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8
9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**

11 GREGORY BROD, Individually and on
12 Behalf of All Others Similarly Situated,

13 Plaintiff,

14 v.

15 SIOUX HONEY ASSOCIATION,
16 COOPERATIVE, an Iowa entity,

17 Defendant.

Case No.: 12-CV-01322 EMC

CLASS ACTION

**PLAINTIFF BROD'S MEMORANDUM
OF POINTS AND AUTHORITIES
(1) IN OPPOSITION TO PLAINTIFF
ROSS' MOTION TO CONSOLIDATE
AND APPOINT INTERIM LEAD
CLASS COUNSEL; AND (2) IN
SUPPORT OF BROD'S RENEWED
CROSS-MOTION TO CONSOLIDATE
AND APPOINT INTERIM LEAD
CLASS COUNSEL**

18
19 Date: November 30, 2012
20 Time: 1:30 p.m.
21 Dept.: Courtroom 5 – 17th Floor
22 Judge: Hon. Edward M. Chen

23 SORAYA ROSS, Individually and on
24 Behalf of All Others Similarly Situated,

25 Plaintiff,

26 v.

27 SIOUX HONEY ASSOCIATION,
28 COOPERATIVE, an Iowa entity,

Defendants.

Case No.: 12-CV-01645 EMC

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1 Plaintiff Gregory Brod (“Plaintiff Brod”), by his undersigned counsel, respectfully
2 submits this memorandum (1) in support of his renewed motion for appointment of Laurence D.
3 King (“King”) of the San Francisco office of Kaplan Fox & Kilsheimer LLP (“Kaplan Fox”),
4 Robert Lax (“Lax”) of Lax LLP (the “Lax firm”) and Jon Herskowitz (“Herskowitz”) of Baron &
5 Herskowitz (collectively, “Brod’s Proposed Counsel”) as interim lead class counsel; (2) in
6 support of consolidating two cases pending before the Honorable Edward M. Chen – *Brod v.*
7 *Sioux Honey Association, Cooperative*, Case No. C 12-01322 EMC (“*Brod*”), the first-filed case,
8 and *Ross v. Sioux Honey Association, Cooperative*, Case No. C 12-01645 EMC (“*Ross*”)¹; and
9 (3) in opposition to the motion filed by Plaintiff Ross, plaintiff in the related *Ross* case, seeking
10 appointment of her New York counsel, Horwitz, Horwitz & Paradis (the “Paradis firm”), as sole
11 interim lead class counsel. Plaintiff Ross’ other counsel of record, two law firms located in
12 California, neither appear on the moving papers nor are proposed for a formal role in the
13 litigation. For the reasons stated herein, Brod’s Proposed Counsel should be appointed interim
14 lead class counsel as they are best suited to represent the interests of the Class.

15 When more than one applicant seeks appointment as interim class counsel, the court must
16 appoint the applicant that is “best able to represent the interests of the class.” Fed. R. Civ.
17 P. 23(g)(2). Where, as here, the competing firms are equally experienced in handling class
18 actions and other complex litigation, and are knowledgeable of the applicable consumer law, the
19 Court “may consider any other matter pertinent to counsel’s ability to fairly and adequately
20 represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(B). In particular, many courts
21 consider whether counsel is free of conflicts of interest, since the responsibility of class counsel to
22 absent class members whose control over their attorneys is limited does not permit even the
23 appearance of divided loyalties of counsel. *See Allen v. Stewart Title Guar. Co.*, 246 F.R.D. 218,
24 219 (E.D. Pa. 2007) (citing *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir.1995)).

25
26
27 ¹ Both share common class members, legal theories, and factual scenarios. Further, all
28 related actions are brought against the same defendant-Sioux Honey Association, Cooperative
 (“Sioux ” or “Defendant”). Plaintiff Soraya Ross (“Plaintiff Ross”) and Plaintiff Brod agree that
 consolidation is appropriate.

1 As set forth herein, the Paradis firm is not free of conflicts of interest, and therefore it
2 should not be appointed interim class counsel. The firm having previously represented Plaintiff
3 Brod, owes its former client a continuing fiduciary duty of loyalty and prohibits the firm from
4 undertaking a representation adverse to Brod, as its former client, in a matter substantially related
5 to the prior representation of that client. *In re Jaeger*, 213 B.R. 578, 587 (Bankr. C.D. Cal. 1997).
6 That the Paradis firm attempts to minimize the duty it owes to its former client in its moving
7 papers to be appointed interim lead counsel, only highlights the inescapable conclusion that the
8 firm cannot fairly and adequately represent all members of the proposed Class.

9 Before this Court had even entered its Order permitting the withdrawal of the Paradis firm
10 as counsel for Plaintiff Brod (Dkt. 15),² the Paradis firm filed a substantially similar and
11 competing class action on behalf of Soraya Ross against Defendant Sioux. (*Ross* Dkt. 1.) Since
12 then, the Paradis firm has taken various actions on behalf of current client Ross, which potentially
13 placed former client Brod in an adverse position in this litigation. And the firm continues to take
14 adverse positions, despite receiving a letter in mid-July, 2012, from Brod's Proposed Counsel
15 notifying the Paradis firm, and its co-counsel, of a potential conflict. See Exhibit A to the
16 Declaration of Robert Lax ("Lax Decl."), filed concurrently herewith. The record demonstrates
17 that the Paradis firm is unwilling to avoid both the appearance and the reality of divided loyalties.
18 In proceeding in direct contravention of Plaintiff Brod's best interests, it also demonstrates that
19 the Paradis firm lacks the ability to fairly and adequately represent the interests of all members of
20 the proposed Class.

