IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: ALL-CLAD METALCRAFTERS, LLC, COOKWARE MARKETING AND SALES PRACTICES LITIGATION This Document Relates to All Actions	MDL No. 2988 Master Case No. 2:21-mc-491-NR ELECTRONICALLY FILED

REPLY IN SUPPORT OF OBJECTOR JOHN MICHAEL ANDREN'S MOTION FOR RECONSIDERATION (Dkt. 108)

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In 2022, Andren objected to the settlement, predicting that class counsel's representations about the value of the claims-made settlement and "the effectiveness of [the] proposed method of distributing relief to the class" were inaccurate. Dkt. 86 at 10-15 (quoting Fed. R. Civ. P. 23(e)(2)(C)). This Court approved the settlement over Andren's objection because it believed that withholding $500,000 of attorneys' fees from class counsel made the objection "moot" because now class counsel was incentivized to ensure that the $4 million claims fund would be exhausted. Dkt. 103 at 19, 25.

Just over a year later, on February 26, class counsel sought the release of the withheld $503,000—but hid the effectiveness of the claims process, and the effectiveness of their putative engagement, from the Court. Dkt. 106. Notably, there is no assertion in the "Joint Notice" that the $4 million claims fund was exhausted. The negative pregnant—after the parties represented to the Court that Andren's objection was "fictitious" (Dkt. 94 at 7-9)—spoke volumes. And the parties made no effort to seek Andren's position. But before Andren could respond to the parties' lack of candor, on February 27, the Court granted the requested relief. Dkt. 107. Andren quickly moved for reconsideration of that February 27 order the same day. Dkt. 108.

Though the motion and proposed order expressly limited themselves to the February 27 order, the parties' joint response pretends that Andren is trying to undo the settlement approval. Dkt. 121 at 6. The Court should not fall for the red herring. (For example, because Andren filed the motion to reconsider the February 27 order *on February 27*, the claim that his motion is "untimely" is facially frivolous.) Andren simply moves to have a full and fair opportunity to oppose the unnoticed motion to release the withheld attorneys' fees. Dkt. 108-3 (proposed order). And, as discussed below, the parties' own admissions show that that $503,000 should not be released to class counsel.

Now the parties finally (impliedly) admit on March 22 that Andren's objection was right all along. Dkt. 121-1, Exh. C ¶ 5. Relying on the parties' representation that there were 101,825 A1 claims (Dkt. 103 at 12), that another 35,000 could be expected (*id.* at 13), and that at least two thirds of claims

would be approved (*id.* at 19), the Court overruled Andren's objection. We now learn, however, that there will only be about *six thousand* $75 claims paid.[1]

And not only do they admit this, they admit that they *knew last July* that their representations to the Court at the fairness hearing were erroneous. Dkt. 121-1 ¶ 23. Not only did the parties hide this in their Joint Notice to the Court, but that the defendant is demanding that the Court release the $503,000 to class counsel shows that Andren's objections about the clear sailing agreement and segregated fund with reversion to the defendant were also true: class counsel "urge[d] a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." Dkt. 86 at 23 (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524-25 (1st Cir. 1991)).

The settlement administrator rejected over 95% of the A1 claims! And the parties knew this in July after representing to the Court that a 50% rejection rate was "the most conservative" projection (Transcript, Dkt. 105 at 16:21-17:6) and waited over eight months to disclose that this wasn't true! And the settling parties still haven't formally corrected the misstatement, but bury it as an aside on page 45 of a 47-page filing. Dkt. 121-1.

Still, the parties claim to the Court that this does not matter, and Andren's motion to reconsider should be denied. But the parties' behavior shows that they know this is not true. Pennsylvania ethics rules forbid the failure "to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Pa. R. Prof. Cond. 3.3(a)(1). The settling parties nevertheless failed to make the correction—not just in July, when they learned that the statement was false, but on February 26, when they filed the Joint Notice.

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[1] Dkt. 121-1, Exh. C ¶ 7 ("Angeion has issued over $450,000 in $75 payments."). That the declaration describes the figure as "over $450,000" is a very telling negative pregnant that the amount distributed from the claims fund is not "over $500,000." *See Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can only lead to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character."). And 450,000 divided by 75 is 6,000.

