

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

In re: NEXIUM (ESOMEPRAZOLE)
ANTITRUST LITIGATION

This Document Relates To:

ALL END-PAYOR ACTIONS

MDL No. 2409

Civil Action No.: 1:12-md-2409-WGY

**MEMORANDUM OF LAW IN SUPPORT OF END-PAYOR CLASS
PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF PROPOSED
CLASS ACTION SETTLEMENT WITH TEVA AND APPROVAL OF NOTICE
PLAN FOR THE TEVA AND DRL SETTLEMENTS**

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I. INTRODUCTION

Plaintiffs United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund; Allied Services Division Welfare Fund; Fraternal Order of Police Miami Lodge 20, Insurance Trust Fund; New York Hotel Trades Council & Hotel Assoc. of New York City, Inc. Health Benefits Fund; Laborers International Union of North America Local 35 Health Care Fund; International Brotherhood of Electrical Workers Local 595 Health and Welfare Fund; Laborers International Union of North America Local 17 Health Care Fund; International Union of Machinists and Aerospace Workers District No. 15 Health Fund; Michigan Regional Council of Carpenters Employee Benefits Fund; and A.F. of L. – A.G.C. Building Trades Welfare Plan (“End-Payor Class Plaintiffs”), on behalf of themselves and the certified End-Payor Class (collectively, “End-Payor Class”), respectfully submit this Memorandum in Support of End-Payor Class Plaintiffs’ Motion for Preliminary Approval of Proposed Class Action Settlement with Teva and Approval of Notice Plan for the Teva and DRL Settlements.¹

End-Payor Class Plaintiffs, on behalf of the End-Payor Class, have entered into a settlement agreement (“Settlement Agreement” or “Teva Settlement”) with Teva Pharmaceutical Industries Ltd. and Teva Pharmaceuticals USA, Inc. (collectively, “Teva”), a copy of which is attached as Exhibit 1 to the Declaration of Kenneth A. Wexler in Support of End-Payor Class Plaintiffs’ Motion for Preliminary Approval of Proposed Class Action Settlement with Teva and Approval of Notice Plan for the Teva and DRL Settlements (“Wexler Decl.”). The Direct Purchaser Class Plaintiffs and the Individual Retailer Plaintiffs have also settled their claims against Teva.² As part of its separate settlements with the End-Payor Class and the two other

¹ Teva supports End-Payor Class Plaintiffs’ motion.

² The Direct Purchaser Class Plaintiffs will separately request preliminary approval of their settlement with Teva.

plaintiff groups, Teva has agreed to deposit an aggregate amount of \$24 million into a Settlement Fund, which will be distributed according to the terms of the settlement agreements. The End-Payor Class Plaintiffs have, in turn, agreed to release and dismiss with prejudice the End-Payor Class's claims against Teva.

End-Payor Class Plaintiffs respectfully request that the Court preliminarily approve the Teva Settlement, which provides valuable consideration to the End-Payor Class. End-Payor Class Plaintiffs further request that the Court set a schedule through final approval and approve the plan for distributing notice to the End-Payor Class ("Notice Plan"), as reflected in the proposed order submitted herewith.

The Notice Plan contemplates a single set of notice materials that would permit the End-Payor Class to receive simultaneous notice of both the Teva Settlement and the End-Payor Class Plaintiffs' settlement with Defendants Dr. Reddy's Laboratories, Ltd. and Dr. Reddy's Laboratories, Inc. (collectively, "DRL") (the "DRL Settlement"), which the Court preliminarily approved on January 28, 2015. A separate proposed order approving the Notice Plan and setting a schedule through final approval with respect to the DRL Settlement is also attached.

