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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE GLUMETZA ANTITRUST LITIGATION	Case No.: 3:19-cv-05822-WHA (Consolidated)
This Document Relates To: *Meijer, Inc. et al. v. Bausch Health Companies, Inc. et al.*, No. 3:19-cv-05822-WHA *Bi-Lo, LLC et al. v. Bausch Health Companies, Inc. et al.*, No. 3:19-cv-06138-WHA *KPH Healthcare Services, Inc. v. Bausch Health Companies, Inc. et al.*, No. 3:19-cv-06839-WHA	**DIRECT PURCHASER CLASS PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH ASSERTIO, APPROVAL OF FORM AND MANNER OF NOTICE, APPOINTMENT OF SETTLEMENT ADMINISTRATOR AND ESCROW AGENT, AND FINAL SETTLEMENT SCHEDULE AND DATE FOR FINAL APPROVAL HEARING** Date: September 22, 2021 Time: 8:00 am Courtroom: 12, 19th Floor Before: William Alsup

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 22, 2021, at 8:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable William Alsup, United States District Judge, in Courtroom 12 of the United States District Court for the Northern District of California in San Francisco, California, plaintiffs Meijer, Inc., Meijer Distribution, Inc., BI-LO, LLC, Winn-Dixie Logistics, Inc., and KPH Healthcare Services, Inc. ("Plaintiffs"), on behalf of themselves and the direct purchaser class previously certified by this Court (the "Direct Purchaser Class" or "Class"), will move the Court pursuant to Federal Rule of Civil Procedure 23(e) for entry of an Order:

1. Granting preliminary approval of the agreement by and between Plaintiffs, individually and on behalf of the Direct Purchaser Class, with Defendant Assertio Therapeutics, Inc. ("Assertio") to settle the claims brought on behalf of the Direct Purchaser Class against Assertio in this action;

2. Approving the proposed form and manner of notice of the settlement to the Direct Purchaser Class;

3. Appointing Angeion Group, LLC as settlement administrator to assist in disseminating settlement notice to Direct Purchaser Class members and, if the settlement is granted final approval, administer distribution of the settlement fund to the Direct Purchaser Class;

4. 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

5. Setting a schedule for the final approval process, including the date for a Final Approval Hearing.

In support of this motion, Plaintiffs submit that the proposed settlement is fair, reasonable, and adequate, providing a gross cash payment to the Direct Purchaser Class of $3,850,000.00 in exchange for defined releases to Assertio, and that the proposed form and manner of notice will adequately inform the Direct Purchaser Class of the terms of the settlement.

This motion is based on the Notice of Motion, the Supporting Memorandum of Points and Authorities, and the supporting declarations and exhibits, all papers and records on file in this matter, and the argument of counsel.

Plaintiffs have conferred with counsel for Assertio, and Assertio does not oppose this motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Following an investigation conducted without the aid of any prior governmental action or investigation, Plaintiffs filed this antitrust class action, individually and on behalf of the Direct Purchaser Class, against defendants Bausch Health Companies Inc., Salix Pharmaceuticals, Ltd., Salix Pharmaceuticals, Inc., and Santarus Inc. ("Bausch"), Lupin Pharmaceuticals, Inc. and Lupin, Ltd. ("Lupin"), and Assertio Therapeutics, Inc. ("Assertio") (collectively, "Defendants") on August 29, 2019. Plaintiffs allege that, in exchange for an agreement from generic manufacturer Lupin to delay the launch of its generic Glumetza until February 1, 2016, brand manufacturers Depomed, Inc. (now Assertio) and Bausch paid Lupin with $3 million in cash and a promise not to launch an authorized generic Glumetza until February 2017—12 months after Lupin's delayed generic launch. Plaintiffs allege that, absent these reverse payments, generic Glumetza would have been launched as early as December 2012 (rather than February 1, 2016) and authorized generic Glumetza would have been launched simultaneously. Plaintiffs allege that the reverse payments caused them hundreds of millions of dollars of overcharge damages. Defendants deny that they engaged in unlawful conduct or that their conduct harmed the Direct Purchaser Class.

From approximately September 2019 through the summer of 2021, this litigation proceeded through fact and expert discovery, class certification, summary judgment, and *Daubert* motion practice, and the parties began actively preparing for the trial scheduled to begin on October 4, 2021. In January 2021, the parties initiated settlement discussions at the direction of the Court and under the supervision of Magistrate Judge Donna M. Ryu. On September 15th, with trial preparations well underway, the Direct Purchaser Class and Assertio reached a settlement with the guidance and oversight of Magistrate Judge Ryu. The proposed settlement provides for $3.85 million[1] to be paid to the Class in exchange for dismissal of the litigation with prejudice as to

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

Assertio only and certain releases from the Class as to Assertio only.[2] Under the agreement, Assertio will pay $3.85 million into a settlement escrow account within six business days of this Court's entry of an order granting preliminary approval of the settlement.

The Direct Purchaser Class's recovery of $3.85 million from Assertio, though a small fraction of their claimed aggregate damages,[3] is a fair and reasonable recovery for the Direct Purchaser Class in light of Assertio's perilous financial position, the Class's potential recoveries from other defendants, and the risks and costs of trial. It was negotiated in good faith and at arm's length by counsel experienced in pharmaceutical antitrust matters under the auspices of Magistrate Judge Ryu, after nearly two years of hard-fought litigation and while the parties were preparing for trial. And the Settlement Agreement guarantees that no other settling plaintiff in this federal action will be treated better than the members of the Direct Purchaser Class.

Plaintiffs, on behalf of the certified Direct Purchaser Class, now seek preliminary approval of the proposed settlement, approval of the form and manner of notice to the Class, appointment of a settlement administrator and escrow agent, and a schedule for the final approval process.

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." Approving a settlement is a two-step process, the first of which requires the Court to "make a preliminary determination that the

[2] *See* Ex. 1 to Decl. of Steve D. Shadowen, Settlement Agreement by and between Direct Purchaser Class and Assertio ("Settlement Agreement").

