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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

In re LIDODERM ANTITRUST
LITIGATION

Master File No. 14-md-02521-WHO

MDL No. 2521

THIS DOCUMENT RELATES TO:
END-PAYOR ACTIONS

**END-PAYOR PLAINTIFFS' UNOPPOSED
MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENTS,
PRELIMINARY APPROVAL OF PLAN
OF ALLOCATION, AND APPROVAL OF
NOTICE AND CLAIMS PLAN**

Date: April 25, 2018
Time: 2:00 p.m.
Courtroom: 2, 17th Floor
Before: Hon. William H. Orrick

**END-PAYOR PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENTS,
PRELIMINARY APPROVAL OF PLAN OF ALLOCATION, AND APPROVAL OF NOTICE AND CLAIMS
PLAN**

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 the End-Payor Plaintiffs (“Plaintiffs” or “EPPs”)¹ will
4 and do hereby move the Court for entry of an Order:

5 (1) preliminarily approving the settlement agreements (the “Settlements”) between
6 Plaintiffs, on behalf of themselves and the End-Payor Class, and (a) defendant Endo
7 Pharmaceuticals Inc. (“Endo”); (b) defendants Teikoku Pharma USA, Inc. and Teikoku Seiyaku
8 Co., Ltd. (together, “Teikoku”); (c) defendants Actavis, Inc. (f/k/a Watson Pharmaceuticals,
9 Inc.), Watson Laboratories, Inc., and Actavis plc (together, “Watson” together with Endo and
10 Teikoku, “Defendants”)²;

11 (2) approving the plan for distributing notice of the Settlements to, and receiving claims
12 from, the members of the End-Payor Class; and

13 (3) preliminarily approving the plan of allocation of the settlement funds among the
14 members of the End-Payor Class.

15 This Motion is supported by the accompanying Memorandum of Law, the Declaration of
16 Dena C. Sharp (“Sharp Decl.”) and exhibits thereto, the Lidoderm Settlement Allocation
17 Declaration of Dr. Hal J. Singer (“Singer Decl.”), the Declaration of Carla Peak (“Peak Decl.”),
18 and the accompanying [Proposed] Order Preliminarily Approving of Settlements, Approving
19 Notice and Claims Plan, and Approving Plan of Allocation.

20 _____
21 ¹ Allied Services Division Welfare Fund, City of Providence, International Union of Operating
22 Engineers Local 49 Health and Welfare Fund, International Union of Operating Engineers
23 Local 132 Health and Welfare Fund, Iron Workers District Council of New England Welfare
24 Fund, NECA-IBEW Welfare Trust Fund, United Food and Commercial Workers Local 1776 &
Participating Employers Health and Welfare Fund, Welfare Plan of the International Union of
Operating Engineers Locals 137, 137A, 137B, 137C, 137R, and Ottavio Gallotto.

25 ² The Endo, Teikoku, and Watson settlement agreements are attached as Exhibits 1-3
26 respectively to the Sharp Declaration. Unless otherwise noted, references to “Exhibits” or
27 “Ex.” refer to the exhibits to the Settlement Agreements, which—other than the Stipulated
28 Judgments with Endo—are identical for each of the agreements, with the exception of the
settlement amounts and the dates of payment.

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Plaintiffs have conferred with counsel for Defendants, and this motion is unopposed.

The Court is familiar with the facts of this case and EPPs do not believe that a hearing is necessary. If, however, the Court wishes to hold a hearing, EPPs respectfully request that the hearing be held at the Court's earliest convenience.

MEMORANDUM OF LAW**I. INTRODUCTION**

Shortly before trial was scheduled to begin, End-Payor Plaintiffs, on behalf of themselves and the members of the certified End-Payor Class, reached separate settlements with defendants Endo, Teikoku, and Watson. End-Payor Plaintiffs respectfully request that the Court preliminarily approve the Settlements and the proposed Plan of Allocation and approve the plan for distributing notice of the Settlements to the End-Payor Class.

Defendants will collectively pay \$104.75 million in cash—more than 40% of Plaintiffs’ best-case damages estimate—to settle the claims of the End-Payor Class. In addition to providing substantial relief to the End-Payor Class, the Settlements avoid the risk of an adverse trial verdict or a reversal on appeal. The Settlements were negotiated by counsel experienced in antitrust class actions and the negotiations were overseen by Chief Magistrate Judge Spero. The Settlements have no obvious deficiencies and are well within the range of final approval.

The proposed plan for distributing notice of the Settlements to the End-Payor Class is substantially like the notice plan the Court approved at class certification and will provide the best practicable notice. Notice to third-party payors (“TPPs”) will be given by direct mail and consumers will receive publication notice. The forms that class members will submit to claim a share of the settlement payments are straightforward and easy to complete. The proposed Plan of Allocation is reasonable and fair. It divides the settlement between consumers and third-party payors based on each group’s share of the classwide damages and, within each group, eligible claimants will be paid on a *pro rata* basis. EPPs propose that Kurtzman Carson Consultants (“KCC”)—the nationally-recognized class action administration firm that developed and successfully carried out the class certification notice plan—administer the notice, claims, and settlement fund distribution.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The first end-payor complaint in this multidistrict litigation was filed on November 12, 2013. *See United Food and Commercial Workers Local 1776 v. Teikoku Pharma USA, Inc., et al.*, 5:13-cv-05247 (N.D. Cal.). Other complaints followed in this District and other districts.

