UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE: LOESTRIN 24 FE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: Direct Purchaser Actions	MDL No. 2472 Master File No. 1:13-md-2472-S-PAS

MEMORANDUM IN SUPPORT OF DIRECT PURCHASER CLASS PLAINTIFFS' AMENDED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, APPROVAL OF THE FORM AND MANNER OF NOTICE TO THE CLASS, APPOINTMENT OF CLAIMS ADMINISTRATOR AND ESCROW AGENT, AND SETTING THE FINAL SETTLEMENT SCHEDULE AND DATE FOR A FAIRNESS HEARING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

I. INTRODUCTION

Direct purchaser class plaintiff Ahold USA, Inc., on behalf of itself and the certified class of direct purchasers (the "direct purchasers" or "direct purchaser class"), has entered into a proposed settlement with defendants Warner Chilcott[1] and Watson Laboratories, Inc., related Warner Chilcott and Watson entities,[2] and parent entity Allergan, plc. The settlement provides a total of $120,000,000.00 in cash to the direct purchaser class in exchange for the direct purchasers' dismissal of their case with prejudice and provision of releases from the direct purchasers, as fully set forth in the settlement agreement.[3]

The direct purchasers respectfully request—and the defendants do not oppose—that the Court preliminarily approve the settlement. Co-lead counsel for the direct purchaser class[4] believe this is a fair, reasonable, and adequate result for the class—a resolution negotiated in good faith, at arm's length, by counsel experienced in pharmaceutical antitrust matters, under the auspices of an independent mediator, David Murphy of Phillips ADR, which was achieved following more than six years of litigation and on the eve of trial.

Co-lead counsel for the direct purchasers believe that the settlement is fair, reasonable, and satisfies the requirements of Rule 23(e) of the Federal Rules of Civil Procedure. The settlement meets the standards for preliminary approval. The parties agreed to settle this action near the eve of trial after substantial investigation, discovery, and motion practice. The

[1] Warner Chilcott Co., LLC f/k/a Warner Chilcott Co., Inc.; Warner Chilcott (US), LLC; and Warner Chilcott Sales (US), LLC (together and individually, "Warner Chilcott").

[2] Warner Chilcott plc n/k/a Allergan WC Ireland Holdings Ltd.; Warner Chilcott Holdings Co. III, Ltd.; Warner Chilcott Corp.; Warner Chilcott Laboratories Ireland Limited; and Watson Pharmaceuticals, Inc.

[3] *See* Settlement Agreement, Exhibit 1 to the Declaration of Thomas M. Sobol, filed herewith ("Sobol Decl. Ex. 1").

[4] On July 2, 2019, the Court appointed Faruqi & Faruqi LLP, Berger Montague PC, Hagens Berman Sobol Shapiro LLP, and Kessler Topaz Meltzer & Check LLP co-lead counsel for the certified direct purchaser class. *In re Loestrin 24 Fe Antitrust Litig.*, No. 13-md-2472, 2019 WL 3214257, at *17 (D.R.I. July 2, 2019).

defendants deny any allegations of unlawful or wrongful conduct, and believe they have meritorious defenses to this litigation. Thus, the settlement ensures that the class will receive substantial benefits, while avoiding the risk and delays of continued litigation.

II. PROCEDURAL BACKGROUND

A. The direct purchasers allege that the defendants violated federal antitrust law and imposed overcharges on the class.

This case has a long and complex procedural history. The first direct purchaser complaint was filed on May 14, 2013.[5] On October 3, 2013, the Judicial Panel on Multidistrict Litigation transferred four actions pending in the Eastern District of Pennsylvania to this district for consolidated pretrial proceedings.[6] The direct purchasers filed the first of three consolidated amended class action complaints on December 6, 2013.[7] That complaint, and the others following it, alleged that defendants violated the federal antitrust laws by engaging in a wrongful anticompetitive scheme to impede and delay market entry of AB-rated, less expensive, generic versions of Warner Chilcott's brand name prescription drug, Loestrin 24 Fe. The alleged scheme included patent fraud, a wrongful Orange Book listing, sham litigation, and a large, anticompetitive reverse payment settlement that paved the way for a hard product switch from Loestrin 24 Fe to Minastrin 24 Fe—a product the direct purchasers allege provided no additional benefit to patients over Loestrin 24 Fe.[8] As a result of the defendants' alleged antitrust violations, the direct purchasers alleged that they were precluded from buying less expensive generic Loestrin 24 Fe and were forced to pay artificially inflated prices for brand and generic Loestrin

[5] Class Action Compl. & Jury Demand, *Am. Sales Co., LLC v. Warner Chilcott Public Ltd. Co.*, No. 13-cv-347 (D.R.I. May 14, 2013), ECF No. 1.

