UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 05-8809 JVS (MLGx)	Date	December 31, 2008
Title	In re Endosurgical Products Direct Purchaser Antitrust Litigation		

Present: The Honorable	James V. Selna
Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order re Motion for Preliminary Approval of Class Action Settlement, and Motion for Substitution of Co-Lead Counsel

I. BACKGROUND

Plaintiffs Niagara Falls Memorial Medical Center ("Niagara") and Bamberg County Memorial Hospital and Nursing Center ("Bamberg") (collectively, "Class Representatives"), individually and on behalf of classes of direct and indirect purchasers, respectively, seek preliminary approval of a proposed settlement with defendants Johnson & Johnson, Johnson & Johnson Health Care Systems, Inc., Ethicon, Inc., and Ethicon Endo-Surgery, Inc. ("Defendants"). The complaint alleges that Defendants violated antitrust laws by bundling endosurgical products with other products and by including anticompetitive provisions in their contracts with hospitals and group purchasing organizations. Niagra also moves for substitution of co-lead counsel. Preliminary approval of class certification and the proposed settlement is GRANTED, and the motion for substitution of counsel is GRANTED IN PART AND DENIED IN PART, as set forth below.

II. PRELIMINARY CLASS CERTIFICATION

All class actions in federal court must meet the following four prerequisites for class certification:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are

> typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). If these prerequisites are satisfied, an action may be maintained as a class action if common questions of law and fact predominate over questions affecting individual members and a class action is superior to other means to adjudicate the controversy. Fed. R. Civ. P. 23(b)(3).

Certification of a class for the purpose of settlement is similar to certification for purposes of trial, except the Court "need not inquire whether the case, if tried, would present intractable management problems" under Rule 23(b)(3)(D). Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997). However, the settlement context "demand[s] undiluted, even heightened, attention" to "unwarranted or overbroad class definitions." Id. The decision to grant or deny class certification is within the trial court's discretion. Yamamoto v. Omiya, 564 F.2d 1319, 1325 (9th Cir. 1977).

Class Representatives move to certify two classes for settlement purposes: (1) "Direct Purchasers" including "[a]ll persons and entities who made purchases of Defendants' Relevant Endosurgical Products in the United States directly from Defendants . . . at any time during the Class Period" (Mot. at 5); and (2) "Indirect Purchasers" including "[a]ll persons and entities who made purchases of Defendants' Relevant Endosurgical Products in the United States other than directly from Defendants . . . at any time during the Class Period" (id. at 6). Both classes expressly exclude "Defendants, Defendants' parents, subsidiaries, and affiliates, and the federal government." (Id. at 5-6.) The Class Period is December 19, 2001 through October 20, 2008. (Id. at 6.)

A. Rule 23(a) Prerequisites

1. Numerosity

In determining whether a plaintiff has satisfied the numerosity requirement of Rule 23(a)(1), a court may consider factors including the size of the class, geographical diversity, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought. Jordan v. Los Angeles County, 669 F.2d 1311,

1319 (9th Cir. 1982), vacated on other grounds, 459 U.S. 810 (1982); see Gen. Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 330 (1980). Here, the size of the proposed classes, consisting of over 4,000 Direct Purchasers and over 9,000 Indirect Purchasers, is sufficient to satisfy the numerosity requirement, as joinder of this many parties would clearly be impracticable. Moreover, the class members are geographically dispersed.

2. Commonality

Rule 23(a)(2) requires that questions of law or fact be common to the class. This requirement is permissively construed. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Id. In this case, the primary questions of law and fact central to the claims against Defendants are whether (1) Defendants possessed monopoly power in the relevant market; (2) Defendants maintained their monopoly through willful, anticompetitive, or unlawful activity; and (3) Defendants' anticompetitive conduct injured class members. These questions of law and fact are common to all of the class members' claims against Defendants. Accordingly, the Court finds that the proposed class members share sufficient factual and legal commonalities to satisfy Rule 23(a)(2).

3. Typicality

In order for a class representative to satisfy the typicality requirement of Rule 23(a)(3), he or she must show that his or her claims do "not differ significantly from the claims or defenses of the class as whole." In re Computer Memories, 111 F.R.D. 675, 680 (N.D. Cal. 1986). The class representative's claims and the claims of the class must arise from the same events or course of conduct and must be based on the same legal theory. In re United Energy Corp. Solar Power Modules Tax Shelter Invs. Sec. Litig., 122 F.R.D. 251, 256 (C.D. Cal. 1985). Here, Niagara's claims are typical of those of Direct Purchasers, and Bamberg's claims are typical of those of Indirect Purchasers. Specifically, each class member has a claim that arises from the same course of events – Defendants' alleged anticompetitive conduct – and would make similar legal arguments to establish liability and damages.

