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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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| *In re K-Dur Antitrust Litigation*<br><br>This document relates to:<br><br>All Direct Purchaser Actions | Civil Action No. 01-cv-1652(SRC)(CLW)<br>MDL Docket No. 1419<br><br>Motion Date: June 19, 2017 |

**DIRECT PURCHASER CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT, APPROVAL OF THE FORM AND MANNER OF NOTICE TO THE CLASS AND PROPOSED SCHEDULE FOR A FAIRNESS HEARING**

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**DOCKETED CASES**

**FEDERAL STATUTES**



**FEDERAL RULES**



**SECONDARY AUTHORITIES**

Direct Purchaser Class Plaintiffs ("DPC Plaintiffs" or "Plaintiffs") respectfully submit this Memorandum of Law in support of their Unopposed Motion for Preliminary Approval of Proposed Settlement, Approval of the Form and Manner of Notice to the Class, and Proposed Schedule for a Fairness Hearing.

## I. INTRODUCTION

After more than seventeen years of litigation and four rounds of mediation, DPC Plaintiffs and Defendants Merck & Co., Inc. (formerly known as Schering-Plough Corporation, hereinafter "Merck") and Upsher-Smith Laboratories, Inc. (hereinafter, "Upsher") (jointly, "Defendants") have reached a settlement by which Defendants will pay $60.2 million in cash into an escrow fund for the benefit of all members of the direct purchaser class previously certified by the Court (the "Class")[1] in exchange for dismissal of the litigation between DPC Plaintiffs and Defendants with prejudice and certain releases (collectively, the "Settlement"). All the terms of the Settlement are set forth in the Settlement Agreement dated May 15, 2017 ("Settlement Agreement") (annexed as Exhibit 1 to the Declaration of Bruce E. Gerstein).

Preliminary approval of the Settlement is appropriate. DPC Plaintiffs and Defendants entered into the Settlement after lengthy, intense, fully-developed litigation, three previous unsuccessful mediations, a looming trial, and hard-fought settlement negotiations presided over by the Honorable Garrett E. Brown, Jr., former Chief Judge of the United States District Court for the District of New Jersey, as private mediator. Counsel for both sides are experienced in class actions generally and pharmaceutical antitrust litigation in particular, and are well-

[1] As detailed *infra* at 4-5, Class members previously received notice of the pendency of this litigation and the certification of a direct purchaser Class. The deadline for Class members to exclude themselves from the Class expired, with all Class members having elected to remain in the Class.

positioned to assess the risks and merits of this case. The Settlement assures that all Class members will receive a substantial cash settlement payment, and that the litigation will finally be put to rest, avoiding continued litigation and potential appeals.

Accordingly, DPC Plaintiffs respectfully request that the Court enter the proposed order (Exhibit A to the Settlement Agreement) which provides for the following:

1. Preliminarily approval of the proposed Settlement Agreement and the documents necessary to effectuate the Settlement, including a proposed form of notice to the Class (Exhibit B to the Settlement Agreement) and a proposed plan of distribution for settlement funds as described in the proposed form of notice;
2. Appointment of Berdon Claims Administration LLC ("Berdon") as settlement administrator;
3. Appointment of Berdon as escrow agent for the settlement funds pursuant to an Escrow Agreement (Exhibit D to the Settlement Agreement); and
4. A proposed settlement schedule, including the scheduling of a Fairness Hearing during which the Court will consider: (a) DPC Plaintiffs' request for final approval of the Settlement and entry of a proposed order and final judgment (Exhibit C to the Settlement Agreement); (b) Class Counsel's application for an award of attorneys' fees and reimbursement of costs and expenses, and a service award to the class representative; and (c) DPC Plaintiffs' request for dismissal of this action against Defendants with prejudice.

## II. BACKGROUND

### A. Overview of the History of the Litigation

On April 4, 2001, DPC Plaintiffs filed the first antitrust lawsuit on behalf of all direct purchasers challenging Defendants' conduct regarding the prescription pharmaceutical K-Dur. DPC Plaintiffs alleged, *inter alia*, that Schering and Upsher had entered into an agreement which unlawfully delayed the availability of less expensive, generic versions of K-Dur through, *inter alia*, entering into an unlawful "reverse payment" agreement.[2] In 2004, The Honorable Joseph A.

