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 OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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Court–appointed Lead Counsel, Entwistle & Cappucci LLP ("Entwistle & Cappucci" or "Lead Counsel"), respectfully submits this Memorandum of Law in support of its motion (the "Motion") for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, as authorized by the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). The Motion is unopposed by the Defendants.[1]

PRELIMINARY STATEMENT

Lead Plaintiffs have requested the Court approve a settlement of all claims against Defendants in this Action for a multi–faceted recovery consisting of three components: (i) cash, (ii) Akorn Settlement Shares, and (iii) Settlement CVRs (*see* Memorandum of Law In Support of Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation,[2] which is being filed contemporaneously herewith). Lead Counsel respectfully requests attorneys' fees of 25% of each component of the Settlement Fund – *i.e.*, (i) $6,614,980.62 in cash,[3] (ii) 1,621,593 Akorn Settlement Shares (as well as up to 562,332 additional shares when they become available from the expiration of out–of–the–money Akorn stock options),[4] and (iii) 25% of the Settlement CVRs.

Lead Counsel successfully litigated this Action from its inception in March 2018 on an entirely contingent–fee basis. In connection with prosecuting this action, Lead Counsel and

[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] Cited herein as "Final Approval Mem."

[3] This amount equals: 25% of the available cash component of the settlement (*i.e.*, $30,000,000 minus (a) the $2,500,000 Reimbursement Cap for ongoing defense costs and (b) the $1,040,077.52 counsel seeks in reimbursement of litigation expenses, discussed in Section IV below).

[4] All Akorn Settlement Shares distributed to the Settlement Class and/or Counsel are exempt from the registration requirements of the Securities Act of 1933 ("Securities Act") pursuant to Section 3(a)(10) of the Securities Act.

Liaison Counsel Bernstein Litowitz Berger & Grossmann LLP, under Lead Counsel's direction (collectively, "Plaintiff's Counsel"):

- Conducted interviews of dozens of confidential witnesses (former Akorn employees) (*see* Entwistle Decl.[5] ¶ 15);
- Carefully monitored and analyzed the Merger Litigation filed in the Delaware Chancery Court and subsequent appeal to the Delaware Supreme Court, including attending the five–day bench trial and other public hearings, reviewing all public filings and analyzing the transcripts of the more than fifty depositions conducted in that action (*Id.*);
- Briefed and argued a Motion to Lift the PSLRA discovery stay (*id.* ¶ 16);
- Drafted and filed a detailed Consolidated Amended Complaint, which pled claims against 12 defendants and contained allegations spanning over 371 paragraphs (*id.* ¶¶ 17–20);
- Negotiated an agreement pursuant to which certain Defendants forwent moving to dismiss the Amended Complaint (*id.* ¶ 24);
- Obtained an assented order allowing the parties to treat the depositions from the Merger Litigation as having occurred in this Action, thereby streamlining discovery (*id.* ¶ 28);
- Conducted extensive fact discovery, including serving document requests and 15 third party subpoenas, thereby obtaining over 3.75 million documents (over 12 million pages) relating to the alleged wrongdoing. Plaintiffs' Counsel conducted a review of these documents using artificial intelligence and targeted searches to prioritize the review while preparing to depose the Individual Defendants and other witnesses (*id.* ¶¶ 30–36);
- Responded and objected to document requests served on Lead Plaintiffs, including collecting internal documents from Lead Plaintiffs, conducting a review of those documents for responsiveness and privilege, and preparing approximately 89,000 pages of internal documents for production (*id.* ¶ 33);
- Drafted and obtained 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 (*id.* ¶ 40);

[5] 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 (submitted herewith and cited herein as the "Entwistle Decl. ¶ _" or "Entwistle Declaration").

- Successfully moved to reassign and consolidate the related *Wickstrom* and *Juan* actions (ECF Nos. 88, 104), and successfully moved to reassign as related the *Twin Master Funds* and *Manikay Funds* actions (ECF Nos. 112, 122) (Entwistle Decl. ¶¶ 37–46);

- Moved for class certification, including consulting with experts on the issues of market efficiency and class–wide damages (Entwistle Decl. ¶¶ 47–48, 50);

- Engaged 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 class–wide damages theory (*id*. ¶¶ 57–59);

- Negotiated a settlement involving multiple components to maximize shareholder value despite Akorn's limited ability to fund a settlement or judgment (*id*. ¶¶ 60–62);

- Moved for preliminary approval of the settlement, including conducting a bidding process for a claims administrator, and negotiating the Stipulation of Settlement and CVR Agreement (*id*. ¶¶ 62–63); and

- Worked extensively with the Claims Administrator to provide broad notice of the proposed Settlement to prospective Settlement Class Members (*id*. ¶¶ 82–86).

