UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHAUN HOUSE, On Behalf of Himself and All Others Similarly Situated, Plaintiff, v. AKORN, INC., JOHN N. KAPOOR, KENNETH S. ABRAMOWITZ, ADRIENNE L. GRAVES, RONALD M. JOHNSON, STEVEN J. MEYER, TERRY A. RAPPUHN, BRIAN TAMBI, and ALAN WEINSTEIN, Defendants.	1:17-cv-05018 Considered with:[1] 1:17-cv-05022 1:17-cv-05026 CLASS ACTION Hon. Thomas M. Durkin

THEODORE H. FRANK'S REPLY MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION TO INTERVENE

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[1] Filings made in the *House* action apply for the other two actions. *See* Minute Order, No. 17-cv-5018, Dkt. 47.

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INTRODUCTION

Certain Plaintiffs' Opposition to Frank's Renewed Motion to Intervene ("New Opp.," No. 17-cv-5018, Dkt. 50) rehashes the same themes from Plaintiff Berg's first three oppositions.[2] Unlike the prior oppositions, this new opposition spans 30 pages with an additional 18-page expert report offering legal conclusions contrary to recent district court decisions which the plaintiffs neither cite nor distinguish. Most of the issues raised in this opposition have been addressed by Frank's prior Reply Memorandum ("Prior Reply," Dkt. 88), and these points briefly bear repeating. Once again, Frank does not plead a derivative claim on behalf of Akorn, but a direct claim against Settling Counsel, who purported to represent him.[3] *See* Prior Reply at 1. Frank plausibly pleads that Settling Counsel breached their duty to him, and that this breach may be equitably remedied. *Id.* at 3.

Plaintiffs attempt to breathe new life into their fourth-fried argument by arguing that particular tactics Settling Counsel used—filing and dismissing complaints—could not constitute any breach of fiduciary duty. New Opp. 10-13. These arguments entirely miss the mark. Frank does not argue that Settling Counsel somehow breached their fiduciary duty by failing to notice class members or for merely filing suit against Akorn. As Frank pleaded, Settling Counsel's actions harmed and continue to harm Frank through their sham litigation used to extract personal benefits, which violated their fiduciary duty to him. *See* Proposed Complaint, Dkt. 82-1 at 19-21.

Plaintiffs now deny that class counsel owes absent class members a fiduciary duty, arguing that the 2003 Amendments to Rule 23 somehow swept this away. New Opp. at 10-11. However, the plain text of the changes and the Rules Committee Notes suggest no such departure. As discussed herein,

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[2] While the prior oppositions were formally on behalf of plaintiff Berg whose counsel has since disclaimed any entitlement to attorneys' fees, the first of these oppositions was "reviewed and approved" by other plaintiffs' counsel, including the non-disclaiming counsel. Dkt. 78 at 1 n.1. Unless otherwise noted, references to "Dkt." refer to *Berg v. Akorn, Inc.*, No. 17-cv-5016, where most relevant documents have been filed to date.

[3] "Settling Counsel" and other capitalized terms have the same meaning as defined in Frank's Memorandum of Law in Support of Renewed Motion to Intervene, Dkt. 83 ("Memo.") and his Second Amended Proposed Complaint, Dkt. 82-1 ("Proposed Complaint").

subsequent case law confirms that counsel continues to owe fiduciary responsibility to classes they seek to represent. The Court should find, as Plaintiff Berg freely admitted: "Plaintiffs' Counsel does not dispute that they owe fiduciary duties to the putative class." Dkt. 84, at 9.

Plaintiffs also argue that Frank does not state a valid unjust enrichment claim because allegedly only the source of the unjust enrichment (Akorn) could pursue this claim. New Opp. 25-26. But here again, Frank pleads unjust enrichment based on the fiduciary duty owed to him—not to the corporation. The law of Illinois and Delaware confirms that such claim may be brought on behalf of individual shareholders. *See* Section I.E, *infra*.

