IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-3307
SHAUN 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. 19-2401
DEMETRIOS PULLOS, On behalf of himself and all others similarly situated,
Plaintiff - Appellant
v.
AKORN, INC., et al.,
Defendants – Nominal Appellees
APPEAL OF: DEMETRIOS PULLOS, Plaintiff

No. 19-2408
SHAUN HOUSE, Individually and on behalf of all others similarly situated,
Plaintiff - Appellant
v.
AKORN, INC., et. al.,
Defendants – Nominal Appellees
APPEAL OF: SHAUN HOUSE, Plaintiff

On Appeal from the United States District Court for the Northern District of Illinois,
Nos. 1:17-CV-05018 and 1:17-CV-05026, Trial Judge Thomas M. Durkin

# Brief of *Amicus Curiae* Theodore H. Frank
# in Opposition to Appeals of Plaintiffs-Appellants House and Pullos

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**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 18-3307; 19-2401; 19-2408 (revised)

Short Caption: House v. Akorn, Inc., et al.; Pullos v. Akorn, Inc., et al. (revised)

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Theodore H. Frank

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Hamilton Lincoln Law Institute, Center for Class Action Fairness

(Revised; formerly Competitive Enterprise Institute)

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i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

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Attorney's Signature: s/ Theodore H. Frank Date: 10/19/2019

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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## APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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n/a

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Attorney's Signature: s/ M. Frank Bednarz Date: 11/25/2019

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**Statement of the Issues**

1. "It is well established that a federal court may consider collateral issues after an action is no longer pending." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990). "Collateral issues" include "the imposition of costs, attorney's fees, … contempt sanctions, … [and] whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate." *Id.* at 396. After the parties filed a stipulation of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), did the district court retain jurisdiction to rule on whether plaintiffs should return the attorneys' fees they extracted for "ultimately frivolous lawsuits" against the defendants?

2. A "primary aspect" of courts' inherent authority is "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). Did the district court have the inherent authority to order the return of attorneys' fees that plaintiffs extracted from defendants by filing "ultimately frivolous lawsuits" where there is no legal provision or precedent that directly or implicitly conflicts with the exercise of that authority?

3. This Circuit held in *In re Walgreen Co. Stockholder Litigation* that supplemental disclosures in class settlements must be "plainly material" to justify the payment of attorneys' fees. 832 F.3d 718, 725 (7th Cir. 2016). This Circuit has repeatedly held that "a class action that seeks only worthless benefits for the class should be dismissed out of hand." *Id.* at 725; *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551, 556 (7th Cir. 2017). Is this holding an "off-handed statement" as

plaintiffs insist (PB32),[1] or did the district court correctly apply the "plainly material" standard in assessing whether any of the demands in plaintiffs' complaints sought valuable disclosures for the putative class? A219.

## Standard of Review

While an appellate court reviews "the issue of whether a district court properly invoked its inherent powers *de novo*," *Schmude v. Sheahan*, 420 F.3d 645, 650 (7th Cir. 2005), "[a] district court's exercise of its inherent authority is reviewed for an abuse of discretion." *Miller v. Wolpoff & Abramson, LLP*, 309 Fed. App'x 40, 42 (7th Cir. 2009) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991)). A court's decision to impose sanctions is reversible only for an abuse of discretion. *Schmude*, 420 F.3d at 650. A district court's determination of attorneys' fees is also reviewed for abuse of discretion. *Vance v. Gallagher*, 280 Fed App'x 533, 538 (7th Cir. 2008). Whether a district court had jurisdiction and other questions of law are reviewed *de novo*. *Id.* at 536.

## Interest of Amicus Curiae

As set forth in his consolidated opening brief as cross-appellant, *amicus* Theodore H. Frank is an Akorn shareholder represented *pro bono* by the Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF"), which successfully argued

[1] "PBxyz" refers to page xyz of plaintiffs' opening brief. "FBxyz" refers to page xyz of Frank's opening brief from his consolidated appeal. "Axyz" refers to page xyz of Frank's Appendix. "Dkt." refers to the docket in *House v. Akorn, Inc.*, No. 17-cv-5018 (N.D. Ill.), unless otherwise indicated.

*Walgreen* and several other landmark decisions protecting the rights of class members and shareholders from abusive class-action settlements and practices. FB11. Frank founded CCAF in 2009 in part to ensure plaintiffs' counsel have incentives to file only socially valuable litigation, not the cynical rent-seeking racket that *Walgreen* recognized and these plaintiffs' counsels continue to the detriment of shareholders. FB12-13.

As Fed. R. App. Proc. 29(a)(4)(E) requires, Frank states that (i) no party's counsel authored the brief in whole or in part; (ii) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) while CCAF is part of the non-profit HLLI, which is funded in part through charitable contributions, no person contributed money to HLLI or Frank that was directed or intended to be directed toward preparing or submitting this brief.

As an *amicus*, Frank need not provide his own Statement of the Case, but Frank notes that his opening brief in consolidated Appeal No. 18-3307 contains a more complete statement than plaintiffs', including facts about the alleged disclosures. FB3-19. Plaintiffs' brief is largely bereft of record citations for purported facts. *See* Section **Error! Reference source not found.**.

## Summary of the Argument

If "in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power" to sanction abuse of the judicial process. *Chambers*, 501 U.S. at 50. This holding forecloses plaintiffs' legal objections. Plaintiffs seek (PB11) to sidestep *Chambers* (which they never squarely address) by characterizing the district court's action as the *ultra vires* action of "forc[ing]

Plaintiffs to litigate the merits of the dismissed claims." Not so. The district court acted within its authority to order plaintiffs' return of ill-gotten fees and curb their abuse of the judicial process.

First, a district court retains jurisdiction after a Rule 41 dismissal over "collateral issues" such as fees and attorney misconduct. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 295 (1990). Contrary to plaintiffs' misinterpretation, the court did not continue the litigation between the parties; it analyzed only whether the fees plaintiffs extracted were justified. Concluding Akorn instead paid them "to avoid the nuisance of ultimately frivolous lawsuits," the court ordered the fees' return, which served as a sanction for plaintiffs' abuse of the judicial process. A219. That the payment of fees had been set forth in an agreement is irrelevant, except that the court abrogated that agreement to ensure that the parties were not faced with conflicting legal obligations.

Plaintiffs admit (PB12) that "courts can litigate post-dismissal issues involving attorney's fees or sanctionable behavior." Courts' authority to do so necessarily involves an analysis of whether fees are justified or whether the behavior during the course of the litigation warrants sanctions.

Second, the court's order did not conflict with any rule or statute. *Contra* PB13. Neither Rule 41, Rule 23(e), nor the Private Securities Litigation Reform Act (PSLRA) purports to narrow the court's jurisdiction and long-standing inherent authority to address issues of attorneys' fees or attorney misconduct—and, in any event, *Chambers* holds that inherent authority reaches bad-faith conduct outside the reach of rules and statutes.

