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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

*IN RE HIV ANTITRUST LITIGATION*

THIS DOCUMENT RELATES TO :

KPH Healthcare Services, Inc. v. Gilead Sciences, Inc. *et al.*, 3:20-cv-06961-EMC

Case No. 3:19-cv-02573-EMC (lead case)

**DIRECT PURCHASER CLASS PLAINTIFFS’ NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT WITH GILEAD AND ATTORNEYS’ FEES, COSTS AND EXPENSES, AND SERVICE AWARD**

Date: January 18, 2024  
Time: 1:30 p.m.  
Ctrm: 5 – 17th Floor  
Judge: Honorable Edward M. Chen

**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 18, 2024, at 1:30 p.m., before the Honorable Edward Chen, United States District Judge, in Courtroom 5 of the United States District Court for the Northern District of California in San Francisco, CA, Plaintiff KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc. (“KPH”), on behalf of itself and the Direct Purchaser Classes, will and hereby does move the Court pursuant to Federal Rule of Civil Procedure 23(e) for entry of an Order: (1) finding the Settlement Agreement (ECF No. 2086-2) and Allocation Plan to be fair, reasonable, and adequate, and granting final approval of the Settlement; (2) awarding DPP Counsel \$75,000,000 for attorneys’ fees and reimbursement of \$2,887,478.45 for costs and litigation expenses incurred in the reasonable prosecution of this matter; and approving a \$40,000 class representative service award to KPH.

This motion is based on the Notice of Motion, the Supporting Memorandum of Points and Authorities, the supporting declarations and exhibits, and all papers and records on file in this matter.

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**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

KPH Healthcare Services, Inc. (“KPH” or “Plaintiff”), through its counsel, began investigating this case over four years ago. After years of complex case work and hard-fought litigation and just hours before opening statements, KPH, on behalf of itself and the certified Direct Purchaser Classes (“DPPs” or “DPP Classes”), reached agreement on the material terms of a class action settlement with Gilead.<sup>1</sup> KPH and Gilead subsequently executed the long-form Settlement Agreement after additional negotiations regarding the language of the agreement (including a binding mediation with Kenneth Feinberg).<sup>2</sup> Under the terms of the Settlement, Gilead is required to pay \$246,750,000 into a non-reversionary Settlement Fund for the benefit of the DPP Classes.

The Settlement is fair, reasonable, and adequate. It represents an excellent recovery for the DPP Classes, given the novel and complex nature of the antitrust claims at issue and the significant risks DPP Class Members faced of receiving no recovery had their claims proceeded to verdict. *See* Preliminary Approval Order, ECF No. 2108 at 3 (“with hindsight, it is clear that there were significant risks given that the indirect purchasers chose to proceed to trial and lost”). To receive a cash payment under the Settlement, DPP Class Members need only complete and submit a pre-populated claim form.

The Court-approved notice program is substantially complete. The direct notice, publication notice, and initial reminder notice aspects of the notice program have been fully implemented, and DPP Counsel have already begun the process of contacting DPP Class Members that have not yet filed claims. To complete the notice program, DPP Counsel will finish contacting DPP Class Members, and a second reminder notice will be mailed by December 4, 2023. While DPP Class Members have until January 1, 2024 to submit claim forms, 16 claim forms have already been received from known DPP Class Members, and DPP Co-Lead Class Counsel (“Class Counsel”) fully

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<sup>1</sup> “Gilead” collectively refers to Defendants Gilead Sciences, Inc., Gilead Holdings, LLC, Gilead Sciences, LLC, and Gilead Sciences Ireland UC.

<sup>2</sup> The Settlement Agreement (“Settlement” or “S.A.”) was previously submitted to the Court as Exhibit 1 to the DPPs’ Motion for Preliminary Approval. ECF No. 2086-2.

1 expect a robust claims rate similar to the BMS Settlement’s claims rate. DPPs respectfully submit  
2 that final approval of the Settlement should be granted.

3 For the substantial results DPP Counsel achieved for the Classes, and for the extensive work  
4 required to secure those results, Class Counsel seek an attorneys’ fee award of \$75,000,000,  
5 reimbursement of incurred costs and expenses in the amount of \$2,887,478.45, and a \$40,000 class  
6 representative service award for KPH. The requested fee award translates to 30.39% of the Gilead  
7 Settlement Fund (or 29.1% of the total benefits DPP Counsel secured during the litigation from  
8 Gilead and BMS), compares favorably to attorneys’ fee awards entered in similar cases, and is  
9 reasonable and justified, given the results DPP Counsel secured, the risky and complex nature of this  
10 case, and the tremendous resources—in the form of 39,091 hours<sup>3</sup> and \$5,387,478.45 in total costs  
11 and expenses—DPP Counsel devoted to litigating this matter on a contingent basis for more than  
12 three years. *See* Decl. of Brian T. Fitzpatrick (“Fitzpatrick Decl.”) ¶¶ 9-33, attached as Exhibit 7 to  
13 the Decl. of Michael L. Roberts (“Roberts Decl.”), attached hereto as Exhibit A. A lodestar cross-  
14 check, which yields a multiplier of 2.19, further confirms the reasonableness of the requested fee  
15 award. *Id.* ¶¶ 18, 32.

16 Class Counsel’s request for reimbursement of \$2,887,478.45 for costs and litigation expenses  
17 incurred to advance the matter is reasonable and consistent with what the market would award in a  
18 private setting. The requested service award of \$40,000 is likewise reasonable given that KPH was  
19 the sole class representative in this DPP litigation, the significant time and effort KPH’s employees  
20 put into the litigation, and the fact that without KPH’s tireless representative work, the DPP Classes  
21 would receive none of the sizeable benefits they will enjoy through the Settlement.

22 DPPs respectfully request that the Court grant this motion.  
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27 <sup>3</sup> The 39,091 hours Class Counsel refer to herein excludes the 520 hours DPP Counsel collectively  
28 spent between inception and October 31, 2023 on this filing, BMS Settlement administration, and  
time from attorneys with less than \$20,000 in lodestar on the case. Roberts Decl. ¶ 6 n. 2.

## II. BACKGROUND AND PROCEDURAL HISTORY

### A. The Parties Reached an Agreement on the Eve of Trial After Years of Hard-Fought Litigation.

On the eve of trial, as opening statements were slated to begin the following morning, and after approximately four years of factual investigation, intense litigation, and several rounds of contentious negotiations before one of the most respected mediators in the industry, Kenneth Feinberg, KPH and Gilead reached an agreement to resolve the DPPs' claims against Gilead. *See* Roberts Decl. ¶¶ 3–5. By the time KPH and Gilead executed a Memorandum of Understanding (“MOU”), KPH had defeated arbitration and a dismissal motion, reviewed millions of pages of discovery, participated in 90 depositions of fact and expert witnesses, successfully moved for certification of two direct purchaser classes, successfully defended the certification before the Ninth Circuit Court of Appeals, collaborated with more than a dozen experts to prepare and submit reports supporting the DPPs' case-in-chief, prepared dozens of pretrial briefs and submissions, held multiple DPP-only jury focus exercises including a two-day mock trial, substantively participated in an all-Plaintiffs' mock trial, rigorously prepared for a challenging trial, and participated in jury selection after which a jury was empaneled. *See generally* Roberts Decl. ¶¶ 5, 8–154. DPPs were prepared to give their opening statement and had exchanged with the other plaintiff groups and Defendants their witness lists and exhibits for the first substantive days of trial. *Id.* ¶¶ 115, 152.

Each segment of the litigation was hard fought. In the early segment of the litigation, after KPH filed its complaint in October 2020, Defendants responded with motions to compel arbitration, to dismiss, and to stay and for costs. *Id.* ¶¶ 12, 15. KPH fully briefed and presented oral argument defending against a motion to compel arbitration and a motion to dismiss; it successfully defended against the motion to stay and for costs on the papers alone. *Id.* ¶¶ 16–17. Defendants raised issues of applicable state law, standing, and damages. *Id.* ¶ 16. After successfully defeating those motions in large part, KPH dove into discovery efforts in cooperation with the EPPs, which consisted of months of intense negotiations with Defendants, scores of fact depositions, and the review of millions of documents. *Id.* ¶¶ 26–42. Successfully conducting discovery in this case required DPP Counsel to

1 understand not only complicated patent, pharmaceutical, and regulatory matters, but also the nuances  
2 of legal complexities across plaintiff groups and claims.

3           Between May 26, 2021 and December 17, 2021, DPPs and EPPs (and sometimes Retailers)  
4 deposed 42 fact witnesses. *Id.* ¶ 38. In early October 2021, DPP Counsel were also engaged in  
5 settlement negotiations with defendant BMS and preparing their class certification submission. On  
6 October 19, 2021, DPPs and BMS reached agreement on the material terms of a proposed class  
7 action settlement. *Id.* ¶ 51. DPPs and BMS notified the Court of that fact the next day. *Id.* And just  
8 hours later, DPPs filed a motion requesting certification of three direct purchaser classes—a Truvada  
9 Class, an Atripla Class, and a Complera Class. *Id.* ¶ 43. DPPs submitted the expert reports of Dr.  
10 Russell L. Lamb, Ph.D. (regarding class-wide impact and damages) and Professor Thomas G.  
11 McGuire (regarding market power) and approximately two dozen other exhibits in support of their  
12 class certification motion. *Id.*

13           In connection with EPPs' request for leave to amend their complaint to add an additional  
14 plaintiff, on December 14, 2021, the Court extended the time for Gilead to file its opposition to  
15 DPPs' class certification motion until June 2022. *Id.* ¶ 44. But the winter and spring of 2022 were  
16 not idly spent in this litigation; far from it. In addition to wrapping up fact discovery depositions in  
17 January 2022, DPP Counsel spent this period beginning to collaborate with two new plaintiff groups  
18 (IHPPs and United), working on ten expert merits reports, and negotiating the language of the BMS  
19 Settlement. *Id.* ¶¶ 30, 38, 52, 59-60. After months of negotiations, DPPs' motion for preliminary  
20 approval of the \$10,800,000 BMS Settlement was filed on May 13, 2022. *Id.* ¶ 52.

