

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

**IN RE SUBOXONE (BUPRENORPHINE  
HYDROCHLORIDE AND NALOXONE)  
ANTITRUST LITIGATION**

**MDL No. 2445**

**Master File No. 2:13-MD-2445-MSG**

**THIS DOCUMENT RELATES TO:**

*All Direct Purchaser Class Actions*

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

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. BACKGROUND ..... 3

    A. Procedural Background & Settlement Negotiations ..... 3

    B. The Proposed Settlement ..... 6

III. THE PROPOSED SETTLEMENT MEETS THE STANDARD FOR PRELIMINARY APPROVAL ..... 7

    A. Plaintiffs’ Counsel are Highly Experienced in Pharmaceutical Antitrust Litigation ..... 9

    B. The Settlement Negotiations Occurred at Arm’s Length ..... 9

    C. The Relief Provided to the Class is Adequate ..... 10

    D. The Plan of Allocation Treats All Class Members Equitably Relative to Each Other ..... 14

    E. The Settlement Occurred at an Advanced Stage of the Proceedings ..... 15

    F. No Class Members Have Objected to Date ..... 15

IV. The Proposed Form and Manner of Notice Are Appropriate ..... 15

    A. Form of Notice ..... 15

    B. Manner of Notice ..... 16

    C. An Additional Opt-Out Period Is Unnecessary ..... 17

V. RG/2 SHOULD BE APPOINTED CLAIMS ADMINISTRATOR ..... 18

VI. FIRST STATE TRUST COMPANY IS AN APPROPRIATE ESCROW AGENT ..... 18

VII. THE PROPOSED SCHEDULE IS FAIR AND SHOULD BE APPROVED ..... 19

VIII. CONCLUSION ..... 20

## TABLE OF AUTHORITIES

### CASES

<i>Beltran v. SOS Ltd.</i> , 2023 U.S. Dist. LEXIS 9971 (D.N.J. Jan. 3, 2023) .....	11
<i>Caddick v. Tasty Baking Co.</i> , 2021 U.S. Dist. LEXIS 70016 (E.D. Pa. Apr. 12, 2021) .....	7, 10
<i>Checchia v. Bank of Am., N.A.</i> , 2023 U.S. Dist. LEXIS 26261 (E.D. Pa. Feb. 16, 2023) .....	8, 10
<i>Denney v. Deutsche Bank AG</i> , 443 F.3d 253 (2d Cir. 2006) .....	17
<i>Ehrheart v. Verizon Wireless</i> , 609 F.3d 590 (3d Cir. 2010) .....	7
<i>In re Brand Name Prescription Drugs Antitrust Litig.</i> , 1996 U.S. Dist. LEXIS 4359 (N.D. Ill. Apr. 4, 1996) .....	17
<i>In re Flonase Antitrust Litig.</i> , 2013 U.S. Dist. LEXIS 197122 (E.D. Pa. Jan. 14, 2013) .....	18
<i>In re Generic Pharm. Pricing Antitrust Litig.</i> , No. 16-MD-2724 (E.D. Pa. Mar. 9, 2023).....	11
<i>In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.</i> , 55 F.3d 768 (3d Cir. 1995) .....	7
<i>In re Namenda Direct Purchaser Antitrust Litig.</i> , No. 1:15-cv-7488 (S.D.N.Y. Jan. 6, 2020 & May 27, 2020).....	13, 18
<i>In re Novartis and Par Antitrust Litig.</i> , No. 1:18-cv-04361 (S.D.N.Y. Jan. 26, 2023) .....	17
<i>In re Opana ER Antitrust Litig.</i> , No. 1:14-cv-10150 (N.D. Ill. Jul. 28, 2022) .....	17, 18
<i>In re Provigil Antitrust Litig.</i> , No. 06-1797 (E.D. Pa. Oct. 15, 2015) .....	11
<i>In re Suboxone Antitrust Litig.</i> , 622 F.Supp.3d 22 (E.D. Pa. 2022) .....	12
<i>In re Suboxone Antitrust Litig.</i> , 967 F.3d 264 (3d Cir. 2020) .....	4
<i>In re Suboxone Antitrust Litig.</i> , 421 F.Supp.3d 12 (E.D. Pa. 2019) .....	12

<i>In re Tricor Direct Purchaser Antitrust Litig.</i> , No. 05-cv-340 (D. Del. Apr. 23, 2009).....	11
<i>In re Valeant Pharms. Int'l, Inc. Secs. Litig.</i> , 2021 U.S. Dist. LEXIS 18894 (D.N.J. Jan. 31, 2021) .....	13
<i>In re Wawa Inc. Data Sec. Litig.</i> , 2021 U.S. Dist. LEXIS 142025 (E.D. Pa. July 30, 2021) .....	11
<i>In re Wellbutrin XL Antitrust Litig.</i> , No. 08-cv-02431 (E.D. Pa. Aug. 17, 2012) .....	18
<i>Klingensmith v. Max &amp; Erma's Rests., Inc.</i> , 2007 U.S. Dist. LEXIS 81029 (W.D. Pa. Oct. 23, 2007) .....	9
<i>McRobie v. Credit Prot. Ass'n</i> , 2020 U.S. Dist. LEXIS 217563 (E.D. Pa. Nov. 20, 2020) .....	7, 10, 14
<i>Myers v. Jani-King of Phila., Inc.</i> , 2019 U.S. Dist. LEXIS 79572 (E.D. Pa. May 10, 2019) .....	9
<i>Mylan Pharms., Inc. v. Warner Chilcott Public Ltd.</i> , No. 12-cv-3824 (E.D. Pa. Sep. 15, 2014) .....	11
<i>Officers for Just. v. Civil Serv. Com.</i> , 688 F.2d 615 (9th Cir. 1982) .....	17
<i>Sullivan v. DB Invs., Inc.</i> , 667 F.3d 273 (3d Cir. 2011) .....	11, 12
<i>Sweda v. Univ. of Pa.</i> , 2021 U.S. Dist. LEXIS 121336 (E.D. Pa. Jun. 28, 2021) .....	8
<i>Taylor v. Populus Grp., Inc.</i> , 2022 U.S. Dist. LEXIS 137518 (S.D. Cal. Aug. 1, 2022) .....	9
<b>STATUTES</b>	
28 U.S.C. § 1715 .....	19, 20
<b>RULES</b>	
Fed. R. Civ. P. 23 .....	15
<b>OTHER AUTHORITIES</b>	
MANUAL FOR COMPLEX LITIGATION (4th ed. 2005).....	15, 17

