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☐ FPD ☐ Appointed ☐ CJA ☐ Pro Per ☒ Retained

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Ketrina Gordon, PLAINTIFF(S), v. Tootsie Rolls Industries, Inc., et al. DEFENDANT(S).	CASE NUMBER: 2:17-cv-02664-DSF-MRW **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that Ketrina Gordon hereby appeals to
Name of Appellant
the United States Court of Appeals for the Ninth Circuit from:

Criminal Matter

☐ Conviction only [F.R.Cr.P. 32(j)(1)(A)]
☐ Conviction and Sentence
☐ Sentence Only (18 U.S.C. 3742)
☐ Pursuant to F.R.Cr.P. 32(j)(2)
☐ Interlocutory Appeals
☐ Sentence imposed:

☐ Bail status:

Civil Matter

☒ Order (specify):
ECF Nos. 146, 149

☒ Judgment (specify):
ECF No. 150

☐ Other (specify):

Imposed or Filed on 9/6/2018; 9/25/2018. Entered on the docket in this action on 9/6/2018; 9/25/2018.

A copy of said judgment or order is attached hereto.

10/8/2018
Date

/s/ Ryan J. Clarkson
Signature
☐ Appellant/ProSe ☒ Counsel for Appellant ☐ Deputy Clerk

Note: The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, if not electronically filed in a criminal case, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

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Attorneys for Plaintiff and Appellant Ketrina Gordon

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

KETRINA GORDON, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

TOOTSIE ROLL INDUSTRIES, INC., and DOES 1 through 10, inclusive,

Defendants.

Case No. 2:17-cv-02664-DSF-MRW

NINTH CIRCUIT RULE 3-2 REPRESENTATION STATEMENT

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NINTH CIRCUIT RULE 3-2 REPRESENTATION STATEMENT

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REPRESENTATION STATEMENT

Pursuant to Rule 12(b) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 3-2, all parties to the action are listed below along with the names, addresses, and telephone numbers of their respective counsel.

PARTIES	COUNSEL OF RECORD
Plaintiff-Appellant Ketrina Gordon, individually and on behalf of all others similarly situated	CLARKSON LAW FIRM, P.C. Ryan J. Clarkson, (SBN 257074) rclarkson@clarksonlawfirm.com Shireen M. Clarkson, (SBN 237882) sclarkson@clarksonlawfirm.com Bahar Sodaify, (SBN 289730) bsodaify@clarksonlawfirm.com 9255 Sunset Blvd., Suite 804 Los Angeles, CA 90069 Tel: (213) 788-4050 Fax: (213) 788-4070
Defendants-Appellees Tootsie Roll Industries, Inc., and Does 1 through 10, inclusive	COVINGTON & BURLING LLP David M. Jolley (SBN 191164) djolley@cov.com One Front Street San Francisco, CA 94111-5356 Telephone: (415) 591-6000 Facsimile: (415) 591-6091 COVINGTON & BURLING LLP Ashley Simonsen (SBN 275203) asimonsen@cov.com 1999 Avenue of the Stars Los Angeles, CA 90067 Telephone: (424) 332-4800 Facsimile: (424) 332-4749

Dated: October 8, 2018

CLARKSON LAW FIRM, P.C.

/s/ Ryan J. Clarkson

Ryan J. Clarkson, Esq.
Shireen M. Clarkson, Esq.
Bahar Sodaify, Esq.
Attorneys for Plaintiff and Appellant Ketrina Gordon

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KETRINA GORDON, Plaintiff, v. TOOTSIE ROLL INDUSTRIES, INC., Defendant.	CV 17-2664 DSF (MRWx) Order DENYING Motion for Catalyst Fees and Expenses; Order DENYING Motion for Sanctions (Dkt. Nos. 104, 125)

Plaintiff Ketrina Gordon brought this case on her behalf and on behalf of a similarly situated class for changes in the way Defendant Tootsie Roll Industries packaged its Junior Mints and Sugar Babies candies.[1] After the moving and opposition papers for a motion for class certification were filed, Plaintiff dropped her motion for class certification and declared that the case was moot due to packaging changes made by Defendant. Plaintiff now moves for an award of fees and expenses, arguing that this case was the catalyst for the changes. For its part, Defendant brings a motion for sanctions, arguing that Plaintiff unduly added to the costs of the case by forcing partial briefing of the class certification issue where the facts that allegedly make the case moot were known to the Plaintiff prior to the filing of the class certification motion.

