

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:18-cv-23786-MARTINEZ-OTAZO-REYES

CHARLES STEINBERG, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

v.

OPKO HEALTH, INC., PHILLIP FROST,
ADAM LOGAL, and JUAN RODRIGUEZ,

Defendants.

**LEAD PLAINTIFF'S MOTION FOR APPROVAL OF
DISTRIBUTION PLAN, AND INCORPORATED MEMORANDUM OF LAW**

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Lead Plaintiff, The Amitim Funds, by and through its attorneys, hereby moves this Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure and this Court's Order Granting Final Approval of Class Action Settlement and Order of Dismissal with Prejudice (ECF No. 130) and Final Judgment (ECF No. 132), for approval of Lead Plaintiff's proposed distribution plan and entry of the accompanying [Proposed] Order Approving Distribution Plan ("Distribution Order").¹ In further support of this motion, Lead Plaintiff submits (i) the Memorandum of Law in Support of Lead Plaintiff's Motion for Approval of Distribution Plan, incorporated herein; (ii) the Declaration of Luiggy Segura in Support of Lead Plaintiff's Motion for Approval of Distribution Plan (the "Segura Declaration") submitted on behalf of the Court-approved Claims Administrator, JND Legal Administration ("JND"); and (iii) all other papers and proceedings herein.

Among other things, the Distribution Order would: (i) approve the administrative determinations of JND accepting and rejecting Claims submitted in connection with the Settlement as stated in the Segura Declaration; (ii) direct the distribution of the US Net Settlement Fund to Claimants whose Claims are accepted by JND as valid and approved by the Court ("Authorized Claimants"), while maintaining a Reserve for any tax liability or claims administration-related contingencies that may arise; (iii) direct that distribution checks state that the check must be cashed within 90 days after the issue date; (iv) direct that Authorized Claimants will forfeit all recovery from the Settlement if they fail to cash their distribution checks in a timely manner; (v) approve the recommended plan for any funds remaining after the distribution; (vi) approve JND's fees and expenses incurred and estimated to be incurred in the administration of the Settlement; (vii) release

¹ All terms with initial capitalization not otherwise defined herein shall have the meanings ascribed to them in the Segura Declaration or the Stipulation and Agreement of Settlement dated June 26, 2020 (ECF No. 112-1) ("Stipulation").

claims related to the administration process; and (viii) authorize the destruction of Claim Forms and supporting documents at an appropriate time.

Under the Stipulation, Defendants have no role in or responsibility for the administration of the Settlement Fund or processing of Claims, including determinations as to the validity of Claims or the distribution of the US Net Settlement Fund. *See* Stipulation ¶¶ 19, 25; *see also* Notice ¶ 49. Accordingly, Defendants do not have an interest in the relief requested in this Motion. Lead Counsel respectfully submits that this Distribution Motion can be decided on the papers, unless the Court deems a hearing necessary.

MEMORANDUM OF LAW

I. GENERAL BACKGROUND

As the Court is aware, this Action was settled for \$16.5 million in cash. On April 28, 2021, the Court issued its Order Granting Final Approval of Class Action Settlement and Order of Dismissal with Prejudice (ECF No. 130) (“Final Approval Order”) and entered the Final Judgment (ECF No. 132) on the following day. The Effective Date of the Settlement has now occurred. *See* Stipulation ¶ 33. Accordingly, the US Net Settlement Fund may be distributed to Authorized Claimants. In accordance with paragraph 28 of the Stipulation, Lead Plaintiff respectfully requests that the Court enter the Distribution Order approving the Distribution Plan.

