No. _____

In the Supreme Court of the United States

JORGE ALCAREZ AND SEAN HARRIS,
Petitioners,

-v.-

AKORN, INC., JOHN N. KAPOOR, RONALD M. JOHNSON, KENNETH S. ABRAMOWITZ, AND ADRIENNE L. GRAVES

THEODORE H. FRANK,
Intervenor/Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition implicates the important and long-standing rule that prohibits a court of appeals from *sua sponte* considering new issues and making new factual findings that were not before the district court or ever raised by the parties on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

The Seventh Circuit Panel breached this well-established rule twice below when it *sua sponte* made a new evidentiary finding to support a new legal theory to salvage a serial objector's failed intervention in a PSLRA merger case, to wit: the Panel found that a publicly traded defendant corporation's payment of a nominal "mootness fee" to plaintiffs' counsel caused the market price of the company's stock to decline (without any evidence in support), which price decline supported a new, court-concocted theory of damages for a shareholder's standing to intervene in these securities cases after they had been voluntarily dismissed.

Similarly, though not raised by the parties, the Panel held that a Federal Rule of Civil Procedure ("Rule") 41(a) self-executing voluntary dismissal without prejudice constitutes a "final adjudication" under the Private Securities Litigation Reform Act of 1995 ("PSLRA") (15 U.S.C. § 78u-4(c)(1)) so that the district court on remand must make Rule 11 findings. This conclusion eviscerates safe harbors afforded other litigants under Rule 11 in order to cabin voluntarily dismissed PSLRA cases within the

Seventh Circuit's rumination *In re Walgreen Co. Stockholder Litigation,* 832 F.3d 718 (7th Cir. 2016) that "a class action that seeks only worthless benefits for the class should be dismissed out of hand." *Id.* at 724. Other litigants who's pleadings are challenged early as "worthless" are given the chance to correct the offense without sanctions. Not so anymore for PSLRA litigants in the Seventh Circuit if this decision is left to stand.

The questions presented are:

1. Whether the court of appeals "so far departed from the accepted and usual course of judicial proceedings…" (Supreme Court Rule 10(a)) that this Court should exercise its supervisory powers and reverse the Panel's order and remand the case to the district court to determine if the court of appeal's new theory of damages was supported by the evidence and whether the Rule 41(a) voluntary dismissals should be treated as a "final adjudication" under the PSLRA under the circumstances of these cases.

RELATED PROCEEDINGS

United States District Court for the Northern District of Illinois:

Jorge Alcarez, individually and on behalf of all others similarly situated v. Akorn, Inc., et al., No. 1:17-cv-05017 (May 24, 2018);

Sean Harris, individually and on behalf of all others similarly situated v. Akorn, Inc., et al., No. 1:17-cv-05021 (May 24, 2018);

Robert Berg, individually and on behalf of all others similarly situated v. Akron, Inc., et al., No. 1:17-cv-05016 (Nov. 21, 2017);

Shaun A. House, individually and on behalf of all others similarly situated v. Akorn, Inc., et al., No. 1:17-cv-05018 (Sept. 25, 2018).

United States Court of Appeals for the Seventh Circuit:

Jorge Alcarez, individually and on behalf of all others similarly situated v. Akorn, Inc., et al., No. 18-2220 (Apr. 15, 2024);

Sean Harris, on behalf of himself and all others similarly situated v. Akorn, Inc., et al., No. 18-2221 (Apr. 15, 2024);

Shaun A. House, individually and on behalf of all others similarly situated v. Akorn, Inc., et al., No. 18-3307 (Apr. 15, 2024);

Shaun A. House, individually and on behalf of all others similarly situated v. Akorn, Inc., et al., No. 19-2408 (Apr. 15, 2024).

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[1] Pursuant to Intervenor Theodore H. Frank's Notices of Appeal filed in *Alcarez v. Akorn, Inc., et al.*, No. 17-cv-05017 (June 1, 2018) and *Harris v. Akorn, Inc., et al.*, No. 17-cv-05021 (June 1, 2018), "Intervenor Theodore H. Frank appeal[ed] to the United States Court of Appeals for the Seventh Circuit from the Court's Order entered on May 24, 2018 (Dkt. 55) [in No. 17-cv-05017 and entered on May 24, 2018 (Dkt. 56) in No. 17-cv-05021], which denied as moot Frank's Renewed Motion to Intervene (filed in No. 17-cv-5016, Dkt. 82), **and all orders that merge therein**." (emphasis added). *See* App. 191a-192a, 194a-195a.

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PETITION FOR A WRIT OF CERTIORARI

Jorge Alcaraz and Sean Harris ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 99 F.4th 368. The order of the court of appeals denying the petition for rehearing (App., *infra,* 84a-85a) is not published but may be found at 2024 WL 2188476. The orders of the district court at issue in these appeals are from November 21, 2017, at 2017 WL 5593349 (App., *infra*, 18a-30a), and during hearings held on March 21, 2018 (App., *infra*, 33a-51a), April 11, 2018 (App., *infra*, 52a-59a), May 2, 2018 (App., *infra*, 60a-73a), and in minute entries on May 24, 2018 (App., *infra*, 31a, 32a).

JURISDICTION

The Seventh Circuit issued its opinion on April 15, 2024, and denied the petition for rehearing on May 15, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Petitioners commenced putative class actions pursuant to Rule 23, each asserting a claim under Section 14(a) of the Securities Exchange Act of 1934 (the "Exchange Act") as amended by the PSLRA, 15 U.S.C. § 78u-4, in their complaints. They voluntarily dismissed their actions prior to class certification

and without prejudice under Rule 41(a).

The Intervenor, Theodore Frank ("Frank"), sought to intervene under Rule 24 after the cases had been dismissed. His motions to intervene were denied by the district court on grounds that there was no case or controversy and he did not allege injury to give him standing under Article III.

STATEMENT OF THE CASE

It is axiomatic that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." This general rule has been recognized and applied by the Seventh Circuit. *See e.g., Wagner v. Retail Credit Co.*, 338 F.2d 598, 601-02 (7th Cir. 1964) (citing *Hormel).*

This petition presents the question of whether the Court should reverse the Seventh Circuit's decision to allow Frank to intervene in these long-dismissed Section 14(a) cases because it *sua sponte* concluded that Akorn, Inc.'s ("Akorn" or the "Company") disclosure of its intent to pay a so-called "Mootness Fee" to plaintiffs' attorneys caused the market price of Frank's Akorn stock to decline, which stock price decline the Panel opined was the damages Frank suffered for standing purposes under

Article III in order to intervene. App., *infra*, 10a "A concrete loss, caused by the complained-of conduct and remediable by the judiciary, supplies standing." App., *infra*, 7a (citing *Spokeo, Inc. v. Robins,* 578 U.S. 330 (2016), *as revised* (May 24, 2016)); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). The "upshot" according to the Panel when a mootness fee is paid is that the "payment *diminishes (though only a little) the market price of each share*." App., *infra*, 5a (emphasis added). The Panel concluded that "Frank suffers some loss from diversion of corporate money, which affects the *value of his shares*," thus supplying him with Article II standing. App., *infra*, 7a (emphasis added). The court remanded the case with instructions for the district court to treat him as an intervenor and permit him to seek relief pursuant to Rule 60(b). App., *infra*, 15a.

The fundamental, and reversable, error with this ruling is that the supposed market price impact of the disclosure of the payment of a Mootness Fee was never argued by Frank, either at the district court level or with the court of appeals. App., *infra*,197a-283a. No evidence on market price impact has ever been presented. *Id.* Frank has always only argued that plaintiffs' attorneys breached duties owed to him and were unjustly enriched at the Company's expense by the Mootness Fee – a claimed injury that is, as the district court noted multiple times, derivative not direct. *See e.g.,* App., *infra*, 250a; A186, A212-13 to the Appendix of Frank filed in *Alcarez v. Akorn, Inc., et al.*, No. 18-2220 and *Harris v. Akorn, Inc., et al.*, No. 18-2221 (7th Cir. Sept. 10, 2018) ("Frank App. App'x"), ECF Nos. 28 & 27,

respectively; Appellees' App. Answering Br. 18-20, 22-25 filed in *Alcarez v. Akorn, Inc., et al.*, No. 18-2220 and *Harris v. Akorn, Inc., et al.*, No. 18-2221 (7th Cir. Oct. 10, 2018), ECF Nos. 30 & 29, respectively.

The Panel skirted past this inconvenient truth and came up with its new direct damage theory based on assumed, untested, factual findings that are not in the record – *i.e.,* the market price for Akorn's publicly traded stock declined, and the decline was caused by the disclosure of the Mootness Fee as opposed to other factors. Even if the Panel has the discretion to salvage Frank's efforts to intervene with a new damage theory that he never raised, there was no record evidence of price impact to support the Panel's new theory. Petitioners certainly were never afforded the opportunity to contest this supposed price impact from the payment of a nominal attorney fee, having read about it for the first time in the Panel's decision. Moreover, such supposed price impact did not occur.

In an open and developed securities market, available material information regarding a company and its business informs that company's stock price. *Basic Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988). "[M]arket professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 272 (2014) (quoting *Basic*, 485 U.S. at 247 n.24). The Seventh Circuit has accepted that in an efficient market, prices reflect publicly available material

information. *See e.g., In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 600, 605 (7th Cir. 2020). The Panel does not cite to any evidence supporting its claim that the market price of Akorn stock was negatively impacted by the news of the nominal Mootness Fee.

Indeed, the supposed negative price impact never happened – Petitioners submitted with their Petition for Rehearing Akorn's historical stock price performance during the time when the Mootness Fee was disclosed to the market showing that Akorn's stock price increased when the Mootness Fee was disclosed. App., *infra*, 289a. Frank made money on his investment rather than suffer damages. *Id.* Although as stated by the Panel, even an "identifiable trifle" may suffice for standing (*United States v. SCRAP,* 412 U.S. 669, 688-90 & n.14 (1973)), the evidence shows that such trifle does not exist here. Since the value of Frank's shares increased after the disclosure of the Mootness Fee, applying the Panel's own rationale, Frank could not have suffered a loss in the value of his stock that was caused by the payment of the Mootness Fee.

The Panel appears not to have even looked at this evidence in rejecting the Petition for Rehearing as the grounds for denial were that there no longer was a quorum of the panel to consider the rehearing request.[2]

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[2] These appeals were argued on November 6, 2018. App., *infra*, 1a. They were not decided until April 15, 2024, by which time one panel member, Judge Kanne, had died. *Id.* The Petition for Rehearing was filed on April 29, 2024 and on May 1, 2024, Judge Wood, retired. App., *infra*, 84a-85a.

There are exceptions to the general rule that a court of appeals may not consider new issues when there are extenuating circumstances. For example, in *Kannikal v. Attorney General U.S.*, 776 F.3d 146 (3d Cir. 2015), the Third Circuit considered *sua sponte* a new issue regarding the interplay between two statutory provisions (issue of whether § 2401(a) applies to Title VII) but noted that its action fit the exception to the general rule because the issue did not implicate the introduction of new evidence. *Id.* at 148-49. Moreover, the court of appeals noted that it had ordered two rounds of supplemental briefing and had discussed the issue extensively at oral argument. *Id.* 149. No party in *Kannikal* was prejudiced by the court's consideration of this new legal issue.

Here, by contrast, the Panel not only crafted a new damage theory for Frank, but in doing so relied on supposition that is not born out by any evidence. The Panel's new theory for Frank's standing to intervene should be reversed or at the very least remanded to the district court for the presentation of evidence regarding the supposed price impact of the Mootness Fee.

The Panel's errors continued. Having *sua sponte* created a new basis for Frank's standing to intervene, the Panel went on to instruct Frank's remedy at the district court – to seek Rule 11 sanctions. App., *infra*, 15a. The Panel's instructions were based on its perfunctory holding – made without affording the parties a chance to present evidence or brief the issue and without citation to

any case authority - that the voluntary dismissals without prejudice amounted to a "final adjudication" under the PSLRA such that a Rule 11 review was mandated. App., *infra*, 11a-12a. While the Panel's holding dovetails with the Seventh Circuit's complaint in *Walgreen* that supposed "strike suits" that seek worthless benefits for class members "should be dismissed out of hand", both the Panel and *Walgreen* approach conflict with every district court decision that has examined whether a Rule 41(a) voluntary dismissal fits the PSLRA's intended meaning of "final adjudication".[3] Indeed, district courts reject the Panel's holding because it flies in the face of the PSLRA's statutory framework which, although mandating a Rule 11 review, substitutes for Rule 11's safe harbor procedures. The Rule 11 safe harbor procedures afford a party the chance to correct or withdraw the alleged violation within 21 days of being served with a Rule 11 motion. The PSLRA by contrast mandates a Rule 11 review and the imposition of sanctions if there is a violation, but only if the case results in a "final adjudication".

The Panel's decision, if left uncorrected, strips PSLRA litigants in the Seventh Circuit of a safe

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[3] There is one outlier case that did not examine the interplay of the PSLRA and Rule 11, but rather found that a plaintiff who asserted securities and RICO claims could not avoid a Rule 11 review after his voluntary dismissal, when among other glaringly obvious deficiencies, the case had been filed long after the expiration of the statute of limitations and, after dismissal, was then re-filed in state court. *See Smith v. Smith*, 184 F.R.D. 420, 421-23 (S.D. Fla. 1998). The *Smith* case has not been followed by other district courts. Moreover, the circumstances of *Smith* are completely different from this case.

harbor mechanism to avoid Rule 11 reviews which other litigants are afforded under Rule 11.

At bottom, the Seventh Circuit's decision is wrong, conflicts with this Court's precedent, and warrants review.

A. Background

1. Merger Is Announced And Shareholder Litigation Commenced

On April 24, 2017, Akorn's Board of Directors (the "Board" or "Individual Defendants") caused the Company to enter into an agreement and plan of merger (the "Merger Agreement") with Fresenius Kabi AG ("Fresenius Kabi") and its wholly-owned subsidiary, Quercus Acquisition, Inc. ("Merger Sub" and, together with Fresenius Kabi, "Fresenius"). Pursuant to the terms of the Merger Agreement, shareholders of Akorn would have received $34.00 in cash for each share of Akorn common stock (the "Transaction"). App., *infra*, 158a-159a, 163a-164a.

On May 22, 2017, Akorn filed a preliminary proxy statement (the "Proxy" or "Proxy Statement") with the United States Securities and Exchange Commission ("SEC") in connection with the Transaction. App., *infra*, 159a, 164a.

In June of 2017, stockholders of Akorn filed multiple actions in federal courts in Louisiana and Illinois challenging the sufficiency of the disclosures

made in the Proxy Statement.[4] *Id.* Each plaintiff generally alleged that the Proxy Statement omitted material information with respect to the Transaction, which rendered that document false and misleading. *Id.* The plaintiffs each further alleged that defendants had violated Sections 14(a) and 20(a) of the Exchange Act in connection with the Proxy Statement. *Id.* Plaintiffs sought to correct the deficient proxy material and to enjoin the Transaction until the deficiencies were satisfactorily addressed. Frank App. App'x A109, A126-27, A148. There were six total shareholder suits filed: *Berg v. Akorn, Inc., et al.,* No. 17-cv-5016; *Alcarez v. Akorn, Inc., et al.,* No. 17-cv-5017; *House v. Akorn, Inc., et al.*, No. 17-cv-5018; *Harris v. Akorn, Inc., et al.,* No. 17-cv-5021; *Carlyle v. Akorn, Inc., et al.,* No. 17-cv-5022; *Pullos v. Akorn, Inc., et al.,* No. 17-cv-5026.[5] App., *infra*, 60a-61a.

2. Subsequent Developments While Cases Were Pending At The District Court

On June 15, 2017, Akorn filed a definitive proxy statement (the "Definitive Proxy") that addressed several of the major disclosure deficiencies identified in the various complaints. App., *infra*, 159a-160a, 164a-165a.

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[4] The cases that were filed in federal district court in Louisiana were transferred to federal district court for the Northern District of Illinois where Akorn is headquartered.

[5] Collectively referred to when appropriate as the "Section 14(a) Actions."

On June 20, 2017, Frank purchased shares of Akorn. *See* App., *infra*, 264a. On June 20, 2017, Akorn's stock price closed at $33.41 per share. App., *infra*, 291a.

On July 10, 2017, Akorn filed a Form 8-K that included additional information to supplement the Definitive Proxy. App., *infra*, 19a. Akorn's stock price closed up over the price of the previous trading day at $33.56, and the following trading day, the price continued to rise, closing at $33.60. App., *infra*, 291a.

On July 14, 2017, Petitioners voluntarily dismissed their cases without prejudice under Rule 41(a). App., *infra*, 158a-161a, 163a-166a. There was no settlement or release of any class claims in these Actions. *Id.* Alcarez's and Harris's Rule 41(a) dismissals were self-executing, did not need court approval, did not request that the district court retain jurisdiction for any purpose, and no further actions in the cases were requested. *Id.*

On July 17, 2017, the next trading day after the cases were dismissed, the market price of Akorn stock closed at $33.70, up from the previous day's close of $33.645. *Id.*

On September 15, 2017, the parties in the *Berg* Action filed a stipulation with the district court reflecting that Akorn had agreed to pay plaintiffs' counsel a fee of $322,500. App., *infra*, 20a.

On September 14, 2017, Akorn shares closed at $32.97 per share and on September 15, 2017 – the

day the parties filed the stipulation disclosing the Mootness Fee – Akorn's share price closed up at $33.10 and continued to trade higher than $33.00 per share through the end of September. App., *infra*, 293a-294a.

3. Frank Seeks To Intervene In The District Court Actions

On September 18, 2017, Frank moved to intervene in all of the Section 14a Actions. App., *infra*, 20a. After full briefing, the district court denied Frank's motion because he failed to allege an interest in the case:

> Federal Rule of Civil Procedure 24, governing intervention, requires that a potential intervenor demonstrate his "interest" in the case. Frank, however, has not, and—it appears to the Court—cannot, identify such an interest. To the extent Frank addresses this issue, Frank makes two seemingly incompatible arguments. He first argues that he "intervenes not as a shareholder on behalf of the corporation, but as a class member to this strike suit." R. 79 at 9. But two sentences later, he asserts, "there is no speculation about Frank's injury. By design, the Plaintiff succeeded in extracting fees from Akorn, which Frank is a shareholder of, depleting the capital reserves of [an] entity Frank partially owns." *Id.* And in his opening brief, Frank argues that he "has a protectable interest as an Akorn shareholder, and has an ongoing

interest in curtailing the scourge of merger strike suits." R. 66-2 at 13.

On the one hand, to the extent Frank contends he has an "interest in curtailing the scourge of merger strike suits," and the attorneys' fees settlement in this case is a product of such a suit, Frank's injury from Akorn's payment of the settlement, can only be derivative of Akorn's. The Court does not see how that derivative injury can serve as an interest supporting Frank's intervention in this case. First, relief for a derivative injury generally requires compliance with procedures for filing derivative lawsuits under Federal Rule of Civil Procedure 23.1, state law, or both. Berg's case was not filed as a derivative suit, and Frank does not claim to have complied with any of these procedures. Second, even if Frank had complied with these procedures, or they are otherwise not applicable (or futile), his claim would almost certainly be barred by the business judgment rule. He admits as much when he concedes that Akorn's decision to settle with Berg was "rational." R. 79 at 8. Lastly, Rule 24 requires that an intervenor have an "interest" in "the subject of the action," or that they share "a claim or defense." The subject of the action here was the information in the proxy statement, not the settlement Frank argues is harmful to Akorn and by extension his ownership stake of Akorn.

> On the other hand, to the extent Frank contends he has an interest in this case because he is "a class member," that appears to be insufficient because the class claims have been dismissed without prejudice. The class members' claims are no longer at issue in this case, meaning that the class members' rights with respect to the claims Berg brought can no longer be vindicated or prejudiced. Frank has not demonstrated that the class has any continuing interest in this case in which Frank can intervene.

See Berg v. Akorn, Inc., No. 17 C 5016, 2017 WL 5593349, at *3 (N.D. Ill. Nov. 21, 2017) (App., *infra*, 25a-27a). However, the district court gave Frank an opportunity to re-file his motion to address the lack of interest discussed by the district court. *Id.* at *4 (App., *infra*, 29a). Frank did not timely file a notice of appeal of the district court's November 21, 2017 order.

Frank re-filed his motion to intervene in December 2017. Frank App. App'x A62. Before the district court ruled on Frank's renewed motion to intervene, counsel for Alcarez and Harris (and Berg) notified the court at a hearing on May 25, 2018, that they were disclaiming the Mootness Fee. App., *infra*, 67a-68a. Consequently, the district court verbally told the parties at the hearing that Frank's effort to intervene in the dismissed *Alcarez* and *Harris* (and *Berg*) cases was moot. 69a. Frank's renewed motion to intervene was deemed filed in the other remaining

Section 14(a) cases that continued to litigate a claim to the Mootness Fee. *Id.*

Frank filed a notice of appeal in the *Alcarez* and *Harris* Actions on June 1, 2018, claiming to be appealing the district's court's order from the May 24, 2018 hearing "and all orders that merge therein." App., *infra*, 191a-192a, 194a-195a.

Subsequently, the district court denied Frank's renewed motion to intervene for the same general reasons it denied his original motion to intervene: he failed to show he had an interest in the case:

> Frank's primary argument for intervention is that he has stated a claim against plaintiffs' counsel for breach of fiduciary duty.
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> But the authority setting forth such a duty indicates that it is limited to protecting class members' legal rights that form the basis of the claims at issue. *See Schick v. Berg*, 2004 WL 856298, at *6 (S.D.N.Y. Apr. 20, 2004) (holding that "pre-certification class counsel owe a fiduciary duty not to prejudice the interests that putative class members have in their class action litigation" because "class counsel acquires certain limited abilities to prejudice the substantive legal interests of putative class members even prior to class certification"); *see also* Nick Landsman-Roos, *Front-End Fiduciaries: Precertification Duties and Class Conflict*, 65 STAN. L. REV. 817, 849 (2013). In

other words, class counsel have a duty not to act in a manner that prejudices class members' ability to secure relief for the alleged injuries at issue in the case.

Frank does not claim that plaintiffs' counsel caused any such prejudice. Rather, he alleges that the attorneys' fees paid to class counsel are a loss to Akorn and thereby harmed Akorn shareholders, including the class members. *See* 17 C 5018, R. 51 at 4 ("Settling Counsel breached their duty through their scheme to extract attorneys' fees through sham litigation diametrically opposed to the interests of class members they purported to represent."). Frank makes no allegation that plaintiffs' counsel prejudiced the class members' claims in any of the six cases. In fact, Frank's underlying rationale for seeking to intervene is that plaintiffs' claims are worthless, which would mean that class members are not entitled to any recovery. It is difficult to see how worthless claims could ever be prejudiced.

Moreover, the injury Frank identifies is not to the class members *qua* class members. Rather, it is an injury to *Akorn* that the class members might realize through their shares of Akorn. But an injury to Akorn can only be pursued by class members through a derivative action, which is not the procedural posture of any of the six cases. And in any event, the fact that all the class members are Akorn shareholders does

> not mean that plaintiffs' counsel's fiduciary duty to the putative class extends to a duty to refrain from injuring Akorn. Indeed, plaintiffs' claims are designed to compel Akorn to act in a way it otherwise had not, thereby causing some form of expense and injury. Clearly, the class members' claims and Akorn's interests are not coextensive. As such, there is a break in the causal chain connecting the class members to Akorn that Frank relies upon to support his theory of intervention.

House v. Akorn, Inc., Nos. 17 C 5018, 17 C 5022, 17 C 5026, 2018 WL 4579781, at *2 (N.D. Ill. Sept. 25, 2018), App., *infra*, 78a-80a.

B. The Fresenius Merger Collapses And Akorn Files For Bankruptcy

On April 22, 2018, Fresenius Kabi gave notice of intent to terminate the Merger Agreement, citing, inter alia, Akorn's false statements regarding regulatory compliance and failure to otherwise comply with its Merger Agreement obligations. *Akorn Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, 2018 WL 4719347, at *2 (Del. Ch. Oct. 1, 2018) (the "Delaware Akorn Opinion"). Akorn responded by filing suit in the Delaware Court of Chancery seeking a decree of specific performance compelling Fresenius Kabi to close. *See id.* at *3. Expedited litigation over Fresenius' attempt to terminate the Merger Agreement ensued. The Delaware Court of Chancery ultimately issued the Delaware Akorn

Opinion siding with Fresenius, and the Merger was terminated as of October 1, 2018. *See id.* at *101.

On May 20, 2020, Akorn filed for Chapter 11 bankruptcy protection. Bankruptcy proceedings were concluded in September of 2020 resulting in Akorn reforming as a private entity under the legal name of Akorn Operating Company LLC. Following the conclusion of its bankruptcy proceedings, Akorn was no longer a public company, Akorn's public stock ceased to exist, and former Akorn stockholders' equity and ownership interests in the Company were eliminated.

C. Court Of Appeals Proceedings

The Seventh Circuit reversed the district court. The Panel (and Frank) latched on to what amounted to colloquy with counsel from the May 2, 2018, hearing in which the district court stated that Frank's effort to intervene in the *Alcarez* and *Harris* cases was moot since the cases themselves had long been dismissed and their counsel had disclaimed any part of the Mootness Fee. App., *infra*, 69a, 236a.

The Panel criticized what the Panel and Frank appear to (incorrectly) assume as the district court's sole basis for denying Frank's motion to intervene:

> So was the district judge right to deny Frank's motion to intervene? Certainly not for the reason he gave. "I'm planning to reject your proposed remedies, so your request is moot" is not a recognized legal doctrine. A case

> becomes moot only when it is *impossible* to grant effective relief. See, e.g., *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). It was possible to grant the sort of relief Frank requested. A decision not to do so is one on the merits, not a conclusion that the case does not present a case or controversy under Article III (which is what it means to call it moot). If "you are going to lose, so your claim is moot" were a proper approach, unsuccessful suits would be dismissed as moot rather than on the merits. That's not how things are supposed to work. See, e.g., *Bell v. Hood*, 327 U.S. 678 (1946).

App., *infra*, 8a-9a.

But the Panel completely ignored the district court's prior detailed analysis of Frank's motion to intervene in its November 21, 2017 order, in which it held that Frank had no interest in the case. App, *infra*, 26a. Indeed, even if the November 21, 2017 decision was not before the Panel since Frank was given a chance to renew his motion to intervene, the district court reached the same conclusion in its September 25, 2018, order after giving Frank a second shot at demonstrating his injury.

> Frank makes no allegation that plaintiffs' counsel prejudiced the class members' claims in any of the six cases.
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> Moreover, the injury Frank identifies is not to the class members *qua* class members.

> Rather, it is an injury to *Akorn* that the class members might realize through their shares of Akorn. But an injury to Akorn can only be pursued by class members through a derivative action, which is not the procedural posture of any of the six cases.

App, *infra*, 79a.

So, the Panel looked for an injury beyond anything in the record before it. After over 5 years from the oral arguments, the Panel finally issued its decision on April 15, 2024, with the here-to-for unasserted injury that the Panel claimed gives him standing to intervene:

> Frank suffers some loss from diversion of corporate money, which affects the value of his shares. The diminution is minimal - $322,500 is small beer in a $4 billion transaction, something like 0.008% of the value of Frank's shares. Still, that is a few cents. The Supreme Court tells us that an 'identifiable trifle' suffices for standing. *United States v. SCRAP,* 412 U.S. 669, 688-90 & n. 14 (1973).

App, *infra*, 7a.

But the impact that the payment of this "small beer" could have had on the value of Akorn's publicly traded stock was never raised by any Party and never considered by the district court. Nor was it considered by the parties on appeal as no one had

raised this argument. To date, there has never been any evidence introduced whether there was any price impact that the Mootness Fee had on the price of Akorn shares, and if so what the impact of that fee was as opposed to other internal or external information.

Having found a new – albeit unsupported – theory of injury for Frank, the Panel then provided the remedy for him to seek against Alcarez and Harris in the form of a motion for Rule 11 sanctions:[6]

> The dismissal of each suit was a "final adjudication of the action"; settlements were the reasons for the dismissals, but the statute [PSLRA] applies to the judicial action, not to the reason for it. It obliges the judge to determine whether each suit was proper at the moment it was filed. The statute directs the court to the criteria of Fed. R. Civ. P. 11, which entails notice and an opportunity to be heard. Those steps have not been put in motion, given the denial of Frank's motion to intervene, but they should occur on remand.

App., *infra*, 12a.

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[6] Return of the Mootness Fee as a remedy is not available. Counsel for Alcarez and Harris had waived any claim to it in 2017. App, *infra*, 67a-68a. The district court later ordered its return to Akorn in the other cases that were still litigating over it. *House v. Akorn, Inc.*, 385 F. Supp. 3d 616, 623 (N.D. Ill. 2019).

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit *Sua Sponte* Manufactured A New Theory of Damages Without Any Evidence That Such Damages Exist

In order to intervene, Frank must have standing. *See e.g., Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016); *see also Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433, 434 (2017) ("A litigant seeking to intervene as of right under Rule 24(a)(2) must meet the requirements of Article III standing if the intervenor wishes to pursue relief not requested by a plaintiff"). Frank had to demonstrate that he has an injury in fact, which means an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *See e.g.*, *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *see also Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 103 (1998) (noting that injury in fact is "[f]irst and foremost" of standing's three elements).

A. The Panel Concluded That Frank Suffered A Direct Injury To His Akorn Share Value Without Frank Making the Argument And No Evidence In Support

Frank argued that his injury arose from the purported breach of duties by Petitioners' attorneys and the payment of the Mootness Fee, which

unjustly enriched Petitioners' attorneys. App, *infra*, 213a, 214a. Petitioners disputed that Frank had standing under this argument because the purported injury – i.e., the payment of the Mootness Fee – was to the Company not to Frank.

The Panel conceded that the Mootness Fee "is a loss to the corporate treasury". App, *infra*, 7a. Nevertheless, the Panel found that Frank was injured by holding that the Mootness Fee "payment diminishes (though only a little) the market price of each share." App, *infra*, 5a. The Panel concluded that Frank had standing to intervene because "Frank suffers some loss from diversion of corporate money, which affects the value of his shares." App, *infra*, 7a.

Frank never argued this theory of standing and no party presented evidence regarding the impact of the Mootness Fee on Akorn's stock price, which even the Panel recognized was "small beer in a $4 billion transaction". App, *infra*, 7a. As recognized by the Seventh Circuit:

> *Basic* describes a mechanism by which public information affects stock prices, and thus may affect traders who did not know about that information. Professional investors monitor news about many firms; good news implies higher dividends and other benefits, which induces these investors to value the stock more highly, and they continue buying until the gains are exhausted. With many professional investors alert to news, markets are efficient in the sense that they rapidly

> adjust to all public information; if some of this information is false, the price will reach an incorrect level, staying there until the truth emerges. This approach has the support of financial economics as well as the imprimatur of the Justices: few propositions in economics are better established than the quick adjustment of securities prices to public information. See Richard A. Brealey, Stewart C. Myers & Alan J. Marcus, *Fundamentals of Corporate Finance* 322–39 (2d ed.1998).

See West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002).

The fundamental premise of the Panel's Opinion, that the Mootness Fee negatively impacted Akorn's stock price was never supported by evidence and on basic review of the Akorn's stock price, is unfounded. App, *infra*, 293a. Akorn's stock price increased after public disclosure of the Mootness Fee on September 15, 2017, which conflicts with the premise of the Panel's Opinion that the payment of a mootness fee diminishes "*the market price of each share*." App, infra, 5a (emphasis added).

On September 14, 2017, Akorn shares closed at $32.97 per share and on September 15, 2017 – after the parties filed the stipulation disclosing the agreement of the Mootness Fee – Akorn's share price closed up at $33.10 and continued to trade higher than $33.00 per share through the end of September. 293a-294a.

Determining the potential stock price impact of public news about a company involves the exchange of expert financial analysis and a full evidentiary hearing on the matter. None of this has been done in this case, because the Panel was the first to assert this basis for standing. This new untested theory of injury should not have been adopted by the Panel to salvage Frank's motion to intervene.

B. Frank Waived The Argument Of A Share Price Impact Because He Never Raised The Argument

Frank's failure to raise this argument either at the district court level or on appeal waives the argument. *See e.g.*, *Williams v. Dieball*, 724 F.3d 957, 961–62 (7th Cir. 2013) (appellant failed to raise argument in district court); *see also Willis v. Harrah's Ill. Corp.*, 182 F.3d 923, 1999 WL 313755, at *3 (7th Cir. 1999) (the appellate court concluded, however, that plaintiff's claim was waived on appeal because Willis never argued below that statements at issue were direct evidence of discriminatory animus); *United States v. Husband*, 312 F.3d 247, 250-51 (7th Cir. 2002), (holding that "any issue that could have been but was not raised on appeal is waived"); *Andersen v. Thieret*, 903 F.2d 526, 531 & n.2 (7th Cir. 1990) (holding that issue of whether magistrate in federal habeas proceeding applied incorrect quantum of proof in deciding that petitioner's confession was voluntary was waived on appeal, where petitioner never raised argument except in response to questions in oral argument.). In *Doe by & through Doe v. Apple Inc.*, No. 3:22-CV-2575-NJR, 2023 WL 3301795, at *5 (S.D. Ill. May 8,

2023), in finding that a court could not address such issues *sua sponte*, the court cited to two Illinois State Court decisions which held that "the circuit court's jurisdiction, while plenary, is not boundless, and where no justiciable issue is presented to the court through proper pleadings, the court cannot adjudicate an issue *sua sponte*" and that "[o]rders entered in absence of a justiciable question properly presented to the court by parties are void since they result from court action exceeding its jurisdiction" (quoting *Ligon v. Williams*, 264 Ill.App.3d 701, 202 Ill.Dec. 94, 637 N.E.2d 633, 638 (Ill. App. Ct. 1994); *see also Expedited, Inc. v. Korunovski*, 2021 IL App (1st) 192323-U, ¶ 47, *appeal denied*, 451 Ill.Dec. 415, 183 N.E.3d 872 (Ill. 2021) (quoting *Ligon* and finding that a court cannot adjudicate a claim that is not pleaded against a party)).

C. The Only Purported Injury Was To Akorn Due To The Payment Of The Mootness Fee

In general, and specifically under Louisiana law,[7]

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[7] In cases involving substantive corporate law issues, the law of a corporation's state of incorporation is controlling. *See Seidel v. Allegis Corp.*, 702 F. Supp. 1409, 1410–11 (N.D. Ill. 1989). Akorn is a Louisiana corporation and, thus, any substantive claims against it, or on its behalf, are governed by Louisiana law. *See Burks v. Lasker*, 441 U.S. 471, 478-79 (1979); *In re Abbott Labs. Derivative S'holders Litig.,* 325 F.3d 795, 804 (7th Cir. 2003) ("It is the law of the state of incorporation which controls these substantive rights and governs what excuses are adequate for failure to make demand"). Accordingly, the substance of the issues raised by Frank's motion and proposed complaint must be adjudicated under Louisiana law.

a shareholder does not have a general right to sue directly for harms to the corporation in which he or she owns an interest. *Guillory v. Broussard*, 15-888 (La. App. 3 Cir. 5/18/16), 194 So. 3d 764, 780, *reh'g denied* (Aug. 3, 2016), *writ denied,* 16-1707 (La. 11/29/16), 210 So. 3d 806. When the alleged loss to the individual shareholder is the same loss that would be suffered by other shareholders, a shareholder does not have a direct cause of action. *Paul Piazza & Son, Inc. v. Piazza*, 11-548 (La. App. 5 Cir. 12/28/11), 83 So. 3d 1066, 1070, *writ denied by* 12-0261 (La. 3/30/12), 85 So. 3d 123 ("[I]n situations where the alleged loss to the individual shareholder is the same loss that would be suffered by other shareholders, the loss is considered to be indirect"); *see also Crochet v. Cisco Sys., Inc.*, 02-1357 (La. App. 3 Cir. 5/28/03), 847 So. 2d 253, 256, *writ denied by* 03-1838 (La. 10/17/03), 855 So. 2d 765 (noting that under Louisiana jurisprudence, if a shareholder can recover in a suit only by showing that the corporation was injured, then the suit is derivative in nature, even if the corporate injury does cause indirect harm to the shareholder, while if a recovery can be granted without a proof of a corporate loss, then the suit is considered to be direct).

Rather than through direct claims, Louisiana law requires that a shareholder bring claims to enforce a right on behalf of a corporation ***derivatively***, pursuant to the Louisiana Business Corporation Act. *See* La. Stat. Ann. §§ 12:1-740 - 12:1-747 (2015). Indeed, and most applicable to the circumstances here, Louisiana law holds that claims arising from

attorneys' fees paid by a corporation belong to the corporation, not to stockholders, and may only be brought derivatively. *Cf. Piazza*, 83 So. 3d at 1070 (claims arising from corporate attorneys' fees are indirect in nature and must be asserted by the corporation itself or derivatively on behalf of the corporation).

Frank lacked standing when he attempted to intervene directly to recover for alleged acts committed against, or causing damage to, Akorn. *See Scaffidi & Chetta Entm't v. Univ. of New Orleans Found.*, 04-1046 (La. App. 5 Cir. 2/15/05), 898 So. 2d 491, 495, *writ denied*, 05-0748 (La. 5/6/05), 901 So. 2d 1102; *Joe Conte Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.,* 95-1630 (La. App. 4 Cir. 2/12/97), 689 So.2d 650, 654, *writ denied*, 97-659 (La. 4/25/97), 692 So.2d 1090. The injuries that he alleged were suffered by Akorn itself, and only indirectly by all of Akorn's stockholders. The relief sought -- the disgorgement to Akorn of the Mootness Fee -- reflected the fact that these funds (and any claims arising therefrom) belonged to Akorn, and not to Frank. Accordingly, Frank could only properly sue to recover losses to Akorn through a shareholder's derivative suit. Such claims would have to be pled under Rule 23.1 and conform to Louisiana's substantive law for the pleading of such claims.[8]

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[8] Louisiana is a "universal demand" state, meaning that it requires, *without exception*, a shareholder to make a pre-suit demand on the corporation's board to institute a lawsuit. Under Louisiana Law, no shareholder may commence a derivative proceeding until a written demand has been made upon the corporation to take suitable action. La. Stat. Ann. § 12:1-742 (2015). There is no statutory exception to this requirement. *See*

Clearly, Frank's claims have not been pled in a manner consistent with such requirements.

As explained in district court's Order of September 25, 2018 denying Frank's right to intervene:

> [T]he injury Frank identifies is not to the class members *qua* class members. Rather, it is an injury to *Akorn* that the class members might realize through their shares of Akorn. But an injury to Akorn can only be pursued by class members through a derivative action, which is not the procedural posture of any of the six cases. And in any event, the fact that all the class members are Akorn shareholders does not mean that plaintiffs' counsel's fiduciary duty to the putative class extends to a duty to refrain from injuring Akorn. Indeed, plaintiffs' claims are designed to compel Akorn to act in a way it otherwise had not, thereby causing some form of expense and injury. Clearly, the class members' claims and Akorn's interests are not coextensive. As such, there is a break in the causal chain connecting the class members to Akorn that Frank relies upon to support his theory of intervention.

See House v. Akorn, No. 17-C-5018 (N.D. Ill. Sep. 25. 2018) (order denying motion to intervene), App, *infra*, 79a-80a.

La. Rev. Stat. Ann. § 12:1-742 cmt. (West) ("Demand is always required, and so never is excused as futile.").

