No. 19-3095

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NICK PEARSON, *et al.*,
Plaintiffs-Appellees,

v.

TARGET CORPORATION; NBTY, INCORPORATED;
and REXALL SUNDOWN, INCORPORATED,

Defendants-Appellees.

APPEAL OF: THEODORE H. FRANK,
Objector-Intervenor-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:11-cv-07972,
Judge John Robert Blakey

Opening Brief and Required Short Appendix of Appellant Theodore H. Frank

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3095

Short Caption: Pearson, et al., v. NBTY, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Theodore H. Frank

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

Hamilton Lincoln Law Institute, Center for Class Action Fairness

(formerly part of the Competitive Enterprise Institute)

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

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

n/a

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

n/a

Attorney's Signature: s/ Theodore H. Frank Date: 12/6/2019

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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n/a

Attorney's Signature: s/ M. Frank Bednarz Date: 11/25/2019

Attorney's Printed Name: M. Frank Bednarz

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

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Table of Contents

Table of Authorities

Cases

Rules and Statutes

Other Authorities

Statutes, Regulations, and Rules

Federal Rule of Civil Procedure 23. Class Actions.

(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:

…

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

…

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Federal Rule of Civil Procedure 60. Relief from a Judgment or Order.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

…

(6) any other reason that justifies relief.

Jurisdictional Statement

The district court had jurisdiction under 28 U.S.C. § 1332(d)(2) because this is a class action where the amount in controversy exceeds $5,000,000 exclusive of interest and costs; many of the millions of class members in the nationwide class are citizens of states other than a defendant's state of citizenship; and no exception to the Class Action Fairness Act applies. Dkt. 64 at 4.[1] For example, named plaintiff Nick Pearson is an individual and citizen of Illinois, while defendant Target Corporation is a citizen of Minnesota because it is a corporation incorporated under the laws of Minnesota, where its headquarters are located. *See id.* at 4-7.

The district court issued final judgment concerning the underlying litigation under Rule 54(b) on August 25, 2016. A62. Appellant Theodore H. Frank is a class member who objected to the final settlement, filed a claim, and appeared at the fairness hearing through counsel. Dkt. 259. Earlier, he had objected to the first settlement agreement entered in 2013, which he successfully litigated before this Court. *Pearson v. NBTY*, 772 F.3d 778 (7th Cir. 2014).

Three other objectors filed objections to the second settlement, and each appealed under Fed. R. App. Proc. 4(a)(1)(A) or 4(a)(3) on September 23 and September 26, 2016; Frank timely cross-appealed October 4 under Fed. R. App. Proc. 4(a)(3). Dkt. 289, 293, 298, 308. On November 7, 2016, stipulated dismissals under Fed. R. App. Proc. 42 were entered in the appeals of Steven Buckley, Patrick Sweeney, and Randy Nunez. These objectors were individually represented and likely acted independently of one another,

[1] "Axyz" refers to page xyz of Frank's Appendix in this appeal. "Dkt." refers to docket entries in Case No. 11-cv-07972 (N.D. Ill.) below. "Appeal Dkt." refers to docket entries in this appeal.

but for convenience, we shall collectively call them the "Buckley objectors." Frank dismissed his cross-appeal on November 8, 2016.

On November 14, 2016, plaintiffs-appellees Nick Pearson, Francisco Padilla, Cecilia Linares, Augustina Blanco, Abel Gonzalez, and Richard Jennings (collectively the "named plaintiffs") and defendants-appellees NBTY, Inc., Rexall Sundown, Inc., and Target Corporation (collectively "Rexall") requested voluntary dismissal with prejudice under Rule 41(a)(1)(A)(ii). Dkt. 332. The court granted this on November 18, 2016. Dkt. 333.

On May 19, 2017, Frank filed a motion under Federal Rule of Civil Procedure 60(b) to reopen the case so that he could pursue motions to intervene and require the disgorgement of suspected side-payments to the objectors. Dkt. 348. After the district court summarily denied Frank's motion, Dkt. 350, Frank timely appealed, and this Court reversed on June 26, 2018. *Pearson v. Target Corp.*, 893 F.3d 980 (7th Cir. 2018) ("*Pearson*").

On remand of the now-reopened case, the district court denied Frank's motion to disgorge the side payments to the objectors on September 23, 2019. A1; A11. Frank appealed this final decision on October 23, 2019. A160. This appeal is timely under Fed. R. App. Proc. 4(a)(1)(A), and this Court has appellate jurisdiction under 28 U.S.C. § 1291.

Appellee Buckley contends in a docketing statement there is no Article III jurisdiction because the district court's ruling on the merits found that Buckley's side-deal did not harm the class and thus Frank "lacks standing to mount his disgorgement challenge, because he has not articulated any harm he suffered as a result of the Buckley agreement." Appeal Dkt. 12 at 4. Buckley's argument confuses a finding of lack of injury on the merits with jurisdictional standing. *Bell v. Hood*, 327 U.S. 678 (1946); *e.g.*, *Craftwood II, Inc. v. Generac Power Sys., Inc.*, 920 F.3d 479, 481 (7th Cir. 2019). Frank is a

class member, and his complaint in intervention alleged that the "attorneys have been unjustly enriched at the expense of the class." A77. Standing "is established by allegations (and, if necessary, proof) of injury, caused by the defendant, and redressable by a favorable judicial decision." *Craftwood II*, 920 F.3d at 481.

Statement of the Issues

In *Pearson v. Target, Corp.*, this Court noted "selfish settlements by objectors are a serious problem," and reversed a denial of a Rule 60(b)(6) motion because Frank should be "allowed to pursue his theory." 893 F.3d 980, 983, 986 (7th Cir. 2018). Disclosure of the objectors' side deals revealed what Frank alleged on information and belief in *Pearson*: the objectors had been paid by the defendant to dismiss their appeals without any new benefit being provided to the class. Nevertheless, the district court held that this fact-pattern did not entitle a class member to disgorgement. The issue of appellate first impression here is:

1. This Court has suggested that courts have equitable powers to prevent unjust enrichment where "the class device has been used to obtain leverage for one person's benefit." *Murray v. GMAC Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (citing *Young v. Higbee*, 324 U.S. 204 (1945)); *accord Pearson*, 893 F.3d at 982-83. Is it unjust enrichment as a matter of law when an objector dismisses an appeal in exchange for a side payment without any additional benefit to the class, or is the district court correct that more, such as something "unlawful," must be shown first?

Standard of Review

A district court's finding of facts are reviewed for clear error or abuse of discretion. *Ridge Chrysler Jeep, LLC v. DaimlerChrysler Fin. Servs. Ams. LLC*, 516 F.3d 623, 625 (7th Cir. 2008). It is always an abuse of discretion to base a decision on an incorrect

view of the law or "failure to consider an essential factor." *Smith v. Ford Motor Co.*, 215 F.3d 713, 717 (7th Cir. 2000); *United States v. Mietus*, 237 F.3d 866, 870 (7th Cir. 2001). Questions of law are reviewed *de novo*. *Mietus*, 237 F.3d at 870. Mixed questions of law and fact are also reviewed *de novo*. *Mungo v. Taylor*, 355 F.3d 969, 974 (7th Cir. 2004).

Statement of the Case

Three objectors filed a total of fifteen pages of unsuccessful objections, appealed the settlement approval, and settled their appeals for $130,000 in payments without any additional benefit to the class. Appellant Theodore H. Frank moved for disgorgement, and the district court denied the motion.

A. A class action over glucosamine labeling settles; class member Frank objects and successfully reverses approval of the "selfish" agreement on appeal.

This case was previously before this Court when unnamed class member and appellant Theodore H. Frank and other objectors successfully appealed approval of the first settlement in this class action. *Pearson v. NBTY*, 772 F.3d 778 (7th Cir. 2014); Susan Beck, *Posner Slams 'Selfish' Class Settlement in Latest Coup for Ted Frank*, AM. LAW. LITIG. DAILY (Nov. 24, 2014).

Frank is an attorney who founded the Center for Class Action Fairness in 2009. Dkt. 95-1. Center attorneys' objections and appeals have "recouped more than $100 million for class members" by driving the settling parties to reach an improved bargain or by reducing outsized fee awards, and have received national recognition. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2016); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 13, 2013) (calling Frank "the leading critic of abusive class action settlements").

