

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

In re ZETIA (EZETIMIBE) ANTITRUST
LITIGATION

MDL No. 2:18-md-2836

THIS DOCUMENT RELATES TO:
All Actions

OPINION AND ORDER

Before the court is the End Payor Plaintiffs' ("EPPs") Motion for Entry of an Order to Approve the Form and Manner of Notice and Appoint a Notice Administrator. (ECF No. 1430). As the class has been certified under Federal Rule of Civil Procedure 23(b)(3), (ECF No. 1316), the EPPs now request that the court approve the proposed form and manner of notice ("Notice Plan") and appoint A.B. Data Ltd. ("A.B. Data") as the notice administrator, EPPs' Mem. Law Supp. Mot. ("EPPs' Mem.") (ECF No. 1431, at 2). Defendants Merck¹ and Glenmark² opposed the motion, ("Defs.' Opp'n") (ECF No. 1439), and the EPPs replied, ("EPPs' Reply") (ECF No. 1445). On February 3, 2022, the court heard oral argument.

¹ "Merck" consists of Merck & Co., Inc.; Merck Sharp & Dohme Corp.; Schering-Plough Corp.; Schering Corp.; and MSP Singapore Co. LLC.

² "Glenmark" consists of Glenmark Pharmaceuticals Limited and Glenmark Pharmaceuticals Inc., USA, the latter incorrectly identified as Glenmark Generics Inc., USA.

The matter was referred to the undersigned United States Magistrate Judge to hear and determine under 28 U.S.C. § 636(b)(1)(A) and Rule 71(a) of the Federal Rules of Civil Procedure.³ Based on the record submitted, I conclude the Notice Plan is the best practicable under the circumstances, and includes individual notice to members "who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). It therefore satisfies the requirements of Rule 23(c)(2)(B) and due process, and the court will GRANT the EPPs' Motion for Entry of an Order to Approve the Form and Manner of Notice and Appoint a Notice Administrator. (ECF No. 1430).

I. BACKGROUND

The district court approved the EPP class in August 2021, In re Zetia (Ezetimibe) Antitrust Litig. (Zetia I), No. 2:18-MD-2836, 2020 WL 5778756, at *29 (E.D. Va. Aug. 14, 2020), R. & R. adopted

³ Magistrate judges may "hear and determine any pretrial matter pending before the court," except they cannot decide motions "to dismiss or to permit maintenance of a class action" 28 U.S.C. § 636(b)(1)(A). I have not found any authority that approval of the form and manner of notice for class actions already certified falls within this enumerated exception. Other courts have decided the mechanics of notice as a non-dispositive matter. See, e.g., Rojas v. Marko Zaninovich, Inc., 2013 U.S. Dist. LEXIS 85366 (E.D. Cal. June 17, 2013) (issuing order on Rule 23(c) notice); cf. Wedel v. Gyro Techs., Inc., No. 2:15-CV-93, 2015 WL 5918216, at *6 (S.D. Tex. Sept. 2, 2015) (observing that magistrate judge would determine "non-dispositive matters relating to the mechanics of the notice" for FLSA conditional certification), adopted sub nom. by Wedel v. Vaughn Energy Servs., LLC, 2015 WL 5920034 (Oct. 9, 2015). Therefore, an order, and not a report and recommendation, is appropriate.

as modified, In re Zetia (Ezetimibe) Antitrust Litig. (Zetia II), 2021 WL 3704727 (Aug. 20, 2021), and the Fourth Circuit denied Defendants' request to appeal, (ECF No. 1364).⁴ Defendants now challenge the EPPs' Notice Plan because it does not utilize the methodology that the EPPs submitted as evidence of ascertainability under Rule 23 in their motion for class certification. Defs.' Opp'n (ECF No. 1439, at 12). Defendants also argue that banner advertisements detailed as one component of the Notice Plan should be amended to clarify that consumers are not class members. Id. at 21.

