IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re: OPANA ER ANTITRUST LITIGATION	**MDL No. 2580**
This Document Relates to All Cases	**Case No 14 C 10150**
	Judge Harry D. Leinenweber

ORDER

End Payor Plaintiffs' motion to certify class (Dkt. No. 438) and Direct Purchaser Plaintiffs' motion to certify class (Dkt. No. 436) are granted.

I. BACKGROUND

The Court's contemporaneously released opinion and order regarding summary judgment recounts the facts of the case in detail, so the Court limits the background discussion of this order to the most relevant particulars. This case was filed as a putative class action alleging antitrust violations as established under *F.T.C. v. Actavis, Inc.*, 570 U.S. 136 (2013). In 2010, Endo Pharmaceuticals Inc. and its affiliated entities ("Endo") sued Impax Laboratories, Inc., alleging patent infringement from Impax's proposed generic production of the pharmaceutical drug Opana ER. The parties settled in a 2010 Settlement and License Agreement, which allegedly provided a reverse payment settlement from Endo to Impax. Reverse payment settlements arise when a

generic drug producer agrees to delay its cheaper product from competing with the plaintiff's product in exchange for substantial payment. *Id.* at 145. Absent the patent litigation context, this would be a clear violation of the Sherman Act's prohibition on "restraint[s] of trade or commerce." 15 U.S.C. § 1.

While a "'*valid* patent excludes all except its owner from the use of the protected process or product,' . . . an *invalidated* patent carries with it no such right." *Actavis*, 570 U.S. at 147 (quoting *United States v. Line Material Co.*, 333 U.S. 287, 308 (1948)). In 2014, Plaintiffs filed this motion alleging that the patents that immunized Endo and Impax's agreement from scrutiny were invalid, and thus the agreement that prevented the distribution and sale of the cheaper generic Opana ER violated the antitrust laws.

End Payor Plaintiffs and Direct Purchaser Plaintiffs now move to certify their respective classes. (Dkt. Nos. 436, 438.) On a broad level, End Payor Plaintiffs seek class certification of all payors who purchased or reimbursed at least a portion of the branded or generic versions of Opana ER from April 1, 2011 until the still-in-dispute end of the injurious conduct. End Payor Plaintiffs group their classes into two broad categories based on the legal injury: the "Antitrust/Consumer Class" and the "Unjust Enrichment Subclasses." Direct Purchaser Plaintiffs seek to

certify all persons or entities, other than the defendants themselves and the federal government, who purchased branded or generic Opana ER "directly from any manufacturer" from April 1, 2011 until August 31, 2017.

II. LEGAL STANDARD

Plaintiffs seek to certify classes under Federal Rule of Procedure 23(a) and 23(b)(3). "[A] proposed class must always meet the Rule 23(a) requirements of numerosity, typicality, commonality, and adequacy of representation." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). Under Rule 23(b), the putative class must additionally demonstrate "(1) that the questions of law or fact common to the members of the proposed class predominate over questions affecting only individual class members; and (2) that a class action is superior to other available methods of resolving the controversy." *Id.* Plaintiffs bear the burden of showing by a preponderance of the evidence that the class satisfies these prerequisites. *Bell v. PNC Bank, N.A.*, 800 F.3d 360, 373 (7th Cir. 2015). When reviewing for class certification, a district court is directed to make "whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied before deciding whether a class should be certified, even if those considerations

overlap the merits of the case." *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010).

III. DISCUSSION

A. Antitrust/Consumer Class and the Unjust Enrichment Subclasses

End Payor Plaintiffs ("EP Plaintiffs") state that the Antitrust/Consumer Class and Unjust Enrichment Subclasses have met the four characteristics of Rule 23(a). First, EP Plaintiffs allege that over one million prescriptions for Opana ER were filled during the class period, satisfying the requirement for numerosity. (Mem. at 19, Dkt. No. 439.) Second, EP Plaintiffs argue that there are common issues of law and fact because there was only one antitrust conspiracy, and Defendants had the same conduct towards all parties, citing *In re Sulfuric Acid Antitrust Litig.*, 2007 WL 898600, at *4 (N.D. Ill. Mar. 21, 2007). Pointing to the alleged common scheme and course of conduct, EP Plaintiffs similarly argue they have satisfied typicality. Finally, EP Plaintiffs point to their robust efforts to prosecute this case thus far and the commonality of interests between themselves and the other class members as proof that they satisfy the adequacy of representation requirement.