1 The Judicial Panel on Multidistrict Litigation centralized all pending Lidoderm actions before
2 this Court. ECF 1. On May 23, 2014, the Court appointed Girard Gibbs LLP, Heins Mills &
3 Olson, P.L.C., and Cohen Milstein Sellers & Toll PLLC as Interim Co-Lead Counsel, and
4 Joseph Saveri Law Firm, Inc. as Interim Liaison Counsel. ECF 63.

5 **Motions to Dismiss.** Following transfer of all pending Lidoderm actions to this Court,
6 the Court consolidated the end-payor actions. EPPs filed a consolidated amended complaint,
7 which Defendants moved to dismiss. ECFs 72, 95. On November 17, 2014, the Court largely
8 denied Defendants' motion to dismiss and upheld EPPs' claims under the laws of seventeen
9 states. ECF 117.

10 **Discovery.** The parties began initial discovery while Defendants' motion to dismiss was
11 pending and commenced with full discovery once the Court denied Defendants' motion.
12 Defendants ultimately produced over 3.3 million pages of documents, with third parties
13 producing thousands of additional pages of documents and data. EPPs—along with the other
14 plaintiffs—litigated numerous complex privilege issues in pursuit of their claims. *E.g.* ECFs
15 227, 269, 276, 345, 359, 364, 377, 398, 399, 401, 402, and 427 (Joint Discovery Letter Briefs);
16 ECFs 536 and 679 (at-issue waiver order and Ninth Circuit denial of petition for interlocutory
17 review); ECFs 367 and 484 (common interest order and Ninth Circuit denial of petition for
18 interlocutory review). Plaintiffs deposed 32 fact witnesses, including current and former
19 employees of Defendants as well as third parties.

20 **Class Certification.** In fall 2016, EPPs moved for certification of the End-Payor Class.
21 On February 21, 2017, the Court granted EPPs' motion and denied Defendants' *Daubert*
22 challenges to EPPs' experts. ECF 670. The Court appointed Girard Gibbs, Heins Mills, and
23 Cohen Milstein as Co-Lead Counsel for the End-Payor Class, and Saveri Law as Liaison Class
24 Counsel. Defendants filed a petition with the Ninth Circuit seeking interlocutory review under
25 Federal Rule of Civil Procedure 23(f), which EPPs opposed and the Ninth Circuit denied. ECF
26 756. In summer 2017, EPPs distributed notice in accordance with the Court-approved notice
27 plan, which used a combination of direct and publication notice to reach virtually all third-party
28 payor class members and approximately 80% of consumer class members. *See* Declaration of

1 Carla Peak Regarding Distribution of Notice to the End-Payor Class, ECF 872 (“Peak Class
2 Notice Decl.”); *see also* ECF 751 (approving EPPs’ proposed method of distributing notice).
3 Several large insurers opted out of the End-Payor Class. No consumers opted out of the End-
4 Payor Class.

5 ***Expert Work, Summary Judgment and Trial Preparations.*** The trial in this case was
6 initially scheduled for December 2017 and later set to begin on February 23, 2018. In
7 preparation for trial, the parties exchanged merits expert reports on a range of topics including
8 damages, patent issues, when generic entry would have been expected to occur absent the
9 settlement, and Watson’s manufacturing capabilities. EPPs’ damages expert calculated the
10 maximum single damages for the End-Payor Class as \$229 million (ECF 776-25 (Singer Reply
11 Rpt.) at 40). Defendants’ expert calculated the maximum damages for the End-Payor Class as
12 \$5.6 million, assuming plaintiffs proved that the patents would not prevent generic entry. (ECF
13 778-5 (Bell Rpt.) at 69).

14 In June 2017, after expert depositions had concluded, the parties filed motions for
15 summary judgment and *Daubert* motions to exclude various experts from testifying at trial.
16 Defendants sought summary judgment on all Plaintiffs’ claims on the issue of causation, while
17 Plaintiffs sought partial summary judgment on the relevant market and the “contract,
18 combination, or conspiracy” prong of their antitrust claims. ECFs 775, 786. On November 3,
19 2017, after oral argument, the Court denied Defendants’ motion, granted Plaintiffs’ motions,
20 and granted in part and denied in part the parties’ *Daubert* motions. ECF 900. Defendants later
21 moved unsuccessfully for reconsideration of the ruling concerning the causation standard that
22 would apply at trial. ECF 978. The parties exchanged their initial proposed pretrial materials—
23 including exhibit lists, witness lists, deposition designations, jury instructions, verdict forms—
24 on November 6, 2017. After protracted negotiations, in early December the parties filed their
25 agreed-upon and disputed pretrial submissions. ECFs 929 and 933.

26 ***Settlements.*** Certain of the parties participated in mediation before the Hon. Layn
27 Phillips in May 2017 but made only limited progress. Thereafter settlement negotiations took
28 place under the auspices of Chief Magistrate Judge Joseph C. Spero. EPPs reached an

1 agreement in principle with Teikoku following an initial settlement conference in December
2 2017, with Watson following a January settlement conference, and with Endo following a
3 February settlement conference, one week before jury selection.

