No. 15-3799

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: WALGREEN CO. STOCKHOLDER LITIGATION

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:14-cv-9786,
Judge Joan B. Gottschall

Opening Brief and Required Short Appendix of Appellant John Berlau

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 15-3799

Short Caption: In re: Walgreen Co. Stockholder Litigation

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):

John Berlau

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

Competitive Enterprise Institute, Center for Class Action Fairness

Williams, Montgomery & John

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

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

N/A

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

N/A

Attorney's Signature: s/ Melissa A. Holyoak Date: 12/24/2015

Attorney's Printed Name: Melissa A. Holyoak

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

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Attorney's Signature: s/ Theodore H. Frank Date: 12/24/2015

Attorney's Printed Name: Theodore H. Frank

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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Statutes, Regulations, and Rules

15 U.S.C. § 78n – Proxies

(a) Solicitation of proxies in violation of rules and regulations

(1) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

…

17 CFR § 229.10 – (Item 10) General.

(a) *Application of Regulation S-K*. This part … states the requirements applicable to the content of the non-finance statement portions of:

…

(2) … proxy and information statements under section 14 (part 240 of this chapter) …

17 CFR § 229.103 – (Item 103) Legal proceedings.

Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. …

Instructions to Item 103: …

2. No information need be given with respect to any proceeding that involves primarily a claim for damages if the amount involved, exclusive of interest and costs, does not

exceed 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis. …

…

17 CFR § 240.14a-9 – False or misleading statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

…

Federal Rule of Civil Procedure 23. Class Actions.

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

…

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

…

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

…

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e) …

(h) Attorney's Fees and Nontaxable Costs.

In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

…

Jurisdictional Statement

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

This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court judge issued an Amended Order and Final Judgment on November 20, 2015. A1-A9. Objector John Berlau filed a notice of appeal on December 17, 2015. A628-A629. The notice of appeal is timely under Fed. R. App. Proc. 4(a)(1).

Berlau, as a class member who objected to the Rule 23 class action settlement below (A78-A111) has standing to appeal the district court's settlement approval without the need to intervene formally. *Devlin v. Scardelletti*, 536 U.S. 1 (2003).

Statement of the Issues

1. The Seventh Circuit has held that attorneys who bring a class action solely for their own benefit at the expense of the class fail to meet the adequacy requirements of Rule 23(a)(4). *See In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011) (Easterbrook, J.). The Seventh Circuit has also held that the appropriate remedy when a shareholder suit will make shareholders worse off is to dismiss the case. *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012) (Easterbrook, J.). Did the district err as a

[1] "Axyz" refers to page xyz of Berlau's Appendix. "App. Dkt." refers to docket entries in Appeal No. 15-3799. Except where otherwise noted, "Dkt." refers to docket entries in Case No. 1:14-cv-9786 (N.D. Ill.) below.

matter of law or abuse its discretion when it approved a zero-dollar settlement that made shareholders worse off because the sole relief provided payment to the attorneys and only supplemental disclosures to the proxy statement that were immaterial as a matter of law?

2. Did the district court err as a matter of law or abuse its discretion in holding that the settlement provided benefits to the class because it provided for:

(a) supplemental disclosure of the specific percentage of the selling investors' post-merger stock ownership, even though such information could be computed from information already contained in the proxy statement;

(b) supplemental disclosure of the fact that the CEO recused himself from the Board's decision to merge because of his interest in the transaction, even though the proxy detailed the CEO's interest in the transaction and disclosed that the CEO did not vote on the merger decision;

(c) supplemental disclosure of the fact that the Board had entered into a confidentiality agreement in connection with the negotiation of a Nomination and Support Agreement regarding the appointment of a Board member, even though the proxy detailed the existence and terms of the Nomination and Support Agreement; and

(d) disclosure in broad terms of the existence of a disgruntled executive's lawsuit over his dismissal, alleging defamation *inter alia*, though everything disclosed about the lawsuit was immaterial to the merger?

Statement of the Case

A. Deal litigation is filed in over 97.5% of mergers.

Deal litigation—shareholder actions challenging public company mergers—is increasingly common: "In 2012, 93% of deals over $100 million and 96% of deals over

$500 million were challenged in shareholder litigation."[2] In 2013, over 97.5% of deals over $100 million were challenged.[3]

Settlements of these actions rarely provide monetary relief for the class members but instead, usually consist solely of supplemental disclosures to the merger proxy statement. *See* Fisch, 93 TEX. L. REV. at 559; *see also* Ann Woolner, Phil Milford & Rodney Yap, *Merger Suits Often Mean Cash for Lawyers, Zero for Investors*, BLOOMBERG (February 16, 2012), *available at* http://www.bloomberg.com/news/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuit-deals.html (noting that 70% of Delaware investor class action suits following mergers and acquisitions in 2010 and 2011 made money only for the plaintiffs' lawyers and not their clients). In 2012, for example, 80% of settlements were disclosure-only settlements.[4]

This appeal relates to a shareholder objection to one such suit and settlement.

B. Walgreens announces merger with Boots Alliance.

On August 2, 2012, defendant Walgreen Co. ("Walgreens") acquired a 45% equity stake in Switzerland-based pharmacy company Alliance Boots GmbH ("Alliance Boots") for $6.7 billion with the option to purchase the remaining 55% starting

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[2] Jill E. Fisch, Sean J. Griffith & Steven M. Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 558-59 (2015) ("Fisch").

[3] *Id*. (citing Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2013*, at 1–2 & tbl.A (Moritz Coll. of Law Ctr. for Interdisciplinary Law & Policy Studies, Public Law & Legal Theory Working Paper Series No. 236, 2014), *available at* http://ssrn.com/abstract=2377001, *archived at* http://perma.cc/XP2B-8C8B).

[4] Fisch, 93 TEX. L. REV. at 559 n.7 (citing Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2012*, at 1–2 & tbl.A (Feb. 1, 2013) (unpublished manuscript), *available at* http://ssrn.com/abstract=2216727, archived at http://perma.cc/X8HDPLHC).

February 2, 2015 ("Step 1 Acquisition"). Dkt. 1 at 2. On August 6, 2014, Walgreens announced that it entered into an agreement with Alliance Boots to accelerate the option to purchase the remaining 55% ("Step 2 Acquisition"), as well as undergo a related corporate reorganization where Walgreens would become a wholly owned subsidiary of Walgreens Boots Alliance ("WBA"), a new Delaware corporation. Dkt. 1 at 2-3. The deal was worth about $15 billion in cash and stock.

On November 24, 2014, Walgreens filed a definitive proxy statement on Schedule 14A ("Proxy") with the SEC soliciting shareholder approval for the corporate reorganization and Step 2 Acquisition. A360-A363. The Proxy announced that the vote on the reorganization would be held at a special meeting of Walgreens shareholders on December 29, 2014. A364. Walgreens and Alliance Boots were represented by Wachtell, Lipton, Rosen & Katz and Simpson Thacher & Bartlett LLP respectively. A429, A425-A426. In addition to the hundreds of pages of attachments, the Proxy consists of over 230 pages detailing the merger transaction for the shareholders. A360-A618.

C. Plaintiffs sue and settle a couple weeks later for Supplemental Disclosures.

On December 5, 2014, less than two weeks after the Proxy was filed, plaintiffs filed a class action complaint alleging material omissions in Walgreens' registration statement and Proxy relating to the Boots Alliance merger. Dkt. 1 at 5. On December 23, 2014, less than a week before the shareholder vote, the parties reached an agreement in principle. A44. The agreement provided that Walgreens would file with the SEC a Form 8-K that would contain agreed-upon supplemental disclosures ("Supplemental Disclosures") concerning the reorganization and Step 2 Acquisition. *Id*.

The Supplemental Disclosures totaled 1,218 words, and after duplicative language is removed, the Supplemental Disclosures total just 746 words. A62-A77. The additional language from the Supplemental Disclosures equals just a half of a percent of

the information contained in the Proxy. A360-A618. Walgreens filed the Supplemental Disclosures on December 24, 2014 in time for the shareholder vote on December 29, 2014. A44. The Supplemental Disclosures included five categories of information.

1. Rosenstein's Nomination and Support Agreement.

The Supplemental Disclosures included information regarding the nomination of Barry Rosenstein for election to the Board. A68. The Proxy explained that on September 5, 2014, Walgreens had entered into a Nomination and Support Agreement with JANA Partners LLC, which owned 1.5% of Walgreens' common stock, where Walgreens agreed to nominate JANA's designee Mr. Rosenstein for election to the Board at Walgreens' 2015 annual shareholders' meeting. A376. In exchange, JANA agreed to support the Board's position in certain transactions. The Proxy disclosed the terms of the Nomination and Support Agreement:

> … Under the Nomination and Support Agreement, among other things, until the later of (a) forty-five days prior to the advance notice deadline for the 2016 annual meeting of shareholders and (b) fifteen days after Mr. Rosenstein or another JANA designee is no longer a member of the Board, JANA has agreed to, and to cause its affiliates and controlled associates to, vote all shares owned beneficially or of record, and that they are entitled to vote, in favor of all incumbent directors nominated by the Board and in accordance with the Board's recommendation on any other proposals or business that comes before any shareholders meeting, including the Transactions, other than certain specified matters. The Standstill Period is subject to early termination in the event of an uncured material breach of the Nomination and Support Agreement by Walgreens, and will be extended if we voluntarily agree to nominate Mr. Rosenstein at the 2016 annual meeting of shareholders, and any successive annual meeting of shareholders, and Mr. Rosenstein agrees to serve as a director nominee. As of

> November 17, 2014, JANA and its affiliates and controlled associates beneficially owned approximately 1.5% of the outstanding shares of Walgreens common stock.

A376, A419. The only additional information the Supplemental Disclosures provided regarding the Nomination and Support Agreement is that the negotiations were confidential:

> Prior to the appointment of Mr. Rosenstein to the Board, Mr. Rosenstein and senior management of Walgreens had engaged in preliminary discussions during which Mr. Rosenstein expressed his views regarding Walgreens and its strategic direction and prospects. In connection with these preliminary discussions, on August 5, 2014, Walgreens entered into a confidentiality agreement with JANA. Thereafter, senior management of Walgreens engaged in further discussions with Mr. Rosenstein and extended the term of the original confidentiality agreement with JANA. Also during this period, representatives of Walgreens and Wachtell Lipton negotiated the terms of the Nomination and Support Agreement with representatives of JANA. In connection with these discussions, and following further consultation with management and Walgreens' financial and legal advisors, the Walgreens Board determined that Mr. Rosenstein would be a valuable addition to the Board, and Walgreens and JANA entered into the Nomination and Support Agreement on September 5, 2014.

A68, A70.

2. SP Investors' and KKR Investors' post-merger stock ownership.

The Proxy explained that in the Step 2 Acquisition, Walgreens would purchase the remaining 55% of Boots Alliance for £3.133 billion in cash and 144,333,468 shares of WBA common stock. A380. Walgreens would purchase the remaining 55% of Boots Alliance from the principal seller, AB Acquisitions, which was made up of two sets of investors: the SP Investors (affiliates of Stefano Pessina, the Executive Chairman of

Boots Alliance) and the KKR Investors (investment funds affiliated with Kohlberg Kravis Roberts & Co. L.P.). A375, A383. The Proxy explained that it was unknown how the 144 million shares would be finally allocated among the SP Investors and KKR Investors. A403-A404. Prior to the Step 2 Acquisition, the SP Investors owned 7.7% and the KKR Investors owned 0.7% of the outstanding shares of Walgreens common stock. A376. The Proxy did not estimate what percentages the SP Investors and KKR Investors would hold after the merger of the outstanding WBA shares.

The Proxy estimated that the SP Investors would receive 34.1% and the KKR Investors would receive 30.1% of the 144,333,468 WBA shares paid to the sellers (Step 2 Acquisition consideration), but it did not specifically estimate what the investors' share of the outstanding WBA shares would be. A420, A462. The Supplemental Disclosures added an estimate of how much WBA stock would be held by the SP Investors and the KKR Investors after the merger:

> Assuming that the SP Investors and the KKR Investors each receive shares of Walgreens Boots Alliance (or Walgreens, as applicable) based on their current pro rata ownership of AB Acquisitions, and after giving effect to the MEP Restructuring described elsewhere in this proxy statement/prospectus, the SP Investors are expected to hold approximately 11.3% of the pro forma total outstanding shares of the combined company and the KKR Investors are expected to hold approximately 4.6% of the pro forma total outstanding shares of the combined company (in each case, based on the number of shares of Walgreens common stock outstanding as of November 17, 2014, assuming completion of the Step 2 Acquisition and the issuance of 144,333,468 shares as of that date) and assuming, for purposes of calculating the interests of the MEP, a share price of $72.32.

