

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**IN RE: VITAMINS ANTITRUST** )  
**LITIGATION,** )  
 )  
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 ) **Misc. No. 99-197 (TFH)**  
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 )  
**This Document Applies To:** )  
**All Actions.** )

**MEMORIALIZING OPINION – Re: Final Approval of Settlement**

In accordance with the Court’s March 28, 2000 bench opinion, this Court will grant class plaintiffs’ motion for final approval of the class action Settlement Agreement (“Settlement” or “Agreement”) and will deny the Tyson plaintiffs’ renewed motion for leave to intervene and the additional opt-outs’ motion for leave to intervene. The Court will also grant approval of the Settlement plan of distribution.

**I. BACKGROUND**

Class plaintiffs’ counsel initiated their investigation into the bulk vitamin industry in 1997. Co-lead Decl. ¶ 15. In March 1998, the first complaint on behalf of a class of direct purchasers of vitamins was filed, alleging that as early as 1990, and continuing into 1998, the world’s largest manufacturers of vitamins, vitamin premixes and other bulk vitamin products had conspired to fix prices, allocate markets, and engage in other illegal conduct with respect to vitamin products, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Id. ¶ 16. In March 1999, the Antitrust Division of the United States Department of Justice announced the first antitrust guilty pleas in this industry. Id. ¶ 21. In following months, several more guilty pleas followed. Settlement negotiations began in May, 1999, before the

public announcement of the guilty pleas of F. Hoffman-La Roche and BASF AG. Id. ¶ 27. Settlement negotiations intensified over the summer and continued through most of the fall.

On November 3, 1999, class plaintiffs presented the Court with the Settlement Agreement, along with their motion seeking preliminary approval of this Settlement. The Court set a hearing for preliminary approval on November 22, 1999. On November 12, 1999, several direct action plaintiffs filed motions to intervene for the limited purpose of objecting to the MFN clause. On November 22, 1999, the Court heard arguments on behalf of class plaintiffs' motion for preliminary approval and the direct action plaintiffs' motions to intervene to strike the MFN clause. On November 23, 1999, the Court denied the pending motions to intervene, permitted the opt-outs to participate as amicus curiae in the final approval hearing, preliminarily approved the class Settlement, conditionally certified the Vitamins Products and Choline Chloride classes, authorized the form and manner of class notice, and scheduled a Rule 23(e) hearing on the fairness of the Settlement for March 28, 2000.

## II. DISCUSSION

### A. Standard for Final Approval of a Class Action Settlement

Pending before the Court is class plaintiffs' Motion for Final Approval of the Settlement.<sup>1</sup> Fed.

R. Civ. P. 23(e) provides that:

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

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<sup>1</sup> The Settling defendants filed a memorandum in support of the class plaintiffs' Motion for Final Approval on March 22, 2000.

Approval of a proposed class action settlement is within the discretion of the court. United States v. District of Columbia, 933 F.Supp. 42, 47 (D.D.C. 1996). “In determining whether a settlement should be approved, the court must decide whether it is fair, reasonable, and adequate under the circumstances and whether the interests of the class as a whole are being served if the litigation is resolved by the settlement rather than pursued.” Manual For Complex Litigation, Third, § 30.42 at p.264 (1999). Although settlement is favored, court review must not be perfunctory. Id.

There is no single, obligatory test in this Circuit for determining whether the proposed settlement of a class action should be approved under Rule 23(e). Pigford v. Glickman, 185 F.R.D. 82, 98 (D.D.C. 1999). Instead, courts consider the facts and circumstances of each case, ascertain the factors that are most relevant in the circumstances and exercise their discretion in deciding whether the proposed settlement is “fair, adequate, and reasonable.” Id. Several factors that have been examined by courts in this Circuit in determining whether to approve settlements in class actions include: (1) whether the settlement is the result of arm’s-length bargaining, (2) the terms of the settlement in relation to the strength of plaintiffs’ case; (3) the status of the litigation at the time of settlement; (4) the reaction of the class; and (5) the opinion of experienced counsel. See Stewart v. Rubin, 948 F.Supp. 1077, 1087 (D.D.C. 1996), aff’d, 124 F.3d 1309 (D.C. Cir. 1997); Thomas v. Albright, 139 F.3d 227, 230-33 (D.C. Cir. 1998); Pigford, 185 F.R.D. at 98-101; In re National Student Marketing Litig., 68 F.R.D. 151, 155 (D.D.C. 1974), Osher v. SCA Realty I, 945 F.Supp. 298, 304 (D.D.C. 1996)

The inquiry is perhaps best stated in the recent decision by Judge Ziegler, approving certain partial settlements in In re Flat Glass Antitrust Litig.: “The test is whether the settlement is adequate and

reasonable and not whether a better settlement is conceivable.” In re Flat Glass Antitrust Litig., slip op. at 6 (W.D. Pa. Feb. 9, 2000). As stated in the Manual for Complex Litigation, Third, a “presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s length negotiations between experienced, capable counsel after meaningful discovery.” Id. § 30.42.

