*E-Filed*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

| Case No. | CV 14-6414-GHK (PJWx) | Date | August 17, 2016 |
|---|---|---|---|
| Title | *In re: CytRx Corp. Stockholder Derivative Litigation* | | |

| **Presiding: The Honorable** | **GEORGE H. KING, U.S. DISTRICT JUDGE** | |
|---|---|---|
| Paul Songco | N/A | N/A |
| Deputy Clerk | Court Reporter / Recorder | Tape No. |

| Attorneys Present for Plaintiffs: | Attorneys Present for Defendants: |
|---|---|
| None | None |

**Proceedings:** **(In Chambers) Order re:** (1) Plaintiffs' Motion to Set Aside Judgment (Dkt. 96); (2) Proposed Intervenors' Motion to Intervene (Dkt. 97)

This matter is before us on Plaintiffs Jared Pankratz and Jack Taylor's ("Plaintiffs") Motion to Set Aside Judgment, (Dkt. 96), and Gordon Niedermayer and Brent Reed's ("Proposed Intervenors") Motion to Intervene, (Dkt. 97). We have considered the papers filed in support of and in opposition to these motions and deem these matters appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows:

## I. BACKGROUND

This is a shareholder derivative action brought by Plaintiffs against nominal Defendant CytRx Corporation ("CytRx"). (Dkt. 1, Compl. ¶¶ 2, 15.) Plaintiffs, derivatively and on behalf of CytRx, filed this action against current and former directors Steven A. Kriegsman, John Y. Caloz, Marvin R. Selter, Louis J. Ignarro, Joseph Rubinfeld, and Richard L. Wennekamp (collectively, "Defendants") for: (1) breach of fiduciary duties; (2) unjust enrichment; (3) gross mismanagement; (4) abuse of control; and (5) insider selling and misappropriation of information. (*Id.* ¶ 15.)

This action is one of a handful that have been brought against Defendants for their purported involvement in an alleged stock-promotion scheme. Plaintiffs allege that

Defendants hired the DreamTeam Group to promote company stock via a series of allegedly misleading articles "touting the supposed strength of CytRx and its products." (*Id.* ¶ 3.) We presided over the related securities class action. That action settled in late 2015, and we granted final approval of the settlement on May 18, 2016. (*See* CV 14-1956, Dkt. 162.)

On July 24, 2015, Defendants filed a motion to dismiss on *forum non conveniens* grounds. (Dkt. 60.) They argued that CytRx's forum-selection bylaw set the Delaware Court of Chancery as the exclusive forum for shareholder derivative suits.[1] (*See id.*) We agreed and, on October 30, 2015, dismissed the case without prejudice to its refiling in the Delaware Court of Chancery. (*See* Dkts. 68, 69.) On November 17, 2015, Plaintiffs appealed our dismissal order. (*See* Dkt. 70.)

On December 23, 2015, the Parties executed a Memorandum of Understanding memorializing the terms of a settlement of this action. (Dkt. 96, Motion to Set Aside ("Motion") at 5.) On February 19, 2016, a Ninth Circuit mediator issued an order stating that Plaintiffs' appeal was "dismissed without prejudice to reinstatement in the event the

[1] CytRx's forum-selection bylaw provides, in full:

> Unless the corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the corporation, (ii) any action asserting a claim for breach of a fiduciary duty owed by any director, officer, employee or agent of the corporation to the corporation or the corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, the certificate of incorporation or the by-laws of the corporation or (iv) any action asserting a claim governed by the internal affairs doctrine, in each case subject to said Court of Chancery having personal jurisdiction over the indispensable parties named as defendants therein. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the corporation shall be deemed to have notice of and consented to the provisions of this Section.