4. Fair and Adequate Representation

Representation is adequate if (1) the attorneys representing the class are qualified and competent and (2) the class representatives are not disqualified by conflicts of interest. Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978).

i. *Competency of counsel*

First, class counsel must be experienced and competent. See Hanlon, 150 F.3d at 1021. Cohen, Milstein, Hausfeld & Toll[1] ("Cohen Milstein"), class counsel for Direct Purchasers, and Ball & Scott, class counsel for Indirect Purchasers (collectively, "Class Counsel"), submit evidence that they have substantial experience in handling class actions and antitrust cases. (Hausfeld Decl., Ex. A ¶ 3 (including a firm resume of relevant cases, a list of awards, and detailed attorney profiles); Ball Decl., Ex. D ¶ 3 (providing a detailed attorney biography, including relevant cases in which counsel has participated).) The Court has no reason to doubt their competence. Moreover, Class Counsel has done substantial work in identifying and investigating Class Representatives' claims, and in negotiating a resolution of this litigation. (Hausfeld Decl., Ex. A ¶ 2; Ball Decl., Ex. D ¶ 2.)

Presently before the Court is Niagra's motion to substitute Hausfeld LLP for Cohen Milstein as co-lead counsel for Direct Purchasers.[2] Niagra represents that Michael D. Hausfeld ("Hausfeld") was the Cohen Milstein attorney "who principally negotiated the proposed settlement with Defendant's counsel." (Substitution Mot. at 2.) For the same reasons it found Cohen Milstein qualified above, the Court also finds Hausfeld LLP qualified to serve as class counsel. (Hausfeld Decl., Ex. A (noting that Hausfeld was named one of "the most influential lawyers in America," and providing a detailed attorney profile for Hausfeld as former head of the antitrust practice group at Cohen Milstein); Substitution Reply, Hausfeld Decl., Ex. 13 (including a firm resume).)

[1] The firm is now known as Cohen, Milstein, Sellers & Toll.

[2] Niagra and Bamberg have filed a Notice of Amendment to Plaintiffs' Motion for Preliminary Approval of Settlement to change all references to Niagra's counsel in the motion, supporting papers, and proposed order from Cohen Milstein to Hausfeld LLP. (Docket No. 148.)

Regardless of the Court's ruling on the motion to substitute counsel, all proposed counsel have the requisite experience and competence.

ii. *Adequacy of class representatives*

Rule 23(a)(4) also requires that the representative parties fairly and adequately protect the interests of the class. This requirement is thought of as whether the named plaintiff and his counsel will pursue each class member's claim with sufficient "vigor." Hanlon, 150 F.3d at 1021. In the context of a settlement-only class, the Court examines the "rationale for not pursing further litigation." Id.

Class Counsel asserts that Class Representatives have shared interests with the class members in recovering damages and obtaining structural relief from Defendants. The issue is whether Class Representatives have pursued those interests vigorously. The Court finds that the parties have pursued claims on behalf of the class members with the requisite vigor.

Accordingly, the Court finds that the parties have met, for purposes of preliminary approval, the requirements of Rule 23(a).

B. Rule 23(b)

The Court now addresses whether the proposed classes fall within the requirements of 23(b)(1), 23(b)(2), or 23(b)(3). Class Representatives contend that the classes ought to be preliminarily certified under 23(b)(3). (Mot. at 18-19.)

"Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Kamm v. Cal. City Dev. Co., 509 F.2d 205, 211 (9th Cir. 1975) (quoting Committee notes). A class action may be certified (1) where common questions of law and fact predominate over questions affecting individual members and (2) where a class action is superior to other means to adjudicate the controversy. Fed. R. Civ. P. 23(b)(3).

1. Predominance of Common Issues

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem, 521 U.S. at 623. The Court must rest its examination on the legal or factual questions of the individual class members. Hanlon, 150 F.3d at 1022.

Here, common issues predominate as to proof of the relevant market, Defendants' market power, Defendant's anticompetitive conduct, the effects of that conduct, and damages to Class Representatives and class members. Thus, although there may be some variation between individual class member's claims, such as the actual amount of damages, the Court finds that common questions of law and fact predominate.

2. Superior Method of Adjudication

Next, the Court must consider if the class suit is superior to individual suits. Amchem, 521 U.S. at 615. "A class action is the superior method for managing litigation if no realistic alternative exists." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234-35 (9th Cir. 1996).

