UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re: Orexigen Therapeutics, Inc., Debtor. [1]	Chapter 11 Case No. 18-10518-KG **Re: Docket Nos. 967, 968 & 969**

LIMITED PRELIMINARY OBJECTION OF SECURITIES LEAD PLAINTIFF TO APPROVAL OF PROPOSED DISCLOSURE STATEMENT ON AN INTERIM BASIS

Karim Khoja, the court-appointed lead plaintiff ("Lead Plaintiff") in the securities class action litigation captioned as *Karim Khoja v. Orexigen Therapeutics, Inc., et al.*, Case No. 3:15-cv-00540 (JLS) (the "Securities Litigation"), pending in the United States District Court for the Southern District of California (the "District Court"), on behalf of himself and the proposed class he represents in the Securities Litigation (the "Proposed Class"), hereby submits this limited and preliminary objection (the "Limited Objection") to approval on an interim basis of the *Disclosure Statement for Debtor's Plan of Liquidation* (the "Disclosure Statement) [D.I. 968] filed by the above-captioned debtor in possession (the "Debtor") in conjunction with its *Debtor's Plan of Liquidation* (the "Plan") [D.I. 967]. As and for this Limited Objection, Lead Plaintiff respectfully states as follows:

BACKGROUND

1. The Debtor was a biotechnology firm that was primarily focused on the development of Contrave, an obesity therapy. On June 22, 2015, the District Court entered an order consolidating two putative class actions filed against the Debtor and certain other defendants in March 2015 into the Securities Litigation and appointing Lead Plaintiff as lead

[1] The last four digits of the Debtor's federal tax identification number are 8822. The Debtor's mailing address for purposes of this Chapter 11 Case is 3344 North Torrey Pines Court, Suite 200, La Jolla, CA, 92037.

plaintiff. On August 20, 2015, Lead Plaintiff filed the *Consolidated Complaint for Violation of the Federal Securities Laws* (the "Consolidated Complaint") against the Debtor and three individual insiders (the "Non-Debtor Defendants" and together with the Debtor, the "Defendants"): Michael A. Narachi (President, CEO, and Director), Joseph P. Hagan (Chief Business Officer, Treasurer, and Acting CFO), and Preston Klassen (Head of Global Development).

2. The Consolidated Complaint asserts claims against the Defendants for violations of the Securities Exchange Act of 1934, and certain rules promulgated thereunder, on behalf the Proposed Class, consisting of all persons who purchased or otherwise acquired the publicly traded securities of the Debtor between March 3, 2015 and March 12, 2015, inclusive (the "Class Period") and were damaged by the conduct asserted in the Consolidated Complaint.[2] The Consolidated Complaint alleges, among other things, that throughout the Class Period, the Defendants actively misled investors, the FDA, and the Debtor's business and academic partners about an FDA-mandated clinical trial for Contrave called the Light Study, and that when the truth about their materially misleading statements became known, the Debtor's stock plummeted on virtually unprecedented volume.

3. On June 27, 2016, the District Court entered an order and judgment granting the Defendants' motion to dismiss the Consolidated Complaint, dismissing two causes of action with prejudice and the remainder without prejudice. Lead Plaintiff appealed. On August 13, 2018, the Ninth Circuit affirmed in part and reversed in part the District Court's order and remanded the case to the District Court, solely with respect to the Non-Debtor Defendants due to the

[2] Any reference in this Limited Objection to the Proposed Class, the Class Period, or the Consolidated Complaint or any allegations therein is for informational purposes only, is qualified in its entirety by the actual allegations in the Consolidated Complaint (as may be further amended), and is made without prejudice to any rights, claims, arguments, and counterarguments of Lead Plaintiff and/or the Proposed Class in the Securities Litigation, including but not limited to the rights to amend the Consolidated Complaint and to modify the definitions of the Proposed Class and/or the Class Period.

automatic stay in effect in the Debtor's chapter 11 case. Pursuant to scheduling orders entered by the District Court on January 23, 2019 and March 7, 2019, the Non-Debtor Defendants' renewed motion to dismiss the Consolidated Complaint is scheduled to be fully briefed on March 21, 2019 and a hearing on the motion is scheduled for April 18, 2019.

LIMITED OBJECTION

4. Lead Plaintiff recognizes that the circumstances of the Debtor's chapter 11 case necessitate the use of efficient procedures such as a single, combined hearing on approval of the Disclosure Statement and confirmation of the Plan to reduce administrative expenses. However, preliminarily, two material defects in the Plan and the corresponding disclosures in the Disclosure Statement must be resolved at the interim approval stage, before the Debtor undertakes the expense of soliciting votes on a defective Plan with an inadequate Disclosure Statement.

