

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CLARKSON LAW FIRM, P.C.
Ryan J. Clarkson (SBN 257074)
rclarkson@clarksonlawfirm.com
Shireen M. Clarkson (SBN 237882)
sclarkson@clarksonlawfirm.com
Katherine A. Bruce (SBN 288694)
kbruce@clarksonlawfirm.com
Lauren E. Anderson (SBN 329173)
landerson@clarksonlawfirm.com
9255 Sunset Blvd., Suite 804
Los Angeles, CA 90069
Tel: (213) 788-4050
Fax: (213) 788-4070

Attorneys for Plaintiffs

MOON LAW APC
Christopher D. Moon (SBN 246622)
chris@moonlawapc.com
Kevin O. Moon (SBN 246792)
kevin@moonlawapc.com
600 West Broadway, Suite 700
San Diego, California 92101
Tel: (619) 915-9432
Fax: (650) 618-0478

Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

MIKE XAVIER and STEVEN PRESCOTT,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

BAYER HEALTHCARE LLC, a Delaware
limited liability company; BEIERSDORF,
INC., a Delaware corporation,

Defendants.

Case No. 5:20-CV-00102-NC
Case Filed: 1/3/2020
FAC Filed: 5/15/2020

*Assigned for all purposes to the Hon. Nathanael
M. Cousins*

**DECLARATION OF MARK SCHEY RE:
NOTICE AND CLAIMS ADMINISTRATION
PROGRAM**

DECLARATION OF MARK SCHEY

I, MARK SCHEY, hereby declare under penalty of perjury as follows:

1. I am a founding partner of Digital Settlement Group, LLC (“DSG”), a company that provides class action notice and claims administration. The following statements are based on my personal knowledge and information provided by other DSG principals and employees working under my supervision, and if called upon to do so, I could and would testify competently about these issues.

2. DSG was retained to provide notice and claims administration services for the proposed settlement in this action.

3. Digital Settlement Group has served as a court-approved notice provider in numerous state and federal court class actions and has worked in the class action category for over a decade. DSG has provided expertise in Internet notice to some of the largest class action administration companies in the industry.

4. A sample of class action settlements where DSG has provided class notice and administration services is listed below:

- a. *Eggnatz et al v. The Kellogg Company et al*, Case No. 1:12-cv-21678 (S.D. Fla. 2015) (Nationwide class of purchasers of Kashi brand cereal products)
- b. *Garcia v. Iovate Health Sciences USA Inc.* (Santa Barbara County Superior Court 2016) (National indirect purchaser class of a consumer product at retail)
- c. *Amy Rehak, et al. v. Telebrands Corporation & Walgreen Co.*, Case No. 1522-CC10756 (Circuit Court of the City of St. Louis, State of Missouri 2017)
- d. *Jan Harrison, et al. v. E. I. Du Pont De Nemours and Company, et al.*, Case No. 5:13-cv-01180-BLF (N.D. Cal. 2017)
- e. *Iglesias vs. Ferrara Candy Co.*, Case No. 3:17-cv-00849-VC (N.D. Cal. 2018) (Nationwide class of purchasers of candy products)
- f. *Liptai v. Spectrum Brands Holdings, Inc., et al.*, Case No. 2018CV000321 (Wis. Cir. Ct. 2018) (Nationwide class of purchasers of coffee maker and household products)

1 g. *Hart v. BHH LLC, et al*, Case No. 1:15-cv-04804-WHP (S.D.N.Y. 2020)
2 (Nationwide class of purchasers of “pest repeller” products)

3 h. *Mateski, et al. v. Just Born, Inc.*, Case No. CIVDS1926742 (Cal. Super Ct.
4 2020) (Nationwide class of purchasers of candy products)

5 5. In approving *In Re: Wellnx Marketing & Sales Practices* (a national, 18 state
6 multidistrict class action litigation with a substantial indirect purchaser class), the Court noted: “the
7 effort to provide notice to the class went well beyond what due process would require at its
8 minimum. In fact, it was both an intelligent and effusive, if I can use that word, notification process,
9 which has given me new some ideas for similar cases in the future for the proper way of giving
10 notice in a case like this where it is hard to otherwise ascertain the identity of the class members.”

11 6. Additionally, Digital Settlement Group has over twenty years of marketing experience
12 with a specialty in television and Internet advertising, including managing the official online sites
13 for 20th Century Fox on behalf of News Corporation from 1993 to 1996. Our founders have served
14 as marketing consultants to a variety of consumer product companies, where responsibilities
15 included creative directing national marketing campaigns and producing and directing national
16 television commercials (which have been featured in trade magazines, like *Advertising Age*, and
17 generated hundreds of millions of dollars in retail revenue). Digital Settlement Group personally
18 managed tens of millions of dollars in Internet advertising for consumer products. Due to the
19 extensive Internet marketing experience, our area of specialty is providing class notice in cases
20 where the identities of individual Class Members is not known, including classes comprised of
21 purchasers of consumer products. *See Arreguin v. Telebrands*, No. CIVRS1307798 (San Bernardino
22 County Superior Court) (Indirect purchaser class of nationwide Pocket Hose consumer product.);
23 and *Eggnatz et al v. The Kellogg Company et al*, No. 1:12-cv-21678 (S.D. Fla.). (Indirect purchaser
24 class of nationwide Kashi products with no direct mail component.)

