BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.
Patricia N. Syverson (Bar No. 203111)
Elaine A. Ryan (*Admitted Pro Hac Vice*)
Lindsey M. Gomez-Gray (*Admitted Pro Hac Vice*)
2325 East Camelback Road, Suite 300
Phoenix, Arizona 85016
Telephone: (602) 274-1100
Facsimile: (602) 274-1199
psyverson@bffb.com
Attorneys for Plaintiffs

(Additional Attorneys Listed on Signature Page)

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 **PLAINTIFFS' REPLY IN SUPPORT OF *EX PARTE* MOTION FOR LEAVE TO WITHDRAW FROM SETTLEMENT**

I. INTRODUCTION

Nearly a year ago, the parties finalized the Settlement Agreement in this matter and moved for preliminary approval of that Agreement. (*See, e.g.*, Doc. 78, 81.) In the interim, due to developments in other, similar cases, Plaintiffs now believe that the settlement reached in this matter will draw objections that could result in the settlement not being finally approved.

To address these concerns, on December 22, 2014, counsel for Plaintiffs and Defendants filed a joint stipulation asking the Court to stay the settlement process because both parties agreed "that the Seventh Circuit's decision in *Pearson* makes it appropriate for them to engage in further mediation in this case." (Doc. 116

(citing *Pearson v. NBTY*, 2014 WL 6466128 (7th Cir. Nov. 19, 2014))). The Court denied the requested stay and Plaintiffs' motion to reconsider, finding that the opinion in *Pearson* did not necessitate a stay of the approval process because both the settlement and the law by which the fairness of the settlement would be judged were different. (Docs. 116-119.) Plaintiffs and their counsel then filed the instant motion requesting the Court grant them leave to withdraw from the settlement because they believed "that the criticisms leveled by the Seventh Circuit towards the *Pearson* settlement are likely to be raised by objectors here." (Doc. 120 (the "Motion to Withdraw").)

In response, Defendants filed a 25-page Opposition to Plaintiffs' 2-page motion. (Doc. 123 (the "Opposition").) In the Opposition, Defendants attempt to distinguish this settlement and Ninth Circuit law from the *Pearson* settlement and ruling. Disagreement over the impact of *Pearson*, however, is now largely beside the point.

Of much greater concern are the likely objections to the settlement. Based upon Plaintiffs' counsel's experience in other glucosamine related settlements, objectors will rely on Ninth Circuit law recognizing the importance of obtaining meaningful injunctive relief in consumer fraud class action settlements. They will argue that the injunctive relief in the current settlement regarding the removal of "repair/rebuild/rejuvenate cartilage/joint" representations is toothless because Defendants presently use, and may continue to use, various synonyms to make the same representations.

Indeed, Defendants' Opposition acknowledges the possibility of objections and concedes that modifications to the settlement may ultimately be "prudent to address potential objectors." (Doc. 123 at p. 11, n.8.) Such objections are not hypothetical—pursuant to their request on February 20, 2015, Plaintiffs' counsel informed Defendants of one such objector, Truth In Advertising ("TINA").

Defendants' counsel then spoke with TINA's counsel and, shortly thereafter, counsel for TINA reiterated in an email that they are going to file a brief in opposition to the current settlement. (Exhibit A (February 25, 2015 Email from Laura Smith (TINA).) Other likely objectors include AARP (who objected to the settlement in another glucosamine case, *Quinn, et al., v. Walgreen Co., et al.*, Case No. 7:12-CV-8187-VB (S.D.N.Y.) ("*Perrigo*")) and Ted Frank (the objector in *Pearson* who filed a declaration there stating that he also purchased Defendants' Move Free product). Both TINA and AARP objected to the injunctive relief in the initial *Perrigo* settlement—injunctive relief that was similar to that in the settlement agreement here. The parties in *Perrigo* amended their settlement and in so doing headed off the objections.

The fact is that the parties here share the same realistic concern regarding potential meritorious objections. And it is this concern, and not the desire for a bigger fee (as Defendants wrongly contend), that resulted in the Motion to Withdraw. Plaintiffs believe that such objections can be mooted by modifications to the settlement and that Judge Wayne Andersen, who has been involved in three other glucosamine-related mediations, might be able to guide the parties to a mutually agreeable resolution.