A. The EPPs' Evidence of Ascertainability on Their Motion to Certify the Class.

On their motion for class certification, the EPPs were required to establish that the class they identified was ascertainable. Zetia II, 2021 WL 3704727, at *3-5. To make this showing, the EPPs argued that class members could be identified reliably "[u]sing the one or more of the layers of purchase data available from pharmacy benefit managers ("PBMs") and pharmacies" EPPs' Mem. Supp. Mot. Class Certification (ECF No. 734, at 24 (sealed)). The EPPs' expert on this PBM-based methodology

⁴ For a detailed review of the facts in this case, see In re Zetia (Ezetimibe) Anti. Litig., No. 2:18-md-2836, 2019 WL 6122017, at *1-3 (E.D. Va. Oct. 15, 2019), R. & R. adopted as modified, 2019 WL 6977405 (E.D. Va. Dec. 20, 2019); In re Zetia (Ezetimibe) Anti. Litig., No. 2:18-md-2836, 2019 WL 1397228, at *1-10 (E.D. Va. Feb. 6, 2019), R. & R. adopted as modified, 400 F. Supp. 3d 418 (E.D. Va. 2019).

was Laura R. Craft, who testified that the EPPs could "efficiently and programmatically" identify class members and apply class exclusions using the PBM data. Craft Decl. ¶ 39 (ECF No. 730-14, at 24). Craft also described her methodology at the motion hearing. Class Certification Hr'g Tr. 85:12-117:8 (ECF No. 931 (sealed)).

In certifying the class, the district court determined that "Craft provided extensive and detailed testimony, which the court finds credible, regarding her ability to obtain relevant PBM data, standardize it, then identify class members and exclude non-members -- all without the type of individualized inquiry that would make any proposed methodology unfeasible." Zetia II, 2021 WL 3704727, at *4. The court also observed that Craft's methodology had been found feasible elsewhere. Id. at *5 (citing In re Loestrin 24 FE Antitrust Litig., 410 F. Supp. 3d 352, 397 (D.R.I. 2019), and distinguishing In re Niaspan Antitrust Litig., No. 13-md-2460, 2020 WL 2933824 (E.D. Pa. June 2, 2020)). The court found on this evidence that the EPPs had established ascertainability using the PBM-based methodology. Id.

Importantly, Craft did not opine on notice questions. Beyond identifying payors included in the class, she offered no opinion on whether the PBM data included current phone numbers or addresses -- physical or email. See Craft Decl. ¶ 1 (ECF No. 730-14, at 4-5) (stating that counsel asked her "to evaluate whether . . . it

is possible to identify the TPPs"); id. ¶ 5 (ECF No. 730-14, at 6) (affirming that PBM data could "identify virtually all TPPs who purchased Zetia and ezetimibe").

B. The EPPs' Notice Plan for Notifying Individual Class Members.

Following the court's certification ruling, the EPPs propose to use a "proprietary and comprehensive A.B. Data Database" ("the List") for notifying individual class members. EPPs' Mem. (ECF No. 1431, at 3). EPP class representatives do not possess the List, and Defendants did not request or obtain it through discovery. See EPPs' Reply (ECF No. 1445, at 7-8) (representing that "Defendants did not endeavor to obtain the [L]ist" or "cite any discovery request or subpoena" that should have produced the List). According to a declaration submitted in support of the Notice Plan, the List is updated annually and contains approximately 42,000 third-party payors ("TPPs"). Young Decl. ¶ 4 (ECF No. 1431-1, at 2); see also Young Decl. Ex. B ("Prop. Notice Plan") (ECF No. 1431-1, at 33). It has been maintained by A.B. Data and includes information the company acquired during several previous appointments as notice administrator in pharmaceutical antitrust claims. Prop. Notice Plan (ECF No. 1431-1, at 33).

C. The Proposed Notices.

The Notice Plan includes several notices, including banner advertisements to be placed on certain websites, Young Decl. Ex. C ("Banner Ad") (ECF No. 1431-1, at 35), long form notices that

will appear on the class action website, Young Decl. Ex. D ("Long Form Notice") (ECF No. 1431-1, at 36-44), short form notices, Young Decl. Ex. E (ECF No. 1431-1, at 45-47), and postcards that will be mailed directly to TPPs on the List, Young Decl. Ex. F (ECF No. 1431-1, at 48-50).

