UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICK PEARSON, FRANCISCO PADILLA, CECILIA LINARES, AUGUSTINA BLANCO, ABEL GONZALEZ, and RICHARD JENNINGS,
On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

NBTY, INC., a Delaware corporation; and REXALL SUNDOWN, INC., a Florida corporation; TARGET CORPORATION, a Minnesota Corporation

Defendants.

THEODORE H. FRANK,

Objector/Intervenor.

Case No. 11-CV-07972

CLASS ACTION

Hon. Elaine E. Bucklo

OBJECTOR/INTERVENOR THEODORE H. FRANK'S REPLY IN SUPPORT OF HIS MOTION TO ADMINISTER CONSTRUCTIVE TRUST

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INTRODUCTION

The responding objectors Steven Buckley and Randy Nunez ("Buckley Objectors") ask this Court to disregard the law of the case and controlling precedent.[1] This is frivolous. The Seventh Circuit already held "funds wrongfully held by the objectors" should be placed into a "constructive trust." *Pearson v. Target Corp.*, 968 F.3d 827, 837 (7th Cir. 2020) (*Pearson III*). The Seventh Circuit already rejected Nunez's assertion that his payment was received for a separate litigation in the Southern District of California. *Id.* at 834-35. Likewise, Buckley repeats many of the arguments that failed to persuade the Seventh Circuit.

Buckley's new arguments—that his counsel should be compensated for his work extracting and retaining funds that belong to the class—wins points for chutzpah and creativity, but lack legal support. Buckley's factually mistaken and inappropriate personal attacks on Objector-Intervenor Theodore H. Frank do not aid his argument.

The Buckley Objectors sold their supposedly public-minded appeals for private gain—objector blackmail. "Equity does not permit them to keep that gain." *Pearson III*, 968 F.3d at 833.

I. The Seventh Circuit already decided disgorgement should be ordered.

The Buckley Objectors attempt to relitigate issues the Seventh Circuit already decided.

To quickly recap the factual background (*see* Mem. in Sup., Dkt. 438-1 at 2-7), Frank objected in 2014 to an inferior class action settlement, which approval he successfully appealed. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) ("*Pearson I*") (crediting Frank for having "flagged fatal weaknesses in the [original] proposed settlement."). This successful appeal resulted in a new settlement approved in 2016, which provided millions more to class members. Dkt. 213 at 7. The Buckley Objectors, who did not participate in the 2014 objection, filed perfunctory four-page objections to the 2016 settlement. Dkts. 256 & 258. Following final approval, they appealed purportedly on behalf

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[1] The undersigned sent certified mail to two former addresses for the third objector, Patrick Sweeney, a disbarred attorney. *See* Mem. in Sup., Dkt. 438-1 at 8. The post office returned both packages as undeliverable. Frank believes the $10,000 paid to Sweeney cannot be recovered because he owes former partners hundreds of thousands of dollars of restitution. Frank will not address further filings to him.

of all class members, but instead settled for undisclosed private payments. Dkts. 377 & 400. Frank suspected such payments, so sought discovery and intervention on behalf of the class.

Four years ago, Frank established his standing to pursue disgorgement of side-payments, if they existed. Even though Frank could not prove the existence of side-payments, and even though the case had been dismissed with prejudice, "selfish settlements by objectors are a serious problem," which merited allowing Frank to reopen the case though Rule 60(b). *Pearson v. Target Corp.*, 893 F.3d 980, 986 (7th Cir. 2018) ("*Pearson II*"). Thus, four years ago the Seventh Circuit rejected Buckley's argument that only Class Counsel may challenge objector blackmail.

Two years ago, after proving that the Buckley Objectors had been paid simply to dismiss their appeals, the Seventh Circuit reversed denial of Frank's motion to disgorge the objector blackmail. *Pearson III*, 968 F.3d at 837. The money must be disgorged for class benefit because the Buckley Objector's settlements simply leveraged the settlement value of the underlying litigation. "Money that class counsel were willing to part with to finally resolve the litigation consisted of savings that ought to have enured to the class—not to defendants, the three objectors, or their lawyers." *Id.* at 836.

