

**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

**MEMORANDUM OF LAW  
IN SUPPORT OF END-PAYOR CLASS COUNSEL'S MOTION FOR  
ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS**

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## I. INTRODUCTION

Over the course of four years, Co-Lead Counsel, Liaison Counsel, and other firms working for the benefit of the End-Payor Class under their direction (together “Class Counsel”)<sup>1</sup> actively prosecuted this action on behalf of the End-Payor Class. This Court presided over each step of this litigation, including denying Allergan’s motions to dismiss, deciding in plaintiffs’ favor numerous discovery motions and challenges to Allergan’s assertions of attorney-client privilege, presiding over a two-day evidentiary hearing on class certification, granting the motion to certify the End-Payor Class, and analyzing Allergan’s response to the class notice program. The Court is thoroughly familiar with the efforts expended on both sides of the litigation, the novelty and complexity of the issues, and the substantial risk that the End-Payor Class and their counsel could come away from this litigation empty-handed. The result of Class Counsel’s efforts is a \$30 million settlement with Allergan, which as detailed in End-Payor Plaintiffs’ (“EPPs”) motion for final approval of the settlement, is an excellent result for the class given the strength of the claims and the risks of further litigation.

For the risks undertaken, the resources invested, and the result achieved, Class Counsel seek an award of attorneys’ fees of \$10,000,000, which is one-third of the settlement fund. Courts in the Second Circuit and in end-payor pharmaceutical antitrust cases throughout the country frequently award attorneys’ fees of one-third of the settlement fund. The requested

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<sup>1</sup> Class Counsel includes: Court-appointed 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; Liaison Counsel Zwerling, Schachter & Zwerling, LLP, and other firms working for the benefit of the End-Payor Class under the direction of Co-Lead Counsel. Those firms include Cafferty Clobes Meriether & Sprengel (Executive Committee); Edelson & Associates, LLC; Grant & Eisenhofer P.A.; Gustafson Gluek PLLC; Heins Mills & Olson P.L.C. (Executive Committee); Hilliard & Shadowen LLP; Kroub, Silbersher & Kolmykov, PLLC; Miller Shah LLP; Safirstein Metcalf LLP; and Wexler Boley & Elgersma LLP.

award represents less than 52% of the total lodestar Class Counsel expended in this litigation, and courts throughout the Second Circuit have recognized that fee awards representing a negative multiplier are reasonable.

Class Counsel also respectfully request that the Court approve the payment of \$4,635,684.00 in unreimbursed expenses incurred by Class Counsel. While Class Counsel sought to keep expenses low by splitting costs with other plaintiff groups, the necessities of this complex litigation—including highly contested class certification proceedings—required significant expert work and other costs. Class Counsel also requests service awards of \$20,000 to each of the ten Class Representatives in recognition of their service on behalf of the End-Payor Class and the time and effort they expended during the course of this litigation.<sup>2</sup>

## **II. BACKGROUND AND OVERVIEW OF WORK PERFORMED**

### **A. Filing Complaints and Early Case Management Efforts.**

The first end-payor complaint in this multidistrict litigation was filed in this District on November 15, 2017. *See 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.). Other complaints followed in this District and other districts. The Judicial Panel on Multidistrict Litigation centralized all pending Restasis actions before this Court. ECF No. 1. After appointing Co-Lead and Liaison Counsel after a contested leadership process, Class

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<sup>2</sup> The Class Representatives are 1199SEIU National Benefit Fund, 1199SEIU Greater New York Benefit Fund, 1199SEIU National Benefit Fund for Home Care Workers, 1199SEIU Licensed Practical Nurses Welfare Fund, American Federation of State, County and Municipal Employees District Council 37 Health & Security Plan, Fraternal Order of Police, Miami Lodge 20, Insurance Trust Fund, Ironworkers Local 383 Health Care Plan, Self-Insured Schools of California, Sergeants Benevolent Association Health & Welfare Fund, and St. Paul Electrical Workers' Health Plan.



Counsel worked collaboratively to prepare a consolidated complaint and select the causes of action to assert. Co-Lead Decl., ¶ 12.<sup>3</sup>

**B. Motions to Dismiss.**

Allergan moved to dismiss the consolidated complaint. ECF Nos. 53, 111. EPPs and DPPs worked together to oppose Allergan's motion, which the Court denied on September 18, 2018. ECF No 146. Allergan also sought to dismiss certain of EPPs' state law claims, which EPPs alone opposed and which the Court largely denied on November 13, 2018. ECF No. 176. On December 20, 2018, EPPs filed a Corrected First Amended Consolidated Class Action Complaint. ECF No. 210.

**C. Fact Discovery.**

The parties began initial discovery while Allergan's motion to dismiss was pending and commenced with full discovery once the Court denied Allergan's first motion to dismiss. Allergan produced nearly 690,000 documents, totaling over 7 million pages. Non-parties produced more than 10,000 additional documents, totaling over 130,000 pages. Co-Lead Decl., ¶ 20. Plaintiffs litigated numerous complex discovery and privilege issues in pursuit of their claims. *E.g.*, ECF Nos. 145 (Motion to Compel Specific Searches from Three Allergan Custodians), 157 (order granting motion), 188 (Motion to Compel Production of Documents withheld as Privileged), 224 (order granting motion), 470 (Motion to Compel Production of Documents Withheld as Privileged), 541 (order granting motion).