Although the claims may vary from one class member to another, it is highly unlikely that the vast majority of the putative class members could economically prosecute their individual claims. Litigation cost would almost certainly surpass the likely recovery for each member. As a result, many litigants would probably not pursue their claims against Defendants because of the financial and other burdens in pursuing complex claims. A class action here presents the advantages of increased likelihood of resolution by settlement where claims are aggregated, economies of scale, and a lighter burden on the individual class members and the judiciary. The proposed class action is "inherently superior" to individual actions in an antitrust case such as this one. Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc., 209 F.R.D. 159, 168 (C.D. Cal. 2002).

From the perspective of judicial resources, a class action is clearly superior. There is no reason to believe that any single plaintiff could try the complex core allegations in less time than the month-long trial in Applied Medical Resources Corp. v. Ethicon, Inc., No. SACV 03-1329 JVS (MLGx), 2006 WL 1381697 (C.D. Cal. Feb. 3, 2006). Such

multiple trials would be unduly burdensome on the judicial system.

Accordingly, the Court finds that Class Representatives have sufficiently satisfied the requirements of Rule 23 for purposes of preliminary class certification.

III. PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Federal Rule of Civil Procedure 23(e) requires the Court to determine whether the proposed settlement is "fundamentally fair, adequate and reasonable." Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982). The settlement as a whole, rather than the component parts, is the proper level of inquiry. Hanlon, 150 F.3d at 1026. "The settlement must stand or fall in its entirety," and the Court may not delete, modify, or rewrite particular provisions. Id. "Settlement is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion." Id. at 1027.

In assessing a settlement proposal, the Court must consider a number of factors, including: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003); Hanlon, 150 F.3d at 1026. "Ultimately, the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." Officers for Justice, 688 F.2d at 625 (internal quotations omitted).

For purposes of preliminary approval, the Court must determine whether the proposed settlement seems fair on its face and is worth submitting to the class members. See In re Corrugated Container Antitrust Litig., 643 F.2d 195, 212 (7th Cir. 1981). The hurdle for preliminary approval is more modest than the hurdle for final approval. The private consensual decision of the parties is entitled to deference. Hanlon, 1027 F.3d at 1027. The Court's role "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." Officers for Justice, 688 F.2d at 626.

A. Settlement Terms

The proposed settlement includes three components: (1) $13 million in cash; (2) structural relief estimated to be worth at least $26.1 million; and (3) up to $500,000 in notice and other administrative costs. (Settlement Agreement, Ex. B.)

First, Defendants will pay class members $13 million in cash, to be deposited into an interest-bearing escrow account. (Id. ¶ 9.1.) These proceeds "will be divided among direct purchasers from all states and indirect purchasers from [] twenty-six states . . ., in proportion to their total purchases of Relevant Endosurgical Products during the Class Period."[3] (Notice Plan, Ex. G.1 at 8; Settlement Agreement, Ex. B ¶¶ 9.2 & 10.4) The relevant distribution factors are: (1) the number of valid claim forms received; (2) the amount of relevant endosurgical products each class member purchased during the Class Period; (3) whether those purchases were direct or indirect; and (4) the state in which those purchases were made.[4] (Id.) By the settlement terms, Class Counsel will be reimbursed and paid out of these proceeds as well. (Id. ¶ 10.5.)

Second, Defendants will adopt restrictions on their contracting practices. For a period of five years, Defendants will comply with the following restrictions on bundled contracts with hospitals and group purchasing organizations that cover endosurgical and other products: (1) such contracts will include the existing "carve outs" for all non-full

[3] The twenty-six jurisdictions are Alabama, Arizona, California, the District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. (Notice Plan, Ex. G.1 at 8; see Docket No. 47 ¶ 30.)

[4] Although not as detailed as some proposals, the Court interprets this plan to mean that the $13 million will be distributed according to the proportionate claim of all eligible class members, direct and indirect, who properly file a claim within the allotted time. (Notice Plan, Ex. G.1 at 8 ("The cash amount of the Settlement Fund will be divided among direct purchasers from all states and indirect purchasers from the twenty-six states listed below, in proportion to their total purchases of Relevant Endosurgical products during the Class Period.").)

line suppliers[5]; (2) such contracts will be terminable at will by customers on thirty days' notice; and (3) such contracts will not prohibit competitive evaluations. (Id. ¶ 9.3.) Class Representatives' expert has estimated the value of the carve-out extension alone at approximately $26.1 million. (Mot., Young Decl., Ex. C ¶ 3.) The Court also finds that the value of other restrictions, though difficult to quantify in monetary terms, will ameliorate the conduct that prompted Class Representatives to bring these actions in the first place.

