No. 17-2275

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

v.

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

Defendants-Appellees.

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

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

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

COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
Theodore H. Frank
Melissa A. Holyoak
1310 L St., N.W., 7th Floor
Washington, D.C. 20005
(202) 331-2263
Attorneys for Objector-Appellant
Theodore H. Frank

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2275

Short Caption: Pearson v NBTY

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

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

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

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

Theodore H. Frank

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

Competitive Enterprise Institute, Center for Class Action Fairness

Williams, Montgomery & John

Falkenberg, Fieweger & Ives LLP

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

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

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

Attorney's Signature: s/ Theodore H. Frank Date: 23 June 2017

Attorney's Printed Name: Theodore H. Frank

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

Address: Competitive Enterprise Institute, 1310 L Street NW, 7th Floor
Washington, DC 20005

Phone Number: 202-331-2265 Fax Number:

E-Mail Address: tfrank@gmail.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2275

Short Caption: Pearson v. NBTY

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

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

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

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

Theodore H. Frank

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

Competitive Enterprise Institute, Center for Class Action Fairness

Williams, Montgomery & John

Falkenberg, Fieweger & Ives LLP

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

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

N/A

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

N/A

Attorney's Signature: s/ Melissa A. Holyoak Date: 7/31/2017

Attorney's Printed Name: Melissa A. Holyoak

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

Address: 1310 L Street NW, 7th Floor
Washington, D.C. 20005

Phone Number: (573) 823-5377 Fax Number:

E-Mail Address: melissaholyoak@gmail.com

Table of Contents

Table of Authorities

Cases

Rules and Statutes

Other Authorities

Statutes, Regulations, and Rules

Federal Rule of Civil Procedure 23. Class Actions.

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

…

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

…

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

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

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

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

(1) mistake, inadvertence, surprise, or excusable neglect;

…

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

…

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

…

(2) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

…

Jurisdictional Statement

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

The district court issued final judgment concerning the underlying litigation under Rule 54(b) on August 25, 2016. A16. Appellant Theodore H. Frank is a class member who objected to the final settlement, filed a claim, and appeared at the fairness hearing through counsel. Dkt. 259. Earlier, he had objected to the first settlement agreement entered in 2013, which he successfully litigated before this Court. *Pearson v. NBTY*, 772 F.3d 778 (7th Cir. 2014).

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

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

independently of one another, but for convenience, we shall collectively call them the "Sweeney objectors." Frank dismissed his cross-appeal on November 8, 2016.

On November 14, 2016, plaintiffs-appellees Nick Pearson, Francisco Padilla, Cecilia Linares, Augustina Blanco, Abel Gonzalez, and Richard Jennings (collectively the "named plaintiffs") and defendants-appellees NBTY, Inc., Rexall Sundown, Inc., and Target Corporation (collectively "Rexall") requested voluntary dismissal with prejudice under Rule 41(a)(1)(A)(ii). A150. The court granted this on November 18, 2016. A5.

On May 19, 2017, Frank filed a motion under Federal Rule of Civil Procedure 60(b) to reopen the case so that he could pursue motions to intervene and require the disgorgement of side-payments to the objectors. A187. The district court summarily denied Frank's motion on May 19, 2017. A1. On June 16, 2017, Frank filed notice of appeal; the notice is timely under Fed. R. App. Proc. 4(a)(1)(A). Dkt. 351.

The Rule 60 decision is a final order, and this Court has jurisdiction under 28 U.S.C. § 1291. *Madej v. Briley*, 371 F.3d 898, 899 (7th Cir. 2004). Appellant Frank, as a class member who objected to settlement approval below, and who is prejudiced by the appealed order, has standing to appeal the final May 19, 2017 Minute Order denying his Rule 60 motion to reopen: unnamed class members "who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening." *See Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002); *cf. also Safeco Ins. Co. of Amer. v. American Int'l Group, Inc.*, 710 F.3d 754, 758 (7th Cir. 2013) (implying absent class members are parties who may bring Rule 60(b) motions). To the extent *Devlin* does not apply to post-judgment motions, Frank's motion below also asked for it to be treated as a hybrid motion to intervene (A196 n.2), and the failure of the district court to grant intervention to an absent class member seeking to vindicate rights of the class is both immediately appealable as a final order and legal error. *See*

Williams v. Katz, 23 F.3d 190, 191-92 (7th Cir. 1994); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 318 (7th Cir. 2012); *Crawford v. Equifax Info Servs.*, 201 F.3d 877, 881 (7th Cir. 2000). Additional discussion of jurisdictional issues is in Section I.D below.

Statement of the Issues

1. Did the district court err as a matter of law or abuse its discretion when it failed to consider this Court's instruction *in Safeco Ins. Co. of Am. v. Am. Int'l Group, Inc.*, 710 F.3d 754 (7th Cir. 2013) to grant relief under Rule 60(b)(6) to class members prejudiced by settling parties' settlement with objectors who appealed and settled for private benefit?

2. Did the district court err as a matter of law or abuse its discretion in refusing to reopen the case under Rule 60(b)(1) by holding that Frank is bound by the mistake of the settling parties who intended the district court to have jurisdiction over the settlement agreement but instead dismissed the matter with prejudice, even though Frank had no control over their actions?

3. This Court has suggested that courts have equitable powers to prevent unjust enrichment where "the class device has been used to obtain leverage for one person's benefit." *Murray v. GMAC Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (citing *Young v. Higbee,* 324 U.S. 204 (1945)). Do district courts have the equitable power to prevent bad-faith objectors from being unjustly enriched from the settlement of their objections putatively brought on behalf of the entire class?

Statement of the Case

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

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

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

The underlying claims concern NBTY and its subsidiary Rexall Sundown, which manufacture glucosamine pills for distribution and sale under Rexall's label and the labels of numerous other vendors, including defendant Target. Dkt. 124 at ¶ 5. Plaintiffs sued NBTY, Rexall, and various vendors of Rexall-manufactured glucosamine products in the Northern District of Illinois and the District of Massachusetts, alleging that the products' labeling violated state consumer fraud laws. Dkt. 21 at ¶¶ 1-6.

The parties reached a global settlement. Dkt. 73 ("the 2013 settlement"). Under the 2013 settlement, class members who saved receipts from 2005 to 2013 purchases could have obtained a check of up to $50 ($5/bottle for up to ten bottles); class members without proofs of purchase could claim a check of up to $12 ($3 for up to four bottles). *See Pearson*, 772 F.3d at 783. Predictably, few claims were filed, yet the settlement

entitled four law firms to seek a total of $4.5 million in attorneys' fees, which Rexall agreed not to oppose, and any amounts not awarded would revert to Rexall. *Id.* at 780.

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

B. The district court grants final approval of an improved class action settlement on August 25, 2016.

On remand, as a result of Frank's objection and meritorious appeal, the parties negotiated a revised settlement with a $7.5 million common fund, which provided over $3 million more in class recovery than the original agreement provided, approximately a five-fold improvement or more. A57; Dkt. 251 at 2-3. (Unfortunately, the parties have not provided a final accounting, so it is unclear how much of the common fund went to the settlement administrator.) Based on the substantial improvement to the revised settlement over the original 2014 settlement agreement, Frank sought and the court awarded $180,000 in attorneys' fees. A14. No other objector-appellant from the 2014 *Pearson* decision sought fees. Frank objected to the revised settlement only regarding the separate provision of his attorneys' fees, which he contended should be pooled with plaintiffs' fee request so that total attorneys' fees would not exceed 33% of the settlement fund. Dkt. 259.

Steven Buckley, Patrick Sweeney, and Randy Nunez (the "Sweeney objectors") filed objections to the revised settlement and class counsel's fee request, claiming to bring the objections on behalf of the entire class or subclass, rather than claiming that the settlement was unfair to their claims in particular. A102; A105-08; A111-12.

On July 14, 2016, the court granted plaintiffs' motion for final approval of the revised settlement and plaintiffs' fee request. Dkt. 285. The district court also awarded Frank's fee request, but declined to award those fees out of class counsel's share. Dkt. 286. On August 25, 2016, the Court issued its Final Judgment and Order. A6-16.

The Final Judgment and Order adopted a provision from the revised settlement agreement that expressly required the court to retain jurisdiction to decide all matters under the order and Settlement Agreement:

> Without affecting the finality of this Final Judgment and Order, the 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 or Agreement.

Id. at A14; Settlement Agreement, A71, ¶ 23(e).

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

The Sweeney objectors appealed. Dkts. 289 (Buckley), 293 (Nunez), and 298 (Sweeney). Frank defensively cross-appealed. Dkt. 308.

On October 28, 2016, the named plaintiffs condemned "patently frivolous appeals" by the Sweeney objectors, and moved for the district court to impose an appeal bond to protect the class. A115, A130. Class counsel documented instances where two of the Sweeney objectors previously settled low-value and poorly-edited

objections. A130-31. Two of the Sweeney objectors filed oppositions to the bond motion (A141 and Dkt. 317), but class counsel never noticed the bond motion for hearing.

Within days, all three of the Sweeney objectors filed joint motions for voluntary dismissal in each of their appeals. Dkt. 327. On information and belief, the settling parties struck deals with each of the three Sweeney objectors to dismiss his appeal. A192. On information and belief, the Sweeney objectors settled their appeals for strictly personal gain: the settlement was not modified and absent class members received nothing from the settlement of the Sweeney objectors' appeals.

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

D. The named parties stipulate for dismissal with prejudice, blocking Frank from pursuing the Sweeney objectors for unjust enrichment.

On November 14, 2016, without notice to the class or Frank, the named plaintiffs and defendants filed a Joint Request for Voluntary Dismissal With Prejudice Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii). A150. The joint request did not seek to retain jurisdiction for any purpose. The district court granted the parties' request on November 18, 2016: "Pursuant to the parties' Joint Request for Voluntary Dismissal [332], this matter is dismissed with prejudice." A5.

