Appeal Nos. 14-1198, 14-1227, 14-1245, 14-1389

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NICK PEARSON, *et al.*, and RICHARD JENNINGS,

Plaintiffs-Appellees, Cross-Appellants

v.

NBTY, INC., *et al.*

Defendants-Appellees.

APPEALS OF: THEODORE H. FRANK, KATHLEEN MCNEAL, and ALISON PAUL

Objectors-Appellants, Cross-Appellees.

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

Response Brief of Defendants-Appellees NBTY, Inc., Rexall Sundown, Inc., and Target Corporation

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-1198

Short Caption: Nick Pearson, et al. v. NBTY, Inc., et al.

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):

NBTY, Inc.

(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:

Sidley Austin LLP

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

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

NBTY, Inc. is a wholly-owned subsdiary of Alphabet Holding Company, Inc., an affiliate of T.C. Group LLC (dba The Carlyle Group)

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

N/A

Attorney's Signature: s/ Kara L. McCall Date: 2/18/14

Attorney's Printed Name: Kara L. McCall

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

Address: Sidley Austin LLP, One South Dearborn, Chicago, Illinois 60603

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[ ] **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):

Rexall Sundown, Inc.

(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:

Sidley Austin LLP

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

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

Rexall Sundown, Inc. is a wholly-owned indirect subsidiary of NBTY, Inc.

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

N/A

Attorney's Signature: s/ Kara L. McCall Date: 2/18/14

Attorney's Printed Name: Kara L. McCall

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

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(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):

Target Corporation

(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:

Sidley Austin 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:

Target Corporation is a publicly traded company. It is not aware of any publicly held company that owns 10% or more of its stock.

Attorney's Signature: s/ Kara L. McCall Date: 2/18/14

Attorney's Printed Name: Kara L. McCall

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

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Jurisdictional Statement

The jurisdictional summary in Appellants' Opening Brief is complete and correct.

Statement of Issues Presented for Review

1. Whether the District Court abused its discretion in approving a settlement that provided undisputedly adequate compensation to class members in light of the challenges faced in litigation, after an undisputedly adequate notice program.

2. Whether the District Court abused its discretion in refusing to treat the Defendants' agreement not to object to an award of attorneys' fees below a certain amount as evidence self-dealing or collusion.

3. Whether challenges raised for the first time on appeal to the following features of the settlement are waived or otherwise fail on the merits:

(a) Providing that any reduction in the fee request submitted by class counsel revert to the Defendants;

(b) Providing for a *cy pres* distribution if the claims made by class members resulted in total payments below $2 million; and

(c) Requiring class members to submit claims in order to recover.

Statement of the Case

I. Litigation

NBTY, Inc. and its subsidiary Rexall Sundown, Inc. (collectively, "Rexall") manufacture and sell joint health dietary supplements that contain glucosamine and/or chondroitin (Obj. A1–2).[1] Starting in June 2011, Plaintiffs – consumers of these products – filed five statewide and nationwide consumer fraud class actions against Rexall and its affiliates, alleging that certain representations made in the product labeling and advertising for the glucosamine/chondroitin products were false or misleading.[2] The labeling at issue stated, *inter alia*, that the products would "help rebuild cartilage," "support[ ] mobility and flexibility," "lubricate joints," and "maintain the structural integrity of joints" (Obj. A2). Plaintiffs alleged that they bought the products based on these representations but had not received the claimed benefits (*id.*). Plaintiffs further alleged that, had they known the products would not provide them the desired benefits, they would not have purchased the products (*id.*).

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[1] References to "Obj. A ___" refer to the appendix submitted with Objectors-Appellants' opening brief. References to "Supp. A___" refer to the Joint Supplemental Appendix submitted with Defendants-Appellees' and Plaintiffs-Appellees' response briefs. References to "Dkt. ___" refer to docket entries in Case No. 1:11-cv-07972 (N.D. Illinois). References to "App. Dkt. ___" refer to the docket entries in this appeal.

[2] *See Cardenas, et al. v. NBTY, Inc. et al.*, No. 2:11-cv-01615-TLN-CKD (E.D. Cal) (filed June 14, 2011); *Jennings v. Rexall Sundown, Inc.,* No. 1:11-cv-11488-WGY (D. Mass.) (filed August 22, 2011); *Linares, et al. v. Costco Wholesale, Inc.*, No. 3:11-cv-2547-MMA-BGS (S.D. Cal.) (filed November 2, 2011); *Pearson v. Target Corp.*, No. 1:11-cv-07972 (N.D. Ill.) (filed November 9, 2011); *Blanco v. CVS Pharmacy, Inc.,* No. 5:13-cv-00406-JGB-SP (C.D. Cal.) (filed March 4, 2013).

II. Settlement

In late summer 2012 – after more than a year of vigorous litigation involving motions to dismiss, fact and expert discovery, and class certification briefing – settlement negotiations commenced (Dkt. 73 at 3–4). While Rexall continued to believe that Plaintiffs would not succeed at class certification or on the merits, it wanted to forego the uncertainty and expense of continued litigation (Obj. A46–47). Accordingly, after eight months of arm's-length negotiations between the Parties, a settlement was executed in mid-April 2013 (Obj. A46–84).[3]

At the time of settlement, two of the cases were in the midst of class and merits discovery (Dkt. 73 at 3). In a third case – *Cardenas* – fact discovery was completed, Plaintiffs' experts had been deposed, and the Parties were briefing class certification (*id.*). A fourth case – *Jennings* – was on the eve of a seven-day pre-class certification "exemplar" trial on the merits of the individual plaintiff's claims, with expert reports, expert depositions, and all discovery completed for both sides (*id.*). The District Court found:

> Thousands of pages of documents had been produced, depositions had been taken of experts and employees, and expert reports had been submitted. Discovery completed in *Cardenas* and *Jennings*, including the depositions of experts and preparation of expert reports, provided Plaintiffs and counsel a thorough record upon which to evaluate the case and determine whether settlement was in the best interests of the Class (Obj. A7).

[3] To achieve a global resolution of all of the cases, the Parties agreed to centralize settlement in the Northern District of Illinois. On April 22, 2013, Plaintiffs filed their Second Amended Complaint by which all of Plaintiffs' claims under the various state consumer protection statutes were brought in the *Pearson* Court (Dkt. 64).

The Settlement Agreement and General Release ("Settlement") (Obj. A46–84), provides both compensatory (monetary) and injunctive benefits to the class.

A. Uncapped Monetary Compensation

Each class member is entitled to seek monetary compensation, the aggregate amount of which is uncapped (Obj. A51, ¶ 7). Proof of purchase is not required: Class members without proof of purchase are entitled to reimbursement of $3 per bottle up to a maximum of four (4) bottles (or $12), and class members with proof of purchase are entitled to reimbursement of $5 per bottle, for up to ten (10) bottles (or $50) (*id.*). To obtain reimbursement (and to discourage fraudulent claims), class members are required to submit a simple claim form identifying the product(s) purchased, the approximate date of purchase, and the location of the purchase (Obj. A59–60; Hamer Aff. ¶¶ 5–7 (Dkt. 113-2 (Supp. A13–14))).

While there was no ceiling on Rexall's exposure, the Settlement Agreement set a floor of $2 million minimum to be paid by Rexall (Obj. A60). If the total dollar value of valid claims is less that $2 million, payment to each claimant with proof of purchase is *tripled*, and payment to each claimant without proof of purchase is *doubled (id.*). After these payments, any amounts remaining under the floor are to be paid as a *cy pres distribution* to the Orthopaedic Research and Education Foundation ("OREF") (Obj. A61).[4]

[4] OREF is a 501(c)(3) organization that leaders of the three major professional organizations in the orthopedic community (American Orthopaedic Association, American Academy of Orthopaedic Surgeons, and Orthopaedic Research Society) established "as a means of supporting research and education toward building the scientific base of clinical practice." OREF, About OREF, http://www.oref.org/site/PageServer?pagename= oref_about (last visited April 21, 2014). The mission of OREF is to "be the leader in supporting

B. Injunctive Relief/Labeling Changes

The Settlement also provides for the removal, for the next 30 months, of all labeling or packaging representations that the products will rebuild, build, or renew cartilage (Obj. A51–52). Rexall is also required to place on the packaging and labeling a statement that "individual results may vary" (*id.*). As long as Rexall keeps these labeling changes in place, Settlement Class members who purchase a Covered Product after the 30-month period release any claim that was or could have been asserted in the litigation (Obj. A57). If, however, Rexall re-introduces the "rebuild" cartilage representations after the 30-month period, Rexall could be subject to suit by Class Members (*id.*).

