UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SHAUN HOUSE, individually and on behalf of all others similarly situated, Plaintiff-Appellee, v. AKORN, INC., et al., Defendants-Appellees. THEODORE H. FRANK, Intervenor-Appellant.	**Motion for Appointment as *Amicus Curiae*** **Case No. 18-3307** Appeal from the Northern District of Illinois, Case No. 1:17-CV-05018 Thomas M. Durkin, Judge
DEMETRIOS PULLOS, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. AKORN, INC., et al., Defendants-Appellees.	**Case No. 19-2401** Appeal from the Northern District of Illinois, Case No. 1:17-CV-05026 Thomas M. Durkin, Judge
SHAUN HOUSE, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. AKORN, INC., et al., Defendants-Appellees.	**Case No. 19-2408** Appeal from the Northern District of Illinois, Case No. 1:17-CV-05018 Thomas M. Durkin, Judge

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-3307; 19-2401; 19-2408 (revised)

Short Caption: House v. Akorn, Inc., et al.; Pullos v. Akorn, Inc., et al. (revised)

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.**

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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):

Theodore H. Frank

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

Hamilton Lincoln Law Institute, Center for Class Action Fairness

(Revised; formerly Competitive Enterprise Institute)

(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/ M. Frank Bednarz Date: 10/18/2019

Attorney's Printed Name: M. Frank Bednarz

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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Motion of Theodore H. Frank for Order Appointing Him *Amicus Curiae* to Defend the District Court's Judgment on Appeal; and in the Alternative Leave to File *Amicus Curiae* Brief in Support of Affirmance of District Court's Order

As F.R.A.P. 27 and 29(b) permit, Theodore H. Frank moves this Court to appoint him as *amicus curiae* to defend the district court's judgment in Case Nos. 19-2401 and 19-2408, with the same briefing schedule, requirements, and opportunity for oral argument as an appellee. Alternatively, Frank seeks leave of this Court to file an *amicus* brief in support of the district court's order on appeal. If Frank is permitted to participate as *amicus*, Frank requests an extension of the applicable word limit from 7,000 to 14,000 words, because *amicus curiae* would be the only party defending the district court's judgment.

Such an order is appropriate because the nominal appellees, defendants Akorn, Inc., and certain of its directors (collectively "Akorn") have advised Frank that they will not file a brief in support of affirmance of the judgment below. This Court would not have the benefit of an adversarial appeal in the absence of appointment of *amicus* to defend the district court's decision.

I. Background

The appellants are plaintiffs, strike suite filers whose complaints alleged that Akorn provided deficient disclosures in connection with a then-proposed merger transaction with Fresenius Kabi AG. "In merger litigation the terms 'strike suit' and 'deal litigation' refer disapprovingly to cases in which a large public company announces an agreement that requires shareholder approval to acquire another large company, and a suit, often a class action, is filed on behalf

of shareholders of one of the companies for the sole purpose of obtaining fees for the plaintiffs' counsel." *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 721 (7th Cir. 2016).

Following Akorn's filing of supplemental disclosures, appellants, along with four other plaintiffs, agreed to dismiss their complaints without prejudice as "moot" on July 14, 2017. No. 17-cv-5016, Dkt. 54. The plaintiffs retained jurisdiction to move for attorneys' fees in the low-numbered *Berg* docket. On September 15, 2017, all six plaintiffs agreed to settle for a single payment of $322,500. No. 17-cv-5016, Dkt. 56.

Akorn shareholder Theodore H. Frank then appeared and sought to intervene in all six actions to unwind the socially-useless blackmail payment to plaintiffs' counsel. Three of the plaintiffs eventually disclaimed their entitlement to the shared $322,500 fee, and on May 2, 2018, the district court dismissed intervention with respect to these plaintiffs' actions as "moot." (None of the six actions are consolidated below.) Frank appealed this decision, and the still-pending consolidated appeal was heard by this Court last year. Appeal Nos. 18-2220, -2221, -2225.

