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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LUIS LERMA, an Individual, and NICK PEARSON, an Individual, On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

SCHIFF NUTRITION INTERNATIONAL, INC., a Delaware Corporation, and SCHIFF NUTRITION GROUP, INC., a Utah Corporation,

Defendants.

CASE NO. 3:11-cv-01056-MDD

CLASS ACTION

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO WITHDRAW FROM SETTLEMENT

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Defendants Schiff Nutrition International, Inc. and Schiff Nutrition Group, Inc. (collectively, "Schiff") respectfully submit the following memorandum in opposition to the motion filed by Plaintiffs Luis Lerma and Nick Pearson (collectively, "Plaintiffs") and their counsel, seeking leave of Court to withdraw from the Settlement:[1]

I. INTRODUCTION

This Court has already ruled (twice) that the Seventh Circuit's recent ruling in Pearson does not justify a stay of the settlement process in this case or a restructuring of the Settlement Agreement that was presented to this Court for approval a number of months ago. Apparently dissatisfied with that answer, Plaintiffs and their counsel now move to withdraw from the Settlement, which was the result of extensive mediation efforts before Justice Howard B. Wiener (ret.) and which Plaintiffs' counsel repeatedly characterized to the Court as being fair, reasonable and adequate for all members of the Settlement Class.

Plaintiffs and their counsel offer no coherent reason why they should be allowed to withdraw from the Settlement Agreement, which is otherwise fully enforceable. Instead, they claim that in light of Pearson "the law in the Circuit Courts of Appeal" is somehow no longer "favorable," and they suggest that some of the objections made in Pearson may be made here. This Court, however, is bound by Ninth Circuit precedent, and the law of the Ninth Circuit and the Seventh Circuit vary on many, many issues, including class action settlements, as this Court has already recognized. Moreover, the primary objection that was made to the settlement in Pearson was that the attorneys' fees were too high relative to the benefit to the class, and to the extent that is an issue under Ninth Circuit law, it is

[1] Unless otherwise defined herein, capitalized terms have the meaning ascribed to them in the Amended Settlement Agreement. See Am. Settlement Agmt. (Dkt. #107-1). In addition, unless stated otherwise, all emphasis is supplied and all internal citations and quotations are omitted from any quoted material.

easily addressed without throwing the baby out with the bath water or scrapping a Settlement Agreement that the Parties and their counsel spent a great deal of time, money and effort negotiating and then ultimately presenting to this Court.

Last but not least, the attempt of Plaintiffs and their counsel to withdraw from a Settlement they previously argued was in the best interests of the Settlement Class necessarily raises issues with respect to adequacy of representation. The Settlement Class, however, has already waited long enough for the relief provided by the Settlement Agreement. Accordingly, Schiff respectfully suggests that Plaintiffs' motion should be denied and that the settlement approval process be allowed to resume. Alternatively, the Court should exercise its inherent authority to protect the Settlement Class and appoint new class counsel for purposes of completing the approval process.

II. RELEVANT FACTUAL BACKGROUND

While this Court is obviously familiar with the background of this case as well as the terms of the Settlement Agreement, Schiff believes a brief recitation of the relevant facts may be of assistance to the Court. See disc. infra at 2-11.

A. The Parties And Their Counsel Undertake Extensive Mediation Efforts With Justice Wiener

Between November of 2011 and March of 2013, the Parties participated in no less than five separate mediation sessions with Justice Wiener. See Pls.' Mem. in Supp. of Mot. for Prelim. Approval (Dkt. #81-1) ("PA Mem.") at 3, 21-22.[2] They provided extensive written submissions to Justice Wiener and then supplemented those submissions as issues arose during the mediation.

The goal of the mediation was, of course, to reach a settlement that was fair, reasonable and adequate and that would be suitable for approval by this Court

[2] Justice Wiener actually oversaw six separate days of mediation (i.e., November 15, 2011, February 2, 2012, March 15, 2012, May 9, 2012, May 10, 2012 and March 19, 2013).

pursuant to the process required by Fed. R. Civ. P. 23 and under governing law in this district and this circuit. See PA Mem. (Dkt. #81-1) at 3, 21-22. While there were disagreements on various issues, Schiff had every reason to believe that Plaintiffs and their counsel were negotiating in good faith, and at the conclusion of the final mediation session on March 19, 2013, the Parties reached an agreement in principle, subject to memorialization in a definitive written agreement. See id.

B. The Settlement Agreement Is Finalized, And Plaintiffs Seek And Obtain Preliminary Approval

On or about March 13, 2014, the Parties finalized the Settlement Agreement, and on March 25, 2014, Plaintiffs and their counsel moved for preliminary approval. See PA Mem. (Dkt. #81-1) at passim; Settlement Agmt. (Dkt. #81-2). The Settlement Agreement was intended to resolve claims in this case as well as all claims in Jayson v. Schiff Nutrition Int'l, Inc., et al., Case No. 0:13-cv-60400-JIC (S.D. Fla.). See Settlement Agmt. (Dkt. #81-2) at Recitals.

The Settlement provides monetary contribution to members of the Settlement Class who file claims as well as injunctive relief in the form of specified labeling changes. See PA Mem. (Dkt. #81-1) at 4-6. More specifically, members of the Settlement Class who file claims without proof of purchase are eligible to receive $3.00 per bottle of product up to a maximum of four bottles, and those who file claims with proof of purchase are eligible to receive $5.00 per bottle up to a maximum of ten bottles. See id.; Settlement Agmt. (Dkt. #81-2) at § IV, ¶ A; disc. infra at 4-5 (discussing later amendments to the Settlement Agreement). The Settlement Agreement further specifies that Schiff is obligated to pay all valid claims with no cap or ceiling whatsoever on the dollar amount to be ultimately paid. See Settlement Agmt. (Dkt. #81-2) at § IV, ¶¶ A-B. Moreover, the Settlement Agreement requires Schiff to pay at least $2 million directly to the Settlement Class. See id. at § IV, ¶ B. Thus, if the claims that are filed do not reach or exceed $2 million, payments to members of the Settlement Class who file claims would be

increased on a pro rata basis until the $2 million floor is met.[3] See id.

As made abundantly clear in their motion for preliminary approval, Plaintiffs and their counsel strongly supported the Settlement. See PA Mem. (Dkt. #81-1) at passim. Indeed, they unequivocally represented to this Court that the Settlement was fair, reasonable and adequate and in the best interests of the Settlement Class:

> Plaintiffs have concluded that, due to the uncertainties and expense of protracted litigation, it is in the best interest of Plaintiffs, and the best interests of the putative Settlement Class, to resolve this action on the terms provided in the Settlement Agreement.

