UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EMPLOYEES RETIREMENT SYSTEM OF THE CITY OF ST. LOUIS, *et al.*, Plaintiffs, v. CHARLES E. JONES, *et al.*, Defendants, and FIRSTENERGY CORP., Nominal Defendant.	Case No. 2:20-cv-04813 Chief Judge Algenon L. Marbley Magistrate Judge Kimberly A. Jolson JURY TRIAL DEMANDED

PLAINTIFFS' RESPONSE IN OPPOSITION TO TODD AUGENBAUM'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER OF FINAL SETTLEMENT APPROVAL AND FINAL JUDGMENT

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Court-appointed Co-Lead Plaintiffs Employees Retirement System of the City of St. Louis and Electrical Workers Pension Fund, Local 103, I.B.E.W, together with additional Plaintiff Massachusetts Laborers Pension Fund (collectively "Plaintiffs"), respectfully submit this Response in opposition to Todd Augenbaum's Motion for Reconsideration (ECF No. 197, the "Reconsideration Motion") of the Court's Order of Final Settlement Approval (ECF No. 195, the "Approval Order") and Final Judgment (ECF No. 196).

I. PRELIMINARY STATEMENT

In its Approval Order, this Court recognized that the Settlement approved in this Action represents a "prime exemplar" of what can be achieved through stockholder derivative litigation. Approval Order at 21. Plaintiffs achieved by far the largest monetary recovery in any derivative suit in the history of the Sixth Circuit, as well as extensive governance reforms including unprecedented changes to the company's leadership. Remarkably, as the Court recognized, Plaintiffs achieved structural reforms that go far beyond even those secured by the Government through its criminal Deferred Prosecution Agreement with FirstEnergy. *Id.* The Settlement was widely supported by FirstEnergy's shareholders, as reflected by the absence of any objection from the myriad sophisticated institutional investors that own approximately 86% of FirstEnergy's more than 570 million outstanding shares of common stock. *Id.* at 16.

Augenbaum, the holder of just 200 such shares, stands alone in his purported dissatisfaction with the Settlement and his efforts to obstruct its finalization. He previously filed the sole timely objection to the Settlement, challenging the adequacy of certain aspects of the Settlement consideration and the releases provided in exchange therefore (but notably *not* any aspect of the Notice provided to stockholders or any aspect of Plaintiffs' Counsel's fee request) and his counsel appeared and was heard at the Settlement Fairness Hearing conducted by the Court. *See* ECF Nos. 181 (Augenbaum Objection); 194 (Settlement Fairness Hearing Transcript). After providing

Augenbaum and his counsel with a full and fair opportunity to be heard and present his objection at the Settlement Fairness Hearing, the Court carefully considered and rejected Augenbaum's arguments in its thoroughly reasoned Approval Order. Yet rather than abide by the Court's ruling and the evident wishes of FirstEnergy's many other stockholders, Augenbaum now seeks to improperly relitigate arguments already addressed by the Court and belatedly raise new ones—all in a transparent effort to delay finalization of the Settlement, including FirstEnergy's receipt of the significant consideration it is owed thereunder, so that his counsel may continue seeking to litigate FirstEnergy's settled claims in the parallel Northern District Action.

Motions for reconsideration are extraordinary and only very rarely warranted. They are appropriate only in highly unusual circumstances involving a change in controlling law, compelling new evidence, or clear error by the Court. *See, e.g.*, *Pegg v. Davis*, 2009 WL 5194436, at *1 (S.D. Ohio Dec. 22, 2009) (Marbley, J.). Such motions emphatically *do not* provide a vehicle for relitigation of issues already raised and decided, or issues which could have been raised previously but were not. Yet that is precisely what Augenbaum does here in his transparent effort to prevent the Court's approval of the Settlement from becoming final and effective. Augenbaum does not discuss the relevant legal standards, identifies no change in controlling law, does not identify any new evidence, and certainly does not identify any clear error in this Court's reasoned analysis. Simply put, his Reconsideration Motion represents a legally and factually baseless effort to serve the interests of Augenbaum's counsel, to the detriment of FirstEnergy, which is being denied the benefits of the Settlement as a result of Augenbaum's obstruction. The Reconsideration Motion should be denied forthwith so that the Court's Final Judgment may be implemented and FirstEnergy may finally receive the money that it is owed under the terms of the Settlement.