On December 7, 2016, Objector Frank moved to intervene for the purpose of seeking disgorgement of payments made to the Sweeney objectors in exchange for dropping their appeals. A153. Frank argued that the Sweeney objectors were unjustly

enriched for appeals that plaintiffs had called "vexatious" and "bad faith," and any moneys they received were disproportionate to the zero benefit they provided the class—and especially compared to the benefit Frank's participation in the case had provided. The district court summarily struck Frank's motion on December 15, 2016, because the November 18 dismissal with prejudice meant that "the Court is without jurisdiction to adjudicate disputes arising out of the settlement that led to the dismissal." A4 (citing *Dupuy v. McEwen*, 495 F.3d 807, 809 (7th Cir. 2007)).

Frank investigated and concluded that the district court was correct. Frank attempted to raise this issue with counsel for the named parties, noting that the dismissal with prejudice meant that the settlement's injunction on the defendants was effectively void, but repeated attempts at communication about the problem failed to induce action by class counsel. A209, ¶ 6.

Instead, on February 20, 2017, the named plaintiffs filed a Consented-To Motion For Court Approval of Distribution of Class Settlement Funds, which sought an order from district court on the handling of apparently fraudulent claims. A177. The motion effectively revealed that the settling parties, even after the district court's December order, did not understand the effects of their dismissal with prejudice. The court denied the motion on March 6, 2017, for the same reason that it had denied Frank's motion to intervene: lack of jurisdiction after the dismissal with prejudice. A3. Frank then repeatedly reached out to the plaintiffs through his counsel to offer assistance in filing a joint Rule 60 motion to reopen the case, but plaintiffs did not respond. A209-10.

E. The district court summarily rejects Frank's attempt to reopen the case.

Once it became clear class counsel would not act to reopen the case, on May 19, 2017, Frank filed a Motion to Reopen Under Rule 60(b)(1) and 60(b)(6), relying heavily on *Safeco Ins. Co. of Am. v. Am. Int'l Group, Inc.*, 710 F.3d 754 (7th Cir. 2013). A186; A191. The papers noted that *Safeco* suggested that a Rule 60(b)(6) motion in district court was

the mechanism for class members to address questionable settlements of objecting class members' appeals. In the alternative, Rule 60(b)(1) reopening was appropriate, because Frank was prejudiced by the parties' mistaken dismissal with prejudice. The same day, the district court issued a one-page minute order summarily denying the motion. A1. The minute order addressed neither *Safeco* nor Rule 60(b)(6), but asserted that Frank failed to identify "mistake, inadvertence, surprise, or excusable neglect" because the named parties' "ignorance of the law does not justify relief under Rule 60(b)" and should not have been surprised. *Id.* It further found no "exceptional circumstances" warranting reopening the case. *Id.*

This timely appeal followed. Dkt. 351.

Summary of the Argument

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

The underlying settlement provides millions to class members, and is vastly superior to the 2013 settlement Frank successfully opposed before this Court. *Pearson v. NBTY*, 772 F.3d 778 (7th Cir. 2014). Yet three objectors filed appeals based on their

insubstantial objections, only to dismiss them before opening merits briefs were due—after the parties apparently offered them cash. If bad-faith objectors can profit nearly as much as (or even more than) successful good-faith objectors with much less work, it creates a perverse incentive to bring bad-faith objections and appeals that waste judicial resources instead of meritorious objections that benefit the system. This is not hypothetical. A Federal Judicial Center study covering several years of objector appeals in the Seventh Circuit found that "all of the identified class action objector appeals were voluntarily dismissed pursuant to Rule 42(b)"; the entire report is edifying. Marie Leary, *FJC Report on Class Action Objector Appeals in Three Circuit Courts of Appeals*, Federal Judicial Center 11 (2013) ("Leary"). And the Frankel story in the paragraph above suggests that some objectors are able to extract more from selling a losing objection than the $180,000 fees Frank earned in this case from successfully prosecuting a substantive good-faith objection and appeal and then spending attorney time obtaining court approval of a fee award.

Safeco proposed a mechanism for class members concerned about objector blackmail: Rule 60(b). In *Safeco*, the panel granted an objector's stipulated dismissal under Fed. R. App. P. 42(b), which was filed *after* oral argument concerning the underlying settlement. The panel majority granted dismissal because the sophisticated insurance company class members were presumed capable of protecting their interests and had not expressed any opposition to the settlement. *Id.* at 757. Nevertheless, the panel majority suggested that "[i]f despite appearances this settlement makes other class members worse off or disappoints their reasonable expectations, a class member could file a motion in the district court under Fed. R. Civ. P. 60(b)(3) … or 60(b)(6) …" *Id.* at 758.

Frank's appeal follows up on the dicta in *Safeco* to raise matters of first impression in this Circuit: whether and how absent class members can combat objector

blackmail, which the Sweeney objectors apparently successfully extracted from the parties here. Frank seeks disclosure of these agreements and equitable disgorgement of any unjust enrichment from payments that the three objectors appropriated for themselves when they dismissed their appeals on November 7, 2016. But because class counsel's dismissal with prejudice divested the district court of the intended jurisdiction to oversee the settlement, Frank requires Rule 60(b) relief to reopen the case. Frank does *not* seek to upset the finality of the underlying settlement, which in fact contemplates that the district court would exercise continuing jurisdiction, as the parties themselves expected when they filed a motion pertaining to settlement administration in February 2017—months after the parties dismissed the case with prejudice. A177.

Frank asks this Court to reverse the district court's denial of his Rule 60 motion. The district court summarily denied Frank's motion on the same day it was filed. The one-page minute order (A1) does not mention either *Safeco* or Rule 60(b)(6), which Frank's motion raised (A191). Thus, the district court failed to exercise *any* discretion in denying Frank's *Safeco* argument. *Safeco* implicitly suggests objector blackmail constitutes an exceptional circumstance for relief under Rule 60(b). The district court's order should be vacated for its failure to consider *Safeco* alone.

The district court also erred in misapplying Rule 60(b) by imputing other parties' mistakes in dismissing the matter with prejudice to Frank. While courts properly impute errors of attorneys to their clients in deciding excusable neglect, the district court offers no argument for imputing the *error of settling parties* to Frank, who is not a principal with control over them, and has been adverse to them throughout his participation in the litigation. At best, the district court abused its discretion in binding Frank to the mutual mistake of the settling parties, and the order should be vacated independently for this reason. The district court further erred in reading a freestanding "exceptional circumstances" requirement into Rule 60(b)(1). While district courts are

given deference in resolving Rule 60 motions, deference should not be given to a court that erroneously concludes it lacks discretion. *Robb v. Norfolk & Western Ry.*, 122 F.3d 354, 362 (7th Cir. 1997).

While courts often phrase Rule 60(b) relief as only being granted in exceptional circumstances, excusable neglect under Rule 60(b)(1) may be shown "*without identifying any 'extraordinary' circumstance*". *Robb*, 122 F.3d at 359 (emphasis in original). A district court's discretion "must be exercised after careful consideration of 'all relevant circumstances surrounding the omission' *in a particular case*, including the equitable factors set forth in *Pioneer* [*Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 295 (1993)]." *Id.* at 363 (emphasis in original). The district court exercised no such equitable discretion here, but instead cited cases where the moving party attempted to undo his or her *own mistake* and surmising without explanation there were no "exceptional circumstance." A1. In fact, excusable neglect exists for not preventing a stipulated dismissal Frank had no control over. For this third independent reason, the district court's order should be vacated.

On remand, the district court should be instructed to investigate the settlements by the three Sweeney objectors. The absent class is entitled to equitable relief from self-styled objectors who purport to act on behalf of the class but instead are unjustly enriched by personal side-settlements. *See Young v. Higbee*, 324 U.S. 204, 214 (1945) (reversing dismissal of intervenor action for an accounting of proceeds that two objector-appellants to a bankruptcy allocation order achieved by selling their appeals); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (citing *Young* for proposition that "class device [should not be] used to obtain leverage for one person's benefit").

Without reversal, the Sweeney objectors in this case will abscond with what *Vollmer* calls "extortion" and a leading academic calls "blackmail." Brian T. Fitzpatrick,

The End of Objector Blackmail?, 62 VAND. L. REV. 1623 (2009). It would be unfortunate if the conflicts of interest in class action settlements are compounded with perverse incentives in objections to those conflicts of interest.

Standard of Review

A district court's denial of a motion to vacate default judgment under Rule 60(b) is reviewed for an abuse of discretion. *Robb v. Norfolk & Western Ry.*, 122 F.3d 354, 357 (7th Cir. 1997). However, when a district court erroneously concludes that it lacks discretion, this Court may need to "address the legal assumption" underlying the determination. *Id.* It is always an abuse of discretion to base a decision on an incorrect view of the law or "failure to consider an essential factor." *Smith v. Ford Motor Co.*, 215 F.3d 713, 717 (7th Cir. 2000); *United States v. Mietus*, 237 F.3d 866, 870 (7th Cir. 2001). Questions of law are reviewed *de novo*. *Mietus*, 237 F.3d at 870.

Argument

I. The district court erred by ignoring the Seventh Circuit's instruction in *Safeco* when it denied Frank's motion to reopen.

Frank's appeal of the first settlement in this case resulted in a revised settlement that provided over $3 million in additional pecuniary benefit to the class. But after the district court approved that revised settlement, the class members were once again unfairly treated by actors taking advantage of the class-action system for their own "selfish" benefit. Frank sought to protect the class from three settling objectors believed to have dismissed their appeals solely to "benefit only [themselves] at the expense of all other parties to the litigation." *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003). To challenge what *Vollmer* called objector "extortion," Frank followed this Court's

instruction in *Safeco Ins. Co. of Am. v. Am. Int'l Group, Inc.*, 710 F.3d 754 (7th Cir. 2013), where the Seventh Circuit directed class members to use Rule 60 as a mechanism to contest an objector's settlement. *Id*. at 758. The district court erred when it ignored *Safeco* in its same-day summary denial of Frank's motion. A1.

