DURIE TANGRI LLP
DARALYN J. DURIE (SBN 169825)
ddurie@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: (415) 362-6666

HILLIARD & SHADOWEN LLP
STEVE D. SHADOWEN (*pro hac vice*)
steve@hilliardshadowenlaw.com
1135 W. 6th Street, Suite 125
Austin, TX 78703
Telephone: (855) 344-3298

HAGENS BERMAN SOBOL SHAPIRO LLP
STEVE W. BERMAN (*pro hac vice*)
steve@hbsslaw.com
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292

Interim Co-Lead Counsel for End-Payor Plaintiffs

(Additional Counsel Listed on Signature Page)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PETER STALEY, et al.

Plaintiffs,

v.

GILEAD SCIENCES, INC., et al.

Defendants.

Case No. 3:19-cv-02573-EMC (Master Docket)

END-PAYOR CLASS PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF PRELIMINARY APPROVAL OF SETTLEMENT WITH BRISTOL-MYERS SQUIBB COMPANY AND E.R. SQUIBB & SONS L.L.C.

Date: December 9, 2021
Time: 1:30 p.m.
Ctrm: 5, 17th Floor
Judge: Honorable Edward M. Chen

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The End-Payor Plaintiffs ("Plaintiffs") provide this response to the Court's Order of November 10, 2021, ECF No. 719 (the "Order"). Defendants Bristol-Myers Squibb Company and E.R. Squibb & Sons, L.L.C. join in the response.

1. NUMBERS OF CLASS MEMBERS

The following chart provides the Plaintiffs' best estimates of the numbers of Third-Party Payor ("TPP") and consumer class members for each of the proposed classes.[1]

CLASS	TPP MEMBERS	CONSUMER MEMBERS
Damages Classes		
Atripla	1,108	229,297
Evotaz	275	17,884
Truvada	1,889	
Complera	780	
Stribild	1,098	
Injunction Classes		
Prezcobix	804	122,818
cART Foundation[2]	> 2,016	2,635,737

2. MAXIMUM DAMAGES RECOVERY

[1] The estimates for the number of TPP members for each of the classes, except the Evotaz and Prezcobix classes, are provided in the Second Declaration of Steve D. Shadowen ("Second Shadowen Decl."), Ex. XX, Declaration of Laura R. Craft, at ¶ 3. The estimates for the number of TPP members of the Evotaz and Prezcobix classes are provided in the Expert Report of Laura R. Craft, ECF No. 695-5, at ¶ 47, Table 11. The estimates for the number of consumer members for the Atripla, Evotaz, Prezcobix, and cART Foundation Drug classes (all of the classes that include consumers) are provided in the Second Declaration of Steve D. Shadowen, Ex. 8, Declaration of Richard G. Frank, Ph.D. Estimating the Number of Consumers of Specified Gilead cART Drugs, at ¶ 4, Table 1.

[2] For purposes of the class definition, the cART Foundation Drugs are Atripla, Biktarvy, Complera, Descovy, Genvoya, Odefsey, Stribild, Symtuza, Truvada, and Viread.

The following chart lists Plaintiffs' single damages for each of the listed drugs.[3] As noted in detail below in Section 3, Plaintiffs could recover damages with respect to any of these drugs, other than Evotaz, only by first obtaining appellate reversal of the Court's dismissal of the conspiracy claims against BMS (among other hurdles).

DAMAGES CLASS	SINGLE DAMAGES RANGE ($ millions)
Atripla	$ 102 to $306
Evotaz	$ 7.87
Truvada	$ 864 to $2,039
Complera	$14 to $44
Stribild	$135 to $148

The damage models for Atripla, Truvada, and Complera are set forth in full in Dr. Frank's damages report in the ongoing litigation.[4] In very summary form, the models for Atripla and Truvada are based on a "reverse payment" liability theory, i.e., that Gilead unlawfully paid Teva Pharmaceuticals to delay entry into the marketplace with generic versions of those drugs. Generic entry did not in fact occur until September 2020. Plaintiffs contend that, absent the reverse payments, generic entry would have occurred much sooner than that, in a range from February 2018 to July 2019. The damage model estimates the range of overcharges that the proposed classes incurred, corresponding to those entry dates, using as a yardstick the generic prices that resulted after generic Atripla and generic Truvada in fact entered the marketplace.

Complera comprises the two components in Truvada, TDF and FTC, plus Janssen's RPV. The Complera damage model is founded on: (1) reverse-payment liability theory—absent the reverse payment from Gilead to Teva on Truvada, those generic components would have been available in the

[3] The estimates for Atripla, Truvada, and Complera are found in the Declaration of Richard G. Frank, Ph.D. in Support of the Certification of Classes of End-Payors and the Calculation of Damages, ECF No. 695-5, at ¶ 153, Table 1. The estimate for Evotaz is found in the Declaration of Richard G. Frank, Ph.D. on the Calculation of Damages for Third-Party Payor Purchasers of Evotaz, ECF No. 711-8, at ¶ 10, Table 1. The estimate for Stribild is found in the Second Shadowen Decl. at ¶ 13.

