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11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**  
13

14 In re LIDODERM ANTITRUST  
15 LITIGATION

Master File No. 14-md-02521-WHO

MDL No. 2521

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18 THIS DOCUMENT RELATES TO:  
19 END-PAYOR ACTIONS

**END-PAYOR CLASS COUNSEL'S  
MOTION FOR AN AWARD OF  
ATTORNEYS' FEES, EXPENSES, AND  
SERVICE AWARDS**

Date: September 12, 2018

Time: 2:00 p.m.

Courtroom: 2, 17<sup>th</sup> Floor

Before: Hon. William H. Orrick  
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END-PAYOR CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND  
SERVICE AWARDS

CASE No. 14-MD-02521-WHO

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1 **NOTICE OF MOTION AND MOTION**

2 **TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that counsel for the End-Payor Class (“class counsel” or  
4 “EPP class counsel”)<sup>1</sup> will and do hereby move the Court for entry of an Order awarding class  
5 counsel one-third of the settlement amounts (\$34,916,000), plus proportional interest accrued on  
6 the Settlement Fund; reimbursement of \$3,647,041.43 in expenses advanced in the course of the  
7 litigation; and service awards of \$10,000 to each of the End-Payor Plaintiffs (“EPPs”).<sup>2</sup>

8 This Motion is supported by the accompanying Memorandum of Law, the Joint  
9 Declaration of End-Payor Plaintiff Co-Lead Counsel and exhibits thereto; and the declarations  
10 of Co-Lead Counsel and Liaison counsel, as well as the declarations of additional non-lead  
11 firms describing the work performed in the litigation.

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20 <sup>1</sup> Cohen Milstein Sellers & Toll PLLC; Girard Gibbs LLP; Heins Mills & Olson, P.L.C.;  
21 Joseph Saveri Law Firm, Inc.; Hilliard & Shadowen LLP; Miller Law LLC; Motley Rice LLC;  
22 Robbins Geller Rudman & Dowd LLP; Cohen, Placitella & Roth, P.C.; Freed Kenner London  
23 & Millen LLC; Glancy Prongay & Murry LLP; Hach Rose Schirripa & Cheverie LLP; Kohn,  
24 Swift & Graf, P.C.; Krause, Kalfayan, Benink & Slavens, LLP; Labaton Sucharow LLP; Law  
Offices of Robert W. Sink; Lockridge Grindal Nauen P.L.L.P.; Meredith & Narine; Pomerantz  
LLP; Shepherd, Finkelman, Miller & Shah, LLP; Spector Roseman & Kodroff, P.C.; Weinstein  
Kitchenoff & Asher LLC; and Wexler Wallace LLP.

25 <sup>2</sup> Allied Services Division Welfare Fund, City of Providence, International Union of Operating  
26 Engineers Local 49 Health and Welfare Fund, International Union of Operating Engineers  
Local 132 Health and Welfare Fund, Iron Workers District Council of New England Welfare  
27 Fund, NECA-IBEW Welfare Trust Fund, United Food and Commercial Workers Local 1776 &  
28 Participating Employers Health and Welfare Fund, Welfare Plan of the International Union of  
Operating Engineers Locals 137, 137A, 137B, 137C, 137R, and Ottavio Gallotto.

1 **MEMORANDUM OF LAW**

2 **I. INTRODUCTION**

3 The settlements before the Court will create a fund of over \$100 million to reimburse  
4 End-Payers for their purchases of branded and generic Lidoderm pain patches at supra-  
5 competitive prices. The settlements were reached shortly before jury selection after four years of  
6 hard-fought litigation. This Court presided over each step of this litigation, denying Defendants'  
7 motions to dismiss, deciding numerous discovery motions and challenges to assertions of  
8 attorney-client privilege, granting the motion to certify the EPP class, granting Plaintiffs' motion  
9 for summary judgment on relevant market, denying Defendants' motion for summary judgment  
10 on causation (which the Court again upheld on a motion for reconsideration), and denying  
11 various *Daubert* and *in limine* challenges that threatened to hobble Plaintiffs' case-in-chief at  
12 trial. Defendants Endo, Watson, and Teikoku mounted a vigorous defense through highly skilled  
13 counsel.

14 Counsel believe the \$104.75 million settlement is the most favorable recovery for end-  
15 payors both in absolute and relative terms in similar federal pharmaceutical antitrust litigation in  
16 at least the past decade. The End-Payor Class will recover more than 45% of class counsel's  
17 highest single damages estimate now, without having to undertake the risks and delay of post-  
18 trial appeals. Upon this Court's approval, the money recovered through these settlements will  
19 vest in the plaintiff class, and the funds will be promptly distributed to the consumers and third  
20 party-payors who make up the class. The Court is thoroughly familiar with the efforts expended  
21 on both sides of the litigation, the novelty and complexity of the issues, and the substantial risk  
22 that the End-Payor Class and their counsel could come away from this litigation empty-handed.

23 For the risks undertaken, the resources invested, and the result achieved, EPP class  
24 counsel seek an award of attorneys' fees of one-third of the Settlement Fund (\$34,916,000), plus  
25 proportional interest accrued from the Settlement Fund, representing a 1.37 multiplier on class  
26 counsel's lodestar, at the low end of multipliers awarded in this district. The requested fee falls  
27 within the range of percentages awarded in the Ninth Circuit for cases involving similar risks and  
28 results, and is also consistent with at least two recent awards to end-payor counsel in pay-for-

1 delay litigation. Class counsel devoted more than 51,000 hours to litigating this case, foregoing  
2 other opportunities and assuming the risk of recovering nothing and losing nearly \$4 million in  
3 expenses advanced to bring this case to trial. Class counsel therefore request that the Court award  
4 attorneys' fees of one-third of the settlement amounts, approve the reimbursement of the  
5 expenses advanced, and approve incentive awards for each of the EPP class representatives.

## 6 **II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

7 The first end-payor complaint in this multidistrict litigation was filed on November 12,  
8 2013. *See United Food and Commercial Workers Local 1776 v. Teikoku Pharma USA, Inc., et*  
9 *al.*, 5:13-cv-05247 (N.D. Cal.). Other complaints followed in this District and others. In the  
10 spring of 2014, the Judicial Panel on Multidistrict Litigation centralized all pending Lidoderm  
11 actions before this Court. ECF 1. And on May 23, 2014, the Court appointed Girard Gibbs LLP,  
12 Heins Mills & Olson, P.L.C., and Cohen Milstein Sellers & Toll PLLC as Interim Co-Lead  
13 Counsel; the Joseph Saveri Law Firm, Inc. as Interim Liaison Counsel; and Hilliard &  
14 Shadowen LLP, Miller Law LLC, Motley Rice LLC, Robbins Geller Rudman & Dowd LLP,  
15 and The Dugan Law Firm, APLC as members of the Executive Committee. ECF 63.

16 Since that time, Co-Lead Counsel has directed the overall conduct of the litigation and  
17 has worked with Liaison Counsel, the Executive Committee, and other plaintiffs' counsel to  
18 prosecute the litigation through the eve of trial. A detailed description of the work performed by  
19 each firm seeking payment is set forth in Co-Lead Counsel's Joint Declaration and the  
20 individual declarations of class counsel submitted herewith. Below is a brief summary of work  
21 performed by class counsel during the litigation.

22 ***Motions to Dismiss.*** Following transfer of all pending Lidoderm actions to this Court,  
23 the Court consolidated the end-payor actions. EPPs filed a consolidated amended complaint,  
24 which Defendants moved to dismiss. ECFs 72, 95. EPPs worked with DPPs to jointly oppose  
25 Defendants' arguments, and EPPs separately opposed Defendants' motion concerning EPPs'  
26 state law claims. Joint Decl., ¶¶ 15-16. On November 17, 2014, the Court largely denied  
27 Defendants' motion and upheld EPPs' claims under the laws of seventeen states. ECF 117.