C. Attorneys' Fees

The Settlement provides that Rexall will not object to the Court awarding an aggregate fee award of $4.5 million to class counsel (Obj. A52–53). All attorneys' fees and expenses are to be paid separate and apart from, and will not diminish or erode, the payment of claims to Settlement Class Members (*id.*).

D. Notice and Administration

The Settlement provides that Rexall shall pay a minimum of $1.5 million, and a maximum of $2.5 million, for the costs associated with the dissemination of notice to the Class and the administration of the claims process (Obj. A58). As with attorneys' fees and expenses, Rexall is paying the cost of notice and administration

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orthopaedic research to improve function, eliminate pain and restore mobility." *Id.* OREF does not and has not had any relationship with Rexall and does not receive any donations or benefits from Rexall (Declaration of Michael Collins (Dkt. 113-11 ¶¶ 3–5 (Supp. A52))).

separate and apart from the payments to Settlement Class Members who file valid claims (*id.*).

E. Incentive Awards

The Settlement provides for $5,000 in incentive awards to each of the named plaintiffs, subject to Court approval, to be paid separate and apart from, and without eroding, the payments to Settlement Class Members (Obj. A53).

F. Preliminary Approval

By Order dated May 24, 2013 (Dkt. 87), as corrected on May 30, 2013 (Dkt. 89 (Obj. A98–106)), the Court preliminarily approved the class action settlement, and directed notice to the Class pursuant to the approved Notice Plan. The Court also provisionally certified the Class, consisting of all U.S. consumers who purchased for personal use certain joint health dietary supplements sold or manufactured by the Defendants (*id.* ¶ 3, at A99).

III. Notice

Notification was provided to the Settlement Class Members (Obj. A89–96). The targeted campaign consisted of four means of communicating with the Class:

> (1) Publication of the Court-approved notice in five magazines that the Settlement Administrator determined would best reach the Class (*Guideposts, People, Prevention, First for Women,* and *Woman's World*) (Schey Aff. ¶ 8 and Ex. B (copies of all published notices) (Dkt. 113-1 (Supp. A56, A65–69)));
>
> (2) Direct mailing via postcard or email to known consumers (approximately 4.7 million households with consumers who were identified through retail and loyalty program information) (Ross Decl. ¶¶ 5–6 (Dkt. 113-4 (Supp. A71–72)); Hamer Aff. ¶¶ 10–13 (Dkt. 113-2 (Supp. A15–16)); Schey Decl. ¶ 10 (Dkt. 113-1 (Supp. A57)));

> (3) An Internet campaign in which over 49 million "impressions" (or advertising displays) were generated through Yahoo, Google, and AOL, alerting consumers to the settlement and directing them to the settlement website (Schey Aff. ¶ 9 (Dkt. 113-1 (Supp. A56–57))); and,
>
> (4) A social media campaign involving Facebook that provided approximately 132 million targeted alerts to consumers about the settlement (*id.*).

The combination of these four means of communicating with the Class reached approximately 9.1 million, or 76%, of the Class Members (*id.* ¶ 10).

The Notice (including the Internet impressions) directed the Class Members to the settlement website (www.glucosaminesettlement.com), where Class Members could file claims online via an electronic form or download a claim form to mail (Hamer Aff. ¶¶ 5–7 (Dkt. 113-2 (Supp. A13–14))). During the claims process, two changes were made to the claim form in response to inquiries received from class members (*id.* ¶ 15 (Supp. A17)).

All of the documents related to the settlement were posted on the settlement website (*id.* ¶ 7 (Supp. A14)), and the Settlement Administrator (Heffler Claims Group, LLC) has maintained an automated voice information system for Class Members to call for further information (*id.* ¶ 9 (Supp. A15)).

IV. Objections

A. Objections by Frank

Through counsel, Theodore Frank ("Frank") filed an objection to the settlement (Dkt. 95). Frank is the founder and president of the public interest law firm Center for Class Action Fairness ("CCAF"), whose purported mission is to "litigate on behalf of class members against unfair class action procedures and settlements"

(Obj. A118). Elsewhere, Frank has stated that he thinks class action litigation, in general, is a problematic component of the U.S. tort system.[5]

Frank at no time argued that the settlement did not provide fair or adequate compensation to the class members. Instead, Frank raised five basic objections: First, he argued that the schedule for the District Court's review of the settlement violated Rule 23(h) because objections were due before the fee application was submitted, and because the fairness hearing was scheduled to take place prior to the claims deadline (Obj. A117, 121–122, 133–135).[6] Second, he argued that the $5,000 incentive awards to each of the named plaintiffs were improper (Obj. A135–136). Third, he argued that the process of objecting or opting out of the settlement was onerous because objectors and opt-outs could not submit their papers

[5] *See, e.g.*, Theodore H. Frank, Resident Fellow, American Enterprise Institute and Director, AEI Legal Center for the Public Interest, *Protecting Main Street from Lawsuit Abuse: Statement Presented to the Senate Republican Conference* at 1 (Mar. 16, 2009) (Dkt. 113-18) (testifying that the tort system is "still a tremendous drag on the economy relative to other industrialized nations" and identifying "class-action litigation" as one feature of the American system (among many) responsible for "rais[ing] costs tremendously"), *available at* http://www.aei.org/files/2009/03/16/Frank%20 testimony.pdf.

[6] The District Court allowed for supplemental briefing after the attorneys' fee applications had been filed (Dkt. 137, 138). Moreover, while the fee application was not filed prior to the objection deadline, the Objectors were on notice that the request could be as high as $4.5 million (Hamer Aff. at Ex. A (Dkt. 113-2 (notice) (Supp. A20–35))), which is all that is required under Rule 23(h). *See, e.g., In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 972–73 (N.D. Ill. 2011) ("[T]he fact that the class notice enabled Class Members to learn [the maximum amount Class Counsel would seek] constituted adequate notice. . . . The Class Notice was sufficient with respect to the costs and expenses that Counsel would likely seek."). Additionally, the District Court did not issue its final approval or fee award until *after* the claims period deadline and *after* the Plaintiffs submitted the final claims information (Dkt. 141), mooting Frank's objection that the District Court should wait until after the claim deadline to consider the fee award.

electronically (Obj. A136–138).[7] The District Court rejected all three of these arguments, and Frank does not raise them on appeal.

Frank further objected that the structure of the settlement as it pertained to attorneys' fees reflected "collusion" or "self-dealing" by the settling Parties (Obj. A125–135). He pointed to the following "evidence" of collusion or self-dealing: (1) class counsel's fee request was in excess of the likely monetary compensation paid to the class (Obj. A120, 125–128); (2) Rexall agreed not to object to a fee award less than $4.5 million (what Frank calls a "clear-sailing provision") (Obj. A131–132); and (3) any deduction in the fee award would revert to Rexall (what Frank calls a "kicker") (Obj. A132–133).[8] Frank's counsel appeared and presented argument at the fairness hearing.

B. Objections by McNeal/Paul

Kathleen McNeal and Alison Paul ("McNeal/Paul") also filed an objection through counsel (Dkt. 104 (Supp. A1–11)).[9] They argued, first, that the different

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[7] Contrary to Objectors-Appellants' brief in this Court, Objector Frank never argued that "the claims process was structured to throttle the number of claims that would be filed" (Opening Brief of Appellants Theodore H. Frank, Kathleen McNeal, and Alison Paul (App. Dkt. 29) ("Obj. Br.") at 7).

[8] Frank also objected on the ground that the $1.5 million (at least) to be paid by Rexall in notice and administration costs should not be considered a benefit to the class for purposes of determining the attorneys' fees award based on a percentage of recovery approach (Obj. A128–131). The District Court, however, ultimately awarded class counsel's lodestar (Obj. A18). Nevertheless, the Objectors continue to raise this issue (if only in passing) on appeal (Obj. Br. at 31–33). This argument, however, goes only to the valuation of the settlement for purposes of considering class counsel's fee, not to the reasonableness of the compensation provided to the class.

