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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 BAUSCH, 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, CA, 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 Defendants Bausch Health Companies Inc., Salix Pharmaceuticals, Ltd., Salix Pharmaceuticals, Inc., and Santarus, Inc. ("Bausch") to settle the claims brought on behalf of the Direct Purchaser Class against Bausch 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 $300,000,000 in exchange for defined releases to Bausch, 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, 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 Bausch, and Bausch 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 trial scheduled to begin on October 4, 2021. In July 2021, with trial preparations underway, the parties initiated settlement discussions at the direction of the Court under the supervision of Magistrate Judge Donna M. Ryu. Within days after a July 20, 2021 settlement conference conducted by Magistrate Judge Ryu, the Direct Purchaser Class reached a settlement with Bausch. The proposed settlement provides for $300 million[1] in cash to be paid to the Class in exchange for dismissal of the litigation with prejudice as to Bausch only

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

and certain releases from the Class as to Bausch only.[2] Under the agreement, Bausch will pay $100 million into a settlement escrow account on the later of five business days of this Court's preliminary approval of the settlement without material change or October 6, 2021 and upon receipt of certain payment-related documentation from Class Counsel (the "First Payment"); another $100 million 30 days following the First Payment (the "Second Payment"); and the final $100 million 30 days following the Second Payment.

The Direct Purchaser Class's recovery of $300 million from Bausch amounts to between 33% and 60% of their claimed aggregate damages[3] and between 57.5% and 103% of their claimed aggregate damages attributable to purchases from Bausch.[4] The settlement represents an excellent result for the Direct Purchaser Class; indeed, Class Counsel believe that, depending on the criteria used, this is either the largest or second-largest recovery for a direct-purchaser class in a reverse payment case. 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 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.

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

[4] Purchases from Bausch and Oceanside constitute approximately 58% of the total aggregate damages.

II. ARGUMENT

A. The proposed settlement easily 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 settlement is 'fair, reasonable, and adequate' when considering the factors set out in Rule 23(e)(2)."[5] At the preliminary approval stage, "a full fairness analysis is unnecessary"[6]; 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."[7] 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.[8]

The Court does not have the authority to "delete, modify or substitute certain provisions," so the settlement "must stand or fall in its entirety."[9] 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."[10]

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[5] *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*").

[6] *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)).

[7] *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).

[8] *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)).

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

[10] *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)).

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*[11] and the Court's November 4, 2019 Notice and Order on Putative Class Actions and Factors to Be Evaluated for Any Proposed Settlement.[12]

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 is necessary and that the Court should grant preliminary approval on the papers. If the Court desires a hearing, however, Class Counsel will, of course, make themselves available at the Court's convenience.

1. The proposed settlement, 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.'"[13] There is "an initial presumption of fairness" afforded to settlements "recommended by class counsel after arm's-length bargaining."[14] The use of an experienced

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

[12] ECF No. 39.

[13] *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)).

[14] *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)).

mediator, particularly after discovery, also "supports the conclusion that Plaintiffs were armed with sufficient information about the case to broker a fair settlement."[15]

The proposed settlement was reached approximately 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, preparing expert reports and taking and defending expert depositions, briefing class certification summary judgment motions, and *Daubert* motions, and finalizing witness lists, exhibits lists, and other trial preparations. Counsel for the Direct Purchaser Class expended tens of thousands of hours developing and preparing their case before reaching a settlement with Bausch. 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 the Direct Purchaser Class's claims and Bausch's defenses. With the case nearing trial, the parties had fully developed their claims and defenses, enabling both sides to negotiate with a fulsome understanding of the strengths and weaknesses of their cases. Moreover, the proposed settlement was negotiated with the active involvement of Magistrate Judge Ryu, and the settlement amount resulted from her mediator's proposal.

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

[15] *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.").

Class ("Class Members") with a cash recovery that is substantial, immediate, and certain, and the release granted to Bausch is narrowly tailored to the allegations at issue in the litigation.[16]

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.[17] The proposed settlement does not allow for a reversion of any settlement funds to Bausch; does not contain any 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.'"[18] For that reason, courts in this district deem preliminary approval inappropriate "where the proposed agreement 'improperly grants preferential treatment to class representatives.'"[19]

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

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[16] *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 non 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 payment pursuant to this Settlement Agreement." Settlement Agreement § 9.

[17] ECF No. 39.

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

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

based on that Class Member's purchases.[20] 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 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.[21]

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

[20] 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).

[21] *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))).

volume exceeds the amount of the Direct Purchaser Class's settlement amount as a percentage of their claimed direct purchases by unit volume, Bausch will increase the Class's settlement amount to a commensurate percentage.[22]

4. The $300 million settlement amount secures an excellent result for the Direct Purchaser Class and is well within the range of possible approval.