A68, A69, A72.

But the information needed to estimate the SP Investors' and KKR Investors' percentage of outstanding WBA shares after the merger was already in the Proxy. The investors' percentage of the outstanding shares of the newly formed WBA is simple arithmetic:

$$\frac{\text{total WBA shares (Walgreens shares + WBA shares from sale)}}{\text{outstanding total WBA shares}} = \%\text{ of outstanding}$$

All of the elements of the computation were in the Proxy. Because the Walgreens Co. common stock would convert to WBA shares on a one-for-one basis, A420, the investors' total WBA shares after the merger equals their Walgreens Co. shares plus the WBA shares they received from the merger sale. Dividing the total WBA shares investors would hold after the merger with the total WBA shares to be issued pursuant to the merger reveals the same percentages included in the Supplemental Disclosures:

SP Investors	72,803,206 pre-merger[5] + 49,217,713 shares earned from merger[6] = 11.2%[7] 1,089,829,648 outstanding post-merger shares[8]
KKR Investors	6,618,473 pre-merger + 43,444,374 shares earned from merger = 4.6% 1,089,829,648 outstanding post-merger shares

The original Proxy provided further assurances regarding the SP Investors and the KKR Investors' ownership post-merger. The Proxy explained that the SP Investors and KKR Investors had contractual restrictions generally prohibiting them from

[5] A417-A418.

[6] A420, A462.

[7] The Supplemental Disclosures estimated that the SP Investors' would own 11.3%, while the calculation above shows 11.2%. It is unclear why the 0.1% difference but it is immaterial given that the Supplemental Disclosures were only providing an approximation that was based on several assumptions. A68, A69, A72.

[8] A561.

transferring the WBA shares after the merger for specified time periods. A409. And if the SP Investors and KKR Investors continued to meet certain ownership thresholds, they were entitled to designate a nominee for the Board but were required to vote all of their shares in accordance with the recommendation of the WBA Board of Directors on matters submitted to a shareholder vote. A410.

3. Miquelon's defamation lawsuit.

On August 4, 2014, Wade D. Miquelon resigned his position as Walgreens Executive Vice President, Chief Financial Office and President, International. A71. On August 4, 2014, Walgreens filed with the SEC a Form 8-K detailing the terms of Miquelon's Transition and Separation Agreement. *See* Walgreen Co. Form 8-K dated Aug. 4, 2014, *available at* http://www.sec.gov/Archives/edgar/data/104207/000119312514293743/d768416d8k.htm. Several months later, Mr. Miquelon sued Walgreens for alleged defamatory statements about Mr. Miquelon made in a page-one *Wall Street Journal* article. A71; Dkt. 65-2. The Proxy did not discuss the Miquelon lawsuit.

The Supplemental Disclosures added the following description of the Miquelon lawsuit:

> On August 4, 2014, Wade D. Miquelon resigned his position as Walgreens Executive Vice President, Chief Financial Officer and President, International. On that date, Mr. Miquelon also entered into a Transition and Separation Agreement with Walgreens. On October 16, 2014, Mr. Miquelon filed a lawsuit against Walgreens in Illinois state court captioned Miquelon v. Walgreen Co., No. 14-ch-16825, Cook County, Illinois Circuit Court (the "Lawsuit"). The Lawsuit alleges, among other things, that, shortly after Mr. Miquelon's termination, certain Walgreens executives met with investors and made disparaging and defamatory comments about Mr. Miquelon. The Lawsuit asserts claims against Walgreens for

> Declaratory Judgment, Breach of the Transition and Separation Agreement, Defamation Per Se, and Tortious Interference with Prospective Economic Advantage, and seeks damages and injunctive relief. Walgreens believes these claims are without merit and intends to vigorously defend these claims.

A71.

On June 29, 2015, Cook County Circuit Judge Franklin Valderrama granted Walgreens' motions to dismiss seven of the nine counts alleged in Miquelon's defamation litigation, leaving only Miquelon's claims of breach of contract and conversion for Walgreens' refusal to pay him severance which Miquelon thinks he's entitled to under the separation agreement. A237-A239.

4. Risk factors of the merger.

The Proxy devoted two sections and 15 pages to detailing several risk factors associated with the merger ("Risk Factors" and "Cautionary Statement Regarding Forward Looking Statements"). A399-A413. Many of the identified risk factors in the Risk Factors section were repeated or summarized later in the Proxy in a list of bullets of "risks and potentially negative factors" considered by the Board. A431-A433.

The Supplemental Disclosures added four new bullets to the list of risks considered by the Board; however, they provide no new information regarding risk to shareholders because each of those four bullets is verbatim language already contained in the Proxy's Risk Factors section:

Risk Factors Identified in the Proxy	**Supplemental Disclosures**
"The processes and initiatives needed to achieve these potential benefits are complex, costly and time-consuming, and Walgreens has not previously completed a transaction comparable in size or scope." A401 (emphasis added).	• "the fact that Walgreens has not previously completed a transaction comparable in size or scope;" A71 (emphasis added).
"Achieving the expected benefits of the Alliance Boots transaction, including the Step 2 Acquisition, is subject to a number of significant challenges and uncertainties, including, without limitation, whether unique corporate cultures will work collaboratively in an efficient and effective manner, the coordination of geographically separate organizations, …." A401 (emphasis added).	• "the potential challenges and uncertainties surrounding whether Walgreens' and Alliance Boots' unique corporate cultures will work collaboratively in an efficient and effective manner;" • "the potential challenges and uncertainties related to the coordination of geographically separate organizations;" A71 (emphasis added).
"The Step 2 Acquisition will increase our exposure to certain joint ventures and investments of Alliance Boots over which we would not have sole control. Some of these companies may operate in sectors that differ from our or Alliance Boots' current operations and have different risks." A403 (emphasis added).	• "the risk that the Transactions will increase Walgreens' exposure to certain joint ventures and investments of Alliance Boots over which Walgreens may not have sole control and may operate in sectors that differ from Walgreens' or Alliance Boots' current operations." A71 (emphasis added).

Although the Board's list of bullets did not repeat or summarize all of the risk factors discussed in the Risk Factors section, the Proxy explained that the Board had considered *all* of the risk factors contained in the Risk Factors section, which includes the four bullets added in the Supplemental Disclosures. A433.

5. Pessina and Murphy's recusal from the Board's vote on the merger.

The Supplemental Disclosures added the following additional language regarding Pessina's and Murphy's recusal (bolded and underlined) to the section describing the transaction background:

> At the conclusion of the meeting, the Walgreens Board (excluding Messrs. Pessina and Murphy**, who, as a result of their interest in the proposed transaction, recused themselves from the Board's decision to exercise the Call Option**) unanimously approved the amendment to the Purchase and Option Agreement and the exercise of the Call Option and recommended that the Walgreens shareholders approve the Share Issuance and Reorganization.

A71.

The Proxy explained to shareholders that "Walgreens' executive officers and members of the Board, and associates of each of the foregoing persons, may be deemed to have interests in the Transactions in addition to, or different from, Walgreens shareholders generally." A390, A459. The Proxy specifically detailed the interests of CEO Stefano Pessina and Board member Dominic Murphy who were affiliated with the SP Investors and KKR Investors, respectively. A391; A462-A463.

The Proxy explained that with respect to Pessina's and Murphy's personal interests, "[t]he Board was aware of and considered these interests in evaluating and negotiating the Purchase and Option Agreement, in evaluating the Call Option and Step 2 Acquisition and in exercising the Call Option, in evaluating the Reorganization Merger Agreement, and in recommending to Walgreens shareholders that they vote to approve the Reorganization Proposal, the Share Issuance Proposal and the Adjournment Proposal." A459. After detailing Mr. Pessina's and Mr. Murphy's interests in the merger transaction, the Proxy clarified—two separate times—that "[n]either Mr. Pessina nor Mr. Murphy voted with respect to any Board determinations and

recommendations with respect to the Step 2 Acquisition, including the determination of the Board to exercise the Call Option." A391; A463; *see also* A428 (vote excluded Pessina and Murphy).

6. Pessina's experience and expertise.

On December 10, 2014, Walgreens filed an 8-K with the SEC announcing that Walgreens' CEO, Gregory Wasson, was retiring as President and CEO and Mr. Pessina would serve as acting CEO. A620. The December 10, 2014 8-K explained that Mr. Pessina had "extensive leadership experience and knowledge of Walgreens and Boots Alliance" and listed the previous positions Mr. Pessina held and the other boards on which he serves. *Id*.

Although the December 10, 2014 8-K was filed by Walgreens *after* this lawsuit was filed, the Supplemental Disclosures included a paragraph supplementing the December 10, 2014 8-K:

> Mr. Pessina was selected to serve as Acting Chief Executive Officer as of the Transition Time based on a number of factors considered by the Board of Walgreens. These included Mr. Pessina's considerable knowledge of the industries in which both Walgreens and Alliance Boots operate, his familiarity with both Walgreens' and Alliance Boots' respective businesses and leadership teams and his international experience and background in managing global businesses.

A73.

D. 97% of shareholders approve the merger.

97% of Walgreens shareholder votes were in favor of the reorganization and Step 2 Acquisition and only 2.2% were against. A625.

E. Plaintiffs seek preliminary approval.

On July 2, 2015, plaintiffs moved for preliminary approval of the class action settlement ("Settlement") and notice to the class. Dkt. 24. The Settlement covered a non-opt out settlement class defined as:

> [A]ll record holders and beneficial holders of any shares of common stock of Walgreen and any and all of their successors in interest, predecessors, representatives, trustees, executors, administrators, heirs, assigns or transferees, immediate and remote, and any Person or entity acting for or on behalf of, or claiming under, any of them, and each of them, at any time between and including August 5, 2014 and December 31, 2014 (the date of the closing of the Reorganization and Step 2 Acquisition) (the "Class Period"), excluding Defendants, members of the immediate families of the Individual Defendants, and any Person, firm, trust, corporation or other entity related to, controlled by, or affiliated with, any Defendant, and the legal representatives, heirs, successors, and assigns of any such excluded persons.

A51. The only consideration provided to the plaintiffs in exchange for the full settlement and release of all settled claims (including unknown claims), was defendants' December 24, 2014 filing of the Supplemental Disclosures. A52. The Settlement further provides that Walgreens will pay class counsel fees and expenses up to $370,000, as approved by the Court. A54-A55.

Class counsel filed a fee request seeking an award of $365,336 in attorneys' fees and $4,663 in expenses. Dkt.45-1 at 1. In support of their request, class counsel submitted a collective lodestar of $292,978.75 (528 hours). Dkt. 45-1 at 10. The lodestar included time through July 2, 2015, when the parties submitted their motion for preliminary approval of the Settlement. Dkt. 45-1 at 10. Walgreens submitted no opposition to the fee request.

F. Berlau objects to the settlement.

John Berlau, a shareholder member of the class represented by the non-profit Competitive Enterprise Institute's Center for Class Action Fairness, objected to the Settlement and fee request. A78-A111. The objection argued that, because the Settlement made the shareholders worse off, plaintiffs could not satisfy Rule 23(a)(4)'s adequacy requirement or Rule 23(e)'s fairness requirement. A85 (citing *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011)). Berlau argued that the cost to shareholders (plaintiffs' attorneys' fees plus the cost of defending the action) could not be justified because the Supplemental Disclosures were not material. A93-A94. Berlau's objection dissected each of the Supplemental Disclosures and explained why they were immaterial. A95-A106. Berlau argued that the immateriality of the Supplemental Disclosures was further demonstrated by the 97% shareholders' vote in favor of the merger. A106.

Finally, Berlau argued that class counsel's lodestar was exaggerated. A109. The parties reached an agreement in principle just two weeks after the action was filed. A44. Berlau argued that after that time, class counsel was merely churning hours to run up the lodestar to justify their excessive fee request. A109.

G. The fairness hearing, settlement approval, and fee award.

Counsel represented Berlau at the fairness hearing on January 15, 2015. A326. The district court questioned the materiality of some of the disclosures noting that it would approve the settlement if convinced that "something" in the Supplemental Disclosures was material. A329-A330.

