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

IN RE SUBOXONE (BUPRENORPHINE HYDROCHLORIDE AND NALOXONE) ANTITRUST LITIGATION	:	**MDL NO. 2445 13-MD-2445**
THIS DOCUMENT RELATES TO:,	:	
Wisconsin, et al. v. Indivior Inc. et al. Case No. 16-cv-5073	:	
STATE OF WISCONSIN By Attorney General Brad D. Schimel, *et al.*	:	
Plaintiffs,	:	**CIV. A. NO. 16-5073**
v.	:	
INDIVIOR INC. f/k/a RECKITT BENCKISER PHARMACEUTICALS, INC., et al.	:	
Defendants.	:	

Goldberg, J. **January 20, 2021**

MEMORANDUM

Defendant Reckitt Benckiser, Inc. ("Defendant") [1] manufactures Suboxone, a drug commonly used to combat opioid addiction. Suboxone previously came in tablet form, but in 2010, citing safety concerns, Defendant effectuated a change in the administration of this drug, switching from tablet to sublingual film. Various purchasers/consumers of Suboxone claimed that this switch was anticompetitive and solely designed to maintain Defendant's market exclusivity—a scheme known as a "product hop." These claims have resulted in multi-district, antitrust litigation before this Court, as well as the certification of a class of direct purchaser Plaintiffs ("DPPs").

[1] Reckitt is currently known as Indivior, Inc. In December 2014, Reckitt Benckiser Pharmaceuticals, Inc. was demerged from its prior parent, the Reckitt Benckiser Group PLC, into Indivior PLC. Although Indivior is technically the named defendant in this case, the pleadings and many of the relevant exhibits use the name "Reckitt."

The DPPs recently sought approval of the notice to be issued to the Class regarding the pending litigation. Defendant opposes that notice and seeks disqualification of one of the DPPs' named class representatives and its counsel. For the following reasons, I will deny Defendant's Motion to Disqualify and grant the Motion to Approve the Class Notice.

I. RELEVANT FACTUAL BACKGROUND[2]

On September 27, 2019, I certified a class of Direct Purchaser Plaintiffs in this antitrust litigation. In re Suboxone Antitrust Litig., No. 13-md-2445, 2019 WL 4735520 (E.D. Pa. Sept. 27, 2019). The United States Court of Appeals for the Third Circuit affirmed that decision on July 28, 2020. In re Suboxone Antitrust Litig., 967 F.3d 264 (2020).

On August 24, 2020, the DPPs sought an order approving the form and manner of notice to the Direct Purchaser Class informing them of the pendency of this class action. Defendant opposed the DPPs' Motion. Along with that opposition, Defendant moved to disqualify named Plaintiff Rochester Drug Co-Operative ("Rochester") as a class representative based, in part, upon Rochester's March 22, 2020 initiation of Chapter 11 bankruptcy proceeding. Defendant also requested disqualification of Rochester's counsel, Faruqi & Faruqi, LLP, as class counsel because the firm would no longer be retained by any named class reprseentative.

I thereafter directed the parties to submit a joint update regarding the status of Rochester's bankruptcy proceedings. According to that December 14, 2020 update, Rochester filed its Amended Chapter 11 Plan and accompanying Amended Disclosure Statement on December 8, 2020. The Amended Plan calls for Rochester's assets, including the "Antitrust Actions" to vest in a Liquidating Trust, and for Rochester to wind up its affairs and liquidate its assets "as expeditiously as reasonably possible." (Doc. No. 681, at 2.) The Liquidating Trustee is then granted the authority to "commence and prosecute . . .

[2] Rather than re-hashing the complicated regulatory background and factual basis of this case, I incorporate by reference the history set forth in my prior decision certifying a class for both the DPPs and EPPs. In re Suboxone Antitrust Litig., 421 F. Supp. 3d 12 (E.D. Pa. 2019), aff'd, 967 F.3d 264 (3d Cir. 2020).

Antitrust Actions . . . and, without further supervision or approval of the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules . . . assign, transfer, compromise, and settle such actions." (Id.)

Under the current schedule, the Bankruptcy Court held a hearing on January 15, 2021, to approve the Amended Disclosure Statement. A Confirmation Hearing is currently scheduled for February 26, 2021. (Id. at 3.)

II. DEFENDANT'S MOTION TO DISQUALIFY

Defendant seeks to disqualify Rochester from serving as a class representative on three grounds. First, Rochester's ongoing bankruptcy and "Amended Plan of Liquidation" calls for it to assign away its antitrust claims. Consequently, Defendant posits that Rochester is no longer a member of the class it seeks to represent. Second, Defendant asserts that one of Rochester's creditors is Defendant, and thus as a debtor-in-possession, it owes fiduciary duties to both the DPP class and its creditors, including Defendant. Third, Defendant posits that even before the bankruptcy, Rochester engaged in the criminal distribution of opioid products and currently has a deferred prosecution agreement with the United States Attorney for the Southern District of New York. To the extent that Rochester is disqualified on any or all of these grounds, Defendant also seeks to disqualify Rochester's counsel unless that counsel is engaged by any of the remaining class members.

