UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JORGE ALCAREZ, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

AKORN, INC., et al.,

Defendants-Appellees.

SEAN HARRIS, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

AKORN, INC., et al.,

Defendants-Appellees.

ROBERT BERG, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

AKORN, INC., et al.,

Defendant-Appellees.

THEODORE H. FRANK,

Intervenor-Appellant.

OPPOSITION TO APPELLEES' JOINT MOTION TO DISMISS AND CROSS-MOTION FOR SANCTIONS

Case No. 18-2220

Appeal from the Northern District of Illinois,
Case No. 1:17-CV-05017

Thomas M. Durkin, Judge

Case No. 18-2221

Appeal from the Northern District of Illinois,
Case No. 1:17-CV-05021

Thomas M. Durkin, Judge

Case No. 18-2225

Appeal from the Northern District of Illinois,
Case No. 1:17-CV-05016

Thomas M. Durkin, Judge

FRANK'S OPPOSITION TO APPELLEES' JOINT MOTION TO DISMISS APPEALS

The three appellees each brought securities strike suits of the sort that this Court has found to be "no better than a racket." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016). However, instead of the suits being "dismissed out of hand," *id.*, the appellees and three other plaintiffs negotiated payment of $322,500 in attorneys' fees from defendant Akorn, Inc., without district court approval under Rule 23, and stipulated to dismiss the suits.

Shareholder Theodore H. Frank, the appellant, moved to intervene as a putative class member harmed by the selfish racket of attorneys who pretended to represent his interests and the interests of other class members. Frank seeks disgorgement of the $322,500 absconded by plaintiffs' counsel. And, relevant to this appeal, Frank seeks a permanent injunction preventing plaintiffs' counsel from securing fees in future strike suits without court approval. The appellees incorrectly contend that Frank's underlying motions to intervene (and this appeal) are moot because their attorneys have

disclaimed any entitlement to the $322,500 attorneys' fee fund.[1] This is trivially false, because appellees have not offered a consent decree to prevent them from extorting attorneys' fees in similar strike suits. Frank sought two forms of equitable relief: disgorgement *and* a permanent injunction to prevent further end-runs around *Walgreen* and the PLSRA's statutory safeguards against meritless strike suits. Appellees may not moot Frank's motion to intervene by belatedly conceding that their meritless lawsuits do not entitle them to attorneys' fees in this case.

The permanent injunction Frank seeks remains necessary; appellees' counsel have filed at least 122 additional strike suits since January 1, 2018, including suits against companies where Frank is or was a shareholder. Because appellees' attorneys obtain payment in these cases without court approval, shareholders like Frank could only conceivably seek disgorgement in these cases by intervening in each one. If strike suit plaintiffs could unilaterally moot motions to intervene by disclaiming fees, they will permanently evade *Walgreen* and its holding that such suits be

[1] Three other plaintiffs have not disclaimed attorneys' fees. Frank's motion to intervene in their cases remains pending before the district court.

"dismissed out of hand" without payment to attorneys. An ongoing wrongful practice "capable of repetition yet evading review" does not divest a Court of Article III jurisdiction even if the underlying controversy is no longer live. *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1975-76 (2016). Appellees' prolific filing of strike suits and willingness to drop fee requests when challenged would otherwise insulate their tactics from judicial review. *See id*.

Appellees have already evaded Seventh Circuit law to perpetuate their "racket," and their motion to dismiss the appeal violates Seventh Circuit procedural standards and needlessly multiplies proceedings to bury Frank's nonprofit counsel in paper. The Court should deny Appellees' motion to dismiss and issue sanctions for their machinations to burden Frank and evade briefing word limits by styling a premature merits brief as a "motion to dismiss." Frank thus cross-moves for sanctions in an amount equal to the lodestar Frank incurs in defending appellees' motion, and for other equitable relief permitted by FRAP 2.

Background

The underlying litigation consists of six "strike suits" brought by plaintiffs in June 2017 purporting to seek an injunction against the then-proposed acquisition of Akorn by Fresenius Kabi AG. *See*, *e.g.*, Dkt. 1.[2] Strike suits are "cases in which a large public company announces an agreement that requires shareholder approval to acquire another large company, and a suit, often a class action, is filed on behalf of shareholders of one of the companies for the sole purpose of obtaining fees for the plaintiffs' counsel." *Walgreen*, 832 F.3d at 721.

Appellant Theodore H. Frank's appeals the district court's denial of his motion to intervene in three out of the six strike suits. Frank's identical motion to intervene remains pending in three other actions before the same district court.

A. The Mootness Fee Racket

Traditionally, merger strike suits were brought to extort attorneys' fees through the leverage of a time-sensitive motion for preliminary injunction,

[2] Unless otherwise specified, "Dkt." refers to the district court docket in *Berg*, No. 17-cv-05016.

which could derail a multi-billion dollar merger like the underlying Akorn transaction. Until recently, strike suits generally quickly settled as *class actions* with defendants offering to pay attorneys' fees and provide dubiously-valuable supplemental SEC filings. Defendants settle simply because the costs of litigation delay are greater than the extortionate demands made by class counsel. This Court recognized that rote approval of such settlements had "caused deal litigation to explode in the United States beyond the realm of reason." *Walgreen*, 832 F.3d at 725 (quoting *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884, 894 (Del. Ch. 2016)). *Walgreen* followed *Trulia* and cracked down on the attorney-friendly disclosure-only class action settlements, holding they would be treated with "disfavor" unless the supplemental disclosures "address a plainly material misrepresentation or omission." *Walgreen*, 832 F.3d at 725; *Trulia*, 129 A.3d at 898-99.

