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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELLIOT ZEISEL,

Plaintiff,

No. C 10-01192 JSW

v.

**NOTICE OF QUESTIONS FOR
HEARING**

DIAMOND FOODS, INC.,

Defendant.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE
NOTICE OF THE FOLLOWING QUESTIONS FOR THE HEARING SCHEDULED ON
OCTOBER 12, 2012, AT 9:00 A.M.:

The Court has reviewed the parties' papers and, thus, does not wish to hear the parties
reargue matters addressed in those pleadings. If the parties intend to rely on authorities not
cited in their briefs, they are ORDERED to notify the Court and opposing counsel of these
authorities reasonably in advance of the hearing and to make copies available at the hearing. If
the parties submit such additional authorities, they are ORDERED to submit the citations to the
authorities only, with reference to pin cites and without argument or additional briefing. *Cf.*
N.D. Civil Local Rule 7-3(d). The parties will be given the opportunity at oral argument to
explain their reliance on such authority. The Court suggests that associates or of counsel
attorneys who are

United States District Court
For the Northern District of California

1 working on this case be permitted to address some or all of the Court’s questions contained
2 herein.

3 1. The parties distinguish *Dennis v. Kellogg*, – F.3d –, 2012 WL 3800230 (9th Cir. Sept. 4,
4 2012), in part on the basis that the court in that case evaluated a settlement that was
5 reached before the class was certified and, thus, was subject to a higher standard of
6 fairness and a more probing inquiry than might normally be required. *Id.*, 2012 WL
7 3800230, at *4 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).
8 The court in the *Dennis* case also noted that the settlement agreement, which was “the
9 only legally-enforceable document” was silent on a number of key points, including the
10 specific charities that would receive *cy pres* distributions and whether the donations
11 were donations to which the defendant had already obligated itself to give. Here, the
12 Settlement Agreement does identify that any donations would be at retail value, but it
13 remains silent on the issue of pre-existing obligations and the specific charities.

14 a. Given that the Settlement Agreement is the only legally enforceable document,
15 and in light of the fact that the Court cannot rewrite portions of the Settlement
16 Agreement, do the parties have any other authority or argument that the
17 provisions regarding the *cy pres* distribution meet the standards required by
18 *Dennis* and are fair, reasonable and adequate?

19 2. In *Dennis*, the court also concluded that the selected charities - food banks - did not have
20 the requisite nexus to the plaintiff’s claims under the UCL and the CLRA, because the
21 gravamen of the plaintiffs’ claims were about false advertising. Like the plaintiff in
22 *Dennis*, Zeisel brings claims under the UCL and the CLRA, as well as the FAL. The
23 gravamen of Zeisel’s claims focuses on the allegedly false and misleading content of the
24 Disputed Labels, as was the case in *Dennis*. *See Dennis*, 2012 WL 3800230, at *7
25 (finding that parties’ assertions that case was about the nutritional value of food “is
26 simply not true” and noting that gravamen of lawsuit was about false advertisements).
27 Although the parties state that the American Heart Association and the specific food
28 banks identified in the Sibert Declaration had educational programs about nutrition, is

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there any evidence in the record that any of these organizations make any efforts to protect consumers from or redress injuries caused by false advertising? *See Dennis*, 2012 WL 3800230, at *7. What is the parties' best argument that this case is, unlike *Dennis*, about the nutritional value of the food in question?

2. Do Plaintiffs have any authority to show that the Court should approve the incentive award to Mr. Zeisel when he, himself, has not substantiated the amount of time spent on this case?

IT IS SO ORDERED.

Dated: October 9, 2012



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE