

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re Cell Pathways, Inc.,
Securities Litigation II

Master File
01-CV-1189

This Document Relates To:

All Actions

:
:

MEMORANDUM AND ORDER

McLaughlin, J.

September 23, 2002

The plaintiffs have requested approval of a settlement of this securities class action and class counsel seeks approval of their petition for attorneys' fees and reimbursement of expenses. After a hearing held on September 6, 2002, the Court grants these requests and enters a final judgment and order of dismissal.

I. BACKGROUND

On March 13, 2001 a class action complaint was filed against Cell Pathways, Inc. ("the company" or "CPI") and its two principal officers, Robert Towarnicki and Rifat Pamukcu. The

complaint sought damages for violations **of** Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. The suit was brought on behalf of purchasers of CPI securities who purchased between October 27, 1999 and September 22, 2000, and alleged that the defendants made false and misleading statements concerning CPI's drug Aptosyn.

Subsequently ten additional complaints were filed. The Court consolidated all the cases on May 14, 2001. On **July 27**, 2001, the Court appointed Paul Didion, Sanford Goldfine, Michael Denton, and Richard Darlington as lead plaintiffs and approved the **lead** plaintiffs' selection of the law firms of Berger & Montague, P.C. and Schiffrin & Barroway, LLP as counsel for the class.

A consolidated class action complaint was filed on September 10, 2001. The consolidated complaint alleged generally that CPI and its two principal officers violated sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule **10b-5** promulgated thereunder, by making allegedly false and misleading statements regarding the clinical evidence of the safety and efficacy of the company's lead drug, Aptosyn, as a treatment for Familial Adenomatous Polyposis and the prospects for FDA approval of the company's new drug application seeking approval of Aptosyn.

The consolidated complaint also alleged that on September 22, 2000, after the close of trading that day, the company disclosed that the FDA had advised CPI that the pending Aptosyn new drug application was not approvable, and that the FDA would send the company a formal letter setting forth the reasons for that action. The consolidated complaint alleged that news of the FDA's refusal to approve the new drug application sent the price of the company's common stock tumbling nearly 70% on September 25, 2000.

With the Court's permission, the parties thereafter stipulated to defer the defendants' response to the consolidated complaint to allow the parties to engage in settlement discussions. On May 16, 2002, the parties entered into a stipulation and agreement of settlement and a separate supplemental agreement, which has been submitted for the Court's approval. Stipulation May 16, 2002, and Supplemental Agreement, May 16, 2002. The agreement provides that a cash payment of \$2 million (\$2,000,000.00) plus interest and 1,700,000million shares of freely tradeable CPI common stock shall be issued by CPI to create a gross settlement fund. In exchange, all claims of the class against the defendant shall be extinguished.

Upon approval of the settlement and entry of an order approving distribution, the gross settlement fund, less the costs

of notice and administration of the settlement and any fees and costs as may be awarded by the Court (the "net settlement fund"), shall be distributed to class members who timely submit valid proof of claim forms to the claims administrator. Each claimant's proportional share of the net settlement fund shall be calculated according to the type **of** security purchased and the time of the purchase. If the total recognized losses for all authorized claimants exceed the net settlement fund, each authorized claimant's share will be determined based upon the percentage that his, her, or its recognized loss bears to the total recognized losses for all authorized claimants.

Lead plaintiffs and the defendants made an application **for** an order approving the settlement. On June 6, 2002, the Court certified this action as a class action pursuant to Fed. R. Civ. P. 23. The Court also approved, as to form and content, the proposed Notice to the Class and scheduled a hearing on approval of the settlement.

The notice of the proposed settlement was distributed to the class through 34,277 directly mailed notices, as well as publication in the national edition of the Wall Street Journal and over the PR Newswire service. Affidavit of Edward J. Sincage, CPA Regarding Notice to the Class ("Sincage Aff."). After dissemination of the notice, class counsel received notice

of 19 opt-outs, amounting to 59,383 shares. One objection was received from class members Jonathan I. Arnold and Anita W. Garten, two economists, who tried unsuccessfully to be named lead plaintiffs earlier in the case. Mr. Arnold and Ms. Garten objected only to the attorneys' fee petition. Notice of Intention to Appear, Object, and **be** Heard at the Settlement Hearing ("Obj"). Mr. Arnold and **Ms.** Garten also filed a pro se motion to intervene with respect to the fees and expenses requested **by** counsel.

On September 6, 2002, the Court held a hearing on the proposed settlement and the petition for attorneys' fees. Counsel for the class described the settlement and explained why the settlement and the attorneys' fee petition should be approved. Counsel for the defendant expressed the defendants' support for approval of the settlement. The Court granted the intervention petition of Mr. Arnold and Ms. Garten **and** heard from each **of** them as to their objections to the fee petition.

11. DISCUSSION

The Court decides the following five questions:

- A) whether there is a properly certified settlement class under Federal Rule of Civil Procedure 23;
- B) whether notice to the class regarding the settlement and attorneys' fees petition was adequate;

- C) whether the settlement itself and the plan of allocation are fair, adequate and reasonable;
- D) whether the shares of CPI stock that are to be issued to the Class as part of the settlement are exempt from registration under 15 U.S.C. §77c(a) (10); and
- E) whether the attorneys' fee petition should be approved.

