

1 Mediation. (ECF No. 116). The Court construed the stipulation as a
2 motion to stay and denied the motion on January 25, 2015, finding that
3 the *Pearson* case did not provide a basis to stay the settlement process in
4 the instant case. (ECF No. 117). On January 30, 2015, Plaintiffs filed a
5 “Response to Court’s January 25, 2015 Order . . . Regarding Motion to
6 Stay Settlement Approval Process. (ECF No. 118). The Court construed
7 the response as a Motion to Reconsider and denied it on February 2,
8 2015, finding that differences between the instant settlement agreement
9 and the agreement at issue in *Pearson*, as well as differences in circuit
10 law did not warrant a stay of proceedings. (ECF No. 119).

11 Plaintiffs also raised at that time their concern that there might be
12 objections in the instant case based upon a settlement reached in
13 another case in the Southern District of New York which included
14 synonyms in the injunctive relief to the terms that the defendants in
15 that case would not use on future containers and advertising. This
16 Court declined to provide an advisory ruling regarding objections which
17 had not yet been presented in this case but recognized that the parties
18 could choose to renegotiate on their own and present the results to the
19 Court as a proposed modification to the settlement agreement. (*Id.*).

20 On February 6, 2015, Plaintiffs filed the instant Motion to
21 Withdraw from Settlement. (ECF No. 120).

22 Discussion

23 Plaintiffs initially sought the Court’s approval to withdraw from
24 the Amended Settlement Agreement (“Agreement”) based upon the
25 perceived impact of *Pearson* upon the this Court’s ultimate
26 determination of fairness and on the likelihood of the *Pearson* ruling
27 inspiring objections. (ECF No. 120 at 2). Plaintiffs also stated:
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1 Plaintiffs and their counsel can no longer
2 recommend this settlement on behalf of the class
3 and will not move to seek final approval of this
settlement.

4 (*Id.*).

5 In their response, Defendants disagree that *Pearson* or the
6 possibility of objections authorize Plaintiffs to withdraw from the
7 Agreement. And, considering Plaintiffs assertion that they would not
8 support final approval nor move to seek final approval, Defendants
9 properly suggested that the Court must consider replacing counsel and
10 class representatives. (ECF No. 123 at 26-29 (using the ECF numbering,
11 not the original numbering)).

12 In their reply, Plaintiffs distance themselves from their earlier
13 reliance on *Pearson*, stating, “Disagreement over the impact of *Pearson*,
14 however, is now largely beside the point.” (ECF No. 124 at 2). Plaintiffs
15 also appear to distance themselves from their earlier decision not to
16 participate in or support the final approval process stating that in the
17 event the Court denies the instant Motion, “Plaintiffs and their counsel
18 are fully aware that they are contractually bound to proceed forward
19 with this settlement.” (*Id.* at 10).

20 Paragraph X of the Agreement provides for the circumstances
21 under which a party can withdraw from the Agreement. (ECF No. 107-
22 12 at 29). Interestingly, neither party has addressed this provision. A
23 review of the paragraph reveals that it does not provide a basis for
24 withdrawal by either party at this time and the Court so finds. Rather,
25 it appears that Plaintiffs are asking the Court to invoke its inherent
26 power, as a fiduciary for the class as a whole, to allow withdrawal in
27 their interest. The Court declines the invitation.

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1 In its two Orders denying motions to stay settlement proceedings,
2 the Court rejected the view that the *Pearson* decision required a stay of
3 the proceedings in this case to allow the parties to return to mediation
4 and consider changing their settlement agreement. (ECF Nos. 117 and
5 119). The Court found that differences between the instant Settlement
6 Agreement and the settlement agreement in *Pearson*, and differences in
7 circuit law, do not invalidate the terms of the Agreement in this case.
8 The Court finds no reason to change its ruling.

9 The Court also has previously stated that it would not rule in
10 advance of any objections; rather, the Court left it to the parties to
11 decide whether to negotiate changes and seek court approval to further
12 modify the Agreement. Specifically, the Court stated “[t]he parties
13 remain at liberty to consider modifying their settlement agreement and
14 jointly presenting any modifications to the Court.” (ECF No. 119 at 2).
15 The Court held that the possibility of objections did not justify a stay or
16 continuance in the instant case. (*Id.*). For the same reasons, the Court is
17 unpersuaded that Plaintiffs’ withdrawal from the Agreement is justified
18 or warranted.

19 The Court recognizes that Truth in Advertising, Inc., has moved
20 the Court for leave to file an *amicus* brief in this case regarding the
21 fairness of the injunctive relief provided for in the Agreement. (ECF No.
22 127). The Court has not yet ruled on the motion. In any event, the
23 Court finds that the proposed brief provides no basis for Plaintiffs to
24 withdraw from the Agreement.

25 Conclusion

26 Plaintiffs’ Motion for Leave to Withdraw from the Settlement
27 Agreement is DENIED. In their reply to Defendants’ opposition and
28 again at the hearing on this Motion, Plaintiffs’ counsel unequivocally

1 renounced their previous statement they will not support the Agreement
2 and will not bring the motion for final approval upon this Court's denial
3 of this Motion. The Court accepts their representation and will not act
4 to seek replacement counsel nor replacement plaintiffs at this time.

5 A new Scheduling Order regarding final approval also will be filed
6 concurrent with this Order.

7 **SO ORDERED:**

8 DATED: March 26, 2015

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11 Hon. Mitchell D. Dembin
12 U.S. Magistrate Judge
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