**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**Case No.: 0:21-md-03015-SINGHAL/Valle**

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| IN RE:<br><br>JOHNSON & JOHNSON SUNSCREEN MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION | **MDL CASE NO.: 3015** |
| Theodore H. Frank,<br><br>Objector. | |

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**OBJECTOR THEODORE H. FRANK'S**
**MOTION TO STRIKE AS UNTIMELY, AND REPLY TO,**
**PLAINTIFFS' AUGUST 8 RESPONSE TO OBJECTION**

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## INTRODUCTION

Plaintiffs' opposition to Objector Theodore H. Frank's objection was untimely, abusive, and unhelpful to the Court's determination of the issues at hand. The Court should strike the filing and consider whether any further sanction is necessary to deter similar unprofessional conduct.

In his objection, Frank simply makes the same arguments that he successfully made on behalf of class members in *Pearson v NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), and *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021). Plaintiffs' opposition provides no substantive response to those arguments; it does not even mention Rule 23(e)(2)(C). The law, including precedents Frank and his nonprofit counsel have previously won, requires rejection of this lopsided settlement.

## ARGUMENT

### I. Plaintiffs' response is untimely and should be stricken.

On August 8, four days before the final approval hearing and over a full month after Frank filed his July 7 objection, plaintiffs filed their opposition. The Court's Preliminary Approval Order did not provide a deadline for a response from plaintiffs to any objections. *See* Dkt.68 at 9. The proposed settlement does state that "the Parties shall request that the Court allow any interested party to file a response to any objection . . . no later than seven (7) days before the Fairness Hearing, or as the Court may otherwise direct." Dkt.55-9 at ¶106. But no party requested to respond to Frank's objection, the Court has not otherwise directed a party may respond, and Plaintiff's response was filed four days prior to the hearing. Even under the more general Local Rules governing motion practice, any opposition must be filed no later than fourteen days after the motion. L.R. 7.1(c)(1). Plaintiffs' filing is untimely under any feasible calculation and its lateness unfairly prejudices Frank and it would "ill-serve the interests of judicial economy" to delay the hearing to provide Frank the seven-period for a reply allotted him by Local Rule 7.1(c)(1).[1] *William v. R.W. Cannon, Inc.*, 657 F. Supp.2d 1302, 1320 (S.D. Fla. 2009). Accordingly, the filing should be struck from the record. *Id.*

[1] Rather than burden the Court and delay proceedings, Frank submits this motion and reply under an abbreviated timeline, to respond to Plaintiff's opposition as is his right, to help inform the Court of the issues under discussion at the hearing, and to preserve the Court's original timeline setting the hearing for August 12.

## II. Frank's objection has merit and the proposed settlement should be rejected.

Portentous of things to come, Plaintiffs begin their substantive response by misguiding the Court as to the legal standard it should apply to its review of the settlement. Class action settlements involve the legal claims of, in this case, millions of individuals not present in the litigation and who may be completely unaware that their legal rights are being bargained away. *See*, *e.g., Piambino v. Bailey II*, 757 F.2d 1112, 1139 (11th Cir. 1985). That's why class action settlements are not "presumptively reasonable," as plaintiffs suggest, but rather "Rule 23(e)(2) assumes that a class settlement is invalid." *Briseño*, 998 F.3d at 1030 (citation omitted). It is class counsel, not Frank, who "voluntarily accepted a fiduciary obligation towards members of the putative class," and bears the "heavy burden" imposed upon them by Rule 23. *Piambino*, 757 F.2d at 1144 (cleaned up). Class counsel owes a fiduciary duty to the class not to structure a settlement so that they are the primary beneficiaries. *Pearson*, 772 F.3d at 780; *Briseño*, 998 F.3d at 1024-25.

In their response, class counsel admits that the coupons are worth less than $5 each when redeemed. Dkt. 87 at 7 (providing a value of $4.98 per coupon). And they do not even pretend to comply with the plain text of 28 U.S.C. § 1712 requiring valuation based on redemption rate. *Id.* at 9. Though plaintiffs have the burden of proof, they present no evidence that the injunction is worth anything—let alone $80 million—for the reasons Frank stated in his July 7 filings. Dkt.83 at pp. 13-15. Beyond that, class counsel adds nothing else that wasn't already addressed in the July 7 Frank filings other than attempts to distinguish a fraction of the precedents Frank cited on immaterial grounds that have nothing to do with those cases' holdings. For instance, nothing in the reasoning of *Pearson* precludes its application to a class action over sunscreen. And plaintiffs do not even cite, let alone engage with, numerous applicable authorities cited by Frank, including:

- Fed. R. Civ. Pro. 23(e)(2)(C);
- *In re Home Depot Inc., Customer Data Sec. Breach Litig.*, 931 F.3d 1065 (11th Cir. 2019);
- *Piambino v. Bailey II*, 757 F.2d 1112 (11th Cir. 1985);
- *McKinney-Drobnis v. Oreshack*, 16 F.4th 594 (9th Cir. 2021);
- *Jane Roes 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035 (9th Cir. 2019);
- *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011); and
- *Redman v. Radioshack Corp.*, 768 F.3d 622 (7th Cir. 2014).

To name just a few.

Even if the Court permits plaintiffs to file a belated opposition weeks after the Local Rules permit, it should question why the filing fails to respond to applicable authority on the issues squarely before it.

## III. Plaintiff's *ad hominem* attacks are abusive and unhelpful to the Court in assessing the settlement's fairness.

It is bad enough class counsel violated the Local Rules and this Court's order by filing a last-minute opposition. It is even worse that that response simply refuses to address the law Frank raises. But a shocking amount of that response is taken up with baseless *ad hominems* against Frank that do not even acknowledge that Frank preemptively addressed those personal attacks in the lengthy declaration that this Court's preliminary approval order required. Dkt. 83-1 at ¶¶ 15-43.

The Seventh Circuit criticized such abusive tactics in *St. Lucie Cnty. Fire Dist. Firefighters' Pension Trust Fund v. Stericycle, Inc. (In re Stericycle Sec. Litig.)*, 35 F.4th 555 (7th Cir. 2022). In *Stericycle*, the plaintiffs took the same tack class counsel does here by calling Frank a "notorious professional objector" and attacking his record. The Seventh Circuit found the "attempts to use Frank's past work to undermine his substantive arguments . . . improper and not at all persuasive." *Id.* at 572. "At this point, Frank's track record—which now includes his success in this case—speaks for itself." *Id.* Like the attacks in *Stericycle*, class counsel's attacks on Frank and his law firm are "not professional and serve[] only to emphasize the weakness of lead counsel's own arguments." *Id.*

The *Stericycle* reprimand was widely publicized, including by David Lat's May 21 newsletter, which named it as a runner-up for Ruling of the Week. David Lat, *Judicial Notice (05.21.22): 2400 Hours*, Original Jurisdiction (May 21, 2022);[2] Holly Barker, *Stericycle Securities Class Lead Counsel Sees Fee Award Tossed*, Bloomberg Law (May 18, 2022). In addition to striking plaintiff's filing for its untimeliness, the Court may wish to consider *sua sponte* a formal sanction of class counsel. Apparently, the informal reprimand and warning of *Stericycle* was insufficient deterrent against this abusive tactic, and harsher measures from this Court are needed.

## CONCLUSION

For the reasons contained in Frank's objection, the proposed settlement should be rejected.

[2] *Available at* https://davidlat.substack.com/p/judicial-notice-052122-2400-hours.

Date: August 11, 2022

Respectfully submitted,

*/s/ John M. Andren*

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