

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

GOVERNMENT EMPLOYEES HOSPITAL
ASSOCIATION, DISTRICT COUNCIL
37 HEALTH AND SECURITY PLAN TRUST,
and HEALTH NET, INC., individually and on
behalf of all others similarly situated,

Plaintiffs

v.

SERONO INTERNATIONAL, S.A.,
SERONO LABORATORIES, INC.,
SERONO, INC., RJI SYSTEMS, INC., AND
RUDOLPH J. LIEDTKE,

Defendants.

C.A. No. 05-cv-11935 (PBS)

EUGENE FRANCIS, individually and on behalf
of all others similarly situated,

Plaintiffs

v.

SERONO LABORATORIES, INC.,
SERONO, INC., RJI SYSTEMS, INC., AND
RUDOLPH J. LIEDTKE,

Defendants.

C.A. No. 06-cv-10613 (PBS)

**ORDER GRANTING PRELIMINARY APPROVAL OF SETTLEMENT,
CERTIFYING CLASS FOR PURPOSES OF SETTLEMENT, DIRECTING NOTICE
TO THE CLASS AND SCHEDULING FAIRNESS HEARING**

WHEREAS, this matter has come before the Court pursuant to a Joint Motion for Preliminary Approval of Proposed Settlement, Certification of Class for Purposes of Settlement, and Approval of Form and Notice Plan (the "Joint Motion") filed by Plaintiffs Government Employees Hospital Association ("GEHA"), District Council 37 Health & Security Plan Trust ("DC 37 Plan"), Health Net, Inc., and Eugene Francis ("Francis") and Defendants Serono

DOCKETED

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International, S.A., Serono Laboratories, Inc., and Serono, Inc. (collectively, “Serono Defendants”);¹

WHEREAS, the Court finds that it has jurisdiction over these actions and the parties for purposes of settlement only;

WHEREAS, this Court has conducted a preliminary approval hearing on February 12, 2007, and is otherwise fully advised of the facts and circumstances of the proposed settlement;²

IT IS HEREBY ORDERED THAT:

Preliminary Approval of the Class Agreement and Settlement

1. The Court preliminarily approves the Class Settlement Agreement and Release dated January 31, 2007 between GEHA, DC 37 Plan, and Francis (“Class Plaintiffs”) and the Serono Defendants (“Class Agreement”), subject to further consideration thereof at the Fairness Hearing provided for below. The Class Agreement calls for an affiliate of the Serono Defendants to pay a total of \$24 million to satisfy claims of all private purchasers of Serostim during the class period. The Court finds that the settlement embodied in the Class Agreement (the “Settlement”) is sufficiently within the range of reasonableness so that notice of the Settlement should be given as provided in this Order. The Class Agreement was entered into after extensive litigation and arm’s-length negotiation by experienced counsel for the parties and for certain third-party payor Settling Health Plans (the “SHPs”) who have executed a separate, but related and coordinated settlement agreement with the Serono Defendants.

Preliminary Approval of Serostim Purchaser Class

2. The Court preliminarily finds that the proposed nationwide Serostim Purchaser Class, for the purpose of this Settlement only, meets the applicable requirements of Fed. R. Civ.

¹ In January 2007, Serono, Inc. changed its name to EMD Serono, Inc. and Serono International, S.A. changed its name to Merck Serono International, S.A.

² The terms used herein shall have the same meaning as defined in the Class Agreement.

P. 23(a) and (b)(3), and hereby conditionally certifies the following Class for settlement purposes only:

All individual persons or entities who, during the Class Period, made Serostim Purchases in the United States. Excluded from the class are the Settling Health Plans; the Serono Defendants, their respective present and former, direct and indirect, parents, subsidiaries, divisions, partners and affiliates; and the United States government, its officers, agents, agencies and departments, and all other government entities, to the extent that they previously released their claims pursuant to the 2005 Settlement Agreement and Release resolving the matter of *United States of America v. Serono Laboratories, Inc.*, 05-CR-10282-RCL (D. Mass.) and all related litigation.