4 **III. THE SETTLEMENTS**

5 Defendants will collectively pay \$104.75 million in cash to settle the claims of the End-
6 Payor Class in the seventeen class states—*i.e.* the states included in the definition of the End-
7 Payor Class. Of the \$104.75 million, Teikoku will pay \$23.75 million, Watson will pay \$41
8 million, and Endo will pay \$40 million. In exchange, Defendants will receive releases from the
9 End-Payor Class members. The Class members will only release their claims related to
10 Defendants’ reverse payment agreement and the releases are limited to claims in the class states.
11 The EPPs’ consolidated complaint and the separate complaint of the Government Employees
12 Health Association (which has rejoined the End-Payor Class) will be dismissed with prejudice.

13 Under the terms of the proposed Settlements, Teikoku and Watson will pay their entire
14 settlement amounts shortly after the Court grants preliminary approval. Endo will pay its
15 settlement amount in three installments. It will pay \$20 million shortly after the Court grants
16 preliminary approval, another \$10 million by February 15, 2019, and the final \$10 million by
17 February 15, 2020. Endo’s payment schedule was negotiated with the assistance of Magistrate
18 Judge Spero and allows EPPs to maximize the recovery from Endo. The agreement with Endo
19 includes terms that protect the End-Payor Class if Endo does not make its second or third
20 payments on time. Endo has signed two Stipulated Judgments (attached as Exhibit H and I to
21 the Endo Settlement Agreement), which Class Counsel will hold in escrow but may move to
22 have entered by the Court in the event Endo fails to pay. Endo may oppose such a motion only
23 to the extent it has a good-faith defense based on EPPs’ breach of the settlement agreement or
24 exhibits. *See* Endo Settlement Agreement, ¶¶ 6(c)-(d).

25 In connection with the Settlements, certain large insurers (referred to as “Separately
26 Represented End-Payers” or “SREPs”) that had opted out of the End-Payor Class withdrew
27 their opt-out requests and rejoined the End-Payor Class. *See* ECF 997 (granting stipulation
28 withdrawing opt-out requests). Securing the SREPs’ agreement to opt back into the End-Payor

1 Class increased EPPs’ negotiating leverage with defendants, thereby maximizing the recovery.
2 *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 310 (3d Cir. 2011) (“achieving global peace
3 is a valid, and valuable, incentive to class action settlements”). To encourage the SREPs to
4 rejoin the End-Payor Class, EPPs have agreed to expedite payment procedure for the SREPs,
5 who have comprehensive data available to support their claims. The SREPs and their ASO
6 clients account for at least 33.5% of the purchases by third-party payors. Sharp Decl., ¶ 9. The
7 SREPs (which include the self-funded clients for which they process prescription drug claims)
8 will submit their claims before the final approval hearing in the same manner and format as all
9 other third-party payor class members. Once the Settlements are approved and any appeals
10 resolved, the SREPs will receive an initial distribution of 32.5% of the portion of settlement
11 proceeds allocated to pay TPP claims. Ex. A1 at ¶¶ 1(g) & 2(b).

12 After the remainder of the End-Payor Class has submitted claims, and the Claims
13 Administrator has determined the allocation of the Settlement Funds among the eligible
14 claimants, there will be a “true-up” of the SREPs’ claims. If the initial claims payment
15 exceeded the SREPs’ final allocation amount, then the SREPs will refund the difference to the
16 Settlement Fund. *Id.* at ¶ 4(h)(i). If the initial claims payment is less than the SREPs’ final
17 allocation amount, then the difference will be paid to the SREPs when the rest of the End-Payor
18 Class receives their payments. *Id.* at ¶ 4(h)(ii). In short, although SREPs will receive an early
19 payment on their claims, they will ultimately receive only their *pro rata* share of the Settlement
20 Fund and the initial payments will not delay or otherwise impact the payments to the rest of the
21 End-Payor Class.

22 **IV. DISTRIBUTION OF NOTICE OF THE SETTLEMENTS TO THE END-PAYOR** 23 **CLASS IS WARRANTED**

24 **A. The Legal Standard**

25 Federal Rule of Civil Procedure 23(e) “requires the district court to determine whether a
26 proposed settlement is fundamentally fair, adequate, and reasonable.” *Hanlon v. Chrysler*
27 *Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). The district court’s role in evaluating a proposed
28 settlement “may be limited to the extent necessary to reach a reasoned judgment that the

1 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating
 2 parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all
 3 concerned.” *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (quoting
 4 *Hanlon*, 150 F.3d at 1027).