[3] *See* Ex. 3 to Rebuttal Report of Jeffrey J. Leitzinger, Sept. 11, 2020 (showing, after deducting retailer opt outs, class damages ranging from $500 to $900 million depending on the entry scenario). Note that this estimate is based on data through November 2019, the latest then available. And the damages are single damages. Of course, Assertio contends that damages, if any, were much lower, ranging from negative $79.5 million to $540.2 million, depending on the (different) entry scenario. *See* Expert Report of Bruce Strombom, Ph.D. at 46, fig. 8, Aug. 21, 2020.

settlement is 'fair, reasonable, and adequate' when considering the factors set out in Rule 23(e)(2)."[4] At the preliminary approval stage, "a full fairness analysis is unnecessary"[5]; the Court need only make an "'initial evaluation of the fairness of the proposed settlement . . . on the basis of written submissions and informal presentation from the settling parties."[6] At this phase:

> Courts may preliminarily approve a settlement and direct notice to the class if the proposed settlement: (1) appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not grant improper preferential treatment to class representatives or other segments of the class; and (4) falls within the range of possible approval.[7]

The Court does not have the authority to "delete, modify or substitute certain provisions," so the settlement "must stand or fall in its entirety."[8] While courts "must be particularly vigilant" for signs of collusion or self-interest, "[t]he Ninth Circuit maintains a 'strong judicial policy' that favors the settlement of class actions."[9]

The Court should grant preliminary approval because, as detailed further below, the proposed settlement satisfies this standard and complies with this district's *Procedural Guidance for Class Action Settlements*[10] and the Court's November 4, 2019 Notice and Order on Putative Class Actions and Factors to Be Evaluated for Any Proposed Settlement.[11]

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[4] *Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 966 (N.D. Cal. 2019); *see also Edenborough v. ADT, LLC*, No. 16-cv-02233, 2017 WL 4641988, at *5-6 (N.D. Cal. Oct. 16, 2017); *Manual for Complex Litigation (Fourth)* § 21.632 (2015) ("*Manual*").

[5] *Zepeda v. PayPal, Inc.*, Nos. C 10-2500, C 10-1668, 2014 WL 718509, at *4 (N.D. Cal. Feb. 24, 2014) (quoting *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D. Cal. 2008)).

[6] *In re High-Tech Emp. Antitrust Litig.*, No. 11-cv-2509, 2013 WL 6328811, at *1 (N.D. Cal. Oct. 30, 2013) (quoting *Manual* § 21.632).

[7] *Cuzick v. Zodiac U.S. Seat Shells, LLC*, No. 16-cv-03793, 2017 WL 4536255, at *5 (N.D. Cal. Oct. 11, 2017) (citing *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)).

[8] *Id.* at *5 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

[9] *Haralson*, 383 F. Supp. 3d at 966 (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011); *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)).

[10] https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/ (updated Nov. 1, 2018 & Dec. 5, 2018).

[11] ECF No. 39.

The initial evaluation for preliminary approval does not require a hearing and may be made on the basis of information already known. In light of the Court's extensive knowledge of this case and the involvement of Magistrate Judge Ryu in all negotiations, Plaintiffs respectfully submit that no hearing on preliminary approval is necessary and that the Court may grant preliminary approval on the papers. Should the Court desire a hearing, however, Class Counsel will, of course, make themselves available at the Court's convenience.

1. The proposed settlement, reached on the eve of trial after hard-fought litigation, was the result of serious, arm's-length negotiations guided by Magistrate Judge Donna M. Ryu.

The first preliminary approval factor evaluates the means by which the parties reached the settlement agreement. To grant preliminary approval, "a court must be satisfied that the parties 'have engaged in sufficient investigation of the facts to enable to court to intelligently make . . . an appraisal of the settlement.'"[12] There is "an initial presumption of fairness" afforded to settlements "recommended by class counsel after arm's-length bargaining."[13] The use of an experienced mediator, particularly after discovery, also "supports the conclusion that Plaintiffs were armed with sufficient information about the case to broker a fair settlement."[14]

The proposed settlement was reached less than two months before trial, following extensive investigation of and discovery on the merits of the case, including reviewing more than a half million documents produced by the defendants and non-parties; taking dozens of depositions;

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[12] *Uschold v. NSMG Shared Serv., LLC*, 333 F.R.D. 157, 169 (N.D. Cal. 2019) (quoting *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 396 (C.D. Cal. 2007)); *see also Acosta v. Frito-Lay, Inc.*, No.15-cv-02128, 2018 WL 646691, at *8 (N.D. Cal. Jan 31, 2018) ("For the parties 'to have brokered a fair settlement, they must have been armed with sufficient information about the case to have been able to reasonably assess its strengths and value.'" (quoting *Acosta*, 243 F.R.D. at 396)).

[13] *Cuzick*, 2017 WL 4536255, at *5 (quoting *Harris v. Vector Mktg. Corp.*, No. 08-cv-5198, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011)).

[14] *Uschold*, 333 F.R.D. at 170; *see also Acosta*, 2018 WL 646691, at *8 ("The use of a mediator and the presence of discovery 'support[s] the conclusion that the Plaintiff was appropriately informed in negotiating a settlement.'" (quoting *Villegas v. J.P. Morgan Chase & Co.*, No. 09-cv-00261, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012))); *Satchell v. Fed. Express Corp.*, No. C03-2659, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.").

preparing expert reports and taking and defending expert depositions; briefing and resolution of class certification and summary judgment motions; briefing of *Daubert* motions; and preparing witness lists, exhibits lists, and other trial materials. Class Counsel expended tens of thousands of hours developing and preparing their case before reaching a settlement with Assertio. The Court, having presided over discovery, motion practice, and pretrial management, is well aware of the intensity of the settling parties' engagement in this case.

The proposed settlement was the result of arm's-length, non-collusive negotiations. During settlement negotiations, the parties prepared and presented written and oral arguments on the merits and value of Plaintiffs' claims and Assertio's defenses. With the case nearing trial, the parties had fully developed their claims and defenses, enabling both sides to negotiate with a full understanding of the strengths and weaknesses of their cases. Moreover, the proposed settlement was negotiated with the active involvement of Magistrate Judge Ryu.

2. The proposed settlement has no obvious deficiencies.

There are no clear omissions or deficiencies in the proposed settlement. To the contrary, the settlement fund created by the proposed settlement provides members of the Direct Purchaser Class ("Class Members") with a cash recovery that is reasonable in view of the financial condition of Assertio and the other contingent liabilities it faces. And the release granted to Assertio is narrowly tailored to the allegations at issue in the litigation.[15]

Nor are there any red flags as identified by the Court in its Notice and Order on Putative Class Actions and Factors to be Evaluated for Any Proposed Settlement.[16] The proposed settlement does not allow for a reversion of any settlement funds to Assertio; does not contain any

[15] *See, e.g.*, *Torres v. Pick-A-Part Auto Wrecking*, No. 16-cv-01915, 2018 WL 306287, at *3 (E.D. Cal. Jan. 5, 2018) (finding no obvious deficiencies in proposed agreement providing for non-reversionary cash fund to be divided among class members who submit valid claims and release of liability narrowly tailored to the claims); *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1334 (N.D. Cal. 2014) (finding no obvious deficiencies in settlement agreement where scope of release, while broad, was limited to claims based on the facts set forth in the complaint). The proposed settlement contemplates release of claims for class members "who receive notice pursuant to this Settlement Agreement." Settlement Agreement § 9.