21 On the other hand, Brod's Proposed Counsel have already demonstrated their commitment
22 to vigorously prosecute this consumer class action on behalf of all Class members, and they will
23 continue to do what is in the best interests of the Class. They have investigated the claims, filed
24 the first case, and have all committed and will continue to commit, significant resources towards
25 the successful prosecution of these cases. In short, Brod's Proposed Counsel meet and exceed
26 Rule 23(g) requirements. For these reasons, and in the interests of cooperation, efficiency and,

27 ² Unless otherwise stated, all "Dkt." references hereafter are to the docket in *Brod v. Sioux*
28 *Honey Association, Cooperative*, Case No. 12-cv-01322.

1 most importantly, protecting the rights of the persons who were harmed by Defendant's unlawful
2 conduct, Plaintiff Brod requests that the Court consolidate the related cases of *Brod* and *Ross*, and
3 appoint King, Lax and Herskowitz as interim lead class counsel.

4 I. FACTUAL BACKGROUND

5 Nearly two and half years ago California passed legislation dedicated to protecting
6 consumers, honey packers and honey products from false, deceptive and misleading product
7 labeling.³ For honey to be offered for sale in the State of California as "honey," it must contain
8 pollen unless the removal of the pollen was unavoidable in the removal of foreign matter.⁴

9 Defendant sells a variety of honeys in stores throughout California, including a product
10 called Sue Bee Clover Honey.⁵ It admits to the removal of all of the natural pollen in that
11 product, but not because it was necessary for the removal of foreign matter. Instead Defendant's
12 removal of pollen is intended "to lessen its chances of granulation (sugaring)."⁶ Because Sue Bee
13 Clover Honey does not conform to California's honey law, it cannot be sold within the State of
14 California simply labeled as "honey," but rather must disclose that the product is pollen-free or
15 filtered.⁷

16 Nevertheless, Sioux markets and sells the product now at issue in California, which is
17 "honey" that has been filtered and is therefore pollen free, but is sold without disclosure of that
18 fact.⁸ As a result of Sioux's marketing and sale of the product in the State of California, despite
19 its failure to meet California's honey laws, Brod purchased it and received a product whose label
20 is false and misleading. Had he known that the "honey" did not comply with California standards
21 for honey, Brod would not have purchased the product.⁹

22
23
24 ³ See Second Amended Class Action Complaint ("SAC"), ¶4 (Dkt. 55).

25 ⁴ SAC, ¶16.

26 ⁵ SAC, ¶¶12, 22, 24

27 ⁶ SAC, ¶22.

28 ⁷ SAC, ¶¶5-6, 14-25, 41, 50, 56, 69.

⁸ SAC, ¶¶14, 22.

⁹ SAC, ¶¶8, 25.

1 **II. PROCEDURAL BACKGROUND**

2 Plaintiff Brod initiated his action against Sioux on January 19, 2012 in the California
3 Superior Court of Marin County. Sioux removed the case on March 16, 2012 (Dkt. 1). Plaintiff
4 Brod was initially represented in this action by the Lax firm, as well as the law firms of Kiesel
5 Boucher Larson LLP (the “Kiesel firm”), and the Paradis firm. As a result of differences in
6 strategy however, Plaintiff Brod requested the withdrawal of the Kiesel and Paradis firms. On
7 April 6, 2012, a Notice of Substitution was filed, substituting King and one of his colleagues in
8 place of the Paradis and Kiesel firms. Dkt. 5. Before the Court entered its Order granting the
9 request for substitution (Dkt. 15) on April 12, 2012, the Kiesel and Paradis firms filed *Ross*, a
10 competing second action against Sioux, in the Northern District of California. *See Ross* Dkt. 1
11 (*Ross* Class Action Complaint filed on April 2, 2012).

12 On April 25, 2012, Plaintiff Brod moved to relate *Ross* (Dkt. 20). In response, his former
13 counsel in this matter (the Kiesel and Paradis firms) not only opposed the motion of their former
14 client on behalf of their new client, Soraya Ross (Dkt. 22), but also requested a stay of the actions
15 pending the outcome of a motion to consolidate and transfer all actions to the Central District of
16 California, also filed by Ross’ counsel (and Brod’s prior counsel) before the Judicial Panel on
17 Multidistrict Litigation (the “MDL Motion”). Both Plaintiff Brod and Sioux opposed the MDL
18 Motion, which was denied on August 2, 2012.¹⁰

19 On August 10, 2012, the Court heard Defendant’s motion to dismiss in *Brod*, which
20 motion was granted without prejudice to file an amended complaint. Dkt. 52.¹¹ On October 11,
21 2012, Brod filed his SAC. Dkt. 55. Sioux filed its motion to dismiss the *Brod* SAC, which is
22 currently set for hearing on December 11, 2012. Dkt. 56-1; Dkt. 57.

