Nos. 18-3307, 19-2401, and 19-2408

In the United States Court of Appeals for the Seventh Circuit

SHAUN A. HOUSE, Individually and on behalf of all others similarly situated,
Plaintiff-Appellee,

v.

AKORN, INC., ET AL.,
Defendants-Appellees.

APPEAL OF: THEODORE H. FRANK,
Intervenor.

DEMETRIOS PULLOS,
Plaintiff-Appellant,

v.

AKORN, INC., ET AL.,
Defendants-Appellees.

SHAUN A. HOUSE, Individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

AKORN, INC., ET AL.,
Defendants-Appellees.

On Appeals from the United States District Court for the Northern District of Illinois in Nos. 1:17-cv-05018 and 1:17-cv-05026,
Hon. Thomas M. Durkin, District Judge

JOINT CONSOLIDATED OPENING BRIEF AND REQUIRED SHORT APPENDIX FOR PLAINTIFFS-APPELLANTS SHAUN A. HOUSE AND DEMETRIOS PULLOS

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2401

Short Caption: Demetrios Pullos v. Akorn, 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):

Demetrios Pullos

(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:

Geyser P.C. | Levi & Korsinsky

Kahn Swick & Foti, LLC

Blau & Malmfeldt

(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/ Daniel L. Geyser Date: July 30, 2019

Attorney's Printed Name: Daniel L. Geyser

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

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2408

Short Caption: Shaun A. House v. Akorn, 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.

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(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):

Shaun A. House

(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:

Geyser P.C.	|	Levi & Korsinsky
Monteverde & Associates PC	|	Blau & Malmfeldt
Kahn Swick & Foti, LLC	|	Lubin Austermuehle, P.C.

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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/ Daniel L. Geyser Date: July 30, 2019

Attorney's Printed Name: Daniel L. Geyser

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2408

Short Caption: Shaun A. House v. Akorn, 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.

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Shaun A. House

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(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/ Juan E. Monteverde Date: October 18, 2019

Attorney's Printed Name: Juan E. Monteverde

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

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JURISDICTIONAL STATEMENT

A. District Court's Jurisdiction

1. Each Plaintiff's complaint asserted claims under Section 14(a) and Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e), 78t(a). The district court thus initially had jurisdiction over the case under 28 U.S.C. 1331.

2. After the complaints were filed but before any defendant filed an answer or motion for summary judgment, all parties to the action filed joint stipulations of dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), thus ending each action and mooting the present controversy. A1-A3, A5-A7. The district court entered a minute entry reflecting each stipulated dismissal, striking all pending deadlines and declaring the case "terminated." A4, A8.

Notwithstanding this dismissal, the district court later entertained a shareholder's tardy motion to intervene (which it denied), A9-A19, and then opted to "exercise its inherent powers" to (i) decide whether it believed the parties' private "settlement" was proper; and (ii) direct one side (House) to return fees voluntarily paid by the other side (the defendants) to end the

litigation. See A20-A28, A29-A40.[1] The district court took these actions without identifying any authority in any statute or any rule (or anything else) authorizing courts to continue adjudicating an action that had already been dismissed, in order to "abrogate" a private, out-of-court settlement terminating the underlying litigation.

As established below, the Rule 41(a) dismissal ought to have been the final word in this action. The parties' stipulation did not request that the district court maintain jurisdiction. It was effective immediately upon filing, ending the case and depriving the district court of the power to continue adjudicating a (non-existent) dispute. See *Jenkins* v. *Vill. of Maywood*, 506 F.3d 622, 624 (7th Cir. 2007). After the Rule 41(a)(1) dismissal, "the case was gone; no action remained for the district judge to take." *Smith* v. *Potter*, 513 F.3d 781, 782-783 (7th Cir. 2008).

Although the district court initially had jurisdiction, that jurisdiction lapsed by the time the court unilaterally decided to demand further litigation

---

[1] Although the parties reached an agreement regarding attorney's fees, that agreement did not settle the underlying *claims* (class or individual). Those claims, however, were indisputably moot in light of Akorn's supplemental disclosures filed after Akorn's original disclosures were challenged in this litigation. When we refer to "settlement" through this brief, we are referring exclusively to the parties' agreement on fees, nothing more.

over an action dismissed by all parties. "Since there was no longer a case pending before him, and since a federal judge's authority to issue orders depends (with immaterial exceptions) on the existence of a case, his order was void." *Smith*, 513 F.3d at 782-783.

B. Appellate Jurisdiction

Although the district court's order was improper, this Court has jurisdiction to review it under 28 U.S.C. 1291. The district court's (extracurricular) order was entered on June 24, 2019 (A29), nearly two years after these actions were voluntarily dismissed. The district court confirmed that its order was "final and appealable" on June 27, 2019. A41-A42. Pursuant to Fed. R. App. P. 4(a)(1)(A), Plaintiffs each filed a timely notice of appeal (Pullos on July 23, 2019, and House on July 24, 2019).

STATEMENT OF THE ISSUES

1. Whether the district court improperly asserted jurisdiction over these actions in order to adjudicate the merits and abrogate an out-of-court settlement where (i) a live controversy no longer existed between the parties; and (ii) the underlying actions were dismissed under Fed. R. Civ. P. 41(a)(1)(A)(ii).

2. Whether the district court had the inherent authority to revive Plaintiffs' claims and force litigation on the merits despite (i) the lack of any rule or

statute supporting its directive; (ii) the deep conflict between its order and Rule 41(a)(1), Rule 23(e), and the PSLRA; and (iii) the plain interference with the reticulated scheme devised by Congress and the Rules Committee for handling dismissed claims in precisely these circumstances.

3. In the event this Court finds that the district court properly exercised jurisdiction and had the inherent authority to review the merits of the complaints and supplemental disclosures, whether the district court nevertheless erred by (i) declining to apply the "helpful" standard for mootness fees recognized by the Delaware Court of Chancery in *Trulia* and *In re Xoom Corp. Stockholder Litig.*; (ii) failing to analyze all of the supplemental disclosures Plaintiffs were responsible for; and (iii) concluding that the supplemental disclosures it did review were not plainly material.

STATEMENT OF THE CASE

On April 24, 2017, Akorn, Inc. and Fresenius Kabi AG announced that they had entered into an agreement under which Akorn would be acquired by Fresenius for $34.00 per share (the "Merger"). *House* Doc. 65-2 at 2.

On May 22, 2017, Akorn filed a preliminary proxy statement regarding the Merger ("Preliminary Proxy") (House Doc. 65-1). As outlined below, shareholders were rightfully concerned regarding the sufficiency of the

disclosures in the Preliminary Proxy, and six of them ultimately filed lawsuits challenging the disclosures made therein. The district court's June 24, 2019 Order focused its analysis on the claims raised by three of the six plaintiffs: Shaun House ("House"), who filed his action in the Middle District of Louisiana on June 12, 2017; Robert Carlyle ("Carlyle"), who filed his initial action in the Northern District of Illinois on June 13, 2017;[2] and Demetrios Pullos ("Pullos"), who filed his action in the Middle District of Louisiana on June 22, 2017. See A29-A40.[3]

After the Preliminary Proxy was filed, certain plaintiffs demanded that Defendants remedy the disclosure deficiencies therein. On June 15, 2017,

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[2] Carlyle filed his initial complaint on June 13, 2017 in the Northern District of Illinois (Case No. 1:17-cv-04455). Carlyle then filed a notice of voluntary dismissal on June 20, 2017 and refiled his action in the Middle District of Louisiana (where the remaining shareholders commenced their actions) that same day, with a slightly different complaint (M.D. La. Case No. 3:17-cv-00389). When his Louisiana action was subsequently transferred to the Northern District of Illinois, it was assigned Case No. 1:17-cv-05022. In conducting its analysis of Carlyle's complaint, the district court looked at the complaint Carlyle filed in the Middle District of Louisiana on June 20, 2019 (*i.e.*, after the Definitive Proxy was filed), not the original complaint he filed in the Northern District of Illinois in Case No. 1:17-cv-0445 on June 13, 2017. See A32-38.

[3] Pullos is represented by Kahn, Swick & Foti, LLC, which also acted as local Louisiana counsel for House, Carlyle and another Akorn shareholder, Sean Harris.

Akorn filed a definitive proxy statement ("Definitive Proxy") (House Doc. 65-2), which addressed two important disclosure deficiencies.

On June 20, 2017, Frank purchased 1,000 shares of Akorn, presumably for the purpose of attempting to establish standing to interject himself into this litigation. See Berg Doc. 82-1 at 23. While Frank was setting himself up to be an objector to a settlement that never happened, Plaintiffs were busy litigating:

- On June 15, 2017, Defendants filed a motion to transfer the actions from the Middle District of Louisiana to the Northern District of Illinois (which was subsequently also filed in the related actions filed after that date);
- On June 26, 2017, plaintiffs filed a motion for preliminary injunction and expedited discovery that raised two disclosure issues that were not addressed in the Definitive Proxy;[4]
- On June 27, 2017, plaintiffs' counsel received and reviewed confidential discovery from Akorn, including Akorn board of directors ("Board")

[4] The preliminary injunction motion was filed in the Middle District of Louisiana in the action styled *Robert Carlyle* v. *Akorn, Inc., et al.*, No. 3:17-cv-00389-BAJ-RLB, and was joined by Plaintiffs House and Pullos. M.D. La. Case No. 3:17-cv-00389-BAJ-RLB, Doc. 6, 6-1.

meeting minutes and financial analyses performed by J.P. Morgan, Akorn's financial advisor;

- On June 28, 2017, plaintiffs sent another demand letter to Akorn identifying disclosure deficiencies that were either not addressed in the Definitive Proxy or that came to light through the discovery; and
- On June 30, 2017, the Middle District of Louisiana held a status conference to discuss the pending motions with the parties.

On July 5, 2017, Akorn agreed to make the additional important disclosures plaintiffs demanded, and plaintiffs agreed to withdraw their preliminary injunction motion. That same day, the Middle District of Louisiana transferred the six actions to the Northern District of Illinois. See House Doc. 25.

The second round of supplemental disclosures were disseminated via a Form 8-K dated July 10, 2017 (the "8-K") (House Doc. 65-3) (the disclosures made via the 8-K along with the two important categories of information that were added to the Definitive Proxy are referred to collectively as the "Supplemental Disclosures").

Having secured the information they considered important, and pursuant to the preferred procedure for resolving mooted disclosure cases set forth in *Trulia*, on July 14, 2017, Plaintiffs House and Pullos dismissed their cases

without prejudice to themselves or the putative class pursuant to Fed. R. Civ. P. 41(a)(1)(A). A1-A3; A5-A7. No settlement—individual or class—was reached. No claims—individual or class—were released.

After the stipulations were filed, and as required by N.D. Ill. LR54.3(d), the parties commenced discussions regarding an appropriate mootness fee to the various plaintiffs' counsel. The Defendants, in a valid exercise of their business judgment, agreed to resolve the fee issue via agreement and, on September 15, 2017, a publicly available stipulation disclosing the amount of the fee and expense reimbursement was filed by one of the shareholder plaintiffs, Robert Berg. Berg Doc. 56. As the district court initially noted, "the strategy employed by Plaintiffs' council [sic] here was actually encouraged by the court in *Trulia*, whose reasoning *Walgreen* adopted." A18. It was also required by N.D. Ill. LR54.3(d) ("The parties involved shall confer and attempt in good faith to agree on the amount of fees or related nontaxable expenses that should be awarded prior to filing a fee motion.").

Nevertheless, on September 18, 2017, Frank moved to consolidate and intervene in the six dismissed actions. Frank sought to undo the parties' fee agreement and require the plaintiffs' counsel to disgorge fees he had no interest in. *House* Doc. 57.

On November 21, 2017, the district court denied Frank's motion in its entirety (*i.e.*, both his motion to intervene and his motion to consolidate), correctly finding that Frank lacked the requisite interest required under Fed. R. Civ. P. 24. A9-A19. The district court also made several important determinations that it later disregarded, including that:

- "[T]he court in *Trulia* favorably contemplated the very scenario that has arisen in this case."
- "There does not appear to be a process for the Court to approve or reject the [fee] settlement * * * ."
- The facts of this case "make[] it difficult (if not impossible) to see how this case remains within the ambit of Rule 23, or any other authority of the Court."
- "*Walgreen* applied a standard for approval of class settlements under Rule 23, which is not at issue here * * * . *Walgreen* was primarily concerned with abuse of the special status of class counsel. That concern is not present here, and the Court does not perceive a basis to take the extraordinary remedy of disgorgement."

A14-A18.

Despite these findings, the district court gave Frank a second bite at the apple, and allowed him to refile his motion to intervene to "focus on the issues identified by the Court in [its] opinion regarding his interest in the case generally." A18.

Frank accepted the district court's invitation and, on September 25, 2018, after briefing, the district court again denied Frank's motion to intervene on the grounds that he lacked the requisite interest under Rule 24. A20-A28. However, rather than finally deeming the dismissed actions closed, the district court contradicted its prior reasoning and afforded Frank a third bite at the apple, this time indicating *sua sponte* that it would invoke its "inherent powers" to revive dismissed cases, terminate the Parties' fee agreement, force Plaintiffs to litigate the merits of their dismissed claims, and review the disclosures for which Plaintiffs' claimed credit under the "plainly material" standard for approving a class action settlement set forth in *Walgreen*. A27. Despite finding Frank lacked a sufficient interest to intervene under Rule 24, the district court nevertheless invited Frank to participate in the proceedings as *amicus curiae*, *ibid.*, which he accepted. In their subsequent briefing, Plaintiffs focused their materiality argument on the "the disclosures for which they claim credit," as the district court instructed. *Ibid.*

On June 24, 2019, the district court rendered the opinion at issue in this appeal. The district court once again disregarded its previous order, and *sua sponte* decided to "assess whether the disclosures Plaintiffs *sought* in their complaints—not the disclosures Akorn made after the complaints were filed in the revised proxy and Form 8-K—are plainly material." A32. The district court determined that none of the three complaints it reviewed sought "plainly material" information, and ordered Plaintiffs' counsel to return the fees Defendants agreed to pay them, which they earned. A29-A40.

