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

REPLY MEMORANDUM OF LAW IN FURTHER 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

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Court-appointed Lead Plaintiffs,[1] on behalf of themselves and the Settlement Class, respectfully submit this Reply Memorandum of Law in further support of their Motion for (i) Final Approval of Class Action Settlement and Plan of Allocation and (ii) Award of Attorneys' Fees and Reimbursement of Litigation Expenses (ECF No. 144, the "Motion").[2]

I. INTRODUCTION

Lead Plaintiffs' Motion asks the Court to approve three things:

(1) The Settlement and its terms;

(2) The Plan of Allocation for the Settlement Consideration; and

(3) The requested award of attorneys' fees and litigation expenses.

Significantly, the Claims Administrator mailed more than 64,500 notice and claim form packets to potential Settlement Class Members. Lead Counsel and the Claims Administrator have received no objections (timely or otherwise) to the adequacy of the Settlement Consideration, the fairness of the Plan of Allocation or the attorneys' fees and expenses sought. The *single* objection Lead Counsel and the Claims Administrator did receive – by the plaintiff in one of the pending derivative cases – is based on a misunderstanding of the scope of the Release in the Final Order and Judgement.

Three hedge fund groups filed requests for exclusion. The lack of significant objections and limited number of "opt outs" underscores the fairness and adequacy of the Settlement.

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[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) and the Memorandum of Law in Support of Lead Plaintiffs' Motion For Final Approval of Class Action Settlement and Plan of Allocation (ECF No. 146).

[2] Lead Plaintiffs respectfully submit herewith the Declaration of Andrew J. Entwistle in Further 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 (the "Entwistle Reply Declaration"), cited herein as "Entwistle Reply Decl. ¶ __"

II. RELEVANT PROCEDURAL HISTORY[3]

The November 12, 2019 deadline set by Judge Kennelly for objections to the Settlement or requests for exclusion has passed. Lead Counsel and the Claims Administrator received a single objection to the Settlement. The objection is by Dale Trsar as Trustee of the Dale A. Trsar Trust (ECF No. 154), who is pursuing derivative claims on behalf of Akorn against certain Akorn officers and directors. *See In re Akorn, Inc. Shareholder Derivative Litigation*, 1:18-cv-07374 (N.D. Ill.) (pending before the Honorable John J. Tharp). Significantly, Mr. Trsar *does not* object to the Plan of Allocation for the Settlement Consideration or request for attorneys' fees and litigation expenses. His objection is limited to an erroneous concern that the Settlement might release his derivative claims – *i.e.*, Akorn's claims against its own officers and directors.

Lead Counsel and the Claims Administrator also received requests for exclusion from three groups of investment funds (the "Opt-Out Funds") represented by three separate law firms. Because the claims of the Opt-Out Funds are sufficient to trigger the Settlement termination provision in the non-public Supplemental Agreement (commonly known as a "blow provision"), which are customary in cases such as this,[4] and in light of Akorn's precarious financial situation and the exposure represented by the Opt-Out Funds' claims, the parties jointly requested an adjournment of the final fairness hearing rather than forcing a near-term decision on the potential

[3] For a fulsome recitation of the procedural history of the Action, *see* 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, ECF No. 148 at ¶¶ 12-59.

[4] *See, e.g.*, Catherine J. Galley & Erin E. McGlogan, *Considerations for Blow Provisions in Securities Class Action Settlements*, CORNERSTONE RESEARCH, 2016 at 1 ("Cornerstone Opt-Out Report") ("Many securities class action settlement agreements include what is commonly referred to as a 'blow provision'. Blow provisions are structured to give defendants the option to terminate a conditional class settlement agreement if a specified threshold is reached in terms of investors opting out of the settlement class (opt outs)."), *available at* https://www.cornerstone.com/Publications/Research/Blow-Provisions-Considerations-Securities-Opt-Out.

termination of the Settlement. (ECF No. 161). On November 26, 2019, the Court adjourned indefinitely the fairness hearing and set a status conference for January 28, 2020. (ECF No. 163).

