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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 PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT WITH GILEAD
DEFENDANTS**

Date: September 21, 2023*
Time: 1:30 p.m.
Ctrm: 5 – 17th Floor
Judge: Honorable Edward M. Chen

*Subject to Court’s consent, Direct Purchaser
Class Plaintiffs seek to vacate hearing and
have motion decided on the papers.*

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiff KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc., on behalf of itself and the Direct Purchaser Classes, hereby moves the Court pursuant to Federal Rule of Civil Procedure 23(e) for entry of an Order:

1. Granting preliminary approval of the agreement by and between KPH, on behalf of itself and the Direct Purchaser Classes previously certified by this Court, and Defendants Gilead Sciences, Inc.; Gilead Holdings, LLC; Gilead Sciences, LLC; Gilead Sciences Ireland UC to settle the claims against Gilead in this action (the “Settlement” or “Settlement Agreement”), based on the Court’s finding that the Settlement is fair, reasonable, and adequate within the meaning of Fed. R. Civ. P. 23;

2. Appointing KCC Class Action Services, LLC as Settlement Administrator to disseminate settlement notice to the Classes, process and engage in follow-up communications relating to Claim Forms, and, if the Settlement is granted final approval, administer distribution of the Gilead Settlement Fund;

3. Appointing The Huntington National Bank as Escrow Agent to receive and invest the Gilead Settlement Fund in the Escrow Account in accordance with the terms of the Escrow Agreement;

4. Finding that dissemination of notice to the Classes is warranted and approving the proposed forms and manners of notice as compliant with Rule 23 and due process;

5. Directing Gilead to serve notice on the appropriate federal and state officials as required by the Class Action Fairness Act, 28 U.S.C. § 1715 (“CAFA Notice”) and contemporaneously provide an electronic copy of the notice to Co-Lead Class Counsel;

6. Approving the proposed Plan of Allocation;

7. Setting a schedule for the final approval process, including deadlines for claim submissions and objections and a date for a Final Approval Hearing; and

1 8. Providing that if final approval of the Settlement is not obtained, the Settlement shall
2 be null and void, and the settling parties will revert to their positions *ex ante* without prejudice to
3 their claims or defenses.

4 In support of this motion, KPH submits that the Settlement is fair, reasonable, and adequate.
5 The Settlement requires Gilead to pay \$246,750,000 into a Settlement Fund for the benefit of the
6 certified Direct Purchaser Classes, and the proposed form and manner of notice will adequately
7 inform the Direct Purchaser Classes of the terms of the Settlement.

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

10 KPH has conferred with counsel for Gilead. Gilead does not oppose this motion.

11 PLEASE TAKE FURTHER NOTICE that the hearing on this motion is presently set for
12 September 21, 2023, at 1:30 p.m., or as soon thereafter as the matter may be heard, before the
13 Honorable Edward M. Chen, United States District Judge, in Courtroom 5 of the United States
14 District Court for the Northern District of California in San Francisco, California. KPH respectfully
15 submits that this matter is appropriate for disposition without a hearing, and requests that the Court
16 vacate the hearing date and decide the motion on the papers.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On July 24, 2023 KPH Healthcare Services, Inc. (“KPH” or “Plaintiff”), on behalf of itself
 4 and the Direct Purchaser Classes (“DPPs” or “Classes”), reached a settlement in this matter with
 5 Defendants Gilead Sciences, Inc.; Gilead Holdings, LLC; Gilead Sciences, LLC; and Gilead
 6 Sciences Ireland UC (collectively “Gilead”), resolving more than three years of active litigation and
 7 several rounds of mediation.¹ KPH alleged that Defendants engaged in anticompetitive conduct in
 8 violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, which caused DPPs to pay more
 9 than they would have otherwise paid for certain drugs used to treat and prevent HIV (Truvada and
 10 Atripla) if generic versions of those drugs had not been delayed. Pursuant to the Settlement, Gilead
 11 shall pay \$246,750,000 for the benefit of the DPPs in exchange for certain releases and the dismissal
 12 of the action. As detailed in this Memorandum, this Settlement meets the standard for preliminary
 13 approval and provides fair, reasonable, and adequate relief to the previously certified DPPs.

14 KPH, on behalf of the Classes, seeks preliminary approval of the proposed Settlement,
 15 approval of the forms and manner of notice to the Classes, appointment of a settlement administrator
 16 and escrow agent, and a schedule for the final approval process.

17 **II. THE SETTLEMENT**

18 **A. The Settlement Classes**

19 The Settlement was entered into on behalf of the following previously certified Direct
 20 Purchaser Classes:

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

24 **Atripla Class:** All persons or entities in the United States and its
 25 territories who purchased Atripla or generic Atripla directly from
 any of Defendants or any brand or generic drug manufacturer from

26
 27 ¹ A copy of the Settlement Agreement (“Settlement” or “S.A.”) is attached as Exhibit 1 to the
 28 Declaration of Michael L. Roberts in Support of Motion for Preliminary Approval of Class Action
 Settlement (“Roberts Decl.”), filed contemporaneously with this motion. The definitions in the
 Settlement are incorporated herein by reference.

February 1, 2018, until the date of the class certification order, September 27, 2022.

S.A. ¶ 1(e). The Settlement classes are the certified Direct Purchaser Classes. The following persons and entities are excluded from the Classes: (1) Defendants, named co-conspirators, and their officers, directors, employees, subsidiaries, and affiliates; (2) federal, state, and local governmental entities; (3) any judicial officer presiding over the litigation and members of their immediate family and judicial staff; (4) the Retailer Plaintiffs;² and (5) United Healthcare Services Inc. *Id.*

B. Benefits of the Settlement to the Classes

Pursuant to the Settlement, Gilead shall pay \$246,750,000 into an Escrow Account for the benefit of the Classes (the “Gilead Settlement Fund”).³ All Notice and Administration Expenses and Court-approved attorneys’ fees, costs, expenses, and a representative-plaintiff service award shall be paid from the Gilead Settlement Fund. *Id.* ¶ 7. All amounts remaining in the Gilead Settlement Fund after these payments are made (the “Net Gilead Settlement Fund”) shall be distributed *pro rata* to each Member of one or both of the Classes that submits a valid claim based on the volume of Truvada, Atripla, and generic equivalents purchased, with varying weights applied, based on the specific drugs purchased and whether the drugs were brand or generic, as set forth in the proposed Plan of Allocation.⁴

C. The Released Claims

Under the Settlement, the Classes will release:

Gilead and each and every Gilead Release Party (collectively, the “Releasees”), from all manner of claims, debts, obligations,

² 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 Retailers Plaintiffs and United Healthcare Services Inc. opted out of the DPP Classes.

³ *Id.* ¶¶ 1(q), 7. Paragraphs 14 and 16 of the Settlement describe the limited scenarios in which the Gilead Settlement Fund, less any incurred Notice and Administration Expenses, would be returned to Gilead. *See also id.* ¶ 7(d) (noting incurred Notice and Administration Expenses are non-refundable).

⁴ *See* S.A. Ex. H. The parties to the Settlement submit that a second opt-out period pursuant to Fed. R. Civ. P. 23(e)(4) is not necessary, (*see* S.A. ¶ 16(a)); however, should another opt-out period be ordered by the Court, the parties to the Settlement “have agreed to certain confidential terms regarding the potential reduction of the Gilead Settlement Fund and termination of the Settlement. The parties will lodge the termination and diminution agreement with the Court for *in camera* review, if requested by the Court.” *See id.* ¶ 16(b).

