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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KIMBERLY BIRBROWER, individually and on behalf of all others similarly situated,

Plaintiff,

v.

QUORN FOODS, INC., et al.,

Defendants.

Case No. 2:16-cv-01346-DMG-AJW

MEMORANDUM OF LAW IN OPPOSITION TO THE PARTIES' PROPOSED SETTLEMENT AGREEMENT BY CENTER FOR SCIENCE IN THE PUBLIC INTEREST APPEARING AS *AMICUS CURIAE*

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The Center for Science in the Public Interest ("CSPI") hereby submits the following memorandum in opposition to the proposed settlement agreement (the "Settlement" or "Agreement") in the above-entitled action. For the reasons stated herein, the parties' forthcoming motion for final approval of the Agreement should be denied.

I. INTRODUCTION

The Agreement in this case would allow Defendants to continue largely unabated with the deceptive marketing practices that precipitated this litigation.

As Plaintiff alleged in the First Amended Complaint ("FAC"), "'mycoprotein' is a term invented by Quorn to mislead consumers and hide the fact that its products are actually made of mold." FAC ¶ 1. Consequently, Plaintiff demanded that "Defendants [] prominently disclose on the front of its product packaging in bold print and large font that 'THIS PRODUCT CONTAINS MOLD' in order to cure the false advertising Defendants have been disseminating for years." *See* FAC, Prayer for Relief. But the Agreement fails to address this core class claim with anything like the relief pled.

First, the intended labeling changes are unfair and unreasonable in that they are: (A) vague and unclear as to the definition of "prominent" for the mold clarification; and (B) condone further (1) false claims that too much protein and fiber causes "intolerance in some people," while omitting reference to mold, which is the principal cause of adverse reactions, and (2) deceptive claims that mold causes "rare" allergic reactions, when Quorn causes allergic reactions in a substantial number of consumers.

Second, the Agreement identifies as a *cy pres* recipient an organization—FARE—that declined to take action on behalf of consumers when notified of serious concerns about Quorn products and extreme adverse reactions to it.

And third, CSPI's informal sampling of California consumers who contacted CSPI about Quorn indicates that not one of those answering the inquiry had

received notice of the Settlement (other than through CSPI)—despite indications by some that they had contacted Quorn after their purchase—raising serious concern about how many class members, if any, received actual notice.

Notwithstanding these serious deficiencies, and the relatively early stage of this Agreement in the litigation, under the Agreement, plaintiff's counsel seeks $1,350,000 in fees.

For these reasons, CSPI, a national consumer advocacy organization dedicated to promoting nutrition and protecting consumers from false and deceptive advertising, respectfully opposes the Settlement as being unfair, and urges the Court to deny final approval.

II. INTEREST OF *AMICUS CURIAE*

CSPI is a 501(c)(3) nonprofit, nonpartisan organization whose mission is to advance nutrition and public health. As part of that mission, CSPI Litigation protects consumers nationwide through the prevention of false and deceptive marketing of food and supplements, focusing on those instances where the advertising practice at issue is nutritionally significant and material to consumers.[1]

As explained in detail in the attached Memorandum of Law in Support of Motion of the Center for Science in the Public Interest for Leave to File Brief as *Amicus Curiae* in Opposition to Proposed Settlement, CSPI has an important interest in and a valuable perspective on the issues presented in this case.

III. ARGUMENT

A. The Injunctive Relief in the Agreement Is Vague and Unclear Because the Term "Prominent" Is Never Defined.

There is only one provision in the Agreement that may help inform consumers that mycoprotein is a deceptive and euphemistic term used to describe

[1] *See, e.g.*, NICOLE NEGOWETTI, BROOKINGS INSTITUTE, FOOD LABELING LITIGATION: EXPOSING GAPS IN THE FDA'S RESOURCES AND REGULATORY AUTHORITY (June 2014), *available at* https://goo.gl/EWGs82 (noting that CSPI pioneered false advertising litigation in the food context) (last visited Mar. 18, 2017).

