

UNITED STATES DISTRICT COURT  
FOR EASTERN DISTRICT OF NEW YORK

IN RE RESTASIS (CYCLOSPORINE  
OPHTHALMIC EMULSION)  
ANTITRUST LITIGATION

18-MD-2819 (NG) (LB)

THIS DOCUMENT APPLIES TO:

**All Direct Purchaser Class Actions:**

*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).

**ORDER GRANTING PRELIMINARY APPROVAL OF THE SETTLEMENT  
BETWEEN THE DIRECT PURCHASER CLASS PLAINTIFFS AND THE DEFENDANT  
AND OTHER RELATED RELIEF**

Upon review and consideration of the Settlement Agreement between Allergan, Inc. (“Allergan”) and FWK Holdings, LLC (“FWK”), Rochester Drug Co-Operative, Inc. (“RDC”), KPH Healthcare Services, Inc. (“KPH”), Meijer, Inc. and Meijer Distribution, Inc. (“Meijer”) (collectively, “Direct Purchaser Class Plaintiffs”) dated February 16, 2020, the Direct Purchaser Class Plaintiffs’ Motion for Certification of Class for Purposes of Settlement, Preliminary Approval of Settlement, Approval of the Form and Manner of Notice to the Class, Appointment of Claims Administrator and Escrow Agent, and Setting the Final Settlement Schedule and Date for a Fairness Hearing, the attachments to such motion, the Declaration of Thomas M. Sobol and its attached exhibits, the Second Amended Proposed Preliminary Approval of Settlement, the

Second Amended Proposed Approval of the Form and Manner of Notice to the Class, and the Declaration of Eric J. Stock dated May 8, 2020, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

**Jurisdiction**

1. This Court has subject matter jurisdiction over this case and has personal jurisdiction over this action and each of the representative class plaintiffs FWK Holding, LLC, KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc., Rochester Drug Cooperative, Inc., Meijer, Inc., and Meijer Distribution, Inc. as well as defendant Allergan.

2. This Order hereby incorporates by reference the definitions in the Settlement Agreement among Allergan, the Direct Purchaser Class Plaintiffs, and the proposed Direct Purchaser Settlement Class, dated February 16, 2020. All capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Settlement Agreement.

**Likely Certification of the Proposed Direct Purchaser Settlement Class**

3. The Court preliminarily approves the settlement between the Direct Purchaser Class Plaintiffs and Allergan and has determined that it is likely—at the final approval stage—to make findings and determinations in connection with the settlement as described below.

4. Under Rule 23(e)(1)(B), this Court may direct notice to all class members “if giving notice is justified by the parties’ showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal.” The following paragraphs provide the findings the Court is likely to make with respect to the Direct Purchaser Class Plaintiffs’ proposed settlement class.

5. The Court is likely to certify a class (hereinafter the “Proposed Direct Purchaser Settlement Class”) 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.

6. Excluded from the Proposed Direct Purchaser Settlement Class are the following entities, in their own capacity or as assignees, who 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. (collectively, “Retailer Plaintiffs”) and have settled with Allergan separately.

7. The Court is likely to determine, under Rule 23(a)(1), that the Proposed Direct Purchaser Settlement Class is so numerous that joinder of all members is impracticable. According to data produced in this litigation and opinions by Direct Purchaser Class Plaintiffs’ expert, the Proposed Direct Purchaser Settlement Class has at least 35 geographically dispersed members throughout the United States. The Court will likely find Rule 23(a)(1)’s impracticality of joinder requirement satisfied.

8. The Court is also likely to identify, under Rule 23(c)(1)(B), the following issues relating to class claims and/or defenses (expressed in summary fashion):

- Whether Allergan had monopoly power over cyclosporine ophthalmic emulsion 0.05% products;
- Whether Allergan engaged in unlawful conduct with respect to obtaining the second wave patents, listing them in the Orange Book, and filing patent infringement actions;
- Whether Allergan engaged in unlawful conduct with respect to submitting allegedly baseless citizen petitions;
- Whether Allergan’s conduct violated the antitrust laws; and
- Whether Allergan’s conduct delayed the entry of generic Restasis.

9. The Court is likely to determine that the foregoing class-wide issues relating to claims and/or defenses are questions of law or fact that are common to the Proposed Direct Purchaser Settlement Class that would satisfy Rule 23(a)(2).