SUMMARY OF ARGUMENT

In an unprecedented opinion, the district court revived a series of dismissed, closed cases; terminated a private contractual agreement regarding attorney's fees; forced Plaintiffs to litigate the merits of their dismissed claims; applied a class-settlement standard despite there being no class settlement; and ordered Plaintiffs' counsel to return a fee award because the court, in a self-initiated review, felt the proxy-disclosure violations alleged in Plaintiffs' complaints were not "plainly" meritorious. This decision is riddled with a series of critical and fundamental errors, and it warrants reversal.

I. A. First and foremost, the court's order was void because it lacked jurisdiction. The court acted after the controversy was over. The parties

settled their differences, and the cases were dismissed. There was nothing left to adjudicate. Rule 41(a) does not permit courts to attach conditions on a voluntary dismissal; the right is absolute (and automatic), and the parties' filing of a Rule 41 stipulation itself terminated each case. At that point, the court's jurisdiction had officially lapsed over the merits, and it had no authority to continue. Its decision to review the merits of the complaint—to determine whether it should "abrogate" the parties' resolution of the core dispute—is directly at odds with settled law.

B. Nor could the court rely on the narrow license to continue jurisdiction over "collateral" disputes. There are indeed limited pockets of ancillary jurisdiction, but none of the traditional exceptions remotely apply here. The Rule 41 dismissal dropped the case from the docket; the court had no authority to add a condition retaining supervisory jurisdiction. And while courts can litigate post-dismissal issues involving attorney's fees or sanctionable behavior, the proceedings below fell well outside those exceptions. By the court's own admission, this was a direct attempt to relitigate the merits of a dismissed case. It was deciding whether to "abrogate" the parties' out-of-court settlement on the ground that the initial complaint lacked merit—precisely the issue a *settlement* is designed to resolve.

II. By ordering Plaintiffs to litigate the merits of their dismissed claims, the district court drastically overstepped the bounds of its inherent authority. This court has repeatedly held that inherent authority must be exercised sparingly. Courts may not rely upon their inherent authority to side-step applicable rules, statutory regimes, and established principles of law. Yet that is precisely what the district court did here. Its order disregarded the Parties' absolute right to resolve their dispute without court intervention and end the litigation via Rule 41, as well as the 2003 amendment to Rule 23(e) which "intentionally * * * limit[ed] the courts' supervisory powers over dismissals and voluntary settlements to class actions in which a class has been certified."

Both Congress and the Rules Committee are fully aware how to authorize courts to police out-of-court settlements, yet there is no license in any statute or rule authorizing the action here. Congress has directly occupied the field, and the court demonstrably erred in inventing its own procedure that conflicts with the existing scheme.

III. Even if this Court concludes that the district court had the jurisdiction and the inherent power to conduct a post-dismissal merits review, the district court's review itself was fundamentally flawed.

First, the district court declined to apply the actual standard for approving a mootness fee. As the *Trulia* Court explained, "an award of fees in the mootness fee scenario may be appropriate for supplemental disclosures of less significance than would be necessary to sustain approval of a settlement." The "plainly material" standard applies to *class* settlements, which this was plainly not. Had the court applied the correct standard, Plaintiffs clearly would have prevailed.

Second, the district court wrongly truncated its materiality review, refusing to consider any disclosures that were not listed in the Plaintiffs' original complaints—even though Plaintiffs prompted additional key disclosures during the course of litigation. There is no basis in law or logic for ignoring essential contributions simply because the dispute was over before Plaintiffs could submit a first-amended complaint.

Finally, the district court miscomprehended the significance of the Supplemental Disclosures it actually considered, which were plainly material. Simply put, "there is a substantial likelihood that a reasonable shareholder would have considered the Supplemental Disclosures important in deciding how to vote." *TSC Indus.* v. *Northway*, 426 U.S. 438, 449 (1976).

The court's contrary ruling was fatally flawed, and its judgment should be reversed.

STANDARD OF REVIEW

This Court reviews de novo (i) "whether a district court properly invoked its inherent powers"; (ii) the scope of federal jurisdiction; and (iii) the interpretation of statutes and rules. *Schmude* v. *Sheahan*, 420 F.3d 645, 650 (7th Cir. 2005); *Jaffee* v. *Redmond*, 142 F.3d 409, 412 (7th Cir. 1998). When materiality is resolved as a matter of law, as it was below, it is also reviewed de novo. See *Jaffee*, 142 F.3d at 412; *Garcia* v. *Cordova*, 930 F.2d 826, 828 (10th Cir. 1991).

ARGUMENT

I. THE DISTRICT COURT'S ORDER IS VOID BECAUSE THE COURT LACKED JURISDICTION TO COMPEL GRATUITOUS LITIGATION AFTER PLAINTIFFS' CLAIMS WERE MOOTED AND DISMISSED

A. The Rule 41 Dismissals Eliminated The Court's Jurisdiction Over The Merits, Including Its Self-Directed Review Of The Parties' Out-Of-Court Settlement

The district court erred, first and foremost, in compelling litigation over a dispute that no longer existed. It is axiomatic that Article III courts exist to *resolve* "cases or controversies," not to create them. Under Rule 41(a)(1), a plaintiff's decision to dismiss "terminates the case all by itself"; it leaves

"nothing left to adjudicate." *Szabo Food Serv., Inc.* v. *Canteen Corp.*, 823 F.2d 1073, 1078 (7th Cir. 1987); accord *Smith* v. *Potter*, 513 F.3d 781-782-783 (7th Cir. 2008). This is why there is "considerable and unchallenged case authority (including decisions by this court) that a judgment on the merits that is entered after the plaintiff has filed a proper Rule 41(a)(1) notice of dismissal is indeed void." *Marques* v. *FRB*, 286 F.3d 1014, 1018 (7th Cir. 2002); see, *e.g.*, *Am. Soccer Co.* v. *Score First Enters.*, 187 F.3d 1108, 1112 (9th Cir. 1999) (reversing order vacating a Rule 41 dismissal and ordering plaintiff to pay attorney's fees, as the district court "was without jurisdiction to rule on the merits of the case").

This straightforward principle is the swiftest path to resolving this appeal. The district court ordered the parties to engage in full-blown merits litigation *after* the parties had filed their Rule 41 dismissals and the court had recognized the matters were "terminated." A4, A8. Those Rule 41(a) dismissals were effective immediately upon filing (*Jenkins* v. *Vill. of Maywood*, 506 F.3d 622, 624 (7th Cir. 2007)), and they left each suit as if it "had never been brought" (*Smith*, 513 F.3d at 783). Once the "main case[s] w[ere] settled," the actions "became moot." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 396 (1990). Yet without any live controversy, the court post-hoc "abrogated" the

parties' out-of-court agreement—which had *already resolved* any remaining dispute—based on the court's perceptions of the merits of a *dismissed* complaint.

This was a plain excess of the court's Article III power. There is no jurisdiction over a case that no longer exists. Rule 41 provides an "unfettered right" to dismiss an action "for any reason" (*Wolters Kluwer Fin. Servs.* v. *Scivantage*, 564 F.3d 110, 114-115 (2d Cir. 2009)), and that "right is absolute" (*Marques*, 286 F.3d at 1017). "When the plaintiff packs up his portfolio and goes home, the case goes home with him. There is no longer a dispute for the court to decide," and "the absence of a plaintiff ends the court's power." *Szabo*, 823 F.3d at 1078. The court's extracurricular adjudication of a non-existent action violated Article III: "Since there was no longer a case pending before him, and since a federal judge's authority to issue orders depends (with immaterial exceptions) on the existence of a case, his order was void." *Smith*, 513 F.3d at 782-783.[5]

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[5] Nor is there any conceivable argument that the court retained some authority under Rule 41 to "approve" the stipulation. See Fed. R. Civ. P. 41(a)(1) (granting right to dismiss "without a court order" subject only to narrow, enumerated exceptions). Here, the only plausible hook for that power is Rule 23, but that rule was amended in 2003 to confirm that court "approval" is required

[Footnote continued on next page]

In short, "it is beyond debate that a dismissal under Rule 41(a)(1) is effective on filing, no court order is required, the parties are left as though no action had been brought, the defendant can't complain, and the district court lacks jurisdiction to do anything about it." *Commercial Space Mgmt. Co.* v. *Boeing Co.*, 193 F.3d 1074, 1078 (9th Cir. 1999). This is a sufficient basis for reversing and vacating the court's unauthorized order, and any contrary ruling invites a square circuit conflict. See, *e.g.*, *In re Matthews*, 395 F.3d 477, 482 (4th Cir. 2005) ("Once the United States voluntarily dismissed its forfeiture action, all proceedings in the action were terminated, and the district court lacked the authority to issue further orders addressing the merits of the

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"only if the claims, issues, or defenses of a *certified class* are resolved"—and these putative classes were never certified. Fed. R. Civ. P. 23, advisory committee notes (2003 Amendment) (emphasis added); see also, *e.g.*, 7B Wright, Miller, & Kane, *Federal Practice & Procedure* § 1797 (3d ed. 2017) ("[T]he 2003 amendments make clear that Rule 23(e) only applies to the 'claims, issues, or defenses of a certified class.' Thus, settlements or voluntary dismissals that occur before class certification are outside the scope of subdivision (e)."). Indeed, the district court itself recognized the lack of any statute- or rule-based authority for reviving the dismissed actions: "the fact that Plaintiffs[] have dismissed their class claims without prejudice, and that Defendants have already reached an agreement with Plaintiffs' counsel, makes it difficult (if not impossible) to see how this case remains within the ambit of Rule 23, or any other authority of the Court." A17; see also A25 ("Without a certified class, Rule 23's mechanism for judicial review of class settlements is inapplicable."). The court would have reached the right (non-)disposition had it simply followed its own rationale.

case."); *Am. Soccer*, 187 F.3d at 112 (vacating a post-Rule 41 merits ruling as "without jurisdiction"); *Smith* v. *Phillips*, 881 F.2d 902, 904 (10th Cir. 1989) ("A voluntary dismissal by stipulation under Rule 41(a)(1)(ii) is of right, cannot be conditioned by the court, and does not call for the exercise of any discretion on the part of the court. Once the stipulation is filed, the action on the merits is at an end.") (internal citations omitted); *Williams* v. *Ezell*, 531 F.2d 1261, 1264 (5th Cir. 1976) (reversing as a "nullity" an order awarding attorney's fees against plaintiffs after Rule 41(a)(1) dismissal); see also 8 Moore's *Federal Practice* § 41.33[6][e], at 41-84 (3d ed. 1999) ("Once a notice of dismissal without prejudice is filed, the court loses jurisdiction over the case, and may not address the merits of [the] action or issue further orders.").

B. The District Court Could Not Rely On Ancillary Jurisdiction To Revive The Dismissed Claims And Unwind The Parties' Fee Agreement

The district court never identified any basis for its continued jurisdiction over the *terminated* cases, but instead invoked its "inherent authority" (A28, A30), which could only be "understood as a reference to ancillary jurisdiction." *United States* v. *Wahi*, 850 F.3d 296, 300 (7th Cir. 2017). This is woefully inadequate. While courts retain "ancillary jurisdiction" post-dismissal to address a *limited* set of "collateral" issues (*Cooter & Gell*, 496 U.S. at 395-396), none of

the recognized exceptions apply here. *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-380 (1994). Indeed, to our knowledge, there is no authority, anywhere, for applying ancillary jurisdiction to conduct a sua sponte, post-hoc merits analysis of a dismissed complaint because the court believes the *resolved* claims might otherwise have been dismissed.

Ancillary jurisdiction is not a roving license to do equity, and its reach is not unlimited. The doctrine "exists for two limited purposes: (1) to permit claims that are factually interdependent to be resolved in a single proceeding; and (2) to enable the court to 'manage its proceedings, vindicate its authority, and effectuate its decrees.'" *Wahi*, 850 F.3d at 298 (quoting *Kokkonen*, 511 U.S. at 380). Neither purpose is implicated here.[6]

By the court's own admission, this was a direct attempt to litigate the merits of a *dismissed* case. It was deciding whether to "abrogate" the parties' out-of-court settlement on the ground that the initial complaints (which were since mooted) lacked merit—precisely the issue a *non-judicial settlement* is designed to resolve. There was no decree to "effectuate" or authority to "vindicate" (*Wahi*, 850 F.3d at 298), as the parties resolved every aspect of their

[6] Not even Frank suggests that the first exception—for "factually interdependent" claims—applies here.

dispute without judicial intervention. Nor were there any "proceedings" left to manage, since the Rule 41 dismissals dropped the cases from the docket, eliminating any semblance of a live Article III controversy.