As the Court will recall, the Settlement Class in this case included persons or entities that purchased or otherwise acquired OPKO common stock during the Class Period (September 26, 2013, through September 7, 2018, inclusive), on U.S. exchanges (including the New York Stock Exchange and Nasdaq) and on the Tel Aviv Stock Exchange (the “TASE”). The Net Settlement Fund resulting from the \$16.5 million Settlement has been divided into the US Net Settlement Fund, which will be distributed based on Settlement Class Members’ purchases of OPKO common

stock on U.S. exchanges, and the TASE Net Settlement Fund, which will be distributed based on Settlement Class Members' purchases on the TASE. *See* Notice App. A ¶ 3. As provided in the Plan of Allocation, 90.8% of the Net Settlement Fund was allocated to the US Net Settlement Fund and 9.2% was allocated to the TASE Settlement Fund, based on the respective trading volume of OPKO common stock on the relevant exchanges during the Class Period. *See id.*

Settlement Class Members who purchased shares traded on the TASE did not have to submit a Claim Form to be eligible for a recovery from the TASE Net Settlement Fund because the Claims Administrator was able to take advantage of a "claim-free" mechanism that is available for Israeli shareholder class actions. That procedure is underway. Specifically, a court in Israel has entered an order requiring all TASE member brokers to provide us the data necessary to compute the distribution and the order has been served on all TASE members. Once that information is provided and processed, the TASE Net Settlement Fund will be distributed as provided under the Plan of Allocation without further order of the Court.

In contrast, Claimants who purchased OPKO common stock on U.S. exchanges (or any other manner other than on the TASE) were required to submit a Claim Form to be eligible for a distribution from the US Net Settlement Fund. The proposed Distribution Order before this Court and the remainder of this Memorandum address only the US Net Settlement Fund.

In accordance with the Court's Order Preliminarily Approving Settlement and Authorizing Dissemination of Notice of Settlement (ECF No. 115) (the "Preliminary Approval Order"), JND mailed the Notice of (I) Pendency of Class Action and Proposed Settlement; (II) Settlement Fairness Hearing; and (III) Motion for Attorneys' Fees and Litigation Expenses ("Notice") and the Proof of Claim and Release ("Claim Form" and, collectively with the Notice, the "Notice Packet") to potential Settlement Class Members, brokers, and other nominees. Segura Decl. ¶ 2. As stated

in the Segura Declaration, JND has disseminated 271,422 Notice Packets to potential Settlement Class Members, brokers, and nominees. *Id.* ¶ 4. The Notice informed Settlement Class Members that if they wished to be eligible to participate in the distribution of the US Net Settlement Fund, they were required to submit a properly executed Claim Form received or postmarked no later than January 26, 2021. *Id.* ¶ 7.

II. CLAIMS ADMINISTRATION

As detailed in the Segura Declaration, through October 17, 2021, JND received and processed 18,659 Presented Claims. Segura Decl. ¶ 7. All Claims received through October 17, 2021, have been fully processed in accordance with the Stipulation and the Court-approved Plan of Allocation included in the Notice (*id.*), and JND has worked with Claimants to help them perfect their Claims. *See id.* ¶¶ 19-32. As discussed in the Segura Declaration, many of the Claims submitted in the Settlement were initially deficient or ineligible for one or more reasons, including being incomplete, not signed, not properly documented, or otherwise deficient, which required substantial follow-up work by JND. *Id.* ¶¶ 19, 22.

If JND determined a Claim to be defective or ineligible, a Deficiency Letter (if the Claimant or filer filed a paper Claim) or a Deficiency Email with an attached Deficiency Spreadsheet (if the Claimant or E-Filer filed an Electronic Claim) was sent by JND to the Claimant or filer, as applicable, describing the defect(s) or condition(s) of ineligibility in the Claim and the steps necessary to cure any curable defect(s) in the Claim. *Id.* ¶¶ 20, 22. The Deficiency Letter or Deficiency Email advised the Claimant or filer that the appropriate information or documentary evidence to complete the Claim had to be sent within 20 days from the date of the Deficiency Letter or Deficiency Email, or JND would recommend the Claim for rejection to the extent the deficiency or condition of ineligibility was not cured. *Id.* ¶¶ 20, 23. Examples of a Deficiency

Letter, Deficiency Email, and Deficiency Spreadsheet are attached as Exhibits A, B, and C to the Segura Declaration.