II. The Court Of Appeals Also Raised Another New Issue - That The Petitioners' Voluntary Dismissals Constituted A "Final Adjudication" Under The PSLRA's Rule 11 Safe Harbor Provision

A. Rule 11 And The PSLRA

Rule 11, by its terms, is an optional remedy for a court and also contains a safe harbor provision for litigants to avoid Rule 11 review.

A court has discretion whether to impose Rule 11 sanctions:

> If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court **may** impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.

Fed. R. Civ. P. 11(c)(1) (emphasis added).

The Rule also provides that a motion for sanctions "must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." Fed. R. Civ. P. 11(c)(2). A court may on its own order an attorney or party to show cause why conduct has not violated Rule 11(b), but must not impose monetary sanctions if there is a

voluntary dismissal before the order to show cause issued. Rule 11(c)(3), (c)(5)(B).

The PSLRA omits this kind of safe harbor and instead mandates a Rule 11 review and the imposition of sanctions if there is a violation, but only if the litigation proceeds to a "final adjudication". 15 U.S.C. § 78u-4(c)(1). Under the PSLRA, only "upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion." *Id.*

B. Voluntary Dismissal Without Prejudice Is Not A Final Adjudication

A voluntary dismissal under Rule 41(a) is not a "final adjudication" that invokes a Rule 11 review under the PSLRA. *See, e.g.*, *Rosenfeld v. Time Inc.*, No. 17cv9886 (DLC), 2018 WL 4177938, at *5 (S.D.N.Y. Aug. 30, 2018); *Manchester Mgmt. Co., LLC v. Echo Therapeutics, Inc.*, 297 F. Supp. 3d 451, 465-66 (S.D.N.Y. 2018); *Shoemaker v. Cardiovascular Sys., Inc.*, No. 16-568 (DWF/KMM), 2017 WL 1180444, at *11 n.12 (D. Minn. Mar. 29, 2017); *Unite Here v. Cintas Corp.*, 500 F. Supp. 2d. 332, 336-37 (S.D.N.Y. 2007); *Blaser v. Bessemer Trust Co.*, No. 01 Civ. 11599(DLC), 2002 WL 31359015, at *3 (S.D.N.Y. Oct. 21, 2002); *Hilkene* v. *WD–40 Co.*, No. 04-2253-KHV, 2007 WL 470830, at *1 (D. Kan. Feb. 8, 2007); *Great Dynasty*

Int'l Fin. Holdings Ltd. v. *Haiting Li*, No. C-13-1734 EMC, 2014 WL 3381416, at *4–5 (N.D. Cal. July 10, 2014); *cf. In re Cross Media Mktg. Corp. Sec. Litig.*, 314 F. Supp. 2d 256, 269 (S.D.N.Y. 2004) (dismissal of a case without prejudice and with leave to refile is not a "final adjudication").

As explained by Judge Cote from the District Court for the Southern District of New York who examined this issue in great depth, in rejecting such a view adopted by the Panel:

> [I]f . . . a voluntary dismissal without prejudice were to constitute a "final adjudication" under the PSLRA, then, under the mandatory review provisions of Section 78u–4(c)(1), a district court would be required to conduct a Rule 11 inquiry and make specific findings as part of that inquiry in every action filed under the PSLRA which is voluntarily dismissed, including actions in which no answer has been filed or where the parties have stipulated to dismissal. . . . [s]uch voluntary dismissals could occur "without order of court," Fed.R.Civ.P. 41(a)(1)(i), but would nevertheless require the district court to make specific Rule 11 findings. If Congress actually intended to saddle district courts with this task, it would have stated so explicitly instead of using the phrase "final adjudication" as the trigger for the Rule 11 review.

Blaser, 2002 WL 31359015, at *3.

The voluntary dismissals of the Section 14 Actions were not "final adjudications" for purposes of the PSLRA. First, each of the voluntary dismissals was in line with Rule 41(a), they were without prejudice, and required no action by the Court to be effective. App, *infra*, 158a-161a, 163a-166a. In addition, neither of the Petitioners compromised the substantive claims that they asserted in their respective actions. *Id.* The Rule 41(a) voluntary dismissals were not "settlements" and in no way can be considered "final adjudications." Rather, they fully comported with the PSLRA's statutory framework to substitute for the safe harbor under Rule 11 that is not available to plaintiffs in PSLRA litigation.

III. The Seventh Circuit Panel Improperly *Sua Sponte* Manufactured A Damage Theory For Frank And Instructed The Remedy He Should Pursue Under The PSLRA And Rule 11

As a general rule, "an appellate court does not give consideration to issues not raised below" for the purpose of reversing the lower court's judgment. *Hormel v. Helvering,* 312 U.S. 552, 556 (1941); *see Singleton v. Wulff,* 428 U.S. 106, 120 (1976), *Gen. Utils. & Operating Co. v. Helvering,* 296 U.S. 200, 206-07 (1935). In this case, the Seventh Circuit Panel, *sua sponte*, created a new theory of damages based on supposed facts regarding Akorn's stock price reaction to the Mootness Fee. The Panel also raised the new issue that the Rule 41(a) voluntary dismissals without prejudice were "final adjudications" under the PSLRA and therefore Rule

11 review was mandated on remand. The Panel's actions were absolutely incorrect, break with this Court's precedent and warrant review by this Court under Supreme Court Rule 10.

The function of the court of appeals is to "review the case presented to the district court, rather than a better case fashioned after a[n] . . . unfavorable order." *Barner v. Pilkington N. Am., Inc.,* 399 F.3d 745, 749 (6th Cir. 2005). In *Hormel, supra,* this Court stated the policy behind the rule as follows:

> For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. *This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues* which the trial tribunal is alone competent to decide; *it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence*. And the basic reasons which support this general principal applicable to trial courts make it equally desirable that parties should have an opportunity to offer evidence on the general issues involved in the less formal proceedings before administrative agencies entrusted with the responsibility of fact finding.

Hormel, supra, 312 U.S. at 556 (emphasis added).

There are several purposes behind this rationale. As a procedural matter, the trial court is the forum

vested with the duty of determining issues of fact. Fairness to the parties requires that each party be allowed the opportunity to present all evidence and arguments relevant to the issues to be determined in the trial forum. *Hormel, supra.*

Moreover, there is a paramount need to promote judicial economy. The burden and practical effect of multiplicitous trial and appeal of issues requires that all issues be raised at the trial level. *See Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1368 (5th Cir. 1983); *Payne v. McLemore's Wholesale & Retail Stores,* 654 F.2d 1130, 1144 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). Further, the facilitation accorded appellate review by a lower court's consideration of the legal issues and judicial resolution of factual disputes commands that such a rule not be disregarded lightly. *See Helvering v. Wood*, 309 U.S. 344, 349 (1940).

However, in the present case, despite the fact that the district court was the forum vested with the duty of determining the factual issues, the Panel violated this rule by deciding a factual issue not raised by any party at the district court or on appeal and without affording Petitioners any opportunity to respond. The Panel's actions completely violated the general rule set forth in *Hormel* and created the exact scenario which *Hormel* sought to protect against. Here, the Panel rendered a factual conclusion without allowing Petitioners an opportunity to respond or offer proofs which would contradict the conclusion reached by the Panel. Quite simply, the Panel's order from April 15, 2024,

surprised Petitioners by ruling on a new legal theory of damages based on facts that were not in the record and to which they had no opportunity to respond.

CONCLUSION

Wherefore, it is respectfully requested that the Supreme Court grant this Petition for a writ of certiorari.

Respectfully submitted,

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August 13, 2024

APPENDIX

APPENDIX A

In the

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 18-2220, 18-2221, 18-2225, 18-3307, 19-2401, and 19-2408

JORGE ALCAREZ, *et al.*, as representatives of a class,
Plaintiffs-Appellees,

v.

AKORN, INC., *et al.*,
Defendants-Appellees.

Appeals of THEODORE H. FRANK, SHAUN A. HOUSE, and DEMETRIOS PULLOS

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 17 C 5016, 5017, 5018, 5021 & 5026 — **Thomas M. Durkin**, *Judge*.

ARGUED NOVEMBER 6, 2018, and APRIL 14, 2020 — DECIDED APRIL 15, 2024

Before EASTERBROOK and WOOD, *Circuit Judges*.*

* Circuit Judge Kanne, a member of the panel, died after the appeals were argued. They are being decided by a quorum. 28 U.S.C. §46(d).

EASTERBROOK, *Circuit Judge*. Six suits, filed under the federal securities laws, present questions about "mootness fees" in federal litigation. Akorn, Inc., asked its investors to approve a merger (valued at more than $4 billion) with Fresenius Kabi AG. Plaintiffs assert that the proxy statement (82 pages long, with 144 pages of exhibits) should have contained additional details, whose absence violated §14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a). Within weeks Akorn amended its proxy statement to add some disclosures, though it insisted that none of these additions was required by law.

All six plaintiffs then moved to dismiss their suits, asserting that the additional disclosures mooted their complaints. They did not notify the proposed classes (five of the six suits had been filed as class actions) or seek judicial approval under Fed. R. Civ. P. 23(e). Different district judges entered orders of dismissal between July 17 and July 25, 2017.

Akorn's shareholders overwhelmingly approved the merger, with only 0.1% of all votes cast against. Many of the proxies had been voted before Akorn's supplemental disclosures; plaintiffs did not protest. On September 15 all six plaintiffs told the district court that any claim to attorneys' fees and costs had been resolved by a payment of $322,500, which counsel would divide. Those are the mootness fees. The proposed merger was abandoned for reasons unrelated to these suits, but that does not affect the dispute about what to do with this money.

Theodore Frank, one of Akorn's shareholders, learned through the press that Akorn had paid

mootness fees and on September 18, 2017, filed a motion to intervene. He asked the court to require counsel to disgorge the money as unjust enrichment (since they had not achieved any benefit for the investors). He also asked the court to enjoin the lawyers who represented the six plaintiffs to stop filing what Frank calls strike suits, whose only goal is to extract money for counsel. Frank contends that the suits amount to abuse of the legal process. Indeed, this court has remarked that litigation "that yields fees for class counsel and nothing for the class is no better than a racket. It must end." *In re Walgreen Co. Stockholder Litigation*, 832 F.3d 718, 724 (7th Cir. 2016) (cleaned up). But litigation of this kind has not ended since *Walgreen*.

Delaware, where most suits seeking extra disclosure had been filed, decided that they would be subject to "disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission". *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884, 898 (Del. Ch. 2016). Delaware already had limited the payment of mootness fees unless the suit was meritorious. *In re Sauer-Danfoss Inc. Shareholders Litigation*, 65 A.3d 1116, 1123 (Del. Ch. 2011). The combination of *Sauer-Danfoss* with *Trulia* initially led to a decline in suits seeking more disclosure for mergers. In 2012 90% of deals worth more than $100 million were challenged in litigation. In 2013 that proportion rose to 96%. *Trulia* knocked it down to 74% in 2016. By 2017 and 2018 the proportion was back to 83%. And the location of the suits changed radically. In 2012 56% of these suits were in Delaware and 34% in federal court. By 2018 only 5% were in Delaware and 92% in federal

court. These figures come from Matthew D. Cain, Jill E. Fisch, Steven Davidoff Solomon & Randall S. Thomas, *Mootness Fees*, 72 Vand. L. Rev. 1777, 1787 (2019). By filing in federal court plaintiffs avoid *Trulia*—for federal courts use their own procedures, whether the claim arises under state or federal law. See, e.g., *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010); *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996); *Mayer v. Gary Partners & Co.*, 29 F.3d 330 (7th Cir. 1994).

These six cases illustrate the federal practice. Suits are filed as class actions seeking more disclosure but not contending that any of the existing disclosures is false or materially misleading. Such a claim is problematic under federal securities law. See, e.g., *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, No. 22–1165 (U.S. Apr. 12, 2024) (nondisclosure does not violate Rule 10b–5). Counsel for the plaintiffs and counsel for the firms involved agree on additional disclosures. The suits are then dismissed and mootness fees paid. Plaintiffs do not move for class certification, and Rule 23(e), which requires judicial approval only when a certified class action is settled or dismissed, does not come into play. The class is not notified.

Because plaintiffs and defendants agree on the fees, the judge is not asked to award anything. A statute providing that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class", 15

U.S.C. §78u–4(a)(6) (part of the Private Securities Litigation Reform Act or PSLRA), does not apply, because the judge does not "award" fees. And if a class member finds out and objects, as Frank did, he is met with the response that the suit is moot and there is nothing to object *to*. The upshot: money moves from corporate treasuries to plaintiffs' lawyers; the investors get nothing, yet the payment diminishes (though only a little) the market price of each share. That's why *Walgreen* called this "no better than a racket." But with the judiciary and investors cut out of the process, they cannot do anything about it. Or so class counsel insists.

Frank asked the judge to do something, such as ordering counsel to disgorge unearned money or issuing an injunction blocking mootness fees in future cases. Before the district judge could rule, counsel for three of the six plaintiffs disclaimed their portions of the $322,500. The district judge then denied Frank's motion to intervene in those cases, stating that, because he did not anticipate awarding any of the remedies Frank requested, intervention would be "moot." Frank's appeals were orally argued in November 2018.

We put those appeals on hold pending the disposition of the three remaining cases, in which the lawyers wanted some share of the fund (which one of them was holding for the group's benefit). In these three cases, the district judge again denied Frank's motion to intervene but permitted him to participate as *amicus curiae*. The judge took to heart the admonition in *Walgreen* that suits seeking extra disclosure should be reviewed immediately after being

filed. Acknowledging that he had not done that, he reopened the suits, concluded that the complaints were frivolous, and found that the extra disclosures were worthless to investors. In light of that finding the judge ordered counsel to return Akorn's money. *House v. Akorn, Inc.*, 385 F. Supp. 3d 616 (N.D. Ill. 2019). One of the three lawyers accepted that outcome. Two did not and have appealed. (Technically, the would-be representative plaintiffs have appealed, seeking an order that will let their lawyers divvy up the $322,500 pot.) Frank also has appealed, because he is still not a party and wants additional relief. These three final appeals were argued in April 2020, and all six appeals are now ready for decision.

Shaun House and Demetrios Pullos, the two plaintiffs who have appealed, contend that the district court lacked jurisdiction to reopen a dismissed case. The complaints had been dismissed, none of the litigants was unhappy, and there was nothing more for the court to do, they maintain. Although Fed. R. Civ. P. 60(b) allows judges to reopen cases, that must be done "on motion", according to the Rule, and none of the litigants had filed a motion. But this does not take Frank into account. If he should have been allowed to intervene, he will become a party and may file motions.

Plaintiffs insist that Frank lacks standing—and if Frank lacks standing, then House and Pullos also lack standing, for they will not recover a penny or obtain any other relief whether or not the attorneys collect fees. Their lack of interest in the outcome is so clear that we dismiss their appeals. Frank's standing remains to be decided.

Frank suffers some loss from diversion of corporate money, which affects the value of his shares. The diminution is minimal—$322,500 is small beer in a $4 billion transaction, something like 0.008% of the value of Frank's shares. Still, that is a few cents. The Supreme Court tells us that an "identifiable trifle" suffices for standing. *United States v. SCRAP*, 412 U.S. 669, 688–90 & n.14 (1973).

A concrete loss, caused by the complained-of conduct and remediable by the judiciary, supplies standing. See, e.g., *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). So we have held that a small loss caused by a brief inability to use a credit card after a data breach confers standing. See, e.g., *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826 (7th Cir. 2018); *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963 (7th Cir. 2016); *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015). We have held that even a few pennies' loss of potential interest (on a small non-interest-bearing deposit), see *Goldberg v. Frerichs*, 912 F.3d 1009 (7th Cir. 2019), or a brief delay in receiving income, *Brown v. CACH, LLC*, 94 F.4th 665 (7th Cir. 2024), amounts to a concrete injury. Only a "de minimis loss" threshold for standing would throw out Frank's contention, and the Supreme Court has not announced such a threshold.

Plaintiffs are mistaken to think that Frank needs to make a demand on the board of directors, and pursue a derivative action, rather than intervene personally. True, the $322,500 is a loss to the corporate treasury, but Frank does not contend that Akorn's directors violated their fiduciary duties. The

mootness fees may well have cost Akorn less than what its own lawyers would have billed to defend the suits. This means that the directors did not violate either the duty of care or the duty of loyalty when paying to buy peace. Frank contends that class counsel violated their duties *to him* when they used the class allegations as leverage to obtain private benefits. The existence of duties to class members is clear after a judge certifies a class. See *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 946–47 (9th Cir. 2011); *Back Doctors Ltd. v. Metropolitan Property & Casualty Insurance Co.*, 637 F.3d 827, 830–31 (7th Cir. 2011); *Martens v. Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001) (Sotomayor, J.) (citing *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 331 (1980)). There is no such duty if the judge has definitively ruled against certification. How things stand while certification is an open question is itself an open question. No matter how that question is resolved, however, Frank's contention that the representative plaintiffs and their lawyers owed duties to him, personally, need not be processed through the mechanism for derivative litigation.

So was the district judge right to deny Frank's motion to intervene? Certainly not for the reason he gave. "I'm planning to reject your proposed remedies, so your request is moot" is not a recognized legal doctrine. A case becomes moot only when it is *impossible* to grant effective relief. See, e.g., *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). It was possible to grant the sort of relief Frank requested. A decision not to do so is one on the merits, not a conclusion that the case does not

present a case or controversy under Article III (which is what it means to call it moot). If "you are going to lose, so your claim is moot" were a proper approach, unsuccessful suits would be dismissed as moot rather than on the merits. That's not how things are supposed to work. See, e.g., *Bell v. Hood*, 327 U.S. 678 (1946).

When the representative plaintiffs and the defendants strike a deal, intervention by a member of the class may be essential to protect the class's interests. We have told judges to grant intervention freely when a class member contends that the representatives (or, more realistically, their lawyers) are misbehaving. See, e.g., *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877 (7th Cir. 2000); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 318–19 (7th Cir. 2012). Indeed, under some circumstances, class members are entitled to appellate review without intervention. See *Devlin v. Scardelletti*, 536 U.S. 1 (2002). Just being in the class entitles a dissatisfied member to appellate review of a contention that the putative representative has acted against the class's interests.

Frank sought to intervene both as of right under Fed. R. Civ. P. 24(a) and permissively under Rule 24(b). The motion is timely; Frank acted soon after learning of the mootness fees. See *Cameron v. EMW Women's Surgical Center, P.S.C.*, 595 U.S. 267, 279–81 (2022). The district court addressed only his proposal to intervene as of right—and then only in three of the six cases. If the district judge had concluded that Frank lacks "a claim or defense that shares with the main action a common question of law

or fact" (Rule 24(b)(1)(B)), appellate review would be deferential. But the district judge did not make any findings on this subject. It seems to us that, as an investor in Akorn whose shares' value was affected by the merger and the mootness fees, Frank has a claim in common with the main action; how could it be otherwise? After all, Frank is a member of the proposed classes. And since class counsel and Akorn are looking out for their own interests rather than those of the class, intervention is appropriate. We hold that Frank is entitled to participate as a party. And that could solve any problem with reopening the judgments, because as a party Frank would be entitled to make the motion required for relief under Rule 60(b). He will have that opportunity on remand.

But the remedies that Frank initially proposed, such as disgorgement or an injunction, are not satisfactory. Disgorgement would be appropriate only if the mootness fees had been retained by counsel, yet the district judge has ordered the money returned. An injunction against repetition might be appropriate with respect to the individual plaintiffs, but Frank wants relief against the lawyers, who are repeat players—and the lawyers are not parties, so they would not be proper objects of injunctive relief unless they were added as parties. And Frank recognizes that Rule 23(e) deals only with cases certified as class actions, which these were not. Perhaps the rules committees of the Judicial Conference should take a look at the question whether judicial approval should be required to settle or dismiss cases brought as class actions, yet not so certified, but we must enforce the rule as it stands.

As this case proceeded, however, Frank turned his attention to the Private Securities Litigation Reform Act. Two of its provisions may affect the proper treatment of suits filed in quest of mootness fees. We have mentioned one—15 U.S.C. §78u–4(a)(6), which says that attorneys' fees "awarded" by a court "shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." This rule applies to all securities suits "brought" as class actions, whether or not they are so certified. See §78u–4(a)(1) ("The provisions of this subsection shall apply in each private action arising under this chapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure."). See also *Higginbotham v. Baxter International Inc.*, 495 F.3d 753, 756 (7th Cir. 2007). Yet §78u–4(a)(6) does not do any work when the defendant pays fees voluntarily rather than insisting on a judicial award.

The other statute, 15 U.S.C. §78u–4(c)(1), tells us:

> **Mandatory review by court**[.] In any private action arising under this chapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

"This chapter" means the whole Securities Exchange Act of 1934 (which is Chapter 2B of Title

15), and the six suits invoked that statute. The caption calls this review "mandatory," and the word "shall" tells us that the caption is accurate. The district court must make the required findings whether or not a litigant asks. *City of Livonia Employees' Retirement System v. Boeing Co.*, 711 F.3d 754, 757, 761 (7th Cir. 2013). Accord, *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 579 F.3d 143, 152 (2d Cir. 2009); *Morris v. Wachovia Securities, Inc.*, 448 F.3d 268, 283–84 (4th Cir. 2006).

The dismissal of each suit was a "final adjudication of the action"; settlements were the reasons for the dismissals, but the statute applies to the judicial action, not to the reason for it. It obliges the judge to determine whether each suit was proper at the moment it was filed. The statute directs the court to the criteria of Fed. R. Civ. P. 11, which entails notice and an opportunity to be heard. Those steps have not been put in motion, given the denial of Frank's motion to intervene, but they should occur on remand.

Rule 11(b) provides:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause

> unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

From Frank's perspective, the very purpose of these suits was "needlessly [to] increase the cost of litigation" (Rule 11(b)(1)) in order to induce Akorn to pay the lawyers to go away. He contends that the suits violate the other three paragraphs as well. And that is essentially what the district judge found when he finally looked at the complaints.

On the current record we are inclined to agree with the district judge's analysis. He wrapped up:

> [T]he Court finds that the disclosures sought in the three complaints at issue [the three for which counsel declined to waive their share of the mootness fees] were not "plainly material"

> and were worthless to the shareholders. Yet, Plaintiffs' attorneys were rewarded for suggesting immaterial changes to the proxy statement. Akorn paid Plaintiffs' attorney's fees to avoid the nuisance of ultimately frivolous lawsuits disrupting the transaction with [Fresenius]. The settlements provided Akorn's shareholders nothing of value, and instead caused the company in which they hold an interest to lose money. The quick settlements obviously took place in an effort to avoid the judicial review this decision imposes. This is the "racket" described in *Walgreen*, which stands the purpose of Rule 23's class mechanism on its head; this sharp practice "must end." 832 F.3d at 724.
>
> Plaintiffs' cases should have been "dismissed out of hand." *See id.* at 724. Since the Court failed to take that action, the Court exercises its inherent authority to rectify the injustice that occurred as a result. The settlement agreements are abrogated and the Court orders Plaintiffs' counsel to return to Akorn the attorney's fees provided by the settlement agreements. Plaintiffs' counsel should file a status report by July 8, 2019 certifying that the fees have been returned.

385 F. Supp. 3d at 622–23 (one citation omitted). The district court's reference to "inherent authority" should have been to §78u–4(c)(1) and Rule 11, but with that change the analysis holds. Still, our reference to "the current record" is important; a formal motion under Rule 60(b) is necessary, and counsel are

entitled to be heard.

Because Rule 11(c)(4) gives the district judge discretion over the choice of sanction, the court would be entitled to direct counsel who should not have sued at all to surrender the money they extracted from Akorn. But selecting an appropriate remedy (if any) should await resolution of the proceedings under §78u–4(c)(1) and, derivatively, Rule 11.

The orders of the district court denying Frank's motion to intervene are vacated, and the cases are remanded with instructions to treat him as an intervenor, permit him to make a motion under Rule 60(b), and decide what relief, if any, is appropriate in light of that motion should one be made. The appeals by House and Pullos are dismissed for lack of jurisdiction because they have not explained how, if at all, the district court's orders adversely affect them, as opposed to counsel.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FINAL JUDGMENT

April 15, 2024

Before
FRANK H. EASTERBROOK, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*

Nos. 18-2220, 18-2221, 18-2225, 18-3307, 19-2401, & 19-2408	JORGE ALCAREZ, et al., as representatives of a class, Plaintiffs - Appellees v. AKORN, INC., et al., Defendants - Appellees APPEALS OF: THEODORE H. FRANK, SHAUN A. HOUSE, and DEMETRIOS PULLOS
Originating Case Information:	
District Court Nos: 1:17-cv-05016, 1:17-cv-05017, 1:17-cv-05018, 1:17-cv-05021, & 1:17-cv-05026 Northern District of Illinois, Eastern Division District Judge Thomas M. Durkin	

The orders of the district court denying Frank's motion to intervene are vacated, and the cases are remanded with instructions to treat him as an intervenor, permit him to make a motion under Rule 60(b), and decide what relief, if any, is appropriate in light of that motion should one be made. The appeals

by House and Pullos are dismissed for lack of jurisdiction because they have not explained how, if at all, the district court's orders adversely affect them, as opposed to counsel. The above is in accordance with the decision of this court entered on this date. Frank recovers and everyone else pays.

Clerk of Court

* Circuit Judge Kanne, a member of the panel, died after the appeals were argued. They are being decided by a quorum. 28 U.S.C. §46(d).

APPENDIX B[1]

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

ROBERT BERG, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC.; JOHN N. KAPOOR; KENNETH S. ABRAMOWITZ; ADRIENNE L. GRAVES; RONALD M. JOHNSON; STEVEN J. MEYER; TERRY A. RAPPUHN; BRIAN TAMBI; ALAN WEINSTEIN; RAJ RAI; FRESENIUS KABI AG; QUERCUS ACQUISITION, INC.,	No. 17 C 5016 Judge Thomas M. Durkin

[1] Pursuant to Intervenor Theodore H. Frank's Notices of Appeal filed in *Alcarez v. Akorn, Inc., et al.*, No. 17-cv-05017 (June 1, 2018) and *Harris v. Akorn, Inc., et al.*, No. 17-cv-05021 (June 1, 2018), "Intervenor Theodore H. Frank appeal[ed] to the United States Court of Appeals for the Seventh Circuit from the Court's Order entered on May 24, 2018 (Dkt. 55) [in No. 17-cv-05017 and entered on May 24, 2018 (Dkt. 56) in No. 17-cv-05021], which denied as moot Frank's Renewed Motion to Intervene (filed in No. 17-cv-5016, Dkt. 82), **and all orders that merge therein**." (emphasis added). *See* App. 191a-192a, 194a-195a.

Defendants.

MEMORANDUM OPINION AND ORDER

Robert Berg filed this action, and several other individuals filed similar actions, against Akorn, Inc., the members of Akorn's board of directors, and Frensenius Kabi AG, in order to force Akorn to make certain revisions to the proxy statement it filed with the U.S. Securities and Exchange Commission in connection with Frensenius's bid to acquire Akorn. On July 10, 2017, Akorn made the changes to its proxy statement sought by Berg in this case and the plaintiffs in the other actions, making their claims moot. *See* R. 54-1 at 4. Shortly thereafter, all the cases were dismissed without prejudice by joint stipulations pursuant to Federal Rule of Civil Procedure 41(a)(1). *See id.* at 5. Plaintiffs' counsel also informed Defendants that they intended to seek their fees from Defendants. *See id.*

In this case in particular, Berg's counsel filed a "Motion for Entry of Stipulation and Voluntary Dismissal Without Prejudice." R. 54. The motion document provided that the Court would "retain[] jurisdiction over all parties solely for the purposes of any potential further proceedings relating to the adjudication of any claim by any Plaintiff in the Akorn Section 14 Actions (as defined in the accompanying stipulation and proposed order) for attorneys' fees and/or expenses." *Id.* As noted, the motion document attached a "Stipulation and Proposed Order" that included a more extensive recitation of the history of the cases. *See* R. 54-1. The Court granted the motion to dismiss by minute order on July 19, 2017, *see* R. 55,

but did not enter the "Stipulation and Proposed Order." Two months later, on September 15, 2017, the parties filed another "Stipulation and Proposed Order Closing Case for All Purposes." R. 56. This document provided that "Plaintiffs in the Akorn Section 14 Actions have reached agreement with Defendants with respect to the Fee Claims and Defendants have agreed to provide Plaintiffs with a single payment of $322,500 in attorneys' fees and expenses to resolve any and all Fee Claims, and thus there are no Fee Claims to be adjudicated by the Court." *Id.* at 6. The document provided further, that "[t]his matter is fully resolved and no further issues remain in dispute, and, there being no reason for the Court to retain jurisdiction over this matter, the case should be closed for all purposes." *Id*.

Three days later, before the Court could take any action with respect to the September 15 proposed order, Theodore Frank, an owner of 1,000 Akorn shares, filed a motion to intervene for purposes of objecting to the settlement of the attorneys' fee claims. R. 57; R. 66. Frank contends that the cases filed by Berg and the other plaintiffs are part of a "racket," pursued "for the sole purpose of obtaining fees for the plaintiffs' counsel," R. 66-2 at 1, which are successful "because victim defendants [like Akorn] find it cheaper, and therefore rational, to pay nuisance value attorneys' fees rather than contest them," R. 79 at 1, and further delay the merger. Frank contends that this is a "misuse of the class action device for private gain." R. 66-2 at 6. Berg opposes Frank's motion to intervene. That motion is now fully briefed and before the Court.

1. Jurisdiction

Berg's primary argument against Frank's motion is that "[t]he Rule 41(a)(1) dismissal divested this Court of subject matter jurisdiction and, contrary to Frank's contention, there is no ancillary jurisdiction based on the subsequent agreement by Akorn to pay fees and expenses." R. 78 at 3. It is generally true that a Rule 41 dismissal ends the case and strips the court of jurisdiction in a manner of speaking. But even Berg admits that there are a number of exceptions to this general rule, including motions for relief from judgment under Rule 60, *see Nelson v. Napolitano*, 657 F.3d 586, 588-89 (7th Cir. 2011); motions for sanctions under Rule 11, *id.*; and retention of jurisdiction in a case where the settlement precipitating the stipulated dismissal "falls apart," *see Voso v. Ewton*, 2017 WL 365610, at *3 (N.D. Ill. Jan. 25, 2017). Another exception is intervention by a shareholder in a derivative lawsuit in order to appeal a judgment. *See Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012). Notably, members of an uncertified putative class can appeal after the named plaintiffs have settled without intervening in the underlying case. *See Devlin v. Scardelletti*, 536 U.S. 1 (2002). Thus, the mere fact that the case was dismissed pursuant to Rule 41 does not prohibit Frank from seeking to intervene.

2. Intervention

Like this case, the *Walgreen Company Stockholder Litigation* case involved settlement of claims seeking to compel disclosure of information in the context of a merger. 832 F.3d 718 (7th Cir. 2016). Unlike this case, the parties in *Walgreen* settled the class claims and sought court approval of the settlement, including attorneys' fees, which the

district court granted. The Seventh Circuit reversed. In doing so, the court adopted a standard devised by the Delaware Chancery Court requiring that the sought after disclosures be "plainly material." *Id.* at 725 (quoting *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 894 (Del. Ch. 2016)). The Seventh Circuit observed that there was no "indication that the members of the class [had] an interest in challenging" the merger at issue, and that the "only concrete interest suggested by this litigation is an interest in attorneys' fees." *Walgreens*, 832 F.3d at 726. The court opined that these types of cases that do not materially benefit the class but are designed only to generate attorneys' fees are "a racket" that "must end." *Id.* at 725.

In *Trulia*, the Delaware court also was concerned with the procedural posture of class settlement approvals, because once parties have settled, neither party has an incentive to advocate against its approval. Outside the normal adversarial process, it can be difficult for a court to determine whether the proxy disclosures at issue are material. As an alternative to the process for class settlement approval, the court suggested that:

> plaintiffs' counsel apply to the Court for an award of attorney's fees after defendants voluntarily decide to supplement their proxy materials by making one or more of the disclosures sought by plaintiffs, thereby mooting some or all of their claims. In that scenario, where securing a release is not at issue, defendants are incentivized to oppose fee requests they view as

excessive. Hence, the adversarial process would remain in place and assist the Court in its evaluation of the nature of the benefit conferred . . . for the purposes of determining the reasonableness of the requested fee.

[This] preferred scenario of a mootness dismissal appears to be catching on. In the wake of the Court's increasing scrutiny of disclosure settlements, the Court has observed an increase in the filing of stipulations in which, after disclosure claims have been mooted by defendants electing to supplement their proxy materials, plaintiffs dismiss their actions without prejudice to the other members of the putative class (which has not yet been certified) and the Court reserves jurisdiction solely to hear a mootness fee application. From the Court's perspective, this arrangement provides a logical and sensible framework for concluding the litigation. After being afforded some discovery to probe the merits of a fiduciary challenge to the substance of the board's decision to approve the transaction in question, plaintiffs can exit the litigation without needing to expend additional resources (or causing the Court and other parties to expend further resources) on dismissal motion practice after the transaction has closed. Although

defendants will not have obtained a formal release, the filing of a stipulation of dismissal likely represents the end of fiduciary challenges over the transaction as a practical matter.

In the mootness fee scenario, the parties also have the option to resolve the fee application privately without obtaining Court approval. Twenty years ago, Chancellor Allen acknowledged the right of a corporation's directors to exercise business judgment to expend corporate funds (typically funds of the acquirer, who assumes the expense of defending the litigation after the transaction closes) to resolve an application for attorneys' fees when the litigation has become moot, with the caveat that notice must be provided to the stockholders to protect against "the risk of buy off" of plaintiffs' counsel. As the Court recently stated, "notice is appropriate because it provides the information necessary for an interested person to object to the use of corporate funds, such as by 'challeng[ing] the fee payment as waste in a separate litigation,' if the circumstances warrant." In other words, notice to stockholders is designed to guard against potential abuses in the private resolution of fee demands for mooted representative actions. With that protection in place, the Court has

> accommodated the use of the private resolution procedure on several recent occasions and reiterates here the propriety of proceeding in that fashion.

Trulia, 129 A.3d at 897-98.

Thus, the court in *Trulia* favorably contemplated the very scenario that has arisen in this case. And Plaintiffs' counsel have taken the advice of the court in *Trulia* and dismissed this case without prejudice, such that the class claims are no longer at issue. The court in *Trulia* also contemplated that an objecting shareholder like Frank would bring a "separate litigation" to challenge the reasonableness of any settlement payment. Instead, Frank seeks to intervene in a case that has settled.

3. "Interest" Under Rule 24

Federal Rule of Civil Procedure 24, governing intervention, requires that a potential intervenor demonstrate his "interest" in the case. Frank, however, has not, and—it appears to the Court—cannot, identify such an interest. To the extent Frank addresses this issue, Frank makes two seemingly incompatible arguments. He first argues that he "intervenes not as a shareholder on behalf of the corporation, but as a class member to this strike suit." R. 79 at 9. But two sentences later, he asserts, "there is no speculation about Frank's injury. By design, the Plaintiff succeeded in extracting fees from Akorn, which Frank is a shareholder of, depleting the capital reserves of [an] entity Frank partially owns." *Id.* And in his opening brief, Frank argues that he "has a protectable interest as an Akorn shareholder, and has

an ongoing interest in curtailing the scourge of merger strike suits." R. 66-2 at 13.

On the one hand, to the extent Frank contends he has an "interest in curtailing the scourge of merger strike suits," and the attorneys' fees settlement in this case is a product of such a suit, Frank's injury from Akron's payment of the settlement, can only be derivative of Akorn's. The Court does not see how that derivative injury can serve as an interest supporting Frank's intervention in this case. First, relief for a derivative injury generally requires compliance with procedures for filing derivative lawsuits under Federal Rule of Civil Procedure 23.1, state law, or both. Berg's case was not filed as a derivative suit, and Frank does not claim to have complied with any of these procedures. Second, even if Frank had complied with these procedures, or they are otherwise not applicable (or futile), his claim would almost certainly be barred by the business judgment rule. He admits as much when he concedes that Akorn's decision to settle with Berg was "rational." R. 79 at 8. Lastly, Rule 24 requires that an intervenor have an "interest" in "the subject of the action," or that they share "a claim or defense." The subject of the action here was the information in the proxy statement, not the settlement Frank argues is harmful to Akorn and by extension his ownership stake of Akorn.

On the other hand, to the extent Frank contends he has an interest in this case because he is "a class member," that appears to be insufficient because the class claims have been dismissed without prejudice. The class members' claims are no longer at issue in this case, meaning that the class members' rights with respect to the claims Berg brought can no

longer be vindicated or prejudiced. Frank has not demonstrated that the class has any continuing interest in this case in which Frank can intervene.

From a different perspective, Frank has not explained what procedural device would be available to him should he be permitted to intervene. The Court has entered no judgment from which Frank might seek relief under Rule 60. Frank was not a party to the litigation, so he does not have standing to seek sanctions under Rule 11. While he is a member of the putative class, no motion for class certification was filed, let alone denied, from which Frank might take an appeal. And as discussed, any standing Frank has to challenge the attorneys' fees settlement is derivative of an injury to Akorn. But Akron willingly agreed to the settlement, and Frank concedes that it was a rational decision.

Frank clearly seeks to challenge or object to the attorneys' fees settlement. But he has not identified a procedural mechanism that would serve as a vehicle for such an objection. There does not appear to be a process for the Court to approve or reject the settlement akin to that under Rule 23 for class actions or Rule 23.1 for derivative suits.

Maybe Frank theorizes that the Court's retention of jurisdiction, and Plaintiffs' pending request for entry of an order closing the case "for all purposes," means that this case remains within the realm of a class action settlement that must comply with Rule 23. If this is Frank's theory, he has not articulated it. To the extent the Court's decision to retain jurisdiction in this case may have facilitated Berg's counsel's ability to extract greater fees from

Defendants, the Court is sympathetic to Frank's frustration with Plaintiffs' engineering of a device to evade review under Rule 23 and the spirit of *Walgreen*. But the fact that Plaintiffs' have dismissed their class claims without prejudice, and that Defendants have already reached an agreement with Plaintiffs' counsel, makes it difficult (if not impossible) to see how this case remains within the ambit of Rule 23, or any other authority of the Court.

4. Inherent Authority

Separate from his motion to intervene, Frank asks the Court to order disgorgement of the attorneys' fees under its inherent authority to address abuse of the judicial process. Frank contends that such an action by the Court would be appropriate because Plaintiffs' claims are "shams," *see* R. 66-2 at 5, filed "for the sole purpose of obtaining fees for the plaintiffs' counsel," *id.* (quoting *Walgreen*, 832 F.3d at 724), which are a "misuse of the class action process." R. 66-2 at 13. But *Walgreen* applied a standard for approval of class settlements under Rule 23, which is not at issue here. Notably, the Seventh Circuit did not find that the claims in *Walgreen* were frivolous, and did not order their dismissal. Thus, even if Berg's claims are "worthless," they are not necessarily meritless. *Walgreen* was primarily concerned with abuse of the special status of class counsel. That concern is not present here, and the Court does not perceive a basis

to take the extraordinary remedy of disgorgement.[2] Neither has Frank identified one.