[6] JPML Transfer Order, ECF No. 1.

[7] Direct Purchaser Class Pls.' Consol. Am. Class Action Compl. & Jury Demand, ECF No. 39.

[8] Direct Purchaser Class Pls.' Third Am. Consol. Class Action Compl. & Jury Demand ¶¶ 99-296, ECF No. 378.

24 Fe and brand Minastrin 24 Fe.

The district court dismissed the first consolidated amended class action complaint on September 4, 2014, holding that only cash reverse payments are actionable under *Federal Trade Commission v. Actavis*.[9] On February 22, 2016, the First Circuit vacated the District Court's decision and remanded for further proceedings.[10] After a second amended complaint and a renewed round of motion to dismiss briefing, the District Court upheld all of the direct purchasers' causes of action but dismissed claims against parent company Allergan, plc and previous parent company Actavis, Inc. on August 8, 2017.[11]

B. The parties engage in investigation, discovery, and arm's length settlement negotiations.

Following the Court's second motion to dismiss decision, the parties engaged in substantial discovery, both formal and informal. The Court ordered production of documents to be substantially complete by October 5, 2017[12] and set the close of fact discovery on June 29, 2018.[13] The defendants produced over 365,000 documents totaling nearly 3.4 million pages. Between April 2018 and April 2019, the parties took 113 depositions of the parties' current and former employees, as well as non-parties.[14]

Settlement negotiations between class counsel and attorneys for the defendants were hard fought, at arm's length, and spanned multiple years. The parties' first formal attempt to mediate

[9] *In re Loestrin 24 Fe Antitrust Litig.*, 45 F. Supp. 3d 180, 195 (D.R.I. 2014), *vacated*, 814 F.3d 538 (1st Cir. 2016).

[10] *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538 (1st Cir. 2016).

[11] *In re Loestrin 24 Fe Antitrust Litig.*, 261 F. Supp. 3d 307 (D.R.I. 2017).

[12] Interim Case Management Order No. 8, ECF No. 326.

[13] Interim Case Management Order No. 13, ECF No. 480.

[14] After the direct purchasers signed a binding term sheet with the defendants, the plaintiffs deposed the late-identified former Warner Chilcott employee Katie MacFarlane on December 17, 2019, bringing the deposition total in the case to 114.

their dispute occurred at a mediation session with defendants on December 3, 2018 with mediators Layn R. Phillips and David Murphy of Phillips ADR. The direct purchasers and defendants both submitted detailed mediation briefs with exhibits prior to the mediation. Settlement talks were unsuccessful at that time, and the parties continued to litigate. The parties exchanged a total of 57 expert reports between July 2018 and April 2019 on every aspect of the case, including class certification, market power, patent merits, causation issues, antitrust injury and impact, and damages.

C. The Court certifies the direct purchaser class.

The parties completed briefing class certification on November 29, 2018.[15] The Court held a full day hearing on the issue on February 11, 2019, and, on July 2, 2019, the Court certified the following direct purchaser class:

> All persons or entities in the United States and its territories who purchased brand or generic Loestrin 24 directly from Warner [Chilcott] or Amneal at any time during the period from September 1, 2009, through and until June 3, 2015, and all persons or entities in the United States and its territories who purchased brand Minastrin 24 directly from Warner at any time during the period from September 1, 2009, through and until March 14, 2017 (the "Class Period").
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> Excluded from the Class are defendants, and their officers, directors, management, employees, subsidiaries, or affiliates, and, all federal governmental entities. Also excluded from the class are educational institutions such as universities and colleges.[16]

Following submission of requests for exclusion from the class submitted by certain entities that had independently filed actions against defendants, the Court excluded the following entities from the direct purchaser Class: Walgreen Co., The Kroger Co., Safeway Inc., HEB

[15] Reply in Further Supp. of Direct Purchaser Class Pls.' Mot. for Class Certification, ECF No. 627

[16] *Loestrin 24 Fe*, 2019 WL 3214257, at *7.

