

EXHIBIT II

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE OPANA ER ANTITRUST LITIGATION	MDL No. 2580
THIS DOCUMENT RELATES TO: Direct Purchaser Actions	Lead Case No. 14-cv-10150 Hon. Harry D. Leinenweber

**DIRECT PURCHASER PLAINTIFF’S [PROPOSED] PLAN OF
ALLOCATION FOR THE DIRECT PURCHASER CLASS**

Value Drug Company, Meijer, Inc. and Meijer Distribution, Inc. (collectively, “Plaintiffs”), on behalf of the previously certified Class,¹ hereby submit this proposed Plan of Allocation to allocate the settlement funds received in the settlement with Impax Laboratories, Inc. (“Impax”), plus any interest earned on the settlement funds, and net of Court-approved attorneys’ fees, any Court-approved named plaintiff service awards, and Court-approved expenses, including settlement-related costs and expenses (the “Net Settlement Fund”).

¹ The Court previously certified the following “Class” or “Direct Purchaser Class”:

All persons or entities in the U.S. and its territories, including Puerto Rico, who purchased brand or generic Opana ER 5, 10, 20, 30, and/or 40 mg tablets directly from Defendants at any time during the period from April 1, 2011 until August 31, 2017 (the “Class”). Excluded from the Class are the Defendants and their officers, directors, management, employees, subsidiaries, or affiliates, and all federal governmental entities.

ECF No. 751 at 1. (“Defendants” are Endo Health Solutions Inc., Endo Pharmaceuticals Inc., Penwest Pharmaceuticals Co. (collectively, “Endo”) and Impax.) Also excluded from the Class are the following entities who have independently filed actions and previously opted out of the Class: CVS Pharmacy, Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Walgreen Co., The Kroger Co., Albertsons LLC, Safeway Inc. and H-E-B L.P (collectively, the “Retailer Plaintiffs”). See ECF No. 768 at ¶ 9.

The proposed Plan of Allocation (“Allocation Plan”) allocates the Net Settlement Fund based on each Class member’s *pro rata* weighted share of combined unit purchases of brand and generic Opana ER (extended-release oxymorphone hydrochloride) in 5, 10, 20, 30, and/or 40 mg tablets purchased directly from Endo or Impax.² This proposal is similar to allocation plans that have been approved in settlements of similar class actions brought by direct purchasers to recover overcharges arising from allegedly impaired generic competition.³

Plaintiffs’ expert, economist Jeffrey J. Leitzinger, Ph.D., can calculate each Class member’s (and eventually, each Claimant’s⁴) percentage share of the Net Settlement Fund using

² See Declaration of Jeffrey J. Leitzinger, Ph.D. Related to Proposed Allocation Plan and Net Settlement Fund Allocation, dated July 19, 2022 (“Leitzinger Allocation Declaration”) (filed herewith).

³ See, e.g., *In re Intuniv Antitrust Litig.*, 1:16-cv-12653, ECF Nos. 480-7, 551 (D. Mass.) (*pro rata* shares of settlement fund computed on basis of claimants’ brand and generic purchases); *In re Loestrin 24 FE Antitrust Litig.*, 1:13-md-02472, ECF Nos. 1411-8, 1462 (D.R.I.) (same); *In re Namenda Direct Purchaser Antitrust Litig.*, 1:15-cv-7488, ECF Nos. 919-2, 947 (S.D.N.Y.) (same); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, 1:14-md-02503-DJC, ECF Nos. 1163-4, 1179 (D. Mass.) (same); *In re Lidoderm Antitrust Litig.*, 3:14-md-02521-WHO, ECF Nos. 1004-5, 1004-6, 1054 (N.D. Cal.) (same); *In re Aggrenox Antitrust Litig.*, No. 14-md-02516, ECF Nos. 733-8, 739 (D. Conn.) (*pro rata* shares of settlement fund computed on basis of purchases); *King Drug of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-01797, ECF Nos. 864-17, 870 (E.D. Pa.) (same); *In re Doryx Antitrust Litig. (Mylan Pharms., Inc. v. Warner Chilcott Public Ltd.)*, No. 2:12-cv-03824, ECF Nos. 452-3, 665 (E.D. Pa.) (same); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 1:05-00340, ECF Nos. 536-1, 543 (D. Del.) (*pro rata* shares of settlement fund computed on basis of claimants’ unit purchases in a product hop case).

