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Class Counsel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE FERRERO LITIGATION

Case No. 3:11-cv-00205-H-KSC
Pleading Type: Class Action

DECLARATION OF JACK FITZGERALD IN SUPPORT OF PLAINTIFFS' OPPOSITION TO NON-PARTY OBJECTORS' MOTION TO VACATE

Judge: The Honorable Marilyn L. Huff
Location: Courtroom 13

I, Jack Fitzgerald, declare:

1. I am a member in good standing of the State Bars of California and New York; and of the United States District Courts for the Northern, Central, and Southern Districts of California and the Southern and Eastern Districts of New York; and of the United States Court of Appeals for the Ninth Circuit. I am Class Counsel in the above-captioned action. I make this declaration in support of Plaintiffs' Opposition to Non-Party Objectors' Motion to Vacate.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the Honorable John A. Houston's October 17, 2012 Order Granting Joint *Ex Parte* Motion to Strike Purported "Response" to Joint Motion and Stipulation Regarding Class Period Definition in *Galluci et al. v. Boiron Inc., et al.*, No. 3:11-cv-0239-JAH-NLS (S.D. Cal.), Dkt. No. 124.

3. Attached hereto as **Exhibit 2** is a true and correct copy of the parties' Joint *Ex Parte* Motion to Strike Non-Parties' Purported Response to Joint Motion and Stipulation Regarding Class Period Definition in *Galluci et al. v. Boiron Inc., et al.*, No. 3:11-cv-0239-JAH-NLS (S.D. Cal.), Dkt. No. 123.

4. Attached hereto as **Exhibit 3** is a true and correct copy of relevant excerpts of the Honorable Margaret M. Morrow's Tentative Order Granting Class Certification in *Yumul v. Smart Balance, Inc.* No. CV 10-00927 MMM (C.D. Cal). There is no docket number because the parties reached a settlement before the tentative was entered as a final order.

5. Attached hereto as **Exhibit 4** is a true and correct copy of relevant excerpts of the Honorable George H. Wu's April 12, 2012 tentative ruling on class certification in *Red v. Kraft Foods, Inc.*, No. 10-cv-1028-GW, Dkt. No. 212.

6. Attached hereto as **Exhibit 5** is a true and correct copy of the relevant excerpts from a Declaration of Jack Fitzgerald in Support of Supplemental Brief Concerning Plaintiffs' Termination of Beck & Lee and Reese Richman in *Red v Unilever*, No. 5:10-cv-00387-JW, Dkt. No. 85, including corresponding pages of a July 19 hearing transcript in the matter of *Levitt v. Yelp! Inc.*, No. 10-cv-1321 (N.D. Cal.).

7. Attached hereto as **Exhibit 6** is a true and correct copy of the Honorable Thomas J. Whelan's October 27, 2010 Order on OSC Regarding Sanctions for Violation of Rule 11(b) in *Weston*

Firm, P.C. v. Beck & Lee P.A. d/b/a Beck & Lee Trial Lawyers, et al., No. 3:10-cv-01694-W-CAB, Dkt. No. 32.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on November 19, 2012 in San Diego, California.

/s/ Jack Fitzgerald
Jack Fitzgerald

DATED: November 19, 2012

Respectfully Submitted,

/s/ Jack Fitzgerald
Jack Fitzgerald

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EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SALVATORE GALLUCCI, AMY ARONICA, KIM JONES, DORIS PETTY, and JEANNE PRINZIVALLI, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BOIRON, INC., a foreign corporation; and BOIRON USA, INC., a foreign corporation,

Defendants.

Case No: 3:11-CV-2039 JAH NLS
Class Action

ORDER GRANTING JOINT *EX PARTE* MOTION TO STRIKE PURPORTED "RESPONSE" TO JOINT MOTION AND STIPULATION REGARDING CLASS PERIOD DEFINITION

Judge: The Hon. John A. Houston
Location: Courtroom 11

Having considered the Parties' Joint *Ex Parte* Motion to Strike the Purported "Response" to the Joint Motion and Stipulation to Modify the Settlement Agreement's Class Period Definition, the Court finds that good cause exists to grant the joint motion.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The Joint Motion is **GRANTED**; and

2. The purported "Response" filed by non-parties Henry Gonzales, Monica Fernandez, Eleanor Lanigan, Michael Martinez, Glenna O'Dell and Gemis Rangel, located at Docket No. 122, shall be stricken from the record.

Dated: October 16, 2012

Hon. John A. Houston
United States District Judge

EXHIBIT 2

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Attorneys for Defendants Boiron, Inc. and Boiron USA, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SALVATORE GALLUCCI, AMY ARONICA, KIM JONES, DORIS PETTY, and JEANNE PRINZIVALLI, on behalf of themselves, all others similarly situated, and the general public,

Plaintiffs,

v.

BOIRON, INC., BOIRON USA, INC.,

Defendants.

CASE NO. 11-CV-2039 JAH NLS
CLASS ACTION

JOINT *EX PARTE* MOTION TO STRIKE NON-PARTIES' PURPORTED "RESPONSE" TO JOINT MOTION AND STIPULATION REGARDING CLASS PERIOD DEFINITION

Judge: Hon. John A. Houston

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TABLE OF AUTHORITIES

Cases

Other Authority

PLEASE TAKE NOTICE, that pursuant to Local Rule 83.3(h), Plaintiffs and Defendants hereby jointly move ex parte for an order striking the purported "Response" of non-parties Henry Gonzales, Monica Fernandez, Eleanor Lanigan, Michael Martinez, Glenna O'Dell and Gemis Rangel (the "NTG Objectors") filed by Newport Trial Group and its co-counsel (collectively, "NTG") (Dkt. No. 122, "Response").[1]

INTRODUCTION

The purported "Response" to the parties' Stipulation and Joint Motion concerning the Settlement Agreement's "Class Period" definition (Dkt. No. 120) is improper and should be stricken.

First, NTG's clients are not parties and thus cannot file documents in this action, as this Court has previously held. (*See* Dkt. No. 88 at 6.)

Second, NTG filed the "Response" *after* the Court granted the Joint Motion and effected the stipulation (Dkt. No. 121), and thus there is no party motion to which to respond. Indeed, objectors concede that the Stipulation was "appropriately approved by the Court." (Response at 2:13).

Third, to the extent that NTG's "Response" is challenging the stipulation—which the Court has already granted—its merits fall far below what is required to sustain a motion for reconsideration.

Fourth, the purported "Response" is an overt attempt to rehash arguments previously presented to the Court, and to present new arguments well after the time period for raising them has expired. This is procedurally improper under the Federal Rules, the Local Rules, and the Court's Preliminary Approval Order. (Dkt. No. 89 at ¶¶ 7, 20, 22-24.)

Finally, even if the Court were to consider NTG's latest improper filing, their arguments are meritless. Instead of seeking to disrupt the settlement because of their own self-interest, NTG should respect the views of a majority of the class's members, who overwhelmingly support the proposed settlement.