(Dkt. 61, Ex. 1.)

district court does not enter a final order approving the settlement in accordance with the agreement reached between the parties or such final order is not affirmed on appeal." (Dkt. 73.) Thereafter, on April 4, 2016, Plaintiffs filed a motion for preliminary approval of the action pursuant to Federal Rule of Civil Procedure 23.1. (Dkt. 78.) On May 6, 2016, two purported shareholders of CytRx, the Proposed Intervenors, filed a motion to intervene. (Dkt. 80.) Shortly after our dismissal of this action, on December 17, 2015, Proposed Intervenors filed a similar derivative action in the Delaware Chancery Court. (*See* Dkt. 99, Opp'n at 4-5.) Their case has been stayed pending the outcome of this litigation. (*Id.* at 6.)

In a May 31, 2016 Order, we concluded that both the preliminary approval motion and motion to intervene were "premature at best" given that the case is still dismissed. (Dkt. 95.) We also noted that a circuit mediator has no ability to affect our dismissal order and that the mediator's order dismissing the appeal did not even purport to remand the case. (*Id.*) As such, we denied both motions without prejudice and gave the Parties thirty days to file a motion to set aside our order if they chose to do so. (*Id.*)

Plaintiffs timely filed the instant Motion to Set Aside Judgment ("Motion") pursuant to Federal Rule of Civil Procedure 60(b)(6). (Dkt. 96.) Defendants filed a joinder in Plaintiffs' Motion. (Dkt. 98.) Proposed Intervenors filed a motion to intervene to oppose Plaintiffs' Motion. (*See* Dkt. 97.)

## II. ANALYSIS

### A. Motion to Set Aside Dismissal Order

#### 1. Legal Standard

Plaintiffs move under Rule 60(b)(6) to set aside our dismissal order. (Mot. at 2.) Under Rule 60(b)(6), we "may relieve a party . . . from a final judgment, order, or proceeding for . . . any [] reason that justifies relief." Fed. R. Civ. P. 60(b)(6). In determining whether to vacate a judgment or order upon a settlement between parties, we apply an "equitable balancing test." *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1167-69 (9th Cir. 1998). *American Games* sets forth various factors to weigh, including, but not limited to: "'the consequences and attendant hardships of dismissal or refusal to dismiss,' the 'competing values of finality of judgment and right to relitigation

of unreviewed disputes,' the 'motives of the party whose voluntary action mooted the case,' and the public policy against allowing a losing party to 'buy an eraser for the public record.'" *Ayotte v. Am. Econ. Ins. Co.*, 578 F. App'x 657, 658-59 (9th Cir. 2014) (quoting *Am. Games*, 142 F.3d at 1168, 1170); *Susilo v. Wells Fargo Bank NA*, 2014 U.S. Dist. LEXIS 92908, at *4 (C.D. Cal. June 30, 2014) (same); *see also Bates v. Union Oil Co. of Cal.*, 944 F.2d 647, 650 (9th Cir. 1991) ("When the parties seek vacatur as a condition of settlement, the district court may refuse to vacate the judgment. In deciding whether to vacate the judgment, we have directed district courts to balance the competing values of finality of judgment and right to relitigation of unreviewed disputes. The purpose of this balancing process is to enable the district court to consider fully the consequences of vacatur." (internal quotation marks and citations omitted)). We are not obligated to vacate an order pursuant to a settlement. Otherwise "any litigant dissatisfied with a trial court's findings would be able to have them wiped from the books." *Ringsby Truck Lines, Inc. v. W. Conference of Teamsters*, 686 F.2d 720, 721 (9th Cir. 1982).

**2. Discussion**

We decline to set aside the order dismissing the case given that none of the factors weighs in favor of vacatur.

