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

10 IN RE: XYREM (SODIUM OXYBATE)
11 ANTITRUST LITIGATION

Case No. 3:20-md-02966-RS-SVK

**MOTION FOR ENTRY OF A SET-
ASIDE ORDER**

12
13 THIS DOCUMENT APPLIES TO:
14 ALL CLASS ACTIONS

Date: TBD
Time: TBD
Courtroom: 3, 17th Floor

15 The Honorable Richard Seeborg
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1 **I. INTRODUCTION**

2 Co-Lead Counsel respectfully request that the Court enter an order providing a framework
3 for counsel to seek compensation for common benefit work performed in this litigation. Over the
4 past three years, the firms appointed as Co-Lead Counsel and the Steering Committee (“Class
5 Counsel”)¹ have devoted significant time and resources to investigate, develop, and prosecute this
6 case to its current posture. These efforts have benefited and continue to benefit all purchasers of
7 Xyrem. Under the proposed set-aside order: (i) each defendant responsible for paying a settlement
8 or judgment obtained by any future filed tag-along action would be required to withhold a portion
9 of the payment and deposit it into an escrow account; (ii) the funds would be held pending an
10 order from this Court; (iii) counsel who can demonstrate that they performed legal work or
11 incurred costs that provided a common benefit to any settling tag-along plaintiffs would then be
12 able to seek this Court’s approval for payment from the escrow account; and (iv) remaining funds
13 would be released from the escrow and paid to the settling tag-along plaintiff(s). The proposed
14 order is consistent with Rule 23 and common benefit principles. While set-aside orders for
15 common benefit work have historically been most common in mass tort cases, courts have
16 increasingly recognized that the rationale for issuing them applies equally in antitrust MDLs.

17 To date, Class Counsel have conferred substantial benefits to members of the Damages,
18 Injunctive Relief and Settlement Classes. Over the past three years, Class Counsel have advanced
19 this litigation by: (i) successfully opposing a motion to dismiss; (ii) conducting extensive
20 discovery and related motion practice; (iii) seeking and obtaining certification of Damages and
21 Injunctive Relief Classes, and (iv) retaining numerous experts on issues of liability, causation,
22 and damages, all of whom are prepared to testify at trial in this complex antitrust MDL. In class
23 actions and mass actions generally, and pharmaceutical MDLs like this one specifically, certain
24 class members (typically large third-party payors) sometimes opt out of the class and seek

25 ¹ Dena C. Sharp of Girard Sharp LLP and Michael M. Buchman of Motley Rice LLC as Co-Lead
26 Class Counsel. and Joseph Saveri of Joseph Saveri Law Firm, Inc.; Jessica MacAuley of Hagens
27 Berman Sobol Shapiro LLP; Karin Garvey of DiCello Levitt LLC; Kenneth Wexler of Wexler
28 Boley & Elgersma LLP; Clark Craddock of the Radice Law Firm; John Macoretta of Spector
Roseman & Kodroff PC; and Mark Fischer of Rawlings & Associates, PLLC are members of the
Plaintiffs’ Steering Committee.

1 recovery on their own, outside the Rule 23 class mechanism. Recognizing this reality and that it is
2 well within courts' equitable authority to require common benefit compensation, MDL courts
3 routinely order a percentage of recoveries obtained by tag-along plaintiffs through the efforts of
4 MDL lead counsel be set aside and made available for counsel who can demonstrate that they
5 have performed common benefit work. Here, Co-Lead Counsel propose that 12.5 percent of an
6 opt-out or tag-along plaintiff's recovery be set aside as *potential* compensation for work
7 performed by Class Counsel that redounded to the common benefit of all plaintiffs. That amount
8 is well within the range courts have sequestered in similar cases and is appropriate given the
9 complexity and significantly advanced stage of the litigation.

10 Entry of a set-aside order at this juncture—with the classes certified—will be efficient and
11 transparent, and consistent with the timing of entry of set-aside orders in comparable cases. Class
12 members will be able to take into account the possibility of a set-aside order when deciding
13 whether to opt out. As set forth in more detail below, Class Plaintiffs propose that the briefing
14 deadlines and hearing date for this motion be set in coordination with Class Plaintiffs'
15 concurrently-filed motion seeking the Court's authorization for distribution of notice to the
16 Classes.