## **B. The Settlement Agreement**

The Settlement Agreement before this Court achieves for the class a recovery of approximately 18 to 20 percent of the dollar value of the class purchases of the affected vitamins from the Settling defendants. This Settlement, which had a maximum dollar recovery of \$1.05 billion, will fully and finally resolve the claims of more than 3,900 class members and will result in a distribution of approximately \$325 million<sup>2</sup>. In addition, the class Settlement has also resulted in approximately 35 settlements with opt-out plaintiffs representing more than \$700 million in purchases of vitamin products from Settling defendants. The Settlement is unprecedented for many reasons: the percentage rate on which the Agreement is predicated is in the highest tier of settlements for price-fixing class actions; the total dollar value to the class is the largest settlement of a price-fixing class action; the Settlement is a totally cash settlement and calls for immediate payment by defendants; the Agreement was reached at a relatively

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<sup>2</sup> In addition, the Settlement calls for cash payment to the Choline Chloride class of between \$5 and \$25 million. This Choline Chloride Settlement is solely with BASF AG and leaves the class’s claims with respect to Choline Chloride against the other defendants intact. BASF’s initial cash payment of \$5 million will not be reduced as a result of exclusions from the class; if class plaintiffs are unable to recover from the other Choline Chloride defendants an amount equal to that part of \$20 million which represents the percentage of purchases by class members remaining in the Choline Chloride Settlement class, BASF must pay the difference to the class. There have been no objections, from class members or opt-outs, to the Choline Chloride Settlement.

early stage in the litigation; the class purchases from non-settling defendants remain in the case as to the non-settling defendants; the release of claims does not cover foreign sales of vitamins or indirect purchaser claims; the Settlement contains a provision for three-year injunctive relief barring future collusive behavior by these defendants; the Agreement contains a most-favored-nations clause (“MFN clause”) with a two-year duration; and the Settlement provides for a separate fund for attorneys’ fees<sup>3</sup>.

The MFN clause, which is the subject of all objections to this Settlement, lasts until the earlier of (i) November 3, 2001 (two years after the Settlement Agreement was executed); (ii) the date of a final pretrial order in an opt-out plaintiff’s action; or (iii) 30 days prior to a trial date in an opt-out plaintiff’s action. Settl. Agr. ¶ 22(g). The MFN clause contains two exceptions: (i) an opt-out plaintiff may settle with a Settling defendant, as many have already done, at the same or a lesser settlement percentage than the percentage at which the particular defendant settled with the Vitamin Products class (i.e. 18-20 percent), plus up to 17.65 percent for attorneys’ fees (Settl. Agr. ¶ 22(c), (e)); and (ii) a larger payment to an opt-out plaintiff does not trigger the MFN if it is determined that the opt-out plaintiff is in a materially different situation from class members, a determination with which class plaintiffs’ counsel must concur. *Id.* ¶ 22(e).

This Court finds that the Settlement in this case is the product of extensive arm’s length negotiations by experienced counsel, undertaken in good faith, and after substantial factual investigation and legal analysis. Moreover, given the substantial risks inherent in every litigation and the benefits to

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<sup>3</sup> The separate fund for attorneys fees provides the class with greater certainty as to what each class member would receive from the Settlement, because the amount that class plaintiffs receive is not reduced by the award of attorneys’ fees.

the class in achieving an early resolution to this dispute, the Court finds that the terms of the Agreement are fair in relation to the strength of the plaintiffs' case. Plaintiffs' expert economist Dr. Beyer has submitted a detailed affidavit summarizing his investigation, statistical analysis and opinion with respect to the probable range of damages that would be presented to a jury if plaintiffs' claims had gone to trial; and the Settlement percentage of 18-20 percent was well within Dr. Beyer's projected range. In addition, the Settlement payments, representing an 18-20 percentage rate, far exceed recoveries approved in other price-fixing antitrust actions. Based upon the representations made by counsel and the Court's own experience with antitrust litigation, this proposed Settlement ranks near the top of the highest tier of antitrust settlements.

