UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT BERG, On Behalf of Himself and 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, and QUERCUS ACQUISITION, INC.,

Defendants.

THEODORE H. FRANK,

Intervenor.

Case No. 1:17-cv-05016

Related cases:[1]
1:17-cv-05017
1:17-cv-05018
1:17-cv-05021

CLASS ACTION

Hon. Thomas M. Durkin

THEODORE H. FRANK'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF UNDER RULE 60(b) AND FOR THE COURT TO ISSUE AN ORDER TO SHOW CAUSE THAT PLAINTIFFS AND THEIR COUNSEL SHOULD NOT BE SANCTIONED PURSUANT TO 15 U.S.C. § 78u-4(C)(1) AND RULE 11

[1] For case management purposes, all filings in the related cases should be made on the *Berg* docket, No. 17-cv-5016. Dkt. 128.

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INTRODUCTION

Both plaintiffs' oppositions to Intervenor Frank's Rule 60(b) Motion for Order to Show Cause ("Motion," Dkt. 129) oddly pretend as if the Seventh Circuit's opinion does not bind this Court. *See* Dkt. 135 ("Disclaimed Opp.") at 4-5; and Dkt. 136 ("Monteverde Opp.") at 3-4 & n.3. Both sets of plaintiffs contend that their dismissals in 2017 rob the Court of jurisdiction to conduct the "[m]andatory" review under the PSLRA. The panel emphatically rejects this argument. "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. … Those steps have not been put in motion, … but they should occur on remand." *Alcarez v. Akorn, Inc.*, 99 F.4th 368, 376 (7th Cir. 2024).

Plaintiffs advance of grab bag of dubious process—that a PSLRA review somehow contradicts Rule 11's safe harbor provision, that sanctions cannot be sought against counsel, even though the PSLRA contemplates it, and that Frank's motion is untimely. Most of these arguments are mistaken on their face and at least implicitly contradicted by the Seventh Circuit opinion.

Plaintiffs argue that sanctions against them would be moot because they disclaimed fees (or in the case of Monteverde, because Akorn is bankrupt). This is false: Frank's Motion and Proposed Complaint enumerates remedies that the Court may impose. Motion at 24-25. Even if this were not so, the panel opinion counsels against short-circuiting review by skipping to the merits of remedies. *Alcarez*, 99 F.4th at 375. After the Court issues an order to show cause, the parties retain every opportunity under Rule 11 to contest suitable remedies and the merits of imposing any sanction at all.

Finally, plaintiffs argue that their complaints did not violate Rule 11, but they almost completely elide Frank's contention that the complaints were filed for an *improper purpose*—to extract attorneys' fees, as plaintiffs' counsel appear to have done hundreds of other times. Motion 16-17. Even accepting plaintiffs' framing that the Court should only evaluate the complaints for frivolousness or materiality, their arguments fail. The complaints *were* frivolous, which is why plaintiffs' counsel settled for worthless disclosures of no use to shareholders simply as a means to extract attorneys' fees.

The Court should grant Frank's motion under Rule 60(b), set aside plaintiffs' cynical dismissals, and order plaintiffs' counsel to show cause that they should not be sanctioned under 15 U.S.C. § 78u-4(c)(1) "and, derivatively, Rule 11." *Alcarez*, 99 F.4th at 377.

I. Plaintiffs' counsel cannot escape mandatory review by dismissing meritless complaints after extracting attorneys' fees.

Both sets of plaintiffs' counsel ask this Court to disregard the Seventh Circuit and ignore law of the case. It should not.

Monteverde argues categorically that no judgment exists that the Court can grant Rule 60 relief over, citing dicta from the Court's 2017 order denying intervention as to plaintiff Berg. Monteverde Opp. 3. Monteverde asserts that the Seventh Circuit misunderstood what a "judgement" is. *Id.* at 4 & n.3. In fact, the panel opinion suggested that Frank must file a Rule 60 in direct response to Monteverde's argument on appeal "that the district court lacked jurisdiction to reopen a dismissed case." *Alcarez*, 99 F.4th at 374. The panel took this argument seriously and found that Frank's Motion "could solve any problem with reopening the judgments." *Id.* at 375.