First, the court initially agreed with Berlau that a reasonable person would expect that the negotiations of the Rosenstein nomination would be confidential. A327-A328. Class counsel argued that Supplemental Disclosure was important because JANA Partners was an activist hedge fund engaged "in meetings with Walgreen management

leading up to the decision to enter into the step two transaction" and shareholders want to know the influences on the Board when the Board was "making a decision to enter into a transformative transaction for the company." A342-A343. What class counsel did not explain, however, was that the Board had already voted on the call option when Walgreens began preliminary discussions with JANA and entered into the confidentiality agreement. In late 2013 and early 2014, the Board began exploring the possibility of exercising the call option early. A422. In May 2014, the Board met regarding the call option, arranged meetings with representatives of Walgreens and Boots Alliance, and in June 2014, the Board established a Transaction Committee of independent directors to evaluate transaction structures. A423-A424. The Board again met on July 9, 2014, July 21, 2014 and July 30, 2014 regarding the merger. A425-A427. On August 5, 2014, the Board met and voted to exercise the call option. A427-A428. The Supplemental Disclosures explain that Walgreens began the preliminary discussions with JANA and entered into a confidentiality agreement on August 5, 2014, A70. The Nomination and Support Agreement was later executed on September 5, 2014. A419.

The district court concluded that the Supplemental Disclosures regarding Rosenstein's Nomination and Support Agreement were material. A13.

Second, the court agreed that Berlau made a "good point" regarding the immateriality of the Miquelon lawsuit because disclosure was not required under the SEC regulations and allegations regarding a former disgruntled executive would not appear to matter to shareholders regarding the merger. A328, A331. Class counsel argued that the Miquelon lawsuit was material because shareholders would want to know "some of the events that were occurring within that company." A331. The district court concluded that it remained "somewhat skeptical of the importance of the Miquelon lawsuit." A13. The court concluded: "that there was turmoil in the company

and that a merger was in Walgreen's interest may not have come as a surprise to the shareholders; but as I say, I think it's not a frivolous point." *Id*.

Third, the district court questioned the materiality of the Supplemental Disclosures regarding the post-merger ownership percentages for the SP Investors and the KKR Investors. A332. Berlau had argued in his objection that Supplemental Disclosures regarding the ownership was immaterial because the ownership percentages could be easily computed based on information already in the Proxy. A98-A99. Class counsel argued that it was more than a "mathematical matter" because it was important for "shareholders to understand the precise amount of power." A334. Walgreens' counsel argued that they provided supplemental disclosure regarding the percentages but "[i]t's not precise, for reasons that I don't think we need to get into." A337. The court ultimately concluded that addition of the post-merger ownership for the SP Investors and KKR Investors was material. A13.

Fourth, the district court questioned the materiality of additional language regarding Pessina's recusal from the Board's vote on the Step 2 Acquisition. A338-A339. Walgreens' counsel argued that "it's useful for shareholders to know who actually made the decisions." A339. Again, the settling parties did not disclose to the court that in *two other places* in the Proxy, the Proxy detailed Pessina's interests in the transaction and that he would not vote on the merger. A391; A462-A463. The district court concluded that additional disclosure regarding Pessina's recusal from the Board's decision to exercise the call option was material. A13.

Fifth, the district court questioned the inclusion of the risk factors in the Supplemental Disclosures. A340. Walgreens' counsel argued that it "adds certain important risks to that list of risks that were actually considered by the board in making this decision." A341. The district court made no findings as to the addition of the risk factors. A13-A27.

Sixth, with respect to Supplemental Disclosures of Pessina's experience, the district court concluded that it was not material. A13-A14.

The district court approved the Settlement and awarded class counsel fees and expenses of $370,000. A14; A26; A1-A9. The Court issued no written opinion laying out its reasoning beyond what it said at the fairness hearing.

Berlau filed a timely notice of appeal from the court's order. A628-A629.

Summary of the Argument

As noted above, nearly every merger above a certain size results in a lawsuit, and the vast majority of these lawsuits settle for supplemental disclosures and attorneys' fees. Such litigation correlates with the size of the underlying deal, not the inadequacy of the merger price. Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter* , 75 OHIO ST. L. J. 829 (2015) (contrasting the "pathologies" of merger class litigation with more meritorious appraisal claims). The sudden increase over the last ten years of such shareholder litigation is not because the well-compensated law firms putting together several-hundred-page proxy statements have become less competent over the years, but because plaintiffs' lawyers have flocked to the rent-seeking opportunity. As a Delaware court recently noted,

> It is beyond doubt in my view that the dynamics described above, in particular the Court's willingness in the past to approve disclosure settlements of marginal value and to routinely grant broad releases to defendants and six-figure fees to plaintiffs' counsel in the process, have caused deal litigation to explode in the United States beyond the realm of reason. In just the past decade, the percentage of transactions of $100 million or more that have triggered stockholder litigation in this country has more than doubled, from 39.3% in 2005 to a peak of 94.9% in 2014.

In re Trulia, Inc. Stockholder Litig., 2016 Del. Ch. LEXIS 8, *23-*24 (Del. Ch. Jan. 22, 2016).

Scholars often describe this deal litigation as "strike suits—meritless claims filed for their nuisance value—by entrepreneurial plaintiffs' attorneys." Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY L.J. 55 (2014). Rather than risk derailment of the merger transaction, "the vast majority of these strike suits settle, settle quickly, and settle on a disclosure-only basis." Koji F. Fukumura and Peter M. Adams, *Update on Corporate Governance Litigation: M&A and Proxy Strike Suits*, *available at* http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2013_corporate_counselcleseminar/7_2_update_on_corporate_governance.authcheckdam.pdf ; *see also* Andrew J. Pincus, *The Trial Lawyer's New Merger Tax,* U.S. Chamber Inst. For Legal Reform (Oct. 2012), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/M_and_A.pdf (observing that "vast majority" of strike suits settle within three months).

Not only do these strike suits provide no monetary relief to class members, but scholars argue that the settlements actually harm corporate shareholders by driving up the cost of the merger transactions, extorting a "transaction tax" in the form of attorneys' fees. *See* Jeffries, 11 BERKELEY L. J. at 108; Joel C. Haims & James J. Beha, II, *Recent Decisions Show Courts Closely Scrutinizing Fee Awards in M&A Litigation Settlements* 1 (2013), *available at* http://media.mofo.com/files/Uploads/Images/130418-In-the-courts.pdf (observing that the majority of such shareholder class and derivative suits that quickly follow almost every significant merger announcement settle quickly, and the payment of attorneys' fees "effectively becomes a tax on M&A transactions") (internal citation omitted). *See also Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998) (noting problem of shareholder derivative suit settlements that "divert the firm's resources to

the plaintiffs' lawyers without providing a corresponding benefit"), *aff'd by an equally divided Court, California Public Employees' Retirement System v. Felzen*, 525 U.S. 315 (1999).

This Court has repeatedly criticized misuse of the class-action or shareholder-derivative device for "selfish" purposes, especially in the shareholder context, going so far as to hold that district courts should throw out such suits rather than allow attorneys to impose social costs and hurt the class members they putatively represent. *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 320 (7th Cir. 2012); *see also In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (self-dealing suits imposing only social costs should not be certified under Rule 23(a)(4)).

This is just such a suit, and the district court's conclusion otherwise does not stand up to any scrutiny. After duplicative language is removed, the Supplemental Disclosures totaled just 746 words. A62-A77. All of these Supplemental Disclosures either reiterate material that had already been disclosed in the Proxy, or disclosed trivia immaterial to the merger. The district court's ruling at the fairness hearing that the Supplemental Disclosures were "material" is legally and factually erroneous. Had the plaintiffs attempted to prosecute a failure-to-disclose case based on "omissions" of the words in the Supplemental Disclosures, it would normally flunk Rule 12(b)(6). But plaintiffs were counting on the economics of the strike suit: for a £3.133 billion deal like this one, a $370,000 payment to class counsel is a drop in the bucket, particularly to ensure that the deal is not derailed, and likely cheaper than litigating the merits to success. But this Court should not condone the use of the class-action system as a device for such rent-seeking, and Rule 23(a)(4) forbids it, especially in the shareholder context where the class members themselves ultimately pay the expense of the merger tax.

This Court should extend its rulings in *Crowley* and *Aqua Dots* and join Delaware's *Trulia* decision in condemning the merger strike suit in the federal system. The settlement approval and class certification should be reversed for failure to satisfy

Rule 23(a)(4) and Rule 23(e); in the alternative, settlement fairness requires that the fees be proportionate to the negligible value of the supplemental disclosure, rather than a source of profit for class counsel.

Standard of Review

Approval of class settlements is reviewed for abuse of discretion. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 652 (7th Cir. 2006). "Abuse of discretion occurs when the district court commits a serious error of judgment, such as the failure to consider an essential factor." *United States v. Lowe*, 632 F.3d 996, 997 (7th Cir. 2011). And "[a] district court by definition abuses its discretion when it makes an error of law." *Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003) (internal citation omitted).

Questions regarding the legal principles undergirding review of class settlement approval motions are questions of law about the proper interpretation of Rule 23(e) and Rule 23(a)(4). They are reviewed *de novo. See Gwin v. Am. River Transp. Co.*, 482 F.3d 969, 974 (7th Cir. 2007).

Mixed questions of law and fact are reviewed *de novo. Mungo v. Taylor*, 355 F.3d 969, 974 (7th Cir. 2004); *see also Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1200 (2d Cir. 1978) (review of district court's materiality holding relating to a Rule 14a-9(a) disclosure violation is not under "clearly erroneous" standard because application of legal standard to facts is not "finding of fact").

Argument

I. *Aqua Dots* and *Crowley* require reversal because this class action settlement leaves shareholder class members worse off: shareholders are paying for class counsel's attorneys' fees in exchange for immaterial supplemental disclosures.

The Seventh Circuit has consistently warned against class action settlements designed to make class counsel the primary beneficiary. *E.g., Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011) (counsel must show the district court that "they would prosecute the case in the interest of the class … rather than just in their interests as lawyers who if successful will obtain a share of any judgment or settlement as compensation for their efforts.").

In *In re Aqua Dots Products Liability Litigation*, the Seventh Circuit held that such self-serving litigation could not be certified as a class action. 654 F.3d at 752. There, plaintiffs sought relief that was already available to the consumer class members. *Id*. Judge Easterbrook explained that the class representatives could not fairly and adequately protect the interests of the class under Rule 23(a)(4) when plaintiffs were proposing that "high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that is already on offer." *Id*.; *see also Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (settlement "untenable" where it is "proof that the class device had been used to obtain leverage for one person's benefit.").

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

investors may be poor champions of corporate interests and thus injure fellow shareholders." *Id*. at 317, 318; *cf. Felzen v. Andreas*, 134 F.3d at 876 (citing empirical studies showing that shareholder actions "do little to promote sound management and often hurt the firm by diverting the managers' time from running the business while diverting the firm's resources to the plaintiffs' lawyers without providing a corresponding benefit"). Dismissal was appropriate in *Crowley* because it was "impossible to see how the investors could gain from it." 687 F.3d at 319; *cf. Crawford v. Equifax Payment Servs., Inc*., 201 F.3d 877, 882 (7th Cir. 2000) (rejecting settlement providing only injunctive relief and *cy pres*).

As in *Aqua Dots* and *Crowley*, plaintiffs here cannot satisfy the adequacy requirement of Rule 23(a)(4); the Settlement further fails Rule 23(e) fairness because the only purpose of this strike suit is to line class counsel's pockets and the shareholder class members in this case are worse off than if the case had never been filed. *Cf. also* 28 U.S.C. § 1713 (proscribing settlements where class members incur a net monetary loss unless there is a written finding that the nonmonetary benefits to class members "substantially outweigh" the monetary loss). Because plaintiffs brought this litigation, corporate assets have been depleted to pay defense attorneys and, pursuant to the Settlement, the plaintiffs' attorneys' fees and expenses totaling $370,000. To justify bringing this action and paying class counsel for this disclosure-only Settlement, the Supplemental Disclosures required by the Settlement must actually be material. And the disclosures must be more valuable than the social cost of class counsel's and defense counsel's legal bills. *See Zucker v. Westinghouse Elec. Corp*., 265 F.3d 171, 177 (3d Cir. 2001).

Numerous courts have rejected disclosure-only class action settlements for adequacy and fairness reasons when the supplemental disclosures were not material.

Delaware Chancery courts—faced with a significant number of merger strike suits—have become increasingly impatient with settlements providing immaterial disclosures:

> But far too often such litigation serves no useful purpose for stockholders. Instead, it serves only to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints on behalf of stockholders on the heels of the public announcement of a deal and settling quickly on terms that yield no monetary compensation to the stockholders they represent.