Id. at 1-2; see also id. at 21-22 (noting that Plaintiffs' counsel are experienced counsel who fully evaluated the fairness of the proposed Settlement). Plaintiffs and their counsel further represented to this Court that the Settlement provides "meaningful benefits" to the Settlement Class, both monetary and injunctive (see id. at 20, 24-25) and that the Settlement was in the best interest of the Settlement Class, as litigation would take years to complete and there was no guarantee the Settlement Class would ultimately prevail. See id. at 19 ("At a minimum, absent settlement, litigation would likely continue for years before Plaintiffs or the Settlement Class would see recovery, if any. That a settlement would eliminate the delay and expenses strongly weighs in favor of approval.").

C. The July 10, 2014 Hearing

The Court held a preliminary approval hearing in this case on July 10, 2014, during which the Court discussed at length the proposed Settlement and provided the Parties with valuable guidance regarding the Settlement and its proposed terms. See Order re Pls.' Mot. for Prelim. Approval (Dkt. #100). In light of the Court's comments, the Parties conducted further investigation as well as additional

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[3] As discussed below (see disc. infra at 6-8), this provision is markedly different from what was in the settlement in Pearson, and it would address one of the concerns of Judge Posner in Pearson, as it would allow for substantial enhancements to the awards of Settlement Class Members who claim-in if the rate of claim-in in this case turned out to be low. See id.; see also Pearson v. NBTY, 772 F.3d 778, 781, 784 (7th Cir. 2014).

negotiations, ultimately agreeing to material modifications to the Settlement Agreement. See Am. Settlement Agmt. (Dkt. #107-1). Specifically, and in light of the Court's question as to whether the Settlement adequately compensated members of the Settlement Class who had retained proof of purchase, the Parties agreed to the following modification:

> Settlement Class Members who submit Valid Claims accompanied by Adequate Proof of Purchase shall receive $10.00 per bottle of Covered Product, up to a maximum of five (5) bottles per household.

Am. Settlement Agmt. (Dkt. #107-1) at § IV, ¶ A.

In response to other questions raised by the Court, the Parties made additional submissions in support of the Settlement Agreement. See Pls.' Supp. Mem. in Supp. of Mot. for Prelim. Approval (Dkt. #107) ("PA Supp. Mem."); Schiff Mem. (Dkt. #108). In their September 15, 2014 submission, Plaintiffs and their counsel provided further support for the value of the proposed injunction as well as support for the other modifications made by the Parties to the Settlement Agreement. See PA Supp. Mem. (Dkt. #107) at passim. As they did before, however, Plaintiffs and their counsel strongly supported the Settlement as fair, reasonable and adequate. See id. at 5-10 (supporting the injunction as enjoining key misrepresentations); id. at 14-16 (supporting the monetary relief to the class as fair, reasonable and adequate).

After consideration of everything that had been presented by the Parties and their counsel, this Court granted preliminary approval on November 21, 2014. See Order of Prelim. Approval (Dkt. #113). In so doing, the Court issued a detailed opinion and order that weighed all of the factors for preliminary approval and ultimately approved the Settlement, noting that "Plaintiff's counsel has sufficiently demonstrated that the procedure for reaching this settlement was fair and reasonable." Id. at 13.

D. Pearson

Prior to Plaintiffs moving for preliminary approval in this case, final approval was granted of the class settlement in Pearson, a case that had been pending before Judge James B. Zagel in the United States District Court for the Northern District of Illinois since it was first filed on November 9, 2011.[4] See Settlement Agmt. (Dkt. #73-1), Pearson v. NBTY, No. 1:11-cv-07972 (N.D. Ill.) ("Pearson"). The settlement in Pearson allowed class members to claim-in for reimbursement. See id. at § 7. Those without proof of purchase were eligible to receive $3.00 per bottle of product up to a maximum of four bottles, and those with proof of purchase were eligible for $5.00 per bottle up to a maximum of ten bottles. See id. The settlement in Pearson further specified that the defendants would pay at least $2 million, either directly to those who claimed-in or to cy pres if the entire $2 million was not paid out to the class. See Pearson, 2014 WL 30676, at *3. Finally, the settlement in Pearson offered injunctive relief in the form of certain labeling changes, though the injunction in Pearson merely contained words and phrases that were considered acceptable and thus supposedly could not be challenged in future litigation. See id.; Pearson Settlement Agmt. (Dkt. #73-1) at §§ 8(c), 11, Ex. B.[5]

On January 3, 2014, the settlement in Pearson received final approval from

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[4] The plaintiffs in Pearson are represented by the same counsel that represent Plaintiffs in this case. See Pearson v. NBTY, 2014 WL 30676 (N.D. Ill. 2014). As here, the plaintiffs in Pearson alleged that the defendants, which marketed and sold certain joint-health dietary supplements containing glucosamine, made false and misleading statements regarding the benefits of the products on joint health. See id. at *1. The specific products at issue in Pearson were different from the products at issue here, however, as were the defendants and various terms of the two settlements. See, e.g., Pearson Settlement Agmt. (Dkt. #73-1) at Recitals, §§ 7-9, Ex. A.

[5] As discussed below, while the Settlement before this Court and the settlement in Pearson share some similarities, there are also material differences between the two, as this Court has noted. Compare Am. Settlement Agmt. (Dkt. #107-1) at § IV, with Pearson Settlement Agmt. (Dkt. #73-1) at §§ 7, 8, 17. For example, the Settlement Agreement in this case (as amended) calls for increased payments to members of the Settlement Class with proof of purchase and the payment of at least $2 million directly to members of the Settlement Class, features for which Plaintiffs and their counsel fail to account. See disc. infra at 20-21.

Judge Zagel. See Pearson, 2014 WL 30676, at passim. In assessing the fairness of the settlement, Judge Zagel observed that litigation would be risky, expensive and complex, that there were "non-trivial" obstacles on plaintiffs' path to recovery, including whether they could obtain and maintain class certification in contested litigation, and that as such, there was a real question whether the class would recover anything at all. See id. at *3. Judge Zagel further examined the monetary benefits that would be paid to the settlement class in Pearson and concluded that those benefits were sufficient in light of the risks of litigation:

> The settlement agreement . . . is fair, adequate, and reasonable and the result of arms-length negotiations. Even though the actual benefit to the Class is only a fraction of the available fund, the settlement provides for adequate economic recovery by claimants in light of the costs, likelihood of only marginal additional relief to individual consumers, and uncertainty of continued litigation.

Id. at *5.

