

**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 and Nominal Defendants.

THEODORE H. FRANK,

Intervenor.

Randy Nunez, Steven Buckley, and Patrick Sweeney

Objectors.

Case No. 11-CV-07972

CLASS ACTION

Hon. James B. Zagel

[PROPOSED] COMPLAINT OF INTERVENOR THEODORE H. FRANK

Intervenor Theodore H. Frank (“Intervenor”), by and through his attorneys, intervenes for the limited purpose of asking this Court to investigate the nature of settlements made by Randy Nunez, Steven Buckley, and Patrick Sweeney (collectively, “Objector-Appellants”) with Nominal Defendants NBTY, Inc., Rexall Sundown, Inc. (“Rexall”), and/or Target Corporation (collectively, “Target”), exercising its jurisdiction over the settlement and its equitable powers to require disgorgement of any unjust enrichment achieved by Objector-Appellants; and to preserve his appellate rights in this proceeding. He alleges as follows:

NATURE OF THE ACTION

1. The Seventh Circuit has previously complained about the problem of rent-seeking extortionate objectors, objectors who improperly object not to improve the settlement on behalf of the class, but to extract a payment for themselves and their attorneys at the expense of the class. *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003). The Objector-Appellants in this case and their attorneys have been unjustly enriched at the expense of the class by engaging in this practice in appeals of the final judgment in this class that they were, on information and belief, paid to dismiss.

2. Intervenor Theodore H. Frank is a graduate of the University of Chicago Law School and an elected member of the American Law Institute. He founded the Center for Class Action Fairness in 2009. The Center was a non-profit public-interest law firm that became part of the non-profit Competitive Enterprise Institute in 2015. The Center brings good-faith objections to abusive class-action settlements, and has won dozens of objections and over a hundred million dollars for consumer and shareholder class members. The Center and Frank bring all of their objections in good faith and have never agreed to settle any of their objections in exchange for pecuniary payments. They have won national acclaim for their work, with favorable coverage in, among other publications, the *New York Times* and *Wall Street Journal*, and have been praised by courts, including the Seventh Circuit, for their work.

3. Frank is a class member who objected in good faith to an earlier settlement in this case; through hundreds of hours of work by Frank and his attorneys, Frank succeeded in winning a Seventh Circuit appeal that struck an earlier unfair settlement and resulted in a new, improved settlement that won additional millions of dollars for the class members in this case. Frank asks this Court to exercise its supervisory powers over the Settlement and its equitable powers to require Objector-Appellants to disgorge any payments that did not improve the class settlement from improper side-settlements with Nominal Defendants. The benefits appropriated by Objector-Appellants derive entirely from the underlying value of the class action settlement, and the proceeds ought to revert to the Class.

4. Any payments to Objector-Appellants and their attorneys are disproportionate to the benefits they achieved for the class and their side-settlements were not disclosed to this Court as Rule 23(e) requires.

5. For example, this Court awarded Frank and his attorneys \$180,000 for the work they did over several years to improve the settlement in this case, which included a partially-successful objection at the district-court level, a fully-successful landmark appellate victory, and then participating in litigation over the second settlement. Since 2012, the Center has won four appeals in the Seventh Circuit, but this is the only case where the appellate victory resulted in attorneys' fees.

6. In contrast, press reports of a recent dispute between Edelson PC and the Bandas Law Firm allege that the two agreed that class counsel would pay an objector \$225,000 to resolve the unlitigated appeal of an unsuccessful objection in an Illinois state-court case.

7. The presence of bad-faith objectors seeking to extract windfalls for little work regularly interferes with the good-faith objections brought by the Center and Frank. Because courts have condemned bad-faith objectors as "professional objectors," class-action attorneys regularly deliberately attempt to confuse courts by noting that Frank is a "professional" and an "objector," and then cite the court decisions condemning "professional objectors" to falsely accuse Frank and his clients of objecting in bad faith. In other cases, class-action attorneys have used precedents against "professional objectors" to obtain abusively large appeal bonds to interfere with Frank's clients' right of appeal. In still other cases, the cacophony created by shoddy objections brought by bad-faith objectors interferes with a court's ability to fairly consider the reasoned good-faith objections brought by the Center.

8. Meritless objections thrive when unsuccessful objectors obtain more—or any—money compared to successful objectors who file good-faith objections that accomplish valuable results for class members. The windfall given to unsuccessful objectors creates a perverse incentive encouraging bad-faith objections while undermining meritorious good-faith objections. These perverse incentives ultimately encourage abusive class-action settlements that hurt class members.