Conclusion

For these reasons, Frank's motions to intervene, R. 57; R. 66, and to consolidate, R. 67, are denied without prejudice. Because the parties' briefs on Frank's motion to intervene were focused on the Court's subject matter jurisdiction and contributed little to the Court's understanding of Frank's potential interest in this case; and because the Court is concerned with Berg's apparent success in evading the requirements of Rule 23, and takes seriously Frank's contention that this case, although brought in the name of Akorn's shareholders, actually serves to injure their interests (if only derivatively); Frank is granted leave to refile his motion to intervene (and motion to consolidate) by December 8, 2017. Should Frank refile his motion, it should focus on the issues identified by the Court in this opinion regarding his interest in this case generally. Should Frank refile his motion, Berg's opposition is due December 22, 2017, and Frank's reply is due January 8, 2018. If Frank does not file a motion by December 8, 2017, the Court will consider the case closed.

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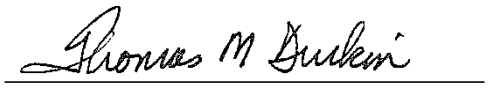

[2] Moreover, as discussed, the strategy employed by Plaintiffs' council here was actually encouraged by the court in *Trulia*, whose reasoning *Walgreen* adopted.

Honorable Thomas M. Durkin
United States District Judge

Dated: November 21, 2017

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 6.2.1
Eastern Division

Jorge Alcarez,

Plaintiff,

v.

Akorn, Inc., et al.,

Defendant.

Case No. 1:17-cv-05017
Honorable
Thomas M. Durkin

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, May 24, 2018:

MINUTE entry before the Honorable Thomas M. Durkin: Theodore Frank filed a motion to intervene in case 17 C 5016. That motion is deemed filed in this case, 17 C 5017, and is denied as moot for the reasons stated on the record at hearings in both cases. Mailed notice(srn,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 6.2.1
Eastern Division

Sean Harris,

Plaintiff,

v.

Akorn, Inc., et al.,

Defendant.

Case No. 1:17-cv-05021
Honorable
Thomas M. Durkin

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, May 24, 2018:

MINUTE entry before the Honorable Thomas M. Durkin: Theodore Frank filed a motion to intervene in case 17 C 5016. That motion is deemed filed in this case, 17 C 5021, and is denied as moot for the reasons stated on the record at hearings in both cases. Mailed notice(srn,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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

ROBERT BERG, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC.; JOHN N. KAPOOR; KENNETH S. ABRAMOWITZ; ADRIENNE L. GRAVES; RONALD M. JOHNSON; STEVEN J. MEYER; TERRY A. RAPPUHN; BRIAN TAMBI; ALAN WEINSTEIN; RAJ RAI; FRESENIUS KABI AG; QUERCUS ACQUISITION, INC., Defendants.	Docket No. 17 C 5016 Chicago, Illinois March 21, 2018 9:34 a.m.

TRANSCRIPT OF PROCEEDINGS - Motion Hearing
BEFORE THE HONORABLE THOMAS M. DURKIN

APPEARANCES:

For Plaintiff (via telephone):	MR. BRIAN D. LONG Rigrodsky & Long PA 919 N. Market Street, Suite 980 Wilmington, DE 19801

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(In open court:)

THE CLERK: C 5016, Berg v. Akorn. And I need to get someone --

THE COURT: That's going to take a few minutes.

THE CLERK: Oh, sorry. All right.

THE COURT: We're going to do that one last.

(The Court attends to other matters.)

THE CLERK: 17 C 5016, Berg v. Akorn. And I need to get counsel on the line for that one as well.

(Clerk places telephone call.)

MR. LONG: Brian Long.

THE CLERK: Hi, Mr. Long. This is Sandy with Judge Durkin. This is Case 17 C 5016, Berg v. Akorn.

THE COURT: All right. Good morning.

MR. LONG: Good morning.

THE COURT: Let's have everyone identify themselves for the record, starting first with the person on the phone.

MR. LONG: Sure. Good morning, your Honor. May it please the Court, this is Brian Long from Rigrodsky & Long in Wilmington, Delaware, on behalf of plaintiff Robert Berg.

THE COURT: Okay.

MR. AUSTERMUEHLE: Good morning, your Honor. Patrick Austermuehle, local counsel on behalf of plaintiffs.

MR. BEDNARZ: Good morning, your Honor. This is Frank Bednarz on behalf of intervenor Frank.

THE COURT: All right. Why doesn't someone explain to me what's going on. I've read through the papers. I see what they say. Why is this happening? That's my question.

And, Mr. Berg, you're probably going to have to answer -- or not Mr. Berg. Mr. Long, you may have to answer that, or your local counsel may have to. But why are you withdrawing?

MR. LONG: Sure.

THE COURT: Go ahead.

MR. LONG: I apologize for interrupting, your Honor. Again, Brian Long from Rigrodsky & Long in Wilmington, Delaware.

The circumstances since the parties completed briefing have changed with respect to the transaction that was challenged in the lawsuit. Recently, as I mentioned in the papers, there have been news reports that, one, the deal still has not closed. Two, there are now ongoing investigations by both the company and Fresenius regarding breaches of FDA data integrity requirements relating to product development. And there have also been new cases filed pursuing claims, 10b-5 claims involving the company.

So under that backdrop, we conferred internally and determined that we no longer thought it was appropriate to take a fee in this one and decided just to alert the Court to that fact, move on and, you know, call it a day.

We did communicate that to counsel for plaintiffs in the other actions. They haven't yet confirmed or denied that they are going to seek the same course of action.

I will say, however, that counsel for plaintiff Berg -- all of whom have appeared in the action. All of the firms have now determined to disclaim and forbear any right to payment of attorneys' fees in the case. And so, you know, we do it now; we do it forever. We're just not going to take a fee.

THE COURT: Well, that would be fine if all these cases were in front of me and I had dismissed the others with prejudice and this is the only case left because then I'd order the 300-some thousand dollars to be returned to the defendant, and things would be over. Things may be over anyway.

But what's to prevent -- and I think this is what was in the intervenor's motion. What's to prevent the other attorneys -- I don't know how many there are, four or five sets of plaintiff attorneys -- to go in front of -- well, either, one, to get paid those fees, in which case some other judge in this building is going to have to deal with the same issue on whether or not those fees ought to be paid and to deal with the question of whether the intervenor has an ability to come in on the case.

And then are those attorneys at some point then going to say, "I don't want the fees either," in which case there will be a claim of mootness so that we go through this same process in front of a bunch of other judges?

You chose me, whether you -- whether you chose me or not, one way or the other, I'm the only one dealing with this issue. We've got five other cases, I believe, that are dismissed without prejudice.

It -- and if you're all disclaiming over a quarter million dollars in fees and you want it to go back to the defendant, I'll order it to go back to the defendant. But it seems as if there might be a claim by other attorneys who at least are -- haven't decided if they want to give up $300,000 in fees. That's why I'm puzzled about all this.

MR. LONG: Sure. And your Honor's correct. I'm not sure what is to prevent those other counsel from maintaining their claim for those attorneys' fees.

And, you know, we did select your Honor. It was the low-filed case, and so yours was the only action in which we included the retention of jurisdiction for the claim -- for the mootness fee claim -- or for -- to have the mootness fee claim determined. And we're not trying to cause any more work for anyone else. But like I said, we've determined that for our purposes, we want to disclaim the mootness fee.

And so those other counsel -- those other plaintiffs, for better or for worse, are not parties in this action. And so, you know, I'm not sure what they're going to do. They haven't -- they haven't told us either way what they're going to do.

But, you know, as we said in our reply, the claims with respect to Mr. Berg, the claims with respect to counsel for Mr. Berg, are now moot. And so we think that the Court no longer has Article III jurisdiction over the case. Mr. Frank no longer has

standing. And any claim -- any claim for injunctive relief that he may have -- or may like to – may desire to seek we think is far too speculative to permit him to intervene or for -- you know, or to permit him to intervene.

So I think where we are, respectfully, is that we think the motion to intervene should be denied as moot because counsel for the parties and -- counsel for the plaintiff and the plaintiff have disclaimed any right or entitlement to fees in this action.

THE COURT: I'll hear from the intervenor in a minute. But the rationale for not seeking a fee here by you is because there's been some hiccups on this deal involving Fresenius, correct?

MR. LONG: Correct.

THE COURT: Do you intend to file another suit?

MR. LONG: No, your Honor.

THE COURT: Because there has been one filed. There's one before Judge Kennelly on this.

MR. LONG: Yes.

THE COURT: And I saw you're not the attorney on it, at least not a named attorney on it. And it's not your intent to come back in and file a suit -- on behalf of your client, not you. But Mr. Berg is not going to come in and file another suit against Akorn relating to any revised proxies that may have to go out in light of the FDA issue with Akorn?

MR. LONG: Absolutely not, your Honor.

THE COURT: All right.

MR. LONG: And just to confirm for your Honor, we are not in any capacity involved in that case.

THE COURT: All right.

MR. LONG: We're finished. You know, if the Court will permit -- if the Court will permit it, we're finished with this.

THE COURT: All right. Well, the rationale for wanting to withdraw given the fact there was a -- there were further problems relating to this -- at least reported problems related to this potential acquisition of Akorn -- it's an acquisition, correct?

MR. LONG: Yes, your Honor.

THE COURT: Fresenius is buying it?

MR. BEDNARZ: Yes.

MR. LONG: Correct.

THE COURT: Okay. Would that rationale carry over to all the other attorneys too where the reason you're disclaiming fees, wouldn't the other attorneys have the same reason to do so?

MR. LONG: Well, I think it's a reason that's sort of -- it could, but I don't know. I mean, not necessarily I think is the fair answer. I mean, this is a determination that as a firm, as co-counsel, we made amongst ourselves. We communi -- after we found out about these developments, we communicated it to the counsel in the other case -- I think it was Friday a week ago -- and said, "This is what we have determined to do. We would strongly encourage you to also forgo your right to payment."

And so we didn't really hear anything from anyone. And so after we filed the papers regarding the withdrawal, we reached out again. I informed my colleagues that we would be seeking to, you know, present the motion today and that I would appreciate greatly if they would get back to me with respect to their position on, you know, whether they too would disclaim any right to payment of fees because I was, of course, positive that your Honor would be interested in that question.

You know, despite repeated efforts to solicit that information from them, they simply haven't responded to me in many instances.

THE COURT: Well, if I ordered all the money to go back to Akorn, would that hasten their making a decision on whether they wanted to stop me from doing that?

MR. LONG: Well, speaking for myself, if I were out there where they are, I think it would, your Honor.

THE COURT: All right. And it's different plaintiffs on each of those cases, of course, correct?

MR. LONG: Correct.

MR. BEDNARZ: Yes.

MR. LONG: Different plaintiffs and different counsel for each of the plaintiffs.

THE COURT: Okay. Now I'll hear from intervenor Frank.

MR. BEDNARZ: Your Honor, this is precisely why we wanted to consolidate the cases to begin with, because if one plaintiff has a reason to leave the case.

We've already briefed this intervention before, your Honor. In fact, we sort of briefed it twice because plaintiff argued that there was a threshold issue.

I'd also argue that there isn't actually a very good reason for plaintiffs to withdraw now except that I – they might have been able to delay the case until the transaction had occurred. And at that point I think they would have argued that our client was getting the full measure of anything he could have gotten, which was exactly the target price for the acquisition.

Now that the merger is falling apart, in spite of their previous agreement in order to get the fees for the supposedly valuable disclosure, they're backing out. And I think the reason they're backing out is because there's no -- there's no cavalry coming in for the transaction to be completed and a possibly stronger mootness argument.

And, your Honor, we disagree that the Berg motion renders the case moot. In the first place, it's a little bit odd because it's not fashioned as an offer of judgment. It's a motion that assumes the conclusion that it moots our motion to intervene.

In fact, we have cases pending where counsel for plaintiff Berg has filed strike suits against companies that Mr. Frank owns shares in. And we listed 16 suits that counsel for plaintiff Berg has filed suits in since the New Year. And two of those are Clifton Bancorp and Pinnacle Entertainment. And the Pinnacle Entertainment one, at least, is pending.

The other one has been dismissed. And that just shows our -- the problem in intervening in these

cases. It's sort of a whack-a-mole problem that if we try to jump in at a future transaction where Mr. Frank owns shares, they will dismiss the case. And these cases are dismissed very quickly anyways. They might dismiss them with prejudice in the future, which in this circuit would have been arguably fatal to us even trying to intervene.

THE COURT: Mr. Bednarz, let me interrupt you for a minute, though, because I've read your briefs, and I understand your position. I am not going to enjoin plaintiff or plaintiff's counsel from filing suits, and I'm not going to interfere with those suits. If you have a complaint about their conduct in those suits, you have the forum to do it. File a motion to intervene in those cases.

It may be frustrating for you that you're going to have to do that in a lot of cases, and it may be that you can develop a history if there are dismissals in those cases when you seek to intervene. You may be able to develop a track record that you can bring to the attention of a judge who has that case.

But I am not -- and I'm not going to enter an injunction relating to enjoining Mr. Berg and his counsel from filing suits. If there's something wrong with the suit, you can move to intervene. You can -- if your client owns stock in that company, you can move to intervene. And if you think it's an abuse of process, you can take it up with that judge who has that case.

But I can only deal with this case, and I'm not going to -- to the extent that your request seeks broader injunctive relief other than what you were trying to get in this case, I'm not going to do that.

So we're really down to what we do on this case. I should have consolidated the cases back when you -- last fall and taken the other five cases that were dismissed without prejudice, put them in front of me, and then I would turn them all into with-prejudice dismissals and order the money back to the defendant and just say we're done.

Those cases are not in front of me. And I -- it's not your fault. I think you had suggested I do that. And I even had said I likely would do that, but events overtook it, namely, the back and forth on the intervention itself. And lesson learned by me, but it doesn't help anybody here.

I can't stop them, I don't believe, from disclaiming any right to payment of fees and expenses and withdrawing an opposition -- and that may moot -- given the fact I'm not going to enter injunctive relief, that may moot your request in this case, in which case I'd simply dismiss this case with prejudice, the one before me.

But I am troubled by this $300,000 plus that's sitting in an escrow account, waiting for four or five other sets of attorneys to decide whether they want to keep it or not. That may just have to be a problem in front of another judge, which, unfortunately, means you're going to have to go and I suppose seek to intervene in another case if they try and get the fees from another judge. But I'm happy to take a suggestion.

MR. BEDNARZ: Well, your Honor, given that we have briefed this issue a couple of times here, at the minimum, I think that we ought to be able to file motions to transfer for the other judges, to put all of

them before your Honor. I think it would be much more inefficient if we had to file before five different judges because there are five other sets of plaintiffs.

And I just want to say for the record that we – we disagree that it's moot in part because this is a situation that's capable of repetition, but evading review, like in *Davis FEC*, that Frank owns all of these shares, that they're filing prolifically on virtually all of the merger transactions involving public companies, it appears.

And anytime that we were to intervene, they would have the ability to dismiss the case and we have to argue all of these very basic things all over again. Whether we could even have standing to intervene might be varied, vary based on circuit law.

And that's our position on why it's not moot.

THE COURT: I don't think your -- the key to that is whether it evades review. I don't think you evade review if you bring an intervention action in front of another judge.

They may do as they did here, seek to disclaim fees. But I'm not sure, unless you have multiple cases, that's going to be a satisfactory result for a plaintiff because if they can't get fees, they -- it's a waste of time for them.

So here we have an unusual situation where there's five or six cases that got transferred from -- I forget what jurisdiction it was, but somewhere down south.

MR. BEDNARZ: Yes.

THE COURT: And I think in the other cases, unless it's a multiple set of cases all existing in one district and people try and move from one judge to another judge, there is a basis for review, and that's going to be the judge who has the case.

And if as occurred here with Mr. Long, if the attorneys disclaim fees, then you win because the point of your suit is to prevent a dissipation of assets for payment of fees you believe are not necessary to be paid and not properly paid. So you'd be getting the relief you wanted if they dismissed and disclaimed fees, which is really what you're getting here.

But I am willing to have the other cases, which are closed but dismissed without prejudice, transferred to me. I don't think any judge in this building will care. And then it will all be before me. And then the attorneys who are in those other cases can either confront this issue head on if I allow you to intervene in those cases or can disclaim fees also.

What I would ask, though, is that the -- what I've said today, Mr. Long, be communicated to your -- I'm going to say former colleagues, but the people on the other cases who you've had communication with. And before we go through the administrative task of getting five cases from other judges brought before me, see if they are seeking fees or are going to disclaim fees in those cases.

If they are, there may be no need to have these cases transferred to me. But I'm willing to -- this is an unusual situation. I haven't confronted it. So what is -- what do people think about coming back in 14 days to report on what the other attorneys intend to do in those cases?

MR. BEDNARZ: Your Honor, from my perspective, that makes sense.

I would want to clarify one thing with local counsel. I believe they've appeared for three of the other plaintiffs. So I think both of the motions would just have to be sort of continued. And then if it turns out that all of the cases -- all of the other plaintiffs and their counsel, I should say, have disclaimed fees, that presents a very tidy resolution one way or another here.

THE COURT: Mr. Long or Mr. Austermuehle, what do you want to do on that?

MR. AUSTERMUEHLE: I would defer to Mr. Long on the substantive judgment. I wasn't aware that we were local counsel on two of -- two other cases, three including this one. But if that is the case, then –

THE COURT: All right.

MR. AUSTERMUEHLE: -- that certainly sounds reasonable.

THE COURT: Mr. Long, will that be --

MR. LONG: Your Honor –

THE COURT: -- enough time to communicate with your -- with the other attorneys? You've already started communications with them --

MR. LONG: Yes, absolutely.

THE COURT: -- and this is --

MR. LONG: Sorry. I apologize for interrupting. Yes, absolutely, your Honor. I will be sending them a communication about what transpired at today's conference shortly after I hang up the phone.

And then we'd be looking to provide an update by – or I'm sorry. We'd be back on April 11th?

THE COURT: Is that a good day, Sandy?

THE CLERK: April 11th will work, yeah.

MR. LONG: That's 14 days.

THE COURT: All right.

MR. BEDNARZ: And, your Honor, I would prefer that whatever form the other -- the other counsels file that it's all signed by them so there's no sort of bizarre collateral attack later on if one of the attorneys wasn't nailed down and actually wants to get the fees.

And, second, that it should just be an offer of judgment. And that way we could preserve for appeal our argument about whether, in fact, it renders the case moot.

THE COURT: Well, whatever form it takes, I think, Mr. Bednarz, you ought to be in communication with Mr. Long, who is going to be the de facto representative of the other attorneys. I don't --

Mr. Long, I'm not granting your motion at this time. I'm going to continue it so that --

MR. LONG: Okay.

THE COURT: -- you're still in the case.

MR. LONG: All right.

THE COURT: But my intent in 14 days is if we don't get a definitive answer from those counsel, I'm going to grant a motion to reassign those cases to me. And they can all appear in this case. And if there is

going to be -- if I have -- if the motion to intervene is in effect -- effectively refiled in those cases, I'll have jurisdiction to decide whether or not these fees ought to be paid and what the justification for it is.

MR. LONG: Sure. May I --

THE COURT: Go ahead, Mr. Long.

MR. LONG: Sorry. I apologize.

And I'm just seeking to determine in 14 days, irrespective of whether they agree to forgo their right to payment or they are going to continue to assert that right and then are transferred in front of your Honor, will you permit at least our case to be dismissed at that point given our forbearance?

THE COURT: I likely will, but I'll decide that in 14 days. I think --

MR. LONG: Okay.

THE COURT: -- the -- there's no reason not to grant your motion that I've heard today. I've already told the intervenor I'm not -- I'm not going to be granting prospective relief to prevent you or your client from filing similar suits in front of other judges. That's -- if they're unhappy with that, they can go to that other judge and seek whatever relief they want. But I'm not going to prospectively put a cap on you or your client in these cases.

But I'm not going to tell you for sure what I'll do in 14 days because I need to hear what everyone else is doing.

THE CLERK: April 11th is --

MR. LONG: Very good.

THE CLERK: -- 21 days.

THE COURT: Oh, I'm sorry. April 11th may not be a good day?

THE CLERK: No, it's 21 days. It's not 14.

THE COURT: Oh, that's fine. 21 days is fine. This is not going to rise or fall with the extra week. And that will give you more time to herd the cattle.

MR. LONG: Very good, your Honor. Thank you.

THE COURT: And I don't mean that in any disparaging way. I meant that in the colloquial way. All right.

MR. LONG: It's more like herding the cats.

THE COURT: All right. Better idea.

Okay. Anything else we need to discuss?

MR. BEDNARZ: No, your Honor.

MR. LONG: No, your Honor. Thank you.

MR. AUSTERMUEHLE: The only other matter is our separate motion to withdraw. Is your disposition towards that the same as towards --

THE COURT: It is.

MR. AUSTERMUEHLE: Okay.

THE COURT: It will all be entered and continued to the April 11th.

THE CLERK: Mm-hmm.

MR. AUSTERMUEHLE: Okay. Thank you, your Honor.

THE COURT: All right. Thank you all.

MR. BEDNARZ: Thank you.

MR. LONG: Thank you.

THE COURT: Okay.

(Concluded at 10:21 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ LAURA R. RENKE *June 14, 2018*
LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter

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

ROBERT BERG, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC.; JOHN N. KAPOOR; KENNETH S. ABRAMOWITZ; ADRIENNE L. GRAVES; RONALD M. JOHNSON; STEVEN J. MEYER; TERRY A. RAPPUHN; BRIAN TAMBI; ALAN WEINSTEIN; RAJ RAI; FRESENIUS KABI AG; QUERCUS ACQUISITION, INC., Defendants.	Docket No. 17 C 5016 Chicago, Illinois April 11, 2018 9:01 a.m.

TRANSCRIPT OF PROCEEDINGS - Status
BEFORE THE HONORABLE THOMAS M. DURKIN

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(In open court:)

THE CLERK: 17 C 5016, Berg v. Akorn.

I need to get someone on the line for that one.

(Clerk places telephone call.)

MR. BEDNARZ: Good morning, your Honor. This is --

THE COURT: We're going to wait till we get somebody on the phone so you don't need to repeat yourself.

MR. LONG: Hi. Brian Long.

THE CLERK: Hi. Good morning. This is Sandy with Judge Durkin. And this is Case 17 C 5016, Berg v. Akorn.

THE COURT: All right. Good morning. Let's have --

MR. LONG: Good morning.

THE COURT: -- everyone identify themselves for the record, starting first with the person on the phone.

MR. LONG: Sure. Good morning, your Honor. This is Brian Long from Rigrodsky & Long in Wilmington, Delaware, on behalf of plaintiff Robert Berg. Thank you for allowing me to appear telephonically.

THE COURT: No problem.

MR. AUSTERMUEHLE: Good morning, your Honor. Patrick Austermuehle, local counsel for plaintiffs.

MR. BEDNARZ: Good morning, your Honor. This is Frank Bednarz on behalf of proposed intervenor Frank.

THE COURT: All right. Mr. Long, what did the other attorneys, the plaintiffs in the other actions, decide to do about the attorneys' fees?

MR. LONG: Sure. So I canvassed them immediately after we spoke last time, your Honor, by e-mail. I followed up with several of them by phone. I can report that counsel for plaintiffs in the Berg case, which is our case, the Alcarez case, which is 17 CV 05017, and counsel for plaintiffs in the Harris case, which is 17 CV 05021, have all decided to walk away and disclaim any interest in fees.

I received a response from counsel in the Pullos case. That's 17 CV 05026. And they are not prepared to walk away, and they were willing to litigate the motion to intervene in their matter.

In the remaining two cases, the House case and the Carlyle case -- House is 17 CV 05018; Carlyle is 17 CV 05022 -- I've not actually gotten a response from either of the firms representing the plaintiff in those cases, although I have tried to reach them both repeatedly, both by telephone and e-mail. My suspicion is that they are going to join with the plaintiff in the Pullos case and do not intend to walk away.

THE COURT: All right. Well, what I said last time was absent a disclaim -- who holds the fees, by the way? Where are they?

MR. LONG: Plaintiff -- sure. Plaintiff -- the attorney for the plaintiff in the House case, I

understand, is holding the entire fee in his attorney fee escrow account.

THE COURT: Where it should remain until further order of the Court.

MR. LONG: Okay.

THE COURT: I'm going to have all of these other cases, which were dismissed, reassigned to me. They were all dismissed without prejudice. I'm going to have them reassigned to me.

And then we're going to have another status in this case in approximately 21 days when that reassignment's been accomplished where I will have the attorneys in those cases before me. And if they wish to litigate the fee issue, then they're free to do so.

I'm not going to foist this off on another judge. I could, but I don't think that's fair. I'm too deeply involved in this right now to ask another judge on a dismissed case to involve themselves in this process. That's not efficient for other judges or for you. So I'm going to have each one of these cases reassigned to me, and we'll see how we go from there.

Anything else we need to discuss today other than giving you another date?

MR. LONG: Just a clarification. With respect to the cases where the -- the three cases where plaintiff's counsel has indicated that they're going to be walking away from the fee or -- and including our case, are we still going to be -- continue to be before your Honor?

THE COURT: For the time being, yes. Nobody gets out until I decide what I'm going to do in this case. And until -- I may very well release you, but I'm not

going to do that -- and I think inevitably you will be released. You've disclaimed any fees. There's really no need to keep you in the case. But until I get my arms around the entirety of this saga, I don't intend to let anybody out.

Eventually, you will certainly get out.

MR. LONG: Okay. Great.

THE COURT: But I'll give you a date in 21 days. I think by then we should have accomplished the reassignments so that the attorneys in these other cases will have notice of the next status and can appear either live or -- well, they're always going to be live. They can either appear in person or over the phone.

THE CLERK: 21 days takes us to May the 2nd, if that works.

MR. AUSTERMUEHLE: Yes.

THE COURT: All right.

MR. BEDNARZ: Yes, that works for the intervenor.

THE COURT: And, Mr. Long, how does that work for you?

MR. LONG: May -- I'm sorry. May 2nd?

THE COURT: Yes.

MR. LONG: That's fine for me, your Honor.

THE COURT: Okay. And the other attorneys who are -- don't know of this yet will just have to make arrangements to make themselves available.

Certainly they can appear by phone if they can't be here in person.

As to the issue about the supplement that was filed, or the last brief filed by the intervenor, it hasn't changed my decision that the issue that intervenor Frank wants to raise about attempting to enjoin Mr. Berg and other people in his position from filing suits like this -- I'm -- I don't believe I -- I'm not going to enter such an order.

You've made your record, and I'll make mine. You have the ability if you believe that Mr. Berg is filing an improper lawsuit to -- elsewhere in the country to seek relief from whatever judge has that case.

And each one of these is a different case. Each one has different facts, different reasons. Mr. Berg or other people that want to -- who want to object to a particular merger or whatever the particular financial transaction is, you've got the -- your client, Mr. Frank, has the ability, if he owns shares in that company, to bring a suit in such a forum.

But I'm not going to prospectively bar him from filing suits. He's like no other -- he's no different than any other -- Mr. Berg is no different than any other litigant. They have to bring it in good faith. And that's something you can address with the judge who has the case.

MR. BEDNARZ: Your Honor, that's understood. That's just for the record on a potential appeal. And to the extent that there are plaintiffs still interested in keeping the fees, that might be

satisfactory for us so that we can get a decision on the meaty part of our motion.

THE COURT: You may very well because as long as the fees are out there, that keeps the issue alive, in my mind.

So we'll see you in 21 days.

MR. AUSTERMUEHLE: Thank you, your Honor.

MR. LONG: Thank you, your Honor.

MR. BEDNARZ: Thank you.

(Concluded at 9:12 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ LAURA R. RENKE *June 14, 2018*
LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter

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

ROBERT BERG, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	Docket No. 17 C 5016 Chicago, Illinois May 2, 2018 9:06 a.m.
JORGE ALCAREZ, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	Docket No. 17 C 5017
SHAUN A. HOUSE, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	Docket No. 17 C 5018

(continued on next page)

(continued from previous page)

SEAN HARRIS, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	)	Docket No. 17 C 5021
ROBERT CARLYLE, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	)	Docket No. 17 C 5022
DEMETRIOS PULLOS, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	)	Docket No. 17 C 5026

TRANSCRIPT OF PROCEEDINGS – Motion Hearing

BEFORE THE HONORABLE THOMAS M. DURKIN

(continued on next page)

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APPEARANCES:

For Plaintiff Robert Berg (via telephone):	MR. BRIAN D. LONG Rigrodsky & Long PA 919 N. Market Street Suite 980 Wilmington, DE 19801
For Plaintiff Jorge Alcarez (via telephone):	MS. ELIZABETH K. TRIPODI Levi & Korsinsky 30 Broad Street 24th Floor New York, NY 10004
For Plaintiff Shaun House (via telephone):	MR. MILES D. SCHREINER Monteverde & Associates 350 Fifth Avenue Suite 4405 New York, NY 10118
For Plaintiff Sean Harris (via telephone);	MR. JAMES M. WILSON, JR. Faruqi & Faruqi, LLP 685 Third Avenue 26th Floor New York, NY 10017
For Plaintiff	MR. DAVID A.P. BROWER

Robert Carlyle (via telephone):	Brower Piven 136 Madison Avenue 5th Floor New York, NY 10016
For Plaintiff Robert Carlyle (via telephone):	MR. CHARLES J. PIVEN Brower Piven 1925 Old Valley Road Stevenson, MD 21153
APPEARANCES (Cont'd.):	
For Plaintiff Demetrios Pullos (via telephone):	MR. LEWIS S. KAHN MR. MICHAEL J. PALESTINA Kahn Swick & Foti LLC 206 Covington Street Madisonville, LA 70447
For Plaintiffs Berg, Alcarez, House and Harris (in person):	MR. PATRICK D. AUSTERMUEHLE DiTommaso Lubin PC 17 W 220 22nd Street Suite 410 Oakbrook Terrace, Illinois 60181
For the Intervenor (in person):	MR. M. FRANK BEDNARZ Competitive Enterprise Institute Center for Class Action Fairness 1145 E. Hyde Park Boulevard

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(In open court:)

(Clerk places telephone call.)

THE CLERK: Hi. Good morning, everyone. This is Sandy with Judge Durkin. If you'd like to hold the line, the judge will be with us momentarily. Okay?

UNIDENTIFIED MAN ON TELEPHONE: Thank you.

UNIDENTIFIED MAN ON TELEPHONE: Thank you.

THE CLERK: Thank you.

MS. TRIPODI: Thank you.

(Pause in proceedings.)

THE CLERK: All rise.

Be seated, please.

Okay. This is Cases 17 C 5016, Berg v. Akorn; 17 C 5017, Alcarez v. Akorn; 17 C 5018, House v. Akorn; 17 C 5021, Harris v. Akorn; 17 C 5022, Carlyle v. Akorn; and 17 C 5026, Pullos v. Akorn.

THE COURT: All right. Good morning.

Let's have everyone identify themselves for the record starting first with the people on the phone. And then if you speak and you're on the phone, after you identify yourself, you're going to have to state your name each time so we have an accurate record.

So let's start with anyone who wants to start on the phone.

MR. BROWER: Your Honor –

UNIDENTIFIED MAN ON TELEPHONE: Good morning --

MR. BROWER: -- David Brower from Brower Piven representing plaintiffs.

MR. PIVEN: And Charles Piven from Brower Piven.

MR. LONG: Good morning, your Honor. May it please the Court, this is Brian Long from Rigrodsky & Long. I'm here today on behalf of plaintiff Robert Berg in Civil Action No. 17 C 5016.

THE COURT: Okay.

MR. WILSON: Good morning, your Honor. This is James Wilson from Faruqi & Faruqi for plaintiff Sean Harris in the 5021 case.

MS. TRIPODI: Good morning, your Honor. This is Elizabeth Tripodi with Levi & Korsinsky on behalf of plaintiff Jorge Alcarez.

MR. SCHREINER: Good morning, your Honor. This is Miles Schreiner of Monteverde & Associates on behalf of the plaintiff Shaun House in the 05018 action.

THE COURT: All right. Anyone else on the phone?

MR. KAHN: Yes, your Honor. Lewis Kahn in the Pullos action for plaintiffs. And my partner Michael Palestina is also on the line.

THE COURT: Okay. And in court.

MR. AUSTERMUEHLE: Good morning, your Honor. Patrick Austermuehle for plaintiff.

MR. BEDNARZ: And good morning, your Honor. This is Frank Bednarz on behalf of intervenor Ted Frank.

THE COURT: All right. Other than the Berg v. Akorn case, these cases had all been administratively closed because the cases had settled.

The intervenor had objected to the manner in which these cases had been resolved. And ultimately the Berg plaintiff in 17 CV 5016 withdrew and disclaimed any claim on the attorneys' fees that were going to be paid as part of the settlement in this case.

And I had asked counsel for Berg whether or not that was going to be the case on these other plaintiffs. You thought some maybe and some maybe not.

Rather than get everybody on the phone, do you have any more information you can provide me on that?

MR. AUSTERMUEHLE: No, I don't, your Honor.

THE COURT: Okay.

MR. AUSTERMUEHLE: Mr. Long may, but I believe probably everyone who is on the phone had already filed something or indicated that they would be withdrawing any claim for fees, or disclaiming fees.

THE COURT: All right. Well, let's go through one after the other. Again, state who you are, who you represent and the case number, whether or not you are going to disclaim fees in this case or whether you're still seeking them because if you're still seeking them, then we need to get the matter at issue with the intervenor.

So let's start probably in the order in which you identified yourselves, but, once again, state your name.

MR. BROWER: Your Honor, David Brower, Brower Piven. We represent plaintiff Carlyle in 17-5022.

THE COURT: And what's your position on the attorneys' fees?

MR. BROWER: We are not withdrawing, your Honor.

THE COURT: All right. Okay.

Next.

MR. LONG: Your Honor, this is Brian Long from Rigrodsky & Long on behalf of plaintiff Berg.

Our position has not changed. We are withdrawing and disclaiming any interest in the fees.

THE COURT: Okay.

MR. WILSON: Your Honor, James Wilson from Faruqi & Faruqi for Sean Harris in 5021.

We withdraw and join the disclaimer.

THE COURT: All right.

MS. TRIPODI: And good morning, your Honor. This is Elizabeth Tripodi with Levi & Korsinsky on behalf of plaintiff Jorge Alcarez in the 5016 [*sic*] action.

We have withdrawn, and we are disclaiming any claim to fees.

MR. SCHREINER: Your Honor, this is Miles Schreiner of Monteverde & Associates on behalf of plaintiff Shaun House in the 05018 action.

And we are not withdrawing and maintaining our interest in the fees.

THE COURT: Okay.

MR. KAHN: And, your Honor, Lewis Kahn with Kahn, Swick & Foti on behalf of Mr. Pullos in the 5026 case.

We are not disclaiming fees.

THE COURT: All right. Anyone else?

(No response.)

THE COURT: All right. So the 5022, 5018, and 5026 cases are the three where people are still maintaining their right to the fees, correct?

UNIDENTIFIED MAN ON TELEPHONE: That's right.

UNIDENTIFIED MAN ON TELEPHONE: Yes, your Honor.

UNIDENTIFIED MAN ON TELEPHONE: Yes.

THE COURT: All right. So what's the position of the intervenor as to these three cases?

MR. BEDNARZ: Your Honor, with these cases, we would just like to, if necessary, refile the same motion with, you know, approximately the same legal argument, and then we should proceed to a decision on whether we can intervene in these three cases.

With regard to the other three where fees are being disclaimed, those could be dismissed. And local counsel, I believe, represented three of them and probably would not be necessary. So his motion could also be granted with respect to those three.

THE COURT: All right. Yeah, I think as to the Berg case, the -- which is 5016, as to the 5021 case, and the Alcarez case -- what number is that?

MR. AUSTERMUEHLE: 5017.

THE COURT: 5017. Those cases are all dismissed. The attorneys are allowed to withdraw. They are not seeking the fees in the case, and there's no case in controversy relating to them.

As to the other three, there's no need for Mr. Frank to refile any documents. We need to hear from the attorneys in the 5022, 5018, and 5026. We need to hear from them and what their response is to your request to intervene.

So how much time do the parties want? I'm going to suggest 14 days if that works for everyone. I'll assume it's good unless I hear an objection. And tell me if you need more time. You ought to state it it now.

(No response.)

THE COURT: Okay. I hear nothing. So 14 days for the attorneys in those three cases to respond to the petition by Frank to intervene.

I think that's the pending motion. Is that correct?

MR. BEDNARZ: That's correct, your Honor.

And also these parties can join the response of Brian Long. So I'm wondering if it necessarily needs to be a 14-day deadline. Mr. Long had a very strong interest in getting the same results that the other three are going to get here, and it seems like it should be sort of an abbreviated response because they can already use this work product.

THE COURT: Well, I'm going to give them the opportunity to look it over and decide for themselves. They haven't been active participants in this case, and they ought to at least see what the briefing has been.

If the brief is -- that's going to be filed for those three plaintiffs is simply a "me too" brief, just say so. Just say you're going to adopt the briefing that's already taken place. But do it --

MR. BROWER: Your Honor --

THE COURT: -- within 14 days.

MR. BROWER: Your Honor, this -- I --

THE COURT: Who is this?

MR. BROWER: I'm sorry. It's David Brower.

I would suggest that the firms that are still here, we'll file at least a single brief, if that's okay with the other two.

THE COURT: Well, I'll let -- I'll let the three of you decide that. No need for me to get involved, especially since you're on the phone. A single brief is fine, as far as I'm concerned. In fact, it's preferable. But if you have separate interests, file something different.

But 14 days. And then -- excuse me -- the intervenor has seven days after that to file any reply.

And I'll rule by mail. If I need to get you in on the phone, it will be fewer people than this time. And we'll set it for status.

Anything else we need? First from the people on the phone.

UNIDENTIFIED MAN ON TELEPHONE: No, your Honor.

UNIDENTIFIED MAN ON TELEPHONE: No, your Honor.

UNIDENTIFIED MAN ON TELEPHONE: No.

THE COURT: Anyone in court?

MR. AUSTERMUEHLE: Just to clarify, your Honor. I think we had filed three motions to withdraw after the cases were consolidated before your Honor. Those are being granted to the extent that they're not just granted automatically by the dismissal?

THE COURT: No, those will be -- those are granted.

MR. AUSTERMUEHLE: Okay.

THE COURT: They're granted automatically by the dismissal, but we'll put it -- we'll tie it up by saying you've also been granted leave to withdraw.

MR. AUSTERMUEHLE: Great. Thank you.

MR. BEDNARZ: Well, and, your Honor, I believe one of them, the 5018 action, there's a withdrawal on that, and that one is continuing. So that one ought to be granted.

THE COURT: Well, you're local counsel on that one?

MR. AUSTERMUEHLE: Yes. To be honest, I had written down only the three that are being dismissed. But if 5018, I can double-check and --

THE COURT: Yeah. If you're still local counsel on that case, it remains pending, so you're still in on that one. If you want to separately withdraw, speak to counsel for the House plaintiff and see if they need you as local counsel or not.

MR. AUSTERMUEHLE: Sure.

Okay. Thank you very much.

THE COURT: Okay. Anything else?

(No response.)

THE COURT: All right. Thank you all.

MR. BEDNARZ: Thank you.

THE COURT: Okay.

UNIDENTIFIED MAN ON TELEPHONE: Thanks.

UNIDENTIFIED MAN ON TELEPHONE: Bye-bye.