Third, Defendants will pay up to $500,000 in costs for notice and administration of the settlement. (Settlement Agreement, Ex. B ¶ 4.4.) In return for these three concessions, class members agree to a full and final release of all claims relating to this action. (Id. ¶¶ 8.1-3.)

B. Preliminary Approval Factors

The Court considers the merits of the proposed settlement under the Staton/Hanlon factors, and then addresses the objections of Delaware Valley Surgical Supply Co., Inc. ("Delaware").

1. General Considerations

Niagra, Bamberg, and Defendants reached this settlement after nearly two years of arms-length negotiations beginning in November 2006. (Hausfeld Decl., Ex. A ¶ 4.) There is no evidence that the agreement is the result of fraud or collusion. Delaware's counsel, a distributor that directly purchased endosurgical products from Defendants, participated in at least one settlement meeting in January 2007. (Id. ¶ 5.) But Delaware did not participate in further negotiations, allegedly because it valued the case "unrealistically high." (Id. ¶ 6.)

[5] Beginning in late 2003, Defendants took steps to mitigate the effects of its bundled contracts on single-product suppliers. In determining threshold discount percentage requirements, Defendants carved out purchases from suppliers who did not offer a full line of products. In a related matter, this Court previously found that, as a result of these carve outs, there was no harm to competition resulting from those contracts after late 2003. Applied Med. Res. Corp. v. Ethicon, Inc., No. SACV 03-1329 JVS (MLGx), 2006 WL 1381697, at *3-4 (C.D. Cal. Feb. 3, 2006).

The proposed settlement is within the parameters for submission to class members. On its face, it provides consideration in the form of $13 million in cash, structural relief worth at least $26.1 million, and up to $500,000 in notice and other administrative costs. In sum, the total settlement is valued at over $39.6 million. (Id., Young Decl., Ex. C ¶ 3.) Class Representatives submit that, in assessing this settlement value, the most relevant time period is from December 19, 2001, when the Class Period begins, through late 2003, when Defendants' contracts included carve outs mitigating subsequent harm from those contracts. The Court agrees. Class Representatives assert that the total value of the proposed settlement is at least 1.7% of Defendants' sales during this relevant period.[6] (Mot. at 10.)

The Court relies on this percentage, even though Class Counsel offers no evidence to corroborate this point.[7] Assuming the settlement is worth approximately 1.7% of relevant sales, the Court finds this percentage within the range of settlements approved in similar cases when alleged monopolists were sued first by competitors, and then by purchasers. Class Representatives cite a number of cases as persuasive authority. In LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003), a competitor obtained a judgment against a company that monopolized the transparent tape market. Purchasers subsequently filed a class action, and the court approved a settlement of "approximately 2% of the total amount paid to [defendant] by members of the Settlement Class for invisible and transparent tape for home or office use during the Class Period." Meijer, Inc. v. 3M, Civ. No. 04-5871, 2006 WL 2382718, at *15 (E.D. Pa. Aug. 14, 2006). In Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002), a competitor obtained a judgment against a company that monopolized the smokeless tobacco market. Again, purchasers subsequently filed a class action, and the court approved a settlement for a 2% refund on one year's purchases, which itself was twice what opt-out plaintiffs

[6] At oral argument, Class Counsel asserted that further evidence may put the value of the settlement at 1.9% of Defendants' sales.

[7] Class Counsel does not cite any substantive evidence to show that the "value of the settlement is at least 1.7% of Defendant's sales during this period" between December 19, 2001 and the fall of 2003. (Mot. at 10.) However, Class Counsel were prepared at oral argument to make a further evidentiary showing by declaration. The Court will obviously have a fuller record when it considers final approval.

received. (See Mot., Ex. E, In re Smokeless Tobacco Antitrust Litig., Civ. A. Nos. 1:00CV01415, 1:00CV01454, 1:03CV00875 (D.D.C.), Mem. In Supp. of Mot. for Final Approval of Proposed Settlement, at 2; Ex. F, id., Final Judgment Order.)

