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14 UNITED STATES DISTRICT COURT
15 SOUTHERN DISTRICT OF CALIFORNIA

16 In re DURA PHARMACEUTICALS, INC.)
17 SECURITIES LITIGATION)

Master File No. 99-CV-0151-JLS (WMc)

18 _____)
19 This Document Relates To:)
20 ALL ACTIONS.)

**ORDER (1) GRANTING MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT AND PROVIDING FOR
NOTICE and (2) DENYING WITHOUT
PREJUDICE MOTION TO WITHDRAW
AS LEAD PLAINTIFFS**

(Doc. Nos. 183, 202-03)

1 WHEREAS, Lead Plaintiffs, Neil Siskind, Michael Broudo, Baldev S. Gill, Larry Morgan
2 IRA, Leonid S. Shvartsman, Roberta Speck and Brent Vogt and Defendants Dura Pharmaceuticals,
3 Inc. (“Dura” or the “Company”), Cam L. Garner, James W. Newman and Walter F. Spath (the
4 “Individual Defendants”) (collectively “Defendants”), have applied to the Court pursuant to Rule
5 23(e) of the Federal Rules of Civil Procedure for an order approving the settlement of the above-
6 captioned litigation (the “Litigation”) in accordance with the Stipulation of Settlement dated as of
7 March 20, 2009 (the “Stipulation”), which, together with the Exhibits annexed thereto, sets forth the
8 terms and conditions for a proposed settlement of the Litigation (the “Settlement”) and for dismissal
9 of the Litigation with prejudice as against all the Released Persons, upon the terms and conditions set
10 forth therein; and the Court having read and considered the Stipulation and the exhibits annexed
11 thereto;

12 NOW, THEREFORE, IT IS HEREBY ORDERED:

13 1. This order (the “Notice Order”) hereby incorporates by reference the definitions in
14 the Stipulation, and all terms used herein shall have the same meanings as set forth in the Stipulation.
15 Any inconsistencies between the Stipulation and the Notice of Pendency and Proposed Settlement of
16 Class Action will be controlled by the language of the Stipulation.

17 2. The Court hereby preliminarily approves the Settlement as being fair, just, reasonable
18 and adequate to the Settlement Class, pending a final hearing on the Settlement.

19 **CLASS CERTIFICATION**

20 3. The Court hereby certifies, for settlement purposes only, pursuant to Rules 23(a) and
21 23(b)(3) of the Federal Rules of Civil Procedure, a Settlement Class defined as follows:

22 all Persons who purchased or acquired Dura Securities between April 15, 1997 and
23 February 24, 1998, inclusive, including but not limited to those Persons who
24 purchased or acquired Dura Securities during the Settlement Class Period and held
25 such Dura Securities after September 23, 1998, November 4, 1998 and December 4,
26 1998. Excluded from the Settlement Class are Defendants, members of the families
27 of the Individual Defendants, any parent, subsidiary, affiliate, partner, officer,
28 executive or director of any Defendant, any entity in which any such excluded party
has a controlling interest and the legal representatives, affiliates, heirs, successors, or
assigns of any such excluded Person. Also excluded from the Settlement Class are
those Persons who timely and validly request exclusion from the Settlement Class
pursuant to the Notice of Pendency and Proposed Settlement of Class Action.

1 4. The Court finds, for the purposes of the Settlement only, that the prerequisites for a
2 class action under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure have been satisfied
3 in that: (a) the number of Settlement Class Members is so numerous that joinder of all members
4 thereof is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c)
5 the claims of the Lead Plaintiffs are typical of the claims of the Settlement Class it seeks to
6 represent; (d) Lead Plaintiffs have fairly and adequately represented the interests of the Settlement
7 Class; (e) the questions of law and fact common to the members of the Settlement Class predominate
8 over any questions affecting only individual members of the Settlement Class; and (f) a class action
9 is superior to other available methods for the fair and efficient adjudication of the controversy.

10 5. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and for the purposes of
11 the Settlement only, the Lead Plaintiffs are certified as Class Representatives.

