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

| | |
|---|---|
| ROBERT CARLYLE, On Behalf of Himself and All Others Similarly Situated,<br><br>Plaintiff,<br><br>v.<br><br>AKORN, INC., JOHN N. KAPOOR, KENNETH S. ABRAMOWITZ, ADRIENNE L. GRAVES, RONALD M. JOHNSON, STEVEN J. MEYER, TERRY A. RAPPUHN, BRIAN TAMBI, and ALAN WEINSTEIN,<br><br>Defendants. | Case No. 1:17-cv-04455<br><br>CLASS ACTION<br><br>Hon. Robert M. Dow, Jr |
| ROBERT BERG, On Behalf of Himself and All Others Similarly Situated,<br><br>Plaintiff,<br><br>v.<br><br>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, and QUERCUS ACQUISITION, INC.<br><br>Defendants. | Case No. 1:17-cv-05016<br><br>CLASS ACTION<br><br>Hon. Thomas M. Durkin |

[captions continued on the next page]

JORGE ALCAREZ, On Behalf of Himself and All Others Similarly Situated,

Plaintiff,

v.

AKORN, INC., KENNETH S. ABRAMOWITZ, ADRIENNE L. GRAVES, RONALD M. JOHNSON, STEVEN J. MEYER, TERRY A. RAPPUHN, BRIAN TAMBI, and ALAN WEINSTEIN,

Defendants.

Case No. 17-cv-05017

CLASS ACTION

Hon. Amy J. St. Eve

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SHAUN HOUSE, On Behalf of Himself and All Others Similarly Situated,

Plaintiff,

v.

AKORN, INC., JOHN N. KAPOOR, KENNETH S. ABRAMOWITZ, ADRIENNE L. GRAVES, RONALD M. JOHNSON, STEVEN J. MEYER, TERRY A. RAPPUHN, BRIAN TAMBI, and ALAN WEINSTEIN,

Defendants.

Case No. 17-cv-05018

CLASS ACTION

Hon. Elaine E. Bucklo

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SEAN HARRIS, On Behalf of Himself and All Others Similarly Situated,

Plaintiff,

v.

AKORN, INC., JOHN N. KAPOOR, RONALD M. JOHNSON, STEVEN J. MEYER, BRIAN TAMBI, ALAN WEINSTEIN, KENNETH S. ABRAMOWITZ, ADRIENNE L. GRAVES, and TERRY A. RAPPUHN,

Defendants.

Case No. 17-cv-05021

CLASS ACTION

Hon. Ronald A. Guzman

[captions continued on the next page]

ROBERT CARLYLE, On Behalf of Himself and All Others Similarly Situated,

Plaintiff,

v.

AKORN, INC., JOHN N. KAPOOR, KENNETH S. ABRAMOWITZ, ADRIENNE L. GRAVES, RONALD M. JOHNSON, STEVEN J. MEYER, TERRY A. RAPPUHN, BRIAN TAMBI, and ALAN WEINSTEIN,

Defendants.

Case No. 17-cv-05022

CLASS ACTION

Hon. Sharon Johnson Coleman

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DEMETRIOS PULLOS, On Behalf of Himself and All Others Similarly Situated,

Plaintiff,

v.

AKORN, INC., JOHN N. KAPOOR, KENNETH S. ABRAMOWITZ, ADRIENNE L. GRAVES, RONALD M. JOHNSON, STEVEN J. MEYER, TERRY A. RAPPUHN, BRIAN TAMBI, and ALAN WEINSTEIN,

Defendants.

Case No. 17-cv-05026

CLASS ACTION

Hon. Matthew F. Kennelly

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THEODORE H. FRANK,

Intervenor.

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

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## INTRODUCTION

The captioned litigation comprises several cynically-filed "strike suits" designed only to convey attorneys' fees to counsel. Intervenor Theodore H. Frank is an aggrieved shareholder of Akorn, Inc. ("Akorn") a Chicagoland pharmaceutical manufacturer being acquired by German pharmaceutical giant Fresenius Kabi AG ("Fresenius"). Frank seeks intervention to prevent plaintiffs and their counsel from profiting off of their strike suits, which are "no better than a racket" and "must end." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016) ("*Walgreens*").

"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." *Id.* at 721.