Appellees and their counsel have adapted with an end-run around the scrutiny that *Walgreen* demands, by settling for attorneys' fees without class release. Whereas class action settlements allow shareholders to object to the payment of attorneys' fees, like a shareholder represented by Frank did in

Walgreen, appellees' new racket extorts payment without seeking or receiving court approval under Rule 23. Appellees' counsel have eschewed class action settlement and have instead negotiated payments of "mootness fees" to evade the careful judicial review required under *Walgreen* and *Trulia*. *See* Dkts. 83-1 and 83-2 (articles discussing plaintiffs' changed tactics to seek mootness fees).

No federal basis exists for "mootness fees," which are an idiosyncratic feature of Delaware Chancery law. Such fees are unlawful for federal complaints like those appellees brought under the Exchange Act. "Total attorneys' fees and expenses awarded…shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 78u-4(a)(6). Moreover, plaintiffs could not show entitlement to mootness fees even if Delaware law applied, which it does not. (Akorn is a Louisiana Corporation with its primary place of business in Illinois.) Delaware courts award mootness fees only when an underlying complaint is "meritorious when filed." *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1123 (Del Ch. 2011).

Yet appellees and appellees' counsel have settled other strike suits for six-figure "mootness fees," without the safeguards of settlement approval under Rules 23 or 23.1. *See* Dkt. 83 at 9-10.

The underlying litigation illustrates the new "mootness fee" racket. On July 10, 2017, Akorn filed a Form 8-K with the SEC, which contained supplemental disclosures agreed by the six plaintiffs. On July 14, all six plaintiffs moved to dismiss their complaints without prejudice, implausibly claiming that the supplement had mooted every complaint. *E.g.* Dkt. 54 at 1. In September 2017, Akorn agreed to pay $322,500 to resolve attorneys' fees claims by all six plaintiffs. Dkt. 56 at 6.

Within days, Frank moved to intervene because the plaintiffs' settlement for payment of fees constitutes an end-run around *Walgreen*, the PSLRA, and this Court's guidance that a proposed "class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end." *Walgreen*, 832 F.3d at 724. In order to end the racket, Frank's proposed complaint sought (1) an accounting of attorneys' fees received by plaintiffs, (2) disgorgement of any such unjust enrichment, and (3) a permanent injunction against plaintiffs' and their counsel prohibiting them

from accepting similar payments in strike suits without court approval. Dkt. 57-1 at 20-21.

B. Appellees Belatedly Disclaim Entitlement to Attorneys' Fees

While waiting for the district court to rule on Frank's motions to intervene, the Akorn transaction fell apart. On February 27, 2018, Fresenius announced it was investigating alleged FDA regulatory violations by Akorn, unrelated to plaintiffs' underlying allegations. Before Fresenius officially called off the merger on March 13, Plaintiff Berg filed a motion seeking to withdraw from the case and forgo any entitlement to the $322,500 in attorneys' fees. Dkt. 92 at 1. The district court held a status call on the matter, preliminarily expressing the view that Berg's disclaimer of attorneys' fees would moot the motion to intervene as to Berg. Tr. 3/21/2018 (Appellees' Ex. 1), at 11-12. Frank disagreed and filed a declaration and offer of proof that an Article III controversy continued to exist because Frank seeks to enjoin Berg and his counsel from settling similar strike suits against other companies where Frank is a shareholder. Dkts. 98 and 98-1.

The district court ordered that counsel for all six actions to attend a status conference on May 2, 2018. Dkt. 99. At the conference, counsel for

three plaintiffs—the appellees in these consolidated appeals—indicated that they disclaimed their entitlement to attorneys' fees in this matter. Tr. 5/2/2018 (Appellees' Ex. 3), at 8-9. Counsel for three other plaintiffs indicated that they still seek a share of the $322,500 payment for fees. *Id.* The district court deemed that Frank's motion to intervene had been filed in all six actions, and denied the motion as moot in the three actions where counsel disclaimed fees. Dkt. 103; No. 17-5017, Dkt. 55; No. 17-5022, Dkt. 56.

C. The Center for Class Action Fairness

Appellant Frank is represented *pro bono* by the non-profit he directs, the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF"), which successfully argued *Walgreen* and several other landmark decisions protecting the rights of class members and shareholders from abusive class-action settlements and practices. *See generally Pearson v. Target,* 893 F.3d 980, 982 (7th Cir. 2018). This appeal, as *Walgreen*, is brought in good faith for the purpose of vindicating the rights of shareholders against strike suits.

Argument

A comment by Frank's counsel during a status hearing did not waive Frank's argument that jurisdiction exists over his motion, an argument which he raised three times in written filings both before and after the hearing. Nor is Frank's underlying motion to intervene moot. Appellees have not stipulated to the injunctive relief Frank seeks—an injunction requiring appellees and their counsel to obtain court approval for attorneys' fees extracted from strike suit defendants. Finally, Frank retains standing because he remains directly prejudiced by the lack of his requested injunctive relief. Appellees' counsel continue to file strike suits, including suits against companies where Frank is a shareholder and putative class members, and appellees' counsel continues to breach their fiduciary duties to shareholders like Frank by extorting attorneys' fees without court approval or any other procedural protection. If nothing else, this is a problem capable of repetition yet evading review—and not just capable of repetition, but already repeated several times while appellees have delayed consideration of the merits for ten months.

I. The "motion to dismiss" is procedurally improper and abusive.

Appellants do not even mention the appropriate standard for their motion to dismiss:

> Motions for summary affirmance generally should be confined to certain limited circumstances. Summary disposition is appropriate in an emergency, when time is of the essence and the court cannot wait for full briefing and must decide a matter on motion papers alone. Summary affirmance may also be in order when the arguments in the opening brief are incomprehensible or completely insubstantial. Finally, summary affirmance may be appropriate when a recent appellate decision directly resolves the appeal.