II. LEGAL STANDARD

The Federal Rules require that, for classes certified under Rule 23(b)(3), the court "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). In plain language, the notice must also state the following: (1) the nature of the action; (2) the definition of the class certified; (3) the class claims, issues, or defenses; (4) that a class member may enter an appearance through an attorney if the member so desires; (5) that the court will exclude from the class any member who requests exclusion; (6) the time and manner for requesting exclusion; and (7) the binding effect of a class judgment on members under Rule 23(c)(3). Id.

III. ANALYSIS

Defendants only challenge two aspects of the EPPs' Notice Plan: (1) their failure to use Craft's PBM-Based Methodology for the individual notice component; and (2) the absence of clarifying language regarding consumers on banner advertisements and short-

form notices. Defs.' Opp'n (ECF No. 1439, at 7). Because neither contention requires adjustments to the Notice Plan or renders it deficient under Rule 23(c)(2)(B), I will GRANT the EPPs' Motion and APPROVE the Notice Plan without adjustment. (ECF No. 1430).

A. The EPPs Need Not Implement Craft's PBM-Based Methodology to Send Notice, and the List Satisfies the Rule's Requirements to Use Reasonable Efforts to Send Individual Notice.

Rule 23 requires plaintiffs to provide "sufficient information about the details of the proposed method of providing notice to the class" to facilitate court review. Angell v. City of Oakland, No. 13-cv-00190, 2014 WL 11369765, at *2 (N.D. Cal. Nov. 21, 2014). This includes "specify[ing] what reasonable efforts have been made to obtain potential class members' names and addresses" (i.e., contact information). Brooks v. GAF Materials Corp., No. 8:11-cv-00983, 2013 WL 2109559, at *2 (D.S.C. May 15, 2013). If a class member is identifiable through reasonable efforts, then "individual notice to identifiable class members is not discretionary" Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974). The court's review of individual notice to class members is thus focused on reasonableness. Fed. R. Civ. P. 23(c)(2)(B).

i. Ascertainability and Notice Are Distinct Standards.

Defendants oppose the EPPs' Notice Plan on what they characterize as a "bait and switch":⁵ that, having overcome Defendants' ascertainability challenge to class certification using Craft's PBM-based methodology, the EPPs now seek to "discard" it in favor of the List. Defs.' Opp'n (ECF No. 1439, at 6). Defendants argue that the Notice Plan is not the best practicable notice because Craft's methodology would yield a more accurate class list with reasonable effort. Id. at 21 (citing Fed. R. Civ. P. 23). The EPPs argue that Defendants are "conflating the separate requirements of ascertainability and class notice," EPPs' Reply (ECF No. 1445, at 17), and that implementing the PBM-based methodology over the course "of a number of months" is not reasonable when notice could be sent using the List "without delay," id. at 8. I agree with EPPs that Craft's methodology was not directed to the notice question and does not undermine the

⁵ Defendants also argue that the List was not adequately disclosed until after the close of discovery and issuance of the report and recommendation on certification. Defs.' Opp'n (ECF No. 1439, at 10 n.9). But the EPPs cite the court to earlier briefing mentioning the List. EPPs' Reply (ECF No. 1445, at 6) (citing EPPs' Suppl. Mem. Suppl. Mot. Class Certification (ECF No. 949, at 3 & n.9); EPPs' Opp'n Defs.' Mot. Leave File Suppl. Br. Opposing Class Certification ("EPPs' Opp'n Suppl.") (ECF No. 1260, at 2 n.5) (stating that "[a]s in other cases, EPPs can use lists of self-insured TPPs and targeted publication for class notice").

evidence that use of the List for individual notice will meet the Rule 23(c)(2) standard.

