UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHAUN HOUSE, 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, and ALAN WEINSTEIN, Defendants.	1:17-cv-05018 Considered with:[1] 1:17-cv-05022 1:17-cv-05026 CLASS ACTION Hon. Thomas M. Durkin

AMICUS CURIAE **BRIEF OF THEODORE H. FRANK THAT THE SUPPOSED SUPPLEMENTAL DISCLOSURES ARE NOT MATERIAL**

[1] The three actions are not formally consolidated, but filings made in the *House* action have applied to the other two pending actions; *Carlyle* and *Pullos*, respectively. *See* Minute Order, Dkt. 47. Unless otherwise indicated, "Dkt." in this brief shall refer to the *House* action, No. 17-cv-5018.

TABLE OF CONTENTS

Table of Contents i

Table of Authorities... ii

Introduction 1

Argument 2

I. Delaware's idiosyncratic practice of "mootness fees" does not govern actions under the Securities Act against a Louisiana corporation, and plaintiffs anyhow failed to notice their fee settlement, which *Trulia* would require. 2

A. Evolution of the mootness fee racket in spite of no federal authority. 3

B. *Walgreen* did not import all Delaware legal procedures into federal cases. 4

C. Even if Delaware law applied, plaintiffs did not follow mootness fee protocol. 4

II. *Walgreen*'s "plainly material" standard applies to any disclosure relief sought through shareholder litigation in this Circuit—even absent settlement. 5

III. Plaintiffs are not responsible for alleged supplemental disclosures in the Definitive Proxy, which occurred before one of them even filed suit. 7

IV. None of the alleged disclosures were material under any standard. 9

A. The unused November 2016 projections, which plaintiffs cannot claim responsibility for, provided no additional information to shareholders........................ 9

B. GAAP reconciliation is still not material. 11

C. Fresenius' offers to Dr. Kapoor were accurately described. 13

D. Akorn repeatedly disclosed *and disputed* pending litigation against its board................ 13

E. J.P. Morgan's fee structure was already disclosed. 15

Conclusion 15

Certificate of Service... 16

TABLE OF AUTHORITIES

Cases

In re Adv. Mammography Sys., Inc. S'holders Litig.,
1996 WL 633409 (Del. Ch. Oct. 30, 1996) 4

Allied Artists Pictures Corp. v. Baron,
413 A.2d 876 (Del. 1980) 5

Assad v. DigitalGlobe, Inc. at al., Nos. 17-cv-1097, -1140, -1159, -1190, -1570,
2017 WL 3129700 (D. Colo. Jul. 21, 2017) 11

Bushansky v. Remy Intl., Inc.,
262 F.Supp.3d 742 (S.D. Ind. 2017) 11, 12

City of Philadelphia v. Fleming Cos.,
264 F.3d 1245 (10th Cir. 2001) 15

Conrad v. Boiron, Inc.,
869 F.3d 536 (7th Cir. 2017) 7

Dent v. Ramtron Int'l Corp.,
2014 WL 2931180 (Del. Ch. Jun. 30, 2014) 13

Globis Partners, L.P. v. Plumtree Software, Inc.,
2007 WL 4292024 (Del. Ch. Nov. 30, 2007) 13

Kuebler v. Vectren Corp., No. 18-cv-0113,
2018 WL 4003626 (S.D. Ind. Aug. 22, 2018) 12

In re IAC/InterActive Corp. Secs. Litig.,
695 F. Supp. 2d. 109 (S.D.N.Y. 2010) 14

In re Medicis Pharma. Corp. S'holders Litig.,
C.A. No. 7857-CS (Del. Ch. Feb. 26, 2014) 11

Mostaed v. Crawford, No. 3:11-CV-00079-JAG,
2012 WL 3947978 (E.D. Va. Sept. 10, 2012) 3

In re Orchard Enterprises, Inc. Stockholder Litig.,
88 A.3d 1 (Del. Ch. 2014) 13

Parshall v. Stonegate Mortg. Corp.,
2017 WL 3530851 (S.D. Ind. Aug. 11, 2017) 3

In re Sauer-Danfoss Inc. S'holders Litig.,
65 A.3d 1116 (Del Ch. Ct. 2011) 5

Simer v. Rios,
661 F.2d 655 (7th Cir. 1981) 7

Skeen v. Jo-Ann Stores, Inc.,
750 A.2d 1170 (Del. 2000) 7

In re Subway Footlong Sandwich Mkt'g & Sales Practices Litig.,
869 F.3d 551 (7th Cir. 2017) 6

Susman v. Lincoln Am. Corp.,
578 F. Supp. 1041 (N.D. Ill. 1984) 10

TSC Industries, Inc. v. Northway, Inc.,
426 U.S. 438 (1976) 7, 11

In re Trulia, Inc. Stockholder Litig.,
129 A.3d 884 (Del. Ch. 2016) 1, 3, 4

In re Walgreen Co. Stockholder Litig.
832 F.3d 718 (7th Cir. 2016) ("*Walgreen*") 1, 2, 4, 5, 6, 7, 9, 15