In addition, Judge Zagel considered the request of class counsel for attorneys' fees and costs in the amount of $4.5 million and the objections to that request. See Pearson, 2014 WL 30676, at *5-10. As Judge Zagel noted, the focus of the objections in Pearson was that the settlement in that case "disproportionately advances the interests of Class Counsel over those of the class itself through excessive attorneys' fees." Id. at *2. Judge Zagel, in turn, considered the amount made available to the class in addressing the issue of fees and costs. See id. at *5-9. In so doing, Judge Zagel held that the injunctive relief included in the settlement could not be valued for the purposes of awarding fees. See id. at *9-10. Judge Zagel, however, ultimately awarded plaintiffs' counsel their lodestar without a multiplier as well as their costs. See id. at *10 (awarding approximately $2.1 million in fees and costs versus the $4.5 million in fees and costs that had been requested).

Certain objectors in Pearson appealed the final approval order as did class counsel. See Pearson, 772 F.3d at 780. The fee award to class counsel relative to

the relief awarded to the class, however, was again the focus of the appeal. See id. at 780-85. And in reversing the order of final approval, the Seventh Circuit primarily took issue with the award of attorneys' fees and costs relative to what the class had recovered. See id.

More specifically, the Seventh Circuit held in its decision in Pearson that when awarding fees in a class settlement, courts in the Seventh Circuit should consider "the ratio of (1) the fee to (2) the fee plus what the class members received" (Pearson, 772 F.3d at 781), not simply what is made available to the class:

> When the parties to a class action expect that the reasonableness of the attorneys' fees allowed to class counsel will be judged against the potential rather than actual or at least reasonably foreseeable benefits to the class, class counsel lack any incentive to push back against the defendant's creating a burdensome claims process in order to minimize the number of claims.

Id. at 783. Moreover, the Seventh Circuit held that Judge Zagel was correct in excluding the injunctive relief and cy pres award from that ratio, affirming Judge Zagel's ruling that the injunction could not be valued. See id. at 781.

Notably, the Seventh Circuit did not disrupt Judge Zagel's ruling that the compensation offered to the class was otherwise fair, reasonable and adequate. See Pearson, 772 F.3d at passim. Nor did the Seventh Circuit disagree with Judge Zagel's conclusion that the class would face "non-trivial" obstacles in actually recovering on their claims. See id. Instead, the Seventh Circuit held that the primary failing of the settlement was the proportion of the fees awarded to class counsel compared to the ultimate relief recovered by the class. See id.[6]

[6] The Seventh Circuit also expressed some concern over the claims process and claim form, noting that they appeared to discourage the filing of claims. See Pearson, 772 F.3d at 783. Whether any given claims process or claim form is fair, reasonable and adequate, however, is, of course, something that can only be addressed on a case-by-case basis, as forms and processes vary from case to case. See id. In this case, the Parties have employed a settlement administrator as well as a notice and administration expert, and this Court has already approved both the claims process as well as the claim form. See Order of Prelim. Approval (Dkt. #113) at 13-15, 19-20. Indeed, this Court scrutinized both the claims process as well as the claim form and requested that the Parties make changes to the process,

(continued...)

E. Following The Seventh Circuit's Decision In Pearson, Plaintiffs' Counsel Demand That The Settlement Be Completely Restructured

Shortly after the issuance of the Seventh Circuit's decision in Pearson, Plaintiffs' counsel contacted counsel for Schiff to discuss the potential impact of Pearson on the Settlement before this Court. Plaintiffs' counsel took the position that the decision in Pearson required a complete restructuring of the Settlement, including changing from an unlimited, claim-in process to a common fund. Moreover, Plaintiffs' counsel took the position that they would no longer support the Settlement as submitted to the Court and that if Schiff did not agree to mediate, they would seek to withdraw from the Settlement.

For its part, Schiff has never believed that Pearson warrants extensive (if any) modification of the Settlement or that Pearson is in accordance with Ninth Circuit precedent (see disc. infra at 14-19), but Schiff nevertheless agreed to consent to further mediation in light of the threat of Plaintiffs' counsel to withdraw from the Settlement. See Stip. to Stay Settlement (Dkt. #116). Accordingly, the Parties submitted a stipulation requesting that the settlement approval process be stayed to allow for further mediation. See id.[7]

On January 25, 2015, the Court denied the Parties' request for a stay, noting specifically that "[t]he Court ha[d] read and considered the Pearson case and

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(...continued)
including but not limited to allowing members of the Settlement Class to opt out of the Settlement by way of the website. See PA Supp. Mem. (Dkt. #107) at 15.

[7] In their motion to withdraw, Plaintiffs and their counsel imply that Schiff has somehow unilaterally caused a delay in the settlement process by not yet issuing notice. See Mot. to Withdraw (Dkt. #120) at 2 n.1. Plaintiffs' counsel fail to mention, however, that since the decision in Pearson was rendered, they have consistently told Schiff and its counsel that they will simply not support the Settlement as previously submitted to this Court. See Decl. of K. Lally, Ex. A hereto, at ¶¶ 2-4. As such, Schiff was in an untenable position: issuing notice would have cost approximately $1.5 million. Had it issued notice and the Parties later agreed to modify the Settlement or Plaintiffs and their counsel later sought to withdraw from the Settlement, Schiff might have been required to issue notice again, incurring another $1.5 million in expenses. See id. Counsel for Plaintiffs were, of course, well aware that Schiff was not planning on issuing notice while they were threatening to withdraw from the Settlement and expressed no objection whatsoever. See id. at ¶ 5.

disagrees that Pearson provides a basis to stay the settlement approval process here." Order Denying Stay (Dkt. #117) at 2. Without addressing the issue with Schiff, Plaintiffs' counsel then filed a "response" to the Court's January 25, 2015 Order, reiterating that Plaintiffs and their counsel would like to re-negotiate the Settlement to which they had previously agreed and had otherwise represented to the Court was fair, reasonable and adequate. See Pls.' Resp. to Court's Jan. 25, 2015 Order (Dkt. #118); disc. supra at 3-5.

Construing the response as a motion to reconsider, the Court promptly denied Plaintiffs' motion, noting the differences between the two settlements. See Order Denying Mot. to Reconsider (Dkt. #119) at 2 ("[T]he Court finds that differences between the instant settlement agreement and the settlement agreement in Pearson, and differences in circuit law, do not require a continuance or stay in this case."). Importantly, the Court pointed out in its February 2, 2015 Order that at the time Plaintiffs submitted their motion for preliminary approval, the district court in Pearson had already determined that the injunctive relief had no value and that Plaintiffs and their counsel had expressly argued before this Court that the law in the Ninth Circuit was and is different:

> At the time of the settlement agreement and preliminary approval in the instant case, the district court in Pearson already had determined that the injunctive relief in that case had no value in terms of considering the overall value of the agreement to the class and in considering the appropriateness of the fee request. The Seventh Circuit agreed. Pearson at 785-86. In this Circuit, however, as the parties acknowledged in moving for preliminary approval, injunctive relief can be given a value and that value can be part of the consideration of the Court regarding the appropriateness of a fee request in this Circuit. See, e.g., In re: Ferrero Litigation, 583 Fed. Appx. 665, 668 (9th Cir. 2014); Carr v. Tadin, Inc., 2014 WL 7499454 *3 (S. D. Cal. December 5, 2014). This is particularly true when a lodestar method ultimately is used to determine the appropriate fee. Id.