The court's invocation of jurisdiction is truly extraordinary: it suggests that courts have the power to revive dismissed claims, compel unwanted merits litigation, and unwind private settlements because, in the court's view, the operative complaint was vulnerable to a dismissal motion that was never filed in litigation that had long since disappeared. Ancillary jurisdiction may permit a lot of things, but it does not permit courts to engage in self-directed merits litigation or revive settled controversies. If a court believes a party engaged in *sanctionable* misconduct, the court retains the authority to target the sanctionable act—with the appropriate procedures and applying the suitably demanding standards. See, *e.g.*, *Kokkonen*, 511 U.S. at 379-380; *Chambers* v. *NASCO, Inc.*, 501 U.S. 32 (1991); Fed. R. Civ. P. 11. But it cannot ignore a Rule 41(a) dismissal simply because it prefers a different outcome: "The dismissal terminates the case all by itself. There is nothing left to adjudicate. So several courts, including this one, have held that a judge may not reject the

Rule 41(a)(1)(i) notice and then decide the case on the merits; one disposition is enough!" *Szabo*, 823 F.2d at 1078.[7]

"'Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.'" *Wahi*, 850 F.3d at 299. If the court wished to compel parties to involuntarily litigate the merits of dismissed claims, it had to identify some authority for engaging in that unprecedented practice.

II. EVEN IF THE COURT HAD JURISDICTION, IT HAD NO AUTHORITY TO UNILATERALLY UNWIND A PRIVATE SETTLEMENT AND RELITIGATE THE MERITS OF A DISMISSED CASE

Even if the district court somehow had jurisdiction, it lacked the substantive power to do what it did. There is no statute and no rule authorizing courts to sweep aside a Rule 41(a)(1) dismissal and insist upon a searching review to decide for themselves whether terminated claims lacked merit. Both

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[7] Consistent with the "limited" nature of ancillary jurisdiction, appellate courts have instructed district courts not to entertain intervention motions filed after a Rule 41 dismissal. See, *e.g.*, *Marex Titanic, Inc.* v. *Wrecked & Abandoned Vessel*, 2 F.3d 544, 547-548 (4th Cir. 1993) (finding "no discretion" to permit intervention in a "defunct action"); *United States* v. *Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981) ("Since there is no proceeding in which appellants can intervene, this appeal is moot."). Here, the district court exercised jurisdiction it never had to consider Frank's intervention motion, and then used that (denied) motion as a springboard for conducting its unauthorized merits review.

Congress and the Rules Committee have crafted procedures allowing courts to examine settlements in certain contexts, but they adopted the opposite rule here; the court's unilateral, post-hoc review interferes with the policymakers' highly reticulated scheme, and it contravenes the express restraints that apply in this very setting. If Frank (or the district court) believes that the existing rules are unwise, his proper recourse is to the political branches. The district court vastly exceeded the bounds of its authority, and its decision should be reversed.

A. The Court's Self-Initiated Merits Review After A Rule 41(a)(1) Dismissal Violates The Limits Of Inherent Authority

Inherent authority is a "residual authority" to be "exercised sparingly." *Zapata Hermanos Sucesores* v. *Hearthside Baking Co.*, 313 F.3d 385, 390 (7th Cir. 2002). Its use warrants "cautio[n]," especially when trenching upon areas "governed by other procedural rules." *Kovilic Constr. Co.* v. *Missbrenner*, 106 F.3d 768, 772-773 (7th Cir. 1997). It cannot justify action that "directly conflict[s]" with positive authorities, and where rules "'mandate a specific procedure *to the exclusion of others*, inherent authority is proscribed.'" *G. Heileman Brewing Co.* v. *Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) (en banc); see also *Degen* v. *United States*, 517 U.S. 820, 823 (1996) ("In many instances the inherent powers of the courts may be controlled or overridden by statute

or rule."). Indeed, "even in the absence of a direct conflict," inherent authority is improper if it would leave "restrictions" in other rules "meaningless." *Missbrenner*, 106 F.3d at 772-773.

These principles doom the decision below. The district court candidly admitted that it had no actual legal basis for reviewing the merits of a private settlement outside the specific sources of authority in any rule or statute. See, *e.g.*, A17-A18, A25-A26. Yet it decided to attach an unprecedented form of review to claims resolved under Rule 41(a)(1) (contradicting the unqualified right of dismissal), and to assess the merits of a "settlement" in class claims that were never certified (effectively reinstating the *overridden* directives of old Rule 23(e)). And while Congress has instructed courts to examine the merits of claims and settlements in multiple areas (including *allegedly abusive securities litigation*), it has limited those provisions to stop far short of this situation.

As Plaintiffs explained below, if the district court truly believed that Plaintiffs' counsel had engaged in sanctionable misconduct, its only option was to invoke its inherent *sanctions authority* and apply the applicable standard (*House* Doc. 65 at 5-7); consistent with its previous order (see A18), the court declined the invitation. Its decision instead to conduct a post-Rule 41(a)(1)

merits analysis violates the "'considered limitations of the law it is charged with enforcing.'" *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988). Congress and the Rules Committee have occupied the field, and the court's novel procedure impermissibly intrudes upon their careful scheme.

1. The court's action had no legal basis in any rule, and it contradicts the express and implied commands of Rule 41(a)(1) and Rule 23(e)

The court's new procedure—reviewing the merits of a non-existent case dispatched under Rule 41(a)(1)—conflicts with the clear mandates of both Rule 41(a)(1) and Rule 23(e).

a. The district court's order violates Rule 41(a)(1). The rule's operation could not be any clearer: a Rule 41(a)(1) stipulation immediately terminates the case, and does so automatically "without a court order." *Jenkins*, 506 F.3d at 624. "Judicial approval is not required and cannot be withheld." *Boran* v. *United Migrant Opportunity Servs., Inc.*, 99 F. App'x 64, 67 (7th Cir. 2004) (citations omitted). This "unconditional right" eliminates a court's ability to conduct any further review (*Barbee* v. *Big River Steel, LLC*, 927 F.3d 1024, 1027 (8th Cir. 2019)): "'A court has no authority to disapprove or place conditions on any such dismissal.'" *Hester Indus., Inc.* v. *Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998).

The district court's action runs headlong into these settled rules. A decision to "abrogate" a settlement is exactly tantamount to a decision attaching conditions to a Rule 41(a)(1) dismissal. The stipulation here ended the case and the parties resolved their differences out of court. Rather than accept that the case is over, the court effectively rejected the parties' stipulation and demanded further litigation over their (now-defunct) claims. It reviewed those claims on the merits and struck down the parties' private resolution of the dispute. A39-A40. And it did so notwithstanding "'the traditional view'" that "'the judge merely resolves issues submitted to him by the parties * * * and stands indifferent when the parties, for whatever reason commends itself to them, choose to settle a litigation.'" *Gardiner* v. *A.H. Robins Co.*, 747 F.2d 1180, 1189 (8th Cir. 1984); see also, *e.g.*, *Quad/Graphics, Inc.* v. *Fass*, 724 F.2d 1230, 1232 (7th Cir. 1983).

As this Court has long instructed, "a judge may not reject the Rule 41(a)(1)(i) notice and then decide the case on the merits." *Szabo*, 823 F.3d at 1078. The stipulation is the final (and only) disposition, and courts lack authority to insist upon a self-directed inquiry into whether the parties' private agreement made sense. Again, "[i]n ordinary litigation," "courts recognize that settlement of the dispute is solely in the hands of the parties." *Gardiner*,

747 F.2d at 1189. "When all parties to a case sign a dismissal, that dismissal is effective unless federal law provides otherwise" (*Barbee*, 927 F.3d at 1027)—and no federal law "provides otherwise" here.[8]

The district court's contrary action "'deprived the parties of their unconditional right to a Rule 41(a)(1)(ii) dismissal by stipulation.'" *In re Wolf*, 842 F.2d 464, 466 (D.C. Cir. 1988) (per curiam). Because the "clear and unambiguous language of Rule 41(a)(1) * * * contains no exceptions that call for the exercise of judicial discretion by any court,'" the district court's order to override the parties' stipulation "'directly conflicts'" with the rule's mandate. *Wolf*, 842 F.2d at 466. That renders the court's exercise of inherent authority invalid. See, *e.g.*, *Carlisle* v. *United States*, 517 U.S. 416, 425-426 (1996) (disavowing

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[8] The *Gardiner* court also rejected the argument that a district court's authority to oversee class or derivative settlements was implicated simply because the consolidated proceedings there had "many of the characteristics of a class action." 747 F.2d at 1188-1189. The court noted that "the record is unequivocal that neither the parties nor the district court regarded the agreement as binding other plaintiffs. The Settlement Agreement was a matter of private contract between [corporate defendant] and [plaintiffs' counsel] on behalf of several named individuals, and is enforceable only by those parties." *Ibid.* The same is true here.

[Footnote continued on next page]

inherent-authority acts that "circumvent or conflict" with federal rules); *Strandell* v. *Jackson Cnty., Ill.*, 838 F.2d 884, 886-887 (7th Cir. 1988).[9]

b. The district court's order likewise violates the operative version of Rule 23(e). As explained above, Rule 23(e) was amended in 2003 to specifically reject the proposition that judicial approval is required over *non-certified* classes. See, *e.g.*, *Federal Practice & Procedure* § 1797; see also Fed. R. Civ. P. 23(e) (limiting the court-approval requirement to "certified class[es]" or "a class proposed to be certified for purposes of settlement"); 5 Moore's *Federal Practice* § 23.160 (3d ed. 2017) (Moore) ("the 2003 amendments to Rule 23(e) intentionally * * * limit[ed] the courts' supervisory powers over dismissals and voluntary settlements to class actions in which a class has been certified").

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[9] *E.g.*, *Williams*, 531 F.2d at 1263-1264 ("At the time plaintiffs filed their motion to dismiss [under Rule 41(a)(1)] the case was effectively terminated. The court had no power or discretion to deny plaintiffs' right to dismiss or to attach any condition or burden to that right. That was the end of the case and the attempt to deny relief on the merits and dismiss with prejudice was void."); see also, *e.g.*, *United States* v. *Altman*, 750 F.2d 684, 690, 696-697 (8th Cir. 1984) (reversing order enjoining parties from settling litigation on "principles of equity," because in "lawsuits between private parties, courts recognize that settlement of the dispute is solely in the hands of the parties"); *McKenzie* v. *Davenport-Harris Funeral Home*, 834 F.2d 930, 935 (11th Cir. 1987) (reversing order dismissing complaint with prejudice as a sanction for violating previous order after parties reached settlement and filed a Rule 41(a)(1)(ii) stipulation, because "[i]f the parties can agree to terms, they are free to settle the litigation at any time, and the court need not and should not get involved").

The district court's order is again squarely out of step with this rule. In conducting its merits review, the district court admitted it was applying the *Walgreens* standard *for evaluating class settlements*. A27. The court thus reinstated the precise change that the Rules Committee expressly disavowed—the court exercised its supervisory power to approve or reject the settlement of a *non-certified* action. The court earlier conceded (with full candor) that it *lacked* the power to engage in this type of review, precisely because Rule 23(e) restricted the judicial role to certified classes. A17, A25-A26; see, *e.g.*, Moore, *supra*, § 23.64[2][a], at 23-360-361 ("A court cannot effectively coerce continued litigation when all parties have agreed not to litigate further.") (footnotes omitted). But the court again ignored its own advice, and in doing so violated the deliberate calibration of interests captured by revised Rule 23(e).

This is another plain misapplication of the court's inherent authority. "[I]n those areas of trial practice where the Supreme Court and the Congress, acting together, have addressed the appropriate balance between the needs for judicial efficiency and the rights of the individual litigant, innovation by the individual judicial officer must conform to that balance." *Strandell*, 838 F.2d at 886-887. Otherwise, the "restrictions in those rules become meaningless." *Kovilic*, 106 F.3d at 773. There is no "'inherent power' to act in contravention

of applicable Rules" (*Carlisle*, 517 U.S. at 428), and the district court's contrary approach is mistaken.

2. The court's action had no legal basis in any statute, and it exceeds the express authority found in the PSLRA

The district court's order also has no grounding in any federal statute, and the statutes that do exist directly undercut the court's action.

First, the court stated that its approach was warranted to curb abuse in securities litigation. A27. Yet this concern is nothing new. Congress has already addressed the same concerns in major pieces of legislation, including the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737. Among those reforms, Congress authorized mandatory sanctions (including the award of attorney's fees) for certain baseless filings. See 15 U.S.C. 78u-4(c) ("Sanctions for abusive litigation"). Yet when Congress trained its attention on this problem, it drafted procedures that do *not* permit the kind of review the court undertook here. It instead limited this tool to situations where an action reached a "final adjudication" (not a voluntary dismissal) and required courts to measure compliance against the standards of Rule 11, not the more demanding standard required by *Walgreens*. 15 U.S.C. 78u-4(c).

If Congress believes that the PSLRA is not up to the task in today's world, it is always free to amend the law and impose a broader or different standard than the one it actually enacted. But it is not the judiciary's role to craft its own procedure that goes beyond the legislative aim in addressing the same subject.

Second, the district court further overlooked the many statutes where Congress *does* require judicial scrutiny before accepting a voluntary dismissal. See, *e.g.*, 8 U.S.C. 1329; 31 U.S.C. 3730(b)(1), (c)(2)(B). Congress knows how to require court approval when it so wishes, and it has done exactly that in a variety of fields. Yet it conspicuously did not provide that kind of authority here. It was not up to the court to supplant the legislative process by adopting its own unilateral scheme found nowhere in any provision of the U.S. Code or Federal Rules.

B. The Court's Sole Legal Support For Its Unprecedented Action—Invoking Two Decisions Having Nothing To Do With This Situation—Is Unavailing

According to the district court, its exercise of inherent authority was supported by this Court's decisions in *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016), and *Dale M* v. *Bd. of Educ. of Bradley-*

Bourbonnais High Sch. Dist. No. 307, 282 F.3d 984 (7th Cir. 2002). But neither decision remotely authorizes the court's unprecedented action.

