UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICK PEARSON, FRANCISCO PADILLA, CECILIA LINARES, AUGUSTINA BLANCO, ABEL GONZALEZ, and RICHARD JENNINGS,

On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

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

Defendants.

THEODORE H. FRANK,

Objector/Intervenor.

Case No. 11-CV-07972

CLASS ACTION

Hon. John Robert Blakey

OBJECTOR/INTERVENOR THEODORE H. FRANK'S REPLY IN SUPPORT OF MOTION TO DISGORGE SIDE PAYMENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

The responding Sweeney objectors[1] provide no reason that their gains [redacted] should not be disgorged. While the Sweeney objectors quibble about [redacted] the Seventh Circuit, which concluded the pleaded facts constitute "extraordinary circumstances" to merit this remand. *Pearson v. Target Corp.*, 893 F.3d 980, 984 (7th Cir. 2018) ("*Pearson II*").

Objector Steven Buckley instead insists that the Seventh Circuit misunderstands its own precedent and employs an array of personal attacks against movant Frank for supposedly having the "least clean hands" and for being "on a crusade driven by his own vanity and personal agenda." Buckley at 2, 12. The record here speaks for itself; Frank's objection resulted in the class receiving $3.1 million more than the original settlement would have provided. Mr. Buckley's objection resulted in [redacted].

Both of the responding objectors deny that they've engaged in [redacted].

The Sweeney objectors filed appeals purporting to be for the benefit of all class members and [redacted]. This result in inequitable, and should be undone.

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[1] For consistency with our opening brief, Frank refers to Sweeney, Buckley, and Nunez as the "Sweeney Objectors," though Mr. Sweeney himself failed to respond to Frank's motion. Mr. Sweeney emailed counsel for Frank on October 4, 2018 with updated contact information where counsel for Frank served his motion to disgorge. *See* Declaration of Melissa A. Holyoak (attached at Exh. 1). The responding Sweeney objectors filed oppositions to Frank's motion at Dkts. 386 ("Buckley") and 387 ("Nunez").

ARGUMENT

While *Pearson II* did not prejudge what the evidence would reveal on remand, [redacted] Therefore *Safeco Insurance Company of America v. American International Group, Inc.* [redacted] 710 F.3d 754 (7th Cir. 2013). In *Safeco*, after the objector-appellant settled with defendant and filed stipulated dismissal of its appeals, the panel sought additional briefing on whether class members' rights were adversely affected. *Id.* at 755. The panel majority declined to investigate the side-agreement between the objector and defendant only because the class comprised sophisticated insurance companies who did not object to the deal, and where the objector was simultaneously settling valuable individual claims. *Id.* at 756. [redacted]. *See* Memo. of Law in Support of Motion to Disgorge ("Memo."), Dkt. at 9-12.

Objector Buckley spends much of his brief second-guessing *Safeco* and the Seventh Circuit's refusal to follow a First Circuit decision decided before the Rules of Civil Procedure even suggested district courts inquire about objector settlements. Buckley at 8-10. None of these provide reasons to deny Frank's motion, nor do Buckley's personal attacks against Frank. *Id.* at 11. Whereas Frank's objection ultimately provided $3.1 million to absent class members and invited praise from the Seventh Circuit, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) ("*Pearson I*")—Buckley's objection [redacted]. These results speak for themselves.

As for objector Nunez, while his counsel does not regularly [redacted], he did in this case. [redacted]

[redacted]

I. As *Safeco* demonstrates, [redacted]. Buckley's first proposition is preposterous and the second is irrelevant.

[redacted]

Contrary to Buckley's repeated strawman assertion, Frank did not file an "identical appeal," but only a protective cross-appeal. Frank would not have appealed at all but for the Sweeney objectors' appeals, which might have disrupted a relatively beneficial settlement for the class. Buckley personally attacks Frank for dismissing his cross-appeal (Buckley at 11-12), but the record shows that Frank filed his cross-appeal on October 4, 2016 (Dkt. 308)—over 30 days after the August 25 Final Judgment and Order (Dkt. 288). Frank had no intention of appealing, and could not have appealed at all but for the Sweeney objectors' bad faith appeals, which enabled Frank to file a cross-appeal under Rule 4(a)(3). Frank's cross-appeal—which he never wanted to bring—was dismissed after the Sweeney objectors' appeals were dismissed and with no money changing hands. Buckley has no basis for his scurrilous remark that "Mr. Frank's hands are the least clean." Buckley at 2. Frank received nothing for dismissing his cross-appeal. Holyoak Decl. ¶ 7.

