[*Submitting Counsel on Signature Page*]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STALEY, *et al.*,
Plaintiffs,
v.
GILEAD SCIENCES, INC., *et al.*,
Defendants.

This Document Relates to:
KPH Healthcare Services, Inc. v. Gilead Sciences, Inc. et al., 3:20-cv-06961-EMC

Case No. 3:19-cv-02573-EMC (lead case)

JOINT SUPPLEMENTAL BRIEF IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: May 19, 2022
Time: 1:30 p.m.
Courtroom: 5, 17th Floor
Before: Honorable Edward M. Chen

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Plaintiff KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc. ("Plaintiff"), individually and on behalf of the proposed Direct-Purchaser Settlement Class ("DPPs"), and Defendants Bristol-Myers Squibb Company and E.R. Squibb & Sons, LLC (together, "BMS"), respectfully submit this joint response to the Court's Order of April 19, 2022, ECF 1014, in further support of Plaintiff's motion for preliminary approval of a class action settlement agreement between DPPs and BMS.[1]

A. SETTLEMENT CLASS DEFINITION AND RELEASE

The scope of the release in the Settlement Agreement is not broader than the scope of the Settlement Class definition. Within the definition of "Direct-Purchaser Settlement Class," the Settlement Agreement defines "cART Drugs" as "Atripla, Evotaz, Reyataz, Sustiva, Truvada, Complera or Stribild, or any of their generic equivalents."[2] The following definition of "Released Claims" limits the scope of the release to claims with regard to "cART Drugs":

> "Released Claims" means all claims in law or equity **with regard to cART Drugs** that were asserted against BMS or its affiliates in this Action, and all claims **with regard to cART Drugs** that Plaintiff could have asserted or could assert against BMS or its affiliates that arise out of the facts, occurrences, transactions, or other matters alleged or asserted in the Action, whether known or unknown.[3]

As a result, the same subset of drugs is covered by both the class definition and the release.

B. NUMBER OF SETTLEMENT CLASS MEMBERS

Plaintiff's economic expert, Dr. Russell L. Lamb, identified 76 Direct-Purchaser Settlement Class Members in reviewing transaction-level data produced by Gilead, BMS, and certain generic manufactures.[4] To account for the fact that the dataset reviewed by Dr. Lamb did not include direct

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[1] The sections of this submission regarding the scope of the release, the number of settlement class members, the plan of allocation, the average payment to Settlement Class members, litigation risk, the notice plan, the notice forms, and the claim form are submitted jointly on behalf of Plaintiff and BMS. The sections responsive to the Court's questions regarding the maximum damages value and litigation expenses incurred by Plaintiff to date are submitted on behalf of Plaintiff and the proposed Settlement Class only.

[2] *See* ECF 1002-1, Exhibit 1 (Settlement Agreement), at ¶ 1(p), on line 4.

[3] *See id.* at ¶ 1(l) (emphasis added).

[4] *See* Second Declaration of Dr. Russell Lamb ("Second Lamb Declaration") at ¶ 2. The Second Lamb Declaration is attached as Exhibit H to the Second Declaration of Michael L. Roberts ("Second Roberts Declaration"), which is attached as Exhibit 1 to this supplemental brief. Unless otherwise noted, all exhibit references in this brief are to exhibits to the Second Roberts Declaration.

sales for all concerned drugs (including generic equivalents) for the entire Class period and the fact that unknown assignees may exist, Plaintiff believes a reasonable class-size estimate to be in the range of 80.[5]

C. PLAN OF ALLOCATION

Dr. Lamb provided the following clarity regarding the meaning of "relative share" in Paragraph 11 of the Plan of Allocation:

> The Allocation Plan involves calculating a "relative share" for each concerned drug (inclusive of generic equivalents, where applicable) based on the amount (measured in units) of direct purchases of each drug (inclusive of generic equivalents, where applicable) as compared to the total volume of direct purchases (measured in units) of all concerned drugs and generic equivalents. To calculate the "relative share" for each drug, I divided the sum of all Extended Units ("EUs") for each branded drug and its generic equivalents (where applicable) in the IQVIA National Sales Perspectives ("NSP") data from October 2016 through June 2021, by the sum of all EUs of Atripla, Complera, Evotaz, Reyataz, Stribild, Sustiva, Truvada, and generic equivalents in the IQVIA NSP data from October 2016 through June 2021. June 2021 is the latest date for which data is available for all drugs.
>
> By way of example, using the IQVIA NSP data from October 2016 through June 2021, the "relative share" assigned to Truvada will be calculated using the following formula: (Truvada EUs + generic equivalents of Truvada EUs) / (Atripla EUs + generic equivalents of Atripla EUs+ Complera EUs + Evotaz EUs + Reyataz EUs + generic equivalents of Reyataz EUs + Stribild EUs + Sustiva EUs + generic equivalents of Sustiva EUs + Truvada EUs + generic equivalents of Truvada EUs). Repeating this process for all seven concerned drugs (including generic equivalents, where applicable) results in the following relative shares: Atripla (14%), Complera (5%), Evotaz (1%), Reyataz (7%), Stribild (7%), Sustiva (3%), Truvada (63%).[6]