Plaintiffs' Counsel undertook these substantial efforts without compensation for over one–and–a–half years in the face of substantial litigation risks, many of which could have resulted in no recovery for the Settlement Class and therefore no attorneys' fees. For example, as explained in detail in the accompanying Entwistle Declaration and summarized below, Lead Plaintiffs faced challenges in establishing falsity, scienter, and loss causation. Among other things, Defendants contend: (i) the alleged misstatements were not false when made; (ii) even if false, the alleged misstatements are not actionable under the federal securities laws; (iii) Lead Plaintiffs cannot prove scienter; (iv) a class cannot be certified because, among other things, investors who purchased prior to and after the announcement of the Akorn–Fresenius merger (the "Merger") require different damages theories; and (v) Lead Plaintiffs cannot prove loss causation because the decline

in Akorn's stock price was primarily caused by the Company's financial collapse, not the disclosure of its data integrity problems. *See id*. ¶¶ 66–76.

Even more significantly, Akorn is in dire financial condition and is unlikely to be able to fund a larger judgment or settlement. *See id*. ¶¶ 77–81. Indeed, to defend the Action through trial and appeal, Akorn would have exhausted much, if not all, of the Applicable Insurance Policies it is using to settle the Action.

As compensation for their efforts on behalf of the Settlement Class, Lead Counsel now requests a fee award of 25% of each component of the Settlement Consideration on behalf of all Plaintiffs' Counsel. As detailed in Section III.A below, such a request is consistent with fee percentages awarded in this District Court, other courts in this Circuit, and elsewhere. The fee request is also reasonable under the lodestar method (*see infra* Section III.C). Moreover, Lead Plaintiffs, who are sophisticated institutional investors, have approved the requested fees and reimbursement of expenses as fair and reasonable. *See* Entwistle Decl., Exhibit 5 (Goldman Decl.). Finally, following a comprehensive notice program to prospective Settlement Class Members, no objections to the attorneys' fees or expenses set forth in the Notice have been received to date. *See* Entwistle Decl. ¶ 86. This positive reaction of the Settlement Class to date further supports Lead Counsel's request.

For all of these reasons, and those detailed below, Lead Counsel respectfully requests that the Court approve its application for an award of attorneys' fees and reimbursement of litigation expenses.

RELEVANT FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This Action was commenced on March 8, 2018. (ECF No. 1). On May 31, 2018, the Honorable Matthew F. Kennelly appointed Lead Plaintiffs, Lead Counsel and Liaison Counsel. (ECF No. 37). At the time, Akorn was litigating with Fresenius Kabi AG ("Fresenius") in the

Delaware Chancery Court seeking to enforce its merger agreement with Fresenius (the "Merger Litigation"). Fresenius had purported to terminate the Merger Agreement on grounds that Akorn had breached its representations and warranties, breached the ordinary course covenant in the Merger Agreement, and suffered a Material Adverse Event under the terms of the Merger Agreement. Either potential outcome of the Merger Litigation presented serious risk to Lead Plaintiffs' case. If Akorn prevailed, Lead Plaintiffs would likely need to overcome an adverse decision from the Delaware Chancery Court that found Akorn had *not* violated the representations and warranties in the Merger Agreement, which is one of the key allegations in Lead Plaintiffs' complaint.[6] If Fresenius prevailed – which was ultimately the case – Lead Plaintiffs would be litigating against an opponent in dire financial condition with little ability to fund a substantial judgment or settlement. Either way, Lead Plaintiffs and Lead Counsel faced significant risks during the course of this Action.

