

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

IN RE RESTASIS (CYCLOSPORINE
OPHTHALMIC EMULSION) ANTITRUST
LITIGATION

THIS DOCUMENT APPLIES TO:
ALL END-PAYOR ACTIONS

Case No. 18-MD-2819 (NG) (LB)

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

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I. INTRODUCTION

End-Payor Plaintiff Class Counsel¹ respectfully request that the Court enter an order providing a process for Class Counsel to seek compensation for work they have performed—and will perform—in this litigation that has benefitted any end-payors of Restasis that may opt out of the certified End-Payor Class and obtain their own recoveries. Under the proposed accompanying Set-Aside Order, a portion of any settlement or judgment obtained by a plaintiff who opts out of the End-Payor Class will be withheld and deposited into an escrow account. Payments from the account will be subject to Court approval, upon a showing by EPP Class Counsel of the benefits Class Counsel conferred, the legal work they performed, and the costs they incurred. Such set-aside orders have been entered in other antitrust and mass tort cases to provide for ensuring that Class Counsel are adequately compensated for efforts that redound to the benefit of other end-payors. In this way, attorneys can be fairly compensated for the costs borne and work performed for the common benefit of all plaintiffs and their counsel. Such orders are consistent with Rule 23 and the common benefit principles. *See Boeing Co. v. Van Gemert*, 444 U.S. 473, 478 (1980).

To date, EPP Class Counsel have conferred substantial benefits to members of the Class. Over the past two years, EPP Class Counsel have substantially advanced this litigation, having investigated and brought this action, successfully opposed motions to dismiss, conducted extensive discovery and related motion practice, obtained certification of the End-Payor Class, and retained numerous experts on issues of liability, causation, and damages, all of whom are

¹ Girard Sharp LLP; Lieff, Cabraser, Heimann & Bernstein, LLP; and the Joseph Saveri Law Firm as End-Payor Co-Lead Counsel; Zwerling, Schachter & Zwerling, LLP as End-Payor Liaison Counsel; Heins Mills & Olson, P.L.C. and Cafferty Clobes Meriwether & Sprengel LLP as members of the End-Payor Executive Committee.

prepared to testify at trial in this complex antitrust MDL. In class actions and mass actions generally, and pharmaceutical MDLs like this one specifically, certain class members (typically large third-party payors) sometimes opt out of the class and seek recovery on their own, outside the Rule 23 class mechanism. Class member MSP Recovery has, for example, already filed its own complaint. Courts faced with similar circumstances have invoked longstanding Supreme Court precedent and applied their equitable authority to ensure that counsel who have conferred a common benefit have an opportunity to apply for fair compensation for their work and expenditures.

Because no end-payors have opted out or—to EPP’s knowledge—obtained any recoveries in this action, entry of a set-aside order at this juncture, before the opt-out deadline and summary judgment, will be efficient and transparent. As set forth in more detail below, EPPs propose that the briefing deadlines and hearing date for this motion be set in coordination with EPPs’ forthcoming motion seeking the Court’s authorization for distribution of notice to the End-Payor Class.

II. FACTUAL BACKGROUND

On April 4, 2018, the Court appointed End-Payor Interim Co-Lead Counsel, Interim Liaison Counsel, and an Executive Committee to conduct this litigation on behalf of all Restasis end-payors seeking damages due to Allergan’s efforts to delay the introduction of a generic version of Restasis. ECF 51. Over the past two years, EPP Class Counsel have diligently pursued the interests of all class members. EPP Class Counsel investigated and drafted an 88-page complaint and opposed Allergan’s motion to dismiss, which the Court largely denied. ECFs 80 and 176. The parties then commenced extensive fact discovery in which EPP Class Counsel, together with other plaintiffs’ counsel, reviewed over eight million pages of documents produced by Allergan, reviewed tens of thousands of pages produced by third parties, and deposed more

than twenty fact witnesses. Declaration of Dena Sharp, ¶ 3. EPP Class Counsel have also litigated numerous discovery disputes that have resulted in the production of key documents that support end-payors' case against Allergan. *E.g.*, ECFs 157, 224. After a two-day evidentiary hearing, a full day of oral argument, and post-hearing briefing, the Court issued an order certifying the End-Payor Class. ECF 501.