Third, the district court properly determined that the disclosures sought by plaintiffs were "worthless to the shareholders." A219. The court applied the "plainly material" standard that this Court adopted in *Walgreen*, and applied its direction that class actions that "seek[] 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). This directive does not require a court to wait for a settlement to occur, and neither it (nor the PSLRA) allows for any payment of "mootness fees." Moreover, even if this Court were to apply Delaware law's approach to mootness fees, plaintiffs failed to adhere to Delaware's requirement that they notify the class of such fees to protect stockholders against the risk of buy off of plaintiffs' counsel. The court had no obligation to consider two other alleged disclosures not sought in plaintiffs' complaints that plaintiffs now implausibly purport to take credit for, but even if it did, the error was harmless, because all the additional disclosures were immaterial as a matter of law.

## Argument

### I. The district court had jurisdiction to determine whether the attorneys' fees extracted by plaintiffs' counsel were warranted.

Plaintiffs' argument (and jurisdictional statement claim) that the district court lacked jurisdiction to unwind Akorn's payment of their fees is wrong. Plaintiffs cast the district court's order as one on the merits of the litigation (even calling it a "settlement" to imply such), but in fact, the order exclusively addressed attorneys' fees. More specifically, it addressed the propriety of plaintiffs' recovery of fees where they abused the judicial process to further the "racket" this Court addressed in *Walgreen*. A219.

While a stipulated dismissal may have removed the court's authority to resolve the dispute between plaintiffs and defendants on the merits (because that dispute no longer existed), it had no such effect on the court's inherent authority over attorneys' fees and attorney misconduct. Rather, district courts retain inherent authority to decide issues such as the propriety of a fee award and attorney sanctions after a Rule 41 dismissal. *See Szabo Food Serv. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987).

### A. The stipulation did not divest the district court of jurisdiction over attorneys' fees and counsel's misconduct.

The court "order[ed] Plaintiffs' counsel to return to Akorn the attorney's fees provided by the settlement agreements" and "abrogated" those fee settlement agreements. A219-20. The court issued this order once it determined that there was no basis for plaintiffs' counsel to recover fees for their "frivolous lawsuits" that mirrored the "'racket' described in *Walgreen*." A219. Had the court not also abrogated the settlement agreement, Akorn would have had conflicting legal obligations: the agreement required it to pay the fees to plaintiffs, while the court's order required plaintiffs to return the fees to Akorn and, implicitly, prevented Akorn from simply re-paying the funds. A219-20.

"It is well established that a federal court may consider collateral issues after an action is no longer pending." *Cooter & Gell*, 496 U.S. at 395;[2] *see, e.g., Eash v. Riggins*

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[2] 1993 amendments to Rule 11 limit the applicability of *Cooter & Gell* to some scenarios of where Rule 11 sanctions may be issued, but those amendments do not affect any of the propositions Frank or the district court cite *Cooter & Gell* for. The Federal Rules Committee's Notes to the 1993 Amendments emphasize that the rule changes do not "inhibit" the holding of *Chambers v. NASCO*.

*Trucking, Inc.*, 757 F.2d 557 (3d Cir. 1985) (district court retained jurisdiction to assess cost of impaneling jury due to attorneys' abuse of judicial process).

Parties' stipulation to dismiss without prejudice served only to divest the court of authority to resolve the *merits* of the dispute between the parties, as embodied in the complaint filed by plaintiffs. An order regarding fees or imposition of a "sanction does not signify a District Court's assessment of the legal merits of the complaint" and therefore "does not deprive the plaintiff of his right under Rule 41(a) to dismiss an action[.]" *Cooter & Gell*, 496 U.S. at 396. The district court's rulings do not affect the merits; nothing in the decision precludes plaintiffs from bringing a meritorious complaint against Akorn were one to exist.

Although plaintiffs cast the district court's order as improperly abrogating a private settlement agreement, they don't dispute that the only material term of that agreement was Akorn's payment of attorneys' fees. As such, the fee "settlement" continued to fall within the district court's jurisdiction, and the court had the "inherent power to fashion an appropriate sanction for conduct which abuses the judicial process." *Salmeron v. Enter. Recovery Sys.*, 579 F.3d 787, 793 (7th Cir. 2009). Just as in *Pearson v. Target Corp.*, "the district court's continuing jurisdiction over Frank's claim and other [fee-related] disputes is clear." 893 F.3d 980, 986 (7th Cir. 2018). This Court has suggested that even if a dismissal of a class action is *with* prejudice, the district court may retain authority to protect class members and "ensure that no class sellout had occurred." *Id.*

Plaintiffs' own cases don't support their view of Rule 41(a)(1). For example, *Smith v. Potter* merely holds that a district court may not dismiss a suit with prejudice

when the plaintiff had already filed a notice of voluntary dismissal. 513 F.3d 781 (7th Cir. 2008) (PB2). Likewise, *Marques v. FRB* involved a court's ruling on the *merits* of the claims after a notice of dismissal had been filed. 286 F.3d 1014 (7th Cir. 2002) (PB16). While these cases and others cited by plaintiffs may establish that a court cannot validly enter a "judgment on the merits ... after the plaintiff has filed a proper Rule 41(a)(1) notice of dismissal," PB16, this is irrelevant to whether the district court had authority after a voluntary dismissal to rule on fees and attorney misconduct.

*Szabo*, 823 F.2d at 1078 (PB15-16), and *Pearson* establish that a dismissal under Rule 41(a)(1) does not deprive a district court of jurisdiction over non-merits matters such as attorneys' fees and attorney misconduct. As *Szabo* explained, plaintiffs' analogy of a Rule 41(a) dismissal as comparable to a suit having never been brought breaks down quickly. A plaintiff cannot file suit, order a transcript of preliminary proceedings, bounce the check for the filing fees and transcript, and then dismiss, with the expectation that they can avoid paying. *Szabo*, 823 F.2d at 1079. Nor can a plaintiff punch the judge during a hearing and then dismiss the case to avoid the "inevitable citation for contempt of court" that would follow. *Id.* "The obligation to answer for one's act accompanies the act, a lawyer cannot absolve himself of responsibility by dismissing his client's suit." *Id.* at 1079. Illustrating the propriety of the district court's analysis here, the court in *Szabo* analyzed whether the underlying claim was "frivolous" to determine whether sanctions were appropriate. *See id.* at 1081-82. Although *Szabo* addressed fees as a sanction under Rule 11 rather than under a court's inherent authority, the same jurisdictional reasoning applies here.

Plaintiffs' position appears premised entirely on the district court's parsing of the merits of their claims for the purpose of determining whether disgorgement was appropriate. The court did not "engage in full-blown merits litigation," PB16; rather, the court followed the established rule that it can deter frivolous or improper actions in its court, and fees should be awarded only if attorneys have provided a benefit or succeeded on their claims. Finding that plaintiffs' counsel provided no such benefit and instead perpetuated the "racket" of meritless strike suits filed for personal gain, the district court ordered the return of those funds to the payor. Its order was consistent with *Cooter & Gell* and *Chambers*.

