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' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, PRELIMINARY APPROVAL OF PLAN OF ALLOCATION, AND APPROVAL OF NOTICE AND CLAIMS PLAN

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I. INTRODUCTION

After nearly four years of hard-fought litigation, End-Payor Plaintiffs ("EPPs"), on behalf of themselves and the members of the certified End-Payor Class, reached a settlement with Allergan. EPPs respectfully request that the Court grant preliminary approval to the settlement, approve the proposed Plan of Allocation, and approve the plan for distributing notice of the settlement to the End-Payor Class.

The settlement was negotiated at arm's length by counsel experienced in antitrust class actions. Negotiations included three separate mediations, the last two of which were mediated by the Honorable Edward A. Infante, former Chief Magistrate Judge of the U.S. District Court, Northern District of California. The settlement, which provides for Allergan to pay approximately $30 million in cash, was reached after completion of fact and expert discovery, class certification, and summary judgment briefing. The Class will obtain immediate relief and avoid the potential risks and delay of summary judgment, trial, and appeal.

The proposed plan for distributing notice of the Settlement to the End-Payor Class is substantially similar to the notice plan the Court approved for class certification notice and will provide the best notice practicable. The notice plan includes an online media campaign, publication notice, and direct mail to third-party payors ("TPPs"). The forms that class members will submit to claim a share of the settlement payments are straightforward and easy to complete. Also, the proposed Plan of Allocation is reasonable and fair. It divides the settlement proceeds into pools for the different types of class members (cash paying consumers, insured consumers, and TPPs), and distributes funds within each pool on a *pro rata* basis.

II. BACKGROUND

Filing Complaints and Organization. The first end-payor complaint in this multidistrict litigation was filed 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. On April 4, 2018, the Court appointed as End-Payor Interim Co-Lead Counsel: Eric B. Fastiff of Lieff, Cabraser, Heimann & Bernstein, LLP; Dena C. Sharp of Girard Sharp LLP; and Joseph R. Saveri of the Joseph Saveri Law Firm, LLP. ECF No. 51.[1] The Court also appointed Dan Drachler, then of Zwerling, Schachter & Zwerling, LLP, as End-Payor Interim Liaison Counsel. *Id.*

Motions to Dismiss. Following transfer of all pending Restasis actions to this Court, the Court consolidated the end-payor actions. EPPs filed a consolidated complaint, which Allergan moved to dismiss. ECF Nos. 53, 111. On September 18, 2018, the Court denied Allergan's motion to dismiss, and on November 13, 2018, the Court largely denied Allergan's challenges to EPPs' state law causes of action. ECF Nos. 146, 176. On December 20, 2018, EPPs filed a Corrected First Amended Consolidated Class Action Complaint. ECF No. 210.

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. Plaintiffs

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

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). Between January 2019 and July 2019, Plaintiffs deposed 33 fact witnesses, including current and former employees of Allergan and non-parties.

Class Certification. In April 2019 EPPs moved for certification of the End-Payor Class, supported by three experts (one of whom submitted only a rebuttal report). Allergan opposed, also relying on three experts. The motion for class certification resulted in seven briefs before oral argument. ECF Nos. 396, 399, 401, 403, 430. 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. On October 23, 2019, the Court held oral argument on class certification and the *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. Defendants 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.

Expert Discovery. Between August 2019 and December 2019, the parties exchanged twenty-nine merits expert reports. In November and December 2019, Plaintiffs deposed seven of Allergan's experts. In January and February 2020, the direct purchaser class plaintiffs and

retailer plaintiffs settled. From January 2020 to September 2020, 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.

Summary Judgment. Between September 2020 and January 2021, the parties filed three motions and one cross-motion for summary judgment. ECF Nos. 582, 586, 588, 589, 590, 591, 637. 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.

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. 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. Declaration of Adam Gitlin ("Gitlin Decl.") Ex. 1, Settlement Agreement, § 12. In exchange, Defendants 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. In event that over a predetermined percentage of the class chooses to opt-out of the settlement, Allergan will have the right to terminate the agreement. *Id*., § 29(d).[2]

III. ARGUMENT

A. The Court Should Preliminarily Approve the Settlement.

Approval of a class action settlement "typically occurs in two stages:" first, "preliminary approval—where 'prior to notice to the class, a court makes a preliminary evaluation of fairness,'" and second, "final approval—where 'notice of a hearing is given to the class members, [and] class members and settling parties are provided the opportunity to be heard on the question of final court approval.'" *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 27 (E.D.N.Y. 2019) (quoting *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-CV-5450, 2016 WL 7625708, at *2 (S.D.N.Y. Dec. 21, 2016)).