In re Trulia, Inc. Stockholder Litig., 2016 Del. Ch. LEXIS 8, *15 (Del. Ch. Jan. 22, 2016). In *Trulia*, the court rejected the settlement as unfair, holding that because the supplemental disclosures were not material, they did not "provide adequate consideration to warrant the 'give' of providing a release of claims to defendants and their affiliates, in the form submitted or otherwise." *Id.* at *60. Similarly, in *In re Aruba Networks, Inc. Shareholder Litigation*, the Delaware Chancery Court found that the class representatives were inadequate and dismissed the case where the disclosure-only settlement appeared only to be a "harvesting-of-a-fee opportunity." A225 (*In re Aruba Networks, Inc. S'Holder Litigation*, C.A. No. 10765-VCL, at 73 (Del. Ch. Oct. 9, 2015) (Transcript)); *see also* Fisch at 568 (disclosure-only settlements with illusory benefits "raise questions about the adequacy with which the class has been represented, suggesting that the court should deny class certification") (citing Transcript of Teleconference at 10–11, *In re Transatlantic Holdings Inc. S'holders Litig.*, C.A. No. 6574-CS, 2013 Del. Ch. LEXIS 90 (Del. Ch. Mar. 8, 2013)).

New York courts have reached similar results. In *Gordon v. Verizon Communications, Inc.*, the court rejected a disclosure-only class action settlement because, "the Supplemental Disclosures that are included in the Settlement [] are so trivial or obviously redundant as to add nothing of material value from a disclosure

standpoint." 2014 N.Y. Misc. LEXIS 5642, at *7 (NY Sup. Ct. Dec. 19, 2014). "Merely providing additional information—unless the additional information offers a contrary perspective on what has previously been disclosed—does not constitute material disclosure." *Id*. at *6. The court concluded that if it approved the settlement based on the trivial disclosures, "it would be an enabler of an unwarranted divestiture of shareholder rights by virtue of plaintiff's release, as well as a misuse of corporate assets were plaintiff's legal fees to be awarded." *Id*. at *21 (citing *Creative Montessori Learning Centers*, 662 F.3d at 918); *see also* A114 (*In re Allied Healthcare S'holder Litig*., 652188/2011 (N.Y. Sup. Ct. Oct. 23, 2015) (rejecting disclosure-only settlement because supplemental disclosures were insignificant)); *City Trading Fund v. Nye*, 2015 N.Y. Misc. LEXIS 11, *63-*64 (N.Y. Sup. Ct. Jan. 7, 2015) (rejecting settlement because although "mergers taxes may simply be a reality, an inevitable cost of doing business, … this court sees no reason to countenance frivolous litigation").

This Court should not allow such frivolous corporate litigation to find a forum-shopping refuge in the courts of this Circuit just because federal district courts are less familiar with it.

The settlement here fails Rule 23(a)(4) adequacy and Rule 23(e) fairness requirements because the Supplemental Disclosures were not material. The district court did not reach this question because it found some of the Supplemental Disclosures material, but this finding was reversible error by itself.

A. The district court erred in approving the Settlement based on four of the Supplemental Disclosures because those disclosures were immaterial as a matter of law.

In the context of Rule 14a-9, which governs disclosure in proxy statements, the Supreme Court held that an "omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in [making her decision]."

TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). "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*. Describing materiality, this Court explained: "[r]easonable 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." *Wieglos v. Commonwealth Edison Co.*, 892 F.2d 509, 517 (7th Cir. 1989); *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").

"Omitted facts are not material simply because they might be helpful." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000). The question is whether defendant's "failure to make any of the additional disclosures [would] have resulted in this Court issuing a preliminary injunction to prevent or delay the merger"? *Allied Healthcare, supra* (A114).

Further, the supplemental disclosure is only material if it "contradicts, not reinforces, management's recommendation." A141 (*In re Medicis Pharma. Corp. S'holders Litig.*, C.A. No. 7857-CS, at 22 (Del. Ch. Feb. 26, 2014) (Transcript));[9] *see also Gordon*, 2014 N.Y. Misc. LEXIS 5642, at *6 (holding that to be material, the supplemental disclosure must "offer[] a contrary perspective on what has previously been disclosed"). This is because the defendant corporation already has the incentive of producing positive

[9] "[B]ecause of the similarity of the materiality standards, Delaware cases involving materiality for purposes of the duty of disclosure are helpful for considering materiality under § 14(a) and vice versa." *Himmel v. Bucyrus Int'l, Inc.*, 2014 U.S. Dist. LEXIS 50481, *40 (E.D. Wis. Apr. 11, 2014).

information in order to win shareholder approval of the merger. *See* Fisch, *supra*, at 575; *see also* Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 683 (1984) (explaining that, without disclosure, "[i]nvestors would assume the worst, because, they would reason that if the firm had anything good to say for itself it would do so"). Instead, the disclosure must contain "new *negative* information" that would have a "negative impact on shareholder voting in favor of the merger." *See* Fisch, *supra*, at 575-76.

The district court approved the settlement because it found that three or four of the Supplemental Disclosures were material: (1) the post-merger ownership for the SP Investors and KKR Investors; (2) Pessina's recusal from the Board's vote on the merger; (3) the negotiation of the Nomination and Support Agreement with JANA; and (4) the Miquelon defamation lawsuit.[10] A13. On *de novo* review of the application of law to the uncontested facts of what is in the Supplemental Disclosures and already in the Proxy, the district court erred (and even clearly erred) because none of these new disclosures are material.

1. Disclosure of the SP Investors' and KKR Investors' post-merger ownership was immaterial because shareholders could calculate the ownership from information already in the Proxy.

The district court's finding that the disclosure of the SP Investor's and KKR Investors' post-merger ownership of WBA shares was material is wrong for two independent reasons. A13.

[10] It is unclear whether the district court found that disclosure of the Miquelon defamation lawsuit was material. Regarding the Miquelon lawsuit, the district court concluded: "that there was turmoil in the company and that a merger was in Walgreen's interest may not have come as a surprise to the shareholders; but as I say, I think it's not a frivolous point." A13. Either way, disclosure of the Miquelon lawsuit is immaterial as a matter of law and cannot support approval of the Settlement. *See* Section I.B.4 below.

First, the post-merger ownership is immaterial because shareholders could have calculated the same percentages included in the Supplemental Disclosures with the information contained in the Proxy. A98-A99. Courts have consistently held that omissions are not material if the shareholders could have made their own calculations from the information available. For example, in *Werner v. Werner*, the Third Circuit affirmed the district court's dismissal of a disclosure claim that alleged the Proxy failed to specify the amount of money that would inure to shareholders as a result of the deletion of the right of first refusal. 267 F.3d 288, 299 (3d Cir. 2001). The Third Circuit agreed that the omission was immaterial as a matter of law because "the shareholders had access to all of the information necessary to calculate the exact amount." *Id.*; *see also Ash v. LFE Corp.*, 525 F.2d 215, 219 (3d Cir. 1975) (finding omission of exact difference between old and new pension levels in proxy was not material when proxy supplied shareholders with information necessary to perform the calculation themselves); *Kahn v. Wien*, 842 F. Supp. 667, 675 (E.D.N.Y. 1994) (finding no material omission when attached financial statements contained information "from which the reasonable investor could perform the simple mathematical calculations necessary to determine the present and future values of the proposed transaction to both parties"); *Sec. & Exch. Com. v. Texas Int'l Co.*, 498 F. Supp. 1231, 1249 (N.D. Ill. 1980) (finding omission immaterial because superfluous mathematical computation was "little more than a drafting comment"). In this case, the investors' post-merger ownership is a straightforward calculation: the investors' number of WBA shares divided by the total outstanding WBA shares. *See* Statement of the Case Section C.2 above. Because the shareholders had access in the Proxy to the information needed to calculate the omitted information, the omission was not material as a matter of law.

Second, disclosure of the investors' exact post-merger ownership was immaterial because the Shareholder Agreement between Walgreens and the SP Investors and KKR

Investors directed these investors to vote with the WBA Board. A410. Class counsel argued to the district court that disclosure of the post-merger ownership was material because it was "critically important for shareholders to understand the precise amount of power" the investors would have when voting their shares. A334. Putting aside the fact that the ownership estimates in the Supplemental Disclosures could have been easily computed by the shareholders, understanding the "precise power" of these investors was immaterial because the Proxy already told shareholders that the SP Investors and KKR Investors were contractually required to vote all of their shares in accordance with the recommendation of the WBA Board of Directors on matters submitted to a shareholder vote. A410.

In short, disclosure of the investors' post-merger ownership was not material because it didn't change the "total mix" of information available but merely provided a superfluous mathematical computation. A reasonable investor can multiply and divide. And even if she couldn't, the SP Investors' and KKR Investors' post-merger ownership was irrelevant because of the requirement that they vote with the WBA Board. The settlement cannot be approved based on disclosure of the SP Investors' and KKR Investors' post-merger ownership because shareholders should not have to pay attorneys' fees for a simple junior-high-school computation.

2. Supplemental disclosure of Pessina's recusal was redundant because it was already disclosed in two other places in the Proxy.

The district court erred in finding that the duplicative disclosure of Pessina's recusal from the Board's decision to exercise the call option was material. A13.

The Supplemental Disclosures added the following language (bolded and underlined) to the Proxy:

> At the conclusion of the meeting, the Walgreens Board (excluding Messrs. Pessina and Murphy**, who, as a result of their interest in**

> **the proposed transaction, recused themselves from the Board's decision to exercise the Call Option**) unanimously approved the amendment to the Purchase and Option Agreement and the exercise of the Call Option and recommended that the Walgreens shareholders approve the Share Issuance and Reorganization.

A70-A71. Walgreens' counsel argued that the recusal was material because "it's useful for shareholders to know who actually made the decisions." A339. But the above paragraph without the supplemental language already disclosed that Pessina and Murphy were "exclude[ed]" from the vote on the call option and, therefore, were not involved in making the decision. A70-A71.

More importantly, the fact that Pessina and Murphy did not vote based on their interest in the transaction was also disclosed in *two other* places in the Proxy. The Proxy detailed the interests of CEO Stefano Pessina and Board member Dominic Murphy who were affiliated with the SP Investors and KKR Investors, respectively. A391; A462-A463. In its detailed discussion of Mr. Pessina's and Mr. Murphy's interests, the Proxy clarified—two separate times—that "[n]either Mr. Pessina nor Mr. Murphy voted with respect to any Board determinations and recommendations with respect to the Step 2 Acquisition, including the determination of the Board to exercise the Call Option." A391; A463.

Supplemental disclosure of Pessina's and Murphy's recusal is redundant and therefore immaterial. In *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, the Second Circuit held that the district court erred in finding that the alleged omission was material because difference between the supplemental disclosure and the proxy was "semantic." 584 F.2d at 1199-1200 (finding no violation for difference between proxy's "detailed study" and supplemental disclosure's "thorough investigation"); *cf. Kas v. Fin. Gen. Bankshares, Inc.*, 796 F.2d 508, 517 (D.C. Cir. 1986) (affirming dismissal of proxy disclosure claim because "defendants need not label or editorialize on the disclosed

facts, at least where the potential conflict would be obvious to any reasonable shareholder"). "There is no requirement that a material fact be expressed in certain words or in a certain form of language." *Kennecott Copper*, 584 F.2d at 1200 (quoting *Richland v. Crandall*, 262 F. Supp. 538, 553-54 (S.D.N.Y. 1967)). "[N]it-picking should not become the name of the game." *Id*. The Supplemental Disclosure of Pessina's and Murphy's recusal does not significantly alter the mix of information because it redundantly adds a *third* place to the Proxy discussing Pessina's and Murphy's exclusion from the vote based on their interest in the transaction. Accordingly, Supplemental Disclosure of Pessina's and Murphy's recusal is immaterial as a matter of law.

Furthermore, even if Pessina's and Murphy's recusal had not already been disclosed in the Proxy, disclosure of the recusal is immaterial because it would have no negative impact on a shareholder's vote. *Medicis Pharma Corp., supra* (A141) (supplemental disclosure only material if it "contradicts, not reinforces, management's recommendation"); *see also Gordon*, 2014 N.Y. Misc. LEXIS 5642, at *6 (same). Pessina's and Murphy's recusal shows that the Board's vote was free of a conflict of interest and merely reinforces management's recommendation; it would have no negative impact on a shareholder's vote in favor of the merger.

3. Disclosure that Walgreens entered into a confidentiality agreement with JANA when negotiating the Nomination and Support Agreement is an insignificant and obvious consequence of such negotiations.

The district court erred in finding that disclosure of Walgreens' negotiations with JANA Partners LLC of Rosenstein's Nomination and Support Agreement was material. A13.