A. The problem of professional objectors.

Courts and commentators have lamented the phenomenon of objector blackmail by professional objectors. While good-faith objectors like Frank successfully oppose class action settlements to benefit absent class members, professional objectors instead obstruct or delay settlement proceedings so as to extract attorneys' fees in exchange for the withdrawal of an objection. *See* 7B Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 1797.4 n.5 (3d ed. 2005). Professional objectors seek to "get paid to go away" which "would benefit only the [objectors] at the expense of all other parties to the litigation." *Vollmer*, 350 F.3d at 660 (calling practice "extortion" and sanctionable). Legal academics have criticized this practice as "objector blackmail." Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009).

In district court, objectors are appropriately deterred from making selfish settlements by Fed. R. Civ. P. 23, which empowers 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, many or perhaps most objector appeals are filed for the sole purpose of obtaining individual settlement. For example, in a study of twenty-seven Seventh Circuit objector appeals filed between January 1,

2008 through March 1, 2013, "all of the identified class action objector appeals were voluntarily dismissed pursuant to Rule 42(b)." Leary 11.

At best, such objector settlements burden the judicial system with meritless appeals calculated for individual gain at the expense of other litigants. At their worst, such settlements may "jeopardize the interests of the unrepresented class members." *Safeco*, 710 F.3d at 755. When an objector agrees to drop a meritorious appeal, the entire class is potentially worse off because the class action settlement never receives appellate scrutiny that would have protected their interests against district-court error.[2] Either way, such settlements constitute an abuse of the class-action system.

Objector blackmail settlements also create inequitable results and perverse incentives. If it is more profitable for a bad-faith objector to lose in district court and settle an unmeritorious appeal than to vindicate class-member rights as a good-faith objector, bad-faith objectors will outnumber good-faith ones—as this very case illustrates. Three objectors got "paid to go away," failing to win any relief for the class,

[2] And even more so where class counsel uses an oversized payment to induce an objector whose counsel is acting in good faith to drop a meritorious objection. If it is problematic for a neutral district judge to preclude appellate review (*Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 318 (7th Cir. 2012)), it is surely more so when settling parties successfully preclude appellate scrutiny of a settlement by buying off individual class members who are challenging it. *Cf. In re Capital One TCPA Litig.*, No. 15-1546 (7th Cir.) (appeal of $3,671/hour $15.6 million fee award dismissed after class counsel pays Center's client $25,000 against Center's wishes and likely more to other objectors). The possibility of such payments makes it almost impossible for non-profits to seek appellate review in large class actions involving class with low-income demographics: class counsel with millions of dollars at stake can always make an offer that only the most ascetic of objectors will refuse, and legal ethics rules prohibit even non-profits from disregarding a client's instructions about settlement. D.C. Ethics Opinion 289 (1999).

but also quite possibly pocketed more for themselves and their attorneys for a perfunctory objection and notice of appeal than Frank's counsel won in this case for his successful objection and fully-briefed appeal that earned the class an additional $3 million. To add insult to injury, the cacophony of bad-faith objections can taint district-court perceptions of meritorious good-faith objections. *E.g.*, *In re Target Corp. Customer Data Security Breach Litig.*, 2016 WL 259676 at *1 (D. Minn. Jan. 20, 2016) (grouping CCAF client with bad-faith "professional objectors" and imposing oversized appeal bond), *reversed*, 847 F.3d 608 (8th Cir. 2017) (holding appeal bond *ultra vires* and reversing district court for failing to address CCAF's class-certification objection); *Dewey v. Volkswagen AG*, 728 F. Supp. 2d 546, 574-75 & n.19 (D.N.J. 2010) (grouping Frank with bad-faith "professional objectors" and rejecting Frank's clients' Rule 23(a)(4) objections), *reversed*, 681 F.3d 170 (3d Cir. 2012).

B. *Safeco* proposes a procedural solution to the objector-blackmail problem.

In dicta, *Safeco* suggests that selfish objector settlements may be remedied by an absent class member's motion under Rule 60(b)(6), which Frank sought here.

Safeco involved a class action settlement of claims brought by insurance underwriters who alleged that AIG had underreported the size of its business to a workers' compensation reinsurance pool, thereby causing other insurers to bear disproportionate losses in unprofitable years. 710 F.3d at 755. The parties reached a class-action settlement, to which Liberty Mutual Insurance Co. objected through its subsidiaries, arguing: (1) that Liberty possessed unique claims against AIG worth $25 million, and (2) that class recovery should be over six times larger—$3.1 billion instead of $450 million. *Id.* at 761. After oral argument, Liberty settled with defendant AIG and stipulated the dismissal of its appeals. As in this case, no class representative opposed Liberty's dismissal under Fed. R. App. P. 42(b). *Id.* at 756.

The panel requested additional briefing on whether the dismissal adversely affected class members' rights. *Id.* at 755. A split decision ultimately chose to honor the request to dismiss the appeals. The panel majority noted that "no member of the class has expressed opposition." *Id.* The lack of opposition sufficed for the majority in part because "All members of the class are large and sophisticated businesses, many with millions on the line and legal staffs to protect their interests." *Id.* at 756.

Judge Posner dissented and would not have granted dismissal due "to the risks of class action sell-out" because the terms of settlement were not disclosed to the panel. *Id*. at 758. The dissent was particularly concerned that objector Liberty had appropriated superior relief for itself as a "bribe" to drop its appeal. *Id.* at 761. The dissent concluded: "We should not dismiss the appeal without at least informing ourselves of the terms of Liberty's settlement with AIG." *Id.* at 762.

The panel majority responded to the dissent's concerns pragmatically. Because there was no party objecting to the settlement, there was no reason to retain jurisdiction. The majority also proposed a mechanism under Rule 60 whereby absent class members could challenge such settlements:

> If despite appearances this settlement makes other class members worse off or disappoints their reasonable expectations, a class member could file a motion in the district court under Fed. R. Civ. P. 60(b)(3) (misconduct by an opposing party) or 60(b)(6) ("any other reason that justifies relief"). If such a motion were to be filed, a concrete controversy would call for judicial resolution. At the moment, however, none of the parties wants to fight, and none of the class members has expressed dissatisfaction. Any further proceedings would be gratuitous.

Id. at 758.

In this case, Frank filed a Rule 60(b)(6) motion and outlined this Court's guidance set forth in *Safeco*, A191, A204-05, yet the district court ignored such instruction in denying the motion. This was error.

C. The district court failed to consider *Safeco* even though the objector settlement(s) are more suspect than the one involved in *Safeco*.

The district court erred by failing to consider *Safeco*, and its one-page order should be vacated for this reason alone. Frank's motion to reopen created a "concrete controversy" that "call[s] for judicial resolution." *Safeco,* 710 F.3d at 758. The risk of objector sell-out is even greater here than in *Safeco*. Unlike the small, sophisticated *Safeco* class, the millions of class members here have scant resources to monitor potentially abusive side agreements. The class does not comprise insurance companies with in-house legal teams. The fiduciary obligation of counsel is most significant "when the class members are consumers, who ordinarily lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011).

Even if class members could carefully monitor this settlement, it would be irrational to do so because each class member's claim is worth at most tens of dollars, not hundreds of thousands (or millions) as in *Safeco*. *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992); *cf. Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014). There is so little at stake to an individual class member that even the $0.10/page PACER fees to monitor the litigation would dwarf that recovery.

Moreover, the Sweeney objectors here cannot pretend—as the large insurance company Liberty did in *Safeco*—that they are resolving individual claims. Each objection is premised on arguments applicable to an entire class or subclass, and none claims that an individual objector's claim has unique value of more than a few dollars.

See A100-103 (objecting that settlement does not protect subclass interests); A105-07 (objecting to attorneys' fees); A111-12 (objecting to notice, claims process, and attorneys' fees). The settling objectors either raised their arguments as a cynical procedural device to extract rents on the back of class-wide settlement, or they have sold out the class in exchange for private gain. No other possibilities exist.

Objector Frank agrees with class counsel's assessment that the Sweeney objectors' appeals were "noticed strictly to disrupt the settlement so these Objectors can extort a buyout." A130. The settling objectors were apparently successful. The settling objectors, who did not opt out of the class and would be bound by the settlement, have likely obtained payments without improving recovery to the entire class and without any judicial approval. As discussed in Section III below, this is wrong.

The district court's failure to follow *Safeco* and reopen the case under Rule 60(b) to investigate the objector settlements was reversible error.

D. There is no jurisdictional bar to considering Frank's Rule 60 motion and appeal.

The district court did not contest Frank's authority to bring a Rule 60 motion, but we anticipate possible jurisdictional objections in this sub-section. Rule 60(b) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding." Frank is a party for the purposes of the rule.

Absent class members bound by final approval have standing to file a motion under Rule 60(b). *See Safeco*, 710 F.3d at 758 (an unnamed "class member could file a motion in the district court under" Rule 60(b)); *cf. also Reynolds v. Beneficial National Bank,* 288 F.3d 277, 288 (7th Cir. 2002) (objector's counsel may make motion for fee award under common-fund doctrine without intervention); *see generally Devlin v.*

Scardelletti, 536 U.S. 1, 9-10 (2002) (unnamed class members are parties for some purposes including "in the sense of being bound by the settlement").

Here, Frank is bound by the settlement, which, on information and belief, was flouted by the side-payments the parties paid to settling objectors. Thus, Frank is a party for the purpose of filing a Rule 60 motion so that he may move to *enforce* the settlement through equitable disgorgement of objector blackmail. Frank is additionally a party for the purpose of Rule 60 due to his extensive involvement in the litigation, having successfully litigated an appeal over the original settlement, which preceded and precipitated the approved settlement. Frank's long participation in the case distinguishes his motion from those filed by class members with no prior involvement. *Cf. Adelson v. Ocwen Fin. Corp.*, 621 Fed. Appx. 348, 351 (7th Cir. 2015) ("some form of participation in the litigation is necessary before an unnamed class member can seek relief under Rule 60(b)").[3] Requiring intervention that might eventually be needless because an objector is considered a party for purposes of some appeals, but held not to be a party under other sets of circumstances, would effectively undo *Devlin*. If "class members would be forced to intervene to preserve their claims, [then] one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated." *Devlin*, 536 U.S. at 10; *cf. also Rothstein v. Am. Int'l Grp., Inc.*, 837 F.3d 195, 205 (2d Cir. 2016).

