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: THEODORE H. FRANK, Intervenor

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

Opening Brief of Appellant Theodore H. Frank, With Required Short Appendix

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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.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Theodore H. Frank

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Hamilton Lincoln Law Institute, Center for Class Action Fairness

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Attorney's Signature: s/ M. Frank Bednarz Date: 10/18/2019

Attorney's Printed Name: M. Frank Bednarz

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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Statutes, Regulations, and Rules

Federal Rule of Civil Procedure 24. Intervention.

(a) Intervention of Right.

On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

Jurisdictional Statement

The district court has jurisdiction under, *inter alia*, 28 U.S.C. § 1331 and Section 27 of the Exchange Act, 15 U.S.C. § 78aa, because plaintiffs filed suits alleging claims under Sections 14(a), and 20(a) of the Exchange Act, 15 U.S.C. §§ 78n(a) and 78t(a), and the rules and regulations promulgated thereunder, including SEC Rule 14a-9, 17 C.F.R. § 240.14a-9. A33, A53.[1]

On September 25, 2018, the district court denied appellant Theodore H. Frank's Motion to Intervene with respect to the *House*, *Carlyle*, and *Pullos* cases. Frank filed a notice of appeal from the lead *House* action on October 25, 2018, which is timely under Fed. R. App. Proc. 4(a)(1)(A). A150.

An order denying intervention is final and appealable. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 513 (1950); *B.H. by Pierce v. Murphy*, 984 F.2d 196, 199 (7th Cir. 1993). This court thus has jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

1. "The type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016). When class-

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[1] "Axyz" refers to page xyz of appellant's Appendix.

action attorneys show a pattern and practice of engaging in the “racket” criticized by *Walgreen* while evading court review, are putative class members permitted to intervene to challenge class-action attorneys’ circumvention of *Walgreen* by seeking injunctive relief, sanctions, and other remedies?

2. Upon filing a class action, putative class counsel owe a fiduciary duty to class members that encompasses more than simply avoiding prejudice to the claims plaintiffs allege. *See Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 820 (7th Cir. 2011). This Court recognizes that shareholders suffer cognizable harm sufficient for intervention purposes from the use of corporate funds to pay attorneys’ fees in meritless suits. *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012). Did the district court err by denying Frank’s motion to intervene on the grounds that (i) putative class counsel’s fiduciary duty is limited solely to protecting class members’ claims alleged in the class action complaint and (ii) the alleged injury was only derivative of the injury to defendant Akorn such that Frank’s intervenor complaint failed to identify any injury to class members that could support intervention?

3. Where a district court fails to rule on an issue presented and gives no basis upon which to evaluate a decision, remand is appropriate. *See Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 752 (7th Cir. 1988). If the Court affirms the district court’s decision to deny Frank’s motion to intervene as a matter of right under Rule 24(a), is remand appropriate where the district court failed to rule on, or analyze at all, Frank’s motion to intervene permissively under Rule 24(b)?

Standard of Review

In analyzing a motion to intervene the district court "must accept as true the non-conclusory allegations of the motion and cross-complaint." *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983). The district court's decision on the timeliness of a motion to intervene is reviewed for an abuse of discretion, but the other factors are reviewed *de novo*. *Nissei Sangyo America, Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994). Mixed questions of law and fact are also reviewed *de novo*. *Mungo v. Taylor*, 355 F.3d 969, 974 (7th Cir. 2004).

Statement of the Case

The relevant facts are drawn from the record and Frank's well-pleaded proposed intervenor complaint. In analyzing a motion to intervene, the district court "must accept as true the non-conclusory allegations of the motion and cross-complaint." *Lake Investors Dev. Group*, 715 F.2d at 1258.

A. Merger and acquisition activity leads to opportunistic rent-seeking "strike suits." Judicial scrutiny of such suits in Delaware encourages plaintiffs' attorneys to relocate such litigation to federal courts.

"In merger litigation the terms 'strike suit' and 'deal litigation' refer disapprovingly to 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. Plaintiffs can extract profitable settlements at the expense of shareholders regardless of the merit

of the suit. "Because the litigation threatens the consummation of the deal if not resolved quickly and because corporations may view the settlement amount as a drop in the bucket compared to the overall transaction amount, defendants are motivated to settle even meritless claims." Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY L.J. 55, 58 (2014). Crafty class counsel created a cottage industry: "In 2012, 93% of deals over $100 million and 96% of deals over $500 million were challenged in shareholder litigation." Jill E. Fisch, Sean J. Griffith & Steven M. Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 558-59 (2015) ("Fisch"). In 2013, over 97.5% of deals over $100 million were challenged. *Id.* Merger strike suits typically leverage the threat of a time-sensitive motion for preliminary injunction, which could derail a multi-billion dollar merger like the underlying proposed Akorn transaction. *Id.* at 565-66.

Settlements of these actions rarely provide monetary relief for the class members but instead, usually consist solely of supplemental disclosures in the merger proxy statement filed with the Securities and Exchange Commission ("SEC"). *See* Fisch at 559. The disclosure-only settlements "do not appear to affect shareholder voting in any way." *Id.* at 561. 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 Litig.*, 129 A.3d 884, 894 (Del. Ch. 2016)).

Until recently, many strike suits were filed in the Delaware Court of Chancery. *Walgreen*, 832 F.3d at 725. The dramatic increase in deal litigation was temporarily

stymied in 2016 by the Delaware Court of Chancery's decision in *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, which drastically changed Delaware's approach to settlement review. *Trulia* held that disclosure-only settlements would be subject to "continued disfavor in the future unless the supplemental disclosures address a *plainly material misrepresentation or omission*." *Id.* at 898 (emphasis added). This Court adopted *Trulia's* reasoning in *Walgreen*, and held that these kinds of class-action strike suits—that yield fees for class counsel and immaterial supplemental disclosures for the class—are "no better than a racket." 823 F.3d at 724. *Walgreen* and *Trulia* had a temporarily beneficial effect for shareholders by slightly slowing the pace of strike suits. In 2016, 73% of mergers worth over $100 million faced strike suits, down from 97.5% in 2013. Matthew D. Cain, Jill E. Fisch, Steven M. Davidoff Solomon & Randall S. Thomas, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 608 (2018) ("Cain"). Unfortunately, such complaints rebounded to 85% in 2017 and 83% in 2018. *Id.;* Cadwalader, Client & Friends Memo, *2017 Year in Review: Corporate Governance Litigation & Regulation* (Jan. 9, 2018) at 2-3;[2] Matthew D. Cain, Jill E. Fisch, Steven M. Davidoff Solomon & Randall S. Thomas, *Mootness Fees*, forthcoming 73 VAND. L. REV. (2019) ("*Mootness Fees*"), at A176.

Plaintiffs and their counsel here have adapted with an end-run around the scrutiny that *Walgreen* demands, by settling for attorneys' fees *without* seeking class release. A93-94. Whereas class-action or derivative settlements allow shareholders to

[2] *Available at* https://www.cadwalader.com/resources/clients-friends-memos/2017-year-in-review-corporate-governance-litigation--regulation, archived at http://archive.is/MMg4S.

object, like a shareholder did in *Walgreen*, plaintiffs' new racket extorts payment without class notice and without seeking or receiving court approval under Rule 23. Instead, many merger plaintiffs have discovered it's easier to extort payments from defendants by stipulating dismissal of the underlying complaint, then negotiating for "mootness fees," a Delaware procedural device. "These cases appear to indicate that plaintiffs' counsel may be extracting rents by seeking low cost payments to 'go away.'" Cain, 71 VAND. L. REV. at 632.

Delaware reacted swiftly to this new tactic by signaling that they would slash contested mootness fee applications put before them. *E.g.*, *In re Xoom Corp. Stockholder Litig.*, CV 11263-VCG, 2016 WL 4146425, at *5, 2016 Del. Ch. LEXIS 117, at *14 (Del. Ch. Aug. 4, 2016) (awarding only $50,000 of requested $275,000 mootness fee payment). The Delaware Chancery recognized that even though historically their procedure allows for the payment of mootness fees, these fees should be modest when no material misstatement was corrected. "Not even great counsel can wring significant stockholder value from litigation over an essentially loyal and careful sales process." *Id*.

In this game of whack-a-mole, plaintiffs' counsel moved their racket into federal courts. Prior to 2014, virtually no strike suits in Delaware or elsewhere were resolved through mootness fees, "but in the wake of *Trulia* these cases became more significant. They comprised 14% of cases in 2015 and rose to 75% of cases by 2017." Cain, 71 VAND. L. REV. at 623. While "mootness fees" have no basis under federal law, strike suits dismissed for mootness fees have soared in the wake of *Trulia* and *Xoom*. In 2016, 39% of all merger strike suits were filed in federal courts, which tied the historic record of such filings. Cain, 71 VAND. L. REV. at 620. But in 2017, an astonishing 87% of all strike suits

filings were made in federal court, more than doubling the previous record, and the rate in 2018 was 92%. *Mootness Fees* at A176.

Forum shopping their racket has brought success to plaintiffs' counsel. The rate of mootness fee dismissals has increased from 0% in 2013 to 65% in 2017. *Id.* at A179. However, this figure likely underestimates the true rate of mootness fee extortion. "The presence of a mootness fee payment is frequently disclosed by the parties, although the amount of the fee paid is usually not included in the disclosure. Unfortunately, sometimes the parties do not disclose the payment of a mootness fee even though one was paid." *Id*. at A180 n.35.

Undisclosed payments to plaintiffs' counsel at the ultimate expense of shareholders likely total in the millions, although counsel have lately declined to disclose the size of stipulated mootness fees. Suits against numerous merging companies have been dismissed following supplemental disclosures, and the average *disclosed* mootness payment in 2017 was $265,000. Cain, 71 VAND. L. REV. at 625.

To Frank's knowledge, no federal appellate court has considered the propriety of strike suits resolved through so-called mootness fees. In two cases where *defendants* contested the requested mootness fees, one district court refused to award them under the PSLRA, but another granted a significantly-reduced award. *Compare Franchi v. Bay Bancorp, Inc*., No. GLR-17-3699, 2018 WL 8415675, 2018 U.S. Dist. LEXIS 225962, at *4 (D. Md. Oct. 25, 2018) (declining to grant motion for mootness fees due to contravention of PSLRA that fees awarded "shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.") *with Comeaux v. Seventy Seven Energy, Inc*., No. CIV-17-191-M, 2018 U.S. Dist. LEXIS 220373 (W.D. Okla.