Of the 18,659 Claims that are the subject of this motion, JND has determined that 6,340 Claims are acceptable in whole or in part to participate in the distribution of the US Net Settlement Fund, and that 12,326 Claims should be wholly rejected because they are ineligible for payment from the US Net Settlement Fund. Segura Decl. ¶¶ 39-42. Lead Plaintiff respectfully requests that the Court approve JND's administrative determinations accepting and rejecting Claims as stated in the Segura Declaration.

A. Disputed Claims

JND carefully reviewed Claimants' and filers' responses to the Deficiency Letters and Deficiency Emails and worked with them to resolve deficiencies where possible. *Id.* ¶¶ 21, 26. Consistent with paragraph 26(e) of the Stipulation, the Deficiency Letters and Deficiency Emails specifically advised Claimants or filers of their right, within 20 days after the mailing of the Deficiency Letter or emailing of the Deficiency Email, to contest the rejection of their Claims and request Court review of JND's administrative determinations of the Claims. *Id.* ¶¶ 20, 23, and Exhibits A and B.

Out of 18,659 Presented Claims, JND received twenty-three (23) requests for Court review. To resolve these disputes without necessitating the Court's intervention, JND contacted the Claimants requesting Court review and attempted to answer all questions, fully explain JND's administrative determination of each Claim's status, and facilitate the submission of missing information or documentation where applicable. *Id.* ¶ 32. As a result of these efforts, eleven (11) Claimants resolved their deficiencies and withdrew their requests for Court review, and their Claims are recommended for approval. *Id.* Ten (10) Claimants understood the reasons for JND's

determinations and are no longer requesting Court review. *Id.* Currently two (2) Claims remain disputed and are being submitted to the Court for resolution (the “Disputed Claims”). *Id.*

Exhibit D of the Segura Declaration contains a copy of each Disputed Claim with its supporting documentation and sets forth the reasons for JND’s rejection of each Disputed Claim. *Id.* For privacy reasons, the documents included in Exhibit D have been redacted to remove personal information such as street addresses, email addresses, telephone numbers, account numbers, Taxpayer ID, Social Security, or Social Insurance Numbers, and all financial and transaction information not related to the Claimants’ transactions in OPKO common stock purchased/acquired during the Class Period. JND recommends both Disputed Claims (Claim ID: DD9LUTW7SC and Claim ID: DHSTQB2RGX) for rejection due to the fact that Claimants sold their shares of OPKO common stock prior to the first corrective disclosure on September 7, 2018. *Id.*; *see also* Ex. D to the Segura Decl. Under the Court-approved Plan of Allocation, the sale of Claimants’ shares prior to September 7, 2018, renders these Claims ineligible to participate in the recovery of this Settlement. Segura Decl. ¶ 32; *see also* Notice App. A ¶ 6. This is because these Claimants have not suffered any cognizable loss due to the alleged fraud on account of the fact that they sold their OPKO shares before the revelation of the alleged fraud caused the stock price to decline; indeed, they sold their shares at a time when artificial inflation was still present in the stock price. The Segura Declaration explains in detail the calculations JND conducted that demonstrate the Disputed Claims do not calculate to a US Recognized Claim. Segura Decl. ¶ 32. Lead Counsel has reviewed the Disputed Claims and JND’s determinations and concurs that the Disputed Claims should be rejected for the reasons set forth in the Segura Declaration.

B. Late Claims and Final Cut-Off Date

The 18,659 Claims received through October 17, 2021, include 771 Claims that were postmarked or received after January 26, 2021, the Court-approved Claim submission deadline, but received before October 17, 2021. *Id.* ¶¶ 33, 41. Those late Claims have been fully processed, and 235 of them are, but for their late submission, otherwise eligible to participate in the Settlement. *Id.* Although these 235 Claims were late, they were received while the processing of timely Claims was ongoing. Due to the amount of time needed to process the timely Claims received, the processing of these late Claims did not delay the completion of the Claims administration process or the distribution of the US Net Settlement Fund. The Court has discretion to accept Claims received after the Claim submission deadline. *See* Preliminary Approval Order ¶ 11. Lead Plaintiff respectfully submits that, when the equities are balanced, it would be unfair to prevent an otherwise eligible Claim from participating in the distribution of the US Net Settlement Fund solely because it was received after the Court-approved Claim submission deadline if it were submitted while timely Claims were still being processed.