Wayne Cty. Emps. Ret. Sys. v. Corti,
954 A.2d 319 (Del. Ch. 2008) 10

Wieglos v. Commonwealth Edison Co.,
892 F.2d 509 (7th Cir. 1989) 7

Wong v. Accretive Health Inc.,
773 F.3d 859 (7th Cir. 2014) 5

In re Xoom Corp. Stockholder Litig., No. CV 11263-VCG,
2016 WL 4146425 (Del. Ch. Aug. 4, 2016) 3, 5

In re Zalicus, Inc. Stockholders Litig., No. CV 9602-CB,
2015 WL 226109 (Del. Ch. Jan. 16, 2015) 4

Rules, Statutes, and Regulations

Fed. R. Civ. P. 23(e) 3

15 U.S.C. § 78u–4(a)(6) 3

15 U.S.C. § 7261 12

17 C.F.R. § 229.103 15

17 C.F.R. § 240.14a-6 8

17 C.F.R. § 240.14a-9 7

17 C.F.R. § 244.100 12

Other Authorities

Matthew D. Cain, Jill E. Fisch, Steven M. Davidoff Solomon & Randall S. Thomas,
The Shifting Tides of Merger Litigation, 71 VAND. L. REV. 603 (2018) 3, 6

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) 6

Browning Jeffries,
The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals, 11 BERKELEY L.J. 55 (2014) 6

INTRODUCTION

Plaintiffs, in their mootness fee brief (Dkt. 65, "Br."), argue that their mootness fee agreement is authorized by *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016); that it satisfies Delaware law; and alternatively that the alleged disclosures are "plainly material" under *Walgreen*. Below, Theodore H. Frank, as invited amicus (Dkt. 53), explains that each argument is incorrect.

Walgreen cited *Trulia* for one and only one holding: the "plainly material" "standard for the approval of [class action] settlements." 832 F.3d at 725 (quoting *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 898-99 (Del. Ch. 2016)). But according to plaintiffs' retelling, *Walgreen* instead silently imported Delaware's idiosyncratic mootness fee regime into federal Exchange Act litigation. The one holding of *Trulia* that *doesn't* apply to this case, according to plaintiffs, is the "plainly material" standard! Br. 4. Plaintiffs can cite nothing in *Walgreen* that compels this Bizzaro World conclusion. Even if the "plainly material" standard only applies to class action settlements under Delaware law, *Walgreen* adopts the categorical proposition that "a class action that seeks only worthless benefits for the class should be dismissed out of hand." 832 F.3d at 724. Even if *Walgreen* did import Delaware's mootness fee regime, plaintiffs assertion that they "scrupulously followed" Delaware law is a bald-faced lie. Notice to stockholders is mandatory under Delaware law to permit shareholders to investigate and contest such settlements. Yet, ***no*** "notice was provided no stockholders." *Contra* Br. 4 n.1.

As for the alleged disclosures, plaintiffs identify five, but not one of them is even "helpful" let alone "plainly material"; under *Walgreen* the case deserved to be "dismissed out of hand." First, disclosing the November 2016 Management Case—an out-of-date financial projection that the board did *not* use to evaluate the proposed merger—has little to no value. That Akorn's finances deteriorated toward March 2017 was already known to shareholders, and in any event *supports* the merger recommendation. Second, plaintiffs fail to cite or distinguish two cases concluding that GAAP reconciliation is not material. If anything, the July 10 reconciliation of out-of-date financial projections misled shareholders because Akorn's financial position had drastically worsened by July 2017. Third, disclosing an offer to Akorn's chairman Dr. Kapoor simply confirmed what the initial proxy accurately

summarized: the lack of substantial discussion—much less acceptance—of any side-agreements involving Dr. Kapoor. Fourth, a note that the board considered unspecified derivative litigation and did not place value on its claims is not material. In fact, Akorn and the board had repeatedly disputed the merits of the litigation, so their $0 valuation of the claims was known. Finally, shareholders know basic arithmetic; because the initial proxy already disclosed that J.P. Morgan received $3 million and would ultimately charge $47 million in sum, there is no value in stating the difference is $44 million.

Because plaintiffs sought and received only worthless disclosures for the class they purported to represent, their suit should have been "dismissed out of hand" before counsel could extract $322,500. Given that plaintiffs' counsel have executed their racket in order to evade judicial review, this Court should use its inherent authority to best approximate the dismissal that should have occurred in summer 2017, and disgorge attorneys' fees from the plaintiffs.

ARGUMENT

I. Delaware's idiosyncratic practice of "mootness fees" does not govern actions under the Securities Act against a Louisiana corporation, and plaintiffs anyhow failed to notice their fee settlement, which *Trulia* would require.

Plaintiffs pretend to be operating on "established jurisprudence" (Br. 1), but in fact mootness fees are a recent and dubious tactic in federal Exchange Act litigation. The practice has exploded in the last two years because as Delaware courts provide more scrutiny of mootness fee petitions, plaintiffs have endeavored to exploit federal courts' unfamiliarity with the law. Contrary to plaintiffs, there is no established jurisprudence allowing such settlements, and nothing in *Walgreen* supports the wholesale importation of Delaware corporate law into Exchange Act actions.

