Case Nos. 14-1198, 14-1227, 14-1245 and 14-1389

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NICK PEARSON, et al., and RICHARD JENNINGS,

Plaintiffs-Appellees/Cross-Appellants,

versus

NBTY, INC., et al.,

Defendants-Appellees.

APPEALS OF: THEODORE H. FRANK,
KATHLEEN MCNEAL AND ALISON PAUL,
Objectors-Appellants/Cross-Appellees.

Appeal from the United States District Court for the Northern District of Illinois,
Honorable James B. Zagel, Case No. 1:11-cv-07972

Reply Brief of Plaintiffs-Appellees/Cross-Appellants Nick Pearson, et al. and Richard Jennings

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RESPONSE TO OBJECTORS' JURISDICTIONAL STATEMENT

Objectors' argument that the Court lacks jurisdiction over Plaintiffs' appeal of the fee award misrepresents the finality of the District Court's fee award. The District Court did not make an interim fee award; it rendered a Final Judgment and Order. Obj. A. 22-31.[1] Nothing in the Final Judgment and Order, or the District Court's Memorandum Opinion and Order, says, or even remotely implies, that the District Court was awarding interim fees "at this time," or that it invited Plaintiffs to apply for additional fees at a later time. The word "interim" or the phrase "for this period of time," or any words or phrases of similar effect, appear nowhere in the District Court's Memorandum or Judgment.

The fee award is expressly included in the District Court's "Final Judgment and Order." Obj. A. 29. The "Final Judgment and Order" expressly states that any appeal from the fee award shall not "in any way affect or delay the finality of this Judgment." Obj. A. 30. And, the "Final Judgment and Order" "directs the Clerk to enter final judgment." Obj. A. 31. The finality of the District Court's fee award could not be clearer. Thus, this Court has jurisdiction.

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[1] "Obj. A." refers to Objectors-Appellants' Appendix; "Supp. A." refers to the Supplemental Appendix of Plaintiffs and Defendants-Appellees; "Dkt." Refers to the docket entries in the District Court; and "App. Dkt." refers to the docket entries in this Appeal.

Objectors, on the other hand, lack standing to challenge Plaintiffs' appeal of the fee award.[2] Objectors have not objected to the monetary amounts made available to them and the other Class Members. In *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956 (7th Cir. 2013), this Court dismissed an objector's appeal of the fee award because the objector had not filed a claim and thus was held to lack "any interest in the amount of fees, since he would not receive a penny from the fund even if counsel's take should be reduced to zero." *Id.*, at 957. Objectors here, too, lack any interest in the fee award because they have admittedly not objected to the monetary amount available, that amount is uncapped, and the amount of money that Objectors will receive is not affected by the fee award.

To a similar effect is *Glasser v. Volkswagen of America Inc.*, 645 F.3d 1084 (9th Cir. 2011). In *Glasser*, the court stated that simply being a member of the class "does not automatically confer standing to challenge a fee award to class counsel – the objecting class member must be 'aggrieved' by the fee award." *Id.*, at 1088. "If modifying the fee award would not 'actually benefit the objecting class member,' the class member lacks standing because his challenge to the fee award cannot result in redressing any injury." *Id.* Objectors acknowledge the applicability of *Silverman* and *Glasser* here. (Response and Reply Brief, p. 4).

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[2] This argument was raised before the District Court in the parties' Joint Response to Objections. Dkt 113, p. 5.

Thus, they lack standing to object to the fees awarded or Plaintiffs' appeal of the fee award.

Although Objectors contend that *In Re GMC Pick-Up Trucks Prods. Liab. Litig.*, 55 F.3d 768 (3rd Cir. 1995) also is analogous to this case, it is not. In *GMC*, unlike here, the objectors challenged the adequacy of the compensation made available to settlement class members. *Id.*, at 781. Thus, the court found that the fees awarded were part of the constructive fund available to the class. *Id.*, at 820. Here, because the constructive fund is uncapped, any fee award will neither increase nor decrease the monies made available to Class Members or Objectors. Moreover, Objectors' objection to the fairness of the Settlement does not allow them to bootstrap an objection to the fees. If this Court finds, as the District Court correctly found, that the settlement should be finally approved, any objections to the fees awarded fail for lack of standing.