Direct Purchaser Class Plaintiffs Burlington Drug Company, Inc. (“BDC”), Rochester Drug Co-Operative, Inc. (“RDC”), and Meijer, Inc. and Meijer Distribution, Inc. (collectively “Meijer”) (BDC, RDC and Meijer collectively “Plaintiffs”), have reached an agreement on their own behalf and on behalf of the certified direct purchaser class,<sup>1</sup> with Indivior Inc., f/k/a Reckitt Benckiser Pharmaceuticals, Inc. (“Indivior” or “Defendant”) to settle the Direct Purchaser Class’s claims in this litigation against Indivior. Plaintiffs respectfully submit this Memorandum of Law in Support of their Motion for Preliminary Approval of Proposed Settlement, Approval of the Form and Manner of Notice to the Class and Proposed Schedule for a Fairness Hearing.

## **I. INTRODUCTION**

Under the terms of a settlement agreement dated October 22, 2023 (the “Settlement Agreement”), Indivior has agreed to make one (1) immediate cash payment of \$385,000,000 (Three Hundred Eighty-Five Million and no/100) to Plaintiffs in exchange for Plaintiffs’ agreement to dismiss their claims (on their behalf and on behalf of the Class) against Indivior with prejudice and to provide certain releases. *See* Settlement Agreement, Exhibit 1 to the Declaration of Bruce E. Gerstein (“Gerstein Decl.”). This settlement represents an outstanding result for Plaintiffs and the Class.

---

<sup>1</sup> The settlement is on behalf of Plaintiffs and a class defined as follows (“Direct Purchaser Class” or “Class”):

All persons or entities in the United States and its territories who purchased branded Suboxone tablets directly from Reckitt Benckiser Pharmaceuticals, Inc. (now known as Indivior, Inc.) at any time during the period January 1, 2012 through March 14, 2013 (“the Class”). Excluded from the Class are Indivior Inc. (formerly known as Reckitt Benckiser Pharmaceuticals, Inc.) its officers, directors, management, employees, subsidiaries, and affiliates, and all federal governmental entities.

*See generally* ECF No. 588 (Order) (Certifying the Class) at ¶ 1.a.

Plaintiffs and Indivior entered into the Settlement Agreement after more than a decade of intense, fully developed litigation, weeks before a jury trial was set to begin. Counsel for both sides are highly experienced in pharmaceutical antitrust litigation and well-positioned to assess the risks and merits of the case. Plaintiffs were fully prepared to go to trial but concluded that the proposed settlement was in the best interests of the Class since, if finally approved, the settlement assures Class members of receiving substantial cash payments while putting the litigation against Indivior to rest and avoiding the inherent risks of jury trial and potential appeals. For these reasons, and as further detailed below, the settlement satisfies the requirements for preliminary approval.

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

1. Preliminary approval of the proposed Settlement Agreement and the documents necessary to effectuate the Settlement, including a proposed form of notice to the Class (in the form appearing as Exhibit B to the Settlement Agreement) and a proposed plan of allocation to be used to allocate the settlement funds among the Class members, as set forth in Exhibits 2 and 3 to the Gerstein Decl.;
2. Re-appointment of RG/2 Claims Administration LLC (“RG/2”), previously appointed by the Court as Notice Administrator, as Claims Administrator;
3. Appointment of First State Trust Company as escrow agent for the settlement funds as set forth in Exhibit D to the Settlement Agreement; and
4. A proposed settlement schedule, including the scheduling of a Fairness Hearing during which the Court will consider: (a) Plaintiffs’ request for final approval of the Settlement Agreement and entry of a proposed order and final judgment (in the form appearing as Exhibit C to the Settlement Agreement); (b) Plaintiffs’ Counsel’s application for an award of attorneys’ fees and reimbursement of expenses, payment of administrative costs, and service awards to the named class plaintiffs; and (c) Plaintiffs’ request for dismissal of this action against Indivior with prejudice.

## **II. BACKGROUND**

### **A. Procedural Background & Settlement Negotiations**

On December 21, 2012, before any FDA referral of Indivior (then known as Reckitt) to the FTC, and before any Department of Justice (“DOJ”) enforcement activity, the undersigned counsel filed the first direct purchaser complaint alleging that Indivior violated the antitrust laws with respect to Suboxone, in the District of Vermont, following an extensive private investigation. *See Burlington Drug Co., Inc. v. Reckitt Benckiser Group plc et al.*, No. 2:12-cv-282 (D. Vt.). Shortly thereafter, other substantially similar direct and indirect purchaser class complaints were filed in different districts, and as a result, on June 6, 2013, the United States Judicial Panel on Multidistrict Litigation centralized all then-pending actions (two direct purchaser and one indirect purchaser) in this District and assigned them to this Court. *See MDL No. 2445, Doc. 60 (Transfer Order)*. On August 7, 2013, the Court appointed Garwin Gerstein & Fisher LLP, Faruqi & Faruqi LLP and Hagens Berman Sobol Shapiro LLP as Interim Co-Lead Counsel for the Direct Purchaser Class and Garwin Gerstein & Fisher LLP as Interim Liaison Counsel for same. *See ECF No. 44 (Pretrial Order No. 2)*. On September 27, 2019, in its order certifying the Class, the Court ruled that these firms had “prosecuted this litigation effectively to date” and “confirm[ed] their appointments as Lead Counsel for the Class.” *ECF No. 588 (Order)* at ¶ 1.b.