mold—common mold grown in large, industrial vats. Under the Agreement, Quorn is required to indicate that "mycoprotein is a 'mold (member of the fungi family)' in a prominent location at or near the top of the back and/or side of the product label (as applicable)." *See* Agreement pt. III(B). Further definition is given to this charge under section III(B)(2)(ii), which specifies that such language is part of a modified allergy notice that states, "There have been rare cases of allergic reactions to products that contain mycoprotein, a mold (member of the fungi family). Mycoprotein is high in protein and fiber, which may cause intolerance in some people. We do not use any genetically modified ingredients in this product." *Id.* pt. III(B)(2)(ii). Subpart III(B)(1)(ii) also directs Defendants to state that "mycoprotein ('myco' is Greek for 'fungi') . . . for more information on nutritious mycoprotein check out our website above." *Id.* pt. III(B)(ii).

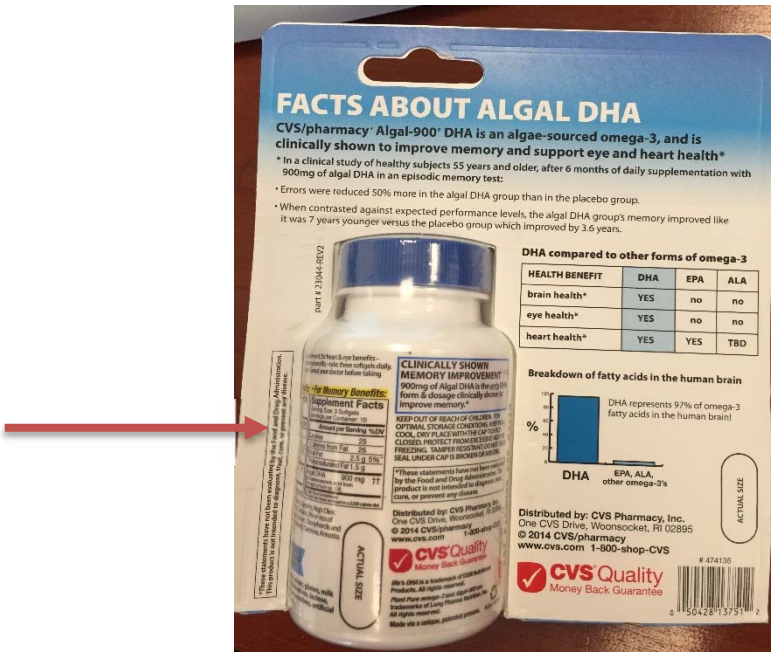
This injunctive relief is a far cry from the relief sought in the FAC, which claimed in strong language that the term mycoprotein itself was intentionally deceptive and demanded bold, large font notification of the products' mold contents on the *front* of packaging. Even accepting for settlement purposes, however, that a back or side label disclaimer is adequate in lieu of the front, the impact of Subpart III(B)(2)(ii) on Quorn's deceptive advertising practices is woefully unclear. The only term used in the Agreement to indicate the visibility of the mold clarification is the term "prominent," as per "in a prominent location," which is never defined.

The term "prominent," however, has connotations under current food industry practices, which could readily gut any injunctive relief here. So-called "prominent" notifications are often, if not typically, obscured by myriad competing label claims and information, which are presented in larger, bolder, and higher-contrast font.

For example, under the same regulatory framework that governs food labeling, manufacturers of dietary supplements are required to provide prominent disclaimers on their products. *See*, *e.g.*, 21 U.S.C.A. § 343(r)(6)(c) ("[A] statement

for a dietary supplement may be made if—the statement contains, *prominently displayed and in boldface type*, [a disclaimer.]") (emphasis added). To industry, this means something other than what one expects. For example, CVS's approach to "prominent" is illustrated in Image 1 below—that is, wording that is sideways and almost illegible despite that it is also "prominently" boxed and bolded. *See also* Declaration of Michael F. Jacobson, Ph.D., Executive Director, Center for Science in the Public Interest, dated March 23. 2017 ("Jacobson Decl."), ¶¶ 12–14. Such an interpretation of "prominent" would do little to apprise consumers that mycoprotein is commercially-grown mold by another name.