Id. at 3.

Following issuance of the Court's February 2, 2015 Order, Plaintiffs and their counsel requested that Schiff consent to them withdrawing from the

Settlement and having the Parties return to active litigation. Plaintiffs' counsel stated that they would still be willing to mediate with Schiff, but only if Schiff would agree to an entirely different settlement structure. As noted, however, Schiff does not agree with Plaintiffs' interpretation of Pearson and believes that this Court has properly interpreted Pearson. See disc. supra at 9. Accordingly, Schiff would not consent to Plaintiffs' motion to withdraw, and Plaintiffs then filed their motion on February 6, 2015. See Mot. to Withdraw (Dkt. #120) at 2.

In their motion, Plaintiffs provide little support for their request to withdraw from a Settlement that was the subject of extensive negotiation and that Plaintiffs' counsel repeatedly characterized as fair, reasonable and adequate. See Mot. to Withdraw (Dkt. #120) at 1-2. Instead, Plaintiffs' counsel simply reiterate their view (twice rejected by this Court) that Pearson somehow requires the Parties to completely restructure the Settlement and that they have been contacted by various, unnamed "objectors" who purportedly feel the same way.[8] See id. As discussed in more detail below, however, Plaintiffs and their counsel are incorrect on both the facts and the law, and their request to withdraw from the Settlement Agreement is not only unwarranted and unprecedented, but it is also in tension with their duties to a Settlement Class they otherwise purport to represent. See disc. infra at 12-25.

III. DISCUSSION

Plaintiffs' motion to withdraw should be denied for the reasons discussed below. See disc. infra at 12-25.

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[8] After several requests, Plaintiffs' counsel provided the name and contact information of one potential objector late last week, and Schiff will promptly contact that person and organization. Schiff respectfully requests, however, that Plaintiffs' counsel be directed to provide Schiff with the names and contact information of any other persons who contacted them with regard to potential objections in this case, and Schiff will then apprise the Court if after communicating with those persons and entities, it would appear that some or another modification to the Settlement might be prudent to address potential objectors.

A. Plaintiffs And Their Counsel Have No Basis For Repudiating The Settlement Agreement, And As Such, Schiff Is Entitled To Enforce The Agreement On Its Terms

It is well-settled that courts have the equitable power to enforce settlement agreements in litigation that is pending before them. See, e.g., Schaffer v. Litton Loan Servicing, 2012 WL 10274678, *8 (C.D. Cal. 2012); see also Vasile v. Flagship Fin., 2014 WL 2700896, *6 (E.D. Cal. 2014) (there is a strong policy in favor of enforcing settlement agreements). The only limitation on a court's power is that it may only enforce complete agreements. See, e.g., Vasile, 2014 WL 2700896, at *1. Under governing law, "[a] complete agreement requires: (1) accord on all material terms; and (2) the intent of the parties to bind themselves." Id. (emphasis in original).

In this case, there can be no legitimate dispute that the Settlement Agreement is complete and enforceable. See, e.g., Vasile, 2014 WL 2700896, at *1. The Settlement Agreement presented to this Court demonstrates an accord on all material terms. See Am. Settlement Agmt. (Dkt. #107-1). Indeed, it was entered into after five separate mediation sessions with a neutral mediator and after extensive negotiations between the Parties and their counsel. See PA Mem. (Dkt. #81-1) at 21-22; Settlement Agmt. (Dkt. #81-2); Am. Settlement Agmt. (Dkt. #107-1). Moreover, it was clearly the intent of the Parties to bind themselves to the Settlement Agreement. See Am. Settlement Agmt. (Dkt. #107-1). In fact, this Court has already acknowledged that the Parties intended to and did enter into a binding Settlement Agreement in granting preliminary approval. See Order of Prelim. Approval (Dkt. #113).

Plaintiffs and their counsel have offered no basis for repudiating the Settlement Agreement, and none exist. See Mot. to Withdraw (Dkt. #120). To the extent Plaintiffs and their counsel simply regret their bargain, "this is not a basis for repudiating [a settlement agreement]." Campbell v. Geithner, 2011 WL 6032957, *2 (N.D. Cal. 2011); see also Sylvester v. Northrop, 1996 U.S. App.

LEXIS 17778, *4-5 (9th Cir. 1996) ("a party can no more repudiate a [settlement agreement] than he could disown any other binding contractual relationship"). To the extent Plaintiffs and their counsel believe a change in applicable law necessitates re-negotiation of the Settlement, Schiff disputes that there has been any change in law, but even if there had been, it is well-settled that "changes in the law after a settlement is reached do not provide ground for rescission of the settlement." Ehrheart v. Verizon, 609 F.3d 590, 593 (3d Cir. 2010).

The Third Circuit's decision in Ehrheart is particularly instructive. In Ehrheart, the parties entered into a class action settlement to resolve claims by the plaintiff relating to alleged violations of the Fair and Accurate Credit Transactions Act. See Ehrheart, 609 F.3d at 592. After the settlement had been preliminarily approved, legislation was enacted that would have eliminated plaintiff's claim. See id. Defendant then sought to withdraw from the settlement. See id. In reversing the district court's decision to allow the defendant to withdraw, however, the Third Circuit held that the fact that the district court had not yet granted final approval of the settlement did not render it any less enforceable and that a change in the law was simply not grounds for repudiating a class action settlement:

> It is essential that the parties to class action settlements have complete assurance that a settlement agreement is binding once it is reached. The fact that a settlement agreement is governed by Rule 23 does not diminish its enforceability as a contract. Where, as here, the parties have executed an agreement, a party cannot avoid its independent contractual obligations simply because a change in the law confers upon it a benefit that could have altered the settlement calculus.

Id. at 596; see also In re Syncor ERISA Litig., 516 F.3d 1095, 1100 (9th Cir. 2008) ("[T]he requirement that the district court approve a class action settlement does not affect the binding nature of the parties' agreement[.]").