1 demands, actions, suits, causes of action, damages whenever
2 incurred, liabilities of any nature whatsoever, including costs,
3 expenses, penalties and attorneys' fees, under federal or state laws,
4 whether known or unknown, foreseen or unforeseen, suspected or
5 unsuspected, contingent or non-contingent, assigned or otherwise,
6 in law or equity, that arise out of or relate, in whole or in part in any
7 manner, to all conduct, acts, or omissions alleged in the Action
8 and/or that could have been alleged in the Action (or arising out of
9 substantially the same subject matter), regardless of legal theory.

10 S.A. ¶ 13(a). Except as otherwise provided in the agreement, the Settlement is not intended to release
11 any claims arising in the ordinary course of business between DPPs and Gilead Release Parties under
12 the Uniform Commercial Code, the laws of negligence, product liability, implied warranty, contract,
13 or personal injury (other than breach of warranty or contract based in whole or in part on any
14 conduct challenged by DPPs in the Action). *Id.* Pursuant to the Settlement, Gilead releases “all
15 claims related to the allegations made in letters to KPH’s assignor, McKesson, dated: June 2, 2021
16 and others, relating to alleged noncompliance with ADR provisions contained in the
17 McKesson/Gilead distribution agreement.” *Id.* ¶ 13(b). Furthermore, “[f]or the avoidance of doubt,
18 Gilead shall not seek indemnification from Direct Purchaser Class Member McKesson Corporation
19 as to any and all claims arising out of the Direct Purchaser Class settlement of the above-captions
20 antitrust dispute.” Finally, the Settlement provides generally that both Gilead and the DPPs release
21 the provisions, rights, and/or benefits conferred by Section 1542 of the California Civil Code and by
22 any similar, comparable, or equivalent law or principle of common law. *See id.* ¶ 13(c).

23 The released claims virtually match the claims certified for class treatment on behalf of the
24 DPPs. Before the DPPs and Gilead reached an agreement to settle their claims, the parties to the
25 Settlement had the benefit of having completed discovery; receiving rulings from the Court on class
26 certification and motions for summary judgment, motions *in limine*, *Daubert* motions, and other
27 pretrial motions; and preparing for trial. When the parties settled, opening statements were set to
28 begin the following morning. Co-Lead Counsel therefore well understood the advantages and
disadvantages of their case, including what claims were viable for the Classes. With over three years
of litigation, the DPPs’ claims released by the Settlement accurately reflect the claims having value
for the Classes.

D. Attorneys' Fees, Costs and Expenses, and Representative Plaintiff Service Award

The Settlement provides for the payment of attorneys' fees, costs, expenses, and service awards from the Escrow Account no later than 30 days after the Effective Date of the Settlement; there is no quick-pay provision in the Settlement. S.A. ¶ 12(a). Pursuant to the Settlement, the amounts of any such awards are intended to be considered by the Court separately from the fairness, reasonableness, and adequacy of the Settlement. *Id.* ¶ 12(b). Aside from the fact that the Settlement would include a common fund, the parties did not discuss attorneys' fees, costs, and expenses or a representative-plaintiff service award until after all substantive elements of the Settlement were agreed upon. *See Roberts Decl.* ¶ 6.

Co-Lead Class Counsel intend to seek Court approval for payment of: (1) an award of attorneys' fees not to exceed 33 $\frac{1}{3}$ % of the Gilead Settlement Fund; (2) reimbursement of reasonable out-of-pocket costs and expenses not to exceed \$4 million;⁵ and (3) a representative-plaintiff service award in the amount of \$40,000. DPP counsels' reported lodestar in the case as of August 1, 2023, was \$34,111,242 at current rates, with counsel expending more than 39,100 hours litigating the case.⁶ Class Counsel did not seek an award of attorneys' fees in connection with the BMS Settlement. *Roberts Decl.* ¶ 7.

III. ARGUMENT

A. The Settlement Meets the Standard for Preliminary Approval

"The Ninth Circuit maintains a '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)). Class action settlements require court approval, *see Fed. R. Civ. P. 23(e)*, but "[a]t the preliminary approval stage, 'a full fairness analysis is unnecessary.'" *Zepeda v. PayPal, Inc.*, Nos. 10-cv-02500-SBA, 10-cv-01668-

⁵ DPP counsel collectively report having incurred \$3,379,946 (paid and due) in unreimbursed costs and expenses advancing the litigation. *Roberts Decl.* ¶ 6. This figure does not include the \$2,500,000 DPP counsel were reimbursed in connection with the settlement with Defendant BMS. *Id.* ¶¶ 6, 7. DPP counsel are awaiting a few additional invoices and expect that this number will increase prior to final approval.

⁶ *Roberts Decl.* ¶ 6. Based on the reported lodestar through August 1, 2023, from counsel for the DPPs, an attorneys' fee award of 33 $\frac{1}{3}$ % of the fund equates to a lodestar multiplier of 2.41 ($(\$246,750,000 / 3) / \$34,111,242 = 2.41$). *Id.*

1 SBA, 2014 WL 718509, at *4 (N.D. Cal. Feb. 24, 2014) (quoting *Alberto v. GMRI, Inc.*, 252 F.R.D.
2 652, 665 (E.D. Cal. 2008)). The Court need make only an “initial evaluation of the fairness of the
3 proposed settlement . . . on the basis of written submissions and informal presentation from the
4 settling parties.” *In re High-Tech Emp. Antitrust Litig.*, No. 11-cv-02509-LHR, 2013 WL 6328811,
5 at *1 (N.D. Cal. Oct. 30, 2013) (citing *Manual for Complex Litigation (Fourth)* (“*Manual*”) at
6 § 21.632).

7 The first step is for the Court to “make a preliminary determination that the settlement is
8 ‘fair, reasonable, and adequate’ when considering the factors set out in Rule 23(e)(2).” *Haralson*,
9 383 F. Supp. 3d at 966 (quoting Fed. R. Civ. P. 23(e)(2)). Those factors, set forth in the December 1,
10 2018 amendments to Rule 23, are whether:

11 (A) the class representatives and class counsel have adequately
12 represented the class; (B) the proposal was negotiated at arm’s
13 length; (C) the relief provided for the class is adequate, taking into
14 account: (i) the costs, risks, and delay of trial and appeal; (ii) the
15 effectiveness of any proposed method of distributing relief to the
16 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.

17 Fed. R. Civ. P. 23(e)(2).

18 These amended factors were not intended to “displace” any factor previously adopted by
19 courts, “but rather to focus the court and the lawyers on the core concerns of procedure and
20 substance that should guide the decision whether to approve the proposal.” Rule 23(e)(2) Advisory
21 Committee Notes to 2018 Amendments. To that end, the Court additionally may consider the
22 *Churchill* factors previously adopted by the Ninth Circuit:

23 (1) the strength of the plaintiff’s case; (2) the risk, expense,
24 complexity, and likely duration of future litigation; (3) the risk of
25 maintaining class action status throughout the trial; (4) the amount
26 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.

