

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, and DISTRICT 37 HEALTH AND
SECURITY FUND,

Plaintiffs,

v.

FIRST DATABANK, INC., a Missouri corpo-
ration; and McKESSON CORPORATION, a
Delaware corporation,

Defendants.

C.A. No. 1:05-CV-11148-PBS

**FINAL ORDER AND JUDGMENT CERTIFYING THE CLASS FOR
PURPOSES OF SETTLEMENT, APPROVING OF CLASS ACTION
SETTLEMENT, AND DISMISSING THE ACTION WITH PREJUDICE**

Upon considering the Joint Motion for Approval of Class Settlement (the “Joint Motion”), filed by plaintiffs and defendant First DataBank, Inc. (“FDB”) on November 1, 2006, seeking approval of the Proposed Settlement Agreement (the “PSA” or the “Proposed Settlement,”) dated as of August 3, 2006, Class Plaintiffs Memorandum of Law in Support of Joint Motion for Preliminary Approval of Proposed First DataBank Class Settlement, Certification of Settlement Class and Approval of Notice Plan, a Joint Memorandum of Law in Support of the Joint Motion, all of the supporting material submitted in conjunction with the Joint Motion, and Class Settlement, Counsel’s Motion for Approval of an Award of Attorneys’ Fees and Memorandum in Support Thereof, and on considering the record of these proceedings, the representations, argument, and recommendation of counsel for the moving parties, and the requirements of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Court has jurisdiction over the subject matter and parties to this proceeding pursuant to 28 U.S.C. § 1332.
2. Venue is proper in this district.
3. The Court finds, that the Rule 23 factors are present and that certification of the proposed Class, as defined and set forth below, is appropriate under Fed. R. Civ. P. 23(b)(1), 23(b)(2) and 23(b)(3), and hereby certifies the following Class for settlement purposes only and without prejudice to any other parties to the litigation:

The “Private Payor Class”: All individual persons or entities who, during the Class Period (as defined in the PSA), made purchases and/or paid, whether directly, indirectly, or by reimbursement, for all or part of the purchase price of prescription pharmaceuticals, including, but not limited to, those pharmaceuticals listed on the attached Exhibit A, where any or all of the purchase price, reimbursement or payment amount was based in any part on the Average Wholesale Price, Blue Book Average Wholesale Price, or similar data published or disseminated by First DataBank, Inc., electronically or otherwise, and which such Average Wholesale Price, Blue Book Average Wholesale Price, or similar data published or disseminated by First DataBank, Inc., electronically or otherwise, in whole or part, was based on a FDB wholesale survey, but excluding those persons or entities set forth below.

The Class shall not include: 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, and all other federal, state or local government entities’ claims, to the extent such governmental entities purchased and/or paid, whether directly or by reimbursement, for all or part of the cost of prescription pharmaceuticals as benefits provided pursuant to a legislatively enacted public health and welfare entitlement program.

4. Specifically, the Court finds that the Class described above satisfies Fed. R. Civ. P. 23(a) and Rule 23 (b)(1), 23(b)(2), and 23(b)(3) for settlement purposes:

Rule 23(a)

- (a) **Numerosity:** Numerosity is established in that the size of the proposed class, , is sufficiently large to joinder in practical, 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 thousands of third party payors (welfare funds, self insured employers, for profit and not for profit health insurers which provide prescription drug benefits) that 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. Therefore, claims all hinge on common questions. These elements would be established by common class-wide proof. They demonstrate common questions sufficient to satisfy Rule 23(a)(2).

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

- a. The publication of AWP and BBAWP data fields as a common event upon which all of plaintiffs' and proposed Class members' claims rely;
- b. Whether Defendants engaged in a course of conduct that improperly inflated the WAC-to-AWP markup and the ultimate AWP's used by plaintiffs and Class members as the basis for reimbursement;
- c. Whether Defendants artificially inflated the published AWP's for the drugs that are the subject of this complaint;
- d. Whether Defendants engaged in a pattern and practice that caused Plaintiffs and Class members to make inflated payments for the AWP's;
- 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 and various California statutes and common law; and
- i. Whether Defendants are liable to Plaintiffs and the Class members for damages for conduct actionable under the various state consumer protection statutes.

