UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE AKORN, INC. DATA INTEGRITY SECURITIES LITIGATION	Civ. A. No. 1:18-cv-01713 Hon. Steven C. Seeger

DECLARATION OF ANDREW J. ENTWISTLE IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR (I) FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION; AND (II) AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

TABLE OF CONTENTS

EXHIBIT LIST

Ex. #	DESCRIPTION
1	Declaration of Layn R. Phillips in Support of Motion for Final Approval of Class Action Settlement ("Phillips Decl.")
2	Declaration of Luiggy Segura Regarding: (A) Mailing of Notice and Proof of Claim Form; (B) Publication of the Publication Notice; and (C) Report on Requests for Exclusion Received ("Segura Decl.")
3	Declaration of David Tabak, Ph.D. Regarding Plan of Allocation ("Tabak Decl.")
4	Declaration of Jonathan I. Arnold, Ph.D. [Regarding Akorn's Financial Condition] ("Arnold Decl.")
5	Declaration of David Goldman in Support of Lead Plaintiff's Motion[] ("Goldman Decl.")
6	Declaration of Andrew J. Entwistle in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, Filed on Behalf of Entwistle & Cappucci LLP
7	Declaration of John Rizio–Hamilton in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, Filed on Behalf of Bernstein Litowitz Berger & Grossmann LLP
8	Declaration of Ira A. Schochet in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, Filed on Behalf of Labaton Sucharow LLP
9	Summary of Plaintiffs' Counsel Lodestar and Expenses

I, ANDREW J. ENTWISTLE, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I, Andrew J. Entwistle, am the managing partner of the law firm of Entwistle & Cappucci LLP ("E&C" or "Lead Counsel"), counsel for Lead Plaintiffs Gabelli & Co. Investment Advisors, Inc. and Gabelli Funds, LLC (together, "GAMCO" or "Lead Plaintiffs") and Court–appointed Lead Counsel for the Settlement Class in this class action (the "Action").[1] I have personal knowledge of the matters set forth herein based upon my close supervision of, and active participation in, the Action.

2. I respectfully submit this declaration (the "Declaration") in support of Lead Plaintiffs' Motion for: (i) Final Approval of the Class Action Settlement and Plan of Allocation; and (ii) Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Final Approval Motion" or "Motion").

3. This Declaration provides an overview of the events leading to the Settlement and the basis upon which Lead Plaintiffs and Lead Counsel recommend its final approval. Specifically, this Declaration sets forth: (i) the nature of the claims asserted against the Defendants;[2] (ii) the procedural background of the Action; (iii) the negotiations that led to the Settlement; (iv) the mechanics of the proposed Plan of Allocation for distribution of the Net Settlement Fund to Settlement Class Members; and (v) the basis for Lead Counsel's request for attorneys' fees and expenses. While this Declaration provides highlights regarding these issues, the Declaration is not intended to detail each and every event in the litigation. This Declaration demonstrates that the

[1] Unless otherwise defined, all capitalized terms herein have the same meanings set forth in the Stipulation and Agreement of Settlement, dated August 9, 2019 (the "Stipulation"). (ECF No. 127-1).

[2] Defendants are Akorn, Inc. ("Akorn" or the "Company"), Rajat Rai, Duane Portwood, Alan Weinstein, Brian Tambi and Ronald Johnson.

Settlement, Plan of Allocation, and application for attorneys' fees and expenses are fair, reasonable, and adequate and should be approved by the Court.

4. The Settlement will resolve all claims asserted in the Action against Defendants on behalf of the Settlement Class. The Settlement Class is defined as:

> all persons and entities that purchased or otherwise acquired shares of Akorn's common stock during the period from November 3, 2016 through January 8, 2019, inclusive (the "Class Period"), and were damaged thereby, including any and all of their respective successors in interest, predecessors, representatives, trustees, executors, administrators, heirs, assigns or transferees, immediate and remote, and any person or entity acting for or on behalf of, or claiming under, any of them (the "Settlement Class" and its members the "Settlement Class Members").[3]

For purposes of the Settlement, Defendants have agreed to the certification of a Settlement Class under Rule 23 of the Federal Rules of Civil Procedure.

5. The Honorable Matthew F. Kennelly preliminarily approved the Settlement and certified the Settlement Class by Order entered on August 26, 2019 (ECF No. 132) (the "Preliminary Approval Order").

I. INTRODUCTION

6. Lead Plaintiffs have succeeded in obtaining a significant recovery for the Settlement Class. The Settlement Consideration includes: (i) up to $30 million in cash; (ii) approximately 8.7 million shares of Akorn common stock (valued at between $42.8 million and

[3] Excluded from the Settlement Class are: (i) Defendants; (ii) any person who was an officer, director or managing agent of Akorn or any of its subsidiaries or affiliates at any point during the Class Period; (iii) members of the immediate family of any of the foregoing individuals; (iv) any affiliate of Akorn; (v) any entity in which any Defendant has or had a controlling interest; and (vi) the legal representatives, heirs, predecessors, successors or assigns of any of the foregoing. Also excluded from the Settlement Class are any persons and entities who validly exclude themselves from the Settlement Class by timely filing a request for exclusion in accordance with the requirements set forth in paragraphs 38-39 of the Notice.

$65.4 million[4]); and (iii) up to $60.0 million in Contingent Value Rights ("CVRs") issued by Akorn (the "Settlement Consideration"). Lead Plaintiffs estimate the dollar value of the Settlement Consideration to be approximately $72.8 million to $155.4 million.

7. The Settlement benefits each member of the Settlement Class by conferring a guaranteed and immediate benefit while avoiding the substantial risks and expense of continued litigation, including the risk of recovering less than the Settlement amount after substantial delay, or of no recovery at all. As discussed below, the Settlement's combination of cash, Akorn stock and CVRs provides valuable and immediate recovery paired with additional upside in the event Akorn's turnaround plan returns the Company to profitability.

8. The Settlement was reached after extensive litigation efforts by Lead Plaintiffs and comprehensive negotiations between Lead Counsel and counsel for Defendants with the assistance of former United States District Court Judge Layn R. Phillips, a well–respected and experienced mediator.

9. At the time the Settlement was reached, Lead Plaintiffs had a clear understanding of the strengths and weaknesses of the asserted claims given the thorough prosecution of the case by Plaintiffs' Counsel. Plaintiffs' Counsel conducted extensive work to prosecute and evaluate the claims, including: (i) conducting a thorough investigation of the claims against Defendants; (ii) filing two detailed consolidated amended class action complaints; (iii) review and analysis of voluminous documents produced by Defendants in fact discovery and consideration of the extensive trial record in the related Delaware Chancery Court proceedings (the "Merger Litigation") between Akorn and Fresenius Kabi AG ("Fresenius"); (iv) consulting with experts to

[4] This range reflects the closing price of Akorn common stock on the date of this filing ($4.90 per share) at the low end, and the highest price at which shares of Akorn common stock have traded since the unfavorable decision of the Delaware Chancery Court on October 1, 2018 ($7.49 per share) at the high end.

assess class–wide damages, market efficiency and loss causation, as well as Akorn's solvency and ability to pay; and (v) preparing and filing Lead Plaintiffs' motion for class certification, which included a detailed expert report on class–wide reliance and related issues.

10. While Lead Plaintiffs and Lead Counsel were confident in the strength of the asserted claims, the Settlement Class faced the possibility of a much smaller recovery or no recovery at all had the Action proceeded to summary judgment or trial. As discussed more fully below, the substantial litigation risks included challenges to: (i) establishing Defendants' liability under the federal securities laws for their alleged misstatements; (ii) proving loss causation, class–wide reliance on the alleged misstatements, and the class–wide measure of damages; and (iii) recovering on any favorable judgment in light of Akorn's precarious financial condition. The Settlement represents an outstanding recovery for the Settlement Class considering these risks and Lead Plaintiffs' thorough appreciation of the strengths and weaknesses of the asserted claims.