[2] Two days prior, the Federal Trade Commission ("FTC") filed an administrative complaint containing similar allegations against Defendants, which proceeded through administrative trial and appeal to the Eleventh Circuit. *See Valley Drug Co. v. Geneva Pharm., Inc.*, 344 F. 3d 1294 (11th Cir. 2003), *rev'd, FTC v. Actavis*, 133 S. Ct. 2223 (2013).

Greenaway, Jr. denied Defendants' motion to dismiss DPC Plaintiffs' antitrust claims and Defendants' motion for judgment on the pleadings. *See* Dkt. No. 174. The parties then undertook extensive fact and expert discovery, which ultimately concluded in 2008. During discovery, DPC Plaintiffs reviewed millions of pages of documents (including the entirety of the FTC record, as well as additional materials never examined by the FTC), took or defended dozens of depositions, submitted or responded to 26 expert reports, and engaged in protracted discovery-related motion practice. DPC Plaintiffs also moved for the certification of a direct purchaser class, Dkt. No. 573, which led to protracted proceedings related to certification. Defendants moved for summary judgment on all of DPC Plaintiffs' claims related to the Schering/Upsher agreement. *See* Dkt. No. 677. By agreement of the parties and by order of the Court, both motions, *inter alia*, were referred for argument and decision to the Honorable Steven M. Orlofsky, formerly a judge of the United States District Court for the District of New Jersey, as Special Master. *See* Dkt. No. 316.

In April 2008, Special Master Orlofsky granted DPC Plaintiffs' motion for class certification, concluding that the requirements of Rule 23 had been met. *See* Dkt Nos. 636-37. Over Defendants' objections, Judge Greenaway adopted that ruling as the opinion of the Court. *See* Dkt. No. 731. In February 2009, Special Master Orlofsky granted Defendants' motion for summary judgment by virtue of the application of the (now-defunct) "scope of the patent" test. *See In re K-Dur Antitrust Litig.,* No. 01-cv-1652, 2009 WL 508869 (D.N.J. Feb. 6, 2009). In March 2010, Judge Greenaway adopted that ruling as the opinion of Special Master Orlofsky and dismissed the case. *See* Dkt. No. 758.

On appeal, the Third Circuit issued a precedential decision which: (1) reversed the Court's grant of summary judgment; and (2) affirmed the Court's grant of class certification. *See*

*In re K-Dur Antitrust Litig.*, 686 F. 3d 197 (3d Cir. 2012). Defendants filed petitions for *certiorari* limited solely to the legal standard applied by the Third Circuit in reversing the grant of summary judgment. Those petitions were held in abeyance by the Supreme Court pending its decision in another case involving reverse payments, *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).

In *Actavis*, the Supreme Court rejected the "scope of the patent" test, and held that courts must apply the rule of reason standard in determining whether a reverse payment agreement violates the antitrust laws. *Id.* The Supreme Court then granted Defendants' petitions for *certiorari*, and remanded the case to the Third Circuit for further proceedings consistent with *Actavis*. At the request of all parties, the Third Circuit reinstated its prior holding on class certification, and remanded the case to this Court for further proceedings. *In re K-Dur Antitrust Litig.*, Nos. 10–2077, 10–2078, 10–2078, 10–4571, 2013 WL 5180857 (3d Cir. 2013).

In April 2015, Defendants filed a renewed motion for summary judgment on all claims relating to the Schering/Upsher settlement. *See* Dkt. No. 839. In February 2016, this Court denied Defendants' motion. *See* Dkt. No. 863. In June 2016, Magistrate Judge Waldor issued a pretrial scheduling order, (*see* Dkt. No. 878), and the parties actively began to prepare for trial. The parties filed their Proposed Pretrial Order in September 2016, (*see* Dkt. No. 883), and pursuant to that Order, fully briefed 13 *Daubert* motions, 23 motions *in limine*, and Defendants' summary judgment motion concerning market power issues. On January 27, 2017, the Court held its Final Pretrial Conference, and the parties continued to engage in trial preparation up through the February 14, 2017 mediation that culminated in the proposed settlement.