Furthermore, courts favor the pursuit of early settlement. See, e.g., In re M.D.C. Holdings Securities Litig., 1990 WL 454747, at \*7 (S.D. Calif. 1990) ("Early settlements benefit everyone involved in the process and everything that can be done to encourage such settlements – especially in complex class action cases – should be done."). By reaching a large settlement at a relatively early stage in the litigation, plaintiffs avoided significant expense and delay and ensured a guaranteed recovery at a high level. Antitrust price fixing actions are generally complex, expensive, and lengthy. Trial of this matter easily could have lasted months and may not even have started for many years; and any verdict inevitably would have led to an appeal and might well have resulted in appeals by both sides and a possible remand for retrial, thereby further delaying final resolution of this case. These factors weigh in favor of the proposed Settlement. See Slomovics v. All for a Dollar, Inc., 906 F.Supp. 146, 149 (E.D.N.Y. 1995) ("The potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interest of the Class.").

The Court has strongly weighed the reactions of both the class members and the opt-out plaintiffs in determining the reasonableness of this Settlement. Considering that more than 5,900 notices of this Court's preliminary approval of the Settlement were sent to class members, the Court finds it noteworthy that there were only three objections to the Settlement<sup>4</sup> and that of these none were on behalf of a class member<sup>5</sup>. Nevertheless, all concerns raised by the amicus participants have been accorded great weight by this Court.

All objections to the Settlement related to the scope and duration of the MFN clause. Specifically, the Tyson and Cargill plaintiffs were concerned that the two-year MFN clause was unduly restrictive and would impede their ability to resolve their cases with the Settling defendants during the duration of this clause; and Nutra-Blend objected to the class counsels' "veto power" with regard to the "material difference" provision of the clause. After seriously considering these objections to the MFN clause, the Court finds that both the two-year period of this clause and the "material difference" provision are reasonable.

First, the Court notes that the MFN clause is not triggered until an opt-out settlement exceeds the high percentage of recovery (approximately 18-20 percent) achieved by the class plaintiffs. The

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<sup>4</sup> Objections were raised by Nutra-Blend, the Cargill plaintiffs, and the Tyson plaintiffs. All three related to the MFN clause. The Cargill and Tyson groups were concerned with the duration of the clause and Nutra-Blend challenged the scope of the clause.

<sup>5</sup> Originally, there was one objection filed on behalf of a class member but that objection, which was filed by the Dairy Farmers of America on February 3, 2000, was withdrawn on March 27, 2000 because the parties reached an agreement in principle to resolve the potential claims related to the Dairy Farmers' purchases of vitamin containing products from Givaudan Roure Flavors, an affiliate of the Roche Settling defendants.

fact that many opt-outs have already entered into multimillion dollar settlements on this basis<sup>6</sup> and many more are presently negotiating to settle at or below the class amount supports the Court's finding that this recovery is both adequate and reasonable. Second, the two-year time limitation on this clause has already started to run, so the time remaining on this clause is now approximately a year and a half. Although this is still lengthy, the Court must take into account the projected duration of this litigation, considering that the parties are currently in the beginning stages of discovery. In a case of this magnitude, a year and a half is not outside the range of reasonableness. See In re Ampicillin Antitrust Litig., 82 F.R.D. 652, 655 (D.D.C. 1979) (approving a two-year MFN clause that reduced proportionally the settling defendant's payment to plaintiffs if plaintiffs settled with the remaining defendants for less than \$6.44 million, either before a specified date or more than 30 days before a firm trial date); see also In re Prescription Brand Name Prescription Drugs Antitrust Litig., 1996-1 Trade Cas. (CCH) ¶ 71,449 at ¶ 77, 317-18 (N.D. Ill. June 21, 1996).

Furthermore, the Court finds no support for the opt-out plaintiffs' contention that they would be effectively barred from settling their cases during the term of this clause. It is pure speculation that the Settling defendants would be willing to pay more than the class Settlement recovery during the next year and a half or thereafter. It is also pure conjecture that if the Settling defendants were willing to pay more, they would refuse to do so during this period because the MFN clause would then require them to pay the same consideration to the class. The Court has no knowledge of the motivations underlying

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<sup>6</sup> A significant portion of the opt-outs – already numbering 35 companies representing over 12 percent of class purchases – have entered into settlements with the Settling defendants for the same percentage or slightly less than that in the Settlement Agreement. Co-lead Decl. ¶ 64.

class defendants' acceptance of the Settlement Agreement, but it is at least conceivable that these defendants settled for an amount less than they would ultimately be willing to pay, with the knowledge that they could then settle with the opt-out plaintiffs and still have sufficient funds to pay the same consideration to the class. The MFN clause is also flexible in that it permits the opt-out plaintiffs to settle for a mix of cash and non-cash consideration. See Ampicillin, 82 F.R.D. at 655 (approving a MFN clause because it allowed opt-out plaintiffs plenty of room for "reasonable settlement discussions.")