Over the course of the next ten years, the undersigned counsel vigorously litigated this case. During 2013, the parties engaged in motion to dismiss briefing, and on December 3, 2013 the Court rejected Defendant’s arguments and largely denied Defendant’s motion to dismiss. *See ECF No. 97 (Mem. Op.)*. The parties then engaged in extensive fact and expert discovery, which proceeded for many years. Plaintiffs secured the production of approximately 6.7 million pages of documents from Defendant and third parties, took 29 fact depositions, several expert

depositions, and defended 12 plaintiff-witness depositions (including experts). The parties also exchanged a total of 17 expert reports. Extensive discovery motion practice occurred. For instance, Plaintiffs filed two motions to compel against non-party Actavis, one of the earliest sellers of generic Suboxone tablets, which were granted in part. *See* ECF Nos. 257 & 461 (motions to compel) and ECF Nos. 289 & 471 (Orders on motions to compel). Separately, after the parties reached impasse concerning the depositions of certain witnesses who intended to invoke their Fifth Amendment rights, Plaintiffs opposed Indivior's motion to "temporarily defer" the depositions of those witnesses during the DOJ criminal investigation into Reckitt's marketing of Suboxone, resulting in this Court establishing a protocol for such witnesses. *See* ECF No. 393 (Order). It is notable that the DOJ (and FTC) investigation into Indivior and its employees followed the initial complaint in this matter, not the other way around.

During 2018 and into 2019, the parties briefed class certification. Defendant also filed a *Daubert* motion to exclude Plaintiffs' class certification expert. On September 27, 2019, the Court granted Plaintiffs' motion for class certification and denied Defendant's *Daubert* motion. *See* ECF Nos. 587 & 588 (Mem. Op. and Order). Defendant appealed this ruling to the Third Circuit Court of Appeals, which, following argument, unanimously affirmed this Court's grant of class certification in a precedential opinion. 967 F.3d 264 (3d Cir. 2020).

During the pendency of the class certification appeal, the parties briefed "Phase I" *Daubert* motions, *i.e.*, motions directed primarily to non-economic expert opinions that would not be impacted by the Third Circuit's resolution of the appeal. *See* ECF No. 612 (Order). In August 2020, the Court set a schedule for the remaining *Daubert* ("Phase II") motions and summary judgment motions. *See* ECF No. 644 (Order). During this time, the parties also extensively litigated both Indivior's motion to disqualify RDC as a class representative and



Indivior's opposition to Plaintiffs' motion to approve notice to the class of the pendency of this action and the grant of class certification. On November 24, 2020, the Court issued a 96-page opinion ruling on the "Phase I" *Daubert* motions, including ruling on Indivior's motion to preclude opinion on whether its "safety" messages were false and misleading. *See* ECF No. 677 (Mem. Op.). Shortly thereafter, the Court denied Indivior's motion to disqualify RDC from serving as a class representative, approved the notice to Class members of the certification of a direct purchaser class, and ruled on the balance of the parties' *Daubert* motions. *See* ECF Nos. 683 (Order) & 685 (Mem. Op.).

On February 22, 2021, the Court-approved notice was disseminated to all Class members via first-class mail, informing them about the litigation, that a direct purchaser class had been certified, and that Class members could elect to opt out if they wished. *See* ECF No. 736-1 (Declaration of RG/2, the Notice Administrator). All Class members were informed that the deadline to opt-out of the Class was April 9, 2021. *Id.* at ¶ 9. No Class member requested exclusion. *Id.* at ¶ 2.

The parties filed lengthy summary judgment motions. Plaintiffs filed a motion for partial summary judgment as to the relevant antitrust market, and Indivior filed two summary judgment motions (one seeking to dismiss all of Plaintiffs' claims and one challenging, *inter alia*, Plaintiffs' damages calculations as well as the validity of Plaintiff Meijer's assignment). On August 22, 2022, in an 87-page opinion, the Court denied both of Indivior's summary judgment motions. *See* ECF Nos. 812 & 813 (Mem. Op. and Order). The Court denied Plaintiffs' motion for partial summary judgment as to the relevant antitrust market on August 30, 2023. *See* ECF Nos. 937 & 938 (Mem. Op. & Order).

On December 14, 2022, by agreement of all counsel and the parties, mediation before this Court was ordered, commencing on January 24, 2023, representing the third effort at mediation in this case. *See* ECF No. 851 (Order). On December 16, 2022, the case was set for trial on September 18, 2023, and a pre-trial schedule was ordered. *See* ECF No. 852 (Order). The parties continued to mediate while also engaging in trial preparation activities. On July 14, 2023, the trial date was reset for October 30, 2023. *See* ECF No. 912 (Order).