Feb. 26, 2018) (awarding $128,354 of $380,000 request based on the court's "broad authority over awards of attorneys' fees"). Another court, in this Circuit, refused to allow strike suit plaintiffs to retain jurisdiction "for the mere purpose of giving the plaintiff leverage in his attempt to negotiate the payment of an attorneys' fee" because such fee would be a catalyst fee foreclosed by federal law. *Parshall v. Stonegate Mortgage Corp.*, No. 17-cv-00711, 2017 WL 35530851, 2017 U.S. Dist. LEXIS 129977, at *3 (S.D. Ind. Aug. 11, 2017) (citing *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001)).

B. Six plaintiffs file strike suits against Akorn.

On May 22, 2017, Akorn, Inc., filed a preliminary definitive proxy statement with the SEC recommending that shareholders approve a proposed merger with German pharmaceutical company Fresenius Kabi AG. A117. The preliminary proxy and the non-preliminary definitive proxy filed on June 15, 2017, were prepared by Akorn's outside counsel Cravath, Swaine & Moore LLP, and each described the $4.3 billion transaction. Dkt. 65-1 (Akorn, Inc. Preliminary Proxy (May 22, 2017)). Like all such proxies, it was rife with detail; the definitive proxy totaled 82 pages with another 153 pages of exhibits. *Id*.

From June 2 to 22, 2017, six plaintiffs filed actions alleging that these proxy statements were "false and misleading"—*not* because anything said in those pages was actually false, but rather based on a "tell me more" theory that Akorn's failure to disclose still more subsidiary details violates Sections 14(a) and 20(a) of the Exchange Act. *E.g.* A38 (House); A58 (Pullos).

On June 26, 2017 one of the plaintiffs filed a motion for preliminary injunction to halt the merger vote scheduled for July 19. No. 17-cv-5022, Dkt. 6. Other plaintiffs joined this motion and on July 5, 2017, cited the urgency of this motion as a reason to deny defendant's motion to transfer the cases to the Northern District of Illinois. No. 17-cv-5016, Dkt. 38 at 6. This forced the district court to expeditiously resolve the motion to transfer, which was granted the same day: July 5. Dkt. 24.[3] Upon transfer, each of the six plaintiffs' suit was assigned to a different judge.

C. Akorn files supplemental disclosures.

On July 10, 2017, Akorn filed a Form 8-K with the SEC, which contained supplemental disclosures agreed to by all six plaintiffs. A154. Akorn prefaced these disclosures by denying that they were material:

> Akorn believes that the claims asserted in the Federal Merger Litigation are without merit and no supplemental disclosure is required under applicable law. . . . Akorn specifically denies all allegations in the Federal Merger Litigation that any additional disclosure was or is required.

Id. at A155.

As Frank later pleaded, the supplemental disclosures *were* immaterial. A121-28. For example, the supplement included a hypothetical accounting reconciliation of previously-provided financial projections (A124), but courts find such reconciliation immaterial. *See Assad v. DigitalGlobe, Inc.*, No. 17-cv-1097, 2017 WL 3129700 (D. Colo. Jul.

[3] Unless otherwise stated, "Dkt." refers to docket entries in the *House* action below, No. 17-cv-05018 (N.D. Ill.).

21, 2017); *Bushansky v. Remy Intl., Inc.*, 262 F. Supp. 3d 742, 748 (S.D. Ind. 2017) (GAAP reconciliation "not plainly material"; rejecting proposed settlement under *Walgreen*).

D. Over 99% of shares voted favor the merger; plaintiffs dismiss their complaints for "mootness fees"; Akorn pays $322,500 in attorneys' fees.

None of the actions ended in a class-action settlement. Instead, on July 14, 2017, all six plaintiffs moved to dismiss their complaints without prejudice, claiming that the supplement had mooted every complaint. *E.g.*, A74; A81. Plaintiffs retained jurisdiction to file a request for attorneys' fees on behalf of all six plaintiffs in the first-filed *Berg* action. A79.

Meanwhile, Akorn shareholders voted on the proposed transaction at a special meeting of its shareholders at its Lake Forest, Illinois headquarters on July 19, 2017. A129. The votes in favor of the transaction totaled 104,651,745, with only about ***0.1%*** of that amount—104,914 shares—voted in opposition. *Id.* Over 99% of the votes favored the transaction, and the supplemental disclosures made no material difference in the vote. *Id.*; *cf. also Walgreen*, 832 F.3d at 723.

On September 15, 2017, in the *Berg* action, the parties filed a stipulation and proposed order indicating that "Defendants have agreed to provide Plaintiffs with a single payment of $322,500 in attorneys' fees and expenses to resolve any and all Fee Claims, and thus there are no Fee Claims to be adjudicated by the Court." A94. Akorn thereupon paid the agreed amount, which was held in escrow by counsel for plaintiff House—Monteverde & Associates PC ("Monteverde"). No. 17-cv-5016, Dkt. 80 at 2.

E. Appellant/*amicus* Frank moves to intervene in all actions.

Theodore H. Frank is an Akorn shareholder within the putative class of shareholders represented by the plaintiffs-appellants, and thus owed a fiduciary duty by plaintiffs and their counsel. A129. Frank, an attorney, is represented *pro bono* by the non-profit law firm he directs, the Hamilton Lincoln Law Institute's Center for Class Action Fairness, 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 Corp.*, 893 F.3d 980, 982 (7th Cir. 2018).

Three days after plaintiffs filed their fee stipulation, Frank, as a shareholder and putative class member aggrieved by the abusive class action and settlement, moved to intervene in each of the six actions because the plaintiffs' settlement for payment of fees contravenes 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." Dkt. 35; Dkt. 35-1 at 2 (quoting *Walgreen*, 832 F.3d at 724). In order to thwart the racket, Frank's proposed intervenor complaint sought (1) an accounting of attorneys' fees received by plaintiffs, (2) disgorgement of any such unjust enrichment, (3) sanctions, and (4) 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." Dkt. 35-1 at 20-21; *see also* A133.

Frank sought an injunction prohibiting fee awards without court approval because plaintiffs' counsel had filed hundreds of strike suits within the previous year.

Dkt. 35-1 at 19; A131. Counsel for plaintiff House, Monteverde, has been on the forefront of the shift to mootness fee applications. *See* Anthony Rickey, *Absent Reform, Little Relieve in Sight From Chronic "Merger Tax" Class-Action Litigation*, Legal Backgrounder Vol. 32, No. 22, Washington Legal Foundation (Aug. 25, 2017) ("Rickey"), at 4 (documenting Delaware mootness fee stipulations filed by Monteverde following *Trulia*).[4]

As of 2019, Monteverde is the most "successful" prolific strike suit filer in terms of extracting fees, with "the highest percentage (80%) of cases in which they obtained a mootness fee." *Mootness Fees* at A189. Monteverde has settled other federal strike suits for six-figure "mootness fees," without the safeguards of settlement approval under Rules 23 or 23.1, or, indeed, any court hearing, much less notice to the class. *See* No. 17-cv-5016, Dkt. 83-1 at 10; Rickey at 4. From January to October 1, 2019, Monteverde has filed fifty-three merger strike suits in federal courts.[5]

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[4] *Available at*: http://www.wlf.org/upload/legalstudies/legalbackgrounder/082517LB_Rickey.pdf.

[5] *Gabriel v. Old Line Bancshares Inc.*, No. 19-cv-9095 (S.D.N.Y. Oct. 1, 2019); *Mehta v. NRC Group Holdings Corp.*, No. 19-cv-9091 (S.D.N.Y. Oct. 1, 2019); *Humbert v. Gannett Co. Inc.*, No. 19-cv-9081 (S.D.N.Y. Sept. 30, 2019); *Rupniak v. Alder Biopharms, Inc.*, No. 19-cv-9025 (S.D.N.Y. Sep. 27, 2019); *Gray v. Wesco Aircraft Holdings, Inc.*, No. 19-cv-8528 (S.D.N.Y. Sept. 13, 2019); *Biasi v. Caesars Entertainment Corp.*, No. 19-cv-8547 (S.D.N.Y. Sept. 13, 2019); *Kravcenko v. Oritani Fin. Corp.*, No. 19-cv-8527 (S.D.N.Y. Sept. 13, 2019); *Grobman v. Carbon Black, Inc.*, No. 19-cv-8538 (S.D.N.Y. Sept. 13, 2019); *Polakoff v. Oritani Fin. Corp.*, No. 19-cv-8309 (S.D.N.Y. Sept. 6, 2019); *Andre v. Carrizo Oil & Gas, Inc.*, No. 19-cv-8064 (S.D.N.Y. Aug. 28, 2019); *Cason v. Total Sys. Serv.s, Inc.*, No. 19-cv-7471 (S.D.N.Y. Aug. 9, 2019); *Ford v. Raytheon Co.*, No. 19-cv-7220 (S.D.N.Y. Aug. 1, 2019); *Karmazyn v. Del Frisco's Restaurant Group, Inc.*, No. 19-cv-7193 (S.D.N.Y. Aug. 1, 2019); *Nixon v. Wageworks, Inc.*, No. 19-cv-7120 (S.D.N.Y. July 30, 2019); *Ford v. Raytheon Company*, No. 19-cv-6953 (S.D.N.Y. July 25, 2019); *Shirley v. Aerohive Networks, Inc.*, No. 19-cv-6742

Frank also moved to consolidate the six cases (No. 17-cv-5016, Dkt. 75), but the court declined to rule on the motion so briefing instead proceeded in the lead action *Berg* alone. Plaintiff Berg filed an opposition to Frank's motion to intervene that was "reviewed and approved" by the other five plaintiffs. No. 17-cv-5016, Dkt. 78 at 1 n.1.