11. For these reasons, and for the additional reasons set forth below, I respectfully submit that the Settlement and Plan of Allocation are fair, reasonable, and adequate and warrant final approval under Federal Rule of Civil Procedure 23(e). Moreover, for the reasons detailed below, I respectfully submit that Lead Counsel's request for attorneys' fees and reimbursement of litigation expenses is also fair and reasonable and should be approved.

II. HISTORY OF THE ACTION

A. Commencement of the Action and the Appointment of Lead Plaintiffs and Lead Counsel

12. Plaintiff the Joshi Living Trust filed the initial complaint in the Action on March 8, 2018. (ECF No. 1).

13. On May 7, 2018, three applicants/applicant groups – Joshi Living Trust, Walleye Trading LLC and GAMCO – moved to be appointed as lead plaintiff and for their counsel to be

appointed as lead counsel. (ECF Nos. 6, 16, 22). On May 10, 2018 and May 17, 2018, respectively, movants Joshi Living Trust and Walleye Trading LLC withdrew their motions for appointment as lead plaintiff. (ECF Nos. 28, 29).

14. On May 31, 2018, the Court granted an Order Appointing Gabelli & Co. Investment Advisors, Inc. and Gabelli Funds, LLC as Lead Plaintiffs, Approving their Selection of Lead Counsel and Liaison Counsel, and, among other things, ordering that all subsequently filed related actions would be consolidated with the Action. (ECF No. 37).

B. The Investigation and Filing of the Complaint

15. After appointment as Lead Counsel, Plaintiffs' Counsel[5] conducted a thorough pre–complaint investigation and analysis of the facts supporting the claims asserted against Defendants. This investigation included a review and analysis of: (i) Akorn's public filings with the Securities and Exchange Commission (the "SEC"); (ii) research reports by securities and financial analysts; (iii) transcripts of Akorn's conference calls with analysts and investors; (iv) presentations, press releases, and reports; (v) news and media reports concerning the Company and other facts related to the Action; (vi) data reflecting the pricing of Akorn securities; and (vii) additional material from the public domain concerning the Company. Plaintiffs' Counsel also closely monitored the Merger Litigation, including attending in–person all public hearings and the five–day trial and closely reviewing and analyzing all pleadings, motions and transcripts. In addition, Plaintiffs' Counsel identified, located, and interviewed dozens of former Akorn employees and other witnesses concerning the claims asserted.

[5] "Plaintiffs' Counsel" includes Lead Counsel, Liaison Counsel (Bernstein Litowitz Berger & Grossmann ("BLBG" or "Liaison Counsel")) and Labaton Sucharow LLP. All work was conducted under the supervision and direction of Lead Counsel.

16. In an effort to expedite discovery, on June 14, 2018, Lead Plaintiffs filed a Motion for Limited Relief from the PSLRA Discovery Stay, requesting that the Court order Defendants to produce certain documents Akorn had already collected, reviewed and produced in the Merger Litigation. (ECF No. 43). Defendants opposed that motion on June 22, 2018. (ECF No. 51). After argument on June 26, 2018, the Court denied, in part, Lead Plaintiffs' motion, but ordered that the parties enter a preservation order to ensure certain relevant documents would be retained for the duration of the Action. *Id*. On August 17, 2018, the Court approved the parties' Stipulation and Order For the Preservation of Evidence. (ECF No. 54).

17. On September 5, 2018, Lead Plaintiffs filed a 115–page Consolidated Amended Class Action Complaint (the "Amended Complaint"). (ECF No. 55). The Amended Complaint alleged violations of: (i) Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") on behalf of themselves and all other persons or entities who purchased or otherwise acquired the common stock of Akorn, Inc. during the period from November 3, 2016 through April 20, 2018, inclusive and were damaged thereby; and (ii) Sections 14(a) and 20(a) of the Exchange Act on behalf of Akorn shareholders of record as of June 9, 2017. The Amended Complaint alleged Section 10(b) and Section 20(a) claims against Defendants Akorn, Rai, Portwood, Weinstein, Johnson and Tambi. In addition, the Amended Complaint alleged Section 14(a) and Section 20(a) claims (the "Proxy Claims") against Defendants Akorn, Rai and the Board Defendants.[6]

18. Among other things, the Amended Complaint alleged that Akorn and certain of its senior executives and board members made material misrepresentations and omissions during the class period concerning the Company's widespread data integrity problems. These alleged

[6] The Board Defendants were John Kapoor, Alan Weinstein, Kenneth Abramowitz, Adrienne Graves, Ronald Johnson, Steven Meyer, Terry Rappuhn and Brian Tambi.

misstatements represented to investors that Akorn was in compliance with FDA regulations, and that the Company had valuable drugs in its pipeline as a result. The Amended Complaint further alleged that Akorn's senior executives and certain board members received multiple internal audit reports and reports from third–party consultants cataloguing the Company's wide–spread data integrity failures, and were aware of instances where Akorn submitted falsified data to the FDA.

19. The Amended Complaint alleged the truth about Akorn's data integrity failures was revealed in a series of partial disclosures that corrected the alleged class period misrepresentations and omissions. First, Fresenius, a German health care giant that had entered into an April 24, 2017 Agreement and Plan of Merger (the "Merger Agreement") to acquire Akorn for $34.00 per share (the "Merger"), announced it was "conducting an independent investigation, using external experts, into alleged breaches of FDA data integrity requirements relating to product development at Akorn, Inc." Second, on Sunday, April 22, 2018, Fresenius announced it was terminating the Merger Agreement based on, among other factors, "material breaches of FDA data integrity requirements relating to Akorn's operations found during Fresenius' independent investigation." The Merger Litigation between Akorn and Fresenius commenced after termination of the Merger Agreement.

20. The Amended Complaint also alleged that Akorn's proxy issued in connection with the proposed Fresenius Merger contained materially false and misleading statements or omissions of material facts. Had the truth been fully disclosed, it was alleged that class members may not have voted in favor of the proposed Merger.

C. Lead Plaintiffs Leverage The Chancery Court's Opinion to Expedite the Litigation and Streamline Discovery

21. Following Lead Plaintiffs' filing of the Amended Complaint, on October 1, 2019, the Delaware Chancery Court issued a 247–page Memorandum Opinion finding in favor of Fresenius (the "Chancery Court Opinion"). In summary, the Chancery Court found Fresenius

validly terminated the Merger Agreement on three separate grounds: (i) "Akorn's representations regarding its compliance with regulatory requirements were not true and correct, and the magnitude of the inaccuracies would reasonably be expected to result in a Material Adverse Effect" under the Merger Agreement; (ii) "Fresenius validly terminated because Akorn materially breached its obligation to continue operating in the ordinary course of business between signing and closing"; and, (iii) "Fresenius properly relied on the fact that Akorn has suffered a Material Adverse Effect as a basis for refusing to close." *See Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018–0300–JTL, 2018 WL 4719347, at *3 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018).

22. The additional factual revelations disclosed in the Chancery Court Opinion caused Akorn's stock price to fall approximately 58.7%, from $12.98 per share at close on September 28, 2018 (the trading day prior to the Chancery Court Opinion) to $5.36 per share at close on October 1, 2018.

23. Akorn filed an appeal of the Chancery Court Opinion to the Supreme Court of the State of Delaware. After briefing and oral argument, on December 7, 2018, the Delaware Supreme Court affirmed the Chancery Court Opinion. *See Akorn, Inc. v. Fresenius Kabi AG*, 198 A.3d 724 (Del. 2018).

24. Lead Plaintiffs and Lead Counsel used the findings in the Chancery Court Opinion to help expedite the Action. Following negotiations with counsel for Defendants, in October 2018 the parties entered into a Stipulation and Joint Motion for Entry of Agreed Order (the "MTD Agreement"), which provided that Defendants Akorn, Rajat Rai, Duane Portwood, Alan Weinstein, Ronald Johnson and Brian Tambi would not file a motion to dismiss Counts I and II of the Amended Complaint (the claims under Sections 10(b) and 20(a)), and would instead file Answers to those claims. In turn, Lead Plaintiffs agreed to dismiss Counts III and IV of the

Amended Complaint (the Proxy Claims) without prejudice. (ECF No. 61).[7] The Court so ordered the stipulation on October 30, 2018. (ECF No. 63). This agreement allowed Lead Plaintiffs to avoid time–consuming motion to dismiss briefing (and the attendant PSLRA discovery stay).