Those trial preparation activities included exchanging witness lists, exhibits, deposition designations, jury instructions, verdict forms, *voir dire* and jury questionnaires (and objections to same), and filing their respective pretrial memoranda, forty-two motions *in limine*, two sets of motions relating to the criminal and False Claims Act proceedings and the Fifth Amendment invocations of numerous former Indivior employees, among numerous other pretrial motions. During this time Plaintiffs also took the depositions of four former Reckitt employees who had previously invoked their Fifth Amendment right but now represented that they were willing to testify. On October 4, 2023, just weeks before trial was set to commence, and with the assistance of this Court as mediator, Plaintiffs and Indivior reached an agreement-in-principle, which then resulted in the Settlement Agreement.

### **B. The Proposed Settlement**

Under the Settlement Agreement, Indivior will pay \$385,000,000 (Three Hundred Eighty-Five Million and no/100) in cash for the benefit of all Class members in exchange for dismissal of the litigation between Plaintiffs and Indivior with prejudice and certain releases. In agreeing on the settlement, Plaintiffs' Counsel assessed the merits of Plaintiffs' claims against Indivior, Indivior's defenses thereto, and the risks of trial.

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 object to the proposed Settlement Agreement; and (c) Class members may object to Plaintiffs' Counsel's application for attorney's fees, reimbursement of reasonable expenses incurred in prosecuting this action, and service awards to the three class representatives, BDC, RDC and Meijer, for their decade-long efforts on behalf of the Class. Plaintiffs' proposed notice plan and procedures are fair and reasonable and similar to those utilized by this Court and others in other pharmaceutical antitrust cases involving similar claims and many of the same Class members.

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

As the Third Circuit has recognized, "a strong public policy exists, which is particularly muscular in class action suits, favoring settlement of disputes, finality of judgments and the termination of litigation." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010). *See also In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation").

In deciding whether to give preliminary approval to a proposed settlement, "Rule 23(e) directs the court to consider whether the proposed settlement will ultimately achieve [final] approval" pursuant to the Rule 23(e)(2) factors. *In re Suboxone (Buprenorphine & Naloxone) Antitrust Litig.*, No. 13-md-2445, ECF No. 932 (Aug. 21, 2023 Order) (Goldberg, J.) ("*In re Suboxone*") at ¶ 10. *Accord McRobie v. Credit Prot. Ass'n*, 2020 U.S. Dist. LEXIS 217563, at \*6-7 (E.D. Pa. Nov. 20, 2020); *Caddick v. Tasty Baking Co.*, 2021 U.S. Dist. LEXIS 70016, at \*16 (E.D. Pa. Apr. 12, 2021). Under Rule 23 (e)(2), a court considers 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;
- (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.

*Id.* This analysis enables the court to determine “whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval.” *In re Suboxone*, ECF No. 932 (Aug. 21, 2023 Order) at ¶ 10 (internal quotation omitted). *Accord Checchia v. Bank of Am., N.A.*, 2023 U.S. Dist. LEXIS 26261, at \*8 (E.D. Pa. Feb. 16, 2023). Additionally, the Court can consider whether there was sufficient discovery to enable a significant investigation of the plaintiff's claims and objections (if any) to the proposed settlement. *See In re Suboxone*, ECF No. 932 (Aug. 21, 2023 Order) at ¶ 10; *Sweda v. Univ. of Pa.*, 2021 U.S. Dist. LEXIS 121336, at \*19 (E.D. Pa. Jun. 28, 2021).

As demonstrated below, consideration of each factor strongly supports preliminarily approving the Settlement Agreement and authorizing notice to the Class. While a hearing is not required under Rule 23(e) at the preliminary approval stage, should the Court desire to hold one, Plaintiffs' Counsel are, of course, available at the Court's convenience.

**A. Plaintiffs' Counsel are Highly Experienced in Pharmaceutical Antitrust Litigation**

In evaluating a proposed settlement, courts have recognized that the “professional judgment of counsel involved in the litigation is entitled to significant weight.” *Klingensmith v. Max & Erma's Rests., Inc.*, 2007 U.S. Dist. LEXIS 81029, at \*19 (W.D. Pa. Oct. 23, 2007) (internal quotation omitted). This is because experienced counsel familiar with the facts of the case are best positioned to produce a settlement that is in the best interests of the class. *See Taylor v. Populus Grp., Inc.*, 2022 U.S. Dist. LEXIS 137518, at \*19-20 (S.D. Cal. Aug. 1, 2022). *See also Myers v. Jani-King of Phila., Inc.*, 2019 U.S. Dist. LEXIS 79572, at \*11 (E.D. Pa. May 10, 2019) (“After ten years of litigation, the settlement was negotiated by experienced counsel with the help of an experienced mediator. It provides significant benefits to the class members. We are satisfied that preliminary approval is appropriate”).

Here, Plaintiffs' Counsel, who are highly experienced in pharmaceutical antitrust litigation, believe that the settlement with Indivior is fair and in the best interests of the Class. If finally approved, the settlement will result in a fund for Class members, providing them with immediate receipt of compensation versus litigating to final resolution. Accordingly, this factor weighs in favor of preliminary approval.

**B. The Settlement Negotiations Occurred at Arm's Length**

As noted *supra*, counsel reached the proposed settlement after more than ten years of hard-fought litigation on the eve of trial and almost ten (10) months of mediation with the assistance of this Court, in what was the third effort at mediation in this case. Consequently, a voluminous record enabled the parties and their counsel to amply explore the merits of the litigation before engaging in the settlement negotiations that led to this proposed resolution. Under this Court's supervision, the parties engaged in arm's length settlement negotiations that

were detailed, time-consuming, and hard fought. *See, e.g., Checchia*, 2023 U.S. Dist. LEXIS 26261, at \*8 (“[T]here is nothing to indicate that the proposed settlement is not the result of good faith, arms-length negotiations”); *id.* at 9 (“[S]ettlement in this case was aided by a mediator, which is compelling evidence that vigorous and arms-length negotiations occurred”).