- (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)(1)

By this Final Order and Judgment, the Court is hereby ordering FDB to fulfill the terms of the Settlement Agreement. Specifically, consistent with the terms of the Settlement Agreement, FDB must adjust the WAC to AWP markup to 1.20, FDB is enjoined from publishing the BBAWP data field for any pharmaceutical consistent with the terms of the Settlement Agreement (except under certain circumstances as defined in the Settlement Agreement), and FDB must establish and maintain an FDA Data Room as defined in the Settlement Agreement and provide other access to information consistent with the terms of the Settlement Agreement. In light of this injunctive relief, inconsistent adjudications with respect to individual members of the Class would establish incompatible standards of conduct for FDB. Thus, certification under Rule 23(b)(1) is necessary and appropriate.

Rule 23(b)(2)

Plaintiffs in this case allege that FDB's policies and practices have caused them to pay inflated prices for certain pharmaceutical products. As such, plaintiffs allege that FDB has acted on grounds generally applicable to the class. Thus, Rule 23(b)(2) is satisfied.

Rule 23(b)(3)

- (e) Predominance: There is predominance. The common legal and factual issues listed above predominate over adjudication of all claims and defenses in the litigation. Because all class members were affected formulaically through a software code change (a change in the markup factor between two fields in a database) which is mechanistically applied to prescription drug reimbursements general causation is proved for common not individualized proof. 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 determine the issues common to all Class Members is superior to thousands of 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 Class Members. Piecemeal litigation would also tax the resources of the judiciary.

5. In the interest of clarity, the Court reiterates that it makes the above findings set forth in paragraph 4 regarding certification of the Class only for the purposes of settlement.

6. The Court reconfirms the appointment of the class representatives.

7. Proposed Settlement Agreement, together with all of its Exhibits, filed with the Court on November 1, 2006 as being fair, adequate, and reasonable and in the best interests of the Class, satisfying Rule 23(e) and the fairness and adequacy factors of this Circuit. In particular, the Court finds that:

(a) **Fairness, Adequacy, and Reasonableness of the Proposed Settlement:**

The Court finds that the Proposed Settlement is fair, adequate, and reasonable. The facts and circumstances of the negotiations set forth in counsels' affidavits and papers demonstrate that there has been considerable arms' length bargaining and discovery in this case. A proposed class action settlement is considered presumptively fair where, as here, sufficient discovery has been provided and the parties have engaged in arms' length negotiations. *See City P'Ship*, 100 F.3d at 1043.

Although there is no single test in the First Circuit for determining the fairness, reasonableness, and adequacy of a proposed class action settlement, *see In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003), the fairness factors concern whether there has been arms' length bargaining. *See City P'Ship Co. v. Atlantic Acquisition Ltd. P'Ship.*, 100 F.3d 1041, 1043 (1st Cir. 1996). Courts in this Circuit consider (1) comparison of the proposed settlement with the likely result of litigation; (2) reaction of the class to the settlement; (3) stage of the litigation and the amount of discovery completed; (4) quality of counsel; (5) conduct of the negotiations; and (6) prospects of the case,

including risk, complexity, expense, and duration. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003) (citations omitted).

1. Comparison of Settlement With Likely Result of Litigation:

Although Class Members have consistently asserted their confidence in the strength of their case, this is complex litigation for which the outcome is uncertain and unpredictable. In order to succeed on the merits, Class Members would need to succeed on several complex and hotly disputed legal and factual issues. The relief contemplated in the PSA is fair, adequate, and reasonable. Indeed, injunctive relief is frequently an appropriate remedy where, as here, class action plaintiffs seek institutional reform. The injunctive relief in this case will ensure that, in the future, the conduct of which plaintiffs have complained will cease. This result, coupled with the uncertainty of protracted litigation and trial, weighs heavily in favor of approval of this settlement.

