UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re: NEXIUM (ESOMEPRAZOLE) ANTITRUST LITIGATION	MDL No. 2409 Civil Action No. 1:12-md-02409-WGY
This Document Relates To: All Direct Purchaser Class Actions	

DIRECT PURCHASER CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT WITH DR. REDDY'S LABORATORIES, LTD. AND DR. REDDY'S LABORATORIES, INC.

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I. INTRODUCTION

Direct Purchaser Class Plaintiffs and the certified class of direct purchasers[1] (or, "Plaintiffs" or the "Class") respectfully submit this Memorandum of Law in support of their Motion for Preliminary Approval of the Proposed Class Action Settlement with Dr. Reddy's Laboratories, Ltd. and Dr. Reddy's Laboratories, Inc. (collectively, "DRL"), one of the four defendants in *In re Nexium (Esomeprazole) Antitrust Litigation*, Civil Action No. 1:12-md-2409-WGY (the "Class Action").

In exchange for DRL's cooperation at trial against DRL's co-defendants, the proposed settlement releases DRL from all claims by Plaintiffs in the Class Action (the "Settlement"). Class Counsel have determined that the cooperation provided for in the Settlement will significantly enhance Plaintiffs' prospects at trial. The remaining defendants, Aktiebolaget Hassle, AstraZeneca LP, and AstraZeneca AB (collectively, "AstraZeneca"), Ranbaxy Pharmaceuticals, Inc., Ranbaxy Inc., Ranbaxy Laboratories Ltd. (collectively, "Ranbaxy"), Teva Pharmaceuticals Industries, Ltd. and/or Teva Pharmaceuticals USA, Inc. (collectively, "Teva") (collectively "remaining defendants") are jointly and severally liable to Plaintiffs for the damages arising from defendants' overarching conspiracy to delay the introduction of generic

[1] On December 11, 2013, this Court certified a class of:

> All persons or entities in the United States, including U.S. territories, who purchased Nexium directly from AstraZeneca at any time during the period from August 27, 2008 through December 11, 2013 (the "Direct Purchaser Class"). Excluded from the Direct Purchaser Class are the Defendants, their officers, directors, management, employees, subsidiaries, and affiliates, and all federal governmental entities.

In re Nexium Esomeprazole Antitrust Litig., No. 12-md-2409-WGY, 2013 U.S. Dist. LEXIS 173353 (D. Mass. Dec. 11, 2013). The following entities timely requested exclusion from the Class.

> CVS Pharmacy Inc., Rite Aid Corporation and Rite Aid Hdqtrs Corp., The Jean Coutu Group (PJC) USA, Inc., Maxi Drug, Inc., d/b/a Brooks Pharmacy and Eckerd Corporation, Walgreen Co., HEB Grocery Company LP, Safeway Inc., SuperValu, Inc., The Kroger Co., and Giant Eagle, Inc. in their own right as direct purchasers of Nexium from AstraZeneca, and as assignees limited to their purchases of Nexium from Class members.

See ECF No. 862 ("Retailer Individual Plaintiffs").

versions of the prescription drug Nexium (delayed-release esomeprazole magnesium), in violation of the Sherman Act, 15 U.S.C. § 1, and the Settlement will enhance the chances and size of the overall recovery from the remaining defendants. The End-Payor Class Plaintiffs and the Retailer Individual Plaintiffs, the other plaintiff groups engaged in trial in this litigation, have made a similar assessment and have also agreed to settle for DRL for the same cooperation.

Accordingly, Plaintiffs respectfully request that the Court enter a preliminary approval order, substantially in the form annexed to Plaintiffs' Motion for Preliminary Approval as Ex. 1, by which the Court will preliminarily approve the Settlement between Plaintiffs and DRL as embodied in the Settlement Agreement, attached to the Declaration of Bruce E. Gerstein ("Gerstein Decl.") as Ex. A.