17 **II. FACTUAL BACKGROUND**

18 On February 22, 2021, the Honorable Lucy H. Koh appointed Interim Co-Lead Class
19 Counsel and the Plaintiffs' Steering Committee to conduct this litigation on behalf of all Xyrem
20 purchasers and payers seeking injunctive relief and damages due to Defendants' conduct, which
21 Class Plaintiffs allege delayed the introduction of a less expensive generic version of Xyrem. ECF
22 No. 59. For more than two years, Class Counsel have diligently pursued the interests of all class
23 members. Class Counsel investigated and drafted a 122-page complaint and opposed Defendants'
24 motion to dismiss, which the Court largely denied. ECF Nos. 62 and 137. The parties then
25 commenced extensive fact discovery in which Class Counsel reviewed nearly three million pages
26 of documents produced by Defendants, reviewed tens of thousands of pages produced by third
27 parties, and deposed approximately twenty-nine fact witnesses. Joint Declaration of Dena C.
28 Sharp and Michael M. Buchman ("Joint Decl.") ¶ 3. Class Counsel have also litigated numerous

1 discovery disputes that have resulted in the production of key discovery that support the case
 2 against Defendants. *E.g.*, ECF Nos. 187, 281. After hearing oral argument, on May 12, 2023, the
 3 Court issued an order certifying a Damages Class and Injunctive Relief Class, and preliminarily
 4 approving a settlement with Amneal and Lupin on behalf of a Settlement Class. ECF No. 500.

5 Co-Lead Counsel have engaged numerous experts to submit merits reports addressing a
 6 range of issues. Joint Decl., ¶ 4. Class Counsel have also worked with class-specific experts Dr.
 7 Rena Conti and Ms. Laura Craft during the class certification phase of this litigation. *See* ECF
 8 No. 500 at 3, 6, 9–18 (class certification order discussing Dr. Conti and Ms. Craft). To date, Class
 9 Counsel have collectively devoted tens of thousands of hours in attorney time. Joint Decl., ¶ 5.

10 With merits expert work underway, Class Counsel will continue to devote significant
 11 additional time and costs further pursuing this matter. This will include expert reports, dispositive
 12 motion practice, document and witness preparation for trial, and trial.

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

14 **A. The Court Has Discretion to Set Aside Funds to Compensate Class Counsel** 15 **for Common Benefit Work**

16 The Supreme Court has long recognized that, where attorneys’ efforts on behalf of one
 17 client confers a benefit upon others, a court may compensate the attorneys who conferred the
 18 benefit by awarding them a portion of the recoveries of the passive beneficiaries. *See Boeing Co.*
 19 *v. Van Gemert*, 444 U.S. 472, 478 (1980); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116
 20 (1885). This common-benefit doctrine “rests on the perception that persons who obtain the
 21 benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful
 22 litigants’ expense.” *Boeing*, 444 U.S. at 478. As one court explained, “[i]n accordance with the
 23 common benefit doctrine, it has been a common practice in the federal courts to impose set-asides
 24 in the early stages of complex litigation in order to preserve common-benefit funds for later
 25 distribution.” *Turner v. Murphy Oil USA, Inc.*, 422 F. Supp. 2d 676, 680 (E.D. La. 2006).

26 A federal court’s “inherent powers of equity” provide the “foundation for the historic
 27 practice of granting reimbursement for the costs of litigation” and allow the court to ensure
 28 “justice as between a party and the beneficiaries of his litigation.” *In re Air Crash Disaster at*

1 *Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1018 (5th Cir. 1977) (quoting
2 *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166–67 (1939)). Complex aggregate litigation,
3 where the same claims against the same defendants arising from the same conduct and based on
4 the same legal theories are brought by late filers, presents a classic free-rider problem. *See In re*
5 *Zyprexa Prod. Liab. Litig.*, 594 F.3d 113, 129 (2d Cir. 2010) (Kaplan, J., concurring). The
6 lawyers appointed as lead counsel in MDL litigations perform work on behalf of their clients that
7 often inures to the benefit of tag-along plaintiffs who bring claims well after substantial hurdles
8 have been cleared and after an extensive factual record has been established. *See In re Linerboard*
9 *Antitrust Litig.*, 292 F. Supp. 2d 644, 657 (E.D. Pa. 2003) (“In carrying out the duties of lead and
10 liaison counsel, designated counsel have done much to craft the case against defendants. That
11 work has benefitted all litigants in the class action and the tag-along actions.”). If follow-on
12 plaintiffs were not called upon to pay some of the costs of that work, “high-quality legal work
13 would be under-incentivized and, ultimately, under-produced.” *In re General Motors LLC*
14 *Ignition Switch Litig.*, 477 F. Supp. 3d 170, 174 (S.D.N.Y. Aug. 10, 2020). Where class counsel’s
15 work on behalf of a group of plaintiffs confers a benefit on others outside the represented group, a
16 portion of beneficiaries’ recoveries should fairly be allocated to compensate class counsel. *See*
17 *Linerboard*, 292 F. Supp. 2d at 657.²