### B. The district court had inherent authority to order plaintiffs to return the attorneys' fees to Akorn.

Plaintiffs fault (PB19) the district court for not "identif[ying] any basis for its continued jurisdiction" over the case and "instead invok[ing] its 'inherent authority.'" But they acknowledge that courts retain "ancillary jurisdiction" to address a limited set of collateral issues following a Rule 41(a) dismissal. PB19 (citing *Cooter & Gell*, 496 U.S. at 395-96, which noted attorneys' fees and sanctions as one such issue)."Courts have broad power, deemed 'inherent' in the sense that its existence does not depend on an explicit grant of power in a statute or other formal enactment, to regulate the conduct of lawyers who practice before them." *Dale M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch.*, 282 F.3d 984, 985-86 (7th Cir. 2002). "[T]he imposition of financial sanctions on attorneys [is] the most appropriate sanction for abuse of the judicial process." *See*

Carolyn L. Dessin, *Civil Procedure – Federal District Courts Have Inherent Power to Sanction Attorneys for Abuse of the Judicial Process*, 31 Villanova L. Rev. 1073, 1091 (1986).

*Kokkonen v. Guardian Life Ins. Co. of America* noted one of the purposes behind ancillary jurisdiction is "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees," by, for example, compelling payment of an opposing party's fees as sanction for misconduct. 511 U.S. 375, 380 (1994) (citing *Chambers*, 501 U.S. 32; *United States v. Hudson*, 11 U.S. 32 (1812)). *See also United States v. Wahi*, 850 F.3d 296, 300 (7th Cir. 2017) (quoting *Kokkonen* and cited by plaintiffs). Just so here.

Plaintiffs' argument (PB20) is little more than a doubling down on their incorrect description of the court's action as a decision on the merits. As discussed in Section I.A, "[l]ike the imposition of costs, attorney's fees, and contempt sanctions," the district court's order was "not a judgment on the merits of the action[; r]ather, it require[d] the determination of a collateral issue: whether the attorney ha[d] abused the judicial process, and, if so, what sanction would be appropriate." *Cooter & Gell*, 496 U.S. at 396.

Plaintiffs admit (PB21) that "the court retains the authority to target [any] sanctionable act." PB21. The court did just that, ending this inquiry. That the court assessed the validity of plaintiffs' allegations does not convert the court's action into an attempt to resolve the dispute between plaintiffs and Akorn. Instead, it is akin to an assessment of whether a filing was an abuse of the judicial process—which noone disputes is within a court's ancillary jurisdiction. If the court had not abrogated the settlement, then Akorn would have faced conflicting demands in a court order and a binding contract, leading only to more litigation. This action by the court in no way

"revive[d]" dismissed claims or "compel[led]" merits litigation. PB21. (Because the claims were dismissed without prejudice, plaintiffs have always had the right to renew litigation. There's a very good reason they have not yet, and will not, but it goes undiscussed in plaintiffs' brief.)

Plaintiffs have no authority for their argument that a district court cannot analyze whether attorneys abused judicial process simply because the plaintiffs dismissed the claims.

## II. The court had authority to sanction plaintiffs' abuse of the judicial process by ordering return of their attorneys' fees.

Appellants' second point of argument once again depends on mischaracterizing the district court's action and ignoring courts' inherent authority to regulate attorneys' conduct. *See* Section I. Plaintiffs identify no rule or law that conflicts with the district court's action. The district court's order is fully consistent with its broad inherent authority and the precedent relating to use of that authority.

### A. The district court did not conduct a "self-initiated merits review" post-dismissal.

Plaintiffs cite no authority for their position that the court's "only option was to invoke its inherent *sanctions authority* and apply the applicable standard." PB24 (emphasis in original). And, in fact, they are wrong about the law. "All 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 extraction of illegal fees." *Dale M.*, 282 F.3d at 986 (cleaned

up). In such cases, it is entirely appropriate for the court to "order [the receiving party] to return the money to the defendant." *Id.*

The cases plaintiffs cite are inapposite. For example, *Zapata Hermanos Sucesores v. Hearthside Baking Co.*, 313 F.3d 385, 389-91 (7th Cir. 2002), held that the district court did not have inherent authority to punish misconduct that occurred *apart from the litigation*.

Likewise, cases involving use of inherent authority that conflicts with rules that "mandate a specific procedure to the exclusion of others" are inapplicable because the court's order does not conflict with any other statutes or rules. PB23 (cleaned up). While plaintiffs' vaguely point to Rule 41(a)(1), Rule 23(e), and the PSLRA as conflicting with the district court's action, they identify no actual conflict or reason to believe that Congress or the Rules Committee sought to abrogate the judiciary's authority to ensure its own proper functioning. Plaintiffs forfeit their most plausible argument: that Fed. R. Civ. Proc. 11(c)(5)(B) prohibits a *sua sponte* Rule 11(c)(3) show-cause order after settlement or voluntary dismissal. But even this fails, because these were not Rule 11 sanctions, and *Chambers v. NASCO*, 501 U.S. 32, 46-51 (1991), explicitly rejects plaintiffs' argument. Inherent authority may punish "bad-faith conduct … beyond the reach of the Rules"; if "in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power." *Id.* at 50. And the Federal Rules Committee's Notes to the 1993 Amendments to Rule 11 agree that Rule 11 does not "inhibit" a court's inherent authority.

There are no conflicts between the district court's order and Rule 23 or the PLSRA that would circumscribe the district court's authority. The district court did not apply Rule 23 to require approval of the merits settlement based on the class action-

status of the litigation. *Contra* PB28. Plaintiffs' gripe seems to be that the district court cited *Walgreen* in its decision to order the return of attorneys' fees. The district court examined whether the initial complaint failed to seek disclosures that were "plainly material" and therefore should have been "dismissed out of hand." PA219. Concluding that the answer was yes, the district court recognized that it was its own failure to do so that allowed plaintiffs to leverage the meritless suits for their counsel's personal gain. It therefore "exercise[d] its inherent authority to rectify the injustice that occurred as a result." *Id.* Neither Rule 23(e) nor *Walgreen* foreclose this decision. Plaintiffs cite (PB29) the district court's initial misunderstanding of its authority, but that since-corrected mistake does not taint the ultimate decision being reviewed.

15 U.S.C. § 78u-4(c) only requires courts to exercise their authority to apply Rule 11 after a final adjudication. This *additional* protection against abusive litigation does not limit or alter a court's inherent authority to prevent abusive litigation. Courts have always had authority to curb abuses of the judicial system in addition to any separate efforts Congress may enact. *Langley v. Union Elec. Co.*, 107 F.3d 510, 514 n.4 (7th Cir. 1997); *Rose v. Franchetti*, 979 F.2d 81, 86 (7th Cir. 1992); *Chambers*, 501 U.S. 32.

