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

KING DRUG COMPANY OF FLORENCE, INC., ET AL., on behalf of itself and all others similarly situated, **Plaintiffs,** **v.** **CEPHALON, INC., ET AL.,** **Defendants.**	**Civil Action No. 06-cv-1797-MSG** **Judge Mitchell S. Goldberg**

DIRECT PURCHASER CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR CERTIFICATION OF A SETTLEMENT CLASS, APPOINTMENT OF CLASS COUNSEL, 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 **Page #**

Statutes

Secondary Authorities

Direct Purchaser Class Plaintiffs King Drug Co. of Florence, Inc., Rochester Drug Co-Operative, Inc., Burlington Drug Co., Inc., J.M. Smith Corp. d/b/a Smith Drug Co., Meijer, Inc., Meijer Distribution, Inc., Stephen L. LaFrance Pharmacy d/b/a SAJ Distributors, Inc., and Stephen L. LaFrance Holdings, Inc. ("DPC Plaintiffs" or "Plaintiffs"), respectfully submit this Memorandum of Law in support of their Unopposed Motion for Certification of a Settlement Class, Appointment of Class Counsel, 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 over a decade of litigation and three rounds of mediation, DPC Plaintiffs and Mylan[1] have reached a settlement by which Mylan will pay $96,525,000 million in cash into an escrow fund for the benefit of all members of the Class (the "Class")[2] in exchange for dismissal of the litigation between DPC Plaintiffs and Mylan with prejudice and certain releases (the "Settlement").[3] All the terms of the Settlement are set forth in the Settlement Agreement dated January 17, 2017 ("Settlement Agreement") (annexed as Exhibit 1 to the Declaration of Bruce E. Gerstein).

Preliminary approval of the Settlement is appropriate. DPC Plaintiffs and Mylan entered into the Settlement after intense, fully-developed litigation and extensive mediation and negotiations. Counsel for both sides are experienced in class actions generally and

[1] Mylan Pharmaceuticals, Inc. and Mylan Laboratories, Inc. (now known as Mylan Inc.) are collectively referred to as "Mylan" herein.

[2] The Class is defined below at p. 6.

[3] Defendants Ranbaxy Laboratories, Ltd. and Ranbaxy Pharmaceuticals, Inc. (collectively "Ranbaxy") are not parties to the Settlement, and thus DPC Plaintiffs' pending claims against Ranbaxy remain. DPC Plaintiffs previously settled their claims against Cephalon, Inc., Teva Pharmaceutical Industries, Ltd., Teva Pharmaceuticals USA Inc., and Barr Pharmaceuticals, Inc. (the "Cephalon Defendants"). Mylan, Ranbaxy and the Cephalon Defendants are collectively referred to as "Defendants" herein.

pharmaceutical antitrust litigation in particular, and are well-positioned to assess the risks and merits of this case. Mylan does not oppose certification of a direct purchaser class under Federal Rule of Civil Procedure 23 for purposes of the Settlement. The Settlement assures that all Class members will receive a substantial cash settlement payment now, and that the litigation against Mylan will be put to rest, while 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. Certification of the Class for purposes of settlement;
3. Pursuant to Federal Rule of Civil Procedure 23(c)(1)(B) and 23(g), reaffirming Lead Counsel, Liaison Counsel and an Executive Committee as Class Counsel for purposes of settlement;
4. Appointment of Berdon Claims Administration LLC ("Berdon") as settlement administrator;
5. Appointment of Berdon as escrow agent for the settlement funds (Escrow Agreement annexed as Exhibit D to the Settlement Agreement); and
6. 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 expenses, payment of administrative costs, and incentive awards to the named class plaintiffs; and (c) DPC Plaintiffs' request for dismissal of this action against Mylan with prejudice.