Finally, as recommended by the Manual for Complex Litigation, the MFN clause permits class counsel and defendants to exempt from the clause a settlement with an opt-out plaintiff if unique circumstances are demonstrated, and allows for access to the Court if the class plaintiffs and class defendants do not agree. This was the substance of Nutra-Blend's objection to the Settlement. Nutra-Blend argued that it should not be bound by the MFN clause because as a blender it was in a unique situation since it suffered not only from the overcharges on the vitamins themselves but also suffered lost profits when it was forced to resell products at a price less than it cost Nutra-Blend to purchase the raw materials. The Court notes that Nutra-Blend's ability to opt out of the settlement, which it has done here, provides an efficient and effective way to deal with the existence of a small group of entities that wish to press unique claims against the Settling defendants. However, once Nutra-Blend elected to opt-out of the Settlement, it no longer had standing to object to the terms of that Agreement. It is firmly established in this Circuit, and elsewhere, that class members who opt out of the class and are thus not parties to the settlement lack standing to object to the settlement. Mayfield v. Barr, 985 F.2d 1090, 1092 (D.C. Cir. 1993); Agretti v. ANR Freight Sys., Inc., 982 F.2d 242, 245, 246-48 (7<sup>th</sup> Cir.

1992); Pigford, 185 F.R.D. at 103 n.17; Ampicillin, 82 F.R.D. at 654. These decisions rest “on the principle that those who fully preserve their legal rights cannot challenge an order approving an agreement resolving the legal rights of others.” Mayfield, 985 F.2d at 1093.

Nutra-Blend argues that it was forced to opt-out of this Settlement by the fact that the Agreement required it to forego its lost profit claims. However, it is well-settled that “in order to achieve a comprehensive settlement that would prevent relitigation of settled questions,” in a class action, a court may permit a broad release of claims based on overlapping factual predicates. City Partnership Co. v. Atlantic Acquisition Limited Partnership, 100 F.3d 1041, 1044 (1<sup>st</sup> Cir. 1996); In re Corrugated Container Antitrust Litig., 643 F.2d 195, 221 (5<sup>th</sup> Cir. 1981) (“The weight of authority establishes that. . . a court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged by reason of or in connection with any matter or fact set forth or referred to in the complaint”), cert denied, 456 U.S. 998 (1982). Since other similarly situated blenders, such as Animal Science Products, Inc., have chosen to remain in the class, Nutra-Blend’s interests were represented; the class simply decided as a whole that it made sense to waive the small number of lost profit claims in favor of a larger overall recovery to the class. Furthermore, the presence of other blenders in the class shows that some blenders found the total settlement sufficient to warrant the release of claims for lost profits.

After seriously considering all objections, the Court finds that this Settlement is the product of arms’ length negotiation by experienced counsel and that it is fair, adequate and reasonable. Therefore, this Court will grant final approval of the Settlement.

### **C. Settlement Plan of Distribution**

The Settlement Agreement provides for a “plan of distribution.” See Sett. Agr. ¶¶ 16, 17(d). Pursuant to Fed. R. Civ. P. 23(e), therefore, this Court must determine, within its discretion, whether the plan of distribution is fair, adequate and reasonable. In re Chicken Antitrust Litig., 669 F.2d 228, 238 (5<sup>th</sup> Cir. 1982). Settlement distributions, such as this one, that apportion funds according to the relative amount of damages suffered by class members have repeatedly been deemed fair and reasonable. See, e.g., Beecher v. Able, 575 F.2d 1010, 1013-14 (2d Cir. 1978); In re Chicken, 669 F.2d at 240-42. Therefore, since there were no objections to the Settlement plan of distribution and since the Court finds this distribution plan to be fair, adequate, and reasonable, the Court will approve the Settlement plan of distribution.

#### **D. Motions to Intervene**

There were two motions to intervene filed for the limited purpose of seeking deletion of the MFN clause in this Settlement: (1) the renewed motion to intervene filed by the Tyson plaintiffs<sup>7</sup> and (2) the motion to intervene brought by 24 additional opt-out companies.