1 EPPs subsequently amended their complaint and opposed an additional motion to dismiss state  
2 law claims, culminating in the filing of a third amended complaint. ECF 208.

3 ***Discovery of Defendants and Non-Parties.*** The parties began discovery while  
4 Defendants' initial motion to dismiss was pending. Joint Decl., ¶ 18. Full discovery commenced  
5 once the Court denied Defendants' motion. *Id.*, ¶ 19. EPPs, along with DPPs, negotiated an ESI  
6 protocol, protective order, various discovery stipulations, and search terms and custodians that  
7 Defendants would use to produce responsive documents. *Id.*, ¶ 20. EPPs reviewed more than 3.3  
8 million pages of documents produced by Defendants, as well as thousands of additional pages  
9 of documents and data produced by non-parties. *Id.*, ¶ 28. EPPs also took the lead on Requests  
10 for Admission relating to earlier generic launches. *Id.*, ¶ 22. EPPs also collaborated with DPPs  
11 and the Retailers to depose thirty-two current and former employees of Defendants. *Id.*, ¶ 27. To  
12 develop the record in relation to end-payors' payment structures and the implied  
13 "ascertainability" requirement under Rule 23, EPPs also conducted additional, unique discovery  
14 of non-party pharmacy benefits managers (PBMs), resulting in declarations and the production  
15 of payment data and rebate contract information from the leading national PBMs. ECF 208.

16 The parties litigated numerous complex privilege issues in pursuit of their claims, many  
17 of which EPPs were primarily responsible for briefing (before this Court and on petitions for  
18 writs of mandamus) and arguing. *E.g.* ECFs 227, 269, 276, 345, 359, 364, 377, 398, 399, 401,  
19 402, and 427 (Joint Discovery Letter Briefs); ECFs 536 and 679 (at-issue waiver order and  
20 Ninth Circuit denial of petition for interlocutory review); ECFs 367 and 484 (common interest  
21 order and Ninth Circuit denial of petition for interlocutory review).

22 ***Discovery of Plaintiffs.*** Defendants served over 100 requests for production of  
23 documents, and numerous interrogatories on EPPs. Joint Decl., ¶ 39. EPPs met and conferred  
24 with Defendants over the course of several months and successfully overcame Defendants'  
25 various motions to compel the production of documents, including Defendants' efforts to  
26 compel the production of information related to premiums. ECF 435. EPPs drafted responses to  
27 Defendants' contention interrogatories and coordinated with other plaintiffs on their responses  
28 as well. Joint Decl., ¶ 44.

1 Defendants also served Rule 30(b)(6) deposition notices on each EPP, and Co-Lead  
2 Counsel prepared for and defended each of those depositions. Joint Decl., ¶ 42.

3 ***Defendants' Disqualification Motion.*** In connection with a dispute concerning  
4 Plaintiffs' use of two documents produced by Teikoku, Teikoku moved to disqualify Plaintiffs'  
5 counsel. ECF 293. EPP class counsel took the lead in drafting Plaintiffs' opposition (and cross-  
6 motion challenging Teikoku's assertion of privilege over the documents in question) and  
7 worked with counsel for DPPs to develop the factual record in support of Plaintiffs' arguments.  
8 Joint Decl., ¶ 37. The Court denied Defendants' motion on November 25, 2015, and  
9 subsequently rejected in part Teikoku's assertion of attorney-client privilege. ECFs 338 and  
10 367.

11 ***Class Certification.*** In summer 2016, EPPs moved for certification of the End-Payor  
12 Class. ECF 524. In support of EPPs' motion, Dr. Hal Singer—a leading antitrust economist—  
13 submitted a report showing that market power could be established, and that injury and damages  
14 to end-payors could be determined on a classwide basis. ECF 524-1. EPPs also retained an  
15 expert on the pharmaceutical distribution chain to address ascertainability and “pass on”  
16 defenses. ECF 524-2. That report was supported by third-party discovery obtained from the  
17 largest PBMs in the country. Joint Decl., ¶ 49. Defendants countered with their own expert  
18 economist, a pharmacy payment expert and a market power expert. *Id.*, ¶ 50. A heated “battle of  
19 the experts” ensued, with multiple depositions of the experts and *Daubert* challenges. *Id.*

20 On February 21, 2017, the Court granted EPPs' motion and denied Defendants' *Daubert*  
21 challenges to EPPs' experts. ECF 670. Defendants filed a petition with the Ninth Circuit  
22 seeking interlocutory review under Federal Rule of Civil Procedure 23(f), which EPPs opposed  
23 and the Ninth Circuit denied. ECF 756. In summer 2017, EPPs worked with KCC—the notice  
24 administrator approved by the Court—to develop and implement a notice program that used a  
25 combination of direct and publication notice to reach virtually all third-party payor class  
26 members and approximately 80% of consumer class members. ECF 872; *see also* ECF 751  
27 (order approving EPPs' proposed method of distributing notice).  
28

1 Certain large insurers that had opted-out of the End-Payor Class (and later rejoined the  
2 class for purposes of settlement) attempted to also opt out self-funded health and welfare plans  
3 for whom the insurers provide administrative services. EPPs filed a motion seeking to preclude  
4 the insurers' attempted mass opt-outs of their self-funded plans. ECF 893. The Court granted  
5 EPPs' motion. ECF 946.

6 In addition, EPPs moved for a "set aside" order under which a portion of any recovery  
7 obtained by any opt-out would be set aside and considered for payment to class counsel in  
8 recognition of the work performed by class counsel that benefited all end-payors, including any  
9 opt-outs. Joint Decl., ¶ 56. After briefing and argument, the Court granted EPPs' set-aside  
10 motion, marking only the second antitrust case in which such an order has been entered. ECF  
11 828.

12 ***Merits Expert Reports.*** The trial in this case was ultimately set for February 23, 2018. In  
13 preparation for trial, EPPs and DPPs retained and worked with more than a dozen experts to  
14 prepare reports on a range of topics including patent issues, when generic entry would have  
15 been expected to occur absent the settlement, and Watson's manufacturing capabilities. Joint  
16 Decl., ¶ 57. EPPs and DPPs collaborated on the depositions of each of Defendants' experts, with  
17 EPPs taking the lead on deposing defendants' manufacturing, at-risk and authorized generic  
18 launch experts. *Id.*, ¶ 65.

19 EPPs also worked with Dr. Singer to calculate and prepare merits reports concerning  
20 EPPs damages, with Dr. Singer calculating the maximum single damages for the End-Payor  
21 Class as \$229 million, using the "forecasting" model. *Id.*, ¶ 60. His "backcasting" model, which  
22 mirrored the modeling DPPs chose to use, resulted in maximum single damages of \$156  
23 million. ECF 776-25 (Singer Reply Rpt.) at 40, Table 2. Defendants' expert calculated the  
24 maximum damages for the End-Payor Class as \$5.6 million, assuming plaintiffs proved that the  
25 patents would not prevent generic entry. ECF 778-5 (Bell Rpt.) at 69.

26 ***Summary Judgment.*** In June 2017, after expert depositions had concluded, the parties  
27 filed motions for summary judgment and *Daubert* motions to exclude various experts from  
28 testifying at trial. Defendants sought summary judgment on all Plaintiffs' claims on the issue of

1 causation. ECF 786. With input from the DPPs, EPPs took the lead in drafting Plaintiffs’  
2 opposition to Defendants’ motion and also argued the motion. Joint Decl., ¶ 69. EPPs also  
3 worked with DPPs to prepare successful partial summary judgment motions on the relevant  
4 market and the “contract, combination, or conspiracy” prong of Plaintiffs’ antitrust claims.  
5 ECFs 775.

