

**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 PLAINTIFFS'
MOTION TO AUTHORIZE DISTRIBUTION OF THE NET SETTLEMENT FUND**

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I. INTRODUCTION

Over the past several months A.B. Data, Ltd. (“A.B. Data.”) and Class Counsel have undertaken the final steps of the claims administration and review process. As Class Counsel have noted in their regular status reports to the Court, this case has unfortunately attracted a large number of fraudulent claims. With few exceptions, when A.B. Data notified such claimants that their claims would be rejected, the claimants did nothing in response and those claims have been rejected. Eighteen claimants have, however, requested Court review of the rejection of their claims. To bring this matter to a close and allow the process of distributing funds to eligible claimants to begin, Class Counsel respectfully requests that the Court enter an order providing for the following relief.

First, Class Counsel request that the Court enter an order approving A.B. Data and Class Counsel’s determination that the claims subject to Court review should be rejected. As described in more detail below, the claims all exhibit multiple, significant indicia of fraud. None of these claimants has provided documentation or other evidence to substantiate their claims in response to A.B. Data’s requests.

Second, Class Counsel request the payment of \$191,871.44 to A.B. Data for costs accrued since final approval and for future costs in relation to its work related to the settlement. At final approval, the Court approved payment to A.B. Data of costs accrued at that time and allowed the submission of an additional request for payment when the claims process was complete. The additional costs for which payment is being requested have been (or will be) incurred by A.B. Data in connection with providing notice of the settlement to the End-Payor Class, receiving and processing claims, meeting with Class Counsel and preparing submissions to the Court, and distributing settlement payments to Eligible Claimants. With this additional

amount, the total amount paid to A.B. Data will be less than the total cap approved by the Court for settlement-related work. Class Counsel also requests the payment of an additional \$98,304.02 to A.B. Data which reflects costs incurred in preparation of sending notice of the Court's class certification order prior to the settlement. Taking both payments into account, the total costs paid from the Settlement Fund will be less than the amount provided for in the notice to class members.

Third, if the Court agrees that the disputed claims should be rejected, then Class Counsel request that the Court authorize the distribution of the Net Settlement Fund to eligible claimants. A.B. Data has calculated each class members' *pro rata* share of the Net Settlement Fund pursuant to the Plan of Allocation and is prepared to distribute funds to eligible claimants once all questions concerning the validity of certain claims has been resolved.

As always, Class Counsel appreciate the Court's attention to this matter and can be available at the Court's convenience for a hearing or conference concerning this motion and the requested relief.

II. CLAIMANTS REQUESTING COURT REVIEW

Throughout the claims administration process, A.B. Data has actively monitored claims that exhibited indicia of fraud. Such indicia include claims submitted by known fraudulent filers, unrealistic claim amounts, and the submission of multiple claims.¹ For certain categories of claims that were almost certainly the result of fraud, A.B. Data sent claimants a notice of rejection. For other categories of claims where the claims present significant indicia of fraud, A.B. Data sent a request to the claimants for further information to verify their claims. Where

¹ The repeated submission of fraudulent claim by certain individuals is a burden on the effective administration of class actions generally that should be deterred. Class Counsel reserves the right to seek sanctions against any claimant that submitted a fraudulent claim in this matter.

claimants provided the requested information, A.B. Data considered the claim to be an eligible claim and has included it within the proposed distribution. Where claimants failed to provide the requested information (or did not respond at all), the claimants were sent a notice of rejection and given thirty days to respond. All claimants were advised of their right to seek Court review of the rejection of their claims.

As a result of this process, eighteen claimants have requested Court review of the rejection of their claim, consisting of two claims from third-party payors (“TPPs”) and sixteen consumer claims. The following sections categorize the claims that have requested Court review based on the reason that A.B. Data and Class Counsel have recommended that the claim be rejected. The final subsection provides a chart identifying each claim that has requested Court review, the reason for the recommended rejection of the claim, and the corresponding Exhibit to the Declaration of Scott Grzenczyk where copies of the correspondence between A.B. Data and the claimant have been filed.² Each of the claimants identified below will be provided with a copy of this motion and the Exhibit corresponding to his or her claim, and will be advised that they should submit any response within 14 days of receipt of the motion.