(Concluded at 9:18 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ LAURA R. RENKE *June 15, 2018*
LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter

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

SHAUN A. HOUSE, individually and on behalf of all others similarly situated, Plaintiff,	No. 17 C 5018
ROBERT CARLYLE, Plaintiff,	No. 17 C 5022
DEMETRIOS PULLOS, individually and on behalf of all others similarly situated, Plaintiff,	No. 17 C 5026
v.	
AKORN, INC.; JOHN N. KAPOOR; KENNETH S. ABRAMOWITZ; ADRIENNE L. GRAVES; RONALD M. JOHNSON; STEVEN J. MEYER; TERRY A. RAPPUHN; BRIAN TAMBI; ALAN WEINSTEIN, Defendants.	Judge Thomas M. Durkin

MEMORANDUM OPINION AND ORDER

Six named plaintiffs each filed an action against Akorn, Inc. and members of Akorn's board of directors in order to force Akorn to make certain revisions to the proxy statement it filed with the U.S. Securities and Exchange Commission in connection with Frensenius Kabi AG's bid to acquire Akorn. Akorn made the changes to its proxy statement, which plaintiffs conceded mooted their claims, and led them to stipulate to dismissal without prejudice of all six cases pursuant to Federal Rule of Civil Procedure 41(a)(1). Although five of the six cases were filed as class actions, the cases were voluntarily dismissed before any class was certified or any motion for class certification was filed.

In the one of the six cases originally assigned to this Court, the motion seeking entry of a stipulation of dismissal provided that the Court would "retain[] jurisdiction over all parties solely for the purposes of . . . any claim by any Plaintiff . . . for attorneys' fees and/or expenses." 17 C 5016, R. 54 at 1. Two months later, on September 15, 2017, the parties in that case filed another stipulation providing that the plaintiffs in all six cases had reached a settlement agreement with Defendant providing for $322,500 in attorneys' fees, and that "there being no reason for the Court to retain jurisdiction over this matter, the case should be closed for all purposes." 17 C 5016, R. 56 at 6.

Three days later, before the Court could take any action with respect to the September 15 proposed order, Theodore Frank, an owner of 1,000 Akorn shares, filed motions to intervene in all six cases for

purposes of objecting to the attorneys' fee settlement.[1] Frank contends that the cases are part of a "racket," known as "strike suits," pursued "for the sole purpose of obtaining fees for the plaintiffs' counsel," 17 C 5016, R. 66-2 at 1, which are successful "because victim defendants [like Akorn] find it cheaper, and therefore rational, to pay nuisance value attorneys' fees rather than contest them," 17 C 5016, R. 79 at 1, and further delay the merger. Frank contends that this is a "misuse of the class action device for private gain." 17 C 5016, R. 66-2 at 6. Frank's motion relies on the Seventh Circuit's decision in *In re Walgreen Co. Stockholder Litig.*, holding that analysis under Rule 23 of the fairness of a settlement of strike suit claims must consider whether the demanded changes to the proxy statement are "plainly material" such that the class derived a benefit supporting payment of attorneys' fees. 832 F.3d 718, 725 (7th Cir. 2016).

Frank also sought to consolidate all six cases before this Court. 17 C 5016, R. 67. The Court withheld ruling on that motion. 17 C 5016, R. 75. Proceedings on Frank's motions in the five other cases paused while this Court addressed Frank's motion to intervene in the case before it (17 C 5016) (following this district's custom that proceedings in the case with the lowest number take precedence when appropriate). The Court denied Frank's motion, finding that Frank had failed to identify an interest in the case upon which his intervention could be based. 17 C 5016, R. 81 (*Berg v. Akorn*, 2017 WL 5593349 (N.D. Ill. Nov. 21, 2017)). Because the Court was

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[1] 17 C 5016, R. 57; 17 C 5017, R. 36; 17 C 5018, R. 35; 17 C 5021, R. 36; 17 C 5022, R. 26; 17 C 5026, R. 20.

"concerned with [the plaintiff's] apparent success in evading the requirements of Rule 23," the Court invited Frank to file a motion to reconsider addressing the questions the Court raised in its opinion denying intervention. R. 81. Frank filed a renewed motion for intervention arguing that plaintiffs' counsel had breached their fiduciary duties to the putative class by abusing the class mechanism to "extort" attorneys' fees from Akorn, which were against the class members' interests as shareholders of Akorn. 17 C 5016, R. 83.

Whether in light of Frank's renewed motion, or possibly because the Akorn-Frensenius merger had failed and devolved into litigation, or for some other reason entirely, plaintiffs' counsel in three of the six cases disclaimed attorneys' fees and sought to withdraw their representations.[2] At subsequent status hearings, the Court explained that, rather than consolidate all six cases, the Court would recommend to the district's executive committee that the five other cases be reassigned to this Court. 17 C 5016, R. 97, R. 99. Anticipating reassignment, the Court ruled that Frank's motions to intervene in the three cases in which counsel had disclaimed fees were moot,[3] and that the Court's original denial of Frank's motion to intervene, and his motion for reconsideration, were deemed to be filed in all three of the remaining cases,[4] with continued briefing being filed in case 17 C 5018. Remaining counsel filed a joint brief in opposition to Frank's motion for reconsideration, 17 C 5018, R. 50,

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2 17 C 5016; 17 C 5017; 17 C 5021.

3 17 C 5016, R. 103; 17 C 5017, R. 55; 17 C 5021, R. 56.

4 17 C 5018, R. 47; 17 C 5022, R. 32; 17 C 5026, R. 27.

and Frank filed a reply, 17 C 5018, R. 51. The Court now turns to that motion.

As mentioned, Frank's primary argument for intervention is that he has stated a claim against plaintiffs' counsel for breach of fiduciary duty. It is true that counsel who file a case as class action have a fiduciary duty to the putative class even before it is certified. *See Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (the named plaintiff in a putative class action "has a fiduciary duty to its fellow class members. A representative can't throw away what could be a major component of the class's recovery."); *Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918, 928 (9th Cir. 2014) ("[W]here the settlement agreement is negotiated prior to final class certification, [t]here is an even greater potential for a breach of fiduciary duty owed the class during settlement." (quoting *In re Bluetooth Headset Products Liability Litigation,* 654 F.3d 935, 946 (9th Cir. 2011))). But the authority setting forth such a duty indicates that it is limited to protecting class members' legal rights that form the basis of the claims at issue. *See Schick v. Berg*, 2004 WL 856298, at *6 (S.D.N.Y. Apr. 20, 2004) (holding that "pre-certification class counsel owe a fiduciary duty not to prejudice the interests that putative class members have in their class action litigation" because "class counsel acquires certain limited abilities to prejudice the substantive legal interests of putative class members even prior to class certification"); *see also* Nick Landsman-Roos, *Front-End Fiduciaries: Precertification Duties and Class Conflict*, 65 STAN. L. REV. 817, 849 (2013). In other words, class counsel have a duty not to act in a manner that prejudices

class members' ability to secure relief for the alleged injuries at issue in the case.

Frank does not claim that plaintiffs' counsel caused any such prejudice. Rather, he alleges that the attorneys' fees paid to class counsel are a loss to Akorn and thereby harmed Akorn shareholders, including the class members. *See* 17 C 5018, R. 51 at 4 ("Settling Counsel breached their duty through their scheme to extract attorneys' fees through sham litigation diametrically opposed to the interests of class members they purported to represent."). Frank makes no allegation that plaintiffs' counsel prejudiced the class members' claims in any of the six cases. In fact, Frank's underlying rationale for seeking to intervene is that plaintiffs' claims are worthless, which would mean that class members are not entitled to any recovery. It is difficult to see how worthless claims could ever be prejudiced.

Moreover, the injury Frank identifies is not to the class members *qua* class members. Rather, it is an injury to *Akorn* that the class members might realize through their shares of Akorn. But an injury to Akorn can only be pursued by class members through a derivative action, which is not the procedural posture of any of the six cases. And in any event, the fact that all the class members are Akorn shareholders does not mean that plaintiffs' counsel's fiduciary duty to the putative class extends to a duty to refrain from injuring Akorn. Indeed, plaintiffs' claims are designed to compel Akorn to act in a way it otherwise had not, thereby causing some form of expense and injury. Clearly, the class members' claims and Akorn's interests are not coextensive. As such, there is a break in the causal chain connecting the class members to

Akorn that Frank relies upon to support his theory of intervention.

It is unsurprising that Frank must rely on injury to Akorn and cannot identify any prejudice to the class members since no class was ever certified and the claims were dismissed without prejudice. Without a certified class, Rule 23's mechanism for judicial review of class settlements is inapplicable. Judicial review under Rule 23 formerly applied to a settlement with a putative class pre-certification, but the Rule was revised in 2003 to limit judicial review to certified classes. Frank argues that plaintiffs' counsel's fiduciary duty to the putative class is a basis to disgorge the settlement fees. But the cases he cites in support of this argument either predate the relevant amendments to Rule 23, *see Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 776 (3d Cir. 1995), or address settlements that were binding on the class members despite the fact that no class had been certified, *see Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006); *Grok Lines, Inc. v. Paschall Truck Lines, Inc.*, 2015 WL 5544504, at *2 (N.D. Ill. Sept. 18, 2015)—in other words, at least some of the class members' claims or rights to relief had been released, establishing an equitable basis for them to demand a fair portion of the settlement. Neither circumstance is present here, so the Court will not permit Frank to intervene as a party.

However, the Seventh Circuit has clearly and repeatedly stated that attorneys' fees awards for disclosure suits like this are generally "no better than a racket" that "should be dismissed out of hand,"

unless the disclosures achieved are "plainly material." *Walgreen*, 832 F.3d at 724, 725; *In re Subway Footlong Sandwich Mktg. and Sales Prac. Litig.*, 869 F.3d 551, 557 (7th Cir. 2017); *see also Bushansky v. Remy Int'l, Inc.*, 262 F. Supp. 3d 742 (S.D. Ind. 2017) (rejecting settlement pursuant to *Walgreen* standard). These decisions came in the context of review of settlements under Rule 23, and as discussed, Rule 23 is inapplicable here. Nevertheless, the suggestion that such cases "should be dismissed out of hand" indicates that the Seventh Circuit believes that courts should not permit plaintiffs' counsel to file cases purely to exact attorneys' fees from corporate defendants under any circumstances. *See Pearson v. Target Corp.*, 893 F.3d 980, 982 (7th Cir. 2018) (counsel and parties should not be permitted to "leverage" the class mechanism "for a purely personal gain"). Accordingly, the Court will exercise its inherent powers to police potential abuse of the judicial process—and abuse of the class mechanism in particular—and require plaintiffs' counsel to demonstrate that the disclosures for which they claim credit meet the *Walgreen* standard. *See Dale M., ex rel. Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 282 F.3d 984, 986 (7th Cir. 2002) ("[A]ll courts possess an inherent power to prevent unprofessional conduct by those attorneys who are practicing before them. This authority extends to any unprofessional conduct, including conduct that involves the exaction of illegal fees."). Failure to demonstrate compliance with *Walgreen's* "plainly material" standard will result in the Court ordering plaintiffs' counsel to disgorge the attorneys' fees back to Akorn.

Although the Court has denied Frank's motion to intervene, the Court invites him to continue to participate in this case as an amicus curiae, because the Defendants have abandoned the adverse perspective necessary for the Court to determine this issue. *See Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) ("[U]nfortunately American judges are accustomed to presiding over adversary proceedings. They expect the clash of the adversaries to generate the information that the judge needs to decide the case. And so when a judge is being urged by both adversaries to approve the class-action settlement that they've negotiated, he's at a disadvantage[.]").[5] In the prior briefing, plaintiffs' counsel made arguments as to why certain disclosures met the *Walgreen* standard. Frank only briefly addressed these issues, as they were not immediately relevant to his motion to intervene. The Court requires further briefing to address this issue. Plaintiffs' counsel should file a brief of no more than fifteen pages in support of their position by November 1, 2018, including addressing the arguments Frank has already made that the disclosures are not plainly material. Frank may then file a brief of no more than fifteen pages in response by December 3, 2018. Defendants may also file a brief stating their position by November 1, 2018.

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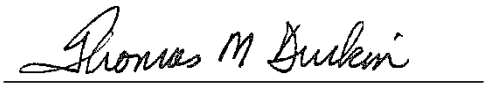
[5] In *Walgreen*, Judge Posner suggested that in circumstances such as these the district court could appoint an independent expert pursuant to Federal Rule of Evidence 706. The Court makes no ruling as to the necessity of expert reports on the issue of materiality, and does not foreclose the issue at this time. Frank is simply invited to make legal argument in opposition to plaintiffs' counsel's positions.

In sum, Frank's motion for reconsideration is denied in part and granted in part.[6] He is not granted leave to intervene as a party. But his motion is granted insofar as the Court will exercise its inherent authority to apply the standard set forth by the Seventh Circuit in *Walgreen* to the settlement at issue in this case, and Frank is granted leave to file a brief as an amicus curiae as described above. Frank should file a notice in case 17 C 5018 by October 1, 2018, stating whether he will accept the Court's invitation to participate as amicus curiae.

ENTERED:



Honorable Thomas M. Durkin
United States District Judge

Dated: September 25, 2018

[6] For purposes of the docket, this means that Frank's motions R. 35 in 17 C 5018, and R. 26 in 17 C 5022, are denied in part and granted in part.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, IL 60604

May 15, 2024

Before

FRANK H. EASTERBROOK, *Circuit Judge*

Nos. 18-2220, 18-2221, 18-2225, 18-3307, 19-2401, and 19-2408 JORGE ALCAREZ, *et al.*, as representatives of a class, *Plaintiffs-Appellees,* *v.* AKORN, INC., *et al.*, *Defendants-Appellees.* Appeals of THEODORE H. FRANK, SHAUN A. HOUSE, and DEMETRIOS PULLOS	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division Nos. 17 C 5016, 5017, 5018, 5021 & 5026 Thomas M. Durkin, *Judge.*

O R D E R

Plaintiffs-Appellees filed a petition for rehearing and rehearing en banc on April 29, 2024. No judge in regular active service has requested a vote on the petition for rehearing en banc, so the petition for

rehearing en banc is denied. The petition for rehearing by the panel is denied for lack of a quorum.*

* Circuit Judge Wood retired on May 1, 2024.

APPENDIX D

U.S.C.A. Const. Art. III

ARTICLE III. THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[1]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original

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[1] This clause has been affected by the Eleventh Amendment.

Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

15 U.S.C.A. § 78n

§ 78n. Proxies

Effective: December 23, 2022

(a) Solicitation of proxies in violation of rules and regulations

(1) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

(2) The rules and regulations prescribed by the Commission under paragraph (1) may include--

(A) a requirement that a solicitation of proxy, consent, or authorization by (or on behalf of) an issuer include a nominee submitted by a shareholder to serve on the board of directors of the issuer; and

(B) a requirement that an issuer follow a certain procedure in relation to a solicitation described in subparagraph (A).

(b) Giving or refraining from giving proxy in respect of any security carried for account of customer

(1) It shall be unlawful for any member of a national securities exchange, or any broker or dealer registered under this chapter, or any bank, association, or other entity that exercises fiduciary powers, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to give, or to refrain from giving a proxy, consent, authorization, or information statement in respect of any security registered pursuant to section 78*l* of this title, or any security issued by an investment company registered under the Investment Company Act of 1940, and carried for the account of a customer.

(2) With respect to banks, the rules and regulations prescribed by the Commission under paragraph (1) shall not require the disclosure of the names of beneficial owners of securities in an account held by the bank on December 28, 1985, unless the beneficial owner consents to the disclosure. The provisions of this paragraph shall not apply in the case of a bank which the Commission finds has not made a good faith effort to obtain such consent from such beneficial owners.

(c) Information to holders of record prior to annual or other meeting

Unless proxies, consents, or authorizations in respect of a security registered pursuant to section 78*l* of this title, or a security issued by an investment company registered under the Investment Company Act of 1940, are solicited by or on behalf of the management of the issuer from the holders of record of such security in accordance with the rules and regulations

prescribed under subsection (a) of this section, prior to any annual or other meeting of the holders of such security, such issuer shall, in accordance with rules and regulations prescribed by the Commission, file with the Commission and transmit to all holders of record of such security information substantially equivalent to the information which would be required to be transmitted if a solicitation were made, but no information shall be required to be filed or transmitted pursuant to this subsection before July 1, 1964.

(d) Tender offer by owner of more than five per centum of class of securities; exceptions

(1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such

additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security--

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) Untrue statement of material fact or omission of fact with respect to tender offer

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances

under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

(f) Election or designation of majority of directors of issuer by owner of more than five per centum of class of securities at other than meeting of security holders

If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 78m of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

(g) Filing fees

(1)(A) At the time of filing such preliminary proxy solicitation material as the Commission may require by rule pursuant to subsection (a) of this section that concerns an acquisition, merger, consolidation, or proposed sale or other disposition of substantially all the assets of a company, the person making such filing, other than a company registered under the Investment Company Act of 1940, shall pay to the Commission the following fees:

(i) for preliminary proxy solicitation material involving an acquisition, merger, or consolidation, if there is a proposed payment of cash or transfer of securities or property to shareholders, a fee at a rate that, subject to paragraph (4), is equal to $92 per $1,000,000 of such proposed payment, or of the value of such securities or other property proposed to be transferred; and

(ii) for preliminary proxy solicitation material involving a proposed sale or other disposition of substantially all of the assets of a company, a fee at a rate that, subject to paragraph (4), is equal to $92 per $1,000,000 of the cash or of the value of any securities or other property proposed to be received upon such sale or disposition.

(B) The fee imposed under subparagraph (A) shall be reduced with respect to securities in an amount equal to any fee paid to the Commission with respect to such securities in connection with the proposed transaction under section 77f(b) of this title, or the fee paid under that section shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this

subsection. Where two or more companies involved in an acquisition, merger, consolidation, sale, or other disposition of substantially all the assets of a company must file such proxy material with the Commission, each shall pay a proportionate share of such fee.

(2) At the time of filing such preliminary information statement as the Commission may require by rule pursuant to subsection (c) of this section, the issuer shall pay to the Commission the same fee as required for preliminary proxy solicitation material under paragraph (1) of this subsection.

(3) At the time of filing such statement as the Commission may require by rule pursuant to subsection (d)(1) of this section, the person making the filing shall pay to the Commission a fee at a rate that, subject to paragraph (4), is equal to $92 per $1,000,000 of the aggregate amount of cash or of the value of securities or other property proposed to be offered. The fee shall be reduced with respect to securities in an amount equal to any fee paid with respect to such securities in connection with the proposed transaction under section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)), or the fee paid under that section shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this subsection.

(4) Annual adjustment

For each fiscal year, the Commission shall by order adjust the rate required by paragraphs (1) and (3) for such fiscal year to a rate that is equal to the rate (expressed in dollars per million) that is

applicable under section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)) for such fiscal year.

(5) Fee collection

Fees collected pursuant to this subsection for fiscal year 2012 and each fiscal year thereafter shall be deposited and credited as general revenue of the Treasury and shall not be available for obligation.

(6) Review; effective date; publication

In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of Title 5. An adjusted rate prescribed under paragraph (4) shall be published and take effect in accordance with section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)).

(7) Pro rata application

The rates per $1,000,000 required by this subsection shall be applied pro rata to amounts and balances of less than $1,000,000.

(8) Notwithstanding any other provision of law, the Commission may impose fees, charges, or prices for matters not involving any acquisition, merger, consolidation, sale, or other disposition of assets described in this subsection, as authorized by section 9701 of Title 31, or otherwise.

(h) Proxy solicitations and tender offers in connection with limited partnership rollup transactions

(1) Proxy rules to contain special provisions

It shall be unlawful for any person to solicit any

proxy, consent, or authorization concerning a limited partnership rollup transaction, or to make any tender offer in furtherance of a limited partnership rollup transaction, unless such transaction is conducted in accordance with rules prescribed by the Commission under subsections (a) and (d) as required by this subsection. Such rules shall--

(A) permit any holder of a security that is the subject of the proposed limited partnership rollup transaction to engage in preliminary communications for the purpose of determining whether to solicit proxies, consents, or authorizations in opposition to the proposed limited partnership rollup transaction, without regard to whether any such communication would otherwise be considered a solicitation of proxies, and without being required to file soliciting material with the Commission prior to making that determination, except that--

(i) nothing in this subparagraph shall be construed to limit the application of any provision of this chapter prohibiting, or reasonably designed to prevent, fraudulent, deceptive, or manipulative acts or practices under this chapter; and

(ii) any holder of not less than 5 percent of the outstanding securities that are the subject of the proposed limited partnership rollup transaction who engages in the business of buying and selling limited partnership interests in the secondary market shall be required to disclose such ownership interests and any

potential conflicts of interests in such preliminary communications;

(B) require the issuer to provide to holders of the securities that are the subject of the limited partnership rollup transaction such list of the holders of the issuer's securities as the Commission may determine in such form and subject to such terms and conditions as the Commission may specify;

(C) prohibit compensating any person soliciting proxies, consents, or authorizations directly from security holders concerning such a limited partnership rollup transaction--

(i) on the basis of whether the solicited proxy, consent, or authorization either approves or disapproves the proposed limited partnership rollup transaction; or

(ii) contingent on the approval, disapproval, or completion of the limited partnership rollup transaction;

(D) set forth disclosure requirements for soliciting material distributed in connection with a limited partnership rollup transaction, including requirements for clear, concise, and comprehensible disclosure with respect to--

(i) any changes in the business plan, voting rights, form of ownership interest, or the compensation of the general partner in the proposed limited partnership rollup transaction from each of the original limited partnerships;

(ii) the conflicts of interest, if any, of the general partner;

(iii) whether it is expected that there will be a significant difference between the exchange values of the limited partnerships and the trading price of the securities to be issued in the limited partnership rollup transaction;

(iv) the valuation of the limited partnerships and the method used to determine the value of the interests of the limited partners to be exchanged for the securities in the limited partnership rollup transaction;

(v) the differing risks and effects of the limited partnership rollup transaction for investors in different limited partnerships proposed to be included, and the risks and effects of completing the limited partnership rollup transaction with less than all limited partnerships;

(vi) the statement by the general partner required under subparagraph (E);

(vii) such other matters deemed necessary or appropriate by the Commission;

(E) require a statement by the general partner as to whether the proposed limited partnership rollup transaction is fair or unfair to investors in each limited partnership, a discussion of the basis for that conclusion, and an evaluation and a description by the general partner of alternatives to the limited partnership rollup transaction, such as liquidation;

(F) provide that, if the general partner or sponsor has obtained any opinion (other than an opinion of counsel), appraisal, or report that is prepared

by an outside party and that is materially related to the limited partnership rollup transaction, such soliciting materials shall contain or be accompanied by clear, concise, and comprehensible disclosure with respect to--

(i) the analysis of the transaction, scope of review, preparation of the opinion, and basis for and methods of arriving at conclusions, and any representations and undertakings with respect thereto;

(ii) the identity and qualifications of the person who prepared the opinion, the method of selection of such person, and any material past, existing, or contemplated relationships between the person or any of its affiliates and the general partner, sponsor, successor, or any other affiliate;

(iii) any compensation of the preparer of such opinion, appraisal, or report that is contingent on the transaction's approval or completion; and

(iv) any limitations imposed by the issuer on the access afforded to such preparer to the issuer's personnel, premises, and relevant books and records;

(G) provide that, if the general partner or sponsor has obtained any opinion, appraisal, or report as described in subparagraph (F) from any person whose compensation is contingent on the transaction's approval or completion or who has not been given access by the issuer to its personnel and premises and relevant books and

records, the general partner or sponsor shall state the reasons therefor;

(H) provide that, if the general partner or sponsor has not obtained any opinion on the fairness of the proposed limited partnership rollup transaction to investors in each of the affected partnerships, such soliciting materials shall contain or be accompanied by a statement of such partner's or sponsor's reasons for concluding that such an opinion is not necessary in order to permit the limited partners to make an informed decision on the proposed transaction;

(I) require that the soliciting material include a clear, concise, and comprehensible summary of the limited partnership rollup transaction (including a summary of the matters referred to in clauses (i) through (vii) of subparagraph (D) and a summary of the matter referred to in subparagraphs (F), (G), and (H)), with the risks of the limited partnership rollup transaction set forth prominently in the fore part thereof;

(J) provide that any solicitation or offering period with respect to any proxy solicitation, tender offer, or information statement in a limited partnership rollup transaction shall be for not less than the lesser of 60 calendar days or the maximum number of days permitted under applicable State law; and

(K) contain such other provisions as the Commission determines to be necessary or appropriate for the protection of investors in limited partnership rollup transactions.

(2) Exemptions

The Commission may, consistent with the public interest, the protection of investors, and the purposes of this chapter, exempt by rule or order any security or class of securities, any transaction or class of transactions, or any person or class of persons, in whole or in part, conditionally or unconditionally, from the requirements imposed pursuant to paragraph (1) or from the definition contained in paragraph (4).

(3) Effect on Commission authority

Nothing in this subsection limits the authority of the Commission under subsection (a) or (d) or any other provision of this chapter or precludes the Commission from imposing, under subsection (a) or (d) or any other provision of this chapter, a remedy or procedure required to be imposed under this subsection.

(4) "Limited partnership rollup transaction" defined

Except as provided in paragraph (5), as used in this subsection, the term "limited partnership rollup transaction" means a transaction involving the combination or reorganization of one or more limited partnerships, directly or indirectly, in which--

(A) some or all of the investors in any of such limited partnerships will receive new securities, or securities in another entity, that will be reported under a transaction reporting plan declared effective before December 17, 1993, by the Commission under section 78k-1 of this title;

(B) any of the investors' limited partnership securities are not, as of the date of filing, reported under a transaction reporting plan declared effective before December 17, 1993, by the Commission under section 78k-1 of this title;

(C) investors in any of the limited partnerships involved in the transaction are subject to a significant adverse change with respect to voting rights, the term of existence of the entity, management compensation, or investment objectives; and

(D) any of such investors are not provided an option to receive or retain a security under substantially the same terms and conditions as the original issue.

(5) Exclusions from definition

Notwithstanding paragraph (4), the term "limited partnership rollup transaction" does not include--

(A) a transaction that involves only a limited partnership or partnerships having an operating policy or practice of retaining cash available for distribution and reinvesting proceeds from the sale, financing, or refinancing of assets in accordance with such criteria as the Commission determines appropriate;

(B) a transaction involving only limited partnerships wherein the interests of the limited partners are repurchased, recalled, or exchanged in accordance with the terms of the preexisting limited partnership agreements for securities in an operating company specifically identified at the time of the formation of the original limited

partnership;

(C) a transaction in which the securities to be issued or exchanged are not required to be and are not registered under the Securities Act of 1933;

(D) a transaction that involves only issuers that are not required to register or report under section 78*l* of this title, both before and after the transaction;

(E) a transaction, except as the Commission may otherwise provide by rule for the protection of investors, involving the combination or reorganization of one or more limited partnerships in which a non-affiliated party succeeds to the interests of a general partner or sponsor, if--

(i) such action is approved by not less than 66 $^{2}/_{3}$ percent of the outstanding units of each of the participating limited partnerships; and

(ii) as a result of the transaction, the existing general partners will receive only compensation to which they are entitled as expressly provided for in the preexisting limited partnership agreements; or

(F) a transaction, except as the Commission may otherwise provide by rule for the protection of investors, in which the securities offered to investors are securities of another entity that are reported under a transaction reporting plan declared effective before December 17, 1993, by the Commission under section 78k-1 of this title, if--

(i) such other entity was formed, and such class of securities was reported and regularly traded, not less than 12 months before the date on which soliciting material is mailed to investors; and

(ii) the securities of that entity issued to investors in the transaction do not exceed 20 percent of the total outstanding securities of the entity, exclusive of any securities of such class held by or for the account of the entity or a subsidiary of the entity.

(i) Disclosure of pay versus performance

The Commission shall, by rule, require each issuer to disclose in any proxy or consent solicitation material for an annual meeting of the shareholders of the issuer a clear description of any compensation required to be disclosed by the issuer under section 229.402 of title 17, Code of Federal Regulations (or any successor thereto), including, for any issuer other than an emerging growth company, information that shows the relationship between executive compensation actually paid and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions. The disclosure under this subsection may include a graphic representation of the information required to be disclosed.

(j) Disclosure of hedging by employees and directors

The Commission shall, by rule, require each issuer to disclose in any proxy or consent solicitation material

for an annual meeting of the shareholders of the issuer whether any employee or member of the board of directors of the issuer, or any designee of such employee or member, is permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) that are designed to hedge or offset any decrease in the market value of equity securities--

(1) granted to the employee or member of the board of directors by the issuer as part of the compensation of the employee or member of the board of directors; or

(2) held, directly or indirectly, by the employee or member of the board of directors.

(k) Data standards for proxy and consent solicitation materials

(1) Requirement

The Commission shall, by rule, adopt data standards for all information contained in any proxy or consent solicitation material prepared by an issuer for an annual meeting of the shareholders of the issuer, except that the Commission may exempt exhibits, signatures, and certifications from those data standards.

(2) Consistency

The data standards required under paragraph (1) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 5334 of Title 12, including, to the extent practicable, by having the characteristics described

in clauses (i) through (vi) of subsection (c)(1)(B) of such section 5334 of Title 12.

CREDIT(S)

(June 6, 1934, c. 404, Title I, § 14, 48 Stat. 895; Pub.L. 88-467, § 5, Aug. 20, 1964, 78 Stat. 569; Pub.L. 90-439, § 3, July 29, 1968, 82 Stat. 455; Pub.L. 91-567, §§ 3 to 5, Dec. 22, 1970, 84 Stat. 1497; Pub.L. 98-38, § 2(b), June 6, 1983, 97 Stat. 205; Pub.L. 99-222, § 2, Dec. 28, 1985, 99 Stat. 1737; Pub.L. 101-550, Title III, § 302, Nov. 15, 1990, 104 Stat. 2721; Pub.L. 103-202, Title III, § 302(a), Dec. 17, 1993, 107 Stat. 2359; Pub.L. 105-353, Title III, § 301(b)(7), Nov. 3, 1998, 112 Stat. 3236; Pub.L. 107-123, § 6, Jan. 16, 2002, 115 Stat. 2396; Pub.L. 111-203, Title IX, §§ 953(a), 955, 971(a), 991(b)(3), July 21, 2010, 124 Stat. 1903, 1904, 1915, 1953; Pub.L. 112-106, Title I, § 102(a)(2), Apr. 5, 2012, 126 Stat. 309; Pub.L. 117-263, Div. E, Title LVIII, § 5821(g), Dec. 23, 2022, 136 Stat. 3426.)

15 U.S.C.A. § 78t

§ 78t. Liability of controlling persons and persons who aid and abet violations

Effective: July 16, 2011

(a) Joint and several liability; good faith defense

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable (including to the Commission in any action brought under paragraph (1) or (3) of section 78u(d) of this title), unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

(b) Unlawful activity through or by means of any other person

It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person.

(c) Hindering, delaying, or obstructing the making or filing of any document, report, or information

It shall be unlawful for any director or officer of, or any owner of any securities issued by, any issuer required to file any document, report, or information under this chapter or any rule or regulation thereunder without just cause to hinder, delay, or obstruct the making or filing of any such document, report, or information.

(d) Liability for trading in securities while in possession of material nonpublic information

Wherever communicating, or purchasing or selling a security while in possession of, material nonpublic information would violate, or result in liability to any purchaser or seller of the security under any provisions of this chapter, or any rule or regulation thereunder, such conduct in connection with a purchase or sale of a put, call, straddle, option, privilege or security-based swap agreement with respect to such security or with respect to a group or index of securities including such security, shall also violate and result in comparable liability to any purchaser or seller of that security under such provision, rule, or regulation.

(e) Prosecution of persons who aid and abet violations

For purposes of any action brought by the Commission under paragraph (1) or (3) of section 78u(d) of this title, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to

the same extent as the person to whom such assistance is provided.

(f) Limitation on Commission authority

The authority of the Commission under this section with respect to security-based swap agreements shall be subject to the restrictions and limitations of section 78c-1(b) of this title.

CREDIT(S)

(June 6, 1934, c. 404, Title I, § 20, 48 Stat. 899; May 27, 1936, c. 462, § 6, 49 Stat. 1379; Pub.L. 88-467, § 9, Aug. 20, 1964, 78 Stat. 579; Pub.L. 98-376, § 5, Aug. 10, 1984, 98 Stat. 1265; Pub.L. 104-67, Title I, § 104, Dec. 22, 1995, 109 Stat. 757; Pub.L. 105-353, Title III, § 301(b)(12), Nov. 3, 1998, 112 Stat. 3236; Pub.L. 106-554, § 1(a)(5) [Title II, § 205(a)(3), Title III, § 303(i), (j)], Dec. 21, 2000, 114 Stat. 2763, 2763A-426, 2763A-456; Pub.L. 111-203, Title VII, § 762(d)(6), Title IX, §§ 929O, 929P(c), July 21, 2010, 124 Stat. 1761, 1862, 1865.)

15 U.S.C.A. § 78u-4

§ 78u-4. Private securities litigation

Effective: July 22, 2010

(a) Private class actions

(1) In general

The provisions of this subsection shall apply in each private action arising under this chapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.

(2) Certification filed with complaint

(A) In general

Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such plaintiff and filed with the complaint, that--

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this chapter;

(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this chapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve as a representative party on behalf of a class; and

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4).

(B) Nonwaiver of attorney-client privilege

The certification filed pursuant to subparagraph (A) shall not be construed to be a waiver of the attorney-client privilege.

(3) Appointment of lead plaintiff

(A) Early notice to class members

(i) In general

Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class--

(I) of the pendency of the action, the claims asserted therein, and the purported class period; and

(II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

(ii) Multiple actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this chapter is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i).

(iii) Additional notices may be required under Federal rules

Notice required under clause (i) shall be in addition to any notice required pursuant to the Federal Rules of Civil Procedure.

(B) Appointment of lead plaintiff

(i) In general

Not later than 90 days after the date on which a notice is published under subparagraph (A)(i), the court shall consider any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the "most adequate plaintiff") in accordance with this subparagraph.

(ii) Consolidated actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this chapter has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not make the determination required by clause (i) until after the decision on the motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions in accordance with this paragraph.

(iii) Rebuttable presumption

(I) In general

Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this chapter is the person or group of persons that--

(aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

(II) Rebuttal evidence

The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff--

(aa) will not fairly and adequately protect the interests of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

(iv) Discovery

For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

(v) Selection of lead counsel

The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.

(vi) Restrictions on professional plaintiffs

Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.

(4) Recovery by plaintiffs

The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly

relating to the representation of the class to any representative party serving on behalf of a class.

(5) Restrictions on settlements under seal

The terms and provisions of any settlement agreement of a class action shall not be filed under seal, except that on motion of any party to the settlement, the court may order filing under seal for those portions of a settlement agreement as to which good cause is shown for such filing under seal. For purposes of this paragraph, good cause shall exist only if publication of a term or provision of a settlement agreement would cause direct and substantial harm to any party.

(6) Restrictions on payment of attorneys' fees and expenses

Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

(7) Disclosure of settlement terms to class members

Any proposed or final settlement agreement that is published or otherwise disseminated to the class shall include each of the following statements, along with a cover page summarizing the information contained in such statements:

(A) Statement of plaintiff recovery

The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis.

(B) Statement of potential outcome of case

(i) Agreement on amount of damages

If the settling parties agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this chapter, a statement concerning the average amount of such potential damages per share.

(ii) Disagreement on amount of damages

If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this chapter, a statement from each settling party concerning the issue or issues on which the parties disagree.

(iii) Inadmissibility for certain purposes

A statement made in accordance with clause (i) or (ii) concerning the amount of damages shall not be admissible in any Federal or State judicial action or administrative proceeding, other than an action or proceeding arising out of such statement.

(C) Statement of attorneys' fees or costs sought

If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought. Such information shall be clearly summarized on the cover page of any notice to a party of any proposed or final settlement agreement.

(D) Identification of lawyers' representatives

The name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to the class.

(E) Reasons for settlement

A brief statement explaining the reasons why the parties are proposing the settlement.

(F) Other information

Such other information as may be required by the court.

(8) Security for payment of costs in class actions

In any private action arising under this chapter that is certified as a class action pursuant to the Federal Rules of Civil Procedure, the court may require an undertaking from the attorneys for the plaintiff class, the plaintiff class, or both, or from the attorneys for the defendant, the defendant, or both, in such proportions and at such times as the court determines are just and equitable, for the payment of fees and expenses that may be awarded under this subsection.

(9) Attorney conflict of interest

If a plaintiff class is represented by an attorney who directly owns or otherwise has a beneficial interest in the securities that are the subject of the litigation, the court shall make a determination of whether such ownership or other interest constitutes a conflict of interest sufficient to disqualify the attorney from representing the plaintiff class.

(b) Requirements for securities fraud actions

(1) Misleading statements and omissions

In any private action arising under this chapter in which the plaintiff alleges that the defendant--

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made,

not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(2) Required state of mind

(A) In general

Except as provided in subparagraph (B), in any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(B) Exception

In the case of an action for money damages brought against a credit rating agency or a controlling person under this chapter, it shall be sufficient, for purposes of pleading any required state of mind in relation to such action, that the complaint state with particularity facts giving rise to a strong inference that the credit rating agency knowingly or recklessly failed--

(i) to conduct a reasonable investigation of the

rated security with respect to the factual elements relied upon by its own methodology for evaluating credit risk; or

(ii) to obtain reasonable verification of such factual elements (which verification may be based on a sampling technique that does not amount to an audit) from other sources that the credit rating agency considered to be competent and that were independent of the issuer and underwriter.

(3) Motion to dismiss; stay of discovery

(A) Dismissal for failure to meet pleading requirements

In any private action arising under this chapter, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) are not met.

(B) Stay of discovery

In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(C) Preservation of evidence

(i) In general

During the pendency of any stay of discovery pursuant to this paragraph, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

(ii) Sanction for willful violation

A party aggrieved by the willful failure of an opposing party to comply with clause (i) may apply to the court for an order awarding appropriate sanctions.

(D) Circumvention of stay of discovery

Upon a proper showing, a court may stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph.

(4) Loss causation

In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the

plaintiff seeks to recover damages.

(c) Sanctions for abusive litigation

(1) Mandatory review by court

In any private action arising under this chapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) Mandatory sanctions

If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(3) Presumption in favor of attorneys' fees and costs

(A) In general

Subject to subparagraphs (B) and (C), for

purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction--

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) Rebuttal evidence

The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that--

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) Sanctions

If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

(d) Defendant's right to written interrogatories

In any private action arising under this chapter in which the plaintiff may recover money damages, the court shall, when requested by a defendant, submit to the jury a written interrogatory on the issue of each such defendant's state of mind at the time the alleged violation occurred.

(e) Limitation on damages

(1) In general

Except as provided in paragraph (2), in any private action arising under this chapter in which the plaintiff seeks to establish damages by reference to the market price of a security, the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.

(2) Exception

In any private action arising under this chapter in which the plaintiff seeks to establish damages by reference to the market price of a security, if the plaintiff sells or repurchases the subject security prior to the expiration of the 90-day period described in paragraph (1), the plaintiff's damages shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the security and the mean trading price of the security during the period beginning immediately after dissemination of information correcting the misstatement or omission and ending on the date on which the plaintiff sells or repurchases the security.

(3) "Mean trading price" defined

For purposes of this subsection, the "mean trading price" of a security shall be an average of the daily trading price of that security, determined as of the close of the market each day during the 90-day period referred to in paragraph (1).

(f) Proportionate liability

(1) Applicability

Nothing in this subsection shall be construed to create, affect, or in any manner modify, the standard for liability associated with any action arising under the securities laws.

(2) Liability for damages

(A) Joint and several liability

Any covered person against whom a final judgment is entered in a private action shall be liable for damages jointly and severally only if the trier of fact specifically determines that such covered person knowingly committed a violation of the securities laws.

