UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE INTUNIV ANTITRUST LITIGATION This Document Relates to: *Direct Purchaser Actions*	Civil Action No. 16-cv-12653-ADB (Lead)

MEMORANDUM IN SUPPORT OF DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH SHIRE, APPOINTMENT OF CLASS REPRESENTATIVES FOR SETTLEMENT PURPOSES, APPROVAL OF FORM AND MANNER OF NOTICE TO THE CLASS, APPOINTMENT OF SETTLEMENT ADMINISTRATOR AND ESCROW AGENT, AND PROPOSED SCHEDULE FOR A FAIRNESS HEARING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Direct purchaser class plaintiffs Meijer, Inc. and Meijer Distribution, Inc. ("Meijer") and Quality King Healthcare, Inc. ("QK Healthcare"), individually and on behalf of the certified direct purchaser class, respectfully submit this memorandum in support of their motion for preliminary approval of their proposed settlement with Shire LLC and Shire US, Inc. ("Shire").

I. INTRODUCTION

After extensive, hard-fought litigation, the direct purchaser class plaintiffs have reached a settlement with Shire that provides for the payment of $58 million in cash to be paid to the direct purchaser class[1] in exchange for dismissal of the action against Shire with prejudice and certain releases from the parties. A copy of the settlement agreement is submitted herewith.[2]

Preliminary approval of the settlement with Shire is appropriate. While the direct purchasers strongly believe in the merits of their claims, Shire denies all allegations of unlawful or wrongful conduct and has vigorously asserted its defenses. The parties agreed to settle after years of litigation that included extensive discovery, motion practice (including motions to dismiss, motions for class certification and summary judgment, *Daubert* motions, and motions in limine), and trial preparation. The settlement is the result of informed, arm's-length negotiations over several years between counsel experienced in class actions generally and in pharmaceutical antitrust litigation particularly with intimate knowledge of the case and the governing law. The proposed settlement assures that direct purchaser class members will receive a recovery, avoiding the uncertainties and delays of continued litigation and potential appeals.

[1] Court-approved attorneys' fees, reimbursed expenses, and settlement administration costs will be deducted from this amount.

[2] *See* Ex. 1 to Decl. of Thomas M. Sobol in Supp. of Direct Purchaser Class Pls.' Mot. for Prelim. Approval of Settlement with Shire ("Sobol Decl."), Settlement Agreement.

Counsel for the direct purchaser class believe that the proposed settlement is fair, reasonable, and adequate and satisfies the requirements of Rule 23(e). Accordingly, the direct purchasers respectfully request that the Court enter an order:

- Granting preliminary approval of the proposed settlement by and between the direct purchaser plaintiffs, individually and on behalf of the direct purchaser class, and Shire;
- Appointing Meijer and QKH as class representatives solely for purposes of the settlement;
- Approving the proposed form and manner of notice to the direct purchaser class;
- Appointing A.B. Data, Ltd. as settlement administrator to assist in disseminating settlement notice to the class members and, if the settlement is granted final approval, administering distribution of the settlement fund to the class;
- Appointing The Huntington National Bank as escrow agent to receive and invest the settlement funds in accordance with the terms of the escrow agreement; and
- Adopting the proposed settlement schedule set forth in the proposed preliminary approval order, including scheduling a fairness hearing.

II. ARGUMENT

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

Pursuant to Federal Rule of Civil Procedure 23(e), "[t]he claims, issues, or defenses of a certified class may be settled . . . only with the court's approval." Approval of a class action settlement generally involves a three-step process. First, the parties submit the proposed settlement to the court to make a preliminary fairness determination.[3] In this preliminary evaluation, the court considers only whether the proposal has "obvious deficiencies" and whether "it is in the range of fair, reasonable, and adequate."[4] Second, if the court preliminary approves

[3] *See Manual for Complex Litigation* § 21.632 (4th ed. 2004) [hereinafter *Manual*]; William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 13:10 (6th ed. 2022 & Supp. 2024).

[4] *In re M3 Power Razor Sys. Mktg. & Sales Prac. Litig.*, 270 F.R.D. 45, 62 (D. Mass. 2010) (citing *Manual* § 21.632).

the settlement, notice is disseminated to the class describing the terms of the proposed settlement and notifying class members of their right to object and to appear at a fairness hearing.[5] Third, the court holds a fairness hearing to consider all the information learned during the class notice process and make a fully informed determination of whether to grant final approval of the settlement.[6] While courts must be vigilant for indications of collusion or self-interest, settlements "enjoy great favor with the courts 'as a preferred alternative to costly, time-consuming litigation.'"[7]

To determine whether to grant preliminary approval, First Circuit courts consider whether a settlement "is the result of serious, informed, and non-collusive negotiations," whether there are "grounds to doubt its fairness" or "other obvious deficiencies," and "where the settlement appears to fall within the range of possible approval."[8] A settlement is entitled to a presumption of fairness where "the negotiations occurred at arm's length," "there was sufficient discovery," and "the proponents of the settlement are experienced in similar litigation."[9]

Rule 23(e) does not require a hearing at the preliminary approval stage. As explained in the *Manual*, "this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties."[10] Given the Court's extensive knowledge of counsel and the case, supplemented by this memorandum and

[5] Rubenstein, *supra* note 3, § 13:10.