[1] See Fed. R. Civ. P. 78; Local Rule 7-15. The hearing set for September 10, 2018 is removed from the Court's calendar.

> California law continues to recognize the catalyst theory and does not require "a judicially recognized change in the legal relationship between the parties" as a prerequisite for obtaining attorney fees under Code of Civil Procedure section 1021.5. In order to obtain attorney fees without such a judicially recognized change in the legal relationship between the parties, a plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense, . . .; and, (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit.

Tipton-Whittingham v. City of Los Angeles, 34 Cal. 4th 604, 608 (2004).

Plaintiff's motion for fees and expenses fails for several reasons. First, Plaintiff has not established that this lawsuit was the catalyst for any changes made by Defendant. At best, Plaintiff has presented very limited evidence that the numerous "slack fill" lawsuits filed against food manufacturers may have been a partial motivation for the changes. This is not the same as establishing that the merits of *this suit* motivated Defendant to make the changes prior to being ordered to make them by the Court. In any event, there is no evidence that Defendant thought that even the general category of "slack fill" lawsuits had any meaningful merit, as opposed to being costly and annoying.

Second, the kind of labeling changes made by Defendant were clearly not the primary relief sought. In pre-litigation demand letters, Plaintiff sought money and either a modification of the boxes or an increase in the amount of candy in the boxes. See Dkt. No. 106-8 at 5; Dkt. No. 106-7 at 4-5. Labeling does not appear to

have been more than a side thought. Relatedly, while settlement offers were made prior to litigation, it is apparent from Plaintiff's subsequent conduct that the kind of labeling changes eventually made by Defendant would not have warded off Plaintiff's lawsuit. The operative complaint directly emphasizes the importance of the correspondence of the physical size of the box to the number of candies and discounts labeling as a means of overcoming confusion in this area. See Second Am. Compl. ¶¶ 39, 47-48; 139-40; 142; 170; 175; 180; 182; 190; 192. Plaintiff's counsel apparently continued in this vein by disregarding net weight and servings disclosures as "irrelevant" during later settlement discussions.[2] In this context, the Court has no reason to credit Plaintiff's assertion that the changes to the boxes eventually made by Defendant – changes that involve no reduction of box size or increase in candy – would have satisfied Plaintiff's primary demands at an earlier juncture in the litigation.

However, sanctions against Plaintiff are also not appropriate. Defendant seeks sanctions under both the Court's inherent powers and 28 U.S.C. § 1927. "Before awarding sanctions under its inherent powers, however, the court must make an explicit finding that counsel's conduct 'constituted or was tantamount to bad faith.'" Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997). Similarly, "[s]anctions pursuant to section 1927 must be supported by a finding of subjective bad faith." Blixseth v. Yellowstone Mountain Club, LLC, 796 F.3d 1004, 1007 (9th Cir. 2015). "Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious

[2] "Apparently" because Defendant provides a declaration of its counsel quoting from an e-mail but does not, for some reason, provide a copy of the e-mail itself. However, Plaintiff does not dispute Defendant's recitation of the e-mail's contents.

claim for the purpose of harassing an opponent." Id. (internal citations and quotation marks omitted).

Even viewing the evidence favorably to Defendant, Plaintiff does not appear to have acted in bad faith. Assuming that Plaintiff knew before filing her class certification motion that the changes at issue were going to be implemented shortly, nothing required Plaintiff to capitulate immediately. There is no evidence that the class certification motion was filed with no intention to litigate it fully. In fact, Defendant argues, in part, that Plaintiff abandoned her class certification motion because Defendant's opposition was so strong. See Def. Reply at 5-6. And, as discussed above, the label changes implemented by Defendant were not the primary relief sought by Plaintiff, so there was no immediate reason to stop litigating even if Plaintiff knew for certain that the changes would be made imminently. Even viewed favorably to Defendant, the evidence suggests that Plaintiff intended, in good faith, to keep litigating until she decided that it would be a better strategy to cut her losses and attempt to claim victory and the fees that go with it.