(S.D.N.Y. July 19, 2019); *O'Brien v. Tableau Software, Inc.*, No. 19-cv-6447 (S.D.N.Y. July 11, 2019); *Salpeter-Levy v. Cypress Semiconductor Corp.*, No. 19-cv-6369 (S.D.N.Y. July 10, 2019); *Groeschel v. Array Biopharma, Inc.*, No. 19cv1960 (D. Colo. July 8, 2019); *Brennan v. Bioscrip, Inc.*, No. 19-cv-1865 (D. Colo. June 27, 2019); *Karels v. Zayo Group Holdings, Inc.*, No. 19-cv-1809 (D. Colo. June 21, 2019); *Luers v. Buckeye Partners, L.P.*, No. 19-cv-5767 (S.D.N.Y. June 20, 2019); *Langford v. Control4 Corp.*, No. 19-cv-5793 (S.D.N.Y. June 20, 2019); *Manasfi v. Control4 Corp.*, No. 19-cv-5790 (S.D.N.Y. June 20, 2019); *Pyziur v. Andeavor Logistics LP*, No. 19-cv-5714 (S.D.N.Y. June 19, 2019); *Duffy v. Maxwell Techs, Inc.*, No. 3:19-cv-1094 (S.D. Cal. June 11, 2019); *Najafi v. Intermolecular, Inc.*, No. 19-cv-5438 (S.D.N.Y. June 11, 2019); *Strenger v. HFF, Inc.*, No. 19-cv-5404 (S.D.N.Y. June 10, 2019); *Brown v. Papa Murphy's Holdings Inc.*, No. 3:19-cv-5514 (W.D. Wash. June 7, 2019); *Pierson v. Aratana Therapeutics, Inc.*, No. 19-cv-5318 (S.D.N.Y. June 6, 2019); *Yu v. The Aquantia Corp.*, No. 19-cv-5293 (S.D.N.Y. June 5, 2019); *Vakil v. The Aquantia Corp.*, No. 19-cv-5287 (S.D.N.Y. June 5, 2019); *Engel v. The Aquantia Corp.*, No. 19-cv-5285 (S.D.N.Y. June 5, 2019); *Gafford v. Suntrust Banks, Inc.*, No. 19-cv-5175 (S.D.N.Y. June 3, 2019); *Grutz v. Mellanox Techs, Ltd.*, No. 19-cv-4802 (S.D.N.Y. May 23, 2019); *Clairmont v. The Keyw Holding Corp.*, No. 19-cv-4695 (S.D.N.Y. May 21, 2019); *Mansell v. Suncoke Energy, Inc.*, No. 19-cv-4165 (S.D.N.Y. May 8, 2019); *Henderson v. Bemis Co., Inc.*, No. 19-cv-3382 (S.D.N.Y. Apr. 16, 2019); *Kopanic v. GTx, Inc.*, No. 19-cv-3239 (S.D.N.Y. Apr. 11, 2019); *Harrelson v. TCF Fin. Corp.*, No. 19-cv-3183 (S.D.N.Y. Apr. 10, 2019); *Gomez v. Spark Therapeutics, Inc.*, No. 19-cv-2487 (S.D.N.Y. Mar. 20, 2019); *Beveridge v. Ellie Mae, Inc.*, No. 19-cv-2390 (S.D.N.Y. Mar. 18, 2019); *Gomez v. Slakter*, No. 19-cv-2386 (S.D.N.Y. Mar. 18, 2019); *Gray v. Immune Design Corp*, No. 19-cv-2410 (S.D.N.Y. Mar. 18, 2019); *Walker v. Immune Design Corp.*, No. 19-cv-2391 (S.D.N.Y. Mar. 18, 2019); *Loar v. Trinity Capital Corp.*, No. 19-cv-1340 (S.D.N.Y. Feb. 12, 2019); *Rogers v. Celgene Corp.*, No. 19-cv-1275 (S.D.N.Y. Feb. 11, 2019); *Tran v. Mindbody Inc.*, No. 2:19-cv-638 (C.D. Cal. Jan. 28, 2019); *Elasmar v. Loxo Oncology Inc.*, No. 4:19-cv-498 (N.D. Cal. Jan. 28, 2019); *Sarkis v. TheStreet, Inc.*, No. 19-cv-275 (S.D.N.Y. Jan. 10, 2019); *Wefer v. LSC Comms., Inc.*, No. 19-cv-7 (S.D.N.Y. Jan. 2, 2019); *Clay v. Newfield Exploration Co.*, No. 19-cv-19 (S.D.N.Y. Jan. 2, 2019); *Burely v. Wildhorse Therapeutics, Inc.*, No. 19-cv-36 (S.D.N.Y. Jan. 2, 2019).

The court denied Frank's motion to intervene without prejudice. A96-106. The district court rejected plaintiff Berg's primary argument that no jurisdiction existed due to plaintiffs' July 14 dismissal without prejudice, *id*. at A99, but the court found that Frank had not explained his "interest" in the case under Rule 24. A103. Thus, Frank filed a renewed motion on December 8, 2017, and a Second Amended Proposed Complaint, which extensively discussed his interest as a putative class member owed a fiduciary duty from plaintiffs' counsel and the breach of that duty. No. 17-cv-5016, Dkt. 83; A111-134.

F. Three plaintiffs disclaim entitlement to attorneys' fees; the court finds Frank's intervention is moot relating to the three disclaiming attorneys.

As Frank's motion to intervene was pending, the Akorn merger collapsed. On February 27, 2018, Fresenius announced it was investigating alleged FDA regulatory violations by Akorn, unrelated to any of the plaintiffs' underlying allegations. *See* No. 17-cv-5016, Dkt. 91-2 at 1-2. The stock price fell nearly 40%, confirming that the transaction plaintiffs challenged would have been very beneficial to shareholders. Bryce Elder, *Stocks to Watch*, FINANCIAL TIMES (Feb, 27, 2018).

On March 13, 2018, before Fresenius officially rescinded its merger offer, plaintiff Berg filed a motion seeking to withdraw from the case and forgo any entitlement to the $322,500 in attorneys' fees, which he claimed rendered Frank's motion to intervene "moot." No. 17-cv-5016, Dkt. 91-2. Frank opposed Berg's suggestion, but at a March 21 hearing, the district court remarked that the underlying relief requested in Frank's intervenor complaint (disgorgement and injunctive relief) would be moot because of

plaintiffs' disclaimer of fees *and* because "I'm not going to enter injunctive relief." No. 17-cv-5016, Dkt. 108 at 12.

On April 11, 2018, the district court held a status hearing where Berg confirmed that three of the six plaintiffs intended to disclaim fees. No. 17-cv-5016, Dkt. 109 at 3. The district court reaffirmed its view that it was "not going to prospectively bar [plaintiffs' counsel] from filing suits" like these. *Id*. at 6. (Frank did not in fact seek to bar filing complaints, but merely require plaintiffs' counsel to receive court approval for Exchange Act attorneys' fee awards. A133.) The district court advised it would request the other five actions be reassigned to him and set a status date for all plaintiffs. *Id.* at 4; No. 17-cv-5016, Dkt. 99.

On May 2, 2018, the district court held a status conference relating to all six actions at which counsel for three plaintiffs (Berg, Harris and Alcarez) disclaimed their entitlement to attorneys' fees in this matter. A142-43. Counsel for three other plaintiffs (House, Pullos and Carlyle) indicated that they still sought a share of the $322,500 attorneys' fee payment. *Id.* In light of the court's previous decision regarding mootness for the three disclaiming plaintiffs, Frank indicated those cases could be dismissed. Dkt. 52 at 10. Frank timely appealed the mootness determination, which remains pending before this Court ("*Berg* appeals"). Appeal Nos. 18-2220, -2221, and -2225.

As for the three remaining plaintiffs who did not disclaim fees—including appellants House and Pullos here—the district court deemed Frank's motion to intervene filed in those three actions, and scheduled additional briefing. A149.

G. The district court denies intervention with respect to the remaining plaintiffs, but invites briefing concerning its use of inherent authority.

On May 16, 2019, the three plaintiffs who did not disclaim fees filed a consolidated opposition in all three actions, which Frank replied to in support of his motion. Dkts. 50 and 51. (For clarity, this briefing responded to Frank's motion to intervene that he had originally filed only in the *Berg* action December 8, 2017. A107. To this day, none of the six actions have been formally consolidated; briefing was instead filed in parallel in the three actions.)

On September 25, 2018, the district court again denied Frank's motion to intervene, for much the same reason it had preliminarily done so in November 2017—because he allegedly lacked a direct injury: "Rather, it is an injury to Akorn that the class members might realize through their shares of Akorn. But an injury to Akorn can only be pursued by class members through a derivative action, which is not the procedural posture of any of the six cases." A6. The district court also found that Frank had failed to state a claim for breach of fiduciary duty against plaintiffs' counsel's because that duty was "limited to protecting class members' legal rights that form the basis of the claims at issue" in the case. A5.

Frank timely appealed denial of intervention with respect to plaintiff House only, whose counsel (Monteverde) retained the $322,500 payment on behalf of the three non-disclaiming plaintiffs. A150. This Court stayed the appeal pending resolution of the district court's decision whether to exercise its inherent authority and disgorge the $322,500, so that both issues could be heard together in a consolidated appeal. Appeal No. 18-3307, Dkt. 6.

H. The district court exercises its inherent authority to require the remaining plaintiffs to return the $322,500 in attorneys' fees.

After Frank's intervention was denied, and at the district court's invitation, Frank advised that he was willing to serve as an *amicus* regarding whether the fees should be disgorged. Dkt. 54.

The three remaining plaintiffs—including appellants House and Pullos—filed a joint brief attempting to rationalize their fee award based on five alleged supplemental disclosures they claimed to have secured from Akorn: (1) the disclosure of superseded financial projections the board prepared in November 2016 and did not consider in their merger vote; (2) GAAP reconciliation for certain non-GAAP financial projection metrics; (3) additional detail concerning an offer Fresenius made to Akorn's chairman Dr. Kapoor, which was not pursued; (4) that the board considered pending derivative litigation in recommending the merger; and (5) that J.P. Morgan's fee payable "immediately prior to the consummation of the merger" was in fact contingent on the merger occurring. Dkt. 65 at 9-15.