27 *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); *see also Cottle v. Plaid Inc.*,
28 No. 20-cv-03056-DMR, 2021 WL 5415252, at *11 (N.D. Cal. Nov. 19, 2021) (court examines Rule

1 23(e)(2) and *Churchill* factors in deciding whether to grant preliminary approval). No additional
 2 analysis is required here, however, because the first six *Churchill* factors are included within the
 3 analysis of the factors listed in Rule 23(e)(2),⁷ and the last two factors are not pertinent to this
 4 motion.⁸

5 The Court also should consider the extent to which the Settlement complies with the
 6 Northern District of California’s *Procedural Guidance for Class Action Settlements* (“ND CA
 7 Procedural Guidance”). Consideration of the foregoing demonstrates that the Settlement is fair,
 8 reasonable, adequate, and likely to be granted final approval.

9 **1. The Classes Are Adequately Represented.**

10 The Classes are well represented in this matter. This case was hard-fought from beginning to
 11 end. Counsel for the Direct Purchaser Classes spent more than 39,100 hours litigating the case and
 12 incurred costs and expenses of \$5,879,946 in advancing the matter. Roberts Decl. ¶ 6. Co-Lead Class
 13 Counsel, Michael L. Roberts and Dianne M. Nast (“Class Counsel”), have significant experience
 14 prosecuting complex antitrust class action cases.⁹ When negotiating the Settlement, Class Counsel
 15 possessed a clear, comprehensive understanding of the strengths, weaknesses, and value of the
 16 claims, enabling them to evaluate the fairness of the Settlement for the Classes.

17 Additionally, KPH fulfilled its duties as Class Representative by keeping apprised of the
 18 litigation, producing significant discovery, presenting a corporate representative for deposition,
 19 presenting a corporate representative who was prepared to attend and testify at trial, and evaluating
 20 and approving the Settlement. Roberts Decl. ¶ 4. This factor supports preliminary approval.

21
 22 _____
 23 ⁷ The first four factors are covered under Rule 23(e)(2)(C)(i)’s analysis of whether “the relief
 24 provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and
 appeal.” The fifth and sixth factors are covered under Rule 23(e)(2)(B)’s analysis of whether “the
 proposal was negotiated at arm’s length.”

25 ⁸ The seventh factor “is inapplicable because there is no government participant in this case.”
 26 *Cottle*, 2021 WL 5415252, at *14. The eighth factor “is best assessed at the final approval hearing
 since the court can look at how many class members submitted claim forms and objections.” *Id.*
 (citing *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009)).

27 ⁹ See Order Granting in Part and Denying in Part Motions for Class Certification at 91, ECF No.
 28 1452-7; Motion to Appoint Counsel as Direct-Purchaser Interim Co-Lead Counsel at 3-7, ECF No.
 447.

1 **2. The Settlement was Reached on the Eve of Trial and is the Result of**
2 **Arm’s-Length Negotiations.**

3 The Settlement is supported by experienced counsel and was reached on the eve of trial after
4 years of hard-fought litigation and several rounds of contested negotiations assisted by one of the
5 nation’s top mediators. “[A]n initial presumption of fairness” is afforded to settlements
6 “recommended by class counsel after arm’s-length bargaining.” *Cuzick v. Zodiac U.S. Seat Shells,*
7 *LLC*, No. 16-cv-03793-HSG, 2017 WL 4536255, at *5 (N.D. Cal. Oct. 11, 2017) (quoting *Harris v.*
8 *Vector Mktg. Corp.*, No. 08-cv-05198-EMC, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011)).
9 To negotiate at arm’s length, counsel “must have been armed with sufficient information about the
10 case to have been able to reasonably assess its strengths and value.” *Acosta v. Trans Union, LLC*,
11 243 F.R.D. 377, 396 (C.D. Cal. 2007). The “court must be satisfied that the parties ‘have engaged in
12 sufficient investigation of the facts to enable the court to intelligently make . . . an appraisal of the
13 settlement.’” *Uschold v. NSMG Shared Servs., LLC*, 333 F.R.D. 157, 169 (N.D. Cal. 2019) (quoting
14 *Acosta*, 243 F.R.D. at 396).

15 By the time KPH and Gilead executed their Memorandum of Understanding (“MOU”), KPH
16 had defeated arbitration and dismissal motions, evaluated extensive briefings and rulings on motions
17 to dismiss other actions, reviewed millions of pages of discovery documents, participated in
18 depositions of dozens of fact witnesses, prepared expert reports and a memorandum in support of
19 class certification, worked with merit experts to support its case-in-chief, briefed numerous pretrial
20 motions, held multiple focus groups, orchestrated a mock trial, participated in jury selection after
21 which a jury was empaneled, and engaged in extensive trial preparation with opening statements
22 scheduled to begin on May 25, 2023. *See* Roberts Decl. ¶¶ 5, 10. Negotiations continued after the
23 MOU was signed for an additional eight weeks while KPH and Gilead met, conferred, and edited the
24 Settlement and its attachments until reaching a meeting of the minds on critical provisions such as
25 the scope of the Classes, the terms of the DPPs’ release, and timing for funding, with the exception
26 of one issue. *Id.* ¶ 7. KPH and Gilead re-engaged mediator Kenneth Feinberg to assist the parties in
27 binding mediation to resolve the remaining issue. *Id.* Following the mediator’s decision and
28 additional rounds of negotiation on the Settlement and related documents, KPH and Gilead executed
the Settlement on July 24, 2023. *Id.*

1 Class Counsel entered into this agreement with a clear understanding of the strengths,
2 weaknesses, and value of their claims. They have extensive experience litigating antitrust cases and
3 believe the recovery provided in the Settlement is a highly favorable result for the Classes in light of
4 the risks of litigating this case to judgment. *Id.* ¶¶ 5, 10. *See Nat’l Rural Telecomms. Coop. v.*
5 *DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (“*Rural Telecomms.*”) (quoting *In re*
6 *Painewebber Ltd. P’Ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997)) (Courts afford “[g]reat
7 weight ... to the recommendation of counsel, who are most closely acquainted with the facts of the
8 underlying litigation.”); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995) (“Parties
9 represented by competent counsel are better positioned than courts to produce a settlement that fairly
10 reflects each party’s expected outcome in litigation.”). *See also Roberts v. AT & T Mobility LLC*, No.
11 15-cv-03418-EMC, 2021 WL 9564450, at *1 (N.D. Cal. Mar. 31, 2021) (preliminarily approving
12 settlement reached after “significant litigation[,] . . . investigation and discovery”).

13 These risks included the significant complexity of the trial in this case. KPH was litigating
14 alongside four other plaintiff groups with sometimes diverging interests and trial strategies,
15 involving mostly adverse fact witnesses and weeks of expert testimony, regarding highly complex
16 and abstract subject matter. *Roberts Decl.* ¶ 10. The jury verdict reached on June 30, 2023 in favor of
17 Defendants Gilead and Teva in the actions brought by the End Payor Plaintiffs (“EPPs”), the
18 Individual Health Plan Plaintiffs (“IHPPs”), and United Healthcare Services Inc. (“United”) demonstrates the high level of risk. This factor weighs heavily in favor of preliminary approval.