[6] *Id.*; *see also M3 Power Razor Sys.*, 270 F.R.D. at 62.

[7] *Fid. & Guar. Ins. Co. v. Star Equip. Corp.*, 541 F.3d 1, 5 (1st Cir. 2008) (quoting *Mathewson Corp. v. Allied Marine Indus., Inc.*, 827 F.2d 850, 852 (1st Cir. 1987)).

[8] *Trombley v. Bank of Am. Corp.*, No. 08-cv-456, 2011 WL 3273930, at *5 (D.R.I. July 29, 2011) (quoting *Passafiume v. NRA Grp., LLC*, 274 F.R.D. 424, 2010 WL 6641072, at *5 (E.D.N.Y. Nov. 30, 2010)).

[9] *In re Lupron Mktg. & Sales Pracs. Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tanks Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995)).

[10] *Manual* § 21.632.

accompanying declaration and exhibits, the direct purchasers respectfully submit that no hearing is necessary and that the Court should grant preliminary approval on the papers. If the Court desires a hearing, however, class counsel will of course make themselves available at the Court's convenience.

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

The nature of the negotiations leading to settlement is a key factor in deciding whether to preliminary approval is appropriate. Where "a settlement is untainted by collusion . . . 'and the parties have bargained at arms-length, there is a presumption in favor of the settlement.'"[11]

Here, settlement negotiations between counsel for the class and Shire were hard-fought and always at arm's length. The parties addressed settlement during two separate mediations held more than a year apart and, after the second, continued discussions, informed by the record and the parties' respective assessments of likely outcomes and often guided by the mediator, the Honorable Layn Phillips (ret.). The client-approved settlement, which provides for the payment of $58 million to the direct purchaser class in exchange for dismissal of the class's claims against Shire with prejudice and certain releases, was the product of vigorous, years-long negotiations.

[11] *In re Lupron Mktg. & Sales Pracs. Litig.*, 228 F.R.D. 75, 93 ((D. Mass. 2005) (quoting *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)); *see also New Eng. Carpenters Health Benefits Fund v. First DataBank, Inc.,* 602 F. Supp. 2d 277, 282 (D. Mass 2009) ("Although the district court must carefully scrutinize the settlement, there is a presumption in favor of the settlement if the parties negotiated it at arms-length . . . ." (quoting *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 259 (D.N.H. 2007))).

2. The proposed settlement was reached after seven-and-a-half years of hard-fought litigation that included extensive investigation, discovery, motion practice, and trial preparation.

The parties did not reach a settlement until the case was nearly trial-ready. Until the Court cancelled it on January 29, 2024,[12] the parties had been actively preparing for a February 2024 trial. In the seven-and-a-half years since the direct purchasers filed their original complaint, the parties fully briefed, argued, and obtained rulings from the Court on myriad motions, including 12(b)(6), class certification, summary judgment, and *Daubert*, and in limine motions.[13] Fact and expert discovery, long completed, encompassed the production and review of hundreds of thousands of pages of documents, nearly two-dozen depositions, substantial non-party document productions and depositions, and the exchange of reports from 21 different experts on issues ranging from pharmaceutical manufacturing to patent law to antitrust economics and damages. In September 2020, the direct purchasers successfully negotiated a settlement with the Actavis defendants, which the Court granted final approval on December 9, 2020.[14] The parties have since engaged in work connected to the applicability of arbitration to various class members' claims, including absent class member discovery, and renewed preparations for the trial scheduled for February 2024 (before it was postponed in late January). As the trial date approached, the parties served and negotiated witness lists, exhibit lists, and deposition

[12] *See* Elec. Notice, Jan. 29, 2024, ECF No. 718 (cancelling final pretrial conference and jury trial set for February 26, 2024).

[13] *See, e.g.*, Mem. & Order on Defs.' Mots. to Dismiss, ECF No. 92; Mem. & Order on Direct Purchaser Pls.' Mot. for Class Certification at 23, ECF No. 343; Mem. & Order on Mots. for Summ. J., ECF No. 500; Mem. & Order on Mots. to Exclude Expert Ops. & Test., ECF No. 525; Mem. & Order on Mots. in Limine, ECF No. 558.