25. The parties held a telephone status hearing with the Court on November 8, 2018. At the hearing, the Court set a schedule for fact and expert discovery. (ECF No. 64). Pursuant to that schedule, fact discovery was set to be completed by June 28, 2019, and expert discovery was to be completed by October 15, 2019. *Id*.

26. On December 19, 2018, Defendants filed their Answer to the Amended Complaint. (ECF No. 70). In the Answer, Defendants denied the majority of Lead Plaintiffs' allegations and asserted eighteen affirmative defenses.

27. On December 21, 2018, the parties served initial disclosures pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure.

28. In a further effort to streamline discovery, Lead Plaintiffs negotiated an agreement with Defendants regarding the use of the deposition transcripts from the Merger Litigation. Over 50 depositions were taken in that litigation, many of which included questions that related to Akorn's data integrity problems or other aspects of the Action. On January 29, 2019, the parties filed a Stipulation and Joint Motion for Entry of Agreed Order Regarding the Use of Depositions, which stipulated that no party to the Action could object to the admissibility or use of the depositions taken in the Merger Litigation on certain grounds. (ECF No. 82). The Court so ordered the stipulation on January 31, 2019 ("Deposition Stipulation"). (ECF No. 86). This agreement further streamlined discovery by allowing Lead Plaintiffs to focus their discovery efforts on issues that were specifically relevant to the Action, such as scienter and the falsity of Defendants'

[7] Lead Plaintiffs and Lead Counsel believed that the Proxy Claims were no longer viable because the proposed Merger would no longer be consummated.

statements, instead of re–deposing witnesses on issues already established (*i.e.*, Akorn's data integrity failures).

29. As a result of the MTD Agreement and Deposition Stipulation, discovery commenced in late December 2018. The following provides an overview of the parties' extensive discovery efforts:

1. Party Document Discovery

30. Pursuant to the schedule set by the Court (ECF No. 64), starting in December 2018 Defendants produced the documents from the Merger Litigation that were the subject of Lead Plaintiff's motion for limited relief from the PSLRA discovery stay. These productions included 3,639,945 documents (12,037,733 pages), including all of the confidential trial exhibits and deposition transcripts from the Merger Litigation. Lead Plaintiffs also requested and received a detailed memorandum describing the scope of the discovery in the Merger Litigation, including the search protocols used for the productions.

31. To assist with discovery in the Action, Lead Plaintiffs retained Precision Discovery, Inc. ("Precision Discovery") an industry leader in eDiscovery software, technology and professional services. The documents produced in the Action were hosted on an electronic platform maintained by Precision Discovery to facilitate a review process that was cost and time–efficient. In order to prioritize the review of the documents, Precision Discovery and Plaintiffs' Counsel applied an artificial intelligence tool and targeted searches to focus the review on key witnesses, issues and time periods. Plaintiffs' Counsel reviewed and analyzed the documents with the aim of preparing for fact witness depositions, expert discovery, summary judgment motions and trial.

32. In addition to obtaining and reviewing the discovery from the Merger Litigation, Lead Plaintiffs sought supplemental discovery focused on issues not relevant to the Merger Litigation. Lead Plaintiffs propounded their First Request for Production of Documents on Defendants on January 14, 2019. On February 13, 2019, Defendants served Responses and Objections to Plaintiffs' First Request for Production of Documents. The parties held several meet–and–confers on the objections and scope of the supplemental discovery, including each party providing proposed search protocols identifying date ranges, custodians and search terms.

33. Defendants propounded document requests on Lead Plaintiffs on February 8, 2019. Lead Plaintiffs served responses and objections on March 12, 2019. In March 2019, Lead Plaintiffs produced certain core documents, such as their trading data and analyst reports. In addition, Lead Counsel collected, reviewed, and prepared for production over fifteen thousand of Lead Plaintiffs' internal documents (approximately 89,000 pages) in response to Defendants' document requests.

2. Non–Party Document Discovery

34. Lead Plaintiffs also served document subpoenas on relevant non–parties that possessed key information. This included non–parties related to Akorn and the Fresenius Merger, including: (i) Fresenius; (ii) NSF International, Inc.; (iii) Lachman Consultant Services, Inc.; (iv) Ernst & Young LLP; (v) Cerulean Associates LLC; (vi) Moelis & Company; (vii) PricewaterhouseCoopers LLP; (viii) ICR, LLC; (ix) PQE US Inc.; (x) Allen & Overy LLP; (xi) Credit Suisse Securities USA, Inc.; (xii) D2 Pharma Consulting LLC; (xiii) Marsh & McLennan Companies, Inc.; (xiv) Sidley Austin LLP; and (xv) Dr. John Kapoor.

35. These subpoenas were subject to multiple meet–and–confers between Lead Counsel and counsel for the non–parties. Following these meet–and–confers, the non–parties collectively produced 142,115 documents (773,545 pages) that were reviewed and analyzed by

Plaintiffs' Counsel. The documents obtained through Lead Plaintiffs' subpoenas to these non–parties were critical to the successful prosecution of the case and Lead Plaintiffs' significant recovery for the Settlement Class.

36. As noted above, in order to effectively and efficiently review and analyze the voluminous documents from multiple sources, Plaintiffs' Counsel used Precision Discovery's sophisticated electronic database to host and manage the non–party document productions. Lead Counsel reviewed and analyzed the non–party documents with the aim of preparing for fact witness depositions, expert discovery, summary judgment motions and trial.

D. Lead Plaintiffs Amend the Complaint and Consolidate Related Actions

37. Throughout the course of the Action, Lead Plaintiffs and Lead Counsel moved to consolidate pursuant to Rule 42 of the Federal Rules of Civil Procedure and/or to re–assign to Judge Kennelly pursuant to Local Rule 40.4 several related class actions and individual actions.

38. On February 21, 2019, an individual investor filed the action captioned *Johnny Wickstrom v. Akorn, Inc., et al.*, 1:19–cv–01299 (N.D. Ill.) ("*Wickstrom*). The *Wickstrom* action asserts claims on behalf of purchasers of Akorn securities from August 1, 2018 through January 8, 2019, inclusive, and seeks damages relating to a drop in Akorn's stock price following the January 9, 2019 disclosure that Akorn had received an FDA Warning Letter concerning its facility in Decatur, Illinois. The January 9, 2019 disclosure caused Akorn's stock price to fall 11.6% from $3.94 per share at close of trading on January 8, 2019 to $3.48 per share at the close on January 9, 2019.

39. On March 8, 2019, Lead Plaintiffs and Defendants filed a Stipulation regarding Consolidation of the *Wickstrom* action, which consolidated *Wickstrom* into the Action pursuant to the Court's May 31, 2018 order consolidating all related actions. (ECF No. 87). Mr. Wickstrom opposed consolidation on March 12, 2019. (ECF Nos. 92; 96). Lead Plaintiffs filed a reply in

further support of consolidation on March 26, 2019. (ECF No. 97). On March 27, 2019, the Court transferred *Wickstrom* as related to the Action under Local Rule 40.4, and scheduled a follow up hearing regarding consolidation for April 22, 2019, after the lead plaintiff deadline in *Wickstrom*. (ECF No. 98).

40. On April 22, 2019, with Defendants' consent pursuant to Federal Rule of Civil Procedure 15(a)(2), Lead Plaintiffs filed a Second Consolidated Amended Class Action Complaint (the "Second Amended Complaint"). (ECF No. 101). Among other things, the Second Amended Complaint extended the class definition to include all investors who purchased Akorn securities from November 3, 2016 through January 8, 2019, inclusive.

