UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE RESTASIS (CYCLOSPORINE OPHTHALMIC EMULSION) ANTITRUST LITIGATION	Case No. 18-MD-2819 (NG) (LB)
THIS DOCUMENT APPLIES TO: ALL END-PAYOR PLAINTIFF CLASS ACTIONS	

[REVISED PROPOSED] ORDER GRANTING END-PAYOR PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT, APPROVAL OF PLAN OF ALLOCATION, AND ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and in accordance with the terms of the End-Payor Class Settlement Agreement with Allergan dated September 23, 2021:

WHEREAS, terms capitalized in this Order and not otherwise defined herein have the same meanings as those used in the Settlement Agreement and exhibits thereto, *see* ECF No. 708-2, 710-1, 711, 712-1, 715-6;

WHEREAS, this matter having come before the Court by way of End-Payor Plaintiffs' Motion for Final Approval of Settlement, Approval of Plan of Allocation, and Order of Dismissal with Prejudice ("Motion");

WHEREAS, on September 23, 2021, End-Payor Plaintiffs and Defendant Allergan, Inc. ("Allergan") entered into a settlement agreement that, if finally approved by the Court, would result in a settlement of the end-payors' claims in the Action;

WHEREAS, on January 18, 2022, the Court issued an order ("Preliminary Approval Order"), ECF No. 716, granting End-Payor Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, Notice and Claims Plan, and Plan of Allocation;

WHEREAS, on May 5, 2020, ECF No. 501, the Court certified the following End-Payor Class:

> All persons or entities who indirectly purchased, paid and/or provided reimbursement for some or all of the purchase price for Restasis, other than for resale, who made their purchases in Arizona, Arkansas, California, Colorado, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine*, Massachusetts*, Michigan, Minnesota, Mississippi, Missouri*, Montana*, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont*, West Virginia, and Wisconsin from May 1, 2015, through the present (in the case of Arkansas only, July 31, 2017), for consumption by themselves,

> their families, or their members, employees, insureds, participants, or beneficiaries.[1]

WHEREAS, the Court excluded the following from the End-Payor Class:

> Allergan, its officers, directors, employees, subsidiaries, and affiliates; all federal and state government entities except for cities, towns, municipalities, or counties with self-funded prescription drug plans; all persons or entities who purchased Restasis for purposes of resale or directly from Allergan of its affiliates; fully insured health plans, *i.e.*, plans that purchased insurance covering 100 percent of their reimbursement obligations to members; any "flat copay" consumers who purchased Restasis only via a fixed dollar copayment that does not vary on the basis of the drug's status as brand or generic; PBMs; and all judges assigned to this case and their chambers staff and any members of the judges' or chambers staff's immediate families.

WHEREAS, in the Preliminary Approval Order, for the purposes of settlement the Court amended the class period set forth in the class definition, with respect to all states except for Arkansas, to end on July 31, 2021, and further excluded MSP Recovery Claims, Series LC, MSPA Claims 1, LLC, and MAO-MSO Recovery II, LLC, Series PMPI, who jointly filed a separate action against Allergan and have settled separately with Allergan;

WHEREAS, in accordance with the Preliminary Approval Order, notice of settlement was given by publication beginning on February 1, 2022; by direct mail and e-mail beginning on February 8, 2022; by toll-free telephone helpline beginning February 1, 2022; and by website, www.RestasisLitigation.com, beginning February 1, 2022;

WHEREAS, only five End-Payor Class Members have submitted requests to exclude themselves from the settlement, listed in the submission at docket number ECF No. 728-1 (Miller Decl. Ex. A, at 1 (May 17, 2022));

WHEREAS, no End-Payor Class Member has objected to the Settlement Agreement;

[1] In the states marked with an asterisk, class members are only consumers, not TPPs.

WHEREAS, on July 12, 2022, the Court held a fairness hearing, and has considered all of the submissions and arguments with respect to the settlement, and otherwise being fully informed, and good cause appearing therefore;

WHEREAS, this Order incorporates and makes a part hereof the Settlement Agreement and the Preliminary Approval Order,

THEREFORE, the Court **GRANTS** the motion and **ORDERS** as follows:

I. Jurisdiction

1. The Court has jurisdiction over the subject matter of and the parties to the Action.

II. Notice

2. Notice has been given to the Class in substantially the manner approved by the Court in its Preliminary Approval Order.