Counsel for the parties are currently engaging in discussions with counsel for the Opt-Out Funds, and Defendants' motions to dismiss the complaints by certain of the Opt-Out Funds are *sub judice* before Judge Kennelly.

III. ARGUMENT

A. The Settlement Remains an Excellent Result for the Settlement Class

As detailed in Lead Plaintiffs' memoranda in support of its Motion (ECF Nos. 146-147), the Settlement is an excellent result for the Settlement Class. The relief it provides to the Settlement Class is plainly adequate considering the litigation costs, risks and delay of trial and appeal, as well as Akorn's precarious financial position and limited ability to pay. Indeed, Akorn faces multiple near-term challenges, including debt which must be refinanced by December 13, 2019 to avoid or forestall bankruptcy proceedings. (Entwistle Reply Decl. ¶¶ 12-13). Moreover, Akorn awaits a ruling on Fresenius's motion for summary judgment on its damages claims in the Merger Litigation, which would be catastrophic for Akorn if granted in full. (*Id.* ¶ 15). Given the confluence of these issues, it is not surprising that there are no substantive objections to the Settlement.

B. The Lone Objection is Without Merit

The lone objection by Mr. Trsar, a plaintiff in separate derivative proceedings, is limited to a concern that the Settlement might release Akorn's claims against its own officers and directors. However, the Stipulation plainly does not release, and does not purport to release, any claims Akorn may have.

First, Akorn is not a "Releasing Person" under the Stipulation. That term, as defined in the Stipulation, clearly ***excludes*** Akorn and its affiliates. Indeed, the Stipulation defines Releasing

Persons as Lead Plaintiffs, Settlement Class Members and their agents and related persons, and specifically provides:

> "Releasing Persons" means Lead Plaintiffs, Settlement Class Members and, to the extent acting as such, Lead Plaintiffs' or any Settlement Class Members' current and former directors, officers, shareholders, employees, servants, partners, agents, affiliates, subsidiaries, parents, joint ventures, successors or assigns, and any representatives, trustees, executors, heirs, assigns or transferees, attorneys, accountants, investment bankers, commercial bankers, advisors or insurers of any of the foregoing, jointly and severally, individually and collectively, whether in an individual, class, representative, legal, equitable or any other type or in any other capacity. As used in this paragraph, "affiliates" means entities controlling, controlled by or under common control with any Releasing Person.

Stipulation (ECF No. 127-1) § 1.55.[5]

Second, Akorn's claims are not "Settled Claims." That term is defined to include only those Claims asserted "by or on behalf of the Lead Plaintiffs and/or any and all Settlement Class Members that any of the Releasing Persons ever had, now has, or hereafter shall or may have."[6]

[5] Mr. Trsar's observation that certain defendants in Akorn's derivative action are "Released Persons" under the Stipulation is of no moment. The Stipulation only releases claims against such individuals to the extent those claims are held by Releasing Persons, *i.e.*, not Akorn.

[6] Section 1.59 of the Stipulation provides, in full:

> "Settled Claims" means any and all Claims (including any Claim that this Stipulation was fraudulently induced), demands, rights, actions or causes of action, whether the Claims are known or Unknown Claims, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, hidden or concealed, matured or unmatured, accrued or unaccrued, that have been, could have been, or in the future can or might be asserted in the Action or in any court, tribunal or proceeding, including, but not limited to, any claims arising under federal or state statutory or common law or relating to alleged fraud, misrepresentation (negligent, reckless, intentional or otherwise, and including misrepresentations through omission(s)), breach of any duty, negligence, violations of federal or state securities laws or any other claim under any theory by or on behalf of the Lead Plaintiffs and/or any and all Settlement Class Members that any of the Releasing Persons ever had, now has, or hereafter can, shall or may have against the Released Persons by reason of, arising out of, relating to or in connection with (i) the allegations, facts, matters, events, transactions, acts, occurrences, statements, representations,

