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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: BAYER CORP. COMBINATION ASPIRIN PRODUCTS MARKETING AND SALES PRACTICES LITIGATION THIS PLEADING RELATES TO: ALL CASES	09-md-2023 (BMC)(JMA) **COGAN**, District Judge

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

Class Plaintiffs William Blank, Beverlysue Blank, Anne McCabe, and Douglas Vinson, by and through their attorneys, and as their Motion for Final Approval of Class Settlement, state the following:

As described more fully in their accompanying Memorandum of Law, incorporated here by reference, Plaintiffs seek final approval of their Settlement Agreement and Release ("Settlement" or "Settlement Agreement")[1] with Bayer HealthCare LLC ("Bayer" or

[1] All capitalized terms have the same meaning as defined in the Settlement Agreement. The Settlement is attached as Exhibit 1 to the Declaration of Daniel J. Kurowski in Support of Plaintiffs' Motion for Final Approval of Class Settlement.

"Defendant"). Under Rule 23, final approval of a class action settlement is appropriate if that settlement is fair, reasonable, and adequate. The Settlement here was achieved after years of hard-fought litigation that included a motion to dismiss, extensive written and oral discovery involving 2.5 million pages of documents and dozens of depositions, a fully briefed motion for class certification, combined with five motions to strike expert declarations. Moreover, the Settlement was reached after negotiations before two mediators, and only after a failed mediation attempt. Given the nature of the litigation and risks to the Parties, the Settlement will provide Class Members with monetary relief now without the delay and risk associated with continued litigation.

ARGUMENT

A. Final Approval of the Settlement Is Appropriate Because It Is Procedurally and Substantively Fair, Reasonable, and Adequate.

First, this Court should grant final approval of the Settlement. To start, the Settlement is procedurally fair, reached only after years of litigation, extensive discovery, and vigorous arm's length negotiations by skilled attorneys before two mediators.

In addition, the Settlement is substantively fair, satisfying the nine factors found in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). First, given the complexity, expense and likely duration of the litigation, final approval is appropriate given the effort needed to litigate through trial and subsequent appeals. Second, the class has favorably reacted to the Settlement, with only 32 timely opt-outs and no objections to date.[2] Third, the Parties reached Settlement only after extensive oral and documentary discovery – and fully briefing class certification – providing them with the pertinent information to evaluate their cases and assess the settlement proposal against that evaluation. Next, the continued litigation

[2] Should any be filed, Plaintiffs will address such objections as directed by the Court in the Preliminary Approval Order.

risks involved in establishing liability, damages and maintaining the class action through trial all favored Settlement here. While Plaintiffs are confident about the evidence they uncovered would result in a trial victory, the trier of fact could ultimately disagree. And, despite a strong liability case, procedural roadblocks related to class certification could have limited recovery to only the Class Plaintiffs. Lastly, while there "is no reason…why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery," *Grinnell*, 495 F.2d at 455 n.2, Plaintiffs have recovered $15 million here, affording aggregate recovery between 9.63% and 87.14% depending on the damage calculation considered. This recovery favors settlement, falling well within the range of reasonableness in light of the best possible recovery and in light of all litigation risks.

B. The Court Should Also Approve the Plan of Allocation

The Court should also approve the proposed Plan of Allocation., which provides for the distribution of the Net Settlement Fund after payment of required expenses and payments due from any Fee and Expense Reward.

Each Class Member is eligible for payment based on his or her purchases during the relevant time period. And, Class Members can be members of both Classes. The Plan of Allocation allocates 60% to the "Bayer Women's Low-Dose Aspirin + Calcium" Class, and 40% to the "Bayer Aspirin With Heart Advantage" Class. The proposed allocation is derived as the result of informed, arm's length negotiations conducted by separately appointed Allocation Counsel. See Settlement, §§ II(B), III(E)(1). The record reveals that each counsel, experienced in complex actions like this case, conducted arm's length negotiations over the course of a month, arriving at the 60%/40% allocation values. *See generally* Decl. of Daniel J. Mogin in Support of Allocation to Bayer Women's Class (filed separately); Decl. of Melanie H. Muhlstock in Support of Allocation to Bayer Heart Advantage Class (filed separately).

C. The Court Should Approve the Proposed *Cy Pres* Recipients

The Court should also approve the proposed *cy pres* recipients. Under the Settlement, if there are any Excess Amounts remaining after all payments ordered by the Court have been made ("Final Excess Amount"), the Final Excess Amount should be distributed *cy pres* in equal shares to the AARP Foundation and the American Heart Association. *See generally* Settlement Agreement, § III.E.

D. The Court Should Also Find the Class Notice Was Adequate

Likewise, the Court should find that the notice issued here was adequate. The Parties selected and the Court appointed Gilardi & Co. LLC/Larkspur Design Group as the qualified third-party Claims Administrator. *See* Settlement Agreement, §§ II(H), IV(A). Gilardi provided notice as directed by the Court in the Preliminary Approval Order, and following extensive efforts by Class Counsel to obtain Class Member information, Gilardi and Costco mailed nearly 700,000 postcards to Class Members' addresses, informing them of details of the settlement. *See generally* Declaration of Tricia M. Solorzano on Behalf of Settlement Administrator Regarding Notice and Administration (filed separately); Declaration of Dan Ross (filed separately) (attesting to Costco Wholesale Corp.'s notice efforts).