Here, six plaintiffs filed seven strike suits for the sole purpose of obtaining attorneys' fees, and only intervention or use of the Court's inherent authority can remedy this misuse of class action procedure. Plaintiffs Robert Carlyle, Robert Berg, Jorge Alcarez, Shaun House, Sean Harris, and Demetrios Pullos have no intention of curtailing their attorneys' "racket." Like many merger plaintiffs in the last year, they have discovered it's easier to extort payments from Defendants by stipulating dismissal of the underlying complaint, then negotiating for "mootness fees," a Delaware procedural device that does not exist in Federal courts or under the Exchange Act of 1934 ("Exchange Act"). Because Plaintiffs have employed this dubiously legal gimmick to extort fees, shareholders like Frank have no opportunity to object at a class action fairness hearing as *Walgreens* contemplated.

Instead, Frank must intervene to protect his interests. Frank moves for intervention as permitted by Local Rule 5.6, for the limited purpose of seeking equitable remedies and/or sanctions against the Plaintiffs and their counsel. Frank also moves for belt-and-suspenders reason to preserve any appellate rights relating to the court's decision on disgorgement. Frank satisfies all the criteria for intervention as a matter of right under Rule 24(a)(2): his motion is timely; he has a pecuniary interest that will otherwise be forfeit; and no other party has an interest in ending the racket. Alternatively, permissive intervention pursuant to Rule 24(b) should be granted.

## BACKGROUND

### A. Procedural History

On Friday April 7, 2017, Akorn and Fresenius announced that they were discussing a merger, causing the value of Akorn stock to jump 29% from April 6 ($25.22) to Monday April 10 ($32.50). On April 24, Akorn and Fresenius announced they had entered a merger agreement whereby Fresenius will acquire shares of Akorn for cash payment of $34 per share upon completion of the merger. On May 22, Akorn issued a preliminary definitive proxy statement recommending that shareholders approve the merger. This SEC filing triggered a land rush of complaints alleging that supposed omissions in the proxy statement rendered it "false or misleading" in violation of Sections 14(a) and 20(a) of the Exchange Act, and related regulations. Akorn issued it's (non-preliminary) definitive proxy statement on June 15. *See* Akorn, Inc. Proxy Statement, Form DEFM14A ("Proxy Statement"), Proposed Complaint, Ex. 2.

From June 2 to 22, 2017, the six Plaintiffs filed seven suits alleging that these proxy statements were deficient. All of the suits name as defendants Akorn and eight directors of the corporation ("Defendants").[1] Five of the Plaintiffs originally filed in the Middle District of Louisiana, while the sixth—Robert Carlyle—filed in this district, then dismissed so he could refile in the Middle District of Louisiana. No. 1:17-cv-04455, Dkt. 7.[2] Carlyle filed his motion to dismiss and refiled on June 20, five days *after* Akorn filed its ultimately-successful motion for change in venue to this district. No. 17-cv-05016, Dkt. 6. On June 29, 2017, counsel for all six Plaintiffs and all defendants filed a stipulation to consolidate the actions for "all purposes." *Id.* at Dkt. 24. However, on July 30, the Middle District granted the stipulation "for the limited purpose of resolving the issue of venue." *Id.* at Dkt. 31.

All of the suits were transferred to the Northern District of Illinois on July 5, when the district judge granted Akorn's motion for change of venue. *Id.* at Dkt. 40 (while Akorn is a Louisiana

[1] The Robert Berg complaint also uniquely names (1) Akorn CEO Raj Rai, (2) Fresenius, and (3) Quercus Acquisition, Inc.—an entity wholly owned by Fresenius to accomplish the merger. *See* No. 17-cv-05016, Dkt. 1.

[2] All citations refer to N.D. Ill. docket numbers, whether transferred or originally filed here.

corporation, it has no offices or facilities there, and this venue is much more convenient to it and all potential witnesses, especially because the American headquarters of Fresenius also lie in this district).

Upon transfer, each suit was assigned to a different judge, including the Carlyle action, which was given a new docket number before a different judge.

### B. Supplemental Disclosures and Dismissals

On July 10, 2017, Akorn filed a Form 8-K with the SEC, which supplements the June 15 Proxy Statement. 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.

Proposed Complaint, Ex. 1 at 2 ("Supplemental Disclosures").