II. BACKGROUND

A. DPC Plaintiffs' Claims and Procedural Background

In April 2006, DPC Plaintiffs filed the first antitrust lawsuit on behalf of all direct purchasers challenging Defendants' conduct regarding the prescription pharmaceutical Provigil.[4] DPC Plaintiffs alleged that Defendants had unlawfully delayed the availability of less expensive,

[4] *See* Dkt. No. 1.

generic versions of Provigil through, *inter alia*, unlawful "reverse payment" agreements. DPC Plaintiffs further alleged that defendant Cephalon had obtained U.S. Patent No. RE 37,516 ("RE '516 patent") by fraud, then used that patent to delay generic competition for Provigil.[5] Defendants twice moved to dismiss DPC Plaintiffs' complaint, and DPC Plaintiffs prevailed after extensive briefing and oral argument. The case then proceeded through intensive discovery, including production and review of millions of pages of documents, dozens of expert reports, and dozens of depositions (fact and expert). During and after discovery, the parties briefed and argued multiple rounds of dispositive and other motions, including summary judgment motions, *Daubert* motions, motions *in limine*, and DPC Plaintiffs' motion for class certification. The parties also engaged in extensive preparations for a trial that had been scheduled to begin January 2016 (although the trial was later stayed). The Court's decision on class certification resulted in appellate briefing and argument before the Third Circuit Court of Appeals, which then remanded on the limited issue of the impracticality of joinder.[6]

DPC Plaintiffs' supplemental brief for certification of a litigation class is being submitted simultaneously with this motion. Further briefing on the litigation class will be completed in early April, with a hearing scheduled on April 17, 2017. *See* Dkt No. 1028.

B. Settlement Negotiations and the Proposed Settlement

The settlement negotiations between Class Counsel and attorneys for Mylan were hard fought and at arm's-length, and included three rounds of mediation, once with Magistrate Judge Strawbridge, and twice with a private mediator, the Honorable Faith S. Hochberg, a former United States District Judge for the District of New Jersey. Both sides made presentations as to

[5] *See Walker Process Equip., Inc. v. Food Mach. & Chem.* Corp., 382 U.S. 172 (1965).

[6] The DPC Plaintiffs had previously settled their claims against the Cephalon Defendants.

the strengths and weaknesses of their respective cases. Class Counsel assessed this action in light of their extensive experience litigating similar delayed generic entry cases, the Supreme Court's decision in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), the numerous opinions issued by this Court over the course of the litigation (including this Court's decision denying Defendants' motions for summary judgment), and the Third Circuit's decision concerning class certification.

Mylan will pay $96,525,000 million in cash for the benefit of all Class members in exchange for dismissal of the litigation between DPC Plaintiffs and Mylan and certain releases. The proposed Settlement Agreement provides that even if the Court does not approve the settlement (including because the Court does not certify the Class for purposes of settlement) for any reason other than that the settlement is not fair, reasonable or adequate, Mylan 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 incentive awards for the named plaintiffs).

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; (b) Class members may seek exclusion from the Class or object to the proposed Settlement Agreement; (c) Class Counsel shall apply for attorney's fees of no more than thirty percent of the settlement amount and reimbursement of expenses incurred in prosecuting this action and for service awards to the named plaintiffs for their efforts on behalf of the Class. Final approval of the proposed Settlement Agreement will result in the dismissal with prejudice of DPC Plaintiffs' claims in their entirety against Mylan.

III. THE REQUIREMENTS FOR CERTIFICATION OF A SETTLEMENT CLASS HAVE BEEN MET

DPC Plaintiffs and Mylan have agreed, subject to the Court's review and approval, to a Class for purposes of settlement. The requirements of Rule 23 are the same when certifying a class in connection with settlement (as opposed to certifying a class in connection with litigation), except that "a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial."[7]

The Court previously found that the proposed litigation class met the requirements of Rule 23(a)(2)-(4) and 23(b)(3) and that appointment of counsel was appropriate under Rule 23(g). *See* Dkt. Nos. 829, 830.[8] In other words, the Court found that the commonality, typicality, adequacy, predominance, and superiority prongs of Rule 23 were satisfied. Defendants appealed the Court's prior certification order, raising only two issues. While the Third Circuit remanded as to one issue (whether joinder is impracticable), it rejected Defendants' "*Comcast*" argument concerning Rule 23(b)(3). Because Defendants did not raise any other challenge to this Court's certification order and because the Third Circuit affirmed this Court's finding that Rule 23(b)(3) was met, the prior findings under Rule 23(a)(2)-(4), (b)(3), and (g) remain the law of the case.[9]

