UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CYNTHIA RUSSO, LISA BULLARD, RICARDO GONZALES, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 38 HEALTH AND WELFARE FUND, INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 295-295C WELFARE FUND, AND STEAMFITTERS FUND LOCAL 439, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. WALGREEN CO., Defendant.	Civil No. 17-cv-2246 Judge Edmond E. Chang

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT AND AUTHORIZATION TO DISSEMINATE NOTICE OF SETTLEMENT

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Plaintiffs Cynthia Russo, Lisa Bullard, Richard Gonzales (the "Individual Plaintiffs"), International Brotherhood of Electrical Workers Local 38 Health and Welfare Fund, International Union of Operating Engineers Local 295-295c Welfare Fund, and Steamfitters Fund Local 439 (the "Fund Plaintiffs," and with the Individual Plaintiffs, "Plaintiffs") respectfully submit this memorandum of law in support of their motion for preliminary approval.[1]

I. PRELIMINARY STATEMENT

After seven years of highly contested litigation, Plaintiffs have reached an agreement with Defendant Walgreen Co. ("Walgreens") to resolve all claims asserted in the Action in exchange for $100 million in cash and termination of the challenged Prescription Savings Club ("PSC") program. At this time, Plaintiffs seek the Court's preliminary approval of the Settlement under Federal Rules of Civil Procedure ("Rule") 23(e)(1) so that notice of the Settlement can be provided to the Settlement Class and a hearing on final approval ("Fairness Hearing") can be scheduled.

The proposed Settlement is an excellent result for the Settlement Class. The Settlement is the product of extensive arm's-length negotiations, including a formal mediation session and numerous follow-up negotiations, with experienced mediator Fouad Kurdi of Resolutions LLC. In agreeing to settle, Plaintiffs and Class Counsel were aware of the strengths and weaknesses of Plaintiffs' claims and made a well-informed evaluation of the risks of continued litigation of this complex case against the benefits of settlement at this time. In the absence of settlement, Plaintiffs faced the risk that the Court would rule adversely on Plaintiffs' pending motion for class certification, or later rule against Plaintiffs at the summary judgment stage, or that a trial of the

[1] All capitalized terms not defined herein have the meanings ascribed to them in the Stipulation of Class Action Settlement dated October 31, 2024 ("Stipulation" or "Stip.") which is attached as Exhibit 1 to the Declaration of Joseph P. Guglielmo in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Proposed Settlement and Authorization to Disseminate Notice of Settlement ("Guglielmo Decl.") filed concurrently herewith.

Action, and the likely appeals that would follow, could have precluded ***any*** recovery for the Settlement Class, let alone a recovery greater than the Settlement Amount.

At the Fairness Hearing, the Court will have before it more extensive submissions in support of the Settlement, and will be asked to determine whether, in accordance with Rule 23(e)(2), the Settlement is fair, reasonable, and adequate. Entry of the Preliminary Approval Order will begin this process by, *inter alia*: (1) granting preliminary approval of the Settlement Agreement; (2) provisionally certifying a Settlement Class; (3) preliminarily appointing Class Counsel and Class Representatives; (4) appointing a Settlement Administrator and Escrow Agent; (5) approving the form and manner of Notice to the Settlement Class; (6) preliminarily approving the Plan of Allocation and Distribution; and (7) scheduling a Fairness Hearing, at which the Court will consider final approval of the Settlement, certification of the Settlement Class, the appointment of Class Counsel, and the Plan of Allocation and Distribution, and Class Counsel's motion for Attorneys' Fees and Expenses and Service Awards. *See* Guglielmo Decl. Ex. B Proposed Order Granting Preliminary Approval. *See also, id.*, ¶30, Appendix A (setting forth proposed deadlines and schedule).[2]

II. FACTUAL BACKGROUND

A. Overview of the Action

Plaintiffs filed their initial class action complaint on March 23, 2017. ECF No. 1. Plaintiffs' central allegation is that Defendant improperly inflated its usual and customary ("U&C") prices by not considering the prices it charged through its PSC, resulting in insured customers and third-party payors ("TPPs") paying more for prescription drugs. An Amended

[2] As set forth in Proposed Order Granting Preliminary Approval, Plaintiffs respectfully request that the Fairness Hearing be scheduled for no sooner than 14 days after the filing of Final Approval Brief, Updated Fee Brief, and Response to Objections Deadline or at the Court's earliest convenience thereafter.