[4] Declaration of Richard G. Frank, Ph.D. in Support of the Certification of Classes of End-Payors and the Calculation of Damages, ECF No. 695-5.

date range from February 2018 to July 2019; and (2) absent the unlawful No-Generics Restraint agreed between Gilead and Janssen, Janssen would have made an AB-rated version of Complera once generic Truvada became available. Dr. Frank conservatively estimated the competitive price of that product using as a yardstick another HIV drug that had only one generic competitor for a sustained period of time.[5]

Evotaz comprises Gilead's cobicistat and BMS's atazanavir. Dr. Frank's damage model for Evotaz is premised on the No-Generics Restraint liability theory. Plaintiffs contend that Gilead and BMS included such a restraint in their Evotaz collaboration, which prevented Gilead from making an AB-rated version of Evotaz when a generic version of BMS's ingredient, atazanavir, became available in December 2017.[6] Dr. Frank applies the same yardstick that he used for Complera—another HIV drug that had only one generic competitor for a sustained period of time.[7]

As for Stribild, Plaintiffs are not pursuing a liability theory in the ongoing litigation specifically with respect to Stribild, although Gilead's anticompetitive conduct regarding Stribild is part of its overall anticompetitive scheme as to which Plaintiffs will seek injunctive relief. The damage model that Plaintiffs prepared for purposes of the settlement with BMS is founded on Gilead's artificially raising the price of TDF-based Stribild in order to drive patients to TAF-based Genvoya. The overcharges are the difference in the price of Stribild before and after the artificial price increase.[8]

3. LITIGATION RISKS

Atripla: The Complaint does not allege, and discovery did not reveal, that BMS had any involvement in the unlawful Gilead/Teva reverse-payment agreement with respect to either Truvada or Atripla. Gilead terminated the Atripla Agreement effective December 31, 2017, before a generic version

[5] *Id*. at ¶ 123.

[6] First Amended Complaint, ECF No. 347 ("FAC") ¶¶ 124-125.

[7] Declaration of Richard G. Frank, Ph.D. on the Calculation of Damages for Third-Party Payor Purchasers of Evotaz, ECF No. 711-8, at ¶ 6.

[8] Second Shadowen Decl. ¶ 13.

of Gilead's Truvada became available in September 2020. Moreover, that termination also occurred before the earliest date that Plaintiffs contend, for purposes of their damages analysis, that generic Truvada would have become available absent the reverse payments to Teva, i.e., February 2018. Thus, the No-Generics Restraint on Atripla never had the anticompetitive effect of preventing BMS from making Atripla with generic TDF/FTC.

As the facts played out, Plaintiffs' principal legal avenue of imposing liability on BMS was through Counts 1 and 4 of the Complaint, alleging that BMS is jointly and severally liable with Gilead and Janssen for all of each of their anticompetitive conduct, including Gilead's unlawful reverse payments on Atripla. The Court granted BMS's motion to dismiss that claim.[9] The litigation risks that Plaintiffs face with respect to that claim include the possibilities that Plaintiffs: (a) will not obtain appellate reversal of that dismissal; (b) will not prove that Gilead had market power with respect to Atripla and/or cART Foundation drugs; (c) will not prove that Gilead and Teva exchanged a reverse payment; (d) will not prove that the reverse payment's anticompetitive effects outweighed any purported procompetitive benefits; (e) will not prove that, absent the reverse payment, generic entry would have occurred any sooner than it in fact occurred; (f) will not prove that the overcharges are of the magnitude that Plaintiffs contend; or (g) will not prove the facts necessary to establish BMS's liability for the antitrust violation under the standard that the appellate court establishes.

Evotaz: In the ongoing litigation, Plaintiffs are not pursuing damages with respect to Evotaz, but are continuing to pursue injunctive relief against Gilead. The litigation risks that Plaintiffs faced regarding the No-Generics Restraint claim on Evotaz included the possibilities that Plaintiffs: (a) would not prove that Gilead/BMS had market power with respect to Evotaz; (b) would not prove that Gilead and BMS included a No-Generics Restraint in the Evotaz collaboration agreement; (c) would not prove, if the Court were to require such proof, that the restraint's anticompetitive effects outweighed any

[9] ECF No. 388, at p. 16.

purported procompetitive benefits; (d) would not prove that, absent the No-Generics Restraint, Gilead would have marketed (through a licensing agreement or directly itself) an AB-rated generic version of Evotaz; or (e) would not prove that the overcharges were of the magnitude that Plaintiffs contend.

