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

13  
14 In re LIDODERM ANTITRUST LITIGATION

Master File No. 14-md-02521-WHO

MDL No. 2521

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17 THIS DOCUMENT RELATES TO:  
18 END-PAYOR PLAINTIFF ACTIONS

**END-PAYOR CLASS COUNSEL'S  
MOTION FOR ENTRY OF A SET-ASIDE  
ORDER**

**ORAL ARGUMENT REQUESTED**

Date: July 12, 2017

Time: 2:00 p.m.

Courtroom: 2, 17th Floor

The Honorable William H. Orrick

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1 **NOTICE OF MOTION AND MOTION**

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

3 **PLEASE TAKE NOTICE** that on July 12, 2017, at 2:00 p.m., before the Honorable William  
4 H. Orrick, Co-Lead Counsel, Liaison Counsel, and the Executive Committee (“EPP Class Counsel”)<sup>1</sup>  
5 for plaintiffs Allied Services Division Welfare Fund, City of Providence, International Union of  
6 Operating Engineers Local 49 Health and Welfare Fund, International Union of Operating Engineers  
7 Local 132 Health and Welfare Fund, Iron Workers District Council of New England Welfare Fund,  
8 NECA-IBEW Welfare Trust Fund, United Food and Commercial Workers Local 1776 & Participating  
9 Employers Health and Welfare Fund, Welfare Plan of the International Union of Operating Engineers  
10 Locals 137, 137A, 137B, 137C, 137R, and Letizia Gallotto (“End-Payor Plaintiffs”) will and do  
11 hereby move the Court for an order providing a framework for EPP Class Counsel and other counsel  
12 to seek payment of expenses and attorneys’ fees for work performed in this litigation that has  
13 benefitted all end-payors of brand and generic Lidoderm (together “Lidoderm”) asserting claims  
14 arising from Defendants’ reverse payment agreement.

15 **STATEMENT OF ISSUE TO BE DECIDED**

16 Should the Court enter a “set-aside” order establishing a framework for counsel to seek  
17 compensation for work performed in this litigation that has benefitted all end-payors of Lidoderm,  
18 including persons or entities that may opt out of the End-Payor Class?

19 **MEMORANDUM OF LAW**

20 **I. INTRODUCTION**

21 EPP Class Counsel respectfully request that the Court enter an order providing a framework  
22 for Class Counsel and other counsel to seek compensation for work performed in this litigation that  
23 has benefitted all end-payors of Lidoderm. Under the proposed “set-aside” order, a portion of any  
24

25 <sup>1</sup> Co-Lead Counsel is Girard Gibbs LLP, Cohen Milstein Sellers & Toll PLLC, and Heins Mills &  
26 Olson PLC; Liaison Counsel is The Joseph Saveri Law Firm, Inc.; the Executive Committee is  
27 comprised of Hilliard & Shadowen LLP, Miller Law LLC, Motley Rice LLC, Robbins Geller  
28 Rudman & Dowd LLP, and The Dugan Law Firm, APLC. EPP Class Counsel as used in this motion  
also includes any firms and attorneys that performed work at the direction of Co-Lead Counsel.

1 settlement or judgment obtained by a plaintiff who opts out of the End-Payor Class will be withheld  
2 and deposited into an escrow account. Payments from the account will be subject to Court approval  
3 after a showing by EPP Class Counsel (or any other counsel) specifying the benefits EPP Counsel or  
4 other counsel conferred, the legal work they performed, and the costs they incurred.

5 Over the past three years, EPP Class Counsel have substantially advanced this litigation at a  
6 cost of millions of dollars in time and expenses, having investigated and brought this action, defeated  
7 motions to dismiss, conducted extensive discovery and related motion practice, obtained certification  
8 of the End-Payor Class, and retained numerous experts on the issues of liability, causation and  
9 damages, all of whom are prepared to testify at trial in this complex antitrust MDL. In class actions  
10 and mass actions generally, and pharmaceutical MDLs like this one specifically, certain class  
11 members (typically large third-party payors) may opt out of the class and seek recovery outside the  
12 class mechanism. Courts faced with similar circumstances have invoked longstanding Supreme  
13 Court precedent and applied their equitable authority to ensure that all counsel that have conferred a  
14 common benefit have an opportunity to apply for fair compensation for their work and expenditures.

