

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

NEW ENGLAND CARPENTERS  
HEALTH BENEFITS FUND; PIRELLI  
ARMSTRONG RETIREE MEDICAL  
BENEFITS TRUST; TEAMSTERS  
HEALTH & WELFARE FUND OF  
PHILADELPHIA AND VICINITY;  
PHILADELPHIA FEDERATION OF  
TEACHERS HEALTH AND WELFARE  
FUND; DISTRICT COUNCIL 37,  
AFSCME - HEALTH & SECURITY  
PLAN; JUNE SWAN; BERNARD  
GORTER; SHELLY CAMPBELL and  
CONSTANCE JORDAN,  
Plaintiffs,

v.

FIRST DATABANK, INC., a Missouri  
Corporation; and McKESSON  
CORPORATION, a Delaware Corporation,  
Defendants

Civil Action No. 1:05-CV-11148-PBS

**[AMENDED ~~PROPOSED~~] ORDER GRANTING PRELIMINARY APPROVAL  
OF THE MCKESSON SETTLEMENT, CERTIFYING THE U&C CLASS FOR  
PURPOSES OF SETTLEMENT ONLY, DIRECTING NOTICE TO THE CLASS  
AND SCHEDULING A FINAL APPROVAL HEARING**

WHEREAS, this matter has come before the Court pursuant to a Motion for  
Preliminary Approval of Settlement, Certification of Private Payor Settlement Class,  
Approval of Class Notice, and Scheduling of Final Approval Hearing;

WHEREAS, the Court finds that it has jurisdiction over this action and each of the parties under 28 U.S.C. §§ 1331 and 1332 and that venue is proper in this district;

WHEREAS, this Court conducted a hearing on December 11, 2008, with regard to a Settlement between plaintiffs and McKesson Corporation, and has fully considered the record of these proceedings, the representations, argument, and recommendation of counsel for the moving parties, and the requirements of law;

WHEREAS, in response to an objection made by certain absent class members referred to as the Independently Represented Third Party Payors (the “IRTPPs”), the parties submitted an Amended Settlement Agreement on January 21, 2009; and

WHEREAS, the IRTPPs have withdrawn their objection to preliminary approval of the Settlement.

**IT IS HEREBY ORDERED THAT:**

**I. Preliminary Approval of the Amended Settlement Agreement and Release and Certification of Private Payor Settlement Class**

The terms of the Settlement Agreement and Release between plaintiffs and defendant McKesson Corporation (“McKesson”), dated November 20, 2008, as amended by the Amended Settlement Agreement dated January 21, 2009, including all exhibits thereto (the “Amended Settlement Agreement” or “Settlement,” attached hereto as Exhibit 1) are preliminarily approved, subject to further consideration thereof prior to or at the Final Approval Hearing provided for below. Unless otherwise provided herein, the terms defined in the Amended Settlement Agreement shall have the same meaning in this Order. The Amended Settlement Agreement was entered into at arms length by experienced counsel and only after extensive arms length negotiations lasting many months. Both the Settlement and Allocation negotiations were presided over by an

experienced mediator. The Amended Settlement Agreement is not the result of collusion. The Settlement bears a reasonable relationship to the claims alleged by plaintiffs and the litigation risks of plaintiffs as well as McKesson. The Settlement is sufficiently within the range of reasonableness so that notice of the Settlement should be given as provided by this Order.

The Court further finds, on a preliminary basis for settlement purposes only, that the Rule 23 factors are present and that certification of the following subclass is appropriate under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure.

Class 3: Cash Payor Settlement Class: All uninsured or underinsured individual persons who, during the period from August 1, 2001, through the date of the Settlement Court's preliminary approval of the Settlement, paid or incurred a debt enforceable at the time of judgment in this case for any of the drugs listed in Appendix A to Plaintiffs' Third Amended Complaint, Docket Entry #360 ("Marked Up Drugs").

The Court previously certified a class of TPPs and a class of consumers who paid percentage co-pays. Although similar in many respects to the previously certified classes the proposed U&C Class is distinguishable in that U&C class members paid the cash or usual and customary ("U&C") price, whereas members of the certified classes purchased drugs according to an AWP-based contractual reimbursement formula. In support of their motion to certify the U&C class, plaintiffs submitted a report by their expert, Dr. Hartman, opining that U&C prices are formulaically tied to AWP, as well as deposition testimony, declarations, and documents produced by retail chains and other third parties relating to U&C pricing.

