

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

IN RE RESTASIS (CYCLOSPORINE
OPHTHALMIC EMULSION) ANTITRUST
LITIGATION

MDL No. 2819

18-MD-2819 (NG) (LB)

This Document Relates To:
All End-Payor Class Actions

**JOINT DECLARATION OF END-PAYOR CO-LEAD COUNSEL IN SUPPORT OF
END-PAYOR PLAINTIFFS' MOTIONS FOR FINAL APPROVAL AND FOR
ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS**

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Dena Sharp, Eric Fastiff, and Joseph Saveri hereby jointly declare as follows:

1. We serve as Co-Lead Counsel for the End-Payor Class in this matter. This declaration is submitted in support of both End-Payor Plaintiffs' Motion for Final Approval of Settlement, Approval of Plan of Allocation, and Order of Dismissal with Prejudice, and End-Payor Class Counsel's Motion for Attorneys' Fees, Expenses, and Service Awards. We have personal knowledge of the facts below and, if called upon to do so, could and would testify competently thereto.

I. THE SETTLEMENT IS FAIR AND REASONABLE.

2. Co-Lead Counsel Girard Sharp LLP, Loeff, Cabraser, Heimann & Bernstein LLP, and The Joseph Saveri Law Firm LLP are highly experienced in prosecuting end-payor pharmaceutical antitrust cases, and each firm has a track record of successfully litigating antitrust and other complex MDLs of all types. *See* ECF No. 18-2 (Memorandum of Law in Support of Motion to Appoint Counsel and Consolidate). They have served in leadership positions and successfully prosecuted other pharmaceutical end-payor actions. For example, Loeff Cabraser and The Joseph Saveri Law Firm served as co-lead counsel in *In re Cipro I and II Cases*, which—after appeals to the California Supreme Court—resulted in a settlement exceeding \$350 million. Girard Sharp served as co-lead counsel, and The Joseph Saveri Law Firm as liaison counsel, in *In re Lidoderm Antitrust Litigation*, which settled for \$104.75 million dollars and at the time was the largest settlement in federal court on behalf of a pharmaceutical end-payor class.

3. Co-Lead Counsel are qualified to evaluate the benefits of settling this case as opposed to proceeding to trial. They have litigated this case for over four years. Through their experience in this matter, in similar pharmaceutical antitrust litigation, in other antitrust actions,

and in class actions generally, Co-Lead Counsel are thoroughly familiar with the relative risks and rewards of settlement in relation to trial.

4. Co-Lead Counsel believe the settlement is fair, reasonable, and adequate. Other end-payor pharmaceutical antitrust class actions have settled for significantly less than \$30 million. *E.g. In re: Prograf Antitrust Litigation*, Case No. 1:11-md-02242, Order Granting Final Approval of EPP Settlement, ECF No. 712 (D. Mass.) (\$13.3 million); *In re: Skelaxin (Metaxalone) Antitrust Litigation*, Case No. 1:12-md-02343, Order Granting Final Approval of EPP Settlement, ECF No. 950 (E.D. Tenn.) (\$11 million); *In re DDAVP Antitrust Litigation*, Case No. 05-cv-02237, Order Granting Final Approval of EPP Settlement, ECF No. 178 (S.D.N.Y.) (\$4.75 million).

5. Aside from providing substantial relief, the settlement will allow the End-Payor Class to avoid the substantial risks that proceeding through trial to verdict would have posed. In addition to establishing that Allergan committed fraud on the Patent Office, filed sham citizen petitions with the FDA, and held a monopoly in the market for Restasis, EPPs would have had to convince the jury that Allergan's conduct caused a delay in the market entry of generic versions of Restasis and led to EPP overcharges. At the time of settlement (before any generics had been approved) Allergan was prepared to argue to the jury that its conduct had no effect on the market for Restasis because none of its would-be generic competitors had obtained FDA approval, though their abbreviated new drug applications (ANDAs) had been pending for years. As such, Allergan would have told the jury that it was the generic manufacturers' inability to obtain FDA approval, and not Allergan's conduct, that delayed the entry of generic Restasis. Similar issues were fatal in the *Nexium* pay-for-delay case, where the jury returned a verdict for the defense based on causation issues. *See In re: Nexium (Esomeprazole) Antitrust Litig.*, No. 1:12-md-

02409-WGY, ECF No. 1383 (D. Mass. Dec. 5, 2014) (verdict form). And even if EPPs won at trial, Allergan signaled its intention to appeal any adverse verdict (and class certification and any summary judgment and *Daubert* motions it lost). The risks of continued litigation thus counsel for settlement.

6. The reaction of the Class to the Settlement has also been favorable. The May 3, 2022, deadline for Class Members to exclude themselves from the Class has passed, and only five exclusions requests have been received from the following third-party payor Class Members: Accusoft; Central Painting & Sandblasting, Inc.; Donegal Insurance Group; Citation Oil & Gas Corp.; and U.S. Bancorp. Ex. 1 (Declaration of Eric Miller), ¶ 4. No natural persons have opted out of the Class.

