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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 ANTONIO BACHAALANI NACIF and
7 WIES RAFI, individually and on behalf
8 of all others similarly situated,

9 Plaintiffs,

C21-0861 TSZ

10 v.

MINUTE ORDER

11 ATHIRA PHARMA, INC.; and LEEN
12 KAWAS, Ph.D.,

13 Defendants.

14 The following Minute Order is made by direction of the Court, the Honorable
15 Thomas S. Zilly, United States District Judge:

16 (1) Counsel are DIRECTED to meet and confer and to file, on or before
17 June 30, 2023, a Joint Status Report (“JSR”) addressing the following issues:

18 (a) **Definition of Settlement Class:** Plaintiffs’ claims under §§ 10(b)
19 and 20(a) of the Securities Exchange Act of 1934 (“Exchange Act”) were
20 dismissed with prejudice as to certain defendants and otherwise without prejudice
21 and with leave to amend, but plaintiffs did not timely file an amended pleading.
22 *See* Order at 29–33, 35–47, & 48–49 (docket no. 89); Minute Order at ¶ 1 (docket
23 no. 91). Thus, the only claims remaining in this action are under §§ 11 and 15 of
the Securities Act of 1933 (“Securities Act”). *See* Order at 49 (docket no. 89).
These claims, which survive only against Athira Pharma, Inc. (“Athira”) and Leen
Kawas, Ph.D. with respect to “Statement 3,” require proof that the purchase or
acquisition of Athira stock was traceable to the initial public offering (“IPO”) or
secondary public offering (“SPO”). The proposed settlement class is defined as
follows:

all persons and entities who or which purchased or otherwise
acquired Athira Pharma, Inc. publicly traded common stock:
(a) during the period from September 17, 2020[,] through June 17,

1 2021, inclusive; (b) pursuant and/or traceable to the registration
2 statement and prospectus issued in connection with the Company's
3 September 2020 initial public offering; and/or (c) pursuant and/or
4 traceable to the registration statement and prospectus issued in
5 connection with the Company's January 2021 secondary public
6 offering, and were damaged thereby.

7 Stipulation and Agreement of Settlement ("Stip.") at ¶ 1(ss) (docket no. 118-2 at
8 14); *see* Prop. Notice at ¶ 22 (docket no. 118-2 at 64). With respect to the
9 proposed definition of the settlement class, the JSR shall discuss:

10 (i) **Traceability and the Class Period:** The parties shall explain
11 the meaning of the term "traceable," which appears in the proposed
12 settlement class definition. The proposed notice to putative class members
13 and the proposed claim form, which the parties seek to require putative
14 class members to submit, indicate that shares will be deemed traceable to
15 the IPO if they were purchased or acquired between September 17, 2020,
16 and January 20, 2021, and that shares will be deemed traceable to the SPO
17 if they were purchased or acquired at the SPO price of \$22.50 per share
18 between January 21, 2021, and February 10, 2021. Prop. Notice at 13 nn.3
19 & 4 (docket no. 118-2 at 70); Prop. Claim Form at ¶ 10 (docket no. 118-2 at
20 83). In their JSR, the parties shall propose language that could be included
21 in the proposed notice to indicate the relevance of the aforementioned dates
22 and how those dates demonstrate traceability. In addition, the parties shall
23 address whether the proposed Class Period (September 17, 2020 – June 17,
2021) is inaccurate and should instead end on February 10, 2021.

(ii) **Exchange Act:** The proposed notice refers to the Exchange
Act. *See* Prop. Notice at ¶ 49 (docket no. 118-2 at 70) ("For shares of
Athira common stock eligible for a recovery under both the Exchange Act
and the Securities Act, a Recognized Loss Amount will be calculated in the
manner set forth in this Plan using an Exchange Act measure of loss, and
any Recognized Loss Amount greater than zero will be increased by
25%."). In the required JSR, counsel shall clarify whether the proposed
settlement class includes individuals and/or entities that have only an
Exchange Act claim. If so, counsel shall address whether the interests of
such individuals and/or entities are antagonistic to the interests of putative
class members who have viable Securities Act claims and whether, as a
result, the Court should decline to approve the proposed settlement.

