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

Reply Brief of Appellant Theodore H. Frank

HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
Theodore H. Frank
Anna St. John
1629 K St. NW, Suite 300
Washington, D.C. 20006
(703) 203-3848
ted.frank@hlli.org
Attorneys for Objector-Appellant
Theodore H. Frank

Table of Contents

Table of Authorities

Cases

Rules and Statutes

Other Authorities

Summary of the Argument

The district court committed legal error by failing to order the objectors to equitably disgorge their ill-gotten gains in this class action. Objectors Buckley and Nunez now rely on immaterial distinctions between this case and Supreme Court and Circuit precedent to challenge courts' authority to order equitable disgorgement when litigants unjustly enrich themselves by leveraging the class action device. This Court already has relied on *Young v. Higbee*, 324 U.S. 204 (1945), in the class action context. Under that precedent, and contrary to Buckley's claim, individual class members cannot leverage the aggregated claims of a class action for their personal benefit by eliciting a separate payment from defendants any more than class counsel could avoid Rule 23(h) scrutiny by segregating their fee payment. *See id.* at 213-14. Through their side settlements, Buckley, Nunez, and Sweeney unjustly enriched themselves and abused the judicial process. Courts have inherent authority to order disgorgement in response, without the need to find a violation of criminal law. The district court's imposition of such a requirement was legal error requiring reversal. *See* Section I.

Nunez primarily argues that his dismissal of a class action in California involving a nearly identical class somehow legitimizes his $60,000 settlement deal. Nunez's actions do not support his claim of acting in good faith on behalf of the class, as he pursued an appeal for "public policy" reasons with no claim that he could have obtained a better deal for the class. Nor can Nunez identify any benefit he created for the class. If he had created such a benefit, the proper procedure would have been to file a motion under Rule 23(h)—not to use the class's claims to leverage a side settlement with defendants outside the court's supervision and approval process. His settlement agreement gives no indication that defendants paid him for work in connection with the California action; it does not even mention the California action. Instead, the settlement

shows the payment was made solely in exchange for him dismissing his appeal in this case; indeed, it paid him the same amount as Buckley, who was not involved in a separate action. *See* Section II.

Nunez and Buckley also rely on out-of-Circuit precedent that Frank identified and discussed in his opening brief. These authorities fail to offer the support they seek. *See* Section III.

Buckley's argument that Frank lacks standing to challenge the objectors' side settlements overlooks his allegation of harm from the objectors' unjust enrichment at the expense of the class. As Justice Thomas explained in *Spokeo, Inc. v. Robins*, and objectors fail to rebut, remedies for private-rights causes of action such as unjust enrichment are not contingent on an allegation of damages beyond the violation of his private legal right. 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring). Nevertheless, Frank alleged injury from the objectors' retention of benefits that equitably belong to the class. Meanwhile, Nunez's claim that the Court lacks jurisdiction because review of his agreement somehow divests the Southern District of California of jurisdiction over his separate case makes little sense when he dismissed that case himself. Even if he hadn't, he failed to timely opt out of the class in this case so as to preserve his right to pursue the separate California action. *See* Section IV.

Finally, neither Buckley nor Nunez disputes that Circuit Rule 36 should apply on remand such that, if the case is remanded, it should be assigned to a different district court judge. *See* Section V.

Argument

I. Buckley and Nunez fail to undermine the holdings of *Pearson* and *Young v. Higbee* supporting equitable disgorgement of their settlement proceeds.

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

Buckley argues (PB27-29) that the side settlements are not subject to disgorgement because unlike in *Young v. Higbee*, this is "not a limited fund situation" and the objectors had no statutory duty of good faith to the class.[1] This argument is untenable. Nothing in the words or reasoning of *Young* limits its holding in this way. First, *Young* is express that when parties appeal from a judgment that "affected a whole class," "at the very least they owed them an obligation to act in good faith." 324 U.S. at 210. This obligation did not arise from the subsection of the Bankruptcy Act permitting the *Young* respondents to appeal. That statute, 11 U.S.C. § 606 (now partially recodified at 11 U.S.C. § 1109), read in relevant part in the same general terms as Rule 23(e)'s right of objection: "The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter." *In re 7309 Talbot Place Corp.*, 27 F. Supp. 40, 40 (E.D.N.Y. 1939) (quoting § 606).