[redacted]

[redacted]

Buckley preposterously asserts that "*Safeco* . . . rejected a suggestion that it should review appellate settlements by objectors, concluding that such settlements did not jeopardize the interests of other class members in any way." Buckley at 10. Nearly every detail of this statement is false.

In the first place, the decision in *Safeco* was *sua sponte*: the only "party" suggesting that the settlement should be reviewed was Judge Posner due to "the risks of class action sell-out." *Safeco*, 710 F.3d at 758. The panel majority took this risk so seriously that it declined to act on an *unopposed* motion to dismiss the appeal. Instead, it "asked for additional memoranda" and allowed two additional months for any absent class member to come forward and express their opposition. *Id.* at 755. Only

[2] Buckley criticizes Frank for advancing an alternative argument that the Sweeney objectors either brought frivolous appeals or [redacted]. Buckley at 8 n.4. But the same alternatives lie at the heart of Buckley's response: he wants credit for supposedly trying to help the class secure a half million dollars, but abandoned his appeal [redacted]. One of Frank's alternative arguments must be true, but Buckley's alternative defenses cannot both be true—if he hoped for the class to win a half million dollars, he [redacted].

then, months after parties filed their stipulated dismissal, did the panel majority dismiss the appeal, but with a guarantee that any absent class member could later file a Rule 60(b) motion before the district court if the "settlement makes other class members worse off or disappoints their reasonable expectations." *Id.* at 758. The panel majority assured itself through supplemental briefing that the underlying class action settlement would not leave class members worse off, but the majority still left the door open for absent class members to later oppose the deal. *Id.* at 757-58. If it were true that *Safeco* provides a blanket prohibition on reviewing appellate settlements that don't take money from a settlement fund, none of this would be necessary.

Dismissal in *Safeco* was only allowed over Judge Posner's dissent because the majority relied on several factors [redacted]. First, the *Safeco* appeal involved a class action with only 1363 class members, all of them sophisticated financial institutions capable of protecting their own significant interests in the settlement. *Id.* at 759. In contrast, "[t]his class is composed of ordinary consumers who, by terms of the settlement, could recover no more than $200 each, and likely much less." *Pearson II,* 893 F.3d at 985.

Second, class members belonged to a risk management pool, "a multi-billion-dollar business" whose manager "looks out for the aggregate of all members' interests, [and] support[ed] . . . dismissal of [objector's] appeal." *Safeco*, 710 F.3d at 757. The Sweeney objectors provide no evidence that any class member [redacted].

Third, the lack of any opposition in *Safeco* meant the court lacked jurisdiction: it is "hard to see how a live controversy remains, and courts should not issue opinions resolving litigation that the parties no longer want to pursue." *Id.* No such problem exists here because Frank timely opposed [redacted] and has standing to intervene.

Finally, the settling objector in *Safeco* didn't simply agree to drop an appeal, but also settled its own individual claims, which it contended to be worth billions—more than all other class members' claims combined. *Id.* at 759. The settlement therefore resolved substantive issues, so it was more akin to "a *de facto* opt-out" of the settlement, a contingency "provided for in the settlement itself." *Id.* at 757. Settlements based on individual claims are less suspect, as the Advisory Committee noted in the 2003

amendments that empowered district courts to inquire into objector settlements: "Approval under paragraph (4)(B) with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members." Advisory Committee Notes to 2003 Amendment of Rule 23(e)(4)(B) (now codified at Rule 23(e)(5)). In contrast, [redacted] "[t]o justify even the filing fee, each objector must have been advancing claims on behalf of the class as a whole." *Pearson II*, 893 F.3d at 985. [redacted]

Contrary to Buckley, *Safeco* did not "reject the suggestion" that objector settlements should be reviewed. *Safeco* draws the line on permissible objector settlements. [redacted]

