Case Nos. 14-1198, 14-1227, 14-1245 and 14-1389

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NICK PEARSON, et al., and RICHARD JENNINGS,

Plaintiffs-Appellees/Cross-Appellants,

versus

NBTY, INC., et al.,

Defendants-Appellees.

APPEALS OF: THEODORE H. FRANK,
KATHLEEN MCNEAL AND ALISON PAUL,
Objectors-Appellants/Cross-Appellees.

Appeal from the United States District Court for the Northern District of Illinois,
Honorable James B. Zagel, Case No. 1:11-cv-07972

Brief as Appellees and Cross-Appellants of Plaintiffs-Appellees/Cross-Appellants Nick Pearson, et al. and Richard Jennings

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-1198

Short Caption: Pearson v. NBTY, Inc., et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Nick Pearson; Francisco Padilla; Cecilia Linares; Augustina Blanco; and Abel Gonzalez

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Stewart Weltman, LLC; Bonnett Fairbourn Friedman & Balint, PC; Levin Fishbein Sedran & Berman

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Stewart Weltman Date: 2-12-2014

Attorney's Printed Name: Stewart Weltman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-1245

Short Caption: Nick Pearson, et al. and Richard Jennings v. NBTY, Inc., et al.

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The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Richard Jennings

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Denlea & Carton LLP

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: Peter N. Freiberg Date: February 19, 2014

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellees/Cross-Appellants state that the jurisdictional statement contained in Objectors-Appellants' Opening Brief is complete and correct.

Regarding Plaintiffs-Appellees'/Cross-Appellants' appeal, the District Court has jurisdiction over this matter pursuant to 28 U.S.C. §1332(d)(2) because this is a class action in which the amount in controversy exceeds the sum of $5,000,000, exclusive of interest and costs, which class action includes millions of class members, and some of the members of the Class are citizens of a state different from the defendants. Plaintiffs Nick Pearson and Francisco Padilla are citizens of the State of Illinois; plaintiffs Cecilia Linares, Augustina Blanco and Abel Gonzalez are citizens of the State of California; and plaintiff Richard Jennings is a citizen of the State of Massachusetts. Defendant NBTY, Inc. is a Delaware corporation with its principal place of business in the State of New York; defendant Rexall Sundown, Inc. is a Florida corporation with its principal place of business in the State of New York; and defendant Target Corporation is a Minnesota corporation with its principal place of business in the State of Minnesota. Furthermore, no jurisdictional exception contained in 28 U.S.C. §1332 applies.

The United States Court of Appeals for the Seventh Circuit has jurisdiction over this matter pursuant to 28 U.S.C. §1291. The District Court entered a Final

Judgment and Order on January 22, 2014 which disposed of all claims and defenses of the parties. Plaintiffs, Nick Pearson, et al., filed a Notice of Appeal on February 3, 2014, and Plaintiff, Richard Jennings, filed a Notice of Appeal on February 4, 2014. The Notices of Appeal were timely filed pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

As Appellees:

1. Whether the District Court abused its discretion in finally approving the settlement that provides an uncapped fund against which Class members can make claims; a $2 million minimum payment that, if not exhausted even after doubling or tripling Class members' payments, is awarded to an appropriate *cy pres* entity; and substantial product labeling changes such that future frauds will not be committed against Class members and the public at large?

As Appellants:

1. Whether the District Court abused its discretion in limiting counsel's fee award to their lodestar with no multiplier when the settlement provides substantial benefits to the Class and furthers consumer protection by eliminating and deterring future fraudulent product label representations?

2. Whether the District Court abused its discretion in awarding attorneys' fees by not taking into account the substantial injunctive relief achieved by the settlement and Plaintiffs' expert valuation of the injunctive relief based on independently prepared market analyses that Rexall commissioned in the regular course of its business?

3. Whether the District Court abused its discretion by only considering the monetary component of the settlement instead of viewing the benefits of the settlement as a whole in awarding fees?

4. Whether the District Court abused its discretion in not awarding the requested fees to which the settling defendants agreed not to object?

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Plaintiffs adopt the Statement of the Case and Facts of Defendants-Appellees, NBTY, Inc. and its subsidiary Rexall Sundown, Inc. (collectively, "Rexall"), and offer the following additional facts:

There were two main representations that Rexall made about its glucosamine/chondroitin products: (1) that they rebuild or renew cartilage; and (2) that they provide some form of palliation (e.g. comfort, flexibility, mobility). Dkt. 121 at 15.[1] The settlement provides that for a period of at least 30 months,[2] Rexall must stop making the rebuild/renew cartilage representations and, with regard to the palliation representations, state that "results may vary" – taking into account that 30-40% of consumers of these products experience a placebo effect. Dkt. 121 at 18-19; Dkt. 133-22.

As part of the final approval process, Plaintiffs submitted the expert Report of Keith Reutter, Ph.D. (an economist with expertise in financial and economic data pertaining to damages in complex litigation and regulatory matters) to value *ex ante* the injunctive relief of removing the rebuild/renew cartilage claims during

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[1] "Obj. A." refers to Objectors-Appellants' Appendix; "Supp. A." refers to the Supplemental Appendix of Plaintiffs and Defendants-Appellees; "Dkt." Refers to the docket entries in the District Court; and "App. Dkt." refers to the docket entries in this Appeal.