From this general language and the class-affecting nature of the appeal, the Supreme Court imputed a duty of good faith. *Pearson* echoes this rule in the Rule 23 context: appeals in a class action "with all their inherent agency problems[,]require an extra analytical step to ensure that the interests of the class are protected." *Pearson v. Target Corp.*, 893 F.3d 980, 985 (7th Cir. 2018). *Safeco*, too, holds that courts should

[1] OB, PB, and NB refer to the opening brief, Buckley's merits brief (represented by John Pentz), and Nunez's merits brief respectively. As in the opening brief, "Dkt." refers to the district court docket in this case.

protect the class from side settlements in which an appellant "sold out the class." *Id.* at 985 (discussing *Safeco Ins. Co. of Am. v. Am. Int'l Group*, 710 F.3d 754, 758 (7th Cir. 2013)). And, in *Murray v. GMAC Mortgage Corp.*, this Court relied on *Young* for the proposition that the class action device may not be "used to obtain leverage for one person's benefit." 434 F.3d 948, 952 (7th Cir. 2006) (criticizing a class action settlement that paid a representative and his attorney but froze out the class).

Put simply, under Circuit precedent, self-appointed champions may not use the leverage of a group of claims to benefit themselves even in the absence of a statutory duty. That a district court in the Eastern District of Pennsylvania chose to interpret *Young* differently is irrelevant. *See* PB27 (discussing *Rougvie v. Ascena Retail Group, Inc.*, 2017 U.S. Dist. LEXIS 92814 (E.D. Pa. June 16, 2017)). That objectors have a right to appeal (PB30) does not undercut courts' authority to police misuse of the judicial process.

There is no dispute that the objectors appealed from a judgment that affected the whole class, and then leveraged the class action, *i.e.*, the claims of other class members, to obtain a settlement that exclusively benefited the individual objectors and/or their attorneys. Indeed, "[t]o justify even the filing fee, each objector must have been advancing claims on behalf of the class as a whole." *Pearson*, 893 F.3d at 985. Just as in *Young*, the rights of the individual objectors and the other class members are inseparable. If the attorneys' fee award was too high, as Buckley claimed, it came at the expense of *all* class members. Likewise, if only the interim class counsel appointed in *Nunez* was permitted to settle on class members' behalf, as Nunez claimed, that too affected all class members. *See Crawford v. Equifax Info Servs.*, 201 F.3d 877, 881 (7th Cir. 2000) ("[A]ppellate correction of a district court's errors is a benefit to the class."). No matter whether the fund was limited or not, or whether there was a separate statutory duty of good faith, the right to appeal in a class action does not give appellants a "right

to sell the privilege of appeal to the disadvantage of all other stockholders in their class." *Young*, 324 U.S. at 210. Yet that's exactly what they did.

Second, Buckley claims that the settlement payments were not at the expense of other class members because these were "new monies not derived from the class settlement in any way." PB28. Under *Safeco*, the provenance of the money is irrelevant. Appellants do not dispute that their side payments increased defendants' overall payment to settle and definitively end the *class action*. If defendants were willing to expend additional money to settle the class action, that money belongs to the entire class. The equitable logic of *Murray* and *Young* apply with full force against individuals who misuse procedure pretending "to be for the benefit of all" but instead take money "in excess of their own interest [and are] not paid for anything they owned." *Young*, 324 U.S. at 213, 214. The side settlements "do[] not alter the rights of parties as to distribution of the fruits of the settlement"; "its fruit properly belongs to all" the class members. *Id.* The objectors are not separate from the class action that the funds were directly paid to end. *Id.* All class action settlement payments ultimately derive from leverage of the underlying claims. *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (discussing how class claims generate settlement pressure); *cf. also* Manual for Complex Litig. § 21.75 (4th ed. 2008) ("If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees … the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class."). *Pearson* likewise recognizes this fact; otherwise, why allow an absent class member to investigate untoward objector side deals?