Even if Delaware law did apply—which it does not—plaintiffs have brazenly lied about "scrupulously follow[ing]" this law. Br. 3. Delaware courts will not even enter dismissals for mootness fee agreements that do not notify putative class members. Plaintiffs never provided such notice, so their actions are *ultra vires* even if their tendentious reading of *Walgreen* is credited. The Court should exercise its inherent authority to remedy such misconduct.

A. Evolution of the mootness fee racket in spite of no federal authority.

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." 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"). 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). The Delaware Chancery recognized that even though state procedure allows for the payment of mootness fees, 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.* 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. *See* Cain at 620. But in the first ten months of 2017, an astonishing 87% of all strike suits were filed in federal court. 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 tactical shift—from state courts to federal and from Rule 23(e) settlement to dismissals for mootness fees—has scarcely been scrutinized by district courts, which routinely grant stipulated dismissals and where there is rarely opposition. Plaintiffs' counsel have filed—and dismissed as "moot"—scores of strike suits for an average disclosed mootness payment in 2017 of $265,000. Cain at 625.

However, under federal law, no basis for mootness fees exists, and several authorities are quite hostile to the concept. The PSLRA limits fee awards to "a reasonable percentage" of class recovery, which is $0 here. 15 U.S.C. § 78u-4(a)(6); *see* Dkt. 51 at 9-10; No. 17-cv-5016, Dkt. 88 at 13-14. Further, federal laws generally do not permit attorneys' fees under catalyst theory. *Parshall v. Stonegate Mortg. Corp.*, 2017 WL 3530851, at *1 (S.D. Ind. Aug. 11, 2017) (dismissing case where plaintiffs tried to retain jurisdiction for mootness fees); *see also Mostaed v. Crawford*, 2012 WL 3947978, at *7 (E.D. Va. Sept. 10, 2012); No. 17-cv-5016, Dkt. 83 at 8. Given the facial incompatibility of mootness fees with

federal Exchange Act litigation, it speaks volumes that plaintiffs rely only on *Walgreen*, which doesn't mention mootness fees or their preferred "helpful" standard of review.

B. *Walgreen* did not import all Delaware legal procedures into federal cases.

Plaintiffs incorrectly read *Walgreen* to somehow endorse their mootness racket. While *Walgreen* adopted the "plainly material" *Trulia* standard for evaluating supplemental disclosures, it did not import all Delaware corporate law of mootness fees into Exchange Act litigation, and Frank did not "admit" otherwise. Br. 3 (misrepresenting No. 17-cv-5016, Dkt. 82-1 at 16). *Walgreen* does not mention mootness, let alone mootness fees, nor the alleged "helpful" standard. Not one sentence of the opinion compels the breathtaking conclusion that idiosyncratic Delaware law was imported wholesale. Importing it *sub silentio* would contravene the very aims of *Walgreen*: "end[ing]" the "racket" of "class action[s] that seek[] only worthless benefits for the class." 832 F.3d at 724. Plaintiffs' behavior and lawsuit is governed by Seventh Circuit law. Plaintiffs cannot whimsically pick and choose to apply Delaware law in the patchwork that suits them.

C. Even if Delaware law applied, plaintiffs did not follow mootness fee protocol.

Contrary to their assertion, plaintiffs do not hew to *Trulia*; they entirely disregarded mandatory shareholder protections. 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. Plaintiffs omit this requirement in the body of their brief. Br. 4. Notice of mootness fees is required so that shareholders like Frank can object because "the case really is not moot but that the proposed payment to counsel is the only motivation for the dismissal." *In re Adv. Mammography Sys., Inc. S'holders Litig.*, 1996 WL 633409, at *1 (Del. Ch. Oct. 30, 1996) (cited by *Trulia*, 129 A.3d at 898).

No such notice—through independent means, SEC filing, or press release—has been provided to Akorn shareholders. Thus, under Delaware law, plaintiffs would not even have been entitled to dismiss their action. *See In re Zalicus, Inc. Stockholders Litig.*, CV 9602-CB, 2015 WL 226109, at *1 (Del. Ch. Jan. 16, 2015) (cited by *Trulia*, 129 A.3d at 898 n.45). Notice is non-negotiable. *Id.*

Plaintiffs' counsel have moved their racket into federal courts precisely to evade Delaware's stringent supervision. *See* Section I.A. Yet having sidestepped the notice requirement, plaintiffs insist that *Trulia* robs this court of jurisdiction to consider a claim *Trulia* expressly allows: that the proposed payment to counsel is the only motivation for the suit. Br. 4. Plaintiffs suggest for Frank a path foreclosed by Louisiana law: a separate derivative action against Akorn. In other words, plaintiffs contend that their fee extraction in federal Exchange Act litigation just so happens to be unreviewable because the Seventh Circuit 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.

