UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD AYERS, JOSE ACOSTA, FREDERICK ANTHONY BROUSSARD, and JEFFREY WAYNE SCHELL, individually and on behalf of others similarly,

Plaintiffs,

-against-

SGS CONTROL SERVICES, INC., SGS NORTH AMERICA, INC., and SGS AUTOMOTIVE SERVICES, INC.,

Defendants.

ORDER

03 Civ. 9078 (RMB)

BRIAN FERRY, individually and on behalf of and others similarly situated,

Plaintiffs,

-against-

SGS CONTROL SERVICES, INC., and SGS NORTH AMERICA, INC.,

Defendants.

06 Civ. 7111 (RMB)

I. Introduction

On or about September 22, 2008, pursuant to Rule 59 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") and Local Civil Rule 6.3 of the United States District Courts for the Southern and Eastern Districts, Plaintiffs, former employees of SGS Control Services, Inc., SGS North America, Inc., and SGS Automotive, Inc. ("Defendants"), moved for reconsideration of the Court's September 8, 2008 fee award to Plaintiffs' counsel (which was approximately 34% less than the $2,102,500 Plaintiffs had applied for) and the Court's determination not to award a

"service payment" to named plaintiffs. (Pls.' Mem. of Law in Supp. of Mot. to Reconsider Attorneys' Fees and Service Payments, dated Sept. 22, 2008 ("Pls. Mem."), at 1; see also Decision and Order, dated September 8, 2008 ("Decision and Order"), at 10, 14 ("the Court finds . . . that 19% of the $7,250,000.00 Settlement Fund or $1,377,500.00 is a fair and reasonable fee," and "Plaintiff's application for [service payments] does not support a level of special circumstances warranting an incentive award.") (internal quotations omitted).) Defendants have not opposed Plaintiffs' motion for reconsideration.

For the reasons set forth below, Plaintiffs' motion for reconsideration is denied.

II. Legal Standard

"Reconsideration of a court's previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." Cartier, a Div. of Richemont N. Am., Inc. v. Aaron Faber, Inc., 396 F. Supp. 2d 356, 363 (S.D.N.Y. 2005) (internal quotation omitted). "[R]econsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusions reached by the court." Shrader v. CSX Transp. Inc., 70 F.3d 255, 257 (2d Cir. 1995). A motion for reconsideration is "not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved." In re Houbigant, Inc., 914 F. Supp. 997, 1001 (S.D.N.Y. 1996) (citations omitted).

III. Analysis

Plaintiffs argue in their motion for reconsideration, among other things, that the Court erred by awarding Plaintiffs' counsel less than the "written one-third contingency fee

arrangement" presumably agreed to between Plaintiff's counsel and (named and opt-in) Plaintiffs between July 30, 2004 and August 30, 2006; "the risks undertaken by Plaintiffs' counsel in this case were considerable and justify some positive multiplier of the lodestar fee"; "when this case was accepted [Plaintiffs' counsel] had only two lawyers, and three lawyers for most of the remainder . . . [and] expended more than 1.8 million dollars worth of [Plaintiffs' counsel's] time . . . [but the Order] effectively slashes [Plaintiffs' counsel's] compensation for this time by one-third"; and "some award [to the named plaintiffs] would be appropriate given the service these individuals gave the class." (Pls. Mem. at 1, 4, 10, 12.)

Plaintiffs' argument that "under the fee agreements that counsel has with the named and opt-in plaintiffs, counsel is contractually entitled to a fee of $1,821,221.91," (Pls. Mem. at 2), does not appear to have been raised in Plaintiffs' original application for attorneys' fees and costs, dated July 22, 2008, (see Mem. of Law in Supp. of Class Counsel's Application for Attorneys' Fees and Costs, dated July 22, 2008, at 8–11), and a motion for reconsideration is not "an opportunity for making new arguments that could have been previously advanced," Associated Press v. U.S. Dep't of Def., 395 F. Supp. 2d 17, 19 (S.D.N.Y. 2005). But even if the Court were to consider Plaintiffs' argument on the merits at this time, it would fail because "a district court is not required to adhere to a retainer agreement" in reaching its determination as to a reasonable award for attorney compensation in class actions. In re WorldCom Sec. Litig., 388 F. Supp. 2d 319, 356 (S.D.N.Y. 2005); Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 123–24 (2d Cir. 2005); see also In re Ashanti Goldfields Sec. Litig., No. 00 Civ. 717, 2005 U.S. Dist. LEXIS 28431, at *5 (E.D.N.Y. Nov. 15, 2005) ("where a class action settlement creates a common fund the plaintiffs' attorneys are entitled to a reasonable fee – set by the court – to be

taken from the fund.") (quotations omitted); In re Alloy, Inc. Sec. Litig., No. 03 Civ. 1597, 2004 U.S. Dist. LEXIS 24129, at *8 (S.D.N.Y. Dec. 2, 2004) ("Ultimately, the determination of a reasonable fee award is within the district court's sound discretion."). In its Decision and Order, the Court analyzed the factors which guide the determination of a reasonable fee and Plaintiffs "fail[] to point to any fact or relevant law that the Court overlooked in rendering its decision." Patterson v. United States, No. 04 Civ. 3170, 2006 U.S. Dist. LEXIS 50732, at *4 (S.D.N.Y. July 26, 2006); see also Goldberger v, Intergrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000).

Plaintiffs' remaining assertions in their motion for reconsideration, including that Plaintiffs' counsel should be awarded a higher fee because they "bore the risk of losing on the merits," and "a common fund fee frequently results in much higher multiples of the lodestar," and that the named Plaintiffs should be awarded a service payment because they bore "risks and costs which the class itself did not have to bear," (Pls. Mem. at 6, 9, 12), "repeat arguments considered by the Court and addressed in the [Decision and Order] without pointing to any authority or argument made by the [Plaintiffs] which the Court overlooked," In re WorldCom Sec. Litig., No. 02 Civ. 3288, 2007 U.S. Dist. LEXIS 76272, at *6 (S.D.N.Y. Oct. 16, 2007). (See also Order at 8, 10–13, 15–17.) "A party moving for reconsideration may not . . . simply repeat arguments already briefed, considered, and decided." Racepoint Partners, LLC v. JPMorgan Chase Bank, No. 06 Civ. 2501, 2007 U.S. Dist. LEXIS 1902, at *3 (S.D.N.Y. Jan. 11, 2007).

Payment to Class Members

On or about October 3, 2008, the parties wrote to the Court stating, among other things, that "given [Plaintiffs'] motion for reconsideration, the parties agree that the Court's September 8, 2008 Decision and Order is not a final Order." (Letter from David W. Long-Daniels to the Hon. Richard M. Berman, dated October 3, 2008 ("Long-Daniels Letter").) The parties further agreed that, under the terms of the Settlement Agreement, "Defendant is not obligated to remit the settlement proceeds to the claims administrator until such time as the Plaintiffs' motion for reconsideration has been ruled upon and the time for an appeal has expired." (Id.) The parties understanding as to the interpretation of their own agreement(s) seems reasonable. **At the same time, the Court is eager to have the settlement proceeds distributed to class members as soon as possible and, therefore, directs counsel to advise the Court of the status of such distribution(s) within twenty-one (21) days of the date hereof and each 21 days thereafter.**

IV. Conclusion and Order

For the reasons stated in the Order and herein, Plaintiffs' motion for reconsideration [#243] is denied.

Dated: New York, New York
October 16, 2008

RMB

RICHARD M. BERMAN, U.S.D.J.