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

| | |
|---|---|
| In re: RESTASIS (CYCLOSPORINE OPHTHALMIC EMULSION) ANTITRUST LITIGATION | 18-MD-2819 (NG) (LB) |
| THIS DOCUMENT APPLIES TO:<br>**All Direct Purchaser Class Actions:**<br>*FWK Holdings, LLC v. Allergan, Inc.*, 18-cv-00677 (E.D.N.Y.);<br>*Rochester Drug Co-Operative, Inc. v. Allergan, Inc.*, 18-cv-00970 (E.D.N.Y.);<br>*KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc., v. Allergan, Inc*., No. 18-cv-00974 (E.D.N.Y.); and<br>*Meijer, Inc. and Meijer Distribution, Inc. v. Allergan, Inc*., 19-cv-02563 (E.D.N.Y). | |

**MEMORANDUM IN SUPPORT OF DIRECT PURCHASER CLASS PLAINTIFFS' MOTION FOR CERTIFICATION OF A CLASS FOR PURPOSES OF SETTLEMENT, 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 A DATE FOR A FAIRNESS HEARING**

**TABLE OF CONTENTS**

# TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Statutes**



**Other Authorities**

## I. INTRODUCTION

Direct purchaser plaintiffs FWK Holdings, LLC, Rochester Drug Co-Operative, Inc., KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc., Meijer Inc., and Meijer Distribution, Inc. ("direct purchaser class plaintiffs" or "direct purchasers"), on behalf of a proposed class of direct purchasers, have entered into a Settlement Agreement with defendant Allergan, Inc. The proposed Settlement provides a total of $51,250,000.00 in cash to the direct purchaser settlement class in exchange for the direct purchasers' dismissal of their case with prejudice and provision of releases from the direct purchaser class plaintiffs and the direct purchaser class, as fully set forth in the Settlement Agreement.[1]

The direct purchasers respectfully request—and Allergan does not oppose—that the Court preliminarily approve the Settlement and certify the proposed direct purchaser class for settlement purposes only. As described more fully below, the proposed direct purchaser settlement class meets all the requirements of the Federal Rules of Civil Procedure 23(a) and (b)(3).

The Settlement meets the standards for preliminary approval. The parties agreed to settle this action after substantial investigation, discovery, and motions practice. Allergan denies any allegations of unlawful or wrongful conduct and believes it has meritorious defenses to this litigation. The Settlement ensures that the proposed class will receive substantial benefits, while avoiding the risks and delays of continued litigation. Lead/Liaison counsel for the direct purchasers[2] believe this is a fair, reasonable, and adequate result for the proposed class—a

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

[2] On April 4, 2018, the Court appointed Thomas M. Sobol and Kristen A. Johnson of Hagens Berman Sobol Shapiro LLP as interim Lead/Liaison counsel for the certified direct purchaser class. Order Consolidating the Direct Purchaser Class Actions; Appointing Liaison/Lead Counsel and an Executive Committee; and Appointing Interim Class Counsel Pursuant to 23(g)(3), No. 18-md-2819, ECF No. 50 (E.D.N.Y. Apr. 4, 2018).

resolution negotiated in good faith, at arm's length, by counsel experienced in pharmaceutical antitrust matters, achieved after more than two years of litigation.

Direct purchaser plaintiffs seek an order substantially in the form of the proposed Preliminary Approval Order agreed to by the parties and submitted with this memorandum: (1) granting direct purchasers' unopposed motion for certification of the direct purchaser class under Rule 23 for purposes of settlement; (2) granting preliminary approval of the proposed Settlement; (3) approving the proposed form and manner of notice to the direct purchaser settlement class, (4) appointing a claims administrator and escrow agent, (5) appointing lead class counsel, and (6) adopting a proposed schedule for final approval of the Settlement.

## II. PROCEDURAL BACKGROUND

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

The declaration of Thomas M. Sobol, submitted with this memorandum, outlines the extensive litigation proceedings in this action in detail. To avoid repetition, the direct purchasers review that procedural history only briefly here. On November 17, 2017, the first direct purchaser complaint leading to this matter was filed in the United States District for the Eastern District of Texas.[3] On April 4, 2018, after transfer to this district, the direct purchasers filed the first of two consolidated amended class action complaints.[4] That complaint, and the others following it, alleged that Allergan violated the federal antitrust laws by engaging in an anticompetitive scheme to impede and delay market entry of more affordable generic versions of

[3] Sobol Decl. ¶ 12.

[4] Sobol Decl. ¶ 15.

Allergan's brand name prescription drug, Restasis.[5] The alleged scheme included patent fraud, a wrongful Orange Book listing, sham patent litigation, sham citizen petitions to the FDA, and a wrongful transfer of patents to a Native American Tribe to try to avoid invalidation of those patents.[6] The direct purchasers alleged that absent this unlawful scheme, more affordable versions of Restasis would have been available for purchase after May 2014. This Court denied Allergan's motion to dismiss the direct purchasers' complaint on September 18, 2018, holding that the direct purchasers had adequately alleged violations of Sections 15(a) and 26 of the Clayton Act and Sections 1 and 2 of the Sherman Antitrust Act.[7]

**B. The parties engaged in extensive investigation, discovery, and arm's length settlement negotiations.**

Following the Court's denial of Allergan's motion to dismiss, the parties engaged in substantial discovery. Allergan produced nearly 690,000 documents, totaling over 7 million pages. Non-parties produced an additional 10,511 documents, totaling about 135,000 pages. Between January 2019 and July 2019, the parties took 33 depositions of the parties' current and former employees, as well as non-parties.

The direct purchasers moved to certify a class on April 26, 2019.[8] Ultimately, they submitted three briefs related to class certification, covering complicated issues related to the Rule 23 requirements.[9] On September 25 and October 22, 2019, the Court heard arguments and

[5] *See* Direct Purchaser Class Pls.' First Am. Consol. Class Action Compl., No. 18-md-2819, ECF No. 245 (E.D.N.Y. Feb. 11, 2019). A fourth direct purchaser plaintiff filed a nearly identical complaint with this Court on May 1, 2019. Compl. and Jury Demand, No. 19-cv-2563, ECF No. 1 (E.D.N.Y. May 1, 2019).

[6] *See* Direct Purchaser Class Pls.' First Am. Consol. Class Action Compl. at 1-2, No. 18-md-2819, ECF No. 245 (E.D.N.Y. Feb. 11, 2019).

[7] Sobol Decl. ¶ 18.

[8] Sobol Decl. ¶ 30.

[9] Sobol Decl. ¶¶ 30-32.

testimony regarding the direct purchasers' motion for class certification.[10] The Court has not yet ruled on the direct purchasers' motion.

All parties consulted with economic, scientific, patent, and regulatory experts, each of whom submitted substantial expert reports and rebuttal reports. In total, the parties exchanged 36 expert reports covering every aspect of the case, including class certification, market power, patent merits, causation issues, and damages. The parties also took eight depositions of the expert witnesses.