A. Certification of the Class

This action was certified as a class action for settlement purposes pursuant to Fed. R. Civ. P. 23 on June 6, 2002. The class was defined to include all persons who purchased or otherwise acquired CPI common stock or the publicly-traded options on CPI common stock between October 27, 1999 and September 22, 2000, inclusive. Excluded from the class are the defendants, any entity in which they have a controlling interest or is a parent or subsidiary of or is controlled by CPI, and the officers, directors, employees, affiliates, legal representatives, heirs, predecessors, successors and assigns of the defendants.

In certifying this class, the Court found that the requirements of Fed. R. Civ. P. Rules 23(a) and 23(b) (3) were satisfied. Nothing has occurred in the interim between the class certification and the present that has changed any of these factors or would otherwise warrant or require decertification.

The class remains properly certified for the purposes of this settlement.

B. Notice

The due process requirements of Fed. R. of Civ. Pro. 23 demand that, prior to final approval of a class action settlement, class members be given the best notice practicable under the circumstances, including individual notice **to all** members who can be identified through reasonable efforts. E.g., Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 173 (1974). A decision that notice is appropriate is required before any inquiry is made into the merits of the settlement itself. E.g., In re Prudential, 148 F.3d 283, 326-27 (3d Cir. 1998).

In this case notice met the requirements of Rule 23 and of due process. The notice disseminated, pre-approved by this court, described the proposed settlement, its terms, and the nature of the claim filed on behalf of the class, as well as detailed instructions regarding class members' rights to object to or opt out of the settlement and their opportunity to be heard at the final fairness hearing.

The notice was printed in the national edition of the Wall Street Journal, and disseminated over a national newswire service. In addition to general publication, nearly 36,000

individual notice forms were sent to known class members. Because individual notices were sent to all identified class members, and because the notice was widely disseminated through widely read national business publications, the Court finds the notice in this case was the best practicable given the potential number of class members and thus meets due process requirements.

C. Approval of the Settlement

1. The Settlement as a Whole

In order for a settlement to be approved in a class action case, the proposed settlement must be "fair, reasonable, and adequate" and in the best interests of the class. In Re General Motors, 55 F.3d 768, 785 (3d Cir. 1995).

In Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975), the Third Circuit set forth the following specific factors a district court should consider in determining whether a settlement is fair, reasonable, and adequate: 1) the complexity, expense and likely duration of the litigation; 2) the reaction of the class to the settlement; 3) the stage of the proceedings and the amount of discovery completed; 4) risks of establishing liability; 5) risks of establishing damages; 6) the risks of maintaining the Class action through trial; 7) the ability of the defendants to withstand a greater judgment; 8) the range of reasonableness of

the settlement fund in light of the best possible recovery; and
9) the range of reasonableness of the settlement fund to a
possible recovery in light of all the attendant risks of
litigation. Id. at 157.

a) The Ability of the Defendants
to Withstand a Greater Judgment

This factor will be discussed first because this was
the most important reason for class counsel's recommendation **of**
the settlement. The Court concludes that it is highly uncertain
whether the defendants would be able to pay any greater judgment
than the settlement amount.

At the time of the settlement, CPI had no substantial
cash assets and was going through its cash position at the rate
of approximately \$22 million per year. Over a nine-month period
the company's financial statements showed a decline of **\$16.5**
million in the company's cash, cash equivalents, and short-term
investments. Id. at 10-11. Additionally, the FDA denial **of**
approval for Aptosyn, the company's lead product in development,
further jeopardized the company's financial health and stability.

The likelihood that CPI could withstand a higher
judgment was also diminished by the lack of available insurance
proceeds to pay the judgment. Though there was a potential \$10
million in insurance proceeds to fund the settlement, the actual

amount available is actually much lower. One **of** the insurance carriers providing half of the coverage, Reliance, was placed into rehabilitation and then into liquidation. The Pennsylvania Insurance Commissioner, appointed as the Reliance rehabilitator, has advised that the claims against Reliance exceed \$9 billion and the likelihood that either the class or CPI could recover on that \$5 million policy is very limited.

The other carrier, Hartford, has disclaimed coverage. Hartford has contended that the policy at issue had been exhausted **by** the settlement and defense of a prior case against CPI. Though Hartford eventually agreed to provide the funds which make up the cash portion of the settlement, it is unlikely that they would have agreed to pay a larger judgment without a full litigation of the insurance coverage issue which brings uncertainty and risk.

It is highly unlikely that CPI would have been able to pay, on its own or through insurance, any judgment significantly larger than this settlement. In fact, had the parties taken significantly more time, through protracted settlement negotiations or litigation, CPI may not have been **able** to pay a judgment equal to or even smaller than the settlement. CPI's' inability to withstand a greater judgment weighs strongly in favor of approving this settlement.

b) Complexity, Expense, and
Likely Duration of Litigation

The claims advanced by the class involved numerous legal and financial issues, requiring extensive expert testimony, which would have added considerably to the expense and duration of the litigation. In addition, because the case settled at a relatively early stage in the proceedings, continued litigation would have greatly increased the expense and duration of this action.

c) Class Reaction

Not one class member has objected to the terms of the settlement. Although Mr. Arnold and Ms. Garten have expressed objection to the attorneys' fee petition, they **do** not object to the settlement itself. In addition, only **19** requests to opt out, totaling 59,383 shares, had been received as of the fairness hearing.