II. FACTUAL BACKGROUND

As the Court knows well, this is a stockholder derivative action brought by Plaintiffs to remedy harm incurred by FirstEnergy in connection with a corporate bribery scandal and to reform FirstEnergy's governance to prevent a recurrence of similar misconduct in the future. Following intense adversarial litigation involving myriad contested motions, an appeal before the Sixth Circuit, extensive written and document discovery, and mediation before a respected former district court judge, Plaintiffs secured a Settlement achieving these aims in the form of: (i) a $180 million monetary recovery, less Court-approved attorneys' fees, constituting the largest derivative recovery in the history of the Sixth Circuit; and (ii) extensive corporate reforms involving substantial changes of company leadership, oversight systems, and policy. Following a comprehensive settlement approval process in which Augenbaum submitted the sole timely stockholder objection and Augenbaum's counsel appeared and was heard at the three-hour Settlement Fairness Hearing, the Court approved the Settlement and issued a Final Judgment on August 23, 2022. The Settlement will become final, and FirstEnergy will receive the substantial monetary consideration it is owed, once any appeals of the Final Judgment have been resolved. *See* Settlement Stipulation (ECF No. 170-3) at ¶1(e)(i).

While Plaintiffs vigorously litigated this action through to its successful conclusion, Augenbaum's counsel at Abraham, Fruchter, & Twersky ("AFT") spent the better part of two years unsuccessfully seeking to insert itself into the litigation. First, AFT attempted to intervene in the parallel Northern District of Ohio action on behalf of purported FirstEnergy stockholder Leslie Katz, but that motion was denied. NDA ECF Nos. 22, 23, 24, 72. Second, AFT filed a books-and-records lawsuit on behalf of Katz in Ohio state court seeking documents related to FirstEnergy's bribery scandal, but that action was dismissed for failure to establish the requisite stock ownership requirements. *See* NDA ECF Nos. 48, 70. Third, AFT served a litigation demand

on FirstEnergy's Board on behalf of Katz, later joined by Augenbaum, demanding that the Board initiate litigation against certain third parties alleged to have participated in FirstEnergy's bribery scheme. ECF No. 181-2. Notably, by making a litigation demand, Augenbaum conceded that a majority of the Board at the time of his demand was independent and could consider whether to pursue claims on behalf of FirstEnergy in connection with the bribery scandal—even though the Board was then still dominated by a majority of directors who oversaw the Company during the scandal, including those whose departures were ultimately secured by the Settlement.[1]

Following the submission of Augenbaum's litigation demand, AFT's and Augenbaum's efforts remained dormant until after Plaintiffs secured the Settlement and received preliminary approval from this Court. Then, following the Northern District of Ohio's solicitation of new counsel to take over prosecution of the parallel action before it (NDA ECF No. 332), Augenbaum filed an objection to the Settlement in this Court (ECF No. 181). Meanwhile, his counsel applied to lead the Northern District Action, emphasizing that they were representatives of the only stockholder to timely appear and object to the Settlement in this Court (*see* NDA ECF No. 345-1 at 2). Prior to this Court's issuance of its Approval Order and Final Judgment, the Northern District indicated its intent to appoint Augenbaum's counsel to assume leadership of the Northern District Action. NDA ECF No. 345. However, all parties to the Northern District Action filed a joint motion to dismiss that action (NDA ECF No. 353) following this Court's approval of the

[1] *See City of Tamarac Firefighters' Pension Tr. Fund v. Corvi*, 2019 WL 549938, at *5 (Del. Ch. Feb. 12, 2019) ("By making a pre-suit demand, a stockholder 'tacitly concedes' the disinterest and independence of the board to respond."; "After making a pre-litigation demand, a stockholder plaintiff may not pursue claims challenging the subject matter of the demand[.]"; "This limitation applies to all derivative claims arising from the subject matter of the demand, even legal theories not expressly identified by the stockholder[.]"); *see also Brosz v. Fishman*, 2016 WL 7494883, at *4 (S.D. Ohio Dec. 29, 2016) (in context of Ohio corporation, applying Delaware law and recognizing "Plaintiff conceded the Board's independence by making [a] demand.")