15 Although no end-payors have, to date, obtained any recoveries in this action, entry of a set-  
16 aside order at this juncture—before the opt-out deadline<sup>2</sup> and summary judgment—will promote  
17 efficiency and avoid ambiguity. EPP Class Counsel therefore respectfully request that the Court enter  
18 the proposed order filed with this motion.

## 19 **II. FACTUAL AND PROCEDURAL BACKGROUND**

20 On April 3, 2014, the Judicial Panel on Multidistrict Litigation centralized before this Court  
21 several antitrust cases brought on behalf of end-payors and direct purchasers of Lidoderm. ECF 1.  
22 This Court then consolidated and coordinated the pending Lidoderm actions and directed plaintiffs to  
23 attempt to reach consensus on the appointment of lead counsel and an organizational structure for  
24 management of the litigation. ECF 2 at 6. All end-payor plaintiffs reached agreement on leadership,  
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26  
27 <sup>2</sup> On May 30, 2017, End-Payor Plaintiffs moved to provide notice of the Court's class certification  
28 order and provide class members an opportunity to opt out. ECF 741.

1 with the exception of end-payor plaintiff Government Employees Health Association (“GEHA”),  
2 which advocated for the appointment of its counsel. ECF 63 at 1.

3 On May 23, 2014, the Court adopted the consensus proposal and appointed three firms—  
4 Girard Gibbs LLP, Heins Mills & Olson, P.L.C., and Cohen Milstein Sellers & Toll PLLC—as  
5 Interim Co-Lead Counsel for the proposed End-Payor Class. *Id.* at 2. The Court also appointed the  
6 Joseph Saveri Law Firm as Interim Liaison Counsel and an Executive Committee to assist Co-Lead  
7 Counsel with the prosecution of End-Payor Plaintiffs’ claims. *Id.* GEHA and its counsel filed their  
8 own complaint and elected to prosecute GEHA’s claims separately from those of the End-Payor  
9 Class. ECF 71 (GEHA Amended Complaint).

10 EPP Class Counsel have diligently pursued the interests of all Lidoderm end-payors with  
11 claims arising from Defendants’ reverse payment agreement. EPP Class Counsel investigated and  
12 drafted a forty-five page complaint and opposed Defendants’ motion to dismiss, which the Court  
13 largely denied. The parties then commenced extensive fact discovery in which EPP Class Counsel  
14 reviewed over 3.4 million pages of documents produced by Defendants (including obtaining certified  
15 translations of foreign language documents), reviewed tens of thousands of pages produced by third  
16 parties, and deposed more than thirty fact witnesses. EPP Class Counsel have also litigated numerous  
17 discovery disputes that have resulted in the production of key documents that support end-payors’  
18 case against Defendants, secured the Ninth Circuit’s denial of two mandamus petitions filed by  
19 Defendants, and obtained an order certifying the End-Payor Class (which they are currently defending  
20 on appeal).

21 EPP Class Counsel have also retained several testifying experts who have provided reports on  
22 liability and causation issues that are relevant to all plaintiffs and other issues that are particular to the  
23 claims of end-payor purchasers. Collectively, the parties have retained and produced reports from  
24 twenty-three experts and engaged in extensive expert discovery, which is nearing completion. Over  
25 the next three months the parties will brief summary judgment motions and prepare for trial, which is  
26 set for December 2017.

27 To date, EPP Class Counsel have collectively committed tens of thousands of hours in  
28 attorney time and have advanced litigation costs of well over \$1 million in this case.

1 **III. THE COURT SHOULD ENTER A SET-ASIDE ORDER**

2 **A. The Court Has Discretion to Set Aside Funds to Compensate Class Counsel for**  
 3 **Common Benefit Work**

4 An MDL court’s authority to ensure compensation for “attorneys acting for MDL  
 5 administration and common benefit of all plaintiffs . . . derives from the Supreme Court’s common  
 6 benefit doctrine.” *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. M:05-CV-  
 7 01699-CRB, 2006 WL 471782, at \*1 (N.D. Cal. Feb. 28, 2006) (citing *Boeing Co. v. Van Gemert*,  
 8 444 U.S. 472 (1980); additional citations omitted); *see also Turner v. Murphy Oil USA, Inc.*, 422 F.  
 9 Supp. 2d 676, 680 (E.D. La 2006) (“the U.S. Supreme Court over 125 years ago approved the  
 10 common benefit doctrine, which provides that when the efforts of a litigant or attorney create,  
 11 preserve, protect, increase, or discover a common fund, all who benefit from that fund must  
 12 contribute proportionately to the costs of the litigation”). The common benefit doctrine “reflects the  
 13 traditional practice in courts of equity” and “rests on the perception that persons who obtain the  
 14 benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant’s  
 15 expense.” *Boeing*, 444 U.S. at 478.

16 A federal court’s “inherent powers of equity” provide the ““foundation for the historic practice  
 17 of granting reimbursement for the costs of litigation”” and allow the court to ensure ““justice as  
 18 between a party and the beneficiaries of his litigation.”” *In re Air Crash Disaster at Florida*  
 19 *Everglades on December 29, 1972*, 549 F.2d 1006, 1018 (5th Cir. 1977) (quoting *Sprague v. Ticonic*  
 20 *Nat’l Bank*, 307 U.S. 161, 166-67 (1939)). Under the common benefit doctrine, a court may use its  
 21 inherent equitable powers to “compensate [class counsel] whose actions in commencing, pursuing or  
 22 settling litigation, even if taken solely in their own name and for their own interest, benefit a class of  
 23 persons not participating in the litigation.” *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard*  
 24 *Sanitary Corp.*, 487 F.2d 161, 164 (3d Cir. 1973). Thus, “[a] necessary corollary to court  
 25 appointment of lead and liaison counsel and appropriate management committees is the power to  
 26 assure that these attorneys receive reasonable compensation for their work.” *In re Linerboard*  
 27 *Antitrust Litig.*, 292 F. Supp. 2d 644, 653 (E.D. Pa. 2003).



1 Courts across the country, including in this District, have invoked the common benefit  
2 doctrine and recognized that where lead counsel’s work on behalf of a group of plaintiffs confers a  
3 benefit on others, a portion of the attorneys’ fees the beneficiaries pay should be allocated to lead  
4 counsel. *See, e.g., In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 265–266 (E.D.N.Y. 2006)  
5 (“it is standard practice for courts to compensate attorneys who work for the common benefit of all  
6 plaintiffs by setting aside a fixed percentage of settlement proceeds”). “[F]oreclosing those  
7 recoveries as a source of funding for the common benefit work would enrich the non-contributing  
8 individual plaintiffs unjustly at the expense of . . . the lead counsel.” *In re Zyprexa Prods. Liab.*  
9 *Litig.*, 594 F.3d 113, 130 (2d Cir. 2010) (Kaplan, J., concurring). To ensure the availability of funds  
10 to equitably compensate lead counsel, courts have directed defendants to sequester and place into an  
11 escrow account a portion of the recoveries obtained by individual plaintiffs. As one court explained,  
12 “In accordance with the common benefit doctrine, it has been a common practice in the federal courts  
13 to impose set-asides in the early stages of complex litigation in order to preserve common-benefit  
14 funds for later distribution.” *Turner*, 422 F. Supp. 2d at 680.

15 In the *Linerboard* antitrust litigation, for example, the court ordered the creation of an escrow  
16 account “for the purpose of paying class plaintiffs’ Lead and Liaison Counsel and the Executive  
17 Committees appointed by the Court . . . for work benefitting plaintiffs in all lawsuits filed . . . by  
18 former class members who opted out of the classes certified by the Court.” 292 F. Supp. 2d at 668.  
19 And in *Bextra*, Judge Breyer directed the defendants “to withhold the amount of [the common benefit  
20 attorneys’ fees] assessment from any amounts paid to plaintiffs and their counsel, and to pay the  
21 assessment directly into the common benefit fund.” 2006 WL 471782, at \*1. *See also, e.g., In re*  
22 *Diet Drugs*, 582 F.3d 524, 546-48 (3d Cir. 2009); *In re Genetically Modified Rice Litig.*, No. 4:06  
23 MD 1811 CDP, 2010 WL 716190, at \*4-6 (E.D. Mo. Feb. 24, 2010); *In re Protegen Sling & Vesica*  
24 *Sys. Prods. Liab. Litig.*, Nos. 1:01-01387, 2002 WL 31834446, at \*1 (D. Md. Apr. 12, 2002); *In re*  
25 *Rezulin Products Liability Litig.*, MDL No. 1348, 2002 WL 441342, at \*2 (S.D.N.Y. Mar. 20, 2002).  
26 Although set-aside orders are frequently entered in cases involving products liability claims where  
27 many individual cases are consolidated for pretrial proceedings, the rationale for entry of a set-aside  
28 order in those cases applies with equal force here, where antitrust opt-out plaintiffs may utilize