7. Given the size of the recovery and potential for an unfavorable trial or a reversal on appeal, Co-Lead Counsel respectfully submit that the settlements are fair, reasonable, and adequate.

II. WORK PERFORMED BY CLASS COUNSEL

8. From the inception of the litigation through completion of summary judgment briefing more than three years later, counsel for the end-payers actively litigated this case against two large defense firms. Over the course of the case, class counsel briefed, argued, and obtained rulings denying Allergan's motions to dismiss and granting EPPs' motion to class certification, the latter after a two-day evidentiary hearing and another day of oral argument. Class counsel also pursued discovery of Allergan, responded to Allergan's discovery of the EPP class representatives, reviewed the millions of pages of documents produced by Allergan and its generic competitors, deposed Allergan's fact and expert witnesses, retained and assisted experts, prevailed on key discovery disputes, moved for summary judgment and opposed Allergan's related motions, and appeared at multiple mediation sessions.

9. As explained in further detail below, each phase of the litigation required significant expertise and expenditure of class counsel's substantial time and resources.

A. Investigation and Complaint Filing

10. On November 15, 2017, American Federation of State, County and Municipal Employees District Council 37 Health & Security Plan (DC 37) filed the first Restasis antitrust action against Allergan. *American Federation of State, County and Municipal Employees District Council 37 Health & Security Plan v. Allergan, Inc.*, No. 1:17-cv-06684-NG-LB (E.D.N.Y.). Prior to filing, DC 37's counsel researched and investigated the factual and legal issues in the litigation, including the voluminous patent histories and patent litigation records. EPPs and DPPs filed additional complaints in this and in other districts across the country.

11. On January 31, 2018, the Judicial Panel on Multidistrict Litigation centralized all pending Restasis actions before this Court. ECF No. 1. On April 4, 2018, the Court resolved the contested Rule 23(g) motion and appointed as End-Payor Interim Co-Lead Counsel: Eric B. Fastiff of Lieff, Cabraser, Heimann & Bernstein, LLP; Dena C. Sharp of Girard Sharp LLP; and Joseph R. Saveri of the Joseph Saveri Law Firm, LLP. ECF No. 51.¹ The Court also appointed Dan Drachler, then of Zwerling, Schachter & Zwerling, LLP, as End-Payor Interim Liaison Counsel. *Id.* The Court appointed Renae D. Steiner of Heins Mills & Olson, P.L.C. and Ellen Meriwether of Cafferty Clobes Meriwether & Sprengel LLP, to the End-Payor Executive Committee. *Id.*

12. Following transfer of all pending Restasis actions to this Court, the Court separately consolidated the end-payor actions and the direct purchaser actions. EPPs filed a consolidated amended complaint (CAC) on April 4, 2018. ECF No. 53. Before filing the CAC,

¹ At the time, Girard Sharp LLP was named Girard Gibbs LLP, and the Joseph Saveri Law Firm, LLP, was named the Joseph Saveri Law Firm, Inc.

class counsel further investigated EPPs' claims, including each of the state laws claims asserted by the plaintiffs named in the CAC.

B. Motions to Dismiss

13. Allergan moved to dismiss the CAC. ECF Nos. 111, 114. Allergan argued that the CAC did not adequately allege that Allergan's conduct delayed generic competition or that Allergan's citizen petitions were anticompetitive shams. EPPs collaborated with the DPPs to oppose these arguments and prepare for oral argument. Allergan separately argued that certain of EPPs' state-law claims failed as a matter of law, which EPPs alone briefed and argued.

14. On September 18, 2018, the Court denied Allergan's motion to dismiss, and on November 13, 2018, the Court largely upheld the EPPs' state law claims that Allergan had challenged. ECF Nos. 146, 176. On December 20, 2018, EPPs filed a Corrected First Amended Consolidated Class Action Complaint. ECF No. 210. Allergan filed an additional motion to dismiss that continued to challenge certain of EPPs' state law claims, which was resolved by agreement after further briefing and argument. ECF Nos. 226, 257.

15. The parties began initial discovery while Allergan's initial motion to dismiss was pending. In April 2018 Allergan produced (a) materials exchanged between the parties and/or filed with the Court in *Allergan, Inc. v. Teva Pharmaceuticals USA, et al.*, No. 2:15-cv-1455-WCB (E.D. Tex.), including pleadings, documents produced, other discovery materials, and expert reports; (b) deposition and trial transcripts from that case; and (c) the documents produced to the U.S. Senate in response to a November 7, 2017 demand. *See* ECF No. 13. DPPs and EPPs collaborated to review, index, and analyze these initial productions.

16. EPPs and DPPs also negotiated numerous pretrial stipulations with Allergan: a Stipulated Confidentiality Order, ECF No. 68; a Stipulated Expert Discovery Protocol, ECF No. 69; a Stipulated Privilege Protocol, ECF No. 78; and an ESI Protocol, which was largely

stipulated save for two disputes that the parties briefed and the Court resolved in Plaintiffs' favor. *See* ECF Nos. 103, 108.