[3] *Adelson*, where an appellant waited several years before moving to reopen, relied on *In re Four Seasons Sec. Litig.*, 525 F.2d 500, 504 (10th Cir. 1975), which noted that "Appellant had not acted in any way to bring himself within the traditional framework of the litigation as he could have by an appearance or by seeking to intervene." *Adelson*'s unpublished refusal to permit an absent class member from moving for Rule 60 relief is therefore distinguishable from this case where Frank both made an appearance and sought to intervene, especially since *Adelson* did not address the *Safeco* scenario.

Even if *Devlin* did not apply and intervention is required, Frank's Rule 60 motion requested intervention. A196. The failure of the district court to grant intervention to an absent class member seeking to vindicate rights of the class that no party is pursuing is legal error. *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 318 (7th Cir. 2012) (Rule 23.1); *Crawford v. Equifax Info Servs*., 201 F.3d 877, 881 (7th Cir. 2000); *cf. Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (describing "minimal" burden to make showing of inadequate representation).

There is no jurisdictional bar to considering Frank's Rule 60 motion and appeal.

II. In the alternative, the district court misapplied Rule 60(b)(1) because Frank was not responsible for the mistake from which he seeks relief.

The district court did not explicitly apply Rule 60(b)(6) or distinguish *Safeco* whatsoever, and it further abused its discretion in applying Rule 60(b)(1) so as to erroneously attribute to Frank the mistakes committed by adverse parties. Even when exercising its discretion, a district court "cannot base its decision on an irrelevant consideration." *Johnson v. GDF, Inc.*, 668 F.3d 927, 929 (7th Cir. 2012).

A. The district court erred in applying Rule 60(b)(1).

The district court either misapprehended the law or abused its discretion in denying Frank relief from a mistake not of his own creation. The district court found that "[t]he underlying rule of law was well settled long before the parties specifically asked the Court to dismiss their case with prejudice, and their ignorance of the law does not justify relief under Rule 60(b)." A1. But *another party's* mistake and ignorance of the law cannot reasonably be charged to Frank. To the extent the district court found that Frank bears responsibility for unrelated party's acts, it clearly erred and thus abused its discretion.

Additionally, the district court apparently applied an incorrect legal standard to Frank's Rule 60(b)(1) argument in summarily denying his motion due to a purported failure to demonstrate "exceptional circumstance." In fact, excusable neglect may be shown "*without identifying any 'extraordinary' circumstance*[.]" *Robb v. Norfolk & Western Ry.*, 122 F.3d 354, 359 (7th Cir. 1997) (emphasis in original). To the extent the district court misapprehended the law concerning excusable neglect, it abused its discretion should be reversed for this independent reason.

1. The settling parties' conduct reveals that they mistakenly dismissed the action with prejudice when they actually intended for the district court to retain jurisdiction over administration of the settlement.

The Settlement Agreement suggests that the parties themselves intended for the Court to retain jurisdiction, which is precisely what absent class members such as Frank reasonably believed. The agreement expressly retains jurisdiction:

> The Court shall retain 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 or Agreement.

Settlement Agreement, A71 ¶ 23(e). A similar provision was incorporated into the Proposed Final Approval Orders agreed by the settling parties and noticed to the class. *See* Dkt. 213-2 at 81. The Court adopted a similar retention of jurisdiction in its Final Judgment and Order, A14.

This express retention of jurisdiction is confirmed by other terms of the Settlement Agreement, which contemplate that the Court would use its jurisdiction after final approval. In particular, the Settlement states that counsel shall endeavor to resolve "any suspected fraud and, if necessary, Rexall may suspend the claim process, *and then the Parties will promptly seek assistance from the Court.*" A66, ¶ 19 (emphasis

added). The settling parties apparently did not appreciate the jurisdiction-robbing effects of dismissal with prejudice, or else paragraph 19's requirement to seek judicial assistance would be understood to be completely inoperative. While the Settlement Agreement required the settling parties to dismiss the action with prejudice within five days of the effective date (that is, after dismissal of appeals) (A72, ¶ 25), the intent of that provision could not have been to deprive the district court of jurisdiction. Indeed, even the district court issued an order contemplating that it was enjoining the defendants to take actions that would occur six months after the Settlement required dismissal with prejudice. A12-A13.

After final approval and after the Sweeney objectors dismissed their appeals, the named parties continued to act as if jurisdiction existed. The Settlement Administrator detected claims fraud, so the settling parties sought assistance from the district court to clarify the Administrator's obligations. A177. However, because the parties had inconsistently agreed to dismiss the case *with prejudice* (A72 ¶ 25), they inadvertently vitiated part of their own agreement under Seventh Circuit law, and were unable to obtain the order they sought.[4]

[4] This Court, unlike some other Circuits, does not recognize jurisdiction after the filing of a dismissal with prejudice, even after a conditional dismissal that purports to retain limited jurisdiction. *Dupuy v. McEwen*, 495 F.3d 807, 809 (7th Cir. 2007). One commentator suggests that the Seventh Circuit's approach conflicts with *Kokkonen v. Guardian Life Ins. Co. of Amer.*, 511 U.S. 375 (1994). Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 310 (2010). But any arguable discrepancy between *Dupuy* and *Kokkonen* would not change the district court's conclusion. The named parties' November 14 request for dismissal was unconditional and separate from the earlier order retaining limited jurisdiction, so jurisdiction likely would not exist even in circuits that depart from the Seventh Circuit's approach. *E.g.*, *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491, 503 (6th Cir. 2000).

2. The district court abused its discretion by effectively holding that the settling parties acted as Frank's agent, a finding which no reasonable factfinder could reach.

The district court abused its discretion in analogizing Frank's motion to cases where parties sought relief from their own mistake. *Pioneer* shows that such a mistake may be grounds for a successful motion, but the equitable inquiry required by *Pioneer* tilts even further in Frank's favor because *he did not make the mistake*.

While "a lawyer's errors are imputed to the client," *Moje v. Fed. Hockey League, LLC*, 792 F.3d 756, 758 (7th Cir. 2015), the *named parties* erred, and the named parties emphatically do not represent Frank. Indeed, the named parties bitterly contested Frank's objections and his meritorious appeal of their 2013 settlement, and they may well oppose this appeal.

Each and every case cited by the district court involved a client trying to escape from his or her attorneys' mistakes. *Compare* A1 *with Humphrey v. Sheriff*, No. 15 C 3358, 2016 WL 5720355, at *2 (N.D. Ill. Oct. 3, 2016) ("failure to meet filing deadlines"); *Dickerson v. Bd. of Educ. of Ford Heights, Ill.*, 32 F.3d 1114, 1116 (7th Cir. 1994) (failure to prosecute); *Harold Washington Party v. Cook County, Ill. Democratic Party*, 984 F.2d 875, 879 (7th Cir. 1993) (failure to respond to motion to dismiss); *Sadowski v. Bombardier Ltd.*, 539 F.2d 615, 618 (7th Cir. 1976) (failure to object to expert testimony). Furthermore, none of the Seventh Circuit precedents cite *Pioneer*, and it at least one is no longer good law. *Compare Dickerson*, 32 F.3d at 1116 ("counsel's negligence, whether gross or otherwise, is never a ground for Rule 60(b) relief") *with Robb*, 122 F.3d at 359 ("'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence"). None of the district court's cases apply to Frank's motion under Rule 60(b)(1) because neither Frank nor his agent made the mistake he seeks relief from. *Cf. Cashner v. Freedom Stores*, 98 F.3d 572, 577 (10th Cir. 1996) ("[T]he kinds of mistakes by a party that may be raised by

a Rule 60(b)(1) motion are litigation mistakes that a party could not have protected against, such as the party's counsel acting without authority of the party to that party's detriment.").

This Court has acknowledged that "abandoned clients who take reasonable steps to protect themselves can expect to have judgments reopened under Rule 60(b)(1)." *Moje*, 792 F.3d at 759 (cleaned up). And so too should Frank, who was not merely "abandoned" by the named parties, but was never represented by them to begin with, at least not since he entered a separate appearance in the litigation in 2013. Frank *has* taken reasonable steps to protect his interests. He moved to intervene on behalf of the class within one month of the settling objectors' dismissals. A154. His intervention was denied due to the dismissal with prejudice, but Frank moved to reopen on May 19, 2017, once it became clear the parties were not going to seek to cooperate to correct their own mutual mistake to give the district court jurisdiction over the settlement.

Under *Pioneer*, a court must equitably evaluate all relevant circumstances to evaluate excusable neglect. The district court abused its discretion in failing to recognize Frank's innocence in the mistake that prejudices him, and by misapplying precedent concerning a party's own mistake as an absolute bar to relief. This error alone merits vacatur. *See Robb*, 122 F.3d at 362 (vacating and remanding denial of Rule 60(b)(1) motion where court failed to exercise discretion due to misapprehension that mistake by party's own attorney required denial).

3. Independently, the district court erred because excusable neglect under Rule 60(b)(1) does not require "exceptional circumstances" after *Pioneer*.

Rule 60(b)(1) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reason[]: … mistake, inadvertence, surprise, or excusable neglect[.]" Prior to 1993, a Rule 60(b)(1) motion premised on "excusable neglect" required "some kind of

'exceptional circumstance,' and not mere carelessness or negligence." *Robb*, 122 F.3d at 358. This changed when the Supreme Court clarified that "excusable neglect" could in fact relieve a party from his own error in some situations. A determination of excusable neglect is:

> at bottom an equitable one, taking account of all the relevant circumstances surrounding the party's omission. These include … the danger of prejudice to the [non-moving parties], the length of the delay and its potential impact on judicial proceedings, the reasons for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted within good faith.

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993). Thus, excusable neglect may be found "*without identifying any 'extraordinary' circumstance*[.]" *Robb*, 122 F.3d at 359 (emphasis in original).