Both sets of plaintiffs' counsel boldly argue that the Seventh Circuit is wrong about its interpretation of the PSLRA, and that the Court should simply disregard it in favor of decisions by district courts in other circuits. Disclaimed Opp. 5; Monteverde Opp. 6-7. None of the cases cited would be more than persuasive authority even if this Court were located in, for example, the District of Kansas or the Southern District of New York.[2] In contrast, the Seventh Circuit's opinion in this case unambiguously holds " 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

[2] Disclaimed Plaintiffs assert that "the Seventh Circuit's view on 'final adjudication'" was "made without any briefing by the parties and without citing to authority." Disclaimed Opp. 5 n.5. In fact, Frank raised the argument in a 28(j) letter shortly after oral argument, observing that the Seventh Circuit held in *Higginbotham v. Baxter International Inc.* that 15 U.S.C. § 78u-4(c)(1) applies upon the filing of a putative class complaint and further that "upon final adjudication of the action" a district court must make mandatory Rule 11 findings. No. 18-2220, Dkt. 45 (7th Cir. Nov. 7, 2018) (discussing 495 F.3d 753 (7th Cir. 2007)). Disclaimed Plaintiffs could have argued their belated views on "final adjudication" to the Seventh Circuit in response, but chose to instead argue that mootness fees here were not court-ordered and they had disclaimed fees. *See* No. 18-2221, Dkt. 45 (7th Cir. Nov. 8, 2018).

reason for it. It obliges the judge to determine whether each suit was proper at the moment it was filed." *Alcarez.*, 99 F.4th at 376.

Both sets of plaintiffs' counsel quote district court orders that the "final adjudication" requirement is necessary check because no Rule 11 "safe harbor" applies. Disclaimed Opp. 4; Monteverde Opp. 6. But the Seventh Circuit simply does not agree, and it was not the first court to have done so. *See Smith v. Smith*, 184 F.R.D. 420, 423 (S.D. Fla. 1998) (ordering plaintiff to show cause he should not be sanctioned for filing his voluntarily-dismissed complaint, and affording notice and opportunity to respond required by § 78u-4(c)(2)). Frank agrees the PSLRA affords no 21-day safe harbor, but in any event even the Disclaimed Plaintiffs waited seven months to disclaim their entitlement to attorneys' fees. Monteverde at least tacitly admits that the Court unlikely countermand the Seventh Circuit, by clarifying in a footnote that they raise the argument "to preserve it for appeal." Monteverde Opp. 7 n.5.

Disclaimed Plaintiffs curiously argue that Frank is wrong to say that plaintiffs purported to rob the Court of jurisdiction under the PSLRA through their dismissals. Disclaimed Opp. 4. Instead, Disclaimed Plaintiffs purport that their dismissals rob the court of jurisdiction for mandatory review under the PSLRA! *Id*. Plaintiffs' apparently grumble that their dismissals did not *expressly* evade PSLRA § 78u-4(c)(2). Sure, but Frank's point is that plaintiffs' counsel dismissed in hopes of escaping any judicial review, and indeed they continue to insist that such dismissals should be a get-out-of-sanctions free card for violating the PSLRA. The Seventh Circuit found otherwise.

II. Intervenor Frank's remedies are not moot with respect to any plaintiff, and mootness would not be a reason to deny the motion anyway.

Both sets of counsel argue that the Court cannot grant meaningful relief because attorneys' fees have been disclaimed or irretrievably disgorged to Akorn. The *Alcarez* panel found otherwise because Frank seeks—and the Court has the authority to issue—other sanctions.

Disclaimed Plaintiffs make their version argument under Rule 60(b)(6), asserting no injustice exists because those plaintiffs waived their entitlement to fees. Disclaimed Opp. 9. The panel itself noted that disgorgement is no longer possible, but the Seventh Circuit remanded this complaint in

part because it remains "possible to grant the sort of relief Frank requested." *Alcarez*, 99 F.4th at 375. Independently, the Court has discretion over the choice of sanction under § 78u-4(c)(1). *Id.* at 377.