Settlement, which entailed "a *de facto* resolution of the Northern District and State Court actions." Approval Order at 26. The parties to the Northern District Action also filed oppositions to Augenbaum's motion to intervene in the Northern District Action. *See* NDA ECF Nos. 359–361 (arguing, *inter alia*, that Augenbaum's motion to intervene was untimely and substantively baseless). The parties' joint motion to dismiss and Augenbaum's subsequent motion to intervene are briefed and remain *sub judice* in the Northern District.[2]

Given this backdrop and Augenbaum's patent failure to meet any of the requirements for a motion for reconsideration, the Reconsideration Motion appears to represent little more than a tactic to delay the Settlement's "Effective Date" with the hope that, in the meantime, he and his counsel will be permitted to prosecute FirstEnergy's settled claims before the Northern District. These shenanigans are not without cost and patently do not serve the interests of FirstEnergy. While Augenbaum presses his meritless Reconsideration Motion, FirstEnergy incurs unnecessary costs litigating over resolved claims and is denied receipt of the significant consideration it is owed under the terms of Settlement approved by this Court.

III. ARGUMENT

A. Augenbaum improperly seeks to re-litigate decided issues and raise new arguments that he has waived

Augenbaum's Reconsideration Motion attempts to relitigate this Court's comprehensive Settlement approval process in which he and his counsel were full participants and is, therefore, procedurally improper. "Motions for reconsideration are 'extraordinary in nature and, because they run contrary to notions of finality and repose, should be discouraged." *Plaskon Elec.*

[2] The Court overseeing the State Court Action granted a motion to dismiss that action in light of the Final Judgment in this Court, over Augenbaum's attempt to intervene in the State Court Action. *See Gendrich v. Anderson, et al.*, Case No. 2020-07-2107, Motion to Dismiss (Ohio Ct. Comm. Pleas Aug. 30, 2022); *id*., Order Granting Dismissal (Ohio Ct. Comm. Pleas Sept. 2, 2022). Augenbaum has not appealed that ruling.

Materials, Inc. v. Allied-Signal, Inc., 904 F. Supp. 644, 669 (N.D. Ohio 1995) (further citation omitted). Such motions are widely disfavored and only "very sparingly" granted. *Id.* Importantly, "[a] motion for reconsideration is not a vehicle to reargue the case or to present evidence which should have been raised" at an earlier juncture but were not. *Dukes v. ADS All. Data Sys., Inc.*, 2007 WL 1057387, at *1 (S.D. Ohio Apr. 4, 2007). Arguments raised to a district court for the first time upon a motion for reconsideration are therefore waived. *See Newburgh/Six Mile Ltd. P'ship II v. Adlabs Films USA, Inc.*, 483 F. App'x 85, 90 (6th Cir. 2012); *Playa Marel, P.M., S.A. v. LKS Acquisitions, Inc.*, 2007 WL 3342439, at *2 (S.D. Ohio Nov. 6, 2007) ("Courts should not reconsider prior decisions where the motion for reconsideration either renews arguments already considered or proffers new arguments that could, with due diligence, have been discovered and offered during the initial consideration of the issue."). Instead, reconsideration motions "are generally only warranted where there is: (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Pegg*, 2009 WL 5194436 at *1.

As detailed below, no such circumstances are present here. Augenbaum seeks to relitigate matters already decided or which he failed to previously raise, while identifying no change in controlling law or new facts supporting his contentions. Indeed, to the extent there have been relevant developments in the law since the Court issued its Final Judgment, those developments only further support the Court's approval of the Settlement and weigh further against Augenbaum's objection. Specifically, on August 11, 2022—following the Settlement Fairness Hearing but prior to the Court's issuance of its Final Judgment—the Sixth Circuit issued an Opinion affirming the approval of a shareholder derivative settlement involving the Wendy's Corporation, therein reiterating the *Granada* court's direction that "[a]bsent evidence of fraud or

collusion, such settlements are not to be trifled with." *In re Wendy's Co. S'holder Derivative Action*, 44 F.4th 527, 536 (6th Cir. 2022) (quoting *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992)).