---

[7] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). *See also King Drug Co. of Florence v. Cephalon, Inc*., 309 F.R.D. 195, 204 (E.D. Pa. 2015) (citing *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 798–99 (3d Cir.1995)), *vacated and remanded sub nom. on other grounds*, *In re Modafinil Antitrust Litig*., 837 F.3d 238 (3d Cir. 2016).

[8] The Court also previously certified a class for purposes of the settlement with the Cephalon Defendants. *See* Dkt. No. 831.

[9] *See United States v. Husband*, 312 F.3d 247, 250 & n.3 (7th Cir. 2002) ("any issue that could have been but was not raised on appeal is waived and thus not remanded" and thus is "law of the case"); *United States v. Ticchiarelli*, 171 F.3d 24, 29 (1st Cir. 1999) ("findings and conclusions that are not appealed and are not related to the issues on appeal are treated as settled[…]");

As to the one open issue following remand – the impracticality of joinder – Plaintiffs incorporate by reference their supplemental brief on certification of a litigation class that is being filed today.

The settlement class would be defined as follows:

> All persons or entities in the United States and its territories and/or their assignees (partial or otherwise) who purchased Provigil in any form directly from Cephalon at any time during the period from June 24, 2006 through August 31, 2012 (the "Class"). Excluded from the Class are Defendants, and their officers, directors, management, employees, subsidiaries, or affiliates, and all federal governmental entities.
>
> Also excluded from the Class are: Rite Aid Corporation, Rite Aid HDQTRS. Corp., JCG (PJC) USA, LLC, Eckerd Corporation, Maxi Drug, Inc. d/b/a Brooks Pharmacy, and CVS Caremark Corporation, Walgreen Co., The Kroger Co., Safeway Inc., American Sales Co. Inc., HEB Grocery Company, LP, Supervalu, Inc., and Giant Eagle, Inc., and their officers, directors, management, employees, subsidiaries, or affiliates in their own right and as assignees from putative Direct Purchaser Class members as more fully described in Paragraph 10 herein ("Retailer Plaintiffs"). For purposes of clarity, Steven L. LaFrance Holdings, Inc., and Steven L. LaFrance Pharmacy, Inc. d/b/a SAJ Distributors ("SAJ") is not a Retailer Plaintiff and is a member of the Class; while Retailer Plaintiff Walgreen Co. acquired SAJ in 2012, SAJ's case and claim have proceeded independently of Walgreen Co.[10]

Cowgill v. Raymark Indus., Inc., 832 F.2d 798, 802 n.2 (3d Cir.1987) (noting that party waives contentions that could have been but were not raised on prior appeal).

[10] *See* Settlement Agreement at ¶ 1. This definition is in all material respects the same as the litigation class definition in this Court's order of August 13, 2015, as clarified on December, 2015. *See* Dkt Nos. 841, 948. Contemporaneously with this motion, Plaintiffs are seeking certification of a class for purposes of continued litigation against Ranbaxy. Although similarly defined, the settlement class and the litigation class would be separate.

IV. 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.[11] "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."[12]

Accordingly, preliminary approval does not require a court to reach any ultimate conclusions on the merits of the litigation.[13] Instead, "[t]his analysis often focuses on whether the settlement is the product of arm's-length negotiations."[14]

In a court's evaluation of a proposed settlement, the "professional judgment of counsel involved in the litigation is entitled to great weight."[15] Here, Class Counsel have been litigating similar delayed generic entry cases since the late 1990s, and are recommending a settlement that adds to the already substantial financial benefits that Class members have received through the previous settlement with the Cephalon Defendants (and with one defendant still remaining).

---

[11] *See Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007); *Thomas v. NCO Fin. Sys., Inc.*, 2002 U.S. Dist. LEXIS 14157, *5 (E.D. Pa. July 31, 2002); *Greer v. Shapiro & Kreisman*, 2001 WL 1632135, *3 (E.D. Pa. Dec. 18, 2001).

