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 LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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Court–appointed Lead Plaintiffs and Class Representatives Gabelli & Co. Investment Advisors, Inc. and Gabelli Funds, LLC (collectively, "Lead Plaintiffs"), on behalf of themselves and the Settlement Class,[1] respectfully submit this Memorandum of Law in support of their motion ("Motion"), pursuant to Rule 23 of the Federal Rules of Civil Procedure, for final approval of the Settlement in this Action, and for approval of the proposed plan of allocation of the net proceeds of the Settlement (the "Plan of Allocation"). The Motion is unopposed by the Defendants.[2]

I. INTRODUCTION

Lead Plaintiffs have agreed to settle all claims asserted against Defendants in this Action in exchange for consideration to the Settlement Class valued at approximately $72.8 million to $155.4 million. The Settlement Consideration includes: (i) up to $30 million in cash;[3] (ii) approximately 8.7 million shares of Akorn common stock (valued at between $42.8 million and $65.4 million);[4] and (iii) Contingent Value Rights issued by Akorn (valued at up to $60 million). Lead Plaintiffs and Lead Counsel respectfully submit that the proposed Settlement represents a substantial and favorable recovery for the Settlement Class in light of Akorn's precarious financial condition.

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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).

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

[3] The Stipulation provides for a Cash Settlement Amount of $30 million, minus $2.5 million in Reimbursable Defense Costs that revert to the Settlement Class if unused.

[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 in the Merger Litigation (defined below) ($7.49 per share) at the high end.

The Honorable Matthew F. Kennelly granted preliminary approval of the Settlement on August 26, 2019 (the "Preliminary Approval Order") (ECF No. 132). The Court also certified the Settlement Class for settlement purposes and approved the process by which the Settlement Class would receive Notice of the Settlement and submit claims, objections, or requests for exclusion.

As detailed below and in the accompanying Declaration of Andrew J. Entwistle,[5] the Settlement is fair, reasonable, and adequate, and readily meets the standards for final approval under Federal Rule of Civil Procedure 23(e)(2) and Seventh Circuit criteria:

- **Lead Plaintiffs and Plaintiffs' Counsel have adequately represented the Settlement Class**. Lead Plaintiffs have actively participated in, consulted with and/or directed Plaintiffs' Counsel at every stage of the Action. Plaintiffs' Counsel has in turn spent thousands of hours vigorously litigating the Action on behalf of the Settlement Class, including investigating the claims, drafting two detailed complaints, reviewing and analyzing voluminous document productions by Defendants, moving for class certification, and negotiating with Defendants' Counsel to structure this complex Settlement;

- **The Settlement was negotiated at arm's–length**. The Settlement is the result of three months of intensive arm's–length negotiations, including two in–person mediation sessions under the supervision of former United States District Judge Layn R. Phillips, a nationally–recognized expert in mediating large class action settlements. These extensive arm's length negotiations between the well–informed parties demonstrates that the Settlement was not the product of fraud or collusion;

- **The relief provided for the Settlement Class is adequate**, taking into account:

  (i) *The costs, risks and delay of trial and appeal*. Defendants vigorously contested certain elements of Lead Plaintiffs' claims. Responding to these challenges would require costly and time–consuming proceedings with no guarantee of a favorable outcome. Indeed, while Lead Plaintiffs believe they would ultimately prevail at trial, there is a material risk that an adverse ruling could reduce or eliminate any recovery. This risk is particularly acute given Akorn's limited insurance coverage and

[5] Lead Plaintiffs respectfully refer the Court to the 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 filed herewith (the "Entwistle Declaration"). The Entwistle Declaration contains a detailed description of, among other things, the nature of the claims asserted, the procedural history of the Action, the risks of continued litigation, negotiations leading to the Settlement, and the terms of the Plan of Allocation. Citations herein to "¶ __" refer to paragraphs in the Entwistle Declaration, and all exhibits referenced herein are attached to the Entwistle Declaration.

precarious financial condition. Thus, the Settlement represents a sizeable and immediate recovery when measured against the strength and risks of Lead Plaintiffs' case;

(ii) *The proposed method of Settlement distribution is effective*. The Court–approved claims administrator will distribute the Settlement proceeds to Settlement Class Members who submit eligible claim forms, and will be based on a Plan of Allocation that treats all Settlement Class Members equitably;

(iii) *The requested attorneys' fees are reasonable*. Lead Counsel respectfully requests attorneys' fees equal to 25% of each component of the Settlement (*i.e.*, 25% of the cash component, the Akorn stock component, and the Contingent Value Rights). This amount is entirely consistent with attorneys' fees awarded by courts in this Circuit for comparable class action settlements;

(iv) *The Settlement agreements are fair and reasonable*. Each of the agreements associated with the Settlement are fair, reasonable and appropriate. The carefully negotiated Stipulation details the parties' rights and obligations under the Settlement. The CVR Agreement is necessary to govern the operation of the CVRs awarded under the Settlement. The parties' confidential Supplemental Agreement governs exclusion requests and is a standard provision in class action settlements.

- **The Settlement treats Settlement Class Members equitably**. The Plan of Allocation treats each Settlement Class Member equally by providing a *pro rata* distribution of Settlement proceeds based on a universally applied formula. The Plan does not improperly give preferential treatment to any Settlement Class Member.

- **There is no opposition to the Settlement**. Lead Counsel and Lead Plaintiffs fully support final approval of the Settlement. To date, no Settlement Class Member has objected to the Settlement or Plan of Allocation. This overwhelmingly positive reaction by Settlement Class Members further supports final approval.