[9] Objectors McNeal and Paul are represented by Joseph Darrell Palmer, one of the most active professional objectors currently in operation. *See* Dkt. 113-25 (collecting 24 federal case objections involving Mr. Palmer since 2007). At least two courts have denied or

tiers of compensatory relief for consumers who retained proof of purchase versus those who did not were "unfair" (*id.* at 4). Second, they argued that three "rounds of distribution, and then, most likely, a distribution to the *cy pres* recipient," were "costly and time-consuming" (*id.* at 5). (McNeal/Paul, however, did *not* challenge anything about the claim form or the process for submission of the claim form.) Third, McNeal/Paul argued that it was onerous to require an objector to appear at the fairness hearing or request the court to waive the requirement (*id.* at 5–6). Finally, McNeal/Paul argued that the attorneys' fee request "appears especially suspect" (*id.* at 7), and that consideration of the fee award should be delayed until after the class has had a chance to inspect the fee application (*id.* at 8). Contrary to Objectors-Appellants' brief, McNeal never objected "that the settlement was not

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revoked Palmer's *pro hac vice* status due to unethical conduct. *See Herfert v. Crayola, LLC*, No. 2:11-cv-01301, Order at 1 [D.E. 74] (W.D. Wash. Aug. 17, 2012) (denying *pro hac vice* application because Palmer "falsely declared under penalty of perjury that he had not been disbarred or formally censured by a court of record or by a state bar association" when in fact he had been "temporarily suspended from the Colorado Bar Association, the State Bar of Arizona, and the State Bar of California as a result of a Colorado felony conviction") (Dkt. 113-14 (Supp. A73)); *Arthur v. Sallie Mae, Inc.*, No. 2:10-cv-00198, 9/14/2012 Motion Hearing Tr. at 9–10 [D.E. 268] (W.D. Wash. Sept. 21, 2012) (finding Palmer's failure to timely amend his *pro hac vice* application did "not demonstrate candor with the court or that he took seriously the fact that he made a false statement under oath" and stating that Palmer "has apparently submitted false pro hac vice applications in at least three other cases") (Dkt. 113-15 (Supp. A83–84)); *see also*, *e.g.*, *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 159 n.40 (E.D. La. 2013) ("Mr. Palmer has been deemed a 'serial objector' by several courts" and citing a transcript in which "Mr. Palmer admit[ed] . . . he had been found to have engaged in 'bad faith and vexatious conduct'"); *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, No. 11-MD-2247, 2012 WL 3984542, at *3 (D. Minn. Sept. 11, 2012) (finding that "the Palmer Objectors have evidenced bad faith and vexatious conduct" and noting "the Palmer Objectors appear to be represented by an attorney who has not entered an appearance in this case and who is believed to be a serial objector to other class-action settlements"); *Embry v. ACER Am. Corp.*, No. C09-01808, 2012 WL 3777163, at *2 (N.D. Cal. Aug. 29, 2012) (holding objector represented by Palmer in contempt and striking his objection for failure to comply with two court orders requiring him to post an appellate bond or dismiss his appeal).

large enough" (Obj. Br. at 9). McNeal/Paul did not appear at the hearing or ask to be excused.[10]

C. Parties' Response to Objectors

Plaintiffs and Defendants filed a Joint Response to Objections (Dkt. 113), and Plaintiffs filed a separate Plaintiffs' Response to Objections related to the importance and the valuation of the label change injunctive relief in support of final approval of both the settlement and the award of attorneys' fees (Dkt. 120). Plaintiffs and Defendants offered evidence of the total value of the settlement under Seventh Circuit principles (Dkt. 113 at 4–11), and Plaintiffs offered an expert opinion on the value of the injunctive relief in the form of labeling changes (Dkt. 120; Dkt. 113-20 (Reutter report) (Supp. A86–105)).

V. Final Approval

The District Court held a final fairness hearing on October 4, 2013 (*see* Tr., Obj. A149–186). The hearing related solely to the calculation of the value of the settlement (and, primarily, the value of the injunctive relief/labeling changes) for purposes of determining the appropriateness of class counsel's fee request (*see, e.g.*, Tr., Obj. A179:14–25 ("I started with the premise that likely the greatest value, if there is value in this, comes from what happens in the future, not the past. . . . What we're in the business here of discussing is, what's the worth of that, how does

[10] Other objections were filed by C. Jane Radlinski (Dkt. 90), John Michael Buckley (Dkt. 93), Pamela Easton (Dkt. 98), Peggy Thomas (Dkt. 99), and Simone Thomas (Dkt. 100). While Peggy Thomas and Simone Thomas filed notices of appeal, they subsequently withdrew their appeals (Case No. 14-1244, App. Dkt. 24; Case No. 14-1247, App. Dkt. 24). The other objectors did not appeal or appear at the fairness hearing. Approximately 1,620 class members (.0001% of the class) requested exclusion from the class (Hamer Aff. ¶ 16 (Dkt. 113-2 (Supp. A17–18))).

that contribute to the worth of these individual people, and how do we measure the compensation to class counsel.")).

In response to Objector Frank's complaint about the schedule, the District Court agreed to give him more time to consider the fee request (Tr., Obj. A163:21-A164:4). The District Court also gave class counsel and Objector Frank an opportunity to submit additional briefing regarding the valuation of the injunctive relief for purposes of determining the fee award (Tr., Obj. A184). Class Counsel and Objectors submitted additional briefing on that issue (Dkt. 137; Dkt. 138 (Obj. A187–195)).

The Claims period ended on December 3, 2013. On December 6, 2013, pursuant to the Court's request, Plaintiffs submitted information regarding the total amount of relief to be disbursed to the class members (Dkt. 141). By the close of the claims period, 30,245 claims had been filed, requiring Rexall to pay $865,284 to those who submitted claims (*id.*). Rexall will pay an additional $1,134,716 as a *cy pres* award to OREF (*id.*).

Roughly one month after the close of the claims period, on January 3, 2014, the Court, fully aware of the total monetary compensation to be provided to the class, issued a Memorandum Opinion and Order finding the settlement to be fair, adequate, and reasonable (Obj. A1–21). The court examined the factors identified by this Court in *Synfuel Technologies v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006), and found, first, that there was a risk that the class would not succeed at trial: "[T]he Court finds non-trivial potential obstacles to Plaintiffs'

prevailing on the merits. As a threshold, Plaintiffs may be refused class certification" (Obj. A5).

The District Court went on to find that the litigation involved "a number of complex legal, factual, and scientific questions" (Obj. A6):

> The disputed issues include scientific literature and medical studies regarding the benefits of glucosamine and chondroitin, whether Class Members obtained some benefit (excluding a known placebo effect) from the use of the products, and whether the Class Members are entitled to damages. Parties also dispute the impact of and potential liability arising from the disputed misrepresentations. There are also contested issues relating to class certification (Obj. A6–7).

The Court further noted the likely duration of continued litigation:

> In the absence of a settlement, Plaintiffs would be required to undergo extensive litigation to secure a finding of liability, and then, if successful, continued litigation on causation, damages, limitations and other defenses. Even if able to prevail at all of these stages, Plaintiffs may face an appeal. Should Plaintiffs continue to litigate, any recovery or benefit would not likely be realized for years (Obj. A7).

The District Court found that expert and fact discovery had provided counsel a thorough record upon which to evaluate the cases (*id.*), and that counsel had appropriately assessed the significant uncertainty in predicting the outcome of the litigation (Obj. A7–8). The Court considered the amounts to be provided to class members, as well as injunctive relief that eliminated key allegedly false marketing claims alleged in the lawsuit, finding such relief to be "potentially significant to both Class Members who may still be looking to improve joint health and those who are not Class Members" (Obj. A6).

After considering the Objectors' arguments about collusion and self-dealing, as well as the fact that the Objectors did *not* argue that the class members had been unfairly compensated, the Court held that "[t]he settlement agreement, withholding approval of the requested attorneys' fees, is fair, adequate, and reasonable and the result of arms-length negotiations" (Obj. A10). The Court found:

> Even though the actual benefit to the Class is only a fraction of the available fund, the settlement provides for adequate economic recovery by claimants in light of the costs, likelihood of only marginal additional relief to individual consumers, and uncertainty of continued litigation (*id.*).

After finding that the class members had been adequately compensated by the settlement, the Court then went on to consider class counsel's fee request. The Court awarded Class Counsel only 43% of the requested fee award, which amounted to Class Counsel's lodestar with no multiplier ($1.93 million) (Obj. A17–18). In doing so, the Court found "no accurate estimate to assess the value to the Class of the injunctive relief," and therefore did not award any attorneys' fees based on the value of the injunctive relief (Obj. A20–21). A final judgment and order was issued on January 22, 2014 (Obj. A22–31).