Finally, this Court should reject Objectors' invitation to disregard Article III standing requirements and appoint Objectors to serve as "*amicus*." (Response and Reply Brief, p. 4). Objectors cite to *FTC v. Trudeau*, 606 F.3d 382 (7th Cir. 2010) and *In re Troutt*, 460 F.3d 887 (7th Cir. 2006) in support. *Id.* But, both cases are distinguishable – they involved the appointment of *amicus* to represent District Court judges who had entered orders of criminal contempt. Unlike Objectors here,

each District Court judge was seeking to protect the sanctity of their proceedings and required someone to advance their ruling.

For these reasons, Objectors lack standing and their objections to Plaintiffs' appeal of the fee award should be dismissed.

INTRODUCTION

As previously noted, Mr. Frank has publically stated that class actions are, in his view, bad for the economy. This Court, however, does not hold Mr. Frank's view regarding class actions, and in particular, consumer fraud class actions. Since Mr. Frank filed his objections, this Court has issued opinions emphasizing the importance of consumer fraud class actions. *See, Hughes v. Kore of Ind. Enter.*, 731 F.3d 672 (7th Cir. 2013), *Eubank v. Pella Corp.*, ___F.3d ___, 2014 U.S. App. LEXIS 10332 (7th Cir. 2014), and *In re IKO Roofing Shingle Prods. Liab. Litig.*, ___ F.3d___, 2014 U.S. App. LEXIS 12684 (7th Cir. 2014). And rightly so – in this modern day economy, with consumers further distanced from their sellers, consumer fraud is a pernicious evil for a fully functioning free market, because it pollutes the market with disinformation.

Consistent with this Court's opinions and the recognized importance of consumer fraud class actions[3], where, as here, both monetary and non-monetary components of the settlement are substantial, Plaintiffs' counsel must be justly

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[3] *See also Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 434, 445 (2000) ("Courts long have acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system" and noting that class actions often produce "'several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims.'").

compensated. To rule otherwise will send a clear message to counsel who have dedicated themselves to prosecuting consumer fraud cases on a contingency basis to not expect any more than a lodestar – hardly an incentive to shoulder a contingent risk.

RESPONSE TO COUNTER-STATEMENT OF FACTS

In their counter-statement of facts, Objectors include a chart (Response and Reply Brief, p. 7) that wholly misrepresents the significant labeling changes achieved by the Settlement. The Settlement entailed negotiations over every panel – front, back and sides - of Rexall's packaging. The key injunctive relief obtained is that the main renews/repairs/rebuilds cartilage representations prominently featured on the front of the products' packages that every prospective consumer sees are being removed after having been there for over ten years. Dkt. 64, pp. 8, 10.

No longer when consumers look at the front labels will they view these misrepresentations. The chart that is attached to the Settlement Agreement (Obj. A. 88) confirms just that. The chart has two columns: column 1 lists the language that Rexall cannot use and column 2 lists language that Rexall may use. The space in column 2 corresponding to the "renews," "repairs" and "rebuilds" claims is blank – because Rexall cannot put these statements anywhere on the label, and most importantly Rexall cannot put them on the front of the labels.

Most of the permissible label language Objectors include in their chart is found on the side panels. To get the key offending language removed from the front of the labels, Plaintiffs were willing to allow these other representations to remain unchanged, particularly since they were far less prominently located on the

side panels and contained within sentences. The representations that the products "support," "strengthen," or "nourish[]" cartilage and contain a "building block" of cartilage are all maintenance claims. To "maintain" is a far cry from repairing or rebuilding what has been lost. The majority of glucosamine/chondroitin users are people with osteoarthritis – a disease involving degeneration of cartilage. No longer will Rexall be able to mislead these consumers into believing that their products are a "fountain of youth" that can reverse the progress of the disease and rebuild damaged cartilage.

Objectors also attack Dr. Reutter's report on the grounds that he relies upon 2002 information and that he did not consider "the effect of the settlement's labeling changes (or even the post-2002-study labeling change) on purchasing decisions…" (Response and Reply Brief, pp. 8-9). Objectors presume that such data was available when it was not. Objectors forget that this is a Settlement and the evidentiary basis for its approval and the award of attorneys' fees does not and should not require a separate parallel litigation involving highly detailed analyses. Dr. Reutter's analysis of the value of the injunctive component of the Settlement was a good faith estimate based upon the information available – no more, no less.