⁴ A “Claimant” is any entity that timely submits a completed claim form. A Claimant’s percentage share will be zero if that Claimant timely submits a claim form but that Claimant’s claim is rejected because, for example, the Claimant did not purchase brand or generic Opana ER during the relevant time period (described below) and does not have any valid assignment covering any such direct purchases. Allocations to Claimants whose right to settlement allocation arises by virtue of assignment from Class members would be determined in the same fashion as allocation for Class members. In such cases, the volumes of brand and generic purchases used to determine the allocation would be the volumes assigned to the Claimant by an otherwise eligible Class member (and the assignor Class member’s brand and generic purchase volumes would be reduced by the same amount). Leitzinger Allocation Declaration at ¶ 5 n.8. As the Claim Form will make clear, data submitted by a Claimant who files a Claim Form based on an assignment may be shared with the Claimant’s assignor Class member during the claims

sales data for branded and generic Opana ER produced by Defendants Endo and Impax during discovery.⁵ Claimants will also have the option of submitting their own records or data showing their net unit purchases of brand or generic Opana ER (net of returns) during the relevant periods described below in, *inter alia*, Section 2.1, along with data regarding any relevant assignment agreement. Dr. Leitzinger will review any such submissions and confer with the Claims Administrator and Class Counsel regarding the final calculations, which may include making any necessary and appropriate adjustments. *See* Leitzinger Allocation Declaration at ¶ 7.

Throughout this Allocation Plan, “purchases” refers to unit purchases of branded or generic Opana ER in the 5 mg, 10 mg, 20 mg, 30 mg, and 40 mg strengths⁶ made directly from Defendants during the relevant time periods or purchases that are covered by a Claimant’s assignment from a Class member of such purchases during the relevant time periods. The unit of purchase is a milligram (mg) of Opana ER.⁷ “Purchases” throughout refers to net unit purchases,

administration process.

⁵ *See* Leitzinger Allocation Declaration at ¶¶ 5-6, 8. Dr. Leitzinger previously submitted three reports in this matter, which addressed, among other issues, damages and class certification. The Court previously found that Dr. Leitzinger’s expert analysis and opinions supported class certification and his opinion on damages was admissible at trial and reliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* Leitzinger Allocation Declaration at ¶ 1 n.1 (listing reports); Expert Report of Jeffrey J. Leitzinger, Ph.D., dated March 25, 2019 (“Leitzinger Report”) (ECF No. 437-2); Rebuttal Report of Jeffrey J. Leitzinger, Ph.D., dated November 5, 2019 (“Leitzinger Rebuttal Report”) (ECF No. 468-2); Supplemental Report of Jeffrey J. Leitzinger, Ph.D., dated July 26, 2021 (“Leitzinger Supplemental Report”) (ECF No. 758-2). *In re Opana ER Antitrust Litig.*, 2021 WL 3627733, at *4, *5 (N.D. Ill. June 4, 2021) (citing the Leitzinger Report and certifying the class); Minute Entry, *In re Opana ER Antitrust Litig.*, No. 14-cv-10150 (N.D. Ill. Dec. 2, 2021) (ECF No. 765) (denying Defendants’ motion to exclude Dr. Leitzinger’s opinions and proposed trial testimony regarding damages).