Complaint was filed on June 22, 2017. ECF No. 46. On October 17, 2017, IUOE filed its own complaint. *International Union of Operating Engineers Local 295-295C Welfare Fund v. Walgreen Co.*, Case No. 17-cv-07515 (N.D. Ill.), ECF No. 1. On March 9, 2018, the Court denied Walgreens' Motion to Dismiss. ECF No. 91. On April 26, 2018, the Court appointed Scott+Scott Attorneys at Law LLP and Robbins Geller Rudman & Dowd LLP as Plaintiffs' Interim Co-Lead Class Counsel. *See* ECF No. 95 (consolidating actions); Apr. 26, 2018 Status Hearing Tr. at 7:1-4. Plaintiffs filed a Second Amended Complaint on May 1, 2018, ECF No. 96, with Walgreens filing an Answer on June 13, 2018. ECF No. 111. Plaintiffs filed a Third Amended Complaint on June 3, 2020. ECF No. 269. Following additional briefing, on June 16, 2021, Plaintiffs filed a Fourth Amended Complaint, ECF No. 477 ("4thAC"), with Walgreens filing an Answer on July 15, 2021. ECF No. 485; *see also* Guglielmo Decl., ¶3.

During this litigation, the Parties engaged in extensive fact and expert discovery. Plaintiffs issued and Walgreens responded to 46 requests for production, 24 interrogatories, and 99 requests for admission. Walgreens issued and Plaintiffs responded to 54 requests for production, 18 interrogatories, and 90 requests for admission. Plaintiffs issued more than a dozen non-party subpoenas and obtained documents and deposition testimony. All told, Plaintiffs reviewed approximately 80,000 documents totaling over 460,000 pages of party and non-party documents and took or defended 36 party and non-party depositions pursuant to Rule 30(b)(1), Rule 30(b)(6) and Rule 45, including depositions of the parties' seven experts, who issued opening, responsive, and reply reports relating to Plaintiffs' motion for class certification. Each Plaintiff also sat for a full-day deposition and produced thousands of documents, including, for some Plaintiffs, transaction data reflecting their payments for purchases of prescription drugs from Walgreens. Guglielmo Decl., ¶4.

Plaintiffs filed their motion for class certification and expert reports on November 17, 2022, ECF Nos. 552-556; 553-44, 553-45; 556-55, 556-56, with Defendant filing its opposition and expert reports on March 17, 2023. ECF Nos. 586-589; 586-1, 586-2, 586-17, 586-48; 588-1. 588-2, 588-24, 588-61.[3] Class certification briefing concluded following the filing of Plaintiffs' reply papers and Defendant's sur-reply. ECF Nos. 602-603, 608-609, 645-646. The Parties completed all briefing related to their respective Rule 702 motions on December 12, 2023. ECF Nos. 580-81, 583-84, 599-600, 604-607, 610-613, 621, 623-25, 627-628, 634, 636-638, 640-641, 648-650, 652-659, 661, 663; *see also* Guglielmo Decl., ¶5.

B. Settlement Negotiations and Terms of the Proposed Settlement

In approximately December 2023, while Plaintiffs' class certification motion was pending, the Parties began discussions regarding the possibility of settling the Action. Given that the factual record was substantially complete, the Parties believed that they were fully informed as to the potential strengths and weaknesses of their claims and defenses as well as the risks associated with class certification. Thereafter, the parties retained Fouad Kurdi of Resolutions LLC as mediator. The settlement negotiations occurred at arm's length and were hard fought at all times. In advance of mediation, the Parties exchanged detailed mediation submissions, which included extensive evidence developed through fact discovery. The Parties also participated in numerous pre-mediation video and telephonic conferences with both Mr. Kurdi and on their own. The Parties attended an in-person mediation on June 6, 2024, and engaged in additional negotiations thereafter, ultimately agreeing to settle the Action in exchange for a non-reversionary cash payment of $100 million for the benefit of the Settlement Class, Walgreens' agreement to

[3] Walgreens also served on Plaintiffs at that time, but did not file on the docket until later, one additional expert report. ECF No. 624-1. Walgreens also served three amended expert reports on Plaintiffs on April 25, 2023, April, 27, 2023, and May 18, 2023, only one of which was filed on the docket. ECF No. 627-1.

terminate the PSC program, and other terms as further described below. The Parties memorialized their agreement in a Term Sheet executed on June 6, 2024. Guglielmo Decl., ¶¶6-7.

Thereafter, the Parties further negotiated the specific terms of their agreement and ultimately executed the Settlement Agreement dated October 31, 2024. Guglielmo Decl., ¶8. The Settlement Agreement provides that Defendants will pay or cause to be paid $100 million in cash into an interest-bearing escrow account. This is not a claims-made settlement; the Settlement Class will receive the full Settlement Amount, plus interest, after deduction of Court-approved attorneys' fees, expenses, and costs ("Net Settlement Fund"), without regard to the number of Claims submitted. Stip., ¶1.20. After the Settlement becomes Final, the Net Settlement Fund will be distributed among Settlement Class Members who submit valid Claims in accordance with a Court-approved Plan of Allocation and Distribution. Stip., ¶1.27.