ARGUMENT ON REPLY

I. INTRODUCTION.

The Settlement requires Rexall to pay at least $2 million to Class Members who make claims, with the remainder paid to an appropriate *cy pres* recipient. That Objectors do not agree with this Court's recent holding in *Kore* (noting the salutary effects of *cy pres* awards in small claim/large aggregate consumer fraud cases) does not make inapplicable this Court's finding that payments to appropriate *cy pres* recipients are equally, if not more, valuable than payments to Class Members. *Kore,* 731 F.3d at 678. Also of significant value, but ignored by Objectors, is that: (1) substantial injunctive relief was obtained, (2) an unprecedented direct notice program was achieved by this Settlement, and (3) substantial uncapped funds were available to Class Members upon submission of a simple claim form. That many Class Members elected not to submit a claim does not diminish the fact that Class Counsel and Rexall did everything feasible to maximize notice to the Class Members of the Settlement and provide an easy claims process.

Objectors argue that the settlement is one that settles meritless claims where only the lawyers are compensated. (Response and Reply Brief, pp. 10-11). This is false on its face. Objectors have ignored the evidence demonstrating the falsity of the main claims that are being removed, and have portrayed in a false light the

claims allowed to remain. Objectors' *ad hominem* that the injunctive relief is "trivial" (Response and Reply Brief, p. 13), "meaningless" (*id.*, p. 34) and amounts to "any old injunction" (*id.*, p. 28) demonstrates their complete misunderstanding of the science regarding glucosamine and chondroitin.

Carrying their misconceived "meritless claims argument" further, Objectors contend that "any hypothetical overpayment of settlement value relative to alleged nuisance litigation value must be proportionately shared between the class and the class counsel to avoid the perverse incentive created by the appellees' proposed rule of decision." (Response and Reply Brief, p. 11). Again, this argument falls of its own weight because cutting the fee award will not result in any more being paid to Class Members.

Objectors' attempt to liken the Settlement to the settlement in *Pella* could not be more misplaced. *Pella* is a prime example of a settlement that should not have been approved for a whole host of reasons. As this Court noted, the multiple layers of conflicts present in that case between class counsel and the class were so epidemic that the approval of the settlement was "scandalous." *Id.*, *9. Unlike here, where claims can be filed electronically on one page, *Pella* involved a claims process that was confusing and included either a 12 or 13 page claim form. *Id.*, *23-24. Moreover, in *Pella*, though $11.5 million in fees were awarded the total settlement monies to be paid out were at most $1.5 million at the time of approval -

less than the $2 million minimum that Rexall will pay here. Moreover, the *Pella* settlement did not provide any injunctive relief, let alone the substantial labeling changes obtained here. And, *Pella's* notice was "incomplete and misleading." *Id.*, *31. In stark contrast to *Pella,* this Settlement is a salutary example of what a consumer fraud settlement can achieve.

Objectors point out that because the settlement approval process is non-adversarial, District Courts are sometimes left without the benefit of opposing positions being submitted in the approval process. (Response and Reply Brief, p. 13). Not the case here. Mr. Frank and other objectors raised numerous objections, including that the Settlement was the by-product of collusion, the District Court took them into consideration, and rejected them. Unless this Court is going to find that an irrebutable presumption of collusion exists in all settlements containing clear sailing and fee reversion provisions, then Objectors' collusion arguments were addressed and rejected as a matter of fact – a ruling that is subject to an abuse of discretion standard. *Harman v. Lyphomed, Inc.*, 945 F.2d 969 (7th Cir. 1991).

Finally, Objectors focus exclusively on the dollars paid to Class Members, when this Court in *Kore* made it clear that, in cases such as this, the monies paid to class members may not be the most important factor. *Kore*, 731 F.3d at 678. This Settlement includes a powerful combination of a simple uncapped claims procedure, a minimum payment that if left unclaimed will go to a worthy *cy pres*

recipient, and labeling changes needed to correct falsehoods. When the Settlement is viewed as a whole, it accomplishes everything that a small claim consumer fraud settlement should and, as a result, final approval should be affirmed and Class Counsel should be justly compensated for this excellent result.