⁶ To be clear, “purchases” do not include other strengths of branded or generic Opana ER. Leitzinger Allocation Declaration at ¶ 3 n.4. “Purchases” also do not include branded or generic Opana ER purchased, directly or indirectly, from any entity other than Endo or Impax. *Id.*

⁷ So, for example, a 5mg branded Opana ER pill is 5 units and a 10mg branded Opana ER

i.e., gross purchases net of any returns and net of any purchases for which the Claimant or Class member has assigned away its rights to recovery in this litigation. *Id.* at ¶ 3 n.4.

As explained more fully below, Claimants' *pro rata* shares will be based only on purchases of Opana ER and/or generic Opana ER made directly from Defendants (or covered by an assignment from a Class member) during the relevant time periods. *See id.*

The proposed Allocation Plan is practical and efficient, using computerized sales data already obtained from Defendants during discovery.⁸ It also is a reasonable way to allocate the Net Settlement Fund and is fair to all members of the Class.⁹

THE ALLOCATION PLAN

The Allocation Plan works as follows:

1.1 At the appropriate time and after receiving Court approval, the Claims Administrator, working with Dr. Leitzinger's firm Econ One Research, Inc. ("Econ One"), will provide a separate, individualized claim form (the "Claim Form") for each Class member. The Claim Form will expressly set forth the Class member's purchases of branded and generic Opana ER from Defendants Endo and Impx during the period of April 1, 2011 through December 31, 2017, specifically: (a) net branded Opana ER direct purchases from Endo from April 1, 2011 until August 31, 2017;¹⁰ and (b) net generic Opana ER direct purchases from Impax for the period from January 7, 2013 until December 31, 2017.¹¹ Dr. Leitzinger can calculate these

pill is 10 units.

⁸ *See* Leitzinger Allocation Declaration at ¶ 8.

⁹ *See id.*

¹⁰ April 1, 2011 is the beginning of the Class Period and the beginning of the damages period Dr. Leitzinger analyzed in his prior reports. August 31, 2017 is the last date that branded Opana ER was on the market. *Id.* at ¶ 3.a.

¹¹ January 7, 2013 is the first date on which Impax sold generic Opana ER according to the

figures using the sales data produced during discovery by the Defendants.¹² The Claim Form will request that the Class member verify the accuracy of the information contained in the Claim Form and will provide instructions for challenging any of the figures or computations contained in the Claim Form. If a Class member agrees that the information in the Claim Form is accurate, it will be asked to sign and return the Claim Form to the Claims Administrator.¹³ If a Class member believes that the information contained in its Claim Form is not accurate, that Class member may submit its own purchase data pursuant to the procedures described below.

1.2 The Claim Form will request the Claimant's full name and mailing address for correspondence regarding the distribution of the Net Settlement Fund and the identity and contact information for the person responsible for overseeing the claims process for the Claimant. In addition, the Claim Form will include the release language contained in the settlement agreement with Impax. Each Claimant will be required to execute the Claim Form in exchange for receiving any distribution from the Net Settlement Fund.

1.3 *Timeliness.* The submission of the Claim Form to the Claims Administrator (with any necessary supporting documentation if the Claimant disagrees with the

sales data produced by Impax, and December 31, 2017 is end of the overcharge damages period during which Dr. Leitzinger measured overcharge damages in his previous reports. Leitzinger Allocation Declaration at ¶ 3.b.; Leitzinger Report at ¶ 30 & n.170.

¹² See Leitzinger Allocation Declaration at ¶¶ 5-6, 8 (explaining that these totals can be calculated from the sales data produced in this case, and that he has already performed preliminary calculations of each Class member's net purchases that account for known assignments to the Retailer Plaintiffs that have previously opted out of the Class).

¹³ In order to help the Claimant verify that the purchase totals contained in the Claim Form are accurate, the brand and generic Opana ER National Drug Codes ("NDCs") will be listed on the Claim Form. The NDCs are standard codes maintained by the FDA and used in the pharmaceutical industry to identify specific pharmaceutical products and allow Claimants to understand precisely what purchases are being considered for purposes of allocation.

information contained in its Claim Form) will be deemed timely if it is received or postmarked within 45 days of the date Claim Forms are mailed.