To the extent that the district court required "exceptional circumstances" under Rule 60(b)(1), it erred as a matter of law, and failed to appropriately exercise discretion over the equitable considerations discussed in *Pioneer*. The district court's order should be vacated for this independent failure to exercise appropriate discretion. *See Robb*, 122 F.3d at 362.

4. Excusable neglect should be found because policy favors providing relief to class members in rare exceptional cases like this one rather than encourage the litigation of usually-meaningless settlement conditions.

One might argue that the "reasonable steps" required by *Moje* includes absent class members anticipating this scenario and objecting in 2016 to Paragraph 25 of the Settlement Agreement (A72) to prevent future divestiture of jurisdiction. The Court should reject that view. Frank possesses excusable neglect even to the extent he "failed" to prevent the named parties' dismissal with prejudice. A contrary holding would harm the class in this matter and encourage pointless litigation in future actions.

When objecting to unfair class action settlements, good-faith objectors like Frank must advance arguments likely to succeed. Merely hypothetical technical objections are unlikely to merit rejection of a proposed settlement because courts may not "delete, modify or substitute certain provisions" of a proposed class action settlement. *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012). "The settlement must stand or fall in its entirety." *Id.*

Here, experienced class counsel refused to believe that they had made a mistake even after the district court cited *Dupuy* in December 2016, and continued to act as if the district court had jurisdiction; the first district court judge in this matter entered an order thinking the settlement would provide for future jurisdiction. Future class counsel will similarly resist any suggestion by an objector of a jurisdictional problem. And if class counsel mistakenly assures a district court that the objection is wrong, a district court will be reluctant to require months of delay and expensive re-noticing of the class to fix the disputed hypothetical technicality. That implies requiring appellate litigation to protect the objector's rights once the hypothetically defective settlement is approved over the objection. But appellate courts are also reluctant to disturb settlements over future hypothetical problems. *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013) (refusing to disturb *cy pres* selection provision before court had decided identity of *cy pres* recipients—even though approval was being reversed on other grounds).

Thus, a rule requiring objectors to intercede when parties propose to dismiss a case with prejudice is counter-productive, assuming it is even legally *possible*.[5]

[5] Dismissals filed by stipulation or filed prior to defendants' filing of an answer do not require court approval under Rule 41(a)(1)(A). Arguably, such dismissal becomes operative immediately, so class members may not even oppose it. *Cf. Adams v. USAA*, -- F.3d --, 2017 WL 3136919 (8th Cir. Jul. 25, 2017). That said, in class actions,

Moreover, even if objectors could successfully raise hypothetical objections concerning prospective dismissal by the parties, the effort would waste private and judicial resources in almost every case. Under most class action settlements, dismissal is benign to class members. Dismissal with prejudice only hinders class interests in exceptional cases like this one where for-profit objectors successfully extract money that rightfully belongs to the class or where both class counsel and the defendant have abandoned the terms of the settlement. No purpose is served by expecting objectors to raise hypothetical arguments about dismissal. *See also Rothstein*, 837 F.3d at 205 (observing "troubling consequences" of requiring premature interventions by nonnamed class members).

All of this additional litigation would be for a contingent issue that might never become ripe and had not ever previously arisen in the several dozen cases Frank has been litigating class action settlements. (Similarly, an argument that class members are bound by their class-action attorneys' mistakes because of the failure to successfully object to the mistake would also potentially shield class counsel from after-the-fact malpractice litigation as collateral estoppel. *Koehler v. Brody*, 483 F.3d 590 (8th Cir. 2007).)

---

there may be sound policy reasons for courts to *not* grant preclusive effect to dismissal with prejudice under Rule 41(a)(1)(A). *See In re Brewer*, -- F.3d --, --, 2017 WL 3091563 at *5 (D.C. Cir. Jul. 21, 2017) (permitting intervention by absent class member, for the purpose of appealing the denial of class certification because "if a stipulated dismissal deprived the court of jurisdiction to hear a motion for intervention filed by absent members of a putative class, then a class action defendant could simply buy off the individual private claims of the named plaintiffs … a strategy the Supreme Court has said 'would frustrate the objectives of class actions' and 'waste … judicial resources by stimulating successive suits' 'contrary to sound judicial administration.'" (*quoting Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 338-39 (1980))).

Courts are understandably reluctant to make it too easy to make Rule 60(b) motions for fear of inviting multiplying collateral litigation. But here, requiring *ex ante* litigation over a class counsel's mistake in settlement language will engender more litigation than permitting the rare *ex post* reopening on this sort of chain of coincidences.

The best interpretation of "excusable neglect" should allow objectors to reopen matters in unusual event that they become prejudiced by third-party conduct, provided that the equities otherwise favor granting relief.

B. The equities favor granting Frank relief under Rule 60(b).

The district court further erred by apparently failing to weigh the equities. Courts must evaluate motions under Rule 60(b) equitably based on all facts and circumstances. The inquiry under Rule 60(b)(1) is "at bottom an equitable one, taking account of all the relevant circumstances surrounding the party's omission." *Robb*, 122 F.3d at 359 (cleaned up) (quoting *Pioneer*, 507 U.S. at 395); *Di Vito v. Fidelity Deposit Co.*, 361 F. 2d 936, 939 (7th Cir. 1966) ("the relief provided by Rule 60(b) is equitable in character and to be administered upon equitable principles"). Relevant circumstances include "the danger of prejudice" to the defendant, "and whether the movant acted within good faith." *Robb*, 122 F.3d at 359. Courts must take *all* relevant facts into account when deciding whether excusable neglect exists under Rule 60(b)(1). *Id.* at 362.

The equities tipped in favor of Frank's motion for several reasons. First, without reopening the case, absent class members lack any practical means to pursue the settling objectors for their violation of the Settlement Agreement and Final Judgment and Order. Frank thus suffers significant prejudice if his Rule 60(b) motion is denied. In contrast, no party would be prejudiced by granting the motion—claims against defendants remain released by virtue of the final approval order. Second, Frank brings his motion in good faith. Finally, unless the Court grants relief, the settling objectors

will succeed in extracting objector blackmail payments, which rightfully belong to the entire class.

Without vacating the order, the interests of Frank (and all absent class members) will be greatly impaired because no other remedy exists. The district court "retains exclusive jurisdiction over this action, the Parties, and all Settlement Class members to determine all matters relating in any way to … the Settlement Agreement, including but not limited to the administration, implementation, interpretation, or enforcement of such orders of Agreement." Final Judgment, A14. Thus, if the Court were to affirm, class members' interest in disgorgement would be extinguished for no compensation. Even if it were possible for Frank to file a new suit seeking disgorgement (and jurisdiction under the Class Action Fairness Act would not be available, given the relatively low amount in controversy), any recovery would be obliterated by duplicative administration costs.[6] In this case, the settlement administrator possesses contact information and means to disburse recovery to unnamed class members.

While Frank and the class suffer great prejudice from the dismissal, no other party will be unfairly prejudiced by granting his motion. Because Frank does not seek to disturb the Final Judgment and Order, the Settlement Agreement remains in place and the claims against defendants are released and may not be brought. A9. It would be

[6] The settlement administrator has apparently already disbursed checks in this case. That said, disgorgement could still benefit the class because "leftover monies" in the Settlement Fund may be distributed *pro rata* to "all Settlement Class Members who have submitted a timely and valid claim." A58 ¶ 8(c). Disgorged funds could thus be disbursed in a subsequent distribution, if any occurs. Alternatively, if the disgorged and leftover monies are insufficient to practically disburse, as a last resort, the excess funds could be paid to a *cy pres* beneficiary. *Pearson*, 772 F.3d at 784. Disgorgement remains necessary because it claws back unjust enrichment acquired in bad faith.

inequitable to bar Frank's motion due to an error not appreciated by even the signatories to the Settlement Agreement.[7]

The Sweeney objectors may argue that they would be prejudiced, but "loss of a windfall is not the kind of harm that a court should endeavor to avert." *In re UAL Corp.*, 411 F.3d 818, 823-824 (7th Cir. 2005) (affirming Rule 60(b)(6) relief over appeal by parties that benefited from prior mistake). Frank's claim is barred by a mistake not of his making. Such mistake ought to be corrected, especially in a class action involving millions of individuals. "If the mistake is not corrected, the cost will be borne not by its maker—[class counsel]—but by [absent class members] no less innocent than the [Sweeney objectors]. A refusal to correct would serve no deterrent or punitive purpose; it would merely redistribute wealth among [class members] capriciously." *Id.* at 824. Here, Frank seeks to equitably disgorge the capricious distribution of wealth to bad faith objectors such as the settling objectors. Frank's blamelessness in the mistake and the prejudice he suffers from the mistake support granting him relief under Rule 60(b).

The equities further favor granting Frank's motion because he has demonstrated good faith in representing aggrieved class members, and in refusing to ask for or accept money to dismiss his appeal. The Court has already praised the work of Frank and his non-profit counsel on behalf of class members ***in this case***. *Pearson*, 772 F.3d 778.

---

[7] No party relied on the mutual mistake to dismiss with prejudice, which further favors vacatur. Relief under Rule 60(b) is appropriate when "mistake could not have invited or received any reliance by the party in whose favor the mistaken judgment was entered." *Lowe v. McGraw-Hill Cos.*, 361 F.3d 335, 342-43 (7th Cir. 2004) (affirming relief under Rule 60(b)(6) where beneficiary of mistaken order did not know about it). Here, the settling parties not only failed to rely on the preclusive effect of dismissal with prejudice, they failed to even appreciate that dismissal with prejudice was incompatible with their February 2017 consented-to motion to approve the administrator's plan of distribution. A177.

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 objectors.

III. Under *Young v. Higbee*, courts should equitably disgorge ill-gotten gains appropriated by appellants that purported to represent an entire class, but settled for private gain.

The district court's failure to consider *Safeco* and the lack of agency between Frank and the settling parties was not harmless error. The district court can and should remedy objector blackmail using its equitable power per *Young v. Higbee*, 324 U.S. 204 (1945).

