

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

IN RE WELLBUTRIN XL ANTITRUST LITIGATION
THIS DOCUMENT RELATES TO:  INDIRECT PURCHASER ACTIONS

Case No. 2:08-cv-2433 (indirect)

Hon. Gerald A. McHugh

**MEMORANDUM OF LAW IN SUPPORT OF INDIRECT PURCHASER PLAINTIFFS’  
MOTION FOR DISTRIBUTION OF THE NET SETTLEMENT FUND AND  
APPLICATION FOR AWARD OF FEES FOR SETTLEMENT ADMINISTRATION**

Indirect Purchaser Plaintiffs<sup>1</sup> (“Plaintiffs”) respectfully submit this Memorandum of Law in support of their Motion for distribution of the Net Settlement Fund<sup>2</sup> to members of the Class whose claims have been approved by the Court-appointed Claims Administrator, Class Action Settlement Services, LLC (“CASS”).

Plaintiffs respectfully request that the Court enter the [Proposed] Order Approving Indirect Purchaser Plaintiffs’ Motion for Distribution of the Net Settlement Fund and Application for Award of Fees (“Proposed Order,” attached as Exhibit A to the Notice of Motion), that, *inter alia*: (i) approves the administrative determinations of CASS concerning the claims filed in this case; (ii) directs distribution of the Net Settlement Fund to Class members and/or their assignees whose Claim Forms have been approved; (iii) authorizes payment to CASS of their reasonable fees and expenses associated with the administration of the Settlement; (iv) approves an award of attorneys’ fees incurred by Class Counsel for administration of the Settlement; (v) ordering that

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<sup>1</sup> Indirect Purchaser Plaintiffs are: Aetna of California, Inc., Plumbers and Pipefitters Local 572 Health and Welfare Fund, IBEW-NECA Local 505 Health and Welfare Plan, and Painters District Council No. 30 Health and Welfare Fund.

<sup>2</sup> As defined in the Settlement Agreement, the Net Settlement Fund is the amount remaining in the settlement fund for distribution of approved claims after reduction for payment of taxes, attorney’s fees, payments to the class representatives and disbursements for such costs and expenses as approved by the Court.

all persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the claims filed herein, or otherwise involved in the administration or taxation of the Net Settlement Fund, be released and discharged from any and all claims by Class members arising out of such involvement; and (vi) finally and forever barring further claims against the Settlement Fund (as defined below).

## **I. BACKGROUND**

On February 22, 2013, the Court issued an Order granting preliminary approval to the Settlement between Plaintiffs, individually and on behalf of the Class they represent,<sup>3</sup> and Defendant Valeant<sup>4</sup> in this action (“Valeant Settlement”). Dkt. No. 456 (“Preliminary Approval Order”). The Preliminary Approval Order established a settlement fund of \$11.75 million dollars plus the lesser of \$500,000 or 50% of the actual costs of notifying Class members of the Settlement, to be funded by Valeant (“Settlement Fund”).

On July 22, 2013, the Court gave final approval to the Valeant Settlement and the plan of allocation (“Final Approval Order,” Dkt. No. 473), which set out the procedures and methods for CASS to allocate and distribute the Net Settlement Fund to Class members. Final Approval

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<sup>3</sup> The Indirect Purchaser Class certified by the Court is defined as follows:

(1) All persons or entities who purchased an AB-rated generic bioequivalent of Wellbutrin XL (“generic XL”) at any time during the “Class Period” (hereafter defined) in California, Florida, Nevada, New York, Tennessee and Wisconsin; and

(2) All entities that purchased 150 mg or 300 mg Wellbutrin XL before an AB-rated generic bioequivalent was available for such dosages AND purchased generic XL in the same state after generic XL became available in California, Florida, Nevada, New York, Tennessee and Wisconsin.

For purposes of the Class definition, persons or entities purchased Wellbutrin XL or generic XL if they paid some or all of the retail purchase price. Excluded from the Class are “flat co-payers” meaning natural persons whose only purchases of generic XL were made pursuant to contracts with third party payers (“TPP”) whereby the amount paid by the natural person for generic XL was the same regardless of the retail purchase price.

The Class Period begins November 14, 2005 and ends on April 29, 2011.

Order at 1-2, Aug. 15, 2014, Dkt. No. 354.

<sup>4</sup> Defendant Valeant includes Valeant Pharmaceuticals International, Inc. (f/k/a Biovail Corp.) and Valeant International Bermuda f/k/a Valeant International (Barbados) SRL (f/k/a Biovail Laboratories SRL and successor-in-interest to Biovail Laboratories, Inc.). These companies are collectively referred to as “Valeant.”

Order at 5. The Court retained exclusive jurisdiction over the Settlement, the plan of allocation, and distribution of the Net Settlement Fund to members of the Class. *Id.* at 9.

