

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

**AMENDMENT TO SETTLEMENT
AGREEMENT AND RELEASE**

**IN RE: BAYER CORP. COMBINATION
ASPIRIN PRODUCTS MARKETING AND
SALES PRACTICES LITIGATION**

09-MD-2023 (BMC)

**THIS DOCUMENT RELATES TO:
All Actions**

AMENDMENT TO SETTLEMENT AGREEMENT AND RELEASE

Subject to Court approval, this Amendment to the Settlement Agreement and Release ("Agreement")¹ is entered into between and among the following parties (the "Parties"), by and through their respective counsel: (i) Anne McCabe, Douglas Vinson, Beverly Sue Blank and William Blank, as Class Representatives on behalf of themselves and the Settlement Classes (as such classes are hereinafter defined) (collectively, "Class Plaintiffs"); and (ii) Bayer HealthCare LLC ("Bayer"). Except as otherwise provided herein, the terms of the Agreement remain unchanged.

WHEREAS, the Court granted Preliminary Approval of the Settlement on July 23, 2012;

WHEREAS, on or before September 7, 2012, Gilardi caused direct notice to be mailed to 454,036 mailing addresses based on Purchase Records from CVS and Wal-Mart's Sam's Club. (See Dkt # 195).

WHEREAS, on September 10, 2012, Gilardi caused direct notice to be mailed to 62,898 mailing addresses based on the Purchase Records received from BJ's Wholesale Club. (See Dkt # 195).

¹ All capitalized terms herein shall have the same meaning as set forth in the Agreement.

WHEREAS, on or about September 25, 2012, Costco caused direct notice to be mailed to 129,474 mailing addresses based on its Purchase Records. (See Dkt 196).

WHEREAS, on or before November 5, 2012, Gilardi caused direct notice to be mailed to 49,686 mailing addresses based on Purchase Records received from Safeway. (See Dkt # 195).

WHEREAS, Class Counsel have concluded that is in the best interests of the Class to distribute additional monies to the Class based on the Purchase Records, and Bayer has agreed;

WHEREAS, Class Counsel has concluded that it would be in Class Plaintiffs' best interests to enter into this Amendment to avoid the uncertainties, burdens, and risks of litigation, and to assure that the substantial benefits reflected herein are obtained for Class Plaintiffs, and further, that this Agreement is fair, reasonable, adequate, and in the best interests of all putative members of the Settlement Classes;

WHEREAS, Bayer has agreed to enter into this Amendment to reduce and avoid further expense, burden, and inconvenience of protracted litigation, and to resolve finally and completely the claims of the Class Plaintiffs;

NOW, THEREFORE, the undersigned counsel on behalf of Bayer and Class Plaintiffs agree that the MDL Class Actions shall be settled, compromised, and/or dismissed with prejudice on the terms and conditions set forth in the Agreement, as amended by this Amendment,² and without costs to Bayer (except as provided in the Agreement), subject to Court approval.

II. OTHER DEFINITIONS

* * *

- C. "Authorized Claimant" means any Settlement Class Member whose claim for recovery has been allowed pursuant to the terms of this Agreement or for which the Claims Administrator or its designee has Purchase Records.

² Only terms of the Agreement that have been amended are reflected below and those amendments are underlined.

* * *

- I. "Claimant" means any Settlement Class Member who files a Claim Form in such form and manner, and within such time, as the Court shall prescribe or for which the Claims Administrator or its designee has Purchase Records.

III. SETTLEMENT TERMS

* * *

- E. Plan of Allocation

* * *

2. Allocation to Settlement Class Members

Unless otherwise directed in this Agreement, the Claims Administrator shall make payments from each Individual Settlement Fund to Authorized Claimants as follows:

a. Each Authorized Claimant who files a valid, sworn and timely Claim Form identifying (i) the products(s) purchased; the approximate date of such purchase(s); and (iii) the location of such purchase(s), and who submits documents that the Claims Administrator determines are valid proof(s) of purchase shall be entitled to payment from the Settlement Class Amounts for \$4.00 for each purchase of "Bayer Women's Low Dose Aspirin + Calcium" and/or \$6.00 for each purchase of "Bayer Aspirin With Heart Advantage," subject to any pro rata reductions described below.

b. Each Authorized Claimant for which the Claims Administrator or its designee has Purchase Records shall be entitled to payment from the Settlement Class Amounts for \$4.00 for each purchase of "Bayer Women's Low Dose Aspirin + Calcium" and/or \$6.00 for each purchase of "Bayer Aspirin With Heart Advantage," subject to any pro rata reductions described below. The amounts computed for any Authorized

Claimant as set forth in these sub-paragraphs (a) and (b) shall be referred to as "Initial Authorized Payments."

c. If an Authorized Claimant submits a valid, sworn and timely Claim Form, including a written attestation that identifies (i) the products(s) purchased; the approximate date of such purchase(s); and (iii) the location of such purchase(s), but does not submit valid proof of purchase and the Claims Administrator or its designee does not have Purchase Records for the Claimant, he or she shall be entitled to a one-time payment of \$4.00 for all purchases of "Bayer Women's Low Dose Aspirin + Calcium" and/or \$6.00 for all purchases of "Bayer Aspirin With Heart Advantage," subject to any pro rata reductions described below. The amounts computed for Authorized Claimants as set forth in this sub-paragraph shall be referred to as "Single Payments."

d. Valid proof of purchase may include but is not limited to product bottles, product packaging, receipts, records from a retailer that identify the claimant and the purchases, or other records that show the Authorized Claimant purchased the Class Product(s). It does not include any written attestations or affidavits from the claimant or other individuals.