Grocery Company L.P., Albertson's LLC, CVS Pharmacy, Inc., Rite Aid Corporation, and Rite Aid Hdqtrs. Corporation.[17]

D. The parties move for summary judgment and prepare for trial.

The Court considered two separate rounds of summary judgment briefing. First, the defendants filed a motion for summary judgment "due to lack of market power" on July 30, 2018 that included over 690 exhibits.[18] The plaintiffs then filed their own market power summary judgment motion on October 19, 2018.[19] A full-day hearing on summary judgment related to the issue of market power was held on March 14, 2019. A second hearing on market power was held on October 3, 2019.

On May 10, 2019, the defendants filed a comprehensive summary judgment motion on all of the direct purchasers' claims concerning issues other than market power.[20] A full day hearing on this motion was held on September 11, 2019.

During the fall and winter of 2019, with summary judgment motions pending, the parties continued to prepare extensively for trial. The parties exchanged thousands of documents designated as potential trial exhibits and filed a combined total of 51 motions *in limine*. The defendants and the direct purchasers also filed competing sets of proposed jury instructions and verdict forms.[21] With trial scheduled to begin on January 6, 2020, the parties began the process, led by the Court, of vetting potential jurors through proposed jury questionnaires.[22] Indeed, by

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[17] *See* Text Order Allowing [1295] Retailers' Requests to Opt Out from the Direct Purchaser Class, Nov. 14, 2019.

[18] Defs.' Mot. for Summ. J. Due to Lack of Market Power, ECF No. 496.

[19] Pls.' Mot. for Summ. J. on Market Power, ECF No. 569.

[20] Defs.' Mot. for Summ J., ECF No. 842.

[21] Defs.' Proposed Jury Charges, ECF No. 1348; Defs.' Proposed Verdict Form, ECF No. 1349; Pls.' Proposed Jury Verdict, ECF No. 1350; Pls.' Proposed Jury Instructions, ECF No. 1351.

[22] Interim Case Management Order No. 16 at 2, ECF No. 1277.

the time of the settlement, the parties had spent hundreds of hours reviewing and preparing the witnesses and documentary evidence necessary to try the case to a jury.

E. The direct purchasers and the defendants settle the case for $120 million.

In December 2019, the direct purchasers and the defendants began to explore the possibility of settlement again. On December 11, 2019, a mediation session was held at White & Case LLP's New York office, overseen by mediator David Murphy of Phillips ADR. On December 13, 2019, the parties entered into a binding settlement term sheet between direct purchaser counsel and counsel for defendants.[23] That term sheet was followed by a letter between the parties related to the terms of the proposed settlement.[24] Subsequently, the parties negotiated the terms of a full settlement agreement, consistent with and incorporating the terms of the December 13, 2019 term sheet, agreeing to settle all direct purchaser claims for a total cash payment of $120 million. The parties executed the settlement agreement on January 14, 2020.[25]

F. The Court denies all summary judgment motions.

Shortly after the direct purchasers and the defendants reached a binding agreement to settle, with claims still pending by the end payer and retailer plaintiffs, the Court denied all motions for summary judgment on December 17, 2019.[26]

G. The First Circuit denies the defendants' appeal of class certification.

On January 7, 2020, the United States Court of Appeals for the First Circuit denied the defendants' petition for leave to appeal the Court's certification of a direct purchaser class under

[23] A copy of the December 13, 2019 settlement term sheet is included as Exhibit 2 to the Sobol Declaration.

[24] A copy of the January 5, 2019 letter from defendants to class counsel is included as Exhibit 3 to the Sobol Declaration.

[25] Sobol Decl. Ex. 1.

[26] Op. & Order on Summ. J. and Order Regarding Mots. to Exclude Certain Expert Ops., ECF No. 1380.