II. THE RESULT OBTAINED WAS SUBSTANTIAL AND MOST CERTAINLY DID NOT CONSTITUTE A SELLOUT FOR FEES.

Objectors spuriously claim that the Settlement "…was **intended** to provide $4.5 million to the attorneys, while actually paying the class less than $900,000" (Response and Reply Brief, p. 17, emphasis added). As a threshold matter, the Settlement agreement did not guarantee counsel $4.5 million in fees and expenses. It was fully understood by the parties that the District Court would and, in fact, did make the decision on the amount of fees to be awarded. The negotiated fees are both fair and reasonable when the Settlement is properly viewed as a whole – including not just the actual claims made but also the significant injunctive relief, the monies paid to a worthy *cy pres* recipient and the comprehensive notice and simple claims process designed to maximize the amount paid out of an uncapped fund.

The notice and claim form in this case were designed to maximize claims and could not be more different from that in *Pella*, upon which Objectors rely. There the claim forms were 12 or 13 pages long, required claimants to submit a "slew of arcane data" regarding windows installed in their homes, and was "so

complicated that [the defendant] could reject many of them on the ground that the claimant had not filled out the form completely and correctly." *Id.*, *23-24. The settlement also contained a requirement that claimants seeking the higher tiered amount arbitrate with the defendant and allowed defendant to interpose various defenses, making it that much harder for claimants to prove their claims. *Id.* None of these infirmities are present here. And, unlike *Pella*, the District Court here withheld final approval until after the claims period had run.[4]

The class action is "an ingenious procedural innovation" enabling persons to obtain relief as a group, which is "especially important when each claim is too small to justify the expense of a separate suit, so that without a class action there would be no relief, however meritorious the claims." *Pella*, *4. Class Counsel here accomplished the purpose of the substantive state consumer protection laws using the class action "innovation" to achieve the many goals of such litigation – compensation to Class Members, money paid to an organization directly related to the interests of Class Members, labeling changes, and deterrence. All of the foregoing contribute to a more truthful, more competitive and freer marketplace.

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[4] The District Court was advised of the number of claims and the value of those claims before granting final approval. Obj. A. 9. Objectors' suggestion that Counsel disclosed the figures "grudgingly" (Response and Reply Brief, p. 22) is untrue and as far afield as their three fictional cases in their briefs: Coyote v. Acme Products, Potter v. Bailey Building & Loan, and Gatsby v. West Egg. These imaginary cases coincide with Objectors' unbending mindset that class attorneys are always inclined to maximize attorneys' fees at the expense of the class.

The fact that the fee amount was negotiated *ex ante* does not create an irrebutable presumption, as Objectors want this Court to hold as a matter of law, that the Settlement should be found to be unfair and inadequate.

III. THE INJUNCTIVE RELIEF PROVIDES SUBSTANTIAL BENEFITS TO THE CLASS.

Rexall has agreed to eliminate a key falsehood from the front of its products' labels. Objectors' argument that the deletions are not material is refuted by common sense. The representations on the fronts of the packages are what consumers necessarily view at the point-of-purchase. The space is limited and reserved for message(s) most likely to induce purchase. That Rexall chose to use this prime real estate to communicate the false representation that its products rebuild, repair or renew cartilage in and of itself establishes that its removal is a substantial consumer victory. Further, Rexall understood from its marketing surveys and studies that [redacted]. Supp. A. 90. Thus, the Settlement's requirement that these claims be removed is no small or trivial accomplishment – regardless of whether the monetary value of eliminating this false message can be estimated. This Court has recognized that truthful labeling is inherently valuable. *FTC v. QT, Inc.*, 512 F.3d 858, 863 (7th Cir. 2008).

Plaintiffs need not, as Objectors contend, fund and conduct a consumer survey in connection with a settlement and fee award, to confirm what common sense and Rexall's own internal documents establish – that "these changes were material to consumers." (Response and Reply Brief, p. 29). Likewise, Plaintiffs cannot and should not be required, at the settlement stage, to engage in the numerous other highly refined, expensive, and ultimately infeasible evaluations of the impact of the injunctive relief urged by Objectors. (Response and Reply Brief, p. 29).

Removal of the key renews/repairs/rebuilds cartilage representations is not a hollow victory. While Objectors point to "protect," "support," "nourish[]," "strengthen" and "building block" of cartilage representations allowed to remain on the packaging – these are all maintenance representations far removed from "renews," "repairs," or "rebuilds." It is one thing to state that a product might maintain what is left; it is altogether another thing to state that it will rebuild or renew what is no longer there. Further, these maintenance representations are far less prominent than the key deleted representations because they appear on the side panels in the midst of what even Objectors note are "wordy" statements. Response and Reply Brief, p. 29.