This includes all individual Consumers and Third-Party Payors (“TPPs”) as the terms are defined in the Class Agreement.

3. The Court preliminarily finds that the following Class Plaintiffs are adequate representatives of the Serostim Purchaser Class for settlement purposes only:

- Government Employees Hospital Association
- District Council 37 Health and Security Plan Trust
- Eugene Francis

4. If the Class Agreement is terminated or is not consummated for any reason, the certification of the Serostim Purchaser Class shall be void, and Plaintiffs and the Serono Defendants shall be deemed to have reserved all of their rights to propose or oppose any and all class certification issues.

5. The Court further preliminarily finds that the following attorneys fairly and adequately represent the interests of the Serostim Purchaser Class and hereby appoints them as class counsel pursuant to Rule 23(g) for settlement purposes only:

Thomas M. Sobol
David S. Nalven
HAGENS BERMAN SOBOL SHAPIRO LLP
One Main Street, 4th Floor
Cambridge, MA 02142

Lance A. Harke
HARKE & CLASBY LLP
155 South Miami Avenue, Suite 600
Miami, FL 33130

6. The Court preliminarily approves the allocation and distribution of settlement proceeds as described in the Class Agreement. Within five business days, the Serono Defendants shall cause the \$13.2 million (the "Class Settlement Fund") to be transferred to an escrow account established pursuant to the Class Agreement.

Approval of Notice Plan and Schedule

7. The Court has reviewed and hereby approves the Notice Plan designed by Kinsella-Novak Communications, Ltd. (the "Notice Plan"), attached to the Affidavit of David S. Nalven in Support of Motion for Preliminary Approval of the Proposed Class Settlement. The Court finds that the notice to be provided to the Serostim Purchaser Class as set forth in the Notice Plan to be the best practicable notice under the circumstances and, when completed, shall constitute fair, reasonable, and adequate notice of the Settlement to all persons and entities affected by and/or entitled to participate in the Settlement, in full compliance with the notice requirements of Fed. R. Civ. P. 23 and due process.

8. The Court orders Class Counsel to implement the notice events identified in the Joint Motion and Notice Plan, using the notice, exclusion, and claim forms attached to the Notice Plan, pursuant to the following schedule:

<u>EVENT</u>	<u>DATE</u>
<i>Notice of Class Action Settlement, Exclusion Forms And Claim Forms to be Posted on Internet, Mailed to TPPs, and Mailed to AIDS Service Organizations And Physicians Who Prescribed Serostim</i>	February 28, 2007
<i>Notice of Class Action Settlement to be Published in National, Local, and</i>	April 17, 2007

Gay Media (Last Date)

*Affidavit of Compliance with Notice Requirements
To be Filed by Class Counsel*

May 15, 2007

9. The Court appoints Complete Claim Solutions, Inc. as the Claims Administrator. Responsibilities of the Claims Administrator include the following: (i) establishing a post office box and toll-free telephone number to be used by members of the Serostim Purchaser Class to submit claims and requests for exclusion, and to obtain additional instructions and directions concerning these matters; (ii) coordinating with notice expert, Kinsella-Novak Communications, Ltd., to establish and maintain a website for purposes of posting the notices, complaint and other case pleadings, and related documents; (iii) accepting and maintaining documents sent from nationwide Serostim Purchaser Class members and the SHPs, including claim forms, exclusion requests, and other documents relating to claims administration; and (iv) administering claims submitted by members of the Serostim Purchaser Class and the SHPs.

10. The Court approves the expenditure of notice and administrative costs reasonably incurred to provide notice to the Serostim Purchaser Class in accordance with the Notice Plan and in connection with the administration of the Settlement. Such costs shall be paid upon approval by Class Counsel and the Serono Defendants by the Escrow Agent.