41. Pursuant to the Court's transfer order, Lead Plaintiffs filed a Motion for Appointment as Lead Plaintiff in *Wickstrom* on April 22, 2019. Another lead plaintiff movant, Vicente Juan, also moved for appointment as lead plaintiff in *Wickstrom*, and filed an additional class action complaint, *Vicente Juan v. Akorn, Inc., et al*, No. 17–cv–2720 (N.D. Ill.) ("*Juan*"), which asserted claims on behalf of purchasers of Akorn securities from May 2, 2018 to January 8, 2019.

42. On April 23, 2019, Judge Kennelly found the *Juan* action to be related to the Action under Local Rule 40.4, and ordered that responses to the *Wickstrom* lead plaintiff briefing be filed by May 6, 2019. (ECF No. 19 in *Wickstrom*).

43. On April 29, 2019, Vicente Juan withdrew his motion for appointment as lead plaintiff in *Wickstrom*. (ECF No. 21 in *Wickstrom*). Lead Plaintiffs promptly notified the Court that the lead plaintiff response briefing was moot, as GAMCO was the only remaining movant. (ECF No. 104). Accordingly, on May 9, 2019, Judge Kennelly consolidated both the *Wickstrom*

and *Juan* actions into the Action. (ECF No. 105). Pursuant to this consolidation, the *Wickstrom* and *Juan* actions are now administratively closed.

44. On May 31, 2019, a separate group of investors filed a direct action, *Twin Master Fund, et al. v. Akorn, Inc et. al*., 1:19–cv–03648 (N.D. Ill.) (the "*Twin Funds*"). *Twin Funds* asserted the same claims as those in the Action, as well as separate claims under Section 18 of the Exchange Act and state law.

45. On June 4, 2019, Lead Plaintiffs filed a Motion to Reassign *Twin Funds* to Judge Kennelly as a related case pursuant to Local Rule 40.4. (ECF No. 109). Judge Kennelly granted that motion on June 11, 2019. (ECF No. 112).

46. On July 10, 2019, another group of investors filed a second direct action, *Manikay Master Fund, LP, et al. v. Akorn, Inc. et al.*, 19–cv–04651 (N.D. Ill.) ("*Manikay*"), asserting identical claims as in the *Twin Funds* Action. On July 16, 2019, Lead Plaintiffs filed a motion to reassign *Manikay* to Judge Kennelly pursuant to Local Rule 40.4. (ECF No. 119). Judge Kennelly granted that motion on July 30, 2019. (ECF No. 122). These reassignments helped further streamline the litigation.

E. Lead Plaintiffs' Motion for Class Certification

47. On July 5, 2019, Lead Plaintiffs moved to certify this case as a class action pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. (ECF No. 113).

48. As part of this motion, Lead Plaintiffs submitted a detailed expert report by Dr. David I. Tabak, Ph.D. in support of class certification. (ECF No. 116–1). The expert report by Dr. David Tabak addressed: (i) the market efficiency for the Akorn stock traded during the Class Period; (ii) a common methodology for calculating class–wide damages for all Settlement Class Members; and (iii) the price impact on Akorn stock in response to the alleged corrective disclosures. Dr. Tabak's opinions on market efficiency were based on, among other things, a

detailed event study concerning the movement of Akorn's stock in response to new market information.

F. Work with Experts and Consultants

49. During the course of the Action, Lead Plaintiffs retained experts and consultants on numerous financial issues relevant to the asserted claims. Among other things, these experts and consultants assisted Lead Plaintiffs and Lead Counsel: (i) estimate class–wide damages; (ii) consider issues of market efficiency and materiality for class certification purposes; (iii) evaluate Akorn's financial condition; and (iv) analyze the impact on Akorn's balance sheet, debt covenants and publicly traded securities in the event the settlement of this litigation included the issuance of stocks and/or warrants.

50. As discussed in paragraph 48 above, Lead Plaintiffs retained Dr. Tabak to prepare a detailed expert report in connection with Lead Plaintiffs' motion for class certification. Dr. Tabak also developed the Plan of Allocation and drafted a declaration in support of the Plan of Allocation, which is being filed contemporaneously herewith as Exhibit 3.

51. Lead Plaintiffs separately worked with consulting experts to estimate damages and analyze issues concerning Akorn's financial ability to fund a settlement or judgment. These experts prepared a class–wide damages analysis that was described to Defendants and Judge Phillips in advance of the first mediation session. Moreover, these experts evaluated Akorn's ability to issue securities in connection with the Settlement, and analyzed the extent to which the issuance of new securities under various contemplated settlement proposals might dilute the value of Akorn common stock.

52. Lead Plaintiffs also interviewed and spoke with numerous experts regarding the issues of FDA regulations, data integrity and the generics pharmaceutical industry. These consultations helped Lead Counsel understand the issues impacting this litigation, and Lead

Plaintiffs intended to retain and designate at least one expert on these issues had the litigation proceeded.

53. Lead Plaintiffs devoted considerable time and effort working with these experts and consultants on their designated subjects. As noted above, Dr. Tabak also submitted a detailed expert report with voluminous exhibits in support of class certification. Dr. Tabak is also submitting an affidavit in support of the Plan of Allocation attached hereto as Exhibit 3.

G. Defendant Akorn's Financial Condition

54. Akorn has experienced a steep decline in performance since the execution of the Merger Agreement. Since April 2017, Akorn's market capitalization has declined by nearly 90% from a high of over $4 billion following announcement of the merger to less than $550 million today. Akorn has not earned a profit in two years; over the last year it experienced nearly $310 million in negative EBITDA, and its cash and cash equivalents declined by 39%.

55. Akorn has a term loan with an outstanding balance over $830 million maturing in April 2021. Akorn is in ongoing discussions concerning that loan with an ad hoc group of lending parties constituting holders of a majority of that debt. Akorn's ability to use its cash without approval of its debtholders is severely constrained.

56. As a result of the above, in its 2019 quarterly reports Akorn has included language nothing that there is "substantial doubt about the Company's ability to continue as a going concern."

H. Mediation with Phillips ADR

57. The parties engaged in various efforts to settle the Action during the course of the case. This included a formal in–person mediation session in New York on May 3, 2019 with former United States District Court Judge Layn R. Phillips. In advance of this full–day mediation, the parties exchanged detailed mediation statements with supporting exhibits referencing key

documents and information obtained during discovery. At the initial mediation session, Akorn provided a detailed presentation regarding the Company's financial condition and ability to fund a settlement or judgment, as well as the status of its ongoing turnaround plan.

58. Following the initial mediation session, the parties continued to negotiate with the assistance of Judge Phillips. In this regard, the parties attended a second in–person mediation session in New York on May 21, 2019. At this session, Akorn's financial advisors again presented information regarding the Company's financial condition.

59. Although the parties were unable to settle the Action at either of the formal mediation sessions, they continued to negotiate with the assistance of Judge Phillips over the course of the next several months.

I. The Parties Reach Agreement to Resolve the Litigation

60. In late July 2019, the parties reached a non–binding agreement in principle to resolve all claims in the Action. (ECF No. 121). The parties informed the Court of this agreement and, at a status hearing on July 30, 2019, Judge Kennelly ordered Lead Plaintiffs to file a motion for preliminary approval of the proposed Settlement by August 9, 2019. (ECF No. 122).

61. On July 30, 2019, Akorn filed a Form 8–K with the SEC disclosing the terms of the non–binding agreement in principle entered into by the parties. Akorn further announced it recorded a charge and corresponding liability associated with such non–binding agreement in principle, as required by generally accepted accounting principles.

62. On August 9, 2019, Lead Plaintiffs filed a Motion for Preliminary Approval of Settlement, Approval of Form of Class Notice, and a Hearing Date For Final Approval of Settlement. (ECF No. 125). As explained in the Motion and supporting papers, the Settlement provides potential recovery of approximately $72.8 million to $155.4 million in value to the Settlement Class. The Settlement Consideration consists of following three components:

1. **Cash:** Up to $30.0 million upon final approval, consisting of 100% of the proceeds from Defendants' primary and excess director and officer (D&O) insurance policies (minus $2.5 million in Reimbursable Defense Costs that revert to the Settlement Class if unused)..