That 36,000 known class members have been identified and received direct notice of the proposed settlement, and thousands of other potential class members received notice through publication, and not one class member objects, is significant. As the Third Circuit noted in Cendant Corp, 264

F.3d 201 (3d Cir. 2001), a vast disparity between the number of potential class members receiving notice of the settlement and the number of objectors creates a strong presumption in favor of approving the settlement. Here, the reaction of the class weighs in favor of approval.

d) Stase of Proceedinss and Discovery Completed

The Court must also examine the stage of the proceedings and the discovery completed, in order to ensure that the parties and counsel have enough information available to them to form understanding of the case sufficient to enter into an appropriate settlement. In re Prudential, 148 F.3d at 319. In this case class counsel has investigated the claims thoroughly, both before and after filing, and are well situated to sufficiently determine the value of the claim and a proper settlement.

Prior to filing the complaint, class counsel conducted both a formal and informal investigation of the facts underlying the claims, including reviewing the company's public filings, annual reports, press releases and other public statements, as well as researching the applicable law regarding the case's claims and defenses. Joint Declaration of Sherrie R. Savett and David Kessler, August 29, 2002, ("Savett/Kessler Decl."), 20.

Counsel also retained and worked closely with an expert in the areas of clinical trials, biostatistics, and FDA drug approval procedures. Id. 19-21.

After the filing of the consolidated complaint, counsel continued with their investigation and discovery. Counsel reviewed thousands of pages of internal documents produced by CPI regarding CPI's operations and dealings with the FDA as well as thousands of pages of new, publically available releases and articles regarding CPI. Counsel also conducted in-depth interviews of senior members of CPO's management, including Kathy Tsokas, CPI's director of regulatory affairs. Savett/Kessler Decl. 9. Class counsel also kept abreast of the financial health and status of the defendant and continued to work with their biotechnology expert. Id.

Class counsel has given this case a thorough review. The discovery and other investigations that class counsel have undertaken render them sufficiently informed to make a decision about the propriety of settling and which terms of settlement to accept. The review class counsel has completed has also put them in a good position to investigate and confirm any representations made by the defendants during settlement and ensure that the settlement is fair and beneficial to the class. The stage of the proceedings and the amount of investigation and discovery

undertaken by counsel weighs in favor of approving settlement.

e) Risks of Establishing Liability and Damages

To properly evaluate the risks of proving liability and damages, the court should balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of a quick settlement. In re Prudential, 148 F.3d at 319.

Class counsel has indicated that liability in this case would be more difficult to prove than in the typical securities case because of the difficulty in proving scienter, a prerequisite to a jury finding of liability. As class counsel explained at the hearing, scienter in a securities litigation case is usually proven by circumstantial evidence, such as a showing that the defendants engaged in insider trading. In this case, there was no insider trading, making it harder to prove that the defendants had the requisite scienter.

Another risk of continued litigation is that the plaintiffs would not be able to prove that the allegedly material facts about Aptosyn were not disclosed by the defendant and were not otherwise available in the market. Even if the material facts were not disclosed by the defendant, it is possible that the jury could find that the defendant has a valid "truth of the

market'' defense. Such a defense is available where a defendant's misrepresentation is irrelevant because accurate information was otherwise available to the general public. The defendants could put on a strong argument that this defense is applicable here because there was considerable discussion in the financial media about the risks associated with investing in companies like CPI.

If liability were proved, damages would likely be hotly disputed by the parties and their experts and would be based on highly complex valuation models. The real possibility that the jury could accept a defense expert's opinion on damages lends even more uncertainty and risk to the plaintiffs' ability to obtain a successful verdict.

By settling this case, class counsel **has** avoided these risks and uncertainties, guaranteeing that at least some benefit will flow to the class. Weighing the high level of risk and uncertainty in this case against the benefits of a quick settlement supports approval of this settlement.

f) Risks of Maintaining a Class
Action Through Trial

The value of a class action depends largely on the certification of the class and the ability to sustain that class through trial. In re General Motors, 55 F.3d at 817. There are

no factors to indicate a likelihood that this class could not have been maintained throughout trial. As with any class action, however, there is always some risk of decertification. Because the risk of decertification is present but no higher than any other class action, this factor neither supports nor undermines approval of this settlement.

g) The Reasonableness of the Settlement
in Light of the Best Possible Recovery
and the Attendant Risks of Litigation

The reasonableness of a proposed settlement depends in part on a comparison of the present value of the damages the plaintiffs would likely recover if successful, discounted by the risks of not prevailing. In re General Motors, 55 F.3d at 806. This settlement is reasonable in light of the risks of litigation and the likelihood that, even if the class prevailed, that CPI would not be able to pay a large judgment.

