IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-2220

JORGE ALCAREZ, 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. 18-2221

SEAN HARRIS, On behalf of himself and all others similarly situated,
Plaintiff - Appellee
v.
AKORN, INC., et al.,
Defendants - Appellees

APPEAL OF: THEODORE H. FRANK, Intervenor

No. 18-2225

ROBERT BERG, Individually and on behalf of all others similarly situated,
Plaintiff - Appellee
v.
AKORN, INC., et. al.,
Defendants - Appellees

APPEAL OF: THEODORE H. FRANK, Intervenor

On Appeal from the United States District Court for the Northern District of Illinois,
Nos. 1:17-CV-05017; 1:17-CV-05021, and 1:17-CV-05016, Trial Judge Thomas M. Durkin

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

COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
Melissa Ann Holyoak
1310 L Street NW, 7th Floor
Washington, D.C. 20005
(202) 331-2263

Attorneys for Appellant Theodore H. Frank

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2220

Short Caption: Alcarez v. Akron, Inc., et al.

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

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

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Theodore H. Frank

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

Competitive Enterprise Institute, Center for Class Action Fairness

(3) If the party or amicus is a corporation:

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

n/a

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

n/a

Attorney's Signature: s/Melissa A. Holyoak Date: 6/8/2018

Attorney's Printed Name: Melissa A. Holyoak

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

Address: 1310 L Street NW, 7th Floor
Washington, DC 20005

Phone Number: (573) 823-5377 Fax Number: ____

E-Mail Address: melissaholyoak@gmail.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2221

Short Caption: Harris v. Akron, Inc., et al.

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

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

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Theodore H. Frank

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

Competitive Enterprise Institute, Center for Class Action Fairness

(3) If the party or amicus is a corporation:

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

n/a

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

n/a

Attorney's Signature: s/Melissa A. Holyoak Date: 6/8/2018

Attorney's Printed Name: Melissa A. Holyoak

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

Address: 1310 L Street NW, 7th Floor
Washington, DC 20005

Phone Number: (573) 823-5377 Fax Number:

E-Mail Address: melissaholyoak@gmail.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2225

Short Caption: Berg v. Akron, Inc., et al.

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

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

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Theodore H. Frank

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

Competitive Enterprise Institute, Center for Class Action Fairness

(3) If the party or amicus is a corporation:

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

n/a

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

n/a

Attorney's Signature: s/Melissa A. Holyoak Date: 6/8/2018

Attorney's Printed Name: Melissa A. Holyoak

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

Address: 1310 L Street NW, 7th Floor
Washington, DC 20005

Phone Number: (573) 823-5377 Fax Number:

E-Mail Address: melissaholyoak@gmail.com

Table of Contents

Rule 26.1 Disclosures i

Table of Contents iv

Table of Authorities vi

Statutes, Regulations, and Rules xii

Jurisdictional Statement 1

Statement of the Issues 2

Statement of the Case 3

A. Background: there is an industry of plaintiffs' attorneys, including the appellees in this case, who file strike suits in an overwhelming majority of mergers. 3

B. Plaintiffs file six strike suits against Akorn. 7

C. Over 99% of shares voted favor the merger; plaintiffs dismiss their complaints for "mootness fees"; Akorn pays $322,500 in attorneys' fees. 11

D. Appellant Frank moves to intervene in all actions. 12

E. Appellees belatedly disclaim entitlement to attorneys' fees. 14

F. Judge Durkin holds status hearings regarding appellees' disclaimer of fees. 15

G. District court denies Frank's motion to intervene as moot. 17

Summary of the Argument 18

Standard of Review 20

Argument 21

I. The district court committed legal error in denying Frank's motion to intervene as moot because it was possible for the court to award effectual relief for Frank; appellees' mootness fee racket will repeatedly evade review. 21

II. To the extent the district court's order is viewed as denying the merits of Frank's intervenor complaint, the district court erred in denying the prospective injunctive relief. 28

A. Frank sought injunctive relief to prohibit class counsel from circumventing *Walgreen* and pursuing their mootness fee racket. 29

B. The district court failed to satisfy Circuit Rule 50; its finding that it would not grant injunctive relief to enjoin appellees' from "filing actions" was clearly erroneous because Frank's request only sought to enjoin appellees from accepting fees in future strike suits without court approval....32

C. Putative class members should be entitled to intervene to challenge "mootness fee" awards. 34

III. This Court has jurisdiction. 41

A. Frank's informal colloquy with the district court did not waive his appellate rights. 41

B. Frank has Article III standing. 46

Conclusion 47

Certificate of Compliance with Fed. R. App. 32(a)(7)(C) and Circuit Rule 30(d) 49

Proof of Service 50

Table of Authorities

Cases

3M v. Pribyl,
259 F.3d 587 (7th Cir. 2001) 20

In re Aqua Dots Prod. Liab. Litig.,
654 F.3d 748 (7th Cir. 2011) 35

Assad v. DigitalGlobe, Inc.,
No. 17-cv-1097, 2017 WL 3129700 (D. Colo. Jul. 21, 2017) 10

Assn. of Community Organizations for Reform Now (ACORN) v. Edgar,
99 F.3d 261 (7th Cir. 1996) 42

Aurora Loan Services, Inc. v. Craddieth,
442 F.3d 1018 (7th Cir. 2006) 19-23

B.H. by Pierce v. Murphy,
984 F.2d 196 (7th Cir. 1993) 1

Back Doctors Ltd. v. Metropolitan Property and Casualty Insurance Co.,
637 F.3d 827 (7th Cir. 2011) 38, 39

In re Bear Stearns Cos.,
297 F.R.D. 90 (S.D.N.Y. 2013). 40

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 23-24

Burrow v. Arce,
997 S.W.2d 229 (Tex. 1999) 47

Bushansky v. Remy Intl., Inc.,
262 F. Supp. 3d 742 (S.D. Ind. 2017) 10

Chapman v. First Index, Inc.,
796 F.3d 783 (7th Cir. 2015) 2, 21

Clark v. Sandusky,
205 F.2d 915 (7th Cir. 1953) 23

Culver v. City of Milwaukee,
277 F.3d 908 (7th Cir. 2002) 38

Dickinson v. Petroleum Conversion Corp.,
338 U.S. 507 (1950) 1

eBay Inc. v. MercExchange, L.L.C.,
547 U.S. 388 (2006) 24, 33

Felzen v. Andreas,
134 F.3d 873 (7th Cir. 1998) 40

In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995) 38, 46

Grok Lines, Inc. v. Paschall Truck Lines, Inc.,
No. 14 C 08033, 2015 WL 5544504 (N.D. Ill. Sept. 18, 2015) 39

INB Banking Co. v. Iron Peddlers, Inc.,
993 F.2d 1291 (7th Cir. 1993) 42

Lake Investors Dev. Group v. Egidi Dev. Group,
715 F.2d 1256 (7th Cir. 1983) 3, 19-20, 23, 28

Ligas v. Maram,
478 F.3d 771 (7th Cir. 2007) 40

Kaplan v. Rand,
192 F.3d 60 (2d Cir. 1999) 47

Knox v. Serv. Employees Intern. Union, Loc. 1000,
567 U.S. 298 (2012) 2, 21

Krislov v. Rednour,
226 F.3d 851 (7th Cir. 2000) 25

MacDonald v. Gen. Motors Corp.,
110 F.3d 337 (6th Cir. 1997) 44

Masters v. Wilhelmina,
473 F.3d 423 (2d Cir. 2007) 31

McCaskill v. SCI Mgt. Corp.,
298 F.3d 677 (7th Cir. 2002) 42-44, 45

Moose Lodge No. 107 v. Irvis,
407 U.S. 163 (1972) 45

Mungo v. Taylor,
355 F.3d 969 (7th Cir. 2004) 20

Murray v. GMAC Mortg. Corp.,
434 F.3d 948 (7th Cir. 2006) 35, 39

Nissei Sangyo America, Ltd. v. United States,
31 F.3d 435 (7th Cir. 1994) 20

Olson v. Brown,
594 F.3d 577 (7th Cir. 2010) 20, 47

Pearson v. Target Corp.,
893 F.3d 980 (7th Cir. 2018) 12, 27, 36

Protestant Memorial Medical Center, Inc. v. Maram,
471 F.3d 724 (7th Cir. 2006) 24

Ragsdale v. Turnock,
941 F.2d 501 (7th Cir. 1991) 37

Remijas v. Neiman Marcus Group, LLC,
794 F.3d 688 (7th Cir. 2015) 47

Robert F. Booth Trust v. Crowley,
687 F.3d 314 (7th Cir. 2012) 23, 35-36, 40-41, 46-47

Robinson v. McNeil Consumer Healthcare,
615 F.3d 861 (7th Cir. 2010) 42

In re Sauer-Danfoss Inc. S'holders Litig.,
65 A.3d 1116 (Del. Ch. 2011) 18, 31

Scanlan v. Eisenberg,
669 F.3d 838 (7th Cir. 2012) 47

Smith v. Greystone Alliance, LLC,
772 F.3d 448 (7th Cir. 2014) 1-2, 19, 21, 33, 47

Sokaogon Chippewa Community v. Babbitt,
214 F.3d 941 (7th Cir. 2000) 37

Stand. Fire Ins. Co. v. Knowles,
568 U.S. 588 (2013) 39

Stewart v. Lincoln-Douglas Hotel Corp.,
208 F.2d 379 (7th Cir. 1953) 42

Stewart Title Guar. Co. v. Cadle Co.,
74 F.3d 835 (7th Cir. 1996) 24

Support Sys. Intern., Inc. v. Mack,
45 F.3d 185 (7th Cir. 1995) 37

Trbovich v. United Mine Workers of Am.,
404 U.S. 528 (1972) 40

In re Trulia, Inc. Stockholder Litigation,
129 A.3d 884 (Del. Ch. 2016) 4-6, 29-30

United States v. Paul,
542 F.3d 596 (7th Cir. 2008) 44

In re Walgreen Co. Stockholder Litig.,
832 F.3d 718 (7th Cir. 2016) 2-5, 7, 11-12, 18, 28-30, 32, 35, 38, 40, 46, 48

W. States Ins. Co. v. Wisconsin Wholesale Tire, Inc.,
148 F.3d 756 (7th Cir. 1998) 32-33

In re Xoom Corp. Stockholder Litig.,
CV 11263-VCG, 2016 WL 4146425 (Del. Ch. Aug. 4, 2016).....6, 31

Young v. Higbee Co.,
324 U.S. 204 (1945) 35

Rules and Statutes

15 U.S.C. § 78n(a) 1, 8

15 U.S.C. § 78t(a).....1, 8

15 U.S.C. § 78u–4(a)(2)(v).....8

15 U.S.C. § 78u-4(a)(3) 26

15 U.S.C. § 78u–4(a)(3)(B)(vi).....9

15 U.S.C. § 78u-4(a)(6) 19, 31

15 U.S.C. § 78aa 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

Cir. R. 50 32-33

Fed. R. App. Proc. 4(a)(1)(A) 1

Fed. R. Civ. Proc. 8 24

Fed. R. Civ. Proc. 23 ..... 5-6, 18, 30, 36

Fed. R. Civ. Proc. 23(a)(4).....35

Fed. R. Civ. Proc. 23(c)(2).....26

Fed. R. Civ. Proc. 23(h)(2) 30

Fed. R. Civ. Proc. 23.1 .....6, 30, 36, 46

Fed. R. Civ. Proc. 24 14

Fed. R. Civ. Proc. 41 27

Fed. R. Civ. Proc. 60 36

Fed. R. Civ. Proc. 60(b)(6) 27

SEC Rule 14a-9, 17 C.F.R. § 240.14a-9 1

U.S. Const., Art. III 46-47

Other Authorities

Akorn, Inc. Preliminary Proxy (May 22, 2017) 8

Cadwalader, Client & Friends Memo, *2017 Year in Review: Corporate Governance Litigation & Regulation* (Jan. 9, 2018) 5

Cain, Matthew D., Jill E. Fisch, Steven M. Davidoff Solomon & Randall S. Thomas,
The Shifting Tides of Merger Litigation,
71 VAND. L. REV. 603, 608 (2018) 5-7, 19, 29-31

Bryce Elder,
Stocks to Watch, FINANCIAL TIMES (Feb, 27, 2018) 14

Fisch, Jill E., Sean J. Griffith & Steven M. Davidoff Solomon,
Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform,
93 TEX. L. REV. 557 (2015) 3-4, 29-30

Jeffries, Browning,
The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals,
11 BERKELEY L.J. 55 (2014) 3, 29

Rickey, Anthony,
Absent Reform, Little Relieve in Sight From Chronic "Merger Tax" Class-Action Litigation,
Legal Backgrounder Vol. 32, No. 22, Washington Legal Foundation
(Aug. 25, 2017) 5-6, 31

Securities Exchange Commission Discl. 5620589, Question 101.01 (Oct. 17, 2017) 11-12

Statutes, Regulations, and Rules

Federal Rule of Civil Procedure 24. Intervention.

(a) Intervention of Right.

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

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

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

(b) Permissive Intervention.

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

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

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

Jurisdictional Statement

The district court has jurisdiction under, *inter alia*, 28 U.S.C. § 1331 and Section 27 of the Exchange Act, 15 U.S.C. § 78aa, because plaintiffs-appellees filed suits alleging claims under Sections 14(a), and 20(a) of the Exchange Act, 15 U.S.C. §§ 78n(a) and 78t(a), and the rules and regulations promulgated thereunder, including SEC Rule 14a-9, 17 C.F.R. § 240.14a-9. A93; A111; A129.[1]

At a May 2, 2018, hearing the district court indicated that it would deny appellant Theodore H. Frank's Motion to Intervene with respect to the *Berg*, *Harris*, and *Alcarez* cases. That same day, the district court issued a minute order in the *Berg* action denying Frank's motion (A41), and filed similar minute orders in the *Alcarez* and *Harris* cases on May 24, 2018. A42; A43. Frank filed notices of appeal in all three underlying actions with the district court on June 1, 2018. A261; A263; A265. Whether the court's denials of intervention are deemed to have occurred on May 2 or May 24, Frank's notices of appeal are timely under Fed. R. App. Proc. 4(a)(1)(A).

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

Though the district court denied intervention on the grounds that the dispute was moot, this Court has appellate jurisdiction to review a final district-court decision

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

finding a lack of jurisdiction. *See, e.g., Smith v. Greystone Alliance, LLC*, 772 F.3d 448, 449 (7th Cir. 2014).

Statement of the Issues

1. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chapman v. First Index, Inc.*, 796 F.3d 783, 786 (7th Cir. 2015) (*quoting Knox v. Serv. Employees Intern. Union, Loc. 1000*, 567 U.S. 298, 307 (2012)). Did the district court err as a matter of law in holding that Frank's motion to intervene was moot on the basis that the court *intended* to deny the merits of Frank's intervenor complaint requesting injunctive relief even though it was *possible* to award such injunctive relief?

2. Generously reading the district court's denial of intervention as a grant of intervention and a denial of the requested injunctive relief on the merits, did the district court err as a matter of law by holding that the district court would not enjoin appellees and their counsel from filing similar suits when Frank's intervenor complaint requested merely that the district court enjoin plaintiffs and their counsel from receiving attorneys' fees in other cases brought under the Exchange Act without court approval?

3. "The type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016). When class-action attorneys show a pattern and practice of continuing the "racket" criticized by *Walgreen* while evading court review, are putative class members permitted to intervene

to challenge class-action attorneys' circumvention of *Walgreen* and to enjoin those counsel from continuing to circumvent *Walgreen*?

Statement of the Case

The relevant facts are drawn from the record and Frank's well-pleaded proposed intervenor complaint. In analyzing a motion to intervene, the district court "must accept as true the non-conclusory allegations of the motion and cross-complaint." *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983). The statement of the case thus construes facts in the light most favorable to appellant Frank.

A. Background: there is an industry of plaintiffs' attorneys, including the appellees in this case, who file strike suits in an overwhelming majority of mergers.