C. Case Management

17. Over the course of the litigation, the Court held twelve status conferences or hearings involving EPPs. At the conferences, the parties discussed the overall conduct of the litigation, the progress of discovery, the case schedule, and any pending disputes. Before each conference the parties jointly submitted case management conferences statements. EPPs frequently took the lead in preparing, finalizing, and filing the statements.

18. In addition to the negotiated priority document requests, EPPs and DPPs collectively served three sets of interrogatories on Allergan and five sets of requests for production of documents.

19. Plaintiffs jointly met and conferred with Allergan concerning Allergan's responses to Plaintiffs' discovery requests. In particular, EPPs, in collaboration with DPPs, negotiated search terms and custodians. Negotiations were extensive, resulting in a set of letters to the Court on July 19, 2018, and a motion to compel in September 2018. ECF Nos. 118-122, 145. EPPs took the lead in arguing both issues.

D. Document Review

20. All told, Allergan produced nearly 690,000 documents, totaling over 7 million pages. Subpoenaed non-parties produced more than 10,000 additional documents, totaling over 130,000 pages.

21. DPPs and EPPs reviewed the documents in teams divided by subject area. Each team developed work product tailored to its assignment. For example, the Patent Team drafted an extensive white paper detailing the history of all patents ostensibly protecting Restasis since the drug's approval. The Economics Team reviewed and analyzed generic entry forecasts from

Allergan and the generic manufacturers and worked with experts to identify the most suitable benchmarks for projecting generic Restasis sales and price. In all, DPPs and EPPs collaborated on eight different subject-matter teams focused on a central aspect of the case.

22. Once prospective deponents were identified, reviewers assembled “deposition kits” that provided background on each person, their involvement in the case, and key documents. Co-Lead Counsel worked directly with the reviewers to refine the kits, prepare for depositions, and strategize about deposition objectives.

23. Co-Lead Counsel closely monitored the document review, tracking the progress of each reviewer to ensure that the time billed by the reviewers was commensurate with the number and type of documents being reviewed.

24. DPPs and EPPs had weekly calls coordinating the teams’ review and analyses, the progress of discovery negotiations, and other case management issues. When there were few or no open issues to discuss, the scheduled weekly calls were canceled.

E. Privilege Disputes

25. Allergan’s in-house counsel were key actors in the conduct giving rise to plaintiffs’ claims, in that it was Allergan’s in-house counsel who submitted the patent applications that EPPs alleged were fraudulent and signed the citizen petitions that EPPs alleged were anticompetitive shams. Allergan also retained a variety of outside counsel and consultants to assist with issues related to the conduct alleged in the litigation. As a result, Allergan’s privilege logs included tens of thousands of entries that required review and discovery spawned a large number of complex privilege disputes.

26. Plaintiffs challenged Allergan’s privilege claims in at least five separate letters, motions, and filings. ECF Nos. 188, 243, 247, 285, 470. EPPs coordinated with DPPs to brief these issues, and EPPs generally took the lead at argument. One of the disputes concerned

whether Allergan had waived privilege as to documents shared with certain of its consultants—the Court held that it had. ECF No. 224. Another concerned whether Allergan’s communications with the St. Regis Mohawk Tribe, before Allergan transferred patents to the Tribe, were covered by the common interest privilege—the Court held that they were not. ECF No. 541. Privilege issues continued to arise all the way through summary judgment. *See, e.g.*, ECF No. 586 (arguing that Allergan was precluded from asserting a defense due to its privilege assertions). EPPs, along with DPPs, sent a series of letters to Allergan challenging privilege claims as to specific documents and categories of documents, which Allergan responded to by withdrawing many of its privilege claims. Plaintiffs’ efforts and persistence ultimately uncovered a systemic failure on the part of Allergan to appropriately review documents for privilege, which resulted in Allergan re-reviewing approximately 18,000 documents. The parties engaged in the time-intensive process of preparing a detailed “redfern” chart setting forth their positions concerning a sample of the re-reviewed documents.

F. Discovery of End-Payor Plaintiffs

27. Allergan served on EPPs extensive document requests and interrogatories. Allergan later served multiple sets of additional interrogatories and document requests. Co-Lead Counsel researched Second Circuit law applicable to a number of issues, including the production of attorney retention agreements and documents related to drugs other than Restasis that Allergan claimed were in the same relevant market. Class counsel conferred with their clients regarding Allergan’s requests, and EPPs served their responses and objections to interrogatories and requests for production. Class counsel also collected documents from their clients, reviewed them for responsiveness and privilege, and facilitated their production.