The logic in Ehrheart is equally applicable here. See Ehrheart, 609 F.3d at 596. As discussed in more detail below, the driving force behind the desire of Plaintiffs' counsel to withdraw from the Settlement appears to be the treatment of

their fee award by the Seventh Circuit in Pearson. See disc. infra at 19-22; see also disc. supra at 6-8 (discussing the holding in Pearson that the fee award to class counsel was too high in relation to the amount recovered by the class). That Pearson might have changed the law (a conclusion Schiff disputes -- see disc. infra at 14-19) in a way that might have impacted the settlement calculus of Plaintiffs' counsel, however, does not provide a legitimate basis for Plaintiffs' counsel to repudiate an otherwise enforceable settlement agreement. See Ehrheart, 609 F.3d at 595-96; see also Am. Settlement Agmt. (Dkt. #107-1) at § XIII, ¶ D (providing for no rescission of the Settlement Agreement on the grounds of mistake). Accordingly, Plaintiffs and their counsel would not be justified in seeking to withdraw from the Settlement Agreement even if Pearson had affected a change in governing law, and the fact that Pearson plainly did not only reinforces why Plaintiffs and their counsel are not entitled to the relief they now seek. See id.; disc. infra at 14-19.

B. As Plaintiffs Have Previously Represented To This Court, Pearson Is Simply Not Consistent With Ninth Circuit Law

Even if Schiff were not entitled to enforce the Settlement Agreement, Plaintiffs and their counsel still have not provided a legitimate basis for their motion to withdraw. See disc. infra at 14-19. Notably absent from Plaintiffs' submissions is any discussion regarding how or why the Seventh Circuit's decision in Pearson actually affects the Settlement now before this Court. See Mot. to Withdraw (Dkt. #120); Pls.' Resp. to Court's Jan. 25, 2015 Order (Dkt. #118). And in fact, Pearson is not consistent with the law in the Ninth Circuit in at least two significant respects, as Plaintiffs and their counsel have themselves represented to this Court in the past. See Order Denying Mot. to Reconsider (Dkt. #119) at 3; PA Supp. Mem. (Dkt. #107) at 11-12.

1. The Ninth Circuit Has Consistently Held That Injunctive Relief Can Be Considered In Assessing The Fairness, Reasonableness And Adequacy Of A Class Settlement

In Pearson, both the district court and the Seventh Circuit held that the injunctive relief could not be valued and should not be considered a benefit to the class. See Pearson, 772 F.3d at 781; see also Order Denying Mot. to Reconsider (Dkt. #119) at 3. Under controlling Ninth Circuit precedent, however, injunctive relief in the form of labeling changes may be considered as part of the benefit conferred, and that type of relief is routinely included in class settlements in this circuit. See, e.g., In re Ferrero Litig., 583 Fed. Appx. 665, 668 (9th Cir. 2014); see also In re Magsafe, 571 Fed. Appx. 560, 565 (9th Cir. 2014) (noting that in considering fees on remand, the district court should consider the value of an injunction); Anthony v. Yahoo!, 376 Fed. Appx. 775, 775 (9th Cir. 2010) (affirming the district court's holding that the settlement was fair, reasonable and adequate when it provided both monetary and injunctive relief).

To that end, Plaintiffs and their counsel have previously argued that Ninth Circuit law fully supports consideration of the injunctive relief called for by the Settlement Agreement in assessing the benefit being conferred to the Settlement Class. See PA Supp. Mem. (Dkt. #107) at 11-12. In the supplemental submission made to the Court on September 15, 2014, Plaintiffs specifically noted that controlling Ninth Circuit precedent contradicted the district court's decision in Pearson and supported valuing the injunction here:

> The court need look no further than the Ninth Circuit's recent decision in In re Ferrero Litigation, 12-56469, 2014 WL 3465685 (9th Cir. July 16, 2014), for confirmation. There, the Ninth Circuit upheld the district court's $985,920 fee award in a settlement with a $550,000 fund and changes to the product label that pale in comparative import to the consumer to those here. The injunctive relief consisted of more nutritional information on the label and replacing "[a]n example of a tasty yet balanced breakfast" with "[t]urn a balanced breakfast into a tasty one" on the back of the label so as not to misleadingly suggest the product is healthy. See Id. at *1; Ex. 10, Motion for Final Approval, No. 12-56469, Dkt No. 114-1. The Ferrero plaintiffs valued that injunctive relief at $14 million, calculated by relying upon sales figures, like Dr. Reutter has done here.

> The Ninth Circuit rejected the objectors' arguments that the injunctive relief did not justify a fee award because the "injunctive relief is too speculative" and "benefits 'society at large' rather than the class members." In re Ferrero, 2014 WL 3465685, at *1. The Ninth Circuit found that the injunctive relief was "meaningful and consistent with the relief requested in plaintiffs' complaint." Id. While this finding was made in relation to the fee award, it applies equally to the fairness, reasonableness and adequacy of the Settlement.

Id. Notably, Plaintiffs' offer no indication in their motion to withdraw as to why their position on this issue has now changed. See Mot. to Withdraw (Dkt. #120).

Numerous courts in the Ninth Circuit and this district, however, have likewise valued injunctions as part of class relief. See, e.g., Carr v. Tadin, 2014 WL 7499454, *3 (S.D. Cal. 2014) (approving settlement providing for only injunctive relief in class suit alleging misleading marketing and advertising in tea products); Foos v. Ann, 2013 WL 5352969, *4 (S.D. Cal. 2013) (considering the work performed in obtaining the injunction as part of attorneys' fees and costs); Minute Order, Pappas v. Naked Juice, No. 2:11-cv-08276 (Dkt. #144) (C.D. Cal., filed Aug. 7, 2013) (court including "injunctive relief valued at $1.4 million" as part of the settlement fund for purposes of determining whether the settlement was reasonable) (PA Supp. Mem. (Dkt. #107) at Ex. 11); In re Jiffy Lube, 2012 WL 4849617, *2 (S.D. Cal. 2012) (granting preliminary approval of settlement as fair and reasonable when considering all aspects of the recovery to the class, including the injunctive relief). Indeed, many of these same cases were cited by Plaintiffs' counsel to this Court in support of this Settlement. See PA Supp. Mem. (Dkt. #107) at 11-12.

As the Court noted, these cases remain good law in the Ninth Circuit and are unaffected by the Seventh Circuit's decision in Pearson. See Order Denying Mot. to Reconsider (Dkt. #119) at 3 ("In this Circuit, however, as the parties acknowledged in moving for preliminary approval, injunctive relief can be given a value and that value can be part of the consideration of the Court regarding the appropriateness of a fee request in this Circuit."). As such, the Seventh Circuit's

decision in Pearson has no effect on the Settlement. See disc. supra at 15-16.