- **The stage of the proceedings favors final approval**. The Settlement was reached only after the parties had significantly advanced the case through fact discovery and clearly understood the strengths and weaknesses of their claims and defenses.

For these reasons and the others set forth below, Lead Plaintiffs submit that the Settlement and Plan of Allocation are fair, reasonable, and adequate and meet all the criteria for final approval.

II. BACKGROUND OF THE LITIGATION AND SETTLEMENT

A. Relevant Procedural And Factual History

The Action was commenced on March 8, 2018, by the filing of the initial Class Action Complaint in this Court. (ECF No. 1). On May 31, 2018, the Court appointed Gabelli & Co. Investment Advisors, Inc. and Gabelli Funds, LLC (the "Gabelli Funds") as Lead Plaintiffs, and appointed the law firms of Entwistle & Cappucci LLP ("E&C") as Lead Counsel for the Settlement Class and Bernstein Litowitz Berger & Grossmann LLP ("BLBG") as Liaison Counsel. (ECF No. 37).

On April 22, 2019, Lead Plaintiffs filed the Second Amended Complaint (ECF No. 101) which alleges claims under (i) Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Defendants; and (ii) Section 20(a) of the Exchange Act against the Individual Defendants. The Second Amended Complaint alleges Defendants' made material misrepresentations and omissions during the Class Period concerning Akorn's data integrity compliance and product pipeline approvals. Specifically, Defendants allegedly misrepresented that Akorn was in compliance with strict FDA data integrity and manufacturing regulations and, consequently, valuable drugs in the Company's product pipeline would soon obtain FDA approval. Lead Plaintiffs allege Defendants deliberately misrepresented and omitted these materials facts in Akorn's Class Period SEC filings and investor calls in order to prop up its stock price and sell the Company to German pharmaceutical giant Fresenius Kabi AG ("Fresenius").

Akorn and Fresenius executed an Agreement and Plan of Merger in April 2017 (the "Merger Agreement"), under which Akorn would be acquired for $34.00 per share (the "Merger"). Lead Plaintiffs allege that Akorn continued to misrepresent its purported compliance with FDA data integrity requirements in the Merger Agreement and after the Merger was announced. Akorn's undisclosed data integrity issues allegedly undermined the Company's financial position

and future product pipeline. Lead Plaintiffs allege the truth regarding Akorn's data integrity and quality–control violations was revealed in a series of partial corrective disclosures that caused a significant decline in Akorn's stock price and the failure of the Merger. In total, the revelation of Akorn's systemic data integrity problems caused Akorn's share price to drop nearly 90% from February 25, 2018 (the day prior to the first corrective disclosure) to $3.48 per share on January 9, 2019 (the day of the last corrective disclosure).

B. Akorn's Precarious Financial Condition

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). Akorn further announced it faces "conditions in the aggregate [that] raise substantial doubt about the Company's ability to continue as a going concern within one year after" its recent financial statements were issued. Although Akorn has implemented a "turnaround plan" to make the Company profitable, several major obstacles remain, including:

- The continuing costs of remediating its FDA compliance issues, which the Delaware Chancery Court found to be significant in the Akorn–Fresenius litigation (the "Merger Litigation");
- A merger–related counterclaim by Fresenius filed in the Delaware Chancery Court for more than $100 million in damages;
- Akorn's need to refinance or renegotiate more than $840 million in debt before mid–December 2019; and
- The ongoing bankruptcy risk stemming from the Fresenius suit, the debt renegotiation, and this and related litigation.

The terms of Akorn's debt also severely restrict its ability to use cash on hand and other assets to fund the Settlement or to pay a judgment in the Action.

C. The Settlement Negotiations

On May 3, 2019, Plaintiffs' Counsel and Defendants' Counsel participated in an in–person mediation session with former United States District Judge Layn R. Phillips to explore a negotiated settlement. The Parties exchanged two rounds of detailed confidential mediation statements in advance of the mediation. Akorn and its restructuring and financial advisors also made various presentations at the mediation concerning its ability to pay and related issues. Although no settlement was reached at this mediation or a follow–up in–person mediation session on May 21, 2019, counsel continued to negotiate with the assistance of Judge Phillips. During the ongoing settlement negotiations, on July 5, 2019, Lead Plaintiffs moved for class certification under Fed. R. Civ. P. 23(a) and 23(b)(3) and pursuant to the Court's scheduling order. (ECF Nos. 113–116).

Lead Plaintiffs ultimately agreed to settle the Action on August 9, 2019. In reaching the Settlement, Lead Plaintiffs carefully considered Akorn's current financial condition, the risk that Lead Plaintiffs might fail to prove one or more elements of their case at trial, and the significant risk that Akorn would not be able to satisfy even a modest judgment given its bankruptcy risk.

D. The Settlement

The Settlement Class will receive cash, common stock and Contingent Value Rights under the Settlement as follows:

1. **Cash:** Up to $30.0 million upon final approval, consisting of 100% of the proceeds from Defendants' primary and excess director and officer 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, no later than ten (10) business days after the date on which the Order and Final Judgment becomes final, 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.[6]

3. **Contingent Value Rights ("CVRs"):** CVRs issued by Akorn entitling 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.

- **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 in 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.

These different Settlement components provide a substantial and immediate cash recovery for the Settlement Class, while ensuring additional recovery should Akorn successfully execute its turnaround plan or seek bankruptcy protection.

ARGUMENT

III. THE SETTLEMENT MEETS THE STANDARDS FOR FINAL APPROVAL UNDER RULE 23(e)

A class action settlement should be approved if the court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). A "presumption of fairness, adequacy, and reasonableness may attach to a class action settlement reached in arm's–length negotiations between experienced, capable counsel after meaningful discovery." *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07 CV 2898, 2012 WL 651727, at *10 (N.D. Ill. Feb. 28, 2012) (citation and internal quotation

[6] As stated in Footnote 4, this represents a range of $4.90 per share (the closing price on the date of this filing) to $7.49 per share (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).

marks omitted). The Seventh Circuit favors the resolution of class actions through settlement and will grant final approval if the settlement is fair, reasonable, and adequate when viewed in its entirety. *See Isby v. Bayh*, 75 F.3d 1191, 1196–1199 (7th Cir. 1996) ("[f]ederal courts naturally favor the settlement of class action litigation"; noting courts "do not focus on individual components of the settlements but rather view them in their entirety in evaluating their fairness.") (citation omitted).

Rule 23(e)(2) specifies that the Court should determine whether a proposed settlement is "fair, reasonable, and adequate after considering whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class–member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other."

Fed. R. Civ. P. 23(e)(2) (as amended on December 1, 2018).[7]

Consistent with this test, the Seventh Circuit has also identified the following factors that a court may consider in evaluating the fairness of a class action settlement: (1) the strength of the

[7] The December 1, 2018 amendments to Rule 23(e)(2) are not intended to "displace any factor" used by the Circuit Courts to assess final settlement approval, but rather to focus on core concerns to guide the approval decision. *See* Fed. R. Civ. P. 23 (2018 Advisory Committee Notes). The factors in amended Rule 23(e)(2) overlap with the factors used by the Seventh Circuit to assess final settlement approval and are each addressed in the sections below.

plaintiff's case on the merits measured against the terms of the settlement; (2) the complexity, length, and expense of continued litigation; (3) the amount of opposition to the settlement among affected parties; (4) the opinion of competent counsel; and (5) the stage of the proceedings and the amount of discovery completed. *See Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863 (7th Cir. 2014); *see also Isby*, 75 F.3d at 1199.

As detailed below, the Settlement easily satisfies each factor in the final approval test and meets the favored public policy goal of resolving securities class action claims.

A. Lead Plaintiffs And Plaintiffs' Counsel Adequately Represented The Class

Rule 23(e)(2)(A) is satisfied because Lead Plaintiffs and Plaintiffs' Counsel have adequately represented the Settlement Class. Lead Plaintiffs have litigated the Action vigorously on behalf of the Settlement Class since inception. Among other things, they consulted with Lead Counsel on litigation strategy and case developments, collected extensive internal documents in response to Defendants' discovery requests, and made representatives available to Lead Counsel for critical fact gathering in support of the alleged claims. *See* Entwistle Decl., Ex 5 (Goldman Decl.). Lead Plaintiffs also have claims that are typical of other Settlement Class Members and have no conflicts of interest with other Settlement Class members. For these reasons, Judge Kennelly found them to be "adequate class representatives" in preliminarily approving the Settlement. (ECF No. 132, at 3–4).

Likewise, Plaintiffs' Counsel have vigorously represented the Class throughout the litigation. Among other things, Plaintiffs' Counsel: (i) conducted a comprehensive factual investigation of the claims at issue in the Action, including interviews with dozens of confidential witnesses and former Akorn personnel; (ii) prepared detailed amended complaints based on their factual investigation; (iii) briefed and argued a motion to lift the PSLRA discovery stay; (iv) engaged in extensive factual discovery, including the review and analysis of over 3.75 million

documents produced by Defendants and third parties using targeted searches; (v) reviewed and analyzed the extensive record from the Merger Litigation, which included over 1,500 joint trial exhibits and dozens of deposition transcripts; (vi) reviewed and prepared for production over 89,000 pages of documents from Lead Plaintiffs' internal files; (vii) prepared a comprehensive submission in support of class certification; (viii) consulted with experts on issues pertaining to class–wide damages, loss causation, and Akorn's solvency; and (ix) engaged in protracted arm's–length settlement negotiations with counsel for Defendants. ¶¶ 15–62, 105.

Given these extensive efforts, both Lead Plaintiffs and Plaintiffs' Counsel were acutely aware of the strengths and weaknesses of the case, and the inherent risk of continued litigation. *See infra* Section I.C. Additionally, Lead Plaintiffs are both sophisticated institutional investors and were actively involved in settlement negotiations, including participation in both mediation sessions before Judge Phillips (Ret.). *See* Entwistle Decl., Ex 5 (Goldman Decl.) at ¶¶ 7–9. Lead Plaintiffs and Plaintiffs' Counsel easily meet the adequacy test of Rule 23(e)(2)(A) given their coordinated efforts to obtain the largest possible recovery for the Settlement Class. *See Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12–0660–DRH, 2018 WL 6606079, at *3 (S.D. Ill. Dec. 16, 2018) (settlement approval favored where Lead Plaintiffs invested significant time and resources to case and counsel had extensive experience litigating similar actions).

B. The Settlement Was Negotiated At Arm's–Length And There Was No Fraud Or Collusion

The Settlement is not the result of fraud or collusion. Lead Plaintiffs and Lead Counsel reached the Settlement only after considering their significant factual and legal investigation of the claims, the extensive discovery produced by Defendants, and their consultation with experts concerning the risk of Akorn's insolvency and limited ability to pay. Accordingly, Lead Counsel was well versed on the strengths and weaknesses of Lead Plaintiffs' claims and the potential

defenses thereto. ¶¶ 65–81. In recommending the Settlement, Lead Counsel also drew on its extensive experience litigating and settling securities class actions, including against companies in bankruptcy or in a work–out setting.

The Settlement was also reached only after extensive arm's–length negotiations by experienced counsel with the assistance of Judge Phillips (Ret.), a well–respected mediator of complex class actions. *See* Entwistle Decl., Ex. 1 (Phillips Declaration). The parties engaged in two formal in–person mediation sessions with Judge Phillips on May 3, 2019 and May 21, 2019, which included the exchange of detailed mediation statements. Following the mediation sessions, the parties continued to negotiate with the assistance of Judge Phillips over the next three months. ¶¶ 59–60.

These extensive arm's–length negotiations between experienced and well–informed parties demonstrate that the Settlement is procedurally fair and not the product of fraud or collusion. *See*, *e.g.*, *In re Groupon, Inc. Sec. Litig.*, No. 12 CV 2450 (CRN), 2016 WL 3896839, at *3 (N.D. Ill. July 13, 2016) (finding no fraud or collusion in negotiated settlement of securities class action); *Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001) ("a settlement proposal arrived at after arms–length negotiations by fully informed, experienced and competent counsel may be properly presumed to be fair and adequate") (citation omitted). The Settlement plainly satisfies the requirements of Rule 23(e)(2)(B).

C. The Settlement Is Fair, Reasonable And Adequate Given The Costs, Risks, And Delay Of Trial And Appeal

The Settlement is fair, reasonable, and adequate when measured against the costs, risks, and delay of further litigation. Continued litigation of the Action would involve complex and costly trial and post–trial proceedings that would delay ultimate resolution of the claims without any guarantee of recovery for the Settlement Class. Should the Action continue, the parties would

need to engage in additional fact and expert discovery, summary judgment motion practice, pre–trial preparation, and post–trial appeals.

Specifically, Lead Plaintiffs intended to take numerous fact depositions of current and former Akorn employees and board members who had not been deposed in the Merger Litigation. Lead Plaintiffs would have also needed to depose certain Defendants and third parties previously deposed in the Merger Litigation to address factual issues, such as the alleged misstatements and scienter, that are specific to the claims in this Action. Additionally, the parties would have been required to conduct extensive class certification discovery, including the depositions of Lead Plaintiffs' representatives, and proffered experts on complex certification issues. Extensive expert discovery on issues such as FDA data integrity compliance and the calculation of class–wide damages was also anticipated. This would have included the preparation of detailed expert reports and numerous expert witness depositions on these complex issues.

Lead Plaintiffs also planned to file detailed summary judgment motions seeking dispositive pre–trial rulings on the asserted claims. Defendants would have also undoubtedly moved for summary judgment to narrow or dismiss the claims before trial, and opposing such a motion would be a costly and uncertain endeavor. At any trial of the Action, the parties would likely face motions *in limine* to exclude certain expert testimony and documentary evidence, the outcome of which also could have a significant impact on the jury's consideration of liability and damages. Numerous post–trial issues would have likely been the subject of appeals by the parties, which could further delay and potentially eliminate any recovery for the Settlement Class.

Courts have consistently acknowledged that this prolonged and costly nature of complex class actions weighs in favor of negotiated settlements. *See, e.g.*, *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 961 (N.D. Ill. 2011) ("Were the Class Members

required to await the outcome of a trial and inevitable appeal . . . they would not receive benefits for many years, if indeed they received them at all"); *In re Harnischfeger Indus., Inc., Sec. Litig.*, 212 F.R.D. 400, 409 (E.D. Wis. 2002) (approving settlement and noting that "[s]hareholder class actions are difficult and unpredictable, and skepticism about optimistic forecasts of recovery is warranted"); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *2 (N.D. Ill. Dec. 10, 2001) (approval of settlements favored because "securities fraud litigation is long, complex and uncertain").

Lead Plaintiffs further recognize that, despite substantial evidence supporting their claims, there were also significant risks in establishing liability and damages at trial. Defendants contested every element of the claims asserted against them under Sections 10(b) and 20(a) of the Exchange Act. For example, Defendants disputed the falsity and materiality of the alleged misstatements and omissions during the Class Period. ¶¶ 66–76.[8] Defendants also asserted that they did not act with the requisite scienter in making the alleged misstatements, and that investor losses were not caused by the disclosure of facts correcting their alleged misrepresentations. *Id.* Although Lead Plaintiffs had evidence supporting these core elements of the claims, they nonetheless faced a risk that the Court or jury would find that they had not met their burden at summary judgment or trial.

In contrast to these tangible litigation risks, the Settlement provides for an immediate recovery of cash and Akorn stock, as well as potential future recovery through additional Settlement Shares and Settlement CVRs. This recovery will be attained without exposing the Settlement Class to the risk, expense and delay of continued litigation. The Settlement was also

[8] Defendants detailed these same defenses in their recently filed motions to dismiss in two actions asserting substantially similar claims as here. *See* Motion to Dismiss, *Twin Master Fund, Ltd. v. Akorn, Inc.*, No. 19–cv–3648 (MFK) (N.D. Ill.), ECF No. 27–1; *Manikay Master Fund, LP v. Akorn, Inc.*, No. 19–cv–04651 (MFK) (N.D. Ill.), ECF No. 29–1. Given the similarity in claims, Lead Plaintiffs and the Settlement Class would undoubtedly face these same vigorous legal challenges at the summary judgment and trial phases of the Action.

carefully structured to give Akorn the ability to negotiate with its creditors to mitigate the risk of pushing the Company into bankruptcy. Moreover, Lead Counsel, Lead Plaintiffs and their experts received various presentations from Akorn's financial and restructuring advisors during the mediation process to fully assess Akorn's financial condition, ability to pay and turnaround strategy. ¶¶ 57–58. Lead Plaintiffs therefore reached the Settlement with an acute understanding of Akorn's liquidity and the possibility of limited or no recovery should the case proceed through summary judgment and trial. ¶¶ 77–79. Further, additional litigation in the matter would likely exhaust most, if not all, of the Applicable Insurance Policies that are being used to fund the cash component of the Settlement Consideration. ¶ 80.

The value of the recovery represents approximately 5.2% to 11.1% of the highest potential class–wide damages estimated by Lead Plaintiffs' damages consultant (assuming loss causation on all alleged corrective disclosures can be established). *See* Entwistle Decl., Ex. 4 (Arnold Decl. ¶ 29). Accordingly, the Settlement is well within the range of reasonableness for class action resolution. *See, e.g.*, *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583–84 (N.D. Ill. 2011) (approving settlement representing 10% of estimated class damages, and noting courts have approved class settlements below this percentage); *Goldsmith v. Tech. Solutions Co.*, No. 92 C 4374, 1995 WL 17009594, at *5 (N.D. Ill. Oct. 10, 1995) (approving settlement of securities class action representing 6.1% of estimated class damages). This is especially so when weighed against the strength of Plaintiffs' claims in further litigation and Akorn's unstable financial condition, including their limited liquidity and insurance policies available to fund a settlement. *See, e.g.*, *In re Northfield Labs., Inc. Sec. Litig.*, No. 06 C 1493, 2012 WL 2458445, at *3 (N.D. Ill. June 26, 2012) (finding settlement fair given that class recovery was limited to defendant's insurance policy amounts); *CE Design Ltd. v. King Supply Co., LLC*, No. 09 C 2057, 2012 WL 2976909, at *3

(N.D. Ill. July 20, 2012), *aff'd* 791 F.3d 722 (7th Cir. 2015) (approving settlement as fair and reasonable where defendant's ability to pay was extremely limited).

Accordingly, the Settlement provides meaningful and immediate relief to the Settlement Class and avoids the significant risks of protracted litigation. This factor clearly weighs in favor of final Settlement approval. *See* Fed. R. Civ. P. 23(e)(2)(C)(i); *see also Schulte*, 804 F. Supp. 2d at 583 ("a dollar today is worth a great deal more than a dollar ten years from now").

D. The Proposed Method Of Distributing Settlement Proceeds Is Effective

The proposed method of distributing the Net Settlement Fund to Settlement Class Members is effective and further supports final approval. *See* Fed. R. Civ. P. 23(e)(2)(ii). The proceeds of the Settlement will be distributed to Settlement Class Members who submit eligible Claim Forms with the required documentation to the Court–approved claims administrator, JND Legal Administration ("JND"). JND will review and process all claims received, provide claimants with an opportunity to cure any deficiency or request Court review of claim denials, and will ultimately mail or wire claimants their *pro rata* share of the Net Settlement Fund as calculated under the proposed Plan of Allocation. This type of claims processing is standard in securities class actions and is an effective method for distributing settlement proceeds. *See, e.g.*, *Groupon*, 2016 WL 3896839, at *3 (approving plan of allocation providing for *pro rata* distribution of settlement proceeds based on claimants' recognized loss); *Harnischfeger*, 212 F.R.D. at 410 (same).

E. The Requested Attorneys' Fees And Expenses Are Fair And Reasonable

The requested attorneys' fees are fair and reasonable and also support final Settlement approval. *See* Rule 23(e)(2)(iii). A Memorandum of Law in Support of the Award of Attorneys' Fees and Reimbursement of Litigation Expenses has been filed concurrently herewith (the "Attorneys' Fee Memorandum"). As detailed therein, Lead Counsel is seeking an attorneys' fee award of 25% of each individual element of the Settlement Fund (*i.e.*, the cash, the Settlement

Shares, and CVRs). This amount is entirely consistent with, if not less than, attorneys' fee percentages approved by courts in this Circuit for complex class actions with comparable recoveries. *See, e.g.*, *Groupon*, 2016 WL 3896839, at *4 (awarding 30% of $45 million settlement fund); *City of Lakeland Emps.' Pension Plan v. Baxter Int'l Inc. ("Baxter")*, No. 1:10–cv–06016 (JJT), 2016 WL 10571629, at *1 (N.D. Ill. Jan. 22, 2016) (awarding 26% of $42.5 million settlement fund); *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 842 (N.D. Ill. 2015) (awarding one–third of $46 million common settlement fund); *City of Sterling Heights Gen. Emps.' Ret. Sys. v. Hospira, Inc.*, No. 1:11–cv–08332–AJS, 2014 WL 12767763 (N.D. Ill. Aug. 5, 2014) (awarding 30% of $60 million settlement fund).

The Attorneys' Fee Motion also includes a request for reimbursement of $1,040,077.52 in litigation expenses. These expenses are the typical costs and expenses incurred by counsel in litigating this type of matter, and are in line with approved expenses in comparable class actions adjudicated in this Circuit. *See, e.g.*, *Groupon*, 2016 WL 3896839, at *4 (awarding $1.04 million in aggregate litigation expenses); *Baxter*, 2016 WL 10571629, at *1 (awarding $1.13 million in litigation expenses).

