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**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*

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

REDACTED COPY PUBLICLY FILED

1 **SUPPLEMENTAL DECLARATION OF MARK SCHEY**

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

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

8 2. **DSG Background/Experience.** Under my leadership, DSG has served as a court-
9 approved notice provider in over two dozen state and federal court class actions. DSG has provided
10 expertise in Internet notice to some of the largest class action administration companies in the
11 industry. Additionally, DSG has over twenty years of marketing experience with a specialty in
12 television and Internet advertising, including managing the official online sites for 20th Century Fox
13 on behalf of News Corporation from 1993 to 1996. DSG has served as a marketing consultant to a
14 variety of consumer product companies, where responsibilities included creative directing for
15 national marketing campaigns and producing and directing national television commercials (which
16 have been featured in trade magazines, like *Advertising Age*, and generated hundreds of millions of
17 dollars in retail revenue). DSG has personally managed tens of millions of dollars in Internet
18 advertising for consumer products. Due to the extensive Internet marketing experience, our area of
19 specialty is providing class notice in cases where the identities of individual class members are not
20 known, including classes comprised of purchasers of consumer products. *See, e.g., Arreguin v.*
21 *Telebrands*, No. CIVRS1307798 (San Bernardino County Superior Court) (Indirect purchaser class
22 of nationwide Pocket Hose consumer product.); *Eggnatz et al v. The Kellogg Company et al*, No.
23 1:12-cv-21678 (S.D. Fla.) (Indirect purchaser class of nationwide Kashi products with no direct
24 mail component.). The opinions expressed in this supplemental declaration are based on the
25 background and experience outlined here and in the Declaration of Mark Schey re: Notice and
26 Claims Administration Program, dated March 15, 2021 (“**Schey Decl.**” or “**Schey Declaration**”).
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28

1 3. **Synopsis of Notice Plan.** DSG has designed a notice plan, which is more thoroughly
 2 described in the Class Action Notice Plan (“**Notice Plan**”)¹ and Schey Declaration, filed
 3 concurrently herewith. In short, the Notice Plan entails a targeted online digital advertising
 4 campaign that is guaranteed to generate a minimum of sixty-six million impressions (i.e.,
 5 66,000,000 views) and drives traffic to a dedicated settlement website containing all relevant
 6 materials (e.g., Short Form Notice, Long Form Notice, Amended Settlement Agreement, Claim
 7 Form, Class Counsel’s contact information, pertinent dates, answers to frequently asked questions,
 8 motions and orders related to the settlement), as well as a press release designed to amplify the reach
 9 and increase impressions by alerting the media industry’s largest content distribution network, PR
 10 Newswire. DSG uses analytics data, including impressions, click-through rates, and conversion
 11 rates, that allow us to make appropriate adjustments day-to-day to increase the online advertising
 12 campaign’s efficacy—i.e., increasing the campaigns reach to the target audience.

13 4. **No Reasonably Available Class Member Contact Information.** DSG consulted
 14 with counsel for Defendants Bayer Healthcare LLC and Beiersdorf, Inc.’s (“**Defendants**”)
 15 regarding the availability of contact information for consumers who bought the Products for reasons
 16 other than for resale—namely, the Settlement Class. Defendants did not sell the Products directly
 17 to consumers during the Class Period; instead, Defendants sold the Products to wholesalers or
 18 retailers, which then sold the Products to consumers or other resellers. Additionally, Defendants
 19 did not regularly or routinely collect or maintain identifying information for retail consumers who
 20 purchased the Products for purposes other than for resale. Accordingly, DSG did not design the
 21 Notice Plan to send postcards (which require mailing addresses) or mass emails (which require
 22 email addresses) directly to consumers who purchased the Products because the names and contact
 23 information for members of the Class are not known or reasonably ascertainable.

24 5. **Class Demographics & Online Usage.** DSG analyzed Comscore, GfK MRI data
 25 and Media Partner data, which track and compile analytics on audiences, brands, consumer
 26 behavior, and demographics across a multitude of platforms. Based on DSG’s analysis from the data

27 _____
 28 ¹ The Class Action Notice Plan is Exhibit B to the Amended Settlement Agreement. The Amended
 Settlement Agreement is filed concurrently as **Exhibit 1** in support of Plaintiffs’ Amended Motion
 for Preliminary Approval of Class Action Settlement.

1 sources listed above, it appears that the overwhelming majority of the Settlement Class is comprised
2 of members who fall between the ages of 25-65+ (89%), with just over half of the class being female
3 (54%). Further, according to Pew Research (2019), over 90% of adults in the United States use the
4 internet. DSG tailored the Notice Plan to better fit the demographics and behavioral categories of
5 the Settlement Class, including but not limited to those interested in outdoor activities and who live
6 in warmer climates. DSG will optimize Internet targeting to reach the necessary audiences
7 throughout the notice period and has placed additional emphasis on females ages 25-34, with and
8 without children, and both males and females, ages 25-54, because a greater concentration of the
9 Class falls within these age and demographic brackets according to our analysis from the above
10 noted court-approved sources.