[16] *See* ECF No. 39.

agreement regarding attorneys' fees, leaving the issue to the Court's discretion; does not expand the Class beyond that previously certified; and does not request any incentive awards for the Class representatives (though they would have been justified by the work performed and service provided by these representatives).

3. The proposed settlement treats all Class Members fairly and equitably.

The Ninth Circuit requires the Court, when considering this factor, to be "'particularly vigilant' for signs that counsel have allowed the 'self-interests' of 'certain class members to infect negotiations.'"[17] For that reason, courts in this district deem preliminary approval inappropriate "where the proposed agreement 'improperly grants preferential treatment to class representatives.'"[18]

Pursuant to the proposed plan of allocation described in Section II.B., *infra*, each Class Member's share of the settlement will be calculated in exactly the same way. Specifically, as is standard in allocation plans that have been approved in similar delayed generic entry antitrust class actions, each Class Member's share of the settlement fund will be calculated on a *pro rata* basis based on that Class Member's purchases.[19] As a result, all Class Members are treated equally and fairly with respect to their monetary recovery. Courts in this district routinely find that plans to

[17] *Cuzick*, 2017 WL 4536255, at *6 (quoting *Bluetooth Headset*, 654 F.3d at 947).

[18] *Id.* (quoting *Tableware*, 484 F. Supp. 2d at 1079).

[19] This is the standard allocation plan 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).

distribute settlement funds *pro rata* to class members are fair and indicate that no preferential treatment has been granted to class representatives or other class members.[20]

The settlement also treats Class Members fairly through the inclusion of a most favored nation (MFN) provision, which ensures the terms of their settlement with Assertio are at least as favorable as those of any settlement between Assertio and any opt-out plaintiff(s). The MFN clause guarantees the Class an equitable recovery by providing that, in the event the amount of any settlement between Assertio and one or more opt-out plaintiffs as a percentage of those opt-out plaintiffs' claimed direct purchases by unit volume exceeds the amount of the Direct Purchaser Class's settlement amount as a percentage of their claimed direct purchases by unit volume, Assertio will increase the Direct Purchaser Class's settlement amount to a commensurate percentage.[21]

4. The $3.85 million settlement amount secures a fair and reasonable recovery for the Class in light of Assertio's weak financial position, potential recoveries from other defendants, and the inherent risks of trial.

To determine whether the settlement falls within the range for possible approval, courts focus on "substantive fairness and adequacy" and consider "plaintiff's expected recovery balanced

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[20] *See, e.g.*, *Acosta*, 2018 WL 646691, at *8 (finding no preferential treatment where proposed allocation plan entitled each class member to claim their *pro rata* share of settlement fund based on number of workweeks worked during class period); *In re Cathode Ray Tube (Crt) Antitrust Litig.*, No. C-07-5944, 2016 WL 3648478, at *15 (N.D. Cal. July 7, 2016) ("[T]he allocation plan appears to have a reasonable, rational basis, and fairly treats class members by awarding each a pro rata share . . . ."); *Gaudin v. Saxon Mortg. Servs., Inc.*, No. 11-cv-01663, 2015 WL 7454183, at *8 (N.D. Cal. Nov. 23, 2015) (finding proposed plan to distribute net settlement fund fairly "award[ed] a pro rata share to class members based on the extent of their injuries"); *In re Zynga Inc. Sec. Litig.*, No. 12-cv-04007, 2015 WL 6471171, at *12 (N.D. Cal. Oct. 27, 2015) ("A settlement in a securities class action case can be reasonable if it fairly treats class members by awarding a pro rata share to every Authorized Claimant . . . . (quoting *Vinh Nguyen v. Radient Pharm. Corp.*, No. 11-cv-00406, 2014 WL 1802293, at *5 (C.D. Cal. May 6, 2014))); *Booth v. Strategic Realty Tr., Inc.*, No. 13-cv-04921, 2015 WL 6002919, at *7 (N.D. Cal. Oct. 15, 2015) (finding the plaintiffs' proposed allocation plan "'fairly treats class members by awarding a pro rata share' to each class member" (quoting *In re Heritage Bond Litig.*, No. 02-ml-2475, 2005 WL 1594403, at *11 (C.D. Cal. June 10, 2005))).

[21] *See* Settlement Agreement § 6(b).

against the value of the settlement offer."[22] This "requires the Court to evaluate the strength of Plaintiff's case."[23] There is no "particular formula" for assessing the fairness and adequacy of a settlement amount; "[u]ltimately, [it] is nothing more than an amalgam of delicate balancing, gross approximations, and rough justice."[24] And "it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to class members at trial."[25]

Here, while the Direct Purchaser Class's recovery of $3.85 million from Assertio is small compared to the Class's maximum potential recovery at trial,[26] it must be assessed in the context of Assertio's difficult financial condition. Assertio is a subsidiary of the public company Assertio Holdings, Inc. Because Assertio itself is not a public company, Class Counsel obtained confidential information about Assertio's financial condition directly from Assertio's counsel, including a declaration from Assertio confirming the accuracy of the information. Class Counsel then retained Dr. Mark L. Frigo, an econometrics and accounting expert, to analyze Assertio's financial statements and its parent company's SEC filings and to research and evaluate Assertio's financial position, credit analysis, and credit risk.[27] Notably, even Assertio's parent company (which has assets in addition to and separate from Assertio) currently has a stock price of less than $1 and a total market capitalization of less than $50 million.[28]

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[22] *Acosta*, 2018 WL 646691, at *9 (quoting *Harris*, 2011 WL 1627973, at *9).

[23] *Cuzick*, 2017 WL 4536255, at *6.

[24] *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (quoting *Officers for Justice*, 688 F.2d at 625).

[25] *Uschold*, 333 F.R.D. at 171 (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004)).

[26] The $3.85 million settlement amount is 0.43% to 0.77% of the aggregate overcharges calculated by Dr. Leitzinger for various entry scenarios. *See supra* note 3.

