IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	MDL 2724 16-md-2724 HON. CYNTHIA M. RUFE
THIS DOCUMENT RELATES TO: INDIRECT RESELLER PLAINTIFF ACTIONS	CIVIL ACTIONS:
West Val Pharmacy, et al. v. Actavis, et al. *West Val Pharmacy, et al. v. Actavis, et al.* *Reliable Pharmacy, et al. v. Actavis, et al.*	17-cv-3822 / 16-PP-27243 18-cv-2533 19-cv-6044

INDIRECT RESELLER PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR AN ORDER APPROVING THE AMENDMENT TO, NOTICE OF, ALLOCATION PLAN FOR, AND FINAL FAIRNESS HEARING DATE FOR THE IRPS' BRECKENRIDGE SETTLEMENT

Pursuant to Federal Rule of Civil Procedure 23, Indirect Reseller Plaintiffs Reliable Pharmacy, Halliday's & Koivisto's Pharmacy, Russell's Mr. Discount Drugs, Falconer Pharmacy, Chet Johnson Drug, and North Sunflower Medical Center (collectively "IRPs"), by and through their undersigned counsel, respectfully submit this memorandum of law to the Court in support of their Motion for an Order Approving the Amendment to, Notice of, Allocation Plan for, and Final Fairness Hearing Date for the IRPs' Breckenridge Pharmaceutical, Inc. Settlement.

PROCEDURAL AND FACTUAL BACKGROUND

On May 11, 2022, the Court granted the IRPs' motion for preliminary approval of the Breckenridge Settlement. MDL 2724 ECF No. 2092. The Settlement Agreement releases Breckenridge of all claims against it by the IRPs in the MDL in return for Breckenridge paying a Settlement Amount of $1,000,000.00, with up to $250,000 to be used toward notice to the

Settlement Classes. *See*, *e.g.*, Case No. 19-cv-6044 ("IRP II") ECF No. 123. Per the terms of the Settlement Agreement, the IRPs' counsel could wait to move the Court with regards to a notice plan, plan of allocation, and other steps to finalize the Settlement at a date of their choosing, with the goal of lessening expenses by utilizing methods and means for other settlements in the MDL. Settlement Agreement ¶ 20, 31-33. IRPs have also sought and received final approval of a settlement with Apotex Corp. *See* MDL 2724 ECF No. 2959 (May 14, 2024). As part of that agreement, on October 17, 2024, a "long-form" notice was mailed out to likely Class Members of the Apotex Settlement per the terms of the Court's order.[1] A website was created to provide information about the settlement, which could be updated to provide information about a claims process as it became available.[2] Similarly, a "short form" postcard notice was approved by the Court for use at Class Counsel's discretion.

Fact discovery remains open in the MDL, and additional data continues to be produced to the IRPs concerning transactions made by Class Members.

ARGUMENT

I. The Proposed Class Definition Amendment

The proposed Settlement Class definition approved by the Court is as follows:

> All dispensers of drugs (including hospitals and independent pharmacies) in the United States and its territories that purchased one or more of the Drugs at Issue directly from distributor Defendants AmerisourceBergen Corp., Cardinal, Red Oak, Harvard, H.D. Smith, McKesson, Morris & Dickson, or WBAD or their subsidiaries; and all dispensers of drugs (including hospitals and independent pharmacies) in the State Damages Jurisdictions[3] that purchased one or more of the Drugs at Issue from any

[1] The Class Members for the Apotex Settlement are virtually identical to those for the Breckenridge Settlement Agreement, with only slight changes in the class definition and an additional enumerated exclusion.

[2] www.genericpharmaceuticalsantitrust.com.

[3] The State Damages Jurisdictions include Alabama, Arizona, California, Connecticut, Delaware, District of Columbia, Florida, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan,

source other than the manufacturer Defendants from January 1, 2010 through the present.

This class excludes:

(a) Defendants, their officers, directors, management, employees, subsidiaries, and affiliates;

(b) entities owned in part by judges or justices involved in this action or any members of their immediate families;

(c) all pharmacies owned or operated by publicly traded companies; and

(d) all hospitals owned or operated by government entities.