Accordingly, this factor weighs in favor of preliminary approval.

### **C. The Relief Provided to the Class is Adequate**

Consideration of each of the four factors relevant to determining whether the proposed settlement provides adequate relief to the Class weighs in favor of preliminary approval.

***The Costs, Risks, and Delay of Trial and Appeal.*** This factor balances the relief that the settlement is expected to provide to class members versus the costs and risks of litigating to conclusion. *Caddick*, 2021 U.S. Dist. LEXIS 70016 at \*17. While Plaintiffs’ Counsel are confident they would have presented a strong case at trial, there is always a serious risk that there would be no recovery for the Class or that a long post-trial appeal would delay any recovery. In contrast, the proposed settlement affords Class members immediate economic relief and litigation finality. Accordingly, this factor weighs in favor of preliminary approval.

***The Effectiveness of the Proposed Method of Distributing Settlement Proceeds to the Class.*** This factor examines how the claims of class members are processed to ensure the facilitation of the filing of legitimate claims in a manner that is not unduly demanding. *Id.* at \*18. Collectively, the proposed form and manner of notice (detailed below in Section IV) and proposed Plan of Allocation ensure that Class members are provided with all relevant information concerning, *inter alia*, the terms of the proposed settlement and the process for obtaining a portion of the settlement proceeds and that the settlement proceeds are allocated to Class members in a manner that is fair, reasonable and adequate under the proposed Plan of Allocation (filed herewith as Exhibit 2 to the Gerstein Decl.). *See generally McRobie*, 2020 U.S.

Dist. LEXIS 217563 at \*12 (mailing of notice of settlement to class members combined with a claims website was effective). More specifically, the proposed Plan of Allocation would allocate the Net Settlement Fund *pro rata* based on Class members' weighted unit shares of net direct purchases of brand Suboxone Tablets and brand Suboxone Film. Such *pro rata* allocation plans are common and routinely accepted. Similar plans of allocation have been repeatedly approved in similar pharmaceutical antitrust actions, including in this District and in other cases challenging unlawful "product hops."<sup>2</sup>

A plan of allocation "provides a detailed overview of how . . . [s]ettlement proceeds will be divided" among class members. *Beltran v. SOS Ltd.*, 2023 U.S. Dist. LEXIS 9971, at \*22-23 (D.N.J. Jan. 3, 2023). Like settlements, proposed allocation plans must be "fair, reasonable and adequate." *Id.* at \*23 (internal quotation omitted). *See also In re Wawa, Inc. Data Sec. Litig.*, 2021 U.S. Dist. LEXIS 142025, at \*50 (E.D. Pa. July 30, 2021) ("A district court's principal obligation in approving a plan of allocation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund") (internal quotation and citation omitted). Courts "generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 328 (3d Cir. 2011) (citation omitted).

The proposed Plan of Allocation satisfies this standard. It provides that the Net Settlement Fund will be distributed to Class members *pro rata*, calculated from each Claimant's

---

<sup>2</sup> *See, e.g., In re Provigil Antitrust Litig.*, No. 06-1797, ECF No. 870 (E.D. Pa. Oct. 15, 2015) (Goldberg, J.) (approving plan allocating common fund among class members on a *pro rata* basis based on class members' weighted share of net direct unit purchases); *In re Generic Pharm. Pricing Antitrust Litig.*, No. 16-MD-2724 (E.D. Pa. Mar. 9, 2023) (same); *Mylan Pharms., Inc. v. Warner Chilcott Public Ltd.*, No. 12-cv-3824, ECF Nos. 452-3, 665 (E.D. Pa. Sept. 15, 2014) (same in "product hop" case); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-cv-340, ECF Nos. 536-1, 543 (D. Del. Apr. 23, 2009) (ordering *pro rata* distribution of settlement funds in "product hop" pharmaceutical antitrust action).

weighted share of net unit purchases of brand Suboxone Tablets and brand Suboxone Film purchased directly from Indivior. *See* Plan of Allocation §§ 2.1-2.2; Lamb Allocation Decl. ¶ 4.<sup>3</sup> Class members' purchases of brand Suboxone Tablets will be weighted relative to Class members' purchases of brand Suboxone Film as follows: (a) 95.22% of the Class damages Dr. Lamb previously measured were incurred on Class members' purchases of Suboxone Film, with the other 4.78% incurred on purchases of Suboxone Tablets, and so (b) 95.22% of the Net Settlement Fund will be allocated based on Class members' purchases of Suboxone Film and 4.78% will be allocated based on Class members' purchases of Suboxone Tablets. Plan of Allocation § 2.3; Lamb Allocation Decl. ¶ 4.<sup>4</sup> This weighting ensures that Class members' purchases of brand Suboxone Tablets and brand Suboxone Film are given fair weight so that Class members' recovery is fair and reasonable and tracks the type and extent of their damages.<sup>5</sup>

In addition, the proposed Plan of Allocation is efficient and will ensure timely distribution of the settlement funds. Using data produced by Indivior in discovery, Dr. Lamb has already performed a preliminary computation of the percentage shares of the Net Settlement Fund allocable to each Class member. Lamb Allocation Decl. ¶ 5. Class members will be

---

<sup>3</sup> "Purchases" refers to purchases, net of returns, made directly from Reckitt (now known as Indivior) during the relevant time periods or purchases that are covered by a Claimant's assignment from a Class member covering purchases made directly from Reckitt during the relevant time periods, in the 8 mg of buprenorphine/2 mg of naloxone strength or the 2 mg of buprenorphine/.5 mg of naloxone strength of Suboxone. The purchase "unit" is a single Tablet or strip of Film. *See* Plan of Allocation at p. 3; Lamb Allocation Decl. ¶ 4 n. 9.