This motion for preliminary approval, which is supported by DRL, is unopposed.[2]

II. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs in the Direct Purchaser Class Action alleged that DRL violated the federal antitrust law (15 U.S.C. § 1) by *inter alia*, entering into an overarching conspiracy with AstraZeneca, Ranbaxy and Teva to wrongfully delay the introduction of generic versions of the prescription drug Nexium (delayed-release esomeprazole magnesium). Plaintiffs allege that, as a result of these antitrust violations, they were forced to pay artificially inflated prices for esomeprazole magnesium.

DRL denies Plaintiffs' allegations of unlawful or wrongful conduct, and denies that any conduct challenged by Plaintiffs caused any damage whatsoever, and have asserted a number of defenses to Plaintiffs' claims.

[2] As detailed below, preliminary approvals of proposed class action settlements are procedural in nature and do not involve determinations on the merits of the proposed settlement, as long as the settlement falls within the range of possible approval. *In re Prudential Securities Inc. Ltd. P'ships. Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995).

After intensive arm's-length negotiations, fact and expert discovery including, among other things, the production and inspection of hundreds of thousands of pages of documents, depositions of DRL's employees and third-party witnesses, substantial briefing on the legal issues (including motions to dismiss, for summary judgment and for class certification), consultation with economic, scientific and regulatory experts regarding numerous relevant legal, evidentiary, and economic issues (including, for instance, estimating damages incurred by the Class), successfully defeating numerous motions for summary judgment filed by DRL and other Defendants, and preparing the case for trial, Plaintiffs, on behalf of the Direct Purchaser Class, agreed, subject to the Court's approval, to settle their claims against DRL.

The proposed Settlement Agreement, which is attached to the Gerstein Decl. as Ex. A, provides for DRL to provide various forms of cooperation at trial to Plaintiffs and the Direct Purchaser Class in exchange for a full and complete settlement and release of all claims that Plaintiffs have asserted or could have asserted in the Direct Purchaser Class Action arising from the challenged conduct and relating to the purchase of esomeprazole pending before this Court.[3]

The instant motion, accordingly, seeks preliminary approval of the proposed Settlement by the Court.

III. PRELIMINARY APPROVAL SHOULD BE GRANTED

Rule 23(e) of the Federal Rules of Civil Procedure provide:

> A. The court must approve any settlement, voluntary dismissal, or compromises of "[t]he claims, issues, or defenses of a certified class."
>
> B. "The court must direct notice in a reasonable mannerto all class members who would be bound by the proposal."

[3] The release, as set forth in Paragraph 9 of the Settlement Agreement, specifically excludes all claims arising in the ordinary course of business between Direct Purchaser Class members and the "released Parties" concerning product liability, breach of contract, breach of warranty or personal injury.

Approval of a class action settlement under Fed. R. Civ. P. 23(e) involves a two-step process. First, counsel submits the proposed terms of settlement and the court makes a preliminary fairness evaluation. *See Federal Judicial Center, Manual for Complex Litigation* § 21.632 (4th ed. 2004) (hereafter "*Manual*"); *see also* 4 *Newberg on Class Actions* § 11:25, at 38-39 (4th ed. 2002) (endorsing two-step process). In this preliminary evaluation of a proposed settlement, courts determine only whether the settlement has "obvious deficiencies" to determine whether "it is in the range of fair, reasonable, and adequate." *In re: M3Power Razor Sys. Mktg. & Sales Prac. Litig.*, 270 F.R.D. 45, 52 (D. Mass. 2010) (Woodlock, J.) (citing *Manual* § 21.632). In this Circuit and elsewhere, settlements are favored, particularly of class actions. *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) (citing *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)).

"At the preliminary approval stage, the Court need not make a final determination regarding the fairness, reasonableness and adequateness of a proposed settlement; rather the Court need only determine whether it falls within the range of possible approval." *In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. 125, 140 (D. Mass. 2010) (Dominguez, J.) (citations omitted). "Ultimately, the more fully informed examination required for final approval will occur in connection with the Final Fairness Hearing, where arguments for and against the proposed settlement will be presented after notice and an opportunity to consider any response provided by the potential Class Members." *In re M3 Power Razor Sys.*, 270 F.R.D. at 62.