Rule 23(e)(2)(C)(ii) speaks of *effectiveness*—an objective measure—but the settling parties ask for the Court to release $503,000 because class counsel was supposedly subjectively "engaged" and "diligent." Dkt. 121. That's not enough. "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig,* 716 F.3d 1173, 1182 (9th Cir. 2013). The Court specifically tied its deferral to a review of the outcome of the claims administration. Final Approval Opinion at 18. The parties cite other language in the opinion, but don't try to explain away the fact that the deferral was meant to "address[]" Andren's objection to the claims rate. Final Approval Opinion at 25. Andren had suggested this as an alternative in his objection, so that the Court could properly calibrate and tie fees to the "actual benefit conferred on the class." Dkt. 86 at 20. And the Third Circuit too suggests that point of deferring a portion of the fee award is to "overcome the speculative nature of the tentative and imprecise settlement valuations." *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 334 (3d Cir. 1998) (cited by Final Approval Opinion at 25). The settling parties don't mention *Prudential* in opposing Andren's motion.

Even on the parties' interpretation of the holdback order—that it serves merely to mark the "completion of the [administration] process" (Dkt. 121 at 1) and nothing more, class counsel would not be entitled to release of the fees now because the process is not complete. Dkt 106-2 ¶ 9 ("claims process is substantially complete" and there are "less than 300 claims to move to completion."). The parties filed the Joint Notice before the completion of the claims process but exactly nine days after the Rule 60(c)(1) deadline for reopening the final judgment on Rule 60(b)(1), (2), or (3) grounds. Combined with the parties' awareness of this fact (Dkt. 121 at 7), it raises suspicion that the parties' action here has been calculated to prevent the Court from exercising its fiduciary duty to class members. *But see* Fed. R. Civ. P. 60(b)(6) (allowing reopening after the one-year period).

The inequitable lack of candor and the degree to which the settling parties' false statements to this Court about the effectiveness of the claims process establish that the Court should not release the $503,000 to class counsel and should instead find a way to get that money to the class. As Andren feared, the parties seem to have delayed the disclosure of their misstatement to the Court to evade the

possibility of a Rule 60(b)(3) motion for misrepresentation or fraud on the court. But the Court still has the authority of Rule 60(b)(6) to reopen the case for the limited purpose of correcting the inequities before it. If the Court wishes, Andren can make a formal motion for equitable redistribution to the class, but the Court has the authority to act in equity *sua sponte*. *See* Fed. R. Civ. P. 23(d) (authorizing courts to issue orders protecting class members). An abuse of this Court's processes—such as exaggerating the effectiveness of the claims process to improperly win approval of a settlement, and then breaching the duty of candor to disclose the incorrect factual claim promptly—enables the Court to craft an equitable remedy. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). Indeed, courts have affirmed decisions to *zero out fees entirely* for a considerably less material breaches of candor that did not implicate settlement fairness. *Rodriguez v. Disner*, 688 F.3d 645, 688 (9th Cir. 2012); *Young v. Smith*, 905 F.3d 229, 239 (3d Cir. 2018) (affirming outright denial of fees and additional imposition of sanctions with "no difficulty").

Class counsel acted against the class's interests when they failed to disclose to the Court in July that Andren's objection was correct and that the settlement disproportionately benefited the attorneys at the expense of the class. Even worse, they sought to hide the ball from the class and the Court even on February 26, and, even now continue to insist on receiving an extra $503,000 in fees—when the settling parties and settlement administrator haven't even demonstrated that the $1.4 million released to class counsel so far is remotely proportional to class benefit. *Cf.* Dkt. 121-1, Exh. C ¶ 7 ("Angeion has issued over $450,000 in $75 payments"); *id.* ¶ 8 (27,000 discount codes, with no evidence of redemption rates except same empty speculation earlier made by settling parties at fairness hearing). Disgorgement is a well-established cure to an attorney's breach of fiduciary duty, "focused on regulating the behavior of the fiduciary." *Huber v. Taylor*, 469 F.3d 67, 80 (3d Cir. 2006); *see also Estakhrian v. Obenstine*, 2019 WL 3035119, 2019 U.S. Dist. LEXIS 50828 (C.D. Cal. Mar. 26, 2019).