<sup>4</sup> The Court previously ruled that Dr. Lamb's prior damages calculations are admissible under *Daubert* and sufficient to support class certification and to support denial of Defendant's motion for summary judgment as to damages. *In re Suboxone Antitrust Litig.*, 421 F.Supp.3d 12, 44-45, 65 (E.D. Pa. 2019) (granting motion for class certification and denying motion to exclude Dr. Lamb's opinions); *In re Suboxone Antitrust Litig.*, 622 F.Supp.3d 22, 86 (E.D. Pa. 2022) (rejecting Indivior's motion for summary judgment regarding Dr. Lamb's damages calculations).

<sup>5</sup> Lamb Allocation Decl. ¶ 6. "Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable." *Sullivan*, 667 F.3d at 328 (quotation omitted).



provided pre-populated Claim Forms listing the amounts of their purchases of brand Suboxone Tablets and brand Suboxone Film. *Id.* Under the proposed Plan of Allocation, the Claims Administrator, working with Dr. Lamb’s firm, Monument Economics Group, and with Plaintiffs’ Counsel, will prepare and send these individualized, pre-populated claim forms to each member of the Class. *Id.* In addition, claimants will have the option to submit their own purchase data (though they will not be required to do so, as they can simply verify that the numbers in the pre-populated claim forms are correct), and any such data that is submitted will be reviewed by the claims administrator and Monument Economics Group before finalizing calculations to determine each Claimant’s *pro rata* share. *Id.*

Finally, both Dr. Lamb—who served as Plaintiffs’ damages expert during the litigation—and Plaintiffs’ Counsel endorse the fairness of the Plan of Allocation. In Dr. Lamb’s opinion, the proposed Plan of Allocation is fair, reasonable, and reflects the type and approximate extent of the injury alleged by Class members. Lamb Allocation Decl. ¶ 6. As Dr. Lamb notes, the proposed Plan of Allocation is similar to the plan of allocation that Dr. Lamb developed in the *Namenda* case, another direct purchaser class case challenging another allegedly unlawful product hop scheme, which received approval from the *Namenda* court. *Id.* ¶ 6 & n.11; *In re Namenda Direct Purchaser Antitrust Litig.*, No. 1:15-cv-7488, ECF No. 947 (S.D.N.Y. May 27, 2020).

Finally, the Plan of Allocation is highly recommended by Plaintiffs’ Counsel, which further supports approval. *See In re Valeant Pharms. Int’l, Inc. Sec. Litig.*, 2021 U.S. Dist. LEXIS 18894, at \*35 (D.N.J. Feb. 1, 2021) (“In determining whether a plan of allocation is fair, reasonable, and adequate, courts give great weight to the opinion of qualified counsel”).

Accordingly, this weighs in favor of preliminarily approving the Settlement and the Court should also preliminarily approve the proposed Plan of Allocation.

***The Terms of Any Proposed Award of Attorney's Fees, Including Timing of Payment.***

Under the proposed Settlement, Plaintiffs' Counsel will apply for an award of attorneys' fees plus reimbursement of litigation expenses (and service awards for the Class representatives). If the Court approves the proposed schedule set forth in the proposed preliminary approval order (annexed as Exhibit A to the Settlement Agreement), Plaintiffs' Counsel will fulsomely brief their application for such awards in time for Class members to object to same, and the Court may consider Plaintiffs' Counsel's application and any objections thereto in determining whether to grant final approval. *See McRobie*, 2020 U.S. Dist. LEXIS 217563 at \*12 (deferring a finding as to this factor because counsel's fee request was forthcoming). Accordingly, this factor does not weigh against preliminary approval.

***Any Agreements Made in Connection With the Proposed Settlement.*** By its terms, the proposed Settlement represents the full agreement of the parties. No other agreement was made in connection with the proposed Settlement.

**D. The Plan of Allocation Treats All Class Members Equitably Relative to Each Other**

As set forth above, the proposed Plan of Allocation, which is similar to plans of allocation that have been accepted repeatedly by courts in similar cases, treats Class members equitably by distributing settlement proceeds on a *pro rata* basis. *McRobie*, 2020 U.S. Dist. LEXIS 217563, at \*13 (finding this factor met where there was no disparate treatment among class members as to process for submitting claims or making objections). Accordingly, this factor weighs in favor of preliminary approval.

**E. The Settlement Occurred at an Advanced Stage of the Proceedings**

Because the proposed Settlement was reached just weeks before a jury trial was set to commence, extensive discovery had taken place, resulting in a robust record that enabled Plaintiffs' Counsel to evaluate the claims and defenses at issue fully. *See generally* Section II, *supra*. Accordingly, this factor weighs in favor of preliminary approval.

**F. No Class Members Have Objected to Date**

While the reaction of the Class will be determined only after the distribution of notice, no Class member has thus far informed Plaintiffs' counsel that it is dissatisfied with the settlement. If, after notice, any objection is filed, the Court can consider it in determining whether to grant final approval. Accordingly, this factor does not weigh against preliminary approval.

