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

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

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

Reply Brief of Appellant Theodore H. Frank

Theodore H. Frank
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street, NW Suite 300
Washington, D.C. 20006
(703) 203-3848
ted.frank@hlli.org

M. Frank Bednarz
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1145 E. Hyde Park Blvd. Unit 3A
Chicago, IL 60615
(801) 706-2690
frank.bednarz@hlli.org

Attorneys for Appellant Theodore H. Frank

Table of Contents

Table of Contents i

Table of Authorities iii

Summary of the Argument 1

Argument 3

I. The district court had jurisdiction to decide Frank's motion. 3

II. Frank has standing to intervene. 7

A. Frank has Article III standing to remedy the breach against him. 8

1. Frank states a breach-of-fiduciary-duty claim under Illinois law. 9

2. House's counsel's unjust enrichment constitutes a particularized and concrete injury-in-fact. 10

3. Frank's well-pleaded complaint remains entitled to a presumption of truth, and is in fact true. 12

4. The misappropriation of $322,500 constitutes a concrete injury particularized to the breach of fiduciary duty against Frank. 13

5. Disgorgement redresses breach of fiduciary duty, as would the injunction Frank seeks. 16

B. Frank has prudential standing. 17

III. House repeats the district court's legal error in denying Frank's motion to intervene as a matter of right. 18

A. Frank's protectible interest is direct, not derivative. 18

B. Disposition of the action may impair Frank's interest. 21

C. Existing parties are not adequate representatives. 23

D. Timeliness is not an issue. 23

IV. The district court failed to address permissive intervention. 24

Conclusion 25

Certificate of Compliance with Fed. R. App. 32(a)(7)(C) and Circuit Rule 30(d) 26
Proof of Service 27

Table of Authorities

Cases

Ashcroft v. Iqbal,
556 U.S. 662 (2009)....................1, 8

Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.,
637 F.3d 827 (7th Cir. 2011)....................20

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007)....................1, 8

Bond v. Ultreras,
585 F.3d 1061 (7th Cir. 2009)....................4-5

In re Brewer,
863 F.3d 861 (D.C. Cir. 2017)....................3-6

Chapman v. First Index, Inc.,
796 F.3d 783 (7th Cir. 2015)....................6

Chen v. Select Income REIT,
2019 U.S. Dist. LEXIS 177687 (S.D.N.Y. Oct. 11, 2019)....................13

City of Chicago v. FEMA,
660 F.3d 980 (7th Cir. 2011)....................22

Comeaux v. Seventy Seven Energy, Inc.,
2018 U.S. Dist. LEXIS 220373 (W.D. Okla. Feb. 26, 2018)....................13

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990)....................4

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980)....................6

Edmonson v. Lincoln Nat'l Life Ins.,
725 F.3d 406 (3d Cir. 2013)....................15-17

Fifth Third Bank of W. Ohio,
52 Fed. Cl. 202 (2002)....................21

Flying J, Inc. v. Van Hollen,
578 F.3d 569 (7th Cir. 2009) 22

Ford v. City of Huntsville,
242 F.3d 235 (5th Cir. 2001) 4

Francis v. Chamber of Commerce,
481 F.2d 192 (4th Cir. 1973) 22

Franchi v. Bay Bancorp, Inc.,
2018 U.S. Dist. LEXIS 225962 (D. Md. Oct. 25, 2018) 13

G & N Aircraft, Inc. v. Boehm,
743 N.E.2d 227 (Ind. 2001) 14

Gould v. Alleco, Inc.,
883 F.2d 281 (4th Cir. 1989) 19

Hendry v. Pelland,
73 F.3d 397 (D.C. Cir. 1996) 20

Hill v. State St. Corp.,
794 F.3d 227 (1st Cir. 2015) 15

Hofheimer v. McIntee,
179 F.2d 789 (7th Cir. 1950) 5

Horist v. Sudler & Co.,
941 F.3d 274 (7th Cir. 2019) 9

Illinois v. City of Chicago,
912 F.3d 979 (7th Cir. 2019) 23

Ligas v. Maram,
478 F.3d 771 (7th Cir. 2007) 23

Lopez-Aguilar v. Marion Cty. Sheriff's Dept.,
924 F.3d 375 (7th Cir. 2019) 4-5

Kauffman v. GE,
No. 14-CV-1358, 2017 U.S. Dist. LEXIS 92228 *8 (E.D. Wis. June 15, 2017) 16

Keith v. Daley,
764 F.2d 1265 (7th Cir. 1985) 19

Kendall v. Emps. Ret. Plan of Avon Prods.,
561 F.3d 112 (2d Cir. 2009) 15-16

Klene v. Napolitano,
697 F.3d 666 (7th Cir. 2012) 5

Knisley v. Network Assocs.,
312 F.3d 1123 (9th Cir. 2002) 15

Lantern Bus. Credit v. Allianza Trinity Dev. Group,
No. 1:16cv107, 2016 U.S. Dist. LEXIS 153462 (W.D.N.C. Oct. 8, 2016)....................19

Lee v. Verizon Commc'ns, Inc.,
837 F.3d 523 (5th Cir. 2016) 15

Leigh v. Engle,
727 F.2d 113 (7th Cir. 1984) 17

Lopez-Aguilar v. Marion Cty. Sheriff's Dept.,
924 F.3d 375 (7th Cir. 2019) 4

Martin v. Heinold Commodities,
163 Ill. 2d 33, 643 N.E.2d 734 (Ill. 1994) 9

Matthews v. Chi. Transit Auth.,
9 N.E.3d 1163, 381 Ill. Dec. 44 (Ill. App. 2014)....................9

McCarter v. Retirement Plan for the Dist. Managers of the Am. Family Ins. Group,
540 F.3d 649 (7th Cir. 2008) 16

Nocula v. UGS Corp.,
520 F.3d 719 (7th Cir. 2008) 18

Odle v. Flores,
899 F.3d 344 (5th Cir. 2017) 2-3

Old Blast, Inc. v. Operating Eng'rs Local 324 Pension Fund,
663 F. App'x 454 (6th Cir. 2016)....................14

