incorporates herein and makes a part hereof the Class Agreement, including the Exhibits thereto. Unless otherwise provided herein, the terms defined in the Class Agreement shall have the same meanings for purposes of this Final Order and Judgment.

2. The Court has personal jurisdiction over all Class Representatives, nationwide Serostim Purchaser Class Members and the Defendants EMD Serono, Inc. and Serono Laboratories, Inc. for purposes of this settlement only, and has subject matter jurisdiction to approve the Class Agreement.

3. Based on the record before the Court, including all submissions in support of the Settlement set forth in the Class Agreement (“Settlement”), objections and responses thereto, as well as the Class Agreement, the Court hereby certifies, for settlement purposes, the following nationwide Serostim Purchaser Class:

¹ In January 2007, Serono, Inc. changed its name to EMD Serono, Inc. and Serono International, S.A. changed its name to Merck Serono International, S.A.

All individual persons or entities who, during the Class Period, made Serostim Purchases in the United States. Excluded from the class are the Settling Health Plans; the Serono Defendants, their respective present and former, direct and indirect, parents, subsidiaries, divisions, partners and affiliates; and the United States government, its officers, agents, agencies and departments, and all other government entities, to the extent that they previously released their claims pursuant to the 2005 Settlement Agreement and Release resolving the matter of *United States of America v. Serono Laboratories, Inc.*, 05-CR-10282-RCL (D. Mass.) and all related litigation.

In so holding, the Court finds that the prerequisites of Rule 23(a) and (b)(3) have been satisfied for certification of the nationwide Serostim Purchaser Class for settlement purposes only: the nationwide Serostim Purchaser Class, numbering in the thousands, is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the nationwide Serostim Purchaser Class, such as whether Class Members paid for Serostim as a result of representations by Serono, and whether the Serostim that they paid for was medically necessary at the time; the claims and defenses of the Class Representatives are typical of the claims and defenses of the Serostim Purchaser Class; the Class Representatives have fairly and adequately protected the interests of the Serostim Purchaser Class with regard to the consolidated claims of the Serostim Purchaser Class; the common questions of law and fact predominate over questions affecting only individual Serostim Purchaser Class Members, rendering the Serostim Purchaser Class sufficiently cohesive to warrant a nationwide class settlement; and the certification of the Serostim Purchaser Class is superior to individual litigation and/or settlement as a method for the fair and efficient resolution of the Serono Litigation. In making all of the foregoing findings, the Court has exercised its discretion in certifying a nationwide settlement class. The Serono Defendants have preserved all of their defenses and objections against and rights to oppose certification of a nationwide litigation class if the Settlement does not become final and effective in accordance with the terms of the Class Agreement. Neither this Order nor

the Class Agreement shall constitute any evidence or admission of liability by any Defendant, or an admission regarding the propriety of any certification of any particular class for purposes of litigation, nor shall they be offered in evidence in this or any other proceeding except to consummate or enforce the Class Agreement or the terms of this Order, or by any Releasee in connection with any action asserting Released Claims.

4. The record shows that Notice has been given to the nationwide Serono Purchaser Class in the manner approved by the Court in its Preliminary Approval Order dated February 13, 2007. Moreover, supplemental direct notice was provided to consumer class members identified through the Court-ordered subpoena project, as provided in the Court's August 16, 2007 Order. The Court finds that such Notice: (i) constitutes reasonable and the best practicable notice; (ii) constitutes notice that was reasonably calculated, under the circumstances, to apprise members of the nationwide Serostim Purchaser Class of the pendency of the Serostim Litigation, the terms of the Settlement, and Serostim Purchaser Class members' right to object to or exclude themselves from the Serostim Purchaser Class, and to appear at the settlement fairness hearings held on June 19, 2007, October 9, 2007 and December 6, 2007 (the "Fairness Hearings"); (iii) constitutes due, adequate, and sufficient notice to all persons or entities entitled to receive notice; and (iv) meets the requirements of Fed. R. Civ. P. 23 and due process.