[27] *See* Ex. 10 to Decl. of Steve D. Shadowen, Decl. of Dr. Mark L. Frigo, ¶¶ 1–15 ("Frigo Decl.").

[28] *See* NasdaqCM Real Time Price for Assertio Holding, Inc. (ASRT), Yahoo! Finance, https://finance.yahoo.com/quote/ASRT/ (last visited September 16, 2021).

Dr. Frigo reviewed Assertio's cash balances and noted that not only were they very low, but there was a significant decrease in that cash balance from June 30, 2020 to April 30, 2021, signaling significant financial risk.[29] Assertio's cash position has remained low since then, as explained in greater detail in the Frigo declaration.[30] Assertio's financial statements also show a consistently negative working capital over the past two years, which means it is difficult for Assertio to find cash to pay short-term liabilities as they become due.[31] This further indicates Assertio's lack of ability to pay a significant judgment. Dr. Frigo also observed continued significant liabilities for customer rebates, returns, and discounts, suggesting there is a significant risk Assertio's accounts receivable will not lead to an improvement in its cash position.[32]

Based on this data, Dr. Frigo opined that (1) Assertio would be unable to survive a significant adverse financial event such as an adverse judgment in this case, and (2) the $3.85 million settlement amount is "at the high end of the range of payments [it] can afford while still meeting its other obligations."[33]

Assertio also faces significant contingent liabilities resulting from its having been named as a defendant in more than 250 opioid-related lawsuits or related matters. As reported by Assertio Holdings in its Form 10-Q for the period ending June 30, 2021:

> **Multidistrict Opioid Litigation**
>
> A number of pharmaceutical manufacturers, distributors and other industry participants have been named in numerous lawsuits around the country brought by various groups of plaintiffs, including city and county governments, hospitals, individuals and others. In general, the lawsuits assert claims arising from defendants' manufacturing, distributing, marketing and promoting of FDA-approved opioid drugs. The specific legal theories asserted vary from case to case, but the lawsuits generally include federal and/or state statutory claims, as well as claims arising under state common law. Plaintiffs seek various

[29] Frigo Decl. ¶ 16.

[30] *Id.*

[31] *Id.* ¶ 17

[32] *Id.* ¶¶ 18–19.

[33] *Id.* ¶ 21.

forms of damages, injunctive and other relief and attorneys' fees and costs. For such cases filed in or removed to federal court, the Judicial Panel on Multi-District Litigation issued an order in December 2017, establishing a Multi-District Litigation court (MDL Court) in the Northern District of Ohio (*In re National Prescription Opiate Litigation*, Case No. 1:17-MD-2804). Since that time, more than 2,000 such cases that were originally filed in U.S. District Courts, or removed to federal court from state court, have been filed in or transferred to the MDL Court. Assertio Therapeutics is currently involved in a subset of the lawsuits that have been filed in or transferred to the MDL Court, as well as one additional federal lawsuit in the Eastern District of Kentucky. Plaintiffs may file additional lawsuits in which the Company may be named. Plaintiffs in the pending federal cases involving the Company include individuals; county, municipal and other governmental entities; employee benefit plans, health insurance providers and other payors; hospitals, health clinics and other health care providers; Native American tribes; and non-profit organizations who assert, for themselves and in some cases for a putative class, federal and state statutory claims and state common law claims, such as conspiracy, nuisance, fraud, negligence, gross negligence, negligent and intentional infliction of emotional distress, deceptive trade practices, and products liability claims (defective design/failure to warn). In these cases, plaintiffs seek a variety of forms of relief, including actual damages to compensate for alleged personal injuries and for alleged past and future costs such as to provide care and services to persons with opioid-related addiction or related conditions, injunctive relief, including to prohibit alleged deceptive marketing practices and abate an alleged nuisance, establishment of a compensation fund, establishment of medical monitoring programs, disgorgement of profits, punitive and statutory treble damages, and attorneys' fees and costs. No trial date has been set in any of these lawsuits, which are at an early stage of proceedings. The Company intends to defend itself vigorously in these matters.

State Opioid Litigation

Related to the cases in the MDL Court noted above, there have been hundreds of similar lawsuits filed in state courts around the country, in which various groups of plaintiffs assert opioid-drug related claims against similar groups of defendants. Assertio Therapeutics is currently named in a subset of those cases, including cases in Missouri, Nevada, Pennsylvania, Texas and Utah. Plaintiffs may file additional lawsuits in which Assertio Therapeutics may be named. In the pending cases involving Assertio Therapeutics, plaintiffs are asserting state common law and statutory claims against the defendants similar in nature to the claims asserted in the MDL cases. Plaintiffs are seeking actual damages, disgorgement of profits, injunctive relief, punitive and statutory treble damages, and attorneys' fees and costs. The state lawsuits in which Assertio Therapeutics has

> been served are generally each at an early stage of proceedings. The Company intends to defend itself vigorously in these matters.[34]

Thus, even if Plaintiffs secured a judgment in this case against Assertio, the Direct Purchaser Class would likely be positioned as only one of hundreds of unsecured creditors in a potential bankruptcy proceeding.

Courts in this district have approved settlement amounts significantly lower than the alleged damages where the defendant's tenuous finances render its ability to pay a judgment uncertain, recognizing that a smaller certain reward is preferable to the possibility of a full recovery that class members may not be able to collect.[35] In such cases, the reasonableness of a settlement amount may more properly be compared not to the maximum possible damages, but to the total amount actually, practically recoverable from the settling defendant. In *In re Critical Path, Inc.*, for example, this Court found a $17.5 million settlement adequate because, while paltry in comparison to the over $200 million in damages alleged, it amounted to one-half of the defendants' limited assets and roughly two-thirds of their available insurance policies.[36] While the Court acknowledged

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[34] Assertio Holdings, Inc., Quarterly Report for the Period Ended June 30, 2021 (Form 10-Q) (Aug. 5, 2021), *available at* https://sec.report/Document/0001808665-21-000069/.