United States v. Fortner, 455 F.3d 752, 754 (7th Cir. 2006). Even if an appeal is "straightforward," a dismissal should not be had when unless the appeal is "so insubstantial that full briefing would not assist the merits panel that decides it." *Id.*

Appellees cannot make this showing. If anything, plaintiffs raise the only "insubstantial" assertion in arguing that Frank waived an argument he twice advanced in writing. Plaintiffs' motion to dismiss is thus doubly frivolous given that a motion for summary disposition requires meeting a higher standard than simple success on merits. Plaintiffs identify no

emergency or other basis for their motion, which appears to be nothing more than an early draft of their brief. (Indeed, the motion to dismiss has delayed the briefing schedule.) *Fortner*'s complaint about such motions is particularly apt:

> [The] submission in this case is fifteen pages long, and but for the formal requirements of Federal Rule of Appellate Procedure 28, it is essentially a brief on the merits. But by filing it the [appellee] has wasted the resources of this court. (Six judges will ultimately consider this appeal: three on the motions panel and three on the merits panel.) The [appellee] could have made these same arguments in a brief and moved to waive oral argument if it felt that argument would be unhelpful.

Id. Despite Seventh Circuit precedent disfavoring motions to dismiss, class counsel abused Fed. R. App. Proc. 27 to file one. Frank has been unfairly prejudiced and sanctions are appropriate—especially sincethe underlying legal assertions are false.

II. Frank did not waive his argument against mootness, which was preserved by written filings.

Even if appellees' motion were procedurally proper, Frank did not waive his argument. Appellees' contend that Frank foreclosed his appeal through a procedural comment during a status hearing. Appellees' Mot. 6-

8. In fact, Frank twice preserved his argument in writing, which the district court expressly acknowledged. Frank's remarks were consistent with his written position—he did not request that his motion be denied. Frank's counsel simply addressed the district court's question of how the cases should proceed below.

In any event, an out-of-context oral statement during informal back-and-forth with the court does not override written pleadings in the absence of a "deliberate, clear, and unambiguous" judicial admission. *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 872 (7th Cir. 2010) (citing cases). No such qualifying judicial admission exists in the record, and appellees omit mentioning Frank's written filings opposing plaintiffs' mootness argument below.[3]

[3] Appellees state the law almost precisely backwards as requiring an appellant to have "*explicitly and unequivocally preserve* its right to appeal." Appellees' Mot. 6. This is because appellees exclusively rely upon cases where the appellant *stipulated* to judgment. *See Assn. of Community Organizations for Reform Now (ACORN) v. Edgar*, 99 F.3d 261, 262 (7th Cir. 1996); *INB Banking Co. v. Iron Peddlers, Inc.*, 993 F.2d 1291, 1292 (7th Cir. 1993) ("agreed to the judgment"); *Stewart v. Lincoln-Douglas Hotel Corp.*, 208 F.2d 379, 381 (7th Cir. 1953) ("order dismissing the amended complaint was drafted by [appellant's] counsel"). Here, the correct standard is whether

Frank repeatedly opposed plaintiffs' suggestion that disclaimer of attorneys' fees mooted his motion to intervene. On March 13, 2018, plaintiff Berg filed his "Motion Disclaiming…Attorneys' Fees…and Withdrawing Opposition to Theodore H. Frank's Renewed Motion to Intervene as Moot." Dkt. 92-1. Contrary to Berg's motion, Frank's proposed intervenor complaint seeks not only disgorgement of attorneys' fees, but also a "permanent injunction prohibiting Settling Counsel from accepting payment for dismissal of class action complaints filed under the Exchange Act without first obtaining court adjudication of their entitlement to any requested fee award disclaims his right to payment of attorneys' fees and expenses." Second Amended Proposed Complaint, Dkt. 82-1 at 23.

Before Berg's motion was first heard, Frank filed an opposition on March 18, disputing that disclaimer moots his motion. Dkt. 94. "Berg and his counsel have not offered to be bound by a consent decree requiring them to submit attorneys' fees in strike suits for court approval, and therefore Frank's renewed motion to intervene does not become moot." *Id.* at 2. At the

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appellant made an unambiguous statement evincing an intentional waiver. *Robinson*, 615 F.3d at 872.

first hearing on Berg's motion, Frank's counsel repeated this position. Plaintiffs' motion is "a motion that assumes the conclusion that it moots our motion to intervene." Tr. 3/21/2018 (Appellees' Ex. 1), at 10-15. However, the district court rejected Frank's argument and suggested that the case as to Berg and any other disclaiming plaintiffs should be dismissed. *Id.* at 11-12.

In response to the district court's comments, on March 27, Frank filed an "Offer of Proof of Standing to Pursue Injunction," which attached a declaration showing the Frank suffers ongoing harm from the plaintiffs' attorneys' activities. Dkt. 98-1. Frank declared: "Unless Plaintiffs and their counsel are enjoined from collecting fees in future strike suits, it is near-certain I will be the shareholder of corporations extorted by Plaintiffs and their counsel." *Id.* at 2. But the district court reaffirmed its position during the April 11 conference. "**You've made your record** [for appeal], and I'll make mine," remarked the district court. Tr. 4/11/2018 (Appellees' Ex. 2), at 6 (emphasis added).

During the final conference before this appeal on May 2, the district court asked for Frank's position on the six cases, and Frank's counsel responded that with respect to the non-disclaiming plaintiffs "we should

proceed to a decision on whether we can intervene in these three cases." Tr. 5/2/2018 (Appellees' Ex. 3), at 9. "With regard to the other three where fees are being disclaimed, those could be dismissed." *Id.* at 9-10.

Read in context of Frank's previous express and written objections, Frank's counsel suggested that the district court proceed to decide the three pending matters where it agreed his motion to intervene was *not* moot. The suggestion that appellees' cases "could be" dismissed cannot be read to implicitly waive an argument Frank preserved in written filings when in context the better understanding is that the comment addressed the next procedural step given that the district court maintained its holding. The "could be dismissed" statement falls far short of being a "deliberate, clear, and unambiguous" judicial admission. *Robinson*, 615 F.3d at 872.