Separately, while the parties were preparing for trial, the Court granted DPC Plaintiffs' unopposed motion to: (a) amend the Class definition to exclude certain plaintiffs (the "Retailer

Plaintiffs") who had elected to file individual lawsuits; and (b) provide Class members with notice of the pendency of the litigation, the certification of a direct purchaser class, and the legal rights available to Class members, including instructions on how a Class member could exercise its right exclude itself from the litigation. *See* Dkt. No. 887. As was duly reported to the Court in November 2016, no Class member opted to exclude itself. *See* Dkt. No. 922.

**B. Settlement Negotiations and the Proposed Settlement**

The settlement negotiations between Class Counsel and counsel for Defendants were at arms-length and hard fought. As noted above, the parties had previously engaged in three previous attempts at mediation during 2006, 2007 and 2015, with private mediators Stephen M. Orlofsky, David Geronemus, and Eric Green, respectively. During the February 2017 mediation presided over by Judge Brown, both sides made presentations as to the strengths and weaknesses of their respective cases and engaged in vigorous discussions that lasted late into the night. Class Counsel assessed this action in the light of their extensive experience litigating similar delayed generic entry cases, the history of the litigation, the Supreme Court's decision in *Actavis,* and this Court's subsequent summary judgment opinion applying *Actavis*.

Defendants will pay $60.2 million in cash for the benefit of all Class members in exchange for dismissal of the litigation between DPC Plaintiffs and Defendants and certain releases. The proposed Settlement Agreement provides that even if the Court does not approve the settlement for any reason other than that the settlement is not fair, reasonable or adequate, Defendants will offer Class members their *pro rata* allocated share of the settlement fund (subject to 40% of each share being placed into escrow while the Court reviews Class Counsel's petition for attorney's fees, costs, and a service award for the class representative).

DPC Plaintiffs have proposed the form and manner of providing notice of the proposed Settlement Agreement to the Class, and the procedures by which: (a) Class members may receive

their share of settlement funds; and (b) Class members may object to the proposed Settlement Agreement and/or Class Counsel application for attorney's fees of no more than one-third of the settlement amount, reimbursement of costs and expenses incurred in prosecuting this action, and a service award to the class representative for its efforts on behalf of the Class. Final approval of the proposed Settlement Agreement will result in the dismissal with prejudice of DPC Plaintiffs' claims against Defendants in this litigation in their entirety.

## III. THE PROPOSED SETTLEMENT MEETS THE STANDARD FOR PRELIMINARY APPROVAL

Preliminary approval of a proposed class settlement is warranted if the court determines it has no grounds to doubt the settlement's fairness, the settlement has no obvious deficiencies, and the settlement appears to fall within the range of possible approval. *See Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007); *Thomas v. NCO Fin. Sys., Inc.*, No. 2002 U.S. Dist. LEXIS 14157, 2002 U.S. Dist. LEXIS 14157, *5 (E.D. Pa. July 31, 2002); *Greer v. Shapiro & Kreisman*, No. Civ.A. 00-4647, 2001 WL 1632135, *3 (E.D. Pa. Dec. 18, 2001). "The preliminary approval decision is not a commitment to approve the final settlement; rather, it is a determination that there are no obvious deficiencies and the settlement falls within the range of reason." *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 438 (E.D. Pa. 2008) (internal quotations and citation omitted). Accordingly, preliminary approval does not require a court to reach any ultimate conclusions on the merits of the litigation. *Thomas*, 2002 U.S. Dist. LEXIS 14157 at *5 (quoting *Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974)). Instead, "[t]his analysis often focuses on whether the settlement is the product of arm's-length negotiations." *Curiale v. Lenox Grp. Inc.*, No. 07-1432, 2008 WL 4899474, *4 (E.D. Pa. Nov. 14, 2008). *See also In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, *2 (E.D. Pa. May

10, 2004) (approving settlement reached "after extensive arms-length negotiation between very experienced and competent counsel.").

In a court's evaluation of a proposed settlement, the "professional judgment of counsel involved in the litigation is entitled to great weight." *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 452 (E.D. Pa. 1985). *See also Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness."). Here, Class Counsel have been litigating similar delayed generic entry cases since the late 1990s, and are recommending a settlement that will unquestionably confer substantial financial benefit on the Class and bring to conclusion more than seventeen years of litigation.