The underlying claims concern NBTY and its subsidiary Rexall Sundown, which manufacture glucosamine pills for distribution and sale under Rexall's label and the

labels of numerous other vendors, including defendant Target. Dkt. 124 at ¶ 5. Plaintiffs sued NBTY, Rexall, and various vendors of Rexall-manufactured glucosamine products in the Northern District of Illinois and the District of Massachusetts, alleging that the products' labeling violated state consumer fraud laws. Dkt. 21 at ¶¶ 1-6.

The parties reached a global settlement. Dkt. 73 ("the 2013 settlement"). Under the 2013 settlement, class members who saved receipts from 2005 to 2013 purchases could have obtained a check of up to $50 ($5/bottle for up to ten bottles); class members without proofs of purchase could claim a check of up to $12 ($3 for up to four bottles). *See Pearson*, 772 F.3d at 783. Predictably, few claims were filed, yet the settlement entitled four law firms to seek a total of $4.5 million in attorneys' fees, which Rexall agreed not to oppose, and any amounts not awarded would revert to Rexall. *Id.* at 780.

Class member Theodore H. Frank objected that the settlement was structured to benefit the attorneys at the expense of the class, but the district court approved the settlement. On appeal, the Seventh Circuit agreed with Frank's objection in several respects. The panel found a disproportional distribution between recovery for the class ($865,284), *cy pres* ($1.13 million), and attorneys' fees with clear sailing and reversion to the defendants ($4.5 million, reduced to $2.1 million by the district court). *Id.* at 782. The panel further found that administration costs should have been excluded in calculating the class benefit. *Id.* Reversing settlement approval, the panel found that the clear-sailing and kicker provisions reflected a "selfish" agreement, and commended Frank and the Center for "flagg[ing] fatal weaknesses in the proposed settlement." *Id*. at 787.

B. Nunez has an overlapping putative class action.

Appellee Randy Nunez had brought an overlapping class action in the Southern District of California, *Nunez v. NBTY, Inc.*, No. 13-cv-0494 (S.D. Cal.), that had been stayed because of the pending *Pearson* settlement before defendants had filed an answer to the complaint. After the Seventh Circuit's 2014 decision, the *Nunez* court appointed

Nunez's attorneys as interim class counsel in March 2015. A156. Defendants asked for the stay in *Nunez* to be extended as they anticipated *Pearson* would settle again shortly, but did not oppose the interim appointment. A154.

Pearson settled in April 2015. Nunez moved to intervene in *Pearson* in May 2015. Dkt. 205. The court denied the motion to intervene in October 2015. Dkt. 227. Nunez let the thirty days for appeal from that final decision lapse without appealing.

C. The district court grants final approval of the improved class action settlement.

On remand, as a result of Frank's objection and meritorious appeal, the parties negotiated a revised settlement with a $7.5 million common fund, of which after fees and administrative expenses, $3.96 million went to the class, over $3.1 million more in class recovery than the original agreement provided, just under a five-fold improvement to the class. Dkt. 213-1 at 6; Dkt. 251 at 2-3; A4. Based on the substantial improvement to the revised settlement over the original 2014 settlement agreement, Frank sought and the court awarded $180,000 in attorneys' fees. Dkt. 245; A61; A70. No other objector-appellant from the 2014 *Pearson* decision sought fees. Frank objected to the revised settlement only regarding the separate provision of his attorneys' fees, which he contended should be pooled with plaintiffs' fee request so that total attorneys' fees would not exceed 33% of the settlement fund. Dkt. 259.

Steven Buckley, Patrick Sweeney, and Nunez (the "Buckley objectors") filed short objections to the revised settlement and class counsel's fee request, claiming to bring the objections on behalf of the entire class or subclass, rather than claiming that the settlement was unfair to their claims in particular. Buckley's four-page objection challenged the attorneys' fee request and cited one case. A46. He filed a supplemental objection to the fee request of three pages; it cited three cases. A56. Sweeney's four-page objection was *pro se* and cited no cases. A51. Nunez filed a four-page objection arguing that his appointment as an interim class counsel in a different case with overlapping

claims after the Seventh Circuit struck the first settlement precluded any other attorneys from negotiating a class settlement without his permission, and claiming that the settlement was the result of a reverse auction. It presented no supporting evidence or declarations, and cited three cases. A41.

On July 14, 2016, the court granted plaintiffs' motion for final approval of the revised settlement and plaintiffs' fee request. Dkt. 285. The district court also awarded Frank's fee request, but declined to award those fees out of class counsel's share. Dkt. 286. On August 25, 2016, the Court issued its Final Judgment and Order. A61.

D. Three objectors appeal and settle claims with Rexall without additional benefit to absent class members.

The Buckley objectors appealed. Dkts. 289 (Buckley), 293 (Nunez), and 298 (Sweeney). Frank defensively cross-appealed. Dkt. 308. No appellant ever filed a transcript information sheet with the Seventh Circuit.

On October 28, 2016, the named plaintiffs condemned "patently frivolous appeals" by the Buckley objectors, and moved for the district court to impose an appeal bond to protect the class. Dkt. 323. Class counsel documented instances where two of the Buckley objectors previously settled low-value and poorly-edited objections. *Id.* at 11-12. Two of the Buckley objectors filed oppositions to the bond motion (Dkt. 317, 323), but class counsel never noticed the bond motion for hearing.

Within days, all three of the Buckley objectors filed joint motions for voluntary dismissal in each of their appeals. Dkt. 327. The side-deals were not disclosed at the time. "The settlement agreements executed by Defendants and the three objector/appellants show that Defendants NBTY and Rexall paid $10,000 to Patrick Sweeney, $60,000 to Steven Buckley, and $60,000 to Randy Nunez in exchange for each objector/appellant's agreement to remain part of the Pearson class, to dismiss his appeal, and to release all claims, including any claim for fees." A6; A93; A102; A112.

(The settlements were sealed by the district court, but the district-court decision disclosed most of their material terms. The district court description is imprecise, because it does not take account of the sealed information in A146.) The objector settlements did not modify the class-action settlement and absent class members received nothing from the settlement of the Buckley objectors' appeals. *Id*. The three settlements are identical in language other than names and dollar amounts, with no mention of any other case or litigation. *Id.*

A guide on the Seventh Circuit website states that a "request to dismiss the appeal of class action litigation receives heightened scrutiny due to the effects it may have on the interests of the unrepresented class members." *Practitioner's Handbook for Appeals* 109 (2017 edition). (On information and belief, the 2016 edition had the same statement.) Nevertheless, the Court immediately granted the Buckley objectors' dismissal motions without inquiry. Frank voluntarily dismissed his cross-appeal, No. 16-3615, without seeking or obtaining payment.

On November 14, 2016, the named plaintiffs and defendants filed a Joint Request for Voluntary Dismissal With Prejudice Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii). Dkt. 332. The district court granted the parties' request on November 18, 2016. Dkt. 333.

E. The district court rejects Frank's attempt to reopen the case and this Court reverses.

On December 7, 2016, Frank moved to intervene for the purpose of seeking disgorgement of payments made to the Buckley objectors in exchange for dropping their appeals. Dkt. 334. Frank argued that, on information and belief, the Buckley objectors were unjustly enriched for appeals that plaintiffs had called "vexatious" and "bad faith," and any moneys they received were disproportionate to the zero benefit they provided the class—and especially compared to the benefit Frank's participation in the case had provided. The district court summarily struck Frank's motion on

December 15, 2016, because the November 18 dismissal with prejudice meant that "the Court is without jurisdiction to adjudicate disputes arising out of the settlement that led to the dismissal." Dkt. 340.

After unsuccessful attempts to get class counsel to act to reopen the case, on May 19, 2017, Frank filed a Motion to Reopen Under Rule 60(b)(1) and 60(b)(6). Dkt. 348. The same day, the district court issued a one-page minute order summarily denying the motion. Dkt. 350.

