

**THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE**

In Re: SKELAXIN (METAXALONE) ANTITRUST LITIGATION	Lead Case No. 2:12-cv-83 MDL No. 2343 Judge Curtis L. Collier
THIS DOCUMENT RELATES TO: All Direct Purchaser Class Actions	

**ORDER GRANTING CLASS COUNSEL’S MOTION FOR ATTORNEY
FEES, REIMBURSEMENT OF EXPENSES,
AND AWARDS FOR THE NAMED PLAINTIFFS**

AND NOW, this ____ day of _____, 2014, upon consideration of Class Counsel’s Motion for Attorney Fees, Reimbursement of Expenses and Awards for the Named Plaintiffs, the supporting Memorandum of Law, the Declarations of Thomas M. Sobol, Dean Hill Rivkin and Ronald J. Berke, and the record in this case, it is hereby ORDERED and DECREED that the Motion is GRANTED.

Class Counsel has moved for an award of attorney fees and reimbursement of expenses. The Court makes the following findings of fact and conclusions of law:

- (1) The Settlement confers a substantial benefit on the Class and the value is immediate and readily quantifiable.
- (2) Class Counsel vigorously and effectively pursued Class members’ claims before this Court. These efforts included an exhaustive factual investigation and discovery effort, including review and analysis of over one million pages of documents; responding to Defendants’ discovery requests to Plaintiffs; engaging in extensive discovery battles involving multiple motions to compel; researching and drafting motions, including the opposition to

Defendants' motions to dismiss and a motion for class certification, appearing and arguing at hearings; working with experts concerning class certification, damages and causation issues; and successfully mediating and then negotiating the terms of this settlement agreement with counsel for Defendants.

(3) The Settlement Fund is a "common fund", and courts have long recognized that a lawyer who recovers such a fund is entitled to a reasonable attorney fee from that fund as a whole. *See Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980); *Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984).

(4) The percentage-of-the-fund method is the proper method to compensate Class Counsel in this litigation. The Court concurs with the observations made by other courts, such as: the lodestar method is cumbersome; the percentage-of-the-fund approach more accurately reflects the result achieved; and the percentage-of-the-fund approach has the virtue of reducing the incentive for plaintiffs' attorneys to over-litigate or "churn" cases. *In re Southeastern Milk Antitrust Litig.*, Master File No. 2:08-MD-1000, 2013 U.S. Dist. LEXIS 70167, at *13 (E.D. Tenn. May 17, 2013); *In re F&M Distrib., Inc. Sec. Litig.*, Case No. 95-CV-71778-DT, 1999 U.S. Dist. LEXIS 11090, at *8 (E.D. Mich. June 29, 1999).

(5) The Court recognizes that the trend in "common fund cases has been toward use of the percentage method." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003) (courts in the Sixth Circuit have "indicated a preference for the percentage-of-the-fund method in common fund cases.").

(6) The Court finds that the requested counsel fee of one third is fair and reasonable and fully justified. The Court finds it is within the range of fees ordinarily awarded. *Southeastern Milk*, 2013 U.S. Dist. LEXIS 70167, at **15-16 ("attorneys' fees requested

represent one-third of the settlement fund. Although the total fee requested is a very large amount . . . the percentage requested is certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit.”); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05–340, Order and Final Judgment Approving Settlement, Awarding Attorneys’ Fees and Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation, and Ordering Dismissal as to All Defendants at ¶ 11 (D. Del. Apr. 23, 2009) (approving one-third fee, equaling approximately \$83 million); *In re Packaged Ice Antitrust Litig.*, Case No. 08-MDL-01952, 2011 U.S. Dist. LEXIS 150427, at **76-77 (E.D. Mich. Dec. 13, 2011) (“Importantly, the requested award of close to 30% appears to be a fairly well-accepted ratio in cases of this type and generally in complex class actions.”). The Court also finds that the award is within the range of fee awards in settlements of this type.

(7) The Court looked at the following factors to determine the reasonableness of the percentage:

- (a) the value of the benefit rendered to the plaintiff class;
- (b) the value of the services on an hourly basis;
- (c) whether the services were undertaken on a contingent fee basis;
- (d) society’s stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others;
- (e) the complexity of the litigation; and
- (f) the professional skill and standing of counsel involved on both sides.

Moulton v. United States Steel Corp., 581 F.3d 344, 352 (6th Cir. 2009) (quoting *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996)). After examination of these factors, the Court finds that these factors support the requested award.

(8) The results achieved in this case fully support the requested fee. The settlement

in this case provides a clear benefit to the Class: an immediate and certain payment, divided among a limited national class of direct purchasers, of \$73 million in cash, plus accrued interest, less attorney fees, expenses, administration costs, and awards to the named Plaintiffs.

(9) A one-third fee recovery in this matter would equate to a lodestar multiplier between 2.1 and 2.5. This level multiplier is reasonable in light of what has been routinely accepted as fair and reasonable in complex matters such as this one. *See, e.g., Bailey v. AK Steel Corp.*, Case No. 1:06-cv-468, 2008 U.S. Dist. LEXIS 18838, at *7 (S.D. Ohio Feb. 28, 2008) (awarding multiplier of 3.04, noting that “[c]ourts typically ... increas[e] the lodestar amount by a multiple of several times itself” and identifying a “normal range of between two and five”); *Manners v. American General Life Ins. Co.*, Civil Action No. 3-98-0266, 1999 U.S. Dist. LEXIS 22880, at *93 (M.D. Tenn. Aug 11, 1999) (3.8 multiplier); *In re Cardinal Health Sec. Litig.*, 528 F. Supp. 2d. 752, 770 (S.D. Ohio 2007) (multiplier of 5.9). Multipliers much higher than the one requested here are also commonplace in complex pharmaceutical antitrust class actions. *See, e.g., Cardizem*, 218 F.R.D. at 533 (noting that direct purchaser class plaintiffs received a fee award that equated to a lodestar multiplier of 3.7). *See also Tricor*, No. 05–340, Order and Final Judgment Approving Settlement, Awarding Attorneys’ Fees and Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation, and Ordering Dismissal as to All Defendants at ¶ 11 (approving lodestar multiplier of 3.93); *Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718 (E.D. Pa Aug. 14, 2006), at *24 (approving a percentage fee award that translated to a 4.77 multiplier in case that settled after one year); *In re: Remeron Direct Purchaser Antitrust Litig.*, Civ. No. 03-0085, 2005 U.S. Dist. LEXIS 27013, at **47-48 (D. N.J. Nov. 9, 2005) (multiplier of 1.86 is on the “low end of the spectrum”).