Disclaimer Plaintiffs further contend that *Pearson* does not require relief under Rule 60(b)(6) because the Court has not (1) retained class-wide jurisdiction over administration of the settlement, (2) because "there is no suspected unfair actions that have negatively impacted a class in these Actions," and (3) because "Frank here does seek to reopen this case…to continue indefinite future litigation that is ancillary to the underlying claims and has sought that relief without. [sic] Mot. 1, 12, 25." Disclaimed Opp. 9. Plaintiffs get the facts of *Pearson II* wrong. The challenge for Objector Frank in that appeal is that the district court entered an "unconditional" dismissal with prejudice, which "was not accompanied by any order effectuating the settlement." *Pearson v. Target Corp.*, 893 F.3d 980, 983 (7th Cir. 2018) ("*Pearson II*"). This was a heavier burden than in this case, where the plaintiffs voluntarily dismissed while expressly reserving jurisdiction for the Court to set attorneys' fees in the *Berg* action, which has never been dismissed for all purposes. Dkt. 54. While the dismissal here did not release class claims, neither did the collusive settlements entered by cynical objectors in *Pearson II*. Nevertheless, the Seventh Circuit *reversed* denial of Rule 60(b)(6) relief simply because there was "there is a real *risk* that they did so at the expense of the class." 893 F.3d at 985. At the time of the *Pearson II* appeal, Objector Frank did not know for certain that the cynical objectors sold out their claims but simply "suspect[ed] that they acted in bad faith." *Id.* 983. Suspicions is unnecessary here: the plaintiffs voluntarily resolved all of their actions in exchange for "$322,500 in attorneys' fees and expenses." Dkt. 56 at 6. That certain plaintiffs' counsel got cold feet seven months after executing their racket does not vitiate their past breach of fiduciary duty, which the court may still remedy. Finally, Disclaimed Plaintiffs are incorrect that Frank seeks to continue indefinite litigation. He moves for an order to show cause plaintiffs' counsel should not be sanctioned under § 78u-4(a)(6). The Seventh Circuit remanded for this Court to determine whether and what sanction would be appropriate, and Frank does not seek relief beyond such sanctions.[3]

[3] Plaintiffs' appear to misunderstand Frank's argument that the equities favor reopening this case for the purpose of assessing sanctions under § 78u-4(a)(6). Disclaimed Opp. 10-11. Frank does

Plaintiffs argue that because they retained no fee, the Court should not reopen the case (Disclaimed Opp. 12; Monteverde Opp. 17), but panel knew about this and still instructed the Court to consider a Rule 60 motion. *Alcarez*, 99 F.4th at 378. The proposed complaint identifies recent complaints targeting companies where Frank is a shareholder, which demonstrates that sanctions would remedy the same sort of conduct by plaintiffs' counsel. Dkt. 129-1 ¶¶ 106-07. Plaintiffs' counsel may be sanctioned for their breach of fiduciary duty, and those sanctions can be tailored to help prevent (or at least illuminate) recurrence of the racket.

Monteverde argues that Intervenor Frank is not "'the opposing party' as used in 15 U.S.C. § 78u-4(c)(3)(A)(ii)," Monteverde Opp. 18, but this does not militate against Rule 60(b) relief. The law provides a "[p]resumption in favor of attorneys' fees and costs," which may include "an award to the opposing party." Even if Frank were not the opposing party, and Monteverde cites no authority for this proposition, Intervenor Frank suggested four other sanctions that do not entail payment of attorneys' fees to him. Motion 24-25.

Moreover, both plaintiffs' arguments about relief seek to short-circuit the Court's Rule 60 analysis in the same way that the panel reversed in the context of intervention. "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." *Alcarez*, 99 F.4th at 375. The Court might conclude, after permitting plaintiffs' counsel their requisite ability to respond to the order to show cause under § 78u-4(c)(2), that no sanction would be appropriate. The Court may not deny the Rule 60 motion now by pre-deciding that issue.

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not contend that Rule 60(b)(6) motions should be decided based on a freeform assessment of the equities; the point is that equitable considerations present no obstacle to relief. Courts consider the equities in deciding whether the movant acted timely and in good faith, and whether prejudice by the responding parties is due to the movant or their own misconduct and intransigence. Motion 11-12. Here, Frank has diligently pursued claims against plaintiffs' counsel who filed complaints for an improper purpose, and appear to have done so at industrial scale. *Pearson II* illustrates how bad faith self-dealing supports Rule 60(b)(6) relief, and plaintiffs cannot identify any equitable consideration that militates against doing so.

