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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) Date: February 28, 2022 Time: 1:30 p.m. Court: 9 Judge: Hon. Cormac J. Carney MDL No. 2291 **CLASS ACTION**

Objector Henderson's Opposition to Plaintiffs' Motion to Reconsider

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INTRODUCTION

This brief will be short. The Court got it right the first time, and plaintiffs' motion is procedurally and substantively improper. Plaintiffs' motion to reconsider is premised (Dkt. 784 at 2) on a putative "manifest showing of a failure to consider material facts presented to the Court before such decision." They ask the Court to approve the settlement by correcting the disproportion with a reduction in attorneys' fees—which they then reserve the right to appeal to the Ninth Circuit, possibly recreating the original unfairness they purport can be corrected with a fee reduction. But it was not the Court that "fail[ed]" to do anything in its settlement rejection: plaintiffs *never argued* for this relief in the alternative. Dkt. 742; Dkt. 769-1. Plaintiffs instead argued that the Court could disregard disproportion and approve the settlement and fee request in full, disclaiming any responsibility for the problematic provisions of the settlement and relying upon the actions of a mediator who did not consider *Bluetooth* or Rule 23(e) requirements. *Id.*

Having chosen to play chicken with an all-or-nothing strategy and to refuse to acknowledge the legal substance of Henderson's objection and Ninth Circuit's ruling,[1] and having lost, plaintiffs now ask the Court to consider a different argument for settlement approval in the alternative. This is wrong. A motion for reconsideration "may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Softketeers, Inc. v. Regal W. Corp.*, No. 19-00519, 2021 U.S. Dist. LEXIS 54717, *7 (C.D. Cal. Feb. 10, 2021) (quoting *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). Motions for reconsideration are not to give parties a "second bite at the apple" if they misjudge the inclinations of the Court to follow the law of the case. *Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001). Worse, plaintiffs' brief show that they are not just asking for a second bite, but, if successful here, will seek a third bite to appeal a

[1] *E.g.*, *compare* Dkt. 742 at 16 (asserting with *chutzpah* that "the 'clear sailing' and 'kicker' provisions do not violate *Bluetooth*") *with* Dkt. 779 at 16-19 (yes, it does, discussing their unfairness and inappropriateness at length) *with* Dkt. 784 (ignoring these grounds for settlement rejection entirely).

proportional Rule 23(h) fee award and try to reestablish the original unfairness and disproportionality with a different appellate panel. Dkt. 784 at 8.

Other arguments plaintiffs make simply rehash misleading rhetorical and legal points they made in their original brief. Plaintiffs repeat the false claim (*compare* Dkt. 784 at 2, 3 *with* Dkt. 742 at 5) that the under-$1 million figure is "more" than the class could get with a successful trial, *still* ignoring the Rule 23(e)(2)(C) requirement that settlements awards be judged by their "effectiveness" and not their fictional hypothetical potential. "The *class* has not been fully compensated, though a tiny percentage of class members may be. 99% of the class received nothing." Dkt. 759 at 16. Again, this is improper in a motion to reconsider. "No motion for reconsideration may in any manner repeat any oral or written argument made in support of … the original motion." C.D. Cal. Loc. R. 7-18; *Roy v. County of Los Angeles*, No. 12-09012, 2018 U.S. Dist. LEXIS 122432 *15 (C.D. Cal. July 11, 2018) (Carney, J.).

Even if one could get past the procedural bars to reconsideration, plaintiffs are wrong on the merits, because they do not even mention the kicker, much less its unfairness and its role in the Court's rejection of the Settlement. This Settlement demonstrates that Conagra was willing to pay at least $7.8 million to make this case go away. Even to the extent that this is a fair number, the kicker makes it impossible for this Court to give the class the relief *that defendant is willing to pay*. If the Court instead reduces the fee, it cannot pass that money on to the class; that money reverts to the defendant. The parties have prevented the Court from returning the fees and class relief to their natural proportionate equilibrium. "[T]here is no plausible reason why the class should not benefit from the spillover of excessive fees." Dkt. 779 at 18 (*quoting Briseño v. Henderson*, 998 F.3d 1014, 1027 (9th Cir. 2021)).

And finally, plaintiffs' motion to reconsider ignores the alternative grounds the Court gave for disapproving the settlement. As the Court's opinion discussed (Dkt. 779 at 15-16), class counsel "bargained away a benefit to the class in exchange for their own interests." *Bluetooth*, 654 F.3d at 938.