[35] *See, e.g.*, *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (finding the defendant's financial condition "predominate[d] to make clear that the district court acted within its discretion" in approving $30 million settlement amounting to 0.4% of alleged $6.7 billion in damages where settling defendant was in negotiations with creditors to restructure its debt and had an involuntary bankruptcy petition filed against it, which "could have led to a bankruptcy reorganization which would have left little if anything for class members"); *Fishman v. Tiger Natural Gas Inc.*, No. C 17-05351, 2019 WL 2548665, at *3 (N.D. Cal. June 20, 2019) ("Although the gross settlement fund of $3.7 million amounts to only 2.78 percent of the statutory damages that plaintiffs contend are owed to the class, there exists a serious risk that defendants would go bankrupt and the class would be left with much less (if anything) even if plaintiffs did succeed at trial."); *Rieckborn v. Velti PLC*, No. 13-cv-03889, 2015 WL 468329, at *5 (N.D. Cal. Feb. 3, 2015) (finding a $9.5 million settlement adequate despite alleged damages of up to $287 million in light of settling defendant's bankruptcy filings and limited assets, concluding it reasonable for the plaintiffs to "agree to accept a smaller certain award rather than seek the full recovery but risk getting nothing" (quoting *Omnivision*, 559 F. Supp. 2d at 1042)); *In re Critical Path, Inc.*, No. C 01-00551, 2002 WL 32627559, at *7 (N.D. Cal. June 18, 2002) (approving $17.5 million settlement in class action alleging over $200 million in damages based on the settling defendants' limited assets and insurance policies, finding that, while small, the settlement was "not unreasonable in light of the perils plaintiffs face in obtaining a meaningful recovery on their claims").

[36] 2002 WL 32627559, at *7.

that "the settlement class could conceivably extract more" at trial, it would be "at a plausible risk of getting nothing," and it was "not unreasonable for counsel and the class representatives to prefer the bird in hand."[37]

Class Counsel and the Direct Purchaser Class representatives are disappointed they cannot recover more from Assertio, especially given that Plaintiffs allege Assertio had an important role in unlawfully extending the monopoly that first it, and then Bausch and Lupin, exploited. But the financial reality—confirmed by Dr. Frigo—makes this the Direct Purchaser Class's best path forward with respect to Assertio. That is Class Counsel's best judgment.

Assertio has also agreed to provide cooperation to assist with the authentication and explanation of documents at trial and has agreed to exercise best efforts to secure the attendance at trial of two witnesses who were involved in the unlawful reverse-payment agreement. This cooperation may prove to be useful in establishing elements of Plaintiffs' case and will allow Class Counsel to focus its efforts at trial on Lupin, the sole remaining defendant with substantial assets.

Although Class Counsel have always been (and remain) confident in the strength of the Direct Purchaser Class's claims, there is no guarantee that a jury would have found in favor of the Class. For example, in denying the purchasers' motion for summary judgment on market power, the Court concluded that a reasonable jury could find for the defendants on this issue, which would entail a verdict for the defense. Likewise, the Direct Purchaser Class's recovery would be dramatically reduced if the jury were to conclude that, even without the reverse payments, generic entry would not have occurred until after the gigantic 2015 price increases, and recovery would be zero if the jury were to find that the reverse payments caused no delay in generic entry. Given these risks of no or substantially reduced recovery—risks that would persist even after a lengthy and costly trial (and despite an already-certified class)—the Class's recovery through the settlement is substantial in light of Assertio's financial condition.[38]

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[37] *Id.*

[38] *See Smith v. Am. Greetings Corp.*, No. 14-cv-02577, 2015 WL 4498571, at *7 (N.D. Cal. July 23, 2015) (evaluating recovery in view of trial hurdles faced by class); *Bellinghausen v. Tractor Supply*

Additionally, as noted above, the settlement occurred just before trial, so the parties conducted settlement negotiations with the benefit of completed fact and expert discovery (including, but not limited to, dozens of depositions and expert reports); numerous rulings of this Court (including on summary judgment), setting forth the substantive law and analytical framework applicable to the Class's claims and shaping the evidence and arguments that could be presented at trial; and extensive trial preparation.[39]

Further, the Direct Purchaser Class is represented by lawyers with extensive pharmaceutical antitrust class action experience, with decades of collective experience representing classes of direct purchasers in similar cases. In approving proposed class settlements, courts afford "[g]reat weight . . . to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."[40]

Accordingly, the amount of the Class's recovery in view of the foregoing factors is well within the range of possible approval. The proposed settlement with Assertio has the imprimatur of Class Counsel and is unanimously supported by the class representatives.[41]

Co., 303 F.R.D. 611, 624 (N.D. Cal. 2014) ("The Court considers that even if 'Plaintiffs were to prevail, they would be required to expend considerable additional time and resources potentially outweighing any additional recovery obtained through successful litigation,' and these delays will affect 'payment to the Class Members and increase the amount of attorneys' fees.'" (quoting *Collins v. Cargill Meat Sols. Corp.*, 274 F.R.D. 294, 302 (E.D. Cal. 2011))).

[39] *See, e.g.*, *Fronda v. Staffmark Holdings, Inc.*, No. 15-cv-02315, 2017 WL 5665671, at *10 (N.D. Cal. Nov. 27, 2017) (counsel for the class had sufficient information to adequately evaluate settlement).

[40] *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528 (quoting *In re Painewebber Ltd. P'Ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997)); *see also, e.g.*, *Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995) ("Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation.").

[41] *See* Shadowen Decl. ¶ 3.

B. The proposed plan to allocate the settlement *pro rata* to Class Members is fair, reasonable, and adequate.

A plan for the allocation of a class settlement fund is governed by the same legal standards applied to settlement approval: it must be "fair, reasonable and adequate."[42] Generally, an allocation plan is reasonable if it "reimburses class members based on the type and extent of their injuries."[43] "Indeed, in this District, a '*pro-rata* [plan] for allocation has been used in many antitrust cases.'"[44]

The proposed plan of allocation here meets this standard. As set forth in the Plaintiffs' proposed Allocation Plan[45] and the supporting declaration of Dr. Jeffrey J. Leitzinger,[46] Plaintiffs will calculate each Class Member's allocation *pro rata* based on the proportion of that Class Member's combined volume of its net unit purchases of brand Glumetza directly from Bausch from May 6, 2012 through August 15, 2020 and net unit purchases of generic Glumetza directly from Lupin and/or Oceanside from February 1, 2016 through August 15, 2020 to all Class Members' qualifying purchases during the class period.[47] The Allocation Plan gives fair weight to brand Glumetza purchases as compared to generic Glumetza purchases, as Dr. Leitzinger has determined that the per-unit dollar overcharge is roughly the same for brand and generic Glumetza.[48] Accordingly, there is no need to "weight" brand versus generic purchases. The proposed Plan of Allocation accounts for assignments by removing any purchases for which the Claimant has assigned to its customer the right to damages in this litigation. In conjunction with notice

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[42] *In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001).