11 **6. Notice Plan Designed to Emulate Defendants' Marketing Strategy to Promote**
12 **Efficiency.** DSG consulted with counsel for Defendants regarding their marketing strategy for the
13 Coppertone "Mineral-Based" sunscreen products at issue in this settlement. Defendants did not
14 typically or heavily market the Products through print media during the Class Period. Rather,
15 marketing efforts online have overwhelmingly outweighed any marketing through print media (such
16 as magazine or newspaper ads). Accordingly, DSG does not recommend taking money out of the
17 Settlement Fund and reallocating it to print publication since it is costly and typically less effective
18 in these types of cases, whereas a similar amount of money spent on digital advertising is more
19 likely to reach more of the consumers who have purchased the Products.

20 **7. Minimum 70% Reach.** The Federal Judicial Center published the Judges' Class
21 Action Notice and Claims Process Checklist and Plain Language Guide in 2010. It endorses a 70-
22 95% reach as reasonable. DSG has designed the Notice Plan to reach a *minimum* of seventy percent
23 (70%) of the Class using the best practicable means described above.

24 **8. Understanding the Reach Curve.** It is critical to understand the 70% reach threshold
25 and the costs associated with exceeding it. The marketing industry uses studies that compile and
26 analyze data which calculate reach based on the anticipated audience who views an advertisement
27 (such as the estimated readership of a magazine, viewership of television program, or audience for
28 a radio show). These studies show that reach, in comparison to media spend, does not grow in a

1 straight linear fashion. In other words, each advertisement purchased will *not* reach an equal
 2 number of new members within the targeted audience. Rather, the reach progresses in a curved line
 3 that flattens at around 70%. Each additional advertisement does not guarantee an entirely new set
 4 of individual viewers, because a portion of the same targeted audience sees the additional
 5 advertisements. At around 70%, the costs exponentially increase when attempting to find entirely
 6 new members of the targeted audience. Put differently, there is a point of diminishing returns where
 7 the costs do not justify the results. DSG is confident that the Notice Plan will reach a minimum of
 8 70% of the Class using the most cost-efficient and best practicable means, without unnecessarily
 9 incurring exorbitant media spending costs that only work to reduce the funds available to the Class,
 10 as opposed to reaching additional members of the Class.

11 9. **Estimated Class Size and Number of Claims.** According to sales data provided by
 12 Defendants, the class is comprised of approximately [REDACTED] or less retail consumers based on
 13 the total unit sales and a conservative reduction for the average repeat purchaser rate. Based on the
 14 estimated number of members in the Class, DSG's experience in administering similar indirect
 15 notice plans, and the FTC's study of claims rates,² DSG estimates that approximately 75,000-
 16 100,000 claims will be filed (which is an estimated claim rate of approximately [REDACTED]%). DSG's
 17 experience with similar settlements further supports the reasonableness of this estimate. A few
 18 specific case examples are listed below:

- 19 a. *Eggnatz et al v. The Kellogg Company et al*, Case No. 1:12-cv-21678 (S.D.
 20 Fla. 2015) (Nationwide class of purchasers of Kashi brand cereal products)
- 21 b. *Iglesias vs. Ferrara Candy Co.*, Case No. 3:17-cv-00849-VC (N.D. Cal. 2018)
 22 (Nationwide class of purchasers of candy products)
- 23 c. *Mateski, et al. v. Just Born, Inc.*, Case No. CIVDS1926742 (Cal. Super Ct.
 24 2020) (Nationwide class of purchasers of candy products)

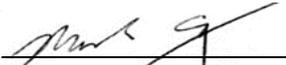
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 26 ² See Federal Trade Commission, *Consumers and Class Actions: A Retrospective and Analysis of*
 27 *Settlement Campaigns* (Sept. 2019), available at
 28 https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf (last accessed 7/13/2021)
 (average claims rate of approximately 4% for consumer class action settlements involving direct notice and a combination of direct and indirect notice).

1 All three of these settlements included internet notice to consumers. Since the products at issue in
2 these cases were sold primarily through retail chains, emails and/or physical addresses were not
3 readily available for a direct notice program. Additionally, these cases guaranteed a minimum reach
4 of 70%. They also shared a similar range of payouts fluctuating from \$7.50 to \$27.50, without proof
5 of purchase. The first case listed above (*Eggnatz*) featured a \$27.50 payout and drew a greater
6 number of claims than the others at approximately 130,000.³ The second (*Iglesias*) and third
7 (*Mateski*) cases, with a respective \$7.50 and \$8.00 payout, included roughly 80,000 claims each,
8 with an estimated claim rate of approximately 1.7% and 0.63% respectively.

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

Executed on July 13, 2021


MARK SCHEY

³ No class size data is currently available to estimate the claim rate.