A hearing is not necessary or required under Rule 23(e) at the preliminary approval stage. As explained in the Manual for Complex Litigation (the "Manual"), "[i]n some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties." MANUAL FOR COMPLEX LITIGATION, § 21.632 at 382 (4th ed. 2005). *See also Curiale,* 2008 WL 4899474 (court granting preliminary approval without hearing). However, the class representative, Louisiana Wholesale Drug Co., Inc., and Class Counsel are, of course, available at the Court's convenience if it wishes to hold a hearing.

### A. The Proposed Settlement Is the Product of Serious, Informed, Arm's-Length Negotiations

If a court finds that a settlement is the result of good-faith, serious, arm's-length negotiations, the settlement is entitled to a presumption of fairness because such negotiations guard against any "obvious deficiencies" in a settlement. *Hughes v. InMotion Entm't.*, No. 07cv1299, 2008 WL 3889725, *3 (W.D. Pa. Aug. 18, 2008). *See also Mehling*, 246 F.R.D. at

472 ("A common inquiry is whether the proposed settlement is the result of 'arms-length negotiations.'"); *Curiale*, 2008 WL 4899474, at *4 (the preliminary approval analysis "often focuses on whether the settlement is the product of arm's-length negotiations."); *Gates*, 248 F.R.D. at 444 (granting preliminary approval where there was "nothing to indicate that the proposed settlement . . . [was] not the result of good faith, arms-length negotiations between adversaries.").

As noted herein, the settlement here was achieved only after more than seventeen years of hard-fought litigation and three previously unsuccessful attempts at mediation. The voluminous record has permitted DPC Plaintiffs and Defendants to scrutinize the strengths and weaknesses of their claims. Equipped with this knowledge, and with the prospect of a looming trial, the parties engaged in intensive settlement negotiations that were detailed, time-consuming, and hard-fought.

**B. The Advanced Stage of This Case Supports Preliminary Approval**

The Court held a Final Pretrial Conference on January 27, 2017, and up through the February 14, 2017 mediation that led to the proposed Settlement, the parties were actively preparing for a spring 2017 trial. Accordingly, the advanced state of the litigation has allowed Class Counsel to make a fully-informed assessment of the value of the case.

**C. Class Counsel Are Highly Experienced in Antitrust Litigation Alleging Delayed Generic Drug Competition**

Class Counsel believe that the proposed settlement is fair and in the best interests of the Class. In approving class action settlements, courts often defer to the judgment of experienced counsel who have engaged in arm's-length negotiations, understanding that vigorous, skilled negotiation protects against collusion and advances the fairness interests of Rule 23(e). *See Collier v. Montgomery Cnty. Housing Auth.*, 192 F.R.D. 176, 186 (E.D. Pa. 2000) ("the court

will give due regard to the advice of the experienced counsel in this case who recommend the settlement… who have negotiated this settlement at arms-length and in good faith"); *Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995) (stating that significant weight should be attributed "to the belief of experienced counsel that settlement is in the best interest of the class").

Class Counsel have very substantial experience in similar delayed generic entry cases, having been involved in many such cases for over 16 years.[3] In fact, no other group of lawyers has more experience representing classes of direct purchasers in similar cases. Significantly, the proposed Class includes many of the same wholesalers that composed the classes in those prior cases, and no member of the proposed Class has objected to any of the prior settlements.