Yet, in their Opposition Defendants take internally inconsistent positions. On the one hand, Defendants argue the current settlement is worthy of final approval as it stands. On the other hand, Defendants are concerned that modifications to the settlement may be needed and they do not want to issue notice only to have to spend an additional $1.5 million for a second notice. (Doc. 123 at p. 11, n.8.)

Defendants should not be allowed to have it both ways. If Defendants believe that the settlement as it now stands is sound, then the Court should order them to issue notice to the class immediately, and if meritorious objections are

lodged that require a new notice, Defendants will just have to suffer the consequences. If, however, and as appears to be the case, Defendants have cold feet about the settlement, then they should not oppose the Motion to Withdraw or attack Plaintiffs and their counsel for seeking the very thing that Defendants appear to want: the opportunity to amend the settlement so that it can stand on solid ground against any potential objections that might be lodged.

And so, rather than run the risk of proceeding with a flawed settlement that will draw objections—wasting $1.5 million of Defendants' money and delaying relief to Plaintiffs and Class members for potentially years as the settlement wends its way through the appeals process—Plaintiffs request that the Court grant them leave to withdraw from the settlement.

II. ARGUMENT

A. Defendants' Opposition And Plaintiffs' Experiences In Similar Glucosamine Cases Demonstrate The Settlement Can And Should Be Modified To Avoid Likely Objections.

Defendants' Opposition asserts that Plaintiffs have no basis for repudiating the settlement. (Doc. 123 at 12-14.) Plaintiffs' motion does not argue that the settlement agreement is not enforceable. Rather, Plaintiffs brought this motion because they believe that the settlement likely will not be upheld due to objections that can and should be addressed by the parties. What is more, Defendants' Opposition demonstrates that, as was the case when they joined in the joint stipulation, the parties agree that modifications to the settlement are needed.

1. Defendants' Opposition makes it clear that Defendants realize modifications to the settlement will likely be required.

Throughout their Opposition, Defendants repeatedly make concessions demonstrating that they agree that modifications to the settlement are needed. (Doc. 123 at pp. 9, n.7, 11, n.8.) Defendants' most telling concession is buried in a

footnote, where they discuss potential objectors. (*Id.* at p. 11, n.8.) After explaining that Plaintiffs' Counsel gave them the name and contact information of one objector and requesting that Plaintiffs' counsel be directed to provide them with similar information should any other potential objectors contact them, Defendants represent the following: "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." (Doc. 123 at p. 11, n.8 (emphasis added).)

This is precisely what Plaintiffs have been seeking—to stay the approval process in this matter, address the potential objections that are going to be made, and modify the settlement accordingly. How can Defendants insist that the current agreement is sound, but not immediately cause notice to issue and, instead, conduct a unilateral poll of potential objectors for some indeterminate period of time? Defendants' answer is no answer at all and that is probably why it is in a footnote where Defendants claim "Schiff was in an untenable position." (Doc. 123 at p. 9, n.7.[1]) The only thing that made this position untenable, though, is the thing that Plaintiffs are now seeking to avoid—proceeding with a settlement that might require Defendants to issue notice at a cost of approximately $1.5 million, when the possibility remains that, among other things, the settlement might ultimately ***have*** to be modified and, as a result, notice might have to be issued again, costing Defendants another $1.5 million in expenses. *Id.*

[1] Defendants also contend in this footnote that Plaintiffs are "implying that Schiff has somehow unilaterally caused a delay in the settlement process." (Doc. 123 at p. 9, n.7.) Plaintiffs have not objected to Defendants' failure to issue notice or seek new dates to do so, as Plaintiffs have been consistently asserting that the settlement needs to be modified.

Plaintiffs agree that this would be inefficient and so have been seeking to avoid having notice issue until the parties determine whether modifications to the settlement are needed.

2. Plaintiffs' Counsel's experience in similar glucosamine cases suggests that the settlement can and should be modified to address anticipated objections.

