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. James B. Zagel

OBJECTOR THEODORE H. FRANK'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AND TO REQUIRE DISCLOSURE AND DISGORGEMENT OF SIDE-PAYMENTS

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INTRODUCTION

The Seventh Circuit has previously complained about the problem of rent-seeking extortionate objectors—objectors who improperly object not to improve the settlement on behalf of the class, but to extract a payment for themselves and their attorneys at the expense of the class. *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003). Legal academics have also criticized this practice of "objector blackmail." Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009).

On October 28, 2016, the named plaintiffs condemned "patently frivolous appeals" by objectors Randy Nunez, Steven Buckley, and Patrick Sweeney ("objector-appellants"), and moved for the court to impose an *ultra vires* appeal bond to protect the class from rent seeking. Dkt. 322. Within days, all three objector-appellants settled their appeals with no benefit to the absent class.

On information and belief, Rexall Sundown, Inc. and NBTY, Inc. ("defendants") stuck deals with each objector-appellant to dismiss his appeal. Objector-appellants have received unjust payments for appeals that plaintiffs called "vexatious" and "bad faith." Objector Theodore H. Frank moves to disgorge the inappropriately-paid objector blackmail; he moves for intervention as permitted by Local Rule 5.6 for belt-and-suspenders reason and to preserve any appellate rights relating to the court's decision on disgorgement.

This is purely a motion relating to the court's equitable powers to enforce the existing settlement. This is not a challenge to the settlement that this court has approved, where all appeals have been dismissed and cannot be resuscitated.

The objector-appellants and their attorneys are already under the jurisdiction of this court without needing to be named parties. *Cf. Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 287 (7th Cir. 2002).

BACKGROUND

A. Procedural History

Following final approval of the original settlement in 2014, Objector Frank appealed. The Seventh Circuit agreed with Frank's objection in several respects. The court found a disproportional distribution between recovery for the class ($865,284), *cy pres* ($1.13 million), and attorneys' fees with

clear sailing and kicker ($4.5 million). *See Pearson*, 772 F.3d at 781. The panel further found that administration costs should have been excluded in calculating the class benefit. *Id.* As for the settling parties, the panel found that the clear-sailing and kicker provisions reflected a "selfish" agreement, and commended Frank for "flagg[ing] fatal weaknesses in the proposed settlement." *Id.* at 787.

As a result of Frank's objection and meritorious appeal, the revised settlement was structured with a $7.5 million common fund, which provides approximately $3.3 to $4.1 million more for class recovery than the original agreement would have provided. Frank and three other objectors filed objections to the revised settlement and fee request.[1] *See* Dkts. 256 (Nunez), 258 (Buckley), 259 (Frank), and 261 (Sweeney).

On August 25, 2016 the final approval order for the revised settlement issued with plaintiffs' fee request granted in full. *See* Final Judgment and Order, Dkt. 288. On the basis of the substantial improvement to the revised settlement over the original 2014 settlement agreement, Frank sought and was awarded $180,000 in attorneys' fees. *Id.* at 9.

The objector-appellants filed timely notice of appeal within 30 days of the Final Judgment pursuant to Rule 4(a)(1)(A). *See* Dkts. 289 (Buckley), 293 (Nunez), and 298 (Sweeney). On October 4, 2016, Objector Frank filed notice of his cross-appeal pursuant to Rule 4(a)(3). *See* Dkt. 308.

On October 17, 2016, class counsel moved for this Court to require the objector-appellants and Objector Frank to jointly and severally post an appeal bond of $200,000. *See* Dkt. 314. In response, Objector Frank served a Rule 11 letter on class counsel requesting retraction of false accusations and frivolous legal arguments in the memorandum.[2] On October 28, Class counsel filed an Amended Memorandum, which omitted the false statements and did not seek an appeal bond from Objector Frank. *See* Amended Memorandum in Support of Motion Requiring Certain Objectors to Post an

[1] Frank objected only to the provision of his own attorneys' fee request, which he contends would have more equitably resulted in shared attorneys' fees of no more than 33%. The court ultimately awarded these fees separately from the common fund. Dkt. 286. Frank elected not to appeal this decision because quibbling over a 2% discrepancy would have been a poor use of private and judicial resources.

[2] The letter was attached as an exhibit to an opposition filed by Steven Buckley. *See* Dkt. 317-3.

Appeal Bond ("Bond Memo."), Dkt. 323. Two objector-appellants filed opposition to the bond motion (Dkts. 317 and 324), but class counsel never noticed the bond motion for hearing.

