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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

IN RE CONAGRA FOODS, INC.	Case No. CV 11-05379-CJC (AGRx) MDL No. 2291 **CLASS ACTION** DATE: October 7, 2019 TIME: 1:30 p.m. JUDGE: Hon. Cormac J. Carney

OBJECTOR M. TODD HENDERSON'S NOTICE OF MOTION, MOTION, AND MEMORANDUM TO STRIKE MOTION TO STRIKE DECLARATION OF MR. COLIN WEIR UNDER *DAUBERT*

NOTICE OF MOTION

TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 7, 2019, at 1:30 p.m. or as soon thereafter as this matter may be heard in Courtroom 7C of the United States District Court, Central District of California, Western Division, located at 350 W. 1st Street, Los Angeles, CA 90012 Objector M. Todd Henderson hereby moves, to strike the 2019 declarations of Colin B. Weir, (Dkts. 652-4 and 674-1), filed in support of Plaintiffs' Motion for Final Approval of the Proposed Class Action Settlement and Plaintiffs' Motion for an Award of Attorneys' Fees because these declarations fail to meet the standards for admissible expert opinions set forth in Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.* Henderson makes this motion following the Local Rule 7.3 conference of counsel , which took place on August 30, 2019 (call with plaintiffs' counsel) and on August 28, 2019 (call with counsel for Conagra Brands, Inc. ("Conagra")). Plaintiffs and Conagra oppose the motion.

Good cause exists for the granting of this motion, as set forth in the accompanying memorandum of points and authorities.

Dated: September 9, 2019

Respectfully submitted,

/s/ Theodore H. Frank

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MEMORANDUM OF POINTS AND AUTHORITIES

Conagra is willing to settle this case for about $8 million in cash—but class counsel is taking nearly 90% of that sum. A fair settlement would find a way to distribute $6 million of the $8 million to the class, instead of the upside-down allocation to class counsel. Class counsel justifies this impermissible disparity by asserting that the settlement's injunction is worth tens of millions of dollars to the class, even though it does not require defendant to do anything. Conagra sold the Wesson Oil product and brand to another company not bound by the settlement, so the injunction only becomes operative in the unlikely event that Conagra reacquires a business it strategically divested. Except for an implausible stipulation,[1] the only evidence of *any* class benefit from the injunction the parties provide is the declarations of Mr. Colin Weir. But Weir's testimony, while purporting to be expert testimony, is based on an *ipse dixit* and false assumption that the settlement controls the labelling; as such, it is inadmissible under *Daubert*. Even beyond the fatally flawed premise of Weir's testimony, his methodology unscientifically and impermissibly gerrymanders data to avoid risking falsification of his hypothesis. For these independent reasons, the Court should strike Weir's testimony.

[1] Without explanation, the parties stipulated that the injunction was worth $27 million. *See* Dkt. 652-1 ("Settlement"), ¶ 8.2.4. But stipulated settlement values are not what counts when evaluating fairness. "Cases are better decided on reality than on fiction." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 721 (6th Cir. 2013) (cleaned up). The benchmark must be what class members *actually* receive. *Allen v. Bedolla*, 787 F.3d 1218, 1224 n.4 (9th Cir. 2015) (zeroing in on the "economic reality"). Conagra's willingness to include "$27 million" injunctive relief and class counsel's willingness to accept it, are emblematic of the perverse class-action incentive problems that courts must guard against. *See, e.g.,* Erichson, *Aggregation as Disempowerment*, 92 NOTRE DAME L. REV. at 872-78 (discussing "spurious injunctive relief"). Conagra incurs no cost by agreeing to an injunction forbidding it from doing something in a hypothetical alternate universe, and which it already ceased voluntarily two years ago back when it owned Wesson Oil. The parties' stipulation to value the injunction at $27 million only confirms that injunctive relief value is "easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund." *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003).

If such stipulations could override reality, parties could stipulate their way into any unfair settlement. A defendant could agree to be enjoined to change the color of the CEO's desk, and then stipulate a similarly absurd value for the worthless injunction.

I. Rule 702 requires exclusion of scientifically unreliable expert testimony.

Federal Rule of Evidence 702 permits a witness to offer testimony in the form of an opinion if he or she is "qualified as an expert by knowledge, skill, experience, training, or education," only if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based upon sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert witness has reliably applied the principles and methods reliably to the facts of the case. Fed. R. Evid. 702.