The Buckley Objectors illegitimately absconded with class property. "Objectors who settle their objections for amounts in excess of their shares as class members are, in essence, 'not paid for anything they owned.'" *Pearson III*, 968 F.3d at 829 (quoting *Young v. Higbee Co.*, 324 U.S. 204, 213 (1945)). The fruit of the appeal "properly belongs to all [class members]." *Pearson III*, 968 F.3d at 837. The panel found that the Buckley Objectors sacrificed class interests "to their own advantage by selling their appeals without benefit to the class. … **Equity does not permit them to keep that gain.**" *Pearson III*, 968 F.3d at 833 (emphasis added).

Buckley argues that the Seventh Circuit announced a "new standard," so that no basis exists for "retroactive disgorgement" (Dkt. 440 at 1), but *Pearson III* does not permit such a reading. The Seventh Circuit *reversed denial* of Frank's motion for disgorgement. The case that the panel relies upon—*Young v. Higbee*—likewise required disgorgement without any sort of "qualified immunity" type of safe harbor that Buckley urges. The Seventh Circuit did not announce a new rule in *Pearson III*, but instead applied equitable principles to prevent unjust enrichment that it previously applied to guard

against using the class action device "obtain leverage for one person's benefit." *Murray v. GMAC Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (citing *Young v. Higbee*).[2]

More to the point, the law of the case requires disgorgement. The Seventh Circuit *reversed* and remanded, adopting Frank's suggestion to apply Circuit Rule 36 to reassign the case on remand. *Pearson III*, 968 F.3d at 838. The Seventh Circuit rejected most of the Buckley Objectors' arguments already. The objectors' response amounts to pretending otherwise.

Earlier orders and declarations filed in other cases do not negate controlling precedent in this case, neither do arguments based on mischaracterizations that the Seventh Circuit *already* rejected. "Equity does not permit" the Buckley Objectors to retain their selfish settlements.

A. Other district court opinions and a law professor's 2015 declaration do not overrule *Pearson III*.

Buckley nakedly asks this Court to overrule *Pearson III*, which he says cannot be squared with a 2015 declaration filed in the docket of another case and certain out-of-circuit orders. Dkt. 440 at 2-3. None of the citations provide even persuasive authority for this Court to disobey the Seventh Circuit.

Three years before *Pearson III*, the Eastern District of Pennsylvania declined to find standing for an objector to disgorge fees secured by another objector. *Rougvie v. Ascena Retail Grp., Inc.*, No. 15-724, 2017 U.S. Dist. LEXIS 92814, at *9 (E.D. Pa. June 16, 2017). So what? The Seventh Circuit established the controlling rule otherwise in this case—twice! If Buckley thought *Pearson II and Pearson III* inappropriately contradicted *Rougvie*, his remedy was to seek *certiorari*.

Buckley cites cases (Dkt. 440 at 2) where district courts declined to follow *Pearson III*. Again, so what? This Court is bound by the mandate of the Seventh Circuit, not ruminations of the Northern District of California. Moreover, courts in other circuits *have* "elected to follow" *Pearson III*. *Contra* Dkt. 440 at 2. Another N.D. Cal. judge praised *Pearson III* as an "elegant, well-reasoned contribution

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[2] Buckley falsely claims *Young v. Higbee* had "never before been applied in the class action context." Dkt. 440 at 1. Frank's briefing repeatedly discussed *Murray*, where the Seventh Circuit applied *Higbee* for the proposition that a named plaintiff cannot misuse class action procedure to obtain private benefit. Dkts. 334-2 at 12; 348 at 10; 384 at 10, 12; 391 at 8, 11. Frank successfully argued in *Pearson III* that cynical objectors' appeals are at least as analogous to the sellout appellants where *Higbee* ordered disgorgement.