Parshall v. Stonegate Mortgage Corp.,
2017 U.S. Dist. LEXIS 129977 (S.D. Ind. Aug. 11, 2017)....13

Pearson v. Target Corp.,
893 F.3d 980 (7th Cir. 2018) 4

Rigco, Inc. v. Rauscher Pierce Refsnes, Inc.,
110 F.R.D. 180 (N.D. Tex. 1986) 19

Robert F. Booth Trust v. Crowley,
687 F.3d 314 (7th Cir. 2012) 1, 2, 7, 20

Scanlan v. Eisenberg,
669 F.3d 838 (7th Cir. 2012) 1, 2, 7, 11-12, 15-17

Sec'y U.S Dep't of Labor v. Koresko,
726 F. App'x 127 (3d Cir. 2018) 15

Silverman v. Motorola Sols., Inc.,
739 F.3d 956 (7th Cir. 2013) 14-15

Sommers v. Bank of Am.,
835 F.3d 509 (5th Cir. 2016) 4

Southmark Corp. v. Cagan,
950 F.2d 416 (7th Cir. 1991) 22

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016).... 8-11, 14, 17

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998)....17

Twohy v. First Nat'l Bank of Chicago,
758 F.2d 1185 (7th Cir. 1985) 13-14

United Airlines, Inc. v. McDonald,
432 U.S. 385 (1977)....3

In re Walgreen Co. Stockholder Litig.,
832 F.3d 718 (7th Cir. 2016) 9, 12, 18, 25

Worlds v. Dep't of Health & Rehab. Servs.,
929 F.2d 591 (11th Cir. 1991) 22

Young v. Higbee Co.,
324 U.S. 204 (1945) 1, 8, 14, 19, 20, 25

Rules and Statutes

Fed. R. Civ. Proc. 11 21

Fed. R. Civ. Proc. 24 17

Fed. R. Civ. Proc. 24(a) 2, 19, 24

Fed. R. Civ. Proc. 24(a)(2) 20

Fed. R. Civ. Proc. 24(b) 24

Fed. R. Civ. Proc. 25(a) 5

Fed. R. Civ. Proc. 41 ....1, 3, 4, 6

Fed. R. Civ. Proc. 41(a) 3

U.S. Const., Art. III 1, 4, 8

Summary of the Argument

House's assertion that the district court did not have jurisdiction to rule on putative class member Theodore H. Frank's motion to intervene fails. Rule 41 dismissals do not have dispositive jurisdictional effect on motions to intervene, and moreover Frank's motion and proposed claims address attorneys' fees and attorney misconduct—issues solidly within the court's ancillary jurisdiction. The parties expressly acknowledged in the stipulation dismissing the claims between plaintiff and the defendants that the court retained jurisdiction over "any claim by any Plaintiff in the [six cases] for attorneys' fees and expenses." A84. House intended to leverage that jurisdiction to extract fees from Akorn, and cannot cry foul only now that the district court used its jurisdiction to deny House's counsel ill-gotten fees. *See* Section I.

House is also wrong that Frank lacks standing. Frank was harmed by the breach of fiduciary duty House and his counsel owed directly to Frank, and their resulting unjust enrichment. *Scanlan v. Eisenberg*, 669 F.3d 838, 846 (7th Cir. 2012). He was further harmed by Akorn's payment of fees from its corporate treasury. *Young v. Higbee Co.*, 324 U.S. 204 (1945); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 320 (7th Cir. 2012). These injuries are individually sufficient for Article III standing, and his pleadings, which are entitled to a presumption of truth, are sufficient under *Twombly* and *Iqbal*. Further, House's argument that Illinois law does not provide a cause of action for unjust enrichment is simply wrong when, as here, it is pleaded with a claim for breach of fiduciary duty. *See* Section II.

House's arguments against the merits of Frank's motion to intervene repeat the errors of the district court. First, Frank's claims simply are not derivative of Akorn's. He does not seek relief for damages to Akorn but to himself as a shareholder and putative class member. Circuit law holds that the harm Frank alleged is sufficient for intervention purposes. *Scanlan*, 669 F.3d at 846; *cf. also Crowley*, 687 F.3d 314. Second, this Circuit holds that the inconvenience and inefficiencies of requiring a proposed intervenor to start a new lawsuit are sufficient impairment under Rule 24(a) to permit intervention. Third, House's position that Akorn adequately represents Frank's interest makes no sense when Akorn paid plaintiffs and their counsel over $300,000 in fees when Frank is opposed to and harmed by such payment in the same way the shareholder in *Young v. Higbee Co.* was and had the right to rectify the breach of duty. Finally, House's timeliness argument rewrites history and demands Frank to attempt to intervene before he has incurred any harm that would allow him to do so or knows that his interests are not adequately represented. *See* Section III. House does not dispute that the district court did not address Frank's request for permissive intervention—a reversible error particularly because the court did not address the relevant factors even in other parts of its order. *See* Section IV.

Argument

I. The district court had jurisdiction to decide Frank's motion.

House incorrectly urges (PB15)[1] this court to adopt "the radical rule that intervention is *always* improper after dismissal." *Odle v. Flores*, 899 F.3d 344, 348 (5th Cir. 2017) (Graves, J., concurring in denial of rehearing *en banc*) (emphasis in original). This position ignores (1) the court's existing ancillary jurisdiction to rule on attorneys' fees and attorney misconduct, as well as stipulations plaintiffs filed to "belt-and-suspender" the district court's jurisdiction over fees, and (2) precedent holding that, following dismissal under Rule 41(a), a court retains authority to take "any action a court can take despite having dismissed a case as moot." *In re Brewer*, 863 F.3d 861 (D.C. Cir. 2017). Such action includes granting a motion to intervene by a class member of an uncertified settlement class after the named plaintiff settles his individual claims and walks away from the case. *See id.*; *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977) (allowing class member to intervene following named plaintiff's decision not to appeal denial of class certification) (cited by *Odle*, 899 F.3d at 346).