This Court is the gatekeeper for expert testimony. *See, e.g., Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 597 (1993); *see also* Fed. R. Evid. 702 Advisory Committee Notes. The party proffering expert testimony bears the burden of proving, by a preponderance of the evidence, that the expert's testimony meets the requirements of Rule 702 and Daubert. *See Lust By & Through Lust v. Merrill Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

The standards for admissibility set forth in Rule 702 and *Daubert* apply at the class certification stage. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 (2011); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). Even if a witness is otherwise qualified as an expert, Rule 702 requires the district court to determine if the expert opinion would "assist the trier of fact." *See* Fed. R. Evid. 702.

Even a witness with unimpeachable expertise cannot offer opinion premised on nothing more than say-so. See *In re Brand Name Prescription Drugs Antitrust Litigation*, 1999 U.S. Dist. LEXIS 550 (N.D. Ill. Jan. 19, 1999) (excluding testimony of Nobel Prize-winning economist Robert Lucas when opinions not based on evidence), *aff'd on other grounds*, 186 F.3d 781 (7th Cir. 1999).

II. The court should strike Weir's testimony because it relies on a trivially false supposition.

Plaintiffs offer the declaration of Colin B. Weir to support their argument that the injunction provided by the settlement is worth tens of millions of dollars. But the entire

testimony hinges on a single false assumption: that the injunction in some way alters the packaging of Wesson Oils.

Because the Court can ascertain as a matter of law that the settlement's injunction does not require anything of any manufacturer, contrary testimony could not assist the Court and should be excluded.

A. In fact, the injunction has no effect, so could not provide value.

The Settlement binds only one party: Conagra Brands, Inc., which no longer manufactures or sells Wesson Oil branded products. *See* Dkt. 652-1 ("Settlement") at 1. "Conagra divested all interest in the Wesson Oil brand to a third party purchaser, with the sale being final prior to the signing of this Agreement." Settlement ¶ 3.3.1. The injunction only becomes operative if two conditions are true in the future: (1) "Conagra reacquire the Wesson Oil brand" and (2) the FDA and federal government do *not* "permit[] use of a 'natural' claim on a product containing oil derived from genetically engineered seed stock." *Id.* ¶ 3.3.1-2. No reason exists to believe Conagra ever reacquires Wesson Oil. Indeed, Conagra would have sold the business 18 months earlier in 2017 to J.M. Smucker, except the Federal Trade Commission raised antitrust concerns about the sale.[2] About divesting Wesson, Conagra's CEO explained "We continue to reshape our portfolio and focus our resources on priorities that support Conagra's business strategy and drive value creation for shareholders." *Id.* The sale is part of a broader business strategy Conagra began in 2015 when activist investors moved for the appointment of the current CEO, who then spun off low-margin private-label, ingredient, and frozen potato businesses, while acquiring several new brands like Frontera.[3] Wesson Oil does not fit into Conagra's current business plans, and Conagra passed it over for internal

[2] *See* Monica Watrous, *Conagra finds another buyer for its Wesson oil brand*, FOOD BUSINESS NEWS (Dec. 19, 2018), available online at: https://www.foodbusinessnews.net/articles/13053-conagra-finds-another-buyer-for-its-wesson-oil-brand.

[3] *Conagra offloads Wesson Oil as it works toward turn around*, OMAHA WORLD-HERALD (May 31, 2017), available online at: https://www.omaha.com/eedition/sunrise/articles/conagra-offloads-wesson-oil-as-it-works-toward-turn-around/article_e9bc799b-3ccf-5c19-baf5-9fab5f4b684e.html.

investment even before the failed 2017 sale. *Id.* Nothing in the record suggests that Conagra will ever reacquire Wesson Oil, and thus no reason exists that the injunction will ever become operative. The injunction is no more meaningful than an injunction against Ford Motor on the marketing of the Edsel.

B. Weir's testimony cannot supersede the plain text of the settlement.

Plaintiffs have offered two declarations by Weir in support of their settlement. The March 8, 2019 Declaration of Colin B. Weir ("Weir Decl."), Dkt. 652-4, purports to show that "the annual value of the injunctive relief provided by the settlement across the eleven-state class to be approximately $11,540,000 per year." ¶ 15. Weir calculates the figure this way:

- A hedonic regression allegedly isolates price premiums that consumers pay at retail for the "100% natural" label in the 11 class states. *Id.* ¶ 22.
- Weir multiplies the sales volume with share of sales in each state and the state price premium above to obtain supposed consumer savings attributable to removal of the GMO-free attribute of "100% natural." *Id.* ¶ 19.

