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[1] Considered with: 1:17-cv-05022 1:17-cv-05026 CLASS ACTION Hon. Thomas M. Durkin

SUR-REPLY OF *AMICUS CURIAE* THEODORE H. FRANK ADDRESSING ARGUMENTS PLAINTIFFS SHOULD HAVE ADVANCED ON NOVEMBER 1

[1] The three actions of non-disclaiming plaintiffs ("Plaintiffs") 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.

Plaintiffs' Reply (Dkt. 75) raises new arguments they forfeited when they failed to raise them November 1. The Court granted Frank leave to file this sur-reply in support of disgorging Plaintiffs' attorneys' fees. Dkt. 76. None of Plaintiffs' belated arguments support contravening *In re Walgreen Co. Stockholder Litig.*, which directs that the strike suit racket "must end." 832 F.3d 718, 724 (7th Cir. 2016).

I. Plaintiffs retained jurisdiction as part of their racket.[2]

While Plaintiffs dismissed their individual actions without prejudice, they simultaneously retained jurisdiction in the lead *Berg* action "for purposes of any potential further proceedings related to the adjudication of any claim by Plaintiffs in the Akorn Section 14 Actions for attorneys' fees and/or expenses." No. 17-cv-5016, Dkt. 54 at 5. This jurisdiction retained Plaintiffs' ability to threaten a contested motion for attorneys' fees, and Plaintiffs were able to execute their racket, which would not have been possible if the Court unilaterally dismissed their action "out of hand" as *Walgreen* suggests is most appropriate. 832 F.3d at 724; *cf. Parshall v. Stonegate Mortg. Corp.*, 2017 WL 3530851, at *1 (S.D. Ind. Aug. 11, 2017) (dismissing where plaintiffs tried to retain jurisdiction for mootness fees).

Having expressly retained jurisdiction and having profited $322,500 from this jurisdiction, Plaintiffs cannot now pretend that the Court has no authority to sanction attorney conduct before it.[3]

II. *Walgreen* applies more broadly than *Trulia* or Rule 23(e).[4]

While *Walgreen* reversed the approval of a class action settlement under the "plainly material" standard, its scope is much broader. *Walgreen* stands for the proposition that "a class action that seeks only worthless benefits for the class should be dismissed out of hand." 832 F.3d at 724. The Seventh Circuit has applied this principle in the absence of class settlement or certification. For example, a

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[2] Plaintiffs cite no argument from Frank's brief in support of their new theory that the Court lacks jurisdiction to vindicate its inherent authority. This argument should have been raised earlier.

[3] The record would be more clear if all six cases were consolidated. While the Court has referred to "the six consolidated cases before the Court" (Dkt. 70), Frank cannot find an order on the record consolidating the cases except for the limited purpose of deciding the motion to transfer.

[4] The only reference to Frank's *Amicus* Brief is Plaintiffs misrepresentation of Frank's statement that *Walgreen* only adopted the *Trulia* "plainly material" standard for evaluating class action settlements (and did not import all Delaware procedure). Reply at 3. Frank has observed this many times in the past (*e.g.* Dkt. 51 at 9), so Plaintiffs' argument should have been in their November brief.

"representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests." *In re Aqua Dots Products Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011).

Walgreen cannot be read to only narrowly apply to securities settlements where class member claims are released, but to all putative class actions like these, which "yield[ed] fees for class counsel and nothing for the class." 832 F.3d at 724. *See* Dkt. 67 at 5-7.

III. Plaintiffs' other belated arguments fail to justify their $322,500 windfall.

A. Court filings are not "notice" under Delaware law or common sense.[5] Plaintiffs assert that they complied with Delaware law by providing "notice" to class members in the form of a court filing. Reply at 3. But court filings are not notice. Delaware declines to allow the dismissal of mootness fee cases where actual notice to the class has not been provided; filings are inadequate. "[I]t 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*." *In re Adv. Mammography Sys., Inc. Shareholders Litig.*, CV 14831, 1996 WL 633409, at *1 (Del. Ch. Oct. 30, 1996) (emphasis added). This is true even when a public court filing describes the terms of the mootness agreement. "[N]otice of the [disclosed $400,000] Fee Stipulation nevertheless should be given to the putative class of Zalicus stockholders before I may enter an order closing this case." *In re Zalicus, Inc. Stockholders Litig.*, CV 9602-CB, 2015 WL 226109, at *1 (Del. Ch. Jan. 16, 2015). Mootness settlements in Delaware are usually noticed by SEC filing. Plaintiffs do not deny that no such notice was provided here.[6]