The Parties now ask the Court to adjust exclusion (d), to read:

(d) all hospitals owned or operated by federal government entities and any other government entities named as parties in this MDL or in related actions styled *Connecticut, et al. v. Sandoz, et al*., No. 3:20-cv-00802 (D. Conn.), *Connecticut, et al. v. Aurobindo, et al.*, No. 3:16-cv-02056 (D. Conn.), and *Connecticut, et al. v. Teva, et al.*, 3:19-cv-00710 (D. Conn.).

This change is very minor to the class definition but ensures that there are no potential settlement class members left unaccounted for by any of (a) this settlement, (b) the actions currently being undertaken by the various State Attorneys General in the District of Connecticut, or (c) being otherwise unable to come under this class.[4] The Court has the ability to amend the class definition, because the class does not become final until after a the Court finds that it meets the standards of Fed. R. Civ. P. 23 after a fairness hearing and the due process procedures leading up to it. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797 (3d Cir. 1995) ("Thus, while we approve the provisional certification of a settlement class to

Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin.

[4] The federal government cannot be represented by private counsel in a class action lawsuit. *See* 28 U.S.C. §§ 516, 519.

facilitate settlement discussions, final settlement approval depends on the finding that the class met all the requisites of Rule 23."). Such procedures start with notice, which has not yet gone out, thus no potential class members have yet been put on notice as to whether they should object or opt-out. Said notice will go out upon approval of the Court in this motion.

While the adjustment of the exclusion may have the effect of enlarging the settlement class, there is functionally no difference between the potential new class members and the class members that were preliminarily approved. The amendment does not change the class's ability to meet the elements of Rule 23(a) or Rule 23(b)(3). Here, IRPs refer the Court to the arguments made in the Memorandum of Law in Support of Indirect Reseller Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (MDL 2724 ECF No. 2914-1), with additional support.

Fed. R. Civ. P. 23(a)(1): Numerosity. Because the exclusion adds class members, the Court's finding concerning Numerosity is unaffected.

Fed. R. Civ. P. 23(a)(2): Commonality. Because the potentially unexcluded class members would all be indirect purchasers of drugs at issue in this MDL, their claims are premised on the same factual allegations about the "fair share" price-fixing conspiracy and same causes of action under antitrust laws, thus the Court's finding concerning Commonality would apply to them as well.

Fed. R. Civ. P. 23(a)(3): Typicality. The potentially unexcluded class members are functionally no different than any other class members, as they would also be dispensers of drugs who purchased indirectly from defendants in the MDL. Therefore, from both a factual and legal perspective, the potentially unexcluded class members will have their rights and interests advanced by the plaintiffs. *See, e.g.*, *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984). The Court's finding concerning Typicality would thus apply.

Fed. R. Civ. P. 23(a)(4): Adequacy. The Court's finding concerning Adequacy is unaffected by adding the potentially unexcluded class members.

Fed. R. Civ. P. 23(b)(3): Predominance, Superiority. Adding the potentially unexcluded class members would not alter the Court's findings concerning predominance or superiority, as the common issues of law and fact concerning the fair share conspiracy still predominate over the unexcluded members' claims.

II. The Notice Plan

Class members are entitled to reasonable notice of a proposed settlement before a class settlement is finally approved by the Court. Fed. R. Civ. P. 23(e)(1). The Rule provides "broad discretion" to district courts with respect to the notice's form and content, so long as it satisfies the requirements of due process. *See In re Baby Products Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013). "Generally speaking, the notice should contain sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class." *Id*. *See also In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 326 (3d Cir. 1998). The two components of a sufficient notice are (1) the form of the notice, and (2) the manner in which the notice is sent to Settlement Class members. Here, the proposed notice is designed to reach the greatest practicable number of potential class members and provides them with easy access to the details of how the class action may impact their rights.

The proposed form of the notice is substantially similar to notices used by Settlement Class Counsel in prior antitrust and class action cases, and is also substantially similar to notices submitted by other classes in this MDL and found appropriate by the Court, including in the

Apotex Settlement.[5] It announces in large, bold font that there is a proposed settlement, and the plain language of the text provides important information concerning the Settlement Agreement's terms, including details regarding Settlement Class Members' ability to opt-out or object to the Settlement Agreement, the deadline to opt-out or object, and the date, time and location of the Final Approval Hearing, among other information. Azari Decl ¶ 29. *See also* Exhibit A. It follows the principles embodied in the Federal Judicial Center's illustrative "model" notices posted at www.fjc.gov, and has been written in a mode and by the same firm as notices that many courts (and the Federal Judicial Center itself) have approved. Azari Decl. ¶ 28.