The Proxy already included the existence and terms of the Nomination and Support Agreement. A376, A419. The only thing the Supplemental Disclosures added regarding the Nomination and Support Agreement is the trivial fact that Walgreens and

JANA had entered into a confidentiality agreement during preliminary negotiations. A70; *see* Statement of the Case Section C.1 above. Class counsel argued that this additional information was important because it revealed that "JANA was engaging in meetings with Walgreen management leading up to the decision to enter into the step two transaction" and investors should know the "outside influences on the board of directors when that board of directors is making a decision to enter into a transformative transaction for the company." A343.

But the Board had already voted on the call option when Walgreens began preliminary discussions with JANA and entered into the confidentiality agreement. In late 2013 and early 2014, the Board began exploring the possibility of exercising the call option early. A422. In May 2014, the Board met regarding the call option, arranged meetings with representatives of Walgreens and Boots Alliance, and in June 2014, the Board established a Transaction Committee of independent directors to evaluate transaction structures. A423-A424. The Board again met on July 9, July 21, and July 30, 2014 regarding the merger. A425-A427. On August 5, 2014, the Board met and voted to exercise the call option. A427-A428. The Supplemental Disclosures explain that Walgreens began the preliminary discussions with JANA and entered into a confidentiality agreement on August 5, 2014. A70. The Nomination and Support Agreement was later executed on September 5, 2014. A419. In the absence of a time machine, the Proxy-disclosed Nomination and Support Agreement (much less the collateral confidentiality agreement about that Nomination and Support Agreement) did not cause the earlier decision to exercise the option.

Further, disclosing that the preliminary discussions with JANA were confidential—a natural consequence of such negotiations as the district court initially found (A328)—is insignificant and reveals nothing regarding the actual terms of the Nomination and Support Agreement which were already set forth in the Proxy. A419.

Companies do not need to describe each step of their negotiations. "[I]f companies were forced to disclose all preliminary negotiations, proxy statements would become longer and more obtuse than they already are." *Beaumont v. Am. Can Co*., 797 F.2d 79, 85 (2d Cir. 1986). In *Beaumont*, the Second Circuit affirmed dismissal of the complaint because only the "actual terms of the proposed merger, not the preliminary terms subsequently amended" must be disclosed. *Id*. "To read the requirements of the Proxy Rules to require a round by round synopsis of the negotiations goes too far. The Proxy Rules are intended to require disclosure of facts that a reasonable investor would consider significant." *Kaufman v. Cooper Comps., Inc*., 719 F. Supp. 174, 183 (S.D.N.Y. 1989) (defendant need not describe each step of negotiations regarding position of preferred shareholders).

Even assuming *arguendo* that the Nomination and Support Agreement with a large shareholder after the decision of the board to exercise the call option is by itself material, the fact that JANA and Walgreens entered into confidential preliminary discussions is an obvious, expected consequence of negotiating that agreement and doesn't "significantly alter" the information contained in the Proxy. The Proxy set forth the terms of the Nomination and Support Agreement and a shareholder would not change her vote simply because such Agreement was negotiated in confidence. Plaintiffs do not identify, and we could not find, any precedent to the contrary.

4. The Miquelon defamation lawsuit was not material because SEC proxy rules did not require disclosure and the defamation lawsuit had nothing to do with the merger transaction.

The Supplemental Disclosures added a paragraph regarding a defamation lawsuit filed by the former CFO Wade Miquelon. A71. Regarding the Miquelon lawsuit, the court concluded: "that there was turmoil in the company and that a merger was in Walgreen's interest may not have come as a surprise to the shareholders; but as I say, I

think it's not a frivolous point." A13. To the extent this is a finding that the disclosure was material, it is in error for several independent reasons.

First, the Miquelon lawsuit is not material because it would not need to be disclosed under the SEC's rules regarding disclosure of legal proceedings in proxy materials. *Gen. Elec. Co. v. Cathcart*, 980 F.2d 927, 937 (3d Cir. 1992) (quoting *GAF Corp. v. Heyman*, 724 F.2d 727, 739 (2d Cir. 1983)). 17 C.F.R. § 229.103 requires disclosure of material pending litigation, and specifically excludes a "proceeding that involves primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis." 17 C.F.R. § 229.103, Instruction 2; *see generally Gen. Elec. Co.*, 980 F.2d at 936 (discussing "required scope of disclosure in proxy materials" at length). Here, the Miquelon lawsuit seeks an injunction preventing Walgreens from disparaging or defaming Miquelon and damages that exceed $50,000. *See* Dkt. 1-1 at 53. Miquelon claims to have lost lucrative, high-level executive positions and that his current and future income is damaged. *See id*. at 51-52. Although his total damages are not specified, Miquelon's alleged personal damages could not possibly approach the $1.2 billion materiality threshold. A472 (current assets of Walgreens as of Aug. 31, 2014 total $12,242,000,000). A suit alleging failure to disclose the Miquelon lawsuit would flunk Rule 12(b)(6) as a matter of law. *E.g., City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1266 (10th Cir. 2001); *see also Prettner v. Aston*, 339 F. Supp. 273, 290 (D. Del. 1972) (finding that materiality was not "close case" in light of current assets of $56 million and contingent liability less than $1 million).

Second, the Miquelon lawsuit supplemental disclosure is not material because it tells shareholders nothing that affects their evaluation of the merger. Class counsel argued that the Miquelon lawsuit was material because shareholders would want to know "some of the events that were occurring within that company." A331. Certainly,

we concede that a hypothetical suit by an ex-CFO could possibly be material without meeting the SEC's 10% threshold. The obvious example would be a lawsuit alleging impropriety relating to the merger. Outside of that, perhaps a former executive is a whistleblower and her suit would expose criminal wrongdoing by the corporation, Theranos- or Madoff-scale fraud, or some other earthshaking scandal. But even if one concedes such exceptions, *nothing in the Supplemental Disclosures* warns shareholders of that scenario! Miquelon "alleges, among other things, that, shortly after Mr. Miquelon's termination, certain Walgreens executives met with investors and made disparaging and defamatory comments about Mr. Miquelon." A71. Heaven forfend! The Supplemental Disclosures regarding Miquelon's lawsuit only apprised shareholders of a lawsuit by a disgruntled former officer. If there was any reason to believe Miquelon's lawsuit was a ticking time-bomb material to Walgreens' operations (and nothing in the record—or in the post-merger Miquelon litigation results—suggests that it is), the Supplemental Disclosures fail to disclose it and are thus no better than the original Proxy.

Similarly, the district court erred when it concluded that it remained "somewhat skeptical of the importance of the Miquelon lawsuit, although counsel has convinced me that it isn't a frivolous point and may well have alerted investors to issues they would have otherwise ignored about turmoil in the company." A13. As shown in the proceeding paragraph, the description of the lawsuit contained in the Supplemental Disclosures offered no description of "turmoil" in the company. A71. If there is material turmoil beyond a fired executive using litigation to leverage a non-material dispute over compensation, the Supplemental Disclosures do nothing to unearth it.

A shareholder who reviewed the description of the Miquelon lawsuit in the Supplemental Disclosures would quickly dismiss the lawsuit as immaterial because it has no bearing on the merger. That the company allegedly made disparaging remarks

about the former CFO would be irrelevant to a shareholder's consideration of the merger because it doesn't concern the "operation of the company as a whole." *Gen. Elec.*, 980 F.2d at 937 (finding litigation immaterial and distinguishing cases where litigation was material in merger proxy statements because litigation concerned company's overall operation); *cf. GAF Corp.*, 724 F.2d at 740 ("Whether [the litigation] would be considered important in deciding how to vote would then depend on the issues involved in the proxy contest itself.").

Because SEC rules do not require disclosure of the Miquelon lawsuit and because disclosure of a former-disgruntled-employee lawsuit has no relation to the soundness of the merger transaction, supplemental disclosure regarding the Miquelon lawsuit would have no impact on a reasonable shareholder's vote and is therefore immaterial as a matter of law.

Third, a look at the facts of the lawsuit show that the disclosure *promotes* the board's position about the merger. Miquelon's suit alleges that "Walgreen's chief executive and a company board member defamed him in meetings with large shareholders that became the basis of a page-one article in The Wall Street Journal" by accusing him of running a finance department that was "weak" and had "lax controls." Dkt. 65-2 (*Wall Street Journal* article about Miquelon lawsuit). If Miquelon's lawsuit is correct, then that means that Walgreens had *better* historical internal controls than Walgreens disclosed in a front-page *Wall Street Journal* article, and that would be a *positive* message to shareholders in support of the board's position, and thus not material in its omission. *Medicis Pharma Corp., supra* (A141); *see also Gordon*, 2014 N.Y. Misc. LEXIS 5642, at *6.

* * *

In short, the district court erred in approving the Settlement based on these Supplemental Disclosures because they were superfluous or insignificant and therefore

immaterial as a matter of law. Approval of the Settlement should be reversed because shareholders are worse off for paying for class counsel's fees in exchange for the immaterial disclosures.

B. Nor can plaintiffs argue for affirmance on alternative grounds of materiality of the other Supplemental Disclosures, because the district court correctly found them to be immaterial.

The district court based its approval of the Settlement on its finding that four of the six categories of Supplemental Disclosures were material. A13. Appellees may argue that the Settlement could be affirmed based on the two other Supplemental Disclosures, but those disclosures are also immaterial, because they are simply: (1) risk factors that repeat *verbatim* information already in the Proxy; and (2) summary of Pessina's experience that was previously disclosed.

1. The Supplemental Disclosures of risk factors are immaterial because they repeat *verbatim* information already contained in the Proxy.

The Supplemental Disclosures add four bullets to a list of risk factors considered by the Board in approving the merger. A71. Each of the four bullets repeats *verbatim* language contained in a previous section in the Proxy titled "Risk Factors." *See* Statement of the Case Section C.3 above (*comparing* A71 *with* A401, A403). Walgreens' counsel argued that the disclosure "adds certain important risks to that list of risks that were actually considered by the board in making this decision." A341. But the Proxy specifically noted that the Board had considered the risk factors contained in the Risk Factors section, A433 which would have included those risk factors in the Supplemental Disclosures.

The redundant language is immaterial. *JMB Realty Corp. v. Associated Madison Cos.*, 1980 U.S. Dist. LEXIS 14477, at *19 (N.D. Ill. Oct. 8, 1980) (finding omitted language as "superfluous" and describing plaintiffs' allegations as "'nit-picking' which is not sufficient to state a claim under Section 14(a)"); *see also Texas Int'l Co.*, 498 F. Supp. at

1249 (finding omission immaterial because superfluous computation was "little more than a drafting comment"). It goes without saying that repeating identical language does not "significantly alter" the total mix of information. Accordingly, because the Supplemental Disclosures regarding risk factors duplicate language already in the Proxy, they are not material as a matter of law.

Further, the addition of risk factors considered by the Board are not material for the additional reason that it would not have a negative impact on a shareholder's vote. *See Medicis Pharma Corp., supra* (A141); *see also Gordon*, 2014 N.Y. Misc. LEXIS 5642, at *6. Knowing that the Board considered additional risk factors, a shareholder would conclude that the Board was even more thorough in its analysis and thus the disclosure would not negatively impact the shareholder's vote in favor of the merger.

2. Summary of Pessina's experience is immaterial.

The Supplemental Disclosures included two sentences supplementing the December 10, 2014 8-K regarding reasons Mr. Pessina was selected as acting CEO including "Mr. Pessina's considerable knowledge of the industries in which both Walgreens and Alliance Boots operate, his familiarity with both Walgreens' and Alliance Boots' respective businesses and leadership teams and his international experience and background in managing global businesses." A73. The district court correctly found that the supplemental disclosure regarding Pessina's experience was immaterial. A13-A14.

The December 10, 2014 8-K previously disclosed Mr. Pessina's experience and expertise including that Mr. Pessina had "extensive leadership experience and knowledge of Walgreens and Boots Alliance" and listing the previous positions Mr. Pessina held and the other boards on which he serves. A620. The previously disclosed facts relating to Mr. Pessina's experience and expertise were sufficient. It was unnecessary to include the additional language summarizing his experience or the

Board's motivation for its decision. *Cf. Mendell v. Greenberg*, 927 F.2d 667, 674 (2d Cir. 1990) ("A proxy statement need not disclose the underlying motivations of a director or major shareholder so long as all the objective material facts relating to the transaction are disclosed."). These additions are insignificant and would have no impact on a shareholder's vote as a matter of law. Moreover, the additional disclosure about Pessina's experience would, if anything, make a shareholder more likely to support the merger. *See Medicis Pharma Corp., supra* (A141); *see also Gordon*, 2014 N.Y. Misc. LEXIS 5642, at *6.

