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Clerk of Court
Superior Court of CA,
County of Santa Clara
16CV295357
Reviewed By:R. Walker

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

KEITH ANDERSON,

Plaintiff,

vs.

ALEXZA PHARMACEUTICALS, INC., ET
AL.,

Defendants.

Case No.: 16-CV-295357

**ORDER AFTER HEARING ON
MARCH 30, 2017**

**Plaintiffs' Motion for Final Approval
of Class Action Settlement**

The above-entitled matter came on for hearing on Thursday, March 30, 2017 at 3:00 p.m. in Department 19 (Complex Civil Litigation), the Honorable Peter H. Kirwan presiding. The Court reviewed and considered the written submission of all parties and issued a tentative ruling on March 29, 2017. The Court has also considered the argument presented by the parties at the hearing. The matter having now been submitted, the Court rules as follows:

This putative shareholder class action arises from the agreed sale of Alexza Pharmaceuticals, Inc. to Grupo Ferrer Internacional, S.A. and its subsidiary. (Complaint, ¶ 1.) Before the Court is plaintiffs' motion for final approval of a settlement.

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1 Pursuant to the settlement, Alexza made certain supplemental disclosures in connection
2 with the merger in exchange for a release of claims. There will be no monetary recovery to the
3 class, although defendants have agreed not to oppose plaintiff's request for attorney fees.

4 While settlements with this structure were once regularly approved, recent decisions
5 have questioned this practice. *In re Trulia, Inc. Stockholder Litigation* (Del. Ch. 2016) 129
6 A.3d 884 explains in detail the issues with these "disclosure settlements," and held that

7 practitioners should expect that disclosure settlements are likely to be met with
8 continued disfavor in the future *unless the supplemental disclosures address a*
9 *plainly material misrepresentation or omission*, and the subject matter of the
10 proposed release is narrowly circumscribed to encompass nothing more than
11 disclosure claims and fiduciary duty claims concerning the sale process, *if the*
12 *record shows that such claims have been investigated sufficiently.*

13 (*Id.* at p. 898, italics added.) *Trulia* was endorsed by Judge Posner of the United States Court
14 of Appeals for the Seventh Circuit in a published opinion, *In re Walgreen Co. Stockholder*
15 *Litigation* (7th Cir. 2016) 832 F.3d 718. The Court agrees with the reasoning of these cases
16 and adopts the standard that they establish for these types of settlements.

17 Plaintiffs' original motion for preliminary approval did not address the materiality of
18 the supplemental disclosures in light of these authorities. The Court therefore continued the
19 motion for supplemental briefing, which plaintiffs filed on December 9, 2016. In that briefing,
20 plaintiffs represented that "as part of the Supplemental Disclosures, Alexza revealed that the
21 analysis of its financial advisor, Guggenheim, was limited to a *Liquidation Analysis*" prepared
22 by Alexza management. (At p. 3.) "Significantly, Plaintiffs' expert explicitly set forth his
23 opinion that this disclosure was material because it informed shareholders that 'Guggenheim
24 did not conduct any independent financial analysis but rather simply adopted management's
25 potentially conflicted views of value for every asset and every liability comprising the
26 Liquidation Analysis.'" (At pp. 3-4.) Relying on plaintiffs' characterization, the Court issued
27 its tentative ruling preliminarily approving the settlement, explaining in its analysis that
28 plaintiffs' expert

1 opines that the Supplemental Disclosure made clear that the only financial
2 analysis that was reviewed and considered by the fairness consultant,
3 Guggenheim Securities, was the Liquidation Analysis prepared by Alexa's senior
4 management and not Guggenheim. In other words, [the expert] is critical of
5 Guggenheim for not performing any independent valuation analysis and simply
6 relying on management's analysis which had the potential for conflicted views of
7 value for every asset and liability.