6 On November 3, 2017, the Court denied Defendants’ summary judgment motion,  
7 granted Plaintiffs’ motions, and granted in part and denied in part the parties’ *Daubert* motions.  
8 ECF 900. Defendants later moved for reconsideration of the causation standard that would  
9 apply at trial; EPPs took the lead in successfully opposing Defendants’ motion. ECF 978.

10 ***Trial Preparation.*** The parties exchanged their initial proposed pretrial materials—  
11 including exhibit lists, witness lists, deposition designations, jury instructions, verdict forms—  
12 on November 6, 2017. Joint Decl., ¶ 74. EPPs were the primary drafters of large Plaintiffs’  
13 portions of the pretrial exchanges. *Id.*, ¶ 75. After protracted negotiations, in early December the  
14 parties filed their agreed-upon and disputed pretrial submissions. ECFs 929 and 933.

15 In the months leading up to the February 23, 2018 jury selection, EPP Co-Lead Counsel  
16 dedicated themselves to preparing for trial. Joint Decl., ¶ 79. Each of the EPP Co-Lead Counsel  
17 was a member of Plaintiffs’ joint trial team. *Id.*, ¶ 81. EPPs worked with counsel for other  
18 Plaintiffs to develop a draft outline of their case-in-chief, designate portions of fact witness  
19 depositions for use at trial, and identify documents to be used as exhibits. *Id.*, ¶ 80-82.

20 ***Settlements.*** EPPs participated in mediation with Endo and Teikoku before the Hon.  
21 Layn Phillips in May 2017 but made only limited progress. *Id.*, ¶ 84. Thereafter settlement  
22 negotiations took place under the auspices of Chief Magistrate Judge Joseph C. Spero. *Id.* EPPs  
23 reached an agreement in principle with Teikoku following an initial settlement conference in  
24 December 2017, with Watson following a January 2018 settlement conference, and finally with  
25 Endo following a February settlement conference, one week before jury selection. *Id.* EPPs  
26 prepared the settlement papers for each of the Endo, Teikoku, and Watson settlements, working  
27 with both counsel for Defendants and counsel for the insurer opt-outs represented by the Lowey  
28

1 Dannenberg firm. *Id.*, ¶ 85. After lengthy negotiations, the parties finalized their settlements and  
 2 EPPs submitted them for preliminary approval on March 20, 2018. ECF 1005.

3 In connection with the settlements, EPPs worked with KCC to develop a state-of-the-art  
 4 notice and claims plan. The long- and short-form notices distributed to class members informed  
 5 them that class counsel would seek a fee award of up to one-third of the settlement fund,  
 6 expenses not to exceed \$5,000,000, and service awards of \$10,000 to each of the Class  
 7 Representatives. ECF 1014 (long form and short-form notice documents). The notices also  
 8 provided class members with the August 21, 2018 deadline to object the requested amounts,  
 9 which is 21 days after the filing of this motion. *See In re Online DVD-Rental Antitrust Litig.*,  
 10 779 F.3d 934, 954 (9th Cir. 2015) (approving similar methods of notifying the class of  
 11 requested fee and expense awards). Class counsel also worked with Dr. Singer to develop an  
 12 allocation plan that would fairly distribute the settlement proceeds among claimants. ECF 1005-  
 13 6 (Declaration of Dr. Hal J. Singer).

14 The Court preliminarily approved the settlements, notice plan, and plan of allocation on  
 15 May 1, 2018. ECF 1016. EPPs have since worked with KCC to implement the notice plan  
 16 approved by the Court, as detailed in EPPs motion for final approval.

### 17 **III. SUMMARY OF REQUESTED FEES, EXPENSES, AND SERVICE AWARDS**

18 As detailed below and in the accompanying declarations, class counsel devoted a total of  
 19 51,668.35 hours to this case, with a resulting lodestar of \$25,560,049.50. Of the total hours  
 20 spent, 73.6% was spent by Co-Lead Counsel, 7.9% by Liaison Counsel, and 18.5% by other  
 21 firms. Each firm's overall lodestar and expenses are listed below:

Firm	Hours	Lodestar
Cohen Milstein Sellers & Toll PLLC (Co-Lead Counsel)	13,594.00	\$6,772,990.00
Girard Gibbs LLP (Co-Lead Counsel)	12,146.2	\$6,237,297.00
Heins Mills & Olson, P.L.C. (Co-Lead Counsel)	12,270.7	\$6,367,266.00
Joseph Saveri Law Firm, Inc. (Liaison Counsel)	4091.0	\$1,994,244.50
Hilliard & Shadowen LLP (Executive Committee)	882.8	\$362,700.00
Miller Law LLC (Executive Committee)	1,111.0	\$423,476.50
Motley Rice LLC (Executive Committee)	18,13.8	\$795,609.50
Robbins Geller Rudman & Dowd LLP (Executive Committee)	1,043.9	\$429,844.50

1	Cohen, Placitella & Roth, P.C.	72.1	\$49,012.50
2	Freed Kanner London & Millen LLC	667.5	\$235,117.00
3	Glancy Prongay & Murry LLP	31.0	\$22,317.50
4	Hach Rose Schirripa & Cheverie LLP	1,592.0	\$605,232.50
5	Kohn, Swift & Graf, P.C.	23.4	\$14,868.00
6	Krause, Kalfayan, Benink & Slavens, LLP	170.35	\$ 71,697.50
7	Labaton Sucharow LLP	519.3	\$313,413.00
8	Law Offices of Robert W. Sink	45.1	\$31,268.00
9	Lockridge Grindal Nauen P.L.L.P.	406.7	\$251,043.50
10	Meredith & Narine	6.0	\$3,900.00
11	Pomerantz LLP	481.35	\$249,141.50
12	Shepherd, Finkelman, Miller & Shah, LLP	461.3	\$220,631.00
13	Spector Roseman & Kodroff, P.C.	57.75	\$31,015.00
14	Weinstein Kitchenoff & Asher LLC	20.0	\$9,035.00
15	Wexler Wallace LLP	161.1	\$68,929.50

16 Class counsel respectfully requests the payment of one-third of the settlements amounts  
17 (\$34,916,000) in attorneys' fees, plus proportionate interest from the Settlement Fund, which  
18 represents a 1.37 multiplier on their lodestar. They also request the reimbursement of  
19 \$3,647,041.43 in unreimbursed expenses.

20 To facilitate the Court's consideration of class counsel's fee and expense requests, each  
21 firm has submitted a declaration that (1) identifies the attorneys and staff members who worked  
22 on the case and the tasks they performed, (2) describes the amount of time spent by each of the  
23 firm's attorneys and staff members, and the hourly rates for each of them, (3) breaks down the  
24 amount billed by each attorney or staff member for specific tasks, and (4) provides an  
25 itemization of the expenses incurred by the firm.

26 Class counsel also requests that each Class Representative receive a service award in the  
27 amount of \$10,000.

#### 28 **IV. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE**

Pursuant to Federal Rule of Civil Procedure 23(h), a "court may award reasonable attorneys' fees" to plaintiffs' counsel in class action cases. "[C]ourts have an independent obligation to ensure that the award, like the settlement itself, is reasonable[.]" *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). "Where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the



1 lodestar method or the percentage-of-recovery method.” *Id.* at 942. “Though courts have  
2 discretion to choose which calculation method they use, their discretion must be exercised so as  
3 to achieve a reasonable result.” *Id.* Class counsel’s requested fee is reasonable under either  
4 approach.

5 **A. The Lodestar Method Supports the Requested Attorneys’ Fees**

6 The lodestar figure is calculated by multiplying the number of hours reasonably spent by  
7 a reasonable hourly rate. *Bluetooth*, 654 F.3d at 941. “There is a strong presumption that the  
8 lodestar is a reasonable fee.” *Stetson v. Grissom*, 821 F.3d 1157, 1165 (9th Cir. 2016). Courts  
9 may, however, “adjust [the lodestar figure] upward or downward by an appropriate positive or  
10 negative multiplier reflecting a host of reasonableness factors.” *Bluetooth*, 654 F.3d at 941-42  
11 (citation omitted).