The Court finds that both groups of opt-out plaintiffs lack standing to intervene in the proposed

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<sup>7</sup> On November 12, 1999, the Tyson plaintiff-intervenors moved pursuant to Fed. R. Civ. P. 24(a)(2) and 24(b)(2) to intervene for the limited purpose of seeking deletion of the MFN clause from the Settlement Agreement. On November 23, 1999, the Court denied intervention and granted preliminary approval of the Settlement. In its order, the Court reserved discretion to ultimately consider and rule upon the proper scope and duration of the MFN clause and stated that plaintiff intervenors’ concerns can be addressed at the fairness hearing. These plaintiffs have appealed the denial of their motions to intervene and oral argument is currently scheduled for April 3, 2000. Accordingly, these plaintiff-intervenors now renew their motions to intervene to pursue their request for participation as parties at the fairness hearing with respect to the MFN clause issue.

Settlement since they have opted out of the class. See Building & Constr. Trades Dept. v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (Article III standing necessary for Rule 24(a) standing); Mayfield, 985 F.2d at 1092 (“those who fully preserve their legal rights cannot challenge an order approving an agreement resolving the legal rights of others.”). Permissive intervention under Rule 24(b) is not a mechanism for evading the requirements of legal standing. See EEOC v. National Children’s Center, Inc., 146 F.3d 1042, 1046 (D.C. Cir. 1998) (“[p]ermissive intervention . . . has always required an independent basis for jurisdiction.”).

Courts have permitted limited intervention only where the party has standing to advance the legal interest it seeks to protect. EEOC v. Nevada Resort Ass’n, 792 F.2d 882, 886 (9<sup>th</sup> Cir. 1986) (permissive intervention denied in Title VII action in absence of standing); see also In re Discovery Zone Sec. Litig., 181 F.R.D. 582, 596 (N.D. Ill. 1998) (limited intervention to challenge class settlement only appropriate with respect to those with standing to object to the settlement, class members or class members who were excluded from the settlement). The only exception to this rule of standing is one for “plain legal prejudice,” which does not include allegations of injury in fact or tactical disadvantage. Mayfield, 985 F.2d at 1092; Agretti, 982 F.2d at 247; see also Hirshon v. Republic of Bolivia, 979 F.Supp. 908, 912 (D.D.C. 1997) (“The sole factor in determining whether a nonsettling party has standing to object to a settlement agreement is whether the agreement causes him plain legal prejudice. . . . Such prejudice occurs when the settlement strips the party of a legal claim or cause of action.”). Both groups of opt-out plaintiffs have failed to meet this standard because there has been no convincing showing that they would be foreclosed from pursuing their claims as a result of this Settlement.

Therefore, since these opt-out plaintiffs cannot show, with any degree of certainty, that they have suffered a legally cognizable impairment of interest and since permissive intervention would only serve to unduly delay the Settlement, the plaintiff-intervenors' renewed motion to intervene and the additional opt-outs' motion to intervene, both for the limited purpose of seeking deletion of the MFN clause, should be denied. Their concerns were heard by the Court in their capacity as amicus curiae and granting intervention would substantially prejudice the class by unnecessarily delaying this Settlement. See In Re Domestic Air Transportation Antitrust Litig., 148 F.R.D. 297, 337 (N.D. Ga. 1993) ("The Court has discretion to deny a motion for permissive intervention if intervention would unduly delay or prejudice adjudication of the rights of the original parties. . . . [The objecting class members'] presence through intervention would not accomplish any more than their participation as objectors and would create the possibility of further delay in final disposition of this action.")

### III. CONCLUSION

For the foregoing reasons, the Court grants final approval of the Settlement Agreement and approves the plan of distribution of Settlement proceeds. The Court also denies the Tyson plaintiffs' renewed motion to intervene and the additional opt-outs' motion to intervene. An order will accompany this opinion.

March \_\_\_\_\_, 2000

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Thomas F. Hogan  
United States District Judge

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**IN RE: VITAMINS ANTITRUST ,** )  
**LITIGATION** )  
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**MEMORIALIZING ORDER – Re: Final Approval of Settlement**

In accordance with the accompanying memorializing opinion and the Court’s March 28, 2000 bench opinion, it is hereby

**ORDERED** that class plaintiffs’ motion for final approval of the class action Settlement Agreement is **GRANTED**. It is further

**ORDERED** that the Settlement plan of distribution is **APPROVED**. And it is further hereby

**ORDERED** that the Tyson plaintiffs’ renewed motion to intervene and the additional opt-out plaintiffs’ motion for leave to intervene are **DENIED**.

March \_\_\_\_\_, 2000

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Thomas F. Hogan  
United States District Judge