"In merger litigation the terms 'strike suit' and 'deal litigation' refer disapprovingly to cases in which a large public company announces an agreement that requires shareholder approval to acquire another large company, and a suit, often a class action, is filed on behalf of shareholders of one of the companies for the sole purpose of obtaining fees for the plaintiffs' counsel." *Walgreen*, 832 F.3d at 721. Plaintiffs can extract profitable settlements at the expense of shareholders regardless of the merit of the suit. "Because the litigation threatens the consummation of the deal if not resolved quickly and because corporations may view the settlement amount as a drop in the bucket compared to the overall transaction amount, defendants are motivated to settle even meritless claims." Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY L.J. 55, 58 (2014). Crafty class counsel created a cottage industry: "In 2012, 93% of deals over $100 million

and 96% of deals over $500 million were challenged in shareholder litigation." Jill E. Fisch, Sean J. Griffith & Steven M. Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 558-59 (2015) ("Fisch"). In 2013, over 97.5% of deals over $100 million were challenged. *Id.*

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

Many of these actions were filed in the Delaware Court of Chancery. *Walgreen*, 832 F.3d at 725. The dramatic increase in deal litigation was temporarily stymied in 2016 by the Delaware Court of Chancery's decision in *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 894 (Del. Ch. 2016), which drastically changed Delaware's approach to settlement in deal litigation. *Trulia* held that these kind of disclosure-only settlements would be subject to "continued disfavor in the future unless the supplemental disclosures address a *plainly material misrepresentation or omission*." *Id*. at 898 (emphasis added).

The Seventh Circuit adopted *Trulia's* reasoning in *Walgreen*, and held that these kind of class action strike suits—that yield fees for class counsel and immaterial supplemental disclosures for the class—are "no better than a racket." 823 F.3d at 724. *Walgreen* and *Trulia* had a temporarily beneficial effect for shareholders by slightly slowing the pace of strike suits. Only 73% of mergers worth over $100 million faced

strike suits in 2016. Matthew D. Cain, Jill E. Fisch, Steven M. Davidoff Solomon & Randall S. Thomas, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 608 (2018) ("Cain"). Unfortunately, such complaints rebounded to 85% in 2017. *Id.;* Cadwalader, Client & Friends Memo, *2017 Year in Review: Corporate Governance Litigation & Regulation* (Jan. 9, 2018) at 2-3.[2] The prevalence is likely higher today because plaintiffs have modified their tactics.

Appellees and their counsel have adapted with an end-run around the scrutiny that *Walgreen* demands, by settling for attorneys' fees *without* seeking class release, as happened here. A160-61. Whereas class-action or derivative settlements allow shareholders to object to the settlement, class certification, or the payment of attorneys' fees, like a shareholder did in *Walgreen*, appellees' new racket extorts payment without class notice or seeking or receiving court approval under Rule 23. "These cases appear to indicate that plaintiffs' counsel may be extracting rents by seeking low cost payments to 'go away.'" Cain, 71 VAND. L. REV. at 632.

Appellees' counsel have been on the forefront of this shift. Counsel for appellee Alcarez—Levi & Korsinsky LLP—stipulated the first mootness fee payment in the Delaware Chancery after *Trulia*. Anthony Rickey, *Absent Reform, Little Relieve in Sight From Chronic "Merger Tax" Class-Action Litigation*, Legal Backgrounder Vol. 32, No. 22, Washington Legal Foundation (Aug. 25, 2017) ("Rickey"), at 4, available online at: http://www.wlf.org/upload/legalstudies/legalbackgrounder/082517LB_Rickey.pdf.

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

Counsel for appellees Berg and Harris—Rigrodsky & Long, P.A. and Faruqi & Faruqi, LLP—were involved in the second and third post-*Trulia* mootness stipulations in Delaware, respectively. *Id.* Delaware reacted swiftly to this new tactic by signaling that they would slash contested mootness fee applications put before them. *In re Xoom Corp. Stockholder Litig.*, CV 11263-VCG, 2016 WL 4146425, at *5 (Del. Ch. Aug. 4, 2016) (awarding only $50,000 of requested $275,000 mootness fee payment to several plaintiffs' firms, including Rigrodsky & Long, P.A., counsel for appellee Berg, because of low value of supplemental disclosures). The Delaware Chancery recognized that even though their procedure allows for the payment of mootness fees, that these fees should be modest when no material misstatement was corrected. "Not even great counsel can wring significant stockholder value from litigation over an essentially loyal and careful sales process." *Id*.

Appellees and appellees' counsel have settled other federal strike suits for six-figure "mootness fees," without the safeguards of settlement approval under Rules 23 or 23.1, or, indeed, any court hearing, much less notice to the class. *See* A216-17; Rickey at 4.

Prior to 2014, virtually no strike suits in Delaware or in federal courts were resolved through mootness fees, "but in the wake of *Trulia* these cases became more significant. They comprised 14% of cases in 2015 and rose to 75% of cases by 2017." Cain, 71 VAND. L. REV. at 623. While "mootness fees" have no basis under federal law, strike suits dismissed for mootness fees have soared in the wake of *Trulia* and *Xoom*. In 2016, 39% of all merger strike suits were filed in federal courts, which tied the historic record of such filings. Cain, 71 VAND. L. REV. at 620. But in the first ten months of 2017,

an astonishing 87% of all strike suits filings were made in federal court, more than doubling the previous record. Similarly, the rate of mootness fee dismissals has increased from 0% in 2013 to 75% in the first ten months of 2017. *Id.* at 622.

This sea change of tactics—from state courts to federal and from class-action settlement to stipulated dismissals for mootness fees—has scarcely been scrutinized by district courts, which routinely grant stipulated dismissals. Since January 1, 2018, appellees' counsel have filed at least 122 additional strike suits. A267-72. Undisclosed payments to appellees' counsel at the expense of shareholders likely totals in the millions; although appellees' counsel have lately declined to disclose the size of stipulated mootness fees, suits against numerous merging companies have been dismissed following supplemental disclosures, and the average disclosed mootness payment in 2017 was $265,000. Cain, 71 VAND. L. REV. at 625; A233-34 (describing three mootness dismissals in 2017 with disclosed fees to Rigrodsky & Long, P.A. and Levi & Korsinsky, LLP ranging from $265,000 to $350,000); A267-72.

This appeal relates to unnamed class members' rights and recourse in shareholder strike suits where class counsel seeks (and continues repeatedly to seek) extortionate fees in circumvention of *Walgreen*. *See* A175 (motion to intervene). To Frank's knowledge, no federal appellate court has considered the propriety of strike suits resolved through so-called mootness fees.

B. Plaintiffs file six strike suits against Akorn.

On May 22, 2017, Akorn, Inc., filed a preliminary definitive proxy statement with the SEC recommending that shareholders approve a proposed merger with German

pharmaceutical company Fresenius Kabi AG. The preliminary proxy and the non-preliminary definitive proxy filed on June 20, 2017, were prepared by Akorn's outside counsel Cravath, Swaine & Moore LLP, and each described the $4.3 billion transaction. *See* Akorn, Inc. Preliminary Proxy (May 22, 2017) at A-55, available online at: https://www.sec.gov/Archives/edgar/data/3116/000130817917000183/lakrx2017_pre14a.htm. Like all such proxies, it was rife with detail; the definitive proxy totaled 82 pages with another 153 pages of exhibits. *Id.*; Dkt. 57-3.[3]

From June 2 to 22, 2017, six plaintiffs filed actions alleging that these proxy statements were "false and misleading"—*not* because anything said in those pages was untrue, but rather based on a "tell me more" theory that Akorn's failure to disclose still more subsidiary details violates Sections 14(a) and 20(a) of the Exchange Act. A94; A112; A130.

Plaintiff-appellee Berg was the first to file in Case No. 1:17-cv-05016, represented by Rigrodsky & Long, P.A. and RM Law, P.C. (collectively "Rigrodsky"). A110. Berg individually filed 28 strike suits over five months between May 16 and October 17, 2017, each time represented by Rigrodsky. A229. Though 15 U.S.C. § 78u–4(a)(2)(v) requires securities plaintiffs to "identify any other action under this chapter, *filed* during the 3-year period . . . in which the plaintiff has sought to serve as a representative party on behalf of a class" (emphasis added), Berg declared only that he "has not *moved* to serve" as a representative. A230 (emphasis added). The PSLRA presumptively prohibits

[3] Unless otherwise stated, "Dkt." refers to docket entries in the low-numbered *Berg* action below, No. 17-cv-05016 (N.D. Ill.).

plaintiffs from leading more than five securities actions within a 3-year period. *See* 15 U.S.C. § 78u–4(a)(3)(B)(vi). The vast majority of Rigrodsky's filings are on behalf of serial plaintiffs who have filed many more than five strike suits since 2016. Rigrodky has singlehandedly filed **72** strike suits in federal court in the first six months of 2018. *See* A267-72 (suits on behalf of plaintiffs Assad, Assad Trust, Bartholomew, Buckingham, Fallness, Franchi, Gusinsky Rev. Trust, Jaso, Kent, Kunkel, Leon Family Trust, Myhre, Parshall, Paskowitz, Pratt, Raatz, Rosenblatt, Sbriglio, Scarantino, Sciabacucchi, Truong, Vana, and Witmer). Over half of these suits, 39, were brought by just 3 plaintiffs: Franchi, Rosenblatt, and Scarantino.

Plaintiff-appellee Alcarez was the second to file suit against Akorn on June 7, 2017, Case No. 1:17-cv-05017, represented by Levi & Korsinsky, LLP ("Levi"). A128. (Note that the defendants in these suits overlap extensively with those filed by Rigrodsky; merging public companies often attract multiple strike suits brought by different law firms.) In the first half of 2018, Levi has filed an additional 28 strike suits in federal courts. *See* A267-72 (suits on behalf of Aiken, Armas, Barmack, Doller, Einhorn, Freeze, Garcia, Goldstein, Gonzalez, Lawson, Madry, Martinez, Mccauley, Miramond, Mohr, Patel, Pham, Romanko, Rosenfeld, Sharfstein, Stein, Stein, Stephens, Tas, Vonsalzen, Weinstock, White, and *Williams v. DST Systems, Inc.*).

Plaintiff-appellee Harris filed on June 14, 2017 in Case No. 1:17-cv-05021, represented by Faruqi & Faruqi, LLP ("Faruqi"). A148. In the first half of 2018, Faruqi has filed twenty-two strike suits in federal courts. *See* A267-72 (suits on behalf of Byrne, Carter, Fineberg, Gordon, Johnson, Kendall, Newman, Pollack, Ryan, Sanderson, Scott, Smith, Stanfield, Stein, West, and *Williams v. CSRA, Inc.*).

The remaining suits were brought by non-appellee plaintiffs: *House* (17-cv-05018); *Carlyle* (17-cv-05022); and *Pullos* (17-cv-05026). Motions to intervene in these three actions remains pending before the district court. A36.

Plaintiffs-appellees' complaints were brought on behalf of a class of stockholders of Akorn. A93; A111; A129.

Five of the plaintiffs originally filed in the Middle District of Louisiana, but a district judge granted Akorn's motion for change of venue transferring all of the suits to the Northern District of Illinois on July 5. Dkt. 40. Upon transfer, each suit was assigned to a different judge as none of the plaintiffs informed the courts of the related pending actions.

On July 10, 2017, Akorn filed a Form 8-K with the SEC, which contained supplemental disclosures agreed by the six plaintiffs. A187. Akorn prefaced these disclosures by denying that they were material:

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

Id.

As Frank pleaded, the supplemental disclosures *were* immaterial. A187-95. For example, the supplement included a hypothetical accounting reconciliation of previously-provided financial projections (A191), but courts find such reconciliation immaterial. *See Assad v. DigitalGlobe, Inc.*, No. 17-cv-1097, 2017 WL 3129700 (D. Colo. Jul. 21, 2017); *Bushansky v. Remy Intl., Inc.*, 262 F. Supp. 3d 742, 748 (S.D. Ind. 2017) (GAAP

reconciliation "not plainly material"; rejecting proposed settlement under *Walgreen*). The SEC has confirmed that disclosure of non-GAAP projections is not misleading to shareholders when "the financial measures are included in forecasts provided to the financial advisor for the purpose of rendering an opinion that is materially related to the business combination transaction." Securities Exchange Commission Discl. 5620589, Question 101.01 (Oct. 17, 2017), available online at: https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm. The financial projections appellees complained about were precisely this sort of permissible background information. A194-95.

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

None of the actions ended in a class-action settlement. Instead, on July 14, 2017, all six plaintiffs moved to dismiss their complaints without prejudice, claiming that the supplement had mooted every complaint. *E.g.*, A148.

Meanwhile, Akorn shareholders voted on the proposed transaction at a special meeting of its shareholders at its Lake Forest, Illinois headquarters on July 19, 2017. The votes in favor of the transaction totaled 104,651,745, with only about ***0.1%*** of that amount—104,914 shares—voted in opposition. A196. Over 99% of the votes favored the transaction, and the supplemental disclosures made no material difference in the vote. *Id.*; *cf. also Walgreen*, 832 F.3d at 723.

On September 15, 2017, all six plaintiffs filed stipulations and proposed orders indicating that "Defendants have agreed to provide Plaintiffs with a single payment of

$322,500 in attorneys' fees and expenses to resolve any and all Fee Claims, and thus there are no Fee Claims to be adjudicated by the Court." A161. The plaintiffs cited no basis for this fee award. Appellee Berg subsequently termed this payment as a "mootness fee" award. Dkt. 78; A5. Akorn has already paid the agreed amount, which is held in escrow by a non-appellee plaintiff. Dkt. 80 at 2; A22.

D. Appellant Frank moves to intervene in all actions.

Appellant Frank is an Akorn shareholder within the putative class of shareholders represented by the plaintiffs-appellees, and thus owed a fiduciary duty by appellees and their counsel. A196.

Frank, an attorney, is represented *pro bono* by the non-profit project he directs, the Competitive Enterprise Institute's Center for Class Action Fairness, which successfully argued *Walgreen* and several other landmark decisions protecting the rights of class members and shareholders from abusive class-action settlements and practices. *See generally Pearson v. Target Corp.*, 893 F.3d 980, 982 (7th Cir. 2018).

Within days of plaintiffs' filing of the fee stipulation, Frank, as a shareholder and putative class member aggrieved by the abusive class action and settlement, moved to intervene in each of the six actions filed by all six plaintiffs because the plaintiffs' settlement for payment of fees constitutes an end-run around *Walgreen* and this Court's guidance that a proposed "class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end." Dkt. 57; Dkt. 57-1 at 1 (quoting *Walgreen*, 832 F.3d at 724). In order to end the racket, Frank's proposed intervenor complaint sought (1) an accounting of attorneys' fees received by plaintiffs, (2)

disgorgement of any such unjust enrichment, and (3) a permanent injunction "prohibiting Settling Counsel from accepting payment for dismissal of class action complaints filed under the Exchange Act without first obtaining court adjudication of their entitlement to any requested fee award." Dkt. 57-1 at 20-21; *see also* A200.

As a diversified shareholder, Frank devotes a portion of his investment portfolio to shares in companies reasonably predicted to be merger targets because Frank believes those companies to be undervalued or as possible arbitrage. A257. As of March 27, 2018, Frank's portfolio included four companies where appellees' counsel had filed similar strike suits. *Id*. Based on Frank's investment strategy, Frank alleged that unless appellees and their counsel are enjoined from collecting mootness fees without court approval in future strike suits, it is near-certain Frank will be the shareholder of corporations extorted by appellees and their counsel. A257. Since January 1, 2018, appellees' counsel have filed at least 122 additional strike suits, including several suits against companies where Frank is or was a shareholder. *See* A267-72. For example, appellee Berg's counsel Rigrodsky has filed suits against at least twenty-two other corporations where Frank is or was a shareholder. A231 (listing eighteen); A257 (listing four more). Appellee Alcarez's attorney Levi has filed strike suits against at least nine other publicly-traded corporations where Frank is or was a shareholder. A231-32. And appellee Harris's attorney Faruqi has filed strike suits against at least eight other publicly-traded corporations where Frank is or was a shareholder. A232 (listing seven); A257 (*Smith v. Pinnacle Entertainment*).

The court declined to rule on Frank's motion to consolidate the cases (Dkt. 75), so briefing proceeded in the lead action *Berg* alone.

Plaintiff-appellee Berg filed an opposition to Frank's motion that was "reviewed and approved" by the other five plaintiffs. Dkt. 78 at 1 n.1. The court denied Frank's motion without prejudice. A163-73. Judge Durkin rejected plaintiff Berg's primary argument that no jurisdiction existed due to the July 14 dismissal without prejudice, *id*. at A165, but the court found that Frank had not explained his "interest" in the case under Rule 24. A168. Thus, Frank filed a renewed motion on December 8, 2017, and a Second Amended Proposed Complaint, which extensively discussed his interest: (1) as a putative class member owed a fiduciary duty from appellees' counsel, which duty was breached, and (2) as a diversified shareholder of companies, many of which are extorted by plaintiffs-appellees and their counsel. A217; A178.

E. Appellees belatedly disclaim entitlement to attorneys' fees.

As Frank's motions to intervene were pending, the Akorn transaction collapsed. On February 27, 2018, Fresenius announced it was investigating alleged FDA regulatory violations by Akorn, unrelated to plaintiffs' underlying allegations. *See* A244-45. The stock price fell nearly 40%, showing the value of the premium to shareholders that plaintiffs had challenged. Bryce Elder, *Stocks to Watch,* FINANCIAL TIMES (Feb, 27, 2018). On March 13, 2018, before Fresenius officially called off the merger, Plaintiff Berg filed a motion seeking to withdraw from the case and forgo any entitlement to the $322,500 in attorneys' fees. A238. Frank opposed Berg's motion on March 18, noting Berg's offer did not resolve Frank's request for injunctive relief. A249.

F. Judge Durkin holds status hearings regarding appellees' disclaimer of fees.

On March 21, 2018, Judge Durkin held a status call on the *Berg* matter, the only Akorn action pending before him, to discuss whether Berg's disclaimer of attorneys' fees would moot the motion to intervene as to Berg. A11-12. Judge Durkin ruled that he would not grant injunctive relief: "I am not going to enjoin plaintiff or plaintiff's counsel from filing suits, and I'm not going to interfere with those suits. If you have a complaint about their conduct in those suits, you have the forum to do it. File a motion to intervene in those cases." A11; A18 ("I'm not going to be granting prospective relief to prevent you or your client from filing similar suits in front of other judges.").

Judge Durkin reasoned: "[I]t may be that you can develop a history if there are dismissals in those cases when you seek to intervene. You may be able to develop a track record that you can bring to the attention of a judge who has that case." A12. But, the court ruled, appellees' counsel would "not evade review if [Frank] bring[s] an intervention action in front of another judge. They may do as they did here, see to disclaim fees." A13. "And if as occurred here with [plaintiffs' counsel], if the attorneys disclaim fees, then you win because the point of your suit is to prevent a dissipation of assets for payment of fees you believe are not necessary to be paid and not properly paid." A14.

Judge Durkin explained that he was limited to the *Berg* action: "I should have consolidated the cases back when you -- last fall and taken the other five cases that were dismissed without prejudice, put them in front of me, and then I would turn them all into with-prejudice dismissals and order the money back to the defendant and just say we're done." A11-12. Judge Durkin did not discuss the merits of Frank's motion to

intervene but reasoned that the underlying relief requested in Frank's intervenor complaint (disgorgment and injunctive relief) would be moot because of plaintiffs' disclaimer of fees *and* because Judge Durkin would not award injunctive relief:

> I can't stop them, I don't believe, from disclaiming any right to payment of fees and expenses and withdrawing an opposition -- and that may moot -- given the fact I'm not going to enter injunctive relief, that may moot your request in this case, in which case I'd simply dismiss this case with prejudice, the one before me.

A12.

On April 11, 2018, Judge Durkin held another hearing in *Berg* where appellees' counsel confirmed that three of the six plaintiffs were disclaiming fees. A22. Judge Durkin reaffirmed his view that he was "not going to prospectively bar [appellees' counsel] from filing suits like this." A25. "You've made your record [for appeal], and I'll make mine," remarked Judge Durkin. *Id.* (emphasis added). (Notwithstanding this statement, the court did not create a record, except for remarking "if you believe that Mr. Berg is filing an improper lawsuit to . . . seek relief from whatever judge has that case," A25, and never gave oral or written reasons for its conclusion that injunctive relief was unavailable.) Judge Durkin confirmed that he would have the other five actions reassigned to him and set another status with all parties. A23; Dkt. 99.

On May 2, 2018, Judge Durkin held a status conference relating to all six actions at which counsel for three plaintiffs—Berg, Alcarez, and Harris, the appellees in these consolidated appeals—indicated that they disclaimed their entitlement to attorneys' fees in this matter. A34-35. Counsel for three other plaintiffs indicated that they still seek a share of the $322,500 payment for fees. *Id.* During the conference, the district

court asked for Frank's position on the six cases, and Frank's counsel responded that with respect to the non-disclaiming plaintiffs "we should proceed to a decision on whether we can intervene in these three cases." A35. In light of the court's previous decision regarding Frank's request for injunctive relief, where Frank had already objected, Frank counsel responded, "With regard to the other three where fees are being disclaimed, those could be dismissed." A35-36.

G. District court denies Frank's motion to intervene as moot.

After the status conference, the district court entered a minute order that read in its entirety: "Motion to intervene [82] is denied as moot. Plaintiff's motions to withdraw as attorney [86] [87] [89][91] [92][100] are granted. Status hearing held on 5/2/2018." A41. On May 23, 2018, Frank's counsel wrote the district court to clarify the record in preparation for this appeal, *i.e.*, that the district court's denial of intervention as moot applied to all three actions where appellees' counsel disclaimed fees (*Berg*, *Harris*, and *Alcarez*). A259-60. The district court deemed that Frank's motion to intervene had been filed in all six actions, and denied the motion as moot in the three actions where counsel disclaimed fees. A41, A42, A43.

Appellant Frank timely appealed the district court's denial of his motion to intervene in three out of the six strike suits. A261, A263, A265. Frank's identical motion to intervene remains pending in three other actions before the same district court. *See* Nos. 17-cv-05018, 17-cv-05022, and 17-cv-05026.

The appellees here moved to dismiss this appeal on the grounds that Frank's counsel's statement at the May 2 hearing constituted a waiver of any claims against

counsel, and on jurisdictional grounds. On August 9, the Court denied the motion to dismiss and directed the parties to address jurisdictional grounds in their briefs.

Summary of the Argument

The underlying litigation consists of six "strike suits" (three brought by plaintiffs-appellees here along with three other plaintiffs) filed in June 2017 purporting to seek an injunction against the then-proposed acquisition of defendant Akorn, Inc. by Fresenius Kabi AG. *See*, *e.g.*, A93. Strike suits are "cases in which a large public company announces an agreement that requires shareholder approval to acquire another large company, and a suit, often a class action, is filed on behalf of shareholders of one of the companies for the sole purpose of obtaining fees for the plaintiffs' counsel." *Walgreen*, 832 F.3d at 721. Generally, strike suits were quickly settled as class actions with defendants offering to pay attorneys' fees in exchange for dubiously-valuable supplemental filings with the SEC. *Id*. at 725. *Walgreen* cracked down on these attorney-friendly disclosure-only class-action settlements, holding they would be treated with "disfavor" unless the supplemental disclosures "address a plainly material misrepresentation or omission." *Id*.

To circumvent the judicial scrutiny under Rule 23 and *Walgreen*, appellees here did not seek approval of a class-action settlement, but instead, successfully extorted $325,000 in attorneys' fees from Akorn, later styled as a "mootness fee." A161; Dkt. 78. "Mootness fees" are available under Delaware procedure when a strike suit is dismissed as moot *and* the strike suit was meritorious when filed. *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1123 (Del. Ch. 2011). But "mootness fees" have no basis

under federal law: 15 U.S.C. § 78u–4(a)(6) precludes awards of fees in federal securities cases where there is no pecuniary benefit to shareholders. Still, strike suits awarding mootness fees have soared in federal courts. Cain, 71 VAND. L. REV. at 628. Appellees' counsel have engaged in a prolific practice of filing strike suits, filing 122 in just the first half of 2018. *See* A267-72.

Frank sought to intervene in the Akorn actions to disgorge the ill-gotten gains from plaintiffs and to enjoin plaintiffs and their counsel from receiving attorneys' fees in other cases brought under the Exchange Act without court approval—at least against companies where Frank is a shareholder. A179. The three appellees only agreed to relinquish their entitlement to attorneys' fees in the Akorn transaction after it became clear Akorn would not be acquired as originally planned. A240-41. Appellees argued that their disclaimer of fees rendered Frank's motion to intervene moot. A242. The district court agreed. A41-43. This is wrong. "An offer that the defendant or the judge believes sufficient, but which does not satisfy the plaintiff's demand" does not moot the case. *Smith*, 772 F.3d at 451.

The district court denied intervention, improperly finding mootness because the disclaimer mooted Frank's disgorgement claims *and* because the district court was "not going to" grant the prospective injunctive relief requested in Frank's intervenor complaint. A11. But intervention is not moot "if the court *could* grant [a complainant] relief." *See Aurora Loan Services, Inc. v. Craddieth*, 442 F.3d 1018, 1026 (7th Cir. 2006) (emphasis added). In analyzing a motion to intervene, the district court "must accept as true the non-conclusory allegations of the motion and cross-complaint." *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983). Accepting the

allegations in Frank's intervenor complaint as true, it was possible for the district court to grant prospective injunctive relief. The district court improperly skipped over Frank's motion to intervene and based its decision on its intention to deny the merits of Frank's intervenor complaint. *Aurora*, 442 F.3d at 1026. Even if the district court had properly ruled on the merits of the requested injunctive relief (assuming intervention was granted for that purpose), the district court's finding was based on the erroneous premise that Frank sought to enjoin settling counsel from filing future strike suits, when Frank's proposed injunction merely required court approval for future strike-suit fee awards. This Court should reverse the district court's finding of mootness and confirm his entitlement to intervention.

Standard of Review

"Whether a case is moot is a question of law that we review *de novo*." *Olson v. Brown*, 594 F.3d 577, 580 (7th Cir. 2010). Mixed questions of law and fact are likewise reviewed *de novo*. *Mungo v. Taylor*, 355 F.3d 969, 974 (7th Cir. 2004). This Court reviews a denial of a permanent injunction for abuse of decision, accepting all factual determinations unless they are clearly erroneous. *3M v. Pribyl*, 259 F.3d 587, 597 (7th Cir. 2001). (In analyzing a motion to intervene, however, the district court "must accept as true the non-conclusory allegations of the motion and cross-complaint." *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983).) The district court's decision on the timeliness of a motion to intervene is reviewed for an abuse of

discretion, but the other factors are reviewed *de novo*. *Nissei Sangyo America, Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994).

Argument

I. The district court committed legal error in denying Frank's motion to intervene as moot because it was possible for the court to award effectual relief for Frank; appellees' mootness fee racket will repeatedly evade review.

After the appellees disclaimed entitlement to mootness fees from Akorn, the district court denied Frank's motion to intervene as moot in a one-sentence minute order. A41. The district court's conclusory order is wrong as a matter of law. Appellees had not agreed to the injunctive relief Frank had requested. "[A] court must resolve the merits unless the defendant satisfies the plaintiff's demand. An offer that the defendant or the judge believes sufficient, but which does not satisfy the plaintiff's demand, does not justify dismissal." *Smith*, 772 F.3d at 451.

Frank's motion to intervene was not moot because the district court could have granted Frank's request for injunctive relief. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chapman v. First Index, Inc.*, 796 F.3d 783, 786 (7th Cir. 2015) (quoting *Knox v. Serv. Employees Intern. Union, Loc. 1000*, 567 U.S. 298, 307 (2012)). The question of mootness was discussed at a status hearing before the district court where appellee's counsel argued that because they had disclaimed any entitlement to attorneys' fees, Frank's request to disgorge those fees was moot. *See* A12. Frank's intervenor complaint, however, also sought to enjoin appellees' counsel from obtaining fees in other strike

suits without court approval. A200. The district court supposed that because it did not *intend* to grant the injunctive relief either, that intervention may be moot: "given the fact I'm not going to enter injunctive relief, that may moot your request in this case." *See* A12. The district court committed legal error in denying the motion to intervene as "moot" because it was still *possible* to grant effectual injunctive relief, even if the court intended to subsequently deny the merits of Frank's intervenor complaint seeking injunctive relief.

Aurora Loan Services, Inc. v. Craddieth is instructive here. 442 F.3d 1018 (7th Cir. 2006). In *Aurora*, a successful bidder in a foreclosure sale moved to intervene in foreclosure proceedings. 442 F.3d at 1026. The district court vacated the foreclosure judgment, dismissed the action, and denied the bidder's motion to intervene as moot. *Id.* at 1022. The Seventh Circuit reversed, holding that the motion to intervene was not moot because the purpose of the motion was to challenge the district court's dismissal of the foreclosure suit so the foreclosure sale could go through. *Id.* at 1026. The Court held that intervention is not moot "if the court *could* grant relief." *Id.* at 1026 (emphasis added). The Seventh Circuit explained that the district court erred in denying the motion to intervene as moot based on its decision of the *merits* of the intervenors' complaint: "It would be as if the plaintiff moved for a jury trial and the judge, without ruling on the motion, conducted a bench trial, rendered judgment for the defendant, and then dismissed the plaintiff's motion as moot." *Id.* at 1027.

The same is true here. Frank's motion to intervene was not moot because the court *could* have granted effectual injunctive relief. But the district court improperly skipped past the intervention motion, ruled on the merits of Frank's intervenor's

complaint (or at least the merits of permanent injunction), and then denied the intervention as moot. While intervenors must plead an interest protected by the law, they are not required "to establish a meritorious legal claim." *Aurora*, 442 F.3d at 1024. Instead, the district court "must accept as true the non-conclusory allegations of the motion and cross-complaint" *Lake Investors*, 715 F.2d at 1258. "A motion to intervene as a matter of right, moreover, 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." *Id.* (emphasis added); *see also Clark v. Sandusky*, 205 F.2d 915, 918 (7th Cir. 1953) ("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."). (Of course, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), modifies the *Conley v. Gibson* "any set of facts" standard to also require plausibility, but there's no suggestion Frank's allegations are implausible.)

Frank plausibly pleaded that appellees' counsel breached their duty to him, and that this breach to Frank may be equitably remedied. This is enough for intervention and enough to sustain his complaint at this stage of the proceedings. "[E]ven if the judge had concluded that the plaintiffs have the better of their dispute with Frank, still the judge should have granted his motion to intervene." *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 318 (7th Cir. 2012). The district court failed to apply the correct legal standards for a motion to intervene and failed to conduct *any* analysis of whether Frank had sufficiently plead his motion to intervene and complaint.

The court's error was more than just a technicality; it deprived Frank of the development and factual discovery supporting his injunction claims. Frank's intervenor complaint contained a short and plain statement of his claims with plausible factual allegations and nothing more was required. *See* Fed. R. Civ. P. 8; *Twombly*. Whether or not the court was initially inclined to reject Frank's injunction request, it was legal error for the court to judge the merits (and deny intervention on that basis) when Frank's plausibly-plead complaint set forth facts entitling Frank to injunctive relief. Indeed, the parties never briefed and the court never even *addressed* whether Frank had established the elements for a permanent injunction. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). If Frank's motion to intervene had been granted, Frank could have proceeded with discovery into appellees' counsel's practices in support of Frank's injunction claims, or at least briefed a motion to dismiss the injunctive relief. *Stewart Title Guar. Co. v. Cadle Co.*, 74 F.3d 835, 836-37 (7th Cir. 1996).

Finally, assuming *arguendo* that the motion to intervene was moot, the district court further erred when it found that appellees' counsel's prolific practice of extorting fees in exchange for dismissal of strike suits would not "evade review." A13. The mootness doctrine provides an exception for cases that are "capable of repetition, yet evading review" where "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party will be subjected to the same action again." *Protestant Memorial Medical Center, Inc. v. Maram*, 471 F.3d 724, 730 (7th Cir. 2006). Frank's motion would not be moot because "the challenged situation is likely to recur"

and "would be subjected to the same adversity." *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000).

Here, repetition in this case is a certainty. Appellees counsel continue to prolifically carpet-bomb strike suits against merging companies. Counsel for the three appellees filed 122 different strike suits across the country in the first six months of 2018. A267-72. In fact, appellees' counsel has filed suit against nearly every merging companies which Frank declared he is or was a shareholder of—23 companies, including Akorn. A231 and A257. Appellees appear to have successfully extracted undisclosed fees in exchange for dismissal of several of those suits.[4] Because Frank's investment strategy includes maintaining a percentage of merging companies, A257, Frank will most certainly fall victim to appellees' counsel's extortionate fee practice again and again.