10. The Court is likely to appoint FWK Holdings, LLC, Rochester Drug Co-Operative, Inc., KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc., Meijer, Inc., and Meijer Distribution, Inc., the named plaintiffs in this lawsuit, representatives of the Class, for the following reasons:

- i. the Direct Purchaser Class Plaintiffs allege, on behalf of the Proposed Direct Purchaser Settlement Class, the same manner of injury from the same course of conduct that they complain of themselves. The Direct Purchaser Class Plaintiffs further assert on their own behalf the same legal theories that they assert for the Proposed Direct Purchaser Settlement Class. The Court is therefore likely to determine that the Direct Purchaser Class Plaintiffs' claims are typical of the claims of the Proposed Direct Purchaser Settlement Class within the meaning of Rule 23(a)(3); and
- ii. the Court is likely to determine, under Rule 23(a)(4), that the Direct Purchaser Class Plaintiffs will fairly and adequately protect the interests of the Proposed Direct Purchaser Settlement Class. The Court will likely find that the Direct Purchaser Class Plaintiffs' interests do not conflict with the interests of absent members of the Proposed Direct Purchaser Settlement Class. The Court will likely find that the Proposed Direct Purchaser Settlement Class members share a common interest in recovering the overcharge damages sought in the complaint. And any class member that wishes to opt out will be given an opportunity to do so. The Court will likely find

that the Direct Purchaser Class Plaintiffs are well qualified to represent the Proposed Direct Purchaser Settlement Class in this case.

11. The Court is further likely to determine that, under Rule 23(b)(3) and in connection with and for purposes of settlement, common questions of law and fact predominate over questions affecting only individual class members. In light of the class-wide claims, issues, and defenses set forth above, the Court is likely to find that the issues in this action that are subject to generalized proof, and therefore applicable to the Proposed Direct Purchaser Settlement Class as a whole, predominate over those issues that are subject only to individualized proof. The Court will likely find that it is desirable, for purposes of judicial and litigation efficiency, to concentrate the claims of the Proposed Direct Purchaser Settlement Class in a single action.

12. The Court is also likely to determine that, under Rule 23(b)(3) and in connection with and for purposes of settlement, a class action is superior to other available methods for fair and efficient adjudication of this action.

13. Finally, the Court is likely to appoint, under Rules 23(c)(1)(B) and 23(g), the following counsel as Lead Counsel for the Proposed Direct Purchaser Settlement Class consistent with the Court's Order dated April 4, 2018<sup>1</sup> and the duties and responsibilities described in that Order. For now, the Court maintains their appointment as Interim Lead Class Counsel:

Thomas M. Sobol  
Kristen A. Johnson  
HAGENS BERMAN SOBOL SHAPIRO LLP  
55 Cambridge Parkway, Suite 301  
Cambridge, MA 02142  
Tel: 617-482-3700

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<sup>1</sup> ECF No. 50.

Thomas M. Sobol direct: 617-475-1950  
Kristen A. Johnson direct: 617-475-1961  
Fax: 617-482-3003  
Email: tom@hbsslaw.com  
kristenj@hbsslaw.com

The Court previously found that counsel has experience in representing similar classes in other cases and counsel have served well in their role as Interim Lead Class Counsel.

**Opportunity to Opt Out of Class**

14. If the Court does certify the class—which it is likely to do—Proposed Direct Purchaser Settlement Class members who wish to exclude themselves from the Proposed Direct Purchaser Settlement Class will have an opportunity to do so. As described fully in the Notice, those members who wish to exclude themselves must send a letter via first-class U.S. mail stating that they wish to exclude themselves from the settlement in the Direct Purchaser Class Action in *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, 18-md-2819 (NG) (E.D.N.Y.). The letter must include their name, address, telephone number, email address, and signature. The letter requesting exclusion should be sent to: RG/2 Claims Administration, P.O. Box 59479, Philadelphia, PA 19102-9479. In the event the Proposed Direct Purchaser Settlement Class member is unable to send a letter via first-class U.S. mail, the letter may be sent by electronic mail (“email”) to [restasisDPPsettlement@rg2claims.com](mailto:restasisDPPsettlement@rg2claims.com). The letter requesting exclusion must be postmarked or emailed no later than 50 days from the date the Notice was mailed. This letter or email should include additional secondary contact information such as email addresses and cell phone numbers due to business closures as a result of the COVID-19 pandemic.