12 Class counsel here spent 51,668.35 hours prosecuting this litigation on behalf of the  
13 End-Payor Class with a resulting lodestar of \$25,560,049.50. Class counsel’s requested fee  
14 award of one-third of the settlements amounts (\$34,916,000) represents a modest upward  
15 adjustment of 1.37 on their lodestar. As explained below, the lodestar is reasonable and the  
16 modest enhancement is warranted.

17 **1. The Time Spent by Class Counsel is Reasonable**

18 Class counsel’s lodestar reflects time that was necessarily and reasonably spent for the  
19 benefit of the End-Payor Class, while also reflecting Co-Lead Counsel’s significant efforts to  
20 increase efficiency and avoid duplication.

21 The Court’s May 2014 order appointing the leadership for the EPPs vested Co-Lead  
22 Counsel with authority for the overall conduct of the case and responsibility for carrying out all  
23 major aspects of the litigation. ECF 63. In accordance with that directive, the three Co-Lead  
24 Counsel firms conducted the significant majority of the work in this matter, including preparing  
25 and responding to written discovery, taking depositions, working with experts, briefing, court  
26 appearances, and overall strategy.

27 Co-Lead Counsel also divided tasks among themselves to further avoid duplication.  
28 Joint Decl., ¶ 89. Ms. Sharp (and her colleague Mr. Grzeczyk), for example, took the lead in

1 much of the legal briefing; Ms. Steiner was in charge of working with EPPs' economic expert,  
2 Dr. Hal Singer, and many of plaintiffs' joint experts; and Ms. Robertson oversaw plaintiff and  
3 non-party discovery critical to EPPs' class certification motion and related expert work, as well  
4 as EPPs' responses to Defendants' discovery requests. *Id.* Ms. Sharp, Ms. Steiner, and Ms.  
5 Robertson collaborated on overall case strategy to draw on their collective experience. *Id.* In  
6 accordance with the Court's direction at the May 9, 2015 Initial Case Management Conference,  
7 Co-Lead Counsel generally limited attendance on internal strategy calls or at court hearings to  
8 one attorney per firm (Ms. Sharp, Ms. Steiner, and Ms. Robertson), and otherwise staffed  
9 meetings and hearings as leanly as possible but in accordance with the needs of the case and  
10 skill set of available attorneys. *Id.* Liaison Counsel supported Co-Lead Counsel on key projects  
11 including research in support of EPPs' amended complaint, class certification and *Daubert*  
12 briefing and oral argument, legal and factual research in support of Plaintiffs' privilege  
13 challenges, pretrial preparations, and oversight of class counsel's time and expense submissions.  
14 *Id.* Co-Lead Counsel and Liaison Counsel billed 82% of the total hours billed by all class  
15 counsel. *Id.*

16       Aside from Co-Lead Counsel and Liaison Counsel, 23 firms billed time to this matter  
17 (with only 14 firms billing more than \$70,000). *Compare with In re Anthem, Inc. Data Breach*  
18 *Litig.*, 2018 WL 1940418, at \*7 (N.D. Cal. Apr. 24, 2018) (suggesting a lodestar reduction  
19 where 53 firms billed time to the matter). Non-lead firms carried out a limited number of non-  
20 duplicative, discrete tasks at Co-Lead Counsel's direction, consisting primarily of conducting  
21 document review and working with named plaintiffs. Joint Decl., ¶ 93. Eight non-lead firms  
22 (including Liaison Counsel) assisted in reviewing over 3.3 million pages of documents  
23 produced by Defendants, and preparing Co-Lead Counsel for the depositions of key fact  
24 witnesses. The document review process was closely monitored by Co-Lead Counsel, including  
25 weekly conference calls and consistent oversight and adjustment of review strategy to ensure  
26 effectiveness and efficiency. *Id.*, ¶ 30. In addition, non-lead counsel representing the named  
27 plaintiffs provided input into EPPs' responses to discovery requests propounded by Defendants,  
28 assisted with the collection of documents from their clients, and assisted in preparing their



1 clients for their depositions. *Id.*, ¶ 93. Non-lead firms also assisted with other discrete tasks at  
 2 direction of Co-Lead Counsel, such as assisting with non-party discovery and expert discovery,  
 3 which proved critical to EPPs' class certification efforts. *Id.* Firms other than Co-Lead Counsel  
 4 and Liaison Counsel billed 84% of their time to document review and discovery of their clients.  
 5 *Id.* A chart showing the time class counsel spent on specific types of work is included in  
 6 Paragraph 92 of Co-Lead Counsel's Joint Declaration.

7 Co-Lead Counsel also collaborated closely with counsel for DPPs to further reduce  
 8 duplication and increase efficiency. To illustrate:

- 9 • DPPs took the lead briefing the at-issue waiver motions before this Court, while  
 10 EPPs briefed Defendants' unsuccessful appeal. *Id.*, ¶ 36.
- 11 • EPPs took the lead in Watson and Teikoku meet and confers, joint statements  
 12 related to discovery and privilege disputes, while DPPs took the lead as to Endo.  
*Id.*, ¶¶ 24-25.
- 13 • EPPs took the laboring oar drafting Plaintiffs' opposition to Defendants'  
 14 summary judgment motion and DPPs took the lead drafting Plaintiffs' summary  
 judgment motion and reply. *Id.*, ¶¶ 68-69.
- 15 • EPPs and DPPs split the primary responsibility for drafting and responding to  
 16 *Daubert* motions. *Id.*, ¶ 70.
- 17 • EPPs took the lead preparing plaintiffs' trial filings, such as deposition  
 18 designations, jury instructions and statements of disputed and undisputed facts,  
 with DPPs preparing specific portions (such as the proposed Hatch-Waxman and  
 patent jury instructions). *Id.*, ¶ 75.
- 19 • EPPs took the lead on jury testing in advance of the trial, with DPPs preparing  
 20 Plaintiffs' exhibit list and objections to Defendants' exhibit list. *Id.*, ¶ 83.

21 EPPs agree with DPPs' assessment that "[c]ounsel for the direct purchaser class and the end[-  
 22 ]payor class enjoyed an exceptionally cooperative relationship in this case that benefited both  
 23 classes." ECF No. 1024 at 5 n.3 (Declaration of Peter Kohn).

24 Class counsel also took steps to ensure that the time submitted reflected only work  
 25 reasonably performed for the benefit of the End-Payor Class. *First*, each firm kept  
 26 contemporaneous records of their time and was directed to review their daily time records to  
 27 eliminate inefficiencies. Joint Decl., ¶ 94. Co-Lead Counsel and Liaison Counsel also reviewed  
 28 the time records. *Id.* Work that did not benefit the End-Payor Class—such as intra-firm

1 conferences or “read and review” time beyond what is necessary to provide status updates to  
2 clients—is not included in class counsel’s lodestar. *Id. Second*, time related to the JPML transfer  
3 motion or the appointment of interim lead counsel was excluded entirely from each firm’s  
4 lodestar. *Id. Third*, each firm’s lodestar includes a maximum of only twenty hours for drafting  
5 their client’s initial complaint; any additional complaint-related time was excluded. *Id.* The  
6 number of hours reported is also conservative in that it does not reflect time that class counsel  
7 will continue to spend administering the settlements and overseeing the distributions of  
8 settlement proceeds, which will not be complete until 2020.

9 That class counsel spent many thousands of hours litigating this matter is a reflection of  
10 the fact that this complex antitrust action proceeded to the eve of trial. The requested hours are  
11 reasonable.

