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	

END-PAYOR PLAINTIFFS' REPLY MEMORANDUM
IN SUPPORT OF
MOTION FOR FINAL APPROVAL OF SETTLEMENT, APPROVAL OF PLAN OF ALLOCATION, AND ORDER OF DISMISSAL WITH PREJUDICE, AND
MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

I. Introduction

On May 17, 2022, in accordance with the Court's scheduling order, ECF No. 718, the End-Payor Plaintiffs ("EPPs"), on their own behalf and on behalf of the certified End-Payor Class, moved for final approval of their $30 million (minus one cent) Settlement with Defendant Allergan, Inc., ECF No. 726, and for payment of their attorneys' fees, expenses, and service awards. ECF No. 727. EPPs' motions were supported by the declarations of Co-Lead and Liaison Counsel, ECF No. 728, all Class Counsel, ECF No. 729, and the claims administrator, A.B. Data. ECF No. 725. Any Class members' oppositions or objections to these motions, along with notices of intent to appear at the final approval hearing, were due June 7, 2022. No such oppositions or notices were filed or have been received by Class Counsel or A.B. Data.

That is no surprise. If approved, the Settlement will afford substantial, immediate relief to End-Payor Class Members, while avoiding the significant risks and costs of further litigation. And Class Counsels' requested fee of one third of the Settlement—barely more than 50 percent of their lodestar—and reimbursement of their out-of-pocket expenses is reasonable in light of the risks assumed by Counsel in prosecuting this novel litigation, the resources expended by Counsel in prosecuting it zealously and effectively, and the result achieved by Counsel for Class members, as embodied in the Settlement. For these reasons, and those given in EPPs' opening briefs, EPPs' motions should be granted.

II. Background

The Court is familiar with the facts of this litigation, as recently detailed in EPPs' briefs in support of preliminary and final approval, EPPs' brief in support their attorneys' fee request, and the declaration of Co-Lead Counsel. *See* ECF Nos. 708-1, 726-1, 727-1, 728. As explained more fully in those papers, EPPs' claims that Allergan wrongfully delayed market entry of generic versions of its branded product Restasis have been tirelessly litigated over four years

through motions to dismiss, fact and expert discovery, class certification, and hundreds of pages of *Daubert* and summary judgment briefing.

As of the filing of EPPs' motion for final approval, only five Class members (no consumers) requested to be excluded from the Settlement. ECF No. 726-1, at 3. That figure remains unchanged, with the deadline for postmarking or e-mailing opt-out requests having run nearly six weeks ago. Moreover, since EPPs filed their opening briefs in support of final approval and their attorneys' fees and expense reimbursement request, *no* Class member has objected—neither to the Settlement itself nor to the fee and expense request. In short, EPPs' motions are entirely unopposed.

III. The Settlement Is Fair, Reasonable, and Adequate.

As explained more fully in EPPs' opening brief, the Settlement merits final approval under Rule 23. The analysis begins from the strong judicial policy in favor of settlement. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 27 (E.D.N.Y. 2019) (Brodie, J.) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)). Procedurally, the Settlement was reached only after years of hard-fought litigation and a year and a half of arm's-length negotiations "between experienced, capable counsel," with the assistance of experienced mediators across three mediations. *Puddu v. 6D Glob. Techs., Inc.*, No. 15- CV-8061 (AJN), 2021 WL 1910656, at *4 (S.D.N.Y. May 12, 2021) (quoting *Wal-Mart*, 396 F.3d at 116); *see also* ECF No. 501, at 11 (finding Class Counsel "qualified, experienced, and able to conduct this litigation"), *reported at* 335 F.R.D. 1, 13 (2020). The Settlement is thus presumptively fair. *Puddu*, 2021 WL 1910656, at *4.

Substantively, the Settlement amount is more than adequate in light of the considerable risks to EPPs and Class members from the parties' *Daubert* and summary judgment motions, and then, perhaps, trial and appeal—a timeline that would stretch well into 2023 and likely beyond.

See ECF No. 726-1, at 8–10. After several rounds of revision at the Court's direction, the proposed plan of allocation, which divides Class members into three pools and distributes Settlement proceeds among the pools *pro rata*, is likewise fair, reasonable, and adequate. *See id.* at 10–11.