As before, plaintiffs' arguments about the *merits* of Frank's proposed complaint provide no reason for the Court to deny intervention. Prior Reply at 6. Even if such arguments were appropriate, plaintiffs' argument that the disclosures meet the "plainly material" *Walgreen* standard, New Opp. at 17-18, remains incorrect on the law. Prior Reply at 7-12; Section I.D *infra*. The plaintiffs' factual assertions are particularly implausible. Despite the nearly 50 pages of new argument, plaintiffs offer no evidence to support their dubious claim to have shaped the voluminous Proxy Statement filed June 15, 2017. Plaintiffs and their legal expert also devote considerable space to the claim that Akorn's supplemental GAAP reconciliation could be material. New Opp. 20-21; Affidavit of M. Travis Keath ("Kath Aff.," No. 17-cv-5018, Dkt. 50-1). Yet neither plaintiffs nor their expert cite or discuss two recent decisions, cited in Frank's Prior Reply, which reach the opposite conclusion. *See Bushansky v. Remy Intl., Inc.*, 262 F.Supp.3d 742, 746 (S.D. Ind. 2017); *Assad v. DigitalGlobe, Inc. at al.*, Nos. 17-cv-1097, -1140, -1159, -1190, -1570, 2017 WL 3129700, *6 (D. Colo. Jul. 21, 2017); Prior Reply at 10-11.

Finally, plaintiffs depart from Plaintiff Berg's opposition by including lengthy *ad hominems* toward Intervenor Frank, who they characterize as working for a "Libertarian political action organization," with an "overarching political agenda" and as having "been met with little enthusiasm by the courts." Opp. 4 n.5, 9. Such attacks have no bearing on Frank's right to intervene in these actions, and they are particularly off-base given the parties' extensive citations to *Walgreen*—a case where Frank, representing a shareholder, successfully reversed approval of a settlement that diverted money from shareholders to strike-suit filers like Settling Counsel. *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016). That said, if the Court is interested in Frank's record of successfully objecting to unfair class action settlements—or the record of the Center for Class Action Fairness, which is part of a 501(c)(3) non-profit, not a "political action organization"—these facts are addressed in the accompanying Declaration of Theodore H. Frank ("Frank Decl.").

Frank's motion to intervene should be allowed.

I. Frank is entitled to intervene under Rule 24.

Frank is entitled to intervention as of right under Rule 24(a)(2) because he filed a timely motion demonstrating a pecuniary interest that will be forfeited (based on breach of Settling Counsel's fiduciary duty), and no other party adequately represents Frank's interest. *See Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 945-46 (7th Cir. 2000). Plaintiffs now argue that Settling Counsel owed no fiduciary duty to class members (New Opp. at 9) or alternatively that neither voluntary dismissal of their complaints (*Id.* at 10-12) nor the filing of their complaints (*Id.* at 13) could constitute breach of their fiduciary duties, but this badly misinterprets Frank's proposed complaint. Contrary to plaintiffs' argument (*Id.* at 3), no paradox exists in Frank's complaint. Plaintiffs did not breach their duty to Frank by bringing a meritorious suit which they inappropriately sold out. Instead, Settling Counsel instead harmed Frank through their premeditated strike suit scheme, whereby they file suit on behalf of a putative class, only to then harm that class by extracting money in exchange for worthless disclosures from the merging company. Proposed Complaint at 19.

Moreover, contrary to plaintiffs, the 2003 amendments to Rule 23 did not abrogate a class counsel's fiduciary duty on behalf of a class they seek to represent. Frank has plausibly pleaded that Settling Counsel breach this duty, and this is sufficient to sustain Frank's motion. At this stage, disputes of fact are resolve in favor of the intervenor—Frank. The Court "must accept as true the non-conclusory allegations of the motion." *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) (reversing and remanding with instructions to permit intervention).

A. Even prior to certification, class counsel owe a fiduciary duty to class members they seek to represent.

Plaintiffs argue that the 2003 amendments to Rule 23 excuse them from any duty to the class that they purport to represent. New Opp. at 10-11. This is simply false. Plaintiffs appear to willfully misread Frank's complaint on this point. He does not claim that the Settling Counsel somehow lacked the authority to dismiss individual claims. Nor does Frank argue that settlement *per se* breached Settling Counsel's fiduciary duty to the class. Instead, 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.