3. Such notice, in the form presented by the exhibits to the Declaration of Eric J. Miller Regarding Dissemination of Notice, ECF No. 725, constituted the best notice practicable under the circumstances. The notice provided for actual individual notice to all Class Members who were identified through reasonable efforts by direct mail and/or e-mail, and was further given by publication in print and on a case-specific website, www.RestasisLitigation.com.

4. This notice provided Class Members due and adequate notice of the settlement, the Settlement Agreement, these proceedings, and the rights of End-Payor Class Members to opt out of the Settlement Agreement or object to Settlement Agreement.

III. Final Approval

5. The deadline to e-mail or postmark requests to opt out from the End Payor Class and Settlement Agreement was May 3, 2022. Only five exclusion requests were received before the date of the fairness hearing.

6. The deadline for Class Members to object to the Settlement Agreement was June 7, 2022. No Class Members objected to the Settlement Agreement.

7. On July 12, 2022, the Court held a fairness hearing.

8. The Settlement Agreement includes the following releases:

> u. "Released Claims" means any and all manner of claims, demands, rights, actions, suits, causes of action, lawsuits, proceedings, judgments, losses, liabilities, fees (including attorneys' fees and the fees of expert witnesses), costs, penalties, injuries, or damages of any kind whatsoever, whether class, individual, or otherwise in nature, whenever incurred, known or unknown (including, but not limited to, "Unknown Claims"), foreseen or unforeseen, suspected or unsuspected, asserted or unasserted, contingent or non-contingent, accrued or unaccrued, in law or in equity, under the laws of any jurisdiction, which Releasors or any Releasor, whether directly, representatively, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have, relating in any way to any conduct prior to the Effective Date and arising out of or related in any way in whole or in part to: (a) all claims asserted by End Payor Plaintiffs in this Action; and/or (b) all claims concerning alleged delay or impairment in the marketing, sale, manufacture, pricing, or purchase of, or the enforcement of intellectual property related to Restasis or its generic equivalents that could reasonably have been known and/or asserted in the Action, including but not limited to claims of *Walker Process* Fraud, sham Orange Book patent listings, sham citizen petitions, efforts to petition Congress, transactions with the Saint Regis Mohawk Tribe, or agreements between Allergan and potential manufacturers of generic Restasis resolving patent infringement litigation prior to the date hereof. The Released Claims shall include claims that would arise out of or relate to future purchases of Restasis® or generic Restasis® and that relate to the subject matters described above. For avoidance of doubt, "Released Claims" do not include claims excluded from release under ¶ 11 of this Agreement ("**Claims Excluded from Release**") . . . .
>
> **7. Released Claims.** Upon the Effective Date, the Releasors (regardless of whether any such Releasor ever seeks or obtains any recovery by any means, including, without limitation, by submitting a Proof of Claim and Release, or by seeking any distribution from the Net Settlement Fund) shall be deemed to have, and by operation of the Judgment shall have fully, finally, and forever released,

relinquished, and discharged all Released Claims against the Releasees.

8. No Future Actions Following Release. The Releasors shall not, after the Effective Date, seek (directly or indirectly) to commence, institute, maintain, or prosecute any suit, action, or complaint or collect from or proceed against Defendant or any other Releasee (including pursuant to the Action) based on any Released Claim in any forum worldwide, whether on his, her, or its own behalf, or as part of any putative, purported, or certified class of purchasers or consumers. This Settlement Agreement does not include any provisions for injunctive relief. Class Members shall look solely to the Settlement Fund for settlement and satisfaction against Defendant of all claims that are released hereunder.

9. Covenant Not to Sue. Releasors hereby covenant not to sue the Releasees with respect to any such Released Claims. Releasors shall be permanently barred and enjoined from instituting, commencing, or prosecuting against the Releasees any Released Claims or claims related to the Released Claims. The Settling Parties contemplate and agree that this Agreement may be pleaded as a bar to a lawsuit, and an injunction may be obtained, preventing any action from being initiated or maintained in any case sought to be prosecuted on behalf of any Releasors with respect to the Released Claims.