Such side deals have other pernicious effects. The presence of bad-faith objectors seeking to extract windfalls for little work regularly interferes with the good-faith objections brought by Frank and the Hamilton Lincoln Law Institute. Because courts have condemned bad-faith objectors as "professional objectors," class-action attorneys

regularly deliberately attempt to confuse courts by noting that Frank is a "professional" and an "objector," and then cite the court decisions condemning "professional objectors" to falsely accuse Frank and his clients of objecting in bad faith. In other cases, class-action attorneys have used precedents against "professional objectors" to obtain abusively large appeal bonds to interfere with Frank's clients' right of appeal. In still other cases, the cacophony created by shoddy objections brought by bad-faith objectors interferes with a court's ability to fairly consider the reasoned good-faith objections brought by HLLI. Meritless objections thrive when unsuccessful objectors obtain more—or any—money compared to successful objectors who file good-faith objections that achieve valuable results for class members. The windfall given to unsuccessful objectors creates a perverse incentive encouraging bad-faith objections while undermining meritorious good-faith objections. These perverse incentives ultimately encourage abusive class-action settlements that hurt class members.

B. Disgorgement does not require a violation of criminal law and is an appropriate remedy for objectors' abuse of judicial process to unjustly enrich themselves.

Nunez argues briefly, and incorrectly, that the district court was correct that disgorgement requires either a violation of a rule or statute or some other unlawful act such that the settlement payment amounted to ill-gotten gains. He cites no legal authority supporting this position, and he admits that under binding precedent a court may exercise its "equitable powers to enjoin … *other wrongful conduct*." NB8 (emphasis added). At the time appellees obtained personal payouts by holding up the class settlement, such conduct had long been recognized as "improper" by this Circuit, even if it might only be "extortion" in the colloquial, rather than criminal sense. *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003).

In *Porter v. Warner Holding Co.*, a case Nunez cites, the Supreme Court made clear that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its equitable] jurisdiction." 328 U.S. 395, 398 (1946); *see also* OB15-16. The Court emphasized that where "the public interest is involved in a proceeding," the court has broad authority to "go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances," including ordering disgorgement. *Id.* The Court again held in *Chambers v. NASCO, Inc.* that courts have inherent authority to craft an equitable remedy when a litigant abuses the judicial process. 501 U.S. 32, 46 (1991). The other Supreme Court case Nunez cites, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), involved an order of disgorgement in an SEC action as a penalty for securities law violations. Nunez's cited passage simply notes that disgorgement is generally a form of restitution measured by the defendant's wrongful gain achieved through interference with a claimant's legally protected rights; it doesn't hold that disgorgement is only appropriate following a violation of criminal law. *Id.* at 1640 (citing Restatement (Third) of Restitution and Unjust Enrichment § 51, Comment a, p. 204 (2010)).

Nunez also quotes *FTC v. Credit Bureau Center*, 937 F.3d 764, 796 (7th Cir. 2019), to support his argument that the "primary purpose of disgorgement orders is to deter violations of the laws by depriving violators of their ill-gotten gains." NB8. But that is a case discussing the FTC's authority to request disgorgement, and was not making a statement that a violation of the law is a prerequisite for disgorgement in other contexts. In any event, one can analogize here: Frank seeks disgorgement from appellants for unjustly enriching themselves through abuse of the judicial process and violation of Rule 23(h), and disgorgement will deter similar wrongful conduct in the future. Disgorgement complements the then-current and now amended Federal Rules of Civil

Procedure. A court's inherent power is available "when no direct conflict with laws or national rules of procedure would arise." *Kovilic Constr. Co. v. Missbrenner*, 106 F.3d 768, 773 (7th Cir. 1997). Nunez identifies no such direct conflict here. Instead, the amended Rule 23(e)(5) supports judicial action to prevent objector side settlements such as his.

Buckley doesn't deny the court's authority to order disgorgement. Instead, he incorrectly claims that rescission, rather than disgorgement, is the proper remedy here. *See* PB31. The only source he cites for this argument is Rule 23(e)(5)(C), which says nothing about rescission. Rule 23(e)(5)(C) addresses how to notify the court of an objector side settlement if an appeal is pending at the time. Parties are instructed to file a Rule 62.1 request for an indicative ruling *while the appeal remains pending*. Once the parties dismiss an appeal, there is no procedure to reinstate it, and doing so rewards bad faith settlements that district courts appropriately reject.