Summary of the Argument

This is an *uncapped* settlement allowing compensation for *all* class members and *all* valid claims, reached after more than a year of vigorous litigation and eight additional months of arm's-length settlement negotiations. As a result of those negotiations, Rexall agreed to pay – and will double or triple – every valid claim that was submitted. Accordingly, the Objectors do not argue that the class was not

fairly compensated: "*The district court held that the payments fairly reflected the risk of proceeding with litigation, and [Objector] Frank, who did not object to the settlement size, does not challenge that holding on appeal*" (Obj. Br. at 11) (emphasis added).[11] Nor have the Objectors ever raised any objection – due process or otherwise – to the Notice Program.

Even though they have no complaint about the compensation to the class, no complaint about the Notice Program, no complaint about the labeling changes, and no complaint about the *cy pres* recipient, the Objectors want to invalidate the entire settlement. But Objectors-Appellants' arguments about "collusion" and "self-dealing" grow out of Frank's assertion that class counsel's fee award is excessive. In other words, because he thinks class counsel's fee award was too high, Frank suggests that all of the important benefits to the class that Rexall agreed to provide through this settlement (not to mention the benefits to the judicial system that result from settlements and the benefits to Rexall in being able to put this litigation behind it) should be nullified.

There is no reason, and Objector Frank provides none, why Frank's challenge to class counsel's fee award should call into question the adequacy of the settlement to

[11] *See also* Obj. Br. at 14 ("Perhaps it is the case, as the district court implicitly held, that a settlement that paid only $.087 million to the class was adequate given the risks of continued litigation."). The uncapped compensation to the entire class sets this settlement worlds apart from the settlement considered in the *Mirfasihi* case upon which Objectors so heavily rely. In *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781 (7th Cir. 2004), one of the two plaintiff classes received absolutely nothing in the settlement while releasing all claims against the defendant. *Id.* at 785 (noting "the denial of any relief to an entire class"). Moreover, the benefits that were due to the class that received nothing were shifted to the second class instead. *Id.* at 783.

the class members. No matter the amount of attorneys' fees that were requested or awarded, every class member who submitted a claim is going to receive compensation (which will be doubled or tripled). Class counsel, who were awarded their lodestar amount with no multiplier, did not benefit "at the expense of their clients" (Obj. Br. at 11). All of the Objectors' arguments regarding "self-dealing" and "collusion" were correctly found by the District Court to be unsupported.

Because no one – not even Objector Frank – has a problem with the compensation provided to the class, the District Court's decision to approve the settlement was not an abuse of discretion and should be affirmed.[12]

Statement of the Appellate Standard of Review

This Court reviews the District Court's approval of the settlement for abuse of discretion. *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 634 (7th Cir. 2011); *Freeman v. Berge*, 68 F. App'x 738, 741 (7th Cir. 2003) ("Our review of the district court's decision to approve the [settlement] agreement . . . is narrow; we will reverse only if the district court abused its discretion."), citing *Uhl v. Thoroughbred Tech. & Telecommc'ns, Inc.*, 309 F.3d 978, 986 (7th Cir. 2002), and *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). In reviewing a class action settlement, this Court "do[es] not focus on individual components of the settlements, but rather view[s] them in their entirety in evaluating their fairness." *Isby*, 75 F.3d at 1199 (internal quotation marks and citation omitted). "Evaluations of fairness, reasonableness,

[12] Plaintiffs-Appellees are filing a separate response to the Objectors' brief. To the extent the Plaintiffs-Appellees' separate response relies on the alleged falsity or deceptiveness of Defendants-Appellees' labeling and advertising and/or the alleged lack of efficacy of the products, Defendants-Appellees disagree with such assertions. Of course, the Court need not determine the merits of such assertions as part of this Appeal.

and adequacy require that the facts be viewed in a light most favorable to the settlement." *Redman v. RadioShack Corp*., No. 11 C 6741, 2014 WL 497438, at *3 (N.D. Ill. Feb. 7, 2014), citing *Isby*, 75 F.3d at 1199; *see also Uhl*, 309 F.3d at 986 (noting that Objector "must do more than just argue that she would have preferred a different settlement structure"); *Armstrong v. Bd. of Sch. Dirs. of the City of Milwaukee*, 616 F.2d 305, 315 (7th Cir. 1980) ("Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel."), *overruled on other grounds by Felzen v. Andreas,* 134 F.3d 873, 875 (7th Cir. 1998); *In re Lawnmower Engine Horsepower Mktg. & Sales Pracs. Litig.*, 733 F. Supp. 2d 997, 1005 (E.D. Wis. 2010) ("[The court] must not substitute [its] own judgment as to optimal settlement terms for the judgment of the litigants and their counsel."), citing *Armstrong,* 616 F.2d at 315.

Argument

This Court has repeatedly recognized that "[f]ederal courts naturally favor the settlement of class action litigation." *Isby*, 75 F.3d at 1196; *see also Uhl,* 309 F.3d at 986 ("federal courts favor settlement"); *Armstrong,* 616 F.2d at 313 ("In the class action context in particular, there is an overriding public interest in favor of settlement") (internal quotation marks and citation omitted); *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888–89 (7th Cir. 1985) (noting a general policy favoring settlements of class action disputes).

Class action settlements allow Defendants to provide adequate compensation to class members who feel aggrieved, and to provide injunctive relief to prevent future harm, in order to put litigation behind them. *Hiram Walker*, 768 F.2d at 889 (noting that a settling party "gains the benefit of immediate resolution of the litigation and some measure of vindication for its position"); *Armstrong*, 616 F.2d at 313 ("Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduce the strain such litigation imposes upon already scarce judicial resources."). Indeed, Rexall agreed to settle this case not because it believed it was at fault, but to avoid continued cost and expense associated with the litigation, which was likely to continue for several more years (Obj. A6–7, A47–48).

The District Court approved this settlement as fair, reasonable, and adequate compensation for class members, finding no evidence of collusion or self-dealing. *Isby*, 75 F.3d at 1196 (District Court's inquiry is limited to whether settlement is "lawful, fair, reasonable, and adequate"). As the District Court was required to do, it viewed the facts in the light most favorable to the settlement and did "not substitute [its] own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." *Armstrong*, 616 F.2d at 315. The District Court's approval of the settlement was not an abuse of discretion and should be affirmed.

I. The District Court Correctly Found No Evidence Of Collusion Or Self-Dealing.

The Objectors did not challenge the adequacy of the compensation to class members before the District Court (Obj. A107–140; Supp. A1–11 (McNeal/Paul

Brief). Indeed, the Objectors expressly concede in their brief to this Court that they have no objection to the amount of compensation the class is receiving pursuant to the Settlement (Obj. Br. at 11). Instead, they believe that the award to class counsel of their lodestar amount, with no multiplier, is too high (*e.g.,* Obj. Br. at 14–16). In a misguided attempt to take what is a simple attack on the amount of class counsel fees and turn it into an attack on the entire settlement, Objectors argue that because the fees awarded ended up being, in their view, disproportionate to the compensation claimed by the class, a court should conclude that there was collusion or self-dealing, which should eviscerate the entire settlement (*e.g.,* Obj. Br. at 17–19, 46).

Such a view is backwards. The fact that the settlement – after it had been negotiated and administered – ended up providing more money to class counsel than to the class does not provide any evidence that, months earlier, while the settlement was being negotiated, anything untoward was happening. Indeed, Rexall agreed to pay compensation for all valid claims – *without a cap* – and gave direct notice to almost 40% of the class along with a robust publication notice, both of which were designed to increase the claims rate. The District Court applied careful and heightened scrutiny to the fee award in light of Objector Frank's arguments that the claims rate would likely be low.[13]

[13] The Objectors have taken issue with the District Court's valuation of the Settlement at $20.2 million (Obj. A13-14). This valuation, however, was conducted in connection with the attorneys' fee decision and was not a basis for the court's determination that the Settlement was fair, adequate, and reasonable.

Moreover, contrary to Objectors' version of the proceedings below, the Court did not "short circuit" its self-dealing inquiry because of the existence of arm's-length negotiations (Obj. Br. at 19). The Court simply did not find any evidence of collusion or self-dealing given the generally accepted structure of the settlement and the more than adequate benefits provided to the class.

A. That the Fee Award, in Hindsight, Exceeds the Monetary Payment to the Class Does Not Make the Settlement *Per Se* Unfair.

