

UNITED STATES DISTRICT COURT  
FOR THE 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 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).

**SETTLEMENT AGREEMENT**

This Settlement Agreement is made and entered into on February 16, 2020, by and between Allergan, Inc. (“Allergan” or “Defendant”), by and through its undersigned counsel, Gibson, Dunn & Crutcher LLP and Kirkland & Ellis LLP, on the one hand, and FWK Holdings, LLC, KPH Healthcare Services, Inc. a/k/a Kinney Drugs, Inc., Rochester Drug Cooperative, Inc., Meijer, Inc., and Meijer Distribution, Inc, (on behalf of themselves and a putative class of direct purchasers of Restasis) (collectively, “Direct Purchaser Class Plaintiffs” or “Plaintiffs”) in the above-captioned litigation by and through their undersigned counsel Hagens Berman Sobol Shapiro LLP. This Settlement Agreement is intended to, and upon occurrence of the Effective Date will, fully, finally, and forever resolve, compromise, discharge, and settle the claims of the

Direct Purchaser Class, including any successors-in-interest or assignees thereof, in the above-captioned litigation, subject to the terms and conditions set forth herein.

WHEREAS, Plaintiffs filed class action lawsuits alleging that Defendant violated 15 U.S.C. §§ 1 & 2 by monopolizing, conspiring to monopolize, and entering into agreements that unreasonably restrained trade in the United States market for the prescription drug Restasis in order to delay generic equivalents' entry into the market;

WHEREAS, Plaintiffs' claims were consolidated under the caption *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, No. 18-md-2819-NG-LB, before the United States District Court for the Eastern District of New York (the "Court") as a putative class action on behalf of the Direct Purchaser Class, defined in Paragraph 1 below (the "Direct Purchaser Class Action" or the "Action");

WHEREAS, the Court denied Defendant's motions to dismiss, held a hearing on the Direct Purchaser Class's motion for class certification, and granted in part and denied in part Defendant's motion to stay further merits deadlines pending resolution of the class certification motion;

WHEREAS, the parties completed service of merits expert reports in accordance with agreed-upon revisions to a Revised Schedule as of July 24, 2019, and the Court stayed summary judgment briefing, until the Court's issuance of a decision on the class certification motion;

WHEREAS, a decision on the Direct Purchaser class certification motion has not yet been rendered;

WHEREAS, Defendant denies each and every one of Plaintiffs' allegations, has not conceded or admitted any liability, has not conceded or admitted the propriety of certification of any class in this Action for any purpose other than settlement, has not conceded or admitted that

any conduct challenged by Plaintiffs caused any damage whatsoever, and has asserted a number of defenses to Plaintiffs' claims;

WHEREAS, Plaintiffs and Defendant agree that the Court has both personal jurisdiction over the parties as well as subject matter jurisdiction over the claims of the Direct Purchaser Class brought in the Action;

WHEREAS, Plaintiffs and Defendant agree that this Settlement Agreement shall not be deemed or construed to be an admission or evidence of any violation of any statute or law, or of any liability or wrongdoing by Defendant, or of the truth of any of the claims or allegations alleged in the Direct Purchaser Class Action or a waiver of any defenses thereto, or of the applicability or lack thereof of any arbitration clauses;

WHEREAS, Plaintiffs' Counsel has concluded, after extensive discovery and investigation of the facts, and after carefully considering the circumstances of the Direct Purchaser Class Action, including the claims asserted in this action, and the possible and asserted legal and factual defenses thereto, that it would be in the best interests of the Direct Purchaser Plaintiffs and the Class (defined in Paragraph 1 below) to enter into this Settlement Agreement in order to avoid the uncertainties of litigation, particularly complex litigation such as this, and to assure a benefit to the Direct Purchaser Plaintiffs and the Class and further, that Plaintiffs' Counsel considers the Settlement set forth in this Settlement Agreement to be fair, reasonable, and adequate within the meaning of Fed. R. Civ. P. 23 and in the best interests of the Direct Purchaser Plaintiffs and the Class;

WHEREAS, Defendant has concluded, despite its belief that it is not liable for the claims asserted and that it has good defenses thereto, that it would be in its best interest to enter into this

Settlement Agreement to avoid the uncertainties and additional costs of further litigation and to finally put to rest all claims relating to the Direct Purchaser Class Action;

WHEREAS, Plaintiffs' Counsel, on behalf of themselves and the proposed Direct Purchaser Class, on the one hand, and counsel for Defendant on the other, have engaged in arm's-length settlement negotiations, including use of a court-appointed mediator at times, and have reached this Settlement Agreement, subject to Court approval, which, together with a separate letter of even date herewith to be filed with the Court *in camera* in connection with preliminary approval, embodies all of the terms and conditions of the settlement between Direct Purchaser Plaintiffs, both individually and on behalf of the Direct Purchaser Class, and Defendant; and