I. The motion fails on multiple independent procedural grounds.

Henderson is somewhat prejudiced in his response because the plaintiffs violated Loc. R. 7-20 by failing to provide a proposed order. The Court has the discretion to reject the motion on this ground alone. Loc. R. 7-12.

As an initial matter, the Rule 59(e) relief plaintiffs request is unavailable: the rule applies only to "judgments" and the Court's ruling was interlocutory. *Ball v. Idaho State Bd. of Corrections*, 869 F.2d 461, 467 (9th Cir. 1989).[2] Loc. R. 7-18 provides essentially the same mechanism for relief—but on more limited grounds than Rule 59, which itself is "an 'extraordinary remedy,' available only in limited circumstances." *Rishor v. Ferguson*, 822 F.3d 482, 491-2 (9th Cir. 2016) (cleaned up); *accord 389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) ("highly unusual circumstances"). But the motion still fails procedurally.

Under Loc. R. 7-18,

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in

[2] Rule 59(e)(3) relief was substantively unavailable anyway. "Mere doubts or disagreement about the wisdom of a prior decision" is insufficient to warrant granting a Rule 59(e) motion. *Campion v. Old Repub. Home Protection Co., Inc.*, 2011 U.S. Dist. LEXIS 54104, 2011 WL 1935967 at *1 (quoting *Hopwood v. Texas*, 236 F.3d 256, 273 (5th Cir. 2000)). For a decision to be considered "clearly erroneous" it must be "more than just maybe or probably wrong; it must be dead wrong." *Id.* A "movant must demonstrate a 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" *Id.* (quoting *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)). *See also Garcia v. Biter*, 195 F. Supp. 3d 1131, 1133 (E.D. Cal. 2016).

Plaintiffs speculate that the class might receive nothing if the Court rejects the settlement and Conagra prevails instead of renegotiates. But that would not be "manifest injustice": Conagra would prevail only if they were legally in the right and the class was entitled to nothing.

> any manner repeat any oral or written argument made in support of or in opposition to the original motion.

Though plaintiffs assert Loc. R. 7-18(c)'s "manifest showing of a failure" applies (Dkt. 784 at 2), the three "failures" they assert are no such thing.

- "Relief" (Dkt. 784 at 3). Plaintiffs made this argument repeatedly in their briefing and at the fairness hearing. *E.g.*, Dkt. 742 at 9, 15-16, 21. The Court expressly considered "the relief provided for the class" (Dkt. 779 at 11), which is the relevant metric (*Briseño*, 998 F.3d at 1024), despite plaintiffs trying to muddy the waters by looking solely at the relief to the claiming class members in what the Court recognized was a throttled claims process. Dkt. 779 at 14-15.[3]
- Likelihood of success if settlement rejected (Dkt. 784 at 3). Plaintiffs made this argument repeatedly in their briefing and at the fairness hearing. *E.g.*, Dkt. 742 at 21-22. It's expressly a question under Rule 23(e)(2)(C)(i). The Court correctly stated it need not adjudicate the Rule 23(e)(2)(C)(i) question because the settlement flunked Rule 23(e)(2)(C)(iii). Dkt. 779 at 19 n.3. Plaintiffs cite no law to the contrary, and *Briseño* expressly rejected the suggestion that satisfying one clause of Rule 23(e)(2)(C) allowed a court to ignore the other three requirements of the rule.

[3] Plaintiffs once again misrepresent the record by falsely asserting "Notably, neither the Court nor Objector M. Todd Henderson took issue with the settlement terms related to class relief alone." Again, "relief to a single class member" is not "class relief." The settlement terms related to class relief were objectionably disproportionate because they paid the class a small fraction of what class counsel accepted for itself, and left 99% of the class uncompensated. That's why the Court rejected the settlement.

Even under plaintiffs' slanted characterization of the legal question, their argument fails. The Ninth Circuit rejected appellees' self-serving argument that Conagra would not agree to a "windfall" (Dkt. 784 at 2) and required a disproportionate settlement. *Briseño*, 998 F.3d at 1025. Moreover, direct distribution could have solved both the "windfall" and disproportion problem by increasing the number of class members who received low sums, just as it has in multiple other settlements. Dkt. 759 at 37-38. But then class counsel would not have been able to obtain nearly $7 million in fees from Conagra, which was concerned about the "bottom line." *Briseño*, 998 F.3d at 1025.

998 F.3d at 1030. There was no "manifest failure" here: the Rule 23(e)(2)(C)(i) inquiry is irrelevant to the failure to satisfy Rule 23(e)(2)(C)(iii) that led the Court to reject the settlement.