JURISDICTION AND VENUE

9. Plaintiffs alleged a cause of action for under 28 U.S.C. §1332(d)(2), and this court exercises collateral jurisdiction over the underlying Settlement Agreement and conduct related to it. There are over 1000 members in the previously-certified Class, the underlying matter in controversy exceeds \$5,000,000 exclusive of interests and costs, and many class members in the nationwide class are citizens of states other than a defendant's state of citizenship, and no exception to the Class Action Fairness Act applies. Named plaintiffs Nick Pearson and Francisco Padilla are citizens of the State of Illinois, named plaintiffs Cecilia Linares, Augustino Blanco and Abel Gonzalez are citizens of the State of California, named plaintiff Richard Jennings is a citizen of the Commonwealth of Massachusetts, whereas defendant NBTY, Inc. is incorporated in Delaware, and its corporate headquarters are located in the State of New York and defendant Rexall Sundown, Inc. is incorporated in Florida, and its corporate headquarters are located in the State of New York.

10. This Court also has jurisdiction over the claims asserted in this action by virtue of its creation of and the exercise of jurisdiction over the Class Action Settlement, which was finally approved by this Court on August 25, 2016. The Court "retains exclusive jurisdiction over this action, the Parties, and all Settlement Class members to determine all matters relating in any way to the Final Judgment and Order, the Preliminary Approval Order, or the Settlement Agreement, including but not limited to the administration, implementation, interpretation, or enforcement of such orders of Agreement." Final Judgment and Order, Dkt. 288 at 9. This Court's jurisdiction over Class Action Settlement extends to resolve the unjust enrichment and quantum meruit claims asserted by Intervenor. This Court has ancillary jurisdiction because the claims raised in this Complaint, have a "direct relation to property or assets actually or constructively drawn into [this Court's] possession or control by the principal suit." *Fulton National Bank of Atlanta v. Hozier*, 267 U.S. 276, 280 (1925); *See also Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294, 1300 (7th Cir. 1995).

11. Additionally, or in the alternative, this Court has supplemental jurisdiction under 28 U.S.C. § 1367. The unjust enrichment and quantum meruit claims asserted in this action against all

defendants are so related that they form part of the same case or controversy under Article III of the United States Constitution.

12. This Court has personal jurisdiction over each of the Objector-Appellants, because they actively do and/or have done business in Illinois (including attending hearings in this district, filing papers and notices of appeal, and/or directing numerous telephone calls, e-mails, and other correspondence into this District pertaining to this litigation). Moreover, the Court retains “retains exclusive jurisdiction over . . . all Settlement Class members to determine all matters relating in any way to the Final Judgment and Order, the Preliminary Approval Order, or the Settlement Agreement . . .” Final Judgment and Order, Dkt. 288 at 9. Personal jurisdiction over Objector-Appellants is proper because they have transacted business within Illinois, thereby subjecting Objector-Appellants to personal jurisdiction under the Illinois Long-Arm Statute. 735 ILCS 5/2-209(c).

13. Venue in this district is proper under 28 U.S.C. § 1391(b)(1)-(2) because a substantial part of the events or omissions giving rise to the claim occurred within this district. Venue is also proper under 18 U.S.C. § 1965(a) to the extent that the Objector-Appellants and Nominal Defendants transact substantial business in this District.

PARTIES

14. Frank purchased Kirkland-brand Extra Strength Glucosamine HCl 1500 mg with MSM 1500 mg from the Arlington, VA Costco store in 2011 and/or 2012. *See* Theodore H. Frank’s Declaration, Dkt. 259-1. On this basis, Intervenor is a member of the Class, which means he is a person in the U.S. who are among consumers who during particular time periods and in certain U.S. locations, purchased for personal use and not resale or distribution certain joint health dietary supplements: (a) sold by Rexall or any of its affiliates under the brand names of Rexall or its affiliates; or (b) sold by another brand name by a company not affiliated with Rexall and manufactured by (i) Rexall, (ii) any of Rexall’s affiliates, or (iii) any entities that manufactured or sold the Covered Products from which Rexall acquired assets of contracts (collectively “Covered Products”), and he is not a person who submitted a valid request for exclusion. *See* Final Judgment and Order, Dkt. 288 at 3-4.

The Covered Products and relevant periods of sale are identified in Exhibit A to the Settlement Agreement (Dkt. 213-2). Intervenor Frank is a resident of Washington D.C.