While the 2003 amendments removed the requirement that absent class members be noticed of dismissal prior to certification, the amendments did not alter the duty the counsel owes to class members he or she seeks to 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. . . . 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." Advisory Committee Notes on 2003 Amendments to Rule 23. The amendments allow plaintiffs the right to dismiss their individual claims without prior court approval, but neither the Committee Notes nor the Amendments themselves suggest that the revised rules abrogate precedent finding that class counsel has a duty to the putative class they seek to represent. *See* Frank's Memorandum of Law in Support of Renewed Motion to Intervene, Dkt. 83 ("Memo.") at 5 (citing *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 777 (3d Cir. 1995) and *Culver v. City of Milwaukee*, 277 F.3d 908, 911, 913-14 (7th Cir. 2002) (collecting cases finding a fiduciary duty)).

Subsequent case law shows that class counsel retains obligations to putative class members they seek to represent. Contrary to plaintiffs' assertion, *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 831 (7th Cir. 2011) did not merely deal "with the irrelevant standard to evaluate the amount in controversy under CAFA." New Opp. at 11 n.9. The opinion is unambiguous on this point:

"Back Doctors has a fiduciary duty to its fellow class members." *Back Doctors*, 637 F.3d at 830. The breach of fiduciary duty compelled the panel to vacate an order remanding the case to state court at the named plaintiff's request. *Id.* The fiduciary duty to absent class members also forbids "leverag[ing]" "the class device" for the representatives' own benefit. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006). The fiduciary duty existed in *Back Doctors* even though the case was pre-certification and even though post-2003 plaintiffs no longer require permission to dismiss their complaints under the rules. *See generally* 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….")

Unsurprisingly, Plaintiff Berg forthrightly admitted what the remaining plaintiffs now attempt to deny: "Plaintiffs' Counsel does not dispute that they owe fiduciary duties to the putative class." Dkt. 84, at 9.[4]

B. Plaintiff Carlyle likewise owed a duty to fellow shareholders, which was breached by his sham litigation.

Plaintiffs argue that Frank's proposed complaint fails because one of the three remaining plaintiffs, Plaintiff Carlyle, did not file a putative class complaint. New Opp. 9. Not so. In the first place, plaintiffs' argument does nothing to refute that both of the other remaining plaintiffs *did* have a fiduciary duty to the class because they sought to represent all shareholders. *See* No. 17-cv-5018, Dkt. 1 and No. 17-cv-5026, Dkt. 1.

Moreover, shareholders do incur equitable obligations to each other when they undertake litigation positioned to benefit all shareholders. *See Young v. Higbee*, 324 U.S. 204 (1945). As Frank previously explained (Memo. at 11), *Higbee* arose when two individual shareholders, Potts and Boag, objected to the confirmation of a bankruptcy plan which allegedly unfairly treated preferred

[4] Plaintiffs also argue against a strawman; Frank does not contend an attorney-client relationship ever existed with Settling Counsel, and he has not pleaded such a relationship. *Contra* Opp. 10. Rebuttals against imaginary arguments do not disprove the existence of Settling Counsel's fiduciary duty to class members they purported to represent.

shareholders like them. *Id.* at 206. The shareholders' arguments were rejected by the district court and they appealed, but Potts and Boag "sold" (i.e., settled) their claims rather than prosecute the appeal. *Id.* at 207. Like the remaining plaintiffs here, Potts and Boag argued that they had an absolute right to settle their claims for private gain. *Id.* Like Plaintiff Carlyle, they further argued that they "had not acted as representatives of a class," so there was no justification for disgorging their settlement. *Id.* at 208. The Supreme Court reversed and required equitable disgorgement because though "Potts and Boag did not expressly specify that they appealed in the interest of the whole class of preferred stockholders" the basis of that appeal "was that every other preferred stockholder, as well as themselves, would be injured by confirmation." *Id.*

Plaintiff Carlyle, though he did not *expressly* purport to represent other shareholders, settled his claim much like the shareholders Potts and Boag. His complaint alleged that Akorn's Preliminary and non-preliminary Proxy Statements were "false and misleading" in violation of the Exchange Act and relevant rules. No. 17-cv-5022, Dkt. 1 at 4.[5] None of Plaintiff Carlyle's pleadings suggested that he was idiosyncratically harmed or uniquely capable of perceiving the alleged false and misleading proxy statements. *Id.* Thus, Plaintiff Carlyle purported to sue on grounds generally applicable to all class members including to enjoin the merger until Akorn "adopts and implements a procedure or process to obtain the best available terms for *shareholders*." No. 17-cv-5022, Dkt. 1 at 19 (emphasis added). Yet Carlyle sold out his claim for the opportunity of private gain in the form of attorneys' fees. Such conduct is inequitable to other class members, who have "inseparable" rights to adequate disclosure, as Frank pleaded. Proposed Complaint at 22. Though Plaintiff Carlyle did not expressly claim to represent the class "[e]quity looks to the substance and not merely the form." *Higbee*, 324 U.S. at 209.