Image 1



The potential for Defendants to "comply" with the Settlement yet maintain a low visibility clarification is magnified by the fact that the term "prominent" is modified by the term "location." As noted above, the visibility of a disclaimer has as much to do with font size, contrast, style, and competing text, as it does with "location." For this reason, the FDA frequently provides exacting detail about the font size of claims with comparisons to competing text. *See, e.g.*, 21 C.F.R.

§ 101.13 ("A nutrient content claim shall be in type size no larger than two times the statement of identity and shall not be unduly prominent in type style compared to the statement of identity.").

The simple solution to any ambiguity over the visibility of the statement on mold is to either attach a mock label to the Agreement showing an acceptably prominent mold clarification, or to provide further definition of the term "prominent" as applied in the context of other labeling information.[2] CSPI has used a similar methodology in past settlement agreements. *See, e.g., Lipkind v. PepsiCo*, Case No. 16cv5506 (EDNY), Settlement Agreement at 4–6, *available at* https://goo.gl/bGwYX0 (last visited Mar. 18, 2017) (specifying placement and font characteristics in different contexts; "[T]he font size of the 'juices from' text will match the font size, style, color, and contrast of the listed ingredients.").

At bottom, the current Settlement could offer the class nothing more in terms of notification that mycoprotein is mold than Quorn's *current* label does—in other words, no meaningful injunctive relief to the class whatsoever. *See infra* at 7, Image 2 (current mold notification).

B. The Agreement Judicially Condones Continued Use of Certain Explicitly Deceptive Claims

The Agreement also expressly retains deceptive labeling language about the origins of any adverse reactions to Quorn products and how common these reactions are among consumers.

1. The Agreement Condones Deceptive Competing Claims

The Agreement allows Quorn to deceptively claim that "Mycoprotein is high in protein and fiber, which may cause intolerance in some people." Agreement

[2] CSPI requested from the parties a mockup of the label to ensure that "prominent" would be used in a manner commonly understood, and suggested that such a mock label be attached to the Agreement. The parties were unwilling to provide a mockup or more specificity on "prominent" in advance of the objection deadline. *See, e.g.*, Exhibit A (letter from Maia Kats to Jason Frank and Eric Kizirian (Feb. 17, 2017); email exchange between Maia Kats and Eric Kizirian (March 18-20, 2017); email from Maia Kats to Eric Yuhl, Jason Frank, and Eric Kizirian (March 18, 2017)).

pt. III(B)(2)(ii). However, most Quorn products contain only a small percentage of the recommended daily intake ("RDI") of protein and fiber per reference amount customarily consumed ("RACC"). For example, Quorn's meatless breakfast sausage patties contain 5 grams of protein and 2 grams of fiber per RACC, or approximately 10 percent and 8 percent of the RDI per RACC, respectively.[3] *See* FDA, GUIDANCE FOR INDUSTRY: A FOOD LABELING GUIDE (APPENDIX F), *available at* https://goo.gl/IJN15w (last visited Mar. 19, 2017). To give some further context, the FDA requires that products contain at least *20 percent* of the RDI per RACC of a given nutrient to claim that the product is "high" in that nutrient.[4] *See* 21 C.F.R. § 101.54(b).