- The possibility of a reduced fee award to create proportionality (Dkt. 784 at 3). Plaintiffs never argued for approving the settlement with a reduced fee; they argued (and continue to argue) that there is no requirement for proportionality under Rule 23(e). Plaintiffs cannot use a motion to reconsider to complain that the Court did not address an argument they did not raise. *Kona Enterprise*, 229 F.3d at 890; *Softketeers*, 2013 U.S. Dist. LEXIS 202106 at *8-9; *see also Am. Ironworks & Erectors Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 899 (9th Cir. 2001). In any event, the Court *did* consider the possibility of a reduced fee award—and found that the "kicker" clause required rejection of the settlement because it would result in an unacceptable reversion to Conagra. Dkt. 779 at 16-19.

Plaintiffs' argument retreads have no place in a motion for reconsideration. *Roy v. County of Los Angeles*, No. 12-09012, 2018 U.S. Dist. LEXIS 122432 *15 (C.D. Cal. July 11, 2018) (Carney, J.) ("No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion." (quoting Loc. R. 7-18(c))). Further, the lack of discussion of the cited facts and arguments does not indicate the Court's analysis failed to consider them. "[T]he Court need not explicitly discuss each and every argument in any order. The Court's refusal to discuss an argument constitutes an implicit rejection of those arguments." *Id.* at *15-16 (citations omitted).

In this case, however, the Court considered every relevant element plaintiffs claim it did not consider. In its original order, the Court considered all the relevant facts relating to the settlement approval request. Plaintiffs have not presented any "basis to disturb its finding now." *Alcon Entm't, LLC v. Autos. Peugeot*, 19-00245, 2020 U.S. Dist. LEXIS 249207, *8 (C.D. Cal. Jan. 16, 2020) (Carney, J.). The motion is procedurally improper and there are no grounds to reconsider under Loc. R. 7-18(c).

II. Plaintiffs fail to refute the grounds for the Court's original decision, which was correct.

Plaintiffs continue to make the category error, rejected by the Ninth Circuit, of treating settlement relief as independent of the fee question. Dkt. 759 at 17-18. But this settlement is a *compromise*, and "in essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal." *Johnson v. Comerica*, 83 F.3d 241, 246 (8th Cir. 1996); *accord In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 948-49 (9th Cir. 2011).

Even if one could get past the procedural bars to reconsideration, and consider plaintiffs' forfeited argument for reducing their fees and approving the settlement, plaintiffs never address two of the independent problems that caused the Court to reject the settlement.

A. Plaintiffs do not challenge this Court's finding that the Settlement flunks *Bluetooth*.

Plaintiffs never address the problem of the kicker that caused the Court to reject the settlement:

> "Unless the district court is able to conclude that in this particular case, a kicker provision is in the class' best interest as part of the settlement package, the kicker makes it less likely that the settlement can be approved if the district court determines the clear sailing provision authorizes unreasonably high attorneys' fees."

Dkt. 779 at 17 (*quoting Bluetooth*). As Henderson noted,

> Plaintiffs provide no explanation of how the kicker benefits the class, rather than themselves. Plaintiffs provide no explanation why they did not insist on including a term in the settlement for the reversion to go to the class, instead of Conagra. (Indeed, plaintiffs contend that any such explanation is "privileged" and beyond discovery.)

Dkt. 759 at 1. Thus, the Court found that there "is no indication that the reverter provision here is in the class's best interest." Dkt. 779 at 18. This, in conjunction with the clear-sailing agreement and disproportion, doomed the settlement. *Id.* at 18-19.

Plaintiffs *still* fail to identify *any* grounds for the reverter/kicker, much less grounds that the kicker benefits the class at all, much less that the kicker "is in the class' best interest." Indeed, the words "kicker" or "reverter" are absent from their motion. So even if the Court is willing to ignore the prerequisites of Loc. R. 7-18 and reconsider its order, it has no reason not to reach its original conclusion: "there is no plausible reason why the class should not benefit from the spillover of excessive fees." Dkt. 779 at 18 (*quoting Briseño*, 998 F.3d at 1027).

Indeed, plaintiffs themselves demonstrate that the kicker was meant to benefit themselves rather than the class and shield their illegitimately high fees from scrutiny, because in 2019 they *expressly argued to the Court that the kicker prevented Henderson from arguing that the fee was too high*. Dkt. 672 at 9-10. The Settlement did not fall within any of the appellate exceptions to *Bluetooth*, and must fall. Dkt. 759 at 15-17.