III. Intervenor Frank may seek sanctions against the real parties in interest.

Plaintiffs' counsel similarly asserts that no new facts and circumstances justify seeing remedies against counsel and that the panel observed "the lawyers are not parties, so they would not be proper objects of injunctive relief unless they were added as parties." Disclaiming Opp. 12 (quoting *Alcarez*, 99 F.4th at 376). Intervenor Frank admits he is following the Seventh Circuit's opinion, but he disagrees that this bars claims against the real parties in interest.

Disclaiming plaintiffs suggest that Frank should have multiplied proceedings by filing a new complaint within five years of their breach of fiduciary duty. Disclaiming Opp. 11. But Frank moved within three days, and has timely pursued his claim ever since. While proposed intervenor complaints did not name plaintiffs' counsel as parties, from the very beginning he pleaded misconduct by "Plaintiffs ***and their counsel***." Dkt. 57-1 (2017 proposed complaint) at 1, 2, 3, 17, 18, 19, 20 (emphasis added). To the extent that Frank's proposed complaint is permitted, it relates back to his original 2017 proposed complaint under Rule 15(c)(1)(A), (B), (C), and Illinois law. *See Owens v. VHS Acquisition Subsidiary No. 3, Inc.*, 2017 IL App (1st) 161709, ¶ 29, 413 Ill. Dec. 478, 488, 78 N.E.3d 470, 480 (Ill. App. 1st Dist. 2017) (finding that amended pleading with correct doctor's name related back or original pleading because doctor was on "constructive notice" by the complaint) (following *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538 (2010)). Plaintiffs presumably contend that the complaint should not relate back to the 2017 proposed complaint because the Court denied intervention—but the issue has been almost continuously on appeal since then. A new complaint would have unnecessarily multiplied proceedings. Monteverde's suggestion (Monteverde Opp. 5) that Frank should have filed a new complaint after the *Pearson II* opinion issued seems similarly unnecessarily duplicative.

In any event, the Court need not formally add counsel as parties to conduct the mandatory PSLRA review. The attorneys long ago submitted to the Rule 11 oversight by signing the underlying complaints. The panel discusses the court's basis for examining the complaints under § 78u-4(a)(6) after concluding that Frank's originally-sought injunction would require their addition as parties. *Alcarez*, 99 F.4th at 376. Frank suggests adding counsel as parties as belts and suspenders: Rule 11 already provides the court discretion to fashion appropriate remedies to counsel. *Id.* at 377.

Monteverde argues that Intervenor Frank must not be allowed to pursue a "vendetta with Monteverde." Monteverde Opp. 16. This argument is peculiar given that Frank seeks sanctions against four unrelated sets of counsel for engaging in repeated and ongoing conduct involving breaches of fiduciary duty. While Monteverde complains that Frank has not also pursued claims against counsel for plaintiff Pullos, Frank explained the reasons for this already: " These matters are differently situated, inter alia, because Frank did not appeal denial of intervention with respect to those plaintiffs' actions, raising serious timeliness/laches defenses that the other plaintiffs lack." Dkt. 125 (Joint Status Report) at 8. Significant differences in conduct since 2017 also exist. While counsel for plaintiffs Carlyle appears to have filed securities suits against merging companies since 2018, Monteverde has filed 176 in the last four years. Dkt. 129-1 ¶¶ 92-3. Frank did not allege that "every case filed by Monteverde" is "a frivolous 'strike suit'" (Monteverde Opp. 1) but Frank did identify 176 apparent strike suits under Sections 14(a) and 20(a) of the Securities Exchange Act filed against merging companies that alleged deficient disclosures since July 2020. Monteverde does not point to a single mistaken inclusion, supporting the pattern and practice of Monteverde's racket.

