

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

HARTIG DRUG COMPANY INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	C.A. No. 14-719-JFB-SRF
SENJU PHARMACEUTICAL CO. LTD.,)	
KYORIN PHARMACEUTICAL CO., LTD.,)	
AND ALLERGAN, INC.,)	
)	
Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S UNOPPOSED MOTION
TO AUTHORIZE DISTRIBUTION OF THE SETTLEMENT FUND**

OF COUNSEL:	J. Clayton Athey (#4378)
	Eric J. Juray (#5765)
Brent W. Landau	PRICKETT, JONES & ELLIOTT, P.A.
HAUSFELD LLP	1310 King Street
325 Chestnut Street, Suite 900	Wilmington, DE 19899
Philadelphia, PA 19106	(302) 888-6500
	jcathey@prickett.com
Melinda R. Coolidge	ejjuray@prickett.com
HAUSFELD LLP	
1700 K Street NW, Suite 650	Settlement Liaison Counsel and Attorneys for
Washington, DC 20006	Plaintiff Hartig Drug Company Inc.
Gregory A. Frank	
Marvin L. Frank	
FRANK LLP	
275 Madison Ave. #705	
New York, NY 10016	
Co-Lead Counsel and Attorneys for	
Plaintiff Hartig Drug Company Inc.	

Settlement Class Counsel and Attorneys for Plaintiff Hartig Drug Company Inc.

Plaintiff respectfully submits this memorandum in support of its motion to authorize distribution of funds from the Settlement Fund (as defined below) to claimants.

I. FACTUAL BACKGROUND

On November 9, 2019, the Court granted final approval of the settlement between Plaintiff Hartig Drug Company Inc. (“Plaintiff” or “Hartig”) and Senju Pharmaceutical Co., Ltd., Kyorin Pharmaceutical Co., Ltd., and Allergan Inc. (together, “Defendants”), reached on behalf of the below Settlement Class:

All persons or entities in the United States who purchased branded Zymar or Zymaxid directly from any of the Defendants at any time during the Class Period (June 15, 2010 through and including December 31, 2017). The Settlement Class does not include Defendants, government entities or any person or entity in which any Defendant holds a controlling interest, the officers, directors, employees, affiliates, subsidiaries, legal representatives, heirs, successors and assigns of any such person or entity, as well as any immediate family member of any officer, director or employees of any named Defendant that is not a natural person, and any judge or magistrate involved in this matter, as well as members of their immediate family.

See D.I. 75.

Plaintiff now seeks authorization to distribute funds from that settlement to claimants. The Garden City Group, (“GCG”), serving as the Court-approved Claims Administrator, has engaged in the claims administration process, and the Settlement Fund, less the deductions set forth in more detail below, is ready to be distributed to Settlement Class members. *See* Supplemental Declaration of Eric Kierkegaard re Final Claim Determination & Distribution, dated April 4, 2019 (“Kierkegaard Declaration”).

II. CLAIMS ADMINISTRATION PROCESS

GCG was charged with various administrative tasks, including: disseminating notices and claim forms; publishing summary notices; receiving and processing claims and requests for

exclusion; responding to class member inquiries; establishing and maintaining a settlement website; and performing such other duties as were directed by the Court or the parties. D.I. 56 (Order Preliminarily Approving Settlement); D.I. 60. (Declaration of Brandon Schwartz concerning Proposed Notice Program and Administration); D.I. 61 (Order Granting Motion to Distribute Notice to the Class and Approving the Plan of Allocation). GCG also conducted the administrative tasks associated with collecting claim forms from claimants, evaluating and auditing those claim forms, and ultimately calculating the appropriate allocated amount for each qualified claimant. Kierkegaard Declaration at ¶¶ 2-13.

A. Claim Form Deadline and Documentation

The postmark deadline for Settlement Class members to submit claims was October 5, 2018. To make a claim, Settlement Class members were required to complete the approved Claim Form. The 95 Settlement Class members known or ascertainable through transaction data Defendants provided to GCG were mailed pre-printed Claim Forms that included sales data provided by Defendants. These Settlement Class members were permitted to amend the sales data included on their Claim Form provided they included sufficient documentation to support the change, the accuracy of the supplemental sales data could be verified, and they certified under penalty that the supplemental sales data was true and correct.

GCG received a total of 436 timely Claim Forms and 37 late Claim Forms, for a total of 473 claims received. GCG reviewed claims for completeness, duplication, timeliness, fraud, and whether the claim could be supported by documentation or defendant data.