(B) Proportionate liability

(i) In general

Except as provided in subparagraph (A), a covered person against whom a final judgment is entered in a private action shall be liable solely for the portion of the judgment that corresponds to the percentage of responsibility of that covered person, as determined under paragraph (3).

(ii) Recovery by and costs of covered person

In any case in which a contractual relationship permits, a covered person that prevails in any private action may recover the attorney's fees and costs of that covered person in connection with the action.

(3) Determination of responsibility

(A) In general

In any private action, the court shall instruct the jury to answer special interrogatories, or if there is no jury, shall make findings, with respect to each covered person and each of the other

persons claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff, including persons who have entered into settlements with the plaintiff or plaintiffs, concerning--

(i) whether such person violated the securities laws;

(ii) the percentage of responsibility of such person, measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by the plaintiff; and

(iii) whether such person knowingly committed a violation of the securities laws.

(B) Contents of special interrogatories or findings

The responses to interrogatories, or findings, as appropriate, under subparagraph (A) shall specify the total amount of damages that the plaintiff is entitled to recover and the percentage of responsibility of each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs.

(C) Factors for consideration

In determining the percentage of responsibility under this paragraph, the trier of fact shall consider--

(i) the nature of the conduct of each covered

person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs; and

(ii) the nature and extent of the causal relationship between the conduct of each such person and the damages incurred by the plaintiff or plaintiffs.

(4) Uncollectible share

(A) In general

Notwithstanding paragraph (2)(B), upon[1] motion made not later than 6 months after a final judgment is entered in any private action, the court determines that all or part of the share of the judgment of the covered person is not collectible against that covered person, and is also not collectible against a covered person described in paragraph (2)(A), each covered person described in paragraph (2)(B) shall be liable for the uncollectible share as follows:

(i) Percentage of net worth

Each covered person shall be jointly and severally liable for the uncollectible share if the plaintiff establishes that--

(I) the plaintiff is an individual whose recoverable damages under the final judgment are equal to more than 10 percent

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[1] So in original. Probably should be preceded by "if,".

of the net worth of the plaintiff; and

(II) the net worth of the plaintiff is equal to less than $200,000.

(ii) Other plaintiffs

With respect to any plaintiff not described in subclauses (I) and (II) of clause (i), each covered person shall be liable for the uncollectible share in proportion to the percentage of responsibility of that covered person, except that the total liability of a covered person under this clause may not exceed 50 percent of the proportionate share of that covered person, as determined under paragraph (3)(B).

(iii) Net worth

For purposes of this subparagraph, net worth shall be determined as of the date immediately preceding the date of the purchase or sale (as applicable) by the plaintiff of the security that is the subject of the action, and shall be equal to the fair market value of assets, minus liabilities, including the net value of the investments of the plaintiff in real and personal property (including personal residences).

(B) Overall limit

In no case shall the total payments required pursuant to subparagraph (A) exceed the amount of the uncollectible share.

(C) Covered persons subject to contribution

A covered person against whom judgment is not collectible shall be subject to contribution and to any continuing liability to the plaintiff on the judgment.

(5) Right of contribution

To the extent that a covered person is required to make an additional payment pursuant to paragraph (4), that covered person may recover contribution--

(A) from the covered person originally liable to make the payment;

(B) from any covered person liable jointly and severally pursuant to paragraph (2)(A);

(C) from any covered person held proportionately liable pursuant to this paragraph who is liable to make the same payment and has paid less than his or her proportionate share of that payment; or

(D) from any other person responsible for the conduct giving rise to the payment that would have been liable to make the same payment.

(6) Nondisclosure to jury

The standard for allocation of damages under paragraphs (2) and (3) and the procedure for reallocation of uncollectible shares under paragraph (4) shall not be disclosed to members of the jury.

(7) Settlement discharge

(A) In general

A covered person who settles any private action at any time before final verdict or judgment shall be discharged from all claims for contribution brought by other persons. Upon entry of the settlement by the court, the court shall enter a bar order constituting the final discharge of all obligations to the plaintiff of the settling covered person arising out of the action. The order shall bar all future claims for contribution arising out of the action--

(i) by any person against the settling covered person; and

(ii) by the settling covered person against any person, other than a person whose liability has been extinguished by the settlement of the settling covered person.

(B) Reduction

If a covered person enters into a settlement with the plaintiff prior to final verdict or judgment, the verdict or judgment shall be reduced by the greater of--

(i) an amount that corresponds to the percentage of responsibility of that covered person; or

(ii) the amount paid to the plaintiff by that

covered person.

(8) Contribution

A covered person who becomes jointly and severally liable for damages in any private action may recover contribution from any other person who, if joined in the original action, would have been liable for the same damages. A claim for contribution shall be determined based on the percentage of responsibility of the claimant and of each person against whom a claim for contribution is made.

(9) Statute of limitations for contribution

In any private action determining liability, an action for contribution shall be brought not later than 6 months after the entry of a final, nonappealable judgment in the action, except that an action for contribution brought by a covered person who was required to make an additional payment pursuant to paragraph (4) may be brought not later than 6 months after the date on which such payment was made.

(10) Definitions

For purposes of this subsection--

(A) a covered person "knowingly commits a violation of the securities laws"--

(i) with respect to an action that is based on an untrue statement of material fact or omission of a material fact necessary to make the statement not misleading, if--

(I) that covered person makes an untrue statement of a material fact, with actual knowledge that the representation is false, or omits to state a fact necessary in order to make the statement made not misleading, with actual knowledge that, as a result of the omission, one of the material representations of the covered person is false; and

(II) persons are likely to reasonably rely on that misrepresentation or omission; and

(ii) with respect to an action that is based on any conduct that is not described in clause (i), if that covered person engages in that conduct with actual knowledge of the facts and circumstances that make the conduct of that covered person a violation of the securities laws;

(B) reckless conduct by a covered person shall not be construed to constitute a knowing commission of a violation of the securities laws by that covered person;

(C) the term "covered person" means--

(i) a defendant in any private action arising under this chapter; or

(ii) a defendant in any private action arising under section 77k of this title, who is an outside director of the issuer of the securities that are the subject of the action; and

(D) the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

CREDIT(S)

(June 6, 1934, c. 404, Title I, § 21D, as added and amended Pub.L. 104-67, Title I, § 101(b), Title II, § 201(a), Dec. 22, 1995, 109 Stat. 743, 758; Pub.L. 105-353, Title I, § 101(b)(2), Title III, § 301(b)(13), Nov. 3, 1998, 112 Stat. 3233, 3236; Pub.L. 111-203, Title IX, § 933(b), July 21, 2010, 124 Stat. 1883.)

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) ***Nature of a Sanction.*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable

conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) ***Limitations on Monetary Sanctions.*** The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) ***Requirements for an Order.*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

CREDIT(S)

(Amended April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

Federal Rules of Civil Procedure Rule 23

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class,

so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses,

and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes*. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3)--or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)--the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting

exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) ***In General.*** In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class--or a class proposed to be certified for purposes of settlement--may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class.***

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to

all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) ***Identifying Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to be Excluded.*** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) ***Class-Member Objections.***

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States,

a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C)may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable

costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the

facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 24, 1998, effective December 1, 1998; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009; April 26, 2018, effective December 1, 2018.)

Federal Rules of Civil Procedure Rule 24

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) ***Delay or Prejudice.*** In exercising its discretion,

the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007.)

Federal Rules of Civil Procedure Rule 41

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

> **(i)** a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
>
> **(ii)** a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff

fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule--except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19--operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; December 4, 1967, effective July 1, 1968; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1,

1991; April 30, 2007, effective December 1, 2007.)

Federal Rules of Civil Procedure Rule 60

Rule 60. Relief From a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

APPENDIX E

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

JORGE ALCAREZ, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. AKORN, INC., KENNETH S. ABRAMOWITZ, ADRIENNE L. GRAVES, RONALD M. JOHNSON, JOHN N. KAPOOR, STEVEN J. MEYER, TERRY A. RAPPUHN, BRIAN TAMBI, and ALAN WEINSTEIN, Defendants	Case No. 1:17-cv-05017 Hon. Amy J. St. Eve

STIPULATION CONCERNING PLAINTIFF'S VOLUNTARY DISMISSAL WITHOUT PREJUDICE

WHEREAS, on April 24, 2017, Akorn, Inc. ("Akorn") and Fresenius Kabi AG ("Fresenius Kabi") announced that they had entered into an Agreement and Plan of Merger (the "Merger Agreement"), dated as of April 24, 2017, among Akorn, Fresenius Kabi,

Fresenius Kabi's indirect subsidiary Quercus Acquisition, Inc. and, solely for purposes of Article VIII thereof, Fresenius SE & Co. KGaA, pursuant to which shares of Akorn would be converted into the right to receive $34.00 in cash per share (the "Proposed Merger");

WHEREAS, on May 22, 2017, Akorn filed a preliminary proxy statement on Schedule 14A (the "Preliminary Proxy") with the SEC;

WHEREAS, on June 7, 2017, plaintiff Jorge Alcarez filed a purported class action lawsuit in the United States District Court for the Middle District of Louisiana (the "Louisiana Court"), on behalf of himself and other public shareholders of Akorn, asserting claims under Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act") against Akorn and Akorn directors John N. Kapoor, Kenneth S. Abramowitz, Adrienne L. Graves, Ronald M. Johnson, Steven J. Meyer, Terry A. Rappuhn, Brian Tambi and Alan Weinstein (the "Defendants") and challenging the disclosures made in the Preliminary Proxy, captioned *Alcarez v. Akorn, Inc., et al.*, No. 17-cv-359-BAJ-RLB (the "Action");

WHEREAS, on June 15, 2017, Akorn filed a definitive proxy statement on Schedule 14A (the "Proxy") with the SEC, which set the Akorn shareholder vote on the Proposed Merger for July 19, 2017. Among other things, the Proxy (i) summarized the Merger Agreement, (ii) provided an account of the events leading up to the execution of the Merger Agreement, (iii) stated that the Akorn Board of Directors determined that the Proposed Merger was in the best interests of Akorn's shareholders and

recommended the Proposed Merger and (iv) summarized the valuation analyses and fairness opinion by J.P. Morgan Securities LLC, the financial advisor to Akorn;

WHEREAS, on July 5, 2017, the Louisiana Court granted Defendants' Motion for Change of Venue pursuant to 28 U.S.C. § 1404(a), and transferred the Action to the United States District Court for the Northern District of Illinois;

WHEREAS, on July 10, 2017, Akorn filed a Form 8-K with the SEC, supplementing the disclosures in the Proxy with certain additional information relating to the Proposed Merger (the "Supplemental Disclosures"); and

WHEREAS, Plaintiff agrees that as a result of the filing of the Supplemental Disclosures, the disclosure claims relating to the Proposed Merger identified in the Complaint in the Action have become moot;

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the respective parties that Plaintiff hereby voluntarily dismisses the Action without prejudice, pursuant to Fed. R. Civ. P. 41(a)(1), and without costs to any party.

Dated: July 14, 2017

/s/ Christopher J. Kupka
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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 6.2.1
Eastern Division

Jorge Alcarez,

Plaintiff,

v.

Akorn, Inc., et al.,

Defendants

Case No. 1:17-cv-05017
Honorable Amy J. St. Eve

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, July 17, 2017:

MINUTE entry before the Honorable Amy J. St. Eve: Pursuant to the parties' stipulation of dismissal, this case is hereby dismissed without prejudice and without costs to any party. All dates and deadlines are stricken. Civil case terminated. Mailed notice(kef,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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

SEAN HARRIS, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. AKORN, INC., JOHN N. KAPOOR; RONALD M. JOHNSON; STEVEN J. MEYER; BRIAN TAMBI; ALAN WEINSTEIN; KENNETH S. ABRAMOWITZ; ADRIENNE L. GRAVES; and TERRY A. RAPPUHN, Defendants	Case No. 1:17-cv-05021 Hon. Ronald A. Guzman

STIPULATION CONCERNING PLAINTIFF'S VOLUNTARY DISMISSAL WITHOUT PREJUDICE

WHEREAS, on April 24, 2017, Akorn, Inc. ("Akorn") and Fresenius Kabi AG ("Fresenius Kabi") announced that they had entered into an Agreement and Plan of Merger (the "Merger Agreement"), dated as of April 24, 2017, among Akorn, Fresenius Kabi, Fresenius Kabi's indirect subsidiary Quercus

Acquisition, Inc. and, solely for purposes of Article VIII thereof, Fresenius SE & Co. KGaA, pursuant to which shares of Akorn would be converted into the right to receive $34.00 in cash per share (the "Proposed Merger");

WHEREAS, on May 22, 2017, Akorn filed a preliminary proxy statement on Schedule 14A (the "Preliminary Proxy") with the SEC;

WHEREAS, on June 14, 2017, plaintiff Sean Harris filed a purported class action lawsuit in the United States District Court for the Middle District of Louisiana (the "Louisiana Court"), on behalf of himself and other public shareholders of Akorn, asserting claims under Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act") against Akorn and Akorn directors John N. Kapoor, Kenneth S. Abramowitz, Adrienne L. Graves, Ronald M. Johnson, Steven J. Meyer, Terry A. Rappuhn, Brian Tambi and Alan Weinstein (the "Defendants") and challenging the disclosures made in the Preliminary Proxy, captioned *Harris v. Akorn, Inc., et al.*, No. 17-cv-00373-BAJ-RLB (the "Action");

WHEREAS, on June 15, 2017, Akorn filed a definitive proxy statement on Schedule 14A (the "Proxy") with the SEC, which set the Akorn shareholder vote on the Proposed Merger for July 19, 2017. Among other things, the Proxy (i) summarized the Merger Agreement, (ii) provided an account of the events leading up to the execution of the Merger Agreement, (iii) stated that the Akorn Board of Directors determined that the Proposed Merger was in the best interests of Akorn's shareholders and recommended the Proposed Merger and (iv)

summarized the valuation analyses and fairness opinion by J.P. Morgan Securities LLC, the financial advisor to Akorn;

WHEREAS, on July 5, 2017, the Louisiana Court granted Defendants' Motion for Change of Venue pursuant to 28 U.S.C. § 1404(a), and transferred the Action to the United States District Court for the Northern District of Illinois;

WHEREAS, on July 10, 2017, Akorn filed a Form 8-K with the SEC, supplementing the disclosures in the Proxy with certain additional information relating to the Proposed Merger (the "Supplemental Disclosures"); and

WHEREAS, Plaintiff agrees that as a result of the filing of the Supplemental Disclosures, the disclosure claims relating to the Proposed Merger identified in the Complaint in the Action have become moot;

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the respective parties that Plaintiff hereby voluntarily dismisses the Action without prejudice, pursuant to Fed. R. Civ. P. 41(a)(1), and without costs to any party.

Dated: July 14, 2017

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 6.2.1
Eastern Division

Sean Harris,

Plaintiff,

v.

Akorn, Inc., et al.,

Defendants.

Case No. 1:17-cv-05021
Honorable
Ronald A. Guzman

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, July 17, 2017:

MINUTE entry before the Honorable Ronald A. Guzman: Pursuant to the parties' stipulation concerning plaintiff's voluntary dismissal [33], this case is dismissed without prejudice, pursuant to Fed.R.Civ.P. 41(a)(1), and without costs to any party. Any pending motions or schedules in this case are stricken as moot. Civil case terminated. Mailed notice(is,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov*.**

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

ROBERT BERG, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	Case No. 17 C 5016 Chicago, Illinois October 4, 2017 9:02 a.m.
JORGE ALCAREZ, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	Case No. 17 C 5017
SHAUN A. HOUSE, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants	Case No. 17 C 5018

(continued on next page)

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SEAN HARRIS, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	)	Case No. 17 C 5021
ROBERT CARLYLE, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	)	Case No. 17 C 5022
DEMETRIOS PULLOS, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	)	Case No. 17 C 5026

TRANSCRIPT OF PROCEEDINGS – STATUS

BEFORE THE HONORABLE THOMAS M. DURKIN

(continued on next page)

(continued from previous page)

APPEARANCES:

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For Plaintiffs Berg, Alcarez, House and Harris:	LUBIN AUSTERMUEHLE PC BY: PETER S. LUBIN 17W220 22nd Street, Suite 410 Oakbrook Terrace, Illinois 60181
For the Defendants:	POLSINELLI PC BY: MR. ANTHONY C. PORCELLI 150 N. Riverside Plaza, Suite 300

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* * * * *

PROCEEDINGS REPORTED BY STENOTYPE
TRANSCRIPT PRODUCED USING COMPUTER-AIDED TRANSCRCIPTION

(Proceedings heard in open court:)

THE CLERK: 17 C 5016, Berg v. Akorn.

THE COURT: All right. Good morning.

MR. LONG: Good morning, your Honor.

MR. BEDNARZ: Good morning.

THE COURT: Let's have everyone identify themselves for the record.

MR. LUBIN: Peter Lubin for the plaintiffs.

THE COURT: Okay.

MR. PORCELLI: Good morning, your Honor. Tony Porcelli for Akorn, Inc., and the individual defendants.

MR. LONG: Brian Long for plaintiffs.

MS. TRIPODI: And Elizabeth Tripodi for plaintiffs.

THE COURT: Okay.

MR. BEDNARZ: Good morning, your Honor. This is Frank Bednarz on behalf of proposed intervenor Ted Frank.

THE COURT: All right. First question is, is anybody opposed to Mr. Frank intervening in this case?

MR. LONG: Yes, your Honor.

THE COURT: All right. Well, they have an extensive brief which they filed, setting forth the reasons why they think they ought to be able to intervene.

I'll be interested in hearing what the response is to it. It seems like a strong motion. It seems painless to let them intervene if there's a challenge to the attorneys' fees in this case.

Or, more importantly, if they want to file an appeal from any approval that I give, they need to have intervened to be able to preserve their right to file an appeal. I think that was pretty clear from the -- might have been the *Walgreens* case which actually noted that.

So I'll certainly give you a chance to respond. But I'm predisposed to grant the motion to intervene so we can just get to the main event, which is whether the fees involved in this case are appropriate and need to be approved by me.

MR. LONG: Your Honor, just to put this in context, this is not a class action settlement. This isn't a situation where the Court is asked under Rule 23 in the context of granting a release to approve or not approve a settlement.

The fee --

THE COURT: Then why come to me?

MR. LONG: Excuse me?

THE COURT: Then why come to me?

MR. LONG: We did that and we've been doing that as a matter of course in many of the cases that we filed like this. We have a mootness fee claim. We --

THE COURT: You have a what?

MR. LONG: When we have a mootness fee claim, what we do and what the parties -- real parties in interest to the action agreed to do was to see if in good faith they could work out the mootness fee claim, resolve it without Court intervention, resolve it without putting anything to a motion.

And if we are unable to work it out, then what we would do is come back to the Court and say, look. We have this fee claim. We think that, you know, we need your help in resolving it. Can you determine the amount of the claim, if any.

So, again, there's no classwide release here, your Honor. The proposed intervenor's client doesn't have any stake in this.

THE COURT: Why not? He's a shareholder.

MR. LONG: Well, sure. He's a shareholder.

But this isn't the appropriate way for him to go about doing this. What he's got potentially -- and I don't want to tell him his business -- is he's got a derivative claim. He's got a remedy. He's got options. He's got options under Rule 23.1. He's got options under state law. If he's unhappy about this payment, which again, doesn't have to be approved by the Court, then he can make a demand on the board of directors. He can assert a derivative action.

But we don't think he's got any standing to assert any such claim in this action.

THE COURT: All right. But, yeah, that case is over, though. If the board acts in a reasonable way and deny – and basically denies his claim, that extinguishes a derivative claim. It's an empty method

often for shareholders to seek any kind of action from a board, at least through the courts.

MR. LONG: I don't disagree at all with your Honor. I think the decision to pay the fee here was simply a business judgment made by a board of directors.

THE COURT: Well, and that's why the derivative claim likely won't succeed. The business judgment rule would extinguish such a claim.

MR. LONG: Correct. And so it's not my fault that the derivative claim that he might bring is without merit.

THE COURT: No. But you are coming to me to seek approval -- well, I'm -- the whole posture of this case is confusing to me. And there is a -- you had a series of lawsuits filed down in Louisiana, it looked like, starting -- one case in Chicago, right?

MR. LONG: Correct.

THE COURT: Before Judge Dow?

MR. LONG: Correct.

THE COURT: And then was Judge Dow's case moved to -- duplicatively filed down in Louisiana?

MR. LONG: Sure. There were four cases initially filed in Louisiana, and the fifth case was filed in front of Judge Dow.

After conversation with counsel for the plaintiff in that action, they decided to voluntarily dismiss their case and refile back down in Louisiana so that all the cases would be before a single Court.

THE COURT: All right. And then the Louisiana courts granted a motion to transfer it back here?

MR. LONG: Correct, and so all of the cases were transferred back here.

After the cases were transferred back here, we reached an agreement in principle with the defendants to resolve our claims in the actions. They mooted the disclosure claims that we had, and in exchange, we agreed that we would dismiss our individual claims with prejudice as to the named plaintiffs and that we would dismiss the classwide claims without prejudice. Ergo, there would be no class action settlement; there would be no release.

So if you're looking at *Walgreens*, if you're looking at the Delaware chancery decision, truly what the plaintiffs did here actually --

THE COURT: Slow down.

MR. LONG: Sorry.

THE COURT: Go ahead.

MR. LONG: I just get so excited when I talk about Delaware law.

THE COURT: Yeah, I know. It's a subject that increases the heartbeat of everybody. But slow down because my court reporter needs to make sure she gets an accurate record.

MR. LONG: I apologize.

So, you know, what we did here I think complies with the letter of, you know, what's been suggested. Instead of having a settlement that arguably would provide a broad release of claims

related to the merger for a set of supplemental disclosures, which is, you know, the way these claims -- these cases have been resolved in the past, here what we did was we didn't give up a release.

We didn't -- we didn't have a settlement. There was no notice. There was no nothing, except the benefit that we believe we created by forcing -- or having the defendants agree, rather, to make the supplemental disclosures.

THE COURT: Is that benefit something that can be judicially reviewed? You're saying it doesn't have any -- there's no place for that review in court, correct?

MR. LONG: Well, I think, you know, the other -- the other avenue that we could have that claim -- to answer your Honor's questions, I don't believe that that mootness fee claim needs to be judicially reviewed. I don't believe, your Honor, that needs to be approved by a Court.

If we can't work it out and your Honor would have said, "You know what? I dismiss the case. You can either file a new suit or file a suit in state court," that might be one thing. But, I mean, we had -- we believe we had a claim for mootness for fees -- mootness fees based on the common benefit that we created.

Defendants in their business judgment determined that they would, instead of litigating that case -- claim, instead of potentially defending more litigation, that they would resolve that fee claim with us. And that's not a classwide issue. That's the lawyers -- the plaintiffs, their lawyers, we created a

benefit, and we believe we're entitled to a fee. Again, instead of litigating that fee, we reached an agreement to resolve it.

We -- and that's why, your Honor, after we reached that agreement, we submitted a second stipulation to the Court that said your Honor had this outstanding issue. We asked the Court earlier to retain jurisdiction for the sole purpose of assisting with the resolution of this claim if we couldn't work it out.

We've now worked it out. We're providing your Honor notice as we said we would in the earlier submission. And the matter can be closed as far as I believe -- and I don't want to speak for counsel for defendants, but in terms of the real parties in interest, I believe that the matter can be dismissed.

THE COURT: Well, I think my case is the only one that has -- the case before me is the only one that has a -- any type of fee issue brought, which is why Judge Dow, who has the lower-numbered case, suggested I keep this case.

There is a motion, I think, to consolidate all these cases.

MR. LONG: Right.

THE COURT: Let's deal with that first. That was brought by the intervenor. But as a practical matter, is there any objection to that anyway, or do you want to go before six different judges in this building to fight this out?

MR. LONG: Well, no, your Honor. I guess the objection to that is a threshold issue. This is -- your Honor is correct. This is the only case with that

retention of jurisdiction. The other five cases are just dismissed.

MR. BEDNARZ: Your Honor, the other cases were dismissed without prejudice. And none of the other cases said that they were dismissed without prejudice for the express purpose of filing fees in this case.

This case was dismissed without prejudice with the anticipation of filing a fee motion on behalf of all plaintiffs' counsel, all six sets of plaintiffs' counsel. And this fee motion is to reward all six sets of plaintiffs' counsel.

So we were concerned that if this hearing doesn't go the way the plaintiffs like that maybe this case would be dismissed, and instead they would file a fee application for one of the other ones that was dismissed without prejudice.

THE COURT: Are the other cases dismissed without prejudice, or –

MR. LONG: That's not correct, your Honor. The other cases are dismissed -- excuse me. The other cases are dismissed with prejudice as to the individual named plaintiffs. The other cases are dismissed without prejudice as to the class claims.

THE COURT: So currently these cases have been dismissed before Judges Kennelly --

MR. LONG: Correct.

THE COURT: -- Guzmán, Bucklo, and St. Eve.

MR. LONG: Correct.

THE COURT: Okay.

MR. LONG: And so our opposition, as an initial matter, would be that there's --

THE COURT: And Dow.

MR. LONG: Correct, which is, you know, the same -- there's one case that had two judges, Carlyle case.

So as an initial matter, I don't believe there's even jurisdiction to consolidate these cases because they're all dismissed. I mean, the 30-day appeal period has run on these cases. For all intents and purposes, they're done.

THE COURT: All right. Well, if they've been dismissed, there's no point in consolidating them -- right? -- that I can see.

Is there a -- although your motion to intervene is still pending, I'm still going to ask you if you have an objection to my denying your motion to consolidate since those cases have been dismissed.

MR. BEDNARZ: Your Honor, I don't have a copy of any of the dismissals in the other six cases, but I do believe they were dismissed without prejudice.

Now, they didn't have the kind of proviso in this dismissal where they were going to file for fees, but that's because this particular case was dismissed with the proviso that they would apply for fees for all of the plaintiffs for all six cases.

So if, in fact, they were all dismissed with prejudice, then, no, your Honor, we don't have any objection. But I don't believe that's correct.

THE COURT: Were they dismissed with prejudice?

MR. LONG: Again, your Honor -- and I can hand one up. I apologize. I only have one copy. I can hand one up to your Honor.

You know what? I misspoke, your Honor. One of these -- I apologize. This one -- let me just make sure because my understanding --

THE CLERK: Do you want me to run any of the dockets?

THE COURT: We can pull the docket sheets and look. Let's check with --

THE CLERK: Which one do we want?

THE COURT: Let's try --

MR. LONG: The Alcarez case was dismissed without prejudice.

THE CLERK: 17-5017.

MR. LONG: As was the House case, as was the Harris case, the initial Carlyle case, the Pullos case.

THE CLERK: All right. The first one, before Judge St. Eve, was dismissed without prejudice without costs pursuant to a stipulation.

THE COURT: All right. Before you look them all up.

MR. LONG: Yeah.

THE COURT: Is that the case with all these other cases?

MR. LONG: It appears to be. And I apologize for misspeaking.

THE COURT: All right. So what is the downside with consolidating these cases, dismissing

all except the one in front of me, the Berg case, with prejudice, and then teeing up the issues about intervention and fees if there is any role for me to play -- which your position is I don't have a role on that.

MR. LONG: Correct.

THE COURT: But if there is any role for me to play being done in the Berg case, then administratively, at least, we've isolated the issue to one case. We've taken these -- even the chance of having a refiling in front of a different judge away from -- that's forum shopping. There's no point doing that.

MR. LONG: Sure.

THE COURT: Stay in front of one judge -- we're all the same -- and just deal with this issue head on in one court.

MR. LONG: Right. So apart from the threshold jurisdictional issue, I don't know that there's any reason not -- there would not be any reason in the normal course to consolidate these cases.

THE COURT: All right. The motion to consolidate then -- which -- and, actually, even though the intervenor is not --

MR. LONG: If I might, I mean, what we were hoping to do is perhaps before your Honor granted that motion --

THE COURT: Yeah.

MR. LONG: -- perhaps engage in a truncated expedited briefing, series of briefs regarding the threshold jurisdictional issues.

THE COURT: That's fine. I won't -- I'll hold off on the consolidation. My intent, though, is -- so you know what I want to do -- is to -- whether by motion -- my own action --

I'll let you finish.

(Counsel conferring.)

THE COURT: All right. Did you want to say something?

MR. LONG: I do.

MR. LUBIN: I was confused, and I -- I thought we don't have a problem with not having consolidation, and the threshold jurisdiction issue was just to the intervention. But am I --

MR. LONG: It's to both.

MR. LUBIN: It's to both?

MR. LONG: Yeah, it's to both.

THE COURT: All right. Well, my intent absent hearing something in the briefing that makes it -- makes me change my mind would be to consolidate, whether it's with an intervenor who is not yet in the case's motion or on my own initiative, consolidate all of these cases -- or transfer them, basically, to me. It's not even consolidating them. It's transferring them to me.

Upon their transfer to me, I'm going to dismiss all the ones that were without prejudice, make them with-prejudice dismissals, and allow the Berg case to remain so that the intervention issue can be resolved through the Berg case.

If they aren't allowed to intervene and there's no role for me to play in review of these fee petitions, simply dismiss your case. You've noted to the Court you're going to pay fees -- or you're going to receive fees; you're going to pay fees -- and dismiss this case with prejudice, which is what you're -- you have that on the docket already --

MR. LONG: Correct.

THE COURT: -- to do it, at least as to the individuals.

MR. LONG: That is -- that is --

THE COURT: The class claims are without prejudice. If somebody in a class wanted to come in later and, you know, refile or do something else, if they had a -- any cause of action, they're free to do so. You're not settling this on behalf of the class because you're not giving notice to the class.

MR. LONG: Correct.

THE COURT: But I'm just trying to clean it up administratively.

MR. LONG: Sure.

THE COURT: And so that's what I'd like to do.

But I will hold off on that until you've had a chance to do some briefing on that plan if there's an objection to it and also the straight-up issue of whether Mr. Frank should be allowed to intervene in this case.

So how much time do you want to respond to his motion and also discuss the transfer issue and my

plan to dismiss the individual claims with prejudice if it's transferred before me?

(Counsel conferring.)

MR. LONG: So, your Honor, what I was suggesting was that we actually try to sort of see if we can make this more expeditious for the Court and, as an initial matter, address the threshold jurisdictional issue. Assuming that your Honor agrees with the parties' position on that, then I think at that point it would be appropriate for you to simply enter the closing order that we submitted back on September 15th, and that would be the end of this.

THE COURT: What is the threshold jurisdictional issue you're going to raise?

MR. LONG: The case is dismissed. The only thing that the Court had left before it was the possibility of determining the mootness fee claim if the parties were unable to resolve that.

We notified the Court September 15th that we'd resolved that claim and asked the Court to dismiss the case -- close the case administratively for all purposes.

Our position is -- and if your Honor had entered that order, then there would be absolutely no way that the Court would have the authority to grant a motion to intervene in that action.

THE COURT: Right. But I didn't because, frankly, I saw that order and was concerned about it.

I -- you know, I've read the -- thanks.

(Document tendered to the Court.)

THE CLERK: I don't know if that matters.

THE COURT: Oh. This is the local rule on transferring cases for reassignment.

But I keep up with the Seventh Circuit. And I've read *Walgreens*, and I've read the *Subway* case. And then I saw this. Although you correctly point out this is not a -- my -- you're not asking for a judicial imprimatur or judicial approval of fees, you nonetheless brought the issue before me in case you couldn't work it out.

MR. LONG: Absolutely.

THE COURT: You're saying now you worked it out.

MR. LONG: We did.

THE COURT: Okay. Well, with courts of limited jurisdiction, you can try and convince me I have no jurisdiction. You can -- I'll allow you in a limited way to convince me otherwise.

Because if I have jurisdiction, then I can confront the issue of intervention. If I have no jurisdiction, then you're correct. The intervention -- intervention motion falls by the wayside.

MR. BEDNARZ: Our position, your Honor, is that jurisdiction was retained with regard to a fee award. And this is all we're opposing. We're opposing the award of fees here. And we would -- if fees have already been paid, we think that they ought to be disgorged.

And so we are standing on the very same jurisdiction that was expressly retained by the plaintiffs.

THE COURT: Well, they're going to address it. I think you need to address it with more particularity.

Your complaint asks for also an injunction to prevent them from ever filing suits in any cases where Mr. Frank is a shareholder, which was unusual. But that's for another day.

So how much time do you want to file something relating to the jurisdiction issues?

MR. LONG: Could we have two weeks?

THE COURT: That's fine. Give you a date.

THE CLERK: Two weeks from today is October the 18th.

THE COURT: And how much time do you want to respond?

MR. BEDNARZ: Ten days ought to be enough. I think that lands on a Friday? If it lands on a Friday.

THE CLERK: The 27th.

MR. BEDNARZ: Friday the 27th is fine.

THE COURT: All right. I'll give you a brief reply, seven days.

MR. LONG: Thanks. Thank you, your Honor.

THE CLERK: That will be November 3rd.

THE COURT: All right. And I'll set you for a status in mid-November. Actually, I won't be here mid-November.

THE CLERK: The week of the 20th?

THE COURT: Yeah, the week of the 20th to give you a ruling on that preliminary issue.

THE CLERK: How is the 21st?

MR. BEDNARZ: Is that the week before Thanksgiving?

THE CLERK: Well, it's the week of Thanksgiving.

MR. BEDNARZ: Okay.

THE CLERK: Is that a bad week? Do you want to do the following week?

MR. BEDNARZ: No problem.

MR. LONG: Is it possible to do it the next week?

THE CLERK: The next week? Sure. Do you want to do the 27th?

MR. LONG: If it's all right with everyone else.

THE COURT: It's fine by me.

How does that work for Mr. Frank's counsel?

MR. BEDNARZ: That works, your Honor.

THE COURT: All right. So November 27th to deal with this preliminary jurisdiction issue. And then if I find that I have jurisdiction to do anything in this case, we'll decide whether or not intervention is permissible. I think that's probably the most logical way to proceed on this.

Okay. So that will be what we'll do. We have a briefing schedule set, and you can tell me what you think in those briefs.

MR. LONG: Great.

THE COURT: All right. Anything else we need to discuss?

MR. LONG: I don't believe so, your Honor.

MR. PORCELLI: No.

MR. BEDNARZ: No, your Honor.

THE COURT: Thank you all.

MR. LUBIN: I don't know how you get all my interesting cases. The last few weeks, every time I file a case, it ends up in front of you.

(Off the record.)

(Concluded at 9:37 a.m.)

* * * * *

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ LAURA R. RENKE *July 25, 2024*
LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter

UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JORGE ALCAREZ, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. AKORN, INC., KENNETH S. ABRAMOWITZ, ADRIENNE L. GRAVES, RONALD M. JOHNSON, STEVEN J. MEYER, TERRY A. RAPPUHN, BRIAN TAMBI, and ALAN WEINSTEIN, Defendants.	Case No. 1:17-cv-05017 CLASS ACTION Hon. Thomas M. Durkin
THEORDORE H. FRANK, Intervenor.	

INTERVENOR THEODORE H. FRANK'S NOTICE OF APPEAL

Notice is hereby given that Intervenor Theodore H. Frank appeals to the United States Court

of Appeals for the Seventh Circuit from the Court's Order entered on May 24, 2018 (Dkt. 55), which denied as moot Frank's Renewed Motion to Intervene (filed in No. 17-cv-5016, Dkt. 82), and all orders that merge therein.

Dated: June 1, 2018 /s/ M. Frank Bednarz

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Certificate of Service

The undersigned certifies he electronically filed the foregoing Notice via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing.

Dated: June 1, 2018 /s/ M. Frank Bednarz

UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

SEAN HARRIS, On Behalf of Himself and All Others Similarly Situated, Plaintiff, v. AKORN, INC., JOHN N. KAPOOR, RONALD M. JOHNSON, STEVEN J. MEYER, BRIAN TAMBI, ALAN WEINSTEIN, KENNETH S. ABRAMOWITZ, ADRIENNE L. GRAVES, and TERRY A. RAPPUHN; Defendants.	Case No. 1:17-cv-05021 CLASS ACTION Hon. Thomas M. Durkin
THEORDORE H. FRANK, Intervenor.	

INTERVENOR THEODORE H. FRANK'S NOTICE OF APPEAL

Notice is hereby given that Intervenor Theodore H. Frank appeals to the United States Court

of Appeals for the Seventh Circuit from the Court's Order entered on May 24, 2018 (Dkt. 56), which denied as moot Frank's Renewed Motion to Intervene (filed in No. 17-cv-5016, Dkt. 82), and all orders that merge therein.

Dated: June 1, 2018 /s/ M. Frank Bednarz

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Dated: June 1, 2018 /s/ M. Frank Bednarz

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 18-2220

JORGE ALCAREZ, individually and on behalf of all others similarly situated,

Plaintiff - Appellee

v.

AKORN, INC., et al.,

Defendants - Appellees

APPEAL OF: THEODORE H. FRANK, Intervenor

No. 18-2221

SEAN HARRIS, On behalf of himself and all others similarly situated,

Plaintiff - Appellee

v.

AKORN, INC., et al.,

Defendants - Appellees

APPEAL OF: THEODORE H. FRANK, Intervenor

No. 18-2225

ROBERT BERG, Individually and on behalf of all others similarly situated,

Plaintiff - Appellee

v.

AKORN, INC., et. al.,

Defendants - Appellees

APPEAL OF: THEODORE H. FRANK, Intervenor

On Appeal from the United States District Court for the

Northern District of Illinois, Nos. 1:17-CV-05017; 1:17-CV-05021, and 1:17-CV-05016, Trial Judge Thomas M. Durkin

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Opening Brief of Appellant Theodore H. Frank, With Required Short Appendix

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Statutes, Regulations, and Rules

Federal Rule of Civil Procedure 24. Intervention.

(a) Intervention of Right.

On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

Jurisdictional Statement

The district court has jurisdiction under, *inter alia*, 28 U.S.C. § 1331 and Section 27 of the Exchange Act, 15 U.S.C. § 78aa, because plaintiffs-appellees filed

suits alleging claims under Sections 14(a), and 20(a) of the Exchange Act, 15 U.S.C. §§ 78n(a) and 78t(a), and the rules and regulations promulgated thereunder, including SEC Rule 14a-9, 17 C.F.R. § 240.14a-9. A93; A111; A129.[1]

At a May 2, 2018, hearing the district court indicated that it would deny appellant Theodore H. Frank's Motion to Intervene with respect to the *Berg*, *Harris*, and *Alcarez* cases. That same day, the district court issued a minute order in the *Berg* action denying Frank's motion (A41), and filed similar minute orders in the *Alcarez* and *Harris* cases on May 24, 2018. A42; A43. Frank filed notices of appeal in all three underlying actions with the district court on June 1, 2018. A261; A263; A265. Whether the court's denials of intervention are deemed to have occurred on May 2 or May 24, Frank's notices of appeal are timely under Fed. R. App. Proc. 4(a)(1)(A).

An order denying intervention is final and appealable. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 513 (1950); *B.H. by Pierce v. Murphy*, 984 F.2d 196, 199 (7th Cir. 1993). This court thus has jurisdiction under 28 U.S.C. § 1291.

Though the district court denied intervention on the grounds that the dispute was moot, this Court has appellate jurisdiction to review a final district-court decision finding a lack of jurisdiction. *See, e.g., Smith v. Greystone Alliance, LLC*, 772 F.3d 448, 449 (7th Cir. 2014).

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[1] "Axyz" refers to page xyz of appellants' Appendix.