11. The Court hereby approves the terms of the Settlement Escrow Agreement as submitted by the parties.

Objections to and Requests for Exclusion from the Serostim Purchaser Class

12. Any member of the Serostim Purchaser Class who objects to or wishes to be excluded from the nationwide Serostim Purchaser Class shall mail a written notice of exclusion to the Claims Administrator pursuant to the following schedule:

EVENT

DATE

*Postmark Deadline for Requests for Exclusion
And Objections*

May 21, 2007

*Receipt Deadline for Requests for Exclusion
And Objections*

May 25, 2007

13. The written notice of exclusion shall state the following: the name, address, taxpayer identification number, telephone number, and fax number (if any) of the individual or entity who wishes to be excluded from the Serostim Purchaser Class as well as the time period during which the class member made Serostim purchases. Consumer Class Members may use the exclusion form provided pursuant to this Order. For Third-Party Payors, the notice of exclusion must also include a signed certification containing the following language:

The undersigned individual hereby represents that he/she has authority to sign and submit this notice of exclusion on behalf of the above-named class member. The undersigned also certifies that he/she has not received any advice from the parties to this litigation or their attorneys concerning his/her or the class member's fiduciary obligations under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1100, *et seq.*, or other laws governing their obligations to any class member. The undersigned understands that by submitting this notice of exclusion, the class member identified above will not be entitled to receive any proceeds of the Class Settlement Fund. By affixing my signature below, I certify under penalty of perjury that the foregoing is true and correct. *See 28 U.S.C. § 1746.*

14. If the person providing a certification in the TPP notice of exclusion is not a duly authorized officer, director or employee of the TPP Class Member requesting exclusion (if a corporation), or a general partner or duly authorized employee of the TPP Class Member requesting exclusion (if a partnership), the person must attach written evidence of the TPP Class Member's grant of authority to execute the notice of exclusion on its behalf.

15. In addition, for purposes of implementing the Class Agreement, including (a) the calculation of the amount of the Serostim Refund (as described in Paragraph 11 of the Class

Agreement), (b) the SHP Group Reversion Amount, and (c) whether the termination contingency referenced in the Supplemental Class Agreement and Supplemental SHP Agreement has been met, each TPP Class Member requesting exclusion shall be required to set forth in the notice of exclusion the amount it paid for Serostim during the class period.

16. Class Opt-Outs shall not be bound by the Settlement, Class Agreement, or Final Order and Judgment. Upon receipt, the Claims Administrator shall promptly provide copies of each notice of exclusion to Class Counsel and the Serono Defendants' counsel.

17. Any member of the Serostim Purchaser Class who does not properly and timely mail a notice of exclusion as set forth herein shall be included in the Serostim Purchaser Class and shall be bound by the terms of the Settlement, Class Agreement, and Final Order and Judgment, whether or not such member of the Serostim Purchaser Class shall have otherwise objected to the Settlement or sought exclusion, and whether or not such member submits a claim or participates in the Settlement.

Filing and Administration of Proofs of Claims

18. To effectuate the Settlement and the provisions of the Notice Plan, the Claims Administrator shall be responsible for the receipt of all notices of exclusion and proofs of claim. The Claims Administrator shall preserve (on paper or transferred into electronic format) all notices of exclusion, proofs of claim, and any and all other written communications from members of the nationwide Serostim Purchaser Class in response to the notices for a period of five (5) years, or pursuant to further order of the Court. All written communications received by the Claims Administrator from members of the Serostim Purchaser Class relating to the Class Agreement shall be available at all reasonable times for inspection and copying by Class

Settlement Counsel and the Serono Defendants' Counsel, until payments are mailed to each Class Member.

19. To participate in the Settlement, each member of the Serostim Purchaser Class shall take the following actions and be subject to the following requirements:

- (a) A nationwide Serostim Purchaser Class Member who wishes to receive a distribution from the Class Settlement Fund must mail a properly executed proof of claim (either a TPP proof of claim or a consumer proof of claim, whichever is appropriate (collectively, a "Proof of Claim") to the Claims Administrator at the address indicated in the notice. If such Proof of Claim is transmitted in any manner other than the United States Postal Service, it shall be deemed to have been submitted when actually received by the Claims Administrator and must be received by the Claims Administrator.
- (b) Each Proof of Claim must satisfy the following conditions: (i) the Proof of Claim must be properly completed in accordance with the instructions thereon and submitted in a timely manner in accordance with subparagraph (a) of this paragraph; (ii) the Proof of Claim must be signed under penalty of perjury; (iii) if the person executing the Proof of Claim is acting in a representative capacity, certification of such person's authority to act on behalf of the claimant must be included with the Proof of Claim; and (iv) the Proof of Claim must be complete and contain no material deletions or modifications of the printed matter contained therein;
- (c) Each Consumer Proof of Claim shall be accompanied by evidence of payment for Serostim as called for in the Consumer Proof of Claim attached to the Notice Plan. Consumer Class Members shall be required to certify (i) the time period over which they, or the Consumer Class Member on whose behalf they are submitting a Proof of Claim, took Serostim, and (ii) the total payments for Serostim (including any co-pay or cash payments therefore) net of any reimbursements from insurers or any other source during the Class Period. In addition, Consumer Class Members shall be required to provide ONE of the following evidences of payment for Serostim during the Class Period:
 - Copy of a single receipt evidencing payment of a co-pay or cash payment for Serostim during the Class Period;
 - Single EOB form (explanation of benefits) from an insurer or other health plan evidencing a co-pay or cash payment for Serostim during the Class Period;
 - Single cancelled check or credit card invoice evidencing a co-pay or cash payment for Serostim during the Class Period; or

- Copy of a prescription for Serostim and a notarized statement made under pains and penalties of perjury stating that you made a co-pay or cash payment for Serostim during the Class Period and setting forth your total out-of-pocket payment for Serostim during the Class Period.
- (d) Each TPP Proof of Claim shall be accompanied by evidence of payment as called for in the TPP Proof of Claim attached to the Notice Plan. Each TPP Class Member or SHP shall be required to certify the total expenditures for Serostim during the Class Period net of any co-pays, reimbursements, discounts or rebates received for Serostim. Any TPP Proof of Claim, including any Proof of Claim submitted by an SHP, that claims a total net expenditure for Serostim of \$100,000 or more shall be accompanied by electronic evidence of payment in the form attached to the TPP Proof of Claim or such other evidence as is acceptable to the Claims Administrator. Any TPP Proof of Claim that claims a total net expenditure for Serostim of less than \$100,000 shall not need to be accompanied by electronic evidence of payment to be considered by the Claims Administrator (although such information may be requested by the Claims Administrator);
- (e) Each Proof of Claim shall be submitted to and reviewed by the Claims Administrator, who shall make a recommendation to Class Settlement Counsel about which claims should be allowed in whole or in part;
- (f) The Claims Administrator will notify each member of the nationwide Serostim Purchaser Class that filed a Proof of Claim of any recommendation of disallowance, in whole or in part, of the Proof of Claim submitted by such Serostim Purchaser Class Member and will set forth the reasons for any such disallowance. Serostim Purchaser Class Members shall be permitted a reasonable period of time to cure once any deficiency with respect to their respective Proofs of Claim is identified. A copy of such notification shall also be sent by the Claims Administrator to Class Counsel. The Claims Administrator shall apply the same process described in this paragraph to the claim submitted by SHPs for payment from the TPP Settlement Pool in accordance with the Class Agreement;
- (g) All members of the Serostim Purchaser Class who do not submit timely Proofs of Claim, or submit Proofs of Claim that are disallowed and not cured, shall be barred from participating in the Settlement (except to the extent that a Proof of Claim may be partially allowed) but otherwise shall be bound by all of the terms of the Class Agreement; and
- (h) Each member of the Serostim Purchaser Class who submits a Proof of Claim shall thereby expressly submit to the jurisdiction of the Court with respect to the claims submitted and shall (subject to final approval of the Settlement) be bound by all the terms and provisions of the Class Agreement.