Further, for settlement purposes only, the Parties agreed to certification of a Settlement Class consisting of "[a]ll individuals or entities in the United States and its territories who paid, in whole or in part, at any point in time during the Settlement Class Period [January 1, 2007 through the date of preliminary approval of the Settlement or December 31, 2024, whichever comes first], for one or more prescription drugs from Walgreens, where prescription insurance benefits were used in filling the prescription(s)." Stip., ¶1.37. As discussed below, Plaintiffs submit that the proposed Settlement Class satisfies all requirements of Rules 23(a) and 23(b)(3), and that the Court should certify the Settlement Class for purposes of effectuating the Settlement.

If the Court grants final approval, Settlement Class Members will release the "Plaintiffs' Released Claims" in exchange for the right to participate in the distribution of the Net Settlement Fund. Stip., ¶1.25. The scope of this release is reasonable because it is limited to claims "arising

out of or related to the conduct challenged in the Action, including any and all claims relating to the reporting of U&C prices for pharmaceuticals . . . ." Stip., ¶1.25.

III. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL

A. Standards Governing Approval of Class Action Settlements

Settlement is a strongly favored method for resolving class action litigation. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."); *Goldsmith v. Tech. Sols. Co.*, No. 92 C 4374,1995 WL 17009594, at *1 (N.D. Ill. Oct. 10, 1995) ("'[T]he federal courts look with great favor upon the voluntary resolution of litigation through settlement. In the class action context in particular, there is an overriding public interest in favor of settlement.'").[4] Rule 23(e) requires judicial approval of class action settlements in a two-step process. *Reynolds, v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002). *First*, under Rule 23(e)(1), the court performs a preliminary review of the terms of the proposed settlement to determine whether it is sufficient to warrant notice to the class and a hearing. *Second*, under Rule 23(e)(2), after notice has been provided and a hearing held, the court determines whether to grant final approval of the settlement. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) §13.14 (2020).

A court should grant preliminary approval and authorize notice of a settlement to the class upon a finding that it "will likely be able" to: (i) finally approve the settlement under Rule 23(e)(2) and (ii) certify the class for settlement purposes. *See* Fed. R. Civ. P. 23(e)(1)(B). This standard codifies prior case law holding that preliminary approval is warranted where "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or

[4] Unless otherwise indicated, citations are omitted and emphasis is added.

segments of the class, and falls within the range of possible [judicial] approval." 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §13:13 (5th ed. 2021) (alteration in original).[5]

> In considering whether final approval is likely, courts consider whether:
>
> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).[6] At the preliminary approval stage, however, the purpose of the inquiry is only "'to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing, not to conduct a full-fledged inquiry into whether the settlement meets Rule 23(e)'s standards.'" *In re TikTok, Inc., Customer Privacy Litig.*, 565 F. Supp. 3d 1076, 1083 (N.D. Ill. 2021), citing *Am. Int'l Grp. v. ACE INA Holdings, Inc.*, No. 07 C 2898, 2011 WL 3290302 at *6 (N.D. Ill. July 26, 2011), at *6. Because these factors are satisfied here, preliminary approval of the Settlement is warranted. Fed. R. Civ. P. 23(e)(1)(B).

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[5] *See also Armstrong v. Board of School Directors of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980) (the question at the preliminary approval stage is "whether the proposed settlement is 'within the range of possible approval'"); *Kaufman v. Am. Express Travel Related Servs. Co., Inc.*, 264 F.R.D. 438, 447 (N.D. Ill. 2009) (a relevant consideration is "whether [the settlement] 'has no obvious deficiencies [and] does not improperly grant preferential treatment to class representatives or segments of the class'") (second alteration in original).

[6] Final approval will involve an analysis of the Rule 23(e)(2) factors and, to the extent they do not overlap, the Seventh Circuit's approval factors: (i) the strength of the case, balanced against the settlement amount; (ii) the defendant's ability to pay; (iii) the complexity, length, and expense of further litigation; (iv) the amount of opposition to the settlement; (v) the presence of collusion in reaching a settlement; (vi) the reaction of class members to the settlement; (vii) the opinion of competent counsel; and (viii) the stage of the proceedings. *Armstrong*, 616 F.2d at 314.

B. The Court Will Likely Approve the Proposed Settlement

1. Procedural Aspects of the Settlement Satisfy Rule 23(e)(2)

Rule 23(e)(2)'s first two factors "look[] to the conduct of the litigation and of the negotiations leading up to the proposed settlement." Rule 23(e)(2) advisory committee's notes to 2018 amendment. Courts have found that a settlement arrived at after arm's-length negotiations by fully informed, experienced, and competent counsel may be properly presumed to be fair and adequate. *See In re Mexico Money Transfer Litig. (W. Union & Valuta)*, 164 F. Supp. 2d 1002, 1020 (N.D. Ill. 2000), *aff'd sub nom. In re Mexico Money Transfer Litig.*, 267 F.3d 743 (7th Cir. 2001).