Truvada: Just as with Atripla, Plaintiffs' legal avenue for obtaining damages from BMS for the Gilead/Teva reverse payment on Truvada was through Counts 1 and 4 of the Complaint, alleging that BMS is jointly and severally liable with Gilead and Janssen for all of each of their anticompetitive conduct, including Gilead's unlawful reverse payments on Truvada. Plaintiffs faced all of the litigation risks with respect to Truvada that we identified above with respect to the reverse payments on Atripla.

Complera: Plaintiffs' liability theory regarding Complera is that: (1) absent the Gilead/Teva reverse payments on Truvada, generic Truvada would have been available sooner than it was; and (2) absent the Gilead/Janssen No-Generics Restraint on Complera, Janssen would have marketed a generic-Truvada-based version of Complera. Thus, in order to establish BMS's liability with respect to Complera, Plaintiffs would need to overcome all of the litigation risks identified above with respect to the reverse-payment claims on Atripla and Truvada. In addition to those risks, Plaintiffs would also need to overcome all of the litigation risks identified above with respect to the No-Generics Restraint claim on Evotaz.

Stribild: In the ongoing litigation, Plaintiffs are not pursuing damages with respect to Stribild, but Gilead's conduct with respect to Stribild, including taking artificial price increases on Stribild in order to drive patients to Genvoya and other TAF-based products, continues to be part of Plaintiffs' claim that Gilead (and its coconspirators) unlawfully monopolized cART Foundation drugs. The litigation risks that Plaintiffs faced with respect to a damages claim against BMS on Stribild included the possibilities that Plaintiffs: (a) would not obtain appellate reversal of the dismissal of the conspiracy/monopolization claim against BMS; (b) would not prove that Gilead had market power with respect to cART Foundation drugs; (c) would not prove that Gilead's raising the price of Stribild was anticompetitive; (d) would not

prove that the overcharges were of the magnitude that Plaintiffs contended; or (e) would not prove the facts necessary to establish BMS's liability for the antitrust violation under the standard that the appellate court establishes.

Prezcobix: Prezcobix comprises Gilead's cobicistat and Janssen's ripilvirine (RPV), and Plaintiffs contend that those defendants included a No-Generics Restraint that prohibits the parties from making the product with a generic version of the other's ingredient. No generic version of either ingredient is yet available in the marketplace, so Plaintiffs are pursuing only injunctive relief against Gilead and Janssen. The litigation risks that Plaintiffs faced regarding the No-Generics Restraint claim against BMS with respect to Prezcobix included the possibilities that Plaintiffs: (a) would not obtain appellate reversal of the dismissal of the conspiracy/monopolization claim against BMS; (b) would not prove that Gilead/Janssen had market power with respect to Prezcobix; (c) would not prove that Gilead and Janssen included a No-Generics Restraint in the Prezcobix collaboration agreement; (d) would not prove that the No-Generics Restraint with respect to Prezcobix was part of the scheme to monopolize cART Foundation drugs; (e) would not prove, if the Court were to require such proof, that the restraint's anticompetitive effects outweighed any purported procompetitive benefits; (f) would not prove that the No-Generics Restraint threatens harm to the Plaintiffs; (g) would not prove the facts necessary to establish BMS's liability for the antitrust violation under the standard that the appellate court establishes; or (h) would not prove that BMS is capable, as a practical matter, of providing any of the specific injunctive relief that Plaintiffs are pursuing with respect to Prezcobix, i.e., the elimination of the No-Generics Restraint agreed between Gilead and Janssen.

cART Foundation Drugs: Plaintiffs seek only injunctive relief with respect to the claim that defendants monopolized cART Foundation Drugs. The litigation risks that Plaintiffs faced regarding this claim against BMS included the possibilities that Plaintiffs: (a) would not obtain appellate reversal of the dismissal of the conspiracy/monopolization claim against BMS; (b) would not prove that Gilead had

market power with respect to cART Foundation Drugs; (c) would not prove that Gilead engaged in all or any of the exclusionary conduct that Plaintiffs allege; (d) would not prove that the exclusionary conduct threatens harm to the Plaintiffs; (e) would not prove that they are entitled to all or any of the specific injunctive relief they seek; (f) would not prove the facts necessary to establish BMS's liability for the antitrust violation under the standard that the appellate court establishes; or (g) would not prove that BMS is capable, as a practical matter, of providing any of the specific injunctive relief that Plaintiffs are pursuing.