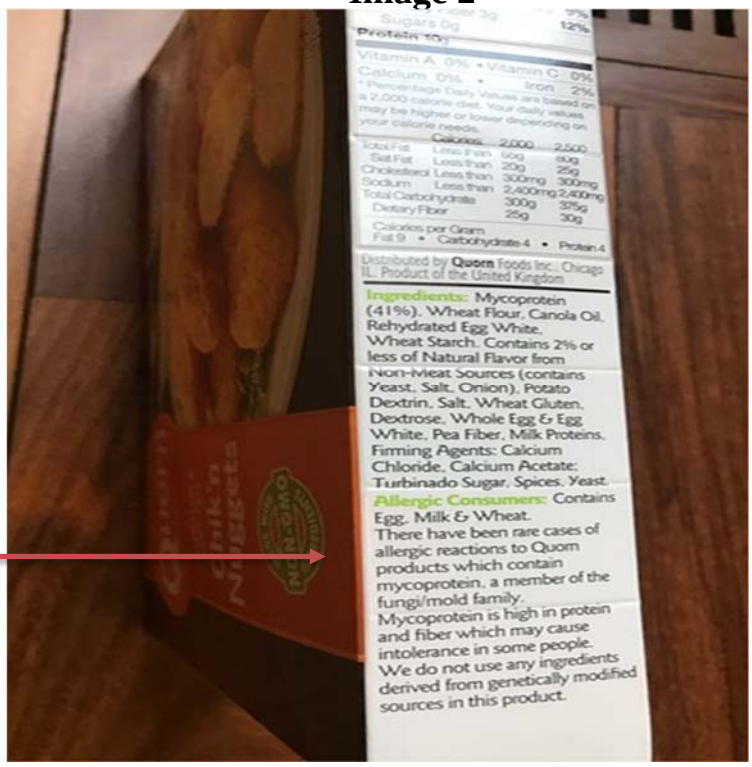
At least equally, the claim diverts attention away from mold as the principal cause of adverse reactions to the product. In the world of food labeling, claims compete for coveted space on packaging. Where several claims are made and only one is pertinent to consumers, the pertinent claim is drowned out by competing claims and is necessarily made less prominent. The relatively low levels of fiber and protein in Quorn products would not be the source of intolerance to the product. *See* Jacobson Decl. ¶ 17. Instead, the source of the approximately 2,500 adverse reaction complaints that we have received is, in all likelihood, mold, as evidenced by clinical research, including one study sponsored by the developer of mycoprotein. *See id.* ¶ 18. Thus, the inclusion of the statement suggesting that high levels of protein and fiber are the cause of adverse reactions is deceptive and misleading, reduces the visibility of the statement regarding mold, encourages consumers to draw a false equivalency between the two disclaimers, and suggests

[3] Quorn, *Meatless Breakfast Sausage Patties*, https://goo.gl/u1QfAW (last visited Mar. 19, 2017).

[4] While not the principal basis of our objection here, Quorn's protein and fiber claim likely violates this FDA regulation. *See* 21 C.F.R. § 101.13(i)(2) (Where a claim "implicitly characterizes the level of the nutrient in the food and is not consistent with such a definition, . . . the label [must] carr[y] a disclaimer adjacent to the statement that the food is not . . . [high in] the nutrient.").

that the product contains a substantial amount of healthful nutrients when it does not.[5]

Image 2



2. The Agreement Allows Quorn to Falsely Claim Adverse Reactions Are "Rare"

The Agreement continues to allow Quorn to state that "there have been *rare* cases of allergic reactions" to their products. Agreement pt. III(B)(2)(ii) (emphasis added). CSPI's evidence strongly suggests that this statement is deceptive and could readily be proven so by plaintiff's counsel.

Indeed, CSPI created a website to document adverse reactions to Quorn products. *See* Jacobson Decl. ¶¶ 8–10. Utilizing only that website, CSPI has received approximately 2,500 adverse reaction reports, which included reports of

[5] The same can be said of the inclusion in the allergen warning of the claim "[w]e do not use any ingredients derived from genetically modified sources in this product." *See* Agreement pt. III(B)(2)(ii). This claim, while potentially accurate, draws attention away from the mold notification and has no place in the "Allergic Consumers Statement." At minimum, it should be given substantially less visibility than the statement concerning Quorn's mold content. *See* Jacobson Decl. ¶ 20.

more than 350 skin and respiratory problems, including 1 death (of a young California boy who had asthma), and over 2,100 gastrointestinal reactions (diarrhea, cramps, vomiting). *See id.* ¶ 9. Moreover, in 2003, CSPI commissioned a telephone survey of 1,000 people in the United Kingdom. Of the 400 people that confirmed they had consumed Quorn products, five percent said they suffered adverse reactions. This is higher than rates of adverse reactions to other common allergens, such as peanuts, and does not qualify as "rare." *See id.* ¶ 11.