25 7. This declaration will describe the notice program that my colleagues and I suggest
26 using in this matter, including the considerations that informed the development of the plan and why
27 it will provide Due Process of Law to the Class Members. This case’s Notice Plan will largely mirror
28 but improve upon *Iglesias v. Ferrara Candy Company*, No. 3:17-cv-00849-VC (N.D. Cal.)

1 (National purchaser class products sold mainly at retail similar to this case) based on information
2 learned through the Notice and Claims Administration process of that case.

3 **SUMMARY OF NOTICE PROGRAM**

4 8. This Litigation involves Products sold predominantly online and at retail locations, so
5 the identity of purchasing Class Members is not readily known. In such cases, Internet notice
6 typically is the best way to inform Class Members about the Settlement. Digital Settlement Group
7 relies heavily on recommendations from the Federal Judicial Centers Judges' Class Action Notice
8 and Claims Process Checklist and Plain Language Guide ("Claims Guide") in designing its notice
9 plans.

10 9. DSG developed a comprehensive notice program consisting of efficient media
11 vehicles with the objective of reaching a substantial portion of Class Members. A detailed breakout
12 of what is included in the administration and notice plan is outlined in the Service Agreement. DSG
13 believes this provides the best practicable methods to reach potential class members and has seen
14 successful results in similar plans with similar class members.

15 10. Before any of the notices begin, DSG will review all materials and work with Counsel
16 to help comply with Claims Guide recommendations and timelines. All the advertisements will
17 direct potential Class Members to the Settlement Website, where they will be able to download
18 important documents, review frequently asked questions, and file a claim either online and/or postal
19 as stated in the agreement. Administration will notify claimants of any missing or invalid claim
20 information after the Approval Hearing. An email address and a toll-free phone number, with an
21 Interactive Voice Response ("IVR") system, will also be available to answer potential questions.

22 11. One of the concerns noted in the Claims Guide is that claims administrators are "often
23 accountants by training and may lack personal knowledge or the training to conduct reach analyses."
24 Digital Settlement Group, however, has extensive expertise in marketing and media-planning that
25 is essential to conducting reach analysis that has been approved by Courts in similar cases with a
26 large indirect purchaser class.

27 12. The notice plan is supported by "unbiased evidence supporting the plans adequacy"
28 as recommended by the Claims Guide. DSG previously developed the notice plan for *Iglesias v.*

1 *Ferrara Candy Co.*, which was a substantially similar action. In developing the plan, DSG used
 2 industry-standard reporting tool comScore, the leading cross-platform measurement company that
 3 provides independent data, metrics, products and services to clients in the media, advertising and
 4 marketing industries. They provide digital media analytics that help advertisers understand the
 5 composition, reach, and frequency of consumer media audiences. The accuracy of reporting
 6 from comScore has been approved by Courts in previous notice plans DSG has developed. This
 7 notice plan will take advantage of comScore data and the experiences from the previous notice plan.

8 13. Our notice programs create the best practicable plan because they are designed in the
 9 same way a company would design an advertising campaign to sell that very same product.
 10 Specifically, we used industry standard advertising tools to identify media properties where
 11 purchasers of “sunscreen” were most likely to be located. In addition, the methods used have been
 12 approved in multiple cases with a substantial indirect purchaser class.

13 **CLASS DEFINITION**

14 14. The “Settlement Class” includes: all persons or entities, except Excluded Persons¹,
 15 who purchased one or more Coppertone sunscreen products with “mineral-based” on the label, in
 16 various sizes and forms, including Water Babies Pure & Simple, Kids Tear Free, and Sports Face,
 17 on or before the Notice Date², in the United States, for reasons other than resale.

18 **SETTLEMENT WEBSITE**

19 15. Digital Settlement Group will create and maintain a dedicated web site for the Class
 20 Members to learn about the Settlement. It will feature the ability to download all relevant documents
 21

22 ¹ “Excluded Persons” as used in this definition of the Settlement Class includes: (i) Defendants,
 23 their assigns, successors, and legal representatives; (ii) any entities in which Defendants have
 24 controlling interests; (iii) federal, state, and/or local governments, including, but not limited to, their
 25 departments, agencies, divisions, bureaus, boards, sections, groups, counsels, and/or subdivisions;
 26 (iv) all persons presently in bankruptcy proceedings or who obtained a bankruptcy discharge in the
 27 last three years; (v) any judicial officer presiding over this matter, including the Honorable
 28 Nathanael M. Cousins and Virginia K. DeMarchi, and person within the third degree of
 consanguinity to such judicial officer; and (vi) any persons who timely exclude themselves from the
 Settlement Class. *See* Exhibit 1 [Settlement Agreement] at ¶¶ 2.13 (Excluded Persons), 2.39
 (Settlement Class).