15. On information and belief, Nick Pearson, Augustino Blanco, Abel Gonzales, Richard Jennings, Cecilia Linares, and Francisco Padilla (collectively, “Plaintiffs”) are each U.S. residents and members of the Class by virtue of having purchased Covered Products within the relevant periods of sale identified in Exhibit A to the Settlement Agreement (Dkt. 213-2).

16. Nominal Defendant NBTY, Inc. is a corporation organized and existing under the laws of the state of Delaware. NBTY’s headquarters is at 2100 Smithtown Ave., Ronkonkoma, New York 11779

17. Nominal Defendant Rexall Sundown, Inc. is a corporation organized and existing under the laws of the state of Florida. Defendant Rexall’s headquarters is at 2100 Smithtown Ave., Ronkonkoma, New York 11779.

18. Nominal Defendant Target Corporation is incorporated under the laws of the state of Minnesota. Defendant’s corporate headquarters is located at 1000 Nicollet Mall, Minneapolis, Minnesota 55403.

19. Objector-Appellant Randy Nunez purported to be a member of the Class and upon information and belief is a resident of California; objector Nunez and his attorneys subjected themselves to the jurisdiction of this Court by filing an objection and appeal from the Final Judgement and Order. *See* Buckley Objection, Dkt. 256 and 293.

20. Objector-Appellant Steven Buckley purported to be a member of the Class and upon information and belief is a resident of Massachusetts; objector Buckley and his attorneys subjected themselves to the jurisdiction of this Court by filing an objection and appeal from the Final Judgement and Order. *See* Buckley Objection, Dkt. 258 and 289.

21. Objector-Appellant Patrick Sweeney purported to be a member of the Class and upon information and belief is a resident of Wisconsin; objector Sweeney subjected himself to the jurisdiction of this Court by filing an objection and appeal from the Final Judgement and Order. *See* Sweeney Objection, Dkt. 261 and 298.

22. Intervenor Frank is entitled to intervene in this action as a matter of right pursuant to Rule 24(a) because “he claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect [his] interest.” Specifically, Intervenor and class members like him have an interest in payments made by Nominal Defendants for resolution of the underlying claims. Such payments ought to be distributed to the whole class, and failure to grant intervention practically forfeits the interest of class members like Intervenor.

23. Existing parties do not adequately represent Frank’s interests. Plaintiffs have told counsel for Frank that they will not seek disgorgement against the Objector-Appellants, and Nominal Defendants are bound by their payments to the Objector-Appellants. No existing party has any interest in pursuing Objector-Appellants’ unjust enrichment.

SUBSTANTIVE ALLEGATIONS

24. In 2014, Frank, appealing from approval of a settlement in this action, won *Pearson v. NBTY, Inc.*, 772 F.3d 778, in the Seventh Circuit, reversing settlement approval. As a result of that victory, the parties negotiated a substantially improved settlement that paid the class millions of dollars more in cash than the original settlement.

25. On August 25, 2016, the Court granted final approval of settlement of the underlying class action complaint against Nominal Defendants on behalf of a class of purchasers, or which Intervenor Frank is a member. Final Judgment and Order, Dkt. 288. Following approval, the Objector-Appellants each filed notice of appeal. Dkts. 289 (Buckley), 293 (Nunez), and 298 (Sweeney).

26. Upon information and belief, the Objector-Appellants, in conjunction with their counsel, each filed appeals to secure settlement for individual gain, a process known as “objector blackmail.”

27. All three Objector-Appellants, along with Plaintiffs and Nominal Defendants, stipulated dismissal of his respective appeal on November 7, 2016. Upon information and belief, each

Objector-Appellant received monetary compensation and/or attorneys' fees from Nominal Defendants in exchange for dismissing his appeal.

28. Frank had cross-appealed the appeals of the Objector-Appellants, and dismissed his cross-appeal without any payment to himself or his attorneys shortly after the Objector-Appellants dismiss their appeals, including no reimbursement for costs or time expended on the appeal.

29. Neither Intervenor Frank nor any absent class member received any benefit from the stipulated dismissals that Objector-Appellants secured. Dismissal of objector appeals in exchange for individual payment is widely recognized as a misuse of appellate and class action process.

30. Objector blackmail generally and in this case extracts value from the underlying Class Action Settlement, which was generated by Plaintiffs and Intervenor's earlier objection for enjoyment by the Entire Class. The Court recognized the substantial investment by Plaintiffs and Intervenor in creating the common fund settlement, so awarded reasonable attorneys' fees for their efforts. Dkt. 288.