Based upon the public record in the Merger Litigation and the facts uncovered during their own investigation, Plaintiffs' Counsel prepared and filed a Consolidated Amended Class Action Complaint asserting claims under (i) Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") on behalf of purchasers of Akorn common stock from November 3, 2016 through and including April 20, 2018, and (ii) Sections 14(a) and 20(a) of the Exchange Act on behalf of Akorn shareholders of record as of June 9, 2017. (ECF No. 55). Discovery in the case commenced in December 2018. Akorn and third parties produced over 3.75 million documents (more than twelve million pages), including the transcripts and exhibits from all depositions taken

[6] Indeed, in the Merger Litigation, Akorn vigorously denied that it had material data integrity problems and presented voluminous evidence that Fresenius was simply trying to renegotiate the transaction as a result of "buyer's remorse."

in the Merger Litigation.[7] Entwistle Decl. ¶¶ 30–36. As a result of findings during discovery and additional revelations regarding Akorn's wrongdoing, on April 22, 2019, Lead Plaintiffs filed the Second Amended Complaint, which, among other things, extended the end date of the class period from April 20, 2018 to January 8, 2019. (ECF No. 101).

Lead Counsel spent significant time on class certification–related discovery and briefing. Entwistle Decl. ¶¶ 47–48. Specifically, Lead Counsel responded and objected to Defendants' document requests and collected, reviewed and prepared for production approximately 89,000 pages of Lead Plaintiffs' internal documents. Lead Counsel also worked extensively with their experts to develop a class–wide damages theory in connection with submitting Lead Plaintiffs' motion for class certification. (ECF No. 113).

On May 3, 2019, Lead Plaintiffs, Lead Counsel, Liaison Counsel, and Defendants participated in an in–person mediation session before retired United States District Court Judge Layn R. Phillips. *Id.* at ¶¶ 57–59. In advance of the mediation, the parties exchanged two rounds of detailed confidential mediation statements. Although no agreement was reached during the mediation session or a follow–up in–person mediation session on May 21, 2019, Lead Counsel and Defendants' Counsel continued to negotiate with the assistance of Judge Phillips.

Following months of intensive negotiations, and in light of Akorn's challenging financial circumstances, its ongoing bankruptcy risk, the risk that Lead Plaintiffs would fail to prove elements of their case at trial, and the significant risk that Akorn would not be able to satisfy even

[7] As noted above, Lead Counsel obtained an assented order allowing them to treat those depositions as having occurred in this Action, thereby avoiding duplicating the efforts of Fresenius's counsel in establishing certain evidentiary points. (ECF No. 86). Lead Counsel was also prepared to take additional depositions focused on issues specific to this Action, such as scienter and loss causation. *See* Entwistle Decl. ¶¶ 28, 31, 36.

a modest judgment in the future, Lead Plaintiffs and Lead Counsel determined to settle the Action. Judge Kennelly preliminary approved the Settlement on August 26, 2019. (ECF No. 132).

ARGUMENT

I. COUNSEL ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Seventh Circuit has similarly held that "[w]hen a case results in the creation of a common fund for the benefit of the plaintiff class, the common fund doctrine allows plaintiffs' attorneys to petition the court to recover its fees out of the fund." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 563 (7th Cir. 1994).

Courts routinely recognize that awarding attorneys' fees from a common fund attracts skilled counsel to represent those who seek redress for damages inflicted on classes of persons. *See, e.g., In re Synthroid Mktg. Litig.*, 264 F.3d 712, 720 ("*Synthroid I*") (7th Cir. 2001) ("[A]wards net of fees could rise with the level of fees if a higher payment attracts the best counsel."); *Silverman v. Motorola Sols., Inc.* ("*Motorola I*"), 739 F.3d 956, 958 (7th Cir. 2013) ("The greater the risk of walking away empty–handed, the higher the award must be to attract competent and energetic counsel."). Indeed, compensating plaintiffs' counsel for the risks they take in bringing federal securities actions is essential because private securities actions, such as this one, are "an indispensable tool with which defrauded investors can recover their losses—a matter crucial to the integrity of domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 320 n.4 (2007) (private actions are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC). *Id.* at 313. Accordingly, common fund fee awards

encourage and support meritorious class actions and thereby promote compliance with the federal securities laws.

Here, Lead Counsel is entitled to an award of attorneys' fees from the common fund for their extensive efforts on behalf of the Settlement Class.

II. THE AWARDED FEES SHOULD BE A PERCENTAGE OF THE FUND

Lead Counsel respectfully submits that the Court should award a fee based on a percentage of the Settlement Fund. The Seventh Circuit has "held repeatedly that, when deciding on appropriate fee levels in common–fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Synthroid I*, 264 F.3d at 718. In common fund cases, "the measure of what is reasonable is what an attorney would receive from a paying client in a similar case." *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408 (7th Cir. 2000).