Here, the Settlement embodies all the hallmarks of a procedurally fair resolution under Rule 23(e)(2). *First*, Class Counsel's settlement posture was informed by the extensive factual and legal record, developed over years-long litigation efforts that preceded the Settlement. Guglielmo Decl., ¶¶3-5. Through the mediation process, Class Counsel comprehensively vetted the factual record, analyzed Defendants' arguments and contrary facts, and thoroughly considered the costs and risks of ongoing litigation. Class Counsel – who have extensive experience litigating consumer and other complex class actions – were well informed of the strengths and weaknesses of the claims and defenses in this Action and conducted the settlement negotiations seeking to achieve the best possible result for the Settlement Class in light of the risks, costs, and delays of continued litigation.[7] *Id.*, ¶6.

Second, the Parties' settlement negotiations were at arm's length (*see id.*, ¶¶6-7), and the mediator's close involvement in the settlement process further supports that the Settlement is fair

[7] Courts give considerable weight to the opinion of experienced and informed counsel. *See In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liab. Litig.*, 2016 WL 772785, at *12 (N.D. Ill. Feb. 29, 2016); *Armstrong*, 616 F.2d at 325 (in assessing a class settlement, "the court is entitled to rely heavily on the opinion of competent counsel").

and that the Parties achieved it free of collusion. *See McCue v. MB Fin., Inc.*, No. 1:15–cv–00988, 2015 WL 1020348, at *1-2 (N.D. Ill. Mar. 6, 2015) (preliminarily approving settlement and finding it to be "result of extensive, arms'-length negotiations by [well-versed] counsel" with the assistance of an experienced mediator, "reinforc[ing] the non-collusive nature of the settlement").

2. The Terms of the Proposed Settlement Are Adequate

a. The Settlement Provides Substantial Relief, Especially in Light of the Costs, Risks, and Delay of Further Litigation

A key factor in assessing whether to approve a class action settlement is a plaintiff's likelihood of success on the merits, balanced against the relief offered in settlement. *See* Fed. R. Civ. P. 23(e)(2)(C). "Twenty years ago, in *Reynolds v. Beneficial National Bank*, the Seventh Circuit advised that, in making this inquiry, district courts should 'quantify the net expected value of continued litigation' by 'estimating the range of possible outcomes and ascribing a probability to each point on the range.'" *In re TikTok, Inc., Consumer Privacy Litig.*, 617 F. Supp. 3d 904, 933 (N.D. Ill. 2022) (quoting *Reynolds* 288 F.3d at 284–85). "More recently," however, "the Seventh Circuit has endorsed a less formulaic scrutiny of class action settlements when indicia of trustworthiness—third-party mediation, extensive confirmatory discovery, and hard-fought, arm's-length negotiation—work against any suggestion of impropriety." *Id.* at 934.[8]

[8] *See Kaufman v. American Express Travel Related Servs.*, 877 F.3d 276, 285 (7th Cir. 2017) (stating that "potential outcomes need not always be quantified, particularly where there are other reliable indications that the settlement reasonably reflects the relative merits of the case"); *Wong v. Accretive Health*, 773 F.3d 859, 864 (7th Cir. 2014) (holding "it was not an abuse of discretion to approve the settlement without" attempting "'to quantify the net expected value of continued litigation'"); *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. 202, 218–19 (N.D. Ill. 2019) (approving class action settlement without quantifying net expected value where parties had reached settlement terms after prolonged, arms-length mediation sessions and extensive discovery), *aff'd sub nom. Walker v. Nat'l Collegiate Athletic Ass'n*, No. 19-2638, 2019 WL 8058082 (7th Cir. Oct. 25, 2019).

Here, the Parties reached the Settlement only after the completion of fact discovery, full briefing on class certification, and challenges to the admissibility of expert reports under Rule 702. *See* Guglielmo Decl., ¶¶4-8. Moreover, the Settlement was reached after more than six months of negotiations and only after numerous conference calls and zoom meetings, which included in-person mediation. *Id*., ¶6-7. The Settlement was negotiated through arms'-length negotiations that were conducted with the oversight and assistance of a nationally renowned and experienced mediator. *Id*. There is a complete absence of any suggestion of impropriety with respect to this Settlement.