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[1] *Ex parte* treatment for this Motion is proper because Plaintiffs' Motion for Final Approval has already been heard and is under consideration. Plaintiffs accordingly might be irreparably harmed if the NTG Objectors' filing were considered. The Response is also procedurally improper according to the terms of the Preliminary Approval Order, which set forth the deadline for when objections needed to be filed and prohibited the raising of new issues which could have been included in an objection but were not. (Dkt. No. 89 at ¶¶ 7, 20, 22-24.) The parties are without fault in creating the need for *ex parte* relief because the NTG Objectors filed their purported response without requesting leave of Court or even notifying the parties of their intent to respond.

For all these reasons, NTG's "Response" should be stricken.

ARGUMENT

I. As this Court Previously Ruled, NTG's Clients Are Not Parties and Therefore NTG Cannot File Documents in this Case

Because NTG's clients are not parties to this action, they cannot file a "response" to the Joint Motion filed by those who are parties in this action. *See, e.g.*, *Federman v. Artzt*, 339 Fed. Appx. 31, 34 (2d Cir. 2009) (holding that unnamed class members did not have standing to file a motion in the class action); *Dail v. City of Goldsboro*, No. 5:10–CV–00451–BO, 2011 WL 2293904, at *1 (E.D.N.C. June 9, 2011) (denying non-party's motion to strike because "[a]s a mere non-party, [movant] has no standing to file pleadings or motions in this lawsuit"); *S.E.C. v. Provident Royalties, LLC*, No. 3:09-CV–1238–L, 2010 WL 27185, at *2 (N.D. Tex. Jan. 5, 2010) (denying non-party's motion for lack of standing); *Dungan v. Acad. at Ivy Ridge*, No. 06–CV–0908, 2009 WL 2176278, at *2 (N.D.N.Y. July 21, 2009) (holding that non-parties do not have standing to oppose a motion); *Pitre v. Blanchard*, Civ. A. No. 96-0014, 1996 WL 148164, at *1 n.4 (E.D. La. Mar. 27, 1996) (holding that non-party does not have standing to file a motion). Indeed, this Court previously so held. (Dkt No. 88 at p. 6 ["Because this Court denies proposed intervenor's motion to intervene, proposed intervenor lacks standing to move to strike the motion for class action settlement"]).

If this Court's prior rulings were not enough, the Local Rules likewise prohibit NTG from filing documents in this case: "Except as provided in the federal rules, or by leave of court, ***no document will be filed in any case by any person not a party thereto***." S.D. Cal. Civ. L.R. 5.1(h) (emphasis added). Although NTG could have sought leave of the Court to file their "response," they did not.

Because NTG's response thus violated not only case precedent, but the Local Rules, it should be stricken.

II. NTG's "Response" Is Moot Because the Court Granted the Joint Motion and Stipulation

The Joint Motion and Stipulation was filed October 9, 2012. (Dkt. No. 120.) The Court ruled on the Joint Motion and Stipulation on October 11, 2012, granting the relief sought. (Dkt. No. 121.) NTG's "Response," also filed October 11, 2012 and which acknowledges awareness of the Court's

order, therefore comes after the Court's ruling, rendering the "response" moot. The Court should strike it as moot.

III. NTG's "Response" Does Not Meet the Very High Bar Set for Motions to Reconsider

In the parties' Joint Motion and Stipulation, the parties asked the Court to approve the Stipulation without requiring additional notice to the Class because the stipulation did not harm the class. (Dkt. No. 120-1 at p. 6.) The Court then approved the stipulation and did not require additional notice to the Class. (Dkt. No. 121.) Although NTG concedes, as it must, that the Stipulation was proper,[2] Dkt. 122 at 2:13, they ask the Court to reconsider its decision not to require notice of the stipulation. But, as the Ninth Circuit has held, "a motion for reconsideration should not be granted, absent highly unusual circumstances . . . ." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (internal quotation marks omitted). NTG's "Response" falls far short of the very high bar set for motions to reconsider.

As explained in the Joint Motion, additional notice is not necessary when an amendment to a settlement agreement benefits class members. (Dkt. No. 120-1 at p. 6.) Nonetheless, NTG makes two arguments.

First, they assert that the amendment does not "improve the rights of Class members who purchased the products prior to July 27, 2012." (*Id.* at 4.) This is incorrect. By shortening the class period, the Stipulation reduces the number of potential claims against the common fund and thus potentially increases the funds available to those class members who do submit claims, in the form of a supplemental distribution. (Dkt. 64-2, Ex. A ["Settlement Agreement"] at ¶ 4.3.5.) It also reduces the chance of *pro rata* reduction arising from "the aggregate number of claims exceed[ing] the Net Settlement Fund." (*Id.* at ¶ 4.3.4.) Other than these significant benefits, the Stipulation has no impact whatsoever on purchasers before July 27, 2012. Thus, notice of the stipulation to them is not required.

Second, despite their stated Due Process concern, objectors paradoxically assert that the revision harms consumers who purchase Boiron products after July 27, 2012 "and relied on the prior

[2] Given NTG's representation at the Fairness Hearing, they must so concede. (*See* Oct. 1 Hrg. Tr. at 11:11-13 ("[T]he release should stop at the deadline to make a claim, the deadline to opt out and the deadline to object.").) Revising the "Class Period" definition to July 27, 2012 limits the release to consumers who purchased Boiron products on or before that date.

notice and Settlement Agreement." (Response at 4:5-6.) This makes no sense, if it refers to consumers who purchased the Products in reliance on the notice of the Settlement Agreement. Those persons would have been purchasing in order to create a claim, and not because they were injured. Thus, they would not be able to make a claim as the Settlement Agreement states only legitimate, non-fraudulent claims shall be paid. (Settlement Agreement at ¶ 4.3.1.)

In terms of consumers who purchased after July 27, 2012 and later learned of the Settlement Agreement, these consumers are benefited, not damaged. First, the legal claims of persons who purchase a Boiron product for the first time after July 27, 2012—who are the only people the stipulation impacts—are not released. (Dkt. No. 121.) Second, anyone who purchases a Boiron product after July 27, 2012—whether first time or not—is eligible for a full refund through the Boiron Promise, agreed to in the Settlement. (Settlement Agreement ¶ 4.1.6.) Thus, they retain the right to not only bring their own suit for misleading or false advertising but also to receive a full refund of the purchase price paid. (*See id.*)

In a similarly nonsensical argument, NTG asserts that "post July 27, 2012 purchasers were advised that their claims would be adjudicated through the *Gallucci* action and they could make a claim for recovery thereunder" and will "not be made aware that they cannot rely on the Settlement Agreement to have their rights adjudicated and that the statute of limitations for their claims is no longer tolled by the *Gallucci* action." (Response at 4:7-8, 13-15.) To the extent that someone who had never purchased a Boiron product was exposed to the class notice, they would have no claims to "adjudicate[] through the *Gallucci* action," *id.*, since any claim has not yet arisen. Moreover, every consumer who purchases a product subject to a class action settlement after the class period closes lacks tolling protection from the class action.