Even if Delaware mootness fees were somehow adopted by the Seventh Circuit, the correct standard for evaluating the fees is the standard for a contested fee award—whether "(1) the suit was meritorious when filed; (2) the action producing benefit to the corporation was taken by the defendants before a judicial resolution was achieved; and (3) the resulting corporate benefit was causally related to the lawsuit." *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1123 (Del Ch. Ct. 2011). The "meritorious when filed" requirement applies to all mootness fee dismissals in addition to plaintiffs' preferred focus on whether the alleged disclosures were "helpful." *Xoom*, 2016 WL 4146425, at *3. It is insufficient that some alleged benefit resulted from the lawsuits. "[T]his Court has been concerned with discouraging baseless litigation . . . and has adhered to the merit requirement." *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 879 (Del. 1980).

That said, *Walgreen* controls the appropriateness of fees in this action, not Delaware law.

II. *Walgreen*'s "plainly material" standard applies to any disclosure relief sought through shareholder litigation in this Circuit—even absent settlement.

Plaintiffs assert that *Walgreen* only governs class action settlements (Br. 3), but a fair reading has much broader application to all putative class actions, even prior to settlement.

Walgreen broadly aims to curtail socially useless rent-seeking. It makes sense for *Walgreen* to apply more broadly than *Trulia*'s application of state law, because Congress passed the PSLRA to "curb frivolous, lawyer-driven litigation." *Wong v. Accretive Health Inc.*, 773 F.3d 859, 863 (7th Cir. 2014).

Approval of strike suit settlements had "caused deal litigation to explode in the United States beyond the realm of reason." *Walgreen*, 832 F.3d at 725. "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). In 2013, over 97.5% of deals over $100 million were challenged. *Id.* Settlements of these actions usually consist solely of supplemental disclosures to the merger proxy. *Id.* at 559. The disclosure-only settlements "do not appear to affect shareholder voting in any way." *Id.* at 561.

Plaintiffs have executed what they believe to be end-run around the scrutiny that *Walgreen* demands, by settling for attorneys' fees *without* seeking class release. Whereas class action or derivative settlements allow shareholders to object to the settlement, class certification, or the proposed fees, plaintiffs' current 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 at 632.

But *Walgreen* instructs courts to scrutinize *all* putative class actions on behalf of shareholders:

> 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. No 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.

832 F.3d at 724 (emphasis added).

The Seventh Circuit is serious about dismissing noxious class actions. *See In re Subway Footlong Sandwich Mkt'g & Sales Practices Litig.*, 869 F.3d 551, 556 (7th Cir. 2017) (quoting *Walgreen*). A representative who seeks attorneys' fees without obtaining a benefit "is not adequately protecting the

class members' interests." *Walgreen*, 832 F.3d at 725 (cleaned up). "[I]f at ***any time*** the trial court realizes that class counsel should be disqualified, the court is required to take appropriate action." *Id.* at 726 (emphasis added). Although a mootness fee arrangement "[does] not bind absent class members, the practical effect of the settlement . . . may [be] contrary to the interests of putative class members." *Simer v. Rios*, 661 F.2d 655, 666-67 (7th Cir. 1981).

Under *Walgreen*, the standard for rooting out merger strike suits is whether they seek to provide "plainly material" disclosures to shareholders. In this case, one need not speculate about what plaintiffs sought because they dismissed their cases following the filing of Supplemental Disclosures on July 10, 2017. Those disclosures supposedly "mooted" plaintiffs' complaints by providing exactly the relief plaintiffs evidently sought. The question now is whether the supplemental disclosures remedied "plainly material" omissions in Akorn's prior disclosures. As discussed below, they did not.

In the context of § 240.14a-9, which governs disclosure in proxy statements, an "omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in [making her decision]." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). "Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* "Reasonable investors do not want to know everything that could go wrong, without regard to probabilities; that would clutter registration documents and obscure important information. Issuers must winnow things to produce manageable, informative filings." *Wieglos v. Commonwealth Edison Co.*, 892 F.2d 509, 517 (7th Cir. 1989); *TSC Indus.*, 426 U.S. at 449 n.10 (noting "the SEC's view of the proper balance between the need to insure adequate disclosure and the need to avoid the adverse consequences of setting too low a threshold for civil liability")."Omitted facts are not material simply because they might be helpful." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000).

III. Plaintiffs are not responsible for alleged supplemental disclosures in the Definitive Proxy, which occurred before one of them even filed suit.

Plaintiffs identify five disclosures they claim to be material, but two of these disclosures—the first and the last on their list—are not contained in the July 10, 2017 Form 8-K (Dkt. 35-3,

"Supplemental Disclosure"), but were published in Akorn's June 15 definitive proxy statement (Dkt. 35-2, "Definitive Proxy"), which amends the preliminary definitive proxy statement (Dkt. 35-1 "Preliminary Proxy"). By SEC rules, definitive proxies are always filed at least 10 days after a preliminary proxy. *See* 17 C.F.R. 240.14a-6. The Definitive Proxy totaled 82 pages with another 153 pages of exhibits. Plaintiffs provided no reason to believe they are responsible for the Definitive Proxy. No. 17-cv-5016, Dkt. 88 at 8. This is even more true here, where one plaintiff filed *after* the Definitive Proxy and the remaining plaintiffs filed suit just days before!