The PBM-based methodology was proffered as evidence of ascertainability under Rule 23(a), which is a separate standard than that applying to individual notice to class members under Rule 23(c)(2). Neither party has produced law from this circuit that these requirements are the same, and I have found none in my own review of the caselaw. Ascertainability does not require plaintiffs "to identify every class member at the time of certification." EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014). Instead, it focuses on whether identification would require "extensive and individualized fact-finding" Id. (quoting Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012)). Put differently, the EPPs were required to show through Craft's testimony that "proposed class members are readily identifiable in reference to objective criteria." Zetia II, 2021 WL 3704727, at *4 (quoting Krakauer v. Dish Network, LLC, 925 F.3d 643, 655 (4th Cir. 2019) (cleaned up). The EPPs defined these "objective criteria" as "(1) TPP purchases of brand and/or generic Zetia (2) within applicable states (3) during discrete time periods." Zetia I, 2020 WL 5778756, at *8 (citing briefs). Identifying purchasers of Zetia that met these criterion -- which did not require contact details, such as addresses and phone

numbers -- established ascertainability. Zetia II, 2021 WL 3704727, at *5.

Defendants cite caselaw for the proposition that "the methodology posited during class certification for ascertaining class membership should generally be used for class notice" Defs.' Opp'n (ECF No. 1439, at 14). Defendants quote J.O.P. v. United States Department of Homeland Security, which noted that "ascertainability is a requirement tied almost exclusively to the practical need to notify absent class members and to allow those members a chance to opt-out." 338 F.R.D. 33, 50 (D. Md. 2020) (quoting Cole v. City of Memphis, 839 F.3d 530, 541 (6th Cir. 2016)). However, both J.O.P. and its sixth circuit precursor, Cole v. City of Memphis, resolved the question of whether certification under Rule 23(b)(2), for the imposition of final injunctive relief, required the same ascertainability showing as Rule 23(a). Id. at 50-51, 53 (finding the ascertainability standard applicable to Rule 23(b)(2) actions and satisfied in that case); Cole, 839 F.3d at 542 (finding ascertainability standard inapplicable to Rule 23(b)(2) actions). Thus, the cases Defendants rely on to imply an ascertainability-notice connection did not involve the adequacy of notice vel non. Instead, both courts were evaluating whether certification of a Rule 23(b)(2) class imposed any ascertainability requirement at all.

Defendants also rely on cases in which plaintiffs' proposed notice plans did not intend to provide any individual notice. Defs.' Opp'n (ECF No. 1439, at 13); EPPs' Reply (ECF No. 1445, at 11-12). Plaintiffs in these cases advocated for publication only, which was held insufficient. See, e.g., Eisen, 417 U.S. at 175-76; Hecht v. United Collection Bureau, Inc., 691 F.3d 218, 222-26 (2d Cir. 2012). These results are not persuasive here, as they merely implement the plain meaning of Rule, which requires individual notice when it can be accomplished reasonably. They do not address the current scenario, in which the Notice Plan already contemplates providing individualized notice using the List. Further, the fact that the List exists and can be rapidly utilized distinguishes another case, Physicians Healthsource, Inc. v. Stryker Sales Corp., in which the court required the issuance of subpoenas to identify class members because there was no pre-existing list of class members, and the plaintiffs advocated for sending notice via unsolicited faxes when the underlying lawsuit challenged unsolicited faxes. No. 1:12-CV-729, 2014 WL 11429029, at *1 (W.D. Mich. Feb. 20, 2014).

This court has also not previously addressed whether the EPPs would be required to use the PBM-based methodology for notice. Cf. EPPs' Opp'n Suppl. (ECF No. 1260, at 4) (noting that the R&R did "not discuss class notice, much less whether implementation of Craft's ascertainability methodology was necessary to disseminate

class notice"). In fact, Craft did not opine about whether the PBM-based methodology was a reasonable method of notifying class members. See Craft Decl. ¶ 1 (ECF No. 730-14, at 4-5) (stating that counsel asked her "to evaluate whether . . . it is possible to identify the TPPs"). Accurate identification is different than effective contact. Indeed, when considering a nearly identical objection to notice, the Eastern District of New York reached a similar conclusion:

Craft did not opine on the questions central to this motion: the ease with which the data could be used to collect consumers' addresses, how accurate the addresses would be, or the most effective method to contact consumers. In other words, . . . Craft did not offer any opinion on whether identifying class members for notice purposes could be done through "reasonable effort."