2. Reaction of the Class to the Settlement:

Class members had until _____, 2007 to opt-out of the Class and _____, 2007 to object. As a result of the extensive Notice program ordered by the Court, there have been __ opt-outs and __ objections filed with the Court. The overall reaction to the settlement has been positive. Given the size of the class, the number of objections and opt-outs is small.

3. State of the Litigation:

This litigation has been pending for __ months. During that time (and indeed even well before the instant case was brought), Class Settlement Counsel engaged in extensive discovery and investigation, including the analysis of voluminous records of parties and non-parties, extensive data review with health care economists and the interviews or depositions of certified witnesses. Class Settlement Counsel has been consistently and vigorously preparing for trial, and such work has generated significant information about the prospects for success in this litigation. On the other hand, although extensive discovery has been conducted to ensure that the settlement is fair, adequate, and reasonable, there remains substantial litigation ahead, including extensive motion practice, trial preparation, and the trial itself. Indeed, litigation of this complex case through trial would require to millions of dollars in expenses. Given that the parties have undertaken sufficient discovery to ensure the fairness, reasonableness, and adequacy of the settlement, expenditure of these resources would be wasteful and unnecessary. The state of the litigation therefore weighs in favor of approval of the settlement.

4. Quality of Counsel:

Class Settlement Counsel are very well-qualified and experienced. Class Settlement Counsel regularly engage in complex litigation similar to the present case and have dedicated substantial resources to the prosecution of this matter. The experience and skill of all counsel involved weighs in favor of final approval of this settlement.

5. Conduct of Negotiations:

Class Settlement Counsel and Defense counsel have engaged in extensive, arms-length negotiations following extensive discovery. Indeed, negotiations leading up to the Settlement spanned almost one year and countless meetings. The complexity and duration of these negotiations weighs in favor of final approval of this settlement.

6. Case Prospects, Including Risk, Complexity, Expense, and Duration:

This case has the potential to impose enormous litigation costs on all of the parties. Indeed, although the ultimate result of a trial cannot be foreseen, absent a settlement, an expensive, complex and time-consuming process is assured. In light of the high stakes involved, a lengthy and costly appeal is certain to follow regardless of the outcome at trial. Thus, the complexity, expense and likely duration of the litigation weighs heavily in favor of final approval of this settlement.

8. [DISCUSSION OF ANY OBJECTIONS]

9. The Court holds that the Notice and notice plan as carried out satisfy the requirements of Rule 23(e) and due process. This Court has previously held the Notice and notice plan to be the best practicable under the circumstances. The Court ordered notice by mail to identifiable Class Members, as well as the widespread publication of notice, constitute sufficient notice to all persons entitled to notice, and satisfy the Constitutional requirements of notice.

10. The Court reconfirms the appointment of Thomas M. Sobol and Steve W. Berman of Hagens Berman Sobol Shapiro LLP, Jeffrey Kodroff of Spector Roseman & Kodroff, PC,

Mark H. Edelson of Edelson & Associates LLC, and Kenneth Wexler of Wexler Toriseva Wallace LLP as Lead Class Settlement Counsel for the putative Class.

11. The “Released Claims” (as defined below) of any and all Class Members are HEREBY DISMISSED WITH PREJUDICE against all “Released Entities” (as defined below):

Released Claims: Any and all known or unknown claims, demands, actions, suits, causes of action, damages whenever incurred whether compensatory or exemplary, liabilities of any nature or under any theory whatsoever, including costs, expenses, penalties and attorneys’ fees, in law or equity, that any Releaser who has not timely excluded themselves from the Class, whether or not they object to the settlement, ever had or now has, directly, representatively, derivatively or in any capacity, arising out of any conduct, events or transactions relating to the collection, calculation, formulas, mark-up, determination, dissemination, publication of, and representations concerning, the AWP or BBAWP or similar data published or disseminated by First DataBank, Inc. electronically or otherwise for any prescription pharmaceuticals, including but not limited to, the allegations contained in the action entitled *New England Carpenters Health Benefits Fund et al. v. First DataBank, Inc., et al.*, Civil Action No. 1:05-CV-11148 (D.Mass.).

