

**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

**MEMORANDUM IN SUPPORT OF LEAD PLAINTIFFS'
UNOPPOSED MOTION FOR APPROVAL OF DISTRIBUTION PLAN**

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Court-appointed Lead Plaintiffs and Class Representatives Gabelli & Co. Investment Advisors, Inc., and Gabelli Funds, LLC (collectively, “Lead Plaintiffs”), respectfully move for entry of the proposed Order Approving Distribution Plan (the “Class Distribution Order”) for the proceeds of the Settlement in the above-captioned action (the “Action”). The Distribution Plan is included in the accompanying Declaration of Luiggy Segura in Support of Lead Plaintiffs’ Motion for Approval of Distribution Plan (the “Segura Declaration” or “Segura Decl.”),¹ submitted on behalf of the Court-approved Claims Administrator, JND Legal Administration (“JND”).

If entered by the Court, the Class Distribution Order would, among other things, (i) approve JND’s administrative recommendations accepting and rejecting Claims submitted in the Action; (ii) direct the Initial Distribution of the Net Settlement Fund to Claimants whose Claims are accepted by JND as valid and approved by the Court, while maintaining a Reserve for any tax liability and claims administration-related contingencies that may arise; and (iii) approve JND’s fees and expenses incurred and estimated to be incurred in the administration of the Settlement. This Motion is unopposed and there are no Disputed Claims by any Claimant. This Motion is therefore ripe for determination.

I. BACKGROUND OF THE SETTLEMENT

On March 13, 2020, the Court granted final approval in its Order Approving Plan of Allocation of Net Settlement Fund (ECF No. 189) (the “Final Approval Order”) and entered the Order and Final Judgment Approving Class Action Settlement (ECF No. 190) (the “Judgment”) between Lead Plaintiffs, on behalf of themselves and the other members of the Settlement Class, and the Defendants. The Effective Date of the Settlement has occurred. Accordingly, the Net

¹ Unless otherwise indicated in this memorandum, all terms with initial capitalization shall have the meanings ascribed to them in the Segura Declaration or the Stipulation and Agreement of Settlement dated August 9, 2019 (ECF No. 127–1) (the “Stipulation”).

Settlement Fund may be distributed to Authorized Claimants. In accordance with paragraphs 38 through 43 of the Stipulation, Lead Plaintiffs respectfully ask the Court to enter the Class Distribution Order approving the Distribution Plan.²

As the Court may recall, due to Defendant Akorn's financial crisis brought on by the allegations underlying the Action and severe limits on the Company's cash on hand and covenants under its funded debt, the Settlement Consideration in this matter included three components: (i) \$27.5 million in cash,³ consisting of all of Akorn's available insurance coverage; (ii) approximately 8.7 million shares of Akorn common stock, consisting of all common shares in the Company's treasury and from expiring stock options ("Settlement Shares"); and (iii) Contingent Value Rights ("CVRs") issued by Akorn worth up to \$60 million. In total, the Settlement Consideration could have provided well in excess of \$100 million in value to the Settlement Class.

Shortly after the Court's Final Approval Order, Akorn and its affiliated Debtors filed for bankruptcy protection. (*See In re Akorn, Inc., et al.* No. 20-11177) (the "Chapter 11 Case"). To protect and advance the interests of the Class, lead plaintiff Gabelli Funds LLC was appointed by the United States Trustee for the District of Delaware to serve as a member of the Creditors Committee. In connection with that committee service, various contested motions, the asset sale, and a confirmation hearing (lasting the better part of a week), Lead Counsel spent several hundred hours on behalf of the Class in an effort to advance the interests of the CVR and equity holders.

² The Court retained continuing and exclusive jurisdiction over, among other things, implementing the Settlement, including the disposition of the Settlement Fund and any motion to approve the Class Distribution Order. *See* Judgment ¶ 20.

³ The Stipulation provided for a Cash Settlement Amount of \$30 million, minus \$2.5 million in Reimbursable Defense Costs that revert to the Settlement Class if unused. The full \$2.5 million defense cost cap has been exhausted.

Unfortunately, the sale of Akorn's assets yielded far less than was hoped; in part because a last-minute equity bid failed to secure committed financing. As a result, while trade and similar general unsecured creditors were assumed or paid in connection with the sale, there were no funds remaining to pay special creditors like the CVR holders or equity holders. Although certain antitrust litigation creditors have appealed plan confirmation, the asset sale is final and no additional distribution will be available to the Settlement Class. Accordingly, Lead Plaintiffs are solely moving to distribute the remaining cash portion of the Settlement.

