

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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In re GROUPON, INC. SECURITIES LITIGATION	:	
	:	Master File No. 12-CV-2450
	:	
	:	<u>CLASS ACTION</u>
	:	
This Document Relates To:	:	Hon. Charles R. Norgle
ALL ACTIONS	:	
	:	Hon. Mary M. Rowland
	:	
	x	

**AGREED MOTION FOR VOLUNTARY DISMISSAL OF UNDERWRITER
DEFENDANTS WITHOUT PREJUDICE PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE 41(a)(2)**

NOW COME Class Representatives Michael Carter Cohn and Eric Durdov (“Plaintiffs”), Defendants Morgan Stanley & Co. LLC, Goldman, Sachs & Co., and Credit Suisse Securities (USA) LLC (collectively, “the Underwriter Defendants”), and Defendants Groupon, Inc., Kevin Efrusy, Theodore J. Leonsis, Howard Schultz, Jason Child, Joseph M. Del Preto, Eric P. Lefkofsky, and Andrew D. Mason (collectively, “the Groupon Defendants”), through their respective counsel, and for their Agreed Motion for voluntary dismissal without prejudice of all remaining claims against the Underwriter Defendants in the Consolidated Amended Class Action Complaint (Oct. 29, 2012) (the “Complaint”) (Dkt. No. 125). In support of the Agreed Motion, the Parties state as follows:

Background

1. Plaintiffs asserted claims against the Underwriter Defendants under Section 11 and Section 12(a)(2) of the Securities Act of 1933 (“Securities Act”) in the Complaint (*see* Counts I and II of the Complaint).

2. The Underwriter Defendants are not named as parties to Plaintiffs' claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (*see* Counts IV and V of the Complaint).

3. On November 6, 2013, Plaintiffs filed a motion to withdraw their Section 12(a)(2) claim against the Underwriter Defendants. (Dkt. No. 176.)

4. On November 14, 2013, the Court granted Plaintiffs' motion to withdraw their Section 12(a)(2) claim against the Underwriter Defendants. (Dkt. No. 181.)

5. On December 20, 2013, the Underwriter Defendants served initial disclosures on Plaintiffs pursuant to Federal Rule of Civil Procedure 26(a).

6. On November 5, 2013, Plaintiffs served document requests on the Underwriter Defendants.

7. On May 29, 2015, Plaintiffs served requests for admission on the Underwriter Defendants.

8. On July 16, 2015, the Underwriter Defendants served responses and objections to Plaintiffs' requests for admission.

9. Between April 10, 2014 and June 17, 2015, the Underwriter Defendants produced hundreds of thousands of pages of documents, which Plaintiffs' counsel has reviewed.

10. Plaintiffs' counsel has conducted a deposition under Federal Rule of Civil Procedure 30(b)(6) of Defendant Morgan Stanley & Co. LLC ("Morgan Stanley"), the lead underwriter of the initial public offering ("IPO") of Groupon, Inc., by Paul Kwan, the most senior and knowledgeable member of Morgan Stanley's IPO due diligence team.

11. Fact discovery in this action closed on June 29, 2015, and expert discovery will close on November 30, 2015. (Dkt. No. 278.)

The Agreed Motion

12. After substantial discovery, Plaintiffs' counsel has determined that it is in the best interests of the Class to streamline Plaintiffs' claims in advance of trial by dismissing claims against the Underwriter Defendants. Plaintiffs' counsel believes that continuing to pursue claims against the Underwriter Defendants would not provide the Class any economic or strategic benefit, and could become an unnecessary distraction at trial.

13. In reaching this conclusion, Plaintiffs' counsel notes that continued prosecution of claims against the Underwriter Defendants would not expand the scope of damages that Plaintiffs may seek under the Securities Act. Moreover, because the Underwriter Defendants are fully indemnified by Groupon, Inc., their presence does not provide a separate source of recovery. *See* Underwriting Agreement at 19-20 (Nov. 3, 2011) (CS_Groupon_0012299 - CS_Groupon_0012344) ("The Company agrees to indemnify . . . each Underwriter . . . from and against any and all losses, claims, damages and liabilities").