1 common benefit work performed by court-appointed Class Counsel to advance their own claims and  
2 obtain recoveries. See *Linerboard*, 292 F. Supp. 2d at 655-56 (citing *Air Crash Disaster*, *Diet Drugs*,  
3 *Protegen Sling*, and *Rezulin*). EPP Class Counsel’s request is also consistent with the Manual for  
4 Complex Litigation, which explains that “MDL judges generally issue orders directing that  
5 defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general  
6 fund to pay national counsel.” Manual for Complex Litigation, Fourth, (“Manual”) § 20.312. See  
7 also Duke Law Center for Judicial Studies, Standards and Best Practices for Large and Mass-Tort  
8 MDLs, Standard 5 (5H: “In imposing fee assessments, the transferee judge should promote fairness  
9 among counsel, compensate counsel who made the recovery possible, and suppress perverse  
10 incentives among non-performing counsel. This may include imposing fees on attorneys  
11 representing individual clients who opt out, yet use MDL discovery materials or otherwise  
12 enjoy the fruits of common benefit counsels’ efforts.”).<sup>3</sup>

13 **B. A Set-Aside Order Is Appropriate in This Case**

14 The record here presents a strong factual basis for a set-aside order, as EPP Class Counsel  
15 have “done much to craft the case against defendants,” and “[t]hat work has benefitted all litigants in  
16 the class action and [potential] tag-along actions.” *Linerboard*, 292 F. Supp. 2d at 657.

17 At the outset of the litigation, the Court appointed EPP Class Counsel to prosecute this case  
18 on behalf of all end-payers. For more than three years, EPP Class Counsel have discharged the duties  
19 the Court assigned and have substantially advanced the litigation on behalf of all end-payers of  
20 Lidoderm (including any Class members who may elect to opt out). Any opt-out plaintiff will, for  
21 example, be able to enjoy the benefits of the Court’s motion to dismiss ruling, the extensive fact and  
22 expert discovery that has been essential to prosecuting end-payers’ claims, and the fruits of multiple  
23 successful discovery motions that have resulted in the production of key documents. EPP Class  
24 Counsel have, among other things, procured Japanese-language translations and documents initially  
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27 <sup>3</sup> Available at [https://law.duke.edu/sites/default/files/centers/judicialstudies/standards\\_and\\_](https://law.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf)  
28 [best\\_practices\\_for\\_large\\_and\\_mass-tort\\_mdls.pdf](https://law.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf) (last visited June 1, 2017).

1 withheld as privileged, and Defendants have foregone certain defenses based on attorney-client  
2 privilege waiver elections.

3 In addition, opt-out plaintiffs have the benefit of the litigation strategy EPP Class Counsel  
4 have developed. As in *Linerboard*, “[i]n the favorable rulings of this Court and the Court of Appeals  
5 on the class action motions, the tag-along plaintiffs obtained the benefit of the *imprimatur* of those  
6 courts on the theory of the case formulated by class plaintiffs and adopted in the tag-along actions.”  
7 292 F. Supp. 2d at 659. This case involves the interplay of multiple complex issues, including  
8 Watson’s ability to manufacture generic Lidoderm, the Lidoderm launch strategies that Endo and  
9 Watson would have adopted absent the settlement agreement, and the FDA’s evaluation of Endo’s  
10 citizen petition—all issues that EPP Class Counsel have spent considerable time analyzing and  
11 developing. EPP Class Counsel also marshaled evidence concerning liability and impact issues  
12 common to all end-payors in support of their motion for class certification. Any end-payor that opts  
13 out will thus obtain the benefit of “the theory of the case formulated by class plaintiffs.” *Id.* The size  
14 of any opt-out plaintiff’s recovery will be directly tied to the strength of the case that EPP Class  
15 Counsel has developed over the past three years. EPP Class Counsel has thus “made a sufficient  
16 showing to warrant establishment of a framework to ensure that funds will be available to compensate  
17 them should the Court later determine such compensation is warranted.” *Id.* at 662.