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. Co-Lead

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<sup>3</sup> All citations are to the Joint Declaration of Co-Lead Counsel ("Co-Lead Decl.").

Decl., ¶ 31. EPPs and DPPs collaborated to prepare outlines and identify documents to be used during the depositions. *Id.*, ¶ 32. EPPs took the lead in questioning for certain depositions, including David Pyott, Damon Burrows, Wayne Talton, Frederik Defesche, and Sasank Kunadharaju. *Id.* DPPs and EPP divided the questioning for other witnesses, including Aziz Mottiwala, David LeCause, and Dwight Moxie. *Id.* 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. *Id.*

**D. Class Certification.**

In April 2019 EPPs moved for certification of the End-Payor Class, which Allergan opposed. The class certification proceedings required intensive work by EPPs because of the unsettled legal landscape concerning certification of end-payor claims in pharmaceutical antitrust cases. In particular, Allergan relied heavily on the most recent appellate court decision in such cases, *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018), in which the First Circuit concluded that end-payors could not demonstrate classwide injury. Class Counsel and EPPs' experts needed to develop a detailed record to provide the Court with a sufficient basis to certify the class in light of *Asacol* and other recent cases that have also denied certification.

To make their showing, EPPs retained two highly experienced experts (Dr. Richard Frank and Ms. Laura Craft) to provide detailed reports in connection with EPPs' motion. Allergan opposed and offered contrary expert opinions, as well as two experts on an issue not raised in EPPs' motion: whether the market performance of generic Restasis in Canada demonstrated that generic penetration for generic Restasis in the United States would have been low. To address this issue, EPPs retained a third expert (Todd Clark) with expertise in the relevant international

regulatory frameworks and prescription drug markets. EPPs deposed each of Allergan's experts and defended the depositions of their own experts. Co-Lead Decl., ¶¶ 36-37.

After EPPs' filed their reply brief, Allergan filed a sur-reply (purportedly to respond to new material in EPPs' brief), supported by a surrebuttal report from their primary class certification expert. 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. EPPs also moved to exclude two of Allergan's experts pursuant to *Daubert*. ECF Nos. 433, 435.

On September 26 and 27, 2019, the Court held an evidentiary hearing where it heard testimony from six expert witnesses. To prepare for the hearing, Co-Lead Counsel met with and assisted their experts to prepare for the hearing and prepared to cross-examination each of Allergan's experts. On October 23, 2019, the Court held oral argument on the class certification and *Daubert* motions. The Court also requested additional briefing on state law issues, which the parties provided. ECF Nos. 448, 464, 468.

On May 5, 2020, the Court granted EPPs' motions for class certification and to exclude two of Allergan's experts. ECF Nos. 501, 502. Allergan filed a petition with the Second Circuit seeking interlocutory review under Federal Rule of Civil Procedure 23(f), which EPPs opposed and the Second Circuit denied. ECF 540. EPPs moved for authorization of distribution of Class Certification Notice to the End-Payor Class, to which Allergan responded and which the Court granted after argument and supplementation. ECF Nos. 510, 513, 515, 644, 646, 647, 664.

#### **E. Expert Discovery.**

Between August 2019 and December 2019, the parties exchanged twenty-nine merits expert reports. Co-Lead Decl., ¶¶ 44-50. Consistent with the breadth of the claims in the

litigation, the expert reports covered a wide range of topics: ophthalmology (Dr. Andrew Calman), statistics (Dr. Daniel Bloch), FDA regulatory matters (Dr. David Kessler), patent prosecution (Mr. Edward Lentz), accounting (Mr. Greg Regan), pharmacology (Dr. Justin Hanes), FDA ANDA review (Dr. Roger Williams), pharmaceutical economics and market analysis (Dr. Thomas McGuire), international regulatory matters (Mr. Todd Clark), and drug development and bioequivalence (Dr. Uwe Christians). 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. *Id.* EPPs also separately served the report of Dr. Richard Frank (damages) and adopted the class certification reports from Ms. Craft as merits reports. *Id.*

In late 2019, Plaintiffs deposed seven of Allergan's experts. *Id.* In January and February 2020, the direct purchaser class plaintiffs and retailer plaintiffs settled. After that point—with only EPPs left in the litigation—Allergan deposed eleven of Plaintiffs' experts and submitted five additional merits expert reports, and EPPs submitted four additional rebuttal merits expert reports and deposed two of Allergan's additional experts. *Id.*

#### **F. Summary Judgment.**

Between September 2020 and January 2021—after other plaintiff groups had settled—the parties filed three motions and one cross-motion for summary judgment. ECF Nos. 582, 586, 588, 589, 590, 591, 637. Allergan's motion was 100 pages, included over 460 exhibits, and was supported by a 157-page statement of material facts, all of which required substantial effort from EPPs 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.