Proceeding with a reinstated appeal makes little sense. Buckley's appeal challenged the attorneys' fee award to class counsel. *See* PB9. The side settlement did not reduce the fee award, return any funds to the class, or otherwise compensate the class for the amount Buckley believed to be overpayment to the attorneys. If his appeal had been brought in good faith—either to reduce what he believed to be a windfall to the plaintiffs' attorneys or to create favorable precedent that would ensure greater class recovery in the future—then he would not have accepted a personal payout from the defendants. Buckley asserts that his $60,000 settlement "very closely tracked the amount of his counsel's attorney's fees at the time of the settlement." PB16. So what? An attorney fee for no benefit to the class is not made kosher by conforming to lodestar. Rescinding the settlement and allowing these cynical appeals to continue would perpetuate abuse of the judicial process and burden the court system with appeals that appellants abandoned.

Defendants have expressed no interest in recovering the settlement payments. Dkt. 36. They do not deny (nor could they) that the payments were made to settle the litigation finally and to avoid the costs and risk of the objectors' appeals. At a minimum, defendants would incur the cost of reading the briefs, monitoring the appeals, and the unlikely but potentially devastating risk that the Court would reverse approval of the underlying settlement. *Contra* PB21; *but see* PB21 n.5 (acknowledging the side settlement benefited defendants). Defendants settled for the same reason any party pays to settle: They assessed the cost of a nuisance payment to be lower than the alternative cost of litigation. The settlements show that, as an indisputable matter of economic reality, they were willing to pay more to end the class action and the risk of exposure to them. After leveraging the underlying class claims to create that risk, the objectors agreed to settle only after capturing defendants' payments for themselves. The money should benefit the *class*, even if only indirectly through escheat.[2]

II. Nunez's dismissal of a parallel class action is irrelevant to his agreement to drop the appeal in this case for the same $60,000 paid to Buckley.

Nunez's framing of his individual settlement is utter fiction. He attempts to salvage that settlement by arguing that the district court properly found his actions to be in good faith and consistent with his counsel's role as interim class counsel in a separate California action. NB9. Nunez casts his settlement as a wrenching choice between (i) pursuing an appeal meant to protect the class and (ii) dismissing the appeal to advance the class's interest in receiving the settlement proceeds more quickly. *E.g.*,

[2] Buckley's comments (PB26) alleging "vanity" and a "personal agenda" as Frank's motives for this appeal are entirely baseless. Frank used his fee award as a reference point to show how the district court's decision will incentivize objectors to act in bad faith because they can settle their objection or appeal for a higher hourly fee than if they had worked to benefit the class. *See* OB27.

NB11-12. Yet, the supposed choice was a win-win: Both courses of action overwhelmingly favored Nunez and his counsel.

First, the facts of Nunez's appeal suggest that he was not acting in good faith from the beginning. Nunez doesn't argue that he could have obtained a better settlement as interim class counsel; rather, his appeal arose from his belief that "as a matter of public policy," only he—as interim class counsel in the California action—should have been able to agree to a resolution of the class claims and, presumably, collect attorneys' fees for that role. NB6. Following Frank's appeal and this Court's 2014 decision, the revised *Pearson* settlement distributed $3.1 million more to the class than the original settlement. Nunez appealed this revised settlement, but he did not object to the amount or other terms of the settlement. NB11. Nunez never explains why he failed to appeal denial of his motion to intervene if he believed his participation was necessary to protect the class. Thus, his reasons for appealing show only that he was using the appeal as leverage for personal gain.

Second, dropping his appeal did not create a benefit for the class when it was the very action of the appeal that created the detriment in the first place. *Cf. Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012). It thus doesn't warrant fees. If Nunez and his counsel *had* conferred a benefit to the class meriting compensation, then the proper course was to petition the district court for fees and costs pursuant to Rule 23(h). Under Rule 23(h), any claim for attorneys' fees and costs "must be made by motion under Rule 54(d)(2)." The rule has governed all fee awards in class actions since 2003 and demands "any claim for an award of attorney fees must be sought by motion." Advisory Committee Notes to 2003 Amendment to Rule 23. This includes both awards to class counsel and to objectors' counsel. *Id.* (contemplating "an award to other counsel whose work produced a beneficial result for the class, such as … attorneys who represented objectors to a proposed settlement under Rule 23(e)"); Advisory Committee Notes to

2018 Amendment to Rule 23 ("If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees."). To the extent that Nunez believes he was entitled to attorneys' fees, then he was required to follow that procedure after dismissing his appeal. Nunez instead chose to enter a secret side agreement settling his appeal. Rule 23(h) exists to protect the class from efforts by class counsel, defendants, and others to pay funds attributable to class members' claims—such as the side settlements here—outside the court's supervision and approval process.