[14] Order Granting Final J. & Approving Direct Purchaser Class Settlement & Dismissing Direct Purchaser Class Claims Against Actavis, ECF No. 551.

designations, briefed and argued numerous pre-trial motions, and prepared their fact and expert witnesses for trial. There can be no doubt that counsel for the class and Shire who negotiated the settlement were intimately familiar strengths and weaknesses of their respective claims and defenses.[15] The advanced stage of the case and well-developed record, including expansive discovery, militates in favor of the settlement's fairness.[16]

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

In approving class action settlements, courts routinely defer to the judgment of experienced counsel who have engaged in arm's-length negotiations.[17] The presumption in favor of such settlements reflects the understanding that vigorous, skilled negotiation by experienced attorneys protects against collusion and advances the fairness interests of Rule 23(e).

The Court has recognized that class counsel here are "qualified, experienced, and ha[ve] and will continue to adequately represent the class."[18] Class counsel, who demonstrated their command of this particular area of antitrust law throughout the litigation and doggedly

[15] *See Bezdek v. Vibram USA, Inc.*, 79 F. Supp. 3d 324, 348 (D. Mass. 2015) (finding fact that "the parties had a sufficient understanding of the merits of the case," allowing them "to engage in informed negotiations," indicated the settlement was a fair result).

[16] *See New Eng. Carpenters*, 602 F. Supp. 2d at 280 (noting that a settlement reached "after conducting meaningful discovery" supports "a presumption in favor of the settlement" (quoting *Tyco Int'l*, 535 F. Supp. 2d at 259)); *Lupron*, 228 F.R.D. at 93 ("When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement." (quoting *City P'ship*, 100 F.3d at 1043)).

[17] *See Bezdek,* 79 F. Supp. 3d at 348 (fact that "plaintiffs' counsel are skilled and experienced in consumer class action litigation" was evidence of settlement's fairness); *Dallas v. Alcatel-Lucent USA, Inc.,* No. 09-cv-14596, 2013 WL 2197624, at *9 (E.D. Mich. May 20, 2013) ("Here, settlement negotiations were conducted . . . by adversarial parties and experienced counsel, which itself is indicative of fairness, reasonableness, and adequacy. 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) ("[C]lass counsel has extensive experience in litigation, including that of class actions, and is capable of a competent and vigorous prosecution of this action on behalf of the Plaintiff class members. Their judgment with regard to the fairness of the proposed agreement should thus be given substantial weight.").

[18] Mem. & Order on Direct Purchaser Pls.' Mot. for Class Certification at 14, ECF No. 343.

prosecuted this case, believe the settlement is fair and in the best interests of the direct purchaser class.

4. The proposed settlement has no obvious deficiencies.

There are no clear omissions or deficiencies in the proposed settlement.[19] The direct purchasers' allocation plan treats all class members fairly and equitably, calculating their shares of the net settlement fund on a *pro rata* basis based on their purchases.[20] The settlement notice informs class members that class counsel may seek an award of attorneys' fees of up to one-third of the settlement fund,[21] which is routinely granted in these cases.[22] The releases granted to Shire are narrowly tailored to the allegations at issue in the litigation.[23] And the proposed settlement provides direct purchaser class members a cash recovery that is substantial, immediate, and

[19] *See Trombley*, 2011 WL 3273930, at *5 (giving "unduly preferential treatment of class representatives or of segments of the class" and "excessive compensation for attorneys" as examples of obvious deficiencies).

[20] *See* Sobol Decl. Ex. 6, Proposed Plan of Allocation. The proposed allocation plan is nearly identical to those approved in similar pharmaceutical antitrust class actions brought by direct purchasers to recover overcharges arising from impaired generic competition. *See, e.g.*, *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, No. 18-md-2819 (E.D.N.Y.), ECF Nos. 490-7, 562 (approved Oct. 7, 2020); *In re Loestrin 24 Fe Antitrust Litig.*, No. 13-md-2472 (D.R.I.), ECF Nos. 1396-8, 1462 (approved Sept. 1, 2020); *In re Lidoderm Antitrust Litig.*, No. 14-md-2521 (N.D. Cal.), ECF Nos. 1004-5, 1004-6, 1054 (approved Sept. 20, 2018); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-2503, (D. Mass.), ECF Nos. 1163-4, 1179 (approved July 18, 2018); *In re Celebrex (Celecoxib) Antitrust Litig.*, No. 14-cv-361 (E.D. Va.), ECF Nos. 609-4, 630 (approved Apr. 18, 2018); *In re Aggrenox Antitrust Litig.*, No. 14-md-2516 (D. Conn.), ECF Nos. 733-1, 740 (approved Dec. 19, 2017); *In re Asacol Antitrust Litig.*, No. 15-cv-12730 (D. Mass.), ECF Nos. 419-9, 648) (approved Dec. 7, 2017); *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 06-cv-1797 (E.D. Pa.), ECF Nos. 864-17, 870 (approved Oct. 15, 2015).