Additionally, since the Court presumably reaches a legal question of first impression—how, procedurally, class members may combat objector blackmail—the panel should guide the district court on how to resolve Frank's underlying motion to disgorge. Here, the district court should be instructed to investigate the terms of the settling objectors' agreement with the settling parties pursuant to Rule 23(e)(5). To the extent that the settling objectors secured payment for themselves or their counsel without improving the class action settlement for absent class members, the district court should exercise its equitable discretion pursuant to pursuant to *Young* and order objector blackmail disgorged for distribution to absent class members.

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

Disgorgement of unjust enrichment is an equitable remedy within the inherent power of district courts. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 397-99 (1946) ("unless otherwise explicitly restricted by statute, District Courts may exercise all inherent equitable powers to fashion relief, including ordering the payment of

money."). Here, the equities favor disgorging the spoils of objector blackmail and paying restitution to the class, as illustrated in *Young v. Higbee*.

Payments to individual class members who have not opted out without proportional benefits to absent class members necessarily cheat the class, and this principle is well-understood in the context of named plaintiffs settling individual claims. *Murray*, 434 F.3d 948, 952; *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003); *Greisz v. Household Bank, N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999). It is equally well-understood that class counsel should not use the class-action process to benefit themselves without benefit to absent class members. *See, e.g.*, *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016). Thus, the equities point to disgorging unjust enrichment that would otherwise result from settling objectors' cynical misuse of the class action process to extract private gain. "The object of restitution [in the disgorgement context] … is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty." AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(4) (2010).

This equitable calculus underlies *Young v. Higbee*, which arose out of the proposed bankruptcy reorganization of a golden-age Cleveland department store incorporated as The Higbee Company. 324 U.S. at 206. Two preferred shareholders (Potts and Boag) objected to the confirmation of the plan, contending that junior debt was allocated too great a share of the plan's proposed distribution. *Id*. After the district court overruled their objections and confirmed the plan, they appealed to have the confirmation set aside based upon the unfair treatment of preferred shareholders like themselves. *Id*. at 206-07. But rather than proceed on that argument, they "sold" their appeal to the junior debt holders (*i.e.*, they settled and dismissed their appeal) for a personal payoff. *Id*. at 207. Another preferred shareholder (Young) intervened to compel an accounting by the initial appellants to disgorge the proceeds of the sale of

their appeal to the other preferred shareholders. *Id*. at 208. A special master, the district court and the circuit court of appeals presumed that because Potts and Boag "had not acted as representatives of a class" there was no justification for disgorgement. *Id*. The Supreme Court reversed and required disgorgement. Even though "Potts and Boag did not expressly specify that they appealed in the interest of the whole class of preferred stockholders" the basis of that appeal "was that every other preferred stockholder, as well as themselves, would be injured by confirmation." *Id* at 209. Their rights were "inseparable" and "[e]quity looks to the substance and not merely the form." By appealing from a judgment that affected "a whole class of stockholders," "at the very least they owed them an obligation to act in good faith." *Id*. at 210.

As in *Young*, at least one of the settling objectors' appeals was expressly "alleged to be for the benefit of [absent class members]." *Id.* at 214. *See* Plaintiff-Intervenor Randy Nunez' Opposition to Motion Requiring Objectors to Post an Appeal Bond, A145 ("Nunez has sufficiently set forth a valid basis to be concerned that the new Settlement does not protect his putative class' interests"). Further, all of the settling objectors filed objections that exclusively concerned issues of common interest to all class members such as notice and attorneys' fees. None of the settling objectors suggested that their claims were idiosyncratic to individual circumstances, but instead advanced objections with applicability to an entire class. To the extent that the appeals had merit, the settlements are losses to the class because "appellate correction of a district court's errors is a benefit to the class." *Crawford v. Equifax Info Servs*., 201 F.3d 877, 881 (7th Cir. 2000). More likely, the three appeals lacked merit, the settlements are losses to the class because the "the money [objectors] received in excess of their own interest as [class members] was not paid for anything they owned." *Young*, 324 U.S. at 213. The fruit of the appeal "properly belongs to all [class members]." *Id.* at 214. That the value of the

appeal was exacted through settlement rather than through a litigated conclusion does not change this fact. *Id*. at 213-14.

Just as Potts and Boag proceeded under the "statutory privilege of litigating for the interest of a class," so too did the settling objectors in this case. That the privilege at issue was conferred under Fed. R. Civ. P. 23(e)(5), rather than the Bankruptcy Act of 1938 makes no difference. *See Murray*, 434 F.3d at 952 (citing *Young* in support of idea the class device may not be "used to obtain leverage for one person's benefit"). "This representative responsibility is emphasized by the fact that they might have been awarded compensation for their services had they succeeded [on appeal] to the advantage of all the [absent class members]." *Young*, 324 U.S. at 213; *accord Eubank v. Pella Corp*., 753 F.3d 718, 720 (7th Cir. 2014). (Indeed, Frank was awarded fees for his good faith objection and meritorious appeal in this very case.)

If, as is frequently the case, class counsel paid the objector blackmail, then the objectors' payments effectively came out of the common fund, contrary to the terms of the settlement; moreover, to the extent that class counsel was willing to take less, that money belongs to the class.

Perhaps the money did not come out of the class counsel's share of the common fund, but was additional money paid by defendants; if so, defendants may argue that the side-payments paid settling objectors came out of "their" money, so should not or cannot revert to the class. Likewise, the settling objectors may argue that such payments are merely "private" arrangements that could not possibly prejudice the class. This distinction does not withstand scrutiny.

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

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

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

The Seventh Circuit has previously used similar principles to order disgorgement. For example, *Dale M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist.*

No. 307 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." 282 F.3d 984, 986 (7th Cir. 2002). *Dale M.* ordered disgorgement from a non-party attorney who attempted to retain a fee award arising from a judgment reversed on prior appeal, rather than requiring duplicative litigation to unwind the series of transactions.

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

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

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

Finally, *Duhaime* was implicitly rejected by *Safeco*, which ignored *Duhaime* in its fact-specific decision not to investigate the settlement in that appeal.

Rougvie v. Ascena Retail Grp., Inc. denied absent class members' efforts to intervene and move to disclose and disgorge side payments, reasoning that they lacked standing to intervene. No. 15-cv-724, 2017 WL 2624544, at *3-*5 (E.D. Pa. Jun. 16, 2017). *Rougvie* gainsaid the class members' interest in the proceeds of objector-appellants' side-settlements because, it thought, the objector-appellants had no fiduciary duty to the class and the prospects of objector-appellants prosecuting an appeal to success were low. *Id*. But these are arguments on the merits, not a reason to find a lack of standing, and courts should not confuse merits arguments with jurisdictional arguments. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 88-90 (1998). Non-party objectors possess standing to the extent they may suffer from an "objectively reasonably likelihood" of suffering injury-in-fact. *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 692 (7th Cir. 2015). Here, with reasonable likelihood, the Sweeney objectors absconded with recovery that rightfully belongs to the entire class,

including Frank. Moreover, "Many traditional remedies for private-rights causes of action—such as for … ***unjust enrichment***—are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) (emphasis added).

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

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

Frank and his attorneys, through hundreds of hours of work over several years, won a hard-fought landmark appeal over the original settlement approval that resulted in an improved settlement that quadrupled or quintupled actual class recovery by millions of dollars *in this case*. For his efforts toward his successful objection improving class recovery, the court awarded Frank's counsel $180,000 in attorneys' fees, a small percentage of the improvement to the class, and one awarded on top of class counsel's fees. It would be unjust and inequitable if objectors (and objectors' counsel) who filed unsuccessful objections that provided no benefit to the class were to realize benefits disproportionate to what they have accomplished for the class.

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 in this very case, and apparently regularly happens in this Circuit and others. Leary; *see generally* discussion in Section I.A, above.

Conclusion

The district court failed to consider this Court's guidance in *Safeco* and abused its discretion in resolving Frank's motion to reopen, which requires vacatur at minimum. This Court should confirm that class members have an equitable remedy against professional objectors who blackmail class action settlements for private gain.

Dated: July 31, 2017

Respectfully submitted,

COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS

/s/ Theodore H. Frank
Theodore H. Frank
Melissa A. Holyoak
1310 L Street NW, 7th Floor
Washington, DC 20005
(202) 331-2263
Attorneys for Objector-Appellant
Theodore H. Frank

Statement Regarding Oral Argument

Frank requests under Cir. R. 34(f) that the Court hear oral argument in his case because it presents significant issues concerning the settlement of class action appeals. These issues, regarding availability of relief under Fed. R. Civ. P. 60 and disgorgement from bad-faith objectors to class action settlements, are meritorious, and have not been authoritatively settled in the Seventh Circuit in this particular scenario. Exploration at oral argument would aid this Court's decisional process and benefit the judicial system.

Frank is working with the *pro bono* assistance of his colleagues with the non-profit Competitive Enterprise Institute's Center for Class Action Fairness. The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements. It has won tens of millions of dollars for class members and shareholders, and acclaim from the press and this Court—including in this very action. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780, 787 (7th Cir. 2014); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013. Neither Frank nor the Center for Class Action Fairness has settled an appeal for a *quid pro quo* payment to themselves; they bring this appeal in good faith.

A favorable resolution in this appeal would provide guidance to district courts in overseeing side-deals with class action objectors, and reduce the windfalls achieved by bad-faith objectors at the expense of absent class members.

Certificate of Compliance with Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 30(d)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, Type Style Requirements, and Appendix Requirements:

1. This brief complies with the type-volume limitation of Cir. R. 32(c) because:

This brief contains 12,729 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 12-point Palatino Linotype font.

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

Executed on July 31, 2017.

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on July 31, 2017, I caused to be electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system pursuant to Cir. R. 25(a), thereby effecting service on all counsel of record, who are registered for electronic filing.