By virtue of filing his complaint in purported support of fellow shareholder interests, Plaintiff Carlyle "at the very least [] owed them an obligation to act in good faith." *Id.* at 210. Frank's Proposed

[5] Similar allegations are contained in Plaintiff Carlyle's first complaint originally filed in this district at No. 17-cv-4455, but for convenience we cite only the second complaint originally filed in the Middle District of Louisiana, which is presently before this Court.

Complaint plausibly pleads that Settling Counsel brought and selfishly settled sham litigation, and such conduct fails to comport with Plaintiff Carlyle's duty of good faith. Proposed Complaint at 19-20. [6]

C. Dismissals that make putative class members like Frank worse off *do* breach counsel's fiduciary duty.

Plaintiffs also argue that voluntary dismissal of their claims without waiver cannot constitute a breach of fiduciary duty (New Opp. at 12), but this misconstrues Frank's Proposed Complaint.

Plaintiffs oddly assert that "[a] decision to avail oneself of a statutory right under federal law cannot be a breach of fiduciary duty" (*Id.* at 13) but this is trivially false. In the first place, plaintiffs identify no federal statutory basis for extracting mootness fees, which are a creature of Delaware Chancery procedure unique to Delaware corporation law and inapplicable to federal Exchange Act claims involving a Louisiana corporation in this forum. *See* Section I.D, *infra*. Even interpreting plaintiffs' argument narrowly—that they have an absolute right to dismiss without court approval—this is not actually the behavior Frank complains about. Instead, Settling Counsel harmed Frank by engaging in sham litigation and extracting fees against Frank's pecuniary interest and in direct contravention of the duty putative class counsel owed him.[7] Frank does not incoherently allege prejudice because meritless claims against Akorn were waived. *Contra* Opp. 12.

Frank has provided numerous examples of fiduciary duties being breached by means other than waiver. *See* Prior Reply at 3. Plaintiffs' efforts to distinguish these cases fall flat because each

[6] To the extent Frank's Proposed Complaint does not make clear that Plaintiff Carlyle breached his duty of good faith, Frank should be permitted to file an amended complaint expressly pleading the appropriate legal standard with respect to Plaintiff Carlyle. Alternatively, the action against Plaintiff Carlyle may be sustained based on the Court's inherent authority to prevent misconduct before it. Memo. 14-15. Neither Plaintiff Berg nor the remaining plaintiffs argued against this basis for the Court exercising jurisdiction over the Renewed Proposed Complaint. Settling Counsel appear to have only sought "worthless benefits" in meritless complaints that should have been "dismissed out of hand." *Walgreen*, 832 F.3d at 724.

[7] Even if Settling Counsel were exercising a federal statutory right and even if Frank pleaded that they had violated this right, it remains false that "[a] decision to avail oneself of a statutory right under federal law cannot be a breach of fiduciary duty." New Opp. at 13. One can easily imagine situations where a fiduciary recklessly exercises rights against the interests of his clients—mere procedural legality does not imply faithful execution of duties.

example supports finding a breach of fiduciary duty without waiver of absent class member claims. New Opp. at 12 n.10. While *Grok Lines, Inc. v. Paschall Truck Lines, Inc.*, No. 14 C 08033, 2015 WL 5544504 (N.D. Ill. Sept. 18, 2015) involved an offer of settlement, the settlement did *not* release claims of absent class members, yet the court found counsel inappropriately "abandoned pursuit of a monetary recovery for the class." *Id.* at *7. Plaintiffs cannot distinguish *Back Doctors*, except to disingenuously assert it concerned "the irrelevant standard to evaluate the amount in controversy under CAFA." New Opp. 11 n.9; discussed in Section I.A, *supra*. Finally, while *Stand. Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013) does indeed stand for the proposition that representatives cannot bind absent class members without certification (New Opp. 12 at n.10), Frank cites because it also states that a court can find a representative inadequate for failing his or her "fiduciary duty not to 'throw away what could be a major component of the class's recovery.'" *Id.* at 594 (parenthetically quoting *Back Doctors*, 637 F.3d at 830-31).