Disclaiming Plaintiffs similarly criticize Frank's lists because "because he only 'made some effort to remove suits that sought substantive relief.'" Disclaiming Opp. 13 n.9. But they do not identify a single erroneous entry either. Even if they had, Frank has identified **955** apparent strike suits filed by plaintiffs' counsel in the last four years. Dkt. 91-1 ¶¶ 85-94. Frank's counsel has reviewed hundreds of these dockets, and the vast majority revealed that merging companies were generally swarmed by multiple redundant actions which were usually dismissed without a single contested filing. *Id.* ¶¶ 94-95. Frank does not seek sanctions for this later conduct itself. Instead, Frank contends that the continuing racket supports the inference of an "improper purpose" for plaintiffs' suits against Akorn. The ongoing nature of the racket—right up until the Seventh Circuit issued its opinion—also demonstrates the ongoing need for sanctions, including disclosure of increasingly obscure demand letter practices. *Id.* ¶¶ 100-02. Disclaimed Plaintiffs call the demand letter racket "speculation," but it is no more speculative than the cynical objectors' settlements in *Pearson II*—objectors do not generally file and dismiss appeals without securing something for themselves. Likewise, attorneys do not idly

write corporate boards. In one recent merger, putative shareholder sent ***eleven*** letters demanding supplemental disclosures. *Id.* ¶ 100. On information and belief, for-profit attorneys don't create such work product without some chance of recovering attorneys' fees. Intervenor Frank suggests that disclosure of this activity would form part of a suitable sanctions order. Motion 25.

IV. All of plaintiffs' complaints were filed with an improper purpose.

Plaintiffs' counsel contends that their complaints were not *frivolous*, but say little about Frank's primary argument that they were filed "for the improper purpose of demanding attorneys' fees under the pretext of filing securities class actions under the PSLRA." Motion 16. Monteverde quotes *In re Honeywell Int'l Inc. Consol. Stockholder Litig.*, which was not a disclosure strike suit, for the proposition that "counsel's hope to achieve a settlement without having to do much work is not, by itself, an improper purpose." Monteverde Opp. 7, quoting 2024 WL 3487855, 2024 U.S. Dist. LEXIS 127616, at *9 (D. Del. July 19, 2024). But Frank does not merely allege that plaintiffs filed suits in hopes of reaching a quick settlement—in fact plaintiffs filed suits in hopes of receiving a payoff without achieving a class settlement or any court approval, contrary to *In re Walgreen Co. Stockholder Litigation*, 832 F.3d 718, 725 (7th Cir. 2016).[4]

While an attorney who ethically seeks a quick settlement on behalf of her clients does not file for an improper purpose, *Honeywell* cites authority that better describes plaintiffs' conduct here. *See Scott v. Vantage Corp.*, 64 F.4th 462, 472-73 (3d Cir. 2023) (affirming Rule 11 violation and vacating denial of sanctions to securities plaintiffs because "PSLRA's text requires that some sanction be imposed where, as here, a party violates Rule 11.") (cited by *Honeywell*, 2024 U.S. Dist. LEXIS 127616, at *9). "Plaintiffs did not simply have an eye toward settlement. They expressly stated that their 'strategy was to file these complaints to force a settlement.' … Finally, in evaluating Plaintiffs' federal securities claims, the District Court determined that two out of the three claims lacked factual support

[4] Monteverde cites older cases for the proposition that disclosure-only securities settlements are not only permissible but preferred. Monteverde Opp. 1-2. But to the extent these authorities remain good law—questionable in this Circuit in view of *Walgreen*—the problem is that plaintiffs never sought class settlements and instead executed an end-run around judicial oversight.

in violation of Rule 11(b)(3)." The evidence here shows that plaintiffs' counsel until quite recently spammed federal courts with complaints in hopes of achieving quick settlements without court review. Monteverde's complaint in *Akorn*, which overlaps significantly with the Disclaimed Plaintiffs' complaints, resulted in payment of "attorney's fees to avoid the nuisance of ultimately frivolous lawsuits disrupting the transaction with Frensenius." *House v. Akorn, Inc.*, 385 F. Supp. 3d 616, 623 (N.D. Ill. 2019). This conduct—not merely counsel's abstract desire for settlement—was the improper which merits sanction.