4. DIFFERENCE BETWEEN SETTLEMENT CLASSES AND THE CLASS PROPOSED IN THE OPERATIVE COMPLAINT

Plaintiffs' Complaint alleges relevant markets for a number of individual drugs and their generic equivalents,[10] plus a broader relevant market for all cART drugs or "narrower markets therein."[11] Correspondingly, the Complaint alleges a class of end-payors of "any cART drug."[12]

For purposes of the ongoing litigation against Gilead and Janssen, Plaintiffs narrowed the scope of the action to six classes, all of which are subsets of the original class definition in the Complaint. Plaintiffs are pursuing damages classes for each of Atripla, Truvada, and Complera, and injunction classes for each of Prezcobix and a group of cART Foundation Drugs.

Plaintiffs selected the *damages* classes to match the drugs as to which: (1) defendants had used a reverse payment (Atripla and Truvada) and/or a No-Generics Restraint (Complera); and (2) damages have already accrued. Evotaz also fits into that category (it is subject to a No-Generics Restraint), but Plaintiffs are pursuing only injunctive relief on Evotaz in the ongoing litigation. Viread (standalone TDF) also fits into that category (it was the subject of a reverse payment), but Plaintiffs are pursuing only injunctive relief on Viread (it is among the cART Foundation Drugs). Plaintiffs explain in our in camera

[10] FAC ¶ 389.

[11] *Id.* ¶ 391.

[12] *Id.* ¶ 456.

presentation to the Court the reasons why we are not seeking damages with respect to these two products in the ongoing litigation.

Plaintiffs selected Prezcobix for an injunction class because it is subject to a No-Generic Restraint. One of Plaintiffs' goals is to eliminate all such restraints, on all of defendants' drugs at issue in this litigation. Prezcobix is in a separate class from the cART Foundation Drugs because Prezcobix, like Evotaz, is not a cART Foundation Drug as Plaintiffs' expert economist has defined that antitrust market. They are not NRTIs that provide the foundation for a typical cART regimen of two NRTIs plus a "third agent." Instead, both Prezcobix and Evotaz are third agents, which are boosted by Gilead's cobicistat.

Plaintiffs narrowed the principal injunctive-relief class from all cART drugs (the class alleged in the Complaint) to purchasers of defendants' "cART Foundation Drugs" based on two considerations. First, as noted at the outset of this litigation, market definition is a fact-intensive inquiry subject to discovery and expert analysis.[13] Based on the factual record developed in this case, Plaintiffs' expert economist concluded that the appropriate set of drugs for determining the effects of defendants' overall anticompetitive scheme is all cART Foundation Drugs, i.e., the NRTI "backbone" drugs and the single-

[13] *See* Tr. of Remote Video Proceedings, ECF No. 381, at 30 (July 16, 2020) (Plaintiffs' counsel arguing that "[d]efining relevant product market[s] in an antitrust case, especially one as sophisticated … as this one, is a fact-intensive inquiry. We're going to end with expert reports on both sides that are going to run 50, 75, 100 pages on market definition."); *see also* Order Granting in Part and Denying in Part Defs.' Mot. to Dismiss FAC, ECF No. 388, at 12 ("…market definition is a deeply fact-intensive inquiry…" (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001)); *id*. at 13 ("The issue of the relevant market here is complex and multidimensional.").

tablet regimens that usually use those backbones.[14] Plaintiffs narrowed the set of cART drugs as to which we seek class certification to match the expert's market definition.[15]

Second, Plaintiffs furthered narrowed the drugs encompassed in the proposed class from *all* cART Foundation Drugs (which includes some drugs marketed by non-defendants) to just those marketed by the defendants. Plaintiffs concluded that the narrower set of drugs was all that was needed in order to get all of the injunctive relief that Plaintiffs seek.

Plaintiffs also narrowed the damages classes to include only TPPs, not consumers. Plaintiffs are providing the explanation of that decision to the Court in camera. The BMS settlement does not release the damages claims of any consumers except with respect to their purchases of Atripla and Evotaz.

Narrowing class definitions is a frequent and entirely proper part of the class-certification process. *See, e.g.*, *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1139 (9th Cir. 2016) ("the district court may construe the class definition more narrowly, or otherwise conform its interpretation of the class definition with the prevailing theory of liability"); *Sloan v. Gen. Motors LLC, No. 16-cv-07244-EMC, 2020 WL 1955643,* at *3 n.2 *(N.D. Cal. Apr. 23, 2020)* (Chen, J.) ("Because Plaintiffs narrowed the class definition [certain products] are no longer part of the class definition."); *Newton v. Am. Debt Servs., Inc.*, No. C-11-3228 EMC, 2015 WL 3614197, at *5 (N.D. Cal. June 9, 2015) (Chen, J.) (certifying "alternate and more focused class definition" than alleged in complaint); *Davy v. Paragon Coin, Inc.*, No. 18-CV-00671-JSW, 2020 WL 4460446, at *2 (N.D. Cal. June 24, 2020) (allowing modified class definition

[14] In connection with Plaintiffs' motion for class certification in the ongoing litigation, Plaintiffs submitted Professor McGuire's report on market power, which explains the bases for his conclusions about the cART Foundation Drugs. *See* Expert Report of Professor Thomas G. McGuire, ECF No. 695-5.