NOW THEREFORE, it is agreed by the undersigned, on behalf of Direct Purchaser Class Plaintiffs and the Direct Purchaser Class, on the one hand, and Defendant, on the other, that the Direct Purchaser Class Action and all claims of Direct Purchaser Class Plaintiffs and the Direct Purchaser Class be settled, compromised, and dismissed with prejudice as to Defendant (and, except as hereinafter provided, without costs as to any member of the Direct Purchaser Class or Defendant), subject to Court approval, on the following terms and conditions:

1. **Class Certification.** The Direct Purchaser Class Plaintiffs shall seek preliminary and final approval of the Settlement Agreement, and Allergan shall not oppose, certification of the below-defined Direct Purchaser Class (or any modification necessary or appropriate in order to effectuate this Settlement Agreement), for purposes of this Settlement only:

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.

2. **Retailer Plaintiffs.** For the avoidance of doubt, the parties agree that the class, as defined in paragraph 1 above, excludes the following entities, in their own capacity or as assignees, which have also 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”).

3. **Reasonable Best Efforts to Effectuate This Settlement.** Counsel for the Plaintiffs and Defendant agree to recommend approval of this Settlement Agreement to the Court and to undertake their reasonable best efforts, including undertaking all actions contemplated by and steps necessary to effectuate this Settlement Agreement, to carry out the terms of this Settlement Agreement, and to secure the prompt, complete, and final dismissal with prejudice of all claims in the Direct Purchaser Class Action. This includes Defendant serving notice on those entities required to receive notice pursuant to 28 U.S.C. § 1715.

4. **Motion for Preliminary Approval of the Settlement.** Plaintiffs shall submit to the Court—and Defendant shall support—a motion (the “Motion”) requesting entry of an order preliminarily approving the settlement and authorizing dissemination of notice to the Direct Purchaser Class (the “Preliminary Approval Order”) substantially in the form of Exhibit A hereto. The Motion shall:

a. request preliminary approval of the Settlement set forth in this Settlement Agreement as fair, reasonable, and adequate within the meaning of Fed. R. Civ. P. 23 and in the best interests of the Direct Purchaser Class;

b. request a stay of all proceedings against Defendant in the Direct Purchaser Class Action, except those proceedings provided for or required by this Settlement Agreement;

c. seek approval for notice to the Class by means of direct first-class United States mail notice substantially in the form attached hereto as Exhibit B; and

d. include a proposed form of order substantially in the form of Exhibit A hereto, which includes such provisions as are typical in such orders, including a finding that the proposed plan of notice complies with Rule 23 and the requirements of due process, and a provision that if final approval of the settlement is not obtained, the settlement is null and void and the parties will revert to their positions *ex ante* without prejudice to their rights, claims, or defenses.

Class Counsel for the Direct Purchaser Class shall provide preliminary and final approval papers to Allergan's counsel for review and comment before filing them with the Court.

5. **Motion for Final Approval and Entry of Final Judgment.** If the Court preliminarily approves this Settlement Agreement, Plaintiffs shall submit—and Defendant shall support—a motion for final approval by the Court of this Settlement Agreement (“Final Approval Motion”) after notice has been disseminated to the Class pursuant to the Preliminary Approval Order and the deadline to opt out has run. The Final Approval Motion shall be submitted to the Court no later than 14 days before the date of the final Fairness Hearing set by the Court in the Preliminary Approval Order, and shall seek entry of an order and final judgment (“Final Approval Order”) substantially in the form attached hereto as Exhibit C:

a. finding this Settlement Agreement and its terms to be a fair, reasonable, and adequate settlement as to Plaintiffs and the Direct Purchaser Class within the meaning of Rule 23 of the Federal Rules of Civil Procedure and directing its consummation pursuant to its terms;

- b. finding that all members of the Class (“Class Members”) shall be bound by this Settlement Agreement, including the release provisions and covenant not to sue set forth in this Settlement Agreement;
- c. finding that notice given constitutes due, adequate, and sufficient notice and meets the requirements of due process and the Federal Rules of Civil Procedure;
- d. incorporating the release set forth in Paragraphs 12 and 13 of this Settlement Agreement, and forever barring the Releasors from asserting any Released Claims against any of the Releasees as defined below;
- e. providing for the payment of reasonable attorneys’ fees and reimbursement of expenses solely from the Settlement Fund based upon a motion seeking such fees and expenses filed at least 7 days in advance of the Court-ordered deadline for Class Members to object;
- f. directing that the Direct Purchaser Class Action be dismissed with prejudice as to Defendant and, except as provided for herein, without costs or attorneys’ fees recoverable under 15 U.S.C. § 15(a);
- g. providing that the Court shall retain exclusive jurisdiction over the Settlement and the Settlement Agreement, including the administration and consummation of the Settlement;
- h. directing that the judgment of dismissal with prejudice of all Direct Purchaser Class claims against Defendant shall be final and appealable pursuant to Fed. R. Civ. P. 54(b), there being no just reason for delay; and
- i. directing that, for a period of five (5) years, the Clerk of the Court shall maintain the record of those members, if any, who have timely excluded themselves from the Direct Purchaser Class (“Opt Outs”) and that a certified copy of such records shall be provided to Allergan upon request.