Concurrently with summary judgment briefing, EPPs moved to exclude all or part of eight of Allergan's experts' testimony, which Allergan opposed, and Allergan moved to exclude

all or part of ten of EPPs' experts' testimony, which EPPs opposed. ECF Nos. 596, 598, 599, 605, 607, 609, 612, 613, 614, 615, 616, 626, 627, 628, 629, 630, 631, 632, 634. The parties also consulted extensively with nonparty generic manufacturers regarding confidentiality issues and filed detailed motions to seal and oppositions. ECF Nos. 653, 692.

**G. Settlement.**

EPPs and Allergan discussed settlement on various occasions, including in three mediations: on September 23, 2019, before Magistrate Judge Lois Bloom; and on March 25, 2020, and April 26, 2021, before Judge Infante. Co-Lead Decl., ¶ 55. 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.

The settlement provides that Allergan will pay \$29,999,999.99 to settle the claims of the End-Payor Class. Settlement Agreement, ECF No. 708-2, § 12.<sup>4</sup> In exchange, Allergan will receive releases from the End-Payor Class Members. The releases will cover claims that EPPs alleged or could have alleged in their complaints or that relate to the alleged delay of generic versions of Restasis, and the class period shall be May 1, 2015 through July 31, 2021. *Id.*, § 1(u), 7-9. The released claims include any and all future claims or damages that may be alleged by any Class Member which arise out of or relate to such Class Members' future purchases and which relate to the subject matter of this litigation, but do not include any future claims or damages arising from conduct by Allergan after the date of the Settlement. *Id.* The EPPs' complaint will be dismissed with prejudice. *Id.*, § 6.

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<sup>4</sup> All exhibit citations are to the Joint Declaration of Co-Lead Counsel.

### **III. SUMMARY OF REQUESTED FEES, EXPENSES, AND SERVICE AWARDS**

Class Counsel respectfully request the payment of attorneys' fees in the amount of \$10,000,000, which is one-third of the settlement fund. This amount is less than 52% of Class Counsel's lodestar of \$19,624,592.75. They also request the reimbursement of \$4,635,684.00 in unreimbursed expenses. Settlement administration is ongoing, and Class Counsel will request payment of additional administration costs when distributions are ready to be made to class members.

To facilitate the Court's consideration of Class Counsel's fee and expense requests, each firm has submitted a declaration that (1) identifies the attorneys and staff members who worked on the case and the tasks they performed, (2) sets forth 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) provides an itemization of the expenses incurred by the firm. Class Counsel also requests that each of the 10 Class Representatives receive a service award in the amount of \$20,000.

### **IV. ARGUMENT**

#### **A. The Requested Attorneys' Fees are Reasonable.**

To determine the reasonableness of a fee, district courts have discretion to apply either the lodestar method or the percentage-of-recovery method. *City of Birmingham Ret. & Relief Sys. v. Davis*, 806 F. App'x 17, 18 (2d Cir. 2020); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). The Second Circuit favors the latter because the percentage method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 121 (2d Cir. 2005) (quoting *In re Lloyd's Am. Tr. Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002)); see also *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 348 (S.D.N.Y. 2014) (Schofield, J.); *In re Vitamin C Antitrust Litig.*, No. 06-md-

1738, 2012 WL 5289514, at \*9 (E.D.N.Y. Oct. 23, 2012) (Cogan, J.). It also “spares the court and the parties the ‘cumbersome, enervating, and often surrealistic process of lodestar computation.’” *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-md-1775, 2011 WL 2909162, at \*5 (E.D.N.Y. July 15, 2011) (Gleeson, J.) (quoting *Goldberger*, 209 F. 3d at 50). But regardless of which method is used, the focus of the court’s analysis is the reasonableness of the fee award under the circumstances. *Goldberger*, 209 F.3d at 47 (“whether calculated pursuant to the lodestar or the percentage method, the fees awarded in common fund cases may not exceed what is ‘reasonable’ under the circumstances”).

Class Counsel’s request for attorneys’ fees in the amount of one-third of the settlement fund is consistent with other awards in the Second Circuit, and the same amount (on a percentage basis) as the Court awarded to the DPPs. It is also less than 52% of Class Counsel’s lodestar. Thus, regardless of whether the Court analyzes the fee request through a percentage of recovery method or a lodestar method, the result is the same: the fee request is reasonable.

**1. The Percentage of Recovery Method Supports the Requested Attorneys’ Fees.**

“In class settlement funds like this one, a one-third award of the settlement proceeds for attorneys’ fees is considered typical and reasonable because the attorneys’ fees requested were entirely contingent upon success. Class Counsel risked time and effort and advanced costs and expenses, with no ultimate guarantee of compensation.” *Bryant v. Potbelly Sandwich Works, LLC*, No. 117CV07638CMHBP, 2020 WL 563804, at \*6 (S.D.N.Y. Feb. 4, 2020) (McMahon, J.) (quotations and alterations omitted). Courts in other end-payor pharmaceutical antitrust cases regularly grant fee awards of one-third of the settlement fund. *E.g. In re Lidoderm Antitrust Litig.*, No. 14-MD-02521-WHO, 2018 WL 4620695, at \*1 (N.D. Cal. Sept. 20, 2018); *In re Aggrenox Antitrust Litig.*, No. 3:14-md-02516-SRU, Order Granting Final Judgment and Order

of Dismissal Approving Indirect Purchaser Class Settlement and Dismissing Indirect Purchaser Class Clams Against Boehringer and Teva, ECF No. 821 at 9-10 (D. Conn. July 19, 2018).