On November 7, 2016, joint motions for voluntary dismissal were filed in the Seventh Circuit on behalf of all three objector-appellants. Following the filing of motions to dismiss, Objector Frank voluntarily dismissed his cross-appeal without seeking or obtaining payment. On November 14, the defendants and named plaintiffs jointly requested voluntary dismissal with prejudice, which was granted on November 18. Dkt. 333.

B. Settlement of Objector-Appellants

On information and belief, defendants offered valuable consideration in exchange for dismissal of each of the objectors' appeals.

The objector-appellants settled their appeals for strictly personal gain. Absent class members received nothing from any additional payment the defendants provided. On information and belief, objector-appellants were paid simply to drop their appeals.

Class counsel previously warned the court of this likely outcome, accusing the appellant-objectors of settling the vast majority of their appeals and of regularly filing low-value and poorly-edited objections. *See* Bond Memo, Dkt. 323. It is unlikely that any of the three objector-appellants settled his appeal without receiving consideration and/or payment of attorneys' fees. Unnamed class members received nothing from the objector-appellants' misuse of the objection and appellate process and hindrance of the class action.

ARGUMENT

Objector Frank agrees with class counsel's argument that the objector-appellants' appeals were "noticed strictly to disrupt the settlement so these Objectors can extort a buyout," and the appellant-objectors were apparently successful.[3] Dkt. 323 at 2. Appellants, who did not opt out of the class and

[3] That said, plaintiffs' bond motion was legally mistaken in asserting that a $200,000 appeal bond may be assessed against objectors to a class action settlement. Rule 7 permits a district court to require appellant to post an appeal bond for "costs on appeal." Fed. R. App. P. 7. Every circuit court to have considered the meaning of "costs," has defined such them to include *only* those costs expressly authorized by rule or statute. *See Tennille v. Western Union Co.*, 774 F.3d 1249, 1255 (10th Cir. 2014) (citing D.C., First, Second, Third, Ninth,

would be bound by the settlement, have obtained payments without improving recovery to the entire class without any judicial approval. This is wrong.

Frank believes that, as a class member, he can ask the court to exercise its equitable powers in supervision of the settlement to order disgorgement of these side-payments without intervention, but moves to intervene for belt-and-suspenders reasons to preserve his rights to request this remedy and to preserve his appellate rights. *Cf. Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 287 (7th Cir. 2002). The court has jurisdiction to entertain Frank's motion. Intervention as a right is required because no existing party (neither the defendants nor the named plaintiffs) adequately represent absent class members like Frank. Only equitable disgorgement by this court can prevent objector-appellants from receiving socially costly "objector blackmail."

A. Jurisdiction

The court retains jurisdiction to decide collateral issues such as attorneys' fees, sanctions, and disgorgement related to the settlement agreement. Although the *underlying cause of action* against defendants has been dismissed with prejudice, the court retains "exclusive jurisdiction" over "all matters relating in any way" to the settlement. Final Judgment, Dkt. 288 at 9; see *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) (ancillary jurisdiction doctrine permits motions to enforce settlement where the judgment expressly reserves jurisdiction). "[E]ven years after entry of a judgment

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and Eleventh Circuits). While "costs" might include a few thousand dollars to cover printing costs under Fed. R. App. P. 39, no rule or statute could support the $185,000 fee for alleged administration expenses that were requested by plaintiffs. *See Allen v. J.P. Morgan Chase Bank, NA*, No. 15-3425, 2015 U.S. App. LEXIS 23165, at *1-2 (7th Cir. Ill. Dec. 4, 2015) (modifying appeal bond of $121,886 to $5,000). Bonds under Rule 7 simply may not be used to discourage appeals as suggested by plaintiffs. *See id.*; *In re American President Lines, Inc.*, 779 F.2d 714, 717 (D.C. Cir. 1985); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir. 1974) (bond may not be imposed for the purpose of discouraging exercise of the right to appeal).