If the Court finds that the parties reached the settlement as a result of arm's length negotiations and after sufficient discovery, then a presumption of fairness attaches to the settlement. *See In re Pharm. Indus. Avg. Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009). Specifically, courts in this Circuit have looked to four factors to determine whether a

settlement is entitled to such a presumption: "(1) the negotiations occurred at arm's length; 2) there was sufficient discovery; 3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected."[4] *In re Lupron Mktg. & Sales Pracs. Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004) (Stearns, J.). As explained below, this settlement more than satisfies the relevant criteria for preliminary approval.

A. The Proposed Settlement Is the Product of Good Faith, Extensive, Arm's-Length Negotiations

The proposed Settlement resulted from extensive arm's-length negotiations undertaken in good faith between Plaintiffs, Class Counsel, and DRL. The settlement negotiations, which included numerous communications as well as in-person meetings held over a number of months, actively involved Class Counsel and counsel for DRL. The parties scrutinized the strengths and weaknesses of the pending claims and DRL's defenses. Because of the extensive, arm's-length bargaining involved, there can be no issue (or even a suggestion) of any collusive aspect to the proposed Settlement.

B. There Was More Than Sufficient Discovery and Investigation for Counsel for the Class to Make an Informed Decision

Discovery in this case spanned more than a year. In all, Plaintiffs reviewed and analyzed more than 500,000 documents and more than 6 million pages produced by DRL and the other Defendants and parties to this litigation, and various non-parties. Armed with this written and electronic discovery, counsel for the Direct Purchaser Class deposed current and former executives and employees of DRL. Counsel for the Direct Purchaser Class also retained and worked with expert witnesses in evaluating scientific and economic issues relating to liability and damages. As a result, issues relating to liability and damages have been developed

[4] The fourth factor is more often relevant for purposes of final approval, after notice has issued and class members have been given an opportunity to object to a settlement.

sufficiently for counsel for the Direct Purchaser Class to make an informed decision regarding the proposed Settlement. Plaintiffs' counsel have prepared this case for trial and only settled on the eve of trial with DRL after successfully defeating DRL's motion for summary judgment.[5]

C. The Proponents of the Settlement Are Highly Experienced in Antitrust Litigation

Class Counsel believes that this is a fair settlement and is in the best interests of the Class. The Class is represented by lawyers who have extensive antitrust class action experience.[6] *See* Gerstein Decl. at Ex. B (containing firm biographies of co-lead counsel for the Direct Purchaser Class). Co-Lead Counsel and the other firms representing the Direct Purchaser Class are on the forefront of antitrust litigation and complex litigation generally, as well as litigation pertaining to the pharmaceutical industry specifically. Significantly, the proposed Class is composed primarily of many of the same wholesalers and retail entities that composed the classes in those prior cases, and no member of the proposed Class has objected to the adequacy of class counsel in obtaining those prior settlements. Other courts have also recognized class counsel's expertise in this field and have been repeatedly adjudged class counsel adequate under

[5] *See* ECF Nos. 857, 977.