There is ample reason in this litigation similarly to award Class Counsel one-third of the settlement fund. Courts in the Second Circuit evaluate attorneys' fees requests using the factors set forth in *Goldberger*: (a) the time and labor expended by counsel; (b) the magnitude and complexity of the litigation; (c) the risk of the litigation; (d) the quality of the representation; (e) the requested fee in relation to the recovery under the settlement; and (f) public policy. *See City of Birmingham Ret. & Relief Sys.*, 806 F. App'x at 18 (citing *Goldberger*, 209 F. 3d at 50). With respect to the DPPs' fee award, the Court previously recognized that a one-third fee award in this case was reasonable given the complexity of the litigation. ECF No. 562 at 11. The same analysis holds true for the fee award for EPP Class Counsel.

**a. The Time and Labor Expended by Counsel**

Each aspect of EPPs' claims was hotly contested in the litigation and the subject of extensive discovery. As the Court recognized in awarding DPP counsel one-third of that settlement, these proceedings were "intensely litigated." ECF No. 562 at 11. As described in more detail above, Allergan sought to dismiss all of EPPs' claims for failure to allege a violation of the antitrust laws, and many of their state law claims for a variety of additional reasons. It also opposed EPPs' motion for class certification, including retaining numerous experts and filing a series of sur-reply briefs. Summary judgment proceedings—which included only EPPs as other plaintiff groups had already settled their claims—were likewise extensive, with Allergan filing hundreds of pages of motions, and hundreds more pages of statements of purportedly undisputed facts.

With respect to discovery, Class Counsel worked with other plaintiff groups to review the over seven million pages of documents Allergan produced. Co-Lead Decl., ¶ 20. They prepared



detailed “deposition kits” and took the lead on many of the twenty-two fact witness depositions and assisted with others. *Id.*, ¶ 32. Throughout the course of discovery, the parties litigated a wide range of privilege disputes, on which Class Counsel frequently took the lead. Class Counsel worked collaboratively with counsel for DPPs to retain and serve reports on behalf of ten experts. DPPs settled their claims in the early stages of expert depositions, meaning that Class Counsel thereafter did all of the work defending and taking expert depositions, and filing and opposing *Daubert* motions.

EPPs also undertook efforts to streamline the litigation where possible. They “collaboratively shared the work” with the DPPs and the parties “achieved innumerable compromises with defendant’s counsel, saving time both for their clients and for the court.” ECF No. 562 at 11. Despite these efforts, the record makes clear the substantial time and energy that Class Counsel necessarily devoted to prosecuting the claims on behalf of the End-Payor Class.

**b. The Magnitude and Complexity of the Litigation**

The breadth of the work required of Class Counsel was also a function of the scope of complexity of EPPs’ claims. EPPs alleged that Allergan engaged in a multi-part scheme to delay the entry of generic Restasis, including baseless patent litigation, attempting to shield those patents from invalidation by paying a Native American tribe to take ownership of them, and filing rounds of baseless citizen petitions. Each of these issues then had to be analyzed in terms of their impact of when generic Restasis could have come to market, which also included extensive analysis of the FDA’s review of the applications submitted by the generic Restasis applicants. Discovery and expert opinions were needed on each of these issues, as well as antitrust injury, damages, and ascertainability. Cases with such high stakes warrant a significant investment by Class Counsel to put the class in the best position possible to achieve a recovery.

**c. The Risks of the Litigation**

While EPPs were confident in the merits of their claims, they acknowledge that the litigation presented significant risks. In particular, at the time of settlement no generic version of Restasis had been approved despite the fact that the last significant piece of wrongdoing alleged by EPPs ended in January 2018. As a result, the record at the time of settlement was that the FDA had not approved generic Restasis applications that had been pending for over nine years, including three years after the end of the alleged anticompetitive conduct by Allergan. While EPPs were confident that the Court would deny Allergan’s summary judgment motion on this basis, Allergan would nonetheless have had an argument at trial that would have been easy for jurors to believe. And even if EPPs had prevailed at trial, Allergan was poised to appeal the Court’s order certifying the End-Payor Class. The risks of the class receiving nothing from continued litigation were significant.

In addition, as the possible entry date for generic Restasis became later and later, more and more of the class period overlapped with periods in which Allergan provided heavy rebates for its products, which arguably would have reduced damages every day. Thus, even if EPPs ultimately prevailed, their damages may have been relatively modest.

**d. The Quality of the Representation**

Class Counsel are experienced antitrust and class actions lawyers, and the Court previously described them “well qualified to litigate this class action.” ECF No. 501 at 11 (finding counsel adequate under Rule 23(a)(4)). As set forth in each firm’s individual declaration, Class Counsel have extensive background in prosecuting the claims of end-payors in pharmaceutical antitrust cases. Lief Cabraser, The Joseph Saveri Law Firm, and Zwerling served as 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. Co-Lead Decl., ¶ 2. 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. *Id.* These four firms—as well as other Class Counsel firms—have served as co-lead counsel or executive committee members in many of the pharmaceutical end-payor cases litigated in the last decade. Those experiences were brought to bear in this case, particularly with respect to class certification, privilege strategy, and expert work. In short, the class was well-represented by qualified and dedicated counsel and their efforts and experience directly led to the success in this litigation.