Plaintiffs' claim of responsibility for the Definitive Proxy contradicts their own past representations. After it was filed, plaintiffs continuously argued that the Definitive Proxy was "false and misleading" (No. 17-cv-5022, Dkts. 1 at 4 (June 20, 2017); 6 at 1 n.1 (June 26); No. 17-cv-5016, Dkt. 38 at 3 (July 5)). Later, 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. Dkt. 33 at 2. 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." No. 17-cv-5016, 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 (No. 17-cv-5016, Dkt. 84).

The remaining plaintiffs provide no reason to believe their unsworn, uncorroborated assertion to have precipitated the Definitive Proxy. The theory is even less credible for these plaintiffs than when plaintiff Berg advanced it. While Berg sued Akorn on June 2, 2017, the earliest complaint by the remaining plaintiffs predates the 82-page Definitive Proxy by just **three days**. Dkt. 1 (June 12, 2017). One of the three remaining plaintiffs, Pullos, filed suit a week *after* the Definitive Proxy, so obviously he could not be responsible for its contents. *See* No. 17-cv-5026, Dkt. 1. In unsworn attorney argument, plaintiffs now claim that on "June 14, 2017, certain plaintiffs sent a letter to Akorn demanding that Defendants remedy disclosure deficiencies in the Preliminary Proxy." Br. 1. Plaintiffs

do not indicate who sent this letter, nor what exactly it demanded. Most likely, the letter was sent on behalf of earlier-filing plaintiffs who have disclaimed attorneys' fees. The Definitive Proxy did not mention the purported letter demanding additional disclosures. While it did add new material to the preliminary proxy (such as recounting plaintiffs lawsuits and correctly labelling them "without merit," *id.* at 9), none of the new material proclaims to address plaintiffs' demands.

Like Berg, the remaining plaintiffs make materiality arguments based on the Definitive Proxy, presumably recognizing the Supplemental Disclosure is insubstantial even compared to the disclosure in *Walgreen*. Even if plaintiffs could show responsibility for the Definitive Proxy disclosures, they are not material because shareholders already had access to the information. *See* Sections IV.A and IV.E.

IV. None of the alleged disclosures were material under any standard.

Plaintiffs construct a fanciful story in which "stockholders were surprised by the consideration" that Fresenius offered for the company. Br. 8. Plaintiffs' *ipse dixit* notwithstanding, the facts show shareholders were quite happy with the proposed merger. Over 99% of votes favored the transaction, demonstrating the supplemental disclosures made no material difference in the vote. *See Walgreen*, 832 F.3d at 723. The disclosures were not a product of genuine shareholder concerns, but of plaintiffs' assembly-line cast-mold tactics. Plaintiffs sought disclosures they knew defendants would capitulate to and would provide a pretext for fees. For example, a verbatim 157-word paragraph that three plaintiffs used in their complaints seeking GAAP reconciliation (Dkt. 1 ¶ 51; No. 17-cv-5021, Dkt. 1 ¶ 46; No. 17-cv-5026, Dkt. 1 ¶ 52) has been used—verbatim!—in about 60 other strike suit complaints across the country. Shareholders were not concerned about these alleged omissions. The disclosures sought were cookie-cutter trivia and the suit should have been dismissed out of hand.

A. The unused November 2016 projections, which plaintiffs cannot claim responsibility for, provided no additional information to shareholders.

As discussed in Section III, plaintiffs implausibly claim responsibility for the Definitive Proxy's disclosure on June 15, 2017 of the November 2016 Management Case—financial projections which were *not* used by the board in deciding whether to approve the merger. The board had instead used an updated March 2017 Management Case, which *was* disclosed in the May 22 Preliminary Proxy.

Plaintiffs claim that the November 2016 Management Case was material because it showed investors Akorn's downward trajectory (Br. 9), but this claim is contradicted by plaintiffs' own assertion that investors were "surprised to learn when Akorn filed the Preliminary Proxy . . . the Board had lowered its projected financial performance during the sales process." *Id.* at 8. In actuality, the deterioration of Akorn's earnings was reported *even earlier*. On March 1, 2017, Akorn provided guidance to its shareholders that net income for 2017 was projected to be down 20-33% from net income in 2016.[2]

For this reason, and contrary to plaintiffs' dramatic retelling, the market reacted with a yawn to the June 15 Definitive Proxy. The share price rose one penny upward, closer to the target price, and the trade volume was low: the second-lowest volume day from that calendar week. The dates of the Definitive Proxy and July 10 Supplemental Disclosures are marked in stock chart below:

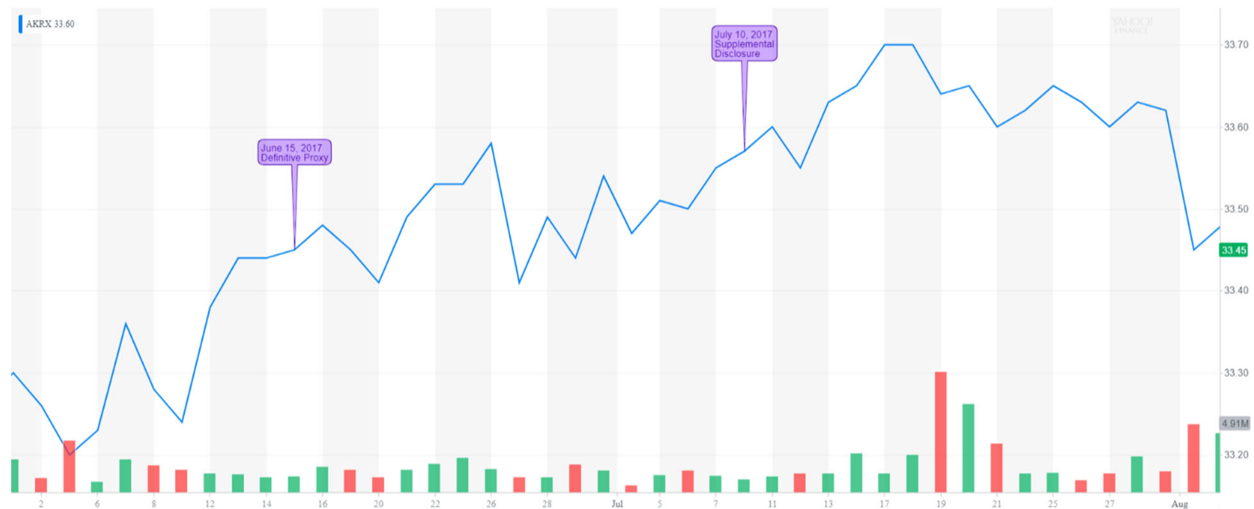

Fig. 1. Interactive chart available online at https://yhoo.it/2rdx6Ao.

Plaintiffs do not explain how a stale projection that Akorn disregarded could have materially altered the total mix of information. *See Wayne Cty. Emps. Ret. Sys. v. Corti*, 954 A.2d 319, 332 (Del. Ch. 2008) (rejecting argument that additional internal projections must be disclosed because, *inter alia*, "there is no evidence in the record that the . . . board relied on these . . . projections"). Even if Akorn *had* considered it, because it was outdated, it need not have been disclosed. *Susman v. Lincoln Am. Corp.*,

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

578 F. Supp. 1041, 1057-58 (N.D. Ill. 1984) (Shadur, J.). The November 2016 Management Case was simply cumulative with the Preliminary Proxy's disclosure of Akorn's low expectations. Dkt. 65-2 at 48-49. Cumulative disclosures are not even helpful, nor can failure to disclose them be misleading. *TSC Indus.*, 426 U.S. at 449 ("omitted fact" must "significantly alter[] the 'total mix' of information made available"). In any event, to be beneficial to shareholders the material disclosure must "contradict[], not reinforce[], management's recommendation." *In re Medicis Pharma. Corp. S'holders Litig.*, C.A. No. 7857-CS, at 22 (Del. Ch. Feb. 26, 2014) (Transcript, attached). A reduced valuation of Akorn affirmatively supports management's recommendation to accept the merger offer.

B. GAAP reconciliation is still not material.

The July 10, 2017 Supplemental Disclosure added a reconciliation of GAAP net income from the previously-provided non-GAAP projections in the November 2016 and March 2017 Management Cases. Dkt. 65-2 at 47-48. These numbers were months out of date, and therefore provided at best a misleading picture of Akorn's finances, which continued to rapidly deteriorate.[3] The Supplement also states that some values were simply assumed to be $0 due to missing data, and cautions that the reconciliation is "not indicative of the Company's expected performance." *Id.* Indeed it was not!

Although the Court instructed plaintiffs to address arguments Frank has made, they fail to cite or distinguish cases he has repeatedly cited that show GAAP reconciliation is not material. *See Assad v. DigitalGlobe, Inc.*, 2017 WL 3129700, at *6 (D. Colo. Jul. 21, 2017); *Bushansky v. Remy Intl., Inc.*, 262 F. Supp. 3d 742, 748 (S.D. Ind. 2017). Plaintiffs could hardly be unaware of *Assad*, because counsel for plaintiff House represented a plaintiff whose GAAP reconciliation arguments the court specifically rejected. *See* No. 17-cv-1570, Dkt. 6 (D. Colo.).