On July 14, 2017, a single nonresident attorney—Christopher Kupka of Levi & Korsinsky LLP—entered an appearance in all six transferred actions, although his firm had only appeared for Plaintiff Alcarez prior to transfer.[3] All Plaintiffs filed a substantially identical stipulation and proposed order. *See*, *e.g.*, No. 17-cv-05016, Dkt. 54. The stipulation states that the claims asserted in each Plaintiffs' complain have become moot as a result of the Supplemental Disclosures. *Id.* at 4. The stipulation also says that "counsel for Plaintiffs has informed counsel for Defendants that Plaintiffs may assert a claim for attorneys' fees and expenses in connection with the common benefit provided to Akorn's shareholders as a result of the filing of the Supplemental Disclosures." *Id.* at 5. Between July 17 and July 25, dismissal without prejudice was granted in each of the six transferred actions.

### C. Plaintiffs Extort At Least $322,500 in Attorneys' Fees

On September 15, 2017, Plaintiff Berg filed a stipulations and proposed order indicating that "Defendants have agreed to provide Plaintiffs with a single payment of $322,500 in attorneys' fees and expenses to resolve any and all Fee Claims, and thus there are no Fee Claims to be adjudicated by the Court." No. 17-cv-05016, Dkt. 54 at 6. Plaintiff Berg does not cite any basis for this fee award.

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[3] Mr. Kupka has not designated local counsel, which appears to violate LR 83.15(a).

At this time, the other five Plaintiffs have not filed such stipulations, but by the plain terms of the dismissal request filed on behalf of Plaintiff Berg, the fee settlement covers all open actions.

## ARGUMENT

The court has jurisdiction to entertain Frank's motion, and it should in order to prevent Plaintiffs' counsel from profiting off of their abuse of judicial process. Only the court's inherent authority or equitable disgorgement can prevent Plaintiffs and their counsel from misappropriating funds from Akorn, which Frank is a shareholder of. Intervention as a matter of right is required because no existing party adequately represent absent shareholders like Frank.

### I. Jurisdiction

After dismissal, courts retains jurisdiction to decide collateral issues such as attorneys' fees and sanctions. Although the *underlying cause of action* against Defendants has been dismissed without prejudice, the court retained jurisdiction over fees, just as Plaintiffs had requested. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) (ancillary jurisdiction doctrine permits express reservation of jurisdiction). "[E]ven years after entry of a judgment on the merits" the court retains jurisdiction to grant a motion pertaining to collateral issues such as enforcement of the agreement, contempt charges, costs, attorneys' fees, and sanctions." *Cooter & Gell. v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990) (cleaned up); *see also In re Bear Stearns Cos.*, 297 F.R.D. 90, 98 (S.D.N.Y. 2013) (granting class member's motion to intervene to submit Rule 60(b) motion to modify final judgment).

Frank independently possesses Article III standing to pursue his claims against Plaintiffs because as an Akorn shareholder he was harmed by the settlement, which benefits only attorneys. *Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir. 1999). It is no longer sufficient to dismiss the actions as suggested by *Walgreens*; Plaintiffs have already accomplished their racket and extorted fees from Akorn. Non-parties possess standing to the extent they suffer from a non-speculative injury-in-fact. *See Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 692 (7th Cir. 2015). Here, there is little speculative about Frank's injury. By design, the Plaintiffs sought to collect fees from Akorn, which Frank is a shareholder of. Thus, the court retains jurisdiction to consider Frank's motion to intervene for the purpose of seeking disgorgement of ill-gotten windfalls paid to the Plaintiffs and their counsel.

## II. Plaintiffs' Conduct Warrants Disgorgement

Disgorgement is an equitable remedy within the inherent power of the court. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 397-99 (1946) ("unless otherwise explicitly restricted by statute, District Courts may exercise all inherent equitable powers to fashion relief, including ordering the payment of money."). Here, the court ought to exercise its equitable discretion to disgorge unjust enrichment that would otherwise result from Plaintiffs misuse of the class action process to extract private gain. "The object of restitution [in the disgorgement context] . . . is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty." Restatement (Third) of Restitution and Unjust Enrichment § 51(4) (2010).

### A. Plaintiffs' strike suits were a sham.

The conduct of Plaintiffs and their counsel shows that the underlying complaints were shams "filed . . . for the sole purpose of obtaining fees for the plaintiffs' counsel." *Walgreens*, 832 F.3d at 724. At their best, such strike suits burden the judicial system with meritless motions for preliminary injunction that plaintiffs have no interest in obtaining, pointlessly consuming judicial resources as a bargaining chip for fees. Even if Frank is not permitted to intervene, the Court may and should exercise its inherent authority to prevent counsel from obtaining fees through bad-faith litigation. *See, e.g., Boyer v. BNSF Ry. Co.,* 832 F.3d 699 (7th Cir. 2016).