28. Co-Lead Counsel and certain Executive Committee counsel took the lead in negotiating the scope of Allergan’s document requests and prepared numerous letters to Allergan

regarding EPPs' objections to the requests. While the parties were able to resolve most of their disputes by meeting and conferring, Allergan filed two motions to compel. ECF No. 144, 191. Allergan sought discovery into EPPs' premiums and employer contributions, which the Court denied. ECF No. 157. Allergan also sought contracts from 1199 SEIU, which the Court ultimately found moot based on agreement of the parties.

29. Allergan also served Rule 30(b)(6) deposition notices on each of the class representatives. Co-Lead Counsel worked with members of the Executive Committee to prepare clients for depositions. Depositions of the EPPs took throughout the first half of 2019. With the assistance of Co-Lead Counsel, class counsel prepared and defended the depositions of each of the class representatives.

30. Allergan also served lengthy contention interrogatories. EPP coordinated with DPPs to marshal the most compelling evidence—including testimony from Allergan's fact witnesses—to include in their responses. On August 14, 2019, EPPs and DPPs served a 47-page response.

G. Depositions

31. Plaintiffs also served Rule 30(b)(1) and 30(b)(6) deposition notices on Allergan and its corporate officers. Plaintiffs ultimately deposed 22 fact witnesses, including 12 current and former employees of Allergan, 2 consultants, and 8 witnesses from generic companies.

32. EPPs and DPPs collaborated to prepare outlines and identify documents to be used during the depositions. Doing so required reviewing documents flagged as highly relevant that related to the deponents, and reviewing the deponents' custodial files. EPPs took the lead in questioning for certain depositions, including David Pyott, Damon Burrows, Wayne Talton, Frederik Defesche, and Sasank Kunadharaju. DPPs and EPPs divided the questioning for other witnesses, including Aziz Mottiwala, David LeCause, and Dwight Moxie. In instances where

DPPs led the deposition examination, EPPs were also present to assist the questioner, ask follow-up questions (for example, in the depositions of Laura Wine and Sesha Neervannan), and ensure that all critical issues were covered.

33. EPPs assigned lawyers to deponents based on the lawyer's experience and familiarity with the issues the witness was expected to testify about. All of the fact depositions taken by the EPPs were taken by Co-Lead Counsel or members of their firms, as EPP counsel anticipated that the deposition video was likely to be used at trial in lieu of live testimony for most witnesses, and Co-Lead Counsel intended to serve as lead trial counsel for the End-Payor Class. As a result of Plaintiffs' careful preparation, the depositions yielded statements and admissions that would have played a significant role in Plaintiffs' case-in-chief at trial.

H. Class Certification and Related Proceedings

34. EPPs filed their opening motion to certify the End-Payor Class in April 2019. ECF No. 396. In support of their motion for class certification, EPPs submitted reports from Dr. Richard G. Frank and Laura Craft, experts in economics and the pharmaceutical industry, respectively. Dr. Frank created a model showing that EPPs suffered injury and were damaged on a classwide basis. Ms. Craft opined that the class was ascertainable.

35. Preparing the motion for class certification was a significant undertaking, particularly because Allergan was poised to argue that recent appellate court decisions—most prominently the First Circuit's decision in *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018)—precluded certification. Anticipating those arguments, EPPs worked diligently to create the detailed factual record to support their assertions of classwide injury, and worked with Dr. Frank and Ms. Craft to help them prepare their reports.

36. Allergan opposed class certification, arguing that EPPs had not met their burden under Rule 23(b)(3). ECF No. 399. Allergan deposed Dr. Frank and Ms. Craft and submitted

expert reports of Drs. James W. Hughes, Kathryn Masselam Hatch, and Kyriakos (Ken) Mandadakis in support of their opposition. Among other topics, Allergan argued that the modest uptake of the generic version of Restasis in Canada suggested that there were too many uninjured class members in the class for certification to be appropriate. Because this issue had been raised for the first time during the class certification briefing, class counsel worked quickly to analyze the relevant facts and prepare responsive arguments.

37. EPPs deposed Allergan's experts and submitted a reply brief, supported by rebuttal reports from Dr. Frank and Ms. Craft, as well as Todd Clark, an expert in international pharmaceutical marketing and regulatory matters. ECF No. 401.

38. To respond to purportedly new material in EPPs' reply brief, Allergan filed a surreply, supported by a surrebuttal report from Dr. Hughes, its economist. EPPs filed a response, Allergan filed an opposition, and EPPs filed a further response. ECF Nos. 403, 430. The Court also asked the parties to brief the extent to which there were factual issues that the Court must resolve as part of its class certification analysis and whether it should hold an evidentiary hearing.

39. EPPs also moved to exclude two of Allergan's experts pursuant to *Daubert*. ECF Nos. 433, 435. EPPs argued that the expert reports of Dr. Mandadakis and Dr. Hatch were not the products of reliable methods and were inadmissible for other reasons.

40. On September 26 and 27, 2019, the Court held a two-day evidentiary hearing. EPPs extensively prepared to cross-examine Allergan's experts and assisted their own experts in advance of the hearing as well. At the hearing, EPPs conducted direct examination of all three of their class certification experts and cross-examined all three of Allergan's experts. On October

23, 2019, the Court held oral argument for several hours on the class certification and *Daubert* motions.