Frank appealed, Dkt. 351, and this Court reversed. *Pearson*, 893 F.3d 983. *Pearson* agreed that "selfish settlements by objectors are a serious problem." *Id.* at 986. An "absent class member objects to a settlement with no intention of improving the settlement for the class. Instead, the objector files her objection, appeals, and pockets a side payment in exchange for voluntarily dismissing the appeal. A potential benefit for the class—a better settlement—is leveraged for a purely personal gain—a side bargain." *Id.* at 982. "Because the motion should have been granted and Frank allowed to pursue his theory, we reverse." *Id.* at 983.

F. Factual development confirms Frank's information and belief, but the district court rejects disgorgement.

At the initial status hearing, Frank acknowledged he had no evidence yet of blackmail, merely information and belief. A7. The court ordered disclosure of the side-deals. Dkt. 373. Disclosure did confirm, as discussed above, that the objectors received payment from defendants without any new benefit to the class. A91-A118.

Buckley, who had only objected to attorneys' fees before, argued that his "settlement payment was made exclusively by NBTY, out of new monies it paid in order to avoid the Buckley appeal, and therefore did not derive in any way from the consideration paid in settlement of the Class's claims," and therefore the class was not injured. Dkt. 386. (Plaintiffs filed a response to this inaccurate claim. A146.) The

payment amount "fairly approximates his counsel's lodestar" of 78 hours in preparing a four-page objection and a 3,118-word draft of a Seventh Circuit opening brief that only addressed the district court's fee decision. *Id.*; A158; Dkt. 406-1.

Nunez argued that his payment was meant as consideration for settling the parallel *Nunez* class action in the Southern District of California that would have been barred by the *Pearson* class-action settlement. Dkt. 390; A149. Frank protested that Nunez had no explanation why his settlement agreement had no discussion of the *Nunez* litigation and was the same boilerplate as the other two objectors' settlements. Dkt. 411. Moreover, Nunez's counsel had made no Rule 23(h) motion and provided no notice to the class that he was settling a class action. *Id.*

Sweeney filed no opposition to the motion to disgorge.

The district court denied the motion to disgorge. A1. Disgorgement requires that the settling objectors "violated some rule or statute or did something unlawful, that the settlement payments amounted to ill-gotten gains." A5. "Without more, the dismissal of an appeal does not necessarily indicate objector blackmail." A6. Because Buckley "represented that he did not file his objection or notice of appeal to leverage a settlement from Defendants" and "largely drafted" an appellate brief, the $60,000 payment ($55,000 of which went to Buckley's attorney) was "to compensate him for the time he actually spent prosecuting the appeal" and there was no wrongdoing. A7.

Nunez's "sole claim on appeal argued (in good-faith and with cause) that it was improper for Defendants to settle with the named plaintiffs in Pearson's case, when Nunez's counsel had been named interim class counsel in the California case and therefore had sole authority to negotiate any potential resolution of the claims asserted in Nunez's case." A7.

As for Sweeney (and presumably the other two objectors), it did not matter whether he claimed to be acting in good faith. The

> money paid to Nunez, Buckley, and Sweeney came from funds separate and apart from the settlement fund. The objectors and Defendants represent that these funds were never earmarked for the class, and there is no evidence to suggest that they would have gone to the class had they not gone to the objectors. Nothing in the settlement required Defendants to put up all the money they had; nor was there anything in the settlement to preclude Defendants from paying more in the end than they ultimately agreed to pay in the settlement agreement. Nor does the Court have a basis to find that the appeals, had the objectors pursued them rather than settle them, would have benefitted the class. Quite simply, the Court has no basis to conclude that the side settlements harmed the class in any way. If anything, class members benefitted from the side settlements, because they allowed the class settlement to become final, thereby ensuring prompt payment of class members' claims.
>
> … Any amounts paid to the objectors were above and beyond what Defendants agreed to pay to the class, and nothing in the record suggests that the class would have received that money had Defendants not paid it to objectors. …
>
> Absent some indication that such settlements harm the class or somehow diminish the relief available to the class, this Court finds no basis to inject itself into these arms' length transactions with an unfounded order of disgorgement.

A8-A9. Some of the district court's discussion contradicts the information disclosed by named plaintiffs under seal in A146.

Frank timely appealed. A160.

Summary of the Argument

The crux of the case is a dispute of law over some simple facts. In *Pearson*, Frank's appeal asked for the opportunity to prove that the objectors had cut side-deals to dismiss their appeals while the class had received nothing. This Court agreed that

such side-deals were a problem and that Frank should be "allowed to pursue his theory"; it reversed and remanded for factual development. 893 F.3d at 983. Factual development confirmed the allegations: the Buckley objectors appealed settlement approval, and then dismissed their appeals in secret side-deals where they received $130,000 and the class received nothing. A6.

This is sufficient evidence to hold disgorgement an appropriate remedy as a matter of law. An "objector files her objection, appeals, and pockets a side payment in exchange for voluntarily dismissing the appeal. A potential benefit for the class—a better settlement—is leveraged for a purely personal gain—a side bargain." *Pearson*, 893 F.3d at 982. There's no dispute that that is what happened here: the obejctors filed their objections, appealed, and pocketed a side payment for purely personal gain. This Court has cited *Young v. Higbee,* 324 U.S. 204 (1945), in the class-action context to suggest that equitable remedies are appropriate for such selfish behavior. *Murray v. GMAC Corp.*, 434 F.3d 948, 952 (7th Cir. 2006). And other district courts in this circuit have applied equitable remedies. *House v. Akorn, Inc.*, 385 F. Supp. 3d 616, 623 (N.D. Ill. 2019), *appeal pending*, Nos. 19-2401 and 19-2408 (7th Cir.).

But the district court believed more was necessary. Because the district court had no "basis to find that the appeals, had the objectors pursued them rather than settle them, would have benefitted the class," there was no harm to the class from the settlement; thus, the Court found "no basis to inject itself into these arms' length transactions with an unfounded order of disgorgement." But this reasoning oddly creates a perverse incentive to bring meritless objections, because those can be settled profitably in a way that colorable objections cannot.

Similarly, it makes little sense to credit the purported subjective motivations of the objectors that they did not intend to leverage an objection for a settlement over the objective indication that they settled selfishly without benefit to the class. The smoking

gun is the settlement agreement itself. While it would certainly be optically worse if the objector settlements came from the existing settlement fund, there is no economic difference between that and a payment from plaintiffs' attorneys or from the defendants. Litigants are rational economic actors, and if they have a rational expectation that there will be an "objector tax" paid to get rid of bad-faith objectors, that money will be set aside in the budget to settle the case instead of going to the class.

Frank won the right to "pursue his theory" in *Pearson*, and then proved his case below. If the district court is correct that the objective evidence of a selfish side-deal is defeated by a self-serving declaration of subjective good faith "that [Buckley] did not file his objection or notice of appeal to leverage a settlement from Defendants" (A7), or that a disgorgement remedy requires collateral relitigation of a dismissed appeal on the merits to prove injury to the class, or that a selfish side-deal is alright so long as it does not make the underlying class-action settlement worse, then there was no reason to reopen the case under Rule 60(b)(6) in the first place.

This case embodies the kind of "class action sell-out" that this Court has criticized. *Safeco Ins. Co. of Amer. v. American Int'l Group, Inc.*, 710 F.3d 754, 759 (7th Cir. 2013) (Posner, J., dissenting); *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003). Bad-faith objectors bring inexpensive objections to class-action settlements, lose in the district court, and then threaten to create delay and legal expense by litigating an appeal unless they are paid to go away. By offering to settle for less than the cost of litigation—or for a fraction of the litigation value of the objection to class counsel to the extent that the objection has merit—bad-faith objectors can always extract rents from the class action process, sometimes in the hundreds of thousands of dollars. Alison Frankel, *Prominent class action firm sues 'professional objectors' for racketeering*, Reuters (Dec. 5, 2016) (discussing $225,000 payment by a class counsel to objector).