5 Courts in this District have granted “preliminary approval” “if ‘the proposed settlement
 6 appears to be the product of serious, informed, non-collusive negotiations, has no obvious
 7 deficiencies, does not improperly grant preferential treatment to class representatives or
 8 segments of the class, and falls within the range of possible approval.’” *State of California v.*
 9 *eBay, Inc.*, 2014 WL 4273888, at *5 (N.D. Cal. 2014) (quoting *In re Tableware Antitrust*
 10 *Litig.*, 484 F.Supp.2d 1078, 1079 (N.D. Cal. 2007)). Under the revisions to Rule 23 set to take
 11 effect December 1, 2018, a court may direct notice of a proposed settlement to the class where
 12 the parties have shown “that the court will likely be able to . . . approve the proposal under Rule
 13 23(e)(2).” PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (2017) at
 14 11;³ *see also Boyd v. Avanquest N. Am. Inc.*, 2015 WL 4396137, at *2 (N.D. Cal. July 15, 2015)
 15 (considering the final approval factors at preliminary approval stage). The Settlements satisfy
 16 either test and distribution of notice to the members of the End-Payor Class is warranted.

17 **B. The Court Should Preliminarily Approve the Settlements**

18 The Settlements are entitled to “an initial presumption of fairness” because they resulted
 19 from arm’s length negotiations among experienced counsel. *In re: Volkswagen “Clean Diesel”*
 20 *Marketing, Sales Practices, and Prods. Liability Litig.*, 2016 WL 4010049, at *14 (N.D. Cal.
 21 July 26, 2016) (quoting *In re High-Tech Empl. Antitrust Litig.*, 2013 WL 6328811, at *1 (N.D.
 22 Cal. Oct. 30, 2013) and *Newberg on Class Actions* § 11.41 (4th ed. 2002)); *see also Byrne v.*
 23 *Santa Barbara Hospitality Servs., Inc.*, 2017 WL 5035366, at *9 (C.D. Cal. Oct. 30, 2017)
 24 (“Great weight is accorded to the recommendation of counsel, who are most closely acquainted
 25 with the facts of the underlying litigation.” (citation omitted)). Class Counsel are nationally-

27 ³ Available at [https://www.fjc.gov/sites/default/files/2017/Rules-Amendments-2018-Supreme-](https://www.fjc.gov/sites/default/files/2017/Rules-Amendments-2018-Supreme-Court-Transmittal.pdf)
 28 [Court-Transmittal.pdf](https://www.fjc.gov/sites/default/files/2017/Rules-Amendments-2018-Supreme-Court-Transmittal.pdf).

1 recognized antitrust litigators with experience litigating reverse payment cases and each
2 believes that the Settlements are fair, reasonable, and in the best interests of the End-Payor
3 Class. Sharp Decl., ¶ 6; *see also* ECF 670 at 29 n.24 (appointing Girard Gibbs, Heins Mills, and
4 Cohen Milstein as Class Counsel and explaining that “[t]hese firms have ably and vigorously
5 litigated this case, and nothing has occurred to undermine my initial determination of their
6 experience and adequacy”); ECF 46-2 (firm resumes). In addition, the Settlements were the
7 result of months of negotiations overseen by experienced mediators: first, retired Judge Phillips
8 and then by Chief Magistrate Judge Spero. “The assistance of an experienced mediator in the
9 settlement process confirms that the settlement is non-collusive.” *Wellens v. Daiichi Sankyo,*
10 *Inc.*, 2015 WL 10090564, at *2 (N.D. Cal. Oct. 16, 2015); *see also Brown v. Hain Celestial*
11 *Group, Inc.*, 2016 WL 631880, at *6 (N.D. Cal. Feb. 17, 2016) (granting final approval of
12 settlement “reached after an extensive mediation process, including the final mediation with
13 Magistrate Judge Spero”).

14 The terms of the Settlements are also likely to warrant final approval as fair, reasonable,
15 and adequate. In deciding whether to grant final approval, courts balance “the strength of the
16 plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk
17 of maintaining class action status throughout the trial; the amount offered in settlement; the
18 extent of discovery completed and the stage of the proceedings; the experience and views of
19 counsel; the presence of a governmental participant; and the reaction of the class members to
20 the proposed settlement.” *Hanlon*, 150 F.3d at 1026. The *Hanlon* factors weigh in favor of
21 approval.⁴

22 Defendants will pay a total of \$104.75 million in cash to settle EPPs’ claims. The End-
23 Payor Class will recover 46% of EPPs’ most aggressive single damages estimate they would
24 have sought at trial (\$229 million). *See Rodriguez*, 563 F.3d at 964-65 (antitrust settlement for
25

26 ⁴ Because no government entity has participated in this litigation and class members have not
27 yet had an opportunity to respond to the Settlements, those factors are inapplicable at this stage.
28 But, the SREPs, some of the largest class members, have rejoined the class to participate in the
settlements, suggesting that this factor also weighs in favor of preliminary approval.

1 30% of plaintiffs’ estimated damages was “fair and reasonable no matter how you slice it”);
2 *Edwards v. Nat’l Milk Producers Federation*, 2017 WL 3623734, at *7 (N.D. Cal. June 26,
3 2017) (that settlement was 30% of estimated indirect purchaser damages “strongly weighs in
4 favor of granting final approval”); *In re High-Tech Employee Antitrust Litig.*, 2015 WL
5 5159441, at *4 (N.D. Cal. Sept. 2, 2015) (approving total settlements that were 14% of the class
6 damages estimate, and noting that “District courts in the Ninth Circuit routinely approve
7 settlements with much larger differences between the settlement amount and estimated
8 damages.”).

