

**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 APPLIES TO:

**All Direct Purchaser Plaintiff Class Action
Cases:**

FWK Holdings, LLC v. Allergan, Inc., 18-cv-
00677 (E.D.N.Y.);

*Rochester Drug Co-Operative, Inc. v.
Allergan, Inc.*, 18-cv-00970 (E.D.N.Y.);

*KPH Healthcare Services, Inc. a/k/a Kinney
Drugs, Inc. v. Allergan, Inc.*, No. 18-cv-
00974 (E.D.N.Y.); and

*Meijer, Inc. and Meijer Distribution, Inc. v.
Allergan, Inc.*, 19-cv-02563 (E.D.N.Y).

**DIRECT PURCHASER CLASS PLAINTIFFS' [PROPOSED] PLAN OF
ALLOCATION FOR THE DIRECT PURCHASER SETTLEMENT CLASS**

Direct purchaser class plaintiffs FWK Holdings, LLC, Rochester Drug Co-Operative, Inc., KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc., Meijer Inc., and Meijer Distribution, Inc. ("Plaintiffs" or "Direct Purchaser Class Plaintiffs"), on behalf of a proposed settlement class of direct purchasers hereby submits this proposed Plan of Allocation to allocate the settlement funds received in the Settlement with defendant, Allergan, Inc. ("Allergan"), plus any interest earned on the settlement funds, and net of Court-approved attorneys' fees, any Court-approved named plaintiff service awards, and Court-approved expenses, including settlement-related costs and expenses (the "Net Settlement Fund").

The proposed Settlement Class of direct purchasers is defined as follows:

All persons who or entities which purchased Restasis in the United States or its territories and possessions directly from Allergan at any time after May 2014 through and including February 16, 2020 (the “Class Period”). Excluded from the class are Allergan and its officers, directors, management, employees, subsidiaries, or affiliates, and all governmental entities.

Also excluded from the Settlement Class are the following entities, in their own capacity or as assignees, which have filed separate but coordinated actions against Allergan: CVS Pharmacy, Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Walgreen Co., The Kroger Co., Albertsons Companies, Inc., and HEB Grocery Company L.P.

The proposed Plan of Allocation (“Allocation Plan”) allocates the Net Settlement Fund among Settlement Class members (or their assignees) who timely submit claims as part of the claims process (“Claimants”), based on each Settlement Class member’s *pro rata* share of combined unit purchases of single-use vials of Restasis and Restasis MultiDose bottles (together “Restasis”). This proposal is similar to allocation plans that have been approved in similar class actions brought by direct purchasers to recover overcharges arising from impaired generic competition.¹

For the purposes of this allocation plan, a “Claimant” is any entity that meets the definition of the Settlement Class and timely submits a completed claim form. A Claimant’s percentage share will be zero if that Claimant timely submits a claim form but that Claimant’s

¹ See, e.g., *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-2503, ECF Nos. 1163-4, 1179 (D. Mass.) (*pro rata* shares of settlement fund computed on basis of claimants’ brand and generic purchases); *In re Lidoderm Antitrust Litig.*, No. 14-md-2521, ECF Nos. 1004-5, 1004-6, 1054 (N.D. Cal.) (*pro rata* shares of settlement fund computed on basis of claimants’ brand and generic purchases); *In re Aggrenox Antitrust Litig.*, No. 14-md-2516, ECF Nos. 733-1, 739 (D. Conn.) (*pro rata* shares of settlement fund computed on basis of purchases); *King Drug of Florence, Inc. v. Cephalon, Inc.*, No. 06-cv-1797, ECF Nos. 864-17, 870 (E.D. Pa.) (same); *In re Doryx Antitrust Litig. (Mylan Pharms., Inc. v. Warner Chilcott Public Ltd.)*, No. 12-cv-3824, ECF Nos. 452-3, 665 (E.D. Pa.) (same); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340, ECF Nos. 536-1, 543 (D. Del.) (*pro rata* shares of settlement fund computed on basis of claimants’ unit purchases in a product hop case).

claim is rejected because, for example, the Claimant did not purchase Restasis during the relevant time periods and does not have any valid assignment covering any such direct purchases.