[4] *Smith v. Pinnacle Entertainment, Inc*., No. 18cv314, Dkt. 6 (D. Nev. Apr. 4, 2018) (dismissing case but retaining jurisdiction for mootness fee application) and *Franchi v. Pinnacle Entertainment, Inc*. et al, No. 18cv415, Dkt. 2 (D. Nev. Apr. 4, 2018) (dismissal filed by counsel for appellee Berg); *Gordon v. Care Capital Properties, Inc. et al*, No. 17cv859, Dkt. 15 (D. Del. Feb. 14, 2018) (agreement to pay undisclosed attorneys' fees to several plaintiffs represented by counsel for all three appellees); *Berg v. Panera Bread Co. et al*, No. 17cv1631, Dkt. 18 (notice of agreement to pay undisclosed amount of attorneys' fees to appellee Berg) (E.D. Mo. Feb. 8, 2018); *Parshall v. CU Bancorp et al*, No. 17cv4303, Dkt. 27 (agreement to pay undisclosed attorneys' fees to counsel for appellee Berg) (C.D. Cal. Dec. 29, 2017); *Jackson v. WGL Holdings Inc. et al*, No. 17cv0530, Dkt. 13 (D.D.C. Dec. 13, 2017) (agreement to pay $240,000 attorneys' fees to two plaintiffs represented by counsel for appellees Berg and Alcarez); *Stern v. Atwood Oceanics, Inc. et al*, No. 17cv1942, Dkt. 9 (S.D. Tex. Nov. 21, 2017) (agreement to pay undisclosed attorneys' fees to plaintiffs represented by counsel for all three appellees).

At the status hearing, the district court found that appellees' counsel would "not evade review" because Frank could "bring[s] an intervention action in front of another judge." A13. It would be highly impractical and futile for Frank to intervene in all of appellees' counsel's future strike suits for several reasons. *First*, because appellees are receiving fees in exchange for dismissing these actions, Frank does not receive notice of these actions as a class member normally would. *See* Fed. R. Civ. P. 23(c)(2).[5] Instead, Frank would have to scour dockets across the country to determine if a strike suit was filed. *Second*, even if Frank were successful in locating those actions *and* successfully intervening, nothing would stop settling counsel from moving on to the next strike suit and the process would repeat itself. *Third*, appellees' counsel now appear to be dismissing these actions with prejudice but *without* disclosing to the court appellees' counsel's agreement regarding fees. *See, e.g.*, *Franchi v. Pinnacle Entertainment, Inc.*, No. 18cv415, Dkt. 2 (D. Nev. Apr. 4, 2018) (dismissal with prejudice by counsel for Appellee Long); *Ayzin v. Orbital ATK, Inc*., No. 17cv1151, No. 3 (E.D. Va. Nov. 27, 2017) (same by

[5] Plaintiffs are required to publish notice of a PSLRA action in a "widely circulated national business-oriented publication," 15 U.S.C. § 78u-4(a)(3), and usually opt for a cheaper option, as they did here, with a wire service. Dkt. 85-1. Even assuming that Frank were to happen upon similar future notices, the notice would not identify all pending actions, *see id.*, and Frank would still be required to comb through dockets nationwide. Moreover, the news release in this case was filed *after* the supplemental disclosures were filed and did not disclose that the underlying claims were allegedly moot, nor that the attorneys intended to seek mootness fees; instead, it indicated that lead counsel would be appointed 60 days after the wire release. *Id.* Appellees could proceed in future suits as they did here, pretending that the action would proceed as an ordinary securities action and making unsuspecting class members none the wiser. *Id.*

counsel for Appellee Alcarez); *Sharpenter v. Gigamon Inc.*, No. 17cv6755, Dkt. 10 (N.D. Cal. Mar. 1, 2018) (dismissal without prejudice by counsel for Appellee Harris).[6] Not only does such concealment impose an unjustified burden on Frank's intervention and eliminates any chance that a district court would independently review the dismissal-fee arrangement, these Rule 41 dismissals attempt to deprive the court of jurisdiction; it is far from certain whether courts outside this Circuit would apply *Pearson v. Target* to a Rule 60(b)(6) motion by a shareholder, and if not, appellees would evade review forever. And even if Frank successfully reopens a case, appellees can play the same "heads-I-win, tails-don't-count" game they try to play here, waiting to suss out whether a court is sympathetic to Frank's arguments and then disclaiming the fee if they face any risk of an adverse precedent and arguing mootness. Appellees' counsel have shown no sign of ceasing their abuse of the courts; rather, they have continued unabated. The injunctive relief that Frank requests will end this game of whack-a-mole against appellees' counsel.

[6] Because the defendants in these actions filed supplemental disclosures to moot the strike suit claims, plaintiffs were likely successful in their racket and extorted fees without disclosing them. *See* Penn National Gaming Form 8-K dated Mar. 19, 2018, *available at*: https://www.sec.gov/Archives/edgar/data/921738/000110465918018673/a18-7036_48k.htm (because of disclosures, "the claims in each of the lawsuits have been mooted"); Orbital ATK Supplemental Proxy Statement dated Nov. 20, 2017, *available at*: https://www.sec.gov/Archives/edgar/data/866121/000110465917069503/a17-27213_1defa14a.htm (supplementing proxy "in order to moot plaintiffs' unmeritorious disclosure claims"); Gigamon Supplemental Form 8-K dated Dec. 12, 2017, *available at:* https://www.sec.gov/Archives/edgar/data/1484504/000119312517366731/d475427d8k.htm (describing strike suits and supplemental disclosures).

II. To the extent the district court's order is viewed as denying the merits of Frank's intervenor complaint, the district court erred in denying the prospective injunctive relief.

The district court apparently denied Frank's motion to intervene as moot because it held that it would deny Frank's request for prospective injunctive relief. A12. Preliminarily, the district court committed legal error in finding the motion moot on that basis. *See* Section I, above. But even if the court's order is viewed as a denial of the prospective injunctive relief sought in Frank's intervenor complaint (and assumes that the motion to intervene was essentially granted for that purpose), the district court further erred in categorically denying Frank injunctive relief. The district court erred in denying injunctive relief because it held that it would not enjoin future suits when Frank requested only that appellees' counsel seek court approval in future strike suits. *See* Section II.B below. While intervention is assumed based on the district court's denial of injunctive relief, putative class members like Frank should be entitled to intervene to challenge appellees' "mootness fee" racket. *See* Section II.C below.

Nor can Plaintiffs argue that their original complaints were meritorious and that the supplemental disclosures were material. Those are questions on the merits, and the time to make that case is *after* the motion to intervene is granted. The district court "must accept as true the non-conclusory allegations of the motion and cross-complaint." *Lake Investors*, 715 F.2d at 1258. Frank has plausibly (and correctly!) alleged that these suits would fail under *Walgreen*. A179.

A. Frank sought injunctive relief to prohibit class counsel from circumventing *Walgreen* and pursuing their mootness fee racket.

Merger strike suits are brought to extort attorneys' fees through the leverage of a time-sensitive motion for preliminary injunction, which could derail a multi-billion dollar merger like the underlying proposed Akorn transaction. *See* Fisch, 93 TEX. L. REV. at 565-66. Strike suits rarely provide monetary relief for the putative class members but instead typically consist solely of supplemental disclosures to the merger proxy statement. *Id.* at 599 & n.7. Until recently, strike suits generally quickly settled as *class actions* with defendants offering to pay attorneys' fees and provide dubiously-valuable supplemental SEC filings. Cain, 71 VAND. L. REV. at 619, 623. "Because the litigation threatens the consummation of the deal if not resolved quickly and because corporations may view the settlement amount as a drop in the bucket compared to the overall transaction amount, defendants are motivated to settle even meritless claims." Jeffries, 11 BERKELEY L.J. at 58. This Court recognized that rote approval of such settlements had "caused deal litigation to explode in the United States beyond the realm of reason." *Walgreen*, 832 F.3d at 725 (quoting *Trulia*, 129 A.3d 884 at 894). *Walgreen* followed *Trulia* and cracked down on the attorney-friendly disclosure-only class-action settlements, holding they would be treated with "disfavor" unless the supplemental disclosures "address a plainly material misrepresentation or omission." *Walgreen*, 832 F.3d at 725; *Trulia*, 129 A.3d at 898-99.

Walgreen and *Trulia* had a temporarily beneficial effect for shareholders by slightly slowing the pace of disclosure-only class-action settlements, which "do not appear to affect shareholder voting in any way." Fisch at 561. Strike suits were filed in

96% of mergers worth over $100 million in 2013, and this number fell to 73% in 2016. Cain, 71 VAND. L. REV. at 608. Unfortunately, such complaints rebounded to 85% in 2017 and are likely higher today because plaintiffs have modified their tactics. *Id*.

Appellees and their counsel have adapted with an end-run around the scrutiny that *Walgreen* demands, by settling for attorneys' fees *without* seeking class release. Cain, 71 VAND. L. REV. at 615. Whereas class action or derivative settlements allow shareholders to object to the payment of attorneys' fees, *see* Fed. R. Civ. P. 23(h)(2), like a shareholder did in *Walgreen*, appellees' new racket extorts payment without seeking or receiving court approval under Rule 23. Appellees' counsel have eschewed class-action settlement and have instead negotiated payments of "mootness fees" to evade the careful judicial review required under *Walgreen* and *Trulia*. *See* Cain, 71 VAND. L. REV. at 615. Appellees and appellees' counsel have settled other strike suits for six-figure "mootness fees," without the safeguards of settlement approval under Rules 23 or 23.1. *See* A216-17.

Prior to 2014, virtually no strike suits in Delaware or in federal courts were resolved through mootness fees, "but in the wake of *Trulia* these cases became more significant. They comprised 14% of cases in 2015 and rose to 75% of cases by 2017." Cain, 71 VAND. L. REV. at 623. This sea change of tactics—from state courts to federal and from class-action settlement to stipulated dismissals for mootness fees—has scarcely been scrutinized by district courts, which routinely grant stipulated dismissals. To Frank's knowledge, no appellate court has considered the propriety of strike suits resolved through mootness fees. Federal courts should address the mootness fee phenomenon:

> Although these cases are being dismissed without a release, reflecting the likelihood that they are largely nuisance suits, they appear to be generating the payment of mootness settlement fees, creating an incentive for plaintiffs' lawyers to continue to file them. **These cases appear to indicate that plaintiffs' counsel may be extracting rents by seeking low cost payments to "go away."** Mootness fee payments thus likely warrant a more thoughtful response by the federal courts.

Cain, 71 VAND. L. REV. at 632.

No federal basis exists for "mootness fees," which are an idiosyncratic and evolving feature of Delaware Chancery law. Rickey at 1-2. Such fees are unlawful for federal complaints like those appellees brought under the Exchange Act: "Total attorneys' fees and expenses awarded . . . shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 78u-4(a)(6). Because the amount plaintiffs recovered for the class is zero, any reasonable percentage likewise ought to be $0. *Cf. Masters v. Wilhelmina*, 473 F.3d 423, 438 (2d Cir. 2007). Moreover, plaintiffs could not show entitlement to mootness fees even if Delaware law applied, which it does not. (Akorn is a Louisiana Corporation with its primary place of business in Illinois.) Delaware courts award mootness fees only when an underlying complaint is "meritorious when filed." *Sauer-Danfoss*, 65 A.3d at 1123.[7]

[7] Notably, appellees' counsel seldom file strike suits in Delaware state courts any more even when the defendant is a Delaware corporation, likely because the Delaware Chancery actively scrutinizes and slashes mootness fee payments. *E.g., Xoom*. Thus, "the primary driver of the [shift of filings to] federal court . . . is a rise in mootness fee payments. In 2017, all mootness fee payments were in federal court cases." Cain, 71 VAND. L. REV. at 628.

Frank moved to intervene to stop appellees' mootness fee racket and their end-run around this Court's precedent in *Walgreen* by enjoining appellees from extracting attorneys' fees in strike suits without court approval.

B. The district court failed to satisfy Circuit Rule 50; its finding that it would not grant injunctive relief to enjoin appellees' from "filing actions" was clearly erroneous because Frank's request only sought to enjoin appellees from accepting fees in future strike suits without court approval.

The court denied the motion to intervene based on its intention to deny the prospective injunctive relief sought in Frank's intervenor complaint. As an initial matter, because the court's decision was based on the merits of Frank's intervenor complaint, the district court's one-sentence order (and status conference colloquy) do not satisfy Circuit Rule 50: "Whenever a district court resolves any claim or counterclaim on the merits, . . . the judge shall give his or her reasons, either orally on the record or by written statement." Cir. R. 50. The rule serves three important functions: "to create the mental discipline that an obligation to state reasons produces, to assure the parties that the court has considered the important arguments, and to enable a reviewing court to know the reasons for the judgment." *W. States Ins. Co. v. Wisconsin Wholesale Tire, Inc*., 148 F.3d 756, 757–58 (7th Cir. 1998). "The purposes of the rule are not met, however, if the 'reasons' provided are so conclusory that the judge's line of thinking cannot be discerned. To that end, we have interpreted the rule as requiring district judges to 'analyze the facts in relation to the law,' rather than merely to provide conclusions on the controlling issues." *Id.* at 758.

The judge's one-sentence order and conclusory oral statements that it would not enjoin future strike suits (which is not what Frank requested) never explain *why* the district court would deny the injunctive relief. Interpreting the district court's oral statements most charitably, the statement "And each one of these is a different case. Each one has different facts, different reasons" is perhaps a finding that Berg brings meritorious suits or that Frank failed to demonstrate that Berg is repeatedly bringing meritless suits, disentitling Frank to an injunction. A25. But such a finding would be inappropriate in construing the facts in the light most favorable to Frank, as the court is required to do at that early procedural stage. And a "court can't decide the merits and *then* dismiss for lack of jurisdiction." *Smith*, 772 F.3d at 450 (emphasis in original).

Indeed, the district court conducted no analysis or application of the law, including the elements of permanent injunction under *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. at 391. The district court's order cannot stand for the independent reason that it failed to meet Circuit Rule 50. *Wisconsin Wholesale*, 148 F.3d at 759 (remanding with instructions to comply with Circuit Rule 50).

The district court also clearly erred in finding that it would deny injunctive relief enjoining future strike suits because that was *not* the injunctive relief Frank requested. The district court stated multiple times that it would deny intervention because it would not enjoin appellees' counsel from *filing* future actions:

- "I am not going to enjoin plaintiff or plaintiff's counsel from filing suits, and I'm not going to interfere with those suits." A11.
- "I'm not going to enter an injunction relating to enjoining Mr. Berg and his counsel from filing suits." A11.

- "I'm not going to be granting prospective relief to prevent you or your client from filing similar suits in front of other judges." A18.
- "[I]t hasn't changed my decision that the issue that intervenor Frank wants to raise about attempting to enjoin Mr. Berg and other people in his position from filing suits like this -- I'm -- I don't believe I – I'm not going to enter such an order." A25.
- "But I'm not going to prospectively bar him from filing suits." A25.

But that's *not* what Frank requested. Frank's intervenor complaint sought a narrowly-tailored permanent injunction "prohibiting Settling Counsel from accepting payment for dismissal of class action complaints filed under the Exchange Act without first obtaining court adjudication of their entitlement to any requested fee award." A200; Dkt. 57-1 at 20-21. Such narrowly-tailored injunctive relief is within the court's purview and does not unduly burden the rights of shareholders bringing meritorious—or even merely non-frivolous—suits. The district court's holdings regarding the prospective injunctive relief were based on the erroneous premise that Frank sought to enjoin the actions. Because that clearly erroneous finding served as the basis for denying Frank's motion to intervene as moot, *see* Section I above, the district court's order must be reversed.

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

As discussed above, at a minimum, this Court should vacate and remand the district court's order denying intervention because it improperly based its ruling on the merits of the prospective injunctive relief, *see* Section I, and because its mootness

determination was based on the erroneous premise that Frank sought to enjoin settling counsel from filing future strike suits, *see* Section II.B. In addition, because the Court presumably reaches a legal question of first impression—how, procedurally, putative class members should challenge "mootness fees"—the panel should guide the district court and instruct it to permit intervention.

Class action strike suits that yield fees for class counsel and immaterial supplemental disclosures for the class are "no better than a racket." *Walgreen*, 823 F.3d at 724. Appellees' circumvention of this Court's precedent in *Walgreen* and its pursuit of this "mootness fee" racket is a perversion of the class action device. Individuals may not use "the class device . . . to obtain leverage for one person's benefit." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (citing *Young v. Higbee Co.*, 324 U.S. 204 (1945)). This Court has repeatedly criticized misuse of the class-action or shareholder-derivative device for "selfish" purposes, especially in the shareholder context, going so far as to hold that district courts should throw out such suits rather than allow attorneys to impose social costs and hurt the class members they putatively represent. *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 320 (7th Cir. 2012); *see also In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (self-dealing suits imposing only social costs should not be certified under Rule 23(a)(4)).