Had the Action continued, Plaintiffs faced significant and ongoing risks to recovery. The core of Plaintiffs' claims concerned allegations that Walgreens improperly inflated the U&C prices charged to insured customers and third-party payors ("TPPs") for prescription drugs by failing to report its PSC prices when determining the U&C prices it charged in connection with insured transactions for generic prescription drugs. One of Walgreens' primary defenses is that PSC prices are not "cash prices" and thus are excluded when reporting or otherwise determining an accurate U&C price. Further, Walgreens argued that its contracts with prescription benefit managers ("PBMs"), the companies that administer prescription drug benefits on behalf of TPPs, as well as PBM contracts with putative TPP class members, do not require Walgreens to report PSC prices as its U&C prices. Guglielmo Decl., ¶9.

While Plaintiffs largely prevailed on Walgreen's motion to dismiss, there is no guarantee that Plaintiffs would prevail at class certification, summary judgment, or trial in the face of more rigorous burdens of proof. *See Washington v. CVS Pharmacy, Inc.*, No. 21-16162, 2022 WL 17430289, at *2 (9th Cir. Dec. 6, 2022) (affirming defense verdict on similar claims by insured drug buyers that pharmacy chain over charged them for generic drugs by failing to report

prescription drug program prices as U&C prices). Indeed, the Court reserved decision on the most significant factual issues until after the completion of fact discovery. See, *e.g.*, Memorandum Opinion and Order, ECF No. 91, at 11.; *see also* Guglielmo Decl., ¶10.

Not surprisingly, Walgreens pressed forward with this line of argument in opposition to class certification, contending, among other things, that: (i) the definition of U&C varied across more than a dozen contracts with PBMs, and (2) a class member specific, contract-by-contract analysis would be required to determine liability. Further, Walgreens argued that it had the freedom to contract with PBMs and did contract with them to exclude PSC prices from its reported U&C prices. Plaintiffs responded that Walgreens' contracts with PBMs could not shield it from liability as Plaintiffs claimed that Walgreens allegedly deceived individuals and TPPs in failing to report lower PSC prices as its U&C prices, and that insured individuals and TPPs reasonably expected to pay no more than cash customers, making Walgreens' conduct fraudulent. Plaintiffs risk obtaining no recovery at all if they continue to litigate and lose on this issue. Thus, the Settlement provides a substantial recovery for Settlement Class Members in light of the significant risks of continued litigation. Guglielmo Decl., ¶11.

b. The Settlement Does Not Unjustly Favor Any Class Member

The Court must also ultimately assess the Settlement's effectiveness in equitably distributing relief to the Settlement Class. Fed. R. Civ. P. 23(e)(2)(C)(ii) & (e)(2)(D). The proposed Plan of Allocation ("Plan") set forth as Exhibit A to the Stipulation provides a fair and effective means of distributing the Net Settlement Fund.

In summary, to receive a distribution under the Plan of Allocation and Distribution, Settlement Class members must submit a timely and valid Claim Form. Claims must be supported by Claim Documentation, as required by the Settlement Administrator. For example, large value

claims and claims submitted from individuals or entities that do not receive direct notice of the Settlement will be subject to specific documentation requirements to prevent potential fraudulent claims. In addition, claims subject to the Settlement Administrator's audit program will be subject to additional documentation requirements to ensure the integrity of the claims process. Claims will be valued based on the estimated or actual dollars spent to purchase or pay for some or all of the purchase price of eligible prescription drugs from Walgreens during the Class Period. The Settlement Administrator will calculate a Distribution Amount for each Recognized Claim pursuant to the Plan of Allocation and Distribution. These amounts are not intended to be the estimate of the amounts that will be distributed; rather, the Distribution Amount is a means to calculate the value of Authorized Claimants' Recognized Claims relative to one another for purposes allocating of the Net Settlement Fund *pro rata* among Authorized Claimants. *See* Ex. A, Plan of Allocation and Distribution. *See also,* Guglielmo Dec., ¶12.

c. The Anticipated Request for Attorneys' Fee Is Reasonable

The Settlement notices provide that Class Counsel, on behalf of Plaintiffs' Counsel, will apply for attorneys' fees in the amount of no more than 30% of the Settlement Fund, plus payment of litigation costs and expenses. Before the final approval hearing, Class Counsel will file a detailed motion in support of their fee request, and Settlement Class Members and Walgreens will have an opportunity to weigh in on this request prior to the Settlement Hearing.

d. Plaintiffs Have Identified All Agreements Made in Connection with the Settlement

In addition to the Term Sheet and Stipulation, the Parties have entered into a standard, confidential Side Agreement that gives Walgreens the option to terminate the Settlement in the event that requests for exclusion from the Settlement Class exceed certain agreed-upon conditions. Stip., ¶7.3; see also Guglielmo Decl., ¶8. This type of agreement is standard in class action

settlements and has no negative impact on the fairness of the Settlement. *See, e.g., Hefter v. Wells Fargo & Co.*, 2018 WL 4207245, at *11 (N.D. Cal. Sept. 4, 2018) ("The existence of a termination option triggered by the number of class members who opt out of the Settlement does not by itself render the Settlement unfair.").[9]