**a. Consequences and Hardship of Dismissal**

As to hardship resulting from dismissal, Plaintiffs argue that "the Appeal will be reinstated [] 'which poses a hardship because of the use of potential resources in reinstating and relitigating the appeal.'" (Mot. at 8 (quoting *Hebrew Univ. of Jerusalem v. Gen. Motors LLC*, 2015 WL 9653154, at *2 (C.D. Cal. Jan. 12, 2015)).) They contend that we will conserve judicial resources that otherwise would be expended in deciding the appeal if we set aside the order and consider the settlement. (Mot. at 9.) But the case Plaintiffs rely on in making this argument, *Hebrew University*, is factually distinguishable. There, the district court entered summary judgment in favor of the defendant, and the plaintiff appealed. 2015 WL 9653154, at *1. On appeal, the parties reached a settlement agreement, a specific condition of which was a vacatur of the judgment. *Id.* The district court decided to vacate the judgment in part because settlement would "conserve the Ninth Circuit resources that are expended in deciding the appeal." *Id.* at *2.

*Hebrew University* does not support Plaintiffs' argument. There, the court had entered judgment in favor of the defendant. While the plaintiff could have dismissed the appeal and settled the case, the summary judgment order likely impaired an important element of the settlement. Moreover, the existence of the summary judgment order, a ruling on the merits, may very well have had collateral consequences for the plaintiff. Indeed, the settlement between the *Hebrew University* parties took care to address "the preclus[ive] effect of the Judgment." *Id.* at *1.

Nothing about *Hebrew University* compels a like result here. Our dismissal order made no determination of the merits whatsoever. It merely ruled on a venue issue. The enforceability of the forum-selection bylaw would have no effect on either party's ability to either litigate the merits of the claims or seek approval of the settlement in Delaware. In either event, no party will be saddled with any adverse determination or judgments on the merits.

Plaintiffs can save the very judicial resources they purport to want to conserve by simply abandoning the appeal in favor of litigation in Delaware. Of course, Plaintiffs have the right to persist in their appeal. But given the circumstances here, any hardship that results from the appeal (if Plaintiffs continue to pursue it) is largely of their own making. Nor would setting aside our order necessarily obviate an appeal. If we were to reject the settlement, the Parties would be restored to their pre-settlement positions, which would necessitate reinstating the appeal if Plaintiffs continued to resist litigation in Delaware. On balance, we conclude that there are minimal consequences and attendant hardships to maintaining the dismissal of this action.

**b. Finality of Judgment and Relitigation of Unreviewed Disputes**

Plaintiffs wholly ignore the resources that we have expended in deciding the forum-selection bylaw issue. *See Tumulty v. Fedex Ground Package Sys., Inc.*, 2007 WL 896035, at *2 (W.D. Wash. Mar. 22, 2007) (evaluating a motion to vacate summary judgment order in light of settlement and concluding that the hardship of pursuing an appeal would not be "undue or unusual" and that the parties overlooked the "resources that this Court has expended in this case—work that would be negated by a vacatur order"). Although our order dismissing the case will remain available on research databases, it will not be citeable as an actual order. Our resources effectively "would be

expended for nought if vacatur were ordered." *Id.* (quoting *Aetna Cas. & Surety Co. v. Home Ins. Co.*, 882 F. Supp. 1355, 1358 (S.D.N.Y. 1995)).

In their Joinder, Defendants argue that, if we deny the Motion, "CytRx will be required to defend the reinstated appeal by the CA Derivative Plaintiffs and likely respond to the Delaware Derivative Plaintiffs['] complaint in the Delaware Chancery Court, a complaint that brings nearly identical claims as in the CA Derivative Action. Such additional litigation costs will put a financial strain on the Company." (Dkt. 98, Joinder at 2.) But Defendants explicitly—and successfully—argued that this case should be dismissed in favor of a Delaware forum in light of CytRx's forum-selection bylaw. The contention that a denial of the Motion would prejudice them rings hollow in light of their successful efforts to have the case dismissed on *forum non conveniens* grounds. Having insisted on the enforcement of the forum-selection bylaw, Defendants surely must have known that there is a potential for an appeal which, if they were to win, would result in litigation on the merits, or settlement, in Delaware.