14. Furthermore, the Underwriter Defendants point out that they have asserted an underwriters' due diligence defense that is not available to the Groupon Defendants. Plaintiffs take no position as to the viability of this defense.

15. The Parties have agreed to Plaintiffs' voluntary dismissal without prejudice of all remaining claims against the Underwriter Defendants, with each party to bear its own costs. Claims against the Groupon Defendants are not affected by this motion.

16. If requested by Plaintiffs, the Underwriter Defendants agree to produce to testify at a trial in this action Mr. Kwan or another witness acceptable to Plaintiffs' counsel.

17. If requested by Plaintiffs, the Underwriter Defendants agree to provide affidavits under Federal Rule of Evidence 901 to authenticate documents the Underwriter Defendants

produced to Plaintiffs in this action.

18. The Underwriter Defendants expressly reserve all rights if they are renamed as defendants in this action, including to reassert all defenses, seek adjustment to the case schedule, conduct any discovery, submit expert reports, and seek summary judgment. The Underwriter Defendants also reserve and maintain all rights and defenses if they are named in any other action or proceeding.

19. The voluntary dismissal of Plaintiffs' claim against the Underwriter Defendants will not bind absent Class members because it is without prejudice. *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. H-01-3624, 2007 WL 209923, at *3 (S.D. Tex. Jan. 24, 2007) (“given the dismissals [are] without prejudice, there is no resolution of any of the claims on the merits that would bind the class members.”). Accordingly, dismissal of the Underwriter Defendants does not trigger the notice and hearing requirements of Federal Rule of Civil Procedure 23. *See* Rule 23(e)(1) (addressing notice to “class members who would be bound by the proposal”) & 23(e)(2) (requiring hearing only “[i]f the proposal would bind class members”).

As the *Enron* court explained:

[N]otice to the absent class members and a hearing are required for a motion for court approval of a voluntary dismissal under Rule 41(a) only when the class is “bound” by the dismissal, i.e., that it is precluded from asserting its claims against [the defendants] which Lead Plaintiff moves to dismiss. [*Enron*, 2007 WL 209923, at *3.]

See also Advisory Committee Notes to 2003 Amendments to Rule 23 (explaining that Subdivision (e)(1)(B) “carries forward the notice requirement...when the settlement binds the class through claim or issue preclusion”); *Baxter v. Kawasaki Motors Corp., U.S.A.*, No. 07 C 6745 (N.D. Ill.), Transcript of Proceedings before the Honorable William T. Hart on September 16, 2010 (stating that if the plaintiff did not want to incur notice, he could make the dismissal

without prejudice), attached hereto as Exhibit 1. Here, the proposed dismissal without prejudice has no preclusive effect.

20. Although the class is not bound and notice is not required under Rule 23, Plaintiffs' counsel believes that summary notice should nonetheless be provided in the form attached hereto as Exhibit 2 and disseminated to the Class by: (a) publication on the Class notice website, www.grouponsecuritieslitigation.com; and (b) distribution on Globe Newswire, a wire service with broad national coverage that will ensure placement of the summary notice on prominent search engines and brokerage sites.

WHEREFORE, the Parties respectfully request that this Court (i) grant their Agreed Motion for voluntary dismissal without prejudice of the Complaint against the Underwriter Defendants pursuant to Federal Rule of Civil Procedure 41(a)(2), with each party to bear its own costs and expenses, and with the Underwriter Defendants preserving all rights if they are renamed as defendants in this action, including to reassert all defenses, seek adjustment to the case schedule, conduct any discovery, submit expert reports, and seek summary judgment; (ii) enter an order in the form submitted herewith; and (iii) approve the summary notice attached hereto as Exhibit 2 and plan of notice described in Paragraph 20 above.