C. The Settlement Class Satisfies the Standards for Class Certification[10]

The second part of the approval process is to determine whether the Action may be maintained as a class action for settlement purposes under Rule 23. *See* Fed. R. Civ. P. 23(e)(1)(B)(ii). At the preliminary approval stage, the Court should determine whether it "will likely be able" to certify the proposed Settlement Class at final approval. Fed. R. Civ. P. 23(e)(1)(B). While the Parties have vigorously litigated the issue of class certification, an issue that was pending before the Court when the Parties entered into settlement negotiations, Plaintiffs believe the proposed Settlement Class satisfies both Rules 23(a) and 23(b).

1. The Settlement Class Satisfies the Requirements of Rule 23(a)

Rule 23(a) requires for class certification that:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical . . .; and (4) the representative parties will fairly and adequately protect the interests of the class.[11]

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[9] The Parties' agreement in this regard will be provided *in camera* to the Court upon request.

[10] Walgreens does not oppose certification of a Settlement Class for settlement purposes only. However, should the Settlement not be finally approved or be terminated for any reason, Walgreens has reserved all rights to argue that certification of a litigation class would not have been appropriate for the reasons set forth in its Opposition and Sur-reply to Plaintiffs' Motion for Class Certification and supporting expert reports. ECF Nos. 587, 602, 645. *See also* Stip., ¶¶7.3, 7.4.

[11] The Rule 23(a) requirements are more fully detailed in the memorandum supporting Plaintiffs' Motion for Class Certification (ECF No. 346-1), which was pending at the time of settlement, and Plaintiffs' memorandum and exhibits are incorporated herein by reference.

Courts have held that similar claims brought by insured customers and TPPs challenging similar conduct were appropriate for class certification. *Corcoran v. CVS Health Corp.*, 779 F. App'x 431 (9th Cir. 2019); *Sheet Metal Workers Loc. No. 20 Welfare & Benefit* 3 *Fund v. CVS Pharmacy, Inc.*, 540 F. Supp. 3d 182 (D.R.I. 2021) (certifying claims brought by TPPs). The same result should issue here with respect to the Settlement Class.

First, Rule 23(a)(1)'s numerosity requirement is satisfied where "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Numerosity is typically satisfied where there are more than 40 class members. *Kramer v. Am. Bank & Tr. Co., N.A.*, No. 11 C 8758, 2017 WL 1196965, at *4 (N.D. Ill. Mar. 31, 2017); *see also Anderson v. Weinert Enters., Inc.*, 986 F.3d 773, 777 (7th Cir. 2021). Here, there are millions of individual-members and thousands of TPP-members of the Settlement Class. A class that includes "hundreds if not thousands of TPPs – is too numerous to render joinder practical." *Sheet Metal Workers Loc. No. 20 Welfare & Benefit Fund v. CVS Pharmacy, Inc.*, 540 F. Supp. 3d 182, 198 (D.R.I. 2021). Accordingly, the numerosity requirement is met here.

Second, Rule 23(a)(2)'s commonality requirement is satisfied where "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Common questions "need not address every aspect of the plaintiffs' claims," but they "must 'drive the resolution of the litigation.'" *Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 553 (7th Cir. 2016). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014); *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998); *Kaufman* , 264 F.R.D. at 442 (characterizing Rule 23(a)(2)'s commonality requirement as a "'low . . . hurdle'"). Here, the claims present common questions of law and fact, including whether Walgreens should have

reported or otherwise included its PSC prices when determining the U&C price to report. 4thAC, ¶¶95-96 (identifying additional common questions). As the Seventh Circuit has repeatedly recognized, the question of whether "statements [are] false or misleading" is a '"common contention'" that is "'capable of classwide resolution'" because the "'determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 673 (7th Cir. 2015); *Suchanek*, 764 F.3d at 756-57 (holding that question of whether defendant's misrepresentations were "likely to deceive a reasonable consumer is common" to the class). Thus, commonality is satisfied. *Sheet Metal*, 540 F. Supp. 3d at 199 (certifying a TPP class and holding that "a common question exists regarding whether Defendants engaged in a scheme to defraud TPPs by failing to report HSP prices as U&C prices").

Third, Rule 23(a)(3)'s typicality requirement is satisfied if a plaintiff's claims arise from the same "event or practice or course of conduct that gives rise to the claims of other class members and . . . are based on the same legal theory." *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998). Here, Plaintiffs' claims are typical of those of other Settlement Class Members because the claims all arise from Walgreens' unitary course of conduct in not including its PSC prices in reporting U&C prices. Therefore, typicality is established.