[15] That narrowing explains why the following drugs mentioned in the Court's supplemental-briefing Order (ECF No. 719) are not encompassed by the cART Foundation Drug class. Vemlidy, while an NRTI, is not FDA-approved for use in treating or preventing HIV; Prezista, Reyataz, and Edurant are standalone third agents; Tybost is a booster. Emtriva is a standalone NRTI, but it is a complement to, rather than a substitute for, Viread (standalone TDF); the latter is the higher-selling drug so Professor McGuire included it, rather than Emtriva, in his analysis of the market power of Gilead's cART Foundation Drugs.

where "the modified definition narrows the scope of the class"); *Abdeljalil v. Gen. Elec. Cap. Corp.*, 306 F.R.D. 303, 306 (S.D. Cal. 2015) ("a narrower version of the class definition presented in the [complaint] ... is allowable" at class certification) (citation omitted).

In several respects the Settlement classes are broader than those that Plaintiffs are now pursuing in the ongoing litigation. For example, the Settlement classes include a damages class for Stribild (because Plaintiffs and BMS reached agreement at a time when Plaintiffs were seriously considering seeking a litigation damages for Stribild); includes a damages class for Evotaz; and includes in the damages classes certain State entities where applicable State law permits those entities to be represented by private lawyers. In all of these respects, these classes, although broader than those that Plaintiffs are now pursuing in the ongoing litigation, are narrower than those alleged in the Complaint.

Under the Settlement Agreement, there are damages for some drugs but only injunctive relief for others. The Settlement includes damages classes for Atripla and Evotaz, and the classes include consumers, because BMS insisted upon (reasonably, in Plaintiffs' view) complete peace with respect to its own drugs. As noted in Plaintiffs' brief in support of preliminary approval, *settlement* of classes including consumers in pharmaceutical antitrust cases does not present the type of management problems that have led some courts (wrongly, in Plaintiffs' view) to deny certification of such cases *for litigation*.[16]

Plaintiffs seek only injunctive relief with respect to Prezcobix because no generic versions of either of its two active ingredients is yet available. The No-Generics Restraint will have its principal anticompetitive bite in the future.

Plaintiffs include in their in camera presentation the explanation for not seeking damages with respect to the class of purchasers of cART Foundation Drugs.

5. DAMAGES FOR CONSUMERS

[16] ECF No. 711, at 19.

Plaintiffs are separately providing to the Court, in camera, the explanation as to why they are not including consumers in their damages classes in the ongoing litigation. The BMS settlement does not release the damages claims of any consumers except with respect to their purchases of Atripla and Evotaz.[17]

6. INJUNCTIVE RELIEF

The most important relief that Plaintiffs are getting in this Settlement is the elimination of the No-Generics Restraint on Evotaz. Eliminating that restraint sets an important practical precedent. This is the first lawsuit asserting antitrust claims with respect to such restraints. A major international pharmaceutical manufacturer is eliminating a No-Generics Restraint from its collaboration agreement with a significant competitor on a not-insignificant drug.

Plaintiffs would have obtained further injunctive relief from BMS if there were any to be had; there isn't any. For the reasons noted in detail above, Evotaz is the only drug as to which BMS can provide effective injunctive relief.

The Settlement Agreement calls for the certification of the other damages classes—for Atripla, Truvada, Complera, and Stribild—under Rule 23(b)(2) as well as (b)(3). That certification, and the release of those purchasers' claims against BMS for injunctive as well as monetary relief, is appropriate. First, all of the members of those classes are, by definition, also members of the cART Foundation Drugs class. No-Generics Restraints are a prominent part of the defendants' anticompetitive conduct with respect to that class's claim. Those class members thus will benefit from the practical precedent that this

[17] Settlement Agreement § 1(n) (defining "Consumer Damages Classes Released Claims" to encompass only consumers' claims with respect to Atripla and Evotaz).

Settlement sets (including members who bought Truvada or Stribild, which are not subject to a No-Generics Restraint).[18]

Second, all of the damages classes are receiving money damages. Certification under (b)(2) as well as (b)(3)—with full opt-out rights—and the release of those purchasers' claims against BMS *for all forms of relief related to those claims* is clearly appropriate. *See, e.g.*, *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) ("A settlement agreement may preclude a party from bringing a related claim in the future" provided only that "the released claim is 'based on the identical factual predicate as that underlying the claims in the settled class action.'" (quoting *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir.2008))); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2011 WL 13152270, at *6 (N.D. Cal. Aug. 24, 2011) ("The IPPs in all fifty states may settle these federal injunctive claims in exchange for monetary consideration.").