To determine whether the settlement falls within the range for possible approval, courts focus on "substantive fairness and adequacy," including "plaintiff's expected recovery balanced against the value of the settlement offer."[23] This "requires the Court to evaluate the strength of Plaintiff's case."[24] "[I]t 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, the Direct Purchaser Class's recovery compares favorably to their potential recovery at trial. The Class's recovery of $300 million from Bausch amounts to 33% to 60% of the Class's claimed aggregate damages and 57.5% to 103% of its claimed aggregate damages attributable to purchases from Bausch. And the Class is able to (and will) continue to pursue the balance of its damages from the remaining defendants. These percentages well exceed the ranges that courts have deemed to be fair and adequate.[26]

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

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

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

[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] *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (affirming preliminary approval of class settlement representing approximately one-sixth of potential recovery); *In re LendingClub Sec. Litig.*, Nos. C 16-02627, C 16-02670, C 16-03072, 2018 WL 1367336, at *2 (N.D. Cal. Mar. 16, 2018) (granting preliminary approval of $125 million settlement representing approximately 17% of the $711 million maximum recoverable at trial); *Brown v. CVS Pharm., Inc.*, No. 15-cv-7631, 2017 WL 3494297, at *4 (C.D. Cal. Apr. 24, 2017) (finding recovery of 27% of class's potential damages "well within the range of possible approval"); *Glass v. UBS Fin. Servs., Inc.*, No. C 06-4068, 2007 WL 221862, at *4 (N.D. Cal. Jan. 26, 2007) (preliminarily approving settlement amount constituting 25–35% of recoverable damages).

Although Class Counsel have always been (and remain) confident in the strength of the Direct Purchaser Class's claims, there was 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 Defendants on this issue, which would entail a verdict for the defense. Similarly, the 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 the recovery would be nil if the jury found 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.[27]

Additionally, the settlement occurred just before trial, so the parties conducted settlement negotiations with the benefit of completed fact and expert discovery (including 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 Direct Purchaser Class's claims, and extensive trial preparation.[28]

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 "great weight . . . to the recommendation of counsel, who are most closely acquainted with the facts

[27] *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 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))).

[28] *See, e.g.*, *Fronda*, 2017 WL 5665671, at *10 (counsel for the class had sufficient information to adequately evaluate settlement).

of the underlying litigation."[29] The proposed settlement has the imprimatur of Class Counsel and is unanimously supported by the Class representatives.[30]

The amount of the Class's recovery in view of the foregoing factors is well within the range of possible approval. It compares favorably, for example, to the recent direct purchaser class settlement in the reverse payment case *In re Loestrin 24 Fe Antitrust Litigation* (D.R.I.). There, the total settlement fund for the direct purchaser class was $120 million; there were 47 class members, and notice of the settlement and claim forms were sent to all of them by U.S. First-Class Mail; the average payment per claimant (for the 39 class members and 5 additional assignees who returned valid claim forms) was $1,756,453.96; the cost of administering the settlement was $57,517.50; the court awarded $3,965,558.00 to Class Counsel in reimbursable expenses; and the court awarded 33.3% of the Settlement Fund (net of reimbursed expenses)—$38,678,147.00—as attorneys' fees to Class Counsel.[31]

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

A plan for allocating a class settlement fund is governed by the same legal standards applied to settlement approval: it must be "fair, reasonable and adequate."[32] Generally, an allocation plan is

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[29] *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. 523, 528 (N.D. Cal 2004) (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.").

[30] *See* Shadowen Decl. ¶ 3.

[31] 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 members of the *Loestrin* direct purchaser class 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, the claims of these eight non-participating class members totaled approximately 0.08% of the total claims. Shadowen Decl. ¶ 5. Only two of the *Loestrin* class members who did not submit claims are members of the Direct Purchaser class here. *Id.*

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

reasonable if it reimburses class members based on the type and extent of their injuries.[33] "Indeed, in this district, a '*pro-rata* [plan] for allocation has been used in many antitrust cases.'"[34]

The proposed plan of allocation here meets this standard. As set forth in Plaintiffs' proposed Allocation Plan[35] and the supporting declaration of Dr. Jeffrey J. Leitzinger,[36] 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.[37] 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.[38] Accordingly, there is no need to "weight" brand versus generic purchases. The proposed Plan of Allocation accounts for assigned claims by removing any purchases for which the Claimant has assigned to its customer the right to damages in this litigation. In conjunction with notice following class certification, at the Court's direction, Class Counsel gathered the required information regarding assignments.[39]

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[33] *Id.*

[34] *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.

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

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

[37] *See* Allocation Plan § 2.

[38] Allocation Plan § 2.3; Leitzinger Decl. ¶ 8 n.9.

[39] Shadowen Decl. ¶ 4.

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.[40] 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.[41]

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.[42] 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 contained in its Claim Form is not accurate, that Class Member may submit its own purchase records pursuant to the procedures described below.[43]

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[40] Allocation Plan § I n.2; Leitzinger Decl. ¶ 4; *see also supra* note 20.