41. After the hearing, the Court also requested additional briefing on specific state law issues, which the parties provided. ECF Nos. 448, 464, 468.

42. On May 5, 2020, the Court certified the EPP class and excluded two of Allergan's experts. ECF Nos. 501, 502. The Court's order remains one of only a handful of post-*Asacol* decisions to certify a class that includes consumers as well as third-party payors. Allergan filed a petition with the Second Circuit seeking interlocutory review under Federal Rule of Civil Procedure 23(f), which EPPs opposed. The Second Circuit denied the petition. ECF No. 540.

43. EPPs moved to disseminate class certification notice to the End-Payor Class. Allergan opposed the notice plan and argued that EPPs were required to provide direct mail notice to each class member. After extensive briefing and argument, and further supplementation of the proposed method of providing notice, the Court granted EPPs' motion to authorize distribution of notice, rejecting Allergan's argument. ECF Nos. 510, 513, 515, 644, 646, 647, 664.

I. Merits Expert Discovery

44. On August 19, 2019, EPPs and DPPs jointly served merits expert reports authored by ten experts: Dr. Andrew Calman (ophthalmology), Dr. Daniel Bloch (statistics), Dr. David Kessler (FDA regulatory matters), Mr. Edward Lentz (patent prosecution), Mr. Greg Regan (accounting), Dr. Justin Hanes (pharmacology), Dr. Roger Williams (FDA ANDA review), Dr. Thomas McGuire (pharmaceutical economics and market analysis), Mr. Todd Clark (international regulatory matters), and Dr. Uwe Christians (drug development and bioequivalence). EPPs worked closely with these experts, serving as the primary handlers for Mr. Regan, Dr. Williams, Dr. McGuire, and Mr. Clark, and as the primary points of contact for

portions of the testimony of Dr. Hanes and Dr. Bloch. EPPs also separately served the report of Dr. Richard Frank (damages) and adopted the class certification reports from Ms. Craft as merits reports.

45. On November 8, 2019, Allergan served responsive merits reports from eleven experts: Dr. Sumanth Addanki, Dr. Jonca Bull, Dr. D. Bruce Burlington, Dr. Rahul Guha, Dr. Frederic Lallemand, Dr. Martin L. Lee, Dr. Nancy J. Linck, Dr. Robert J. Noecker, Mr. Stan North, Dr. Hatch, and Dr. Mandadakis. EPPs and DPPs coordinated to depose six of these experts, with EPPs taking the lead on Dr. Burlington, Dr. Addanki, and Dr. Guha. Having successfully excluded the opinions of Dr. Hatch and Dr. Mandadakis at class certification, EPPs did not re-depose them.

46. On December 20, 2019, DPPs and EPPs jointly served rebuttal reports from nine experts: Dr. Bloch, Dr. Calman, Dr. Christians, Mr. Clark, Dr. Hanes, Dr. Kessler, Mr. Lentz, Dr. McGuire, and Dr. Williams. As before, EPPs were the leads for work with Dr. Williams, Dr. McGuire, and Mr. Clark, and for portions of the reports of Dr. Hanes and Dr. Bloch.

47. DPPs and EPPs jointly helped Dr. Christians prepare for his deposition, and DPPs took the lead in defending the deposition. DPPs then settled in January 2020, and EPPs defended the depositions of Dr. Bloch, Dr. McGuire, Dr. Calman, Dr. Kessler, Mr. Clark, Mr. Lentz, and Dr. Williams.

48. Before expert depositions could be completed, the COVID-19 pandemic struck, causing postponements. After the Court ruled on EPPs' class certification motion in May 2020, expert discovery resumed.

49. On June 22, 2020, Allergan withdrew the merits reports of Dr. Hatch and Dr. Mandadakis, and Allergan served amended reports from these experts, as well as a new report by Dr. Guha and reports from Dr. Johanna Choremis and Dr. Henrique Reis.

50. On August 7, 2020, EPPs served responsive reports by Mr. Clark, Ms. Craft, and Dr. Frank. On September 1, 2020, EPPs served a responsive report from Dr. Kenneth Roberts, who opined on Teva's generic Restasis in Canada in response to Dr. Mandadakis, Dr. Choremis, and Dr. Reis. EPPs also deposed Dr. Choremis and Dr. Reis and defended the depositions of Dr. Hanes, Ms. Craft, and Mr. Clark.

J. Summary Judgment

51. In September 2020, the parties filed summary judgment motions. EPPs moved for partial summary judgment on monopoly power and certain other elements of their antitrust claims. Allergan moved for summary judgment on causation and *Noerr-Pennington* immunity. The parties cross-moved for summary judgment on fraud on the Patent Office.