Third, although BMS is not providing any additional injunctive relief directly with respect to these classes, the release of their claims against BMS is appropriate because Plaintiffs assert in the Complaint that BMS is jointly and severally liable with respect to these drugs as a coconspirator in Gilead's overall anticompetitive scheme. Plaintiffs' litigation risks with respect to those claims are significant, for the reasons detailed above. Nevertheless, BMS appropriately seeks release of those claims as part of the Settlement.

7. PLAN OF ALLOCATION BETWEEN CONSUMERS AND TPPS

The Settlement damages classes for Atripla and Evotaz include consumers. The damages classes in the ongoing litigation against Gilead and Janssen will not include any consumers, only TPPs. The proposed Allocation Plan for this Settlement allocates $2.5 million to be used to reimburse and pay for

[18] The Prezcobix class will likewise benefit for the same reason. The cART Foundation and Prezcobix injunction classes will also benefit from the $2.5 million that Plaintiffs seek to earmark for paying the costs of the litigation.

litigation expenses. Those expenses cannot sensibly be attributed to and apportioned among particular classes.

Some of the $2.5 million for expenses will be used to benefit litigation damages classes of which the Atripla and Evotaz consumers will not be members. The proposed Allocation Plan therefore allocates a corresponding $2.5 million to these consumers in order to protect them from the unfairness of having funds that their releases help to generate being used to benefit classes of which they will not be members. *See* Allocation Plan § 1.2.

8. PLAN OF ALLOCATION RELATED TO ATRIPLA

Members of the Atripla class have a damage claim against BMS because Plaintiffs allege in Counts 1 and 4 of the Complaint that BMS is jointly and severally liable with Gilead for all of its exclusionary conduct in monopolizing cART Drugs. That conduct includes making the reverse payments to Teva with respect to Atripla.[19] That is, if Plaintiffs were to get appellate reversal of the dismissal of the conspiracy claims against BMS, BMS could be found liable for Gilead's reverse payments to Teva.

9. CONFIDENTIAL SETTLEMENT TERMS

The parties are separately providing the confidential terms to the Court for in camera review.

10. CLAIM FORMS

Per the Court's suggestion (Order, at ¶ 13, p.6), Plaintiffs' have altered the Allocation Plan and Notices to provide for the consumer members of the Atripla and Evotaz classes to submit claim forms upon preliminary approval, rather than final approval, of the Settlement. A proposed claim form is attached to the Second Shadowen Declaration as Exhibit 5. A revised Plan of Allocation, reflecting the immediate availability of the claim form and ability to submit it, is attached to the Second Shadowen Declaration as Exhibits 6 (redline) and 7 (clean).

[19] It also includes delaying the introduction of TAF, for which Plaintiffs do not have a separate, quantifiable damage claim, but which nevertheless damaged Atripla purchasers.

Regarding A.B. Data's estimate that 15,000 consumers may make a claim, it reached that estimate based on its experiences in three recent similar cases, which it selected as exemplars based on their relatively small class sizes, similar in size to the Atripla and Evotaz Settlement Damages Classes.[20]

In *In Re: Aggrenox Antitrust Litigation*, 3:14-md-02516-SRU (D. Conn.) ("*Aggrenox*"), 29,954 total consumer claims were submitted, of which 9,020 were found valid. In *In re Solodyn (Minocycline Hydrochloride) Antitrust Litigation*, 1:14-md-02503 (D. Mass.), 20,314 total consumer claims were submitted, of which 11,045 were found valid. In *In re Cipro Cases I & II*, S198616 (Cal.), 12,555 total consumer claims were submitted, of which 4,749 were found valid.[21]

11. PAST DISTRIBUTIONS

In the *Aggrenox* case, Notice was provided to consumer class members through publications in Parade Magazine, Time Magazine, and People Magazine; a press release disseminated through PR Newswire; and advertisements on digital media platforms. Similar to the plan here, the consumer notice plan for Aggrenox delivered an estimated reach of 80% with 172 million impressions. Additionally, notice was provided via direct mail to 40,876 prescription drug plans.[22] The total settlement amount for Aggrenox was $54 million. The average consumer payout of $373.85. The average TPP payout was $44,657.39. The total administrative costs for Aggrenox were $836,847.58, comprising $651,899.97 in Notice costs and $184,947.61 in Claims Administration costs. The total attorneys' fees and costs were $17,182,578.59 plus interest. The net settlement fund was exhausted by the claims and no funds were distributed *cy pres*.[23]

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[20] Second Shadowen Decl., Ex. 10, Declaration of Linda V. Young in Support of End-Payor Class Plaintiffs' Supplemental Brief in Support of Preliminary Approval of Settlement with BMS ("Young Decl."), at ¶ 4.