Objectors-Appellants argue throughout their brief that the settlement structure "ensured that class members would receive little" of the money put toward settlement (Obj. Br. at 11). To the contrary, the structure ensured that all class members who filed valid claims would receive full payment.

Accordingly, the cases that Objectors-Appellants rely on for the premise that settlements are unfair where "class counsel *is* the primary beneficiary" are inapposite (Obj. Br. at 15). In *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012) (Obj. Br. at 16), for instance, the Court recognized in a derivative lawsuit brought by defendant's investors that it was "impossible to see how the investors could gain from" the proposed settlement that involved only attorneys' fees and the resignation of one company director. *Id.* at 317, 319. Because of that "impossib[ility]," the Court found that "[t]he only goal of this suit appears to be fees for the plaintiffs' lawyers." *Id.* at 319; *see also Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 882 (7th Cir. 2000) (Obj. Br. at 16) (rejecting settlement where named plaintiff "and his attorney were paid handsomely to go away; the other class members received *nothing* . . . and lost the right to pursue class relief") (emphasis

added); *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (Obj. Br. at 16) ("Plaintiffs want relief that duplicates a remedy that most buyers already have received, and that remains available to all members of the putative class. A representative who proposed that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests."). Here, where all class members who filed valid claims will receive the payment to which they are entitled under the settlement – doubled or tripled – it is far from "impossible to see how" class members could gain, and have gained, from the settlement.

Moreover, *Thorogood v. Sears, Roebuck & Co.*, 627 F.3d 289 (7th Cir. 2010) (Obj. Br. at 15), belies Frank's proposed *per se* rule that "a disproportionate allocation of settlement proceeds in a consumer class action precludes Rule 23(d) settlement approval" (Obj. Br. at 16). There, the Court explained that "[c]lass action attorneys have an 'inherent motivation' to enrich themselves at the expense of the class . . . but *motivation is not a synonym for action; any actual corruption or selling out is gauged case by case*." *Thorogood*, 627 F.3d at 293 (emphasis added). As explained, Frank here points only to what he perceives to be an unfair end result – not any "action" or "actual corruption or selling out."[14]

[14] In *Creative Montessori Leaning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913 (7th Cir. 2011) (Obj. Br. at 15–16), attorneys' fees and the benefit obtained for the class were not even in question. Rather, the Court decertified a class after recognizing that class counsel engaged in misleading communications to obtain information used in the suit, which "demonstrated a lack of integrity that casts serious doubt on their trustworthiness as representatives of the class." *Id.* at 917. On that basis alone, the Court held there was "no basis for confidence that they would prosecute the case in the interest of the class, of which they are the fiduciaries, rather than just in their interest as lawyers who if successful will obtain a

While it is true that claims rates are sometimes low, a low claims rate was anything but a "guarantee" here (Obj. Br. at 14). In recent years, several consumer fraud class action settlements just like this one have resulted in payouts of tens of millions of dollars. For example, in a settlement involving the dietary immunity supplement "Airborne," the settling defendants ultimately paid consumer claims of at least $14.9 million. *See Wilson v. Airborne, Inc.*, No. EDCV 07-770 VAP, 2008 WL 3854963, at *7 (C.D. Cal. Aug. 13, 2008) (also noting that an additional $6.8 million claims had been found to be fraudulent). In another example, a class action settlement involving Skechers shoes resulted in payments to class members of more than $40 million. *In re Skechers Toning Shoe Prods. Liab. Litig.*, No. 3:11-MD-2308-TBR, 2013 WL 2010702, at *2–3 (W.D. Ky. May 13, 2013).[15]

If the claims rate in this case reached even 10% (1.2 million claims), with each claimant making claims without proof of purchase for $12, Rexall's exposure would be well over $14 million, not including costs of notice and administration and attorneys' fees. There is nothing to distinguish the structure of this settlement from other cases resulting in claim rates in the 5% to 15% range. In hindsight, the

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share of any judgment or settlement as compensation for their efforts." *Id.* (citations omitted).

[15] *See also Desai v. ADT Sec. Servs., Inc.*, No. 1:11-cv-01925 [D.E. 240 at 8, 12–13] (N.D. Ill. June 7, 2013) (claims rate in consumer class action case was "over 14% of direct notice recipients") (Supp. A118, A122–123); *Fogel v. Farmers Group, Inc.*, No. BC300142 [Judgment, Final Order and Decree ¶ 26] (Cal. Super. Ct. L.A. Cnty. Dec. 21, 2011) (noting a 21.6% claims rate that was "significantly higher than the Court has anticipated and than is customary in other settlements of consumer class actions") (Supp. A135); *Watson v. Dell Inc.*, No. 3:05-cv-05200 [D.E. 93 ¶¶ 7, 11] (W.D. Wash. Oct. 13, 2006) (933,576 class members given notice; 85,017 claims filed, constituting a claims rate above 9 percent) (Supp. A140).

Parties now know that the claims rate was low, but an ultimately low claims rate does not provide any evidence of collusion or self-dealing in the settlement negotiation process. *See, e.g., LaGarde v. Support.com, Inc.*, No. C 12-0609, 2013 WL 1283325, at *10 (N.D. Cal. Mar. 26, 2013) ("That most class members presumably found it not worth their time to file the claim form and receive a $10 check, does not impute collusion to the parties."); *In re TJX Cos. Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 406 (D. Mass. 2008) ("even when class counsel perform ably, with integrity, and with an eye toward ensuring that class members are aware of a settlement that offers them an opportunity to claim benefits of value with a minimum fuss, there still may be underwhelming class participation"); *Khanna v. Intercon Sec. Sys., Inc.*, No. 2:09-CV-2214, 2014 WL 1379861, at *9 (E.D. Cal. Apr. 8, 2014) (finding "settlement was not collusive" despite "low response rate"). Nor is a settlement that ultimately results in more money being paid to class counsel than to the class members *per se* inadequate or unfair. *See, e.g., McKinnie v. JP Morgan Chase Bank, N.A.,* 678 F. Supp. 2d 806, 811 (E.D. Wis. 2009) (approving settlement and attorneys' fees where "approximately $187,000 would be paid out to claiming class members," and attorneys' fee award was $625,000); *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1033 (N.D. Ill. 2000) ("Even where the relief accorded is non-monetary, an award of cash for attorneys fees is appropriate.").

B. Class Counsel's Fee Request Was Subject to Exacting Scrutiny by the District Court.

The Settlement provided that Defendants would not object to a fee request by class counsel that did not exceed a certain amount (what Objectors-Appellants call

the "clear-sailing" provision) (Obj. A52–53). The Settlement also provided that attorneys' fees would not be paid out of a common fund, but rather would be paid separate and apart from any amounts paid to the class (*id.*). This structure assured that class members would be paid for all valid claims without regard to the amounts ultimately awarded in attorneys' fees. Objectors-Appellants argue, however, that such provisions – commonplace in class action settlements – are evidence of collusion or self-dealing (*e.g.,* Obj. Br. at 11–12, 35–37). Their arguments are belied by both the law of this Circuit and the actual history of this case.

1. Clear-Sailing Provisions and Separate Funds for Attorneys' Fees Are Common Settlement Agreement Provisions.

A clear-sailing provision is a helpful and typical component of any settlement where the fee amount is negotiated after the parties have agreed to the benefits to the class. Otherwise, an agreement to pay fees separate from the funds made available to the class could never be reached. *See, e.g., Weber v. Gov't Employees Ins. Co.*, 262 F.R.D. 431, 439 (D.N.J. 2009) (approving settlement and attorneys' fees involving clear-sailing provision, after class counsel explained: "'[T]he award of attorneys' fees and expenses was negotiated with Defendants' counsel only after the parties had reached agreement in principle of all the terms relating to relief for the Class. Thus, in accordance with [Plaintiffs' attorneys'] duty to the Class, in no way did [Plaintiffs' counsel] bargain away Class members' recovery rights for [their] own financial benefit.'"). Moreover, separate negotiation is a preferred practice because it ensures that class counsel obtain the best possible deal for the settlement class, as the quality of benefits provided by the Settlement will then serve as the basis for

the subsequent fee negotiations and award. There is nothing *per se* objectionable about a "clear-sailing" provision. *See, e.g., McKinnie,* 678 F. Supp. 2d at 812 ("[A] defendant in a class action settlement has no obligation to oppose the fee petition submitted by class counsel. Thus, the fact that the proposed settlement includes these terms does not render it inherently unfair or unreasonable."); *Blessing v. Sirius XM Radio Inc.*, 507 F. App'x 1, 4 (2d Cir. 2012) ("To the extent objectors argue that the clear-sailing and reversionary provisions suggest improper collusion between class counsel and [defendant], we note that such provisions, without more, do not provide grounds for vacating the fee."); *Shames v. Hertz Corp.*, No. 07-CV-2174, 2012 WL 5392159, at *13 (S.D. Cal. Nov. 5, 2012) (approving settlement and attorneys' fees that were subject to clear-sailing provision, and "plac[ing] little to no value on the fact that Plaintiffs' fee request is uncontested," where "the Court finds no evidence of collusion in the settlement process" or of "the possible existence of collusion in negotiating the uncontested attorneys' fee request"); *Amunrud v. Sprint Commc'ns Co.*, No. CV 10-57, 2012 WL 443751, at *4 (D. Mont. Feb. 10, 2012) (approving fee award and finding that "the clear-sailing provision is no evidence of collusion").