Considering the additional risks of litigation and delay in this case, the settlement is reasonable despite the disparity between the settlement amount and the tens of millions of dollars of losses suffered by the class. Even if the class were to be awarded an amount of damages comparable to the losses, the likelihood that the class would ever collect the award is slim to none because of CPI's' financial situation. In light of

these risks, the settlement is a reasonable compromise for the class, which weighs heavily in favor of the settlement's approval.

All but one of the Girsh factors weigh in favor of approval of the settlement, and the other, risk of maintaining the class through litigation, weighs neither for nor against approval. CPI's quickly deteriorating economic health in particular makes it in the best interest of the class for the parties to achieve a settlement rather than to proceed through a lengthy litigation process. Even had the class been able to prevail despite significant potential difficulties in proving their case, it is unlikely that they would ever recover a judgment significantly larger than as provided in the settlement. In light of these circumstances, this settlement is fair, reasonable, and adequate to protect the interests of the class.

2. The Plan of Allocation

The plan of allocation of settlement proceeds among class members must also be approved as part of the settlement. F.R.C.P. 23. The same standards apply as to the plan of allocation that apply to approval of the settlement as a whole; the plan of allocation must **be** fair, reasonable and adequate. In

re Cendant Corp. Litigation, 264 F.3d 201, 248 (3d Cir. 2001).

The proposed allocation would distribute the settlement proceeds to the class members based on the level of artificial inflation in the stock. The differences in allocation are made based on the type of security that was bought and/or sold by the class member and the timing of any such transactions in an attempt to correlate the portion of the settlement received to the likely damages each class member sustained.

To distinguish between the award given to class members based on these factors is reasonable. The factors used to allocate the funds, the timing of the purchase or sale of shares, as well as the type of shares involved, directly impact the risks and damages faced by various class members. Though each class member will not be allocated the same amount of the settlement proceeds as all other class members, the distribution is fair and equitable because each class member will receive a relative share based on factors directly related to their estimated losses. The plan of allocation is fair, reasonable, and adequate.

D. Exempted Securities

Counsel has requested that this Court determine whether or not the securities issued as part of this settlement will be exempt from registration and other requirements under 15 U.S.C.

§77c. A security is exempt Under 15 U.S.C. §77c(a) (10) if it is:

issued in exchange for one or more bona fide outstanding securities, claims, or property interests ... where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court ... of the United States ... authorized by law to grant such approval.

In this case, the CPI securities that are being issued to class members as part of the settlement are exempt under this section. The bona fide claims of the class against CPI will be extinguished upon approval of the settlement, in exchange for the securities at issue. The Court has held a hearing on the fairness of the settlement, including the securities portion. All class members to whom securities may issue had the right and opportunity to appear at the fairness hearing. Thus, upon final approval of the settlement by the Court, the conditions for exemption under 15 U.S.C. §77c(a) (10) will be met and the securities issued as part of this settlement are exempt from the provisions of 15 U.S.C. §77c.

E. Attorneys' Fee Petition

Class counsel in a class action who recovers a common fund for the benefit of persons other than himself or his client

should receive an award of attorneys' fees that is fair and reasonable from the fund. Boeing Co. v. VanGemert, 444 U.S. 472, 478, 100 S. Ct. 745, 749 (1980). The attorneys in this case have petitioned the Court for an award based on a percentage of the common fund, which is the method generally favored in common fund cases. E.g., In re General Motors, 55 F.3d at 821, In re Prudential, 148 F.3d at 333. In deciding whether to approve the fee request, this Court must consider both the Attorneys' Fee petition and the Objection to the petition **by** Mr. Arnold and Ms. Garten.

1. Reasonableness of the Fee Requested

The Third Circuit has identified seven factors that should be considered in deciding whether a fee petition should be approved. Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 (3d Cir. 2000). These are: 1) the size of the fund created and the number of persons benefitted; 2) the presence or absence of substantial objections by members of the class to the settlement terms or fee request; 3) the skill and efficiency of the attorneys involved; 4) the complexity and the duration **of** the litigation; 5) the risk of nonpayment; 6) the amount **of** time devoted to the case by counsel; and 7) the awards in similar cases. These factors all weigh in favor **of** approving the

attorneys' fee petition in this case.

a) The Size of the Fund and the
Number of Persons Benefitted

The size of the fund and the number of persons benefitted is an important factor in setting attorneys' fees because attorneys should be rewarded for procuring a successful result for the class. E.g., Hensley v. Eckhart, 461 U.S. 424, 436 (1983); In re General Motors, 55 F.3d at 821. Though the size of the fund is not large, counsel has procured a substantial amount of money and stock that **will** benefit thousands of class members.

The measure of counsel's success in this case also cannot be determined by considering only the final amount of the award itself; the amount of the settlement fund is a very good recovery in light of the difficulties of proving the plaintiffs' case and the precarious financial position of the defendants. Plaintiffs' counsel's success should be rewarded by an adequate fee award.