1. To the extent the district court believed *Walgreen* authorized its review, it was badly mistaken. *Walgreen* involved a *court-approved settlement* on behalf of a *certified class*, which included "a narrow release of claims." 832 F.3d at 721. The judiciary's role in that context is both common and approved (indeed, *required*). But that is the polar opposite of putative claims dismissed via Rule 41(a)(1), before any class is certified or any class interests are impaired. See A12 (so acknowledging). This Court's off-handed statement—that a class action seeking "only worthless benefits" should be "dismissed out of hand"—did not provide any foundation (legal or factual) for invoking inherent authority, much less for devising an unwritten adjunct to Rules 12 and 56 for judges to sua sponte "dismiss" actions they find suspect. See, *e.g.*, *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prods. Liab. Litig.*, 288 F. Supp. 3d 1087, 1235 n.51 (D.N.M. 2017) (no basis for concluding courts may "*sua sponte* dismiss a case because it is not a 'good case'" or claim a "roving, inherent ability to decide which class actions should be dismissed out of hand").

The mooted claims here were properly withdrawn under the express provisions of Rule 41, and the court's jurisdiction and authority lapsed over

those claims the instant the stipulation was filed. Nothing in *Walgreen* suggests otherwise.[10]

2. Contrary to the district court's view, nor does *Dale M.* support the staggering proposition that a court can broadly "exercise[] its inherent authority to rectify [] injustice." A39 (citing *Dale M.*, 282 F.3d at 986).

Dale M. involved a striking fact-pattern where a lawyer collected a fee for winning a judgment at trial that was later reversed on appeal. 282 F.3d at 985. The lawyer resisted the order to return the fees, and this Court

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[10] *Walgreen* adopted the approach of the Delaware courts in *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884 (Del. Ch. 2016). In addition to announcing a more stringent standard for approval of disclosure-only class settlements, *Trulia* embraced a "preferred scenario" for resolving litigation over proxy disclosures—"mootness dismissals." 129 A.3d at 897. In that scenario, the defendants "voluntarily" supplement their disclosures, the plaintiffs' claims are mooted, the plaintiffs "dismiss their actions without prejudice to the other members of the putative class," and, ideally, the parties "resolve the fee" issue "privately" outside court. *Id.* at 897-898. In this case, the parties thus faithfully followed the direct advice of the leading Delaware decision for this very scenario. A14; see also *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983) ("Ideally, of course, litigants will settle the amount of a fee."); *Estate of Enoch* v. *Tienor*, 570 F.3d 821, 823 (7th Cir. 2009). It is difficult to fault the parties for embracing Delaware's preferred blueprint.

(Incidentally, *Trulia* also noted that corporations should provide notice to shareholders of any fee agreement, so shareholders could "challeng[e] the fee payment as waste in a separate litigation, if the circumstances warrant." 129 A.3d at 898. Frank's efforts in this case are an obvious attempt to skirt the proper means of disputing the settlement.)

unremarkably held that the court had "inherent authority" to enforce the decree and compel the repayment of money obtained via the reversed order. *Shapo* v. *Engle*, 463 F.3d 641, 644 (7th Cir. 2006) (explaining *Dale M.*'s disgorgement order as "necessary to implement" this Court's judgment).

Nothing in that fact-pattern provides any support for "abrogating" a private agreement (obtained without *any* judicial involvement) to resolve a contested dispute over fees.

* * *

At bottom, the court invoked its inherent authority in an unbounded way. Inherent authority is a powerful tool that requires careful exercise; there is no place for inherent authority where Congress and the Rules Committee have already occupied the field: courts cannot contradict the express rights afforded under Rule 41(a); they cannot rewrite the careful balancing reflected under Rule 23(e); they cannot ignore Congress's policy decisions in the PSLRA and other statutes; and they cannot invent a new procedural scheme for generally policing an entire class of litigation without any attempt to honor the usual rulemaking and political processes.

Neither Congress nor the Rules Committee have seen fit to provide the kind of sweeping authority the district court arrogated to itself. And there are

good reasons to presume that choice is deliberate: Settlements are a social *good*; they spare party and judicial time and avoid unnecessary cost. The political branches are well aware of the potential for abuse in class and securities litigation. They have crafted powerful defenses and protections to deter and punish frivolous litigation and compensate defendants who incur costs as a result. But none of those defenses or protections involve a searching inquiry into a Rule 41 dismissed action after parties have resolved their differences out of court.

If the defendants in these cases felt the claims had no merit, they could have fought the claims (or fee petition) in court and sought sanctions. They instead settled to avoid the expense and risk of litigating on the merits; it makes little sense to compel the very litigation both parties compromised to avoid.[11]

[11] The court also overlooked an important question: Suppose the court's extracurricular litigation revealed that Plaintiffs' claims were not just plausible but undeniably sound. Would *Plaintiffs* then have a right to unwind the agreement and demand additional compensation from Defendants? In addition to its overall lack of legal support, the court's procedure assuredly lacked a legal justification for arising only as a one-way rachet.

III. EVEN ON ITS OWN TERMS, THE DISTRICT COURT ERRED BECAUSE PLAINTIFFS' FEES WERE PLAINLY JUSTIFIED

The district court had no business resuscitating dismissed actions and ordering litigation over mooted claims. But if this species of self-imposed litigation is now allowed, the court still erred in multiple ways.

First, the court applied the heightened *Walgreen* standard ("plainly material") for *class settlements* rather than the proper standard ("helpful") for mootness-fee applications. Second, the court wrongly limited its focus to the disclosures sought in the complaint, rather than considering the additional disclosures sought (*and obtained*) over the initial stages of litigation. Third, the court erred in finding none of the supplemental disclosures "plainly material."

A. The District Court Erred In Applying The "Plainly Material" Standard

As the district court correctly noted (A3), this Court in *Walgreen* adopted *Trulia*'s "plainly material" standard for assessing disclosure-only class settlements, acknowledging Delaware's expertise in the area. *Walgreen*, 832 F.3d at 725. But the district court was wrong to assume that same standard thus automatically applies in all settings.

The court made a key error: it missed that the "plainly material" standard was directly tied to the reality that class settlements *eliminate* class

claims—it was the *release* (and the potential prejudice to the class) that required asking whether the class was getting anything in return. See *Walgreen*, 832 F.3d at 725 (noting the "'give' and 'get' of such settlements").

Had the district court acknowledged these plain limitations, it would have continued reading—and noted that *Trulia* itself applies a *different* standard—a more-relaxed one—in evaluating motions for mootness fees. As *Trulia* explained, "[i]n contrast to the settlement context," there is "no[] need to weigh the 'get' of the supplemental disclosures against the 'give' of a release." 129 A.3d at 898 n.46. Thus fees may be "appropriate for supplemental disclosures of *less significance* than would be necessary to sustain approval of a settlement." *Ibid.* (emphasis added). The question becomes one of parity: the amount of the fee should be "commensurate with the value of the benefit conferred," so a "disclosure of nominal value would warrant only a nominal fee." *Ibid.*

The Delaware courts later confirmed this understanding in *In re Xoom Corp. Stockholder Litig.*, No. 11263-VCG, 2016 Del. Ch. LEXIS 117 (Del. Ch. Aug. 4, 2016). Building on *Trulia*'s reasoning, the *Xoom* court awarded a $50,000 mootness fee for disclosures it deemed "only mildly helpful to stockholders" (*id.* at *11):

> This Court in *Trulia* made clear that, to support a settlement and class-wide release based on disclosures only, the materiality of the disclosures to stockholders must be plain. The mootness context, in my view, supports a different analysis. That is because, here, the individual Plaintiffs have surrendered only their own interests; the dismissal is to them only, not to the stockholder class. Thus, with respect to the class, there is no "give" to balance against the disclosure "get"; the benefit is the "get" of the disclosures, with no waiver of class rights to be set against that benefit. Therefore, a fee can be awarded if the disclosure provides some benefit to stockholders, whether or not material to the vote. In other words, *a helpful disclosure may support a fee award in this context.*

Id. at *9-*10 (emphasis added).

Having already adopted Delaware law for the first part of the analysis ("plainly material" standard for class settlements), there is no reason to ignore Delaware law at the next step ("helpful" standard for mootness fees). And this is especially warranted given the difficulty of assessing "materiality," the desire to avoid extensive litigation over fees, and the federal interest in securing adequate disclosure. See, *e.g.*, *TSC Indus.* v. *Northway*, 426 U.S. 438, 448 (1976) ("Doubts as to the critical nature of information misstated or omitted will be commonplace * * * . In view of the prophylactic purpose of the Rule and the fact that the content of the proxy statement is within management's control, it is appropriate that these doubts be resolved in favor of those the statute is designed to protect.").

Applying that standard here, because the district court acknowledged that at least one supplemental disclosure was helpful (A32), Plaintiffs' fees were plainly reasonable. That alone ends the analysis, and the court would have reached the right result had it simply applied the relevant Delaware standard.

B. The District Court Erred In Refusing To Analyze Each Disclosure Plaintiffs Actually Caused, As Opposed To The Smaller Subset Of Disclosures Sought In The Original Complaints

In addition to applying the wrong standard, the district court also ignored key disclosures prompted by this litigation. As outlined above, Defendants made two sets of supplemental disclosures: (i) in the Definitive Proxy responding to certain complaints and counsel's subsequent demands; and (ii) in a Form 8-K responding to Plaintiffs' preliminary-injunction motion and counsel's further demands.[12]

In setting the ground rules for its *Walgreen*-style review, the district court instructed Plaintiffs' counsel to "demonstrate that the *disclosures for which they claim credit* meet the *Walgreen* standard." A27 (emphasis added).

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[12] The preliminary-injunction motion was filed in *Carlyle* v. *Akorn, Inc.*, No. 3:17-cv-389-BAJ-RLB (M.D. La.), and joined by Plaintiffs House and Pullos. *Carlyle* Doc. 6 at 6-1.

Plaintiffs' counsel thus identified five categories of supplemental disclosures and explained how they prompted those disclosures and how those disclosures were material. In its final order, however, the district court changed course: rather than analyzing all five categories of disclosures, it truncated its analysis to assess only "the disclosures Plaintiffs *sought* in their complaints—not the disclosures Akorn made after the complaints were filed in the Definitive and Form 8-K." A32.

That was both legal and logical error. As a preliminary matter, the court ignored the fluid nature of litigation, especially during fast-paced proxy solicitations. An original complaint is rarely a *final* complaint; where an initial investigation reveals additional problems, the plaintiffs are entitled to amend their complaints, which Plaintiffs would have done here had Akorn refused to disclose the essential material. It makes little sense to penalize Plaintiffs because their quick action prompted the relevant disclosures and mooted their claims before they had any reason to amend. The court thus erred as a matter of law in refusing even to consider the materiality of multiple important disclosures.

Moreover, the court ignored Delaware's presumption of causation: plaintiffs are entitled to an "inference" that "corporate action" following the

"stockholder's action" is causally "connected." *Grimes* v. *Donald*, 755 A.2d 388, 388 (Del. 2000); see also *Allied Artists Pictures Corp.* v. *Baron*, 413 A.2d 876, 880 (Del. 1980) (allocating the burden to the defendant of *disproving* causation, as the party in the best "position to know the reasons, events and decisions leading up to the defendant's action"); *Blau* v. *Rayette-Faberge, Inc.*, 389 F.2d 469, 474 (2d Cir. 1968) (attorney's fees could be awarded based upon pre-suit letters, even though no suit had been commenced).

The district court, in short, erred in not considering all "the disclosures for which [Plaintiffs] claim credit" (A27), not just those raised in the complaints.

C. Plaintiffs Should Have Prevailed Even Under A Heightened Standard, Because Akorn's Disclosures Were "Plainly Material"

Its other errors aside, the district court was wrong that Plaintiffs failed the "plainly material" standard.

When the merger was announced in April 2017, Akorn was, by all accounts, a healthy company on the brink of significant profitability. Less than two months earlier, it had announced positive financial results for FY2016, including a 13% increase in revenue, and it had received critical FDA approval

for a new drug. As a result, financial analysts increased their price targets and upgraded Akorn's future outlook.

Many stockholders were thus surprised by the merger consideration. To persuade shareholders regarding the merger's fairness, the Preliminary Proxy touted a fairness opinion by J.P. Morgan. That opinion relied upon a case of projections suddenly prepared in March 2017—after Fresenius had submitted its initial offer and it became necessary to justify an offer in the relevant price range. The projections Akorn's board and management had used until March 2017—virtually the entire strategic-review process—were omitted from the Preliminary Proxy. (These were called the November 2016 Management Case.) Furthermore, the Preliminary Proxy noted that around the same time Akorn suddenly "updated" the projections relied upon during the sales process, Fresenius had offered John Kapoor, Akorn's chairman and 22.8% shareholder, the opportunity to invest 20% of his merger proceeds in the post-merger company. Preliminary Proxy at 34.

Given these concerning facts, Plaintiffs and several other Akorn shareholders filed their actions. Thereafter, Plaintiffs obtained confidential discovery from Defendants, which revealed additional material deficiencies in

Akorn's proxy statements. Plaintiffs primarily sought to force the disclosure of the following categories of information:

1. The case of projections that had been relied upon throughout virtually all of the strategic-review process, the November 2016 Management Case;
2. A GAAP reconciliation of Akorn's projections, including the disclosure of net income, in light of increasing concern and scrutiny over the use of non-GAAP financial metrics;
3. Further information regarding Fresenius' offer to Dr. Kapoor to invest in the post-merger company, which was made while the board was simultaneously negotiating the consideration to be received by stockholders and around the same time Akorn's projections were suddenly revised;
4. The fact that the board considered the merger's favorable effect on the derivative lawsuits against them, and assigned no value to potentially valuable litigation; and
5. Certain conflicts of interest involving J.P. Morgan.