Allocations to Claimants whose right to the settlement allocation arises by virtue of assignments from Settlement Class members would be determined in the same fashion as allocation for Settlement Class members. In these cases, the volumes of purchases used to determine the allocation would be the volumes assigned to the Claimant by an otherwise eligible Settlement Class member (and the assignor Settlement Class member's purchase volumes would be reduced by the same amount).² As the claim form will make clear, data submitted by a Claimant who files a claim form based on an assignment may be shared with the Claimant's assignor Settlement Class member during the claims administration process.

Direct Purchaser Class Plaintiffs' expert economist, Dr. Jeffrey J. Leitzinger, Ph.D., can calculate each Settlement Class member's (and eventually, each Claimant's) percentage share of the Net Settlement Fund using sales data for Restasis produced by Allergan during discovery.³ Claimants will also have the option of submitting their own records or data showing their unit purchases of Restasis (net of returns) during the relevant periods described below in Section 2.1, along with data regarding any relevant assignment. Dr. Leitzinger will review any such

² Declaration of Jeffrey J. Leitzinger, Ph.D, Related to Proposed Allocation Plan and Net Settlement Fund Allocation dated February 25, 2020 ("Leitzinger Allocation Declaration") ¶¶ 5, 6, & n.10.

³ See *id.* ¶¶ 5, 6 & n.7. Dr. Leitzinger previously submitted two expert reports and served on Allergan two declarations in support of class certification in this matter which addressed, among other issues, damages and class certification. See Declaration of Jeffrey J. Leitzinger, Ph.D., April 26, 2019 ("Leitzinger Class Declaration" submitted as Exhibit 1 to the Declaration of Ellen T. Noteware in Support of Direct Purchaser Plaintiffs' Memorandum of Law for Class Certification); Rebuttal Declaration of Jeffrey J. Leitzinger, Ph.D., July 19, 2019 ("Leitzinger Class Rebuttal Declaration" submitted as Exhibit 1 to the Declaration of Ellen T. Noteware in Support of Direct Purchaser Plaintiffs' Reply Memorandum of Law for Class Certification); Expert Report of Jeffrey J. Leitzinger, Ph.D., served on Allergan on Aug. 14, 2019 ("Leitzinger Merits Report"); Rebuttal Report of Jeffrey J. Leitzinger, Ph.D., served on Allergan on Dec. 20, 2019 ("Leitzinger Merits Rebuttal Report"). Allergan did not submit any *Daubert* motion to exclude Dr. Leitzinger's opinions.

submissions and confer with the Claims Administrator regarding the final calculations, which may include making any necessary and appropriate adjustments.⁴

Throughout this Allocation Plan, “purchases” refers to unit purchases of Restasis made directly from Allergan during the relevant time periods, or purchases that are covered by a Claimant’s assignment from a direct purchaser of such purchases, during the relevant time periods. The unit of purchase is a 30-day supply of Restasis. A 30-day supply of Restasis single-use vials consists of 60-single use vials (packages of 30 single-use vials are considered half a unit of purchase).⁵ A single bottle of Restasis MultiDose constitutes a 30-day supply of the drug. Brand WAC per 30-day supply is the same for vial and multi-dose products.⁶ “Purchases” throughout refers to net unit purchases, *i.e.*, gross purchases net of any returns and net of any purchases for which the Claimant or Settlement Class member has assigned away its rights to recovery in this litigation.⁷

As explained more fully below, Claimants’ *pro rata* shares will be based only on purchases of Restasis made directly from Allergan (or covered by an assignment from a direct purchaser).⁸

The proposed Allocation Plan is practical and efficient, using computerized sales data already obtained from Allergan during discovery.⁹ It also is a reasonable way to allocate the Net Settlement Fund and is fair to all members of the Class.¹⁰

⁴ See Leitzinger Allocation Declaration ¶ 7.

⁵ See *id.* n.5.

⁶ See *id.* n.8.

⁷ See *id.* ¶ 5 & n.4-6.

⁸ See *id.* ¶ 5 & n.9.

⁹ See *id.* ¶¶ 5-8.

¹⁰ See *id.* ¶ 8.

THE ALLOCATION PLAN

The Allocation Plan works as follows:

1. Development of Claims Form

1.1 At the appropriate time and after receiving Court approval, the Claims Administrator, working with Dr. Leitzinger's firm Econ ONE Research, Inc. ("Econ One"), will provide a separate, individualized claim form for each Settlement Class member. The claim form will expressly set forth the Settlement Class member's purchases of Restasis after May 2014 through March 31, 2019, which is the last date of the data that Allergan produced in this case.¹¹ Using the time period that corresponds with the data produced does not favor or disfavor any Claimant because the 58 months of purchase data serves as a reasonable proxy for the 68 month class period.¹² Dr. Leitzinger can calculate these figures using the sales data already produced during discovery by Allergan.¹³ The claim form will request that the Class member verify the accuracy of the information contained in the claim form and will provide instructions for challenging any of the figures or computations contained in the claim form. If a Class member agrees that the information in the claim form is accurate, the Class member will be asked to sign and return the claim form to the Claims Administrator.¹⁴ If a Class member believes that the

¹¹ June 1, 2014 is the beginning of the Class Period and the beginning of the damages period Dr. Leitzinger analyzed in his prior reports. *Id.* ¶¶ 3 & n.5; Leitzinger Class Declaration ¶ 5 & n.4; Leitzinger Merits Report ¶ 5 & n.5. March 31, 2019, is the last date of sales data produced by Allergan in this litigation. Leitzinger Allocation Declaration ¶ 5(a) & n.7. Based on Dr. Leitzinger's review of purchase patterns by Class members, he opines that the absence of Allergan data after March of 2019 does not materially affect the resulting allocations. *Id.* n.7.

¹² *Id.* n.7.

¹³ *See id.* ¶¶ 5-6 & n.10 (explaining that these totals can be calculated from the sales data produced in this case, and that he has already performed preliminary calculations of each Class member's net purchases that account for known assignments to the retailer entities (i.e., CVS Pharmacy, Inc., Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Walgreen Co., The Kroger Co., Albertsons Companies, Inc., and HEB Grocery Company L.P.), in their own capacity or as assignees, which have filed separate but coordinated actions against Allergan; *see also id.* ¶ 7.

¹⁴ In order to help the Claimant verify that the purchase totals contained in the claim form is accurate, the Restasis single use vial and Restasis MultiDose National Drug Codes ("NDCs") will be listed on the claim form.

information contained in its claim form is not accurate, that Class member may submit its own purchase data pursuant to the procedures described below.

1.2 The claim form will request the Claimant's full name and mailing address for correspondence regarding the distribution of the Net Settlement Fund and the identity and contact information of the person responsible for overseeing the claims process for the Claimant. In addition, the claim form will include the release language contained in the Settlement agreement with Allergan. Each Claimant will be required to execute the claim form in exchange for receiving any distribution from the Net Settlement Fund.

1.3 The submission of the claim form to the Claims Administrator (with any necessary supporting documentation if the Claimant disagrees with the information contained in its claim form) will be deemed timely if it is received or postmarked within 30 days of the date the claim forms were mailed. At Class Counsel's discretion, this deadline may be extended by up to an additional 45 days without additional approval of the Court. Class Counsel may also seek further extensions of the deadline by order of the Court after any such initial extension.

2. Calculation of *Pro Rata* Shares of the Net Settlement Fund

2.1 Each Claimant's *pro rata* share of the Net Settlement Fund will be calculated as follows by the Claims Administrator working with Dr. Leitzinger:

- a. Each Claimant's Restasis vial purchases from June 1, 2014 through March 31, 2019, as measured in units of 30-day supply, using Allergan's sales data will be calculated;¹⁵

The NDCs are standard codes maintained by the FDA and used in the pharmaceutical industry to identify specific pharmaceutical products, and allow Claimants to understand precisely what purchases are being considered for purposes of allocation.

¹⁵ Leitzinger Allocation Declaration ¶ 5(a).