[21] *Id*.

[22] *Id*. Note that the number of prescription drug plans is different from the number of Third-Party Payors as Plaintiffs here have used that term in estimating the number of TPP class members—there are many more plans than there are payors. *See, e.g.*, Expert Report of Laura R. Craft, ECF No. 695-5 at ¶ 47, Table 11.

[23] Young Decl. at ¶ 4.

12. SHORT FORM NOTICE

It is not possible for Plaintiffs to provide a reliable estimate of the average payout for either a TPP or consumer claim. Especially given that many consumers will not have paid out-of-pocket for these drugs at all, the average claim could vary anywhere from full single damages to just a fraction of that. The TPP funds are not being distributed now at all, but will be held to be paid out with other (potential) recoveries later.

The revised short-form notice, attached as Exhibits 1 (redline) and 2 (clean) to the Second Shadowen Decl., includes the other edits that the Court suggested.

13. LONG FORM NOTICE

The long-form notice is available only on the settlement website, not via direct mail. TPPs that receive direct notice are generally sophisticated entities that will visit the website in any event; the important aspect is providing them notice that they should visit the website.

Regarding the time allowed to file a claim, object, or opt out, etc., Plaintiffs propose the following:

Disseminate notice: 15 days after entry of the Preliminary Approval Order

Deadline to opt out: 60 days after entry of the Preliminary Approval Order (45 days after the date notice is disseminated)

Deadline for objections to the Settlement or the Allocation Plan: within 90 days after entry of the Preliminary Approval Order (75 days after the date notice is disseminated)

Deadline to file brief and papers in support of final approval: within 111 days after entry of this Preliminary Approval Order and within 21 days after the deadline for objections

Final Approval Hearing: within 120 days after entry of the Preliminary Approval Order

File a Claim: within 60 days after entry of the Final Approval Order.

The revised long-form notice, attached as Exhibits 3 (redline) and 4 (clean) to the Second Shadowen Decl., include the other edits that the Court suggested.

Dated: November 18, 2021

Respectfully submitted,

HILLIARD & SHADOWEN LLP

By: */s/ Steve D. Shadowen*

STEVE D. SHADOWEN (*pro hac vice*)
steve@hilliardshadowenlaw.com
RICHARD BRUNELL (*pro hac vice*)
rbrunell@hilliardshadowenlaw.com
NICHOLAS WILLIAM SHADOWEN (*pro hac vice*)
nshadowen@hilliardshadowenlaw.com
MATTHEW C. WEINER (*pro hac vice*)
matt@hilliardshadowenlaw.com
TINA JOANN MIRANDA (*pro hac vice*)
tmiranda@hilliardshadowenlaw.com
1135 W. 6th Street, Suite 125
Austin, TX 78703
Telephone: (855) 344-3298
Facsimile: (361) 882-3015

DARALYN J. DURIE (SBN 169825)
ddurie@durietangri.com
MARK A. LEMLEY (SBN 155830)
mlemley@durietangri.com
DAVID McGOWAN (SBN 154289)
dmcgowan@durietangri.com
EUGENE NOVIKOV (SBN 257849)
enovikov@durietangri.com
ADITYA V. KAMDAR (SBN 324567)
akamdar@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: (415) 362-6666
Facsimile: (415) 236-6300

DURIE TANGRI LLP
ALLYSON R. BENNETT (SBN 302090)
abennett@durietangri.com
W. HENRY HUTTINGER (SBN 312843)
hhuttinger@durietangri.com
953 East 3rd Street
Los Angeles, California 90013
Telephone: (213) 992-4422
Facsimile: (415) 236-6300

HAGENS BERMAN SOBOL SHAPIRO LLP
STEVE W. BERMAN (*pro hac vice*)

steve@hbsslaw.com
1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

HAGENS BERMAN SOBOL SHAPIRO LLP
THOMAS M. SOBOL (*pro hac vice*)
tom@hbsslaw.com
GREGORY T. ARNOLD (*pro hac vice*)
grega@hbsslaw.com
ABBYE R. KLAMANN OGNIBENE (SBN 311112)
abbyeo@hbsslaw.com
55 Cambridge Parkway, Suite 301
Cambridge, MA 02142
Telephone: (617) 482-3700
Facsimile: (617) 482-3003

Interim Co-Lead Counsel for End-Payor Plaintiffs

RADICE LAW FIRM, P.C.
JOHN RADICE (*pro hac vice*)
jradice@radicelawfirm.com
DAN RUBENSTEIN (*pro hac vice*)
drubenstein@radicelawfirm.com
475 Wall Street
Princeton, NJ 08540
Telephone: (646) 245-8502
Facsimile: (609) 385-0745