To the extent they complain that there might be simultaneous proceedings before the Ninth Circuit and the Delaware Chancery Court, they have made no showing, other than bald conclusory statements, that the Company would experience any financial strain. Nor are simultaneous proceedings a foregone conclusion. Indeed, the Delaware court has stayed proceedings pending our resolution of this matter, and may be persuaded to enter case management orders that would relieve legitimate and demonstrated hardships, if any. At bottom, Defendants should not be allowed to waste the Court's scarce resources to serve their changing strategies to suit their current desires.

Nor do "competing values of finality of judgment and the right to relitigation of unreviewed disputes" militate in favor of vacatur. The right to relitigate unreviewed disputes is given more weight when a party is deprived of that right for reasons beyond its control. That is not the case here. If Plaintiffs' right to relitigate unreviewed disputes is lost, it is due to Plaintiffs' voluntary acts of opting for settlement. *Compare Log Cabin Republicans v. United States*, 658 F.3d 1162, 1167-68 (9th Cir. 2011) (concluding that appeal was moot because Congress repealed the challenged statute and that the repeal of the statute "deprived the United States of the review to which it was entitled" such that vacatur was proper); *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (concluding that plaintiffs' status as no longer on active duty rendered appeal moot and that, because plaintiffs did not cause appeal to be moot, vacatur was appropriate), *with*

*ACLU of Nev. v. Masto*, 670 F.3d 1046, 1065-66 (9th Cir. 2012) (concluding that defendant's "strategic decision . . . rather than mere happenstance" caused the appeal to be moot and remanding the matter to district court to "balance the relevant equitable concerns and decide whether to vacate its judgment"); *Zinus, Inc. v. Simmons Bedding Co.*, 2008 WL 1847183, at *1-2 (N.D. Cal. Apr. 23, 2008) (declining to vacate summary adjudication order in patent infringement case where parties reached voluntary settlement in part because "allowing a patent holder to litigate issues of claim construction and infringement, only to settle and obtain vacatur of any unfavorable rulings, would raise weighty policy concerns"). Ultimately, this factor weighs in favor of denying the motion.

**c. Motives of Parties Whose Action Mooted the Case**

Both Parties contend that settling here makes sense given our familiarity with the lawsuit. (*See* Mot. at 12; Joinder at 1 ("The CA Derivative Plaintiffs' motion allows all shareholders of CytRx to be heard on the arms-length negotiated settlement before a Court fully familiar with the allegations raised by both the CA Derivative Plaintiffs and the Delaware Derivative Plaintiffs.").) The Parties overstate our familiarity with this case. Although we resolved a motion to dismiss in the CytRx securities action, (*see* CV 14-1956, Dkt. 117), which involves the same general factual allegations, we have not resolved a single motion on the merits in this case, which also concerns distinct claims that were not litigated in the securities action. The fact that this case is in its infancy and is capable of being litigated and settled in Delaware weighs against the Parties' familiarity argument.

If anything, we are skeptical of the Parties' motivation for attempting to settle here. The Delaware Court of Chancery has gained a reputation for rejecting shareholder class action and derivative settlements that do not have a monetary component yet include a broad release of claims and an award of attorneys' fees, similar to the proposed settlement here. A recent *Wall Street Journal* article highlighted this trend, particularly focusing on shareholder suits that arise after company mergers. *See* Liz Hoffman, *The Judge Who Shoots Down Merger Lawsuits*, The Wall Street Journal, Jan. 10, 2016 ("Companies agree in predictable settlements to disclose additional information—typically obscure financial analyses or mundane details of negotiation meetings—and to pay the plaintiffs' lawyers a fee. In exchange, companies receive immunity from future lawsuits related to the deal. . . . Delaware judges have become increasingly critical of these 'disclosure only' pacts, which they say do shareholders little