B. Causation for the Definitive Proxy cannot be presumed here. Plaintiffs previously asserted responsibility for the Definitive Proxy (Dkt. 35-2) that Defendant filed with the SEC June 15, 2017, just three days after the earliest remaining Plaintiff filed suit, and a week *before* plaintiff Pullos

[5] On November 1, Plaintiffs claimed to have "scrupulously followed" *Trulia*, but omitted the notice requirement from their quotation. Dkt. 65 at 3-4. They should have addressed it instead.

[6] Plaintiffs also pretend to misunderstand Frank's alternative argument by suggesting he is picking and choosing which Delaware law to apply. Reply at 3 n.5. Frank contends Delaware law does not apply at all, but alternatively argues "[e]ven if Delaware law applied, plaintiffs did not follow mootness fee protocol." Dkt. 67 at 4. Plaintiffs' mootness fee rationale fails under its own excuses.

filed. Dkt. 67 at 8. Plaintiffs belatedly cite cases purporting to show their responsibility is presumed, but they instead show how tenuous Plaintiffs' claim is. In *Koppel v. Wien*, the defendant agreed to modify the *substantive terms* of an acquisition one week *after* suit was filed—and even then the Second Circuit declined to assume the plaintiff was responsible, but remanded "to determine whether plaintiffs' suit was a substantial cause of the benefit obtained." 743 F.2d 129, 135 (2d Cir. 1984). Similarly, *Alaska Elec. Pension Fund v. Brown* found that the defendant rebutted any presumption of causation, even though the tender offer price increased after plaintiff sued. 988 A.2d 412, 417 (Del. 2010). *Lewis v. Gen. Emp't Enters., Inc.* is even further afield, concerning a case where plaintiffs achieved TRO against defendant, which scuttled its plans. No. 91-cv-0291, 1991 WL 125993, at *1 (N.D. Ill. July 2, 1991). These defendants provided *measurable relief* after suits were filed.

Here, Plaintiffs' credit for the Definitive Proxy is soundly rebutted because: (1) the purported benefit is fictitious, (2) Berg filed suit almost two weeks before any non-disclaiming Plaintiff, (3) SEC rules required Akorn to file a Definitive Proxy anyway, and (4) plaintiff Pullos cannot time travel.

C. Congress is hostile toward fees for $0 Exchange Act settlements. Without citation, Plaintiffs assert that Frank harbors "contempt for Section 14(a) litigation that is resolved through disclosure of important information to shareholders—precisely as Congress intended." Reply at 5. Plaintiffs *ad hominen* speculation of Frank's views is immaterial. In fact, in contrast to many other provisions of the Exchange Act, Section 14(a) has no express cause of action. Courts later implied a cause of action for the provision, which is dubious under more recent jurisprudence. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 n.19 (1979) (noting long judicial acquiescence to causes of action under §§ 10(b) and 14(a) of the Exchange Act, and declining to infer a further cause of action for § 17(a)). Congress remained unhappy with § 14(a) actions, so passed the PSLRA to "curb frivolous, lawyer-driven litigation." *Wong v. Accretive Health Inc.*, 773 F.3d 859, 863 (7th Cir. 2014). Under the PSLRA, attorneys' fees are entirely unavailable for class action settlements that provide no money to class members. *See* Dkt. 51 at 9-10; No. 17-cv-5016, Dkt. 88 at 13-14.

Thus Congress and *Walgreen*—not Frank's purported views—militate in disgorging attorneys fees from the remaining Plaintiffs, who harmed the Akorn shareholders they purported to represent.

Dated: January 3, 2018

/s/ M. Frank Bednarz
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CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Sur-Reply of *Amicus Curiae* of Theodore H. Frank via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing.

Dated: January 3, 2018

/s/ M. Frank Bednarz