3. Remaining Funds

Any portion of the Settlement Amount remaining in a Net Settlement Fund for either Class after calculation of all Initial Authorized Payments and Single Payments shall be considered "Excess Amounts." If the calculation of the total of the Single Payments and the Initial Authorized Payments for a particular Settlement Class would exceed the Net Settlement Fund from which they are to be made, then the Net Settlement Fund for that Settlement Class shall be referred to as an "Exhausted Settlement Fund." If

there are Excess Amounts, the Excess Amounts, after deduction of any further fees and expenses for administration approved by the Court, shall be distributed as provided below.

a. If there are no Excess Amounts after the calculations above, then all payments shall be made to Authorized Claimants solely from the respective Settlement Classes' Net Settlement Funds and all payments to Authorized Claimants, including both Single Payments and Initial Authorized Payments, in any Exhausted Settlement Fund shall be reduced pro rata.

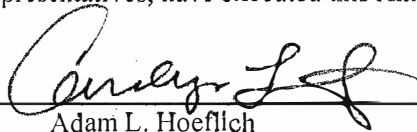
b. If there are both Excess Amounts and an Exhausted Settlement Fund, the Excess Amounts shall be reallocated to the Exhausted Settlement Fund up to the amount necessary that would provide sufficient amounts in the Exhausted Settlement Fund to pay the Single Payments and the Initial Authorized Payment to each Authorized Claimant.

c. Within one-hundred-twenty (120) days of the Claims Deadline, the Claims Administrator shall identify and submit to Lead Class Counsel an accounting of all Single Payments, Initial Authorized Payments, and all pro rata payments, if any, the Claims Administrator intends to pay. At the same time, the Claims Administrator will provide Bayer with sufficient information to (i) identify, for each Settlement Class, the aggregate of all amounts the Claims Administrator intends to pay to Authorized Claimants, and (ii) explain, for each Settlement Class Amount, the calculation as provided for in this section. Within fourteen (14) days of such notice, Lead Class Counsel shall identify any issues or communicate their agreement with the payments proposed to be made by the Claims Administrator. If Lead Class Counsel and the Claims

Administrator are unable to agree on the appropriate payments to be made or the resolution of any outstanding issues, or if Bayer has an objection, they shall request an Order from the Court resolving any such issues. No payments shall be made until so ordered by the Court.

d. If there are any Excess Amounts remaining after all payments ordered by the Court have been made ("Final Excess Amount"), the Claims Administrator shall notify Lead Class Counsel and counsel for Bayer of the Final Excess Amount. The parties shall then apply to the Court for an order pursuant to Section III.G of the Agreement to distribute the Final Excess Amount as *cy pres* payments to charities agreed to by the parties and approved by the Court.

IN WITNESS WHEREOF, the Parties hereto, by and through their fully authorized representatives, have executed this Amendment as of March 1, 2013.



Adam L. Hoeflich
Carolyn J. Frantz
BARTLIT BECK HERMAN
PALENCHAR & SCOTT LLP
54 W. Hubbard St.
Chicago, IL 60654
Ph: (312) 494-4400
Fax: (312) 494-4440
*Counsel for Bayer HealthCare
LLC*

Eric M. Anielak
James P. Muehlberger
SHOOK HARDY & BACON, LLP
2555 Grand Boulevard
Kansas City, MO 64108
Tel: (816) 474-6550
Fax: (816) 421-5547
*Counsel for Bayer HealthCare
LLC*

Michael A. London
Douglas & London, P.C.
111 John Street, 14th Floor
New York, NY 10038
Ph: (212) 566-7500
Fax: (210) 566-7501
*Co-Lead and Liaison Counsel
for Plaintiffs*

Elizabeth A. Fegan
Hagens Berman Sobol Shapiro
LLP
1144 W. Lake Street, Suite 400
Oak Park, IL 60301
Ph: (708) 628-4960
Fax: (708) 628-4950
Co-Lead Counsel for Plaintiffs

Administrator are unable to agree on the appropriate payments to be made or the resolution of any outstanding issues, or if Bayer has an objection, they shall request an Order from the Court resolving any such issues. No payments shall be made until so ordered by the Court.

d. If there are any Excess Amounts remaining after all payments ordered by the Court have been made ("Final Excess Amount"), the Claims Administrator shall notify Lead Class Counsel and counsel for Bayer of the Final Excess Amount. The parties shall then apply to the Court for an order pursuant to Section III.G of the Agreement to distribute the Final Excess Amount as *cy pres* payments to charities agreed to by the parties and approved by the Court.

IN WITNESS WHEREOF, the Parties hereto, by and through their fully authorized representatives, have executed this Amendment as of March 1, 2013.

Adam L. Hoeflich
Carolyn J. Frantz
BARTLIT BECK HERMAN
PALENCHAR & SCOTT LLP
54 W. Hubbard St.
Chicago, IL 60654
Ph: (312) 494-4400
Fax: (312) 494-4440
*Counsel for Bayer HealthCare
LLC*

Eric M. Anielak
James P. Muehlberger
SHOOK HARDY & BACON, LLP
2555 Grand Boulevard
Kansas City, MO 64108
Tel: (816) 474-6550
Fax: (816) 421-5547
*Counsel for Bayer HealthCare
LLC*

Michael A. London
Douglas & London, P.C.
111 John Street, 14th Floor
New York, NY 10038
Ph: (212) 566-7500
Fax: (212) 566-7501
*Co-Lead and Liaison Counsel
for Plaintiffs*

Elizabeth A. Fegan
Hagens Berman Sobol Shapiro
LLP
1144 W. Lake Street, Suite 400
Oak Park, IL 60301
Ph: (708) 628-4960
Fax: (708) 628-4950
Co-Lead Counsel for Plaintiffs