**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

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| **IN RE NAMENDA DIRECT PURCHASER ANTITRUST LITIGATION**<br><br>**THIS DOCUMENT RELATES TO:**<br>**All Direct Purchaser Actions** | **Case No. 1:15-cv-07488-CM-RWL** |

# DIRECT PURCHASER CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT

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## I. Introduction

Class counsel representing Direct Purchaser Class Plaintiffs J M Smith Corp. (d/b/a Smith Drug Co.) ("Smith Drug"), Rochester Drug Co-Operative, Inc. ("RDC"), and the direct purchaser class (collectively, "Plaintiffs") respectfully submit this memorandum in support of their Motion for Final Approval of Proposed Settlement.

As the Court knows, the evening prior to jury selection, Class counsel reached an agreement in principle with Forest to settle this matter for $750 million, the largest ever settlement of an antitrust case alleging suppressed generic competition against a single defendant under Section 4 of the Clayton Act. The parties submitted the signed settlement agreement to the Court on December 24, 2019, *see* ECF No. 919-1 ("Settlement Agreement" or "Settlement"), and the Court granted preliminary approval on January 6, 2020. ECF No. 920 ("Preliminary Approval Order"). Pursuant to the Preliminary Approval Order, notice of the Settlement was sent to all Class members by First Class mail on February 12, 2020. *See* Affidavit of Claims Administrator Concerning Provision of Settlement Notice to Class Members filed herewith ("Administrator Decl."), at ¶ 3.

No objections to the Settlement were filed by the March 30, 2020 deadline set by the Court, and none has been received since. *See* Administrator Decl. at ¶ 7. Eight Class members have submitted letters affirmatively supporting the settlement (and supporting the requested incentive awards of $150,000 for each named plaintiff, and the fees and expenses requested by Class counsel). *See* Supplemental Declaration of Bruce E. Gerstein in Support of Class Counsel's Motion for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards for the Named Plaintiffs ("Gerstein Fairness Decl.") (being submitted in connection with Class Counsel's Notice of National Wholesalers' Fee Objection Withdrawal and Brief in Further

Support of Class Counsel's Fee Request, being filed concurrently), Exs. G-N. One Class member, Humana Inc., sought clarification that the release in the Settlement Agreement did not cover its claims related to indirect purchases of brand or generic Namenda IR and Namenda XR. ECF No. 930. That issue was resolved pursuant to a Court-ordered stipulation. *See* ECF No. 938.

Class members Cardinal Health, Inc., AmerisourceBergen Drug Corporation and McKesson Corporation (collectively, the "National Wholesalers") filed an objection to Class counsel's requested fee. *See* ECF No. 932 ("Objection"). The National Wholesalers, however, did not object to the Settlement itself, nor to Class counsel's request for incentive awards or reimbursement of expenses. *See* ECF No. 932 at 1, 2 n.1, ¶ 5. Moreover, the National Wholesalers have agreed to withdraw their Objection and support Class counsel's lowered fee request of 21% of the gross Settlement (plus a proportionate share of interest). *See* Class Counsel's Notice of National Wholesalers' Fee Objection Withdrawal and Brief in Further Support of Class Counsel's Fee Request.

The $750 million settlement is plainly fair, adequate and reasonable, and therefore merits final approval under Rule 23(e)(2) and under the "*Grinnell* factors," derived from *City of Detroit v. Grinnell Corp*., 495 F. 2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F. 3d 43 (2d Cir. 2000), which courts in the Second Circuit use in tandem with Rule 23 to determine whether a class settlement warrants final approval.

As set forth in our prior brief, the requested incentive awards are also fair, considering that the named plaintiffs paved the way for all Class members to benefit from this historic settlement, but only they bore the burden of producing documents, sitting for depositions, and

preparing for trial. *See* ECF No 926 at 24-25. Finally, there is no objection to Class counsel's request for reimbursement of expenses of just over $5.8 million. *Id.* at 24.

Class counsel, on behalf of the Class, therefore respectfully request that the Court enter the accompanying proposed Order Granting Final Judgment and Order of Dismissal Approving Direct Purchaser Class Settlement and Dismissing Direct Purchaser Class Claims which, *inter alia*: (a) grants final approval to the Settlement pursuant to Federal Rule of Civil Procedure 23(e); (b) approves the Plan of Allocation (ECF No. 919-2), which provides a fair and reasonable method of determining each Class member's allocated share of the Settlement based upon each Class member's actual purchases of brand and/or generic Namenda IR and brand Namenda XR; (c) dismisses all claims against Forest; and (d) grants incentive awards of $150,000 each for Class representatives Smith Drug and RDC, reimburses Class counsel for $5,823,928.91 in expenses, and awards attorneys' fees in the amount of $157,500,000, *i.e.*, 21% of the gross settlement amount (plus an equal percentage of any interest accrued since the settlement amount was escrowed). The proposed order submitted herewith is based on the proposed order attached as Exhibit B to the Settlement Agreement, revised to reflect the resolution of the Humana submission, the amount of fees and costs being sought, and the selection of Rust Consulting, Inc., as the settlement administrator. *See* ECF No. 919-1.

## II. Relevant Procedural History

### A. The Settlement Resulted from More Than Four-And-A-Half Years of Hard-Fought Litigation and Negotiation

Since the first class-action complaint was filed in May 2015, Class counsel aggressively litigated this case to the brink of trial. Class counsel also engaged in mediation and settlement negotiations over a two-and-a-half year period. The full procedural history of this case is detailed in the Declaration of Bruce E. Gerstein in Support of Class counsel's Motion for

Attorney Fees, Reimbursement of Expenses and Incentive Awards for the Named Plaintiffs (ECF No. 927), which is incorporated herein ("First Gerstein Decl.").

To summarize, Class counsel expended more than 52,000 hours in prosecuting this case from investigation in June of 2014 and filing in 2015 through the present. *See* Gerstein Fairness Decl. at ¶ 3; ECF No. 927 at ¶ 2. Class counsel: (a) successfully defeated Forest's motion to dismiss (ECF No. 927 at ¶¶ 9-11); (b) reviewed and analyzed millions of pages of documents and lines of transaction data from Forest and third parties (*id.* at ¶ 16); (c) took or defended 46 fact and expert depositions (*id.* at ¶¶ 17, 33, 35, 80); (d) consulted with and retained nine experts in wide-ranging disciplines (*id.* at ¶ 32); (e) engaged in substantial discovery motion practice, including on the issue of privilege (*id.* at ¶¶ 15, 18-28); (f) successfully obtained class certification and defeated Forest's Rule 23(f) petition to the Second Circuit (*id.* at ¶ 36); (g) defeated Forest's comprehensive motion for summary judgment and all but one of Forest's *Daubert* motions (*id.* at ¶ 41); (h) briefed 32 motions *in limine* filed by both sides (*id.* at ¶ 45); (i) prepared for and participated in multiple mediations (*id.* at ¶¶ 48-52); and (j) prepared for a two-phase trial that would have begun on October 28, 2019, the day after the parties reached the Settlement (*id.* at ¶¶ 42-44).

This was the most complex Hatch-Waxman antitrust case Class counsel have encountered in over two decades of prosecuting them. Class counsel had to (a) master various complexities of patent law to show that Mylan would have prevailed in showing that the '703 patent was not infringed, and that Forest's patent claims as well as the patent term extension were invalid, and to rebut Forest's arguments to the contrary; (b) master the biopharmaceutical aspects of NMDA receptor antagonism; (c) master several challenging areas of FDA and CMS drug regulation, including: (i) FDA regulations regarding approval of transfers of manufacturing

technology (for Lexapro) from one site to another; and (ii) CMS regulations governing the Medicaid rebate liability consequences of selling an authorized generic (Lexapro) in various ways; and then (d) apply those areas of FDA and CMS drug regulation (and the cost savings they imply) to a forensic examination of Forest's deal valuation spreadsheets; (e) develop a defensible multi-input economic model to determine the earlier entry date a reverse-payment-free settlement between Forest and Mylan would have borne; (f) analyze and determine the most likely market entry dates from ANDA approval and manufacturing capacity points of view for a host of generic companies and Forest's "authorized generic" "but for" the reverse payment deal between Forest and Mylan; and (g) develop economic modeling of the complicated interaction between the delay of generic Namenda IR entry from the reverse payment (on the one hand) and the hard switch product conversion enabled by that delay (on the other hand), which were interdependent sources of overcharges for direct purchasers. *See id.* at ¶ 32. Class counsel also had to determine the quantum of damages based on various assumptions (*see id.* at ¶ 67), and combine all this evidence into a trial presentation that would be comprehensible to a jury (*id.* at ¶¶ 42-47).

On December 24, 2019, Class counsel filed a fully executed version of the Settlement Agreement with the Court. ECF No. 919-1. On the same date, Class counsel filed a Motion for Preliminary Approval (ECF No. 917) requesting that the Court preliminarily approve the Settlement, approve the form and manner of notice to the Class, and set a schedule leading up to and including a Fairness Hearing. On January 6, 2020, the Court concluded that the Settlement between the Class and Forest was arrived at by arm's-length negotiations by highly experienced counsel after years of litigation and fell within the range of possibly approvable settlements, and preliminarily approved it. ECF No. 920, at ¶ 6. Concurrently, the Court appointed an escrow

agent and claims administrator, approved the form and manner of notice to the Class, and set a schedule. *Id.* at ¶¶ 7-18. Thereafter, Forest deposited the settlement fund into an escrow account that is earning interest for the benefit of the Class. ECF No. 927 at ¶ 56.

