

Akorn Can't Duck Investor Suits Over Collapsed \$4.3B Merger

By **Reenat Sinay**

Law360 (February 6, 2020, 3:09 PM EST) -- Akorn Inc. must face two securities fraud suits over its \$4.3 billion merger that imploded after regulatory violations came to light, an Illinois federal judge ruled Wednesday, finding that the generic drug-maker plausibly deceived shareholders in its financial filings.

U.S. District Judge Matthew F. Kennelly rejected Akorn's bid to dismiss two similar suits accusing it of hiding data integrity problems with its generic drug testing from the U.S. Food and Drug Administration, which later tanked Akorn's acquisition by Fresenius Kabi AG.

The judge said Akorn's noncompliance with FDA standards was a "known trend" because employees had raised the issue with management and the FDA itself had expressed concerns, and the shareholders properly alleged that Akorn omitted this crucial information from its filings with the U.S. Securities and Exchange Commission.

"First, the silence regarding Akorn's regulatory noncompliance in its Forms 8-K and 10-Q violated Item 303's duty to disclose," Judge Kennelly said. "And there was some nonzero probability of adverse effects arising out of Akorn's data integrity problems: The FDA had already found noncompliance with its standards at one of Akorn's [facilities] and the buyout by Fresenius was contingent on Akorn's regulatory compliance. These allegations are sufficient to meet the materiality standard."

The judge also found the investors' state common law fraud claims sufficient because they rely on the disclosure of any potential changes to a company's financial condition required by Item 303 in SEC filings when deciding whether to purchase its securities.

When Fresenius **decided to walk away** from the table in April 2018, Akorn's stock plummeted from \$19.70 per share to \$13.05 within the span of a day, the shareholders said.

The suits, brought by hedge funds Twin Master Fund Ltd. and Manikay Master Fund LP and their related entities in May and July, respectively, are just two of several that have come out of the collapsed merger.

An earlier proposed class action filed in the same court in May 2018 **received the initial OK** in August 2019 for a \$30 million cash settlement plus 8.7 million shares of Akorn stock.

Final approval of the deal was put on hold pending the outcome of dismissal attempts in the current suits because it "may have an impact" on the settlement in that case, court records show. Twin and Manikay both requested to be excluded from that proposed class action, according to court documents.

Other investors had reached disclosure-only settlements with Akorn, only to be **axed in June** by a different Illinois federal judge, who found the promised additional disclosures about the merger to be "worthless" information for the shareholders.

An attorney for Twin and Manikay told Law360 on Thursday that they were "very pleased" with Wednesday's ruling.

"It is important that investment managers be allowed to hold those who violate the securities laws accountable," said Lawrence Rolnick of Lowenstein Sandler LLP.

Counsel for Akorn did not immediately respond to requests for comment Thursday.

Twin and Manikay are represented by Andrew D. Campbell and John Haarlow Jr. of Novack and Macey LLP, and Lawrence M. Rolnick, Michael J. Hampson, Richard A. Bodnar and Jennifer A. Randolph of Lowenstein Sandler LLP.

Akorn is represented by Robert H. Baron of Cravath Swaine & Moore LLP, and James R. Figliuolo of Figliuolo & Silverman PC.

The cases are Twin Master Fund Ltd. et al. v. Akorn Inc. et al. and Manikay Master Fund LP et al. v. Akorn Inc. et al., case numbers 1:19-cv-03648 and 1:19-cv-04651, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Dean Seal. Editing by Stephen Berg.