B. [redacted] upset reasonable expectations.

Contrary to Buckley's strawman argument (Buckley at 8), Frank does not believe all objector settlements on appeal are illegitimate, but when objectors compromise claims of the class for individual payment, the settlement must benefit absent class members. For example, Frank recently helped negotiate a settlement on appeal that tripled relief to class members. The Seventh Circuit opined "[i]t would be inequitable for [Frank] to receive nothing despite negotiating, in exchange for dropping the second appeal, a tripling of relief for the class." *In re Southwest Airlines Voucher Litig.*, 898 F.3d 740, 746 (7th Cir. 2018). This the reasonable expectation regarding attorneys' fees in all contingency and class action litigation. Objectors, like representatives, are entitled to reasonable attorneys' fees *when* they secure absentees a common benefit. *See, e.g., id.* Buckley contends that he has an unfettered right to [redacted], but class actions don't work that way:

> Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results. Because it is the class relief that is *both* a necessary and a sufficient condition to an award of attorney's fees, it follows that an attorney's fees award can only be "attributable to," or the consequence of, the class relief, not the attorney's hard work.

In re HP Inkjet Printer Litig., 716 F.3d 1173, 1182 (9th Cir. 2013).

Likewise, class action objectors should only be paid for results—for assisting courts in deciding fairness, or for improving a proposed settlement to class members. *See Southwest,* 898 F.3d at 746 (objectors should not be paid for "[running] up a tab with minimal value added"). The class action process is less efficient and less equitable because [redacted].

The responding Sweeney objectors do not answer Frank's analogy of [redacted] with the supposedly separate "kicker" and "reversion" fees in the original settlement which plaintiffs' counsel unsuccessfully tried to insist were not part of the constructive common fund. Memo. at 9 (citing *Pearson I*, 772 F.3d at 786). The reasonable expectation in class action settlements is [redacted]. Here, the Sweeney objectors [redacted].

The underlying Settlement Agreement (Dkts. 213-1) gave absent class members additional reasonable expectations regarding the settlement and fees, which [redacted]. The Settlement Agreement defined the settlement fund to provide "***any and all*** Cash Awards, Attorneys' Fee Awards, Incentive Awards, and Notice and Administration Costs that exceed $1,500,000." *Id.* at 6 (emphasis added). The Settlement does not contemplate [redacted] but says class claimants "shall look solely to the Net Settlement Fund for payment of such claims." *Id.* If additional funds were added they ought to be distributed *pro rata* to class claimants as the Settlement provides. *Id.*

The Settlement further states that any incentive awards to individual plaintiffs "shall not exceed $5,000 for each Plaintiff, subject to Court approval." *Id.* at 9. These awards compensate individual class members for the work they performed on behalf of the entire class. The Sweeney

objectors, in contrast, [redacted].

II. The Seventh Circuit is the law in this Court.

Objector Buckley makes several suggestions that *Pearson II* was mistaken in applying *Safeco*, but Frank submits that the Seventh Circuit understands its precedent better than Buckley does. As explained above, *Safeco* compels the conclusion that [redacted]. Buckley also faults *Pearson II* for not applying *Duhaime*, a First Circuit decision reached before the 2003 amendments empowered district courts to inquire about withdrawn objections. But Frank's appellate brief put *Duhaime* in front of the Seventh Circuit, and *Pearson II* declined to follow it. Frank agrees *Duhaime* would have been dipositive toward his motion if it were good law—but it's not, as confirmed by *Pearson II*.

Buckley also argues that granting Frank's motion would somehow infringe upon the Seventh Circuit's docket management, but if this were true *Pearson II* would have said so.

Finally, Buckley asserts that *Young v. Higbee* stands only for an obscure provision of bankruptcy law, *see* Buckley at 12, apparently having ignored Frank's citation to *Murray v. GMAC* which specifically applies it to [redacted], *see* Memo at 12.

The Court should disregard Buckley's suggestions to ignore the law of the case and controlling Seventh Circuit law.

A. *Duhaime* is not the law of this Circuit; *Pearson II* declined to follow it.

Objector Buckley faults the Seventh Circuit for not discussing *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999), an opinion written before the 2003 amendments to the Rules. Buckley at 9. In fact, *Pearson II* did not neglect to cite the case, but implicitly rejected it because Frank

drew the precedent directly to the Seventh Circuit's attention. Frank filed the only brief on appeal, and it plainly laid out how *Duhaime* would be fatal to his theory if it were good law:

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

Pearson II, No. 17-2275, Opening Brief at 37-38 (Jul. 31, 2017).