A. The Plan fails to classify the claims of Lead Plaintiff and the Proposed Class against the Debtor.

5. The Plan does not classify or treat the claims of Lead Plaintiff and the Proposed Class against the Debtor (the "Securities Claims"), which are subordinated pursuant to section 510(b) of the Bankruptcy Code. This appears to be simply an oversight, because neither the Securities Claims nor the Securities Litigation are mentioned anywhere in the Plan or the Disclosure Statement. As a result, through the definition of "General Unsecured Claim" contained in Article 1.2.85 of the Disclosure Statement, the Plan arguably, and likely inadvertently, classifies the Securities Claims as General Unsecured Claims entitled to vote to accept or reject the Plan. See Disclosure Statement, Art. 1.2.85 (defining "General Unsecured Claim" as "Any Claim against the Debtor which is not" one of a list of categories of all other claims identified under the Plan); Plan, Art. 1.1(D) (General Unsecured Claims in Class 4 are entitled to vote to accept or reject the Plan). In turn, holders of General Unsecured Claims who

are entitled to vote on the Plan, but do not vote, are deemed to grant the third-party release contained in Article 6.2(b) of the Plan. Although the Non-Debtor Defendants do not appear to be Released Parties (as defined in Article 1.2.160 of the Disclosure Statement), Lead Plaintiff and the Proposed Class should not be deemed to grant a release given by creditors in voting classes where they should not be classified in a class that is entitled to vote in the first instance because their treatment pursuant to section 510(b) of the Bankruptcy Code is no different than that of holders of equity interests in the Debtor under the absolute priority rule. To resolve this oversight, the Plan should be revised to classify the Securities Claims separately from General Unsecured Claims (and all other claims), in a class that is deemed to reject the Plan and thus is not entitled to vote or impacted by the third-party release contained in the Plan.

B. The Plan and Disclosure Statement do not disclose whether or how the Debtor's books, records, and other documents and items potentially relevant to the Securities Litigation will be preserved after the effective date of the Plan.

6. The Securities Litigation is subject to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4, which, among other things, mandates that

> any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(b)(3)(C)(i). This mandatory requirement is subject to "sanction for willful violation." 15 U.S.C. § 78u-4(b)(3)(C)(ii).

7. The Debtor is a party to the Securities Litigation and thus is subject to the PSLRA's document preservation mandate. Due to the operation of the automatic stay, the Securities Litigation is currently stayed with respect to the Debtor. Lead Plaintiff believes it is appropriate for the Plan to permit the continued prosecution of the Securities Litigation against

the Debtor to the extent of any available residual entity coverage under any applicable insurance policies, in which instance the Debtor will remain a party to the Securities Litigation. In the event the Debtor ceases (temporarily or otherwise) to be a party to the Securities Litigation, the PSLRA's document preservation mandate should nonetheless continue to apply.

8. Continuing preservation of the Debtor's books, records, electronically stored information, and other documents and items that are potentially relevant to the Securities Litigation post-confirmation is absolutely crucial to avoid prejudice to Lead Plaintiff and the Proposed Class, particularly where the Debtor is liquidating and winding down. However, the Plan does not contain and the Disclosure Statement does not describe any requirement that the Debtor or the Wind Down Administrator and the Wind Down Entity (as defined in Articles 1.2.190 and 1.2.194 of the Disclosure Statement, respectively) take any action to preserve documents and other items potentially relevant to the Securities Litigation, nor does the Disclosure Statement contain any explanation of what, if any, measures the Debtor will implement to ensure such items are retained and preserved through the completion of the Securities Litigation. The Plan and Disclosure Statement should also make clear that nothing in the Plan will impact the ability of Lead Plaintiff and the Proposed Class to obtain the Debtor's books and records that are potentially relevant to the Securities Litigation through post-confirmation discovery in the Securities Litigation.