2. Calculation of Weighted *Pro Rata* Shares of the Net Settlement Fund.

2.1 Each Claimant's allocated share of the Net Settlement Fund will be set in proportion to each Claimant's weighted combined total of (a) net branded Opana ER direct purchases from Endo from April 1, 2011 until August 31, 2017; and (b) net generic Opana ER direct purchases from Impax for the period from January 7, 2013 until December 31, 2017.¹⁴

The Allocation Plan utilizes the weighted totals of each Claimant's purchases of branded and generic Opana ER to account for the different amount of overcharge associated with purchases of brand and generic products, as described in Section 2.3.¹⁵

2.2 The allocation computation will be based on the following information (whether from the data already produced in discovery or from submissions by Claimants): (a) each Claimant's net branded Opana ER purchases from Endo from April 1, 2011 through August 31, 2017; (b) each Claimant's net generic Opana ER purchases from Impax from January 7, 2013 through December 31, 2017; and (c) the combined total of net unit purchases of branded Opana ER purchases from Endo from April 1, 2011 through August 31, 2017, and generic Opana ER purchases from Impax from January 7, 2013 through December 31, 2017 made by all Claimants with valid, accepted Claim Forms.¹⁶

2.3 According to Dr. Leitzinger's prior damages calculations, the Class

¹⁴ Leitzinger Allocation Declaration at ¶ 5. The dates utilized in this Plan of Allocation are explained above in Section 1.1 and footnotes 10-11.

¹⁵ Leitzinger Allocation Declaration at ¶ 3 & n.6; ¶ 5(d) & n.7.

¹⁶ *Id.* at ¶¶ 3, 5

suffered a lower average per-unit overcharge on generic purchases than it did on brand purchases. According to Dr. Leitzinger's calculations, the average claimed per-unit overcharge on generic purchases is 40% of the average per-unit overcharge on branded Opana ER purchases during the overcharge period, from April 1, 2011 through December 31, 2017.¹⁷ This is because claimed damages on brand purchases were calculated as the difference between the high brand price and the much lower generic price; while damages on generic purchases were calculated as the difference between the low generic price and the even lower generic price that would have prevailed with additional generic competition, including competition from authorized generic Opana ER. Accordingly, the Allocation Plan weighs each generic Opana ER purchase as .4 (or 40%) of a branded Opana ER purchase.¹⁸

2.4 To calculate the *pro rata* share for each Claimant of the Net Settlement Fund, the Claims Administrator, working with Dr. Leitzinger, will take (a) each Claimant's weighted combined total net purchases of branded Opana ER purchases from Endo from April 1, 2011 through August 31, 2017, and generic Opana ER purchases from Impax from January 7, 2013 through December 31, 2017, (b) remove any purchases for which the rights to damages in this litigation have been assigned by agreement, and divide it by (c) the weighted combined total purchases by all Claimants who timely submit valid, accepted Claim Forms of brand Opana ER purchases from Endo from April 1, 2011 through August 31, 2017, and generic Opana ER purchases from Impax from January 7, 2013 through December 31, 2017. This calculation will yield each Claimant's *pro rata* share of the Net Settlement Fund.¹⁹ Using data produced in

¹⁷ *Id.* at ¶ 5.d. & n. 7.

¹⁸ *Id.*

¹⁹ *Id.* at ¶ 5.

discovery, Dr. Leitzinger has already performed a preliminary computation of net brand Opana ER purchases from Endo and net generic Opana ER purchases from Impax for each Class member, and can use these figures to calculate the percentage shares of the Net Settlement Fund due to each Class member.²⁰ Should any Class member fail to submit a claim or should any Claimant document and submit an alternative amount of purchases that is approved by the Claims Administrator (in consultation with Dr. Leitzinger and Class Counsel), the Claimant's shares will be recalculated accordingly.²¹

2.5 The final calculations of each Claimant's *pro rata* share will then be applied to the Net Settlement Fund to determine each Claimant's allocated share (in dollars).