The underlying settlement provides millions to class members, and is vastly superior to the 2013 settlement Frank successfully opposed before this Court. *Pearson v. NBTY*, 772 F.3d 778 (7th Cir. 2014). Yet three objectors filed appeals based on their insubstantial objections, only to dismiss them before opening merits briefs were due—after the parties offered them cash. If bad-faith objectors can profit with nearly as much as successful good-faith objectors with much less work, it creates a perverse incentive to bring bad-faith objections and appeals that waste judicial resources instead of meritorious objections that benefit the system. This is not hypothetical. A Federal Judicial Center study covering several years of objector appeals in the Seventh Circuit found that "all of the identified class action objector appeals were voluntarily dismissed pursuant to Rule 42(b)"; the entire report is edifying. Marie Leary, *FJC Report on Class Action Objector Appeals in Three Circuit Courts of Appeals*, Federal Judicial Center 11 (2013) ("Leary"). As the Frankel story shows, some objectors are able to extract more from selling a losing objection than the $180,000 fees Frank earned in this case from successfully prosecuting a substantive good-faith objection and appeal and then spending attorney time obtaining court approval of a fee award.

Without reversal, the Buckley objectors in this case will abscond with what *Vollmer* calls "extortion" and a leading academic calls "blackmail." Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009). It would be unfortunate if the conflicts of interest in class-action settlements are compounded with perverse incentives in objections to those conflicts of interest.

Argument

I. The district court erred, because under *Pearson* and *Young v. Higbee*, courts should equitably disgorge ill-gotten gains appropriated by appellants that purport to represent an entire class, but settled for private gain.

To the extent that settling objectors secure payment for themselves or their counsel without improving the class-action settlement for absent class members, a district court should exercise its equitable discretion and order objector blackmail disgorged for distribution to absent class members. This is precisely the scenario Frank raised in *Pearson*, and the court, rather than holding the question moot because there was no remedy to be had, permitted Frank to "pursue his theory." Indeed, as in this court's discussion, "the objector files her objection, appeals, and pockets a side payment in exchange for voluntarily dismissing the appeal" without benefit to the class. There is no dispute about that. The only question is one of law: what legal consequences follow?

A. *Young v. Higbee* compels equitable disgorgement when litigants purport to appeal on behalf of a class, but sell out for private gain.

Disgorgement of unjust enrichment is an equitable remedy within the inherent power of district courts. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 397-99 (1946) ("unless otherwise explicitly restricted by statute, District Courts may exercise all inherent equitable powers to fashion relief, including ordering the payment of money."). Here, the equities favor disgorging the spoils of objector blackmail and paying restitution to the class, as illustrated in *Young v. Higbee*, 324 U.S. 204 (1945).

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

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

Payments to individual class members who have not opted out without proportional benefits to absent class members necessarily cheat the class, and this principle is well-understood in the context of named plaintiffs settling individual claims. *Murray*, 434 F.3d at 952; *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003); *Greisz v. Household Bank, N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999). It is equally well-understood that class counsel should not use the class-action process to benefit themselves without benefit to absent class members. *See, e.g.*, *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016). Thus, the equities point to disgorging unjust enrichment that would otherwise result from settling objectors' cynical misuse of the class action process to extract private gain. "The object of restitution [in the

disgorgement context] … is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty." AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(4) (2010).

As in *Young*, the settling objectors' objections and appeals from the denials of those objections were "alleged to be for the benefit of [absent class members]." 324 U.S. at 214. All of the settling objectors filed objections that exclusively concerned issues of common interest to all class members such as notice and attorneys' fees. None of the settling objectors suggested that their claims were idiosyncratic to individual circumstances, but instead advanced objections with applicability to an entire class. To the extent that the appeals had merit, the settlements are losses to the class because "appellate correction of a district court's errors is a benefit to the class." *Crawford v. Equifax Info Servs*., 201 F.3d 877, 881 (7th Cir. 2000). To the extent the district court is correct that the three appeals lacked merit (and it is correct), the settlements are losses to the class because the "the money [objectors] received in excess of their own interest as [class members] was not paid for anything they owned." *Young*, 324 U.S. at 213. The fruit of the appeal "properly belongs to all [class members]." *Id.* at 214. That the value of the appeal was exacted through settlement rather than through a litigated conclusion does not change this fact. *Id*. at 213-14.

Just as Potts and Boag proceeded under the "statutory privilege of litigating for the interest of a class," so too did the settling objectors in this case. That the privilege at issue was conferred under Fed. R. Civ. P. 23(e)(5), rather than the Bankruptcy Act of 1938 makes no difference. *See Murray*, 434 F.3d at 952 (citing *Young* in support of idea the class device may not be "used to obtain leverage for one person's benefit"). "This representative responsibility is emphasized by the fact that they might have been awarded compensation for their services had they succeeded [on appeal] to the advantage of all the [absent class members]." *Young*, 324 U.S. at 213; *accord Eubank v.*

Pella Corp., 753 F.3d 718, 720 (7th Cir. 2014). (Indeed, Frank was awarded fees for his good-faith objection and meritorious appeal in this very case, as well as on remand in *Pella*.)

B. "Objector blackmail" and "objector extortion" are rhetorical terms, and to be worthy of disgorgement, they do not require a showing of a violation of criminal law.

Frank used the terms "blackmail" and "extortion" because that is what the Seventh Circuit and academic literature called the practice, not because he was alleging the need for criminal prosecution. Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009); *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003); *cf. also In re Walgreen Stockholder Litig.*, 832 F.3d 718, 723 (7th Cir. 2016) (using term "racket" without formally finding racketeering). But the district court seems to have believed actual criminal blackmail or extortion needed to be proven, and held it against Frank's motion that Frank never intended to make such a showing.

The district court held that a violation of a rule or statute is required before disgorgement can take place. A5. Not so; no rule or statute was violated in *Young*. And the Seventh Circuit has previously used similar principles to order disgorgement without violation of an explicit rule or statute, noting that district courts possess inherent authority to revert baseless attorneys' fees in order to prevent "circuity and enforce ethical conduct in litigation before it." *Dale M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 282 F.3d 984, 986 (7th Cir. 2002). *Dale M.* ordered disgorgement from a non-party attorney who attempted to retain a fee award arising from a judgment reversed on prior appeal, rather than requiring duplicative litigation to unwind the series of transactions. *Accord House v. Akorn, Inc.*, 385 F. Supp. 3d 616, 623 (N.D. Ill. 2019) (ordering disgorgement of "mootness fee" by putative class counsel in strike suit under *Walgreen* without any finding of criminal behavior), *appeal pending*,

Nos. 19-2401 and 19-2408 (7th Cir.). To the extent the district court thought that Frank had to make a showing of illegal behavior or criminal blackmail before finding disgorgement appropriate, it committed legal error. Merely the leveraging of class-action procedure for selfish benefit is enough.

C. The purported subjective intent should be irrelevant when the deal is objectively selfish.

These were settlements that provided no benefit for the class, but paid the objectors. (The district court suggested that expediting payment to the class was a class benefit, A8, but that's an obvious error of equitable principles, given that it was the objectors' appeals that created the delay in the first place. In *Robert F. Booth Trust v. Crowley*, this Court rejected the argument that the end of litigation caused by the plaintiff was a benefit to the shareholder class: "It is an abuse of the legal system to cram unnecessary litigation down the throats of firms whose directors serve on multiple boards, and then use the high costs of antitrust suits to extort settlements (including undeserved attorneys' fees) from the targets." 687 F.3d 314, 319-20 (7th Cir. 2014).) The agreements objectively constitute selfish settlements for personal gain, but the district court valued the self-serving declaration of Buckley that he didn't *intend* to leverage his objection for profit. But parties intend the foreseeable consequences of their actions: Buckley *did* leverage his objection for profit. He objected to the plaintiffs' attorneys being paid too much and wanted the class to be paid more, and was paid by the defendants to drop that objection without any additional money going to the class. Buckley does not contend that he was coerced into that selfish deal. Objective evidence of leveraging from the four corners of the settlement—especially when the district court thought the appeals meritless after looking at the 3,118-word draft submitted by Buckley's attorney (Dkt. 406-1)—is a better legal rule than requiring expensive collateral litigation over subjective motivations. (It will be a rare objector foolish enough to admit

to bad faith.) The district court clearly erred when it held Frank had no evidence of blackmail. The court's emphasis on Buckley's assertion that he didn't intend to leverage violated "either the letter or spirit of the mandate construed in light of the [*Pearson*] opinion." *Oswald v. McGarr*, 620 F.2d 1190, 1196 (7th Cir. 1980). The settlements themselves were all the evidence Frank needed.