Settlement negotiations between class counsel and Allergan's attorneys were hard fought, at arm's length, and spanned multiple months. Through multiple meetings, including an in-person mediation session before Magistrate Judge Lois Bloom, phone conversations, emails, and other in-person meetings, the parties eventually reached an acceptable resolution. On January 18, 2020, the parties executed a binding settlement term sheet. Subsequently, the parties negotiated a full settlement, consistent with the terms of the January 18 agreement. The Settlement resolved all direct purchaser plaintiffs and class members' claims for a cash payment of $51.25 million.

## III. ARGUMENT

The proposed Settlement provides for payment by Allergan of $51,250,000.00 into an interest-bearing escrow account to settle the direct purchasers' claims.[11] In exchange for the cash payment, and upon the Court's final approval of the Settlement, the proposed direct purchaser class will dismiss their claims against Allergan with prejudice and release claims, consistent with the terms of the Settlement Agreement.[12]

[10] Sobol Decl. ¶¶ 33-34.

[11] Sobol Decl. Ex. 1 ¶ 7(a).

[12] Sobol Decl. Ex. 1 ¶¶ 12-13.

**A. The Court should certify the proposed direct purchaser class for purposes of settlement pursuant to Rule 23.**

The direct purchasers seek certification of a settlement class defined as:

> All persons who or entities which purchased Restasis in the United States or its territories and possessions directly from Allergan at any time after May 2014 through and including February 16, 2020 (the "Class Period").
>
> Excluded from the Direct Purchaser Class are Allergan and its officers, directors, management, employees, subsidiaries, or affiliates, and all governmental entities.

Also excluded from the class are the following retailer entities, in their own capacity or as assignees, which have filed separate but coordinated actions against Allergan: CVS Pharmacy, Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Walgreen Co., The Kroger, Co., Albertsons Companies, Inc., and HEB Grocery Company L.P. The Settlement Agreement sets forth the form and manner of notice to the proposed direct purchaser class.[13]

Courts have repeatedly certified—both for litigation and settlement—classes of direct purchasers alleging that a name-brand drug maker wrongfully delayed the market entry of generic competitors.[14] Where, as here, the proposed class satisfies the requirements of Rule

[13] Sobol Decl. Ex. 3. The form of notice attached to this memorandum as Sobol Decl. Ex. 3 complies with the notice requirements of Rule 23 and the direct purchasers' obligations under the Settlement Agreement.

[14] For settlement, *see, e.g.*, *In re Aggrenox Antitrust Litig.*, No. 3:14-md-2516 (SRU), 2017 WL 4278788 (D. Conn. Sept. 19, 2017); *In re Asacol Antitrust Litig.*, No. 1:15-cv-12730, 2017 WL 4118967 (D. Mass. Sept. 14, 2017); *In re Prandin Direct Purchaser Antitrust Litig.*, No. 2:10-cv-12141-AC-DAS, 2014 WL 8335997 (E.D. Mich. Oct. 2, 2014); *In re Skelaxin (Metaxalone) Antitrust Litig.*, MDL No. 2343, 2014 WL 11669877 (E.D. Tenn. Apr. 30, 2014); *Mylan Pharm., Inc. v. Warner Chilcott Pub. Ltd. Co.*, No. 12-cv-3824, 2014 WL 631031 (E.D. Pa. Feb. 18, 2014) ("*Doryx*"); *Rochester Drug Co-Operative, Inc. v. Braintree Labs., Inc.*, No. 07-142, 2012 WL 12910047 (D. Del. Feb. 6, 2012) ("*Miralax*"); *In re Metoprolol Succinate Direct Purchaser Antitrust Litig.*, No. 06-052, 2011 WL 13097266 (D. Del. Nov. 16, 2011) ("*Toprol*"); *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 05-2237, 2011 WL 13318188 (S.D.N.Y. Aug. 16, 2011); *In re OxyContin Antitrust Litig.*, MDL No. 1603, 2010 WL 11493630 (S.D.N.Y. Sept. 27, 2010); *In re Children's Ibuprofen Oral Suspension Antitrust Litig.*, No. 04-mc-535, ECF No. 24 (D.D.C. Jan. 9, 2006); *In re Remeron Direct Purchaser Antitrust Litig.*, No 03-cv-0085, ECF No. 181 (D.N.J. Aug. 30, 2005); *North Shore Hematology and Oncology Assoc.*, No. 04-cv-00248, ECF No. 21 (D.D.C. Sept. 10, 2004). For trial, *see, e.g.*, *In re Namenda Direct Purchaser Antitrust Litig.*, 331 F. Supp. 3d 152 (S.D.N.Y. 2018); *In re Lamictal Indirect Purchaser Antitrust Litig.*, No. 12-cv-00995, 2018 WL 6567709 (D.N.J. Dec. 12, 2018), *Rule 23(f) pet. to appeal granted*, No. 18-8061 (3d. Cir. Mar. 3, 2019); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-02503, 2017 WL 4621777 (D. Mass. Oct. 16, 2017); *Am. Sales Co., LLC*

23(a), (b)(3), (e), and (g), class certification is appropriate.[15]

**1. The direct purchaser settlement class satisfies all Rule 23(a) requirements.**

Federal Rule of Civil Procedure 23(a) requires that: (1) the class is so numerous as to make joinder of all members impracticable; (2) questions of fact or law common to the class exist; (3) the representative parties' claims or defenses are typical of those of the class; and (4) the representative parties—plaintiffs and counsel—will fairly and adequately protect the class's interests. The proposed direct purchaser class and its representatives satisfy these requirements.

**a. The numerous and widely dispersed direct purchaser settlement class renders joinder impractical.**

Rule 23(a)(1) permits class certification if "the class is so numerous that joinder of all members is impracticable." In the Second Circuit, "numerosity is presumed at a level of 40 members."[16] But the numerosity inquiry "is not strictly mathematical"; it "must take into account the context of the particular case."[17] Plaintiffs need not show joinder is "impossible,"[18] only that the "difficulty or inconvenience of joining all members of the class make use of the class action appropriate."[19] As the Second Circuit has explained, "[d]etermination of practicability depends on all the circumstances surrounding a case, not on mere numbers."[20] As a result, courts consider

*v. Pfizer, Inc.* ("*Celebrex*"), No. 2:14-cv-361, 2017 WL 3669604 (E.D. Va. July 28, 2017), *adopted*, No. 2:14-cv-361, 2017 WL 3669097 (E.D. Va. Aug. 24, 2017); *In re Lidoderm Antitrust Litig.*, No. 14-md-2521, 2017 WL 679367 (N.D. Cal. Feb. 21, 2017); *In re Nexium (Esomeprazole) Antitrust Litig.*, 296 F.R.D. 47 (D. Mass. 2013); *In re Prograf Antitrust Litig.*, No. 11-cv-10344, 2013 WL 2395083 (D. Mass. Apr. 23, 2013).

[15] Settlement classes must meet all requirements of Rule 23, except for manageability. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 31 (E.D.N.Y. 2006).

[16] *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

[17] *Pa. Pub. Sch. Emps. Ret. Sys. v. Morgan Stanley & Co. Inc.*, 772 F.3d 111, 120 (2d Cir. 2014).