Objectors' argument about notice only shows that they are willing to stake any position, even one contrary to their previous position and the class's interest, in order to argue against the Settlement. Such dubious arguments deserve short shrift.

IV. Objectors' "Response" Should Be Stricken Because it Amounts to an Improper Sur-Reply

Nothing in the Federal Rules, Local Rules, or the Court's Preliminary Approval Order gives NTG a right to file sur-reply papers after the Fairness Hearing. Yet, that is the patent purpose of their "Response." After conceding in a single line that the Stipulation was "necessary and appropriately approved," Dkt. No. 122 at 2:13, NTG goes on to argue for seven pages why *other* objections—all totally unrelated to the Stipulation's redefinition of the class period—should be sustained. This is an unauthorized attempt to brief issues that have already been fully briefed and heard by the Court.

V. The Settlement is Fair, Reasonable, and Adequate, and NTG's Objections Should Be Overruled

NTG's "Response" raises some new arguments against the Settlement and rehashes prior arguments. None of the arguments, new or old, are well-founded.

A. New Objections Presented for the First Time in NTG's "Response" Are Improper and Should Not Be Considered.

The deadline for filing objections was July 27, 2012, yet, the "Response" raises two wholly new objections to the Settlement: purportedly vague language in the class notice, and identification of the cy pres recipient. These objections—raised for the first time nearly two weeks after the Fairness Hearing, and over two months after the deadline for filing objections—should not be considered.[3] (*See* Dkt. No. 89 at ¶¶ 7, 20, 22-24.)

i. The Notice Concerning Final Judgment Is Not Vague

Objectors assert that the class notice was "impermissibly vague" because it did not provide a date certain for the term "Final Judgment," such that "Class members will continue to be unaware of

[3] Indeed, even if the Court had granted the NTG Objectors leave to file a sur-reply, it would still be improper for them to raise new objections. (Dkt. No. 89 at ¶¶ 7, 20, 22-24.) *C.f. In re MF Global Inc.*, 2012 Bankr. LEXIS 1801, at *21 (S.D.N.Y. Apr. 24, 2012) ("The Court allowed counsel [for objectors] to file a sur-reply . . . limited to [a certain issue]. Instead, the sur-reply improperly raises new and untimely arguments." (record citation omitted)).

when they have to file for recovery in the case and run the risk of being unable to participate in the Settlement Agreement." (Response at 5:6-9.) This is wrong.[4]

The Notice clearly stated that "[t]o be eligible for a payment pursuant to the Settlement, a Class Member must submit a claim that (i) is postmarked (or dated, if submitted online) by the Claim Filing Deadline, which will be forty-five (45) days after the date the Court enters the judgment." (Dkt. No. 105-2 at 19.) The Notice also directed class members to the settlement website, whose home page prominently notes the "Case Status" as "Receiving Claims. Claim-In Period has not passed." *See* http://www.gilardi.com/boironsettlement. The website also contains a "Frequently Asked Questions" section, which identifies the claim-in period repeatedly. *See* http://www.gilardi.com/boironsettlement/Home/FAQ. The website also includes a "Dates to Remember" section, which plainly states that the "Claim-In Period (postmarked by) is "No later than 45 days after the date the Court enters judgment. *Such deadline may be further extended without notice to the Class by Court Order*." *See* http://www.gilardi.com/boironsettlement/Home/Dates.

ii. Notice Regarding the Cy Pres Recipient Was Adequate

Contrary to NTG's representation to this court (Response at p. 6), *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011), does not require a class notice to specify the *cy pres* recipient. In fact, in *Nachshin*, the Ninth Circuit expressly declined to address the sufficiency of the notice to the class in the case. *See id.* at 1042 ("McKinney argues the class notice was not sufficient. We decline to address the issue . . . .").

What the Ninth Circuit has held, however, is that "[n]otice provided pursuant to Rule 23(e) must 'generally describe[ ] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Lane v. Facebook, Inc.*, 2012 U.S. App.

[4] Objectors' argument is not even apt, since the term "Final Judgment" was used in the Settlement Agreement a single time to indicate the end of the "Class Period" (*see* Settlement Agreement ¶ 1.7)— which has been revised by the recent Stipulation— and does not refer to the period for making claims, which was always defined as "forty-five days after the date the Court enters Judgment." (*See id.* ¶ 1.3.) "Judgment," in turn, was defined as "the judgment to be entered by the Court pursuant to the Settlement. (*Id.* at ¶ 1.18.)

LEXIS 19767, at *31 (9th Cir. Sept. 20, 2012) (quoting *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009)).

Here, the notice did exactly that. It notified people that "[a]ny of the [Settlement funds] remaining after payment of all claims, attorneys' fees and expenses, the incentive awards, administrative costs, and taxes will be distributed fifty (50) percent to a Court-approved non-profit pro-consumer organization or organizations dedicated to food and drug labeling concerns . . . ." Detailed Notice of Proposed Class Action Settlement, Dkt. No. 105-2 at 19. The Notice gave Class Members the information necessary to investigate and determine whether the cy pres relief provision of the Settlement Agreement matched the goals of the class. Notice thus was sufficient. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, MDL No. 1827, 2012 U.S. Dist. LEXIS 142695, at *50 (N.D. Cal. Oct. 1, 2012) ("The objectors, who previously objected to final approval of the seven settlements, contend that *Dennis v. Kellogg Co.*, --- F.3d ---, 2012 U.S. App. LEXIS 18576, 2012 WL 3800230 (9th Cir. 2012), requires the parties to identify the potential cy pres recipients in the settlement agreements. The Court finds that this contention lacks merit . . . .").

Significantly, even NTG—who undoubtedly knew the identity of the *cy pres* recipient—did not object to the *cy pres* recipient, Consumers Union. Nor could they, since it is a non-profit group dedicated to informing people about consumer products, including drugs, and thus clearly meets the standards articulated by the Ninth Circuit in *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307-1308 (9th Cir. 1990). *See Nachshin*, 663 F. 3d at 1038-40; *Lane*, 2012 U.S. App. LEXIS 19767, at *22 ("while Objectors may vigorously disagree with the class representatives' decision not to hold out for more . . . or insist on a particular recipient of cy pres funds, that disagreement does not require a reviewing court to undo the settling parties' private agreement"); *Dennis*, 2012 U.S. App. LEXIS 18576, at *11-23; www.consumerreports.org/health/best-buy-drugs/index.htm (demonstrating that Consumers Union devotes an extensive portion of Consumer Reports to drugs, "natural health," "conditions & treatments," and how to "read a drug label") (last visited Oct. 15, 2012). (*See also* Dkt. No. 105 at 9:7-14 [explaining why Consumers Union is a good fit].)