Similarly, paying attorneys' fees out of a fund separate and apart from payments to class members is also a valid settlement feature, ensuring that the class is fully compensated without regard for attorneys' fees. *See, e.g., Cox v. Clarus Mktg. Grp., LLC*, 291 F.R.D. 473, 482 (S.D. Cal. 2013) ("Where there is no evidence of collusion, an agreement between the parties on attorneys' fees is entitled to significant

weight, especially where the attorneys' fees are paid separate and apart from the fund provided to class members."); *In re Vitamins Antitrust Litig.*, No. MISC. 99-197, 2001 WL 34312839, at *4 (D.D.C. July 16, 2001) (approving settlement and attorneys' fees that involved settlement funds and "separate attorneys' fee funds").

2. The Record Evidences Heightened Scrutiny of the Class Counsel Fee Request.

Objectors-Appellants admit that "[t]he district court certainly scrutinized the attorneys' fees" in reducing the request by more than 50 percent (Obj. Br. at 36). Indeed, the attorneys' fee award was the primary – if not the only – topic at the fairness hearing (Tr.; Obj. A151–186). It was the primary topic of the Objectors-Appellants' arguments to the District Court (Obj. A117–133), and after the hearing, the District Court even asked for additional briefing from both class counsel and the Objectors, limited to the topic of fees (Tr; Obj. A187–195). At least ten pages of the District Court's 21-page opinion related to its review of the fee award request (Obj. A10–21 (considering whether "the fee award, like the settlement itself, is reasonable")).

There is no evidence whatsoever in this case that counsel "shielded" the fee request from scrutiny; to the contrary, the District Court devoted substantial attention to it and undertook the analysis required by the law of this Circuit. *See, e.g., Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408 (7th Cir. 2000); *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 597 (N.D. Ill. 2011); *McKinnie*, 678 F. Supp. 2d at 814.

II. Objectors-Appellants Do Not Contest The Adequacy Of The Settlement Amount And Have Not Shown That It Was Feasible, Much Less Required, To Automatically Provide Compensation To Class Members Without A Claim Process.

The Objectors do not dispute that the Settlement provides fair and reasonable compensation to the class, making this case very different from the *Synfuel Technologies v. DHL Express (USA)* case on which Frank so heavily relies in this appeal. The Objectors have not argued that class members were entitled to more than $12 (without proof of purchase) or $50 (with proof of purchase) in monetary compensation.[16] They have not argued that Rexall should have made additional labeling changes. They have not argued here that the class representatives were not entitled to their incentive awards. They have not argued that the Notice Program violated the due process rights of the class members. They have argued only that the class counsel's fee award was too high and therefore not proportionate to the benefits provided to the class. But because the compensatory benefits provided to the class were uncapped, the award of class counsel's fees did not impact the class compensation.

Recognizing this lack of impact, but apparently still wanting to eviscerate the entire settlement on principle, the Objectors now say that, when the Court drastically cut the fee award, the amount cut should have gone to the known class members – even if they had not filed a valid claim (Obj. Br. at 35–37). The Objectors, however, never asked the District Court to require such a structure.

[16] Objectors-Appellants state that "[t]he district court rejected the . . . McNeal objections that the settlement was not large enough" (Obj. Br. at 9), but neither McNeal nor Paul ever made any such argument to the District Court (Dkt. 104).

Similarly, they now say that the amount to be paid to OREF under the Settlement in light of the amount of claims filed should also go to the known class members (Obj. Br. at 38–40). Yet again, they are raising an argument they did not urge upon the District Court; they never asked the District Court for such a process or objected to OREF as a *cy pres* recipient. The Objectors seek to raise still another unpreserved argument when they contend the Court should not have approved a claims-made process at all and should have required Rexall to write checks to all of the *known* class members (Obj. Br. at 34). (Apparently, the more than 7 million *unknown* class members would just be left in the cold.)

Not only are these arguments waived, but they are also wrong. A District Court is not empowered to rewrite the terms of a settlement agreement. *See, e.g., Armstrong,* 616 F.2d at 315 ("Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel."). The District Court's job is to evaluate the settlement for reasonableness. *See, e.g., Freeman*, 68 F. App'x at 741 ("Because federal courts favor the settlement of class action litigation, a district court properly limits its inquiry to whether the proposed settlement is lawful, fair, reasonable, and adequate."), citing *Uhl*, 309 F.3d at 986. Moreover, there is no evidence in the record to support the feasibility of Objectors' late-proposed approach, and courts have consistently approved the settlement provisions used by the Parties for distribution of funds in this settlement.

A. Objectors Have Waived Their Arguments for Automatic Payments.

Objector Frank never asked the District Court to automatically redirect unawarded attorneys' fees and unclaimed funds to all known class members. Although the Objectors argued that class counsel's fee request was too high, they never argued that any unawarded fees should be given to the class. Similarly, Objector Frank did not find fault with the choice of *cy pres* recipient or the use of *cy pres* as a method of disseminating any residual funds below the $2 million floor. Instead, he argued to the District Court in a footnote that any *cy pres* distribution should not count as recovery to the class for purposes of the attorneys' fee award (Obj. A128 n.9 ("[a] dollar to the *cy pres* is not worth a dollar to the class")). Moreover, Objectors McNeal and Paul expressly told the District Court that they "do not find any fault with" the *cy pres* provisions (Dkt. 104 at 5 (Supp. A5)).

As they are raised for the first time on appeal, these arguments for additional payments to the known class members are waived. *See, e.g., Mote v. Aetna Life Ins. Co.*, 502 F.3d 601, 608 n.4 (7th Cir. 2007) ("[I]t is axiomatic that arguments not raised below are waived on appeal.") (internal quotation marks and citations omitted); *Hicks v. Midwest Transit, Inc.*, 500 F.3d 647, 652 (7th Cir. 2007) ("[A]rguments not raised before the district court are waived on appeal."), citing *Belom v. Nat'l Futures Ass'n*, 284 F.3d 795, 799 (7th Cir. 2002); *see also To-Am Equip. Co., v. Mitsubishi Caterpillar Forklift Am., Inc.*, 152 F.3d 658, 663 (7th Cir. 1998) (affirming district court's finding that party had waived argument because it

was "buried" in a footnote of a reply brief and stating that "[s]uch a truncated presentation will not do").

B. The Record Does Not Contain Evidence That It Would Have Been Feasible to Make Payments Directly to the Class Members.

Objectors argue, without any citation to the record, that "it was entirely possible to directly compensate class members" (Obj. Br. at 39). Although Frank's counsel made a similar assertion at the fairness hearing, *see* Obj. A161–163, this unfounded assertion did not preserve the issue because it was not sufficiently presented to the District Court. In a footnote in his brief below, Objector Frank remarked only that the court should ask "[t]he parties [ ] to justify why they are not remitting relief on those purchases directly" (for the known purchasers who received direct notice) (Obj. A126 n.4). In their Joint Response to Objections, the Parties provided such a justification and described the infeasibility of such a process (Dkt. 113 at 20–21).