If the Seventh Circuit considered *Duhaime* good law, it would have not remanded because denial of Frank's Rule 60 motion would have been harmless error. Instead, *Pearson II*, though made aware of the adverse precedent, knowingly and implicitly rejected *Duhaime* just as *Safeco* did, finding that objector blackmail presents a "serious problem" rather than merely a natural and unremarkable result of objector's separate representation. *Contrast Pearson II*, 893 F.3d at 896 *with Duhaime*, 183 F.3d at 6. Contrary to Buckley's arguments, *Safeco*'s detailed and close consideration cannot be read to have "followed" *Duhaime* and "rejected a suggestion that it should review appellate settlements by objectors." Buckley at 10. *Duhaime*'s categorical refusal to review objector settlements has simply been superseded by the 2003 amendments to Rule 23(e), which empowered courts to scrutinizes side agreements and withdrawals of objections in district courts. *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.").

B. This case was remanded to consider Frank's motion to intervene for disgorgement; Frank's motion does not frustrate the Seventh Circuit's prerogative.

Buckley's most creative argument is that granting Frank's motion "would effectively eviscerate the Seventh Circuit's civil appeal mediation program," and "improperly infringe on the prerogative of the Seventh Circuit to manage its docket." Buckley at 8. To the contrary.

This case was remanded precisely so that the Court could "entertain [Frank's] previous motion to disgorge any side payments." *Pearson II*, 893 F.3d at 983-84. Frank was not coy about his objective here, yet the only concern *Pearson II* expressed about managing its docket is that it perhaps shouldn't have allowed the Sweeney objectors to settle their appeals at all: "We could have provided more scrutiny at an earlier stage before granting the Federal Rule of Appellate Procedure 42 motion to dismiss the appeal voluntarily." *Id.* at 987.

The Seventh Circuit understood that their remand would increase scrutiny of this appellate settlement. That's the point. And it's the law of the case.

C. *Young* applies to class actions, as the Seventh Circuit recognized.

Buckley also argues that *Young* is an opinion concerned only with idiosyncratic features of bankruptcy procedure, Buckley at 12, but he apparently ignores Frank's citation to *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948 (7th Cir. 2006) (Easterbrook, J.). Memo. at 12 (citing *Murray*'s reliance on *Young* for the proposition that class device may not be "used to obtain leverage for one person's benefit"). The Seventh Circuit relied on *Young* in evaluating a class action settlement that paid a representative and his attorney, but froze out the class. *Young* stands for an equitable principle that self-appointed representatives are obliged not enrich themselves by leveraging the claims of absent parties:

> This looks like the sort of settlement that we condemned in *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir.1999), and *Crawford v. Equifax Payment Services*, 201 F.3d 877 (7th Cir.2000), two appeals arising from the same litigation. That suit had been settled for $2,000 to the named plaintiff, $5,500 to a legal-aid society that had not been injured by the defendant's conduct, and $78,000 in legal fees. We treated the disproportion—$2,000 for one class member, nothing for the rest—as proof that the class device had been used to obtain leverage for one person's benefit. See also, e.g., *Young v. Higbee Co.,* 324 U.S. 204, 211–14, 65 S.Ct. 594, 89 L.Ed. 890 (1945) . . . . Here the proposed award is $3,000 to the representative while other class members are frozen out. The payment of $3,000 to Murray is three times the statutory maximum, while others don't get even the $100 that the Act specifies as the minimum. . . . Such a settlement is untenable.

Murray, 434 F.3d at 952.

[redacted]

Buckley also argues that *Young* is dissimilar [redacted]. Individuals purporting to bring class-wide objections cannot misuse class action procedure "to obtain leverage for one person's benefit." *Murray*, 434 F.3d at 952.

The Sweeney objectors do not and cannot deny that they filed appeals based on objections purportedly based on class-wide defects in the underlying class action settlement. They cannot deny that they [redacted]. Equity demands disgorgement. *Cf. Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex. 1999) ("main purpose" of disgorgement is not compensation, rather it is discouraging future wrongdoing).

[3] Buckley's assertion that defendants would not be harmed by a prolonged or successful appeal does not pass the laugh test. Buckley at 14. Frank admits that his motion to intervene has imposed costs on the settling parties, but he attempts to minimize such costs by efficient proceedings here. And unlike Buckley, Frank seeks to vindicate the rights of absent class members and deter objector blackmail, which will ultimately benefit future class members and the courts by weeding out bad-faith objections. Memo. at 12-13.