2. Well-Settled Law In The Ninth Circuit Also Supports The Settlement Structure

In addition and contrary to Plaintiffs' suggestions to the contrary, the law in the Ninth Circuit does not require the creation of a common fund in a class action settlement, nor does Ninth Circuit law prohibit the payment of attorneys' fees from a fund separate from the relief provided to the class. See Pls.' Resp. to Court's Jan. 25, 2015 Order (Dkt. #118) at 2-3. In fact, courts within the Ninth Circuit regularly approve settlements that do not include common funds, where the amount to be provided to the class is not capped and attorneys' fees are separately negotiated and awarded. See, e.g., In re Magsafe, 2015 WL 428105, *8 (N.D. Cal. 2015) ("Here, the court recognizes that the amount of compensation for class members was not capped, thus the parties did not know how many cash awards would be made or how many replacement adapters would be provided at the time the Settlement Agreement was reached. . . . Likewise, in evaluating the kicker provision, it does not appear there was collusion because the unawarded fees that will revert back to Apple does not in any way impact the benefit to the class—class members had the ability to obtain a cash refund or replacement adapter regardless of the amount reverted back to Apple."); Shames v. Hertz, 2012 WL 5392159, *14 (S.D. Cal. 2012) ("[B]ecause the attorneys' fees in this case are wholly separate from the class settlement -- and will have no impact one way or the other on the amount the class recovers -- a 'savings' for Defendants does not implicate the concerns the Ninth Circuit expressed about the 'kicker' provision[.]"); In re Bluetooth, 2012 WL 6869641, *10 (C.D. Cal. 2012); see also Navarro v. Servisair, 2010 WL 1729538, *1 (N.D. Cal. 2010) (granting final approval of a settlement despite reversion of a substantial portion of the common fund to the defendant).

Moreover, the Ninth Circuit recently addressed in Bluetooth the payment of attorneys' fees from a fund that is separate from the relief to the class. See In re

Bluetooth, 654 F.3d 935 (9th Cir. 2011). In Bluetooth, the Ninth Circuit reversed final approval of a class settlement, holding that the district court had not provided a sufficient analysis of the fairness of the settlement and the basis for fees and costs. See id. at 947-50. More specifically, the court in Bluetooth identified certain settlement terms that might require additional scrutiny to ensure that the settlement is truly fair, reasonable and adequate: (1) whether class counsel receives a disproportionate amount of the settlement; (2) whether the parties agree to a "clear sailing" provision; and (3) whether the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund. See id. at 946-47. Importantly, however, the Ninth Circuit also held in Bluetooth that none of these settlement terms are per se prohibited, only that if one or more are present, the district court must "examine the negotiation process with even greater scrutiny than is ordinarily demanded." Id. at 949. Moreover, the Ninth Circuit emphasized that the district court could reach any number of conclusions on remand, including that it properly approved the settlement in the first instance. See id. at 949-50.

Many months prior to the Seventh Circuit's decision in Pearson, the Ninth Circuit re-affirmed the fact that Bluetooth does not dictate any particular result. See In re Magsafe, 571 Fed. Appx. at 565. In Magsafe, the Ninth Circuit reversed final approval of a settlement and remanded to the district court, directing it to more thoroughly address the issues identified in Bluetooth, but emphasizing that its decision did not dictate that the district court reach any particular result:

> We also conclude that the district court erred by not addressing the indicia of self-dealing or implicit collusion identified in Bluetooth. The court did not assess with specificity whether class counsel received a disproportionate share of the settlement, nor did it mention the clear-sailing provision or the implied reversion clause. The court might find, after conducting a proper inquiry, that the fee award requested by the plaintiffs is proportionate to the value received by the class, that the clear-sailing provision is outweighed by other portions of the settlement agreement, and that a reversion clause is of no concern in an uncapped claims-made settlement. Or the court might conclude that the agreement is tainted by the possibility of self-dealing and direct the parties back to the negotiating table. Once again, we request only that the court

> demonstrate that it was particularly vigilant in monitoring for self-dealing and implicit collusion.

Id. at 565; see also In re Magsafe, 2015 WL 428105, at *9 (approving settlement on remand).

This Settlement is plainly free of collusion. The Settlement was negotiated over the course of more than a year with the assistance of a well-respected neutral mediator, namely Justice Wiener, during five separate mediation sessions. See PA Mem. (Dkt. #81-1) at 21-22; see also, e.g., In re Bluetooth, 654 F.3d at 948 (noting that involvement of neutral mediator is relevant for purposes of assessing the likelihood of any collusion). Schiff has no doubt that when this Court examines the Settlement in the context of a final approval determination, the Court will find that it is free of collusion under any conceivable standard. But for purposes of Plaintiffs' motion to withdraw, the most critical fact is that Pearson in no way overrules or otherwise impacts the well-settled and controlling precedent in the Ninth Circuit, which precedent was well-settled and controlling at the time Plaintiffs negotiated the Settlement and filed for preliminary approval, representing to this Court that the Settlement was in fact fair, reasonable and adequate and reached free of any collusion. See disc. supra at 17-19.

C. Pearson Requires No Modifications To The Settlement, And Even If It Did, The Only Potential Modification Is Fairly Obvious

As discussed above and as this Court has recognized, Pearson does not change the state of the law in this district or this circuit and does not require modification of the Settlement. See Order Denying Mot. to Reconsider (Dkt. #119) at 3; disc. supra at 14-19. To the extent Pearson does have an impact, however, any concerns raised by that decision could be addressed with modest modifications to the Settlement. See disc. infra at 19-22. For example, Plaintiffs indicate that the claim form should be "simplified." See Pls.' Resp. to Court's Jan. 25, 2015 Order (Dkt. #118) at 2. While Plaintiffs fail to explain how the current two-page form is not simple enough, modifying the claim form would hardly be a

difficult or time-consuming task, and it is certainly not a reason for Plaintiffs and their counsel to withdraw from the Settlement or insist that the entire Settlement be restructured. See id.

Similarly, Plaintiffs claim that a common fund supposedly must be created, because of a low claim-in rate in Pearson. See Pls.' Resp. to Court's Jan. 25, 2015 Order (Dkt. #118) at 2. Ninth Circuit law, however, does not require a common fund (see disc. supra at 17-19), and Plaintiffs fail to explain how a common fund would improve the claim rate here or how a common fund (which necessarily places a cap on the total recovery of the Settlement Class) is preferable for members of the Settlement Class to an uncapped claim-in structure, as in the Settlement. See Pls.' Resp. to Court's Jan. 25, 2015 Order (Dkt. #118) at 2.[9]

Finally, Plaintiffs claim that the Settlement should include higher payouts per purchase. See Pls.' Resp. to Court's Jan. 25, 2015 Order (Dkt. #118) at 2. They fail to acknowledge, however, that the Settlement in this case actually does contain higher payouts per purchase than Pearson. Compare Am. Settlement Agmt. (Dkt. #107-1) at § IV, ¶¶ A-B (those with proof of purchase may receive $10 per bottle for a maximum of five bottles and providing that a minimum of $2 million will be paid directly to the Settlement Class), with Pearson Settlement