[2] As set forth in Defendants-Appellees' Brief, at § II.B, Rexall has every incentive to continue the labeling changes after the 30-month period.

the mandatory 30-month period of labeling changes. Supp. A. 86-105; see also Report of Keith A. Reutter, Ph.D. (filed under seal). Dr. Reutter's Report relied upon marketing surveys and studies that Rexall commissioned in the regular course of business, [redacted] Supp. A. 89-90; Reutter Report, at ¶¶ 5-6. [redacted] Supp. A. 90; Reutter Report, at ¶ 7. Relying on these studies, and the fact that [redacted] (Dkt. 113-27 (Declaration of Jorge Granja, at ¶ 3) (filed under seal), Dr. Reutter estimated the consumer savings due to the labeling changes for current Class members and all consumers over the 30-month period to be $21.7 million and $46.2 million, respectively. Supp. A. 92-94; Reutter Report, at ¶¶ 10-12.

At the hearing on Plaintiffs' motion for final approval of the class action settlement, the District Court requested Plaintiffs to submit briefing on the feasibility of waiting until after the label changes went into effect to determine their monetary value. Plaintiffs submitted a supplemental Report by Dr. Reutter

addressing the feasibility of an *ex post facto* valuation by analyzing sales and pricing data before and after the label changes are implemented. Dr. Reutter explained that, while theoretically feasible, such a "before and after" study would require a regression analysis that was not practically feasible. Among other things, it would require pricing and marketing information from Rexall's competitors (information they are not likely to voluntary provide and could not be compelled to divulge), would take at least two years, and would cost at least $500,000 to complete. Dkt. 137-1, at ¶ 4.

Although the District Court recognized that the labeling changes required by the settlement are a substantial benefit, it held that the injunctive relief benefits future consumers, not Class members, and refused to attach any value to the injunctive relief. Obj. A. 6, 9, 10, 14-15. The District Court also did not view the *cy pres* award (to an organization engaged in orthopedic research and education) as a benefit to the Class and thus did not consider it in evaluating the attorneys' fee request. Obj. A. 9, 10.

After approving the settlement as fair, reasonable and adequate, the District Court awarded a total of $1,933,593.75 in attorneys' fees based on Class Counsels' lodestar, without any multiplier. Obj. A. 17-18. The District Court noted that the award comprised 9.6% of the $20.2 million fund benefitting the Class, and 13.6% of the $14.2 million compensatory fund made available to the Class for claims.

Obj. A. 17-18.[3] The District Court did not consider the benefit of the injunctive relief when it awarded attorneys' fees because it concluded that the injunctive relief did not benefit current Class members and that benefit to current Class members was the only factor for evaluating the injunctive relief. Obj. A. 21.

[3] It also performed a lodestar analysis crosscheck. Obj. A. 15-17.

SUMMARY OF PLAINTIFFS' ARGUMENT AS APPELLEES

The District Court did not abuse its discretion in finally approving this comprehensive settlement, which provides substantial benefits to Class members, an appropriate *cy pres* recipient and the public at large. The settlement makes available an uncapped fund against which all Class members can make claims. Even Objectors do not challenge the monetary amounts made available to individual Class members. To encourage claims, the notice program was as robust as possible, including direct mailed notice to almost half of the Class (approximately 4.7 million households) - a rarity in mass-marketed consumer fraud product labeling cases. A $2 million floor is included which, if not exhausted after doubling or tripling Class members' claims, is awarded to an appropriate *cy pres* entity. And, to ensure that frauds do not continue (and to deter others), the settlement requires the removal of key false and misleading language from the front of the product labels, benefitting Class members and the public at large.

ARGUMENT

I. PLAINTIFFS' ARGUMENTS AS APPELLEES

A. STANDARD OF REVIEW

The Court reviews a District Court's approval of a class action settlement for an abuse of discretion. *Synfuel Techs v. DHL Express (USA),* 463 F.3d 646, 652 (7th Cir. 2006). Although a District Court should evaluate, among other things, the probability of plaintiff prevailing on its various claims, the expected costs of future litigation, and hints of collusion, this Court's review is more limited. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). When an agreement has been approved by the District Court, it will not be reversed on appeal absent plain error or an abuse of discretion. *Cusak v. Bank United FSB*, 159 F.3d 1040, 1042 (7th Cir. 1998).

B. THE DISTRICT COURT PROPERLY HELD THAT THE SETTLEMENT WAS FAIR, REASONABLE AND ADEQUATE.

The settlement is fair, adequate and reasonable, and was not the product of collusion. The District Court found that the Parties had developed a thorough record upon which to base the settlement, and that the settlement was the product of arm's-length negotiations. Obj. A. 4, 7. The settlement creates an uncapped fund for Class members to claim against, and requires a minimum payout by Rexall of $2 million, with the costs of notice (which reached at least 76% of the Class) and attorneys' fees being paid separate and apart from the compensation available to the Class. Obj. A. 52-35, 58, 60-61; Supp. A. 57. Objectors did not in

the District Court and do not here challenge the monetary amounts made available to individual Class members. (Objectors' Brief, at 11). The settlement provides that if claims of $2 million are not made even after doubling and tripling claims made without and with proof of purchase, respectively, remaining monies will be awarded to a *cy pres* recipient dedicated to orthopedic research and education. Obj. A. 60-61. The settlement also includes substantial injunctive relief, prohibiting Rexall from making deceptive claims, including the demonstrably false claim that its products will "rebuild" or "renew" cartilage. Obj. A. 51-52, 88. The settlement is a model for resolving class actions involving mass-marketed goods. See, generally, *Hughes v. Kore*, 731 F.3d 672 (7th Cir. 2013).

Plaintiffs adopt all of the arguments made by Rexall supporting the fairness, reasonableness and adequacy of the settlement. The Objectors' attacks on the fairness of the settlement are without merit, including their conflation of the attorneys' fees award with the fairness of the settlement. The size of the fee award does not eliminate or reduce in any way the substantial monetary and injunctive benefits provided by the settlement.