### **Preliminary Approval of the Proposed Settlement**

15. Rule 23(e) of the Federal Rules of Civil Procedure sets forth the standards and procedures that apply to class action settlements.

16. A class action settlement approval procedure typically occurs in two stages: (1) preliminary approval — where prior to notice to the class, a court makes a preliminary evaluation of fairness, and (2) 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.

17. During the preliminary approval stage, this Court reviews the proposed terms of settlement and makes a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms.

18. Under Rule 23(e), the Court determines whether “giving notice is justified by the parties’ showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal.”<sup>2</sup>

19. To guide its analysis during the preliminary approval stage in determining whether it will likely approve a proposal under Rule 23(e)(2), the Court looks to the factors contained in the text of Rule 23(e)(2), which a court must consider when weighing final approval. Although the factors apply to final approval, the Court looks to them to determine whether it will likely grant final approval based on the information currently before the Court.

20. Upon review of the record, including the Settlement Agreement, the Sobol Declaration, the supporting briefing submitted with Direct Purchaser Class Plaintiffs’ motion for preliminary approval, the Second Amended Proposed Preliminary Approval of Settlement, the

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<sup>2</sup> Fed. R. Civ. P. 23(e)(1)(B).

Second Amended Proposed Approval of the Form and Manner of Notice to the Class, and the Declaration of Eric J. Stock dated May 8, 2020, the Court will likely find that the proposed settlement, which includes a cash payment of \$51,250,000.00 in escrow funds for the benefit of the Proposed Direct Purchaser Settlement Class (the “Settlement Fund”) in exchange for, *inter alia*, dismissal of the litigation between Direct Purchaser Class Plaintiffs and Allergan with prejudice and releases as set forth in Paragraph 12 and 13 of the Settlement Agreement, is sufficiently fair, reasonable, and adequate, in the best interests of the members of the direct purchaser class, and within a range that responsible and highly experienced counsel could accept, considering all relevant risks of litigation and arrived at by arm’s-length negotiations.

21. As described in the Sobol Declaration, counsel are experienced and able to conduct this complex antitrust matter. Counsel for the class forcefully litigated in the interests of the class and there is no indication that the Direct Purchaser Class Plaintiffs, or their counsel, have interests antagonistic to the class. The Parties have conducted extensive fact discovery, including taking over thirty depositions, producing millions of pages of documents, and exchanging thirty-four expert reports. The parties, therefore, have a sufficient understanding of the risks of litigating this action further, the likelihood of success at class certification, summary judgment, and trial, and the potential class recovery. The history of negotiations, including an in-person mediation in front of Magistrate Judge Bloom, demonstrates that the negotiations here were arm’s-length and conducted by capable counsel.

22. In light of the above, this Court finds that it will likely be able to: (i) approve the proposed Settlement under Rule 23(e)(2), and (ii) certify the class for purposes of judgment on the proposal.

**Approval of the Plan of Notice to the Proposed Direct Purchaser Settlement Class**

23. The proposed form of Notice to the Proposed Direct Purchaser Settlement Class members (“Notice”) and the proposed method of dissemination of the Notice by first class mail, as well as email, satisfy the requirements of Rule 23(e) of the Federal Rules of Civil Procedure and due process, are otherwise fair and reasonable, and therefore are approved. Because of the ongoing COVID-19 pandemic and various “social distancing” orders and recommendations, Interim Lead Class Counsel and RG/2 Claims Administration LLC (“RG/2”) shall disseminate the Notice through both first-class mail and email. Email notice may be sent to the email addresses of the proposed class members’ counsel’s offices, or other appropriate recipients. These means of notice are acceptable here because members of the Proposed Direct Purchaser Settlement Class are all sophisticated business entities, many of whom have been in contact with Interim Lead Class Counsel previously because of other similar antitrust settlements.

24. The Direct Purchaser Class Plaintiffs shall submit proof of notice to the Proposed Direct Purchaser Settlement Class to the Court as part of their submission for final approval of the settlement.