Additionally, the settlement fund procured by the attorneys will benefit a large number of people. Identified class members number at least 35,950, and there are likely more class members who received notice through publication. The

number of persons benefitted and the size of the settlement both weigh in favor of approving their fee petition.

b) The Presence or Absence of Substantial Objections by the Members of the Class

The reaction of the class in this case also supports approval of the attorneys' fee petition. **All** class members who received notice, either individually or through publication were notified that the attorneys would request up to thirty percent as their fee award. Sincage Aff. Exh. **A**. Despite the large number of class members notified, only one objection was received and it related only to the fee petition. This reaction shows that the class views the settlement as a success, and, other than the objection by **Mr.** Arnold and Ms. Garten indicates that the class does not object to the thirty percent requested by the attorneys. This positive reaction supports approval of the fee petition.

c) The Skill and the Efficiency of the Attorneys Involved

The plaintiffs' counsel is highly skilled in the area of shareholder securities litigation. The attorneys involved have extensive experience in this area and have used their skill to efficiently resolve this matter. Most of the work on this case was done by skilled senior lawyers who had the most

experience in and understanding of biotechnology securities litigation and could thus do the work more efficiently than less experienced attorneys. Transcript **of** Hearing on Settlement, September 6, 2002 ("Tr.") 50. The submissions made in this case were always thorough and of consistently high quality, showing a high level of skill and effort by counsel. Additionally counsel have always carried themselves in a professional manner and have represented their clients effectively before the Court.

Counsel has also shown a high level of awareness of the need for efficiency in handling this case. Six months prior to filing the initial complaint in this case, counsel researched and prepared the case so as to put forth the strongest complaint possible from the beginning. Tr. 9, 27. As counsel for both plaintiffs and defendants noted at the settlement hearing, shortly after their appointment as lead counsel by the Court, class counsel began negotiations with the defendants an attempt to reach a prompt settlement without extensive litigation and fees. Id. at 25, 28. A tentative agreement was reached within seven months and, the plaintiffs' counsel had provided this Court with **a** settlement agreement within eleven months of their appointment. Savett/Kessler Decl. **14**. Both the high level of skill and experience of counsel and their efficient handling **of** this case support approval of their fee petition.

d) The Complexity and Duration of the Litigation and the Risk of Nonpayment

The complexity and difficulty of this case support approval of the attorneys' fee petition. This is a biotechnology securities litigation case involving several complex issues of fact and law that plaintiffs' counsel was able to effectively address because of their experience and research. **As** discussed in Part III, there were several difficult liability and damage issues present in this litigation, as well as the added complexity of CPI's insurance problems.

The complexity and difficulty of the case and CPI's precarious financial situation directly correlated to a high risk of nonpayment. As already discussed, not only there was a high risk that no or few damages would be awarded, it was also likely that even had damages been awarded they would not have been collectable. Both the class and the attorneys faced a high risk of non-payment despite putting forth best efforts.

Though the duration of the litigation was relatively quick for a class action case involving such complex and intricate issues, the reason for the quick result appears to be plaintiffs' counsel's hard work. Additionally, even though the

settlement itself was reached promptly, it is important to note that plaintiffs' counsel has been working on this case for about two years. Tr. at 9. Much of this time involved intensive work by the attorneys: at least six months of extensive research in preparation for writing the complaint; followed by five months of discovery and fact-finding; seven months of aggressive settlement negotiations; and three months of confirmatory discovery. Id. at 9-11; Savett/Kessler Decl. 14.

Though counsel acted in the best interest of the class by reaching a quick settlement, the case has been neither easy nor short. The complexity of the case, the risk of non-payment, and the duration of the litigation also support approval of the fee petition.

e) The Amount of Time Devoted to the Case

Counsel has invested a significant amount of time into preparing and prosecuting this case. A total of over 2,600 hours was spent by plaintiffs' counsel. Savett/Kessler Decl. 40. This amount justifies an award of the size counsel has requested. Counsel has provided hourly rates for purposes of cross checking the percentage award against what the fee would be if billed hourly (the "lodestar"). This Court finds the hourly rates offered to be reasonable in light of counsel's experience and

skill and the nature of this case.

Using the hourly rates provided by counsel, the thirty percent award is equal to approximately 1.2 times the lodestar. The amount of time counsel spent on this matter supports granting the fee requested in the fee petition.

f) Comparing the Awards in Similar Cases

The thirty percent counsel has requested is well within the range approved in other class action fee awards where a percentage of the common fund was awarded. In In re General Motors, the Third Circuit cites data from a District Court, noting that fee awards have ranged from nineteen to forty-five percent of the fund in common fund cases. 55 F.3d at 174. The request in this case is not even at the top of this range.

In fact, thirty percent is very close to other fee awards that have been made by courts in this District. In In re Ikon, Judge Katz approved a thirty percent award in a class action securities case where the percentage fee was approximately 2.46 times the lodestar. 194 F.R.D. 166, 195. In In re Rite Aid, Judge Dalzell approved an award of twenty five percent and cited data from one study that indicates the average attorney's fees percentage in a common fund case is 31.71% and the median was about 33.3%. 146 F. Supp. 2d 706, 735 (2001). A thirty

percent fee is very comparable to awards in similar cases, providing further support for approval of the fee petition.