D. It's economically and legally irrelevant if it was the defendants who paid the blackmail rather than class counsel.

When class counsel pays the objector blackmail, then the objectors' payments effectively come out of the common fund, contrary to the terms of the settlement; moreover, to the extent that class counsel was willing to take less, that money belongs to the class. *See also* A146, which the district court's decision erroneously did not take into account, but the district court's protective order precludes us from discussing in a public merits brief.

This case was decided on the premise that the settlement was made under the unusual circumstance where the money did not come out of the class counsel's share of the common fund, but was additional money paid by defendants. The district court accepted arguments that the side-payments paid settling objectors came out of the defendants' money, and wasn't part of the settlement obligations, but merely private arrangements that could not possibly prejudice the class. A8-A9. But even assuming *arguendo* that the district court was not clearly erroneous in believing that it was the defendants who paid the settlement to objectors, this distinction does not withstand scrutiny.

All class-action payments ultimately derive from resolution of the class's underlying claims. *Pearson v. NBTY*, 772 F.3d at 786 (defendant cares only about total liability). Here, settling objectors misused appellate procedure to divert additional funds solely to themselves. To the extent defendants paid, they were "blackmailed" to

pay because the value of the underlying class-action settlement and the cost of defending it on appeal gave settling objectors leverage to extract an additional payment. A selfish objector's leverage comes from the underlying release against the entire class, which the appeal threatens to delay. Benefits extracted based on such leverage ought to benefit all class members; an objector is no more entitled to 100% of the benefit of the settlement than a class counsel is. *E.g., Walgreen*, 832 F.3d 718. Courts ought not reward vexatious and pointless appeals after the class has secured its award. *Cf. Greisz v. Household Bank, N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999) ("Once a party has won his suit and obtained the attorney's fees that were reasonably expended on winning, additional attorney's fees would not be reasonably incurred.").

Because defendants settle in order to extinguish claims class-wide, courts generally do not allow individual class members who have not opted out to settle on superior terms. For example, service awards may be approved to compensate named plaintiffs for their effort, but this does not imply parties can divert funds to prioritize the interests of individual class members. *See Murray*, 434 F.3d at 952. This is why courts must approve incentive awards to individually-named class members, such as the $5000 payments approved to each of the class representatives in this case. Such awards are appropriate, with court approval, for the time and expense that class representatives reasonably expend on securing a common fund for the entire class. But it is inequitable for individual class members to advantage themselves over other class members in side deals without conferring the class any benefit and without judicial oversight. Here, the defendants apparently did not want to expend the costs to defend another appeal and the Buckley objectors apparently made it more profitable for the defendants to pay them to go away rather than to seek delayed victory at the Seventh Circuit.

Moreover, settling parties in a class action are, as this Court has recognized, rational actors. *Pearson v. NBTY, Inc.*, 772 F.3d at 786. Just as an "economically rational

defendant will be indifferent to the allocation of dollars between class members and class counsel," that same defendant will be indifferent between the allocation of dollars between class members and class counsel *and the expected payments to bad-faith objectors*. Class-action attorneys (and frequently objectors) are repeat players. If the cost of settlement can be expected to include six-digit sums to bad-faith objectors, that money will be set aside in advance and withheld from the common fund.

E. It is irrelevant that Nunez also dismissed a parallel class action: he was paid to drop the appeal in *this* case.

The district court also thought it important that Nunez was complaining about being left out of the settlement discussions when he had an overlapping class action. Objective evidence of a settlement of an objector's appeal where the objector and his counsel collected 100% of the proceeds without any benefit to the class is sufficient to require disgorgement by itself as a matter of law. But it's worth noting that the district court's factual finding is clearly erroneous.

Nunez signed a settlement settling his appeal in this case; the settlement had the same language as that of the other two objectors, without mentioning the *Nunez* action nullified by the underlying *Pearson* class-action settlement. It was on identical terms as the Buckley settlement: Nunez and his attorney split $60,000, and the class gets nothing. The four corners of the Nunez settlement agreement speak for themselves, and there is no need to consider extrinsic evidence that dismissing *Nunez* was also consideration—especially when he was paid the same amount as Buckley, who did not have a parallel class action, or even any challenge to the underlying settlement.

The *Nunez* class action provided no benefit to the class, and it is inequitable to pay him for it. And to the extent that Nunez now claims, contrary to the four corners of the settlement agreement, that he is entitled to the payment for settling the class's claims in his class action, his failure to notice the class under Rule 23(e) or Rule 23(h)

presents obvious obstacles to his entitlement to fees—even if Rule 23(e) permitted a settlement where class counsel was paid and the class received nothing. Indeed, Nunez's sell-out is arguably more objectionable than Buckley's, because, as a putative class counsel, he has a formal fiduciary duty to the class, rather than merely the *Young v. Higbee/Murray v. GMAC* obligation not to use the class-action procedure to financially self-deal.

Nunez did not make a credible challenge to the appointment of class counsel. He did not appeal the final decision (Dkt. 227) denying his intervention motion within thirty days, and thus forfeited any argument he was entitled to intervene in this case. *B.H. v. Murphy*, 984 F.2d 196 (7th Cir. 1993). His objection was four pages long and cited three cases, including the 2014 *Pearson v. NBTY* decision. He presented no evidence that the settlement reflected a reverse auction, or even any evidence that he would have settled on different terms if he had been appointed class counsel for his overlapping claims. He did not order a transcript for his appeal. The district court simultaneously suggested that Nunez's argument was made "with cause" (A7) and that his appeal could not benefit the class (A8). Both can't simultaneously be true; but either would be grounds for disgorgement of a settlement that benefited only Nunez. Either Nunez sold out the *Nunez* class by dismissing an objection that had cause, or he abused the legal system to bring a meritless objection solely to benefit himself. *Cf. Robert F. Booth Trust*, 687 F.3d 314; *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016). That either-or principle by itself demonstrates the legal error of the court holding that dismissing a meritless appeal cannot be grounds for disgorgement.

F. Contrary precedent the parties might cite is also wrong.

In *Safeco*, this Court did not interfere with a side settlement that resulted in a dismissed appeal; the district court relied on that to reject Frank's argument that objective evidence was sufficient, and held an additional showing of actual harm to the

class. A9. But *Safeco*, as *Pearson* recognized, was a unique circumstance where "a class of sophisticated financial institutions and an objector with individualized claims" provided "compelling reasons suggesting that there was nothing unfair about the settlement in that case." 893 F.3d at 985. That is absent here: the claims of the appellant class members were worth less than the filing fee, so "each objector must have been advancing claims on behalf of the class as a whole." *Id.* None of the objectors denies that their objections purported to be on behalf of the class as a whole, rather than on behalf of their particular claim.

True, *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999), declined to pursue the idea that there was need for court oversight of side-agreements with objectors to withdraw appeals. But *Duhaime* should not apply here for several reasons. *First, Duhaime* spurred, and was superseded by, Rule 23(e)(3) and (e)(5)'s respective requirements of scrutiny of side agreements and withdrawals of objections in district court in the 2003 Amendments. Alan B. Morrison, *Improving the Class Action Settlement Process: Little Things Mean a Lot*, 79 GEO. WASH. L. REV. 428, 447 (2011); *see also* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.08, cmt. a (2010).

Second, the *Duhaime* appellant appeared to rely solely on Rule 23(e) without raising the court's power in equity or to enforce the settlement as proposed, but the text of the rule itself doomed that argument. 183 F.3d at 4. The lack of argument on equity grounds meant that *Duhaime* does not mention or distinguish *Young*; rather, it relies on premises inconsistent with *Young*. *Duhaime* found objector side-agreements to be "peripheral," suggesting that opportunistic objector behavior is acceptable because it does not implicate the fiduciary duties of the official class representatives, and that dissimilar treatment of class members through a side-settlement is acceptable because objectors hire separate counsel. 183 F.3d at 4-6. This would be true if the objectors were

opt-outs litigating separately, but as objectors they act on behalf of the class as a whole—including delaying ultimate resolution of a class action. *Young* in conjunction with *Murray* teach that the fruit of the appeal "properly belongs to all [class members]" regardless of whether the value of the appeal was extracted through settlement or a litigated conclusion. *Young*, 324 U.S. at 213-14. It matters not that the objectors are not fiduciaries because as appellants from a judgment that affected "a whole class of stockholders," "at the very least," they owed a "duty of good faith to all other stockholders whose interests they temporarily control[led] because they [we]re necessarily involved in the appeal." *Id*. at 210-12. *Duhaime* erred by overlooking the connection between the objector's appeals and the underlying class resolution. (One might argue that *Young* applies only to shareholders and their duties to other shareholders under corporate law, or only amongst creditors of a bankruptcy estate, but *Murray* takes the position that *Young*'s principles were appropriately applicable to class actions.)