25. In the event that any hearing dates or deadlines are changed, all Proposed Direct Purchaser Settlement Class members will receive notification by email. Any date change will also be posted on the website [www.RestasisAntitrustSettlement.com](http://www.RestasisAntitrustSettlement.com).

26. No later than 30 days following the entry of this Order, Interim Lead Class Counsel shall cause the Notice substantially in the form attached to this Order to be disseminated via first-class mail and email to the last known address of each entity that purchased Restasis directly from Allergan during the Class Period. Interim Lead Class Counsel shall also cause the Notice to be posted on the website [www.RestasisAntitrustSettlement.com](http://www.RestasisAntitrustSettlement.com).

27. Potential Direct Purchaser Settlement Class members may request exclusion from the Proposed Direct Purchaser Class or object to the Settlement, no later than 50 days from the date the Notice was mailed. Interim Lead Class Counsel, or their designee, shall monitor and record any and all opt out requests that are received.

28. Pursuant to the Class Action Fairness Act of 2005 (“CAFA”), Allergan shall serve notices as required under CAFA within ten (10) days from the date Direct Purchaser Class Plaintiffs filed for preliminary approval of the Settlement.

29. The Court appoints RG/2 as Settlement Administrator to help in disseminating the Notice to the Proposed Direct Purchaser Settlement Class and, if the proposed settlement is approved, administration of the distribution of the Settlement Fund to members of the Proposed Direct Purchaser Settlement Class. William W. Wickersham, Vice President of Business Development and Client Relations at RG/2, has submitted a declaration setting forth RG/2’s qualifications, attached as Exhibit 9 to the Sobol Declaration. All expenses incurred by the Settlement Administrator must be reasonable, and, except as otherwise noted herein, are subject to Court approval, and shall be payable solely from the Settlement Fund, as set forth in the Settlement Agreement.

30. The Court appoints The Huntington National Bank to serve as Escrow Agent for the purpose of administering the escrow account holding the Settlement Fund. Copies of the Escrow Agreements executed by The Huntington National Bank and Interim Lead Class Counsel are attached as Exhibit 6 to the Sobol Declaration. All expenses incurred by the Escrow Agent must be reasonable, and, except as otherwise noticed herein, are subject to Court approval, and shall be payable from the Settlement Fund.

31. Court approval shall not be required for disbursements or distribution of such expenses associated with notice and administration of the settlement, for amounts (in the aggregate) of less than \$75,000, as set forth in the Settlement Agreement.

**Final Fairness Hearing**

32. A hearing on final approval of the settlement (the “Fairness Hearing”) shall be held on September 29, 2020 at 10:30 a.m. The hearing will be held at the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, NY 11201 in Courtroom 6D South. At the Fairness Hearing, the Court will consider, (a) whether the Proposed Direct Purchaser Settlement Class should be certified, (b) the fairness, reasonableness, and adequacy of the settlement and whether the settlement should be finally approved, including the proposed plan to allocate funds amongst class members, (c) whether the Court should approve direct purchaser counsel’s application for attorney’s fees and reimbursement of costs and expenses, (d) whether a service award out of the Settlement Fund should be awarded to the Direct Purchaser Class Plaintiffs who served as class representatives, and (e) whether entry of a final judgment terminating direct purchasers’ litigation against Allergan should be entered. The Fairness Hearing may be rescheduled or continued; in this event, the Court will furnish all counsel with appropriate notice. Interim Lead Class Counsel shall be responsible for communicating any such notice promptly to the Proposed Direct Purchaser Settlement Class by email and by posting conspicuous notice on the settlement website, [www.RestasisAntitrustSettlement.com](http://www.RestasisAntitrustSettlement.com).

33. All briefs and materials in support of direct purchaser class counsel’s application for fees, reimbursement of costs and expenses (as well as expenses to be incurred in finalizing the settlement and disbursing payments to the class), and any service award to the Direct Purchaser Class Plaintiffs shall be filed with the Court no later than 30 days after the date on the

Notice to the Class or any extension thereof. Once filed, briefs shall also be made available on the settlement website, [www.RestasisAntitrustSettlement.com](http://www.RestasisAntitrustSettlement.com).