Dated: September 1, 2015

Respectfully submitted,

/s/Joshua B. Silverman

Patrick V. Dahlstrom
Joshua B. Silverman
Louis C. Ludwig
POMERANTZ LLP
10 South LaSalle Street, Suite 3505
Chicago, Illinois 60603
(312) 377-1181

/s/Kevin B. Duff

Kevin B. Duff
Michael Rachlis
RACHLIS DUFF ADLER PEEL &
KAPLAN, LLC
542 South Dearborn Street, Suite 900
Chicago, Illinois 60605
(312) 733-3950

Lead and Class Counsel

Jonathan Rosenberg
William J. Sushon
O'MELVENY & MYERS LLP
Seven Times Square
New York, New York 10036
(212) 326-2000

*Counsel for Defendants Morgan Stanley &
Co. LLC, Goldman, Sachs & Co., and
Credit Suisse Securities (USA) LLC*

/s/Elizabeth A. Coleman

Anton R. Valukas
Robert L. Byman
Elizabeth A. Coleman
Howard S. Suskin
JENNER & BLOCK LLP
353 North Clark Street
Chicago, Illinois 60654-3456
(312) 222-9350

*Attorneys for Defendants Groupon, Inc.,
Andrew D. Mason, Jason E. Child, Joseph
M. Del Preto, Eric P. Lefkofsky, Theodore
J. Leonsis, Kevin J. Efrusy, and Howard
Schultz*

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KEITH BAXTER, on behalf of himself) No. 07 C 6745
and all others similarly situated,)
)
Plaintiff,)
)
v.)
)
KAWASAKI MOTORS CORP., U.S.A., and) Chicago, Illinois
KAWASAKI HEAVY INDUSTRIES, LTD.,) September 16, 2010
) 11:00 a.m.
Defendant.) Motion

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM T. HART

APPEARANCES:

For the Plaintiff Class:	KROHN & MOSS, LTD.
	120 West Madison Street
	10th Floor
	Chicago, Illinois 60602
	BY: MR. GREGORY H. MOSS

For the Defendant:	SEGAL McCAMBRIDGE SINGER & MAHONEY
	233 South Wacker Drive
	Suite 5500
	Chicago, Illinois 60606
	BY: MS. REBECCA LETOURNEAUX

TRACEY DANA McCULLOUGH, CSR, RPR
 Official Court Reporter
 219 South Dearborn Street
 Room 1420
 Chicago, Illinois 60604
 (312) 922-3716

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1 THE CLERK: 07 C 6745, Keith Baxter versus Kawasaki
2 Motors Corporation.

3 THE COURT: Good morning.

4 MS. LETOURNEAUX: Good morning, Your Honor. Rebecca
5 Letourneau on behalf of Kawasaki.

6 MR. MOSS: Good morning, Your Honor. Greg Moss on
7 behalf of the class plaintiffs.

8 THE COURT: You want to dismiss out defendant Kawasaki
9 Motors Corporation U.S.A. with prejudice, is that right?

10 MR. MOSS: That's correct, Your Honor.

11 THE COURT: All right. You understand it's a class
12 action, and I can't do that now without a notice. I can enter
13 and continue it, and at the conclusion of the proceedings
14 dismiss it. But in a class action when I've certified a class,
15 I can't do that without a notice. I assume you don't want to
16 have to give another notice.

17 MR. MOSS: Correct, Your Honor.

18 THE COURT: All right. So what do you want me to do?
19 I'll enter and continue it, or I can dismiss it without
20 prejudice.

21 MR. MOSS: Well, the agreement that we had worked out
22 with counsel was with prejudice. So I guess --

23 THE COURT: I know, but you got --

24 MR. MOSS: No, I understand. That's what I'm saying
25 my suggestion would be to do it at the end of the case.

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1 THE COURT: All right. Enter and continue it.

2 MR. MOSS: If that's okay with counsel.

3 MS. LETOURNEAUX: Yes.

4 THE COURT: All right. That's what I'll do. Then
5 there's a modification of the protective order that the parties
6 agree to modify with respect to a third party, is that right?