6. **Finality of Settlement.** This Settlement Agreement shall become final upon the occurrence of all of the following (the “Effective Date”):

a. The Settlement is not terminated pursuant to Paragraph 16 below;

b. The Settlement and this Settlement Agreement are preliminarily approved by the Court as required by Rule 23(e) of the Federal Rules of Civil Procedure;

c. The Court enters the Final Approval Order, or a substantially similar order, entering a final judgment of dismissal with prejudice against Plaintiffs and the Class Members; and

d. The time for appeal from the Court’s signing of the Final Approval Order has expired or, if the Final Approval Order is appealed, it has been resolved by agreement and withdrawn by the appealing party, or it has been affirmed (or leave to appeal has been denied) by the court of last resort to which an appeal of such Final Approval Order may be taken.

7. **Settlement Payment.** Within ten (10) days of the Court granting preliminary approval to the Settlement:

a. Allergan shall, pursuant to instructions from Plaintiffs’ Counsel, transfer fifty one million, two hundred fifty thousand dollars (\$51,250,000.00) (the “Settlement Amount”) to a designated account (the “Settlement Fund”), which shall be held in escrow (the “Escrow Account”) subject to the terms and conditions of the escrow agreement attached hereto as Exhibit D (the “Escrow Agreement”), and in accordance with the provisions below of Paragraphs 7(b)–(d). Payment shall be made by wire transfer pursuant to instructions from Interim Lead Counsel. Defendant shall not pay any additional amount at any time, whether for wire transfer fees or bank fees of any kind associated with the wire transfer of funds, interest, notice, administration, costs, attorneys’ fees, or otherwise, into the Escrow Account. The total consideration that



Defendant will pay for this Settlement shall be the Settlement Amount only. Defendant shall not be obligated to pay the Direct Purchaser Class or Class Counsel for the Direct Purchaser Class any amount other than the Settlement Amount.

b. The Escrow Account is to be established by Interim Lead Counsel for the Direct Purchaser Class. The Escrow Account shall be held as a separate trust constituting a Qualified Settlement Funds (“QSF”) as described in Treasury Regulation § 1.468B-1, 26 C.F.R. § 1.468B-1.

c. Interim Lead Counsel for the Direct Purchaser Class and Allergan jointly shall, and shall cause the Trustee of the QSF to, take such steps as shall be necessary to qualify the QSF under § 468B of the Internal Revenue Code, 26 U.S.C. § 468B, and the regulations promulgated pursuant thereto.

d. The QSF shall be solely used to pay for the costs of notice and claims administration, distribution of payments to class members on a pro rata basis based on their actionable purchase volumes, attorneys’ fees and expenses to Class Counsel for Direct Purchaser Class as awarded by the Court, and service awards (if any) awarded to the named class representatives as set forth more fully herein. It is the parties’ intention and expectation that the QSF shall distribute substantially all of the Settlement Amount for these purposes. Regardless, Allergan shall have no claim upon money, if any, remaining in the QSF, except as set forth herein.

8. **The Settlement Fund.**

a. Before the Court issues the Final Approval Order, disbursements for expenses associated with providing notice of the Settlement to the Class, expenses associated with administering the Settlement, and any payments and expenses incurred in connection with

taxation matters relating to the Settlement and this Settlement Agreement (collectively, “Administration Expenses”) may be paid out of the Escrow Account, without recourse to the Plaintiffs or Plaintiffs’ Counsel. In no event shall Defendant be liable for any class notice costs other than out of the Settlement Fund. In the event the Agreement is disapproved, terminated, or otherwise fails to become effective, Allergan shall promptly receive the Settlement Amount from the QSF, plus interest earned, minus the actual costs of Administration Expenses incurred. Court approval shall not be required for disbursements or distributions of Administration Expenses for amounts (in the aggregate) of less than \$75,000. Otherwise, no disbursement from or distribution of the Settlement Fund shall be made without prior approval of the Court.

b. At all times, the Settlement Fund shall be invested as set forth in Paragraph 3 of the Escrow Agreement, in instruments or accounts backed by the full faith and credit of the United States Government or fully insured by the United States Government or an agency thereof, including a U.S. Treasury Money Market Fund or a bank account that is either (a) fully insured by the Federal Deposit Insurance Corporation (“FDIC”) or (b) secured by instruments backed by the full faith and credit of the United States Government as directed in writing by Plaintiffs’ Counsel. All interest and dividends earned on the Settlement Fund shall become and remain part of the Settlement Fund. Any losses on the Settlement Fund shall be borne by the Settlement Fund and shall not be recoverable from Defendant. Defendant shall have no liability, obligation, or responsibility of any kind in connection with the investment, disbursement, or other oversight of the Settlement Fund.