**e. The Fee in Relation to the Settlement**

As noted above, fee awards of one-third of the settlement are commonplace in the Second Circuit and in pharmaceutical antitrust cases in particular. Such awards recognize the substantial investment of time and resources that counsel must invest in class actions, especially ones like this litigation where the stakes are high and the issues complex.

Class Counsel recognizes that the Court awarded DPP class counsel one-third of the net settlement fund, *i.e.* after deducting expenses from the settlement fund, while EPP Class Counsel is seeking one-third of the gross settlement fund, *i.e.* one-third of the \$30 million settlement. Payments of fees from the gross settlement fund for EPP Class Counsel is warranted for several reasons. First, even when using the gross settlement fund as the basis for calculating the fee award, Class Counsel will still receive a significant negative multiplier. Second, EPPs counsel had to perform far more work, including certifying the class, defeating the Rule 23(f) petition, and briefing summary judgment, and handling merit expert reports and *Daubert* challenges. Third, despite splitting the majority of pre-certification merits case costs with DPP class counsel, EPP Class Counsel incurred significantly higher expenses than DPP class counsel because of the

additional complexity of the EPP class certification proceedings (and considering that motion was actually decided) and because they litigated the case for much longer than the DPPs. *See* Part IV.B, *infra* (discussing Class Counsel’s expert expenses in more detail). Calculating fees based on the net settlement fund would therefore have a much larger impact on EPP Class Counsel’s fee amount than it did for DPP class counsel.

**f. Public Policy**

Public policy favors “the award of reasonable attorney’s fees,” but courts must also “guard against providing a monetary windfall to class counsel to the detriment of the plaintiff class.” *In re NTL Inc. Sec. Litig.* No. 02 CIV. 3013 (LAK), 2007 WL 1294377, at \*8 (S.D.N.Y. May 2, 2007) (Peck, J.). Awarding Class Counsel one-third of the settlement fund is supported by public policy considerations because it will “adequately compensate Class Counsel for their time and effort, the risks they faced in this case, and the high quality of their representation.” *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 130 (S.D.N.Y. 2009) (Pauley III, J.). And no concern exists here that Class Counsel will receive a windfall because their requested fee award would result in a significant negative multiplier. Public policy therefore weighs in favor of the requested fee.

**2. The Lodestar Cross-Check Method Supports the Requested Attorneys’ Fees.**

While courts in the Second Circuit typically use the percentage-of-recovery method to evaluate requests for attorneys’ fees in class actions, they can further assess the reasonableness of the request under the lodestar method. *See Tanski v. AvalonBay Communities, Inc.*, No. CV 15-6260 (AKT), 2020 WL 2733989, at \*1 (E.D.N.Y. May 26, 2020) (Tomlinson, J.) (“Courts often use the lodestar figure as a cross-check to ensure the reasonableness of the percentage-based fee.”). Under the lodestar method, “the district court scrutinizes the fee petition to

ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate.” *Goldberger*, 208 F.3d at 47. Even under the lodestar method the court must still consider the *Goldberger* factors, which, as noted above, support the reasonableness of the award. *Id.* (“no matter which method is chosen, district courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee”).

Comparing the requested fee to Class Counsel’s lodestar underscores the reasonableness of the request. Class Counsel’s lodestar of \$19,624,592.75 was the result of intense, years-long litigation on behalf of the End-Payor Class. As described more fully below, Class Counsel efficiently prosecuted this action and their hourly rates are reasonable and consistent with rates charged by them, and approved by courts, in similar matters. The resulting lodestar “creates a presumptively reasonable fee,” *Tanski*, 2020 WL 2733989, at \*2 (quoting *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 166 (2d Cir.2011)), and the fact that the requested fee award is less than 52% of that presumptively reasonable amount further supports the fee request.

**a. The Time Spent by Class Counsel is Reasonable.**

Class Counsel’s lodestar reflects time that was necessarily and reasonably spent for the benefit of the End-Payor Class, while also reflecting Co-Lead Counsel’s significant efforts to increase efficiency and avoid duplication. As detailed above, Class Counsel zealously litigated this matter for over four years against one of the largest pharmaceutical companies in the world. Class Counsel’s lodestar of \$19,624,592.75 stems from the intensity of the litigation and the significant work required of Class Counsel.

Class Counsel’s lodestar also reflects sound and efficient staffing and billing. The Court’s April 4, 2018, order appointing the leadership for EPPs vested Co-Lead Counsel with authority for the overall conduct of the case and responsibility for carrying out all major aspects of the litigation. ECF No. 52. In accordance with that directive, the three Co-Lead Counsel firms and

Liaison Counsel conducted the significant majority of the work in this matter, including preparing and responding to written discovery, taking depositions, working with experts, briefing, court appearances, and overall strategy. Of the total hours spent, 89% was spent by Co-Lead Counsel and Liaison Counsel, and 11% by other firms. Co-Lead Decl., ¶ 55.

