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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

VINCENT D. MULLINS, individually and on behalf of all others similarly situated,

Plaintiff,

v.

PREMIER NUTRITION CORPORATION f/k/a JOINT JUICE, INC.,

Defendant.

Case No.: C-13-01271 RS

JOINT STATUS REPORT

CLASS ACTION

JURY TRIAL DEMANDED

Judge: Honorable Richard Seeborg
Courtroom: Courtroom 3, 17th Floor
CMC Date: September 1, 2016
CMC Time: 10:00 am

Complaint Filed: March 21, 2013

Plaintiff Kathie Sonner ("Plaintiff") and Defendant Premier Nutrition Corporation ("Defendant"), through their respective counsel of record (collectively, "the Parties"), submit this Joint Status Report in advance of the Case Management Conference set for September 1, 2016, at 10:00 am.

I. Background

On April 15, 2016, the Court denied Defendant's motion for summary judgment, granted in part Plaintiff's motion for class certification, and requested additional briefing on the geographic scope of the Class. *See* ECF Nos. 133-134. The parties submitted additional briefing, and on June 20, 2016, the Court issued an order limiting the Class to California consumers who purchased Joint Juice from Mach 1, 2009 to the present. *See* ECF No. 137.

II. Renewed Settlement Discussions/Class Notice

In light of the Court's rulings on summary judgment and class certification, the parties have resumed settlement discussions. If the parties are able to reach a class settlement, they will submit that settlement, including a proposed notice plan, for the Court's preliminary approval. If they are not able to reach a settlement, Plaintiff will submit a motion, unopposed or otherwise, for an order approving the notice plan and forms. The plan will include a standard 60-day period during which Class members may opt out of the Class. Accordingly, taking into account the time needed for the independent notice administrator to finalize the notice forms, case website, telephone hotline, publish the notice, and receive opt-outs, the notice process can be completed within approximately 90 days of an order approving notice.

III. Discovery

Plaintiff's Position: Defendant should supplement its previous discovery responses, including its document production. Rule 26(e)(1) states parties "must" supplement discovery responses:

> (1) A party who has made a disclosure under Rule 26(a) – or who has responded to an interrogatory, request for production, or request for admission – must supplement or correct its disclosure or response:
>
> (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or

> corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
>
> (B) as ordered by the court.

Fed. R. Civ. P. 26(e)(1)(A)-(B).

Here, supplemental discovery is necessary for two primary reasons. First, Defendant continues to sell Joint Juice with the advertisements at issue, so discovery responses should be updated. Second, pursuant to an agreed protocol for the production and review of Defendant's ESI (e.g., what employee custodians to search for ESI and what keywords to use for filtering down their ESI), Defendant produced its responsive ESI through March 2014. Given Defendant's continued sale of Joint Juice and the temporal scope of the certified Class, Defendant's ESI production is an "incomplete" response to Plaintiff's requests for production and "additional" information must be provided.

For example, using the ESI keywords, Defendant previously produced communications regarding scientific studies concerning glucosamine through March 2014 (the date through which Defendant's counsel collected potentially responsive ESI). A supplemental production should be made using the same ESI keywords for the period March 2014 through the present to capture subsequent, responsive communications. If Defendant believes it is overly burdensome to supplement its production, it may save on pre-production review costs by producing the ESI pursuant to a Rule 502 "quick peek" or "clawback" agreement. *See* Fed. R. Evid. 502 (Advisory Comm. Explanatory Note, Rev. 11/28/2007) (Rule 502 "contemplates enforcement of claw back and quick peek arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product") (citing *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003). Defendant can further minimize costs by providing ESI in its native format.

There are also supplemental, responsive documents that should be provided without using ESI keywords. These are likely a literal handful of documents. For example, Defendant should product Joint Juice marketing exemplars (labels, TV ads, radio ads etc.) and market

research reports (*e.g.*, focus group study reports) that were not previously collected or produced.

Defendant has agreed to provide supplemental responses to the interrogatories which seek discrete sales and expense data relating to Joint Juice.

Based on this supplemental discovery, Plaintiff will likely need no more than three or four depositions focused on this supplemental information, including to authenticate such information and fully prepare for the merits' experts stage of the litigation.

Defendant's Position: Defendant will provide updated California sales figures for Joint Juice.