c. After the Effective Date, the Settlement Fund shall be distributed in accordance with the Court-approved allocation plan. After making the payment described in Paragraph 7 above, Defendant shall have no responsibility whatsoever for the allocation or distribution of the

Settlement Fund and shall not be responsible for any disputes relating to the amount, allocation, or distribution of any fees, costs or awards. Further, after making the payment described in Paragraph 7 above, Defendant shall not be liable for any additional payments to the Direct Purchaser Class or Plaintiffs' Counsel pursuant to this Settlement Agreement.

d. Plaintiffs and Counsel for the Class shall be reimbursed and indemnified solely out of the Settlement Fund for all expenses. Defendant shall not be liable for any costs, attorneys' fees, other fees, or expenses of any of Plaintiffs' or the Direct Purchaser Class's respective attorneys, experts, advisors, agents, or representatives, but all such costs, fees, and expenses as approved by the Court shall be paid out of the Settlement Fund.

e. To the extent that there is any ambiguity or inconsistency when this Settlement Agreement and the Escrow Agreement are read together, the terms of this Settlement Agreement shall control.

9. **No Injunctive Relief.** This Settlement Agreement does not include any provisions for injunctive relief.

10. **Full Satisfaction; Limitation of Interest and Liability.** Class Members shall look solely to the Settlement Fund for settlement and satisfaction against Defendant of all claims that are released hereunder. Except as provided by order of the Court, no Class Member shall have any interest in the Settlement Fund or any portion thereof.

11. **Attorneys' Fees, Expenses and Costs.**

a. Plaintiffs' Counsel intend to seek attorneys' fees and/or costs from so much of the Settlement Amount deposited into the Escrow Account, as such attorneys' fees and/or costs shall be determined by the Court ("Fee and Expense Award"). Plaintiffs' Counsel shall file a motion for approval of the Fee and Expense Award ("Motion for Fee and Expense Award") at no later

than 14 days after the date of dissemination of notice to the Direct Purchaser Settlement Class, and Defendant agrees to take no position with respect to the Motion for Fee and Expense Award, or on any other application by Plaintiffs' Counsel for fees and/or expenses to be paid only from the Settlement Fund as may be necessary to effectuate this Settlement Agreement. Defendant also agrees not to oppose any request by Plaintiffs' Counsel that the Court order that any Fee and Expense Award be disbursed only to the Court-appointed Interim Lead Counsel for the Class, for allocation among the various counsel to the Class that have participated in this litigation. The various counsel for the Class, including Plaintiffs' Counsel, shall be reimbursed and paid solely out of the Settlement Fund for all such fees and expenses and not by the Defendants. In no event shall any Fee and Expense Award be paid before the Effective Date. Plaintiffs, Class Members, and their respective counsel shall not seek payment of any attorneys' fees, expenses, costs, or service awards from Defendant in this action, or in any other action related to the released claims set forth in Paragraphs 12 and 13 hereof, from any source other than the Settlement Fund.

b. The procedures for and the allowance or disallowance by the Court of the application by Plaintiffs' Counsel for attorneys' fees, costs, and expenses to be paid out of the Settlement Fund are not part of this Agreement, and are to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the settlement. Notwithstanding any right of termination in Paragraph 16, any order or proceeding relating to the Motion for Fee and Expense Award, or any appeal from any such order, shall not operate to terminate or cancel this Agreement, provide a basis to terminate or cancel this Agreement, affect or delay the finality of the judgment approving settlement, or affect or delay the payment of the Fee and Expense Award as provided in Paragraph 7.

c. If the Court's Fee and Expense Award is vacated, reversed, or reduced subsequent to the disbursement of any Fee and Expense Award, Plaintiffs' Counsel shall within ten (10) business days after receiving written notice from the Court or from Defendant of such vacatur, reversal, or reduction, make a refund to the Escrow Account in the amount of such vacatur, reversal, or reduction with interest, and further provided that if the Settlement Agreement is terminated pursuant to Paragraph 16 below, Plaintiffs' Counsel shall within ten (10) business days after giving notice to or receiving notice from Defendant of such termination, make a refund to the Escrow Account in the amount of any such Fee and Expense Award with interest. The interest rate applicable to any refund made to the Escrow Account pursuant to this Paragraph shall be the same interest rate earned by the Settlement Fund during the period between the disbursement of any Fee and Expense Award and any refund required by this Paragraph.

12. **Releases and Covenants.**

a. **Direct Purchaser Class Release.** Upon the occurrence of the Effective Date and in consideration of payment of the Settlement Amount specified in Paragraph 7 above, Plaintiffs and all Class Members, whether or not they object to the Settlement and whether or not they make a claim upon or participate in the Settlement Fund, on behalf of themselves and their respective past, present, and future parents, subsidiaries, associates, affiliates, officers, directors, employees, insurers, general or limited partners, divisions, agents, attorneys, servants, trustees, joint ventures, heirs, executors, administrators, representatives, assignees (and the parents' subsidiaries' and affiliates' past and present officers, directors, employees, agents, attorneys, servants, and representatives and assignees), and their predecessors, successors, heirs, executors, administrators, and representatives (collectively, the "Direct Purchaser Class Releasers"), hereby release and forever discharge, and covenant not to sue, Defendant and its past, present, and

future parents, subsidiaries, divisions, affiliates, joint ventures, stockholders, officers, directors, management, supervisory boards, insurers, general or limited partners, employees, agents, attorneys, servants, representatives, assignees (and the parents', subsidiaries', and affiliates' past, present, and future officers, directors, employees, agents, attorneys, servants, and representatives, and assignees), and the predecessors, successors, heirs, executors, administrators and representatives of each of the foregoing (collectively, the "Defendant Releasees") from and with respect to all manner of claims, debts, obligations, demands, actions, suits, causes of action, damages whenever incurred, and liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, under federal or state laws, whether known or unknown, foreseen or unforeseen, suspected or unsuspected, contingent or non-contingent, in law or equity, that arise out of or relate, in whole or in part in any manner, to:

(a) the subject matter of all acts, omissions, or other conduct alleged in the first amended consolidated class action complaint dated February 11, 2019, and/or the complaint and jury demand of Meijer, Inc. and Meijer Distribution, Inc. dated May 1, 2019, in the Action related to Restasis or its generic equivalents, (b) the subject matter of any prior complaints or subsequent amended complaints related to Restasis or its generic equivalents filed in the Direct Purchaser Class Action; (c) the subject matter of pretrial proceedings related to Restasis or its generic equivalents in the Direct Purchaser Class Action; and/or (d) 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 Direct Purchaser Class Action, including but not limited to claims of Walker Process Fraud, sham Orange Book patent listings, sham citizen petitions, 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 (collectively, this entire paragraph, the "Released Claims").

For the avoidance of doubt, Released Claims includes any and all future claims or damages that may be alleged by any Direct Purchaser Class Member which arise out of or relate to such Class

Members' future purchases of Restasis or its generic equivalent and which relate to the subject matter described in subparagraphs (a)-(d), above. Released Claims do not include any future claims or damages arising from acts, omission, or other conduct committed by Defendant on or after the date of this Settlement Agreement.

b. **Defendant's Release.** Upon the occurrence of the Effective Date and in consideration of the Releases and Covenants specified in Paragraphs 7 and 12(a) above, Defendant on behalf of itself and its respective past, present, and future parents, subsidiaries, associates, affiliates, officers, directors, employees, insurers, general or limited partners, divisions, agents, attorneys, servants, trustees, joint ventures, heirs, executors, administrators, representatives, assignees (and the parents' subsidiaries' and affiliates' past and present officers, directors, employees, agents, attorneys, servants, and representatives), and their predecessors, successors, heirs, executors, administrators, representatives and assignees (collectively, the "Defendant Releasers"), hereby release and forever discharge, and covenant not to sue, Direct Purchaser Class Members and their past, present, and future parents, subsidiaries, divisions, affiliates, joint ventures, stockholders, officers, directors, management, supervisory boards, insurers, general or limited partners, employees, agents, attorneys, servants, representatives, assignees (and the parents', subsidiaries', and affiliates' past, present, and future officers, directors, employees, agents, attorneys, servants, representatives and assignees), and the predecessors, successors, heirs, executors, administrators, and representatives of each of the foregoing (collectively, the "Direct Purchaser Class Releasees") from and with respect to all manner of claims, debts, obligations, demands, actions, suits, causes of action, damages whenever incurred, and liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, under federal or state laws, whether known or unknown, foreseen or

unforeseen, suspected or unsuspected, contingent or non-contingent, in law or equity, asserted in connection with the Action or that should have been asserted in the Action as compulsory counterclaims arising out of the alleged conduct that is the subject of Paragraph 12(a).

c. This Settlement Agreement is not intended to release anyone other than the Defendant Releasees or the Direct Purchaser Class Releasees, is not on behalf of anyone other than the Direct Purchaser Class Releasors or Defendant Releasors, and is not intended to affect the claims of the proposed end-payor class or the Retailer Plaintiffs, nor is it intended to release any actual or potential claims described in Paragraph 14.