Most of plaintiffs' claims were frivolous, as the court previously found, but to the extent that counsel asserted a colorable argument or two, this does not preclude sanctions for their improper purpose in the mootness fee racket. *See Vantage Corp.*, 64 F.4th at 473 (affirming finding securities complaint was filed for an improper purpose where "only" two of the three claims lacked support). None of plaintiffs' complaints sought material disclosures, most were frivolous at the time of filing, and none of the claims demonstrate any proper purpose for the filings.

A. GAAP reconciliations remain immaterial.

Both sets of plaintiffs argue GAAP reconciliation as their lead demanded disclosure. Disclaimed Opp. 14-16; Monteverde Opp. 9-11. These arguments closely track arguments presented by the non-disclaiming plaintiffs in 2018 and rejected by the Court. *House*, 385 F. Supp. 3d at 619. In fact, disclaimed plaintiffs' include a lengthy blockquote of one SEC commissioner's view which were actually part of the complaint filed by Monteverde. *Compare* Disclaimed Opp. 15-16 *with House*, No. 17-cv-5018, Dkt. 1, ¶ 38. Plaintiffs' counsel cannot deny that additional courts have followed this Court and the precedents it cited in finding such disclosures immaterial. The best Monteverde can argue is that none of these courts actually sanctioned the filing attorneys. *Id.* at 11. But the lack of sanctions does not mean much—prior to the panel's opinion in this case, district courts did not often conduct the "mandatory" review required by § 78u-4(C)(1), as plaintiffs' own citations show. Disclaimed Opp. 5; Monteverde Opp. 6.

Plaintiffs take the position that *at the time of their complaints* GAAP reconciliation was not widely recognized to be frivolous, but this ignores Frank's overarching argument that meritless claims were filed for an improper purpose. Whatever the standards for GAAP reconciliation in particular, Walgreen was binding authority and held emphatically that "[n]o class action settlement that yields zero benefits for the class should be approved, and a class action that seeks only worthless benefits for the class should be dismissed out of hand." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016). Counsel could have dismissed upon transfer to the Northern District of Illinois, but persisted in their racket in order to achieve fees that would be foreclosed by *Walgreen*.

B. J.P. Morgan inputs, like most financial advisor inputs, were redundant.

Both sets of plaintiffs argue that *Trulia* does not mean what it says that "only a 'fair summary' of a financial advisor's opinion is required." *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884, 901 (Del. Ch. 2016). Disclaimed Plaintiffs say that every merger is unique and that the financial inputs here were unusually valuable because "at the same time Akorn was publicly disclosing the positive results, the Company' Board of Directors … had privately reduced its projections for Akorn's future performance." Disclaimed Opp. 18. While plaintiffs say that "Frank barely touches on the background leading to the merger" (*id.* at 17), he anticipated this argument. The financial inputs continued to reflect relatively rosy projections prepared no later than 2017 1Q, so were "more likely to *mislead* shareholders because they did not update shareholders on the rapid deterioration of Akorn's finances." Motion 19. The revelation of Akorn's collapse did not come from the Definitive Proxy or the Supplemental Disclosures, but from periodic disclosures on March 1, 2017,[5] and afterwards, on July 31, 2017. Motion 19. Disclaimed Plaintiffs assert that the input of "projected net debt" was "particularly important" because it was used in the advisors' calculations. Disclaimed Opp. 20. This argument makes no sense, and merely asserts importance by association to the net present value calculation, but

[5] *See* Akorn, Inc. press release, *Akorn Provides Fourth Quarter and Full Year 2016 Results and Outlines Full Year 2017 Guidance* (Mar. 1, 2017) (projecting $124-148 million net income, a decline of 20-33% from 2016 figures), available online at: https://www.sec.gov/Archives/edgar/data/3116/000117184317001235/exh_991.htm.

not all inputs that relate to the advisor's bottom line are material or even "helpful." *See In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 906 (Del. Ch. 2016). Plaintiffs contend that doubts about materiality should be resolved in favor of shareholder disclosure. Disclaimed Opp. 20 (*citing TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448 (1976)). But an allegedly an "omitted fact" must "significantly alter[] the 'total mix' of information made available." *Id.* at 449. The inputs to previously-disclosed analyst projections (one of which was not even relied upon by the board) are simply cumulative with the prior disclosures.