[21] *See* Sobol Decl. Ex. 2, Proposed Form of Settlement Notice, at 4, 6–7.

[22] *See, e.g.*, Final Approval Order, *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, No. 13-md-2445 (E.D. Pa. Feb. 27, 2024), ECF No. 1000; Final Approval Order, *In re Novartis & Par Antitrust Litig.* (*Exforge*), No. 18-cv-4361 (S.D.N.Y. July 26, 2023), ECF No. 635; Final Approval Order, *In re Intuniv Antitrust Litig.*, No. 16-cv-12653 (D. Mass. Dec. 9, 2020), ECF No. 565; *In re Solodyn Antitrust Litig.*, No. 14-md-2503, 2018 WL 7075881 (D. Mass. July 18, 2018); *In re Loestrin 24 Fe Antitrust Litig.*, No. 13-md-2472, 2020 WL 5203323 (D.R.I. Sept. 1, 2020); *In re Celebrex (Celecoxib) Antitrust Litig.*, No. 14-cv-351, 2018 WL 2382091 (E.D. Va. Apr. 18, 2018).

[23] *See* Sobol Decl. Ex. 1, Settlement Agreement, ¶ 9.

certain, avoiding the significant risks and obstacles the direct purchasers would have faced if they pursued the litigation to trial.[24]

B. Meijer and QKH are adequate class representatives under Rule 23 for purposes of the settlement.

On October 10, 2017, the Court issued its Memorandum and Order on the direct purchasers' motion for class certification, certifying a class of 48 pharmaceutical wholesalers and retailers that purchased brand and/or generic Intuniv in any form directly from Shire or Actavis during the class period and appointing Thomas Sobol and Lauren Barnes of Hagens Berman Sobol Shapiro LLP lead counsel for the direct purchaser class.[25] The Court should now appoint Meijer and QK Healthcare as class representatives.

In its class certification order, the Court observed that proposed must class representatives show they "fairly and adequately protect the interests of the class," that their interests "will not conflict with the interests of any of the class members," and that they are "qualified" and "experienced."[26] The Court also noted that "[a]n assignee may be a class representative."[27] Class representatives "need not be the best of all possible plaintiffs," and, "[w]here a finding that class representatives are inadequate will 'forestall class certification[,] the intra-class conflict must be so substantial as to overbalance the common interests of the class members as a whole.'"[28]

[24] *Bezdek*, 79 F. Supp. 3d at 348 (recognizing that "the plaintiffs faced significant hurdles in pursuing the litigation to trial" that suggested settling before trial "might present a better outcome").

[25] Mem. & Order on Direct Purchaser Pls.' Mot. for Class Certification at 23, ECF No. 343.

[26] *Id*. at 13 (quoting Fed. R. Civ. P. 23(a)(4); *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)).

[27] *Id*. (citing *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 104 (2d Cir. 2007)).

[28] *Id*. (citing *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012)).

Proposed class representative Meijer, a pharmacy retailer headquartered in Michigan with approximately 250 stores located throughout the upper Midwest, purchased generic Intuniv directly from Actavis. Meijer is also pursuing claims conferred by a long-standing assignment from direct purchaser Frank W. Kerr Co., a former pharmaceutical Michigan wholesaler, and an assignment from national wholesaler McKesson Corporation. As a major pharmacy retailer, Meijer purchased millions of dollars of brand and generic Intuniv throughout the class period and began purchasing generic Intuniv as soon as it was available.

Proposed class representative QK Healthcare is a national wholesale distributor of healthcare products, including brand and generic pharmaceutical products, to retailers, other wholesale distributors, and pharmacy benefit managers. QK Healthcare was established by Bernie Nussdorf and his wife, Ruth, in 1961 and remains a Nussdorf-family-owned business. The company has been headquartered in Bellport, New York since its founding. QK Healthcare purchased Intuniv directly from Shire during the class period and began purchasing generic Intuniv directly from Actavis as soon as it was available.

Meijer and QK Healthcare can fairly and adequately protect the interests of the class. Since the defendants' actions form the basis for Meijer's and QK Healthcare's antitrust claims, there is no intra-class conflict because "the named plaintiffs and their counsel have the same core objectives as would absent class members"[29]—namely, proving they were overcharged as a result of Shire's and Actavis's unlawful conduct and recovering damages for those overcharges. Certainly, there is no conflict "so palpable as to outweigh the substantial interest of every class member in proceeding with the litigation."[30] Meijer has a substantial track record of serving as a

[29] *In re Carbon Black Antitrust Litig.*, No. 03-cv-1011, 2005 WL 102966, at *14 (D. Mass. Jan. 18, 2005).

[30] *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 514–15 (S.D.N.Y. 1996); *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 81 (D. Mass. 2005) ("The conflict that will prevent a

class representative in pharmaceutical antitrust cases, having been appointed to represent both litigation and settlement direct purchaser classes in pharmaceutical antitrust cases many times,[31] (including in this district), and has never been found to be inadequate. QK Healthcare likewise has never been found to be inadequate class representative.