Frank responded to these materiality arguments and further contended that the district court could not infer plaintiffs were responsible for the first and fifth alleged disclosures, which were made in Akorn's (non-preliminary) proxy statement filed with the SEC on June 15, 2017. Dkt. 67 at 7. Akorn never conceded plaintiffs' responsibility for differences between the preliminary and definitive proxy statement, and none of the plaintiffs asserted such benefit until December 22, 2017, when plaintiff Berg briefed his second opposition to Frank's motion to intervene. *Id*. at 8. Such causation is even more implausible as to the non-disclaiming plaintiffs. House filed his complaint just three

days before the 82-page definitive proxy was filed—and Pullos only filed his suit a week *after* the proxy. *Id.* No sworn evidence suggests any of the plaintiffs were responsible, and if any were, credit more likely belongs to plaintiff Berg, who filed on June 2, 2017. *Id.*

The three remaining plaintiffs replied with new arguments that *Walgreen* does not apply outside of class action settlements, and that *Walgreen* somehow endorsed Delaware's mootness fee procedure, which plaintiffs claimed to have followed. Dkt. 75 at 2-3. In sur-reply, Frank pointed out that *Walgreen*'s command to "dismiss[] out of hand" could not be limited to settlements, and that even if Delaware procedure applied, plaintiffs failed to provide notice which is mandatory in Delaware so that shareholders like Frank can object to mootness fee payments. Dkt. 77.

On June 24, 2019 the district court elected to exercise its inherent authority and order the three non-disclaiming plaintiffs to return the $322,500 payment to Akorn. A209. While the plaintiffs and Frank briefed the materiality of disclosures allegedly achieved by the plaintiffs, the district court determined it should instead look to the relief sought in plaintiffs' underlying complaints. A212. The district court identified eight disclosures sought by at least one of the non-disclaiming plaintiffs' complaints: (1) GAAP reconciliation for certain non-GAAP financial projection metrics; (2) component numbers for J.P. Morgan's analysis; (3) that J.P. Morgan's fee payable "immediately prior to the consummation of the merger" was in fact contingent on the merger occurring; (4) J.P. Morgan's past compensation from Fresenius; (5)-(7) three disclosures sought by only plaintiff Carlyle, who did not appeal; and (8) that the board considered pending derivative litigation in recommending the merger. A212-19. Notably, only

three of these eight disclosures (1, 3, and 8) were even arguably obtained by plaintiffs. *Id.*. The district court found that none of the eight alleged omissions in Akorn's disclosures could have been plainly material, so the suit should have been "dismissed out of hand" before plaintiffs could execute their racket. A219. Having failed to do so, the district court ordered the payment to be disgorged. *Id.* The non-disclaiming plaintiffs confirmed their return of the money on July 3, 2019. Dkt. 83.

Plaintiffs House and Pullos appealed this order, which is now consolidated - before the Court. Dkt. 84; No. 17-5026, Dkt. 40.

Summary of the Argument

This appeal arises from the district court's denial of Frank's motion to intervene with respect to the efforts of two plaintiffs—House and Pullos—to obtain attorneys' fees, after they and four other plaintiffs filed strike suits for the purported benefit of Akorn shareholders. As is customary in such suits, plaintiffs provided no value for the putative shareholder class, but staked their claim to fees on immaterial supplemental disclosures issued by Akorn. *Walgreen* cracked down on these 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 721. To circumvent the judicial scrutiny under Rule 23 and *Walgreen*, appellants House and Pullos did not seek approval of a class-action settlement, but instead, successfully extorted $322,500 in attorneys' fees from Akorn, later styled as a "mootness fee." Dkt. 75. Federal courts have not recognized the availability of such "mootness fees," and they are available under Delaware procedure

only when a suit is dismissed as moot *and* the suit was meritorious when filed. *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1123 (Del. Ch. 2011). *Walgreen*, 832 F.3d at 721.

Unlike the three *Berg* appeal plaintiffs that disclaimed any right to the mootness fee whose appeals are currently pending (Nos. 18-2220, -2221, and -2225), the two appellants consolidated in this appeal have not disclaimed their entitlement to the $322,500. Although the district court ordered appellants to return the fees to Akorn, the court denied Frank's motion to intervene and did not order the other relief he sought, including injunctive relief and other equitable remedies such as sanctions.

This appeal seeks to reverse the district court's denial of intervention with respect to plaintiff House. Counsel for House, Monteverde & Associates PC, held the $322,500 payment from Akorn. Monteverde is also by far the most prolific of the three non-disclaiming plaintiffs' counsel. It has filed over fifty strike suits so far in 2019, and academics have pegged Monteverde's success at extracting fees in such suits at 80%, the highest of any serial strike suit filer. *Mootness Fees* at A189.

In denying Frank's motion to intervene as a matter of right, the district court made two distinct legal errors. First, it erroneously concluded that plaintiffs' counsel did not have a full fiduciary duty to class members, but only a duty not to impair claims alleged in the plaintiffs' complaints. Contrary to the district court's conclusion, plaintiffs' fiduciary duty is not so limited, and no case law expressly limits it in this way. The 2003 amendments to Rule 23 did not alter the substance of the representatives' duty, but merely simplified the procedure for dismissing a putative class action complaint.

The district court's legal error had profound implications for Frank because the breach of fiduciary duty by plaintiffs' counsel in this case was stark. Proclaiming to represent shareholders, plaintiffs filed complaints that the district court has since determined to be meritless and more appropriately "dismissed out of hand." A219 (quoting *Walgreen*, 832 F.3d at 724). This scheme could only possibly harm shareholders, and its execution was necessarily incompatible with counsel's fiduciary duty to the shareholder class members they purported to represent.

Second, the district court incorrectly concluded that Frank had no interest in intervention because the injury pleaded—the improper payment of $322,500 from Akorn to plaintiffs—could allegedly only be remedied by Akorn or perhaps derivatively. But this misapprehends Frank's well-pleaded complaint, which alleged that plaintiffs' counsel breached the *direct fiduciary duty* to putative class members like Frank. No such duty was owed to Akorn, and only class members would have standing to remedy the breach. The fiduciary duty necessarily gives rise to a legally-protectable interest, and Frank also has a cognizable interest in the payment of attorneys' fees from Akorn's corporate treasury.

Moreover, Frank's motion to intervene has not been mooted by the district court's subsequent disgorgement of the $322,500 payment, because Frank also sought sanctions and injunctive relief against plaintiffs. These remedies would allow good faith shareholders like Frank to more effectively counter plaintiffs' abusive mootness fee racket. If the only penalty to plaintiffs' counsel for their ongoing strike suit abuse is disgorgement of their attorneys' fee in a single case, then their "racket" will continue unabated. Plaintiffs have succeeded in running up Frank's litigation expenses and a

mere disgorgement in a single case without procedures in place to prevent future abuse will be a Pyrrhic victory.

Alternatively, this Court could remand for a determination of permissive intervention under Rule 24(b), which the district court failed to address at all in its order. This Court should enable intervenors to challenge mootness fee awards, just as shareholders may before the Delaware Chancery. If plaintiffs persist in strategically importing incompatible Delaware procedure into Federal Exchange Act litigation, this Court should at least ensure that shareholders have appropriate tools to contest the racket.

Argument

I. The district court committed legal error in denying Frank's motion to intervene as a matter of right.

The district court erred as a matter of law in denying Frank's motion to intervene. A class member meets the requirements to intervene as of right under Rule 24(a) when (1) his application is timely; (2) he "claim[s] an interest relating to the property or transaction which is the subject of the action"; (3) he "is so situated that the disposition of the action may as a practical matter impair or impede [his] ability to protect that interest"; and (4) "existing parties [are not] adequate representatives of [his] interest." *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 945-46 (7th Cir. 2000).[6]

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[6] The district court correctly did not find any timeliness concern with Frank's application to intervene, which he filed three days after plaintiffs' stipulated dismissal was filed, Dkt. 57. *See Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991) (timeliness

According to Frank's proposed intervenor complaint, plaintiffs' counsel repeatedly breached their fiduciary duties to putative class members such as Frank by collectively filing hundreds of meritless strike suits they intended to settle for private gain—against the interests of shareholders of the corporations being acquired.

The district court premised its denial of intervention on its legally incorrect beliefs that (1) Frank's interest, and class counsel's duty, was limited to preventing prejudice to protecting his substantive legal claims as a class member, and (2) any injury caused by class counsel's breach of fiduciary duty was an injury to Akorn that class members could pursue only through a derivative action. A5-6. Neither holds true. The district court's order denying Frank's motion to intervene should be reversed.

A. Frank has a direct interest harmed by class counsel's breach of the fiduciary duty owed to him.

1. Class counsel owed Frank a fiduciary duty and breached that duty by improperly leveraging his claims as a class member to extract funds from Akorn.

From the moment they filed a class action, putative class counsel had a fiduciary duty to not harm class members' interests. *See Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 820 (7th Cir. 2011). The district court correctly found putative class counsel here had such a duty, but incorrectly limited the scope of that duty to preservation of class claims. A4.

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considered holistically given factors such as length intervenor knew of interest in the case).

Putative class counsel's duty goes "[b]eyond their ethical obligations to their clients" as part of the traditional attorney-client relationship. *In re General Motors Corp. Pick-Up Truck Fuel Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("*GMC Pick-Up*"). "[C]lass attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed." *Id.*; *see also Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002) (collecting cases finding a fiduciary duty). In discussing the need for "appropriate" plaintiffs and class counsel, the Third Circuit noted the very "problem" here: "class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extra a settlement far in excess of the individual claims' actual worth." *GMC Pick-Up Truck*, 55 F.3d at 784-85. Public company defendants undergoing a merger transaction or tender offer are especially vulnerable to this leverage because plaintiffs can file—or threaten to file—costly and time-sensitive motions for preliminary injunction, which could derail the proposed transaction. Plaintiffs filed such a motion here before Akorn agreed to provide immaterial supplemental disclosures. No. 17-cv-5022, Dkt. 6.

A fiduciary duty attaches to class action complaints because class counsel has voluntarily taken *de facto* control and dominance over the litigation decisions that are made, and the absent class members are uniquely vulnerable to such control. While the details vary, the essential problem is the same: Plaintiffs' counsel used the threat of a shareholder class action to extract personal gain in the form of attorneys' fees, and now say those shareholders have no way to stop this abusive practice that depends on the misuse of their own legal claims.

According to Frank's proposed intervenor complaint, plaintiffs' counsel repeatedly breach their fiduciary duties to putative class members including Frank by collectively filing literally hundreds of meritless strike suits they intend to settle for private gain—against the interests of shareholders of the corporations being acquired. A131. These allegations are sufficient as a matter of law. Even if bringing and dismissing a suit is ordinarily permitted by the rules, a fiduciary who takes an otherwise lawful action for self-interested reasons can breach his duty. *See generally* American Law Institute, Principles of the Law of Aggregate Litig. § 1.05, cmt. f (2010) (fiduciary duty "forbids a lead lawyer from advancing his or her own interests by acting to the detriment of the persons on whose behalf the lead lawyer is empowered to act.").