9 While the size of the Settlements reflects the strength of EPPs’ case, there were
10 substantial risks that could have prevented the class from recovering anything had the case
11 proceeded to trial. To prevail at trial, EPPs would have been required to prove not only that
12 Defendants entered into an unlawful pay-for-delay agreement, but also that the agreement (as
13 opposed to Endo’s and Teikoku’s patents or Watson’s manufacturing problems) delayed generic
14 competition and that End-Payor Plaintiffs were overcharged as a result. The same causation
15 issues were fatal in the *Nexium* pay-for-delay case, where the plaintiffs obtained a liability
16 verdict from a jury but lost on the issue of causation. *See In re: Nexium (Esomeprazole)*
17 *Antitrust Litig.*, No. 1:12-md-02409-WGY, ECF No. 1383 (D. Mass. Dec. 5, 2014) (verdict
18 form).

19 Moreover, this case involved numerous complex issues of law on which courts have
20 diverged and the Ninth Circuit has not yet spoken. Had End-Payor Plaintiffs won at trial,
21 Defendants were poised to appeal numerous important decisions of the Court, including the
22 Court’s certification of the End-Payor Class, its decision concerning the relevant market, and its
23 order regarding the appropriate standard for establishing causation at trial. *See* ECF 929 at 25
24 (reserving appellate rights as to class certification); *id.* at 8 n.5 (same as to market definition);
25 ECF 948 at 2 (arguing that the Court’s causation standard “would create an appellate issue that
26 would permeate the entirety of any liability verdict”). Settlement avoids these risks while
27 providing substantial relief to the End-Payor Class. And having reached agreement with each
28 Defendant shortly before trial and after four years of litigation—including motions to dismiss,

1 class certification, summary judgment and *Daubert* motions, completion of fact and expert
2 discovery, and trial preparation to the point of jury selection—“the parties came to the
3 negotiating table with adequate knowledge of the strengths and weaknesses of their positions.”
4 *Newton v. American Debt Services, Inc.*, 2016 WL 7743686, at *3 (N.D. Cal. Jan. 15, 2016).

5 The Settlements also satisfy the additional factors that courts in this District have
6 traditionally used at the preliminary approval stage. As detailed above, the Settlements are well
7 within the range of final approval, were the result of serious, non-collusive negotiations, and
8 have no obvious deficiencies (such as a reversion clause). *E.g.*, *Torres v. Pick-A-Part Auto*
9 *Wrecking*, 2018 WL 306287, at *3-4 (E.D. Cal. Jan. 5, 2018) (no obvious deficiencies where
10 class members received cash recovery and release narrowly tailored to claims). The Settlements
11 do not improperly provide preferential treatment to the Class Representatives or any segments
12 of the End-Payor Class. As explained in Section VI, each class member will receive a *pro rata*
13 share of the settlement proceeds. And EPPs’ request for payment of \$10,000 incentive awards
14 to each of the nine Class Representatives (\$90,000 total, which is .086% of total value of the
15 Settlements) is consistent with similar service awards regularly approved in class actions. *E.g.*
16 *Alvarez v. Farmers Ins. Exchange*, 2017 WL 2214585, at *1 (N.D. Cal. Jan. 18, 2017)
17 (approving nine \$10,000 service awards that in the aggregate were 1.8% of the settlement
18 value); *In re Animation Workers Antitrust Litig.*, 2016 WL 6663005, at *9 (N.D. Cal. Nov. 11,
19 2016) (approving \$10,000 service awards in a case with \$18.95 million settlement fund). Nor
20 does the proposal to provide SREPs with an initial payment of their claims improperly benefit
21 the SREPs at the expense of the rest of the End-Payor Class. *See In re Flonase Antitrust Litig.*,
22 No. 2:08-cv-03301-AB (E.D. Pa.), ECF 566 (plan of allocation including initial claims
23 payment) and ECF 606 (order approving plan of allocation). The SREPs are large insurers (and
24 their self-funded plans) that will receive a large portion of the settlement proceeds (*see Sharp*
25 *Decl.*, ¶ 9 (summarizing SREPs’ share of class purchases)) and there is no reason to delay the
26 distribution of a portion of their reasonably-estimated claim value. And SREPs, like all End-
27 Payor Class members, will only receive their *pro rata* share of the settlement fund once all
28 claims have been received and adjudicated.

1 In short, the Settlements are well within the range of final approval and should be
2 preliminarily approved.

3 **V. THE NOTICE AND CLAIMS PLAN IS ADEQUATE AND SATISFIES THE**
4 **REQUIREMENTS OF RULE 23 AND DUE PROCESS**

5 **A. The Proposed Manner and Forms of Notice Comply with Rule 23**

6 Rule 23(e)(1) requires that notice of a class action settlement be sent “in a reasonable
7 manner to all class members who would be bound by the proposal.” FED. R. CIV. P. 23(e)(1).
8 “[N]either Rule 23 nor the Due Process Clause requires actual notice to each individual class
9 member.” *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128 (9th Cir. 2017). EPPs propose
10 that notice of the Settlements be distributed to the End-Payor Class in substantially the same
11 manner as notice of the Court’s class certification order, which the Court previously concluded
12 satisfied the requirement of Rule 23(c)(2) that notice be “the best notice that is practicable under
13 the circumstances.” ECF 751. EPPs’ proposed plan for distributing notice will reach End-
14 Payor Class members two ways.