"During the preliminary approval stage, a court 'must review the proposed terms of settlement and make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms.'" *Id*. (quoting *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007)). The Court must direct notice to the class "if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule

[2] EPPs have separately moved to seal the specific percentage that may trigger Allergan's termination right.

23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B).

As to the second factor, the Court has previously certified the class. With respect to whether the Settlement likely warrants approval under Rule 23(e)(2), courts consider:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2); *see also City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (listing factors), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). In this analysis, "[c]ourts should remain mindful . . . 'of the "strong judicial policy in favor of settlements, particularly in the class action context."'" *Interchange*, 330 F.R.D. at 27 (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)).

1. <u>The settlement is procedurally fair.</u>

The first two factors in Rule 23(e)(2) concern the procedural fairness of the settlement. Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment; *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 311 (S.D.N.Y. 2020). "A presumption of

fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel." *Puddu v. 6D Glob. Techs., Inc.*, No. 15-CV-8061 (AJN), 2021 WL 1910656, at *4 (S.D.N.Y. May 12, 2021) (quoting *Wal-Mart*, 396 F.3d at 116). There is also "a presumption of fairness when a settlement is reached with the assistance of a mediator." *Id*.

Here, the settlement has a presumption of fairness because it is the product of nearly two years of arm's-length negotiations, beginning in September 2019 and culminating in an agreement in May 2021, assisted by experienced and capable mediators in three mediation sessions and extensive negotiations between the sessions. Gitlin Decl., ¶ 2. *See Puddu*, 2021 WL 1910656, at *4 ("Here, the parties reached negotiation only after three unsuccessful mediations. Furthermore, the long procedural history of this case evinces that the parties—far from colluding—aggressively litigated this case and reached this settlement only after years of litigation.").

Furthermore, the class representatives and class counsel have adequately represented the class. EPPs worked in coordination with the other plaintiff groups to litigate common issues in this case, including defeating Allergan's motion to dismiss and engaging in extensive discovery. After other plaintiffs settled, EPPs obtained class certification, finished expert discovery, and briefed summary judgment and merits *Daubert* motions. The named plaintiffs have performed all the duties of class representatives, including producing documents, sitting for depositions, and keeping informed regarding the progress of the litigation. Thus, the class representatives and class counsel have continued to conduct the litigation in the manner that led the Court to conclude that they were adequate representatives at class certification. *See* ECF No. 501 at 11 ("I find that the named plaintiffs are adequate class representatives and that class counsel are

qualified, experienced, and able to conduct this litigation. . . . Moreover, through my extensive observations of counsel, I am assured that they are well qualified to litigate this class action.").

2. The settlement is substantively adequate.

The second two factors in Rule 23(e)(2) concern the substantive adequacy of the settlement. Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. At this stage, the primary pertinent factor is the relief to the class, taking into account "the costs, risks, and delay of trial and appeal." Fed. R. Civ. P. 23(e)(2)(C)(i). "The adequacy of the amount achieved in settlement may not be judged in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 162 (S.D.N.Y. 2011) (internal quotation marks omitted). "[W]e must examine whether the settlement amount lies within a range of reasonableness, which range reflects the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012) (internal quotation marks omitted).

Also, courts analyze certain non-enumerated factors—in the Second Circuit, the *Grinnell* factors—because the factors in Rule 23(e)(2) were not intended to "not to displace any factor" previously developed by courts to analyze class action settlements "but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment; *see Namenda*, 462 F. Supp. 3d at 311-15. Many of the *Grinnell* factors are substantively similar to those in Rule 23(e)(2) and may be considered together.[3]

[3] Specifically, the first, fourth, fifth, eighth, and ninth *Grinnell* factors are largely the same as the analysis under Rule 23(e)(2). These factors are, respectively: the complexity, expense, and likely

Here, the settlement is substantively adequate. The relief to the class is approximately $30 million immediately, in comparison to the considerable costs, risks, and delay of trial and appeal. Before trial, the court likely would hold hearings on the numerous and lengthy summary judgment and *Daubert* motions. After decisions on these motions, the parties would have to engage in several months of additional pretrial briefing and preparation. *See* ECF No. 509 at 2-3 (providing about five months of pretrial briefing and conferences after summary judgment). This work would include preparing EPPs' thirteen expert witnesses for trial, which would entail significant costs. Trial itself would take several weeks, and an appeal would add additional cost and time, likely over a year.[4] In short, continuing to litigate would considerably delay relief and impose substantial costs, which weighs in favor of preliminary approval. *See, e.g.*, *Namenda*, 462 F. Supp. 3d at 311-12 ("The first *Grinnell* factor evaluates whether the continuation of the litigation would be complex, expensive, and lengthy. This case, had it not settled, would have been all three.").