13. **Additional Release.** In addition, with respect to the claims that are the subject matter of Paragraph 12, each Direct Purchaser Class Releasor and Defendant Releasor (collectively, “Releasors”) hereby expressly waives and releases, upon the Settlement Agreement becoming final, any and all provisions, rights, and/or benefits conferred by § 1542 of the California Civil Code, which reads:

Section 1542. General Release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor;

and any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to § 1542 of the California Civil Code. Each Releasor may hereafter discover facts other than or different from those which he, she, or it knows or believes to be true with respect to the claims that are the subject matter of Paragraph 12. Nonetheless, upon the Effective Date, each Releasor hereby expressly waives and fully, finally, and forever settles and releases any known or unknown, foreseen or unforeseen, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim that is the subject matter of Paragraph 12, whether or not concealed or hidden, without regard to the subsequent discovery or existence



of such different or additional facts. Each Direct Purchaser Class Releasor also hereby expressly waives and fully, finally, and forever settles, releases, and discharges any and all claims that are the subject matter of Paragraph 12(a) that it may have against any Defendant Releasees under § 17200, et seq., of the California Business and Professions Code or any similar comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction. Each Defendant Releasor also hereby expressly waives and fully, finally, and forever settles, releases, and discharges any and all claims that are the subject matter of Paragraph 12(b) that it may have against any Direct Purchaser Class Releasees under § 17200, et seq., of the California Business and Professions Code or any similar comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction.

14. **Reservation of Claims.** The intent of this Settlement is to effect a complete and total resolution of the Direct Purchaser Class Actions to the extent of the claims of the Direct Purchaser Class that were or could have been asserted relating to the allegations in this Action, as well as any compulsory counterclaims of Defendant relating to the allegations in the Action that were or should have been asserted, but it is not intended to release any claims (1) arising in the ordinary course of business between Releasors and the Releasees arising under Article 2 of the Uniform Commercial Code (pertaining to sales), the laws of negligence or product liability or implied warranty, breach of contract, breach of express warranty, or personal injury; or (2) arising out of or in any way relating to any alleged horizontal price-fixing agreement between Allergan (as a generic manufacturer) and other manufactures of generic pharmaceutical products, including claims alleged in *In re: Generic Pharmaceuticals Pricing Antitrust Litig.*, MDL No. 2724, 16-MD-2724 (E.D. Pa.); and/or (3) other claims unrelated specifically to Restasis.

15. **Effect of Releases.** This Settlement Agreement may be pleaded as a full and complete defense to any action that may be instituted, prosecuted, or attempted by any Direct Purchaser Class Member with respect to any of the Released Claims. The parties agree that for any such action, the Court or any court of competent jurisdiction may enter an injunction restraining prosecution of such proceeding.

16. **Termination Options.**

a. Defendant and Plaintiffs shall have the option to terminate the Settlement and have their Settlement Payment (net of the cost of settlement notice and administration incurred to date) refunded if the Court declines to grant final approval to the Direct Purchaser Class Settlement. If for any reason the Settlement does not become final in accordance with the terms of Paragraph 6 of this Settlement Agreement, then (i) this Settlement Agreement shall be of no force or effect; (ii) all funds paid by Defendant into the Settlement Fund, plus interest (net of any taxes paid on such interest and of the cost of settlement notice and administration incurred to date) shall be returned to Defendant as set forth in Paragraph 17 and Paragraph 19; (iii) any release pursuant to Paragraphs 12 and 13 above shall be of no force or effect; and (iv) the parties agree, subject to the Court's approval, that litigation of the Direct Purchaser Class Action by Plaintiffs and the Direct Purchaser Class will resume, in a reasonable manner and on a reasonable timetable to be approved by the Court.

b. For the avoidance of doubt, any order of the Court that (i) narrows or does not approve the scope of the release and covenant not to sue contemplated by this settlement, (ii) purports to impose additional material obligations on Defendant, or (iii) declines to enter a final judgment that meets the minimum requirements set forth in Paragraph 4 and 5 of this Agreement, or any order on review or appeal that would have the foregoing effects, except as otherwise

agreed to in writing by Defendant and Plaintiffs, constitutes a failure to grant final approval of this Agreement and confers on Defendant and Plaintiffs the right to terminate provided by this Paragraph.

c. A modification or reversal on appeal of any amount of the Fee and Expense Award shall not be deemed a modification of all or a part of the terms of this Settlement Agreement or such Final Approval Order and shall not give rise to any right of termination.

d. Allergan shall also have the right to terminate the settlement agreement under the conditions delineated in the confidential letter of understanding that the Parties have submitted *in camera* to the Court in conjunction with the motion for preliminary approval.

17. **Reimbursement of the Settlement Fund Upon Termination.** If this Settlement Agreement is terminated pursuant to the provisions of Paragraph 16 above, the Escrow Agent shall return the Settlement Fund—including any Fee and Expense Award paid to Plaintiffs’ Counsel but net of any cost of settlement notice and administration incurred to date (the “Net Settlement Fund”)—to Defendant. Subject only to expiration of any time deposit investment(s) not to exceed ninety (90) days, the Escrow Agent shall disburse the Net Settlement Fund to Defendant in accordance with this Paragraph within fifteen (15) business days after receipt of either (i) written notice signed by Defendant’s counsel stating that this Settlement Fund has been terminated, or (ii) any order of the Court so directing. Any remaining portion of the Net Settlement Fund invested in time deposits not to exceed ninety (90) days shall be disbursed within ten (10) days after the expiration of such investments. If the Settlement Agreement is terminated pursuant to Paragraph 16 above, any obligations pursuant to this Settlement Agreement (other than disbursement of the Net Settlement Fund to Defendant as set forth above) shall cease immediately and the releases set forth in Paragraphs 12 and 13 shall be null and void.