The parties attempt to retroactively justify the settlement by mentioning the additional costs All-Clad bears to administer the settlement. Dkt. 121-1 at 45.[2] Of course, that wasn't the rationale for

[2] The Dalton Declaration redacts information about the aggregate value of coupons distributed under

settlement approval over a year ago. Nor could it be: the value of a settlement is the benefit to the class, not "how much money a company spends on purported benefits, but the value of those benefits to the class." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011) (quoting *In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009)); *accord O'Keefe v. Mercedes-Benz USA*, L.L.C., 214 F.R.D. 266, 304-05 (E.D. Pa. 2003); *Charles v. Goodyear Tire & Rubber Co.*, 976 F. Supp. 321, 325 (D.N.J. 1997); *see also* Dkt. 86 at 20 (citing, *inter alia*, *In re Baby Products Antitrust Litigation*, 708 F.3d 163, 178 (3d Cir. 2013)). If settlement administrator Angeion had purchased a $7 million 30-second Super Bowl ad at All-Clad's expense, it would only be a benefit to the class as much as that extra notice increased the payout rate.

In his motion to reconsider, Andren documented the difficulties of his claims process. Dkt. 108-2. He did this to demonstrate the truth of his original objection: the benefit to the class was less than the $4 million promised to this Court. The settling parties bristle at the problems Andren documented, but they've already conceded the fundamental point. What's important to the issues facing this Court is that Andren's objection was correct, and the settlement did not provide $4 million of benefit to the class. *Why* the settlement did not pay the class $4 million is of interest only to future settlement administrators and actuaries selling settlement insurance: Rule 23(e)(2)(C) asks only about the objective effectiveness of the claims process, not about the subjective frictions involved and whether an internet comment thread complaining about the claims process is probative. But, to the extent the Court cares about these collateral issues, Andren is correct—and the rejection rate of over 90% of the A1 claims demonstrates it. *See* Supplemental Third Declaration of John Andren (filed contemporaneously).[3]

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the settlement. Dkt. 121-1 at 45. This is not the "internal pricing and costs" information that this Court held could be sealed. Dkt. 119 at 2.

[3] Moreover, it is the settling parties' papers, not Andren's declaration, that contain "significant inaccuracies." Andren knows that he never received his shipping label until November 20, 2023. That the parties may have intended to send it earlier and failed to would be consonant with the other errors afflicting this claims process. *See*, *e.g., Id.* ¶¶8-9 (highlighting misinformation about subject line of email containing shipping label).

The parties' belated admissions demonstrate that the relief Andren requests is justified. The Court should (1) grant the motion to reconsider; (2) deny the release of the $503,025.43 in held back attorneys' fees; (3) require the parties to file an actual accounting of claims numbers, submitted and paid out, broken down by the type of claim at the completion of the claims process; and (4) consider whether there are any viable methods to use the $500,000 excess in negotiated attorneys' fees to benefit the class and avoid enriching All-Clad, especially given All-Clad's apparently erroneous representations about the ease of the claims process. The Court may wish to consider other sanctions. *Cf. Ark. Tchr. Retirement Sys. v. State St. Corp.*, 25 F.4th 55 (1st Cir. 2022) (affirming sanctions issued after district court *sua sponte* reopened a case after learning of misstatements in granted Rule 23(h) motion); *id.* at 65 (noting "elevated duty of candor" in unopposed motion, including avoiding "half-truths that deceived through their incompleteness"). "[I]t is absolutely imperative that attorneys submit honest and accurate fee petitions." *Young*, 905 F.3d at 235.

In any event, it remains true that the simple denial of the fee release is a half solution because it rewards All-Clad, who similarly failed to disclose the claims rate to the Court. Recent Third Circuit law suggests that the full solution is the elimination of the fee reversion. *In re Wawa, Inc. Data Sec. Litig.*, 85 F.4th 712, 726-27 (3d Cir. 2023). It is not too late for All-Clad and Class Counsel to renounce their interest in the excess fees, and use that sum of money to benefit the class. It would be a "welcome change." *Id.*

Dated: March 29, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have filed the foregoing Reply in Support of Reconsideration through the Court's ECF system, which has effectuated service of this motion upon all attorneys in this case who are registered for electronic filing.

Dated: March 29, 2024

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