With regards to the proposed manner in which notice is sent to Settlement Class members, the plan provides for multiple forms of communication layered together to reach a high percentage of the class. IRPs' vendor, a firm with extensive experience in the field of providing settlement notice and identifying class members to be notified, believes that the plan, utilizing email and/or mail, will reach approximately 90% of the Settlement Class Members. Azari Decl. ¶ 18. Potential Settlement Class Members have been identified through purchasing lists from third-party data providers for said members, which included names and current or last known postal addresses. Azari Decl. ¶ 20. Those lists were used for the Apotex Settlement, in which more than 93% of the Settlement Class was contacted. The lists are refined and supplemented by various methods, including checking addresses against the National Change of Address database maintained by the USPS, and then used to effectuate direct mailings of the Notice via USPS first-class mail.[6] Azari Decl. ¶ 22. A "short form" postcard will be mailed out to the lists, directing members to review

[5] *See* Order Regarding DPPs' Apotex Settlement, *In re Generic Pharmaceuticals Pricing Antitrust Litig.*, Case No. 2:16-md-02724 (Feb. 13, 2024), ECF No. 2841.

[6] "[F]irst-class mail…is unquestionably the best notice practicable under the circumstances." *Smith v. Prof'l Billing & Mgmt. Servs., Inc.*, Civil No. 06–4453 (JEI), 2007 WL 4191749, at *5 (D.N.J. Nov. 21, 2007).

the details of the "long form" notice on the website (and which is substantially similar to the "long form" notice potential Class Members already received for the Apotex Settlement. Azari Decl. ¶¶ 21, 24. Finally, the plan also allows for the remailing of the Notice should new information arise or mail be returned as undeliverable. Azari Decl. ¶ 23.

The mailing outreach will be further enhanced by a settlement website and a toll-free telephone number, which will provide additional avenues for Settlement Class Members to be notified of their rights. *See* Azari Decl. ¶¶ 24-26. Such a method of notice is already considered sufficient means to reach class members by itself; here it supplements the already best-in-class notice standard of USPS First Class mail. *See In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, Civil Action No. 16-5073, 2021 WL 3929698, at *3 (E.D. Pa. Sept. 2, 2021) ("[p]ublication notice alone is considered sufficient means to reach class members").

The combination of direct mail and an online media plan is commonly approved by courts in pharmaceutical litigation, and has been used as a notice plan by other classes in the instant litigation. *See* Order Regarding DPPs' Breckenridge Settlement, *In re Generic Pharmaceuticals Pricing Antitrust Litig.*, Case No. 2:16-md-02724 (Feb. 13, 2024), ECF No. 2841. *See, e.g.*, *In re Flonase Antitrust Litig*., Case No. 08-cv-3149, 2013 WL 12148283, at *1 (E.D. Pa. Jan. 14, 2013); *In re Wellbutrin SR Antitrust Litig*., Civil Action No. 04-5525, 2011 WL 13392296, at *1 (E.D. Pa. Nov. 21, 2011); *In re Prograf Antitrust Litig*., No. 1:11-md-02242-RWZ, 2015 WL 13908415, at *1 (D. Mass. May 20, 2015); *In re DDAVP Direct Purchaser Antitrust Litig.*, Docket No. 05 Civ. 2237 (CS), 2011 WL 13318188, at *3 (S.D.N.Y. Aug. 15, 2011).

The Federal Judicial Center considers a reasonable notice plan to reach between 70-95% of a settlement class.[7] The proposed form and manner of notice for the IRPs' Breckenridge settlement is designed to reach the high end of that range. The proposed form and manner of notice satisfies due process and Rule 23, and IRPs therefore humbly request that their notice plan be approved by the Court.