II. FACTUAL AND PROCEDURAL BACKGROUND

End-Payor Class Plaintiffs filed several class actions alleging that Teva, DRL, AstraZeneca AB, Aktiebolaget Hassle, AstraZeneca LP (collectively, "AstraZeneca"), Ranbaxy Pharmaceuticals, Inc., Ranbaxy Inc., and Ranbaxy Laboratories Ltd. (collectively, "Ranbaxy"), violated federal and state antitrust laws, as well as state consumer protection laws, by wrongfully delaying the introduction of generic versions of the prescription drug Nexium. End-Payor Class Plaintiffs allege that they paid more for generic Nexium and/or its AB-rated generic equivalents than they would have absent Defendants' unlawful conduct. Teva denies End-Payor Class Plaintiffs' allegations of unlawful or wrongful conduct, denies that any of the conduct challenged

by End-Payor Class Plaintiffs caused any damage, and has asserted a number of defenses to End-Payor Class Plaintiffs' claims.

For over a year the parties engaged in extensive discovery and motion practice. On November 14, 2013, the Court certified the following End-Payor Class:

All persons or entities in the United States and its territories who purchased and/or paid for some or all of the purchase price for Nexium and/or its AB-rated generic equivalents in Arizona, California, Florida, Iowa, Kansas, Massachusetts, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and the District of Columbia (collectively, the "Class States"), in capsule form, for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries, during the time period April 14, 2008 through and until the anticompetitive effects of Defendants' unlawful conduct cease. For the purposes of the Class definition, persons or entities "purchased" Nexium or its generic equivalent if they paid or reimbursed some or all of the purchase price (the "End-Payor Class").

ECF No. 520, at 4-5.³ End-Payor Class Plaintiffs have entered into the Settlement Agreement on behalf of themselves and the same End-Payor Class. See Settlement Agreement at 1-2.

³ The following are excluded from the proposed class:

(a) Defendants and their officers, directors, management, employees, subsidiaries, or affiliates; (b) All persons or entities who purchased Nexium or its AB-rated generic equivalent only directly from Defendants; (c) All persons or entities who purchased Nexium or its AB-rated generic equivalent only for resale purposes; (d) All government entities, except for government-funded employee benefit plans; (e) Fully insured health plans (*i.e.*, plans that purchased insurance from another third-party payor covering 100 percent of the plan's reimbursement obligations to its members); (f) "Flat co-pay" "Cadillac Plan" consumers who made purchases only via fixed dollar co-payments that do not vary between Nexium and its AB-rated generic equivalent; (g) Consumers who purchased or received Nexium or its AB-rated generic equivalent only through a Medicaid program; (h) All pharmacy benefit managers without capitation agreements, regardless of whether they accepted AstraZeneca rebates for Nexium; and (i) The judges in this case and any members of their immediate families.

See Settlement Agreement at 2-3. Also excluded from the End-Payor Class are those consumers and third-party payors ("TPPs") who have validly excluded themselves pursuant to the notice issued pursuant to Court order dated December 3, 2013, ECF No. 573, who are identified in Exhibit B to the Settlement Agreement. *Id.* at 3.

Following the resolution of hotly contested motions for summary judgment, the parties prepared for trial, which commenced on October 20, 2014. In the approach to and during the course of trial, End-Payor Class Plaintiffs engaged in extensive, arm's-length negotiations with Teva in an effort to resolve the claims of the End-Payor Class. The parties' negotiations were informed by fact and expert discovery, including the review of hundreds of thousands of documents; depositions of Teva's employees and third-party witnesses; extensive legal briefing on liability and damages issues; consultation with a variety of experts; vigorous trial preparation efforts; and rulings by the Court during the course of trial. As a result, when they reached a settlement with Teva weeks into the trial, End-Payor Class Plaintiffs were well-versed in the strengths and weakness of their case against Teva—as well as the remaining non-settling Defendants—and were in a position to balance the risks of continuing to litigate with Teva against the benefits of settlement.

The Court preliminarily approved End-Payor Class Plaintiffs' settlement with DRL on January 28, 2015. ECF No. 1478. No schedule or notice plan with respect to the DRL Settlement has been established to date; Counsel for the End-Payor Class Plaintiffs had hoped to combine notice of the DRL Settlement with notice of another settlement to save the End-Payor Class the considerable expense that multiple notices would entail.