The proposed timing of the requested attorneys' fees and expenses also supports final approval of the Settlement. Pursuant to the terms of the Stipulation, and as is standard in securities class actions, attorneys' fees and expenses will be paid only upon such award being granted by the Court, and shall be reimbursed to the Settlement Fund if the award is reduced or reversed in any subsequent legal proceedings. (*See* ECF No. 127–1 at Section V.A).

F. The Parties' Settlement Agreements Are Fair, Reasonable, And Adequate

Rule 23(e)(2)(C)(iv) asks the Court to consider any agreements made by the Parties in connection with the Settlement. Here, the agreements are the: (i) Stipulation, (ii) CVR Agreement, and (iii) Supplemental Agreement. The Stipulation has been filed with the Court and it details the

Settlement Consideration, each of the parties' respective rights and obligations under the Settlement, and the mutual release of claims by the parties, among other things. (ECF No. 127–1). As noted above, the Stipulation was executed by the parties after extensive arm's–length negotiations and it accurately memorializes the terms under which the parties' agreed to resolve the Action. The CVR Agreement filed with the Court details the operation of the CVRs and protects Settlement Class Members as CVR holders under the Settlement. (ECF No. 127–7). Namely, the Agreement ensures that Settlement Class Members will receive additional compensation should Akorn's profitability improve in the future, or should the Company be forced to seek bankruptcy protection.

The parties' confidential Supplemental Agreement also does not affect the fairness of the Settlement. This Supplemental Agreement merely allows Defendants to terminate the Settlement if a defined threshold of Settlement Class Members request exclusion from the Settlement Class. This type of agreement is a standard provision in class actions and has no negative impact on the fairness of the Settlement. *See, e.g.*, *Am. Int'l Grp*, 2012 WL 651727, at *1 (approving class action settlement agreement that permitted settlement termination in the event of exclusion requests by a certain portion of the class).

G. The Settlement Treats Settlement Class Members Equitably

The proposed Settlement treats members of the Settlement Class equitably relative to one another. *See* Rule 23(e)(2)(D). There is no preferential treatment for any members of the Settlement Class. Lead Plaintiffs and the other Settlement Class Members will receive recoveries based on the same formula as detailed in the Plan of Allocation. As discussed below in Section II, the Net Settlement Fund will be distributed among Settlement Class Members in accordance with the Plan of Allocation, which provides a fair and equitable method of allocation to Settlement

Class Members. Thus, the Plan of Allocation ensures that all Settlement Class Members will be treated equally based on their respective losses on Akorn common stock caused by the alleged wrongdoing. *See infra* Section II.

H. Lead Counsel, Lead Plaintiffs And Settlement Class Members Support Final Approval

Lead Counsel, Lead Plaintiffs, and Settlement Class Members support final approval of the Settlement. Lead Counsel has conducted a thorough fact–finding investigation into the claims against the Defendants and has a firm understanding of the strengths and risks attendant to these claims. Entwistle Decl. ¶¶ 65–81. Based on this understanding, as well as Lead Counsel's substantial experience litigating complex securities class actions such as this one, Lead Counsel and Lead Plaintiffs have concluded that the Settlement is fair, reasonable and adequate to the Settlement Class. Courts place great weight on the endorsement of counsel when assessing final settlement approval. *See, e.g.*, *Isby*, 75 F.3d at 1200 ("the district court was entitled to give consideration to the opinion of competent counsel that the settlement was fair, reasonable, and adequate"); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 495 (N.D. Ill. 2015) (finding class counsel's strong support of settlement weighed in favor of final approval). Lead Plaintiffs also strongly endorse the Settlement. Both are sophisticated institutional investors that have supervised and monitored the work of Lead Counsel throughout the Action, and were involved in the mediation and settlement negotiations with Defendants. *See* Entwistle Decl., Ex 5 (Goldman Decl.).

Additionally, the positive response of Settlement Class Members to date further supports final approval of the Settlement. JND, as the Court–appointed Claims Administrator, has disseminated 47,780 copies of the Notice to potential Settlement Class Members and nominees. *See* Entwistle Decl., Ex. 2 (Segura Decl. ¶ 9). The Notice describes the essential terms of the

Settlement, and informs Settlement Class Members of their right to opt–out of the Settlement Class or object to any aspect of the Settlement. As set forth in the Notice, the deadline for Settlement Class Members to submit objections to the Settlement or request exclusion from the Settlement Class is November 12, 2019. While this deadline has not yet passed, to date, no objections to the Settlement or Plan of Allocation have been received. *Id.* at Ex. 2 (Segura Decl. ¶ 13).[9]

This absence of any objections strongly weighs in favor of final approval. *See, e.g.*, *Northfield*, 2012 WL 2458445, at *3 (finding absence of objections supported final settlement approval); *Mangone*, 206 F.R.D. at 226–27 (noting court may approve settlement over objections by some or even many class members); *cf. Isby*, 75 F.3d at 1200 (approving settlement despite fact that "thirteen per cent [sic] of the class submitted written objections in response to the notice of settlement").

I. The Stage Of The Proceedings And Amount Of Discovery Completed Favor Final Approval

The stage of the proceedings and significant discovery completed in the Action also weigh in favor of final approval. When the action settled, Defendants had, among other things, answered the Amended Complaint, fact discovery was three months from completion, and Lead Plaintiffs moved for class certification. In addition, Lead Counsel had engaged experts on the issues of materiality and class–wide damages. Moreover, the parties exchanged two rounds of detailed mediation statements outlining their arguments on significant disputed issues.

Substantial discovery had also been completed when the Settlement was reached. This

[9] Under the schedule set by the Court, Lead Plaintiffs will file reply papers in further support of final approval on November 26, 2019, by which time all timely objections and requests for exclusion will have been received and can be addressed by Lead Counsel.

included, among other things, the (i) exchange of initial disclosures and letters concerning discovery issues; (ii) review and analysis of over 3.75 million documents produced by Defendants and third parties using targeted searches; (iii) review and analysis of the voluminous record in the Merger Litigation; (iv) collection and review of over 89,000 document pages from Lead Plaintiffs' internal files in preparation for production; and (v) consultation with experts on both merits and class certification issues. As a result of the findings from these extensive discovery efforts, Lead Plaintiffs were evaluating an affirmative partial summary judgment motion on the falsity and materiality of Defendants' alleged misrepresentations.

Accordingly, Lead Plaintiffs and Lead Counsel agreed on the Settlement at a point when they had a clear understanding of the strengths and weaknesses of the claims and defenses in the Action. Both the stage of the proceedings and the discovery completed allowed Lead Plaintiffs and Lead Counsel to fully evaluate the claims and agree on a Settlement that is fair, reasonable, and adequate for the Settlement Class. *See, e.g.*, *Wong*, 773 F.3d at 864 (affirming final settlement approval despite the absence of any formal discovery); *AT&T*, 789 F. Supp. 2d at 966–67 (same).

IV. THE COURT SHOULD AFFIRM AND FINALIZE ITS CERTIFICATION OF THE SETTLEMENT CLASS

Judge Kennelly preliminarily certified the Settlement Class in the Preliminary Approval Order. (ECF No. 132). Lead Plaintiffs respectfully submit that nothing has changed to alter the validity of the Court's preliminary certification of the Settlement Class under Fed. R. Civ. P. 23. Accordingly, for all of the reasons stated in Lead Plaintiffs' Memorandum of Law in Support of Preliminary Approval (ECF No. 126) and Motion for Class Certification (ECF Nos. 113–116), incorporated herein by reference, Lead Plaintiffs now request that the Court affirm the Preliminary Approval Order and finally certify the Settlement Class for purposes of effectuating the Settlement.

Lead Plaintiffs further request that the Court affirm the certification of the Gabelli Funds as Class Representatives, and the appointment of E&C as Class Counsel and BLBG as Liaison Counsel.

V. THE PLAN OF ALLOCATION SHOULD BE FINALLY APPROVED

The Plan of Allocation should also be granted final approval because it provides a fair and reasonable method to allocate the Net Settlement Fund and does not improperly give preferential treatment to Lead Plaintiffs or any other Settlement Class Member. *See, e.g.*, *Harnischfeger*, 212 F.R.D. at 410 ("[a] plan of allocation of settlement proceeds in a class action must also be fair and reasonable"). All Settlement Class Members with valid claims for the Net Settlement Fund, including Lead Plaintiffs, will receive a *pro rata* allocation pursuant to the uniformly applied Plan.

The Plan of Allocation was formulated by Lead Counsel in consultation with Dr. David Tabak, a highly–regarded damages expert who has been credited by numerous courts at the class certification and final settlement approval stages of securities class actions. *See* Entwistle Decl., at Ex. 3 (Tabak Decl.). The Plan accounts for the estimated amount of artificial inflation in the price of Akorn common stock over the course of the Class Period that was allegedly caused by Defendants' misconduct. It also apportions the Net Settlement Fund among Settlement Class Members based on when they purchased, acquired, and/or sold their Akorn common stock, and was created without consideration of Lead Plaintiffs' individual transactions. This method ensures that Settlement Class Members' recoveries are based upon the relative losses they sustained from the alleged fraud, and eligible Settlement Class Members will receive a *pro rata* distribution from the Net Settlement Fund calculated in the same manner. This will include a *pro rata* distribution

of the cash funds, Class Settlement Shares,[10] and CVRs which collectively comprise the Settlement Consideration.[11]

Thus, the Plan of Allocation fairly accounts for each respective Settlement Class Members' purchases and sales of Akorn stock, and only provides recovery for those who can establish loss causation. *See, e.g.*, *Wong*, 773 F.3d at 864–65 (approving plan of allocation that accounted for stock transaction dates and corrective disclosures); *Groupon*, 2016 WL 3896839, at *3 (approving plan of allocation that compensated class members based on timing and price of class period stock purchases). Although the methodologies used in the Plan of Allocation may result in different per–share recoveries for each Authorized Claimant due to the amount and timing of each claimant's purchases, the methodologies will be uniformly applied to all Settlement Class Members. No Settlement Class Member will receive preferential treatment when the Settlement is distributed. The Net Settlement Fund will be distributed to Authorized Claimants on a *pro rata* basis until the Fund is depleted or it is no longer economically feasible to do so.

The Plan of Allocation is fully described in the Notice that was distributed to Settlement Class Members pursuant to the Preliminary Approval Order. (*See* ECF No. 127–3). To date, the Plan of Allocation has received no objections from any Settlement Class Members. *See* Entwistle Decl. at Ex. 2 (Segura Decl. ¶ 13). Accordingly, for the reasons set forth herein and in the Entwistle Declaration, Lead Plaintiffs submit that the Plan of Allocation is fair and reasonable and respectfully request that it be approved by the Court.