And, there is no truth to Objectors' cynical suggestion that both sides conspired to pay-off Class counsel and design a process that would limit claims at the expense of the Class. Fees were not negotiated or even discussed until after the monetary benefits and injunctive relief to the Class were agreed upon. Dkt. 124, at

¶14. Lacking any evidence of collusion – because there simply was none – Objectors resort to pure speculation and conjecture. Objectors' Brief, at 18-19, 28-29, 33-34. Even if properly considered - which it is not - Objectors' "game theory" fails to take into account the most important actor in the settlement process – the District Court. Since the District Court must approve the settlement and the attorneys' fees awards, Plaintiffs' counsel, even under a game theory approach, would not negotiate a settlement that could not support the fee requested.

The record confirms that the District Court carefully scrutinized the process by which the settlement was achieved and the relief provided by the settlement and found no collusion or improprieties. The District Court cannot be accused of awarding excessive fees. Indeed, as discussed in Plaintiffs' argument as Appellants below, it should have awarded more than Class counsels' lodestar given the substantial benefits, including important injunctive relief and *cy pres* benefits, provided by this settlement.[4]

Although the District Court erred in limiting the award of fees, it correctly followed *Boeing v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676

[4] Objectors also give short-shrift to the *cy pres* component of the settlement. Objector Frank "disagrees" (Objectors' Brief, page 42) with this Court's decision in *Kore,* where the Court heartily endorsed the use of *cy pres* relief in class actions involving small individual but large aggregate claims. Objectors offer no cogent reason why the *cy pres* provision does not provide a benefit. Moreover, Objectors do not take issue with the recipient, the Orthopedic Research and Education Foundation, admitting that "there is no dispute about the *cy pres* selection in this particular case." Objectors' Brief, page 44.

(1980), and valued the settlement based upon the entire amount made available to the Class, rather than the amount actually claimed. Despite Objectors' protestations, *Boeing* remains good law. In *Mars Steel v. Continental Illinois Nat'l. Bank & Trust Co.*, 834 F.2d 677 (7th Cir. 1987), the Court concluded that the defendant bank's agreement to provide 23,000 corporate borrowers the opportunity for new loans up to $100,000 for a one-year period if found creditworthy, was worth approximately $500 per class member. Based upon Class members being given this opportunity – as opposed to their actually taking it - the court concluded that the "maximum" value of the settlement was $11.5 million (23,000 Class members x the potential $500 benefit). Thus, the settlement in *Mars Steel* was valued at $11.5 million even though there was no certainty that any class member would gain this benefit because (1) they may not have needed a loan during the following year, and (2) they might not have met the bank's creditworthiness standards upon application. Even with uncertainties about the actual value that might be imparted to the class, the court found that this settlement "possibly worth as much as $11.5 million to the plaintiffs" was "generous and certainly adequate…" *Id.* at 682.

Objectors acknowledge that *Boeing* is still the law, but urge the Court to find it "inapplicable," likening this settlement to the "phantom" settlement fund in *Strong v. Bell South Telecoms,* 137 F.3d 844 (5th Cir. 1988) (Objectors' Brief, page

24). In *Strong*, the settlement provided that the Class members could either continue as subscribers to BellSouth's indoor wire maintenance plan (the plan being challenged), or cancel the service and obtain a credit towards other BellSouth plans. *Id.*, at 847. As the Fifth Circuit noted, no fund was established for the Class members, but instead the settlement provided Class members with coupons or certificates. *Id.*, at 852. This case could not be more different. It is not a "coupon" settlement: Rexall made available an uncapped cash fund for the Class members to make claims against.

Furthermore, Objectors' arguments fail to assign any importance to the substantial injunctive relief that was obtained by this settlement. Based upon the injunctive relief alone, the amount awarded by the District Court was not excessive. If Plaintiffs' counsel had tried this matter to conclusion and had achieved this same injunctive relief, they would have been entitled to an award of their lodestar as prevailing parties under the fee shifting provisions of the state consumer fraud laws under which these cases were brought. See, e.g., 815 ILCS §505/2S; Mass. Gen. Laws ch. 93A, §9(3A); Calif. Civil Code, §1780(d).

Finally, Objectors contend that the fees awarded were excessive because they were greater than the monies ultimately claimed by Class members. (Objectors' Brief, at 11-12, 14-16, 17-19, 20-21). Again, in addition to the arguments made by Defendants-Appellees in opposition to this contention

(Rexall's Appellees' Brief, § I.A.), this argument ignores both the monies made available to the Class and the substantial injunctive relief that was obtained as a result of the settlement. In *Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243 (7th Cir. 2014), the fees awarded exceeded the actual claims by a greater extent than here. Moreover, unlike here, no minimum payment/*cy pres* was required, and all of the unclaimed amounts reverted back to the defendant. And, there was no substantial injunctive relief obtained as a result of the settlement. While there were no objections to the fee award in *Americana Art China*, if the award there required reduction due to the small amount of actual claims, it would have been incumbent upon this Court, pursuant to Rule 23(h), to so order. Yet, this Court affirmed the district court's award of a 1.5 multiplier, holding that it was not an abuse of discretion. That is because the fee award calculation must be made *ex ante*, without the 20/20 hindsight of the amount of actual claims. *Americana Art China*, 743 F.3d at 246 (fee award must be based upon *ex ante* evaluation).

The relevant *ex ante* facts here include Rexall's observation that claims rates vary from case to case and are unpredictable. (Rexall's Appellees' Brief, § I.A.). Plaintiffs' counsel negotiated a robust notice program in which close to half the Class members received direct notice of the settlement – a rarity in small claims consumer products cases. Claims could be filed electronically and claimants could

make claims without a proof of purchase. This claims process was designed to achieve the highest legitimate claims rate possible.