good and can bury instances of actual wrongdoing."); *see also* Jeff Montgomery, *Chancery Denies Partial Deal In Providence Shareholder Suit*, Law360, Feb. 9, 2016, www.law360.com/articles/757012/chancery-denies-partial-deal-in-providence-shareholder-suit (noting that there are "new Chancery Court mandates for clearer and greater shareholder benefits in derivative suits" and that the Chancery Court recently "declared that derivative cases have too often secured too little benefit for shareholders while giving up valuable liability releases to companies"). In refusing to approve a non-monetary settlement in a shareholder suit that arose after an acquisition, Chancellor Bouchard stated, in no uncertain terms, that litigants "can expect that the Court will be increasingly vigilant in scrutinizing the 'give' and the 'get' of such settlements to ensure that they are genuinely fair and reasonable to the absent class members." *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 886 (Del. Ch. 2016); *see also id.* at 896 n.36 ("[I]n the area of derivative litigation, a culture has developed that results in cases of relatively worthless settlements . . . that discontinue the action (with releases) resulting in the corporate defendants not opposing an agreed upon legal fee to class counsel" (internal quotation marks and citation omitted)); *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1067 (Del. Ch. 2015) (Laster, V.C.) (approving derivative action settlement, noting that it avoided the perils of "routine disclosure-only settlements, entered into quickly after ritualized quasi-litigation"); *In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *28 (Del. Ch. Dec. 9, 2011) (Laster, V.C.) (noting general practice in derivative suits of "cookie-cutter deal litigation" that achieve "disclosure-only settlements"). Further, in a case in which Plaintiffs' counsel's firm, The Weiser Law Firm, P.C., represented the plaintiff, Vice Chancellor Laster rejected a settlement because the relief obtained was insufficient to support a broad release, noting that plaintiff's counsel would recover $825,000 in fees while the class "gets nothing." *Acevedo v. Aeroflex Holding Corp.*, C.A. No. 9730-VCL, at 60-63 (Del. Ch. July 8, 2015) (transcript).

While this case is not a derivative suit that arose in the shadow of a merger or acquisition, the settlement is non-monetary, includes a global release of claims, and provides an attorneys' fee and expense award of $700,000. (*See* Dkt. 78, Stipulation of Settlement ¶¶ 4.1-4.2 (releases), 5.2 (attorneys' fee and expense award).) There is little reason to think that the Chancery Court would not "be increasingly vigilant in

scrutinizing" this settlement as well.[3] *See In re Trulia*, 129 A.3d at 886. It is reasonable to infer that a motivation for seeking vacatur may be to avoid a forum that reviews critically the general type of settlement proposed by the Parties here. This inference is made all the more reasonable by Plaintiffs' counsel's recent failure to receive approval of a non-monetary settlement in the Chancery Court. We cannot ignore the possibility that the current Motion may be an attempt to shop for a more hospitable forum in which to settle the dispute. *See* Hoffman, *Merger Lawsuits*, *supra* ("[A] tougher stance in Delaware may drive cases to other jurisdictions that are less predictable."). At the least, we cannot conclude that the Parties' motivation weighs in favor of setting aside the dismissal order.

### d. Public Policy Considerations

Finally, Plaintiffs argue that the public policy favoring settlements supports granting the Motion. *See, e.g.*, *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) ("[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned."). This argument is unavailing. As mentioned, settlement is still possible because denial of the motion does not foreclose settlement in Delaware. CytRx shareholders still have the option of entering a beneficial settlement without requiring us to vacate our order.

Plaintiffs again analogize to inapposite cases. *See id.*; *Bedrock Fin., Inc. v. United States*, 2015 WL 1989106 (E.D. Cal. Apr. 30, 2015). *In re Syncor* concerned an ERISA class action that the district court dismissed on summary judgment. *See* 516 F.3d at 1099. While the parties' summary judgment motions were under submission, the parties settled the case, notified the court of the settlement, and requested that the court not rule on their summary judgment motions. *Id.* Nevertheless, the day after receiving notice of the settlement, the court entered judgment against the class. *Id.* The class filed a motion to set aside the judgment under Rule 60(b), which the court denied. *Id.* The Ninth Circuit reversed, noting that "[a]t the time of settlement, Defendants knew they had