“Released Entities” means First DataBank, Inc., its parent, subsidiaries, and affiliates and their (including First DataBank Inc.’s) past, present and future officers, directors, trustees, employees, agents, attorneys, shareholders, predecessors, successors and assigns; provided, however, that Medispan, a division of Wolters Kluwer Health, Inc., its parent, subsidiaries, and affiliates and their (including Medispan’s) past, present and future officers, directors, trustees, employees, agents, attorneys, shareholders, predecessors and assigns (collectively referred to herein as “Medispan”) are excluded from the term Releasees and Released Entities, except for (1) the period when Medispan was owned by First DataBank, and (2) the period from December 19, 2001 to and including October 2, 2004, when First DataBank was required to divest the Medispan business and provide related editorial and consulting services to Medispan, which during these periods (1) and (2) above, Medispan is included in the term Releasees and Released Entities.

12. By entry of this Final Order and Judgment, each Class Member, and all other persons and entities claiming by, through, or on behalf of, a Class Member, are hereby forever barred and enjoined from commencing, filing, initiating, instituting, prosecuting, maintaining, or consenting to any action against the Released Entities with respect to the Released

Claims and forever discharge and hold harmless the Released Entities of and from any and all Released Claims which the Class Member has or may hereafter have.

13. This Final Order and Judgment notwithstanding, this Court retains continuing jurisdiction over the case, the Proposed Settlement, this Final Order and Judgment, the Class Members, the Plaintiffs and FDB for only that time that is necessary for the purpose of administering, supervising, construing and enforcing the PSA and the Final Order and Judgment, and supervising the management and disbursement of the settlement and disputes that arise under the PSA.
14. Pursuant to the All Writs Act, 28 U.S.C. § 1651, this Court shall retain the authority to issue any order necessary to protect its jurisdiction from any action, whether in state or federal court, that threatens to undermine the settlement in this case and this Final Order and Judgment.
15. The Court also finds, following an evaluation of Class Counsels' fee petition against the factors set forth in *In re Lupron Mktg. & Sales Practices Litig.*, that the Class Counsel fees are reasonable and employ a reasonable percentage of the actual benefit of the class settlement to the Class and that Class Counsel's Motion for Approval of an Award of Attorneys' Fees is hereby approved. 2005 U.S. Dist. LEXIS 17456, at *12 (D. Mass. Aug. 17, 2005) (citing *Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237, 255-56 (1985)). With respect to the *Lupron* factors most relevant here, the Court finds that Class Counsel have expended considerable time and labor in the negotiation and implementation of the Proposed Settlement, and that this work will be on-going; that the efforts of Class Counsel have resulted in a resolution that confers substantial benefits

on members of the Class, and that those benefits are comparable to other similar settlements and were achieved sooner than most, if not all, similar settlements; that Class Counsel undertook this matter with no guarantee of payment and thus shouldered considerable risk; and that the attorneys' fees award in this case is not inconsistent with awards in similar cases.

16. FINAL JUDGMENT is hereby ENTERED directing First DataBank, Inc. to comply with the terms of the Settlement Agreement as herein described.
17. FINAL JUDGMENT is hereby ENTERED dismissing with prejudice all Released Claims of the Class against all Released Entities as herein described.
18. Pursuant to FRCP 54(b), the Court determines that there is no just cause for delay and expressly DIRECTS the ENTRY OF JUDGMENT on all issues contained in this Order.

DATED: _____, Massachusetts
This _____, day of _____, 2007

Honorable Patti B. Saris, Judge
United States District Court