## 12 2. Class Counsel’s Hourly Rates are Reasonable

13 The second part of the lodestar calculation is multiplying the hours spent by a  
14 “reasonable hourly rate for the region and the experience of the lawyer.” *Bluetooth*, 654 F.3d at  
15 941. Class counsel’s historic rates—which range from \$350 to \$1,050 for partners and senior  
16 counsel, \$300 to \$675 for associates, and \$100 to \$400 for paralegals and other litigation staff  
17 (including senior cases managers)—meet both criteria.

18 The hourly rates are consistent with rates approved in recent antitrust class actions in this  
19 district. *E.g., In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*,  
20 2017 WL 6040065 (“NCAA”), at \*8 (N.D. Cal. Dec. 6, 2017) (approving hourly rates for  
21 partners of \$578 to \$1,035 and rates for associates of \$295 to \$635); *Nitsch v. DreamWorks*  
22 *Animation SKG Inc.*, 2017 WL 2423161, at \*9 (N.D. Cal. June 5, 2017) (attorney rates  
23 generally between \$275 to \$750, and rates for the most senior attorneys of \$870 to \$1,200); *In*  
24 *re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 4126533, at \*7 (N.D. Cal. Aug. 3, 2016)  
25 (rates between \$350 and \$875); *In re High-Tech Empl. Antitrust Litig.*, 2015 WL 5158730, at \*9  
26 (N.D. Cal. Sept. 2, 2015) (partner rates of \$490 to \$975, non-partner rates of \$310 to \$800, and  
27 staff rates of \$190 to \$430). Ms. Sharp, Ms. Robertson, and Ms. Steiner billed at historic rates  
28 ranging from \$510 to \$700, at the lower end of partner rates recently approved in antitrust cases

1 this district. Each firm's rates are also its usual and customary rates that were charged by the firm  
2 in similar matters in which the firm is paid on a contingent basis, as well as the firm's  
3 noncontingent matters. Class Counsel Decls., section II. Each firm's declaration provides examples  
4 of courts approving the firm's hourly rates. *Id.*

5 Class counsel assigned tasks to attorneys and staff based on their skills and experience.  
6 *Id.*, section I.C. Depositions and expert work were, for example, largely handled by senior  
7 attorneys while document review and legal research was conducted by more junior associates.  
8 Co-Lead Counsel set an hourly cap of \$350 for all time spent on document review, including  
9 time spent compiling and preparing "deposition kits."<sup>3</sup> A small number of firms paid contract  
10 attorneys to review documents. *Id.* Co-Lead Counsel understands that the use of contract  
11 attorneys is an issue of increasing importance to courts. Here, contract attorneys, who were  
12 capped at a \$350 hourly rate, billed only a small fraction of the time in this case.

13 While class counsel's lodestar is calculated using historic billing rates, courts in this  
14 district have recognized that use of current billing rates for all work is appropriate "'in order to  
15 account for the delay . . . in receiving payment.'" *CRT*, 2016 WL 4126533, at \*7 (citing *Fischel*  
16 *v. Equitable Life Assur. Soc.*, 307 F.3d 997 (9th Cir. 2002)); *see also Stanger v. China Elec.*  
17 *Motor, Inc.*, 812 F.3d 734, 740 (9th Cir. 2016) ("attorneys in common fund cases must be  
18 compensated for any delay in payment" and directing the district court to use current rates or a  
19 rate enhancement on remand (quoting *Fischel*, 307 F.3d at 1010)). Applying current rates, class  
20 counsel's lodestar would be substantially higher and the requested fee multiplier would be  
21 lower.

### 22 3. The Requested Multiplier is Warranted

23 In deciding whether to deviate from the lodestar figure, courts consider "the quality of  
24 representation, the benefit obtained for the class, the complexity and novelty of the issues  
25 present, and the risk of nonpayment." *Bluetooth*, 654 F.3d at 942 (quoting *Hanlon v. Chrysler*  
26

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27 <sup>3</sup> The only exception was the \$400 hourly rate permitted for an experienced Japanese language  
28 document reviewer who reviewed and identified key documents produced by Teikoku.

1 *Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)). “Foremost among these considerations, however,  
2 is the benefit obtained for the class.” *Id.* Each of these factors weighs in favor of class counsel’s  
3 requested 1.37 multiplier.

4 First, class counsel obtained a significant benefit for the End-Payor Class. Defendants  
5 will pay a total of \$104.75 million in cash to settle EPPs’ claims. The End-Payor Class will  
6 recover 46% of the most favorable single damages estimate EPPs were prepared to seek at trial  
7 (\$229 million). *See Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 964-65 (9th Cir. 2009)  
8 (antitrust settlement for 30% of plaintiffs’ estimated damages was “fair and reasonable no  
9 matter how you slice it”); *Edwards v. Nat’l Milk Producers Federation*, 2017 WL 3623734, at  
10 \*7 (N.D. Cal. June 26, 2017) (that settlement was 30% of estimated indirect purchaser damages  
11 “strongly weighs in favor of granting final approval”); *In re Cathode Ray Tube (CRT) Antitrust*  
12 *Litig.*, 2016 WL 3648478, at \*7 n.19 (N.D. Cal. July 7, 2016) (describing survey of 71 settled  
13 cartel cases where weighted mean settlement recovery was 19% of single damages); *In re High-*  
14 *Tech Empl. Antitrust Litig.*, 2015 WL 5159441, at \*4 (N.D. Cal. Sept. 2, 2015) (approving total  
15 settlements that were 14% of the class damages estimate, and noting that “[d]istrict courts in the  
16 Ninth Circuit routinely approve settlements with much larger differences between the settlement  
17 amount and estimated damages.”).

18 As shown in the following chart, class counsel have been unable to identify any recent  
19 federal pay-for-delay or related drug litigation brought on behalf of end-payors that has settled  
20 for more than \$100 million. Joint Decl., ¶ 5. As a percentage of the DPPs’ recovery, the EPP  
21 settlement is likewise unprecedented.

<b>CASE (District and Settlement Year)</b>	<b>DPP (~MM)</b>	<b>EPP (~MM)</b>	<b>EPP % of DPP Total</b>
<i>Lidoderm (N.D. Cal. 2018)</i>	<b>\$166</b>	<b>\$104.75</b>	<b>63%</b>
<i>Aggrenox (D. Conn. 2018)</i>	\$146	\$54	37%
<i>Solodyn (D. Mass. 2018)</i>	\$77	\$45	58%
<i>Skelaxin (E.D. Tenn. 2015)</i>	\$73	\$9	12%
<i>DDAVP (S.D.N.Y 2013)</i>	\$20	\$5	25%
<i>Flonase (E.D. Pa. 2013)</i>	\$150	\$35	23%
<i>Toprol XL (D. Del. 2012)</i>	\$20	\$11	55%

1	<i>Wellbutrin SR</i> (E.D. Pa 2011)	\$50	\$22	44%
2	<i>Tricor</i> (D. Del. 2009)	\$250	\$66	26%
3	<i>Ovcon</i> (D.D.C. 2009)	\$22	\$13	59%
4	<i>Terazosin</i> (S.D. Fla. 2005)	\$75	\$31 <sup>4</sup>	41%
5	<i>Relafen</i> (D. Mass. 2005)	\$175	\$75 <sup>5</sup>	43%
6	<i>Remeron</i> (D.N.J. 2005)	\$75	\$36	48%
7	<i>Paxil</i> (E.D. Pa. 2005)	\$150 <sup>6</sup>	\$65	43%%
8	<b>Pre-Lidoderm Average (unweighted)</b>			<b>39%</b>

9 Whether measured in dollars or by reference to percentage-of-recovery, the size of the recovery  
10 here alone warrants a substantial multiplier. *See Nitsch v. DreamWorks Animation SKG Inc.*,  
11 2017 WL 2423161, at \*10 (awarding a 2.0 multiplier for a 30.5% recovery).