The remaining stages of litigation also would involve significant risk. Allergan has filed summary judgment motions regarding patent fraud, sham petitioning, and causation and has moved to exclude key opinions of EPPs' experts. While EPPs filed oppositions and believe that Allergan's motions should be denied, the motions remain pending and pose some risk that some or all of EPPs' claims or expert testimony might not survive to trial.

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duration of the litigation; the risk of establishing liability; the risk of establishing damages; the range of reasonableness of the settlement fund in light of the best possible recovery; and the range of reasonableness of the settlement fund in light of all the attendant risks of litigation. *See Namenda*, 462 F. Supp. 3d at 311-15.

[4] U.S. Court of Appeals Summary -- 12 -Month Period Ending March 31, 2021 (https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary0331.2021.pdf) at 2 (median time from notice of appeal to disposition in the Second Circuit is 14.2 months).

Trial would involve further risks. One of the key issues at trial would be whether Allergan's conduct caused a lack of generic competition at any time. There is always inherent risk in trying the issue of causation because it depends on predicting "the but-for world—a hypothetical world free of defendant's alleged anticompetitive actions." ECF No. 501 at 6. As the Court explained, "neither side will ever prove whether its predictions are correct. The but-for world is, by definition, hypothetical." *Id.* at 22.

That the FDA still has not approved a generic Restasis is a fact that creates additional risk. While EPPs dispute whether any events that already have taken place constitute superseding causes absolving Allergan from liability, it remains possible that the jury will decide that the FDA, and not Allergan, is solely responsible for the delayed approval of generic Restasis, in which case EPPs might recover nothing. *See In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 39 (1st Cir. 2016) (affirming a jury verdict for the defendant due to lack of causation in a pharmaceutical antitrust case). In light of the costs, risks, and delay of continuing to litigate, the approximately $30 million in immediate relief to the class is adequate.

3. <u>The other *Grinnell* factors weigh in favor of approval or are neutral.</u>

The third *Grinnell* factor is the stage of the proceedings and the amount of discovery completed, with a focus on whether the case was sufficiently advanced that the parties were sufficiently informed regarding the strengths and weaknesses of the case. *See In re Forest Lab'ys, Inc. Sec. Litig.*, No. 05 CIV. 2827 (RMB), 2009 WL 10738220, at *4 (S.D.N.Y. May 15, 2009). Here, after production of millions of pages of documents, depositions of dozens of fact and expert witnesses, and fully briefing summary judgment, the parties were sufficiently informed that this factor weighs in favor of approval. *See id.*

The other *Grinnell* factors are neutral. The second factor is the reaction of the class to the settlement, which is not relevant at preliminary approval because the class has not yet been notified about the settlement. The sixth factor is the risk of maintaining the class action through trial, which is neutral because the class was certified and Allergan's 23(f) petition was denied. *See Namenda*, 462 F. Supp. 3d at 314. The seventh factor—whether the defendant is able to withstand a greater judgment—"is typically relevant only when a settlement is less than what it might otherwise be but for the fact that the defendant's financial circumstances do not permit a greater settlement." *Id*. This factor is thus neutral here.

B. The Notice and Claims Plan Is Adequate and Satisfies the Requirements of Rule 23 and Due Process.

1. EPPs' proposed notice, consisting of a digital campaign, print and web publication notice, and mailed notice to TPPs, is the best notice practicable.

Rule 23(e)(1) requires that notice of a class action settlement be sent "in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). "[F]or due process to be satisfied, not every class member need receive actual notice, as long as class counsel 'acted reasonably in selecting means likely to inform persons affected.'" *In re Adelphia Commc'ns Corp. Sec. & Derivatives Litig.*, 271 F. App'x 41, 44 (2d Cir. 2008) (quoting *Weigner v. New York*, 852 F.2d 646, 649 (2d Cir. 1988)). EPPs propose that notice of the Settlements be distributed to the End-Payor Class in substantially the same manner as the proposed notice of the Court's class certification order, which the Court previously concluded satisfied the requirement of Rule 23(c)(2) that notice be "the best notice that is practicable under the circumstances." ECF 656.