B. Objectors' Re-Arguments of Previously Raised Objections Are Still Meritless

Rehashing the arguments from their objection brief and lengthy Fairness Hearing presentation, NTG asserts that their five objections should still be sustained. But each lacks merit.

i. The Notice Was More Than Adequate

As discussed at length in the Notice Plan and related briefing on the Motion for Final Approval of the Settlement (Dkt. Nos. 64, 105, 106, and 107), adequate notice has been provided to the Class. For example, the claims administrator

> suggest[ed] utilizing Magazines of general interest to the Target Audience and internet advertising focused on websites that provide information about health, medicine, and homeopathic remedies, as well as general news sites for those that may not be currently researching products at issue in the matter. Based on research through Simmons . . . it is [the claims administrator's] opinion that these media vehicles will be the most effective means by which to reach the Target Audience and by consequence, the class members themselves."

(Dkt. No. 64-2 at 56.)

The parties evaluated and accepted this suggestion, effecting notice in two health-oriented print publications relevant to "alternative" type remedies, like homeopathy (Natural Health Magazine and Health Magazine), as well as USA Today. They also effected online notice through tens of millions of internet impressions on popular general sites like Google and Facebook, and on health-oriented sites like HealthOnline, Medhealth, Healthgrades, Medicine Online, Mayo Clinic, CNN/Health, USA Today Health, Health Answers, Dr. Koop, Discover Health, Men's Health, Medicine News Today, RunnersWorld, YogaJournal, WholeLiving, and the health pages of 300 top internet news sites. (*See id.* at 58; Decl. of Markham Sherwood, Dkt. No. 105-2 at 2-5, 7-10, ¶¶ 5-11, 17-26.) Thousands have made claims, and they continue at a steady and robust rate. This objection thus should be overruled.

ii. The Notice Did Not Require Disclosure of the* Amount *of Fees

As discussed at length with the Court, Notice concerning fees has been adequately provided. The Notice made clear that Class Counsel would seek fees from the common fund.[5] Specifically, the Notice provided that:

[5] At one point during the Fairness Hearing, the Court stated that "the Notice did not include the fact that that attorneys' fees were coming out of the overall settlement amount." (Oct. 1 Hrg. Tr. at 32.) While

> Class Counsel will apply to the Court for an award of attorneys' fees plus actual expenses (including their court costs), subject to Court approval. Defendants shall have the option of responding to any such application, including by contesting any fees and expenses requested. If the Court approves the attorneys' fee and expense application, it will be paid from the Settlement Fund.

(Notice, Dkt. No. 105-2 at 20.) The Notice further provided that the motion for attorneys' fees and incentive awards would be posted on the web site after it was filed, and the date by when the motion had to be filed. (*Id.*) The Notice was entirely proper and satisfied the requirements set forth by the Ninth Circuit in *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988 (9th Cir. 2010). "[T]he only clear requirement" of the Ninth Circuit as articulated in *In re Mercury* "is that class counsel file their application for attorneys' fees, costs and incentive awards before the deadline for filing objections." *Weeks v. Kellogg Co.*, 2011 U.S. Dist. LEXIS 155472, at **81-82 (C.D. Cal. Nov. 23, 2011). (*See also* Motion for Fees, Dkt. No. 93, at 7-10 (collecting authority).) This objection should be overruled.

iii. The Scope of the Settlement's Release is Not Objectionable

Objectors next re-assert that the Settlement's release "violates the factual predicate doctrine" because it supposedly "applies to *any* non-personal injury litigation that has been brought against Boiron between January 1, 2000 and July 27, 2012," rather than being limited to claims "tied to the subject matter of the complaint." (Response at 6.) This is patently untrue, since the Settlement's release is limited to claims "arising out of or related in any way ***to statements made in or in connection with Defendants' advertising, marketing, packaging, labeling, promotion, manufacturing, sale and distribution of the Products***, that have been brought, could have been brought, or are currently pending, by any Class Member." (*See* Settlement Agreement ¶ 1.28.)

Moreover, the parties addressed this objection in their joint response (*see* Dkt. No. 107 at 24-26), including showing that *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), does not apply to the facts of this case. *National Super Spuds* concerned liquidated and unliquidated contracts for potato futures, and does not apply to classes where, as here, "the lead

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Class Counsel corrected this misunderstanding at the hearing (*id.* at 37-38), it bears repeating that the Notice fully disclosed these elements of their fee application. The Court also expressed concern that "the original agreement didn't include that" fees would come from a common fund, but instead a separate, $2 million fund. (*Id.*) While the parties had filed their original MOU containing that provision, it was never part of a final settlement agreement about which the Class was notified, so this could not have presented any confusion to class members.

plaintiffs are necessarily a part of" the settlement class and their interests are "aligned with the interests of" the class. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 111 (2d Cir. 2005). The Court should overrule this objection.

iv. The Injunctive Relief and Timing of Labeling Changes Are Not Objectionable

The parties have thoroughly addressed the substantial benefits of the injunctive relief and explained the process necessary for Boiron to implement it. (*See* Dkt. Nos. 93 at 11-12, 105 at 7-8, 107 at 16-18; Oct. 1 Hrg. Tr. at 20-22, 55-59). Indeed, as explained in FDA guidelines, there are many steps to implement a product labeling change and "[a] compliance period of less than 1 year would be generally considered a very short compliance period by most food and dietary supplement manufacturers." (*See* Dkt. No. 107 at 18). Objectors' repetition does not make their objection any more compelling; it should be overruled.

v. The Monetary Relief is Not Objectionable

Continuing to rely on the unsupported and self-serving assertion of attorney Ryan Ferrell, objectors again assert that the monetary relief represents a far smaller portion of sales than it actually represents; is the result of a "reverse auction," despite that NTG was fully aware of the mediation and declined to attend; and Boiron never negotiated a competing settlement with them and thus could not have been pitting parties against one another. (*See* Response at 6-7.) The parties have thoroughly refuted these objections (*see, e.g.*, Dkt. No. 107 at 11-15), and they should also be overruled.

As explained by the parties in testimony and papers distributed to the Court, the amount of sales from which relief could have been sought at trial does not include: (i) sales to physicians, because those consumers would not have relied on the packaging claims, but rather their doctor's recommendation to take the product (*see In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 134 (2009)); and (ii) sales to natural food stores which draws consumers more educated in the dilution levels of homeopathic medicines, for whom the named plaintiffs arguably did not have standing because they purchased in chain drugs stores (*see id.* at 130 ["Where the advertising or practice is targeted to a particular group or type of consumers, either more sophisticated or less sophisticated than the ordinary consumer, the question whether it is misleading to the public will be viewed from the vantage point of members of the targeted group, not others to whom it is not primarily directed."]). Thus, Class Counsel appropriately

determined a fair, reasonable and adequate amount for the capped settlement fund based on the amount of sales that were arguably reachable if a full trial on the merits would have been necessary.

C. The Class's Reaction Demonstrates the Strength of the Settlement

The Class's reaction to the Settlement is overwhelmingly positive. This Settlement received only three written objections. Compared to the many thousands of claims, the three objections represents a very small fraction of objecting Class Members. This weighs in favor of settlement approval. *See, e.g., Dennis v. Kellogg Co.*, 2011 U.S. Dist. LEXIS 36651, at *5 (S.D. Cal. Apr. 5, 2011) (granting final approval in part because "[o]f the thousands who received the Class Notice, only two Class Members" objected); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 641 (S.D. Cal., Jan. 20, 2011) ("The absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of the settlement are favorable to the class members.") (citing *Nat'l Rural Telecomms. Coop. v. DirecTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal., Jan. 5, 2004)).

