

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE INTUNIV ANTITRUST LITIGATION Civil Action Nos. 16-cv-12653-ADB

This Document Relates to:
Direct Purchaser Actions

ORDER GRANTING DIRECT PURCHASER CLASS PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT WITH DEFENDANT ACTAVIS, APPROVAL OF THE FORM AND MANNER OF NOTICE TO THE CLASS, AND PROPOSED SCHEDULE FOR A FAIRNESS HEARING

Upon review and consideration of Direct Purchaser Plaintiff's Motion for Preliminary Approval of Proposed Settlement, Approval of the Form and Manner of Notice to the Class, and Proposed Schedule for a Fairness Hearing, the exhibits thereto, and any hearing thereon, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

Jurisdiction

1. This Court has jurisdiction over the named plaintiff Meijer, Inc. and Meijer Distribution, Inc. ("Meijer" or "Plaintiff"), individually and on behalf of the certified Direct Purchaser Class in this action as defined below ("Direct Purchaser Class"), and Actavis Elizabeth LLC, Actavis LLC, and Actavis Holdco US, Inc. ("Actavis"); and jurisdiction over the litigation to which Plaintiff and Actavis are parties.¹

Appointment of Meijer as Class Representative for Purposes of the Settlement

2. On September 24, 2019, the Court issued an order on Direct Purchasers' motion for class certification pursuant to Fed. R. Civ. P. 23 certifying the following Direct Purchaser Class:

¹ This Order hereby incorporates by reference the definitions in the Settlement Agreement among Plaintiff, individually and on behalf of the Direct Purchaser Class, and Actavis. All capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Settlement Agreement.

All persons or entities in the United States and its territories, or subsets thereof, that purchased Intuniv and/or generic Intuniv in any form directly from Shire or Actavis, including any predecessor or successor of Shire or Actavis, from October 19, 2012 through June 1, 2015 (the “Class”). Excluded from the Class are Shire, Actavis, and any of their officers, directors, management, employees, subsidiaries, and affiliates, as well as governmental entities.

In the same order, the appointed Thomas M. Sobol and Lauren G. Barnes Hagens Berman Sobol Shapiro LLP as Lead Counsel for the Direct Purchaser Class.

3. Pursuant to Rule 23(a)(4), the Court determines, in connection with and solely for purposes of Settlement, that the Meijer will fairly and adequately protect the interests of the Direct Purchaser Class. Meijer’s interests in connection with Settlement do not conflict with the interests of absent members of the Direct Purchaser Class. All of the Direct Purchaser Class members share a common interest in proving the alleged anti-competitive conduct, and recovering the overcharge damages sought in the complaints filed by Meijer and others on behalf of the Direct Purchaser Class. Meijer has previously been appointed as a direct purchaser plaintiff class representative in many other pharmaceutical antitrust cases, including cases in this District, and has never been found to be inadequate. See, e.g., In re Asacol Antitrust Litig., No. 15-cv-12730, 2017 WL 4118967, at *1–2 (D. Mass. Sept. 14, 2017); In re Nexium (Esomeprazole) Antitrust Litig., 296 F.R.D. 47, 53–54 (D. Mass. 2013). Accordingly, in connection with and solely for purposes of Settlement, the Court appoints Meijer as representative of the Class.

Preliminary Approval of the Proposed Settlement

4. “[T]he approval of a settlement agreement is a two-step process, which first requires the court to make a preliminary determination regarding the fairness, reasonableness, and adequacy of the settlement terms. It is only after the second step, a fairness hearing has taken place, however, that the court may “approve” the settlement agreement. Hochstadt v.

Boston Scientific Corp., 708 F.Supp.2d 95, 97 n.1 (D. Mass. 2010) (citing Federal Judicial Center, Manual for Complex Litigation §13.14 (4th ed. 2004) (“Manual”). “It is inherently difficult to determine the fairness and adequacy of a proposed settlement in the preliminary review context where the parties have advanced a settlement in lieu of litigation. Courts and commentators, nevertheless, have developed a presumption that the settlement is within the range of reasonableness when certain procedural guidelines have been followed.” In re M3 Power Razor, 270 F.R.D. at 62. These are: “(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.” In re Lupron Mktg. & Sales Pracs. Litig., 345 F. Supp. 2d 135, 137 (D. Mass. 2004). 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. The Settlement satisfies this standard.