12 Second, class counsel respectfully submits that they provided their clients with diligent  
13 and effective representation in this matter, and “did a good job persistently advocating for the  
14 best interests of class members, and obtained a very good result for the class[.]” *In re Charles  
15 Schwab Corp. Securities Litig.*, 2011 WL 1481424, at \*8 (N.D. Cal. Apr. 19, 2011) (awarding a  
16 2.68 multiplier). One example is class counsel’s advocacy for the forecasting approach to  
17 damages. Had EPPs used the same “backcasting” type model used by DPPs, EPP damages  
18 would have been \$156 million and the settlement recovery would have been 67% of damages.  
19 As noted in the Kohn Decl. at 1 (ECF 1024), the recovery of between 67%-88% of backcasting  
20 damages would put this recovery in the top three of percentage-of-damages recoveries for *DPP  
21 settlements*, which historically have much higher recoveries as a percentage of damages than  
22 EPP cases. Defendants were represented by leading defense firms, including counsel brought in  
23 specifically for purposes of trial. Despite the skill of opposing counsel, class counsel obtained  
24 favorable rulings on key issues throughout the case, including motions to dismiss, class  
25 certification, discovery disputes, summary judgment, and pretrial matters.

26 <sup>4</sup> Of this amount, \$2 million was set aside to pay for the fees, costs, and claims of the state  
27 plaintiffs.

28 <sup>5</sup> This amount includes an \$8 million payment to a large non-class group of third-party  
purchasers.

<sup>6</sup> After accounting for opt-outs, the final settlement amount was \$100 million.

1 Third, this case raised numerous complex and novel issues of law. The Supreme Court  
2 issued its decision in *Actavis* in June 2013, shortly before this action commenced in November  
3 2013. This case was the first post-*Actavis* pay-for-delay case filed in the Ninth Circuit, and  
4 many of the issues class counsel litigated were matters of first impression in this Circuit. Those  
5 issues included the proper standard of proof to apply at summary judgment and trial, an issue on  
6 which EPPs led the plaintiffs' briefing efforts. And because this litigation challenged a  
7 settlement of a patent litigation, it raised issues at the intersection of antitrust and patent law and  
8 often involved complex attorney-client privilege issues. Class counsel, for example, litigated  
9 (and prevailed on) disputes involving the common interest privilege and at-issue privilege  
10 waivers. Defendants unsuccessfully petitioned the Ninth Circuit to review the Court's order on  
11 both of these issues. EPPs took the lead on briefing both appeals. Class counsel's successful  
12 litigation of the unique and difficult issues presented in this case also weighs in favor of a  
13 multiplier. *Cf. DreamWorks*, 2017 WL 2423161, at \*9-10 (awarding a 2.0 multiplier even where  
14 a prior case "provided much of the evidence, legal theories, arguments, and prior rulings  
15 necessary to litigate this case").

16 Fourth, this litigation presented a substantial risk of loss at the pretrial stage or at trial.  
17 In the only pay-for-delay case to proceed through trial since *Actavis*, the jury returned a victory  
18 for the defendants. *See In re: Nexium (Esomeprazole) Antitrust Litig.*, No. 1:12-md-02409-  
19 WGY, ECF No. 1383 (D. Mass. Dec. 5, 2014) (verdict form). In other cases, plaintiffs have lost  
20 at summary judgment. *See In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class*, 868  
21 F.3d 132 (3d Cir. 2017) (affirming summary judgment in favor of defendants). Obtaining  
22 certification of an end-payor class is also notoriously difficult. As indirect purchasers, EPPs  
23 cannot rely on defendants' sales data to create their classwide damages model and must  
24 separately model damages for consumers and third-party payors, overcome "pass-on"  
25 arguments, account for various categories of payors that defendants argue escaped injury, and  
26 demonstrate that their class is ascertainable. These challenges are unique to end-payors and  
27 have proved fatal in other end-payor cases. *See Vista Healthplan, Inc. v. Cephalon, Inc.*, 2015  
28 WL 3623005 (E.D. Pa. June 10, 2015) (denying class certification); *In re Skelaxin (Metaxalone)*



1 *Antitrust Litig.*, 299 F.R.D. 555 (E.D. Tenn. 2014) (same). Even a victory on liability and  
2 causation would not have guaranteed a recovery significantly larger than the settlement. If  
3 Defendants had persuaded the jury to use a backcasting approach to damages and to adopt a  
4 later but-for entry date than the date advocated by EPPs, the maximum EPP damages would  
5 \$118.75 million.

6 In addition, had EPPs prevailed at trial, Defendants were poised to appeal several  
7 important decisions, including the Court’s certification of the End-Payor Class, its summary  
8 judgment order on the relevant market, and its order on the appropriate standard for establishing  
9 causation at trial. *See* ECF 929 at 25 (reserving appellate rights as to class certification); *id.* at 8  
10 n.5 (same as to market definition); ECF 948 at 2 (arguing that the Court’s causation standard  
11 “would create an appellate issue that would permeate the entirety of any liability verdict”).  
12 Against the backdrop of these risks, “Class Counsel litigated this action without pay for several  
13 years, even though recovery was uncertain.” *High-Tech*, 2015 WL 5158730, at \*10; *see also In*  
14 *re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998) (“Antitrust  
15 litigation in general, and class action litigation in particular, is unpredictable.”). And during the  
16 course of the litigation, class counsel incurred more than \$2.9 million in out-of-pocket expenses,  
17 for which there was no guarantee of reimbursement. Joint Decl., ¶¶ 98, 104.

18 Finally, the requested multiplier is well within the range of multipliers awarded in the  
19 Ninth Circuit. In *Vizcaino v. Microsoft Corporation* the Ninth Circuit surveyed common fund  
20 cases with settlements ranging from \$50-200 million and found that multipliers ranged from  
21 1.0-4.0 in the vast majority of cases. 290 F.3d 1043, 1052-54 (9th Cir. 2002). Courts in this  
22 district have recently awarded significantly larger multipliers in antitrust cases than the 1.37  
23 multiplier requested by class counsel. *E.g. DreamWorks*, 2017 WL 2423161, at \*10 (2.0  
24 multiplier); *High-Tech*, 2015 WL 5158730, at \*10 (2.2 multiplier after “Class Counsel devoted  
25 considerable time and effort litigating this case over a period of four years”).

26 Viewed in light the above factors and awards in other cases, a 1.37 multiplier on class  
27 counsel’s lodestar is warranted.

1           **B.     The Percentage-of-the Recovery Method Supports the Requested Attorneys’**  
 2           **Fee Amount**

3           Applying the percentage-of-the-recovery method, EPPs request a fee award of one-third  
 4 of the settlement fund, including accrued interest. In the Ninth Circuit, the benchmark for  
 5 attorneys’ fees under a percentage-of-the-recovery approach is 25% of the settlement fund.  
 6 *Bluetooth*, 654 F.3d at 942 (citation omitted). But “[t]he benchmark percentage *should be*  
 7 adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the  
 8 percentage recovery would be either too small or too large in light of the hours devoted to the  
 9 case or other relevant factors.” *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d  
 10 1301, 1311 (9th Cir. 1990) (emphasis added). If the Court were to apply a percentage-of-  
 11 recovery method here, an upward adjustment is warranted in light of class counsel’s efforts,  
 12 persistence, and the result achieved in this litigation. The factors courts consider when  
 13 determining whether to depart from the 25% benchmark are: “(1) the result achieved; (2) the  
 14 risk involved in the litigation; (3) the skill required and quality of work by counsel; (4) the  
 15 contingent nature of the fee; and (5) awards made in similar cases.” *Larsen v. Trader Joe’s Co.*,  
 16 2014 WL 3404531, at \*9 (N.D. Cal. 2014) (citing *Vizcaino*, 290 F.3d at 1048-50).