EPP Class Counsel have engaged twelve experts submitting merits reports addressing a range of issues, the review and analysis of Allergan's opposition reports, and the preparation of rebuttal reports. Sharp Decl., ¶ 4. EPP Class Counsel took the lead in taking and defending many of the expert depositions, including several that occurred after the Direct Purchasers and Retailer Plaintiffs settled their claims in the litigation. *Id.* In addition, EPP Class Counsel also worked with end-payor-specific experts Dr. Richard Frank, Todd Clark, and Laura Craft during the class certification phase of the litigation. *See* ECF 501 at 14-15, 20-31, 33, 40 (class certification order citing the report of Dr. Frank, Mr. Clark, and Ms. Craft).

To date, EPP Class Counsel have collectively devoted tens of thousands of hours in attorney time and have advanced litigation costs well in excess of \$1 million. Sharp Decl., ¶ 5. One potential class member—MSP Recovery—has already filed an individual complaint, which was stayed pending the Court's determination of EPPs' class certification motion. *See* July 18, 2019, Minute Entry (adopting stipulation staying the MSP action, ECF 329). Aside from filing its complaint and then staying its action, MSP Recovery has not participated in any aspect of the litigation.

EPP Class Counsel will devote significant additional time and costs during the remainder of these proceedings. This will include additional expert discovery, dispositive motion practice, preparation for trial, and trial.

III. THE COURT SHOULD ENTER A SET-ASIDE ORDER

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

“A necessary corollary to court appointment of lead and liaison counsel and appropriate management committees is the power to assure that these attorneys receive reasonable compensation for their work.” *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 265 (E.D.N.Y. 2006) (quoting *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 653 (E.D. Pa. 2003)). The right to equitable compensation extends not only to the parties specifically represented by court-appointed counsel, but also to “those parties on whose behalf the work is performed and on whom a benefit has been conferred.” *Id.* (quoting *In re Worldcom, Inc. Sec. Litig.*, No. 02-CIV-3288, 2004 WL 2549682, at *2 (S.D.N.Y. Nov. 10, 2004) (Cote, J.)). To ensure the availability of funds to equitably compensate lead counsel, in courts across the country, including this District, it is “standard practice . . . to compensate attorneys who work for the common benefit of all plaintiffs by setting aside a fixed percentage of settlement proceeds.” *Id.*; see also *In re Rezulin Products Liability Litig.*, MDL No. 1348, 2002 WL 441342, at *2 (S.D.N.Y. Mar. 20, 2002) (Kaplan, J.) (entering set-aside order).

An MDL court’s authority to ensure equitable compensation for attorneys that have contributed to the common benefit of all plaintiffs “derives from the Supreme Court’s common benefit doctrine.” *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. M:05-CV- 01699-CRB, 2006 WL 471782, at *1 (N.D. Cal. Feb. 28, 2006) (citing *Boeing*, 444 U.S. 472; additional citations omitted); see also *Turner v. Murphy Oil USA, Inc.*, 422 F. Supp. 2d 676, 680 (E.D. La 2006) (“the U.S. Supreme Court over 125 years ago approved the common benefit doctrine, which provides that when the efforts of a litigant or attorney create, preserve, protect, increase, or discover a common fund, all who benefit from that fund must contribute

proportionately to the costs of the litigation.”). A federal court’s “inherent powers of equity” provide the ““foundation for the historic practice of granting reimbursement for the costs of litigation”” and allow the court to ensure ““justice as between a party and the beneficiaries of his litigation.”” *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1018 (5th Cir. 1977) (quoting *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 166-67 (1939)). The common benefit doctrine “reflects the traditional practice in courts of equity” and “rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant’s expense.” *Boeing*, 444 U.S. at 478. Thus, as one court explained, “[i]n accordance with the common benefit doctrine, it has been a common practice in the federal courts to impose set-asides in the early stages of complex litigation in order to preserve common-benefit funds for later distribution.” *Turner*, 422 F. Supp. 2d at 680.

While set-aside orders were developed—and mostly frequently entered—in mass tort cases,² the same principles apply in antitrust actions, like this one. In *In re Lidoderm Antitrust Litigation*, for example, the court held that “[a]s in the mass torts context, where lead plaintiffs’ counsel are responsible for pushing the cases forward, marshalling the evidence and discovery, and at least initial rounds of motion practice, EPP Class Counsel has performed the same tasks here for the benefit of *all* of the EPPs.” No. 14-md-02521-WHO, 2017 WL 3478810, at *1 (N.D. Cal. Aug. 14, 2017). And in the *Linerboard Antitrust Litigation*, the court ordered the creation of an escrow account “for the purpose of paying class plaintiffs’ Lead and Liaison Counsel and the

² *E.g.*, *In re Diet Drugs*, 582 F.3d 524, 546-48 (3d Cir. 2009); *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at *4-6 (E.D. Mo. Feb. 24, 2010); *In re Protegen Sling & Vesica Sys. Prods. Liab. Litig.*, No. 1:01-01387, 2002 WL 31834446, at *1 (D. Md. Apr. 12, 2002).