21           On June 2, 2022, approximately two weeks after deposing Dr. Lamb the first of four times in  
22 this case, Gilead filed its opposition to DPPs' motion for class certification and moved to exclude Dr.  
23 Lamb's opinions in support. *Id.* ¶ 45. DPPs filed their opposition to Gilead's *Daubert* motion just  
24 twelve days later. *Id.* On June 23, 2022, DPPs (in coordination with other plaintiff groups) served the  
25 merits reports of nine experts. *Id.* ¶ 59. The next day, June 24, 2022, DPPs deposed Gilead's class  
26 certification expert, Dr. Bruce Strombom. *Id.* ¶ 64. On June 28, 2022, DPPs served the merits expert  
27 report of Dr. Russell L. Lamb, Ph.D. on Gilead. *Id.* ¶ 59. And finally, on June 30, 2022, DPPs filed a  
28

1 reply brief in support of their motion for class certification supported, the supporting expert rebuttal  
2 report of Dr. Russell Lamb, Ph.D., and over a dozen other supporting exhibits. *Id.* ¶ 45.

3 Intense expert discovery occurred between July 1 and September 15, 2022. On July 22, 2022,  
4 Defendants served 12 merits experts reports. *Id.* ¶¶ 59, 63. Defendants served their expert report on  
5 damages five days later. *Id.* Plaintiffs' 13 merits rebuttal reports were served on August 12, 2022,  
6 and Dr. Lamb's merits rebuttal report on DPP damages was served on August 17, 2022. *Id.* ¶ 59.  
7 Additionally, between July 13, 2022 and September 15, 2022, Defendants conducted 20 depositions  
8 of Plaintiffs' shared and DPP-only experts, and the plaintiff groups deposed eight of Defendants'  
9 experts. *Id.* ¶¶ 61, 64. The Court also heard arguments on DPPs' and EPPs' motions for class  
10 certification on August 25, 2022, which DPP counsel prepared for and successfully argued on  
11 behalf of the DPP Classes. *Id.* ¶ 45.

12 This Court granted in substantial part DPPs' motion for class certification on September 27,  
13 2022, certifying a class of Atripala Direct Purchasers and a class of Truvada Direct Purchasers and  
14 appointing Michael L. Roberts and Dianne Nast as Co-Lead Class Counsel and Francis Scarpulla as  
15 Liaison Counsel. *Id.* ¶¶ 46, 47; ECF No. 1388. Defendants' petition for permission to appeal that  
16 order under Rule 23(f) followed, against which DPP Counsel deftly defended, again on the papers.  
17 Roberts Decl. ¶ 48. DPPs proceeded to provide notice to the Classes pursuant to the Court's orders.  
18 *Id.* ¶¶ 49-50.

19 Motions for summary judgment and *Daubert* motions were under way by early September  
20 2022, when Defendants filed three separate motions for summary judgment against Plaintiffs. *Id.*  
21 ¶ 65. DPPs worked tirelessly in coordination with the other plaintiff groups to oppose those motions,  
22 including the identification of over 200 exhibits, and to file Plaintiffs' own motion for partial  
23 summary judgment and six *Daubert* motions against Defendants' experts. *Id.* ¶¶ 65-66. DPPs and the  
24 other plaintiff groups immediately proceeded to defend against Defendants' omnibus *Daubert*  
25 motion against several of Plaintiffs' key experts. *Id.* ¶ 67. DPPs were prepared to argue a portion of  
26 the summary judgment and *Daubert* briefing. *Id.* ¶ 68. On January 9, 2023, the Court gave Plaintiffs  
27 the green light as to their MFE/MFEP claims, that is, the reverse payment claims. *Id.* ¶ 69.

28

1           The summary judgment and *Daubert* motion practice transitioned into grueling pretrial  
2 motions and submissions. *See generally id.* ¶¶ 70-125. DPPs’ pretrial motions and submissions—in  
3 extensive cooperation with the other plaintiff groups, when necessary—including several drafts of  
4 witness lists and summaries, multiple drafts of trial exhibits, several rounds of deposition  
5 designations, seven motions *in limine* and oppositions to Defendants’ seven motions *in limine*, a trial  
6 structure brief, several iterations of jury instructions and a verdict form, a pretrial conference  
7 statement, a trial brief, and several drafts of a joint juror questionnaire. *Id.* DPPs participated in  
8 extensive meet-and-confer meetings with Defendants and other plaintiff groups in the process of  
9 developing these pretrial submissions. *Id.* DPPs further represented the DPP Classes at multiple  
10 pretrial conference hearings ahead of trial as well as at voir dire the day before DPPs reached  
11 agreement with Gilead. *Id.*

12           At the same time that DPPs were preparing pretrial motions and submissions and gearing up  
13 for a complex and lengthy trial, they prepared and executed three jury exercises working with trial  
14 consultants they had engaged, including an in-person meeting regarding that mock trial and trial  
15 strategy and a two-day mock trial in person in the Bay Area. *Id.* ¶¶ 129-33. In addition, DPPs  
16 represented the DPP Classes at the additional all-plaintiffs’ mock trial which also took place in the  
17 Bay Area during other dates. *Id.* ¶¶ 5, 128.

18           By the time the parties reached an agreement, after a jury was empaneled and just before  
19 opening statements were to begin, and after months of negotiations with the guidance of Mr.  
20 Feinberg, counsel for both sides were keenly aware of the strengths and weaknesses of their  
21 respective case and the significant risks in continuing to litigate. *Id.* ¶ 3. After signing the MOU,  
22 DPPs and Gilead continued to negotiate the long-form Settlement Agreement until the parties agreed  
23 on all but one of the major provisions, such as the scope of the Classes, the terms of the release, and  
24 the timing for funding. *Id.* ¶ 160. To resolve the one remaining issue, KPH and Gilead engaged  
25 mediator Kenneth Feinberg, who issued a decision following a round of binding mediation. *Id.*  
26 ¶ 161. KPH and Gilead thereafter executed the Settlement on July 24, 2023. *Id.*

27           KPH moved for preliminary approval of the Settlement on August 9, 2023. ECF No. 2086.  
28 The Court heard oral argument on September 21, 2023, and granted preliminary approval on

1 September 25, 2023. ECF Nos. 2109, 2110. The notice plan approved by the Court, which was  
 2 designed to provide robust notice of the Settlement to the Classes and to satisfy the requirements of  
 3 Fed. R. Civ. P. 23 and due process, was immediately implemented by the Court-approved claims  
 4 administrator, KCC<sup>4</sup>: within fourteen days of the preliminary approval order, direct notice consisting  
 5 of the long-form notice and a pre-populated claim form was mailed to all known Class Members,  
 6 press releases were published in *PR Newswire and Business Wire*, and a case-specific website was  
 7 published. *See* Decl. of Carla Peak (“Peak Decl.”) ¶¶ 4, 8-9, 13, attached as Exhibit 6 to the Roberts  
 8 Decl. By October 24, 2023, the remainder of the media portion of the notice plan was complete, with  
 9 banners and leaderboards being published twice each in e-newsletters *Becker’s Pharmacy Report*,  
 10 *NAW SmartBrief*, and *Pharmaceutical Commerce Direct*. *Id.* ¶¶ 10-12. In the meantime, the first  
 11 reminder notices were mailed, and Class Members began filing claims. *Id.* ¶¶ 5, 15. DPP Counsel  
 12 have already begun directly contacting by phone and email all known Class Members who had not  
 13 yet submitted claims. Roberts Decl. ¶ 173. The second reminder notice will be mailed by December  
 14 4, 2023. Peak Decl. ¶ 7. Class Members have until January 1, 2024 to file their claims. *See*  
 15 Preliminary Approval Order ¶ 20, ECF No. 2109.

16 **B. This Settlement Provides Significant Monetary Relief to the DPP Classes**

17 Pursuant to the terms of the Settlement, Gilead paid \$246,750,000 into the Gilead Settlement  
 18 Fund, which will be used to pay valid claims submitted by DPP Class Members in accordance with  
 19 the Plan of Allocation, all Notice and Administration Expenses and Court-approved attorneys’ fees,  
 20 costs, expenses, and a representative-plaintiff service award. S.A. ¶¶ 1(q), 7. The Gilead Settlement  
 21 Fund is placed in an interest-bearing, QSF escrow account. The Plan of Allocation provides that the  
 22 Net Gilead Settlement Fund shall be distributed *pro rata* to each DPP Class Member that submits a  
 23 valid claim based on the units of brand and generic Truvada and Atripla purchased, with weights  
 24 applied based on the drug purchased and whether the drug was brand or generic. S.A. Ex. H, ECF  
 25 No. 2086-2. Under the Settlement, none of the Settlement Fund shall revert to Gilead. *Id.* ¶ 16(b), .  
 26  
 27

28 <sup>4</sup> *See* ECF No. 2109 ¶ 12.

1 KPH entered into the Settlement on behalf of the following previously certified Direct  
2 Purchaser Classes:

3 **Truvada Class:** All persons or entities in the United States and its  
4 territories who purchased Truvada or generic Truvada directly from  
5 any of Defendants or any brand or generic drug manufacturer from  
6 February 1, 2018, until the date of the class certification order,  
7 September 27, 2022.