31. Objector-Appellants benefited from their misuse of the Class Action Settlement, which is held common for the protection of the class, by settling each of their appeals with one or more Nominal Defendants.

32. It is unclear whether Frank needs to intervene to request the Court disgorge the improperly-paid objector blackmail.

CLASS ALLEGATIONS

33. Intervenor Frank is a member of the Class, which has been certified by this Court. Final Judgment and Order, Dkt. 288 at 9. The Court has previously found that the Class satisfies each of the requirements of Rule 23.

34. Intervenor seeks equitable relief on behalf of the entire Class, on grounds generally applicable to the entire class, and requiring Objector-Appellants to provide full restitution to Intervenor and similarly-situated class members.

COUNT I
UNJUST ENRICHMENT

35. Intervenor re-alleges and incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

36. As a result of the common benefit provided by Plaintiffs and Intervenor on the Class, specifically the creation of a Class Action Settlement, Objector-Appellants received, appreciated, and accepted benefits beyond those defined by the settlement itself.

37. It would be unjust to allow Objectors-Appellants to retain these benefits at the expense of the Class.

38. As a result of Objector-Appellants unjust enrichment, Intervenor and other members of the Class are entitled to disgorgement equal to the pecuniary value received by Objector-Appellants for their settlements with Nominal Defendants.

COUNT II
QUANTUM MERUIT

39. Intervenor re-alleges and incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

40. As a result of the common benefit services provided by Plaintiffs and Intervenor on the Class, specifically the creation of a Class Action Settlement, Objector-Appellants received, appreciated, and accepted benefits beyond those defined by the settlement itself.

41. As a result of Objector-Appellants acceptance of valuable services provided by Plaintiffs and Intervenor, the Intervenor and other members of the Class are entitled to disgorgement equal to the pecuniary value received by Objector-Appellants for their settlements with Nominal Defendants.

COUNT III
INEQUITABLE CONDUCT

42. Intervenor re-alleges and incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

43. The Court retains jurisdiction to enforce the Settlement Agreement, and thus has authority to order equitable remedies pertaining to related misconduct, including objector blackmail which adds no value to the class.

44. The Court further has a fiduciary responsibility to absent class members.

45. Disgorgement is an equitable remedy that takes ill-gotten gains from a wrongdoer so that he does not profit from his misconduct.

46. As a result of seeking and accepting objector blackmail in dismissing their appeals, the Objector-Appellants received ill-gotten gains from Nominal Defendants by leveraging the underlying class action complaint, which was filed on behalf of all class members, including Intervenor.

47. Disgorgement of the objector blackmail would ensure that Objector-Appellants do not profit from their misconduct and deliver additional pecuniary relief to class members under the Settlement Agreement, including Intervenor.

PRAYER FOR RELIEF

WHEREFORE, Intervenor Frank, pursuant to the Settlement Agreement and the Court's own equitable powers, request that the Court:

- A. Require disclosure of the terms of the settlements by the Objector-Appellants as Rule 23(e) requires.
- B. Disgorge all pecuniary relief received by Objector-Appellants in exchange for the dismissal of their appeals on or about November 7, 2016, and deposit this money with the previously-appointed Settlement Administrator, Heffler Claims Group, for *pro rata* distribution to class member claimants under the Settlement Agreement;
- C. Enter a permanent injunction prohibiting Plaintiffs and Nominal Defendants from agreeing to dismiss any future appeal in this matter in exchange for individual payment;
- D. Award Intervenor such preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of further class injury during the pendency of this action, including, but not limited to, an order freezing assets of Objector-Appellants;

- E. Attorneys' fees for Intervenor's counsel, but only to the proportionate extent that Intervenor successfully improves class recovery; and
- F. Such other and further relief as the Court deems just and proper.

Dated: December 7, 2016

/s/ M.Frank Bednarz

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CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Objector Theodore H. Frank's Motion to Intervene and Disgorge Side-Payments via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing. Additionally, he caused to be served via First-Class mail a copy of this Objection 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
Peter N. Freiberg DENLEA & CARTON, LLP 2 Westchester Park Drive, Suite 410 White Plains, New York 10604	Kara L. McCall SIDLEY AUSTIN LLP One S. Dearborn Street Chicago, Illinois 60603

Dated: December 7, 2016

/s/ M. Frank Bednarz