To facilitate the efficient distribution of the US Net Settlement Fund, however, there must be a final cut-off date after which no other Claims may be accepted. Accordingly, Lead Plaintiff respectfully requests that the Court order that any new Claims and any adjustments to previously filed Claims that would result in an increased US Recognized Claim amount received after October 17, 2021, be barred, subject to the provisions of paragraph 45(f) of the Segura Declaration. Paragraph 45(f) applies to any Claims received or modified after October 17, 2021, that would have been eligible for payment or additional payment under the Court-approved Plan of Allocation if timely received. At the time when Lead Counsel, in consultation with JND, determines that a further distribution is not cost-effective as provided in paragraph 45(e) of the Segura Declaration,

the post-October 17, 2021 Claimants, after payment of fees and expenses as provided in paragraph 45(f) of the Segura Declaration, at the discretion of Lead Counsel, and to the extent possible, may be paid their distribution amounts or additional distribution amounts on a *pro rata* basis that would bring them into parity with other Authorized Claimants who have cashed all their prior distribution checks.

III. FEES AND EXPENSES OF CLAIMS ADMINISTRATOR

In accordance with JND's agreement with Lead Counsel to act as the Claims Administrator for the Settlement, JND was responsible for, among other things, disseminating notice of the Settlement to the Settlement Class, creating and maintaining the Settlement Website and toll-free telephone helpline, processing Claims, and allocating and distributing the US Net Settlement Fund to Authorized Claimants. Segura Decl. ¶ 2. As stated in the Segura Declaration, JND's fees and expenses for its work performed through July 31, 2021, are \$950,438.22 *Id.* ¶ 44. The brokerage firms and nominees charged JND another \$151,675.37 for their work. *Id.* JND anticipates that its fees and expenses for the work performed in conjunction with the initial distribution of the US Net Settlement Fund will be \$54,778.38. *Id.* Should the estimate of fees and expenses to conduct the Initial Distribution of the US Net Settlement Fund exceed the actual cost, the excess will be returned to the US Net Settlement Fund and will be available for subsequent distribution to Authorized Claimants. *Id.* To date, JND has received payment in the amount of \$555,435.04 for its fees and expenses. *Id.* Accordingly, there is an outstanding balance of \$601,456.93 payable to JND, which amount includes the estimated fees and expenses to be incurred by JND in connection with the Initial Distribution. *Id.* Lead Counsel has reviewed JND's invoices and respectfully requests on behalf of Lead Plaintiff that the Court approve all of JND's fees and expenses.

