

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

IN RE: DIET DRUGS  
(PHENTERMINE, FENFLURAMINE,  
DEXFENFLURAMINE) PRODUCTS  
LIABILITY LITIGATION

MDL DOCKET NO. 1203

THIS DOCUMENT RELATES TO:

SHEILA BROWN, et al.

v.

AMERICAN HOME PRODUCTS  
CORPORATION

CIVIL ACTION NO. 99-20593

PRETRIAL ORDER NO. 1003

AND NOW, TO WIT, this 3rd day of December, 1999, IT IS ORDERED that the Memorandum below shall supplement the court's order in Pretrial Order No. 1001.

In Pretrial Order No. 1001, this court ruled that based on a hearing held on November 30, 1999, no cause was shown to vacate Pretrial Order No. 997, which preliminarily approved the nationwide settlement in this action. The court's opinion as to preliminary approval is as follows.

I. BACKGROUND

At the show cause hearing held on November 30, 1999, several parties of record in this MDL No. 1203 addressed the court concerning preliminary approval of the settlement. First, the PMC addressed the court on, among other things, the background of the diet drug litigation and this MDL No. 1203, the major elements of the Settlement Agreement before the court and an outline of the notice program contemplated by the Settlement Agreement. (Tr. at

7-19.)<sup>1</sup>

Several representatives who negotiated the Settlement Agreement addressed the court regarding their negotiations and the discovery conducted in MDL No. 1203 and the state court actions in this diet drug litigation. According to these representatives, settlement negotiations with AHP began in April 1999. (Tr. at 21, 24, & 26-27.) A number of attorneys were involved from the start, including the PMC, working in liaison with representatives of other states, and another group led by Gene Locks, Esq., class counsel in New Jersey and New York, working in liaison with other states. (Tr. at 22.) Counsel for AHP indicated that although the original plaintiffs' negotiating group was larger, AHP requested that plaintiffs return with a smaller group that was representative of the larger group, in order to make negotiations more manageable. (Tr. at 27.) Throughout the negotiations, the parties met on a consistent basis, and devoted substantial amounts of time and effort to achieving the Settlement Agreement. (Tr. at 22 & 24.) Throughout May, for example, negotiations were held on a daily basis. (Tr. at 22.) At the negotiations, each of the subclasses in the Brown Complaint was independently represented. (Tr. at 22-23.) Beginning in August, the parties began drafting the Memorandum of Understanding ("MOU"). These efforts involved around-the-clock negotiations. (Tr. at 23.) Once the MOU was drafted those same parties drafted the Settlement Agreement

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<sup>1</sup> All references to "Tr." refer to the transcript of the preliminary approval show cause hearing held by the court on November 30, 1999.

presently before the court. (Tr. at 23.) Throughout the negotiations, input was requested from all interested parties to the Settlement, and advice and counsel was taken from several attorneys involved in the diet drug litigation, as well as from scholars and other experts. (Tr. at 23-24, 25 & 40.) The parties represented to the court that negotiations were hard fought. (Tr. at 24-28 & 35.) In fact, the Settlement Agreement achieved is the first of its kind in that it has incorporated into it three opt out opportunities for class members. (Tr. at 26.)

The representatives who attended the show cause hearing also addressed the court on the progress of discovery within the diet drug litigation. In MDL No. 1203, this court has issued over 1000 pretrial orders involving several discovery issues. The PMC stated that it has examined over 6 million documents and stored them in a database. (Tr. at 28.) The PMC represented that virtually every significant possible member of AHP has been deposed. (Tr. at 28-29.) Several discovery issues have been explored and either were or are being resolved, including issues involving AHP records of E-mail communications and issues involving AHP's privilege log. (Tr. at 29.) Almost all generic expert witnesses of the PMC have been deposed and the PMC is currently completing depositions of defense expert witnesses. (Tr. at 29.) The PMC's work product has been thoroughly analyzed, put into usable form and disseminated to those participating in MDL No. 1203. (Tr. at 29.) With regard to individual plaintiffs, discovery has been completed through fact sheets and depositions of experts. (Tr. at 30-31.) Almost two

years of extensive discovery have been conducted in this MDL No. 1203. (Tr. at 31.)