/s/ Theodore H. Frank
Theodore H. Frank

Required Short Appendix

Statement of Compliance
with Circuit Rule 30(d)

All materials required by Cir. R. 30(a) & (b) are included in the Appendix of Objector-Appellant Theodore H. Frank.

/s/ Theodore H. Frank
Theodore H. Frank
Melissa Ann Holyoak
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1310 L Street, N.W
Washington, D.C. 20005
(202) 331-2263
Attorneys for Appellant Frank

APPENDIX
TABLE OF CONTENTS
Required Short Appendix

Appendix Page

APPENDIX
TABLE OF CONTENTS

Appendix Page

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1.2
Eastern Division

Nick Pearson, et al.

Plaintiff,

v.

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

Target Corporation, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, May 19, 2017:

MINUTE entry before the Honorable John Robert Blakey: The case is before the Court on Objector Theodore H. Frank's motion to reopen the case and require disclosure and disgorgement of side−payments [348]. Frank seeks to reopen the case under Fed. R. Civ. P. 60(b)(1), which provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" on the basis of "mistake, inadvertence, surprise, or excusable neglect." Although the parties requested and obtained a dismissal of this matter with prejudice, Frank argues that they were somehow "surprised by the Court's lack of jurisdiction to enter Plaintiffs' Consented−to−Motion for Court Approval of Distribution of Class Settlement Funds." Memorandum in support of motion to reopen [348], p. 1. To the extent the parties claim they were surprised that a dismissal with prejudice divests a court of jurisdiction to enforce terms of a settlement, such surprise alone fails to warrant the relief sought here. The underlying rule of law was well settled long before the parties specifically asked the Court to dismiss their case with prejudice, and their ignorance of the law does not justify relief under Rule 60(b). "Relief under Rule 60(b) is 'an extraordinary remedy and is granted only in exceptional circumstances.'" Humphrey v. Sheriff, No. 15 C 3358, 2016 WL 5720355, at *2 (N.D. Ill. Oct. 3, 2016) (quoting Dickerson v. Bd. of Educ. of Ford Heights, Ill., 32 F.3d 1114, 1118 (7th Cir. 1994); Harold Washington Party v. Cook County, Ill. Democratic Party, 984 F.2d 875, 879 (7th Cir. 1993)). No such circumstances have been demonstrated here, and Frank's motion to reopen the case [384] is, accordingly, denied. See Sadowski v. Bombardier Ltd., 539 F.2d 615, 618 (7th Cir. 1976) ("Rule 60(b) is not to be invoked to give relief to a party who has chosen a course of action which in retrospect appears unfortunate or where error or miscalculation is traceable really to a lack of care."). The 5/25/17 Notice of Motion date is stricken, and the parties need not appear. Mailed notice(gel,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was

generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1
Eastern Division

Nick Pearson, et al.

Plaintiff,

v.

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

Target Corporation, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, March 6, 2017:

MINUTE entry before the Honorable John Robert Blakey: Plaintiffs' consented−to motion for court approval of distribution of class settlement funds [342] is denied for the same reasons the Court denied Theodore Frank's motion to intervene. See [340]. Although the Court initially dismissed this case without prejudice and retained jurisdiction to assist the parties in the administration and implementation of the settlement provisions, the parties subsequently sought a dismissal with prejudice. And the Court granted that request. See [333]. "[O]nce a suit is dismissed with prejudice the judge loses all power to enforce the terms of the settlement that may lie behind that dismissal." Jessup v. Luther, 277 F.3d 926, 929 (7th Cir. 2002) (citations omitted). See also Hill v. Baxter Healthcare Corp., 405 F.3d 572, 576 (7th Cir. 2005) (a "case that is dismissed with prejudice is unconditional; therefore, it's over and federal jurisdiction is terminated"). The parties cannot by consent create federal jurisdiction where it is otherwise lacking. E.g., Nick's Cigarette City, Inc. v. United States, 531 F.3d 516, 525 (7th Cir. 2008). The 3/7/17 Notice of Motion date is stricken, and the parties need not appear. Mailed notice(gel,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1
Eastern Division

Nick Pearson, et al.

Plaintiff,

v.

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

Target Corporation, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, December 15, 2016:

MINUTE entry before the Honorable John Robert Blakey: Theodore H. Frank's motion to intervene and disgorge side payments [334] is stricken, and the briefing schedule set on 12/12/16 [338] is vacated. As Frank correctly notes, the Court dismissed this case with prejudice on 11/18/16 −− "it is gone," and the Court is without jurisdiction to adjudicate disputes arising out of the settlement that led to the dismissal. Dupuy v. McEwen, 495 F.3d 807, 809 (7th Cir. 2007). See also Hill v. Baxter Healthcare Corp., 405 F.3d 572, 576 (7th Cir. 2005) (a "case that is dismissed with prejudice is unconditional; therefore, it's over and federal jurisdiction is terminated"); Jessup v. Luther, 277 F.3d 926, 929 (7th Cir. 2002) (when "a suit is dismissed with prejudice the judge loses all power to enforce the terms of the settlement that may lie behind that dismissal."). This Court is without jurisdiction to consider Frank's motion, and the case remains closed. Mailed notice(gel,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1
Eastern Division

Nick Pearson, et al.

Plaintiff,

v.

Case No.: 1:11−cv−07972
Honorable James B. Zagel

Target Corporation, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, November 18, 2016:

MINUTE entry before the Honorable James B. Zagel: Pursuant to the parties' Joint Request for Voluntary Dismissal [332], this matter is dismissed with prejudice. Mailed notice(ep,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

Plaintiffs,

v.

REXALL SUNDOWN, INC., a Florida corporation; and NBTY, INC., a Delaware corporation,

Defendants.

Case No. 11-cv-07972

CLASS ACTION

Judge James B. Zagel

FINAL JUDGMENT AND ORDER

This matter came before the Court on Plaintiffs' motion for final approval of the proposed class action settlement with Rexall Sundown, Inc. and NBTY, Inc. and their affiliated parties ("Rexall") set forth in the Settlement Agreement dated April 10, 2015 between Plaintiffs and Rexall Sundown, Inc., and NBTY, Inc. ("Settlement Agreement), and preliminarily approved in this Court's order of February 1, 2016 [Dkt. 238]. The Settlement Agreement [Dkt. 213-1 through 213-5], together with the exhibits attached thereto, sets forth the terms and conditions for the proposed settlement of the case, and provides for the dismissal of Plaintiffs' individual and class claims against Rexall with prejudice upon the Effective Final Judgment Date.

The Court having held a Fairness Hearing on the fairness, adequacy, and reasonableness of the settlement on July 14, 2016, and having considered all of the written submissions, objections, and oral arguments made in connection with final settlement approval, and having issued a Minute Order on July 14, 2016 granting Plaintiffs' Motion for Final Approval of Class Action Settlement [Dkt. No. 285], and a Minute Order on July 28, 2016 granting Plaintiffs' Motion for Attorneys' Fees and granting in part Objector Theodore H. Frank's Motion for Attorneys' Fees [Dkt. No. 286], hereby finds and orders as follows:

1. Unless defined herein, all defined terms in this Final Judgment and Order shall have the respective meanings as the same terms in the Settlement Agreement.

2. Notice to the Settlement Class has been provided in accordance with the Court's Preliminary Approval Order. The notice, in form, method, and content, fully complied with the requirements of Rule 23 and due process, constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons entitled to notice of the settlement.

3. The settlement set forth in the Settlement Agreement is fair, reasonable, adequate, and in the best interests of the Settlement Class. The Settlement Agreement was arrived at through good-faith bargaining at arm's-length, without collusion, conducted by counsel with substantial experience in prosecuting and resolving consumer class actions. The settlement consideration provided under the Settlement Agreement constitutes fair value given in exchange for the release of the Released Claims against the Released Parties. The consideration to be paid to members of the Settlement Class is reasonable, considering the facts and circumstances of the numerous types of claims and affirmative defenses asserted in the Litigation, and in light of the

complexity, expense, and duration of litigation and the risks involved in establishing liability and damages and in maintaining the class action through trial and appeal.

4. All Settlement Class members who failed to submit an objection to the settlement in accordance with the deadline and procedure set forth in the Preliminary Approval Order are deemed to have waived and are forever foreclosed from raising any objection to the settlement.

5. The Parties, the Released Parties, and each Settlement Class member have irrevocably submitted to the exclusive jurisdiction of this Court for any suit, action, proceeding, or dispute relating in any way to, or arising out of, the Released Claims, the Settlement Agreement, or this Final Judgment and Order.

6. The Parties are directed to consummate the Settlement Agreement in accordance with its terms. The Parties and any and all Settlement Class members who did not timely exclude themselves from the Settlement Class are bound by the terms and conditions of the Settlement Agreement.

7. Under Rule 23(b)(3), the Court makes final its previous conditional certification of the Settlement Class, defined as all persons in the U.S. who, during particular time periods and in certain U.S. locations, purchased for personal use and not resale or distribution certain joint health dietary supplements: (a) sold by Rexall or any of its affiliates under the brand names of Rexall or its affiliates; or (b) sold under another brand name by a company not affiliated with Rexall and manufactured by (i) Rexall, (ii) any of Rexall's affiliates, or (iii) any entities that manufactured or sold the Covered Products from which Rexall acquired assets or contracts (collectively, "Covered Products"). The Covered Products and locations and time periods of sale covered by this Settlement are identified in Exhibit A to the Settlement Agreement. The

Settlement Class does not include persons who submitted valid requests for exclusion from the Settlement Class.

8. The requirements of Rule 23(a) and (b)(3) have been satisfied for purposes of settlement. The Settlement Class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the Settlement Class; the claims of the Plaintiffs are typical of the claims of the Settlement Class; the Plaintiffs will fairly and adequately protect the interests of the Settlement Class; and the questions of law or fact common to Settlement Class members predominate over any questions affecting only individual members.