52. Allergan's motion was 100 pages long, included over 460 exhibits, and was supported by a 157-page statement of material facts, requiring substantial time and resources to oppose. EPPs' opposition brief exceeded 100 pages and their response to Allergan's statement of material facts (including their own statement of material acts) was 326 pages.

53. EPPs filed four separate motions to exclude expert testimony pursuant to *Daubert*, directed at Dr. Bull and Dr. Lallemand; Dr. Linck; Dr. Guha; and Dr. Mandadakis, Dr. Choremis, Dr. Reis, and Dr. Hatch. Allergan filed five separate motions, directed at Dr. Christians and Dr. Kessler; Mr. Clark and Dr. Frank; Ms. Craft; Dr. Williams; and Dr. Lentz, Dr. Calman, Dr. Bloch, and Dr. Hanes.

54. The parties filed oppositions and replies over the course of the next few months, completing briefing in January 2021. *See* ECF Nos. 582, 586, 588, 589, 590, 591, 637 (summary

judgment); ECF Nos. 596, 598, 599, 605, 607, 609, 612, 613, 614, 615, 616, 626, 627, 628, 629, 630, 631, 632, 634 (*Daubert*). The parties also consulted extensively with nonparties and former parties regarding confidentiality issues and filed detailed motions to seal and oppositions. ECF Nos. 653, 692.

K. Settlement

55. EPPs and Allergan engaged in arm's-length negotiations over the course of two years, and explored settlement numerous times, including in three mediations: on September 23, 2019, before Magistrate Judge Lois Bloom; on March 25, 2020, before former Chief Magistrate Judge Edward A. Infante; and on April 26, 2021, again before Judge Infante. Following the last mediation, EPPs and Allergan continued to negotiate and eventually reached agreement, about which EPPs notified the Court on May 28, 2021. ECF No. 695.

56. EPPs prepared the settlement agreement. After detailed negotiations, the parties agreed on final settlement terms, and EPPs moved for preliminary approval and approval of class notice on October 8, 2021. After revisions to the class notice requested by the Court, the Court granted preliminary approval on January 18, 2022.

57. On February 2, 2022, Allergan certified that it had provided notice on federal and state officials as required by the Class Action Fairness Act (CAFA), 28 U.S.C. § 1715(b). ECF No. 720.

III. CLASS COUNSEL'S LODESTAR

58. Class counsel have prosecuted this litigation solely on a contingent-fee basis and have at all times risked that they would not receive any compensation for prosecuting claims against the Allergan. While class counsel devoted their time and resources to this matter, they have foregone the option of other opportunities for which they may have been compensated.

59. Class counsel spent 33,412.55 hours prosecuting this case on behalf of the End-Payor Class, with a resulting lodestar of \$19,624,592.75. Of the total hours spent, 89% was spent by Co-Lead Counsel and Liaison Counsel, with the remaining 11% of hours billed by Executive Committee and other class counsel firms. Co-Lead Counsel divided tasks among themselves to avoid duplication. Girard Sharp, for example, took the lead working with Dr. Frank and on related class certification issues. Loeff Cabraser performed the bulk of the work (including document review and depositions) related to EPPs' citizen petition claims. Joseph Saveri Law Firm presented oral argument at the class certification hearing and responded to the hundreds of pages of Allergan's statement of facts at summary judgment. Zwerling undertook the time-intensive process of handling redactions throughout the course of the litigation, handled administrative matters, and took the lead on certain briefs (such as motions to exclude numerous of Allergan's experts).

60. All three Co-Lead Counsel collaborated on overall case strategy and drew on their collective experience. We generally staffed meetings and hearings as leanly as possible but in accordance with the needs of the case and skill set of available attorneys. Liaison Counsel supported Co-Lead Counsel on key projects including taking the lead on sealing issues, filing papers on behalf of EPPs and DPPs, certain class certification research and expert work, *Daubert* briefing and oral argument for certain experts, and oversight of class counsel's time and expense submissions.

61. Below is a summary of number of hours worked by each firm and the firm's total lodestar (based on historic rates).

Firm	Hours	Lodestar
Girard Sharp LLP	9,736.20	\$5,190,696.75
Lieff, Cabraser, Heimann, & Bernstein, LLP	7,563.50	\$4,851,366.25

Firm	Hours	Lodestar
Joseph Saveri Law Firm, LLP	5,600.50	\$3,329,726.25
Zwerling, Schachter & Zwerling, LLP	6,784.20	\$4,084,372.25
Cafferty Clobes Meriether & Sprengel	700.60	\$552,957.50
Edelson & Associates	788.20	\$467,317.50
Grant & Eisenhofer P.A.	41.40	\$37,590.00
Gustafson Gluek PLLC	432.80	\$204,672.50
Heins Mills & Olson P.L.C.	892.90	\$461,905.00
Hilliard & Shadowen LLP	62.80	\$23,457.50
Kroub, Silbersher & Kolmykov, PLLC	65.15	\$50,491.25
Safirstein Metcalf LLP	252.20	\$144,030.50
Miller Shah LLP	90.40	\$71,386.00
Wexler Boley & Elgersma LLP	401.70	\$154,623.50
TOTAL:	33,412.55	\$19,624,592.75

62. Declarations submitted by each firm (1) identify the attorneys and staff members who worked on the case and the tasks they performed, (2) describe the amount of time spent by each of the firm's attorneys and staff members, and the hourly rates for each of them, and (3) provide an itemization of the expenses incurred by the firm.