Notice of Settlement was sent to all Class members via direct mailing on February 12, 2020. The notice detailed, *inter alia*: (a) the terms of the Settlement and proposed plan of allocation; (b) that Class counsel intended to seek attorneys' fees of up to 33⅓% of the Settlement fund, reimbursement of expenses, and incentive awards of $150,000 for each representative plaintiff and would file their motion for fees, expenses and incentive awards by March 13, 2020; (c) the procedures and deadline for objecting to the settlement and/or Class counsel's motion for attorneys' fees, expenses and incentive awards; and (d) the location, date and time of the Court's final fairness hearing on May 27, 2020. The notice also explained that copies of the Settlement, the motion for fees (when filed), and other important documents would be posted publicly on the websites of Class counsel. *See* Administrator Decl. & Ex. 1 (copy of mailed notice).

Class counsel timely filed their motion for fees, expenses and incentive awards on March 13, 2020. ECF Nos. 925-28. Class counsel sought 27.5% of the common fund, reimbursement of expenses of $5,823,928.91 and incentive awards of $150,000 for each representative plaintiff. Pursuant to the Preliminary Approval Order, Class members had until March 30, 2020 to object to the Settlement and/or Class counsel's fee request. ECF No. 920 at ¶¶ 14, 15. On March 17, 2020, Forest filed a response to the fee request, stating it took no position on the motion, but reemphasizing its position that Plaintiffs had not "succeeded in proving that Forest was liable for the alleged conduct or that Forest's actions were actually found to be unlawful and anti-competitive." ECF No. 929, at 1.

On March 30, 2020, the National Wholesalers filed an objection to Class counsel's requested fee, sought more time to take discovery on Class counsel's lodestar and submit an expert report and an additional brief on fees, and requested that the issue of attorneys' fees be bifurcated from the issue of final review and approval of the Settlement. ECF Nos. 932-33. The National Wholesalers did not object to the Settlement nor dispute the requested expense reimbursement or incentive awards to the named Class representatives. *See* ECF No. 932 at 1, 2 n.1, ¶ 5.

On April 1, 2020, the Court denied the National Wholesalers' bifurcation request and stated that it was not inclined to permit expert testimony on the proposed fee or postpone the final fairness hearing scheduled for May 27, 2020. ECF No. 935. Thereafter, Class counsel and the National Wholesalers resolved the Objection.

The Humana filing sought clarification that the release in the Settlement did not cover its claims related to indirect purchases of brand or generic Namenda IR and Namenda XR. ECF No. 930. Shortly after, Class counsel and Forest submitted a Stipulation Amending Paragraph 11 of the Settlement Agreement that resolved the Humana filing. ECF No. 937. The Court "so ordered" and entered that Stipulation on April 6, 2020. ECF No. 938.

## III. Argument

### A. Settlements of Class Actions Are Encouraged

"The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 116-17 (2d Cir. 2005); *see also In re Advanced Battery Techs., Inc. Sec. Litig*., 298 F.R.D. 171, 174 (S.D.N.Y. 2014) (McMahon, J.) ("The law favors settlement, particularly in class actions and other complex cases.").

### B. The Proposed Settlement is Fair, Reasonable, and Adequate under Rule 23 and the *Grinnell* Factors

Federal Rule of Civil Procedure 23(e)(2) provides that a court may approve a class action settlement if "it is fair, reasonable, and adequate." Rule 23, as amended December 2018, enumerates four factors for the Court to consider as part of this inquiry. The Court should consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Courts within the Second Circuit also analyze the *Grinnell* factors listed below to determine whether a settlement is substantively fair and thus warrants final approval:

> (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.

*Grinnell*, 495 F. 2d at 463.

"The factors set forth in Rule 23(e)(2) have been applied in tandem with the Second Circuit's *Grinnell* factors and 'focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal."' *Christine Asia Co. v. Jack Yun Ma*, 2019 U.S. Dist. LEXIS 179836, at *37 (S.D.N.Y. Oct. 16, 2019) (McMahon, J.) (quoting Advisory Committee Notes to 2018 Amendments, 324 F.R.D. 904, 918 (Apr. 26, 2018)).

**1. The Settlement is Procedurally Fair**

Rules 23(e)(2)(A)-(B) "'constitute the procedural analysis' of the fairness inquiry." *Id.* at *38 (quoting *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019)). "A strong initial presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to counsel's recommendation." *Guevoura Fund Ltd. v. Sillerman*, 2019 U.S. Dist. LEXIS 218116, at *16 (S.D.N.Y. Dec. 18, 2019) (McMahon, J.) (citations omitted). The presumption of fairness and adequacy applies here.

For over four-and-a-half years, Class counsel aggressively prosecuted this uniquely complicated antitrust case against a determined defendant. Class counsel collectively have more experience with generic-delay cases than any other firm or group of firms, having pioneered such cases in the late 1990s. Class counsel applied their well-honed litigation and trial preparation

skills, along with their over twenty-one years of experience handling these types of cases, to this matter.

Class counsel negotiated a settlement of the claims as vigorously as they litigated them. The parties reached an agreement in principle on October 27, 2019, the night before the first official trial day and after the completion of trial preparations and participation in the day long Final Pre-Trial Conference on October 10, 2019. ECF No. 927 at ¶ 47. The parties first attempted to resolve the case in March 2017, via direct communications. *Id.* at ¶ 48. In the Fall of 2018, the parties engaged Jonathan Marks, one of the preeminent mediators in the nation. That mediation, which continued into March of 2019, included the exchange of lengthy mediation statements and multiple individual sessions, as well as one joint session with Mr. Marks. *Id.* at ¶¶ 49-50. Starting in September 2019, the parties engaged in additional mediation efforts before retired United States District Judge Faith Hochberg, including additional written submissions and an in-person session. *Id*. at ¶ 51. The mediation before Judge Hochberg included another full day session and laid the groundwork for settlement. *Id*. at ¶ 52. Ultimately, the parties reached a settlement in principle with the able assistance of the Court's staff. *Id*.

Accordingly, the requirements of Rules 23(e)(2) (A)-(B) are met.

**2. The Settlement is Substantively Fair**

**a) The First *Grinnell* Factor – the Complexity, Expense and Likely Duration of the Litigation – Favors Final Approval of the Settlement**

The first *Grinnell* factor evaluates whether the continuation of the litigation would be complex, expensive, and lengthy. This case, had it not settled, would have been all three. *See, e.g.*, *Jermyn v. Best Buy Stores, L.P.*, 2012 U.S. Dist. LEXIS 90289, at *13-14 (S.D.N.Y. June

27, 2012) (McMahon, J.) (recognizing the complexity of a potential trial with 25 fact witnesses, additional expert witness, and hundreds of exhibits). In general, antitrust trials require the expenditure of significant time and resources by both the parties and the court, and this case would have been no exception. This case was scheduled to be tried in two phases, with Phase 1 covering Sherman Act Section 1 "pay-for-delay" liability and causation issues, and Phase 2 covering Section 2 "hard-switch" causation, and quantum of damages issues for both Section 1 and 2. For Phase 1 alone, the parties projected calling 23 fact and expert witnesses, some of whom would be on the witness stand for lengthy amounts of time. Forest raised numerous defenses that Plaintiffs would have needed to overcome in order to prevail in Phases 1 and 2 of this jury trial.

Moreover, whichever side lost at trial surely would have appealed (most likely after filing extensive post-trial motions). Given the size and complexity of the case, this process would likely would have included a petition for *certiorari* as well. Such continued litigation would have required further time and resources with no certainty of a favorable outcome. *Fleisher v. Phoenix Life Ins. Co.*, 2015 U.S. Dist. LEXIS 121574, at *22 (S.D.N.Y. Sep. 9, 2015) (McMahon, J.) ("Even if the Class could recover a judgment at trial and survive any decertification challenges, post-verdict and appellate litigation would likely have lasted for years.") (citations omitted). By contrast, the Settlement provides the Class with immediate, substantial and definite relief without the delay, risk, and uncertainty of trial and continued litigation.

Accordingly, analysis of the first *Grinnell* factor strongly supports approval of the Settlement.

**b) The Second *Grinnell* Factor – the Reaction of the Class to the Settlement – Favors Approval of the Settlement.**

As set forth above, no Class member has objected to final approval of the Settlement, and eight Class members submitted letters affirmatively supporting it. *See* Gerstein Fairness Decl. Exs. G-N. Humana merely sought clarification that the release in the Settlement did not cover its claims related to indirect purchases of brand or generic Namenda IR and Namenda XR. ECF No. 930. That issue was resolved pursuant to a Court-ordered stipulation. *See* ECF No. 938. The National Wholesalers did not object to the $750 million settlement, only to the attorneys' fee sought by Class counsel (and the Objection has been resolved upon Class counsel's agreement to reduce their fee request to 21% of the gross Settlement, as noted).

Accordingly, analysis of the second *Grinnell* factor strongly supports approval of the Settlement.

