

Brown et al. v. Medicis Pharmaceutical Corporation,

No. 1:13-cv-01345-RJL

AMENDED EXHIBIT 2

Exhibit to the Joint Motion for Final Approval of the Proposed Class Settlement¹

¹ This amended Proposed Administrative Order is substituted for Exhibit 2 to the Joint Motion for Final Approval of the Proposed Class Settlement (ECF 46-2).

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

| | | |
|--|---|-------------------|
| |) | |
| Bonnie Brown, Leslie Baginski, |) | |
| Lisa Cummings-Gallina, Laurie Introp, |) | |
| Lisa Levine, Bridget Oliveto, & Lindsay Pihaly |) | |
| on behalf of themselves and all others similarly |) | |
| situated, |) | NO. 1:13-cv-01345 |
| |) | CLASS ACTION |
| Plaintiffs, |) | |
| v. |) | |
| |) | |
| Medicis Pharmaceutical Corporation, |) | |
| |) | |
| Defendant. |) | |
| |) | |

AMENDED [PROPOSED] ADMINISTRATIVE ORDER¹

This Court has entered an order granting final approval of the Settlement Agreement and awarding Class Counsel attorneys’ fees and expenses. Consistent with its rulings, the Court enters this Administrative Order in furtherance of the Settlement. Any and all terms defined in the Settlement Agreement and utilized within this Order shall be given the meanings provided within Section III.A. of the Settlement Agreement (ECF 30-2).

I. ESTABLISHMENT AND PURPOSE OF THE SETTLEMENT FUND.

Defendant shall pay the sum of seven million one hundred and fifty thousand dollars \$7,150,000 (\$7.15 million) into a Settlement Fund within 5 business days of this Order.² The payment shall be by wire transfer to the Medicis Sex Discrimination Settlement Fund

¹ This proposed Administrative Order is submitted by Plaintiffs. Defendants have indicated that they do not object to the proposed Order.

² Presuming Final Approval is granted subject only to completion of the notice process contemplated by the Class Action Fairness Act (“CAFA”), Defendant shall pay this sum (\$7.15 million) into an escrow fund within five business days of this Order. No monies will be distributed from this escrow account until the CAFA process is completed. In the event that the Settlement does not receive Final Approval because of an objection from a government official who receives the CAFA Notice, the monies will be returned, with any interest accrued, to Defendant.

(“Settlement Fund”) at BB&T Bank in Washington, DC. The Settlement Fund, including all portions and income thereon, if any, shall be a single Qualified Settlement Fund within the meaning of Treas. Reg. Section 1.468B-1, et seq. No distributions shall be made from this account until the later of September 2, 2016 or after completion of the CAFA notice process by Defendant. The division of the Settlement Fund into portions is for accounting and bookkeeping purposes only. Defendant shall be deemed to have made an election under Section 468B of the Revenue Code to have the Settlement Fund treated as a “qualified settlement fund.” Defendant shall timely furnish a statement to the Trustee that complies with Treasury Regulation § 1.468B-3(e) and shall attach a copy of the statement to its federal income tax return that is filed for the taxable year in which Defendant makes the required payment(s) to the Settlement Fund. The parties shall cooperate to ensure such treatment and shall not take a position in any filing or before any tax authorities inconsistent with the treatment of the Settlement Fund as a Qualified Settlement Fund.

The Settlement Fund is established exclusively for the purposes of: (a) making distributions from the Claims Portion to Eligible Claimants, including the Named Plaintiffs, pursuant to the claims process described in the Settlement Agreement, including the employee portion of any employment, withholding or income taxes due on such distributions; (b) making payments to Class Counsel pursuant to any orders from the Court; and (c) making payments to the Claims Administrator, if necessary, and any third-parties that provide services directly to the Settlement Fund relating to the Fund’s compliance with all legal requirements, including but not limited to, tax obligations, and to any *cy pres* recipients.

II. ALLOCATION OF THE SETTLEMENT FUND PORTIONS.

The Court hereby allocates the Settlement amount to the Settlement Fund portions, as follows:

A. Claims Portion. The Claims Portion shall be used to make distributions to or on behalf of eligible Claimants, including the Named Plaintiffs, and for the employee portion of any taxes due on such distributions. The Claims Portion shall be administered for the benefit of the eligible Claimant group and not for the benefit of individual eligible Claimants. The sum of \$4,370,364³ shall be allocated to the Claims Portion.

B. Attorneys' Fees and Expenses & Monitoring Portion. The sum of \$2,779,636 plus all income earned thereon since the inception of the Settlement Fund shall be allocated to the Attorneys' Fees & Monitoring Portion.