Objectors forget that settlement is by its nature compromise, and this Settlement should be held to no different standard. This Settlement achieved an

important victory. No longer will Rexall be able to mislead consumers into believing that its products can reverse the progress of arthritis and rebuild damaged cartilage.

And, the injunctive relief does benefit the Class. Objectors, like the District Court, fail to acknowledge the undisputed evidence that [redacted]% of the Class are repeat purchasers (which is to be expected given that many consumers suffer from chronic arthritic conditions and there is a demonstrably high percentage of consumers who experience a placebo effect with these products).[5]

In an attempt to minimize the value of the injunctive relief, Objectors challenge the substantive merits of the case. Plaintiffs submitted expert reports of Jeremiah Silbert, M.D. and Thomas Schnitzer, M.D., Ph.D. to the District Court (Dkt. 113-22 and Dkt. 113-23). Both experts, who have been studying glucosamine and chondroitin for decades, showed that Rexall's efficacy claims were demonstrably false: Dr. Silbert stating without equivocation, that from a biochemical perspective, it is not possible that oral ingestion of glucosamine or chondroitin, alone or in combination, can renew cartilage (Dkt. 113-23, pages 7-8); and Dr. Schnitzer stating without equivocation that the vast weight of high-quality scientific evidence demonstrates that the products do not rebuild or renew cartilage. (Dkt. 113-22, page 11-12).

[5] Dkt. 113-22, pp. 10-11.

Contrary to the Objectors' contentions, this case could not be more different than *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013). The injunctive relief there (adding language to diaper box labels and the manufacturer's Internet site that "amounts to little more than an advertisement for Pampers" (*id.*, at 719)) was worthless to buyers:

> But we would denigrate the intelligence of ordinary consumers (and thus of the unnamed class members) if we concluded that—absent this suggestion from P&G—they would have little idea to "see [their] child's doctor" if their child's rash was accompanied by a fever or boils or "pus or weeping discharge." And we would denigrate their intelligence still further if we concluded that the value of this suggestion was so great, to ordinary consumers, as to be commensurate with a fee award of $2.73 million. The information contained in this paragraph is neither unknown nor counterintuitive to most people—the way that information about, say, toxic- shock syndrome would have been to consumers in 1980. Instead the information is common sense, within the ken of ordinary consumers, and thus of limited value to them.

By contrast, ordinary consumers do not have knowledge about the biochemical or medicinal qualities of glucosamine and chondroitin. Thus, because consumers are no longer misled into believing that their worn-down cartilage will reappear, this is an important consumer victory.

Even without placing a precise dollar amount on the value of the injunctive relief, it is clear that the labeling changes achieved by this Settlement are significant and provide valuable consumer protection.

IV. PLAINTIFFS' EXPERT REPORT IS ADMISSIBLE AND PROVIDED A GOOD FAITH ESTIMATE OF THE VALUE OF THE INJUNCTIVE RELIEF.

Without explanation, Objectors contend that Plaintiffs' economist, Dr. Reutter's, report is inadmissible under "both *Daubert* and Rule 23(h)(1)." There was no *Daubert* motion filed by Objectors and thus there was no *Daubert* hearing, and in any event the report was not offered to assist the trier of fact at trial, so no *Daubert* proceedings were needed. Further, Objectors did not raise this argument in the District Court and thus it is waived.

Nevertheless, Objectors' attack on Plaintiffs' expert economist's estimate of the value of the injunctive relief and the District Court's rejection of same are both misplaced. The report was an attempt to provide a reasonable estimate of the value of the injunctive relief based upon available information without commencing a parallel litigation involving highly expensive and sophisticated econometric and consumer survey techniques to find a "true" value – particularly since much of the information required to do so is unobtainable.[6] Plaintiffs and their expert did what they could with what they had. 2002 consumer surveys in Rexall's document production independently confirmed: (1) [redacted]

[6] Objectors contend that Plaintiffs and their expert should have conducted post-2002 analyses to see if the marketing program had its projected effect. But the documents required to perform such an analysis would have required years to obtain (assuming various third parties would even provide them) and the performance of an expensive regression analysis. Dkt. 137-1, pp. 4, 9-10.