² The “Notice Date” is the Court-ordered date on which Online Notice is initiated. *See* Exhibit 1
 [Settlement Agreement] at ¶¶ 2.23 (Notice Date), 2.26 (Online Notice).

1 (in industry standard PDF format), including Claim Forms, Important Dates, Frequently Asked
2 Questions, Long Form Notice, and the Short Form notice. The site will be designed for broad
3 compatibility with browsers and platforms using best practices.

4 16. All traffic to the site will be monitored with proprietary fraud detection systems,
5 similar to those used on e-commerce platforms, to help ensure legitimate Class Members receive
6 the maximum benefit. A 3rd party monitoring service will check the site at regular intervals to
7 ensure the site is functioning properly and, if required, provide an independent report on the total
8 up-time of the site. The Settlement Web Site will be updated in a timely manner, based upon the
9 Court-approved schedule. For example, when the deadline for filing a claim has passed, that option
10 will be removed from the site.

11 **PRESS RELEASE**

12 17. DSG will release a press release, with language to be agreed upon by Counsel, through
13 PR Newswire. PR Newswire is the industry's largest content distribution network reaching more
14 than 4,000 US websites, nearly 3,000 media outlets, and more than 550 news content systems. The
15 network also includes PR Newswire for Journalists, an exclusive, media-only community with over
16 20,000 daily unique visitors.

17 **INTERNET ADVERTISEMENTS**

18 18. The Internet is an extremely powerful tool for reaching potential class members and
19 driving them to the settlement website. According to Pew Research (2019), 90% of all adults in the
20 United States use the Internet, up from 79% in 2010. Over a decade of Internet marketing experience
21 has been leveraged to design the most effective plan.

22 19. DSG will target Class Members with impressions on the ComScore Ranked Tier 1
23 websites over the course of 30 days, as defined in the agreement. An impression is defined as when
24 the internet ad is shown or loaded on a Website. The sites selected for the Internet notice reach at
25 least 70% or higher of the Internet population and are the most popular on the United States Internet,
26 based upon comScore data. This notice plan will deliver impressions using interest, and/or
27 behavioral targeting. Whenever possible and cost effective, behavioral and "transactional
28 targeting", networks, or 3rd party data sources will be used to deliver advertisements to users who

1 have purchased the product or shown interest in a specific product or category. Digital Settlement
2 Group will also use targeted native ads to help provide information to those individuals that may
3 not fall into the other targeted segments. Unlike traditional media (like print publications), this
4 allows a notice plan to target potential class members more accurately with significantly fewer
5 “wasted” impressions.

6 20. In addition, targeted “search terms” advertisements on popular search engines and
7 networks will be incorporated into the plan. Per the Claims Guide, this is to help satisfy “extra
8 effort” where the class is “highly concentrated.” Whenever possible and cost effective, settlement
9 notice advertisements will be targeted based on past user behavior. In addition, contextual, in-
10 market, topic and affinity targeting are used to ensure the most relevant audience is reached. This
11 type of advertising targets the right potential class members at the right time.

12 21. The Internet notice program will consist of over 66 million targeted Internet
13 impressions on Tier 1 properties (e.g., Verizon, Google, Facebook), using third-party tools to verify
14 reach and frequency. Behaviors, interests, and topics will be used to target the notice in the most
15 efficient manner. For example, targeting will include adults in the United States who are known to
16 have purchased “sunscreen”.

17 22. The notice advertisements are designed to “command class members attention” and
18 “are written in a clear, concise and easily understood language.” Clicking on the links will direct
19 the Class Member to the Settlement Website where they will have quick access to a printable and
20 online Claim Form. Examples of the Internet advertisements can be seen in Exhibit B3. Digital
21 Settlement Group will report detailed statistics weekly to Counsel and adjust the notice plan on an
22 as needed basis.

23 **CONCLUSION**

24 23. The notice plan has been designed to reach the largest target audience in a cost-
25 efficient and timely manner. Furthermore, the notice plan provides the best notice practicable, with
26 similar reach to other Court-approved notice plans in the same product category. It has been
27 designed to reach at least 70% of the class, allowing for duplication across medium and utilizing 3rd
28 party-reporting tools that have been accepted in similar cases.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

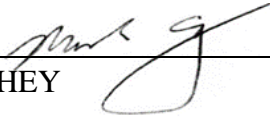
24. Based on Digital Settlement Group’s class action notice planning experience, described above in Paragraphs above the methods utilized in this Notice Program will be consistent with other effective class action settlement notice plans that our team has developed. And it is my professional opinion that the Class Action Notice Plan will provide the best notice practicable and meets the desire to actually inform. Furthermore, it provides the same reach and frequency evidence that Courts have approved in previous settlements.

25. It is my opinion that the Notice Program provides Class Members Due Process of Law and is the best notice that is practicable under the circumstances and is fully in accordance with California class action procedures.

26. DSG’s cost to manage and effect Class Notice, Claims Administration and distribution is \$530,000, plus any unanticipated postage and check based distribution cost overage. Unanticipated overages will be correlated to the number of overall claims filed.

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

Executed this 15th day of March, 2021.



MARK SCHEY