to the class-action jurisprudence." *In re Wells Fargo & Co. S'holder Derivative Litig.*, 523 F. Supp. 3d 1108, 1117 (N.D. Cal. 2021) (declining to order disgorgement only because the court lacked jurisdiction over the state-court settlement). Other courts have recognized that approving such fees "would make the court complicit in a "practice that undermines the integrity of class action procedure, and needlessly provide putative objectors with potentially dubious claims precedential support for a practice of fee extraction." *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 334 F.R.D. 62, 64 (S.D.N.Y. 2019). *See also Drazen v. Godaddy.Com, LLC*, No. 1:19-00563-KD-B, 2022 U.S. Dist. LEXIS 94572, at *8 (S.D. Ala. May 25, 2022) ("[n]on-meritorious advocacy does not warrant attorneys' fees.").

Buckley cites a 2002 order for the proposition that "the rule in the Circuit used to be that an objector could receive fees for simply 'sharpening the debate.'" Dkt. 440 at 3 (citing In *Great Neck Capital Appreciation Inv. P'ship, L.P. v. Pricewaterhousecoopers*, 212 F.R.D. 400, 415 (E.D. Wis. 2002)). Again, so what? To the extent *Great Neck* contradicts *Pearson III*, it is abrogated. But *Great Neck* involved a court award of fees through a transparent, formal, and contested application for a fee award. This in no way resembles Buckley's undisclosed settlement for strictly private gain. Moreover, *Great Neck* found the objectors created a "benefit on the entire class," unlike Buckley. 212 F.R.D. at 414 (explaining that objectors secured a revision to the release, and without this change the court would have rejected the entire settlement as unfair).

Buckley repeatedly exaggerates the significance of a 2015 declaration by Alexandra D. Lahav. As an initial matter, Frank objects to the declaration: it necessarily fails to take *Pearson III* into account, and thus flunks Fed. R. Evid. 702(b) and is inadmissible; Frank further objects to the inability to cross-examine Lahav in this case. But in any event, Lahav argues it was not unethical for *plaintiffs' counsel* (not the objector) in an unrelated case to settle an objection. Dkt. 440-2. Buckley's mischaracterization of the document's effect (Dkt. 440 at 2) is sanctionably false. The Seventh Circuit never reached the merits of the disputed issues, never considered Lahav's declaration, and could not have been "persuaded" of anything. *In re Capital One Tel. Consumer Prot. Act Litig.*, No 15-1400, Dkt. 82-1 (7th Cir. Jun. 26, 2015). In any event, Lahav's opinion that class counsel may ethically offer to settle with an objector does not contradict *Pearson III*. The Seventh Circuit chastised neither the defendants nor

Class Counsel for paying off the Buckley Objectors. Instead, the Seventh Circuit determined that the *objectors* unjustly enriched themselves though their settlements, an issue the Lahav declaration says nothing about. In fact, Lahav expresses support for rules to prevent objectors from selling out their appeals "because it will protect the legal system from abuse." Dkt. 440-2, ¶ 14. Even if the unconsidered disposition of *Capital One* contradicted *Pearson III*, Buckley articulates no reason that a declarant's views and filed in different litigation should compel this Court to ignore the law of the case.

Courts appropriately require objectors to prove class benefit in order to receive fees, and Buckley failed to articulate any class benefit from paying his attorney $60,000; *Pearson III* already rejected those arguments.

B. *Pearson II* and *Pearson III* found Frank has standing.

Buckley argues that only Class Counsel has standing to pursue disgorgement, but the Seventh Circuit has now rejected this notion twice in *Pearson II* and *Pearson III*, neither of which Class Counsel participated in. *Pearson III* specifically rejected the argument Buckley rehashes. "Frank had standing in the district court and has standing now for the same reason that Buckley and the other objectors had standing in the appeals that precipitated Frank's motion: a class member has standing to defend the class, whose interest he shares, against sell-outs by the self-appointed representatives who control the interests of all." 968 F.3d at 835.