- b. Each Claimant's Restasis MultiDose bottle purchases, as measured in units of 30-day supply from March 28, 2017 through March 31, 2019 using Allergan's sales data will be calculated;¹⁶
- c. From the totals in (a) and/or (b), any purchases for which the rights to damages in this litigation have been assigned by agreement will be removed using data provided by the Claimant or its corresponding assignee;¹⁷
- d. The totals in (a) and (b) will be added together, as adjusted, if at all, pursuant to (c), to obtain the Claimant's total purchase volume.¹⁸
- e. The Net Settlement Fund will be allocated to each Claimant based upon its percentage share of the total purchase volumes calculated in (d) across all Claimants who timely submit valid, accepted claim forms.¹⁹

2.2 This calculation will yield each Claimant's *pro rata* share of the Net Settlement Fund. Using data produced in discovery, Dr. Leitzinger has already performed a preliminary computation of Restasis purchases for each Class member and can use these figures to calculate the percentage shares of the Net Settlement Fund due to each Class member.²⁰ Should any Class member fail to submit a claim or should any Claimant document and submit an alternative amount of purchases that is approved by the Claims Administrator (in consultation with Dr. Leitzinger and Class Counsel), the Claimant's shares will be recalculated accordingly.²¹

2.3 The final calculations of each Claimant's *pro rata* share will then be

¹⁶ *Id.* ¶¶ 3(b) & n.6, 5(b).

¹⁷ *Id.* ¶ 5(c).

¹⁸ *Id.* ¶ 5(d). No weighting of purchases between Restasis single-dose vials and Restasis MultiDose bottles is required because, according to data produced in this litigation, the average overcharge associated with each is the same. *Id.*, n.8. The list price for a thirty-day supply of Restasis single-use vials is the same as the list price for a thirty-day supply of Restasis MultiDose, throughout the relevant time period. *Id.*

¹⁹ Allocations to Claimants whose right to settlement allocation arises by virtue of assignments would be determined in this same fashion. In these cases, the volumes of purchases used to determine the allocation would be the volumes assigned to the Claimant by an otherwise eligible Class member (and the assignor Class member's purchase volumes would be reduced by the same amount).

²⁰ *See id.* ¶ 6.

²¹ *See id.* ¶ 7.

applied to the Net Settlement Fund to determine each Claimant's allocated share.

3. Processing of Claims

3.1 All Claims will be reviewed and processed by the Claims Administrator, with assistance from Dr. Leitzinger and his staff at Econ One as required and appropriate.

3.2 The Claims Administrator shall first determine whether a claim form received is timely, properly completed, and signed. If a claim form is incomplete, the Claims Administrator shall communicate with the Claimant via First Class Mail, email, or telephone regarding the deficiency. Claimants will then have 21 days from the date they are contacted by the Claims Administrator regarding the deficiency to cure any such deficiency. If any Claimant fails to correct the deficiency within this time, the claim may be rejected and the Claimant shall be notified by letter stating the reason for rejection. The Claims Administrator will then review all completed, non-deficient claim forms to determine whether each will be accepted or rejected. The Claims Administrator will then notify any Claimants whose claim forms are rejected by letter stating that the Claimant's claim form is rejected and stating the reason for rejection. Any Claimant whose claim form is rejected may seek review by the Court via the appeals process described in Section 7.2 below.

3.3 All late claims forms that are otherwise complete will be processed by the Claims Administrator, but marked as "Late Approved Claims." If Class Counsel conclude that, in their judgment, any such "Late Approved Claims" should ultimately not be accepted,²² the Claimant will be so notified and then may seek review by the Court via the appeals process

²² Cf. *Kuehbeck v. Genesis Microchip Inc.*, No. C02-05344, 2007 WL 2382030, at *1 (N.D. Cal. Aug. 17, 2007) (authorizing distribution to timely filed claims and valid claims that were submitted late). Courts have approved similar provisions in similar cases. See, e.g., *Solodyn*, 14-md-02503, ECF Nos. 1163-4 § 3.3, 1179 (D. Mass.) (approving a similar provision regarding late claims); *Lidoderm*, 14-md-02521, ECF Nos. 1004-5 § 3.3, 1054 (N.D. Cal.) (same).

described in Section 7.2 below.