Having preserved his argument for appeal at two prior hearings and in two written filings, Frank was not obligated to continue repeating his objection in every breath. "Once a court has conclusively ruled on a matter, it is unnecessary for counsel to repeat his objection in order to preserve it for appeal." *United States v. Paul*, 542 F.3d 596, 599 (7th Cir. 2008).

Additionally, the context of the oral statement confirms that Frank did not waive his mootness argument at all, let alone "unambiguously." On May 23 Frank's counsel wrote the district court to clarify the record of the *Alcarez* and *Harris* dockets in preparation for this appeal:

> I do not wish to re-litigate this Court's decision that plaintiffs' disclaimer of fees moots Mr. Frank's motion, which the Court explained at the April 11 conference.
>
> …If it was the court's intention to deny the motion with respect to all three "disclaimed fees" cases, I request that the court clarify the record by entering a similar docket entry in the above-referenced two matters, noting that Mr. Frank's motion was deemed filed, but denied as moot for the same reasons explained on the record in the *Berg* action. This would allow Mr. Frank to notice an appeal in all three cases.

No. 17-cv-5017 (Alcarez), Dkt. 54 and No. 17-cv-5021 (Harris), Dkt. 53. Frank did not assent to dismissal of the Alcarez and Harris cases, but expressly wanted the court to act so he could file the present appeal.

The district court quickly responded to these letters by entering minute orders in the Alcarez and Harris dockets that say: "Theodore Frank filed a motion to intervene in case 17 C 5016. That motion is deemed filed in this case…and is denied as moot for the reasons stated on the record at hearings

in both cases." No. 17-cv-5017, Dkt. 55; No. 17-5021, Dkt. 56. Thus, neither Frank nor the district court believed that he waived the argument.

Unlike cases appellees cite, Frank did not stipulate to judgment. Remarks at the May 2 status conference that the court "could" dismiss appellees' actions simply addressed handling the cases in view of the district court's previously-announced decision that the motion was "moot" with respect to plaintiffs who disclaim attorneys' fees. "[W]e are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170 (1972).

III. The underlying controversy is not moot.

Plaintiffs next argue that Frank's appeal should be dismissed because the underlying controversy is supposedly moot. Appellees' Mot. 9-10. The alleged mootness question is the *central issue* of Frank's appeal and should be decided after full briefing on the merits.

Contrary to appellees, mootness cannot be decided though summary affirmance because relinquishing attorneys' fees simply does not render Frank's motion to intervene moot. Frank requested both disgorgement of

fees *and* a permanent injunction. The second form of relief has simply not been provided. Appellees' belated agreement to relinquish fees in this case does not relieve Frank of the ongoing harm he plausibly pleaded. Specifically, Frank owns shares in several merging companies targeted by the same plaintiffs' counsel engaged in the same "racket" as in the Akorn transaction.

Plaintiffs correctly state that the "test for mootness on appeal is…whether it is still possible to 'fashion some form of meaningful relief' to the appellant in the event he prevails on the merits." *Flynn v. Sandahl*, 58 F.3d 283, 287 (7th Cir. 1995). Frank's requested relief remains meaningful because he continues to suffer from appellees' attorneys' prolific strike suit filings. Frank declared that he "devote[s] approximately 5-10% of my portfolio to arbitrage on pending mergers because it is a relatively safe way to exceed money-market returns." Dkt. 98-1 at 2. As of March 27, 2018, these companies included: "Clifton Bancorp Inc.; La Quinta Holdings, Inc.; Pinnacle Entertainment, Inc.; Time Warner, Inc.; and United American Bank." *Id.* Appellees' counsel filed suit against each and every one of these companies. *Id*. Appellees' counsel appears to have successfully executed

their racket against at least one of these defendants. *See*, *e.g.*, *Smith v. Pinnacle Entertainment, Inc.*, No. 18cv314 (D. Nev.), Dkt. 6 (dismissing case but retaining jurisdiction in case no agreement reached on mootness fee application).[4]

Appellees counsel continue to prolifically carpet-bomb strike suits against merging companies. Since the beginning of 2018, the three appellees' counsel have filed at least 122 such strike suits.[5]

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[4] The *Pinnacle* dismissal also illustrates appellees' attorneys' brazen disregard of 15 U.S.C. § 78u–4(a)(2)(v). While securities plaintiffs are required to "identify any other action under this chapter, filed during the 3-year period…in which the plaintiff has sought to serve as a representative party on behalf of a class," the plaintiff in *Franchi v. Pinnacle Entertainment, Inc.* declared only that he "has not **moved** to serve as a representative party…." No. 18cv415, Dkt. 1 at 16 (Mar. 7, 2018) (emphasis added). This is not what PLSRA requires. *See In re OSI Pharm., Inc. Securities Litig.*, No. 04-cv-5505, 2005 WL 6171305, at *8 (E.D.N.Y. Sept. 21, 2005) ("It cannot be seriously argued that a party commencing a securities class action does not seek to serve as a 'representative party on behalf of a class.'"). Mr. Franchi has filed 21 strike suits *this year*. *See* Appendix. In this appeal, plaintiff Berg filed 28 strike suits since May 2017.

[5] Strike suits against merging companies filed in 2018 by the appellees' law firms are listed in an Appendix to this opposition.

Unless Plaintiffs and their counsel are enjoined from collecting fees in future strike suits, it is near-certain Frank will be the shareholder of additional corporations extorted by appellees' counsel purporting to represent the interests of shareholders like Frank. "There is a reasonable expectation that the same complaining party will be subject to the same action again." *Kingdomware*, 136 S. Ct. at 1976. Rule 27 word limits do not permit a full exploration of the complex issues relating to the "capable of repetition, yet evading review" exception to mootness, but the existence of the issue—entirely unmentioned by the motion to dismiss—shows that the appeal raises sufficiently "substantial" questions that should not be resolved with summary affirmance without a full merits briefing.

