

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

RONALD MONK, Individually and on Behalf of
All Others Similarly Situated,

Plaintiff,

vs.

JOHNSON & JOHNSON, WILLIAM C.
WELDON, DOMINIC J. CARUSO, COLLEEN
A. GOGGINS and PETER LUTHER,

Defendants.

Civil Action No. 10-4841 (FLW) (DEA)

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT**

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Defendants Johnson & Johnson (“J&J”), Dominic J. Caruso, and Colleen A. Goggins (collectively, “Defendants”), by their undersigned counsel, respectfully submit this memorandum of law in support of lead plaintiff Sjunde AP-Fonden’s (“Lead Plaintiff”) motion for final approval of the proposed settlement in this action.

Introduction

Defendants write to emphasize that the parties’ settlement is the result of extensive, arm’s-length negotiations between the parties, facilitated by a highly experienced and respected mediator. The settlement should be approved for this reason and for the others cited in Lead Plaintiff’s motion.

Background

This case arises from allegations that certain current and former officers at J&J and J&J’s wholly owned subsidiary McNeil-PPC, Inc. (“McNeil”) misrepresented quality control issues at McNeil in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. Lead Plaintiff’s Amended Complaint, filed on March 11, 2011, contained dozens of boilerplate alleged misrepresentations purportedly made by four different officers. *See* ECF No. 16. On May 27, 2011, Defendants moved to dismiss the Amended Complaint. *See* ECF No. 24. In an Opinion and Order dated December 19, 2011, the Court dismissed claims against two of the four defendants and narrowed substantially the claims against the other two, leaving only three alleged misrepresentations in the case. *See* ECF No. 33.

After the Court’s ruling, the parties began discovery, which quickly became contentious. On May 9, 2012, after protracted negotiations about which J&J custodians possessed documents relevant to the case, the parties submitted letters to the Court, in which Defendants contested the relevancy of six custodians from whose files Lead Plaintiff sought documents. Declaration of C.

William Phillips (“Phillips Decl.”) ¶¶ 3-4. On May 15, 2013, after oral argument on the issue, the Court ordered J&J to produce documents from two of the six custodians. *See* ECF No. 69.

In July 2012, Lead Plaintiff again requested documents from custodians whose relevancy Defendants questioned. Phillips Decl. ¶ 5. In August 2012, the parties briefed their dispute, in two letters per side to the Court. *Id.* On August 23, 2012, with the parties’ discovery dispute still pending, Lead Plaintiff sought leave to file a Second Amended Complaint (“SAC”) that included two new claims against one of the remaining individual defendants. ECF No. 76. The Court granted leave on August 31, 2012, and Lead Plaintiff filed its SAC on September 7, 2012. *See* ECF Nos. 80 & 83.

Defendants moved to dismiss in part the SAC on September 27, 2012. ECF No. 90. On October 5, 2012, Defendants submitted a letter to the Court requesting that discovery be stayed under Section 78u-4(b)(3)(B) of the Private Securities Litigation Reform Act pending the resolution of their motion to dismiss. Phillips Decl. ¶ 6. In response, on October 12, 2012, Lead Plaintiff submitted a letter stating that discovery should proceed on the three claims that survived Defendants’ first motion to dismiss. *Id.*

At the Court’s suggestion, the parties agreed to explore settlement while the motion to dismiss and their discovery disputes remained pending. *Id.* ¶ 7. The parties thus retained the Honorable Daniel H. Weinstein (Ret.), a mediator with extensive experience resolving securities actions, and held their first mediation session on December 4, 2012. Declaration of Daniel H. Weinstein (Ret.), Oct. 4, 2013 (“Weinstein Decl.”), ¶¶ 1, 5, ECF No. 113-4. At Judge Weinstein’s request, the Court held the pending motions in abeyance as the parties pursued an agreement. Letter Order, Nov. 5, 2012, ECF No. 100.