[redacted], and (2) [redacted]. Based on this information, Plaintiffs' expert projected what he believed would have been the value of these representations. He then used these projections to arrive at an estimated reduction in Rexall's sales under the assumption that the removal of these representations would result in the loss of future consumers who found these representations to be important. Moreover, the fact that the report primarily relied upon 2002 documents from Rexall's files does not undercut its value. The demographics of users of Rexall's products still remain primarily older people suffering from some form of arthritis. There is thus no reason to believe that the renews/repairs/rebuilds representations would have any less importance to consumers today than they did in 2002.

No one claimed, particularly Plaintiffs' expert, that this was anything more than an estimate. The report complied, as best as was possible, with this Court's directive in *Reynolds v. Beneficial Nat. Bank.*, 288 F.3d 277 (7th Cir. 2007) that an attempt be made to monetize the value of injunctive relief. It also reflected that there would be some monetary value to the injunctive relief – which is not surprising given that elimination of frauds and more truthful information will

always impact the marketplace. *FTC v. QT, Inc.*, 512 F.3d 858, 863 (7th Cir. 2008).[7]

If the detail required by Objectors to monetize the value of labeling changes is adopted by this Court, this will only serve to eliminate injunctive relief as a part of future consumer fraud settlements – thwarting the purpose of the consumer protection laws. Objectors miss the point when they contend that "Rexall's newfound advantage" may have been "competed away over the next ten years by other glucosamine product making identical claims…" (Response and Reply Brief, p. 36). Even if all competitors followed Rexall's lead it would only mean that the glucosamine prices charged by Rexall and its competitors were higher than they should have been absent these representations.

V. OBJECTORS WERE NOT PREJUDICED BY THE EXPERT REPORT BEING FILED UNDER SEAL.

Objectors contend that the expert report violated Rule 23(h)(1)'s notice requirement. (Response and Reply Brief, p. 38-39). Objectors were given every opportunity to view the full expert report – all they had to do was sign the protective order the District Court entered.[8] They refused to do so.

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[7] For this reason Objectors' contention that Plaintiffs have failed to establish that there is a "net benefit" from the removal of these false representations (Response and Reply Brief, pp. 39-40) also fails. The net benefit is the removal of false language from the marketplace – false language on the front labels of products.

[8] The same would have applied to any Class Member who requested to view it.

VI. NOTICE AND ADMINISTRATION COSTS ARE A BENEFIT TO THE CLASS.

Objectors are simply wrong that the cost of notice and administration is not considered a benefit to the Class. Where the defendant pays "the justifiable cost of notice to the class -- but not, as here, an excessive cost -- it is reasonable (although certainly not required) to include that cost in a putative common fund benefiting the plaintiffs for all purposes, including the calculation of attorneys' fees." *Staton v. Boeing Corp.*, 327 F.3d 938, 975 (9th Cir. 2003). The cost of notice and claims administration is properly considered part of the fund, as are attorneys' fees. *In re Kentucky Grilled Chicken Coupon Mktg. & Sales Pracs. Litig.* 280 F.R.D. 364, 386 (N.D. Ill. 2001). *See also Weeks v. Kellog Co.*, 2011 U.S.Dist. LEXIS 155472, *107-108 (C.D. Cal. Nov. 23, 2011) ("Plaintiff successfully negotiated a provision that required defendants to bear the cost of notice and settlement administration. In doing so, they prevented these costs from being paid in a manner that reduced the Settlement Fund, and thus ensure that more money would be available to pay claimants. This conferred a concrete benefit on the class. The court thus concludes that it is proper to include them in the value of the class-action settlement."); *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 669 (S.D. Fla. 2006) ("[Defendant] Carnival has also agreed to pay all costs of notice and claims administration, which Carnival estimates will exceed $146,350. This is an additional benefit for the class negotiated by class counsel because otherwise the cost of this undertaking would

have been deducted from the settlement fund."); and *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. 2011) ("In cases such as this one, where attorneys' fees are paid separately from the claim fund, courts place the fee award on the entire settlement fund as that package is the benefit to the class. This amount includes notice and administration costs and separately paid attorneys' fees and costs." (citing cases including *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996)).

Objectors continue to "stand" by their reading of *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011). (Response and Reply Brief, p. 27). *Aqua Dots* did not involve a settlement nor did it address whether the costs of notice should be included as part of the value of a settlement.