The DPPs respond that, at present, Rochester remains a debtor-in-possession working to maximize the value of its assets. It further notes that out of Rochester's $96 million in current liabilities to over 2,000 creditors, Rochester owes Defendant only $135,567, making Defendant a minor creditor. Finally, it contends that Rochester's deferred prosecution agreement has no bearing on Rochester's adequacy as a class representative or this litigation.

A. Rochester's Ongoing Chapter 11 Bankruptcy

Turning first to issues arising out of Rochester's Chapter 11 bankruptcy, I find no basis on which to disqualify Rochester at this time. As I noted in my class certification decision, "[t]he principal purpose

of the adequacy requirement [of Federal Rule of Civil Procedure 23] is to determine whether the named plaintiffs have the ability and the incentive to vigorously represent the claims of the class." In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig., 795 F.3d 380, 393 (3d Cir. 2015). This adequacy requirement focuses primarily on whether the class representatives have conflicts of interest with the putative class members. Williams v. Sweet Home Healthcare, LLC, 325 F.R.D. 113, 122 (E.D. Pa. 2018) (citing New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 313 (3d Cir. 2007)). Only a "fundamental" conflict of interest will be sufficient to impact the adequacy analysis. Id. (citing Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 183 (3d Cir. 2012)). "A fundamental conflict exists where some [class] members claim to have been harmed by the same conduct that benefitted other members of the class." Dewey, 681 F.3d at 183 (internal quotation marks omitted).

Here, the question before me is whether a named plaintiff in bankruptcy can serve as a class representative. The leading case on this issue, and the one on which Defendant relies heavily, is the Seventh Circuit decision in Dechert v. Cadle Company, 333 F.3d 801 (7th Cir. 2003). Defendant posits that Dechert stands for the proposition that a class representative's bankruptcy, especially one where one of the defendants is a creditor, "creates an intractable conflict of interest between the representative's fiduciary duties to its creditors and its duties to absent class members." (Def.'s Mot. to Disqualify 7.)

I find that Defendant takes a myopic view of Dechert's holding. In Dechert, the sole named plaintiff, Judy Oyler, brought a putative class action under the Fair Debt Collection Practices Act. Id. at 802. Shortly before filing the suit, Oyler declared bankruptcy under Chapter 7 of the Bankruptcy Code. When the trustee in bankruptcy discovered her pending class action suit, he had himself substituted for Oyler and then asked the district court to certify the suit as a class action with him (the trustee) as the only class representative. Id.

The Seventh Circuit de-certified the class, finding that the trustee in bankruptcy was not an adequate class representative. Id. at 802–03. The Court remarked that "[w]hen the named plaintiff is a fiduciary . . . he cannot just 'go along' with the class lawyer," but rather "has a duty to seek to maximize

the value of his claim, and this duty may collide with his fiduciary duty as class representative . . . to represent all members of the class equally." Id. at 803. The court went on to note that such a collision was "especially likely in a case in which the fiduciary is a trustee in bankruptcy, because class-action litigation tends to be protracted yet the Bankruptcy Code requires the trustee to complete his work expeditiously." Id. at 803 (citing 11 U.S.C. § 704(1)). Ultimately, the Court found that Oyler's trustee had a fiduciary obligation exclusively to the estate in bankruptcy and to Oyler's unsecured creditors. Id. at 802. Because Oyler had only a small stake in the class action, the unsecured creditors would derive little to no benefit from a judgment or settlement and, thus, the trustee had a disincentive to fully prosecute the class action. Id. at 803; see also In re Merrill Lynch & Co., Inc. Research Reports Secs. Litig., 375 B.R. 719, 727–28 (S.D.N.Y. 2007) (citing Dechert and declining to let trustee in Chapter 7 bankruptcy serve as sole class representative because of conflicts).

Notably, however, the Seventh Circuit declined to "lay down a flat rule that a trustee in bankruptcy (or, what is the equivalent, a debtor in possession) can never be a class representative." Id. at 803. It recognized that "[t]here may be cases in which the expected recovery of individual class members is substantial and only a fiduciary is available to be the class representative." Id. at 803. The Court further acknowledged that although an actual conflict existed because one of the defendants was one of Oyler's unsecured creditors, that conflict would be obviated if there were other named plaintiffs in the class action who served as class representatives. Id. at 804.

Relying on Dechert, courts have reached different conclusions on this issue depending on the specific circumstances. Recently, the United States District Court for the District of Massachusetts confronted whether the same party at issue here, Rochester, could serve as the sole class representative in a putative antitrust class action against two pharmaceutical companies in light of its ongoing Chapter 11 bankruptcy proceedings. In re Intuniv Antitrust Litig., No. 16-12653, 2020 WL 3840901 (D. Mass. July 8, 2020). In Intuniv, a class action brought solely by Rochester, was certified by the district court. Id. at *1–2. Subsequently, Rochester filed for the current Chapter 11 bankruptcy, owing over $100 million in

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