19 Importantly, this Settlement was negotiated before an experienced mediator, Kenneth
20 Feinberg. The parties’ use of an experienced mediator, particularly after extensive discovery,
21 “supports the conclusion that Plaintiffs were armed with sufficient information about the case to
22 broker a fair settlement.” *Uschold*, 333 F.R.D. at 170; *see also Acosta*, 2018 WL 646691, at *8 (“The
23 use of a mediator and the presence of discovery ‘support[s] the conclusion that the Plaintiff was
24 appropriately informed in negotiating a settlement.’”) (quoting *Villegas v. J.P. Morgan Chase & Co.*,
25 No. 09 cv-00261-SBA-EMC, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012)); *Satchell v. Fed.*
26 *Express Corp.*, No. 03-cv-02659-SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) (“The
27 assistance of an experienced mediator in the settlement process confirms that the settlement is non
28

1 collusive.”); *Roberts*, 2021 WL 9564450 at *1 (finding the settlement was the product of arms’
2 length negotiations through an experienced mediator).

3 Furthermore, Class Counsel will request a reasonable fee award, reimbursement for their out-
4 of-pocket costs and expenses, and a service award for KPH. This will be paid from the Gilead
5 Settlement Fund, S.A. ¶ 12(a), and any amounts requested but not awarded will revert to the Classes.
6 While Gilead has agreed not to take any position with respect to these requests, *id.*, the Settlement is
7 not contingent on these awards. To the contrary, Class Counsel and Gilead have agreed that the
8 Court will consider these requests separately from the fairness, reasonableness, and adequacy of the
9 Settlement, and that any order relating to these awards, or any appeal from any such orders, or any
10 modification or reversal to these awards on appeal, shall not operate to modify, cancel, or allow for
11 the termination of the Settlement or affect or delay the finality of any judgment approving the
12 Settlement. *Id.* ¶ 12(b). This factor weighs in favor of preliminary approval.

13 3. The Settlement Is Fair and Equitable for All Members of the Classes.

14 The share of the Settlement for each Member of the Classes will be calculated in the same
15 way pursuant to the proposed Plan of Allocation, which provides a standardized method based on the
16 Member’s purchases for a *pro rata* calculation of recovery, S.A. Ex. H, as has been approved in this
17 case and similar antitrust cases brought by direct purchasers to recover overcharges. *See, e.g.*, Order
18 Granting DPPs’ Mot. for Final Approval of Class Action Settlement with BMS ¶ 2, ECF No. 1524.¹⁰

19 The standard for approval of a proposed allocation plan is the same as the standard for
20 approval of a class action settlement; each must be “fair, reasonable and adequate.” *See In re Citric*

21
22 ¹⁰ *See also In re Glumetza Antitrust Litig.*, No. 19-cv-05822-WHA, 2022 WL 327707 (N.D. Cal.
23 Feb. 3, 2022); *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, No. 18-md-
24 02819, 2020 WL 6193857, at *1 (E.D.N.Y. Oct. 7, 2020) (“*Restasis*”); *In re Loestrin 24 Fe*
25 *Antitrust Litig.*, No. 13-md-2472 (D.R.I. Jan. 22, 2020), ECF Nos. 1396-8, 1462 (approved Sept. 1,
26 2020) (“*Loestrin*”); *In re Lidoderm Antitrust Litig.*, No. 14-md-02521-WHO (N.D. Cal.), ECF Nos.
27 1004-5, 1004-6, 1054 (approved Sept. 20, 2018) (“*Lidoderm*”); *In re Solodyn (Minocycline*
28 *Hydrochloride) Antitrust Litig.*, No. 14-md-02503 (D. Mass.), ECF Nos. 1163-4, 1179 (approved
July 18, 2018) (“*Solodyn*”); *In re Celebrex (Celecoxib) Antitrust Litig.*, No. 14-cv-00361 (E.D. Va.),
ECF Nos. 609-4, 630 (approved Apr. 18, 2018) (“*Celebrex*”); *In re Aggrenox Antitrust Litig.*, No.
14-md-02516 (D. Conn.), ECF Nos. 733-1, 740 (approved Dec. 19, 2017) (“*Aggrenox*”); *In re*
Asacol Antitrust Litig., No. 15-cv-12730 (D. Mass.), ECF Nos. 419-9, 648 (approved Dec. 7, 2017)
 (“*Asacol*”); *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).

1 *Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001) (citations omitted). An allocation
2 plan is reasonable if it “reimburses class members based on the type and extent of their injuries.” *Id.*

3 The Plan of Allocation provides that each claimant will receive a *pro rata* share of the Net
4 Gilead Settlement Fund based on its total unit volume of applicable purchases, with varying weights
5 applied depending on which drugs were purchased. S.A. Ex. H ¶¶ 12-14. To address the fact that
6 alleged damages stemming from the purchase of brand drugs are higher than those stemming from
7 the purchase of generic drugs, full value will be placed on purchases of brand drugs for which no
8 generic is available, a multiplier of 0.89 will be applied to brand purchases for which a generic was
9 available, and a multiplier of 0.11 will be applied to generic purchases. *Id.* ¶¶ 12, 14.

10 This plan should be deemed reasonable, given that “in this District, a ‘*pro-rata* [plan] for
11 allocation has been used in many antitrust cases.”” *See In re Cathode Ray Tube (CRT) Antitrust*
12 *Litig.*, No. 07-cv-05944-JST, 2016 WL 721680, at *21 (N.D. Cal. Jan. 28, 2016) (quoting *In re TFT-*
13 *LCD (Flat Panel) Antitrust Litig.*, No. 07-md-01827-SI, 2011 WL 7575004, at *4 (N.D. Cal. Dec.
14 27, 2011)); *see also In re Lidoderm Antitrust Litig.*, No. 14-md-02521-WHO, 2018 WL 11375216, at
15 * 2 (N.D. Cal. Sept. 20, 2018). Indeed, courts throughout the nation have approved *pro rata*
16 allocation plans in pharmaceutical antitrust class actions similarly alleging generic delay.¹¹

17 **4. Similar Allocation and Notice Plans Were Approved in the BMS** 18 **Settlement Earlier in This Litigation.**

19 This Court approved similar allocation and notice plans for the settlement between another
20 defendant in this litigation, BMS, and KPH, individually and on behalf of a settlement class of direct
21 purchasers (the “BMS Settlement”), orchestrated by the same DPP Class Counsel, Dianne Nast and
22 Michael Roberts. *See* ECF No. 1524 ¶¶ 2, 9. The certified settlement class for the BMS Settlement
23 included:

24 All persons or entities in the United States and its territories who
25 directly purchased Atripa, Evotaz, Reyataz, Sustiva, Truvada,

26 ¹¹ *See, e.g., Restasis*, 2020 WL 6193857, at *3; *Loestrin*, No. 13-md-02472, ECF 1396-8 at 2-3, 6-8
27 (D.R.I. Jan. 22, 2020) (plan submitted); *Loestrin*, No. 13-md-02472, 2020 WL 5203323, at *5
28 (D.R.I. Sept. 1, 2020) (plan approved); *Celebrex*, No. 14-cv-00361, 2018 WL 2382091, at *3 (E.D.
Va. Apr. 18, 2018); *Aggrenox*, No. 14-md-02516, ECF 733-8 at 2-6 (D. Conn. Nov. 22, 2017) (plan
submitted); *Aggrenox*, No. 14-md-02516, 2017 WL 11636126, at *2 (D. Conn. Dec. 21, 2017) (plan
approved).