63. The firms other than Co-Lead Counsel and Liaison Counsel worked on discrete tasks at Co-Lead Counsel's direction. Cafferty Clobes Meriwether & Sprengel, for example, took the lead on plaintiff discovery along with Edelson & Associates, who also worked on plaintiff discovery and document review related to citizen petition issues. Heins Mills & Olson reviewed key documents (*e.g.*, pharmacy benefit management agreements and profit and loss statements), assisted lead counsel with Dr. Frank's reports, took the deposition of Allergan's economic expert, and assisted Co-Lead Counsel's preparation for the evidentiary hearing on class certification. Other firms reviewed documents under the supervision with Co-Lead Counsel. In addition, non-lead counsel representing the named plaintiffs provided input into EPPs' responses

to discovery requests propounded by Allergan, assisted with the collection of documents from their clients, and assisted in preparing their clients for their depositions. The non-lead firms do not seek compensation for any significant amount of time spent on litigation strategy, participating on conference calls, or unnecessary “read and review” time.

64. Class counsel also took steps to ensure that the time submitted reflects only work reasonably performed for the benefit of the End-Payor Class. *First*, each firm kept contemporaneous records of their time and has reviewed their daily time records to eliminate inefficiencies. Co-Lead Counsel and Liaison Counsel also reviewed the time records. Work that did not benefit the End-Payor Class—such as intra-firm administrative tasks or “read and review” time beyond what is necessary—is not included in class counsel’s lodestar. Class counsel are prepared to submit their detailed time records for in camera review if requested by the Court. *Second*, time related to the JPML transfer motion or the appointment of interim lead counsel was excluded entirely from each firm’s lodestar. *Third*, each firm’s lodestar includes only a maximum of twenty-five hours for drafting their client’s initial complaint (except firms that contributed to the first-filed complaint); any additional complaint-related time was excluded to avoid billing the Class multiple times for similar work performed.

65. Class counsel’s requested fees are based entirely on hours worked by class counsel. Any fees owed to non-class counsel as a result of a client referral agreement will in no way affect the amount recovered by the End-Payor Class.

IV. LITIGATION EXPENSES

66. Class counsel also seeks the reimbursement of out-of-pocket expenses. The expenses fall into two categories: litigation fund payments and firm-specific costs. In addition, EPPs seek payment from the settlement fund of the amounts incurred in connection with sending notice to the class and processing claims.

A. Litigation Fund Payments

67. Co-Lead Counsel, Liaison Counsel, firms on the Executive Committee, and other counsel contributed to a litigation fund that was used to pay costs common to the class. Class counsel's individual declarations set forth their respective litigation fund contributions. In total, EPPs spent \$3,689,345.86 from the litigation fund (net of any reimbursements they received from other plaintiff groups and including one outstanding invoice) and seek reimbursement of that amount.

68. The primary expenses paid from the litigation fund include:

Category	Amount Incurred
Experts	\$3,094,688.17
Pharmaceutical industry data from IQVIA	\$263,001.38
Document hosting services	\$124,010.66
Deposition transcripts	\$52,782.36
Outstanding deposition transcript invoices	\$26,932.14
Mediation	\$12,941.41

69. The two largest general categories of expenses paid from the litigation fund went toward (1) pharmaceutical industry data and (2) experts. EPPs purchased data from IQVIA, a pharmaceutical industry firm, showing Restasis sales on a very detailed level and products that Allergan asserted, or seemed likely to assert, were in the same relevant market as Restasis. These datasets formed the backbone of much of EPPs' damages and market power expert opinions and cost over \$260,000.

70. The vast majority of the expenses paid from the litigation fund were used to pay the numerous experts retained by EPPs for class certification and trial. As the Court previously recognized in approving the DPPs' requested expenses, expenses in this proceeding are significant largely because of "the expert-driven nature of this complex case." ECF No. 562 at

11. That is all the more true as it relates to the EPPs and explains why EPPs' expense request is larger than that of the DPPs. With respect to class certification, for example, the DPPs offered the opinions of one expert. In contrast, to support the record on class certification, EPPs offered opinions of three experts: Dr. Richard Frank, who offered opinions on classwide injury and damages; Laura Craft, who offered opinions relevant to ascertainability and the pharmaceutical industry generally; and Todd Clark, who responded to Allergan's experts' opinions concerning the extent to which the marketplace performance of Restasis in Canada was relevant to estimating how much of the market generic Restasis would have captured in the United States.