18 Given those principles, it is well recognized that a “necessary corollary to court
19 appointment of lead and liaison counsel and appropriate management committees is the power to
20 assure that these attorneys receive reasonable compensation for their work.” *In re Zyprexa Prods.*
21 *Liab. Litig.*, 467 F. Supp. 2d 256, 265 (E.D.N.Y. 2006) (quoting *Linerboard*, 292 F. Supp. 2d at
22 653). “[C]ourts have the right and power to require those who benefit from a lawsuit to share in
23 the costs of litigation which benefitted them.” *In re Zetia Antitrust Litigation*, 2022 WL
24 18108387, at *4 (E.D. Va. Nov. 8, 2022) (quoting *Linerboard*, 292 F. Supp. 2d at 654). The right

25 ² *See also* Elizabeth C. Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. Rev. 71, 103–04
26 (2015) (“When lead lawyers perform the work for individually retained attorneys, they benefit
27 them. Failing to pay lead lawyers could thus unjustly enrich non-lead attorneys, particularly free
28 riders who simply wait for lead lawyers to negotiate a proposed settlement.”); Hon. Eldon E.
Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 La. L. Rev. 371, 379 (2014) (“[T]he
common benefit doctrine has been consistently used and is well established as the justification for
the payment of common benefit fees in MDLs.”).

1 to equitable compensation extends not only to the parties specifically represented by court-
2 appointed counsel, but to any “parties on whose behalf the work is performed and on whom a
3 benefit has been conferred.” *Zyprexa*, 467 F. Supp. 2d at 265 (quoting *In re Worldcom, Inc. Sec.*
4 *Litig.*, No. 02 CIV. 3288 (DLC), 2004 WL 2549682, at *2 (S.D.N.Y. Nov. 10, 2004)). To ensure
5 the availability of funds to equitably compensate lead counsel, courts across the country,
6 including in this District, have confirmed that it is “standard practice . . . to compensate attorneys
7 who work for the common benefit of all plaintiffs by setting aside a fixed percentage of
8 settlement proceeds.” *Id.*; see also *In re Rezulin Products Liability Litig.*, No. 00 CIV. 2843
9 (LAK), 2002 WL 441342, at *2 (S.D.N.Y. Mar. 20, 2002) (entering set-aside order).

10 An MDL court’s authority to ensure equitable compensation for attorneys that have
11 contributed to the common benefit of all plaintiffs “derives from the Supreme Court’s common
12 benefit doctrine.” *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. M:05-
13 CV-01699-CRB, 2006 WL 471782, at *1 (N.D. Cal. Feb. 28, 2006) (citing *Boeing*, 444 U.S. 472;
14 additional citations omitted); see also *Turner*, 422 F. Supp. 2d at 680 (“[T]he U.S. Supreme Court
15 over 125 years ago approved the common benefit doctrine, which provides that when the efforts
16 of a litigant or attorney create, preserve, protect, increase, or discover a common fund, all who
17 benefit from that fund must contribute proportionately to the costs of the litigation.”). A federal
18 court’s “inherent powers of equity” provide the “foundation for the historic practice of granting
19 reimbursement for the costs of litigation” and allow the court to ensure “justice as between a
20 party and the beneficiaries of his litigation.” *In re Air Crash Disaster at Florida Everglades on*
21 *December 29, 1972*, 549 F.2d at 1018 (quoting *Sprague*, 307 U.S. at 166–67).