A. TPP Claimants

Two claimants that submitted claims as TPPs have requested court review of their claims.

The first is Susan Ruth (Claim ID 145371522), who frequently files claims in class actions and has been flagged by A.B. Data as a likely fraudulent filer. In this case, likely in an effort to appear to have submitted a legitimate claim, Ms. Ruth filed a claim as a third-party

² The initial email correspondence from A.B. Data to each claimant rejecting his or her claim was automatically generated and sent using a standard template form. A.B. Data does not have copies of the individualized emails sent to each claimant, but has included in the exhibits the templates that were used for the individualized emails.

payor under the name “Susan Ruth LLC” and has claimed \$280,000 in Restasis payments. Ms. Ruth has not provided any verification that Susan Ruth LLC is a legitimate business, let alone one that paid for or provided reimbursement for Restasis.

The second is Lansing Pipe & Flange of New York (“Lansing Pipe”) (Claim ID 145371931). Like Ms. Ruth, Lansing Pipe is a repetitive filer in a wide range of class actions (including cases where its owner files as a consumer). Lansing Pipe (and Mr. Lansing as a consumer) submit claims, for example, regardless of the states that the class is limited to. In A.B. Data’s opinion, Lansing Pipe is a serial fraudulent filer. Lansing Pipe did not submit any documentation or other evidence in response to A.B. Data’s request for information to verify the legitimacy of the claim.

B. Consumer Claimants

Sixteen consumer claimants have requested Court review.³ Each of these claimants was flagged by A.B. Data as exhibiting indicia of fraud and, in response, A.B. Data informed each claimant that their claim would be rejected absent documentation to verify their claim.⁴ None of the claimants provided such documentation, and in some instances the documentation provided confirms that the claim is not legitimate.

The various indicia of fraud that formed the basis of A.B. Data’s decision to reject the consumer claims at issue is described in this section. While the presence of any one indicium would provide a sufficient basis to reject the claim in the absence of documentation in response

³ Consumer claimants are referred to only by their Claim Number to avoid any potential disclosure of their medical histories (to the extent the consumer claimants were actually prescribed Restasis), which is generally protected from disclosure. Class Counsel has filed a motion to seal the correspondence between A.B. Data and each claimant.

⁴ Where claimants that received claim denial letters did provide documentation (such as a picture of their Restasis package or a copy of their prescription), their claims were approved for payment.

to A.B. Data's request, each disputed claim has multiple indicia of fraud. Each claim, and the indicia of fraud applicable to that claim, is set forth in Section C below.

Serial Claim Filer: Fifteen of the claimants⁵ were flagged by A.B. Data as serial fraudulent filers. This means that the claimant has submitted claims in numerous cases in which A.B. Data has served as the claims administrator. In A.B. Data's view, there is little-to-no chance that an individual would have legitimate claims (*i.e.*, have made purchases) for each of the products at issue in those cases (for example, taking each of the many different drugs at issue in the cases that A.B. Data has administered). In many instances, the claimants also have a history of filing claims in matters in which they could not possibly be a class member (*i.e.*, matters that do not involve consumers or involve states in which the claimant does not reside). In addition, the claimants generally have a history of failing to respond to requests for verification of class membership. The claims submitted by these claimants were thus flagged in A.B. Data's system as potentially or likely fraudulent, resulting in A.B. Data requesting verification that the claim is legitimate.

Filed Multiple Claims: Six claimants⁶ submitted multiple claims, sometimes under different names from the same address or using different addresses (or email addresses) but the same name in an attempt to make the claims appear distinct.

Multiple Claimants from the Same Address: In nine instances⁷ multiple claims were submitted from the same address (and in each instance the claimants were Serial Claim Filers).