8 Plaintiffs did not raise any issues regarding the Court's description of the supplemental
9 disclosures at the preliminary approval hearing. Since that hearing, certain statements on page
10 30 of the original Schedule 14D-9, filed with the SEC on May 23, 2016, have come to the
11 Court's attention. That original filing provided:

12 In arriving at its opinion, Guggenheim Securities did not perform or obtain any
13 independent appraisal of the assets or liabilities ... of Alexza or the solvency or
14 fair value of Alexza, nor was Guggenheim Securities furnished with any such
15 appraisals. As noted above, Alexza's senior management prepared the
16 Liquidation Analysis and provided it to Guggenheim Securities in connection
17 with its opinion.

18 The original filing went on to provide three additional disclaimers emphasizing that
19 Guggenheim did not independently evaluate Alexza's liquidation value, assets, or liabilities.

20 It thus appears to the Court that its decision to preliminarily approve the settlement was
21 based on an incorrect premise: that Guggenheim's complete reliance on the Liquidation
22 Analysis prepared by management, without conducting any independent financial analysis, was
23 disclosed for the first time in the Supplemental Disclosures.

24 In addition, having performed its own comparison of the supplemental disclosures
25 provided in Amendment No. 2 to the 14D-9 to the original 14D-9, the Court is not convinced
26 that the other assertedly new disclosures discussed in plaintiffs' supplemental brief are plainly
27 material. While the Liquidation Analysis itself was newly-disclosed, the analysis shows that
28 Alexa's liabilities far exceeded its assets under either the low or high projection, and the fact
that the Liquidation Analysis indicated a per share value of zero was already disclosed at page
31 of the original 14D-9. So too were the uncertainties regarding ADASUVE, discussed
throughout the original 14D-9. The conclusion that Alexa's assets exceeded its liabilities is
further highlighted by disclosures on page 29 of the original 14D-9, beginning, "if Alexza were

1 to satisfy all of its existing credit and other payment obligations, then Alexza's liquidity
2 resources would likely be immediately depleted” The Court does not believe that the
3 details of the Liquidation Analysis plainly and “significantly alter[ed] the ‘total mix’ of
4 information made available” under these circumstances. (*In re Trulia, Inc. Stockholder*
5 *Litigation, supra*, 129 A.3d at p. 899.)

6 Similarly, plaintiffs state in their supplemental brief that “[t]he Original 14D9 was
7 silent on how ... warrant values were calculated despite their significant impact on the value of
8 the Acquisition consideration.” (At p. 5.) However, the drop in per share cash consideration
9 that plaintiffs’ expert attributes to the warrants was disclosed in the context of a discussion of
10 the warrants at page 19 of the original 14D9. It was disclosed that Alexa’s trading volatility
11 reached a peak of 327% and “[g]iven this increase, the Black-Scholes value of Alexa’s out-of-
12 the-money warrants increased to approximately \$3.7 million from approximately \$400,000,”
13 an obviously significant increase. Given these disclosures, the Court is not convinced that the
14 additional details about how the warrant values were calculated were plainly material, either.

15 In the Court’s view, the value of these new disclosures to shareholders was de minimis
16 and does not justify the release they would provide under the settlement.

17 At the hearing on this matter, plaintiffs did not deny that it was disclosed in the original
18 14D-9 that the Liquidation Analysis was the only analysis Guggenheim considered. Instead,
19 they relied entirely upon their argument that the disclosure of the content of the Liquidation
20 Analysis was material. However, other than a brief reference to the “valuation spread”
21 reflected therein, they did not explain *why* the details of the Liquidation Analysis were material
22 or address the Court’s analysis on this point set forth above. The Court remains unpersuaded
23 that these details were plainly material.

24 The motion for final approval of the settlement is accordingly DENIED. A case
25 management conference is hereby scheduled for **May 26, 2017 at 10:00 a.m. in Department**
26 **19.**

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1 IT IS SO ORDERED.

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3 Dated: April 3, 2017

Peter H. Kirwan

Honorable Peter H. Kirwan
Judge of the Superior Court

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