As contended during the hearing, the NTG Objectors were motivated by their counsel's desire to derail this Settlement so that their clients' pending related cases could proceed. Indeed, one of the objectors, Mr. Gonzales, *testified* that he was satisfied with the Settlement (*see* Dkt. No. 107 at 6:14-7:3), calling into question whether his objection declaration (Dkt. No. 96-4) is truthful.[6] On behalf of Mr. Gonzales, NTG filed an action only seeking a California class. Their assertion that this precludes other individuals from seeking relief for consumers outside California—as Mr. Gallucci did when he filed his action seeking a nationwide class—is without support and against public policy. No attorney

[6] Objectors' counsel also feign indignation that Mr. Gallucci supposedly "copied" Mr. Gonzales' Complaint, but Mssrs. Ferrell and Warshaw, like all attorneys who prosecute class actions for plaintiffs, have themselves filed many such "copycat" actions. Indeed, on November 16, 2011, Mr. Ferrell threatened to file duplicative actions against Ferrero concerning its Nutella advertising, despite that Class Counsel had brought that action nine months earlier. (*See* Dkt. No. 44-1 at 16-19, Ex. 3.) And while they have repeatedly claim that Mr. Gallucci "plagiarized" 20 paragraphs of Mr. Gonzales' Complaint, they neglected to tell the Court that they are including in this count boilerplate recitations appearing in nearly every complaint ever filed, for example that Plaintiff "realleges the allegations contained herein." Even if copying occurred, which Mr. Gallucci denies, these experienced class action attorney have "simply fail[ed] to establish that the copying of complaints by other consumer class action attorneys is in any manner wrongful." *Cohorst v. BRE Props.*, 2011 U.S. Dist. LEXIS 87263, at *16-17 n.1 (S.D. Cal. Aug. 5, 2011). Ultimately, whether an action was filed first or later in no way affects whether a settlement is fair, reasonable or adequate. Settlements reached in later-filed actions concerning overlapping litigation are regularly approved. (*See* cases cited in Dkt. No. 107 at 7-8.)

has a monopoly on litigation against a particular defendant. The courts exist to benefit litigants, not attorneys. This fact is of particular importance in the class action context.

The Court should not be persuaded by these attorney-driven objections. Rather, it should look at the overwhelming response of the class, which is positive. This factor further supports the approval of the settlement.

CONCLUSION

NTG's latest effort to circumvent Court rules and proper procedure, reargue old points and raise new ones should be rejected, and the purported "Response" stricken. As explained in the substantial briefing to the Court and extensive oral argument, the Settlement is fair, reasonable, and adequate. It should be granted final approval, thereby allowing important injunctive relief, affecting not just Boiron but the homeopathy industry as a whole, and permitting monetary distributions to the thousands of class members who have filed claims and are awaiting the Settlement's approval.

DATED: October 16, 2012

Respectfully submitted,

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Counsel for Defendants[7]

[7] Counsel for Plaintiffs, Ronald A. Marron, certifies that, pursuant to Section 2.f.4. of the Court's CM/ECF Administrative Policies, Defendants' counsel, Christina Sarchio, has reviewed the contents of this Joint Motion and Stipulation and authorized placement of her electronic signature on this document.

EXHIBIT 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

REBECCA YUMUL, individually, and on behalf of all others similarly situated, Plaintiff, vs. SMART BALANCE, INC., Defendant.	CASE NO. CV 10-00927 MMM (AJWx) TENTATIVE ORDER GRANTING MOTION FOR CLASS CERTIFICATION

Rebecca Yumul filed this putative class action against Smart Balance, Inc. ("Smart Balance" or "SBI") on February 8, 2010.[1] On May 24, 2010, the court dismissed the complaint with leave to amend for failure to allege with particularity the facts upon which the claims were based.[2] On July 30, 2010, the court dismissed the amended complaint insofar as it pled claims that predated the limitations period.[3] The court directed Yumul to file a second amended complaint alleging any facts on which she based her invocation of the delayed discovery rule. On August 12, 2010, she filed a second amended complaint pleading three claims: (1) violation of

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[1]Complaint for Violations of Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act ("Complaint"), Docket No. 1 (Feb. 8, 2010).

[2]Order Granting in Part and Denying in Part Defendant's Motion to Dismiss ("First Order"), Docket No. 18 (May 17, 2010).

[3]Order Granting in Part and Denying in Part Defendant's Motion to Dismiss ("Second Order"), Docket No. 29 (July 30, 2010).

arguments are unavailing. The Court finds Plaintiff has met the typicality requirement here insofar as each class member's claim arises from the same standard form purchase agreement" (record citations omitted)); *Chavez*, 268 F.R.D. at 377-78 ("Defendants argue that plaintiff's claims are not typical of the purported class. . . . Plaintiff's claims here arise out of the allegedly false statement, worded in several variations, made on every Blue Sky container indicating that the beverages are connected to Santa Fe, New Mexico and therefore arise from the same facts and legal theory. Because plaintiff alleges that all the Blue Sky beverages bore substantially the same misrepresentation, . . . , his claims are 'reasonably coextensive with those of absent members'" (citations omitted)).

G. Adequacy

The adequacy of representation requirement set forth in Rule 23(a)(4) involves a two-part inquiry: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020; accord *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Other than suggesting that her claims are atypical of those of other class members, Smart Balance does not argue that Yumul is not an adequate class representative.[76] Because the court has found that Yumul's claims are typical, it concludes that she is also an adequate class representative. Moreover, having reviewed the evidence Yumul has presented, the court finds that there is no apparent conflict between her and other members of the putative class, and that her counsel is competent and has diligently prosecuted the action. The court thus concludes that they are able adequately to represent the consumer class.[77]

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[76]See Opp. at 17 ("If a plaintiff is not a typical representative, she is also not an adequate representative.").

[77]In August 2010, the Weston Firm's ("Weston") former co-counsel, Beck & Lee, sought to have Weston disqualified from representing the putative class, alleging that Weston had engaged in unethical conduct, including the offering of kickbacks to named plaintiffs in other class actions. The court declined to disqualify Weston at that time, because none of the allegedly unethical conduct had taken place in this action, and because it concluded that the matter was more properly considered in the context of a motion for class certification. The court granted

H. Whether Plaintiff Has Satisfied the Requirements of Rule 23(b)(3)

Rule 23(b)(3) requires two separate inquiries: (1) do issues common to the class "predominate" over issues unique to individual class members, and (2) is the proposed class action "superior" to other methods available for adjudicating the controversy. See FED.R.CIV.PROC. 23(b)(3).