All of these authorities stand for the proposition that Settling Counsel may still breach their fiduciary duty even without waiving the claims of absent class members. Apart from not inflicting harm upon the principal, a fiduciary must not abandon its principal to extract a personal gain. That a fiduciary's breach "was unaccompanied by damage" is "no sufficient answer by a trustee forgetful of his duty." *Wendt v. Fischer*, 154 N.E. 303, 304 (N.Y. 1926) (Cardozo, J.). "Only by this uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion." *Id.*

Frank admits that no case directly addresses Settling Counsel's mootness fee racket, but that's because this tactic is relatively new. Prior to 2017, strike suits generally ended in settlement, but *Trulia* and *Walgreen* have made approval of worthless settlements much more difficult. Proposed Complaint at 3. Frank's arguments are new because they address Settling Counsel's new tactics to circumvent *Trulia* and *Walgreen*.

D. *Walgreen* did not import all idiosyncrasies of Delaware corporation law into Seventh Circuit controversies involving alleged Securities Act violations by a Louisiana corporation.

The parties agree that *Walgreen* adopted Delaware's "plainly material" standard for approving disclosure-only strike suit settlements. 832 F.3d at 725. But plaintiffs seem to think *Walgreen* also imports every other element of idiosyncratic Delaware corporation law and procedure into Federal Exchange Act litigation—including mootness fees, a shareholder's right to file collateral litigation concerning mootness fees before the Delaware Chancery, and the purported standards[8] for awarding mootness fees. New Opp. at 6-8; 15 n.12. A simple reading of *Walgreen* does not support this position.

Plaintiffs chose to file complaints under the Exchange Act in federal courts, and they should not be permitted to evade evaluation of their purported mootness fee award derived from the Exchange Act. Plaintiffs cannot whimsically choose to apply Delaware substantive and procedural law, much less can they pick and choose which sets of law to obey. For example, plaintiffs cannot file a federal Exchange Act claim and inconsistently argue that Frank's remedy lays in state court simply because the Seventh Circuit approved of a standard adopted in Delaware.

Thus, it does not matter whether *Trulia* mentioned the federal prohibition on catalyst fees. New Opp. at 15. The Exchange Act is federal law, and analogous federal statutes have been interpreted to prohibit catalyst fees. *See Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (repudiating theory that obtaining voluntary concessions after inception of case makes plaintiff "prevailing party"). The substitution of Delaware law and procedure makes no sense, particularly where Akorn is a Louisiana corporation.

1. PSLRA applies to all complaints filed under the Securities Act.

Plaintiffs do not dispute that this suit falls under the PSLRA which provides: "Total attorneys' fees and expenses awarded . . . shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 78u-4(a)(6). Plaintiffs insist that attorneys' fees are not limited by the PSLRA because the court "awarded" no benefit to the class! New

[8] As discussed *infra* Section I.D.2, plaintiffs err in their description of Delaware law.

Opp. 15 at n.12. The PSLRA makes no such exception. 15 U.S.C. § 78u-4(a)(6). A reasonable percentage of $0 paid to the class is $0.

Plaintiffs cite several cases where strike suit plaintiffs were in fact awarded attorneys' fees for disclosure-only settlements. New Opp. at 1. Of course, bad class action settlements have been approved: *Walgreen* itself could be added to this list (prior to its reversal before the Seventh Circuit). The fact that courts have granted such awards without considering their propriety under the PSLRA's fee provision does not imply they were proper. Instead, plaintiffs fail to address the case cited by Frank, *Mostaed v. Crawford* (Prior Reply at 13), where the issue was actually considered. *Mostaed* rejected a fee award because "under federal law, the plaintiffs must be denied attorneys' fees because the Private Securities Litigation Reform Act . . . prevent[s] the award of attorneys' fees except where counsel's efforts have led to monetary relief that is 'actually paid to the class' of claimants." *Mostaed v. Crawford*, No. 3:11-CV-00079-JAG, 2012 WL 3947978, at *7 (E.D. Va. Sept. 10, 2012) (denying fee award for disclosure settlement under Delaware law). The cases cited by plaintiffs simply do not condone fee awards in disclosure-only settlements in contravention of PSLRA § 78u-4(a)(6)'s prohibition.