IV. DISTRIBUTION PLAN FOR THE US NET SETTLEMENT FUND

A. Initial Distribution of the US Net Settlement Fund

Under the proposed Distribution Plan, JND will distribute approximately 95% of the US Net Settlement Fund, after deducting: (i) all payments previously allowed, (ii) payments approved by the Court on this motion, and (iii) any estimated taxes, the costs of preparing appropriate tax returns, and any escrow fees (the “Initial Distribution”). *See* Segura Decl. ¶ 45(a). In the Initial Distribution, JND will calculate award amounts for all Authorized Claimants as if the entire US Net Settlement Fund were to be distributed now. *Id.* ¶ 45(a)(1). JND will first determine each Authorized Claimant’s *pro rata* share of the total US Net Settlement Fund based on the Claimant’s US Recognized Claim in comparison to the total US Recognized Claims of all Authorized Claimants. *Id.* In accordance with the Court-approved Plan of Allocation, JND will eliminate from the Initial Distribution any Authorized Claimant whose *pro rata* share calculates to less than \$10.00, as these Claimants will not receive any payment from the US Net Settlement Fund and will be so notified by JND. *Id.* ¶ 45(a)(2). JND will then recalculate the *pro rata* share of the US Net Settlement Fund for Authorized Claimants who would have received \$10.00 or more based on the amount of the Authorized Claimant’s US Recognized Claim in comparison to the total US Recognized Claims of all Authorized Claimants who would have received \$10.00 or more. *Id.* ¶ 45(a)(3). This *pro rata* share is the Authorized Claimant’s Distribution Amount. *Id.* Authorized Claimants whose Distribution Amount calculates to less than \$200.00 will be paid their full Distribution Amount in the Initial Distribution (“Claims Paid in Full”). *Id.* ¶ 45(a)(4). These Authorized Claimants will receive no additional funds in subsequent distributions. *Id.* After deducting the payments to the Claims Paid in Full, 95% of the remaining balance of the US Net Settlement Fund will be distributed *pro rata* to Authorized Claimants whose Distribution Amount

calculates to \$200.00 or more. *Id.* ¶ 45(a)(5). The remaining 5% of the US Net Settlement Fund will be held in reserve (the “Reserve”) to address any tax liability and claims administration-related contingencies that may arise. *Id.* To the extent the Reserve is not depleted, the remainder will be distributed in the Second Distribution. *Id.*

In order to encourage Authorized Claimants to cash their checks promptly, Lead Plaintiff proposes that all distribution checks bear the notation, “CASH PROMPTLY. VOID AND SUBJECT TO REDISTRIBUTION IF NOT CASHED BY [DATE 90 DAYS AFTER ISSUE DATE].” *Id.* ¶ 45(b). Authorized Claimants who do not cash their checks within the time allotted or on the conditions stated in paragraph 45(b) of the Segura Declaration will irrevocably forfeit all recovery from the Settlement, and the funds allocated to these stale-dated checks will be available to be redistributed to other Authorized Claimants in a subsequent distribution, as described below. *Id.* ¶ 45(c).

B. Additional Distribution(s) of the US Net Settlement Fund

After JND has made reasonable and diligent efforts to have Authorized Claimants cash their Initial Distribution checks, but not earlier than seven (7) months after the Initial Distribution, JND will, after consulting with Lead Counsel, conduct the Second Distribution of the US Net Settlement Fund. *Id.* ¶ 45(d). In the Second Distribution, any amounts remaining in the US Net Settlement Fund (after deducting any unpaid fees and expenses incurred) will be distributed to all Authorized Claimants who cashed their Initial Distribution checks and would receive at least \$10.00 from the Second Distribution based on their *pro rata* share of the remaining funds. *Id.* After the Second Distribution, if any funds remain in the US Net Settlement Fund, and if cost-effective, subsequent distributions will take place in six (6)-month intervals. *Id.* When Lead Counsel, in consultation with JND, determines that further distribution is not cost-effective, if sufficient funds

remain to warrant the processing of Claims received after October 17, 2021, JND will process those Claims. *Id.* ¶ 45(e). Any of these Claims that are otherwise valid, as well as any earlier received Claims for which an upward adjustment was received after October 17, 2021, may be paid in accordance with paragraph 45(f) of the Segura Declaration. *Id.* If any funds remain in the US Net Settlement Fund after payment of these Claims and unpaid fees or expenses, the remaining funds will be contributed to the National Consumer Law Center (“NCLC”). *Id.*; *see also* Notice App. A ¶ 14.