Monteverde characterizes *Trulia* as a "nonbinding Delaware trial court opinion," while simultaneously asserting that the Seventh Circuit's favorable citation to it meant that it "was reasonable to believe that a stipulated dismissal of an uncertified action without prejudice after the issuance of disclosures qualitatively similar to those that have justified fee awards or defeated motions to dismiss was an appropriate way to end this case." Monteverde Opp. 15 & n.10. In this view, *Trulia*'s holding concerning disclosure materiality, which the Seventh Circuit "endorse[d]" (*Walgreen*, 832 F.3d at 725) was "non-binding," but the entire mootness fee regime of Delaware—except without the judicial oversight that Delaware courts provide—was imported *sub silencio* into the Seventh Circuit. Frank modestly submits that this is not a reasonable or good faith interpretation of *Walgreen*. Monteverde does not explain why the disclosed advisor opinion would not sot serve as a "fair summary," and his citations to out-of-circuit decisions predating *Trulia* and *Walgreen* suggest the demand was frivolous at the time it was made—and certainly now.

C. Akorn disclosed J.P. Morgan's non-material relationship.

Both sets of plaintiffs' counsel renew an argument advanced by non-disclaiming plaintiffs in 2018—that the *amount* of compensation to J.P. Morgan was a material omission. Disclaimed Opp. 20; Monteverde Opp. 11-13. This information was not provided by the Supplemental Disclosure, but in the Definitive Proxy. Plaintiffs' claim of responsibility for the Definitive Proxy contradicts their own past representations.[6] Monteverde further gaslights the Court by stating that "this Court's previous

[6] After the Definitive Proxy was filed, plaintiffs continuously argued that the Definitive Proxy was "false and misleading" (No. 17-cv-5022, Dkt. 1 at 4 (June 20, 2017); Dkt. 38 at 3 (July 5)). Later,

analysis" misunderstood the alleged omission and "**did *not* analyze Item 1015(b)(4) in its disgorgement order**." Monteverde Opp. 12 (emphasis in original). This is because the Court addressed the argument that Monteverde actually made, that the Preliminary Proxy supposedly did not disclose the conditional nature of J.P. Morgan's compensation *in that transaction*. No. 17-cv-5018, Dkt. 65 at 14; No. 17-cv-5018, Dkt. 75 at 5 ("the word 'contingent' is noticeably missing"). The Court did not fail to analyze the argument, it's a new invention created seven years after the fact.

Monteverde now argues that Item 1015(b)(4) requires disclosure of the "specific amounts" of compensation within a two year period. But in fact the item requires preparers to "[d]escribe any **material relationship** that existed during the past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of the relationship between: [the parties]." 17 C.F.R. § 229.1015(b)(4). The Preliminary Proxy did this—in fact the House complaint recites the disclosed the transactions J.P. Morgan was involved with. *House*, No. 17-cv-5018, Dkt. 1 ¶ 46.

None of Monteverde's citations suggest this was insufficient. "Again, there is no hard and fast rule that requires financial advisors to always disclose the specific amount of their fees from a counterparty in a transaction." *City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings, Inc., No. 305, 2023*, 2024 Del. LEXIS 151, at *49 (Del. May 1, 2024) (citing *Assad v. Botha*, 2023 WL 7121419, at *6, 2023 Del. Ch. LEXIS 462 (Del. Ch. 2023) ("Generally, the disclosure of the specific fees a financial advisor received from unrelated work for a transactional counterparty is immaterial where the relationship and its rough scale are disclosed.")). *Inovalon Holdings* and *Assad* concerned relationships

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plaintiffs repeatedly claimed the Supplemental Disclosure—not the Definitive Proxy—mooted their complaints. On July 14, 2017, all six plaintiffs moved to dismiss their complaints, claiming that the **supplement** had mooted every complaint. The dismissals did *not* claim that the Definitive Proxy mooted any part of their complaints, nor did they take credit for the proxy. On September 15, 2017, plaintiffs jointly filed mootness fee stipulations and proposed orders indicating that "**as a result of the filing of the Supplemental Disclosures**, the . . . Actions have become moot." Dkt. 56 at 5. Plaintiff Berg restated this position even after Frank moved to intervene. *See* No. 17-cv-5016, Dkt.78 at 4 (October 18). Berg didn't claim responsibility for the Definitive Proxy until December 22, 2017. Dkt. 84.

much more extensive than the one between Fresenius and J.P. Morgan here. *Campbell v. Transgenomic, Inc.*, did not even concern compensation paid to an advisor. 916 F.3d 1121, 1124 (8th Cir. 2019).