D. AVERAGE PAYOUT

As noted in the opening brief, Plaintiff will request the following distributions from the $10.8 million BMS Settlement Fund: (1) up to $2.5 million for reimbursement of out-of-pocket litigation expenses; (2) $10,000 as a service award to KPH; and (3) notice and settlement

[5] Because BMS does not sell all of the products covered by the class, it does not take a position on the number of class members.

[6] *See id.* at ¶¶ 3-4.

administration expenses, estimated at $22,278.[7] If the Court approves the full amount of all these payments ($2,532,278), a Net Settlement Fund balance of $8,267,722 will be available for distribution to Settlement Class Members. Based on an estimated 80-member class[8] and an estimated claims rate of 75%,[9] Plaintiff estimates an average payout of $137,795.[10]

Class Counsel submit that this figure should not be included in the settlement notices because it could confuse and potentially mislead class members. Given the nature of the pharmaceutical industry, there are vast differences between the size of and the number of purchases made by wholesalers who are included in this settlement. If provided with an average payout figure, small wholesalers may come away with unrealistic expectations, while large wholesalers may be discouraged from filing claims. For this reason, Class Counsel have attached (and will email to the Court) a revised Proposed Order that removes reference to potential "five-to-six figure settlement payments."[11]

E. MAXIMUM VALUE AND LITIGATION RISK

1. ATRIPLA AND OVERARCHING CONSPIRACY CLAIMS

In response to the Court's questions regarding Plaintiff's assessment of the value of the Atripla no generic restraint ("NGR") and overarching conspiracy claims against BMS, Plaintiff agrees that its Atripla NGR damages claims against BMS have zero value and submits that its overarching conspiracy claims for damages against BMS are of limited value at this stage of the

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[7] *See* ECF 1002 (Motion for Preliminary Approval), at 17, 20, 22. In order to provide a conservative estimate of the average payout amount, Plaintiff has included the full amount of administrative costs in this calculation, even though BMS has agreed to pay half of the first $400,000 of notice costs through the BMS Notice Fund. *See id.* at 17. (Subject to court approval, the BMS Settlement Fund will be used to pay the other half of the first $400,000 of notice costs, all notice costs above $400,000, and all claims administration costs. *Id.*)

[8] *See supra* at § B.

[9] *See* ECF 1002 (Motion for Preliminary Approval) at 19.

[10] Class Counsel calculated this figure by multiplying the estimated number of class members (80) by the estimated claim rate (75%) and then dividing the estimated Net Settlement Fund balance ($8,267,722) by that figure (60).

[11] *See* Exhibit A (Revised Proposed Order) at ¶ 8. The Revised Proposed Order also references the revised notices and claim forms in place of the original versions, as well as the online opt-out option. Redlined and clean-copy versions have been provided for ease of reference.

litigation.

Plaintiff's Atripla NGR claim for damages against BMS was premised on the theory that absent the NGR clauses in the Atripla collaboration agreement between BMS and Gilead, BMS would have marketed a lower-cost version of Atripla containing generic Truvada and BMS's Sustiva after generic Truvada became available. Through the course of discovery, Plaintiff learned that Gilead terminated the Atripla collaboration agreement (including the NGR relating to Atripla) on December 31, 2017—33 months prior to generic Truvada becoming available in the United States in September 2020. As a result, this claim for damages against BMS has no value.

The overarching conspiracy claims against BMS have limited value now only because Plaintiff will be prohibited from presenting them at trial as a result of this Court's dismissal of those claims. These claims potentially could regain value years from now, however, if Plaintiff were to take the surviving claims against BMS to trial and obtain a final judgment; file, brief, argue, and win an appeal on the dismissed overarching conspiracy claims against BMS; and then pursue those revived overarching conspiracy claims against BMS in a second trial. Given the time and expense associated with that alternate process and the uncertainties involved during each stage, resolution under this settlement is preferable.