The claims held by Akorn against its directors and officers are not asserted on behalf of the Lead Plaintiffs and/or any Settlement Class Member. They are asserted on behalf of Akorn. Nor are they claims that any Releasing Person ever had, now has, or hereafter can, shall or may have, as Akorn is not a Releasing Person.[7]

Mr. Trsar fixates on language in the Stipulation barring Settled Claims from being prosecuted derivatively. But, as is clear from the context of the Settlement, this provision is intended to prevent derivative claims on behalf of Settlement Class Members who are themselves corporate entities (*e.g.*, ***claims on behalf of an investment company*** that purchased Akorn's common stock during the Class Period, brought derivatively by a shareholder ***of the investment company***).

Mr. Trsar cites *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1186-87 (N.D. Cal. 1993) for the proposition that "the court has an additional duty to determine whether a settlement affecting derivative claims reasonably protects the interests of the corporation." (ECF No. 154 at 2). That decision is facially inapposite. In *Oracle*, the court was presented with a proposed settlement of "consolidated class and derivative actions," wherein the "class settlement agreement and the

> misrepresentations, or omissions or failures to act that were alleged or could have been alleged in the Action; (ii) any disclosures, non-disclosures or public statements made in connection with any of the foregoing; and (iii) the Stipulation and the Settlement. For the avoidance of doubt, the Settled Claims do not include (x) any claim by or on behalf of any Defendant against any insurance carrier; (y) any claim to enforce the Settlement, if approved by the Court, or the Stipulation; or (z) any claim of or against any Opt-Outs.

[7] Mr. Trsar also notes Lead Plaintiffs' agreement to cooperate with and not to interfere with certain Defendants' efforts to settle or dismiss derivative actions brought on behalf of Akorn. (ECF No. 154 at 2.) But Mr. Trsar has it backwards; the non-interference provision implicitly affirms that the Settlement does not operate as a bar to the action Mr. Trsar is prosecuting. Further, that provision places no obligation on Settlement Class Members other than Lead Plaintiffs and releases no claims whatsoever.

derivative settlement agreement [were] contingent upon one another." *Oracle*, at 1176, 1178. No such condition exists with respect to the settlement of the class claims here.[8]

Mr. Trsar's reliance on *Herbst v. International Telephone & Telegraph Corp.*, 72 F.R.D. 85, 87 (D. Conn. 1976) is also misplaced. The settlement at issue there expressly released claims for contribution that a settling corporate defendant may have had. Here, Akorn's claims against its own officers and directors are not released by the proposed Settlement. Additionally, as the Third Circuit observed in rejecting an objection purportedly asserted on behalf of a settling defendant and shareholders pursuing derivative claims on its behalf, "the [Private Securities Litigation] Reform Act significantly changed the law of securities fraud since *Herbst* and the other cases on which [the objector] relies . . . ." *In re Cendant Corp. Litig.*, 264 F.3d 286, 299 (3d Cir. 2001) (affirming district court's final approval of settlement over objection of shareholder pursuing derivative action on behalf of settling defendant).

Finally, the objector acknowledges that Defendants' have taken the position that the securities class action settlement does *not* release the derivative claims. *See* ECF No. 155-1.

C. The Absence of Substantive Objections Strongly Supports Final Approval

As discussed, there are no objections to: (i) the fairness, reasonableness and adequacy of the Settlement Consideration; (ii) the Plan of Allocation; or (iii) the request for attorneys' fees and reimbursement of litigation expenses. Courts have recognized that a small number of objections is "strong circumstantial evidence supporting the fairness of the settlement." *See, e.g.*, *In re Sears, Roebuck & Co. Front-loading Washer Prods. Liab. Litig.*, No. 06 C 7023, 2016 WL 772785, at

[8] Mr. Trsar cites *Soranno v. New York Life Insurance Co.*, No. 96 C 7882, 2001 WL 290303, at *4 (N.D. Ill. Mar. 20, 2001) for the unremarkable proposition that named plaintiffs cannot release claims that the class does not have. The releases in the Stipulation are entirely consistent with that proposition (*i.e.*, no derivative claims held by Akorn are being released).