Unlike in the two cases cited above, the competitor cases leading up to this matter were "ultimately . . . less successful than plaintiffs anticipated." (Mot. at 2.) Applied Medical Resources Corp. ("AMR"), for example, lost a jury verdict in this Court and recovered nothing.[8] Applied Med., 2006 WL 1381697. For this reason alone, the risk of litigation here is substantial. Whereas AMR had the benefit of a relatively favorable jury instruction on the bundling issue, the class members in this case would face a far more difficult burden in light of recent changes in Ninth Circuit law. Compare Jury Instructions at 33, id. (No. 361) ("Bundling contracts can [] be exclusionary if the total discount on the bundle is so high that an equally-efficient competitor selling only one of the bundled products cannot lower its price for that product enough to meet the aggregate bundled discount and still sell at an above-cost level."), with Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 911 (9th Cir. 2008) (holding that, for exclusionary conduct in bundling cases, "the relevant inquiry is not whether [defendant's] pricing practices forced [plaintiff] to price below cost, but whether [defendant] priced its own services below an appropriate measure of its cost"). Thus, the Court finds this substantive change significantly heightens the litigation risk and weighs heavily in favor of preliminary approval.

Aside from the real possibility that the class members may not prevail at trial, the carve outs may limit damages to a one-year period. Moreover, the Court notes that this is a relatively early settlement. Trial is not set to begin until June 2010. (Docket No. 117.) Before that date, Class Counsel would have to litigate class certification, complete merits discovery, retain experts and serve expert reports, and so forth, expending substantial time, resources, and effort. Therefore, the timing of the settlement supports preliminary approval, as antitrust class actions "are notoriously complex, protracted, and bitterly

[8] Class Counsel also represents that Conmed Corporation sued Defendants for alleged damages of $1.8 billion but settled for only $11 million with no structural relief; and that Genico, Inc. also settled its claim for a confidential sum and no structural relief. (Mot. at 2.) But Class Counsel offers no evidence to corroborate these representations. Thus, the Court does not address them.

fought." In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 510 (E.D.N.Y. 2003) (citation omitted); see also Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation.").

2. Delaware's Objections

With this background the Court now turns to Delaware's specific objections to preliminary approval. The Court considers each argument in turn, as set forth below. Before addressing these arguments, however, the Court notes that Delaware makes no mention of the standard for preliminary approval in its opposition. Indeed, the standard for preliminary approval of the proposed class settlement is modest. Absent "glaring deficiencies," a proposed settlement at the preliminary approval stage need only be "within the range of possible approval." Alberto v. GMRI, Inc., 252 F.R.D. 652, 665 (E.D. Cal. 2008) (citing Gautreaux v. Pierce, 690 F.2d 616, 621 n.3 (7th Cir. 1982)). As "a full fairness analysis is unnecessary at this stage," much of Delaware's opposition is premature because it goes far beyond the issue of whether the proposed settlement is in the range of possible approval. Cf. Hanlon, 150 F.3d at 1019 (involving final rather than preliminary approval). Delaware's critiques of the proposed settlement are not without substance, but they do not alter the Court's conclusion that the proposed settlement should be submitted to class members.

First, Delaware contends that the settlement amount is low relative to both potential recoverable damages and the merits of the case. But the issue is not whether the settlement could be higher, but whether it is within the range of settlements approved in similar cases. Based on the cases discussed above, 1.7% of sales is well within this range. See supra Subsection III.B.1. Delaware makes no attempt to distinguish these cases. Moreover, in a similar case, Delaware's counsel recently filed a joint motion for preliminary approval of a proposed $7 million settlement representing 1.5% of sales. (Reply, Hausfeld Decl., Ex. A at 11 ("A recovery equivalent to approximately 1.5 percent of sales easily puts this settlement into the range of possible final approval.") (footnote omitted) (emphasis supplied).) As for potential recoverable damages, Delaware concedes that its own estimate is "rough," "preliminary," and in need of "further refinement." (Oppo. at 10 & n.5.)

Second, Delaware contends that the settlement amount is low relative to analogous cases. But on this point Delaware relies on a single case, Spartanburg Regional Health Services District, Inc. v. Hillenbrand Industries, Inc., C.A. No. 7:03-2141-HFF (D.S.C.) (settling for $337.5 million in cash and injunctive relief valued at an additional $150 million), which itself is distinguishable. There are significant differences between that case and the present one: (1) Spartanburg followed a successful suit brought by a competitor plaintiff, while this case follows a competitor plaintiff who lost before a jury; (2) Spartanburg was not subject to the higher standard recently adopted by the Ninth Circuit in Cascade; (3) the Spartanburg defendant had a total monopoly in the hospital bed market, while the Defendants here face substantial competition from Tyco; and (4) the defendant's documents in Spartanburg were far more damaging than Defendants' documents here. (Reply, Ball Decl. ¶ 4.) The Court agrees that these differences suggest a much lower recovery in this case. Even if potential recoverable damages are high, the measure of damages would be irrelevant unless Class Representatives can win on liability. In light of AMR's failed litigation and the heightened Cascade standard on bundling, any potential recovery must be substantially discounted for this litigation risk.[9]

