

Investors Sue Keryx Over \$1.3B Merger With Akebia

By **Reenat Sinay**

Law360 (October 16, 2018, 6:59 PM EDT) -- Keryx Biopharmaceuticals Inc. misled investors about the company's financial future in documents related to its \$1.3 billion acquisition by Akebia Therapeutics Inc., shareholders alleged in a proposed securities class action filed in Delaware federal court on Tuesday.

The proposed class, led by investor Gregory Corwin, accused the biopharma company and its board of directors of violating federal securities laws by filing "materially incomplete" forms with the U.S. Securities and Exchange Commission that excluded crucial information on the financial projections and valuation of the company.

The investors seek to prevent the merger from going forward until they can review any relevant missing information ahead of an upcoming shareholder vote, or to receive damages if the deal should go through, according to the complaint.

"The question here is not the duty to speak, but liability for not having spoken enough," the investors said. "With regard to future events, uncertain figures and other so-called soft information, a company may choose silence or speech elaborated by the factual basis as then known — but it may not choose half-truths."

The merger between the two biopharmaceutical companies, both of which produce medications related to kidney disease, was **announced in June**.

The press release reporting the agreement said Keryx shareholders would receive 0.37433 common shares of Akebia for each share of Keryx they own, but the investors believe the merger consideration is "inadequate" because of the company's recent growth and financial success, according to the complaint.

Additionally, in an October 2018 proxy statement to the SEC, Keryx provided several non-generally accepted accounting principles financial metrics, but failed to disclose how they were calculated, the investors said.

"In stark contrast to GAAP metrics, non-GAAP figures are not standardized and, consequently, can be manipulated and easily taken out of context," they said in the complaint.

The shareholders also accused Keryx of failing to disclose in its proxy statement whether there were any negotiations about who would serve on the combined company's board of directors after the merger, depriving investors of information on any potential conflicts of interest.

"Indeed, the timing and nature of post-close employment provides key insight concerning motivations that would prevent fiduciaries from acting solely in the best interests of a company's shareholders," the investors said.

The suit follows an **ongoing proposed securities class action** filed in 2016 alleging that the company misled investors to believe it had mitigated supply chain risks before a stock drop.

Representatives for the parties did not immediately respond to requests for comment on Tuesday.

The proposed class is represented by Juan E. Monteverde of Monteverde & Associates PC, and Blake A. Bennett of Cooch & Taylor PA.

Counsel information for the defendants was not immediately available on Tuesday.

The case is Corwin v. Keryx Biopharmaceuticals Inc. et al, case number 1:18-cv-01589, in the U.S. District Court for the District of Delaware.

--Additional reporting by Chelsea Naso and Alison Noon. Editing by Stephen Berg.