3. Federal Courts Have Rejected Similar Agreements

The Seventh Circuit roundly rejected a settlement with similarly deficient injunctive relief. In *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), Judge Posner explained that because the injunctive relief required only "cosmetic" label changes, the benefits inured solely to defendants, not the consumers who were, and will continue to be, deceived:

> A larger objection to the injunction is that it's superfluous—or even adverse to consumers. Given the emphasis that class counsel place on the fraudulent character of [defendant]'s claims, [defendant] might have an incentive even without an injunction to change them. The injunction actually gives it protection by allowing it, with a judicial imprimatur (because it's part of a settlement approved by the district court), to preserve the substance of the claims by making—as we're about to see—purely cosmetic changes in wording. . . . We see no substantive change.

Pearson, 772 F.3d at 785.

The same criticism is appropriately leveled at the Settlement in this case, which is to say that the injunctive relief is substantively empty because Defendants will be able to continue the deceptive marketing of Quorn products. For these reasons, the Agreement is unfair to the class and should be rejected.

C. The *Cy Pres* Recipient Is Not Consistent With the Class's Interest

In this case, the choice of *cy pres* recipient is paramount because the vast majority of the guaranteed Settlement Funds will likely revert to that recipient.

The Agreement creates a "Settlement Fund" of $2,500,000 "that will be used to pay for Claims, Class Counsel's Fees and Expenses, Administrative Costs, the Service Award and any and all other 'all-in' costs associated with the Settlement." Agreement pt. I(41). While plaintiff's counsel has sought $1,350,000 in attorneys' fees, *see* ECF No. 45, only $1,000,000, or 40 percent, of the Settlement Fund is guaranteed to either go to claims by class members or to a *cy pres* recipient, *id.* pt. (I)(11), (23). Because of the relatively small economic recovery to individual consumers and the difficulty of making a claim, it is highly unlikely that the claims will exceed $1,000,000, or even $200,000.[6] In fact, based on CSPI's experience, most of the $1,000,000 will likely revert to the *cy pres* recipient. *See Tait*, 2015 WL 4537463, at *7–8 (Considering potential claims for $55, stating that there was a

[6] The Agreement inappropriately requires class members to provide proof of purchase for their past grocery items—something few people retain or care to labor to reconstruct with their respective credit card companies. *See, e.g.*, Agreement pt. I(3); *Walter v. Hughes Commc'ns, Inc.*, 2011 WL 2650711, at *15 (N.D. Cal. July 6, 2011) ("But the vast majority of class members who would receive any cash payment under the settlement would receive a mere $5. Many class members will likely find that given the size of the cash benefit and the amount of time required to submit a claim, it simply is not worth the time and effort to submit a claim."); *Tait v. BSH Home Appliances Corp.*, 2015 WL 4537463, at *7–8 (C.D. Cal. July 27, 2015) ("[E]conomic reality should be taken into account when assessing the adequacy of the settlement. . . . Put another way, the proposed settlement buys a release from approximately 650,000 class members for the price of $1.65 per class member ($55 x 19,469 claims submitted ÷ 650,000 class members)."); *Pearson*, 772 F.3d at 783 ("As experienced class action lawyers, class counsel in the present case must have known that the notice and claim forms, and the very modest monetary award that the average claimant would receive, were bound to discourage filings."); *see also* Federal Judicial Center, Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, https://goo.gl/IASw5D (last visited Mar, 19, 2017) ("Watch for situations where class members are required to produce documents or proof that they are unlikely to have access to or to have retained. A low claims rate resulting from such unreasonable requirements may mean that your eventual fairness decision will overstate the value of the settlement to the class and give plaintiff attorneys credit for a greater class benefit than actually achieved."). Indeed, in this instance, proof of purchase is required just to lodge an objection to the proposed settlement. This high hurdle renders CSPI's Objection even more vital.

three percent claims rate, and noting "[i]t [was] patently unrealistic to expect that all—or close to all—class members would submit a claim.").