[18] *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993).

[19] *Cent. States SE & SW Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244-45 (2d Cir. 2007).

[20] *Robidoux*, 987 F.2d at 936.

whether "a class [action] is superior to joinder based on other relevant factors."[21] "Relevant considerations include judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, [and] the ability of claimants to institute individual suits . . . ."[22]

Based on these considerations, multiple district courts have certified substantively identical classes alleging the same harm that the direct purchasers posit here.[23] The proposed class consists of thirty-five geographically dispersed entities.[24] Widespread "geographic dispersion" "suggests joinder is impracticable, even when putative class members are corporate entities."[25] "Individual suits"—spread across the country in disparate courts—would unnecessarily burden the judicial system, rendering joinder impracticable.[26]

Furthermore, many class members are small wholesalers[27]—entities that lack the resources necessary to bring complex, expert-intensive antitrust suits on an individual basis. In this matter, expert costs were substantial, but not recoverable under the Clayton Act. Thus, for class members with smaller claims, their individual litigation costs dwarf their potential

[21] *Pa. Pub. Sch.*, 772 F.3d at 120.

[22] *Robidoux*, 987 F.2d at 936.

[23] *See supra* n.14.

[24] Decl. of Ellen T. Noteware in Support of Direct Purchaser Pls.' Memo. of Law for Class Cert. (Noteware Class Cert. Decl.) at Ex. 1, Declaration of Jeffrey J. Leitzinger, Ph.D. dated Apr. 26, 2019 (Leitzinger Class Cert. Decl.) at Exs. 5 and 6, No. 18-md-2819, ECF No. 385-2 (E.D.N.Y. Oct. 4, 2019) (served on Allergan on Apr. 26, 2019) (listing class members and showing their geographic dispersion). Exhibit 5 to Dr. Leitzinger's Declaration enumerated 42 class members because his list included certain retailer plaintiffs (*i.e.*, Albertsons Companies, CVS Pharmacy Inc., HEB Grocery, Kroger Company, Rite Aid Corporation, Rite Aid Hdqtrs. Corp., and Walgreens Company). However, these retailer plaintiffs are no longer a part of the direct purchaser class; they have reached their own settlement with Allergan. Even without these retailer plaintiffs, Dr. Leitzinger's Exhibit 5 demonstrates that the class is ascertainable and well-defined based on objective criteria.

[25] *Solodyn*, 2017 WL 4621777, at *5; *see also Celebrex*, 2017 WL 3669604, at *10.

[26] *Robidoux*, 987 F.2d at 936.

[27] Leitzinger Class Cert. Decl. at Ex. 5.

recoveries.[28] Denial of class certification for settlement purposes would prevent these smaller direct purchasers from sharing in the settlement recovery.

**b. The key issues of law and fact are common to all direct purchaser settlement class members.**

Rule 23(a)(2) requires questions of law or fact common to the class. As the Supreme Court has explained, "even a single common question will" satisfy Rule 23(a)(2).[29] Rule 23(a)(2) does not require plaintiffs "to demonstrate that the class members' claims are identical"; "[r]ather, it demands that the disputed issue of law or fact occupies essentially the same degree of centrality to the named plaintiffs' claim as to that of other members of the proposed class."[30]

The proposed direct purchaser settlement class easily meets this requirement. "In the antitrust context 'courts have held that the existence of an alleged conspiracy or monopoly is a common issue that will satisfy the Rule 23(a)(2) prerequisite.'"[31] The proposed settlement class alleges injury based on the same Allergan misconduct that was intended to and did impair generic competition.[32]

---

[28] *Celebrex*, 2017 WL 3669604, at *10 ("[T]he majority of the proposed class members have negative value claims (i.e., the expenses, including expert fees, exceed their possible recovery).").

[29] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (internal quotation and alterations omitted).

[30] *Dodge v. Cty. of Orange*, 208 F.R.D. 79, 88 (S.D.N.Y. 2002) (internal quotation and alterations omitted).

[31] *Natchitoches Par. Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, 247 F.R.D. 253, 264 (D. Mass. 2008) (quoting Newberg on Class Actions § 3:10 (4th ed. 2002)); *see also In re Buspirone Patent Litig.*, 210 F.R.D. 43, 57 (S.D.N.Y. 2002) (same); *In re NASDAQ Mkt-Makers Antitrust Litig.*, 169 F.R.D. 493, 509 (S.D.N.Y. 1996) (same).

[32] *See, e.g.*, *In re Wellbutrin XL Antitrust Litig.*, No. 08-2431, 2011 WL 3563385, at *4, *13-14 (E.D. Pa. Aug. 11, 2011) (common issues include whether "defendants engaged in a scheme to delay the entry of less expensive generic versions" resulting in delayed generic entry); *Solodyn*, 2017 WL 4621777, at *3 n.4 (similar); *Lidoderm*, 2017 WL 679367, at *11 (similar); *In re Relafen Antitrust Litig.*, 218 F.R.D. 337, 342 (D. Mass. 2003) (similar); *In re Wellbutrin SR Direct Purchaser Antitrust Litig.*, No. 04-5525, 2008 WL 1946848, at *2 (E.D. Pa. May 2008) (similar); *Teva Pharm. USA, Inc. v. Abbott Labs.* ("*TriCor*"), 252 F.R.D. 213, 225 (D. Del. 2008) (similar); *In re K-Dur Antitrust Litig.*, No. CIV. A. 01-1652 JAG, 2008 WL 2699390, at *4 (D.N.J. Apr. 14, 2008), subsequently *aff'd*, 686 F.3d 197 (3d Cir. 2012), *cert. granted, judgment vacated sub nom. Upsher-Smith Labs., Inc. v. Louisiana Wholesale Drug Co.*, 570 U.S. 913 (2013), *and reinstatement granted*, No. 10-2077, 2013 WL 5180857 (3d Cir. Sept. 9, 2013) (similar); *In re Nifedipine Antitrust Litig.*, 246 F.R.D. 365, 368-71 (D.D.C. 2007) (similar); *Meijer, Inc. v. Warner Chilcott Holdings Co. III* ("*Ovcon*"), 246 F.R.D. 293, 300 (D.D.C. 2007) (similar); *Buspirone*, 210 F.R.D. at 57 (similar).

There are numerous other common issues, easily satisfying Rule 23.[33]

**c. The direct purchaser class representatives' claims are typical.**

The class representatives' claims and defenses are typical of the absent class members', meeting Rule 23(a)(3)'s typicality requirement.[34] Typicality is satisfied when a representative plaintiff can show that "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability."[35] Class members' claims need not be "identical," and "differences in the amount of damages, date, size or manner of purchase, the type of purchaser . . . will not defeat class certification when plaintiffs allege that the same unlawful course of conduct affected all members of the proposed class."[36]

Faced with analogous facts, courts have found the proposed representatives satisfied the typicality prong because they asserted the defendants impaired generic competition and sought overcharges on behalf of themselves and the class.[37] The same is true here.