23 Plaintiff Brod seeks to represent a class comprised of all persons who purchased Sue Bee
24 Honey from any stores located in California at any time from January 1, 2010 through the
25 present. Both actions include claims for violations of the Unfair Competition Law (Cal. Bus. &

26 ¹⁰ See Dkt. 67 in *In Re: Honey Production Marketing and Sales Practices Litigation*, MDL
27 No. 2374.

28 ¹¹ On July 16, 2012, Plaintiff Ross filed a Second Amended Class Action Complaint. *Ross*
Dkt. 20.

1 Prof. Code §§17200, *et seq.*), and the California Legal Remedies Act (Cal. Civ. Code §§1750, *et*
2 *seq.*). *Brod* also includes claims for breach of the express and implied warranties of
3 merchantability, and *Ross* includes claims for unjust enrichment and breach of contract, in the
4 alternative.

5 III. ARGUMENT

6 A. Plaintiffs Brod and Ross Agree the Two Related Actions Should Be Consolidated

7 Plaintiff Ross agrees with Plaintiff Brod that *Ross* and *Brod* should be consolidated under
8 Rule 42(a) because the actions involve common questions of fact and law. Plaintiff Ross'
9 Memorandum of Points and Authorities in Support of Motion to Appoint Interim Lead Class
10 Counsel and to Consolidate ("*Ross* Brief") at 15:4-25. *Ross* Dkt. 51-1.

11 B. This Court Should Appoint Brod's Proposed Counsel as Interim Class Counsel

12 Brod's Proposed Counsel meet the requirements for appointing lead counsel under
13 Rule 23(g). Lax, one of Brod's Proposed Counsel, conducted an extensive factual investigation
14 into Sioux's marketing and illegal sale of its product, Sue Bee Clover Honey, in the State of
15 California, and filed the first case against Sioux in the California Superior Court, Marin County,
16 on January 19, 2012. Ross' counsel, who formerly represented Plaintiff Brod, filed the *Ross*
17 Class Action Complaint on April 2, 2012.

18 Brod's Proposed Counsel are committed to devoting significant resources to the
19 successful prosecution of these cases. The three firms, having served in leadership capacities in
20 numerous prior and current cases, have track records which show their collective abilities to work
21 cooperatively with, and gain the respect of, both opposing counsel and other plaintiffs' counsel.
22 Standing alone, these facts more than satisfy Rule 23(g)(1)'s considerations for appointing co-
23 lead counsel and demonstrate that the appointment of Brod's Proposed Counsel as interim lead
24 class counsel is in the best interests of the putative Class.

25 1. This Court Should Appoint Brod's Proposed Counsel as Interim Lead Class 26 Counsel Because They Are Free of Conflicts and Meet and Exceed the Requirements of Rule 23(g)(1)(A)

27 Brod's Proposed Counsel meet and exceed each of the factors set forth under
28 Rule 23(g)(1)(A)(i) – (iv) for selecting lead counsel. Rule 23(g)(3) provides that, "[t]he court may

1 designate interim counsel to act on behalf of a putative class before determining whether to
2 certify the action as a class action.” See, e.g., *In re Vioxx Prods. Liab. Litig.*, No. MDL No. 1657,
3 2005 WL 1662043, at *2 (E.D. La. June 23, 2005) (“the Court appointed the PSC as interim class
4 counsel pursuant to Fed.R.Civ.P. 23(g)(2)(A)”). Rule 23(g)(1)(A) provides that in appointing
5 class counsel, the court must consider: (i) the work counsel has done in identifying or
6 investigating potential claims in the action; (ii) counsel’s experience in handling class actions,
7 other complex litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge
8 of the applicable law; and (iv) the resources that counsel will commit to representing the class.

9 Brod’s Proposed Counsel defined the central claims and conducted an extensive
10 investigation into these cases; they have extensive history of successfully leading similar actions
11 and offer a particularized understanding of the issues relevant to this litigation; and they bring to
12 bear significant resources to the continued prosecution of the cases. Thus, King, Lax and
13 Herskowitz should be appointed interim lead class counsel.

14 **a. Brod’s Proposed Counsel Identified and Investigated the Potential**
15 **Claims in This Action**

16 Lax, one of Brod’s Proposed Counsel, was among the first to identify and file the claims
17 alleged against Sioux concerning the illegal marketing and sale of its product, Sue Bee Honey, in
18 violation of California’s Food & Agriculture Code and consumer laws. Lax, King and Herskowitz
19 have been working together for several months and have already taken a number of necessary
20 preliminary actions on behalf of the putative Class.

21 Brod’s Proposed Counsel have extensive practices in the area of consumer class actions.
22 All three of the firms’ focus on these issues directly led to an in-depth investigation and analysis
23 of the claims now before the Court. See Declaration of Laurence D. King (“King Decl.”), ¶¶2-3,
24 filed herewith. Lax’s investigation to date includes conducting an interview of Plaintiff,
25 researching the history of honey legislation and administrative law, and Defendant’s actions in
26 the industry, and notifying Defendant of its obligations under California’s Consumer Legal
27 Remedies Act. King Decl., ¶3. Brod’s Proposed Counsel’s efforts culminated in the drafting and
28 filing of the *Brod* first and second amended complaints, and fully briefing the motions to dismiss.