As a result of Plaintiffs' litigation efforts, Akorn addressed these disclosure deficiencies by making supplemental disclosures in the Definitive Proxy

and Form 8-K. And, as set forth below, each supplemental disclosure was material.

1. The significantly higher November 2016 Management Case projections used throughout the sales process

The Preliminary Proxy revealed that, near the end of the sales process and at the same time Akorn was publicly disclosing its positive financial results, Akorn's projections were suddenly "updated." Preliminary Proxy at 47. As a result of this litigation, Defendants disclosed the case of projections they relied upon for virtually the entire sales process (the November 2016 Management Case) in the Definitive Proxy. Definitive Proxy at 47.[13]

The November 2016 Management Case projections were plainly material. They revealed that Akorn management had authorized massive reductions to Akorn's projections just before the merger was announced and a fairness opinion was necessary. See Definitive Proxy at 47-48. This was obviously suspect, and the November 2016 Management Case projections clearly supported a higher valuation. Accordingly, reasonable shareholders found the

[13] The supplemental disclosures revealed that Akorn projected expected 2017 unlevered free cash flow to be $294 million in the November 2016 Projections but reduced that projection by 41% ($120 million), to just $174 million, in the March 2017 Projections. Definitive Proxy at 47-48. Similar reductions propagated throughout the rest of the ten-year projection period. *Ibid.*

projections material in deciding whether to support the merger. See, *e.g.*, *Chester Cty. Emples. Ret. Fund* v. *KCG Holdings, Inc.*, No. 2017-0421-KSJM, 2019 Del. Ch. LEXIS 233, at *6 (Del. Ch. June 21, 2019) (finding omission of earlier optimistic projections a "significant deficienc[y] in the defendants' disclosures concerning the merger that render[ed] the stockholder vote uninformed"); *Azar v. Blount Int'l, Inc.*, No. 3:16-cv-483-SI, 2017 U.S. Dist. LEXIS 39493, at *17 (D. Or. Mar. 20, 2017) ("[A] reasonable shareholder would want to know management's most optimistic projections when assessing the fairness of the Merger stock price and would question the reduction in financial outlook[.]"); *Trulia*, 129 A.3d at 901 n.57 ("[T]his Court has placed special importance on [management projections and internal forecasts] because it may contain unique insights into the value of the company that cannot be obtained elsewhere.").

Rather than addressing the materiality of this disclosure, the district court simply ignored it, which was prejudicial error.

2. GAAP reconciliation and Non-GAAP line items including net income

It was also important for Akorn to disclose both cases of projections in a format that its shareholders were accustomed to seeing. In its regular quarterly reports, Akorn traditionally disclosed its financial results in compliance

with GAAP, with net income being the ultimate, bottom-line GAAP metric. GAAP format is important because GAAP metrics—like revenue and net income—are well-defined metrics that all investors can understand, and they are less prone to subjective adjustments, which has been a primary concern of the SEC.[14]

When Akorn only disclosed non-GAAP projections, two problems arose. *First*, in calculating non-GAAP metrics (like EBITDA and UFCF), companies often use their own formulas, with their own subjective adjustments. For this reason, under then-prevailing interpretation of SEC rules, when a company disclosed non-GAAP financial measures in a proxy, it was also generally required to disclose all projections and information necessary to make the non-GAAP measures not misleading and to provide a reconciliation of the non-

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[14] As outlined in greater depth in the House complaint, (1) the problem had been specifically recognized by the former SEC Chairwoman, who noted a number of "troublesome practices which can make non-GAAP disclosures misleading"; (2) at the time plaintiffs filed their suits, the SEC had been emphasizing that disclosure of non-GAAP projections can be inherently misleading and had heightened its scrutiny of the use of such projections; and (3) just before Plaintiffs filed suit, the SEC released new and updated Compliance and Disclosure Interpretations on the use of non-GAAP financial measures that demonstrated it was tightening policy, one of which regarded forward-looking information, such as financial projections, and required companies to provide any reconciling metrics that are available without unreasonable efforts.

GAAP measure to the most comparable financial measure or measures calculated and presented in accordance with GAAP. 17 C.F.R. 244.100.

Second, because Akorn investors had received GAAP metrics (like net income) for years in the company's quarterly reports, receiving only non-GAAP metrics made it difficult to compare apples to apples, *i.e.*, to compare past financial performance with what Akorn projected its future financial performance to look like. Accordingly, the disclosure of solely non-GAAP metrics in the proxy statements without a GAAP reconciliation was materially misleading.

To cure this proxy-statement deficiency, Plaintiffs demanded and obtained the disclosure of: (i) the individual line items that go into the calculation of UFCF (which were added to the Definitive Proxy at 47-48); and (ii) a GAAP reconciliation of the non-GAAP metrics to net income (which was the subject of Plaintiffs' PI Motion and thereafter included in the 8-K). In its order, the court ignored the former, and its analysis of the latter was flawed.[15]

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[15] This disclosure revealed that the November 2016 Projections assumed steady increases in Akorn's net income, which were consistent its past performance, while the March 2017 Projections assumed a sudden drop in Akorn's performance, below the prior year's net income and inconsistent with its past performance.

First, the district court suggested Plaintiffs failed to "explain why the specific net income numbers were material." A33. But, to the contrary, Plaintiffs explained net income was important to shareholders because (i) it is a GAAP metric and is thus meaningfully distinct from the non-GAAP metrics that were included in the proxy statement, and (ii) Akorn shareholders were routinely provided with net income for purposes of assessing the company's financial performance and value. *House* Doc. 65 at 9-10. Nothing more was required. See *Campbell*, 916 F.3d at 1125 ("[P]rojected net income/loss is not trivial information * * * . This court has considered net income to be among the three most valuable figures in determining the fairness of an acquisition."). The district court also suggested that the net-income projections obtained were immaterial because they were consistent with the trends that were already evident by comparing the other projections included in the Definitive Proxy. A33. But the significance of the GAAP Reconciliation and addition of the net-income projections was not to show that the company's projections had been lowered, but rather, to enable Akorn's shareholders to properly compare the company's past historical performance (which was routinely presented with net income numbers) with management's projections for the future.

The district court also selectively quoted language from 17 C.F.R 244.100(d) and the SEC's Compliance and Disclosure Interpretations (C&DI) to conclude that "while such reconciliation might be helpful, the applicable SEC regulation requiring GAAP reconciliation does 'not apply to * * * a disclosure relating to a proposed business combination.'" A32. But the language from Section 244.100(d)—which states "[t]his section shall not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination"—has a caveat that the district court overlooked. To qualify for this exception, the non-GAAP financial measure also had to be "contained in a communication that is subject to § 230.425 of this chapter, § 240.14a-12 or § 240.14d-2(b)(2) of this chapter or § 229.1015 of this chapter." 17 C.F.R 244.100(d). The SEC's C&DI explaining this exemption for business combinations elaborated that it was *not available* "if the same non-GAAP financial measure that was included in a communication filed under one of those rules is *also disclosed in a Securities Act registration statement, proxy statement, or tender offer statement*." Question 101.04. Thus, when the supplemental disclosures were made, it was far from clear that exemption from GAAP reconciliation under Section 244.100(d) applied. And, at that time, the SEC had been emphasizing that disclosure of non-GAAP projections was often inherently

misleading and had heightened its scrutiny of the practice. Thus, while the SEC obviously saw the need to update its C&DI after these actions were filed to clarify this issue, that update occurred on October 18, 2017—after Plaintiffs filed suit, after the Supplemental Disclosures were issued, and after the cases were dismissed without prejudice.

Simply put, while the district court failed to appreciate the significance of the GAAP reconciliation and disclosure of net income, this supplemental disclosure was in fact material to Akorn shareholders.

3. Discussions regarding Fresenius' investment offer to Dr. Kapoor and higher offer prices

Through confidential discovery, Plaintiffs uncovered a third important disclosure issue regarding the investment offer Fresenius made to Dr. Kapoor, which arrived around the time the company's projections were slashed, and while the merger consideration was still being negotiated. The Definitive Proxy's entire disclosure regarding this issue was that on March 30, 2017, Fresenius requested that "Dr. Kapoor agree to invest 20% of any proceeds that [he] would receive in [the Merger] in ordinary shares of [the surviving company]," and that purportedly "[*t]here were no other substantive discussions with respect to such an investment by Dr. Kapoor*[.]" Definitive Proxy at 34.

This was not true. As Plaintiffs learned through discovery, there were other proposals by Fresenius, including one which *tied a higher price to Dr. Kapoor's continuing equity*. Specifically, the Definitive Proxy only revealed that Fresenius had made a $34.00 bid on April 2, 2017. Definitive Proxy at 34. Through the supplemental disclosures, stockholders learned that Fresenius actually made two alternative proposals on that date, both of which would have provided stockholders with greater value. Specifically, Fresenius also indicated its willingness to pay $33.00 per share plus a contingent value right (CVR) worth up to $2.00, or $34.50 per share if Dr. Kapoor accepted their post-merger investment offer. In other words, the proxy statement was wrong about there being no further discussions regarding an investment by Dr. Kapoor after March 30, and also hid two higher proposals from shareholders.

The district court erroneously failed to address this supplemental disclosure, which corrected a material misstatement regarding a conflict of interest faced by Akorn's chairman and revealed higher offers. Such information is plainly material. See, *e.g.*, *Orchard Enters.*, 88 A.3d at 23 ("[T]he omission of key information about a competing bid is material—even if the bid is 'highly speculative and contingent'—where a proxy statement contains partial and incomplete disclosures about the bidding history.") (internal quotation marks

omitted); *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 114, 116 (Del. Ch. 2007); *RBC Capital Mkts., LLC* v. *Jervis* , 129 A.3d 816, 860 n.157 (Del. 2015); *In re El Paso S'holder Litig.*, 41 A.3d 432, 444-445 (Del. Ch. 2012).

4. The board's consideration of the merger's positive effect on the derivative lawsuits against them while assigning no value to the derivative litigation

The fourth supplemental disclosure revealed that, in negotiating the merger consideration, the board assigned no value to a potentially valuable asset—pending derivative lawsuits against certain Akorn directors and officers. This disclosure also revealed that the board "considered the likely effect of the potential merger" on those lawsuits, *i.e.*, that the shareholders who brought them would lose standing, as one of the reasons for supporting the merger.

In other words, this disclosure revealed that the unique benefit the merger would provide to certain directors and officers—the elimination of the derivative claims against them—actually factored into the board's merger deliberations. This was a conflict of interest, particularly because less than two months before the merger's announcement, Akorn's motion to dismiss the securities litigation that formed the basis of these derivative actions was denied

in its entirety, which significantly increased the likelihood of a recovery and liability against the named directors and officers.

Thus, this disclosure was important to Akorn shareholders for two reasons: First, it alerted them to the fact that, in negotiating the merger, the board failed to assign any value to a potentially valuable asset; and second, it revealed that a conflict of interest created by the merger—the elimination of derivative lawsuits against certain Akorn directors and officers—factored into the board's deliberations. See, *e.g.*, *In re Massey Energy Co. Derivative & Class Action Litig.*, No. 5430-VCS, 2011 Del. Ch. LEXIS 83, at *8-*12 (Del. Ch. May 31, 2011) (noting importance of proxy fairly and accurately describing board's weight of derivative claims in connection with merger; "any board negotiating the sale of a corporation should attempt to value and get full consideration for all of the corporation's material assets" and finding that the disclosure that a derivative claim was not valued allowed shareholders to vote on an informed basis).

The district court entirely missed the point of this disclosure. It viewed Plaintiffs' request for important information regarding how the derivative lawsuits factored into the board's assessment of the merger as a request for self-flagellation. A39-A40. But Plaintiffs sought (and obtained) *facts*, not self-

flagellation. In other words, Plaintiffs sought disclosure regarding *whether the board considered and valued the derivative lawsuits when deciding to pursue and approve the merger*, because the answer would reveal whether the board was acting under the influence of a conflict and whether it may have undervalued shareholder's shares. The supplemental disclosures provided Akorn shareholders with the information they needed to answer these important questions for themselves.

5. Information regarding J.P. Morgan's conflicts

Finally, Plaintiffs obtained material information related to J.P. Morgan's conflicts of interest: (i) what percentage of J.P. Morgan's fee was contingent upon the consummation of the merger; (ii) J.P. Morgan received millions of dollars in compensation from Fresenius during the two years preceding the date of its fairness opinion; and (iii) the amount of J.P. Morgan's compensation from Akorn during the two years preceding its fairness opinion, which is required by 17 C.F.R. 229.1015(b)(4).

With respect to the percentage of J.P. Morgan's fee that was contingent upon the consummation of the merger, courts have recognized that paying a banker a fee that is largely contingent on a deal closing creates a potential conflict of interest, because "the interests of the agent [banker] and principal

[board] diverge over whether to take the deal in the first place," as "[t]he agent only gets paid if the deal happens, but for the principal, the best value may be not doing the deal at all." *Rural Metro I*, 88 A.3d at 94-95; see also *TIBCO*, 2015 Del. Ch. LEXIS 265, at *84 (noting that a 99% contingent fee likely provided "a powerful incentive * * * to refrain from providing information to the Board"); *In re Atheros Communs., Inc. S'holder Litig.*, C.A. No. 6124-VCN, 2011 Del. Ch. LEXIS 36, at *29 (Del. Ch. Mar. 4, 2011) (where 97% of fee is contingent, it "exceeds both common practice and common understanding of what constitutes 'substantial'" and "can readily be seen as providing an extraordinary incentive for [banker] to support the Transaction"). The supplemental disclosure added to the Definitive Proxy revealed that $44 million of J.P. Morgan's $47 million fee (94%) was contingent on the Merger closing.