(b) **Numerosity:** Based on the current record, the Court is unable to
find the requisite numerosity to certify a settlement class. The parties have
indicated that Athira had more than 30 million common shares outstanding during
the "Class Period," which might itself be overbroad. The Court cannot determine

1 from this information how many persons or entities would be in the proposed
 2 settlement class. In their JSR, the attorneys shall provide the following additional
 3 information and/or reasonable estimates: (i) the number of shareholders who
 4 purchased or acquired shares that are traceable to Athira’s IPO and/or SPO;
 5 (ii) of these shareholders, the number or percentage that are institutional investors,
 6 brokerage firms, or nominees for beneficial purchasers of securities; and
 7 (iii) the number of shares held by individuals¹ or entities² that are excluded from
 8 the settlement class or ineligible to participate in the settlement.

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 10 (c) **“Opt In” Approach:** Counsel shall address whether a feasible
 11 method exists for distributing net settlement funds without requiring putative class
 12 members to submit claim forms or, in other words, to “opt in” to the settlement. If
 13 the parties cannot agree on an alternative to the “opt in” approach, counsel should
 14 show cause why the Court should not decline to approve the proposed settlement.
 15 The “opt in” requirement appears to benefit institutional investors at the expense
 16 of individuals with relatively smaller numbers of shares who might lack the

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Name	Position	Number of Shares (as of April 16, 2021, except as indicated)
Kevin Church	Vice President of Discovery (stock ownership as of Sep. 2020)	40,981
Joseph Edelman	Director since May 2020	3,432,080
John M. Fluke	Director since Dec. 2014	156,779
James A. Johnson	Director since Aug. 2020	6,935
Leen Kawas, Ph.D.	Director, CEO, & President from Jan. 2014 until Oct. 2021	1,693,102
Barbara Kosacz	Director since March 2021	1,541
Mark Litton	Director since Oct. 2021 CEO & President (previously COO)	13,126
Kelly A. Romano	Director since Dec. 2020 Chair of Board since Jan. 2021	4,168
Tadataka Yamada, M.D.	Director since June 2019 (deceased) Chair from Jan. 2020 until Jan. 2021	62,382
Ineligible Shares		5,411,094

² Excluded entities appear to include Athira’s employee retirement and/or benefit plans. *See* Stip. at ¶ 1(ss) (docket no. 118-2); Prop. Notice at ¶¶ 22 & 40 (docket no. 118-2 at 65 & 69).

1 necessary records and/or incentive to return completed claim forms. In addition,
2 the “opt in” approach would bind individuals and entities that do not opt out of the
3 settlement, while offering them no portion of the settlement funds if they do not
4 return the requisite claim form.

5 (d) **Plan of Allocation**: The terms of the settlement do not specify how
6 net proceeds will be distributed among class members, and the parties propose to
7 allow the Court to modify the Plan of Allocation without notice to putative class
8 members. *See* Stip. at ¶ 21 (docket no. 118-2) (“The Plan of Allocation proposed
9 in the Notice is not a necessary term of the Settlement or of this Stipulation and it
10 is not a condition of the Settlement or of this Stipulation that any particular plan of
11 allocation be approved by the Court.”); *see also* Prop. Notice at ¶ 43 (docket
12 no. 118-2 at 69) (“The Plan of Allocation . . . is the plan for the distribution of the
13 Settlement proceeds that is being proposed by Lead Plaintiffs and Co-Lead
14 Counsel to the Court for approval. The Court may approve this Plan of Allocation
15 or modify it without additional notice to the Settlement Class.”). Counsel shall
16 address in the JSR (i) whether the parties have actually reached a settlement;
17 (ii) whether the requirements of due process are satisfied when, pursuant to the
18 proposed settlement, putative class members will not know how net settlement
19 funds will be distributed prior to the deadlines for opting out of or objecting to the
20 settlement; and (iii) given that defendants are precluded by the parties’ settlement
21 agreement from objecting to plaintiffs’ proposed Plan of Allocation, *see* Stip. at
22 ¶ 21 (docket no. 118-2), by what method the Court will be provided with any
23 alternatives or suggested amendments.

(e) **Net Settlement Proceeds**: The parties have indicated the gross
settlement amount (\$10 million) and the attorney’s fees and litigation costs that
plaintiffs’ counsel will seek (\$3,333,333.33 plus \$125,000 for a total of
\$3,458,333.33), but they have not provided enough information to calculate the
anticipated net settlement proceeds or to understand how they have estimated an
average recovery of \$0.47 per eligible share of stock. *See* Prop. Notice at ¶ 3
(docket no. 118-2 at 60). In their JSR, the attorneys shall disclose how the
proposed claims administrator, Strategic Claims Services, will be compensated
and provide an anticipated total for settlement administration costs, as well as the
amount of any taxes or other payments that will reduce the net recovery. They
shall further set forth language that could be included in a notice to putative class
members concerning how the average recovery per share is computed and the
expected range (minimum and maximum) of payments among class members.