For the reasons set forth above, the Court should reject the Objectors' contention that the settlement is unfair to the Class because of the size of the fee award.[5]

[5] The fairness of the settlement is demonstrated by the overwhelmingly positive response by the Class. Only 1,620 persons, of the approximately 12 million Class members, attempted to exclude themselves from the Class, a mere .0001% of the entire Class, and a mere .0003% of the approximately 4.7 million Class Members who received direct notice. Only eight people filed objections to the Settlement, only three of whom have pursued this appeal. Dkt. 121, at page 11.

SUMMARY OF PLAINTIFFS' ARGUMENT AS APPELLANTS

The District Court abused its discretion and erred in limiting the fee award to Plaintiffs' counsels' lodestar with no multiplier. The settlement makes substantial monetary relief available to the Class, provides that unclaimed monies are awarded to an appropriate *cy pres* recipient, and puts a stop to future consumer fraud by requiring the removal of materially false claims from Defendants' product labels. Instead of properly considering the settlement as a whole, the District Court based the fee award solely on the monetary component of the settlement. The District Court erred in its stated refusal to consider the social benefits to Class members and the public provided by the *cy pres* award and the substantial injunctive relief achieved by the settlement.

By eliminating the false label representations, the injunctive relief will provide for a better informed marketplace, which, in turn, will lead to appropriate product pricing. This is a benefit to all consumers - Class members included – as [redacted].

By limiting counsel's fee award to their lodestar and by disregarding the important benefits provided by the injunctive relief, the District Court has disincentivized counsel prosecuting similar small individual but large aggregate consumer fraud cases from seeking injunctive relief or requiring it as a term of

future settlements. As a result, frauds will continue and further litigation over the same frauds will result. And, by reducing the fee which counsel requested (and to which the settling defendants agreed not to object) because of a low amount of claims made, settlement short of trial will be discouraged in similar cases.

Finally, by not crediting Counsel with the injunctive relief and the *cy pres* award achieved, the District Court thwarted the important deterrent effect both of these components have on future violations of the consumer fraud laws.

II. PLAINTIFFS' ARGUMENTS AS APPELLANTS

A. STANDARD OF REVIEW

A District Court's fee determination is reviewed for an abuse of discretion. An abuse of discretion occurs when the District Court "reaches an erroneous conclusion of law, fails to explain a reduction or reaches a conclusion that no evidence in the record supports as rational." *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 973 (7th Cir. 1991); *Americana Art China*, 743 F.3d at 246. This Court also reviews *de novo* the District Court's methodology to determine whether it reflects the procedure approved for calculating awards. *Id.*

B. THE DISTRICT COURT ERRED IN ITS FEE AWARD

1. The Settlement Provides Substantial Benefits – To Current Class Members and the Public at Large.

The settlement achieved substantial results and is a prime example of how to settle cases involving small individual, large in the aggregate, consumer fraud cases.

Every Class member, with or without proof of purchase, may make a claim for monetary benefits. Even though the Class exceeds 10 million persons, there is no pro rata reduction in monetary benefits because the claim fund is uncapped. Every Class member is entitled to seek a monetary benefit under the settlement.

In addition to the monetary component of this settlement, Rexall agreed to significant injunctive relief in the form of substantial labeling changes. There were

two main representations made on the front of the product labels by Rexall: (1) that they rebuild or renew cartilage; and (2) that they provide palliative relief of joint discomfort. The injunctive relief removes, in its entirety, the first demonstrably false claim. The palliation message may remain on the labels provided that the labels also state "individual results may vary," taking into account the products' large placebo effect and providing at least fair warning that they will not always provide pain relief. Dkt. 113-22, Declaration of Thomas J. Schnitzer, Ph.D., ¶¶ 20-21.

It is axiomatic that what a manufacturer places on a label is an important communication that a seller wants to impart to consumers. The label is often the first point of contact between a consumer and a manufacturer. It not only identifies the product's characteristics, but allows one manufacturer to tout its product over others' by making claims and representations. As one court noted:

> Simply stated: labels matter. The marketing industry is based on the premise that labels matter that consumers will choose one product over another similar product based on its label and various tangible and intangible qualities they may come to associate with a particular source. An entire body of law, trademark law, exists to protect commercial and consumer interests in accurate label representations . . . because consumers rely on the accuracy of those representations in making their buying decisions.

Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 328, 246 P.3d 877, 889 (2011) (internal quotes and citations omitted). *See also Delacruz v. Cytosport, Inc.*, No.

C 1103532 CW, 2012 WL1215243 (N.D. Cal. Apr. 11, 2012) (same proposition – labels matter); *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 475 (E.D. N.Y. 2013) ("The marketing industry is based on the premise that labels matter, that consumers will choose one product over another similar product based on its label and various tangible and intangible qualities they may come to associate with a particular source." (citing *Kwikset*)); and *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1306,128 Cal. Rptr. 3d 109, 118 (2011) ("We agree wholeheartedly that 'labels matter.'").

Despite the recognized importance of label representations and the significant label changes achieved by the settlement which cure falsehoods Rexall has used for many years to promote its products, the District Court found that the injunctive relief provided no benefit to the Class and thus could not be considered in the award of attorneys' fees. Obj. A. 6, 9, 10, 14-15, 19. This was error. This Court has noted that requiring truth in the marketplace is a benefit unto itself. "One important reason for requiring truth is so that competition in the market will lead to appropriate prices." *F.T.C. v. QT Inc.*, 512 F.3d 858, 863 (7th Cir. 2008). This settlement is no exception. [redacted]

[redacted] Dkt. 121, p.19; Dkt.130-3 and 130-4. Thus, on its face, the injunctive relief provides an important benefit for which counsel should have been compensated.[6] Following the precepts of *Kore*, the removal of misleading language from the front of product labels in a case where the individual claims are small but the aggregate fraud is large is an important social benefit that cannot be disregarded when it comes to evaluating Class Counsels' success.