Notice will be given by four methods:

- An online media campaign, including targeted digital banner ads, social media, and search advertising. Declaration of Linda Young ("Young Decl."), ¶¶ 6-13.
- Publishing the Short-Form Notice, Young Decl. Ex. B, in *AARP: The Bulletin* and *People* magazine advertisements and using it for a press release distributed to thousands of newsrooms.
- Posting the Long-Form Notice, Young Decl. Ex. C, on the EPP case website, to which traffic will be directed by the digital media campaign, social media ads, and search engine ads. The Long-Form Notice will also be mailed upon request to Class members.
- Sending the Postcard Notice, Young Decl. Ex. D, by first-class mail to the over 42,000 TPPs and their agents and representatives in A.B. Data's database.

Each notice has been edited to explain the settlement in clear and easy-to-understand terms. The Court previously approved this method of notice, and A.B. Data as Notice and Claims Administrator, and they should be approved again now. *See* ECF Nos. 510, 515, 647, 656.

2. <u>The proposed schedule of notice is appropriate.</u>

EPPs propose that the digital campaign, including posting the Long-Form Notice to the EPP case website, will begin within 14 days of entry of an order granting preliminary approval and approving the notice, and the mailing of postcard notice to TPPs will be completed within 21 days of such an order. Publication notice, including both digital and magazine, will be complete within 91 days of preliminary approval. After notice is complete, EPPs will file a declaration from A.B. Data that notice has been distributed in accordance with the proposed notice plan. These steps are similar to the schedule previously proposed and approved. *See* ECF No. 664. Class members will have 14 days after the completion of notice to submit exclusion requests.

EPPs will move for final approval and for attorneys' fees, expenses, and service awards, shortly after the opt-out deadline. Class members may submit objections to such motions 21 days later, with EPPs filing reply briefs 14 days thereafter. Class members will also have an opportunity to oppose EPPs' previously-filed Motion for Entry of a Set-Aside Order. ECF 511.

The following table summarizes the proposed schedule.

Event	Date
Modify website and initiate digital publication notice	No later than 14 days after entry of preliminary approval order
Complete mailing Postcard Notice to TPPs	No later than 21 days after entry of preliminary approval order
Complete publication notice	No later than 91 days after entry of preliminary approval order
Opt-out/objection deadline	No later than 105 days after entry of preliminary approval order
Motion for final approval and motion for attorneys' fees, expenses, and service awards	No later than 119 days after entry of preliminary approval order
Opposition to motion for final approval and motion for attorneys' fees, expenses, and service awards	No later than 140 days after entry of preliminary approval order
Reply in support of motion for final approval and motion for attorneys' fees, expenses, and service awards	No later than 154 days after entry of preliminary approval order
Fairness hearing	At the Court's convenience soon after the reply brief is filed

This schedule satisfies all pertinent requirements, including Rule 23 and due process. *See Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 193 (S.D.N.Y. 2012) (holding that an 89-day notice period and 115-day period to submit objections was adequate), *aff'd sub nom. Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013); *see also DeJulius v. New England Health Care Emps. Pension Fund*, 429 F.3d 935, 947 (10th Cir. 2005) (holding that notice was adequate when "notices were sent out nearly two weeks prior to the settlement hearing").

3. <u>The proposed claim forms are adequate.</u>

To receive a payment under the Settlements, class members must submit a claim form. The claim forms (Young Decl. Exs. E & F) are straightforward and easy to understand, provide

class members with all the information they need to submit a claim, and should be approved as fair, reasonable, and adequate.

Both the consumer and TPP claim forms require class members to provide their name, contact information, and basic information concerning their Restasis purchases. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 721680, at *21 n.26 (N.D. Cal. Jan. 28, 2016) (requiring similar information). Because retail prices differ between 30-vial, 60-vial, and multidose packages of Restasis, cash paying consumers will provide the number of each package type they purchased. Insured consumers, however, generally pay a set co-payment regardless of the package type, and therefore need only provide the number of prescriptions they paid for. And TPPs will provide the total amount they spent on Restasis prescriptions.

Both claim forms also provide the states and timeframe in which purchases must have been made to qualify for payment under the settlement and require claimants to certify, under penalty of perjury, that the information provided is accurate to the best of the claimant's knowledge. *See In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 1:11-MD-2262-NRB, 2020 WL 6381829, at *4 (S.D.N.Y. Oct. 30, 2020) (requiring an attestation under penalty of perjury). The claim forms also "fairly and adequately inform members of the Settlement Classes that failure to complete and submit a Claim Form in the manner and time specified . . . shall constitute a waiver of any right to obtain any compensation or benefit under the Settlement." *Sanborn v. Viridian Energy, Inc.*, No. 3:14-CV-01731 (SRU), 2018 WL 940542, at *5 (D. Conn. Feb. 16, 2018). Both TPPs and consumers will also be able to submit claims online, if they choose to do so, or by mailing their claim form to the Claims Administrator.