(f) **Nominal Amounts**: In the required JSR, the parties shall show
cause why the Court should not decline to approve the proposed settlement, which
would deny payment, during the initial round and any subsequent round of
distribution of settlement funds, to class members whose Distribution Amount is

1 below \$10.00. *See* Prop. Notice at ¶¶ 53 & 62 (docket no. 118-2 at 72 & 74). The
 2 record contains no basis for distinguishing between \$10.00 and \$9.99.

3 (g) **Dispute Resolution**: The attorneys shall show cause why the Court
 4 should not decline to approve a settlement pursuant to which disputes about the
 5 amounts of class member distributions must be resolved by the Court as opposed
 6 to the settlement or claims administrator. *See* Pls.’ Mot. at 14 (docket no. 118 at
 7 21) (citing Stip. at ¶¶ 24(d)–(e) (docket no. 118-2)).

8 (h) **Cy Pres Recipient**: Counsel shall explain why Public Justice
 9 Foundation is an appropriate *cy pres* recipient. *See Nachshin v. AOL, LLC*, 663
 10 F.3d 1034, 1036 (9th Cir. 2011) (“*Cy pres* distributions must account for the
 11 nature of the . . . lawsuit, the objectives of the underlying statutes, and the interests
 12 of the silent class members, including their geographic diversity.”); *see also*
 13 *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012).

14 (i) **Notices to Attorneys General**: The parties shall show cause why
 15 the motion for preliminary approval of class settlement should not be denied
 16 without prejudice if the requisite notices of the proposed settlement have not been
 17 served on the appropriate federal and state officials pursuant to 28 U.S.C. § 1715.

18 (j) **Derivative Actions**: Given the Court’s rulings in this matter,
 19 counsel shall discuss in the required JSR what claims, if any, remain viable in the
 20 related shareholder derivative actions, *Bushansky v. Kawas*, C22-497 TSZ, and
 21 *Houlihan v. Kawas*, C22-620 TSZ, and to what extent the parties have explored
 22 the possibility of a global settlement. The attorneys shall further provide language
 23 suitable for inclusion in a class notice that explains how the derivative litigation
 affects or might affect putative class members.

(2) Plaintiffs’ motion for preliminary approval of a proposed class settlement,
 docket no. 118, is RENOTED to June 30, 2023. Any revised stipulation and agreement
 of settlement, any revised proposed notice to putative class members,³ any revised claim

³ The Court will not approve a form of notice that includes the following language or provisions:
 (i) verbiage suggesting that the notice or its content has the imprimatur of the Court, for example,
 “a Federal Court authorized this Notice,” “The Court directed that this Notice be mailed to you,”
 “The Court has directed us to send you this Notice”; (ii) directions to file materials with the
 Clerk of the Court, *see* Prop. Notice at ¶ 72 (docket no. 118-2), or indicating that materials may
 be inspected in the Clerk’s Office, *id.* at ¶ 81; all correspondence and inquiry concerning this
 matter shall be directed to either counsel or the settlement/claims administrator; (iii) explanations
 suggesting that class members are “not personally liable” for attorney’s fees or expenses, *see id.*
 at ¶ 64; such statement is not accurate because attorney’s fees and expenses will be paid from the
 settlement fund, and those amounts would otherwise be distributed to class members; or (iv) any

1 form, any previously-issued § 1715 notice, and redlined versions of such materials shall
2 be attached to the JSR referenced in Paragraph 1, above. In addition, contemporaneously
3 with the JSR, the parties shall file **under seal** the following materials: (i) the additional
4 discovery provided to plaintiffs' counsel pursuant to the parties' Term Sheet, *i.e.*,
5 documents that the Special Committee of Athira's Board of Directors considered in its
6 investigation into the alleged misconduct, *see* Stip. at ¶ J (docket no. 118-2 at 6); and
7 (ii) the Supplemental Agreement dated April 27, 2023, concerning the circumstances
8 under which Athira may terminate the settlement.

9 (3) The Clerk is directed to send a copy of this Minute Order to all counsel of
10 record.

11 Dated this 31st day of May, 2023.

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Ravi Subramanian
Clerk

s/Laurie Cuaresma
Deputy Clerk

requirements that putative class members provide information about their shares as a condition
of opting out of the settlement, *see id.* at ¶ 66, or file or submit written materials as a prerequisite
to participating in or addressing the Court at any hearing concerning the proposed settlement, *see*
id. at ¶¶ 74 & 75.