

POMERANTZ LLP

Jennifer Pafiti (SBN 282790)
468 North Camden Drive
Beverly Hills, CA 90210
Telephone: (818) 532-6499
E-mail: jpafiti@pomlaw.com

Counsel for Plaintiff

- additional counsel on signature page -

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

_____, Individually and on Behalf of All
Others Similarly Situated,

Plaintiff,

vs.

OBALON THERAPEUTICS, INC.,
ANDREW P. RASDAL and WILLIAM
JOHN PLOVANIC,

Defendants

Case No.

**CLASS ACTION COMPLAINT FOR
VIOLATION OF THE FEDERAL
SECURITIES LAWS**

JURY TRIAL DEMANDED

Plaintiff _____ (“Plaintiff”), individually and on behalf of all other persons similarly situated, by Plaintiff’s undersigned attorneys, for Plaintiff’s complaint against Defendants (defined below), alleges the following based upon personal knowledge as to Plaintiff and Plaintiff’s own acts, and information and belief as to all other matters, based upon, *inter alia*, the investigation conducted by and through Plaintiff’s attorneys, which included, among other things, a review of the Defendants’ public documents, conference calls and announcements made by Defendants, United States Securities and Exchange Commission (“SEC”) filings, wire and press releases published by and regarding Obalon Therapeutics, Inc. (“Obalon” or the “Company”), analysts’ reports and advisories about the Company,

1 and information readily obtainable on the Internet. Plaintiff believes that substantial evidentiary support
2 will exist for the allegations set forth herein after a reasonable opportunity for discovery.

3 **NATURE OF THE ACTION**

4 1. This is a federal securities class action on behalf of a class consisting of all persons other
5 than Defendants who purchased or otherwise acquired common shares of Obalon between January 5,
6 2018 and January 22, 2018, both dates inclusive (the “Class Period”). Plaintiff seeks to recover
7 compensable damages caused by Defendants’ violations of the federal securities laws and to pursue
8 remedies under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”)
9 and Rule 10b-5 promulgated thereunder.
10

11 2. Obalon Therapeutics, Inc. is a medical device company that focuses on developing and
12 commercializing medical gastric balloons for weight loss therapy.
13

14 3. Founded in 2008, the Company is headquartered in Carlsbad, California, and its stock
15 trades on the NASDAQ Global Market (“NASDAQ”) under the ticker symbol “OBLN.”

16 4. Throughout the Class Period, Defendants made materially false and misleading
17 statements regarding the Company’s business, operational and compliance policies. Specifically,
18 Defendants made false and/or misleading statements and/or failed to disclose that: (i) Obalon’s
19 accounting methods do not conform to generally accepted accounting principles; (ii) the Company
20 lacked effective internal controls over financial reporting; and (iii) as a result, Obalon’s public
21 statements were materially false and misleading at all relevant times.
22

23 5. On January 23, 2018, Obalon announced that it would cancel its previously announced
24 public offering of Obalon common stock after its independent auditor, KPMG LLP, received a
25 complaint from a “purported whistleblower” alleging “improper revenue recognition during the
26 Company's fourth fiscal quarter of 2017.”
27
28

6. On this news, Obalon's share price fell \$1.73, or 33.33%, to close at \$3.46 on January 23, 2018.

7. As a result of Defendants' wrongful acts and omissions, and the precipitous decline in the market value of the Company's common shares, Plaintiff and other Class members have suffered significant losses and damages.

JURISDICTION AND VENUE

8. The claims asserted herein arise under and pursuant to §§10(b) and 20(a) of the Exchange Act (15 U.S.C. §§78j(b) and 78t(a)) and Rule 10b-5 promulgated thereunder by the SEC (17 C.F.R. §240.10b-5).

9. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §1331 and §27 of the Exchange Act.

10. Venue is proper in this Judicial District pursuant to §27 of the Exchange Act (15 U.S.C. §78aa) and 28 U.S.C. §1391(b). Obalon's principal executive offices are located within this Judicial District.

11. In connection with the acts, conduct and other wrongs alleged in this Complaint, Defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including but not limited to, the United States mail, interstate telephone communications and the facilities of the national securities exchange.

