MSG

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

KING DRUG COMPANY OF FLORENCE, Inc., *et al.*, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **CEPHALON, INC., *et al.*, Defendants.**	**Master Docket No. 2:06-cv-01797-MSG** **Judge Mitchell S. Goldberg**

FILED
OCT 15 2015
MICHAEL E. KUNZ, Clerk
By Dep. Clerk

ORDER GRANTING FINAL JUDGMENT AND ORDER OF DISMISSAL APPROVING DIRECT PURCHASER CLASS SETTLEMENT AND DISMISSING DIRECT PURCHASER CLASS CLAIMS AGAINST THE CEPHALON DEFENDANTS

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and in accordance with the terms of the Settlement Agreement between Defendants Cephalon, Inc., Teva Pharmaceutical Industries Ltd., Teva Pharmaceuticals USA, Inc., and Barr Pharmaceuticals, Inc. (collectively, the "Cephalon Defendants"), and Direct Purchaser Class Plaintiffs' Lead Counsel acting pursuant to the authority provided by the Court's Order dated August 18, 2009 (ECF No. 196), on behalf of Plaintiffs King Drug Co. of Florence, Inc. ("King Drug"), Rochester Drug Co-Operative, Inc. ("RDC"), Burlington Drug Company Inc. ("Burlington"), J.M. Smith Corp. d/b/a Smith Drug Co. ("Smith Drug"), Meijer, Inc. and Meijer Distribution, Inc. ("Meijer"), Stephen L. LaFrance Pharmacy d/b/a SAJ Distributors, Inc. and Stephen L. LaFrance Holdings, Inc. ("SAJ" and together with King Drug, RDC, Burlington, Smith Drug, and Meijer, the "Plaintiffs"), and on behalf of the Direct Purchaser Class, dated April 17, 2015, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. This Final Judgment and Order of Dismissal hereby incorporates by reference the definitions in the Settlement Agreement among the Cephalon Defendants, Plaintiffs, and the Direct Purchaser Class, and all capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Settlement Agreement.

2. On, July 27, 2015, this Court certified a class for purposes of settlement ("Direct Purchaser Class"):

> All persons or entities in the United States and its territories who purchased Provigil in any form directly from Cephalon at any time during the period from June 24, 2006 through August 31, 2012 (the "Class"). Excluded from the Class are Defendants, and their officers, directors, management, employees, subsidiaries, or affiliates, and all federal governmental entities.
>
> Also excluded from the Class are: Rite Aid Corporation, Rite Aid HDQTRS. Corp., JCG (PJC) USA, LLC, Eckerd Corporation, Maxi Drug, Inc. d/b/a Brooks Pharmacy, and CVS Caremark Corporation, Walgreen Co., The Kroger Co., Safeway Inc., American Sales Co. Inc., HEB Grocery Company, LP, Supervalu, Inc., and Giant Eagle, Inc., and their officers, directors, management, employees, subsidiaries, or affiliates in their own right and as assignees from putative Direct Purchaser Class members as more fully described in Paragraph 10 of the Settlement Agreement ("Opt Out Plaintiffs").

3. The Court has appointed King Drug, RDC, Burlington, Smith Drug, Meijer, and SAJ as representatives of the Direct Purchaser Class (the "Class Representatives"). The Court has found that Lead Counsel, Liaison Counsel and the Executive Committee ("Class Counsel") have fairly and adequately represented the interests of the Direct Purchaser Class and satisfied the requirements of Fed. R. Civ. P. 23(g).

4. The Court has jurisdiction over these actions, each of the parties, and all members of the Direct Purchaser Class for all manifestations of this case, including this Settlement.

5. The notice of settlement (substantially in the form presented to this Court as Exhibit B to the Settlement Agreement) (the "Notice") directed to the members of the Class, constituted the best notice practicable under the circumstances. In making this determination, the Court finds

that the Notice provided for individual notice to all members of the Direct Purchaser Class who were identified through reasonable efforts. Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, the Court hereby finds that the Notice provided Direct Purchaser Class members due and adequate notice of the Settlement, the Settlement Agreement, these proceedings, and the rights of Class members to opt-out of the Direct Purchaser Class and/or object to the Settlement.