10. Waiver of California Civil Code § 1542 and Similar Laws. The Releasors acknowledge that, by executing this Agreement, and for the consideration received hereunder, it is their intention to release, and they are releasing, all Released Claims, even Unknown Claims. In furtherance of this intention, the Releasors expressly waive and relinquish, to the fullest extent permitted by law, any rights or benefits conferred by the provisions of California Civil Code § 1542, as set forth in ¶ 1(aa), or equivalent, similar, or comparable laws or principles of law. The Releasors acknowledge that they have been advised by Class Counsel of the contents and effects of California Civil Code § 1542, and hereby expressly waive and release with respect to the Released Claims any and all provisions, rights, and benefits conferred by California Civil Code § 1542 or by any equivalent, similar, or comparable law or principle of law in any jurisdiction. The Releasors may hereafter discover facts other than or different from those which they know or believe to be true with respect to the subject matter of the Released Claims, but the Releasors hereby expressly waive and fully, finally, and forever settle and release any known or unknown, suspected or unsuspected, foreseen or unforeseen, asserted or unasserted, contingent or non-contingent, and accrued or unaccrued claim, loss, or damage with respect to the Released Claims, whether or not

> concealed or hidden, without regard to the subsequent discovery or existence of such additional or different facts. The release of unknown, unanticipated, unsuspected, unforeseen, and unaccrued losses or claims in this paragraph is not a mere recital.
>
> **11. Claims Excluded from Release**. Notwithstanding the foregoing, the releases provided herein shall not release claims of Persons that are outside the Class; claims or damages arising solely from conduct by Defendant after the Effective Date of this Agreement; claims against Defendant or any Releasee pending in *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, Case No. 2:16-md-02724-CMR (E.D. Pa.); or claims against Defendant other than the Released Claims, such as for product liability, breach of contract, or personal injury; or claims to enforce the terms of this Agreement.

9. The consideration for these releases is twenty-nine million, nine-hundred and ninety-nine thousand, nine-hundred and ninety-nine U.S. Dollars and ninety-nine cents ($29,999,999.99).

10. The Court hereby approves the settlement, as set forth in the Settlement Agreement, and finds that the settlement is, in all respects, fair, reasonable, and adequate to the End-Payor Plaintiff Class members, and contains terms that responsible and experienced attorneys could accept considering all relevant risks and factors, and are in full compliance with all applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), and the Class Action Fairness Act (including 28 U.S.C. § 1715).

11. Specifically, the settlement is fair, reasonable, and adequate based on the factors set forth in Rule 23(e)(2) and the Second Circuit's decision in *City of Detroit v. Grinnell Corp.*[2]:

[2] 495 F.2d 448, 463 (2d Cir. 1974) (enumerating the factors to be considered for final approval as: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining

a. The litigation was complex, expensive, and of long duration.

b. The Class has almost unanimously supported the settlement.

c. Discovery has been completed, with millions of pages of documents exchanged, depositions taken, and expert reports exchanged.

d. There are risks associated with establishing liability, damages, and maintaining the Class through trial, including but not limited to the risk that the End-Payor Plaintiffs would not prevail on Allergan's summary judgment motions or key *Daubert* challenges; that the End-Payor Plaintiffs could not prove causation through a hypothetical "but for" world of generic competition; and that a jury would find that the FDA, not Allergan, is responsible for the delayed approval of generic Restasis.

e. The settlement amount is reasonable in light of the potential recovery and the attendant risks of this litigation.

12. The Plan of Allocation provides for *pro rata* distribution and is fair, reasonable, and adequate.

13. The Court finally approves in all respects the settlement, finds that it benefits the End-Payor Class Members, and directs its consummation pursuant to its terms.

14. Class Counsel and A.B. Data, Ltd., the Court-approved administrator, are authorized to administer and distribute the net proceeds of the settlement according to the terms of the Settlement Agreement and the Plan of Allocation.