22 While set-aside orders were developed—and mostly frequently entered—in mass tort
23 cases,³ the same principles apply in antitrust actions like this one. In *In re Lidoderm Antitrust*
24 *Litigation*, for example, the court held that “[a]s in the mass torts context, where lead plaintiffs’
25 counsel are responsible for pushing the cases forward, marshalling the evidence and discovery,
26 and at least initial rounds of motion practice, EPP Class Counsel has performed the same tasks

27 ³ *E.g.*, *In re Diet Drugs*, 582 F.3d 524, 546–48 (3d Cir. 2009); *In re Genetically Modified Rice*
28 *Litig.*, 2010 WL 716190, at *4–6 (E.D. Mo. Feb. 24, 2010); *In re Protegen Sling & Vesica Sys.*
Prods. Liab. Litig., 2002 WL 31834446, at *1 (D. Md. Apr. 12, 2002).

1 here for the benefit of *all* of the EPPs.” No. 14-md-02521-WHO, 2017 WL 3478810, at *1 (N.D.
2 Cal. Aug. 14, 2017). In another pharmaceutical antitrust case—*In re Zetia Antitrust Litigation*—
3 the Court explained that “the risk of free-riding in class actions is not non-existent, especially in
4 complex, vigorously contested antitrust cases such as this one. That situation presents a classic
5 problem of unjust enrichment, which the common benefit doctrine is meant to remedy.” No. 2:18-
6 MD-2836, 2022 WL 18108387, at *4 (E.D. Va. Nov. 8, 2022); *see also In re Restasis*
7 *(Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, No. 18-MD-2819 (NG) (LB), 2022 WL
8 19837725, at *1 (E.D.N.Y. Aug. 3, 2022) (entering a set-aside order “to pay attorneys’ fees and
9 expenses incurred by EPP Class Counsel for their common benefit work”). And in *Linerboard*
10 *Antitrust Litigation*, the court ordered the creation of an escrow account “for the purpose of
11 paying class plaintiffs’ Lead and Liaison Counsel and the Executive Committees appointed by the
12 Court . . . for work benefitting plaintiffs in all lawsuits filed . . . by former class members who
13 opted out of the classes certified by the Court.” 292 F. Supp. 2d at 668 and 655–56 (citing *Air*
14 *Crash Disaster*, *Diet Drugs*, *Protegen Sling*, and *Rezulin*). Similarly, in *Bextra*, the Court directed
15 the defendants “to withhold the amount of [the common benefit attorneys’ fees] assessment from
16 any amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the
17 common benefit fund.” 2006 WL 471782, at *1; *see also Smilovits v. First Solar, Inc.*, 2019 WL
18 6841736, at *4 (D. Ariz. Dec. 16, 2019) (entering set-aside order in class action).

19 While Class Counsel will apply for an award of attorneys’ fees and reimbursement of
20 costs from any class-wide recovery they may achieve from each Defendant,⁴ Class Counsel will
21 not receive payment for recoveries by end-payors outside the class action. In particular, they will
22 not receive payment for any recoveries obtained by opt-out plaintiffs. Absent a set-aside order,
23 Class Counsel would not receive any fees or costs from an opt-out recovery derived from its
24 efforts. That Class Counsel may obtain fees and costs for a class recovery does nothing to cure
25 this potentially inequitable result. “[F]oreclosing those recoveries as a source of funding for the

26 _____
27 ⁴ Co-Lead Counsel does not intend to seek fees or expense awards with respect to the Amneal and
28 Lupin settlements. The Court granted preliminary approval of the Amneal and Lupin settlements
and the use of the settlement funds for continued litigation rather than distribution. *See* ECF Nos.
423 and 500.

1 common benefit work would enrich the non-contributing individual plaintiffs unjustly at the
2 expense of . . . the lead counsel.” *Zyprexa*, 594 F.3d at 130 (Kaplan, J., concurring). Accordingly,
3 a set-aside order is fair and necessary to ensure that Class Counsel have an opportunity to seek
4 appropriate compensation for work and expenditures that benefit individual litigants.