Executive Committees appointed by the Court . . . for work benefitting plaintiffs in all lawsuits filed . . . by former class members who opted out of the classes certified by the Court.” 292 F. Supp. 2d at 668 and 655-56 (citing *Air Crash Disaster, Diet Drugs, Protegen Sling, and Rezulin*). Similarly, in *Bextra*, the Court directed the defendants “to withhold the amount of [the common benefit attorneys’ fees] assessment from any amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the common benefit fund.” 2006 WL 471782, at *1; *see also Smilovits v. First Solar, Inc.*, No. CV2:12-cv-00555-DGC, 2019 WL 6841736, at *4 (D. Ariz. Dec. 16, 2019) (entering set-aside order in class action).

While EPPs will apply for an award of attorneys’ fees and reimbursement of costs from any classwide recovery they may achieve, EPPs will not receive payment for recoveries by end-payors outside the class action. In particular, they will not receive payment for any recoveries obtained by opt-out plaintiffs. Absent a set-aside order, EPP Class Counsel may not receive any fees or costs from an opt-out recovery derived from Class Counsel’s efforts. That EPP Class Counsel may obtain fees and costs for a class recovery does nothing to cure this potentially inequitable result. “[F]oreclosing those recoveries as a source of funding for the common benefit work would enrich the non-contributing individual plaintiffs unjustly at the expense of . . . the lead counsel.” *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 130 (2d Cir. 2010) (Kaplan, J., concurring). Accordingly, a set-aside order is fair and necessary to ensure that EPP Class Counsel have an opportunity to seek appropriate compensation for work and expenditures that benefit individual litigants.

EPP Class Counsel’s request is also consistent with the *Manual for Complex Litigation*, which explains that “MDL judges generally issue orders directing that defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay

national counsel.” *Manual for Complex Litigation*, Fourth, § 20.312; see also Duke Law Center for Judicial Studies, *Standards and Best Practices for Large and Mass-Tort MDLs*, Standard 5 (5H: “In imposing fee assessments, the transferee judge should promote fairness among counsel, compensate counsel who made the recovery possible, and suppress perverse incentives among non-performing counsel. This may include imposing fees on attorneys representing individual clients who opt out, yet use MDL discovery materials or otherwise enjoy the fruits of common benefit counsels’ efforts.”).³

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

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

At the outset of the litigation, the Court appointed EPP Class Counsel to prosecute this case on behalf of all end-payors. ECF 52. For more than two years, EPP Class Counsel have discharged the duties the Court assigned and have substantially advanced the litigation on behalf of all Restasis end-payors (including any class members who may elect to opt out). Any opt-out plaintiff will, for example, be able to take advantage of the Court’s motion to dismiss ruling, the extensive fact discovery that has been essential to prosecuting end-payors’ claims, and the fruits of multiple successful discovery motions. EPP Class Counsel have, among other things, reviewed hundreds of thousands of documents produced by Allergan and third parties and procured documents initially withheld as privileged. They have also proffered opening and

³ Available at https://law.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf (last visited May 18, 2020).

rebuttal reports from twelve experts, and have taken and defended expert depositions. The Court granted the EPPs' motion to exclude two of Allergan's class certification experts, Drs.

Mandadakakis and Hatch (ECF 145), whom Allergan also noticed as merits experts, thus casting a shadow on their potential testimony in the class or any opt-out trial.