*11 (N.D. Ill. Feb. 29, 2016) (characterizing three objections as a "small number") (citation omitted); s*ee also Swift v. Direct Buy, Inc.*, No. 2:11-CV-401-TLS, 2013 WL 5770633, at *6 (N.D. Ind. Oct. 24, 2013) (noting that "limited opposition to the Settlement Agreement among affected parties . . . also favors settlement") (citation omitted); *Mangone v. First USA Bank*, 206 F.R.D. 222, 227 (S.D. Ill. 2001) (approving settlement with 97 objections and approximately 19,637 opt-outs).

Here the total absence of substantive objections is strong evidence of the fundamental fairness of the Settlement, Plan of Allocation, and attorneys' fees and litigation expenses.

D. The Opt-Outs Have No Bearing on the Fairness of the Settlement

The only requests for exclusion received were submitted by large, highly risk-tolerant investment vehicles, some of which frequently employ an "opt-out" strategy. (Entwistle Reply Decl. ¶ 65).[9] At least five of these funds (all represented by the same counsel) are requesting exclusion based on litigation tactics that have nothing to do with the terms of the Settlement, as they filed direct actions well before the parties to this Action reached the Settlement—*see Twin Master Fund, Ltd. v. Akorn, Inc.*, No. 19-cv-3648 (MFK) (N.D. Ill.) ("*Twin Funds* Action"); *Manikay Master Fund, LP v. Akorn, Inc.*, No. 19-cv-04651 (MFK) (N.D. Ill.) ("*Manikay Funds* Action")[10]—and, at a July 30, 2019 telephonic status conference in this Action, announced to

[9] The nineteen entities, which can be grouped into seven sets of affiliated funds (each group advised by one investment manager), are identified in Exhibit A to the Segura Suppl. Decl., filed herewith, and in Exhibit 1 to the [Proposed] Order of Final Approval and Final Judgment submitted contemporaneously herewith pursuant to the Court's procedures.

[10] The Opt-Out plaintiffs in the *Twin Funds* and *Manikay* actions filed their complaints prior to the Settlement. The cases were reassigned to Judge Kennelly as related, but Judge Kennelly terminated the association between this class case and those cases on September 11, 2019, following his order preliminarily approving the Settlement. (*See Twin Funds* Action, C.A. No. 19-cv-3648, ECF No. 26; *Manikay Funds* Action, C.A. No. 19-cv-4651, ECF No. 27.) Those cases remain pending before Judge Kennelly on Defendants' motions to dismiss both complaints.

Judge Kennelly that they would request exclusion from ***any*** settlement, regardless of the terms. While these entities may believe they are well positioned to endure the delay and risks attendant to protracted litigation against a defendant in Akorn's precarious financial condition, that is no reason to deny the benefits of the Settlement to the remaining members of the Settlement Class. It is precisely the avoidance of that delay and risk which makes the Settlement highly attractive to long-term institutional investors and especially to individuals.

In any case, the low number of exclusion requests supports final approval of the Settlement. *See, e.g., Sears*, 2016 WL 772785, at *11 (describing as "minuscule" opposition to the settlement that included 59 opt-outs from 542,000 potential class members noticed).

CONCLUSION

For the reasons set forth above and in Lead Plaintiffs' prior submissions (ECF Nos. 146-148), Lead Plaintiffs and Lead Counsel respectfully request that the Court grant 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.

Dated: December 10, 2019

Respectfully submitted,

/s/ Andrew J. Entwistle

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CERTIFICATE OF SERVICE

I certify that on December 10, 2019, the foregoing memorandum of law was filed with the 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
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