5. No individuals or entities, other than those listed on Exhibit A to the Proposed Final Order and Judgment Granting Final Approval to the Proposed Class Action Settlement filed under seal October 17, 2007 [Dkt. 122] have excluded themselves from the Serostim Purchaser Class. This Order shall have no force or effect on the persons or entities listed on Exhibit A if and to the extent that they have properly complied with opt-out procedures mandated by the Class Agreement and Class Notice.

6. The Court finds that extensive arm's-length negotiations have taken place in good faith among Class Settlement Counsel, the Serono Defendants' Counsel, and SHP Group Counsel, resulting in the Class Agreement.

7. Pursuant to Fed. R. Civ. P. 23(e), the Court hereby finally approves in all respects the Settlement set forth in the Class Agreement and the Supplemental Class Agreement ("the Settlement"), and finds that the Settlement, the Class Agreement, the Supplemental Class Agreement, and the plan of distribution of the Class Settlement Fund as set forth in Paragraph 17 of the Class Agreement, are in all respects fair, reasonable and adequate, and in the best interest of the Serono Purchaser Class. The Court finds that further relief, in the form of an injunction against any Serostim Defendant or some other equitable relief, is not warranted because EMD Serono, Inc. is subject to a comprehensive Corporate Integrity Agreement that provides for monitoring and auditing by the Government, and also mandates (i) maintenance of a medical information request database and conduct of verbatim physician surveys to determine if off-label promotion of Serostim is occurring; (ii) review and approval of all Serostim product claims by EMD Serono's Legal Department; (iii) review and approval of all grants to Serostim prescribers by EMD Serono's Legal Department; (iv) review and approval of all compensation plans for EMD Serono sales personnel; and (v) other general compliance activities, such as mandatory training of all EMD Serono sales and marketing personnel.

8. The Court further approves the establishment of the Class Settlement Fund under the terms and conditions set forth in the Class Agreement and the Settlement Escrow Agreement submitted by the parties. The parties are hereby directed to implement and consummate the Settlement according to the terms and provisions of the Class Agreement. In addition, the parties are authorized to agree to and adopt such amendments and modifications to

the Class Agreement as (i) shall be consistent in all material respects with this Final Order and Judgment, and (ii) do not limit the rights of the nationwide Serostim Purchaser Class Members.

9. The Serostim Litigation is hereby dismissed with prejudice and without costs to any party, except as otherwise provided herein.

10. Upon the Effective Date of the Class Settlement, the Releasors (as defined in Paragraph 2(y) of the Class Agreement) shall release and forever discharge the Releasees (as defined in Paragraph 2(w) of the Class Agreement) from the Released Claims (as defined in Paragraph 2(x) of the Class Agreement). In addition, each Class Member expressly waives and releases, upon the Effective Date of the Class Settlement, any and all provisions, rights and benefits conferred by §1542 of the California Civil Code, which reads:

Section 1542. Certain claims not affected by general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

or by any law or any state or territory of the United States, or principle of common law, which is similar, comparable or equivalent to §1542 of the California Civil Code. Each Releasor may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are the subject matter of the Class Agreement, but each Releasor expressly waives and fully, finally and forever settles and releases, upon this Order becoming final, any known or unknown, suspected or unsuspected, contingent or non-contingent Released Claims with respect to the subject matter of the Class Agreement whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Releasor also hereby expressly waives and fully, finally and forever settles and releases any and all Released Claims it may have against Releasees under §17200, et seq., of the California Business and Professions Code.

11. The Court finds that each of the denominated accounts and sub-accounts created by the Settlement Escrow Agreement is a “Qualified Settlement Fund” as defined in section 1.468B-1(a) of the Treasury Regulations in that it satisfies each of the following requirements:

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

(b) it is established to resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event that has occurred and that has given rise to at least one claim asserting liability arising out of an alleged violation of law; and

(c) the assets of each such denominated account or sub-account are segregated from other assets of the affiliate of the Serono Defendants that was the transferor of payments into said accounts and sub-accounts, and from the assets of persons related to the Serono Defendants.