End-Payor Class Plaintiffs' motion seeks (i) preliminary approval of the proposed settlement with Teva as set forth in the Settlement Agreement, (ii) a stay of End-Payor Class Plaintiffs' litigation against Teva, (iii) approval of a Notice Plan and proposed schedule for final approval with respect to the Teva Settlement, and (iv) approval of a Notice Plan and proposed schedule for final approval with respect to the DRL Settlement. Plaintiffs have included herewith two proposed orders: one with respect to the preliminary settlement approval, Notice

Plan, and schedule through final approval for the Teva Settlement, and the other with respect to the Notice Plan and schedule through final approval for the DRL Settlement.

III. MATERIAL TERMS OF THE TEVA SETTLEMENT

Under the terms of the Settlement Agreement, Teva will deposit the aggregate amount of \$24 million into a Settlement Fund, which will be distributed according to the terms of Teva's separate settlement agreements with the End-Payor Class Plaintiffs, Direct Purchaser Class Plaintiffs, and the Individual Retailer Plaintiffs. Settlement Agreement § 5. The Settlement Fund, together with any interest thereon, shall be used to pay (1) the costs and expenses incurred by counsel for the End-Payor Class (including but not limited to the costs of notice previously distributed pursuant to Court Order dated December 3, 2013, ECF No. 573), Direct Purchaser Class, and Individual Retailer Plaintiffs, as approved by the Court, through trial; (2) any costs and expenses, not in excess of \$2 million, incurred by counsel for the End-Payor Class, Direct Purchaser Class, and Individual Retailer Plaintiffs in *continuing* their litigation against AstraZeneca and/or Ranbaxy; (3) any taxable costs; (4) taxes payable on the Settlement Fund; and (5) any and all administrative and notice expenses associated with this litigation or the Settlement. *Id.* § 5(c). The remainder of the Settlement Fund, if any, is to be allocated (a) in the amount of \$1 million to the End-Payor Class, (b) with 61% of the balance of the Settlement Fund to be allocated to the Direct Purchaser Class and 39% of that balance to the Individual Retailer Plaintiffs. *Id.* End-Payor Class Counsel intend to seek, solely from the End-Payor Class's portion of the Settlement Fund, an incentive award of \$5,000 for each of the End-Payor Class Plaintiffs. *Id.* § 12. The \$1 million allocation to the End-Payor Class is in recognition of both (1) its disproportionately large notice costs and (2) the opinion of End-Payor Class Counsel that a proportionate allocation to the End-Payor Class would not result in the distribution of any funds to End-Payor Class members because the costs of distribution would exceed or be grossly

disproportionate to the amount that could potentially be distributed should there be no further recoveries. *Id.* § 5(c). Barring further success against the remaining Defendants, End-Payor Class Counsel will likely seek distribution of the \$1 million as a *cy pres* award as directed by the Court. *Id.*

With respect to claims relating to conduct that occurred on or before the execution of the Settlement Agreement and which caused, resulted in, or in any way contributed to the alleged delayed entry of generic versions of Nexium in the Class States from April 14, 2008 onward, End-Payor Class Plaintiffs have agreed to release Teva from liability according to the terms of the Settlement Agreement. *Id.* at 2, § 9. End-Payor Class members' rights to recover damages under the laws of certain states are subject to the Court's rulings with respect to applicable statutes of limitation. *Id.* at 3.

The parties have agreed that, pending Court approval of the Settlement Agreement, all proceedings against Teva in the above-captioned action (other than those incident to the settlement process) shall be stayed. *Id.* § 14. Upon the Settlement Agreement becoming final in accordance with its terms, the End-Payor Class Plaintiffs' claims against Teva in the above-captioned action shall be dismissed with prejudice. *Id.* at 5, § 11. The Settlement will resolve End-Payor Class Plaintiffs' claims against Teva only, and not any other defendant. *Id.* § 11.

The full terms of the agreement are set forth in the Settlement Agreement.