[43] *Id.*

[44] *In re Cathode Ray Tube (Crt) Antitrust Litig.*, No. 07-cv-5944, 2016 WL 721680, at *21 (N.D. Cal. Jan. 28, 2016) (quoting *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-1827, 2011 WL 75750004, at *4 (N.D. Cal. Dec. 27, 2011)); *see supra* note 20.

[45] Shadowen Decl. Ex. 6, Direct Purchaser Class Pls.' Proposed Plan of Allocation ("Allocation Plan").

[46] Shadowen Decl. Ex. 7, Decl. of Jeffrey J. Leitzinger, Ph.D. Related to Proposed Allocation Plan & Net Settlement Fund Allocation ("Leitzinger Decl.").

[47] *See* Allocation Plan § 2.

[48] *Id.* § 2.3; Leitzinger Decl. ¶ 8 n.9.

following class certification, at the Court's direction, Class Counsel gathered the required information regarding assignments.[49]

The Allocation Plan is similar to other court-approved *pro rata* allocation plans in cases involving alleged overcharges from delayed generic competition and can be implemented with a high degree of efficiency.[50] In addition, in Dr. Leitzinger's opinion:

> [T]his allocation method is practical and efficient inasmuch as it uses Bausch's sales data for brand Glumetza and Lupin's and Oceanside's sales data for generic Glumetza, all as supplemented when necessary with IQVIA data--the same data I used in calculating aggregate Class overcharges. In addition, as noted above, this allocation method employs allocation approaches similar to those approved by courts in other similar cases. Finally, this method provides a reasonable procedure, in my opinion, for distributing the Net Settlement Fund and reimbursing Claimants. It reflects the type and approximate extent of their injury (according to my prior overcharge calculations) and does not systematically favor recovery (relative to actual overcharges) on the part of potential Claimants who purchased brand Glumetza or generic Glumetza.[51]

The Allocation Plan proposes to send a separate, individualized claim form to each Class Member, pre-populated with that Class Member's total qualifying brand and generic Glumetza direct purchases, as calculated by Dr. Leitzinger based on transactional sales data produced by Bausch, Lupin, and Oceanside, supplemented as necessary by IQVIA data.[52] The claim form will (a) request that each Class Member verify the accuracy of the information contained in the claim form, and (b) provide instructions for challenging any of the figures or computations contained in the claim form. If a Class Member agrees that the information contained in the claim form is accurate, it will be asked to sign the claim form verifying its accuracy and timely mail it to the proposed Settlement Administrator, Angeion Group. If a Class Member believes that the information

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[49] Shadowen Decl. ¶ 4.

[50] Allocation Plan at 2 & n.2; Leitzinger Decl. ¶ 4; *see also supra* note 19.

[51] Leitzinger Decl. ¶ 9.

[52] *Id.* ¶ 6 (explaining the sources for these totals).

contained in its claim form is not accurate, that Class Member may submit its own purchase records pursuant to the procedures described below.[53]

Each claimant will be required to execute and return the claim form to receive any distribution from the Net Settlement Fund.[54] The Settlement Administrator shall follow up, by phone, email, and/or mail, with any Class Member that does not timely return a claim form to attempt to confirm that the decision not to submit a claim form was intentional and/or to address any questions the Class Member may have.[55]

The proposed Allocation Plan fairly and appropriately reimburses Class Members on a *pro rata* basis, based on the extent of their injuries. The Plan is also easy to implement, allowing Dr. Leitzinger to use existing data to determine the volume of relevant purchases for each Class Member, subject to possible adjustment based on purchase data submitted by Class Members should they choose to submit their own data.

C. The proposed form and manner of notice will fairly and efficiently inform Class Members of the terms of the settlement and their options.

Federal Rule of Civil Procedure 23(e)(1) requires the Court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." The notice of settlement must fairly inform class members of the settlement and their options,[56] and notice is satisfactory "if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard."[57] The proposed notice program here meets this standard.

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[53] Allocation Plan § 1.1; Dr. Leitzinger will work with the Settlement Administrator to review any data and related documentation submitted by claimants to finalize the allocation calculations. Leitzinger Decl. ¶ 8.

[54] Allocation Plan § 1.3.

[55] Allocation Plan § 1.4.

[56] *See Manual* § 21.312 (the notice must "describe clearly the options open to the class members and the deadlines for taking action").

[57] *Uschold*, 333 F.R.D. at 172 (quoting *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)).

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

Rule 23 requires settlement notices to "generally describe[] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." While notice must "adequately apprise[] class members of all material elements of the settlement agreement," it complies with the requirements of Rule 23(e) without containing "detailed analysis of the statutes or causes of action forming the basis for the plaintiff's claims" or "an estimate of the potential value of [the] claims."[58]

The proposed form of settlement notice contains all elements enumerated in Rule 23(c)(2)(b).[59] It provides, clearly and concisely in plain, easily understood language, a description of the Class,[60] the claims contained in the lawsuit and the procedural status of the litigation,[61] the significant terms of the proposed settlement and the total amount of money that Assertio has agreed to pay to settle the claims,[62] the proposed allocation plan,[63] the releases,[64] Class Counsel's forthcoming request for attorneys' fees in the amount of up to 25% of the settlement fund and reimbursement of reasonable litigation expenses;[65] the rights of Class Members under Rule 23, including the right to object and be heard as to the reasonableness and fairness of the proposed settlement or request for attorneys' fees and expense reimbursement;[66] and the contact information

[58] *Lane v. Facebook*, 696 F.3d 811, 826 (9th Cir. 2012) (quoting *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009)).

[59] *See* Shadowen Decl. Ex. 4, Proposed Form of Settlement Notice.

[60] *Id.* at 3-4.

[61] *Id.* at 1–2.

[62] *Id.* at 4–5.

[63] *Id.* at 5.

[64] *Id.* at 4.