Third, despite Nunez's protests to the contrary, his settlement agreement has no evidence that it had anything to do with the California action it does not mention. The side agreement unambiguously compensated Nunez only for dismissing his appeal in *this case*. It stipulates that consideration was to be paid in exchange for only two specific conditions: "Objector agrees to move for dismissal of Objector's Appeal within 24 hours of execution of this Agreement" and agreeing not to opt out of the underlying *Pearson* settlement. A112. The agreement does not even allude to the existence of the *Nunez* action, let alone require the dismissal of the suit.

Nunez points to the "broad language and general release" in his side agreement to make the point that the separate action in the Southern District of California was not "exempt." NB12. But Frank doesn't claim that the California action survived the *Pearson* settlement; the issue is whether Nunez's side agreement also imposed on Nunez the obligation to dismiss the *Nunez* action and compensated him in return. Nothing in the agreement suggests Nunez was required to dismiss the California action or that such dismissal was consideration for the $60,000 payment. The broad generic language in the side agreement cannot be read to impose additional unnamed duties on a party. *Davis v. G.N. Mortg. Corp.*, 396 F.3d 869, 879 (7th Cir. 2005). Even that language cites only *Pearson*, with no mention of *Nunez*. *See* NB12 (quoting release).

It might be true that the *Pearson* settlement necessitated dismissal of *Nunez*, NB14, but Nunez's side agreement did not bring about that result. The deadline to request exclusion from the underlying settlement was six months before Nunez and defendants struck their side agreement. While courts sometimes grant leave for class members to belatedly opt out of a settlement, Nunez was represented by competent counsel aware of the significance of requesting exclusion, so a belated effort to save his individual action would be unlikely to succeed. Defendant's inclusion of a belt-and-suspenders requirement for all of the objectors to remain bound by the settlement cannot be read to impose a separately-enforceable duty on Nunez alone.

Nunez agrees with Frank that the settlement agreement speaks for itself. NB12. There is thus no basis for looking outside the agreement to extrinsic parol evidence for ambiguity or meaning. "The introduction of parol evidence to establish ambiguity in a facially unambiguous, signed, dated and fully integrated contract is a practice which the Illinois Supreme Court has, to this date, neither condoned nor sanctioned." *Davis*, 396 F.3d at 879. Nunez's agreement is even less ambiguous than the one in *Davis* in which the court did not permit parol evidence to be used to create ambiguity in a contract that did not expressly label itself as a fully integrated agreement. An integrated contract necessarily includes every material term "and parol evidence cannot be admitted to add another item to the agreement." *Id.* at 878 (internal quotations omitted). Where, as here, "parties formally include an integration clause in their contract, they are explicitly manifesting their intention to protect themselves against misinterpretations which might arise from extrinsic evidence." *Air Safety, Inc. v. Teachers Realty Corp.*, 706 N.E.2d 882, 885 (Ill. 1999). The Nunez agreement is emphatic that it is fully integrated. *See* A114.

Even if the contract were ambiguous and extrinsic evidence were relevant, extrinsic evidence shows that the entire settlement value derives from dismissal of the

appeal, not the hypothetically-required dismissal of the California action. Nunez fails to address the glaring fact that he was paid the exact same $60,000 that fellow objector Buckley was paid to dismiss his appeal. Buckley did not have a separate action against defendants, so the fact he was paid the same price suggests no incremental settlement value for the California action. This is unsurprising. The California action was entirely foreclosed by res judicata and had no independent value given that Nunez was bound by the *Pearson* class certification and release. Therefore, the entire value of the payment for Nunez accrued through the threat to impose costs through the selfish *Pearson* appeal.

Nunez further argues that dismissal of the *Nunez* action was a material term of his side settlement as evidenced by defense counsel preparing and filing the dismissal "as part of the settlement agreement." NB14. Opposing counsel often draft stipulated filings for each other, and the fact that defendants drafted the California notice of dismissal has no bearing on the interpretation of the agreement. NB14. (Presumably, Nunez's comment that the dismissal was prepared and filed "as part of the settlement agreement" refers to the timing, as there is no reference to the dismissal in the settlement agreement. *Id.*) A belated, self-serving attorney comment about drafting error (NB12 n.2) cannot override the plain language of the agreement.

