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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

In re LIDODERM ANTITRUST LITIGATION	MDL Docket No. 14-md-02521-WHO
THIS DOCUMENT RELATES TO: END-PAYOR PLAINTIFF ACTIONS	<b>SEPARATELY REPRESENTED END-PAYORS' SUPPLEMENTAL MOTION FOR REIMBURSEMENT OF OUT OF POCKET LITIGATION EXPENSES</b>  Date: September 12, 2018 Time: 2:00 p.m. Courtroom 2, 17th Floor The Honorable William H. Orrick

1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

3 **PLEASE TAKE NOTICE** that at 2:00 p.m. on September 12, 2018, Counsel for the  
4 Separately Represented End-Payors and their counsel will, and hereby do move before the  
5 Honorable William H. Orrick, United States District Judge, at the United States Courthouse,  
6 450 Golden Gate Avenue, Courtroom 2 – 17th Floor, San Francisco, California, pursuant to  
7 Fed. R. Civ. P. 23(h) and 54(d) for the following:

- 8 • Reimbursement of \$297,434.13 of additional out-of-pocket litigation expenses from the  
9 Settlement Fund, which amount is not included in the request for reimbursement of  
10 expenses filed by End Payor Class Counsel.

11 This motion is made on the grounds that the additional expenses for which  
12 reimbursement is sought were reasonably and necessarily incurred in connection with the  
13 prosecution of this action. This Motion is based on this Memorandum of Law of Points and  
14 Authorities, the Declaration of Peter D. St. Phillip, Jr., the proposed order submitted herewith,  
15 and all other records, pleadings, and papers filed in this action; and upon such argument and  
16 further pleadings as may be presented to the Court at the hearing on this Motion.

17 Counsel for the Separately Represented End Payors will request that End Payor Class  
18 Counsel make this Motion available on the settlement website established for this case for  
19 review by class members.

20 **STATEMENT OF THE ISSUE TO BE DECIDED**

21 Whether the Court should order payment from the Settlement Fund for Separately  
22 Represented End-Payors' Counsels' additional expenses totaling \$297,434.13, which amount is  
23 not included in the request for reimbursement of expenses filed by End Payor Class Counsel,  
24 where the expenses were incurred for necessary processing and hosting of documents collected  
25 in response to discovery demands, document productions in this action, and expert economic  
26 consulting regarding relevant market and damages, and which expenditures benefited the Class  
27 as a whole.

28 **MEMORANDUM OF POINTS AND AUTHORITIES**

1 **I. PRELIMINARY STATEMENT**

2 Counsel for the Separately Represented End Payors litigated this matter alongside End  
3 Payor Class Counsel on behalf of Plaintiff Government Employees Health Association Inc.  
4 (“GEHA”), and represents the 17 additional Separately Represented End-Payors” or “SREPs,”  
5 as these terms are defined in the Court’s February 23, 2018 Stipulation and Order, ECF No.  
6 997. Counsel for the SREPs participated in the settlement conferences that ultimately led to  
7 Plaintiffs’ settlements with the Teikoku, Watson and Endo Defendants. For purposes of  
8 achieving global resolution of all End Payor Plaintiffs’ claims, SREPs agreed to withdraw their  
9 opt out requests and proceed as members of the End Payor Class. ECF No. 997, at 1. Having  
10 litigated the case from inception, Counsel for SREPs acquired a strong grasp of the documents  
11 and theories of the case and assisted End Payor Class Counsel in prosecuting their claims,  
12 which ultimately strengthened the Class’ and SREPs’ positions in the litigation, and bolstered  
13 the settlement negotiations to the benefit of the Class. *See* Declaration of Peter D. St. Phillip, Jr.  
14 (“St. Philip Decl.”), ¶ 8.

15 Because SREPs agreed to proceed as members of the Class for purposes of achieving a  
16 global settlement, End Payor Plaintiffs are currently seeking reimbursement for certain expenses  
17 incurred by the SREPs in their July 31, 2018 submission. *See* St. Philip Decl. ¶ 2 and Exhibit  
18 A. However, the expenses End Payor Plaintiffs have agreed to submit do not constitute the  
19 entirety of the reasonable out-of-pocket expenses SREPs incurred in connection with the  
20 prosecution of this action. *Id.* ¶ 3. Specifically, End Payor Plaintiffs have not agreed to submit  
21 the out-of-pocket expenses SREPs necessarily incurred in connection with processing and  
22 hosting the voluminous document productions in this case, as well as producing GEHA’s  
23 documents, or those incurred in connection with GEHA’s expert report and deposition  
24 testimony. *Id.* ¶ 4.

25 SREPs and End Payor Plaintiffs were in the process of negotiating the treatment of these  
26 expenses, but were unable to reach agreement prior to the Court’s July 31, 2018 deadline. *Id.*  
27 ¶ 3. Discussions surrounding these expenses continues, but because the deadline is upon us,  
28 SREPs have submitted this supplemental request for reimbursement of out-of-pocket litigation

1 expenses in the amount of \$297,434.13. As discussed in further detail below and in the  
2 Declaration of Peter D. St. Phillip submitted herewith, these expenses are non-duplicative of  
3 those submitted by the End Payor Class, were reasonable and necessary for SREPs' litigation of  
4 the case and useful participation in the settlement negotiations, and ultimately inured to the  
5 benefit of the End Payor Class to which the SREPs belong.