17           The first four factors largely mirror the considerations discussed above with respect to a  
 18 lodestar multiplier. Just as those factors weigh in favor of a multiplier, they also weigh in favor  
 19 of a fee award of one-third of the settlement fund.<sup>7</sup> “With respect to the first factor, the overall  
 20 result and benefit to the class from the litigation is the most critical factor in granting a fee  
 21 award.” *Larsen*, 2014 WL 3404531, at \*9 (citation omitted). Class counsel recovered 46% of  
 22 EPPs’ most favorable damages estimate, and more than 67% of “backcasting” damages, and  
 23 “[f]ar lesser results (with 20% recovery of damages or less) have justified upward departures  
 24 from the 25% benchmark.” *NCAA*, 2017 WL 6040065, at \*3 & n.14 (collecting cases). Second,

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25  
 26 <sup>7</sup> When calculating the percentage, courts should use the gross settlement amount—*i.e.*  
 27 including amounts that will be used to pay notice and administrative costs and litigation  
 28 expenses—as the denominator. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953  
 (9th Cir. 2015).



1 the EPPs faced substantial, unique risks throughout the litigation—including previous decisions  
2 denying certification of similar end-payor classes, and significant damages modeling  
3 challenges. *See* Part IV.A.3, above. Third, overcoming these risks and additional complex risks  
4 shared with the other plaintiff groups (including on motions to dismiss, privilege issues,  
5 summary judgment, *Daubert* challenges), required skillful and thoughtful representation and  
6 close collaboration with DPP counsel. Class counsel are among the most experienced class  
7 action and antitrust firms in the country, and their experience and skills were brought to bear to  
8 achieve a substantial result in for the End-Payor Class. Fourth, class counsel undertook this  
9 matter on an entirely contingent fee basis, with no (or late) parallel government litigation, and  
10 litigated under the demanding rule-of-reason standard. In cases like this one, “the public interest  
11 is served by rewarding attorneys who assume representation on a contingent basis with an  
12 enhanced fee to compensate them for the risk that they might be paid nothing for their work.”  
13 *Larsen*, 2014 WL 3404531, at \*9.

14 As to the fifth factor, a fee award of one-third of the settlement fund is within the range  
15 of awards in this Circuit. *See id.*, 2014 WL 3404531, at \*9 (citing numerous cases awarding fees  
16 of 32% or greater); *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995)  
17 (affirming award of 33%). *See also In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at \*10  
18 (D.D.C. July 16, 2001) (awarding fees of 34% of \$359 million settlement fund).

19 Fee awards of one-third are also commonplace in pay-for-delay litigation and were very  
20 recently awarded in two such cases. *E.g. In re Aggrenox Antitrust Litig.*, No. 2:14-md-02516-  
21 SRU, ECF 821, at 9-10 (July 19, 2018) (awarding 33 1/3%); *In re Solodyn (Minocycline*  
22 *Hydrochloride) Antitrust Litig.*, No. 1:14-md-02503-RJC, ECF 1176, at 5 (July 18, 2018) (fee  
23 award of 33 1/3%; 1.08 multiplier); *In re Tricor Indirect Purchaser Antitrust Litig.*, No. 1:05-  
24 cv-00360-SLR, slip op. at 4, ECF No. 544 (D. Del. Oct. 28, 2009) (fee award of 33 1/3% of the  
25 \$67,500,000 settlement fund; 1.48 multiplier); *In re Relafen Antitrust Litig.*, No. 01-cv-12239-  
26 WGY, slip op. at 9, ECF No. 459 (D. Mass. Oct 13, 2005) (fee award of 33 1/3% of the  
27 \$67,000,000 settlement fund; 2.02 multiplier).

1           Moreover, there is “no rule in the Ninth Circuit that requires a court to decrease the  
2 percentage of the fee award as the size of the settlement increases.” *In re Toyota Corp.*  
3 *Unintended Marketing, Sales Pracs. and Prods. Liability Litig.*, 2013 WL 12327929, at \*34  
4 (C.D. Cal. July 24, 2013) (citing *Vizcaino*, 290 F.3d at 1047). Instead, the size of the fund is  
5 simply one factor courts can look to when determining a reasonable fee. *Vizcaino*, 290 F.3d at  
6 1047. A presumption that a certain percentage applies based on the size of the settlement fund  
7 “flies in the face” of a court’s obligation to “consider[] all the circumstances of the case and  
8 reach[] a reasonable percentage.” *Id.* at 1048; *see also Washington Public Power Supply Sys.*  
9 *Sec. Litig.*, 19 F.3d 1291, 1298 (9th Cir. 1994) (“courts cannot rationally apply any particular  
10 percentage—whether 13.6 percent, 25 percent or any other number—in the abstract, without  
11 reference to all the circumstances of the case”).

12           In appropriate circumstances, “federal district courts across the country have, in the class  
13 action settlement context, routinely awarded class counsel fees in excess of the 25%  
14 ‘benchmark,’ even in so-called ‘mega-fund’ cases.” *NCAA*, 2017 WL 6040065, at \*5 & n.30  
15 (collecting cases, including those awarding fees of 1/3 of the settlement fund); *see also In re*  
16 *Urethane Antitrust Litig.*, 2016 WL 4060156, at \*6 (D. Kan. July 29, 2016) (“although a one-  
17 third fee would be at the top of the range of awards in megafund cases, that figure does still fall  
18 within that range, especially in more recent cases”); *In re Checking Account Overdraft Litig.*,  
19 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011) (“courts nationwide have repeatedly awarded fees  
20 of 30 percent or higher in so-called ‘megafund’ settlements”) (collecting cases). For the reasons  
21 discussed above, an award above the benchmark is appropriate in this case.

22           While in some cases, it may be necessary to award a lower percentage to prevent  
23 “windfall profits for class counsel *in light of the hours spent on the case.*” *Bluetooth*, 654 F.3d  
24 at 942 (emphasis added); *see also CRT*, 2016 WL 4126533, at \*6 (“the best way to guard  
25 against a windfall is first to examine whether a given percentage represents too high of a  
26 multiplier of counsel’s lodestar”); *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 WL 2438274, at  
27 \*4 (N.D. Cal. May 21, 2015) (refusing to apply 25% benchmark where result would have been a  
28 10.38 multiplier). This is not one of those cases, however, given the modest multiplier class

1 counsel seek here. And just as the 25% benchmark is inappropriate in cases where it would  
2 result in a windfall, it is equally inappropriate where—as here—it would result in a fee that  
3 undercompensates class counsel. *See Six (6) Mexican Workers*, 904 F.2d at 1311 (benchmark  
4 should be adjusted where the recovery would be “either *too small or too large* in light of the  
5 hours devoted to the case”) (emphasis added).

6 Even when courts have awarded less than 25%, they have regularly awarded lodestar  
7 multipliers of 2 or more, which is significantly more than Co-Lead Counsel has requested. *E.g.*  
8 *High-Tech*, 2015 WL 5158730, at \*10 (awarding fees of 10.8%, a 2.2 multiplier). And, in light  
9 of the work performed and results achieved, courts in “megafund” cases have awarded fees that  
10 are both above the 25% benchmark and resulted in a significant multiplier. *E.g. Vizcaino*, 290  
11 F.3d at 1050 (affirming 28% fee and multiplier of 3.65); *CRT*, 2016 WL 4126533, at \*6, 10  
12 (awarding a fee of 27.5% and a 1.96 multiplier); *Urethane*, 2016 WL 4060156, at \*7 (awarding  
13 a fee of one-third, a 3.2 multiplier).

14 In short, the rationales for awarding fees at or below the 25% benchmark do not apply  
15 here. All of the relevant factors support the requested fee award.