House's attack on the district court's jurisdiction focuses on the effect of a Rule 41 dismissal. But even if the parties' stipulation and proposed order may have removed the district court's authority to rule on the *merits* of the dispute *between the plaintiffs and defendants*, it had no such effect on the court's jurisdiction over motions to intervene (*Odle*), or other ancillary matters such as attorneys' fees, and misconduct—the subjects Frank sought to address through his intervention. *Cooter & Gell v. Hartmarx Corp.*, 496

[1] "PB" refers to plaintiff House's brief; "OB" refers to Frank's opening brief.

U.S. 384, 395 (1990). House admits that the district court "already ha[d] the power to entertain post-dismissal fee motions under the auspice of their ancillary jurisdiction." PB22 n.5 (citing *Cooter & Gell*, 496 U.S. at 395-96). The relief Frank requested in his proposed complaint in intervention was disgorgement of attorneys' fees, injunctive relief to prevent future extortion of attorneys' fees in meritless cases, and sanctions—putting his proposed complaint in intervention squarely within the court's jurisdiction.

Regardless of the breadth of Frank's claims, the district court had jurisdiction over the motion to intervene. "[C]aselaw does not forbid intervention as of right in a jurisdictionally procedurally proper suit that has been dismissed voluntarily." *Sommers v. Bank of Am.*, 835 F.3d 509, 513 n.5 (5th Cir. 2016); *see also Ford v. City of Huntsville*, 242 F.3d 235 (5th Cir. 2001) (allowing intervention as of right when motion for intervention was filed after entry of dismissal order).

This authority derives from the fact that "[a] stipulated dismissal, aside from its immediate effectiveness, is no different in jurisdictional effect from a dismissal by court order." *Brewer*, 863 F.3d at 869. "It follows that any action a court can take despite having dismissed as case as moot …, it can take following the entry of a stipulated dismissal." *Id.* It is "well established" that mootness alone does not strip a court of jurisdiction to hear a motion to intervene so long as the intervenor has Article III standing to proceed. *Id.* at 870.

House's cites of inapposite anecdotes are not authority that intervention is never permissible following a Rule 41 dismissal. In *Lopez-Aguilar v. Marion Cty. Sheriff's Dept.*, the court reversed denial of a motion to intervene filed after the court entered a stipulated final judgment and order for permanent injunction. 924 F.3d 375 (7th Cir.

2019). It follows that a motion to intervene similarly would be permissible post-Rule 41 dismissal. *Pearson v. Target Corp.* further supports that reading. 893 F.3d 980 (7th Cir. 2018). House's attempt to distinguish *Pearson* doesn't change the court's holding that parties' attempts to retain jurisdiction, as plaintiffs did here on the issue of fees, can provide jurisdiction for a class member's motion to intervene. *Bond v. Ultreras* held only that after a stipulated dismissal a court lacks the "inherent power" to modify a confidentiality order "sua sponte." 585 F.3d 1061, 1078 (7th Cir. 2009). Had the intervenor shown standing, the court suggested, the district court would have had jurisdiction to grant the motion to intervene to allow him to challenge the protective order. *See id.* at 1071 & 1078.

Hofheimer v. McIntee, cited by House, involved a dismissal under Rule 25(a), which sets a time limit for substitution after a notice of death. 179 F.2d 789 (7th Cir. 1950). The proposed *Hofheimer* intervention also did not involve issues such as attorneys' fees already within the court's ancillary jurisdiction. While *Hofheimer* broadly states that an existing suit is a "prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit," 179 F.2d at 792, the last seventy years of precedent discussed above demonstrates that courts do not take this dicta as literally as House argues.

More importantly, "the Supreme Court has repeatedly advised against giving jurisdictional significance to statutory provisions that do not clearly speak in jurisdictional terms." *Brewer*, 863 F.3d at 870 (internal quotation omitted); *accord Klene v. Napolitano*, 697 F.3d 666, 668 (7th Cir. 2012). But that is just what House argues for, even

as he fails to address the substantial authority that courts have jurisdiction to decide motions to intervene post-Rule 41 stipulated dismissals.

Many of the same policy concerns aimed at protecting absent putative class members that motivated *Walgreen* and *Pearson* apply in this context. In particular, "if a stipulated dismissal deprived the court of jurisdiction to hear a motion for intervention" filed by an absent class member whose goal is to protect the class, "then a class action defendant could simply 'buy off' the individual private claims of the named plaintiffs in order to defeat the class litigation." *Brewer*, 863 F.3d at 870; *accord Chapman v. First Index, Inc.*, 796 F.3d 783, 787 (7th Cir. 2015). Here, of course, the problem is the reverse: named plaintiffs and their attorneys settled their individual claims after using the class device as leverage to extract fees from Akorn. Either way, this judicial abuse has the same deleterious effect of "frustrat[ing] the objectives of class actions" and wasting judicial resources. *Cf. Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980).

Plaintiffs took additional steps to ensure everyone was aware of that the district court's ancillary authority. A stipulation filed in *Berg* expressly retained the court's jurisdiction for adjudicating attorneys' fees for plaintiffs in *all* six actions, including *House*. A79-A84. That the short *pro forma* minute entry granting House's motion to dismiss did not parrot the language in a stipulation the parties deemed effective upon filing is irrelevant. The district court's subsequent actions showed that it understood itself to have continuing authority over attorneys' fees in all of the actions. While the cases were not formally consolidated, the district court treated the issue of attorneys' fees as it applied to all six cases and even filed its disgorgement order on the *House* docket. Dkt. 81.

II. Frank has standing to intervene.

House's standing arguments depend on two false assumptions. First, House argues (PB30) that because the money came out of Akorn's treasury, Frank could not be harmed. Second, House argues (PB32) that plaintiffs could not have owed Frank a duty because even though he is in their class definition, he purchased Akorn shares too late to vote. Neither withstands scrutiny.