II. CLAIMS ADMINISTRATION

In accordance with the Order Preliminarily Approving Settlement, Approving Form of Class Notice, and Setting Hearing Date for Final Approval of Settlement (ECF No. 132) (the "Preliminary Approval Order") entered by the Court, JND has mailed the Notice of (I) Pendency of Class Action and Proposed Settlement; (II) Settlement Fairness Hearing; and (III) Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Notice") and the Proof of Claim and Release (the "Proof of Claim Form") and, together with the Notice, the "Notice Packet") to potential Settlement Class Members, brokers, and other nominees. Segura Decl. ¶ 2. As stated in the Segura Declaration, JND has disseminated 65,012 Notice Packets to potential Settlement Class Members and nominees. *Id.* ¶ 4. The Notice informed Settlement Class Members that if they wished to be eligible to participate in the distribution of the Net Settlement Fund, they were required to submit a properly executed Proof of Claim Form received or postmarked no later than January 24, 2020. Pursuant to the Court's order dated February 6, 2020, the deadline to submit a Proof of Claim Form was extended to March 5, 2020. *See* Order Modifying the Proof of Claim Deadline Established in the Preliminary Approval Order (ECF No. 172).

As detailed in the accompanying Segura Declaration, through October 31, 2020, JND received and processed 15,290 Claims. Segura Decl. ¶ 7. All Claims received through October 31, 2020, have been fully processed in accordance with the Stipulation and the Court-approved Plan of Allocation included in the Notice (*id.*), and JND has worked with Claimants to help them perfect their Claims (see *id.* ¶¶ 7-9). No additional Claims have been received since October 31, 2020. *Id.* ¶ 33. Any Claims received after October 31, 2020, may be paid in subsequent distributions in accordance with paragraph 45(e) of the Segura Declaration. *Id.* ¶ 45(e).

As discussed in the Segura Declaration, many of the Claims submitted in the Settlement were initially deficient or ineligible for one or more reasons, including being incomplete, not signed, not properly documented, or otherwise deficient, which required substantial follow-up work by JND. *Id.* ¶¶ 19-30.

If JND determined a Claim to be defective or ineligible, it sent a letter to Claimants or filers who filed a paper Claim or an email to Claimants or filers who filed an Electronic Claim, describing the defect(s) or condition(s) of ineligibility in the Claim and what was necessary to cure any curable defect(s) in the Claim (“Deficiency Notices”). *Id.* ¶¶ 20-25. The Deficiency Notices advised the Claimant or filer that the appropriate information or documentary evidence to complete the Claim had to be sent within 20 days from the date of the letter, or JND would recommend the Claim for rejection to the extent the deficiency or condition of ineligibility was not cured. *Id.* Examples of the Deficiency Notices are attached as Exhibits A through C to the Segura Declaration.

A. Late Claims and Final Cut-Off Date

The 15,290 Claims received through October 31, 2020, include 151 that were postmarked or received after the Court-approved Claim submission deadline of March 5, 2020, but that were received before October 31, 2020. *Id.* ¶¶ 33-34, 41. Those late Claims have been fully processed,

and 39 of them are, but for their late submission, otherwise eligible to participate in the Settlement. *Id.* Although these 39 Claims were late, they were received while the processing of timely Claims was ongoing. Due to the amount of time needed to process the timely Claims received, the processing of these late Claims did not delay the completion of the Claims administration process or the distribution of the Net Settlement Fund. The Court has discretion to accept Claims received after the submission deadline.⁴ Lead Plaintiffs respectfully submit that, when the equities are balanced, it would be unfair to prevent an otherwise eligible Claim from participating in the distribution of the Net Settlement Fund solely because it was received after the Court-approved Claim submission deadline, if it was submitted while timely Claims were still being processed – i.e., before October 31, 2020.

To facilitate the efficient distribution of the Net Settlement Fund, however, there must be a final cut-off date after which no other Claims may be accepted. Accordingly, Lead Plaintiffs respectfully request that this Court order that any new Claims and any adjustments to previously filed Claims that would result in an increased Recognized Claim amount received after October 31, 2020, be barred, subject to the provisions of paragraph 45(f) of the Segura Declaration.⁵ Paragraph 45(f) applies to any Claims received or modified after October 31, 2020, that would have been eligible for payment or additional payment under the Court-approved Plan of Allocation if timely received. At the time when Lead Counsel, in consultation with JND, determines that a further distribution is not cost-effective as provided in paragraph 45(e) of the

⁴ See Preliminary Approval Order ¶ 11 (“*Unless the Court orders otherwise*, all Proof of Claim Forms must be postmarked no later than one hundred twenty (120) calendar days after the Notice Date. Notwithstanding the foregoing, *Lead Counsel may, at its discretion, accept* for processing late Claims provided such acceptance does not delay the distribution of the Net Settlement Fund to the Settlement Class.”) (emphasis added).