On February 20, 2015, pursuant to Defendants' request, Plaintiffs' counsel provided Defendants' counsel with a January 21, 2015 email in which counsel for TINA advised that it intended to file objections to the settlement. (*See* Exhibit B.) Plaintiffs' counsel also has apprised Defendants' counsel that it is likely that the AARP Foundation will file an objection consistent with the objection it filed in *Perrigo*.[2]

In *Perrigo*, TINA and AARP attacked the strength of the injunctive relief, similar to that here. They contended that the most important facet of small claim consumer fraud settlements where the monies paid out will always pale in comparison to the actual damages is whether substantial and meaningful injunctive relief has been achieved by the settlement. These objections differ from those raised by the objectors and accepted by the court in *Pearson*, which held that injunctive relief is not a valuable benefit because it does not directly benefit the class—especially where defendants are able to use synonyms to make the same misrepresentations. *See Pearson*, 772 F.3d 778, 785-786.

[2] Plaintiffs' counsel also advised Defendants' counsel that Ted Frank, the objector in *Pearson*, stated in his declaration in *Pearson* that he had purchased Defendants' Move Free Product. Logic dictates that since Mr. Frank is in the business of objecting to settlements (he is the founder of the "Center for Class Action Fairness"—an entity devoted to objecting to class action settlements, *See* http://en.wikipedia.org/wiki/Center_for_Class_Action_Fairness) and has succeeded in overturning a settlement similar to the one here, he is more than likely to object to this settlement.

In contrast, Plaintiffs agree that injunctive relief should be meaningful and that injunctive relief is an important facet of consumer fraud class action settlements. So does the Ninth Circuit. *See, e.g., In re Ferrero Litig.*, 583 F. App'x 665 (9th Cir. 2014) (finding that the "injunctive relief in this case is meaningful and consistent with the relief requested in plaintiffs' complaint").[3] Likewise, Defendants concede that injunctive relief is an important benefit that the Ninth Circuit and district courts in the Ninth Circuit value. (Doc. 123 at 15-17.) And, this Court has also recognized the importance of injunctive relief. (*See, e.g.*, Doc. 119 at 3.)

Currently, the settlement provides that, for a period of 24 months, Defendants shall not represent that their products "repair joints", "repair cartilage", "rebuild joints", "rebuild cartilage", "rejuvenate joints" or "rejuvenate cartilage." (Doc. 107-1, Settlement Agreement IV.C. p. 13 (the "rebuild" representations).) As reflected on their web site, Defendants still make these representations as well as analogous representations using synonyms that their products maintain and strengthen joints, that the products also protect joints and cartilage from breakdown, and that they fight the breakdown of cartilage.[4]

At the preliminary approval hearing, this Court questioned whether allowing the word "strengthens" to remain on the product labels undercut the benefit of removal of the "rebuild" representations. Based on market research and the district court in *Pearson* having rejected an identical objection shortly before the

[3] In *Ferraro*, the Ninth Circuit affirmed an attorneys' fee award of $985,920 due to the injunctive relief that had been obtained even though there was only a $550,000 monetary fund established. *Id.* at 668.

[4] *See, e.g.*, http://www.movefree.com/about-move-free?utm_source=bing&utm_medium=cpc&utm_campaign=Brand%20-%20Move%20Free%20-%20Phrase&utm_term=what%20is%20move%20free&gclid=CPjbieCm-8MCFQVUKwodWS0A3Q&gclsrc=ds.

preliminary approval hearing,[5] Plaintiffs' counsel argued that even with "strengthens" on the label, there was benefit to removal of the "rebuild" representations. Subsequently, the Seventh Circuit held that because the injunctive relief allowed the use of synonyms like "strengthens," the injunctive relief was illusory. *See Pearson*, 772 F.3d at 785.

Given the *Pearson* holding, counsel for the parties in *Perrigo*, who had initially entered into a settlement with injunctive relief similar to that in this case and similar to that struck down in *Pearson*, arrived at an amended settlement agreement regarding the injunctive relief. That amended agreement now provides that the settling defendant "will not make the following statements, *or statements conveying the same message*, on the labels of any of the Covered Products as it pertains to the effect of the Covered Products on cartilage, *using synonyms such as, but not limited to: fixing, mending, reconditioning, rehabilitating, increasing, developing, building, maintaining, strengthening, repairing*, rebuilding, renewing, regrowing, adding, regenerating or *rejuvenating*." (*Perrigo* Doc. 141, Ex. 1 at ¶ 10 (amended language is emphasized).)

This amendment eliminated all of the "language" concerns raised by the Seventh Circuit in *Pearson* and effectively mooted the concerns raised by objectors in that case—including TINA, which has already indicated that it intends to object to the current settlement.[6] Likewise, the Amended Settlement in *Perrigo*

---

[5] *See Pearson*, Doc. 141 (Mem. Op. at 10 dated January 3, 2014).