To avoid duplication, tasks were generally divided among Co-Lead Counsel and Liaison Counsel. *Id.* Girard Sharp, for example, took the lead working with Dr. Frank and on related class certification issues. *Id.* Lieff Cabraser performed much of the work (including document review and depositions) related to EPPs' citizen petition claims. *Id.* Joseph Saveri Law Firm presented oral argument at the class certification hearing and responded to Allergan's statement of facts at summary judgment. *Id.* 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). *Id.*

Other firms performed discrete additional tasks at Co-Lead Counsel's direction. Cafferty Clobes Meriwether & Sprengel took the lead on plaintiff discovery along with Edelson & Associates, which also reviewed documents related to citizen petition issues. *Id.*, ¶ 63. 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, and took the deposition of Allergan's economic expert. *Id.* Other firms reviewed documents under the supervision with Co-Lead Counsel. *Id.* 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 helped prepare their clients for their depositions. *Id.* Each firm's overall lodestar is listed below, and the separate declarations

submitted by each firm detail the tasks performed and time spent by each firm and individual biller. *See* Class Counsel Declarations, section II.<sup>5</sup>

<b>Firm</b>	<b>Hours</b>	<b>Lodestar</b>
Lieff, Cabraser, Heimann, & Bernstein, LLP	7,563.50	\$4,851,366.25
Girard Sharp LLP	9,736.20	\$5,190,696.75
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
<b>Total:</b>	33,412.55	\$19,624,592.75

The total and individual firm time submissions followed a detailed auditing process conducted by Co-Lead Counsel. Over the past several months, Co-Lead Counsel conducted a line-by-line review of the detailed time entries submitted by each firm and worked with Class Counsel to eliminate (or revise as needed) time that was excessive or insufficiently documented, and to ensure compliance with the April 17, 2018 Order on Procedures and Guidelines for Class Plaintiffs' Counsel's Time and Expense Submissions. ECF No. 62; Co-Lead Decl., ¶ 64. Among other things, Co-Lead Counsel required additional detail on insufficiently detailed entries,

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<sup>5</sup> The individual Class Counsel Declarations are contained in the Compendium of End-Payor Class Counsel Declarations submitted with this motion.

ensured travel time was billed at one-half rate, removed time related to internal firm management, capped the number of hours any firm could bill for work related to the preparation and filing of its initial complaint at twenty-five hours (except for the few firms that filed the first complaint), and removed all time related to proceedings before the Judicial Panel on Multidistrict Litigation, organization of plaintiffs' counsel and leadership submissions, and internal firm management. *Id.* As a result of this process, the time entries upon which Class Counsel's lodestar is based are well-documented and stripped of time that did not serve the interests of the End-Payor Class. *Id.*

**b. Class Counsel's Hourly Rates are Reasonable.**

The second part of the lodestar calculation is multiplying the hours spent "by an appropriate hourly rate." *Goldberger*, 209 F.3d at 47. The reasonableness of an hourly rate is based on "prevailing market rates for comparable attorneys of comparable skill and standing in the pertinent legal community." *Id.* at 56 (quotation omitted).

Class Counsel's historic rates—which range from \$450 to \$1,150 for partners and senior counsel, \$250 to \$650 for associates, and \$140 to \$420 for paralegals and other litigation staff (including senior cases managers)—are consistent with rates approved in recent antitrust class actions in this district and in similar cases. *E.g.*, *In re GSE Bonds Antitrust Litig.*, 2020 WL 3250593, at \*5 (S.D.N.Y. June 16, 2020) (Rakoff, J.) (using lodestar cross-check based on hourly rates between \$350 and \$1,150 per hour); *Lidoderm*, 2018 WL 4620695, at \*2 (approving rates between \$350 and \$1,050 per hour). Each firm's rates are also its usual and customary rates that were charged by the firm in similar matters in which the firm is paid on a contingent basis, as well as the firm's noncontingent matters. *See* Class Counsel Declarations, section II. The declarations from individual firms provide examples of courts approving the firm's hourly rates. *Id.*



Class Counsel also assigned tasks to attorneys and staff based on their skills and experience. *Id.*, section I.C. Depositions and expert work were, for example, largely handled by senior attorneys while document review and legal research were conducted by junior associates.

In light of the above, Class Counsel's hourly rates are reasonable and support the overall reasonableness of Class Counsel's lodestar and attorneys' fee request.