Statement of the Issues

1. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chapman v. First Index, Inc.*, 796 F.3d 783, 786 (7th Cir. 2015) (*quoting Knox v. Serv. Employees Intern. Union, Loc. 1000*, 567 U.S. 298, 307 (2012)). Did the district court err as a matter of law in holding that Frank's motion to intervene was moot on the basis that the court *intended* to deny the merits of Frank's intervenor complaint requesting injunctive relief even though it was *possible* to award such injunctive relief?

2. Generously reading the district court's denial of intervention as a grant of intervention and a denial of the requested injunctive relief on the merits, did the district court err as a matter of law by holding that the district court would not enjoin appellees and their counsel from filing similar suits when Frank's intervenor complaint requested merely that the district court enjoin plaintiffs and their counsel from receiving attorneys' fees in other cases brought under the Exchange Act without court approval?

3. "The type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016). When class-action attorneys show a pattern and practice of continuing the "racket" criticized by *Walgreen* while evading court review, are putative class members permitted to intervene to challenge class-action attorneys'

circumvention of *Walgreen* and to enjoin those counsel from continuing to circumvent *Walgreen*?

Statement of the Case

The relevant facts are drawn from the record and Frank's well-pleaded proposed intervenor complaint. In analyzing a motion to intervene, the district court "must accept as true the non-conclusory allegations of the motion and cross-complaint." *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983). The statement of the case thus construes facts in the light most favorable to appellant Frank.

A. Background: there is an industry of plaintiffs' attorneys, including the appellees in this case, who file strike suits in an overwhelming majority of mergers.

"In merger litigation the terms 'strike suit' and 'deal litigation' refer disapprovingly to cases in which a large public company announces an agreement that requires shareholder approval to acquire another large company, and a suit, often a class action, is filed on behalf of shareholders of one of the companies for the sole purpose of obtaining fees for the plaintiffs' counsel." *Walgreen*, 832 F.3d at 721. Plaintiffs can extract profitable settlements at the expense of shareholders regardless of the merit of the suit. "Because the litigation threatens the consummation of the deal if not resolved quickly and because corporations may view the settlement amount as a drop in the bucket compared to the overall transaction amount, defendants are motivated to settle even meritless claims." *Browning*

Jeffries, The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals, 11 BERKELEY L.J. 55, 58 (2014). Crafty class counsel created a cottage industry: "In 2012, 93% of deals over $100 million and 96% of deals over $500 million were challenged in shareholder litigation." Jill E. Fisch, Sean J. Griffith & Steven M. Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 558-59 (2015) ("Fisch"). In 2013, over 97.5% of deals over $100 million were challenged. *Id.*

Settlements of these actions rarely provide monetary relief for the class members but instead, usually consist solely of supplemental disclosures to the merger proxy statement filed with the Securities and Exchange Commission ("SEC"). *See* Fisch at 559. The disclosure-only settlements "do not appear to affect shareholder voting in any way." *Id.* at 561.

Many of these actions were filed in the Delaware Court of Chancery. *Walgreen*, 832 F.3d at 725. The dramatic increase in deal litigation was temporarily stymied in 2016 by the Delaware Court of Chancery's decision in *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 894 (Del. Ch. 2016), which drastically changed Delaware's approach to settlement in deal litigation. *Trulia* held that these kind of disclosure-only settlements would be subject to "continued disfavor in the future unless the supplemental disclosures address a *plainly material misrepresentation or omission*." *Id.* at 898 (emphasis added).

The Seventh Circuit adopted *Trulia's* reasoning in

Walgreen, and held that these kind of class action strike suits—that yield fees for class counsel and immaterial supplemental disclosures for the class—are "no better than a racket." 823 F.3d at 724. *Walgreen* and *Trulia* had a temporarily beneficial effect for shareholders by slightly slowing the pace of strike suits. Only 73% of mergers worth over $100 million faced strike suits in 2016. Matthew D. Cain, Jill E. Fisch, Steven M. Davidoff Solomon & Randall S. Thomas, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 608 (2018) ("Cain"). Unfortunately, such complaints rebounded to 85% in 2017. *Id.*; Cadwalader, Client & Friends Memo, *2017 Year in Review: Corporate Governance Litigation & Regulation* (Jan. 9, 2018) at 2-3.[2] The prevalence is likely higher today because plaintiffs have modified their tactics.

Appellees and their counsel have adapted with an end-run around the scrutiny that *Walgreen* demands, by settling for attorneys' fees *without* seeking class release, as happened here. A160-61. Whereas class-action or derivative settlements allow shareholders to object to the settlement, class certification, or the payment of attorneys' fees, like a shareholder did in *Walgreen*, appellees' new racket extorts payment without class notice or seeking or receiving court approval under Rule 23. "These cases appear to indicate that plaintiffs' counsel may be extracting rents by seeking low cost payments to 'go away.'" Cain, 71 VAND. L. REV. at 632.

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[2] Available at https://www.cadwalader.com/resources/clients-friendsmemos/2017-year-in-review-corporate-governance-litigation--regulation, archived at http://archive.is/MMg4S.

Appellees' counsel have been on the forefront of this shift. Counsel for appellee Alcarez—Levi & Korsinsky LLP—stipulated the first mootness fee payment in the Delaware Chancery after *Trulia*. Anthony Rickey, *Absent Reform, Little Relieve in Sight From Chronic "Merger Tax" Class-Action Litigation*, Legal Backgrounder Vol. 32, No. 22, Washington Legal Foundation (Aug. 25, 2017) ("Rickey"), at 4, available online at: http://www.wlf.org/upload/legalstudies/legalbackgrounder/082517LB_Rickey.pdf. Counsel for appellees Berg and Harris—Rigrodsky & Long, P.A. and Faruqi & Faruqi, LLP—were involved in the second and third post-*Trulia* mootness stipulations in Delaware, respectively. *Id.* Delaware reacted swiftly to this new tactic by signaling that they would slash contested mootness fee applications put before them. *In re Xoom Corp. Stockholder Litig.*, CV 11263-VCG, 2016 WL 4146425, at *5 (Del. Ch. Aug. 4, 2016) (awarding only $50,000 of requested $275,000 mootness fee payment to several plaintiffs' firms, including Rigrodsky & Long, P.A., counsel for appellee Berg, because of low value of supplemental disclosures). The Delaware Chancery recognized that even though their procedure allows for the payment of mootness fees, that these fees should be modest when no material misstatement was corrected. "Not even great counsel can wring significant stockholder value from litigation over an essentially loyal and careful sales process." *Id.*

Appellees and appellees' counsel have settled other federal strike suits for six- figure "mootness fees," without the safeguards of settlement approval under Rules 23 or 23.1, or, indeed, any court hearing, much less

notice to the class. *See* A216-17; Rickey at 4.

Prior to 2014, virtually no strike suits in Delaware or in federal courts were resolved through mootness fees, "but in the wake of *Trulia* these cases became more significant. They comprised 14% of cases in 2015 and rose to 75% of cases by 2017." Cain, 71 VAND. L. REV. at 623. While "mootness fees" have no basis under federal law, strike suits dismissed for mootness fees have soared in the wake of *Trulia* and *Xoom*. In 2016, 39% of all merger strike suits were filed in federal courts, which tied the historic record of such filings. Cain, 71 VAND. L. REV. at 620. But in the first ten months of 2017, an astonishing 87% of all strike suits filings were made in federal court, more than doubling the previous record. Similarly, the rate of mootness fee dismissals has increased from 0% in 2013 to 75% in the first ten months of 2017. *Id.* at 622.

This sea change of tactics—from state courts to federal and from class-action settlement to stipulated dismissals for mootness fees—has scarcely been scrutinized by district courts, which routinely grant stipulated dismissals. Since January 1, 2018, appellees' counsel have filed at least 122 additional strike suits. A267-72. Undisclosed payments to appellees' counsel at the expense of shareholders likely totals in the millions; although appellees' counsel have lately declined to disclose the size of stipulated mootness fees, suits against numerous merging companies have been dismissed following supplemental disclosures, and the average disclosed mootness payment in 2017 was $265,000. Cain, 71 VAND. L. REV. at 625; A233-34 (describing three mootness dismissals in 2017 with

disclosed fees to Rigrodsky & Long, P.A. and Levi & Korsinsky, LLP ranging from $265,000 to $350,000); A267-72.

This appeal relates to unnamed class members' rights and recourse in shareholder strike suits where class counsel seeks (and continues repeatedly to seek) extortionate fees in circumvention of *Walgreen*. *See* A175 (motion to intervene). To Frank's knowledge, no federal appellate court has considered the propriety of strike suits resolved through so-called mootness fees.

B. Plaintiffs file six strike suits against Akorn.

On May 22, 2017, Akorn, Inc., filed a preliminary definitive proxy statement with the SEC recommending that shareholders approve a proposed merger with German pharmaceutical company Fresenius Kabi AG. The preliminary proxy and the non-preliminary definitive proxy filed on June 20, 2017, were prepared by Akorn's outside counsel Cravath, Swaine & Moore LLP, and each described the $4.3 billion transaction. *See* Akorn, Inc. Preliminary Proxy (May 22, 2017) at A-55, available online at: https://www.sec.gov/Archives/edgar/data/3116/000130817917000183/lakrx2017_pre14a.htm. Like all such proxies, it was rife with detail; the definitive proxy totaled 82 pages with another 153 pages of exhibits. *Id.*; Dkt. 57-3.[3]

From June 2 to 22, 2017, six plaintiffs filed actions

[3] Unless otherwise stated, "Dkt." refers to docket entries in the low-numbered *Berg* action below, No. 17-cv-05016 (N.D. Ill.).

alleging that these proxy statements were "false and misleading"—*not* because anything said in those pages was untrue, but rather based on a "tell me more" theory that Akorn's failure to disclose still more subsidiary details violates Sections 14(a) and 20(a) of the Exchange Act. A94; A112; A130.

Plaintiff-appellee Berg was the first to file in Case No. 1:17-cv-05016, represented by Rigrodsky & Long, P.A. and RM Law, P.C. (collectively "Rigrodsky"). A110. Berg individually filed 28 strike suits over five months between May 16 and October 17, 2017, each time represented by Rigrodsky. A229. Though 15 U.S.C. § 78u–4(a)(2)(v) requires securities plaintiffs to "identify any other action under this chapter, *filed* during the 3-year period . . . in which the plaintiff has sought to serve as a representative party on behalf of a class" (emphasis added), Berg declared only that he "has not *moved* to serve" as a representative. A230 (emphasis added). The PSLRA presumptively prohibits plaintiffs from leading more than five securities actions within a 3-year period. *See* 15 U.S.C. § 78u–4(a)(3)(B)(vi). The vast majority of Rigrodsky's filings are on behalf of serial plaintiffs who have filed many more than five strike suits since 2016. Rigrodky has singlehandedly filed 72 strike suits in federal court in the first six months of 2018. *See* A267-72 (suits on behalf of plaintiffs Assad, Assad Trust, Bartholomew, Buckingham, Fallness, Franchi, Gusinsky Rev. Trust, Jaso, Kent, Kunkel, Leon Family Trust, Myhre, Parshall, Paskowitz, Pratt, Raatz, Rosenblatt, Sbriglio, Scarantino, Sciabacucchi, Truong, Vana, and Witmer). Over half of these suits, 39, were brought by just 3 plaintiffs: Franchi, Rosenblatt, and Scarantino.

Plaintiff-appellee Alcarez was the second to file suit against Akorn on June 7, 2017, Case No. 1:17-cv-05017, represented by Levi & Korsinsky, LLP ("Levi"). A128. (Note that the defendants in these suits overlap extensively with those filed by Rigrodsky; merging public companies often attract multiple strike suits brought by different law firms.) In the first half of 2018, Levi has filed an additional 28 strike suits in federal courts. *See* A267-72 (suits on behalf of Aiken, Armas, Barmack, Doller, Einhorn, Freeze, Garcia, Goldstein, Gonzalez, Lawson, Madry, Martinez, Mccauley, Miramond, Mohr, Patel, Pham, Romanko, Rosenfeld, Sharfstein, Stein, Stein, Stephens, Tas, Vonsalzen, Weinstock, White, and *Williams v. DST Systems, Inc.*).

Plaintiff-appellee Harris filed on June 14, 2017 in Case No. 1:17-cv-05021, represented by Faruqi & Faruqi, LLP ("Faruqi"). A148. In the first half of 2018, Faruqi has filed twenty-two strike suits in federal courts. *See* A267-72 (suits on behalf of Byrne, Carter, Fineberg, Gordon, Johnson, Kendall, Newman, Pollack, Ryan, Sanderson, Scott, Smith, Stanfield, Stein, West, and *Williams v. CSRA, Inc.*).

The remaining suits were brought by non-appellee plaintiffs: *House* (17-cv-05018); *Carlyle* (17-cv-05022); and *Pullos* (17-cv-05026). Motions to intervene in these three actions remains pending before the district court. A36.

Plaintiffs-appellees' complaints were brought on behalf of a class of stockholders of Akorn. A93; A111; A129.

Five of the plaintiffs originally filed in the Middle District of Louisiana, but a district judge granted Akorn's motion for change of venue transferring all of the suits to the Northern District of Illinois on July 5. Dkt. 40. Upon transfer, each suit was assigned to a different judge as none of the plaintiffs informed the courts of the related pending actions.

On July 10, 2017, Akorn filed a Form 8-K with the SEC, which contained supplemental disclosures agreed by the six plaintiffs. A187. Akorn prefaced these disclosures by denying that they were material:

> Akorn believes that the claims asserted in the Federal Merger Litigation are without merit and no supplemental disclosure is required under applicable law. . . . Akorn specifically denies all allegations in the Federal Merger Litigation that any additional disclosure was or is required.

Id.

As Frank pleaded, the supplemental disclosures *were* immaterial. A187-95. For example, the supplement included a hypothetical accounting reconciliation of previously-provided financial projections (A191), but courts find such reconciliation immaterial. *See Assad v. DigitalGlobe, Inc.*, No. 17-cv-1097, 2017 WL 3129700 (D. Colo. Jul. 21, 2017); *Bushansky v. Remy Intl., Inc.*, 262 F. Supp. 3d 742, 748 (S.D. Ind. 2017) (GAAP reconciliation "not plainly material"; rejecting proposed settlement under *Walgreen*). The SEC has confirmed that disclosure of non-GAAP projections is not misleading to

shareholders when "the financial measures are included in forecasts provided to the financial advisor for the purpose of rendering an opinion that is materially related to the business combination transaction." Securities Exchange Commission Discl. 5620589, Question 101.01 (Oct. 17, 2017), available online at: https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm. The financial projections appellees complained about were precisely this sort of permissible background information. A194-95.

C. Over 99% of shares voted favor the merger; plaintiffs dismiss their complaints for "mootness fees"; Akorn pays $322,500 in attorneys' fees.

None of the actions ended in a class-action settlement. Instead, on July 14, 2017, all six plaintiffs moved to dismiss their complaints without prejudice, claiming that the supplement had mooted every complaint. *E.g.*, A148.

Meanwhile, Akorn shareholders voted on the proposed transaction at a special meeting of its shareholders at its Lake Forest, Illinois headquarters on July 19, 2017. The votes in favor of the transaction totaled 104,651,745, with only about ***0.1%*** of that amount—104,914 shares—voted in opposition. A196. Over 99% of the votes favored the transaction, and the supplemental disclosures made no material difference in the vote. *Id.*; *cf. also Walgreen*, 832 F.3d at 723.

On September 15, 2017, all six plaintiffs filed stipulations and proposed orders indicating that

"Defendants have agreed to provide Plaintiffs with a single payment of $322,500 in attorneys' fees and expenses to resolve any and all Fee Claims, and thus there are no Fee Claims to be adjudicated by the Court." A161. The plaintiffs cited no basis for this fee award. Appellee Berg subsequently termed this payment as a "mootness fee" award. Dkt. 78; A5. Akorn has already paid the agreed amount, which is held in escrow by a non-appellee plaintiff. Dkt. 80 at 2; A22.

D. Appellant Frank moves to intervene in all actions.

Appellant Frank is an Akorn shareholder within the putative class of shareholders represented by the plaintiffs-appellees, and thus owed a fiduciary duty by appellees and their counsel. A196.

Frank, an attorney, is represented *pro bono* by the non-profit project he directs, the Competitive Enterprise Institute's Center for Class Action Fairness, which successfully argued *Walgreen* and several other landmark decisions protecting the rights of class members and shareholders from abusive class-action settlements and practices. *See generally Pearson v. Target Corp.*, 893 F.3d 980, 982 (7th Cir. 2018).

Within days of plaintiffs' filing of the fee stipulation, Frank, as a shareholder and putative class member aggrieved by the abusive class action and settlement, moved to intervene in each of the six actions filed by all six plaintiffs because the plaintiffs' settlement for payment of fees constitutes an end-run around *Walgreen* and this Court's guidance that a proposed

"class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end." Dkt. 57; Dkt. 57-1 at 1 (quoting *Walgreen*, 832 F.3d at 724). In order to end the racket, Frank's proposed intervenor complaint sought (1) an accounting of attorneys' fees received by plaintiffs, (2) disgorgement of any such unjust enrichment, and (3) a permanent injunction "prohibiting Settling Counsel from accepting payment for dismissal of class action complaints filed under the Exchange Act without first obtaining court adjudication of their entitlement to any requested fee award." Dkt. 57-1 at 20-21; *see also* A200.

As a diversified shareholder, Frank devotes a portion of his investment portfolio to shares in companies reasonably predicted to be merger targets because Frank believes those companies to be undervalued or as possible arbitrage. A257. As of March 27, 2018, Frank's portfolio included four companies where appellees' counsel had filed similar strike suits. *Id.* Based on Frank's investment strategy, Frank alleged that unless appellees and their counsel are enjoined from collecting mootness fees without court approval in future strike suits, it is near-certain Frank will be the shareholder of corporations extorted by appellees and their counsel. A257. Since January 1, 2018, appellees' counsel have filed at least 122 additional strike suits, including several suits against companies where Frank is or was a shareholder. See A267-72. For example, appellee Berg's counsel Rigrodsky has filed suits against at least twenty-two other corporations where Frank is or was a shareholder. A231 (listing eighteen); A257 (listing four more). Appellee Alcarez's attorney Levi has filed strike suits against at least nine other publicly-traded

corporations where Frank is or was a shareholder. A231-32. And appellee Harris's attorney Faruqi has filed strike suits against at least eight other publicly-traded corporations where Frank is or was a shareholder. A232 (listing seven); A257 (*Smith v. Pinnacle Entertainment*).

The court declined to rule on Frank's motion to consolidate the cases (Dkt. 75), so briefing proceeded in the lead action *Berg* alone.

Plaintiff-appellee Berg filed an opposition to Frank's motion that was "reviewed and approved" by the other five plaintiffs. Dkt. 78 at 1 n.1. The court denied Frank's motion without prejudice. A163-73. Judge Durkin rejected plaintiff Berg's primary argument that no jurisdiction existed due to the July 14 dismissal without prejudice, *id.* at A165, but the court found that Frank had not explained his "interest" in the case under Rule 24. A168. Thus, Frank filed a renewed motion on December 8, 2017, and a Second Amended Proposed Complaint, which extensively discussed his interest: (1) as a putative class member owed a fiduciary duty from appellees' counsel, which duty was breached, and (2) as a diversified shareholder of companies, many of which are extorted by plaintiffs-appellees and their counsel. A217; A178.

E. Appellees belatedly disclaim entitlement to attorneys' fees.

As Frank's motions to intervene were pending, the Akorn transaction collapsed. On February 27, 2018, Fresenius announced it was investigating alleged FDA regulatory violations by Akorn, unrelated to plaintiffs'

underlying allegations. See A244-45. The stock price fell nearly 40%, showing the value of the premium to shareholders that plaintiffs had challenged. Bryce Elder, *Stocks to Watch*, FINANCIAL TIMES (Feb, 27, 2018). On March 13, 2018, before Fresenius officially called off the merger, Plaintiff Berg filed a motion seeking to withdraw from the case and forgo any entitlement to the $322,500 in attorneys' fees. A238. Frank opposed Berg's motion on March 18, noting Berg's offer did not resolve Frank's request for injunctive relief. A249.

F. Judge Durkin holds status hearings regarding appellees' disclaimer of fees.

On March 21, 2018, Judge Durkin held a status call on the Berg matter, the only Akorn action pending before him, to discuss whether Berg's disclaimer of attorneys' fees would moot the motion to intervene as to Berg. A11-12. Judge Durkin ruled that he would not grant injunctive relief: "I am not going to enjoin plaintiff or plaintiff's counsel from filing suits, and I'm not going to interfere with those suits. If you have a complaint about their conduct in those suits, you have the forum to do it. File a motion to intervene in those cases." A11; A18 ("I'm not going to be granting prospective relief to prevent you or your client from filing similar suits in front of other judges.").

Judge Durkin reasoned: "[I]t may be that you can develop a history if there are dismissals in those cases when you seek to intervene. You may be able to develop a track record that you can bring to the attention of a judge who has that case." A12. But, the court ruled, appellees' counsel would "not evade review if [Frank]

bring[s] an intervention action in front of another judge. They may do as they did here, see to disclaim fees." A13. "And if as occurred here with [plaintiffs' counsel], if the attorneys disclaim fees, then you win because the point of your suit is to prevent a dissipation of assets for payment of fees you believe are not necessary to be paid and not properly paid." A14.

Judge Durkin explained that he was limited to the *Berg* action: "I should have consolidated the cases back when you -- last fall and taken the other five cases that were dismissed without prejudice, put them in front of me, and then I would turn them all into with-prejudice dismissals and order the money back to the defendant and just say we're done." A11-12. Judge Durkin did not discuss the merits of Frank's motion to intervene but reasoned that the underlying relief requested in Frank's intervenor complaint (disgorgment and injunctive relief) would be moot because of plaintiffs' disclaimer of fees *and* because Judge Durkin would not award injunctive relief:

> I can't stop them, I don't believe, from disclaiming any right to payment of fees and expenses and withdrawing an opposition -- and that may moot -- given the fact I'm not going to enter injunctive relief, that may moot your request in this case, in which case I'd simply dismiss this case with prejudice, the one before me.

A12.

On April 11, 2018, Judge Durkin held another

hearing in *Berg* where appellees' counsel confirmed that three of the six plaintiffs were disclaiming fees. A22. Judge Durkin reaffirmed his view that he was "not going to prospectively bar [appellees' counsel] from filing suits like this." A25. "You've made your record [for appeal], and I'll make mine," remarked Judge Durkin. *Id.* (emphasis added). (Notwithstanding this statement, the court did not create a record, except for remarking "if you believe that Mr. Berg is filing an improper lawsuit to . . . seek relief from whatever judge has that case," A25, and never gave oral or written reasons for its conclusion that injunctive relief was unavailable.) Judge Durkin confirmed that he would have the other five actions reassigned to him and set another status with all parties. A23; Dkt. 99.

On May 2, 2018, Judge Durkin held a status conference relating to all six actions at which counsel for three plaintiffs—Berg, Alcarez, and Harris, the appellees in these consolidated appeals—indicated that they disclaimed their entitlement to attorneys' fees in this matter. A34-35. Counsel for three other plaintiffs indicated that they still seek a share of the $322,500 payment for fees. *Id.* During the conference, the district court asked for Frank's position on the six cases, and Frank's counsel responded that with respect to the non-disclaiming plaintiffs "we should proceed to a decision on whether we can intervene in these three cases." A35. In light of the court's previous decision regarding Frank's request for injunctive relief, where Frank had already objected, Frank counsel responded, "With regard to the other three where fees are being disclaimed, those could be dismissed." A35-36.

G. District court denies Frank's motion to intervene as moot.

After the status conference, the district court entered a minute order that read in its entirety: "Motion to intervene [82] is denied as moot. Plaintiff's motions to withdraw as attorney [86] [87] [89][91] [92][100] are granted. Status hearing held on 5/2/2018." A41. On May 23, 2018, Frank's counsel wrote the district court to clarify the record in preparation for this appeal, *i.e.*, that the district court's denial of intervention as moot applied to all three actions where appellees' counsel disclaimed fees (*Berg*, *Harris*, and *Alcarez*). A259-60. The district court deemed that Frank's motion to intervene had been filed in all six actions, and denied the motion as moot in the three actions where counsel disclaimed fees. A41, A42, A43.

Appellant Frank timely appealed the district court's denial of his motion to intervene in three out of the six strike suits. A261, A263, A265. Frank's identical motion to intervene remains pending in three other actions before the same district court. *See* Nos. 17-cv-05018, 17-cv-05022, and 17-cv-05026.

The appellees here moved to dismiss this appeal on the grounds that Frank's counsel's statement at the May 2 hearing constituted a waiver of any claims against counsel, and on jurisdictional grounds. On August 9, the Court denied the motion to dismiss and directed the parties to address jurisdictional grounds in their briefs.

Summary of the Argument

The underlying litigation consists of six "strike suits" (three brought by plaintiffs-appellees here along with three other plaintiffs) filed in June 2017 purporting to seek an injunction against the then-proposed acquisition of defendant Akorn, Inc. by Fresenius Kabi AG. *See, e.g.*, A93. Strike suits are "cases in which a large public company announces an agreement that requires shareholder approval to acquire another large company, and a suit, often a class action, is filed on behalf of shareholders of one of the companies for the sole purpose of obtaining fees for the plaintiffs' counsel." *Walgreen*, 832 F.3d at 721. Generally, strike suits were quickly settled as class actions with defendants offering to pay attorneys' fees in exchange for dubiously- valuable supplemental filings with the SEC. *Id.* at 725. *Walgreen* cracked down on these attorney-friendly disclosure-only class-action settlements, holding they would be treated with "disfavor" unless the supplemental disclosures "address a plainly material misrepresentation or omission." *Id.*

To circumvent the judicial scrutiny under Rule 23 and *Walgreen*, appellees here did not seek approval of a class-action settlement, but instead, successfully extorted $325,000 in attorneys' fees from Akorn, later styled as a "mootness fee." A161; Dkt. 78. "Mootness fees" are available under Delaware procedure when a strike suit is dismissed as moot and the strike suit was meritorious when filed. *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1123 (Del. Ch. 2011). But "mootness fees" have no basis under federal law: 15 U.S.C. § 78u–4(a)(6) precludes awards of fees in federal securities cases where there is no pecuniary benefit to shareholders. Still, strike suits awarding mootness fees

have soared in federal courts. Cain, 71 VAND. L. REV. at 628. Appellees' counsel have engaged in a prolific practice of filing strike suits, filing 122 in just the first half of 2018. *See* A267-72.

Frank sought to intervene in the Akorn actions to disgorge the ill-gotten gains from plaintiffs and to enjoin plaintiffs and their counsel from receiving attorneys' fees in other cases brought under the Exchange Act without court approval—at least against companies where Frank is a shareholder. A179. The three appellees only agreed to relinquish their entitlement to attorneys' fees in the Akorn transaction after it became clear Akorn would not be acquired as originally planned. A240-41. Appellees argued that their disclaimer of fees rendered Frank's motion to intervene moot. A242. The district court agreed. A41-43. This is wrong. "An offer that the defendant or the judge believes sufficient, but which does not satisfy the plaintiff's demand" does not moot the case. *Smith*, 772 F.3d at 451.

The district court denied intervention, improperly finding mootness because the disclaimer mooted Frank's disgorgement claims *and* because the district court was "not going to" grant the prospective injunctive relief requested in Frank's intervenor complaint. A11. But intervention is not moot "if the court *could* grant [a complainant] relief." *See Aurora Loan Services, Inc. v. Craddieth*, 442 F.3d 1018, 1026 (7th Cir. 2006) (emphasis added). In analyzing a motion to intervene, the district court "must accept as true the non-conclusory allegations of the motion and cross-complaint." *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983). Accepting the allegations in Frank's

intervenor complaint as true, it was possible for the district court to grant prospective injunctive relief. The district court improperly skipped over Frank's motion to intervene and based its decision on its intention to deny the merits of Frank's intervenor complaint. *Aurora*, 442 F.3d at 1026. Even if the district court had properly ruled on the merits of the requested injunctive relief (assuming intervention was granted for that purpose), the district court's finding was based on the erroneous premise that Frank sought to enjoin settling counsel from filing future strike suits, when Frank's proposed injunction merely required court approval for future strike-suit fee awards. This Court should reverse the district court's finding of mootness and confirm his entitlement to intervention.

Standard of Review

"Whether a case is moot is a question of law that we review *de novo*." *Olson v. Brown*, 594 F.3d 577, 580 (7th Cir. 2010). Mixed questions of law and fact are likewise reviewed *de novo*. *Mungo v. Taylor*, 355 F.3d 969, 974 (7th Cir. 2004). This Court reviews a denial of a permanent injunction for abuse of decision, accepting all factual determinations unless they are clearly erroneous. *3M v. Pribyl*, 259 F.3d 587, 597 (7th Cir. 2001). (In analyzing a motion to intervene, however, the district court "must accept as true the non-conclusory allegations of the motion and cross-complaint." *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983).) The district court's decision on the timeliness of a motion to intervene is reviewed for an abuse of discretion, but the other factors are reviewed *de novo*. *Nissei Sangyo America, Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994).

Argument

I. The district court committed legal error in denying Frank's motion to intervene as moot because it was possible for the court to award effectual relief for Frank; appellees' mootness fee racket will repeatedly evade review.

After the appellees disclaimed entitlement to mootness fees from Akorn, the district court denied Frank's motion to intervene as moot in a one-sentence minute order. A41. The district court's conclusory order is wrong as a matter of law. Appellees had not agreed to the injunctive relief Frank had requested. "[A] court must resolve the merits unless the defendant satisfies the plaintiff's demand. An offer that the defendant or the judge believes sufficient, but which does not satisfy the plaintiff's demand, does not justify dismissal." *Smith*, 772 F.3d at 451.

Frank's motion to intervene was not moot because the district court could have granted Frank's request for injunctive relief. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chapman v. First Index, Inc.*, 796 F.3d 783, 786 (7th Cir. 2015) (quoting *Knox v. Serv. Employees Intern. Union, Loc. 1000*, 567 U.S. 298, 307 (2012)). The question of mootness was discussed at a status hearing before the district court where appellee's counsel argued that because they had disclaimed any entitlement to attorneys' fees, Frank's request to disgorge those fees was moot. *See* A12. Frank's intervenor complaint, however, also sought to enjoin

appellees' counsel from obtaining fees in other strike suits without court approval. A200. The district court supposed that because it did not *intend* to grant the injunctive relief either, that intervention may be moot: "given the fact I'm not going to enter injunctive relief, that may moot your request in this case." *See* A12. The district court committed legal error in denying the motion to intervene as "moot" because it was still *possible* to grant effectual injunctive relief, even if the court intended to subsequently deny the merits of Frank's intervenor complaint seeking injunctive relief.

Aurora Loan Services, Inc. v. Craddieth is instructive here. 442 F.3d 1018 (7th Cir. 2006). In *Aurora*, a successful bidder in a foreclosure sale moved to intervene in foreclosure proceedings. 442 F.3d at 1026. The district court vacated the foreclosure judgment, dismissed the action, and denied the bidder's motion to intervene as moot. *Id.* at 1022. The Seventh Circuit reversed, holding that the motion to intervene was not moot because the purpose of the motion was to challenge the district court's dismissal of the foreclosure suit so the foreclosure sale could go through. *Id.* at 1026. The Court held that intervention is not moot "if the court *could* grant relief." *Id.* at 1026 (emphasis added). The Seventh Circuit explained that the district court erred in denying the motion to intervene as moot based on its decision of the *merits* of the intervenors' complaint: "It would be as if the plaintiff moved for a jury trial and the judge, without ruling on the motion, conducted a bench trial, rendered judgment for the defendant, and then dismissed the plaintiff's motion as moot." *Id.* at 1027.

The same is true here. Frank's motion to

intervene was not moot because the court *could* have granted effectual injunctive relief. But the district court improperly skipped past the intervention motion, ruled on the merits of Frank's intervenor's complaint (or at least the merits of permanent injunction), and then denied the intervention as moot. While intervenors must plead an interest protected by the law, they are not required "to establish a meritorious legal claim." *Aurora*, 442 F.3d at 1024. Instead, the district court "must accept as true the non-conclusory allegations of the motion and cross-complaint" *Lake Investors*, 715 F.2d at 1258. "A motion to intervene as a matter of right, moreover, should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief ***under any set of facts*** which could be proved under the complaint." *Id.* (emphasis added); *see also Clark v. Sandusky*, 205 F.2d 915, 918 (7th Cir. 1953) ("The question on a petition to intervene is whether a well-pleaded defense or claim is asserted. Its merits are not be [] determined. The defense or claim is assumed to be true on [a] motion to intervene, at least in the absence of sham, frivolity, and other similar objections."). (Of course, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), modifies the *Conley v. Gibson* "any set of facts" standard to also require plausibility, but there's no suggestion Frank's allegations are implausible.)

Frank plausibly pleaded that appellees' counsel breached their duty to him, and that this breach to Frank may be equitably remedied. This is enough for intervention and enough to sustain his complaint at this stage of the proceedings. "[E]ven if the judge had concluded that the plaintiffs have the better of their dispute with Frank, still the judge should have granted

his motion to intervene." *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 318 (7th Cir. 2012). The district court failed to apply the correct legal standards for a motion to intervene and failed to conduct *any* analysis of whether Frank had sufficiently plead his motion to intervene and complaint.

The court's error was more than just a technicality; it deprived Frank of the development and factual discovery supporting his injunction claims. Frank's intervenor complaint contained a short and plain statement of his claims with plausible factual allegations and nothing more was required. *See* Fed. R. Civ. P. 8; *Twombly*. Whether or not the court was initially inclined to reject Frank's injunction request, it was legal error for the court to judge the merits (and deny intervention on that basis) when Frank's plausibly-plead complaint set forth facts entitling Frank to injunctive relief. Indeed, the parties never briefed and the court never even *addressed* whether Frank had established the elements for a permanent injunction. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). If Frank's motion to intervene had been granted, Frank could have proceeded with discovery into appellees' counsel's practices in support of Frank's injunction claims, or at least briefed a motion to dismiss the injunctive relief. *Stewart Title Guar. Co. v. Cadle Co.*, 74 F.3d 835, 836-37 (7th Cir. 1996).

Finally, assuming *arguendo* that the motion to intervene was moot, the district court further erred when it found that appellees' counsel's prolific practice of extorting fees in exchange for dismissal of strike suits would not "evade review." A13. The mootness doctrine

provides an exception for cases that are "capable of repetition, yet evading review" where "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party will be subjected to the same action again." *Protestant Memorial Medical Center, Inc. v. Maram*, 471 F.3d 724, 730 (7th Cir. 2006). Frank's motion would not be moot because "the challenged situation is likely to recur" and "would be subjected to the same adversity." *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000).

Here, repetition in this case is a certainty. Appellees counsel continue to prolifically carpet-bomb strike suits against merging companies. Counsel for the three appellees filed 122 different strike suits across the country in the first six months of 2018. A267-72. In fact, appellees' counsel has filed suit against nearly every merging companies which Frank declared he is or was a shareholder of—23 companies, including Akorn. A231 and A257. Appellees appear to have successfully extracted undisclosed fees in exchange for dismissal of several of those suits.[4] Because Frank's investment

[4] *Smith v. Pinnacle Entertainment, Inc.*, No. 18cv314, Dkt. 6 (D. Nev. Apr. 4, 2018) (dismissing case but retaining jurisdiction for mootness fee application) and *Franchi v. Pinnacle Entertainment, Inc.* et al, No. 18cv415, Dkt. 2 (D. Nev. Apr. 4, 2018) (dismissal filed by counsel for appellee Berg); *Gordon v. Care Capital Properties, Inc. et al*, No. 17cv859, Dkt. 15 (D. Del. Feb. 14, 2018) (agreement to pay undisclosed attorneys' fees to several plaintiffs represented by counsel for all three appellees); *Berg v. Panera Bread Co. et al*, No. 17cv1631, Dkt. 18 (notice of agreement to pay undisclosed amount of attorneys' fees to appellee Berg) (E.D. Mo. Feb. 8, 2018); *Parshall v. CU Bancorp et al*, No. 17cv4303, Dkt. 27 (agreement to pay undisclosed attorneys' fees to counsel for appellee Berg) (C.D. Cal. Dec. 29,

strategy includes maintaining a percentage of merging companies, A257, Frank will most certainly fall victim to appellees' counsel's extortionate fee practice again and again.

At the status hearing, the district court found that appellees' counsel would "not evade review" because Frank could "bring[s] an intervention action in front of another judge." A13. It would be highly impractical and futile for Frank to intervene in all of appellees' counsel's future strike suits for several reasons. *First,* because appellees are receiving fees in exchange for dismissing these actions, Frank does not receive notice of these actions as a class member normally would. *See* Fed. R. Civ. P. 23(c)(2).[5] Instead, Frank would have to scour

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2017); *Jackson v. WGL Holdings Inc. et al*, No. 17cv0530, Dkt. 13 (D.D.C. Dec. 13, 2017) (agreement to pay $240,000 attorneys' fees to two plaintiffs represented by counsel for appellees Berg and Alcarez); *Stern v. Atwood Oceanics, Inc. et al*, No. 17cv1942, Dkt. 9 (S.D. Tex. Nov. 21, 2017) (agreement to pay undisclosed attorneys' fees to plaintiffs represented by counsel for all three appellees).

[5] Plaintiffs are required to publish notice of a PSLRA action in a "widely circulated national business-oriented publication," 15 U.S.C. § 78u-4(a)(3), and usually opt for a cheaper option, as they did here, with a wire service. Dkt. 85-1. Even assuming that Frank were to happen upon similar future notices, the notice would not identify all pending actions, *see id.,* and Frank would still be required to comb through dockets nationwide. Moreover, the news release in this case was filed *after* the supplemental disclosures were filed and did not disclose that the underlying claims were allegedly moot, nor that the attorneys intended to seek mootness fees; instead, it indicated that lead counsel would be appointed 60 days after the wire release. *Id.* Appellees could proceed in future suits as they did here, pretending that the action would proceed as an ordinary securities action and making unsuspecting class

dockets across the country to determine if a strike suit was filed. *Second,* even if Frank were successful in locating those actions and successfully intervening, nothing would stop settling counsel from moving on to the next strike suit and the process would repeat itself. *Third,* appellees' counsel now appear to be dismissing these actions with prejudice but *without* disclosing to the court appellees' counsel's agreement regarding fees. *See, e.g., Franchi v. Pinnacle Entertainment, Inc.*, No. 18cv415, Dkt. 2 (D. Nev. Apr. 4, 2018) (dismissal with prejudice by counsel for Appellee Long); *Ayzin v. Orbital ATK, Inc.*, No. 17cv1151, No. 3 (E.D. Va. Nov. 27, 2017) (same by counsel for Appellee Alcarez); *Sharpenter v. Gigamon Inc.*, No. 17cv6755, Dkt. 10 (N.D. Cal. Mar. 1, 2018) (dismissal without prejudice by counsel for Appellee Harris).[6] Not only does such concealment impose an unjustified burden on Frank's intervention and eliminates any chance that a district court would

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members none the wiser. *Id.*

[6] Because the defendants in these actions filed supplemental disclosures to moot the strike suit claims, plaintiffs were likely successful in their racket and extorted fees without disclosing them. *See* Penn National Gaming Form 8-K dated Mar. 19, 2018, *available at*: https://www.sec.gov/Archives/edgar/data/921738/000110465918018673/a18-7036_48k.htm (because of disclosures, "the claims in each of the lawsuits have been mooted"); Orbital ATK Supplemental Proxy Statement dated Nov. 20, 2017, *available at*: https://www.sec.gov/Archives/edgar/data/866121/000110465917069503/a17-27213_1defa14a.htm (supplementing proxy "in order to moot plaintiffs' unmeritorious disclosure claims"); Gigamon Supplemental Form 8-K dated Dec. 12, 2017, *available at:* https://www.sec.gov/Archives/edgar/data/1484504/000119312517366731/d475427d8k.htm (describing strike suits and supplemental disclosures).

independently review the dismissal- fee arrangement, these Rule 41 dismissals attempt to deprive the court of jurisdiction; it is far from certain whether courts outside this Circuit would apply *Pearson v. Target* to a Rule 60(b)(6) motion by a shareholder, and if not, appellees would evade review forever. And even if Frank successfully reopens a case, appellees can play the same "heads-I-win, tails-don't-count" game they try to play here, waiting to suss out whether a court is sympathetic to Frank's arguments and then disclaiming the fee if they face any risk of an adverse precedent and arguing mootness. Appellees' counsel have shown no sign of ceasing their abuse of the courts; rather, they have continued unabated. The injunctive relief that Frank requests will end this game of whack-a-mole against appellees' counsel.