But Weir builds all of this analysis on an assumption from plaintiffs' counsel, which he does not question:

> I have also been informed that the parties have reached a settlement that, among other relief, provides for the entry of an injunction ordering that Wesson Oils will not be advertised, marketed, or sold as "natural" unless the FDA issues express guidance or a regulation, or federal legislation is enacted, authorizing permitting use of a "natural" claim on a product containing processed oil derived from genetically engineered seed stock. As a result of that injunction, consumers will continue to receive the full economic benefit of the removal of the Natural Claim from all Wesson Oils labels for at least the foreseeable future, and possibly in perpetuity.

Weir Decl. (Dkt. 652-4) ¶ 12. Weir assumes both that the injunction prevents advertising as "natural" and that consumers receive benefit "[a]s a result of that injunction." Neither is true—the company Conagra sold Wesson Oil to (Richardson International) is free to do whatever it wants with the brand. The class has received any alleged past benefits from the label change since July 2017 without the help of the injunction, or the waiver of class claims.

Whatever the merits of Weir's hedonic regression, it is built on the demonstrably false assumption that Wesson Oil's packaging will be affected "as a result of the injunction." Because *nothing* results from the injunction, this Settlement value is in fact nil. At best, the injunction acts as a "dam holding back" a flood that does not exist. *Grok Lines v. Paschall Truck Lines*, 2015 WL 5544504, 2015 U.S. Dist. LEXIS 124812 (N.D. Ill. Sept. 18, 2015).

Plaintiffs extrapolate from Mr. Weir's tenuous testimony and suggest an alternative valuation for the Settlement's alleged value as $30,600,000. Plaintiffs calculate the supposed annual consumer price benefit from July 1, 2017 to February 25, 2020. *See* Kelston-Levitt Decl. (Dkt. 652) ¶ 16. But the hypothesized price drop of Wesson Oils—generously assuming it exists at all—is not a *Settlement* benefit. Consumers achieve the same dubious benefit whether the Court approves or rejects Settlement *in toto*.

Following the filing of Henderson's Objection (Dkt. 666), Weir filed a reply declaration that does not grapple with the main shortcoming flagged. *See* August 20, 2019 Declaration of Colin B. Weir ("Weir Reply"), Dkt. 675-1. The Objection made the illusory nature of the injunction central, but the Weir Reply instead quibbles with relatively fine points.

First, Weir responds at length to Henderson's argument that Weir failed to test his hypothesis by confirming whether prices have dropped for consumers by examining sales data since Wesson Oil packaging removed "100% natural" in July 2017. Weir Reply ¶¶ 9-20. Weir claims that other variables would confound raw or wholesale sales data. But that's exactly what regressions account for. Weir's facile response ignores what he testified in 2014—the time-series regressions are well known and economists can perform regressions to control for all the factors he now contends would confound such a comparison. "In a time series analysis, an economist compares data across time, including time periods where the value of the explanatory variable of interest varies. …Both cross-sectional and time series regressions use the same general regression methodology." Dkt. 367 ¶¶ 75-76. The vagaries of promotional sales and advertising no more confounds a before-and-after regression than they confound the static regression Weir used to derive the alleged price premiums.

Second, Weir scoffs at the Objection's footnote suggestion that a product with increasing sales and steady wholesale prices seems unlikely become cheaper at retail. Weir Reply ¶¶ 21-23. Weir observes that retailers can discount products well below normal to serve as promotions and even loss leaders. This is an odd comment at tension with Weir's regression, which controls for whether a oil was sold at a regular or promotional price. Dkt. 367 ¶ 102. Weir has theorized that both sorts of prices will be lower. To the extent that Weir suggests that retailers make Wesson Oil a loss leader more often than they did before July 2017, that's at least a counter-intuitive claim, and one that an economist could easily prove one way or another by examining later sales data.

Third, Weir argues against a strawman. Weir Reply ¶¶ 24-26. Objector readily agrees that the increasing sales of Wesson Oil make it unlikely demand for the product has dropped since the removal of the "100% natural label."

Fourth, Weir claims that the regression is not untested because "Questions about the reliability or explanatory power of these models can be answered by examining these [the R-squared statistic, the F-statistic, and T-statistic] and other measures of reliability." Weir Reply ¶ 29. Notably, these figures are absent from both Weir's Declaration and his Reply.