In any event, this argument is not applicable to the unknown class members who are, by definition, unknown. And as to the known class members, the record does not contain any information regarding, *inter alia*, (1) what information Rexall actually has about the class members, if any; (2) how many class members Rexall has information for, if any; and (3) what mechanism might be appropriate, if any, for distributing unclaimed funds or unawarded fees to these class members. While the Parties were able to identify *some* class members to receive direct notice (primarily members of the Osteo Bi-Flex loyalty club and Costco purchasers of the Kirkland products), Rexall does not have complete information regarding the types

of products they purchased, how many they purchased, when they made their purchases, or how much they paid.[17]

This Court requires specific arguments to be made at the District Court so that arguments on appeal can be reviewed in light of an adequate record. *See, e.g.*, *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) (stating that "even arguments that have been raised may still be waived on appeal if they are underdeveloped, conclusory, or unsupported by law" and that "raising an issue in general terms is not sufficient to preserve specific arguments that were not previously presented") (citations omitted); *Hannemann v. S. Door Cnty. Sch. Dist.*, 673 F.3d 746, 754 (7th Cir. 2012) ("[A] party 'waive[s] the ability to make a specific argument for the first time on appeal when the party failed to present that specific argument to the district court, even though the issue may have been before the district court in more general terms.'"), quoting *Fednav Int'l Ltd. v. Cont'l Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010) (alteration in original); *U.S. v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("[P]erfunctory and undeveloped arguments . . . are waived."); *see also, e.g.*, *U.S. v. Acox*, 595 F.3d 729, 731 (7th Cir. 2010) ("A court of appeals is limited to the record built in the district court, so arguments that depend on extra-record information have no prospect of success.").

[17] Frank boldly states – without any record citation – that "[t]he settling parties knew which class members had purchased which Covered Products, but failed to give the class any way to access that information" (Obj. Br. at 40). Not only is this assertion not supported by the record, it simply is not true – the majority of the Covered Products were sold to unknown class members through retail stores not affiliated with the Defendants.

The Objectors' failure to sufficiently present these arguments below not only means that the Objectors have waived them, but also that even if this Court were to consider them on the merits, there is no evidentiary basis on which to credit them. There is no reason to believe that it would have been feasible for Rexall to pay directly all known class members. Absent a sufficient record on this question, Objectors' appeal fails.

C. Courts Consistently Accept Claims Processes in Consumer Fraud Class Action Settlements.

Objectors argue that "the settlement was unfair because the parties used a claims-made process instead of simply paying $14.2 million in checks to the 4.7 million identifiable class members" (Obj. Br. at 33–34). Not only is this argument waived (*supra* § II.A–B, at 29–32), but there is no question that settlements using a proof of claim requirement are "commonly employed" in consumer fraud cases. 3 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 8:45 (4th ed. 2002); *see also, e.g.*, *Schulte*, 805 F. Supp. 2d at 593 ("there is nothing inherently suspect about requiring class members to submit claim forms in order to receive payment"); *McKinnie*, 678 F. Supp. 2d at 814 (rejecting objection that requiring claimants to "attest that they withdrew cash from a Chase ATM using a non-Chase card 'under penalty of perjury' made the process too onerous and deterred potential class members from filing claims" because "requiring claimants to verify on the claim forms that they meet class requirements" was not improper); *Milliron v. T–Mobile USA, Inc.,* No. 08-4149, 2009 WL 3345762, at *6 (D.N.J. Sept. 10, 2009) (finding "it perfectly appropriate to require Class members to submit

certain information proving that they are entitled to collect the relief awarded in this case"), *aff'd*, 423 F. App'x 131 (3d Cir. 2011).

Requiring claimants to present some type of proof of purchase – even if it is just a claim form, as it was here – is warranted because it reflects each plaintiff's burden to establish liability and damages. *See Mangone v. First USA Bank*, 206 F.R.D. 222, 234–35 (S.D. Ill. 2001) (rejecting objectors' argument that bank should bear the burden of establishing which class members were entitled to relief because "[c]lass action status does not alter th[e] basic principle" that "plaintiffs in civil actions bear the burden of proving their damages"), citing *Sprogis v. United Air Lines,* 517 F.2d 387, 392 (7th Cir. 1975); *Eleven Line, Inc. v. N. Texas State Soccer Ass'n,* 213 F.3d 198, 206–07 (5th Cir. 2000).

Moreover, while the Parties disputed the efficacy of the products, there was some evidence (primarily in the form of expert opinion) that, at the very least, glucosamine provided benefit to certain users. In light of this dispute, providing automatic compensation to all class members – particularly those who received direct notice of the settlement and consciously chose not to submit a claim – could potentially overcompensate class members. Numerous courts have recognized that providing such windfalls to claimants is unacceptable. *See Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 388 (D.N.J. 2012), *aff'd sub nom.*, *Dewey v. Volkswagen Aktiengesellschaft*, Nos. 13-1123 & 13-1124, 2014 WL 542224 (3d Cir. Feb. 12, 2014) (rejecting objector's proposal to compensate class members whose cars had yet to need repair because "[a]llowing compensation for those who actually incur an

expense is a reasonable remedy, but permitting those who expended no funds to obtain money would be tantamount to an impermissible windfall"); *McKinnie*, 678 F. Supp. 2d at 813 (rejecting objector's argument that unclaimed portion of common fund should be distributed to claimants on a *pro rata* basis because this "will result in an unwarranted windfall for those claimants").[18]

Further, providing for automatic compensation to only *known* class members would treat them differently than *unknown* class members based on the mere fact that Rexall had their addresses. While it is permissible to treat some class members more favorably than others, such differential treatment should be based on a factor going to the merits of each class member's claim – not the arbitrary fact that the defendant happened to possess their contact information. *See Schulte*, 805 F. Supp. 2d at 589 ("[W]hen real and cognizable differences exist between the likelihood of ultimate success for different plaintiffs, it is appropriate to weigh distribution of the settlement in favor of plaintiffs whose claims comprise the set that was more likely to succeed.") (internal quotation marks and citations omitted)); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997) (collecting cases in which

[18] *See also In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1076–77 (S.D. Tex. 2012) (approving use of *cy pres* provision because it was "the only way to avoid having the unclaimed funds . . . revert to [the defendant], escheat to the government, or provide a huge windfall to the few who filed valid claims"); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 642 (S.D. Cal. 2011) (concluding, in case where each class member's damages were "modest," that it would be inappropriate to distribute unclaimed funds to claimants on a *pro rata* basis because this "would result in a substantial windfall"); *Hall v. AT & T Mobility LLC*, No. 07-5325, 2010 WL 4053547, at *11 (D.N.J. Oct. 13, 2010) (rejecting objector's argument that unclaimed funds should be distributed on *pro rata* basis due to "the potential of a windfall to certain Class members"); *State v. Levi Strauss & Co.*, 41 Cal. 3d 460, 476 (1986) (rejecting objection arguing that *cy pres* distribution should instead be allocated to claimants because providing additional money to claimants – whether legitimate or fraudulent – would constitute a "windfall").

"merit-based weighting has been approved . . . where substantially different or additional claims have been asserted by certain class members and not others").

The disparate treatment of unknown class members contemplated by Objector Frank could also incentivize individuals to bring class actions where the vast majority of class members are unidentifiable. *See Hartless*, 273 F.R.D. at 642 (rejecting objector's proposal to distribute unclaimed funds to claimants on a *pro rata* basis because the resulting windfall "could encourage individuals to bring class actions that will result in large unclaimed damage funds and create conflicts of interest between named plaintiffs and other class members"). Given these sensible concerns, and the substantial body of case law supporting the use of a claims-made settlement, particularly in consumer fraud cases, it was not abuse of discretion for the District Court to approve of the claims process used here.

D. Reversion of the Unawarded Fee Amount to Rexall Is Proper.

For similar reasons, there is nothing *per se* objectionable about a reverter of unawarded attorneys' fees to Rexall, particularly where class members are already receiving full payment for any valid claims made. *See, e.g., Mirfasihi*, 356 F.3d at 785 ("[W]e do not suggest that deletion of the reversion provision . . . [was a] per se requirement[ ] of an acceptable settlement."); *McKinnie*, 678 F. Supp. 2d at 812 ("[T]he reversion of unclaimed funds to the defendant is not objectionable when class members receive full recovery for their damages and the parties agree to the reversion."); *Lake v. First Nationwide Bank*, 900 F. Supp. 726, 734 (E.D. Pa. 1995) (finding no impropriety in agreement, bargained for after settlement had been reached, that defendant would pay particular amount of attorney fees and any

portion disapproved by the court would revert to defendant). Objectors have cited no case law in this Circuit that finds a reverter of unawarded attorneys' fees to the defendant to be cause for rejection of a settlement agreement. As this Court has recognized, such a structure "might encourage a more generous settlement offer" for the class. *Mirfasihi*, 356 F.3d at 785.