**d. The interests of the direct purchaser class representatives and the direct purchaser settlement class do not conflict, and class counsel is experienced in complex antitrust class litigation.**

Rule 23(a)(4) also requires adequacy of representation. As the Second Circuit has explained, "[d]etermination of adequacy typically 'entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys

---

[33] *See* Direct Purchaser Class Pls.' Proposed Trial Plan, No. 18-md-2819, ECF No. 385-5 (E.D.N.Y. Oct. 4, 2019) (served on Allergan on Apr. 26, 2019) (enumerating these common issues).

[34] *Gen. Tel. Co. of the SW v. Falcon*, 457 U.S. 147, 156 (1982) (class representatives must "possess the same interest and suffer the same injury" as the unnamed class members (internal quotation marks omitted)).

[35] *Robidoux*, 987 F.2d at 936.

[36] *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-md-1175, 2014 WL 7882100, at *31 (E.D.N.Y. Oct. 15, 2014) (internal quotation marks omitted), *report and recommendation adopted*, No. 06-md-1775, 2015 WL 5093503 (E.D.N.Y. July 10, 2015).

[37] *See, e.g.*, *La. Wholesale Drug Co., Inc. v. Sanofi Aventis* ("*Arava*"), No. 07-cv-7343, 2008 WL 11399716, at *2 (S.D.N.Y. Apr. 10, 2008).

are qualified, experienced and able to conduct the litigation.'"[38] The proposed class representatives and class counsel meet both criteria.

**(1) The plaintiffs and absent class members have no conflicts.**

A proposed class representative is adequate under Rule 23(a)(4) unless it has non-speculative conflicts with absent class members that are "so palpable as to outweigh the substantial interest of every class member in proceeding with the litigation."[39] In this case, "because *Hanover Shoe* sets the amount of the overcharge as [direct purchasers'] damages, all of the class members have the same financial incentive for purposes of the litigation—*i.e.* proving that they were overcharged and recovering damages based on that overcharge."[40]

**(2) Interim Lead/Liaison class counsel are well-qualified.**

The Court appointed Thomas M. Sobol and Kristen A. Johnson of Hagens Berman Sobol Shapiro LLP as interim Lead/Liaison counsel for the proposed direct purchaser class pursuant to Federal Rule of Civil Procedure 23(g)(3).[41] The direct purchaser plaintiffs now request, under Rule 23(g), that the Court appoint Hagens Berman Sobol Shapiro LLP to serve as Lead Class Counsel if the proposed settlement class is certified. As this Court has noted, "Lead/liaison counsel is qualified to serve this position based on Hagens Berman Sobol Shapiro's extensive experience with and expertise in pharmaceutical antitrust class actions on behalf of direct purchaser class plaintiffs."[42] Since that interim appointment, Lead/Liaison counsel has prosecuted this case with vigor and commitment. Furthermore, courts have repeatedly adjudged

---

[38] *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007) (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000)).

[39] *NASDAQ*, 169 F.R.D. at 514-15.

[40] *K-Dur*, 686 F.3d at 223; *see also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 532 (3d Cir. 2004).

[41] *See supra* n.2.

[42] *See id.* at 5; Sobol Decl. Ex. 2 (Hagens Berman Sobol Shapiro LLP Boston Office Resume).

counsel for the proposed direct purchaser class adequate under Rule 23(a)(4) and 23(g).[43] Indeed, Allergan never opposed the direct purchasers' motion for class certification on this ground.[44]

**2. The direct purchaser settlement class satisfies all Rule 23(b)(3) requirements.**

Rule 23(b)(3) requires that: (1) common questions of law or fact predominate over individual questions and (2) a class action is superior to other available methods of adjudication.

**a. Common questions of law or fact predominate over individual questions.**

Predominance requires that "*questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class."[45] In *Amgen,* the Supreme Court explained that Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to class-wide proof," but rather that "common questions *predominate* over any questions affecting only individual class members."[46] As a result, predominance is "a test readily met in certain cases alleging . . . violations of the antitrust laws."[47] For antitrust claims, plaintiffs must prove three elements: (1) violation of antitrust law; (2) injury and causation; and (3) damages.[48]

**(1) Proof of antitrust violations relies on predominantly common evidence.**

The direct purchaser plaintiffs allege that Allergan violated Section 2 of the Sherman Act. This claim requires proof (1) that the defendant has monopoly power in the relevant market; and

---

[43] *See, e.g.*, *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-2503, 2018 WL 7075881, at *1 (D. Mass. July 18, 2018); *Lidoderm*, 2017 WL 679367, at *9 n.14; Order at 3, *In re Suboxone Antitrust Litig.*, No. 13-md-2445, ECF No. 44 (E.D. Pa. Aug. 7, 2013).

[44] *See* Allergan's Memo. of Law in Opp'n to Direct Purchasers Class Pls.' Mot. for Class Cert., No. 18-md-2819, ECF No. 386 (E.D.N.Y. Oct. 4, 2019) (served on plaintiffs on June 24, 2019).

[45] *Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455, 459 (2013).

[46] *Id.* at 469 (internal quotation marks and alterations omitted; emphasis in original).

[47] *Amchem*, 521 U.S. at 625; *see also Cordes*, 502 F.3d at 108.

[48] *See Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 29-30 (2d Cir. 2011).

(2) that the defendant willfully acquired or maintained that power, or attempted to do so.[49] The direct purchasers allege Allergan wrongfully maintained monopoly power in the market for cyclosporine ophthalmic emulsion 0.05% by impairing generic competition, thereby forcing the direct purchasers to purchase more-expensive, branded Restasis. If the class members pursued this case individually, each would have to prove the same course of conduct, using the same documents and witnesses. Among the common issues are: (1) whether Allergan had monopoly power over cyclosporine ophthalmic emulsion 0.05% products; (2) whether Allergan engaged in unlawful conduct with respect to obtaining the second wave patents, listing them in the Orange Book, and filing patent infringement actions; (3) whether Allergan engaged in unlawful conduct with respect to submitting baseless citizen petitions; (4) whether Allergan's conduct violated the antitrust laws; and (5) whether Allergan's conduct delayed the entry of generic Restasis.[50] Predominance is therefore satisfied on the issue of antitrust violation.[51]

**(2) Proof of antitrust impact and causation use predominantly common evidence.**

The direct purchaser plaintiffs also offered common proof of antitrust injury or impact and causation. At the class certification stage, plaintiffs need not prove their case and "an appropriate merits inquiry should not 'extend into a protracted mini-trial of substantial portions of the underlying litigation.'"[52] As in all similar cases, antitrust injury in the form of an

[49] *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

[50] *See* Sobol Decl. Ex. 3 (proposed class notice).

[51] *See TriCor*, 252 F.R.D. at 228 ("the court finds that each putative class member, had they pursued their claims individually, would have been required to prove identical facts, such as defendants' monopoly power, exclusionary scheme, effect on interstate commerce, conspiracy, and unreasonable restraint of trade. Therefore, these common issues predominate over any individual issues relating to proof of an antitrust violation"); *see also K-Dur*, 2008 WL 2699390, at *12; *Nifedipine*, 246 F.R.D. at 369 n.5; *Ovcon*, 246 F.R.D. at 307-08; *Relafen*, 218 F.R.D. at 343; *Buspirone*, 210 F.R.D. at 58.