That "many statutes … require judicial scrutiny" before a court accepts a voluntary dismissal are inapplicable here, where the voluntary dismissal has not been abrogated. PB31. With this argument, plaintiffs revert back to their main faulty premise that the district court required the parties to litigate the merits dispute after it was dismissed. It did no such thing.

### B. Plaintiffs again misinterpret the district court's order in claiming it exceeds applicable precedent.

Plaintiffs' next claim that the district court's exercise of inherent authority was not supported by *Walgreen* or *Dale M.* is both wrong and misunderstands the nature of the court's order and its inherent authority. As the name suggests, a court's inherent authority is not derived from precedent or other external sources but rather "necessarily result to our Courts of justice from the nature of their institution;" these are "powers 'which cannot be dispensed with in a Court because they are necessary to the exercise of all others." *Chambers*, 501 U.S. at 43 (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812)). To the extent plaintiffs challenge the district court's order as inconsistent with those precedents, they are wrong. Even if they were correct, any inconsistency is irrelevant; the precedent does not limit the "universally acknowledged" fact that courts are vested with an inherent power that includes as a "primary aspect … the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Id.* at 43, 44-45.

First, plaintiffs are wrong that *Walgreen*'s holding that "a class action that seeks only worthless benefits for the class should be dismissed out of hand," 832 F.3d at 724, applies only to court-approved settlements on behalf of a certified class. While that is the most egregious situation in which strike suits are addressed, *Walgreen* suggests that dismissing meritless suits before they reach that point is just as appropriate. *Cf. also Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012) (remanding similarly abusive Rule 23.1 strike suit on appeal of denial of intervention with instructions to enter judgment for defendant). Courts' obligation and authority to prevent abusive

litigation is not limited to the Rule 23 context. *Walgreen* did not need to "provide any foundation (legal or factual) for invoking inherent authority," PB32, because courts already have such authority. *Walgreen* instead offers a roadmap for courts facing the scourge of meritless strike suits that have sprung up in recent years. Although plaintiffs challenge a district court's inherent authority to dismiss a frivolous suit *sua sponte*, "there is little doubt" that district courts have such power. *Mallard v. United States District Court*, 490 U.S. 296, 307-08 (1989). Plaintiffs' reliance (PB32) on dicta propounded by a district court in an *ipse dixit* footnote does not override these authorities.

Second, *Dale M.* fully supports the district court's exercise of inherent authority to order the return of unwarranted attorneys' fees obtained through improper leverage of the court system. The district court stated that plaintiffs' cases "should have been 'dismissed out of hand.'" A219. Just as in *Dale M.*, plaintiffs had "no right to the money [they] ha[ve] pocketed." 282 F.3d at 986. This exercise of inherent authority did not depend upon the specific reasons plaintiffs were not entitled to the fees; rather, it was consistent with the court's power "to regulate the conduct of the lawyers who practice before them." *Id. Dale M.* even explained that "All 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." *Id.* (internal quotation omitted). *Dale M.* supports the district court's disgorgement order.

## III. The district court correctly found that appellants' complaints did not seek plainly material disclosures when filed.

The district court appropriately applied *Walgreen* and concluded that neither of appellants' complaints sought material disclosures, so should have been "dismissed out of hand." Plaintiffs have failed to show an abuse of discretion in the district court's approach—which was correct as a matter of law.

First, plaintiffs, in violation of Fed. R. App. P. 28, rely on sweeping and almost entirely unsupported arguments about facts and causation, often without citation to the record; the Court can hold that they have forfeited the argument. But even if the Court holds the issues preserved for appellate review, the district court is correct. *Walgreen* controls the district court's application of the "plainly material" standard, which applies more broadly than to just class-action settlements without importing idiosyncratic Delaware procedure. The district court appropriately evaluated disclosures sought by plaintiffs' complaints to determine whether they were meritorious when filed. Finally, none of the plaintiffs' five claimed disclosures (three of which the district court reviewed as overlapping with the claims in the complaints) were material or even helpful.

### A. Plaintiffs' arguments regarding materiality should be stricken for violating Rule 28 because they rely on facts without record citations.

Plaintiffs' arguments regarding materiality of the supplemental disclosures (Section III of plaintiffs' opening brief (PB36-56)) should be viewed as forfeited for violating Fed. R. App. Proc. 28. An opening brief's argument section must contain "citations to the authorities and parts of the record on which the appellant relies." Fed.

R. App. Proc. 28(a)(8)(A). As the Seventh Circuit has "cautioned time and again, judges are not like pigs, hunting for truffles buried in the record." *Friend v. Valley View Cmty. Unit Sch. Dist. 365U*, 789 F.3d 707, 711 (7th Cir. 2015) (cleaned up); *see also Corley v. Rosewood Care Ctr.*, 388 F.3d 990, 1001 (7th Cir. 2004).

In *Valley View*, appellant failed to include specific page numbers to deposition transcripts. 787 F.3d at 711. "Because [appellant] violated Rule 28, we strike all portions of his argument section that rely on unsupported facts or fail to identify a specific error in the district court's decision." *Id*. Plaintiffs' brief is worse. Plaintiffs are not just missing specific page numbers, plaintiffs' brief includes repeated instances of facts with *no* record citations.[3]

For example, plaintiffs' argue they "caused" Akorn to include the supplemental disclosures in the Definitive Proxy is based on purported correspondence, discovery, and agreements between Akorn and plaintiffs, but there are no record citations supporting such assertions. *See* PB6-7, 47. Similarly, plaintiffs' arguments regarding the specific disclosures also lack record citations. *E.g.*, PB42, 44 ("November 2016 Management Case"); PB50-51 (Fresnius's alternative proposals); PB52-53 (board's consideration of the derivative lawsuits); PB55-56 (contingency of J.P. Morgan's fees).

While some facts plaintiffs assert may be somewhere in the record, others are nowhere to be found. Either way, it isn't this Court's job to scour the entire record and determine which of plaintiffs' unsupported facts actually exist. Accordingly, plaintiffs'

[3] Plaintiffs also violate Cir. R. 30(b)(6), and furthermore impolitely use the table of contents in their addendum as argument to make tendentious characterizations of the docket.

arguments regarding materiality should be stricken. But even if the Court generously plays truffle-hunter, plaintiffs' arguments are incorrect.