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[3] Some or all of the attorneys here also were counsel in the following prior generic delay cases that settled: *In re Cardizem CD Antitrust Litig.*, No. 99-md-1278 (E.D. Mich. Edmunds, J.) (final settlement approval on November 25, 2002); *In re Buspirone Antitrust Litig.*, MDL Docket No. 1413 (S.D.N.Y.) (Koeltl, J.) (final settlement approval on April 7, 2003); *In re Relafen Antitrust Litig.*, No. 01-12239 (D. Mass.) (Young, J.) (Apr. 9, 2004); *North Shore Hematology-Oncology Assoc., P.C. v. Bristol Myers Squibb Co.*, No. 1:04-cv-248 (D.D.C.) (Sullivan, J.) (Nov. 30, 2004); *In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-mdl-1317 (S.D. Fla.) (Seitz, J.) (Apr. 19, 2005); *In re Remeron Antitrust Litig*, No. 03-CV-0085 (D.N.J.) (Hochberg, J.) (Nov. 9, 2005); *In re Children's Ibuprofen Oral Suspension Antitrust Litig.*, No. 1:04 CV-01620 (D.D.C.) (Huvelle, J.) (April 24, 2006); *Meijer, Inc. et al. v. Warner Chilcott, & Barr Pharma. Inc.*, No. 05-2195 (D.D.C.) (Kollar-Kotelly J.) (Apr. 20, 2009); *In re Tricor Antitrust Litig.*, No. 05-340 (D. Del.) (Robinson, J.) (April 24, 2009); *In re Nifedipine Antitrust Litig.*, MDL No. 1515 (D.D.C.) (Leon, J.) (Jan. 31, 2011); *In re OxyContin Antitrust Litig.*, No.04 md 1603 (S.D.N.Y.) (Stein, J.) (Jan. 25, 2011); *Meijer, Inc. v. Abbott Labs.*, N.D. Cal. No. 07-5985 (N.D. Cal.) (Wilken, J.) (Aug. 11, 2011); *In re Wellbutrin SR Antitrust Litig.*, No. 04-5525 (E.D. Pa.) (Stengel, J.) (Nov. 21, 2011); *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 05 Civ. 2237 (S.D.N.Y.) (Seibel, J.) (Nov. 28, 2011); *Rochester Drug Co-Operative et al. v. Braintree Labs. Inc.*, No-07-142 (D. Del.) (Robinson, J.) (May 31, 2012); *In re Neurontin Antitrust Litig.*, No. 02-1830 (D.N.J.) (Hochberg, J.) (Aug. 6, 2014); *Mylan Pharma., Inc. v. Warner Chilcott, Ltd.*, No. 12-cv-3824 (E.D. Pa.) (Diamond, J.) (Sept. 15, 2014); *In re Prandin Direct Purchaser Antitrust Litig.*, No. 2:10-cv-12141 (E.D. Mich.) (Cohn, J.) (Jan. 20, 2015); *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 06-1797 (E.D. Pa.) (Goldberg, J.) (Oct. 15, 2015, settled in part).

**D. The Proposed Settlement Is Within the Range of Possible Approval**

The proposed cash payout here of $60.2 million is unquestionably significant. The settlement easily falls "within the range of" settlements that could "possibl[y]" be worthy of final approval as fair, reasonable, and adequate. *See, e.g., Samuel v. Equicredit Corp.*, No. 2002 WL 970396, 2002 WL 970396, *1 n.1 (E.D. Pa. May 6, 2002) (quoting Newberg on Class Actions § 11.25 (1992). This is especially true considering that the litigation has been pending for more than seventeen years, and settlement will avoid further utilization of both the Court's and the parties' resources. Whether a settlement is granted final approval is determined at the final fairness stage in accordance with *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), which enumerates nine factors to be considered by courts assessing the fairness of a settlement under Rule 23(e).[4] At the *preliminary* approval stage, by contrast, courts simply determine if the settlement could possibly be approved using the *Girsh* factors. *See Curiale*, 2008 WL 4899474, at *8 n. 4 ("[a]t the preliminary approval stage, however, we need not address all of these factors, as 'the standard for preliminary approval is far less demanding.'") (quoting *Gates*, 248 F.R.D. at 444 n.7).

As noted herein, this case has been litigated extensively and was poised for imminent trial. In its ruling on summary judgment, and through multiple pre-trial and status conferences, the Court has provided the parties with guidance useful in their evaluation of the likelihood of

[4] The *Girsch* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *See Kaplan v. Chertoff*, No. 06-5304, 2008 WL 200108, *2 n.1 (E.D. Pa. Jan. 24, 2008).

success in this litigation, which is informative of the range of potential recoveries. *See, e.g., In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 334 (E.D.N.Y. 2010) (where "[c]ritical evidentiary rulings on the parties' motions *in limine* in the weeks before trial in this action served to clarify the parties' relative likelihood of success," settlement discussions were well-informed and approval was granted). The proposed Settlement, if finally approved, will result in a settlement fund of $60.2 million, and free Class members from the risk and expense of continued litigation against the Defendants. Compared to litigating to final resolution, the certain immediate receipt of a significant financial recovery after serious, informed negotiations establishes an initial presumption that the settlement is "fair, adequate, and reasonable." *See Samuel*, 2002 WL 970396, at *1 n.1.