VII. THE *CY PRES* AWARD COMPONENT OF THE SETTLEMENT IS AN IMPORTANT BENEFIT.

Objectors contend that the *cy pres* award is valueless because Rexall should have sent identifiable Class Members $3 checks instead. But as shown in Rexall's opening Brief, at pages 30-32, although it was aware of the identify of some of the Class Members from information developed through customer loyalty programs, Rexall did not have complete information regarding the types of products they purchased, how many they purchased, when they made their purchases, or how much they paid. Consequently, sending $3 checks posed a risk of confusing and deterring Class Members who may have been entitled to claim more.

No *cy pres* monies are to be paid until claims have been doubled or tripled according to the provisions of the Settlement.[9] This Court has indicated that it might even be preferable to establish a *cy pres* recipient at the beginning of a case with small claims rather than administering and sending checks out for small dollar amounts.[10] As the Court noted in *Kore*, an award of damages can have no greater deterrent effect than a *cy pres* remedy and may do less for consumer protection than if the money is given to a suitable *cy pres* recipient. *Kore*, 731 F.3d at 678. Contrary to Objectors' contention, *Kore* is not limited to situations where it is impossible to distribute money to class members. Here, Class Counsel ensured that funds not claimed below the $2 million minimum that Rexall agreed to pay would be dedicated to an organization coincident with the interests of the Class. The additional research the Orthopedic Research and Education Foundation may conduct with the $1,134,716 unclaimed settlement funds will benefit Class Members, all of whom necessarily have orthopedic problems. This is a far more beneficial result than ensuring that a Class Member receives a $3 check.

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[9] Claims with documentation of purchase are tripled and undocumented claims are doubled.

[10] "A time-saving alternative might be a class action with the stated purpose, at the outset of the suit, of a collective award to a specific charity. We are not aware of such a case, but mention the possibility of it for future reference." *Kore*, 731 F.3d at 678.

VIII. THE REVERSION OF FEES WAS ENTIRELY APPROPRIATE.

Objectors contend that this Court's recent holding in *Pella* stands for the proposition that clear sailing provisions and fee reversions are automatically questionable. (Response and Reply Brief, p. 42). This Court made no mention or comment on clear sailing provisions. Objectors' contention that by citing *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011), this Court adopted its comments about clear sailing provisions as the law of this Circuit is a stretch to say the least. Here, Class Counsel negotiated the substantive terms of the Settlement first – a salutary process which ensures that attorneys' fees do not in any way affect what is negotiated for the Class.

Even if one assumes that both sides to the negotiations believed that there was going to be a low claims rate (which was not the case as is evidenced by the unprecedented notice program that was executed), Rexall still has to pay out a minimum of $2 million and, most important, Rexall is required to remove a key labeling representation from the front of its labels. These substantial benefits were negotiated prior to fees being discussed and served as the basis for the subsequent fee negotiations.

Under these circumstances, together with the fact that fees were paid separately from the fund, a clear sailing provision and reversion was entirely appropriate. Moreover, it was contemplated and understood that any fee award

would be subject to court approval. While Plaintiffs believe that the District Court erred in reducing Plaintiffs' fee requests, there can be no doubt that the District Court performed its duties under Rule 23.

IX. THE DISTRICT COURT SHOULD HAVE AWARDED MORE FEES.

The District Court awarded Class Counsel their lodestar, with no enhancing multiplier. Objectors have no standing to contest Plaintiffs' appeal of the fee award, *see* pages 2-3 above, yet argue that neither the injunctive relief nor *cy pres* award merits an enhancement.

Counsel are not required to put forth a "prima facie case" (Response and Reply Brief, p. 46) of the value of the injunctive relief. "[A] high degree of precision cannot be expected on valuing a litigation, especially regarding the estimation of the probability of particular outcomes." *Reynolds*, 288 F.3d at 285.[11] Plaintiffs' expert provided a reasonable value estimate of the injunctive relief and explained that the District Court's suggestion of an *ex post facto* valuation was infeasible because of the difficulty and likely impossibility of acquiring the needed

[11] As the Court noted in connection with attaching a value to a request for injunction for purposes of diversity jurisdiction, the amount in controversy is measured by the value of the object of the litigation: the object may be valued from either perspective of what the plaintiff stands to gain, or what it would cost the defendant to meet the plaintiff's demand. *Macken v. Jensen*, 333 F.3d 797, 799-800 (7th Cir. 2003). A party is only required to place a "realistic value" on injunctive relief. *Id.* at 800. A plaintiff has the burden of presenting evidence placing a realistic value on the equitable relief it seeks. *Citizens against Longwall Mining v. Colt LLC*, 2006 U.S. Dist. LEXIS 18887 (C.D. Ill. March 1, 2006).

data from competitors, among other factors. Plaintiffs' expert's valuation report is based upon Rexall's own studies, providing a reliable evidentiary foundation for his estimations.