[12] *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 438 (E.D. Pa. 2008) (internal quotations and citation omitted).

[13] *See Thomas*, 2002 U.S. Dist. LEXIS 14157 at *5 (quoting *Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974)).

[14] *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.*, 2004 WL 1068807, *2 (E.D. Pa. May 10, 2004) (approving settlement reached "after extensive arms-length negotiation between very experienced and competent counsel.").

[15] *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.").

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."[16] Obviously, the named class plaintiffs and Class Counsel are 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.[17]

As noted herein, the settlement here was achieved only after more than a decade of hard-fought litigation. The voluminous record has permitted DPC Plaintiffs and Mylan to scrutinize the strengths and weaknesses of their respective claims and defenses. Equipped with this knowledge, the parties engaged in intensive settlement discussions through three rounds of mediation. The negotiations were detailed, time-consuming, and hard-fought.

B. The Advanced Stage of This Case Supports Preliminary Approval

This is late stage litigation. The Court has issued its summary judgment rulings and numerous other pre-trial rulings, the parties assiduously prepared for a trial last year, and DPC Plaintiffs have filed their supplemental papers for class certification. The Court has also ordered

---

[16] MANUAL FOR COMPLEX LITIGATION, § 21.632 at 382 (4th ed. 2005). *See also Curiale*, 2008 WL 4899474 (court granting preliminary approval without hearing).

[17] *Hughes v. In Motion Entm't.*, 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 'arm's-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, arm's-length negotiations between adversaries.").

that a trial of Apotex and Retailer Plaintiffs' claims will proceed together, and has listed the case for trial on June 5, 2017. Accordingly, Class Counsel has been able to make a fully-informed assessment of the value of its claims against Mylan.

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

Class Counsel believe that the settlement with Mylan 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,[18] understanding that vigorous, skilled negotiation protects against collusion and advances the fairness interests of Rule 23(e).

Class Counsel have very substantial experience in similar delayed generic entry cases, having been involved in many such cases for over 18 years.[19] In fact, no other group of lawyers

[18] *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 arm's-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").

[19] 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.) (April 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.) (April 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. et al.*, No. 05-2195 (D.D.C.) (Kollar-Kotelly J.) (April 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. Abbot Labs.*, N.D. Cal. No. 07-5985 (N.D. Cal.) (Wilken, J.) (August 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

has more experience representing classes of direct purchasers in similar cases. Significantly, the proposed Class includes many of the same wholesalers and retail entities that composed the classes in those prior cases, and no member of the proposed Class has objected to any of the prior settlements, including, most notably, the previous settlement reached with the Cephalon Defendants. The Court has first-hand knowledge of the vigor with which Class Counsel have prosecuted this case for more than a decade.

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

The proposed cash payout here is unquestionably significant, especially in view of the fact that it comes on the heels of Class members' largest recovery ever in a delayed generic entry antitrust case (*i.e.*, the settlement with the Cephalon Defendants) and that DPC Plaintiffs are still proceeding with their claims against Ranbaxy. The settlement easily falls "within the range of" settlements that could "possibl[y]" be worthy of final approval as fair, reasonable, and adequate.[20] 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).[21] At

---

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-cv12141 (E.D. Mich.) (Cohn, J.) (Jan. 20, 2015).

[20] *See, e.g., Samuel v. Equicredit Corp.*, 2002 WL 970396, *1 n.1 (E.D. Pa. May 6, 2002) (quoting Newberg on Class Actions § 11.25 (1992)).

[21] These factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of 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).

the *preliminary* approval stage, by contrast, courts simply determine if the settlement could possibly be approved using the *Girsh* factors.[22]

The proposed Settlement is in the best interest of the Class. In its rulings on summary judgment and other motions, the Court has provided the parties with guidance useful to their evaluation of the likelihood of success in this litigation, which is informative of the range of potential recoveries.[23] The proposed Settlement, if finally approved, will result in a settlement fund of $96,525,000 million, and free Class members from continued litigation against Mylan. Compared to litigating to final resolution, the certain immediate receipt of the proceeds of the Settlement establishes an initial presumption that the settlement is "fair, adequate, and reasonable."[24]

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.[25] Generally, an allocation plan is reasonable if it reimburses class members based on the type and extent of their injuries.[26]

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-

---

[22] *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).