In addition to benefiting the public at large, the evidence presented to the District Court demonstrated that Class members too would benefit from "appropriate prices" and "truth[ful]" product labels. [redacted]. Dkt. 113-27, Declaration of Jorge Granja, ¶ 3 (filed under seal). As such, the injunctive relief provides substantial benefits to current Class members and the public at large and Plaintiff's counsel should have been awarded more than their lodestar for achieving this important consumer victory.

Finally, the settlement also provides for a $2 million minimum payout by Rexall. With almost one-half the Class receiving direct notice as part of the extensive notice plan, Plaintiffs were optimistic that the claims rate would be

[6] While the settlement holds the injunctive relief in place for a minimum of 30 months, Rexall has a strong incentive to keep the labelling changes in place indefinitively. If Rexall maintains the labeling changes, it cannot be sued again by Class members. Obj. A. 51-52, 57.

significant because notice reached so many Class members (76%),[7] such that the payout amount would far exceed the floor. The minimum payout of $2 million allows for a doubling or tripling of claims made without and with proof of purchase, respectively. The remainder is awarded to the Orthopedic Research and Education Foundation - an organization devoted to promoting orthopedic research and providing a benefit to all purchasers of the covered products. *Kore,* 731. F.3d at 678 (noting that *cy pres* to an appropriate organization can be of greater benefit to a class than monetary compensation).

As the Court emphasized in *Kore* and as is equally applicable here: "[b]ut in a case like this, the award of damages to the Class members would have no greater deterrent effect than the cy pres remedy, [and] would do less for consumer protection than if the money is given to a consumer protection charity…." *Kore*, 731 F.3d at 678. In fact, the Court in *Kore* went so far as to propose that, "[a] time-saving alternative might be a class action with the stated purpose, at the outset of the suit, of a collective award to a specific charity." *Id.* Class Counsel made sure that any money not claimed from the $2 million minimum payment would be awarded to a *cy pres* recipient – thus serving the purposes of consumer protection as noted in *Kore*. Yet, contrary to the teachings of *Kore,* the District Court ruled that because the *cy pres* was not a benefit to the Class, it would not take the *cy pres*

[7] Plaintiffs incorporate from Rexall's Brief the citations regarding possible claims rates. (Rexall's Appellees' Brief, § I.A.).

relief into account in assessing the results obtained by Counsel and the fees it awarded.

The District Court's error in failing to credit Class Counsel with the benefits achieved by the injunctive relief and *cy pres* components of the settlement not only resulted in Class Counsel being under-compensated, but thwarted the deterrent effect on future wrong-doing noted in *Kore*: "the attorney's fee that the court will award if the class prevails, will make the suit a wake-up call for *Kore* and so have a deterrent effect on future violations…." *Id.* By not awarding Counsel the fees requested, to which the settling defendants agreed not to object, the District Court blunted the deterring effect that attorneys' fees produce as noted by the Court in *Kore*.

2. The District Court Erred in Not Considering the Benefits of the Settlement As a Whole in Awarding Attorneys' Fees.

Under *Kore*, the District Court should have viewed the settlement as a whole rather than compartmentalizing the settlement's individual components. The settlement makes non-prorated compensation available to all Class members, provides for a minimum pay-out of $2 million, includes substantial injunctive relief, the separate payment of direct mail and publication notice costs, and the separate payment of reasonable attorneys' fees. All provide valuable benefits to Class members and the consuming public, and at the same time deters others from similar conduct. Plaintiffs respectfully submit that the District Court abused its

discretion and erred by not considering these benefits as a whole in awarding attorneys' fees.

Apparently feeling constrained by this Court's decision in *Synfuel Technologies, supra*,[8] in approving the settlement and awarding fees, the District Court only took into consideration what it perceived as the actual benefit to the Class - the monetary component of the settlement. Obj. A. 14. "While the *cy pres* fund and injunctive relief are *substantial benefits* secured under the settlement agreement, they benefit the public and future consumers of glucosamine – not Class members for past injuries – and cannot be a key consideration in determining the fairness of the settlement." Obj. A.10 (emphasis added). This was an unexplained reversal of course, since at the final approval hearing, the District Court stated "[s]o what I regard as the single most defensible value of the settlement in this case to plaintiffs has to do with the change in information." Obj. A. 152 (Transcript of October 4, 2013 Proceedings). And, as to the *cy pres* aspect of the settlement, the District Court's holding runs directly counter to *Kore.*

The District Court also erred in its stated refusal to consider the social benefits to the public and future consumers provided by the settlement in determining the fee award. *Kore* makes clear that where, as here, claims are small,

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[8] The court in *Synfuel* noted that the settlement did not require the defendant to completely discontinue the offending conduct, unlike here, where Rexall is prohibited from making the false representations at issue. *Id.* at 649.

societal benefits (including injunctive relief and deterrence) are an equal, if not more important, aspect of the settlement.