In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., 527 F. Supp. 3d 269, 274 (E.D.N.Y. 2021) (quoting Fed. R. Civ. P. 23(c)(2)(B)) (motion to approve the proposed form and manner of notice). Likewise, here Craft's opinion that her methodology could identify "virtually all" of the class members was not an opinion that PBM data subpoenaed during that process would produce accurate notification contacts such that her method would effectively reach that same percentage. Craft Decl. ¶ 5 (ECF No. 730-14, at 6). In fact, the List -- which A.B. Data maintains expressly for this purpose -- may contain more updated contact information, as addresses and contact information obtained

via subpoena from PBMs might have their own accuracy problems.⁶ See Restasis, 527 F. Supp. 3d at 274 (summarizing representations made before that court related to deficiencies in subpoenaed contact data).

The Fourth Circuit has held that it is not necessary to identify a list of class members when certifying a class. Krakauer, 925 F.3d at 658 (citing EQT Prod. Co., 764 F.3d at 358) (requiring that class members be identifiable "at some point"). Furthermore, the notice requirement is already present in the text of Rule 23, and does not stem from the Fourth Circuit's implied "ascertainability" requirement. Compare EQT Prod. Co., 764 F.3d at 358 (implying ascertainability as a "threshold requirement"), with Fed. R. Civ. P. 23(c)(1) (requiring notice). Therefore, I do not agree that the EPPs must utilize the PBM-based methodology for class notice. Restasis, 527 F. Supp. 3d at 274-75.

ii. The List is an Acceptable Method of Facilitating Individual Notice.

The List satisfies the requirements of Rule 23(c)(2) for providing the individual notice component of the Notice Plan. The EPPs argue that the List "is the best, most cost effective and

⁶ Although Defendants advocate for using Craft's methodology instead of the List, they have not conceded that her methodology would satisfy Rule 23(c)(2). In fact, at the hearing on this motion, counsel reserved Defendants' right to challenge notice again if the court required the PBM-based methodology and Defendants considered such notice inadequate as performed.

reasonable notice that is practicable under the circumstances," EPPs' Mem. (ECF No. 1431, at 4), and "is the standard for TPP class notice," EPPs' Reply (ECF No. 1445, at 8) (emphasis in original). Indeed, the EPPs cite the court to seven prior pharmaceutical cases that used the List for individual notice.⁷ Id. at 5-6. The List therefore appears to be an industry appropriate method for facilitating notice to end payors in similarly defined classes.

Parties also agree that the List will facilitate notice to at least 80% of the class. See Prop. Notice Plan (ECF No. 1431-1, at 33). Defendants point out that 80% is "far short" of the amount Craft's PBM-based methodology would yield.⁸ Defs.' Opp'n (ECF No. 1439, at 11) (noting that the prior methodology would reach 96%

⁷ Cases cited by the EPPs include In re Namenda Indirect Purchaser Antitrust Litig., No. 15-cv-6549 (S.D.N.Y. Mar. 26, 2021) (ECF Nos. 678; 683); Restasis, 527 F. Supp. 3d at 275; In re EpiPen (Epinephrine Injection USP) Marketing, Sales Practices & Antitrust Litig., No. 17-md-2785 (D. Kan. Oct. 13, 2020) (ECF Nos. 2209; 2240); In re Loestrin 24 FE Antitrust Litig., No. 13-md-2472 (D.R.I. Sept. 27, 2019) (ECF Nos. 1124-6; 1234; 1245); In re Aggrenox Antitrust Litig., No. 14-md-2516 (D. Conn. Mar. 6, 2018) (ECF Nos. 748-1; 766); In re Solodyn (Minocycline Hydrochloride) Antitrust Litig., No. 14-md-2503 (D. Mass. Dec. 4, 2017) (ECF Nos. 532; 533-8; 828); Vista Healthplan, Inc., v. Cephalon, Inc., No. 06-CV-01833 (E.D. Pa. Aug. 8, 2019) (ECF Nos. 586-7; 592).