IV. Frank has Article III standing to intervene and to appeal denial of intervention.

Appellees finally rehash a meritless argument previously presented to the district court: that Frank allegedly lacks Article III standing because he supposedly seeks derivative relief for Akorn. Appellees' Mot. 11-12.

As Frank explained numerous times before the district court, he seeks relief not derivatively on behalf of the corporation, but directly as a putative class member affirmatively harmed by attorneys who owe him a fiduciary

duty. *See* Dkt. 55 at 4; Dkt. 82-1 (proposed complaint) at 9; Dkt. 83 at 5-6; Dkt. 88 at 2-3.

When an attorney files a complaint on behalf of a putative class, he or she undertakes a fiduciary responsibility to not harm that class. "Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed." *In re General Motors Corp. Pick-Up Truck Fuel Prod. Liab. Litig.*, 55 F.3d 768, 801 (3rd Cir. 1995); *see also Back Doctors Ltd. v. Metropolitan Property and Casualty Insurance Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (reversing plaintiffs' requested remand to state court due to representatives' breach of fiduciary duty); *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002) (collecting cases finding fiduciary duty). Indeed, appellee Berg's counsel "does not dispute that they owe fiduciary duties to the putative class." Dkt. 84 at 9.

According to Frank's proposed intervenor complaint, Appellees' counsel repeatedly breach their fiduciary duties to putative class members including Frank by filing literally hundreds of meritless strike suits they intend to settle for private gain—against the interests of shareholders of the

corporations being acquired. Dkt. 82-1 at 21. Thus, Frank's request to enjoin this destructive and unethical behavior is of direct financial interest to Frank. An actual controversy exists between appellees who contend they can extract attorneys' fees through Exchange Act litigation without court approval and Frank, who contends that *Walgreen* demands otherwise.

Appellees' motion to dismiss must be denied because it fails to meet the standards for such a motion: it is neither an emergency, nor is it based on "straightforward" jurisdictional issues. Contrary to plaintiffs, Frank preserved his argument for appeal: the underlying Article III controversy between Frank and appellees has not been rendered moot by their eleventh hour attempt to exit litigation that could interfere with their cynical misuse of securities law and evasion of *Walgreen*. Frank suffers ongoing harm, so the district court's finding of mootness cannot be summarily affirmed. Indeed, after briefing, this Court should reverse it.

CROSS-MOTION FOR SANCTIONS

Despite Seventh Circuit precedent disfavoring motions to dismiss, appellees' motion ignores that precedent and instead vexatiously multiplies proceedings, so it merits sanctions under 28 U.S.C. § 1927.

Without waiting for Frank's opening brief, appellees filed a baseless "motion to dismiss" without even mentioning the stringent standards for such a motion. Appellees' motion was not "an emergency," nor was it filed after Frank's opening brief, let alone an "incomprehensible of completely insubstantial brief," nor has a "recent appellate decision directly resolve[d] the appeal." *Fortner*, 455 F.3d at 754. Bad faith is demonstrated by appellees' omission of critical facts, such as that Frank's multiple written filings preserved his argument, disproving their theory of waiver.

Appellees' motion is not just substantively frivolous, but procedurally abusive. Because of appellees' gamesmanship:

- Frank is unduly burdened to file his opposition within sixteen days, defending the merits of his appeal with 5200 words instead of the 14,000 words that this Court permits and the weeks this Court granted;
- plaintiffs, by making their merits argument in a FRAP 27 motion instead of a FRAP 28 merits brief, will get a *de facto* surreply that they would not normally be permitted;

- appellees get two bites at the apple: both a three-judge motions panel and a three-judge merits panel; and
- as a result, plaintiffs can abuse the FRAP 27 motion to float an argument as a trial balloon, see how Frank and the Court respond, and then use that information to either refine the argument for their merits brief or use their 14,000-word limit on different arguments, further effectively evading FRAP 32 word limits.

Such tactics should not be tolerated. Plaintiffs have unnecessarily multiplied proceedings, wasting both the Court's and Frank's counsel's time. 28 U.S.C. § 1927 requires an award of attorneys' fees of $10,177.50 for this vexatious behavior.[6]

[6] Lead appellate counsel Melissa Holyoak spent 2.6 hours at a lodestar rate of $525/hour; Frank Bednarz spent 23.5 hours at a lodestar rate of $375/hour. This figure understates the lodestar, because it omits Mr. Frank's time responding to this motion as the represented party, rather than at his $900/hour lodestar rate, and because CCAF attorneys worked especially efficiently on this dispositive motion by taking advantage of research done for the merits briefing and Frank's previous experience with meritless motions to dismiss. Documentation of these hours may be provided upon request.

Frank and his counsel have repeatedly faced frivolous FRAP 27 motions designed to run up class counsel's hours and punish objectors by vexatiously multiplying appellate proceedings. *E.g.*, *Eubank*, 753 F.3d at 729 (agreeing similar motion to dismiss appeal was frivolous but denying cross-motion for sanctions because, *inter alia*, "Saltzman's removal as lead plaintiff and his lawyers' removal as class counsel are sanction enough"). Frank's counsel is a thinly-staffed non-profit, and being required to drop everything to defend the propriety of an appeal against a meritless shot-in-the-dark motion is extraordinarily burdensome. If courts do not want to be overwhelmed with these sorts of evasions of the FRAP 32 briefing limits, they must deter such procedural abuses.

In addition to monetary sanctions, *Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725 (7th Cir. 2006), suggests an appropriate procedural remedy. *Custom Vehicles* found that an appellant used a 1200-word motion brief to make an argument that should have been made in a FRAP 28 reply brief. It held that when a party makes an "absurd, time-wasting motion," the court would deduct "double the number of words" from the maximum in the merits brief: thus, Custom Vehicles' 7000-word maximum for a reply brief

was reduced 2400 words to a 4600-word maximum. 464 F.3d at 728. Here, plaintiffs have devoted 4,200 words for their meritless motion to dismiss and another several thousand words are likely to come in a reply brief. As *Custom Vehicles* suggests, this Court should issue an order limiting class counsel's merits brief by 8,400 words (double 4,200) from 14,000 to 5,600 words, as it has the authority to do under FRAP 2.