As the Court is aware, Plaintiffs continued to litigate this case against Defendants SmithKline Beecham Corporation d/b/a GlaxoSmithKline and GlaxoSmithKline PLC (collectively, “GSK”). On September 23, 2015, the Court granted GSK’s motion for summary judgment. Dkt. No. 594. On October 21, 2015, Plaintiffs filed a timely Notice of Appeal. Dkt. No. 596. On August 9, 2017, the Court of Appeals issued a decision affirming the District Court’s grant of summary judgment in favor of GSK.<sup>5</sup> *In re Wellbutrin XL Antitrust Litig.*, No. 15-2875, 868 F.3d 132 (3d Cir. 2017), *judgment entered sub nom*, 2017 WL 3529114 (3d Cir. Aug. 9, 2017).

Indirect Purchaser Class Counsel delayed moving the Court to permit distribution of the Valeant Settlement funds until now to await conclusion of the litigation against GSK in order to avoid unnecessary expenses associated with multiple distributions. In light of the Court of Appeal’s decision, Indirect Purchaser Class Counsel are now proceeding with the distribution of the Net Settlement Fund.

## II. THE CLAIMS ADMINISTRATION PROCESS

CASS,<sup>6</sup> the Claims Administrator, established and followed certain procedures to ensure accurate and efficient allocation and distribution of the Net Settlement Fund to Class members, including, *inter alia*:

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<sup>5</sup> Indirect Purchaser Plaintiffs also appealed the Court’s June 30, 2015 Order decertifying the Indirect Purchaser Class. *In re Wellbutrin XL Antitrust Litig.*, No. 15-2875 (3d Cir.). In affirming the District Court’s grant of summary judgment, the Third Circuit did not reach that issue.

<sup>6</sup> See Declaration of Matthew B. Sears in Support of Indirect Purchaser Plaintiffs’ Motion for Distribution of the Net Settlement Fund and Application for Award of Fees for Settlement Administration, dated December 12, 2017 (“Sears Decl.”) submitted herewith.

CASS established a post office box to receive Class members' claims forms and operated an informational telephone line from February 2013 to August 2013 for the purposes of communicating with Class members. Sears Decl, ¶ 6. CASS received a total of 372 calls from prospective Class members, who inquired about the claims submissions process and required documentation, as well as the Settlement in general. *Id.*

CASS took steps to identify and remove any duplicate claims. For example, if a claim was submitted by an authorized agent on behalf of a Class member—*e.g.*, a third-party administrator or a professional benefits manager—that party was required to identify the Class member by name and taxpayer identification number. Using this information, CASS performed a cross-check against all submitted claims to identify any duplicate claims. *Id.*, ¶ 7.

CASS audited any claims that raised a red flag (due to the amount of damages claimed, the evidence submitted, or any other information provided). When required, CASS requested that the claimant provide additional proof or evidence of the damages claimed. *Id.*, ¶ 15.

In order to administer claims for allocation of funds among Class members, CASS received, reviewed, and maintained all claim forms and accompanying documents. *Id.*, ¶ 8. CASS analyzed all payment information submitted by Third-Party Payer (“TPP”) and consumer claimants, as well as created a database identifying claimants who were eligible to participate in this settlement and the amounts of their qualifying payments for Wellbutrin XL and its AB-rated generic bioequivalent. *Id.*

Between March and July 12, 2013 (the claims submission deadline), CASS received 887 claims from Class members—351 from consumers, and 536 from TPPs. *Id.*, ¶ 10. CASS has determined that 277 of the 351 consumer claims and 480 of the 536 TPP claims are eligible to participate in the Settlement. *Id.*

**III. THE COURT SHOULD ENTER THE PROPOSED DISTRIBUTION ORDER**

**A. CASS's Administrative Determinations are Reasonable and Should be Approved.**

The current size of the Net Settlement Fund (including accrued interest) is \$6,025,156.04, less CASS's requested reimbursement of expenses and Class Counsel's request for attorneys' fees incurred for administering the settlement discussed *infra. Id.*, ¶ 11. CASS recommends that the Court approve the distribution of the Net Settlement Fund to the 277 consumer claimants and 478 TPP claimants whose claims CASS has approved. The Court-approved Plan of Distribution provides that the Net Settlement Fund will be "allocated into: (i) a consumer settlement pool of funds, in the amount of 10% of the total available settlement funds, and (ii) a [TPP] settlement pool of funds, in the amount of 90% of the total available settlement funds." Dkt. No. 454, Ex. C. Eligible consumer claimants will be paid at a recognized loss rate of 20% of their qualifying purchases during the class period, while TPP claims will be paid on a *pro rata* basis of available funds, using the dollar amounts of qualifying purchases during the class period. *Id.* In addition, "any remaining funds in the consumer settlement pool of funds will spill over to the [TPP] settlement pool of funds. After such spill-over, substantially all of the available funds will be distributed to the [TPP] claimants." *Id.*

The 277 approved consumer claims had total submitted claim amounts of \$85,615. Sears Decl, ¶ 12. Applying the 20% recognized loss rate provided for in the Court-approved Plan of Distribution, the 277 approved consumer claims had an allowed claim amount of \$17,123.02. *Id.*