12 6. Pursuant to Rule 53(c) of the Federal Rules of Civil Procedure, the Court appoints the
13 firm of A.B. Data, Ltd. (“Claims Administrator”) to supervise and administer the notice procedure as
14 well as the processing of claims as more fully set forth below:

15 a. No later than fourteen (14) days after entry of this Notice Order, the Claims
16 Administrator shall cause a copy of the Notice of Pendency and Proposed Settlement of Class Action
17 (the “Notice”), and the Proof of Claim and Release (the “Claim Form”), annexed hereto respectively
18 as Exhibits A-1 and A-2, shall be mailed by first-class mail, postage prepaid, to all members of the
19 Settlement Class at the address of each such Person as set forth in the records of Dura or its transfer
20 agent, or who are identified by further reasonable efforts (“Notice Date”);

21 b. A summary notice (“Summary Notice”), annexed hereto as Exhibit A-3, shall
22 be published once in the national edition of *Investor’s Business Daily* within two weeks after the
23 mailing of the Notice; and

24 c. The Notice, Summary Notice and Claim Form shall also be placed on the
25 Claims Administrator’s website, on or before the Notice Date.

26 7. The Court approves the form of Notice and Summary Notice (together, the “Notices”)
27 and Claim Form, and finds that the procedures established for publication, mailing and distribution
28 of such Notices substantially in the manner and form set forth in paragraph 6 of this Order meet the

1 requirements of Rule 23 of the Federal Rules of Civil Procedure and due process, and constitute the
2 best notice practicable under the circumstances.

3 8. As soon as practicable, Dura or its transfer agent shall provide the Claims
4 Administrator with shareholder information to the extent available in the records of Dura or its
5 transfer agent, providing the identity of all record holders of Dura Securities. To the extent available
6 in Dura's or its transfer agent's records, this information shall contain the names and addresses of all
7 purchasers of Dura Securities, as reflected in Dura's or its transfer agent's records. Dura shall bear
8 all costs or expenses associated with providing the Claims Administrator with the above-described
9 shareholder information from its and its transfer agent's records.

10 9. Forty-five (45) days before the date fixed by this Court for the Settlement Hearing,
11 Lead Counsel shall cause to be filed with the Clerk of this Court affidavits or declarations of the
12 person or persons under whose general direction the mailing of the Notice and the publication of the
13 Summary Notice shall have been made, showing that such mailing and publication have been made
14 in accordance with this Order.

15 10. Nominees who purchased or otherwise acquired Dura Securities for beneficial owners
16 who are Settlement Class Members are directed to: (a) request within fourteen (14) days of receipt of
17 the Notice additional copies of the Notice and the Claim Form from the Claims Administrator for
18 such beneficial owners; or (b) send a list of the names and addresses of such beneficial owners to the
19 Claims Administrator within fourteen (14) days after receipt of the Notice. If a nominee elects to
20 send the Notice to beneficial owners, such nominee is directed to mail the Notice within fourteen
21 (14) days of receipt of the copies of the Notice from the Claims Administrator, and upon such
22 mailing, the nominee shall send a statement to the Claims Administrator confirming that the mailing
23 was made as directed, and the nominee shall retain the list of names and addresses for use in
24 connection with any possible future notice to the Settlement Class. Upon full compliance with this
25 Notice Order, including the timely mailing of Notice to beneficial owners, such nominees may seek
26 reimbursement of their reasonable expenses actually incurred in complying with this Notice Order
27 by providing the Claims Administrator with proper documentation supporting the expenses for
28 which reimbursement is sought and reflecting compliance with these instructions, including timely

1 mailing of the Notice, if the nominee elected or elects to do so. Such properly documented expenses
2 incurred by nominees in compliance with the terms of this Notice Order shall be paid from the
3 Settlement Fund.

4 **HEARING: RIGHT TO BE HEARD**

5 11. There shall be a hearing on Thursday, December 3, 2009 at 1:30 p.m. (the
6 “Settlement Hearing”) at which time the Court shall address the fairness, reasonableness and
7 adequacy of the Settlement, the fairness and reasonableness of the Plan of Allocation, and Lead
8 Counsel’s application for attorneys’ fees and payment of expenses. The Settlement Hearing shall be
9 held before the Honorable Janis L. Sammartino at the United States District Court for the Southern
10 District of California, 940 Front Street, San Diego, CA 92101-8900.