The district court found that while "the fact that J.P. Morgan's fee is contingent on consummation was not expressly stated in the original proxy" (A35), the following passage somehow made the contingent amount of J.P. Morgan's fee clear:

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

> of the merger (the "Service Fee"), which in this case amounts to approximately $47 million.

A35. Noticeably missing from this excerpt, however, is any statement that the entire fee is actually contingent on the merger's closing. Instead, it says that the fee will be paid "prior to" the merger's consummation—not that it was contingent on it.

The district court also deemed the fact that J.P. Morgan received approximately $10 million in fees from Fresenius during the previous two years to be immaterial. A36. But courts have granted injunctions for failing to disclose the amount of compensation the target company's banker has received from the buyer. *In re Art Tech. Grp., Inc. S'holders Litig.*, 2010 Del. Ch. LEXIS 257, at *1 (Del. Ch. Dec. 21, 2010); *In re Del Monte Foods Co. S'holders Litig.*, 2011 Del. Ch. LEXIS 94, at *32-*33 (Del. Ch. June 27, 2011).

Lastly, this supplemental disclosure revealed that J.P. Morgan received approximately $2 million in fees from Akorn during the preceding two years. This information was required by 17 C.F.R. 229.1015(b)(4), and its omission was therefore a *per se* violation of Section 14(a). *Seinfeld* v. *Becherer*, 461 F.3d 365, 369 (3d Cir. 2006).

* * *

In sum, as a result of Plaintiffs' litigation efforts, Akorn shareholders were provided with significant new information which called into question both the fairness of the merger consideration and the sales process. Courts have consistently deemed the types of disclosures Plaintiffs obtained here to be important to shareholders faced with a merger. The district court's contrary conclusion was fundamentally flawed, as it failed to analyze certain supplemental discourses, and misunderstood or ignored the significance of others it considered. Thus, even on the district court's own terms, *Walgreen*'s "plainly material" standard was satisfied.

CONCLUSION

The judgments below should be reversed, the court's order "abrogating" the parties' settlement should be vacated, and the cases should be remanded with instructions to dismiss.

Respectfully submitted.

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October 18, 2019

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE
REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,208 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Expanded BT font.

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

In accordance with this Court's Rule 30(d), I hereby certify that all materials required by this Court's Rule 30(a) and (b) are included in the appendix.

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October 16, 2019

REQUIRED SHORT APPENDIX

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

DEMETRIOS PULLOS, Individually and on Behalf of 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. 1:17-cv-05026 Hon. Matthew F. Kennelly

STIPULATION CONCERNING PLAINTIFF'S VOLUNTARY DISMISSAL WITHOUT PREJUDICE

WHEREAS, on April 24, 2017, Akorn, Inc. ("Akorn") and Fresenius Kabi AG ("Fresenius Kabi") announced that they had entered into an Agreement and Plan of Merger (the "Merger Agreement"), dated as of April 24, 2017, among Akorn, Fresenius Kabi, Fresenius Kabi's indirect subsidiary Quercus Acquisition, Inc. and, solely for purposes of Article VIII thereof, Fresenius SE & Co. KGaA, pursuant to which shares of Akorn would be converted into the right to receive $34.00 in cash per share (the "Proposed Merger");

WHEREAS, on May 22, 2017, Akorn filed a preliminary proxy statement on Schedule 14A (the "Preliminary Proxy") with the SEC;

WHEREAS, on June 15, 2017, Akorn filed a definitive proxy statement on Schedule 14A (the "Proxy") with the SEC, which set the Akorn shareholder vote on the Proposed Merger for July 19, 2017. Among other things, the Proxy (i) summarized the Merger Agreement, (ii) provided an account of the events leading up to the execution of the Merger

Agreement, (iii) stated that the Akorn Board of Directors determined that the Proposed Merger was in the best interests of Akorn's shareholders and recommended the Proposed Merger and (iv) summarized the valuation analyses and fairness opinion by J.P. Morgan Securities LLC, the financial advisor to Akorn;

WHEREAS, on June 22, 2017, plaintiff Demetrios Pullos filed a purported class action lawsuit in the United States District Court for the Middle District of Louisiana (the "Louisiana Court"), on behalf of himself and other public shareholders of Akorn, asserting claims under Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act") against Akorn and Akorn directors John N. Kapoor, Kenneth S. Abramowitz, Adrienne L. Graves, Ronald M. Johnson, Steven J. Meyer, Terry A. Rappuhn, Brian Tambi and Alan Weinstein (the "Defendants") and challenging the disclosures made in the Preliminary Proxy, captioned *Pullos v. Akorn, Inc., et al.*, No. 17-cv-00395-BAJ-RLB (the "Action");

WHEREAS, on July 5, 2017, the Louisiana Court granted Defendants' Motion for Change of Venue pursuant to 28 U.S.C. § 1404(a), and transferred the Action to the United States District Court for the Northern District of Illinois;

WHEREAS, on July 10, 2017, Akorn filed a Form 8-K with the SEC, supplementing the disclosures in the Proxy with certain additional information relating to the Proposed Merger (the "Supplemental Disclosures"); and

WHEREAS, Plaintiff agrees that as a result of the filing of the Supplemental Disclosures, the disclosure claims relating to the Proposed Merger identified in the Complaint in the Action have become moot;

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the respective parties that Plaintiff hereby voluntarily dismisses the Action without prejudice, pursuant to Fed. R. Civ. P. 41(a)(1), and without costs to any party.

Dated: July 14, 2017

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1.2
Eastern Division

Demetrios Pullos

Plaintiff,

v.

Case No.: 1:17−cv−05026
Honorable Matthew F. Kennelly

Akorn, Inc., et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, July 17, 2017:

MINUTE entry before the Honorable Matthew F. Kennelly: Pursuant to the stipulation concerning plaintiff's voluntary dismissal [18], case is dismissed without prejudice. Civil case terminated. Mailed notice. (pjg,)

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.

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

SHAUN HOUSE, Individually and on Behalf of 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. 1:17-cv-05018 Hon. Elaine E. Bucklo

STIPULATION CONCERNING PLAINTIFF'S VOLUNTARY DISMISSAL WITHOUT PREJUDICE

WHEREAS, on April 24, 2017, Akorn, Inc. ("Akorn") and Fresenius Kabi AG ("Fresenius Kabi") announced that they had entered into an Agreement and Plan of Merger (the "Merger Agreement"), dated as of April 24, 2017, among Akorn; Fresenius Kabi; Fresenius Kabi's indirect subsidiary Quercus Acquisition, Inc. and, solely for purposes of Article VIII thereof, Fresenius SE & Co. KGaA, pursuant to which shares of Akorn would be converted into the right to receive $34.00 in cash per share (the "Proposed Merger");

WHEREAS, on May 22, 2017, Akorn filed a preliminary proxy statement on Schedule 14A (the "Preliminary Proxy") with the SEC;

WHEREAS, on June 12, 2017, plaintiff Shaun A. House filed a purported class action lawsuit in the United States District Court for the Middle District of Louisiana (the "Louisiana Court"), on behalf of himself and other public shareholders of Akorn, asserting claims under Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act")

against Akorn and Akorn directors John N. Kapoor, Kenneth S. Abramowitz, Adrienne L. Graves, Ronald M. Johnson, Steven J. Meyer, Terry A. Rappuhn, Brian Tambi and Alan Weinstein (the "Defendants") and challenging the disclosures made in the Preliminary Proxy, captioned *House v. Akorn, Inc., et al.*, No. 17-cv-00367-BAJ-EWD (the "Action");

WHEREAS, on June 15, 2017, Akorn filed a definitive proxy statement on Schedule 14A (the "Proxy") with the SEC, which set the Akorn shareholder vote on the Proposed Merger for July 19, 2017. Among other things, the Proxy (i) summarized the Merger Agreement, (ii) provided an account of the events leading up to the execution of the Merger Agreement, (iii) stated that the Akorn Board of Directors determined that the Proposed Merger was in the best interests of Akorn's shareholders and recommended the Proposed Merger and (iv) summarized the valuation analyses and fairness opinion by J.P. Morgan Securities LLC, the financial advisor to Akorn;

WHEREAS, on July 5, 2017, the Louisiana Court granted Defendants' Motion for Change of Venue pursuant to 28 U.S.C. § 1404(a), and transferred the Action to the United States District Court for the Northern District of Illinois;

WHEREAS, on July 10, 2017, Akorn filed a Form 8-K with the SEC, supplementing the disclosures in the Proxy with certain additional information relating to the Proposed Merger (the "Supplemental Disclosures"); and

WHEREAS, Plaintiff agrees that as a result of the filing of the Supplemental Disclosures, the disclosure claims relating to the Proposed Merger identified in the Complaint in the Action have become moot;

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the respective parties that Plaintiff hereby voluntarily dismisses the Action without prejudice, pursuant to Fed. R. Civ. P. 41(a)(1), and without costs to any party.

Dated: July 14, 2017

/s/ Christopher J. Kupka

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1.2
Eastern Division

Shaun A. House

Plaintiff,

v.

Case No.: 1:17−cv−05018
Honorable Elaine E. Bucklo

Akorn, Inc., et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, July 25, 2017:

MINUTE entry before the Honorable Elaine E. Bucklo: Application to appear pro hac vice of Robert H. Baron as counsel for defendants [30] is granted. Per the stipulation of dismissal this case is dismissed without prejudice, each party bearing its own attorney's fees and costs. All pending dates before this court are stricken. Civil case terminated. Mailed notice. (mgh,)

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.

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

ROBERT BERG, individually and on behalf of all other 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; ALAN WEINSTEIN; RAJ RAI; FRENSENIUS KABI AG; QUERCUS ACQUISITION, INC., Defendants.	No. 17 C 5016 Judge Thomas M. Durkin

MEMORANDUM OPINION AND ORDER

Robert Berg filed this action, and several other individuals filed similar actions, against Akorn, Inc., the members of Akorn's board of directors, and Frensenius Kabi AG, in order to force Akorn to make certain revisions to the proxy statement it filed with the U.S. Securities and Exchange Commission in connection with Frensenius's bid to acquire Akorn. On July 10, 2017, Akorn made the changes to its proxy statement sought by Berg in this case and the plaintiffs in the other actions, making their claims moot. *See* R. 54-1 at 4. Shortly thereafter, all the cases were dismissed without prejudice by joint stipulations pursuant to Federal Rule of Civil Procedure 41(a)(1). *See id.* at 5. Plaintiffs' counsel also informed Defendants that they intended to seek their fees from Defendants. *See id.*

In this case in particular, Berg's counsel filed a "Motion for Entry of Stipulation and Voluntary Dismissal Without Prejudice." R. 54. The motion document provided that the Court would "retain[] jurisdiction over all parties solely for the purposes of any potential further proceedings relating to the adjudication of any claim by any Plaintiff in the Akorn Section 14 Actions (as defined in the accompanying stipulation and proposed order) for attorneys' fees and/or expenses." *Id.* As noted, the motion document attached a "Stipulation and Proposed Order" that included a more extensive recitation of the history of the cases. *See* R. 54-1. The Court granted the motion to dismiss by minute order on July 19, 2017, *see* R. 55, but did not enter the "Stipulation and Proposed Order." Two months later, on September 15, 2017, the parties filed another "Stipulation and Proposed Order Closing Case for All Purposes." R. 56. This document provided that "Plaintiffs in the Akorn Section 14 Actions have reached agreement with Defendants with respect to the Fee Claims and 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." *Id.* at 6. The document provided further, that "[t]his matter is fully resolved and no further issues remain in dispute, and, there being no reason for the Court to retain jurisdiction over this matter, the case should be closed for all purposes." *Id.*

Three days later, before the Court could take any action with respect to the September 15 proposed order, Theodore Frank, an owner of 1,000 Akorn shares, filed a motion to intervene for purposes of objecting to the settlement of the

attorneys' fee claims. R. 57; R. 66. Frank contends that the cases filed by Berg and the other plaintiffs are part of a "racket," pursued "for the sole purpose of obtaining fees for the plaintiffs' counsel," R. 66-2 at 1, which are successful "because victim defendants [like Akorn] find it cheaper, and therefore rational, to pay nuisance value attorneys' fees rather than contest them," R. 79 at 1, and further delay the merger. Frank contends that this is a "misuse of the class action device for private gain." R. 66-2 at 6. Berg opposes Frank's motion to intervene. That motion is now fully briefed and before the Court.

1. Jurisdiction

Berg's primary argument against Frank's motion is that "[t]he Rule 41(a)(1) dismissal divested this Court of subject matter jurisdiction and, contrary to Frank's contention, there is no ancillary jurisdiction based on the subsequent agreement by Akorn to pay fees and expenses." R. 78 at 3. It is generally true that a Rule 41 dismissal ends the case and strips the court of jurisdiction in a manner of speaking. But even Berg admits that there are a number of exceptions to this general rule, including motions for relief from judgment under Rule 60, *see Nelson v. Napolitano*, 657 F.3d 586, 588-89 (7th Cir. 2011); motions for sanctions under Rule 11, *id.*; and retention of jurisdiction in a case where the settlement precipitating the stipulated dismissal "falls apart," *see Voso v. Ewton*, 2017 WL 365610, at *3 (N.D. Ill. Jan. 25, 2017). Another exception is intervention by a shareholder in a derivative lawsuit in order to appeal a judgment. *See Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012). Notably, members of an uncertified putative class can appeal after the

named plaintiffs have settled without intervening in the underlying case. *See Devlin v. Scardelletti*, 536 U.S. 1 (2002). Thus, the mere fact that the case was dismissed pursuant to Rule 41 does not prohibit Frank from seeking to intervene.