House ignores Frank's actual cause of action. Frank does not assert a derivative claim on behalf of Akorn, but instead a breach of the fiduciary duty that House owed *directly to Frank*. A breach of this duty and unjust enrichment constitutes an injury for the purpose of standing whether or not Frank ultimately suffers a financial harm himself. *Scanlan*, 669 F.3d at 846. In any event, draining Akorn's cash harms shareholders for the purpose of standing because the "move[ment of] money from the corporate treasury to the attorneys' coffers" comes at the expense of shareholders. *Crowley*, 687 F.3d at 320; *see also* Section II.A.

House also incorrectly argues that Frank is not a "legitimate Akorn shareholder[] with voting rights that Plaintiff sought to protect." PB36. In fact, House brought a putative class action on behalf of "public shareholders of Akorn," excluding only shareholders affiliated with Akorn itself and the board member defendants. A42. This broad definition was intentional. House purported to represent all non-Akorn-affiliated shareholders in arguing, for example, "that the Merger Consideration fails to adequately compensate Akorn shareholders." A44. Frank's membership in the class that House claimed to represent cannot be erased based on House's *post hoc* assertions of which class members they deem legitimate. The fact that Frank may not have brought

his own *disclosure* actions against Akorn (PB36) does not negate the duty that House owed Frank whether he properly or improperly included Frank in his complaint's proposed class.[2]

A. Frank has Article III standing to remedy the breach against him.

Most of House's arguments against Article III standing rely on disregarding Frank's pleadings, which spell out a breach of fiduciary duty to him—not any hypothetical tort against the corporation. PB30-31.

The breach of a common-law private right itself constitutes an injury after *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), and in any event the misappropriation of $322,500 is

[2] House complains repeatedly that Frank acquired his shares in order to object to a class-action settlement, which he labels, without any legal or public-policy basis, an "evil" practice (PB3-4) and "'pay-to-play' style misconduct." PB14. However, the only record evidence on the matter, Frank's declarations, say nothing of the sort. The motive impugned by House is inconsistent with Frank's gradual accumulation of 1000 shares, when 67 or 2 shares would have had the same effect. Dkt. 36-1 at 8. Frank further averred that he "devote[s] approximately 5-10% of [his] portfolio to arbitrage on pending mergers because it is a relatively safe way to exceed money-market returns." No. 17-cv-5016, Dkt. 98-1 at 2. House sanctionably quotes (PB14-15) a 2013 district-court order without noting it was vacated; and then quotes a 2002 case that has nothing to do with Frank while implying it made judicial findings against him. Frank has received no payment for being an objector, and has over a $30,000 paper loss from his purchase of Akorn shares, which he still holds, after the merger fell through. (Yes, as Frank belatedly realized, his investment strategy was based on a $20-bill-on-the-ground fallacy, and the market had a good reason for the substantial gap between the proposed merger price and the Akorn share price.) Frank did not object to the settlement or multi-million dollar fee request in the recently-settled securities litigation over Akorn shareholder losses. But the court need not reach any of these factual disputes introduced by House for the first time on appeal, because they are legally irrelevant. Frank's "petition sought relief for the benefit of all the stockholders. The rights of these stockholders are not to be ignored because of some motive attributable to [Frank]." *Young v. Higbee Co.*, 324 U.S. 204, 214 (1945).

not a mere technical breach of duty. *Spokeo* does not mean, as House contends, that fiduciaries can convert assets with impunity so long as beneficiaries do not have to pay out of pocket directly.

Second, the facts pleaded in Frank's intervenor complaint remain entitled to a presumption of truth, and are in any event perfectly plausible and manifestly true under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Third, breach of fiduciary duty is a cause of action under Illinois law. Moreover, the misappropriation of indisputably ascertainable funds is a concrete injury to Frank's rights.

Finally, the injury is redressable because disgorgement itself is the remedy for unjust enrichment—preventing House's counsel from profiting off of what this Court called a "racket." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016).

1. Frank states a breach-of-fiduciary-duty claim under Illinois law.

Even House's own authority agrees that Illinois law recognizes a claim for unjust enrichment when it is a part of a breach of fiduciary duty claim. Frank's complaint pleads such a breach.

Unlike *Horist v. Sudler & Co.*, 941 F.3d 274 (7th Cir. 2019), Frank pleaded facts that support a breach of fiduciary duty. Under Illinois law, a plaintiff must allege and prove: "(1) a fiduciary duty on the part of the defendant; (2) a breach of that duty; (3) damages; and (4) a proximate cause between the breach and the damages." *Matthews v. Chi. Transit Auth.*, 9 N.E.3d 1163, 1196, 381 Ill. Dec. 44, 77 (Ill. App. 2014). Equity does not require Frank to have suffered a direct out-of-pocket loss. "[I]t is gain to the agent from

the abuse of the relationship that triggers the right to recover, rather than loss to the principal." *Martin v. Heinold Commodities*, 163 Ill. 2d 33, 57, 643 N.E.2d 734, 745-46 (Ill. 1994). Frank pleaded that House and his counsel owed him a fiduciary duty, they breached the duty by executing what *Walgreen* called a "racket" against a corporation Frank owned in part, and a concrete and ascertainable $322,500 unjust enrichment resulted as a direct consequence of this breach. As discussed below, nothing more was required for standing or to state a claim.

2. House's counsel's unjust enrichment constitutes a particularized and concrete injury-in-fact.

Spokeo concerns bare *statutory* procedural violations of the Fair Credit Reporting Act. This case is far afield because there is both a concrete $322,500 unjust enrichment and an invasion of the *common-law* duty House and his counsel owed shareholders including Frank.

Spokeo vacated and remanded the Ninth Circuit's standing decision for failure to consider that an injury in fact must be both "particularized" and "concrete." 136 S. Ct. at 1544-45. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (internal quotations omitted). A "concrete injury" is "real" and not "abstract," and can be intangible. *Id.* at 1548-49. "In determining whether an intangible harm constitutes injury in fact … it is instructive . . . whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 1549.