8 **Atripla Class:** All persons or entities in the United States and its  
9 territories who purchased Atripla or generic Atripla directly from any  
10 of Defendants or any brand or generic drug manufacturer from  
11 February 1, 2018, until the date of the class certification order,  
12 September 27, 2022.

13 S.A. ¶ 1(e). The certification order excludes the following persons and entities from the Classes:

14 (1) Defendants, named co-conspirators, and their officers, directors, employees, subsidiaries, and  
15 affiliates; (2) federal, state, and local governmental entities; (3) any judicial officer presiding over  
16 the litigation and members of their immediate family and judicial staff; (4) the Retailer Plaintiffs;<sup>5</sup>  
17 and (5) United Healthcare Services Inc. *Id.*

18 Pursuant to the terms of the Settlement, the members of the DPP Classes:

19 [R]elease and forever discharge, and covenant not to sue, Gilead and  
20 each and every Gilead Release Party (collectively, the “Releasees”),  
21 from all manner of claims, debts, obligations, demands, actions, suits,  
22 causes of action, damages whenever incurred, liabilities of any nature  
23 whatsoever, including costs, expenses, penalties and attorneys’ fees,  
24 under federal or state laws, whether known or unknown, foreseen or  
25 unforeseen, suspected or unsuspected, contingent or non-contingent,  
26 assigned or otherwise, in law or equity, that arise out of or relate, in  
27 whole or in part in any manner, to all conduct, acts, or omissions  
28 alleged in the Action and/or that could have been alleged in the Action  
(or arising out of substantially the same subject matter), regardless of  
legal theory.

S.A. ¶ 13(a).<sup>6</sup>

<sup>5</sup> The Retailer Plaintiffs are: Walgreen Co.; The Kroger Co.; Albertsons Companies, Inc.; H-E-B, L.P.; Rite Aid Corporation; Rite Aid Hdqtrs. Corp.; and CVS Pharmacy, Inc. The Retailer Plaintiffs and United Healthcare Services Inc. (“United”) opted out of the DPP Classes.

<sup>6</sup> Except as otherwise provided in the Settlement, the release does not extend to any claims arising in the ordinary course of business with Gilead under the Uniform Commercial Code, the laws of negligence, product liability, implied warranty, contract, or personal injury, aside from breach of warranty or contract based in whole or in part on any conduct challenged by DPPs in the Action. *Id.* Pursuant to the Settlement, Gilead releases “all claims related to the allegations made in letters to KPH’s assignor, McKesson, dated: June 2, 2021 and others, relating to alleged noncompliance with ADR provisions contained in the McKesson/Gilead distribution agreement.” *Id.* ¶ 13(b). “For the

### III. ARGUMENT

#### A. The Settlement Is Fair, Reasonable, and Adequate

Federal Rule of Civil Procedure 23(e) requires the Court to approve a class-wide resolution of claims. In doing so, courts are mindful of the Ninth Circuit’s “‘strong judicial policy’ that favors the settlement of class actions.” *Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 966 (N.D. Cal. 2019) (quoting *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). The Court may approve a settlement that is “fair, reasonable, and adequate.” *Briseño v. Henderson*, 998 F.3d 1014, 1023 (9th Cir. 2021). The factors that support that analysis are set forth in the December 1, 2018 amendments to Fed. R. Civ. P. 23(e)(2):

(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm’s length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorneys’ fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

The Court additionally may consider the Ninth Circuit’s *Churchill* factors:

(1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and likely duration of future litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the state of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

*Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); *see also Cottle v. Plaid Inc.*, No. 20-cv-03056-DMR, 2021 WL 5415252, at \*11 (N.D. Cal. Nov. 19, 2021) (court examines Rule 23(e)(2) and *Churchill* factors in deciding whether to grant preliminary approval). The Court also should consider the extent to which the Settlement complies with the Northern District of

avoidance of doubt, Gilead shall not seek indemnification from Direct Purchaser Class member McKesson Corporation as to any and all claims arising out of the Direct Purchaser Class settlement of the above-captioned antitrust dispute.” *Id.* Finally, the Settlement provides, generally, that Gilead and the DPPs each release the provisions, rights, and/or benefits conferred by Section 1542 of the California Civil Code and by any similar, comparable, or equivalent law or principle of common law. *Id.* ¶ 13(c). The scope of the released claims is virtually identical to the claims certified on behalf of the DPPs for class-wide treatment. *See* Class Certification Order, ECF No. 1388.

1 California’s *Procedural Guidance for Class Action Settlements*. Evaluating the Settlement against  
 2 these factors demonstrates that the Settlement is fair, reasonable, and adequate and warrants final  
 3 approval.

4 **1. KPH and Class Counsel Have Zealously Represented the DPP Classes,  
 5 Including Reaching a Settlement Following Good-Faith, Informed, and  
 6 Arms’-Length Negotiations.**

6 In evaluating Rule 23(e)(2)(A) and (B)’s requirement that the Class be well represented and  
 7 that the settlement be reached as a result of arm’s length negotiations, the focus is on “the conduct of  
 8 the litigation and of the negotiations leading up to the proposed settlement,” including whether  
 9 counsel “had an adequate information base” and the “the involvement of a neutral . . . mediator.”  
 10 Fed. R. Civ. P. 23 advisory committee’s note to 2018 amendment. The involvement of a neutral  
 11 mediator “supports the conclusion that Plaintiffs were armed with sufficient information about the  
 12 case to broker a fair settlement.” *Uschold v. NSMG Shared Servs., LLC*, 333 F.R.D. 157, 170 (N.D.  
 13 Cal. 2019) (internal quotation marks omitted). Given the involvement of highly respected mediator  
 14 Kenneth Feinberg and the hard-fought litigation preceding the Settlement—including multiple  
 15 rounds and months of mediation and negotiations—there is no question that these factors favor final  
 16 approval.

17 The DPP Classes have been well represented in this case work and litigation by KPH and  
 18 Class Counsel for over four years and will continue to be so represented through administration of  
 19 the Settlement. As described above and in detail in the accompanying Roberts Declaration, DPP  
 20 Counsel litigated strenuously against sophisticated and well-prepared defense counsel. DPP Counsel  
 21 defeated motions to dismiss and to compel arbitration, motions for summary judgment, and *Daubert*  
 22 motions; successfully certified two DPP Classes; defeated a petition to appeal to the Ninth Circuit  
 23 Court of Appeals; briefed numerous pretrial matters; and comprehensively and thoroughly prepared  
 24 for trial. Roberts Decl. ¶¶ 8–154. This vigorous advocacy demonstrates the absence of any fraud or  
 25 collusion underlying the Settlement. DPP Counsel have extended 39,091 hours and incurred total  
 26 costs and expenses of \$5,387,478.45 in litigating this case. *Id.* ¶¶ 179, 181. The negotiations to settle  
 27 this matter before the mediator were extensive and contentious. *Id.* ¶¶ 157-8. By the time the parties  
 28 entered into an agreement to resolve the matter literally on the eve of trial as opening statements

1 were scheduled to begin on the following morning, each side was intimately familiar with the  
2 strengths and weaknesses of its case.

3 The single class representative KPH has enthusiastically supported DPPs' claims from before  
4 the case was even filed, having communicated regularly with Class Counsel, reviewed the complaint  
5 and discovery requests, produced over 26,000 pages of internal documents, prepared and sat for a  
6 lengthy deposition, and spent numerous hours preparing to testify at trial. Roberts Decl. ¶¶ 36–37,  
7 41, 148, 182.

8 Class Counsel have extensive experience litigating complex antitrust cases such as this and  
9 believe the recovery provided by the Settlement is an excellent result for the DPP Classes in light of  
10 the risks of continuing to litigate, which are detailed throughout this Motion. Roberts Decl. ¶¶ 3–5  
11 and Ex. 1 (Roberts Law Firm Resume); Decl. of Dianne Nast (“Nast Decl.”) Ex. 1 (NastLaw LLC  
12 Firm Resume), attached as Exhibit 3 to the Roberts Decl. “The recommendations of plaintiffs’  
13 counsel should be given a presumption of reasonableness.” *See In re Omnivision Techs., Inc.*, 559 F.  
14 Supp. 2d 1036, 1043 (N.D. Cal. 2008) (internal quotation marks and citation omitted); *see also In re*  
15 *Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995) (“Parties represented by competent counsel  
16 are better positioned than courts to produce a settlement that fairly reflects each party’s expected  
17 outcome in the litigation.”).

18 Finally, as discussed below, Class Counsel’s request for a fee award, reimbursement for their  
19 out-of-pocket costs and expenses, and a service award for KPH, was negotiated and is intended to be  
20 considered by the Court separately from the Court’s evaluation of the Settlement. S.A. ¶ 12(a). Any  
21 amounts requested by counsel but not awarded will be allocated to DPP Class Members and will not  
22 be returned to Gilead.

23 The Classes have been and continue to be well represented by Class Counsel and KPH. This  
24 factor supports final approval.

25 **2. The Relief provided for the Classes is Adequate, Especially Considering**  
26 **the Risks of Continued Litigation.**

27 The Settlement provides \$246,750,000 for the benefit of the DPP Classes. This relief is  
28 adequate when taking into account the following factors under Fed. R. Civ. P. 23(e)(2)(C):

- (i) the costs, risks, and delay of trial and appeal;
- (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
- (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and
- (iv) any agreement required to be identified under Rule 23(e)(3).