**c) The Third *Grinnell* Factor – the Stage of the Proceedings and the Amount of Discovery Completed – Favors Approval of the Settlement**

The third *Grinnell* factor considers the amount of discovery completed, with a "focus[] on whether the plaintiffs obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *Fleisher*, 2015 U.S. Dist. LEXIS 121574, at *26 (internal quotation omitted). Here all fact and expert discovery was completed, and this case was on the eve of trial. Thus, the parties' "knowledge of the strength and weakness of their claims was more than the norm" in class action litigation. *In re Veeco Instruments Sec. Litig.*, 2007 U.S. Dist. LEXIS 85629, at *23 (S.D.N.Y. Nov. 7, 2007) (McMahon, J.). In negotiating the Settlement, Class counsel was intimately familiar with the strengths and weaknesses of Plaintiffs' claims and Forest's defenses.

Accordingly, analysis of the third *Grinnell* factor strongly supports approval of the Settlement.

**d) The Fourth *Grinnell* Factor – The Risk of Establishing Liability – Favors Approval of the Settlement**

In assessing the risks of liability, a court need not decide the merits of the case, resolve unsettled legal questions, or attempt to predict the outcome. *See Fleisher*, 2015 U.S. Dist. LEXIS 121574, at *29. Rather, a court "need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Id.* (internal quotation omitted). Regardless of the perceived strength of a plaintiff's case, liability is "no sure thing," and "[l]itigation inherently involves risks." *Wal–Mart Stores*, 396 F.3d at 118. "Indeed, the primary purpose of settlement is to avoid the uncertainty of a trial on the merits." *Tiro v. Pub. House Invs., LLC*, 2013 U.S. Dist. LEXIS 129258, at *25 (S.D.N.Y. Sep. 10, 2013) (quoting *Matheson v. T-Bone Rest. LLC*, 2011 U.S. Dist. LEXIS 143773, at *14 (S.D.N.Y. Dec. 13, 2011)).

Forest still denies that Plaintiffs "succeeded in proving Forest was liable for the alleged conduct[.]" *See* ECF No. 929, at 1. Plaintiffs faced a serious risk of proving liability, causation and damages on the reverse payment claim and proving classwide injury and damages on the product switch claim. Forest could have persuaded the jury, for example, that it made no reverse payment to Mylan because its Lexapro forecasts were reasonable and Forest would have made more money under the Lexapro Amendment than under its prior deal with Mylan. Forest could have persuaded the jury that it made no reverse payment to Mylan because Forest's forecasted Medicaid rebate savings would offset its payments to Mylan. Forest could have persuaded the jury that even if it did make a reverse payment to Mylan, the payment was not sufficiently large, or sufficiently in excess of saved litigation costs, to cause substantial delay. Forest could have persuaded the jury that the '703 patent was not weak, or that the entry date in the Forest-Mylan

settlement fairly represented the strength of the '703 patent. Forest could have persuaded the jury that no generic could have entered the market earlier regardless of the reverse payment deal with Mylan. Plaintiffs thus faced myriad risks in prevailing on the reverse payment claim.

On the hard switch product hop, Forest could have persuaded the jury that the conversion from Namenda IR to XR would have been no different absent the hard switch conduct — that patients and doctors liked Namenda XR, and freely switched between XR and IR and back again — which would have led to a defense verdict on the product hop claim.

Accordingly, analysis of the fourth *Grinnell* factor strongly supports approval of the Settlement.

**e) The Fifth *Grinnell* Factor – The Risk of Establishing Damages – Favors Approval of the Settlement**

Akin to the fourth *Grinnell* factor, this factor focuses on the risks of establishing damages. Even assuming that Plaintiffs prevailed on liability, the existence and amount of damages would have been hotly contested at trial. *See, e.g. Fleisher*, 2015 U.S. Dist. LEXIS 121574, at *31 ("Even if Plaintiffs won the liability phase, Plaintiffs also faced risks in establishing damages during the separate damages phase of trial.").

As concerns the Section 1 "pay-for-delay" case, Forest disputed the ability of generics to enter the market earlier from regulatory and manufacturing points of view. Similarly, damages for the Section 2 product switch claim presented serious issues in light of Forest's argument that the prior injunction issued by Judge Sweet had cured any harm from the announced withdrawal of Namenda IR.

At trial, Plaintiffs intended to rely on Russell Lamb, Ph.D., for an analysis of damages, and Forest planned to challenge Dr. Lamb's opinions with the testimony of their expert economists, Lona Fowdur, Ph.D., and Pierre-Yves Cremieux, Ph.D. The jury's reaction to this

testimony was uncertain. *See, e.g., Veeco*, 2007 U.S. Dist. LEXIS 85629, at *30 ("It is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable [conduct.]") (quotation omitted). There are numerous examples of antitrust plaintiffs receiving little or no damages (or having damages sharply reduced) despite extensive litigation and despite prevailing on liability. *See, e.g., United States Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages"), *aff'd*., 842 F.2d 1335 (2d Cir. 1988); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co*., 708 F.2d 1081, 1166-67 (7th Cir. 1983) (antitrust judgment for $1.8 billion was remanded for new trial on damages, which were reduced to $111 million (*See* H.R. Rep. No. 102-850 at 42 n. 234)); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974) (after two trips to the Second Circuit and one to the Supreme Court, plaintiff and the putative class recovered nothing).

Accordingly, analysis of the fifth *Grinnell* factor strongly supports approval of the Settlement.

**f) The Sixth *Grinnell* Factor – The Risks of Maintaining the Class Action Through Trial – Is Neutral**

Plaintiffs do not believe there was any material risk of maintaining the class action through trial, but Plaintiffs understand that "the risk of maintaining a class through trial is present in any class action." *Guippone v. BH S&B Holdings LLC*, 2016 U.S. Dist. LEXIS 134899, at *19 (S.D.N.Y. Sep. 23, 2016). Forest no doubt would have appealed class certification, among other issues, had Plaintiffs won at trial. Plaintiffs are confident that the Court's class certification decision is correct, but an appeal presents risk.

On balance, the sixth *Grinnell* factor is neutral.

**g) The Seventh *Grinnell* Factor – the Ability of the Defendant to Withstand a Greater Judgment – Is Neutral**

The seventh *Grinnell* factor inquires whether the defendant is able to withstand a greater judgment. This factor is typically relevant only when a settlement is less than what it might otherwise be but for the fact that the defendant's financial circumstances do not permit a greater settlement. When that situation is not present, courts generally do not give much consideration to this factor, and "this factor, standing alone, does not suggest that the settlement is unfair." *Fleisher*, 2015 U.S. Dist. LEXIS 121574, at *33 (internal quotation omitted). Here, Plaintiffs do not contend that Forest could not withstand a greater judgment, and therefore Plaintiffs do not believe this factor is relevant.

**h) The Eighth and Ninth *Grinnell* Factors – the Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and in Light of all the Attendant Risks of Litigation – Favor Approval of the Settlement**

Typically, courts evaluate the final two *Grinnell* factors together. *Guevoura*, 2019 U.S. Dist. LEXIS 218116, at *28 n.1. Determining "whether a settlement amount is reasonable does not involve the use of a mathematical equation yielding a particularized sum." *Fleisher*, 2015 U.S. Dist. LEXIS 121574 at *34 (internal quotation omitted). Settlement should be in a "'range of reasonableness … recogniz[ing] the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Guippone*, 2016 U.S. Dist. LEXIS 134899, at *20-21 (quoting *Henry v. Little Mint, Inc.*, 2014 U.S. Dist. LEXIS 72574, at *25 (S.D.N.Y. May 23, 2014)). As the Second Circuit held in *Grinnell*, "'[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.'" *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*,

2019 U.S. Dist. LEXIS 217583, at *230 (E.D.N.Y. Dec. 16, 2019) (quoting *Grinnell*, 495 F. 2d at 455).

The payout here is the largest amount ever paid by a single defendant in a Hatch-Waxman antitrust lawsuit alleging impaired generic competition. Dr. Lamb calculated total damages suffered by proposed Class members as approximately (1) between $5.73 billion and $6.93 billion assuming the jury found Forest liable for damages for the alleged reverse payment and accounting for the effects of the hard switch product hop; (2) between $3.52 billion and $4.16 billion if the jury found Forest liable for damages only from the alleged reverse payment; and (3) between $659 million and $814 million if the jury found Forest liable for damages only for the hard switch product hop. The range of potential damages was wide – from $659 million to $6.93 billion – and depended on precisely what the jury would find. Given the complexity and risk, the $750 million cash settlement represents an outstanding recovery. *See* Jeff Overley, *Allergan's $750M Deal Among Pharma's Top Antitrust Payouts*, Law360 (Oct. 29, 2019) ("among the most eye-popping sums ever shelled out by a drugmaker for allegedly thwarting generic competition"); *see also In re Merrill Lynch & Co. Research Reports Sec. Litig*., 2007 U.S. Dist. LEXIS 9450, at *33 (S.D.N.Y. Jan. 31, 2007) (approving $40.3 million settlement with a recovery of approximately 6.25% of estimated damages ); *In re Gilat Satellite Networks, Ltd*., 2007 U.S. Dist. LEXIS 68964, at *36 (E.D.N.Y. Sep. 18, 2007); (approving $20 million settlement representing 10.6% of maximum damages); *In re Omnivision Techs., Inc. Sec. Litig.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) ($13.75 million settlement yielding 6% of potential damages after deducting fees and costs).

Accordingly, analysis of the eighth and ninth *Grinnell* factors strongly supports approval of the Settlement.

**i) Class counsel's Costs and Expenses Are Reasonable and Were Necessary to the Result**

There has been no objection to Class counsel's request for reimbursement of costs and expenses of $5,823,928.91. These expenses have been itemized by category for the Court's convenience. *See* ECF Nos. 926 at 24; 927 at ¶¶ 71-72. Accordingly, Class counsel respectfully request that the Court approve reimbursement of Class counsel's expenses in full.