⁸ Defendants focus on the supposed delta of 16% (the difference between Craft's high 96% and the List's conservative 80%). Compare Craft Decl. ¶ 19 (ECF No. 730-14, at 11), with Prop. Notice Plan (ECF No. 1431-1, at 33). However, as discussed above, identification and contact are separate considerations, and thus this is an inapposite comparison. See supra. In addition, the 80% estimation made by A.B. Data is a floor, not an upper limit. Prop. Notice Plan (ECF No. 1431-1, at 33) (asserting that the Notice Plan "will deliver an estimated reach of at least 80%" (emphasis added)).

(citing Craft Decl. ¶¶ 19-21 (ECF No. 730-14, at 11-14)). However, the Federal Judicial Center has opined that “[i]t is reasonable to reach between 70-95%” of the class. Federal Judicial Center, Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide, at 3 (2010), <https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf> (last visited Feb. 7, 2022). There is also no evidence that any class member has challenged class certification based on failure to receive notice. EPPs’ Reply (ECF No. 1445, at 15) (citing Restasis, 527 F. Supp. 3d at 275) (having “no qualms about A.B. Data’s use of the TPP Database,” partly because A.B. Data was unaware of any such challenges)). Therefore, the List provides a reasonable, rapidly available method of serving individual notice to an acceptable percentage of class members.

Defendants have not meaningfully challenged the EPPs’ claim that implementing Craft’s PBM-based methodology would cause significant delay “in pursuit of an incremental improvement to [the List.]” Id. at 8 (citing the extensive delay that has already impacted this case). Although not dispositive, it is relevant that generally a new member list based on the PBM methodology would require the EPPs to subpoena data from multiple PBMs and synthesize the data, which -- while “manageable” -- would consume time and resources. Craft Decl. ¶ 6 (ECF No. 730-14, at

6). This delay is an unreasonable burden on notice considering the availability of the List.

B. It Is Not Necessary to Amend Banner Advertisements to Clarify that Consumers Are Not Included in the Class.

Defendants also challenge the Notice Plan on the basis that the banner advertisements the EPPs propose to place on targeted websites do not state that consumers fall outside the class definition. Defs.' Opp'n (ECF No. 1439, at 21-22). They claim that "[u]nchanged, the banner ad would misleadingly lure consumers to the class action website, and create confusion for consumers." Id. at 22. Notice language should be adjusted when it "would likely result in unneeded confusion on the part of the non-class member recipients." DeHoyos v. Allstate Corp., 240 F.R.D. 269, 297 (W.D. Tex. 2007). The EPPs reply that the banner advertisements are clear as written. EPPs' Reply (ECF No. 1445, at 16).

The banner advertisement states, "If You Purchased, Paid or Provided Reimbursement for Zetia / Or Its Generic Equivalent for Members, Employees, Insureds, Participants or Beneficiaries / A CLASS ACTION LAWSUIT MAY AFFECT YOUR RIGHTS." Banner Ad (ECF No. 1431-1, at 35). During oral argument, Defendants argued that using "You" was confusingly vague and did not clearly exempt consumers. However, the banner advertisement specifies that it applies to purchases and reimbursements "for" specific types of customers

(including only purchases on behalf of "members, employees, insureds, participants, or beneficiaries"). Id. This phrase modifies Zetia purchases, clarifying that consumers -- who did not purchase Zetia for these enumerated types of customers -- are not class members. Terms like "reimbursement" further explain the intended audience. Id.