Defendants object to the typicality and the attorney representation prongs of Rule 23(a), arguing that EP Plaintiffs

cannot adequately protect the interests of the class members it wishes to represent. First, Defendants note that all of the class representatives for the classes and subclasses are "third-party payors." These companies either paid for Opana ER on behalf of consumers or reimbursed consumers after payment, but they are not direct consumers of the product. Second, Defendants object to the inclusion of consumers from States where EP Plaintiffs did not personally pay or reimburse payment for Opana ER. Defendants argue that both of these differences create fundamental barriers to representation, although Defendants do not mention the specifics of what the differences of interest might be.

Adequacy and typicality have similar inquiries: "both look to the potential for conflicts in the class." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 611 (1997). In *Amchem Products, Inc. v. Windsor*, the Supreme Court affirmed the Third Circuit's decision that the "the currently injured and exposure-only categories of plaintiffs, and the diversity within each category" had temporal interests too diffuse to make adequate representation possible. *Id.* at 636–27. Specifically, the already-injured plaintiffs would be interested in immediate payment and relief, whereas the exposure-only plaintiffs would be interested in retaining funds for when the extent of an injury, if any, would become apparent.

Id. Here, Defendants make no such arguments here about why the third-party payors are different than direct consumers.

Unlike *Amchem Products*, both direct consumers and third-party payors suffered a concrete and financially calculable injury, and, assuming the lawsuit is successful, both would be entitled to immediate payment. Further, EP Plaintiffs' combination of third-party payors and direct consumers, as well as its representation of as many States as have laws applicable to the suit, are not novel innovations. *See Messner*, 669 F.3d at 826 (vacating a district court's order denying class certification on a putative class of individual patients and third-party payors); *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) ("By relying principally on federal substantive law, the representative plaintiffs followed the pattern of antitrust and securities litigation, where nationwide classes are certified routinely even though every state has its own antitrust or securities law, and even though these state laws may differ in ways that could prevent class treatment if they supplied the principal theories of recovery.").

The Court does not find any actual conflicts of interest in the differences highlighted by Defendants. As Defendants have no other objection to the requirements set forth in Rule 23(a), the Court finds that EP Plaintiffs have met this burden.

In addition to Rule 23(a), EP Plaintiffs must meet the predominance and superiority requirements set forth in Rule 23(b). Predominance consists of two inquiries: "whether common methods of proof can be used to demonstrate the existence of the alleged collusion and its effect on prices," and "whether the existence and impact of any such collusion predominates over the other factors that may affect an individual plaintiff's damages." *Kleen Prod. LLC v. Int'l Paper Co.*, 831 F.3d 919, 926 (7th Cir. 2016).

Defendants object that EP Plaintiffs' class definition contains too many persons who were not injured. Defendants estimate that over half of all consumers would have continued to pay for branded Opana ER due to brand loyalty. (Resp. at 18, Dkt. No. 451.) In support, Defendants cite to Dr. Hughes' expert report, which simply asserts "[c]onsumers who would have purchased or reimbursed only brand Opana ER and Opana ER CRF (i.e., "brand loyalists") in a but-for world in which generic oxymorphone ER was available prior to January 2013 are likely uninjured and exceed a hundred thousand [out of Hughes' estimated two hundred thousand class members]." (Hughes Report ¶ 21, Resp., Ex. A, Dkt. No. 451-1.)

Other than claiming his percentages are based on Plaintiffs' own calculations, Dr. Hughes does not provide on the record any methodology, sources, or reasoning. (*Id.* ¶ 82 ("Based on Dr. Rosenthal's own calculations, a large share of proposed class

members is likely uninjured because they are brand loyal; that is, they would choose to purchase a brand product even if a generic version was available.") The Court is skeptical of this unsubstantiated claim for several reasons. First, as is immediately evident from the verb tenses throughout the expert report, Dr. Hughes cannot actually show any brand loyalty for Opana ER because Impax's generic product was never on the market as the same time as Endo's branded version, a decision engineered by Endo. Second, in order to receive approval from the Food and Drug Administration, Impax's generic Opana ER product must be chemically identical to branded Opana ER, leaving unanswered the question as to what would induce brand loyalists to continue to pay the higher price point. The last readily apparent complication is that because the products are identical, pharmacists are permitted or even required to substitute generic drugs when fulfilling a prescription for a branded drug. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 628 (2011) (Sotomayor, J., dissenting) ("Currently, all States have some form of generic substitution law . . . Some States require generic substitution in certain circumstances.") All of these factors complicated assertions of brand loyalty and, without further evidence, the Court treats Dr. Hughes' statements as bordering on speculation.