Rule 23(f).[27]

III. ARGUMENT

The settlement provides for payment by defendants of $120,000,000.00 into an interest-bearing escrow account to settle the direct purchasers' claims.[28] In exchange for the cash payment, the direct purchaser class will dismiss their claims against the defendants with prejudice and, consistent with the terms of the settlement agreement, release all claims that the direct purchasers have asserted or could have asserted in the action relating to the conduct alleged.[29]

A. The proposed settlement meets the standard for preliminary approval.

"Settlement agreements enjoy great favor with the courts as a preferred alternative to costly, time-consuming litigation."[30] Approval of a class action settlement under Rule 23(e) involves a two-step process. First, counsel submits the proposed terms of settlement and the court makes a preliminary fairness evaluation.[31] In this preliminary evaluation, the court determines only whether the settlement has "obvious deficiencies" or whether "it is in the range of fair, reasonable, and adequate."[32] Second, "[u]ltimately, the more fully informed examination required for final approval will occur in connection with the Final Fairness Hearing, where arguments for and against the proposed settlement will be presented after notice and an

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[27] Judgment, *City of Providence v. Warner Chilcott Pub. Ltd. Co.*, No. 19-8014 (1st Cir. 2020).

[28] Sobol Decl. Ex. 1 ¶ 6.

[29] *Id.* ¶¶ 11-12.

[30] *Fid. & Guar. Ins. Co. v. Star Equip. Corp.*, 541 F.3d 1, 5 (1st Cir. 2008); *accord In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) ("[T]he law favors class action settlements." (citing *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996))).

[31] *See* Federal Judicial Center, *Manual for Complex Litigation, Fourth* § 21.632 (4th ed. 2004); *see also* William Rubenstein, Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:25 at 38-39 (4th ed. 2002) (endorsing two-step process).

[32] *In re M3Power Razor Sys. Mktg. & Sales Prac. Litig.*, 270 F.R.D. 45, 52 (D. Mass. 2010) (citing Federal Judicial Center, *supra*, § 21.632).

opportunity to consider any response provided by the potential Class Members."[33]

The First Circuit looks to four factors to determine whether a settlement is entitled to a presumption of fairness: whether "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected."[34] The fourth factor is more often relevant for purposes of final approval, after notice has issued and class members have been given an opportunity to object to a settlement.[35]

Preliminary approval does not require a hearing (though the direct purchasers will make themselves available should the Court desire one at this stage). As explained in the *Manual for Complex Litigation (Fourth)*, "this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties."[36] Given its knowledge of counsel and the case, supplemented by the pleadings and exhibits submitted herewith, this Court can and should grant the direct purchasers' motion and preliminarily approve the settlement.

1. The proposed settlement is the product of good faith, informed, arm's-length negotiations.

Negotiation leading to settlement is a key factor in deciding whether to grant preliminary approval. Where "a settlement is untainted by collusion and is fair, adequate, and reasonable . . . and the parties have bargained at arms-length, there is a presumption in favor of the

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[33] *Id.* at 62.

[34] *In re Lupron Mktg. & Sales Pracs. Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004).

[35] *Id.*; *see also Hill v. State Street Corp.*, No. 09-cv-12146, 2015 WL 127728, at *8 (D. Mass. Jan. 8, 2015) ("The 'favorable reaction of class to settlement, albeit not dispositive, constitutes strong evidence of fairness of proposed settlement and supports judicial approval[.]'" (quoting *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999)) (alteration in original)).

[36] § 21.632 at 382.

settlement."[37] These kinds of negotiations guard against any "obvious deficiencies" in a settlement.[38]

As recounted above, the direct purchasers and counsel for defendants engaged in multiple rounds of arm's-length, hard-fought settlement discussions over the course of years. These discussions were based upon the extensive record in this case, including two rounds of motions to dismiss, millions of pages of documents produced, 113 depositions, 57 expert reports, two full rounds of summary judgment proceedings with full-day evidentiary hearings, and co-lead counsel's extensive experience in prosecuting delayed generic entry cases. The final settlement was brokered by a neutral mediator and accepted by the parties.

2. Class counsel engaged in detailed investigation and discovery.

The settlement was reached at a very mature stage of the case. Having closely supervised the case for six years, the Court is familiar with the parties' litigation activities. The parties engaged in two rounds of motion to dismiss briefing. Summary judgment, *Daubert*, and *in limine* motions were fully briefed and heard before the settlement was consummated. Trial was less than a month away at the time the direct purchasers and the defendants reached a binding agreement to settle.