For settlement purposes, Shire has expressly and affirmatively waived any right to compel Meijer or QK Healthcare to arbitrate,[32] meaning that any possible arbitration provisions are no impediment to either the settlement or to Meijer's or QK Healthcare's serving as class representatives.

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

Under Rule 23(e)(1), class members are entitled to reasonable notice of a proposed settlement before it is finally approved by the Court. While "[n]o rigid standards govern the contents of notice to class members, the notice must 'fairly apprise prospective members of the

---

plaintiff from meeting the Rule 23(a)(4) prerequisite must be fundamental, and speculative conflict should be disregarded at the class certification stage." (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001))).

[31] **Litigation Classes**: *In re Opana ER Antitrust Litig.*, No. 14 C 10150, 2021 WL 3627733 (N.D. Ill. June 4, 2021); *In re Ranbaxy Generic Drug Application Antitrust Litig.*, 338 F.R.D. 294 (D. Mass. 2021); *In re Glumetza Antitrust Litig.*, No. C 19-05822, 2020 WL 4732333 (N.D. Cal. Aug. 15, 2020); *In re Suboxone (Buprenorphine Hydrochloride & Nalaxone) Antitrust Litig*., 421 F. Supp. 3d 12 (E.D. Pa. 2019), *aff'd*, 967 F.3d 264 (3d Cir. 2020); *In re Nexium (Esomeprazole) Antitrust Litig.,* 296 F.R.D. 47 (D. Mass. 2013); *In re Neurontin Antitrust Litig.*, No. 1479, 2011 WL 286118 (D.N.J. Jan. 25, 2011); *Am. Sales Co. v. SmithKline Beecham Corp.* (*Flonase*), 274 F.R.D. 127 (E.D. Pa. 2010); *Meijer, Inc. v. Abbott Labs.* (*Norvir*), No. 07-cv-5985, 2008 WL 4065839 (N.D. Cal. Aug. 27, 2008); *In re Wellbutrin SR Direct Purchaser Antitrust Litig.*, No. 04-cv-5525, 2008 WL 1946848 (E.D. Pa. May 2, 2008); *Teva Pharms. USA, Inc. v. Abbott Labs.*, 252 F.R.D. 213 (D. Del. 2008); *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365 (D.D.C. 2007); *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.* (*Ovcon*), 246 F.R.D. 293 (D.D.C. 2007).

Settlement Classes: *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, No. 18-md-2819, 2020 WL 6193857 (E.D.N.Y. Oct. 7, 2020); *In re Asacol Antitrust Litig.*, No. 15-cv-12730, 2017 WL 4118967 (D. Mass. Sept. 14, 2017); *In re Skelaxin (Metaxalone) Antitrust Litig.,* No. 12-md-2343, 2014 U.S. Dist. LEXIS 60214 (E.D. Tenn. Apr. 30, 2014); *Mylan Pharms., Inc. v. Warner Chilcott Pub, Ltd.* (*Doryx*), No. 12-cv-3824, 2014 WL 631031 (E.D. Pa. Feb. 18, 2014); *Rochester Drug Coop., Inc. v. Braintree Labs.* (*Miralax*), No. 07-cv-142, 2012 WL 12910047 (D. Del. Feb. 6, 2012); *In re Metoprolol Succinate Direct Purchaser Antitrust Litig.* (*Toprol*), No. 06-cv-052, 2011 WL 13097266 (D. Del. Nov. 16, 2011); *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 05-cv-2237, 2011 U.S. Dist. LEXIS 97487 (S.D.N.Y. Aug. 16, 2011); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-cv-0085, 2005 U.S. Dist. LEXIS 47058 (D.N.J. Aug. 30, 2005).

[32] *See* Ex. 1 to Sobol Decl., Settlement Agreement, ¶ 9.

class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings.'"[33] There are two components of notice: the form of the notice and the manner in which notice is sent to class members.

1. The proposed form of settlement notice clearly and concisely describes all information required by Rule 23(c)(2)(b).

The proposed form of settlement notice contains all elements enumerated in Rule 23(c)(2)(b). It states, clearly and concisely in plain, easily understood language:

- The nature of the action[34];
- The definition of the certified direct purchaser class[35];
- The class claims, issues, and defenses[36];
- The rights of class members to retain counsel (if desired), to object in part or in full to the reasonableness or fairness of the settlement or to class counsel's request for fees, costs, and expenses, and to appear and be heard at the final fairness hearing[37]; and
- The binding effect of a class judgment on members of the class[38];

The notice also sets forth in detail the significant terms of the settlement,[39] the process and schedule for completing the settlement approval process,[40] the procedure for obtaining a share of the net settlement fund,[41] and the proposed plan of allocation.[42] It also includes contact

[33] *Weinberger v. Kendrick*, 698 F.2d 61, 69–70 (2nd Cir. 1982) (alteration in original) (citation omitted) quoting *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1975)) (citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

[34] *See* Sobol Decl. Ex. 3, Proposed Form of Settlement Notice, at i, 1–2.