6. Due and adequate notice of the proceedings having been given to the Direct Purchaser Class and a full opportunity having been offered to the Direct Purchaser Class to participate in the October 15, 2015 Fairness Hearing, it is hereby determined that all Direct Purchaser Class members are bound by this Order and Final Judgment.

7. In determining that the Settlement should be given final approval, the Court makes the following findings of fact and conclusions of law.

8. The Court has fully considered the *Girsch* factors and the *Prudential* factors and finds that, considered together, the factors overwhelmingly favor approval of the Settlement. *See Girsch v. Jepson*, 521 F. 2d 153 (3d Cir. 1975); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F. 3d 283 (3d Cir. 1998).

9. No class members have opted out of the Settlement or objected to any part of it, and class members who will be collectively entitled to approximately 96% of the monetary recovery here have submitted letters to the Court explicitly and affirmatively supporting the Settlement. Four of the named plaintiffs, outside counsel for the country's three largest pharmaceutical distributors and six other class members, collectively who made approximately 96% of the purchases at issue in this case, wrote to the Court to express their support for the Settlement. These class members are business entities which have participated in other, similar cases and possess the incentive and knowledge to assess the fairness, reasonableness and

adequacy of the Settlement. The overwhelming positive reaction of the class, which is a *Girsch* factor that is critical to the Court's fairness analysis, strongly supports the Court's conclusion that the Settlement is fair, reasonable and adequate.

10. The amount of the Settlement, plus interest accrued from August 6, 2015 (the date upon which the Cephalon Defendants deposited such amount into an escrow account held in trust by Morgan Stanley Smith Barney LLC that is earning interest for the benefit of the Direct Purchaser Class) confers a monetary benefit on the Direct Purchaser Class that is substantial.

11. Every issue in this highly complex antitrust case has been vigorously litigated for almost a decade. The litigation between the Direct Purchaser Class and the Cephalon Defendants is in an advanced stage, with all discovery having been completed and the parties having completed dispositive motion briefing, and was poised for trial at the time of the Settlement. Class Counsel thus had an adequate appreciation of the merits of the case.

12. Class Counsel faced significant risks in taking their claims against the Cephalon Defendants to trial, including the risk that a jury might not find in their favor on any of a number of issues and that any jury verdict could result in a lengthy post-trial motion and appellate process. By contrast, the Settlement provides the Direct Purchaser Class with immediate relief without the delay, risk and uncertainty of continued litigation.

13. The Settlement of this Direct Purchaser Class Action was not the product of collusion between the Direct Purchaser Class Plaintiffs and the Cephalon Defendants or their respective counsel, but rather was the result of *bona fide* and arm's-length negotiations conducted in good faith between Direct Purchaser Class Counsel and counsel for the Cephalon Defendants, with the assistance of a mediator.

14. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby approves the Settlement, and finds that the Settlement is, in all respects, fair, reasonable and

adequate to Direct Purchaser Class members. Accordingly, the Settlement shall be consummated in accordance with the terms and provisions of the Settlement Agreement.

15. The Court hereby approves the Plan of Allocation of the Settlement Fund as proposed by Class Counsel (the "Plan of Allocation"), which was summarized in the Notice of Proposed Settlement and is attached to Direct Purchaser Class Plaintiffs' Motion for Final Approval of Settlement, and directs Berdon Claims Administration LLC, the firm retained by Direct Purchaser Class Counsel as the Claims Administrator, to distribute the net Settlement Fund as provided in the Plan of Allocation.

16. All claims against the Cephalon Defendants in *King Drug Company of Florence, Inc., et al. v. Cephalon, Inc., et al.*, No. 2:06-cv-1797-MSG (E.D. Pa.), including by those members of the Direct Purchaser Class who have not timely excluded themselves from the Direct Purchaser Class, are hereby dismissed with prejudice, and without costs.