C. The 97% vote in favor of the merger provides additional evidence that the Supplemental Disclosures were immaterial.

The immateriality of the Supplemental Disclosures is demonstrated as a matter of law by the 97% shareholders' vote in favor of the merger transaction. The Supreme Court held that an "omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in [making her decision]." *TSC Indus.*, 426 U.S. at 449. "Because the purpose of merger disclosure is to inform shareholder voting, it is reasonable to view supplemental disclosure as meaningful if it changes the way reasonable shareholders vote." *See* Fisch, *supra*, at 575. Thus, "for supplemental disclosures to be meaningful, they must have a negative impact on shareholder voting in favor of the merger" so that "disclosure-only settlements should reduce shareholder votes in favor of the deal." *Id.*

The Walgreens shareholder's voting on the merger did not experience such a negative impact. After the Supplemental Disclosures were provided, 97% of the shareholders voted in favor of the merger transaction and only 2.2% against. A625; *cf. In re Transatlantic Holdings Inc. S'holders Litig.*, 2013 Del. Ch. LEXIS 90, at *3-*9 (refusing to approve settlement where disclosures had no utility as confirmed by 99.85% vote in favor of transaction). No opponent to the merger arose because of the Supplemental

Disclosures; no press coverage breathlessly headlined the "new" information in the supplemental disclosure. Shareholders shrugged it off as an exemplar of the merger tax. The overwhelming vote in favor of the merger confirms that the Supplemental Disclosures had no impact on the merger vote.

* * *

In short, none of the Supplemental Disclosures were material as a matter of law and therefore, the Settlement provided no benefit to shareholder class members. The only beneficiaries of the Settlement are the attorneys, and settlement approval must be reversed.

II. The district court erred in awarding class counsel's fees award because the Settlement achieved no value for the shareholder class members.

This Court should reverse class certification pursuant to *Aqua Dots* and/or dismiss the action pursuant to *Crowley*. But even if the Court holds that Rule 23(a)(4) is met, the Settlement is unfair unless the fee award is materially decreased—perhaps to $1—because the Settlement has achieved nothing for the shareholders. The "fundamental focus" in awarding fees under Rule 23(h) "is on the result actually achieved for class members." Notes of Advisory Committee on 2003 Amendments to Rule 23(h) (emphasis added); *accord Redman v. RadioShack Corp*., 768 F.3d 622, 633 (7th Cir. 2014) ("[I]n determining the reasonableness of the attorneys' fee agreed to in a proposed settlement, the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation."); *In re HP Inkjet Printer Litig*., 716 F.3d 1173, 1182 (9th Cir. 2013) ("Plaintiffs attorneys' don't get paid simply for working; they get paid for obtaining results.").

This Circuit has described the "acute conflict of interest" between class counsel, whose pecuniary interest is in their fees, and class members, whose pecuniary interest is in the award to the class:

> We thus have "remarked the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judges approve a settlement involving a meager recovery for the class but generous compensation for the lawyers — the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014).

Pearson v. NBTY, 772 F.3d 778, 787 (2014). A class action settlement may not confer preferential treatment upon class counsel to the detriment of class members. *Id*. Like *Pearson*, this Settlement is a "selfish deal" that "disserves" the class. *Id*.

Here, the Settlement's only consideration provides meaningless Supplemental Disclosures. *See* Section I, above. Under Seventh Circuit law, attorneys' fees cannot be awarded for injunctive relief that has no value. *Cf. Pearson*, 772 F.3d at 785-86 (affirming that injunctive relief had zero value); *see also Grok Lines, Inc. v. Paschall Truck Lines, Inc.*, 2015 U.S. Dist. LEXIS 124812 (N.D. Ill. Sept. 18, 2015) ("The proposed settlement can only be characterized as disproportionately benefiting counsel at the expense of class members, who gain little to nothing, the proposed injunctive relief having little or no value.").

In *Pearson*, the court examined at length the proposed labeling changes, which it found were "substantively empty" and "purely cosmetic changes in wording." 772 F.3d at 785; *see also In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (finding that class counsel's fees could not be justified by the illusory relief of valueless labeling changes). As detailed above, the Supplemental Disclosures here involve cosmetic

rehashing of the Proxy that are substantively empty and thus cannot justify an award of attorneys' fees. *See In re Sauer-Danfoss*, 65 A.3d 1116, 1128 (Del. Ch. 2011) ("Remedying an immaterial omission through supplemental disclosure does not benefit stockholders and will not support a fee award."); *Zucker v. Westinghouse Elec. Corp.*, 265 F.3d 171, 178 n.6 (3d Cir. 2001) ("A question of whether the benefit is contrived is particularly likely to arise when the plaintiff asserts that the corporation received a substantial nonmonetary benefit in a settled case."); *cf. Kaplan v. Rand*, 192 F.3d 60 (2d Cir. 1999) (refusing to award fees in derivative action where relief was illusory because plaintiffs are "entitled to counsel fees upon a settlement of the action only when the non-monetary, therapeutic benefits obtained are substantial in nature").

In the disclosure-only context, courts have repudiated the "merger tax" of class counsel fees in settlements providing trivial disclosures. *In re Trulia, Inc. Stockholder Litig.*, 2016 Del. Ch. LEXIS 8, *26 (Del. Ch. Jan. 22, 2016) (observing that "non-material supplemental disclosures provide no benefit to stockholders and amount to little more than deal "rents" or "taxes"). Most recently, in *In re Allied Healthcare Shareholder Litigation*, the judge rejected the proposed settlement, observing that the "practice of compensating class counsel no matter how meaningless the result is, creates the impression with most objective observers that these actions are brought merely for the purpose of generating legal fees. … The willingness to rubber stamp class action settlements reflects poorly on the profession and on those courts that, from time to time, have approved these settlements." *Allied Healthcare*, *supra* (A117); *see also In re Riverbed Tech. Inc.*, Consol. C.A. No. 10484-VCG, 2015 WL 5458041, *7 (Del. Ch. Sept. 17, 2015) (decreasing fee request because additional disclosures provided minor tangible benefit); A316-318 (*Acevedo v. Aeroflex Holding Corp.*, C.A. No. 7930-VCL (Del. Ch. Jul. 8, 2015) (Transcript)).

The additional disclosures were not material and provide nothing for the class; the disclosures cannot justify the attorneys' fees shareholders are paying to obtain them. If the Settlement is to be approved, it can only be so if the attorneys are receiving substantially less than the $500/word they were paid (and the much greater cost they incurred to shareholders) for meaningless supplemental disclosures.

Conclusion

The Court should reverse approval of the Settlement and remand with instructions to dismiss the action or decertify the class, or, in the alternative, remand with instructions to reduce the Rule 23(h) award to $1.00. Any other result would make Walgreens shareholders worse off and make future shareholders worse off by encouraging similarly abusive strike suits.

Dated: March 11, 2016

Respectfully submitted,

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Statement Regarding Oral Argument

Berlau requests under Cir. R. 34(f) that the Court hear oral argument in his case because it presents significant issues concerning class action cases. These issues, regarding the requirements of Fed. R. Civ. P. 23(a)(4) and 23(e), are meritorious, and have not been authoritatively settled in the Seventh Circuit in this particular scenario. Exploration at oral argument would aid this Court's decisional process and benefit the judicial system.

Attorneys with the non-profit Competitive Enterprise Institute's Center for Class Action Fairness are representing Berlau *pro bono*. Dkt. 208-1. The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements. It has won tens of millions of dollars for class members and shareholders, and acclaim from the press and this Court. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780, 787 (7th Cir. 2014); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013. The Center for Class Action Fairness has never settled an appeal for a *quid pro quo* payment to the Center, and brings Berlau's objection and appeal in good faith to overturn an unfair settlement.

Berlau's counsel has previously argued and won landmark appellate rulings improving the fairness of class-action and derivative settlement procedure, including four times in this Circuit. A favorable resolution in this appeal would provide guidance to district courts in assessing future merger strike suits, and reduce the windfalls achieved by class counsel at the expense of class members.

Certificate of Compliance

with Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 30(d)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, Type Style Requirements, and Appendix Requirements:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 12,537 words, 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:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 and Microsoft Word for Mac 2011 in 12-point Palatino Linotype font.

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

Executed on March 11, 2016.

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on March 11, 2016, I caused to be electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, thereby effecting service on counsel of record who are registered for electronic filing under Cir. R. 25(a).

In addition, I hereby certify that on March 11, 2016, I caused a copy of the foregoing to be sent by first-class mail to the following address:

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/s/ Theodore H. Frank
Theodore H. Frank

Required Short Appendix

Statement of Compliance
with Circuit Rule 30(d)

All materials required by Cir. R. 30(a) & (b) are included in the Appendix of Objector-Appellant John Berlau.

/s/ Theodore H. Frank

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

IN RE WALGREEN CO. STOCKHOLDER LITIGATION	Civil Action No. 1:14-cv-09786

[PROPOSED] AMENDED ORDER AND FINAL JUDGMENT

A hearing having been held before this Court on Nov. 20, 2015 to determine whether the terms and conditions of the Stipulation of Settlement, dated July 2, 2015, 2015 (the "Stipulation"), and the terms and conditions of the settlement proposed in the Stipulation (the "Settlement") are fair, reasonable, and adequate for the settlement of all claims asserted in the above-captioned shareholder class action ("Action"); and whether the Settlement should be approved by this Court and the Amended Order and Final Judgment should be entered herein; and the Court having considered all matters submitted to it at the hearing and otherwise;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED this 20 day of Nov., 2015, AS FOLLOWS,

1. This Amended Order and Final Judgment ("Judgment") incorporates and makes part hereof the Stipulation filed with this Court on July 2, 2015, including the exhibits thereto. Unless otherwise defined in this Judgment, the capitalized terms in the Judgment have the same meaning as they have in the Stipulation.

2. This Court has jurisdiction over the subject matter of the Action and over all parties to the Action, including all members of the Settlement Class.

3. The dissemination of the Notice pursuant to and in the manner prescribed in the Order on Preliminary Approval of Class Action Settlement and Class Certification entered on July 14, 2015 (the "Preliminary Approval Order"), according to the proof of such dissemination

of the Notice to the Class filed with the Court by counsel for Walgreens Boots Alliance, Inc. ("WBA") on _____, 2015, is hereby determined to be appropriate and reasonable notice under the circumstances, satisfying Fed. R. Civ. P. 23 ("Rule 23"), due process, and applicable law.

4. The Court finds that the Class Action is a proper class action, for settlement purposes only, and hereby certifies the Action as a class action under Rules 23(a) and (b)(1) and/or (b)(2) on behalf of the following non-opt-out class (the "Settlement Class"):

> all record holders and beneficial holders of any shares of common stock of Walgreen Co. ("Walgreen") and any and all of their successors in interest, predecessors, representatives, trustees, executors, administrators, heirs, assigns or transferees, immediate and remote, and any Person or entity acting for or on behalf of, or claiming under, any of them, and each of them, at any time between and including August 5, 2014 and December 31, 2014 (the date of the closing of the Reorganization and Step 2 Acquisition) (the "Class Period"), excluding Defendants, members of the immediate families of the Individual Defendants, and any Person, firm, trust, corporation or other entity related to, controlled by, or affiliated with, any Defendant, and the legal representatives, heirs, successors, and assigns of any such excluded persons.

5. Specifically, the Court finds, for the sole purpose of settlement, that: (a) the Settlement Class is so numerous that joinder of all members is impracticable, thus Rule 23(a)(1) is satisfied; (b) there are questions of fact or law common to the Settlement Class, thus Rule 23(a)(2) is satisfied; (c) the claims of James Hays and Richard Potocki, the conditionally certified Class Representatives, are typical of the claims of the Settlement Class, thus Rule 23(a)(3) is satisfied; (d) Plaintiffs and their counsel have and will fairly and adequately protect the interests of the Settlement Class, thus Rule 23(a)(4) is satisfied; and (e) in accordance with Rule 23(b)(1), a class action provides a fair and efficient method for adjudication of the controversy because the prosecution of separate actions by individual members of the Settlement Class would create a risk of inconsistent adjudications that would establish incompatible

standards of conduct for Defendants, and/or, as a practical matter, the disposition of the Action will influence the disposition of any pending or future identical cases brought by other members of the Settlement Class; and/or (f) in accordance with Rule 23(b)(2), the Action alleges that Defendant acted or refused to act on grounds that apply generally to the Settlement Class, so that final injunctive relief is appropriate respecting the Settlement Class as a whole.

6. The Court hereby certifies, for settlement purposes only, Plaintiffs Hays and Potocki as Class Representatives, and their counsel, Pomerantz LLP (the "Pomerantz Firm"), Friedman Oster PLLC ("Friedman Oster"), and Levi & Korsinsky LLP ("Levi & Korsinsky") as Class Counsel.