**IV. THE PROPOSED FORM AND MANNER OF NOTICE ARE APPROPRIATE**

**A. Form of Notice**

Under Rule 23(e), Class members are entitled to reasonable notice of a proposed settlement before the Court finally approves it, and to notice of the final Fairness Hearing. *See* MANUAL FOR COMPLEX LITIGATION, § §§ 21.312, 21.633 (4th ed. 2005) ("MANUAL"). For 23(b)(3) classes such as the Direct Purchaser Class in this case, the court must "direct to class members the best notice that is practical under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). 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 notice is based on the notice previously approved by this Court and mailed to Class members (advising Class members of the pendency of the litigation, that the Class had been certified, and of Class members' right and deadline to opt-out). *See* ECF No. 683 (Order). The proposed notice is designed to alert Class members to the proposed settlement by using a

bold headline, and the plain language text provides important information regarding, among other things, the significant terms of the proposed settlement, including the total amount Indivior has agreed to pay to the Class, that a Class member may object to all or any part of the proposed settlement and the process and deadline 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 Plaintiffs' Counsel's request for attorneys' fees (net of Court-approved reimbursed costs and expenses and service awards), reimbursement of all litigation expenses, and service awards to the named Plaintiffs; the schedule for completing the settlement approval process, including the submission of the motion for final approval of the settlement, and the submission of the motion for attorneys' fees, expenses, and service awards to the named Plaintiffs; and the binding effect of a final judgment on members of the Class. *See generally* Exhibit B to the Settlement Agreement. In addition, the proposed notice prominently features Plaintiffs' Counsel's contact information and directions to the firm websites for Plaintiffs' Counsel where the settlement documents, proposed Plan of Allocation, and supplemental information will be provided, as well as contact information for the Claims Administrator (RG/2). As noted above, for efficiency, each Class member will also receive, contemporaneously with their notice, a pre-populated Claim Form that will be due 45 days from the date the notice and claim form are mailed.

**B. Manner of Notice**

Plaintiffs propose to send notice by first-class United States mail to each Class member, all of which are business entities. This is the same method that was used previously, with Court approval, to provide notice to the Class regarding certification of the Class. *See* ECF No. 683. The list of Class members was drawn from Indivior's electronic transactional sales data and/or is otherwise known to Plaintiffs' Counsel, and the same mailing addresses that were previously

used for the prior notice will be used again. In circumstances like this, where all class members can be identified, the best method of notice is individual notice. *See* MANUAL, § 21.311 at 488 (“Rule 23(c)(2)(B) requires that individual notice in 23(b)(3) actions be given to class members who can be identified through reasonable effort”). For this reason, courts have repeatedly authorized individual notice by first class mail. *See, e.g., In re Opana ER Antitrust Litig.*, No. 1:14-cv-10150, ECF No. 1054 (N.D. Ill. Jul. 28, 2022) at ¶ 6 (approving notice of settlement via first-class mail to the last known address of each class member); *In re Novartis and Par Antitrust Litig.*, No. 1:18-cv-04361, ECF No. 595 (S.D.N.Y. Jan. 26, 2023) at ¶ 13 (same).

### **C. An Additional Opt-Out Period Is Unnecessary**

Class members have all been afforded the opportunity to opt out previously. There is no need for a second opt-out period. None is required, as numerous courts have recognized. *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, 1996 U.S. Dist. LEXIS 4359 at \*8 (N.D. Ill. Apr. 4, 1996) (“We have found no authority of any kind suggesting that due process requires...a second chance to opt out”) (quoting *Officers For Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 634-35 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983)); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270-71 (2d Cir. 2006) (courts are under “no obligation” to afford class members a second opportunity for exclusion).

Here, all Class members (all of which are business entities) were previously informed about this case pursuant to Court-approved, mailed individual notice following class certification, and were given the opportunity to opt out of the certified Class (none did). All Class members will of course be provided the opportunity to object to the terms of the settlement and/or Plaintiffs’ Counsel’s request for attorneys’ fees, expenses and service awards to the class representatives. Therefore, Plaintiffs respectfully submit that no second opt-out period is necessary or appropriate here. Courts in similar cases have repeatedly approved settlements

without providing a second opt-out period. *See, e.g., In re Wellbutrin XL Antitrust Litig.*, No. 08-cv-02431, ECF No. 473 at ¶ 5 (E.D. Pa. Aug. 17, 2012) (no second opt out period); *In re Flonase Antitrust Litig.*, 2013 U.S. Dist. LEXIS 197122, at \*5 (E.D. Pa. Jan. 14, 2013) (same); *In re Namenda Direct Purchaser Antitrust Litig.*, No. 1:15-cv-07488-CM-RWL, ECF No. 920 at ¶ 7 (S.D.N.Y. Jan. 6, 2020) (same); *In re Opana ER Antitrust Litig.*, No. 1:14-cv-10150, ECF No. 1054 at ¶ 6 (N.D. Ill. Jul. 28, 2022) (same).

#### **V. RG/2 SHOULD BE APPOINTED CLAIMS ADMINISTRATOR**

The Court previously appointed RG/2 as the Notice Administrator. *See* ECF No. 683 (Order). Plaintiffs request that RG/2 now be reappointed as the Claims Administrator. RG/2 is qualified to serve in this role. *See* ECF No. 641-1 (Plaintiffs' Mem. of Law in Supp. of Mot. to Approve the Form and Manner of Notice to the Direct Purchaser Class) at 4-5 (detailing RG/2's qualifications). RG/2 ably served as the Notice Administrator in this case and has ably served as the claims administrator in numerous other cases, including in administering settlement funds to similar classes of direct purchasers of pharmaceutical drugs. *Id.*; ECF No. 736-1 (Declaration of RG/2, the Notice Administrator). If so appointed, RG/2 will oversee the administration of the settlement, including disseminating notice to the Class, calculating each Class member's *pro rata* share of the Net Settlement Fund in conjunction with Dr. Lamb and Plaintiffs' Counsel, and distributing Settlement proceeds.

