

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

IN RE RESTASIS (CYCLOSPORINE OPHTHALMIC  
EMULSION) ANTITRUST LITIGATION

**18-MD-2819 (NG) (LB)**

THIS DOCUMENT APPLIES TO:

*FWK Holdings, LLC v. Allergan, Inc.*, 18-cv-677;

*Rochester Drug Co-Operative, Inc. v. Allergan, Inc.*, 18-cv-970;

*KPH Healthcare Services, Inc., a/k/a Kinney Drugs, Inc., v. Allergan, Inc.*, 18-cv-974; and

*Meijer, Inc. et al v. Allergan, Inc.*, 19-cv-2563.

**NOTICE TO COUNSEL  
REGARDING DIRECT  
PURCHASER CLASS  
SETTLEMENT**

**GERSHON, United States District Judge:**

First, of course, I hope that you and those close to you are safe and healthy and will remain so.

Second, I have completed my review of the papers submitted in support of the Direct Purchaser Class settlement and will be able to give it preliminary approval. I have issues only with the form of the Proposed Preliminary Approval Order and the Proposed Form of Notice to the Direct Purchaser Class. Under ordinary circumstances, I would have had you come to court so we could discuss these issues together. Instead, I lay the issues out, below, and ask you to submit new drafts with my requested corrections.

I will not set a deadline for your revised drafts because, in any event, in light of the current health crisis, it is simply not prudent to fix dates for the next stages of settlement approval, including a fairness hearing.

## **I. The Preliminary Approval Order**

My principal concern is that the Proposed Preliminary Approval Order describes the court as certifying the settlement class. Rule 23(e)(1)(B) provides that notice be directed only upon “the parties’ showing that the court will likely be able to: (1) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal.” Fed. R. Civ. P. 23(e)(1)(B). It is clear from the language of the Rule and from the Advisory Committee Notes that the court does *not* certify the settlement class until Final Approval. The Advisory Committee Note to Rule 23(e)(1) expressly states that “[t]he ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement.” Fed. R. Civ. P. 23(e)(1) advisory committee’s note to 2018 amendment.

Therefore, the parties must change the Proposed Preliminary Approval Order in various places to state that the court has found it “likely” that a settlement class will be certified. Certainly, you can recite the various factors for certifying that you urge in the current order, but the order cannot recite that I have made findings regarding those factors nor that I have certified the class.

Incident to this, plaintiffs’ counsel must remain “interim class counsel” in the order.

In sum, Paragraphs 3 through 12 of your Proposed Preliminary Approval Order must be substantially changed. There may be other paragraphs that need to be conformed to this guidance as well.

The Preliminary Approval Order shall be called “Order Granting Preliminary Approval of the Settlement Between the Direct Purchaser Class Plaintiffs and the Defendant and Other Related Relief.” I do not object, however, to the order being referred to within the document as a Preliminary Approval Order, but the terms of the order must indicate that preliminary approval is

based upon my finding that it is “likely” that I will give the settlement final approval. A change is therefore necessary in, for example, Paragraph 20 of the Proposed Order.

I find it unnecessary to cite case law in the Preliminary Approval Order in support of my conclusions. I prefer to rely, at this point, on the Rule itself. Please make the necessary changes.

Finally, if the parties wish to have a Preliminary Approval Order in place now, rather than waiting for a time when a fairness hearing can be scheduled, I am happy to enter one when I approve a new Proposed Preliminary Approval Order and Proposed Form of Notice to the Direct Purchaser Class. However, I will do so without fixing dates. Rather than signing an order with blanks for dates, you may note in the Order that dates will be fixed at a later time. The reason—the current national health emergency—should be noted. In other words, you can prepare a Proposed Preliminary Approval Order which will contain approval of a Proposed Form of Notice with blanks for dates in the Notice. Then, at a later time, I will issue an order directing that Notice issue and fixing the various dates. The exact form I leave to your judgment.

## **II. Proposed Form of Notice to the Direct Purchaser Class**

The Proposed Form of Notice must be conformed, in various places, to the new Preliminary Approval Order and it must not state that the court has decided that the suit can proceed as a class action. By way of example only, Section 15(1) on page 12 must state that the hearing will be held to determine whether to grant final approval of the settlement and whether to certify a settlement class.

Finally, both the Notice, on pages 11 and 13, and the Preliminary Approval Order in describing objections (Paragraph 32) must incorporate the requirement of Rule 23(e)(5)(A) that “[t]he objection must state whether it applies only to the objector, to a specific subset of the