5 Co-Lead Counsel’s request is also consistent with the *Manual for Complex Litigation*,
6 which explains that “MDL judges generally issue orders directing that defendants who settle
7 MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay
8 national counsel.” *Manual for Complex Litigation*, Fourth, § 20.312; *see also* Duke Law Center
9 for Judicial Studies, *Standards and Best Practices for Large and Mass-Tort MDLs*, Standard 5
10 (5H: “In imposing fee assessments, the transferee judge should promote fairness among counsel,
11 compensate counsel who made the recovery possible, and suppress perverse incentives among
12 non-performing counsel. This may include imposing fees on attorneys representing individual
13 clients who opt out, yet use MDL discovery materials or otherwise enjoy the fruits of common
14 benefit counsels’ efforts.”).⁵

15 **B. A Set-Aside Order is Appropriate in This Case**

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

19 At the outset of the litigation, the Court appointed Co-Lead Counsel and the Plaintiffs’
20 Steering Committee to prosecute this case on behalf of all Xyrem purchasers and payers. ECF No.
21 59. For three years, Class Counsel have effectively and efficiently prosecuted this action and
22 substantially advanced the litigation on behalf of all Class members (including any class members
23 who may elect to opt out). Any opt-out plaintiff will, for example, be able to take advantage of the
24 Court’s motion to dismiss ruling, the extensive fact discovery that has been essential to prosecuting
25 plaintiffs’ claims, and the fruits of multiple successful discovery motions. Class Counsel have,
26

27 _____
28 ⁵ Available at https://law.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf (last visited May 17, 2023).

1 among other things, reviewed hundreds of thousands of documents produced by Defendants and
2 third parties and procured documents initially withheld as privileged.

3 In addition, opt-out plaintiffs have the benefit of the litigation strategy Class Counsel has
4 developed. As in *Linerboard*, “[i]n the favorable rulings of this Court . . . on the class action
5 motions, the tag-along plaintiffs obtained the benefit of the imprimatur of those [rulings] on the
6 theory of the case formulated by class plaintiffs and adopted in the tag-along actions.” 292 F. Supp.
7 2d at 659. This case involves complex issues at the intersection of antitrust patent and U.S. Food
8 & Drug Administration (“FDA”) regulatory law, such as: (i) Jazz’s REMS negotiations with the
9 generics; (ii) the establishment of a single-pharmacy distribution; (iii) the prosecution and
10 litigation of the patents at issue; (iv) the standards for FDA approval for Xyrem; and (v) the extent
11 to which Defendants’ conduct has caused a delay in the launch of a less expensive generic version
12 of Xyrem. Co-Lead Counsel and the Steering Committee have spent extensive time analyzing and
13 developing these issues. They have also marshaled evidence concerning liability and impact issues
14 common to all purchasers and payers in support of the class certification motion. Any purchaser or
15 payer that opts out will thus obtain the benefit of “the theory of the case formulated by class
16 plaintiffs.” *Id.* The size of any opt-out plaintiff’s recovery will be directly tied to the strength of the
17 case that Class Counsel has developed over the past three years. The only question posed by this
18 motion is whether Class Counsel has “made a sufficient showing to warrant establishment of a
19 framework to ensure that funds will be available to compensate them should the Court later
20 determine such compensation is warranted.” *Id.* at 662.

21 Co-Lead Counsel respectfully request that the Court enter the accompanying proposed
22 Order. The proposed Order is substantially similar to the orders entered in *Zetia*, *Restasis*,
23 *Lidoderm*, *Linerboard*, and other cases, and includes the following key features:

24 1. In the event an opt-out plaintiff obtains a settlement or judgment related to claims
25 arising from Defendants’ alleged efforts to delay the competitive launch of generic Xyrem,
26 Defendants shall set aside and place into a Xyrem Class Fee and Expense Account 12.5% of such
27 settlement or judgment;

1 2. The set-aside funds shall be available, at the Court’s discretion, to compensate
2 Class Counsel for their common benefit work, subject to a showing that Class Counsel is entitled
3 to such payments; and

4 3. Any set-aside funds not paid to Class Counsel for common benefit work shall be
5 remitted *pro rata* to the opt-out plaintiffs from whose settlements or judgments the set-aside
6 funds were withheld.