1 Complera or Stribild, or any of their generic equivalents, if any
 2 (together, “cART Drugs”) from any Defendant or any brand or
 3 generic manufacturer from October 6, 2016 until October 19, 2021.

4 Order Granting DPPs’ Mot. for Preliminary Approval of Class Action Settlement with BMS ¶ 2,
 5 ECF No. 1159. The Court approved \$10.8 million to be paid by BMS into a settlement fund for the
 6 settlement class members and up to an additional \$200,000 toward costs for providing notice of the
 7 settlement to class members. *See id.* ¶ 8. In addition, BMS agreed to waive enforcement of
 8 contractual provisions that would otherwise prohibit co-Defendant Gilead from making, or licensing
 9 others to make, a version of Evotaz formulated with generic atazanavir (a generic version of BMS’s
 10 Reyataz). *Id.*

11 The manner of notice approved by the Court was similar to that proposed here, with direct
 12 mail notice consisting of a summary notice and reminder notice and reminder phone calls; digital
 13 notice in the form of header banners with the settlement website URL and notice headlines; and a
 14 settlement website. *Id.* ¶¶ 14, 15, 16. At the time the motion for final approval was filed, the response
 15 rate for the BMS settlement was 75%, or 58 of the 77 known Members of the Classes. *See* Second
 16 Decl. of Derek Smith Regarding BMS Allocation Plan ¶ 2, ECF No. 1489-1.

17 This factor weighs in favor of preliminary approval.¹²

18 **5. The Settlement is an Excellent Result for the Classes and Is Within the**
 19 **Range of Possible Approval.**

20 Whether a settlement falls within the range for possible approval concerns “substantive
 21 fairness and adequacy,” including “plaintiff’s expected recovery balanced against the value of the
 22 settlement offer.” *Acosta*, 2018 WL 646691, at *9 (quoting *Harris*, 2011 WL 1627973, at *9). An
 23 evaluation of the strength of a case is required. *Cuzick*, 2017 WL 4536255, at *6. “[I]t is well-settled
 24 law that a proposed settlement may be acceptable even though it amounts to only a fraction of the
 25 potential recovery that might be available to class members at trial.” *Uschold*, 333 F.R.D. at 171
 26 (quoting *Rural Telecomms.*, 221 F.R.D. at 527).

27 ¹² *See also Restasis*, 2020 WL 6193857, at *1, 2, n.3, 6 (similar allocation plan approved where
 28 KPH, represented in part by Dianne Nast and Michael Roberts, and plan required distribution of
 remaining balance after fees, expenses, and service awards on a *pro rata* basis to 32 claimants); *In*
re Restasis Antitrust Litig., No. 18-md-02819, (E.D.N.Y. Apr. 8, 2021), ECF No. 667 ¶¶ 2-3, 4, 16 .

1 The estimated settlement value cannot be viewed in a vacuum; the court must evaluate the
2 strengths and weaknesses of the case to determine the likelihood of recovering that value. *See*
3 *Cuzick*, 2017 WL 4536255, at *6; *see also Smith v. Am. Greetings Corp.*, No. 14-cv-02577-JST,
4 2015 WL 4498571, at *7 (N.D. Cal. July 23, 2015) (evaluating recovery in view of risks). Had KPH
5 not entered into the Settlement on the eve of trial and participated in the jury trial with the other
6 plaintiff groups, it would have faced a significant risk that the jury would find that Gilead lacked
7 market power, that Gilead did not engage in an antitrust violation, or that Members of the Classes
8 suffered no damages. This risk was demonstrated, as discussed, by the June 30, 2023 jury verdict in
9 the related actions of the EPPs, IHPPs, and United.

10 Here, the Classes' recovery compares favorably to their potential recovery at trial. Before the
11 Settlement, the DPPs' economist, Dr. Russell Lamb, estimated the certified classes' damages of
12 approximately \$2,080,000,000. *See Roberts Decl.* ¶ 14. Dr. Lamb's analysis estimated the difference
13 between the amount the DPPs paid for the brand Truvada and Atripla they purchased directly from
14 Gilead and the amount they would have paid as early as May 2019 (when generic Truvada and
15 Atripla likely would have entered the market) by purchasing lower-priced generic versions of
16 Truvada and Atripla absent Gilead's anticompetitive conduct.

17 The Classes' recovery of \$246,750,000 from Gilead therefore amounts to 11.9% of the
18 Class's claimed damages. Although Class Counsel are confident in the strength of the Classes'
19 claims, there was no guarantee that a jury would reach a favorable verdict. Given the relatively high
20 risks of no recovery or a substantially reduced recovery, the Classes' recovery through this
21 Settlement is significant. *See Bellinghausen v. Tractor Supply Co.*, 303 F.R.D. 611, 624 (N.D. Cal.
22 2014) ("The Court considers that even if 'Plaintiffs were to prevail, they would be required to
23 expend considerable additional time and resources potentially outweighing any additional recovery
24 obtained through successful litigation,' and these delays will affect 'payment to the Class Members
25 and increase the amount of attorneys' fees.'") (quoting *Collins v. Cargill Meat Solutions Corp.*, 274
26 F.R.D. 294, 302 (E.D. Cal. 2011)).

27 Furthermore, as noted above, in approving proposed class settlements, courts afford great
28 weight to the recommendation of counsel, who are most closely acquainted with the facts of the

1 underlying litigation. Class Counsel and the Class Representative KPH support this settlement, and
 2 the amount of the Classes' recovery in view of the foregoing factors is well within the range of
 3 possible approval.

4 The amount of the Classes' recovery in view of the foregoing factors is well within the range
 5 of possible approval. It compares favorably, for example, to the direct purchaser class settlement in
 6 the reverse payment case *In re Loestrin 24 Fe Antitrust Litigation*, No. 13-md-02472, (D.R.I.). In
 7 that case, the total settlement fund for the direct purchaser class (of 47) was approximately \$120
 8 million.¹³ Notice of the settlement and claim forms were sent to all the class members by U.S. First-
 9 Class Mail. For the 39 class members and five additional assignees who returned valid claim forms,
 10 the average payment per claimant was \$1,756,453.96. *Id.* The cost of administering the settlement
 11 was \$57,517.50, and the court awarded \$3,965,558.00 to Class Counsel in reimbursable expenses
 12 and 33 ⅓% of the Settlement Fund (net of reimbursed expenses), or \$38,678,147.00, as attorneys'
 13 fees to Class Counsel. *Id.*

14 **B. The Proposed Forms and Manner of Notice Will Inform Members of the**
 15 **Classes of the Settlement and their Options.**

16 As required by the ND CA Procedural Guidance at § 2, Class Counsel provide the
 17 information below regarding how the settlement administrator plans to provide notice, process claim
 18 forms, and send payments to the Classes.