The evidence is also susceptible to an interpretation more favorable to Plaintiff. Defendant's witnesses did not so unequivocally assert that the labeling changes would be made immediately that Plaintiff would have been required, under threat of sanctions, to end the litigation. As Plaintiff notes, she was subject to the class certification motion filing deadline and had to choose at that point to continue with the class action or to abandon it. It was not unreasonable at that point for Plaintiff to continue on a class basis, even if she eventually decided that the class action should not proceed.

The motion for catalyst fees and expenses is DENIED. The motion for sanctions is also DENIED.

IT IS SO ORDERED.

Date: 9/6/18

Dale S. Fischer
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KETRINA GORDON, Plaintiff, v. TOOTSIE ROLL INDUSTRIES, INC., Defendant.	CV 17-2664 DSF (MRWx) Order Dismissing Action for Lack of Prosecution

Plaintiff Ketrina Gordon brought this case on her behalf and on behalf of a similarly situated class for changes in the way Defendant Tootsie Roll Industries packaged its Junior Mints and Sugar Babies candies. After the moving and opposition papers for a motion for class certification were filed, Plaintiff dropped her motion for class certification and declared that the case was moot due to packaging changes made by Defendant. Plaintiff then moved for an award of fees and expenses, arguing that this case was the catalyst for the changes. Defendant brought a motion for sanctions, arguing that Plaintiff unduly added to the costs of the case by forcing partial briefing of the class certification issue where the facts that allegedly make the case moot were known to the Plaintiff prior to the filing of the class certification motion. The Court denied both motions.

On September 13, Defendant complied with the Court's August 22, 2018 Order for the purpose of "complet[ing] the public record

in this action." (Dkt. # 147.) No other activity has occurred in this case: none of the required pretrial documents were provided and neither counsel appeared at the pretrial conference. This action is dismissed for failure to comply with this Court's orders and failure to prosecute.

IT IS SO ORDERED.

Date: September 25, 2018

Dale S. Fischer
United States District Judge

JS 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KETRINA GORDON, Plaintiff, v. TOOTSIE ROLL INDUSTRIES, INC., Defendant.	CV 17-2664 DSF (MRWx) Judgment

Plaintiff having failed to prosecute this action and to comply with this Court's orders,

IT IS ORDERED AND ADJUDGED that plaintiff take nothing, that the action be dismissed and that defendant recover its costs of suit pursuant to a bill of costs filed in accordance with 28 U.S.C. § 1920.

Date: September 25, 2018

Dale S. Fischer
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

KETRINA GORDON, individually and on behalf of all others similarly situated, Plaintiffs, vs. TOOTSIE ROLL INDUSTRIES, INC., and DOES 1 through 10, inclusive, Defendants.	Case No. 2:17-cv-02664-DSF-MRW **PROOF OF SERVICE**

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PROOF OF SERVICE

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

I am employed in the County of LOS ANGELES, State of CALIFORNIA. I am over the age of 18 and not a party to within action; my business address is **9255 Sunset Blvd., Suite 804, Los Angeles, CA 90069.**

On October 8, 2018, I served the foregoing document described as

- **NOTICE OF APPEAL**
- **NINTH CIRCUIT RULE 3-2 REPRESENTATION STATEMENT**
- **EXHIBIT – ORDER DENYING MOTION FOR CATALYST FEES AND EXPENSES (DKT. 146)**
- **EXHIBIT – ORDER DISMISSING ACTION FOR LACK OF PROSECUTION (DKT. 149)**
- **EXHIBIT – JUDGMENT (DKT. 150)**

on interested parties in this action by sending a true copy of the document to the following parties as follows:

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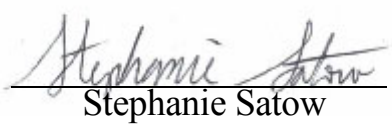
X (BY ELECTRONIC SERVICE) I caused the document(s) to be sent to the offices of the addressees via CM/ECF Service.

Executed on October 8, 2018, at Los Angeles, California.

X (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Stephanie Satow