Finally, Weir says that his models have been accepted by other courts, including *Kumar v. Salov North American Corp*, where Theodore H. Frank objected to the purported settlement value. Weir Reply ¶¶ 34-35. But *Salov* concerned an injunction that required an olive oil manufacturer continuing to sell olive oil to refrain from using the allegedly unlawful label. In marked contrast, Conagra no longer manufactures or sells Wesson Oil; the argument Henderson makes was not at issue in *Kumar*. Weir wrote a 14-page reply "pertaining to the value of injunctive relief" (*id.* ¶ 8), but not once grapples with Henderson's primary objection: because the injunction requires nothing, it cannot be worth anything to anybody, let alone provide consideration for class members' release to make the fee-heavy settlement fair, reasonable, and adequate.

Weir's declarations do not hinge on any scientific methods or data—but rather are based on rhetoric, parroting a flatly false understanding of the injunction asserted by Plaintiffs'

counsel. The assumption of injunction value contradicts the law, is not based on a reliable methodology, is not capable of being tested by scientific methods, and cannot help the Court. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *see also Building Indus. Assoc. v. Washington State Building Code Council*, 683 F.3d 1144, 1154 (9th Cir. 2012) (excluding expert testimony where proffered expert "offered no data forming the basis for [his] assumptions or conclusions").

III. There are additional reasons to strike Weir's untested testimony beyond the testimony's fictional premise.

To be clear: because the entire Weir Declaration rests on the false premise that the do-nothing injunction has meaning, the Court need not delve deeply into the reliability of Weir's methodology. The declarations are built on a foundation of sand, so cannot stand no matter how solid the reasoning. Garbage in, garbage out.

But in fact, the declarations raise significant questions about the reliability of Weir's methodology, which provide an alternate ground for striking them, or at least for affording Objector Henderson discovery.

A. In violation of Rule 26(a)(2)(B)(vi), Weir does not disclose how much he is being compensated, nor whether that compensation is contingent on final approval of the settlement.

Weir does not disclose how he is being compensated for his declarations in support of the proposed settlement. This stands in striking contrast to Weir's declarations in support of certification filed in 2014, which disclosed his firm was being paid at $600/hour. *See* Dkt. 243, ¶ 7; Dkt. 285, ¶ 7; Dkt. 367, ¶ 17.

Given that Weir's prior reports included his compensation, plaintiffs' failure to comply with Rule 26(a)(2)(B)(vi) may not be a mere oversight.

B. Weir's failure to independently test whether *any* price premium was apparent after Conagra's July 2017 redesign is an inherently unscientific methodology.

The model Weir created in 2014 purported to find a price premium for "100% natural" using nationwide data from Nielson Research. Weir averred that this "preliminary model" suggested a price premium of 2.28%. Dkt. 367 ¶ 2. That is: Weir predicted that removal of the term would reduce retail prices paid by consumers by about 2.28%.

But the recent Weir declarations use a regression based on a different or additional dataset derived from the market research firm IRI, and the results of this new regression raise serious questions about the robustness of the method. The price premium is supposed to range between 2.22% and 18.82% in the 11 class states.[4] Weir Declaration ¶ 22. For example, Weir's current model predicts that the average price of Wesson Oils would drop by 18.82% in New York state because of removal of the "100% Natural" claim. While Weir protests that "before and after" analysis would be confounded by myriad other variables such as promotions, advertising, and competition (Weir Reply ¶ 9), the hypothesized premium in New York is so large surely these variables could be controlled to prove whether a price drop of this magnitude occurred. (Moreover, Weir's excuse is internally inconsistent. If the effects of other variables are so large, then Weir misdefined his hedonic regression by omitting these variables. And if Weir's regression did account for these variables before the label changes, then it could have accounted for the variables after the label changes. A reputable scientific regression can't have it both ways.) Weir himself swore in 2014 that hedonic regression can be conducted on a "before-and-after" basis when the variable of interest changes—he simply did not recommend, presumably because in 2014 Wesson Oil's label had not yet changed. Dkt. 367, ¶ 75.

[4] In fact, Weir testifies that data from two of the states is not statistically significant, so substitutes other numbers for them—South Dakota and Texas. Weir Declaration ¶ 22. That the small state of South Dakota would have insufficient data is not too surprising, but the supposed lack of Texas data is inexplicable because Texas is the second largest state in the union by population (and presumably, cooking oil sales). Unless there are undisclosed limitations with the underlying IRI data, Objector suspects that the raw, "insignificant" results from Texas do not support a price premium hypothesis.