19 **1. The Proposed Manner of Notice Ensures that All Members of the Classes**
 20 **will Timely Receive Notice**

21 The proposed notice plan is comprised of three parts.¹⁴ *First*, the settlement administrator will
 22 send direct notice via U.S. First-Class mail to each Member of the Classes identified during the
 23 notice plan for class certification and confirmed through transactional-level data produced in this
 24 litigation, *id.* ¶ 7, and will re-mail any returned notices to any alternate addresses available through
 25 postal service forwarding information, *id.* ¶ 8. Before the initial mailing, the settlement administrator

26 ¹³ *Loestrin*, No. 13-md-02472 (D.R.I. Sept. 1, 2020), ECF No. 1462. This represented a recovery of
 27 between 18.75% and 82.75% of single damages, depending on the scenario. *Loestrin*, No. 13-md-
 02472 (D.R.I. Aug. 13, 2020), ECF No. 1448 at 18-19 (Memo in Support of DPPs' Motion for Final
 Approval).

28 ¹⁴ *See* Declaration of Carla A. Peak ("Peak Decl.") ¶¶ 7-16, Ex. 3 to the Roberts Decl.

1 will check all postal addresses against the National Change of Address database maintained by the
2 USPS, certify them via the Coding Accuracy Support System, and verify them through Delivery
3 Point Verification. *Id.* The plan to provide notice of class certification earlier in this litigation
4 identified 78 Members of the Classes, excluding the Retailers and United Healthcare Services, Inc.,
5 which opted out of the Classes. *See* Russell L. Lamb Decl. ¶ 5, Ex. 2 to Roberts Decl.

6 *Second*, the settlement administrator will provide digital notice via *Becker's Pharmacy*
7 *Report*, *NAW SmartBrief*, and *Pharmaceutical Commerce Direct*, which are the same digital
8 publication services utilized for the Classes' certification notice. Peak Decl. ¶ 9. *Becker's Pharmacy*
9 *Report* is an electronic publication geared to pharmacy leaders to cover important topics related to
10 pharmacy and supply chain, among others, delivered to more than 18,500 subscribers four times per
11 week. *Id.* ¶ 12. *NAW SmartBrief* is a subscription-only news service dedicated to informing
12 wholesalers and distributors of the news shaping their industry and is delivered to more than 14,500
13 subscribers daily. *Id.* ¶ 11. *Pharmaceutical Commerce Direct* is geared toward pharmaceutical,
14 biopharmaceutical, marketing communications and other service/consulting industries and is issued
15 twice monthly and has over 14,000 e-newsletter subscribers. *Id.* ¶ 13.

16 KCC will also cause a press release to appear once in the *PR Newswire*. The *PR Newswire* is
17 the premier global provider of multimedia platforms and distribution that marketers, corporate
18 communicators, sustainability officers, public affairs officers, and investor relations officers leverage
19 to engage key audiences. Its network reaches nearly 3,000 newsrooms, including The New York
20 Times and ABC News, and it sends content to more than 550 news content systems including
21 Moody's, SmartBriefs, LexisNexis and McGraw-Hill. *Id.* ¶ 14.

22 *Third*, KCC will update the case-specific website as the website used for class certification
23 notice that will maintain copies of the Settlement, a detailed notice, a static blank claim form, a
24 dynamic claim form for use by Members of the Classes with pre-populated claim forms; the Plan of
25 Allocation; the Escrow Agreement; instructions on how to submit a claim form; the motions for
26 approval of this settlement; the motion for approval of fees, expenses, and a service award; pertinent
27 court orders; and any other important documents in the case. *Id.* ¶ 15. The website address will be
28

1 displayed in the notice documents and will be accessible via a hyperlink embedded in the paid digital
2 notice described above. *Id.*

3 This plan of sending “individual notice to all members who can be identified through
4 reasonable effort” constitutes “the best notice that is practicable under the circumstances.” *See* Fed.
5 R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974). This is
6 particularly true here where data should allow most, if not all, members to be identified. *See Hunt v.*
7 *Check Recovery Sys., Inc.*, No. 05-cv-04993-MJJ, 2007 WL 2220972, at *3 (N.D. Cal. Aug. 1, 2007)
8 (“Delivery by first-class mail can satisfy the best notice practicable when there is no indication that
9 any of the class members cannot be identified through reasonable efforts.”). The plan to supplement
10 this direct notice with digital notice and the settlement website further supports the conclusion that
11 the proposed notice plan satisfies due process. Given that class notice was previously successful with
12 these same entities, the proposed dissemination of settlement notice by direct mail, paired with the
13 digital notice and website, will be sufficient to reach all Class Members. This factor weighs in favor
14 of preliminary approval.

15 **2. The Proposed Claim Form Process Effectuates the Plan of Allocation,**
16 **which is Fair, Adequate, and Reasonable**

17 The direct mail notice will include a claim form, pre-populated based on the transactional
18 data referenced above. S.A. Ex. H ¶¶ 2-3. Members of the Classes will have an opportunity to verify
19 the accuracy of the information on the pre-populated forms and/or challenge the accuracy of the pre-
20 populated information with supporting purchase records. *Id.* ¶ 3. The settlement administrator, with
21 assistance from the DPPs’ expert economist, Dr. Russel L. Lamb and his staff, shall review and
22 process all claim forms and any challenges, after which the settlement administrator shall advise the
23 claimant in writing if an amendment has been made to its total qualifying purchases. *Id.* ¶¶ 9, 15, 16.

24 Distributions shall be made solely to Members of the Classes who timely execute and return a
25 valid Claim Form. *Id.* ¶ 5. To maximize submissions, the settlement administrator shall follow up by
26 U.S. First-Class mail with any Members of the Classes that do not submit a Claim Form within 42
27 days after the entry of the Preliminary Approval Order, and a second time by U.S. First-Class mail
28 days after that. *Id.* ¶¶ 6-8. In the interim, Class Counsel shall follow up by phone with any Class

1 Member that has not yet submitted a completed Claim Form. *Id.* ¶ 7. Any Members of the Classes
 2 who submit timely but deficient Claim Forms shall be given 28 days from the date on which they are
 3 contacted by the settlement administrator to cure the deficiency. *Id.* ¶ 10. Class Counsel have
 4 conservatively estimated that with all of these follow-up procedures in place, at least 75% of class
 5 members should submit a claim form.¹⁵

6 Once all allocations are finalized, the settlement administrator shall mail each Member of the
 7 Classes who had timely submitted a valid Claim Form a check for its approved distribution, which
 8 shall be valid for a period of 90 days. S.A. Ex. H ¶ 17. No later than 28 days after the Claims
 9 deadline set forth in the Preliminary Approval Order, the settlement administrator and Dr. Lamb will
 10 submit declarations summarizing their efforts and the costs and expenses they incurred and expect to
 11 incur in connection with the Allocation Plan. *Id.* ¶ 18.

12 It is anticipated that the entire Net Gilead Settlement Fund will be distributed at one time, but
 13 if amounts that are not *de minimis* remain in the fund 180 days after the initial distribution dates,
 14 such amounts shall be distributed *pro rata* to claimants that timely cashed their settlement checks
 15 based on the same formula used for the initial distribution. *Id.* ¶ 19. If the amounts remaining are *de*
 16 *minimis* such that a second distribution would not be economically feasible, Co-Lead Class Counsel
 17 shall apply to the Court, with notice to Gilead, addressing the proposed distribution of those funds.
 18 *Id.* Unless the confidential reduction provision is triggered, *see supra* n.4, no unclaimed amounts
 19 from the Gilead Settlement Fund will revert to Gilead. S.A. ¶ 7.