2. The Objection by Mr. Arnold and Ms. Garten

Mr. Arnold and Ms. Garten have objected to the fee petition and have requested that they be allowed limited discovery into the attorneys' handling of and the attorneys' time spent in the case. Obj. 1-4; Tr. 32-33. This Court finds that the objections raised by Mr. Arnold and Ms. Garten do not diminish the overall reasonableness of the fee. Additionally, the discovery requested is not warranted by the facts of this case and is therefore denied.

Mr. Arnold and Ms. Garten object to the fee award because they believe that the settlement *is* worth less than counsel has asserted and because they feel that a thirty percent award is excessive. Tr. 29. Mr. Arnold and Ms. Garten argue that the settlement is worth less than reported because the actual value of the settlement is reduced because the settlement is paid to shareholders by the company in which they hold shares. Mr. Arnold and Ms. Garten argue that this dilutes the value *of* any CPI stock already held by the class, thus reducing the actual value of the settlement, particularly to those class members who have other CPI stock holdings. Id. at 35-36.

As both Mr. Arnold and defense counsel noted at the hearing, this dilution argument applies equally regardless of whether a settlement is issued in cash or in securities. Id. at 39, 45. Thus if Mr. Arnold and Ms. Garten's objections were heeded, it would call into question any and all settlements between a class of shareholders and the company in which they hold shares. This would undermine the efficacy and utility of class action securities litigation overall. Additionally, the effect of dilution depends upon the number of shares each class member has apart from the settlement, how long they have held the shares, when they purchased the shares, and other outside factors unrelated to this case or this settlement.

In determining whether a percentage-based fee is appropriate, courts in this Circuit consider only the actual value of the securities and/or cash settlement, not the potential net value to each class member based on dilution or other factors unrelated to the litigation. This is what is contemplated by Section 21D(a)(6) of the Exchange Act, which requires that attorneys get paid based on a reasonable percentage of what gets paid out to class members, not the net value of the settlement. 15 U.S.C. § 78u-4(a)(6). Thus Mr. Arnold and Ms. Garten's objection as to the actual value of the settlement does not change the Court's decision that the factors to consider

regarding an attorneys' fee petition weigh in favor **of** approval of the petition.

Mr. Arnold and Ms. Garten also raised the concern that class counsel's work does not warrant the thirty percent award that they have requested. Mr. Arnold in particular noted that he did not feel that counsel had demonstrated that they were entitled to the thirty percent because, he argued, the case and the result achieved did not require high quality legal work. Tr. 30. The Court disagrees and concludes that the thirty percent award is not an overcompensation **of** class counsel.

Contrary to Mr. Arnold's assertions at the hearing, there is no evidence that this settlement was easily reached or reached without hard work and skill on the part **of** class counsel. As defense counsel explained at the hearing, both the high quality of the complaint and the experience and reputation of class counsel were very influential factors in persuading Hartford to fund this settlement. Tr. 44. As noted in the evaluation in Part V. A. **of** the Gunter factors for fee approval, class counsel has invested considerable time and energy into this case. Counsel has used their skill and expertise to procure a result that is favorable to their clients and a benefit to the class, and has done so efficiently despite very complex issues of law and fact. A thirty percent award is appropriate in such a

case.

Limited discovery, as requested by Mr. Arnold and Ms. Garten, would not be necessary or appropriate in this case. There is no evidence or reason to believe that class counsel has handled this case other than appropriately. Class counsel has provided a list of time spent on this case by all attorneys and paralegals as well as counsel's hourly rates. Counsel has also provided a detailed explanation of their approach to this case. See generally Savett/Kessler Decl. All of this information is available both to the Court and to the objectors, and has been available since before the hearing. The discovery sought is inappropriate in this case because it would place a burden on class counsel that is unnecessary in light of the information already available and the absence of any indication at all of impropriety.

3. Costs Requested

Counsel for the class has also requested reimbursement of fees and expenses totaling \$62,037.12. No class members have objected to this expense request. These expenses are reasonable expenses necessary to this case and, as such, are approved.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

In re Cell Pathways, Inc.,
Securities Litigation II

Master File No. 01-CV-1189

This Document Relates To:
All Actions

FINAL JUDGMENT AND ORDER OF DISMISSAL

On the 6th day of September, 2002, a hearing having been held before this Court to determine: (1) whether the terms and conditions of the Stipulation and Agreement of Settlement and a separate Supplemental Agreement, both dated as of May 16, 2002 (collectively, the "Stipulation"), including the issuance of 1.7 million shares of Cell Pathways, Inc. ("CPI") common stock (the "Settlement Stock") pursuant to the Stipulation, are fair, reasonable and adequate and in the best interest of the Class, the Class Members and each individual Class Member who receives Settlement Cash or Settlement Stock (defined in the Stipulation) pursuant to the Settlement in settlement of all claims asserted by the Class and the Class Members against defendants CPI, Robert Towarnicki and Rifat Pamukcu (the "Defendants") in the Consolidated Class Action Complaint (the "Consolidated Complaint") now pending in this Court under the above caption, including the release of the Defendants and the Released Persons, and should be approved; (2) whether the shares of Settlement Stock are exempted securities pursuant to Section 3(a)(10) of the Securities Act of 1933, 15 U.S.C. § 77c (a)(10); (3) whether judgment should be entered dismissing the Consolidated Complaint on the merits and with prejudice in favor of the