“The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair.” *Nobles v. MBNA Corp.*, No. 06-cv-03723-CRB, 2009 WL 1854965, at \*2 (N.D. Cal. June 29, 2009).

The risks of continuing to litigate in this case are well-documented at this point. “Antitrust cases are particularly risky, challenging, and widely acknowledge[d] to be among the most complex actions to prosecute.” *In re Lithium Ion Batteries Antitrust Litig.*, 13-md-02420-DMR, 2020 WL 7264559, at \*15 (N.D. Cal. Dec. 10, 2020). The estimated settlement value cannot be viewed in a vacuum; the court must evaluate the strengths and weaknesses of the case to determine the likelihood of recovering that value. *See Cuzick v. Zodiac U.S. Seat Shells, LLC*, No. 16-cv-03793-HSG, 2017 WL 4536255, at \*6 (N.D. Cal. Oct. 11, 2017); *see also Smith v. Am. Greetings Corp.*, No. 14-cv-02577-JST, 2015 WL 4498571, at \*7 (N.D. Cal. July 23, 2015) (evaluating recovery in view of risks).

KPH, on behalf of DPPs, was one of five plaintiff groups proceeding to trial, and the plaintiff groups' claims often required diverging interests and trial strategies, not to mention different proofs at trial. The fact witnesses expected at trial were mostly experts and adverse defense witnesses. In addition, the subject matter was highly academic and complex. Roberts Decl. ¶¶ 4, 120. Although they believed mightily in their case, DPPs understood that there were significant risks in proving that Defendants violated the rule of reason, proving that DPP Class Members suffered damages, and proving that Gilead had market power, particularly after the Court denied Plaintiffs' motion for summary judgment and related motions *in limine* and *Daubert* motions on the topic. *See* ECF Nos. 1599 at 1, 27, (Summary Judgment Order), 1716 at 29-30 (Order re Motions *in Limine*), 1694 at 12-17 (Order re Plaintiffs' *Daubert* motions). As this Court has recognized, the jury verdict in favor of Defendants Gilead and Teva in the End Party Payer (“EPP”), Individual Health Plan Plaintiff (“IHPP”), and United trial underscores the seriousness of those risks. *See* Order Denying Set Aside,

1 ECF No. 2136 at 8 n.5 (observing that “the reason why the Retailer Plaintiffs achieved success was  
2 because their counsel prepared for trial and made a good risk assessment, and not simply because  
3 they were effortlessly free riding on the coattails of the EPPs who made a different risk  
4 assessment”); *see also* Hrg. Tr. at 5, ECF No. 2114 (N.D. Cal. Sept. 21, 2023) (“there were  
5 obviously, [it] has become evident, that there were significant litigation risks. Particularly in light of  
6 the experience of the actual trial in this case of the EPPs, I think it underscores the fact that the  
7 litigation risks here warrant the recovery rate . . . ; it is nonetheless, still substantial and will yield  
8 substantial relief to the plaintiff class.”).

9 The DPP Classes’ recovery compares favorably to their potential recovery at trial. Before the  
10 Settlement, DPPs’ economist, Dr. Russell Lamb, estimated the certified Classes’ damages at  
11 approximately \$2,080,000,000. *See* Roberts Decl. ¶ 14. Dr. Lamb’s analysis calculated the difference  
12 between the amount Class Members paid for brand Truvada and Atripla that they purchased directly  
13 from Gilead against the amount they would have paid for lower-priced generic versions of Truvada  
14 and Atripla as early as May 2019—when generic Truvada and Atripla likely would have entered the  
15 market, based upon Plaintiffs’ expert testimony, had Gilead not engaged in the anticompetitive  
16 conduct that delayed those generic versions. Dr. Lamb’s analysis also calculated the difference  
17 between the amount Class Members paid for generic equivalents of Truvada and Atripla and the  
18 amount they would have paid for the same drugs had robust generic entry occurred as early as May  
19 2019. The monetary relief of \$246,750,000 to the Classes is 11.9% of the claimed damages the  
20 Classes stood to receive at trial if they successfully prosecuted their claim against Gilead.

21 Although Class Counsel still believe in the strength of DPPs’ claims, the value and certainty  
22 of recovery here outweighed the obvious and serious risk of no recovery or a substantially reduced  
23 recovery. *See Bellinghausen v. Tractor Supply Co.*, 303 F.R.D. 611, 624 (N.D. Cal. 2014) (“The  
24 Court considers that even if ‘Plaintiffs were to prevail, they would be required to expend  
25 considerable additional time and resources potentially outweighing any additional recovery obtained  
26 through successful litigation,’ and these delays will affect ‘payment to the Class Members and  
27 increase the amount of attorneys’ fees.’”) (quoting *Collins v. Cargill Meat Solutions Corp.*, 274  
28 F.R.D. 294, 302 (E.D. Cal. 2011)). This factor weighs in favor of final approval.

a. **The Settlement Treats Class Members Equitably Relative to One Another and the Claims Process is Straightforward.**

The standard for approval of a proposed allocation plan is the same as the standard for approval of a class action settlement; each must be “fair, reasonable and adequate.” *See In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001) (citations omitted). An allocation plan is reasonable if it “reimburses class members based on the type and extent of their injuries.” *Id.*

Per the Court’s preliminary approval order, the first steps of the notice plan have been implemented: direct notice has been mailed along with pre-populated claims forms, a reminder notice has been mailed, media notice has been published, and a Settlement-specific settlement website has gone live. Peak Decl. ¶¶ 4-5, 6-13. Class Members can submit a claim through an online portal on the Settlement-specific website or by mailing their completed claim form. Class Members submitting their claims by either method that believe they have purchased different amounts than the pre-populated figures may submit documentation showing these purchases, subject to review by KCC with assistance from DPPs’ economist Dr. Lamb as necessary. Plan of Allocation, S.A. Ex. H, ECF No. 2086-2 at 65 ¶ 9.

The Plan of Allocation provides a standardized method of calculating each Class Member’s *pro rata* share of the Settlement based on the member’s purchases, S.A. Ex. H, ECF No. 2086-2, as was previously approved in this case and has been approved in other antitrust cases brought by direct purchasers to recover overcharges. *See, e.g.*, Order Granting DPPs’ Mot. for Final Approval of Class Action Settlement with BMS ¶ 2, ECF No. 1524; *see also In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-cv-05944-JST, 2016 WL 721680, at \*21 (N.D. Cal. Jan. 28, 2016) (quoting *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-01827-SI, 2011 WL 7575004, at \*4 (N.D. Cal. Dec. 27, 2011)) (“[I]n this District, a ‘*pro-rata* [plan] for allocation has been used in many antitrust cases.”); *In re Lidoderm Antitrust Litig.*, No. 14-md-02521-WHO, 2018 WL 11375216, at \*2 (N.D. Cal. Sept. 20, 2018).<sup>7</sup> The *pro rata* share is determined based on the Class Members’ total volume of

<sup>7</sup> *See also In re Glumetza Antitrust Litig.*, No. 19-cv-05822-WHA, 2022 WL 327707 (N.D. Cal. Feb. 3, 2022); *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, No. 18-md-02819, 2020 WL 6193857, at \*1 (E.D.N.Y. Oct. 7, 2020) (“*Restasis*”); *In re Loestrin 24 Fe Antitrust Litig.*, No. 13-md-2472 (D.R.I. Jan. 22, 2020), ECF Nos. 1396-8, 1462 (approved Sept. 1, 2020); *In re Lidoderm Antitrust Litig.*, No. 14-md-02521-WHO (N.D. Cal.), ECF Nos. 1004-5, 1004-6, 1054 (approved Sept. 20, 2018); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-

1 purchases of generic and brand Truvada and Atripla, weighted based on the drug purchased and  
 2 whether it was generic or brand. S.A. Ex. H ¶¶ 12-14, ECF No. 2086-2. No set of Class Members are  
 3 singled out for preferential or advantageous treatment; rather, all Class Members' share is calculated  
 4 the same way. This factor weighs in favor of final approval.

5 **b. Class Counsel's Requested Attorneys' Fees, Costs and Expenses,  
 6 and Representative Plaintiff Service Award Are Reasonable.**

7 Class Counsel's fee request is detailed below, but it is worth emphasizing that the parties  
 8 agreed that the Court's resolution of Class Counsel's request for attorneys' fees, costs and expenses,  
 9 and representative plaintiff service awards is not a precursor to the fairness, reasonableness, and  
 10 adequacy of the Settlement. S.A. ¶ 12(b). Nor does the request impact whether any amount of the  
 11 \$246,750,000 will ever revert to Gilead, as the fund is non-reversionary. *See Moreno v. Beacon*  
 12 *Roofing Supply, Inc.*, No. 19-cv-00185-GPC(LL), 2020 WL 3960481, at \*5 (S.D. Cal. July 13, 2020)  
 13 (holding that non-reversionary aspect of settlement supported final approval under Rule  
 14 23(e)(2)(C)(ii)). The Settlement contains no "clear sailing arrangements," and Class Counsel do not  
 15 request a disproportionate share of the Settlement. *See Briseno*, 998 F.3d at 1023. In other words,  
 16 there are no red flags suggestive of collusion. When negotiating the Settlement, KPH and Gilead  
 17 discussed that the Settlement would include a common fund; they otherwise did not discuss  
 18 attorneys' fees, costs, and expenses or a representative-plaintiff service award until after all  
 19 substantive elements of the Settlement were agreed upon. *See Roberts Decl.* ¶ 162. Furthermore,  
 20 Class Counsel did not seek an award of attorneys' fees in connection with the \$10.8 million BMS  
 21 Settlement. *See Roberts Decl.* ¶ 56. This factor weighs in favor of final approval.  
 22  
 23  
 24

25 \_\_\_\_\_  
 26 02503 (D. Mass.), ECF Nos. 1163-4, 1179 (approved July 18, 2018); *In re Celebrex (Celecoxib)*  
 27 *Antitrust Litig.*, No. 14-cv-00361 (E.D. Va.), ECF Nos. 609-4, 630 (approved Apr. 18, 2018); *In re*  
 28 *Aggrenox Antitrust Litig.*, No. 14-md-02516 (D. Conn.), ECF Nos. 733-1, 740 (approved Dec. 19,  
 2017); *In re Asacol Antitrust Litig.*, No. 15-cv-12730 (D. Mass.), ECF Nos. 419-9, 648 (approved  
 Dec. 7, 2017); *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 06-cv-01797 (E.D. Pa.), ECF  
 Nos. 864-17, 870 (approved Oct. 15, 2015).