Third, Delaware contends that the proposed settlement provides preferential treatment to Indirect Purchasers, as opposed to Direct Purchasers which primarily includes distributors. Delaware bases this argument on prior statements by Defendants regarding Direct Purchasers' lack of interest in structural relief or contractual changes. (Oppo. at 5, 20-21.) Delaware's argument is that the $26.1 million structural relief is essentially worthless to Direct Purchasers, that the only value to Direct Purchasers comes from the $13 million cash settlement, and that – "liberally assuming that the direct purchasers account for 60% of the allocated funds" – Direct Purchasers will receive less than $7 million from this case, or only 20% of the overall settlement. (Oppo. at 22.) Even

[9] Delaware asserts that its case is more attractive than AMR's because it will stress the role of class members as overcharged purchasers, presumably sympathetic purchasers. (Oppo. at 3.) This ignores the fact that the analytic framework for liability is the same, regardless of whether the plaintiff is a competitor or a customer. There is no reason why AMR's jury finding that defendants did not engage in anticompetitive conduct would be any different if a purchaser were the plaintiff. Indeed, to the extent that the defendants tout the benefits of bundling to the consumer, the present plaintiffs are the consumers.

if the Court assumes Delaware's calculations are correct, the premises underlying these calculations are flawed. Delaware incorrectly assumes that Direct Purchasers will receive no value from structural relief. But the Ninth Circuit has rejected this position:

> [T]he distributor is not a completely irrelevant economic actor in this contractual framework. In theory, a demand curve exists for the bundle of goods and services that O & M sells. If the price of the goods is artificially inflated by the anti-competitive practices of J & J, that will affect the attractiveness of the distributor's products in the marketplace. There is no reason to believe that market forces do not work on O & M and other distributors. The presence of another distributor as a plaintiff in this case, DVSS, shows that distributors are indeed affected by J & J's allegedly predatory pricing scheme and do have incentives to bring suit against the manufacturer.

Delaware Valley Surgical Supply Inc. v. Johnson & Johnson, 523 F.3d 1116, 1124 (9th Cir. 2008). Nevertheless, Class Counsel conceded that the impact of the structural change would be different for Direct and Indirect Purchasers. The present record does not allow the Court to quantify the macro effects of structural change on Direct Purchasers versus the more immediate and obvious benefits of the structural change to Indirect Purchasers who can avail themselves of the carve out.[10]

Delaware incorrectly assumes that Indirect Purchasers should not be treated the same as Direct Purchasers for purposes of recovery because Indirect Purchasers have "no treble damages claim" and therefore are entitled to less than Direct Purchasers. (Oppo. at 5.) Delaware's argument that Indirect Purchasers' claims are "far inferior" to those of Direct Purchasers rests on the false premise that "indirect purchasers only have rights to single damages monetary relief." (Opp. at 20-21.) In fact, numerous states allow Indirect Purchasers to recover treble damages or full consideration paid. See, e.g., Ariz. Rev. Stat. § 44-1408(B) (treble); Cal. Bus. & Prof. Code § 16750(a) (treble); Iowa Code § 553.12(3) (double); Kan. Stat. Ann. § 50-115 (full consideration); Mich. Comp. Laws § 445.778(2) (treble); N.M. Stat. § 57-1-3 (treble); Tenn. Code Ann. § 47-25-106 (full consideration).

[10] The analysis is further complicated because some hospitals are both direct and indirect purchasers.

Fourth, Delaware questions whether the value of the structural relief should be taken at face value, given that Defendants voluntarily initiated the carve outs in GPO contracts, and have not shown signs of withdrawing those carve outs. As counsel for Delaware put it, the settlement is no more than an "insurance policy" protecting class members from change over the next five years. This is an area for further analysis.

Fifth, Delaware contends that the proposed settlement arises out of a tainted process by which Class Counsel intentionally excluded Delaware's own counsel. But Delaware cites no authority to show that the intentional exclusion of counsel from settlement negotiations precludes approval of an otherwise proper settlement. The fact that one counsel was not included in most of the negotiations, without more, does not prove collusion. Cf. In re Chicken, 669 F.2d 228, 237 (1982) ("Even irregular settlement negotiations may . . . form the basis for a judicially acceptable class action settlement. It is enough if representation of the class during the negotiations was adequate and that the settlement itself is fair.") (internal quotations and citations omitted) (ellipsis in original).[11] While Delaware was awaiting distributor data only recently received, all Class Counsel have long had hospital data from the AMR and Conmed litigation covering the period 1996 to the second quarter of 2006. If not a complete surrogate, the hospital data was sufficient to bracket likely recoverable damages.