The appropriate remedy when a shareholder suit will make shareholders worse off is to dismiss the case. *Crowley*, 687 F.3d at 320. In *Crowley*, the Seventh Circuit struck down a derivative action observing that "[t]he only goal of this suit appears to be fees for the plaintiffs' lawyers." 687 F.3d at 319. This Court noted that it was "odd" for plaintiffs to sue over the risk that alleged antitrust misconduct would lead to litigation

against the corporation when the suit itself manifested that litigation; "self-appointed investors may be poor champions of corporate interests and thus injure fellow shareholders." *Id*. at 317, 318. Dismissal was appropriate in *Crowley* because it was "impossible to see how the investors could gain from it." 687 F.3d at 319. Likewise, appellees should have avoided harming the class by promptly dismissing—or better yet, never bringing—their immaterial complaints.

Appellees instead harmed the class. Each and every appellee requested an injunction prohibiting Akorn from completing the proposed transaction, which offered a substantial premium over Akorn's market price. Upon Akorn's filing of immaterial supplemental disclosures, appellees then dismissed their complaints as "moot" although many arguments were not addressed by the disclosures at all. *See* A195-96. These disclosures were simply an excuse to seek attorneys' fees, borne out by similar conduct of appellees' counsel in other strike suits. Of course, this isn't the first time appellees have extorted fees at the expense of class-member shareholders. Appellees and appellees' counsel have settled other strike suits for six-figure "mootness fees," without the safeguards of settlement approval under Rules 23 or 23.1. *See* A216-17. The question is how do putative-class-member shareholders challenge this incessant, unethical practice?

In *Pearson v. Target Corp*., after class-action settlement and final judgment, a class member filed a motion to intervene and sought to disgorge "objector blackmail," *i.e*., side settlements paid to objectors to dismiss their appeals. 893 F.3d at 982-83. The district court rejected the class member's Rule 60 request, but this Court reversed, finding that the class member was entitled to relief, "to ensure that no class sellout had

occurred." *Id*. at 986. This Court held: "It is fine to say that individual parties must bear the responsibility for their deliberate litigation conduct and leave it at that. But class-action cases—with all their inherent agency problems—require an extra analytical step to ensure that the interests of the class are protected." *Id*. at 985. Similarly, putative class members like Frank should not be without a remedy to challenge appellees' "mootness fee" scheme to protect their interests. Given the unabated harm to diversified shareholders, the district court should permit intervention to examine whether an injunction would curtail abusive and extortionate fee demands going forward. *Cf. Support Sys. Intern., Inc. v. Mack*, 45 F.3d 185 (7th Cir. 1995).

A motion to intervene to challenge the "mootness fee" racket satisfies the requirements for intervention as a matter of right. In order to intervene as a matter of right, a party must satisfy four requirements: (1) the application must be timely; (2) "the applicant must claim an interest relating to the property or transaction which is the subject of the action"; (3) "the applicant must be so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"; and (4) "existing parties must not be adequate representatives of the applicant's interest." *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 945-46 (7th Cir. 2000). Because Frank filed his motion to intervene three days after the stipulated dismissals were filed, Dkt. 57, Frank's motion to intervene was timely. *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991) (timeliness considered holistically given factors such as length intervenor knew of interest in the case). Frank would satisfy the other elements because Frank, as a putative class-member shareholder, has a direct interest in

eliminating appellees' mootness fee racket which he seeks to enjoin here, and no other party would protect that interest.

1. Putative class members have a direct interest in curtailing the mootness fee racket and vindicating their own interests.

According to Frank's proposed intervenor complaint, appellees' counsel repeatedly breach their fiduciary duties to putative class members including Frank by filing literally hundreds of meritless strike suits they intend to settle for private gain—against the interests of shareholders of the corporations being acquired. A198. Thus, Frank's request to enjoin this destructive and unethical behavior is of direct financial interest to Frank. An actual controversy exists between appellees who contend they can extract attorneys' fees through Exchange Act litigation without court approval and Frank, who contends that *Walgreen* demands otherwise.

By virtue of filing claims on behalf of a class of shareholders, appellees and their counsel undertook fiduciary responsibility to those putative class members. "Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed." *In re General Motors Corp. Pick-Up Truck Fuel Prod. Liab. Litig.*, 55 F.3d 768, 801 (3rd Cir. 1995); *see also Back Doctors Ltd. v. Metropolitan Property and Casualty Insurance Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (reversing plaintiffs' requested remand to state court due to representatives' breach of fiduciary duty); *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002) (collecting cases finding a fiduciary duty).

A fiduciary duty attaches to class action complaints because class counsel has *de facto* control and dominance over the litigation decisions that are made, and the class

members are uniquely vulnerable to such control. "The class action is an awkward device, requiring careful judicial supervision, because the fate of the class members is to a considerable extent in the hands of a single plaintiff . . . whom the other members of the class may not know and who may not be able or willing to be an adequate fiduciary of their interests." *Culver*, 277 F.3d at 910 (7th Cir. 2002).

It is inequitable for individual class members or counsel to advantage themselves over other class members without conferring the class any benefit and without judicial oversight. Representatives breach their fiduciary duty simply by harming class member interests, even if they do not release class members' claims. *See Back Doctors*, 637 F.3d at 830 (breach of fiduciary duty not to advance punitive damages claims); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (inappropriate to "jettison the class for personal benefit"); *Grok Lines, Inc. v. Paschall Truck Lines, Inc.*, No. 14 C 08033, 2015 WL 5544504, at *7 (N.D. Ill. Sept. 18, 2015) (rejecting settlement that did *not* release monetary claims, but where counsel "abandoned pursuit of a monetary recovery for the class"); *see also Stand. Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593-94 (2013) (suggesting class member may intervene to remedy breach of fiduciary duty in response to stipulation that did not bind anyone except representative). Indeed, plaintiff-appellee Berg's counsel "does not dispute that they owe fiduciary duties to the putative class." Dkt. 84 at 9.

The lack of release does not negate prejudice to absent class members who were owed a duty of loyalty they did not receive. "It is unacceptable to mitigate the risk of a relatively small payday by negotiating a settlement at the expense of clients." *Grok Lines*, 2015 WL 5544504 at *8.

Appellees' counsel egregiously violated their fiduciary duty to class members by engaging in a premeditated scheme to shake down defendant companies like Akorn to the detriment of putative class members to whom they owed a duty of loyalty. The underlying complaints were shams "filed . . . for the sole purpose of obtaining fees for the plaintiffs' counsel." *Walgreen*, 832 F.3d at 724. At best, such strike suits burden the judicial system with meritless but time-demanding motions for preliminary injunction that plaintiffs have no interest in obtaining, pointlessly consuming judicial resources as a bargaining chip for fees at the expense of defendant and its shareholders—who are the class that the class counsel and representative putatively represent.

2. No party adequately represents Frank or the other putative class-member shareholders against appellees' mootness fee racket.

Without intervention, the interests of Frank will be greatly impaired because no other remedy exists. Frank's "interest would be extinguished for no compensation, which would eliminate [his] ability to protect its interest." *In re Bear Stearns Cos.*, 297 F.R.D. 90, 97 (S.D.N.Y. 2013). The burden of showing that representation may be inadequate "should be treated as minimal," *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972). An intervenor need only show that representation "may be" inadequate. *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007). Frank meets this burden easily. Here, class members who were owed a fiduciary duty instead had their interests impaired by plaintiff's counsel through an action that only sought "worthless benefits" and should have been "dismissed out of hand." *Walgreen*, 832 F.3d at 724.

In *Crowley*, the Seventh Circuit extended precedent to liberally grant intervention to objectors. 687 F.3d at 318-19; *see also Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998).

There, the Court found that the district court's reason for denying intervention "unsound" because the objecting shareholder's position was "entirely incompatible with the stance taken by" plaintiffs. *Id.* at 318. "That the plaintiffs say they have other investors' interests at heart does not make it so." *Id.* Settlement approval is required "precisely because the self-appointed investors may be poor champions of corporate interests and thus injure fellow shareholders." *Id*. The same is true here. No existing party adequately represents the interests of Frank and the other putative class-member shareholders because appellees actively work *against* those interests and defendant Akorn was essentially extorted into agreeing to the payment. Indeed, the parties have bargained away Akorn's funds to finance bad-faith litigation brought by appellees. Appellees' strike suits and the companies' acquiescence to them run directly contrary to Frank's interest as a shareholder in Akorn and numerous public companies.

III. This Court has jurisdiction.

A. Frank's informal colloquy with the district court did not waive his appellate rights.

Appellees filed a motion to dismiss with this Court, arguing that Frank waived his appeal based on statements by Frank's counsel during informal colloquy with the district court. Appellees' Joint Motion to Dismiss at 6. The argument is meritless; we preempt it here, as the Court directed in its August 9 order, but the Court may disregard this section if appellees do not renew the argument in their merits brief.

On April 11, in a hearing in the single case of *Berg*, the district court stated that it planned Frank's motion to intervene against Berg as moot because Berg had disclaimed

his interest in mootness fees. A243. The court scheduled another conference for May 2 involving all six cases as consolidated. A242. There, three of the six attorneys (the appellees here) disclaimed interest in the mootness fees, and three did not. A252-53. During the conference, the district court asked for Frank's position on the six cases, and Frank's counsel responded that with respect to the non-disclaiming plaintiffs "we should proceed to a decision on whether we can intervene in these three cases." A35. In light of the court's previous decision regarding Frank's request for injunctive relief, where Frank had already objected, Frank counsel responded, "With regard to the other three where fees are being disclaimed, those could be dismissed." *Id*. at 9-10.

Appellees take those statements out of context, and argue that they constitute a waiver of Frank's appellate rights. But Frank's counsel's comments are consistent with two written filings where Frank preserved his arguments for appeal. A249-52; A256-58. Affirmative waiver requires a judicial admission, namely, a "deliberate, clear and unequivocal" statement. *McCaskill v. SCI Mgt. Corp.*, 298 F.3d 677, 680 (7th Cir. 2002); *accord id.* at 682 (Rovner, J., concurring in the judgment). No such statement exists in the record. Under Seventh Circuit law, an out-of-context oral statement cannot override written pleadings. *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 872 (7th Cir. 2010)). Appellees' argument of waiver is based on cases where the appellant *stipulated* to judgment. *See Assn. of Community Organizations for Reform Now (ACORN) v. Edgar*, 99 F.3d 261, 262 (7th Cir. 1996) ("judgment was drafted the state's legal officers"); *INB Banking Co. v. Iron Peddlers, Inc.*, 993 F.2d 1291, 1292 (7th Cir. 1993) ("agreed to the judgment"); *Stewart v. Lincoln-Douglas Hotel Corp.*, 208 F.2d 379, 381 (7th Cir. 1953) ("It is not disputed that an order dismissing the amended complaint was drafted by

[appellant's] counsel"). Here, no stipulation appears on the record, so the correct standard is whether appellant made an "unambiguous statement evincing an intentional waiver." *McCaskill*, 298 F.3d at 682.

Frank repeatedly opposed plaintiffs' suggestion that disclaimer of attorneys' fees caused his motion to intervene to become moot. On March 13, 2018, plaintiff-appellee Berg filed his "Motion Disclaiming . . . Attorneys' Fees . . . and Withdrawing Opposition to Theodore H. Frank's Renewed Motion to Intervene as Moot." A238. Before Berg's motion was first heard, Frank filed an opposition on March 18, disputing that disclaimer moots his motion. A249-52. "Plaintiff Berg and his counsel have not offered to be bound by a consent decree requiring them to submit attorneys' fees in strike suits for court approval, and therefore Frank's renewed motion to intervene does not become moot." A250. At the first hearing on Berg's motion, Frank's counsel repeated this position. Plaintiffs' motion, he said through counsel, is "a motion that assumes the conclusion that it moots our motion to intervene." A10. However, the district court rejected Frank's argument and suggested that the case as to plaintiff Berg should be dismissed. A12.

In response to the district court's comments, on March 27, Frank filed an "Offer of Proof of Standing to Pursue Injunction," which attached a declaration showing the Frank suffers ongoing harm from the plaintiffs' attorneys' activities. A256-58. Frank declared: "Unless Plaintiffs and their counsel are enjoined from collecting fees in future strike suits, it is near-certain I will be the shareholder of corporations extorted by Plaintiffs and their counsel." A257. But the district court reaffirmed its position during

the April 11 conference. "**You've made your record** [for appeal], and I'll make mine," remarked the district court. A25 (emphasis added).

Read in context of Frank's previous express and written objections, Frank's counsel May 2 suggestion that appellees' cases "could be" dismissed cannot be read to implicitly waive an argument Frank preserved through two previous written filings. The "could be dismissed" statement falls far short of being an "unambiguous statement evincing an intentional waiver." *McCaskill*, 298 F.3d at 682 (citing *MacDonald v. Gen. Motors Corp.*, 110 F.3d 337, 340 (6th Cir. 1997) ("counsel used words such as 'probably' and 'suggesting' in making his comments, indicating that such remarks were guarded and qualified")).

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

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

> I do not wish to re-litigate this Court's decision that plaintiffs' disclaimer of fees moots Mr. Frank's motion, which the Court explained at the April 11 conference. However, I would like to preserve the issue for appeal in these two dockets, and the record is currently unclear.

> … If it was the court's intention to deny the motion with respect to all three "disclaimed fees" cases, I request that the court clarify the record by entering a similar docket entry in the above-referenced two matters, noting that Mr. Frank's motion was deemed filed, but denied as moot for the same reasons explained on the record in the *Berg* action. This would allow Mr. Frank to notice an appeal in all three cases.

A259-60. Frank did not assent to dismissal of *Alcarez* and *Harris*, but expressly wanted to court to act so he could file the present appeal.

The district court quickly responded to these letters by entering minute orders in the *Alcarez* and *Harris* dockets that say: "Theodore Frank filed a motion to intervene in case 17 C 5016. That motion is deemed filed in this case … and is denied as moot for the reasons stated on the record at hearings in both cases." A42, A43. Thus, neither Frank nor the district court believed that he waived the argument. The district court correctly entered orders that it had denied the motions to intervene as moot. The written record does not suggest any "deliberate, clear, and unambiguous statement evincing an intentional waiver." *McCaskill*, 298 F.3d at 682. "[W]e are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170 (1972).

Unlike the precedents appellees cite, Frank did not stipulate to judgment. Remarks at the May 2 status conference that the court "could" dismiss appellees' actions simply addressed handling the cases in view of the district court's previously-announced decision that the motion was "moot" with respect to plaintiffs who disclaim attorneys' fees. There is no waiver.

B. Frank has Article III standing.

Appellees' Motion to Dismiss also argued that Frank lacked Article III standing because he did not suffer harm because any harm belonged to Akorn. Appellees' Joint Motion to Dismiss at 11. But Frank is not bringing a derivative suit. He seeks relief not derivatively on behalf of the corporation, but directly as a putative class member affirmatively harmed by attorneys who owe him a fiduciary duty. A186, A212-13, Dkt. 88 at 2-3. When an attorney filed a complaint on behalf of a putative class, he or she undertakes a fiduciary responsibility to not harm that class. *See GMC Pick-Up*, 55 F.3d at 801; Section II.C.1 above.

According to Frank's proposed intervenor complaint, Appellees' counsel repeatedly breach their fiduciary duties to putative class members including Frank by filing literally hundreds of meritless strike suits they intend to settle for private gain—against the interests of shareholders who are owners of corporations being acquired. A198. Thus, Frank's request to enjoin this destructive and unethical behavior is of direct financial interest to Frank. An actual controversy exists between appellees who contend they can extract attorneys' fees through Exchange Act litigation without court approval and Frank, who contends that *Walgreen* demands otherwise.

Frank thus independently possesses Article III standing to pursue his claims against plaintiffs and their counsel, who assumed a fiduciary duty to him when they brought a class action putatively on his behalf, and then breached that fiduciary duty through their self-dealing, causing remediable injury. For example, *Robert F. Booth Trust v. Crowley* found a shareholder had standing to intervene to object to and seek dismissal of a selfish Rule 23.1 derivative suit designed only to generate a settlement to benefit

attorneys at the expense of shareholders. 687 F.3d 314. *Cf. also Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir. 1999) (derivative action); *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). A "shareholder who objects to the payment of a fee from corporate funds in compensation of attorneys" who are suing on behalf of shareholders "has an interest that is affected by the judgment directing payment of the fee." *Kaplan*, 192 F.3d at 67.

