

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

Plaintiff,

v.

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

Defendants.

THEODORE H. FRANK,

Intervenor.

Case No. 1:17-cv-04455

CLASS ACTION

Hon. Robert M. Dow, Jr

**INTERVENOR THEODORE H. FRANK'S
CORRECTED MOTION TO CONSOLIDATE¹**

Pursuant to Rule 42(a) and Local Rule 40.4, proposed Intervenor Theodore H. Frank moves to consolidate this action with 17-cv-05016, 17-cv-05017, 17-cv-05018, 17-cv-05021, 17-cv-05022, and 17-cv-05026 for all purposes. Each of these actions assert similar putative class action claims against Akorn, Inc. (“Akorn”) and its board of directors arising from alleged violations of Sections 14(a) and 20(a) of the Securities Exchange Act of 1934, in connection with disclosures concerning the pending acquisition of Akorn by Fresenius Kabi AG (“Fresenius”). Because Frank moves to intervene

¹ This Motion to Consolidate Corrects the filing at Dkt. 12, which was an inadvertent duplicate filing of Frank’s Motion to Intervene.

only for the collateral issues of attorneys' fees and potential sanctions, he believes a motion to reopen is not necessary.²

As all seven actions involve common fact and legal issues, the Intervenor Frank seeks consolidation of the matters for purposes of dispositive motions and, if necessary, trial. All parties in these actions previously stipulated to consolidation "for all purposes" prior to transfer from the Middle District of Louisiana. *See* No. 17-cv-5016, Dkts. 24 at 4.

BACKGROUND

On April 24, 2017, Akorn and Fresenius announced that they had entered into an agreement for the former to be acquired by the latter, a German pharmaceutical company. On May 22, Akorn issued a preliminary definitive proxy statement recommending that shareholders approve the merger, and Akorn issued a (non-preliminary) definitive proxy statement on June 15.

From June 2 to June 22, 2017, six plaintiffs filed seven suits alleging that these proxy statements were misleading and violated Sections 14(a) and 20(a) of the Exchange Act of 1934. Five of the suits were initially filed in the Middle District of Louisiana although Akorn has no offices in that district. These actions are:

1. *Robert Berg v. Akorn, Inc. et. al.*, now No. 17-cv-5016 (Durkin, J.), filed June 2, 2017.
2. *Jorge Alcaarez v. Akorn, Inc. et. al.*, now No. 1:17-cv-05017 (St. Eve, J.), filed June 7, 2017.
3. *Shaun A. House v. Akorn, Inc. et. al.*, now No. 1:17-cv-05018 (Bucklo, J.), filed June 12, 2107.
4. *Sean Harris v. Akorn, Inc. et. al.*, now No. 1:17-cv-05021 (Guzman, J.), filed June 14, 2017.
5. *Demetios Pullos v. Akorn, Inc. et. al.*, now No. 1:17-cv-05026 (Kennelly, J.), filed June 22, 2017.

² Local Rule 5.6 indicates that Frank, presently a non-party, may not file any motion except for a motion to intervene, which he also files on this date. However, because the parties have failed to alert any of the courts of the related nature of their actions, it is desirable to consolidate *before* Frank's motion to intervene must be resolved by seven different judges. Alternatively, if the clerk must strike this motion as improperly filed, Frank asks that this Court nonetheless seek "reassignment by agreement," which "will enable the . . . cases to be more efficiently administered and will serve to save judicial time," and apply to the Executive Committee for such reassignment pursuant to Internal Operating Procedures 13(d).

A sixth plaintiff, Robert Carlyle, filed the above-captioned action in this district on June 13, 2017, through attorney Daniel Kuznicki with Adam J. Levitt of DiCello Levitt & Casey LLC serving as local counsel. However, Carlyle voluntarily dismissed this complaint on June 20 and refiled in the Middle District of Louisiana that same day, with Lewis Kahn serving as his local counsel.

Meanwhile, on June 15, 2017, the defendants filed an expedited motion for change of venue to this district pursuant to 28 U.S.C. § 1404(a) because neither Akorn nor any of the other defendants or potential witnesses were present in Louisiana. *See* Dkt. 17-cv-5016, No. 6. The Plaintiffs failed to respond to this order until June 27, when the court ordered Plaintiffs to file a memorandum in opposition by June 30. Dkt. 17-cv-5016, No. 22.

On June 29, all six Plaintiffs stipulated that “The Actions shall be consolidated for all purposes.” Dkt. 17-cv-5016, No. 24. The district court granted this stipulation, but instead consolidated the actions “for the limited purpose of resolving the issue of venue.” Dkt. 17-cv-5016, No. 31.

All of the suits were transferred to the Northern District of Illinois on July 5, when the district judge granted Akorn’s motion for change of venue. *Id.* at Dkt. 40. Upon transfer, each suit was assigned to a different judge, including the Carlyle action, which was given a new N.D. Ill. docket number before a different judge.