IV. THE TEVA SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

Under Federal Rule of Civil Procedure 23(e), a court may approve a proposed settlement if it is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2); *see also In re Pharm. Indus. Wholesale Price Litig.*, 588 F.3d 24, 32 (1st Cir. 2009) ("a district court can approve a class action settlement only if it is fair, adequate and reasonable" (citation omitted)). Courts use a two-step process to evaluate a proposed settlement. *See* Federal Judicial Center, *Manual for*

Complex Litigation § 21.63 (4th ed. 2004); *see also Newberg on Class Actions* § 13:10 (5th ed. 2011). At the “preliminary stage, the Court need not make a final determination regarding the fairness, reasonableness or adequateness of the proposed settlement; rather, the Court need only determine whether it falls within the range of final approval.” *In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. 125, 140 (D.P.R. 2010).

Although a district court has wide discretion in approving or disapproving a proposed settlement, “[i]f the parties negotiated at arm’s length and conducted sufficient discovery, the district court must presume the settlement is reasonable.” *In re Pharm. Indus.*, 588 F.3d at 32-33 (citing *City P’ship Co. v. Atlantic Acquisition Ltd. P’ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)); *see also In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 71-72 (D. Mass. 2005) (same). Courts in this District have also considered two additional factors when deciding whether a proposed settlement is entitled to a presumption of fairness: the experience of counsel and the response from the class. *See In re Lupron Mktg. & Sales Practices Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004). As explained below, the proposed settlement is well within the range of final approval and meets the criteria for a presumption of fairness.

A. The Teva Settlement is the product of good-faith, arm’s-length negotiations.

The proposed Settlement is the result of good-faith negotiations between Teva and Co-Lead Counsel for the End-Payor Class that spanned several months and took into account not only information learned during discovery, but also events that unfolded during trial. Like all aspects of this litigation, the negotiations were contentious and hard-fought. There is no indication that the Teva Settlement is collusive, and Co-Lead Counsel will receive reimbursement from the Settlement Fund only for expenses and costs for, *inter alia*, past litigation efforts and *continued* litigation on behalf of the End-Payor Class—not attorneys’ fees. Settlement Agreement § 8. The parties—aided by over a year of litigation, the Court’s class

certification, summary judgment, and other rulings, and pretrial and trial efforts—analyzed the strengths and weaknesses of End-Payor Class Plaintiffs’ claims and Teva’s defenses vis-à-vis the remaining Defendants. They were well-positioned to evaluate their respective positions, and the proposed Settlement is the result of those well-informed and zealous negotiations.

B. The Teva Settlement was reached after extensive discovery and consideration of a full factual record.

The parties reached the proposed Settlement after over a year of hard-fought and highly adversarial discovery. Discovery included the review of documents generated during the underlying patent litigation, interrogatories and document requests, and subpoenas to pharmaceutical manufacturers and consultants to the pharmaceutical industry. In all, Plaintiffs reviewed more than 500,000 documents and approximately 6 million pages produced by Defendants, including Teva, and certain non-parties. With the benefit of this discovery, Plaintiffs’ counsel deposed executives and employees of Teva and the other Defendants. The End-Payor Class Plaintiffs also produced thousands of pages of documents and were subject to numerous depositions. Counsel for the End-Payor Class also retained and worked with expert witnesses in evaluating scientific and economic issues relating to liability and damages.

After an exhaustive review of the facts uncovered through discovery and expert analysis, End-Payor Class Plaintiffs prepared this case for trial. The proposed Settlement was reached only after the parties tried the case in front of a jury for over a month. As a result, End-Payor Class Plaintiffs had the advantage of a well-developed understanding of the risks and benefits of continued litigation involving Teva when agreeing to the terms of the Settlement.

C. The Teva Settlement was negotiated by counsel experienced in antitrust litigation and has the support of Co-Lead Counsel.