Under federal law, no basis for mootness fees exists.

2. Even if Delaware law applied, mootness fee recipients must have lodged complaints that are meritorious when filed.

Even if Delaware procedure applied, plaintiffs misstate the standard for such an award. In addition to disclosure providing "some benefit," mootness fees are only available if the complaint was "meritorious when filed." *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1123 (Del Ch. Ct. 2011). It is insufficient that some allegedly beneficial disclosure was provided. Delaware courts require that mootness fees arise from a complaint meritorious when filed:

> The opinions in the above-cited cases have insisted that a settled or mooted action, in order to form the basis for an award to counsel, must have been meritorious when filed. At least one commentator has suggested that as long as there can be shown a causal connection between the suit and the benefit, e. g., the defendant took it seriously enough to want to settle or take mooting action, it should not matter whether the suit had legal merit. . . . **But this Court**

> **has been concerned with discouraging baseless litigation . . . and has adhered to the merit requirement.**

Allied Artists Pictures Corp. v. Baron, 413 A.2d 876, 879 (Del. 1980) (emphasis added).

To the extent that Frank has not sufficiently pleaded that the Supplemental Disclosures lack any benefit, he has certainly pleaded that plaintiffs complaints where not meritorious when filed.

> All six Plaintiffs implausibly claimed the supplemental disclosures rendered their pending complaints moot. In fact, the supplemental disclosures failed to cure numerous deficiencies Plaintiffs had pleaded, and none of the supplemental disclosures were material. Thus, none of the disclosures would justify mootness fees even if the complaints had been filed before the Delaware Chancery—let alone under Federal procedure, which provide no such fees. *See United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997) (to receive fees, complaint must have been "meritorious when filed").

Proposed Complaint at 10.

Plaintiffs side-step this requirement and Frank's pleadings, insisting that "some benefit" suffices to justify their $325,000 negotiated fee. New Opp. at 17 n.15. Again, even if Delaware procedural and substantive law should apply to an Exchange Act claim filed in federal court against a Louisiana corporation, plaintiffs should not be permitted to mix and match which laws will apply to their racket.

E. Frank has properly pleaded unjust enrichment.

Plaintiffs rehash their "derivative claim" argument one more time by claiming that Frank must allege that plaintiffs' counsel "obtained a benefit ***from him***." New Opp. at 25 (emphasis in original). This argument once again ignores Frank's proposed complaint and simply misstates the law.

An individual claim for unjust enrichment exists when a duty to the stockholder was breached as opposed to a duty toward the corporation. Illinois courts specifically reject the premise that an individual shareholder's standing depends on "whether a shareholder alleges unique harm." *Mann v. Kemper Fin. Companies, Inc.*, 618 N.E.2d 317, 325 (Ill. App. 1st Dist. 1992). "A plaintiff shareholder's injury may not be unique to that particular shareholder, but a plaintiff's cause of action could still be individual instead of derivative." *Id.* Thus, individual shareholders can maintain an action against fiduciaries, even if the harm suffered by these shareholders 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 have similarly rejected 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*).

The key question is whether Frank was owed a duty separately from Akorn, and the answer to this question is an emphatic yes. Frank does not allege that counsel breached any duty to Akron. Indeed, plaintiffs' counsel has no conceivable duty to Akorn—they only had a duty to shareholders, putative class members like Frank. The breach of this duty provides standing for Frank's individual unjust enrichment claims. *Cf. Aon Corp.*, 2018 WL 1184728, at *8 (denying dismissal where "Aon alleges that Contreras owed fiduciary duties directly to it as the parent company of the wholly-owned Bolivian Companies").

Frank pleads that Settling Counsel breached their duties to him—not the corporation—and for this reason he has pleaded a colorable complaint and entitled to intervene in this action permissibly or as a matter of right. *See* Prior Reply at 6.

Plaintiffs' arguments to have adequately represented Frank (New Opp. at 27-28) are simply farcical given their diametric opposition to his interests. *See* Prior Reply 3-4.

II. Plaintiffs improperly reach beyond Rule 24 intervention standards and argue the merits of Frank's complaint; even if proper, plaintiffs' complaints were not meritorious when filed and the disclosures were not material under any standard.