11 12. Papers in support of the Settlement, the Plan of Allocation, and Lead Counsel’s
12 application for attorneys’ fees and payment of expenses shall be submitted no later than forty-five
13 (45) days prior to the Settlement Hearing.

14 13. Any member of the Settlement Class may appear at the Settlement Hearing and show
15 cause why the proposed Settlement embodied in the Stipulation should or should not be approved as
16 fair, reasonable and adequate, or why the Judgment should or should not be entered thereon, and/or
17 to present opposition to the Plan of Allocation or to the application of Lead Counsel for attorneys’
18 fees and payment of litigation expenses. However, no Settlement Class Member or any other Person
19 shall be heard or entitled to contest the approval of the terms and conditions of the Settlement, or, if
20 approved, the Judgment to be entered thereon approving the same, or the terms of the Plan of
21 Allocation or the application by Lead Counsel for an award of attorneys’ fees and payment of
22 litigation expenses unless that Settlement Class Member or Person (i) has served written objections,
23 including the basis therefor, as well as copies of any papers and/or briefs in support of his, her or its
24 position upon the following counsel for receipt no later than thirty (30) days prior to the Settlement
25 Hearing:

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1 Jeffrey D. Light
2 Coughlin Stoia Geller Rudman & Robbins LLP
3 655 West Broadway, Suite 1900
4 San Diego, CA 92101
5 Counsel for Lead Plaintiffs

6 Christopher H. McGrath
7 Paul, Hastings, Janofsky & Walker LLP
8 4747 Executive Drive
9 12th Floor
10 San Diego, CA 92121
11 Counsel for Defendants

12 and (ii) filed said objections, papers and briefs with the Clerk of the United States District Court for
13 the Southern District of California. Any Settlement Class Member who does not make his, her or its
14 objection in the manner provided for herein shall be deemed to have waived such objection and shall
15 forever be foreclosed from making any objection to the fairness or adequacy of the Settlement as
16 incorporated in the Stipulation, to the Plan of Allocation or to the application by Lead Counsel for an
17 award of attorneys' fees and payment of litigation expenses unless otherwise ordered by the Court.
18 The manner in which a notice of objection should be prepared, filed and delivered shall be stated in
19 the Notice.

20 14. All reply papers shall be filed with the Court and served no later than ten (10) days
21 prior to the Settlement Hearing.

22 15. If approved, all Settlement Class Members will be bound by the proposed Settlement
23 provided for in the Stipulation, and by any judgment or determination of the Court affecting
24 Settlement Class Members, regardless of whether or not a Settlement Class Member submits a Claim
25 Form.

26 16. Any member of the Settlement Class may enter an appearance in the Litigation, at
27 their own expense, individually or through counsel of their own choice. If they do not enter an
28 appearance, they will be represented by Lead Counsel.

17. The Court reserves the right to adjourn or continue the Settlement Hearing, or any
adjournment or continuance thereof, without any further notice to Settlement Class Members and to
approve the Stipulation with modification and without further notice to Settlement Class Members.

1 The Court retains jurisdiction of this Litigation to consider all further applications arising out of or
2 connected with the proposed Settlement, and as otherwise warranted.

3 **CLAIMS PROCESS**

4 18. In order to be entitled to participate in the Settlement, a Settlement Class Member
5 must complete and submit a Claim Form in accordance with the instructions contained therein. To
6 be valid and accepted, Claim Forms submitted in connection with this Settlement must be
7 postmarked no later than ninety (90) days from the Notice Date.

8 19. Any Settlement Class Member who does not timely submit a valid Claim Form shall
9 not be entitled to share in the Settlement Fund, unless otherwise ordered by the Court, but
10 nonetheless shall be barred and enjoined from asserting any of the Released Claims and shall be
11 bound by any judgment or determination of the Court affecting the Settlement Class Members.
12 Notwithstanding the foregoing, Lead Counsel shall have the discretion to accept late-submitted
13 claims for processing by the Claims Administrator so long as distribution of the Net Settlement Fund
14 is not materially delayed.