18 Accordingly, EPP Class Counsel request that the Court enter the proposed order submitted  
19 concurrently with this motion. The proposed order is substantially similar to the orders entered in  
20 *Linerboard*, *Bextra*, and numerous other cases, and includes the following key features:

- 21 1. In the event an opt-out plaintiff obtains a settlement or judgment in this matter,  
22 Defendants shall set aside and place into a Lidoderm End-Payor Fee and Expense  
23 Account 12.5 percent (or another percentage designated by the Court) of such  
24 settlement or judgment;
- 25 2. The set-aside funds shall be available, at the Court’s discretion, to compensate EPP  
26 Class Counsel for their common benefit work, subject to a showing that EPP Class  
27 Counsel is entitled to such payments;

- 1           3.     The common benefit work for which EPP Class Counsel shall be eligible for  
2           compensation from the Lidoderm End-Payor Fee and Expense Account includes the  
3           work outlined in the Court’s April 25, 2014 Initial Case Management Order (ECF 21 at  
4           6-9) and May 23, 2014 order appointing EPP Class Counsel (ECF 63);
- 5           4.     Any other counsel for one or more opt-out plaintiffs that believe they have performed  
6           compensable common benefit work shall also be permitted to apply to the Court for  
7           compensation from the set-aside funds; and
- 8           5.     Any set-aside funds not paid to EPP Class Counsel or other counsel for common  
9           benefit work shall be remitted pro rata to the opt-out plaintiffs from whose settlements  
10          or judgments the set-aside funds were withheld.

11           EPP Class Counsel’s proposal deploys the “preferable procedure” of having Defendants set  
12          aside funds before distribution to opt-out plaintiffs rather than requiring EPP Class Counsel to recover  
13          common benefit attorneys’ fees and expenses from the opt-out plaintiffs directly. *Linerboard*, 292 F.  
14          Supp. 2d at 665 (collecting cases requiring set-asides). EPP Class Counsel’s proposed set-aside order  
15          also includes key features that will protect the interests of the opt-out plaintiffs. First, no payments  
16          will be made from the set-aside funds unless and until approved by the Court. *Id.* at 669. Second,  
17          any set-aside funds not paid to Class Counsel for common benefit work will revert to the opt-out  
18          plaintiffs. *Id.* at 667.

19           The 12.5 percent sequestration percentage proposed by EPP Class Counsel is consistent with  
20          set-asides approved in other cases. *E.g.*, *Genetically Modified Rice*, 2010 WL 716190, at \*6 (“Courts  
21          have ordered contributions between 9 and 17 percent in MDLs for common benefit work.”); *Turner*,  
22          422 F. Supp. 2d at 683 (12 percent); *Protegen Sling*, 2002 WL 31834446, at \*1 (9 percent); *In re*  
23          *Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1996 WL 900349, at \*3-4 (E.D. Pa. Jun.  
24          17, 1996) (5 percent for costs and as much as 12 percent for fees); *Air Crash Disaster*, 549 F.2d at  
25          1010-11 (lead counsel awarded 8%). It bears emphasis that EPP Class Counsel do not propose to  
26          automatically recover 12.5 percent of any opt-out settlement or judgment, but will instead make a  
27          showing and seek Court approval for payment of any portion of an opt-out recovery.

1           **C.     EPP Class Counsel’s Motion Is Timely**

2           Although no settlements or judgments have occurred in this litigation to date, now is an  
3 appropriate time for the Court to establish a structure to ensure that EPP Class Counsel may seek  
4 equitable compensation for their common benefit work. The Manual for Complex Litigation explains  
5 that “Early in the litigation the court should . . . establish the arrangements for the [leadership  
6 group’s] compensation, including setting up a fund to which designated parties should contribute in  
7 specified proportions.” Manual, § 20.312. Courts are likewise in agreement that set-aside orders  
8 may issue before any settlement or judgment. As the court in *Zyprexa* explained:

9                     Even if no common benefit compensation had yet been earned, there  
10                    would be a need to put a holdback method into place promptly. Without  
11                    the entry of a set-aside order in advance of individual action settlements or  
12                    judgments, individual actions could be dismissed after settlement or a  
                      judgment, requiring [lead counsel] to pursue separate compensation claims  
                      in any number of jurisdictions around the country.