B. Deficiency Review and Audit Process

While claimants were not initially required to submit supporting documentation for their claimed purchases of Zymar and Zymaxid, the Claim Form required each claimant to agree to

provide additional supporting information if requested and certify under penalty of perjury that, among other things, there was documentation to support the claim. GCG audited all claims with claimed purchase values that were not supported by the transaction data provided by Defendants to GCG. Taken together, GCG audited 444 claims. All claims that were audited were claims filed on behalf of claimants who did not appear to have directly purchased Zymar or Zymaxid according to Defendants' purchase data.

For those claimants who did not provide an adequate response to the initial letter, GCG sent a reminder letter requesting supporting documentation. These letters advised claimants that failure to respond or provide the requested documentation would result in rejection of their claims. After the follow-up efforts noted above, 435 of the claimants did not provide sufficient documentation to support their claim, and their claims were therefore rejected.

A total of 37 claims are eligible for payment, which represent 90% of the class purchases.

C. Late-Filed Claims

Several claims were filed claims after the deadline. *Id.* at ¶ 5. None of these claims was received so late as to interfere with the claims administration process. *Id.* However, through auditing, GCG determined that some of these claims were not valid. *Id.* at ¶¶ 6-8. Therefore, only those late claims that were deemed valid were included and treated as timely claims for purposes of the settlement distribution, and Settlement Class Counsel recommend that they be accepted by the Court. *Id.* It is appropriate for the Court to approve distribution to claimants who filed these late claims, particularly where, as here, it is equitable to do so. *See In re Orthopedic Bone Screw Prod. Liab. Litig.*, 246 F.3d 315, 316-17 (3d Cir. 2001) (late claims may be accepted in class action settlements in accordance with principles of equity when allowing a claimant participation in a settlement works no harm on the conduct of the proceedings and does not

significantly prejudice the interests of the parties); Ann. Manual for Complex Litigation § 21.662 (4th ed.) (“Adequate time should be allowed for late claims before any refund or other disposition of settlement funds occurs.”).

D. The Settlement Fund

As of April 2, 2019, the settlement escrow account totaled \$5,899,231.70. Kierkegaard Declaration at ¶ 9. This includes earned interest and reflect reductions for the payment of attorneys’ fees and expenses and the incentive award approved by the Court (D.I. 70), as well as fees and expenses related to notice and administration approved by the Court (D.I. 63). *Id.*

GCG has been paid \$33,248.68 from the Settlement escrow account for administrative fees and expenses. Additionally, GCG estimates \$15,392.94 for fees and expenses to conduct the initial distribution of the Net Settlement Fund, assuming there is only one distribution.

The amount of the Settlement Fund available for distribution to claimants (holding back GCG’s estimated additional fees and expenses) is \$5,883,838.76 (the “Net Settlement Fund”).

III. PROPOSED DISTRIBUTION

The Net Settlement Fund will be allocated in accordance with the Plan of Allocation approved by the Court. D.I. 61. Under the Plan of Allocation, the Net Settlement Fund shall be distributed to Settlement Class members that submit valid claim forms in proportion to their relevant purchases from defendants of Zymar and Zymaxid.

GCG has completed the processing of claims in connection with the settlement. The Net Settlement Fund is now available for distribution to Settlement Class members who have submitted valid claims. If the Court adopts the recommendations of Settlement Class Counsel and GCG, the distribution would be made pursuant to the chart attached as Exhibit A to the Kierkegaard Declaration. The chart identifies each claimant by number as opposed to names for

purposes of confidentiality, and GCG's recommended allocation is determined according to the Plan of Allocation.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court authorize distribution of the Net Settlement Fund to Settlement Class members who have submitted valid claims as set forth above and in the Kierkegaard Declaration.

Dated: April 8, 2019

PRICKETT, JONES & ELLIOTT, P.A.

OF COUNSEL:

Brent W. Landau
HAUSFELD LLP
325 Chestnut Street, Suite 900
Philadelphia, PA 19106

Melinda R. Coolidge
HAUSFELD LLP
1700 K Street NW, Suite 650
Washington, DC 20006

Gregory A. Frank
Marvin L. Frank
FRANK LLP
275 Madison Ave. #705
New York, NY 10016

*Co-Lead Counsel and Attorneys for
Plaintiff Hartig Drug Company Inc.*

/s/ J. Clayton Athey

J. Clayton Athey (#4378)
Eric J. Juray (#5765)
1310 King Street
Wilmington, DE 19899
(302) 888-6500
jcathey@prickett.com
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