As a matter of policy, Objector Frank believes that the proper remedy is to enjoin settling parties from settling objector appeals for nothing more that appellants' private gain. Such injunction allows meritorious appeals to be freely litigated, while removing the perverse incentive for "objector blackmail" from bad faith objector-appellants. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009) (proposing nonalienability of objector appeals). Here, such an injunction would have prevented objector-appellants from striking their self-interested side-deals, and would have deterred them from bringing their appeals in the first place.

on the merits" the court retains jurisdiction to grant a motion pertaining to collateral issues such as enforcement of the agreement, contempt charges, costs, attorneys' fees, and sanctions. *Cooter & Gell. v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990) (quoting *White v. New Hampshire Dept. of Employment Security*, 455 U. S. 445, 451 n. 13 (1982)); *see also In re Bear Stearns Cos.*, 297 F.R.D. 90, 98 (S.D.N.Y. 2013) (granting class member's motion to intervene for purpose of submitting Rule 60(b) motion to modify final judgment); *Shy v. Navistar Int'l Corp.*, 291 F.R.D. 128 (S.D. Ohio. 2013) (granting motion to intervene for purpose of enforcing settlement agreement). This court has ancillary because the side-payments to objector-appellants have a "direct relation to property or assets actually or constructively drawn into [this court's] possession or control by the principal suit." *Fulton National Bank of Atlanta v. Hozier*, 267 U.S. 276, 280 (1925); *See also Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294, 1300 (7th Cir. 1995).

Frank independently possesses Article III standing to pursue his claims against objector-appellants. Non-party objectors possess standing to the extent they may suffer from a non-speculative injury-in-fact. *See Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 692 (7th Cir. 2015). Here, there is little speculative about Frank's injury. The three objector-appellants absconded with recovery that rightfully belongs to Frank and the entire class.

Thus, the court retains jurisdiction to consider Frank's motion to intervene for the purpose of seeking disgorgement of ill-gotten windfalls paid to self-interested objector-appellants.

B. Intervention

Frank seeks to discover and disgorge payments authorized by defendants, which unjustly enriched objector-appellants at the expense of absent class members. Frank believes he can seek these remedies without intervention simply as a class member, but moves to intervene so that there is no controversy about his right to do so and to preserve any appellate rights. Intervention is appropriate because class counsel have ceased to represent absent class members by failing to take steps to prevent or redress the extortionary side deals, and indeed acquiesced in those deals by dismissing the underlying complaint with prejudice.

1. Frank is entitled to intervention as a matter of right.

Frank's motion to intervene satisfies all the requirements for intervention as a matter of right. In order to intervene as a matter of right, a party must satisfy four requirements: (1) the application must be timely; (2) "the applicant must claim an interest relating to the property or transaction which is the subject of the action"; (3) "the applicant must be so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"; and (4) "existing parties must not be adequate representatives of the applicant's interest." *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 945-46 (7th Cir. 2000).

Here, intervention is timely because Objector Frank has recently learned of his interest in this case. Prior to dismissal of objector-appellants' appeals on November 7, Frank could not have known that the objector-appellants would compromise their appeal by obtaining funds that rightfully belong to the class. Timeliness is measured from the event triggering the need for intervention. *E.g., U.S. v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002) (when settlement negotiations are conducted confidentially, potential intervenors are not put on notice until the settlement terms are made public); *Rothstein v. Am. Int'l Grp., Inc.*, 837 F.3d 195 (2d Cir. 2016) (observing "troubling consequences" of requiring premature interventions by nonnamed class members). Frank has only been aware of his interest since November 7, so intervention is timely. *See In re Discovery Zone Securities Litig.*, 181 F.R.D. 582, 594 (N.D. Ill. 1998) (finding intervention was timely when it was filed one month after the intervener learned that its interests were not protected by class action settlement).

As a class member and claimant to the approved settlement, Frank has an interest in this case; he benefits alongside all other class members from potential disgorgement of the improper payments to individual objector-appellants. Without intervention, the interests of Objector Frank (and all absent class members) will be greatly impaired because no other remedy exists. This court "retains exclusive jurisdiction over this action, the Parties, and all Settlement Class members to determine all matters relating in any way to the Final Judgment and Order, the Preliminary Approval Order, or the Settlement Agreement, including but not limited to the administration, implementation, interpretation, or enforcement of such orders of Agreement." Final Judgment, Dkt. 288 at 9. Thus, if the court were

to deny this motion to intervene, class members' "interest would be extinguished for no compensation, which would eliminate [its] ability to protect its interest." *In re Bear Stearns Cos.*, 297 F.R.D. at 97. Even if it were possible for Frank to file a new suit seeking disgorgement, any recovery would be decimated by duplicative administration costs to redress the same underlying injury. In this case, the settlement administrator possesses contact information and means to disburse recovery to unnamed class members. Unless the improperly paid funds are disgorged and added to the existing common fund being prepared for distribution, there is no practical mechanism to secure their return to class members.