⁵ Claim IDs 145371674, 145371675, 145371672, 145371670, 145402369, 145402373, 145324588, 145323914, 145321333, 145321330, 145321328, 145406823, 145321840, 145321487, and 145321486.

⁶ Claim IDs 145340819, 145324588, 145323914, 145321333, 145321330, and 145406823.

⁷ Claim IDs 145371674, 145371675, 145371672, 145371670, 145402369, 145402373, 145321330, 145321328, and 145406823.

For example, Claim IDs 145371674, 145371675, 145371672, and 145371670 were all submitted by claimants with the same last name and address. There is little-to-no chance that four individuals with the same last name residing at the same location were *all* prescribed Restasis. Each of these four claimants is a Serial Claim Filer. Three of the claimants provided the same explanation for why they could not provide documentation to A.B. Data: that they no longer have the ability to get documentation. Similarly, Claim IDs 145321330 and 145321328 were submitted by Serial Claim Filers that submitted multiple claims with different (but sometimes overlapping) combinations of name and email address. In each instance, the claim's IP Address (*i.e.*, the specific computer or internet access point claim) was the same.

Correspondence Confirms the Claim is Not Legitimate: Three claimants (all Serial Claim Filers) provided documentation that confirms that the claims were either submitted in the wrong case or are fraudulent. Claim ID 145321840 provided tax returns in response to A.B. Data's request for documentation. The claimant may be confusing this matter with the *Provigil* matter in which A.B. Data is also serving as the claims administrator and has requested proof of residence in the State of California. But in either event, tax returns are not sufficient documentation in this case because they say nothing about purchases of Restasis. Claim IDs 145321487 and 145321486 both sent letters saying that they inject Restasis for thrombosis, but Restasis is neither an injectable nor a thrombosis treatment. The letters also reference Lovenox/Enoxaparin—a thrombosis drug at issue in a different litigation in which A.B. Data also serves as claims administrator. Regardless of whether these claimants might have had a valid claim in the Enoxaparin matter, the documentation shows that the claims are either fraudulent or, at best, were submitted in the wrong case.

Unrealistic Claim Amount: In addition to submitting four separate claims, Claim ID 145340819 submitted claims for 150 packages of Restasis (50 each of the 30-vial, 60-vial, and multidose versions). This would amount to well over twelve years of purchases, far exceeding the class period or any reasonable amount of use.

C. Summary

A.B. Data and Class Counsel, after further consultation with claimants, have accepted for payment numerous previously disputed claims. Each of the disputed claims at issue in this motion, however, evidence multiple indicia of fraud and none of the claimants has provided sufficient documentation that they are members of the End-Payor Class and thus entitled to recover from the End-Payor Settlement. A.B. Data and Class Counsel therefore request that the Court confirm the recommendation to reject each claim.

The below chart identifies each claim that has requested Court review, the reason for the recommended rejection of the claim, a summary of the correspondence between A.B. Data and the claimants, and the corresponding Exhibit to the Declaration of Scott Grzenczyk where copies of the correspondence have been filed.

Claim ID	Reason for Rejection	Exhibit
145371522	Serial Claim Filer as an individual claimant under the name Susan Ruth. In this case has submitted a claim as a TPP as Susan Ruth LLC with \$280,000 in claimed Restasis purchases. Did not provide documentation in response to claim denial letter.	1
145371931	Serial Claim Filer as both an individual and business (filed as a TPP in this case). Did not provide documentation in response to claim denial letter.	2
145371674	Serial Claim Filer. Multiple Claimants from the Same Address. Did not provide documentation in response to claim denial letter.	3