**j) Incentive Awards for the Class Representatives Are Appropriate and Reasonable**

There has been no objection to the incentive awards of $150,000 for each of the two representative plaintiffs, which are in line with awards in similar cases and appropriate in light of the services performed for the benefit of the entire Class. *See* ECF Nos. 926 at 24-25; 927 at ¶¶ 75-81.

**k) The Proposed Award of Attorneys' Fees Is Fair and Reasonable (Rule 23(e)(2)(C)(iii))**

Class counsel's request for an award of attorneys' fees in the amount of $157,500,000 (plus proportionate accrued interest), *i.e.*, 21% of the gross settlement amount is fair and reasonable. *See* ECF Nos. 925-28; Class Counsel's Notice of National Wholesalers' Fee Objection Withdrawal and Brief in Further Support of Class Counsel's Fee Request. As noted, the National Wholesalers have agreed to withdraw their Objection and support Class counsel's requested fee of 21% of the gross Settlement amount. Seven other Class members affirmatively supported the original request of 27.5%, and an eighth agrees the proposed fee award is appropriate. *See* Gerstein Fairness Decl. Exs. G-M.

As explained previously and in Class Counsel's Notice of National Wholesalers' Fee Objection Withdrawal and Brief in Further Support of Class Counsel's Fee Request, Class counsel respectfully suggest that the request of 21% is reasonable.

**l) Identification of Agreements in Connection with the Settlement (Rule 23(e)(2)(C)(iv) and Rule 23(e)(3))**

No "side agreements" involving Class counsel or class representatives were made in connection with the Settlement.

**m) The Settlement Treats Class Members Equitably Relative to Each Other (Rule 23(e)(2)(D))**

As detailed in Part III.C. below, the Plan of Allocation and Distribution (ECF No. 919-2) allocates funds among Class members on a *pro rata* basis, which courts uniformly approve as equitable. The Settlement therefore meets the requirements of Rule 23(e)(2)(D).

**C. The Court Should Approve the Plan of Allocation**

The Court should approve the proposed Plan of Allocation, which, like many similar plans in analogous cases, would allocate the net settlement fund to Class members who submit claims on a *pro rata* basis efficiently and fairly. 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. *Hart v. RCI Hosp. Holdings*, 2015 U.S. Dist. LEXIS 126934, at *33-34 (S.D.N.Y. Sep. 22, 2015). "'[A]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent Class counsel.'" *Id*. at *34 (quoting *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002)).

Here, the proposed Plan of Allocation meets this standard. As set forth in the Direct Purchaser Class Plaintiffs' [Proposed] Plan of Allocation for the Direct Purchaser Class and

accompanying Declaration Related to Proposed Settlement Allocation Plan by Dr. Russell L. Lamb (ECF Nos. 919-2, 919-3), the proceeds of the proposed Settlement in this case, net of Court-approved attorneys' fees, incentive awards for named Plaintiffs, and costs and expenses ("Net Settlement Fund"), will be paid to Class members who submit timely and valid claims based on each Class member's *pro rata* share of the Class' total purchases of brand and/or generic Namenda IR and brand Namenda XR. Brand purchases will be weighted more than generic purchases because claimed overcharges on brand units were substantially higher than claimed overcharges on generic units. *See* ECF No. 919-3 at ¶¶ 5-7. This plan 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. *E.g.*, *In re OxyContin Antitrust Litig.*, No.04 md 1603 (S.D.N.Y.) (Stein, J.) (Jan. 25, 2011); *In re DDAVP Direct Purchaser Antitrust Litig.*, No. 05 Civ. 2237 (S.D.N.Y.) (Seibel, J.) (Nov. 28, 2011); *In re Buspirone Antitrust Litig.*, MDL Docket No. 1413 (S.D.N.Y.) (Koeltl, J.) (April 7, 2003); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, 1:14-md-02503-DJC, ECF Nos. 1163, 1179 (D. Mass.) (*pro rata* shares of settlement fund computed on basis of claimants' brand and generic purchases); *In re Lidoderm Antitrust Litig.*, 3:14-md-02521-WHO, ECF Nos. 1004-5, 1004-6, 1054 (N.D. Cal.) (*pro rata* shares of settlement fund computed on basis of claimants' brand and generic purchases).

The allocation will reflect the amount of relative damage sustained by each Class member. The Plan of Allocation will allocate the Net Settlement Fund to Class members efficiently and fairly by relying upon the electronic data that has been produced in this litigation. Class members will be provided claim forms that set forth each Class member's qualifying purchases based on transaction data produced during discovery. Under the proposed plan, the

claims administrator, working with Dr. Lamb and his staff at Monument Economics Group, will prepare and send these individualized claim forms to each member of the Class. *See* Plan of Allocation at ¶ 1.1.

The Plan of Allocation provides a fair and reasonable method of determining each Class member's proportionate share of the Net Settlement Fund in proportion to the share of overcharges each suffered. It does so based on each Class member's purchases of brand and/or generic Namenda IR and brand Namenda XR during the time period at issue. *See* Plan of Allocation at ¶¶ 2.1-2.5. Among other things, the Plan of Allocation describes: (1) the method of calculating each Class member's *pro rata* share of the Net Settlement Fund; (2) the contents and method of disseminating a claim form; (3) the manner in which claims will be initially reviewed and processed; (4) the method of notifying Class members of the amount that each Class member will receive from the Net Settlement Fund; and (5) the process for handling and resolving challenged claims, if any. The Plan of Allocation also provides timetables for completing various tasks related to calculating and distributing each Class member's *pro rata* share of the Net Settlement Fund. Moreover, the Plan of Allocation proposes that Dr. Lamb be retained to assist in making allocation computations under the Plan. *See* Plan of Allocation at ¶ 3.1.

Accordingly, the proposed Plan of Allocation is fair and reasonable, and should be approved by the Court.

## IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the proposed Order Granting Final Judgment and Order of Dismissal Approving Direct Purchaser Class Settlement and Dismissing Direct Purchaser Class Claims which, *inter alia*, provides for: final approval of the Settlement Agreement; approval of the Plan of Allocation of the Settlement

Fund; dismissal of all claims against Defendants; and approves an award of attorneys' fees, reimbursement of expenses and incentive awards for the Class Representatives.

Dated: April 21, 2020

Respectfully Submitted:

*/s/ Bruce E. Gerstein*

David F. Sorensen
Ellen T. Noteware
Daniel C. Simons
Nicholas Urban
Berger Montague PC
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875-4604
dsorensen@bm.net
enoteware@bm.net
dsimons@bm.net
nurban@bm.net

Peter Kohn
Joseph T. Lukens
Faruqi & Faruqi, LLP
1617 John F Kennedy Blvd., Suite 1550
Philadelphia, PA 19103
Tel: (215) 277-5770
Fax: (215) 277-5771
pkohn@faruqilaw.com
jlukens@faruqilaw.com

Bruce E. Gerstein
Joseph Opper
Kimberly M. Hennings
Dan Litvin
Garwin Gerstein & Fisher LLP
88 Pine Street, 10th Floor
New York, NY 10005
Tel: (212) 398-0055
Fax: (212) 764-6620
bgerstein@garwingerstein.com
jopper@garwingerstein.com
khennings@garwingerstein.com
dlitvin@garwingerstein.com

Susan Segura
David C. Raphael, Jr.
Erin R. Leger
Smith Segura Raphael & leger, LLP
221 Ansley Blvd.
Alexandria, LA 71303
Tel: (318) 445-4480
Fax: (318) 487-1741
ssegura@ssrllp.com
draphael@ssrllp.com
eleger@ssrllp.com

Stuart E. Des Roches
Andrew W. Kelly
Odom & Des Roches, LLC
650 Poydras Street, Suite 2020
New Orleans, LA 70130
Tel: (504) 522-0077
Fax: (504) 522-0078
stuart@odrlaw.com
akelly@odrlaw.com

Russ Chorush
Heim Payne & Chorush, LLP

1111 Bagby, Suite 2100
Houston, TX 77002
Tel: (713) 221-2000
Fax: (713) 221-2021
rchorush@hpcllp.com

***Counsel for the Direct Purchaser Class Plaintiffs***

**CERTIFICATE OF SERVICE**

I hereby certify that on April 21, 2020, I electronically filed the above by CM/ECF system.

Respectfully submitted,

/s/ *Bruce E. Gerstein*

Bruce E. Gerstein

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| **IN RE NAMENDA DIRECT PURCHASER ANTITRUST LITIGATION**<br><br>**THIS DOCUMENT RELATES TO:**<br>**All Direct Purchaser Actions** | **Case No. 1:15-cv-07488-CM-RWL** |

# [PROPOSED] ORDER GRANTING FINAL JUDGMENT AND ORDER OF DISMISSAL APPROVING DIRECT PURCHASER CLASS SETTLEMENT AND DISMISSING DIRECT PURCHASER CLASS CLAIMS

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and in accordance with the terms of the Settlement Agreement dated December 20, 2019, between plaintiffs J M Smith Corp. d/b/a Smith Drug Co. ("Smith Drug") and Rochester Drug Co-Operative, Inc. ("RDC") (collectively, the "Class Representatives"), and on behalf of the Class defined below (together with the Class Representatives, the "Plaintiffs"), and defendants Forest Laboratories, LLC; Forest Laboratories, Inc.;[1] Forest Laboratories Holdings Ltd.; and Actavis plc (collectively, "Defendants"), it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. This Final Judgment and Order of Dismissal hereby incorporates by reference the definitions in the Settlement Agreement among Plaintiffs and Defendants, all capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Settlement Agreement.