Plaintiffs filed meritless complaints asking for worthless relief. Upon Akorn's filing of immaterial Supplemental Disclosures, Plaintiffs then dismissed their complaints as "moot" although many arguments were not addressed by the disclosures. These disclosures were simply an excuse to seek attorneys' fees. This is borne out by similar conduct of Plaintiffs' counsel in other actions.

#### 1. Plaintiffs' complaints were meritless.

In the first place, each and every Plaintiff requested an injunction prohibiting Akorn from completing the proposed transaction. While it might make sense to enjoin the transaction for "plainly material" misrepresentations or omissions, as *Walgreens* requires, those are not the kinds of omissions the Plaintiffs pleaded. Instead, every Plaintiff belabored a immaterial omission—lack of reconciliation between GAAP and non-GAAP projection metrics—along with a grab bag of laughable trivia.

As for the supplemental disclosures, none provide material, let alone "clearly material" new disclosures. Three sets of purported disclosures are added by the supplement. First, the supplemental disclosures describe non-specific offers Fresenius made to Akorn's chairman, Dr. John Kapoor, which Akorn did not accept. Second, the supplement says that Akorn's board considered the effect of the merger on previously-disclosed (and unrelated) shareholder litigation. Third, the supplement includes a caveat-laden GAAP reconciliation of previously-disclosed financial projections. None of these Supplemental Disclosures were material. *See* Proposed Complaint, ¶¶ 38-59.

On July 19, 2017, the proxy vote of Akorn shareholders occurred with a result of 104,651,745 in favor of merger and 104,914 against, with 229,782 abstaining. In other words, among the votes, only 0.09993% opposed the merger—fewer than 1 in 1000, substantial evidence of immaterial effect. *See Walgreens*, 832 F.3d at 723.

**2. No basis exists to award attorneys' fees.**

Since none of the disclosures, nor the underlying pleadings were material, Plaintiffs' complaints seeking these disclosures were not "meritorious when filed," which is required to obtain fees under a Delaware procedure ***that does not exist in this venue***. *See United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

In fact, there are several reasons to find that such fees are illegal. First, merger strike suits fall under the Private Securities Litigation Reform Act (PSLRA). *See OFI Asset Mgmt. v. Cooper Tire & Rubber*, 834 F.3d 481, 505 (3d Cir. 2016). Thus, putative class actions must abide by 15 U.S.C. § 78u–4(a)(6) ("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."). Since the amount plaintiffs recovered for the class is zero, the a reasonable percentage likewise ought to be $0.

Plaintiffs characterize their settlement as between the named parties only, but this raises a second problem with such fee awards: misuse of the class action device for private gain. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (individuals may not use of "the class device . . . to obtain leverage for one person's benefit.").

Finally, as the Southern District of Indiana concluded regarding a similar fee request involving some of the same counsel as represent Plaintiffs, the request appears premised on a catalyst theory of equitable award, which does not exist under federal law:

> The court is not amenable to this request [to retain jurisdiction for fees]. No activity whatsoever has occurred in this case, and the court is not willing to let the case linger on the docket (when the plaintiff apparently already has entered an agreement to dismiss it) for the mere purpose of giving the plaintiff leverage in his attempt to negotiate the payment of an attorneys' fee. Moreover, it appears . . . that the plaintiff's catalyst theory for obtaining a fee may be foreclosed by the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001).

*Parshall v. Stonegate Mortg. Corp.*, 17-cv-0711, 2017 WL 3530851, at *1 (S.D. Ind. Aug. 11, 2017). The Seventh Circuit has independently rejected catalyst theory in the class action context. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002).

**1. Plaintiffs' counsels' pattern of bad faith strike suit litigation.**

Most of the attorneys who signed Plaintiffs' complaints are prolific filers of strike suit litigation. For example, Plaintiff Berg individually has filed at least 21 other apparent strike suits in federal courts since May. *See* Declaration of M. Frank Bednarz ("Bednarz Decl."), ¶ 11. All of the non-local counsel who signed the seven duplicative complaints have filed several similar strike suits across the country. *Id.* ¶¶ 13-18. Several attorneys have filed scores of such suits in the last year. *Id.* ¶ 14. Most of these suits are duplicative, and they often evade formalities required in securities putative class actions.[4]