Sixth, Delaware contends that the settlement process involves a "reverse auction." "A reverse auction is said to occur when the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with [] the hope that the district court will approve a weak settlement that will preclude other claims against the defendant." Negrete v. Allianz Life Ins. Co. of N. Am., 523 F.3d 1091, 1099 (9th Cir. 2008) (internal quotations and citation omitted). Here, Class Counsel cannot be fairly described as "the most ineffectual class lawyers." See discussion supra Subsection II.A.4. And there is no basis to conclude that Class Counsel – or Defendants' counsel – did anything improper. Finally, Delaware's reliance on General Motors is misplaced. (Compare In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106,

[11] Delaware incorrectly cites Hanlon for the proposition that "collusion should be suspected" whenever settlement occurs prior to class certification. (Opp. at 23.) There is no such presumption of collusion – Hanlon refers only to the "dangers of collusion" requiring a "more probing inquiry" before the Court grants final approval of a settlement. 150 F.3d at 1026.

1115 (7th Cir. 1979) (involving an "order provid[ing] that the committee could conduct settlement negotiations only with the consent of all counsel for the named plaintiffs"), with Docket No. 62 (including no such limitation in the order appointing counsel).)

Finally, the Court also notes that Delaware incorrectly portrays the proposed settlement's release as being much broader than implied by the plain meaning of its terms. The release applies only to claims that are "related" to "antitrust or unfair competition laws" and "could have been brought based on the allegations in the Actions." (Settlement Agreement, Ex. B ¶ 1.21.) While the release language sweeps broadly to cover antitrust and unfair competition claims, it would not affect usual contractual and other dealings with the defendants.

3. Attorney Fees

As discussed above, the Court has also reviewed the declarations by Class Counsel and is satisfied that they are experienced and well-versed in this area of class action litigation. See supra Subsection II.A.4. In light of this competent representation, and future work to be done on behalf of Class Representatives, the Court notes that Class Counsel seeks up to $3.5 million for attorney fees. (Notice Plan, Ex. G.1 at 11.) In the Ninth Circuit, the Hanlon lodestar calculation guides the determination of whether a fee award is reasonable:

> The lodestar calculation begins with the multiplication of the number of hours reasonably expended by a reasonable hourly rate. The hours expended and the rate should be supported by adequate documentation and other evidence; thus, attorneys working on cases where a lodestar may be employed should keep records and time sheets documenting their work and time spent. The resulting figure may be adjusted upward or downward to account for several factors including the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.

Hanlon, 150 F.3d at 1029 (citations omitted). Here, Class Counsel makes no representation as to the lodestar fee award. Nor has Class Counsel submitted time

records or any other evidence to assist the Court in calculating the lodestar. See Harris v. Marhoefer, 24 F.3d 16, 18 (9th Cir. 1994) (discussing fee awards in the context of section 1988).

Accordingly, the Court expects when Class Counsel seeks final approval, they will adequately support their request for fees and costs with detailed evidence. Moreover, to the extent that there is no agreement among counsel with respect to the allocation of a reasonable fee among counsel, the Court will entertain allocation proposals as part of the final approval process.[12]

Delaware's criticisms invite a fuller analysis of the practical and economic effects of the proposed settlement. However, the showing which Niagra and Bamberg make is sufficient to take up those considerations in the context of final approval rather than derailing the process at this time. In re Corrugated Container, 643 F.2d at 212. Accordingly, the Court grants preliminary approval.

IV. MANNER OF NOTICE

"Adequate notice is critical to court approval of a class [action] settlement." Hanlon, 150 F.3d at 1025; see Fed. R. Civ. P. 23(e)(1)(B). In addition, because the Court preliminarily certifies the class under Rule 23(b)(3), the Court must direct

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: (I) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

[12] Counsel may have made material, compensable contributions to the case even if they are not class counsel at the end of the day.

Fed. R. Civ. P. 23(c)(2)(B). The proposed notice plan has three parts: (1) individual mailed notice to approximately 13,000 class members who can be identified from Defendants' records; (2) publication in the Wall Street Journal, AHA News, Surgical Products, Hospital & Health Networks, Modern Healthcare, and Materials Management in Healthcare; and (3) establishment of a dedicated website. (See Notice Plan, Ex. G.1.) The proposed plan also explains that class members will be able to submit their claim forms by mail or online, and provides information about their direct and indirect purchases of the relevant products during the Class Period. The Court finds that this proposed class notice satisfies the requirements of Rule 23(c)(2) and 23(e).