1 *Id.* Brod’s counsel also drafted and submitted an Opposition to the Motions for Transfer pursuant
2 to 28 U.S.C. §1407 for Consolidated Proceedings, and appeared at the MDL hearing. *Id.*

3 In addition, Brod’s Proposed Counsel negotiated with Defendant a schedule for
4 responding to the first and second amended complaints, as well as accompanying briefing
5 schedules, identified the factual issues and related discovery at issue, investigated the claims and
6 law that comprise both actions and have agreed to develop a system to centralize and maintain
7 documents and other information. King Decl., ¶¶2-3.

8 Accordingly, Brod’s Proposed Counsel have expended substantial effort in investigating
9 and bringing these claims before the Court, and they fully meet and exceed the requirements of
10 Rule 23(g)(1)(A)(i).

11 **b. Brod’s Proposed Counsel Bring a Wealth of Experience to This Matter**

12 Brod’s Proposed Counsel have significant depth of experience in class action and complex
13 litigation. Each firm offers extensive experience in nationwide class actions and complex
14 multidistrict matters. As demonstrated in more detail in the King Decl., the Lax Decl. and the
15 Declaration of Jon Herskowitz (“Herskowitz Decl.”), Brod’s Proposed Counsel have served as
16 lead counsel or in executive committee positions for some of the largest class actions in the
17 country over the last several years, including a multitude of consumer class actions. Accordingly,
18 Brod’s Proposed Counsel have substantial experience in handling class and complex litigation
19 and in-depth knowledge of the applicable laws that are the hallmarks of class counsel under
20 Rule 23(g). *Id.*

21 **c. Brod’s Proposed Counsel Have Proven Knowledge of the Applicable**
22 **Law**

23 Rule 23(g)(1)(A)’s second factor examines proposed interim class counsel’s experience in
24 handling class actions, other complex litigation, and claims of the type asserted in the action.
25 Brod’s Proposed Counsel have many years of experience litigating cases arising from or related
26 to unfair business practices and consumer fraud.¹² For example, attorneys from Kaplan Fox have
27

28 ¹² See King Decl., ¶¶4-9; Lax Decl., ¶¶4-6, 8-10; and Herskowitz Decl., ¶¶3-7.

1 served in a leadership role in numerous complex class actions, obtaining optimal results for the
2 plaintiffs and classes. King Decl., ¶4.

3 Kaplan Fox, headquartered in New York and with offices in San Francisco and throughout
4 the United States, is one of the nation's preeminent law firms concentrating its practice on the
5 representation of plaintiffs in complex and class action litigation. *Id.* Kaplan Fox attorneys
6 regularly obtain some of the largest recoveries in the fields in which they practice, which include
7 consumer protection, securities, and antitrust litigation. *Id.* Kaplan Fox was co-lead counsel in
8 the "Thomas the Train" lead paint litigation against RC2 Corporation where a settlement of
9 \$30 million was achieved in January 2008. *See In re RC2 Corp. Toy Lead Paint Prods. Liab.*
10 *Litig.*, No. 07-CV-3514 (N.D. Ill.). The firm served as a member of the Plaintiffs' Steering
11 Committee in *In re Baycol Prods. Litig.*, No. MDL 1431 (D. Minn.), a proposed class action on
12 behalf of consumers who took a dangerous and defective drug which was recalled from the
13 market. More than \$350 million of settlements were obtained. King Decl., ¶¶5-6, Ex. A. Kaplan
14 Fox has also served as co-lead counsel in *In re Providian Credit Card Cases*, JCCP 4085 (Cal.
15 Super. Ct. San Francisco Cty.), and *In re Providian Fin. Corp. Credit Card Terms Litig.*, MDL
16 No. 1301-WY (E.D. Pa.), two related landmark consumer protection cases alleging deceptive
17 marketing practices by a major credit card issuer. These cases resulted in a class wide settlement
18 of \$105 million and significant injunctive relief. More recently the firm also served as co-lead
19 counsel in *In re Pre-Filled Propane Tank Mktg. and Sales Practices Litig.*, No. 4:09-md-2086
20 (W.D. Mo.) (settlements obtained where consumers will receive substantially in excess of actual
21 damages and significant injunctive relief); and *Berry v. Mega Brands Inc.*, No. 08-CV-1750
22 (D.N.J.) (class wide settlement obtained where consumers will receive full refunds for defective
23 products). *Id.*

24 The Lax firm is also ideally suited to serve as class counsel in this litigation. The Lax
25 firm has extensive experience handling consumer fraud and other complex litigation, particularly
26 in claims such as those asserted in this action. *See Lax Decl.*, ¶¶4-6, 8-10. The Lax firm has been
27 especially successful in representing purchasers of consumer goods, such as those at issue in this
28

1 case, and has developed expertise in the field which has allowed it to score important victories on
2 behalf of such consumers and which can be utilized in this matter. *Id.*