[52] *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09-CV-230, 2012 WL 5844871, at *10 (D. Vt. Nov. 19, 2012) (quoting *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006), *decision clarified on denial of reh'g sub nom. In re Initial Pub. Offering Sec. Litig.*, 483 F.3d 70 (2d Cir. 2007)).

overcharge and causation can be proved through common evidence.

The direct purchasers' expert, Dr. Leitzinger, has concluded that (1) Allergan's allegedly unlawful conduct, if proven, had a direct, market-wide impact on Restasis prices generally, and (2) absent that conduct, all or nearly all class members would have paid less for their direct purchases of Restasis.[53] Dr. Leitzinger identified several types of common evidence that independently and conjunctively support his conclusion that all or nearly all class members paid at least some overcharge.[54] Courts in the Second Circuit and elsewhere have held similar evidence sufficient to prove antitrust injury on a class-wide basis.[55]

**(3) Proving class-wide damages presents predominantly common issues.**

The predominance requirement is further satisfied where, as here, experts can readily measure aggregate damages to the class using common evidence and a common methodology.[56] Importantly, a "defendant whose wrongful conduct has rendered difficult the ascertainment of

[53] Leitzinger Class Cert. Decl. at ¶ 9.

[54] *Id.* at ¶¶ 21-42.

[55] *See, e.g.*, *Namenda*, 331 F. Supp. 3d at 215-16 (holding that studies, defendant's analyses, and sales data were sufficient forms of common proof of antitrust injury); *Solodyn*, 2017 WL 4621777, at *7-8 ("economic research," "forecasting documents," and data are "sufficiently reliable to show common impact"); *Celebrex*, 2017 WL 3669604, at *14-15 (same); *Lidoderm*, 2017 WL 679367, at *9-10 (forecasts and literature are sufficient common proof); *Wellbutrin XL*, 2011 WL 3563385, at *12 (literature, defendants' forecasts, and sales data are sufficient common proof); *In re Neurontin Antitrust Litig.*, No. 02-1390, 2011 WL 286118, at *6-8 (D.N.J. Jan. 25, 2011) (literature, defendants' analyses, and sales data are "well established" forms of common evidence); *Meijer, Inc. v. Abbott Labs.* ("*Norvir*"), No. 07-5985 CW, 2008 WL 4065839, at *8-9 (N.D. Cal. Aug. 27, 2008) (same); *TriCor*, 252 F.R.D. at 229-30 (studies and empirical evidence "can demonstrate impact on a class-wide basis"); *Wellbutrin SR*, 2008 WL 1946848, at *8 ("[L]iterature examining the impact of generic entry into the pharmaceutical market and analysis of public data."); *K-Dur*, 2008 WL 2699390, at *14-19 (studies, defendants' analyses, and sales data sufficient forms of common evidence); *Nifedipine*, 246 F.R.D. at 370-71 & n.10 (same); *Ovcon*, 246 F.R.D. at 308-10 (same); *Relafen*, 218 F.R.D. at 343-46 (same); *Buspirone*, 210 F.R.D. at 58.

[56] *See, e.g.*, *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008) (approving Dr. Leitzinger's use of class-wide aggregate damage model); *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 929 (7th Cir. 2016) ("[A]t the class certification stage, plaintiffs are not obliged to drill down and estimate each individual class member's damages. The determination of the aggregate classwide damages is something that can be handled most efficiently as a class action, and the allocation of that total sum among the class members can be managed individually . . . ."); *NASDAQ*, 169 F.R.D. at 521 (approving damage model "to determine aggregate damages for the Class as a whole"); *Namenda*, 331 F. Supp. 3d at 177-81 (approving aggregate damages); *Solodyn*, 2017 WL 4621777, at *10 (same); *Celebrex*, 2017 WL 3669604, at *16 (same); *Lidoderm*, 2017 WL 679367, at *11 (same).

the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible."[57] "Calculations need not be exact," though "any model supporting a plaintiff's damages case must be consistent with its liability case."[58] The possibility of individual damages inquiries does not pose an obstacle to certification.[59]

In his report, Dr. Leitzinger explained that he would use the same basic methodology that he has used many times before—one that multiple courts approved in similar cases[60]—to measure aggregate class damages.[61] Dr. Leitzinger's model satisfies *Comcast*'s requirement that evidence of damages "measure[s] only those damages attributable to [the] theory"[62] of liability and harm advanced by the direct purchasers—namely, the unlawful delay in generic competition

[57] *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927). Damages may be estimated from available evidence. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Solodyn*, 2017 WL 4621777, at *10 ("[A]lthough Plaintiffs bear the burden to establish predominance, uncertainties regarding damages should be resolved against the wrongdoer, and not those who have allegedly been injured.").

[58] *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (citations and internal quotation marks omitted); *see also Kleen*, 831 F.3d at 929 (rejecting argument that class plaintiffs must show individual and not aggregate damages as a matter of law and holding that "plaintiffs are permitted to use estimates and analysis to calculate a reasonable approximation of their damages").

[59] *See, e.g.*, *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015) ("*Comcast*, then, did not hold that a class cannot be certified under Rule 23(b)(3) simply because damages cannot be measured on a classwide basis.").

[60] *See, e.g.*, *Solodyn*, 2017 WL 4621777, at *9-10 (finding that Dr. Leitzinger has "sufficiently shown that damages may be demonstrated by a 'common methodology' applicable to the class as a whole" where plaintiffs assert that "aggregate damages to the Class can be reliably measured using Class-wide evidence . . . and present Dr. Leitzinger's 'formulaic model' that establishes aggregate overcharges incurred by the putative class" (internal quotation marks omitted)); *Lidoderm*, 2017 WL 679367, at *10 (rejecting defendants' critiques of Dr. Leitzinger's "aggregate damages model" as allegedly "unreliable because it fails to consider the 'actual experience' of particular DPPs since it is based on aggregated purchases" but finding that "aggregate approach to damages is not problematic"); *Prograf*, 2013 WL 2395083, at *3 (concluding that "[o]n the issue of damages, the Declaration of Jeffrey J. Leitzinger, Ph.D., together with prior decisions granting class certification . . . , provide the basis for the Court to find that it will be feasible to calculate aggregate damages to the Direct Purchaser Class as a whole using well-established methodologies, including the 'before and after' method"); *Wellbutrin XL*, 2011 WL 3563385, at *14-15 (approving Dr. Leitzinger's damages calculation and certifying the class); *K-Dur*, 2008 WL 2699390, at *19 ("Defendants do not dispute that the 'before and after' methodology proposed by Dr. Leitzinger is 'judicially recognized and commonly accepted.'").

[61] Leitzinger Class Cert. Decl. ¶¶ 43-54.

[62] *Comcast*, 569 U.S. at 35.