No existing party adequately represents the interests of absent class members, and an intervener need only show that representation "may be" inadequate. *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007); *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (describing "minimal" burden to make that showing). Here, the plaintiffs acquiesced to defendants' settlement with objector-appellants and have signaled disinterest in pursuing disgorgement by their stipulated dismissal. Furthermore, intervention properly introduces adversity into proceedings, which is necessary when both the named plaintiffs and objector-appellants have settled. *See Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003); *see also Gottlieb v. Barry*, 43 F.3d 474, 490 (10th Cir. 1994) (endorsing possibility of guardian ad litem, though holding it not required); *Miller v. Mackey Int'l, Inc.*, 70 F.R.D. 533, 535 (S.D. Fla. 1976) (appointing guardian ad litem to act on behalf of class members in conjunction with class counsel's fee motion); *Haas v. Pittsburgh Nat'l Bank*, 77 F.R.D. 382, 383 (W.D. Pa. 1977) (same). "[J]udges in our system are geared to adversary proceedings. If we are asked to do nonadversary things, we need different procedures." *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992).

Class counsel might protest that *they* are the guardian ad litem for the class. But "if class counsel could always be trusted to be the loyal and competent representative of the class, there would be no requirement that class action settlements be submitted for approval by a court, with approval dependent on the outcome of a hearing to determine the fairness of the settlement to the class." *Safeco Ins. Co. of Amer. v. American Int'l Group, Inc.*, 710 F.3d 754, 761 (7th Cir. 2013) (Posner, J., dissenting). "That the plaintiffs say they have other investors' interests at heart does not make it so." *Robert F.*

Booth Trust v. Crowley, 687 F.3d 314, 318 (7th Cir. 2012) (concerning Rule 23.1 action). Class counsel have signaled their disinterest in seeking disgorgement and restitution for their client class members. Frank should be allowed to intervene for this reason alone. *See* Fed. R. Civ. P. 24(a)(2); Advisory Committee Notes on 2003 Amendment of Rule 23(e)(4)(B) ("a member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court").

Objector Frank and his counsel, the Center for Class Action Fairness ("Center"), are well-situated to represent absent class members. The Seventh Circuit has already praised the Center's and Mr. Frank's work on behalf of class members in this case. *See Pearson*, 772 F.3d 778. The Center's work in this and other cases has won class members millions of dollars and has received national acclaim. *See, e.g.*, Gina Passarella, *Third Circuit Vacates $18.5 Mil. Cy Pres Award in Baby Products Class Action*, L. INTELLIGENCER (Feb. 20, 2013); Jeffrey B. Jacobson, *Lessons From CCAF on Designing Class Action Settlements*, LAW360 (Aug. 6, 2013) (discussing Center's track record); Ashby Jones, *A Litigator Fights Class-Action Suits*, WALL ST. J. (Oct. 31, 2011). Frank himself has been called "the leading critic of abusive class action settlements." Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES (Aug. 13, 2013); *see also* Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, FORTUNE, Dec. 15, 2015 (calling Frank "the nation's most relentless warrior against class-action fee abuse"). Frank and his counsel will work to improve class recovery in this case by seeking disgorgment the inappropriate payments.

2. Alternatively, intervention pursuant to Rule 24(b) should be permitted.

Even if the court finds Objector Frank is not entitled to intervene as a matter of right, the court may grant his motion to as permissive intervention under to Rule 24(b). "The proposed intervenor must demonstrate that there is (1) a common question of law or fact, and (2) independent jurisdiction." *Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). Here, the questions of law and fact are intimately linked, and Objector Frank has independent jurisdiction concerning collateral issues to the settlement, including attorneys' fees and sanctions. *See Cooter & Gell*, 496 U.S. at 395-96.

In evaluating a permissive intervention under Rule 24(b), "the court must give some weight to the impact of the intervention on the rights of the original parties." *Id.* Here, the interests of unnamed class members weigh strongly in favor of intervention since these class members stand to benefit from funds disgorged from the side deals improperly executed by the objector-appellants. The defendants are not prejudiced by intervention, since the underlying claims against defendants have been released in final approval, from which no new appeal is possible. Class counsel has advised that named plaintiffs are not prejudiced either, though they do not wish to seek disgorgement themselves. Thus, the court should grant intervention, allowing Objector Frank to pursue discovery and disgorgement to claw back funds for the benefit of all class members—not just the three class members who filed sham appeals for self-interested settlement.

