

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:)
VITAMINS ANTITRUST LITIGATION)

) Misc. No. 99-197 (TFH)
) MDL 1285

FILED

THIS DOCUMENT RELATES TO:)
Animal Science Products, Inc. v. Chinook)
Group, Ltd., et al.)

JUL 19 2001

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORIALIZING OPINION Re: Final Approval of Akzo Settlement

Pending before the Court is class plaintiffs' Motion pursuant to Fed. R. Civ. P. 23(e) and 54 for Final Approval of Settlement Between Class Plaintiffs and Akzo Defendants and for Entry of Final Judgment. Upon careful consideration of class plaintiffs' Motion, the representations made at the July 17, 2001 hearing on final approval, and the entire record herein, and in accordance with the Court's July 17, 2001 bench opinion, class plaintiffs' Motion for Final Approval and for Entry of Final Judgment is granted.

I. BACKGROUND

By order dated March 9, 2001, the Court preliminarily approved the proposed settlement and certified the settlement class.¹ Pursuant to the Settlement Agreement, Akzo Nobel Chemicals B.V. and Akzo Nobel, Inc. (hereafter the "Akzo defendants") will make \$7.5 million available to the Akzo Settlement Class plus simple interest from August 15, 2000 at the rate of

¹The Akzo Settlement Class includes all persons and entities who directly purchased Vitamin B4 (choline chloride) in the United States for delivery in the United States from any of the defendants or their co-conspirators from January 1, 1988 through December 31, 1998 (excluding all government entities, any defendants, their co-conspirators, and their respective subsidiaries and affiliates).

9.5 percent.² The Settlement Agreement also obligates the Akzo defendants to pay for Court-approved costs and expenses up to \$400,000 associated with notice to members of the class, administration of the settlement, and distribution of the settlement funds. Finally, the Akzo defendants are required to cooperate with class plaintiffs in their ongoing prosecution of this litigation against the remaining defendants. In exchange, members of the Akzo Settlement class will release all claims against the Akzo defendants related to conduct alleged in the class action; this release does not include any potential or current claims based on deliveries outside the United States or based on indirect purchases of vitamins products including choline chloride.

II. DISCUSSION

Approval of the proposed class action settlement lies within the discretion of this Court.

United States v. District of Columbia, 933 F. Supp. 42, 67 (D.D.C. 1996). 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.

Fed. R. Civ. P. 23(e). The Rule 23 requirements are fully consistent with the long-standing judicial attitude favoring class action settlements. Mayfield v. Barr, 985 F.2d 1090, 1092 (D.C. Cir. 1993). “The Court must eschew any rubber stamp approval . . . yet, at the same time, must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.” United States v. District of Columbia, 933 F. Supp. at 47. The exercise of this discretion, however, is constrained by the “principle of preference” favoring and encouraging

²Class plaintiffs estimate that approximately \$600,000 in interest has accumulated to date. See Class Mot. at 4.

settlements in appropriate cases. Pigford v. Glickman, 185 F.R.D. 82, 103 (D.D.C. 1999).

There is no single test in this Circuit for determining whether a proposed class action settlement should be approved under Rule 23(e). Pigford, 185 F.R.D. at 98. Generally, in determining whether settlement should be approved, courts consider whether the proposed settlement “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 settlement rather than pursued.” Manual for Complex Litigation (Third), § 30.42 at p.238 (1995). In making this determination, courts in this Circuit have examined the following factors: (a) whether the settlement is the result of arm’s length negotiations³; (b) the terms of the settlement in relation to the strength of plaintiffs’ case⁴; (c) the status of the litigation at the time of settlement⁵; (d) the reaction of the class⁶; and (e) the opinion of experienced counsel.⁷

A. Arm’s Length Negotiations

A “presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s length negotiations between experienced, capable counsel after

³See Thomas v. Albright, 139 F.3d 227, 231-233 (D.C. Cir.), cert. denied, 525 U.S. 1016, 1033 (1998); Pigford, 185 F.R.D. at 99-101.

⁴See Thomas, 139 F.3d at 231; Pigford, 185 F.R.D. at 98.

⁵See 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); Pray v. Lockheed Corp., 644 F. Supp. 1289, 1290 (D.D.C. 1986); see also Moore v. National Assoc. of Sec. Dealers, Inc., 762 F.2d 1093, 1106 (D.C. Cir. 1985).

⁶See Thomas, 139 F.3d at 231-33; In Re National Student Marketing Litig., 68 F.R.D. at 155; Osher, 945 F. Supp. at 304; Stewart v. Rubin, 948 F. Supp. 1077, 1087 (D.D.C. 1996), aff’d, 124 F.3d 1309 (D.C. Cir. 1997).

⁷See Stewart, 948 F. Supp. at 1087; McGinness v. Parness, 1989 WL 29817, at *1 (D.D.C. Mar. 22, 1989).

meaningful discovery.” Manual for Complex Litig., at § 30.42. According to plaintiffs’ counsel, the Akzo Nobel Settlement was the “product of seven months of extensive arm’s length negotiations by experienced counsel, undertaken in good faith, and after substantial factual investigation and legal analysis.” Pl’s Mot. at 9. Clearly, this Settlement was negotiated by experienced antitrust and class action attorneys. Because there is nothing in the course of the negotiations or the face of the Settlement that “disclose[s] grounds to doubt its fairness,” id. at § 30.41, the Court finds that the Settlement at issue was the result of arms’ length negotiations and is thus presumptively fair, adequate and reasonable.