Allergan's actions caused. Dr. Leitzinger explained that, to calculate class overcharges, he would use the transaction data Allergan produced during discovery to determine the prices Allergan charged for Restasis, and would use forecasts from Allergan and five generic manufacturers (Akorn, Allergan, Apotex, Mylan, and Teva) to determine the generic penetration and generic discount rates that would have occurred absent Allergan's delay of generic competition.[63] Dr. Leitzinger intended to calculate aggregate overcharges by taking the difference between these two prices and then multiplying the result by the actual unit sales volume.[64] In so doing, Dr. Leitzinger relied only on evidence common to the class.[65] As a result, this is not a case where "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."[66]

**b. Class action treatment of the case is superior to other methods.**

The proposed class also satisfies Rule 23(b) because the class action mechanism is superior to other forms of adjudication. The "superiority" requirement of Rule 23(b)(3) ensures that a class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[67]

As demonstrated above, this case presents numerous common issues and evidence. Certification avoids clogging the court with numerous individual suits (for those who can afford to sue), prevents inconsistent results, and ensures that class members with smaller claims have an

[63] Leitzinger Class Cert. Decl. ¶¶ 47-54.

[64] Leitzinger Class Cert. Decl. ¶¶ 43-45.

[65] Leitzinger Class Cert. Decl. ¶¶ 43-45.

[66] *Comcast*, 569 U.S. at 34.

[67] *Amchem*, 521 U.S. at 615 (alteration in original; internal quotation marks omitted).

opportunity for redress. Thus, class action treatment—just as in the prior analogous cases[68]—is the superior method of adjudicating the plaintiffs' claims and ensuring injured Class members recoup their antitrust overcharges.[69]

**B. The proposed Settlement meets the standard for preliminary approval.**

Federal Rule of Civil Procedure Rule 23(e) sets the standards and procedures that apply to class action settlements. Although "the judicial role in reviewing a proposed settlement is demanding," this Court recognizes "the 'strong judicial policy in favor of settlements, particularly in the class action context.'"[70] A "class action settlement approval procedure typically occurs in two stages: (1) preliminary approval — where prior to notice to the class, a court makes a preliminary evaluation of fairness, and (2) final approval — where notice of a hearing is given to the class members, [and] class members and settling parties are provided the opportunity to be heard on the question of final court approval."[71] During the preliminary approval stage, a court "must review the proposed terms of settlement and make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms."[72]

The amendments to Rule 23 (which took effect on December 1, 2018) altered the

---

[68] *See supra* n.14.

[69] *See In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 117 (S.D.N.Y. 2010) (recognizing that "[m]any of the class members' claims will be small relative to the high costs of maintaining an antitrust action," and, thus, "[s]treamlining the litigation in one forum will simplify the process and avoid inconsistency"); *Buspirone*, 210 F.R.D. at 58 (holding class certification for a direct purchaser class action was the superior method of adjudicating the claims at issue); *Arava*, 2008 WL 11399716, at *3 (same).

[70] *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 27 (E.D.N.Y. 2019 (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)). The Second Circuit has noted that where "a settlement is negotiated prior to class certification, as is the case here, it is subject to a higher degree of scrutiny in assessing its fairness. The District Court determines a settlement's fairness by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (internal citations omitted). Here, as explained in greater detail in Parts III.B.4 and 5, the settlement provides a strong recovery to the proposed class and was negotiated at arms-length in good faith.

[71] *Payment Card*, 330 F.R.D. at 27 (internal quotation marks omitted); *see In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007).

[72] *Payment Card*, 330 F.R.D. at 27 (quoting *Initial Pub. Offering*, 243 F.R.D. at 87).

standards that guide a court's preliminary approval analysis.[73] "Under the new Rule 23(e), in weighing a grant of preliminary approval, district courts must determine whether 'giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal."[74] Because Rule 23(e)(2) sets forth the factors courts must consider when weighing final approval, "courts must assess at the preliminary approval stage whether the parties have shown that the court will likely find that the factors weigh in favor of final settlement approval."[75]

As this Court has explained, the amended Rule 23(e)(2) requires courts to consider: "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other."

Prior to the 2018 amendments, courts in the Second Circuit weighed nine factors, known as the *Grinnell* factors, to determine whether final approval was "fair, reasonable, and adequate." These factors are "(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of

[73] *Id.* at 28. ("Prior to the amendments, Rule 23 did not specify standards for courts to follow when deciding whether to grant preliminary approval. Instead, courts in the Second Circuit interpreted Rule 23 to require a determination of whether the proposed settlement fell within the range of possible final approval." (internal quotation marks omitted)).

[74] *Id.* (citing Fed. R. Civ. P. 23(e)(1)(B)(i-ii).

[75] *Id.*

discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation."[76] This Court "understands the new Rule 23(e) factors to add to, rather than displace, the *Grinnell* factors."[77] Indeed, because "there is significant overlap between the *Grinnell* factors and the Rule 23(e)(2)(C-D) factors," "the Court considers both sets of factors below in its analysis of whether the Court will likely find that the proposed settlement is fair, reasonable, and adequate, and grant final approval."[78]

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."[79] 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 underlying litigation is highly complex, expensive, and likely to last for close to another year.**

The first *Grinnell* factor asks the Court to consider "the complexity, expense and likely duration of the litigation."[80] Similarly, Rule 23(e)(2)(C) calls for consideration of whether "the

[76] *Id.* at 29 (quoting *In re Initial Pub. Offering Sec. Litig.*, 260 F.R.D. 81, 88 (S.D.N.Y. 2009)).

[77] *Id.*

[78] *Id.*

[79] Federal Judicial Center, *Manual for Complex Litigation, Fourth* § 21.632 at 382 (4th ed. 2004).

[80] *Payment Card*, 330 F.R.D. at 29.

relief provided for the class is adequate, taking into account" "the costs, risks, and delay of trial and appeal."

Here, the intensive discovery and fact finding that the parties conducted bore out the complexity of the suit. There are four distinct grounds for antitrust liability—patent fraud, sham citizen petitions, pre-textual transfer of the Restasis patents to a Native American tribe, and sham litigation—as well as disputed damages liability. There are also distinct legal issues—such as the effect of class members' distribution services agreements on the damages that can be recovered by the direct purchaser class plaintiffs—that complicate the suit. Furthermore, the FDA still has not approved any of the generic Restasis ANDAs. The experts in this case disagree regarding whether that lack of approval has anything to do with Allergan's conduct and whether any of the ANDAs have actually shown that a generic product is bioequivalent to Restasis. Similarly, the experts in this case disagree over whether Allergan's citizen petitions were baseless. Absent settlement, these issues would require extensive further litigation, including motions for summary judgment, motions *in limine*, *Daubert* motions, trial, and multiple potential appeals. The expert discovery costs alone have already been very high in this case and will only continue to increase should litigation continue. The proposed Settlement secures a fair and adequate recovery for the class, saving it these future litigation costs as well as the substantially delayed recovery these future proceedings would certainly entail.