7. The Court approves the Stipulation and the Settlement set forth therein as fair, reasonable, adequate, and in the best interests of Plaintiffs and the other members of the Settlement Class. The Stipulation and the terms of the Settlement as described in the Stipulation are hereby approved in their entirety. The Parties to the Stipulation are hereby authorized and directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation.

8. The Action and all of the claims alleged therein are hereby dismissed on the merits with prejudice as to all Defendants as against Plaintiffs and all members of the Settlement Class, with no costs awarded to any Party except as provided herein.

9. Upon entry of the Judgment, Plaintiffs and members of the Settlement Class shall be deemed to have fully, finally, and forever settled, released, discharged, extinguished, and dismissed with prejudice, completely, individually, and collectively, the Settled Claims (including Unknown Claims) against the Released Persons and shall forever be enjoined from

prosecuting such claims; provided, however, that such release shall not affect any claims to enforce the terms of the Stipulation or the Settlement.

(a) "Settled Claims" means all known and unknown claims, demands, rights, actions or causes of action, liabilities, damages, losses, obligations, judgments, suits, fees, expenses, costs, penalties, sanctions, matters and issues of every nature and description whatsoever, whether legal, equitable, or any other type, whether or not concealed, hidden or undisclosed, matured or unmatured, that have been, could have been, or in the future can or might be, asserted by or on behalf of Plaintiffs, the Company (whether by the Company or any shareholder or other Person derivatively on behalf of the Company), or any Settlement Class members in their capacity as shareholders, including class, derivative, individual or other claims, in state or federal court, and, based upon, arising from, or related to the disclosure claims or disclosure allegations in, and the settlement of, the Actions including, but not limited to, disclosure claims or disclosure allegations based upon, arising from, or related to: (i) the contents of the Proxy or the S-4; (ii) solicitation of shareholder support for the Reorganization and Step 2 Acquisition; (iii) the fiduciary obligations, if any, of the Defendants or Released Persons in connection with the solicitation of shareholder support for the Reorganization and Step 2 Acquisition; and (iv) the fees, expenses, or costs incurred in prosecuting, defending, or settling the Actions, other than as provided in this Stipulation; provided, however, that Settled Claims shall not include (a) any claims to enforce the Settlement or to enforce any award of attorneys' fees and reimbursement of expenses pursuant to the Settlement or (b) any of the claims or allegations asserted in the currently pending consolidated action captioned *Washtenaw County Employees' Retirement System v. Walgreen Co., et al.*, Civil Action

No. 1:15-cv-03187-SJC-MMR, including any of the individual actions consolidated thereunder, to the extent such claims are not based on alleged misstatements or omissions contained in the November 23, 2014 Schedule 14A Definitive Proxy Statement or any amendments thereto.

(b) "Unknown Claims" means any claim with respect to the subject matter of the Settled Claims that the Released Persons or Plaintiffs or members of the Settlement Class do not know or suspect exists in his, her, or its favor at the time of the release of the Settled Claims, including without limitation, those which, if known, might have affected the decision to enter into the Settlement or might have affected the decision not to object to the Settlement. With respect to any of the Settled Claims, the Parties stipulate and agree that upon the Effective Date, the Released Persons and Plaintiffs shall expressly and each member of the Settlement Class shall be deemed to have, and by operation of the Judgment shall have, expressly waived, relinquished, and released any and all provisions, rights, and benefits conferred by or under California Civil Code section 1542 (or any similar, comparable, or equivalent law or provision), which provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

The Released Persons and Plaintiffs acknowledge, and members of the Settlement Class shall be deemed to have acknowledged, that they may discover facts in addition to or different from those now known or believed to be true with respect to the Settled Claims, but that it is the intention of the Released Persons and Plaintiffs, and by operation of law the members of the Settlement Class, to completely, fully, finally, and forever extinguish and release any and all Settled Claims (including Unknown Claims as defined in this

paragraph), without regard to the subsequent discovery of additional or different facts. The Released Persons and Plaintiffs acknowledge, and the members of the Settlement Class by operation of law shall be deemed to have acknowledged, that the inclusion of Unknown Claims in the definition of Settled Claims was separately bargained for and was a key element of the Settlement and was relied upon by each and all of the Parties in entering into the Stipulation.

(c) "Released Persons" means Defendants and their respective families, predecessors, successors-in-interest, parents, subsidiaries, associates, affiliates and each and all of their respective past, present or future representatives, agents, officers, directors, trustees, executors, heirs, spouses, marital communities, assigns or transferees and any person or entity acting for on behalf of any of them, and each of their respective predecessors, successors-in-interest, parents, subsidiaries, affiliates, representatives, agents, officers, directors, employees, trustees, executors, heirs, spouses, marital communities, assigns or transferees or any person or entity acting for on behalf of any of them and each of them.

10. Upon entry of the Judgment, each of the Released Persons shall be deemed to have fully, finally, and forever settled, released, discharged, extinguished, and dismissed with prejudice, completely, individually, and collectively, all claims, including Unknown Claims, based upon or arising out of the commencement, prosecution, settlement or resolution of the Action or the Settled Claims against Plaintiffs, Plaintiffs' Counsel, and members of the Settlement Class and shall forever be enjoined from prosecuting such claims; provided, however, that such release shall not affect any claims to enforce the terms of the Stipulation or the Settlement.

11. Neither the Memorandum of Understanding ("MOU"), the Stipulation, this Judgment, nor any act performed or document executed pursuant to or in furtherance of the Stipulation or the Settlement: (i) is or may be deemed to be or may be used as an admission of, or evidence of, the validity or lack thereof of any Settled Claim, or of any wrongdoing or liability of the Defendants or any Released Person; or (ii) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of the Defendants or any Released Person, in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal. The Released Persons may file this Stipulation and/or the Judgment in any action that may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar, or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

12. After consideration of Plaintiffs' application for reasonable fees and reimbursement of expenses, Plaintiffs' Counsel is hereby awarded $ 370,000 oc TA in attorneys' fees and expenses, which amounts the Court finds to be fair and reasonable. This amount shall be paid pursuant to the provisions of the Stipulation. Neither counsel representing Plaintiffs in the Action nor Plaintiffs shall make any further or additional application for attorneys' fees and expenses in connection with the Action to the Court or any other court, except as contemplated by the Stipulation.

13. The Class Action Fairness Act ("CAFA") Notice has been given to the relevant public officials; proof of the mailing of the CAFA Notice was filed with the Court; and full opportunity to be heard has been offered to all recipients of the CAFA Notice. The CAFA

Notice is hereby determined to have been given in compliance with each of the requirements of 28 U.S.C. § 1715.

14. Without further order of this Court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

15. If the Effective Date does not occur for any reason, unless the Parties otherwise agree in writing as contemplated in the Stipulation, the Settlement and the Stipulation and all orders entered and releases delivered in connection herewith (except for Paragraph 11 hereof and Paragraphs 3.2, 5.2, 6.1, 6.2, 6.3, 6.4, 7.13, and 7.17 of the Stipulation, which shall survive any such termination or vacatur), shall be rendered null and void and of no force and effect and, in such event, the Parties shall return to their respective litigation positions in the Action as of the time immediately prior to the date of the execution of the MOU, as though it were never executed or agreed to, and the MOU and the Stipulation shall not be deemed to prejudice in any way the positions of the Parties with respect to the Action, or to constitute an admission of fact by any Party, shall not entitle any Party to recover any costs or expenses incurred in connection with the implementation of the MOU, the Stipulation or the Settlement, and neither the existence of the MOU, the Stipulation nor their respective contents shall be admissible in evidence or be referred to for any purposes in the Action, or in any litigation or judicial proceeding, other than to enforce the terms hereof.

16. Without affecting the finality of this Judgment in any way, this Court reserves jurisdiction over all matters relating to the administration, consummation, and enforcement of the Settlement and this Judgment.

17. The Clerk of the Court is directed to enter and docket this Judgment.

IT IS SO ORDERED this 27th day of Nov, 2015.

HONORABLE
UNITED STATES DISTRICT JUDGE

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

JAMES HAYS, on behalf of himself and all others similarly situated shareholders of Walgreen Company, Plaintiff, -vs- WALGREEN COMPANY, et al., Defendants.	Case No. 14 C 9786
RICHARD C. POTOCKI, individually and on behalf of all others similarly situated, Plaintiff, -vs- JAMES A. SKINNER, et al., Defendants	Consolidated with Case No. 14 C 10006 Chicago, Illinois November 20, 2015 10:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOAN B. GOTTSCHALL

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* * *

board's decision to exercise the call option. What was it that he recused himself from that was disclosed in the supplemental disclosures?

MR. DUCAYET: Your Honor, in the supplemental disclosure, we say he recused himself from the board's decision.

THE COURT: From the board's decision. That's what I thought.

MR. DUCAYET: That's right.

THE COURT: To exercise the call option.

MR. DUCAYET: Correct, which is the same thing as saying to do the deal.

THE COURT: All right. A couple of things to say. First of all, I've considered the objections carefully, especially the objections of the Center For Class Action Fairness, which I found helpful in bringing to my attention issues I may have otherwise not sufficiently considered.

It is difficult in a non-adversary presentation, and on top of that a settlement that does not have a monetary dimension, to judge whether these disclosures would matter to a reasonable investor.

I would add that in the future, especially if there are issues like this, hearing from someone who's not a lawyer who could explain to me that it mattered would have been very, very helpful.

That having been said, I've been persuaded that at least the following supplemental disclosures may have mattered to a reasonable investor.

First, the enhanced precision concerning the expected ownership post-merger of SP and KKR; second, the recusal of Pessina from certain board -- from the board's decision to exercise the call option; third, that JANA, the hedge fund, was exercising power on the board, since it seems to me, as was pointed out by counsel, that a hedge fund is likely to have significantly different motivations from those of an ordinary investor, and I would think that people reading the proxy statement might want to know that a hedge fund was involved to this extent.

I remain somewhat skeptical of the importance of the Miquelon lawsuit, although counsel has convinced me that it isn't a frivolous point and may well have alerted investors to issues they would have otherwise ignored about turmoil in the company.

I'm assuming, and the objections I've received sort of underline this, that there was turmoil in the company and that a merger was in Walgreen's interest may not have come as a surprise to the shareholders; but as I say, I think it's not a frivolous point.

And I also just want to say, as I said earlier -- oh, and also, let me just say that the supplemental disclosures

concerning Pessina's experience do not strike me as material. But as I said earlier, I don't think that I need to be convinced that every supplemental disclosure made a difference, but rather that the settlement achieve meaningful disclosures, at least some meaningful disclosures for some investors; and I have been persuaded that it did that adequately.

So, despite the objections and the two requests to opt out, I will approve the settlement. You know what, I left all my paperwork in the office, so I can't even read what it is -- you know, it's all on my desk, unless you have it there. Do you have it there? Yeah, thank you. Just the actual settlement so I can read it in properly. No? Everything's on my desk, and I brought nothing with me.

I don't know if it matters that I name it properly, maybe it's in the docket -- of course, I don't have the docket. Does anybody have a copy of the agreement? Maybe if you could just hand me one, I could just make sure that the record reflects what I'm actually approving. No? Oh, wait a minute. We have it.

LAW CLERK: I think it's 25-1.

MR. TEJTEL: Your Honor, I have a copy here as well.

THE COURT: It's the stipulation of settlement.

MR. TEJTEL: No, your Honor, it's the [Proposed], between brackets, Amended Order and Final Judgment.

THE COURT: Wrong binder. Do we have it, or should I get it from counsel?

MR. TEJTEL: May I approach?

THE COURT: Please. Thank you. Okay. The amended order and final judgment. Is this a copy? Because I want to strike out "Proposed," and if it is not a copy, I will get a copy.

MR. TEJTEL: I'm not sure what you mean by copy.

THE COURT: A copy that I can make notes on.

MR. TEJTEL: Well, the only issue is I've already -- my notes are all through it.

THE COURT: That, we don't want to do. Okay. So, we're going to strike out, "Proposed." We're going to indicate that a hearing was held before the Court on this date; and, therefore, it is ordered, adjudged and decreed this 20th day of November 2015 -- let me just make sure -- okay.

There was a question that was raised about the dissemination of the notice by the Class Action -- the Center For Class Action Fairness, but I don't have any reason to believe that that was the fault of anybody but whoever the intermediary was who was supposed to hand out these documents. And obviously, it didn't prejudice anybody, because everybody's here making their objections.

So, do you want to say anything, or is it -- that's -- I mean, I would need to have a whole hearing to

figure out who to blame for the fact that you got late notice.