The District Court assigned no benefit to the injunctive relief obtained by the settlement even though it correctly noted that an award of fees is appropriate in cases where "the legislature has authorized the award of fees to counsel for undertaking socially beneficial litigation." Obj. A. 18. The consumer fraud statutes under which these cases are prosecuted are all fee-shifting laws. (*See*, 815 ILCS §505/2S; Mass. Gen. Laws ch. 93A, § 9(3A); and Calif. Civil Code §1780(d)). These statutes also allow private plaintiffs to obtain injunctive relief. *See* Mass. Gen. Laws ch. 93A, §9(1); 815 ILCS § 505/10(c); and Calif. Civil Code § 1782(d). And, each of the statute's primary purposes is the eradication of consumer fraud.[9]

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[9] *See, e.g.*, *Tandy v. Marti*, 213 F. Supp. 2d 935, 937 (S.D. Ill. 2002) ("The [Illinois Consumer Fraud] Act gives a 'clear mandate to the Illinois courts to utilize the Act to the greatest extent possible to eliminate all forms of deceptive or unfair business practices and provide appropriate relief for consumers.'") (citation omitted); Cal. Civ. Code § 1760 (the CLRA is designed "to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection"); *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) ("'The UCL is designed to preserve fair competition among business competitors and protect the public from nefarious and unscrupulous business practices.'"); *In re Tobacco II Cases,* 46 Cal. 4th 298, 320 (2009) ("The purpose of [injunctive] relief, in the context of a UCL action, is to protect California's consumers against unfair business practices by stopping such practices in their tracks."); *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 703 (2006) (Noting that the settlement there "resulted in a significant benefit for a substantial number of people by causing [Defendant] to change its labeling and advertising practices and by

Yet, the District Court inexplicably concluded that "we will not award attorneys' fees for injunctive relief secured without clear indication from Congress that consumer class actions fall into fee-shifting 'socially beneficial litigation.'" Obj. A. 21. But Congressional action is not required, as that decision has already been made by the state legislatures in enacting the consumer fraud laws under which these cases were filed. The District Court sitting in this diversity case under 28 U.S.C. §1332(d) was required pursuant to *Erie v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938), to further the purposes articulated by the state legislatures, including awarding fees for the socially beneficial injunctive relief required by the settlement.

Federal Trade Commission guidance establishes that the removal of the "rebuilds and renews" cartilage representations constitutes the removal of highly material information and thus provides important and substantial consumer benefits.[10] For example, the "FTC Policy Statement on Deception," which was

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enjoining it from making future misleading representations."); *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 503 (2003) ("[W]hether an advertisement is deceptive under the UCL . . . certainly has important public policy implications for California consumers and businesses."); and *Heller v. Silverbranch Const. Corp.*, 376 Mass. 621, 382 N.E.2d 1065 (1978) (the Massachusetts Unfair Trade Practices Act is designed to "ensure an equitable relationship between consumers and persons engaged in business").

[10] The state consumer protection statutes under which these cases were brought expressly state that in interpreting their provisions, courts should look to the FTC's interpretations. *See* 815 ILCS 505/2 ("In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal

issued in 1983 (http://www.ftc.gov/ftc-policy-statement-on-deception) states: "The Commission presumes that express claims are material," noting that promotional messages by the company reflect a belief that consumers are interested in those messages. Similarly, the policy states that "[t]he Commission also considers claims or omissions material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned. Depending on the facts, information pertaining to the central characteristics of the product or service will be presumed material." The policy notes that information has been found material where it concerns the purpose, safety, efficacy, or cost of the product or service. According to the Commission, "a 'material' misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product. In other words, it is information that is important to consumers."[11]

There can be no doubt that the labeling changes here, removing one of the key representations made about the products by Rexall for more than ten years,

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courts relating to Section 5(a) of the Federal Trade Commission Act."); Mass. Gen. Laws ch. 93A, §2(b) ("…the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.").

[11] Similarly, in *Negrete v. Allianz Life Ins. Co.*, No. CV 06-6838 CAS (MANx), 2012 WL 6737390, at *20 (C.D. Cal. Dec. 27, 2012), the court noted that, "'[c]onsumers are nearly certain to rely on prominent (and prominently marketed) features of a product which they purchase,' particularly where there are not otherwise compelling reasons for purchasing a product that is allegedly worth less than the purchase price" (internal citations omitted).

provides Class members and consumers with more truthful information concerning the products. This accomplishes an important social goal that should be assigned substantial value in determining the fairness and adequacy of the settlement as well as awarding attorneys' fees. Courts recognize that fees can be enhanced when the "public interest" is advanced by the litigation. *See*, e.g., *In Re Navistar Diesel Engine Products Liability Litigation*, 2013 WL 4556362 * 1, No. 11c2496, MDL No. 2223, (N.D. Ill. Aug. 11, 2013) (quoting, *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010)).

Adhering to the view that it could only consider benefits imparted to Class members, the District Court reduced the fees to which Rexall agreed not to object because only a small number of Class members made monetary claims. The District Court reduced the percentage of the fund from the "standard 25%" (Obj. A 14), and awarded counsel's lodestar rather than the fee to which Rexall agreed not to object, with the remainder reverting back to Rexall. (Obj. A. 14, 17). Apart from the fact that the District Court *de facto* applied a methodology applicable to CAFA coupon settlements when this is not a coupon settlement, the District Court failed to look at the settlement as a whole (including the cash, injunctive relief, *cy*

pres and the deterrent effect of awarding the full amount of fees to which Rexall agreed not to object).[12]