Non-parties possess standing to the extent they suffer from a non-speculative injury-in-fact. *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 692 (7th Cir. 2015). Here, the injury to shareholders is not speculative. By design, appellees harm shareholders by extorting fees from Akorn and other companies. The breach of fiduciary duties gives rise to a legally-protectable interest, and "where parties have long been permitted to bring" actions for breach of fiduciary duty "it is well-nigh conclusive that Article III standing exists." *Scanlan v. Eisenberg*, 669 F.3d 838, 845 (7th Cir. 2012) (cleaned up) (trusts).

Appellees further claim that the district court's finding of mootness precludes Article III jurisdiction in this Court, but that just reflects a misunderstanding of appellate jurisdiction. This Court has appellate jurisdiction to review a final decision of a district court finding lack of jurisdiction. *See, e.g., Smith v. Greystone Alliance, LLC*, 772 F.3d 448 (7th Cir. 2014); *Olson*, 594 F.3d 577.

Conclusion

The Court should reverse and remand the district court's finding of mootness. Additionally, the Court should affirm that absent class members may move to intervene to challenge a "mootness fee" request and to prevent class counsel from flouting

Walgreen, and that appropriately tailored injunctive relief is a prospective remedy. Any other result would fall short of *Walgreen*'s directive that meritless securities strike suits "must end."

Dated: September 10, 2018

Respectfully submitted,

/s/ Melissa Ann Holyoak

Melissa Ann Holyoak
COMPETITIVE ENTERPRISE
CENTER FOR CLASS ACTION FAIRNESS
1310 L Street NW, 7th Floor
Washington, D.C. 20005
(202) 331-2263
Email: melissa.holyoak@cei.org
Attorney 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 Cir. R. 32(c) because excluding the parts of the document exempted by Fed. R. App. P. 32(f):

this document contains 13,253 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 2011 in 12-point Palatino font.

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

Executed on September 10, 2018.

/s/ Melissa A. Holyoak
Melissa A. Holyoak

Proof of Service

I hereby certify that on September 10, 2018, 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).

Alexander Breckinridge V
JONES WALKER
49th Floor
201 St. Charles Avenue
New Orleans, LA 70170-0000

Eric J. O'Bell
GAUTHIER, DOWNING, LABAQURRE, BEISER & DEAN
3500 N. Hullen Street
Metarie, LA 70002-0000

Executed on September 10, 2018.

/s/ Melissa A. Holyoak
Melissa A. Holyoak

Required Short Appendix

Statement of Compliance
with Circuit Rule 30(d)

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

/s/ Melissa A. Holyoak

Melissa A. Holyoak
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1310 L Street, NW, 7th Floor
Washington, DC 20005
Phone: (573) 823-5377
Email: melissaholyoak@gmail.com

Attorney for Theodore H. Frank

APPENDIX
TABLE OF CONTENTS
Required Short Appendix

Appendix Page

**Transcript of Proceedings before
The Honorable Thomas M. Durkin
on March 21, 2018 (Docket 17-cv-5016, No. 108)..... A1**

**Transcript of Proceedings before
The Honorable Thomas M. Durkin
on April 11, 2018 (Docket 17-cv-5016, No. 109) A20**

**Transcript of Proceedings before
The Honorable Thomas M. Durkin
on May 2, 2018 (Docket 17-cv-5016, No. 110) A27**

**Minute Entry of
The Honorable John Thomas Durkin
Re: Denying Theodore H. Frank's Motion to Intervene as
Moot in Berg Action
filed May 2, 2018 (Docket 17-cv-5016, No. 103).....A41**

**Minute Entry of
The Honorable John Thomas Durkin
Re: Denying Theodore H. Frank's Motion to Intervene as
Moot in Alcarez Action
filed May 24, 2018 (Docket 17-cv-5017, No. 55) A42**

**Minute Entry of
The Honorable John Thomas Durkin
Re: Denying Theodore H. Frank's Motion to Intervene as
Moot in Harris Action
filed May 24, 2018 (Docket 17-cv-5021, No. 56) A43**

APPENDIX
TABLE OF CONTENTS

Appendix Page

Docket Entries in Berg Action, Docket 17-cv-5016 ..... A44

Docket Entries in Alcarez Action, Docket 17-cv-5017 ..... A66

Docket Entries in Harris Action, Docket 17-cv-5021 ..... A79

Plaintiff Berg's Complaint for Violation of the Securities Exchange Act of 1934
filed June 2, 2017 (Docket 17-cv-5016, No. 1) A93

Plaintiff Alcarez's Complaint for Violation of Federal Securities Laws
filed June 7, 2017 (Docket 17-cv-5017, No. 1) A111

Plaintiff Harris' Complaint for Violations of Sections 14(a) and 20(a) of the Securities Exchange Act of 1934
filed June 14, 2017 (Docket 17-cv-5021, No. 1) A129

Stipulation and Proposed Order Concerning Plaintiff's Voluntary Dismissal Without Prejudice and Proceedings on Plaintiff's Counsel's Anticipated Application for Attorneys' Fees and Expenses
filed July 14, 2017 (Docket 17-cv-5016, No. 54) A149

Stipulation and Proposed Order Closing Case for All Purposes
filed September 15, 2017 (Docket 17-cv-5016, No. 56) A156

Memorandum and Order Denying Motion to Intervene Without Prejudice
filed November 21, 2017 (Docket 17-cv-5016, No. 81).....A163

Theodore H. Frank's Renewed Motion to Intervene,
filed December 8, 2017 (Docket 17-cv-5016, No. 82) A174

Attachment:

1. Second Amended Proposed Complaint of Intervenor Theodore H. Frank
dated December 8, 2017 (Docket 17-cv-5016, No. 82-1) ...A178

Theodore H. Frank's Memorandum of Law in Support of Renewed Motion to Intervene
filed December 8, 2017 (Docket 17-cv-5016, No. 83) A202

Attachment:

1. December 8, 2017 Declaration of M. Frank Bednarz, Without Supporting Exhibits,
dated December 8, 2017 (Docket 17-cv-5016, No. 83-1) .. A225

Plaintiff Berg's Notice of Motion to Withdraw,
filed March 13, 2018 (Docket 17-cv-5016, No. 91) A235

Exhibits:

1. Plaintiff Robert Berg's Motion Disclaiming and Foregoing All Right to the Payment of Attorneys' Fees and Expenses, and Withdrawing Opposition to Theodore H. Frank's Renewed Motion to Intervene as Moot
dated March 12, 2018 (Docket 17-cv-5016, No. 91-1)..... A236

2. Declaration of Brian D. Long in Support of Plaintiff Robert Berg's Motion Disclaiming and Foregoing All Right to the Payment of Attorneys' Fees and Expenses, and Withdrawing Opposition to Theodore H. Frank's Renewed Motion to Intervene as Moot, With Supporting Exhibits,
dated March 12, 2018 (Docket 17-cv-5016, No. 91-2) A238

Intervenor Theodore H. Frank's Opposition to Plaintiff Berg's Motion
filed March 18, 2018 (Docket 17-cv-5016, No. 94) A249

Intervenor Theodore H. Frank's Offer of Proof of Standing to Pursue Injunction, filed March 27, 2018 (Docket 17-cv-5016, No. 98)..... A254

Attachment:

1. Declaration of Theodore H. Frank dated March 27, 2018 (Docket 17-cv-5016, No. 98-1)..... A256

Letter to The Honorable Thomas M. Durkin from M. Frank Bednarz Re: Record Clarification filed May 23, 2018 (Docket 17-cv-5017, No. 54) A259

Intervenor Theodore H. Frank's Notice of Appeal filed June 1, 2018 (Docket 17-cv-5016, No. 104) A261

Intervenor Theodore H. Frank's Notice of Appeal filed June 1, 2018 (Docket 17-cv-5017, No. 56) A263

Intervenor Theodore H. Frank's Notice of Appeal filed June 1, 2018 (Docket 17-cv-5021, No. 57) A265

Appendix to Frank's Opposition to Appellees' Joint Motion to Dismiss Appeals filed July 26, 2018 (Consolidated Appeal Dkts. 18-2220, -2221, -2225, No. 16)..... A267

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

ROBERT BERG, individually and on behalf of all others similarly situated,	)	Docket No. 17 C 5016
Plaintiff,	)	Chicago, Illinois
	)	March 21, 2018
v.	)	9:34 a.m.
AKORN, INC.; JOHN N. KAPOOR; KENNETH S. ABRAMOWITZ; ADRIENNE L. GRAVES; RONALD M. JOHNSON; STEVEN J. MEYER; TERRY A. RAPPUHN; BRIAN TAMBI; ALAN WEINSTEIN; RAJ RAI; FRESENIUS KABI AG; QUERCUS ACQUISITION, INC.,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS - Motion Hearing
BEFORE THE HONORABLE THOMAS M. DURKIN

APPEARANCES:

For the Plaintiff (via telephone):	MR. BRIAN D. LONG Rigrodsky & Long PA 919 N. Market Street, Suite 980 Wilmington, DE 19801
	MR. PATRICK D. AUSTERMUEHLE DiTommaso Lubin PC 17 W 220 22nd Street, Suite 410 Oakbrook Terrace, IL 60181
For the Intervenor:	MR. M. FRANK BEDNARZ Competitive Enterprise Institute Center For Class Action Fairness 1145 E. Hyde Park Boulevard, Apartment 3A Chicago, IL 60615
Court Reporter:	LAURA R. RENKE, CSR, RDR, CRR Official Court Reporter 219 S. Dearborn Street, Room 1432 Chicago, IL 60604 312.435.6053 laura_renke@ilnd.uscourts.gov

(In open court.)

THE CLERK: 17 C 5016, Berg v. Akorn. And I need to get someone --

THE COURT: That's going to take a few minutes.

THE CLERK: Oh, sorry. All right.

THE COURT: We're going to do that one last.

(The Court attends to other matters.)

THE CLERK: 17 C 5016, Berg v. Akorn. And I need to get counsel on the line for that one as well.

(Clerk places telephone call.)

MR. LONG: Brian Long.

THE CLERK: Hi, Mr. Long. This is Sandy with Judge Durkin. This is Case 17 C 5016, Berg v. Akorn.

THE COURT: All right. Good morning.

MR. LONG: Good morning.

THE COURT: Let's have everyone identify themselves for the record, starting first with the person on the phone.

MR. LONG: Sure. Good morning, your Honor. May it please the Court, this is Brian Long from Rigrodsky & Long in Wilmington, Delaware, on behalf of plaintiff Robert Berg.

THE COURT: Okay.

MR. AUSTERMUEHLE: Good morning, your Honor. Patrick Austermuehle, local counsel on behalf of plaintiffs.

MR. BEDNARZ: Good morning, your Honor. This is Frank Bednarz on behalf of intervenor Frank.

THE COURT: All right. Why doesn't someone explain to me what's going on. I've read through the papers. I see what they say. Why is this happening? That's my question.

And, Mr. Berg, you're probably going to have to answer -- or not Mr. Berg. Mr. Long, you may have to answer that, or your local counsel may have to. But why are you withdrawing?

MR. LONG: Sure.

THE COURT: Go ahead.

MR. LONG: I apologize for interrupting, your Honor. Again, Brian Long from Rigrodsky & Long in Wilmington, Delaware.

The circumstances since the parties completed briefing have changed with respect to the transaction that was challenged in the lawsuit. Recently, as I mentioned in the papers, there have been news reports that, one, the deal still has not closed. Two, there are now ongoing investigations by both the company and Fresenius regarding breaches of FDA data integrity requirements relating to product development. And there have also been new cases filed pursuing claims, 10b-5 claims involving the company.

So under that backdrop, we conferred internally and determined that we no longer thought it was appropriate to take a fee in this one and decided just to alert the Court to that fact, move on and, you know, call it a day.

We did communicate that to counsel for plaintiffs in the other actions. They haven't yet confirmed or denied that they are going to seek the same course of action.

I will say, however, that counsel for plaintiff Berg -- all of whom have appeared in the action. All of the firms have now determined to disclaim and forbear any right to payment of attorneys' fees in the case. And so, you know, we do it now; we do it forever. We're just not going to take a fee.

THE COURT: Well, that would be fine if all these cases were in front of me and I had dismissed the others with prejudice and this is the only case left because then I'd order the 300-some thousand dollars to be returned to the defendant, and things would be over. Things may be over anyway.

But what's to prevent -- and I think this is what was in the intervenor's motion. What's to prevent the other attorneys -- I don't know how many there are, four or five sets of plaintiff attorneys -- to go in front of -- well, either, one, to get paid those fees, in which case some other judge in this building is going to have to deal with the same issue on whether or not those fees ought to be paid and to deal with the question of whether the intervenor has an ability to come in on the case.

And then are those attorneys at some point then going to say, "I don't want the fees either," in which case there

will be a claim of mootness so that we go through this same process in front of a bunch of other judges?

You chose me, whether you -- whether you chose me or not, one way or the other, I'm the only one dealing with this issue. We've got five other cases, I believe, that are dismissed without prejudice.

It -- and if you're all disclaiming over a quarter million dollars in fees and you want it to go back to the defendant, I'll order it to go back to the defendant. But it seems as if there might be a claim by other attorneys who at least are -- haven't decided if they want to give up $300,000 in fees. That's why I'm puzzled about all this.

MR. LONG: Sure. And your Honor's correct. I'm not sure what is to prevent those other counsel from maintaining their claim for those attorneys' fees.

And, you know, we did select your Honor. It was the low-filed case, and so yours was the only action in which we included the retention of jurisdiction for the claim -- for the mootness fee claim -- or for -- to have the mootness fee claim determined. And we're not trying to cause any more work for anyone else. But like I said, we've determined that for our purposes, we want to disclaim the mootness fee.

And so those other counsel -- those other plaintiffs, for better or for worse, are not parties in this action. And so, you know, I'm not sure what they're going to do. They

haven't -- they haven't told us either way what they're going to do.

But, you know, as we said in our reply, the claims with respect to Mr. Berg, the claims with respect to counsel for Mr. Berg, are now moot. And so we think that the Court no longer has Article III jurisdiction over the case. Mr. Frank no longer has standing. And any claim -- any claim for injunctive relief that he may have -- or may like to -- may desire to seek we think is far too speculative to permit him to intervene or for -- you know, or to permit him to intervene.

So I think where we are, respectfully, is that we think the motion to intervene should be denied as moot because counsel for the parties and -- counsel for the plaintiff and the plaintiff have disclaimed any right or entitlement to fees in this action.

THE COURT: I'll hear from the intervenor in a minute. But the rationale for not seeking a fee here by you is because there's been some hiccups on this deal involving Fresenius, correct?

MR. LONG: Correct.

THE COURT: Do you intend to file another suit?

MR. LONG: No, your Honor.

THE COURT: Because there has been one filed. There's one before Judge Kennelly on this.

MR. LONG: Yes.

THE COURT: And I saw you're not the attorney on it, at least not a named attorney on it. And it's not your intent to come back in and file a suit -- on behalf of your client, not you. But Mr. Berg is not going to come in and file another suit against Akorn relating to any revised proxies that may have to go out in light of the FDA issue with Akorn?

MR. LONG: Absolutely not, your Honor.

THE COURT: All right.

MR. LONG: And just to confirm for your Honor, we are not in any capacity involved in that case.

THE COURT: All right.

MR. LONG: We're finished. You know, if the Court will permit -- if the Court will permit it, we're finished with this.

THE COURT: All right. Well, the rationale for wanting to withdraw given the fact there was a -- there were further problems relating to this -- at least reported problems related to this potential acquisition of Akorn -- it's an acquisition, correct?

MR. LONG: Yes, your Honor.

THE COURT: Fresenius is buying it?

MR. BEDNARZ: Yes.

MR. LONG: Correct.

THE COURT: Okay. Would that rationale carry over to all the other attorneys too where the reason you're disclaiming

fees, wouldn't the other attorneys have the same reason to do so?

MR. LONG: Well, I think it's a reason that's sort of -- it could, but I don't know. I mean, not necessarily I think is the fair answer. I mean, this is a determination that as a firm, as co-counsel, we made amongst ourselves. We communi -- after we found out about these developments, we communicated it to the counsel in the other case -- I think it was Friday a week ago -- and said, "This is what we have determined to do. We would strongly encourage you to also forgo your right to payment."