III. Buckley's personal attacks do not substitute for reasoned argument.

Finally, Buckley uses raw personal attacks to answer Frank's argument that unjustly rewarding objectors for unsuccessful objections disserves class members by encouraging meritless objections. Memo. at 12-13. "Courts expect—demand—responsible advocacy from members of the bar. … Lawyers who launch ad hominem attacks on the bench and their adversary bring dishonor only on themselves." *United States v. Kimberlin*, 898 F.2d 1262, 1266 (7th Cir. 1990) (admonishing counsel and threatening disbarment). If objectors are paid whether or not they provide benefits to class members, it's much easier for them to accept payment to go away than to do what Frank did here: (1) win an objection on appeal, which (2) facilitates an improved settlement for class members, and (3) submit a fee application for potential objection and ultimate approval by the district court. In response to his intuitive argument that successful objections should be rewarded rather than unsuccessful, dismissed objections, Buckley responds with bile: "Mr. Frank is not truly concerned about the welfare of the class, but is instead on a crusade driven by his own vanity and personal agenda." Buckley at 12.

But ye shall know them by their fruits. Frank's meritorious and zealously-prosecuted objection led to $3.1 million in additional recovery to absent class members. Such representation ought to be rewarded. [redacted].

Frank believes his record and the record of Buckley and his counsel speak for themselves.

IV. In this case, Nunez is identically situated as the other Sweeney objectors.

"Randy Nunez and his counsel agree with Objector/Intervenor Theodore Frank that objector blackmail is a 'serious problem.'" Nunez at 2. Objector Nunez agrees with most of Frank's arguments, and simply denies he has acted as a professional objector in this case. *Id.*

But Nunez [redacted].

In any event, Frank does not seek to disturb Nunez's action in the Southern District of California, which was voluntarily dismissed with prejudice. Thus, Frank does not ask the Court to impinge upon the jurisdiction of that court as Nunez claims. *Id.* at 5. Frank simply asks the Court to exercise jurisdiction over [redacted], as the Seventh Circuit directs.

If anything, the fact that Nunez had already filed his own putative class action makes [redacted] even worse than that of the other objectors. As a named class representative, Nunez and his counsel owed a fiduciary duty to unnamed class members from the moment he filed a putative class action complaint. "Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed." *In re General Motors Corp. Pick-Up Truck Fuel Prod. Liab. Litig.*, 55 F.3d 768, 801 (3rd Cir. 1995); *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002) (collecting cases finding a fiduciary duty). "A representative can't throw away what could be a major component of the class's recovery." *Back Doctors Ltd. v. Metropolitan Property and Casualty Insurance Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (finding dismissal of punitive damages claims inconsistent with representative's fiduciary duty).

[redacted]

Nunez's separate complaint cannot negate [redacted].

CONCLUSION

This Court should order disgorgement of the side payments to the objector-appellants who failed to obtain benefits for the class as a whole and order further relief as the Court deems just.

Dated: October 25, 2018.

/s/ M. Frank Bednarz
M. Frank Bednarz, (ARDC No. 6299073)
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CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Reply Memorandum in Support of Motion to Disgorge Side Payments via the ECF system for the Northern District of Illinois under seal, including a redacted publicly-available version of the Memo. Additionally, he caused to be served via email and First-Class mail an unredacted copy of this Reply Memo upon the following attorneys and persons that are authorized to receive material designated as Confidential under the Confidentiality Stipulation and Protective Order, Dkt. 379:

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The undersigned further certifies he caused to be served via First-Class mail a copy of the redacted, publicly available version of the Memo upon the following:

Peggy Thomas Simone Thomas 2109 N.W. 12th Avenue Ft. Lauderdale, FL 33311	Melissa Rachel Pavely Stein, Ray & Harris LLP 222 West Adams Street Suite 1800 Chicago IL 60606

Dated: October 25, 2018 /s/ M. Frank Bednarz

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICK PEARSON, FRANCISCO PADILLA, CECILIA LINARES, AUGUSTINA BLANCO, ABEL GONZALEZ, and RICHARD JENNINGS,

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THEODORE H. FRANK,

Objector/Intervenor.