Accordingly, the Seventh Circuit has strongly endorsed the percentage method, pursuant to which fees are awarded as a percentage of the common fund, because it most closely approximates the manner in which attorneys are compensated in the marketplace for contingent work. *See Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund . . . in recognition of the fact that most suits for damages in this country are handled on the plaintiff's side on a contingent–fee basis") (citation omitted); *see also In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.* ("*Dairy Farmers I*"), No. 09–cv–3690, 2015 WL 753946, at *3 (N.D. Ill. Feb. 20, 2015) (finding that the percentage method has "emerged as the favored method for calculating fees in common–fund cases in this district"); *Beesley v. Int'l Paper Co.*, No. 3:06–cv–703–DRH–CJP, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) ("When determining a reasonable fee, the Court of Appeals for the Seventh Circuit uses the percentage basis rather than a lodestar

or other basis.") (citation omitted).[8] In doing so, the Seventh Circuit has recognized "that there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration." *Florin*, 34 F.3d at 566.

The percentage of the fund method is especially appropriate here due to the nature of the Settlement Consideration and fee request. Lead Counsel requests 25% of each component of the Settlement Consideration—*i.e.*, 25% of the cash (net of Litigation Expenses), 25% of the Akorn Settlement Shares, and 25% of the Settlement CVRs. As described below in Section III.C, using the lodestar multiplier method is inherently difficult to apply here because it requires comparing Lead Counsel's lodestar (a fixed dollar amount) to settlement consideration that is not easily valued (due to the fluctuating and unknown future value of the Settlement Shares and Settlement CVRs).

Courts have frequently applied the percentage of the fund method to securities class action settlements consisting in whole or in part of securities, finding that in such circumstances lead counsel has "cast their lot with that of the class: they share in any gain or any loss in the value of the settlement." *In re Microstrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 778, 789 n.35 (E.D. Va. 2001) (awarding attorneys fees as a percentage of the fund in a settlement consisting wholly of notes, common stock and warrants after finding that the "value of the [] settlement is difficult to assess because it fluctuates with market conditions and the price of MicroStrategy's stock"); *see also In re Krispy Kreme Doughnuts, Inc. Sec. Litig.*, 1:04CV00416 (M.D.N.C. Feb. 15, 2007), ECF No. 203 (awarding attorneys' fees to be paid in cash, stock and warrants in the same proportions that the aggregate net settlement fund is distributed to authorized claimants).

[8] The Supreme Court has also indicated a preference for the percentage of the fund method, stating that in common fund cases "a reasonable fee is based on a percentage of the fund bestowed on the class." *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

III. THE 25% ATTORNEYS' FEE REQUEST IS REASONABLE AND APPROPRIATE

A. The Requested Fees Are Consistent With Applicable Precedent

In order to calculate the market rate for counsel's services, a district court must "ascertain the appropriate rate for cases of similar difficulty and risk, and of similarly limited potential recovery." *Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986); *see also Synthroid I*, 264 F.3d at 718 (courts look to the going market rate for legal services in similar cases as a barometer for assessing the reasonableness of a fee award in common–fund cases).

The 25% fee requested here is plainly consistent with – if not below – fee awards that courts in the Seventh Circuit have made in similar cases with comparable recoveries. *See, e.g.*, *In re Groupon, Inc. Sec. Litig.*, No. 12 CV 2450, 2016 WL 3896839, at *4 (N.D. Ill. July 13, 2016) (awarding 30% of $45 million settlement fund); *City of Lakeland Emps.' Pension Plan v. Baxter Int'l Inc.*, No. 1:10–cv–06016, 2016 WL 10571629, at *1 (N.D. Ill. Jan. 22, 2016) (awarding 26% of $42.5 million settlement fund); *City of Sterling Heights Gen. Emps.' Ret. Sys. v. Hospira, Inc.*, No. 11–cv–08332–AJS, 2014 WL 12767763 (N.D. Ill. Aug. 5, 2014), (awarding 30% of $60 million settlement fund); *Dairy Farmers I*, 2015 WL 753946, at *16 (awarding 33% of $46 million common fund); *In re Plasma–Derivative Protein Therapies Antitrust Litig.*, No. 09 C 7666, slip op. at 2 (N.D. Ill. Jan. 22, 2014), ECF No. 693 (awarding 33 1/3% of $64 million settlement fund); *Standard Iron Works v. ArcelorMittal*, No. 08 C 5214, 2014 WL 7781572, at *1, *3 (N.D. Ill. Oct. 22, 2014) (awarding 33% of $163.9 million total common fund, finding the amount "a fair and reasonable attorneys' fee"); *Motorola I*, 739 F.3d at 959 (holding that fee award of 27.5% of a $200 million settlement was not excessive); *Roth v. AON Corp.*, No. 04–C–6835, slip op. at 1 (N.D. Ill. Nov. 18, 2009), ECF No. 220 (awarding 31% of $30 million settlement fund); *Cent.*