145371675	Serial Claim Filer. Multiple Claimants from the Same Address. Did not provide documentation in response to claim denial letter.	4
145371672	Serial Claim Filer. Multiple Claimants from the Same Address. Did not provide documentation in response to claim denial letter.	5
145371670	Serial Claim Filer. Multiple Claimants from the Same Address. Did not provide documentation in response to claim denial letter.	6
145402369	Serial Claim Filer. Multiple Claimants from the Same Address. Did not provide documentation in response to claim denial letter.	7
145402373	Serial Claim Filer. Multiple Claimants from the Same Address. Did not provide documentation in response to claim denial letter.	8
145340819	Filed Multiple Claims. Unrealistic Claim Amount. Did not provide documentation in response to claim denial letter.	9
145324588	Serial Claim Filer. Filed Multiple Claims. Did not provide documentation in response to claim denial letter.	10
145323914	Serial Claim Filer. Filed Multiple Claims. Did not provide documentation in response to claim denial letter.	11
145321333	Serial Claim Filer. Filed Multiple Claims. Did not provide documentation in response to claim denial letter.	12
145321330	Serial Claim Filer. Filed Multiple Claims. Multiple Claimants from the Same Address.	13
145321328	Serial Claim Filer. Multiple Claimants from the Same Address. Documentation provided deemed insufficient.	14
145406823	Serial Claim Filer. Filed Multiple Claims. Multiple Claimants from the Same Address. Did not provide documentation in response to claim denial letter.	15
145321840	Serial Claim Filer. Correspondence Confirms the Claim is Not Legitimate (appears to be submitting a claim in the <i>Provigil</i> litigation).	16
145321487	Serial Claim Filer. Correspondence Confirms the Claim is Not Legitimate (correspondence references	17

	injections—Restasis is not an injectable drug—and the drug Lovenox/Enoxaparin).	
145321486	Serial Claim Filer. Correspondence Confirms the Claim is Not Legitimate (correspondence references injections—Restasis is not an injectable drug—and the drug Lovenox/Enoxaparin).	18

III. DISTRIBUTIONS FOR FEES, EXPENSES, SERVICE AWARDS, AND SETTLEMENT ADMINISTRATION COSTS

A. Amounts Disbursed to Date.

The only payments that have been made from the Settlement Fund to date are those previously authorized by the Court. On August 2, 2022, the Court granted Class Counsel’s motion for the payment of attorneys’ fees, expenses, and service awards. ECF 741. Pursuant to that order, the following amounts have been disbursed from the Settlement Fund: \$10,000,000 for attorneys’ fees, \$4,635,684.00 for expenses incurred during the prosecution of the litigation, and \$198,000 for service awards for the class representatives. During the claims administration process, the Net Settlement Fund (*i.e.* the Settlement Fund minus the above disbursements) has continued to accrue interest. As of April 30, 2023, the value of the Net Settlement Fund was \$15,266,988.02.

B. Future A.B. Data Expenses for the Completion of Claims Administration and Distribution

The Court’s August 2, 2022, order capped the total fees to be paid to A.B. Data for settlement-related work at \$750,000. ECF 741 at 17. The \$4,635,684.00 in expense payments previously authorized by the Court included \$496,177.86 in costs for A.B. Data’s work through April 30, 2022. *See* ECF 727-1 at 22-23.

Through March 31, 2023, A.B. Data has incurred an additional \$147,854.27 in costs and expects to incur \$44,017.17 in costs after March 2023 to complete the claims administration

process, including distributing the Net Settlement Fund and any necessary follow-ups. A.B. Data is not seeking payment of costs related to tasks it performed in response to the Court's concern regarding the unavailability of the Settlement Agreement on the settlement website. Class Counsel requests that the Court authorize the payment of \$191,871.44 to A.B. Data (the accrued and future costs since April 30, 2022), which will bring the total costs payable to A.B. Data for settlement-related work to \$688,049.30 (less than the \$750,000 cap).