1. Predominance

The predominance requirement is "far more demanding" than the commonality requirement of Rule 23(a). *Amchem Products*, 521 U.S. at 623-24. If common questions "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication," then "there is clear justification for handling the dispute on a representative rather than on an individual basis," and the predominance test is satisfied. *Hanlon*, 150 F.3d at 1022. "'[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, [however,] a Rule 23(b)(3) action would be inappropriate.'" *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1778, at 535-39 (1986)). This is because, *inter alia*, "the economy and efficiency of class action treatment are lost and the need for judicial supervision and the risk of confusion are magnified." *Id.*

Smart Balance asserts that individual issues predominate because the elements of Yumul's statutory claims and the statute of limitations raise predominating individual issues.[78]

a. Materiality

Smart Balance's request to modify the scheduling order to allow it to explore the alleged ethical breaches, so that it could present evidence relevant to them in opposition to any future class certification motion. As Smart Balance has not argued that either Yumul or Weston are inadequate due to their involvement in ethical violations in its opposition, the court concludes that Beck & Lee's allegations do not compel a finding that the adequacy requirement is not satisfied.

[78]Defendant also asserts that Article III standing requirements raise predominating individual issues. As the court addressed that "threshold" issue above, it need not repeat that analysis here.

EXHIBIT 4

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-1028-GW(AGRx)	Date	April 12, 2012
Title	*Evangeline Red, et al. v. Kraft Foods, Inc., et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Pat Cuneo	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Gregory S. Weston John Joseph Fitzgerald IV Ronald A. Marrow Gillian C. Wade Sara D. Avila	Kenneth K Lee Dean N. Panos

PROCEEDINGS: **PLAINTIFF'S RENEWED MOTION FOR CLASS CERTIFICATION (filed 12/19/11);**

PLAINTIFFS' MOTION TO STRIKE OR EXCLUDE THE DECLARATION OF PROFESSOR RAN KIVETZ (filed 03/15/12)

The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. For reasons stated on the record, the motions are **TAKEN UNDER SUBMISSION** and continued to **April 26, 2012 at 8:30 a.m.** Counsel will contact the court clerk by April 24, 2012 whether a hearing will be required. Court to issue ruling.

1 : 00

Initials of Preparer JG

Evangeline Red, et al. v. Kraft Foods, Inc., et al.; Case No. CV-10-1028
Tentative Ruling on Renewed Motion for Class Certification

I. Background

This putative class action lawsuit was filed by Plaintiffs Evangeline Red ("Red") and Rachel Whitt ("Whitt") (collectively "Plaintiffs") against Defendants Kraft Goods, Inc., Kraft Foods North America, and Kraft Foods Global, Inc. (collectively "Kraft" or "Defendants") on February 11, 2010. *See* Docket No. 1. Plaintiffs claim that Kraft falsely markets numerous food products (collectively the "Products"), namely Teddy Grahams, many varieties of Ritz Crackers, Original Premium Saltine Crackers, Honey Maid Graham Crackers, Vegetable Thins and Ginger Snaps, as healthy, despite the fact that they contain high levels of partially hydrogenated vegetable oil ("PHVO"), "as well as a variety of unhealthy, highly-refined, highly-processed, and nutritionally empty ingredients," and thus allegedly cause health problems including cardiovascular disease, diabetes and cancer. *See* Pl.'s Second Amended Complaint ("SAC"), Docket No. 58 ¶¶ 5, 31-43, 44-47, 48-54. As such, Plaintiffs claim that Kraft's labeling of the Products violates (1) the California Unfair Competition Law's prohibition of unlawful business acts or practices; (2) the California Unfair Competitions Law's prohibition against unfair or fraudulent business practices or acts; (3) California's False Advertising Law, and (4) the federal Consumer Legal Remedies Act. *See generally* SAC.

Plaintiffs filed for class certification once before, on May 13, 2011. After a hearing, this Court denied the motion without prejudice on September 29, 2011 (the "September Order"). *See* Docket No. 145. Plaintiffs now bring a renewed class certification motion. *See* Docket No. 156. The renewed motion for class certification differs from the first in many respects, primarily: 1) instead of proposing a nationwide class, the class is limited to California consumers; 2) instead of one class consisting of consumers who purchased any of the Products, Plaintiffs now propose seven subclasses, one for each Product; 3) each subclass contains a requirement that the purchased food have borne the packaging that Plaintiffs allege to be unlawful; 4) whereas the previous motion for class certification sought to include consumers who purchased the products as early as 2000, the subclasses' date restrictions propose an earliest purchase date of January 1, 2004 (for the Honey Maid Grahams Subclass), with five of the subclasses defined so as to include consumers who purchased the products no earlier than 2006, and one defined so as to include only consumers who purchased the product no earlier than 2007. *See id.* 1-2. In addition, in its reply brief, Plaintiffs respond to one of Defendants' arguments as to ascertainability by proposing end-dates to some of the subclasses, since Defendants apparently contend that the challenged labeling only occurred up until various dates in 2010 or 2011 for some of the products. Thus, the currently proposed subclasses are as follows:

> The **Ginger Snaps Subclass**: All persons who purchased in California, on or after February 11, 2006, and on or before December 31, 2010, Ginger Snaps in packaging

you filed? A: Not really . . . I don't know the difference.").[18] Another concern is that Whitt was apparently unaware that the Beck & Lee law firm was hired and then fired as co-counsel. *See* Docket No. 167, Exh. 61 at 156. However, the Ninth Circuit has set a low bar for the level of knowledge required of class representatives, and a named plaintiff can be an adequate representative if he merely "understands his duties and is currently willing and able to perform them. The Rule does not require more." *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001). Therefore, while the Court would not presently deny certification on account of Red and Whitt's limited involvement in the case, the Court would caution Plaintiffs' counsel that they must include, involve and respect the class representatives sufficiently if the case moves forward such that Red and Whitt are able to discharge their duties in conformance with Rule 23.

Second, this Court previously found that the adequacy of Plaintiffs' counsel was highly questionable for a number of reasons, noting that "Plaintiffs have failed to make the necessary showing that their counsel have the resources necessary to commit to representing the class." September Order at 14; s*ee* Fed. R. Civ. P. 23(g)(1)(A)(iv). Given the small size of the Weston firm (*see* Docket No. 158 ¶¶ 44-45), which shall not be recounted in detail given that the relevant portions of the Weston Declaration were filed under seal and redacted, the Court still has significant doubts that the Weston firm will be able to handle a litigation of this size and complexity. The Marron firm is similarly small, thus even assuming a high level of involvement in the case, the Court's worries are still not fully assuaged, particularly as the Marron declaration details the many other (surely complex) suits for which these two firms are co-counsel and which will likely consume resources. *See* Docket No. 159 ¶¶ 11, 14. However, the addition of Milstein Adelman as yet another co-counsel (*see* Docket No. 154) renders the Court inclined to find that these three firms together will be able to find the resources needed to prosecute this case vigorously and dilligently for their clients.[19] Given that the Weston and Marron firms, together as co-counsel, have been approved as class counsel in a slew of recent class certifications in this district, the Court is sufficiently convinced of their ability to adequately represent the class. *See* Docket No. 158, 4-10.