Moreover, the purported "new evidence" identified by Augenbaum—principally, the recent simultaneous completion of the C-Suite review process required by the Settlement and the resignation without severance of FirstEnergy's CEO—***confirms*** the Settlement's value and effectiveness. As the Court is aware, the Settlement required FirstEnergy's newly-refreshed Board to promptly "implement a process to review the current C-Suite executives" to determine whether they should remain with the Company. *See* Settlement Stipulation (ECF No. 170-3) at Ex. A ¶2. Plaintiffs and their governance expert, Professor Gordon, pointed to this and other provisions to explain to the Court that the Settlement provided meaningful benefits and resulted in meaningful consequences for the alleged wrongdoers. *See infra* Section C. The recent announcement of Strah's resignation, without severance, at the conclusion of this review process—which was conducted as a requirement of the Settlement—demonstrates Plaintiffs were right.

B. Augenbaum's attempt to minimize the historic $180 million monetary component of the Settlement is procedurally improper and meritless

As his lead argument, Augenbaum argues that insurance proceeds that *might* have been recoverable by the Company in connection with other actions should be discounted in valuing the Settlement, and that the parties were required to parse related insurance dynamics in their Notice to stockholders. But the Court has already rejected Augenbaum's arguments concerning the insurance recovery achieved by Plaintiffs (*see* Approval Order at 6–7) and Augenbaum fails to identify any new evidence or provide any basis whatsoever to think the Court's ruling somehow constituted a "clear error." Nor could he.

As a threshold matter, Augenbaum's arguments are not properly raised in a motion for reconsideration because they do not reflect any change in law, new evidence, or clear error. They are based on information contained in Plaintiffs' reply brief (ECF No. 186 at 10 n.6) which, of course, was filed *before* the three-hour Settlement Fairness Hearing at which Augenbaum's counsel appeared and argued at length against the Settlement. Notably, at the Settlement Fairness Hearing, Augenbaum's counsel raised the very same arguments concerning a purported lack of "transparency" concerning the insurance policies funding the Settlement. Those arguments were considered and rejected by the Court, which correctly recognized the total lack of any legal support for Augenbaum's arguments. *See, e.g.*, ECF No. 194 (Settlement Fairness Hearing Tr.) at 92:18–21 ("THE COURT: It was telling that Mr. Markovits, as skilled as he is, could provide no authority for the proposition that he was urging upon the Court."). Augenbaum identifies no proper basis for renewing the same argument on a motion for reconsideration.

The Court's thoughtful rejection of Augenbaum's argument did not constitute clear error. To the contrary, Augenbaum's arguments remain meritless. There is simply no authority whatsoever for discounting the value of an insurer-funded derivative settlement because the payment of the settlement consideration does not exhaust all available insurance coverage. Such a finding would constitute a radical departure of the law, which favors derivative settlements. *See, e.g.*, *Wendy's Co. S'holder Derivative Action*, 44 F.4th at 536; *Granada Invs.*, 962 F.2d at 1205. Notably, the Settlement here did ***not*** release un-used insurance. Approval Order at 7. According to Augenbaum, the Court was nevertheless required to discount the value of the recovery achieved by Plaintiffs by, at minimum, assuming the success of other pending claims, quantifying their hypothetical value, *and* assuming the Company would successfully sidestep collateral insurance litigation. *See, e.g.*, *In re Galena Biopharma, Inc. Deriv. Litig.*, 2016 WL 10840600, at *2 (D. Or.

June 24, 2016) (noting an insurance coverage dispute in derivative litigation and recognizing that "if the Action does not settle and continues to be litigated, there is a risk that insurance coverage will be denied and an additional insurance coverage lawsuit may ensue."). This argument, unsurprisingly, has absolutely no precedential support whatsoever. Plaintiffs achieved a certain and final recovery of $180 million for FirstEnergy, less Court-approved attorneys' fees. There is no basis in law or fact for discounting the value of this certain and final recovery in the manner proposed by Augenbaum. Tellingly, the SLC—which is comprised of outside directors who joined FirstEnergy's Board after the scandal and remained largely adversarial with Plaintiffs through the conclusion of the action—has recognized the value of this recovery and made no attempt whatsoever to discount the monetary benefit achieved by Plaintiffs, including in its objection to Plaintiffs' request for attorneys' fees based on the amount of that recovery.[3]