[6] Some or all of the attorneys in this case have been in the following pharmaceutical antitrust direct purchaser class actions that have previously settled: *Cardizem*, No. 99-md-1278, (E.D. Mich.) (final settlement approval on November 25, 2002); *Buspirone*, MDL Docket No. 1413 (S.D.N.Y.) (final settlement approval on April 7, 2003); *Relafen*, No. 01-12239, (D. Mass.) (Young, J.) (final settlement approval on April 9, 2004); *North Shore Hematology-Oncology Assoc., P.C. v. Bristol Myers Squibb Co*., No. 1:04-cv-248, (D.D.C.) (final settlement approval on Nov. 30, 2004); *In re Terazosin Hydrochloride Antitrust Litig*., No. 99-mdl-1317, (S.D. Fla.) (final settlement approval on April 19, 2005); *In re Remeron Antitrust Litig*, No. 03-CV-0085, (D.N.J.) (final settlement approval on Nov. 9, 2005); *In re Children's Ibuprofen Oral Suspension Antitrust Litig*., No. 1:04 CV-01620, (D.D.C.) (final settlement approval on April 24, 2006); *Ovcon*, No.05-2195, (D.D.C.) (final settlement approval on April 20, 2009); *Tricor*, No. 05-340, (D. Del.) (final settlement approval on April 24, 2009); *Nifedipine*, MDL No. 1515 (D.D.C.) (final settlement approval on Jan. 31, 2011); *OxyContin*, No. 04 md 1603, (S.D.N.Y.) (final settlement approval on Jan. 25, 2011); *Wellbutrin SR*, No.04-5525 (E.D. Pa.) (final settlement approval on Nov. 21, 2011); *Wellbutrin XL*, No. (E.D. Pa.) (final approval of settlement with Defendant Biovail settlement on November 7, 2012); *D.D.A.V.P*.., No. 05 Civ. 2237, (S.D.N.Y.) (final settlement approval on Nov. 28, 2011); *Toprol*, No. 06-52-MPT, (D. Del. Thynge, J.) (final settlement approval on Feb. 21, 2012); *Miralax*, No-07-142, (D. Del.) (final settlement approval on May 31, 2012); *Flonase*, No. 08-cv-3149, (E.D. Pa.) (final settlement approval on June 14, 2013).

Rule 23(a)(4) and 23(g).[7] Thus, counsel are well-versed in both prosecution and settlement of this type of litigation.

Accordingly, counsel's recommendations are entitled to great weight. Indeed, courts have repeatedly and explicitly deferred to the judgment of experienced counsel who have conducted arm's-length negotiations in approving proposed class settlements. *See, e.g., Blank v. Talley Inds., Inc.*, 64 F.R.D. 125, 132 (S.D.N.Y. 1974) (a factor "entitled to substantial weight is that the settlement bears the imprimatur of seasoned and experienced counsel"); *Fisher Brothers v. Phelps Dodge Inds. Inc.*, 604 F. Supp. 446, 452 (E. D. Pa. 1985) ("the professional judgment of counsel involved in the litigation is entitled to significant weight"); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 659, 667 (D. Minn. 1974) ("[t]he recommendation of experienced antitrust counsel is entitled to great weight").[8] The presumption in favor of such settlements reflects courts' understanding that vigorous, skilled negotiation protects against collusion and advances the fairness interests of Rule 23(e).

D. Initial Reaction of Class Members Is Fully Supportive of the Settlement Making a Second-Opt Out Period Unnecessary

Although formal notice of settlement has not yet been sent, counsel for Plaintiffs have spoken with the named Plaintiffs and some of the larger members of the Class (as measured by purchases) to describe the proposed Settlement. None of those Class Members contacted have

[7] One or more of these firms, or the individual lawyers prosecuting this case on behalf of Plaintiffs, has served as lead or co-lead counsel for purchaser classes in many of the actions cited in this submission, including, *e.g.*, *Wellbutrin XL*, *Flonase*, *K-Dur*, *Wellbutrin SR*, *Relafen*, and others. Courts have commented favorably on their performance. *See, e.g.*, *Wellbutrin XL*, 2011 WL 3563385, at *5 ("The plaintiff's counsel are well-qualified to represent the proposed class in this case. They have extensive experience in similar class actions involving delayed generic competition.") *See, e.g., In re K-Dur Antitrust Litig.*, 2008 WL 2699390, at *31 ("Defendants do not dispute that counsel for the proposed DP Plaintiff Class have extensive experience and expertise in antitrust, class action and complex civil litigation, including actions similar to the one at bar. *See* Pl. Br. at 25. I am likewise amply satisfied that counsel for the proposed Class have vigorously and capably prosecuted this action, conducting appropriate discovery and presenting detailed analyses in memoranda, expert declarations and oral argument.").