71. The need for multiple experts—and the depth and scope of their work—arose largely from the state of law on certification of end-payor classes in pharmaceutical antitrust cases, and the arguments Allergan made (and experts it offered). EPPs offered these same opinions (modified to reflect the additional progress in the case) at the merits stage. Many other experts were jointly retained by EPPs and other plaintiff groups, and the costs spread among those groups. Despite the cost savings achieved through this coordination, the sheer number of issues—such as the validity of numerous patents, the legitimacy and impacts of Allergan's citizen petitions, and the approval date for generic Restasis absent Allergan's alleged conduct—required substantial expert work and numerous expert reports. EPPs also incurred additional expenses working with experts to prepare their summary judgment motions and oppose those Allergan filed.

B. Settlement Notice and Administration

72. Class counsel retained A.B. Data, an experienced notice administrator with expertise in pharmaceutical antitrust class actions, to distribute notice to the end-payor class and process claims class members submit. As detailed in the accompanying declaration of Eric Miller concerning completion of the notice program, A.B. Data (1) provided direct mail notice to tens

of thousands of class members, (2) implemented an extensive publication notice program, and (3) operated a website and toll-free number to field class members inquires. *See* ECF No. 725. As class members have submitted claims, A.B. Data has processed those claims and conducted necessary follow-ups. The costs incurred by A.B. Data as of April 30, 2022, are \$496,177.86 *See* Ex. 1 (Declaration of Eric Miller), ¶ 5.

73. In addition to the costs already incurred, A.B. Data will incur significant expenses over the next six months. The deadline for class members to submit claims is August 11, 2022, and in similar cases a significant portion of the claims are generally received close to the deadline. A.B. Data will need to continue processing and verifying those claims as they come in, engaging in follow-up with claimants as necessary, determine each class members' respective payment, distribute payment, and follow-up with class members who fail to cash their checks. At this juncture, A.B. Data anticipates that this work will result in costs of approximately \$250,000. *See* Ex. 1 (Declaration of Eric Miller), ¶ 5.

74. EPPs will update the Court regarding the costs already incurred by A.B. Data and the estimated future costs prior to the July 12, 2022, final approval and fee motion hearing.

C. Firm Expenses

75. Class counsel also incurred \$450,160.28 in out-of-pocket costs that the firms themselves advanced, as opposed to being paid out of the litigation fund. Co-Lead Counsel has reviewed class counsel's expense submissions to ensure that the costs were incurred for the benefit of the End-Payor Class.

76. A breakdown of collective expenses spent by class counsel is below:

Category	Amount Incurred
Commercial Copies	\$6,802.52
Internal Reproduction / Copies	\$24,682.80
Court Fees (Filing costs, etc.)	\$8,192.89

Category	Amount Incurred
Court Reporters / Transcripts	\$9,668.31
Computer Research	\$89,921.54
Telephone/Fax/E-mail	\$11,033.22
Postage/Express Delivery/Messenger	\$9,958.81
Professional Fees (expert, investigator, accountant, etc.)	\$18,543.72
Witness/Service Fees	\$3,060.67
Air Transportation	\$88,804.44
Ground Transportation	\$41,047.61
Meals	\$18,008.13
Lodging	\$94,456.85
Electronic Databases	\$24,848.61
Miscellaneous/Other (Describe in detail)	\$1,130.06
TOTAL:	\$450,160.18

77. Of the above amounts, 94% were incurred by Co-Lead Counsel and Liaison Counsel.

78. The largest expense categories are computerized research, service of process, and travel. The computerized research category includes all Lexis, Westlaw, and PACER costs incurred in connection with research issues raised in this litigation. Class counsel have only requested the reimbursement of their case-specific research costs—class counsel’s request does not include research overhead not directly attributable to this litigation, nor does class counsel’s request reflect any markup on the costs incurred conducting legal research. Service of process includes: the costs incurred by firms serving their complaints on Allergan, service of subpoenas on third parties, and the costs of providing chambers copies of filings in accordance with the Court’s rules and practices. The travel-related expenses were for class counsel to attend the depositions of their clients; travel by Co-Lead Counsel to hearings, status conferences, and settlement conferences where an in-person appearance was necessary; travel by class counsel to conduct and defend fact and expert witness depositions; and other necessary travel.

V. **SERVICE AWARDS**

79. The requested service award of \$20,000 to each of the class representatives is reasonable in light of the time and effort they expended in this litigation, and in recognition of their willingness to serve the end-payor class as a class representative. Among other things, the class representatives stayed apprised of the status of the litigation, conducted extensive searches for responsive documents, worked with their pharmacy benefit managers to provide data concerning their purchases of Restasis, answered questions about their data and document productions (which often required extensive research into their operations), responded to interrogatories, and prepared and sat for depositions. These activities took significant resources away from class representatives' normal business operations.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 17th day of May, 2022.

/s/ Dena Sharp _____

/s/ Eric Fastiff _____

/s/ Joseph Saveri _____

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2022, 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 Sharp _____
Dena Sharp