Fourth, Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." This determination is two-pronged: "'the adequacy of the named plaintiff's counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interest' of the class members." *Retired Chi. Police Ass'n v. City of Chi.*, 7 F.3d 584, 598 (7th Cir. 1993). Here, Plaintiffs have represented and will continue to represent the interests of the Settlement Class fairly and adequately, and there is no antagonism or conflict of

interest between Plaintiffs and the other Settlement Class Members. Class Counsel have substantial expertise in the litigation of consumer class actions and have competently prosecuted this Action. *See* ECF No. 86-1, Exs. A and B, ECF Nos. 556-59 and 556-60. In addition, as a measure to ensure adequate representation of the class, Class Counsel have identified Joseph S. Tusa, counsel for Ms. Russo and Ms. Bullard, to act as separate allocation counsel for individual class members who, along with Class Counsel and input from both economic experts and consultants, have reviewed and approved the proposed Plan of Allocation and Distribution. *See* Guglielmo Decl., ¶12; *see also* Plan of Allocation and Distribution, Stip., Ex. A. The adequacy requirement is satisfied.

2. The Settlement Class Satisfies Rule 23(b)(3)

The Settlement Class satisfies Rule 23(b)(3)'s requirement as this Court is likely to conclude that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3); *see also, TikTok Inc.,* 565 F. Supp. 3d at 1086.

The predominance requirement of Rule 23(b)(3) is satisfied because common questions comprise a substantial aspect of the case and can be resolved for all Settlement Class Members in a single adjudication. Each claim arises from the common, classwide contention that Walgreens should have reported or otherwise included its PSC prices when determining the U&C price to report. Indeed, courts considering challenges to other pharmacies' U&C reporting practices determined that common questions predominated over individualized ones. *See, e.g., Sheet Metal,* 540 F. Supp. 3d at 206 ("[T]he common issues to be tested by the proposed classes – namely, whether CVS fraudulently failed to include its HSP prices in its U&C pricing – will provide common answers.").

A class action is the superior method for the fair and efficient adjudication of these claims. Plaintiffs' claims are shared by millions of other Settlement Class Members nationwide. The resolution of all claims of all Settlement Class Members in a single proceeding promotes judicial efficiency and avoids inconsistent decisions. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (noting "'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23'") (alteration in original). Further, it is unlikely that any Class Member would be willing or able to pursue relief on an individual basis. *Suchanek*, 764 F.3d at 760 (holding that superiority demonstrated "because no rational individual plaintiff would be willing to bear the costs of this lawsuit"); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

Thus, Rule 23(b)(3)'s predominance and superiority requirements are satisfied.

IV. NOTICE TO THE SETTLEMENT CLASS SHOULD BE APPROVED

Rule 23(c)(2)(B) requires the court to direct to a class certified under Rule 23(b)(3) "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Similarly, Rule 23(e)(1)(B) requires the court to "direct notice in a reasonable manner to all class members who would be bound" by a proposed settlement. Moreover, the notice must contain specific information in plain, easily understood language, including the nature of the action and the rights of class members. Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii); *see also In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 352 (N.D. Ill. 2010).

Consistent with Rules 23(c)(2)(B) and 23(e)(1)(B), collectively, the proposed Summary Notices and Long Form Notice, attached to the Stipulation as Exhibits C1, C2 and D, objectively and neutrally apprise recipients of (among other disclosures): (i) the nature of the Action; (ii) the definition of the Settlement Class; (iii) the claims and issues involved; (iv) that a Settlement Class

Member may enter an appearance through an attorney if desired; (v) that the Court will exclude from the Settlement Class any Settlement Class Member who requests exclusion (and the procedures and deadlines for doing so); and (vi) the binding effect of a class judgment on Settlement Class Members under Rule 23(c)(3)(B).

As explained in the Declaration of Eric J. Miller, filed herewith ("Miller Decl."), A.B. Data, the proposed Settlement Administrator[12] has designed a proposed Notice Program that provides individual direct email and mail notice to all reasonably identifiable Settlement Class Members, combined with a state-of-the-art media campaign comprised of internet, social media, and paid search advertising. Miller Decl., ¶¶14-21, 29-30; *see* Fed. R. Civ. P. 23(e)(1) (calling for notice to be provided in a "reasonable manner to all class members who would be bound by the proposal").