(10) Class Counsel bore significant risks. These included: (a) that the case would be

dismissed *via* a Rule 12(b)(6) motion; (b) the difficulties of demonstrating that King's patent infringement lawsuits not only had no realistic expectation of success (i.e., were objectively baseless), but were also filed with the subjective intent of interfering with King's competition in the market for Skelaxin; (c) that the Court would find that King and Mutual's baseless petitions to the FDA were protected under the *Noerr-Pennington* doctrine; (d) that the jury could find that Sandoz's withdrawal from the market for generic metaxalone prevented DPCPs from proving causation and damages; (e) that the jury could find that, regardless of the allegedly baseless litigation, FDA petitions, and the King-Mutual agreement not to compete, none of Mutual, Sandoz, CorePharma or other generic manufacturers were ready or able to enter the market for generic metaxalone prior to 2010.

(11) Antitrust class actions are inherently complex. The legal and factual issues are complicated and highly uncertain in outcome. This case was no exception. As the court noted in *Packaged Ice*, "[t]his antitrust litigation, like all litigation of its species, promises to be extremely complex and time intensive and there is no question that if settlement fails, the Defendants will mount a strong defense." 2011 U.S. Dist. LEXIS 150427, at *76 (citing *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003)). *See also Cardizem*, 218 F.R.D. at 533 ("Antitrust class actions are inherently complex . . . this extraordinarily complex case raised a multitude of difficult issues in the areas of antitrust law, patent law, and laws governing pharmaceutical drugs.").

(12) Direct purchaser class counsel are qualified in this complex area and performed well during the case. Several of these firms have also been actively engaged in antitrust litigation (class and non-class) in the pharmaceutical industry for well over a decade. Class Counsel demonstrated this experience and skill in the efficient and effective prosecution of this

action, and in achieving a relatively quick resolution. As one court observed, “[t]he quality of work performed in a case that settles before trial is best measured by the benefit obtained.”

Behrens v. Wometco Ent., Inc., 118 F.R.D 534, 547-48 (S.D. Fla. 1988). *See also In re Delphi Corp. Securities, Derivative & “ERISA” Litig.*, 248 F.R.D. 483, 504 (E.D. Mich. 2008) (“The ability of Lead Counsel to negotiate a favorable settlement in the face of formidable legal opposition further evidences the reasonableness of the fee award requested.”), *F&M Distrib.*, 1999 U.S. Dist. LEXIS 11090, at *19 (“The skill and competence of the attorneys for the plaintiffs was evident, especially when viewed on the basis of the results that they obtained in this case, while the excellent advocacy skills of the defense counsel . . . were equally evident”).

(13) The Court, therefore, awards Class Counsel attorney fees in the amount of \$24,333,000.00 (twenty-four million, three hundred thirty-three thousand dollars), *i.e.* one third of the \$73 million Settlement Fund and the interest accrued thereon as attorney fees, to be allocated among Class Counsel, as well as approving reimbursement of \$541,671.22 in expenses, which expenses were reasonable and necessary to the representation of the Class.

(14) Numerous courts have found it appropriate to specially reward named class plaintiffs for the benefits they have conferred. As the court noted in *Lonardo v. Travelers Indemnity Company*:

Courts within the Sixth Circuit...recognize that, in common fund cases and where the settlement agreement provides for incentive awards, class representatives who have had extensive involvement in a class action litigation deserve compensation above and beyond amounts to which they are entitled to by virtue of class membership alone.

706 F. Supp. 2d 766, 787 (N.D. Ohio 2010). *See also Cardizem*, 218 F.R.D. at 535-36 (awarding \$75,000 each to the corporate class representatives); *Meijer, Inc., et al. v. Barr Pharma., Inc.*, C.A. No. 05-2195, Order and Final Judgment, at ¶ 17 (D. D.C. Apr. 20, 2009) (awarding \$50,000 to five class representatives – a total of \$250,000); *Tricor*, No. 05-340, Order and Final

Judgment Approving Settlement, Awarding Attorneys' Fees and Expenses, Awarding Representative Plaintiff Incentive Awards, Approving Plan of Allocation, and Ordering Dismissal as to All Defendants at ¶ 14 (awarding \$50,000 to each of three class representatives).

(15) The Class Representatives diligently and completely fulfilled their obligations to the Class. They stepped forward and pursued the Class' interests by filing suit on behalf of the members of the Class and undertaking the responsibilities attendant upon serving as a named plaintiff, including sitting for depositions on both document production and merits issues and responding to document requests and interrogatories. The Class Representatives also participated in the settlement negotiations and attended the first Mediation Session at the request of Judge Coffman.

(16) The named Plaintiffs are granted an award of \$50,000 each, payable from the Settlement Fund, for their efforts in discovery and their role in bringing about this recovery on behalf of the Class.

It is SO ORDERED.

/s/

Hon. Curtis L. Collier
U.S. District Court for the
Eastern District of Tennessee