And so we didn't really hear anything from anyone. And so after we filed the papers regarding the withdrawal, we reached out again. I informed my colleagues that we would be seeking to, you know, present the motion today and that I would appreciate greatly if they would get back to me with respect to their position on, you know, whether they too would disclaim any right to payment of fees because I was, of course, positive that your Honor would be interested in that question.

You know, despite repeated efforts to solicit that information from them, they simply haven't responded to me in many instances.

THE COURT: Well, if I ordered all the money to go back to Akorn, would that hasten their making a decision on whether they wanted to stop me from doing that?

MR. LONG: Well, speaking for myself, if I were out there where they are, I think it would, your Honor.

THE COURT: All right. And it's different plaintiffs on each of those cases, of course, correct?

MR. LONG: Correct.

MR. BEDNARZ: Yes.

MR. LONG: Different plaintiffs and different counsel for each of the plaintiffs.

THE COURT: Okay. Now I'll hear from intervenor Frank.

MR. BEDNARZ: Your Honor, this is precisely why we wanted to consolidate the cases to begin with, because if one plaintiff has a reason to leave the case.

We've already briefed this intervention before, your Honor. In fact, we sort of briefed it twice because plaintiff argued that there was a threshold issue.

I'd also argue that there isn't actually a very good reason for plaintiffs to withdraw now except that I -- they might have been able to delay the case until the transaction had occurred. And at that point I think they would have argued that our client was getting the full measure of anything he could have gotten, which was exactly the target price for the acquisition.

Now that the merger is falling apart, in spite of their previous agreement in order to get the fees for the

supposedly valuable disclosure, they're backing out. And I think the reason they're backing out is because there's no -- there's no cavalry coming in for the transaction to be completed and a possibly stronger mootness argument.

And, your Honor, we disagree that the Berg motion renders the case moot. In the first place, it's a little bit odd because it's not fashioned as an offer of judgment. It's a motion that assumes the conclusion that it moots our motion to intervene.

In fact, we have cases pending where counsel for plaintiff Berg has filed strike suits against companies that Mr. Frank owns shares in. And we listed 16 suits that counsel for plaintiff Berg has filed suits in since the New Year. And two of those are Clifton Bancorp and Pinnacle Entertainment. And the Pinnacle Entertainment one, at least, is pending.

The other one has been dismissed. And that just shows our -- the problem in intervening in these cases. It's sort of a whack-a-mole problem that if we try to jump in at a future transaction where Mr. Frank owns shares, they will dismiss the case. And these cases are dismissed very quickly anyways. They might dismiss them with prejudice in the future, which in this circuit would have been arguably fatal to us even trying to intervene.

THE COURT: Mr. Bednarz, let me interrupt you for a minute, though, because I've read your briefs, and I understand

your position. I am not going to enjoin plaintiff or plaintiff's counsel from filing suits, and I'm not going to interfere with those suits. If you have a complaint about their conduct in those suits, you have the forum to do it. File a motion to intervene in those cases.

It may be frustrating for you that you're going to have to do that in a lot of cases, and it may be that you can develop a history if there are dismissals in those cases when you seek to intervene. You may be able to develop a track record that you can bring to the attention of a judge who has that case.

But I am not -- and I'm not going to enter an injunction relating to enjoining Mr. Berg and his counsel from filing suits. If there's something wrong with the suit, you can move to intervene. You can -- if your client owns stock in that company, you can move to intervene. And if you think it's an abuse of process, you can take it up with that judge who has that case.

But I can only deal with this case, and I'm not going to -- to the extent that your request seeks broader injunctive relief other than what you were trying to get in this case, I'm not going to do that.

So we're really down to what we do on this case. I should have consolidated the cases back when you -- last fall and taken the other five cases that were dismissed without

prejudice, put them in front of me, and then I would turn them all into with-prejudice dismissals and order the money back to the defendant and just say we're done.

Those cases are not in front of me. And I -- it's not your fault. I think you had suggested I do that. And I even had said I likely would do that, but events overtook it, namely, the back and forth on the intervention itself. And lesson learned by me, but it doesn't help anybody here.

I can't stop them, I don't believe, from disclaiming any right to payment of fees and expenses and withdrawing an opposition -- and that may moot -- given the fact I'm not going to enter injunctive relief, that may moot your request in this case, in which case I'd simply dismiss this case with prejudice, the one before me.

But I am troubled by this $300,000 plus that's sitting in an escrow account, waiting for four or five other sets of attorneys to decide whether they want to keep it or not. That may just have to be a problem in front of another judge, which, unfortunately, means you're going to have to go and I suppose seek to intervene in another case if they try and get the fees from another judge. But I'm happy to take a suggestion.

MR. BEDNARZ: Well, your Honor, given that we have briefed this issue a couple of times here, at the minimum, I think that we ought to be able to file motions to transfer for the other judges, to put all of them before your Honor. I

think it would be much more inefficient if we had to file before five different judges because there are five other sets of plaintiffs.

And I just want to say for the record that we -- we disagree that it's moot in part because this is a situation that's capable of repetition, but evading review, like in *Davis FEC*, that Frank owns all of these shares, that they're filing prolifically on virtually all of the merger transactions involving public companies, it appears.

And anytime that we were to intervene, they would have the ability to dismiss the case and we have to argue all of these very basic things all over again. Whether we could even have standing to intervene might be varied, vary based on circuit law.

And that's our position on why it's not moot.

THE COURT: I don't think your -- the key to that is whether it evades review. I don't think you evade review if you bring an intervention action in front of another judge.

They may do as they did here, seek to disclaim fees. But I'm not sure, unless you have multiple cases, that's going to be a satisfactory result for a plaintiff because if they can't get fees, they -- it's a waste of time for them.

So here we have an unusual situation where there's five or six cases that got transferred from -- I forget what jurisdiction it was, but somewhere down south.

MR. BEDNARZ: Yes.

THE COURT: And I think in the other cases, unless it's a multiple set of cases all existing in one district and people try and move from one judge to another judge, there is a basis for review, and that's going to be the judge who has the case.

And if as occurred here with Mr. Long, if the attorneys disclaim fees, then you win because the point of your suit is to prevent a dissipation of assets for payment of fees you believe are not necessary to be paid and not properly paid. So you'd be getting the relief you wanted if they dismissed and disclaimed fees, which is really what you're getting here.

But I am willing to have the other cases, which are closed but dismissed without prejudice, transferred to me. I don't think any judge in this building will care. And then it will all be before me. And then the attorneys who are in those other cases can either confront this issue head on if I allow you to intervene in those cases or can disclaim fees also.

What I would ask, though, is that the -- what I've said today, Mr. Long, be communicated to your -- I'm going to say former colleagues, but the people on the other cases who you've had communication with. And before we go through the administrative task of getting five cases from other judges brought before me, see if they are seeking fees or are going to disclaim fees in those cases.

If they are, there may be no need to have these cases transferred to me. But I'm willing to -- this is an unusual situation. I haven't confronted it. So what is -- what do people think about coming back in 14 days to report on what the other attorneys intend to do in those cases?

MR. BEDNARZ: Your Honor, from my perspective, that makes sense.

I would want to clarify one thing with local counsel. I believe they've appeared for three of the other plaintiffs. So I think both of the motions would just have to be sort of continued. And then if it turns out that all of the cases -- all of the other plaintiffs and their counsel, I should say, have disclaimed fees, that presents a very tidy resolution one way or another here.

THE COURT: Mr. Long or Mr. Austermuehle, what do you want to do on that?

MR. AUSTERMUEHLE: I would defer to Mr. Long on the substantive judgment. I wasn't aware that we were local counsel on two of -- two other cases, three including this one. But if that is the case, then --

THE COURT: All right.

MR. AUSTERMUEHLE: -- that certainly sounds reasonable.

THE COURT: Mr. Long, will that be --

MR. LONG: Your Honor --

THE COURT: -- enough time to communicate with your -- with the other attorneys? You've already started communications with them --

MR. LONG: Yes, absolutely.

THE COURT: -- and this is --

MR. LONG: Sorry. I apologize for interrupting.

Yes, absolutely, your Honor. I will be sending them a communication about what transpired at today's conference shortly after I hang up the phone.

And then we'd be looking to provide an update by -- or I'm sorry. We'd be back on April 11th?

THE COURT: Is that a good day, Sandy?

THE CLERK: April 11th will work, yeah.

MR. LONG: That's 14 days.

THE COURT: All right.

MR. BEDNARZ: And, your Honor, I would prefer that whatever form the other -- the other counsels file that it's all signed by them so there's no sort of bizarre collateral attack later on if one of the attorneys wasn't nailed down and actually wants to get the fees.

And, second, that it should just be an offer of judgment. And that way we could preserve for appeal our argument about whether, in fact, it renders the case moot.

THE COURT: Well, whatever form it takes, I think, Mr. Bednarz, you ought to be in communication with Mr. Long,

who is going to be the de facto representative of the other attorneys. I don't --

Mr. Long, I'm not granting your motion at this time. I'm going to continue it so that --

MR. LONG: Okay.

THE COURT: -- you're still in the case.

MR. LONG: All right.

THE COURT: But my intent in 14 days is if we don't get a definitive answer from those counsel, I'm going to grant a motion to reassign those cases to me. And they can all appear in this case. And if there is going to be -- if I have -- if the motion to intervene is in effect -- effectively refiled in those cases, I'll have jurisdiction to decide whether or not these fees ought to be paid and what the justification for it is.

MR. LONG: Sure. May I --

THE COURT: Go ahead, Mr. Long.

MR. LONG: Sorry. I apologize.

And I'm just seeking to determine in 14 days, irrespective of whether they agree to forgo their right to payment or they are going to continue to assert that right and then are transferred in front of your Honor, will you permit at least our case to be dismissed at that point given our forbearance?

THE COURT: I likely will, but I'll decide that in

14 days. I think --

MR. LONG: Okay.

THE COURT: -- the -- there's no reason not to grant your motion that I've heard today. I've already told the intervenor I'm not -- I'm not going to be granting prospective relief to prevent you or your client from filing similar suits in front of other judges. That's -- if they're unhappy with that, they can go to that other judge and seek whatever relief they want. But I'm not going to prospectively put a cap on you or your client in these cases.

But I'm not going to tell you for sure what I'll do in 14 days because I need to hear what everyone else is doing.

THE CLERK: April 11th is --

MR. LONG: Very good.

THE CLERK: -- 21 days.

THE COURT: Oh, I'm sorry. April 11th may not be a good day?

THE CLERK: No, it's 21 days. It's not 14.

THE COURT: Oh, that's fine. 21 days is fine. This is not going to rise or fall with the extra week. And that will give you more time to herd the cattle.

MR. LONG: Very good, your Honor. Thank you.

THE COURT: And I don't mean that in any disparaging way. I meant that in the colloquial way. All right.

MR. LONG: It's more like herding the cats.

THE COURT: All right. Better idea.

Okay. Anything else we need to discuss?

MR. BEDNARZ: No, your Honor.

MR. LONG: No, your Honor. Thank you.

MR. AUSTERMUEHLE: The only other matter is our separate motion to withdraw. Is your disposition towards that the same as towards --

THE COURT: It is.

MR. AUSTERMUEHLE: Okay.

THE COURT: It will all be entered and continued to the April 11th.

THE CLERK: Mm-hmm.

MR. AUSTERMUEHLE: Okay. Thank you, your Honor.

THE COURT: All right. Thank you all.

MR. BEDNARZ: Thank you.

MR. LONG: Thank you.

THE COURT: Okay.

(Concluded at 10:21 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ LAURA R. RENKE *June 14, 2018*
LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter

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

ROBERT BERG, individually and on behalf of all others similarly situated,	)	Docket No. 17 C 5016
Plaintiff,	)	Chicago, Illinois
	)	April 11, 2018
v.	)	9:01 a.m.
AKORN, INC.; JOHN N. KAPOOR; KENNETH S. ABRAMOWITZ; ADRIENNE L. GRAVES; RONALD M. JOHNSON; STEVEN J. MEYER; TERRY A. RAPPUHN; BRIAN TAMBI; ALAN WEINSTEIN; RAJ RAI; FRESENIUS KABI AG; QUERCUS ACQUISITION, INC.,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS - Status
BEFORE THE HONORABLE THOMAS M. DURKIN

APPEARANCES:

For the Plaintiff (via telephone):
MR. BRIAN D. LONG
Rigrodsky & Long PA
919 N. Market Street, Suite 980
Wilmington, DE 19801

MR. PATRICK D. AUSTERMUEHLE
DiTommaso Lubin PC
17 W 220 22nd Street, Suite 410
Oakbrook Terrace, IL 60181

For the Intervenor:
MR. M. FRANK BEDNARZ
Competitive Enterprise Institute
Center For Class Action Fairness
1145 E. Hyde Park Boulevard, Apartment 3A
Chicago, IL 60615

Court Reporter:
LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter
219 S. Dearborn Street, Room 1432
Chicago, IL 60604
312.435.6053
laura_renke@ilnd.uscourts.gov

(In open court.)

THE CLERK: 17 C 5016, Berg v. Akorn.

I need to get someone on the line for that one.

(Clerk places telephone call.)

MR. BEDNARZ: Good morning, your Honor. This is --

THE COURT: We're going to wait till we get somebody on the phone so you don't need to repeat yourself.

MR. LONG: Hi. Brian Long.

THE CLERK: Hi. Good morning. This is Sandy with Judge Durkin. And this is Case 17 C 5016, Berg v. Akorn.

THE COURT: All right. Good morning. Let's have --

MR. LONG: Good morning.

THE COURT: -- everyone identify themselves for the record, starting first with the person on the phone.

MR. LONG: Sure. Good morning, your Honor. This is Brian Long from Rigrodsky & Long in Wilmington, Delaware, on behalf of plaintiff Robert Berg. Thank you for allowing me to appear telephonically.

THE COURT: No problem.

MR. AUSTERMUEHLE: Good morning, your Honor. Patrick Austermuehle, local counsel for plaintiffs.

MR. BEDNARZ: Good morning, your Honor. This is Frank Bednarz on behalf of proposed intervenor Frank.

THE COURT: All right. Mr. Long, what did the other attorneys, the plaintiffs in the other actions, decide to do

about the attorneys' fees?

MR. LONG: Sure. So I canvassed them immediately after we spoke last time, your Honor, by e-mail. I followed up with several of them by phone. I can report that counsel for plaintiffs in the Berg case, which is our case, the Alcarez case, which is 17 CV 05017, and counsel for plaintiffs in the Harris case, which is 17 CV 05021, have all decided to walk away and disclaim any interest in fees.

I received a response from counsel in the Pullos case. That's 17 CV 05026. And they are not prepared to walk away, and they were willing to litigate the motion to intervene in their matter.

In the remaining two cases, the House case and the Carlyle case -- House is 17 CV 05018; Carlyle is 17 CV 05022 -- I've not actually gotten a response from either of the firms representing the plaintiff in those cases, although I have tried to reach them both repeatedly, both by telephone and e-mail. My suspicion is that they are going to join with the plaintiff in the Pullos case and do not intend to walk away.

THE COURT: All right. Well, what I said last time was absent a disclaim -- who holds the fees, by the way? Where are they?

MR. LONG: Plaintiff -- sure. Plaintiff -- the attorney for the plaintiff in the House case, I understand, is holding the entire fee in his attorney fee escrow account.

THE COURT: Where it should remain until further order of the Court.

MR. LONG: Okay.

THE COURT: I'm going to have all of these other cases, which were dismissed, reassigned to me. They were all dismissed without prejudice. I'm going to have them reassigned to me.

And then we're going to have another status in this case in approximately 21 days when that reassignment's been accomplished where I will have the attorneys in those cases before me. And if they wish to litigate the fee issue, then they're free to do so.

I'm not going to foist this off on another judge. I could, but I don't think that's fair. I'm too deeply involved in this right now to ask another judge on a dismissed case to involve themselves in this process. That's not efficient for other judges or for you. So I'm going to have each one of these cases reassigned to me, and we'll see how we go from there.

Anything else we need to discuss today other than giving you another date?

MR. LONG: Just a clarification. With respect to the cases where the -- the three cases where plaintiff's counsel has indicated that they're going to be walking away from the fee or -- and including our case, are we still going to be --

continue to be before your Honor?

THE COURT: For the time being, yes. Nobody gets out until I decide what I'm going to do in this case. And until -- I may very well release you, but I'm not going to do that -- and I think inevitably you will be released. You've disclaimed any fees. There's really no need to keep you in the case. But until I get my arms around the entirety of this saga, I don't intend to let anybody out.