3.4 Once the Claims Administrator has determined which Claimants' claims are approved, the Claims Administrator will work with Dr. Leitzinger to calculate each Claimant's *pro rata* share of the Net Settlement Fund as determined by the calculation described above in Section 2.²³

4. Processing Challenged Claims

4.1 The Claims Administrator, in conjunction with Dr. Leitzinger and Class Counsel, shall review any and all written challenges by Claimants to the determinations of the Claims Administrator. If, upon review of a challenge and supporting documentation, the Claims Administrator decides to amend or modify its determination of any Claimant's net unit purchases, distribution amount, and/or *pro rata* share of the Net Settlement Fund, it shall advise the Claimant who made the challenge. These determinations shall be final, subject to the appeals process described in Section 7.2 below.

4.2 Where the Claims Administrator determines that a challenge requires additional information or documentation, it will so advise the Claimant and provide that Claimant an opportunity to cure the deficiency within 25 days. If that Claimant fails to cure the deficiency within that time, the challenge may be rejected and the Claimant will be notified of the rejection of its challenge by mail. This notification shall be deemed final, subject to any appeal and decision by the Court.

4.3 If the Claims Administrator concludes that it has enough information to properly evaluate a challenge and maintains that its initial determinations were correct, it will so inform the Claimant in writing. This notification shall be deemed final, subject to any appeal and

²³ See Leitzinger Allocation Declaration ¶¶ 5-7.

decision by the Court.

5. Report to Court Regarding Distribution of Net Settlement Fund

5.1 After the Claims Administrator reviews all submitted claims and works with Dr. Leitzinger to determine the amount each Claimant is entitled to receive from the Net Settlement Fund, the Claims Administrator will prepare a final report for the Court's review and approval. The report will explain the tasks and methodologies employed by the Claims Administrator in processing the claims and administering the Allocation Plan. It will also contain: (a) a list of Class members or other Claimants (if any) who filed claim forms that were rejected and the reasons; (b) a list of challenges (if any) to the estimated distribution amounts that were rejected and the reasons; and (c) the date any such Claimant whose challenge was rejected was informed by the Claims Administrator, for purposes of calculating the timeliness of any appeal using the procedures set forth below. Finally, the final report shall contain an accounting of the expenses associated with the Allocation Plan, including bills from Econ One and the Claims Administrator, any taxes that are due and owing, and any other fees or expenses associated with the settlement allocation process.

6. Payment to the Claimants

6.1 Upon Court approval of the final report and declaration of the Claims Administrator, the Claims Administrator shall issue a check or wire payable to each Claimant who has submitted a complete and valid claim form.

6.2 It is anticipated that the entire Net Settlement Fund will be distributed in a single distribution. However, subject to further order of the Court, any monies from the Net Settlement Fund that remain unclaimed after the first distribution shall, if economically feasible, be distributed to Claimants in an additional distribution or distributions on the basis of the same

calculations of the Claimants' *pro rata* combined total Restasis purchases described above.

6.3 Insofar as the Net Settlement Fund includes residual funds after distribution or distributions as set forth in the preceding sections that cannot be economically distributed to the Claimants (because of the costs of distribution as compared to the amount remaining), Class Counsel shall make an application to the Court for such sums to be used to make *cy pres* payments for the benefit of members of the Class.²⁴

7. Resolution of Disputes

7.1 In the event of any disputes between Claimants and the Claims Administrator on any subject (*e.g.*, timeliness, required completeness or documentation of a claim, or the calculation of the Claimant's unit purchases, share of the net settlement fund, and/or amount payable), the decision of the Claims Administrator shall be final, subject to the Claimant's right to seek review by the Court. In notifying a Claimant of the final rejection of a Claim or a challenge thereto, the Claims Administrator shall notify the Claimant of its right to seek such review.

7.2 Any such appeal by a Claimant must be submitted in writing to the Court, with copies to the Claims Administrator and Class Counsel, within 21 days of the Claims Administrator's final rejection notification to the Claimant.

²⁴ In the experience of Class Counsel, based on numerous prior distributions in similar cases, all net settlement proceeds are typically distributed in a single distribution, obviating the need for additional distributions or for any *cy pres* payments.

Dated: February 25, 2020

Respectfully submitted,

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