[41] Leitzinger Decl. ¶ 9.

[42] *See id.* ¶ 6 (explaining the sources for these totals).

[43] 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.

Each Claimant will be required to execute and return the Claim Form to receive any distribution from the Net Settlement Fund.[44] 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 to address any questions the Class Member may have.[45]

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,[46] 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."[47] The proposed notice program here meets this standard.

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

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[44] Allocation Plan § 1.3.

[45] *Id.* § 1.4.

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

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

heard." While notice must "adequately apprise[] class members of all material elements of the settlement agreement," it complies with Rule 23(e) without containing a "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."[48]

The proposed form of settlement notice contains all elements enumerated in Rule 23(c)(2)(b).[49] It provides, clearly and concisely in plain, easily understood language, a description of the Class,[50] the claims contained in the lawsuit and the procedural status of the litigation,[51] the significant terms of the proposed settlement and the total amount of money that Bausch has agreed to pay to settle the Class's claims,[52] the proposed allocation plan,[53] the releases,[54] 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,[55] 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,[56] and the contact information of Class Counsel and the website for obtaining a full copy of the Settlement Agreement and key pleadings.[57]

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

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[48] *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)).

[49] *See* Shadowen Decl. Ex. 2, Proposed Form of Settlement Notice.

[50] *Id.* at 3–4.

[51] *Id.* at 1–2.

[52] *Id.* at 4–5.

[53] *Id.* at 5.

[54] *Id.* at 4–5.

[55] *Id.* at 7.

[56] *Id.* at 7–8.

[57] *Id.* at 6.

expenses incurred as of that date for which Class Counsel may seek reimbursement were approximately $2.5 million.[58]

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.[59] 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 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.[60]

The notice and program of dissemination proposed by this motion for purposes of providing the settlement notice is similar to the one previously approved by this Court for class notice.[61] 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

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[58] Shadowen Decl. ¶ 6.

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

[60] *Id.* at 2–3.

[61] 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 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.").

or generic Glumetza. Given that Bausch and Lupin have produced their sales records in this case, including their customer contact information, and that the class notice was previously successfully mailed and emailed to these same entities,[62] 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."[63] Based on their recent experience and success with the mailed class notice, and given the availability of Class Member contact information from Defendants, sending settlement notice by U.S. First-Class Mail and email constitutes "the best notice practicable under the circumstances."[64]

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 the Court 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*,[65] due process concerns are not implicated when forgoing a second opt-out opportunity:

> [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

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[62] *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.

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

[64] *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.").

[65] 688 F.2d 615 (9th Cir. 1982).

> settlement have been disclosed to the class would impede the settlement process so favored in the law.[66]

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.[67]

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 in response 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 in the unlikely event they are opposed to it.

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[66] *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"); *In re MetLife Demut. Litig.*, 689 F. Supp. 2d 297, 345 (E.D.N.Y. 2010) ("the court is not required to afford a second opportunity to opt out.").

[67] *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 Direct Purchaser 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."[68]

Angeion Group has provided an estimate for the cost of its requested services which, based on Class Counsel's experience, is competitive and reasonable.[69] 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.[70]

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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[68] *See* https://www.angeiongroup.com/.

[69] 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.

[70] Angeion performed claims administration services in that period in two cases in which Hagens Berman Sobol Shapiro LLP 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 *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 Court appoint The Huntington National Bank ("Huntington"), as escrow agent. 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 with over $60 billion and 150 million checks for law firms, claims administrators, and regulatory agencies. Counsel for the Direct Purchaser Class have securely and successfully used Huntington's services as escrow agent in multiple prior class action settlements. A copy of the Escrow Agreement between Lead Class Counsel and Huntington is attached as Exhibit 5 to the Shadowen Declaration.

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 Order, Plaintiffs propose the schedule below for completion of the final settlement approval process. Under this schedule, Class Members will have up to 75 days to object to any or all of the proposed settlement.

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 that the Court grants preliminary approval to the proposed Settlement, notice will be disseminated to the Class via U.S. First-Class Mail and email, the same methods by which the prior Class Certification Notice was sent;

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

d. Within 90 days from the date that the Court grants preliminary approval to the proposed Settlement (and within 75 days from the date that notice is mailed), Class Members may object to any or all of the proposed settlement and/or the requested attorneys' fees and expenses;

e. Within 111 days from the date that the Court grants preliminary approval to the proposed Settlement (and within 21 days after the expiration of the deadline for Class Members to object to any or all of the proposed settlement and/or the requested attorneys' fees and 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 comports with due process, and complies with the time periods set forth by the Class Action Fairness Act.[71]

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 National Bank 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 14, 2021

Respectfully submitted,

/s/ Lauren G. Barnes

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[71] 28 U.S.C. § 1715 (d).

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Co-Lead Counsel for Direct Purchaser Class

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 14, 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 14, 2021

/s/ *Steve D. Shadowen*
Steve D. Shadowen