Laborers' Pension Fund v. SIRVA, Inc., No. 04–C–7644, 2007 U.S. Dist. LEXIS 105097, at *18–19 (N.D. Ill. Oct. 31, 2007) (awarding 29.85% of $53.3 million settlement).

The 25% fee request is also consistent with nation–wide fee awards. Using data from securities class actions from 1996–2013, a recent study found that for settlements between $25 million and $100 million, where the dollar value of the immediate recovery in this Settlement falls, the median fee award was 27% of the settlement value. *See* Stefan Boettrich and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2018 Full–Year Review* (NERA, Jan. 29, 2019).[9] For settlements between 2014–2018 in the same range of recovery, the median fee award was 25% of the settlement value. *See id.* As illustrated above, the 25% fee request is consistent with the market rate for counsel's services in this type of matter.[10]

B. Other Factors Commonly Considered in the Seventh Circuit Also Support the Requested Fee Award

In addition to looking at comparable cases for the market rate, Courts in this Circuit have also found "the market rate for legal fees depends in part on (1) the risk of nonpayment a firm agrees to bear, in part on (2) the quality of its performance, in part on (3) the amount of work necessary to resolve the litigation, and in part on (4) the stakes of the case." *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.* ("*Dairy Farmers II*"), 80 F. Supp. 3d 838, 844 (N.D. Ill. 2015) (citing *Synthroid I*, 264 F.3d at 721); *see also Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005). The reaction of the class to the requested fees is also relevant. *See Beesley*, 2014 WL

[9] https://www.nera.com/content/dam/nera/publications/2019/PUB_Year_End_Trends_012819_Final.pdf

[10] Some Seventh Circuit cases have applied a "sliding scale" method whereby the court awards counsel a decreasing percentage of the fund for higher tiers of recovery. *See, e.g., In re Synthroid Mktg. Sec. Litig.* ("*Synthroid II*"), 325 F.3d 974, 959 (7th Cir. 2003) (awarding counsel 30% of the first $10 million of the settlement, 25% of the next $10 million of the settlement, etc.). Lead Counsel respectfully submits that the sliding scale method should not be applied here because of the fluctuating and unknown future value of the noncash components of the Settlement Consideration.

375432, at *1 (only one objection to counsel's fee request after mailing notices was "an unmistakable sign of the Class's overwhelming support for Class Counsel's Application."). As detailed below, each of these factors supports Lead Counsel's fee request.

1. The Action Was Inherently Risky to Litigate

This Action was prosecuted under the provisions of the PSLRA and, therefore, was risky and difficult from the outset. After the enactment of the PSLRA, Supreme Court Justice Sandra Day O'Connor recognized, "[t]o be successful, a securities class–action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009) (O'Connor, J., by designation). Moreover, as described above and in the Entwistle Declaration, this Action involved unique litigation risks relating to all possible outcomes of the Merger Litigation, obstacles in establishing the requirements for class certification and loss causation, as well as the financial risk of litigating against a corporate defendant with little–to–no ability to fund a cash judgment or settlement. *See* Entwistle Decl. ¶¶ 65–81; *Motorola I*, 739 F.3d at 959 ("The greater the risk of walking away empty–handed, the higher the award must be to attract competent and energetic counsel.") (citation omitted). The risks of litigating this matter support Lead Counsel's fee request.

2. Plaintiffs' Counsel Provided Quality Legal Services that Produced Excellent Benefits for the Settlement Class

From the outset of the litigation, Lead Counsel engaged in a skillful and concerted effort to obtain the maximum recovery for the Settlement Class. For example, Lead Counsel negotiated an agreement whereby Defendants would not move to dismiss the Consolidated Amended Complaint, thereby allowing the Settlement Class to forgo the risk and delay associated with

litigating such a motion.[11] Lead Counsel also worked extensively with financial experts to carefully structure a settlement proposal that could maximize the recovery for the Settlement Class while being acceptable to Defendants and Akorn's creditors who could veto a cash settlement. *See In re HPL Techs., Inc. Sec. Lit.*, 366 F. Supp. 2d 912, 919 (N.D. Cal. 2005) ("it is worth recognizing the value of class counsel's efforts at extracting a considerable amount of unconventional settlement consideration from defendants whose cash resources were limited."). Moreover, in the event that settlement negotiations were unsuccessful, Lead Counsel was fully prepared to take additional fact depositions focused on issues not litigated in the Merger Litigation, and move for partial summary judgment based on the facts determined by the Delaware Chancery Court. *See* Entwistle Decl. ¶¶ 28, 31, 36, 105.