Representatives breach their fiduciary duty simply by harming class member interests. *Pierce v. Visteon Corp*., 791 F.3d 782, 787 (7th Cir. 2015) ("it is unfathomable that the class's lawyer would try to sabotage the recovery of some of his own clients"). "An agent's breach of fiduciary duty should be deterred even when the principal is not damaged." *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999); *id* at 240 nn. 35-37 (collecting authorities). In accordance with this maxim, courts in this Circuit and others have not limited the duty, as the district court erroneously did, to protecting the claims alleged. For example, courts have found that class counsel and/or representatives have failed to live up to their duties based on actions such as failing to pursue punitive damages claims, to "jettison[ing] the class for personal benefit," to dropping claims for monetary recovery where a defendant had only enough money to pay damages *or* attorneys' fees. *See Back Doctors*, 637 F.3d at 830 (breach of fiduciary duty not to advance punitive

damages claims); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (inappropriate to "jettison the class for personal benefit"); *Grok Lines, Inc. v. Paschall Truck Lines, Inc.*, No. 14 C 08033, 2015 WL 5544504, at *7 (N.D. Ill. Sept. 18, 2015) (rejecting settlement that did *not* release monetary claims, but where counsel "abandoned pursuit of a monetary recovery for the class"); *see also Stand. Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593-94 (2013) (suggesting class member may intervene to remedy breach of fiduciary duty in response to stipulation that agreed not to seek more than a specified amount of damages and did not bind anyone except representative); *Culver*, 277 F.3d at 913 (suggesting refusal to cooperate with division of class into subclasses is a breach of fiduciary duty and collecting cases).

Courts also have held it inequitable for individual class members or counsel to advantage themselves over other class members without conferring upon the class any benefit and without judicial oversight. *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship*, 874 F.3d 692, 694 (11th Cir. 2017) ("If, as it appears, [class counsel] was indeed motivated by a desire to grab attorney's fees instead of a desire to secure the best settlement possible for the class, it violated its ethical duty to the class."); *Grok Lines*, 2015 WL 5544504 at *8 ("It is unacceptable to mitigate the risk of a relatively small payday by negotiating a settlement at the expense of clients."). A rule that limited class counsel's fiduciary duty to simply protecting the claims they alleged on behalf of the class from prejudice would give license to class counsel to abandon claims that become inconvenient or, worse, strategically file pleadings that allow them to prioritize their own personal benefit via the class action device.

By comparison, the breach of duty is *even* more outrageous here. Not only did the putative representatives prioritize their self-interest and abandon the interest of absent class members, those putative class members who continued to hold Akorn stock effectively paid counsel for their abandonment. It's akin to counsel bringing an ERISA class action and settling it by dismissing the class' claims without prejudice while securing for themselves a fee, paid from the retirement funds themselves. Even where an individual settlement "[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).

Frank not only plausibly pleaded that plaintiffs' counsel breached their duty to him; he further pleaded that this breach may be equitably remedied. As a matter of law, these pleadings were sufficient to allow Frank to proceed as an intervenor with his complaint at this stage of the proceedings. Parties "seeking disgorgement of legal fees for a breach of their attorney's fiduciary duty of loyalty need only prove that their attorney breached that duty, not that the breach injured them…." *Hendry v. Pelland*, 73 F.3d 397, 399 (D.C. Cir. 1996). Thus, "even if the judge had concluded that the plaintiffs have the better of their dispute with Frank, still the judge should have granted his motion to intervene." *Crowley*, 687 F.3d at 318.

Plaintiffs may argue, as they did below and with which the district court at least partially agreed, that the 2003 Amendments to Rule 23 extinguished their fiduciary duty to the class where a class action is dismissed prior to certification. The amendments did no such thing. They merely altered the *procedure* for dismissal of a class action prior to certification—not the substantive duty of putative class counsel to

the class members they represent. The Advisory Committee explained that the amendments were necessary because earlier "language could be—and at times was—read to require court approval of settlements with putative class representatives that resolved only individual claims." Advisory Committee Notes on 2003 Amendments to Rule 23. "The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise." *Id.* Plaintiffs may dismiss their individual claims without prior court approval; however, neither the text of the amendments nor the Advisory Committee's Notes suggest any changes that undermine the precedent that class counsel has a duty to the putative class they seek to represent. *See Back Doctors*, 637 F.3d at 830 (noting pre-certification fiduciary duty post-amendment); Nick Landsman-Roos, *Front-End Fiduciaries: Precertification Duties and Class Conflict*, 65 STAN. L. REV. 817, 841 (2013) ("If anything, a greater fiduciary duty should be imposed prior to certification…."). It is the breach of that duty that Frank seeks intervention to address.

2. Frank has a protectible interest as an Akorn shareholder and a shareholder of corporations likely to be targeted by plaintiffs' ongoing mootness fee racket in the future.

As pleaded in his proposed complaint in intervention, Frank is harmed by plaintiffs' and their counsel's practice of filing strike suits on behalf of shareholder classes of which he is a member, and then dismissing the suits for mootness fees. They filed such a meritless suit against Akorn, and then appropriated six-figure attorneys' fees. That suit was merely one of dozens of similar suits plaintiffs have filed in their ongoing strike suit racket. Frank has a direct financial interest in ending this destructive

and unethical behavior by disgorgement, sanctions, and injunction. He has both an immediate protectable interest as an Akorn shareholder and an ongoing interest in curtailing the scourge of merger strike suits. The district court failed to recognize those injuries and instead erroneously viewed his claimed injury as solely "an injury to *Akorn*" and thus capable of being pursued by class members only through a derivative action. A6. The district court's holding is wrong.

First, Frank does not bring claims derivatively on behalf of Akorn, but seeks relief to remedy the breach of fiduciary duty to him *directly* as a shareholder. In fact, the breach of fiduciary duty can only be asserted by shareholders like Frank, not Akorn; plaintiffs obviously have no fiduciary duty to their opponents. An individual claim for unjust enrichment exists when a duty to the stockholder was breached, as opposed to a duty toward the corporation. An individual shareholder's standing does not require the shareholder to allege "unique harm." *See Mann v. Kemper Fin. Cos., Inc.*, 618 N.E. 2d 317, 325 (Ill. App. 1st Dist. 1992). Even if a plaintiff shareholder's harm is not unique to that particular shareholder, "a plaintiff's cause of action could still be individual instead of derivative." *Id.* Individual shareholders such as Frank can maintain an action against fiduciaries such as plaintiffs, even if the harm they suffer is limited to the general decline of share value suffered by the corporation. Such claims properly "allege[] a duty owed directly to plaintiffs." *Id.* at 327 (reversing dismissal of individual claims against financial advisors). Delaware courts similarly reject the notion that "a suit must be maintained derivatively if the injury falls equally upon all stockholders … because a direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, without the claim thereby

becoming a derivative claim." *Tooley v. Donaldson*, 845 A.2d 1031, 1038 (Del. 2004); *Aon Corp. v. Cabezas*, No. 15-CV-04980, 2018 WL 1184728, at *8 (N.D. Ill. Mar. 7, 2018) (observing similar standards for individual unjust enrichment claims under *Tooley* and *Mann*).

Plaintiffs are likely to argue that Frank has suffered only "derivative" harm and therefore has had no cognizable interest impaired. This argument is not supported by Circuit precedent, which recognizes that shareholders suffer cognizable harm from the use of corporate funds to pay attorneys' fees in meritless suits. In *Robert F. Booth Trust v. Crowley*, the Court found a shareholder had standing to intervene to object to and seek dismissal of a selfish Rule 23.1 derivative suit designed only to generate a settlement benefit for attorneys. 687 F.3d 314. There is no question that the "move[ment of] money from the corporate treasury to the attorneys' coffers" comes at the expense of shareholders. *See id.* at 320. Similarly, in *Kaplan v. Rand*, the Second Circuit held that a "shareholder who objects to the payment of a fee from corporate funds in compensation of attorneys" who are suing on behalf of shareholders "has an interest that is affected by the judgment directing payment of the fee." 192 F.3d 60, 67 (2d Cir. 1999). While the interests of shareholders and Akorn may not be "coextensive," A6, shareholders have a common interest in not allowing their company to be extorted.

The Court should draw "all reasonable inferences" in favor of Frank's complaint, which sufficiently pleads standing to the extent it alleges a non-speculative injury-in-fact. *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 692 (7th Cir. 2015). Frank alleges—and establishes above—that plaintiffs and their counsel owed him a fiduciary duty. He further alleges, and bases his request for relief on, harm from their breach of

the duty they owed to him, not any duty they owed to Akorn. An actual controversy exists between plaintiffs who contend they can extract attorneys' fees through Exchange Act litigation without court approval and Frank, who contends that *Walgreen* demands otherwise. Here, the injury to shareholders is not speculative. By *design*, plaintiffs harm shareholders by extorting fees from Akorn and other companies. Class members owed a fiduciary duty should appropriately obtain injunctive relief to prevent future breaches and recover fees from self-dealing attorneys who breach their duty of loyalty. *See Hendry*, 73 F.3d at 401; *Burrow*, 997 S.W.2d at 237.

If there were no remedy to a breach of fiduciary duty, trustees could "mismanage a trust with impunity" and steal "90%" or more just because the beneficiaries might not directly suffer financially. *See Scanlan v. Eisenberg*, 669 F.3d 838, 847 (7th Cir. 2012) (trusts). Likewise, strike suit plaintiffs should not be able to insulate themselves from breach of duty claims simply because shareholders lack a direct claim to the money misappropriated by their attorneys. In many cases, self-dealing by class counsel will be paid from sources entirely independent of the putative class members. Nevertheless, these betrayed class members would still have claims for breach of fiduciary duty. The breach of fiduciary duties gives rise to a legally-protectable interest, and "where parties have long been permitted to bring" actions for breach of fiduciary duty "it is well-nigh conclusive that Article III standing exists." *Id.* at 845 (cleaned up).