3. Processing of Claims.

3.1 All Claims will be reviewed and processed by the Claims Administrator, with assistance from Dr. Leitzinger and his staff at Econ One as required and appropriate.

3.2 *Acceptance and Rejection.* The Claims Administrator shall first determine whether a Claim Form received is timely, properly completed, and signed. If a Claim Form is incomplete, the Claims Administrator shall communicate with the Claimant via First Class Mail, email, or telephone regarding the deficiency. The Claims Administrator may also contact Claimants requesting additional documentation or other materials. Claimants will have 28 days from the date they are contacted by the Claims Administrator regarding any question, requests for additional information, deficiency, or any other issue to provide a complete response, the requested documentation or other materials, and/or to cure any such deficiency. If a Claimant fails to adequately respond and/or correct any deficiency within 28 days, its claim may be

²⁰ See *id.* at ¶ 6.

²¹ See *id.* at ¶ 7.

rejected and the Claimant shall be notified by letter stating the reason for rejection. The Claims Administrator will then review all completed, non-deficient Claim Forms to determine whether each will be accepted or rejected and will notify any Claimants whose Claim Forms are rejected by letter stating that the Claimant's Claim Form is rejected and stating the reason for rejection. Any Claimant whose Claim Form is rejected may seek review by the Court via the appeals process described in Section 7.2 below.

3.3 All late Claims Forms that are otherwise complete will be processed by the Claims Administrator but marked as "Late Approved Claims." If Class Counsel conclude that, in their judgment, any such "Late Approved Claims" should ultimately not be accepted,²² the Claimant will be so notified, and then may seek review by the Court via the appeals process described in Section 7.2 below.

3.4 *The Pro Rata Distribution Calculation.* Econ One, in conjunction with the Claims Administrator and Class Counsel, will be responsible for determining the total amount each Claimant will receive from the Net Settlement Fund. Once the Claims Administrator has determined which claims are approved, Econ One will work with the Claims Administrator to calculate each Claimant's *pro rata* share of the Net Settlement Fund as determined by the calculation described above in Section 2.²³

4. Processing Challenged Claims.

4.1 The Claims Administrator, in conjunction with Econ One and Class

²² Cf. *Kuehbeck v. Genesis Microchip Inc.*, 2007 WL 2382030, at *1 (N.D. Cal. Aug. 17, 2007) (authorizing distribution to timely filed claims and valid claims that were submitted late). Courts have approved similar provisions in similar generic suppression cases. See, e.g., *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, 1:14-md-02503-DJC, ECF Nos. 1163-4 at § 3.3, 1179 (D. Mass.) (approving a similar provision regarding late claims); *In re Lidoderm Antitrust Litig.*, 3:14-md-02521-WHO, ECF Nos. 1004-5 at § 3.3, 1054 (N.D. Cal.) (same).

²³ See Leitzinger Allocation Declaration at ¶¶ 5-7.

Counsel, shall review any and all written challenges by Claimants to the determinations of the Claims Administrator. If upon review of a challenge and supporting documentation, the Claims Administrator and Econ One decide to amend or modify their determination, the Claims Administrator shall advise the Claimant who made the challenge. These determinations shall be final, subject to the appeals process described in Section 7.2 below.

4.2 Where the Claims Administrator, in conjunction with Econ One, determines that a challenge requires additional information or documentation, the Claim Administrator will so advise the Claimant and provide that Claimant an opportunity to cure the deficiency within 28 days, as set forth in Section 3.2 above. If that Claimant fails to cure the deficiency within that time, the challenge may be rejected and the Claimant will be notified of the rejection of its challenge by mail, which notification shall be deemed final subject to any appeal and decision by the Court.

4.3 If the Claims Administrator, in conjunction with Econ One, concludes that it has enough information to properly evaluate a challenge and maintains that its initial determinations were correct, it will so inform the Claimant in writing. Such notification shall be deemed final subject to any appeal and decision by the Court.