### B. The "plainly material" standard from *Walgreen* controls.

Plaintiffs argue (PB31) that *Walgreen* has "nothing to do with this situation." They say that this Court's opinion that "a class action 'seeking only worthless benefits' should be 'dismissed out of hand'" is nothing but an "off-handed statement." PB32 (quoting *Walgreen*, 832 F.3d at 725). But as the district court noted, this Court has reaffirmed this principle. *In re Subway Footlong Sandwich Mktg. and Sales Prac. Litig.*, 869 F.3d 551, 557 (7th Cir. 2017). While *Walgreen* did reverse approval of a class-action settlement under the "plainly material" standard, its scope is broader. *Walgreen* aims to curtail socially useless rent-seeking. It observed that approval of strike-suit settlements had "caused deal litigation to explode in the United States beyond the realm of reason." 832 F.3d at 725. This problem has intensified. *See generally* FB4-7 (discussing the explosion of strike suit litigation); Matthew D. Cain, Jill E. Fisch, Steven M. Davidoff Solomon & Randall S. Thomas, *Mootness Fees*, forthcoming 73 VAND. L. REV. (2019) (academic survey on topic) (duplicated at A166-208). Therefore, *Walgreen* instructs courts to scrutinize all putative class actions filed with an eye toward shareholder interests. 832 F.3d at 724.

"[I]f ***at any tim***e 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). For example, 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); *cf. In re Aqua Dots Products Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011). *Walgreen* applies to all filed complaints, not just settlements. Otherwise "dismissed out of hand" would be an empty phrase, and we know it's not in view of *Subway*, and this Court acted similarly in *Robert F. Booth Trust*.

Plaintiffs' argue that *Walgreen* should instead be read to have imported Delaware procedural and substantive law into Federal Exchange Act litigation against a Louisiana corporation *sub silentio*. "Having already adopted Delaware law for the first part of the analysis ("plainly material" standard for class settlements), there is no reason to ignore Delaware law at the next step ("helpful" standard for mootness fees)." PB38. In fact, *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)). Yet somehow, according to plaintiffs, the only holding of *Trulia* that *doesn't* apply to this case is the "plainly material" standard—the only holding of *Trulia* that *Walgreen* specifically adopted! *Walgreen* does not mention mootness, let alone mootness fees, nor the alleged "helpful" standard.

No basis for mootness fees exists under federal law. 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). Federal law, not Delaware law, governs this case, as well as plaintiffs' conduct before the Court.

In any event, plaintiffs flunk even Delaware law. Delaware mootness fees are only available when "the suit was meritorious when filed." *In re Xoom Corp. Stockholder Litig.*, No. 11263-VCG, 2016 Del. Ch. LEXIS 117, at *9 n.15 (Ch. Aug. 4, 2016). The district court effectively determined appellants' complaints were *not* meritorious when filed. Furthermore, Delaware only tolerates mootness fees "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 (emphasis added). 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). Plaintiffs provided no such notice—through independent means, SEC filing, or press release—to Akorn shareholders.

### C. The district court properly focused on the disclosures actually sought.

Plaintiffs complain about the district court "refusing to analyze" all of the disclosures they claim credit for (PB39), but it was appropriate for the court to review only those disclosures contained in their complaints. Examining plaintiffs pleadings, the district court reviewed three out of the five disclosures plaintiffs claim credit for here. A212-19.[4] The court correctly focused on the complaints to determine whether plaintiffs

[4] The district court also reviewed four other disclosures (disclosures 2, 5, 6, and 7 in the court's opinion) that plaintiffs sought in their complaints but never obtained in

sought "only worthless benefits for the class" such that their complaints should have been "dismissed out of hand." *Walgreen*, 832 F.3d at 724. (Or alternatively, whether plaintiffs' complaints were "meritorious when filed."). Because materiality can often be decided as a matter of law, *Walgreen*, 823 F.3d at 723-24, it was not an abuse of discretion for the district court to decide it on the unambiguous record of plaintiffs' own pleadings. Even if the district court should have evaluated the two disclosures plaintiffs didn't seek in their complaints, but claim to have obtained, the error was harmless. Neither was material, as this Court can decide now *de novo* as a matter of law. *See* Sections III.D.1 and III.D.3 below.

**D. Under any standard, the disclosures actually obtained fell short.**

Plaintiffs allege responsibility for five groups of disclosure, but none of them are material or even helpful to shareholders. In the context of SEC Rule 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." *Wieglos v.*

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their "mooted" suits. A212-19. Plaintiffs do not argue that these four additional disclosures were material and thus, such arguments are forfeited.

*Commonwealth Edison Co*., 892 F.2d 509, 517 (7th Cir. 1989); *see generally TSC Indus*., 426 U.S. at 449 n.10 ("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).

None of the disclosures significanlty altered the mix of information. The lack of materiality was confirmed by the complete indifference the stock market showed toward them. Akorn's share price rose one penny toward the target price on June 15, 2017, when appellants implausibly claim credit for disclosures in the Definitive Proxy. Interactive Stock Chart, Dkt. 67 at 10, *available at* https://yhoo.it/2rdx6Ao. The trade volume was low: the second-lowest volume day from that calendar week. *Id*. Similarly, not much happened on July 10 in response to the Supplemental Disclosure. *Id*. These two dates are marked in the stock chart below:

**Fig. 1.** Dkt. 67 at 10.

In fact, over 99.9% of votes cast favored the transaction (Dkt. 35-1 at 17), confirming the alleged disclosures made no material difference. *See Walgreen*, 832 F.3d at 723.

Plaintiffs weave a fanciful story for the origin of their litigation, but it has no basis in the record. PB42. Plaintiffs say that they "filed their actions" due to concern about the Preliminary Proxy's omission of the "November 2016 Management Case," and Fresenius' investment offer to "John Kapoor, Akorn's chairman." PB42. But neither of appellants' complaints *even mentions* either of these purported concerns. A38-78. Plaintiffs' complaints instead appear to be cut-and-pasted. For example, both appellants' complaints contain an identical 157-word paragraph demanding immaterial GAAP reconciliation. *See* A52 (House); A73 (Pullos).

The disclosures plaintiffs sought were cookie-cutter trivia and the complaints should have been dismissed out of hand, as the district court rightly found. The disclosures that were not sought in the complaint but that appellants claim to have obtained (numbers 1 and 3 below) were likewise immaterial as shown by the stock chart above and as we discuss in detail below.

**1. The November 2016 projections were not sought or precipitated by appellants and were cumulative anyway.**

As an initial matter, there is *no record evidence* that appellants were responsible for the disclosure regarding the November 2016 Management Case projections. *See* Section III.A. above. The claim is implausible. First, none of the appellants sought such disclosure in their complaints.[5] And, along with the disclosure addressed in Section

[5] The district court did not decide Frank's arguments that plaintiffs did not cause the disclosures not sought in their complaints, finding that causation was irrelevant because only plaintiffs' pleadings mattered. A212 n.1; *see* Section III.C above.