[3] We intimate no views on the merits of the proposed settlement as it is not before us at this time. We merely note that the Chancery Court has given heightened scrutiny to the general *type* of settlement that the Parties are proposing. Nor do we express any views on whether we believe the added scrutiny suggested by the Delaware courts is warranted.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

| Case No. | CV 14-6414-GHK (PJWx) | Date | August 17, 2016 |
|---|---|---|---|
| Title | *In re: CytRx Corp. Stockholder Derivative Litigation* | | |

dispositive motions pending and chose the certainty of settlement rather than the gamble of a ruling on their motions. . . . Because the parties bound themselves to a settlement agreement . . . and gave the required notice of the agreement, the district court should not have (1) filed its order granting the motions for summary judgment and (2) entered final judgments against the Class." *Id.* at 1100. This case bears little resemblance to ours because it addresses a situation we do not confront—the effect of a *pre*-judgment settlement on the district court's decision to set aside the judgment. Unlike the settlement in *In re Syncor*, the settlement here was reached *after* we dismissed this action. In fact, the Parties did not notify us that they had reached a settlement until February 25, 2016, nearly four months after we had entered our dismissal order. (*See* Dkt. 74, Notice of Settlement.)

*Bedrock Financial* is also distinguishable for largely the same reasons that *Hebrew University*, discussed *supra*, is not controlling here. The parties in *Bedrock Financial* requested vacatur of summary judgment rulings after they reached a settlement. 2015 WL 1989106, at *2. The request was granted given the "policy favoring settlement, the Ninth Circuit's specific efforts to assist the parties to obtain settlement in this case, the parties' desire to conserve resources in continuing to litigate the matter on appeal, the judicial resources that further litigation would consume, and the fact-specific nature of the orders under consideration." *Id.* at *3. But unlike our case, *Bedrock Financial*—along with *Hebrew University* and *In re Syncor* —involved a dismissal based on summary judgment, which was a potential impediment to settlement. The same is not true here as our venue decision poses no similar impediment to settlement, other than perhaps the Parties may be facing a court in Delaware that has foreshadowed stricter scrutiny of such settlements. But any desire to avoid the glare of the Delaware Chancery Court's spotlight is not a legitimate consideration in our analysis. Denial of the Motion will not run contrary to the strong policy of encouraging settlement.

Plaintiffs also make much of the fact that they were in settlement negotiations at the time we dismissed the action. (*See* Mot. at 6 ("[T]he Parties were already fully engaged in settlement negotiations at the time the October 30, 2015 Order [was] entered . . . .").) Litigants frequently engage in protracted settlement discussions, as they should. But the mere fact that the Parties were in settlement negotiations at the time we dismissed the case does not justify vacating our order. If that were the case, parties could erase any unfavorable order simply because they were in settlement discussions at the time the court issued the order. Neither the law nor wise policy justifies such a result. *See*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

| Case No. | CV 14-6414-GHK (PJWx) | Date | August 17, 2016 |
|---|---|---|---|
| Title | *In re: CytRx Corp. Stockholder Derivative Litigation* | | |

*Ringsby*, 686 F.2d at 721 ("If the effect of post-judgment settlements were automatically to vacate the trial court's judgment, any litigant dissatisfied with a trial court's findings would be able to have them wiped from the books.").

Considering the relevant factors, the Parties have not demonstrated that the balance of the equities weighs in their favor. With a settlement viable in Delaware, the litigation in its infancy, and a reasonable inference that forum-shopping may have played a role in the Parties' desire to remain here, setting aside the dismissal order is unwarranted.

### B. Motion to Intervene

In light of our ruling, we also **DENY as moot** Proposed Intervenors' Motion to Intervene to oppose the Motion. (Dkt. 97.)

## III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion and Defendants' Joinder therein are **DENIED**. Proposed Intervenors' Motion to Intervene is **DENIED as moot**.

**IT IS SO ORDERED.**

_____ : _____

Initials of Deputy Clerk PS