As a separate issue, while considering Plaintiffs' previous class certification motion, the Court found that it "would have an obligation to the putative class to fully investigate" allegations launched by former co-counsel Beck & Lee of impropriety on the part of the Weston firm. September Order at 14. The Court has now considered the detailed description of the Beck & Lee/Weston Firm dispute provided in Gregory Weston's declaration, and is inclined to find the accusations sufficiently groundless, and would not preclude the appointment of the Weston Firm as

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[18] At least one of Kraft's assertions as to Red and Whitt's lack of involvement ignores the nuances of the deposition testimony on which it relies. *Compare* Docket No 176 at 42 *with id.* at Exh. 60 at 80 (quoting language where Red said she did not understand what it meant to be a class representative, failing to include testimony regarding her prior service as a class representative in another case involving allegations similar to those pled in the instant matter).

[19] The Court would recommend, though not require, that these three firms either arrange a fee allocation in writing early on in the litigation, or periodically address this issue or any other potentially contentious matter that might arise when there are three firms who must collaborate in a complex contingency suit, so as to avoid an endgame squabble amongst Plaintiffs' counsel over any potential settlement award or judgment in the Plaintiffs' favor.

class counsel. *See* Docket No. 158 ¶¶ 11-43. Other courts have similarly considered such accusations sufficiently baseless so as not to preclude appointing the Weston Firm as class counsel.

All in all, for the foregoing reasons, the Court would find that all of the requirements of 23(a) are generally met, yet, the requirements of 23(b)(3) are not. The Court would thus DENY certification of any of the Subclasses as 23(b)(3) subclasses, as sought by Plaintiffs, but would permit leave to amend the Complaint so as to seek only injunctive relief via a 23(b)(2) class.

C. Kivetz Declaration

Plaintiffs have submitted a motion to strike or exclude the expert testimony submitted by Defendants in support of their opposition to the renewed class certification motion. *See* Docket No. 199. The Court read and considered the Kivetz Declaration in its evaluation of the class certification motion. Since the Kivetz Declaration did not significantly affect the Court's analysis; the Court would find Plaintiff's motion to strike the declaration moot. If Defendants seek to use the Declaration in support of further motions and proceedings in this case, the Court would invite Plaintiffs to seek consideration of their motion at that point.[20]

III. Conclusion

In sum, the Court would DENY certification of any of the Subclasses pursuant to 23(b)(3). The Court would nonetheless permit Plaintiffs leave to amend the motion for class certification to seek injunctive relief only, pursuant to 23(b)(2). The Could would nonetheless question counsel at the hearing as to the following issues, which are the closest questions in the foregoing analysis:

- How would class members be able to self-identify accurately, such that the class is ascertainable?
- Is the damages calculation method suggested by Plaintiffs in their second proposal (*see* Docket No. 156 at 30-33) feasible, or would it render the case unmanageable?
- Have the class representatives been sufficiently well-informed that they can adequately represent the class?
- Do Defendants object to the subclass period end-dates proposed by Plaintiffs in their reply brief?
- Do Plaintiffs intend to seek certification as a 23(b)(2) class in the alternative to a 23(b)(3) class? If so, would injunctive relief truly be moot, according to both parties?

The Court would also discuss with the parties how to address the next issue that must be considered in this case: the materiality issue. The parties should discuss at the hearing whether this matter is fit for adjudication via a summary judgment motion or whether a specialized hearing is required.

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[20] The Court would note without deciding, however, that Plaintiff's arguments as to the Declaration's relevance will likely not be not well-taken, as Dr. Kivetz offered testimony on issues that, while (as noted previously by this Court in the September Order) are perhaps only marginally relevant to class certification, are highly relevant to the dispute as a whole, particularly with regards to the finding of materiality crucial to maintaining class status for Plaintiffs' CLRA claims.

EXHIBIT 5

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EVANGELINE RED, JENNIFER RED, RACHEL WHITT, on behalf of Themselves and all others similarly situated,

Plaintiffs,

v.

UNILEVER PLC and UNILEVER UNITED STATES, INC.,

Defendants.

Case No: 3:10-cv-00387 JW
Pleading Type: Class Action

DECLARATION OF JACK FITZGERALD IN SUPPORT OF SUPPLEMENTAL BRIEF CONCERNING PLAINTIFFS' TERMINATION OF BECK & LEE AND REESE RICHMAN

Judge: The Hon. James Ware
Date: September 13, 2010
Time: 9:00 a.m.
Location: Courtroom 8, 4th Floor

I, Jack Fitzgerald, declare:

1. I am a member in good standing of the State Bar California, and admitted to practice before this Court. I have personal knowledge of the facts stated herein, and, if called on to do so, could and would testify competently thereto. I make this declaration in support of Plaintiff's Supplemental Brief Concerning Termination of Beck & Lee and Reese Richman.

2. Before joining The Weston Firm, I was associated with the law firms of Baker & Hostetler, LLP, in New York, New York, and Mayer Brown LLP in Palo Alto, California. My practice has always focused on large-scale, complex litigation.

3. I received a B.A. from Cornell University, graduating *magna cum laude*, and a J.D. from New York University School of Law, where I was an editor of the New York University Law Review.

4. I joined the Weston Firm in February, 2010.

5. Initially, Mr. Weston and I discussed ending the Weston Firm's association with Beck & Lee naturally by litigating our existing cases to completion and avoiding bringing any more cases together. Thus, in early July, we declined Beck & Lee's invitation to jointly prosecute an action against Adobe. Attached hereto as Exhibit A is a July 1, 2010 email from Elizabeth Beck to Jack Fitzgerald Re: "commitment."

6. After long deliberation and several attempts to find alternative solutions, Mr. Weston and I decided we had no other option than immediately ending the joint prosecution with Beck & Lee and Reese Richman. Before doing so, we called each of our clients, apprising them of the situation. As a result, each client authorized us to terminate on their behalves Beck & Lee. Plaintiffs in this action also authorized the Weston Firm to terminate Reese Richman on their behalves.

7. I was routinely embarrassed by the Becks' behavior and often felt compelled to apologize to others for it.

8. On July 19, 2010, I attended a case management conference before Judge Patel in an action the Weston Firm is prosecuting against Yelp. Jared Beck and Elizabeth Lee Beck also attended. During the conference, Judge Patel ordered the case consolidated with an earlier-filed

one. She then ordered counsel for both sets of plaintiffs to meet and confer with defendant's counsel in the courthouse's attorneys lounge to determine a schedule for filing a consolidated complaint and beginning discovery.

9. Ms. Beck had previously butted heads with the Mr. Ongaro, when she requested he stipulate to our appointment as lead counsel and he in turn requested certain information relating to our qualifications. Attached hereto as Exhibit B is a true and correct copy of a Letter from David Ongaro to Elizabeth Beck, dated June 15, 2010.