III.D.5, Akorn included the November 2016 projection information in their Definitive Proxy—just three days after appellant House's complaint, and a *week before* Pullos filed suit:

- May 22, 2017 – Akorn files preliminary proxy with SEC. Dkt. 65-1 ("Preliminary Proxy").
- June 2 – Robert Berg (who later disclaimed attorneys' fees) files first strike suit against Akorn and its directors. No. 17-cv-5016, Dkt. 1.
- June 12 – Appellant House files suit. A38.
- June 15 – Akorn files definitive proxy. Dkt. 65-2 ("Definitive Proxy").
- June 22 – Appellant Pullos files suit. A58.
- July 10 – Akorn files 8-K form with three disclosures (numbered 2-4) avowedly caused by the strike suits. A152 ("Supplemental Disclosure").

The notion that Akorn responded in less than 72 hours to a demand House didn't even make is ridiculous, as well as unsupported by the record.

Second, nothing in the Definitive Proxy or the Supplemental Disclosure suggests that plaintiffs were responsible for any changes between the Preliminary and Definitive Proxy. Preliminary Proxy, Dkt. 65-1; Definitive Proxy, Dkt. 65-2. While the Definitive Proxy added new material (such as recounting plaintiffs' lawsuits and correctly labeling them "without merit"), none of the new material addressed any of plaintiffs' demands—let alone House's complaint filed three days earlier.

Third, plaintiffs themselves 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 "as a result of the filing of the Supplemental Disclosures, the disclosure claims … in the Action have become moot."

A82, A87, A92. The dismissals did not claim that the Definitive Proxy mooted any part of their complaints, nor did they take credit for the proxy. *See id*. On September 15, 2017, plaintiffs jointly filed mootness fee stipulations and repeated this statement verbatim. A93; *see also* Plaintiffs' Opposition to Frank's Motion to Intervene, No. 17-cv-5016, Dkt. 78 at 4 (Oct. 18, 2017) (arguing that Supplemental Disclosure mooted their claims). Neither Berg nor any plaintiff claimed credit for disclosures in the Definitive Proxy until December 22, 2017. *See* Plaintiffs' Opposition to Frank's Renewed Motion to Intervene. No. 17-cv-5016, Dkt. 84.

Further, appellants' complaints were correct to omit a demand for the November 2016 Management Case because those projections were not material. Plaintiffs argue that November projections are relevant because the Board relied upon them "for virtually the entire sales process" during which time the Board "authorized massive reductions to Akorn's projections just before the merger was announced." PB44. But "there is no evidence in the record that the … board relied on these … projections" in recommending the merger. *Wayne Cty. Emps. Ret. Sys. v. Corti*, 954 A.2d 319, 332 (Del. Ch. 2008). In fact, the Preliminary Proxy specifically recognized that the November 2016 Management Case "was not relied upon by the Board" in reaching its decision to adopt the merger agreement. Preliminary Proxy, Dkt. 65-1 at 48. Instead, the Board relied on the updated *March 2017* Management Case, which *was* disclosed in the Preliminary Proxy, making the November projections cumulative. *Id.* at 48. There's no need to disclose outdated information: "issuers need not reveal all projections." *Wielgos*, 892 F.2d at 516. Cumulative disclosures are not even helpful, nor can failure to disclose them be misleading. *TSC Indus.*, 426 U.S. at 449.

Plaintiffs artfully imply that the November 2016 Management Case showed investors Akorn's downward trajectory (PB44), but this was already old news. The deterioration of Akorn's earnings was reported *even earlier* than the Preliminary Proxy: on March 1, Akorn provided guidance to its shareholders that net income for 2017 was projected to decline 20-33% from 2016.[6] 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 at Dkt. 67-1). The deteriorating prospects of Akorn supports management's recommendation to accept the merger offer.

The district court did not consider this disclosure because it was not sought in the complaint, but it was not caused by the plaintiffs, and, as a matter of law, it was not material.

**2. GAAP reconciliation is not material.**

Plaintiffs completely ignore all authority the district court relied on in finding that the GAAP reconciliation could not have been material to shareholders who already had access to the figures actually used by the Board. A212-13. The July 10, 2017 Supplemental Disclosure purported to reconcile GAAP net income from previously-provided non-GAAP projections prepared for the Board (namely, the November 2016 and March 2017 Management Cases). A158-63. At the time of disclosures, these numbers already were four months out of date, and therefore provided a misleading

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

picture of Akorn's finances, which continued to deteriorate. Laughably, the Supplement states that some metrics were simply assumed to be $0 due to missing data, and cautions that the reconciliation is "not indicative of the Company's expected performance." A158. Indeed it was not!

Courts have rejected the argument that an assumption-laden "reconciliation" of GAAP financial metrics from non-GAAP projections prepared for a board is material, let alone plainly material, yet plaintiffs do not cite or distinguish precedents that the district court found persuasive. A213 (citing *Assad v. DigitalGlobe, Inc.*, 2017 WL 3129700, at *6, 2017 U.S. Dist. LEXIS 113965 (D. Colo. Jul. 21, 2017); *Bushansky v. Remy Intl., Inc.*, 262 F. Supp. 3d 742, 748 (S.D. Ind. 2017)). *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 somehow render a proxy misleading. *Assad*, 2017 U.S. Dist. LEXIS 113965 at *18. In fact, plaintiffs called the previously-disclosed UFCF figures the "holy grail of projections." Dkt. 65 at 9. A Templar Knight, having discovered the Holy Grail and having achieved immortal life, has little use for hardened old pottery clay.

The district court also relied on the SEC regulation and interpretation flatly rejecting the idea that these non-GAAP financial measures violate SEC rules and regulations. A212 (citing 17 C.F.R. § 244.100(d) and Securities Exchange Commission Discl. 5620589, Question 101.01 (Oct. 17, 2017)). The SEC holds that non-GAAP projections may be provided in merger-related disclosures 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." SEC Discl. 5620589, Question 101.01 (Oct. 17, 2017).[7] Exactly so here. The March 2017 Management Case was "the only forecast approved by the Company for use by J.P. Morgan in connection with rendering its oral opinion." *See* Preliminary Proxy, Dkt. 65-1 at 48.

Plaintiffs cannot argue otherwise, so instead propose that their GAAP reconciliation was required under the "then-prevailing interpretation of SEC rules." PB46. But this is untrue. The tendentiously-interpreted extemporaneous remarks by one Commissioner in a speech (PB46 n.14) do not make for a "prevailing interpretation," and plaintiffs have never been able to cite any law, regulation, or guidance for this supposed requirement. Only contrary law exists, and for good reason.