II. To the extent the district court's order is viewed as denying the merits of Frank's intervenor complaint, the district court erred in denying the prospective injunctive relief.

The district court apparently denied Frank's motion to intervene as moot because it held that it would deny Frank's request for prospective injunctive relief. A12. Preliminarily, the district court committed legal error in finding the motion moot on that basis. *See* Section I, above. But even if the court's order is viewed as a denial of the prospective injunctive relief sought in Frank's intervenor complaint (and assumes that the motion to intervene was essentially granted for that purpose), the district court further erred in categorically denying Frank injunctive relief. The district court erred

in denying injunctive relief because it held that it would not enjoin future suits when Frank requested only that appellees' counsel seek court approval in future strike suits. *See* Section II.B below. While intervention is assumed based on the district court's denial of injunctive relief, putative class members like Frank should be entitled to intervene to challenge appellees' "mootness fee" racket. *See* Section II.C below.

Nor can Plaintiffs argue that their original complaints were meritorious and that the supplemental disclosures were material. Those are questions on the merits, and the time to make that case is *after* the motion to intervene is granted. The district court "must accept as true the non-conclusory allegations of the motion and cross-complaint." *Lake Investors*, 715 F.2d at 1258. Frank has plausibly (and correctly!) alleged that these suits would fail under *Walgreen*. A179.

A. Frank sought injunctive relief to prohibit class counsel from circumventing *Walgreen* and pursuing their mootness fee racket.

Merger strike suits are brought to extort attorneys' fees through the leverage of a time-sensitive motion for preliminary injunction, which could derail a multi-billion dollar merger like the underlying proposed Akorn transaction. *See* Fisch, 93 TEX. L. REV. at 565-66. Strike suits rarely provide monetary relief for the putative class members but instead typically consist solely of supplemental disclosures to the merger proxy statement. *Id.* at 599 & n.7. Until recently, strike suits generally quickly settled as *class actions* with defendants offering to pay attorneys' fees and provide dubiously-

valuable supplemental SEC filings. Cain, 71 VAND. L. REV. at 619, 623. "Because the litigation threatens the consummation of the deal if not resolved quickly and because corporations may view the settlement amount as a drop in the bucket compared to the overall transaction amount, defendants are motivated to settle even meritless claims." Jeffries, 11 BERKELEY L.J. at 58. This Court recognized that rote approval of such settlements had "caused deal litigation to explode in the United States beyond the realm of reason." *Walgreen*, 832 F.3d at 725 (quoting *Trulia*, 129 A.3d 884 at 894). *Walgreen* followed *Trulia* and cracked down on the attorney-friendly disclosure-only class-action settlements, holding they would be treated with "disfavor" unless the supplemental disclosures "address a plainly material misrepresentation or omission." *Walgreen*, 832 F.3d at 725; *Trulia*, 129 A.3d at 898-99.

Walgreen and *Trulia* had a temporarily beneficial effect for shareholders by slightly slowing the pace of disclosure-only class-action settlements, which "do not appear to affect shareholder voting in any way." Fisch at 561. Strike suits were filed in 96% of mergers worth over $100 million in 2013, and this number fell to 73% in 2016. Cain, 71 VAND. L. REV. at 608. Unfortunately, such complaints rebounded to 85% in 2017 and are likely higher today because plaintiffs have modified their tactics. *Id.*

Appellees and their counsel have adapted with an end-run around the scrutiny that *Walgreen* demands, by settling for attorneys' fees *without* seeking class release. Cain, 71 VAND. L. REV. at 615. Whereas class action or derivative settlements allow shareholders to object to the

payment of attorneys' fees, *see* Fed. R. Civ. P. 23(h)(2), like a shareholder did in *Walgreen*, appellees' new racket extorts payment without seeking or receiving court approval under Rule 23. Appellees' counsel have eschewed class- action settlement and have instead negotiated payments of "mootness fees" to evade the careful judicial review required under *Walgreen* and *Trulia*. *See* Cain, 71 VAND. L. REV. at 615. Appellees and appellees' counsel have settled other strike suits for six- figure "mootness fees," without the safeguards of settlement approval under Rules 23 or 23.1. *See* A216-17.

Prior to 2014, virtually no strike suits in Delaware or in federal courts were resolved through mootness fees, "but in the wake of *Trulia* these cases became more significant. They comprised 14% of cases in 2015 and rose to 75% of cases by 2017." Cain, 71 VAND. L. REV. at 623. This sea change of tactics—from state courts to federal and from class-action settlement to stipulated dismissals for mootness fees—has scarcely been scrutinized by district courts, which routinely grant stipulated dismissals. To Frank's knowledge, no appellate court has considered the propriety of strike suits resolved through mootness fees. Federal courts should address the mootness fee phenomenon:

> Although these cases are being dismissed without a release, reflecting the likelihood that they are largely nuisance suits, they appear to be generating the payment of mootness settlement fees, creating an incentive for plaintiffs' lawyers to continue to file them. **These cases appear to**

> **indicate that plaintiffs' counsel may be extracting rents by seeking low cost payments to "go away."** Mootness fee payments thus likely warrant a more thoughtful response by the federal courts.

Cain, 71 VAND. L. REV. at 632.

No federal basis exists for "mootness fees," which are an idiosyncratic and evolving feature of Delaware Chancery law. Rickey at 1-2. Such fees are unlawful for federal complaints like those appellees brought under the Exchange Act: "Total attorneys' fees and expenses awarded . . . shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 78u-4(a)(6). Because the amount plaintiffs recovered for the class is zero, any reasonable percentage likewise ought to be $0. *Cf. Masters v. Wilhelmina*, 473 F.3d 423, 438 (2d Cir. 2007). Moreover, plaintiffs could not show entitlement to mootness fees even if Delaware law applied, which it does not. (Akorn is a Louisiana Corporation with its primary place of business in Illinois.) Delaware courts award mootness fees only when an underlying complaint is "meritorious when filed." *Sauer-Danfoss*, 65 A.3d at 1123.[7]

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[7] Notably, appellees' counsel seldom file strike suits in Delaware state courts any more even when the defendant is a Delaware corporation, likely because the Delaware Chancery actively scrutinizes and slashes mootness fee payments. *E.g., Xoom*. Thus, "the primary driver of the [shift of filings to] federal court . . . is a rise in mootness fee payments. In 2017, all mootness fee payments were in federal court cases." Cain, 71 VAND. L. REV. at 628.

Frank moved to intervene to stop appellees' mootness fee racket and their end- run around this Court's precedent in *Walgreen* by enjoining appellees from extracting attorneys' fees in strike suits without court approval.

B. The district court failed to satisfy Circuit Rule 50; its finding that it would not grant injunctive relief to enjoin appellees' from "filing actions" was clearly erroneous because Frank's request only sought to enjoin appellees from accepting fees in future strike suits without court approval.

The court denied the motion to intervene based on its intention to deny the prospective injunctive relief sought in Frank's intervenor complaint. As an initial matter, because the court's decision was based on the merits of Frank's intervenor complaint, the district court's one-sentence order (and status conference colloquy) do not satisfy Circuit Rule 50: "Whenever a district court resolves any claim or counterclaim on the merits, . . . the judge shall give his or her reasons, either orally on the record or by written statement." Cir. R. 50. The rule serves three important functions: "to create the mental discipline that an obligation to state reasons produces, to assure the parties that the court has considered the important arguments, and to enable a reviewing court to know the reasons for the judgment." *W. States Ins. Co. v. Wisconsin Wholesale Tire, Inc.*, 148 F.3d 756, 757–58 (7th Cir. 1998). "The purposes of the rule are not met, however, if the 'reasons' provided are so conclusory that the judge's line of thinking cannot be discerned. To that end, we have interpreted the rule as

requiring district judges to 'analyze the facts in relation to the law,' rather than merely to provide conclusions on the controlling issues." *Id.* at 758.

The judge's one-sentence order and conclusory oral statements that it would not enjoin future strike suits (which is not what Frank requested) never explain why the district court would deny the injunctive relief. Interpreting the district court's oral statements most charitably, the statement "And each one of these is a different case. Each one has different facts, different reasons" is perhaps a finding that Berg brings meritorious suits or that Frank failed to demonstrate that Berg is repeatedly bringing meritless suits, disentitling Frank to an injunction. A25. But such a finding would be inappropriate in construing the facts in the light most favorable to Frank, as the court is required to do at that early procedural stage. And a "court can't decide the merits and then dismiss for lack of jurisdiction." *Smith*, 772 F.3d at 450 (emphasis in original).

Indeed, the district court conducted no analysis or application of the law, including the elements of permanent injunction under *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. at 391. The district court's order cannot stand for the independent reason that it failed to meet Circuit Rule 50. *Wisconsin Wholesale*, 148 F.3d at 759 (remanding with instructions to comply with Circuit Rule 50).

The district court also clearly erred in finding that it would deny injunctive relief enjoining future strike suits because that was *not* the injunctive relief Frank

requested. The district court stated multiple times that it would deny intervention because it would not enjoin appellees' counsel from filing *future* actions:

- "I am not going to enjoin plaintiff or plaintiff's counsel from filing suits, and I'm not going to interfere with those suits." A11.

- "I'm not going to enter an injunction relating to enjoining Mr. Berg and his counsel from filing suits." A11.

- "I'm not going to be granting prospective relief to prevent you or your client from filing similar suits in front of other judges." A18.

- "[I]t hasn't changed my decision that the issue that intervenor Frank wants to raise about attempting to enjoin Mr. Berg and other people in his position from filing suits like this -- I'm -- I don't believe I – I'm not going to enter such an order." A25.

- "But I'm not going to prospectively bar him from filing suits." A25.

But that's *not* what Frank requested. Frank's intervenor complaint sought a narrowly- tailored permanent injunction "prohibiting Settling Counsel from accepting payment for dismissal of class action complaints filed under the Exchange Act without first obtaining court adjudication of their entitlement to any requested fee

award." A200; Dkt. 57-1 at 20-21. Such narrowly-tailored injunctive relief is within the court's purview and does not unduly burden the rights of shareholders bringing meritorious—or even merely non-frivolous—suits. The district court's holdings regarding the prospective injunctive relief were based on the erroneous premise that Frank sought to enjoin the actions. Because that clearly erroneous finding served as the basis for denying Frank's motion to intervene as moot, *see* Section I above, the district court's order must be reversed.

C. Putative class members should be entitled to intervene to challenge "mootness fee" awards.

As discussed above, at a minimum, this Court should vacate and remand the district court's order denying intervention because it improperly based its ruling on the merits of the prospective injunctive relief, *see* Section I, and because its mootness determination was based on the erroneous premise that Frank sought to enjoin settling counsel from filing future strike suits, *see* Section II.B. In addition, because the Court presumably reaches a legal question of first impression—how, procedurally, putative class members should challenge "mootness fees"—the panel should guide the district court and instruct it to permit intervention.

Class action strike suits that yield fees for class counsel and immaterial supplemental disclosures for the class are "no better than a racket." *Walgreen*, 823 F.3d at 724. Appellees' circumvention of this Court's precedent in *Walgreen* and its pursuit of this "mootness fee" racket is a perversion of the class action device. Individuals may

not use "the class device . . . to obtain leverage for one person's benefit." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (citing *Young v. Higbee Co.*, 324 U.S. 204 (1945)). This Court has repeatedly criticized misuse of the class-action or shareholder- derivative device for "selfish" purposes, especially in the shareholder context, going so far as to hold that district courts should throw out such suits rather than allow attorneys to impose social costs and hurt the class members they putatively represent. *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 320 (7th Cir. 2012); *see also In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (self-dealing suits imposing only social costs should not be certified under Rule 23(a)(4)).

The appropriate remedy when a shareholder suit will make shareholders worse off is to dismiss the case. *Crowley*, 687 F.3d at 320. In *Crowley*, the Seventh Circuit struck down a derivative action observing that "[t]he only goal of this suit appears to be fees for the plaintiffs' lawyers." 687 F.3d at 319. This Court noted that it was "odd" for plaintiffs to sue over the risk that alleged antitrust misconduct would lead to litigation against the corporation when the suit itself manifested that litigation; "self-appointed investors may be poor champions of corporate interests and thus injure fellow shareholders." *Id.* at 317, 318. Dismissal was appropriate in *Crowley* because it was "impossible to see how the investors could gain from it." 687 F.3d at 319. Likewise, appellees should have avoided harming the class by promptly dismissing—or better yet, never bringing—their immaterial complaints.

Appellees instead harmed the class. Each and

every appellee requested an injunction prohibiting Akorn from completing the proposed transaction, which offered a substantial premium over Akorn's market price. Upon Akorn's filing of immaterial supplemental disclosures, appellees then dismissed their complaints as "moot" although many arguments were not addressed by the disclosures at all. *See* A195-96. These disclosures were simply an excuse to seek attorneys' fees, borne out by similar conduct of appellees' counsel in other strike suits. Of course, this isn't the first time appellees have extorted fees at the expense of class-member shareholders. Appellees and appellees' counsel have settled other strike suits for six-figure "mootness fees," without the safeguards of settlement approval under Rules 23 or 23.1. *See* A216-17. The question is how do putative-class-member shareholders challenge this incessant, unethical practice?

In *Pearson v. Target Corp.*, after class-action settlement and final judgment, a class member filed a motion to intervene and sought to disgorge "objector blackmail," *i.e.*, side settlements paid to objectors to dismiss their appeals. 893 F.3d at 982-83. The district court rejected the class member's Rule 60 request, but this Court reversed, finding that the class member was entitled to relief, "to ensure that no class sellout had occurred." *Id.* at 986. This Court held: "It is fine to say that individual parties must bear the responsibility for their deliberate litigation conduct and leave it at that. But class- action cases—with all their inherent agency problems—require an extra analytical step to ensure that the interests of the class are protected." *Id.* at 985. Similarly, putative class members like Frank should not be without a remedy to challenge appellees' "mootness

fee" scheme to protect their interests. Given the unabated harm to diversified shareholders, the district court should permit intervention to examine whether an injunction would curtail abusive and extortionate fee demands going forward. *Cf. Support Sys. Intern., Inc. v. Mack*, 45 F.3d 185 (7th Cir. 1995).

A motion to intervene to challenge the "mootness fee" racket satisfies the requirements for intervention as a matter of right. In order to intervene as a matter of right, a party must satisfy four requirements: (1) the application must be timely; (2) "the applicant must claim an interest relating to the property or transaction which is the subject of the action"; (3) "the applicant must be so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"; and (4) "existing parties must not be adequate representatives of the applicant's interest." *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 945-46 (7th Cir. 2000). Because Frank filed his motion to intervene three days after the stipulated dismissals were filed, Dkt. 57, Frank's motion to intervene was timely. *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991) (timeliness considered holistically given factors such as length intervenor knew of interest in the case). Frank would satisfy the other elements because Frank, as a putative class-member shareholder, has a direct interest in eliminating appellees' mootness fee racket which he seeks to enjoin here, and no other party would protect that interest.

1. Putative class members have a direct interest in curtailing the mootness fee racket and vindicating their own

interests.

According to Frank's proposed intervenor complaint, appellees' counsel repeatedly breach their fiduciary duties to putative class members including Frank by filing literally hundreds of meritless strike suits they intend to settle for private gain— against the interests of shareholders of the corporations being acquired. A198. Thus, Frank's request to enjoin this destructive and unethical behavior is of direct financial interest to Frank. An actual controversy exists between appellees who contend they can extract attorneys' fees through Exchange Act litigation without court approval and Frank, who contends that *Walgreen* demands otherwise.

By virtue of filing claims on behalf of a class of shareholders, appellees and their counsel undertook fiduciary responsibility to those putative class members. "Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed." *In re General Motors Corp. Pick-Up Truck Fuel Prod. Liab. Litig.*, 55 F.3d 768, 801 (3rd Cir. 1995); *see also Back Doctors Ltd. v. Metropolitan Property and Casualty Insurance Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (reversing plaintiffs' requested remand to state court due to representatives' breach of fiduciary duty); *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002) (collecting cases finding a fiduciary duty).

A fiduciary duty attaches to class action complaints because class counsel has *de facto* control and dominance over the litigation decisions that are made,

and the class members are uniquely vulnerable to such control. "The class action is an awkward device, requiring careful judicial supervision, because the fate of the class members is to a considerable extent in the hands of a single plaintiff . . . whom the other members of the class may not know and who may not be able or willing to be an adequate fiduciary of their interests." *Culver*, 277 F.3d at 910 (7th Cir. 2002).

It is inequitable for individual class members or counsel to advantage themselves over other class members without conferring the class any benefit and without judicial oversight. Representatives breach their fiduciary duty simply by harming class member interests, even if they do not release class members' claims. *See Back Doctors*, 637 F.3d at 830 (breach of fiduciary duty not to advance punitive damages claims); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (inappropriate to "jettison the class for personal benefit"); *Grok Lines, Inc. v. Paschall Truck Lines, Inc.*, No. 14 C 08033, 2015 WL 5544504, at *7 (N.D. Ill. Sept. 18, 2015) (rejecting settlement that did not release monetary claims, but where counsel "abandoned pursuit of a monetary recovery for the class"); *see also Stand. Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593-94 (2013) (suggesting class member may intervene to remedy breach of fiduciary duty in response to stipulation that did not bind anyone except representative). Indeed, plaintiff-appellee Berg's counsel "does not dispute that they owe fiduciary duties to the putative class." Dkt. 84 at 9.

The lack of release does not negate prejudice to absent class members who were owed a duty of loyalty

they did not receive. "It is unacceptable to mitigate the risk of a relatively small payday by negotiating a settlement at the expense of clients." *Grok Lines*, 2015 WL 5544504 at *8.

Appellees' counsel egregiously violated their fiduciary duty to class members by engaging in a premeditated scheme to shake down defendant companies like Akorn to the detriment of putative class members to whom they owed a duty of loyalty. The underlying complaints were shams "filed . . . for the sole purpose of obtaining fees for the plaintiffs' counsel." *Walgreen*, 832 F.3d at 724. At best, such strike suits burden the judicial system with meritless but time-demanding motions for preliminary injunction that plaintiffs have no interest in obtaining, pointlessly consuming judicial resources as a bargaining chip for fees at the expense of defendant and its shareholders—who are the class that the class counsel and representative putatively represent.

2. No party adequately represents Frank or the other putative class-member shareholders against appellees' mootness fee racket.

Without intervention, the interests of Frank will be greatly impaired because no other remedy exists. Frank's "interest would be extinguished for no compensation, which would eliminate [his] ability to protect its interest." *In re Bear Stearns Cos.*, 297 F.R.D. 90, 97 (S.D.N.Y. 2013). The burden of showing that representation may be inadequate "should be treated as minimal," *Trbovich v. United Mine Workers of Am.*, 404

U.S. 528, 538 n. 10 (1972). An intervenor need only show that representation "may be" inadequate. *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007). Frank meets this burden easily. Here, class members who were owed a fiduciary duty instead had their interests impaired by plaintiff's counsel through an action that only sought "worthless benefits" and should have been "dismissed out of hand." *Walgreen*, 832 F.3d at 724.

In Crowley, the Seventh Circuit extended precedent to liberally grant intervention to objectors. 687 F.3d at 318-19; *see also Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). There, the Court found that the district court's reason for denying intervention "unsound" because the objecting shareholder's position was "entirely incompatible with the stance taken by" plaintiffs. *Id.* at 318. "That the plaintiffs say they have other investors' interests at heart does not make it so." *Id.* Settlement approval is required "precisely because the self-appointed investors may be poor champions of corporate interests and thus injure fellow shareholders." *Id.* The same is true here. No existing party adequately represents the interests of Frank and the other putative class-member shareholders because appellees actively work *against* those interests and defendant Akorn was essentially extorted into agreeing to the payment. Indeed, the parties have bargained away Akorn's funds to finance bad-faith litigation brought by appellees. Appellees' strike suits and the companies' acquiescence to them run directly contrary to Frank's interest as a shareholder in Akorn and numerous public companies.

III. This Court has jurisdiction.

A. Frank's informal colloquy with the district court did not waive his appellate rights.

Appellees filed a motion to dismiss with this Court, arguing that Frank waived his appeal based on statements by Frank's counsel during informal colloquy with the district court. Appellees' Joint Motion to Dismiss at 6. The argument is meritless; we preempt it here, as the Court directed in its August 9 order, but the Court may disregard this section if appellees do not renew the argument in their merits brief.

On April 11, in a hearing in the single case of *Berg*, the district court stated that it planned Frank's motion to intervene against Berg as moot because Berg had disclaimed his interest in mootness fees. A243. The court scheduled another conference for May 2 involving all six cases as consolidated. A242. There, three of the six attorneys (the appellees here) disclaimed interest in the mootness fees, and three did not. A252-53. During the conference, the district court asked for Frank's position on the six cases, and Frank's counsel responded that with respect to the non-disclaiming plaintiffs "we should proceed to a decision on whether we can intervene in these three cases." A35. In light of the court's previous decision regarding Frank's request for injunctive relief, where Frank had already objected, Frank counsel responded, "With regard to the other three where fees are being disclaimed, those could be dismissed." *Id.* at 9-10.

Appellees take those statements out of context, and argue that they constitute a waiver of Frank's appellate rights. But Frank's counsel's comments are

consistent with two written filings where Frank preserved his arguments for appeal. A249-52; A256-58. Affirmative waiver requires a judicial admission, namely, a "deliberate, clear and unequivocal" statement. *McCaskill v. SCI Mgt. Corp.*, 298 F.3d 677, 680 (7th Cir. 2002); *accord id.* at 682 (Rovner, J., concurring in the judgment). No such statement exists in the record. Under Seventh Circuit law, an out-of-context oral statement cannot override written pleadings. *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 872 (7th Cir. 2010)). Appellees' argument of waiver is based on cases where the appellant *stipulated* to judgment. *See Assn. of Community Organizations for Reform Now (ACORN) v. Edgar*, 99 F.3d 261, 262 (7th Cir. 1996) ("judgment was drafted the state's legal officers"); *INB Banking Co. v. Iron Peddlers, Inc.*, 993 F.2d 1291, 1292 (7th Cir. 1993) ("agreed to the judgment"); *Stewart v. Lincoln-Douglas Hotel Corp.*, 208 F.2d 379, 381 (7th Cir. 1953) ("It is not disputed that an order dismissing the amended complaint was drafted by [appellant's] counsel"). Here, no stipulation appears on the record, so the correct standard is whether appellant made an "unambiguous statement evincing an intentional waiver." *McCaskill*, 298 F.3d at 682.

Frank repeatedly opposed plaintiffs' suggestion that disclaimer of attorneys' fees caused his motion to intervene to become moot. On March 13, 2018, plaintiff-appellee Berg filed his "Motion Disclaiming . . . Attorneys' Fees . . . and Withdrawing Opposition to Theodore H. Frank's Renewed Motion to Intervene as Moot." A238. Before Berg's motion was first heard, Frank filed an opposition on March 18, disputing that disclaimer moots his motion. A249-52. "Plaintiff Berg

and his counsel have not offered to be bound by a consent decree requiring them to submit attorneys' fees in strike suits for court approval, and therefore Frank's renewed motion to intervene does not become moot." A250. At the first hearing on Berg's motion, Frank's counsel repeated this position. Plaintiffs' motion, he said through counsel, is "a motion that assumes the conclusion that it moots our motion to intervene." A10. However, the district court rejected Frank's argument and suggested that the case as to plaintiff Berg should be dismissed. A12.

In response to the district court's comments, on March 27, Frank filed an "Offer of Proof of Standing to Pursue Injunction," which attached a declaration showing the Frank suffers ongoing harm from the plaintiffs' attorneys' activities. A256-58. Frank declared: "Unless Plaintiffs and their counsel are enjoined from collecting fees in future strike suits, it is near-certain I will be the shareholder of corporations extorted by Plaintiffs and their counsel." A257. But the district court reaffirmed its position during the April 11 conference. "**You've made your record** [for appeal], and I'll make mine," remarked the district court. A25 (emphasis added).

Read in context of Frank's previous express and written objections, Frank's counsel May 2 suggestion that appellees' cases "could be" dismissed cannot be read to implicitly waive an argument Frank preserved through two previous written filings. The "could be dismissed" statement falls far short of being an "unambiguous statement evincing an intentional waiver." *McCaskill*, 298 F.3d at 682 (citing *MacDonald v. Gen. Motors Corp.*, 110 F.3d 337, 340 (6th Cir. 1997)

("counsel used words such as 'probably' and 'suggesting' in making his comments, indicating that such remarks were guarded and qualified")).

Having preserved his argument for appeal at two prior hearings and in two written filings, Frank was not obligated to continue repeating his objection in every breath. "Once a court has conclusively ruled on a matter, it is unnecessary for counsel to repeat his objection in order to preserve it for appeal." *United States v. Paul*, 542 F.3d 596, 599 (7th Cir. 2008).

Additionally, the context of the oral statement confirms that Frank did not "unambiguously" waive his mootness argument. On May 23 Frank's counsel wrote the district court to clarify the record of the *Alcarez* and *Harris* dockets in preparation of this appeal:

> I do not wish to re-litigate this Court's decision that plaintiffs' disclaimer of fees moots Mr. Frank's motion, which the Court explained at the April 11 conference. However, I would like to preserve the issue for appeal in these two dockets, and the record is currently unclear.
>
> … If it was the court's intention to deny the motion with respect to all three "disclaimed fees" cases, I request that the court clarify the record by entering a similar docket entry in the above-referenced two matters, noting that Mr. Frank's motion was deemed filed, but denied as moot for the same reasons explained on the record in the Berg

> action. This would allow Mr. Frank to notice an appeal in all three cases.

A259-60. Frank did not assent to dismissal of *Alcarez* and *Harris*, but expressly wanted to court to act so he could file the present appeal.

The district court quickly responded to these letters by entering minute orders in the *Alcarez* and *Harris* dockets that say: "Theodore Frank filed a motion to intervene in case 17 C 5016. That motion is deemed filed in this case … and is denied as moot for the reasons stated on the record at hearings in both cases." A42, A43. Thus, neither Frank nor the district court believed that he waived the argument. The district court correctly entered orders that it had denied the motions to intervene as moot. The written record does not suggest any "deliberate, clear, and unambiguous statement evincing an intentional waiver." *McCaskill*, 298 F.3d at 682. "[W]e are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170 (1972).

Unlike the precedents appellees cite, Frank did not stipulate to judgment. Remarks at the May 2 status conference that the court "could" dismiss appellees' actions simply addressed handling the cases in view of the district court's previously- announced decision that the motion was "moot" with respect to plaintiffs who disclaim attorneys' fees. There is no waiver.

B. Frank has Article III standing.

Appellees' Motion to Dismiss also argued that Frank lacked Article III standing because he did not suffer harm because any harm belonged to Akorn. Appellees' Joint Motion to Dismiss at 11. But Frank is not bringing a derivative suit. He seeks relief not derivatively on behalf of the corporation, but directly as a putative class member affirmatively harmed by attorneys who owe him a fiduciary duty. A186, A212-13, Dkt. 88 at 2-3. When an attorney filed a complaint on behalf of a putative class, he or she undertakes a fiduciary responsibility to not harm that class. *See GMC Pick-Up*, 55 F.3d at 801; Section II.C.1 above.

According to Frank's proposed intervenor complaint, Appellees' counsel repeatedly breach their fiduciary duties to putative class members including Frank by filing literally hundreds of meritless strike suits they intend to settle for private gain— against the interests of shareholders who are owners of corporations being acquired. A198. Thus, Frank's request to enjoin this destructive and unethical behavior is of direct financial interest to Frank. An actual controversy exists between appellees who contend they can extract attorneys' fees through Exchange Act litigation without court approval and Frank, who contends that *Walgreen* demands otherwise.

Frank thus independently possesses Article III standing to pursue his claims against plaintiffs and their counsel, who assumed a fiduciary duty to him when they brought a class action putatively on his behalf, and then breached that fiduciary duty through their self-dealing, causing remediable injury. For example, *Robert F. Booth Trust v. Crowley* found a shareholder had standing to

intervene to object to and seek dismissal of a selfish Rule 23.1 derivative suit designed only to generate a settlement to benefit attorneys at the expense of shareholders. 687 F.3d 314. *Cf. also Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir. 1999) (derivative action); *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). A "shareholder who objects to the payment of a fee from corporate funds in compensation of attorneys" who are suing on behalf of shareholders "has an interest that is affected by the judgment directing payment of the fee." *Kaplan*, 192 F.3d at 67.

Non-parties possess standing to the extent they suffer from a non-speculative injury-in-fact. *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 692 (7th Cir. 2015). Here, the injury to shareholders is not speculative. By design, appellees harm shareholders by extorting fees from Akorn and other companies. The breach of fiduciary duties gives rise to a legally-protectable interest, and "where parties have long been permitted to bring" actions for breach of fiduciary duty "it is well-nigh conclusive that Article III standing exists." *Scanlan v. Eisenberg*, 669 F.3d 838, 845 (7th Cir. 2012) (cleaned up) (trusts).

Appellees further claim that the district court's finding of mootness precludes Article III jurisdiction in this Court, but that just reflects a misunderstanding of appellate jurisdiction. This Court has appellate jurisdiction to review a final decision of a district court finding lack of jurisdiction. *See, e.g., Smith v. Greystone Alliance*, LLC, 772 F.3d 448 (7th Cir. 2014); Olson, 594 F.3d 577.

Conclusion

The Court should reverse and remand the district court's finding of mootness. Additionally, the Court should affirm that absent class members may move to intervene to challenge a "mootness fee" request and to prevent class counsel from flouting *Walgreen*, and that appropriately tailored injunctive relief is a prospective remedy. Any other result would fall short of *Walgreen*'s directive that meritless securities strike suits "must end."

Dated: September 10, 2018 Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 18-2220

JORGE ALCAREZ, individually and on behalf of all others similarly situated,

Plaintiff - Appellee

v.

AKORN, INC., et al.,

Defendants - Appellees

APPEAL OF: THEODORE H. FRANK, Intervenor

No. 18-2221

SEAN HARRIS, On behalf of himself and all others similarly situated,

Plaintiff - Appellee

v.

AKORN, INC., et al.,

Defendants - Appellees

APPEAL OF: THEODORE H. FRANK, Intervenor

No. 18-2225

ROBERT BERG, Individually and on behalf of all others similarly situated,

Plaintiff - Appellee

v.

AKORN, INC., et. al.,

Defendants - Appellees

APPEAL OF: THEODORE H. FRANK, Intervenor

On Appeal from the United States District Court for the

Northern District of Illinois, Nos. 1:17-CV-05017; 1:17-CV-05021, and 1:17-CV-05016, Trial Judge Thomas M. Durkin

Reply Brief of Appellant Theodore H. Frank

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Introduction

Appellees make little effort to address the district court's fundamental errors that require reversal and remand: its ruling that appellant Frank's motion to intervene was moot and mistaken premise that Frank was seeking an injunction prohibiting appellees' counsel from filing suit without court approval. The law is clear that Frank's motion was not moot. *See* Section I. And the record is clear that the district court's understanding of the injunctive relief Frank sought was wrong and that it failed to provide reasons for its ruling as required by Circuit Rule 50. *See* Section II.

Appellees try to brush these errors under the rug and go straight to the merits of Frank's requested relief. But even if this Court also looks past the errors and analyzes the substance of Frank's motion to intervene in the first instance, Frank meets the Rule 24 requirements—particularly viewing his motion and complaint in the light most favorable to him. And he has standing to seek an injunction preventing appellee's counsel from obtaining attorneys' fees after settling strike suits for mootness fees without court approval as a result of their breach of the fiduciary duty they owed to him. *See* Sections II-IV. While the merits of Frank's request for an injunction should be briefed before the district court in the first instance, there is no legal impediment that forecloses his request. *See* Section V.

Tellingly, appellees hardly rebut their involvement in the "racket" Frank described in his opening brief. However, neither this Circuit's decision in *In re Walgreen Co. Stockholder Litigation*, 832 F.3d 718

(7th Cir. 2016), nor the PSLRA, nor mudslinging at Frank justifies or excuses their abusive leveraging of the class action device and their putative clients' claims for personal enrichment. *See* Section VI.

Argument

I. Appellees misrepresent the record and standard of review in an attempt to portray Frank's prayer for injunctive relief as "moot."

Appellees falsely assert that Frank's motion was denied "based on factual representation by Frank that the basis for his Motion to Intervene was moot." PB16, *see also* PB3, PB6, PB30-31.[1] No such factual representation exists. As in their motion to dismiss, appellees quote Frank's counsel responding to the district court's question of how the cases should proceed below, after the court had made clear that it intended to deny his motion to intervene as moot and after the court indicated that Frank had "made [his] record," A25, for appeal: "those could be dismissed." A36. This statement could not possibly constitute a "factual representation" of mootness given that Frank specifically disputed appellees' self-serving conclusion of mootness in two written fillings and before the court. A249 ("Frank strongly disagrees with the Berg Motion's suggestion that it moots Frank's renewed motion to intervene");

[1] OB, PB, and A refer to Frank's Opening Brief, Plaintiffs-Appellees' Answering Brief, and the Appendix respectively.

A256 ("Berg's initial motion to declare my action moot entirely ignored any arguments about my right to an injunction."); A10 (appellees' motion to disclaim "assumes the conclusion that it moots our motion to intervene.").

But assuming *arguendo* that appellees' distorted description of Frank's counsel's statement were accurate, appellees fail to grapple with the standard for judicial admission: An out-of-context verbal statement during informal colloquy with the court does not override written pleadings in the absence of a "deliberate, clear, and unambiguous" judicial admission. *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 872 (7th Cir. 2010); *see* OB42, OB45. And they address none of the waiver cases Frank relies upon: *McNeil, Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), or *McCaskill v. SCI Mgt. Corp.*, 298 F.3d 677 (7th Cir. 2002).

Instead, appellees wrongly assert that the district court's ruling on Frank's motion to intervene is reviewed for abuse of discretion. PB16. Appellees' purported legal authority for this proposition is a decision affirming a district court's mixed factual and legal finding of laches. *Cook v. City of Chicago*, 192 F.3d 693, 694 (7th Cir. 1999). The case has no bearing on the standard of review here. Mootness—unlike laches—is a question of law that must be reviewed *de novo*. *Olson v. Brown*, 594 F.3d 577, 580 (7th Cir. 2010).

The district court's conclusion of mootness must be reversed because Frank requested both disgorgement of fees and a "permanent injunction prohibiting Settling Counsel from accepting payment for dismissal of class

action complaints filed under the Exchange Act without first obtaining court adjudication of their entitlement to any requested fee award." A200. The second form of relief has not been provided. Appellees' belated relinquishment of fees does not relieve Frank of the ongoing harm he pleaded. Frank owns shares in merging companies targeted by the same plaintiffs and counsel engaged in the same "racket" as in the Akorn transaction. *See* A197-98.

Alternatively, if appellees' arguments regarding disclaimer prevail, this controversy satisfies an exception to the mootness doctrine since it is capable of repetition yet evading review. OB24-25. Appellees repeatedly quote the district court's subsequent decision denying intervention with respect to the plaintiffs who seek to retain attorneys' fees.[2] The order proves too much, because it shows that if appellees' arguments are adopted, they make such strike suits impossible to review. The order finds Frank allegedly has no interest to intervene in this case even where plaintiffs successfully extracted $325,000 for disclosures even less substantial than the ones in *Walgreen*. Under this view, Frank supposedly will never have requisite interest in intervention.

As for "capable of repetition," appellees do not deny that they've dismissed strike suits for alleged mootness involving several companies where Frank is or

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[2] The district court has invited Frank to file an *amicus* brief concerning the materiality of the underlying disclosure.

was a shareholder. OB25 n.4. Given that appellees' counsel files suit with respect to the vast majority of mergers of publicly-traded companies—122 suits just in the first half of 2018 (A267-72)—further repetition is assured. Their suggestion that Frank could obtain information about their future suits through the burdensome and likely incomplete process of scouring "news alerts for SEC filings, court filings, and press releases" is both entirely unreliable and telling with respect to their intentions. PB17.

II. Frank met the requirements for intervention under Rule 24.

Appellees put the cart before the horse with their substantive Rule 24 argument. Appellees sneer that Frank discussed Rule 24 only once in his opening brief, PB3, but this is because the district court did not deny his motion under Rule 24, but instead ruled based on its misapprehension that Frank's underlying complaint was "moot." A41-43. Frank unsurprisingly spent little time in his brief rebutting conclusions the district court never reached.[3]

It is surprising, however, that appellees fail to address the district court's mistaken understanding of

[3] Likewise, appellees' contention that Frank "waived" his argument for permissive intervention is unfounded. PB18 n.11. Frank moved for intervention as a matter of right *and* permissive intervention. A174, A221. The district court did not reach either argument with respect to appellees, and so Frank's opening brief did not argue against hypothetical findings never made. Frank reserves the right to argue for permissive intervention on remand.

the relief actually sought by Frank and, to the extent the court rejected the motion to intervene on the merits, its failure to satisfy Circuit Rule 50 by giving its reasons. *See* OB32. So while Frank responds to the substance of appellees' Rule 24 analysis here, there is no reason the Court need reach this issue. The district court either did not conduct this analysis at all because it denied Frank's motion as moot, or it failed to provide the requisite reasons for its ruling and that alone requires remand. *See* OB33.

A. Frank intervenes to vindicate his own interests and remedy the breach of fiduciary duty by appellees' counsel.

Appellees insist that Frank brings a derivative claim on behalf of Akorn, PB19, but this is manifestly false. Frank did not plead that any attorneys or Akorn officers breached their duty to the corporation; nor does he assert claims under Rule 23.1. Instead, Frank contends—and appellees agree—that counsel undertook a fiduciary duty to putative class members when the they filed the complaints. Frank plausibly pleaded that appellees' counsel breached their fiduciary duty to him. *See* A196-97.

First, the claim Frank pleaded is direct. Frank does not allege that anyone breached a duty to the corporation in capitulating to appellees' mootness fee racket. Frank has standing for his claims as a putative class member—not by virtue of being a shareholder. While it is true that Frank was harmed through the loss suffered to his fractional ownership in Akorn, this mechanism does not negate the individual nature of the

claim. By analogy, an individual's suit to enjoin a nearby polluter does not become a derivative claim, even if other parties appreciate most benefit from the injunction. *Cf. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 101 F.3d 503, 509 (7th Cir. 1996).