**c. The Significant Negative Multiplier Class Counsel Would Receive Supports the Requested Fee.**

Despite spending almost \$20,000,000 in attorney time to prosecute this action on behalf of the End-Payor Class, Class Counsel seek an attorneys' fee award of \$10,000,000, *i.e.* a negative multiplier of 52%. A significant negative multiplier "militates very in favor of the reasonableness of the fee request, particularly in light of the fact that courts generally grant fees with positive multipliers to reflect the complexity and risks undertaken by class counsel." *Guevoura Fund Ltd. v. Sillerman*, No. 1:15-CV-07192-CM, 2019 WL 6889901, at \*18 (S.D.N.Y. Dec. 18, 2019) (McMahon, J.); *see also Ovalles Acosta v. Prudent Management LLC*, No. 17-CV-7590 (VSB), 2020 WL 8678079, at \*2 (S.D.N.Y. July 23, 2020) (Broderick, J.) (fee requests amounting to a 0.64 multiplier were well within the range of approval, and noting that courts in the Second Circuit regularly award multipliers of between two and six times lodestar). And "the fact that any reasonable fee would necessarily represent a negative multiplier of the lodestar supports an award at the higher end of the spectrum." *In re Sterling & Foster, Inc. Sec. Litig.*, 238 F. Supp. 2d 480, 490 (E.D.N.Y. 2002) (Spatt, J.) (quoting *Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.*, No. 96 CIV. 0583 (DAB), 2002 WL 1315603, at \*2 (S.D.N.Y. June 17, 2002)) (Batts, J.); *Nilson v. York County*, 400 F. Supp. 2d 266, 271 (D. Me. 2005) ("When the lodestar cross-check shows that the percentage fee is lower than the fee the lawyers have accrued on a time-and-service basis, it is relatively easy to support a percentage-based fee."). In a similar

circumstance in another antitrust case in this Circuit, the court approved attorneys' fees totaling one-third of a \$31 million settlement where the award was a 0.49 negative multiplier on counsel's lodestar. *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, No. 14-MD-02542 (VSB), 2021 WL 2328431, at \*1 (S.D.N.Y. June 7, 2021) (Broderick, J.). In this case, because Class Counsel reasonably expended their time and the requested award would result in a significant negative multiplier, "the lodestar approach also clearly demonstrates that Plaintiff's Counsel's fee request is reasonable." *Guevoura Fund Ltd.*, 2019 WL 6889901, at \*18.

**B. The Requested Expenses Are Reasonable.**

"It is well established that counsel who obtain a common settlement fund for a class are entitled to the reimbursement of expenses that they advance to a class." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015) (Engelmayer, J.); *see also In re Arakis Energy Corp. Sec. Litig.*, No. 95-cv-3431, 2001 WL 1590512, at \*17 n.12 (E.D.N.Y. Oct. 31, 2001) (Ross, J.) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."). EPPs request the reimbursement of \$4,635,684.00 in costs they incurred prosecuting this case on behalf of the End-Payor Class. This amount is consistent with those approved in other antitrust cases in the Second Circuit. *E.g., In re Currency Conversion*, 263 F.R.D. at 131 (approving \$3.7 million in expenses "[g]iven the magnitude of this case, its national scope, its long duration, and the extensive and expensive expert discovery conducted by the parties"); *In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at \*4 (approving \$3.95 million in expenses).

The expenses for which EPPs seek reimbursement fall into two categories: payment for common costs (such as experts) from the litigation fund and expenses incurred by individual firms (such as legal research and travel costs). Co-Lead Decl., ¶ 66. In addition, EPPs seek payment from the settlement fund of the amounts incurred in connection with sending notice to

the class and processing claims. The amount of expenses in each category are below, followed by further detail regarding the nature of the expenses:

Category	Amount
Shared Costs	\$3,689,345.86
Class Notice and Administration (not including future costs to complete settlement administration)	\$496,177.86
Firm-Specific Expenses	\$450,160.28

**Shared Costs:** Class Counsel contributed to a litigation fund and spent \$3,689,345.86 on a variety of litigation expenses.<sup>6</sup> *Id.*, ¶¶ 67-71. Those expenses include EPPs’ portion of certain costs, such as document hosting services and court reporters and transcripts for depositions, that were shared with other plaintiff groups to reduce the amounts paid by the End-Payor Class. *Id.* Other litigation fund expenses include costs paid for mediation (which was eventually successful at resolving EPPs’ claims) and over \$260,000 for data from a health care industry consultant that served as the backbone for the analysis performed by EPPs’ class certification, damages, and relevant market experts. *Id.*

The vast majority of the expenses paid from the litigation fund—roughly \$3.1 million—were used to pay the numerous experts retained by EPPs for class certification and trial purposes. *Id.* As the Court previously recognized in approving the DPPs’ expense request, the costs in this proceeding were significant largely because of “the expert-driven nature of this complex case.” ECF No. 562 at 11. This is even more true with respect to EPPs and explains why EPPs’ expense request is larger than that of the DPPs. With respect to class certification, for example, the DPPs

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<sup>6</sup> The fee request does not include the portion of payments made from the litigation fund that were reimbursement by other plaintiff groups. Class Counsel only seeks reimbursement of expenses paid from the litigation fund that have not been reimbursed. It does, however, include \$26,932.14 of yet unpaid court reported invoices.

offered the opinions of one expert. EPPs, however, utilized 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. The need for multiple experts—and the depth and scope of their work—arose from the status of caselaw regarding end-payor class certification pharmaceutical cases and arguments Allergan made (and experts it offered). EPPs offered these same opinions (modified to reflect 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 volume of issues in the case—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 for their depositions and summary judgment proceedings.