### 3. Class Members' Reaction to the Settlement Has Been Positive.

As noted above, the direct notice, publication notice, and initial reminder notice aspects of the notice program have been fully implemented.<sup>8</sup> While DPP Class Members have until January 1, 2024 to submit claim forms, 16 claim forms have already been received from known DPP Class Members and Class Counsel fully expect a robust claims rate similar to that experienced with the BMS Settlement. While DPP Class Members have until December 28, 2023 to object to the Settlement or DPPs' request for attorneys' fees, costs, and a service award, no objections have been filed to date.

This factor supports final approval, and Class Counsel expect DPP Class Members' positive response to the Settlement to continue.<sup>9</sup>

#### B. The Requested Attorneys' Fee Award Is Fair and Reasonable.

"In a certified class action, the court may award reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Supreme Court has recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). In deciding whether the requested fee amount is appropriate, the Court's role is to determine whether such amount is "fundamentally fair, adequate, and reasonable." *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P. 23(e)).

Where a settlement creates a common fund, courts have discretion to use either the percentage-of-recovery method or the lodestar method to determine what constitutes a fair and

<sup>8</sup> Five notices were returned as undeliverable, and KCC conducted advanced address research and could not locate a different address. Peak Decl. ¶ 6. Once alerted that these notices had been returned as undeliverable, Class Counsel caused PDFs of the notice and relevant pre-populated claim form to be emailed to the respective counsel for four of these entities. Roberts Decl. ¶ 172. Class Counsel also emailed PDFs of the notice and pre-populated claim form to an employee of the fifth entity that Class Counsel had communicated with in connection with the BMS Settlement and confirmed by with a follow-up telephone call that the employee had received the email. Roberts Decl. ¶ 172.

<sup>9</sup> Because the Court did not order a second opt-out period following the opt-out period in connection with class certification, there are no further opt-outs to report. Once the notice plan concludes and the relevant deadlines have passed, Class Counsel will provide a full accounting of the number of claims received.

1 reasonable attorney fee award. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th  
 2 Cir. 2011) (“*Bluetooth*”). “The use of the percentage-of-the-fund method in common-fund cases is  
 3 the prevailing practice in the Ninth Circuit for awarding attorneys’ fees and permits the Court to  
 4 focus on showing that a fund conferring benefits on a class was created through the efforts of  
 5 plaintiffs’ counsel.” *In re Apple Inc. Device Performance Litig.*, No. 18-md-02827-EJD, 2023 WL  
 6 2090981, at \*12 (N.D. Cal. Feb. 17, 2023) (“*Apple Device Performance Litig.*”) (quoting *In re*  
 7 *Korean Air Lines Co., Ltd. Antitrust Litig.*, No. 02-cv-05107, 2013 WL 7985367, at \*1 (C.D. Cal.  
 8 Dec. 23, 2013)); see *In re Robinhood Outage Litig.*, No. 3:20-cv-01626-JD, 2023 WL 5321525, at \*1  
 9 (N.D. Cal. July 28, 2023) (same). Courts employing the percentage-of-recovery method are also  
 10 encouraged to “perform a cross-check by applying the lodestar method to confirm that the  
 11 percentage-of-recovery amount is reasonable.” *In re Optical Disk Drive Prods. Antitrust Litig.*, 959  
 12 F.3d 922, 929-30 (9th Cir. 2020).

13 Although DPPs gave Class Members notice of their intent to seek an attorneys’ fee request of  
 14 up to 33 ⅓%, DPPs request a fee award of \$75,000,000, which translates to 30.39% of the  
 15 \$246,750,000 Settlement Fund (or 29.1% of the total recovery DPP Counsel secured for the DPP  
 16 Classes, including the BMS Settlement).<sup>10</sup> Application of the percentage-of-recovery method  
 17 demonstrates the requested award compares favorably to awards in similar cases and is reasonable  
 18 and appropriate considering the facts and circumstances of this litigation. A lodestar crosscheck  
 19 further confirms the reasonableness of the requested award.

### 20 **1. The Percentage-of-Recovery Method Supports the Requested Award.**

21 “In common fund cases, the 25 percent benchmark for fee awards is merely a ‘starting point  
 22 for analysis’ . . . [and] ‘[s]election of the benchmark or any other rate must be supported by findings  
 23 that take into account all of the circumstances of the case.’” *Senne v. Kansas City Royals Baseball*  
 24 *Corp.*, No. 14-cv-00608-JCS, 2023 WL 2699972, at \*14 (N.D. Cal. Mar. 29, 2023) (quoting  
 25 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002), *aff’d sub nom*, *Senne v.*  
 26 *Concepcion*, 2023 WL 4824938 (9th Cir. June 28, 2023). As the Court recognized in approving a

27 \_\_\_\_\_  
 28 <sup>10</sup> DPP Counsel did not request a fee award in connection with the \$10,800,000 BMS Settlement.  
 Roberts Decl. ¶ 56.

1 33% fee award in *Hernandez v. Dutton Ranch Corporation*, “[d]istrict courts within this circuit,  
 2 including this Court, routinely award attorneys’ fees that are one-third of the total settlement fund.”  
 3 No. 19-cv-00817-EMC, 2021 WL 5053476, at \*6 (N.D. Cal. Sept. 10, 2021) (collecting authorities);  
 4 *see also In re Lidoderm Antitrust Litig.*, No. 14-md-0521-WHO, 2018 WL 4620695, at \*4 (N.D. Cal.  
 5 Sept. 20, 2018) (“*Lidoderm*”) (recognizing in awarding a 33% fee award to DPP counsel in a pay-  
 6 for-delay case that “a fee award of one-third is within the range of awards in this Circuit”) (collecting  
 7 authorities).

8 When determining the appropriate percentage to award, courts consider:

9 [W]hether class counsel achieved exceptional results for the class,  
 10 whether the case was risky for class counsel, whether counsel’s  
 11 performance generated benefits beyond the cash settlement fund, the  
 12 market rate for the particular field of law (in some circumstances), the  
 burdens class counsel experienced while litigating the case (*e.g.*, cost,  
 duration, foregoing other work), and whether the case was handled on  
 a contingency basis.

13 *Apple Device Performance Litig.*, 2023 WL 2090981, at \*12 (citing *In re Online DVD-Rental*  
 14 *Antitrust Litig.*, 779 F.3d 934, 954–55 (9th Cir. 2015)) (“*Online DVD*”) (internal quotations omitted).

15 Here, DPP Counsel obtained an excellent result for the DPP Classes and took on tremendous  
 16 risk in expending 39,091 hours and advancing \$5,387,478 in total costs and expenses prosecuting  
 17 this novel and complex antitrust case on a contingent basis, in the face of a vigorous defense  
 18 mounted by some of the nation’s top defense lawyers on behalf of deep-pocketed pharmaceutical  
 19 companies. DPPs’ requested award of 30.39% of the recovery (or 29.1% of the total recovery from  
 20 both Gilead and BMS) is less than the average fee award of 32.11% of the recovery in direct  
 21 purchaser pay-for-delay class actions and well below the average fee award of 36% of the recovery  
 22 in class actions that proceeded to trial. *See Fitzpatrick Decl.* ¶¶ 18, 20. These facts support approval  
 23 of the requested award.

24 **a. The Settlement Is an Excellent Result for the Classes.**

25 The first factor, that is, the result achieved, is the “most critical” factor to consider. *Apple*  
 26 *Device Performance Litig.*, 2023 WL 2090981, at \*12 (quoting *Hensley v. Eckerhart*, 461 U.S. 424,  
 27 436 (1983)). DPP Counsel secured a \$246,750,000 non-reversionary settlement fund for the DPP  
 28

1 Classes, which equates to 11.9% of the single damages DPPs were seeking at trial.<sup>11</sup> This result is  
 2 exceptional, considering the tremendous risks the DPP Class Members faced. Those risks were not  
 3 theoretical, as three other plaintiff groups that went to trial against Gilead lost and received no  
 4 recovery.

5 DPP Class Members' reactions support the reasonableness of the request. The DPP Classes  
 6 are comprised of sophisticated drug wholesalers and their assignees— a group that has not been shy  
 7 in the past about objecting to fee requests in reverse payment cases. *See, e.g., In re Glumetza*  
 8 *Antitrust Litig.*, No. 19-cv-5822-WHA, 2022 WL 327707, at \*7 (Feb. 3, 2022) (“*Glumetza*”) (three  
 9 national wholesalers “likely represent[ing] over 90% of the subject purchases” objected to direct  
 10 purchaser counsel’s fee request equating to a 4.99 multiplier as “constitute[ing] a windfall”). While  
 11 the deadline to object has not yet passed, no objections have been filed, and not a single DPP Class  
 12 Member has informed Class Counsel that they intend to object to the Settlement or the fee request.  
 13 To the contrary, Class Counsel has spoken with counsel of various DPP Class Members regarding  
 14 the fee request (including the three largest DPP Class Members, that is, the three largest national  
 15 wholesalers, which comprise over 90% of Truvada and Atripla purchases). No objections were made  
 16 by any Class Members with whom Class Counsel spoke. Class Counsel was specifically authorized  
 17 by counsel of the national wholesalers to confirm in this Motion that they do not object to the fee  
 18 requested.