18. **Preservation of Rights.** The parties hereto agree that this Settlement Agreement, whether it becomes final or not, and any and all negotiations, documents, and discussions associated with it shall be without prejudice to the rights of any party (except to the extent provided herein), shall not be deemed or construed to be an admission or evidence of any violation of any statute or law (or lack thereof), of any liability or wrongdoing by Defendant (or lack thereof), or of the truth (or lack thereof) of any of the claims or allegations contained in the Complaint or any other pleading or document, and evidence thereof shall not be discoverable or used directly or indirectly, in any way (other than to effectuate or enforce the terms of this Settlement Agreement). The parties expressly reserve all of their rights if the Settlement does not become final in accordance with the terms of this Settlement Agreement.

19. **Tax Treatment of the Settlement Funds.**

a. The parties intend that any taxes due as a result of income earned by the Settlement Fund will be paid from the Settlement Fund. Plaintiffs' counsel shall be solely responsible for directing the Escrow Agent to file all informational and other tax returns necessary to report any taxable and/or net taxable income earned by the Settlement Fund. Further, Plaintiffs' Counsel shall be solely responsible for directing the Escrow Agent to make any tax payments, including interest and penalties due, on income earned by the Settlement Fund. Plaintiffs' Counsel shall be entitled to direct the Escrow Agent to pay from the Escrow Account customary and reasonable tax expenses, including professional fees and expenses incurred in connection with carrying out the Escrow Agent's or tax preparer's responsibilities as set forth in this Paragraph. Defendant shall have no responsibility to make any tax filings related to the Settlement, this Settlement Agreement, or the Settlement Fund, and shall have no responsibility to pay taxes on any income earned by the Settlement Fund, or to pay taxes with

respect thereto unless the settlement is not consummated and the Settlement Fund or the Net Settlement Fund is returned to Defendant. Other than as specifically set forth herein, Defendant shall have no responsibility for the payment of taxes or tax-related expenses. If, for any reason, for any period of time, Defendant is required to pay taxes on income earned by the Settlement Fund, the Escrow Agent shall, upon written instructions from Defendant with notice to Plaintiffs' Counsel, timely pay to Defendant sufficient monies from the Settlement Fund to enable it to pay all taxes (state, federal, or other) on income earned by the Settlement Fund.

b. For the purpose of § 468B of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder, the "Administrator" of the Escrow Account shall be the Claims Administrator, who shall timely and properly file or cause to be filed on a timely basis, all tax returns necessary or advisable with respect to the Escrow Account (including without limitation all income tax returns, all informational returns, and all returns described in Treas. Reg. § 1.468B-2(1)).

c. As stated in Paragraph 7, the parties to this Settlement Agreement and their counsel shall treat, and shall cause the Escrow Agent to treat, the Escrow Account as being at all times a "qualified settlement fund" within the meaning of Treas. Reg. § 1.468B-1. The parties, their counsel, and the Escrow Agent agree that they will not ask the Court to take any action inconsistent with the treatment of the Escrow Account in this manner. In addition, the Escrow Agent and, as required, the parties, shall timely make such elections as necessary or advisable to carry out the provisions of this Paragraph, including the "relation-back election" (as defined in Treas. Reg. § 1.468B-1(j)) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Escrow Agent to timely and properly prepare and deliver the necessary

documentation for signature by all necessary parties and thereafter to cause the appropriate filing to occur. All provisions of this Settlement Agreement shall be interpreted in a manner that is consistent with the Escrow Account being a “qualified settlement fund” within the meaning of Treas. Reg. § 1.468B-1.

20. **Binding Effect.** This Settlement Agreement shall be binding upon, and inure to the benefit of, the parties hereto and to the Releasees. Without limiting the generality of the foregoing, each and every covenant and agreement herein by the Plaintiffs and their counsel shall be binding upon all Class Members who do not exclude themselves from the Settlement.

21. **Integrated Agreement.** This Settlement Agreement, together with the schedules and exhibits hereto and the documents incorporated herein by reference, including the confidential letter of understanding of even date herewith that the Parties will submit to the Court in camera, contains an entire, complete, and integrated statement of each and every term and provision agreed to by and among the parties hereto with respect to the transactions contemplated by this Agreement, and supersedes all prior agreements or understandings, whether written or oral, between or among any of the parties hereto with respect to the subject matter hereof. The parties agree there are and have been no express or implied promises, inducements or agreements made by any party to the other except as specifically and expressly set forth within this Settlement Agreement and the confidential letter of understanding of even date herewith that the Parties will submit to the Court in camera.