**E. The Plan of Distribution Is Fair, Reasonable, and Adequate**

Approval of a plan of distribution for a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole, *i.e.,* the distribution plan must be fair, reasonable and adequate. *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 174 (E.D. Pa. 2000). Generally, an allocation plan is reasonable if it reimburses class members based on the type and extent of their injuries. *Id.*

The proposed plan of distribution meets this standard. As described in the proposed notice to Class members, the proceeds of the proposed Settlement in this case, net of Court-approved attorneys' fees, a service award for the class representative, and costs of litigation, ("Net Settlement Fund"), will be paid to Class members who submit claims based on each Class member's aggregate share of the total Class' purchases of K-Dur during the class period. This proposed plan of distribution is similar to plans that have previously been approved by courts in analogous cases and implemented with a high degree of success and efficiency, and should be approved here as well. *See, e.g., Mylan Pharma., Inc. v. Warner Chilcott, Ltd.*, No. 12-cv-3824

(E.D. Pa Sept. 15, 2014) (ECF No. 665) (granting final approval to Plan of Distribution); *In re Flonase Antitrust Litig.*, No. 08-cv-3149 (E.D. Pa. June 14, 2013) (ECF No. 496) (same); *Meijer, Inc. et al v. Biovail Corp. et al.* No. 2:08-cv-02431 (E.D. Pa. Nov. 7, 2012) (ECF No. 485) (same).

**F. The Proposed Form and Manner of Notice Are Appropriate**

**1. Form of Notice**

Under Rule 23(e), class members are entitled to reasonable notice of a proposed settlement before it is finally approved by the Court and notice of the final Fairness Hearing. *See* Manual §§ 21.312, 21.633. "[T]o satisfy due process, notice to class members must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Ikon Office Solutions*, 194 F.R.D. at 184. There are two components of notice: (1) the form of the notice; and (2) the manner in which notice is sent to Class members.

The proposed form of notice, which has been used by Class Counsel in virtually the same form in prior, similar cases, is appropriate.[5] The proposed notice is designed to alert Class members to the proposed Settlement by using a bold headline, and the plain language text provides important information regarding the terms of the proposed Settlement. The notice fairly, clearly and concisely describes in plain, easily understood language: the nature of the action; the definition of the Class certified; the significant terms of the proposed Settlement including the total amount Defendants have agreed to pay to the Class; that a Class member may object to all or any part of the proposed Settlement and the process for doing so, including entering an appearance through an attorney if the Class member desires; the process for

[5] Defendants have reviewed and agreed to the proposed form and manner of notice.

obtaining a portion of the settlement proceeds; the deadlines and final approval process for the proposed Settlement and Class Counsel's request for attorneys' fees of no more than one-third of the Settlement and reimbursement of all litigation expenses, and service award to the named plaintiff, and the ways in which Class members may make objections to same; the schedule for completing the settlement approval process; and the binding effect of a final judgment on members of the Class. *See generally* Exhibit B.

In addition, the proposed notice prominently features Class Counsel's contact information and directions to the firm websites for Class Counsel where the Settlement documents and supplemental information will be provided, as well as contact information for the settlement administrator. While the Court has discretion to give members of a previously-certified class a second chance to opt out, *see* Rule 23(e)(4), there is no requirement that it do so, as numerous courts have recognized. *See, e.g.*, *Denney v. Deutsche Bank AG*, 443 F. 3d 253, 270-71 (2d Cir. 2006) (courts are under "no obligation" to afford class members second opportunity for exclusion); *Low v. Trump Univ., LLC*, No. 3:10-cv-00940-GPC-WVG, 2017 U.S. Dist. LEXIS 49739, at *32 (S.D. Cal. March 31, 2017) (second opt-out opportunity at class settlement stage not required); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 745 (E.D. Pa. 2013) (finally approving settlement and noting that because "class members were given the chance to opt out when [the court] originally certified the class . . .[the court] declined to allow class members an additional opportunity to opt out of the class after receiving notice of the settlement"). Because Class members were recently informed about the litigation and were given the chance to invoke their due process rights and opt out of the certified Class, and the Settlement still allows them to object to the terms of the Settlement and/or Class Counsel's

request for attorneys' fees, expenses and service award to the class representative, DPC Plaintiffs respectfully submit that no second opt-out period is necessary here.