[4] For example, every certification filed by Plaintiff Berg appears to evade the requirement of 15 U.S.C. § 78u–4(a)(2)(v): to "identify any other action under this chapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve as a representative party on behalf of a class." Plaintiff Berg's certifications instead say: "During the three years prior to the date of this Certification, Plaintiff has **not moved to serve** as a representative party for a class in an action filed under the federal securities laws." *E.g.*, No. 17-cv-5016, Dkt. 1-1 ¶ 6 (emphasis added). This is not what PLSRA requires. *See Greater Penn. Carpenters Pension Fund v. Whitehall Jewellers, Inc.*, No. 04-CV-1107, 2005 WL 1563206, at *4 (N.D. Ill. June 30, 2005); *In re OSI Pharm., Inc. Securities Litig.*, No. 04-cv-5505, 2005 WL 6171305, at *8 (E.D.N.Y. Sept. 21, 2005) ("It cannot be seriously argued that a party commencing a securities class action does not seek to serve as a 'representative party on behalf of a class.'").

Each suit filed by Plaintiffs and their counsel sought to enjoin a merger citing allegedly materially omissions or misrepresentations. Yet not one resulted in a preliminary injunction. Scores of these suits filed in 2017 have been voluntarily dismissed precisely as these suits have—with a retention of jurisdiction to stipulate mootness fees. Bednarz Decl. ¶ 20.

Although the fees in most such dismissals have not been disclosed, a few examples do exist, which confirm these strike suits are a fee-driven racket. For example, the same attorneys who signed complaints for Plaintiff Berg, Alcarez, and House, have filed litigated strike suits against other defendants resulting in payments of up to $350,000 in attorneys' fees. Bednarz Decl. ¶¶ 22-24.

A recent summary of Delaware mootness fee applications reveals that counsel for the plaintiffs here are represented by attorneys that have used the same tactics in Delaware state court.[5]

**B. Frank proposes to equitable disgorge any attorneys' fees and enjoin Plaintiffs and their counsel from similar misconduct.**

Payments to individual putative class members (or their counsel) necessarily cheat the class, and this principle is well-understood in the context of named plaintiffs settling their individual claims. *Cf. Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011) (citing *Sosna v. Iowa*, 419 U.S. 393, 399, 402 (1975)); *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003) ("Otherwise the defendant could delay the action indefinitely by paying off each class representative in succession."); *Greisz v. Household Bank, N.A.,* 176 F.3d 1012, 1015 (7th Cir. 1999); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 342 n.1 (1980) (Stevens, J., concurring).

This equitable premise underlies *Young v. Higbee*, 324 U.S. 204 (1945). *Higbee* arose out of the proposed bankruptcy reorganization of a golden age Cleveland department store incorporated as The Higbee Company. Two preferred shareholders (Potts and Boag) objected to the confirmation of the plan, contending that junior debt was allocated too great a share of the plan's proposed distribution. *Id.* at 206. After the district court overruled their objections and confirmed the plan, they appealed to

[5] Rickey, Anthony, *Absent Reform, Little Relieve in Sight From Chronic "Merger Tax" Class-Action Litigation*, Legal Backgrounder, Washington Legal Foundation (Aug. 25, 2017), available online at: http://www.wlf.org/upload/legalstudies/legalbackgrounder/082517LB_Rickey.pdf.

have the confirmation set aside based upon the unfair treatment of preferred shareholders like themselves. *Id.* at 206-07. But rather than proceed on that argument, they "sold" their appeal to the junior debt holders (i.e they settled and dismissed their appeal) for a personal payoff. *Id.* at 207. Another preferred shareholder (Young) intervened to compel the initial appellants to disgorge the proceeds of the sale of their appeal. *Id.* at 208. A special master, the district court and the circuit court of appeals presumed that because the Potts and Boag "had not acted as representatives of a class" there was no justification for disgorgement. *Id.* at 208. The Supreme Court reversed and required the remedy of disgorgement. Even though "Potts and Boag did not expressly specify that they appealed in the interest of the whole class of preferred stockholders" the basis of that appeal "was that every other preferred stockholder, as well as themselves, would be injured by confirmation." *Id* at 209. Their rights were "inseparable." and "[e]quity looks to the substance and not merely the form." By appealing from a judgment that affected "a whole class of stockholders," "at the very least they owed them an obligation to act in good faith." *Id.* at 210.