20 This factor weighs in favor of preliminary approval. *See Torres v. Pick-A-Part Auto*
 21 *Wrecking*, No. 16-cv-01915, 2018 WL 306287, at *3-4 (E.D. Cal. Jan. 5, 2018) (finding no obvious
 22 deficiencies in proposed agreement providing for non-reversionary cash fund to be divided among
 23 class members who submit valid claims and release of liability narrowly tailored to claims).

24 _____
 25 ¹⁵ *See Roberts Decl.* ¶ 18. As suggested by ND CA Procedural Guidance at § 1(g), Class Counsel
 26 have based this estimate on the BMS Settlement response rate, as well as the claim form return rates
 27 in other recent antitrust class actions involving direct purchaser plaintiffs. *See Restasis*, No. 18-md-
 28 02819 (E.D.N.Y. Mar. 23, 2021), ECF No. 663 ¶ 6 (30 of 37 identified class members, or 81%,
 submitted claim forms; 2 assignees also submitted claims); *Asacol*, No. 15-cv-12730 (D. Mass.
 Nov. 20, 2017), ECF No. 582-4 ¶¶ 4-5 (Declaration) (notices mailed to 27 class members); *Asacol*,
 No. 15-cv-12730 (D. Mass. Feb. 28, 2019), ECF No. 756 at 2 (Order) (23 (of 27) class members, or
 85%, submitted claim forms).

1 **3. The Proposed Forms of Notice Satisfy the Guidance Provided in Rule**
 2 **23(c)(2)(B), the Manual, and the ND CA Procedural Guidance**

3 The proposed long-form notice states the following, as required by Rule 23(c)(2)(B): (1) the
 4 nature of the action (at No. 1); (2) the definition of the classes certified (at No. 3); (3) the class
 5 claims, issues, or defenses (at No. 1); (4) that a class member may enter an appearance through an
 6 attorney if the member so desires (at No. 16); and (5) the binding effect of a class judgment on
 7 members under Rule 23(c)(3) (at Nos. 4, 8, 11-13). *See* S.A. Ex. D.

8 The proposed long-form notice also includes additional information recommended by the
 9 *Manual* at § 21.312 by: (1) describing options and deadlines (at Nos. 6, 11-13); (2) describing
 10 essential terms (at No. 4); (3) disclosing any special benefits provided to the class representatives (at
 11 No. 10); (4) providing information regarding fees and costs that will be requested (at No. 10);
 12 (5) indicating the time and place of the hearing to consider approval of the settlement (at No. 15);
 13 (6) explaining the procedures for allocating and distributing settlement funds (at No. 7); and
 14 (7) prominently displaying the procedure for making inquiries (at No. 18).¹⁶

15 The proposed long-form notice also includes the additional non-duplicative information
 16 recommended in the ND CA Procedural Guidance at § 3, including: (1) contact information for class
 17 counsel (at No. 18); (2) the settlement website address (at No. 18); and (3) how to determine if the
 18 final approval hearing date has changed (at No. 15).¹⁷ The long-form notice also includes much of
 19 the ND CA Procedural Guidance's suggested language about how to access the case docket and
 20 Settlement (at No. 18) and how to object via the submission of listed information to only the Court
 21 (at Nos. 12, 16).¹⁸

22 In sum, the proposed notice provide sufficient information to Members of the Classes to
 23 satisfy due process.

24 _____
 25 ¹⁶ *See* S.A. Ex. D. As to item 6, the notice refers to *pro rata* distributions, without describing how
 26 class members can calculate or estimate their individual recoveries, because calculations cannot be
 27 made until after all claim forms are received and processed.

28 ¹⁷ *See* S.A. Ex. D. As to item 2, the settlement website will contain links to the documents listed in
 the ND CA Procedural Guidance at § 3, as described in the Proposed Manner of Notice section
 above.

¹⁸ *See* ND CA Procedural Guidance at §§ 3-5; S.A. Ex. D.

4. The Court Should Not Allow Another Opt-Out Opportunity

A second opt-out opportunity is unnecessary because the Classes previously certified by the Court are the same Classes to benefit from this Settlement, and the Members of the Classes received notice that met and surpassed the constitutional standards for due process and all requirements for Rule 23 when the Classes were certified, as described below. As required by due process and Rule 23(c)(2)(B), the initial class notice was “the best practicable [notice], ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Class Counsel made every reasonable effort to identify and deliver direct, individual notice to all Class Members. *See Fed. R. Civ. P. 23(c)(2)(B)*. And to the greatest extent practicable under the circumstances, Class Counsel apprised all interested parties who could be contacted with reasonable effort of the impending litigation, their rights to participate in or be excluded from the Action, and the legal effect(s) of either choice. The Retailers and United opted out (a total of eight Members).

The Court already allowed Members of the Classes an opportunity to opt out following notice, and Rule 23 does not require a second opt-out period. As the Ninth Circuit Court of Appeals observed, forgoing a second opt-out opportunity does not implicate due process concerns:

[The objector]’s rights are protected by the mechanism provided in the rule: approval by the district court after notice to the class and a fairness hearing at which dissenters can voice their objections, and the availability of review on appeal. Moreover, to hold that due process requires a second opportunity to opt out after the terms of the settlement have been disclosed to the class would impede the settlement process so favored in the law.

Officers for Justice v. Civil Serv. Comm’n of City and Cnty. of San Francisco, 688 F.2d 615, 635 (9th Cir. 1982).

Numerous additional courts throughout the country have likewise declined to order a second opportunity to opt out of certified classes. *See, e.g., Low v. Trump Univ., LLC*, 881 F.3d 1111, 1121 (9th Cir. 2018) (affirming rejection of objection to lack of opportunity to opt out at settlement stage because “due process requires that class members be given [only] a single opportunity to opt out”); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006) (“Requiring a second opt-out period as a blanket rule would disrupt settlement proceedings because no certification would be final until

1 after the final settlement terms had been reached”); *Seattle*, 955 F.2d at 1289 (“Class Members were
 2 given notice of the action and afforded an opportunity to opt out. The . . . Class Members also were
 3 given notice of the proposed settlement and afforded the opportunity to object. This is all that Rule 23
 4 requires.”); *Lidoderm*, No. 14-md-02521-WHO, 2018 WL 11293766, at *2 (N.D. Cal. May 3, 2018)
 5 (“[B]ecause prior notice of class certification . . . satisfied the requirements of Fed. R. Civ. P.
 6 23(c)(2)(B) and due process, and because the prior notice of class certification provided an opt-out
 7 period that [had] closed . . . , there is no need for an additional opt-out period.”).

8 For these reasons, forgoing a second opt-out period is consistent with common practice in
 9 other direct purchaser pharmaceutical antitrust class actions in this and other circuits. *See, e.g.*,
 10 *Loestrin*, No. 13-md-02472 (D.R.I. Mar. 23, 2020), ECF No. 1426 ¶ 9; *Lidoderm*, 2018 WL
 11 11293766 ¶ 8; *Solodyn*, No. 14-md-02503, 2018 WL 11293802 ¶ 8 (D. Mass. Mar. 12, 2018); *In re*
 12 *Nexium (Esomeprazole) Antitrust Litig.*, No. 12-md-02409 (D. Mass. June 12, 2015), ECF No. 1536
 13 ¶ 3; *In re Wellbutrin XL Antitrust Litig.*, No. 08-cv-02431 (E.D. Pa. Aug. 17, 2012), ECF No. 473
 14 ¶ 5.