After further briefing, on September 25, 2018, the district court also denied Frank's motion for intervention in the remaining three actions, including those of the two appellants, House and Pullos. Dkt. 53.[1]

[1] Unless otherwise stated, "Dkt." refers to docket entries in the *House* action below, No. 17-cv-05018 (N.D. Ill.).

Frank timely appealed this decision with respect to plaintiff House, which is the subject of Frank's appeal, No. 18-3307, now consolidated with Nos. 19-2401 and 19-2408.

In the same order, the district court also concluded it had inherent authority to remedy any misconduct before it, and so invited Frank to provide an *amicus* brief on the issue. Frank not only filed an *amicus* brief, but a sur-reply responding to belated arguments in plaintiffs reply, and a notice of supplemental authority. Dkts. 67, 77, and 79. Throughout these proceedings, the defendants took no position on the motions and filed no legal briefs before the district court. Nevertheless, on June 24, 2019, the district court elected to exercise its inherent authority and order money returned to the defendants. Dkt. 81. The district court found that plaintiffs' complaints did not seek plainly material disclosures from the defendant, which is characteristic of the "racket" this Court has described, and that plaintiffs' complaints should have been "dismissed out of hand." *Id.* at 11 (quoting *Walgreen*, 832 F.3d at 724). To rectify the injustice, the district court abrogated plaintiffs' settlement agreement and ordered the three non-disclaiming plaintiffs to return the $322,500 payment to defendants. *Id*. The two appellants, House and Pullos, appealed this order.

Defendants continue to take no position on appeal. Defendants' counsel has advised that it will not file a brief in these appeals, and therefore the House and Pullos appeals will be *ex parte* unless an *amicus* is permitted to act as appellee on behalf of the district court's order.

II. Frank and his interest in this case

The district court appointed putative class member Theodore H. Frank as *amicus* below, and only reached its disgorgement order after Frank's participation in the case over the last two years. Frank has an interest in defending the disgorgement order he helped secure, including a possible award of attorneys' fees.

Frank founded the Center for Class Action Fairness ("CCAF") in 2009 as a non-profit to litigate *pro bono* on behalf of the protection of rights of absent class members against unfair class-action settlements and procedures.[2] In its history, CCAF has won hundreds of millions of dollars for class members. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2016). CCAF attorneys have won numerous landmark decisions in support of the principle that fairness requires that the primary beneficiary of a class-action settlement should be the class, rather than the attorneys. *E.g. Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013). CCAF has won the vast majority of appeals it has made in federal court, including its appeals to this Court. *E.g., In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017); *Walgreen*, 832 F.3d 718; *Pearson*, 772 F.3d 778; *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014). CCAF's senior attorney Theodore H. Frank is

[2] From October 1, 2015 through January 31, 2019, CCAF was part of the non-profit Competitive Enterprise Institute. On January 31, CCAF became part of the non-profit Hamilton Lincoln Law Institute.

an experienced appellate litigator and an elected member of the American Law Institute.

CCAF has won national acclaim for its work. *E.g.*, The Editorial Board, *The Anthem Class-Action Con*, WALL ST. J., Feb. 11, 2018 (opining "[t]he U.S. could use more Ted Franks" while covering CCAF's role in exposing "legal looting" in data breach MDL); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 13, 2013) (identifying Frank as "the leading critic of abusive class action settlements"); Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, FORTUNE, Dec. 15, 2015 (calling Frank "the nation's most relentless warrior against class-action fee abuse"); Editorial, *Posner vs. the Plaintiffs Bar*, WALL ST. J. (Aug. 12, 2016) (giving "kudos" to the CCAF for successfully fighting for shareholder rights against M&A strike suits that benefit only attorneys); Jeffrey B. Jacobson, *Lessons From CCAF on Designing Class Action Settlements*, Law360 (Aug. 6, 2013) (discussing CCAF's track record); Ashby Jones, *A Litigator Fights Class-Action Suits*, WALL ST. J. (Oct. 31, 2011).

Frank is also interested in this case because it strives to achieve greater federal scrutiny of abusive class-action tactics such as the strike suit "racket" this Court found in *Walgreen*, which CCAF successfully litigated. This work would come for naught if, as appellants will likely contend, strike-suit filers can strategically dismiss for attorneys' fees and thereby effectively evade scrutiny. The district court's decision simply unwinds plaintiffs' ill-gotten gains, and Frank supports the order and is willing to defend the decision before this Court.