⁵ Should an adjustment be received that results in a lower Recognized Claim amount, that adjustment will be made, and the Recognized Claim amount will be reduced accordingly prior to a distribution to that Claimant. Segura Decl. ¶ 34.

Segura Declaration, the post-October 31, 2020 Claimants, after payment of fees and expenses as provided in paragraph 45(f) of the Segura Declaration, at the discretion of Lead Counsel, and to the extent possible, may be paid the Distribution Amounts or additional Distribution Amounts on a *pro rata* basis that would bring them into parity with other Authorized Claimants who have cashed all their prior distribution checks.

III. FEES AND EXPENSES OF CLAIMS ADMINISTRATOR

In accordance with JND's agreement with Lead Counsel to act as the Claims Administrator for the Settlement, JND was responsible for, among other things, disseminating notice of the Settlement to the Settlement Class, creating and maintaining a website and toll-free telephone helpline, processing Claims, and allocating and distributing the Net Settlement Fund to Authorized Claimants. As stated in the accompanying Segura Declaration, JND's fees and expenses for its work performed through August 31, 2020, are \$391,088.45. Segura Decl. ¶ 44. Additionally, brokerage firms and nominees' charges for the mailing of the Notice and Claims Packet totaled \$44,507.15 and the estimated fees and expenses for the Initial Distribution to be performed on behalf of the Settlement Class are \$28,459.11.⁶ *Id.* To date, JND has received payment in the amount of \$374,737.41 for its fees and expenses. *Id.* Accordingly, there is an outstanding balance of \$89,317.30 payable to JND, which amount includes the estimated fees and expenses to be incurred by JND in connection with the Initial Distribution. *Id.* Lead Counsel reviewed JND's invoices and respectfully requests on behalf of Lead Plaintiffs that the Court approve all of JND's fees and expenses.

⁶ Should the estimate of fees and expenses to conduct the Initial Distribution of the Net Settlement Fund exceed the actual cost to conduct the distribution, the excess will be returned to the Net Settlement Fund and will be available for subsequent distribution to Authorized Claimants. Segura Decl. ¶ 44, n.2.

IV. DISTRIBUTION PLAN FOR THE NET SETTLEMENT FUND

The Net Settlement Fund is ready to be distributed. Lead Plaintiffs respectfully move the Court for entry of an order approving JND's determinations concerning acceptance and rejection of the Claims that are included in the present motion and approving the proposed Distribution Plan as stated in the Segura Declaration.⁷

A. Distribution of the Net Settlement Fund

Under the proposed Distribution Plan, JND will distribute approximately 95% of the Net Settlement Fund, after deducting all payments previously allowed and the payments approved by the Court on this motion, and after deducting payment of any estimated taxes, the costs of preparing appropriate tax returns and any escrow fees (the "Initial Distribution"). In the Initial Distribution, JND will calculate award amounts for all Authorized Claimants as if the entire Net Settlement Fund were to be distributed now. JND will first determine each Authorized Claimant's *pro rata* share of the total Net Settlement Fund based on the Claimant's Recognized Claim in comparison to the total Recognized Claims of all Authorized Claimants. *See* Segura Decl. ¶ 45(a)(1).

In accordance with the Court-approved Plan of Allocation, JND will eliminate from the Initial Distribution any Authorized Claimant whose *pro rata* share calculates to less than \$10.00, as these Claimants will not receive any payment from the Net Settlement Fund and will be so notified by JND. *Id.* ¶ 45(a)(2). JND will then recalculate the *pro rata* share of the Net Settlement Fund for Authorized Claimants who would have received \$10.00 or more (the "Distribution Amount"). *Id.* ¶ 45(a)(3). Authorized Claimants whose Distribution Amount calculates to less than \$100.00 under subparagraph 45(a)(3) of the Segura Declaration will be

⁷ Under the Stipulation, Defendants have no role in or responsibility for the administration of the Settlement Fund or processing of Claims, including determinations as to the validity of Claims or the distribution of the Net Settlement Fund. *See* Stipulation ¶¶ 18, 30. *See also* Notice ¶¶ 64, 78.

paid their full Distribution Amount in the Initial Distribution (“Claims Paid in Full”). *Id.* ¶ 45(a)(4). These Authorized Claimants will receive no additional funds in subsequent distributions. *Id.* After deducting the payments to the Claims Paid in Full, 95% of the remaining balance of the Net Settlement Fund will be distributed *pro rata* to Authorized Claimants whose Distribution Amount calculates to \$100.00 or more. *Id.* ¶ 45(a)(5). The remaining 5% of the Net Settlement Fund will be held in reserve (the “Reserve”) to address any tax liability and claims administration-related contingencies that may arise. *Id.* To the extent the Reserve is not depleted, the remainder will be distributed in the “Second Distribution.” *Id.* ¶ 45(a)(d).