[1] On July 1, 2014, in a series of transactions, Forest Laboratories, Inc. became a limited liability company named Forest Laboratories, LLC. Subsequently, on January 1, 2018, Forest Laboratories, LLC was merged with and into Allergan Sales, LLC, a Delaware limited liability company. As a result of these corporate consolidations, Forest Laboratories, Inc. and Forest Laboratories, LLC are predecessors in interest to Allergan Sales, LLC.

2. On August 2, 2018, this Court certified the following class (the "Class"):

> All persons or entities in the United States and its territories who purchased branded Namenda IR 5 or 10 mg tablets, and/or generic Namenda IR 5 or 10 mg tablets (including an authorized generic), and/or branded Namenda XR capsules, directly from Forest or its successors in interest, Actavis and Allergan, and/or from any generic manufacturer at any time during the period from June 2012 until September 30, 2015. Excluded from the Class are the Defendants and their officers, directors, management, employees, subsidiaries, or affiliates, and all federal governmental entities.

3. The Court previously appointed the Class Representatives. The Court previously appointed Bruce E. Gerstein of Garwin Gerstein & Fisher, LLP and David F. Sorensen of Berger Montague PC as Co-Lead Counsel for the Class ("Class Counsel"). The Class Representatives and Class Counsel have fairly and adequately represented the interests of the Class and satisfied the requirements of Fed. R. Civ. P. 23(g).

4. The Court has jurisdiction over these actions, each of the parties, and all members of the Class for all manifestations of this case, including this Settlement.

5. The notice of settlement (substantially in the form presented to this Court as Exhibit B to the Settlement Agreement) (the "Notice") directed to the members of the Class via First Class Mail, constituted the best notice practicable under the circumstances. In making this determination, the Court finds that the Notice provided for individual notice to all members of the Class who were identified through reasonable efforts. Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, the Court hereby finds that the Notice provided Class members due and adequate notice of the Settlement, the Settlement Agreement, these proceedings, and the rights of Class members to object to the Settlement.

6. Due and adequate notice of the proceedings having been given to the Class and a full opportunity having been offered to the Class to participate in the May 27, 2020 Fairness

Hearing, it is hereby determined that all Class members are bound by this Order and Final Judgment.

7. The Settlement of this Class Action was not the product of collusion between the Class Representatives and Defendants or their respective counsel, but rather was the result of *bona fide* and extensive arm's-length negotiations conducted in good faith between Class Counsel and counsel for Defendants, with the assistance of multiple mediators, including former United States District Court Judge Faith S. Hochberg.

8. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby approves the Settlement, and finds that the Settlement is, in all respects, fair, reasonable and adequate to Class members and in their best interests. Accordingly, the Settlement shall be consummated in accordance with the terms and provisions of the Settlement Agreement.

9. The Court hereby approves the Plan of Allocation of the Settlement Fund as proposed by Class Counsel (the "Plan of Allocation"), which was summarized in the Notice of Proposed Settlement, and directs Rust Consulting, Inc., the firm retained by Class Counsel as the Claims Administrator, to distribute the net Settlement Fund as provided in the Plan of Allocation.

10. All claims against Defendants in *In re Namenda Direct Purchaser Antitrust Litigation*, Civil Action No. 1:15-cv-07488-CM-RWL (S.D.N.Y.) (the "Class Action") are hereby dismissed with prejudice, and without costs (other than as provided herein).

11. Upon the Settlement Agreement becoming final in accordance with paragraph 5 of the Settlement Agreement, Defendants and their past, present, and future parents, subsidiaries, divisions, affiliates, joint ventures, stockholders, officers, directors, management, supervisory boards, insurers, general or limited partners, employees, agents, attorneys, servants, representatives (and the parents', subsidiaries', and affiliates' past, present, and future officers,

directors, employees, agents, attorneys, servants, and representatives), and the predecessors, successors, heirs, executors, administrators and representatives of each of the foregoing (collectively, the "Releasees") are and shall be unconditionally, fully, and finally released and forever discharged from all manner of claims, debts, obligations, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, under federal or state laws, whether known or unknown, foreseen or unforeseen, suspected or unsuspected, contingent or non-contingent, in law or equity, that Plaintiffs and all Class members, whether or not they make a claim upon or participate in the Settlement Fund, on behalf of themselves and their respective past, present, and future parents, subsidiaries, associates, affiliates, officers, directors, employees, insurers, general or limited partners, divisions, agents, attorneys, servants, trustees, joint ventures, heirs, executors, administrators, representatives (and the parents' subsidiaries' and affiliates' past and present officers, directors, employees, agents, attorneys, servants, and representatives), and their predecessors, successors, heirs, executors, administrators, and representatives (collectively, the "Releasors"), ever had, now has, or hereafter can, shall or may have, directly, representatively, derivatively or in any other capacity, arising out of or relating in any way to:

> (a) the subject matter of or acts, omissions, or other conduct alleged in the complaint in the Direct Purchaser Class Action, or any prior complaints or subsequent amended complaints filed in the Direct Purchaser Class Action; (b) the subject matter of pre-trial proceedings in the Direct Purchaser Class Action; and/or (c) all claims concerning alleged delay or impairment in the marketing, sale, manufacture, pricing, or purchase of, or the enforcement of intellectual property related to, Namenda IR, Namenda XR, or their generic equivalents that could have been asserted in the Direct Purchaser Class Action, including but not limited to claims of reverse payments, product hop, and unlawful patent term extension of U.S. Patent No. 5,061,703, sham patent listings, and sham patent litigations prior to the date of the

> Settlement Agreement (collectively, this entire paragraph the "Released Claims").

This Settlement Agreement is not intended to release anyone other than the Releasees, is not on behalf of anyone other than the Releasors, and does not affect the claims of the proposed endpayor class or any claims relating to indirect purchases of brand or generic Namenda IR or Namenda XR, nor is it intended to release any actual or potential claims described in Paragraph 13.

12. In addition, Plaintiffs and each Class member, on behalf of themselves and all other Releasors, hereby expressly waive, release and forever discharge, upon the Settlement becoming final, any and all provisions, rights and/or benefits conferred by § 1542 of the California Civil Code, which reads:

> Section 1542. General Release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor;

or by any law of any state or territory of the United States, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Each Releasor may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are the subject matter of paragraph 11 of the Settlement Agreement, but each Releasor hereby expressly waives and fully, finally and forever settles, releases, and discharges, upon this Settlement becoming final, any known or unknown, foreseen or unforeseen, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Plaintiff and member of the Class also hereby expressly waives and fully, finally and

forever settles, releases, and discharges any and all claims that are the subject matter of Paragraph 11 of the Settlement Agreement that it may have against any Releasees under § 17200, et seq., of the California Business and Professions Code or any similar comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction.

13. As set forth in Paragraph 13 of the Settlement Agreement (with subheading "Reservation of Claims"), the releases set forth in Paragraphs 11 and 12 of the Settlement Agreement (and in Paragraphs 11 and 12 of this Order) shall not release any claims between Plaintiffs, members of the Class, the Releasors, and the Defendants and the Releasees (a) arising in the ordinary course of business between Releasors and Releasees under Article 2 of the Uniform Commercial Code (pertaining to Sales), the laws of negligence or product liability or implied warranty, breach of contract, breach of express warranty, or personal injury; or (b) other claims unrelated to Namenda IR, Namenda XR, or their generic equivalents.

14. Class Counsel have moved for an award of attorneys' fees, reimbursement of expenses and incentive awards for the Class Representatives. Class Counsel now request an award of attorneys' fees of 21% of the gross Settlement amount (plus a proportional share of the interest accrued thereon), reimbursement of the reasonable costs and expenses incurred in the prosecution of this action in the amount of $5,823,928.91, and incentive awards totaling $300,000 collectively for the two Class Representatives, and such motion has been on the docket and otherwise publicly available since March 13, 2020.

15. Upon consideration of Class Counsel's petition for fees, costs and expenses, Class Counsel are hereby awarded attorneys' fees totaling $157,500,000 (representing 21% of the gross Settlement Fund) and costs and expenses totaling $5,823,928.91, plus a proportionate share of the interest thereon from the date the funds are deposited in the Settlement Escrow Account until

payment of such attorneys' fees, costs and expenses, at the rate earned by the Settlement Fund, to be paid solely from the Settlement Fund and only if and after the Settlement becomes final in accordance with paragraph 5 of the Settlement Agreement.