On the record currently before it, the Court finds that there is sufficient evidence to support certification of the Cash Payor Settlement Class for the purposes of

preliminary approval of the proposed settlement.<sup>1</sup> Specifically, the Court preliminarily finds for settlement purposes only that the proposed Cash Payor Settlement Class satisfies the following factors of Rule 23(a) and (b)(3):

**Rule 23(a)**

- (a) Numerosity: Numerosity is established in that the size of the proposed class, even if not exactly determined, is sufficiently large to make joinder impracticable, given the relevant circumstances. *In re Relafen Antitrust Litig.*, 22 F.R.D. 260, 267 (D. Mass 2004)(Young, J.) In this settlement, the proposed class encompasses millions of uninsured and underinsured consumers who have asserted claims or potential claims against the settling defendant. Thus, the Rule 23(a)(1) numerosity requirement has been met.
- (b) Commonality: Generally, the commonality requirement is easily met, provided that at least one common question of law or fact exists. *In re AWP*, 230 F.R.D. at 78.

The numerous common factual and legal issues to be decided include, but are not limited to, the following:

- a. Whether AWP's published by First Data are used as a contractual benchmark for payments by third-party payors for drugs;
- b. Whether defendants engaged in a course of conduct that improperly inflated the WAC-to-AWP markup and the ultimate

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<sup>1</sup> While the Court has previously expressed concern about the manageability of the proposed U&C class, those concerns are not relevant to certification of a settlement class. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial."). The Court further notes that McKesson has consented to certification of the Cash Payor Settlement Class for settlement purposes only, without prejudice to McKesson's ability to oppose such certification if the Court does not give final approval to the Settlement.

AWPs or cash price used by plaintiffs and Class Members as the basis for reimbursement;

- c. Whether defendants agreed to artificially inflate the published AWP and the cash price for the drugs that are the subject of this complaint or the inflation of the cash price was a foreseeable consequence of an agreement to increase AWP;
  - d. Whether defendants engaged in a pattern and practice that caused plaintiffs and Class Members to make inflated payments for brand name drugs;
  - e. Whether defendants engaged in a pattern of deceptive and/or fraudulent activity intended to defraud plaintiffs and the Class Members;
  - f. Whether defendants formed enterprises for the purpose of carrying out the 5% Scheme;
  - g. Whether defendants used the U.S. mails and interstate wire facilities to carry out the 5% Scheme;
  - h. Whether defendants' conduct violated RICO.
- (c) Typicality: The proposed class representatives' claims arise from the same course of conduct and share the same legal theory, as do the claims of the putative Class members. Furthermore, the proposed class representatives will advance the interests of all class members. The proposed class representatives' claims are typical of those of the proposed Class and satisfy Rule 23(a)(3).
- (d) Adequacy: The proposed class representatives assert claims representative of the claims of the entire class with regard to pharmaceutical purchases. As such, even though the claims may not be identical to every claim of every putative Class member, the proposed class representatives can adequately represent the putative Class.

The adequacy factor also considers Class Counsel. In this case, Class Counsel regularly engage in complex litigation similar to the present case and have dedicated substantial resources to the prosecution of this matter. The adequacy requirement is satisfied.

**Rule 23(b)(3)**

- (e) Predominance: There is predominance. The common legal and factual issues listed above predominate and apply to of all claims and defenses in the litigation. All of these common questions constitute a significant part of each individual plaintiffs' and Class members' case. The resolution of these questions will either prove or disprove essential elements of every Class members' claims and will do so on a simultaneous, class-wide basis.
- (f) Superiority: A settlement class that will resolve the issues common to all Class members is superior to numerous trials that would risk disparate results for similarly situated people and entities. The cost of litigation on a case by case basis would be extremely costly for each plaintiff and the putative Class members. Piecemeal litigation would also tax the resources of the judiciary, and could result in inconsistent adjudications. Consequently, the requirements of Rule 23(b)(3) are satisfied.