Testability is hallmark of science and expert testimony. Conagra's label change afford Weir a "natural experiment," where circumstances have changed that would allow him to independently test his hypothesis of a price premium associated with "100% natural." If, after controlling for variables, a price decrease occurred following the label change in July 2017, an economist could directly confirm the predicted price premium. But plaintiffs fail to use this better evidence. Perhaps plaintiffs worry that Weir's hypothesis will be falsified (or perhaps a consulting expert has already confirmed that Weir's hypothesis *was* falsified), but "conclusions that are not falsifiable aren't worth much to either science or the judiciary." *Zenith Elecs. Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416, 419 (7th Cir. 2005). The Court should draw the appropriate negative inference from Weir refusing to use the most scientifically relevant data to prove his claim.

Because Weir's regression methodology is neither clearly explained nor independently tested as the scientific method requires, the court should exclude it for this independent reason.

C. Lack of any methodology whatsoever for constructing conjoint survey.

To win certification, Judge Marrow required plaintiffs to isolate the supposed premium value of "100% natural" as it pertained to their case. *In re Conagra Foods, Inc.*, 302 F.R.D. 537, 579 (C.D. Cal. 2014) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013)). In other words, plaintiffs could not simply assume that damages correspond to the entire alleged price premium, but only some portion of that corresponding to the false "non-GMO" meaning of "100% natural" as opposed to other meanings such as "no preservatives" and "no artificial colors or flavors." Defendants argued that this was an impossible task. For example, consumer surveys could establish that consumers find some feature is "important," but not how much consumers would be willing to pay for those features.

Plaintiffs' proposed solution was to conduct a conjoint analysis, which was described by Dr. Elizabeth Howlett in 2014, but never conducted. Dkt. 368 (Howlett Decl.) ¶¶ 93-144. Basically, the survey would have asked respondents which product they would buy if they were interested in buying "100% natural" oil (for example, to buy GMO-free *or* preservative-free).

Id. ¶ 132. By aggregating responses to these prompts, Dr. Howlett argued that the relative value of the "100% natural" label corresponding to GMO-free could be reckoned. *Id.* ¶¶ 135-39. Defendants objected to this proposed methodology, in part because they believed the list of meanings for "100% natural" was too limited, and Weir claimed in rebuttal that these objections were immaterial because Dr. Howlett's proposed study would first conduct focus groups in several states to ensure all of the possible perceived attributes of "100% natural" were appropriately included in the survey. Dkt. 395 (Weir 2014 rebuttal) ¶ 58.

Turning to the 2019 declarations, none of this appears to have occurred. A survey of unclear methodology approximates the value that consumers in these 11 states place on the "non-GMO" perceived attribute of "100% natural," which turns out to be almost exactly 27% in every state. Weir Decl. ¶ 31. In full, the Weir Declaration says this about the methodology:

> To address this requirement, my firm oversaw the design, execution, and analysis of a conjoint survey to measure the relative value that consumers place on the GMO-free meaning of the Natural Claim on the Wesson Products as compared to other meanings of the Natural Claim. The survey was conducted among respondents in the eleven Class States.

Weir Decl. ¶ 30.

How many people took the survey? What attributes did it include? What was the wording of the questions? What filtering questions were performed? The Weir Declaration says nothing about these topics—the next paragraph simply lists the purported results.

And the results raise even more questions that would likely be profitably tested by discovery. (Class counsel ceased to seek Henderson's deposition after counsel offered to make Henderson available in exchange for a deposition of Weir.) The purported results indicated that the GMO-free attribute ranges between 25.98% and 28.42% in each of the 11 subclass states, a clustering so tight it beggars belief. If seems unlikely that people across the country would have such homogeneous views about label claims, and even if they did one would expect sampling variance greater than 2.44% across 11 individual state surveys. Even very large political polls have greater standard sampling errors than this.

The lack of disclosed methodology independently disqualifies Weir's testimony.

CONCLUSION

Because experts must ground their opinions in more than the mere say-so of a proponent, Weir's testimony fails to meet the reliability standard of Federal Rule of Evidence 702 and *Daubert*. The injunction does not require anything of Conagra, so any regression or conjoint analysis built on a contrary assumption is fatally flawed. Furthermore, Weir's methodology is impermissibly designed to avoid falsifiability of his conclusions by failing to test the effect of the 2017 label change on the prices consumers paid. The Court must therefore strike Weir's 2019 declarations in their entirety.

Dated: September 9, 2019

Respectfully submitted,

/s/ Theodore H. Frank

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PROOF OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Notice of Motion, Motion and Memorandum to Strike Declarations of Colin B. Weir or Alternatively Permit Discovery, using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

DATED this 9th day of September, 2019.

/s/ Theodore H. Frank
Theodore H. Frank