Second, as a shareholder with diverse holdings, Frank is harmed by the pattern and practice of conduct that plaintiffs and their counsel have shown in other cases. Plaintiffs' counsel egregiously violate their fiduciary duty to class members by engaging in a premeditated scheme to shake down defendant companies like Akorn to

the detriment of putative class members to whom they owed a duty of loyalty. The underlying complaints here were shams "filed . . . for the sole purpose of obtaining fees for the plaintiffs' counsel." *Walgreen*, 832 F.3d at 724. Counsel for plaintiff House has filed over fifty strike suits so far in 2019, and in the year preceding Frank's motion to intervene plaintiffs' counsel collectively filed hundreds of suits, including numerous suits against defendants where Frank is or was a shareholder. *See supra* n.5; Dkt. 35-1 ¶ 74.

At best, such strike suits burden the judicial system with meritless but time-demanding motions for preliminary injunction that plaintiffs have no interest in obtaining, pointlessly consuming judicial resources as a bargaining chip for fees at the expense of defendant and its shareholders—who are the class that the class counsel and representative putatively represent. Strike-suit plaintiffs' disregard for judicial efficiency particularly manifests when they demand a court's urgent attention to resolve preliminary injunctions motions plaintiffs have no intention of winning. This is pure selfish social cost with no positive externalities, rent-seeking at its worst. A similar business model of extortionate hit-and-run litigation in the copyright sphere has been the subject of criminal prosecution. Kate Cox, *Prenda Law porn-troll saga ends with prison for founder*, Ars Technica (Jul. 10, 2019); *cf. Lightspeed Media Corp. v. Smith,* 761 F.3d 699 (7th Cir. 2014).

Putative class members have a direct interest in curtailing the mootness fee racket and vindicating their own interests. Frank should have been permitted to intervene to protect his interests by seeking injunctive relief and sanctions to counter this abusive practice.

B. Disgorgement does not remove Frank's interest.

Although the district court ordered plaintiffs' counsel to return to Akorn the attorneys' fees provided by the settlement agreement, Frank also sought to intervene for the purpose of seeking sanctions and an injunction—two remedies that were not provided by the district court's ruling. Intervention ensures that a class member has a right to appellate review and protects against the prospect of future abusive strike suits by plaintiffs.

The sanctions and injunctive remedy are necessary to minimize the harm to Frank from plaintiffs' ongoing mootness fee racket. It is highly impractical and futile for Frank to intervene in all of plaintiffs' counsel's future strike suits. First, because plaintiffs are receiving fees in exchange for dismissing rather than settling these actions, Frank and other shareholders do not receive notice of the actions like a class member normally would. *See* Fed. R. Civ. P. 23(c)(2). Second, even if Frank were successful in locating the actions by scouring dockets nationwide and then intervening, settling counsel could simply move on to the next strike suit. Frank lacks the resources to appear in every court where appellants' counsel perpetuate their unceasing racket. The volume of suits filed by plaintiffs and their counsel make this fact clear. At the same time, Frank had to file multiple briefs in the district court just to seek, unsuccessfully, to intervene in order to protect his interests with respect to this single merger. Third, plaintiffs' counsel now appear to be dismissing these actions with prejudice but without disclosing to the court plaintiffs' counsel's agreement regarding fees. Such concealment makes it even more difficult for shareholders to intervene as shareholders cannot easily prove ripeness.

If the only penalty to plaintiffs for their abusive practices is an occasional ruling requiring them to return their ill-gotten gains in one among their many cases, they and their counsel will continue to reap benefits from their racket and have no incentive to stop. Disgorgement alone is inadequate to protect Frank's interests and remedy his injury. With an award of sanctions, however, courts would better be apprised to plaintiffs' misconduct, and an injunction would foreclose the misconduct within the scope of the relief ordered. Furthermore, an award of attorneys' fees to Frank would ameliorate the asymmetry between appellants' counsel—which wins money in 80% of these strike suits (*Mootness Fees* at A189 (discussing Monteverde's success rate))—and good-faith shareholders like Frank, who has struggled two years to remedy this *one* set of strike suits.

C. Neither plaintiff nor Akorn represent Frank's interests.

The burden of showing that representation may be inadequate "should be treated as minimal," *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972). An intervenor need only show that representation "may be" inadequate. *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007). Frank meets this burden easily.

No existing party adequately represents the interests of Frank and the other putative class-member shareholders. Plaintiffs are actively working *against* those interests, while defendant Akorn has acquiesced to what was essentially extortion, agreeing to the payment sought by plaintiffs and thus failing to protect shareholders' interests.

Frank filed for intervention to address class counsel's *breach of their fiduciary duty to him* and also inhibit future strike suits against companies of which he is a shareholder. Plaintiffs' counsel owed Frank and other class members a duty to protect their interests, but instead, they used class members' legal rights to abuse the judicial process: They brought worthless claims on the class's behalf, then dismissed those claims and sought six-figure fees for themselves as a result. Instead of netting funds for the lawyers, the suit should have been "dismissed out of hand." *Walgreen*, 832 F.3d at 724. Plaintiffs' strike suits and the companies' acquiescence to them run directly contrary to Frank's interest as a shareholder. Of course class counsel do not represent Frank's interests.

Nor does Akorn represent Frank's interests. As the district court found, it instead has "abandoned the adverse perspective necessary for the Court to determine" whether the fees sought by plaintiffs were appropriate. A8. Akorn was essentially extorted into paying the six-figure fees to class counsel to prevent its proposed merger from being held up. Even if Akorn sought to minimize the size of the extorted payment, Frank opposes, and is harmed by, *any* payment at all. That Akorn acquiesced in the six-figure fee, that "provided Akorn's shareholders nothing of value, and instead caused the company in which they hold an interest to lose money," shows that it does not adequately represent his interests. A219. The lawsuit instead should have been "dismissed out of hand." *Id.* (quoting *Walgreen*, 832 F.3d at 724).

Just as in *Crowley*, the district court's reason for denying intervention is "unsound" because the objecting shareholder's position was "entirely incompatible with the stance taken by" plaintiffs. 687 F.3d at 318; *see also Fed. Savings & Loan Ins. Corp.*

v. Falls Chase Spec. Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993). "That the plaintiffs say they have other investors' interests at heart does not make it so." *Crowley*, 687 F.3d at 318. Court supervision is required "precisely because the self-appointed investors may be poor champions of corporate interests and thus injure fellow shareholders." *Id*.

The agreement by Akorn to pay plaintiffs reveals that no one is fighting for Frank and other shareholders' interests. Intervention thus serves the related goal of introducing adversity into the proceedings. *See Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003). This adversity is necessary because "judges in our system are geared to adversary proceedings. If we are asked to do nonadversary things, we need different procedures." *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). Frank and CCAF are well-positioned to provide such adverseness. *See* Dkt. 36-1.

D. Denial of intervention was not harmless error.

While a district court should not prejudge the merits of suit when granting a motion to intervene, the court's error in denying Frank's motion is not harmless. The court's subsequent finding that the litigation was a sham evidences this fact. A7. The district court found that the disclosures sought by plaintiffs did not meet the plainly material standard this Court adopted in *Walgreen*. Instead, they "were worthless to the shareholders," and "Akorn paid Plaintiffs' attorney's fees to avoid the nuisance of ultimately frivolous lawsuits disrupting the transaction with Frensenius." A219.

The district court's refusal to allow Frank to intervene denied him the development and factual discovery supporting his sanctions and injunction claims. Frank's intervenor complaint contained a short and plain statement of his claims with

plausible factual allegations and nothing more was required. *See* Fed. R. Civ. P. 8; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Because Frank was harmed by the breach of fiduciary duty brought about by this meritless suit, he should have been permitted to proceed—whether or not the court was initially inclined to reject Frank's injunction request. Indeed, the parties never briefed and the court never even *addressed* whether Frank had established the elements for a permanent injunction. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). If Frank's motion to intervene had been granted, Frank could have proceeded with discovery into plaintiffs' counsel's practices in support of Frank's injunction claims, or at least briefed a motion to dismiss the injunctive relief. *Stewart Title Guar. Co. v. Cadle Co.*, 74 F.3d 835, 836-37 (7th Cir. 1996).

II. Intervention under Rule 24(b) may also be permitted.

In the alternative, the district court erred by failing to consider Frank's request to intervene permissively under Rule 24(b). Permissive intervention is appropriate where "there is (1) a common question of law or fact, and (2) independent jurisdiction." *Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). Had the district court examined this question, it would have seen that both factors are met.

Frank's proposed complaint involved common legal and factual questions as those at issue in plaintiffs' suit. In particular, whether the disclosures sought and obtained by plaintiffs were material was central to both plaintiffs' claims against Akorn and to Frank's claim that plaintiffs' counsel filed a meritless suit in order to extract attorneys' fees. As a shareholder of the defendant company, Frank had a stake in the

underlying litigation, *see* Section I.A.2, and there is no dispute that the court had independent jurisdiction, as set forth in his proposed complaint.

Intervention by Frank would not have prejudiced the rights of the original parties. *See* Fed. R. Civ. P. 23(b)(3). The Akorn defendants are not prejudiced by intervention because the underlying claims have been released, and Frank does not wish to revive them or any other claims against Akorn. *See generally* Dkt. 35-1. Plaintiffs are prejudiced only in the sense that they may be impeded from continuing their "racket," which this Court has said "must end." *Walgreen*, 832 F.3d at 724. The "loss of a windfall is not the kind of harm that a court should endeavor to avert." *In re UAL Corp*., 411 F.3d 818, 823-24 (7th Cir. 2005).

Permissive intervention does not require an intervenor to have a direct personal or pecuniary interest in the subject of the litigation. Fed. R. Civ. P. 24(b); *see also SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940). Even if the district court had been correct, then, and precedent and Frank's proposed complaint did not establish he has a legally adequate direct interest in the matter, the district court could have permitted Frank to intervene under Rule 24(b). But the court completely disregarded Frank's request. It did not analyze these factors at all. When the district court gives "no reasoned decision to review, and no basis upon which to evaluate its exercise of discretion," it becomes "impossible for [a reviewing court] to do [its] judicial duty." *Blue Cross & Blue Shield of Alabama v. Unity Outpatient Surgery Center*, 490 F.3d 718, 725 (9th Cir. 2007). "Where, as here, a district court does not explain its reasoning, [the court] must remand to that court to reconsider its decision and to set forth its reasons for whatever decision it reaches, so that [the court] can properly exercise [its] powers of

review." *Id.*; *see also Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 752 (7th Cir. 1988) (same).

If the Court holds that Frank does not meet the standard for intervention as of right under Rule 24(a), it will be necessary to remand with an order to the district court to determine whether to allow permissive intervention and to give reasons for its decision.