[23] *See, e.g., In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 334 (E.D.N.Y. 2010) (where "critical 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).

[24] *Samuel*, 2002 WL 970396, at *1 n.1.

[25] *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 174 (E.D. Pa. 2000).

[26] *Id.*

approved attorneys' fees, incentive awards for named plaintiffs, 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 Provigil during the class period. This proposed plan of distribution is the same as this Court previously approved with respect to the prior settlement with the Cephalon Defendants, and is similar to plans that have previously been approved by courts in analogous cases and implemented with a high degree of success and efficiency,[27] and should be approved here as well.

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.[28] "[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."[29] 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.[30] The proposed notice is designed to alert Class members to the proposed Settlement by using a bold headline, and the plain language text

---

[27] *See, e.g., Mylan Pharma., Inc. v. Warner Chilcott*, LTD, No. 12-cv-3824 (E.D. Pa Sept. 15, 2014) (Dkt. No. 665) (granting final approval to Plan of Distribution); *In re Flonase Antitrust Litig.*, No. 08-cv-3149 (E.D. Pa. June 14, 2013) (Dkt. No. 496) (same); *Meijer, Inc. et al v. Biovail Corp. et al.* No. 2:08-cv-02431 (E.D. Pa. Nov. 7, 2012) (Dkt. No. 485) (same).

[28] *See* Manual §§ 21.312, 21.633.

[29] *Ikon Office Solutions*, 194 F.R.D. at 184.

[30] Mylan has reviewed and agreed to the proposed form and manner of notice.

provides important information regarding the terms of the proposed Settlement.[31] In addition, the proposed notice prominently features Class Counsel's contact information and directions to the firm website for Class Counsel where the Settlement documents and supplemental information will be provided, as well as contact information for the settlement administrator.

2. Manner of Notice.

DPC Plaintiffs propose to send notice by first-class United States mail to each Class member, all of which are business entities that have received and followed similar settlement notices. The list of Class members was drawn from Cephalon'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.[32] Individual notice by first class mail has been recognized by the courts as appropriate.[33]

---

[31] The notice fairly, clearly and concisely describes in plain, easily understood language: the nature of the action; the definition of the Class certified; which Defendants are parties to the proposed Settlement; the significant terms of the proposed Settlement including the total amount Mylan has agreed to pay to the Class; that a Class member may exclude itself from the Class and the implications of doing so; 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 obtaining a portion of the settlement proceeds; the final approval process for the proposed Settlement and Class Counsel's request for attorneys' fees of no more than thirty percent of the Settlement and reimbursement of all litigation expenses, and incentive awards to the named plaintiffs; the schedule for completing the settlement approval process, including deadlines for Class members to submit objections to the Settlement, the submission of the motion for final approval of the settlement, and the submission of the motion for attorneys' fees, expenses, and incentive awards to the named plaintiffs; and the binding effect of a final judgment on members of the Class. *See generally* Exhibit B.

[32] *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.").

[33] *See, e.g., In re Janney Montgomery Scott LLC Fin. Consultant. Litig.*, 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 (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*, 2002 WL 734339, *8 (E.D. Pa. Apr. 23, 2002) (notice by first-class mail); *Comer v. Life Ins. Co.*, 2011 U.S. Dist. LEXIS 36042, *4 (D.S.C. Mar. 31,

G. The Court Should Appoint Berdon as Settlement Administrator

DPC Plaintiffs also request that Berdon, whom Class Counsel has used in prior, similar cases, be appointed as the settlement administrator.[34] 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 propose Berdon, whom Class Counsel has previously used as escrow agent. Mylan has approved this selection.[35]

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, Mylan shall serve 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 request exclusion from the Class or object to the Settlement or attorney's fees, expenses and incentive awards;
- 21 days prior to the expiration of deadline for Class members to request exclusion from the Class or object to the Settlement and/or attorney's fees, expenses and incentive awards, Class Counsel will file Class Counsel's petition for attorney's fees, expenses and incentive awards;
- 21 days after the expiration of the deadline for Class members to request exclusion from the Class or object to the Settlement and/or attorneys' fees,

---

2011) (notice by first class mail alone found sufficient, where identity of 84 class members was readily ascertainable from defendant's records).