15 First, the comprehensive, ten-page Long-Form Notice will be directly mailed to TPP
16 members of the End-Payor Class and a Summary Notice emailed to 1,000 TPPs for whom
17 KCC—EPPs’ proposed notice and claims administrator—has email addresses. *See Bui v. Sprint*
18 *Corp.*, No. 2:14-CV-02461-TLN-AC, 2016 WL 727163, at *9 (E.D. Cal. Feb. 24, 2016)
19 (approving a method of notice “via first class U.S. mail or its equivalent”). KCC will utilize the
20 same proprietary database that it used to distribute notice of the class certification order and will
21 obtain updated mailing information for any mail returned as undeliverable. Peak Decl., ¶ 9. To
22 extend the reach of the Notice Plan for TPPs, a Summary Notice will be published in the trade
23 journal HR Magazine (circulation to over 285,000 persons and entities), websites SHRM.org
24 (over 6.3 million views per month) and ThinkAdvisor.com/LifeHealth (415,000 views per
25 month), and electronic newsletters for LifeHealth Pro Daily (83,000 subscribers) and HR Daily
26 (290,000 subscribers). *Id.*, ¶¶ 12-14.

27 Second, the more than one million consumers who are members of the End-Payor Class
28 will receive publication notice by way of a Summary Notice. *Briseno*, 844 F.3d at 1129

1 (“Courts have routinely held that notice by publication in a periodical, on a website, or even at
2 an appropriate physical location is sufficient to satisfy due process.”). The Summary Notice
3 will be published in two magazines selected to increase the likelihood that it will be read by
4 consumers who are part of the End-Payor Class: People and Good Housekeeping. Peak Decl.,
5 ¶¶ 22-24. These magazines are widely circulated, especially among the population of
6 consumers likely to have purchased brand or generic Lidoderm. *Id.* Additionally, the EPPs’
7 plan includes targeted internet banner ads designed to reach both TPP and consumer members
8 of the End-Payor Class. KCC will generate over 155 million internet impressions over leading
9 networks, including on Facebook, the Google Display Network, and the Yahoo! ad network.
10 *Id.*, ¶ 29. The banner ads will include a link to a dedicated case website, which will provide the
11 key information regarding the Settlements and advise End-Payor Class members their options
12 and relevant deadlines. KCC will also maintain call center services that End-Payor Class
13 members can use to obtain information about the case and their options.

14 Other courts have consistently approved similar notice plans in class actions brought by
15 end-purchasers of pharmaceuticals. *See In re Solodyn (Minocycline Hydrochloride) Antitrust*
16 *Litig.*, 1:14-md-02503-DJC (D. Mass.), ECF 532 at 20-21 (motion) and ECFs 555 and 1541
17 (ordering approving notice plan); *In re Aggrenox Antitrust Litig.*, 3:14-md-02516-SRU (D. Ct.),
18 ECF 748-5 (notice plan) and ECF 766 (order approving notice plan); *In re Nexium*
19 *(Esomeprazole) Antitrust Litig.*, No. 1:12-md-2409 (D. Mass.), ECF 1526 (motion) and ECFs
20 1540 and 1541 (orders approving notice plan); *In re Lupron Mktg. & Sales Practices Litig.*, 228
21 F.R.D. 75, 84-85 (D. Mass. 2005) (approving notice plan that distributed direct mail to TPPs
22 and publication notice to the entirety of the class). Under EPPs’ proposed plan, notice is
23 expected to reach virtually all TPP class members and approximately 80% of consumer class
24 members an average of 2.5 times. Peak Decl., ¶ 32. Courts have repeatedly found that notice
25 plans with similar (or less extensive) reach satisfy Rule 23(c)(2)(B). *See, e.g., Nexium*, ECF
26 466 at 5 (notice program designed to reach 80% of end-payor purchasers); *Spann v. J.C. Penney*
27 *Corp.*, 314 F.R.D. 312, 330 (C.D. Cal. 2016) (approving notice plan designed to reach 75% of
28 class members an average of 2.3 times).

1 The proposed Long-Form and Summary Notices (Exs. D-F) are modeled on the notices
2 used at the class certification stage, which were in turn modeled on the Federal Judicial Center's
3 template notice. The first page of the Long-Form Notice concisely describes the litigation and
4 the monetary compensation provided under the Settlements and includes a chart that explains
5 class members' options and the deadlines to submit a claim form, object, or opt out. The second
6 page provides the complete definition of the End-Payor Class. The remainder of the Long-Form
7 Notice provides more detailed information about the Settlements and class members' options,
8 advises End-Payor Class members that they may appear in the litigation through their own
9 attorney, and includes contact information for KCC and for Co-Lead Counsel.

10 The Summary Notices (one each for TPPs and consumers) use large, bold font to advise
11 readers that they may be a part of the End-Payor Class and provide all necessary information:
12 the basic claims in the litigation, the terms of the Settlements, and the deadline to submit claims
13 and object. In addition, the Summary Notices provide the contact information for KCC and the
14 notice website where End-Payor Class members can obtain the Long-Form Notice and
15 additional information concerning the Settlements. The notice website will provide the
16 complete End-Payor Class definition and exclusions and the claim forms will include questions
17 and information that will allow each entity or individual to determine whether they are in the
18 End-Payor Class.