The parties failed to reach a settlement on December 4 at their first mediation session. Weinstein Decl. ¶ 5. As a result, the Court scheduled argument on the parties' discovery disputes, including Defendants' request for a stay of all discovery, for January 22, 2013. *See* ECF No. 107. On February 5, 2013, in a Memorandum Opinion and Order, the Court granted Defendants' request and stayed all discovery pending the outcome of Defendants' Motion to Dismiss the SAC. *See id.*

After the Court's ruling, the parties scheduled another mediation session with Judge Weinstein, to be held on February 14, 2013. Phillips Decl. ¶ 9; Weinstein Decl. ¶ 6. At that session, the parties could not agree upon a final settlement but agreed to a binding resolution to be proposed by the mediator and to submit supplemental mediation statements addressing damages. *See* Weinstein Decl. ¶¶ 6, 7. In line with the parties' agreement, on April 29, 2013, Judge Weinstein issued a mediator's proposal to settle the action for \$22.9 million. *Id.* ¶ 8. Judge Weinstein proposed this amount "based on [his] involvement in the negotiations, review and analysis of the parties' mediation submissions and extensive communications with the parties." *Id.*

Argument

THE PARTIES' PROPOSED SETTLEMENT IS FAIR BECAUSE IT RESULTED FROM AN ARM'S-LENGTH NEGOTIATION BETWEEN THE PARTIES.

Defendants agree with Lead Plaintiff that the parties' proposed settlement is fair, reasonable, and adequate under Rule 23(e) of the Federal Rules of Civil Procedure. *See* Mem. Law Supp. Lead Pl's Mot. Final Approval of Settlement and Plan of Allocation 5-18, Oct. 10, 2013, ECF No. 114. As noted, Defendants write separately to address one aspect in particular of the settlement. Specifically, Defendants wish to emphasize for the Court that the settlement is

the result of contentious, arm's-length negotiations between the parties, facilitated by Judge Weinstein, a highly experienced and respected mediator.

When deciding whether a settlement is fair, courts in the Third Circuit consider whether the parties' negotiations "occurred at arm's length," among other factors. *See In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (3d Cir. 2002) (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 n. 18 (3d Cir. 2001)). The participation of a mediator in those negotiations weighs heavily toward a finding that the parties did in fact negotiate at arm's length. *See Hall v. AT&T Mobility LLC*, No. 07-5325, 2010 WL 4053547, at *7 (D.N.J. Oct. 13, 2010) ("[T]he participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.") (internal quotation marks and citation omitted).

In this case, there is no dispute that the parties' negotiations took place at arm's length. As an initial matter, the settlement negotiations were mediated by Judge Weinstein, a leading independent mediator who has described the mediation not only as having occurred at "arm's-length," but also as "difficult and, at times, tenuous." Weinstein Decl. ¶ 10. The fact that the parties were unable to reach a settlement at their first mediation session and instead moved ahead with the litigation is further evidence of the arm's-length nature of the negotiations. *See Lazy Oil, Co. v. Witco Corp.*, 95 Supp. 2d. 290, 332 (W.D. Pa. 1997) (holding that the court could rely on the judgment of counsel in evaluating the settlement because "negotiations were protracted and difficult" and "[o]n a number of occasions they came to a standstill, but were later revived.") Indeed, having failed to reach an agreement, the parties did not seek to stay the action but began preparations to argue their discovery disputes before the Court.

Uncertainty for both sides ultimately led the parties back to mediation before Judge Weinstein. By February 14, 2013, the date of the second mediation session, Defendants had filed two motions to dismiss and the parties had already briefed three different discovery disputes. After the resolution of the pending motions, discovery would have resumed, likely leading to further disputes between the parties. The litigation would have then proceeded to depositions, expert discovery, and summary judgment briefing. For Defendants, although confident that there was no factual support for Lead Plaintiff's claims, the risk of a long, complex legal fight remained, with its accompanying distraction and expense. This, too, supports a finding that the parties' settlement is fair. *See Girch v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (courts in the Third Circuit are to consider "the complexity, expense, and likely duration of the litigation" in evaluating whether a proposed settlement is fair, reasonable, and adequate under Rule 23(e)). Indeed, by settling this action, Defendants sought to avoid precisely this risk of protracted litigation. *See In re Janney Montgomery Scott LLC Fin. Consulting Litig.*, No. 06-3202, 2009 WL 2137224, at *8 (E.D. Pa. July 16, 2009) (In evaluating the complexity, expense, and likely duration of the litigation, courts are to evaluate whether the "settlement allows both the class and Defendant to avoid obstacles presented by protracted litigation.").