The Agreement designates as its *cy pres* recipient FARE (Food Allergy Research Education). Agreement pt. III(a)(3). While FARE may be a reputable organization that has done important research and educational work on allergens, its designation as the *cy pres* recipient, in these circumstances, is not in the class's interest.

The Ninth Circuit has noted that "[n]ot just any worthy recipient can qualify as an appropriate *cy pres* beneficiary." *See Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (internal quotation marks omitted). Indeed, "[t]o avoid the many nascent dangers to the fairness of the distribution process, we require that there be a driving nexus between the plaintiff class and the *cy pres* beneficiaries." *Id.* Further, the Ninth Circuit has held that it is an abuse of discretion to designate a *cy pres* recipient where there is "no reasonable certainty" that the class members will benefit from the *cy pres* recipients use of the funds. *Id.* (quoting *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990)).

Here, it is reasonably certain that FARE will *not* utilize these funds to conduct research on or educate the public on the risks associated with consuming mold. Indeed, on several occasions, CSPI communicated to FARE, then called FAAN, its concerns about Quorn, including the large number of reported adverse reactions to the product, but the organization failed to take action on behalf of consumers. *See* Jacobson Decl., ¶¶ 22–23. To this day, FARE does not include mold among its list of allergens.[7] Thus, there is no requisite reasonable certainty here about FARE benefitting class members, and it may even take positions adverse to significant numbers of them. As such, its status as *cy pres* recipient should be denied. By contrast, the Broad Institute at Harvard or the Asthma and Allergy

[7] FARE, *Other Allergens*, https://goo.gl/CFOdkK (last visited Mar. 19, 2017).

Foundation of America are highly reputable organizations that have done work related to mold, and there are no doubt many others.[8]

D. There Is Good Cause to Believe that Notice of the Settlement and Opportunity to Object Was Inadequate

Finally, to assess preliminarily whether notice of the settlement is adequate, CSPI reached out to a sampling of 38 individuals who had contacted it after having consumed Quorn products and suffered an adverse reaction. Of the 14 apparent class members who received and responded to our email (in the two-day period before this filing), some of whom had contacted Quorn directly to complain about its products, not one reported having received notice of the Settlement from the parties or the claims administrator. *See* Jacobson Decl. ¶ 24. This raises serious concerns about the adequacy of the Notice concerning the Settlement, including the claims, opt-out, and objection processes. Notably, the total for all claims administration functions, including but not limited to notice and claims processing and administration, were capped at $150,000, or $**.**15 million, in contrast to $1.35 million in class attorneys' fees and $1 million for FARE.

IV. CONCLUSION

For the reasons above, we respectfully urge this Court to deny approval of the proposed Settlement as unfair.

Respectfully submitted,

DATED: March 23, 2017 **MAURIELLO LAW FIRM, APC**

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[8] *See, e.g.*, Broad Institute, *Fungal Genome Initiative*, https://goo.gl/E4M5Iq; Asthma and Allergy Foundation of America, *Mold Allergens*, http://www.aafa.org/page/mold-allergy.aspx (both last visited Mar. 19, 2017).

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2017, I caused the document entitled "MEMORANDUM OF LAW IN OPPOSITION TO THE PARTIES PROPOSED SETTLEMENT AGREEMENT BY CENTER FOR SCIENCE IN THE PUBLIC INTEREST APPREARING AS *AMICUS CURIAE*" to be filed with the Court's CM/ECF system, which sends notice of such filing to all parties registered with the CM/ECF system.

/s/ *Thomas D. Mauriello*
Thomas D. Mauriello