## 16 **V. THE REQUESTED EXPENSES ARE REASONABLE**

17 “Class counsel is entitled to reimbursement of reasonable expenses.” *Larsen*, 2014 WL  
18 3404531, at \*10 (citing Fed. R. Civ. P. 23(h)); *see also High-Tech*, 2015 WL 5158730, at \*16  
19 (“In common fund cases, the Ninth Circuit has stated that the reasonable expenses of acquiring  
20 the fund can be reimbursed to counsel who has incurred the expense.”) (citing *Vincent v.*  
21 *Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977)). Class counsel requests the  
22 reimbursement of their out-of-pocket expenses.

23 Throughout the litigation class counsel contributed to a litigation fund that was used to  
24 pay for common expenses such as expert witnesses, deposition transcripts, a document review  
25 platform, translations, and IMS transactional data used by EPPs’ experts. Joint Decl., ¶ 98. The  
26 largest of these expenses were expert fees paid to EPPs’ class certification and damages  
27 economist, Dr. Hal Singer. *Id.*, ¶ 100. In total, EPPs paid \$2,470,935.01 in case-related expenses  
28 from the litigation fund. An accounting of the litigation fund expenditures is included in

1 Paragraph 99 of Co-Lead Counsel's Joint Declaration. Class counsel also incurred \$434,313.80  
2 in costs borne by individual firms and not paid out of the litigation fund. *Id.*, ¶ 104. These  
3 include costs incurred for legal research, travel, postage, copying costs, and filing fees. *Id.*, ¶  
4 105. An accounting of the non-litigation fund expenditures is included in Paragraph 105 of the  
5 Joint Declaration.

6 In addition, EPPs' expense request includes \$356,792.62 in out-of-pocket expenses  
7 incurred by the Lowey Dannenberg firm that Co-Lead Counsel believe contributed to the result  
8 achieved on behalf of the End-Payor Class, consisting primarily of Lowey Dannenberg's  
9 contributions to the costs of Plaintiffs' joint experts. Joint Decl., ¶ 108. Class counsel also  
10 requests the payment of \$385,000 in costs for distribution of notice of the Court's class  
11 certification order to the End-Payor Class. *Id.*, ¶ 109. While KCC has agreed to carry that cost,  
12 it will become immediately due upon final approval and resolution of any appeals. *Id.* In total,  
13 class counsel requests the reimbursement of \$3,647,041.43 in unreimbursed out-of-pocket  
14 expenses, which consists of \$2,470,935.01 in expenditures from the litigation fund; \$434,313.80  
15 in individual firm expenses; \$356,792.62 in expenses incurred by Lowey Dannenberg; and  
16 \$385,000 for class certification notice.

17 The categories of expenses for which class counsel seeks reimbursement are the type  
18 routinely charged to clients and should be reimbursed. *See High-Tech*, 2015 WL 5158730, at  
19 \*16 (awarding costs for (1) expert witness fees; (2) mediators' fees; (3) document review; (4)  
20 court reporting and videographer services; (5) electronic research; (6) copying, mailing, and  
21 serving documents; and (7) case-related travel for Plaintiffs, witnesses, experts, and counsel); *In*  
22 *re Media Vision*, 913 F.Supp. 1362, 1367-72 (N.D. Cal. 1996) (costs related to experts,  
23 photocopying, legal research fees, travel expenses, postage, and filing fees may be reimbursed).

## 24 **VI. THE REQUESTED SERVICE AWARDS ARE REASONABLE**

25 Class counsels' request for a service award of \$10,000 to each of the nine Class  
26 Representatives (\$90,000 total, which is .086% of total value of the Settlements) is also  
27 reasonable. Each Class Representative actively participated in the litigation, stayed abreast of  
28 the progress of the case, collected and produced documents and responded to interrogatories,

1 and sat and prepared for depositions.<sup>8</sup> Awards of \$10,000 are frequently awarded to end-payors  
 2 in pay-for-delay cases. *E.g.*, *Aggrenox*, No. 2:14-md-02516-SRU, ECF 821, at 10 (awarding  
 3 \$10,000 service awards); *Solodyn*, No. 1:14-md-02503-RJC, ECF 1176, at 4 (same). The  
 4 requested awards are also consistent with similar service awards regularly approved in class  
 5 actions in this district. *E.g.*, *Alvarez v. Farmers Ins. Exchange*, 2017 WL 2214585, at \*1 (N.D.  
 6 Cal. Jan. 18, 2017) (approving nine \$10,000 service awards that in the aggregate were 1.8% of  
 7 the settlement value); *In re Animation Workers Antitrust Litig.*, 2016 WL 6663005, at \*9 (N.D.  
 8 Cal. Nov. 11, 2016) (approving \$10,000 service awards in a case with \$18.95 million settlement  
 9 fund).

10 **VII. PROPOSED SCHEDULE FOR PAYMENT OF FEES, EXPENSES, AND**  
 11 **SERVICE AWARDS**

12 Endo will not make its second and third payments (of \$10 million each, or 9.5% of the  
 13 total settlement amount, each) until February 15, 2019 and 2020, respectively. While Endo's  
 14 second payment will be included in the first distribution of settlement funds to class members in  
 15 March 2019, Endo's third payment will not be available for distribution until March 2020.

16 Class counsel therefore propose that their fees are paid on the same schedule and in the  
 17 same proportion as the End-Payor Class's recoveries. In other words, class counsel would: (1)  
 18 receive 81% of the Court-awarded fees upon final approval and settlement finality (accounting  
 19 for the full payments by Watson and Teikoku, and Endo's payment of one-half of its total  
 20 settlement amount), (2) receive 9.5% of the Court-awarded attorneys' fees after receipt of  
 21 Endo's second payment, and (3) receive the remaining 9.5% of the Court-awarded attorneys'  
 22 fees after receipt of Endo's third payment.

23 In sum, class counsel propose that attorneys' fees and expense payments occur  
 24 according to the following schedule:

25  
 26  
 27 <sup>8</sup> The sole exception is Ms. Gallotto, who by agreement of the parties instead responded to  
 28 written questions due to her failing health.

Event	Date
Endo's first payment, Teikoku payment, Watson payment (total: \$84.75 million)	Already received
Payment of 81% of the Court-awarded attorneys' fees, \$3,647,041.43 in expenses, and service awards	Thirty days after final approval and the running of any appeals ( <i>i.e.</i> settlement finality)
Endo's second payment (\$10 million)	By February 15, 2019
First distribution of settlement funds and payment to class counsel of 9.5% of the court-awarded attorneys' fees	Early March 2019
Endo's third payment (\$10 million)	By February 15, 2010
Second distribution of settlement funds and payment to class counsel of 9.5% of the court-awarded attorneys' fees	Early March 2020

The proposed schedule protects the interests of the End-Payor Class by ensuring that class counsel will receive their fee and expense payments on the same schedule that the End-Payor Class receives its recoveries. The schedule also prevents the overpayment of class counsel in the event of non-payment of the second or third Endo payments.

### VIII. CONCLUSION

For the foregoing reasons, class counsel requests the Court award one-third of the settlement amounts (\$34,916,000) in attorneys' fees, plus proportional interest accrued from the Settlement Fund; award \$3,647,041.43 in expenses; and service awards of \$10,000 to each of the End-Payor Plaintiffs.

DATED: July 31, 2018

Respectfully submitted,

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**ATTESTATION**

I, Dena C. Sharp, am the ECF User whose identification and password are being used to file End-Payor Class Counsel’s Motion for an Award of Attorneys’ Fees, Expenses, and Service Awards. Pursuant to Civil L.R. 5-1(i)(3), I attest under penalty of perjury that concurrence in this filing has been obtained from all counsel.

DATED: July 31, 2018

/s/ Dena C. Sharp  
Dena C. Sharp

**CERTIFICATE OF SERVICE**

I hereby certify that on July 31, 2018, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to all counsel of record registered in the CM/ECF system.

/s/ Dena C. Sharp

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