Contrary to Buckley's suggestion (Dkt. 440 at 5 n.4), the Joint Status Report is accurate when it says he and the Buckley Objectors are "the only parties before the court with an interest in the outstanding dispute." Dkt. 440 at 5 n.4. Frank's counsel drafted the Report by consulting Class Counsel and the defendants, who truly want to limit their involvement in this case. Perhaps understandably, Class Counsel does not want to pause their work pursuing multi-million dollar judgments against corporate defendants in order to disgorge a nuisance sum from a selfish objector they already agreed to buy off six years ago. Frank's counsel, the Center for Class Action Fairness, exists to correct perverse incentives in class-action litigation, including curtailing objector blackmail. No other party would likely volunteer for this thankless task.

C. The Seventh Circuit rejected Nunez's characterization of his attorneys' fees.

Nunez repeats an argument specifically rejected by the Seventh Circuit, that this court allegedly lacks any "basis to disgorge the money he received as part of the global settlement of his appeal and separate case in the Southern District of California." Dkt. 439 at 2. The settlement agreement itself evinces no such thing—Nunez and Buckley signed verbatim agreements on requiring each to dismiss their 2016 appeals. *See* Dkt. 438-2, Ex. A-2 & A-3. And anyhow, the Seventh Circuit rejected the idea that his California litigation spurred the settlement. "The problem for Nunez is that the value of the *Nunez* action at the time it was settled was zero." *Pearson III*, 968 F.3d at 835. Final approval of the *Pearson* settlement released any claims Nunez might have had as a class member or representative.

To the extent that Nunez claims this court lacks jurisdiction over him or his counsel, the Seventh Circuit found otherwise. "Nunez brought these issues before this court in the first instance by filing his objection and appealing its denial." *Id.* Nunez and his attorneys have submitted to the jurisdiction of this court, and can be ordered to return funds that constructively belong to the class.

II. *Pearson III* already rejected Buckley's argument that time spent selfishly securing a private settlement is a "legitimate expense."

Pearson III pre-emptively rejected Buckley's argument that he was entitled to fees for time spent on the case: "neither objector argues that even if disgorgement were ordered, he would still be entitled to deductions for costs or attorney fees. This is a sound concession." 968 F.3d at 837 (citing authorities). When the Seventh Circuit declares a concession, it "bec[omes] the law of the case." *Vidimos, Inc. v. Wysong Laser Co.*, 179 F.3d 1063, 1064 (7th Cir. 1999). So Buckley already forfeited the argument he raises here by failing to raise it in the Seventh Circuit (which would have rejected it). But it's wrong. Bad-faith objections should not be rewarded by allowing them attorney time for work diametrically opposed to class interest.

Buckley has fought providing the class funds that rightly belongs to them for *six years,* and continues to advocate against the class. This does not all resemble the legitimate common benefit award than can be paid when an objector provides a common benefit, as Frank did in this case. Here, Buckley concealed the existence of his selfish payoff, then bitterly fought disgorgement for years, and now claims that nothing at all should be disgorged for class benefit because the money would be

"consumed by [Buckley's] fee requests." Dkt. 440 at 7. A common benefit fee is an equitable remedy, and Buckley's unclean hands independently preclude his requested relief here. *Arkin v. Pressman, Inc.*, 38 F.4th 1001, 1012 (11th Cir. 2022).

Buckley provided zero common benefit. In all likelihood, he cost the class money by cynically appealing and delaying settlement payment. In any event, the Seventh Circuit already decided this issue. "Money that class counsel were willing to part with to finally resolve the litigation consisted of savings that ought to have enured to the class—***not to defendants, the three objectors, or their lawyers***." *Pearson III*, 968 F.3d at 836 (emphasis added).