22. **Captions, Paragraph Headings, Interpretation.** As used in this Agreement, “including” means “including but not limited to,” and “herein,” “hereof,” and “hereunder” refer to this Agreement as a whole. The Paragraph headings used herein are for reference and convenience only, and shall not enter into the interpretation of this Agreement. Unless otherwise

expressly provided herein, any reference to a number of “days” hereunder shall refer to calendar days. The headings used in this Settlement Agreement are intended for the convenience of the reader only and shall not affect the meaning or interpretation of this Settlement Agreement.

23. **Modification; Waiver.** The terms or provisions of this Settlement Agreement may not be changed, waived, modified, cancelled, or varied in any manner whatsoever unless in a writing duly signed by all Parties. Any failure by any Party to insist upon the strict performance by any other Party of any of the provisions of this Settlement Agreement shall not be deemed a waiver of any of the provisions hereof, and that Party, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Settlement Agreement to be performed by the other Party.

24. **Independent Settlement.** This Settlement of the Direct Purchaser Class Action is not conditioned on approval by any other direct purchaser or settlement of any other case. For avoidance of doubt: This Settlement of the Direct Purchaser Class Action is not conditioned on the disposition of the claims of the end-payor class or the Retailer Plaintiffs.

25. **No Party Is the Drafter.** None of the parties hereto shall be considered to be the drafter of this Settlement Agreement or any provision hereof for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof.

26. **Choice of Law.** All terms of this Settlement Agreement shall be governed by, and construed and enforced in accordance with, federal common law, without regard to its principles of conflicts of laws.

27. **Consent to Jurisdiction.** Defendant and each Class Member hereby irrevocably submit to the exclusive jurisdiction of the United States District Court for the Eastern District of

New York for any suit, action, proceeding, or dispute arising out of or relating to this Settlement Agreement or the applicability of this Settlement Agreement, including, without limitation, any suit, action, proceeding, or dispute relating to the release provisions herein. Nothing in this paragraph shall prohibit (a) the assertion in any forum in which a claim is brought that any release herein is a defense, in whole or in part, to such claim or (b) in the event that such a defense is asserted in such forum, the determination of its merits in that forum.

28. **Representations and Warranties.** Each party hereto represents and warrants to each other party hereto that it has the requisite authority (or in the case of natural persons, the legal capacity) to execute, deliver, and perform this Settlement Agreement and to consummate the transactions contemplated hereby.

29. **No Admission.** Nothing in this Settlement Agreement, nor in any document related to this Settlement Agreement, 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, shall be construed as an admission or concession 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 Defendant, including, without limitation, that Defendant has engaged in any conduct or practices that violate any antitrust statute or other law.

30. **Enforcement of Settlement Agreement.** The Parties agree that this Settlement Agreement may be pleaded as necessary for the purpose of enforcing the Settlement Agreement.

31. **Notice.** Notice to Defendant pursuant to this Settlement Agreement shall be sent by United States mail and electronic mail to:

Eric J. Stock  
GIBSON, DUNN & CRUTCHER LLP



200 Park Avenue  
New York, NY 10166  
Tel: (212) 351-2301  
[estock@gibsondunn.com](mailto:estock@gibsondunn.com)

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

Notice to the Plaintiffs pursuant to this Settlement Agreement shall be sent by United States mail and electronic mail to Plaintiffs' Counsel:

Thomas M. Sobol  
HAGENS BERMAN SOBOL SHAPIRO LLP  
55 Cambridge Parkway, Suite 301  
Cambridge, MA 02142  
Tel: (617) 475-1950  
[tom@hbsslaw.com](mailto:tom@hbsslaw.com)

Kristen A. Johnson  
HAGENS BERMAN SOBOL SHAPIRO LLP  
55 Cambridge Parkway, Suite 301  
Cambridge, MA 02142  
Tel: (617) 482-3700  
[kristenj@hbsslaw.com](mailto:kristenj@hbsslaw.com)  
*Copy to: [Jessicam@hbsslaw.com](mailto:Jessicam@hbsslaw.com)*

Any of the parties may, from time to time, change the address to which such notices, requests, consents, directives, or communications are to be delivered, by giving the other parties prior written notice of the changed address, in the manner hereinabove provided, ten (10) days before the change is effective.

32. **Execution in Counterparts.** This Settlement Agreement may be executed in counterparts. Each counterpart shall be deemed an original, and when taken together with other signed counterparts, shall constitute one Settlement Agreement, which shall be binding upon and

effective as to all the parties. An email, facsimile or .pdf signature shall be deemed an original signature for purposes of executing this Settlement Agreement.

**REMAINDER OF PAGE INTENTIONALLY LEFT BLANK**

IN WITNESS WHEREOF, the parties hereto through their fully authorized representatives have agreed to this Settlement Agreement as of the date first herein above written.

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

By:   
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*Counsel for Defendant*

By:   
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*Interim Lead Counsel for Direct Purchaser  
Class Plaintiffs and the Proposed Direct  
Purchaser Class*