C. A.B. Data Expenses Incurred in Connection with Class Certification Prior to Settlement

The Court certified the End-Payor Class on May 5, 2020. ECF 501. After the Court's order, but prior to reaching a settlement with Allergan, Class Counsel worked with A.B. Data to prepare to distribute notice to the End-Payor Class. The Court authorized the distribution of notice on March 23, 2021. ECF 664. The Court's order required the notice program to begin within 14 days. *Id.* Shortly thereafter, on April 8, 2021, the parties informed the Court that they had resumed settlement discussions and requested that the dates in the March 23 order be deferred, which the Court granted. ECF 668. Between March 23 and April 8, 2021, A.B. Data had proceeded with preparing to distribute notice as required by the March 23 order. Although notice was not fully distributed at that time due to the parties' resuming settlement discussions, A.B. Data incurred non-recoverable costs related to the distribution of class certification notice. Those costs included development of the website and toll-free number, preparation and translation of notices for mailing and publication, and standard fees associated with initiating notice. A.B. Data was able to cancel certain publications including *AARP* and *The Bulletin*. However, the scheduled publication in *People* could not be canceled. The amount of those costs is \$98,304.02.

Class Counsel respectfully request payment of this amount to A.B. Data from the Settlement Fund. Including this payment, the total expenses distributed from the Settlement Fund will be \$4,925,859.46 (\$4,635,684.00 in costs previously approved by the Court, \$191,871.44 for A.B. Data to complete the claims and distribution process, and \$98,304.02 for costs incurred in connection with preparing notice of the Court's class certification ruling). This less than the \$5,250,000 limit on expenses included in the Long-Form Notice. *See* ECF 715-1 at 7 (revised Long-Form Notice approved by the Court).

After the payment of A.B. Data's final class certification costs, settlement notice and administration costs, and the accrual of further interest, the balance of the Net Settlement Fund will be approximately \$15,000,000.

IV. DISTRIBUTION OF THE NET SETTLEMENT FUND

A.B. Data has completed the processing of claims. After conferring with and at the instruction of Class Counsel, A.B. Data sent notices to claimants requesting additional information to validate claims and provided an opportunity for any claimant to request Court review of their rejection. Excluding the claims subject to Court review, there are 16,612 Eligible Consumer Claims and 1,393 Eligible TPP Claims.

In accordance with the Plan of Allocation (ECF 715-6, Ex. 3), A.B. Data divided the Net Settlement Fund into three pools: the Cash Consumer Pool, the Insured Consumer Pool, and the TPP Pool (the "Allocation Pools"). Eligible Claimants were then allocated a portion of their respective Allocation Pool on a *pro rata* basis according to their share of the Eligible Purchases within their pool.

Pursuant to the Plan of Allocation, each Eligible Claimant will receive at least \$15. ECF 708-2, Ex. 3, ¶ 23. A.B. Data reduced the distributions to other Eligible Claimants (within each Allocation Pool) on a pro-rata basis until those Eligible Claimant who would otherwise receive

less than \$15 receive as close to \$15 as that Allocation Pool can provide. *Id.* Lists of Eligible Consumers Claimants and Eligible TPP Claimants that will receive a distribution (including their claim number and their *pro rata* share of the Net Settlement Fund⁸) are set forth in Exhibits 19 and 20, respectively, to the Grzenczyk Declaration.

If the Court agrees with A.B Data and Class Counsel’s recommendations to reject the disputed claims and otherwise grants this motion to authorize the distribution of the Net Settlement Fund, then upon entry of such an order A.B. Data will proceed with distributing checks to Eligible Claimants as set forth in Exhibits 19 and 20.

If the Court disagrees with any of A.B Data and Class Counsel’s recommendations to reject the disputed claims, A.B. Data will adjust the Eligible Claimants’ *pro rata* payments accordingly and Class Counsel will submit a supplemental motion to authorize the distribution of the Net Settlement Fund based on the revised allocation.

V. CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that the Court enter an order accepting A.B. Data and Class Counsel’s recommendation to reject the disputed claims and authorizing the distribution of the Net Settlement Fund.

Dated: May 5, 2023

Respectfully submitted,

/s/ Scott Grzenczyk

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⁸ These *pro rata* amounts may change slightly as a result of additional accrued interest, tax payments that occur prior to distribution, and further payments to A.B. Data that the Court may authorize as requested in this Motion.

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