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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

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SAN FRANCISCO DIVISION

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IN RE: BEXTRA AND CELEBREX)
MARKETING, SALES PRACTICES, AND)
19 PRODUCT LIABILITY LITIGATION)

No. M:05-CV-01699-CRB

20

THIS RELATES TO:)
21 ALL PURCHASER CASES)

NOTICE OF UNOPPOSED MOTION
AND MOTION FOR APPROVAL OF
NOTICE PROGRAM

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Date: No date set
Time: No date set
Courtroom: 8, 19th Floor
Judge: Honorable Charles R. Breyer

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1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that Plaintiffs hereby move the Court, pursuant to Rule 23(c) of
3 the Federal Rules of Civil Procedure, for an Order granting approval of the Notice Program
4 attached as Exhibit A to the Declaration of Steve W. Berman In Support of Unopposed Motion For
5 Approval of Notice Program (“Berman Decl.).

6 This motion is based on this Notice of Motion, the Memorandum of Points and Authorities
7 submitted herewith, the Declaration of Steve W. Berman and all exhibits submitted herewith and
8 such other written arguments as may be presented to the Court.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. INTRODUCTION**

11 The Plaintiffs bring this unopposed motion seeking approval of the Notice Program
12 attached as Exhibit A (“Notice Program”) to the Berman Decl. The Notice Program provides a
13 robust, multi-pronged approach to deliver plain and easy-to-understand information regarding the
14 settlement reached between Plaintiffs and Defendant Pfizer Inc. (collectively the “Settling
15 Parties”). The Settlement has resolved the claims of Class Plaintiffs who have alleged, among
16 other things, that Pfizer Inc. engaged in the false marketing of the prescription drugs Celebrex and
17 Bextra. The Defendant denies and continues to deny Class Plaintiffs’ claims but has agreed to
18 settle in order to avoid the cost of litigating the case. The Settlement provides that Pfizer will pay
19 \$89 million to resolve the claims of members of the Settlement Class. Berman Decl. ¶ 4.

20 In order to give notice of the proposed Settlement to the members of the proposed
21 settlement subclasses whose claims are resolved, Plaintiffs have retained a recognized notice
22 expert, Katherine Kinsella of Kinsella Media, LLC (“Kinsella”), to design a notice program that
23 provides the best notice practicable and that is consistent with the requirements of Federal Rule of
24 Civil Procedure 23 and due process. Berman Decl. Ex. A. Plaintiffs have consulted with Pfizer
25 Inc. in the development of this Notice Program, and the Settling Parties believe it achieves the kind
26 of robust and vigorous notice program that will result in members of the Settlement Class receiving
27 ample opportunity to be apprised of their rights under the Settlement. Berman Decl. ¶ 5.

1 The Notice Program is designed to provide the required notice to both Third Party Payor
2 (“TPP”) and consumer class members. The Notice Program combines the provision of direct,
3 individual notice to the TPP subclass members for whom contact information is available as well
4 as supplementary publication in a national newspaper. For the consumer subclasses, for whom
5 personal contact information is generally not available, the Notice Program includes publication
6 through the highly effective medium of television along with both print and internet notice in
7 sources targeting the particular consumer, based on demographics, who purchased these drugs.

8 Plaintiffs’ proposed Notice Program meets and exceeds the requirements of Rule 23,
9 comports with due process, and will fairly apprise potential members of the Settlement Class.
10 Because the proposed Notice Program agreed upon by the Settling Parties would provide the best
11 notice practicable under the circumstances, this Court should approve the dissemination of notice
12 in the manner and form proposed herein.

13 II. OVERVIEW OF NOTICE PROGRAM

14 A. Plaintiffs Have Retained a Renowned Notice Expert With Experience in Similar Drug 15 Claim Litigation

16 Katherine Kinsella is the President of Kinsella Media, LLC (“Kinsella”), a firm that
17 specializes in the design and implementation of legal notification programs. Notice Program, p. 1
18 and Exhibit 1. Kinsella is well known for devising notice programs to apprise class members of
19 their rights, including multiple cases involving the sale of prescription drugs. See *State of*
20 *Connecticut v. Mylan Laboratories, Inc.*, MDL No. 1290, Misc. No. 99-276 (D.D.C.) (Lorazepam
21 and Clorazepate), *In re: Pharm. Average Wholesale Price Litig.*, MDL No. 1456, CA:01-CV-
22 12257-PBS (D. Mass.) (multiple drugs), *In re Buspirone Antitrust Litig.*, MDL No. 1413
23 (S.D.N.Y.) (Buspar), *Simonet v. SmithKline Beecham Corp.*, CA:06-1230 GAG (Paxil CR)
24 (www.simonetpaxilcrsettlement.com). Ms. Kinsella has been recognized as an expert in legal
25 notice programs in both federal and state courts and has lectured, published and been cited
26 extensively on various aspects of legal notice. Notice Program, p. 1 and Exhibit 1 thereto.