C. Administrative Portion. The Administrative Portion shall be used to make distributions to: (i) the Claims Administrator for time and out-of-pocket expenses that exceed \$100,000 and that are associated with determining and distributing Claimant awards and reporting and paying taxes on such awards; and (ii) any third-party who provides a service necessary to the Settlement Fund's compliance with any and all legal requirements including, but not limited to, tax, accounting or legal services. Because the estimated costs of administration will not exceed \$100,000, no sum shall be allocated to the Administrative Portion.

Defendant has agreed to separately pay the fees and expenses associated with the Claims Administrator up to \$100,000. However, Settlement Funds that remain undistributed due to checks uncashed by Claimants will be used to reimburse Defendant for its separate payment of

³ As represented to the Court during the June 1, 2016 Final Fairness Hearing, a portion of the Claims Administrator's administrative expenses were inadvertently included in Class Counsel's calculation of expenses. The calculation of expenses, as well as all calculations including expenses, have been adjusted to reflect the correct expense totals. A corrected expense report is also filed herewith.

Claims Administration fees and costs up to \$100,000.00, with any amount in excess of the amount actually paid by Defendant for Claims Administration reverting to the Settlement Fund.

III. PAYMENTS FROM THE SETTLEMENT FUND.

A. General Payment Restrictions. The Trustee shall not pay any amounts from the above-referenced Settlement Fund Portions until the Settlement Agreement, including completion of the CAFA process, is final.

B. Payments from the Claims Portion. The Trustee shall not pay any awards to eligible Claimants, including Named Plaintiffs, until the Court approves such awards.

C. Payments from the Attorneys' Fees & Monitoring Portion. The Trustee shall pay Class Counsel their respective attorneys' fees and expenses in two installments. The Trustee shall make such payments only after receipt of a statement signed by Mehri & Skalet, PLLC, and Valli Kane & Vagnini, LLP, as to the specific allocation of such attorneys' fees and expenses among the firms.

1. First Installment. The first installment shall be in the sum of \$2,629,636 plus all income earned thereon since the inception of the fund, representing all past and future attorneys' fees and expenses, except those associated with settlement monitoring provided by Class Counsel.

2. Second Installment. The second installment shall be in the sum of \$150,000 plus all income earned thereon, representing attorneys' fees and reimbursement of expenses for settlement monitoring by Class Counsel. The second installment shall be payable after the first anniversary of the court's Final Approval of the Settlement.

D. Cy Pres. Any balance remaining in the Settlement Fund at the time of its termination shall be distributed by the Trustee to one or more charitable organizations that

qualify for charitable donations under Section 501(c)(3) of the Internal Revenue Code. The Trustee shall make such donations upon receipt of a statement signed by Co-Lead Class Counsel. In no event shall any funds be paid to or revert to Defendants.

IV. TRUSTEE

Garden City Group, LLC shall serve as Trustee of the Settlement Fund and shall act as fiduciary with respect to the handling, management and distribution of the Settlement Fund, payment of valid Claims, and reporting and paying taxes on such awards. The Trustee shall consult regularly with Class Counsel in carrying out its duties.

A. Powers & Duties of the Trustee.

1. **Processing Claims.** The Claims Administrator shall determine and distribute Claimant awards, including reporting and paying taxes on such awards. The entirety of the Claims Administrator's powers over the Settlement Fund is as expressly stated in the Settlement Agreement, this Administrative Order or future orders of the Court.

2. **Investment of the Settlement Fund.** Pending payment of awards to the Eligible Claimants, Named Plaintiffs and Class Counsel, and others, the Trustee shall invest the Settlement Fund only in United States Treasury securities and/or securities or other accounts or obligations backed by the full faith and credit of the United States Treasury (collectively "U.S. or U.S.-backed securities"), or in repurchase agreements collateralized by U.S. or U.S.-backed securities. The Trustee shall invest any cash in the Settlement Fund in the foregoing investments as soon as practicable and may retain cash only in an amount reasonable to make distributions and contingent liabilities ripe for payment, and such minimal sums which cannot be reasonably invested to obtain higher yields. The Trustee may invest all such minimal sums of cash in money market accounts whether or not collateralized with U.S. or U.S.-backed securities.

3. **Tax Reporting Obligations.** The Claims Administrator shall determine

and pay income taxes owing with respect to the income earned by the Settlement Fund.

Additionally, the Claims Administrator shall ensure that the Settlement Fund files all applicable tax returns and reports with the appropriate taxing authorities with respect to the payment and withholding of employment and income taxes.

4. **Reporting and Recordkeeping.** The Trustee shall keep detailed and accurate accounts of all investments, receipts, disbursements and other transactions of the Settlement Fund and shall file a final accounting with the Court ninety (90) days before the termination of the Settlement Fund.

5. **Inspection.** The Trustee shall make available for reasonable inspection all accounts, books, and records relating to the Settlement Fund by such persons as the Court orders.