[65] *Id.*

[66] *Id.* at 7.

of Class Counsel and the website address for obtaining a full copy of the Settlement Agreement and key pleadings.[67]

Regarding the anticipated request for attorneys' fees and expenses, Class Counsel's reported lodestar in the case as of July 31, 2021 was approximately $21.5 million; the reported litigation expenses incurred as of that date for which Class Counsel may seek reimbursement were approximately $2.5 million.[68]

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

On November 6, 2020, following the Court's Class Certification Order, a Court-approved class notice was sent by U.S. First-Class mail and email to all direct purchasers of brand Glumetza directly from Bausch and generic Glumetza directly from Lupin or Oceanside during the class period, as identified in transactional sales records produced by the defendants in discovery (though Assertio did not make any sales of Glumetza during the class period).[69] The purpose of the class notice was to: (a) inform Class Members as to the existence of the lawsuit and the nature of the claims; (b) communicate to Class Members that the Direct Purchaser Class had been certified, and (c) allow an opportunity for Class Members to exclude themselves from the case by December 11, 2020. The only opt outs were the retailer plaintiffs, who filed separate complaints to pursue, via partial assignments, claims assigned to them by Class Members; Humana Pharmacy, Inc.; and R&S Northeast LLC.[70]

The notice and manner of dissemination proposed by this motion for purposes of providing settlement notice is similar to the one previously approved by this Court for class notice.[71]

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[67] *Id.* at 6, 9.

[68] Shadowen Decl. ¶ 6.

[69] Statement of Counsel to Court Regarding Notice to Direct Purchaser Class at 2, ECF No. 427.

[70] *Id.* at 2–3.

[71] The only difference from the class notice program is that settlement notice will not be disseminated by FedEx. The parties previously opted to supplement U.S. First-Class Mail and email notice with notice sent by FedEx in light of concerns about postal service delivery delays and

Plaintiffs propose to send a copy of the settlement notice by U.S. First-Class mail to the last known address of, as well as by email (where practicable) to, each entity with qualifying purchases of brand or generic Glumetza. Given that Bausch and Lupin have produced their sales records in this case, including their customer contact information, and that class notice was previously successfully mailed to these same entities,[72] the proposed dissemination of settlement notice by direct mail and email will be sufficient to reach all Class Members.

For purposes of notifying a certified class of a proposed settlement, the Court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[73] Based on their recent experience and success with class notice, and given the availability of Class Member contact information from the defendants, sending settlement notice by U.S. First-Class Mail and email constitutes "the best notice practicable under the circumstances."[74]

The recent settlement in the reverse payment pharmaceutical antitrust case *In re Loestrin 24 Fe Antitrust Litigation*, No. 13-md-2472 (D.R.I.), provides an example of settlement administration in a comparable class action. There, the total settlement fund for the direct purchaser class was

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other unique circumstances presented by the COVID-19 pandemic. But because none of the class notices sent by U.S. First-Class Mail in November 2020 were returned as undeliverable, Class Counsel and proposed settlement administrator Angeion Group believe a supplemental form of delivery is unnecessary for dissemination of settlement notice. *See* Shadowen Decl. Ex. 8, Decl. of Christian J. Clapp, Esq. Regarding Qualifications & Settlement Notice Plan of Angeion Group, LLC, ¶ 15 ("Angeion Decl.").

[72] *Id.* ¶ 13 (reporting that no notices sent by U.S. First-Class Mail were returned as undeliverable and that bouncebacks were received for only 3 of 84 emailed notices); *see also* Statement of Counsel to Court Regarding Notice to Direct Purchaser Class at 2, ECF No. 427.

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

[74] *See Hunt v. Check Recovery Sys., Inc.*, No. C05-04993, 2007 WL 2220972, at *3 (N.D. Cal. Aug. 1, 2007) ("Delivery by first-class mail can satisfy the best notice practicable when there is no indication that any of the class members cannot be identified through reasonable efforts." (citing *Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 356 (E.D.N.Y. 2006))); *see also 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. . . . When the names and addresses of most class members are known, notice by mail is usually preferred.").

$120 million; there were 47 class members, all of which received settlement notice and claims forms disseminated by U.S. First-Class Mail and email; the average payment per claimant (for the 39 class members and five additional assignees who returned valid claim forms) was $1,756,453.96; all claimants received payment, and there was no need for a supplemental or *cy pres* distribution; the settlement administration costs were $57,517.50; the court granted class counsel's request for reimbursement of litigation expenses totaling $3,965,558.00; and the court awarded class counsel attorneys' fees of $38,678,147.00 (33.3% of the settlement fund, net of expenses).[75]

3. The Court should not allow another opt-out opportunity.

The Court already allowed Class Members an opportunity to opt out following notice, and Rule 23 does not require it to authorize a second opt-out period. As the Ninth Circuit Court of Appeals observed in *Officers for Justice v. Civil Service Commission of City and County of San Francisco*,[76] forgoing a second opt-out opportunity does not implicate due process concerns:

> [The objector]'s rights are protected by the mechanism provided in the rule: approval by the district court after notice to the class and a fairness hearing at which dissenters can voice their objections, and the availability of review on appeal. Moreover, to hold that due process requires a second opportunity to opt out after the terms of the settlement have been disclosed to the class would impede the settlement process so favored in the law.[77]

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[75] *See* Shadowen Decl. ¶ 5; Order Granting Direct Purchaser Class Pls.' Unopposed Mot. for Final Approval of Settlement, Approval of Proposed Plan of Allocation & Adoption of R&R of Magistrate Judge, *In re Loestrin 24 Fe Antitrust Litig.*, No. 13-md-2472 (D.R.I. Sept. 1, 2020), ECF No. 1462. Eight *Loestrin* class members did not make claims in connection with that settlement. The claims administrator made repeated efforts to contact each such member, including by phone, email, and mail. None of the mail or email outreach was returned as undeliverable. At least two of the eight explicitly stated that they would not submit any claim. Combined, these eight non-participating class members totaled approximately 0.08% of claims. *See* Shadowen Decl. ¶ 5. Only two of the *Loestrin* class members who did not submit claims there are members of this class. *See id.*

[76] 688 F.2d 615 (9th Cir. 1982).

[77] *Id.* at 635; *see also Low v. Trump Univ.*, 881 F.3d 1111, 1121 (9th Cir. 2018) (affirming rejection of objection to the lack of opportunity to opt out at the settlement stage because "due process requires that class members be given [only] a single opportunity to opt out"); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006) ("Requiring a second opt-out period as a blanket rule would disrupt settlement proceedings because no certification would be final until after the final settlement terms had been reached"); *City of Seattle*, 955 F.2d at 1289 ("Class Members

For these reasons, forgoing a settlement-stage opt-out period is consistent with common practice in other direct purchaser pharmaceutical antitrust class actions in this and other circuits.[78]

Here, too, a second opt-out period is unwarranted. The Class Members are businesses, many of which have their own in-house or retained outside counsel. They decided not to opt out by the December 11, 2020 deadline indicated in the class notice and after being contacted by Class Counsel in conjunction with this Court's order to identify any additional assignees. That notice advised them that, by choosing not to opt out:

> You will not be able to start another lawsuit, continue another lawsuit, or be part of any other lawsuit against Defendants about the legal and factual issues in this case. All the Court's orders in the case by the Direct Purchaser Class Plaintiffs against Defendants will apply to you and legally bind you. You will also be bound by any judgment in the Lawsuit.