MILLER SHAH LLP
JAYNE A. GOLDSTEIN (*pro hac vice*)
jagoldstein@millershah.com
1625 North Commerce Parkway, Suite 320
Fort Lauderdale, FL 33326
Telephone: (954) 515-0123
Facsimile: (866) 300-7367

MILLER SHAH LLP
NATALIE FINKELMAN BENNETT (*pro hac vice*)
nfinkelman@millershah.com
1845 Walnut Street, Suite 806
Philadelphia, PA 19103
Telephone: (610) 891-9880
Facsimile: (866) 300-7367

SPERLING & SLATER, P.C.
PAUL E. SLATER (*pro hac vice*)
pes@sperling-law.com
JOHN P. BJORK (*pro hac vice*)
jbjork@sperling-law.com
EAMON P. KELLY (*pro hac vice*)
ekelly@sperling-law.com
ALBERTO RODRIGUEZ (*pro hac vice*)
arodriguez@sperling-law.com

DAVID P. GERMAINE (*pro hac vice*)
dgermaine@sperling-law.com
55 West Monroe, Suite 3200
Chicago, IL 60603
Telephone: (312) 641-3200
Facsimile: (312) 641-6492

LOCKRIDGE GRINDAL NAUEN PLLP
HEIDI M. SILTON
hmsilton@locklaw.com
KAREN H. RIEBEL (*pro hac vice*)
khriebel@locklaw.com
JESSICA N. SERVAIS (*pro hac vice*)
jnservais@locklaw.com
100 Washington Ave. S., Suite 2200
Minneapolis, MN 55401
Telephone: (612) 339-6900
Facsimile: (612) 339-0981

PRITZKER LEVINE LLP
ELIZABETH C. PRITZKER (SBN 146267)
ecp@pritzkerlevine.com
JONATHAN K. LEVINE (SBN 220289)
jkl@pritzkerlevine.com
BETHANY CARACUZZO (SBN 190687)
bc@pritzkerlevine.com
180 Grand Avenue, Suite 1390
Oakland, CA 94612
Telephone: (415) 692-0772
Facsimile: (415) 366-6110

GUSTAFSON GLUEK PLLC
DANIEL C. HEDLUND (*pro hac vice* pending)
dhedlund@gustafsongluek.com
MICHELLE J. LOOBY (*pro hac vice* pending)
mlooby@gustafsongluek.com
120 South 6th Street, Suite 2600
Minneapolis, MN 55402
Telephone: (612) 333-8844
Facsimile: (612) 339-6622

GLANCY PRONGAY & MURRAY
KEVIN F. RUF (SBN 136901)
kruf@glancylaw.com
LIONEL Z. GLANCY (SBN 134180)
lglancy@glancylaw.com
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: (310) 201-9150
Facsimile: (310) 201-9160

GLANCY PRONGAY & MURRAY
LEE ALBERT (*pro hac vice* pending)
lalbert@glancylaw.com
BRIAN P. MURRAY (*pro hac vice* pending)
bmurray@glancylaw.com

GREGORY B. LINKH (*pro hac vice* pending)
glinkh@glancylaw.com
BRIAN D. BROOKS (*pro hac vice*)
bbrooks@glancylaw.com
230 Park Avenue, Suite 530
New York, NY 10169
Telephone: (212) 682-5340
Facsimile: (212) 884-0988

NUSSBAUM LAW GROUP, P.C.
LINDA P. NUSSBAUM (*pro hac vice*)
lnussbaum@nussbaumpc.com
BART D. COHEN (*pro hac vice* pending)
bcohen@nussbaumpc.com
1211 Avenue of the Americas, 40th Floor
New York, NY 10036
Telephone: (917) 438-9189

SPECTOR ROSEMAN & KODROFF P.C.
EUGENE SPECTOR (*pro hac vice* pending)
espector@srkattorneys.com
JEFFREY L. KODROFF (*pro hac vice*)
jkodroff@srkattorneys.com
WILLIAM CALDES (*pro hac vice* pending)
bcaldes@srkattorneys.com
JEFFREY SPECTOR (*pro hac vice* pending)
jspector@srkattorneys.com
Diana J. Zinser (*pro hac vice*)
dzinser@srkattorneys.com
2001 Market Street, Suite 3420
Philadelphia, Pennsylvania 19103
Telephone: (215) 496-0300
Facsimile: (215) 496-6611

Counsel for End-Payor Plaintiffs

FILER'S ATTESTATION

Pursuant to Local Rule 5-1(i)(3) of the Northern District of California, regarding signatures, I, Steve D. Shadowen, attest that concurrence in the filing of this document has been obtained.

Dated: November 18, 2021 */s/ Steve D. Shadowen*

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2021 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.

/s/ Steve D. Shadowen
STEVE D. SHADOWEN