The quality of opposing counsel is also important in evaluating the quality of the work performed by class counsel. *See, e.g., Arenson v. Bd. of Trade of Chicago*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974) (noting "the attorneys for the defendants represent the cream of the Anti–trust bar"). Lead Counsel was opposed in this Action primarily by attorneys from Cravath, Swaine & Moore, LLP, a firm with a well–deserved reputation as one of the premier law firms in the country in defending securities class actions. Lead Counsel's ability to achieve a superior settlement is particularly notable given this formidable opposition from Defendants' Counsel.

3. Plaintiffs' Counsel Worked Extensively to Obtain a Recovery on Behalf of the Settlement Class

Plaintiffs' Counsel spent more than one–and–a–half years successfully representing the Settlement Class in this Action. *See* Entwistle Decl. ¶¶ 96, 105. Among other things, Lead

[11] Indeed, in the related *Twin Master Funds* and *Manikay* actions, Defendants recently filed a comprehensive 35-page motions to dismiss the complaints. *See Twin Master Fund, Ltd. v, Akorn, Inc.*, No. 19-cv-3648 (MFK) (N.D. Ill.) (ECF No. 27); *Manikay Master Fund, LP v. Akorn, Inc.*, No. 19-cv-04651 (MFK) (N.D. Ill.) (ECF No. 29).

Counsel and Liaison Counsel spent considerable time investigating the claims, drafting pleadings, conducting extensive discovery, moving for class certification, litigating issues concerning the transfer and consolidation of related actions, preparing and engaging in two mediation sessions, and negotiating and seeking preliminary approval for the Settlement. *Id*. ¶ 105.

Plaintiffs' Counsel not only expended significant time prosecuting the claims, but also worked efficiently to move the case forward to a quick resolution. For example, Plaintiffs' Counsel carefully used the public record from the Merger Litigation to draft a Consolidated Amended Complaint that contained allegations distinct from the merger–related claims and did not require an additional immediate amendment following the Chancery Court's October 1, 2018 memorandum opinion. *Id*. ¶¶ 17–20. In addition, Plaintiffs' Counsel leveraged the Chancery Court's decision to convince Defendants to forgo filing a motion to dismiss, to stipulate to the use of the deposition transcripts from the Merger Litigation, and to promptly produce all documents produced in the Merger Litigation. *Id*. ¶ 24. This allowed Lead Plaintiffs to skip time–consuming motion practice (and avoid the delay attendant to the PSLRA discovery stay), and to streamline the discovery process, which was especially important in light of Akorn's poor financial condition and bankruptcy risk. Such efficiency in litigating the Action further supports the fee percentage requested by Lead Counsel. *See Synthroid II*, 325 F.3d at 979–80 ("The client cares about the outcome alone" and class counsel's efficiency should not be used "to reduce class counsel's percentage of the fund that their work produced.")

4. The Stakes of the Action Were Exceedingly High

The Settlement Class suffered in excess of $2 billion in market losses related to their investments in Akorn common stock, and Lead Counsel has estimated recoverable class–wide damages exceed $1.1 billion. *See* Entwistle Decl., Exhibit 2 (Arnold Decl. ¶ 29). Lead Plaintiffs

alone expended over $59 million during the Class Period to purchase 2,386,279 shares of Akorn common stock, and incurred a loss during the Class Period of over $14 million on a LIFO basis, providing Lead Plaintiffs significant incentive to actively oversee the Action and maximize the recovery for the Settlement Class. Likewise, Plaintiffs' Counsel worked 12,464.5 hours prosecuting this Action on a wholly contingent basis. Entwistle Decl. ¶ 100.

For Defendant Akorn, the stakes were even higher. Akorn's market capitalization is currently approximately half of the alleged damages in the Action, making this litigation essentially a bet–the–company matter. *See id.* ¶ 31. There is no question that the stakes in this Action were significant for all parties.