In *Goldfinger v. Journal Communs., Inc.*, the court not only found the alleged omission immaterial because it would not have altered the "total mix" of available information, it order the plaintiffs to file a brief explaining why they should not be sanctioned under § 78u-4(c)(2) and Rule 11. No. 15-C-12, 2015 U.S. Dist. LEXIS 61314, at *10, *17 (E.D. Wis. May 8, 2015). Subsequently the court *did* sanction plaintiffs' counsel, albeit for only $5000. *Goldfinger v. Journal Communs., Inc.*, No. 15-C-12, 2015 U.S. Dist. LEXIS 186504, at *8 (E.D. Wis. Aug. 4, 2015).

The Court should order plaintiffs' counsel to show cause why they should not be sanction precisely because they still fail "to explain how any of the alleged omissions rendered the proxy statements materially misleading." *Goldfinger*, 2015 U.S. Dist. LEXIS 61314, at *10.

D. Communications with Dr. Kapoor concerning an agreement that never materialized could not be material.

Disclaimed Plaintiffs assert that the alleged omission of post-employment agreements for Kapoor would have been material due to the potential for conflicts. Disclaimed Opp. 21. But as Frank observed, Akorn already disclosed that no such post-merger employment agreement existed, and plaintiffs suggest no reason to believe this to be a lie. Motion 19-20. The dates of communications that did not result in any such agreement could not plausibly alter the total mix of information available to shareholders.

E. Again, confidentiality agreements are less material than prospective buyers.

Finally, Disclaimed Plaintiffs assert that their demand for "information regarding the sales process, including confidentiality agreements and other bidders" would be material. Disclaimed Opp. 22. Frank anticipated this argument, but plaintiffs do not reply. "Berg's demand to know whether confidentiality agreements were entered into with other potential bidders besides Fresenius, [] is less substantive variation of Alleged Omission 7, demanding disclosure of other potential bidders, which the Court rightly rejected." Motion 22. As the Court previously found:

> Carlyle contends that the proxy should have detailed the other potential buyers the Board considered and why the Board determined that "it was highly unlikely that any of those counterparties would be interested in an acquisition of the Company at that time due to competing strategic priorities and recent acquisitions in the industry." 17 C 5022, R. 1 ¶¶ 58-59. But this statement speaks for itself regarding why the Board rejected other companies in the industry as potential buyers. And as Carlyle notes, the proxy gives much greater detail regarding the one other company ("Company E") Akorn actually considered. Detailed information about potential buyers Akorn did not actually consider is not material.

House, 385 F. Supp. 3d at 622.

Whether other potential buyers received confidentiality agreements from Akorn necessarily enlightens shareholders even less than substantive details about those potential buyers. Berg's alleged ommission is necessarily even less material than Carlyle's and could not possibly meet the *Walgreen* "plainly material" standard.

CONCLUSION

As outlined by the Seventh Circuit, the Court should reopen Plaintiffs' cases under Rule 60(b) so that it can perform the mandatory evaluation under § 78u-4(c)(1) and, derivatively, Rule 11.The Court should order the Plaintiffs to show cause why they should not be sanctioned for filing frivolous complaints for an improper purpose. Following the required Rule 11 hearing, if a violation is found, the Court should enter appropriate sanctions.

Dated: August 5, 2024

/s/ M. Frank Bednarz

M. Frank Bednarz, (ARDC No. 6299073)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1440 W. Taylor St # 1487
Chicago, IL 60607
Phone: (801) 706-2690
Email: frank.becnarz@hlli.org

Attorneys for Theodore H. Frank

CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Reply Memorandum in Support of Motion for Relief Under Rule 60(b) and for the Court to Issue an Order to Show Cause that Plaintiffs and their Counsel Shound Not Be Sanctioned Pursuant to 15 U.S.C. § 78u-4(c)(1) and Rule 11 via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing.

Dated: August 5, 2024

/s/ M. Frank Bednarz