18. Any member of the Serostim Purchaser Class who wishes to submit a Proof of Claim shall do so in accordance with the procedures set forth herein pursuant to the following schedule:

EVENT

DATE

Deadline for Filing Claims (Postmark if by U.S. Mail or Receipt if by Other Means)

July 19, 2007

20. Any information received by the Claims Administrator in connection with this Settlement that pertains to a particular member of the Serostim Purchaser Class or to an SHP, or information submitted in conjunction with a notice of exclusion (other than the identity of the entity requesting exclusion), shall not be disclosed to any other person or entity other than Class Settlement Counsel, the Serono Defendants' Counsel, and the Court, or as otherwise provided in the Class Agreement, and shall be used only for the purpose of effectuating the Class Agreement and the SHP Agreement. In addition, the Claims Administrator shall not disclose the confidential personal identifying information of any consumer class member for any reason without waiver by such consumer class member. To the extent disclosure is required for the purpose of effectuating the Class Agreement, adequate steps shall be taken to protect against disclosure of confidential personal identifying information, including using personal identification markers (e.g., Jones = "Consumer A"; Smith = "Consumer B") in place of such confidential information.

Consumer Claims Process

21. A minimum payment to Consumer Class Members may be recommended to the Court by Class Settlement Counsel at the final Fairness Hearing based upon the number and magnitude of the claims filed by Consumer Class Members. Any Consumer Class Member whose Recognized Claim falls below the minimum payment as set by the Court at the Fairness

Hearing will receive the minimum payment in lieu of his/her recognized claim, subject to Paragraph 22 below.

22. If the total of all payments to all Consumer Class Members (the total of all Recognized Claims plus minimum payments where applicable) is less than the Net Consumer Settlement Pool, all Consumer Class Members will be paid up to 100% of their Recognized Claim or the minimum payment as set by the Court at the Fairness Hearing, whichever is larger. Any remaining funds in the Net Consumer Settlement Pool, after distribution to Consumer Class Members in accordance with the Class Agreement, shall be subject to distribution at the discretion of this Court. If the total of all payments to Consumer Class Members (the total of all Recognized Claims plus minimum payments where applicable) would equal or exceed the Net Consumer Settlement Pool, all consumers shall share *pro rata* in the Net Consumer Settlement Pool in proportion to the size of their Recognized Claim.

23. The total expenditure for Serostim during the Class Period claimed by each TPP Class Member or SHP Group Member on the TPP Proof of Claim, as verified and accepted by the Claims Administrator, shall be considered the Recognized Claim for each TPP Class Member. Each TPP Class Member shall share *pro rata* in the Net TPP Settlement Pool (which is net of payment of the SHP Group Reversion Amount and the Serono Refund as set forth in the Class Agreement) in proportion to the size of their Recognized Claim.

Fairness Hearing

24. A hearing on final settlement approval (the "Fairness Hearing") shall be held before this Court, at the United States District Court for the District of Massachusetts, One Courthouse Way, Boston, Massachusetts 02210, on the date set forth below, to consider matters relating to the Settlement, including the following: (a) whether the Serostim Purchaser Class

should be finally certified, for settlement purposes only; (b) the fairness, reasonableness and adequacy of the Settlement, the terms of the Class Agreement, the dismissal with prejudice of the Serostim Litigation as to all Defendants, and the entry of final judgment; (c) whether Class Counsel's application for attorneys' fees, expenses and incentive awards for the Class Representatives ("the Fee Petition") should be granted; and (d) whether to approve the proposed plan of allocation and distribution of the Settlement proceeds.

25. The Court orders Class Counsel to file with the Court any memoranda or other materials in support of final approval of the Settlement and any Fee Petition pursuant to the schedule set forth below.

26. Any member of the Serostim Purchaser Class that has not filed a notice of exclusion in the manner set forth above may appear at the Fairness Hearing in person or by counsel and may be heard, to the extent allowed by the Court, either in support of or in opposition to the fairness, reasonableness and adequacy of the Settlement, the dismissal with prejudice of the Serostim Litigation, the entry of final judgment, and/or the Fee Petition; provided, however, that no person shall be heard in opposition to the Settlement, dismissal and/or entry of final judgment or the Fee Petition, and no papers or briefs submitted by or on behalf of any such person shall be accepted or considered by the Court, unless submitted to the Court and served upon Counsel for the parties pursuant to the schedule set forth below. Such person must (a) file with the Clerk of the Court a notice of such person's intention to appear as well as a statement that indicates the basis for such person's opposition and any documentation in support of such opposition, and (b) serve copies of such notice, statement and documentation, as well as any other papers or briefs that such person files with the Court, either in person or by mail, upon all Counsel to the parties. Class Members who fail to object in the manner and by the

dates provided herein shall be deemed to have waived and shall forever be foreclosed from raising any such objections.