3 The Lax firm has been appointed as lead or co-lead counsel in many current high profile
4 consumer class actions – most of which have involved allegations of misrepresentations of the
5 specifications and capabilities of consumer goods, such as those at issue here. The Lax firm was
6 appointed and served as sole Chair of the Plaintiffs’ Counsel Committees in both the *Samsung*
7 *DLP Television Class Action Litig.*, No. 07-2141 (D.N.J.) and *In re LG/Zenith Rear Projection*
8 *Television Class Action Litig.*, No. 06-5609 (D.N.J.); lead counsel for the Indirect Purchasers
9 Counsel Committee in *In re Pineapple Antitrust Litig.*, No. 04-1628 (S.D.N.Y.); and lead
10 plaintiffs’ counsel for *In re Sony SXRDR Rear Projection Television Litig.*, No. 06-5173
11 (S.D.N.Y.). Other cases in which the Lax firm held lead or co-lead positions and was responsible
12 for obtaining significant recoveries for consumers include *Rinaldi v. Iomega Corp.* (Del. Super.
13 Ct.) (nationwide consumer class action filed on behalf of more than 24 million purchasers of
14 allegedly defective computer hard drives); *In re Pioneer X30 Rear Projection Television Litig.*
15 (Cal. Super. Ct. Los Angeles Cty.) (nationwide consumer class action on behalf of purchasers of
16 allegedly defective television sets); *Tulley v. AT&T Commc’ns of Cal.* (Cal. Super. Ct. Los
17 Angeles Cty.) (class action alleging systematic over-billing of local telephone subscribers); and *In*
18 *re ASD Shareholders Derivative Litig.* (Cal. Super. Ct. Los Angeles Cty.) (\$24 million recovery
19 for class members). *Id.*

20 Many of these successful matters have clear parallels to the instant litigation, involving
21 similar allegations of misrepresentations in connection with the marketing of consumer products.
22 The successful conclusions of these matters, leading to consumer relief valued at over
23 \$100 million, demonstrates the capabilities of the Lax firm to serve as interim class counsel here.
24 *Id.*

25 Baron & Herskowitz has the experience and expertise – including a compelling record in
26 winning trials and achieving settlements on behalf of plaintiffs – to advance the interests of the
27 Class. Baron & Herskowitz has vigorously prosecuted numerous class actions including on
28 behalf of consumers who purchased defective equipment, customers subjected to misleading or

1 deceptive fees, discriminated employees, victims of pervasive debt collection practices, and
2 doctors denied payments by an HMO. See Herskowitz Decl., ¶¶3-7.

3 Baron & Herskowitz has been appointed lead or co-lead counsel in many consumer class
4 actions, such as *Michael Cook v. Sony Elecs., et al.* (a consumer defect class action filed in the
5 Southern District of New York brought on behalf of over 75,000 consumers alleging an inherent
6 defect in widely advertised televisions); *Mark Risi and Terry Hollis v. Pioneer Elecs (USA) Inc.*
7 (a consumer defect class action filed in Los Angeles, California and West Palm Beach, Florida
8 brought on behalf of over 15,000 consumers alleging an inherent defect); *Dishkin v. Tire*
9 *Kingdom* (a class action alleging violations of several false advertising statutes); *Toister v. Alegis*
10 *Corp.* (FDCPA class action in which there were thousands of customers significantly affected by
11 a computer error); *Soper, et al. v. Wyndham Hotels* (filed in Madison County, Illinois, Miami-
12 Dade County, Florida, and San Diego, California on behalf of thousands of consumers alleging
13 that Wyndham misrepresented an “energy crisis” and fraudulently charged consumers an “energy
14 surcharge”); *Kenneth Fischer, M.D., et al. v. Foundation Health* (a statewide class action brought
15 on behalf of thousands of Florida physicians alleging that Foundation Health failed to promptly
16 and appropriately pay physicians’ bills for services rendered to patients.); *LaPlanche, et al. v.*
17 *Foot Locker* (a nationwide class action brought on behalf of African American managerial
18 employees alleging discrimination based on race); *James Hutton, et al. v. Miami-Dade Cty.* (a
19 county-wide class action for retaliation against employees for exercising their Worker’s
20 Compensation rights under Florida law). Herskowitz Decl., ¶4.

21 In sum, Brod’s Proposed Counsel have the necessary experience handling class actions,
22 other complex litigation, and claims of the type asserted in these cases. They meet and exceed the
23 requirements of Rule 23(g)(1)(A)(ii).

24 **d. Brod’s Proposed Counsel Will Commit the Resources Necessary to**
25 **Prosecute This Matter**

26 Once again, Brod’s Proposed Counsel have the ability and commitment to devote
27 substantial resources to representing the Plaintiffs in both *Brod* and *Ross*. History should be the
28 guide of what resources class counsel will bring to bear on a new case. Here, Brod’s Proposed

1 Counsel have a well-established history of committing ample resources to class action litigation,
2 providing an extremely strong basis for predicting the firms will do likewise in the future.
3 Moreover, collectively, there can be no question that the firms have more than adequate resources
4 to commit to these actions. Each of the firms has a practice built around class and complex
5 litigation, and will commit all resources necessary to generate an optimal recovery for the
6 putative class in these actions.¹³