*Assad a*nd *Bushansky* are sound because non-GAAP measurements like unlevered free cash flow (UFCF) and earnings before interest, tax, depreciation and amortization (EBITDA) are widely understood, so their provision to shareholders in explaining a board's decision-making could not

[3] The uselessness of the GAAP reconciliation for out-of-date financial projections (and the low value of all Supplemental Disclosures) is confirmed by the market's non-reaction to the July 10 supplement. *See* Fig. 1, *supra*.

somehow render a proxy misleading. In fact, plaintiffs call the previously-disclosed UFCF figures the "holy grail of projections." Br. 9.[4] A Templar Knight, having discovered the Holy Grail and having achieved immortal life, has little use for hardened old pottery clay.

The SEC recently confirmed that disclosure of non-GAAP projections is not misleading when, as here, the terms were part of forecasts provided by financial advisors. No. 17-cv-5016, Dkt. 88 at 9-11. Plaintiffs evasively claim "the SEC later changed its compliance and disclosure interpretations" after the underlying cases were dismissed. Br. 10 n.9. But plaintiffs never cited a contrary SEC interpretation, and instead relied on a former SEC Commissioner's extemporaneous remarks. Dkt. 1 at 10. All along, plaintiffs' interpretation was foreclosed by the plain text of the regulation. SEC Regulation G (17 C.F.R. § 244.100) (cited by Dkt. 1 at 15) expressly applies only to disclosures under 15 U.S.C. § 7261: "Disclosures in periodic reports." Thus, "§ 7261 is inapplicable because the Definitive Proxy is not a periodic report or a public disclosure." *Bushansky*, 262 F. Supp. 3d at 748 (decided *before* SEC expressly endorsed this interpretation, *see* No. 17-cv-5018, Dkt. 88 at 10).

If anything, the filing of out-of-date projections misled shareholders because they did not disclose the rapid deterioration of Akorn's finances, but repeated March's relatively rosy projection of $138 million net income for 2017. Just three weeks later, Akorn reported that net income for the second quarter had declined to $2.5 million, compared to $41 million for the first quarter. Unlike the Definitive Proxy and the Supplemental Disclosure, the July 31 quarterly report *did* noticeably alter Akorn's price. *See* Fig. 1. Arbitrageurs sold, correctly sensing that Akorn's fast-collapsing financials might reduce the chance of acquisition. Akorn eventually posted a net *loss* of $24.6 million for 2017 and Fresenius terminated its acquisition agreement due to unrelated FDA compliance irregularities. Shareholders could not have predicted any of this from the out-of-date GAAP reconciliation.

Reconciliations for outdated projections are not helpful, let alone plainly material.

---

[4] Plaintiffs apparently admit this because their counsel has unsuccessfully argued the reverse position in other cases—that failure to disclose *non-GAAP* measurements like UFCF somehow makes a disclosure false and misleading. *See Kuebler v. Vectren Corp.*, No. 18-cv-0113, 2018 WL 4003626, at *3 (S.D. Ind. Aug. 22, 2018) (rejecting argument that *omission* of UFCF was material).

C. Fresenius' offers to Dr. Kapoor were accurately described.

The original disclosures accurately summarized Fresenius' attempt to require Akorn's chairman, Dr. Kapoor, to invest in the merged company. The proxy statements disclosed that on March 31, 2017 Fresenius asked Kapoor to enter into a voting agreement and further agree to re-invest 20% of the transaction proceeds. Dkt. 65-2 at 34. The section accurately concluded "There were no other ***substantive discussions*** with respect to such an investment by Dr. Kapoor and no agreement with respect to such an investment was ever entered into." *Id.* (emphasis added).

The Supplemental Disclosures simply elaborate on the non-substantive discussions, which by definition could not have been material. In particular, they report that a second offer involving Dr. Kapoor's investment was made on April 2 as part of a two-option proposal that was never accepted. Dkt. 65-3 at 6. These disclosures are cumulative and confirm the Proxy Statement's accurate report that no other "substantive" discussion occurred. In fact, the Supplemental Disclosure itself says the board discussed the "lack of specificity of the investment proposal." *Id.*

"[A] full and fair characterization [of background to a transaction] does not require… a 'play-by-play description of merger negotiations.'" *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *14 (Del. Ch. Nov. 30, 2007); *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *15 (Del. Ch. Jun. 30, 2014). Undetailed and unaccepted offers from Fresenius have no material bearing on the offer Akorn shareholders were actually presented, and such disclosure could not be helpful, let alone plainly material.[5]

D. Akorn repeatedly disclosed *and disputed* pending litigation against its board.

While the Supplemental Disclosure says that the board "was aware of and considered the likely effect of the potential merger with Fresenius Kabi on the previously disclosed derivative lawsuits," plaintiffs suggest that the key information is that "the Board assigned no value based on the

[5] *In re Orchard Enterprises, Inc. Stockholder Litig.*, 88 A.3d 1, 23 (Del. Ch. 2014) doesn't aid plaintiffs. *Orchard* concerned a board that allegedly failed to disclose an offer from another party to pay minority shareholders a 28% premium over the accepted offer. Here, Fresenius offered a price of $34.50 per share (1.5% premium) for an investment scheme that lacked specificity, and entailed "legal risks and other uncertainties related to the timing and structure of this proposal." Dkt. 65-3 at 6.

conclusions and recommendations of the special committee of the Board that had conducted an inquiry into related shareholder demand allegations." Br. 13; Dkt. 65-3 at 6. In fact, Akorn had previously disclosed the derivative claims, repeatedly disputed and depreciated them.