2. EVOTAZ CLAIMS

a. ESTIMATED DAMAGE VALUE

Prior to the parties agreeing to the terms of the Settlement, Dr. Lamb estimated classwide damages of approximately $31.1 million relating to the Evotaz claims.[12] His analysis estimated the difference between the amount Class members paid for the brand Evotaz they had purchased directly from BMS and the amount they would have paid as early as December 2017 (when generic Reyataz entered the market) by purchasing a lower-priced AB-rated generic version of Evotaz (using generic Reyataz) but-for Defendants' anticompetitive conduct.[13]

Dr. Lamb's model for Evotaz used IQVIA NSP data regarding the actual volume of Evotaz

[12] *See* Exhibit H (Second Lamb Declaration) at ¶ 5.

[13] *See id.*

and Trizivir and the prices actually paid.[14] Dr. Lamb used an analog HIV drug, Trizivir, for the generic penetration rate and generic discount rate in calculating the aggregate overcharge for the drugs because no generic version of Evotaz entered the market in the United States.[15] Applying this methodology and relying on evidence common to all class members, Dr. Lamb estimated that direct purchasers or Evotaz paid approximately $31.1 million in overcharges.[16]

b. LITIGATION RISKS

The litigation risks Plaintiff faces with regard to the Evotaz claims are similar to those associated with any antitrust case. For example, the jury could determine: (1) that Gilead and BMS did not have market power with regard to Evotaz; (2) that Gilead and BMS did not include a NGR agreement in their Evotaz collaboration agreement; (3) that the purported procompetitive effects of their NGR agreement outweighed its anticompetitive effects; (4) that Gilead would not have marketed a generic version of Evotaz even if the NGR had not been in place; and/or (5) that the overcharges resulting from the anticompetitive conduct were less than alleged. Additionally, there is a risk that Class Members would collect less after trial, even if the same overcharge determination were made, given the expenses that would be incurred by continuing to litigate against BMS.

F. LITIGATION EXPENSES

At present, Plaintiff's litigation expenses total $2,057,718.63.[17] These expenses can be broken down as follows: $1,776,109.42 for experts and IQVIA data; $181,424.53 for access to a document review platform; $50,154.04 for computerized research; $31,777.24 in court reporter and videographer fees; $7,750.00 for mediation fees; $4,299.00 for court costs; $1,823.62 for reproduction costs; $1,953.40 for service fees; $1,193.21 for travel, hotel, and meals; $772.05 for

[14] *See id.* at ¶¶ 7-8.

[15] *See id.* at ¶ 6. Dr. Lamb selected Trizivir as an appropriate analog because similar to Evotaz in the "but-for" world, Trizivir has had only a single generic competitor since generic entry. *See id.* at ¶ 6.

[16] *See id.* at ¶ 9. More detailed information about this analysis is available in the Second Lamb Declaration. *See id.* at ¶¶ 5-9.

[17] *See* Exhibit 1 (Second Roberts Declaration) at ¶ 11.

postage and messenger fees; and $462.12 for external hard drives for storage of productions.[18]

Class Counsel believe it highly likely that Plaintiff's litigation expenses will exceed $2,500,000 by the time they request a specific dollar amount in Plaintiff's motion for reimbursement of expenses on account of additional expert fees (including those relating to the preparation of 10 or more expert merits reports, corresponding merits rebuttal reports, and expert depositions), document review platform fees, computerized research (for Plaintiff's class certification reply and Plaintiff's opposition to any *Daubert* and dispositive motions filed by Defendants), and court reporter and videographer fees.

G. NOTICE TO THE CLASS

The notice plan provides that in addition to direct-mail notice and the settlement website, there were will be digital notice via a header banner in the *HDA Weekly Digest* that will include the notice headline, the settlement website URL, and a call to action.[19] That banner will appear in one issue of the electronic newsletter, and remain in that issue for all time, regardless of when the issue is accessed.[20] The notice plan does not provide for additional electronic notice, as the direct notice effort alone is expected to reach the vast majority of the Settlement Class, and the reach will be further enhanced by the digital notice placement in the *HDA Weekly Digest* and the public availability of the settlement website.[21]

If, at the time of the Final Approval Hearing, the claim rate is lower than expected, KCC could provide the following additional notice: (1) a press release; (2) advertising in *Pharmaceutical Commerce* via a quarter-page ad in the monthly print magazine, one month of digital leaderboard advertisements on its website (www.pharmaceuticalcommerce.com), and/or a one-time placement of an ad in an issue of its e-newsletter; and/or (3) placement of a quarter-page ad in the HIV demo

[18] *See id.*

[19] *See* Exhibit I (Second Peak Declaration) at ¶ 5. KCC has provided samples of the banner and a page from the *HDA Weekly Digest* to show placement of the banner. *See id.* at ¶¶ 6, 7. Class Counsel mistakenly referenced the publication notice, rather than this banner, in the opening brief.