Moreover, as the EPPs also point out, the banner advertisements "are not going to be placed on websites directed at consumers." EPPs' Reply (ECF No. 1445, at 16). These targeted non-consumer websites include ThinkAdvisor.com/life-health, a website aimed at "insurance agents and brokers"; and BenefitNews.com, a website that "serves human resource management personnel that specialize in determining and implementing benefits for employees, including health insurance." Young Decl. ¶ 6 (ECF No. 1431-1, at 3). This context is relevant. Consumers are unlikely to be confused if they never encounter the advertisements. Further, any confusion would be clarified by the viewer's logical next steps. EPPs' Reply (ECF No. 1445, at 16). The banner advertisement invites viewers to visit the class action website (InReZetiaAntitrustLitigation.com) to learn more, Banner Ad (ECF No. 1431-1, at 35), and that website includes significantly more detail, including the specific exclusion of consumers that Defendants seek, Young Decl. ¶ 11 (ECF No. 1431-1, at 4-5); Long Form Notice (ECF No. 1431-1, at 36-44). Because the TPPs

themselves are "sophisticated entities," the banner advertisements are also "unlikely" to confuse them. EPPs' Reply (ECF No. 1445, at 18).

Importantly, the advertisements say nothing about the antitrust conduct alleged. At oral argument, Defendants argued that misleading advertisements could harm their reputations. However, "[d]amage to reputation from a class action notice is highly speculative given the prevalence of class action lawsuits, meritorious or not, against virtually any and all kinds of companies." Montanez v. Gerber Childrenswear, LLC, No. CV097-420, 2012 WL 12932032, at *2 (C.D. Cal. Feb. 2, 2012) (denying motion for stay pending interlocutory appeal of class certification). These banner advertisements are also particularly innocuous: they do not imply that Zetia was harmful in any way, and neither Merck nor Glenmark are identified by name on the advertisements. The language is not inflammatory and cannot be construed as harmful to Defendants' reputations. Therefore, the banner advertisements in the Notice Plan are appropriate without adding clarifying language.

While Defendants mainly contest the banner advertisements, some of Defendants' arguments direct these same concerns at the other notices. See Defs.' Opp'n (ECF No. 1439, at 21-22) (citing Young Decl. Exs. D-F (ECF No. 1431-1, at 36-50)). These notices are clear as written for the same reasons that the banner

advertisements are. Further, the method of distribution applicable to these notices (for example, the postcards will be mailed directly to TPPs) makes confusion markedly less probable. Therefore, the Notice Plan is appropriate without modifying any of the notices.

IV. CONCLUSION

For the foregoing reasons, the court GRANTS the EPPs' Motion for Entry of an Order to Approve the Form and Manner of Notice and Appoint Notice Administrator (ECF No. 1430).

1. The Notice Plan described in the Young Declaration and attached to this Order as Exhibit A is approved. Prop. Notice Plan (ECF No. 1431-1, at 30-33). Class Counsel shall cause the short form Notice substantially in the form attached be disseminated beginning no later than THIRTY (30) DAYS from the date of this Order,⁹ via first-class mail and email to those members of the Class who can reasonably and economically be identified, and by publication, as set forth in the Notice Plan.

2. The proposed banner ads, long and short forms of Notice to members of the Class, and post-card mailer satisfy the requirements of Rule 23(c)(2)(B) and due process, are otherwise

⁹ In the event a party objects to this ruling under Federal Rule of Civil Procedure 72(b)(2), the deadlines from disseminating notice shall run from the date of any order resolving those objections unless otherwise ordered.

EXHIBIT A



A.B. Data, Ltd.
Class Action Administration Company
600 A.B. Data Drive
Milwaukee, WI 53217

Proposed Class Action Notice Plan

In re Zetia (Ezetimibe) Antitrust Litigation

Civil Action No. 2:18-md-2836

United States District Court for the Eastern District of Virginia

November 24, 2021



Notice Plan

In re Zetia (Ezetimibe) Antitrust Litigation

CASE BACKGROUND AND CLASS DEFINITION

This Notice Plan is submitted by A.B. Data, Ltd. (“A.B. Data”) in connection with *In re Zetia (Ezetimibe) Antitrust Litigation*, a case before the United States District Court for the Eastern District of Virginia. This document outlines the efforts that will be made to provide direct notice to reach potential third-party payor (“TPP”) Class Members.