10. Ms. Beck apparently took this as a personal insult, because as soon as she entered the attorneys lounge and sat across the table from Mr. Ongaro, she began screaming and swearing. Ms. Beck accused Mr. Ongaro of being in "cahoots" with Yelp, of being a sell-out (because he is primarily a defense lawyer who does some plaintiff work), and of being a failed partner at his previous firm. Several times during her fit, Ms. Beck lunged across the table at Mr. Ongaro, repeatedly thrusting in his face her one finger extended from an otherwise tightly-clenched fist, coming within an inch or two of striking him.

11. As this was happening, I implored Mr. Beck to intervene and regain control of Ms. Beck. Mr. Beck stated that this "had to happen" and instructed me not to intervene.

12. Eventually Ms. Beck became calm and retook her seat. As counsel proceeded through each item, however, she again became hostile, and again shouted at and insulted Mr. Ongaro, and lunged across the table at him. During this time, Mr. Beck attempted to hold Ms. Beck back while stating that they had tried "cleared the air" but accusing Mr. Ongaro of further provoking Ms. Beck. After a few minutes, Mr. Ongaro and defense counsel ended the conference over the Becks' objections, electing to return to Judge Patel and advise her what had happened.

13. A true and correct copy of excerpts from the July 19, 2010 Case Management Conference before Judge Patel is attached hereto as Exhibit C.

14. In addition to myself, Mr. Beck, and Ms. Beck, others present when this occurred include David Ongaro and Amelia Winchester, of Ongaro Burtt, and Matthew D. Brown and Benjamin H. Klein, of Cooley Codward. I observed at least Ms. Winchester and Mr. Klein taking contemporaneous hand-written notes as the episode occurred.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARILYN HALL PATEL

BORIS LEVITT, Plaintiff, VS. YELP! INC., Defendant.	)	No. C 10-1321 MHP
CATS AND DOGS ANIMAL HOSPITAL, INC., et al., Plaintiffs, VS. YELP! INC., Defendant.	)	No. C 10-2351 MHP San Francisco, California Monday July 19, 2010

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff Levitt:

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595 Market Street, Suite 610
San Francisco, California 94105
BY: DAVID R. ONGARO, ESQUIRE
AMELIA D. WINCHESTER, ESQUIRE

(Appearances continued on next page)

Reported By: *Katherine Powell Sullivan, CSR #5812, RPR, CRR*
Official Reporter - U.S. District Court

APPEARANCES (CONTINUED):

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		THE WESTON FIRM 2811 Sykes Court Santa Clara, California 95051
	BY:	**JACK FITZGERALD, ESQUIRE**
For Defendant:		Cooley Godward 101 California Street, 5th Floor San Francisco, California 94111-5800
	BY:	**MATTHEW D. BROWN, ESQUIRE** **BENJAMIN H. KLEINE, ESQUIRE**

MR. ONGARO: Thank you, Your Honor.

MR. FITZGERALD: Thank you.

MS. LEE BECK: Thank you, Your Honor.

MR. BROWN: Thank you.

THE COURT: Thank you.

(Break in proceedings.)

THE CLERK: Recalling Civil 10-1321, 10-2351, Boris Levitt versus Yelp!

MS. LEE BECK: Good afternoon, Your Honor.

THE COURT: Yes. Good afternoon.

MS. LEE BECK: We were hoping to have a schedule in place, but we've reached sort of an impasse. Counsel for Mr. Levitt and counsel for Yelp! wish to have a prolonged discovery, prolonged trial schedule. Counsel for Cats and Dogs and the other plaintiffs wish for a more abbreviated one.

I feel that further talking about this will result in an agreement, but they wish to -- they wanted -- they terminated the conversation and came here.

MR. ONGARO: Well, Your Honor, what actually happened was, when we went to sit down, Ms. Beck Lee became agitated, was screaming at me, pointing her finger at me. Literally, her finger was this close (indicating). I asked her to please sit down and stop pointing her finger. It was a scene I have never seen in 19 years of practicing law.

We then got her calmed down, to sit down. We then

started to go through -- and we had previously, in the scheduling order that we had put together, as the Court's ordered with the Cooley attorneys, had sat down and kind of scoped out what we planned for discovery.

The first thing they disagreed with. Again, they yelled at me, saying I'm in cahoots with them and I shouldn't be on this case. Every single item we went to became very contentious. And I just -- it was counter- -- let me finish. It was counterproductive.

And I think -- we've already sat down and figured out kind of how we think it should go. Happy to sit down with them. But Ms. Beck Lee, it's difficult to work with her under these circumstances.

And Mr. Brown can certainly attest to what happened. He's the neutral party here.

MR. BROWN: Far be it from me to be in the position of umpire here, but I have not had a conference quite like the one I experienced, in my years of practice here either. It was not productive.

We, with counsel for Levitt, had come up with a chart that we put in a joint case management statement that was all pegged off the assumption that there wouldn't be discovery until the motion to dismiss was resolved, which it sounded like Your Honor wanted us to do.

And so we started going through or attempting to go

through each of those line items with counsel for the Cats and Dogs Hospital. We got, probably, three items in. And it took us ten minutes to get that far.

And there's, apparently, something going on here that I'm not privy to, where there's a lot of atmospherics around something, but it has nothing to do with the merits of the discovery schedule. And it truly was a breakdown within ten minutes, and so we decided to come back and report to Your Honor and take it from there.

MR. ONGARO: Given that, Your Honor, perhaps we just submit the separate schedules you requested. I think that probably makes the most sense. We have submitted a schedule with our prior briefing.

THE COURT: Mr. Fitzgerald, from your firm, who is going to take the laboring oar on the discovery, the class certification motion, responding to the motion to dismiss?

I know that's a compound, complex question. But you can take them apart, if you want, or answer it all in one.

MR. FITZGERALD: Your Honor, it's difficult for me to say now because it depends on what's going on in our other cases, as well.

But, you know, I would say I tend to do most of the writing. So as far as, like, the motion to dismiss I would be the one taking the laboring oar.

But that being said, I'm just speaking about within

EXHIBIT 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WESTON FIRM, P.C.,

Plaintiff,

v.

BECK & LEE, P.A. d/b/a BECK & LEE TRIAL LAWYERS, et al.

Defendants.

CASE NO: 10-CV-1694 W (CAB)

ORDER ON OSC REGARDING SANCTIONS FOR VIOLATION OF RULE 11(b) [DOC. 22]

On September 30, 2010, Plaintiff's counsel Gregory Weston was ordered to show cause as to why the filing of his TRO request did not violate Rule 11(b) of the Federal Rules of Civil Procedure. (Doc. 22.) Specifically, the omission of Judge Ware's September 14th ruling on a similar TRO request, and other significant pieces of known information concerned this Court. On October 20, 2010, Defendant Reese Richman LLP filed its response. On October 22, 2010, Defendant Beck & Lee, P.A. filed its response.

Having read and considered the responses (Docs. 25, 29, 30), the Court finds that **SANCTIONS ARE NOT WARRANTED** for violation of Rule 11(b) at this time. In light of the foregoing, the hearing set for October 29, 2010 is **VACATED**.

IT IS SO ORDERED.

DATED: October 27, 2010

Hon. Thomas J. Whelan
United States District Judge