5. The Court finds that the Settlement, which includes a cash payment of \$19.9 million by Actavis into an escrow account for the benefit of the Class (the “Settlement Fund”) in exchange for, *inter alia*, dismissal of the litigation between Plaintiff individually and on behalf of the Direct Purchaser Class and Actavis with prejudice and releases of claims filed or that could have been filed against Actavis by Plaintiff, as set forth in the Settlement Agreement, was arrived at by arm’s-length negotiations by highly experienced counsel, after almost four years of litigation, full fact and expert discovery, and with substantial summary judgment motions pending, falls within the range of possibly approvable settlements. The Settlement is therefore preliminarily approved, subject to further consideration at the Fairness Hearing provided for below. In making this finding, the Court observes that as the Settlement involves Actavis only, the litigation will proceed against defendants Shire LLC and Shire U.S., Inc.

Approval of the Plan of Notice to the Class

6. The proposed form of Notice, which informs Direct Purchaser Class members of the Settlement, annexed to the Settlement Agreement as **Exhibit B**, satisfies the requirements of Fed. R. Civ. P. 23(e) and due process, is otherwise fair and reasonable, and therefore is approved. Class Counsel shall cause the Notice, substantially in the form attached as Exhibit B to the Settlement Agreement, to be disseminated within 15 days of this Order via first-class mail to the last known address of each member of the Class. Because of the ongoing COVID-19 pandemic and various social distancing orders and recommendations, Class Counsel shall also exercise best efforts to cause the Notice to be disseminated to all members of the Direct Purchaser Class by email. Email notice may be sent to the email addresses of the class members' counsels' offices or other appropriate recipients. Class Counsel shall notify the Court 15 days before the date to submit objections pursuant to ¶ 9 below that notice has been effectuated.

7. Members of the Direct Purchaser Class have previously been given notice of the pendency of the litigation and the opportunity to exclude themselves from the Class. The prior notice was disseminated by first class mail to all members of the Direct Purchaser Class on or about January 24, 2020; the prior notice of class certification provided for an opt-out period that closed on February 28, 2020; and the Claim Administrator certified that no opt-out requests were received as of March 10, 2020. See ECF 401-1. The prior notice of class certification satisfied the requirements of Fed. R. Civ. P. 23(c)(2)(B) and due process. Accordingly, the Court finds that there is no need for an additional opt-out period pursuant to Fed. R. Civ. P. 23(e)(4). See, e.g., In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-2503 (D. Mass. Mar. 12, 2018), ECF No. 1095, Prelim. Approval Order at 4 (holding that there is “no need for an additional opt-out period”); In re Nexium (Esomeprazole) Antitrust Litig., No. 12-md-2409 (D.

Mass., June 12, 2015), ECF No. 1536, Prelim. Approval Order at 2 (“[A] discretionary second opt-out period pursuant to recently-amended Rule 23(e)(3) is unnecessary.”); In re Carbon Black Antitrust Litig., No. 03-cv-10191 (D. Mass. Nov. 29, 2006), ECF No. 297, Prelim. Approval Order at 1 (finding no need for additional opt-out opportunity “[i]n light of the previous notice to class members of the pendency of this action and the certification of the class, which complied fully with the requirements of Rule 23 and due process”).

8. Actavis shall serve notices on the appropriate federal and state officials under the Class Action Fairness Act 28 U.S.C. § 1715 no later than 10 days from the date Plaintiff has filed the Settlement Agreement and Motion for Preliminary Approval with the Court. Actavis shall contemporaneously provide Lead Counsel with copies of any such notices.

9. Members of the Direct Purchaser Class may object to the Settlement no later than 45 days from the dissemination of the Notice. Class Counsel or their designee shall monitor and record any and all objections that are received.

10. The Court appoints A.B. Data, Ltd. (“A.B. Data”), which was responsible for service of the notice of class certification, to serve as Claim Administrator and to assist Class Counsel in disseminating the Notice. All expenses incurred by the Claim Administrator must be reasonable. Such expenses are subject to Court approval other than as provided for in the Settlement Agreement, and shall be payable solely from the Settlement Fund.