Discovery in this case was substantial and hard-fought. Several discovery disputes were overseen by Magistrate Judge Patricia A. Sullivan. The defendants produced more than 365,000 documents totaling several million pages. Approximately 47,000 documents from non-parties were produced on top of that. The direct purchasers' co-lead counsel deposed many defense

[37] *Lupron*, 228 F.R.D. at 93; *see also In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 76-77 (D. Mass. 2005); *New Eng. Carpenters Health Benefits Fund v. First DataBank, Inc.*, 602 F. Supp. 2d 277, 282 (D. Mass. 2009).

[38] *In re Skechers Toning Shoe*, MDL No. 2308, 2012 WL 3312668, at *8 (W.D. Ky. Aug. 13, 2012).

witnesses, including the former CEOs of both Warner Chilcott and Watson, and the defendants deposed representatives for the direct purchaser class. All parties consulted with economic, scientific, patent, and regulatory experts, each of whom submitted substantial expert reports and rebuttal reports regarding legal, medical, and economic issues. As a result of this intensive litigation experience, issues relating to liability, causation, antitrust injury and impact, and damages were fully developed—enabling co-lead counsel to make an informed decision regarding the proposed settlement.

3. The proponents of the settlement are highly experienced in antitrust litigation alleging delayed generic entry.

In approving class action settlements, courts have repeatedly and explicitly deferred to the judgment of experienced counsel who have engaged in arm's-length negotiations.[39] The presumption in favor of such settlements reflects the understanding that vigorous, skilled negotiation protects against collusion and advances the fairness interests of Rule 23(e).

Co-lead counsel have a great deal of experience in pharmaceutical antitrust litigation generally and delayed generic entry cases in particular.[40] This experience should be given weight in making a determination of preliminary approval. Courts have recognized co-lead counsel's

[39] *Bezdek v. Vibram USA, Inc.*, 79 F. Supp. 3d 324, 348 (D. Mass. 2015) (finding that the parties had a sufficient understanding of the merits of the case to engage in informed negotiations, "particularly where plaintiffs' counsel are skilled and experienced in consumer class action litigation, including class actions involving alleged misrepresentation of the health benefits of footwear"); *Bussie*, 50 F. Supp. 2d at 77 ("The Court's fairness determination also reflects the weight it has placed on the judgment of the parties' respective counsel, who are experienced attorneys and have represented to the Court that they believe the settlement provides to the Class relief that is fair, reasonable and adequate."); *see also Dallas v. Alcatel-Lucent USA, Inc.*, No. 09-cv-14596, 2013 WL 2197624, at *9 (E.D. Mich. May 20, 2013) ("Plaintiffs' counsel's informed and reasoned judgment and their weighing of the relative risks and benefits of protracted litigation are entitled to deference."); *Smith v. Ajax Magnethermic Corp.*, No. 02-cv-0980, 2007 WL 3355080, at *6 (N.D. Ohio Nov. 7, 2007) (judgment of experienced class counsel "should thus be given substantial weight.").

[40] *See In re Loestrin 24 Fe Antitrust Litig.*, No. 13-md-02472 (D.R.I. Aug. 6, 2018), ECF Nos. 550-10 –550-13 (co-lead counsel firm resumes).

expertise in this field and have repeatedly adjudged co-lead counsel adequate under Rule 23(a)(4) and 23(g).[41] Co-lead counsel have demonstrated throughout this litigation that they understand this area of antitrust law, have prosecuted this case with vigor and commitment, and believe this is a fair settlement in the best interests of the class.

B. The proposed form and manner of notice are appropriate.

Rule 23(e)(1)(B) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the propos[ed settlement] . . . ."[42] The proposed forms of notice and notice program here fully comply with due process and Rule 23.

"The notice must describe fairly, accurately and neutrally the claims and parties in the litigation, the terms of the proposed settlement, and the options available to individuals entitled to participate, including the right to exclude themselves from the class."[43] The proposed notice, attached as Exhibit 4 to the Sobol Declaration, describes the class, procedural status of the litigation, significant terms of the proposed settlement, including the amount of money the defendants have agreed to pay, the releases the defendants will receive, and the plan for