---

the class through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

15. All of the End-Payor Plaintiffs' and End-Payor Class Members' claims against Allergan in the Action are hereby dismissed with prejudice and without costs, except as provided for in § F of the Settlement Agreement.

16. Neither the contents of this Order nor the Settlement Agreement nor any other Settlement-related document or related proceedings shall constitute, be construed as, or be deemed to be evidence of or an admission or concession by Defendant as to the validity of any claim that has been or could have been asserted against Defendant or as to any liability by Defendant to the End-Payor Class.

17. The Court retains exclusive jurisdiction over the implementation and enforcement of the Settlement Agreement.

IV. Claims Administration

18. A.B. Data shall provide weekly updates to Class Counsel regarding the status of the claims administration process. Class Counsel shall provide bi-weekly updates to the Court regarding claims administration status. Class Counsel shall also designate at least one primary point of contact for claims administration issues within each their respective firms. As of the date of this Order, those attorneys are Scott Grzenczyk of Girard Sharp LLP, Robert S. Schachter of Zwerling, Schachter & Zwerling, LLP, Joseph R. Saveri of Joseph Saveri Law Firm, LLP, and David Rudolph of Lieff Cabraser Heimann & Bernstein, LLP.

19. As discussed at the fairness hearing, Class Counsel shall continue to supervise A.B. Data throughout the claims administration process. Specifically, in addition to providing Class Counsel with weekly updates, A.B. Data shall confer with Class Counsel regarding the following steps in the claims administration process:

a. A.B. Data shall confer with Class Counsel regarding whether to close online claim filing or extend it for a period of time after the claims filing deadline.

b. A.B. Data shall confer with Class Counsel regarding the specific criteria for determining whether claims are deficient or ineligible.

c. A.B. Data shall confer with Class Counsel regarding the audit threshold and response requirements regarding deficiency and ineligibility issues.

d. A.B. Data shall escalate unresolved claims to Class Counsel for analysis and proposed resolution.

e. A.B. Data shall provide a draft declaration and final claims reports to Class Counsel for review and verification prior to filing.

20. Class Counsel shall file a motion for distribution of settlement funds and for payment of A.B. Data's fees once the claims administration process has completed (both accrued costs and any anticipated costs related to the distribution of settlement funds). A.B. Data's fees shall be capped at $750,000. As discussed at the fairness hearing, Class Counsel anticipate filing the motion for distribution within four to six months from the date this Order is entered.

V. Judgment

21. Having found the Settlement Agreement to be fair, reasonable, and adequate, within the meaning of Rule 23(e) of the Federal Rules of Civil Procedure and *Grinnell* as to End-Payor Class Members, and that due, adequate, and sufficient notice has been provided to all persons or entities entitled to receive notice satisfying the requirements of the United States Constitution (including the Due Process Clause), Rule 23 of the Federal Rules of Civil Procedure, and any other applicable law:

a. The Motion for Final Settlement Approval is GRANTED and the settlement shall be consummated in accordance with its terms as set forth in the Settlement Agreement.

b. The claims against Allergan by the End-Payor Plaintiffs and Class Members are dismissed with prejudice.

c. No costs or attorneys' fees are recoverable under 15 U.S.C. § 15(a) (and none are sought).

d. Releasors' Released Claims with respect to Releasees are hereby released, such release being effective as of the Effective Date.

e. Releasors are permanently enjoined and barred from instituting, commencing, or prosecuting any action or other proceeding asserting any Released Claims against the Releasees.

f. With respect to any non-released claim, no rulings, orders, or judgments in this Action shall have any res judicata, collateral estoppel, or offensive collateral estoppel effect.

g. Attorneys' fees and reimbursement of litigation costs and expenses shall be paid upon the occurrence of the Effective Date as set forth in the Settlement Agreement.

h. There being no just reason for delay, the Court directs that this Order and judgment be final and appealable. The Court finds that no order under Fed. R. Civ. P. 54(b) is necessary, but that, if such an order were necessary, the requirements of Rule 54(b) are satisfied.

22. The Clerk is directed to enter this Order and judgment.

SO ORDERED this __ day of _____, 2022.

_____

THE HONORABLE NINA GERSHON
UNITED STATES DISTRICT JUDGE