Defendants and as against Lead Plaintiffs and all persons or entities who are members of the Class herein who have not timely and validly excluded themselves from the Class; (4) whether to approve the Plan of Allocation as a fair and reasonable method to allocate the Settlement proceeds among the Class Members and each individual Class Member who receives Settlement Cash or Settlement Stock pursuant to the Settlement; and (5) whether and in what amount to award counsel for Lead Plaintiffs and the Class fees and reimbursement of expenses. The Court having considered all matters submitted to it at the hearing and otherwise pursuant to Rule 23, Fed. R. Civ. P., the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4, et seq. (the “PSLRA”) and Section 3(a)(10) of the Securities Act of 1933; and it appears that a notice of the hearing substantially in the form approved by the Court was mailed to all Class Members who purchased Cell Pathways, Inc. common stock (“CPI Stock”) or related options on CPI Stock during the period from October 27, 1999 through and including September 22, 2000 (the “Class Period”), and that a *summary* notice of the hearing substantially in the form approved by the Court was published in the national edition of The Wall Street Journal and disseminated through the PR Newswire pursuant to the specifications of the Court; and the Court having considered and determined the fairness and reasonableness of the award of attorneys’ fees and expenses requested; and all capitalized terms used herein having the meanings as set forth and defined in the Stipulation.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Court has jurisdiction over the subject matter of the Action, the Lead Plaintiffs, all Class Members, the Defendants, and the Released Persons.

2. The Notice of Class Action Certification, Proposed Settlement of Class Action and Hearing Thereon and of other matters set forth therein given to the Class pursuant to the Hearing Order was the best notice practicable under the circumstances, including individual notice to all Class Members who could be identified through a reasonable effort, as well as valid, due and sufficient notice to all persons entitled thereto, and complied fully with the requirements of Fed. R. Civ. P. 23, the Constitution of the United States, the PSLRA, Section 3(a)(10) of the Securities Act of 1933, and for any other applicable law.

3. The Settlement for purposes of Section 3(a)(10) of The Securities Act of 1933 is approved as fair, reasonable and adequate and in the best interest of the Class, the Class Members and each individual Class Member who receives Settlement Stock or Settlement Cash pursuant to the Settlement, and the Parties are directed to consummate the Stipulation in accordance with its terms and provisions.

4. The shares of Settlement Stock are issued in exchange for bona fide outstanding claims; all parties to whom it is proposed to issue such shares have had the right to appear at the hearing on the fairness of the Settlement; and the shares of Settlement Stock are exempted securities pursuant to Section 3(a)(10) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(10).

5. The Consolidated Complaint is hereby dismissed with prejudice and without costs, except as to any fees and costs provided in the Stipulation, as against any and all **of** the Defendants.

6. “Released Claims” collectively means any and all claims, demands, rights, liabilities or causes of action, in law or in equity, known or unknown, accrued or unaccrued, fixed or contingent, direct, individual or representative, of every nature and description

whatsoever, whether based on federal, state, local, statutory or common law or any other law, rule or regulation that have been asserted or that could have been asserted by any Class Member (or such Class Member's "affiliates" or "associates" or other entities "controlled" by them, as defined in SEC Rule 12b-2) against the Released Persons (as defined below) or any one of them, arising out of or relating in any way to any of the alleged acts, omissions, misrepresentations, facts, events, matters, transactions, or occurrences referred to or that could have been asserted in the Consolidated Complaint, or in any of the complaints filed in any of the actions consolidated with this Action, including without limitation any of CPI's financial statements publicly disclosed before or during the Class Period. Released claims also means any and all claims arising out of, relating to, or in connection with the settlement or resolution of the litigation, other than claims to enforce the settlement or any of its terms.

7. "Released Persons" means all of the Defendants and each of their respective past or present subsidiaries, parents, successors and predecessors, officers, directors, shareholders, agents, employees, attorneys, insurers, advisors, investment advisors, auditors, accountants, affiliates (as defined by SEC Rule 12b-2), associates (as defined by SEC Rule 12b-2) and any person, firm, trust, corporation, officer, director or other individual or entity in which any Defendant has a controlling interest or which is related to or affiliated with any of the Defendants, and the legal representatives, heirs, successors in interest or assigns of the Defendants.

8. Lead Plaintiffs and each Class Member (and such Class Member's "affiliates" or "associates" or other entities "controlled" by them, as defined in SEC Rule 12b-2), except those who timely and validly exclude themselves from the Class, shall hereby be deemed to have, and

by operation of the Judgment shall have, fully, finally and forever released, relinquished and discharged all Released Claims against the Released Persons and shall be enjoined forever from prosecuting the Released Claims, whether or not any of the Class Members executes and delivers the Proof of Claim or the release contained therein. The Released Claims are hereby compromised, settled, released, discharged and dismissed as against the Released Persons on the merits and with prejudice by virtue of the proceedings herein and this Final Judgment and Order of Dismissal.