PARTIES

12. Plaintiff, as set forth in the accompanying Certification, purchased Obalon securities at artificially inflated prices during the Class Period and was damaged upon the revelation of the alleged corrective disclosure.

13. Defendant Obalon is incorporated in Delaware, with principal executive offices located at 5421 Avenida Encinas, Suite F, San Diego, California 92008. Obalon's common stock trades on the NASDAQ under the ticker symbol "OBLN."

14. Defendant Andrew P. Rasdal ("Rasdal") has served at all relevant times as the Company's Chief Executive Officer ("CEO"), President and Director.

15. Defendant William John Plovanic ("Plovanic") has served at all relevant times as the Company's Chief Financial Officer ("CFO") and Secretary.

16. The Defendants referenced above in ¶¶ [REDACTED] are sometimes referred to- herein as the "Individual Defendants."

SUBSTANTIVE ALLEGATIONS

Background

17. Obalon Therapeutics, Inc. is a medical device company that focuses on developing and commercializing medical gastric balloons for weight loss therapy.

Materially False and Misleading Statements Issued During the Class Period

18. The statements referenced in ¶¶ [REDACTED] above were materially false and/or misleading because they misrepresented and/or failed to disclose the following adverse facts pertaining to the Company's business, operational and financial results, which were known to Defendants or recklessly disregarded by them. Specifically, Defendants made false and/or misleading statements and/or failed to disclose that: (i) Obalon's accounting methods do not conform to generally accepted accounting principles; (ii) the Company lacked effective internal controls over financial reporting; and (iii) as a result, Obalon's public statements were materially false and misleading at all relevant times.

The Truth Begins to Emerge

19. On January 23, 2018, Obalon announced that it would cancel its previously announced public offering of Obalon common stock after its independent auditor, KPMG LLP, received a

1 complaint from a “purported whistleblower” alleging “improper revenue recognition during the
2 Company's fourth fiscal quarter of 2017.”

3 20. On this news, Obalon’s share price fell \$1.73, or 33.33%, to close at \$3.46 on January
4 23, 2018.

5 21. As a result of Defendants’ wrongful acts and omissions, and the precipitous decline in
6 the market value of the Company’s common shares, Plaintiff and other Class members have suffered
7 significant losses and damages.
8

9 **PLAINTIFF’S CLASS ACTION ALLEGATIONS**

10 22. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure
11 23(a) and (b)(3) on behalf of a Class, consisting of all those who purchased or otherwise acquired
12 Obalon common shares traded on the NASDAQ during the Class Period (the “Class”); and were
13 damaged upon the revelation of the alleged corrective disclosures. Excluded from the Class are
14 Defendants herein, the officers and directors of the Company, at all relevant times, members of their
15 immediate families and their legal representatives, heirs, successors or assigns and any entity in which
16 Defendants have or had a controlling interest.
17

18 23. The members of the Class are so numerous that joinder of all members is impracticable.
19 Throughout the Class Period, Obalon common shares were actively traded on the NASDAQ. While the
20 exact number of Class members is unknown to Plaintiff at this time and can be ascertained only through
21 appropriate discovery, Plaintiff believes that there are hundreds or thousands of members in the
22 proposed Class. Record owners and other members of the Class may be identified from records
23 maintained by Obalon or its transfer agent and may be notified of the pendency of this action by mail,
24 using the form of notice similar to that customarily used in securities class actions.
25
26
27
28

1 24. Plaintiff's claims are typical of the claims of the members of the Class as all members of
2 the Class are similarly affected by Defendants' wrongful conduct in violation of federal law that is
3 complained of herein.

4 25. Plaintiff will fairly and adequately protect the interests of the members of the Class and
5 has retained counsel competent and experienced in class and securities litigation. Plaintiff has no
6 interests antagonistic to or in conflict with those of the Class.

7 26. Common questions of law and fact exist as to all members of the Class and predominate
8 over any questions solely affecting individual members of the Class. Among the questions of law and
9 fact common to the Class are:
10

- 11 • whether the federal securities laws were violated by Defendants' acts as alleged
12 herein;
- 13 • whether statements made by Defendants to the investing public during the Class
14 Period misrepresented material facts about the financial condition, business,
15 operations, and management of Obalon;
- 16 • whether Defendants caused Obalon to issue false and misleading financial
17 statements during the Class Period;
- 18 • whether Defendants acted knowingly or recklessly in issuing false and
19 misleading financial statements;
- 20 • whether the prices of Obalon securities during the Class Period were artificially
21 inflated because of Defendants' conduct complained of herein; and
- 22 • whether the members of the Class have sustained damages and, if so, what is the
23 proper measure of damages.