Moreover, even if Nunez is right that "this Court has no jurisdiction with respect to his separate action," NB13, this line of argument is a *non sequitur*. This appeal relates to the settlement in *this* action. It is law of the case that the district court has ancillary jurisdiction to address it. *See Pearson*, 893 F.3d at 986. With respect to the *Nunez* action, Nunez acknowledges that he—not the district court—separately dismissed his California action. NB14. The district court never "assert[ed] control" of the *Nunez* action. *Id.* Nunez failed to opt out of the *Pearson* settlement that resolved his claims,

failed to appeal the denial of his motion to intervene, and then filed for dismissal in the California action. The *court* did nothing to inhibit his claims.[3]

III. Frank's position is consistent with Buckley's and Nunez's cited authorities.

Nunez relies on *Safeco* to argue that the side settlement is proper because class members will continue to split the class-wide settlement fund. NB14. *Safeco*, however, did not bless all objector side settlements. It expressly recognized the possibility that, as happened here, a class member might protest the terms of an objector settlement with a Rule 60 motion. *Safeco*, 710 F.3d at 757.

Buckley's and Nunez's interpretation of *Safeco* is not only wrong but would allow meritless appeals intended to leverage an individual payout simply because no other class member had an interest in appealing. They would have this Court interpret *Safeco* as allowing courts to reject objector settlements only if other class members had foregone an appeal in reliance on the settling appellant to vindicate their rights. PB25; NB14. But as this Court has observed, it is "naïve" to believe that silence from class members equates their approval. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) (class members' failure to submit claims "shows oversight, indifference,

[3] Despite Nunez's and Buckley's false personal attacks, the truth is that Frank's pursuit of disgorgement is entirely consistent with his mission to protect the class against those who use the class action process for personal gain. *See, e.g.*, PB25 (criticizing Frank for dismissing his 2016 "appeal"). Frank did not directly appeal settlement of the underlying class action, and only filed a cross-appeal under Rule 4(a)(3) in response to the objector's bad-faith appeals, which risked disrupting a relatively beneficial settlement for the class. The record shows that Frank filed his cross-appeal on October 4, 2016 (Dkt. 308)—over 30 days after the August 25 Final Judgment and Order (Dkt. 288). Frank's cross-appeal was dismissed with no money changing hands.

rejection, or transaction costs"). While perhaps no class members were consciously "sitting back rooting on Mr. Buckley" as they hoped for additional cash relief, PB25, there certainly were no class members consciously authorizing Buckley to use their claims to leverage a personal benefit for himself.

In *Safeco*, after the objector-appellant settled with the defendant and filed stipulated dismissals of its appeals, the panel sought additional briefing on whether class members' rights were adversely affected due to the unique circumstances of the case. 710 F.3d at 756. It was only after the panel majority determined that the class comprised sophisticated insurance companies who did not object to the deal, and that the objector was simultaneously settling valuable individual claims that the deal was able to stand. Those circumstances are absent here. Instead of sophisticated insurance companies with large six- and seven-digit claims in a multi-billion-dollar dispute, we have here a largely silent class of consumers and settling objectors who do not have any separate, valuable claims to speak of. *Cf. Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011) (consumer class members "ordinarily lack both the monetary stake and the sophistication in legal and commercial matter that would motivate and enable them to monitor the efforts of class counsel on their behalf.").

Nunez incorrectly challenges the applicability of *Dale M. v. Board of Education of Bradley-Bourbonnais High School District No. 307*, 282 F.3d 984 (7th Cir. 2002). *Dale M.* held that district courts have inherent authority to order disgorgement of fees for unethical conduct. *Id.* at 986. That the underlying case in *Dale M.* is not a class action makes no difference to the broader principle. Here, as discussed in Section II, Nunez extracted fees from the defendants for settling his appeal in *this* case—not the California action—by leveraging the class action device for personal gain. Nunez acted unethically (indeed perhaps even more unethically than Buckley given that his counsel

sought to be class counsel with fiduciary duties under Rule 23(g)), and his fees should be disgorged.