In any event, the Court finds these objections premature. The Seventh Circuit has held again and again that class certification is not a determination on the merits of the litigation. *Messner*, 669 F.3d at 824 (7th Cir. 2012) (collecting cases). The fact that "some class members' claims will fail on the merits if and when damages are decided [is] . . . generally irrelevant to the district court's decision on class certification." *Id.* at 823. The Seventh Circuit has held it is almost inevitable that a class will "include persons who have not been injured by the defendant's conduct." *Id.* (quoting *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009).

Defendants point to language from some cases where class certification has been denied because the definition of the class "sweeps within it persons who could not have been injured by the defendant's conduct." *See Kohen*, 571 F.3d at 677. But there is a crucial difference between plaintiffs who could not have been injured under any set of facts, and plaintiffs whose viable claim ends in failure. *See Messner*, 669 F.3d at 825 (discussing the difference between "class members who *were not* harmed and those who *could not* have been harmed"). Defendants' vague assertions on consumer brand loyalty do not prove that these consumers could not be members of EP Plaintiffs' proposed class, making those cases inapplicable to this litigation.

Defendants also argue that the impact of the 2010 Settlement and License Agreement between Endo and Impax does not predominate over other factors that affect EP Plaintiffs' damages, citing to *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018). In *In re Asacol*, Union-sponsored benefit plans sued because the company producing Asacol pulled it from the market months before the patent protecting Asacol expired and then started marketing a close but still patented-protected substitute named Delzicol. *Id.* at 44. The plaintiffs argued that, because only Delzicol was available, there were no automatic substitutions of generic Asacol in the drug distribution process, i.e., no Asacol was prescribed, and therefore no pharmacist substituted branded Asacol prescriptions with generic Asacol. *Id.* at 45. As part of the class certification process, the district court held that approximately 10% of the class would not have been injured, but that these members could be disentangled from the rest of the class through a Claims Administrator and unrebutted affidavits. *Id.* at 52. Noting there was a circuit split, the First Circuit held that the district court ruling provided two equally unappetizing scenarios on class certification: (1) direct consumers could recover based on "unrebutted affidavits" from class members which would "do away with the rights [the defendant] would customarily have to raise plausible individual challenges on those issues," or (2) "a line

of thousands of class members waiting their turn to offer testimony and evidence on individual issues." *Id.* at 51–52. As a result, it reversed the finding of class certification. *Id.* at 58.

The First Circuit's decision regarding the parties' inability to litigate fairly and efficiently is inapplicable to the facts of the present litigation. Endo chose to completely leave the Opana ER market prior to the entry of the Impax's generic Opana ER. ("Regulatory History of Opana ER" at 10, Mem. on Causation/Damages, Ex. 4, Dkt. No 558-19.) The 2010 Settlement and License Agreement additionally delayed Impax's entry and prohibited Endo from competing in the market as a generic alternative. As a result, the dosage strengths in dispute here have always had a single producer. Assuming the disputed patents are invalid, every consumer has been deprived of the both the opportunity to choose between more than one product as well as the price pressure that comes from allowing more competition on the market. (*See* Leitzinger Report ¶¶ 40–44, Mem., Ex. 2, Dkt. No. 531-3.)

Even if individualized damage calculations are required, however, the Seventh Circuit does not recognize this as a bar to class certification. "It has long been recognized that the need for individual damages determinations at [a] later stage of the litigation does not itself justify the denial of certification." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 671 (7th Cir. 2015);

see also Messner, 669 F.3d at 815 (7th Cir. 2012) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) ("[W]e think it clear that individualized monetary claims belong in Rule 23(b)(3)."). The Court will not disturb this legal precedent.

Finally, Defendants object to the state unjust enrichment classes on the basis that they would be unmanageable to litigate as a class action. Specifically, Defendants claim that EP Plaintiffs have failed to provide the analysis of state law required to pursue class certification. The Court's review of Defendants' specific state-by-state objections failed to show any legal requirements that would overwhelm the predominance or superiority of the set of facts in dispute for the purposes of the class action litigation. For these reasons, the Court grants End Payor Plaintiffs' motion for class certification.

B. Direct Purchaser Plaintiffs Class

Direct Purchaser Plaintiffs ("DP Plaintiffs") also move for class certification under Federal Rule of Civil Procedure 23(a) and 23(b)(3). To meet Rule 23(a)'s numerosity requirement, DP Plaintiffs submit that they are a class of thirty-seven entities who are widely dispersed throughout the country, making joinder impractical. DP Plaintiffs argue that commonality and typicality is easily satisfied because same alleged misconduct injured all parties. DP Plaintiffs also allege that no conflict of interest

between themselves and the larger class members exists and that they have vigorously pursued the case thus far, showing their adequacy of counsel.

Defendants object only as to numerosity, arguing that joinder is practical despite the national spread of the proposed class. First, Defendants argue that there are, at most, thirty-six members of the putative class. Defendants then cite to *In re Modafinil Antitrust Litigation*, where the Third Circuit held that the district court abused its discretion in considering "the late stage of litigation and the sunk costs already incurred" in its numerosity analysis. 837 F.3d 238, 255 (3d Cir. 2016), as amended (Sept. 29, 2016) (holding that a putative class of twenty-two did not meet Rule 23(a)'s numerosity requirement). Defendants argue that the Third Circuit's analysis precludes a finding of numerosity here.

Even without consideration of the stage of litigation or the sunk costs incurred, the Court finds that the putative class here meets the numerosity requirement set forth in Rule 23(a). "While there is no magic number that applies to every case, a forty-member class is often regarded as sufficient to meet the numerosity requirement." *Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 859 (7th Cir. 2017). In general, "courts rely on common sense to determine whether an estimate of class size is reasonable and

meets the numerosity requirement." *Redmon v. Uncle Julio's of Illinois, Inc.*, 249 F.R.D. 290, 294 (N.D. Ill. 2008).

The Court's main concern in this litigation is that there are already multiple defendants in addition to the putative Direct Purchaser Class. (*See* Opp'n at 17, Dkt. No. 450 ("This litigation already includes direct purchaser plaintiffs, end-payor plaintiffs, and opt-out retailers headquartered all around the country.") As a result, this case is more complicated than the average putative class action suit. While the Court recognizes that thirty-six members is slightly lower than the presumptive class, it is still well within the historical range of granted classes. *See e.g.*, *Elizarri v. Sheriff of Cook Cty.*, No. 07 C 2427, 2011 WL 247288, at *3 (N.D. Ill. Jan. 24, 2011) ("Even assuming that the class is only 31 plaintiffs strong, joinder continues to be sufficiently impracticable and the class continues to be sufficiently numerous to satisfy the numerosity requirement.") This case will be a more impractical than average to joinder additional parties, and it will be a particularly efficient use of judicial resources in this litigation to have a single class of direct purchasers represented amongst the other plaintiffs. The Court finds that the numerosity requirement is satisfied.

DP Plaintiffs must also demonstrate that "questions of law or fact common to class members predominate over any questions

affecting only individual members." FED. R. CIV. P. 23(b)(3). The Court has already held that common issues predominate in this inquiry for EP Plaintiffs, and there are no complicating factors for this second class. Further, DP Plaintiffs have offered proof that prices fell for every putative Direct Purchaser Class member who purchased either branded or generic Opana ER after generic entry. (*See* Reply at 17, Dkt. No. 468.) Assuming that the jury finds the patents invalid and the 2010 Settlement and License Agreement to have collusively delayed generic production, DP Plaintiffs have demonstrated that they paid higher prices as a result of that agreement. The Court grants DP Plaintiffs' motion to certify its class.

IV. CONCLUSION

For the reasons stated herein, both End-Payor Plaintiffs' motion to certify class (Dkt. No. 438) and Direct Purchaser Plaintiffs' motion to certify class (Dkt. No. 436) are granted.

Harry D. Leinenweber, Judge
United States District Court

Dated: 6/4/2021