End-Payor Class Plaintiffs are represented by counsel with extensive antitrust and complex litigation experience. *See* ECF No. 388-3 (Ex. 2 to the Decl. of Kenneth A. Wexler in

Supp. of End-Payor Class Pls.’ Mot. for Class Certification) (Co-Lead Counsel firm resumes). Co-Lead Counsel and other counsel for End-Payor Class Plaintiffs have been pioneers in antitrust pharmaceutical litigation, particularly pay-for-delay cases.

Given the depth of experience they have in prosecuting pay-for-delay and other complex antitrust cases, Co-Lead Counsel’s recommendation that the Teva Settlement is in the best interests of the End-Payor Class is entitled to substantial weight. *See, e.g., In re Imprelis Herbicide Mktg., Sales Practices, & Prods. Liability Litig.*, 296 F.R.D. 351, 364 (E.D. Pa. 2013) (“Because a settlement represents the result of a process by which opposing parties attempt to weigh and balance the factual and legal issues that neither side chooses to risk taking to final resolution, courts have given considerable weight to the views of experienced counsel as to the merits of a settlement.”); *Rolland v. Celluci*, 191 F.R.D. 3, 10 (D. Mass. 2000) (“When the parties’ attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight.”); *In re Se. Milk Antitrust Litig.*, No. 2:08-MD-1000, 2013 WL 2155379, at *5 (E.D. Tenn. May 17, 2013) (“[Class Counsel’s] collective judgment that the settlement is in the best interest of class members weighs heavily in favor of the Court’s final approval of the agreement.”). This is particularly true when, as here, counsel have conducted significant discovery and had ability to understand fully the pros and cons of proceeding with the litigation against Teva in the context of trial. *See, e.g., Giusti-Bravo v. U.S. Veterans Admin.*, 853 F. Supp. 34, 40 (D.P.R. 1993) (“In view of the fact that competent and experienced counsel have been able to conduct ample discovery which allowed them to properly assess the probability of success on the merits of the putative class claim . . . their recommendation should be entitled to substantial weight . . .”). Co-Lead Counsel, relying on

their years of experience and their efforts in this litigation, uniformly recommend approval of the proposed Settlement.

D. The Teva Settlement provides substantial benefits to the End-Payor Class and is well within the range of final approval.

The Teva Settlement provides substantial consideration from Teva for the benefit of the End-Payor Class. The Settlement Fund of \$24 million will be available to reimburse End-Payor Class Counsel for costs and expenses incurred in this litigation through trial and—in an amount not to exceed \$2 million—costs and expenses that counsel may incur in their continued litigation against AstraZeneca and/or Ranbaxy. Settlement Agreement § 5(c). If End-Payor Class Plaintiffs obtain a recovery from AstraZeneca and/or Ranbaxy, the costs and expenses reimbursed as a result of the Teva settlement will not need to be reimbursed out of such recovery.

Moreover, the End-Payor Class shall be entitled to the first \$1 million of any amounts remaining in the Settlement Fund after payment of the costs and expenses described in section 5(c) of the Settlement Agreement; this amount shall be allocated to the End-Payor Class before any portion of the remainder is allocated to the Direct Purchaser Class or the Individual Retailer Plaintiffs. *Id.* The \$1 million may be distributed to the members of the End-Payor Class or, if no further recoveries are made that result in a distribution to members of the End-Payor Class, as a *cy pres* award as directed by the Court. *Id.* In either event, the \$1 million will be used for the benefit of the End-Payor Class.

Given the substantial benefits the End-Payor Class will receive as a result of the Teva Settlement, the Court should preliminarily approve the proposed Settlement.

V. SUMMARY OF THE NOTICE PLAN

End-Payor Class Plaintiffs have retained an experienced notice administrator, Kurtzman

Carson Consultants (“KCC”), and they have worked with KCC to develop a comprehensive, easily understandable Notice Plan that will allow End-Payor Class members to receive notice of both the Teva Settlement and the DRL Settlement and, if they so choose, to object to either or both settlements. As described more fully in the Declaration of Markham Sherwood (“Sherwood Decl.”), attached as Exhibit 2 to the Wexler Declaration, the proposed Notice Plan consists primarily of 1) direct first-class mail notice to approximately 48,000 TPPs; 2) summary notice publication in *HR Magazine* and *National Underwriter Life and Health*; and 3) for consumers, summary public notice in *People* and *Parade*. Sherwood Decl. ¶¶ 5, 7-12, 18.