Frank alleges a common-law claim, and the history of such claims confirms Frank has standing. A violation of a fiduciary duty is traditionally viewed as providing a sufficient basis for a lawsuit in English or American Courts. "Historically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more." *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring). "In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded." *Id.* (Take, for example, nominal damages for the most technical of trespasses. *Id.*) "Many traditional remedies for private-rights causes of action—such as for . . . **unjust enrichment**—a**re not contingent on a plaintiff's allegation of damages** beyond the violation of his private legal right." *Id.* (emphasis added). "[T]he concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights. Our contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement." *Id.* at 1552.

Spokeo therefore confirms this Court's decision in *Scanlan v. Eisenberg*. OB31. In *Scanlan*, this Court found constitutional standing for a plaintiff-beneficiary who alleged fiduciaries invaded her "protected interest in the prudent and loyal administration of the Trusts"—even though the beneficiary would unlikely ever exhaust the trust corpus and therefore unlikely ever suffer individual harm. 669 F.3d at 846 (citing authorities in the law of trusts). House's position—that only a direct, out-of-pocket loss can sustain standing—would compel a different result, that "a trustee could mismanage a trust

with impunity, substantially reducing the assets over time, so long as there were enough assets left in the corpus to fund a future distribution." *Id.* at 847.

House's tendentious reading of *Spokeo* is ironic given that he filed an action to vindicate the alleged abridgment of his Exchange Act voting rights for 67 shares of Akorn—one fifteenth of Frank's holdings—caused by alleged omissions of immaterial disclosures. Dkt. 1-1. House's counsel files suits incessantly against merging companies for bare and dubious statutory violations, but asserts Frank lacks standing to remedy their successfully executed, concrete, and clearly-defined cash ransom.

Frank does not merely contend "that a breach of duty, *alone*, is sufficient to satisfy the injury-in-fact requirement." PB8. Here there is a substantive injury and invasion of a private right: House and his counsel breached their fiduciary duty to shareholder class members including Frank and were unjustly enriched by a misappropriation of $322,500.

3. Frank's well-pleaded complaint remains entitled to a presumption of truth, and is in fact true.

The court cannot assume Frank's pleadings are "sham or frivolous allegations." *Contra* PB28. Frank's allegation that House's counsel engaged in what *Walgreen* called a "racket" is plausible and correct. House does not deny that his counsel filed 53 strike suits over just nine months of 2019; he does not cite any examples where preliminary injunctions were granted, instead repeatedly citing two courts that awarded a fraction of contested fee requests, and ignoring the courts that dismissed extortionist fee

requests out of hand.[3] House apparently counts victory as getting paid to go away, and he's very good at extracting these payments—just as Frank pleaded.

Frank's pleading that House's counsel was engaged in a *Walgreen* "racket" is not just plausible under *Twombly* and *Iqbal*, but undeniably true.

4. The misappropriation of $322,500 constitutes a concrete injury particularized to the breach of fiduciary duty against Frank.

Frank does not plead a cause of action based on "the psychological consequence presumably produced by observation of conduct with which one disagrees." PB8. Nor does the pleaded breach of fiduciary duty lack "resulting concrete injury." PB37. House and his counsel owed Frank a fiduciary duty but instead harmed his interests by extracting socially destructive rents from a corporation Frank owns in part. *E.g., Young v. Higbee Co.*; *Crowley*, 687 F.3d at 320.

While shareholders generally do not have an individual right of action against third persons for indirect damages resulting from an injury to the corporation, several "'often overlapping' exceptions to the general rule have been recognized." *Twohy v. First Nat'l Bank of Chicago*, 758 F.2d 1185, 1194 (7th Cir. 1985). For example, "where a special contractual duty exists between the wrongdoer and shareholder or where the shareholder suffers an injury separate and distinct from that suffered by other

---

[3] *Compare Comeaux v. Seventy Seven Energy, Inc*., 2018 U.S. Dist. LEXIS 220373 (W.D. Okla. Feb. 26, 2018) (awarding $128,354.50 of $380,000 fee request) and *Chen v. Select Income REIT*, 2019 U.S. Dist. LEXIS 177687 (S.D.N.Y. Oct. 11, 2019) (awarding $55,813.75 of $350,000 fee request); *with Franchi v. Bay Bancorp, Inc.*, 2018 U.S. Dist. LEXIS 225962, at *4 (D. Md. Oct. 25, 2018) (declining to grant motion for mootness fees because PSLRA precludes it) and *Parshall v. Stonegate Mortgage Corp.*, 2017 U.S. Dist. LEXIS 129977, at *3 (S.D. Ind. Aug. 11, 2017) (dismissing retention of jurisdiction "for the mere purpose of giving the plaintiff leverage in his attempt to negotiate the payment of an attorneys' fee").

shareholders." *Id*. *Young v. Higbee Co.*, which Frank relied upon and this Court has previously cited favorably, is another example of individual shareholders having rights against shareholders who improperly self-deal. (House never mentions *Higbee*.) So too here. House and his counsel had a special duty to Frank and the other non-defendant-director shareholders. *Spokeo* did not overrule *Higbee*, which is precisely on point with the scenario Frank alleges here.

Examining whether the shareholder or the corporation has the rights at issue can help delineate direct and derivative actions. A direct action is one "based upon a primary or personal right belonging to the plaintiff-stockholder . . . . It is derivative when the action is based upon a primary right of the corporation but which is asserted on its behalf by the stockholder because of the corporation's failure, deliberate or otherwise, to act upon the primary right." *G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 235 (Ind. 2001) (cleaned up). Under this rule, Frank's action is direct because the corporation does not have a breach of fiduciary duty claim.