In order to encourage Authorized Claimants to cash their checks promptly, Lead Plaintiffs propose that the distribution checks bear the notation, “CASH PROMPTLY. VOID AND SUBJECT TO REDISTRIBUTION IF NOT CASHED BY 90 DAYS AFTER ISSUE DATE.” *Id.* ¶ 45(b). Authorized Claimants who do not cash their checks within the time allotted or on the conditions stated in paragraph 45(b) footnote 3 of the Segura Declaration will irrevocably forfeit all recovery from the Settlement, and the funds allocated to these stale-dated checks will be available to be redistributed to other Authorized Claimants in any subsequent distribution, as described below. *Id.* ¶ 45(c).

B. Additional Distribution(s) of the Net Settlement Fund

After JND has made reasonable and diligent efforts to have Authorized Claimants cash their Initial Distribution checks, but not earlier than nine (9) months after the Initial Distribution, JND will, after consulting with Lead Counsel, conduct a second distribution of the Net Settlement Fund (the “Second Distribution”). In the Second Distribution, any amounts remaining in the Net Settlement Fund after the Initial Distribution (including from the Reserve and the funds for all void stale-dated checks), after deducting JND’s unpaid fees and expenses incurred in connection with administering the Settlement (including the estimated costs of the Second

Distribution), and after deducting payment of any estimated taxes, the costs of preparing appropriate tax returns, and any escrow fees, will be distributed to all Authorized Claimants in the Initial Distribution who cashed their Initial Distribution checks and would receive at least \$10.00 from the Second Distribution based on their *pro rata* share of the remaining funds. *Id.* ¶ 45(d). If, after the Second Distribution, any funds remain in the Net Settlement Fund because of uncashed checks or otherwise, then after JND has made reasonable and diligent efforts to have Authorized Claimants cash their distribution checks, and if cost-effective, subsequent distributions of the funds remaining in the Net Settlement Fund, after deduction of costs and expenses as described above and subject to the same conditions, will take place at six-month intervals thereafter. *Id.*

When Lead Counsel, in consultation with JND, determines that further distribution is not cost-effective, if sufficient funds remain to warrant the processing of Claims received after October 31, 2020, JND will process those Claims. Any of these Claims that are otherwise valid, as well as any earlier received Claims for which an adjustment was received after October 31, 2020, which resulted in an increased Recognized Claim, may be paid in accordance with paragraph 45(e) of the Segura Declaration. *Id.* ¶ 45(e). If any funds remain in the Net Settlement Fund after payment of these late or late-adjusted Claims, the remaining balance of the Net Settlement Fund, after payment of any unpaid fees or expenses incurred in administering the Net Settlement Fund and after the payment of any estimated taxes, the costs of preparing appropriate tax returns, and any escrow fees, will be contributed to the American Red Cross, a non-sectarian, not-for-profit 501(c)(3) organization. *Id.*

V. RELEASE OF CLAIMS

In order to allow the full and final distribution of the Net Settlement Fund, it is necessary to bar any further claims against the Net Settlement Fund beyond the amounts allocated to

Authorized Claimants, and to provide that all persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Claims submitted in connection with the Settlement, or who are otherwise involved in the administration or taxation of the Settlement Fund or the Net Settlement Fund, be released and discharged from all claims arising out of that involvement. Accordingly, Lead Plaintiffs respectfully request that the Court release and discharge all persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Claims submitted in connection with the Settlement, or who are otherwise involved in the administration or taxation of the Settlement Fund or the Net Settlement Fund, from all claims arising out of that involvement, and bar all Settlement Class Members and other Claimants, whether or not they receive payment from the Net Settlement Fund, from making any further claims against the Net Settlement Fund, Lead Plaintiffs, Lead Counsel, the Claims Administrator, the Escrow Agent, or any other agent retained by Lead Plaintiffs or Lead Counsel in connection with the administration or taxation of the Settlement Fund or the Net Settlement Fund, or any other person released under the Settlement beyond the amounts allocated to Authorized Claimants.

VI. CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully submit that Lead Plaintiffs' Unopposed Motion for Approval of Distribution Plan should be granted, and the [Proposed] Order Approving Distribution Plan should be entered.

Dated: December 14, 2020

Respectfully submitted,

/s/ Andrew J. Entwistle

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CERTIFICATE OF SERVICE

I certify that on December 14, 2020, the foregoing Memorandum of Law was filed with Clerk of the Court through the Court's ECF system, which will cause the document to be served upon all counsel of record.

/s/ Andrew J. Entwistle _____

Andrew J. Entwistle