NCLC is a private, non-sectarian, not-for-profit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. *See About Us*, National Consumer Law Center, nclc.org/about-us/about-us.html (last visited Nov. 19, 2021). NCLC was founded in 1969 through a federal grant to provide legal services addressed to two main goals: improving the access of low-income people to the legal system and enabling advocates to seek remedies where needed. *See Our Story*, National Consumer Law Center, nclc.org/about-us/our-story.html (last visited Nov. 19, 2021). Today, NCLC continues to advocate for low-income consumers and provides many resources to civil legal aid and private attorneys representing low-income consumers. *See id.* NCLC’s lawyers provide policy analysis, advocacy, litigation, expert-witness services, and training for consumer advocates throughout the United States. *See id.* “NCLC works to ensure a fair marketplace and access to justice for all consumers, including low-income people, older Americans, students, military service members and veterans,” and its “work covers a broad range of consumer issues, including consumer protection, fair credit, debt collection, student loans, mortgages and foreclosures, financial services, bankruptcy, [and] unfair and deceptive acts and practices. . . .” *See Cy Pres Awards*, National Consumer Law Center, nclc.org/about-us/cy-pres-awards.html (last visited Nov. 19, 2021). Federal courts have approved NCLC as a *cy pres*

recipient of residual balances of net settlement funds in other settlements. *See, e.g., In re Nu Skin Enters., Inc., Sec. Litig.*, No. 14-cv-00033-JNP-BCW, ECF Nos. 152-154 (D. Utah Aug. 30, 2018); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1261 (C.D. Cal. 2016), *appeal dismissed*, 2016 WL 9778633 (9th Cir. Nov. 7, 2016); *Perkins v. Am. Nat'l Ins. Co.*, 2012 WL 2839788, at *5 (M.D. Ga. July 10, 2012) (“The Court is also satisfied that The National Consumer Law Center’s mission, reputation and established track record will ensure that it will be a good steward of the grant award made to it.”).

V. RELEASE OF CLAIMS

In order to allow the full and final distribution of the Net Settlement Fund, it is necessary to (i) bar any further claims against the Net Settlement Fund beyond the amounts allocated to Authorized Claimants, and (ii) provide that all persons involved in any aspect of Claims processing or who are involved in the administration or taxation of the Settlement Fund or the Net Settlement Fund, be released and discharged from all claims arising out of that involvement. *See* Stipulation ¶ 30. Accordingly, Lead Plaintiff respectfully requests that the Court release and discharge all persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Claims submitted in connection with the Settlement, or who are otherwise involved in the administration or taxation of the Settlement Fund or the Net Settlement Fund from all claims arising out of that involvement, and bar all Settlement Class Members and other Claimants, whether or not they receive payment from the Net Settlement Fund, from making any further claims against the Net Settlement Fund, Lead Plaintiff, Lead Counsel, the Claims Administrator, the Escrow Agent or any other agent retained by Lead Plaintiff or Lead Counsel in connection with the administration or taxation of the Settlement Fund or the Net Settlement Fund,

or any other person released under the Settlement beyond the amounts allocated to Authorized Claimants.

Courts have repeatedly approved similar releases in connection with the distribution of settlement proceeds. *See, e.g., Thorpe v. Walter Inv. Mgmt., Corp.*, 2018 WL 3672266, at *2 (S.D. Fla. May 24, 2018), *report and recommendation adopted*, 2018 WL 3672239 (S.D. Fla. June 8, 2018) (“[A]ll persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the claims submitted herein, or otherwise involved in the administration or taxation of the Settlement Fund, Net Settlement Fund, or Escrow Accounts, are released and discharged from any and all claims arising out of such involvement. All Settlement Class Members are barred from making any further claims against the Settlement Fund or the Net Settlement Fund or the Released Parties beyond the amount allocated to them pursuant to this Order.”); *In re Miva, Inc.*, 2015 WL 12834962, at *2 (M.D. Fla. Sept. 23, 2015) (approving substantially similar language in order authorizing distribution of settlement proceeds).

VI. CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court grant its Motion for Approval of Distribution Plan and enter the [Proposed] Order Approving Distribution Plan.

Dated: November 19, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 19, 2021, the foregoing memorandum and its exhibits were filed with the Clerk of the Court using the CM/ECF electronic notification system, which will send a notice of electronic filing to all parties of record.

/s/ Brandon T. Grzandziel
Brandon T. Grzandziel