There is no reason to believe that Class Members would elect to opt out now, less than a year later. And they can object to the settlement if they are opposed to it.

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were given notice of the action and afforded an opportunity to opt out. The . . . Class Members were also given notice of the proposed settlement and afforded the opportunity to object. This is all that Rule 23 requires."); *In re Lidoderm Antitrust Litig.*, No. 14-md-02521, 2018 WL 11293766, at *2 (N.D. Cal. May 3, 2018) ("[B]ecause prior notice of class certification . . . satisfied the requirements of Fed. R. Civ. P. 23(c)(2)(B) and due process, and because the prior notice of class certification provided an opt-out period that [had] closed, there is no need for an additional opt-out period . . . .").

[78] *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.

D. The Court should appoint Angeion Group, an experienced, nationally recognized settlement administration company, as settlement administrator.

Plaintiffs have retained Angeion Group to serve as settlement administrator for the Class and oversee the settlement notice and claims administration process. Angeion Group describes itself as "an independent, nationally recognized, settlement administration company that has the culture of innovation in our DNA," which "increase[s] efficiency, provide[s] accountability and give[s] counsel and the court peace of mind."[79]

In connection with the Bausch settlement, Angeion Group provided an estimate for the cost of its requested services which, based on Class Counsel's experience, is competitive and reasonable.[80] Class Counsel sent a Request for Proposal to six settlement administration firms, all of which submitted proposals. Angeion Group submitted the second-lowest bid, effectively handled the administration of class notice in this case, and has substantial experience administering complex settlements in federal class actions, including in this district. None of Class Counsel have any financial or other ties with Angeion Group, which has provided claims-administration services in two cases for the three co-lead counsel firms in the last two years.[81]

Should the Court preliminary approve both the Bausch and Assertio settlements, Class Counsel propose that Angeion Group disseminates a single, consolidated notice of the settlements to Class Members and administers the two settlement funds as one. Doing so would both reduce administration costs and eliminate the possibility of confusion to Class Members that may arise from receipt of two similar settlement notices within a short period of time. Plaintiffs will submit a revised consolidated notice for the Court's approval in that instance.

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[79] *See* Who We Are, Angeion Group, https://www.angeiongroup.com/index.php (last visited Sept. 16, 2021).

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

[81] Angeion performed claims administration services in that period in two cases in which Hagens Berman Sobol Shapiro was a lead counsel firm: *In re Chrysler-Dodge-Jeep EcoDiesel Marketing, Sales Practices, and Products Liability Litigation*, No. 17-cv-02777 (N.D. Cal.), and *In re Solodyn (Minocycline Hydrochloride) Antitrust Litigation*, No. 14-md-02503 (D. Mass.).

E. The Court should appoint The Huntington National Bank, a top-25 U.S. bank holding company that has handled thousands of settlements, as escrow agent.

Plaintiffs request that the The Huntington National Bank ("Huntington") be appointed escrow agent for the settlement funds. Huntington is a top-25 U.S. bank holding company with $175 billion in assets. Founded in 1866, the bank employs more than 21,000 colleagues and maintains more than 1,100 branches in 12 states. Huntington's National Settlement Team has handled more than 2,800 settlements totaling over $60 billion and 150 million checks for law firms, claims administrators, and regulatory agencies. Class Counsel have securely and successfully used Huntington's escrow services as in multiple prior class action settlements and have requested that Huntington be appointed the escrow agent for the Bausch settlement.

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

As set forth in the proposed Preliminary Approval Order, Plaintiffs propose the following schedule for completion of the final settlement approval process:

a. Within 10 days from the date of filing for preliminary approval, Defendants shall serve any notices required pursuant to the Class Action Fairness Act of 2005;

b. Within 15 days from the date the Court grants preliminary approval to the proposed Settlement, notice will be disseminated to Class Members via U.S. First-Class Mail and email;

c. Within 45 days from the date the Court grants preliminary approval to the proposed Settlement (and within 30 days from the date notice is disseminated), Class Counsel will file a motion for attorneys' fees and reimbursement of expenses;

d. Within 90 days from the date the Court grants preliminary approval to the proposed Settlement (and within 75 days from the date notice is disseminated), Class Members must postmark or file in person written objections to any or all of the proposed Settlement and/or Class Counsel's request for an award attorneys' fees and reimbursement of expenses;

e. Within 111 days from the date the Court grants preliminary approval to the proposed Settlement (and within 21 days after the expiration of the deadline for Class Members to postmark or file in person written objections to any or all of the proposed Settlement and/or Class Counsel's request for an award of attorneys' fees and reimbursement of expenses), Class Counsel will file a motion for final approval of the settlement; and

f. On a date to be set by the Court no less than 120 days following the issuance of its preliminary approval order, the Court will hold a Final Approval Hearing.

The proposed schedule is expedient and expeditious, comports with due process, and complies with the time periods set forth by the Class Action Fairness Act.[82]

III. CONCLUSION

For the foregoing reasons, the Court should preliminarily approve the proposed settlement, approve the proposed manner and form of notice, appoint Angeion Group as settlement administrator and Huntington as escrow agent, approve the proposed final schedule (or any other schedule satisfactory to the Court), and set a date for a Final Approval Hearing. A proposed order is submitted herewith.

Dated: September 16, 2021

Respectfully submitted,

/s/ Lauren G. Barnes

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[82] 28 U.S.C. § 1715 (d).

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CERTIFICATE OF SERVICE

I, Lauren G. Barnes, certify that, on this date, I served the foregoing document on the CM/ECF system, which sends a notification to all counsel of record.

Dated: September 16, 2021

/s/ Lauren G. Barnes
Lauren G. Barnes

FILER'S ATTESTATION

Pursuant to Local Rule 5-1(i)(3) of the Northern District of California, regarding signatures, I, Steve D. Shadowen, attest that concurrence in the filing of this document has been obtained.

Dated: September 16, 2021

/s/ Steve D. Shadowen
Steve D. Shadowen