C. Disgorgement

Disgorgement is an equitable remedy within the inherent power of the court. *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 court ought to exercise its equitable discretion to disgorge profit that would otherwise result from objector-appellants 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." Restatement (Third) of Restitution and Unjust Enrichment § 51(4) (2010).

1. The objector-appellants unjustly profited from their misconduct.

Side-agreements for private pecuniary gain siphon funds that rightfully belong to the class. Courts have rightly criticized the appellate settlements where objectors "get paid to go away" because such payments "benefit only the [objectors] at the expense of all other parties to the litigation." *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003).

At their best, such objector settlements burden the judicial system with meritless appeals calculated for individual gain. In for-profit objector appeals, the settling parties exploit the lack of oversight afforded by the Federal Rules of Appellate Procedure. While before district courts, objectors

are appropriately deterred from making selfish settlements. The Rules of Civil Procedure expressly empower district courts to discover whether objections are withdrawn for private payment. *See* Advisory Committee Notes to 2003 Amendment of Rule 23(e)(4)(B) (now codified at 23(e)(5) ("If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances."); Rule 23(e)(3) ("The parties seeking [settlement] approval must file a statement identifying any agreement made in connection with the proposal."). No comparable Appellate Rule exists for objector settlements. As a result, most objector appeals are filed for the sole purpose of obtaining individual settlement. *See* Marie Leary, *FJC Report on Class Action Objector Appeals in Three Circuit Courts of Appeals*, Federal Judicial Center (2013) at 11 ("In the Seventh Circuit, all of the identified class action objector appeals [filed January 1, 2008 through June 1, 2013] were voluntarily dismissed pursuant to Rule 42(b).").

At worse, such settlements may "jeopardize the interests of the unrepresented class members." *Safeco Ins. Co. of Amer. v. American Int'l Group, Inc.*, 710 F.3d 754, 755 (7th Cir. 2013) (dismissing appeals where no member of the class expressed opposition to voluntary dismissal). When an objector-appellants agrees to drop a meritorious appeal brought in good faith, the entire class is potentially worse off because the class action settlement never receives appellant scrutiny.[4]

Either way, such settlements constitute an abuse of the class-action system. If the settled appeals are frivolous, individual class members are receiving unearned windfall at the expense of class recovery. If the underlying objection is meritorious, the settling parties doubly disserve the class by spending rightful class recovery to prevent appropriate review of the underlying approval and/or fee award. *Cf. Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 318 (7th Cir. 2012) ("A district judge ought not try to insulate his decisions from appellate review by preventing a person from acquiring a status

[4] *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* 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. *See* Alan B. Morrison, *Improving the Class Action Settlement Process: Little Things Mean a Lot*, 79 GEO. WASH. L. REV. 428, 447 (2011). Moreover, *Duhaime* was implicitly rejected by *Safeco*, which ignored *Duhaime* in its fact-specific decision not to investigate the settlement in that appeal.

essential to that review."). If it is problematic for a neutral district judge to preclude appellate review, it is surely more so a defendant successfully precludes appellate scrutiny of a settlement by buying off individual class members challenging it.

Objector Frank opposes just such extortionate side deals, so seeks disgorgement of funds improperly paid to appellants. Payments to individual class members necessarily cheat the class, and this principle is well-understood in the context of named plaintiffs settling their individual claims. *Cf. Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011) ("defendant may moot a class action through an offer of settlement only if he satisfies the demands of the class; an offer to one cannot moot the action because it is not an offer to all.") (citing *Sosna v. Iowa*, 419 U.S. 393, 399, 402 (1975)); *accord id.* at 1087; *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); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 342 n.1 (1980) (Stevens, J., concurring).[5]

It is inequitable for objector-appellants to profit from a misuse of judicial process widely condemned for its social cost, so Frank should be allowed to intervene and pursue funds on behalf of the class.

2. Objector-appellant windfall constitutes rightful class recovery and should be clawed back to benefit the entire class.

Defendants may argue that the side-payments paid objector-appellants came out of "their" money, so cannot revert to the class. This distinction does not withstand scrutiny.