III. Notwithstanding plaintiffs' dismissals without prejudice, the district court has authority to consider whether to order sanctions and other relief.

When plaintiffs dismissed their individual actions without prejudice by stipulated order, they also simultaneously retained jurisdiction "for purposes of any potential further proceedings related to the adjudication of any claim by Plaintiffs in the Akorn Section 14 Actions for attorneys' fees and/or expenses." No. 17-cv-5016, Dkts. 54, 55. "Akorn Section 14 Actions" was defined to include the two cases brought by appellants House and Pullos. No. 17-cv-5016, Dkt. 54 at 4. Ensuring the district court retained jurisdiction over attorneys' fees was critical to plaintiffs' ability to execute their racket. It allowed them to threaten a contested motion for fees and thereby impose costs on Akorn if it did not agree to pay attorneys' fees. Had the district court dismissed their action "out of hand," as *Walgreen* suggests is most appropriate, plaintiffs would have lost this leverage. 832 F.3d at 724; *cf. Parshall v. Stonegate Mortgage Corp.*, No. 17-cv-00711, 2017 WL 35530851, 2017 U.S. Dist. LEXIS 129977 (S.D. Ind. Aug. 11, 2017) (dismissing where plaintiffs tried to retain jurisdiction for mootness fees).

Having expressly retained jurisdiction and having profited $322,500 as a result, plaintiffs cannot now disclaim the court's authority to allow Frank to intervene or to order injunctive relief and/or sanctions relating to their fee racket. In the district court, plaintiffs relied on *Smith v. Potter*, 513 F.3d 781 (7th Cir. 2008), to argue that after dismissal pursuant to Rule 41(a), there is "no longer a case" and thus the court lacked authority to issue orders. Plaintiffs overlook a key distinction in this case. In *Potter*, the parties dismissed the case with prejudice, while here, they dismissed the underlying cases *without* prejudice, and they expressly retained the court's jurisdiction over proceedings related to attorneys' fees or expenses claimed by plaintiffs. 17-cv-5016, Dkt. 54. 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 (7th Cir. 2018). Moreover, this Court has suggested that even if the dismissal had been with prejudice, the district court may retain authority to protect class members and "ensure that no class sellout had occurred." *Id.* at 986.

IV. Putative class members should be entitled to intervene to challenge "mootness fee" awards.

This appeal, and its prior related *Berg* appeals No. 18-2220, et al., bring before this Court a legal question of first impression—how, procedurally, putative class members should challenge "mootness fees." If the Court remands with an order to allow Frank to intervene, the panel should further guide the district court with respect to the claims Frank raises in this proposed complaint.

Plaintiffs' circumvention of this Court's precedent in *Walgreen* and its pursuit of this "mootness fee" racket is a perversion of the class action device. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (citing *Young v. Higbee Co.*, 324 U.S. 204 (1945)). This Court has repeatedly criticized misuse of the class-action or shareholder-derivative device for "selfish" purposes, especially in the shareholder context, going so far as to hold that district courts should throw out such suits rather than allow attorneys to impose social costs and hurt the class members they putatively represent. *E.g.*, *Crowley*, 687 F.3d at 320; *see also In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (self-dealing suits imposing only social costs should not be certified under Rule 23(a)(4)).

The appropriate remedy when a shareholder suit will make shareholders worse off is to dismiss the case. *Crowley*, 687 F.3d at 320; *Walgreen*, 832 F.3d at 724. In *Crowley*, this Court struck down a derivative action observing that "[t]he only goal of this suit appears to be fees for the plaintiffs' lawyers." 687 F.3d at 319. This Court noted that it was "odd" for plaintiffs to sue over the risk that alleged antitrust misconduct would lead to litigation against the corporation when the suit itself manifested that litigation; "self-appointed investors may be poor champions of corporate interests and thus injure fellow shareholders." *Id*. at 317, 318. Dismissal was appropriate in *Crowley* because it was "impossible to see how the investors could gain from it." 687 F.3d at 319. Likewise, plaintiffs should have avoided harming the class by promptly dismissing—or better yet, never bringing—their immaterial complaints.

Plaintiffs instead harmed the class. Each and every plaintiff requested an injunction prohibiting Akorn from completing the proposed transaction, which offered

a substantial premium over Akorn's market price. Upon Akorn's filing of immaterial supplemental disclosures, plaintiffs then dismissed their complaints as "moot" although many arguments were not addressed by the disclosures at all. *See* A128-29. Of course, this was neither the first nor the last time plaintiffs have extorted fees at the expense of class-member shareholders. Plaintiffs and their counsel have settled other strike suits for six-figure "mootness fees," without the safeguards of settlement approval under Rules 23 or 23.1. *See* Rickey; No. 17-cv-5016, Dkt. 83-1 at 10. Monteverde has also filed suits against other merging companies where Ted is a shareholder. *Id.* at 8. The question is how do putative-class-member shareholders challenge this incessant, unethical practice?

In *Pearson v. Target Corp.*, after class-action settlement and final judgment, a class member filed a motion to intervene and sought to disgorge "objector blackmail," *i.e.*, side settlements paid to objectors to dismiss their appeals. 893 F.3d at 982-83. The district court rejected the class member's Rule 60 request, but this Court reversed, finding that the class member was entitled to relief, "to ensure that no class sellout had occurred." *Id*. at 986. This Court held: "It is fine to say that individual parties must bear the responsibility for their deliberate litigation conduct and leave it at that. But class-action cases—with all their inherent agency problems—require an extra analytical step to ensure that the interests of the class are protected." *Id*. at 985. Similarly, putative class members like Frank should not be without a remedy to challenge plaintiffs' "mootness fee" scheme to protect their interests. Given the unabated harm to diversified shareholders, the district court should permit intervention to examine whether an

injunction would curtail abusive and extortionate fee demands going forward. *Cf. Support Sys. Intern., Inc. v. Mack*, 45 F.3d 185 (7th Cir. 1995).

Conclusion

The Court should reverse the district court's denial of intervention. Additionally, the Court should affirm that absent class members may move to intervene to challenge a "mootness fee" request and to prevent class counsel from flouting *Walgreen*, and that appropriately tailored injunctive relief is a prospective remedy. Any other result would fall short of *Walgreen*'s directive that meritless securities strike suits "must end."

Dated: October 18, 2019

Respectfully submitted,

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Certificate of Compliance
with Fed. R. App. 32(a)(7) and Circuit Rule 30(d)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Cir. R. 32(c) because excluding the parts of the document exempted by Fed. R. App. P. 32(f):

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3. All materials required by Cir. R. 30(a) & (b) are included in the appendix.

Executed on October 18, 2019.

/s/ M. Frank Bednarz
M. Frank Bednarz

Proof of Service

I hereby certify that on October 18, 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).

Executed on October 18, 2019.

/s/ M. Frank Bednarz

Required Short Appendix

Statement of Compliance
with Circuit Rule 30(d)

All materials required by Cir. R. 30(a) & (b) are included in the Appendix of Objector-Appellant Theodore H. Frank.

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filed July 14, 2017 (Docket 17-cv-5016, No. 54) A82

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Theodore H. Frank's Renewed Motion to Intervene,
With Attachment,
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1. Second Amended Proposed Complaint of
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Exhibit to Certain Plaintiffs' Brief in Support of the Mootness Fee Agreement
filed November 1, 2018 (Docket 17-cv-5018, No. 65):

C. Supplemental SEC Disclosure
dated July 10, 2017 (Docket 17-cv-5018, No. 65-3) A152

Attachment to Theodore H. Frank's Notice of Supplemental Authority
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Cain et al. *Mootness Fees*
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filed June 24, 2019 (Docket 17-cv-5018, No. 81) A209

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SHAUN A. HOUSE, individually and on behalf of all other similarly situated, Plaintiff,	No. 17 C 5018
ROBERT CARLYLE, Plaintiff,	No. 17 C 5022
DEMETRIOS PULLOS, individually and on behalf of all other similarly situated, Plaintiff,	No. 17 C 5026
v.	Judge Thomas M. Durkin
AKORN, INC.; JOHN N. KAPOOR; KENNETH S. ABRAMOWITZ; ADRIENNE L. GRAVES; RONALD M. JOHNSON; STEVEN J. MEYER; TERRY A. RAPPUHN; BRIAN TAMBI; ALAN WEINSTEIN, Defendants.	

MEMORANDUM OPINION AND ORDER

Six named plaintiffs each filed an action against Akorn, Inc. and members of Akorn's board of directors in order to force Akorn to make certain revisions to the proxy statement it filed with the U.S. Securities and Exchange Commission in connection with Frensenius Kabi AG's bid to acquire Akorn. Akorn made the changes to its proxy statement, which plaintiffs conceded mooted their claims, and led them to stipulate to dismissal without prejudice of all six cases pursuant to Federal Rule

of Civil Procedure 41(a)(1). Although five of the six cases were filed as class actions, the cases were voluntarily dismissed before any class was certified or any motion for class certification was filed.

In the one of the six cases originally assigned to this Court, the motion seeking entry of a stipulation of dismissal provided that the Court would "retain[] jurisdiction over all parties solely for the purposes of . . . any claim by any Plaintiff . . . for attorneys' fees and/or expenses." 17 C 5016, R. 54 at 1. Two months later, on September 15, 2017, the parties in that case filed another stipulation providing that the plaintiffs in all six cases had reached a settlement agreement with Defendant providing for $322,500 in attorneys' fees, and that "there being no reason for the Court to retain jurisdiction over this matter, the case should be closed for all purposes." 17 C 5016, R. 56 at 6.

Three days later, before the Court could take any action with respect to the September 15 proposed order, Theodore Frank, an owner of 1,000 Akorn shares, filed motions to intervene in all six cases for purposes of objecting to the attorneys' fee settlement.[1] Frank contends that the cases are part of a "racket," known as "strike suits," pursued "for the sole purpose of obtaining fees for the plaintiffs' counsel," 17 C 5016, R. 66-2 at 1, which are successful "because victim defendants [like Akorn] find it cheaper, and therefore rational, to pay nuisance value attorneys' fees rather than contest them," 17 C 5016, R. 79 at 1, and further delay the merger. Frank contends

[1] 17 C 5016, R. 57; 17 C 5017, R. 36; 17 C 5018, R. 35; 17 C 5021, R. 36; 17 C 5022, R. 26; 17 C 5026, R. 20.

that this is a "misuse of the class action device for private gain." 17 C 5016, R. 66-2 at 6. Frank's motion relies on the Seventh Circuit's decision in *In re Walgreen Co. Stockholder Litig.*, holding that analysis under Rule 23 of the fairness of a settlement of strike suit claims must consider whether the demanded changes to the proxy statement are "plainly material" such that the class derived a benefit supporting payment of attorneys' fees. 832 F.3d 718, 725 (7th Cir. 2016).