Apart from being extraordinarily vague (Which lawsuits? What effects?), the supplemental material is cumulative. The proxy statement already disclosed that the board considered "the risk of litigation in connection with the execution of the merger agreement and the completion of the merger." Dkt. 65-3 at 6. It is common sense that the board would be aware of the disclosed lawsuits naming board members as defendants, and would consider the likely effects of a merger on pending lawsuits—as the Definitive Proxy already disclosed. In fact, the relevant litigation had been disclosed for years, regularly updated in Akorn's quarterly and annual reports. For years Akorn advised its shareholders that "The Company and individual defendants [board members] dispute these claims and intend to vigorously defend these allegations."[6] Akorn relayed management's belief that "the ultimate disposition of such proceedings and exposure will not have a material adverse impact on the financial condition . . . of the Company." *Id.* Investors have no use for information already contained in prior SEC filings. *In re IAC/InterActive Corp. Secs. Litig.*, 695 F. Supp. 2d. 109, 118 (S.D.N.Y. 2010).

Nor was it news that a special committee of the board also found the claims not worth pursuing; it was previously disclosed. A special committee was formed to provide recommendations on "four shareholder derivative lawsuits" and shareholder demands to pursue actions against certain board members.[7] "The Board has completed that process and concluded that it would not be in the best interest of the Company to pursue such claims." *Id.* These statements, from the then-most recent Annual Report, were incorporated into the Definitive Proxy by reference. Dkt. 65-2 at 82.

Even if the lawsuit had not been previously disclosed, it would *still* not be material because "there [is] no suggestion that the suit . . . could have had a significant impact on the formation or

---

[6] Akorn, Inc. Annual Report, Form 10-K (March 17, 2015), at 25, available online at: https://www.sec.gov/Archives/edgar/data/3116/000117184315001465/f10k_030215.htm.

[7] Akorn, Inc. Annual Report, Form 10-K (March 1, 2016), at 78, available online at: https://www.sec.gov/Archives/edgar/data/3116/000162828017002069/akorn10k12312016.htm.

operation of the [new entity] or that it was even related to the formation of the new company." *Walgreen*, 832 F.3d at 722; *see also City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1266 (10th Cir. 2001) (observing the "10% of current assets materiality threshold of [17 C.F.R.] § 229.103").

E. J.P. Morgan's fee structure was already disclosed.

Finally, plaintiffs claim that the Definitive Proxy revealed, supposedly for the first time, that $44 million of J.P. Morgan's $47 million fee was conditioned on consummation of the merger. Br. 14-15. In fact, this was already disclosed in the Preliminary Proxy, which Frank has pointed out repeatedly. *See* No. 17-cv-5016, Dkts. 88 at 11; Dkt. 51 at 15. Plaintiffs address this issue by again asserting without explanation that Frank quoted the Preliminary Proxy out of context. Br. 14 n.13 (verbatim with Dkt. 50 at 24 n.25). Repetition has not made plaintiffs' assertion true. The Preliminary Proxy made the contingent nature of J.P. Morgan's fee crystal clear:

> J.P. Morgan received a fee from the Company of $3 million, paid upon the public announcement of the merger, which will be credited against any Services Fee (as defined below). For services rendered in connection with the merger, the Company has agreed to pay J.P. Morgan an additional fee equal to 1.0% of the total amount of cash paid to the Company's common stockholders . . . immediately prior to the consummation of the merger (the "Services Fee"), which in this case amounts to approximately $47 million.

Preliminary Proxy, Dkt. 65-1 at 22.

Thus, weeks before any of the plaintiffs filed suit, Akorn disclosed that J.P. Morgan received $3 million and would receive another $44 million "immediately prior to consummation of the merger." *Id.* Reasonable investors know that $47 million minus $3 million equals $44 million. Plaintiffs' counsel are not entitled to $322,500 for performing second grade arithmetic.

CONCLUSION

Walgreen is the law of this circuit, and only permits putative class actions that seek "plainly material" disclosures. Plaintiffs did not seek and did not achieve such disclosures, so their complaints should have been dismissed out of hand before extorting Akorn for $322,500 in attorneys' fees. Because none of the five purported disclosures is useful, let alone "plainly material," the Court should use its inherent authority to disgorge attorneys' fees from plaintiffs, which they were never entitled to.

Dated: December 3, 2018

/s/ M. Frank Bednarz

M. Frank Bednarz, (ARDC No. 6299073)
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1145 E. Hyde Park Blvd. Apt. 3A
Chicago, IL 60615
Phone: (202) 448-8742
Email: frank.bednarz@cei.org

Attorneys for Theodore H. Frank

CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Amended Memorandum of Law in Support of Motion to Intervene via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing.

Dated: December 3, 2018

/s/ M. Frank Bednarz