9. Inclusion of the following provision in the Plan, along with corresponding disclosure in the Disclosure Statement, would resolve Lead Plaintiff's concerns with respect to the post-effective date preservation of and access to documents and other items that are potentially relevant to the Securities Litigation:

> Until the entry of a final and non-appealable order of judgment or settlement with respect to all defendants now or hereafter named in the litigation captioned as *Karim Khoja v. Orexigen Therapeutics, Inc., et al.*, Case No. 3:15-cv-00540 (JLS) (S.D. Cal.) (the "Securities Litigation"), the Debtor, the Wind Down Administrator, the Wind Down Entity, and any other transferee or custodian of

the Debtor's books, records, documents, files, electronic data (in whatever format, including native format, and from every source and location, including but not limited to all hard drives, servers, and cloud-based storage located in the United States and overseas), or any tangible object or other item of evidence relevant or potentially relevant to the Securities Litigation, wherever stored (collectively, the "Potentially Relevant Books and Records"), shall preserve and maintain the Potentially Relevant Books and Records as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure, and shall not destroy, abandon, transfer, or otherwise render unavailable such Potentially Relevant Books and Records. For the avoidance of doubt, nothing in the Plan (including but not limited to Article 6.2(g) shall impact in any manner any rights of the lead plaintiff and the proposed class in the Securities Litigation to seek and obtain Potentially Relevant Books and Records from any entity through discovery in the Securities Litigation.

RESERVATION OF RIGHTS

10. Neither the filing of this Limited Objection nor anything contained herein are intended to limit, prejudice, or otherwise impact any rights of Lead Plaintiff or the Proposed Class in connection with the filing, solicitation, or confirmation of the Plan (or any other plan). Lead Plaintiff, on behalf of itself and the Proposed Class, hereby reserves all such rights, including but not limited to the rights to (a) object on any and all grounds to confirmation of the Plan and/or approval of the Disclosure Statement, (b) take any other action permitted or required under the Bankruptcy Code and other applicable law, on behalf of itself and the Proposed Class, and (c) seek, on behalf of itself and the Proposed Class, any other relief in connection with the foregoing.

11. For the avoidance of doubt, this Limited Objection does not, shall not, and shall not be deemed to:

a. constitute a submission by Lead Plaintiff, either individually or for the Proposed Class or any member thereof, to the jurisdiction of the Bankruptcy Court;

b. constitute consent by Lead Plaintiff, either individually or for the Proposed Class or any member thereof, to entry by the Bankruptcy Court of any final order in any non-core proceeding, **which consent is hereby withheld unless, and solely to the extent, expressly granted in the future with respect to a specific matter**;

c. waive any substantive or procedural rights of Lead Plaintiff or the Class or any member thereof, including but not limited to (a) the right to challenge the constitutional authority of the Bankruptcy Court to enter a final order or judgment on any matter, (b) the right to have final orders in non-core matters entered only after de novo review by a District Court judge, (c) the right to trial by jury in any proceedings so triable herein, in the Debtor's chapter 11 case, including all adversary proceedings and other related cases and proceedings (collectively, "Related Proceedings"), in the Securities Litigation, or in any other case, controversy, or proceeding related to or arising from the Debtor, its chapter 11 case, any Related Proceedings, or the Securities Litigation, (d) the right to have the reference withdrawn by a United States District Court in any matter subject to mandatory or discretionary withdrawal, or (e) all other rights, claims, actions, arguments, counterarguments, defenses, setoffs, or recoupments to which Lead Plaintiff or the Proposed Class or any member thereof are or may be entitled under agreements, at law, in equity, or otherwise, all of which rights, claims, actions, arguments, counterarguments, defenses, setoffs, and recoupments are expressly reserved.

12. **For the avoidance of doubt, Lead Plaintiff, on behalf of itself and the Proposed Class and the members thereof, does not consent, and expressly objects, to (a) the third-party release contained in Article 6.2(b) of the Plan and (b) this Court's entry of any final order or judgment that this Court lacks jurisdiction or statutory and/or constitutional adjudicatory authority to enter without the affirmative and knowing consent of all parties affected thereby, and reserves all rights to object to confirmation of the Plan, or any other plan proposed in the Debtor's chapter 11 case, on any basis, including but not limited to the fact that the Court lacks constitutional adjudicatory authority pursuant to Stern v. Marshall, 564 U.S. 462 (2011), and its progeny to approve a release of the claims of Lead Plaintiff and the Proposed Class against the Non-Debtor Defendants.**

CONCLUSION

13. The Court should not approve the Disclosure Statement, on an interim basis or otherwise, unless and until the issues identified in this Limited Objection have been addressed through appropriate revisions to the Plan with corresponding disclosures in the Disclosure Statement.

Dated: March 20, 2019

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CERTIFICATE OF SERVICE

I, Christopher P. Simon, hereby certify that on this 20th day of March, 2019, and in addition to the service provided under the Court's CM/ECF system, I caused copies of the foregoing *Limited Preliminary Objection of Securities Lead Plaintiff to Approval of Proposed Disclosure Statement on an Interim Basis* to be served on the following persons via first class mail and electronic mail.

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