MS. HOLYOAK: Well, we preserved that objection, but --

THE COURT: Okay. Fair enough. So, I find that -- let's see. I'm not -- I don't think I need to read every part of this, but I do find that I have jurisdiction over the subject matter and the parties, that the dissemination, based on what's appearing to me, was adequate. Though there seem to have been problems, I have no idea who to blame for those problems at this point. I have no reason to think that it's the settling parties' fault.

And the Court finds that the class action is a proper action on behalf of the following non-opt-out class, and as stated in the order, all record holders and beneficial holders of any shares of common stock of Walgreen Company and any and all of their successors in interest, predecessors, representatives, trustees, executors, administrators, heirs, assigns, or transferees, immediate and remote, and any person or entity acting on behalf of or claiming under any of them on each of them at any time between August 5th, 2014, and December 31, 2014, which is the date of the closing of the reorganization and step two acquisition, or the class period, excluding defendants, members of the immediate families of the individual defendants, and any person, firm, trust, corporation, or other entity related to, controlled by, or

affiliated with any defendant and the legal representatives, heirs, successors, and assigns of any such excluded person.

Specifically the Court finds for the sole purpose of settlement that the settlement class is so numerous that joinder of all members is impracticable, satisfying Rule 23(a)(1); there are questions of law or fact common to the settlement class, satisfying Rule 23(a)(2); the claims of James Hays and Richard Potocki, the conditionally certified class representatives, are typical of the claims of the settlement class, satisfying Rule 23(a)(3); plaintiffs and their counsel have and will fairly protect the interests of the settlement class, satisfying Rule 23(a)(4); and in accordance with Rule 23(b)(1), the class action provides a fair and efficient method for adjudication of the controversy because the prosecution of separate actions by individual members of the settlement class would create a risk of inconsistent adjudications that would establish incompatible standards of conduct for defendants and/or as a practical matter, the disposition of the action will influence the disposition of any pending or future identical cases brought by other members of the settlement class and/or, in accordance with Rule 23(b)(2), the action alleges that defendant acted or refused to act on grounds that apply generally to the settlement class, so that final injunctive relief is appropriate, respecting the settlement class as a whole.

And then the Court certifies for settlement purposes only plaintiffs Hays and Potocki as class representatives and their counsel, Pomerantz -- the Pomerantz firm, Friedman Oster, and Levi & Korsinsky as class counsel.

The Court approves the stipulation and settlement set forth herein as fair, reasonable, and adequate and in the best interests of plaintiffs and other members of the settlement class. The stipulation and the terms of settlement as described in the stipulation are approved in their entirety. The parties to the stipulation are authorized and directed to consummate the settlement in accordance with the terms and provisions of the stipulation.

The action and all the claims alleged therein are hereby dismissed on the merits with prejudice as to all defendants as against plaintiffs and all members of the settlement class with no costs awarded to any party except -- oh, and I'm changing yours. Sorry. You know what, make a note of that, paragraph 8, "expect" needs to be changed to "except" upon entry of the judgment, plaintiffs and members of the settlement class shall be deemed to have fully, finally, and forever settled, released, discharged, extinguished, and dismissed with prejudice, completely individually and collectively the settled claims, including unknown claims, against the released persons and shall forever be enjoined from prosecuting such claims, provided, however, that such

release shall not affect any claims to enforce the terms of the stipulation and/or settlement.

The order's definition of settled claims and unknown claims, released persons will all be accepted and in the final order. And upon entry of judgment, each of the released persons shall be deemed to have fully, finally, and forever settled, released, discharged, extinguished and dismissed with prejudice, completely, individually and collectively, all claims, including unknown claims, based upon or arising out of the commencement, prosecution, settlement, or resolution of the action, or the settled claims against plaintiffs, plaintiffs' counsel, and members of the settlement class, and shall forever be enjoined from prosecuting such claims, provided, however, that such release shall not affect any claims to enforce the terms of the stipulation or settlement.

Paragraph 11 concerning how the memorandum of understanding, stipulation, and acts performed pursuant to it shall not be used as any admission, that will all be set forth.

Now, paragraph 12, how are we going to deal with that at this point? Because there hasn't been a final determination of attorney 's fees yet. Has there? No.

MR. TEJTEL: No, your Honor, but you raised some concerns earlier; and I think we can actually quell a lot of those concerns if you give me three or four minutes, with

respect to the attorney's fees. We may be able to just do everything.

THE COURT: Okay.

MR. TEJTEL: All right. So, one of the things --

THE COURT: But I haven't even looked at -- I mean, are you going to give me your fee schedules and all of that, or do I have that already?

MR. TEJTEL: You have it.

THE COURT: I'm going to have to look at that because I'm not ready to do that.

MR. TEJTEL: That's fine, if I can make a few very quick points.

THE COURT: Yeah, go ahead.

MR. TEJTEL: So, one of the things you mentioned was a little bit of concern about the number of firms on the plaintiffs' side of this action.

THE COURT: Yes.

MR. TEJTEL: So, to be clear, time was submitted on behalf of four firms, and those four firms emanated from two different actions which were consolidated. But one of those four firms only submitted five hours. It essentially removed itself from the case upon the consolidation.

THE COURT: All right.

MR. TEJTEL: So, you wind up with three firms on the plaintiffs' side against two extremely large and powerful and

good firms on the defense side.

With respect to the amounts of the rates, 50 percent of the time submitted by plaintiffs, roughly, was on behalf of our firm, Friedman, Oster & Tejtel; and our rates, are, in fact, the lowest. I believe the highest rate that we submitted from within our firm was $600 per hour.

And just to give you a basis for comparison, we're a New York firm. When I was in a big law firm in New York as a fifth or sixth year, I was billing out at significantly more than that as an associate.

THE COURT: I can believe that.

MR. TEJTEL: Okay. And with respect to New York rates or Chicago rates, it's important to note that from the *Chrapliwy v. Uniroyal* case, that's a Seventh Circuit case, they say that in determining the market rate, it's not the geographic location, but rather, the market rate is set by the community for attorneys with the experience, skill, and qualification of petitioners doing comparable work.

So, you look at the practice area, the niche. This is a highly-specialized, highly-complicated niche area where the practitioners are generally in big cities; and, therefore, there's a higher rate associated with that.

But even if you were to look at Chicago rates, and I'd defer to Mr. Dahlstrom on this, there's little or no difference between New York rates and Chicago rates. They're

both at that upper tier in terms of the rate schedule.

THE COURT: You know, actually, that does not surprise me. It does not surprise me, but I think it needs to be said on the record, and I appreciate it.

Okay. All right. So, I think I need to quickly look at the information you've given me. Do we know where to find that?

MR. TEJTEL: Your Honor, it's submitted as declarations appended to our preliminary approval papers. They were submitted in July. I can give you an exact date, if that would be helpful.

So, it looks like on or around July 2nd, 2015.

THE COURT: And that's up to date?

MR. TEJTEL: Well, your Honor, we're only putting in -- we're only seeking fees based on the time up to submission of that preliminary approval briefing.

THE COURT: Okay.

MR. TEJTEL: So, all the time thereafter, we're not seeking fees for.

And, your Honor, one more point, just to be clear, we're not seeking anything more than $370,000, slightly less.

THE COURT: Right. But you're doing it based on an accounting of your hours, right? It's not just an agreed-upon amount?

MR. TEJTEL: Well, it's sort of both. There's an

agreed-upon amount with defense counsel, and then we've -- we've provided our hours to demonstrate that it is a rational, reasonable, and fair amount.

THE COURT: Right. And I'd like to look at that where you've accounted for your hours, but do we have it?

LAW CLERK: I'm looking for it. I have the motion for fees. Do you have a docket number for the --

MR. TEJTEL: Yes. I believe it's docket No. 25.

LAW CLERK: This is the fee for 25.

THE COURT: This is 45.

MR. TEJTEL: That is not in the motion for fees, just to be clear.

LAW CLERK: I know. I'm looking for it.

MR. TEJTEL: I would check 25.

THE COURT: 25. Oh, great. Thank you so much.

LAW CLERK: This should be it. They don't all have document numbers on them, but the attachment says 25.

THE COURT: I'm looking for something other than a brief.

MR. TEJTEL: Yes, your Honor. There should be four declarations. They're exhibits to docket No. 25. They're later. I'm looking -- what I have here is the declaration of Peter Lubin, who's on behalf of the fourth law firm that only billed five hours, and the docket number is 25-12, so I don't know what letter that equates to necessarily.

THE COURT: You know what, I don't have an infinite amount of time to find this, and I've got a document with lots of exhibits, but none of 12. It's -- you know, I'm just not going to be able to do this today if we can't get our hands on this pretty quickly.

MR. TEJTEL: Are the exhibits by letter, your Honor?

THE COURT: 1A, 1B, 1B1, 1B2, 1C. I don't see any of these that relate to fees.

LAW CLERK: Can we take a really fast break? Do you want me to compare my binder with theirs?

THE COURT: Yeah, let's look at what you're looking at, because I just am running out of time.

MR. DUCAYET: Your Honor, as a housekeeping matter, you could enter everything but the attorney's fee --

THE COURT: That would actually be great if I could do that and just check the attorney's fees. You know what, let's do this. Counsel?

LAW CLERK: We got it.

THE COURT: You have it?

MR. TEJTEL: We have it.

LAW CLERK: We have it. It was just later in the binder.

THE COURT: Thanks. Oh. Thank you. All right. I have the Sun affidavit on behalf of Levi & Korsinsky. What else am I supposed to have?

MR. TEJTEL: Your Honor, there should also be a declaration from Peter S. Lubin, a declaration from Jeremy Friedman, and a declaration from Gustavo Bruckner.

THE COURT: All right. I have Peter Lubin. I don't have the others.

MR. TEJTEL: So, do you -- if you go --

THE COURT: Friedman, I've got Friedman. Okay.

MR. TEJTEL: Okay. Great. And Bruckner should be approximately four exhibits before Sun.

THE COURT: And there's no -- I mean, this is a whole bunch of stuff, and I don't -- the numbers -- what number are you looking at?

MR. TEJTEL: Bruckner is 25-7.

THE COURT: I don't have any number that's anything like 25-7. Show me Bruckner, and we'll be done.

MR. TEJTEL: I'd be happy to --

THE COURT: Wait a minute. Oh, wait a minute. It's a docket number. Thank you, Cynthia. Oh, thank you.

MR. TEJTEL: Thank you, Cynthia.

LAW CLERK: You're welcome.

THE COURT: All right. I think I've got it. So, if I did the math, what would this all amount to?

MR. TEJTEL: $292,000 and change, your Honor, and we're seeking a 1.25 multiplier on top of that to get to the approximately 370,000.

THE COURT: So, the number that should be filled in in the space on paragraph 12 is 370 what?

MR. TEJTEL: $370,000.

THE COURT: Even?

MR. TEJTEL: And that's inclusive of expenses, your Honor.

THE COURT: Exclusive of expenses?

MR. TEJTEL: Inclusive, inclusive.

THE COURT: Inclusive. All right. So, if I do the math and I applied a 1.5 multiplier, that's where I would come out?

MR. TEJTEL: 1.25.

THE COURT: 1.25. Okay. All right. I think that's supported, based on these affidavits. Let's see.

And the order has some other provisions which I -- they all look fine to me. And the clerk is directed to enter and docket this judgment, and it will be ordered the 20th day of November, 2015, and it is signed. And I thank everybody.

MR. TEJTEL: Thank you, your Honor.

MR. DUCAYET: Thank you very much, your Honor.

MR. DAHLSTROM: Thank you, your Honor.

THE COURT: Wait a minute. Is this ours, or is this counsel's?

LAW CLERK: I have a version for us that we can sign.

THE COURT: You know what, I've been signing yours.

I shouldn't be doing that. I'm sorry.

MR. TEJTEL: I don't need it back.

THE COURT: We don't have a freestanding one. All right. So, I'm striking "Proposed." I'm filling in the date of November 20th, 2015. I'm going to fix paragraph 8.

LAW CLERK: Initial.

THE COURT: You did it already, and I'll initial it. Thank you. And I have to put in the -- you did it already, thank you, and I will initial that.

You can give this back to counsel. I'm sorry that I've added to the mess.

Okay. The order is entered. Thank you all.

MR. TEJTEL: Thank you, your Honor.

MR. DUCAYET: Thank you, your Honor.

MR. DAHLSTROM: Thank you, your Honor.

(Which were all the proceedings heard.)

CERTIFICATE

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

/s/Charles R. Zandi *December 1, 2015*

Charles R. Zandi
Official Court Reporter

Date