[6] After the amendment to the settlement in *Perrigo*, TINA posted the following statement on its website: "TINA.org's objection has had a significant impact. After filing the brief, the companies and class-action attorneys revised the proposed settlement agreement to forever prohibit the glucosamine marketers from using any terms that convey the message that its supplements can repair, strengthen or rebuild cartilage unless there is sufficient scientific evidence to substantiate the claims and the court gives permission." *See* https://www.truthinadvertising.org/wellesse-glucosamine-settlement-doesnt-cure-ad-issues/ .

eliminates temporal concerns raised by the *Pearson* court and the objectors in *Perrigo* by making the labeling changes permanent.[7]

Of course, the Schiff Defendants are under no obligation to agree to injunctive relief similar in scope to the amended relief in *Perrigo*. However, absent agreed removal of key synonyms, Plaintiffs believe there is a very real risk that the settlement may not be finally approved and/or withstand appeal, and have thus moved to withdraw from the current settlement.[8] And, based on their efforts to learn the identities of, and thereafter communicate with potential objectors and "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" (Doc. 123 at p. 11, n.8), Defendants apparently agree the risk is real and modifications may be necessary.

B. Defendants' Adequacy Arguments Are Baseless.

Defendants question Plaintiffs' counsel's adequacy to represent the class in light of their motion to withdraw from the current settlement and note that even if *Pearson* does require some changes to the settlement, "the only potential modification is fairly obvious" and should be to lower the fees paid to Plaintiffs' counsel. (Doc. 123 at pp. 19-22.[9]) Again, this contention is internally inconsistent.

---

[7] The revised agreement provides that the changes will remain in place until such time as the Settling Defendant (1) becomes aware of additional evidence substantiating the prohibited representations and (2) obtains Court approval to include them. (*Perrigo*, Doc. 141 Ex. 1 at ¶ 13.)

[8] While Plaintiffs' counsel is not at liberty to disclose the substance of on-going settlement discussions, it is likely that at least one and perhaps two other glucosamine manufacturers are going to agree to injunctive relief provisions similar or identical to those agreed to by *Perrigo*.

[9] This argument constitutes a breach of the Settlement Agreement. The Agreement provides that, "Schiff will not oppose application(s) for an Attorneys' Fee Award of up to an aggregate amount of $3,000,000…" (Doc. 107-1, Settlement Agreement, VI.A.). Suggesting, as Defendants now do, that the solution to any problems here is for the Court to not award Plaintiffs' counsel the full amount that Defendants agreed to pay is making a statement in opposition to such an award.

If a reduction in fees is the only modification required to eliminate objections and ensure final approval of the settlement, there would have been no reason to delay notice. Fees are determined in conjunction with final approval which occurs *after* notice has issued.

The fact is Defendants acknowledge it would be wasteful to provide notice more than once in this case. (Doc. 123 at p. 9, n.7.) Their actions also indicate that modifications should be made to the settlement. Accordingly, the most expeditious and efficient means of proceeding is to discuss these modifications now, agree on whether and how to address them, and then seek approval of an improved settlement.

If, however, the Court does not agree and denies the Motion to Withdraw, Plaintiffs and their counsel are fully aware that they are contractually bound to proceed forward with this settlement. Similarly, Defendants are contractually bound to promptly implement the court ordered notice program.

III. CONCLUSION

As the foregoing discussion and even Defendants' Opposition make clear, both Plaintiffs and Defendants acknowledge that changes need to be made to the settlement. Because they remain concerned about objections to the settlement, Plaintiffs request the Court grant Plaintiffs' *ex parte* motion to withdraw from the settlement. Alternatively, if the Court denies the Motion to Withdraw, Plaintiffs' request that the Court order Defendants to immediately implement the notice program so the settlement process may proceed.

Dated: March 2, 2015

BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.