7 Co-Lead Counsel’s proposal deploys the “preferable procedure” of having Defendants set
8 aside funds before distribution to opt-out plaintiffs rather than requiring Class Counsel to recover
9 common benefit attorneys’ fees and expenses from the opt-out plaintiffs directly. *Linerboard*, 292
10 F. Supp. 2d at 665 (collecting cases requiring set-asides); *see also Lidoderm*, 2017 WL 3478810,
11 at *4 (ordering defendants to “set aside” a fixed percentage of opt-out settlements or recoveries).
12 Co-Lead Counsel’s proposed Order also includes key features that will protect the interests of the
13 opt-out plaintiffs. *First*, no payments will be made from the set-aside funds unless and until
14 approved by the Court. *Lidoderm*, 2017 WL 3478810, at *4; *Linerboard*, 292 F. Supp. 2d at 669;
15 *see also Zetia*, 2022 WL 18108387, at *5 (“The degree of that benefit – relative to Tag-Along
16 Plaintiffs’ own expenditures and effort in securing any eventual recovery – will be determined if
17 and when that recovery is achieved.”). *Second*, any set-aside funds not paid to Class Counsel for
18 common benefit work will revert to the opt-out plaintiffs. *Lidoderm*, 2017 WL 3478810, at *4;
19 *Linerboard*, 292 F. Supp. 2d at 667.

20 **C. A Set-Aside Order Should Be Entered at this Time**

21 While no settlements or judgments have yet occurred in this litigation, now is an appropriate
22 time for the Court to establish a structure to ensure that Class Counsel may seek equitable
23 compensation for their common benefit work. “Without the entry of a set-aside order in advance of
24 [i]ndividual [a]ction settlements or judgments, [i]ndividual [a]ctions could be dismissed after
25 settlement or a judgment, requiring [lead counsel] to pursue separate compensation claims in any
26 number of jurisdictions around the country.” *Worldcom*, 2004 WL 2549682, at *4. Furthermore,
27 once cases are no longer a part of the MDL proceedings (through remand or otherwise), this Court
28 loses jurisdiction and separate common benefit orders would need to be sought in the various

1 remand courts if not entered during the MDL proceedings. *See Lidoderm*, 2017 WL 3478810, at
2 *3; *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998). Recognizing
3 these jurisdictional issues, MDL best practices provide that “[e]arly in the litigation, the court
4 should . . . establish the arrangements for the [lead and liaison counsel’s] compensation, including
5 setting up a fund to which designated parties should contribute in specified proportions.” *Manual*
6 *for Complex Litigation (Fourth)* § 14.215 (2004); *see also* Duke Law Center for Judicial Studies,
7 *Standards and Best Practices for Large and Mass-Tort MDLs* 66–67 (2d ed. 2018). Accordingly,
8 courts routinely enter set-aside orders “prior to any recovery, as long as the litigation has been
9 ‘significantly advanced.’” *Lidoderm*, 2017 WL 3478810, at *2 (entering set-aside order before
10 summary judgment briefing and “prior to settlement negotiations”); *see also, e.g., Turner*, 422 F.
11 Supp. 2d at 680 (“[I]t has been a common practice in the federal courts to impose set-asides in the
12 early stages of complex litigation in order to preserve common-benefit funds for later
13 distribution.”); *Protegen*, 2002 WL 31834446, at *1 (“The Court believes this litigation has
14 advanced to the point that it is appropriate to establish a fair system for the sequestration of a certain
15 percentage of all payments by defendant(s) to plaintiff(s) . . . to be available to provide for
16 reimbursement of costs and payment of attorney’s fees to the Plaintiffs’ Lead Counsel (PLC) and
17 other attorneys who have been authorized by the PLC . . . subject to a proper showing in the
18 future.”). After three years and the completion of class certification, this case is significantly
19 advanced, and Co-Lead Counsel respectfully submit that this is the appropriate time for entry of a
20 set-aside order.

21 **D. A Set-Aside of 12.5% is Appropriate**

22 The proposed 12.5 percent set-aside amount is eminently reasonable, as it falls within the
23 range that courts have set aside in similar MDLs. *See, e.g., Genetically Modified Rice*, 2010 WL
24 716190, at *6 (“Courts have ordered contributions between 9% and 17% in MDLs for common
25 benefit work.”); *see also, e.g., Smilovits*, 2019 WL 6841736, at *4 (ordering 10% set-aside); *In re*
26 *Aggrenox Antitrust Litig.*, No. 3:14 MD 2516 (SRU), 2018 WL 10705542, at *6 (D. Conn. July 19,
27 2018), *aff’d*, 812 F. App’x 26 (2d Cir. 2020) (10%); *In re Fresenius Granuflo/Nautralyte Dialysate*
28 *Prods. Liab. Litig.*, MDL No. 13-2428, 2018 WL 2163627, at *1 (D. Mass. Feb. 1, 2018) (11%);