24 27. A class action is superior to all other available methods for the fair and efficient
25 adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the
26 damages suffered by individual Class members may be relatively small, the expense and burden of
27 individual litigation make it impossible for members of the Class to individually redress the wrongs
28 done to them. There will be no difficulty in the management of this action as a class action.

28. Plaintiff will rely, in part, upon the presumption of reliance established by the fraud-on-the-market doctrine in that:

- Defendants made public misrepresentations or failed to disclose material facts during the Class Period;
- the omissions and misrepresentations were material;
- Obalon common shares are traded in efficient markets;
- the Company's shares were liquid and traded with moderate to heavy volume during the Class Period;
- the Company traded on the NASDAQ, and was covered by multiple analysts;
- the misrepresentations and omissions alleged would tend to induce a reasonable investor to misjudge the value of the Company's common shares; and
- Plaintiff and members of the Class purchased and/or sold Obalon common shares between the time the Defendants failed to disclose or misrepresented material facts and the time the true facts were disclosed, without knowledge of the omitted or misrepresented facts.

29. Based upon the foregoing, Plaintiff and the members of the Class are entitled to a presumption of reliance upon the integrity of the market.

30. Alternatively, Plaintiff and the members of the Class are entitled to the presumption of reliance established by the Supreme Court in *Affiliated Ute Citizens of the State of Utah v. United States*, 406 U.S. 128, 92 S. Ct. 2430 (1972), as Defendants omitted material information in their Class Period statements in violation of a duty to disclose such information, as detailed above.

COUNT I

Violation of Section 10(b) of The Exchange Act and Rule 10b-5 Against All Defendants

31. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

1 32. This Count is asserted against Obalon and the Individual Defendants and is based upon
2 Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the
3 SEC.

4 33. During the Class Period, Obalon and the Individual Defendants, individually and in
5 concert, directly or indirectly, disseminated or approved the false statements specified above, which
6 they knew or deliberately disregarded were misleading in that they contained misrepresentations and
7 failed to disclose material facts necessary in order to make the statements made, in light of the
8 circumstances under which they were made, not misleading.

10 34. Obalon and the Individual Defendants violated §10(b) of the 1934 Act and Rule 10b-5 in
11 that they:

- 12 • employed devices, schemes and artifices to defraud;
- 13 • made untrue statements of material facts or omitted to state material facts
14 necessary in order to make the statements made, in light of the circumstances
 under which they were made, not misleading; or
- 15 • engaged in acts, practices and a course of business that operated as a fraud or
16 deceit upon plaintiff and others similarly situated in connection with their
 purchases of Obalon common shares during the Class Period.

17 35. Obalon and the Individual Defendants acted with scienter in that they knew that the
18 public documents and statements issued or disseminated in the name of Obalon were materially false
19 and misleading; knew that such statements or documents would be issued or disseminated to the
20 investing public; and knowingly and substantially participated, or acquiesced in the issuance or
21 dissemination of such statements or documents as primary violations of the securities laws. These
22 Defendants by virtue of their receipt of information reflecting the true facts of Obalon, their control
23 over, and/or receipt and/or modification of Obalon allegedly materially misleading statements, and/or
24 their associations with the Company which made them privy to confidential proprietary information
25 concerning Obalon, participated in the fraudulent scheme alleged herein.
26
27
28

36. Individual Defendants, who are the senior officers and/or directors of the Company, had actual knowledge of the material omissions and/or the falsity of the material statements set forth above, and intended to deceive Plaintiff and the other members of the Class, or, in the alternative, acted with reckless disregard for the truth when they failed to ascertain and disclose the true facts in the statements made by them or other Obalon personnel to members of the investing public, including Plaintiff and the Class.