Fortner and *Custom Vehicles* are precisely on point. Class counsel has multiplied proceedings, because their motion had no chance of preventing merits briefing and was deliberately designed to give class counsel two bites at the apple and multiply the work Frank would have to do to protect shareholders' rights against plaintiffs' counsels' abusive lawsuits.

CONCLUSION

Not only is this case inappropriate for summary disposition, it would require this Court to disregard Frank's well-pleaded intervenor complaint to affirm at all. Class counsel's motion, which omitted critical facts and law, was substantively frivolous and procedurally abusive. Accordingly, Appellant Frank requests that this Court deny plaintiffs-appellees' Motion to Dismiss this appeal, award Frank sanctions in an amount equal to the attorneys' fees incurred in defending plaintiffs' motion, and order any other relief the Court deems just.

Respectfully submitted,

Dated: July 26, 2018. /s/ Melissa A. Holyoak

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Certificate of Compliance

I certify that this motion complies with the type-volume limitation of Red. R. App. P. 27(d)(2)(A) because it contains 5200 words according to Microsoft Word's word count, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

Dated: July 26, 2018. /s/ Melissa A. Holyoak

Certificate of Service

I hereby certify that on July 26, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: July 26, 2018. /s/ Melissa A. Holyoak

APPENDIX

Strike Suit Complaints Against Companies Involved in Merger Transactions Filed By Appellees' Counsel in 2018

1. *Fineberg v. Cavium, Inc. et al*, No. 18cv11 (N.D. Cal. Jan. 2, 2018);
2. *Stanfield v. General Cable Corp. et al*, No. 18cv6 (D. Del. Jan. 2, 2018);
3. *Franchi v. Repros Therapeutics Inc. et al*, No. 18cv53 (D. Del. Jan. 3, 2018);
4. *Paskowitz v. Dynegy Inc. et al*, No. 18cv27 (S.D. Tex. Jan. 4, 2018);
5. *Stein v. Bazaarvoice, Inc. et al*, No. 18cv67 (D. Del. Jan. 8, 2018);
6. *Stein v. Cavium, Inc. et al*, No. 18cv141 (N.D. Cal. Jan. 8, 2018);
7. *Assad v. Deltic Timber Corp. et al*, No. 18cv1005 (W.D. Ark. Jan. 9, 2018);
8. *Franchi v. Yume, Inc. et al*, No. 18cv75 (D. Del. Jan. 9, 2018);
9. *Rosenblatt v. General Cable Corp. et al*, No. 18cv10 (E.D. Ky. Jan. 9, 2018);
10. *Rosenblatt v. Cavium, Inc. et al*, No. 18cv300 (N.D. Cal. Jan. 12, 2018);
11. *Vana v. Barracuda Networks, Inc. et al*, No. 18cv296 (N.D. Cal. Jan. 12, 2018);
12. *Pollack v. Barracuda Networks, Inc. et al*, No. 18cv317 (N.D. Cal. Jan. 15, 2018);
13. *Miramond v. Aetna, Inc. et al*, No. 18cv83 (D. Conn. Jan. 16, 2018);
14. *Rosenblatt v. Almost Family, Inc. et al*, No. 18cv40 (W.D. Ky. Jan. 18, 2018);
15. *Franchi v. Ignyta, Inc., et al*, No. 18cv131 (S.D. Cal. Jan. 19, 2018);
16. *Stein v. Almost Family, Inc. et al*, No. 18cv127 (D. Del. Jan. 23, 2018);
17. *Vana v. Entellus Medical, Inc. et al*, No. 18cv189 (D. Minn. Jan. 23, 2018);
18. *Armas v. Dynegy Inc. et al*, No. 18cv138 (D. Del. Jan. 24, 2018);

19. *Franchi v. Southcross Energy Partners LP, et al*, No. 18cv179 (N.D. Tex. Jan. 24, 2018);

20. *Stein v. Aetna, Inc. et al*, No. 18cv136 (D. Conn. Jan. 24, 2018);

21. *Freeze v. Barracuda Networks, Inc. et al*, No. 18cv582 (N.D. Cal. Jan. 26, 2018);

22. *Pham v. Bertolini et al*, No. 18cv154 (D. Conn. Jan. 26, 2018);

23. *Sciabacucchi v. Snyder's-Lance, Inc. et al*, No. 18cv49 (W.D.N.C. Jan. 29, 2018);

24. *Vladimir Gusinsky Rev. Trust v. Aetna, Inc. et al*, No. 18cv361 (E.D. Pa. Jan. 29, 2018);

25. *Kendall v. Snyder's-Lance, Inc. et al*, No. 18cv51 (W.D.N.C. Jan. 30, 2018);

26. *The George Leon Family Trust v. Chicago Bridge & Iron Co. N.V. et al*, No. 18cv314 (S.D. Tex. Feb. 2, 2018);

27. *Doller v. Southcross Energy Partners LP et al*, No. 18cv291 (N.D. Tex. Feb. 5, 2018);

28. *Rosenfeld v. Aetna, Inc. et al*, No. 18cv213 (D. Conn. Feb. 5, 2018);

29. *Parshall v. First Banctrust Corp. et al*, No. 18cv218 (D. Del. Feb. 6, 2018);

30. *Franchi v. Stone Energy Corp. et al*, No. 18cv167 (E.D. La. Feb. 8, 2018);

31. *Carter v. Kindred Healthcare, Inc. et al*, No. 18cv254 (D. Del. Feb. 14, 2018);

32. *Jaso v. Cascadian Therapeutics, Inc. et al*, No. 18cv241 (W.D. Wash. Feb. 14, 2018);