16. Upon consideration of Class Counsel's petition for incentive payments for Class Representatives, Smith Drug and RDC are each hereby awarded $150,000, to be paid solely from the Settlement Fund and only if and after the Settlement becomes final in accordance with paragraph 5 of the Settlement Agreement. Class Counsel David F. Sorensen and Bruce E. Gerstein shall allocate and distribute such attorneys' fees, costs and expenses among the various Class Counsel which have participated in this litigation. The Releasees shall have no responsibility for, and no liability whatsoever with respect to, any payment or disbursement of attorneys' fees, expenses, costs or incentive awards among Class Counsel and/or Class Representatives, nor with respect to any allocation of attorneys' fees, expenses, costs or incentive awards to any other person or entity who may assert any claim thereto. The attorneys' fees, costs and expenses, and incentive awards authorized and approved by this Final Judgment and Order shall be paid to Berger Montague PC and Garwin Gerstein & Fisher LLP within five (5) business days after this Settlement becomes final pursuant to paragraph 5 of the Settlement Agreement or as soon thereafter as is practical and in accordance with the terms of the Settlement Agreement and the Escrow Agreement. The attorneys' fees, costs and expenses, and incentive award authorized and approved by this Final Judgment and Order shall constitute full and final satisfaction of any and all claims that Plaintiffs and any Class member, and their respective counsel, may have or assert for reimbursement of fees, costs, and expenses, and incentive awards, and Plaintiffs and members of the Class, and their respective counsel, shall not seek or demand payment of any fees and/or

costs and/or expenses and/or incentive awards from Defendants other than from the Settlement Fund.

17. The Court retains exclusive jurisdiction over the Settlement and the Settlement Agreement as described therein, including the administration and consummation of the Settlement, and over this Final Judgment and Order.

18. The Court finds that this Final Judgment and Order adjudicates all of the claims, rights and liabilities of the parties to the Settlement Agreement (including the members of the Class), and is final and shall be immediately appealable. Neither this Order nor the Settlement Agreement nor any other Settlement-related document shall constitute any evidence, admission, or concession by Defendants or any other Releasee, in this or any other matter or proceeding of any kind whatsoever, civil, criminal or otherwise, before any court, administrative agency, regulatory body, or any other body or authority, present or future, nor shall either the Settlement Agreement, this Order, or any other Settlement-related document be offered in evidence or used for any other purpose in this or any other matter or proceeding except as may be necessary to consummate or enforce the Settlement Agreement, the terms of this Order, or if offered by any Releasee in responding to any action purporting to assert Released Claims, or if offered by any Releasor in asserting that a claim is not a Released Claim, including because such claim is covered by Paragraph 13 of the Settlement Agreement ("Reservation of Claims").

SO ORDERED this ____ day of _____, 2020

_____
The Honorable Colleen McMahon
Chief United States District Judge

**UNITED STATES DISTRICT COURT**
**SOURTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| In re: NAMENDA DIRECT ANTITRUST LITIGATION | Case No. 1:15-cv-07488-CM-RWL |
| THIS DOCUMENT RELATES TO: All Direct Purchaser Actions | |

**DECLARATION OF CLAIMS ADMINISTRATOR**
**CONCERNING PROVISION OF SETTLEMENT NOTICE TO CLASS MEMBERS**

The undersigned, Patrick Hughes, hereby states that:

1. I am a Project Manager of Rust Consulting, Inc. ("Rust"). I have personal knowledge of the matters set forth herein.

2. I submit this declaration to provide the Court with information concerning Rust's compliance with the Court's Order Granting Direct Purchaser Class Plaintiffs' 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, dated January 6, 2020 (ECF No. 920) (the "Order"). Pursuant to paragraph 12 of the Order, Rust was appointed claims administrator and directed to provide notice of the settlement to Class members.

3. On February 12, 2020, Rust sent the Court-approved Notice regarding the settlement (the "Notice") via first-class United States mail to the 63 Class members.[1] A copy of the Notice as mailed is attached hereto as Exhibit 1.

4. Rust received only one undeliverable Notice, but a new address was found and the Notice successfully delivered. The undeliverable Notice had initially been sent to the same

[1] This includes the Class members that previously received notice of the pendency of this class actions as well as Cochran Wholesale Pharmacy and QK Healthcare, in accordance with paragraph 9 of the Order.

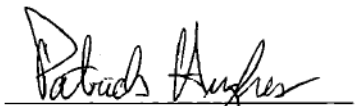
address for class member Valley Wholesale Drug Company Inc. that was previously used for the Notice of Pendency of Class Action, which had not been returned. After initially receiving the undeliverable Notice, Rust identified an updated address for Valley Wholesale Drug Company Inc. and re-mailed the Notice to Valley Wholesale Drug Company Inc. which was not returned as undeliverable. In addition, Class counsel has informed me that counsel for Valley Wholesale Drug Company Inc. was identified, and the Notice was emailed directly to that lawyer on February 14, 2020 and not returned.

5. Pursuant to paragraph 9 of the Order, Rust mailed the letter attached as Exhibit 2 to DMS Pharmaceutical Group ("DMS") on February 12, 2020.[2] Rust has not received any response from DMS.

6. Rust established a mailing address for Class member communications at Namenda Direct Purchaser Claims Administrator, c/o Rust Consulting, P.O. Box 44, Minneapolis, MN 55440-0044.

7. As indicated in Question 14 of the Notice, objections to the settlement or to Class Counsel's application for attorneys' fees, costs and expenses and/or incentive awards to the Class Representatives were required to be post-marked no later than March 30, 2020. To date, Rust has not received any objections other than the two objections that have been docketed at ECF Nos. 930 and 932. In the event that Rust receives any additional objections, Rust will report them to the Court on or before May 10, 2020.

Dated: April 16, 2020



Patrick Hughes

[2] In accordance with paragraph 9 of the Order, Rust did *not* mail the Notice to DMS because Class Counsel determined that DMS does not qualify as a Class member.

# EXHIBIT 1

Namenda Direct Purchaser Claims Administrator
c/o Rust Consulting – 6269
P.O. Box 44
Minneapolis, MN 55440-0044

**IMPORTANT LEGAL MATERIALS**


- UAA <<SequenceNo>>

<<Name1>>
<<Name2>>
<<Name3>>
<<Name4>>
<<Address1>>
<<Address2>>
<<City>> <<State>> <<Zip10>>
<<CountryName>>

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

**If you bought branded Namenda IR, branded Namenda XR, or generic Namenda IR directly from a manufacturer you could get a payment from a class action settlement.**

*A federal court authorized this notice. It is not a solicitation from a lawyer.*

- The purpose of this notice is to alert you about a proposed settlement relating to a Class Action Lawsuit (the "Lawsuit") brought by Direct Purchasers of branded Namenda IR (immediate release memantine hydrochloride), branded Namenda XR (extended release memantine hydrochloride), and/or generic Namenda IR (generic immediate release memantine hydrochloride) ("Direct Purchaser Class Plaintiffs"). The lawsuit asserts that Forest Laboratories, LLC, Forest Laboratories, Inc., Forest Laboratories Holdings Ltd., and Actavis plc ("Forest" or "Defendants") violated antitrust laws relating to the sale of these prescription pharmaceuticals. Defendants have denied any wrongdoing.

- The Court previously determined that the Lawsuit between Direct Purchaser Class Plaintiffs and Defendants can be a class action because it meets the requirements of Federal Rule of Civil Procedure 23, which governs class actions in federal courts. The class (hereinafter, the "Direct Purchaser Class" or the "Class") is defined as follows:

  > All persons or entities in the United States and its territories who purchased branded Namenda IR 5 or 10 mg tablets, and/or generic Namenda IR 5 or 10 mg tablets (including an authorized generic), and/or branded Namenda XR capsules, directly from Forest or its successors in interest, Actavis and Allergan, and/or from any generic manufacturer at any time during the period from June 2012 until September 30, 2015. Excluded from the Class are Defendants and their officers, directors, management, employees, subsidiaries, or affiliates, and all federal governmental entities.

- The Court has preliminarily approved the proposed settlement between the Direct Purchaser Class and Defendants. The proposed settlement will provide for the payment of $750,000,000.00 (seven hundred and fifty million dollars and no/100) in cash into an escrow account (the "Settlement Fund") for allocation to the members of the Class after payment of Direct Purchaser Class Counsel's attorneys' fees, costs, and incentive awards to the Class Representatives out of the Settlement Fund, as approved by the Court. The full text of the proposed settlement ("Settlement Agreement"), which is dated December 20, 2019, is available for your review at www.bergermontague.com and www.garwingerstein.com.

- The Court has scheduled a hearing on Final Approval of the proposed settlement, the plan for allocating the Settlement Fund to members of the Class (summarized in Question 8 below), and Class Counsel's request for reimbursement of costs and payment of attorneys' fees out of the Settlement Fund. That hearing is scheduled for May 27, 2020, at 10:00 a.m., before Chief Judge Colleen McMahon of the U.S. District Court for the Southern District of New York, in Courtroom 24A of the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10007-1312.

- Your legal rights are affected whether you act or do not act, so please read this notice carefully.

| YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT | |
|---|---|
| **WHEN YOU RECEIVE A CLAIM FORM, PROMPTLY COMPLETE AND RETURN IT** | You do not need to do anything now to retain your right to seek a share of the proposed settlement. If the Court decides to give the proposed settlement Final Approval and you are a Class Member, then you will need to complete, sign and return a Claim Form (which will be mailed to you) to obtain a share of the proposed settlement. |
| **OBJECT TO THE SETTLEMENT** | If you object to all or any part of the proposed settlement, write to the Court about why you object to the proposed settlement. |
| **GETTING MORE INFORMATION** | If you would like to obtain more information about the proposed settlement, you can send questions to the lawyers identified in this notice and/or ask to attend the hearing at which the Court will evaluate the proposed settlement. |

- These rights and options – **and the deadlines to exercise them** – are explained in this notice.
- The Court in charge of this case still has to decide whether to give Final Approval to the proposed settlement with Defendants.