Without Frank's participation in support of the decision below, this Court would be left without a proper adversarial presentation in reviewing an appeal.

"[W]hen faced with a complete lack of adversariness" it is common practice for federal courts to "appoint[] an *amicus* to argue the unrepresented side." *Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83, 104 (1993) (Scalia, J., concurring) (listing Supreme Court cases); *see also Warren v. Comm'r*, 282 F.3d 1119, 1122 (9th Cir. 2002) (Reinhardt, J., concurring); *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1030 (D.C. Cir. 2004); *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 525 n.8 (1st Cir. 1991) (granting participation of amicus where there was concern that "negotiated attorneys' fees in plaintiffs' class actions can be a potential source of abuse."); *Zucker v. Westinghouse Elec.*, 374 F.3d 221, 224 & n.3 (3d Cir. 2004) (expressing appreciation for amicus who defended the district court's fee denial). In particular, this Circuit has appointed *amicus* counsel to argue in support of district court sanctions. *See FTC v. Trudeau*, 606 F.3d 382, 385 (7th Cir. 2010); *In re Troutt*, 460 F.3d 887, 892 (7th Cir. 2006). And the Eighth Circuit has appointed CCAF as *amicus* in a similar procedural posture in class actions to resolve the lack of adversary presentation. *E.g., Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069 (8th Cir. 2017).

The lack of adversarial process is especially problematic in the class-action context where conflicts of interest between class counsel and class members are endemic. *Pearson*, 772 F.3d at 787 ("acute conflict of interest"); *In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("the interests of class members and class counsel nearly always diverge."). Without *amicus curiae*, this appeal will likewise lack adversarial process. Frank's participation will not delay proceedings and will not unfairly prejudice appellants, who have no right to an *ex parte* appeal.

III. Strike suits and their incentive problems present a special need for adversarial presentation.

Nowhere is the conflict between class counsel and putative class members more direct and transparent than when counsel collects a "merger tax" by holding up publicly-traded companies. Such litigation affirmatively harms shareholders, but companies feel compelled to pay because of the threat that such litigation could hold up a time-sensitive transaction. Strike suit plaintiffs' counsel appropriate all benefit from their "racket" by settling purely for attorneys' fees and cumulative disclosures worthless to shareholders. In class action settlements, illusory recovery does not justify attorneys' fees. *E.g. Subway*, 869 F.3d 551; *Walgreen*, 832 F.3d 718. Similarly, plaintiffs and their counsel should not be able to leverage the class device to extract fees.

The district court below appropriately abrogated appellants' gamesmanship to evade judicial review to the detriment of shareholders. But the district court is no longer present.

Frank's experience—deriving from his attorneys' involvement in this case and in dozens of other class action proceedings—qualifies him to defend the district court's decisions. After all, the district court itself relied on Frank and invited him to file an *amicus* brief in opposition to these same appellants below. Frank is well-positioned to provide adversarial briefing to this Court.

Conclusion

Frank therefore asks this Court for an order:

- appointing Frank as *amicus curiae* on behalf of affirming the district court in this appeal, and allowing Frank to file a party brief as *de facto* appellee and participate in oral argument as an appellee would in Nos. 19-2401 and 19-2408, should the Court set this case on its oral argument calendar; or,
- in the alternative, permitting Frank to file an *amicus* brief of up to 14,000 words in defense of the district court's opinion, and to fully participate in any oral argument that may be scheduled.

Dated: October 18, 2019. Respectfully submitted,

/s/ M. Frank Bednarz

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Certificate of Compliance

I certify that this filing contains 1,904 words according to Microsoft Word's word count, excluding the parts of the filing exempted by Fed. R. App. P. 32(f).

Dated: October 18, 2019. */s/ M. Frank Bednarz*

Certificate of Service

I hereby certify that on October 18, 2019, I electronically filed the foregoing with the Clerk of The district court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: October 18, 2019. */s/ M. Frank Bednarz*