1 *Lidoderm*, 2017 WL 3478810, at *4 (10%); *In re NuvaRing Prods. Liab. Litig.*, No. 08-md-1964,
 2 2014 WL 7271959, at *3 (E.D. Mo. Dec. 18, 2014) (15.5%); *In re Tyco Int'l, Ltd. Multidistrict*
 3 *Litig.*, 535 F. Supp. 2d 249, 266 (D.N.H. 2007) (14.5%); *Turner*, 422 F. Supp. 2d at 684 (12%); *In*
 4 *re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1996 WL 900349, at *3–4 (E.D.
 5 Pa. June 17, 1996) (17%).

6 It bears emphasis that Co-Lead Counsel do not propose to automatically recover 12.5% of
 7 any opt-out settlement or judgment, but will instead make a showing and seek Court approval for
 8 payment of the set-aside amount. Such a percentage is justified by the extensive work performed
 9 by Class Counsel.⁶

10 **IV. PROPOSED SCHEDULE FOR RESOLUTION OF THE MOTION**

11 Co-Lead Counsel has contemporaneously filed a motion asking the Court to authorize the
 12 distribution of Notice to the Damages, Injunctive Relief, and Settlement Classes pursuant to
 13 Federal Rule of Civil Procedure 23(c)(2)(B). That motion and the notices sent to the Classes
 14 provide proposed deadlines for class members to opt out if they wish to do so.

15 Co-Lead Counsel have filed this motion prior to notice being disseminated to Class
 16 members so that they are aware that, in the event they choose to opt-out, they may be subject to a
 17 set-aside order. In recognition of the possibility that entities that opt out of the Damages and/or
 18 Settlement Classes may wish to be heard on the present motion, Plaintiffs' motion to authorize
 19 distribution of notice proposes that the notices advise class members of: (1) the pendency of this
 20 motion; (2) the deadline and process for filing any response to this motion; (3) the deadline for
 21 Co-Lead Counsel to file a reply in support of this motion; and (4) a date for a hearing, should the
 22 Court wish to hear oral argument.⁷ Co-Lead Counsel will also post the relevant dates and a copy

23 _____
 24 ⁶ To be clear, Class Counsel do not propose to apply the proposed Set-Aside Order to Damages
 25 Class members that have filed and litigated their own independent actions in this MDL as of the
 26 date of the filing of this motion, namely United HealthCare Services, Inc. ("UHS"), Humana Inc.,
 27 Molina Healthcare, Inc., and Health Care Service Corporation, Inc. In contrast, any plaintiffs in
 parallel proceedings pending outside the MDL, such as the *Aetna, Inc. v. Jazz Pharm., Inc.*,
 pending in 22-cv-010951, and any other Damages Class members who have not to date filed their
 own independent cases in the MDL or have filed in some other forum, may be subject to Class
 Counsel's application on any eventual Set-Aside Order.

28 ⁷ Class Plaintiffs recognize that class members may wish to defer a final decision on whether to

1 of this motion on the case website that the Notice Administrator will establish in connection with
2 Co-Lead Counsel's efforts to notify the Class of the Court's May 12, 2023 class certification Order.

3 **V. CONCLUSION**

4 For the foregoing reasons, Co-Lead Counsel and the Steering Committee respectfully
5 request that the Court enter the proposed set-aside Order or grant such further relief as the Court
6 deems appropriate under the circumstances.

7
8 Dated: June 9, 2023

Respectfully submitted,

9
10 By: /s/ Dena C. Sharp

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22 *Co-Lead Class Counsel*

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27 _____
opt out of the Class based on the resolution of this motion. In the event a class member opts out of
28 the Class, opposes this motion, and the Court grants the motion, Class Plaintiffs will not oppose
any timely request from such class member to withdraw their opt-out request and rejoin the Class.

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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(h)(3), I attest under penalty of perjury that concurrence in this filing has been obtained from all counsel.

DATED: June 9, 2023

/s/ Dena C. Sharp
Dena C. Sharp

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2023, 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