2. **Common Stock:** Approximately 8,735,705 shares of Akorn common stock. This consists of approximately: (a) 6,486,375 shares to be escrowed, if possible, for distribution to Settlement Class Members (or sold for cash distribution); and (b) 2,249,330 shares to be issued to the Settlement Class (or sold for cash distribution) between the Effective Date and December 31, 2024, inclusive, as the shares become available through expiration of out–of–the–money Akorn stock options. The stock component of the Settlement is valued at $42.8 million to $65.4 million, using a range of $4.90 per share (the closing price of Akorn common stock on the date of this declaration) to $7.49 per share (the highest price at which Akorn common stock has traded since the Delaware Court of Chancery's October 1, 2018 decision in the Merger Litigation).

3. **Contingent Value Rights ("CVRs"):** CVRs issued by Akorn that entitle holders to:

   - **Cash Payments:** Annual cash payments over the CVRs' five–year term in an amount equal to 33.3% of Akorn's "Excess EBITDA" for any such year. Any such annual payments are capped at $12.0 million per year and $60.0 million in the aggregate during the term of the CVRs. If cumulative annual payments from the CVRs after 5 years are less than $60.0 million, the term of the CVRs would be extended for up to two (2) years.

   - **Change in Control Payment or Bankruptcy Protection Claim:** Either (a) a cash payment to CVR holders in the aggregate amount of $30.0 million upon certain change of control transactions during the term of the CVRs; or (b) a general unsecured claim in the aggregate amount of $30.0 million if the Company is the subject of a voluntary or involuntary bankruptcy filing during the term of the CVRs. CVR holders shall not be entitled to receive both the Change in Control Payment and the Bankruptcy Claim.

63. On August 26, 2019, Judge Kennelly granted preliminary approval of the Settlement, approved the form of Notice, and scheduled the final approval hearing for December 3, 2019 at 9:30 a.m. (ECF No. 132). Subsequently, the case was reassigned to the Honorable

Steven C. Seeger. (ECF No. 134). At a status hearing on October 29, 2019, Judge Seeger re–set the final approval hearing for the same date and time.

64. Lead Plaintiffs support the Settlement as being fair, reasonable, and adequate and in the best interest of the Class. Lead Plaintiffs agree that the Settlement represents a favorable recovery for the Class, particularly given the multiple risks in continuing to litigate the Action as detailed below. *See* Declaration of David Goldman attached hereto as Exhibit 5.

III. RISKS OF CONTINUED LITIGATION

65. Based on the substantial discovery efforts outlined above, Lead Counsel has significant evidence supporting Lead Plaintiffs' claims and were prepared to proceed to summary judgment and trial. However, Lead Plaintiffs realize that the Settlement Class faces considerable risks in pursuing the Action through these stages. Certain of the most significant litigation risks are outlined below. Lead Plaintiffs and counsel carefully considered each of these risks in reaching the Settlement.

A. Risks Concerning Liability

66. Lead Plaintiffs and Lead Counsel faced significant challenges and defenses on each element of the claims asserted against Defendants. Defendants vigorously disputed their liability for the alleged fraudulent misstatements and omissions during the Class Period.

67. For example, Defendants contend that the alleged misstatements were either truthful, inapposite to the allegation that Akorn misled investors about the status of its regulatory compliance, were inactionable "puffery" or otherwise too vague to give rise to liability under the federal securities laws. Defendants further contend that the alleged misstatements were forward–looking statements protected by the PSLRA safe harbor.

68. Defendants also contest that the regulatory representations in the Merger Agreement – which the Chancery Court found was breached – are actionable misstatements. Specifically, Defendants argue the statements in the Merger Agreement cannot give rise to liability because they were negotiated allocations of risk between two contracting parties, were not meant to be statements of fact, and that the Form 8–K disclosing the Merger Agreement to shareholders specifically warned investors to not rely on statements in the Merger Agreement.

69. Defendants also contend that Lead Plaintiffs cannot establish scienter. Specifically, Defendants contend that at the time of the alleged misstatements they did not know, and were not reckless in failing to know, that Akorn was materially non–compliant with FDA regulations.

70. Although Lead Plaintiffs believe the evidence strongly supports both falsity and scienter, there is a risk that the Court or a jury could find otherwise for some or all of the alleged misstatements. Accordingly, the Settlement represents a significant recovery for the Settlement Class given the liability risks posed by continued litigation.

B. Risks Related to Loss Causation and Damages

71. Lead Plaintiffs also recognized risk related to proving loss causation for the alleged misstatements and omissions. Defendants have argued that the Class Period price declines in Akorn's common stock were caused by factors other than the corrective disclosures identified in the Second Amended Complaint.

72. Lead Plaintiffs expected that Defendants would argue the revelation of Akorn's data integrity problems was not the reason for the drops in Akorn's stock price. Defendants would likely contend that after Akorn and Fresenius signed the Merger Agreement, Akorn's share price was primarily a function of the market's confidence that the deal would close. Once news emerged that that deal may not close, Akorn's stock price incorporated both the impact from the alleged

fraud, as well as Akorn's adverse financial performance after the Merger Agreement was signed. As a result, Defendants would argue that the stock price declines are only partially attributed to the alleged wrongdoing, and are mostly attributable to the decline in Akorn's financial performance during the pendency of the proposed Merger.

73. Defendants' arguments would be especially strong given the Chancery Court's Decision. The Chancery Court found three independent reasons why Fresenius was permitted to terminate the Merger Agreement. In addition to breaching the regulatory representations (which is directly related to this Action), the Chancery Court found that Akorn had suffered a financial material adverse event, and that Akorn breached the ordinary course covenant in the Merger Agreement. Accordingly, Defendants would argue that Lead Plaintiffs cannot establish loss causation because the revelation of the alleged wrongdoing (*i.e.*, Akorn's non–compliance with FDA data integrity requirements) was not the primary reason for Akorn's stock price decline.

74. The issue of whether the stock price declines are attributable to Akorn's data integrity problems would directly impact Lead Plaintiffs' ability to prove loss causation. Similarly, the extent to which other factors contributed to the stock price declines would significantly impact class–wide damages. Moreover, Defendants would likely argue that the three independent reasons underlying the Chancery Court's decision prohibits Lead Plaintiffs from asserting issue preclusion. That is because the Chancery Court's finding that the Merger Agreement contained false statements was arguably not a necessary part of its final judgment.

75. Further, Defendants would have vigorously opposed class certification. In that regard, Defendants would have likely argued that Lead Plaintiffs cannot establish a class–wide methodology for calculating damages. For example, Defendants could have argued that investors who purchased before the announcement of the proposed Merger were affected differently than

those who purchased after the announcement. Defendants could also argue that the market for Akorn's common stock was not efficient during the pendency of the proposed Merger, as Akorn's stock price traded just below the $34 Merger price for nearly 10 months and only had minor reactions to news regarding the Company.

76. Lead Plaintiffs and their expert, Dr. Tabak, had strong responses to each of Defendants' loss causation, damages and class certification–related arguments. Nonetheless, if the Court at class certification, summary judgment or trial were to accept any of Defendants' loss causation or damages arguments, the Class's potential recovery would be reduced significantly, if not entirely.

C. Risks Related to Akorn's Financial Condition

77. As the primary Defendant in the Action, Akorn's financial condition posed significant risks to a meaningful recovery for the Settlement Class. Akorn has not earned a profit in two years, and its recent earnings announcement reported a net loss of $111.6 million for the second–quarter of 2019 (including a $74 million charge for the Settlement).

78. In Lead Plaintiffs' view, Akorn faces numerous obstacles to returning to profitability. First, Akorn must remediate its FDA compliance issues, which the Delaware Chancery Court found likely to be in the hundreds of millions of dollars. Second, Akorn faces a Merger–related counterclaim by Fresenius filed in the Delaware Chancery Court for more than $100 million in damages. Third, Akorn is required to refinance or renegotiate more than $840 million in debt, which must be completed by mid–December 2019. Finally, Akorn faces an ongoing bankruptcy risk stemming from the Fresenius suit, the debt renegotiation, as well as this and related litigation.