2. Intervention

Like this case, the *Walgreen Company Stockholder Litigation* case involved settlement of claims seeking to compel disclosure of information in the context of a merger. 832 F.3d 718 (7th Cir. 2016). Unlike this case, the parties in *Walgreen* settled the class claims and sought court approval of the settlement, including attorneys' fees, which the district court granted. The Seventh Circuit reversed. In doing so, the court adopted a standard devised by the Delaware Chancery Court requiring that the sought after disclosures be "plainly material." *Id.* at 725 (quoting *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 894 (Del. Ch. 2016)). The Seventh Circuit observed that there was no "indication that the members of the class [had] an interest in challenging" the merger at issue, and that the "only concrete interest suggested by this litigation is an interest in attorneys' fees." *Walgreens*, 832 F.3d at 726. The court opined that these types of cases that do not materially benefit the class but are designed only to generate attorneys' fees are "a racket" that "must end." *Id.* at 725.

In *Trulia*, the Delaware court also was concerned with the procedural posture of class settlement approvals, because once parties have settled, neither party has an incentive to advocate against its approval. Outside the normal adversarial process, it can be difficult for a court to determine whether the proxy disclosures at

issue are material. As an alternative to the process for class settlement approval, the court suggested that:

> plaintiffs' counsel apply to the Court for an award of attorney's fees after defendants voluntarily decide to supplement their proxy materials by making one or more of the disclosures sought by plaintiffs, thereby mooting some or all of their claims. In that scenario, where securing a release is not at issue, defendants are incentivized to oppose fee requests they view as excessive. Hence, the adversarial process would remain in place and assist the Court in its evaluation of the nature of the benefit conferred . . . for the purposes of determining the reasonableness of the requested fee.
>
> [This] preferred scenario of a mootness dismissal appears to be catching on. In the wake of the Court's increasing scrutiny of disclosure settlements, the Court has observed an increase in the filing of stipulations in which, after disclosure claims have been mooted by defendants electing to supplement their proxy materials, plaintiffs dismiss their actions without prejudice to the other members of the putative class (which has not yet been certified) and the Court reserves jurisdiction solely to hear a mootness fee application. From the Court's perspective, this arrangement provides a logical and sensible framework for concluding the litigation. After being afforded some discovery to probe the merits of a fiduciary challenge to the substance of the board's decision to approve the transaction in question, plaintiffs can exit the litigation without needing to expend additional resources (or causing the Court and other parties to expend further resources) on dismissal motion practice after the transaction has closed. Although defendants will not have obtained a formal release, the filing of a stipulation of dismissal likely represents the end of fiduciary challenges over the transaction as a practical matter.
>
> In the mootness fee scenario, the parties also have the option to resolve the fee application privately without obtaining Court approval. Twenty years ago, Chancellor Allen acknowledged the right of a corporation's directors

> to exercise business judgment to expend corporate funds (typically funds of the acquirer, who assumes the expense of defending the litigation after the transaction closes) to resolve an application for attorneys' fees when the litigation has become moot, with the caveat that notice must be provided to the stockholders to protect against "the risk of buy off" of plaintiffs' counsel. As the Court recently stated, "notice is appropriate because it provides the information necessary for an interested person to object to the use of corporate funds, such as by 'challeng[ing] the fee payment as waste in a separate litigation,' if the circumstances warrant." In other words, notice to stockholders is designed to guard against potential abuses in the private resolution of fee demands for mooted representative actions. With that protection in place, the Court has accommodated the use of the private resolution procedure on several recent occasions and reiterates here the propriety of proceeding in that fashion.

Trulia, 129 A.3d at 897-98.

Thus, the court in *Trulia* favorably contemplated the very scenario that has arisen in this case. And Plaintiffs' counsel have taken the advice of the court in *Trulia* and dismissed this case without prejudice, such that the class claims are no longer at issue. The court in *Trulia* also contemplated that an objecting shareholder like Frank would bring a "separate litigation" to challenge the reasonableness of any settlement payment. Instead, Frank seeks to intervene in a case that has settled.

3. "Interest" Under Rule 24

Federal Rule of Civil Procedure 24, governing intervention, requires that a potential intervenor demonstrate his "interest" in the case. Frank, however, has not, and—it appears to the Court—cannot, identify such an interest. To the extent Frank addresses this issue, Frank makes two seemingly incompatible arguments.

He first argues that he "intervenes not as a shareholder on behalf of the corporation, but as a class member to this strike suit." R. 79 at 9. But two sentences later, he asserts, "there is no speculation about Frank's injury. By design, the Plaintiff succeeded in extracting fees from Akorn, which Frank is a shareholder of, depleting the capital reserves of [an] entity Frank partially owns." *Id.* And in his opening brief, Frank argues that he "has a protectable interest as an Akorn shareholder, and has an ongoing interest in curtailing the scourge of merger strike suits." R. 66-2 at 13.

On the one hand, to the extent Frank contends he has an "interest in curtailing the scourge of merger strike suits," and the attorneys' fees settlement in this case is a product of such a suit, Frank's injury from Akron's payment of the settlement, can only be derivative of Akorn's. The Court does not see how that derivative injury can serve as an interest supporting Frank's intervention in this case. First, relief for a derivative injury generally requires compliance with procedures for filing derivative lawsuits under Federal Rule of Civil Procedure 23.1, state law, or both. Berg's case was not filed as a derivative suit, and Frank does not claim to have complied with any of these procedures. Second, even if Frank had complied with these procedures, or they are otherwise not applicable (or futile), his claim would almost certainly be barred by the business judgment rule. He admits as much when he concedes that Akorn's decision to settle with Berg was "rational." R. 79 at 8. Lastly, Rule 24 requires that an intervenor have an "interest" in "the subject of the action," or that they share "a claim or defense." The subject of the

action here was the information in the proxy statement, not the settlement Frank argues is harmful to Akorn and by extension his ownership stake of Akorn.

On the other hand, to the extent Frank contends he has an interest in this case because he is "a class member," that appears to be insufficient because the class claims have been dismissed without prejudice. The class members' claims are no longer at issue in this case, meaning that the class members' rights with respect to the claims Berg brought can no longer be vindicated or prejudiced. Frank has not demonstrated that the class has any continuing interest in this case in which Frank can intervene.

From a different perspective, Frank has not explained what procedural device would be available to him should he be permitted to intervene. The Court has entered no judgment from which Frank might seek relief under Rule 60. Frank was not a party to the litigation, so he does not have standing to seek sanctions under Rule 11. While he is a member of the putative class, no motion for class certification was filed, let alone denied, from which Frank might take an appeal. And as discussed, any standing Frank has to challenge the attorneys' fees settlement is derivative of an injury to Akorn. But Akron willingly agreed to the settlement, and Frank concedes that it was a rational decision.

Frank clearly seeks to challenge or object to the attorneys' fees settlement. But he has not identified a procedural mechanism that would serve as a vehicle for such an objection. There does not appear to be a process for the Court to approve or

reject the settlement akin to that under Rule 23 for class actions or Rule 23.1 for derivative suits.

Maybe Frank theorizes that the Court's retention of jurisdiction, and Plaintiffs' pending request for entry of an order closing the case "for all purposes," means that this case remains within the realm of a class action settlement that must comply with Rule 23. If this is Frank's theory, he has not articulated it. To the extent the Court's decision to retain jurisdiction in this case may have facilitated Berg's counsel's ability to extract greater fees from Defendants, the Court is sympathetic to Frank's frustration with Plaintiffs' engineering of a device to evade review under Rule 23 and the spirit of *Walgreen*. But the fact that Plaintiffs' have dismissed their class claims without prejudice, and that Defendants have already reached an agreement with Plaintiffs' counsel, makes it difficult (if not impossible) to see how this case remains within the ambit of Rule 23, or any other authority of the Court.

4. Inherent Authority

Separate from his motion to intervene, Frank asks the Court to order disgorgement of the attorneys' fees under its inherent authority to address abuse of the judicial process. Frank contends that such an action by the Court would be appropriate because Plaintiffs' claims are "shams," *see* R. 66-2 at 5, filed "for the sole purpose of obtaining fees for the plaintiffs' counsel," *id.* (quoting *Walgreen*, 832 F.3d at 724), which are a "misuse of the class action process." R. 66-2 at 13. But *Walgreen* applied a standard for approval of class settlements under Rule 23, which

is not at issue here. Notably, the Seventh Circuit did not find that the claims in *Walgreen* were frivolous, and did not order their dismissal. Thus, even if Berg's claims are "worthless," they are not necessarily meritless. *Walgreen* was primarily concerned with abuse of the special status of class counsel. That concern is not present here, and the Court does not perceive a basis to take the extraordinary remedy of disgorgement.[1] Neither has Frank identified one.

Conclusion

For these reasons, Frank's motions to intervene, R. 57; R. 66, and to consolidate, R. 67, are denied without prejudice. Because the parties' briefs on Frank's motion to intervene were focused on the Court's subject matter jurisdiction and contributed little to the Court's understanding of Frank's potential interest in this case; and because the Court is concerned with Berg's apparent success in evading the requirements of Rule 23, and takes seriously Frank's contention that this case, although brought in the name of Akorn's shareholders, actually serves to injure their interests (if only derivatively); Frank is granted leave to refile his motion to intervene (and motion to consolidate) by December 8, 2017. Should Frank refile his motion, it should focus on the issues identified by the Court in this opinion regarding his interest in this case generally. Should Frank refile his motion, Berg's opposition is due December 22, 2017, and Frank's reply is due January 8, 2018. If Frank does not file a motion by December 8, 2017, the Court will consider the case closed.

[1] Moreover, as discussed, the strategy employed by Plaintiffs' council here was actually encouraged by the court in *Trulia*, whose reasoning *Walgreen* adopted.

ENTERED:

Honorable Thomas M. Durkin
United States District Judge

Dated: November 21, 2017

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

SHAUN A. HOUSE, individually and on behalf of all other similarly situated, Plaintiff, ROBERT CARLYLE, Plaintiff, DEMETRIOS PULLOS, individually and on behalf of all other 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; ALAN WEINSTEIN, Defendants.	No. 17 C 5018 No. 17 C 5022 No. 17 C 5026 Judge Thomas M. Durkin

MEMORANDUM OPINION AND ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

gain"). Accordingly, the Court will exercise its inherent powers to police potential abuse of the judicial process—and abuse of the class mechanism in particular—and require plaintiffs' counsel to demonstrate that the disclosures for which they claim credit meet the *Walgreen* standard. *See Dale M., ex rel. Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 282 F.3d 984, 986 (7th Cir. 2002) ("[A]ll courts possess an inherent power to prevent unprofessional conduct by those attorneys who are practicing before them. This authority extends to any unprofessional conduct, including conduct that involves the exaction of illegal fees."). Failure to demonstrate compliance with *Walgreen's* "plainly material" standard will result in the Court ordering plaintiffs' counsel to disgorge the attorneys' fees back to Akorn.

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

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

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

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

ENTERED:

Thomas M Durkin

Honorable Thomas M. Durkin
United States District Judge

Dated: September 25, 2018

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

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

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

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

MEMORANDUM OPINION AND ORDER

As the Court has recounted in greater detail in previous opinions, Plaintiffs in these cases sued Akorn and members of its board of directors seeking certain disclosures regarding a proposed acquisition by Frensenius Kabi AG. *See* 17 C 5018, R. 53 (*House v. Akorn, Inc.*, 2018 WL 4579781 (N.D. Ill. Sept. 25, 2018)); 17 C 5016, R. 81 (*Berg v. Akorn, Inc.*, 2017 WL 5593349 (N.D. Ill. Nov. 21, 2017)). After Akorn revised its proxy statement and issued a Form 8-K, Plaintiffs dismissed their lawsuits and settled for attorney's fees. Shortly thereafter, Theodore Frank, an owner of 1,000

Akorn shares, sought to intervene to object to the attorneys' fee settlement. The Court eventually denied Frank's motion to intervene, but in light of Frank's arguments, ordered Defendants to file a brief addressing whether the Court should exercise its inherent authority to abrogate the settlement agreements under the standard set forth *In re Walgreen Co. Stockholder Litigation*, 832 F.3d 718, 725 (7th Cir. 2016). The Court also invited Frank to file an opposition brief as an amicus curiae, which he did. The parties then filed reply briefs, and briefs on supplemental authority. The Court now addresses whether the settlements should be abrogated.

SEC Rule 14a-9 requires disclosure in proxy statements of all "material fact[s] necessary in order to make the statements therein not false or misleading." *See* 17 C.F.R. § 240.14a-9(a). The Supreme Court has held that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). In other words, omitted information is material if there is

> a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.

Id. Accordingly, "[o]mitted facts are not material simply because they might be helpful." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000); *see also TSC Indus.*, 426 U.S. at 449 n.10 (noting "the SEC's view of the proper balance between the need to insure adequate disclosure and the need to avoid the adverse

consequences of setting too low a threshold for civil liability"); *Wieglos v. Com. Ed. Co.*, 892 F.2d 509, 517 (7th Cir. 1989) ("Reasonable investors do not want to know everything that could go wrong, without regard to probabilities; that would clutter registration documents and obscure important information. Issuers must winnow things to produce manageable, informative filings.").

The Seventh Circuit heightened this standard in the context of reviewing approval of a class settlement of claims for disclosures under Rule 14a-9. *See Walgreen*, 832 F.3d at 723-24. Adopting a standard set by the Delaware Court of Chancery in similar cases, the court held that disclosures must be "plainly material . . . . mean[ing] that it should not be a close call that the . . . information is material." *Id.* at 725 (quoting *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 894 (Del. Ch. Ct. 2016)).