Eventually, you will certainly get out.

MR. LONG: Okay. Great.

THE COURT: But I'll give you a date in 21 days. I think by then we should have accomplished the reassignments so that the attorneys in these other cases will have notice of the next status and can appear either live or -- well, they're always going to be live. They can either appear in person or over the phone.

THE CLERK: 21 days takes us to May the 2nd, if that works.

MR. AUSTERMUEHLE: Yes.

THE COURT: All right.

MR. BEDNARZ: Yes, that works for the intervenor.

THE COURT: And, Mr. Long, how does that work for you?

MR. LONG: May -- I'm sorry. May 2nd?

THE COURT: Yes.

MR. LONG: That's fine for me, your Honor.

THE COURT: Okay. And the other attorneys who are -- don't know of this yet will just have to make arrangements to make themselves available. Certainly they can appear by phone if they can't be here in person.

As to the issue about the supplement that was filed, or the last brief filed by the intervenor, it hasn't changed my decision that the issue that intervenor Frank wants to raise about attempting to enjoin Mr. Berg and other people in his position from filing suits like this -- I'm -- I don't believe I -- I'm not going to enter such an order.

You've made your record, and I'll make mine. You have the ability if you believe that Mr. Berg is filing an improper lawsuit to -- elsewhere in the country to seek relief from whatever judge has that case.

And each one of these is a different case. Each one has different facts, different reasons. Mr. Berg or other people that want to -- who want to object to a particular merger or whatever the particular financial transaction is, you've got the -- your client, Mr. Frank, has the ability, if he owns shares in that company, to bring a suit in such a forum.

But I'm not going to prospectively bar him from filing suits. He's like no other -- he's no different than any other -- Mr. Berg is no different than any other litigant. They have to bring it in good faith. And that's something you

can address with the judge who has the case.

MR. BEDNARZ: Your Honor, that's understood. That's just for the record on a potential appeal. And to the extent that there are plaintiffs still interested in keeping the fees, that might be satisfactory for us so that we can get a decision on the meaty part of our motion.

THE COURT: You may very well because as long as the fees are out there, that keeps the issue alive, in my mind.

So we'll see you in 21 days.

MR. AUSTERMUEHLE: Thank you, your Honor.

MR. LONG: Thank you, your Honor.

MR. BEDNARZ: Thank you.

(Concluded at 9:12 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ LAURA R. RENKE *June 14, 2018*
LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter

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

ROBERT BERG, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	Docket No. 17 C 5016 Chicago, Illinois May 2, 2018 9:06 a.m.
JORGE ALCAREZ, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	Docket No. 17 C 5017
SHAUN A. HOUSE, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	Docket No. 17 C 5018

(continued on next page)

(continued from previous page)

SEAN HARRIS, individually and on behalf of all others similarly situated, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	Docket No. 17 C 5021
ROBERT CARLYLE, Plaintiff, v. AKORN, INC., *et al.*, Defendants.	Docket No. 17 C 5022
DEMETRIOS PULLOS, individually and on behalf of all others similarly situated, Plaintiffs, v. AKORN, INC., *et al.*, Defendants.	Docket No. 17 C 5026

TRANSCRIPT OF PROCEEDINGS - Motion Hearing
BEFORE THE HONORABLE THOMAS M. DURKIN

(continued on next page)

(continued from previous page)

APPEARANCES:

For Plaintiff Robert Berg (via telephone):	MR. BRIAN D. LONG Rigrodsky & Long PA 919 N. Market Street Suite 980 Wilmington, DE 19801
For Plaintiff Jorge Alcarez (via telephone):	MS. ELIZABETH K. TRIPODI Levi & Korsinsky 30 Broad Street 24th Floor New York, NY 10004
For Plaintiff Shaun House (via telephone):	MR. MILES D. SCHREINER Monteverde & Associates 350 Fifth Avenue Suite 4405 New York, NY 10118
For Plaintiff Sean Harris (via telephone):	MR. JAMES M. WILSON, JR. Faruqi & Faruqi LLP 685 Third Avenue 26th Floor New York, NY 10017
For Plaintiff Robert Carlyle (via telephone):	MR. DAVID A.P. BROWER Brower Piven 136 Madison Avenue 5th Floor New York, NY 10016
For Plaintiff Robert Carlyle (via telephone):	MR. CHARLES J. PIVEN Brower Piven 1925 Old Valley Road Stevenson, Maryland 21153

APPEARANCES (Cont'd.):

For Plaintiff Demetrios Pullos (via telephone):	MR. LEWIS S. KAHN MR. MICHAEL J. PALESTINA Kahn Swick & Foti LLC 206 Covington Street Madisonville, LA 70447
For Plaintiffs Berg, Alcarez, House and Harris (in person):	MR. PATRICK D. AUSTERMUEHLE DiTommaso Lubin PC 17 W 220 22nd Street Suite 410 Oakbrook Terrace, IL 60181
For the Intervenor (in person):	MR. M. FRANK BEDNARZ Competitive Enterprise Institute Center For Class Action Fairness 1145 E. Hyde Park Boulevard Apartment 3A Chicago, IL 60615
Court Reporter:	LAURA R. RENKE, CSR, RDR, CRR Official Court Reporter 219 S. Dearborn Street, Room 1432 Chicago, IL 60604 312.435.6053 laura_renke@ilnd.uscourts.gov

(In open court.)

(Clerk places telephone call.)

THE CLERK: Hi. Good morning, everyone. This is Sandy with Judge Durkin. If you'd like to hold the line, the judge will be with us momentarily. Okay?

UNIDENTIFIED MAN ON TELEPHONE: Thank you.

UNIDENTIFIED MAN ON TELEPHONE: Thank you.

THE CLERK: Thank you.

MS. TRIPODI: Thank you.

(Pause in proceedings.)

THE CLERK: All rise.

Be seated, please.

Okay. This is Cases 17 C 5016, Berg v. Akorn; 17 C 5017, Alcarez v. Akorn; 17 C 5018, House v. Akorn; 17 C 5021, Harris v. Akorn; 17 C 5022, Carlyle v. Akorn; and 17 C 5026, Pullos v. Akorn.

THE COURT: All right. Good morning.

Let's have everyone identify themselves for the record starting first with the people on the phone. And then if you speak and you're on the phone, after you identify yourself, you're going to have to state your name each time so we have an accurate record.

So let's start with anyone who wants to start on the phone.

MR. BROWER: Your Honor --

UNIDENTIFIED MAN ON TELEPHONE: Good morning --

MR. BROWER: -- David Brower from Brower Piven representing plaintiffs.

MR. PIVEN: And Charles Piven from Brower Piven.

MR. LONG: Good morning, your Honor. May it please the Court, this is Brian Long from Rigrodsky & Long. I'm here today on behalf of plaintiff Robert Berg in Civil Action No. 17 C 5016.

THE COURT: Okay.

MR. WILSON: Good morning, your Honor. This is James Wilson from Faruqi & Faruqi for plaintiff Sean Harris in the 5021 case.

MS. TRIPODI: Good morning, your Honor. This is Elizabeth Tripodi with Levi & Korsinsky on behalf of plaintiff Jorge Alcarez.

MR. SCHREINER: Good morning, your Honor. This is Miles Schreiner of Monteverde & Associates on behalf of the plaintiff Shaun House in the 05018 action.

THE COURT: All right. Anyone else on the phone?

MR. KAHN: Yes, your Honor. Lewis Kahn in the Pullos action for plaintiffs. And my partner Michael Palestina is also on the line.

THE COURT: Okay. And in court.

MR. AUSTERMUEHLE: Good morning, your Honor. Patrick Austermuehle for plaintiff.

MR. BEDNARZ: And good morning, your Honor. This is Frank Bednarz on behalf of intervenor Ted Frank.

THE COURT: All right. Other than the Berg v. Akorn case, these cases had all been administratively closed because the cases had settled.

The intervenor had objected to the manner in which these cases had been resolved. And ultimately the Berg plaintiff in 17 CV 5016 withdrew and disclaimed any claim on the attorneys' fees that were going to be paid as part of the settlement in this case.

And I had asked counsel for Berg whether or not that was going to be the case on these other plaintiffs. You thought some maybe and some maybe not.

Rather than get everybody on the phone, do you have any more information you can provide me on that?

MR. AUSTERMUEHLE: No, I don't, your Honor.

THE COURT: Okay.

MR. AUSTERMUEHLE: Mr. Long may, but I believe probably everyone who is on the phone had already filed something or indicated that they would be withdrawing any claim for fees, or disclaiming fees.

THE COURT: All right. Well, let's go through one after the other. Again, state who you are, who you represent and the case number, whether or not you are going to disclaim fees in this case or whether you're still seeking them because

if you're still seeking them, then we need to get the matter at issue with the intervenor.

So let's start probably in the order in which you identified yourselves, but, once again, state your name.

MR. BROWER: Your Honor, David Brower, Brower Piven. We represent plaintiff Carlyle in 17-5022.

THE COURT: And what's your position on the attorneys' fees?

MR. BROWER: We are not withdrawing, your Honor.

THE COURT: All right. Okay.

Next.

MR. LONG: Your Honor, this is Brian Long from Rigrodsky & Long on behalf of plaintiff Berg.

Our position has not changed. We are withdrawing and disclaiming any interest in the fees.

THE COURT: Okay.

MR. WILSON: Your Honor, James Wilson from Faruqi & Faruqi for Sean Harris in 5021.

We withdraw and join the disclaimer.

THE COURT: All right.

MS. TRIPODI: And good morning, your Honor. This is Elizabeth Tripodi with Levi & Korsinsky on behalf of plaintiff Jorge Alcarez in the 5016 [*sic*] action.

We have withdrawn, and we are disclaiming any claim to fees.

MR. SCHREINER: Your Honor, this is Miles Schreiner of Monteverde & Associates on behalf of plaintiff Shaun House in the 05018 action.

And we are not withdrawing and maintaining our interest in the fees.

THE COURT: Okay.

MR. KAHN: And, your Honor, Lewis Kahn with Kahn, Swick & Foti on behalf of Mr. Pullos in the 5026 case.

We are not disclaiming fees.

THE COURT: All right. Anyone else?

(No response.)

THE COURT: All right. So the 5022, 5018, and 5026 cases are the three where people are still maintaining their right to the fees, correct?

UNIDENTIFIED MAN ON TELEPHONE: That's right.

UNIDENTIFIED MAN ON TELEPHONE: Yes, your Honor.

UNIDENTIFIED MAN ON TELEPHONE: Yes.

THE COURT: All right. So what's the position of the intervenor as to these three cases?

MR. BEDNARZ: Your Honor, with these cases, we would just like to, if necessary, refile the same motion with, you know, approximately the same legal argument, and then we should proceed to a decision on whether we can intervene in these three cases.

With regard to the other three where fees are being

disclaimed, those could be dismissed. And local counsel, I believe, represented three of them and probably would not be necessary. So his motion could also be granted with respect to those three.

THE COURT: All right. Yeah, I think as to the Berg case, the -- which is 5016, as to the 5021 case, and the Alcarez case -- what number is that?

MR. AUSTERMUEHLE: 5017.

THE COURT: 5017. Those cases are all dismissed. The attorneys are allowed to withdraw. They are not seeking the fees in the case, and there's no case in controversy relating to them.

As to the other three, there's no need for Mr. Frank to refile any documents. We need to hear from the attorneys in the 5022, 5018, and 5026. We need to hear from them and what their response is to your request to intervene.

So how much time do the parties want? I'm going to suggest 14 days if that works for everyone. I'll assume it's good unless I hear an objection. And tell me if you need more time. You ought to state it it now.

(No response.)

THE COURT: Okay. I hear nothing. So 14 days for the attorneys in those three cases to respond to the petition by Frank to intervene.

I think that's the pending motion. Is that correct?

MR. BEDNARZ: That's correct, your Honor.

And also these parties can join the response of Brian Long. So I'm wondering if it necessarily needs to be a 14-day deadline. Mr. Long had a very strong interest in getting the same results that the other three are going to get here, and it seems like it should be sort of an abbreviated response because they can already use this work product.

THE COURT: Well, I'm going to give them the opportunity to look it over and decide for themselves. They haven't been active participants in this case, and they ought to at least see what the briefing has been.

If the brief is -- that's going to be filed for those three plaintiffs is simply a "me too" brief, just say so. Just say you're going to adopt the briefing that's already taken place. But do it --

MR. BROWER: Your Honor --

THE COURT: -- within 14 days.

MR. BROWER: Your Honor, this -- I --

THE COURT: Who is this?

MR. BROWER: I'm sorry. It's David Brower.

I would suggest that the firms that are still here, we'll file at least a single brief, if that's okay with the other two.

THE COURT: Well, I'll let -- I'll let the three of you decide that. No need for me to get involved, especially

since you're on the phone. A single brief is fine, as far as I'm concerned. In fact, it's preferable. But if you have separate interests, file something different.

But 14 days. And then -- excuse me -- the intervenor has seven days after that to file any reply.

And I'll rule by mail. If I need to get you in on the phone, it will be fewer people than this time. And we'll set it for status.

Anything else we need? First from the people on the phone.

UNIDENTIFIED MAN ON TELEPHONE: No, your Honor.

UNIDENTIFIED MAN ON TELEPHONE: No, your Honor.

UNIDENTIFIED MAN ON TELEPHONE: No.

THE COURT: Anyone in court?

MR. AUSTERMUEHLE: Just to clarify, your Honor. I think we had filed three motions to withdraw after the cases were consolidated before your Honor. Those are being granted to the extent that they're not just granted automatically by the dismissal?

THE COURT: No, those will be -- those are granted.

MR. AUSTERMUEHLE: Okay.

THE COURT: They're granted automatically by the dismissal, but we'll put it -- we'll tie it up by saying you've also been granted leave to withdraw.

MR. AUSTERMUEHLE: Great. Thank you.

MR. BEDNARZ: Well, and, your Honor, I believe one of them, the 5018 action, there's a withdrawal on that, and that one is continuing. So that one ought to be granted.

THE COURT: Well, you're local counsel on that one?

MR. AUSTERMUEHLE: Yes. To be honest, I had written down only the three that are being dismissed. But if 5018, I can double-check and --

THE COURT: Yeah. If you're still local counsel on that case, it remains pending, so you're still in on that one. If you want to separately withdraw, speak to counsel for the House plaintiff and see if they need you as local counsel or not.

MR. AUSTERMUEHLE: Sure.

Okay. Thank you very much.

THE COURT: Okay. Anything else?

(No response.)

THE COURT: All right. Thank you all.

MR. BEDNARZ: Thank you.

THE COURT: Okay.

UNIDENTIFIED MAN ON TELEPHONE: Thanks.

UNIDENTIFIED MAN ON TELEPHONE: Bye-bye.

(Concluded at 9:18 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ LAURA R. RENKE *June 15, 2018*
LAURA R. RENKE, CSR, RDR, CRR
Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.2.1
Eastern Division

Robert Berg

Plaintiff,

v.

Case No.: 1:17−cv−05016
Honorable Thomas M. Durkin

Akorn, Inc., et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, May 2, 2018:

MINUTE entry before the Honorable Thomas M. Durkin:Motion to intervene [82] is denied as moot. Plaintiff's motions to withdraw as attorney [86] [87] [89][91] [92][100] are granted. Status hearing held on 5/2/2018. Attorney Christopher James Kupka; Peter Scott Lubin; Andrew Charles Murphy; Elizabeth K. Tripodi; Patrick Doyle Austermuehle and Vincent Louis DiTommaso terminated.Mailed notice(srn,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.2.1
Eastern Division

Jorge Alcarez

Plaintiff,

v.

Case No.: 1:17−cv−05017
Honorable Thomas M. Durkin

Akorn, Inc., et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, May 24, 2018:

MINUTE entry before the Honorable Thomas M. Durkin:Theodore Frank filed a motion to intervene in case 17 C 5016. That motion is deemed filed in this case, 17 C 5017, and is denied as moot for the reasons stated on the record at hearings in both cases.Mailed notice(srn,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.2.1
Eastern Division

Sean Harris

Plaintiff,

v.

Case No.: 1:17−cv−05021
Honorable Thomas M. Durkin

Akorn, Inc., et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, May 24, 2018:

MINUTE entry before the Honorable Thomas M. Durkin:Theodore Frank filed a motion to intervene in case 17 C 5016. That motion is deemed filed in this case, 17 C 5021, and is denied as moot for the reasons stated on the record at hearings in both cases.Mailed notice(srn,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.