As in *Higbee*, Plaintiffs alleged their complaints were "for the benefit of [absent shareholders]." *Id.* at 214. All of the complaints concerned issues of common interest to all shareholders. To the extent the complaints lacked merit, "the money [Plaintiffs] received in excess of their own interest as [putative class members in settlement] was not paid for anything they owned." *Higbee*, 324 U.S. at 213. The fruit of the appeal "properly belongs to all [shareholders]." *Id.* at 214. That the value of the appeal was exacted through settlement rather than through a litigated conclusion does not change this fact. *Id.* at 213-14. *See also Cohen v. Benefit Indus. Loan Corp.,* 337 U.S. 541, 549 (1949).

Putative class representatives should not connive additional individual benefits for themselves, and the court should equitably disgorge ill-gotten gains to the entire class. By filing a class complaint plaintiffs and their counsel have assume fiduciary duties to the putative stockholding class. *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1110 (5th Cir. 1978). Courts generally do not allow individual class members who have not opted out to settle on superior terms. For example, service awards may be approved to compensate named plaintiffs for their effort, but this does not imply parties can divert funds to prioritize the interests of individual calls members. *See Murray v. GMAC Mortg. Corp.*, 434

F.3d 948, 952 (7th Cir. 2006) (citing *Higbee* for proposition that individuals may use of "the class device . . . to obtain leverage for one person's benefit."). This is why courts must approve incentive awards to individually-named class members. Such awards are appropriate, with court approval, for the time and expense named class members spend on securing the fund for the entire class. But it is inequitable for individual class members to advantage themselves over other class members in deals without conferring the class any benefit and without judicial oversight.

Here, Defendants apparently did not want to expend the costs to defend the motion for preliminary injunction. Plaintiffs apparently made it more profitable for the Defendants to pay them off than to seek victory in Court. Whether the underlying appeals were meritorious or not, the class does not benefit, and these payments ought to be disgorged.[6] It is inequitable for Plaintffs to profit from a misuse of judicial process widely condemned for its social cost, so Frank should be allowed to intervene and pursue funds on behalf his interests as a shareholder.

**C. Alternatively, the Court has inherent authority to prevent unjust enrichment.**

If Frank cannot pursue an equitable action against the plaintiffs, the court should use its inherent authority to order disgorgement.[7] When confronted with an abuse of its processes, the court has inherent authority to remedy wrongdoing and craft an equitable remedy. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991) ("A primary aspect of [the court's inherent] discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.").

[6] If Plaintiffs *had* brought meritorious claims not mooted by the Supplemental Disclosures, counsel breached their fiduciary duty in dismissing them. Fee disgorgement owing to a breach of counsel's fiduciary duties is likewise an equitable rule "founded both on principle and pragmatics." *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999). As a matter of principle, the attorney "is not entitled to be paid when he has not provided the loyalty bargained for and promised." *Id.* at 237-38. As a matter of pragmatics, "the possibility of forfeiture of compensation discourages an agent from taking personal advantage of his position of trust in every situation no matter the circumstances, whether the principal may be injured or not." *Id.* at 238. Even where the clients suffer no monetary harm from the breach, the fee should be disgorged to deter future misconduct; it is not a "windfall" for the clients to receive that disgorgement. *Id.* at 240.

[7] Frank does not move for sanctions under Rule 11, although the Court could *sua sponte* order the parties to show cause.

The court's authority is not unbounded, but it is appropriately exercised here because disgorgement complements the Federal Rules of Civil Procedure and is proportional to the wrongdoing. "Sanctions authorized only by the inherent power of the court are . . . available only when no direct conflict with laws or national rules of procedure would arise." *Kovilic Constr. Co. v. Missbrenner*, 106 F.3d 768, 773 (7th Cir. 1997). No conflict is present here. Further, disgorgement perfectly "fits the crime" of bad-faith settlements, because it recovers precisely what the plaintiffs appropriated for themselves. *See Diettrich v. Northwest Airlines, Inc.*, 168 F.3d 961, 964 (7th Cir. 1999). The Seventh Circuit holds that courts possess inherent authority to revert baseless attorneys' fees in order to prevent "circuity and enforce ethical conduct in litigation before it." *Dale M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 282 F.3d 984, 986 (7th Cir. 2002). Identical reasoning applies here: Plaintiffs' counsel circuitously secured themselves fees in a suit that should have been "dismissed out of hand." *Walgreens*, 832 F.3d at 722. Plaintiffs' private awards should be disgorged.