[20] *See id.* at ¶ 6.

[21] *See id.* at ¶ 8.

unit of *The Journal for American Medical Association* (*JAMA*).[22] The estimated cost of providing all this additional media coverage is $13,605.[23] As with all other notice costs, half would be paid via the BMS Notice Fund, and the other half would be paid via the BMS Settlement Fund, subject to court approval.[24]

H. CONTENT OF NOTICES AND CLAIM FORM

1. SUMMARY NOTICE/DIRECT MAIL NOTICE

As requested, Plaintiff has added reference to the *KPH* case number and *Staley* name and case number to this notice. Plaintiff also added reference to the online opt-out option. Redlined and clean-copy versions of the updated draft of this notice are attached as Exhibit B. Based on Plaintiff's belief that providing estimated average payout information in the settlement notices could confuse and potentially mislead class members,[25] Plaintiff has not yet added reference to the estimated average payout, pending further direction from the Court.

2. POSTCARD REMINDER

As requested in relation to other notices, Plaintiff has added reference to the *KPH* case number and *Staley* name and case number to this notice. Redlined and clean-copy versions of the updated draft of this notice are attached as Exhibit C. Based on Plaintiff's belief that providing estimated average payout information in the settlement notices could confuse and potentially mislead class members,[26] Plaintiff has not yet added reference to the estimated average payout, pending further direction from the Court.

3. LONG-FORM NOTICE/NOTICE POSTED ON THE SETTLEMENT WEBSITE

As requested, Plaintiff has added reference to the *KPH* case name and number and *Staley* name and case number, along with language reflecting that class members may submit opt-out

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[22] *See id.*

[23] *See* Exhibit 1 (Second Roberts Declaration) at ¶ 12.

[24] *See* ECF 1002 (Motion for Preliminary Approval) at 2, 17. This division of costs between the BMS Notice Fund and BMS Settlement Fund applies only to the first $400,000 of notice costs, but notices costs are estimated to be considerably less than $400,000. *See id.*

[25] *See supra* at § D.

[26] *See supra* at § D.

forms online, to this notice. KCC will provide the online opt-out option via an interactive web form.[27] As a safety measure, prior to adding an electronic signature, Settlement Class Members will be provided with an overview of what it means to opt-out and be required to check a box confirming that understanding.[28] Redlined and clean-copy versions of the updated draft of this notice are attached as Exhibit D. Based on Plaintiff's belief that providing estimated average payout information in the settlement notices could confuse and potentially mislead class members,[29] Plaintiff has not yet added reference to the estimated average payout, pending further direction from the Court.

4. PUBLICATION NOTICE

As requested, Plaintiff has added reference to the *KPH* case number and *Staley* name and case number to this notice. Redlined and clean-copy versions of the updated draft of this notice are attached as Exhibit E.[30] Based on Plaintiff's belief that providing estimated average payout information in the settlement notices could confuse and potentially mislead class members,[31] Plaintiff has not yet added reference to the estimated average payout, pending further direction from the Court.

5. BLANK AND PRE-POPULATED CLAIM FORMS

For purposes of this settlement, the class period has been defined as October 6, 2016 until October 19, 2021.[32] The blank claim form references only those dates;[33] however, an earlier draft of the pre-populated claim form was inadvertently attached to the Settlement Agreement. The final version of the pre-populated claim form, which references the correct class period dates, is attached

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[27] *See* Exhibit I (Second Peak Declaration) at ¶ 4.

[28] *See id.*

[29] *See supra* at § D.

[30] This notice will be used only if the Court directs the provision of additional notice. *See infra* at § G.

[31] *See supra* at § D.

[32] *See* ECF 1002 (Motion for Preliminary Approval) at 1. *See also* ECF 1002-1, Exhibit 1 (Settlement Agreement) at ¶ 1(p).

[33] *See* ECF 1002-1, Exhibit F (Blank Claim Form) at Q3, Q4. To correct formatting, Plaintiff has attached an updated version of the blank claim form as Exhibit F to the Second Roberts Declaration.

as Exhibit G.

Dated: April 29, 2022

Respectfully submitted,

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FILER'S ATTESTATION

I, Francis O. Scarpulla, an the ECF User whose ID and password are being used to file this document. In compliance with Civil L.R. 5-1(h)(3), I hereby attest that all signing counsel have concurred in this filing. Executed on this 29th day of April, 2022.

By: /s/ *Francis O. Scarpulla*
Francis O. Scarpulla

CERTIFICATE OF SERVICE

I certify that on April 29, 2022, the within document was filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to the attorneys of record in this case.

By: /s/ *Francis O. Scarpulla*
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