**Settlement Notice and Administration:** 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. Doing so requires significant effort and cost. As detailed in A.B. Data's declaration 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 any necessary follow-up. The costs incurred by A.B. Data as of April 30, 2022, are \$496,177.86, and Class Counsel respectfully requests that the Court authorize the payment of that amount to A.B. Data. *See* Co-Lead Decl., Ex. 1 (Declaration of Eric Miller), ¶ 5.

In addition to the costs already incurred, A.B. Data will incur significant expenses to complete the administration of the settlement. 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. Co-Lead Decl., ¶ 73. A.B. Data will need to continue processing and verifying those claims as they come in, engage in follow-ups with claimants as necessary, determine each Class Member's respective payment, distribute payments, and follow-up with Class Members that fail to cash their checks. Once A.B. Data's work is nearly complete (*i.e.* when payments are ready to be distributed to eligible claimants), EPPs will move the Court for an order authorizing the payment of additional costs incurred by A.B. Data beyond the \$496,177.86 that Class Counsel requests be authorized in this motion. At this juncture, A.B. Data anticipates that this future work will result in costs of approximately \$250,000. *Id.* at Co-Lead Decl., Ex. 1 (Declaration of Eric Miller), ¶ 5. Together, the accrued and expected future costs total approximately \$750,000.

EPPs will update the Court regarding the costs already incurred by A.B. Data and the estimated future costs prior to the fairness hearing in July.

**Firm-Specific Expenses:** Class Counsel also incurred out-of-pocket expenses in addition to contributions they made to the litigation fund. The out-of-pocket expenses include essential litigation costs such as legal research, deposition transcripts and videos, filing fees, document management/database hosting fees, mediation fees, and travel costs associated with depositions

and hearings. Co-Lead Decl., ¶¶ 75-78. Counsel in class actions regularly receive reimbursement of such costs from the settlement fund. *See Moses v. Apple Hospitality REIT, Inc.*, No. 14-CV-3131 (SMG), 2018 WL 1513631, at \*10 (E.D.N.Y. Mar. 27, 2018) (Gold, J.) (holding that “expert witness fees, mediation fees, and computerized legal research fees . . . are necessary and incidental to [the] representation of the class”); *Guadalupe v. Tri-State Employment, Management, & Consulting, Inc.*, No. 10-CV-3840 NG CLP, 2013 WL 4547242, at \*18 (E.D.N.Y. Aug. 28, 2013) (Gershon, J.) (approving reimbursement of costs for filing fees, service of process, postage, transcripts, and travel costs). The declarations submitted by each firm detail the out-of-pocket expenses incurred by each firm. As with attorneys’ fees, Co-Lead Counsel reviewed the expenses submitted by each firm and eliminated incorrect or excessive expenses. Co-Lead Decl., ¶ 75.

**C. The Requested Service Awards are Reasonable.**

Class Counsel also requests that the Court approve the payment of \$20,000 service awards to each of the ten named Class Representatives (\$200,000 total). “Service awards are common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs.” *See Viafara v. MCIZ Corp.*, No. 12 Civ. 7452, 2014 WL 1777438, at \*16 (S.D.N.Y. May 1, 2014) (Ellis, J.). “Courts have consistently found service awards to be an efficient and productive way to encourage members of a class to become class representatives.” *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1357 (S.D. Fla. 2011). As “a named plaintiff is an essential ingredient of any class action,” a service award is an appropriate means “to encourage or induce an individual to participate in the suit.” *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass. 2004) (quoting

*In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184, 189 (D. Me. 2003)).

The awards are reasonable in light of the work Class Representatives undertook to represent the interests of the End-Payor Class. Among other things, they kept apprised of the status of the litigation, produced documents, responded to interrogatories, and prepared and sat for depositions. Co-Lead Decl., ¶ 79. These activities took significant resources away from Class Representatives' normal business operations. Awards of \$20,000 per Class Representative are consistent with awards in other end-payor pharmaceutical cases. *E.g. In re Solodyn Antitrust Litig.*, No. 1:14-md-02503-DJC, Order Awarding Attorneys' Fees, Expenses and Approving Service Awards to the Class Representatives, ECF No. 1176 at 5 (D. Mass. July 18, 2018) (awarding \$145,000 total to twelve class representatives).

The amounts requested are significantly less than the \$85,000 awarded to DPP class representatives (aside from the one plaintiff that entered the litigation later in the proceedings), *see* ECF No. 562 at 12, and the up to \$200,000 service awards in some end-payor cases, *see The Hospital Authority of Metropolitan Government of Nashville and Davidson County, Tennessee*, No. 3:15-cv-01100, Order, ECF No. 520 at 45 (M.D. Tenn. May 29, 2020) ("Class Representatives, the named Plaintiffs, are granted service awards of \$200,000.00 each.").

In light of the above, the requested service awards are reasonable and appropriate.

## **V. CONCLUSION**

For the foregoing reasons, Class Counsel respectfully requests that the Court award (1) attorneys' fees in the amount of \$10,000,000; (2) expenses in the amount of \$4,635,684.00 (plus authorization to seek additional payments for future settlement administration costs), and (3) service awards of \$20,000 to each of the Class Representatives.

Dated: May 17, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 17, 2021, 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  
Dena C. Sharp