13           467 F. Supp. 2d at 266 (internal quotation omitted); *see also Turner*, 422 F. Supp. 2d at 680 (“it has  
14 been a common practice in the federal courts to impose set-asides in the early stages of complex  
15 litigation in order to preserve common-benefit funds for later distribution”). Entry of a set-aside  
16 order now—before the deadline for End-Payor Class members to exclude themselves from the Class  
17 and before summary judgment—will avoid uncertainty and streamline the proceedings.

18           Although the deadline to opt out of the End-Payor Class has not yet passed, one third-party  
19 payor—GEHA—will presumably opt out and continue to litigate its claims independently. ECF 71  
20 (GEHA Amended Complaint). GEHA’s counsel—Lowey Dannenberg Cohen & Hart, P.C. and  
21 Rawlings & Associates, PLLC— have advised this Court that they frequently represent other insurers  
22 that opt out in complex MDLs. ECF 51 at 2; *see also In re Nexium (Esomeprazole) Antitrust Litig.*,  
23 1:12-md-02409-WGY (D. Mass.), ECF 1514-1 at Ex. B (showing that GEHA’s counsel represented  
24 over 30 opt-out plaintiffs). Other third-party payors may opt out as well. To promote the efficient  
25 and orderly conduct of the litigation, the Court should enter the proposed set-aside order.  
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1 **IV. CONCLUSION**

2 For the reasons stated above, EPP Class Counsel request that the Court enter an order  
3 governing the payment of attorneys' fees and expenses for work performed for the common benefit of  
4 all Lidoderm end-payors with claims arising from Defendants' reverse payment agreement.

5  
6  
7 DATED: June 2, 2017

Respectfully submitted,

8 /s/ Dena C. Sharp

9 Daniel C. Girard (SBN 114826)

10 Dena C. Sharp (SBN 245869)

11 Scott Grzenczyk (SBN 279309)

**GIRARD GIBBS LLP**

601 California Street, 14th Floor

San Francisco, CA 94108

Telephone: (415) 981-4800

Facsimile: (415) 981-4846

Email: [dcg@girardgibbs.com](mailto:dcg@girardgibbs.com)

Email: [chc@girardgibbs.com](mailto:chc@girardgibbs.com)

Email: [smg@girardgibbs.com](mailto:smg@girardgibbs.com)

12  
13  
14  
15  
16 /s/ Renae D. Steiner

17 Renae D. Steiner

**HEINS MILLS & OLSON, P.L.C.**

310 Clifton Avenue

Minneapolis, MN 55403

Telephone: (612) 338-4605

Facsimile: (612) 338-4692

Email: [rsteiner@heinsmills.com](mailto:rsteiner@heinsmills.com)

18  
19  
20  
21 /s/ Sharon K. Robertson

22 Sharon K. Robertson

Donna M. Evans

**COHEN MILSTEIN SELLERS & TOLL  
PLLC**

88 Pine Street, 14th Floor

New York, New York 10005

Telephone: (212) 838-7797

Facsimile: (212) 838-7745

Email: [srobertson@cohenmilstein.com](mailto:srobertson@cohenmilstein.com)

Email: [devans@cohenmilstein.com](mailto:devans@cohenmilstein.com)

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*Interim Co-Lead Counsel for Plaintiffs and the Proposed End-Payor Class*

Joseph R. Saveri  
Joshua P. Davis  
Andrew M. Purdy  
Ryan J. McEwan  
**JOSEPH SAVERI LAW FIRM, INC.**  
505 Montgomery Street, Suite 625  
San Francisco, California 94111  
Telephone: (415) 500-6800  
Facsimile: (415) 395-9940  
Email: jsaveri@saverilawfirm.com  
Email: rmcewan@saverilawfirm.com

*Interim Liaison Counsel for Plaintiffs and the Proposed End-Payor Class*

**ATTESTATION**

I, Dena C. Sharp, am the ECF User whose identification and password are being used to file this Motion for Entry of a Set-Aside Order 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: June 2, 2017

*/s/ Dena C. Sharp*  
\_\_\_\_\_  
Dena C. Sharp

**CERTIFICATE OF SERVICE**

I hereby certify that on June 2, 2017, 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  
Dena C. Sharp

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