7 **C. The Paradis Firm Has Documented Conflicts of Interest**

8 In appointing interim class counsel, courts may consider whether the competing firms
9 will fairly and adequately represent all of the parties on their side. *See In re Bank of Am. Corp.*
10 *Sec., Derivative & ERISA Litig.*, 258 F.R.D. 260, 272 (S.D.N.Y. 2009). As part of this
11 determination many courts consider whether counsel is free of conflicts of interest, since the
12 responsibility of class counsel to absent class members whose control over their attorneys is
13 limited does not permit even the appearance of divided loyalties of counsel. *See Kayes*, 51 F.3d
14 at 1465; *see also Moreno v. AutoZone, Inc.*, No. C-05-04432 MJJ, 2007 U.S. Dist. LEXIS 98250,
15 at **20-21 (N.D. Cal. Dec. 5, 2007) (“In a class action context, disqualification is more likely
16 because putative class counsel are subject to a ‘heightened standard,’ which they must meet if
17 they are to be allowed by the Court to represent absent class members.” “In the class action
18 context, the Court has an obligation to closely scrutinize the qualifications of counsel to assure
19 that all interests, including those of as yet unnamed plaintiffs, are adequately represented.”
20 “[W]here there is reason to doubt the loyalty of counsel or the adequacy of counsel’s
21 representation, serious questions arise concerning the preclusive effect of any resulting
22 judgment.”) (citations omitted).

23 Fiduciary duties of attorneys to their clients continue beyond the termination of
24 representation, and include the duty of loyalty to avoid adverse representations in matters related
25 to those on which attorneys were previously engaged. Although the Paradis firm acknowledges
26 Rule 3-310 of the California Rules of Professional Conduct (“Rule 3-310”), it misinterprets its

27 ¹³ See King Decl., ¶¶4-10 and Ex. A thereto; Lax Decl., ¶¶4-6, 8-11 and Ex. B thereto; and
28 Herskowitz Decl., ¶¶3-8 and Ex. A thereto.

1 duties. The Paradis firm's argument that it has not violated Rule 3-310 is simply incorrect. *See*
2 *Ross* Brief at 12:13-13:4 (*Ross* Dkt. 51-1) (Paradis firm has not taken positions "adverse" to
3 Plaintiff Brod because both Plaintiff Brod and Plaintiff Ross are "on the same side"). Rule 3-310
4 does not, as the Paradis firm suggests, merely prohibit attorneys from "switching sides in
5 litigation." *Ross* Brief at 12:13-25 (*Ross* Dkt. 51-1).

6 Rather, under California law, an attorney has a fiduciary duty of loyalty to the former
7 client which prohibits the attorney from undertaking a representation adverse to a former client in
8 a matter substantially related to the prior representation of that client. *Jaeger*, 213 B.R. at 587.
9 As the California Supreme Court stated in *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150
10 (1981): "[A]n attorney is forbidden to do either of two things after severing his relationship with
11 a former client. He may not do anything which will injuriously affect his former client in any
12 manner in which he formerly represented him, nor may he at any time use against his former
13 client knowledge or information acquired by virtue of the previous relationship." *Id.* at 155
14 (citation omitted). An "adverse" interest is not limited to "switching sides," as the Paradis firm
15 contends, but is one that is "hostile, opposed, antagonistic ... detrimental, unfavorable" to one's
16 own interest. *Moreno*, 2007 U.S. Dist. LEXIS 98250, at *12 (citation omitted). Further, whether
17 the Paradis firm is on the same or opposing side, makes no difference where it has breached its
18 duty of loyalty to former client Brod. *See also Jaeger*, 213 B.R. at 587 (finding law firm violated
19 its continuing duty of loyalty to *Jaeger* debtors as its former clients while continuing to represent
20 *Jaeger* co-defendants in litigation).

21 Moreover, that the Paradis firm eventually withdrew from representation of Brod, is
22 immaterial to this analysis. Although the Court permitted the firm to substitute out of *Brod*
23 almost two weeks after it filed the competing *Ross* class action, under the "hot potato rule," the
24 Paradis firm's "dual representation conflicts [could not] be cured by the expedient of severing the
25 relationship with one of the clients." *Moreno*, 2007 U.S. Dist. LEXIS 98250, at *16. Absent
26 Brod's informed written consent, the Paradis firm's dual representation of both Brod and Ross
27 whose interests actually conflicted was prohibited. *Id.*

28

1 Notwithstanding that the Paradis firm failed to even attempt to obtain Brod's informed
2 written consent, let alone actually obtain it, the firm filed *Ross*, a competing class action. *See*
3 Dkt. 15 and *Ross* Dkt. 1. Since then, the Paradis firm – as attorneys for Plaintiff Ross – has
4 repeatedly taken positions antagonistic to its former client's stated interests. Among other things,
5 the Paradis firm has (1) opposed Brod's motion to relate, including an attempt to stay his case;
6 (2) filed the MDL Motion seeking transfer of Brod's case from his chosen and preferred venue;
7 (3) attacked the validity of the claims he has alleged and the litigation strategy of his chosen
8 counsel; and (4) sought to supplant its former client's express choice of legal representation while
9 interposing itself as his counsel without his consent. This conduct is expressly adverse,
10 antagonistic and in opposition to Plaintiff Brod's own interests.