Frank pleaded both a particularized breach of fiduciary duty to him and a concrete loss in the form of sapped funds from Akorn's treasury, which he partially owns. None of the cases House cites have both of these features. Frank does not seek to remedy an "injury to the corporation," but instead the breach of fiduciary duty that was owed directly to him. *Cf. Old Blast, Inc. v. Operating Eng'rs Local 324 Pension Fund*, 663 F. App'x 454, 457 (6th Cir. 2016) (cited at PB31).

House's cited authority to the contrary (PB30) is inaccurate and inapposite. Although House elsewhere criticizes Frank for citing class-action settlements, plaintiff relies only a trio of appeals by class-action objectors. Each opinion (*Silverman v. Motorola*

Sols., Inc., 739 F.3d 956, 957 (7th Cir. 2013); *Hill v. State St. Corp.*, 794 F.3d 227 (1st Cir. 2015); *Knisley v. Network Assocs.*, 312 F.3d 1123 (9th Cir. 2002)) dismissed the appeal of an objector who did not claim money from a common fund, but instead only opposed the fee request. Besides being inapposite, these cases are narrow; even in the context of class-action objections "a class member who doesn't participate in the fund distribution . . . might still have standing to appeal the *settlement*; an appellate court could arguably provide redress by vacating the settlement, rendering moot the failure to submit a claim." *Knisley*, 312 F.3d at 1126. Unlike this case, no fiduciary duty claim was at issue, and none of the money in the shareholder suits would remain with the corporation in any event, so each objector had no interest—not even a corporate-ownership interest—in the disposition of the attorneys' fees.

Nor is the misappropriation of $322,500 a mere technical breach. House quotes *Lee v. Verizon Commc'ns, Inc.*, that "mere allegation of fiduciary misconduct" is inadequate for standing, but omits the rest of the sentence: "divorced from any allegation of risk to defined-benefit-plan participants' actual benefits." 837 F.3d 523, 530 (5th Cir. 2016). The plaintiff in *Lee* alleged what could be charitably described as technical breach of fiduciary duty: "failing to disclose the annuity transaction's effect on payor responsibilities and participant enrollment in the Plan" when the subject of the nondisclosure "did not change the form or amount of benefits." *Id.* at 533. If the fiduciary had instead absconded with some of the plan's corpus, the result would be different. *See Scanlan*, 669 F.3d at 846; *Edmonson v. Lincoln Nat'l Life Ins.*, 725 F.3d 406, 417 (3d Cir. 2013); *Sec'y U.S Dep't of Labor v. Koresko*, 726 F. App'x 127, 134 n.4 (3d Cir. 2018) (reaffirming *Edmonson* in view of *Spokeo*). Similarly, the plaintiff in *Kendall v. Emps.*

Ret. Plan of Avon Prods. lacked standing to sue for hypothetical changes the plan might implement in the future. 561 F.3d 112, 121 (2d Cir. 2009). The *Kendall* court contrasted this situation with the one this Court confronted in *McCarter v. Retirement Plan for the District Managers of the American Family Insurance Group*, where "plaintiffs could point to an identifiable and quantifiable pool of assets to which they had colorable claims." *Id.* (citing *McCarter*, 540 F.3d 649, 650 (7th Cir. 2008)). Likewise, the plaintiffs in *Kauffman v. GE* failed to establish that their alleged breach of fiduciary duty harmed beneficiaries—not because the injury was derivative, but because nothing was lost by *anybody*. No. 14-CV-1358, 2017 U.S. Dist. LEXIS 92228, at *8 (E.D. Wis. June 15, 2017). If the *Kauffman* plaintiffs had instead pleaded that ERISA plan managers had *depleted* retirement funds by self-dealing, this would represent a particularized and concrete injury-in-fact, even if plan members could not show individual loss from the breach. *Scanlan*, 669 F.3d at 846.

Here, there was not just *risk* that House's counsel would take money from a company Frank partially owned, it actually happened.

5. Disgorgement redresses breach of fiduciary duty, as would the injunction Frank seeks.

House misunderstands the equitable nature of the disgorgement remedy, which perfectly redresses the injury caused by House's counsel's cynical breach. Disgorging the ill-gotten gains remedies the breach whether or not Frank suffered any loss personally.

> Generally, disgorgement claims for breach of fiduciary duty do not require that a plaintiff suffer a financial loss, as relief in a disgorgement claim "is measured by the defendant's profits." Restatement (Third) on Restitution and Unjust Enrichment § 51 cmt. a (2011); *see also id.* § 43 cmt. d (stating a claim based on a

> breach of the duty of loyalty may be brought "without regard to economic injury"); *id.* (providing examples where fiduciary is liable for gains even though plaintiff suffered no loss). This is because disgorgement claims seek not to compensate for a loss, but to "deprive[] wrongdoers of ill-gotten gains." *Commodity Futures Trading Comm'n v. Am. Metals Exchange Corp.*, 991 F.2d 71, 76 (3d Cir. 1993) (quotation omitted). *See S.E.C. v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993) ("[D]isgorgement is . . . an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs . . . ." (citations omitted)). A requirement of a net financial loss would allow fiduciaries to retain ill-gotten profit—exactly what disgorgement claims are designed to prevent—so long as the breaches of fiduciary duty do not harm the plan or beneficiaries.

Edmonson, 725 F.3d at 415; *accord Scanlan*, 669 F.3d at 846. "At this point in the analysis … plaintiffs are not required to show that the trust lost money as a result of the alleged breaches of fiduciary duties." *Leigh v. Engle*, 727 F.2d 113, 122 (7th Cir. 1984) (ERISA).