3. The District Court Erroneously Disregarded Plaintiffs' Expert Valuation of the Injunctive Relief.

The District Court erred in finding the injunctive relief was not valuable such that Plaintiffs' counsel were not entitled to a fee for the benefit *to the Class* and future consumers they secured by the labeling changes. Obj. A. 19-21. Apart from the presumptive benefit of truth in the marketplace, *F.T.C. v. QT, Inc.*, *supra*, Plaintiffs provided the District Court an expert economist's estimation that the labeling changes will provide consumer savings for current Class members and all consumers over the mandatory 30-month period of $21.7 million and $46.2 million, respectively. Supp. A. 92-94; Reutter Report, at ¶¶ 10-12. The valuation was based upon market analyses that Rexall commissioned in the regular course of

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[12] The cost of notice and claims administration are properly considered benefits to the Class, as are attorneys' fees. *In re Kentucky Grilled Chicken Coupon Mktg. & Sales Pracs. Litig.*, 280 F.R.D. 364, 386 (N.D. Ill. 2001). Objectors' statement that the Court in *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011) "recognized that items such as notice and class administration expenses are a social cost that present an argument against class certification, rather than a benefit to the class" (Objectors' Brief, page 31) is a complete mischaracterization. The plaintiffs were denied class certification in *Aqua Dots* because "the substantial costs of the legal process make a suit inferior to a recall as a means to set things right," *id.*, at 751, and nothing in the decision holds contrary to the well-established case law that class counsel confer a benefit upon the class when they negotiate the defendant's agreement to pay the costs of notifying the class and administering the settlement.

its business, well before this litigation, to determine the effect on price and product sales of the label claims. [redacted] Supp. A. 89-90; Reutter Report, ¶¶ 5-7. The independent preparation of these market analyses as part of Rexall's regular course of business, and Rexall's reliance thereon in labeling the products, provide a very credible basis for concluding that the labeling changes required by the settlement are valuable, significant, and should have been considered in determining the reasonableness of the settlement and the award of attorneys' fees.

Yet, the District Court refused to consider the expert's valuation or these documents. Instead, at the final approval hearing, it requested Plaintiffs' counsel to report back as to whether an *ex post facto* analysis could be performed to determine the "actual" value of the injunctive relief after the labeling changes had been implemented. Obj. A. 172-174 (Transcript of October 4, 2013 Proceedings). Plaintiff's expert economist filed a supplemental report which demonstrated that such an analysis was theoretically possible, but practically infeasible. It would require a regression analysis that, in turn, would require data not only from Rexall and the private label merchants for whom Rexall manufactures products, but also from competitors who are unlikely to voluntarily share their data and could not be

compelled to do so. The analysis would take several years to complete, and would cost at least $500,000. Supp. A. 142-151.

Apart from the numerous problems inherent in the District Court's proposal, the *ex post facto* analysis requested by the District Court is contrary to recently reaffirmed law in this Circuit – which requires that fee awards be based upon an *ex ante* approach. *Americana Art China Company*, 73 F.3d at 246-47 ("…because we always seek to replicate the market value of any attorney's service – and because the market would assign a value up front – a District Court that leaves the matter of fees until the end of the litigation process 'must set a fee by approximating the terms that would have been agree to *ex ante*, had negotiations occurred.'" (citing *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001)).

The District Court concluded that because it was "infeasible" to conduct an *ex post facto* analysis, Plaintiffs' expert's *ex ante* estimate was an insufficient basis on which to consider the injunctive relief as a basis for awarding fees. Obj. A. 20. Yet, the two reports are not conflicting – nor are they mutually exclusive. Dr. Reutter's initial report was performed as an *ex ante* good faith estimate of the value of the injunctive relief based upon internal documents prepared for Rexall estimating the value of the representations in terms of their increased sales and prices. That is all that is needed or can be required to value injunctive relief for purposes of awarding fees in a settlement. In fact, even the District Court noted

that this Circuit does not require "a high degree of precision" in valuing litigation. (Obj. A. 20) (citing *Reynolds v. Beneficial Nat. Bank,* 288 F.3d 277, 285 (7th Cir. 2002). In *Reynolds*, however, there was no attempt to monetize the value of the injunctive relief. *Id.* But here, the District Court was presented with a credible *ex ante* monetization of the injunctive relief by an expert economist.

In sum, the District Court erred by requiring a precise valuation of the labeling changes based upon future happenings and an infeasible process rather than awarding fees based on the substantial value of the injunctive relief to Class members and the public at large.

4. The District Court's Approach to the Fee Award Is Contrary to Public Policy – Both As to Consumer Fraud Protection and Encouraging Settlements.

The settlement satisfied every objective of class actions in mass-marketed consumable product cases with small individual but large aggregate claims, as set forth in *Kore.* It provides a monetary remedy for those who seek it, creates a *cy pres* benefit, and provides injunctive relief consistent with the stated purposes of the statutes to promote truthful advertising. Only after all of this relief was negotiated, did the parties agree upon an amount of fees to which Rexall would not object. The requested fees are reasonable compensation for Plaintiffs' counsel for the risks they took and tremendous results they obtained, and also serve as a deterrent as contemplated by the Court in *Kore*.

If, as here, in large scale consumer fraud cases involving small individual claims, settlement counsel is only awarded fees based upon monies actually claimed by the Class, the salutary and important consumer protection function that such cases serve will be eviscerated.[13] If counsel are not justly compensated for achieving important injunctive relief that prevents future consumer frauds and provides the marketplace more truthful information, there will no longer be an incentive to seek such relief. Frauds will continue. Further litigation over the same frauds will result. And, settlement short of trial will be discouraged since compensation will only be awarded based upon actual funds claimed.

5. The District Court Erred in Not Applying a Lodestar Multiplier.

The District Court abused its discretion in awarding attorneys' fees based solely on a percentage of the fund approach because it failed to account for the total benefits of the settlement. The settlement should have been valued under a lodestar approach and resulted in the award of a multiplier.