Representatives at the show cause hearing also addressed the court on the progress of discovery in various state courts. (Tr. at 32.) For example, in New Jersey, over a year of discovery had been conducted, much of which overlapped with discovery in MDL No. 1203 and other state courts. (Tr. at 32-33.) In fact, a trial in New Jersey for a medical monitoring class had begun and was postponed. (Tr. at 32-33.) Also, in Texas, discovery had also proceeded far, as evidenced by the cases settled and tried in that state and the in depth evidentiary hearing held in the Texas state court medical monitoring class action. (Tr. at 34.) Further, seven states, including New Jersey and Texas, have certified classes in this diet drug litigation.

Other representatives at the hearing addressed the court on the Settlement Agreement's contemplation of federal-state coordination. Specifically, a concern was expressed that in order to maintain the adversarial nature of the settlement proceedings, increased coordination and participation by class counsel and the judges in states where classes have been certified was necessary. (Tr. at 35-39, 41, 52-55 & 60.) Still other representatives voiced their concerns over the Settlement Agreement's effect on issues particular to their state or client's interests. For example, concerns were expressed about extending the notice period, reimbursement rights in Illinois and subrogation interests. (Tr. at 45-49, 50-57 & 64-71.)

## II. LEGAL STANDARD

Prior to a fairness hearing, a district court's first step in reviewing a class action settlement proposal is to hold a "preliminary, pre-notification hearing to determine whether the proposed settlement is 'within the range of possible approval.'" Armstrong v. Board of Sch. Directors of the City of Milwaukee, 616 F.2d 305, 314 (7th Cir. 1980). In a class action settlement, the Third Circuit requires that "[b]efore sending notice of [a] settlement to the class, the court will usually approve the settlement preliminarily. This preliminary determination establishes an initial presumption of fairness when the court finds that: (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 General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995).<sup>2</sup>

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<sup>2</sup> Based on the pleadings before the court, the joint motion seeking an order conditionally certifying the class and the record developed thus far, the court finds that the Brown settlement class meets the requirements under Federal Rule of Civil Procedure 23. However, the court expects that the issue of whether the Brown class meets the requirements of Rule 23 will be disputed. The court notes that it will examine this issue in depth during the briefing and argument leading up to and including the time of the fairness hearing set for May 1-5, 2000, at which further evidence and argument regarding class certification will be heard. See In re General Motors, 55 F.3d at 797 (noting that while provisional certification of a settlement class to facilitate settlement discussions is permissible, "final settlement approval depends on the finding that the class met all the requirements of Rule 23"); see also Tr. at 15 (stating that with regard to Rule 23, "[t]he real fight at the fairness hearing in this case is going to be whether or not this class meets the requirements of Ortiz and Amchem in terms of predominance or cohesiveness") (emphasis added); Pls.'

### III. DISCUSSION

The court finds that the Settlement Agreement meets the legal standard for preliminary approval. The court will address each element of the standard separately.

#### A. **Arm's Length Negotiations**

The court is satisfied that the Settlement Agreement was negotiated at arm's length. Statements made at the November 30, 1999 hearing confirm that six months of steady and almost constant negotiation went into the Settlement Agreement. Those statements also confirm that the negotiations were conducted by several plaintiff representatives on behalf of several states and also that each subclass in Brown was represented independently in the negotiations. Furthermore, the statements confirm that the negotiations were hard fought and were the product of substantial expenditures of time, effort and compromise. Thus, at this stage of the proceedings, the court concludes that these negotiations were conducted at arm's length.