In addition, opt-out plaintiffs have the benefit of the litigation strategy EPP Class Counsel have developed. As in *Linerboard*, “[i]n the favorable rulings of this Court . . . on the class action motions, the tag-along plaintiffs obtained the benefit of the imprimatur of those [rulings] on the theory of the case formulated by class plaintiffs and adopted in the tag-along actions.” 292 F. Supp. 2d at 659. This case involves the interplay of multiple complex issues, including the bases for Allergan's citizen petitions, the prosecution and litigation of the second-wave patents, the standards for FDA approval for Restasis, and the extent to which Allergan's conduct has caused a delay in the approval of generic Restasis—all issues that EPP Class Counsel have spent extensive time analyzing and developing. EPP Class Counsel also marshaled evidence concerning liability and impact issues common to all end-payors in support of the class certification motion. Any end-payor that opts out will thus obtain the benefit of “the theory of the case formulated by class plaintiffs.” *Id.* The size of any opt-out plaintiff's recovery will be directly tied to the strength of the case that EPP Class Counsel have developed over the past two years. And to be clear, the only question posed by this motion is whether EPP Class Counsel has “made a sufficient showing to warrant establishment of a framework to ensure that funds will be available to compensate them should the Court later determine such compensation is warranted.” *Id.* at 662.

EPP Class Counsel request that the Court enter the accompanying proposed order. The proposed order is substantially similar to the orders entered in *Lidoderm*, *Linerboard*, and other cases, and includes the following key features:

1. In the event an opt-out plaintiff obtains a settlement or judgment related to claims arising from Allergan's alleged efforts to delay the introduction of generic Restasis, Allergan shall set aside and place into a Restasis End-Payor Fee and Expense Account 12.5% of such settlement or judgment;
2. The set-aside funds shall be available, at the Court's discretion, to compensate EPP Class Counsel for their common benefit work, subject to a showing that EPP Class Counsel is entitled to such payments;
3. The common benefit work for which EPP Class Counsel shall be eligible for compensation from the Restasis End-Payor Fee and Expense Account includes the work outlined in the Court's April 4, 2018, order appointing EPP Class Counsel (ECF 52); and
4. Any set-aside funds not paid to EPP Class Counsel for common benefit work shall be remitted pro rata to the opt-out plaintiffs from whose settlements or judgments the set-aside funds were withheld.

EPP Class Counsel's proposal deploys the "preferable procedure" of having Allergan set aside funds before distribution to opt-out plaintiffs rather than requiring EPP Class Counsel to recover common benefit attorneys' fees and expenses from the opt-out plaintiffs directly. *Linerboard*, 292 F. Supp. 2d at 665 (collecting cases requiring set-asides); *see also Lidoderm*, 2017 WL 3478810, at *4 (ordering defendants to "set aside" a fixed percentage of opt-out settlements or recoveries). EPP Class Counsel's proposed set-aside order also includes key

features that will protect the interests of the opt-out plaintiffs. First, no payments will be made from the set-aside funds unless and until approved by the Court. *Lidoderm*, 2017 WL 3478810, at *4; *Linerboard*, 292 F. Supp. 2d at 669. Second, any set-aside funds not paid to Class Counsel for common benefit work will revert to the opt-out plaintiffs. *Lidoderm*, 2017 WL 3478810, at *4; *Linerboard*, 292 F. Supp. 2d at 667.

C. A Set-Aside of 12.5% is Appropriate

The 12.5% set-aside proposed is consistent with set-asides approved in other cases. *E.g.*, *Genetically Modified Rice*, 2010 WL 716190, at *6 (“Courts have ordered contributions between 9 and 17 percent in MDLs for common benefit work.”); *Turner*, 422 F. Supp. 2d at 683 (12%); *Lidoderm*, 2017 WL 3478810, at *4 (10 percent); *Protegen Sling*, 2002 WL 31834446, at *1 (9%); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1996 WL 900349, at *3-4 (E.D. Pa. June 17, 1996) (5% for costs and as much as 12% for fees); *Air Crash Disaster*, 549 F.2d at 1010-11 (lead counsel awarded 8%). It bears emphasizing that EPP Class Counsel do not propose to automatically recover 12.5% of any opt-out settlement or judgment, but will instead make a showing and seek Court approval for payment of the set-aside amount. Such a percentage is justified by the extensive work performed by EPP counsel as well as by the fact that no class member has devoted any time or effort to prosecuting their claims to date. They have relied exclusively on the work performed and benefits conferred by EPP counsel.

IV. Proposed Schedule for Resolution of the Motion

EPPs have contemporaneously filed a motion asking the Court to authorize the distribution of notice to the End-Payor Class pursuant to Federal Rule of Civil Procedure 23(c)(2)(B). That motion and the notices sent to the class provide proposed deadlines for class members to opt out of the End-Payor Class if they wish to do so.

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2020, I served the foregoing document via electronic mail in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules, and/or Item 3.C of your Honor's Individual Motion Practices.

/s/ Dena C. Sharp
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