15 A second opt-out period similarly is unwarranted here. Class Members decided not to opt out
 16 by the February 3, 2022 deadline indicated in the class notice. Class Members were advised of the
 17 consequences of choosing not to exercise their right opt out of the Classes (and the method and
 18 deadline for doing so) in clear, concise, conspicuous, and plainly written language, so as to be easily
 19 understood by the average class member, and Class Counsel did so repeatedly throughout the notice
 20 program:

21 ***If you exclude yourself from the Direct Purchaser Class***, you will not
 22 be legally bound by anything that happens in this Lawsuit. If you
 23 exclude yourself from the Direct Purchaser Class so you can start or
 24 continue your own lawsuit against Gilead, or be part of any other
 25 lawsuit against Gilead relating to the legal and factual issues in this
 case, you should talk to your own lawyer because your claims will be
 subject to a statute of limitations, which means that your claims may
 be subject to expiration without timely action.

26 ***If you do not exclude yourself from the Direct Purchaser Class***, you
 27 will keep the right to a share of any recovery that may come from a
 28 trial or settlement of this Lawsuit. You will not be able to start,
 continue, or be part of any other lawsuit against Gilead about the legal
 or factual issues in this case. All the Court’s orders in the Lawsuit will

1 apply to you and legally bind you. You also will be bound by any
2 judgment in the Lawsuit.

3 Class Long Form Notice, ECF No. 1538-6. The explicit exclusion language clearly informed the
4 Class Members of the legal consequences of either remaining in or opting out of the Classes and
5 expressly stated that the possible outcomes of the Action included trial or settlement. *See also id.* at
6 2, 8 (“If you do nothing, you will keep the right to a share of any recovery that may come from a
7 trial or settlement of this Lawsuit.”). Class Members were given a reasonable opportunity to opt-out
8 within at least 49 days of issuance of the notice (from December 16, 2022, from the notice date of
9 the Court’s order, ECF No. 1548, and February 3, 2023, the deadline to opt-out). *Manual* § 21.321
10 (“Courts usually establish a period of thirty to sixty days (or longer if appropriate) following mailing
11 or publication of the notice for class members to opt out.”). Therefore, as part of the Settlement
12 Agreement, the Settling Parties have expressly agreed to recommend that a second opt-out
13 opportunity is unnecessary.

14 There is no reason to believe that Class Members would elect to opt out now, less than a
15 year later, nor should they be allowed to do so. They instead can object to the Settlement if they are
16 opposed to any part of it. *See supra* n.4. Plaintiffs therefore respectfully submit that no additional
17 opt-out opportunity should be provided during notice to the Classes for settlement purposes.

18 **C. The Court Should Appoint The Huntington National Bank as Escrow Agent
19 and KCC Class Action Services, LLC as Settlement Administrator**

20 KPH has retained KCC Class Action Services, LLC (“KCC”) to serve as Settlement
21 Administrator, and The Huntington National Bank (“Huntington”) to serve as Escrow Agent. KCC
22 has been recognized as a best settlement administrator by *The Recorder*, *The New York Law Journal*,
23 and *The National Law Journal*, and has administered over 6,500 cases.¹⁹ The 2020 Antitrust Annual
24 Report on Class Action Filings in Federal Court, published in August 2021, reports that from 2009-
25 2020, KCC was the third top settlement administrator by aggregate settlement amount and the
26 second top settlement administrator by number of settlements.²⁰ Huntington is a top-25 U.S. bank

27 ¹⁹ See <https://www.kccllc.com/our-services/class-action/what-we-do>.

28 ²⁰ See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3898782, Linked Document at 36.

1 holding company with \$189 billion in assets.²¹ Founded in 1866, the bank maintains more than 1,100
 2 branches in twelve states.²² Huntington's National Settlement Team has handled more than 4,500
 3 settlements totaling over \$70 billion and 160 million checks for law firms, settlement administrators,
 4 and regulatory agencies.²³ Counsel for the DPPs have securely and successfully used Huntington's
 5 escrow services in multiple class action settlements and have requested that Huntington be appointed
 6 the escrow agent for this Settlement.

7 Class Counsel is working with KCC on the previous settlement with BMS in this litigation.
 8 During the selection process for the previous BMS Settlement, Class Counsel sought bids from four
 9 established settlement administrators, all of which recommended direct mail notice, digital notice, a
 10 settlement website, and relatively similar plans for processing claims, deficiency letters,
 11 resubmissions, and payments. *See* Roberts Decl. ¶ 15. Class Counsel do not have any financial ties
 12 with KCC. *Id.* ¶ 16. Class counsel selected KCC for this settlement because of its competitive
 13 proposal and its decades of experience administering complex class action settlements. *Id.*

14 KCC has estimated the total cost of its administrative services, less discounts, to be
 15 \$48,381.00, and has agreed to a cap of \$50,000.00. *Id.* ¶ 16. This capped amount, representing
 16 significantly less than 1% of the Gilead Settlement Fund, is reasonable. KCC's experience, along
 17 with the reasonableness of its plans and costs when viewed alone and compared to bids submitted by
 18 three additional established entities, supports the appointment of KCC as Settlement Administrator
 19 and Huntington as Escrow Agent.

20 **D. The Proposed Schedule Meets the Standard for Approval**

21 The schedule outlined in the proposed preliminary approval order provides for the notice
 22 process to start within 14 days after entry of the order, with direct mail notice, a press release, and
 23 the live settlement website. S.A. Ex. A ¶ 15. Then, 28 days after the entry of the order, KCC will
 24 cause digital notice to issue in three separate publications. *Id.* ¶ 16. KCC will follow up with Class
 25 Members that have not submitted claim forms via the reminder notice 42 days after entry of the

26 _____
 27 ²¹ See <https://www.huntington.com/About-Us>.

²² See *id.*

28 ²³ See *id.*

1 order, and Class Counsel will follow up with those Class Members who have not submitted claims
 2 forms by telephone 14 days after that (56 days after entry of the order). *Id.* ¶¶ 17, 18. A second
 3 reminder notice will be sent directly to Class Members who have not yet submitted a Claim Form 14
 4 days later (70 days after entry of the order). *Id.* ¶ 19. The claim form deadline will follow 28 days
 5 after that (98 days after entry of the order). *Id.* ¶ 20. Counsel will move for attorneys' fees,
 6 reimbursement of litigation and administrative expenses and costs, and payment of a class
 7 representative service award at least 56 days before the Final Approval Hearing, *id.* ¶ 26, and Class
 8 Members will have 35 days after that (until 21 days before the Final Approval Hearing) to object to
 9 the proposed settlement or the requested attorneys' fees, litigation and administrative expenses, or
 10 class representative service award, *id.* ¶ 20. This proposed schedule comports with due process and
 11 complies with the timeline required by the ND CA Procedural Guidance at § 9.

12 IV. CONCLUSION

13 For all the foregoing reasons, KPH respectfully requests that the Court preliminarily approve
 14 the Settlement, the proposed schedule, and the proposed manner and forms of notice; appoint KCC
 15 as Settlement Administrator, and Huntington as Escrow Agent; and set a schedule for the final
 16 approval process and the Final Approval Hearing.

17 Respectfully submitted,

18 Dated: August 9, 2023

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