79. In addition, Akorn is likely unable to fund a significantly greater judgment or settlement than the Settlement Consideration. Akorn's balance sheet and the terms of Akorn's debt severely restrict its ability to use cash and other assets to fund the Settlement or to pay a judgment in the Action.

80. Akorn is funding the cash component of the litigation using the Applicable Insurance Policies. Should the litigation continue, most, if not all, of the funds available from these policies will be used in defending the Action. Accordingly, further litigation against Akorn runs the risk that Akorn would have even fewer assets available to fund a judgment or settlement.

81. Given the risks outlined above, including Akorn's precarious financial condition, Lead Plaintiffs and Lead Counsel submit that the Settlement represents an outstanding recovery for the Settlement Class.

IV. NOTICE TO THE CLASS

82. The Court's August 29, 2019 Preliminary Approval Order (ECF No. 132) directed that the Notice and Claim Form be disseminated to the Settlement Class. The Preliminary Approval Order also set a November 12, 2019 deadline for Settlement Class Members to request exclusion from the Settlement Class or to submit objections, if any, to the Settlement, the Plan of Allocation, and/or the Fee and Expense Application.

83. Pursuant to the Preliminary Approval Order, the Court appointed JND Legal Administration ("JND") to supervise and administer the notice procedure in connection with the proposed Settlement and the processing of claims. Lead Counsel instructed JND to begin disseminating copies of the Notice and the Claim Form by mail and to publish the Summary Notice. The Notice contains a description of the Action and the claims asserted, the Settlements, and the proposed Plan of Allocation. The Notice further describes Lead Counsel's intent to apply

for an award of attorneys' fees in an amount up to 25% of the Net Settlement Fund and for reimbursement of Litigation Expenses in an amount up to $1.5 million. The Notice additionally notifies the Settlement Class Members of their rights to participate in the Settlement, object to the Settlement, or exclude themselves from the Settlement Class.

84. To disseminate the Notice, JND obtained information from Akorn and from certain banks, brokers and other nominees regarding the names and addresses of potential Settlement Class Members. *See* Declaration of Luiggy Segura Regarding (A) Mailing of the Notice and Proof of Claim Form; (B) Publication of the Publication Notice; and (C) Report on Requests for Exclusion Received ("Segura Decl."), attached hereto as Exhibit 2, at ¶¶ 2–9. On September 23, 2019, JND began mailing copies of the Notice and Claim Form (together, the "Notice Packet") by first–class mail to potential Settlement Class Members and nominee owners. *See* Segura Decl. at ¶¶ 3–5. As of October 25, 2019, JND disseminated a total of 47,480 Notice Packets potential Settlement Class Members and nominees. *Id.* ¶ 9.

85. Lead Counsel also caused JND to publish a Publication Notice/Summary Notice in *Investor's Business Daily* and over the *PR Newswire* in accordance with the Preliminary Approval Order. *Id.* ¶ 10. The Summary Notice further advised potential members of the Settlement Class of the Settlement, including their rights to participate in, exclude themselves from, or object to the Settlement. In addition, Lead Counsel caused JND to establish a dedicated settlement website, www.Akorn2019SecuritiesSettlement.com, which provides potential Settlement Class Members with information concerning the Settlement and access to downloadable copies of the Notice and Claim Form, as well as copies of the Stipulation, Preliminary Approval Order and Second Amended Complaint. *See* Segura Decl. ¶ 12.

86. The deadline for Settlement Class Members to file objections, if any, to the Settlement, the Plan of Allocation and/or counsel's fee and expense application, or to request exclusion from the Settlement Class, is November 12, 2019. To date, no objections to the Settlement, the Plan of Allocation, or counsel's fee and expense application have been received. *See* Segura Decl. ¶ 13.[8]

V. ALLOCATION OF THE SETTLEMENT PROCEEDS

87. The proceeds of the Settlement, after deducting all Taxes, Tax Expenses, Notice and Administration Expenses, and attorneys' fees and Litigation Expenses awarded by the Court (the "Net Settlement Fund"), will be distributed to eligible Settlement Class Members according to a plan of allocation approved by the Court.

88. Plaintiffs' proposed plan of allocation (the "Plan of Allocation" or "Plan") is set forth in the Notice mailed to potential Settlement Class Members. Lead Counsel developed the Plan of Allocation in consultation with Lead Plaintiffs' expert, Dr. David Tabak. *See* Declaration of David Tabak, Ph.D. Regarding Plan of Allocation ("Tabak Decl."), attached hereto as Exhibit 3, at ¶¶ 7–22. The Plan of Allocation creates a framework for equitable distribution of the Net Settlement Fund among Settlement Class Members who suffered economic losses as a result of Defendants' alleged violations of the federal securities laws. Lead Counsel believes that the proposed Plan provides a fair and reasonable method to equitably distribute the Net Settlement Fund to Settlement Class Members who submit valid Claim Forms ("Authorized Claimants").

89. The Plan is consistent with allocation methods approved by courts in this Circuit, as well as Dr. Tabak's previously–submitted expert report in support of class certification. The Plan is intended to compensate Settlement Class Members who purchased Akorn common stock

[8] Lead Counsel will file reply papers on or before November 26, 2019 (seven calendar days before the Settlement Hearing) that will address any requests for exclusion or objections that may be received.

during the Class Period at prices that Lead Plaintiffs allege were artificially inflated as a result of material misstatements or omissions in violation of Section 10(b) of the Exchange Act, and who incurred losses when the alleged misstatements or omissions were revealed and the price of Akorn common stock declined.

90. The Net Settlement Fund will be distributed *pro rata* to eligible Settlement Class Members based on their Recognized Loss Amount related to the Net Settlement Fund. Recognized Losses will be calculated based on (i) the number of Akorn common shares purchased/acquired, (ii) when the shares were purchased/acquired, (iii) whether the shares were held or sold, and (iv) if sold, the date and price at which the shares were sold. *See* Tabak Decl. ¶¶ 9–11. Distributions to Settlement Class Members are capped by the Claimant's market loss on all of his, her or its purchases or acquisitions of Akorn common stock during the Class Period. Thus, if the Claimant had a market gain with respect to these transactions, the Claimant is not eligible for payment. Likewise, if a Claimant suffered an overall market loss with respect to his, her or its purchases or acquisitions of Akorn common stock during the Class Period, but that market loss was less than the distribution amount calculated, the Distribution Amount is limited to the amount of the actual market loss.

91. Lead Counsel and Dr. Tabak concur that the Plan of Allocation is comparable to those in similar securities class actions and respectfully submit that the Plan of Allocation provides a fair and reasonable method for disbursing the Net Settlement Fund to the Settlement Class.

VI. THE APPLICATION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES

92. In addition to seeking final approval of the Settlement and Plan of Allocation, Lead Counsel is applying to the Court for an award of attorneys' fees to Plaintiffs' Counsel of 25% of each component of the Settlement Consideration, as follows: (i) $6,614,980.62 in cash, (ii)

1,621,593 Akorn shares (as well as up to 562,332 additional Akorn shares when they become available from the expiration of out–of–the–money Akorn stock options) and (iii) 25% of the Settlement CVRs. Plaintiffs' Counsel also requests payment for expenses incurred by Plaintiffs' Counsel in connection with the prosecution of the Action from the Settlement Funds in the amount of $1,040,077.52.

93. The legal authorities supporting the requested fee and expenses are set forth in the Memorandum of Law in Support of Motion for Attorneys' Fees and Reimbursement of Litigation Expenses (the "Fee Memorandum"). The primary factual bases for the requested fee and expenses are summarized below.