Nor is there any legal basis for Augenbaum's untimely, new argument that the insurance dynamics underlying a derivative monetary recovery must be parsed in the settlement notice provided to stockholders. *First*, Augenbaum did not challenge the adequacy of the Notice in his written objection or in his counsel's presentation at the Settlement Fairness Hearing and plainly

[3] Augenbaum's suggestion of "collusion" between Plaintiffs and the SLC is baseless and, of course, has already been considered and rejected by the Court. Approval Order at 12, 27. As the Court highlighted in its Approval Order, Judge Phillips's involvement in the Settlement process—which he has described as "extremely hard-fought," "vigorous and conducted arm's-length and in good faith"—precludes any suggestion of collusion. *Id.* at 12. Augenbaum's attempt to impugn Judge Phillips's credibility by pointing to a single rejected settlement fails. Augenbaum Mem. at 8–9 (citing docket entries in *In re Altria Group, Inc. Deriv. Litig.*, 3:20-cv-00772 (E.D. Va.)). Judge Phillips's credibility is beyond reproach and there is no indication that the Court in *Altria* either questioned his credibility or suggested any collusion in the process leading to the proposed settlement in that action. Augenbaum's suggestion that the extent of Plaintiffs' litigation efforts somehow support an inference of collusion is not properly raised on a motion for reconsideration and, more importantly, is fundamentally meritless and renews arguments already considered and rejected by the Court. *See* Approval Order at 14 ("Plaintiffs have assured the Court that they conducted sufficient document discovery to assess accurately the strengths and weaknesses of their case.").

cannot do so for the first time in a motion for reconsideration. *See, e.g.*, *Newburgh/Six Mile Ltd. P'ship II*, 483 F. App'x at 91–92 (arguments raised for the first time on a motion for reconsideration that could have been raised previously are waived). *Second*, despite the ubiquity of D&O insurance as the source of monetary recoveries in derivative litigation, Augenbaum is unable to identify a single case supporting his proposition. Nor does Augenbaum even point to a single prior notice of settlement in any stockholder derivative case that included such a disclosure. This is unsurprising, as there appear to be none: Plaintiffs have canvassed the settlement notices issued in connection with myriad noteworthy recent derivative settlements including insurer-funded monetary recoveries, by both federal and Delaware courts, and have not identified a single such settlement where the notice issued to stockholders included anything like the type of disclosure parsing insurance dynamics that Augenbaum now belatedly argues was necessary.

Indeed, as Plaintiffs explained in their briefs in support of the Settlement, Plaintiffs are aware of only two comparable derivative settlements—those in *Boeing* and *Wells Fargo*—in which any information relating to the relevant insurance policies was disclosed and, in both cases, the relevant information was supplied in briefing and was *less* specific than the information Plaintiffs disclosed in this action. *See* ECF No. 179 at 32–33; No. 186 at 10. In neither case, for example, was the extent of policy erosion or the split between funding from Side A and other insurance policies disclosed. Thus, contrary to Augenbaum's arguments, the parties to this Action have in fact been unusually transparent concerning the insurance dynamics underlying the Settlement. None of Augenbaum's arguments concerning the Settlement's monetary component or the parties' disclosures pertaining thereto hold water. They should be rejected as both procedurally improper and substantively meritless.

C. Strah's departure and the Company's ongoing recoupment process confirm rather than undermine the propriety of the Settlement

Augenbaum next argues that "newly revealed facts" in related proceedings require this Court to take the extraordinary step of overturning its Final Judgment. But the facts he points to only confirm, rather than undermine, the value and effectiveness of the Settlement. For example, Augenbaum points to certain recently-publicized evidence concerning Defendant Strah and Strah's recent "abrupt decision" to immediately retire as CEO without severance. Augenbaum Mem. at 10–11. Marshalling these purported "newly revealed facts," Augenbaum argues it was inappropriate for the Settlement to "effectively give[] Strah a free pass." *Id.* at 10–11.