Moreover, it is not administratively feasible to distribute the approximately $2.4 million in unawarded fees to the class, even to the 4.7 million known class members. Such a distribution would lead to Rexall providing a check for 58 cents to each known class member. Numerous courts have recognized the common sense in declining to process such *de minimis* distributions. *See, e.g.*, *In re Mut. Funds Inv. Litig.*, MDL No. 1586, 2011 WL 1102999, at *3 (D. Md. Mar. 23, 2011) (noting that "minimum payment thresholds, which are designed to ensure that the cost of processing, printing, and mailing a check does not exceed the value of a claim, have consistently and repeatedly been upheld in federal courts"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 463 (S.D.N.Y. 2004) ("Class counsel are entitled to use their discretion to conclude that, at some point, the need to avoid excessive expense to the class as a whole outweighs the minimal loss to the claimants who are not receiving their de minimis amounts of relief.").

E. Courts Consistently Accept Cy *Pres* as a Method of Distributing Unclaimed Funds.

No portion of the $2 million floor not claimed by class members will revert back to Rexall. Rather, under the settlement's *cy pres* clause, any monies under the $2 million floor not claimed by class members (after the appropriate tripling

(documented purchases) and doubling (undocumented purchases) of payments to class members) will be donated to OREF. Objectors assert, for the first time, that this money should have been disseminated somehow to the class members (Obj. Br. 37–43). Indeed, Objectors note that the District Court "never addressed the question of whether *cy pres* affected settlement fairness" (Obj. Br. at 38). The District Court did not address this question because none of the Parties (or objectors) raised it.

Even if the argument had not been waived (*supra* § II.A, at 29–30), it ignores the Seventh Circuit's acceptance of using *cy pres* relief to handle unclaimed settlement funds in cases like these. *See, e.g., In re Mexico Money Transfer,* 164 F. Supp. 2d at 1031 ("The Seventh Circuit and other courts have recognized that *cy pres* contributions are proper and often are part of class action settlements. . . . Particularly in cases like this, where it may well be difficult to locate class members or to ascertain their status, a *cy pres* distribution is useful."); *McKinnie*, 678 F. Supp. 2d at 813 (stating that "[t]he use of a *cy pres* contribution is proper and acceptable in class action settlements" and granting final approval of settlement that contained a reverter clause and a clear-sailing provision); *Mangone*, 206 F.R.D. at 230 ("Courts have broad discretion in distributing unclaimed class action funds, and where the parties agree on the distribution of unclaimed class funds, the court should defer to that method of distribution."), citing 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 10.15 (3d ed. 1992). This Court has even gone so far as to approve an *all cy pres* class action settlement. *See Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 676 (7th Cir. 2013) ("Payment . . . to a charity

whose mission coincided with, or at least overlapped, the interest of the class . . . would amplify the effect of the modest damages in protecting consumers.").[19]

As with the attorneys' fee reversion, it is not administratively feasible to distribute the approximately $1.13 million in unclaimed funds to the class, even to the 4.7 million known class members. Such a distribution would lead to Settling Defendants providing a check for 28 cents to each known class member. The administrative costs of implementing this distribution would exceed the class benefit provided.

To the extent that Objectors appear to be using this appeal as an attack on the policy of *cy pres* distributions in general (Obj. Br. at 44–46), insinuating ethical problems and conflicts of interest, such attack has no place here. Rexall submitted an affidavit stating that (1) none of the Settling Defendants have or have had any relationship with OREF; (2) none of the Settling Defendants are providing or have provided any monetary contributions or other support to OREF; and (3) none of the Settling Defendants have received or are currently receiving any monetary contributions or other support from OREF (Dkt. 113-11 ¶¶ 3–5 (Supp. A52)). There

[19] Moreover, the *cy pres* provision promotes the parties' legitimate interest in fashioning a claims process that provides benefit to the class but is not susceptible to fraudulent claims. Increasing the payment amount for documented and undocumented claims any further was problematic because it would have increased the likelihood that fraudulent claims would be submitted (Hamer Aff. ¶ 18 (Dkt. 113-2 (Supp. A18–19)) (providing more than $24 to a consumer for undocumented purchases creates significant risk of fraudulent claims)). *See, e.g.*, *Hall*, 2010 WL 4053547, at *11 (rejecting objection asking court to distribute residual funds to class members on *pro rata* basis in part because "the potential for fraudulent claims" presented a "significant" and "well-founded" risk); *In re Lawnmower*, 733 F. Supp. 2d at 1010 (approving parties' attempt to prevent payment of fraudulent claims).

is simply no evidence of any conflicts of interest and it is improper for Objectors to imply that there is without any record evidence to support such an assertion.

F. Objectors Have Waived Any Argument Regarding the Postcard Notice or the Claim Form Itself.

Finally, the Objectors-Appellants have half-heartedly complained – for the first time – about the postcard notice, arguing that it "failed to communicate to the recipients that they were actually class members with the right to make a claim" (Obj. Br. at 6), and that the claim form "assuredly intimidated some class members" from making claims (*id.* at 22; *see also id.* at 6 (complaining about postcard and claims process); *id.* at 39 (complaining about the "burdensome claims process")). First, these arguments are waived, as the Objectors-Appellants never made any argument about the notice or the claim form before the District Court. *See, e.g.*, *Mote*, 502 F.3d at 608 n.4.

Second, these arguments are without merit considering the scope and substance of the class notice. The Notice Program reached an estimated 76% of the Class. Further, unlike most consumer class action settlements, which typically entail only publication notice, the settlement provided direct, individual notice to more than 4.7 million class members – almost 40 percent of the estimated 12 million class members. The class notice approved by the District Court "'fairly apprise[d] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005), quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982); *accord Gooch v. Life Investors Ins. Co. of*

Am., 672 F.3d 402, 423 (6th Cir. 2012); *Adams v. S. Farm Bureau Life Ins. Co.*, 493 F.3d 1276, 1286–87 (11th Cir. 2007). There can be no question that the scope of the Notice Program satisfied due process. *See, e.g.*, *In re AT & T Mobility*, 789 F. Supp. 2d at 968.

The Objectors-Appellants' suggestion that the claims process "demand[ed] burdensome information about the claim" is also unfounded. (Obj. Br. at 30; *see also id.* at 39 (asserting that the "claims process purported to require knowledge of trivia of years-old purchases submitted under penalty of perjury").) Requiring putative class members to affirm the validity of their claims under penalty of perjury is a well-accepted practice designed to prevent fraudulent claims. *See, e.g., Mangone*, 206 F.R.D. at 235 (finding that "[t]he requirement of an affirmation on the claim form, under penalty of perjury, from the Settlement Class Member seeking reimbursement for an Eligible Late Fee was appropriate and not objectionable"). It is likewise standard in consumer class action settlements to require claimants to substantiate their claims by providing information related to the purchase.[20] Such information is not "trivia," but rather the very evidence plaintiffs would need to present to prove their cases at trial. Requiring such information is not only a sensible safeguard to reduce the risk of fraudulent claims, but also a legitimate way to reward class members who have stronger claims. *See, e.g.*, *Schulte*, 805 F. Supp.

[20] Indeed, the failure to institute such precautions may draw objections that the settlement invites fraudulent claims. *See Wilson v. Airborne, Inc.*, No. EDCV 07-770, 2008 WL 3854963, at *8 (C.D. Cal. Aug. 13, 2008) (rejecting objector's "concern that fraudulent claims may be filed, because proofs of purchase are not required for up to six boxes," by observing that "the claims administrator used its experience in setting the available refund without proof of purchase at six boxes while cognizant of the risk of fraudulent claims").

2d at 589–90; *see also, e.g.*, *In re Lawnmower*, 733 F. Supp. 2d at 1010 (requiring class members to include serial numbers on their claim forms was reasonable to avoid fraudulent claims and reduce administrative costs); *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 428–29, 429 n.5 (S.D.N.Y. 2001) (approving proposed "Plan of Allocation" that used a claim formula allowing "for distribution to members of the respective Classes based upon the relative strengths of the claims asserted by said Classes in the Actions"). Accordingly, the Objectors-Appellants' criticisms of the claims process should be rejected.

CONCLUSION

For the foregoing reasons, Defendants-Appellees request that this Court affirm the District Court's approval of the classwide settlement.

Dated: May 16, 2014

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,172 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 in 12-point Century Schoolbook font. Footnotes are prepared in 11-point Century Schoolbook font.

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

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Proof of Service

I hereby certify that on May 16, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants and counsel of record in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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