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[9] As Schiff noted in its September 15, 2014 submission, the Settlement is primarily intended to address what Schiff believes is a relatively small number of consumers who believe they were not receiving the promised benefit from the Covered Products. See Schiff Mem. (Dkt. #108) at 8-10. In fact, it has been Schiff's contention throughout this litigation that the vast majority of consumers who purchased the Covered Products received benefits from taking those products and therefore simply have no cognizable legal claim. It was, in turn, precisely because the Parties disagreed on the nature and extent of consumer dissatisfaction that a claim-in process was agreed upon as a means of ferreting out those consumers who could conceivably have a claim. See id. This Settlement, however, is not intended to be a windfall to otherwise satisfied consumers, and as such, a claim-in process is essential to deter fraudulent claims. See, e.g., In re Lawnmower Engine Horsepower, 733 F.Supp.2d 997, 1010 (E.D. Wis. 2010) (noting that it was important for the settlement to have a mechanism to protect against potential fraudulent claims); Garza v. Sporting Goods Props., 1996 WL 56247, *21 (W.D. Tex. 1996) (limiting the number of claims that class members could make in order to guard against fraudulent claims).

Agmt. (Dkt. #73-1) at § 7 (those with proof of purchase receive $5 per bottle for a maximum of ten bottles), and Pearson, 772 F.3d at 784 (approximately $1.3 million of the minimum $2 million was paid to cy pres). Plaintiffs likewise fail to acknowledge that neither Judge Zagel nor the Seventh Circuit actually took issue with the compensation offered to the class in Pearson, only with the compensation to the class as compared with the compensation to class counsel. See Pearson, 772 F.3d at 780-85; Pearson, 2014 WL 30676, at *5.[10]

And therein lies the potential impact of Pearson (if any): the potential fees to Plaintiffs' counsel. See disc. supra at 6-8. As discussed above, the overriding issue in Pearson was the fact that the fees paid to class counsel were deemed excessive by the Seventh Circuit relative to the benefit conferred to the class. See Pearson, 772 F.3d at 780-85. This issue, however, can easily be addressed without Plaintiffs or their counsel withdrawing from the Settlement. See disc. infra at 21-22. While Plaintiffs' counsel have the ability to seek as much as $3 million in fees and costs, they certainly are not required to do so. See Am. Settlement Agmt. (Dkt. #107-1) at § VI, ¶ A (Settlement Class Counsel may seek up to $3 million). In fact, at the time of final approval, Plaintiffs' counsel can evaluate the benefits

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[10] Plaintiffs also fail to acknowledge that the injunction agreed to in this Settlement is clearer and better supported both on the facts and the law than the injunction in Pearson. See disc. supra at 3-6. In Pearson, the injunction allowed for a rewording of many of the enjoined statements with approved similar terms, which had the effect of immunizing defendants from suit, a fact with which the Seventh Circuit took issue. See Pearson Settlement Agmt. (Dkt. #73-1) at §§ 8, 11 & Ex. B; see also Pearson, 772 F.3d at 785-86. The plaintiffs in Pearson, however, offered little to no explanation as to why the reworded statements were any better or different from the enjoined statements. See Pearson, 772 F.3d at 785-86 Thus, both the district court and the Seventh Circuit gave no value to the injunction in Pearson. See id. at 786. But see disc. supra at 15-16 (discussing the difference in Ninth Circuit law on valuing injunctions). In this case, however, the injunction is more targeted, enjoining the use of only certain, specific phrases, and it does not suggest alternative phrases that are given the imprimatur of the Court. See Am. Settlement Agmt. (Dkt. #107-1) at § IV, ¶ C. Moreover, Plaintiffs and their counsel provided support in their September 15, 2014 submission to this Court for the terms that were enjoined in the Settlement, noting that at least two of those terms were among the labeling representations that played a significant role in driving consumer purchases. See PA Supp. Mem. (Dkt. #107) at 9.

received by the Settlement Class and simply request fees and costs appropriate and proportionate to those benefits, which would certainly be consistent with Pearson. See Pearson, 772 F.3d at 782. Moreover, this Court will, of course, evaluate the fee request of Plaintiffs' counsel at the conclusion of the case. See, e.g., In re Bluetooth, 654 F.3d at 941 ("[C]ourts have an independent obligation to ensure that the award . . . is reasonable, even if the parties have already agreed to an amount."). Thus, the Court can consider all aspects of the Settlement at final approval, including the amount claimed by the Settlement Class and determine whether the fee request is excessive. See id.

The fact that the fees of Plaintiffs' counsel may be reduced upon final approval, however, clearly does not provide a basis for Plaintiffs and their counsel to withdraw from the Settlement. See Am. Settlement Agmt. (Dkt. #107-1) at § VI, ¶ C ("Any order or proceedings relating to the application for the Attorneys' Fee Award and the Incentive Award, or any appeal from any order relating thereto or reversal or modification thereof, will not operate to terminate or cancel this Agreement[.]"). This should be particularly true under the present circumstances, given that Plaintiffs and their counsel have previously represented to this Court that Settlement is preferable to litigation for the Settlement Class in light of the likelihood of prolonged proceedings and uncertain results.[11] See PA Mem. (Dkt. #81-1) at 1-2, 19, 21-22; Schiff Mem. (Dkt. #108) at 6-8; disc. infra at 22-25.

D. Plaintiffs' Motion To Withdraw Necessarily Raises Adequacy Concerns

In light of the fact that the only potential impact of Pearson (if any) is on the fees to be recovered by Class Counsel, the pending motion to withdraw necessarily

[11] In the Settlement Agreement, Schiff agreed to not oppose a fee request from Plaintiffs' counsel of up to $3 million, and Schiff stands by the commitment. See Am. Settlement Agmt. (Dkt. #107-1) at § VI, ¶ A. The Settlement Agreement makes clear, however, that the fees ultimately awarded to Plaintiffs' counsel will be set by this Court, and that is, of course, otherwise consistent with governing law. See, e.g., In re Bluetooth, 654 F.3d at 941.

raises adequacy concerns. See disc. supra at 21-22; see also, e.g., Ellis v. Costco, 657 F.3d 970, 985 (9th Cir. 2011) (the determination of adequacy involves whether "the named plaintiffs and their counsel have any conflicts of interest with other class members and [whether] the named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class"). In support of their motion for preliminary approval, Plaintiffs' counsel represented that the Settlement was in the best interest of the Settlement Class given the risks, uncertainties and expense of litigation:

> Given the alternative of long and complex litigation before this Court, the risks involved in such litigation and the possibility of further appellate litigation, the availability of prompt relief under the Settlement is highly beneficial to the Class.

PA Mem. (Dkt. #81-1) at 20. Nothing has changed since Plaintiffs' counsel made that statement, and those same risks are as present today as they were when Plaintiffs' counsel made their assessment. See id. Yet Plaintiffs and their counsel now want to withdraw from the Settlement and foist all of that risk back on the Settlement Class. See Mot. to Withdraw (Dkt. #120) at 2.