## III. Intervention Should be Granted

Frank seeks to disgorge payments authorized by Defendants, which unjustly enriched Plaintiffs at the expense of shareholders. Intervention is appropriate because Plaintiffs' counsel have dropped all pretense of representing absent putative class members like Frank. Instead, Plaintiffs and their counsel multiplied bad faith proceedings for the purpose of siphoning cash from Akorn, which diametrically opposes Frank's interests.

### A. Frank is entitled to intervention as a matter of right.

Frank's motion to intervene satisfies all 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).

**1. Frank's motion is timely.**

Here, intervention is timely because Frank recently learned of his interest in this case. Timeliness is considered holistically given the circumstances of each case such as: "(1) the length of time the intervenor knew or should have known of his or her interest in this case, (2) the prejudice to the original party caused by the delay, (3) the resulting prejudice to the intervenor if the motion is denied, and (4) any unusual circumstances." *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991). These factors weigh in favor of finding Frank's motion timely.

Frank learned of his interest Friday, September 15 when the undersigned received notice of the attorneys' fee stipulation. *See* Declaration of M. Frank Bednarz ("Frank Decl.") ¶ 15. Here, there is no reason to suppose that Frank "should have known" of his interest earlier; Frank was not a party to the suits and could not have known his interests would necessarily be impaired. Although strike suit defendants often capitulate, many defendants successfully resist paying bad-faith plaintiffs. That certainly seemed to be likely in this case, where the Defendants successfully filed a contested motion for change in venue. Even if Frank—an individual shareholder—were assumed to have perfect knowledge of the Plaintiffs' suits, timeliness is measured from the event triggering the need for intervention. *See In re Discovery Zone Securities Litig.*, 181 F.R.D. 582, 594 (N.D. Ill. 1998) (finding intervention was timely when it was filed 31 days after the intervener learned that its interests were not protected by class action settlement). Prior to Friday, Frank's interest was unripe. Frank would have no standing to intervene before this date because he could reasonably assume that Akorn was protecting his interests in refusing to pay Plaintiffs. *Cf. Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (vacating denial of intervention where "there was nothing to indicate that the [original plaintiff] was planning to throw the case—until he did so"); *Rothstein v. Am. Int'l Grp., Inc.*, 837 F.3d 195 (2d Cir. 2016) (observing "troubling consequences" of requiring premature interventions by nonnamed class members).

As for prejudice, the existing parties suffer none. While intervention will undoubtedly extend proceedings before the Court, this is not itself a reason to deny the motion. "To allow the substitution of a party that has a legally protectable interest in the statute enjoined by the district court is as proper

as permitting an unnamed class member in a class action suit to intervene when the class representative drops out." *Flying J*, 578 F.3d at 573 (vacating district court's denial of intervention even though it "would result in an appeal that is otherwise not forthcoming"). The existing parties will undoubtedly argue they are prejudiced, but Frank seeks to protect his interests as a shareholder because Akorn has given up. As for the Plaintiffs, "loss of a windfall is not the kind of harm that a court should endeavor to avert." *In re UAL Corp.*, 411 F.3d 818, 823-824 (7th Cir. 2005).

In contrast, Frank suffers complete prejudice if his motion to intervene is denied. His suggestion for the Court to exercise its inherent authority can only be exercised in the same proceedings. Frank must proceed in these actions.

Finally, no unusual circumstances warrant finding Frank's motion untimely.

**2. Frank has an interest in fees inappropriately extorted from Akorn.**

Frank has a protectable interest as an Akorn shareholder,[8] and has an ongoing interest in curtailing the scourge of merger strike suits.

Furthermore, as a shareholder with diverse holdings, Frank is harmed by conduct of Plaintiff Berg and Plaintiffs' Counsel in other cases, and will continue to be harmed in the future unless their misconduct is enjoined. Plaintiff Berg has filed at least 22 strike suits since May 2017. Several of these actions have already been dismissed for mootness fees, and among these are strike suits against Whole Foods Market, Inc. and Panera Bread Co., both of which Frank owned shares in. *See* Bednarz Decl. ¶¶ 11-12; Frank Decl. ¶ 17. All but one of the non-local counsel who signed Plaintiffs' complaints have signed complaints against other corporations where Frank is a shareholder. *See* Bednarz Decl. ¶¶ 13-17.