III. Proposed Plan of Allocation

Class Counsel propose that, for the purposes of this Settlement, Settlement Funds will be distributed on a *pro rata* basis to all Class Members who have filed an appropriate claim. Class Counsel has prepared a claims procedure specifying the process for assessing and determining the validity of claims and a methodology for payment of valid claims as of this time, as laid out below. This method is substantially similar to that approved by the Court in the Apotex Settlement, but with more granularity. Class Counsel has retained a Claims Administrator to process the claims, and all Class Members will be required to submit appropriate documentation as will be set forth in detail in the Claim Form, which can be submitted in one of a variety of ways. All claims will be subject to review and approval by the Claims Administrator.

Pro rata disbursement is a common form of disbursement for class action settlements, and makes sense when the costs of determining specific percentages of exact amounts per claimant are not an efficient use of Settlement Funds. Furthermore, Class Counsel fully expect to succeed in gaining additional settlements and/or verdicts against the more than 30 remaining Defendants in this MDL, which will likely lead to larger amounts of money to be disbursed in ways best seen fit at that later time. By distributing the Settlement Funds for the Breckenridge Settlement in a *pro*

[7] Fed. Judicial Ctr, Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide 3 (2010), at https://www.fjc.gov/content/judges-class-action-notice-and-claims-process-checklist-and-plain-language-guide-0.

rata manner, all Class Members will receive at least a starting amount in return for the decade of litigation that has thus far elapsed in this case.

With regards to the amount withheld for the potential award of attorneys' fees, costs, and settlement administration, a subsequent motion will be filed by Class Counsel prior to the Final Fairness Hearing with further information and argument.

Pursuant to the Settlement Agreement, Class Counsel and Breckenridge have established a Settlement Fund into which Breckenridge has paid $1,000,000, before any opt-out reduction. Class Counsel intends to seek $333,333.33 (33% of the Settlement Fund) in fees, costs, and expenses. The remaining amount, totaling $666,666.67 unless there is a reduction, will be set aside for Class Member payments, Class Representative awards, notice costs, and claims administration costs. All claims from Class Members are to be paid from the Settlement Fund pursuant to the terms laid out below.

A proposed Claim Form (Exhibit 1 to Hudson Declaration) will be made available on the website or can be obtained by asking for them to be sent in some other form. Class Counsel estimates that this additional notice, along with claims administration, will cost no more than $250,000. Pursuant to the Settlement Agreement and applicable law, these costs will be paid from the Settlement Fund.

Cash payments to eligible Class Members shall be made from the Settlement Fund. All Class Members will be required to submit appropriate documentation as set forth in detail in the Claim Form. All claims will be subject to review and approval by the Claims Administrator, which is the same entity, Epiq, as the Settlement Administrator.[8]

[8] The Settlement Agreement had listed a different Administrator, but both Breckenridge and IRPs have agreed to use Epiq as the Settlement Administrator and Claims Administrator for the Settlement Fund. An appropriate line has been added to the proposed Order.

A. The Plan of Distribution

This Plan of Distribution ("POD") reflects the current stage of the MDL, the fact that discovery is ongoing, and that the IRPs have a large number of claims against the vast majority of Defendants in the MDL still justiciable. It also reflects the large number of Class Members, who may not all have records of every transaction concerning the more than 240 Drugs at Issue in the IRPs' complaints filed against Breckenridge over the many years encompassed by the class period in the Settlement Agreement.

Therefore, Class Counsel proposes that, for the purposes of this Settlement Agreement, Settlement Funds will be distributed on a "*pro rata*" basis to all Class Members who have filed an appropriate claim. "*Pro rata*" here means that the Settlement Fund will be divided equally between all qualified Class Members, in an amount to each member as determined by the Settlement Administrator after calculating the total number of qualified Class Members.[9] The Class Members will be qualified and able to receive their portion of the Settlement Funds so long as they provide a Claims Form with the required information that they meet the Settlement Class criteria as laid out in the Settlement Agreement, namely, that they were a dispenser of drugs (including Clinics, Hospitals, and Independent Pharmacies) in the United States and its territories that purchased one or more Drugs at Issue from January 1, 2010 through the present, including (a) those that purchased directly from AmerisourceBergen Drug Corporation, Cardinal Health, Inc., Red Oak Sourcing, LLC, The Harvard Drug Group, LLC, HD Smith, LLC, McKesson Corporation, Morris & Dickson, Co., LLC, or Walgreens Boot Alliance, Inc. or their subsidiaries, and (b) those that