34. Proposed Direct Purchaser Settlement Class members who wish to object to the proposed Settlement and/or appear in person at the Fairness Hearing must first email an objection and, if intending to appear, a notice of intention to appear, along with a summary statement outlining the position(s) to be asserted and the grounds therefore, together with copies of any supporting papers or briefs, to the Courtroom Deputy of Judge Gershon, Mr. Victor Joe: [Victor\\_Joe@nyed.uscourts.gov](mailto:Victor_Joe@nyed.uscourts.gov). The class member should also email copies of the objection and/or notice of intention to appear to the following counsel:

On behalf of the direct purchasers, class plaintiffs, and the class:

Thomas M. Sobol: [tom@hbsslaw.com](mailto:tom@hbsslaw.com)  
Kristen A. Johnson: [kristen@hbsslaw.com](mailto:kristen@hbsslaw.com)  
Jessica MacAuley: [jessicam@hbsslaw.com](mailto:jessicam@hbsslaw.com)  
HAGENS BERMAN SOBOL SHAPIRO LLP  
55 Cambridge Parkway, Suite 301  
Cambridge MA 02142  
Tel: 617-482-3700  
Fax: 617-482-3003  
Thomas M. Sobol direct: 617-475-1950  
Kristen A. Johnson direct: 617-475-1961

On behalf of Allergan:

Eric Stock: [ESTock@gibsondunn.com](mailto:ESTock@gibsondunn.com)  
GIBSON DUNN & CRUTCHER, LLP  
200 PARK AVENUE  
New York, NY 10166  
Tel: (212) 351-2301

M. Sean Royall: [sean.royall@kirkland.com](mailto:sean.royall@kirkland.com)  
KIRKLAND & ELLIS LLP  
1601 Elm Street  
Dallas, TX 75201  
Tel: (214) 972-1759

In accordance with Fed. R. Civ. P. 23(e)(5)(A), the objection must also state “whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.” The objection and/or notice of intention to appear shall state that they relate to *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, 18-md-2819. To be valid, any such objection and/or notice of intention to appear must be emailed within 50 days of the date the Notice to the Proposed Direct Purchaser Settlement Class was mailed and it must include the Proposed Direct Purchaser Settlement Class member’s name, email address, physical address, and best telephone number. Except as herein provided, no person or entity shall be entitled to contest the terms of the proposed Settlement. All persons and entities who fail to email a notice of intention to appear or send an email stating the reasons for objecting as provided above shall be deemed to have waived any objections by appeal, collateral attack, or otherwise and will not be heard at the Fairness Hearing.

35. Interim Lead Class Counsel are directed to file any objection and/or notice of intention to appear on the electronic docket of *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, 18-md-2819 (NG) (E.D.N.Y.). Interim Lead Class Counsel must then provide any party objecting and/or intending to appear a receipt of the filing by email.

36. All briefs and materials in support of final approval of the settlement and entry of the final judgment proposed by the parties to the Settlement Agreement, or any extension thereof, shall be filed with the Court no later than 14 days before the final Fairness Hearing set in this Order.

37. In the event that the Settlement does not become final pursuant to Paragraph 16 of the Settlement Agreement, the parties will revert to their litigation positions *ex ante*, without prejudice to their rights, claims, or defenses and the litigation of the direct purchasers’ action

against Allergan will resume in a reasonable manner to be approved by the Court upon joint application by direct purchasers and Allergan.

38. Except as provided herein, all proceedings in the action between Direct Purchaser Class Plaintiffs and Allergan are hereby stayed until such time as the Court renders a final decision regarding the approval of the proposed Settlement and, if the Court approves the proposed Settlement, enters Final Judgment and dismisses such actions with prejudice.

39. Neither this Order, nor the Settlement Agreement, nor any other settlement related document, nor anything contained herein or therein or contemplated hereby or thereby, nor any proceedings undertaken in accordance with the terms set forth in the Settlement Agreement or herein or in any other Settlement-related document, shall constitute, be construed as or be deemed to be evidence of or an admission or concession or waiver of any defense in any action or proceeding of any kind whatsoever, civil, criminal or otherwise, before any court, administrative agency, regulatory body or any other body or authority, present or future, by Allergan including, without limitation, that Allergan has engaged in any conduct or practices that violate any antitrust statute or other law.

**SO ORDERED.**

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**NINA GERSHON**  
**United States District Judge**

May 15, 2020  
Brooklyn, New York