Plaintiffs' interpretation was always foreclosed by the plain text of the regulation. Plaintiffs fault the district court for ignoring a clause in the regulation which they claim made the exception to GAAP reconciliation ambiguous (PB49), but in fact the quoted text proves that projections for such financial opinions are entirely excepted. "This section shall not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, … if the disclosure is contained in a communication that is subject to … § 229.1015 of this chapter." 17 C.F.R. § 244.100. "Relatedly, § 229.1015, also referred to as Item 1015 of Regulation M-A, governs disclosures related to mergers." *Stein v. Almost Family, Inc.*, No. 3:18-CV-129-TBR, 2018 U.S. Dist. LEXIS 46910, at *13 (W.D. Ky. Mar. 21, 2018) (denying preliminary injunction

[7] Available: https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm.

to strike suit plaintiffs). The Preliminary Proxy shows that this exception, including the alleged "caveat that the district court overlooked" apply to Akorn's disclosure of the Management Case:

> [T]he inclusion of the Financial Forecasts in this proxy statement does not constitute an admission or representation by the Company that this information is material. … The summary of the Financial Forecasts is not included in this proxy statement to induce any shareholder to vote in favor of the approval of the merger agreement or any other proposals to be voted on at the special meeting, but because the Financial Forecasts were made available to the Board, the Company's financial advisor and certain parties potentially interested in a transaction…

Dkt. 65-1 at 47. "This language indicates that the non-GAAP metrics are not, in the company's view, material, that they were provided … solely for the purpose of conducting its analysis and issuing its fairness opinion, and that the numbers are not included to influence voting or to indicate which way shareholders should vote." *Almost Family*, 2018 U.S. Dist. LEXIS 46910, at *16.

Later, plaintiffs more modestly argue that "when the supplemental disclosures were made it was far from clear that exemption from GAAP reconciliation under Section 244.100(d) applied." PB49. But plaintiffs cannot deny that the SEC has firmly rejected the position since. *See also Bushansky*, 262 F. Supp. 3d at 748 (decided *before* SEC expressly endorsed this interpretation); *Assad*, 2017 U.S. Dist. LEXIS 113965, at *13 (same). The *Walgreen* "plainly material" standard requires more than merely an arguably colorable interpretation of the law.

If anything, out-of-date projections would have been more likely to *mislead* shareholders because they did not update shareholders on the rapid deterioration of

Akorn's finances, but repeated March's relatively rosy projection of $138 million net income for 2017. A162. 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.[8] Unlike the Definitive Proxy and the Supplemental Disclosure, the July 31 quarterly report *did* noticeably alter Akorn's price. *See* Fig. 1. Akorn eventually posted a net *loss* of $24.6 million for 2017,[9] and Fresenius terminated its acquisition agreement in April 2018 due to unrelated FDA compliance irregularities. Reuters, *Fresenius shares rally after it ditches Akorn takeover* (Apr. 23, 2018).

Plaintiffs also fault the district court for supposedly having "ignored" their alleged responsibility for UFCF line items first disclosed in the Definitive Proxy. PB47. The district court did not consider this argument because plaintiffs' appellate opening brief constitutes the first time in 28 months of litigation that they have claimed responsibility for these numbers. Plaintiffs must have discovered their alleged responsibility for these figures since writing their Statement of the Issues, which says there were only "two important categories of information that were added to the Definitive Proxy." PB7. These line items would be a third category (unless plaintiffs' statement constitutes a concession that they were not "important"). In fact, plaintiffs denigrated disclosure of the UFCF line items as "less preferable," while not even

[8] https://www.sec.gov/Archives/edgar/data/3116/000162828017007466/akorn10q-06302017.htm.

[9] https://www.sec.gov/Archives/edgar/data/3116/000162828018002518/akorn10k12312017.htm

hinting that plaintiffs were allegedly responsible for their disclosure. Dkt. 65 at 10. The district court did not abuse its discretion in deciding this case on the record before it.

**3. Akorn accurately described Fresenius's offers to Kapoor.**

Plaintiffs make much of the Definitive Proxy's statement that there were "no other substantive discussions" with Dr. Kapoor regarding his investment in Fresnius (PB50), but the Supplemental Disclosures' additional details of this *rejected* investment proposal did not change the "total mix of information" for shareholders in deciding to vote on the merger. *TSC Indus.*, 426 U.S. at 449. During negotiations on March 30, 2017, Fresnius asked Dr. Kapoor to invest 20% of his proceeds from the merger in Fresnius. *See* Definitive Proxy, Dkt. 65-2 at 34. The "other discussions" regarding such investment occurred on April 2, 2017, but involved a similar request for Kapoor's $200 million investment (20% of estimated proceeds) and reached the same result described in the Definitive Proxy: no agreement regarding any investment was ever entered into. A156; Definitive Proxy, Dkt. 65-2 at 34, 77.

That the April 2, 2017 investment proposal was tied to a $34.50 share price doesn't change matters. Plaintiffs' reliance on *In re Orchard Enterprises, Inc. Stockholder Litig.*, 88 A.3d 1, 23 (Del. Ch. 2014) is unavailing. PB51. *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 required an evidently unwilling participant (Dr. Kapoor) to invest $200 million. A157. The board discussed the "lack of specificity of the investment proposal and the legal risks and other uncertainties related to the timing and structure of this proposal." *Id*. Sketchy and factually impossible offers

from Fresenius have no material bearing on the offer Akorn shareholders were actually presented.[10]

Plaintiffs argue that the $34.50 offer and the other offer of $33.00 per share plus a contingent value right (CVR) worth up to $2.00 were material because they were "higher offers." P51. But just like the $34.50 price was contingent on Kapoor's investment, the $33.00 plus $2.00 CVR was contingent on meeting certain FDA deadlines and "unspecified product sales targets." A157. The board observed the "the legal and commercial uncertainty and risk related to the timing of payment of the CVR." *Id.* Indeed, these offers were not even the highest proposals, as the Preliminary Proxy also recounted a $30.00 plus $5.00 CVR offer proposed on November 23, 2016, a $30.00-$33.00 plus $2.00 CVR offer proposed on January 3, 2016, and a $32.00 plus $4.00 CVR offer proposed on February 3, 2017, all with varying conditions. Preliminary Proxy, Dkt. 65-1 at 29-31. "[F]or price negotiations, the exact value of every rejected proposal may not need to be recounted in the proxy materials if the overall negotiation process is disclosed 'in sufficient detail' such that stockholders can reasonably determine whether the final, agreed-upon price 'is the product of arms' length negotiations and whether these negotiations succeeded in maximizing shareholder value." *Frank v. Elgamal*, 2014 Del. Ch. LEXIS 37, *112-113, 2014 WL 957550 (Del. Ch. 2014).

Given that the Preliminary Proxy outlines multiple offers from November 2016 until April 2017 that were equal or *greater* than the two offers added in the

[10] Moreover, it's doubtful appellants were responsible for this alleged disclosure, which none of them sought in their complaints. *See* Section III.D.1 above.

Supplemental Disclosure, it is not likely that a reasonable shareholder would "consider [these offers] important in deciding how to vote." *TSC*, 426 U.S. at 449. In fact, it is evident that shareholders did not consider it important, because over 99.9% of shareholders voted to approve the merger despite the inclusion of such offers in the Supplemental Disclosures. *See* Dkt. 35-1 at 17. The vote shows that this extraneous information regarding the merger negotiations simply didn't matter to shareholders. *See Walgreen*, 832 F.3d at 723.