## BASIC INFORMATION

### 1. Why did I get this notice?

You received this notice because according to sales records obtained by Direct Purchaser Class Plaintiffs, you may have purchased Namenda IR, Namenda XR, and/or generic Namenda IR directly from Forest or its successors in interest, Actavis or Allergan, and/or from any generic manufacturer at some point between June 2012 until September 30, 2015. A prior notice about the Lawsuit and the Court's decision to certify a class was mailed on or about December 14, 2018. This second notice is being sent to you because a settlement has been reached in the Lawsuit.

### 2. What is this lawsuit about?

The Direct Purchaser Class Plaintiffs allege that Defendants violated federal antitrust laws by engaging in an unlawful scheme to delay and impede the market entry of less expensive, generic versions of Namenda IR. Specifically, the Direct Purchaser Class Plaintiffs allege that Defendants entered into unlawful, non-competition agreements, or horizontal market allocation agreements, with a prospective generic competitor, whereby Defendants agreed to pay the generic competitor, in exchange for the generic competitor agreeing to delay selling its generic version of Namenda IR. The Direct Purchaser Plaintiffs further allege that Defendants then engaged in a "hard switch product hop" to compel purchasers to switch to Defendants' extended release version of Namenda, called Namenda XR, before less expensive generic versions of Namenda IR became available. Direct Purchaser Class Plaintiffs allege that they and other members of the Class were injured by being overcharged because of Defendants' conduct and overpaid on their purchases of Namenda IR, Namenda XR, and generic Namenda IR. A copy of the Direct Purchaser Class Plaintiffs' First Amended Class Action Complaint filed October 14, 2015 (the "Complaint") is available at www.bergermontague.com and www.garwingerstein.com.

Defendants deny all these allegations, including that any Class member is entitled to damages or other relief. Defendants also respond that none of their conduct violated any applicable law or regulation. The settlement between Direct Purchaser Class Plaintiffs and Defendants is not an admission of wrongdoing by any Defendant. A trial was scheduled to begin on October 28, 2019, but the parties reached a settlement and no trial has occurred.

Following full investigation of relevant facts, and preparation for trial, and following extensive negotiations utilizing more than one independent mediator including former United States District Court Judge Faith S. Hochberg, the class representatives of the Direct Purchaser Class, on behalf of the Class, entered into the Settlement Agreement with Defendants.

THIS NOTICE IS NOT AN EXPRESSION OF ANY OPINION BY THE COURT AS TO THE MERITS OF DIRECT PURCHASER CLASS PLAINTIFFS' CLAIMS AGAINST ANY DEFENDANT OR THE DEFENSES ASSERTED BY ANY DEFENDANT.

The class action is known as *In re Namenda Direct Purchaser Antitrust Litigation*, Civil Action No. 1:15-cv-07488-CM-RWL (S.D.N.Y.). Chief Judge Colleen McMahon of the United States District Court for the Southern District of New York is overseeing this class action.

### 3. Why is this lawsuit a class action?

In a class action, one or more entities called "Class Representatives" sue on behalf of other entities with similar claims. In this case, the Class Representatives are J M Smith Corporation d/b/a Smith Drug Company and Rochester Drug Co-Operative, Inc. ("RDC"). The Class Representatives and the entities on whose behalf they have sued together constitute the "Class" or "Class Members." They are also called the "Direct Purchaser Class Plaintiffs" or "Plaintiffs." Their attorneys are called "Plaintiffs' Counsel" or "Class Counsel."

The companies that have been sued are called the "Defendants." In this case, the Defendants are Forest Laboratories, LLC, Forest Laboratories, Inc., Forest Laboratories Holdings Ltd., and Actavis plc.

In a class action lawsuit, one court resolves the issues for everyone in the class, except for those class members who exclude themselves (i.e., "opt out") from the class. The Court, by order dated August 2, 2018, determined that the Lawsuit between Direct Purchaser Class Plaintiffs and Defendants can proceed as a class action. A copy of the Court's order may be found at www.bergermontague.com and www.garwingerstein.com.

Specifically, the Court found that:

- The number of Class members is so numerous that joining them all into one suit is impractical.
- Members of the Class share common legal or factual issues relating to the claims in this case.

- The claims of the Class Representatives are typical of the claims of the rest of the Class.
- The Class Representatives and the lawyers representing the Class will fairly and adequately protect the Class's interests.
- The common legal questions and facts predominate over questions affecting only individual members of the Class, and this class action will be more efficient than individual lawsuits.
- A class action is the superior method to resolve these claims.

**4. Has the Court identified Class Claims, Issues, or Defenses?**

The Court has identified the following classwide issues:

(a) Whether the conduct challenged by the Class as anticompetitive in the Complaint constituted monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2;

(b) Whether the conduct challenged by the Class as anticompetitive in the Complaint constituted an agreement in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

(c) Whether the challenged conduct caused antitrust injury-in-fact to the Class, in the form of overcharges; and

(d) The amount of overcharge damages, if any, owed to the Class in the aggregate under Section 4 of the Clayton Act, 15 U.S.C. § 4.

**5. Why is there a settlement with Defendants?**

The Direct Purchaser Class Plaintiffs and Defendants were preparing to go to trial beginning October 28, 2019, but they have now agreed to a proposed settlement. By settling, both the Direct Purchaser Class Plaintiffs and Defendants avoid the risks and uncertainties of trial and any subsequent appeal. The Class Representatives and Class Counsel believe that the proposed settlement is fair, adequate, and reasonable and in the best interests of the Class.

## WHO IS IN THE CLASS AND SETTLEMENT

To see if you are in the Class, and if so, how you will be able to share in the Settlement Fund, you first have to decide if you are a Class Member.

**6. Am I part of the Class and the settlement with Defendants?**

You are in the Class if you are a person or entity in the United States and its territories and possessions including the Commonwealth of Puerto Rico who directly purchased Namenda IR or Namenda XR or generic Namenda IR directly from Forest or its successors in interest, Actavis and Allergan, and/or from any generic manufacturer at any time during the period from June 2012 until September 30, 2015.

Excluded from the Class are Defendants and their officers, directors, management, employees, subsidiaries, and affiliates, and all federal governmental entities.

If you are not sure whether you are included, you may call or write to the lawyers in this case at the telephone numbers or addresses listed in Question 11 below.

## THE SETTLEMENT BENEFITS—WHAT YOU GET

**7. What does the settlement with Defendants provide?**

Defendants have agreed to pay $750,000,000.00 in cash into the Settlement Fund (which will include any interest that accrues). Direct Purchaser Class Plaintiffs' Counsel will apply to the Court for reimbursement of costs and expenses, incentive awards to the Class Representatives of $150,000 each for Smith Drug and RDC for their services to the Class, and an award of attorneys' fees of up to one-third of the Settlement Fund, net of expenses and service awards approved by the Court, and a proportionate share of the interest, and payment for costs of administering the settlement from the fund. The remainder (the "Net Settlement Fund") will be divided among Class Members.

In exchange, the litigation between the Direct Purchaser Plaintiffs and Defendants will be dismissed with prejudice and Defendants will be released by Direct Purchaser Class Plaintiffs from certain claims. The full text of the Settlement Agreement and the release is available at www.bergermontague.com and www.garwingerstein.com.

**8. How much will my payment be?**

Your share of the Net Settlement Fund will depend on the amount of Namenda IR or Namenda XR you purchased directly from Defendants or their successors in interest, Actavis and Allergan, during the period from June 1, 2012 until June 30, 2017, and/or the amount of generic Namenda IR you purchased directly from any generic manufacturer at any time during the period from July 11, 2015 (when generic Namenda IR launched) until September 30, 2015. Generally, those who purchased more will get a higher recovery, and those who purchased branded Namenda IR and/or XR will get more than those who purchased only generic Namenda IR.

Your share of the Net Settlement Fund will also depend on the number of valid claim forms that Class Members submit. If less than 100% of the Class sends in a claim form, you could get a larger *pro rata* share. More detail is available in the Proposed Plan of Allocation, which is available at www.bergermontague.com and www.garwingerstein.com.

**9. How can I get a payment?**

If the Court gives Final Approval to the settlement, then you will receive a Claim Form in the mail by which you can request your *pro rata* share of the Settlement Fund. (See Question 8 above). You may be asked to verify the accuracy of the information in the Claim Form, and to sign and return the form according to the directions on the form. For instance, you may be requested to confirm that the Claim Form accurately reports the amount of your qualifying purchases of Namenda IR, Namenda XR, and/or generic Namenda IR, and, if you believe it does not, to supply data you believe to be correct.

**10. When would I get my payment?**

When you get your payment depends on several matters, including whether the Court decides to give Final Approval to the settlement.

When you get a payment depends on the timing of Final Approval and any appeal of that Final Approval. The Net Settlement Fund will be allocated to Class Members as soon as possible after Final Approval has been obtained for the proposed settlement. You will not be responsible for calculating the amount you may be entitled to receive. The Plan of Allocation is generally as follows: the allocation will be on a *pro rata* basis in proportion to how much qualifying branded Namenda IR, Namenda XR, and/or generic Namenda IR you purchased. Those who purchased only generic Namenda IR will receive comparatively less than those who purchased branded Namenda IR and/or XR, as alleged overcharge damages on units of generic Namenda IR alone were substantially lower than alleged overcharges on purchases of branded Namenda IR and XR. If the proposed settlement is given Final Approval, but there is an appeal of the Final Approval, the appeal could take several years to resolve. Any accrued interest on the Settlement Fund will be included, *pro rata*, in the amount paid to the Class Members. The Proposed Plan of Allocation is available at www.bergermontague.com and www.garwingerstein.com.