[8] *See also Stewart v. Rubin*, 948 F. Supp. 1077, 1099 (D. D.C. 1996), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997); *In re Lease Oil Antitrust Litig. (No. II)*, 186 F.R.D. 403, 424-25 (S.D. Tex. 1999); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 312-13 (N.D. Ga. 1993); *Manual* § 30.42; 4 *Newberg on Class Actions*, § 11.41.

indicated that they oppose the Settlement. Furthermore, each Class member will have an opportunity to make any objection to the proposed Settlement prior to or at the Fairness Hearing. Under these circumstances, the parties agree that a discretionary second opt-out period pursuant to recently-amended Rule 23(e)(3) is unnecessary.[9] This is especially true in view of the fact that few (if any) Class members have ever excluded themselves from similar settlements in other pharmaceutical direct purchaser actions.[10]

E. The Proposed Settlement is in the Best Interest of the Class

The settlement agreement provides for DRL to provide valuable cooperation in order to assist Plaintiffs' counsel in trial against the remaining Defendants. Counsel for Plaintiffs feel strongly that the settlement is in the best interests of the Class as it will advance Plaintiffs' interests at trial.[11]

Class Counsel have determined that the cooperation provided for in the Settlement will enhance the Plaintiffs' prospects at trial. As the remaining defendants are jointly and severally liable to Plaintiffs for the damages arising from their conspiracy to delay the introduction of generic versions of Nexium, in violation of the Sherman Act, 15 U.S.C. § 1, the Settlement will enhance the chances and size of the overall recovery from the remaining defendants. The End-

[9] Pursuant to the Court's Order dated December 27, 2013, a "Notice of Pendency of Class Action" in a form approved by the Court, was sent to putative class members. Opt-out elections were required to be postmarked by February 2, 2014. No parties/entities have elected to opt-out of the class other than those prosecuting the *Walgreen* (No. 13-cv-10337-WGY), *Giant Eagle* (No. 13-cv-11305-WGY), and *Rite Aid* (No. 13-cv-12074-WGY) actions. *See* ECF No. 862 (February 25, 2014 Declaration of Daniel Coggeshall of Rust Consulting, Inc. Regarding Receipt of Requests for Exclusion).

[10] In the alternative, Plaintiffs believe an opt-out period of no more than 30 days is appropriate. This Court approved a 30-day opt-out period previously (*see* ECF No. 714 (approving proposed class notice)). Given that the class members have previously had an opportunity to opt out, they certainly do not need a longer opt out period here. *See In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04-8144, 2009 U.S. Dist. LEXIS 120953, at *40 (S.D.N.Y. Dec. 23, 2009) (approving 30-day notice period to class in complex securities fraud class action). A 30-day opt-out period was approved as sufficient in *In re DDAVP Direct Purchaser Antitrust Litig.*, a case with a substantially similar class of direct purchaser plaintiffs. *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 7:05-cv-02237-CS, Dkt. 90, at ¶ 5 (S.D.N.Y. Aug. 16, 2011).

[11] In addition, under joint and several liability, the settlement with DRL does not reduce the amount of money Plaintiffs can recover at trial against the remaining defendants.

Payor Class Plaintiffs and the Retailer Individual Plaintiffs, the other plaintiff groups engaged in trial in this litigation, have made a similar assessment and have also agreed to settle with DRL for the same cooperation.

Accordingly, based on the above factors, this Court should grant preliminary approval of the proposed Settlement.

IV. PLAINTIFFS WILL MOVE THE COURT TO APPROVE NOTICE TO THE CLASS AND TO SCHEDULE A FAIRNESS HEARING AND SET CORRESPONDING DEADLINES.

By October 27, 2014, Plaintiffs will move this Court to approve notice to the Class, appoint a Claims Administrator, and set a schedule for implementation thereof.

V. CONCLUSION

For the foregoing reasons, Class Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement. A proposed order granting these requests accompanies this Memorandum (Ex. 1).

Dated: October 19, 2014

/s/ Joseph Opper

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CERTIFICATE OF SERVICE

I, Joseph Opper, hereby certify that I caused a copy of the foregoing to be filed electronically via the Court's electronic filing system. Those attorneys who are registered with the Court's electronic filing system may access these filings through the Court's system, and notice of these filings will be sent to these parties by operation of the Court's electronic filing system.

Dated: October 19, 2014

***/s/* Joseph Opper**
Joseph Opper