Conclusion

For the foregoing reasons and for the reasons identified in Lead Plaintiff's own briefs, Defendants respectfully request that the Court grant final approval of the parties' proposed settlement.

Dated: New York, NY
November 7, 2013

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Defendants.

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**DECLARATION OF
C. WILLIAM PHILLIPS**

C. WILLIAM PHILLIPS declares, pursuant to 28 U.S.C. § 1746:

1. I am a member of Covington & Burling LLP and have been admitted *pro hac vice* in this action as counsel for defendants Johnson & Johnson (“J&J”), Dominic J. Caruso, and Colleen A. Goggins (collectively, “Defendants”).

2. I make this declaration to provide the Court with certain information relevant to Defendants’ memorandum of law in support of lead plaintiff Sjunde AP-Fonden’s (“Lead Plaintiff”) motion for final approval of the parties’ proposed settlement. In particular, I explain in this declaration the facts leading up to the parties’ agreement.

3. After the Court’s late-2011 ruling on Defendants’ Motion to Dismiss Lead Plaintiff’s Amended Complaint, the parties began discovery, which included negotiations regarding the document custodians from whom Defendants planned to produce documents.

4. After extensive negotiations, the parties reached an impasse as to whether six custodians from whom Lead Plaintiff sought documents were in fact relevant to the litigation.

As a result, in consultation with the Court, the parties agreed to submit letters to the Court on May 9, 2012, explaining their positions. The Court held oral argument on the issue on May 15, 2012, and ordered that Defendants produce documents from two of the six custodians.

5. In July 2012, Lead Plaintiff requested documents from additional J&J custodians, leading again to extensive negotiations between the parties and again to an impasse. In August 2012, the parties each submitted two letters to the Court regarding their dispute.

6. On October 5, 2012, after filing a Motion to Dismiss in part Lead Plaintiff's Second Amended Complaint ("SAC"), Defendants submitted a letter to the Court requesting a stay of discovery under Section 78u-4(b)(3)(B) of the Private Securities Litigation Reform Act pending the resolution of their motion. In response, on October 12, 2012, Lead Plaintiff submitted a letter stating that discovery should proceed on the three claims that survived Defendants' first motion to dismiss.

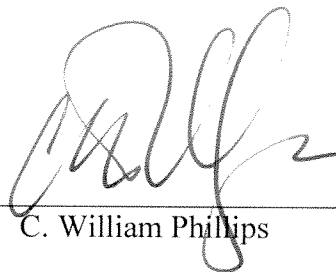
7. On the Court's recommendation, the parties agreed to discuss the possibility of settlement while the motion to dismiss and their discovery disputes were pending. The parties thus engaged the Honorable Daniel H. Weinstein (Ret.), a mediator with extensive experience with securities class actions, and held their first mediation session on December 4, 2012.

8. The parties' first mediation session did not result in a settlement. As a result, the Court moved forward to schedule argument on the parties' discovery disputes. The argument was held on January 22, 2013.

9. On February 5, 2013, the Court granted Defendants' request to stay all discovery pending resolution of the motion to dismiss. The parties then renewed their mediation efforts and scheduled a second session with Judge Weinstein for February 14, 2013.

10. I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 7, 2013
New York, NY



C. William Phillips

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Civil Action No. 10-4841 (FLW) (DEA)

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2013, I caused a true and correct copy of Defendants' Memorandum of Law in Support of Lead Plaintiff's Motion for Final Approval of Settlement and the Declaration of C. William Phillips to be sent by first class mail to the following:

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