Plaintiff alleges that Defendants violated state antitrust and consumer protection and deceptive trade practices laws and engaged in inequitable conduct by participating in an unlawful scheme to delay and impede the market entry of less expensive, generic versions of Zetia. Specifically, the Class Plaintiffs allege that the Defendants entered into unlawful non-competition agreements with prospective generic competitors, whereby Defendants agreed to pay the generic competitors in exchange for the generic competitors agreeing to delay selling their generic version of Zetia before less expensive generic versions of Zetia became available. Class Plaintiffs allege that they and other members of the Class were injured by being overcharged because of Defendants’ conduct, hence overpaying on their purchases of Zetia and generic Zetia in the states.

Although Plaintiffs do not know the exact number of TPP Class Members, it is believed that they number in the thousands. Therefore, members of the TPP Class are numerous, and joinder is impracticable.

The Court certified the following TPP Class:

All Third-Party Payor entities that, for consumption by their members, employees, insureds, participants, or beneficiaries, and not for resale, indirectly purchased, paid, and/or provided reimbursement for some or all of the purchase price of Zetia or its AB-rated generic equivalents in any form, that was sold through a retail pharmacy, including mail-order pharmacies and long-term care pharmacies, in Alabama, Arizona, California, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Puerto Rico, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wisconsin from July 1, 2012, through November 18, 2019.

Excluded from the proposed Class are:

- a. Defendants and their subsidiaries and affiliates;
- b. All federal and state governmental entities except for cities, towns, municipalities, or counties with self-funded prescription drug plans;
- c. All entities who purchased Zetia or generic Zetia for purposes of resale or directly from Defendants or their affiliates;
- d. Fully-insured health plans (*i.e.*, health plans that purchased insurance from another third-party payor covering 100 percent of the plan’s reimbursement obligations to its members); and
- e. Pharmacy benefit managers.



NOTICE PLAN OVERVIEW

The proposed Notice Plan includes a significant direct mail component along with a digital media campaign to reach TPPs. A.B. Data has a proprietary database listing the names and addresses of approximately 42,000 TPPs, compiled from membership listings and existing databases from publicly available sources, including U.S. Department of Labor Form 5500 filings and the Pharmacy Benefits Management Institute, and prior name brand and generic drug litigations that A.B. Data has administered. A.B. Data's database is updated annually. A.B. Data's notice efforts in this litigation will include the preparation and mailing of the printed short form notice to these TPPs.

To reach TPPs and other entities that may be members of the TPP Class, in addition to the direct notice program, it is recommended that a 30-day digital banner ad campaign be scheduled on the following websites. Based on visitor data provided by the vendors, these websites primarily reach insurance agents that specialize in health insurance and human resource management that specialize in employee benefits such as health insurance. These websites are an important resource needed for their work.

- ThinkAdvisor.com/life-health – This website is affiliated with the former publication *National Underwriter Life & Health*. This website is uniquely positioned to provide agents and brokers with timely, insightful information as they navigate the specialty insurance markets and sort through critical industry developments.
- BenefitNews.com – This website is affiliated with the publication *Employee Benefit News*. It serves human resource management personnel that specialize in determining and implementing benefits for employees, including health insurance.

Banner ads that are written specifically for this industry will be delivered on these websites.

It is also recommended that a news release regarding the case be run via *PR Newswire* across the United States. The news release will be distributed via *PR Newswire* to more than 10,000 newsrooms across the United States, including those in general market print, broadcast, and digital media.

The Notice Plan will include significant direct mail notice supplemented by paid media components and earned media vehicles to reach unidentified potential members of the TPP Class. A dedicated informational case website will also be developed to complement the Notice Plan and to ensure TPP Class Members' easy access to updated information.

This Notice Plan, which will deliver an estimated reach of at least 80%, is consistent with other TPP notice plans that A.B. Data has developed and courts have approved in other pharmaceutical cases. The estimated reach of 80% is consistent with The Federal Judicial Center's *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, which considers a 70%-95% reach among class members reasonable. The proposed Notice Plan is, in A.B. Data's experience, the best practicable under the circumstances for TPP Class Members and meets due process requirements.