27. Any Serostim Purchaser Class member may retain an attorney at his or her or its own expense to appear in the action. Such attorney shall serve a Notice of Appearance on the following counsel listed below pursuant to the schedule set forth below.

Counsel for Serostim Purchaser Class

Thomas M. Sobol
David S. Nalven
HAGENS BERMAN SOBOL SHAPIRO LLP
One Main Street, 4th floor
Cambridge, MA 02142

Lance A. Harke
HARKE & CLASBY LLP
155 South Miami Avenue, Suite 600
Miami, FL 33130

Counsel for Serono Defendants

Fred Kelly
Timothy Mungovan
David S. Ryan
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110

28. The date and time of the Fairness Hearing and related filings as identified herein shall be as follows:

EVENT

DATE

*Motion for Final Approval, Attorneys' Fees,
Reimbursement of Expenses, and Incentive Awards
To be Filed by Class Counsel*

May 15, 2007

*Postmark Deadline for Requests for Exclusion
And Objections, and Filing and Service of
Requests to be Heard at the Fairness Hearing
And Notices of Appearance*

May 21, 2007

<i>Receipt Deadline for Requests for Exclusion And Objections</i>	May 25, 2007
<i>Responses to Objections to be Filed</i>	June 14, 2007
<i>Fairness Hearing to be Held</i>	June 19, 2007

29. The date and time of the Fairness Hearing shall be set forth in the notice to be disseminated pursuant to this order and Summary Notice, but shall be subject to adjournment by the Court without further notice other than that which may be posted at the Court, on the Court's website, and/or the website to be established pursuant to the Notice Plan.

30. Upon Final Approval, each and every term and provision of the Class Agreement (except as may be modified by the Final Approval Order) shall be deemed incorporated into the Final Order and Judgment as if expressly set forth and shall have the full force and effect of an Order of the Court.

Status of Litigation and Settlement

31. All discovery and other pretrial proceedings in these actions are stayed and suspended, pending the Effective Date of the Class Settlement ("Final Approval"), except for such proceedings as are provided for in the Class Agreement, or which may be necessary to implement the terms of the Settlement, Class Agreement, or this Order. Pending Final Approval, no nationwide Serostim Purchaser Class Member, either directly, representatively, or in any other capacity (other than a Serostim Purchaser Class Member who validly and timely elects to be excluded from the Class), shall commence, continue or prosecute against any or all Releasees any action or proceeding in any court or tribunal asserting any of the matters, claims or causes of action that are to be released upon Final Approval pursuant to the Class Agreement, and are hereby enjoined from so proceeding.

32. Upon Final Approval, all Serostim Purchaser Class Members that do not file a timely notice of exclusion shall be forever enjoined and barred from asserting any of the matters, claims or causes of action released pursuant to the Class Agreement, and any such Serostim Purchaser Class Member shall be deemed to have forever released the Releasees from any and all such matters, claims and causes of action as provided for in the Class Agreement.

33. In the event the Settlement is terminated in accordance with the provisions of the Class Agreement, the Settlement and all proceedings had in connection therewith shall be null and void, except insofar as expressly provided in the Class Agreement, and without prejudice to the *status quo ante* rights of Plaintiffs or the Serono Defendants.

34. Neither this Order nor the Class Agreement shall constitute any evidence or admission of liability by any Defendant, or an admission regarding the propriety of any certification of any particular class for purposes of litigation, nor shall they be offered in evidence in this or any other proceeding except to consummate or enforce the Class Agreement or the terms of this Order, or by any Releasee in connection with any action asserting Released Claims.

SO ORDERED



HON. PATTI B. SARIS

Dated: February 7, 2007