B. Plaintiffs do not dispute that the Settlement flunks *Allison* or the Court's finding of convincing indications of "excessive self-interest."

The Court found:

> Withholding settlement approval "is warranted when the settlement terms contain convincing indications that the class representative and class counsel's self-interest won out over the class's interest." [*Kim v. Allison*, 8 F.4th 1170, 1178 (9th Cir. 2021)]. Here, the likely low claims rate, class counsel's incentive to make sure claims did not get too high, and the worthless injunction—plus the evidence that the parties knew the claims rate would be extremely low and class counsel's rejection of a more proportional settlement offer—strongly indicate that the disproportionate allocation between class members and counsel reflects excessive self-interest. *See Bluetooth*, 654 F.3d at 947; *Allison*, 8 F.4th at 1178.

Dkt. 779 at 16. The motion to reconsider does not address this ground for settlement rejection, and does not mention *Allison*. Game over—even if plaintiffs survive the procedural hurdles barring their motion to reconsider.

III. Henderson renews his other objections to the settlement.

The Court did not need to reach many of Henderson's arguments against settlement approval and about Rule 23(e)(2)(C) after resolving Rule 23(e)(2)(C)(iii) against the settling

parties. If the Court does reconsider, Henderson renews those objections as both independent and supporting grounds for settlement rejection. Dkt. 759.

Plaintiffs identify cases where other district courts approved settlements and Henderson's counsel chose not to appeal. Of course, a non-profit's decision in the face of limited resources not to appeal in a different case with a different procedural posture with a different client several years ago says nothing about whether Henderson would appeal settlement approval here. This is especially true given that plaintiffs have signaled that they would appeal the court's Rule 23(h) award, and the kicker would deprive Henderson of the standing to oppose what would become an *ex parte* appeal of fees unless Henderson also appeals settlement approval—which is why the *Bluetooth* violation remains dispositive, as the Court already found and plaintiffs do not contest. *Cf. Briseño*, 998 F.3d at 1027 & n.4. Henderson reserves all rights.

IV. Any reconsideration should require the parties to disclose actual, not just preliminary, claims figures.

The Settlement provides the class much less than $993,919. That figure is the amount calculated by the settlement administrator *before* "duplications" and "fraud checks." Fairness Hearing Tr. 13-14 (Oct. 7, 2019). In the *In re Southwest Airlines Voucher Litigation* case where Mr. Levitt was class representative, the settlement administrator's number represented at the fairness hearing was more than *three times as high* as the number of claims accepted for compensation. 898 F.3d 740, 743 (7th Cir. 2018). The parties have not disclosed the settlement administrator's final calculations yet. Henderson objects to crediting even the pathetic $993,919 number, which is exaggerated and misleading.

If the Court decides to ignore its previous ruling about the kicker, any Rule 23(h) award must be proportional to the *actual* claims figure. For example, if the actual total of claims the administrator plans on paying ends up being $650,000 (a plausible reduction from the preliminary number); the total Rule 23(h) award should not exceed $325,000.

V. If the Court reconsiders, the "appropriate" fee is zero.

Plaintiffs request, but do not suggest a number for, an "appropriate" fee. The Court found, and plaintiffs do not contest, there were convincing indications of "excessive self-interest." Dkt. 779 at 16-19. In such an instance where class counsel has breached its fiduciary duty to the class, the Court has the discretion to reduce even a proportionate fee to zero. The Ninth Circuit has upheld such a reduction even where a conflict of interest was immaterial to class recovery. *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012). Here, the "excessive self-interest" has cost the class millions of dollars. Dkt. 779 at 15-16. Zero is an appropriate Rule 23(h) award, only a few hundred thousand less than a proportional fee.

VI. There is no basis for a service award without an approved settlement.

Because plaintiffs do not have a proposed order, it is unclear whether their request (Dkt. 784 at 9 n. 4) for an incentive award to named plaintiffs is contingent upon reconsidering settlement approval or is an independent request for reconsideration. Henderson (and, he presumes, Conagra) objects to any service award in the absence of an approved settlement, and plaintiffs do not identify any authority for such an award.

CONCLUSION

The Court was correct. Plaintiffs' motion is procedurally improper, and fails to address multiple grounds for the Court's settlement rejection. The Court should deny the motion.

Dated: February 7, 2022

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 Objection using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

DATED this 7th day of February, 2022.

/s/ Theodore H. Frank
Theodore H. Frank