19 Both the Long-Form Notice and Summary Notices disclose the maximum amounts of
20 attorneys' fees, expenses, and service awards that EPPs will request. EPPs will file their motion
21 for attorneys' fees, expenses, and service awards once the notice program is complete (or nearly
22 complete) and at least 21 days before the deadline for class members to submit objections. The
23 Long-Form Notice tells class members how to obtain a copy of EPPs' motion once it is filed.

24 **B. A Second Opportunity to Opt Out of the Class Is Not Necessary**

25 All members of the End-Payor Class were afforded an opportunity to opt out of the
26 Class in connection with the notice of class certification. A second opportunity to opt out at the
27 settlement stage is unusual and impedes settlement finality and is therefore not
28 required. *See* Fed. R. Civ. Proc. 23(e)(4) (court "may" require second opportunity to opt out

1 before granting final approval); *Low v. Trump University*, 881 F.3d 1111, 1121 (9th Cir. 2018)
2 (holding that Ninth Circuit “precedent squarely forecloses” the argument that due process
3 requires a second opportunity to opt out and describing second opt out periods as “unusual”);
4 *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 635 (9th Cir. 1982) (“[The objector]’s
5 rights are protected by the mechanism provided in the rule: approval by the district court after
6 notice to the class and a fairness hearing at which dissenters can voice their objections, and the
7 availability of review on appeal. Moreover, to hold that due process requires a second
8 opportunity to opt out after the terms of the settlement have been disclosed to the class would
9 impede the settlement process so favored in the law.”).

10 The parties agree, subject to the Court’s discretion, that no further opt-out opportunity is
11 warranted here. Several TPPs exercised their opt out rights at the class certification stage; no
12 consumers opted out. ECF 997. Given the substantial recoveries the proposed Settlements
13 provide, Class members’ recent opportunity to opt out, and that the release of claims in the
14 Settlements are no broader than the claims certified, there is no reason to require a further opt-
15 out request now, upon the resolution of the litigation. *E.g.*, *In re Solodyn (Minocycline*
16 *Hydrochloride) Antitrust Litig.*, 1:14-md-02503-DJC (D. Mass.), ECF 1526 (motion) and ECFs
17 1540 and 1541 (approving notice plan with no additional opt out opportunity). If the Court
18 requires a second opt-out opportunity, the Settlement Agreements provide that Defendants’
19 settlement contributions will be reduced by an amount equal to the proportion of the purchases
20 of the End-Payor Class members that opts out, if that amount exceeds certain thresholds. And if
21 more than a specified percentage of the End-Payor Class (the percentage trigger has been
22 provisionally filed under seal) opts out of the Class, Defendants will have the right to terminate
23 their respective Settlements. The proposed Notices (Exs. D-F) assume no additional opt-out
24 opportunity. If the Court allows a second opt-out, EPPs will revise the notice accordingly.

25 **C. The Proposed Claim Forms are Adequate**

26 To receive a payment under the Settlements, class members must submit a claim form.
27 The claim forms (Exs. A2 and A3) are straightforward, easy to understand, provide class
28

1 members with all the information they need to submit a claim, and should be approved as fair,
2 reasonable, and adequate.

3 Both the consumer and TPP claim forms require class members to provide their name,
4 contact information, and basic information concerning their Lidoderm purchases. *See In re:*
5 *Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 721680, at *21 n.26 (N.D. Cal. Jan. 28,
6 2016) (requiring similar information). Both forms also provide the states and timeframe in
7 which purchases must have been made to qualify for payment under the Settlements and require
8 claimants to certify, under penalty of perjury, that the information provided is accurate to the
9 best of the claimant's knowledge. *See In re Optical Disk Drive Prods. Antitrust Litig.*, 2016
10 WL 7364803, at *15 (N.D. Cal. Dec. 19, 2016) ("courts in this district have required similar
11 attestations [in claims forms] that the information provided is accurate"). The claim forms also
12 inform class members that "failure to complete and submit a Claim Form, in the manner and
13 time specified, shall constitute a waiver of any right to obtain any share of the Settlement
14 Payment." *Jaffe v. Morgan Stanley & Co., Inc.*, 2008 WL 346417, at *12 (N.D. Cal. Feb. 7,
15 2008). Both TPPs and consumers will also be able to submit claims online, if they choose to do
16 so, or by mailing their claim form to the Claims Administrator.

17 EPPs request that the Court approve the claim forms as fair, reasonable, and adequate.

18 **D. KCC Is Well-Qualified to Serve as Notice and Claims Administrator**

19 Plaintiffs have selected KCC to distribute notice and serve as Notice and Claims
20 Administrator for the Settlement. During the class certification phase, EPPs received proposals
21 from eight well-qualified and experienced notice and claims administrators and selected KCC to
22 serve as notice administrator at that time. Declaration of Dena Sharp, ECF 741-1, ¶ 5. After
23 being appointed by the Court to serve as notice administrator, KCC timely and successfully
24 implemented the Court-approved class certification notice plan and is prepared to do the same
25 with respect to distributing notice of the Settlements to the End-Payor Class.