In the interest of clarity, the Court notes that the Court makes the above findings regarding certification of the proposed Class for the purposes of settlement only. Further, the Court's findings regarding the class certification requirements of Rule 23(a) and (b)(3) are subject to a fairness hearing at a later date.

In addition to the Cash Payor Settlement Class, the Settlement also includes the Co-Pay Consumer and TPP classes previously certified in the Court's March 19, 2008 Order. The March 19 Order defines these classes as follows, with the correction of the end date of the class period from May 15, 2005 to March 15, 2005 to conform to the pleadings and plaintiffs' motion for class certification:

[T]he Court certifies the following class for a period beginning August 1, 2001 and ending on March 15, 2005 for all purposes [hereinafter the "Class Period"]:

Class 1, Consumer Purchasers: All individual persons who paid, or incurred a debt enforceable at the time of judgment in this case to pay, a percentage co-payment for the Marked

Up Drugs during the Class Period based on AWP, pursuant to a plan, which in turn reimbursed the cost of brand-name pharmaceutical drugs based on AWP.

The Court also certifies the following class for a period beginning August 1, 2001 and ending on December 31, 2003 for the purposes of damages, and for a period beginning August 1, 2001 and ending March 15, 2005 for purposes of liability and equitable relief:

Class 2, Third-Party Payors: All third-party payors (1) the pharmaceutical payments of which were based on AWP during the Class Period; (2) that made reimbursements for drugs based on an AWP that was marked up from 20 to 25% during the term of its contract with its PBM or with another entity involved in drug reimbursement; and (3) that used First DataBank or Medispan for determining the AWP of the Marked Up Drugs.

The terms “Co-Pay Consumer Settlement Class” and “TPP Settlement Class” refer to Class 1 and Class 2, respectively, and are comprised of the same membership, respectively. The Cash Payor Settlement Class, the Co-Pay Consumer Settlement Class, and the TPP Settlement Class are referred to collectively as the “Private Payor Settlement Class.” Excluded from the Private Payor Settlement Class are Defendants, their respective present and former, direct and indirect, parents, subsidiaries, divisions, partners and affiliates; the United States government, its officers, agents, agencies and departments; the States of the United States and their respective officers, agents, agencies and departments; and all other local governments and their officers, agents, agencies and departments.

Those entities that own or operate businesses referred to commonly as pharmacy benefit managers (“PBMs”) and who as part of their business operation contract with ultimate Third Party Payors of a prescription pharmaceutical benefit to perform certain services in the administration and management of that prescription pharmaceutical

benefit for those ultimate Third Party Payors are not class members under the Private Payor Settlement Class definition of this Order. The class includes the ultimate Third Party Payors providing the prescription pharmaceutical benefit and not the PBMs with which those Third Party Payors contract to administer or manage that prescription benefit on behalf of the class members, unless such PBMs are the fiduciary of the Third Party Payors or by contract assumed, in whole or in part, the insurance risk of that prescription pharmaceutical benefit during the period from August 1, 2001 through March 15, 2005.

## **II. Class Representatives**

The Court preliminarily appoints the following as class representatives of the Private Payor Settlement Class: New England Carpenters Health Benefits Fund; Pirelli Armstrong Retiree Medical Benefits Trust; Teamsters Health & Welfare Fund of Philadelphia and Vicinity; Philadelphia Federation of Teachers Health and Welfare Fund; District Council 37, AFSCME – Health & Security Plan; June Swan; Bernard Gorter; Shelly Campbell; and Constance Jordan.

## **III. Approval of Settlement Notices and Notice Program**

The Court finds that the Settlement Notices attached as Exhibits A.1, A.2, B.1, B.2, C.1, and C.2 to the Settlement Agreement satisfy the requirements of Rule 23(c)(2) and due process and accordingly approves those Settlement Notices, as conformed to the Amended Settlement Agreement. The Court further approves the Notice Program set forth in the Kinsella Declarations.<sup>2</sup>

The Court further directs that Kinsella Media LLC (formerly Kinsella/Novak Communications, Ltd.), be appointed the Class Notice Consultant (as defined in the

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<sup>2</sup> Docket Nos. 625, 643, 675.