Appellees do not counter the legal precedent holding that the fiduciary duty not only prevents appellees and their counsel from impairing the claims in their underlying suits, it also forbids "leverag[ing]" "the class device" for the representatives' own benefit. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006); OB37-39. Appellees' counsel breached this duty, so Frank has an individual interest in remedying their ongoing breaches in other cases in which they also owe him this duty.[4]

Second, the requirement that intervenors have an interest in "the subject of the action" does not imply intervenors must assert the same claims. *See* PB19. Instead, "[t]hat interest must be unique to the proposed intervenor." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013). Intervention would be unnecessary if the interest was identical. For example, this Court found that exotic dancers could intervene in an agency enforcement action against an adult entertainment company even though they could not

[4] Because Akorn was not owed a fiduciary duty from appellees, it does not adequately represent Frank's interests, as appellees asserted in passing. PB19. It is reversible error to deny intervention based on appellees' preposterous argument that Frank's interests are represented by the settling parties. *See Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 318 (7th Cir. 2012).

possibly be defendants to the action. *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 323 (7th Cir. 1995). The interest need only be "direct, significant and legally protectable," not identical, and the exotic dancers had such interest in "leverage in negotiating their employment conditions" as independent contractors. *Id.* Here, Frank pleads a direct and legally protectable breach of the fiduciary duty owed to him, and the resolution of his claims turns on the same facts as the original lawsuit: specifically, whether Akorn's proxy statements contained material omissions that would render them "false and misleading" under the Exchange Act.

Appellees' citation to *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982) is inapposite. In *Meridian*, the proposed intervenors—brothers who inherited ownership but not a partnership interest in a joint venture—had "no legal interest in the continuation or dissolution of the joint venture agreement," but were "entitled only to the share of the profits." *Id.* In contrast, Frank has a protectable interest by virtue of the fiduciary duty owed to him.

Frank has an interest in curtailing the breach of fiduciary duty by attorneys purporting to represent him, and contrary to appellees (and the district court's subsequent order), the facts of Frank's complaint and the law governing it extensively overlap with the underlying suit. The propriety of the mootness fee turns entirely on the materiality of the proxy statements' alleged material omissions and supplemental disclosures that appellees use as an excuse to obtain fees. To put it another way, the subject of a class action is *closely related* to whether the same "class action … seeks only worthless benefits

for the class [and] should be dismissed out of hand." *Walgreen*, 832 F.3d at 724.

B. Frank's interest is entirely impaired if he cannot intervene against appellees and their counsel.

Appellees next argue that Frank's interest could not possibly be impaired because he has not been forced to release any claims. But representatives may breach their duties without waiving the claims of absent class members. *See* OB39. As a shareholder of many merging companies, Frank has an interest in curtailing counsel's breach of fiduciary duties to him and in enforcing *Walgreen*'s directive that selfish strike suits be dismissed out of hand. Without intervention, Frank cannot seek a permanent injunction to protect his interests, and this impairs his rights, even if the district court were to ultimately conclude such injunction would not be warranted. In *Simer v. Rios*, as here, "[a]lthough the judgment did not bind absent class members, the practical effect of the settlement … may have been contrary to the interests of putative class members." 661 F.2d 655, 666-67 (7th Cir. 1981). Moreover, "even if the judge had concluded that the plaintiffs have the better of their dispute with Frank, still the judge should have granted his motion to intervene." *Crowley*, 687 F.3d at 318.

C. Frank was not required to intervene before his interests were ripe.

Finally, appellees argue that Frank's motion

should be deemed untimely because Frank allegedly should have filed it "the very same day he purchased his shares" on June 20, 2017, instead of after the parties filed their mootness fee stipulation on September 15, 2017. Without the benefit of a factual record on the circumstances of Frank's alleged 90-day delay, appellees suggest this Court should find Frank's motion to intervene untimely. It cannot.

In fact, the "delay" was caused by the need for ripeness, as appellees fully understand when they're not trying to manufacture an alternative ground for denial of Frank's motion. Appellees elsewhere assert that "[n]one of the Disclaimed Fee Plaintiffs' or their counsel ever had possession or control over the Fee in any event, so Frank's proposed claims were never ripe." PB32 n.24. While Frank disagrees that possession of the cash was necessary for ripeness, he agrees that his complaint was not ripe when it remained entirely speculative whether appellees would successfully execute their scheme.

Appellees' timeliness argument has no support in law; not one case they cited suggests absent class members must intervene as soon as they become aware of the lawsuit *just in case* their putative attorneys compromise their interests and just in case defendant capitulates to extortion. *See Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (vacating denial of intervention where "there was nothing to indicate that the [plaintiff] was planning to throw the case—until he did so"); *see also Rothstein v. Am. Int'l Group., Inc.*, 837 F.3d 195, 205 (2d Cir. 2016) (observing "troubling consequences" of requiring premature interventions by nonnamed class members). "Rather, we determine

timeliness from the time the potential intervenors learn that their interest might be impaired." *ABC/York-Estes*, 64 F.3d at 321 (reversing denial of intervention nineteen months after intervenors learned of action where they had "no reason to suspect" employer would fail to defend their interests). The relevant interval here is just *three days*. *See* Dkt. 57.

In *Crowley*, Frank moved to intervene when he objected, almost a year after the suit was filed, long after the suit was disclosed in SEC filings. 687 F.3d at 318. The Seventh Circuit did not find Frank's motion untimely for failing to predict that counsel would reach a selfish settlement. As in this case, Frank was not bound by any settlement in *Crowley*—the district court rejected the proposed settlement so there was no settlement pending at the time of the appeal, but this Court rejected the argument that this mooted Frank's intervention. *Id.*

All four requirements for intervention as a matter of right exist in this case.

III. Appellees' Article III jurisdiction and standing arguments are not grounded in fact or law.

A. Frank possesses standing to pursue claims against appellees' counsel.

Appellees' Article III standing argument simply elaborates on their refusal to understand that Frank moves to intervene in order to remedy repeated and ongoing breaches of fiduciary duty by attorneys who

purported to represent his individual interests. PB23-35. Therefore, the requirements for filing a derivative action on behalf of a Louisiana corporation simply do not apply; Frank does not bring such an action.

Frank seeks redress for a breach of fiduciary duty to him directly. Appellees do not deny the existence of the duty, and for good reason; it's well established. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949); *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002). And "[t]here is no dispute that the Constitution permits [extending] federal court jurisdiction" in a case alleging violation of an attorney's professional duty to his client. *Gunn v. Minton*, 568 U.S. 251, 256 (2013). The breach of fiduciary duties gives rise to a legally-protectable interest.[5] That a fiduciary's breach "was unaccompanied by damage," is "no sufficient answer by a trustee forgetful of his duty." *Wendt v. Fischer*, 154 N.E. 303, 304 (N.Y. 1926) (Cardozo, J.); *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) (there doesn't need to

be *any* injury "beyond the violation of his private legal right"); *Hendry v. Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996) ("[C]lients suing their attorney for breach of the fiduciary duty of loyalty and seeking disgorgement of legal fees as their sole remedy need prove only that their attorney breached that duty, not that the breach caused them injury.").

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[5] Absentees possess a cognizable legal interest in the faithful discharge of their counsel's fiduciary duty to them under relevant state law. *Byer Clinic & Chiropractic, Ltd. v. Kapraun*, 48 N.E.3d 244, 249 (Ill. Ct. App. 2016); *Singleton v. Northfield Ins. Co.*, 826 So.2d 55 (La. Ct. App. 2002).

Here, Frank does suffer harm when appellees continue their mootness fee racket, through which they use the claims of Frank and other members of a shareholder class to unjustly enrich themselves at the expense of those shareholders, which undoubtedly will include Frank. OB13; A267-72. As relief for that breach, Frank seeks an injunction that will protect him against appellees' counsel's continuation of their racket.

Finally, appellees argue that Article III standing does not exist because Frank supposedly has not alleged a "substantial risk that the harm will occur." PB26 (cleaned up). This is simply untrue. Frank's proposed complaint itself noted that plaintiff- appellee Berg alone filed twenty-seven similar strike suits against other merging companies, including two where Frank was a shareholder. A197-98. Between them, appellees' counsel has filed suits against at least fifteen other companies where Frank was a shareholder. A198. The repetition has already come to pass since Frank's complaint was drafted. Counsel for appellees here extracted mootness fees from at least six other companies where Frank is a shareholder, and appellees do not deny their racket was manifestly successful in these cases. OB25 n.4. Given that appellees' counsel continues to file dozens of suits every month (A267-72), further repetition is assured.

There is nothing "purely speculative" about counsel's systematic filing of strike suits, only to dismiss them in order to seek mootness fees. PB26. *See further* Section V.C.

B. The district court can properly exercise jurisdiction over Frank's claims.

Appellees further raise an assortment of undeveloped theories as to why there is no Article III jurisdiction. PB4-5. Appellees first argue that the district court could not exercise supplemental jurisdiction under 28 U.S.C. § 1367 over "the state law claims for 'Unjust Enrichment' and 'Inequitable Conduct'" that Frank asserted in his complaint in intervention. PB4. They assert that such claims are not "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367. PB4. On its face, appellees' argument that the district court lacked jurisdiction is absurd. Consistent with the district court's retention of jurisdiction over fees, Frank asked the court to exercise its "authority to order sanctions and other equitable remedies pertaining to related misconduct, including Settling Counsel's breach of their fiduciary duty in exacting mootness fees for supplemental disclosures in sham litigation which adds no value to the putative class of shareholders." A199 ¶ 88. District courts have broad inherent authority over such matters that arise in the course of proceedings. *See* Section V.A. And as discussed in Section II.A, Frank's complaint involves the same facts and law as the underlying suit, with the materiality of the proxy statements' alleged material omissions and supplemental disclosures central to the propriety of appellee counsel's breach of duty and whether the district court should enjoin their ongoing mootness fee racket. As such, Frank's complaint and the underlying suit are essentially part of the same case or controversy. *See ITT Commercial Finance Corp. v. Unlimited Auto., Inc.*, 814 F. Supp. 664, 669 (N.D. Ill. 1992) (claims seeking declarations against separate defendants comprised "same case or controversy" under § 1367 as

breach of contract claims against other defendants).

With respect to appellees' other jurisdictional arguments, Frank addresses appellees' unfounded contention that he somehow waived or failed to preserve his appellate rights in Sections I and IV. In Section I, he also counters appellees' argument that their disclaimer of the agreed fee mooted his intervention motion, as he did at length in his opening brief, OB41-45, because he seeks additional relief to remedy appellees' counsel's ongoing and repeated breach of their fiduciary duties. And in Section III.A, as well as in his opening brief, *e.g.*, OB6-7, Frank discusses his allegations and the supporting evidence documenting the ongoing mootness fee racket that appellees and their counsel engage in. In short, appellees' poorly supported argument that jurisdiction is lacking must fail.

IV. Frank repeatedly reserved his right to appeal the district court's denial.

As Frank described in his opening brief, OB41-46, and above, an informal remark before the district court cannot erase Frank's repeated written and oral reservation of his right to appeal, which the district court previously acknowledged. Appellees now also contend that Frank's assent to allow local counsel to withdraw somehow "underscores" their contention that Frank waived his argument. PB30. To the contrary, it simply shows Frank's counsel responding to the district court's procedural question "what's the position of the intervenor as to these three cases?" A35.

That Frank displayed professional courtesy by consenting to a routine, procedural withdrawal motion by local counsel has no bearing on whether he believed the case was ongoing. In fact, Frank also provided consent to counsel's withdrawal in an ongoing case. A39. Such professional courtesy simply has no impact on whether Frank believed the case was ongoing.

V. Frank seeks injunctive relief that is neither speculative nor beyond the permissible scope of intervention.

The district court erred in finding intervention moot because the court could grant Frank's requested relief. See OB19-20. And to the extent the district court ruled on the merits, that ruling was based on an erroneous understanding of the relief that Frank sought. *Id.* Perhaps seeking to divert attention from these legal errors, appellees plough forward to the substantive merits of the injunctive relief, wrongly arguing that it is beyond the permissible scope of intervention.

A. The district court has authority to grant Frank's requested relief.

Appellees' counsel voluntarily appeared before the district court and, accordingly, subjected themselves to the court's jurisdiction and broad inherent authority with respect to supervision over the attorneys who appear before it and abusive litigation practices. *See Boyer v. BNSF Ry. Co.*, 832 F.3d 699, 701-02 (7th Cir. 2016) (collecting cases); *Thorogood v. Sears, Roebuck & Co.*, 627 F.3d 289 (7th Cir. 2010) (All Writs Act permits

courts to enjoin vexatious litigation practices). Frank asked the Court to order injunctive relief against appellees' counsel "pursuant to [its] equitable powers and inherent authority." A200.

Indeed, none of the cases cited by appellees forbid intervention for the purpose of asking the Court for relief with respect to attorneys. Instead, courts conduct the standard Rule 24 analysis when ruling on the intervention motions.

Appellees erroneously suggest that Frank seeks relief "only" against the plaintiff appellees. PB31. Frank's proposed complaint requests relief for substantive claims against both plaintiffs and their counsel, and it details the factual basis for those claims. For example, the complaint states: "Frank asserts sanctions and unjust enrichment claims against all Plaintiffs and Settling Counsel for their breach of fiduciary duty to the class." A181 ¶ 11. He further alleged that "[b]y virtue of filing claims on behalf of a class of shareholders, the Plaintiffs and Settling Counsel undertook fiduciary responsibility to those class members" and breached that duty with complaints that "were little more than a vehicle for attorneys' fees." A186 ¶ 38; A196 ¶ 73.

Appellees cite *Julianites Against Shakedown Tactics v. TEJJR*, 2006 WL 8089629, at *7 (S.D. Cal. Dec. 29, 2006), *amended and superseded by Julianites Against Shakedown Tactics v. TEJJR*, 2007 WL 184716 (S.D. Cal. Jan. 5, 2007), and *New York News, Inc. v. Kheel*, 972 F.2d 482 (2d Cir. 1992), as purportedly supporting their argument that intervention to sanction counsel "is not

permissible." PB33. But in both cases, the court analyzed the intervention factors and certainly did not create any bright-line rule barring intervention with respect to requests for relief against counsel, as appellees suggest. The proposed intervenors in *TEJJR* were involved in separate litigation with defendants and sought to sanction plaintiffs' counsel for activities outside the scope of the litigation that they alleged "complicated" their settlement efforts. 2006 WL 8089629, at *1. The court denied intervention because doing so "would significantly change the focus and nature of the litigation" and the applicants failed to meet the intervention factors. *Id.* at *7. In contrast, Frank's intervention would address activity that occurred in the *very litigation* in which he seeks to intervene, that involves a common underlying inquiry, and in which the subject parties owe him a fiduciary duty.

In *Kheel*, the Second Circuit analyzed the Rule 24 intervention standard, and found the applicant in *Kheel* had no legally protectable interest other than a general interest in "protect[ing] the judicial process against abuse" where an attorney signed a pleading with false information. 972 F.2d at 486. The Second Circuit recognized that even nonparties and other "non-participants" in an action could move for sanctions under Rule 11 if they satisfied the intervention requirements of Rule 24. *Id.* at 488 ("the district court properly held that Kheel as a non-party and non-participant in the action could not move for sanctions unless he satisfied the intervention requirements of Rule 24"). Here, class counsel voluntarily took on a fiduciary duty with respect to Frank and all other putative class members when they filed a class action complaint. Unlike the applicant in

Kheel, Frank can satisfy the intervention requirements of Rule 24. *See supra*.

Appellees are wrong that he was required to take the overly formalistic step of naming appellees' counsel as parties and designating a separate count in his complaint. PB32. As a class member and proposed intervenor, Frank could request the proposed relief, and the court could grant it even in the absence of formalities that otherwise may be required for relief requested from true non-parties to the litigation. Even if the Court were to hold that Frank was required to formally name appellees' counsel as parties with a formal count against them in his complaint, courts "decline to apply Rule 24(c) in a needlessly technical manner in the absence of resulting prejudice." *Gibraltar Mausoleum Corp. v. Cedar Park Cemetery Assoc.*, 1993 WL 135454, at *4 (N.D. Ill. Apr. 29, 1993). Frank's motion and complaint provide sufficient notice of the relief he seeks against appellee's counsel. Accordingly, he "should be permitted to rectify [his motion] by submitting a pleading that sets forth an explicit claim and the relief sought." *Id.*

B. Appellees' challenge to Frank's ability to obtain equitable relief fails on the merits and is procedurally improper.

Appellees argue only that Frank cannot meet two of the four factors that a party seeking a permanent injunction must demonstrate—irreparable injury and inadequate remedies available at law. PB33-34. Critically, appellees' argument goes to the merits of the requested relief, not to whether the district court should have granted Frank's motion to intervene. Consistent

with the requirements of Rule 8, Frank's intervenor complaint contained a short and plain statement of his claims with plausible factual allegations. The substantive merits of the requested relief were not briefed or addressed by the district court and, because Frank plausibly pleaded facts entitling him to injunctive relief, it is legal error to judge the merits at this stage, before there has been any discovery or motion to dismiss. *See* OB24.

If the Court does reach the merits, appellees make only a two-sentence superficial argument claiming Frank cannot show irreparable injury. As such, this argument—and any argument that Frank cannot meet factors (3) and (4), which appellees fail to address at all—is forfeited. With respect to the second factor, appellees are flat wrong that Frank failed to show that the remedies available at law are inadequate. In his proposed complaint in intervention, and largely unrebutted by appellees, Frank unambiguously showed that appellees and their counsel repeatedly file and almost certainly will continue to file dozens of strike suits. Through these suits, they extract mootness fees that harm Frank and other putative future class members. *See* OB25-26 (citing the record). Frank's showing is particularly adequate because the court "must accept as true the non-conclusory allegations of the motion and cross- complaint." *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983). And, in any event, "[a] motion to intervene as a matter of right, moreover, should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved under the complaint." *Id.* Appellees cannot rebut

this showing simply by noting that publicly traded companies must disclose strike suits in which they may have to pay attorneys' fees in public SEC filings. PB34. It is entirely unfair and impracticable for Frank and other class members to scrutinize the SEC filings of every company in which they owns shares for the purpose of possibly intervening to protect their interests against parties that should be representing them in a fiduciary capacity.

C. Frank's request for injunctive relief is based on the record set forth in his proposed complaint detailing the "racket" counsel have developed post-*Walgreen*.

Appellees further claim that the requested relief is unavailable because it is based on "false accusations and speculation," when, in fact, they fail to rebut any of the underlying allegations as "demonstrably false." PB34. While the district court was obligated to view Frank's allegations in the light most favorable to him, even under appellees' version of events, they don't dispute that the supplemental disclosures failed to materially impact the shareholder vote or that they filed the suit with the intent to benefit themselves through Akorn's payment of their attorneys' fees. *See id.* They admit that the stipulations of dismissal they filed expressly stated that they intended to petition the court for attorneys' fees if they could not negotiate their claim to fees with the defendants. *Id.* That they assert that the amount had not been negotiated and Akorn had not agreed not to challenge fees at the time Akorn disseminated the supplemental disclosures or the parties

filed the stipulations doesn't change the clear message that appellees intended to demand fees and would impose additional litigation costs on Akorn if it refused to pay. Appellees' actions fit well within the unscrupulous conduct described by Frank in his complaint and declared a "racket" that "must end" in *Walgreen*. 832 F.3d at 724.

Likewise, appellees' argument that Frank's claim of future harm is speculative exemplifies rather than rebuts the need for intervention. Otherwise, Frank lacks an adequate remedy. As Frank alleged in his proposed complaint, appellees have a practice and pattern of filing and then stipulating to the dismissal of meritless strike suits and then enriching themselves by negotiating "mootness fees." *See* OB7 (citing record). Appellees' continuation of this abusive practice is not speculative; appellees do not deny that, collectively, they have filed dozens of strike suits without any intention of benefiting the class or anyone other than themselves, nor do they commit to ending this "racket." In any future suit, appellees can make the same argument they made in this litigation to avoid review of their abuse of the judicial system and disclaim a fee in any case in which the court appears sympathetic to Frank's argument. *See* OB27.

Appellees' cases don't support their argument that Frank's premise for injunctive relief is based on speculation. PB35. *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 741 (7th Cir. 2014), and *Laurens v. Volvo Cars of North America*, 2016 WL 5944896, at *2 (N.D. Ill. Oct. 13, 2017), involved unfair trade allegations against retailers such that the plaintiffs, once they discovered the unfair practices, were "certainly not in

danger of once again being duped." *See also Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 673 (7th Cir. 2006) (instructor unlikely to experience future prior restraint of speech by college that fired her); *Sierakowski v. Ryan*, 223 F.3d 440, 445 (7th Cir. 2000) ("record provide[d] no reason to believe" challenged conduct likely to recur). Here, Frank cannot simply avoid Akorn stock to avoid suffering the same harm appellees caused to him here. Given the high volume of strike suits that appellees and their counsel file, Frank—with 5-10% of his investment portfolio engaged in arbitrage of pending mergers (A257)—can hardly avoid becoming prey to their scheme in the future.

D. There is no conflict between the relief Frank seeks and the Rules of Professional Conduct

Appellees' argument that there is a conflict between the injunction Frank seeks and the Illinois Rules of Professional Conduct is nonsensical. PB36. The rules do not suggest any limitation on courts entering an injunction prohibiting appellees' counsel from accepting mootness fees without court approval. A200. Even if the cited rule applied with respect to court orders—and it doesn't—the injunction places no restriction on counsel's autonomy or a potential client's freedom to choose a lawyer. It simply requires an additional check on the fees paid to the attorney in the course of the litigation to prevent abuse of the class-action system at the expense of absent class members.

VI. Appellees' other arguments provide no support for the legality of their racket,

which is unauthorized by the Exchange Act and contravenes Walgreen.

Appellees lastly assert a hodgepodge of arguments: (1) Frank supposedly rejects corporate transparency, (2) their racket is actually endorsed by *Walgreen*, and (3) the PSLRA does not apply because the district court exercised no supervision in awarding attorneys' fees. Each of these arguments is false.

With respect to (1), appellees offer no support for what they claim are Frank's "personal views." PB38-39. In any event, these characterizations constitute irrelevant *ad hominem*.

A. *Walgreen* did not import all idiosyncrasies of Delaware corporation law into Seventh Circuit controversies involving alleged Exchange Act violations by a Louisiana corporation.

Appellees incorrectly read *Walgreen*, which adopted the "clearer [plainly material] standard for the approval of such settlements," 832 F.3d at 725, to somehow endorse their mootness racket. While *Walgreen* relied on the "plainly material" standard for supplemental disclosures announced in *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884, 894 (Del. Ch. 2016), appellees cannot cite any words suggesting that *Walgreen* imported the procedural and substantive Delaware corporation law of mootness fees into Exchange Act litigation.

Appellees chose to file complaints under the Exchange Act in federal courts, so should follow federal law, which prohibits catalyst fees. *See Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (repudiating theory that obtaining voluntary concessions after inception of case makes plaintiff "prevailing party"). The substitution of Delaware law and procedure makes no sense, particularly where Akorn is a Louisiana corporation.

And appellees don't even hew to *Trulia*. Instead, they pick and choose which standards to apply. For example, appellees entirely disregard the shareholder protections mandatory under Delaware law. Privately-negotiated mootness fees can only be tolerated "with the caveat that notice must be provided to the stockholders to protect against 'the risk of buy off' of plaintiffs' counsel." *Trulia*, 129 A.3d at 898. Notice of mootness fees is required so that shareholders like Frank *can object to the payment*:

> Therefore, should the board elect to pay a reasonable fee for some reason in the context of a moot shareholders' claim, it is necessary that the court be informed and that notice to the class of such payment be made and an opportunity to be heard afforded. The purpose of the hearing would be to afford the class an opportunity to show that the case really is not moot but that the proposed payment to counsel is the only motivation for the dismissal on that ground.

In re Adv. Mammography Sys., Inc. Shareholders Litig., 1996 WL 633409, at *1 (Del. Ch. Oct. 30, 1996) (cited by Trulia, 129 A.3d at 898).

No such notice has ever been provided to Akorn shareholders. No SEC filing or press release announced the settlement of mootness fees in this case. Appellees' counsel have moved their racket into federal courts precisely to evade Delaware's stringent supervision. *See* OB6. Yet having completely sidestepped the mootness fee notice requirement, appellees now insist that *Trulia* robs Frank of any venue to argue a claim *Trulia* expressly allows: that the proposed payment to counsel is the only motivation for their racket. PB38. Frank allegedly could have only filed a separate derivative action against Akorn, which is supposedly foreclosed by Louisiana law. PB24. In other words, appellees contend that their extraction of fees under federal securities law is unreviewable because this Court favorably cited an opinion that also described a process for seeking the review of mootness fees under Delaware state law, which has no parallel in applicable Louisiana law! Kafka would whistle respectfully.

B. The PSLRA was intended to curtail lawyer-driven rackets that harm shareholders.

Securities litigants and courts have found it crystal clear that § 78u-4(a)(6) forbids payment for mere disclosure. *See Mostaed v. Crawford*, 2012 WL 3947978, at *7 (E.D. Va. Sept. 10, 2012) ("The parties agree that, under federal law, the plaintiffs must be denied attorneys' fees because the [PSLRA] ... prevent[s] the

award of attorneys' fees except where counsel's efforts have led to monetary relief that is 'actually paid to the class' of claimants."); *see also Masters v. Wilhelmina*, 473 F.3d 423, 438 (2nd Cir. 2007) ("PSLRA would not allow for the computation of fees on the basis of such non-damages items as discounts or coupons received in settlement.").

The statute cannot be read any other way. Because the amount appellees recovered for the class is zero, any reasonable percentage likewise ought to be $0.

Appellees' contrary theory rests on citations predating *Trulia*, *Walgreen*, and even the PSLRA itself, which lack persuasive force. *Compare Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 396 (1970) (awarding lodestar due to "the stress placed by Congress on the importance of fair and informed corporate suffrage") *with* S. Rep. 104-98, 12, 1995 U.S.C.C.A.N. 679, 691 ("As a result of [lodestar] methodology, attorney's fees have exceeded 50% or more of the settlement awarded to the class. The Committee limits the award of attorney's fees and costs to a reasonable percentage of the amount of recovery awarded to the class.").

The PSLRA was passed, 25 years after Mills, "to curtail the champertous vice of 'lawyer-driven' securities litigation." *City of Pontiac Gen. Employees' Ret. Sys. v. Lockheed Martin Corp.*, 844 F. Supp. 2d 498, 500 (S.D.N.Y. 2012) (Rakoff, J.); *see also Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863 (7th Cir. 2014) (citing House and Senate Reports' concern regarding various

"abusive practices").[6] Even if the mootness fees paid in this case were not governed by § 78u-4(a)(6) because they were not "awarded" by the lower court, that subsection still informs class counsel's breach of duty. Using a process of dismissal and behind-closed-doors fee negotiation, appellees sought to evade not only *Walgreen* but also the PSLRA itself, neither of which would have permitted class counsel to reach the end result they desired through the ordinary process of settlement.

Through their dismiss-and-negotiate-private-fees tactic, appellees also end-ran the PSLRA subsection requiring, *upon final adjudication*, mandatory review of their filings for compliance with Rule 11. *See* 15 U.S.C. § 78u-4(c)(1).

Neither the disputed facts nor the law demonstrate that appellees' counsel could be entitled to attorneys' fees. Much less have appellees shown that Frank's well-pleaded intervention should be denied.

Conclusion

The Court should reverse and remand the district court's finding of mootness. Additionally, the Court should affirm that absent class members may move to intervene to challenge a "mootness fee" request and to prevent class counsel from flouting *Walgreen*, and that appropriately tailored injunctive relief is a prospective remedy.

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[6] Appellees' citation to the House Report (H.R. Conf. Rep. No. 104-369 (1995)) offers them no aid. That passage suggests a lodestar-based award is permissible only if it also constitutes a reasonable percentage of amount awarded to the class.

Dated: November 2, 2018 Respectfully submitted,

/s/ Anna St. John

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ORDER

May 22, 2024

Before
FRANK H. EASTERBROOK, *Circuit Judge*

Nos. 18-2220 & 18-2221,	JORGE ALCAREZ and SEAN HARRIS, as representatives of a class, Plaintiffs - Appellees v. AKORN, INC., et al., Defendants - Appellees APPEALS OF: THEODORE H. FRANK, Intervenor
Originating Case Information:	
District Court Nos: 1:17-cv-05017 & 1:17-cv-05021 Northern District of Illinois, Eastern Division District Judge Thomas M. Durkin	

Upon consideration of the **APPELLEES SEAN HARRIS AND JORGE ALCAREZ'S MOTION TO STAY THE MANDATE PURSUANT TO FED. R. APP. P. 41(d)**, filed on May 21, 2024, by counsel for appellees Jorge Alcarez and Sean Harris,

IT IS ORDERED that the motion to stay the mandate is **DENIED**.

Form name: **c7_Order_3J** (form ID: **177**)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NOTICE OF ISSUANCE OF MANDATE

May 23, 2024

To: Thomas G. Bruton
UNITED STATES DISTRICT COURT
Northern District of Illinois
Chicago, IL 60604-0000

No. 18-2220	JORGE ALCAREZ, individually and on behalf of all others similarly situated, Plaintiff - Appellee v. AKORN, INC., et al., Defendants - Appellees APPEAL OF: THEODORE H. FRANK, Intervenor
No. 18-2221	SEAN HARRIS, On behalf of himself and all others similarly situated, Plaintiff - Appellee v. AKORN, INC., et al., Defendants - Appellees APPEAL OF: THEODORE H. FRANK, Intervenor

No. 18-3307	SHAUN A. HOUSE, Individually and on behalf of all others similarly situated, Plaintiff - Appellee v. AKORN, INC., et al., Defendants - Appellees APPEAL OF: THEODORE H. FRANK, Intervenor
No. 19-2408	SHAUN A. HOUSE, Individually and on behalf of all others similarly situated, Plaintiff - Appellee v. AKORN, INC., et al., Defendants - Appellees
Originating Case Information:	
District Court No: 1:17-cv-05017 Northern District of Illinois, Eastern Division District Judge Thomas M. Durkin	
Originating Case Information:	
District Court No: 1:17-cv-05021 Northern District of Illinois, Eastern Division	
Originating Case Information:	
District Court No: 1:17-cv-05018 Northern District of Illinois, Eastern Division	

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any,

and any direction as to costs shall constitute the mandate.

RECORD ON APPEAL STATUS: No record to be returned

Form name: **c7_Mandate** (form ID: **135**)

Security AKRXQ US Equity
Start Date 4/21/2017
End Date 12/29/2017
Period D
Currency USD

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8/16/2017	33.3300	33.3600	33.1800	33.3000	1,500,196	26.3239
8/17/2017	33.3000	33.3750	32.5100	32.6000	7,720,556	25.7706

8/18/2017	32.4200	32.5000	31.8200	31.9800	8,063,576	25.2805
8/21/2017	32.0900	32.7500	31.9600	32.6100	5,151,797	25.7785
8/22/2017	32.4000	32.7000	32.2900	32.5200	4,023,260	25.7073
8/23/2017	32.5500	32.5800	32.3000	32.3200	2,025,177	25.5492
8/24/2017	32.3300	32.4700	32.3100	32.3600	3,008,340	25.5809
8/25/2017	32.4000	32.6900	32.4000	32.5000	1,287,079	25.6915
8/28/2017	32.4500	32.5900	32.4200	32.4900	2,386,984	25.6836
8/29/2017	32.5300	32.7200	32.3500	32.6200	1,101,094	25.7864
8/30/2017	32.5700	32.8600	32.5400	32.8300	3,185,235	25.9524
8/31/2017	32.8400	33.0000	32.7700	32.9000	1,491,958	26.0077

Date	PX_OPEN	PX_HIGH	PX_LOW	PX_OFFICIAL_CLOSE	PX_VOLUME	PE_RATIO
9/1/2017	32.9200	32.9700	32.8650	32.9400	1,335,401	26.0394
9/5/2017	32.9200	33.0300	32.8500	32.9700	1,743,950	26.0631
9/6/2017	32.9900	33.0300	32.9200	32.9600	1,502,854	26.0552
9/7/2017	32.9900	33.1010	32.9500	32.9900	2,456,018	26.0789
9/8/2017	32.9600	33.1400	32.9590	33.1100	1,522,501	26.1737
9/11/2017	33.1700	33.2200	33.1090	33.1700	1,311,719	26.2212
9/12/2017	33.1800	33.4600	33.1300	33.2300	2,194,629	26.2686
9/13/2017	33.2500	33.3000	33.0601	33.1500	1,582,815	26.2054
9/14/2017	33.1500	33.2325	32.7300	32.9700	2,936,295	26.0631
9/15/2017	33.0000	33.1300	32.9700	33.1000	1,889,374	26.1658
9/18/2017	33.0600	33.1200	33.0000	33.0200	1,359,384	26.1026

9/19/2017	33.0700	33.1300	33.0500	33.1000	736,378	26.1658
9/20/2017	33.1000	33.2100	33.0850	33.1500	943,627	26.2054
9/21/2017	33.1000	33.1575	33.1000	33.1400	1,341,753	26.1975
9/22/2017	33.1400	33.1550	33.0350	33.0600	1,439,347	26.1342
9/25/2017	33.0500	33.1100	33.0200	33.1100	977,746	26.1737
9/26/2017	33.1000	33.1550	33.0500	33.1200	1,630,045	26.1817
9/27/2017	33.1400	33.1550	33.0800	33.1500	1,166,243	26.2054
9/28/2017	33.1400	33.1800	33.1000	33.1700	2,311,644	26.2212
9/29/2017	33.1500	33.3000	33.1350	33.1900	2,059,911	37.0862
10/2/2017	33.2100	33.2100	33.1500	33.1700	2,823,694	37.0639
10/3/2017	33.0300	33.0600	32.6000	32.6800	6,719,083	36.5163
10/4/2017	32.8000	33.0900	32.8000	32.9000	4,777,666	36.7622
10/5/2017	32.9000	33.0000	32.7000	32.7900	3,239,908	36.6392
10/6/2017	32.7800	33.0000	32.6700	32.8300	2,778,460	36.6839
10/9/2017	32.8100	32.9100	32.7950	32.8600	1,437,385	36.7175
10/10/2017	32.9000	33.0000	32.9000	32.9350	2,278,145	36.8013
10/11/2017	32.9900	33.0000	32.8600	32.9500	623,216	36.8180
10/12/2017	32.9900	33.2000	32.9700	33.1600	2,846,383	37.0527
10/13/2017	33.1500	33.2300	33.1300	33.2200	1,553,972	37.1197
10/16/2017	33.2600	33.3500	33.1800	33.2100	1,566,755	37.1086
10/17/2017	33.2200	33.2900	33.1800	33.2500	1,348,573	37.1532
10/18/2017	33.2300	33.3200	33.1500	33.1800	2,295,661	37.0750

Date	PX_OPEN	PX_HIGH	PX_LOW	PX_OFFICIAL_CLOSE	PX_VOLUME	PE_RATIO
10/19/2017	33.1600	33.1700	33.1000	33.1500	1,672,543	37.0415
10/20/2017	33.2200	33.3700	33.1525	33.2800	1,311,566	37.1868
10/23/2017	33.2200	33.3200	33.1900	33.2900	1,012,724	37.1979
10/24/2017	33.2900	33.3000	33.2300	33.2600	430,144	37.1644
10/25/2017	33.2300	33.2700	33.1450	33.2200	1,720,566	37.1197
10/26/2017	33.2000	33.2800	32.1700	32.8400	12,333,905	36.6951
10/27/2017	32.9000	32.9800	32.5000	32.5200	2,730,959	36.3376
10/30/2017	32.4900	32.6500	32.3300	32.4400	2,136,133	36.2482
10/31/2017	32.4900	32.6900	32.3600	32.5700	3,867,479	36.3934
11/1/2017	32.6400	32.7400	32.4500	32.5400	3,414,159	36.3599
11/2/2017	33.1650	33.4100	33.1500	33.2500	9,313,017	37.1532
11/3/2017	33.2000	33.2650	33.0900	33.1500	1,693,317	37.0415
11/6/2017	33.1600	33.3050	33.1300	33.2600	1,505,929	37.1644
11/7/2017	33.2500	33.3600	33.2200	33.2700	2,087,265	37.1756
11/8/2017	33.2900	33.3300	33.2050	33.2400	1,459,423	37.1421
11/9/2017	33.2400	33.2800	33.1350	33.1500	2,406,843	37.0415
11/10/2017	33.1700	33.3200	33.1700	33.2100	2,907,397	37.1086
11/13/2017	33.2500	33.3200	33.1800	33.3100	1,227,115	37.2203
11/14/2017	33.2700	33.4200	33.2600	33.3700	980,819	37.2873
11/15/2017	33.3300	33.5500	33.2600	33.4400	1,158,806	37.3655
11/16/2017	33.4900	33.5300	33.3500	33.4800	1,330,594	37.4102
11/17/2017	33.3500	33.4700	33.3200	33.4000	1,150,101	37.3209
11/20/2017	33.4500	33.4750	33.1500	33.4000	1,090,432	37.3209

11/21/2017	33.3500	33.4500	31.7700	32.3000	10,920,825	36.0917
11/22/2017	32.9500	33.0100	32.3000	32.3700	3,091,750	36.1699
11/24/2017	32.3700	32.7500	32.3700	32.6100	519,761	36.4381
11/27/2017	32.6100	32.6900	32.5500	32.6400	700,546	36.4716
11/28/2017	32.6300	32.7300	32.2800	32.4500	877,042	36.2593
11/29/2017	32.4400	32.7300	32.4300	32.5300	611,628	36.3487
11/30/2017	32.6400	32.7400	32.5200	32.5500	674,825	36.3711
12/1/2017	32.5500	33.0300	32.3500	32.9000	1,531,913	36.7622
12/4/2017	32.9500	33.0600	32.7100	32.7600	871,106	36.6057
12/5/2017	32.7300	32.9300	32.6600	32.8000	536,593	36.6504

Date	PX_OPEN	PX_HIGH	PX_LOW	PX_OFFICIAL_CLOSE	PX_VOLUME	PE_RATIO
12/6/2017	32.8100	33.0500	32.6700	32.6900	1,168,177	36.5275
12/7/2017	32.7000	32.7600	32.3600	32.4900	1,325,474	36.3040
12/8/2017	32.5200	32.9700	32.4600	32.9200	1,579,876	36.7845
12/11/2017	32.9400	32.9400	32.5420	32.6400	1,061,256	36.4716
12/12/2017	32.6600	32.6600	32.0900	32.2000	2,544,773	35.9800
12/13/2017	32.3100	32.5700	31.8100	32.2200	2,135,629	36.0023
12/14/2017	32.1400	32.2700	31.9700	32.2000	1,226,188	35.9800
12/15/2017	32.0700	32.4100	32.0700	32.3600	1,702,791	36.1588
12/18/2017	32.3700	32.6700	32.2200	32.3150	631,915	36.1085
12/19/2017	32.2800	32.6200	32.2700	32.3700	711,294	36.1699
12/20/2017	32.3700	32.4550	32.2900	32.3600	496,273	36.1588

12/21/2017	32.3200	32.4000	31.9900	32.0400	2,003,813	35.8012
12/22/2017	32.1100	32.3300	32.0050	32.0800	1,456,376	35.8459
12/26/2017	32.0800	32.2100	31.7700	31.9500	1,605,227	35.7006
12/27/2017	31.9600	32.0800	31.8000	31.8500	1,734,073	35.5889
12/28/2017	31.9500	32.0350	31.7500	31.8400	2,163,265	35.5777
12/29/2017	31.8400	32.4100	31.8200	32.2300	2,212,899	59.9550