**2. Manner of Notice**

DPC Plaintiffs propose to send notice by first-class United States mail to each of the 41 Class members, all of which are business entities that have received and followed similar settlement notices in many of the cases cites in footnote 3 *supra*. The list of Class members was drawn from Schering's electronic transactional sales data, and/or are otherwise known to Class Counsel. In circumstances in which all class members can be identified and reached with certainty, the best method of notice is individual notice. *See* Manual, § 21.311 at 488 ("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."). Individual notice by first class mail has been recognized by the courts as wholly appropriate. *See, e.g., In re Janney Montgomery Scott LLC Fin. Consultant. Litig.*, No. 2009 WL 2137224, 2009 WL 2137224, *7 (E.D. Pa. July 16, 2009) (notice by first-class mail). *See also Smith v. Prof'l Billing & Mgmt. Servs., Inc.*, 2007 U.S. Dist. LEXIS 86189, *16 (D.N.J. Nov. 21, 2007) ("first-class mail . . . is unquestionably the best notice practicable under the circumstances"); *Wilson v. United Intern. Investigative Servs. 401(k) Sav. Plan*, Civ.A. 01–CV–6126, 2002 WL 734339, *8 (E.D. Pa. Apr. 23, 2002) (notice by first-class mail); *Comer v. Life Ins. Co.*, No. 08-cv-228-JFA, 2011 U.S. Dist. LEXIS 36042, *4 (D.S.C. Mar. 31, 2011) (notice by first class mail alone found sufficient, where identity of 84 class members was readily ascertainable from defendant's records).

**G. The Court Should Appoint Berdon as Settlement Administrator**

DPC Plaintiffs also request that Berdon, whom Class Counsel have used in prior, similar cases, and whom the Court appointed in this case to serve as notice administrator with respect to

the prior notice received by the Class members, be appointed as the settlement administrator.[6] Berdon will oversee the administration of the Settlement, including disseminating notice to the Class, calculating each Class member's *pro rata* share of the Settlement fund, and distributing settlement proceeds.

**H. The Court Should Appoint Berdon as Escrow Agent**

DPC Plaintiffs likewise propose Berdon, whom Class Counsel has used in prior, similar cases, as escrow agent. Defendants have approved this selection.[7]

**I. The Proposed Schedule Is Fair and Should Be Approved**

As set forth in the proposed order, DPC Plaintiffs propose the following schedule for completing the Settlement approval process:

- Within 10 days from the date of filing for preliminary approval, Defendants shall serve any necessary notices pursuant to the Class Action Fairness Act of 2005;
- Within 15 days from the date of preliminary approval, notice is mailed to each member of the Class;
- Within 60 days from the date that notice is mailed to each member of the Class, Class members may object to the Settlement or attorney's fees, costs and expenses and service award;
- 21 days prior to the expiration of deadline for Class members to object to the Settlement and/or petition for attorney's fees, costs and expenses and service award, Class Counsel will file any petition for attorney's fees, costs and expenses and an service award for the named plaintiffs;
- No later than 14 days after the deadline for Class members to object to the Settlement and/or petition for attorney's fees, expenses and service award, Class Counsel will file a motion for final approval of the Settlement and entry of Final Judgment.

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[6] Berdon is well-reputed within the legal, accounting and financial service fields, and frequently handles claims administration in settlement of large, complex antitrust cases.

[7] *See* Exhibit D to Settlement Agreement (Escrow Agreement).

- On a date to be set by the Court no less than 100 days following preliminary approval, the Court will hold a final Fairness Hearing.

This schedule is fair to Class members. It gives Class members ample time for consideration of the Settlement and Class Counsel's request for attorneys' fees, expenses and service award before the deadline for submitting any objections. And as noted herein, the notice will, *inter alia*, direct Class members as to how they can get more information or answers to any questions they may have. In addition, the schedule allows the full statutory period for the Defendants to serve any necessary Class Action Fairness Act notices pursuant to 28 U.S.C. § 1715, and for regulators to review the proposed settlement and, if they choose, advise the Court of their view.

## IV. CONCLUSION

For the foregoing reasons, DPC Plaintiffs respectfully request that the Court enter the proposed Order.

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Respectfully submitted,

***/s/ Daniel C. Simons***

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