9. The preliminary appointment of Jeffrey I. Carton and Peter N. Freiberg (Denlea & Carton LLP); Elaine A. Ryan (Bonnett, Fairbourn, Friedman & Balint, P.C.); and Stewart M. Weltman (Boodell & Domanskis, LLC) as Settlement Class Counsel is hereby made final. Settlement Class Counsel are experienced in class litigation, including litigation of similar claims in other cases, and have fairly and adequately protected the interests of the Settlement Class.

10. Subject to the terms and conditions of the Settlement Agreement, this Court hereby dismisses the Litigation without prejudice and without fees or costs, except as provided in the Settlement Agreement or this Order. This dismissal without prejudice shall not allow the Parties or any members of the Class to litigate or otherwise reopen issues resolved by this judgment, or included within the Released Claims, but is "without prejudice" so as to allow the Court to supervise the implementation and administration of the Settlement.

11. By operation of this Final Judgment and Order, the Releasing Parties release and forever discharge the Released Parties from the Released Claims, and the Released Parties release and forever discharge Plaintiffs, the Settlement Class, and Settlement Class Counsel, as set forth in Paragraphs 12, 13, and 14 of the Settlement Agreement.

a. As used in this Order, the Releasing Parties are Plaintiffs and each Settlement Class member (except a person who has obtained proper and timely exclusion from the Settlement Class), and their related individuals and entities (including but not limited to Plaintiffs' and Settlement Class members' spouses and former spouses, and their present, former, and future respective administrators, agents, assigns, attorneys, executors, heirs, partners, predecessors-in-interest, and successors) (collectively, the "Releasing Parties").

b. As used in this Order, the Released Parties are (i) NBTY, Inc. and Rexall Sundown, Inc.; (ii) Any person or entity in the chain of distribution of the Covered Products, including but not limited to raw material suppliers, distributors, and retailers (including but not limited to Costco, Target, and CVS Pharmacy, Inc., to the extent that they are in the chain of distribution of the Covered Products); (iii) Entities and persons related to 11.b.(i) and 11.b.(ii), including but not limited to their present, former, and future direct and indirect parent companies, affiliates, agents, divisions, predecessors-in-interest, subsidiaries, successors, and any entities that manufactured or sold the Covered Products from which Rexall acquired assets or contracts; and (iv) Entities and persons related to 11.b.(i), 11.b.(ii), and 11.b.(iii), including but not limited to their respective present, former, and future officers, directors, employees, independent contractors, shareholders, agents, assigns, and attorneys (collectively, the entities and persons described in 11.b.(i), 11.b.(ii), 11.b.(iii), and 11.b.(iv) shall be referred to as "Released Parties").

c. The Released Claims include any and all rights, duties, obligations, claims, actions, causes of action, or liabilities, whether arising under local, state, or federal law, whether by statute, contract, common law, or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, arising from any time in the past through the date of Preliminary Approval, arising

out of or relating in any way to: (i) Allegations, claims, or contentions that were or could have been asserted in the Litigation; or (ii) the Covered Products, including, but not limited to, their efficacy or performance, and any and all advertising, labeling, packaging, marketing, claims, or representations of any type whatsoever made in connection with the Covered Products (collectively, the "Released Claims").

12. As long as a product identified on Exhibit A to the Settlement Agreement continues to be sold and does not include on its label any of the words prohibited by Paragraph 9 of the Settlement Agreement, or statements conveying the same message, no Releasing Party who purchases such product may sue based on any allegation, contention, claim, or cause of action that would have, had the matter occurred prior to the date of Preliminary Approval, been within the scope of the Released Claims. The Released Claims do not encompass any claim for personal injuries or safety-related concerns.

13. The Release includes claims that are currently unknown to the Releasing Parties. The Release in this Final Judgment and Order and the Settlement Agreement fully, finally, and forever discharges all Released Claims, whether now asserted or unasserted, known or unknown, suspected or unsuspected, which now exist, or heretofore existed or may hereafter exist, which if known, might have affected their decision to enter into this release. Each Releasing Party shall be deemed to waive any and all provisions, rights, and benefits conferred by any law of the United States, any state or territory of the United States, or any state or territory of any other country, or principle of common law or equity, which governs or limits a person's release of unknown claims. The Releasing Parties understand and acknowledge that they may hereafter discover facts in addition to or different from those that are currently known or believed to be true with respect to the subject matter of this release, but have agreed that they have taken that

possibility into account in reaching the Settlement Agreement and that, notwithstanding the discovery or existence of any such additional or different facts, as to which the Releasing Parties expressly assume the risk, they fully, finally, and forever settle and release any and all Released Claims, known or unknown, suspected or unsuspected, which now exist, or heretofore existed, or may hereafter exist, and without regard to the subsequent discovery or existence of such additional or different facts. The foregoing waiver includes, without limitation, an express waiver, to the fullest extent not prohibited by law, by Plaintiffs, the Settlement Class members, and all other Releasing Parties of any and all rights under California Civil Code Section 1542, which provides:

> **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.**

In addition, Plaintiffs, Settlement Class members, and all other Releasing Parties also expressly waive any and all provisions, rights, and benefits conferred by any law or principle of common law or equity, that are similar, comparable, or equivalent, in whole or in part, to California Civil Code Section 1542.

14. Rexall shall have six (6) months from the Effective Final Judgment Date to begin shipping Covered Products covered by the Settlement with labels and packaging that conform to the terms of the Settlement. Neither Rexall nor any of the retailers of the Covered Products shall be required to recall, remove from shelves, or pull from distribution or inventory any Covered Products that are shipped by Rexall prior to the date commencing six (6) months after the Effective Final Judgment Date.

15. Subsequent to the Effective Final Judgment Date, if Rexall becomes aware of studies or other scientific support for any of the representations prohibited by the terms of Paragraph 9 of the Settlement Agreement, Rexall may, upon notice to Settlement Counsel to the extent such notice is practical, seek relief from the United States District Court for the Northern District of Illinois to change the labels accordingly. However, in no event shall notice to Class Counsel be required if relief is sought more than five years after the Effective Final Judgment Date.

16. Except as to the rights and obligations provided for under the Settlement Agreement, by operation of this Order, NBTY, Inc. and Rexall Sundown, Inc. hereby release and forever discharge Plaintiffs, the Settlement Class, and Settlement Class Counsel from any and all rights, duties, obligations, claims, actions, causes of action, or liabilities, whether arising under local, state, or federal law, whether by statute, contract, common law, or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, which the Released Parties may now have, own, or hold, or which the Released Parties at any time may have, own, or hold, against Plaintiffs, the Settlement Class, or Settlement Class Counsel by reason of any matter, cause, or thing whatsoever occurred, done, omitted, or suffered from the beginning of time to the date of the Preliminary Approval of the Settlement Agreement, related to the subject matter of the Litigation.

17. Plaintiffs, Settlement Class members, and the Releasing Parties are permanently enjoined and barred from commencing or prosecuting any action or proceeding asserting any of the Released Claims, either directly, representatively, derivatively, or in any other capacity, whether by a complaint, counterclaim, defense, or otherwise, in any local, state, or federal court,

or in any agency, or other authority or forum wherever located. Any person or entity that knowingly violates such injunction shall pay the attorneys' fees and costs incurred by Rexall or any other Released Party as a result of such violation.

18. The Court makes the following awards to Plaintiffs and Settlement Class Counsel:

a. Denlea & Carton, LLP, Bonnett, Fairbourn, Friedman & Balint, P.C.; Levin Fishbein Sedran & Berman; and Boodell & Domanskis, LLC, are jointly awarded attorneys' fees and expenses in the amount of thirty three percent (33%) of the net Settlement Fund distributable to the Class Members; and

b. Each of the five (5) Class Representatives is granted an incentive award in the amount of $5,000.00.

The amounts awarded pursuant to subsections a and b above shall be paid to the escrow/trust account of Denlea & Carton, LLP for further distribution to Plaintiffs and to Settlement Class Counsel.

19. The Court awards $180,000.00 as attorneys' fees and expenses to the Competitive Enterprise Institite, as counsel for Objector Theodore H. Frank, which amount will be paid from the gross Settlement Fund.

20. Without affecting the finality of this Final Judgment and Order, the 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 or Agreement.

21. The Settlement Agreement and the proceedings taken and statements made pursuant to the Settlement Agreement or papers filed seeking approval of the Settlement

Agreement, and this Order, are not and shall not in any event be construed as, offered in evidence as, received in evidence as, and/or deemed to be evidence of a presumption, concession, or an admission of any kind by any of the Parties of (a) the truth of any fact alleged or the validity of any claim or defense that has been, could have been, or in the future might be asserted in the Litigation, or any other litigation, court of law or equity, proceeding, arbitration, tribunal, investigation, government action, administrative proceeding or other forum, or (b) any liability, responsibility, fault, wrongdoing or otherwise of Rexall. Rexall has denied and continues to deny the claims asserted by Plaintiffs. Nothing contained herein shall be construed to prevent a party from offering the Settlement Agreement into evidence for the purposes of enforcement of the Settlement Agreement.

22. The certification of the Settlement Class shall be binding only with respect to the settlement of the Litigation. In the event that the Court's approval of the Settlement is reversed, vacated, or modified in any material respect by this or any other Court, the certification of the Settlement Class shall be deemed vacated, the Litigation shall proceed as if the Settlement Class had never been certified, and no reference to the Settlement Class, the Settlement Agreement, or any documents, communications, or negotiations related in any way thereto shall be made for any purpose in this Litigation, the Underlying Actions, or any other action or proceeding.

23. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

24. Neither Settlement Class Counsel's applications for incentive awards, attorneys' fees, and reimbursement of expenses, nor any order or proceedings relating to such applications, nor any appeal from any order relating thereto or reversal or modification thereof, shall in any

way affect or delay the finality of this Judgment, and all such matters shall be considered separate from this Final Judgment and Order.

25. Based upon the Court's finding that there is no just reason for delay of enforcement or appeal of this Order notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Settlement Agreement, the Court directs the Clerk to enter final judgment.

IT IS SO ORDERED.

Dated: 25 August, 2016

James B Zagel

JUDGE JAMES B. ZAGEL
UNITED STATES DISTRICT JUDGE