**4. The derivative litigation disclosure was vague and useless.**

The Supplemental Disclosure states that the board considered "the likely effect of the potential merger with Fresnius Kabi on the previously disclosed derivative lawsuits." A157. Apart from being extraordinarily vague (what effects?), it is also common sense that the board would be aware of previously disclosed lawsuits naming board members as defendants, and would consider the likely effects of a merger on pending lawsuits. In fact, relevant litigation had been disclosed for years, regularly updated in Akorn's quarterly and annual reports.[11] 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). This vague and obvious disclosure provides no new information that would be material to a shareholder in deciding how to vote.

Plaintiffs suggest (PB52-53) that this disclosure should be construed to cover two different premises: (1) that "the board assigned no value to a potentially valuable asset—pending derivative lawsuits against certain Akorn directors and officers;" and

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

(2) that the board had a "conflict of interest," supposedly considering "that the shareholders who brought them would lose standing." First, Akorn had long since disclosed that it found its derivative litigation valueless.[12] Nor was it news that a special committee of the board found the claims not worth pursuing (A157); this was also previously disclosed in the same 2015 10-K. *Id.* The Board concluded that it would not be in the best interest of the Company to pursue such claims, and that information, from the then-most recent Annual Report, was incorporated into the Definitive Proxy by reference. Dkt. 65-2 at 82.

Even if the derivative litigation and the board's estimation of its value 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 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").

Second, the Supplemental Disclosure says nothing about directors considering shareholders losing standing to pursue derivative claims. A157. Plaintiffs' reading requires a motivated inference that because the board considered (unspecified) derivative lawsuits it must have considered (unstated) legal effects of a merger. But if

[12] 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.

the Supplemental Disclosure can be read this way, so could the proxy statements and thus, the Supplemental Disclosure offers no new information.

**5. The contingent nature of J.P. Morgan's compensation was already disclosed, and plaintiffs' new arguments lack support.**

Plaintiffs argue that they caused the contingent nature of J.P. Morgan's fee arrangement to be disclosed (PB55), but the district court accurately found it was already disclosed in the Preliminary Proxy, which was filed before any of the six strike suits against Akorn. *See* A215 (quoting Preliminary Proxy).

From the moment of the merger announcement, disclosures showed J.P. Morgan was paid $3 million up front and would receive the balance of approximately $47 million "immediately prior to consummation." A215 (quoting Preliminary Proxy, Dkt. 65-1 at 55). Plaintiffs argue that the Preliminary Proxy does not use the word "contingent," but the district court correctly found this adjective "can be inferred from the fact that the amount of the fee will ultimately be measured only 'immediately prior to consummation' and is defined as a percentage of the amount to be paid in the transaction." A215. Indeed, J.P. Morgan's fairness opinion, which was incorporated by reference in the Preliminary Proxy, states that "a substantial portion of [its fee] will become payable only if the proposed Transaction is consummated."[13]

Appellants are unlikely to have caused the redundant addition to the Definitive Proxy, which was filed by Akorn three days after the House complaint and a week

[13] Annex F to Akorn, Inc. Preliminary Proxy Statement filed May 22, 2017, at: https://www.sec.gov/Archives/edgar/data/3116/000130817917000183/lakrx2017_pre14a.htm#lakra077

before appellant Pullos even filed suit. *See* Section III.D.1 above; A215. Plaintiffs further argue, without citation or record support, that they were responsible for two other J.P. Morgan-related disclosures in the Definitive Proxy. PB56. But Plaintiffs never claimed credit for these disclosures before the district court. *See* Dkt. 65 at 14-15.

The district court nevertheless considered the disclosures sought by appellant House three days before Akorn made them. A215-16. The court correctly found that they were not material. A216 (quoting *Bushansky*, 262 F. Supp. 3d at 753). For the first time on appeal, plaintiffs purport to cite (PB56) case law to the contrary, but these authorities are inapposite. Preliminary injunction was granted in *In re Del Monte Foods Co. S'holders Litig.*, because "Barclays secretly and selfishly manipulated the sale process to engineer a transaction that would permit Barclays to obtain lucrative buy-side financing fees," rather than because of banal figures from the previous two years. 25 A.3d 813, 817 (Del. Ch. 2011). The seven-paragraph order for *In re Art Tech. Grp., Inc. S'holders Litig.*, 2010 Del. Ch. LEXIS 257 (Ch. Dec. 21, 2010) also concerned a much more significant omission. *See Appel v. Berkman*, No. 12844-VCMR, 2017 Del. Ch. LEXIS 503, at *9 (Ch. July 13, 2017) (noting "huge magnitude" of *Art Tech* relationship).

Plaintiffs also argue (PB56) that the Preliminary Proxy violated 17 C.F.R. § 229.1015(b)(4). But this regulation imposes requirements on the preparer of the fairness opinion to describe ***material*** relationships. Here, both the Preliminary Proxy and J.P. Morgan's report[14] revealed the limited relationship between J.P. Morgan,

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[14] Annex F to Akorn, Inc. Preliminary Proxy Statement filed May 22, 2017, at: https://www.sec.gov/Archives/edgar/data/3116/000130817917000183/lakrx2017_pre14a.htm#lakra077.

Akorn, and Fresenius—like *Appel* and unlike *Art Tech*. *See* Dkt. 65-1 at 45. The Preliminary Proxy describes two deals J.P. Morgan executed for Fresenius and discloses that Akorn's commercial banking affiliate was an agent bank. *Id.*; *compare Appel*, 2017 Del. Ch. LEXIS 503, at *7. Unlike *Art Tech*, Fresenius does not have a similar ongoing relationship with J.P. Morgan, let alone one worth billions of dollars that vastly dwarfs fees from the merger. As in *Bushansky*, the "Proxy already permits shareholders the ability to assess whether [the advisor] was incentivized to support the acquisition because the relevant portion of the … Proxy establishes" the contingent nature of the fees. 262 F. Supp. 3d at 753. J.P. Morgan lost the right to approximately $34 million in fees when the merger fell apart, an amount much higher than the recent and immaterial fees received from Fresenius and Akorn combined.

Neither the redundant word "contingent," nor the dubiously-claimed disclosure of J.P. Morgan's relatively modest fees received prior to the merger constitute "plainly material" or even "helpful" disclosures for shareholders.

## Conclusion

The district court properly exercised its inherent authority to order the return of attorneys' fees to Akorn and to abrogate the agreement providing to the contrary. Its order should be affirmed.

Dated: November 25, 2019

Respectfully submitted,

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**Proof of Service**

I hereby certify that on November 25, 2019, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, thereby effecting service on counsel of record who are registered for electronic filing under Cir. R. 25(a).

*/s/ Theodore H. Frank*