By: /s/ Patricia N. Syverson
Patricia N. Syverson, Attorney for Plaintiffs LUIS LERMA and NICK PEARSON

BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.
Patricia N. Syverson (Bar No. 203111)
Elaine A. Ryan (*Admitted Pro Hac Vice*)
Lindsey Gomez-Gray (*Admitted Pro Hac Vice*)
2325 East Camelback Road, Suite 300
Phoenix, Arizona 85016
Telephone: (602) 274-1100
Facsimile: (602) 274-1199

BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.
Manfred P. Muecke (Bar No. 222893)
600 W. Broadway, Suite 900
San Diego, California 92130
Telephone: (619) 756-7748
Facsimile: (602) 274-1199

BOODELL & DOMANSKIS LLC
Stewart M. Weltman (*Admitted Pro Hac Vice*)
sweltman@boodlaw.com
353 N. Clark St. Suite 1800
Chicago, IL 60604
Telephone: (312) 938-1670

Attorneys for Plaintiffs
LUIS LERMA and NICK PEARSON

Dated: March 2, 2015

DENLEA & CARTON LLP

By: /s/ Jeffery I. Carton
Jeffrey I. Carton, Attorney for Plaintiff MURIEL JAYSON

DENLEA & CARTON LLP
Jeffrey I. Carton
Robert J. Berg
One North Broadway, Suite 509
White Plains, New York 10601
Telephone: (914) 920-7400
Facsimile: (914) 761-1900

CRIDEN & LOVE PA
Kevin Bruce Love
7301 SW 57th Court, Suite 515
South Miami, Florida 33134
Telephone: (305) 357-9000
Facsimile: (305) 357-9050

Attorneys for Plaintiff MURIEL JAYSON

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic mail notice list.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 2, 2015.

/s/*Patricia N. Syverson*
Patricia N. Syverson

EXHIBIT A

-----Original Message-----
From: MARK.MESTER@lw.com [mailto:MARK.MESTER@lw.com]
Sent: Wednesday, February 25, 2015 11:14 AM
To: Stewart Weltman
Subject: RE: Lerma v. Schiff

I have. If any other objectors contacted you about Lerma, however, we would obviously like to know.

_____
From: Stewart Weltman
Sent: Wednesday, February 25, 2015 8:16:24 AM
To: Mester, Mark (CH); Ms. Elaine Ryan; Lally, Kathleen (CH); Patricia N. Syverson
Subject: Fwd: Lerma v. Schiff

Mark - I just received this email. Have you spoken to her yet.

Sent from my iPhone

Begin forwarded message:

From: Laura Smith <lsmith@truthinadvertising.org<mailto:lsmith@truthinadvertising.org>>
Date: February 25, 2015 at 10:10:02 AM CST
To: Stewart Weltman <sweltman@weltmanlawfirm.com<mailto:sweltman@weltmanlawfirm.com>>
Subject: Lerma v. Schiff

Stewart,

This is to confirm that Truth in Advertising (TINA.org<http://TINA.org>) plans on filing an amicus brief opposing the terms of the current settlement agreement pending in the Lerma v. Schiff case. The timing of our filing depends on whether two other organizations that have expressed interest in this case decide to join our brief.

If you have any questions, please don't hesitate to contact me.

Sincerely,

Laura

Laura Smith
Legal Director
203-421-6210 | lsmith@truthinadvertising.org<mailto:lsmith@truthinadvertising.org>
truthinadvertising.org<http://truthinadvertising.org/> | @TruthinAd |
facebook.com/truthinad<http://facebook.com/truthinad>

[https://www.truthinadvertising.org/wp-content/uploads/2014/12/New-Email-Signature-Image-2.png]

EXHIBIT B

From: Laura Smith
<lsmith@truthinadvertising.org>
Date: January 21, 2015 at 2:48:43 PM EST
To: sweltman@weltmanlawfirm.com
Subject: Status of Lerma v. Schiff Nutrition

Mr. Weltman,

My name is Laura Smith and I'm the Legal Director at Truth in Advertising. I'm reaching out to you to learn the status of the Lerma v. Schiff Nutrition litigation in which you're involved. As I mentioned in my voicemail, we were getting ready to object to the terms of the proposed settlement agreement reached in that case but noticed that the parties moved for a stay as a result of the Pearson decision. Would you mind telling me the status of the case at this point in time? Will there be a new proposed settlement agreement or do you intend to proceed at the final fairness hearing on April 8?

Many thanks in advance.

Sincerely,

Laura

Laura Smith

Legal Director

203-421-6210 | lsmith@truthinadvertising.org

truthinadvertising.org | @TruthinAd
| facebook.com/truthinad