Case No. 11-CV-07972

CLASS ACTION

Hon. John Robert Blakey

DECLARATION OF MELISSA HOLYOAK

Melissa Holyoak declares as follows:

1. I have personal knowledge of the facts set forth herein and, if called as witness, could and would testify competently thereto.

2. I am one of the attorneys representing objector Theodore H. Frank in this matter.

3. I am a senior attorney at the Competitive Enterprise Institute ("CEI"), which is located at 1310 L Street, NW, 7th Floor, Washington, DC 20005. The non-profit Center for Class

Action Fairness ("CCAF"), a 501(c)(3) non-profit public interest law firm based out of Washington, D.C., in 2009. In 2015, CCAF merged into the 501(c)(3) non-profit CEI in Washington, D.C.

4. Frank appealed the approved settlement in this case by filing a notice of appeal on October 4, 2016 (Dkt. 288). The appeal was a cross-appeal, which was only timely under Rule 4(a)(3) because three other appeals had already been noticed by Steven Buckley, Randy Nunez, and Patrick Sweeney (the "Sweeney objectors") from the Court's August 25 approval order (Dkt. 288). Frank's cross-appeal, No. 16-3615 (7th Cir.), was consolidated with the Sweeney objectors' appeals on October 11, 2016.

5. On November 7, 2016, I received email notice from the Seventh Circuit's CM/ECF service that all three Sweeney objectors had moved, unopposed, to dismiss their appeals. These three motions were granted together by the Seventh Circuit on November 8, and mandate issued to this Court. Dkt. 327.

6. Because Frank only filed a cross-appeal as a protective measure and would not have otherwise prosecuted his appeal from final approval of the settlement, following dismissal of the Sweeney objectors' appeals, I filed an unopposed motion to dismiss Frank's cross-appeal. Frank's dismissal was likewise granted and mandate issued. Dkt. 329.

7. Neither Frank, CCAF, nor any attorney at CCAF sought or received any compensation for the dismissal of Frank's appeal.

8. On October 4, 2018, after I filed the sealed Objector/Intervenor Frank's Motion to Disgorge, Dkt. 381, I received an email from Patrick Sweeney <patrickshanesweeney@gmail.com>. A true and correct copy of the email is attached hereto at Exhibit A.

9. On October 4, 2018, I mailed a copy of Frank's Motion to Disgorge, Memorandum in Support and Notice of Hearing to the address Mr. Sweeney had on file with the court in these proceedings, as well as the address Mr. Sweeney provided to me in his October 4 email:

Patrick S. Sweeney
2672 Mutchler Road
Madison,WI 53711
patrickshanesweeney@gmail.com

Patrick S. Sweeney
6666 Odana Road, Suite 116
Madison, WI 53711
patrick@sweeneylegalgroup.com

10. In addition, I emailed Mr. Sweeney a copy of Frank's Motion to Disgorge, Memorandum in Support and Notice of Hearing to both email addresses listed above.

11. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 25, 2018 in Columbia, Missouri

/s/ Melissa A. Holyoak
Melissa A. Holyoak

Holyoak Decl.

EXHIBIT A

Gmail **Melissa Holyoak <melissaholyoak@gmail.com>**

Pearson v. Target

3 messages

Patrick Sweeney <patrickshanesweeney@gmail.com> Thu, Oct 4, 2018 at 4:19 PM
To: melissaholyoak@gmail.com

Melissa
Patrick Sweeney here. I have become aware of a procedure to disgorge settlements.
I do not currently receive copies.
please provide.
TY
PSS
Patrick S. Sweeney

2672 Mutchler Road
Madison,WI 53711.
Cell: (424)-488-4383

Melissa Holyoak <melissaholyoak@gmail.com> Thu, Oct 4, 2018 at 5:54 PM
To: patrickshanesweeney@gmail.com

Thanks for getting in touch Patrick. I'll email it out shortly.

Best,
Melissa
[Quoted text hidden]

Patrick Sweeney <patrickshanesweeney@gmail.com> Thu, Oct 4, 2018 at 5:57 PM
To: melissaholyoak@gmail.com

Thanks Melissa
Patrick S. Sweeney

2672 Mutchler Road
Madison,WI 53711.
Cell: (424)-488-4383

[Quoted text hidden]