**2. Class counsel engaged in extensive investigation and discovery.**

The third *Grinnell* factor requires this Court to consider "the stage of the proceedings and the amount of discovery completed."[81] As detailed in the Sobol Declaration, the direct purchaser Settlement was reached at a relatively mature stage of the case. After closely supervising the case

[81] *Payment Card*, 330 F.R.D. at 29.

for two years, the Court is familiar with the parties' litigation activities. The parties engaged in motion to dismiss briefing, class certification briefing and hearings, expert reports, and numerous depositions before the Settlement was consummated. As a result of this extensive fact discovery, issues relating to liability, causation, and damages were fully developed, enabling interim Lead/Liaison counsel to make an informed decision regarding the proposed Settlement.

**3. The risks of the litigation are high.**

The fourth ("the risks of establishing liability"[82]), fifth ("the risks of establishing damages"[83]), and sixth ("the risks of maintaining the class through the trial"[84]) *Grinnell* factors require this Court to consider the risks of continued litigation to the parties. The discovery process underscored the real risks to each party should this litigation continue to trial. The direct purchasers believe that they have assembled proof of Allergan's liability for the generic delay. But the direct purchasers also face risks should they continue to litigate this matter. All patents covering Restasis have either expired or been invalidated and the FDA has rejected Allergan's citizen petitions, yet the FDA still has not approved a generic Restasis product. Similarly, experts in this case have offered conflicting opinions concerning whether Allergan's citizen petitions were baseless. The proposed Settlement accounts for these serious risks on either side and provides a fair and adequate recovery for the class.

**4. The proposed Settlement is fair to both parties.**

Based on these risks, the proposed Settlement represents the best outcome for both parties. When determining whether a proposed settlement is fair, courts within this circuit compare the proposed settlement with the likely result of litigation (the eighth and ninth *Grinnell*

[82] *Id.*

[83] *Id.*

[84] *Id.* This factor does not pose notable risk to the plaintiffs.

factors) as well as the ability of the defendant to satisfy a greater judgment (the seventh *Grinnell* factor).[85] Here, although Allergan could likely satisfy a greater judgment, it is highly uncertain whether litigation would provide a better outcome for the class. As previously explained, every day that passes without a generic Restasis increases the risks to the direct purchaser class. As a result, the proposed Settlement is a fair and reasonable outcome for the proposed class in comparison with the potential result of litigation.

**5. The proposed Settlement is the product of good faith, informed, arm's-length negotiations.**

Rule 23(e)(2)(B) requires this Court to assess whether the proposed settlement was negotiated at arm's length. The "absence of any indication of collusion, the protracted settlement negotiations, [and] the ability and experience of plaintiffs' counsel . . . are important indicia of the propriety of settlement negotiations."[86] Arm's-length negotiations in good faith guard against any "obvious deficiencies" in a settlement.[87] As detailed in the Sobol Declaration, the parties' counsel engaged in many rounds of arm's-length discussions over the course of months.

**6. Proposed Lead Class Counsel are well-qualified.**

Rule 23(e)(2)(A) asks the Court to examine whether the class representatives and class counsel have adequately represented the class. As previously explained,[88] interim Lead/Liaison counsel are highly experienced in pharmaceutical antitrust litigation generally and delayed generic entry cases in particular.[89] Additionally, the class representatives have demonstrated their commitment to this case, making themselves available for multiple depositions.

---

[85] *Id.*

[86] *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982).

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

[88] *See* Part III.A.1.d(2).

[89] *See* Sobol Decl. Ex. 2.

**7. The proposed Settlement treats class members equitably relative to each other and the proposed method of fee disbursement is fair.**

Rule 23(e)(2)(C)(ii) and (D) further require courts to assess the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims" and whether the "proposal treats class members equitably relative to each other," respectively. Here, as later detailed in Part III.D, interim Lead/Liaison counsel have requested that a highly experience claims administrator, RG/2 Claims Administration LLC ("RG/2"), be named the settlement administrator. And counsel proposes an allocation plan that has been sanctioned by over a dozen courts. This proposed appointment will ensure that the class funds are effectively disbursed and the class members are treated equitably relative to each other.

**8. There are currently no known opt-outs to the class (other than the retailer plaintiffs) and class counsel have yet to apply for attorneys' fees.**

The second *Grinnell* factor ("the reaction of the class to the settlement"[90]) cannot be assessed at the preliminary approval stage, as any potential opt-outs are still unknown.[91] Similarly, the 23(e)(2)(C)(iii) factor—"the terms of any proposed award of attorney's fees, including timing of payment"—cannot currently be assessed as class counsel has yet to apply for an award of attorneys' fees.

## C. 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]." "Notice in a class action suit must be neutral and sufficient to alert prospective class members to the pendency and terms of the proposed settlement and to the options that are open to them in connection with the

[90] *Payment Card*, 330 F.R.D. at 29.

[91] *See id.* (noting that at the preliminary approval stage, the only factor the Court cannot fully address is the second *Grinnell* factor).

proceedings."[92] Additionally, "notice must be mailed to each class member who can be identified through reasonable effort."[93] 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." Here, because the direct purchaser class is a finite group of 35 businesses, individual direct mail notice is sufficient and practicable.[94]

The proposed notice (Exhibit 3 to the Sobol Declaration) describes the class, procedural status of the litigation, significant terms of the proposed Settlement (including the amount of money Allergan has agreed to pay), the releases Allergan will receive, and the plan for 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 or to request exclusion from the direct purchaser settlement class. The notice is substantially similar, in both form and substance, to notices used in other direct purchaser generic delay cases. It satisfies the notice requirements of Rule 23(e) and the due process requirements that must be met to bind each member of the class.[95] Interim Lead/Liaison counsel will also post the notice and key litigation documents on a specially designated website: www.RestasisAntitrustSettlement.com.

**D. 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

[92] *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 177 (E.D.N.Y. Sept. 17, 1999) (citing *Handschu v. Special Services Div.*, 787 F.2d 828, 832-33 (2d Cir. 1986)).

[93] *Id.* (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)).

[94] *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355 n.22 (1978).

[95] A declaration from William Wickersham of support of the notice and notice program is attached as Exhibit 9 to the Sobol Declaration.

disseminating notice to the class and, assuming final approval of the Settlement, 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 action practitioners and highly credentialed tax professionals."[96] RG/2 has provided an estimate for the cost of dissemination of the settlement notice and administration of the settlement funds that is similar to its costs in other like matters. Based on interim Lead/Liaison counsel's experience, RG/2's estimate is competitive and reasonable.[97]

**E. The Court should appoint The Huntington National Bank as escrow agent.**

The direct purchasers request that the Court approve The Huntington National Bank as escrow agent for the settlement funds. The Huntington National Bank is among the largest 1% of banks in the United States based on size, holds over $57 billion in assets, and includes 700 offices nationwide. The Bank's National Settlement Team has handled more than 1,000 settlements and Interim Lead/Liaison counsel have successfully used the services of the Bank as escrow agent in multiple class action settlements. The parties have agreed on an escrow agreement to govern the account to hold the settlement proceeds during the approval process.[98]

**F. The proposed schedule is fair and should be approved.**

The direct purchasers propose the below schedule for completing the approval process:

| **Event** | **Deadline** |
|---|---|
| Allergan send notices as required by CAFA. | Within 10 days of the filing of this motion. |
| Dissemination of notices to the proposed direct purchaser settlement class in the form and | Within 14 days of entry of the Order preliminarily approving the settlement. |

[96] About Us, RG/2 Claims Administration, www.rg2claims.com/about.html.