27 When designing notice programs, Kinsella conducts detailed research regarding the claims
28 at issue in the litigation, the demographic characteristics of affected class members, and the

1 appropriate mechanisms by which those class members can be reached. See Notice Program pp.
2 11-27. Based on a comprehensive analysis of these issues, Kinsella designs a notice program that
3 provides the best notice practicable to members of the class. The Notice Program designed by
4 Kinsella, in consultation with counsel for both Plaintiffs and Defendants, is tailored to meet the
5 particular circumstances of this case.

6 **B. The Proposed Notice Program Combines Individual and Publication Notice to Provide**
7 **the Best Notice Practicable to Members of the Settlement Class**

8 In the Order Granting Preliminary Approval of Settlement (Docket No. 2926), the Court
9 preliminarily certified three subclasses including two consumer subclasses and one third party
10 payor (“TPP”) subclass. Kinsella took into account the demographic and other characteristics of
11 these two types of Celebrex and Bextra purchasers in designing the proposed Notice Program. See
12 Notice Program, pp. 11-27. In addition, Ms. Kinsella and Kinsella Media has worked closely with
13 Counsel for the Settling Parties to determine what forms and means of notice would prove most
14 workable and effective in reaching members of the Settlement Classes. Berman Decl. ¶ 6.

15 The TPP Subclass has differing demographic and practical characteristics than the
16 consumer subclasses and therefore the notice program is distinct for each.

17 **1. The TPP Notice Program:**

18 To reach members of the TPP Settlement Subclass, the Notice Program contemplates a
19 combination of direct mail and paid media notice. Because Fed. R. Civ. P. 23 provides that
20 individual notice should be mailed to all identifiable class members, the TPP Notice Program
21 requires that a notice substantially in the form of that attached to the Notice Program as Exhibit 3
22 (Long Form Notice to TPP Class Members) be sent, either via email or by post to all members of
23 the TPP subclass for whom contact information can reasonably be identified primarily through a
24 comprehensive database of over 40,000 TPPs that includes insurance companies, healthcare and
25 welfare funds, employee benefit funds, third-party administrators, pharmacy benefit managers and
26 other record keepers for TPPs. Direct notice will also be sent to any subclass members for whom
27 the parties obtain contact information or who request direct notice. Notice Program, p. 4.

28 Plaintiffs will establish and publicize a website, www.BextraCelebrexSettlement.com, where class

1 members can register their claims and either download a copy of the Notice and a Claim Form or
2 request that it be sent to them. Notice Program, p. 21.

3 To supplement the Direct Notice, the Notice Program provides for publication notice in the
4 United States in substantially the form attached as Exhibit 5 to the Notice Program (“Short Form
5 TPP Notice”). The Publication Notice will appear in *The Wall Street Journal*. In selecting this
6 forum, Ms. Kinsella analyzed the relevant makeup of the The Wall Street Journal audience to
7 ensure that the Publication Notice is placed in a publication where it is most likely to be seen by
8 class members. The Notice Program includes placement of the Publication Notice as well as the
9 long form notice on the internet at the Claims Administrators site,
10 www.BextraCelebrexSettlement.com.

11 This Notice Program is consistent with the standard in the notification industry and
12 complies with both Rule 23 and due process. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025
13 (9th Cir. 1998).

14 **2. The Consumer Notice Program:**

15 To reach members of the consumer subclasses, individuals who purchased Bextra or
16 Celebrex, the Notice Program contemplates use of a combination of television and print publication
17 notice. Consistent with Rule 23 and due process, individual notice will be sent to all consumers
18 who request such notice, however, individual notice to all members of the Consumer subclasses is
19 not practical when the number of class members and the size of the settlement are considered.

20 The Notice Program includes extensive publication notice through the media most likely to
21 reach the consumer class members, including television, print and internet. TV is the medium most
22 heavily used by Celebrex drug consumers and by consumers of all branded prescription drugs. An
23 estimated 95 television and cable Target Rating Points (“TRPs”)¹ over a total of two weeks
24 generating 148,494,500 gross impressions against Adults 35+ will be used. Notice Program, p. 7.

25 To supplement the Television Notice, the Consumer Notice Program provides for
26 publication notice in the United States in substantially the form attached as Exhibit 4 to the Notice

27 ¹ TRPs represent the percentage of persons in the target who are exposed to all the television
28 commercial messages in the schedule. One TRP equals 1% of a given target population.

1 Program (“Short Form Consumer Notice”). The Publication Notice will appear in the following
 2 publications: *People, TV Guide, American Profile, Parade* and *USA Weekend*. In selecting these
 3 publications, Kinsella analyzed the relevant demographics of the consumer subclass to ensure that
 4 the notice is placed in publications where it is most likely to be seen by class members. The
 5 consumer Notice Program incorporates the same internet publication strategies as the TPP Notice
 6 Program described above.