Therefore, the Court preliminarily approves both the proposed notice plan and claim form.

V. MOTION TO SUBSTITUTE COUNSEL

With this background the Court now considers Niagra's motion to substitute Hausfeld LLP for Cohen Milstein as co-lead counsel for Direct Purchasers.

Niagara represents that it "has instructed that no counsel other than Hausfeld LLP is authorized to act on its behalf for the remainder of this litigation." (Id.) But the suggestion that class counsel should be selected based solely on the views of a single plaintiff is misplaced. The Court must also look to the qualifications of counsel in making this decision. See Fed. R. Civ. P. 23(g)(l).

Cohen Milstein opposes the substitution of Hausfeld LLP. As does the other co-lead counsel for Direct Purchasers, Berger & Montague representing Delaware. (Substitution Oppo., Koffman Decl. ¶ 18 (authorizing Cohen Milstein to state its opposition).) But Cohen Milstein concedes that Hausfeld "played an important role in negotiating the proposed settlement with Defendants." (Id. at 4.) Cohen Milstein rests its opposition on the fact that its attorneys Richard A. Koffman ("Koffman") and Christopher J. Cormier ("Cormier") also played a critical role in formulating the innovative terms of the proposed settlement and negotiating those terms with Defendants' counsel. (Id., Koffman Decl. ¶ 7.) Cohen Milstein also offers evidence that Koffman and Cormier together have billed almost 80% of the combined time that they and the

Hausfeld LLP attorneys have billed to the case.[13] (Id. ¶ 10.)

On these grounds, the Court finds that the classes' interests will be best served by retaining Cohen Milstein as counsel for Direct Purchasers, appointing Hausfeld LLP as co-lead counsel for Direct Purchasers, and dismissing Berger & Montague as co-lead counsel for that class. The Court notes that Cohen Milstein is at least partly amenable to this resolution of the issue. (Substitution Oppo. at 10-11.) The Court agrees that it would be inappropriate to retain Berger & Montague given its opposition to the settlement. In essence, there is a conflict between Berger & Montague's position and what the Court has preliminarily found to be in the best interest of the classes. The settlement class should be represented by lawyers who support, rather than oppose, the settlement.[14]

In awarding and allocating fees, the Court will necessarily consider the degree to which counsel have worked together to achieve efficiencies beneficial to the class members.

VI. SCHEDULING

In consideration of the parties' proposal, the Court adopts the following schedule:

Class Counsel shall mail notice.	February 2, 2009
Class Counsel shall publish notice.	March 9, 2009
Last day for class members to submit claim forms, an opt-out form, or written objections.	April 20, 2009
Last day for filling and service of papers in support of final settlement approval and request for attorney fees and expenses.	April 27, 2009

[13] More specifically, Koffman has billed approximately 447 hours, Cornier 494 hours, and Hausfeld 125 hours, and another attorney 129 hours. (Substitution Oppo., Koffman Decl. ¶ 10.)

[14] As suggested in Subsection III.B.3, the Court leaves open the allocation of any fee award.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 05-8809 JVS (MLGx) Date December 31, 2008

Title In re Endosurgical Products Direct Purchaser Antitrust Litigation

Final settlement approval hearing.	May 11, 2009
Defendants to make all payments and structural changes per the proposed settlement.	(10 days after entry of judgment)

(Proposed Order at 2.)

VII. CONCLUSION

For the foregoing reasons, Class Representatives' motion for conditional class certification and preliminary approval of the class settlement is GRANTED. The motion to substitute counsel is GRANTED IN PART AND DENIED IN PART, as discussed above. In summary, the Court orders that:

1. The class be preliminary certified under Federal Rule of Civil Procedure 23(b)(3) for settlement purposes;

2 Niagra be designated class representative for Direct Purchasers, and Bamberg for Indirect Purchasers;

3. Hausfeld LLP be appointed as co-lead counsel for Direct Purchasers, along with Cohen Milstein; Berger & Montague be dismissed as co-lead counsel for Direct Purchasers; and Ball & Scott be appointed class counsel for Indirect Purchasers;

4. The proposed settlement is found sufficiently fair, adequate, and reasonable to merit preliminary approval and notification to class members;

5. Class Counsel adequately support their request for attorney fees and costs with detailed evidence necessary to make a lodestar showing; and

6. All class members shall be provided notice of the proposed settlement to which shall be attached the claims and release form and the opt-out form, as set forth in Exhibit G to the main motion.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 05-8809 JVS (MLGx) Date December 31, 2008

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