The docket numbers, currently-assigned judge, filing dates, original filings attorneys, and current status of all seven actions are shown below:

Plaintiff	N.D. Ill. No.	Original Filing	Attorneys on Complaint	Last Action
Robert Carlyle	17-cv-4455 (Dow, J.)	June 13 (N.D. Ill.)	Daniel Kuznicki (Brower Piven P.C.); Il. local counsel Adam J. Levitt (DiCello Levitt & Casey LLC)	Dismissal granted, June 20 (Dkt. 8)
Robert Berg	17-cv-5016 (Durkin, J.)	June 2 (M.D. La.)	Brian D. Long (Rigrodsky & Long, P.A.); Richard A. Maniskas (RM Law); La. local counsel Eric J. O’Bell (Gauthier, Houghtaling & Williams)	Stipulation and Proposed Order filed, September 15 (Dkt. 56)

Plaintiff	N.D. Ill. No.	Original Filing	Attorneys on Complaint	Last Action
Jorge Alcaez	17-cv-5017 (St. Eve, J.)	June 7 (M.D. La.)	Donald J. Enright; Elizabeth K. Tripodi (Levi & Korsinsky LLP); La. local counsel Eric J. O’Bell	Dismissal granted, July 17 (Dkt. 35)
Shaun House	17-cv-5018 (Bucklo, J.)	June 12 (M.D. La.)	Juan E. Monteverde (Monteverde & Associates PC); La. local counsel Lewis Kahn (Kahn Swick & Foti, LLC)	Dismissal granted, July 25 (Dkt. 34)
Sean Harris	17-cv-5021 (Guzman, J.)	June 14 (M.D. La.)	James M. Wilson (Faruqi & Faruqi, LLP); La. local counsel Lewis Kahn	Dismissal granted, July 17 (Dkt. 35)
Robert Carlyle (second action)	17-cv-5022 (Coleman, J.)	June 20 (M.D. La.)	Daniel Kuznicki ; La. local counsel Lewis Kahn	Dismissal granted, July 17 (Dkt. 25)
Demetrios Pullos	17-cv-5026 (Kennelly, J.)	June 22 (M.D. La.)	Lewis Kahn	Dismissal granted, July 17 (Dkt. 19)

On July 14, 2017, a single nonresident attorney—Christopher Kupka of Levi & Korsinsky LLP—entered an appearance in all six transferred actions, although his firm had only appeared for Plaintiff Alcaez prior to transfer.

In accordance with Local Rule 40.4(c), complaints for the six transferred, higher-numbered dockets are attached to this motion as Exhibits A-F.

ARGUMENT

A. The Cases Are Related Under Local Rule 40.4(a)

Under Local Rule 40.4(a), cases are related if any of the following conditions is satisfied: “1) the cases involve the same property; 2) the cases involve some of the same issues of fact or law; 3) the cases grow out of the same transaction or occurrence; or 4) in class action suits, one or more of the classes involved in the cases is or are of the same.” Local Rule 40.4(a). This rule “does not require complete identity of issues in order for cases to be considered related.” *Murry v. Am.’s Mortg. Banc, Inc.*, No. 03-cv-5811, 2004 WL 407010, at *2 (N.D. Ill. Mar. 1, 2004).

Here, the requirements of L.R. 40.4(a) are clearly met; three conditions independently exist. First, the cases all involve the same issues of fact and law—namely, whether Akorn’s proxy statements violated Sections 14(a) or 20(a) of the Exchange Act. Second, all cases grow out of the same

transaction or occurrence—namely, the pending acquisition of Akorn by Fresenius (or for the propose Intervenor Frank, the settlement for extorted attorneys’ fees in all of the related cases. Finally, the putative class of Akorn shareholders pleaded in each case is identical.

B. Consolidation Would Be Useful Under Local Rule 40.4(b)

Local Rule 40.4(b) permits consolidation where it would be useful and efficient:

Related cases may then be reassigned if each of the following criteria are met:

- 1) both cases are pending in this Court;
- 2) the handling of both cases by the same judge is likely to result in a substantial saving of judicial time and effort;
- 3) the earlier case has not progressed to the point where designating a later filed case as related would be likely to delay the proceedings in the earlier case substantially; and
- 4) the cases are susceptible of disposition in a single proceeding.

The question of whether consolidation will be useful is a matter within the court's discretion. *See Blocker v. City of Chicago*, No. 09-cv-7052, 2011 WL 1004137, at *2 (N.D. Ill. Mar. 16, 2011).

Here, all the enumerated criteria favor consolidation. The status of all cases is identical—each was dismissed prior to any substantive decisions, and all six plaintiffs requested dismissal with the retention of jurisdiction to rule on any motion for attorneys’ fees, which has been granted in all six transferred actions. *See* No. 17-cv-5016, Dkts. 54-55; No. 17-cv-5017, Dkts. 34-35; No. 17-cv-5018, Dkts. 33-34; No. 17-cv-5021, Dkts. 34-35; No. 17-cv-5022, Dkts. 24-25; and No. 17-cv-5026, Dkts. 18-19. Efficiency is also shown by the fact that all named parties themselves stipulated to consolidation “for all purposes” prior to transfer from the Middle District of Louisiana. No. 17-cv-5016, Dkts. 24 at 4. This stipulation was not given effect by the transferring judge, who consolidated them instead “for the limited purpose of resolving the issue of venue.” No. 17-cv-5016, Dkts. 31 at 2.

Without consolidation, seven judges will have to consider proposed Intervenor Frank’s motion to intervene and any motions for sanctions or accounting that may arise after resolution of the motion to intervene. Clearly, judicial economy favors consolidation of these actions.

CONCLUSION

Due to the nearly-identical underlying claims in the pending actions, their identical disposition, the apparent joint settlement by the parties subject of proposed Intervenor's action, and the fact that all existing parties already stipulated to consolidate the actions "for all purposes," consolidation should be granted.

Dated: September 19, 2017

/s/ M.Frank Bednarz
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CERTIFICATE OF SERVICE

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

Dated: September 19, 2017

/s/ M. Frank Bednarz