Beyond that, Defendant is under no obligation to provide supplemental discovery of any kind, because none of Defendant's discovery responses are incomplete or incorrect in any material respect. Rule 26 requires supplementation only "if the party learns that **in some material respect** the disclosure or response is incomplete or incorrect." *Id*. at (e)(1)(A)-(B) (emphasis added); *see also In re High Fructose Corn Syrup Antitrust Litig.*, No. 95-1477, 2000 WL 33180835, at *3 (C.D. Ill. July 19, 2000) (holding that parties are "under no obligation . . . to provide information not yet in existence as of the date they answered the discovery request" except upon "discovering that a response to the . . . discovery request was materially incomplete or incorrect").

Plaintiff ignores the plain language and obvious import of Rule 26, however, arguing that because Defendant produced advertisements, communications regarding scientific studies, and market research reports during fact discovery, it must do so again now, or else its production is "incomplete." But "Rule 26(e) does not place a continuing burden on a party responding to a discovery request to supplement with new information," unless that new information renders prior productions or responses **materially** incomplete or incorrect. *Rhein v. Smyth Auto., Inc.*, No. 1:10-CV-710, 2012 WL 3150953, at *3 (S.D. Ohio Aug. 2, 2012) (citation omitted); *see also Thompson v. Ret. Plan for Employees of S.C. Johnson & Sons, Inc.*, No. 07-CV-1047, 2010 WL 2735694, at *1 (E.D. Wis. July 12, 2010) ("Rule 26(e) does not require continual review of all information in a party's possession and constant

supplementation of discovery up until the moment the court enters a final judgment in the action.").

Since Defendant last responded to Plaintiff's discovery requests, there have been no material changes in Defendant's advertising for Joint Juice, nor has Defendant conducted any consumer research relating to Joint Juice. And to the extent there are new scientific or technical studies relevant to the issues to be tried, the parties' experts can address them without the need for supplemental fact discovery.

Simply put, there is no need for any supplemental ESI searches, or for any depositions (much less the "three or four" that Plaintiff proposes). As the submissions on summary judgment and class certification show, the material facts and evidence in this case have been thoroughly aired, and the parties have all the fact discovery they need to take this case to trial. And contrary to Plaintiff's suggestion, neither Rule 26 nor any other Federal Rule of Civil Procedure impose a free-floating duty to provide "updated" disclosures or discovery responses after the close of fact discovery. *See Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, No. C06-3359 JF (RS), 2008 WL 4786671, at *2 (N.D. Cal. Oct. 29, 2008) ("despite [movant's] reference to Rule 26(e)(1), nothing in that rule imposes a never ending obligation to produce documents continuously as they are created"); *MSC.Software Corp. v. Altair Eng'g, Inc.*, No. 07-12807, 2012 WL 1340445, at *3 (E.D. Mich. Apr. 18, 2012) (finding supplementation was unwarranted because the party's "prior responses to discovery requests were not incorrect or incomplete" and noting that re-opening discovery after the summary judgment phase "would significantly and needlessly delay the trial date").

Plaintiff's proposed "supplemental discovery" is nothing more than a transparent attempt to reopen fact discovery under the guise of supplementation, and the Court should not permit it.

IV. Joint Proposed Schedule

As explained above, the parties have resumed settlement discussions. Building additional time into the schedule will facilitate such discussions and provide greater opportunity for the parties to resolve this case before trial.

- Class Notice Completion: Approximately January 2, 2017. The notice program will begin about two weeks from the date it is approved and the opt-out period should expire 60 days thereafter.
- Supplemental Fact Discovery Cutoff:
  - Plaintiff's Proposal: January 16, 2017. Supplemental documents and written responses should be produced by November 16, 2016. Supplemental fact depositions should be completed by January 16, 2017.
  - Defendant's Proposal: As discussed above, supplemental fact discovery is not appropriate.
- Initial Expert Witness Exchange: February 22, 2017.
- Rebuttal Expert Witness Exchange: April 19, 2017.
- Expert Discovery Cutoff (including expert depositions): June 29, 2017.
- Final Pretrial Conference: August 17, 2017, at 10:00 a.m.
- Trial Date: TBD.
- Trial Length: 7 days.

Respectfully submitted,

Dated: August 25, 2016

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ECF CERTIFICATION

The filing attorney attests that he has obtained concurrence regarding the filing of this document from the signatories to this document.

Dated: August 25, 2016

BLOOD HURST & O'REARDON, LLP

By: */s/ Timothy G. Blood*
TIMOTHY G. BLOOD

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2016, 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, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated 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 August 25, 2016.

/s/ Timothy G. Blood
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