11 Moreover, despite being notified in July 2012 of the continuing duty the firm owed to
12 Plaintiff Brod to avoid the appearance of impropriety (*see* Lax Decl., Ex. A) – an assertion to
13 which the Paradis firm has never meaningfully responded – the Paradis firm now argues that its
14 former client and his chosen counsel cannot adequately represent the proposed Class. *Ross* Brief
15 at 13:18-14:2 (*Ross* Dkt. 51-1). *See also* Plaintiff Ross' Memorandum of Points and Authorities
16 in Support of (1) Opposition to Plaintiff Brod's Motion to Appoint Interim Lead Class Counsel;
17 and (2) Cross-Motion to Appoint Interim Lead Class Counsel (claiming Plaintiff Brod "lacks the
18 ability to adequately prosecute the *Brod* and *Ross* Actions") (Dkt. 46 at 8:1-9). By attacking its
19 former client's adequacy to serve as a class representative, the Paradis firm essentially signaled its
20 intent to ignore the existing duty of loyalty it owes to former client Brod to avoid the appearance
21 of impropriety.

22 This course of conduct simply underscores the disabling nature of the Paradis firm's
23 conflict. Its track record in these actions demonstrates that the Paradis firm cannot fairly and
24 adequately represent all of the parties on its side. Indeed, the Paradis firm's conduct thus far
25 shows it is unprepared to take responsibility as class counsel to a member of the proposed Class,
26 Plaintiff Brod, and it has failed to avoid the appearance of divided loyalties of counsel. For these
27 reasons, the Paradis firm is not qualified to serve as interim class counsel.

1 **D. Brod's Proposed Interim Class Counsel Will Adequately Represent the Proposed**
2 **Class**

3 The Paradis firm contends that Brod's Proposed Counsel cannot adequately represent the
4 proposed Class because they have not hired experts to test the Sue Bee Honey, the three-firm
5 leadership structure is "unwieldy" and "unnecessary," Brod's proposed class period is shorter
6 than Ross' proposed class period, and they filed an amended complaint consistent with the
7 Court's prior order giving Brod leave to amend. *Ross* Brief at 6:10-11; 8:6-23; 14:3-22 (*Ross*
8 Dkt. 51-1).

9 **1. The Retention of Experts Is Unnecessary At This Time**

10 Sioux readily admits that the Sue Bee Honey does not contain pollen,¹⁴ and accordingly,
11 while the retention of an expert may be appropriate sometime in the future, at this pleading stage
12 the retention of an expert is not immediately required.

13 **2. A Three-Firm Leadership Structure Is Warranted Under the Circumstances**

14 The Paradis firm criticizes Brod's proposed three-firm leadership structure, characterizing
15 it as "unwieldy" and "unnecessary." However, in *In Re: Ticketmaster Sales Practices Litig.*, Civ.
16 No. 09-0912 (JCx), a case the firm proffers as an example of its "highest level of skill,
17 competence and professionalism," the Court appointed four firms as interim co-lead counsel and
18 an additional four firms as members of an Executive Committee. In that case, the Kiesel firm
19 served as interim liaison counsel and the Paradis firm with two other firms, served as interim co-
20 lead counsel. *See Ross* Brief, 10:13-18 and Exhibit B to Declaration of Gina M. Tufaro in
21 Support of Plaintiff Ross's Motion to Consolidate, Etc. (Dkt. 51-2) (Declaration of Hon. Dickran
22 Tevrizian (Ret.) at ¶5).

23 While the Paradis firm minimizes the complexity of these cases, Brod's Proposed Counsel
24 views these cases more broadly. Brod's Proposed Counsel recognize that while the numerous
25 honey cases filed throughout the United States do not warrant transfer within the structure of an

26 ¹⁴ *See, e.g.*, Dkt. 55, ¶22 (Sioux Honey website: "Sue Bee Honey is filtered to remove all
27 pollen to lessen its chances of granulation"); Order Granting Defendants' Motion to Dismiss at
28 5:4-6 ("That the pollen has been filtered or otherwise removed from the product does not seem to
be contested by the Defendant.") (Dkt. 52); Dkt. 56-1 at 6:4-7 (U.S. Grade A honey legend
confirms that the honey has been filtered and contains only trace elements of pollen).

1 MDL, they believe that the cases could benefit from informal cooperation among counsel
2 nationwide in order to minimize the possibility of duplicative discovery, and/or inconsistent
3 pretrial rulings. *See, e.g., In re Eli Lilly & Co. (Cephalexin Monohydrate) Patent Litig.*, 446 F.
4 Supp. 242, 244 (J.P.M.L. 1978) (“[N]otices for a particular deposition could be filed in all
5 actions, thereby making the deposition applicable in each action; the parties could seek to agree
6 upon a stipulation that any discovery relevant to more than one action may be used in all those
7 actions; and any party could seek orders from the three courts directing the parties to coordinate
8 their pretrial efforts.”). A three firm leadership structure is not unusual. Indeed, courts have
9 frequently appointed more than one firm to act as interim-lead and/or lead counsel.¹⁵

10 **3. Brod’s Proposed Class Period Does Not Disqualify His Counsel From Serving**
11 **as Interim Lead Class Counsel**

12 The class period alleged in Brod’s SAC was alleged in good faith based upon the timing
13 of the enactment of the California statute at issue. Based upon its continuing investigation into
14 the applicable facts and law, and anticipated discovery, Brod’s Proposed Counsel will determine
15 the most appropriate class period at the time Brod moves for class certification. Indeed the
16 Paradis Firm cites no authority – perhaps because there is none – that counsel who pleads the
17 longest conceivable class period should be appointed interim class counsel under Rule 23(g).