Buckley argues that *Liu v. SEC* stands for the proposition that he may deduct "legitimate expenses," but he does not explain why opposing class interests possibly qualify. Dkt. 440 at 4 (citing 140 S. Ct. 1936, 1946 (2020)). *Liu* concerned the misappropriation of funds meant for a cancer treatment facility. The majority vacated a disgorgement order that may have not allowed the defendants to deduct expenses applied toward "lease payments and cancer-treatment equipment." 140 S. Ct. at 1950. While the disgorgement in *Liu* arose from violating public laws, the Supreme Court did not suggest that the equitable remedy could *only* arise from breaking laws. *Contra* Dkt. 440 at 3. The Supreme Court has affirmed disgorgement for a breach of fiduciary duty. *Snepp v. United States*, 444 U.S. 507, 515 (1980).

The "legitimate expenses" *Liu* identified went toward the advertised purpose of building a cancer treatment center; no comparable legitimate expenses exist here. The *Liu* defendants raised funds under the guise of constructing a cancer treatment center, but in fact pocketed most of the money for themselves. 140 S. Ct. at 1942. The Supreme Court found that, in order to stay within the equitable contours allowed for SEC actions, defendants should be able to deduct whatever funds they legitimately did spend on building a cancer treatment center. Buckley's counsel incurred no similar legitimate expenses, as 100% of their efforts have been deployed opposing class interest so that they can retain money that does not belong to them.

Neither Buckley's objection, nor the years he spent trying to retain $60,000 benefit the class. The class constructive trust should not subsidize one minute of nuisance and selfish waste.[3]

III. Qualified immunity from disgorgement does not exist.

Buckley further asserts that disgorgement could only be "constitutional" if he were on "reasonable notice that settling his appeal in 2016 was wrongful" (Dkt. 440 at 3-4), but nothing in *Liu* supports this proposition, and Buckley quotes no language in support. Frank's best guess is that Buckley wishes his selfish settlement were protected by the same sort of qualified immunity that applies to § 1983 actions. *Liu* simply affirmed disgorgement as a remedy in SEC actions when it "does not exceed a wrongdoer's net profits and is awarded for victims as equitable relief." 140 S. Ct. at 1940.

To the extent that Buckley argues defendant's willingness to pay his attorney legitimates retention of his privately-obtained bounty, the Seventh Circuit also rejected this idea. While Buckley brags about filing a less deficient four-page objection than the now-disbarred objector Patrick Sweeney (Dkt. 440 at 4), *Pearson III* accurately read it as a thin pretext to extract attorneys' fees. 968 F.3d at 834. Ironically, Buckley's four-page objection complained that class counsel sought reimbursement for time "spent negotiating, or trying to get judicial approval for, the original discredited settlement that the Seventh Circuit termed a 'sell out.'" Dkt. 258 at 2. Buckley now seeks to expense time that the Seventh Circuit classified as "profit by his own wrong." *Pearson III*, 968 F.3d at 831-32.

IV. Buckley's personal attacks lack foundation.

Although Judge Blakey denied Frank's motion to disgorge (which the Seventh Circuit reversed), Judge Blakey made no finding against Frank in this order, but simply observed "Litigants routinely dismiss matters for reasons other than blackmail (as Frank knows, having himself dismissed his appeal)." Dkt. 418 at 6. Far from condemning Frank for "unclean hands," the logic of Judge Blakey's order depends on the unremarkable banality of dismissing an appeal as Frank did. Buckley's

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[3] Buckley also asserts that Frank did not challenge his purported 2019 fee application. Dkt. 440 at 5. But on the *very same page* he admits any application "would have been premature." Dkt. 440 at 5 n.3. In any event, Frank categorically disputed the concept that Buckley provided any common benefit whatsoever, and the Seventh Circuit agreed with Frank in *Pearson III*.

claim to the contrary (Dkt. 440 at 6) is sanctionably frivolous. Judge Blakey erroneously concluded that because Frank's uncompensated dismissal of his protective cross-appeal was beyond criticsm then the Buckley Objectors' selfish dismissals must be kosher. It made no findings against Frank.