Frank also sought to consolidate all six cases before this Court. 17 C 5016, R. 67. The Court withheld ruling on that motion. 17 C 5016, R. 75. Proceedings on Frank's motions in the five other cases paused while this Court addressed Frank's motion to intervene in the case before it (17 C 5016) (following this district's custom that proceedings in the case with the lowest number take precedence when appropriate). The Court denied Frank's motion, finding that Frank had failed to identify an interest in the case upon which his intervention could be based. 17 C 5016, R. 81 (*Berg v. Akorn*, 2017 WL 5593349 (N.D. Ill. Nov. 21, 2017)). Because the Court was "concerned with [the plaintiff's] apparent success in evading the requirements of Rule 23," the Court invited Frank to file a motion to reconsider addressing the questions the Court raised in its opinion denying intervention. R. 81. Frank filed a renewed motion for intervention arguing that plaintiffs' counsel had breached their fiduciary duties to the putative class by abusing the class mechanism to "extort" attorneys' fees from Akorn, which were against the class members' interests as shareholders of Akorn. 17 C 5016, R. 83.

Whether in light of Frank's renewed motion, or possibly because the Akorn-Frensenius merger had failed and devolved into litigation, or for some other reason entirely, plaintiffs' counsel in three of the six cases disclaimed attorneys' fees and sought to withdraw their representations.[2] At subsequent status hearings, the Court explained that, rather than consolidate all six cases, the Court would recommend to the district's executive committee that the five other cases be reassigned to this Court. 17 C 5016, R. 97, R. 99. Anticipating reassignment, the Court ruled that Frank's motions to intervene in the three cases in which counsel had disclaimed fees were moot,[3] and that the Court's original denial of Frank's motion to intervene, and his motion for reconsideration, were deemed to be filed in all three of the remaining cases,[4] with continued briefing being filed in case 17 C 5018. Remaining counsel filed a joint brief in opposition to Frank's motion for reconsideration, 17 C 5018, R. 50, and Frank filed a reply, 17 C 5018, R. 51. The Court now turns to that motion.

As mentioned, Frank's primary argument for intervention is that he has stated a claim against plaintiffs' counsel for breach of fiduciary duty. It is true that counsel who file a case as class action have a fiduciary duty to the putative class even before it is certified. *See Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (the named plaintiff in a putative class action "has a fiduciary duty to its fellow class members. A representative can't throw away what could be a major component of the class's recovery."); *Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918,

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[2] 17 C 5016; 17 C 5017; 17 C 5021.

[3] 17 C 5016, R. 103; 17 C 5017, R. 55; 17 C 5021, R. 56.

[4] 17 C 5018, R. 47; 17 C 5022, R. 32; 17 C 5026, R. 27.

928 (9th Cir. 2014) ("[W]here the settlement agreement is negotiated prior to final class certification, [t]here is an even greater potential for a breach of fiduciary duty owed the class during settlement." (quoting *In re Bluetooth Headset Products Liability Litigation,* 654 F.3d 935, 946 (9th Cir. 2011))). But the authority setting forth such a duty indicates that it is limited to protecting class members' legal rights that form the basis of the claims at issue. *See Schick v. Berg*, 2004 WL 856298, at *6 (S.D.N.Y. Apr. 20, 2004) (holding that "pre-certification class counsel owe a fiduciary duty not to prejudice the interests that putative class members have in their class action litigation" because "class counsel acquires certain limited abilities to prejudice the substantive legal interests of putative class members even prior to class certification"); *see also* Nick Landsman-Roos, *Front-End Fiduciaries: Precertification Duties and Class Conflict*, 65 STAN. L. REV. 817, 849 (2013). In other words, class counsel have a duty not to act in a manner that prejudices class members' ability to secure relief for the alleged injuries at issue in the case.

Frank does not claim that plaintiffs' counsel caused any such prejudice. Rather, he alleges that the attorneys' fees paid to class counsel are a loss to Akorn and thereby harmed Akorn shareholders, including the class members. *See* 17 C 5018, R. 51 at 4 ("Settling Counsel breached their duty through their scheme to extract attorneys' fees through sham litigation diametrically opposed to the interests of class members they purported to represent."). Frank makes no allegation that plaintiffs' counsel prejudiced the class members' claims in any of the six cases. In fact, Frank's underlying rationale for seeking to intervene is that plaintiffs' claims are worthless,

which would mean that class members are not entitled to any recovery. It is difficult to see how worthless claims could ever be prejudiced.

Moreover, the injury Frank identifies is not to the class members *qua* class members. Rather, it is an injury to *Akorn* that the class members might realize through their shares of Akorn. But an injury to Akorn can only be pursued by class members through a derivative action, which is not the procedural posture of any of the six cases. And in any event, the fact that all the class members are Akorn shareholders does not mean that plaintiffs' counsel's fiduciary duty to the putative class extends to a duty to refrain from injuring Akorn. Indeed, plaintiffs' claims are designed to compel Akorn to act in a way it otherwise had not, thereby causing some form of expense and injury. Clearly, the class members' claims and Akorn's interests are not coextensive. As such, there is a break in the causal chain connecting the class members to Akorn that Frank relies upon to support his theory of intervention.

It is unsurprising that Frank must rely on injury to Akorn and cannot identify any prejudice to the class members since no class was ever certified and the claims were dismissed without prejudice. Without a certified class, Rule 23's mechanism for judicial review of class settlements is inapplicable. Judicial review under Rule 23 formerly applied to a settlement with a putative class pre-certification, but the Rule was revised in 2003 to limit judicial review to certified classes. Frank argues that plaintiffs' counsel's fiduciary duty to the putative class is a basis to disgorge the settlement fees. But the cases he cites in support of this argument either predate the relevant amendments to Rule 23, *see Culver v. City of Milwaukee*, 277 F.3d 908, 913

(7th Cir. 2002); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 776 (3d Cir. 1995), or address settlements that were binding on the class members despite the fact that no class had been certified, *see Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006); *Grok Lines, Inc. v. Paschall Truck Lines, Inc.*, 2015 WL 5544504, at *2 (N.D. Ill. Sept. 18, 2015)—in other words, at least some of the class members' claims or rights to relief had been released, establishing an equitable basis for them to demand a fair portion of the settlement. Neither circumstance is present here, so the Court will not permit Frank to intervene as a party.

However, the Seventh Circuit has clearly and repeatedly stated that attorneys' fees awards for disclosure suits like this are generally "no better than a racket" that "should be dismissed out of hand," unless the disclosures achieved are "plainly material." *Walgreen*, 832 F.3d at 724, 725; *In re Subway Footlong Sandwich Mktg. and Sales Prac. Litig.*, 869 F.3d 551, 557 (7th Cir. 2017); *see also Bushansky v. Remy Int'l, Inc.*, 262 F. Supp. 3d 742 (S.D. Ind. 2017) (rejecting settlement pursuant to *Walgreen* standard). These decisions came in the context of review of settlements under Rule 23, and as discussed, Rule 23 is inapplicable here. Nevertheless, the suggestion that such cases "should be dismissed out of hand" indicates that the Seventh Circuit believes that courts should not permit plaintiffs' counsel to file cases purely to exact attorneys' fees from corporate defendants under any circumstances. *See Pearson v. Target Corp.*, 893 F.3d 980, 982 (7th Cir. 2018) (counsel and parties should not be permitted to "leverage" the class mechanism "for a purely personal

gain"). Accordingly, the Court will exercise its inherent powers to police potential abuse of the judicial process—and abuse of the class mechanism in particular—and require plaintiffs' counsel to demonstrate that the disclosures for which they claim credit meet the *Walgreen* standard. *See Dale M., ex rel. Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 282 F.3d 984, 986 (7th Cir. 2002) ("[A]ll 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."). Failure to demonstrate compliance with *Walgreen's* "plainly material" standard will result in the Court ordering plaintiffs' counsel to disgorge the attorneys' fees back to Akorn.

Although the Court has denied Frank's motion to intervene, the Court invites him to continue to participate in this case as an amicus curiae, because the Defendants have abandoned the adverse perspective necessary for the Court to determine this issue. *See Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) ("[U]nfortunately American judges are accustomed to presiding over adversary proceedings. They expect the clash of the adversaries to generate the information that the judge needs to decide the case. And so when a judge is being urged by both adversaries to approve the class-action settlement that they've negotiated, he's at a disadvantage[.]").[5] In the prior briefing, plaintiffs' counsel made arguments as to why

[5] In *Walgreen*, Judge Posner suggested that in circumstances such as these the district court could appoint an independent expert pursuant to Federal Rule of Evidence 706. The Court makes no ruling as to the necessity of expert reports on the

certain disclosures met the *Walgreen* standard. Frank only briefly addressed these issues, as they were not immediately relevant to his motion to intervene. The Court requires further briefing to address this issue. Plaintiffs' counsel should file a brief of no more than fifteen pages in support of their position by November 1, 2018, including addressing the arguments Frank has already made that the disclosures are not plainly material. Frank may then file a brief of no more than fifteen pages in response by December 3, 2018. Defendants may also file a brief stating their position by November 1, 2018.

In sum, Frank's motion for reconsideration is denied in part and granted in part.[6] He is not granted leave to intervene as a party. But his motion is granted insofar as the Court will exercise its inherent authority to apply the standard set forth by the Seventh Circuit in *Walgreen* to the settlement at issue in this case, and Frank is granted leave to file a brief as an amicus curiae as described above. Frank should file a notice in case 17 C 5018 by October 1, 2018, stating whether he will accept the Court's invitation to participate as amicus curiae.

ENTERED:

Honorable Thomas M. Durkin
United States District Judge

Dated: September 25, 2018

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issue of materiality, and does not foreclose the issue at this time. Frank is simply invited to make legal argument in opposition to plaintiffs' counsel's positions.

[6] For purposes of the docket, this means that Frank's motions R. 35 in 17 C 5018, and R. 26 in 17 C 5022, are denied in part and granted in part.