18 **4. Brod’s Proposed Counsel Will Adequately Represent the Class**

19 That Brod’s counsel have adamantly advanced a legal theory in good faith, one which
20 they determined to be the best approach based upon their comprehensive analysis, demonstrates
21 their commitment to act in the best interests of the Class. Lax Decl., ¶12. While the Court issued
22 an adverse ruling on Sioux’s original motion to dismiss, it also granted the motion without
23 prejudice to file an amended complaint. Dkt. 52 at 15. After Brod’s counsel thoroughly

24 ¹⁵ *See, e.g., Walker v. Discover Fin. Servs.*, 10-CV-6994, 2011 WL 2160889 (N.D. Ill.
25 May 26, 2011) (citing *e.g., Waudby v. Verizon Wireless Servs., LLC*, 248 F.R.D. 173, 177 (D.N.J.
26 2008) (appointing four firms as interim class counsel)); *In re Air Cargo Shipping Servs. Antitrust*
27 *Litig.*, 240 F.R.D. 56, 58-59 (E.D.N.Y. 2006) (appointing four firms as co-lead counsel);
28 *Nowak v. Ford Motor Co.*, 240 F.R.D. 355, 356 (E.D. Mich. 2006); *In re Pressure Sensitive*
Labelstock Antitrust Litig., No. 3:03-MLD-1566, 2007 WL 4150666, at **22-23 (M.D. Pa.
Nov. 19, 2007) (appointing four law firms as co-lead class counsel after previously appointing the
same four firms as co-lead interim class counsel).

1 evaluated that decision, and determined how best to proceed to protect the interests of the Class in
2 light of the Court's expressed concerns, on October 11, 2012, Brod's counsel filed the SAC. Dkt.
3 55. Sioux's motion to dismiss the SAC is scheduled to be heard on December 11, 2012. That the
4 Court did not agree with Brod's counsel's initial theory of the case should not disqualify it from
5 serving as interim class counsel.

6 Finally, the Paradis firm's inference that its legal theories, which it suggests have existed
7 since the firm's disassociation of counsel from Brod in April, 2012 (Dkt. 5), are belied by the
8 record. *Ross* Brief, 6:24-9:5. Indeed, with the benefit of hindsight and the opportunity to learn
9 how two courts have viewed the claims in these honey cases, the Paradis firm with its California
10 co-counsel have amended the *Ross* initial complaint (*Ross* Dkt. 1) (nearly identical to the *Brod*
11 complaint),¹⁶ once on July 2, 2012 (*Ross* Dkt. 13), a second time on July 16, 2012 (*Ross* Dkt. 20)
12 and then sought to amend a third time (*Ross* Dkt. 35) "to address certain issues raised by:
13 (i) Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint; and (ii) the Court
14 during the August 10, 2012 hearing on Defendant's Motion to Dismiss the *Brod* Action." *Ross*
15 Dkt. 35 at 5:19-22; *see also id.* 6:3-7:6 (Plaintiff *Ross*'s proposed Third Amended Complaint also
16 addresses certain issues raised by Judge Brick in another action filed in Alameda County which
17 "involve allegations similar to those in *Ross*").

18 IV. CONCLUSION

19 Laurence D. King of Kaplan Fox & Kilsheimer LLP, Robert I. Lax of Lax LLP and Jon
20 Herskowitz of Baron & Herskowitz have demonstrated that they are best equipped to serve as
21 interim co-lead class counsel in this litigation-they understand the relevant factual and legal issues
22 presented in these cases, and have the resources and experience to see them through to a
23 successful and efficient resolution. Each of the factors under Rule 23(g)(1)(A) and the other
24

25 ¹⁶ Although the Paradis firm claims to be in sharp disagreement with the merits of Plaintiff
26 Brod's claims, that firm in fact authorized the filing of the original state court complaint on behalf
27 of Mr. Brod, which does not differ materially from the current First Amended Complaint, and
28 which contains the same claims he now characterizes as inadequate. Likewise, the Paradis firm
authorized the filing of the initial complaint on behalf of its former client, Sheri Bowers, which
contains similar claims and phraseology which the Paradis firm now claims have no merit. *Lax*
Decl., ¶13.

1 pertinent matters of Rule 23(g)(1)(B) militate in favor of Brod's Proposed Counsel's
2 appointment.

3 For the foregoing reasons, Plaintiff Brod, individually and on behalf of all others similarly
4 situated, respectfully requests that the Court appoint Brod's Proposed Counsel as interim lead
5 class counsel on behalf of all plaintiffs and the putative Class.

6
7 DATED: November 6, 2012

Respectfully submitted,

8 KAPLAN FOX & KILSHEIMER LLP

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