15 **REQUEST FOR EXCLUSION FROM THE CLASS**

16 20. Any requests for exclusion must be submitted no later than thirty (30) days prior to
17 the Settlement Hearing. Any Person who wishes to be excluded from the Settlement Class must
18 provide (a) the name address and telephone number of the Person requesting exclusion; (b) the
19 Person's transactions in Dura Securities during the Settlement Class Period, including the dates, the
20 number of securities purchased or acquired, the date of each purchase, acquisition or sale and the
21 price paid and/or received; and (c) that the Person wishes to be excluded from the Settlement Class.
22 Within seven (7) calendar days of receipt by Lead Counsel or the Claims Administrator of any
23 request for exclusion and in no event later than fourteen (14) calendar days before the Settlement
24 Hearing, copies of all such requests for exclusion shall be provided to counsel for Defendants. All
25 Persons who submit valid and timely requests for exclusion in the manner set forth in this paragraph
26 shall have no rights under the Stipulation, shall not share in the distribution of the Net Settlement
27 Fund, and shall not be bound by the Stipulation or any final judgment.

1 21. Released Persons shall have no responsibility or liability whatsoever with respect to
2 the Plan of Allocation or Lead Counsel's application for an award of attorneys' fees and payment of
3 litigation expenses. The Plan of Allocation and Lead Counsel's application for an award of
4 attorneys' fees and payment of litigation expenses will be considered separately from the fairness,
5 reasonableness and adequacy of the Settlement. At or after the Settlement Hearing, the Court will
6 determine whether Lead Counsel's proposed Plan of Allocation should be approved, and the amount
7 of attorneys' fees and litigation expenses to be awarded to Lead Counsel. Any appeal from any
8 orders relating to the Plan of Allocation or Lead Counsel's application for an award of attorneys'
9 fees and litigation expenses, or reversal or modification thereof, shall not operate to terminate or
10 cancel the Settlement, or affect or delay the finality of Judgment approving the Settlement and the
11 settlement of the Litigation set forth therein.

12 22. Only Settlement Class Members and Lead Counsel shall have any right to any portion
13 of, or any rights in the distribution of, the Settlement Fund unless otherwise ordered by the Court or
14 otherwise provided in the Stipulation.

15 23. All funds held by the Escrow Agent shall be deemed and considered to be *in custodia*
16 *legis* and shall remain subject to the jurisdiction of the Court until such time as such funds shall be
17 distributed pursuant to the Stipulation and/or further order of the Court.

18 24. As set forth in the Stipulation, the proceeds of the Settlement Fund may be used to
19 pay all reasonable costs and expenses in providing notice to the Settlement Class, locating
20 Settlement Class Members, soliciting claims, assisting with the filing of the claims, administering
21 and distributing the Net Settlement Fund to the Members of the Settlement Class, processing Claim
22 Forms, and paying taxes, escrow fees and costs. In the event the Court does not approve the
23 Settlement, or it otherwise fails to become effective, neither Lead Plaintiffs nor any of their counsel
24 shall have any obligation to repay any amounts actually and properly incurred or disbursed for such
25 purposes.

26 25. Neither the Stipulation, nor any of its terms or provisions, nor any of the negotiations
27 or proceedings connected with it, nor any act performed nor document executed pursuant to or in
28 furtherance of it (a) is or may be deemed to be or may be used as an admission of, or evidence of, the


1 validity of any Released Claim, or of any wrongdoing, fault, or liability of the Settling Parties or the
2 Released Persons; or (b) is or may be deemed to be or may be used as an admission of, or evidence
3 of, any wrongdoing, fault, or liability of any of the Settling Parties or the Released Persons in any
4 civil, criminal or administrative proceeding in any court, administrative agency or other tribunal.

5 26. There shall be no distribution of any of the Net Settlement Fund to any Settlement
6 Class Member until a plan of allocation is finally approved and is affirmed on appeal or *certiorari* or
7 is no longer subject to review by appeal or *certiorari* and the time for any petition for rehearing,
8 appeal, or review, whether by *certiorari* or otherwise, has expired.

9 27. The Court **DENIES WITHOUT PREJUDICE** the motion to withdraw as lead
10 plaintiffs filed by Neil Siskind and Michael Broudo. (Doc. No. 183.) If the Court ultimately denies
11 final approval of the settlement, plaintiffs **MAY REFILE** their motion.

12 IT IS SO ORDERED.

13 DATED: July 31, 2009

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15 THE HONORABLE JANIS L. SAMMARTINO
16 UNITED STATES DISTRICT COURT JUDGE
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