5. The Reaction of the Settlement Class Supports the Requested Fee Award

Approximately 47,480 Settlement Notices were disseminated to potential Settlement Class members and nominees. *See* Entwistle Decl., Exhibit 2 (Segura Decl. ¶9). Notice was also published on the internet and in *Investors Business Daily*. *Id.* ¶¶ 10,12. The Notice informed potential Settlement Class Members that Lead Counsel would apply for attorneys' fees of up to 25% of the Settlement Fund, plus litigation expenses not to exceed $1.5 million. The Notice also advised Settlement Class Members of their right to object to the Settlement or requested attorneys' fees and expenses. While the deadline to file objections has not yet passed, to date, not a single objection to the fee and expense request has been received. Thus, this factor strongly favors approval of the fee request. *See Beesley*, 2014 WL 375432, at *1 (the lack of "any meaningful number of objections" is "an unmistakable sign of the Class's overwhelming support for Class Counsel's Application.").

C. The Requested Fee Is Also Reasonable Using the Lodestar Method

Unlike certain other jurisdictions, the Seventh Circuit does not use a lodestar calculation as a secondary measure of reasonableness when the percentage–of–the–recovery approach is employed. *See, e.g.*, *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) ("consideration of a lodestar check is not an issue of required methodology"); *Silverman v. Motorola, Inc.* ("*Motorola II*"), No. 07 C 4507, 2012 WL 1597388, at *4 (N.D. Ill. May 7, 2012) (stating it was unnecessary to do a lodestar calculation); *Kolinek v. Walgreen Co.*, 311 FRD 483, 500 (N.D. Ill. 2015) ("no Seventh Circuit case law suggests that a percentage–of–the–fund approach will yield a reasonable result only where it satisfies a lodestar cross–check"); *Will v. Gen. Dynamics Corp.*, No. 06–CV–698–GPM, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) ("The use of a lodestar cross–check in a common fund case is unnecessary, arbitrary, and potentially counterproductive."). Nonetheless, Lead Counsel's requested attorneys' fees are reasonable under the lodestar method.

The lodestar method is calculated by multiplying a reasonable hourly rate by the number of hours counsel reasonably expended, and then applying a multiplier. *See Florin*, 34 F.3d at 565 ("a risk multiplier is not merely available in a common fund case but mandated, if the court finds that counsel had no sure source of compensation for their services.") (citation and internal quotations omitted). Here, Plaintiffs' Counsel collectively spent a total of 12,464.5 hours of attorney and other professional support time prosecuting this Action through September 30, 2019. *See* Entwistle Decl. (Ex. 9). Based on Plaintiffs' Counsel's current hourly rates, the total lodestar is $8,551,740.25. *See id*. This lodestar represents the vigorous prosecution of the case as described above and detailed in the Entwistle Declaration.

The requested 25% fee consists of cash, Akorn Settlement Shares, and CVRs. Using Akorn's closing share price on October 29, 2019 ($4.90 per share), the value of the immediate fee award is approximately $14,560,786.32.[12] This represents a multiplier of 1.7 on Plaintiffs' Counsel's total lodestar as of September 30, 2019 – well within the range of lodestar multipliers of 1 to 4 that are commonly awarded in complex class actions with substantial contingency risks such as this case. *See, e.g.*, *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991) ("Multipliers anywhere between one and four . . . have been approved") (citation omitted); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 02–C–5893, 2016 WL 10571774 (N.D. Ill. Nov. 10, 2016) (awarding a $388 million fee for a $1.575 billion settlement, which equated to a multiplier of 3.7).[13]

The hourly rates are Plaintiffs' Counsel's current hourly rates, which is consistent with industry practice and established case law.[14] Plaintiffs' Counsel's rates have been accepted by courts in other securities and shareholder litigation, and are reasonable in light of prevailing market

[12] $6,614,980.62 in cash plus $7,945,805.70 (the value of the 1,621,593 Akorn settlement shares to be awarded under Lead Counsel's fee request at the $4.90 per share closing price as of October 29, 2019). As the CVRs have not been issued and are not yet publicly traded, the CVRs cannot be readily valued for calculating an immediate fee award.