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[41] *See, e.g., In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-2503, 2018 WL 7075881, at *1 (D. Mass. July 18, 2018) ("The Court finds that Co-Lead Counsel [Hagens Berman and Berger Montague] . . . along with other Class Counsel [Faruqi & Faruqi], have fairly and adequately represented the interests of the Class and satisfied the requirements of Fed. R. Civ. P. 23(g) . . . ."); *In re Lidoderm Antitrust Litig.*, No. 14-md-2521, 2017 WL 679367, at *9 n.14 (N.D. Cal. 2017) (appointing Faruqi & Faruqi and Hagens Berman co-lead counsel based on experience and adequacy and because "[t]hose firms have ably and vigorously litigated this case"); *Mylan Pharm., Inc. v. Warner Chilcott Pub. Ltd. Co.*, No. 12-3824, slip op. at 13 (E.D. Pa. Sept. 15, 2014) (approving settlement co-led by Faruqi & Faruqi LLP, noting "[h]ere, the Settlement achieved for the benefit of the Class was obtained as a direct and exclusive result of Class Counsel's skillful advocacy"); Order at 3, *In re Suboxone Antitrust Litig.*, No. 13-md-2445 (E.D. Pa. Aug. 7, 2013), ECF No. 44 (appointing Faruqi & Faruqi and Hagens Berman co-lead counsel); *In re Prograf Antitrust Litig.,* No. 11-cv-10344, 2013 WL 2395083, at *2 (D. Mass. Apr. 23, 2013) (finding class counsel Hagens Berman "well-qualified"); *In re Flonase Antitrust Litig,* 951 F. Supp. 2d 739, 747 (E.D. Pa. 2013) (counsel including Hagens Berman and Kessler Topaz were "knowledgeable, tenacious, and highly skillful"); *In re Wellbutrin XL Antitrust Litig.,* No. 08-cv-2431, 2011 WL 3563385, at *1 (E.D. Pa. Aug. 11, 2011) (Class counsel Hagens Berman and Berger Montague were "well-qualified to represent the proposed class in this case. They have extensive experience in similar class actions involving delayed generic competition. The plaintiff's counsel also have vigorously and capably prosecuted this action.").

[42] Fed. R. Civ. P. 23(e)(1)(B).

[43] *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 203 (D. Me. 2003), *judgment entered*, MDL No. 1361, 2003 WL 21685581 (D. Me. July 18, 2003).

allocation of the funds among class members. The notice also outlines the court approval process and advises class members of their rights under Rule 23, including the right to object to and be heard as to the reasonableness and fairness of the proposed settlement. The notice is substantially similar, in both form and substance, to notices used in other direct purchaser generic delay cases and satisfies the notice requirements of Rule 23(e) and the due process requirements that must be met to bind each member of the class.

Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[44] Here, because the direct purchaser class is a finite group of businesses consisting of 47 members,[45], individual direct mail notice is sufficient and practicable.[46] Co-lead counsel will also post the notice and key litigation documents on a specially designated website.[47] A declaration from William Wickersham of RG/2 Claims Administration LLC ("RG/2") in support of the notice and notice program is attached as Exhibit 10 to the Sobol Declaration.

1. An additional opt-out period is unnecessary.

While the Court has discretion[48] to give members of a previously certified class a second chance to opt out, there is no requirement that it do so, as numerous courts have recognized in

[44] Fed. R. Civ. P. 23(c)(2)(B).

[45] *See Loestrin 24 Fe*, 2019 WL 3214257, at *10 ("[T]he Court concludes that all forty-seven members are properly included in this class . . . .").

[46] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356 n.22 (1978); *Hill*, 2015 WL 127728, at *15 (finding sufficient direct mail notice even when some class members received notice past the deadline for objection); *Thompson v. Midwest Found. Indep. Physicians Ass'n*, 124 F.R.D. 154, 157 (S.D. Ohio 1988) ("Because the names and last known addresses of all class members were available from [defendant's] business records, the mailing of the notice of the proposed settlement agreement and the fairness hearing . . . was the best notice practicable under the circumstances.").

[47] www.Loestrin24AntitrustLitigation.com.