33. *Franchi v. Key Technology, Inc. et al*, No. 18cv5027 (E.D. Wash. Feb. 15, 2018);

34. *Sbriglio v. Bioverativ, Inc. et al*, No. 18cv10291 (D. Mass. Feb. 15, 2018);

35. *Parshall v. Clifton Bancorp Inc. et al*, No. 18cv2273 (D.N.J. Feb. 16, 2018);

36. *Patel v. Mogg et al*, No. 18cv394 (D. Colo. Feb. 16, 2018);

37. *Scott v. DST Systems, Inc. et al*, No. 18cv286 (D. Del. Feb. 20, 2018);

38. *Einhorn v. Kindred Healthcare, Inc. et al*, No. 18cv297 (D. Del. Feb. 21, 2018);

39. *Pratt v. DST Systems, Inc et al*, No. 18cv133 (W.D. Mo. Feb. 21, 2018);

40. *Smith v. Pinnacle Entertainment, Inc. et al*, No. 18cv314 (D. Nev. Feb. 21, 2018);

41. *Williams v. DST Systems, Inc. et al*, No. 18cv322 (D. Del. Feb. 27, 2018);

42. *Stein v. Almost Family, Inc. et al*, No. 18cv129 (W.D. Ky. Mar. 2, 2018);

43. *Franchi v. Callidus Software Inc. et al*, No. 18cv1443 (N.D. Cal. Mar. 6, 2018);

44. *Stein v. Callidus Software Inc. et al*, No. 18cv1453 (N.D. Cal. Mar. 6, 2018);

45. *Williams v. CSRA, Inc. et al*, No. 18cv407 (D. Nev. Mar. 6, 2018);

46. *Franchi v. Pinnacle Entertainment, Inc. et al*, No. 18cv415 (D. Nev. Mar. 7, 2018);

47. *Truong v. Blackhawk Network Holdings, Inc. et al*, No. 18cv1495 (N.D. Cal. Mar. 8, 2018);

48. *Weinstock v. U.S. Geothermal Inc. et al*, No. 18cv371 (D. Del. Mar. 8, 2018);

49. *Fallness v. CSRA Inc. et al*, No. 18cv440 (D. Nev. Mar. 9, 2018);

50. *Rosenblatt v. La Quinta Holdings, Inc. et al*, No. 18cv558 (N.D. Tex. Mar. 9, 2018);

51. *Mohr v. Gener8 Maritime, Inc. et al*, No. 18cv2276 (S.D.N.Y. Mar. 14, 2018);

52. *Raatz v. Idera Pharmaceuticals, Inc. et al*, No. 18cv10485 (D. Mass. Mar. 14, 2018);

53. *Assad v. U.S. Geothermal Inc. et al*, No. 18cv126 (D. Ida. Mar. 16, 2018);

54. *McCauley v. Blackhawk Network Holdings, Inc*. et al, No. 18cv1667 (N.D. Cal. Mar. 16, 2018);

55. *Parshall v. United American Bank et al*, No. 18cv1671 (N.D. Cal. Mar. 16, 2018);

56. *Kunkel v. Zais Group Holdings, Inc. et al*, No. 18cv4018 (D.N.J. Mar. 22, 2018);

57. *Newman v. Dr Pepper Snapple Group, Inc. et al*, No. 18cv442 (D. Del. Mar. 22, 2018);

58. *West v. Dr Pepper Snapple Group, Inc. et al*, No. 18cv429 (D. Del. Mar. 22, 2018);

59. *Witmer v. Validus Holdings, Ltd. et al*, No. 18cv4265 (D.N.J. Mar. 26, 2018);

60. *Gonzalez v. Dr Pepper Snapple Group, Inc. et al*, No. 18cv465 (D. Del. Mar. 27, 2018);

61. *Stein v. Sigma Designs, Inc. et al*, No. 18cv1879 (N.D. Cal. Mar. 27, 2018);

62. *Witmer v. Dr. Pepper Snapple Group, Inc. et al*, No. 18cv209 (E.D. Tex. Mar. 27, 2018);

63. *Franchi v. 8point3 Energy Partners LP et al*, No. 18cv493 (D. Del. Apr. 3, 2018);

64. *Witmer v. Layne Christensen Co. et al*, No. 18cv1051 (S.D. Tex. Apr. 3, 2018);

65. *Goldstein v. Dr Pepper Snapple Group, Inc. et al*, No. 18cv500 (D. Del. Apr. 4, 2018);

66. *Nancy P. Assad Trust v. Hardinge Inc. et al*, No. 18cv416 (W.D.N.Y. Apr. 4, 2018);

67. *Sciabacucchi v. Mulesoft, Inc. et al*, No. 18cv530 (D. Del. Apr. 9, 2018);

68. *Tas v. 8point3 Energy Partners LP et al*, No. 18cv2275 (N.D. Cal. Apr. 16, 2018);

69. *Franchi v. Nustar GP Holdings, LLC*, et al , No. 18cv592 (D. Del. Apr. 19, 2018);

70. *Johnson v. Microsemi Corp. et al*, No. 18cv698 (C.D. Cal. Apr. 24, 2018);

71. *Barmack v. A. Schulman, Inc. et al*, No. 18cv639 (D. Del. Apr. 26, 2018);

72. *Rosenblatt v. Microsemi Corp. et al*, No. 18cv724 (C.D. Cal. Apr. 26, 2018);

73. *Smith v. Phh Corp. et al*, No. 18cv8396 (D.N.J. Apr. 26, 2018);

74. *Gordon v. Commercehub, Inc. et al*, No. 18cv512 (N.D.N.Y. Apr. 27, 2018);

75. *Franchi v. 8point3 Energy Partners LP et al*, No. 18cv2549 (N.D. Cal. Apr. 30, 2018);

76. *Rosenblatt v. A. Schulman, Inc. et al*, No. 18cv992 (N.D. Ohio Apr. 30, 2018);