Finally, *Duhaime* was implicitly rejected by *Safeco*, which ignored *Duhaime* in its fact-specific decision not to investigate the settlement in that appeal, and by *Pearson*, which held the district court should have permitted Frank to pursue his theory of objector blackmail.

Rougvie v. Ascena Retail Grp., Inc., denied absent class members' efforts to intervene and move to disclose and disgorge side payments, reasoning that they lacked standing to intervene. No. 15-cv-724, 2017 WL 2624544, at *3-*5 (E.D. Pa. Jun. 16, 2017). *Rougvie* gainsaid the class members' interest in the proceeds of objector-appellants' side-settlements because, it thought, the objector-appellants had no fiduciary duty to the class and the prospects of objector-appellants prosecuting an appeal to success were low. *Id*. But these are arguments on the merits, not a reason to find a lack of standing, and courts should not confuse merits arguments with

jurisdictional arguments. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 88-90 (1998). Non-party objectors possess standing to the extent they may suffer from an "objectively reasonably likelihood" of suffering injury-in-fact. *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 692 (7th Cir. 2015). Here the Buckley objectors absconded with recovery that rightfully belongs to the entire class, including Frank. Moreover, "Many traditional remedies for private-rights causes of action—such as for … ***unjust enrichment***—are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) (emphasis added).

On the merits, as well, *Rougvie* is mistaken. Like *Duhaime*, the rationales it relies on—lack of fiduciary duty and little chance of litigated success—contradict *Young* and *Murray*. 2019 U.S. Dist. LEXIS 28229 (E.D. Pa. Feb. 21, 2019). *Rougvie* thought *Young* irrelevant because of differences between bankruptcy and class-action law. Again, the fact that the privilege of objection and appeal at issue was conferred under Fed. R. Civ. P. 23(e)(5), rather than the Bankruptcy Act of 1938 makes no difference. This Court has cited *Young* in support of the idea that the Rule 23 class action device may not be "used to obtain leverage for one person's benefit." *Murray*, 434 F.3d at 952. And rightly so. Just as "one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors," *Young*, 324 U.S. at 210, a prime purpose of Rule 23(e) is ensuring an equitable allocation among class members. *E.g., Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785-86 (7th Cir. 2004). (The background principle has since been made explicit by Fed. R. Civ. Proc. 23(e)(2)(D).) Objectors "cannot avail themselves of the statutory privilege of litigating for the interest of a class and then shake off their self-assumed responsibilities to others by a simple announcement that henceforth they will trade in the rights of others for their own aggrandizement." *Young*, 324 U.S. at 213. The Buckley objectors here are positioned identically to the objectors who sold their

claims in *Young*. Because no statute curtails the district court's equitable discretion with regard to class-action objections, *Young* requires disgorgement here.

G. Payments to objectors who have accomplished nothing for the class are otherwise inequitable and bad public policy.

Frank and his attorneys, through hundreds of hours of work over several years, won a hard-fought landmark appeal over the original settlement approval that resulted in an improved settlement that quadrupled or quintupled actual class recovery by millions of dollars *in this case*. For his efforts toward his successful objection improving class recovery, the court awarded Frank's counsel $180,000 in attorneys' fees, less than 6% of the $3.1 million of new benefits the class actually received, and one awarded on top of class counsel's fees. A4. In comparison, the objectors here won $130,000 for filing fifteen pages of unsuccessful objections without any improvement to the class. It would be unjust and inequitable if objectors (and objectors' counsel) who filed unsuccessful objections that provided no benefit to the class were to realize benefits disproportionate to what they have accomplished for the class. But the district court just looked at the absolute numbers, and seemed to think the payments to the settling objectors were fair because they were "far less" than what Frank received for creating actual benefit to the class in a successfully litigated appeal. A6.

Such payments create perverse incentives. If a bad-faith objector can realize more profit per hour of work by bringing an unsuccessful objection and failing to prosecute an appeal than a good-faith objector can by bringing a successful objection and putting in the work to prosecute a successful appeal, it means that courts will be blizzarded with more bad-faith objections designed to fail than good-faith objections attempting to succeed—as happened in this very case, and apparently regularly happens in this Circuit and others. Marie Leary, *FJC Report on Class Action Objector Appeals in Three Circuit Courts of Appeals*, Federal Judicial Center 11 (2013).

While the 2018 amendments to Rule 23 were designed to address payments to bad-faith objectors, equitable disgorgement is necessary to protect class members when the Rules fail to prevent improper payments. Following the 2018 amendments, Rule 23(e)(5)(B) now requires court approval of any payment to objectors in connection with dismissing an objection or an objector's appeal. The Advisory Committee Notes to the 2018 amendments found that class counsel may argue that "avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors." *See* Advisory Committee Notes to 2018 Amendments of Rule 23(e)(5)(B). The Advisory Committee Notes warn that payments to objectors to simply go away "perpetuates a system that can encourage objections advanced for improper purposes." *Id.* And leading commentators on the Rule 23 amendments observe: "[t]he sole fact that the withdrawal of an objection or dismissal of an appeal will expedite distribution of the settlement funds does not justify payment to withdraw an improper objection or dismiss an improper appeal." Duke Law Bolch Judicial Institute, *Guidelines and Best Practices Implementing 2018 Amendments to Rule 23 Class Action Settlement Provisions* 25 (Aug. 2018). Yet the district court here found exactly that scenario was "if anything," a "benefit[]" to the class. A8.

But when under the new rules the dismissing objectors and class counsel present their agreement to the district court, the parties' *ex parte* stipulation will not inform the district court of this analysis. And Rule 23(e)(5)(B) does not identify any criteria in analyzing objector dismissal agreements and thus, nothing in the Rules prevents a district court from approving a payment to an objector who provides no benefit. The Rules may not protect class members from improper payments to bad-faith objectors. In situations where the Rules do not prevent improper payments, class members should be equipped with equitable disgorgement.

If this court affirms, future bad-faith objectors will cite the district court's opinion that selfish settlements benefit the class, and much of the purpose of Rule 23(e)(5)(B) will be nullified.

Moreover, class counsel faced with a meritorious objection complaining that class counsel has unfairly benefited themselves at the expense of the class may find it profitable to make an objector an offer she can't refuse. Ethics rules require a counsel, even a non-profit public-interest counsel, to follow his client's wishes if a client wants to settle selfishly, no matter what good-faith motives the client represents in advance. D.C. Ethics Opinion 289 (1999). While the Center for Class Action Fairness avoids the risk that class counsel will bribe its clients into dropping objections the best it can by screening clients carefully and using its own attorneys as objectors when they are members of the class, there are times when class counsel trying to protect millions of dollars of ill-gotten gains offer a payment to an objector far greater than the objector can hope to receive otherwise. The best CCAF can do in such a circumstance is permit itself to be fired by the client and walk away empty-handed as the objector settles, but in such circumstances, class counsel succeed in cheating the class out of millions. Only if objectors know that they face an *ex ante* risk of disgorgement will they be able to resist such entreaties.

The perverse incentives are exacerbated by the district court's legal error that there was no injury to the class *because* the cursory objections were meritless and had no chance of success on appeal. A41; A46; A51. In other words, not only is it more profitable per hour to settle to dismiss an appeal than to win one, but spending more hours crafting a quality objection in the first place *increases* the likelihood that a district court may find disgorgement appropriate. That's a way to ensure that district courts will face a blizzard of low-quality objections of three or four pages like happened

here—and, as a result, may make unfortunate Bayesian assumptions about the rarer good-faith objections.