B. Terms of Settlement

Under this Settlement Agreement, the Akzo defendants must pay \$7.5 million, plus interest now amounting to approximately \$600,000, to settle the claims of the Akzo Settlement Class. The settlement amount is significant because the Akzo defendants sold no choline chloride in the United States during the class period and members of the Akzo Settlement Class are being compensated only for United States purchases or deliveries. The Agreement also requires the Akzo defendants to make court-approved notice and administration-related costs and expenses up to a maximum of \$400,000.

This is the second class settlement in this litigation. On March 31, 2000, the Court granted final approval of class plaintiffs’ first settlement with seven international companies and their affiliates regarding certain bulk vitamins, including approval of their settlement with BASF regarding choline chloride. Like the Akzo defendants, BASF had no United States market share and settled with a payment to the class of \$5 million. Therefore, in comparison to the previous settlement approved by the Court in this litigation, the Akzo Settlement appears to be a favorable settlement for both sides. This Settlement also has the added benefit of protecting the Akzo

Settlement Class members' future interests in this litigation due to the Akzo defendants' agreement to provide cooperation to class plaintiffs in their remaining cases against the non-settling defendants.

The Settlement provides a meaningful guarantee of recovery to class members regardless of how the litigation against the remaining non-settling defendants is resolved, and also places a limitation on the defendants' liability. Given the history of this case, it is likely that, in the absence of this Settlement, the parties would have engaged in substantial litigation over whether this Court had jurisdiction over the settling defendants due to their lack of participation in the U.S. market, as well as litigation over causation and damages even if the Court could establish jurisdiction. Given these uncertainties as well as the ordinary risks and delays inherent in complex antitrust litigation, the Settlement appears to provide a significant benefit to the Class. Defendants would also appear to benefit from an early and definite resolution to this dispute. Therefore, after weighing the possibilities of recovery and the risks and expenses of protracted litigation for both sides, the Court finds that the instant Settlement falls within the range of fair, adequate and reasonable settlements deserving of final approval.

C. Status of Litigation At Settlement

This Settlement is the result of more than three years of investigation and litigation. Class Plaintiffs uncovered the alleged conduct among bulk vitamin producers before the federal cooperation agreements became public and before any defendants confessed to their wrongdoing. Although the litigation has been ongoing for several years, the instant litigation is still in the discovery stage. Trial is currently scheduled for September 2002. Therefore, this Settlement does not come too early to be suspicious nor too late to be a waste of resources. It is in fact at a desirable point in the litigation for the parties to reach an agreement and to resolve these issues

without further delay, expense, and litigation.

D. Reaction of Class to Settlement

One of the factors generally considered in determining the reasonableness of a settlement is the reaction of the class. Thomas, 139 F.3d at 231-33; In re National Student Marketing Litig., 68 F.R.D. at 155; Osher, 945 F. Supp. at 304; Stewart, 948 F. Supp. at 1057. In this case, more than 6900 notices of this Court's preliminary approval of the Akzo Settlement were sent to class members.⁸ As of May 14, 2001 – the Court appointed deadline for written requests for exclusion and for objections – no objections had been received by class plaintiffs or by the Court. See Sinclair Aff. at ¶ 6. In addition, no objections were raised at the July 17, 2001 hearing on final approval of this Settlement. There have been 263 exclusion requests, most of which come from companies who also opted out of the BASF choline settlement and who are pursuing their own lawsuits. Therefore, there has been no substantive opposition to this Settlement.

E. Opinion of Experienced Counsel

As discussed above, counsel in this case are among the best and most experience antitrust litigators in the country. Consequently, their opinion that this Settlement is fair, adequate, and reasonable is deserving of this Court's consideration. Although the Court will not defer blindly to the views of counsel with regard to the adequacy of a settlement, it must consider that the

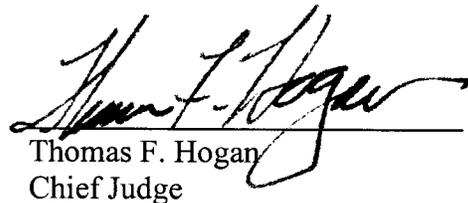
⁸Copies of the Notice of Proposed Settlement with Akzo Nobel and Hearing Thereon were mailed on April 4, 2001 by first class mail to all potential members of the Akzo Settlement Class to the extent that they could be identified from the database of customers created by the Claims Administrator. Summary notices of the proposed Settlement were also published in The Wall Street Journal on April 13 and April 20, in Feedstuffs on April 16, and in Chemical Market Reporter on April 16. The Notices alerted class members to the time and place of the Court's hearing on final approval of this Settlement and directed them to additional sources of information, including access to the documents on the Court's website. Accordingly, the Court is satisfied that adequate notice of the Settlement and hearing have been provided.

Settlement was reached after seven months of arms' length negotiation by experienced counsel and that both counsel and all parties involved view it as a reasonable settlement.

III. CONCLUSION

After considering all of the above mentioned factors, the Court finds that this Settlement is adequate, fair and reasonable. Accordingly, class plaintiffs' Motion for Final Approval of the proposed Settlement Agreement is granted and final judgment dismissing with prejudice the Akzo defendants is entered. An order will accompany this Memorializing Opinion.

July 18th, 2001


Thomas F. Hogan
Chief Judge