19 The absence of objections supports approval of the requested award. *See Foster v. Adams &*  
 20 *Assocs., Inc.*, No. 18-cv-02723-JSC, 2022 WL 425559, at \*10 (N.D. Cal. Feb. 11, 2022); *see also*  
 21 *Fitzpatrick Decl.* ¶¶ 16, 24 (noting that DPP Class Members had a strong incentive to object to the  
 22 fee request and that if they thought the request “was unjustified they would object to it, as they have  
 23 done in a small number of cases”). This factor supports the reasonableness of the requested award.

24 **b. The Litigation Was Challenging and Posed a High Risk.**

25 “Risk is a relevant circumstance” in analyzing a fee request. *Vizcaino*, 290 F.3d at 1048.  
 26 “Antitrust cases are particularly risky, challenging, and widely acknowledge[d] to be among the most  
 27

28 <sup>11</sup> \$246,750,000 / \$2,079,900,000 = .0119.

1 complex actions to prosecute.” *In re Lithium Ion Batteries Antitrust Litig.*, 2020 WL 7264559, at  
2 \*15. As the Second Circuit once recognized, “the history of antitrust litigation is replete with cases in  
3 which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible  
4 damages, at trial, or on appeal.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir.  
5 2005) (internal quotations omitted). Given the defense verdict entered against other plaintiff groups,  
6 it cannot reasonably be disputed that prosecuting this case was a complex, risky, and challenging  
7 endeavor.

8 In contrast to certain other high-profile antitrust cases, no government agency prosecuted  
9 Defendants for the misconduct at issue in this case. As a result, DPPs did not have the luxury of  
10 utilizing or leveraging a preexisting investigation, indictments, or guilty pleas all but guaranteeing a  
11 massive recovery. *See In re Nat’l Collegiate Athletic Ass’n (“NCAA”) Athletic Grant-in-Aid Cap*  
12 *Antitrust Litig.*, No. 14-md-2541-CW, 2017 WL 6040065, at \*6–7 (N.D. Cal. Dec. 6, 2017)  
13 (referencing cases in which “mere disclosure of a government investigation all but guarantees the  
14 creation of a megafund, notwithstanding what counsel does or does not do”). Instead, DPP Counsel  
15 dedicated 39,091 hours and spent \$5,387,478 advancing this litigation on a contingent fee basis in  
16 the face of a vigorous defense mounted by attorneys from some of the nation’s top law firms on  
17 behalf of their deep-pocketed clients. Throughout the litigation, DPP Counsel were faced with the  
18 real prospect that they may never receive any recovery for their efforts.

19 There were significant challenges to prosecuting this case. A number of legal theories were  
20 dismissed at the pleadings stage (overarching conspiracy) or the summary judgment phase  
21 (conspiracy to monopolize based on reverse payments, no-generic restraints, the shelving of TAF,  
22 and other alleged misconduct), and the Court denied the DPPs’ request to certify a class of Complera  
23 purchasers on numerosity grounds. The surviving reverse payment claim was based on the novel  
24 theory that the most-favored-entrant (“MFE”) and most-favored-entrant-plus (“MFEP”) clauses  
25 included the FTC settlement between Gilead and Teva constituted an illegal reverse payment. While  
26 DPP Counsel believed in this claim, there was no guarantee it would survive at trial or that they  
27 would be able to persuade a jury that the MFE/MFEP clauses constituted an illegal reverse payment  
28 to delay generic entry.

1 Complicating matters further, Teva waived privilege as to its internal assessments of Gilead's  
2 patents, the FTC patent litigation, and the FTC settlement, while Gilead cloaked itself in privilege to  
3 prevent its internal assessments seeing the light of day. Another obstacle was introduced when  
4 Defendants' market power expert took the view that traditional economic tests are inapplicable to the  
5 facts of this case, ensuring a battle of the experts on the issue of market power.

6 DPPs faced significant obstacles to prevailing while staring down the upcoming trial. At the  
7 time DPPs and Gilead agreed on the material terms of the Settlement, only two reverse payment  
8 cases had been tried to verdict before a jury, and a defense verdict was returned in both instances.  
9 DPP Counsel's trial preparation (including a DPP-only mock trial, two DPP-only focus group  
10 sessions, an all-plaintiffs' mock trial, and extensive discussions with their trial consultants) revealed  
11 that the highly complex terminology and concepts in this case were very likely to confuse many  
12 jurors. The trial was further complicated by the reality that DPPs were required to try the case in  
13 coordination with four other plaintiff groups (with many times diverging interests and trial strategy),  
14 the fact that key fact witnesses were current or former employees of Gilead or Teva or their outside  
15 counsel (that is, there were no whistleblowers), and the possibility that a jury could enter a verdict in  
16 favor of DPPs on liability but award no damages to DPPs. These risks were compounded by the fact  
17 that Gilead—one of the nation's largest and most profitable pharmaceutical companies—would be  
18 represented at trial by two of the nation's most well-regarded law firms. *Vizcaino v. Microsoft Corp.*,  
19 142 F. Supp. 2d 1299, 1303 (W.D. Wash. 2001) ("Class Counsel's risk was even greater, and their  
20 work made more difficult, because Microsoft is one of the nation's largest and most formidable  
21 companies and it, and several law firms, defended the case vigorously for several years."), *aff'd* 290  
22 F.3d 1043 (9th Cir. 2002). This factor supports approval of the requested award.

23 **c. The Skill and Experience of DPP Counsel Support the Requested**  
24 **Fee Award.**

25 The Classes benefited from DPP Counsel's skill and expertise in prosecuting complex  
26 antitrust class actions. DPP Counsel shepherded DPPs' claims through multiple motions to dismiss  
27 and to compel arbitration; exhaustive discovery; class certification, a Rule 23(f) petition for leave to  
28 appeal certification of two DPP Classes, summary judgment and *Daubert* proceedings; pretrial

1 briefings; and extensive trial preparation. Throughout that entire lengthy and complex process, DPP  
2 Counsel coordinated extensively with counsel from the other four plaintiff groups, DPPs’ expert  
3 economist, Dr. Russell Lamb, Ph.D., and more than a dozen shared experts and consultants.  
4 Leveraging their expertise, DPP Counsel engaged in prolonged and hard-fought negotiations,  
5 assisted by Kenneth Feinberg, culminating in their securing the \$246,750,000 Settlement for the  
6 benefit of the DPP Classes. This factor supports approval of the requested award. *See, e.g., In re*  
7 *Capacitors Antitrust Litig.*, No. 3:14-cv-03264-JD, 2023 WL 2396782, at \*1 (N.D. Cal. Mar. 6,  
8 2023) (finding \$66,000,000 proposed attorneys’ fee award “amount[ing] to 40% of the Settlement  
9 Fund created by the present round of settlements, and a cumulative 31.01% of the total settlements  
10 reached for the Class . . . [to be] well within the range of reasonable fee[] awards, especially in light  
11 of the complexity of these antitrust cases, and the degree of work and skill required to obtain highly  
12 beneficial results for the class”) (collecting authorities).

13 The quality of opposing counsel is a further testament to DPP Counsel’s skill and expertise.  
14 *See Apple Device Performance Litig.*, 2023 WL 2090981, at \*14 (recognizing that courts “consider  
15 the quality of opposing counsel as a measure of the skill required to litigate the case successfully”)  
16 (citation and internal quotations omitted). Here, DPP Counsel faced Gilead, BMS and, for all intents  
17 and purposes, third party Teva (after the Retailers entered the case). That Gilead, BMS, and Teva  
18 had tremendous financial resources at their disposal and were each represented by one or more  
19 highly-respected law firms with a history of mounting a vigorous defense on behalf of its clients—  
20 Gilead (White & Case, Kirkland & Ellis LLP, Proskauer Rose LLP), BMS (Arnold & Porter), Teva  
21 (Goodwin Procter)— evidences DPP Counsel’s substantial skill in achieving the nearly quarter  
22 billion Settlement for the benefit of the DPP Classes. This factor supports approval of the requested  
23 award.

24 **d. The Burden of Prosecuting this Litigation on a Contingent Basis**  
25 **Was Significant.**

26 “When counsel takes cases on a contingency fee basis, and litigation is protracted, the risk of  
27 non-payment after years of litigation justifies a significant fee award.” *Apple Device Performance*  
28 *Litig.*, 2023 WL 2090981, at \* 15 (internal quotation marks and citation omitted). With no guarantee

1 of any recovery for their efforts, DPP Counsel dedicated 39,091 hours and \$5,387,478.45 total to  
2 litigating this high-risk antitrust case for three years. Roberts Decl. ¶ 181. During the prosecution of  
3 this case, there were multiple and lengthy periods of time where litigation was so intense that a  
4 number of highly experienced attorneys from DPP Counsel firms were working full-time on this case  
5 alone. The resources required of this matter were so significant that Class Counsel were forced to  
6 turn down opportunities to work on other cases to devote the resources required to effectively  
7 advance this matter. *See id.* ¶ 70. This factor further supports the reasonableness of the DPPs’  
8 requested fee award. *See, e.g. Davis v. Yelp, Inc.*, No. 18-cv-00400-EMC, 2023 WL 3063823, at \*2  
9 (N.D. Cal. Jan. 27, 2023) (recognizing that “a larger award of 33% is warranted because counsel  
10 risked significant amounts of their own funds and dedicated time and effort to litigate through the  
11 class certification process, the motion for summary judgment, expert retention, trial preparation, and  
12 the nearly \$1 million counsel put at risk in advancing costs”).