But Augenbaum has it exactly backwards. As noted above, the Settlement required FirstEnergy's newly-refreshed Board to "implement a process to review the current C-Suite executives" to determine whether they should remain with the Company within 30 days of the Company's most recent annual meeting and to complete the review within 90 days. *See* Settlement Stipulation (ECF No. 170-3) at Ex. A ¶2. The newly-refreshed Board commenced this review following FirstEnergy's 2022 annual meeting and, on September 15, 2022, simultaneously announced both the completion of the review process and Strah's resignation without severance.[4] This announcement of Strah's resignation at the conclusion of the review process required by the Settlement demonstrates that Strah did not receive a "free pass" at all. Rather, the announcement proves that the corporate governance changes achieved by the Settlement are working as intended. *See, e.g.*, Plaintiffs' Opening Brief in Support of the Settlement (ECF No. 179) at 23 (explaining the value of the C-suite review; "Based on discovery obtained in this litigation, Plaintiffs believe

[4] *See* September 15, 2022 FirstEnergy Form 8-K and attached Press Release (available at: https://www.sec.gov/ix?doc=/Archives/edgar/data/1031296/000103129622000061/fe-20220915.htm).

that a further review of the Company's C-Suite executives is warranted . . . . Simply put, cleansing the management ranks of any remaining culpable officers will serve to restore trust in FirstEnergy's Board and management team and allow the Company to move forward with a clean slate"); Declaration of Professor Gordon (ECF No. 179-4) at ¶20 ("immediate and possible future changes in personnel will distance the Company from the corporate culture that produced the Violations, serve as a deterrent to potential backsliding, and deliver a potent public signal of the Company's determination to restore its reputation with its shareholders and regulators"). Indeed, to Plaintiffs' counsel's knowledge, this is a remarkable result unprecedented in any similar private stockholder litigation. The implementation of the C-Suite review process was not achieved by the Government, the press, activist stockholders, or any other actor: it was achieved by Plaintiffs, through the carefully-crafted terms of the Settlement.

Augenbaum also argues that recent submissions in the Northern District of Ohio concerning the recoupment claims carved out of the Settlement—in particular the Declaration of FirstEnergy SVP Christine Walker (the "Walker Declaration")—somehow undermine this Court's Final Judgment. His arguments are not a model of clarity, but he appears to conflate FirstEnergy's executive compensation recoupment claims (carved out of the Settlement) with equitable breach of fiduciary duty claims (plainly and intentionally released by the Settlement), arguing that there is something inappropriate about FirstEnergy not seeking to continue litigating the breach of fiduciary duty claims asserted, settled, and released in this Action. In any event, none of this information is "new." Indeed, Augenbaum himself acknowledges that the information purportedly supporting his argument demonstrates that FirstEnergy is acting in total conformity with the form of Order that was attached to the Notice of Settlement and submitted to and entered by this Court at the conclusion of this Court's assessment of the Settlement. *See* Augenbaum Mem. at 10 ("…it

is now clear based upon the Walker Declaration that ***the Company has no intention of pursuing any claims for breach of fiduciary duty*** against the Terminated Executives ***as the form of Order submitted to and entered by this Court with prejudice as to those claims demonstrates***") (emphasis added).

Augenbaum's real gripe is not based on new evidence, but rather an improper facial attack on the scope of the releases approved by this Court as part of the Settlement following a rigorous approval process. Augenbaum participated in that process and already had a chance to challenge (and did challenge) the release during that process. His disagreement with the Court's considered ruling does not constitute grounds for a motion for reconsideration. *See, e.g.*, *Playa Marel*, 2007 WL 3342439, at *2 ("[c]ourts should not reconsider prior decisions where the motion for reconsideration either renews arguments already considered or proffers new arguments that could, with due diligence, have been discovered and offered during the initial consideration of the issue."). He gives no reason to doubt that the Settlement is being implemented precisely as the parties intended and the Court ordered.[5]

Relatedly, Augenbaum argues that the Final Judgment should be overturned because the Walker Declaration purportedly demonstrates that the FirstEnergy Board is pursuing the carved-out recoupment claims with insufficient vigor. Plaintiffs disagree with Augenbaum's characterization of the Walker Declaration and understand that the SLC will be providing an additional submission responsive to Augenbaum's Reconsideration Motion on this point. In any event, Augenbaum's argument concerning the way the recoupment claims are being pursued is beside the point. A lack of vigor by FirstEnergy in pursuing claims expressly *carved out* of the

[5] For the same reason that Augenbaum's arguments concerning purportedly "new" evidence fail on the merits, his related arguments concerning the parties' Notice likewise fail.