Amended Settlement Agreement) and, consistent with the Notice Program, directs the Class Notice Consultant to provide notice to the Private Payor Settlement Class in the following manner:

- (a) Publication of Notice Forms substantially in the forms contained in Exhibits A.1, B.1 and C.2 to the Amended Settlement Agreement, in the publications substantially as set forth in the Notice Program, according to the publication schedule set forth in the Exhibit E to the Amended Settlement Agreement;
- (b) Distribution by direct mail of Notice Forms substantially in the forms contained in Exhibits A.2, B.2, and C.1 to the Amended Settlement Agreement, to all members of the Private Payor Settlement Class that can be identified by reasonable means or who have requested a copy, which mailing shall be placed in the mail no later than April 1, 2009;
- (c) Development and management of a toll free telephone number with an automated system providing information about the Amended Settlement Agreement, with the ability to request copies of the Settlement Notices or Amended Settlement Agreement, during the period from April 1, 2009, until entry of Final Judgment; and
- (d) Development and management of a website to provide information and permit the review and downloading of the Settlement Notices, Amended Settlement Agreement, and exhibits to the Amended Settlement Agreement, during the period from April 1, 2009, until Final Judgment.

#### **IV. Consumer Co-payor Information**

To increase the proportion of consumer class members who obtain a financial recovery from the Settlement, the Court hereby orders members of the TPP Class, to provide certain information about their percentage co-payor members to the Claims Administrator, as set forth in the TPP claims form (Exhibit K). This information shall be provided to the Claims Administrator on behalf of the Class, and the Claims Administrator, who will be subject to the Court's October 11, 2006 protective order governing the use of confidential health information, shall use the data for the sole

purpose of calculating the checks and sending them to members of the Co-pay Consumer Class.

By complying with the Court's order and the claims process, it is hereby ordered that TPPs fall within the safe harbor of the Health Insurance Portability and Accountability Act for court-ordered production of personal health information, 45 C.F.R. § 164.512(e)(1)(i), and TPPs shall have no liability under HIPAA or any state confidentiality statute, regulation, or other requirement, for supplying such member information to the Claims Administrator. Further, TPPs will not be deemed to be guarantors for the completeness or accuracy of the data they provide. TPPs are to use their best reasonable efforts to supply the requested data, but shall not be liable in any way to any party, class member, member, or any other person or entity for any claim related to the completeness or accuracy of any data provided, or for any other liability of any kind. Furthermore, the Claims Administrator is likewise not a guarantor for the completeness or accuracy of the data provided to it and shall have right to rely in good faith upon the data provided by TPPs when determining Co-pay Consumer check amounts.

To ensure accurate and complete information members of the Co-pay Consumer Class are encouraged to submit their own claims form. See Exhibit B.2.

#### **V. Appointment of Class Counsel**

The Court preliminarily finds that the following counsel fairly and adequately represent the interests of the putative Private Payor Settlement Class and hereby appoints the following law firms as Class Counsel pursuant to Rule 23(g): Hagens Berman Sobol Shapiro LLP; Spector Roseman Kodroff & Willis; Wexler Wallace LLP; and Edelson & Associates, LLC.

## **VI. Final Approval Hearing**

The Court directs that a hearing be scheduled for July 23, 2009 at 2 p.m., on final settlement approval (the "Final Approval Hearing") before this Court at the United States District Court for the District of Massachusetts, One Courthouse Way, Boston, Massachusetts 02210, to consider, *inter alia*, the following: (a) whether the Private Payor Settlement Class should be certified, for settlement purposes only; (b) the fairness, reasonableness, and adequacy of the Settlement; and (c) Class Settlement Counsel's application for an award of attorneys' fees and costs. Objectors to the Settlement may be heard at the Final Approval Hearing, however, no objector shall be heard and no papers or briefs submitted will be accepted or considered by the Court unless, on or before June 8, 2009, any such objector: (1) has filed with the Clerk of the Court in writing a notice of any such objector's intention to appear personally or, if such objector intends to appear by counsel, such counsel files a notice of appearance; (2) such objector personally or by counsel submits a written statement describing in full the basis for such objector's opposition, and attaches any supporting documentation and a list of any and all witnesses or experts whom such objector shall present to the Court; and (3) has served concurrently therewith copies of such notice(s), statement(s), documentation, and list(s) together with copies of any other papers or brief(s) that the objector files with the Court or wishes the Court to consider at the Final Approval Hearing, upon: (i) Steve W. Berman, Hagens Berman Sobol Shapiro LLP, 1301 Fifth Avenue, Suite 2900, Seattle, WA 98101, Lead Class Settlement Counsel; and (ii) Lori A. Schechter, Morrison & Foerster LLP, 425 Market Street, San Francisco CA 94105, Counsel for McKesson Corporation.