Further, the so-called *Grinnell* factors, *see City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), which largely overlap with Rule 23's standards, *see* ECF No. 726-1, at 7 n.1, either favor the Settlement or, occasionally, are merely neutral. *See id.* at 8–10, 12. One factor weighs even more heavily in favor of final approval today than at the time of EPPs' motion for final approval: the reaction of the Class, the second *Grinnell* factor. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB) (JO), 2019 WL 6875472, at *16 (E.D.N.Y. Dec. 16, 2019) (Brodie, J.). This factor is "perhaps the most significant" to an assessment of a class settlement's adequacy. *Id.* Indeed, "the lack of objections may well evidence the fairness of the Settlement." *Id.* And this "most significant" factor weighs nearly decisively in favor of approval here. As noted above, only five opt-outs and *no* objections have been received in response to the Settlement.

This Court should reach the same conclusion reached by virtually the entire Class after a thorough, wide-ranging, and carefully designed notice program: the Settlement is fair and should be approved.

IV. The Requested Fees, Expenses, and Service Awards Are Reasonable.

Under either the lodestar or percentage-of-recovery measures, *see Wal-Mart*, 396 F.3d at 121, Class Counsels' requested fees are reasonable and merit approval. Class Counsels' fee request of one-third of the Settlement amount is firmly in line with fee awards in the Second Circuit. *See, e.g.*, *Bryant v. Potbelly Sandwich Works, LLC*, No. 117CV07638-CMH-BP, 2020 WL 563804, at *6 (S.D.N.Y. Feb. 4, 2020) (McMahon, J.). Similar requests have also been

approved in other end-payor pharmaceutical antitrust cases. *See, e.g.*, *In re Lidoderm Antitrust Litig.*, No. 14-MD-02521-WHO, 2018 WL 4620695, at *1 (N.D. Cal. Sept. 20, 2018). Indeed, this Court has already approved a one-third award in connection with the Direct Purchaser Plaintiffs' settlement. *See* ECF No. 562, at 11.

Viewed in light of the factors set forth in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), Class Counsels' requested fees are reasonable. Counsel expended significant resources, assumed significant risk, and negotiated a significantly favorable result for the Class in this novel and complex litigation. *See* ECF No. 727-1, at 10–14. The reasonableness of Counsels' fee request is underscored by the substantial discount it embodies—almost 50 percent—relative to Counsels' lodestar, itself a product of Class Counsels' disciplined and efficient staffing, compensated at hourly rates that are consistent with rates approved in recent antitrust cases in the Second Circuit. *See, e.g.*, *In re GSE Bonds Antitrust Litig.*, 2020 WL 3250593, at *5 (S.D.N.Y. June 16, 2020) (Rakoff, J.). The work comprising Counsels' lodestar, and who performed it, is detailed in Class Counsels' declaration. *See* ECF No. 728 ¶ 62; ECF No. 729. In such cases, where "the percentage fee is lower than the fee the lawyers have accrued on a time-and-service basis," it is "relatively easy" to approve a percentage-based request. *Nilson v. York County*, 400 F. Supp. 2d 266, 271 (D. Me. 2005). The Court should do so here.

Further, Counsel incurred significant litigation expenses in this case, including more than $3 million in expert costs. *See* ECF No. 728 ¶ 68. The "expert-driven nature" of this case, ECF No. 562, at 11, is partly a product of the showing that end-payors need to make at the class certification stage and Allergan's specific arguments in opposition to certification, which among other exercises required EPPs to investigate foreign markets for Allergan's and its generic competitors' products. *See* ECF No. 727-1, at 21–22. Besides expert costs, the other major line

item is administration costs incurred by the settlement administrator, A.B. Data. Costs already incurred were reasonable and necessary to effectively conduct the Court-ordered notice program. In addition to those costs, A.B. Data anticipates incurring additional costs to administer the claims process. These expenditures have been and will continue to be critical in ensuring the Class receives a fair distribution of the Settlement, and should be approved.

Finally, named EPP Class Representatives undertook significant work of their own for the benefit of the Class as a whole. *See* ECF No. 727-1, at 25. For this service, the Class Representatives should be granted the requested awards. The Court has already approved service awards more than four times the amounts requested here in connection with the DPP settlement. *See* ECF No. 562, at 12.

V. Conclusion

By granting EPPs' motions, this long, complex, and high-risk litigation will come to a conclusion on terms that represent a commendable result for End-Payor Class members, and a reasonable fee for Class Counsel who labored tirelessly to bring that result about. The Court should grant EPPs' motions.

Dated: June 21, 2022

Respectfully submitted,

/s/ Eric B. Fastiff

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CERTIFICATE OF SERVICE

I certify that on June 21, 2022, I caused the foregoing document to be served on all registered counsel by filing it through the Court's ECF system.

Dated: June 21, 2022

/s/ Eric B. Fastiff
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