37. As a result of the foregoing, the market price of Obalon common shares was artificially inflated during the Class Period. In ignorance of the falsity of Obalon's and the Individual Defendants' statements, Plaintiff and the other members of the Class relied on the statements described above and/or the integrity of the market price of Obalon common shares during the Class Period in purchasing Obalon common shares at prices that were artificially inflated as a result of Obalon's and the Individual Defendants' false and misleading statements.

38. Had Plaintiff and the other members of the Class been aware that the market price of Obalon common shares had been artificially and falsely inflated by Obalon's and the Individual Defendants' misleading statements and by the material adverse information which Obalon's and the Individual Defendants did not disclose, they would not have purchased Obalon's common shares at the artificially inflated prices that they did, or at all.

39. As a result of the wrongful conduct alleged herein, Plaintiff and other members of the Class have suffered damages in an amount to be established at trial.

40. By reason of the foregoing, Obalon and the Individual Defendants have violated Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder and are liable to the plaintiff and the other members of the Class for substantial damages which they suffered in connection with their purchase of Obalon common shares during the Class Period.

COUNT II

1 **Violation of Section 20(a) of The Exchange Act Against The Individual Defendants**

2 41. Plaintiff repeats and realleges each and every allegation contained in the foregoing
3 paragraphs as if fully set forth herein.
4

5 42. During the Class Period, the Individual Defendants participated in the operation and
6 management of Obalon, and conducted and participated, directly and indirectly, in the conduct of
7 Obalon's business affairs. Because of their senior positions, they knew the adverse non-public
8 information regarding the Company's inadequate internal safeguards in data security protocols.
9

10 43. As officers and/or directors of a publicly owned company, the Individual Defendants had
11 a duty to disseminate accurate and truthful information with respect to Obalon's financial condition and
12 results of operations, and to correct promptly any public statements issued by Obalon which had
13 become materially false or misleading.

14 44. Because of their positions of control and authority as senior officers, the Individual
15 Defendants were able to, and did, control the contents of the various reports, press releases and public
16 filings which Obalon disseminated in the marketplace during the Class Period. Throughout the Class
17 Period, the Individual Defendants exercised their power and authority to cause Obalon to engage in the
18 wrongful acts complained of herein. The Individual Defendants therefore, were "controlling persons" of
19 Obalon within the meaning of Section 20(a) of the Exchange Act. In this capacity, they participated in
20 the unlawful conduct alleged which artificially inflated the market price of Obalon common shares.
21

22 45. By reason of the above conduct, the Individual Defendants are liable pursuant to Section
23 20(a) of the Exchange Act for the violations committed by Obalon.
24

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiff demands judgment against Defendants as follows:
27
28

1 A. Determining that the instant action may be maintained as a class action under Rule 23 of
2 the Federal Rules of Civil Procedure, and certifying Plaintiff as the Class representative;

3 B. Requiring Defendants to pay damages sustained by Plaintiff and the Class by reason of
4 the acts and transactions alleged herein;

5 C. Awarding Plaintiff and the other members of the Class prejudgment and post- judgment
6 interest, as well as their reasonable attorneys' fees, expert fees and other costs; and
7

8 D. Awarding such other and further relief as this Court may deem just and proper.

9 **DEMAND FOR TRIAL BY JURY**

10 Plaintiff hereby demands a trial by jury.

11 Dated: January 11, 2018

12 Respectfully submitted,

13 **POMERANTZ LLP**

14 By: /s/ Jennifer Pafiti
15 Jennifer Pafiti (SBN 282790)
16 468 North Camden Drive
17 Beverly Hills, CA 90210
18 Telephone: (818) 532-6499
19 E-mail: jpafiti@pomlaw.com

20 **POMERANTZ, LLP**

21 Jeremy A. Lieberman
22 J. Alexander Hood II
23 600 Third Avenue, 20th Floor
24 New York, New York 10016
25 Telephone: (212) 661-1100
26 Facsimile: (212) 661-8665
27 E-mail: jalieberman@pomlaw.com
28 E-mail: ahood@pomlaw.com

POMERANTZ LLP

Patrick V. Dahlstrom
Ten South La Salle Street, Suite 3505
Chicago, Illinois 60603
Telephone: (312) 377-1181
Facsimile: (312) 377-1184
E-mail: pdahlstrom@pomlaw.com

Attorneys for Plaintiff

DRAFT