C. The Plan of Allocation Is Fair, Reasonable, and Adequate and Satisfies the Requirements of Rule 23 and Due Process.

A plan of allocation must be fair and reasonable. *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 182 (E.D.N.Y. 1999). "The formula established for allocation need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel," and "courts look primarily to the opinion of counsel in determining the reasonableness and fairness of a plan of allocation. *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 414 (S.D.N.Y. 2018) (internal quotation marks omitted), *aff'd sub nom. In re Facebook, Inc.*, 822 F. App'x 40 (2d Cir. 2020). Typically, a *pro rata* allocation is appropriate. *See, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05MD1720MKBJO, 2019 WL 6875472, at *27 (E.D.N.Y. Dec. 16, 2019) ("[T]he pro rata distribution scheme is sufficiently equitable.").

Here, EPPs propose splitting the settlement fund, after any award of attorney fees, costs, and service awards, into three pools: 83.4% for a TPP Pool (for TPPs), 14.4% for an Insured Consumer Pool (for consumers who purchased Restasis with insurance), and 2.2% for a Cash Consumer Pool (for consumers who purchased Restasis without insurance). Gitlin Decl. Ex. 3, Plan of Allocation, ¶ 1; Declaration of Richard G. Frank ("Frank Decl."), ¶ 2. Claimants will be paid their *pro rata* share of their respective pools. Gitlin Decl. Ex. 3, Plan of Allocation, ¶¶ 19-24. Within each pool, claimants will be limited to their 'full' damages, *i.e.* the number of prescription or packages claimed by the class members multiplied by the per-prescription or per-package overcharge. *Id.*[5] If the 'full' damages owed to class members in a single pool is less

[5] The per-prescription and per-package overcharges were calculated by EPPs' economic expert, Dr. Richard Frank. *See* Frank Decl., ¶ 3.

than the amount allocated for that pool, the remainder will be allocated *pro rata* among the other pools. *Id.*, ¶ 24.

D. The Class End Date Should Be July 31, 2021.

The Court previously certified a class of end-payors with a class period "from May 1, 2015, through the present[.]" *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 335 F.R.D. 1, 40 (E.D.N.Y. 2020). The Court may modify that order at any time before final judgment. Fed. R. Civ. P. 23(c)(1)(C). To determine the scope of obligations and release of claims, the parties had to select an end date for the class to settle the case. The executed Settlement Agreement, and accordingly, all other documents submitted herewith, provide that the class period ends July 31, 2021. Plaintiffs respectfully request that the Court modify the end date of the class period to July 31, 2021.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court preliminarily approve the Settlement, approve the method for distributing notice and submitting claims, and approve the Plan of Allocation.

Dated: October 8, 2021

Respectfully submitted,

/s/ *Adam Gitlin*

Eric B. Fastiff
Dan Drachler
David T. Rudolph
Adam Gitlin
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Tel: (415) 956-1000
Fax: (415) 956-1008
efastiff@lchb.com
ddrachler@lchb.com
drudolph@lchb.com
agitlin@lchb.com

/s/ *Dena C. Sharp*

Dena C. Sharp
Scott Grzenczyk
Tom Watts
GIRARD SHARP LLP
601 California Street, Suite 1400
San Francisco, CA 94108
Telephone: (415) 981-4800
Facsimile: (415) 981-4846
dsharp@girardsharp.com
scottg@girardsharp.com
tomw@girardsharp.com

/s/ *Joseph R. Saveri*

Joseph R. Saveri
JOSEPH SAVERI LAW FIRM, INC.
601 California Street, Suite 1000
San Francisco, CA 94108
Tel: (415) 500-6800
Fax: (415) 395-9940
jsaveri@saverilawfirm.com

End-Payor Co-Lead Counsel

/s/*Robert S. Schachter*

Robert S. Schachter (RS 7243)
ZWERLING, SCHACHTER
& ZWERLING, LLP
41 Madison Avenue, 32nd Floor
New York, NY 10010
Tel: (212) 223-3900
Fax: (212) 371-5969
rschachter@zsz.com

End-Payor Liaison Counsel

2310665.1