All class action payments ultimately derive from resolution of the underlying claims. *Pearson*, 772 F.3d at 786 (defendant cares only about total liability). Here, objector-appellants misused appellate

[5] If class counsel authorized settlement with the objector-appellants, disgorgement would be separately warranted for class counsel's breach of fiduciary duty to the entire class. Fee disgorgement owing to a breach of counsel's fiduciary duties is an equitable rule "founded both on principle and pragmatics." *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999). As a matter of principle, the attorney "is not entitled to be paid when he has not provided the loyalty bargained for and promised." *Id.* at 237-38. As a matter of pragmatics, "the possibility of forfeiture of compensation discourages an agent from taking personal advantage of his position of trust in every situation no matter the circumstances, whether the principal may be injured or not." *Id.* at 238. Even where the clients suffer no monetary harm from the breach, the fee should be disgorged to deter future misconduct; it is not a "windfall" for the clients to receive that disgorgement. *Id.* at 240.

procedure to divert additional funds solely to themselves, but the side-payments ultimately derive from the underlying action. Defendants were "blackmailed" to pay because the value of the underlying settlement and the cost of defending that settlement on appeal gave objector-appellants leverage to extract an additional payment. Objector-appellants' leverage comes from the underlying release of the entire class, so benefits extracted based on such leverage ought to benefit all class members. 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.").

Class members should not connive additional individual benefits for themselves, and the court should equitably disgorge ill-gotten gains to the entire class. 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 calls members. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (disapproving use of "the class device…to obtain leverage for one person's benefit."). 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. *See* Final Judgment, Dkt. 288 at 9. Such awards are appropriate, with court approval, for the time and expense named class members spend on securing the 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, defendants apparently did not want to expend the costs to defend another appeal and objector-appellants apparently made it more profitable for them to pay the appellants to go away rather than to seek victory at the Seventh Circuit. Whether the underlying appeals were meritorious or not, the class does not benefit from objector blackmail, and these payments ought to be disgorged.

3. Alternatively, the court has inherent authority to order disgorgement.

If Frank cannot pursue an equitable action against objector-appellants, the court should use its inherent authority to order disgorgement. When confronted with an abuse of its processes, the court has inherent authority to remedy wrongdoing and craft an equitable remedy. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991) ("A primary aspect of [the court's inherent] discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.").

The court's authority is not unbounded, but it is appropriately exercised here because disgorgement complements the Federal Rules of Civil Procedure and is proportional to the wrongdoing. "Sanctions authorized only by the inherent power of the court are . . . available only 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). No conflict is present here; in fact, the Federal Rules were revised in 2003 to enable district courts to inquire into private objector settlements. *See* Advisory Committee Notes to 2003 Amendment of Rule 23(e)(4)(B) (now restyled as 23(e)(5)). Failing to scrutinize objector appeals turns these amendments into a dead letter. Further, disgorgement perfectly "fits the crime" of bad faith settlements, because it recovers precisely what the objector-appellants appropriated for themselves. *See Diettrich v. Northwest Airlines, Inc.*, 168 F.3d 961, 964 (7th Cir. 1999) (when exercising inherent powers to sanction, "the punishment must fit the crime"). The Seventh Circuit has found 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). Identical reasoning applies here: the objector-appellants have provided no benefit to the class, so their private awards should be disgorged.

4. Payments to objector-appellants 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 a settlement that quadrupled or quintupled actual class recovery in this case by millions of dollars. For his efforts for his successful objection improving class recovery, the court awarded him $180,000 in attorneys' fees,

a small percentage of the improvement to the class, and one awarded on top of class counsel's fees. (This payment was substantially lower than it could have been, because Frank, as a *pro se* objector, was not entitled to seek fees for his own valuable work on the case.) It would be unjust and inequitable if objectors who have had unsuccessful objections that provided no benefit to the class were to realize benefits disproportionate to what they have accomplished for the class.

Moreover, 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 here in this very case.

CONCLUSION

This court should order disclosure and disgorgement of any payments to objectors who failed to obtain benefits for the class as a whole. Frank believes he can seek this remedy without intervention, but requests intervention for belt-and-suspenders reasons to protect the interests of unnamed class members who otherwise have no mechanism to recovery payments class counsel made to individual class members without court approval, and to preserve his appellate rights with respect to any court decision on disgorgement. Frank and his counsel will pursue disgorgement of these payments, which will improve class action settlements nationwide by deterring bad-faith objections and appeals and the settlement of such appeals.

Dated: December 7, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Memorandum in Support of Motion to Intervene and Disgorge Side-Payments via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing. Additionally, he caused to be served via First-Class mail a copy of this Motion upon the following:

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