17. Upon the Settlement Agreement becoming final in accordance with paragraph 7 of the Settlement Agreement, Plaintiffs and the Direct Purchaser Class unconditionally, fully and finally release and forever discharge the Cephalon Defendants, any past, present, and future[1] parents, subsidiaries, divisions, affiliates, joint ventures, stockholders, officers, directors, management, supervisory boards, insurers, general or limited partners, employees, agents, trustees, associates, attorneys and any of their legal representatives, or any other representatives thereof (and the predecessors, heirs, executors, administrators, successors and assigns of each of

[1] For the avoidance of doubt, Ranbaxy Laboratories, Ltd., Ranbaxy Pharmaceuticals, Inc., Mylan Laboratories, Inc., and/or Mylan Pharmaceuticals, Inc. are excluded from the definition of future parents, subsidiaries, divisions, affiliates, joint ventures, stockholders, officers, directors, management, supervisory boards, insurers, general or limited partners, employees, agents, trustees, associates, attorneys and any of their legal representatives, or any other representatives of the Cephalon Defendants released under this paragraph. Nothing in the Settlement Agreement dismisses or releases the claims of Plaintiffs and the Direct Purchaser Class against Ranbaxy Laboratories, Ltd., Ranbaxy Pharmaceuticals, Inc., Mylan Laboratories, Inc., and/or Mylan Pharmaceuticals, Inc.

the foregoing) (the "Released Parties") from any and all manner of claims, rights, debts, obligations, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, known or unknown, suspected or unsuspected, fixed or contingent, including costs, expenses, penalties and attorneys' fees, accrued in whole or in part, in law or equity, that Plaintiffs or any member or members of the Direct Purchaser Class (including any of their past, present or future officers, directors, insurers, general or limited partners, divisions, stockholders, agents, attorneys, employees, legal representatives, trustees, parents, associates, affiliates, joint ventures, subsidiaries, heirs, executors, administrators, predecessors, successors and assigns, acting in their capacity as such) (the "Releasors"), whether or not they object to the Settlement, ever had, now has, or hereafter can, shall or may have, directly, representatively, derivatively or in any other capacity, arising out of or relating in any way to: any claim that was alleged or could have been alleged in the Direct Purchaser Class Action prior to the date of the Settlement, including but not limited to:

(1) the alleged delayed entry of generic versions of Provigil (modafinil);

(2) conduct with respect to the procurement and enforcement of United States Reissue Patent Number 37,516 or United States Patent Number 5,618,845;

(3) any conduct relating to Nuvigil that was alleged in, could fairly be characterized as being alleged in, is related to an allegation made in, or could have been alleged in the Direct Purchaser Class Action, such as intending to convert market demand from Provigil to Nuvigil;

(4) the sale, marketing or distribution of Provigil or its generic equivalent, except as provided for in paragraph 19 herein (the "Released Claims").

Releasors hereby covenant and agree that each shall not sue or otherwise seek to establish or impose liability against any Released Party based, in whole or in part, on any of the Released

Claims. For the avoidance of doubt, the release provided herein applies, without limitation, to any conduct relating to the procurement, maintenance or enforcement of United States Reissue Patent Number 37,516 or United States Patent Number 5,618,845, including any commencement, maintenance, defense or other participation in litigation concerning any such patents, that was alleged in, could be fairly characterized as being alleged in, is related to an allegation made in, or could have been alleged in the Direct Purchaser Class Action.