77. *Franchi v. RSP Permian Inc. et al*, No. 18cv1117 (N.D. Tex. May 2, 2018);

78. *Scarantino v. Fairmount Santrol Holdings, Inc. et al*, No. 18cv1047 (N.D. Ohio May 4, 2018);

79. *Rosenblatt v. Infinity Property & Cas. Corp. et al*, No. 18cv315 (S.D. Ohio May 7, 2018);

80. *Franchi v. Nationstar Mortgage Holdings Inc. et al*, No. 18cv1170 (N.D. Tex. May 8, 2018);

81. *Bartholomew v. Decarlo et al*, No. 18cv4178 (S.D.N.Y. May 9, 2018);

82. *Franchi v. Phh Corp. et al*, No. 18cv9006 (D.N.J. May 9, 2018);

83. *Franchi v. The Finish Line, Inc. et al*, No. 18cv1434 (S.D. Ind. May 9, 2018);

84. *Myhre v. Amtrust Financial Services, Inc. et al*, No. 18cv4175 (S.D.N.Y. May 9, 2018);

85. *Rosenblatt v. Analogic Corp. et al*, No. 18cv10988 (D. Mass. May 16, 2018);

86. *Byrne v. Verifone Systems, Inc. et al*, No. 18cv2926 (N.D. Cal. May 17, 2018);

87. *Scarantino v. Verifone Systems, Inc. et al*, No. 18cv752 (D. Del. May 17, 2018);

88. *Scarantino v. Mattersight Corp. et al*, No. 18cv770 (D. Del. May 18, 2018);

89. *Sharfstein v. Coastway Bancorp, Inc. et al*, No. 18cv1471 (D. Md. May 22, 2018);

90. *Franchi v. Armo Biosciences, Inc. et al*, No. 18cv805 (D. Del. May 29, 2018);

91. *Romanko v. Analogic Corp. et al*, No. 18cv11125 (D. Mass. May 29, 2018);

92. *Ryan v. Oclaro, Inc. et al*, No. 18cv3174 (N.D. Cal. May 29, 2018);

93. *Franchi v. MTGE Investment Corp. et al*, No. 18cv1563 (D. Md. May 30, 2018);

94. *Franchi v. Oclaro, Inc. et al*, No. 18cv817 (D. Del. May 30, 2018);

95. *Martinez v. Armo Biosciences, Inc. et al*, No. 18cv3230 (N.D. Cal. May 30, 2018);

96. *Garcia v. Oclaro, Inc. et al*, No. 18cv3262 (N.D. Cal. May 31, 2018);

97. *Parshall v. Community Bank et al*, No. 18cv4821 (C.D. Cal. May 31, 2018);

98. *Franchi v. Orbotech Ltd. et al*, No. 18cv839 (D. Del. Jun. 4, 2018);

99. *Scarantino v. RPX Corp. et al*, No. 18cv840 (D. Del. Jun. 4, 2018);

100. *Assad v. Klondex Mines Ltd. et al*, No. 18cv1065 (D. Nev. Jun. 13, 2018);

101. *Lawson v. Klondex Mines Ltd. et al*, No. 18cv284 (D. Nev. Jun. 15, 2018);

102. *Scarantino v. Financial Engines, Inc. et al*, No. 18cv892 (D. Del. Jun. 15, 2018);

103. *Stein v. Grant et al*, No. 18cv1826 (D. Md. Jun. 19, 2018);

104. *Franchi v. Gramercy Property Trust et al*, No. 18cv1842 (D. Md. Jun. 20, 2018);

105. *Madry v. Gramercy Property Trust et al*, No. 18cv1851 (D. Md. Jun. 21, 2018);

106. *Witmer v. Mitel Networks Corp. et al*, No. 18cv5672 (S.D.N.Y. Jun. 21, 2018);

107. *Vladimir Gusinsky Rev. Trust v. Andeavor et al*, No. 18cv927 (D. Del. Jun. 22, 2018);

108. *Sanderson v. Quality Care Properties, Inc. et al*, No. 18cv1912 (D. Md. Jun. 25, 2018);

109. *Franchi v. Stewart Information Services Corp. et al*, No. 18cv951 (D. Del. Jun. 27, 2018);

110. *Kent v. Abaxis, Inc. et al*, No. 18cv3834 (N.D. Cal. Jun. 27, 2018);

111. *Scarantino v. Steadymed Ltd. et al*, No. 18cv3832 (N.D. Cal. Jun. 27, 2018);

112. *Rosenblatt v. DCT Industrial Trust Inc. et al*, No. 18cv1678 (D. Colo. Jul. 2, 2018);

113. *Scarantino v. ILG, Inc. et al*, No. 18cv999 (D. Del. Jul. 6, 2018);

114. *Scarantino v. Vectren Corp. et al*, No. 18cv115 (S.D. Ind. Jul. 6, 2018);

115. *Vladimir Gusinsky Rev. Trust v. KLX Inc. et al*, No. 18cv1000 (D. Del. Jul. 6, 2018);

116. *Kent v. Foundation Medicine, Inc. et al*, No. 18cv1028 (D. Del. Jul. 11, 2018);

117. *Vonsalzen v. Vectren Corp. et al*, No. 18cv122 (S.D. Ind. Jul. 11, 2018);

118. *Aiken v. DCT Industrial Trust, Inc. et al*, No. 18cv2144 (D. Md. Jul. 13, 2018);

119. *Stephens v. ILG, Inc. et al*, No. 18cv22844 (S.D. Fla. Jul. 13, 2018);

120. *Buckingham v. Express Scripts Holding Co. et al*, No. 18cv1044 (D. Del. Jul. 16, 2018);

121. *White v. Envision Healthcare Corp. et al*, No. 18cv1068 (D. Del. Jul. 19, 2018); and

122. *Rosenblatt v. Envision Healthcare Corp. et al*, No. 18cv1077 (D. Del. Jul. 20, 2018).