While some concerns were raised at the hearing regarding the

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Mem. in Support of Joint Mot. for an Order Conditionally Certifying a Class Action to Effectuate a Class Settlement, Preliminarily Approving a Class Settlement, Directing Class Notice, and Scheduling a Final Fairness Hearing, at 62-63 (requesting that court schedule fairness hearing at which proponents and opponents to the settlement could present their positions as to whether class certification was proper and whether settlement is fair adequate and reasonable) (emphasis added); cf. In re Prudential Ins. Co. of Am. Sales Litig., 148 F.3d 283, 309-16 (3d Cir. 1998) (citing to district court's "Fairness Opinion," which set forth required findings under Rule 23).

continued adversarial nature of the development of this settlement class and the Settlement Agreement's omission of certain provisions, such concerns are squarely addressed by the Settlement Agreement. Specifically, the implementation plan of the Settlement Agreement provides that:

[t]he Parties recommend that the Court establish an Advisory Committee of Class Counsel, which would consist of counsel actively involved in State and Federal Diet Drug Litigation. The purpose of the Advisory Committee of Class Counsel would be to advise the Trustees concerning the proper operation and implementation of the Settlement Agreement.

(Settlement Agreement, § VIII (A) (2), at 125.) The implementation plan of the Settlement Agreement further provides that:

[a] State Court Judicial Advisory Committee will be established within 15 days of Preliminary Approval and will consist of the judges from the State Courts which, as of October 7, 1999, had issued any order certifying state-wide class actions . . .

[t]he State Court Judicial Advisory Committee shall provide advice and counsel to the Federal District Court on all matters pertinent to the Settlement, including approval of the Settlement, which affect Class Members residing in the States of each committee member.

(Settlement Agreement, § VIII (B) (3) & (4), at 125.) The court expects that through these Committees, several objections raised at the show cause hearing will be addressed and resolved in the time from now until the May 1 scheduled date for the fairness hearing, such as preservation of the adversarial nature of the nationwide settlement and individual issues affecting particular states or subrogation interests. Moreover, to the extent that changes in the Settlement Agreement are brought about through work in these Committees, supplemental notices to the class may be disseminated.

As such, while the court recognizes that the objections raised by the representatives at the show cause hearing express valid concerns, they do not affect preliminary approval of the Settlement Agreement.

**B. Sufficient Discovery**

The court is satisfied that a substantial amount of discovery has been conducted in this litigation such that the Settlement Agreement reached by the parties is the product of a thorough understanding of the legal and factual issues which have grown to maturity in this litigation. In the past two years, discovery in this MDL No. 1203 has progressed to a point nearing completion. In addition, discovery conducted in several states has also progressed substantially, even to point of readiness for trial in some circumstances.

**C. Experience of Settlement Proponents**

The court is satisfied that the proponents of this settlement are experienced in similar litigation. This is confirmed by the credentials of the negotiating attorneys and previous Orders of this Court. See Pretrial Order No. 6 (order appointing PMC members and stating that their resumes will be filed with the court); Pretrial Order No. 865 (stating that PMC attorneys are both experienced and qualified in handling mass tort cases); Pretrial Order 884 (stating same).

**D. Objectors**

At this stage, the court is not aware of any objectors to the nationwide class before this court. While the court expects

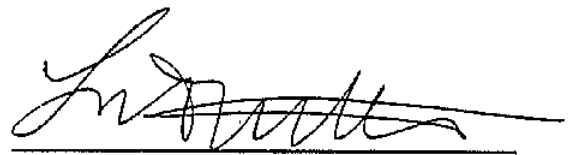
objectors to voice their concerns at the fairness hearing scheduled to begin on May 1, 2000, no evidence exists at this stage for the court to conclude anything other than that only a small fraction of the class has objected.

**IV. CONCLUSION**

For the reasons set forth above, the court finds that preliminary approval of the Settlement Agreement in Brown is appropriate and that no cause has been shown for the court to vacate its Pretrial Order No. 997.

SO ORDERED.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Louis C. Bechtle", is written over a horizontal line.

LOUIS C. BECHTLE, J.