Class Counsel and CASS also recommend that the Court approve a minimum payment amount of \$10 to the 174 approved consumer claimants whose allowed claims would result in a distribution of less than \$10 under the Plan of Distribution. *See* Ex. A. Applying a \$10 minimum payment amount would result in a total allowed claim amount of \$17,249.26 for all consumer

claimants, an increase of \$126.24 over the 20% consumer recognized loss rate consumer allocation. Sears Decl, ¶ 13. After paying out all approved consumer claims, \$585,266.34 will remain in the consumer settlement pool of funds and will thus “spill-over” to the TPP settlement fund. *Id.*

The TPP fund, constituting 90% of total available Settlement funds, has a balance of \$5,422,640.43. *Id.*, ¶ 14. After including the \$585,266.34 in spill-over funds from the unused consumer settlement fund, the TPP settlement fund will total approximately \$6,007,906.77. *Id.* As stated *supra*, CASS recommends 478 of the 536 submitted TPP claims be approved by the Court to be paid their *pro rata* share of the TPP fund. *Id.* CASS and Class Counsel further recommend that the Court approve a minimum payment amount of \$10 to the 51 approved consumer claimants whose allowed claims would result in a pro rata distribution of less than \$10. *Id.* A \$10 minimum distribution to both consumer and TPP claimants will incentivize claimants to promptly cash their checks.

**B. CASS’s Administrative Expenses and Fees Should be Approved.**

The Settlement provides that expenses and costs incurred in connection with the administration of the Settlement may be paid from the Settlement Fund subject to approval by the Court. Dkt. No. 454, Ex. A.

CASS’s administrative fees and expenses incurred to date and expected to be incurred through the distribution of the Net Settlement Fund total \$305,000.00. Sears Decl., ¶ 22. To date, CASS has received Court-approved payment for out-of-pocket expenses totaling \$202,023.33 from the Settlement Fund. *Id.* Accordingly, CASS is due a balance payment of \$102,976.67 from the Settlement Fund, which includes CASS’s estimate of the fees and expenses that will necessarily be incurred through the final distribution of the Net Settlement Fund. *Id.* CASS’s invoice for its expenses is attached as Exhibit E to the Sears Decl. Plaintiffs

respectfully request that the Court authorize payment from the Settlement Fund to CASS in the amount of \$102,976.67 for their expenses in administering the Settlement.

**C. Class Counsel's Request for Attorneys' Fees Incurred for Administration of the Settlement.**

The Court previously awarded Class Counsel's motion for attorneys' fees and expenses in the Court's July 22, 2013 Final Approval Order. Dkt. No. 473. The Court-approved Notice provides that Class Counsel may "make a further request for additional attorneys' fees and expenses incurred as a result of administration of the Valeant Settlement. All awards for attorneys' fees and expenses shall be paid from the Valeant Settlement Fund after the Court approves them." Dkt. No. 454, Ex. B at ¶ 22; *see also* Preliminary Approval Order, Dkt. No. 456.

Class Counsel has expended a total of 100.5 hours in connection with the administration of the Valeant Settlement, representing a lodestar of \$41,020. As detailed in the accompanying Declarations of Peter D. St. Phillip, Jr. and Kenneth A. Wexler, this represents the time that Class Counsel spent working with the Court-appointed Claims Administrator, CASS, to review submitted consumer and TPP claim documentation and CASS's administrative claim determinations, where necessary, as well as preparing Plaintiffs' Motion for Distribution of the Net Settlement Fund. Plaintiffs respectfully request that the Court award Class Counsel's application for \$41,020 in additional attorneys' fees incurred as a result of administration of the Settlement.

**D. Notice of This Distribution Motion Will Be Provided to Claimants.**

Class Counsel has instructed the Notice Administrator to post this motion and its supporting documentation on the official Settlement website, [www.WXLclassaction.com](http://www.WXLclassaction.com), so that it may be viewed by members of the Settlement Class. Ineligible claimants have previously been

provided notice that their claims were determined to be ineligible to share in the Net Settlement Fund. Sears Decl., ¶ 15.

### **CONCLUSION**

Indirect Purchaser Plaintiffs respectfully request that the Court (i) approve the Net Settlement Fund allocation as determined by CASS, (ii) authorize CASS to distribute to each approved Consumer and TPP claimant its share of the Net Settlement Fund, after deduction of the payments requested herein, (iii) authorize the payment of expenses to CASS in the amount of \$102,976.67, and (iv) approve an award of attorneys' fees incurred by Class Counsel for administration of the Settlement. Plaintiffs also respectfully request that the Court finally and forever bar further claims against the Settlement fund. A Proposed Order is submitted herewith.

Dated: December 12, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Uriel Rabinovitz, hereby certify that on December 12, 2017, the foregoing document was served upon Counsel of record via the Court's electronic filing system.

/s/ Uriel Rabinovitz  
Uriel Rabinovitz