II. Circuit Rule 36 Should Apply on Remand.

The district court's opinion was unfair to Frank. The fact that Frank did not have evidence *before any discovery had taken place* at the initial status hearing was treated by the district court as relevantly "conced[ing]" that no evidence existed. A7. (Frank's suspicions that the objectors were paid in side-deals was based on the past pattern and practice of resolution of four-page objections on appeal were entirely borne by the evidence.) The district court seemed to think that it was relevant that the side-deal payments to the settling objectors to dismiss appeals of four-page objections was "far less" than what Frank received—when Frank's $180,000 court-awarded fee was subject to the possibility of opposition and reflected an objection and successful appeal that reversed a district-court decision and was less than 6% of the additional relief to the class.

When Nunez's appeal of settlement approval potentially threatened the settlement, Frank protectively cross-appealed the court's decision to take the $180,000 from the class, instead of from class counsel, to ensure that there was no dispute about whether he could participate in further appellate proceedings. Once the other appeals were dismissed, Frank dismissed his appeal without conditions or payment—and the district court seemed to think that made Frank a hypocrite for complaining about the undisclosed side-deals in other dismissals. A6.

Frank contends that disgorgement is appropriate as a matter of law here under the undisputed facts of this case. But if this Court believes more than ministerial proceedings are necessary on what will be a second remand of these collateral proceedings, Circuit Rule 36 should apply. *E.g., Kristofek v. Village of Orland Hills*, 832

F.3d 785, 800 (7th Cir. 2016) (applying Circuit Rule 36 on partial reversal of summary judgment motion).

Conclusion

This Court should confirm that class members have an equitable remedy against objectors who blackmail class-action settlements for private gain. The district court decision should be reversed. If the Court remands for more than ministerial proceedings, Circuit Rule 36 should apply.

Dated: December 23, 2019

Respectfully submitted,

HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS

/s/ Theodore H. Frank
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Theodore H. Frank

Statement Regarding Oral Argument

Frank requests under Cir. R. 34(f) that the Court hear oral argument in his case because it presents significant issues concerning the settlement of class-action appeals. These issues regarding disgorgement from bad-faith objectors to class-action settlements, 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.

Frank is working with the *pro bono* assistance of his colleagues with the non-profit Hamilton Lincoln Law Institute's Center for Class Action Fairness. This Court has repeatedly recognized Frank's good faith in raising these public-policy issues. *See, e.g., Pearson*, 893 F.3d at 982; *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. Neither Frank nor the Center for Class Action Fairness has settled an appeal for a *quid pro quo* payment to themselves; they bring this appeal in good faith.

A favorable resolution in this appeal would provide guidance to district courts in overseeing side-deals with class action objectors, and reduce the windfalls achieved by bad-faith objectors at the expense of absent 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 Cir. R. 32(c) because:

This brief contains 9,767 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 2013 in 12-point Palatino Linotype font.

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

Executed on December 23, 2019.

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on December 23, 2019, 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 pursuant to Cir. R. 25(a), thereby effecting service on all counsel of record, who are registered for electronic filing.

/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 Theodore H. Frank.

/s/ Theodore H. Frank

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APPENDIX
TABLE OF CONTENTS
Required Short Appendix

Appendix Page

APPENDIX
TABLE OF CONTENTS

Appendix Page

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICK PEARSON, et al., Plaintiffs, v. NBTY, INC., et al., Defendants.	Case No. 11-cv-7972 Judge John Robert Blakey

MEMORANDUM OPINION AND ORDER

This case is before the Court on Objector Theodore Frank's motion seeking disgorgement of side payments Defendants made to other objectors to settle their appeals. For the reasons explained below, the Court denies Frank's motion [381], [383].

A. Background & Procedural History

This case, filed in November of 2011, began as a putative class action on behalf of consumers who purchased glucosamine, a dietary supplement touted to improve joint health. The named Plaintiff, Nick Pearson, alleged, on behalf of the class, that Defendants, Target Corporation, NBTY, Inc., and Rexall Sundown, Inc., violated consumer protection laws by making false claims about the efficacy of the supplement. On April 15, 2013, Pearson, along with Plaintiffs in five other cases, executed a global, nationwide settlement agreement. That initial settlement established a constructive common fund of $14.2 million, only $2 million of which was guaranteed to go to class members. The settlement also secured an additional

$6.5 million to pay notice and administrative costs, attorney's fees, and litigation expenses. Judge Zagel, to whom this case was then assigned, approved the settlement in January 2014, over the objections of several class members, including Theodore Frank, but with certain modifications. As approved, the settlement required Defendants to pay, in addition to money paid on the class members' claims: $1.5 million in notice and administration costs; $30,000 in incentive awards to the six named Plaintiffs; $1.13 million to the Orthopedic Research and Education Foundation; and $1.93 million in attorneys' fees and expenses (a significant reduction from what counsel had requested). *See* [143], [144].

The objectors, including Frank, appealed, and the Seventh Circuit reversed, determining that, although Judge Zagel had improved the settlement with his modifications, he had not gone far enough. [198]. The Seventh Circuit determined that the value to the class was not, as Judge Zagel thought, $20.2 million (the *potential* payout on claims), but $865,284–the total compensation actually paid to the class members on the 30,245 claims they ultimately filed. *Id.* at pp. 4–5. Thus, the attorneys' fees represented not 9.6 percent of the aggregate value, as Judge Zagel believed, "but an outlandish 69 percent." [198] at p. 6. The Seventh Circuit also took issue with several other provisions of the settlement, including a reversion or "kicker" clause providing that, if the court were to shave the proposed fee award, the savings would revert to Defendants and not go to class members. *Id.* at p. 16. Ultimately, the Seventh Circuit concluded that this settlement reflected "a selfish

deal between class counsel and the defendant" that "disserve[d] the class." *Id.* at p. 18.

On remand, the parties reached a new settlement, this time with the assistance of a neutral third-party mediator. The new settlement, in direct response to concerns raised by the Seventh Circuit, established a $7.5 million settlement fund to pay class member claims, attorneys' fees and expenses, and incentive awards. On top of that, the settlement required Defendants to pay an additional $1.5 million for notice and administration costs. The parties eliminated any "kicker" clauses from their agreement; they also simplified the claims process, upping the potential compensation and eliminating any proof of purchase requirement (in fact, while the first settlement yielded 30,245 claims, the second yielded 145,329). Additionally, the injunction component of the parties' settlement was made permanent.

Despite these improvements, several class members, including Frank, Steven Buckley, Randy Nunez, and Patrick Sweeney, filed objections. None of the objectors challenged the reasonableness of the settlement. Rather Nunez objected because his attorney, who had been named interim class counsel in another case pending in California, was not involved in the negotiations that led to the new settlement. Buckley similarly raised no challenge to the terms of the settlement but objected to class counsel's fee petition, arguing that counsel should get no more than $1.5 million. Frank similarly raised no challenge to the terms of the settlement but challenged the proposed fee award and argued that any fees awarded to his

attorney should come from class counsel's award and not from the settlement fund. Sweeney asserted a canned objection and did not even bother to cut and paste his pleadings to state the correct case information.

Judge Zagel approved the settlement, over these objections, awarded $25,000 in incentive awards to five class representatives ($5,000 to each), and awarded class counsel 33% of the net settlement fund. Additionally, Judge Zagel awarded Frank's counsel attorney's fees in the amount of $180,000, to be paid from the gross settlement fund. Judge Zagel granted preliminary approval on February 1, 2016 [238] and final approval on August 25, 2016. *See* [288]. The motion for distribution filed on February 2, 2017 shows that the approved class recovery amount was $3,963,335.32. *See* [344].

Nunez, Buckley, Sweeney, and Frank filed separate notices of appeal. *See* [289], [293], [298], and [308].[1] The Seventh Circuit consolidated the appeals and set a single briefing schedule. But before briefing began, Nunez, Buckley, and Sweeney voluntarily dismissed their appeals. The day the Seventh Circuit dismissed those appeals, Frank voluntarily dismissed his appeal, which entered separately that same day. Thereafter, Plaintiffs and Defendants asked Judge Zagel to dismiss the case with prejudice, and he did, on November 18, 2016 [333].