Steel Co. v. Citizens for a Better Environment does not say contrary. 523 U.S. 83 (1998). There, the defendant owed reporting responsibilities to the U.S. government and potentially owed fines to the U.S. Treasury. *Id.* at 106. A third party could not attempt to extract fines for the government, but Frank does not "attempt to vindicate the infringement of *public* rights." *Spokeo*, 136 S. Ct. at 1552 (Thomas, J. concurring). "Our contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement." *Id.*

B. Frank has prudential standing.

House admits that the requirements for prudential standing are "similar" to the Rule 24 requirement that a proposed intervenor have "an interest relating to the property or transaction at issue in the litigation. PB42 (quotations omitted), and, indeed, his arguments are nearly identical to those against intervention. Just as Frank notes

below, he is not suing "to enforce the rights of the corporation." *Contra* PB42 (quotations omitted). It is of no relevance to his appeal that a shareholder, or any third party, generally cannot sue for that purpose. *Nocula v. UGS Corp.*, cited by House, notes that the general rule that shareholders may not enforce the rights of a corporation obviously does not apply "when the shareholder has suffered a direct, personal injury not derivative of the corporation's, or a special contractual duty exists." 520 F.3d 719, 726 (7th Cir. 2008). The return of those funds, and an injunction preventing House and his counsel from continuing their *Walgreen*-condemned "racket," redresses those injuries to Frank. *See generally* Section III.A below.

III. House repeats the district court's legal error in denying Frank's motion to intervene as a matter of right.

The district court erroneously denied Frank's motion to intervene based only on two of the four requirements for intervention under Rule 24(a): a legally incorrect belief that (1) Frank's interest, and class counsel's duty was limited to preventing prejudice to his substantive claims, and (2) any injury caused by a breach of fiduciary duty was an injury only to Akorn. House now challenges all four intervention requirements. But for each, House misinterprets law and facts.

A. Frank's protectible interest is direct, not derivative.

Frank's opening brief pointed out that his interest cannot be derivative of Akorn's, and even House does not claim that his interest in remedying the breach of fiduciary duty can be asserted by Akorn. Instead, House anchors his argument to largely non-specific quotations that company stockholders' mere interest in "their

corporations litigation and treasury is insufficient" for intervention under Rule 24(a). PB45-46. But that is not the basis for Frank's complaint.[4]

House's cases are irrelevant to Frank's claims of breach of fiduciary duty to him. The underlying and far different concern in these cases is avoiding "any minority owner" from intervening "in a contractual dispute involving the corporation and a third party based on that economic interest as a minority owner." *See Lantern Bus. Credit v. Allianza Trinity Dev. Group*, No. 1:16cv107, 2016 U.S. Dist. LEXIS 153462, at *7 (W.D.N.C. Oct. 8, 2016) (cited at PB46). Frank cannot sue a fraudulent slip-and-fall plaintiff who extorted Akorn, but can sue, *à la Young v. Higbee Corp.*, a putative class representative who self-deals and breaches his fiduciary duty to fellow shareholders. In *Gould v. Alleco, Inc.*, the would-be intervenors were non-class members claiming a general interest in the defendant's assets because they sought a speculative recovery in an unrelated civil action. 883 F.2d 281, 285 (4th Cir. 1989). *Rigco, Inc. v. Rauscher Pierce Refsnes, Inc.* involved the anomalous situation in which the proposed shareholder-intervenors were co-debtors with the bankrupt corporation and sought to maximize the recovery in the action to cover the joint debt. 110 F.R.D. 180, 184 (N.D. Tex. 1986). None of these are relevant to Frank's claims of breach of fiduciary duty to *him*.

[4] House attempts to add a requirement to Rule 24(a) that an intervenor seeks to protect an interest "'based on a right that belongs to the proposed intervenor rather than to an existing party to the suit.'" PB45 (quoting *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985)). Such a requirement does not appear in Rule 24(a). And Frank alleges a breach of fiduciary duty to class members, not to Akorn.

House does not rebut Frank's argument that House's position precludes a remedy where trustees mismanage a trust and beneficiaries do not directly suffer financially. OB31.

Perhaps recognizing the impediment *Crowley* poses to their position, House tries to undermine *Crowley* by pointing to the derivative nature of the class action there, but they don't explain why that matters. PB48. House's suggestion that the Court applies a different intervention standard when a putative class member seeks to *appeal* a class attorney's abuse of the judicial process rather than to argue before the district court is unsupportable. In any event, the *Crowley* district court had rejected the settlement after denying intervention to an objecting shareholder, yet the Seventh Circuit ordered judgment entered for defendants. There is no merit to the argument that the *Crowley* allowed Frank to intervene solely to appeal because settlements are somehow jurisdictionally different, when there was no settlement approval to appeal. And House never mentions *Young v. Higbee Co.*

House also seeks to distinguish *Hendry v. Pelland*, 73 F.3d 397 (D.C. Cir. 1996) as involving "actual clients" rather than class members represented by attorneys who breached their fiduciary duty. PB47. The two state-court cases House relies upon (PB47 & n.12) do not override this Circuit's law that putative class counsel have a fiduciary duty to not harm class members' interests upon filing a complaint purporting to represent them. *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011).

Second, Frank's interest is related to "the subject of the action," Fed. R. Civ. P. 24(a)(2), and his pleaded claim certainly would not "inject collateral issues into a

dismissed action." *Contra* PB47-48. House's counsel's very *modus operandi* is to file strike suits in the wake of a merger announcement to extract fees. *E.g.*, OB12. When initially dismissing their merits claim, plaintiffs specifically asked the court to retain jurisdiction over attorneys' fees—the other side of their transactional lawsuit. A74; A79; A81. At the time Frank filed his initial motion to intervene, plaintiff Berg had filed a stipulation and proposed order just three days earlier in which he disclosed that Akorn had paid plaintiffs' counsel $322,500 in fees. A94. And after denying Frank's renewed motion to intervene, the district court determined that it had inherent authority to order the fees returned to Akorn if plaintiffs could not show that the disclosures met the *Walgreen* standard—and they could not. A8; A219. In short, the propriety of House's attorneys' fees, and their litigation tactics to get them, have long been part of the case.