18. In addition, Plaintiffs on behalf of themselves and all other Releasors, hereby expressly waive, release and forever discharge, upon the Settlement becoming final, any and all provisions, rights and benefits conferred by §1542 of the California Civil Code, which reads:

> Section 1542. General Release; extent. 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 of any state or territory of the United States or other jurisdiction, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Plaintiffs and members of the Direct Purchaser Class 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 this paragraph 18, but each Plaintiff and member of the Direct Purchaser Class hereby expressly waives and fully, finally and forever settles, releases and discharges, upon this Settlement becoming final, any known or unknown, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Plaintiff and member of the Direct Purchaser Class also hereby expressly waives and fully, finally and forever settles, releases and discharges any and all

claims it may have against any Released Party under § 17200, *et seq.*, of the California Business and Professions Code or any similar comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction, which claims are expressly incorporated into the definition of Released Claims.

19. The releases set forth in paragraphs 17 and 18 of this Order shall not release claims between Plaintiffs, members of the Direct Purchaser Class, and the Released Parties unrelated to the allegations in *King Drug Company of Florence, Inc., et al. v. Cephalon, Inc., et al.*, No. 2:06-cv-1797-MSG (E.D. Pa.), including claims under Article 2 of the Uniform Commercial Code (pertaining to Sales), the laws of negligence or product liability or implied warranty, breach of contract, breach of express warranty, or personal injury, or other claims unrelated to the allegations in *King Drug Company of Florence, Inc., et al. v. Cephalon, Inc., et al.*, No. 2:06-cv-1797-MSG (E.D. Pa.).

20. Class Counsel for the Direct Purchaser Class have moved for an award of attorneys' fees, reimbursement of expenses and incentive awards for the class representatives. Class Counsel request an award of attorneys' fees of 27.5% of the Settlement (including the interest accrued thereon), reimbursement of the reasonable costs and expenses incurred in the prosecution of this action in the amount of $3,581,091.19.00, and incentive awards totaling $500,000.00 collectively for the six named plaintiffs, and such motion has been on the docket and otherwise publicly available since September 17, 2015.

21. In awarding attorneys' fees, reimbursement of expenses and incentive awards for the class representatives, the Court makes the following findings of fact and conclusions of law.

22. The "percentage of the fund" method is the proper method for calculating attorneys' fees in common fund class actions in this Circuit. *See, e.g., In re Rite Aid Sec. Litig.*, 396 F. 3d 294, 305 (3d Cir. 2005).

23. The Court has fully considered the *Gunter* factors and the *Prudential* factors and finds that, considered together, the factors overwhelmingly favor granting Class Counsel's requested attorneys' fee, reimbursement of expenses and incentive awards for the class representatives. *See Gunter v. Ridgewood Energy Corp.*, 223 F. 2d 193 (2d Cir. 2000); *In re Prudential, supra.*

24. No class members have objected to any part of Class Counsel's requested 27.5% fee award, and class members who will be collectively entitled to approximately 96% of the monetary recovery here have submitted letters to the Court explicitly and affirmatively supporting Class Counsel's requested fee. Four of the named plaintiffs, outside counsel for the country's three largest pharmaceutical distributors and six other class members, collectively whom made approximately 96% of the purchases at issue in this case, wrote to the Court to express their support for Class Counsel's requested fee. These class members are business entities which have participated in other, similar cases and possess the incentive and knowledge to object to Class Counsel's requested fee. The overwhelming positive reaction of the class, which is a *Gunter* factor, strongly supports the Court's conclusion to grant Class Counsel's requested fee.

25. As noted above, the Settlement has conferred a monetary benefit on the Direct Purchaser Class that is substantial.

26. The Settlement here is directly attributable to the skill and efforts of Class Counsel, who are highly experienced in prosecuting these types of cases.

27. In prosecuting this action, Class Counsel have expended more than 59,000 hours of uncompensated time, and incurred substantial out of pocket expenses, with no guarantee of recovery. Class Counsel's hours were reasonably expended in this highly complex case that was vigorously litigated for almost a decade, and their time was expended at significant risk of non-payment.

28. Class Counsel's requested fee is lower than attorney fee awards in numerous other, Hatch-Waxman cases alleging delayed generic entry, where the courts in such cases have routinely granted a fee award of 33⅓%. Class Counsel's requested fee is also consistent with and/or lower than the fee that would have been negotiated had the case been subject to a private contingent fee agreement.

