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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In re Amicus Therapeutics, Inc. Securities Litigation	Civil Action No. 3:15-cv-7350-PGS-DEA *Consolidated with* 3:15-cv-7380 and 3:15-cv-7448 (per D.I. 40)

LEAD PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. Introduction

Lead Plaintiff is pleased to submit this memorandum in support of his motion for preliminary approval of the settlement of this shareholder class action for a cash payment of $3,750,000. Lead Plaintiff respectfully submits that the settlement is well within the range of fairness and warrants preliminary approval.

This securities class action alleges that defendants Amicus Therapeutics, Inc. ("Amicus" or the "Company"), and officers John Crowley and Jay Barth, made materially false and misleading statements to Amicus investors. Specifically, on September 15, 2015 Amicus publicly reported on a meeting it held with the United States Food and Drug Administration ("FDA") concerning its prospects and timing to file a new drug application ("NDA") for its new drug in development, galafold, which was to treat Fabry disease. Amicus disclosed, in part, that based on FDA meeting feedback, the Company was on track for filing its NDA by year-end 2015. Two weeks later, on October 2, 2015, Amicus indicated that based on what it claimed was additional FDA feedback, it would not be in position to file its NDA by year-end 2015 and Amicus' stock price plummeted by 54% on that day.

Two class action cases were filed alleging that Amicus defrauded its investors between September 15, 2015 and October 1, 2015 (the "Short Period"). During the sixty-day lead plaintiff notice period, however, an additional class action was filed charging that Amicus misled investors as far back as March 19,

2015 regarding the timing and prospects to file an NDA by year-end 2015 (the "Long Period").

Defendants' motion to dismiss Lead Plaintiff's Consolidated and Amended Class Action Complaint (the "Amended Complaint") was pending when the parties reached this settlement. Lead Plaintiff acknowledges that sustaining a claim for securities fraud for alleged misstatements in the Long Period would have been challenging. Whether the misstatements were actionable or merely forward-looking statements presented an uphill battle, along with questions of whether defendants acted with requisite degree of scienter when making those statements.

Lead Plaintiff, however, believed the statements made in the Short Period had merit. Nonetheless, Lead Plaintiff still faced the task of pleading that these statements were made with the requisite degree of scienter, a difficult task under the Private Securities Litigation Reform Act's ("PSLRA") high pleading bar. The estimated alleged damages for the September 15 through October 1, 2015 period were determined to be approximately $44 million. A settlement of almost 8.5% of alleged recoverable damages for the Short Period investors, before resolution of a risky motion to dismiss, we submit, is an excellent result. It guarantees payment to the class now without the attendant risk of dismissal, or continued litigation which could yield no payment at all.

The Settlement Agreement[1] provides for the payment of $3,750,000 for the benefit of the Class.[2] Lead Plaintiff therefore requests that the Court enter the proposed Order Preliminarily Approving Settlement and Authorizing Notice and Scheduling Settlement Hearing (the "Preliminary Approval Order"). Among other things, the Preliminary Approval Order (a) preliminarily approves the terms of the proposed settlement as set forth in the Settlement Agreement; (b) approves the form and method of providing notice of the proposed settlement to the Class; (c) preliminarily certifies an opt-out class action; (d) sets a hearing date for final approval of the settlement, plan of allocation, and Plaintiff's Counsel's application for attorneys' fees and expenses; and (e) appoints a claims administrator to administer the settlement process.

II. Procedural Background

On October 7, 2015, Lifestyle Investments, LLC filed a class action complaint in the United States District Court for the District of New Jersey (the "District Court" or "Court") against Amicus and its Chairman and Chief Executive, Mr. Crowley. *Lifestyle Investments, LLC v. Amicus Therapeutics, Inc., et al.*, No. 3:15-cv-07350 (D.N.J. Oct. 7, 2015). The complaint alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, as amended by the Private

[1] Capitalized terms not defined herein have the same meaning as set forth in the Stipulation of Settlement dated April 14, 2017 ("Settlement Agreement").
[2] As explained in the Notice accompanying the papers, the proposed Plan of Allocation allocates 95% of the Recognized Loss to Short Period purchases.

Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. §§ 78j(b), 78t(a), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (the "Exchange Act"), on behalf of a class of purchasers of the Company's common stock between September 15, 2015 and October 1, 2015 alleging that Defendants made materially false and misleading statements to Amicus investors concerning a meeting the Company held with the Food and Drug Administration about the approval pathway for the drug galafold.

On October 8, 2015, Gary Frechter filed a complaint in the same Court against Amicus, Mr. Crowley and Amicus' Chief Financial Officer, Dr. Barth. *Frechter v. Amicus Therapeutics, Inc., et al.*, No. 3:15-cv-07380 (D.N.J. Oct. 8, 2015). This action also alleged violations of Sections 10(b) and 20(a) of the Exchange Act, but set a class period beginning on March 19, 2015, running through October 1, 2015, that also alleged that Defendants made materially false and misleading statements to Amicus investors about the company's prospects for obtaining FDA approval of its drug Galafold.

On October 13, 2015, Michael R. Harvey filed a complaint in the same Court against Amicus and Mr. Crowley that was virtually identical to the complaint filed by Lifestyle Investments, LLC. *Harvey v. Amicus Therapeutics, Inc., et al.*, No. 3:15-cv-07448 (D.N.J. Oct. 13, 2015) also alleged that Defendants made materially false and misleading statements to Amicus investors.

On May 26, 2016, the Court consolidated the three actions, appointed Dr. Barry Brenner as Lead Plaintiff, and approved Lead Plaintiff's selection of Block & Leviton LLP and Gardy & Notis LLP as Lead and Liaison counsel, respectively, in the consolidated action.

Dr. Brenner the Amended Complaint against Amicus, Mr. Crowley and Dr. Barth on July 11, 2016. (ECF No. 43.) The Complaint adopted the longer class period urged by the *Frechter* action, and alleged that (1) all Defendants made material misrepresentations and omitted from disclosure material facts necessary to make the statements made, not misleading, in violation of Section 10(b) and Rule 10b-5 of the Exchange Act, and (2) the Individual Defendants are liable for any primary violation of the Exchange Act as alleged control persons under Section 20(a) of the Exchange Act.

On August 25, 2016, Defendants filed a Motion to Dismiss the Complaint. (ECF No. 47.) Lead Plaintiff opposed that motion on September 26, 2016. (ECF No. 50.) Defendants replied on October 28, 2016. (ECF No. 54.)

On November 1, 2016, Magistrate Judge Douglas E. Arpert held a telephone conference with counsel for the Parties. During the teleconference, the Parties agreed to attend an out-of-court mediation to see if the case could be resolved before the Motion to Dismiss was decided.

On January 12, 2017, the Parties participated in a mediation led by Jed D. Melnick, Esq., of JAMS. The Parties engaged in arm's-length negotiations and were unable to reach an agreement on that date, but continued settlement discussions through Mr. Melnick as a mediator. On February 16, 2017, following additional arms'-length negotiations facilitated by Mr. Melnick, the Parties reached an agreement-in-principle concerning the proposed settlement of the Action.

expenses. That agreement is documented in the Settlement Agreement filed along with this motion.

III. Factors Supporting The Settlement

The PSLRSA has raised the pleading bar on securities class actions. A securities plaintiff must plead particularized facts supporting as strong inference that a defendant either knowingly, or in reckless disregard for the truth, made materially false statements, or omitted from disclosure material facts necessary to make the statements made not misleading. *See, e.g., Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 515 U.S. 308, 313 (2007)*; In re Rockefeller Ctr. Props. Litig.*, 311 F.3 198, 217 (3d Cir. 2002); *California Pub. Emps.' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 158 (3d Cir. 2004).

Here, Defendants vigorously argued that the Amended Complaint be dismissed because, among other things, Lead Plaintiff failed to plead particularized facts supporting a strong inference of scienter. For the Short Period, Defendants

argued that the FDA provided different and additional information between the initial meeting on September 15, 2015 and October 1, 2015, and thus there were insufficiently pleaded facts to support the strong inference that Defendants intended to defraud when they reported on the meeting on September 15, 2015.