[13] Even assuming the "best case scenario," where: (i) Akorn's share price were to rise to $7.49 per share (the highest daily closing price for Akorn's shares since the Chancery Court's unfavorable October 1, 2018 decision), (ii) all 2,249,330 additional Settlement Shares become available from unexpired Akorn stock options; *and* (iii) the amounts payable under the CVRs reach the full $60 million aggregate cap, counsel's fee award will be valued at approximately $37,972,852.62 (which is overstated as this estimate is not discounted to present day value), resulting in a 4.44 multiplier. By comparison, under a "worst case scenario" where Akorn's share price falls and minimal funds are paid under the CVRs, Counsel's fee award will result in a lodestar multiplier at or below 1.0. Indeed, by receiving Akorn shares and CVRs, Counsel is taking exactly the same risk as the Settlement Class in terms of the future value of the settlement.

[14] The Supreme Court and courts in this Circuit have approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment. *See, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Mathur v. Bd. of Trustees of S. Ill. Univ.*, 317 F.3d 738, 744–45 (7th Cir. 2003) (to adjust for delay in payment, trial courts may calculate lodestars using "either current rates or past rates with interest").

rates for lawyers with comparable levels of experience and expertise in securities and other complex class action litigation. *See, e.g., Godinez v. Alere*, 16–cv–10766 (D. Mass.), ECF No. 283; *In re Cobalt International Energy, Inc. Sec. Lit.*, No. 4:14–cv–03428 (S.D. Tex.), ECF No. 366; *In re Allergan, Inc. Proxy Violation Derivatives Litig.*, No. 2:17–cv–04776, 2018 WL 4959014, at *1 (C.D. Cal. Aug. 13, 2018).

In sum, whether calculated as a percentage of the fund or under the lodestar method, the requested fee award is reasonable and within the range of fees awarded by courts in other securities class actions.

IV. COUNSEL'S EXPENSES WERE REASONABLE AND NECESSARY FOR THE BENEFIT OF THE SETTLEMENT CLASS

Attorneys who generate a common fund for a plaintiff class are entitled to the reimbursement of reasonable litigation expenses from that fund. *See Synthroid I*, 264 F.3d at 722 (holding that courts should award class counsel market–rate litigation expenses) (citation omitted). To prosecute the Action to resolution, Plaintiffs' Counsel incurred reasonable and necessary costs and expenses in the amount of $1,040,077.52. Entwistle Decl. ¶¶ 115–122. Because the expenses at issue are the types of litigation costs reimbursed by individual clients in the marketplace, they should be reimbursed here from the common fund.

The most significant components of Plaintiffs' Counsel's expenses include:

- **Experts** – Counsel consulted experts in the fields of economics and finance to assist with the two applications for Lead Plaintiff appointment, Lead Plaintiffs' class certification motion, and in calculating class–wide damages. These experts were instrumental in assisting Lead Counsel in achieving the favorable result obtained for the Settlement Class;

- **eDiscovery** – Counsel engaged an eDiscovery vendor for: (i) the storage/hosting of over 3.75 million documents produced in the Action by Defendants and third parties, and (ii) the collection, storage, processing and preparation for production of approximately 89,000 pages of Lead Plaintiffs' internal documents;

- **Travel** – In connection with the Action, attorneys have traveled to Chicago to attend Court hearings, to New York for the mediation sessions, and to Delaware to for the Merger Litigation. They have incurred the costs of meals, lodging, and transportation for these necessary activities in furtherance of the case; and

- **Research** – Counsel incurred the costs of online research, such as Westlaw, Bloomberg and PACER.

These are all the types of litigation expenses directly related to the Action that are routinely approved by courts. *See*, *e.g.*, *Abbott v. Lockheed Martin Corp.*, No. 06–cv–701–MJR–DGW, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) ("It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses, which includes such things as expert witness costs; computerized research; court reporters; travel expense; copy, phone and facsimile expenses and mediation") (citation omitted).

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court award (i) attorneys' fees for Plaintiffs' Counsel in the amount of $6,614,980.62 in cash, 1,621,593 Akorn Settlement Shares (as well as up to 562,332 additional Akorn Settlement Shares when they become available from the expiration of out–of–the–money Akorn stock options), and 25% of the CVRs, and (ii) reimbursement of litigation expenses totaling $1,040,077.52 for costs and expenses related to their representation of the Settlement Class.

Dated: October 29, 2019

Respectfully submitted,

/s/ Andrew J. Entwistle

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2019, I caused the foregoing memorandum of law to be served on all counsel of record via the Court's ECF system.

/s/ Andrew J. Entwistle
Andrew J. Entwistle