[97] 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.

[98] *See* Sobol Decl. Ex. 6 (escrow agreement).

| | |
|---|---|
| manner proposed. | |
| 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 dissemination of notice to the direct purchaser settlement class as set forth in the final notice mailed to class members. |
| Deadline for class members to opt out or object to the settlement and/or application for attorneys' fees, expenses, and service awards to the class representatives. | No later than 35 days from the date of dissemination of notice to the direct purchaser settlement class as set forth in the final 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). |

This proposal provides sufficient time (35 days) for class members to opt out or object to the Settlement after notice of the Settlement.[99] Prior to the deadline for class members to object, class counsel will file their motion for attorney's fees and reimbursement of expenses and post that motion on the settlement website for access by interested class members. Any class member who timely objects to the Settlement may be heard at the fairness hearing.

## IV. CONCLUSION

The Settlement negotiated at arm's length by the parties is fair, reasonable, and adequate. The direct purchaser class plaintiffs request that the Court certify the proposed class for settlement purposes, enter the proposed Preliminary Approval Order approving the settlement, approve the proposed form and manner of notice, and approve the proposed settlement schedule.

[99] *See, e.g.*, Order ¶¶ 2, 4, *In re K-Dur Antitrust Litig.*, No. 01-cv-1652, ECF No. 887 (D.N.J. Sept. 12, 2016) (30-day notice period approved); Order ¶¶ 4, 7, *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 06-cv-1797, ECF No. 948 (E.D. Pa. Dec. 17, 2015) (35-day period); Order ¶ 5, *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 05-cv-2237, ECF No. 90 (S.D.N.Y. Aug. 16, 2011) (30-day period); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04-cv-8144, 2009 WL 5178546, at *23 (S.D.N.Y. Dec. 23, 2009) (30-day period).

Dated: February 25, 2020

Respectfully submitted,

*/s/ Thomas M. Sobol*

Thomas M. Sobol
David S. Nalven
Kristen A. Johnson
Jessica MacAuley
Hannah W. Brennan
**HAGENS BERMAN SOBOL SHAPIRO LLP**
55 Cambridge Parkway, Suite 301
Cambridge, Massachusetts 02142
Tel: (617) 482-3700
Fax: (617) 482-3003
tom@hbsslaw.com
davidn@hbsslaw.com
kristenj@hbsslaw.com
jessicam@hbsslaw.com
hannahb@hbsslaw.com

*Direct Purchaser Interim Co-Lead Counsel*

Calvin Capshaw
Elizabeth DeRieux
**CAPSHAW DERIEUX, LLP**
114 E. Commerce Ave.
Gladewater, Texas 75647
Tel.: (903) 845-5770
ccapshaw@capshawlaw.com
ederieux@capshawlaw.com

Linda P. Nussbaum
Bart Cohen
Peter Moran
**NUSSBAUM LAW GROUP, P.C.**
1211 Avenue of the Americas, 40th Floor
New York, NY 10036-8718
Tel.: (917) 438-9102
lnussbaum@nussbaumpc.com
bcohen@nussbaumpc.com
pmoran@nussbaumpc.com

Robert N. Kaplan

Paul E. Slater
Joseph M. Vanek
David P. Germaine
John P. Bjork
**SPERLING & SLATER, P.C.**
55 W. Monroe Street, Suite 3200
Chicago, Illinois 60603
Tel: (312) 641-3200
Fax: (312) 641-6492
pes@sperling-law.com
jvanek@sperling-law.com
dgermaine@sperling-law.com
jbjork@sperling-law.com

John D. Radice
A. Luke Smith
**RADICE LAW FIRM, P.C.**
475 Wall Street
Princeton, NJ 08540
Tel: (646) 245-8502
Fax: (609) 385-0745
jradice@radicelawfirm.com
lsmith@radicelawfirm.com

Gregory K. Arenson
Elana Katcher
**KAPLAN FOX & KILSHEIMER LLP**
850 Third Avenue, 14th Floor
New York, NY 10022
Tel.: (212) 687-1980
rkaplan@kaplanfox.com
garenson@kaplanfox.com
ekatcher@kaplanfox.com

*Counsel for FWK Holdings, LLC, Meijer, Inc., and Meijer Distribution, Inc. and the Proposed Class*

Daniel J. Walker
**BERGER MONTAGUE PC**
2001 Pennsylvania Avenue, N.W., Suite 300
Washington, D.C. 20006
Tel: (202) 559-9745
Fax: (215) 875-4606
dwalker@bm.net

David F. Sorensen
Ellen Noteware
Zachary Caplan
Nicolas Urban
**BERGER MONTAGUE PC**
1818 Market St., Suite 3600
Philadelphia, PA 19103
Tel.: (215) 875-3000
Fax: (215) 875-4604
dsorensen@bm.net
enoteware@bm.net
zcaplan@bm.net
nurban@bm.net

Peter R. Kohn
**FARUQI & FARUQI LLP**
One Penn Center, Suite 1550
1617 JFK Boulevard
Philadelphia, PA 19103
Tel.: (215) 277-5770
Fax: (215) 277-5771
pkohn@faruqilaw.com

Bradley J. Demuth
Kristyn Fields
**FARUQI & FARUQI LLP**
685 Third Avenue, 26th Floor
New York, NY 10017
Tel.: (212) 983-9330
Fax: (212) 983-9331
bdemuth@faruqilaw.com
kfields@faruqilaw.com

Barry Taus
Miles Greaves
**TAUS, CEBULASH & LANDAU, LLP**
80 Maiden Lane, Suite 1204
New York, NY 10038
Tel: (212) 931-0704
Fax: (212) 931-0703
btaus@tcllaw.com
mgreaves@tcllaw.com

*Counsel for Rochester Drug Co-Operative, Inc. and the Proposed Class*

Michael L. Roberts
Debra G. Josephson
Karen S. Halbert
Stephanie E. Smith
**ROBERTS LAW FIRM, P.A**.
20 Rahling Circle
Little Rock, AR 72223
Tel.: (501) 821-5575
Fax: (501) 821-4474
mikeroberts@robertslawfirm.us
debrajosephson@robertslawfirm.us
karenhalbert@robertslawfirm.us
stephaniesmith@robertslawfirm.us

Dianne M. Nast
**NASTLAW LLC**
1101 Market Street, Suite 2801
Philadelphia, PA 19107
Tel: (215) 923-9300
Fax: (215) 923-9302
dnast@nastlaw.com

*Counsel for KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc. and the Proposed Class*

**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 25, 2020

/s/ *Thomas M. Sobol*
Thomas M. Sobol