7 MR. MOSS: Correct.

8 THE COURT: Okay. How about settling the whole case?

9 MR. MOSS: It's interesting you say that. Actually we
10 have had some communication. Counsel requested -- counsel for
11 defendant requested a settlement demand, which we made
12 approximately a week and a half to two weeks ago. And we have
13 followed up again with further clarification based on their
14 request, and we're waiting to hear back with what that -- you
15 know, what that -- what their response is going to be.

16 THE COURT: All right. What's the next status date?
17 Do we have one?

18 MR. MOSS: September 30th.

19 THE COURT: Okay. I'll see you then.

20 MR. MOSS: Okay. Great.

21 MS. LETOURNEAUX: Thank you, Judge.

22 MR. MOSS: Just for clarification, the protective
23 order will be -- the motion to amend will be granted?

24 THE COURT: It's granted.

25 MR. MOSS: Okay. Great. Okay. Thank you.

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MS. LETOURNEAUX: Thank you, Your Honor.

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a true, correct and complete transcript of the proceedings had at the hearing of the aforementioned cause on the day and date hereof.

/s/TRACEY D. McCULLOUGH

September 21, 2010

Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

Date

EXHIBIT 2

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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In re GROUPON, INC. SECURITIES LITIGATION	:
	: Master File No. 12-CV-2450
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	: <u>CLASS ACTION</u>
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This Document Relates To:	: Hon. Charles R. Norgle
ALL ACTIONS	:
	: Hon. Mary M. Rowland
	:
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NOTICE OF VOLUNTARY DISMISSAL OF UNDERWRITER DEFENDANTS

To: ALL PERSONS OR ENTITIES WHO PURCHASED OR ACQUIRED SHARES OF GROUPON, INC. (“GROUPON”) CLASS A COMMON STOCK IN OR TRACEABLE TO GROUPON’S INITIAL PUBLIC OFFERING (“IPO”) BETWEEN NOVEMBER 4, 2011 AND MARCH 30, 2012, BOTH DATES INCLUSIVE (“THE CLASS PERIOD”) AND WERE DAMAGED THEREBY.

Excluded from the Class are (1) Defendants and their immediate families; (2) any entity in which Defendants have or had a controlling interest; (3) Officers and Directors of Groupon, Inc.; and (4) the legal representatives, heirs, successors, or assigns of any excluded party.

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOUR RIGHTS MAY BE AFFECTED BY PROCEEDINGS IN THIS ACTION.

Notice is hereby given to the Class certified by Order of the United States District Court for the Northern District of Illinois (the “Court”) on September 23, 2014, that pursuant to agreed motion, the Court has dismissed without prejudice the claims previously alleged in this Action against Defendants Morgan Stanley & Co. LLC, Goldman, Sachs & Co., and Credit Suisse Securities (USA) LLC (collectively, “the Underwriter Defendants”). This Action will continue against Defendants Groupon, Inc., Kevin Efrusy, Theodore J. Leonsis, Howard Schultz, Jason Child, Joseph M. Del Preto, Eric P. Lefkofsky, and Andrew D. Mason (collectively, “the Groupon Defendants”). No claims against the Groupon Defendants are affected by this dismissal. The reasons for the dismissal are described in the agreed motion to voluntarily dismiss, a copy of which is available on the class notice website, www.grouponsecuritieslitigation.com.

Class members are not bound by this dismissal because it is without prejudice. However, claims against the Underwriter Defendants will no longer be part of this Action and will not be

pursued by Class Counsel. The Underwriter Defendants maintain and reserve all their rights and defenses.

Inquiries regarding this notice may be made to Class Counsel:

Joshua B. Silverman, Esq.
Pomerantz LLP
Ten South La Salle Street
Suite 3505
Chicago, Illinois 60302
Telephone: 312-377-1181
<http://www.pomerantzlaw.com>

**INQUIRIES SHOULD NOT BE DIRECTED TO THE COURT, THE
CLERK'S OFFICE, THE DEFENDANTS, OR DEFENDANTS' COUNSEL.**

Dated: _____, 2015

By Order of the Court

**United States District Court
Northern District of Illinois**