Frank subsequently moved to intervene, seeking to disgorge any side payments made to the three objectors, Nunez, Buckley, and Sweeney. Because Judge Zagel had by then dismissed the case with prejudice, this Court, having

[1] Buckley's appeal, Case No. 16-3507, was docketed 9/23/16; Nunez' appeal, No. 16-3519, was docketed 9/26/16; Sweeney's appeal, No. 16-3541, was docketed 9/27/16; and Frank's appeal, No. 16-3615, was docketed 10/5/16.

received the case on reassignment, denied the motion on jurisdictional grounds [340].

Frank appealed, and the Seventh Circuit reversed. In doing so, the Court noted that Frank had potentially identified a case of "objector blackmail"–the phenomenon where an absent class member objects to a settlement with no intention of improving the settlement for the class, but with the sole purpose of garnering a side payment in exchange for voluntarily dismissing the appeal. In such cases, "a potential benefit for the class–a better settlement–is leveraged for a purely personal gain–a side bargain." *Pearson v. Target Corp.*, 893 F.3d 980, 982-83 (7th Cir. 2018). The Seventh Circuit determined that the circumstances –"three objectors voluntarily dismissed their appeals before appellate briefing began"–were such that this Court should have allowed Frank formally to raise his suspicion that the settling objectors acted in bad faith.

On remand, consistent with the Seventh Circuit's directives, this Court provided Frank with the opportunity to pursue his theory. The parties conducted discovery, filed motions, and argued the matter, but the record failed to confirm suspicions of blackmail or other wrongdoing. As such, the evidence does not warrant disgorgement, and this Court denies Frank's motion [381], [383].

B. Discussion

For the Court to order disgorgement, Frank would have to demonstrate that the objector/appellants violated some rule or statute or did something unlawful, that the settlement payments amounted to ill-gotten gains. *See Porter v. Warner*

Holding Co., 328 U.S. 395, 397–99 (1946) (recognizing the appropriateness of invoking the court's equitable powers to enjoin illegal acts and practices); *Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, No. 18-2847, 2019 WL 3940917, at *27 (7th Cir. Aug. 21, 2019) ("primary purpose of disgorgement orders is to deter violations of the laws by depriving violators of their ill-gotten gains"); *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1640 (2017) ("disgorgement is a form of '[r]estitution measured by the defendant's wrongful gain'") (quoting Restatement (Third) of Restitution and Unjust Enrichment § 51, Comment a, p. 204) (2010)). Without more, the dismissal of an appeal does not necessarily indicate objector blackmail. Litigants routinely dismiss matters for reasons other than blackmail (as Frank knows, having himself dismissed his appeal). And litigants settle disputes every day for reasons having nothing to do with the merits of their claims or defenses. The dismissals raised red flags on appeal because the Seventh Circuit thought that they came possibly at the expense of the class. *See* [366] at p. 8. But after considering the evidence and arguments on that question, this Court cannot say that is the case.

The settlement agreements executed by Defendants and the three objector/appellants show that Defendants NBTY and Rexall paid $10,000 to Patrick Sweeney, $60,000 to Steven Buckley, and $60,000 to Randy Nunez in exchange for each objector/appellant's agreement to remain part of the *Pearson* class, to dismiss his appeal, and to release all claims, including any claim for fees. *See* [377]. Initially, each of these settlements was far less than the $180,000 Frank received.

Frank suggests that the appeals were meritless, designed to leverage payments that should have gone to the class. But at the initial status hearing following the Seventh Circuit's remand, Frank conceded that he had no evidence to support his claim of objector blackmail. Moreover, his assertion remains demonstrably false with respect to at least two of the objectors. In response to Frank's motion, Buckley explained that he filed his objection and his notice of appeal challenging only counsel's fee petition–a challenge similar to that asserted by Frank. *See* [386]. Buckley represented that he did not file his objection or notice of appeal to leverage a settlement from Defendants. His attorney also submitted a declaration, [406], representing that his appellate brief was largely drafted when Defendant NBTY initiated settlement discussions. Counsel further represented that, in exchange for dismissing his appeal, Buckley received $60,000, with the vast majority ($55,000) going to his attorney to compensate him for the time he actually spent prosecuting the appeal.

Randy Nunez represented that his appeal did not challenge any term of the settlement; nor did he challenge class counsel's fee award. Rather, Nunez's sole claim on appeal argued (in good-faith and with cause) that it was improper for Defendants to settle with the named plaintiffs in Pearson's case, when Nunez's counsel had been named interim class counsel in the California case and therefore had sole authority to negotiate any potential resolution of the claims asserted in Nunez's case. *See* [405]. Nunez's counsel further represented that they opted to dismiss his appeal and the California case, rather than hold up the distribution of

funds to class members, ultimately dismissing both in exchange for a remedial $60,000 payment.

It is not clear why Sweeney chose to appeal or why he opted to settle. But the question is irrelevant. First, everyone agrees that the money paid to Nunez, Buckley, and Sweeney came from funds separate and apart from the settlement fund. The objectors and Defendants represent that these funds were never earmarked for the class, and there is no evidence to suggest that they would have gone to the class had they not gone to the objectors. Nothing in the settlement required Defendants to put up all the money they had; nor was there anything in the settlement to preclude Defendants from paying more in the end than they ultimately agreed to pay in the settlement agreement. Nor does the Court have a basis to find that the appeals, had the objectors pursued them rather than settle them, would have benefitted the class. Quite simply, the Court has no basis to conclude that the side settlements harmed the class in any way. If anything, class members benefitted from the side settlements, because they allowed the class settlement to become final, thereby ensuring prompt payment of class members' claims.

When asked to point to something in the record to show that the money, had it not been paid to objectors, would have gone to the class, Frank argued that *any* funds paid by the Defendants were earmarked for the class. That unfounded assertion runs contrary to the parties' settlement agreement, which set the amount to be paid to the class without regard to any objector settlements; Defendants paid

that amount and the class received that amount. Any amounts paid to the objectors were above and beyond what Defendants agreed to pay to the class, and nothing in the record suggests that the class would have received that money had Defendants not paid it to objectors.

Frank's assertions notwithstanding, this Court does not read the Seventh Circuit's decision to preclude all payments beyond those contemplated in a settlement agreement. Nor has the Seventh Circuit held that all side settlements necessarily remain problematic or improper. Indeed, *Safeco Insurance Company of America v. American International Group*, 710 F.3d 754, 758 (7th Cir. 2013), instructs that side settlements can, in fact, be acceptable. In *Safeco*, after describing the side settlement, the Seventh Circuit observed that the "terms of the settlement do not matter to the other members of the class, who still split $351 million among them." *Id.* at 756. Likewise, the side settlements here had no effect on the settlement fund or the class distributions. The money Defendants paid to the objectors remained separate and apart from the settlement fund; the settlement fund was firmly defined before the objectors filed their appeals; and there simply is no mechanism by which those funds would have gone to the class. As such, the settlements did not deprive any class member of his or her reasonable expectations– on the contrary, class members got exactly what they bargained for. Absent some indication that such settlements harm the class or somehow diminish the relief available to the class, this Court finds no basis to inject itself into these arms' length transactions with an unfounded order of disgorgement.

C. Conclusion

For the reasons explained, the Court finds no evidence to show that the side settlements reached between Defendants and objector/appellants Nunez, Buckley, and Sweeney harmed the class or came at the expense of the class. As a result, equitable relief such as disgorgement is neither available nor appropriate. Accordingly, Frank's motion seeking to disgorge side payments [381], [383] is denied.

Dated: September 23, 2019

Entered:

John Robert Blakey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.3.1
Eastern Division

Nick Pearson, et al.

Plaintiff,

v.

Case No.: 1:11−cv−07972
Honorable John Robert Blakey

Target Corporation, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, September 23, 2019:

MINUTE entry before the Honorable John Robert Blakey: Enter Memorandum Opinion and Order. For the reasons explained in the accompanying Memorandum Opinion and Order, the Court finds that equitable relief such as disgorgement is neither available nor appropriate with regard to the settlements of appellate matters designated as Nos. 16−3507, No. 16−3519, and No. 16−3541. Accordingly, Frank's motion seeking disgorgement [381], [383] are denied, and this case remains closed. Mailed notice(gel,)

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