E. The Court Should Certify Two Classes for Settlement Purposes Only

Next, the Court should finally certify, for settlement purposes only, two classes:

> **"Bayer Aspirin With Heart Advantage" Class (Class 1)**
> All persons who from January 1, 2008 to July 23, 2012 purchased Bayer Aspirin with Heart Advantage in the United States for personal, family or household uses. Excluded from the settlement class are any Judges to whom this Action is assigned and any member of their immediate families.
>
> **"Bayer Women's Low Dose Aspirin + Calcium" Class (Class 2)**
> All persons who from January 1, 2000 to July 23, 2012 purchased Bayer Women's Low Dose Aspirin + Calcium in the United States for personal, family or household uses. Excluded from the

> settlement class are any Judges to whom this Action is assigned and any member of their immediate families.

Here, the Rule 23(a) and Rule (b)(3) requirements are met.

1. The Rule 23(a) Requirements Are Met

Regarding the Rule 23(a) requirements, Rule 23(a)(1) is met here, which requires that the proposed class be 'so numerous that joinder of all members is impracticable." Fed. R. CIV. P. 23(a)(1)). The Second Circuit has commented that "numerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, direct notice was mailed to 696,094 Class Member mailing addresses. Moreover, since the members of the Classes included in the Settlement purchased Bayer's Combination Aspirins across the country, there can be no doubt that the number of class members far exceeds the threshold for satisfying the numerosity standard.

Next, the Court should also find the commonality requirement of Rule 23(a)(2) is met, which requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23 (a)(2). The Court should also find that the typicality requirement of Rule 23(a)(3) is met, which requires that "the claims … of the representative parties are typical of the claims … of the class …" Fed. R. Civ. P. 23 (a)(3). Here, each of the Class Plaintiffs' and the Class Members' claims arise from the same course of events, i.e. their purchase of Bayer's Combination Aspirins for which there is a common question: was there a false statement on the product?

Finally, adequacy examines whether the Class Plaintiffs and attorneys "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23 (a)(4). Under the facts presented, Class Plaintiffs do not have any unique relationships with Defendant, do not have interests that are antagonistic to the Class' claims, and are fully aligned with the interests of

other Class Members. In addition, each Named Plaintiff has demonstrated their willingness and ability to take the required role in the litigation and to protect the interests of those they seek to represent. Class Plaintiffs' efforts are reflected in their respective consultations with counsel, preparing for and sitting for their depositions, responding to interrogatories, gathering documents and more. And, Class Counsel have fairly and adequately represented the interests of the Classes. The requirements of Rule 23(a)(4) are satisfied here.

2. Rule 23(b)(3) Is Met Here

In addition, the requirements of Rule 23(b)(3) are also met here. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). This test is "readily met in certain cases alleging consumer or securities fraud." *Id*. at 625.

As previously discussed above as to commonality and typicality, Plaintiffs argue all Class Members share a common legal grievance arising from Bayer's practice of selling Combination Aspirins that allegedly could not provide benefits over aspirin alone. Common legal and factual questions are central to all Class Members' claims and predominate over any individual questions that may exist. These include the questions of whether there were false statements on Bayer's products and/or whether Bayer violated state statutory and common laws when it allegedly misrepresented material facts on its products' labels. Thus, "'[i]ssues of predominance and fairness do not undermine this settlement. All plaintiffs here claim injury that by reason of defendants' conduct ... has caused a common and measurable form of economic damage.... All claims arise out of the same course of defendants' conduct; all share a common nucleus of operative fact, supplying the necessary cohesion.'" *In re Am. Int'l Group, Inc. Sec. Litig*., 689 F.3d 229, 240 (2d Cir. 2012) (quoting *Sullivan v. DB Investments*, 667 F.3d 273, 338 (3d Cir. 2011)).

Resolution of these common legal claims through a class-wide settlement and claims process is also a superior way to proceed. Rule 23(b)(3) lists four factors for courts to consider in determining whether a class action is superior, and each of these factors supports a class-wide resolution. *See* Fed. R. Civ. P. 23(b)(3)(A)-(D) ("(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.").

First, Class Members have little interest in individually controlling separate lawsuits and settlement given the relatively small individual economic injuries involved, and those who do may choose to opt out of the Settlement. Second, it appears that no individual Class Members have chosen to commence litigation concerning this controversy except through class litigation, further suggesting that a collective action is indeed the superior method of recovery. Third, the Judicial Panel on Multidistrict Litigation has already determined that this Court is an appropriate forum in which to concentrate class members' claims. Fourth, there will be no difficulties in managing a class-wide trial, "for the proposal is that there be no trial." *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997). Accordingly, class certification should be finally approved.

CONCLUSION

For the reasons stated above, and in the Memorandum of Law, and all documents submitted in support, Plaintiffs request that the Court (1) finally approve the Settlement as fair reasonable, and adequate, (2) approve the allocation proposed here, including the distribution of excess amounts, if any, to the AARP Foundation and the American Heart Association, (3) conclude that the distribution of the class notice was adequate, and (4) certify, solely for

purposes of settlement, two Settlement Classes under Rule 23(a) and (b)(3). And, Plaintiffs request the Court enter the [Proposed] Final Order and Judgment, filed with this Motion. Plaintiffs further request the Court grant all such other relief that the Court deems necessary and appropriate.

Dated: January 22, 2013

Respectfully submitted,

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