6 **II. THE EXPENSES ARE REASONABLE AND NECESSARILY INCURRED**

7 Attorneys who create a common fund for the benefit of a class are entitled to be  
8 reimbursed out-of-pocket expenses incurred in creating the fund so long as the submitted  
9 expenses are reasonable, necessary and directly related to the prosecution of the action. *Vincent*  
10 *v. Hughes Air West*, 557 F.2d 759, 769 (9th Cir. 1977); *In re Omnivision Techs., Inc.*, 559 F.  
11 Supp. 2d 1036, 1048 (N.D. Cal. 2008) (“Attorneys may recover their reasonable expenses that  
12 would typically be billed to paying clients in non-contingency matters.”).

13 SREPs submit this request for non-duplicative expenses necessarily incurred in  
14 connection with the prosecution of this action. The expenses outlined in Exhibit B to the  
15 Declaration of Peter D. St. Phillip comprise out-of-pocket expenses incurred in connection with  
16 document hosting and production in the amount of \$184,934.13, and expert reports and  
17 deposition testimony of GEHA's economic expert in the amount of \$112,500. St. Phillip  
18 Decl. ¶ 4.

19 The document hosting and production expenses include the costs associated with  
20 managing approximately 700 GB worth of documents received from the Endo, Teikoku and  
21 Watson Defendants, third-parties and GEHA. These productions included over 499,000  
22 documents, totaling over 4 million pages. St. Phillip Decl. ¶ 5. At the outset of the litigation,  
23 all documents were hosted by Counsel for the SREPs on the CaseLogistix platform, a product of  
24 Thomson Reuters-West. *Id.* ¶ 6. The necessary costs associated with CaseLogistix included the  
25 monthly software licensing fees, storage fees, and professional service charges for loading and  
26 processing the documents and managing the case environment. The expenses also include the  
27 costs of generating GEHA's initial document productions for Defendants. The total cost for  
28 Thomson Reuter's services was \$109,472.23. *Id.*

1 As the litigation progressed, SREP Counsel was able to locally deploy Relativity, and  
2 transition from Thomson-Reuters externally hosting the Lidoderm documents. The switch to an  
3 internal Relativity platform eliminated the monthly storage fees associated with the hosted  
4 review platform. St. Phillip Decl. ¶ 7. The costs associated with the in-house Relativity license  
5 and server (licensed through kCura LLC and later through Relativity ODA LLC) are  
6 \$67,136.90. *Id.* SREP Counsel also enlisted Alloy Group LLC (later known as JND  
7 eDiscovery) to manage its internal document review system, and assume responsibilities for  
8 loading and processing all documents and generating all client productions. The total cost  
9 associated with Alloy Group/JND's services is \$8,325.00. *Id.*

10 It was necessary and important for SREP Counsel to utilize the CaseLogistix platform  
11 and later Relativity to have full access to Defendants' productions, and the powerful analytics  
12 and coding features associated with CaseLogistix and Relativity. St. Phillip Decl. ¶ 8. This  
13 afforded SREP Counsel the ability to review and cull key documents and meaningfully  
14 participate in the litigation and depositions. *Id.* CaseLogistix and Relativity also provided an  
15 efficient means to process and produce GEHA's documents to the other parties under the  
16 Court's discovery deadlines. *Id.* Having a strong grasp of the documents and theories of the  
17 case was required to strengthen the Class' and SREPs' positions in the litigation, and ultimately  
18 bolstered the settlement negotiations to the benefit of the Class. *Id.*

19 The cost associated with hosting the documents in a manner that allowed them to be  
20 efficiently reviewed and analyzed also directly benefited the Class Counsel and the Class. The  
21 Class and Class Counsel specifically relied on GEHA's expert, Dr. Glen Melnick, and his  
22 analysis of GEHA's and Defendants' documents. St. Phillip Decl. ¶ 9. Specifically, in End  
23 Payor Class Plaintiffs' Motion for Partial Summary Judgment on relevant market, the Class  
24 Plaintiffs repeatedly and extensively cited and relied on Dr. Melnick's work, and the Class also  
25 submitted Dr. Melnick's expert report to the Court for consideration in its deliberation. *See*  
26 Plaintiffs' Motion for Partial Summary Judgment, ECF No. 775, at 7, n.6, n.15 and n.32; Ex. F  
27 to the June 30, 2017 Declaration of Peter Kohn, ECF No. 776.

28 Dr. Melnick's work and his report provided a direct benefit to the Class, particularly to

1 support Class Plaintiffs' Motion for Partial Summary Judgment on relevant market. SREP  
2 Counsel incurred \$112,500 in expenses for the services of Dr. Melnick. St. Phillip Decl. ¶ 10.  
3 Because the Class cited, filed and relied on Dr. Melnick's report, Dr. Melnick's work  
4 unquestionably benefited the Class. Accordingly, SREP Counsel seeks reimbursement for the  
5 \$112,500 expense associated with the preparation of Dr. Melnick's reports and deposition  
6 testimony. *Id.*

7 **III. CONCLUSION**

8 For the reasons set forth above, SREPs respectfully request that their Supplemental  
9 Motion for Reimbursement of Out-of-Pocket Litigation Expenses be granted.

10 Dated: July 31, 2018

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