[10] As set forth in the Stipulation, at any time after the Effective Date, Lead Counsel shall have the option, in its sole discretion, to direct the Escrow Agent to sell all or any portion of the Class Settlement Shares and/or Settlement CVRs on behalf of the Settlement Class. (ECF No. 127–1 at ¶¶ 15(d) & 17(f)).

[11] As noted above, Court–approved attorneys' fees will be allocated among the three Settlement tranches proportionally. *See supra* Section I.E.

VI. NOTICE TO THE SETTLEMENT CLASS SATISFIED RULE 23

The Notice provided to Settlement Class Members satisfied the requirements of both Fed. R. Civ. P. 23(c)(2) and 23(e). Rule 23(e) requires that notice of the proposed settlement be given "in a reasonable manner to all class members who would be bound by the proposal." Rule 23(c)(2)(B) further requires certified classes to receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." In securities class actions, the content of the notice must contain the information outlined in Rule 23(c)(2)(B) and the PSLRA. *See* 15 U.S.C. § 78u–4(a)(7).

Both the content of the Court–approved Notice and the method of its distribution to Settlement Class Members satisfied these notice requirements. Consistent with Fed. R. Civ. P. 23(c)(2)(B), the Notice described: (i) the nature of the Action; (ii) the definition of the Settlement Class; (iii) the class claims, issues, and defenses; (iv) the process by which Settlement Class Members may enter an appearance through their own counsel; (v) how Settlement Class Members can exclude themselves from the Settlement Class; (vi) the binding effect of the Settlement approval proceedings; (vii) the proposed Plan of Allocation; and (viii) the reasons the Parties are proposing the Settlement. The Notice also supplied the date, time, and place of the Settlement Hearing, and the procedures for commenting on the Settlement and appearing at the hearing.

The Notice also satisfied the PSLRA requirements by including: (i) the amount of the Settlement proposed to be distributed to the parties to the Action, determined in the aggregate and on an average per–share basis; (ii) a statement from the parties concerning the issues on which the parties disagree; (iii) a statement indicating the maximum amount of attorneys' fees and expenses (both on an aggregate and per share basis) sought by Lead Counsel, and a brief explanation supporting the requested fees and expenses; (iv) the name, telephone number, and address of Lead Counsel who will be reasonably available to answer questions concerning any

matter contained in the Notice; (v) a brief statement explaining the reasons why the parties are proposing the Settlement; and (vi) such other information as may be required by the Court. *See* 15 U.S.C. § 78u–4(a)(7)(A)–(F).

The method of notice also fulfilled the requirements of due process because Lead Counsel and the Court–appointed Claims Administrator informed those Settlement Class Members who could be identified through reasonable efforts of all the information set forth above. Courts in this Circuit routinely find that comparable notice programs meet the requirements of due process, the PSLRA, and Rule 23. *See, e.g.*, *Groupon*, 2016 WL 3896839, at *2 (finding comparable notice in securities class action satisfied requirements of Rule 23, PSLRA, and due process); *Baxter*, 2016 WL 10571629, at *1 (securities class action settlement notice satisfied Rule 23 requirements).

Pursuant to the Preliminary Approval Order, the Court–appointed Claims Administrator, JND, began mailing copies of the Notice and Claim Form (the "Notice Packet") by first–class mail to Settlement Class Members and their nominees on September 23, 2019. *See* Entwistle Decl., Ex. 2 (Segura Decl. ¶¶ 3–9). As of October 25, 2019, the Claims Administrator had mailed a total of 47,480 copies of the Notice and Claim Form to potential Settlement Class Members and nominees. *Id*. ¶ 9. In addition, the Summary Notice was published in *Investor's Business Daily* and transmitted over the *PR Newswire*. *Id*. ¶ 10. The Claims Administrator has also made the Notice, Claim Form and other key documents for the Settlement available to the general public on a website dedicated to the Settlement (www.Akorn2019SecuritiesSettlement.com). *Id*. ¶ 12. Lead Counsel has also been informed that Defendants satisfied the required notice provisions under the Class Action Fairness Act of 2005, 28 U.S.C. § 1711 *et seq*.

This thorough approach of providing individual mailings to Settlement Class Members,

notice in widely circulated publications, and a dedicated website containing all relevant Settlement documents was undoubtedly the "best notice . . . practicable" for Settlement Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (specifying that appropriate notice may be by "United States mail, electronic means, or other appropriate means."); *see also Northfield*, 2012 WL 2458445, at *2 (notice adequate when it was mailed directly to class members, and published in *Investor's Business Daily* and *GlobeNewswire*).

The timing of the Notice is also adequate. Settlement Class Members have 50 days from the initial mailing of the Notice to decide if they want to request exclusion or object to the Settlement or Plan of Allocation. Courts have held that such amount of time, or less, constitutes sufficient notice. *See, e.g.*, *Fidel v. Farley*, 534 F.3d 508, 514–15 (6th Cir. 2008) (finding 46 days between notice mailing and objection/exclusion deadline was adequate).

In sum, the Notice complied with the Court's Preliminary Approval Order, as well as the requirements of Fed. R. Civ. P. 23, the PSLRA and due process.

CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court: (i) grant final approval of the Settlement; (ii) approve the Plan of Allocation for the Settlement; and (iii) grant such other relief as the Court deems just and proper.

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