#### **VI. FIRST STATE TRUST COMPANY IS AN APPROPRIATE ESCROW AGENT**

Plaintiffs request that First State Trust Company serve as escrow agent, as it has done in prior class actions. *See* Exhibit D to the Settlement Agreement (Escrow Agreement); *In re Namenda Direct Purchaser Antitrust Litig.*, No. 1:15-cv-07488, ECF No. 920 (S.D.N.Y. Jan. 6, 2020) at ¶ 13 (appointing First State Trust Company as escrow agent); *In re Opana ER Antitrust Litig.*, No. 1:14-cv-10150, ECF No. 1054 (N.D. Ill. Jul. 28, 2022) at ¶ 12 (same).

## VII. THE PROPOSED SCHEDULE IS FAIR AND SHOULD BE APPROVED

Plaintiffs propose the following schedule for completing the settlement approval process:

- Within 10 days from the filing of the Settlement Agreement, Indivior shall serve notices pursuant to the Class Action Fairness Act of 2005 (“CAFA notices”);
- Within 21 days from the date of preliminary approval, notice, with a claim form, shall be mailed to each member of the Class;
- No later than 14 days before the expiration of the deadline for Class members to object to the settlement and/or attorneys’ fees, expenses and service awards, Plaintiffs’ Counsel will file all briefs and materials in support of the application for attorneys’ fees, expenses and service awards;
- Within 45 days from the date that notice is mailed to each member of the Class, Class members may object to the settlement and/or attorneys’ fees, expenses and incentive awards;
- Within 45 days from the date that a pre-populated Claim Form is mailed to each member of the Class (with the notice to the Class), Class members must return the executed Claim Form;
- No later than 21 days after the expiration of deadline for Class members to object to the settlement and/or attorneys’ fees, expenses and service awards, Plaintiffs’ Counsel will file all briefs and materials in support of final approval of the settlement; and
- On a date to be set by the Court after the expiration of the deadline for Class members to file any objections to the settlement and/or attorneys’ fees, expenses and incentive awards, the Court will hold a final Fairness Hearing.<sup>6</sup>

This schedule is fair to Class members since it provides ample time for consideration of the Settlement and Plaintiffs’ Counsel’s request for fees, expenses and service awards before the deadline for submitting objections. Specifically, Class members will have the notice for 45 days before the deadline to object to the Settlement, and will have Plaintiffs’ Counsel’s request for fees, expenses and incentive awards for two weeks before the deadline to object to Plaintiffs’

---

<sup>6</sup> Pursuant to 28 U.S.C. § 1715(d), a court may not finally approve a proposed settlement until 90 days from service of the CAFA notices. However, the Fairness Hearing may be held prior to the expiration of that 90 day period.

Counsel's request for fees, expenses and service awards. In addition, the schedule allows for regulators to review the proposed Settlement after receiving CAFA notices from Indivior pursuant to 28 U.S.C. § 1715, and if they choose, advise the Court of their view.

### VIII. CONCLUSION

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

Dated: October 25, 2023

Respectfully Submitted,

/s/ Bruce E. Gerstein

Bruce E. Gerstein  
Noah Silverman  
Kimberly Hennings  
Garwin Gerstein & Fisher LLP  
88 Pine Street, 28th Floor  
New York, NY 10005  
(212) 398-0055

*Co-Lead Counsel for the Direct Purchaser Plaintiffs and Counsel for Burlington Drug Company, Inc.*

Peter Kohn  
Joseph T. Lukens  
Faruqi & Faruqi, LLP  
One Penn Center, Suite 1550  
1617 John F. Kennedy Blvd.  
Philadelphia, PA 19103  
(215) 277-5770

*Co-Lead Counsel for the Direct Purchaser Plaintiffs and Counsel for Rochester Drug Co-Operative, Inc.*

Thomas M. Sobol  
Jessica R. MacAuley  
Kristen Johnson  
Hannah Schwarzschild  
Hagens Berman Sobol Shapiro LLP  
1 Faneuil Hall Sq., 5<sup>th</sup> Fl.  
Boston, MA 02109  
(617) 482-3700

*Co-Lead Counsel for the Direct Purchaser Class Plaintiffs and Counsel for Meijer, Inc. and Meijer Distribution, Inc.*



Stuart E. Des Roches  
Andrew W. Kelly  
Chris Letter  
Odom & Des Roches, LLC  
650 Poydras Street, Suite 2020  
New Orleans, LA 70130  
(504) 522-0077

*Counsel for Burlington Drug Company, Inc.*

Russell Chorush  
Heim, Payne & Chorush LLP  
1111 Bagby Street, #2100  
Houston, TX 77002  
(713) 221-2000

*Counsel for Burlington Drug Company, Inc.*

Barry S. Taus  
Archana Tamoshunas  
Taus, Cebulash & Landau LLP  
123 William Street, Suite 1900A  
New York, NY 10038  
(212) 931-0704

*Counsel for Meijer, Inc. and Meijer Distribution,  
Inc.*

David P. Smith  
Susan Segura  
David C. Raphael, Jr.  
Erin R. Leger  
Smith Segura Raphael & Leger, LLP  
3600 Jackson St., Suite 111  
Alexandria, LA 71303  
(318) 445-4480

*Counsel for Burlington Drug Company, Inc.*

David F. Sorensen  
Caitlin G. Coslett  
Richard Schwartz  
Berger Montague PC  
1818 Market Street, Suite 3600  
Philadelphia, PA 19103  
(215) 875-3000

*Counsel for Rochester Drug Co-Operative,  
Inc.*

Joseph M. Vanek  
David P. Germaine  
John P. Bjork  
Sperling & Slater, P.C.  
55 W. Monroe Street, Suite 3200  
Chicago, IL 60603  
(312) 641-3200

*Counsel for Meijer, Inc. and Meijer  
Distribution, Inc.*