Buckley relies heavily on *Duhaime v. John Hancock Mutual Life Insurance Co.*, 183 F.3d 1 (1st Cir. 1999), to argue that another Circuit allows side settlements to stand, PB23, despite all the reasons Frank discussed in his opening brief for this Court not to tread the same path. OB24-25. This Court twice now has implicitly rejected *Duhaime*, once in *Safeco* and again when Frank appealed the district court's denial of his Rule 60 motion. *See Pearson*, No. 17-2275, Opening Brief at 37-38 (July 31, 2017). If the Seventh Circuit considered *Duhaime* good law, it would not have remanded because denial of Frank's Rule 60 motion would have been harmless error. Instead, when it remanded for evidentiary discovery regarding terms of the side agreements, it knowingly and implicitly rejected *Duhaime* just as *Safeco* did. *Pearson*, 893 F.3d at 987. (Frank's appeal in *Pearson* forthrightly flagged *Duhaime* for this Court. No. 17-2275, Opening Brief 37-39.) Buckley provides no reason for this Court to reconsider the case again.

IV. Frank has standing to challenge the objectors' sell-out of their appeals.

Frank has standing under precedent from this Circuit and the Supreme Court. Buckley challenges Frank's standing by arguing that Frank failed to show or explain why he was harmed by the objector side settlements when the district court found that "nothing in the record suggests that the class would have received [the side settlement] money had Defendants not paid it to objectors." PB6-7 (quoting A8-9). As Frank anticipated, however, Buckley's standing argument is actually an attack on the merits. *See* OB25. They also rely (PB18, PB27) on a district court case from another circuit, *Rougvie*, that cannot be followed over the Circuit and Supreme Court precedent that establishes Frank's standing.

Frank indisputably alleged that he was harmed by the attorneys unjustly enriching themselves at the expense of the class. A77. Objectors leave unanswered the fact, as confirmed in *Spokeo, Inc. v. Robins*, that "[m]any 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." 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring). Buckley doesn't dispute that, having alleged that objectors unjustly enriched themselves at the expense of the class, Frank was not required to allege any specific damages for standing to pursue the traditional remedy of disgorgement.

Further, the threat of impending injury, "no matter how small," creates standing, and such "[i]njury need not be certain." *Brandt v. Vill. of Winnetka, Ill.*, 612 F.3d 647, 649 (7th Cir. 2010). Frank meets this standard. As Frank alleged, objectors derived substantial payments entirely from the underlying value of the class action settlement, but did not improve that settlement. *Id.* The injury is objectors' retention of benefits from the Rule 23(e) appeals that equitably belong to class, and as a class member, Frank has an interest in the equitable distribution of such benefits.

Nunez, in turn, argues against jurisdiction based on a false premise. He argues (NB13) that this Court should abstain from reviewing the terms of his agreement because reversal and disgorgement will "effectively divest" the jurisdiction of the Southern District of California. His argument is odd, considering that he dismissed that action himself at the time he settled his appeal, and the California action was effectively over once he failed to opt out of the settlement approved by the district court by the court-ordered deadline. The only case Nunez cites in support of his argument, *In re John's Overtime Litigation*, involved the far different scenario of a court enjoining plaintiffs from pursuing their claims against defendants in other district courts. 877 F.3d

756, 769 (7th Cir. 2017). It was Nunez's *own* actions, not an injunction by the district court, that inhibited him from pursuing his claims in the California action.

V. Neither Buckley nor Nunez disputes that Circuit Rule 36 should apply on remand.

Because neither Buckley nor Nunez disputes that Circuit Rule 36 should apply on remand, they have forfeited any opposition to this argument. *See AAR Int'l, Inc. v. Nimelias Enters. SA*, 250 F.3d 510, 526 (7th Cir. 2001) (appellees waive arguments not raised in briefs). Accordingly, if this Court believes substantive or non-ministerial proceedings are necessary on remand—despite disgorgement being appropriate as a matter of law given the undisputed facts—then the case should be reassigned to another judge for those proceedings.

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: April 1, 2020

Respectfully submitted,

HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS

/s/ Theodore H. Frank
Theodore H. Frank
Anna St. John
1629 K Street, NW, Suite 300
Washington, DC 20006
(703) 203-3848
Attorneys for Objector-Appellant
Theodore H. Frank

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 5,749 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 April 1, 2020.

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on April 1, 2020, 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