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

(a) each of the denominated accounts and sub-accounts created by the Settlement Escrow Agreement met the requirements of paragraphs 11(b) and 11(c) of this Order prior to the date of this Order approving the establishment of said accounts and sub-accounts subject to the continued jurisdiction of this Court; and

(b) The affiliate of the Serono Defendants that makes the payment under the Settlement Escrow Agreement and the “Administrator” under section 1.468B-2(k)(3) of the Treasury Regulations may jointly elect to treat each of the denominated accounts and sub-accounts created by the Settlement Escrow Agreement as coming into existence as a “Qualified

Settlement Fund” on the later of the date that each such account and sub-account met the requirements of paragraphs 11(b) and 11(c) of this Order or January 1 of the calendar year in which all of the requirements of paragraph 11 of this Order are met. If such relation-back election is made, the assets held by each of the denominated accounts and sub-accounts created by the Settlement Escrow Agreement on such date shall be treated as having been transferred to each such account and sub-account on that date.

13. Nothing in this Final Order and Judgment, the Settlement, or the Class Agreement is or shall be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by any of the Serono Defendants.

14. Class Counsel have moved pursuant to Rules 23(h), 54(d) and 52(a) of the Federal Rules of Civil Procedure for an award of attorneys’ fees and reimbursement of expenses. Pursuant to Rule 23(h)(3) and 52(a) this Court makes the following findings of fact and conclusions of law:

(a) the Settlement confers a substantial benefit on the nationwide Serostim Purchaser Class;

(b) the value conferred on the nationwide Serostim Purchaser Class is immediate and readily quantifiable. Upon this Judgment becoming final, each nationwide Serostim Purchaser Class Member who has submitted a valid proof of claim will receive a cash payment that represents all or a significant portion of the alleged financial harm alleged to have been incurred as a result of Serono Defendants’ alleged conduct;

(c) Class Counsel vigorously and effectively pursued the nationwide Serono Purchaser Class members’ claims before this Court in this highly complex case;

(d) the Settlement was obtained as a direct result of Class Counsel's skillful advocacy;

(e) the Settlement was reached following extensive negotiation between Class Counsel, Defendants' Counsel and SHP Group Counsel, and was negotiated in good-faith and in the absence of collusion;

(f) during the prosecution of the Serono Litigation, Class Counsel incurred expenses in the amount of \$ 47,089.21 which the Court finds to be reasonable and necessary to the representation of the nationwide Serono Purchaser Class;

(g) nationwide Serostim Purchaser Class Members were advised in the "Notice of Pendency of Class Action, Proposed Settlement and Class Certification for the Settlement" approved by the Court that Class Counsel intended to apply for an award of attorneys' fees in an amount up to 25% of the Class Settlement Fund (plus interest thereon), plus the opportunity to petition the Court for a fee on any amounts refunded to the Serono Defendants as a result of TPP Opt-Outs under the circumstances described in Paragraph 11 of the Class Agreement, plus reimbursement of reasonable costs and expenses incurred in the prosecution of this action;

(h) members of the nationwide Serostim Purchaser Class have had a full and fair opportunity to submit written objections to the award of attorneys' fees and expenses;

(i) counsel who recover a common fund for the benefit of persons other than themselves or their client are entitled to a reasonable attorneys' fee from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Blum v. Stenson*, 465 U.S. 866, 900 n.16 (1984);

(j) use of the percentage of the fund method in common fund cases is the prevailing practice in this Circuit for awarding attorneys' fees and permits the Court to focus on a showing that a fund conferring benefit on a class resulted from the lawyers' efforts. *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir.1995); and

(k) the requested fee award is well within the applicable range of percentage awards in this Circuit; *In re Relafen Antitrust Litig.*, No. 01-12239 (D. Mass. April 9, 2004) [Doc. No. 2971; *Mowbray v. Waste Management Holdings*, No. 98-1 1534-WGY (D. Mass. Aug. 2, 2001); *In re Copley Pharmaceutical, Inc. Sec. Litig.*, No. 94-1 1897-WGY (D. Mass. Feb. 8, 1996); *Wilensky v. Digital Equipment Corp.*, No. 94-10752-JLT (D. Mass. July 11, 2001); *In Re Lupron Marketing and Sales Practices Litigation*, No. 01-CV-10861-RGS (MDL 1430) (D. Mass. 2005).