## THE LAWYERS REPRESENTING YOU

**11. Do I have a lawyer in this case?**

The attorneys and law firms listed below have been appointed by the Court as Lead Class Counsel. Lead Class Counsel is experienced in handling similar cases against other companies. Lead Class Counsel are:

Bruce E. Gerstein, Esq.
GARWIN GERSTEIN & FISHER LLP
88 Pine Street, 10th Floor
New York, NY 10005
Tel.: 212-398-0055
Fax: 212-764-6620

David F. Sorensen
BERGER MONTAGUE PC
1818 Market Street – Suite 3600
Tel.: 215-875-3000
Fax: 215-875-4604

**12. Should I get my own lawyer?**

You do not need to hire your own lawyer because Lead Class Counsel are working on your behalf. However, if you wish to do so, you may retain your own lawyer at your own expense.

**13. How will the lawyers be paid?**

If the Court gives Final Approval to the settlement, then the Court will be asked to approve reimbursement to the lawyers for the costs and expenses they have paid, incentive awards to the Class Representatives for their services to the Class of

$150,000 each to Smith Drug and to RDC, and a fee to the lawyers of up to one-third of the Settlement Fund (including accrued interest but net of expenses and service awards the Court approves). You will not have to pay these fees, costs and expenses, and service awards out of your own pocket. If the Court grants Class Counsel's requests, these amounts would be deducted from the Settlement Fund.

Any application by Class Counsel for an award of attorneys' fees, reimbursement of expenses and incentive awards to the Class Representatives will be filed with the Court and made available for download and/or viewing on or before March 13, 2020 on www.bergermontague.com and www.garwingerstein.com, as well as at the office of the Clerk of Court for the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10007-1312, during normal business hours.

## OBJECTING TO THE SETTLEMENT

You can tell the Court that you do not agree with all or any part of the proposed settlement, and/or the application for attorneys' fees, costs, and expenses, and/or incentive awards to the Class Representatives.

### 14. How do I tell the Court that I do not like the settlement with Defendants ?

If you are a Class Member, you can object to all or any part of the proposed settlement if you do not like all or any part of it. You can give reasons why you think the Court should not approve it. You can also object to Class Counsel's application for attorneys' fees, costs and expenses and/or incentive awards to the Class Representatives, which will be filed with the Court and available for public viewing no later than March 13, 2020. The Court will consider your views. To object, you must send a letter via first class U.S. mail saying that you object to the settlement in the Direct Purchaser Class Action in *In re Namenda Direct Purchaser Antitrust Litigation*, Civil Action No. 1:15-cv-07488-CM-RWL (S.D.N.Y.). Be sure to include your name, address, telephone number, your signature, and the reasons you object to the settlement. Mail the objection to the Clerk of the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10007-1312, with copies to all of the following:

Bruce E. Gerstein, Esq.
GARWIN GERSTEIN & FISHER LLP
88 Pine Street, 10th Floor
New York, NY 10005
Tel.: 212-398-0055
Fax: 212-764-6620

David F. Sorensen
BERGER MONTAGUE PC
1818 Market Street – Suite 3600
Tel.: 215-875-3000
Fax: 215-875-4604

Beth A. Wilkinson
WILKINSON WALSH + ESKOVITZ LLP
2001 M Street, NW, 10th Floor
Washington, DC 20036
Tel: (202) 847-4000
Fax: (202) 847-4005

J. Mark Gidley
WHITE & CASE LLP
701 Thirteenth Street NW
Washington, DC 20005
Tel: (202) 626-3600
Fax: (202) 639-9355

Your objection **must be postmarked no later than March 30, 2020**.

## THE COURT'S FAIRNESS HEARING

The Court will hold a hearing to decide whether to give Final Approval to the settlement. You may attend and you may ask to speak, but you do not have to.

### 15. When and where will the Court decide whether to approve the settlement with Defendants?

The Court will hold a Fairness Hearing at 10:00 a.m. on May 27, 2020, in Courtroom 24A in the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10007-1312. At this hearing, the Court will consider whether the settlement is fair, reasonable and adequate. If there are objections, the Court will consider them. After the hearing, the Court will decide whether to give Final Approval to the settlement. We do not know how long the decision will take.

### 16. Do I have to come to the hearing?

No. Class Counsel will answer questions that the Court may have. But, you are welcome to come at your own expense. If you send an objection, you do not have to come to Court to talk about it. So long as you mail your written objection on time,

the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary. Moreover, attendance is not necessary to receive a *pro rata* share of the Net Settlement Fund.

### 17. May I speak at the hearing?

You may ask the Court for permission to speak at the Fairness Hearing. To do so, you must send a letter via first class U.S. mail saying that it is your "Notice of Intention to Appear in *In re Namenda Direct Purchaser Antitrust Litigation*, Civil Action No. 1:15-cv-07488-CM-RWL (S.D.N.Y.)." Be sure to include your name, address, telephone number, and your signature. Your Notice of Intention to Appear must be postmarked no later than March 30, 2020, and must be sent to the Clerk of the Court, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10007-1312; and to Class Counsel and Defendants' counsel, at the addresses set forth in the response to Question 14. You cannot speak at the hearing if you do not send a notice of intention to appear.

## IF YOU DO NOTHING

### 18. What happens if I do nothing at all?

If you are a Class Member and you do nothing, you will remain in the Class and be eligible to participate in the settlement as described in this notice, if the settlement is approved. However, you will need to complete, sign and return the Claim Form (once it is sent to you) in order to obtain a payment.

## GETTING MORE INFORMATION

### 19. How do I get more information?

If you have questions about this case or want to get additional information, you may call or write to the lawyers listed in answer to Question 11 or visit the website www.bergermontague.com or www.garwingerstein.com. This notice is only a summary of the proposed settlement and is qualified in its entirety by the terms of the actual Settlement Agreement. A copy of the Settlement Agreement is on public file with the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10007-1312 during normal business hours and is also available for download and/or viewing at www.bergermontague.com and www.garwingerstein.com.

**PLEASE DO NOT WRITE OR CALL THE COURT OR THE CLERK'S OFFICE FOR INFORMATION.**

DATE: February 12, 2020

BY THE COURT
Honorable Colleen McMahon
Chief Judge, United States District Court
for the Southern District of New York

# EXHIBIT 2

Namenda Direct Purchaser Claims Administrator
c/o Rust Consulting – 6269
P.O. Box 44
Minneapolis, MN 55440-0044

**IMPORTANT LEGAL MATERIALS**


- UAA <<SequenceNo>>

DMS Pharmaceutical Group
810 Busse Highway
Park Ridge IL 60068-2302

February 12, 2020

*A federal court authorized this communication. It is not a solicitation from a lawyer.*

Dear DMS Pharmaceutical Group,

We are the Court-appointed Claims Administrator in the *In re Namenda Direct Purchaser Antitrust Litigation*, No. 15-7488 (S.D.N.Y.) class action litigation ("Namenda litigation"). We write because, on or about December 14, 2018, you were mailed a notice about the *Namenda* litigation. As described in the December 2018 notice, the Court in the *Namenda* litigation certified the Direct Purchaser Class, finding that the Direct Purchaser Class meets the requirements of Federal Rule of Civil Procedure 23, which governs class actions in federal courts. As set forth in the December 2018 notice, the "Direct Purchaser Class" includes:

> All persons or entities in the United States and its territories who purchased branded Namenda IR 5 or 10 mg tablets, and/or generic Namenda IR 5 or 10 mg tablets (including an authorized generic), and/or branded Namenda XR capsules, directly from Forest[1] or its successors in interest, Actavis and Allergan, and/or from any generic manufacturer at any time during the period from June 2012 until September 30, 2015. Excluded from the Direct Purchaser Class are Defendants and their officers, directors, management, employees, subsidiaries, or affiliates, and all federal governmental entities.

Although DMS Pharmaceutical Group was previously mailed notice of the certification of the Direct Purchaser Class, **we have determined that DMS Pharmaceutical Group is not a member of the certified Direct Purchaser Class**. This is because, according to the sales data produced during the litigation by the Defendants and manufacturers of generic Namenda IR during the *Namenda* litigation, DMS Pharmaceutical Group did not purchase any branded Namenda IR or branded Namenda XR directly from Forest, or its successors in interest, Actavis and Allergan, from June 1, 2012 through September 30, 2015 and did not purchase any generic Namenda IR directly from any generic manufacturer on or before September 30, 2015.

DMS may contest such determination by making a submission to the Court on or before March 30, 2020. Any such submission must be mailed to the Clerk of the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10007-1312, with copies mailed to Lead Counsel for the Direct Purchaser Class, who are:

Bruce E. Gerstein, Esq.
GARWIN GERSTEIN & FISHER LLP
88 Pine Street, 10th Floor
New York, NY 10005
Tel.: 212-398-0055
Fax: 212-764-6620

David F. Sorensen
BERGER MONTAGUE PC
1818 Market Street – Suite 3600
Tel.: 215-875-3000
Fax: 215-875-4604

Sincerely,

Namenda Direct Purchaser Claims Administrator
c/o Rust Consulting – 6269
P.O. Box 44
Minneapolis, MN 55440-0044

[1] "Forest" or "Defendants" include Actavis plc (now known as Allergan plc); Forest Laboratories, LLC; Forest Laboratories, Inc.; and Forest Laboratories Holdings Ltd.