[48] *See* Fed. R. Civ. P. 23(e)(4).

reverse payment and product hop antitrust cases.[49] Because class members (sophisticated business entities) were informed about class certification in August 2019 pursuant to Court-approved mailed individual notice, and were given the opportunity to opt out of the certified class, and the settlement still allows them to object to the terms of the settlement and/or class counsel's request for attorneys' fees, expenses, and service award to the class representative, the direct purchasers respectfully submit that no second opt-out period is necessary here.[50]

C. The Court should appoint RG/2 as settlement administrator.

The direct purchasers request that the Court appoint RG/2 to serve as claims administrator for the class and oversee the administration of the settlement, including disseminating settlement notice to the class and, as necessary, calculating and distributing each class member's share of the remaining settlement funds. RG/2 describes itself as "a boutique class action claims administration firm with a nationwide presence founded by seasoned class

[49] Prelim. Approval Order at 4, *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-2503 (D. Mass. Mar. 12, 2018), ECF No. 1095 (holding there is "no need for an additional opt-out period"); Prelim. Approval Order at 2, *In re Nexium (Esomeprazole) Antitrust Litig.*, No. 12-md-2409 (D. Mass., June 12, 2015), ECF No. 1536 ("[T]he Court finds that a discretionary second opt-out period pursuant to recently-amended Rule 23(e)(3) is unnecessary."); Prelim. Approval Order at 1, *In re Carbon Black Antitrust Litig.*, No. 03-cv-10191 (D. Mass. Nov. 29, 2006), ECF No. 297 (same); *see also* Prelim. Approval Order at 3-4, *In re Namenda Direct Purchaser Antitrust Litig.*, No. 15-cv-7488 (S.D.N.Y. Jan. 6, 2020), ECF No. 920 (same); Am. Prelim. Approval Order at 3-4, *In re Lidoderm Antitrust Litig.*, No. 14-md-2521 (N.D. Cal. May 3, 2018), ECF No. 1018 (same); *Flonase*, 951 F. Supp. 2d at 745 ("[T]he absence of a second opt-out right was of no consequence here.").

[50] *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 270-71 (2d Cir. 2006) (courts are under "no obligation" to afford class members second opportunity for exclusion); *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 635 (9th Cir. 1982) ("[T]o hold that due process requires a second opportunity to opt out after the terms of the settlement have been disclosed to the class would impede the settlement process so favored in the law."); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-2503, slip. op. at 4 (D. Mass. Mar. 12, 2018) (finding "no need for an additional opt-out period"); *In re Titanium Dioxide Antitrust Litig.*, No. 10-cv-0318, 2013 WL 5182093, at *5 (D. Md. Sept. 12, 2013) ("[T]his Court concludes, in exercising its discretion, that no second opt-out period will be required in order to approve the Settlements."); *Pro v. Hertz Equip. Rental Corp.*, No. 06-cv-3830, 2013 WL 12157826, at *4 (D.N.J. Mar. 18, 2013) (class members "not entitled to a second opportunity to exclude themselves from the Class pursuant to Rule 23(e)(4)"); *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 663-64 (N.D. Tex. 2010) ("The court declines in its discretion to refuse approval of the proposed settlement on the ground that it does not permit a second opt out by class members."); *In re Carbon Black Antitrust Litig.*, No. 03-cv-10191, slip. op. at 1 (D. Mass. Nov. 29, 2006) (preliminarily approving settlement and explaining that "[i]n light of the previous notice to class members of the pendency of this action and the certification of the class, which complied fully with the requirements of Rule 23 an due process, there is no need for an additional opt-out opportunity pursuant to Rule 23(e)[(4)]").

action practitioners and highly credentialed tax professionals."[51] RG/2 was previously appointed by this Court to provide notice to class members of the pendency of this litigation[52] and has provided an estimate for the cost of dissemination of the settlement notice and administration and distribution of the settlement. Based on co-lead counsel's experience, RG/2's estimate is competitive and reasonable.[53]

D. The Court should appoint The Huntington National Bank as escrow agent.

The direct purchasers request that the Court approve the service of The Huntington National Bank as escrow agent for the settlement funds.[54] The Huntington National Bank, established in 1866, holds $109 billion in assets, and includes 800 branches nationwide.[55] The Huntington National Bank's National Settlement Team has handled more than 1,000 settlements for law firms, claims administrators, and regulatory agencies. Co-lead counsel have utilized the services of The Huntington National Bank as escrow agent in multiple class action settlements previously, both securely and successfully. The parties have agreed upon the form of escrow agreement to govern the escrow account to hold the settlement proceeds while the settlement approval process plays out.[56]

E. The proposed schedule is fair and should be approved.

The direct purchasers propose the following schedule for completing the approval

[51] About Us, RG/2, www.rg2claims.com/about.html.