## **VII. Procedures and Deadlines for Opt-Outs, Opt-Ins, and Claimants**

### **(A) Appointment of Claims Administrator**

The Court appoints Rust Consulting, Inc. (formerly Complete Claims Solutions, LLC), as the Claims Administrator.

(B) Opt-In Rights

The Court directs that any TPP Opt-Out or Co-Pay Consumer Opt-Out who now wishes to participate in the Settlement may revoke its request for exclusion from the class certified by the Court's March 19, 2008 Order by submitting a written revocation of that request to the Claims Administrator. To be effective, a revocation of request for exclusion by a TPP Opt-Out must be postmarked or delivered no later than June 3, 2009, and must otherwise comply with the procedures for revoking a request for exclusion set forth in the TPP Information Request and Opt-In Notice.

(C) Dissemination of TPP Information Request and Opt-In Notice

The Court directs that, no later than ten days after entry of this Order, the Claims Administrator shall send to each TPP Opt-Out documents substantially in the form of the TPP Information Request and the TPP Opt-In Notice attached to the Amended Settlement Agreement as Exhibits C.3 and C.4. The TPP Information Request shall request that the TPP Opt-Out specify, in writing and under penalty of perjury under the laws of the United States, its name, federal tax ID, and the number of lives for which the TPP provided prescription drug coverage during 2007 (or the last full year the TPP offered prescription drug coverage). The TPP Opt-In Notice shall advise each TPP Opt-Out of its right to participate in the TPP Settlement Class and to revoke its request for exclusion from the class certified by the Settlement Court's March 19, 2008 Order if it chooses to do so. The Claims Administrator shall provide copies of all TPP Information Requests and Opt-In Notices to McKesson's Counsel and Class Settlement Counsel by mail or email at the same time they are delivered to TPP Opt-Outs. Copies of all responses to

TPP Information Request forms shall be delivered to McKesson's Counsel within five business days of receipt by Class Settlement Counsel or the Claims Administrator but in no event later than fifty (50) calendar days before the Final Approval Hearing.

If any TPP Opt-Out does not supply all of the information specified by the TPP Information Request within thirty (30) calendar days of mailing and does not revoke its request for exclusion from the TPP Class, the parties are authorized to seek the information specified in the TPP Information Request by subpoena and to enforce any such subpoena by all lawful means.

(D) Cash Payor Opt-Outs

Any putative member of the Cash Payor Settlement Class who wishes to exclude himself or herself from the Private Payor Settlement Class must submit a written request to be so excluded to the Claims Administrator. To be effective, any Cash Payor's request for exclusion from the Private Payor Settlement Class must be postmarked no later than June 8, 2009, and must otherwise comply with the procedures for requesting exclusion from the Private Payor Settlement Class set forth in the Settlement Notices.

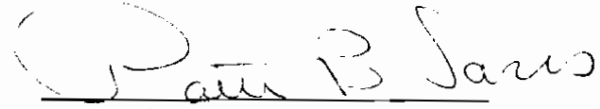
(E) Claims Deadline

In order to participate in the Settlement and receive a distribution from the Settlement Fund, a TPP Class Member must mail to the Claims Administrator a properly executed Proof of Claim and Release Form in substantially the form contained in Exhibit K to the Amended Settlement Agreement. To be effective, any such Proof of Claim and Release Form must be postmarked no later than July 9, 2009, and must otherwise comply with the procedures and instructions set forth in the Proof of Claim and Release Form.

**SO ORDERED.**

DATED: Boston, Massachusetts

This 5 day of March, 2009



Patti B. Saris  
Patti B. Saris, Judge  
United States District Court