Further, the removal of key misrepresentations from the front labels of Rexall's products and the ban from their use elsewhere on the package or in Rexall's marketing materials has an inherent value –whether it is quantified or not. The removal of these key misrepresentations was the result of Plaintiffs' efforts, including the science experts they hired and paid. Only after Plaintiffs' experts demonstrated that these representations were false, and faced with a trial and a class being certified, did Rexall agree to their removal – representations that its own internal documents demonstrated consumers deem to be important. Based upon this record, Objectors' contention that a second litigation over the value of the injunctive relief should ensue with prima facie burdens (Response and Reply Brief, p. 46), is absurd and contrary to the law. Plaintiffs' counsel should be compensated for this important result without having to fund expensive litigation in order to be compensated.

Objectors suggest that *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3rd Cir. 2013), allows a district court to give no attorney-fee credit for *cy pres*. That is not what the case holds:

> We think it unwise to impose, as [Objector] requests, a rule requiring district courts to discount attorneys' fees when a portion of an award will be distributed *cy pres*. There are a variety of reasons that settlement funds may remain even after an exhaustive claims process – including if the class members' individual damages are simply too small to motivate them to submit claims. Class counsel should not be penalized for these or other legitimate reasons unrelated to the quality of representation they provided. Nor do we want to discourage counsel from filing class actions in cases where few claims are likely to be made but the deterrent effect of the class is equally valuable.

Id. at 178.

Objectors note that the Court "has never forbidden district courts from considering the outcome when engaging in a simulated *ex ante* analysis." *Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d. 243 (7th Cir. 2014). That does not mean that a court must do an *ex post facto* analysis to value the settlement: "considering the outcome" does not mandate valuing things with the benefit of hindsight. Objectors' strained argument is contrary to the Circuit's established law that litigation and attorneys' fees are valued *ex ante*. "The court must base the award on relevant market rates and the *ex ante* risk of nonpayment." *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011). "A court must assess the riskiness of the litigation by measuring the probability of success of this type of case at the outset of the litigation." *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994); *see also Taubenfeld v. Aon Corp.*, 415 F.3d 597 (7th Cir. 2005).

Plaintiffs request an increase in their fees that reflects all the benefits of the Settlement. The requested fee equated with multipliers of 2 and 2.56, well within the range of reason sanctioned by courts across the country. Counsel worked for several years on a contingent basis, incurring substantial attorney time and out-of-pocket expenses, and, as Judge Posner has noted, "[a] contingent fee must be higher than a fee for the same services paid as they are performed." Richard Posner, *Economic Analysis of Law*, §21.9 (2d ed. 1984). *As a whole*, the settlement substantially benefits the Class (and other consumers and the marketplace) with monetary payments, material changes to labels needed to cure demonstrable misrepresentations, and funds dedicated to an appropriate orthopedic research foundation, together with notice and administration costs being paid separately from any funds paid to Class Members or the *cy pres* recipient. Plaintiffs respectfully submit that the District Court's denial of Counsels' requested fees, which equated to very reasonable multipliers, or at a minimum failing to provide a lodestar enhancement for the results achieved, was error. If this ruling is upheld it will discourage future plaintiffs' counsel from seeking to settle small claims consumer fraud cases with the broader goal of providing the maximum consumer benefit through the eradication of consumer fraud in favor of a myopic approach that only values getting money back to class members.

CONCLUSION

Objectors' entire appeal speculates based upon implicit collusion between the settling parties. But Objectors can show not a single instance of Plaintiffs or their Counsel conceding any class benefit in order to increase their fees. The result achieved warranted a multiplier, and we therefore respectfully request that the Court affirm the Settlement as fair and adequate to the Class and award the requested fees.

Dated: July 11, 2014

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C)

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

This Brief contains 6,741 words, excluding the parts of the Brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

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PROOF OF SERVICE

I hereby certify that on July 11, 2014, I filed electronically the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, thereby effecting service on counsel of record who are registered for electronic filing under Cir. R. 25(a).

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