26 KCC is also well-positioned to receive, process, and verify claims submitted by class
27 members. KCC has served as claims administrator in numerous antitrust class actions,
28 including cases involving pharmaceutical products, such as *In re Asacol Antitrust Litigation*,

1 No. 1:15-cv-12730 (D. Mass.) (end-payor notice administrator and direct purchaser claims
 2 administrator); *In re: Skelaxin (Metaxalone) Antitrust Litigation*, No. 1:12-md-2343 (E.D.
 3 Tenn.) (notice and claims administrator); *In re Lithium Ion Batteries Indirect Antitrust*
 4 *Litigation*, No. 13-md-02420 (N.D. Cal.) (claims administrator); *In re Domestic Drywall*
 5 *Antitrust Litigation*, No. 2:13-md-02437 (E.D. Pa.) (claims administrator). Peak Decl., ¶ 5
 6 (listing cases). EPPs also propose the KCC’s escrow services affiliate—Computershare Trust
 7 Company, N.A., which has extensive experience holding and distributing settlement funds—
 8 serve as Escrow Agent.

9 EPPs therefore request that KCC be appointed as Notice and Claims Administrator and
 10 Computershare Trust Company, N.A. be appointed as Escrow Agent.

11 **VI. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE**
 12 **AND SATISFIES THE REQUIREMENTS OF RULE 23 AND DUE PROCESS**

13 “Approval of a plan of allocation of settlement proceeds in a class action is governed by
 14 the same standards of review applicable to approval of the settlement as a whole: the plan must
 15 be fair, reasonable and adequate.” *Rieckborn v. Velti PLC*, 2015 WL 468329, at *8 (N.D. Cal.
 16 Feb. 3, 2015) (citation omitted). “[A]n allocation formula need only have a reasonable, rational
 17 basis, particularly if recommended by experienced and competent counsel.” *Id.* (citation
 18 omitted). EPPs’ proposed Plan of Allocation (Ex. A) satisfies these criteria.

19 EPPs’ economic expert—Dr. Hal Singer—determined that approximately 75% of the
 20 damages in this case were borne by TPPs (Singer Decl., ¶ 14), and EPPs thus propose that 75%
 21 of the settlement fund be allocated to the pool of TPP claimants and 25% of the settlement fund
 22 be allocated to the pool of consumer claimants. Given the size of the settlement fund in this
 23 case and the anticipated consumer claims rates, it is likely that the allocation of 25% of the
 24 settlement fund (\$26.19 million, before fees, expenses and class representative awards) to
 25 consumers will be more than enough to pay consumers’ average per box overcharge damages in
 26 full. *Id.* at 39. Should this occur, each consumer claimant will be capped at 100% of his or her
 27 damages and any excess amounts in the consumer pool will flow to the TPP pool. In the
 28 unlikely event that the settlement fund is large enough to pay both consumer claimants and TPP

1 claimants their damages in full, any excess will be re-allocated 75/25 among the TPPs and
2 consumers.

3 Within the consumer and TPP pools, the settlement proceeds will be allocated to class
4 members on a *pro rata* basis. *See In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2015 WL
5 9266493, at *8 (N.D. Cal. Dec. 17, 2015) (use of *pro rata* allocation plan “has frequently been
6 determined to be fair, adequate, and reasonable in comparable cases”) (collecting cases); *In re*
7 *TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004, at *4 (N.D. Cal. Dec. 27, 2011) (“a
8 *pro-rata* allocation has been used in many antitrust cases including in this District”). For
9 consumers, the allocation will be determined based on the number of boxes of Lidoderm or
10 generic Lidoderm each claimant purchased as a percentage of the total number of boxes
11 purchased by all consumer claimants. Ex. A, ¶ 20. To facilitate the claims process, the
12 consumer claim form requires only that consumers indicate the number of brand or generic
13 Lidoderm prescription they filled. *See Nat’l Milk Producers*, 2017 WL 3623734, at * 2
14 (consumers submitted claims “without proof of purchase” and were reimbursed “depending on
15 the level of purchases”). For TPPs, the allocation will be determined based on the amount each
16 TPP claimant spent on Lidoderm or generic Lidoderm as a percentage of the total amount spent
17 by all TPP claimants. Ex. A, ¶ 21.

18 The timing of the distributions to the End-Payor Class will depend in part on when claim
19 processing and adjudication is complete. End-Payors Plaintiffs will determine, in turn, whether
20 the interests of efficiency suggest deferring the first distribution to the Class until after Endo has
21 made its second payment (in the first quarter of 2019), which will avoid the cost and confusion
22 associated with making two distributions to the End-Payor Class within weeks or months of
23 each other.

24 **VII. CONCLUSION**

25 For the foregoing reasons, EPPs request that the Court preliminarily approve the
26 Settlement, approve the method for distributing notice and submitting claims, and approve the
27 Plan of Allocation.

1 DATED: March 20, 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 Plaintiffs' Motion for Order Concerning Opt-Out Requests 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: March 20, 2018

/s/ Dena C. Sharp
Dena C. Sharp

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 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. I also caused a copy of the foregoing document to be served via email on counsel of record for all parties.

/s/ Dena C. Sharp