Plaintiffs remaining arguments go to the merits of Frank's complaint—whether plaintiffs indeed filed meritless complaints and pretextually settled them in exchange for disclosures that provide no benefit to class members. *See* New Opp. 15-26. Such arguments cannot support denial of Frank's motion. A motion to intervene as a matter of right "should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved under the complaint." *Reich*, 64 F.3d at 321. "The question on a petition to intervene is whether a well-pleaded defense or claim is asserted. Its merits are not be [] determined. The defense or claim is assumed to be true on [a] motion to intervene, at least in the absence of sham, frivolity, and other similar objections." *Clark v. Sandusky*, 205 F.2d 915, 918 (7th Cir. 1953); Prior Opp. 6-7.

Plaintiffs' remaining arguments, including its entire expert declaration, provide no reason to deny intervention. It would be especially inappropriate for the court to rely upon plaintiffs' unsworn—and especially implausible—attempt to take credit for the June 15 Proxy Statement, which was filed just three days after the earliest of the remaining plaintiffs filed suit. New Opp. at 19. In any event, Plaintiffs are mistaken that any alleged supplemental disclosure proves their complaints were meritorious when filed, let alone "clearly material" to shareholders.

A. Plaintiffs offer no reason to believe they are responsible for the Proxy Statement, which contradicts their prior conduct and representations.

Like Plaintiff Berg, the remaining plaintiffs argue that their litigation produced not only the July 10, 2017 Supplemental Disclosure, but that they are responsible for changes in the June 15 Proxy Statement as well. Frank has previously addressed this argument (Prior Opp. at 8), pointing out that this argument contradicts repeated representations by the plaintiffs that the Proxy Statement was inadequate (Dkts. 38 at 3; No. 17-cv-5022, Dkt. 6 at 1 n.1) and that Settling Counsel repeatedly and consistently claimed the Supplemental Disclosure—not the Proxy Statement—mooted their complaints. *See* Dkt. 54 at 4 (July 14, 2017); Dkt. 56 at 5 (September 15); Dkt. 78 at 4 (October 18). Plaintiff Berg only claimed responsibility for the Proxy Statement six months after the fact (Dkt. 84) and the remaining plaintiffs provide no reason to believe their unsworn assertion to have precipitated the Proxy Statement. The theory is even less credible than when Plaintiff Berg advanced it. While Plaintiff Berg sued Akorn on June 2, 2017, the earliest complaint by the remaining plaintiffs predates the Proxy Statement by just three days. *See* No. 17-cv-5018, Dkt. 1. One of the three remaining plaintiffs filed suit a week *after* the Proxy Statement, so obviously he could not be responsible for its contents. *See* No. 17-cv-5026, Dkt. 1.

Like Plaintiff Berg, the remaining plaintiffs make several materiality arguments based on the Proxy Statement, presumably because the Supplemental Disclosure is quite insubstantial and compares poorly to the disclosure in *Walgreen*. Because plaintiffs do not establish their responsibility for the Proxy Statement, and because these arguments go to the merits of Frank's complaint, he need not discuss them at length.[9]

Plaintiffs claim that the Proxy Statement's inclusion of the earlier November 2016 Management Case projection would have showed investors its downward trajectory (New Opp. at 19), but plaintiffs do not explain how inclusion of this projection would have materially altered the total mix of information provided. Prior Reply at 11. Contrary to plaintiffs' dramatic retelling, the market reacted with a yawn to the June 15 Proxy Statement: the share price rose one penny upward, closer to the target price, and the trade volume was low: the second-lowest volume day from that calendar week. And this is unsurprising; the more recent and pessimistic March 2017 Management case was already disclosed by the preliminary proxy. Preliminary Proxy, Dkt. 85-3 at 48-49. It has taken plaintiffs nearly a year to articulate their new *post hoc* theory regarding the November 2016 Management Case, and it does not support their contention that this projection was material. Indeed, plaintiffs admit that it was already obvious from the Preliminary Proxy that Akorn had recently "lowered its projected financial performance." New Opp. at 18.