[52] Text Order Granting Direct Purchaser Pls.' Mot. for Entry of an Order Approving the Form & Manner of Notice & Appointing Notice Administrator, ECF No. 1056.

[53] Pursuant to the proposed settlement agreement, the expenses associated with the notice and claims administration process will be deducted from the settlement funds, as is standard practice.

[54] The Escrow Agreement is attached as Exhibit 7 to the Sobol Declaration.

[55] About Us, The Huntington National Bank, https://www.huntington.com/About-Us.

[56] *See* Escrow Agreement, Sobol Decl. Ex. 7.

process:[57]

Event	Deadline
Defendants send notices as required by CAFA.[58]	Within 10 days of the filing of this motion.
Dissemination of notices to the class in the form and manner proposed.	Within 14 days of entry of the Order preliminarily approving the settlement.
Submission of class counsel's application for attorneys' fees, costs and expenses, and application for service awards to the class representatives.	No later than 14 days after the date of notice to the class as set forth in the notice mailed to class members.
Deadline for class members to object to the settlement and/or the application for attorneys' fees, costs and expenses, and service awards to the class representatives.	No later than 35 days from the date of notice to the class as set forth in the notice mailed to class members.
Filing of direct purchasers' motion for final approval of the settlement.	No later than 14 days before the date set for the fairness hearing.
Fairness hearing.	To be determined by the Court (no earlier than 100 days after the date of the filing of the motion for preliminary approval of the settlement).[59]

This proposal provides for sufficient time—35 days—for class members to object to the settlement after receipt of the notice of the settlement.[60] Class counsel will also file their motion

[57] Pursuant to the Class Action Fairness Act of 2005 ("CAFA"), the defendants shall serve notices as required under CAFA within ten (10) days from the date the direct purchasers file for preliminary approval of the settlement.

[58] The Class Action Fairness Act of 2005, 28 U.S.C. § 1715 ("CAFA").

[59] To account for the time period imposed by CAFA.

[60] *See* Order ¶¶ 4, 7, *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 06-cv-1797 (E.D. Pa. Dec. 17, 2015), ECF No. 948 (30-day period approved in delayed generic competition case brought by direct purchasers); Order ¶¶ 2, 4, *In re K-Dur Antitrust Litig.*, No. 01-cv-1652 (D.N.J. Sept. 12, 2016), ECF No. 887 (same); Order Granting Direct Purchaser Class Pls.' Mot. for Class Certification, Appointment of Class Counsel, Preliminary Approval of Proposed Settlement, Approval of Form & Manner of Notice & Setting Schedule & Final Approval Hr'g ¶ 5, *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 05-cv-2237 (S.D.N.Y. Aug. 16, 2011), ECF No. 90 (same); *see also DeJulius v. New Eng. Health Care Emps. Pension Fund*, 429 F.3d 935, 946 (10th Cir. 2005) (affirming a 32-day notice period and noting that "courts have found a notice scheme similar to the one in the instant case sufficient"); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04-cv-8144, 2009 WL 5178546, at *23 (S.D.N.Y. Dec. 23, 2009) (approving 30-day notice period to class in complex securities fraud class action).

for attorney's fees and reimbursement of expenses prior to the deadline for class members to object and timely post that motion on the settlement website for access by interested class members. Any class member who timely objects or advises the Court that it wishes to be heard may be heard at the fairness hearing.

IV. CONCLUSION

The settlement negotiated at arm's length by the parties is fair, reasonable, and adequate. Accordingly, the direct purchaser class plaintiffs request that the Court preliminarily approve the proposed settlement, enter the proposed Preliminary Approval Order (Exhibit 5 to the Sobol Declaration), approve the proposed form and manner of notice, approve the proposed final settlement schedule, and set a date for a fairness hearing at the Court's convenience.

Dated: February 24, 2020

Respectfully submitted,

/s/ Thomas M. Sobol

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CERTIFICATE OF SERVICE

I, Thomas M. Sobol, hereby certify that I caused a copy of the foregoing to be filed electronically via the Court's CM/ECF system. Those attorneys who are registered CM/ECF users may access these filings, and notice of these filings will be sent to those parties by operation of the CM/ECF system.

Dated: February 24, 2020

/s/ Thomas M. Sobol
Thomas M. Sobol (R.I. Bar No. 5005)