

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

SPENCER SAVAGE, et al.,

Plaintiffs,

-against-

ROBERT B. KAY, et al.,

Defendants.

INDEX NO. 162407/2015

MOTION DATE Oct. 20, 2016

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion for preliminary approval of settlement.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

PAPERS NUMBERED

Form with horizontal lines for entering paper numbers.

Cross-Motion: Yes No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In this unopposed motion, plaintiffs seek an order granting preliminary approval of a proposed settlement agreement that would dispose of this action. In so moving, plaintiffs have apparently followed procedure generally utilized in federal courts for review of proposed settlements of class actions brought under Fed Rules Civ Pro rule 23 (see e.g. pls' mem of law in support at 9). Although New York courts follow similar procedure for settlement review in class actions brought under CPLR Article 9 (see e.g. Willson v New York Life Ins. Co., No. 94/127804, 1995 NY Misc LEXIS 652, at *24 n 2 [Sup Ct, NY County Nov. 8, 1995, Index No. 94/127804]), the present case is brought as a derivative claim, not a class action. Like class actions, derivative suits require final judicial approval before a case may be resolved through settlement (Business Corporation Law §§ 626 [d]; 1319). Unlike class actions, however, derivative suits do not utilize the step of preliminary judicial approval as part of the settlement review process (see e.g. Kassner v Am. Exp. Co., 71 Misc 2d 452, 454 [Sup Ct 1972]; Seinfeld v Robinson, 172 Misc 2d 159, 160 [Sup Ct 1997], revd, 246 AD2d 291 [1st Dept 1998]). Therefore, the motion for preliminary approval is denied as moot.

If approved, the proposed settlement would provide for the dismissal of this case with prejudice and would mandate a number of substantial changes in the corporate governance of iBio Inc. ("iBio"). This Court finds that the interests of the shareholders may be substantially affected by such settlement and directs that notice be given pursuant to Business Corporation Law § 626 (d). The parties have submitted a proposed Notice of Pendency of Proposed Settlement of Shareholder Derivative Action ("Settlement Notice") and have agreed upon the means for its distribution (see affirmation of Thomas J. McKenna, exhibit 1). The contents of the Settlement Notice provides a detailed background of the action, describes the terms of the settlement and the allocation of attorneys' fees and costs, and includes a discussion of options available to shareholders in connection with the proceedings. The parties agree that the Settlement Notice is to be sent via U.S. mail to all

iBio shareholders at the last known addresses appearing in iBio's stock transfer records, in addition to being posted on the websites of iBio and plaintiffs' counsel. The parties also agree to issuing a press release announcing the settlement. The notice satisfies the requirements of due process (*see Mullane v Cent. Hanover Bank & Trust Co.*, 339 US 306, 314 [1950]; *Eisen v Carlisle and Jacquelin*, 417 US 156, 173-74 [1974]).

Therefore, it is hereby **ORDERED** that:

1. The motion for preliminary approval is **DENIED** as moot.
2. The Court will hold a final fairness hearing on April 24, 2017, at 3:00 p.m., at Part 49, Room 252 at the Supreme Court of the State of New York, located at 60 Centre Street, New York, New York.
3. Within ten (10) calendar days after the entry of this Order, iBio shall (i) mail by first class postage pre-paid mail a notice (the "Notice), in the form used in the aforementioned Settlement Notice, to all iBio shareholders at the last known addresses appearing in the stock transfer records maintained by or on behalf of iBio; (ii) post copies of the Notice, the Stipulation, and this Order on the Company website at least through the date of the Settlement Hearing; and (iii) issue a press release, via a national newswire service, such as Business Wire, PR Newswire or Investor's Business Daily, announcing the Settlement and directing persons to the Notice and related papers posted on iBio's website. iBio's Counsel shall file with the Court an appropriate affidavit or declaration documenting that iBio has satisfied the requirements of this paragraph as soon as practicable after iBio has done so.
4. Within ten (10) calendar days after entry of this Order, Plaintiffs' Counsel shall post copies of the Notice, the Stipulation, and this Order on its website and shall maintain it there through the date of the Settlement Hearing. Plaintiffs' Counsel shall file with the Court an appropriate affidavit or declaration documenting that it has satisfied the requirements of this paragraph as soon as practicable after it has done so.
5. All papers in support of the proposed settlement and the settling parties' responses to any objections by iBio shareholders, if any, shall be e-filed with the Court and served at least fourteen (14) calendar days prior to the date of the final fairness hearing.

Dated: January 20, 2017


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.