5. Report to Court Regarding Distribution of Net Settlement Fund.

5.1 After the Claims Administrator reviews all submitted claims and works with Dr. Leitzinger to determine the amount each Claimant is entitled to receive from the Net Settlement Fund, the Claims Administrator will prepare a final report for the Court's review and approval. The report will explain the tasks and methodologies employed by the Claims Administrator in processing the claims and administering the Allocation Plan. It will also contain (a) a list of Class members or other Claimants (if any) who filed Claim Forms that were

rejected and the reasons, (b) a list of challenges (if any) to the estimated distribution amounts that were rejected and the reasons, and (c) the date any such Claimant whose challenge was rejected was informed by the Claims Administrator for purposes of calculating the timeliness of any appeal using the procedures set forth below. Finally, the final report shall contain an accounting of the expenses associated with the Allocation Plan, including bills from Econ One and the Claims Administrator, any taxes that are due and owing, and any other fees or expenses associated with the settlement allocation process.

6. Payment to the Claimants.

6.1 Upon Court approval of the final report and declaration of the Claims Administrator, the Claims Administrator shall issue, with Court approval, a check or wire payable to each Claimant who has submitted a complete and valid Claim Form, including to each Claimant that filed a Late Approved Claim.

6.2 Subject to further order of the Court, any monies from the Net Settlement Fund that remain unclaimed after any initial distribution or additional monies received at a later date pursuant to the settlement with Impax shall, if economically feasible, be distributed (with Court approval) to Claimants in an additional distribution or distributions on the basis of the same calculations of the Claimants' *pro rata* weighted combined total of branded Opana ER and generic Opana ER purchases described above. There may be more than one distribution here because the settlement with Impax provides for Impax to make multiple installment payments totaling \$145 million.²⁴

6.3 Insofar as the Net Settlement Fund includes residual funds after distribution or distributions as set forth in the preceding sections that cannot be economically

²⁴ See Paragraph 8 of the settlement agreement with Impax.

distributed to the Claimants (because of the costs of distribution as compared to the amount remaining), Class Counsel shall make an application to the Court for such sums to be used to make *cy pres* payments for the benefit of members of the Class.²⁵

7. Resolution of Disputes.

7.1 In the event of any disputes between Claimants and the Claims Administrator on any subject (*e.g.*, timeliness, required completeness or documentation of a claim, or the calculation of the Claimant's unit purchases of branded or generic Opana ER, share of the net settlement fund, and/or amount payable), the decision of the Claims Administrator shall be final, subject to the Claimant's right to seek review by the Court. In notifying a Claimant of the final rejection of a Claim or a challenge thereto, the Claims Administrator shall notify the Claimant of its right to seek such review.

7.2 Any such appeal by a Claimant must be submitted in writing to the Court, with copies to the Claims Administrator and Class Counsel, within 21 days of the Claims Administrator's final rejection notification to the Claimant.

Dated: July 19, 2022

Respectfully submitted,

/s/ David F. Sorensen
David F. Sorensen
Andrew C. Curley
BERGER MONTAGUE PC
1818 Market Street, Suite 3600
Philadelphia, PA 19103
T: (215) 875-3000
F: (215) 875-4604
dsorensen@bm.net
acurley@bm.net

/s/ Bruce E. Gerstein

²⁵ In the experience of Class Counsel, based on numerous prior distributions in similar cases, an application for a *cy pres* distribution is unlikely.

Bruce E. Gerstein
Jonathan M. Gerstein
GARWIN GERSTEIN & FISHER, LLP
Wall Street Plaza
88 Pine Street, 10th Floor
New York, NY 10005
T: (212) 398-0055
F: (212) 764-6620
bgerstein@garwingerstein.com
jgerstein@garwingerstein.com

Co-Lead Counsel for the Direct Purchaser
Class

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2022, I caused the above to be filed by CM/ECF system.

Respectfully submitted,

/s/ Bruce E. Gerstein
Bruce E. Gerstein