[9] The calculation will not be set until all claims are in, but will take into consideration the estimated percentages of the class made up of independent pharmacies, clinics, and hospitals, and the number of locations and/or hospital beds for those entities.

purchased indirectly from any Defendant in the MDL, and are not otherwise excluded by the settlement class definition.[10]

For the period of time running from the approval of the Court for this Plan of Allocation to a date 90 days after the Court's final approval of the Settlement Agreement (the "Claims Period"), claims can be made by Class Members, using the Claims Form. *See* Hudson Declaration, Exhibit 1. Claims that were postmarked during the Claims Period and fully received and approved 30 days after the end of the Claims Period will be treated as eligible claims, assuming they otherwise meet the eligibility requirements. Any claims received thereafter shall be barred as untimely.

After 30 days from the end of the Claims Period, the Claims Administrator will inform Class Counsel and counsel for Breckenridge of the total number of claims made and the amount per claim to be distributed from the Settlement Fund.

The Claims Administrator shall have the discretion, but is not required, to reissue payments to Class Members returned as undeliverable under such policies and procedures as the Claims Administrator deems appropriate.

Class Counsel reserves the right to petition this Court to modify this Plan if the actual claims rate, the amount of remaining funds, or other factors support a modification. The terms of the Settlement Agreement as they relate to the Settlement Fund are not affected by this Plan.

After 90 days from the close of the Claims Period, or enough time for the Claims Administrator to process the payments (whichever is longer), payments to Qualified Class Members will be made in the amount determined by the Claims Administrator to be equal amongst all Qualified Class Members.

[10] This criteria was already included in the Long-Form Notice sent to likely Class Members.

Should there be any remaining money in the Settlement Fund at the conclusion of this distribution, such as an amount leftover from that withheld for a potential attorneys' fee or claims administration but not ultimately disbursed, that money will be held in the Settlement Fund to be added to any future amounts of settlement or damages awards in this MDL pursuant to the terms of those future allocations. If that money is still not disbursed after two years, a second *pro rata* disbursement among all Qualified Claims may be made as determined by Class Counsel and approved by the Court, or another method of extinguishing the Settlement Fund will be submitted by Class Counsel to the Court for its approval.

IV. Setting a Date for the Final Fairness Hearing

The IRPs ask that a deadline for a final Fairness Hearing and approval of the Settlement Agreement be set by the Court following the making of the instant motion. *See* Order Granting IRPs' Motion for Preliminary Approval of Class Action Settlement, *In re Generic Pharmaceuticals Antitrust Litig.*, Case No. 2:16-md-02724 (May 15, 2024), ECF No. 2959. IRPs ask that the Court set a deadline for final approval of the Settlement Agreement no earlier than 210 days after entry of this order, at a day and time otherwise at the Court's discretion. A period of 210 days provides sufficient time for notice to be given and responses received,[11] and for the IRPs and Breckenridge Corp. to file any remaining documents required by the Settlement Agreement for the Court's approval.

[11] This Court approved a period of no less than 210 days between the approval of a notice plan and the fairness hearing in the Apotex Settlement and the DPP settlement with Breckenridge. *See* Order Regarding DPPs' Breckenridge Settlement, *In re Generic Pharmaceuticals Pricing Antitrust Litig.*, Case No. 2:16-md-02724 (Feb. 13, 2024), ECF No. 2841. Courts in this district have also approved much shorter periods between the approval of a notice plan and the fairness hearing. *See Carlough v. Amchem Products, Inc.*, 158 F.R.D. 314, 324 (E.D. Pa. 1994) (approving a 118-day period).

CONCLUSION

IRPs have conferred with Breckenridge Pharmaceutical, Inc., which does not oppose this motion. For the reasons set forth above, IRPs request that the Court grant IRPs' Motion and schedule a Fairness Hearing. A proposed Order is attached hereto.

Dated: January 20, 2026

Respectfully submitted,

/s/ Christian Hudson

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