6. **Disclosure Limitations.** The Claims Administrator may establish protective conditions concerning the disclosure of information maintained by the Claims Administrator if publication of such information would violate any law, including rights to privacy. Any person entitled to such information who is denied access to the Settlement Fund's records may submit a request to the Court for such information. However, the Claims Administrator shall supply such information to any Claimant as may be reasonably necessary to allow it to accurately determine her federal, state and local tax liabilities. Such information shall be supplied in the form and manner prescribed by relevant law.

7. **Cooperation.** The Claims Administrator and Defendant shall provide to and exchange with each other such information as shall be reasonably necessary to file notices, reports and returns and to make timely determinations of withholding obligations.

8. **Alteration or Amendment of the Settlement Fund.** The Trustee may apply to the Court to alter or amend this Order at any time provided, however, that no such

amendment or modification shall in any way affect: (a) the purposes of the Settlement Fund; (b) the Court's jurisdiction over the Parties; (c) the powers, duties, and liabilities of the Trustee under this Administrative Order; (d) the total amount of money Defendant is to pay into the Settlement Fund; (e) the qualification of the Settlement Fund as a Qualified Settlement Fund under Section 468B of the Internal Revenue Code and regulations thereunder; or (f) any terms of the Settlement Agreement or any of its exhibits.

B. Replacement of Claims Administrator and/or Trustee.

The Claims Administrator and/or Trustee may resign by providing sixty (60) days written notice to the Court, subject to Court approval. The Claims Administrator and/or Trustee may be removed by the Court at any time. In the event of removal or resignation of the Claims Administrator and/or Trustee, the Court shall appoint a successor. The successor Claims Administrator and/or Trustee shall have, without further act on the part of anyone, all the duties, powers, functions, immunities, and discretion granted to the original Claims Administrator and/or Trustee. All notices hereunder, including notices of resignation or removal of any Claims Administrator and/or Trustee, must be in writing and directed to the Court, the Class Counsel and Defendant.

V. INDEMNIFICATION.

A. Liability and Indemnification of Trustee by the Settlement Fund.

Subject to compliance with the Settlement Agreement terms and orders of the Court, the Trustee shall be free from any and all liability to the Settlement Fund in connection with the administration of the Settlement Fund and the settlement of Claimants' claims from the Settlement Fund, except for any loss arising out of her gross negligence and/or willful misconduct. The Settlement Fund shall indemnify and hold harmless the Trustee as to any third-

party claims against her arising from her status as Trustee for all expenses, including attorneys' fees, judgments, fines, and amounts paid in settlement of any action, which amounts are ordinarily and reasonably paid by her in connection with such action, suit, or proceeding, but only if the Trustee acted in good faith and in a manner she reasonably believed to be in the best interest of the Settlement Fund and the Claimants.

B. Indemnifications by Claimants.

Each Named Plaintiff and Eligible Claimant who receives a payment from the Settlement Fund shall be fully and ultimately responsible for payment of any and all federal, state or local taxes (excluding the employer share of employment taxes and unemployment taxes and taxes actually withheld) resulting from or attributable to the payment received by such person. Each Named Plaintiff and Claimant shall indemnify and hold Defendant, Counsel for Defendant, Class Counsel, and the Depository Bank harmless from any tax liability, including penalties and interest, regardless of whether such tax liability is attributable to his or her own acts or omissions. Each Claimant and Named Plaintiff shall indemnify and hold the Claims Administrator harmless from any tax liability, including penalties and interest and costs of any proceedings, attributable to his or her own acts or omissions. In all cases in which the tax liability that arises is not attributable to any acts or omissions on the part of a Named Plaintiff or Eligible Claimant, the Named Plaintiff or Eligible Claimant shall indemnify and hold harmless the Claims Administrator from such tax liability, but not penalties and interest and not the costs of any proceedings related to such tax liability. The indemnities provided for in this paragraph shall apply only to the monetary distributions actually received by each Claimant.

VI. RELATIONSHIP TO SETTLEMENT AGREEMENT.

If there is any conflict between the terms of this Order and the Settlement Agreement, the Settlement Agreement shall take precedence.

IT IS SO ORDERED.

Dated: _____, 2016

RICHARD J. LEON
U.S. District Judge

CERTIFICATE OF SERVICE

I certify that on June 3, 2016, a true and correct copy of the Amended Proposed Administrative Order was served via electronic mail on counsel and/or hand delivery for Defendant listed below:

James Nagle
William Benoit
Goodwin Procter LLP
Exchange Place
53 State Street
Boston, MA 02109
Tel: (617) 570-1904
jnagle@goodwinprocter.com
wbenoit@goodwinprocter.com

W. Kyle Tayman
Goodwin Procter LLP
901 New York Avenue, N.W.
Washington, DC 20001-4432
Tel: (202) 346-4000
Fax: (202) 346-4444
ktayman@goodwinprocter.com
www.goodwinprocter.com

/s/ Cyrus Mehri
Cyrus Mehri
Counsel for the Plaintiffs