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[13] This is the clear purpose of Objector Frank. The unattainable requirements he would seek to impose on approving class action settlements in cases such as this are not borne out of concern for class members' interests. They would make such cases impossible to settle and require every case to go to trial. But this is no surprise. Mr. Frank has gone on record as stating that class actions are a problem. Dkt. 113-18. Thus, his objections purporting to be on behalf of absent class members are really a cynical use of the settlement approval process in order to achieve his goal - to impede or eradicate class actions.

American Art China, supra, is instructive. There, this Court affirmed a $1,147,69.70 fee award in which the District Court awarded a 1.5 multiplier, when only $397,426.66 in claims had been made from a $6.1 million fund that reverted back to the defendant, and where no injunctive relief had been negotiated. In contrast, here the uncapped compensatory fund was conservatively valued at $14.2 million, $865,284 in claims were made, a $2 million minimum payout is required, a *cy pres* benefit is conferred for amounts not claimed up to the $2 million minimum payout, and substantial injunctive relief is achieved. Yet, Plaintiffs' counsel were denied a reasonable multiplier.

Class Counsel should not be penalized because the actual claims rate was less than anticipated despite the robust notice plan they secured (paid for by Rexall) that provided direct notice to approximately 40% of the Class, and overall reached 76% of the Class members. The abuse of discretion standard should not be used to cloak such vastly different results from this Circuit's District Courts. If there is to be any modicum of consistency in fees awarded in this Circuit, at a minimum, Counsel here should at least be rewarded with a 1.5 multiplier, if not more.[14]

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[14] The multipliers requested here (2 and 2.56) are well within the range accepted by courts. "Typical multipliers awarded in comparable class action litigation average around 4, but are often much higher." *In re Kentucky Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 280 F.R.D. at 381.

6. The District Court Should Have Awarded the Requested Fees.

Attorneys' fees in class actions are awarded to compensate class counsel for the benefits they create. Attorneys' fees are also intended to compensate class counsel for the contingent risk they undertake prosecuting cases such as this. As Judge Posner has explained:

> A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The interest rate on such a loan is high because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is so much higher than that of conventional loans.

Richard Posner, *Economic Analysis of Law* § 21.9 (2d ed. 1984).

Further, in awarding fees, the court's task is to do its "best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market" at the outset of the litigation when the risk of loss still existed. *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007), (citing *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001)). In *Sutton*, this Court held that the District Court erred by awarding fees of 15% of the net settlement amount because it did not apply the required market-based approach for determining fee awards, and because its analysis centered solely on the results achieved by class counsel. *Id.*, at 693. Again, as the Court just recently reaffirmed, the compensation due counsel is not to be determined in hindsight.

Americana Art China, 743 F.3d at 246-247. "The court must base the award on relevant market rates and the *ex ante* risk of nonpayment." *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011). "A court must assess the riskiness of the litigation by measuring the probability of success of this type of case *at the outset* of the litigation." *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994); *see also Taubenfeld v. Aon Corp.*, 415 F.3d 597 (7th Cir. 2005).

Moreover, courts give considerable deference to fee agreements negotiated at arm's-length by the parties, especially where, as here, the fee is to be paid by the defendant rather than the Class members. *See In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1033 (N.D. Ill. 2000) ("Because the attorneys' fees award was separately negotiated and separately funded, it does not reflect any diminished recovery to Class members."). See also *In re Apple Computer, Inc. Deriv. Litig., No.* C 06-4128 JF (HRL), 2008 WL 4820784, at *3 (N.D. Cal. Nov. 5, 2008) ("A court should refrain from substituting its own value for a properly bargained-for agreement").

Attorneys' fees were negotiated after the substantive relief provided to the Class was fixed and agreed to. Dkt. 124, ¶ 14. Contrary to Objectors' speculation (Objectors' Brief, p. 14, 17-19), there was no unspoken agreement between counsel for the Parties that Plaintiffs' counsel would forego negotiating a more robust settlement, or intended to suppress claims, in return for a higher fee. The

fact that Rexall agreed not to object to the fee request, free of collusion, should be given great weight. While the District Court correctly found an absence of collusion, it completely ignored this factor. If the full amount of the requested fees were awarded, it would amount to multipliers of 2 and 2.56, which are certainly not excessive given the substantial benefits created by this settlement.

Plaintiffs respectfully request that this Court should reverse the District Court's fee award and award the requested fee to which Rexall did not object or, at a minimum, award a multiplier that it deems appropriate for the tremendous result achieved by this settlement.

CONCLUSION

For the foregoing reasons, the judgment of the District Court approving the settlement should be affirmed, and the judgment awarding fees should be reversed, with a mandate to the District Court to award the requested fees as provided in the settlement.

Dated: June 16, 2014

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Cir. R. 34(f), Plaintiffs-Appellees/Cross-Appellants request that the Court hear oral argument in this matter because it presents significant issues concerning the fairness and adequacy of class action settlements in consumer fraud cases that are settled via a claims-made process, and also presents significant issues as to the proper method of awarding attorneys' fees where the settlement achieves significant injunctive relief requiring substantial changes in a defendant's advertising and marketing practices.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 30(d)

Certificate of Compliance with Type-Volume Limitation; Typeface Requirements, Type Style Requirements, and Appendix Requirements:

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This Brief contains 8,587 words, excluding the parts of the Brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in a Times New Roman 14 point font.

3. All materials required by Cir. R. 30(a) & (b) are included in the appendix.

Dated: June 16, 2014

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PROOF OF SERVICE

I hereby certify that on June 16, 2014, I filed electronically the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, thereby effecting service on counsel of record who are registered for electronic filing under Cir. R. 25(a).

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