In addition, notice will be provided through targeted “unique impressions” website banner publication, which allows banner publication on premium, high-quality websites, consisting of 117 million unique impressions. *Id.* ¶ 19. Additional information will also be available through a settlement website and a toll-free telephone number. *Id.* ¶¶ 20, 21.

In accordance with guidelines issued by the Federal Judicial Center, the Notice Plan is designed to reach virtually all TPPs and in excess of 80% of consumer members of the End-Payor Class. *Id.* ¶¶ 5, 6, 23.

VI. THE NOTICE PLAN SHOULD BE APPROVED

End-Payor Class Plaintiffs request that the Court approve the Notice Plan for distributing notice of the Teva and DRL settlements to the End-Payor Class. The court must direct notice to class members in a reasonable manner. FED. R. CIV. P. 23(e)(1). “Notice meets Rule 23(e) and due process requirements if it is reasonably calculated to reach the class members and inform them of the existence of and the opportunity to object to the settlement.” *Nilsen v. York Cnty.*, 382 F. Supp. 2d 206, 210 (D. Me. 2005). The First Circuit has noted “the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions.” *Garcia-Rubiera v. Fortuno*, 727 F.3d 102, 112 (1st Cir. 2013)

(quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956)); *see also Newberg on Class Actions* § 8:15 (5th ed. 2011) (settlement notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections” (citations omitted)). “There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (internal quotation omitted).

The Notice Plan contemplates the same forms of notice and is designed to reach the same percentage of the End-Payor Class as the plan the Court approved previously in connection with the certification of the End-Payor Class (ECF No. 573). It provides for notice that is reasonably calculated to reach members of the End-Payor Class, and the notices themselves are easy to understand and explain clearly the terms of both settlements and all relevant deadlines. Plaintiffs’ proposed Notice Plan satisfies Federal Rule of Civil Procedure 23(e)(1).

A. KCC is well-positioned to serve as Notice Administrator.

KCC is a national class action administration firm that specializes in class action services, including settlement administration. Sherwood Decl. ¶¶ 3, 4. KCC served as the notice administrator when End-Payor Class Plaintiffs distributed notice of the Court’s class certification ruling; it is therefore familiar with this litigation and has crafted a distribution plan that is designed to reach virtually all TPPs and in excess of 80% of consumer members of the End-Payor Class. KCC also maintains the list of TPPs that have opted out of this litigation, *see* Settlement Agreement, Ex. B, and it is therefore best positioned to ensure that direct mail notice of the settlement is not sent to those entities.

B. The proposed notice materials are easy to understand.

The notices themselves also meet all legal requirements by providing an easily understood explanation of the litigation and both settlements. The proposed notice materials are based on samples promulgated by the Federal Judicial Center and are similar to those regularly used in pharmaceutical class actions across the country. They explain the case in clear, concise, easily understood language and fairly apprise class members of the claims in the litigation, the material terms of both the Teva Settlement and the DRL Settlement, and Class members' options in connection with the settlements.

C. A discretionary second opt-out period is unnecessary.

Federal Rule of Civil Procedure 23(e)(4) provides the Court with discretion concerning whether a second opt-out period is necessary for class actions, such as this one, that have been previously certified under Rule 23(b)(3). *See* FED. R. CIV. P. 23, 2003 Advisory Committee Notes.

A second opt-out period is unwarranted here. The notice previously distributed to members of the End-Payor Class advised them that if they did not opt out at that time, they would "be bound by past and any future court rulings on, or settlement of, the claims against Defendants and you will not be able to pursue your own claims against them." ECF No. 563-1, at 6. For this reason, the Court need not afford members of the End-Payor Class another opportunity to do what they declined to do previously: avoid being bound by a settlement. *See Wal-Mart Stores, Inc.*, 396 F.3d at 114-15 ("Pasta Bella was required to opt-out at the class notice stage if it did not wish to be bound by the Settlement."); *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 345 (E.D.N.Y. 2010) ("If any class member wished to control the prosecution or settlement of their own claims, they could have opted out or sought to intervene after notice of pendency was given."). TPPs and consumers that did not wish to be bound by

settlements in this action opted out when notice was given after class certification, and those who did not opt out previously are unlikely to do so now and pursue independently what has proved to be a costly and difficult litigation.

D. The distribution of the notice is efficient and thorough.

Plaintiffs propose two distinct methods of providing notice to class members. *First*, individual notice will be sent by first-class mail to the majority of TPPs. *See* Sherwood Decl. ¶¶ 7-10. Because the End-Payor Class includes entities that are often claimants in pharmaceutical class action settlements, and because notice has previously been distributed to these entities, their contact information is readily available to KCC. *See id.* ¶¶ 7, 8. Under these circumstances, individual notice to those known entities is the best method available and satisfies Federal Rule of Civil Procedure 23(e)(1). Courts have recognized individual notice by U.S First Class mail as an appropriate manner of delivery of notice. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356 n.22 (1978) (speaks favorably of the use of mail, without specifying the class of mail); *see also In re Volkswagen & Audi Warranty Extension Litig.*, 273 F.R.D. 349, 351, 354-55 (D. Mass. 2011) (approving notice plan including first-class mail notice and notice by publication); *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 67 (D. Mass. 1999) (same); *In re Co. Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 218 (D. Me. 2003) (“Individualized notice by first-class mail ordinarily satisfies the requirement that class members receive the best notice practicable under the circumstances”); *Peters v. Nat’l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) (collecting cases).

As to consumer class members and unknown TPP class members, End-Payor Class Plaintiffs propose publication notice. Sherwood Decl. ¶¶ 11, 12, 18, 19. Publication is an acceptable manner of delivering notice, particularly where, as here, direct notice to all class members is impractical. *See In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 84-85

(D. Mass 2005) (approving notice plan that distributed direct mail to TPPs and publication notice to the entirety of the class); *In re Remeron End-Payor Antitrust Litig.*, No. 02-2007, 2005 WL 2230314, at *15 (D.N.J. Sept. 13, 2005) (“For those whose names and addresses cannot be determined by reasonable efforts, notice by publication suffices under both Rule 23(c)(2) and the Due Process Clause.”); *Nichols v. SmithKline Beecham Corp.*, No. 00-6222, 2005 WL 950616, at *10 (E.D. Pa. Apr. 22, 2005) (approving notice plan consisting of direct mail notice to TPPs and summary publication notice targeted at TPPs and consumers). The publication notice plan includes: publication in major national magazines and trade journals *HR Magazine*, *National Underwriter Life and Health*, *People*, and *Parade*; and online banner publication consisting of 117 million unique impressions. Sherwood Decl. ¶¶ 11, 12, 18, 19. The online banner notice will appear as banner ads for users of premium, high-quality websites, which may include New York Post, Red Book, White Pages, Evite, LinkedIn, People, USA Today, Fox News, HGTV, The Weather Channel, Match.com, and the Food Network. *Id.* ¶ 19.

All told, the notice plan is expected to reach virtually all TPP Class members and over 80% of consumer End-Payor Class members. *Id.* ¶¶ 5, 23.

VII. CONCLUSION

For the above-stated reasons, End-Payor Class Plaintiffs respectfully request that the Court (1) grant preliminary approval of the Teva Settlement; (2) stay the End-Payor Class Plaintiffs’ litigation against Teva; and (3) approve the joint Notice Plan and schedules through final approval for the Teva and DRL settlements.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Glen DeValerio, hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on April 2, 2015.

/s/ Glen DeValerio
Glen DeValerio