[35] *See id.* at 2–3.

[36] *See id.* at 1–2.

[37] *See id.* at 6–9.

[38] *See id.* at ii, 9.

[39] *See id.* at 4.

[40] *See id.* at 8.

[41] *See id.* at 5.

[42] *See id.* at 4–5.

information for class counsel[43] and the settlement website,[44] where class members can view and download and the settlement agreement and settlement-related court filings and confirm the date, time, and location of the fairness hearing.

The proposed form of notice is virtually identical to that the Court approved for notifying class members of the Court's class certification decision[45] and the direct purchasers' earlier settlement with the Actavis defendants[46] and substantially similar to the form of notice approved for settlements in similar pharmaceutical antitrust cases.[47]

2. The proposed manner of disseminating the settlement notice will ensure that notice is timely received by all class members.

The proposed manner of notice is appropriate and identical to that approved by the Court for dissemination of notice of class certification and the direct purchasers' 2020 settlement with Actavis. The direct purchasers propose to send notice by U.S. First-Class Mail to each of the 48 class members, identified from the transactional sales data produced by the defendants in the litigation, all of which are sophisticated businesses. In cases where all class members can be identified and reached with certainty, individual notice is the preferred method,[48] and U.S. First-

[43] *See id.* at 6–7.

[44] *See id.* at 1–2, 4, 6, 8–9.

[45] *See* Order Approving the Form and Manner of Notice and Appointing Notice Administrator, ECF No. 400.

[46] *See* Order Granting Direct Purchaser Class Pls.' Mot. for Prelim. Approval of Proposed Settlement with Def. Actavis, Approval of the Form & Manner of Notice to the Class, & Proposed Schedule for a Fairness Hr'g, ECF No. 493.

[47] *See, e.g.*, Order Granting Direct Purchaser Class Pls.' Am. Mot. for Prelim. Approval of Proposed Settlement, *In re Loestrin 24 Fe Antitrust Litig.*, No. 13-md-2472 (D.R.I. Mar. 23, 2020), ECF No. 1426; Am. Order Granting Direct Purchaser Class Pls.' Mot. for Prelim. Approval of Settlements, *In re Lidoderm Antitrust Litig.,* No. 14-md-2521 (N.D. Cal. May 3, 2018), ECF No. 1018; Order Granting Direct Purchaser Class Pls.' Mot. for Prelim. Approval of Settlement with Medicis, *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-2503, (D. Mass. Mar. 6, 2018), ECF No. 1078; Order Preliminary Approving Direct Purchaser Class Settlement with Teva, *In re Nexium (Esomeprazole) Antitrust Litig*., No. 12-md-2409 (D. Mass. June 12, 2015), ECF No. 1536.

[48] *Manual* § 21.311 ("Rule 23(c)(2)(B) requires that individual notice in 23(b)(3) actions be given to class members who can be identified through reasonable effort").

Class Mail is recognized as an appropriate manner of delivery.[49] Class counsel will also cause notice to be disseminated to all class members by email to all known email addresses for class members, their counsel, and/or other appropriate recipients. A copy of the notice will be prominently posted on the settlement website, along with other key settlement documents.

3. The Court should not require another opt-out period.

Under Rule 23(e), if class members have been afforded the opportunity to exclude themselves from a class following class certification, courts are not required to give them a second opt-out opportunity. Forgoing a second, settlement-stage opt-out period is consistent with common practice in other direct purchaser pharmaceutical antitrust class actions in this and other circuits.[50] As one court in this district explained in a preliminary approval decision declining to require another opt-out period, "In 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 and due process, there is no need for an additional opt-out opportunity pursuant to Rule 23(e)(3)."[51]

---

[49] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356 n.22 (1978); *Hill v. State St. Corp.*, No. 09-cv-12146, 2015 WL 127728, at *15 (D. Mass. Jan. 8, 2015) (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.").