[8] Frank is harmed as a shareholder because the merger will not close until early 2018 and may yet be rejected by government regulators. Given the political hostility to American companies being acquired by foreign corporations, this cannot be ruled out. For example, in 2014 the intended merger between Irish pharmaceutical company Shire plc and American AbbVie Inc. was cancelled due to new Department of Treasury rules aimed at preventing merged companies from obtaining tax treatment enjoyed by foreign corporations. Should the acquisition not occur, Akorn and its shareholders, including Frank, will be saddled with sunk costs from the transaction—including the payoff of Plaintiffs here.

### 3. Without intervention, Frank's cannot protect his interests.

Without intervention, the interests of Frank (and all shareholders) will be greatly impaired because no other remedy exists. Thus, if the court were to deny this motion to intervene, Frank's "interest would be extinguished for no compensation, which would eliminate [its] ability to protect its interest." *In re Bear Stearns Cos.*, 297 F.R.D. at 97.

### 4. No existing party represents Frank's interests.

No existing party adequately represents the interests of shareholders. Indeed, the parties have bargained away Akorn's funds to finance bad-faith litigation brought by the Plaintiffs. An intervener need only show that representation "may be" inadequate. *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007); *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (describing "minimal" burden to make that showing). Here, the Plaintiffs' strike suits and Defendants' acquiescence to them run directly contrary to Frank's interest as a shareholder in Akorn and numerous public companies.

Furthermore, intervention properly introduces adversity into proceedings, which is necessary when both the Plaintiffs and Defendants have settled. *See Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003); *see also Gottlieb v. Barry*, 43 F.3d 474, 490 (10th Cir. 1994) (endorsing possibility of guardian ad litem, though holding it not required). "[J]udges in our system are geared to adversary proceedings. If we are asked to do nonadversary things, we need different procedures." *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992).

Objector Frank and his counsel, the Center for Class Action Fairness ("Center"), are well-situated to provide adversariality. Frank and the Center successfully litigated *Walgreens* itself. The Center's work in other cases has won class members millions of dollars and has received national acclaim. *See* Frank Decl. ¶¶ 3-5. Frank and his counsel will work to improve class recovery in this case by seeking disgorgement of the inappropriate payments.

## B. Alternatively, intervention pursuant to Rule 24(b) should be permitted.

Even if the court finds Objector Frank is not entitled to intervene as a matter of right, the court may grant his motion as permissive intervention under to Rule 24(b). "The proposed intervenor must demonstrate that there is (1) a common question of law or fact, and (2) independent jurisdiction."

*Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). Here, the questions of law and fact are intimately linked, and Frank has independent jurisdiction over collateral matters like attorneys' fees and sanctions. *See Cooter & Gell*, 496 U.S. at 395-96.

In evaluating a permissive intervention under Rule 24(b), "the court must give some weight to the impact of the intervention on the rights of the original parties." *Id.* Here, the interests of unnamed putative class members Plaintiffs falsely claimed to represent weighs strongly in favor of intervention since shareholders stand to benefit from funds disgorged from Plaintiffs' counsel. The Defendants are not prejudiced by intervention, since the underlying claims have been released, and Frank does not wish to revive them. As for the Plaintiffs, they are prejudiced only in the sense that their bad faith attorneys' fees may be disgorged, and "loss of a windfall is not the kind of harm that a court should endeavor to avert." *In re UAL Corp.*, 411 F.3d at 823-824. Frank's action in no way interferes with Plaintiffs' pretextual claims against the Defendants, which Plaintiffs voluntarily dismissed on their own.

Thus, the court should grant intervention, allowing Objector Frank to pursue an accounting to claw back funds for the benefit of Frank and other shareholders—not just the Plaintiffs and their counsel, who filed sham lawsuits.

## CONCLUSION

Using its inherent authority, the Court should order an accounting of any payments to Plaintiffs who failed to obtain benefits for the class as a whole. Frank believes he can seek this remedy without intervention, but requests intervention for belt-and-suspenders reasons to protect his interests, and to preserve his appellate rights with respect to any court decision on disgorgement. Frank and his counsel will pursue disgorgement of these payments, which will deter bad faith strike suits nationwide and enjoin prolific bad actors. Following grant of his motion to intervene, Frank intends to file a motion for an accounting of Plaintiffs attorneys' fees within three business days.

Dated: September 18, 2017.

/s/ M.Frank Bednarz
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**CERTIFICATE OF SERVICE**

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

Dated: September 18, 2017

/s/ M. Frank Bednarz