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

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

expenses and incentive awards, Class Counsel will file a motion and memorandum in support of final approval of the Settlement; and

- 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 fees, expenses and incentive awards before the deadline for opting-out and/or submitting objections. Specifically, Class members will have the notice for 60 days before the deadline to request exclusion from the Class or object to the Settlement, and will have Class Counsel's request for fees, expenses and incentive awards for 21 days before the deadline to request exclusion from the Class or object to the Settlement and/or Class Counsel's request for fees, expenses and incentive awards. And as noted herein, the notice will, *inter alia*, explain the Settlement, inform Class members of Class Counsel's intent to move for attorney's fees, expenses and incentive awards, and 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 Mylan to serve its Class Action Fairness Act notice 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. Given that Class members have familiarity with this type of litigation, the schedule is fair.

V. CONCLUSION

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

Dated: February 3, 2017

Respectfully submitted,

By: /s/ Bruce E. Gerstein
Bruce E. Gerstein
GARWIN GERSTEIN & FISHER LLP
Joseph Opper
Kimberly Hennings
88 Pine Street, 10th Floor
New York, NY 10005
Tel: (212) 398-0055
Fax: (212) 764-6620

Lead Counsel for Plaintiffs in the King Drug Direct Purchaser Action

BERGER & MONTAGUE, P.C. Daniel Berger David F. Sorensen Eric L. Cramer Daniel C. Simons 1622 Locust Street Philadelphia, PA 19103 Tel: (215) 875-3000 Fax: (215) 875-4604 *Liaison Counsel and Member of the Executive Committee for Plaintiffs in the King Drug Direct Purchaser Action*	NASTLAW, LLC Dianne M. Nast Erin C. Burns 1101 Market Street, Suite 2801 Philadelphia, PA 19107 Tel: (215) 923-9300 Fax: (215) 923-9302 *Counsel for Stephen L. LaFrance Holdings, Inc. and Stephen L. LaFrance Pharmacy, Inc. d/b/a SAJ Distributors*
ODOM & DES ROCHES, L.L.P. Stuart E. Des Roches 650 Poydras Street, Suite 2020 New Orleans, LA 70130 Tel: (504) 522-0077 Fax: (504) 522-0078 *Executive Committee for Plaintiffs in the King Drug Direct Purchaser Action*	FARUQI & FARUQI LLP Peter Kohn 101 Greenwood Avenue, Suite 600 Jenkintown, PA 19046 Tel: (215) 277-5770 Fax: (215) 277-5771 *Counsel for Rochester Drug Co-Operative, Inc.*
SMITH SEGURA & RAPHAEL, LLP David P. Smith Susan C. Segura 3600 Jackson Street, Suite 111 Alexandria, LA 71303 Tel: (318) 445-4480 Fax: (318) 487-1741 *Executive Committee for Plaintiffs in the King Drug Direct Purchaser Action*	HEIM PAYNE & CHORUSH, LLP Russell Chorush 1111 Bagby, Suite 2100 Houston, TX 77002 Tel: (713) 221-2000 *Counsel for Plaintiffs in the King Drug Direct Purchaser Class Action*
NUSSBAUM LAW GROUP, P.C. Linda P. Nussbaum 570 Lexington Ave. New York, NY 10022 Tel: (212) 702-7054 Fax: (914) 874-7152 *Counsel for Plaintiffs Meijer, Inc. and Meijer Distribution, Inc. and Executive Committee for Plaintiffs in the King Drug Direct Purchaser Action*	