[50] *See, e.g.*, Order Granting Direct Purchaser Class Pls.' Am. Mot. for Prelim. Approval of Proposed Settlement ¶ 9, *In re Loestrin 24 Fe Antitrust Litig.*, No. 13-md-2472 (D.R.I. Mar. 23, 2020), ECF No. 1426; Am. Order Granting Direct Purchaser Class Pls.' Mot. for Prelim. Approval of Settlements ¶ 8, *In re Lidoderm Antitrust Litig.*, No. 14-md-2521 (N.D. Cal. May 3, 2018), ECF No. 1018; Order Granting Direct Purchaser Class Pls.' Mot. for Prelim. Approval of Settlement with Medicis ¶ 8, *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-2503, (D. Mass. Mar. 6, 2018), ECF No. 1078; Order Preliminary Approving Direct Purchaser Class Settlement with Teva ¶ 3, *In re Nexium (Esomeprazole) Antitrust Litig.*, No. 12-md-2409 (D. Mass. June 12, 2015), ECF No. 1536; Order ¶ 5, *In re Wellbutrin XL Antitrust Litig.*, No. 08-cv-2431 (E.D. Pa. Aug. 17, 2012), ECF No. 473.

[51] Order Granting Prelim. Approval of Proposed Settlement with Degussa Corp., Degussa AG, & Degussa Engineered Carbons, LP & Authorizing Dissemination of Notice at 1, *In re Carbon Black Antitrust Litig.*, No. 03-cv-10191 (D. Mass. Nov. 29, 2006), ECF No. 297.

Here, direct purchaser class members were given the opportunity to exclude themselves from the class when the Court first certified it, and no class member exercised this right. The experience and sophistication of the class members, all of which are business, combined with the prior opt-out opportunity and the other protections afforded the class, make a second opt-out period unnecessary.[52] The Court found no need for an additional opt-out period in connection with the Actavis settlement and should do the same here.[53] There is no reason to believe that any class member would elect to opt out now, and class members can object to the settlement in the unlikely event they are opposed to it.[54]

D. The Court should appoint A.B. Data, Ltd., an experienced, nationally recognized settlement administration company, as settlement administrator.

The direct purchasers ask that A.B. Data, Ltd. be appointed as the settlement administrator to oversee the administration of the settlement, including dissemination of notice to the class and distribution of the net settlement fund to class members. A.B. Data, established in 1981, is in the business of carrying out large public notice or payment projects on behalf of businesses and governmental agencies. The Court previously appointed A.B. Data as notice administrator to notify class members of the Court's class certification order[55] and as settlement

[52] *In re Lloyd's Am. Trust Fund Litig.*, No. 96-cv-1262, 2002 WL 31663577, at *12 (S.D.N.Y. Nov. 26, 2002) ("Due process requires only that Class Members have notice of the proposed settlement and an opportunity to be heard at a fairness hearing. If the proposed settlement is fair, adequate and reasonable, due process does not afford Class Members a second opportunity to opt-out."); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94-cv-897, 1996 WL 167347, at *4 (N.D. Ill. Apr. 4, 1996) ("Due process demands only that the class be given notice of the settlement and an opportunity to be heard. Where these objectives are satisfied, due process does not warrant a second chance to opt-out of the plaintiff class." (citing Fed. R. Civ. P. 23(d), (e))).

[53] Order Granting Direct Purchaser Class Pls.' Mot. for Prelim. Approval of Proposed Settlement with Def. Actavis, Approval of the Form & Manner of Notice to the Class & Proposed Schedule for a Fairness Hr'g at 4, ECF No. 493 (ruling "there is no need for an additional opt-out period").

[54] No class member objected to any aspect of the Actavis settlement. *See* Direct Purchaser Class Pls.' Report Concerning Distrib. of Settlement Notice, ECF No. 538.

[55] *See* Order Approving the Form and Manner of Notice and Appointing Notice Administrator, ECF No. 400.

administrator for the direct purchasers' prior settlement with Actavis settlement,[56] and A.B. Data effectively executed its duties for both.

E. The Court should appoint as escrow agent The Huntington National Bank, a top U.S. bank holding company that has handled thousands of class action settlements.

The direct purchasers request that this Court appoint The Huntington National Bank as escrow agent for the settlement funds. Founded in 1866, Huntington employs more than 21,000 people and maintains more than 1,100 branches in 12 states. Its National Settlement Team has handled more than 2,800 settlements totaling over $60 billion for law firms, claims administrators, and regulatory agencies. Huntington has been approved as escrow agent for multiple class action settlements in pharmaceutical antitrust cases, including for the 2020 settlement with Actavis in this case, for which it seamlessly carried out its responsibilities.

F. The proposed schedule is appropriate, comports with due process, and satisfies the requirements of the Class Action Fairness Act.

The direct purchasers propose the following schedule for completing the settlement approval process:

EVENT	TIMING
Service of CAFA notice	Within 20 days of the filing the preliminary approval motion and settlement agreement.
Dissemination of notice to class members in the form and manner proposed	Within 15 days of entry of the order preliminarily approving the proposed settlement.
Filing of class counsel's application for fees, costs, expenses, and incentive awards	14 days before expiration of deadline to object to the settlement.
Deadline for class members to object to the settlement.	No later than 45 days from the date on the settlement notice.