13 **e. Awards in Similar Cases Support the Reasonableness of the**  
14 **Requested Award.**

15 The requested award compares favorably to awards in similar cases. DPPs have retained  
16 Professor Brian T. Fitzpatrick, who is an expert in federal class action settlements and attorneys’  
17 fees. *See* Fitzpatrick Decl. attached as Exhibit 7 to the Roberts Decl. Professor Fitzpatrick’s analysis  
18 demonstrates the requested award of 30.39% (or 29.1% taking the BMS Settlement into  
19 consideration) is substantially less than the 32.11% average fee award in pharmaceutical direct  
20 purchaser cases. *See* Fitzpatrick Decl. ¶ 18 (empirical analysis of fees awarded in connection with 38  
21 direct purchaser pharmaceutical class actions shows that the average fee award in such cases was  
22 32.11% and the median was 33.3%). The requested award is also well below the 36% average fee  
23 award in class actions that went to trial. *Id.* ¶ 20 (referencing William B. Rubenstein declaration  
24 recognizing that a 36% average fee award for the class action cases in his study that went to trial). As  
25 a result, this factor favors approval of the requested award.

26 DPPs recognize the \$246,750,000 Settlement falls within the definition of settlements  
27 frequently referred to as mega-funds (which is of course a positive thing for the DPP Classes). The  
28 Ninth Circuit has repeatedly “declined to adopt a bright-line rule requiring the use of sliding-scale

1 fee awards in megafund cases.” *In re Optical Disk Drive Prod. Antitrust Litig.*, 959 F.3d at 933  
2 (citing *Vizcaino*, 290 F.3d at 1047)); *see also In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at  
3 \*4 (“There is no rule in the Ninth Circuit that requires a court to decrease the percentage of the fee  
4 award as the size of the settlement increases.”) (internal quotation marks and citation omitted).  
5 “[T]he size of the fund is simply one factor courts look to when determining a reasonable fee . . .  
6 [and f]ederal district courts across the country have, in the class action settlement context, routinely  
7 awarded class counsel fees in excess of the 25% benchmark, even in so-called mega-fund cases.” *In*  
8 *re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at \*4 (collecting authorities).

9 Professor Fitzpatrick’s empirical analysis demonstrates that the median and average awards  
10 in the direct purchaser pharmaceutical class actions with settlements between \$100 million and \$250  
11 million were 32.78% and 30.7%, respectively. Fitzpatrick Decl. ¶ 22. Accordingly, the requested  
12 award is on par with awards entered in connection with similarly sized mega-fund settlements in  
13 direct purchaser pharmaceutical cases.

14 Importantly, none of the rationales put forth as justifying a sliding-scale approach in mega-  
15 fund cases are present. There is no windfall—DPP Counsel spent 39,091 hours litigating this case  
16 and the requested fee award equates to a reasonable lodestar multiplier of 2.19. *Compare In re*  
17 *Lidoderm Antitrust Litig.*, 2018 WL 4620695, at \*4 (“The rationales for awarding fees at or below  
18 the 25% benchmark in some cases – *i.e.*, to avoid a windfall for class counsel – do not apply here.”),  
19 *with Glumetza*, 2022 WL 327707, at \*12 (concluding that a requested award translating to a 4.99  
20 “would unfairly award class counsel a financial windfall”).

21 The size of the Settlement is also not simply attributable to a large class size. *See Gutierrez v.*  
22 *Wells Fargo Bank, N.A.*, 07-cv-05923-WHA, 2015 WL 2438274, at \*5-7 (N.D. Cal. May 21, 2015).  
23 Instead, the opposite is true. As a result of their expertise and the incredible resources they devoted  
24 to this case, DPP Counsel were able to secure a massive recovery despite the small size of the DPP  
25 Classes. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 2017 WL 6040065, at \*6–7 (“A  
26 megafund was created in this case despite the size of the classes, not because of it”).

1                                   **2. A Lodestar Crosscheck Confirms the Reasonableness of the Requested Award.**

2                   “As a final check on the reasonableness of requested attorneys’ fees, courts often compare the  
3 amount counsel would receive under the percentage-of-recovery method with the amount counsel  
4 would have received under the lodestar method.” *Apple Device Performance Litig.*, 2023 WL  
5 2090981, at \*16 (quoting *In re Nexus 6P Prods. Liab. Litig.*, No. 17-cv-02185-BLF, 2019 WL  
6 6622842, at \*13 (N.D. Cal. Nov. 12, 2019)). Courts engaging in a lodestar crosscheck “start by  
7 determining how many hours were reasonably expended on the litigation, and then multiply those  
8 hours by the prevailing local rate for an attorney of the skill required to perform the litigation.”  
9 *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008). The aim of the lodestar  
10 crosscheck is to “do rough justice, not to achieve auditing perfection,” and “trial courts need not, and  
11 indeed should not, become green-eyeshade accountants.” *In re Wells Fargo & Co. Shareholder*  
12 *Derivative Litig.*, 445 F. Supp. 3d 508, 526 (N.D. Cal. 2020) (citations and internal quotations  
13 omitted); *see also In re Capacitors Antitrust Litig.*, No. 14-cv-03264-JD, 2018 WL 4790575, at \*6  
14 (N.D. Cal. Sept. 21, 2018) (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306–307 (3d Cir.  
15 2005) (“[T]he lodestar cross-check calculation need entail neither mathematical precision nor bean-  
16 counting. The district courts may rely on summaries submitted by the attorneys and need not review  
17 actual billing records.”).

18                   DPP Counsel spent 39,091 hours prosecuting the litigation for a collective lodestar of  
19 \$34,281,869 calculated at current rates. Roberts Decl. ¶¶ 179, 181. The requested fee award of  
20 \$75,000,000 equates to a multiplier of 2.19,<sup>12</sup> which is well within the range of lodestar multipliers  
21 regularly deemed reasonable in complex class action cases.

22                                   **a. DPP Counsel Spent a Reasonable Number of Hours Advancing the Litigation.**

23                   This matter was hard-fought and intensely litigated from the beginning. Pursuant to the  
24 Court’s Common Benefit Order (ECF No. 176), Class Counsel collected monthly common benefit  
25 time and expense submissions from DPP Counsel firms and audited those submissions to ensure  
26 their compliance with the directives set forth in that Order. Roberts Decl. ¶ 179. Class Counsel also  
27

28 <sup>12</sup> \$75,000,000 / \$34,281,869 = 2.1877.

1 thoroughly reviewed all DPP Counsel time submissions and made reductions and deletions of time  
2 as appropriate. *Id.*

3 As set forth in the accompanying Roberts Declaration, DPP Counsel collectively spent  
4 39,091 hours opposing multiple motions to dismiss and to compel arbitration; engaging in extensive  
5 written discovery, including serving and responding to written discovery, serving more than a dozen  
6 third party subpoenas, and reviewing millions of pages of documents; preparing for and attending 90  
7 depositions; briefing and arguing class certification; defending the petition for leave to appeal to the  
8 Ninth Circuit Court of Appeals; working with thirteen testifying experts and various other subject-  
9 matter experts and consultants; and coordinating with other plaintiff groups to brief summary  
10 judgment and *Daubert* motions and various other pretrial submissions. *Id.* ¶¶ 8–125. DPP Counsel  
11 also spent significant time preparing for trial and participating in settlement negotiations assisted by  
12 Kenneth Feinberg. *Id.* ¶¶ 126–162. The hours reported by DPP Counsel were reasonable and  
13 necessary to effectively prosecute this case.<sup>13</sup>

14 **b. DPP Counsel’s Hourly Rates Are Reasonable.**

15 In assessing the reasonableness of an attorney’s hourly rate, courts consider whether the  
16 claimed rate is “in line with those prevailing in the community for similar services by lawyers of  
17 reasonably comparable skill, experience and reputation.” *Blum v. Stenson*, 465 U.S. 886, 895-96 n.11  
18 (1984). Because “attorneys in common fund cases must be compensated for any delay in payment,”  
19 courts look to “current rates for all work done in the litigation” when applying a cross-check.  
20 *Marshall v. Northrop Grumman Corp.*, No. 16-cv-6794, 2020 WL 5668935, at \*2 (C.D. Cal. Sept.  
21 18, 2020); *see also Vizcaino*, 290 F.3d at 1051; *Ellis v. Costco Wholesale Corp.*, No. 04-cv-3341-  
22 EMC, 2014 WL 12641574, at \*3 (N.D. Cal. May 27, 2014).

23 Here, the relevant legal community is San Francisco Bay Area attorneys specializing in  
24 complex antitrust class action litigation. DPP Counsel are highly regarded members of the bar with  
25 significant experience prosecuting antitrust cases and other complex class actions. DPP Counsel

26 \_\_\_\_\_  
27 <sup>13</sup> Attached as Exhibit 2 to each DPP Counsel’s declaration is a chart detailing for each timekeeper  
28 from the declarant’s firm: (1) the amount of time the timekeeper spent on each of the Court-approved  
billing activity codes, (2) the timekeeper’s current hourly billing rate, (3) and the timekeeper’s total  
lodestar in the case.