As to individual direct notice, Walgreens will provide the Settlement Administrator with those email addresses it has that are reasonably accessible for individual members of the Settlement Class which will be used to provide direct email notice. Miller Decl., ¶12. The Settlement Administrator also maintains a database of approximately 42,000 entities that include insurance companies, health maintenance organizations, self-insured entities, large corporations, labor unions, and employee benefit and pension plans and certain record keepers such as pharmacy benefits managers and third-party administrators which will be used to mail notice to third-party payor members of the Settlement Class. Miller Decl., ¶¶22-24. The Settlement Administrator will email[13] direct notice to all Settlement Class Members whose contact information is available from

[12] Plaintiffs also request the Court's approval to retain A.B. Data as the Settlement Administrator. Stip., ¶1.3. A.B. Data was selected following a formal bidding process and is a nationally recognized notice and claims administration firm that has successfully administered numerous class action settlements.

[13] Courts permit notice by email. *See, e.g.*, *TikTok, Inc.*, 617 F. Supp. 3d at 920; *Yates v. Checkers Drive-In Restaurants, Inc.*, No. 17 C 9219, 2020 WL 6447196, at *5 (N.D. Ill. Nov. 3, 2020).

Walgreens. Because the Settlement Administrator maintains information regarding thousands of third-party payors, those Settlement Class Members will receive notice via U.S. mail and/or email. *See* Fed. R. Civ. P. 23(c)(2)(B) (permitting notice by "United States mail, electronic means, or other appropriate means").

As set forth in the Miller Declaration, the Settlement Administrator will provide direct mail or email notice to Settlement Class Members. Miller Decl., ¶¶12-13. For email notice, the Settlement Administrator will utilize best practices to increase deliverability and avoid spam and junk filters and will track the deliverability of mail and email notices sent and provide statistics on the number of undeliverable mail and email notices, opened emails, and click-throughs to the settlement website and attempt to resend any undeliverable mail or email notices. Miller Decl., ¶13. Additionally, the Settlement Administrator will establish a paid media program, digital and social media, and earned media which will attempt to provide notice to Settlement Class Members who do not receive direct notice. Miller Decl., ¶¶14-16, 29-30.

Moreover, the Settlement Administrator has numerous control systems and procedures in place, which it believes meet or exceed relevant industry standards, to securely handle class member data, and utilizes a number of fraud prevention techniques to identify claims filed from suspicious locations, by repeat actors, and/or by internet "bots." Miller Decl., ¶7. A.B. Data accepts responsibility for the security of class member information and claimant data; accurate calculation of claims pursuant to a court-approved plan of allocation, subject to the guidance of counsel; and accurate distribution of funds pursuant to court order. *Id.*

The Class Notice and Summary Notice will also direct Class Members to a dedicated Settlement Website, which will contain the Class Notice and an electronic version of the Claim Form that can be submitted online, the toll-free Settlement telephone number, and copies of the

full Settlement Agreement and other important documents (including the Fourth Amended Complaint, this Motion, all Orders of this Court concerning the Settlement, and Plaintiffs' forthcoming motions for attorneys' fees and service award, and final approval of the Settlement). Miller Decl., ¶¶31-32.

The Notice Program also includes a digital banner and social media advertising campaign, which includes banner and social media ads that will appear on Google Display Network, Facebook, Instagram, and Pinterest to help drive Settlement Class Members who are actively searching for information about the Settlement to the dedicated Settlement Website. Miller Decl., ¶¶18, 33.

The Notice Program outlined above includes direct notice to all reasonably identifiable Settlement Class Members combined with a robust media campaign consisting of state-of-the-art internet advertising, a robust social media campaign, and a paid search campaign. Miller Decl., ¶¶14-20, 29-30. Accordingly, Plaintiffs respectfully request that the proposed Notice Program be approved, together with the Class Notices and Claim Form.

V. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant the Motion for Preliminary Approval of the Settlement Agreement and enter the proposed Preliminary Approval Order.

DATED: November 1, 2024

Respectfully submitted,

/s Joseph P. Guglielmo

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Appendix A

Notice Deadline:		[60 days after entry of this Order]
Objection Deadline:		[120 days after entry of this Order]
Exclusion Deadline:		[120 days after entry of this Order]
Claim Filing Deadline:		[150 days after entry of this Order]
Fee Brief Deadline:		[14 days before Objection Deadline / Exclusion Deadline]
Termination Deadline:		[120 days after Exclusion Deadline]
Settlement Administrator Report Deadline:		[14 days after Termination Deadline]
Deadline to File Settlement Administrator Report		[21 days after Termination Deadline]
Final Approval Brief, Updated Fee Brief, and Response to Objections Deadline:		[21 days after Termination Deadline]
Fairness Hearing		[No sooner than 14 days after the filing of the Final Approval Brief, Updated Fee Brief, and Response to Objections Deadline or at the Court's earliest convenience thereafter]

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically through the Court's Electronic Case Filing System, which will then send a notification of such filing to the registered participants as identified on the Notice of Electronic Filing.

/s/ Joseph P. Guglielmo
Joseph P. Guglielmo