This situation bears no resemblance to the authorities House cites. In *Trans Chemical*, the proposed intervenors' cause of action was against two (out of three) entities not before the court and involved "an issue much different from" those before the court. 332 F.3d at 823. In *Kheel*, the movant's only interest was in removing allegedly false allegations from a dismissed complaint via a Rule 11 motion to vindicate an "interest in a streamlined, abuse-free judicial system"—and not seeking to join the case. 972 F.2d at 486. And *Fifth Third Bank of W. Ohio*, denied intervention for a cause of action involving "entirely different" legal and factual questions. 52 Fed. Cl. 202 (2002).

B. Disposition of the action may impair Frank's interest.

House argues that the disposition of the action will not impair Frank's interest because he supposedly has the "remedy" of a derivative lawsuit for waste or a direct

action against plaintiffs' counsel. *See, e.g.*, PB50, PB51. But the Seventh Circuit rejects the draconian interpretation that intervention is barred any time a would-be intervenor "might have an opportunity in the future to litigate his claim." *City of Chicago v. FEMA*, 660 F.3d 980, 985 (7th Cir. 2011). To make a proposed intervenor "start over" could "impose substantial inconvenience … with no offsetting gain." *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 573 (7th Cir. 2009); *see also id.* ("inconvenience is an 'impediment' that can be removed, without prejudice to its opponent, by allowing intervention"). In *Flying J*, an association sought to intervene to appeal. This was a self-contained, post-merits proceeding, much like Frank's claims regarding House's fee gambit. The district court already is familiar with the facts of the case and has ruled on the impropriety of attorneys' fees. It would be both inefficient and difficult for Frank to start a new action.

The only in-Circuit case House cites is inapposite because it involved a petitioner who "only ha[d] a potential unliquidated tort claim" and had already filed her own lawsuit. *Southmark Corp. v. Cagan*, 950 F.2d 416, 418-19 (7th Cir. 1991). House's out-of-circuit cites are similarly unavailing. *See, e.g.*, *Worlds v. Dep't of Health & Rehab. Servs.*, 929 F.2d 591 (11th Cir. 1991) (proposed intervenors would be *better off* filing an individual action); *Francis v. Chamber of Commerce*, 481 F.2d 192, 196 (4th Cir. 1973) (court "fail[ed] to see how [proposed intervenor] might be impaired or impeded … in some future litigation").

C. Existing parties are not adequate representatives.

House admits (PB51) that he and his counsel had interests that "were never aligned" with Frank.[5] His argument that Frank is represented by Akorn ignores the undisputed facts: Akorn and its directors chose to acquiesce to plaintiff's fee demand, an action that is directly at odds with Frank's interest in preventing such payments generally and protecting him from House's breach of fiduciary duty. This divergence in interests is sufficient to meet the "minimal" burden of showing only that the representation "may be" inadequate. *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007).

D. Timeliness is not an issue.

House's timeliness argument depends entirely on the belief that Frank should have anticipated that he and his counsel would breach their fiduciary duty and extract substantial attorneys' fees in exchange for useless "supplemental disclosures" to shareholders, thus unjustly enriching themselves at the expense of shareholder class members. The law does not require proposed intervenors to have such clairvoyance.

The unsuccessful intervenor in *Illinois v. City of Chicago* sat on its rights for nearly a year even as the case was stayed and it was monitoring negotiations for a consent decree that it would oppose because of the effect on its collective bargaining rights. 912 F.3d 979, 982 (7th Cir. 2019). Here, House's counsel purported to act on behalf of the interests of Frank and all other shareholder-class members. Had Frank attempted to intervene earlier in the case, the parties would have claimed that intervention was

[5] It is irrelevant that House and Frank disagree on the reason that plaintiffs failed to adequately represent his interests.

premature. It wasn't until the breach of fiduciary duty and extraction of fees, and until Akorn demonstrated that it would not fight against House's abusive litigation tactics, that Frank had claims against House or had an interest sufficient to intervene. Frank then moved to intervene a mere three days later. Dkt. 35. House cites no authority in which a three-day "delay" is untimely, and demonstrates no prejudice from the delay.

IV. The district court failed to address permissive intervention.

House concedes that the district court failed to address permissive intervention directly. He argues instead that the district court's Rule 24(a) analysis should be interpreted as also applying as Rule 24(b) analysis, despite no indication of such intent from the court. *See* PB56. Unlike in *Ligas*, the district court did not analyze at length factors relevant to whether Frank's claims and the original action share common issues of law or fact and whether it had independent jurisdiction. Instead, it focused on an issue not relevant to permissive intervention: whether Frank had a sufficient interest in the action. Thus, in contrast to *Ligas*, this is not a case in which the court simply did not "explicitly break out its reasoning"; instead, the court provided no reasoning on the factors relevant to Rule 24(b) intervention.

House's substantive arguments against permissive intervention (PB56-57) mirror their arguments against intervention as of right. Despite acknowledging that prejudice to other parties is relevant to whether permissive intervention is appropriate, they do not claim any unfair prejudice. PB55. As detailed above and in Frank's opening brief, the district court erred in denying permissive intervention.

Conclusion

The district court's denial of intervention should be reversed. Frank has standing, and absent class members may move to intervene to challenge, *Young v. Higbee*-style, a "mootness fee" request and to prevent class counsel from flouting *Walgreen*.

Dated: January 21, 2020

Respectfully submitted,

/s/ Theodore H. Frank
Theodore H. Frank
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street, NW Suite 300
Washington, D.C. 20006
(703) 203-3848
Email: ted.frank@hlli.org

M. Frank Bednarz
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1145 E. Hyde Park Blvd. Unit 3A
Chicago, IL 60615
(801) 706-2690
Email: frank.bednarz@hlli.org
Attorneys for Appellant Theodore H. Frank

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

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, Type Style Requirements, and Appendix Requirements:

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

this document contains 6,987 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 12-point Palatino font.

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

Executed on January 21, 2020.

/s/ Theodore H. Frank

Proof of Service

I hereby certify that on January 21, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, thereby effecting service on counsel of record who are registered for electronic filing under Cir. R. 25(a).

/s/ Theodore H. Frank