1 submitted the following hourly rates: attorneys with between 35 and 56 years of experience (\$1,100  
2 to \$1,550 per hour), attorneys with between 20 and 34 years of experience (\$760 to \$1100 per hour);  
3 attorneys with between 8 and 19 years of experience (\$650 to \$920 per hour); attorneys with  
4 between 4 and 6 years of experience (\$560 to \$660); and paralegals (\$150 to \$360). Their hourly  
5 rates are in line with market rates in the San Francisco Bay Area. *See, e.g., In re Animation Workers*  
6 *Antitrust Litig.*, No. 14-cv-4062-LHK, 2016 WL 6663005, at \*6 (N.D. Cal. Nov. 11, 2016) (hourly  
7 rates for senior attorneys of between \$845 and \$1200 deemed reasonable); *In re Volkswagen “Clean*  
8 *Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 2672 CRB, 2017 WL 1047834, at \*5 (N.D.  
9 Cal. Mar. 17, 2017) (finding hourly rates to be reasonable where the billing rates for partners ranged  
10 from \$275 to \$1600, \$150 to \$790 for associates, and \$80 to \$490 for paralegals).

11 Multiplying the hours DPP Counsel spent advancing the litigation by their hourly rates  
12 results in a lodestar multiplier of 2.19, which is well within the range of lodestar multipliers routinely  
13 awarded in complex class actions. *See Vizcaino*, 290 F.3d at 1051 n.6 (9th Cir. 2002) (observing that  
14 lodestar multipliers ranging from one to four are frequently awarded in complex class actions); *Apple*  
15 *Device Performance Litig.*, 2023 WL 2090981, at \*18 (multiplier of 2.232 deemed reasonable);  
16 *Glumetza*, 2022 WL 327707, at \*8 (multiplier of 2.2 deemed reasonable); *McLeod v. Bank of Am.,*  
17 *N.A.*, No. 16-cv-03294-EMC, 2019 WL 1170487, at \*7 (N.D. Cal. Mar. 13, 2019) (multiplier of 3.5  
18 deemed reasonable); *Alexander v. FedEx Ground Package Sys., Inc.*, No. 05-cv-00038-EMC, 2016  
19 WL 3351017, at \*3 (N.D. Cal. June 15, 2016) (multiplier of three deemed reasonable).

### 20 **C. The Costs and Expenses Requested Are Reasonable.**

21 “In common fund cases, the Ninth Circuit has stated that the reasonable expenses of  
22 acquiring the fund can be reimbursed to counsel who has incurred the expense.” *In re High-Tech*  
23 *Employee Antitrust Litig.*, No. 11-cv-02509-LHK, 2015 WL 5158730, at \*16 (N.D. Cal. Sept. 2,  
24 2015) (citing *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1997)). This is because  
25 “litigation expenses make the entire action possible,” *Online DVD*, 779 F.3d at 953, and “[t]o allow  
26 the others to obtain full benefit from the plaintiff’s efforts without contributing equally to the  
27 litigation expenses would be to enrich the others unjustly at the plaintiff’s expense,” *Mills v. Electric*  
28 *Auto-Lite Co.*, 396 U.S. 375, 392 (1970).

1           DPPs request \$2,887,478.45 for unreimbursed costs and expenses incurred by DPP Counsel  
 2 firms in connection with the litigation.<sup>14</sup> Roberts Decl. ¶ 181. These costs and expenses include  
 3 expert witness and consultant fees, mediation fees, travel costs (airfare, hotel, meals, etc.), document  
 4 hosting/review platform costs, court fees, electronic research, service of process, deposition and  
 5 court reporter fees, photocopies, and postage and delivery fees. *Id.* These costs and expenses were  
 6 reasonably necessary for the continued prosecution of this litigation and incurred for the benefit of  
 7 the DPP Classes with no guarantee that they would ever be reimbursed. *Id.* ¶¶ 185, 186. DPPs’  
 8 request for reimbursement of \$2,887,478.45 is reasonable and appropriate.

9           **D. The Requested Class Representative Service Award Is Reasonable.**

10           Service awards “intended to compensate class representatives for work undertaken on behalf  
 11 of a class ‘are fairly typical in class action cases.’” *Online DVD*, 779 F.3d at 943 (quoting *Rodriguez*  
 12 *v. W. Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)). The requested \$40,000 service award is  
 13 reasonable and justified given KPH’s importance to DPPs’ recovery and the time and effort it  
 14 devoted to protecting the DPP Classes.<sup>15</sup>

15           To determine if a requested award is “reasonable,” the Court “must evaluate their awards  
 16 individually, using ‘relevant factors include[ing] the actions the plaintiff has taken to protect the  
 17 interests of the class, the degree to which the class has benefitted from those actions, . . . the amount  
 18 of time and effort the plaintiff expended in pursuing the litigation . . . and the reasonabl[e] fears of  
 19 . . . retaliation.’” *Staton*, 327 F.3d at 977 (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.  
 20 1998)). In addition, a court should look to “the number of named plaintiffs receiving incentive  
 21 payments, the proportion of the payments relative to the settlement amount, and the size of each  
 22 payment.” *Online DVD*, 779 F.3d at 947.

23           In this case, the requested service award is well-deserved. The \$246,750,000 Settlement  
 24 would not have been possible absent the actions of KPH and its employees. Prior to filing this case,

25 \_\_\_\_\_  
 26 <sup>14</sup> DPPs’ request does not include the \$2,500,000 they were reimbursed in connection with the BMS  
 Settlement.

27 <sup>15</sup> KPH received a service award of \$10,000 in connection with the BMS Settlement. As a result,  
 28 KPH will receive service awards totaling \$50,000 for its role in this litigation should the Court grant  
 DPPs’ request.

1 KPH worked with McKesson to obtain an assignment, and KPH reviewed the initial complaint.  
2 Roberts Decl. ¶ 182. From that time forward, KPH received regular updates from Class Counsel  
3 regarding the status of the litigation and reviewed filings (including additional complaints) brought  
4 to its attention by counsel. Working in coordination with Class Counsel, KPH provided responses  
5 and supplemental responses to Defendants' interrogatories, searched through hard-copy documents  
6 and electronically stored information to collect documents and data requested by Defendants, worked  
7 with others at McKesson regarding its collection of documents and data, and signed off on document  
8 productions. *Id.* ¶¶ 36–37. In all, KPH made six productions comprised of 11,152 documents totaling  
9 26,345 pages. *Id.* ¶ 37.

10 KPH's employees spent a significant amount of time preparing to testify at KPH's 30(b)(6)  
11 deposition and at trial. KPH's corporate designee, Charles Aquilina, spent between eight and ten  
12 hours meeting with DPP counsel to prepare to testify at KPH's 30(b)(6) deposition and an additional  
13 five hours participating in that deposition. *Id.* ¶ 41. Additionally, Brian Scott, the KPH corporate  
14 representative designated to testify at trial, spent approximately 40 hours reviewing documents and  
15 working with Class Counsel preparing to testify (preparing outline, reviewing documents, practicing  
16 direct examination and cross-examination, etc.). *Id.* ¶ 148.

17 That KPH is the only class representative for the DPP Classes, and thus the only entity  
18 entitled to receive a service award, is very significant and further justifies an increased service  
19 award. *See McLeod*, 2019 WL 1170487, at \*8 (quoting *Garner v. State Farm Mut. Ins. Co.*, No. 08-  
20 cv-1365-CW(EMC), 2010 WL 1687832, at \*17 (N.D. Cal. Apr. 22, 2010)) (“[U]nlike many class  
21 actions, where there are several class representatives, each of whom are entitled to incentive awards,  
22 here there was just one.”). A service award in this amount is likewise appropriate relative to the  
23 settlement amount obtained from Gilead. This minimal amount represents 0.016% of the Gilead  
24 Settlement Fund. *See Cuzick*, 2017 WL 4536255, at \*6 (quoting *Bluetooth*, 654 F.3d at 947). The  
25 requested \$40,000 service award is reasonable and appropriate considering KPH's importance to the  
26 DPP Classes' recovery as the lone class representative and the significant work it performed to  
27 protect the DPP Classes interests. *See, e.g., In re High-Tech Employee Antitrust Litig.*, 2015 WL  
28 5158730, at \*18 (noting that the service awards of \$80,000 to four class representatives and

1 \$120,000 to one class representative were “in line with awards in other ‘megafund’ cases.”); *Nitsch v.*  
2 *Dreamworks Animation SKG Inc.*, No. 14-cv-04422-LHK, ECF 41 at 25-29 (awarding \$90,000 each  
3 to three class representatives, in addition to the \$10,000 each received from a prior settlement);  
4 *Meijer, Inc. v. Abbott Labs.*, No. 07-cv-05985-CW, ECF 514 ¶ 14 (N.D. Cal. Aug. 11, 2011)  
5 (awarding \$60,000 each to three class representatives); *In re Static Random Access Memory (SRAM)*  
6 *Antitrust Litig.*, No. 07-md-01819-CW, ECF 1370 ¶ 6 and ¶ F (N.D. Cal. June 30, 2011) (awarding  
7 \$50,000 to sole class representative).

#### 8 IV. CONCLUSION

9 For all the foregoing reasons, KPH respectfully requests that the Court grant final approval to  
10 the Settlement; award \$75 million in attorneys’ fees and \$2,887,478.45 in costs and expenses to be  
11 allocated by Class Counsel among the DPP counsel performing common benefit work; and approve  
12 a service award of \$40,000 to Class Representative KPH.

13 Respectfully submitted,

14 Dated: November 21, 2023

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