A. The Fee Application

94. Lead Counsel is applying for a fee award to be paid from the Settlement Fund on a percentage basis for the efforts of Plaintiffs' Counsel on behalf the Settlement Class. As set forth in the accompanying Fee Memorandum, the percentage method is the standard and appropriate method of fee recovery because it best mimics the market price for legal services and aligns the lawyers' interest in being paid a fair fee with the interest of the Settlement Class in achieving the maximum recovery in the shortest amount of time required under the circumstances. Applying the percentage of the fund method is especially appropriate in settlements that include non–cash consideration. The percentage method has been consistently endorsed as appropriate by the U.S. Supreme Court and the Seventh Circuit Court of Appeals for securities class actions of this nature.

95. Based on the results achieved, the extent and quality of the work performed, the significant risks of the litigation, and the fully contingent nature of the representation, Lead Counsel has requested a fee award of 25% of each component of the Settlement Consideration, which Lead Plaintiffs and Lead Counsel believe is fair, reasonable, and consistent with the percentages awarded in class actions in this District and Circuit for comparable settlements.

1. The Risks of Litigation and the Need to Ensure the Availability of Competent Counsel in High–Risk Contingent Cases

96. This Action was undertaken by Lead Counsel entirely on a contingent–fee basis, and there was a real possibility that Lead Counsel would have received little or no compensation for their work in this matter. The risks assumed by Lead Counsel in bringing these claims to a successful resolution included, among other things, the risk that: (i) the Second Amended Complaint would have been dismissed for failure to meet the PSLRA's exacting pleading requirements for federal securities fraud actions; (ii) the Court would not certify the proposed Class; (iii) the Court would dispose of some or all of Lead Plaintiffs' claims at summary judgment; (iv) Lead Plaintiffs would be unable to obtain a unanimous jury verdict that Defendants were liable for the full extent of the claimed damages; (v) Defendants would prevail on any post–trial appeals to the Seventh Circuit; and (vi) Defendants would not be able to satisfy a judgment. If Lead Counsel was unable to overcome any of these substantial hurdles to recovery for the Class, Lead Counsel would have received little or no compensation for their more than one and a half years of prosecuting the Action. Indeed, despite the most vigorous and competent of efforts, success in contingent–fee litigation like this Action is never assured.

97. From the outset, Lead Counsel understood that they were embarking on a complex, expensive, and lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and money the case would require. In undertaking that responsibility, Lead Counsel ensured that sufficient resources were dedicated to the prosecution of the Action, and that funds were available to compensate staff and to cover the considerable litigation costs that a case like this requires. With an average lag time of several years for these cases to conclude, the financial burden on contingent–fee counsel is far greater than on a firm that is paid on an ongoing basis. Indeed, Plaintiffs' Counsel received no compensation during the course of the Action and

has collectively incurred $1,040,077.52 in Litigation Expenses in prosecuting the Action for the benefit of the Settlement Class.

98. As courts have recognized, it is in the public interest to have experienced and able counsel enforce the securities laws and regulations pertaining to the duties of officers and directors of public companies. Congress has likewise recognized, through the passage of the PSLRA, that vigorous private enforcement of the federal securities laws can only occur if private investors, particularly institutional investors, take an active role in securities litigations and are represented by first–rate counsel that are adequately compensated for their work and for bearing the risks of prosecuting claims on a purely contingent–fee basis.

2. The Work and Experience of Counsel Produced Excellent Benefits for the Settlement Class

99. Attached hereto as Exhibits 6, 7 and 8 are declarations from Plaintiffs' Counsel in support of their request for attorneys' fees and reimbursement of litigation expenses. Exhibit 9 contains a summary chart of the hours expended, lodestar amounts and expenses incurred by Plaintiffs' Counsel. Included within each of the supporting declarations is a schedule summarizing the hours and lodestar of each firm from the inception of the case through September 30, 2019, a summary of the Litigation Expenses incurred by that firm, and a firm résumé. As set forth in the supporting declarations, the information concerning each firm's lodestar was prepared from daily time records regularly prepared and maintained by each of the firms. No time expended in preparing the application for fees and expenses has been included. For personnel who are no longer employed by the firms, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment.

100. As set forth in Exhibit 9, over the past two years of litigation, Plaintiffs' Counsel collectively expended a total of 12,464.5 hours in the investigation, prosecution and resolution of

the Action. Plaintiffs' Counsel aggregate lodestar (*i.e.*, the number of hours worked multiplied by the attorneys' hourly rates) is $8,551,740.25.

101. The requested fee of 25% of each component of the Settlement Consideration includes $6,614,980.62 in cash, 1,621,593 Akorn shares (as well as up to 562,332 additional Akorn shares when they become available from the expiration of out–of–the–money Akorn stock options) and 25% of the Settlement CVRs. The Settlement Consideration has an immediate dollar value of approximately $14,560,786.32. Accordingly, the requested fee award represents a multiplier of approximately 1.7 of Plaintiff Counsel's total lodestar. As discussed in further detail in the Fee Memorandum, the requested multiplier is well within the range of multipliers typically awarded in comparable securities class actions involving significant contingency fee risk in this Circuit and elsewhere.

102. Plaintiffs' Counsel are leaders in the specialized area of securities litigation. The attorneys who led the prosecution of this case have prosecuted securities claims throughout their careers, have overseen numerous complex securities cases, and have recovered billions of dollars on behalf of investors over the course of decades. Informed by this experience, they developed and implemented strategies to overcome myriad obstacles raised by Defendants. I firmly believe that Plaintiffs' Counsel depth of skill and experience, including their experience throughout the country successfully prosecuting securities class actions, allowed Lead Plaintiffs and the Settlement Class to achieve a result that might not have been achieved by less skillful or experienced counsel.

103. As demonstrated by the firm résumés attached to Exhibits 6, 7 and 8, Plaintiffs' Counsel are among the most experienced and skilled law firms in the securities litigation field, with a long and successful track record representing investors in cases of this kind. Plaintiffs'

Counsel have extensive experience litigating securities class actions and have successfully prosecuted numerous securities fraud class actions on behalf of injured investors in courts across the country. They each have taken complex cases like this to trial, and are among the few firms with experience doing so on behalf of plaintiffs in securities actions. I believe that counsel's willingness and ability to take complex cases to trial added valuable leverage in the settlement negotiations.

104. The time and labor expended by Plaintiffs' Counsel in pursuing the Action and achieving the Settlements strongly support the reasonableness of the requested fee. The work counsel undertook in investigating and prosecuting this case and achieving the Settlements has been time–consuming and challenging. The time expended was necessary to achieve a successful result in the prosecution of the Action.

105. The many tasks undertaken by and under the supervision of Lead Counsel in this case are detailed above (*e.g.*, ¶¶ 15–62). These tasks included, among other things:

i) conducting a comprehensive factual investigation of the claims at issue in the Action, which included, among other things, a review of all relevant public information, research of the applicable law, identifying, locating, and interviewing dozens of witnesses around the globe, and closely monitoring the Merger Litigation

ii) preparing the detailed Amended Complaint based on counsel's factual investigation, as well as the subsequent Second Amended Complaint based on subsequent facts disclosed by the Company;

iii) briefing and arguing a Motion to Lift the PSLRA discovery stay;

iv) negotiating an agreement whereby certain defendants would forgo moving to dismiss the Complaints (without prejudice);

v) obtaining an assented order allowing the parties to treat the depositions from the Merger Litigation as having occurred in this Action in order to efficiently streamline discovery;

vi) conducting extensive fact discovery, including serving document requests and 15 third party subpoenas and, as a result, obtaining over 3.75 million documents (over 12 million pages) relating to the alleged wrongdoing.