As Schiff detailed in its submission in support of the Settlement, the road to recovery for the Settlement Class would in fact be difficult, further supporting the initial conclusion of Plaintiffs' counsel that providing immediate benefits through settlement is preferable to protracted and uncertain litigation. See Schiff Mem. (Dkt. #108) at 6-8 (detailing the manageability problems in trying Plaintiffs' claims on a class basis as well as the difficulties in proving their claims on the merits); see also PA Mem. (Dkt. #81-1) at 1-2, 18-20, 21-26 (noting the fairness of the settlement and the potential difficulties in litigating Plaintiffs' claims). For example, Plaintiffs would have the burden of proving that Schiff made false or misleading statements. See, e.g., Nat'l Council Against Health Fraud v. King Bio, 107 Cal.App.4th 1336, 1344 (2d Dist. 2003). Plaintiffs, however, could not simply rely upon allegations that Schiff did not have sufficient support for its statements,

as Plaintiffs would actually have to prove the statements were false, which would be very difficult given all the studies and evidence Schiff has amassed over the years to support each of its advertising claims. See, e.g., Fraker v. Bayer, 2009 U.S. Dist. LEXIS 125633, *22-23 (E.D. Cal. 2009); PA Mem. (Dkt. #81-1) at 19.

Now facing the possibility that they may not recover the fees they are seeking, however, Plaintiffs and their counsel apparently believe that protracted, complicated and uncertain litigation is suddenly somehow preferable. See Mot. to Withdraw (Dkt. #120) at 2 (seeking to return the case to litigation). But the fees to be awarded to Plaintiffs' counsel are scarcely of interest to members of the Settlement Class, and the fact that Plaintiffs' counsel would jeopardize what they worked so hard to obtain for the Settlement Class raises obvious issues. See, e.g., Ellis, 657 F.3d at 985; Mot. to Withdraw (Dkt. #120); disc. supra at 21-22.[12]

As such, Plaintiffs' motion to unilaterally withdraw from the Settlement necessarily calls into question whether they and their counsel can "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). And in instances where adequacy is an issue, this Court has broad discretion to remedy the conflict. See Newberg on Class Actions § 3:87 (5th ed. 2014); see also Fed. R. Civ. P. 23(g) advisory committee's note ("If, after review of all applicants, the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified,

[12] In their motion to withdraw from the Settlement, Plaintiffs' counsel imply that Plaintiffs themselves are also no longer willing to serve as Class Representatives, though no declarations or other statements from Plaintiffs are supplied. See Mot. to Withdraw (Dkt. #120). To the extent Plaintiffs are also seeking to withdraw, Schiff respectfully requests that the Court consider holding an evidentiary hearing so that Schiff and the Court may examine Plaintiffs and assess their understanding of the Settlement and their intentions regarding fulfillment of their duties as Class Representatives. See Callie v. Near, 829 F.2d 888, 890 (9th Cir. 1987) (the court may hear evidence and make factual determinations in deciding whether to enforce a settlement). In any event, however, it is well within the authority of this Court to appoint other persons to serve as representatives of the Settlement Class. See, e.g., Negrete v. Allianz Life, 287 F.R.D. 590, 604 n.7 (C.D. Cal. 2012).

invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.").

For all the reasons stated above, Schiff believes that Plaintiffs' motion to withdraw should be denied and that a schedule should be set by the Court to complete the approval process for the Settlement. See disc. supra at 12-25. Alternatively, the Court should appoint new counsel to represent the Settlement Class so that the approval process can be completed and the interests of members of the Settlement Class can be fully protected. See, e.g., Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1239 (9th Cir. 1998) (requiring appointment of additional counsel to cure conflict of interest); Kay v. Wells Fargo, 247 F.R.D. 572, 579 (N.D. Cal. 2007) ("[P]laintiff must publicize notice calculated to invite other counsel to compete for class representation in this case pursuant to Rule 23(g).").

IV. CONCLUSION

For the reasons stated herein, Schiff respectfully requests that the motion of Plaintiffs and their counsel to withdraw from the Settlement be denied. In the alternative, Schiff requests that the Court consider appointment of new counsel to represent the Settlement Class.

Dated: February 23, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2015 a copy of the foregoing document was filed electronically with the Clerk of the Court using the Court's CM/ECF electronic filing system, which will send an electronic copy of this filing to all counsel of record.

/s/ Mark S. Mester
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LUIS LERMA, an Individual, and NICK PEARSON, an Individual, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. SCHIFF NUTRITION INTERNATIONAL, INC., a Delaware Corporation, and SCHIFF NUTRITION GROUP, INC., a Utah Corporation, Defendants.	CASE NO. 3:11-cv-01056-MDD CLASS ACTION **DECLARATION OF KATHLEEN P. LALLY**

I, Kathleen P. Lally, declare and state as follows:

1. I am an attorney admitted to practice law in Illinois, Counsel with the law firm of Latham & Watkins LLP and counsel for Defendants Schiff Nutrition International, Inc. and Schiff Nutrition Group, Inc. (collectively, "Schiff"). This declaration is filed in support of Schiff's memorandum in opposition to the motion of Plaintiffs Luis Lerma and Nick Pearson (collectively, "Plaintiffs") and their counsel to withdraw from the Settlement. I have personal and firsthand knowledge of the facts stated in this declaration. If called upon to do so, I could

and would testify competently thereto.

2. On November 21, 2014, shortly after the Seventh Circuit issued its decision in Pearson v. NBTY, 772 F.3d 778, 784 (7th Cir. 2014) ("Pearson"), counsel for Plaintiffs contacted me and informed me that they would be seeking to withdraw their motion for preliminary approval.

3. Before Plaintiffs were able to withdraw their motion for preliminary approval, however, this Court granted Plaintiffs' motion for preliminary approval and issued its Order of Preliminary Approval of Class Settlement (Dkt. #113). I spoke with Plaintiffs' counsel shortly thereafter, and they informed me that they would no longer support the Settlement and desired to renegotiate and restructure the Settlement.

4. Thereafter and in light of the threat by Plaintiffs' counsel to withdraw from the Settlement, the Parties agreed to engage in further mediation to discuss the impact of Pearson and whether it was necessary to modify the Settlement in this case.

5. In light of Class Counsel's statements that they were no longer willing to support the Settlement and further in light of the Parties' agreement to engage in further mediation, Class Counsel was clearly aware that Schiff was not planning on issuing notice, and Class Counsel did not object to that course of action.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on February 23, 2015 in Chicago, Illinois.

Respectfully submitted,

/s/ Kathleen P. Lally
Kathleen P. Lally