Accordingly, Class Counsel are hereby awarded \$ 3,010,063 (representing \$2,045,813 from Class funds and \$964,250 from the SHP's participation in Class funds) payable as set forth in the Class Agreement and amendments filed with the Court on December 12, 2007, as their fee award which the Court finds to be fair and reasonable, and which amount shall be paid to Class Counsel from the Class Settlement Fund in accordance with the terms of the Class Agreement as amended, with interest from the date of the funding of the Class Settlement Fund (February 20, 2007) to the date of payment, at the same net interest rate earned by the Class Settlement Fund. Further, Class Counsel are hereby awarded \$ 47,089.21 for their expenses which the Court finds to be fair and reasonable, and which amount shall be paid to Class Counsel from the Class Settlement Fund in accordance with the terms of the Class Agreement. The attorneys' fees and

expenses awarded by the Court shall be allocated by Class Counsel, subject to the provisions of the Class Agreement concerning the resolution of disputes over attorneys' fees.

15. The Class Representatives and other appropriate parties, as stated in the Order Granting Preliminary Approval of Settlement, Certifying Class for Purposes of Settlement, Directing Notice to the Class and Scheduling Fairness Hearing, dated February 13, 2007, are hereby granted the following compensation awards for their efforts in this class litigation: GEHA: \$21,250; District Counsel 37: \$5,300; Eugene Francis: \$4000, which amount is in addition to whatever monies the Class Representatives will receive from the Class Settlement Fund pursuant to the Class Agreement.

16. In connection with consumer notice outreach efforts, particularly to AIDS Service Organizations, Class Counsel enlisted the assistance of Prescription Access Litigation ("PAL"). The Court approves a payment to PAL in the amount of \$6,805 for this assistance, to be paid from the Class Settlement Fund. The Court also approves a payment from the Class Settlement Fund to Walgreens Pharmacy in the amount of \$1,480, to compensate Walgreens for costs incurred in complying with the Court-ordered subpoena for pharmacy purchase records.

17. Without affecting the finality of this Final Order and Judgment, the Court retains continuing and exclusive jurisdiction over all matters relating to administration, consummation, enforcement and interpretation of the Class Agreement and of this Final Order and Judgment, to protect and effectuate this Final Order and Judgment, and for any other necessary purpose. Serono Laboratories, Inc. and EMD Serono, Inc., Class Representatives, and each member of the nationwide Serostim Purchaser Class are hereby deemed to have irrevocably submitted to the exclusive jurisdiction of this Court, for the purpose of any suit, action, proceeding or dispute arising out of or relating to the Class Agreement or the applicability of the

Class Agreement, including the Exhibits thereto, and only for such purposes. Without limiting the generality of the foregoing, and without affecting the finality of this Final Order and Judgment, the Court retains exclusive jurisdiction over any such suit, action or proceeding. Solely for purposes of such suit, action or proceeding, to the fullest extent they may effectively do so under applicable law, the parties hereto are deemed to have irrevocably waived and agreed not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of this Court, or that this Court is, in any way, an improper venue or an inconvenient forum.

18. In the event that the Settlement does not become effective according to the terms of the Class Agreement, this Order and Final Judgment shall be rendered null and void as provided by the Class Agreement, shall be vacated and, all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Class Agreement.

19. No nationwide Serostim Purchaser Class member, either directly, representatively, or in any other capacity (other than a nationwide Serostim Purchaser Class Member who validly and timely elected to be excluded from the Class), shall commence, continue or prosecute against any or all Releasees any action or proceeding in any court or tribunal asserting any of the Released Claims defined in the Class Agreement, and are hereby permanently enjoined from so proceeding.

SO ORDERED.


HON. PATTI B. SARIS

Dated: December 12, 2007