[56] Order Granting Direct Purchaser Class Pls.' Mot. for Prelim. Approval of Proposed Settlement with Def. Actavis, Approval of the Form & Manner of Notice to the Class & Proposed Schedule for a Fairness Hr'g at 5, ECF No. 493.

Filing of direct purchasers' motion for final approval of the settlement	14 days after expiration of the deadline to object to the settlement.
Fairness Hearing	Date certain at least 90 days from service of CAFA notice to be determined by the Court.

This schedule is fair to direct purchaser class members, giving them ample time to review the preliminary approval papers, settlement agreement, and application for fees, costs, and expenses before any objection is due. Class members will receive notice approximately 45 days before any objections to the settlement are due and have access to the application for fees, costs, and expenses for 14 days before any objection is due. And the schedule allows the full statutory period for Shire to serve its CAFA notice, 28 U.S.C. § 1715, permitting regulators sufficient time to review the settlement and, if they choose, advise the Court of their view. Given the sophistication of the Class, and their familiarity with this kind of litigation, the schedule should be approved.[57]

III. CONCLUSION

For the foregoing reasons, the direct purchasers respectfully request that the Court enter an order: (1) granting preliminary approval of the proposed settlement with Shire, (2) appointing Meijer and QK Healthcare as class representatives solely for purposes of the settlement, (3) approving the proposed form and manner of notice to the direct purchaser class, (4) appointing

[57] *See* Order ¶¶ 4, 7, *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 06-1797 (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, Prelim. Approval of Proposed Settlement, Approval of Form & Manner of Notice, & Setting Schedule and 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. 40-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 and noting [c]ourts have repeatedly found such a time period to constitute sufficient notice").

A.B. Data, Ltd. as settlement administrator and The Huntington National Bank as escrow agent, and (5) adopting the direct purchasers' proposed schedule for remaining settlement-related proceedings and the final fairness hearing.

Dated: June 21, 2024

Respectfully submitted,

/s/ Thomas M. Sobol
Thomas M. Sobol (BBO #471770)
Lauren G. Barnes (BBO #663819)
Abbye R. Klamann Ognibene (BBO #708584)
Claudia Morera (BBO #709507)
Rachel A. Downey (BBO #706639)
HAGENS BERMAN SOBOL SHAPIRO LLP
1 Faneuil Hall Square, 5th Floor
Boston, MA 02109
Telephone: (617) 482-3700
tom@hbsslaw.com
lauren@hbsslaw.com
abbyeo@hbsslaw.com
claudiam@hbsslaw.com
racheld@hbsslaw.com

Counsel for Plaintiffs Meijer, Inc., Meijer Distribution, Inc., and Quality King Healthcare and Lead Counsel for the Direct Purchaser Class

Joseph M. Vanek
Bruce S. Sperling
Paul E. Slater
David P. Germaine
John P. Bjork
SPERLING & SLATER, LLC
55 W. Monroe, 32 Floor
Chicago, IL 60603
Telephone: 312-641-3200
jvanek@sperling-law.com
bss@sperling-law.com
pes@sperling-law.com
dgermaine@sperling-law.com
jbjork@sperling-law.com

Counsel for Plaintiffs Meijer, Inc. and Meijer

Distribution, Inc. and Additional Counsel for the Direct Purchaser Class

John D. Radice
Kenneth Pickle
Clark Craddock
RADICE LAW FIRM, PC
475 Wall Street
Princeton, NJ 08540
Telephone: 646-245-8502
jradice@radicelawfirm.com
kpickle@radicelawfirm.com
ccraddock@radicelawfirm.com

Linda P. Nussbaum
Peter Moran
NUSSBAUM LAW GROUP, P.C.
1133 Avenue of the Americas, 31st Floor
New York, NY 10036
Telephone: 917-438-9189
lnussbaum@nussbaumpc.com
pmoran@nussbaumpc.com

Sharon K. Robertson
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave, NW, 5th Floor
Washington, DC 20005
Telephone: 202-408-4600
srobertson@cohenmilstein.com
jweiner@cohenmilstein.com

Donna M. Evans (BBO #554613)
COHEN MILSTEIN SELLERS & TOLL PLLC
88 Pine Street, 14th Floor
New York, NY 10005
Telephone: 212-838-7797
devans@cohenmilstein.com

David F. Sorensen
Caitlin G. Coslett
BERGER MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Telephone: (215) 875-3000
dsorensen@bm.net
ccoslett@bm.net

Joseph H. Meltzer
Terence S. Ziegler
KESSLER TOPAZ MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, PA 19087
Telephone: 610-667-7706
jmeltzer@ktmc.com
tziegler@ktmc.com

Additional Counsel for the Direct Purchaser Class

CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing document was served by filing it on the Court's CM/ECF system, which will deliver notification of filing to all counsel of record.

Dated: June 21, 2024

/s/ Thomas M. Sobol
Thomas M. Sobol