Contrary to Buckley's repeated strawman assertion, Frank did not raise "identical issues" in his appeal, but filed only a protective *cross-appeal*. *See* Appeal No. 16-3615, Dkt. No. 12 (noting Frank was a cross-appellant who sought to protect the judgment and was adverse to the Buckley appellants). Frank filed his protective cross-appeal on October 4, 2016 (Dkt. 308)—over 30 days after the August 25 Final Judgment and Order (Dkt. 288).

Buckley has no basis for his scurrilous remark that "Mr. Frank's hands are the least clean." Dkt. 440 at 6. Frank received *nothing* for dismissing his cross-appeal. Dkt. 391-1, Holyoak Decl., ¶ 7. Nothing in *Pearson III* precludes an objector from dismissing an appeal without obtaining a private benefit. The problem is *absconding with class property*. The Seventh Circuit prohibits objectors "from selling out the class in exchange for private payment." 968 F.3d at 838. Frank did not.

Frank's hands are not only clean, they provided approximately $3.1 million more for class recovery than the original agreement would have provided, a five-fold improvement over the 2014 settlement. Dkt. 213 at 7; Dkt. 251 at 2-3. On the basis of the substantial improvement over the original 2014 agreement, Frank publicly sought and was awarded $180,000 in attorneys' fees. Dkt. 288 at 9. Now Frank hopes to claw back an additional $120,000 for the class and firmly establish that objectors should get paid only when they provide a benefit.

Buckley also argues that Frank would be ill-suited to oversee disgorgement because he intends to seek a common-benefit fee award. Dkt. 440 at 6. If this were a real conflict, consumer class action litigation could not exist—*all* attorneys are compensated for their professional service in creating a benefit for others. Well-established law holds that whenever "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980). After Frank succeeds in clawing back $120,000 for the class constructive trust, he will be entitled to reasonable fees from this benefit.

Buckley's counsel cannot seriously believe such a conflict exists, because in the same filing he proposes collecting attorneys' fees from the *entire* $60,000 sum he received which will consume all the money, leaving none for the class's constructive benefit. Dkt. 440 at 7. If Buckley's counsel believed this argument, he could not advocate for the disposition of the $60,000, nor seek an award from it.

V. Disgorged attorneys' fees equitably include interest.

Finally, Nunez argues there is "no legal basis for an award of interest on money being disgorged" (Dkt. 439 at 2), but he cites no authority for this proposition. Frank agrees with Nunez's objection in part and revises his recommendation. The objectors need not repay interest from the date they received their undisclosed funds, but only from the subsequent date of court order.

In general, "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). Interest begins accruing on "date of the entry of the judgment." *Id.* Here, the Buckley Objectors should pay interest at least from September 23, 2019, which is the date their fee awards were improperly endorsed by Judge Blakey. Dkt. 418. The Seventh Circuit's subsequent reversal of this order should entitle the class to the "difference between its original award and its post-vacatur [attorneys' fee] award, plus interest." *In re Optical Disk Drive Prods. Antitrust Litig.*, No. 21-16291, 2022 U.S. App. LEXIS 15571, at *6-7 (9th Cir. June 6, 2022) (affirming disgorgement of attorneys' fee award reduced on appeal *plus interest*); *Perkins v. Standard Oil Co. of Cal.*, 487 F.2d 672 (9th Cir. 1973) (similar).

Failing that, interest should at least accrue from the date this Court grants Frank's motion.

CONCLUSION

This Court should order disgorgement of the side payments from all attorneys who received funds from the Buckley objectors' settlements, and interest from the date of the *Pearson III* mandate.

Dated: November 3, 2022.

By: /s/ M. Frank Bednarz
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CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Memorandum in Support of Motion to Administer the Constructive Trust via the ECF system for the Northern District of Illinois. Additionally, he caused this filing to be served via email upon the following attorneys:

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