vii) reviewing documents using data analytics and targeted searches to prioritize the review while preparing to depose the Individual Defendants and other relevant witnesses;

viii) evaluating and researching the merits of a summary judgment motion on certain factual issues determined by the Delaware Chancery Court in its October 1, 2019 Memorandum Opinion;

ix) responding and objecting to document requests served on Lead Plaintiffs, including collecting internal documents from Lead Plaintiffs and preparing for the production of approximately 89,000 pages of Lead Plaintiffs' internal documents;

x) drafting and obtaining Defendants' consent to file a Second Amended Complaint, which added factual allegations and extended the end date of the class period from April 20, 2018 to January 8, 2019;

xi) moving to transfer and consolidate the related *Wickstrom* and *Juan* actions, and successfully moving to reassign as related the *Twin Master Funds* and *Manikay* actions;

xii) drafting and filing a comprehensive motion for class certification, including consulting with experts on the issues of market efficiency and class–wide damages;

xiii) engaging in two in–person mediation sessions before retired federal judge Layn R. Phillips, including the submission of two confidential mediation statements that extensively discussed Lead Plaintiffs' positions and damages theory;

xiv) negotiating the Settlement, which involves multiple components to maximize shareholder value despite Akorn's limited ability to fund a settlement or judgment;

xv) moving for preliminary approval of the Settlement, including conducting a bidding process for a claims administrator, and negotiating the Stipulation of Settlement and CVR Agreement; and

xvi) working extensively with the Claims Administrator to provide broad notice of the proposed Settlement to prospective class members;

106. As Lead Counsel, I personally devoted substantial time to this case and oversaw the case on a daily basis. In addition, other experienced attorneys at my firm undertook particular tasks appropriate to their levels of expertise, skill and experience, and more junior attorneys and paralegals worked on matters appropriate to their experience levels. Throughout the litigation, Lead Counsel maintained an appropriate level of staffing that avoided unnecessary duplication of effort and ensured the efficient prosecution of this litigation.

107. The quality of the work performed by Plaintiffs' Counsel in attaining the Settlement may also be evaluated in light of the quality of the opposition. Here, the Defendants were primarily represented by Cravath, Swaine & Moore LLP ("Cravath"), one of the country's most prestigious and experienced defense firms, who vigorously represented their clients in the Action. Indeed, Cravath was particularly equipped to defend this Action as it represented Akorn in merger negotiations, a data integrity investigation, and the Merger Litigation through trial and appeal.

108. In the face of this experienced and formidable opposition, Lead Counsel was nonetheless able to efficiently prosecute the matter and persuade Defendants to settle the case on terms favorable to the Settlement Class.

3. The Stakes of the Litigation Were Significant

109. The stakes of this class action were significant for all parties. For Defendant Akorn, this litigation represented a bet–the–company matter, as the alleged damages far exceed Akorn's market capitalization. Indeed, Lead Plaintiffs believe that, had Lead Plaintiffs prevailed at trial, Akorn would likely have been forced to seek bankruptcy protection.

110. Lead Plaintiffs also had a significant stake in the matter. During the Class Period, GAMCO purchased 2,386,278 shares of Akorn common stock, expended $59,068,703 in aggregate on those purchases, and incurred a loss of $14,794,747 on a LIFO basis.

111. The Settlement Class as a whole also had a significant interest in this litigation. Indeed, Lead Plaintiffs estimate that the Settlement Class suffered in excess of $2 billion in market losses related to their investments in Akorn common stock, and Lead Counsel estimates that provable Class–wide damages exceed $1.1 billion.

112. With more than one billion dollars at stake and a corporate defendant that likely could not satisfy a judgment obtained in the matter, the stakes of this Action were exceedingly high. Lead Plaintiffs were therefore incentivized to vigorously prosecute this Action to achieve the best possible recovery for the Settlement Class.

4. Lead Plaintiffs and the Settlement Class Have Authorized and Support the Fee Application

113. Lead Plaintiffs are sophisticated institutional investors that played an active role in supervising and participating in the prosecution and settlement of the Action, and were approved by the Court to serve as the Lead Plaintiffs in the Action. Both of the Lead Plaintiffs have endorsed

and approved the requested attorneys' fee of 25% of each component of the Settlement Consideration as fair and reasonable in light of the results achieved, the work counsel performed, and the risks of the litigation. *See* Ex. 5 (Goldman Decl.) ¶¶ 10–12.

114. The Notice provided to the Settlement Class stated that Lead Counsel's attorneys' fee application would be up to 25% of the Settlement Fund, and Lead Counsel would seek reimbursement of litigation expenses of up to $1,500,000. To date, no Settlement Class Member has objected to the attorneys' fees requested or the maximum amount of expenses disclosed in the Notice.

B. The Application for Reimbursement of Counsel's Litigation Expenses

115. Lead Counsel also seeks reimbursement from the Settlement Fund of $1,040,077.52 in Litigation Expenses that were reasonably incurred by Plaintiffs' Counsel in connection with investigating, commencing, litigating, and settling the claims asserted in the Action. As discussed more fully below, these expenses consist primarily of fees paid to experts and consultants, for document management costs, on–line research, and mediation costs.

116. From the outset of the case, Plaintiffs' Counsel were aware that they might not recover any of their expenses, and, even in the event of a recovery, would not recover any of their out–of–pocket expenditures until the Action might be successfully resolved. Plaintiffs' Counsel also understood that, even assuming that the case was ultimately successful, reimbursement for expenses would not compensate them for the lost use of the funds advanced to prosecute the Action. Plaintiffs' Counsel ensured that appropriate steps were taken to avoid incurring unnecessary expenses and to minimize costs without compromising the vigorous and efficient prosecution of the case.

117. As shown in Exhibits 6, 7 and 8 to this Declaration, Plaintiffs' Counsel incurred a total of $1,040,077.52 in unreimbursed Litigation Expenses in prosecuting the Action. These

expense items are billed separately by Plaintiffs' Counsel and are not duplicated in the firms' hourly rates.

118. Of the total amount of expenses, $654,071.39, or approximately 63%, was incurred for the retention of consulting and testifying experts. Plaintiffs' Counsel consulted with experts concerning damages, loss causation, market efficiency and Akorn's financial condition. In addition, Lead Counsel retained Dr. Tabak to submit an expert report in connection with Lead Plaintiffs' class certification motion and to prepare the Plan of Allocation.

119. In addition, Plaintiffs' Counsel incurred charges of $246,192.72 for document management costs (approximately 24% of the total expenses), including the costs of their electronic–discovery vendor, which provided data–storage services for the discovery documents produced in electronic form. The electronic–discovery vendor's platform also provided tools for electronically searching, reviewing, and analyzing the documents. In this Action, document management was particularly significant, as Defendants and third parties produced over 3.75 million documents that needed to be processed and reviewed.

120. The Litigation Expenses also included fees charged by third–party providers (*e.g.*, Westlaw and Bloomberg) for necessary on–line legal and factual research. Such resources were necessary to research the law pertaining to the claims asserted in the Action, move for class certification and brief other motions in the case. The total charges for on–line legal and factual research amount to $39,445.05, or approximately 4% of the total amount of expenses.

121. Plaintiffs' Counsel also incurred expenses totaling $25,007.50 for mediation fees, or approximately 2.5% of the total expenses.

122. The other expenses for which Plaintiffs' Counsel seek reimbursement are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the

hour. These expenses include, among others, court fees, copying costs, telephone charges and out–of–town travel costs. All of the Litigation Expenses incurred by Plaintiffs' were reasonable and necessary to the successful litigation of the Action.

C. The Reaction of the Settlement Class to the Fee and Expense Application

123. To date, no Settlement Class Member has objected to the attorneys' fees requested or the maximum amount of expenses disclosed in the Notice. Meanwhile, the fee application does not exceed the maximum amount set forth in the Notice, and the expense application is below the $1,500,000 that Settlement Class Members were notified could be sought.

VII. CONCLUSION

124. For all the reasons discussed above, Lead Plaintiffs and Lead Counsel respectfully submit that the Settlement and the Plan of Allocation should be approved as fair, reasonable, and adequate. Lead Counsel further submit that the requested fee in the amount of 25% of the Settlement Funds, less Litigation Expenses, should be approved as fair and reasonable, and the request for reimbursement of Litigation Expenses in the total amount of $1,040,077.52 should also be approved.

I declare, under penalty of perjury, that the foregoing facts are true and correct.

Executed on October 29, 2019

Andrew J. Entwistle