Plaintiffs also claim that the Proxy Statement revealed, supposedly for the first time, that J.P. Morgan's $47 million fee was conditioned on consummation of the merger. *See* New Opp. at 24-25. In fact, this was already disclosed in the Preliminary Proxy. Prior Reply 11. Plaintiffs assert without explanation that Frank has quoted the Preliminary Proxy out of context (New Opp. at 24 n.25), but this is false. The quoted lines indeed concern J.P. Morgan's contingent fees:

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[9] Plaintiffs argue that they need not show they caused any amendments in the Proxy Statement because the matter "is a private mootness fee resolution and the parties thereto bear no burden of proof in that agreement." New Opp. at 16 n.13. Effectively, plaintiffs argue that their claims cannot be disproved because they have no obligations to prove them. At this stage in the proceedings, plaintiffs are perfectly mistaken. The proposed intervener is entitled to the presumption the "non-conclusory allegations" are true. *Reich*, 64 F.3d at 321.

> J.P. Morgan received a fee from the Company of $3 million, paid upon the public announcement of the merger, which will be credited against any Services Fee (as defined below). For services rendered in connection with the merger, the Company has agreed to pay J.P. Morgan an additional fee equal to 1.0% of the total amount of cash paid to the Company's common stockholders plus the principal amount of all indebtedness of the Company outstanding immediately prior to consummation of the merger minus the amount of all cash and cash equivalents of the Company immediately prior to the consummation of the merger (the "Services Fee"), which in this case amounts to approximately $47 million.

Preliminary Proxy, Dkt. 85-1 at 22. This is exactly the data plaintiffs claim to have somehow provided in the June 15 Proxy Statement: that J.P. Morgan would collect $3 million in fees unconditionally and an additional $44 million "immediately prior to consummation of the merger." *Id.* Reasonable investors know that $47 million minus $3 million equals $44 million. Prior Reply at 11.

Thus the June 15 Proxy Statement, even if Plaintiffs could show they were responsible for it—which they haven't—provides no basis for doubting the merits of Frank's complaint, let alone a basis for denying intervention.

B. GAAP reconciliation is still not material.

Much of plaintiffs' opposition and nearly all of their purported expert report is drawn to the issue of whether the GAAP reconciliation in the Supplemental Disclosure provided a material benefit to shareholders. New Opp. at 20-22; Keath Aff. 4-17.

Remarkably, plaintiffs fail to address Frank's prior reply that such reconciliations are pointedly not required by the SEC. Prior Reply 9-11. Two district courts have concluded that such disclosures are not material because they add little information reasonable investors could not understand from widely-used but non-GAAP measures for financial projections. *Id.*; *Bushansky v. Remy Intl., Inc.*, 262 F.Supp.3d 742, 746 (S.D. Ind. 2017) (GAAP reconciliation "not plainly material" and rejecting proposed settlement under *Walgreen*); *Assad v. DigitalGlobe, Inc. at al.*, Nos. 17-cv-1097, -1140, -1159, -1190, -1570, 2017 WL 3129700, *6 (D. Colo. Jul. 21, 2017) ("it is clear that some of the non-GAAP financial measures and challenges are recognized and specifically defined such that they have less potential to be misleading") (denying preliminary injunction to five plaintiffs). Plaintiffs fail to distinguish or even cite *Remy Intl.* or *Assad*. Thus, even if the Court does consider the merits of Frank's complaint, it further militates in favor of intervention.

CONCLUSION

The remaining plaintiffs desperately disavow a truth that Plaintiff Berg found self-evident: that counsel filing a complaint on putative behalf of a class incur duties to that class. Plaintiffs spend their newest opposition to Frank's motion—their fourth bite at the apple—continuing to imagine he brings a derivative claim on behalf of the corporation. Enough is enough. Frank's protectable interest against his supposed fiduciaries justifies intervention in this case. While plaintiff clearly intends to dispute the facts and legal conclusions pleaded in Frank's Proposed Complaint, this is no reason to deny intervention. To the contrary, Frank's motion should be granted so that his pleadings can be tested and resolved on the merits. The court should grant Frank's renewed motion to intervene.

Dated: May 25, 2018

/s/ M. Frank Bednarz
M. Frank Bednarz, (ARDC No. 6299073)
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1145 E. Hyde Park Blvd. Apt. 3A
Chicago, IL 60615
Phone: (202) 448-8742
Email: frank.bednarz@cei.org

Attorneys for Theodore H. Frank

CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Amended Memorandum of Law in Support of Motion to Intervene via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing.

Dated: May 25, 2018

/s/ M. Frank Bednarz