For the Long Period, Defendants argued, among other things, that all the alleged misstatements were non-actionable forward-looking statements; statements concerning whether and when a future act might occur: the filing of an NDA for galafold. Defendants not only argued that these statements were not actionable, but that there were insufficient facts to support a strong inference that they acted with the requisite degree of scienter.

Plaintiff's counsel is fully cognizant of the high pleading bar to sustain a securities fraud claim. Accepting a settlement of approximately 8.5% of alleged recoverable damages for the Short Period, and avoiding the risk of possible dismissal, which would yield no recovery at all, is a fair and reasonable compromise. Even if the Court were to deny the motion to dismiss the Short Period, Lead Plaintiff still faced the task of *proving* that Defendants intended to defraud their investors. Significant additional time, effort and expense would be expended to prove these claims. When balancing between continued risky litigation with significant cost, a sure settlement now is warranted.

IV. Terms of the Proposed Settlement

The settlement set forth in the Settlement Agreement resolves the claims of the Class against the Defendants. Lead Plaintiff and his counsel have diligently litigated this action and after arm's-length negotiation reached an agreement to settle the matter for $3,750,000 in cash. Lead Plaintiff and his counsel believe the claims asserted in the litigation have merit and were adequately pleaded and would survive the pending motion to dismiss. Lead Plaintiff and his counsel have concluded, however, following an evaluation of the risks of proceeding on the pending Motion to Dismiss where the Amended Complaint is subject to the heightened pleading standards of Federal Rule of Civil Procedure 9(b) and the PSLRA, and after evaluating the factual and legal defenses that can be raised by Defendants should the case proceed past a motion to dismiss, that under the circumstances the proposed settlement is an excellent result and is in the best interest of the class.

V. The Settlement Meets the Criteria Necessary for Preliminary Approval

Settlement of a class action requires the district court's approval. The court must find that the settlement is "fundamentally fair, reasonable, and adequate." *Erheart v. Verizon Wireless*, 609 F.3d 590, 593 (3d Cir. 2010); Fed. R. Civ. P. 23(e). The court reviews proposed class settlements in two stages, the first of which is a preliminary fairness evaluation. *Skeen v. BMW of North America, LLC*,

No. 2:13-cv-1531, 2016 WL 70817, at *4 (D. N.J. Jan. 6, 2016) (citing *In re National Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 714 (E.D. Pa. 2014)). *See also* Manual for Complex Litigation § 21.632 (4th Ed. 2006). If the Court grants preliminary approval, which is non-binding, the court then directs that notice be sent to all class members. *Id*.

Preliminary approval is granted unless the proposed settlement is obviously deficient. *Skeen*, 2016 WL 70817, at *4 (citing *Weissman v. Philip C. Gutworth, P.A.*, No. 2:14-cv-00666, 2015 WL 333465, at *2 (D. N.J. Jan. 23, 2015). In the Third Circuit, courts look at four factors to make a preliminary determination that "establishes an initial presumption of fairness" of a proposed class settlement: "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re General Motors Corp. Pick-Up Truck Fuel Tanks Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995); *Weissman*, 2015 WL 333465, at *2.

In this case, all four factors are met.

First, as explained in the accompanying Settlement Agreement, this case was settled following a full-day mediation on January 11, 2017 with Jed D. Melnick, Esq., of JAMS. All settlement negotiations occurred at arm's length. While the parties did not reach an agreement during the all-day mediation,

negotiations continued for over an additional month, and an agreement was finally reached (facilitated by Mr. Melnick) on February 16, 2017. Furthermore, while the Court will have before it on final approval more extensive pleadings to make a final determination that the proposed settlement is fair and adequate, as a preliminary matter, it should be noted that the $3.75 million settlement is an excellent result for the class. Cornerstone Research estimates that median settlements as a percentage of estimated damages in securities class actions range between 1.8% and 2.9% in the years between 2007 and 2016.[3] In this case, the strongest claims in the case belonged to class members who purchased in the Short Period and thus 95% of the Recognized Loss in the proposed Plan of Allocation is provided to these class members. Plaintiff's expert estimated that total alleged damages during the Short Period were approximately $44 million; a $3.75 million settlement represents over 8.5% of the estimated total alleged damages in the Short Period, significantly higher than the median settlement reported by Cornerstone.[4] Plaintiff achieved this result *before* a motion to dismiss was decided, at a time when the claims of the class were at risk of being dismissed.

[3] Cornerstone Research, Securities Class Action Settlements: 2016 Review and Analysis (available at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2016-Review-and-Analysis).

[4] Class members who purchased shares in the longer period are allocated 5% of the Recognized Loss, a recognition that the claims in the Long Period were weaker than those in the Short Period.

Second, because this case was settled before a motion to dismiss was decided, and because it is a securities class action governed by the PSLRA, all discovery was automatically stayed. 15 U.S.C. § 78u-4(3)(b)(3). However, Lead Plaintiff and his counsel conducted an investigation that included a review of stock market analyst reports, filings with the Securities Exchange Commission, a review of news articles, interviews of witnesses, and a consultation with a financial expert prior to filing the amended complaint and agreeing to the settlement.

Third, both Plaintiff's Lead and Liaison Counsel are sophisticated law firms with deep experience in securities litigation. *See* Declaration of Jennifer Sarnelli, Esq. Exhibits E & F (ECF No. 23-2) (resumes of Block & Leviton LLP and Gardy & Notis, LLP).

Finally, because no notice has yet to be provided to the class, no objections have yet been made to the proposed settlement. *See, e.g.*, *Weissman*, 2015 WL 333465, at *2 (preliminarily approving settlement and noting that while no objections have been received, "this does not preclude preliminary approval because putative class members have not yet been formally notified of the class action or its proposed settlement and will have the opportunity to object.")

Because the settlement "lacks obvious deficiencies and appears reasonable," preliminary approval should be granted. *Id.* at *3.

VI. The Class Should Be Conditionally Certified

To grant preliminary approval of a proposed class settlement, a district court must also determine that the requirements for class certification under Federal Rules of Civil Procedure 23(a) and (b) are met. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 296 (3d Cir. 2011). Under Rule 23(a), Plaintiffs must demonstrate: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).[5]

[5] Under Rule 23(b)(3), under which Plaintiff seeks class certification, the Court must also determine whether "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In a federal securities class action related to a stock traded on a public exchange, where the class would rely on the fraud-on-the-market presumption and not have to prove individual reliance, these requirements of predominance and superiority are generally met. *See, e.g., In re Amerifirst Secs. Litig.*, 139 F.R.D. 423, 427 (S.D. Fla. 1991) (citing *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985)) ("It is well-recognized that class actions are a particularly appropriate means for resolving securities fraud actions."); *Willis v. Big Lots, Inc.*, No. 2:12-cv-604, 2017 WL 1063479, at *17-18 (S.D. Ohio Mar. 17, 2017) (explaining why superiority and predominance are generally met in securities fraud class actions where the fraud-on-the-market presumption applies).

A. Numerosity

The Rule 23(a)(1) numerosity requirement provides that it must be impracticable to join all class members, but there is "no minimum number of members needed for a suit to proceed as a class action." *Weissman*, 2015 WL 333465, at *3 (citing *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 595 (3rd Cir. 2012)). Here, Amicus stock is traded publicly on the Nasdaq stock exchange, and there were over 100 million shares outstanding during the class period. As such, joinder of all class members is not practical.

B. Commonality

Rule 23(a)(2) requires that "the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Id.* (citing *Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001)). Class claims "must depend upon a common contention . . . of such a nature that it is capable of classwide resolution-which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). Here, among others, the question of whether Defendants made false statements or omitted to disclose material facts that violated Sections 10(b) and 20(a) of the Securities Exchange Act, whether they acted with scienter in doing so, and whether Class' losses were caused by those misstatements or omissions are all questions common to the entire class.

C. Typicality

The Rule 23(a)(3) typicality requirement requires Plaintiff's claims to be "typical of the claims or defenses of the class," and is "intended to assess . . . whether the named plaintiffs have incentives that align with those of absent class members to as to assure that the absentees' interests will be fairly represented." *Baby Meal v. Casey*, 43 F.3d 48, 57-58 (3d Cir. 1994). Here, Lead Plaintiff has claims that are typical of the claims of the class. And as explained in detail in the briefing for his appointment as lead plaintiff (ECF Nos. 23-1, 31, 33), Dr. Brenner made purchases of Amicus shares throughout the class period, including during the Long and Short Periods. Thus, his claims are typical of those of the Class.

D. Adequacy

The adequacy of representation requirement of Rule 23(a)(4) is satisfied where it is established that a representative party will fairly and adequately protect the interests of the class. *In re FleetBoston Fin. Corp. Sec. Litig.*, No. 02-cv-4561, 2005 U.S. Dist. LEXIS 36431, at *8-9 (D. N.J. Dec. 22, 2005). Here, Lead Plaintiff is an adequate representative of the class. There is no antagonism between his interests and the interests of the Class, and his losses demonstrate that he has a sufficient interest in the outcome of the litigation. *See also Letter Opinion appointing Lead Plaintiff and Lead Counsel*, at *9-10 (ECF No. 39) (May 26, 2016) (discussing Dr. Brenner's adequacy.)

VII. The Notice Program is Adequate and Constitutes Due and Sufficient Notice Under Rule 23, Due Process, and the PSLRA

Rule 23(e) requires that notice of a proposed settlement be sent to class members. Fed. R. Civ. P. 23(e). For classes certified under 23(b)(3), members must be provided with "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Due process requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 214 (1950). The notice must "clearly and concisely state in plan, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

The parties have negotiated the form of notice to be disseminated to all Persons who fall within the definition of the Class and whose names and addresses can be identified with reasonable effort. The parties will also supplement the mailed Notice with a summary notice to be published in Investor's Business Daily,

and with a website providing full information. The Notice, Claim Form, and Summary Notice are attached as Exhibits A1, A2, and A3, respectively.

The proposed "long form" Notice apprises Class Members of the nature of the litigation, the definition of the Class, the claims and issues in the Litigation, and the claims that will be released. The notice advises that a Class Member may enter an appearance through counsel if desired, describes the binding effect of a judgment, states the procedures and deadlines for Class Members to exclude themselves or object to the settlement, describes the proposed Plan of Allocation, explains the requested attorney fees and expenses; states the procedures and deadline for submitting a Proof of Claim and Release to recover; and provides the date, time, and location of the final settlement hearing.

The notice also satisfies the PSLRA's separate disclosure requirements, 15 U.S.C. § 78u-4(a)(7). It provides the amount of the settlement to be distributed in the aggregate and on an average per-share basis; information about the request for attorney's fees and costs; identification of Lead Counsel, and reasons for the settlement.

Lead Counsel also request the Court appoint Epiq Solutions, Inc. as Claims Administrator to provide all notices approved by the Court to Class Members, to process Proofs of Claim and Release, and to administer the settlement. Epiq, which has significant experience in securities class action claims administration, was

selected by Lead Counsel after several qualified and experienced claims administration firms were asked to submit competitive bids and Epiq submitted the lowest bid.

Rule 23(c)(2)(B) requires a certified class to receive the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." And Rule 23(e)(1) requires a court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." The proposed notice plan in this case meets and exceeds these standards, and is typical of notice plans in similar securities actions. For these reasons, the notice program should be approved by the Court.

VIII. Proposed Schedule of Events

The parties propose the following schedule of events:

Notice mailed to the Class (the "Notice Date")	At least 60 days prior to the Settlement Hearing
Summary Notice published	Within 10 days of the Notice Date
Date by which to file papers in support of the proposed settlement, Plan of Allocation, and request for attorneys' fees and expenses	35 days prior to the Settlement Hearing
Last day for Class Members to opt-out or object to the proposed settlement	21 days prior to the Settlement Hearing
Last day for Class Members to file Proof of Claim and Release forms	120 days following the Notice Date

Settlement Hearing	At least 90 days after Preliminary Approval is granted

IX. Conclusion

For the reasons set forth above, the proposed settlement should be preliminarily approved.

April 14, 2017

Respectfully submitted,

/s/ Jennifer Sarnelli

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