Plaintiffs claim that their complaints caused Akorn to make additional disclosures in the revised proxy and Form 8-K, which in turn precipitated their settlement. The parties' briefs focus on whether these additional disclosures are plainly material justifying the settlement. This would be the appropriate perspective if the Court was reviewing a class settlement. *See Walgreen*, 832 F.3d at 724 ("No class action settlement that *yields* zero benefits for the class should be approved . . . .") (emphasis added). But no class was certified here, nor were any class claims released in the settlement. Thus, as the Court explained in its previous order, the case is in the procedural posture suggested by the second half of the sentence from *Walgreen* just quoted: ". . . a class action that *seeks* only worthless benefits for the

class should be dismissed out of hand." *Id.* (emphasis added). To determine whether Plaintiffs' cases should have been "dismissed out of hand"—in which case the settlement agreements should be abrogated—the Court must assess whether the disclosures Plaintiffs' *sought* in their complaints—not the disclosures Akorn made after the complaints were filed in the revised proxy and Form 8-K—are plainly material.[1]

1. GAAP Reconciliation

All three plaintiffs sought GAAP reconciliation of the proxy's projections.[2] Plaintiffs argue that such reconciliation was necessary because GAAP is the format in which "Akorn traditionally disclosed its financial results." R. 65 at 10. But while such reconciliation might be helpful, the applicable SEC regulation requiring GAAP reconciliation does "not apply to . . . a disclosure relating to a proposed business combination." 17 C.F.R. § 244.100(d); *see also* Securities Exchange Commission Discl. 5620589, Question 101.01 (Oct. 17, 2017), available online at: https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm. Although this regulation does not directly address materiality, the Court finds it highly persuasive

[1] Frank questions whether Plaintiffs could have caused the disclosures because plaintiffs Carlyle and Pullos filed their complaints after the revised proxy was issued, and plaintiff House's complaint was filed only days before. The parties dispute whether the disclosures contained in the Form 8-K, which was filed after all three complaints, were necessary to make settlement possible. But since the Court holds that analysis of the materiality of the disclosures sought is the relevant issue, and not the materiality of the disclosures actually made, these causation questions are irrelevant.

[2] *See* 17 C 5018 (House), R. 1 ¶¶ 36, 41; 17 C 5022 (Carlyle), R. 1 ¶ 51; 17 C 5026 (Pullos), R. 1 ¶ 36.

in that regard. Other district courts have reached a similar conclusion. *See Assad v. DigitalGlobe, Inc.*, 2017 WL 3129700, at *6 (D. Colo. Jul. 21, 2017); *Bushansky v. Remy Intl., Inc.*, 262 F. Supp. 3d 742, 748 (S.D. Ind. 2017).

Plaintiffs argue that GAAP reconciliation "revealed that the November 2016 Projections assumed steady increases in [Akorn's] net income consistent with Akorn's past performance, while the lowered March 2017 Projections assumed a sudden drop in Akorn's near term performance, which was inconsistent with Akorn's recent financial performance." R. 65 at 11. But it is obvious that a lower projection implies lower net income. Disclosure of a lower projection already constitutes disclosure of the company's opinion that the company will earn lower net income. Plaintiffs do not explain why the specific net income numbers were material to shareholders' ability to evaluate the merger. Therefore, the Court finds GAAP reconciliation is not plainly material.

2. Components of J.P. Morgan's Analysis

Plaintiffs House and Pullos also sought certain "components" of J.P. Morgan's analysis (J.P. Morgan was Akorn's merger advisor): "(i) the inputs and assumptions underlying the calculation of the discount rate range of 8.0% to 10.0%; (ii) the range of terminal values to which the growth rate range was applied; and (iii) the inputs and assumptions underlying the calculation of the terminal value growth rates."[3] Similarly, Plaintiff Carlyle sought "the basis" for the growth rate J.P. Morgan chose.[4]

[3] *See* 17 C 5018 (House), R. 1 ¶ 43; 17 C 5026 (Pullos), R. 1 ¶ 43.

[4] *See* 17 C 5022 (Carlyle), R. 1 ¶¶ 49.

But this information was already in the original proxy. As to (i), the proxy states that the range of 8.0% to 10.0% "was chosen by J.P. Morgan based upon an analysis of the weighted average costs of capital of the Company." R. 65-1 at 54 (p. 44). As to (ii), the proxy states that the range of terminal values was calculated by "applying terminal value growth rates ranging from 0.0% to 2.0% to the unlevered free cash flows for the Company during the final year of the ten-year period of the March 2017 Management Case." *Id.* As to (iii), growth rates are simply a choice. Shareholders can evaluate Akorn's valuation and merger price by making their own determination of whether a growth rate range of 0-2% is reasonable in light of the company's prior performance. Generally, with respect to data underlying a financial advisor's opinion, courts find that only a "fair summary" must be disclosed, meaning that the company "does not need to provide sufficient data to allow the stockholders to perform their own independent valuation." *Trulia*, 129 A.3d at 901. The data sought by House and Pullos was not material to evaluating the merger proposal. Carlyle's more general demand for "certain internal financial analyses and forecasts prepared by the management of the Company relating to its business," is even less material.

3. J.P. Morgan's Compensation from Akorn

All three plaintiffs sought disclosures regarding J.P. Morgan's compensation from Akorn and Fresenius. As to J.P. Morgan's "specific compensation figures,"[5] Akorn disclosed that information in the original proxy:

[5] 17 C 5018 (House), R. 1 ¶ 45; 17 C 5022 (Carlyle), R. 1 ¶ 56; 17 C 5026 (Pullos), R. ¶ 44; *see also* 17 C 5022 (Carlyle), R. 1 ¶ 54.

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

R. 65-1 at 55 (p. 45). Plaintiffs argue that this quote is taken out of context and does not specifically indicate whether the fee is contingent on the consummation of the merger. *See* R. 65 at 14 & n. 13. The Court has reviewed the context of this quote and finds that it does not change its meaning. The amount of potential compensation ($47 million) is abundantly clear.

The revised proxy added language expressly stating that J.P. Morgan's fee was "contingent and payable upon the closing of the merger." R. 85-2 (17 C 5016) at 22 (p. 45). But Plaintiffs did not seek this information in their complaint. And in any case, although the fact that J.P. Morgan's fee is contingent on consummation was not expressly stated in the original proxy, such an arrangement is certainly customary, and can be inferred from the fact that the amount of the fee will ultimately be measured only "immediately prior to consummation" and is defined as a percentage of the amount to be paid in the transaction. Even if Plaintiff had sought this information in their complaint, it is not plainly material.

4. J.P. Morgan's Compensation from Fresenius

Although Plaintiffs do not address it in their current briefing, they also sought disclosure of "the exact amount of money J.P. Morgan received and may continue to

receive from [Fresenius] while acting as Akorn's financial advisor."[6] The Court finds the exact historical payments are not material. *See Bushansky*, 262 F. Supp. 3d at 753 ("Additionally, Plaintiffs have not presented any evidence or case law establishing that the inclusion of historical fees in similar situations is material."). And the proxy does not indicate that J.P. Morgan was "continuing" to receive payments from Fresenius in any event.

5. "Upside" of the "Stand-Alone Strategic Plan"

Plaintiff Carlyle sought four additional disclosures not sought by Plaintiffs House or Pullos. First, Carlyle sought the following disclosure:

> The Proxy also refers to "the potential upside in the Company's stand-alone strategic plan," which the Board purportedly considered in determining to recommend approval of the Proposed Transaction. Proxy at 39. Yet, the Proxy fails to disclose any further information concerning that "stand-alone strategic plan" or its "potential upside" or exactly why the Board determined it would be in the best interest of the Company and its shareholders to pursue potential strategic alternatives rather than a stand-alone strategic plan.

17 C 5022, R. 1 ¶ 46; *see also id.* ¶ 45. It is apparent from context that "stand-alone" means Akorn not merging with another company. The "upside" of that scenario is also readily apparent, in that avoiding merger means avoiding the costs and the relinquishment of control inherent to the merger. The proxy explains that the Board believed "that the Company's stand-alone strategic plan involved significant risks in light of the industry and competitive pressures the Company was facing and the

[6] *See* 17 C 5018 (House), R. 1 ¶ 46; 17 C 5022 (Carlyle), R. 1 ¶ 55; 17 C 5026 (Pullos), R. 1 ¶ 46.

Board's concerns with respect to the risks relating to the Company's ability to execute on its strategic plan including the possibility that the strategic plan may not produce the intended results on the targeted timing or at all." R. 65-1 at 47 (p. 37). Although the proxy does not detail what "industry risks" and "competitive pressures" the company faced, it is sufficient for the Board to express such concerns generally. Moreover, the Board translated those concerns into financial projections that were provided in the proxy. While it may have been helpful or interesting for shareholders to learn greater detail about how management perceived the industry landscape, such information was not necessary for shareholders to evaluate the merger. Furthermore, Carlyle settled the case without receiving this information. That fact casts significant doubt on whether this information was truly material.

6. "Substance" of the March 2017 Projections

Carlyle also sought disclosure of "complete information concerning the substance of the March 2017 [projections] or the assumptions, analysis, projections, or conclusions reflected therein," 17 C 5022, R. 1 ¶ 48, and the "financial analyses and forecasts" J.P. Morgan reviewed, *id.* ¶ 50. But "completeness" is not the standard. *See Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002) ("incomplete" statements are not necessarily "misleading"). Further, there is presumably a great deal of information underlying the March 2017 projection on which the proxies rely. Carlyle does not identify what information in particular was necessary for shareholders to be able to evaluate the merger. And again, Carlyle settled without receiving this information, casting doubt on its materiality.

7. Other Potential Buyers

Carlyle contends that the proxy should have detailed the other potential buyers the Board considered and why the Board determined that "it was highly unlikely that any of those counterparties would be interested in an acquisition of the Company at that time due to competing strategic priorities and recent acquisitions in the industry." 17 C 5022, R. 1 ¶¶ 58-59. But this statement speaks for itself regarding why the Board rejected other companies in the industry as potential buyers. And as Carlyle notes, the proxy gives much greater detail regarding the one other company ("Company E") Akorn actually considered. Detailed information about potential buyers Akorn did not actually consider is not material.

8. Pending Litigation

Finally, Plaintiff Pullos alleges that "the Board may be using the Proposed Merger as a vehicle to salvage their professional reputations and potentially absolve themselves of liability arising from federal securities and related derivative litigation currently pending in the Northern District of Illinois." 17 C 5026, R. 1 ¶ 47. Pullos claims that the proxy improperly "fails to disclose whether these lawsuits were discussed by the Board and whether the Board took them into account when deciding to undertake the sales process and enter into the Merger Agreement." *Id.* But the lawsuits were public record prior to issuance of the original proxy, and Pullos's allegation that the Board had ulterior motives for the merger related to the lawsuits is unfounded and does not seek "information" relevant to the merger. To the extent the Board might have had ulterior motives, that is not information that is

"disclosable" in the sense required here. The proxy in its entirety is a refutation of Pullos's allegation in that the proxy gives reasons unrelated to the lawsuits for supporting the merger. Pullos's unfounded speculation about the Board's motives does not constitute an information request. And similar to Carlyle's claims, the fact that Pullos settled without provision of information related to this claim indicates that it was not material.

Conclusion

Therefore, the Court finds that the disclosures sought in the three complaints at issue were not "plainly material" and were worthless to the shareholders. Yet, Plaintiffs' attorneys were rewarded for suggesting immaterial changes to the proxy statement. Akorn paid Plaintiffs' attorney's fees to avoid the nuisance of ultimately frivolous lawsuits disrupting the transaction with Frensenius. The settlements provided Akorn's shareholders nothing of value, and instead caused the company in which they hold an interest to lose money. The quick settlements obviously took place in an effort to avoid the judicial review this decision imposes. This is the "racket" described in *Walgreen*, which stands the purpose of Rule 23's class mechanism on its head; this sharp practice "must end." 832 F.3d at 724.

Plaintiffs' cases should have been "dismissed out of hand." *See id.* at 724. Since the Court failed to take that action, the Court exercises its inherent authority to rectify the injustice that occurred as a result. *See Dale M., ex rel. Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 282 F.3d 984, 986 (7th Cir. 2002). The settlement agreements are abrogated and the Court orders Plaintiffs'

counsel to return to Akorn the attorney's fees provided by the settlement agreements. Plaintiffs' counsel should file a status report by July 8, 2019 certifying that the fees have been returned.

ENTERED:

Thomas M Durkin

Honorable Thomas M. Durkin
United States District Judge

Dated: June 24, 2019

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.2.2
Eastern Division

Demetrios Pullos

Plaintiff,

v.

Case No.: 1:17−cv−05026
Honorable Thomas M. Durkin

Akorn, Inc., et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, June 27, 2019:

MINUTE entry before the Honorable Thomas M. Durkin:The Court's Order dated June 24, 2019 [38] is a final and appealable order.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.

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.2.2
Eastern Division

Shaun A. House, et al.

Plaintiff,

v.

Case No.: 1:17−cv−05018
Honorable Thomas M. Durkin

Akorn, Inc., et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, June 27, 2019:

MINUTE entry before the Honorable Thomas M. Durkin:The Court's Order dated June 24, 2019 [81] is a final and appealable order.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.

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2019, an electronic copy of the foregoing Joint Consolidated Opening Brief And Required Short Appendix was filed with the Clerk of Court for the U.S. Court of Appeals for the Seventh Circuit, using the appellate CM/ECF system. I further certify that all parties in these consolidated cases are represented by lead counsel who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Daniel L. Geyser*
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October 16, 2019