Settlement provides no basis to upset the Settlement itself. If Augenbaum believes that FirstEnergy's new, *current* Board is not *currently* pursuing the claims expressly carved out of the Settlement in a proper manner, the solution is not to overturn this Court's Final Judgment and release of other claims. Rather, Augenbaum may serve another litigation demand on the Board or, alternatively, attempt to show in a new derivative action that the new, *current* Board is failing to properly enforce such claims. *See, e.g.*, *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 528 (1984) (emphasizing that a derivative action under Rule 23.1 can only be brought "when the corporation has *failed to enforce a right which may properly be asserted by it*").

D. Augenbaum's objection to the Court's reasoned award of attorneys' fees is procedurally improper and meritless

Finally, Augenbaum asks the Court to reconsider its award of attorneys' fees. As noted, however, Augenbaum did not raise any objection to Counsel's fee request during the Settlement approval process and he cannot do so for the first time on a motion for reconsideration. Indeed, neither Augenbaum's written objections to the Settlement nor his counsel's argument at the Settlement Fairness Hearing included any argument concerning attorneys' fees whatsoever. *See, e.g.*, *Newburgh/Six Mile Ltd. P'ship II*, 483 F. App'x at 90 (arguments unjustifiably raised for the first time on a motion for reconsideration are waived). In any event, the Court's analysis concerning attorneys' fees was thorough, reasoned, and based on extensive adversarial argumentation between Plaintiffs and the SLC, which advocated for a lower award during the Settlement approval process but has not appealed or sought reconsideration of the Court's decision. There is no basis for any reconsideration of the Court's reasoned analysis.

IV. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully submit that Augenbaum's Reconsideration Motion should be denied.

Dated: October 11, 2022

Respectfully submitted,

/s/ John C. Camillus

LAW OFFICES OF JOHN C. CAMILLUS LLC
John C. Camillus (0077435)
P.O. Box 141410
Columbus, OH 43214
Phone: (614) 992-1000
jcamillus@camilluslaw.com

Liaison Counsel for Lead Plaintiffs

SAXENA WHITE P.A.
Maya Saxena
Joseph E. White, III
Lester R. Hooker
Dianne M. Pitre
7777 Glades Road, Suite 300
Boca Raton, FL 33434
Phone: (561) 394-3399
msaxena@saxenawhite.com
jwhite@saxenawhite.com
lhooker@saxenawhite.com
dpitre@saxenawhite.com

SAXENA WHITE P.A.
Thomas Curry
Tayler D. Bolton
824 N. Market St., Suite 1003
Wilmington, DE 19801
Phone: (302) 485-0480
tcurry@saxenawhite.com
tbolton@saxenawhite.com

SAXENA WHITE P.A.
Steven B. Singer
Sara DiLeo
10 Bank Street, 8th Floor
White Plains, NY 10606
Phone: (914) 437-8551
ssinger@saxenawhite.com
sdileo@saxenawhite.com

- and -

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Jeroen van Kwawegen
Alla Zayenchik
Margaret Sanborn-Lowing
1251 Avenue of the Americas
New York, NY 10020
Phone: (212) 554-1400
jeroen@blbglaw.com
alla.zayenchick@blbglaw.com
margaret.lowing@blbglaw.com

Co-Lead Counsel for Lead Plaintiffs

COHEN MILSTEIN SELLERS & TOLL PLLC
Steven J. Toll
Daniel S. Sommers
Molly J. Bowen
1100 New York Ave. NW, Fifth Floor
Washington, D.C. 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
stoll@cohenmilstein.com
dsommers@cohenmilstein.com
mbowen@cohenmilstein.com

- and -

COHEN MILSTEIN SELLERS & TOLL PLLC
Christopher Lometti
Richard A. Speirs
Amy Miller
88 Pine Street, 14th Floor
New York, NY 10005
Telephone: (212) 838-7797
Facsimile: (212) 838 7745
clometti@cohenmilstein.com
rspeirs@cohenmilstein.com
amiller@cohenmilstein.com

Counsel for Additional Plaintiff Massachusetts Laborers Pension Fund

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys on record.

/s/ John C. Camillus

John C. Camillus