9. Lead Plaintiffs, all Class Members (and such Class Member's "affiliates" or "associates" or other entities "controlled" by them, as defined in SEC Rule 12b-2) and anyone claiming through or on behalf of any of them, are barred and enjoined forever from commencing, instituting, prosecuting or continuing to prosecute any action or other proceeding in any court of law or equity, arbitration tribunal, administrative forum, or other forum of any kind, asserting against any of the Released Persons, and each of them, any of the Released Claims.

10. Each of the Released Persons shall be deemed to have, and by operation of this Final Judgment and Order of Dismissal shall have, fully, finally and forever released, relinquished and discharged, and be barred from and enjoined from prosecuting the Released Claims, including Unknown Claims against Lead Plaintiffs, the Class Members, Plaintiffs' Co-Lead Counsel and all other Plaintiffs' Counsel; *provided, however*, that nothing in this Final Judgment and Order of Dismissal shall bar any action or release any claim to enforce the terms of the Stipulation or this Final Judgment and Order of Dismissal.

11. All actions and claims for contribution are permanently barred, enjoined and finally discharged: (i) as provided by Section 21D(f)(7)(A) of the PSLRA, 15 U.S.C. § 78u-4(f)(7)(A), and (ii) as may be provided by applicable federal or state statutes or common law.

12. Neither this Final Judgment and Order of Dismissal, the Stipulation, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

(a) offered or received against the Defendants as evidence of or construed as or deemed to be evidence of any presumption, concession, or admission by any of the Defendants of the truth of any fact alleged by Lead Plaintiffs (or Plaintiffs' Counsel) or the validity of any claim that had been or could have been asserted in the Action or in **any** litigation, or the infirmity of any defense that has been or could have been asserted in the Action or in any litigation, or of any liability, negligence, fault, or wrongdoing of Defendants;

(b) offered or received against the Defendants as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by any Defendant, or against the Lead Plaintiffs and the Class as evidence of any infirmity in the claims of Lead Plaintiffs and the Class;

(c) offered or received against the Defendants as evidence of a presumption, concession or admission of any liability, negligence, fault or wrongdoing, or in any way referred to for any other reason as against any of the Parties to the Stipulation, in any other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation; provided, however, that Defendants **may** refer to the Stipulation to effectuate the liability protection granted them thereunder;

(d) construed against the Defendants or the Lead Plaintiffs **and** the Class as **an** admission or concession that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial; or

(e) construed as or received in evidence as **an** admission, concession or presumption against Lead Plaintiffs or the Class or any of them that any of their claims are without merit or that damages recoverable under the Consolidated Complaint would not have exceeded the Settlement Fund.

13. The Plan of Allocation is approved as fair, reasonable and adequate, and Plaintiffs' Co-Lead Counsel and the Claims Administrator are directed to administer the Stipulation in accordance with its terms and provisions.

14. The Court finds that all Parties and their counsel have complied with each requirement of the Private Securities Litigation Reform Act and Rule 11 of the Federal Rules of Civil Procedure as to all proceedings herein.

15. Plaintiffs' Counsel are hereby awarded 30th0% of the Settlement Fund as and for their attorneys' fees, which sum the Court finds to be fair and reasonable, and which percentage shall be payable from both the Settlement Stock and the Settlement Cash in the Settlement Fund. Plaintiffs' Counsel are also hereby awarded \$ 62,037.12 in reimbursement of expenses (not including any settlement administration or distribution expenses to be incurred) from the cash portion of the Settlement Fund, together with interest from the date the Settlement Fund was funded to the date of payment at the same net rate that the Settlement Fund earns. The above amounts shall be paid to Plaintiffs' Co-Lead Counsel, pursuant to the terms of the Stipulation, from the Settlement Fund. The award of attorneys' fees shall be allocated among Plaintiffs'

Counsel in a fashion which, in the opinion and sole discretion of Co-Lead Counsel, fairly compensates Plaintiffs' Counsel for their respective contributions in the prosecution of the Action.

16. Exclusive jurisdiction is hereby retained over the Parties and the Class Members for all matters relating to this Action, including the administration, interpretation, effectuation or enforcement of the Stipulation and this Final Judgment and Order of Dismissal, the distribution of the Settlement Fund to the Class Members, and any application for fees and expenses incurred in connection with administering and distributing the settlement Fund to the Class Members.

17. No Authorized Claimant shall have any claim against Plaintiffs' Co-Lead Counsel, the Claims Administrator or other agent designated by Plaintiffs' Co-Lead Counsel based on the distributions made substantially in accordance with the Settlement and Plan of Allocation as approved by the Court and further orders of the Court. No Authorized Claimant shall have any claim against Defendants, Defendants' Counsel or any of the Released Persons with respect to the investment or distribution of the Net Settlement Fund, the determination, administration, calculation or payment of claims, or any losses incurred in connection therewith, the Plan of Allocation, or the giving of notice to Class Members.

18. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation,

19. Pursuant to Rule 54(b) of the Fed. R. Civ. P., there is no just reason for delay in the entry of this Final Judgment and Order of Dismissal, **and** the Clerk of Court is expressly directed to enter the Judgment of dismissal in accordance with this Order.

Dated: September 23, 2002

BY THE COURT:



MARY A. McLAUGHLIN, J.

files & mailed 9/24/02:

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