29. A 27.5% fee award would equate to a lodestar multiplier of approximately 4.12. Such a multiplier is within the range of those frequently awarded in common fund cases.

30. Upon consideration of Class Counsel's petition for fees, costs and expenses, Class Counsel are hereby awarded attorneys' fees totaling $140,800,000.00 (representing 27.5% of the Settlement Fund) and costs and expenses totaling $3,581,091.19, together with a proportionate share of the interest thereon from the date the funds are deposited in the Settlement Escrow Account until payment of such attorneys' fees, costs and expenses, at the rate earned by the Settlement Fund, to be paid solely from the Settlement Fund and only if and after the Settlement becomes final in accordance with paragraph 7 of the Settlement Agreement. Upon consideration of Class counsel's petition for incentive payments for Direct Purchaser Class Representatives, each of King Drug, RDC, Burlington, and Smith Drug are hereby awarded $100,000.00, and each of Meijer and SAJ are hereby awarded $50,000.00, to be paid solely from the Settlement Fund and only if and after the Settlement becomes final in accordance with paragraph 7 of the Settlement

Agreement. Garwin Gerstein & Fisher LLP shall allocate and distribute such attorneys' fees, costs and expenses among the various Class Counsel which have participated in this litigation. Garwin Gerstein & Fisher LLP shall allocate and distribute such incentive awards among the various Direct Purchaser Class Representatives which have participated in this litigation. The Released Parties (as defined in paragraph 14 of the Settlement Agreement) shall have no responsibility for, and no liability whatsoever with respect to, any payment or disbursement of attorneys' fees, expenses, costs or incentive awards among Class Counsel and/or Class Representatives, nor with respect to any allocation of attorneys' fees, expenses, costs or incentive awards to any other person or entity who may assert any claim thereto. The attorneys' fees, costs and expenses, and incentive awards authorized and approved by Final Judgment and Order shall be paid to Garwin Gerstein & Fisher LLP within five (5) business days after this Settlement becomes final pursuant to paragraph 7 of the Settlement Agreement or as soon thereafter as is practical and in accordance with the terms of the Settlement Agreement and the Escrow Agreement. The attorneys' fees, costs and expenses, and incentive award authorized and approved by this Final Judgment and Order shall constitute full and final satisfaction of any and all claims that Plaintiffs and any Direct Purchaser Class member, and their respective counsel, may have or assert for reimbursement of fees, costs, and expenses, and incentive awards, and Plaintiffs and members of the Direct Purchaser Class, and their respective counsel, shall not seek or demand payment of any fees and/or costs and/or expenses and/or incentive awards from any source other than the Settlement Fund, including the Cephalon Defendants.

31. The Court retains exclusive jurisdiction over the Settlement and the Settlement Agreement as described therein, including the administration and consummation of the Settlement, and over this Final Judgment and Order.

32. The Court finds that this Final Judgment and Order adjudicates all of the claims, rights and liabilities of the parties to the Settlement Agreement (including the members of the Direct Purchaser Class), and is final and shall be immediately appealable. Neither this Order nor the Settlement Agreement nor any other Settlement-related document shall constitute any evidence or admission by the Cephalon Defendants or any other Released Party on liability, any merits issue, or any class certification issue (including but not limited to whether a class can be certified for purposes of litigation or trial) in this or any other matter or proceeding, nor shall either the Settlement Agreement, this Order, or any other Settlement-related document be offered in evidence or used for any other purpose in this or any other matter or proceeding except as may be necessary to consummate or enforce the Settlement Agreement, the terms of this Order, or if offered by any released Party in responding to any action purporting to assert Released Claims.

IT IS SO ORDERED.

Dated: 10.15, 2015

The Honorable Mitchell S. Goldberg
United States District Judge
U.S. District Court for the
Eastern District of Pennsylvania

ENTERED
OCT 16 2015
CLERK OF COURT