7 An estimated 85.7% of Adults 35+ will be reached with an average estimated frequency of
 8 3.1 times, delivering 400,784,000 gross impressions.² An estimated 131,102,000 Adults 35+ will
 9 have an opportunity to see the Media Notice. Notice Program, p. 9. This reach and frequency is
 10 consistent with the standard in the notification industry and complies with both Rule 23 and due
 11 process. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998).

12 **III. PLAINTIFFS PROPOSED NOTICE PROGRAM MEETS THE REQUIREMENTS** 13 **OF RULE 23 AND DUE PROCESS**

14 Rule 23 requires that notice be given in a reasonable manner to all class members who
 15 would be bound by a proposed settlement prior to final approval of settlement. *See Fed. R. Civ. P.*
 16 23. Where, as here, notice of certification of a Settlement Class and notice of a proposed
 17 settlement are combined, the more detailed provisions contained in Rule 23(c)(2)(B) apply: “[t]he
 18 Court must direct to the class the best notice practicable under the circumstances, including
 19 individual notice to all members who can be identified through reasonable effort.” *Fed. R. Civ.*
 20 *Proc.* 23(c)(2)(B); *see also Molski v. Gleich*, 318 F.3d 937, 952 (9th Cir. 2003); Manual for
 21 Complex Litigation (Fourth) § 21.31 (2004) (when a judge simultaneously certifies a class action
 22 and preliminarily approves a class-wide settlement, notice is commonly combined). Publication
 23 notice is appropriate where direct notice cannot reasonably be provided. *See Mullane v. Central*
 24 *Hanover Bank & Trust Co.*, 339 U.S. 306, 317-18 (1950) (publication is an acceptable means of
 25 providing adequate notice for those whose names and addresses cannot be determined through
 26

27 ² Gross Impressions are the total number of times a media vehicle containing the notice is seen.
 28 This is a duplicated figure, as some viewers will see several media vehicles that contain the notice.

1 reasonable efforts (cited in *Brannon v. Household Int'l, Inc.*, 2007 U.S. App. Lexis 13056, at *4
2 (9th Cir. June 1, 2007).

3 With respect to the form of notice, notice of a proposed settlement:

4 Must concisely and clearly state in plain, easily understood language:
5 the nature of the action, the definition of the class certified, the class
6 claims, issues or defenses, that a class member may enter an
7 appearance through counsel if the member so desires, that he court
8 will exclude from the class any member who requests exclusion,
9 stating when and how members may elect to be excluded, and the
10 binding effect of a class judgment on class members under Rule
11 23(c)(3).

12 Fed. R. Civ. P. 23(c)(2).

13 Notice regarding a proposed settlement is adequate under both Rule 23 and due process
14 standards if it is “reasonably calculated, under all the circumstances to apprise interested parties of
15 the pendency of the action and afford them an opportunity to present their objections.” *Silber v.*
16 *Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994); *Stratton v. Glacier Ins. Adm’rs, Inc.*, 2007 U.S. Dist.
17 Lexis 9509, at *41 (E.D. Cal. Jan. 26, 2007) (“Notice is satisfactory in the context of settlement if
18 it fairly appraises class members of the terms of the settlement in sufficient detail to afford them the
19 opportunity to decide whether they should accept the benefits offered, opt out and pursue their own
20 remedies, or object to the settlement.”)

21 **A. The Method of Notice to the Three Subclasses is the Best Notice Practicable**

22 The Notice Program provides for individual notice to all TPP class members for whom
23 contact information is available. To supplement the provision of direct notice, the proposed Notice
24 Program also includes comprehensive and tailored publication notice programs to both TPPs and
25 consumers. Such paid media or publication notice is appropriate where direct notice cannot
26 reasonably be provided.

27 **B. The Form of the Notices Satisfy Rule 23 and Due Process**

28 Each of the proposed forms of notice include all of the features required by Rule 23 and due
process, including: (1) a description of the Classes; (2) a description of the Settlement; (3) a
description of the release provided by the Settled Classes; (4) the Final Fairness Hearing date; (5)
information about the Final Fairness hearing; (6) information about the deadline for filing

1 objections to the Settlement; (7) a statement of the deadline for filing requests for exclusion from
2 the Settlement; (8) the consequences of exclusion; (9) the consequences of remaining in the
3 Settlement Class; and (10) how to obtain further information about the Settlement. The attached
4 forms of notice were specifically designed to comply with the requirements of Rule 23 and they are
5 written in plain, easily understood language. See Notice Program Exhibits 2-6.

6 **IV. CONCLUSION**

7 For the foregoing reasons, Plaintiffs respectfully request the Court issue an order approving
8 the Notice Program.

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10 Dated: April 7, 2009.

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