11. The Court appoints The Huntington National Bank for the purpose of serving as the Escrow Agent holding the Settlement Fund. All expenses incurred by the Escrow Agent, if any, must be reasonable. Such expenses are subject to Court approval other than as provided for in the Settlement Agreement, and shall be payable solely from the Settlement Fund. A copy of the Escrow

Agreement executed by The Huntington National Bank and counsel is annexed as **Exhibit D** to the Settlement Agreement.

Final Fairness Hearing

12. A hearing on final approval (the “Fairness Hearing”) shall be held before this Court at 10:00 AM on December 9, 2020 (date certain 90 days from service of CAFA notice), at the United States Courthouse, 1 Courthouse Way, Boston, MA 02210, Courtroom 17, 5th Floor. At the Fairness Hearing, the Court will consider, *inter alia*: (a) the fairness, reasonableness and adequacy of the Settlement and whether it should be finally approved; (b) whether the Court should approve the proposed plan of allocation of the Settlement Fund among Direct Purchaser Class members; (c) whether the Court should approve awards of attorneys’ fees and reimbursement of expenses to Class Counsel; and (d) whether entry of a Final Judgment and Order terminating the litigation between Plaintiff and Actavis should be entered. The Fairness Hearing may be rescheduled or continued; in this event, the Court will furnish all counsel with appropriate notice. Lead Counsel shall be responsible for communicating any such notice promptly to the Class by posting a conspicuous notice on the following website established by the Claim Administrator: IntunivAntitrustSettlement.com.

13. Class members who wish to: (a) object with respect to the Settlement; and/or (b) wish to appear in person at the Fairness Hearing, must first send an objection and, if intending to appear, a notice of intention to appear, along with a statement of the position(s) to be asserted and the grounds therefore together with copies of any supporting papers or briefs, via first class mail, postage prepaid, to the Clerk of the United States District Court for the District of Massachusetts, 1 Courthouse Way, Boston, MA 02210, with copies to the following counsel:

Thomas M. Sobol
Lauren G. Barnes
Hagens Berman Sobol Shapiro LLP
55 Cambridge Parkway, Suite 301
Cambridge, MA 02142
Tel: (617) 482-3700
tom@hbsslw.com
lauren@hbsslw.com

Christopher T. Holding
Sarah K. Frederick
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
Tel: (617) 570-1000
cholding@goodwinlaw.com
sfrederick@goodwinlaw.com

*Attorneys for Plaintiff and Lead Counsel
for the Direct Purchaser Class*

*Attorneys for Actavis Elizabeth LLC, Actavis
LLC, and Actavis Holdco U.S., Inc.*

14. To be valid, any such objection and notice of intention to appear and statement must be postmarked no later than November 10, 2020 (45 days from the date of mailing of the Notice). Except as herein provided, no person or entity shall be entitled to contest the terms of the Settlement. All persons or entities who fail to file a notice of intention to appear and statement may not be heard at the Fairness Hearing. All persons or entities who fail to file an objection shall be deemed to have waived any such objections by appeal, collateral attack or otherwise.

15. All briefs and materials in support of the application for an award of attorneys' fees and reimbursement of expenses shall be filed with the Court by October 27, 2020 (14 days prior to the expiration of the deadline for Class members to object to the Settlement and/or attorney's fees and expenses).

16. All briefs and materials in support of the final approval of the Settlement and the entry of Final Judgment proposed by the parties to the Settlement Agreement shall be filed with the Court by November 24, 2020 (14 days after the expiration of the deadline for Class members to object to the Settlement and/or attorney's fees, expenses and incentive awards).

17. All proceedings in the action between Plaintiff and the Direct Purchaser Class and Actavis are hereby stayed until such time as the Court renders a final decision regarding the

approval of the Settlement and, if the Court approves the Settlement, enters Final Judgment and dismisses such actions with prejudice.

18. Neither this Order, nor the Settlement Agreement, nor any other settlement-related document, nor anything contained herein or therein or contemplated hereby or thereby, nor any proceedings undertaken in accordance with the terms set forth in the Settlement Agreement or herein or in any other settlement-related document, shall constitute, be construed as or be deemed to be evidence of or an admission or concession in any action or proceeding of any kind whatsoever, civil, criminal or otherwise, before any court, administrative agency, regulatory body or any other body or authority, present or future, by Actavis including, without limitation, that Actavis engaged in any conduct or practices that violate any antitrust statute or other law.

SO ORDERED.

September 11, 2020

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE