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14 individually and on behalf of all others similarly
15 situated

16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 SORAYA ROSS, individually and on behalf
19 of all others similarly situated,

20 Plaintiff,

21 v.

22 SIOUX HONEY ASSOCIATION,
23 COOPERATIVE, an Iowa Entity,

24 Defendant.

Case No. CV 12-1645 EMC

CLASS ACTION

**PLAINTIFF ROSS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION APPOINT
INTERIM LEAD CLASS COUNSEL AND
TO CONSOLIDATE**

Complaint Filed: April 2, 2012

25 GREGORY BROD, individually and on behalf
26 of all others similarly situated,

27 Plaintiff,

28 v.

SIOUX HONEY ASSOCIATION,
COOPERATIVE, an Iowa Entity,

Defendant.

Case No. CV 12-1322 EMC

Date: November 30, 2012
Time: 1:30 p.m.
Courtroom: 5
Judge: Hon. Edward M. Chen

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1 **I. INTRODUCTION**

2 Plaintiff Soraya Ross (“Plaintiff Ross”) submits this memorandum in support of Plaintiff
3 Ross’ Motion to Appoint Horwitz, Horwitz & Paradis, Attorneys At Law (“HHP”) as Interim Lead
4 Class Counsel (“Plaintiff’s Motion”) on behalf of a proposed class of all persons who purchased
5 Sue Bee Clover Honey (“Sue Bee Honey”) in California at any time from April 2, 2008, through
6 the present (the “Class” and the “Class Period”).

7 Plaintiff Ross submits that her counsel, HHP is best suited to serve as Interim Lead Class
8 Counsel because HHP is the only firm that has:

- 9 • performed substantial work in identifying and investigating potential claims in the action,
10 including hiring an expert to analyze the Sue Bee Honey sold in the State of California;
11 • proactively amended the pleadings to advance a legally viable theory in accordance with
12 recent, highly relevant decisions; and
13 • proposed an efficient leadership structure that accurately reflects the complexity of this
14 matter.

15 Furthermore, as demonstrated herein, HHP will continue to commit resources to representing
16 the Class and has tremendous knowledge of and experience in complex class action litigation.

17 In contrast to the efforts undertaken by HHP, Plaintiff Brod’s Counsel¹ has:

- 18 • failed to conduct the tests necessary to confirm that the Sue Bee Honey lacks the presence
19 of any pollen;
20 • failed to advance a legally viable theory, resulting in the dismissal of Plaintiff Brod’s
21 action;
22 • failed to proactively amend its pleadings to reflect the accurate state of the law; and
23 • failed to propose an efficient leadership structure and, instead, proposes an unwieldy
24 structure consisting of three firms.

25 Moreover, and as an underscore to its inadequacy, Plaintiff Brod’s Counsel continues to cast
26

27 ¹ Robert Lax of LAX LLP (“Lax”), Laurence D. King and Linda M. Fong of Kaplan Fox &
28 Kilsheimer LLP (“KFK”), and Jon Herskowitz of Baron & Herskowitz (“B&H”) are collectively
referred to herein as “Plaintiff Brod’s Counsel.”

1 meritless dispersions, accusing HHP of violating an inapplicable ethical rule.

2 Accordingly, Plaintiff Ross respectfully requests that this Court appoint HHP as Interim Class
3 Counsel.

4 Finally, as demonstrated herein, the *Ross* and *Brod* actions should be consolidated under FED.
5 R. Civ. P. 42(a) because the actions involve common questions of facts and law.

6 **II. STATEMENT OF FACTS**

7 Throughout the Class Period, Sioux Honey Association, Cooperative (“Defendant”)
8 misrepresented its Sue Bee Honey as simply “honey” when, in fact, the Sue Bee Honey does not
9 contain any pollen, and, therefore, cannot be labeled simply as “honey.” Third Amended Class
10 Action Complaint (“TAC”) ¶¶ 7, 16, 26-29. Both federal and California law require that the
11 material fact that the Sue Bee Honey does not contain any pollen be disclosed on the label of the
12 Sue Bee Honey. *Id.* ¶ 4.

13 21 U.S.C. § 343(i)(1) of the federal Food, Drug, & Cosmetic Act’s (the “FDCA”) provides
14 that food is misbranded unless it is labeled by its “common or usual name.” “Common or usual
15 name” is defined in 21 C.F.R. § 102.5, the implementing regulation of 21 U.S.C. § 343(i)(1).
16 Subsection 102.5(c) states,

17 The common or usual name of a food shall include a statement of the . . . absence
18 of any characterizing . . . component(s) . . . when the . . . absence of such . . .
19 component(s) in the food has a material bearing on price or consumer acceptance . .
..

20 (1) The . . . absence of a characterizing . . . component shall be declared by the
21 words . . . “containing (or contains) no -----” or “no -----” or “does not
22 contain -----”, with the blank being filled in with the common or usual name of
the . . . component.

* * *

23 (3) The statement(s) required under paragraph (c)(1) . . . shall appear following or
24 directly below the part of the common or usual name of the food . . . in easily
25 legible boldface print or type in distinct contrast to other printed or graphic
matter

26 Similarly, California’s standard of identity for honey provides that “Honey shall not have
27 begun to ferment or effervesce and *no pollen or constituent particular to honey may be removed*
28 except where unavoidable in the removal of foreign inorganic or organic matter.” TAC ¶ 48

1 (citing CAL. FOOD & AGRIC. CODE § 29413(e) (emphasis added)). Furthermore, mislabeling honey
2 is unlawful and selling any product that “is marked, labeled, or designated as honey, . . . which
3 does not conform to the provisions of this chapter” is also unlawful. TAC ¶ 49 (citing CAL. FOOD
4 & AGRIC. CODE § 29673); TAC ¶ 50 (citing CAL. FOOD & AGRIC. CODE § 29671).

5 The central issue involved in Plaintiff Ross’ action, and in Plaintiff Brod’s, as well, is
6 whether the Sue Bee Honey contains any pollen. In recognition of this fact, in connection with the
7 prosecution of Plaintiff Ross’ and the Class’ claims, HHP’s experts conducted tests on various
8 samples of the Sue Bee Honey, including that purchased by Plaintiff Ross, to demonstrate and
9 confirm that all of the Sue Bee Honey sold by Defendant is completely devoid of pollen. TAC ¶ 7.
10 Such tests did, indeed, confirm this very salient fact.

11 In light of the fact that the Sue Bee Honey is completely devoid of pollen, Defendant was
12 required to label the pollenless Sue Bee Honey not simply as “honey” but rather as “Honey –
13 Contains No Pollen,” “Honey – No Pollen,” or “Honey Does Not Contain Pollen.” TAC ¶¶ 17-43.
14 By failing to disclose the absence of pollen, Defendant violated the FDCA’s requirement that food
15 be labeled by its common or usual name, the implementing regulation of the FDCA’s common or
16 usual name requirement, and California’s standard of identity for Honey.

17 **III. PROCEDURAL BACKGROUND**

18 Plaintiff Brod initiated his action on January 19, 2012 in the California Superior Court of
19 Marin County, which was removed to this Court on March 12, 2012. *Brod* action, dkt. no 1.
20 Initially, HHP, Kiesel, Boucher, & Larson, and Lax LLP represented Plaintiff Brod, but this
21 association of counsel dissolved shortly after the filing of the initial complaint as a result of an
22 impasse over litigation strategy. Declaration of Gina M. Tufaro in Support of Plaintiff Ross’
23 Motion to Appoint Interim Lead Class Counsel (“Tufaro Decl.”), ¶ 5. HHP believed that Lax’s
24 legal theory was untenable and unsupported by law and that to pursue such a claim was not in the
25 best interests of the Class. *Id.*; see also Plaintiff Brod’s First Amended Class Action Complaint
26 (“FAC”), dkt. no. 19, ¶¶ 16-25, 41, 49, 68); *Ross* action, dkt. no. 35, Ex. B, at pp. 4-8, Trans. of
27 Hr’g on Mot. to Dismiss FAC, Aug. 10, 2012; *Brod* action, dkt. no. 28, Opp. to Def.’s Mot. to
28 Dismiss, at p. 4).

1 HHP believed that the correct interpretation of California law was that pollenless honey
2 could be sold in California so long as it was accurately labeled under the California labeling
3 requirements. Tufaro Decl. ¶ 5. Because of the divergence of opinion, HHP agreed to be
4 substituted as counsel for Plaintiff Brod by KFK. *Id.*

5 On April 2, 2012, Plaintiff Ross filed her initial complaint, dkt. no. 1, alleging that, by
6 failing to disclose the absence of pollen, a material component of “honey,” Defendant violated
7 California state law.

8 On April 23, 2012, Plaintiff Brod filed his First Amended Complaint, which continued to
9 characterize this case not as a labeling matter, but as one concerning California’s substantive ban
10 on the sale of products such as filtered honey. FAC ¶¶ 16-25, 41, 49, 68.

11 On September 11, 2012, this Court dispensed with Plaintiff Brod’s Counsel’s untenable
12 legal theory by finding that the FDCA preempted Plaintiff Brod’s claims. *Brod v. Sioux Honey*
13 *Assoc., Coop.*, No. CV 12-1322 EMC, 2012 U.S. Dist. LEXIS 129391, at *23-*25 (N.D. Cal. Sept.
14 11, 2012). Significantly, this Court noted that had Plaintiff Brod pled a non-disclosure claim, as
15 Plaintiff Ross has done, such claims would not have been preempted. *Id.* at *25.

16 Also, on September 11, 2012, Plaintiff Ross filed the TAC, alleging that, by failing to
17 disclose the absence of pollen, a material component of “honey,” Defendant violated both
18 California and federal law. *Ross* action, dkt. no. 42. Such claims reflect the underpinnings of this
19 Court’s ruling on the motion to dismiss in *Brod*. Plaintiff Ross further alleged that the common or
20 usual name of the Sue Bee Honey is not simply “honey” but it is “Honey – No Pollen.”

21 On October 11, 2012, Plaintiff Brod filed his Second Amended Class Action Complaint
22 (“SAC”), which advances a legal theory that is strikingly similar to the legal theory that Plaintiff
23 Ross has vigorously advanced. Significantly, Plaintiff Brod’s Counsel double-backed on its theory
24 of their action only *after* this Court and Plaintiff Ross had pointed out that Plaintiff Brod’s
25 Counsel’s quality standards theory was not legally viable.

26 **IV. ARGUMENT**

27 **A. The FED. R. CIV. P. 23(g) Standards for Interim Lead Counsel**

28 FED. R. CIV. P. 23(a)(4) requires that a class be certified only if “representative parties will

1 fairly and adequately protect the interests of the class.” Additionally, FED. R. CIV. P. 23(g)(3)
2 provides that a court “may designate interim counsel to act on behalf of the putative class before
3 determining whether to certify the action as a class action.” *Levitte v. Google, Inc.*, No. C 08-
4 03369, 2009 U.S. Dist. LEXIS 18198, at *5 (N.D. Cal. Feb. 25, 2009) (quoting FED. R. CIV. P.
5 23(g)(3)); *see also* MANUAL FOR COMPLEX LITIG. (FOURTH) §§ 10.22, 10.221. “Although Rule
6 23(g)(3) does not provide any guidance for selecting interim class counsel, a court may consider
7 the factors enumerated in Rule 23(g)(1).” *Id.*; *see also Four in One Co. v. SK Foods, L.P.*, No.
8 2:08-cv-03017-MCE-EFB, 2009 U.S. Dist. LEXIS 28657, at *7-*8 (E.D. Cal. Mar. 19, 2009)
9 (same); *In re Air Cargo Shipping Services Antitrust Litigation*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006)
10 (same).

11 In appointing interim lead counsel, the Court must consider the following factors: (i) the
12 work counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s
13 experience in handling class actions, other complex litigation, and the types of claims asserted in
14 the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will
15 commit to representing the class. *E.g., Levitte*, 2009 U.S. Dist. LEXIS 18198 at *5 (citing FED. R.
16 CIV. P. 23(g)(1)(A)(i)-(iv)). Finally, the court may consider any other matter pertinent to counsel’s
17 ability to fairly and adequately represent the interests of the class. FED. R. CIV. P. 23(g)(1)(B).

18 **B. HHP Is Best Qualified to Serve as Interim Lead Class Counsel Because**
19 **HHP Has Extensively Investigated the Facts Underlying Plaintiff Ross’**
20 **and the Class’ Claims, Identified the Correct Legal Claims, and Seeks**
21 **to Represent the Entire Class**

22 **1. HHP Is the Only Firm to Hire Experts to Test the Sue Bee**
23 **Honey During HHP’s Extensive Factual Investigation of**
24 **Plaintiff Ross’ Claims**

25 Several months before the filing of the *Brod* action, HHP investigated the sale of
26 mislabeled and misbranded pollenless honey, researched several states’ laws, regulations, and
27 legislative histories regarding the labeling of honey and identified claims arising out of such sales
28 of mislabeled and misbranded pollenless honey. Tufaro Decl. ¶ 3. HHP consulted many
resources regarding beekeeping, and the harvesting, production, and sale of honey. *Id.*

While Plaintiff Brod’s Counsel has claimed that it is “committed to devoting significant

1 resources to the successful prosecution of these cases,”² Plaintiff Brod’s Counsel’s inactions speak
2 volumes. Conversely, HHP is the only firm that has taken significant steps to prosecute this action
3 by hiring experts to test the Sue Bee Honey to demonstrate that all of the Sue Bee Honey is
4 completely devoid of pollen. This allegation lies at the very heart of this action, and HHP is the
5 only firm that took the actions necessary to obtain the evidence to prove Plaintiff Ross’ and Class
6 members’ claims. Specifically, HHP hired experts to test the Sue Bee Honey contained in
7 randomly selected bottles of Sue Bee Honey purchased in California, including the Sue Bee Honey
8 purchased by Plaintiff Ross, for the presence of pollen. *Id.* ¶ 4. The results of these tests
9 conclusively demonstrate that *none* of the tested samples contains *any* pollen. *Id.*

10 In stark contrast to HHP’s vigorous prosecution of Plaintiff Ross’ and the Class’ claims,
11 Plaintiff Brod’s Counsel still has not hired experts to test the Sue Bee Honey. The need to conduct
12 such testing is crucial to the prosecution of this action and, by not having bothered to obtain this
13 critical evidence, irrespective of any admission by Defendant, Plaintiff Brod’s Counsel has
14 exposed the claims of Plaintiff Brod and putative Class members to dismissal for lack of standing
15 or failure to satisfy FED. R. CIV. P. 8(a)’s pleading standards. *See Guerrero v. Target Corp.*, No.
16 12-21115-CIV-COHN/SELTZER, 2012 U.S. Dist. LEXIS 125055, at *8 (S.D. Fla. Sept. 4, 2012)
17 (granting the plaintiff leave to plead how she knew that the honey sold by the defendant contained
18 no pollen).

19 By having the Sue Bee Honey tested, HHP has indisputably confirmed that Defendant has
20 removed all of the pollen from the Sue Bee Honey and that Plaintiff, and members of the putative
21 Class, have standing sufficient to seek recourse. Therefore, HHP is the only firm that has taken the
22 steps necessary to prosecute the Class’ claims and HHP is, therefore, best suited to serve as Interim
23 Lead Class Counsel.

24 **2. HHP Has Proactively Filed an Amended Complaint in**
25 **Accordance with Prior Court Rulings Involving Claims**
26 **Similar to Those Asserted in this Action**

27 Plaintiff Ross amended her pleading in order to address issues raised by the Court during

28 ² Plaintiff Brod’s Reply in Support of Motion to Appoint Interim Lead Class Counsel, *Brod*
action, dkt. no. 47 (“Brod’s Reply Br.”) at 6.

1 the August 10, 2012 hearing on Defendant’s Motion to Dismiss Plaintiff Brod’s FAC and to
2 address issues raised by a recent decision in *Strobridge v. Safeway, Inc.*, No. RGJ2611078 (Cal.
3 Super. Ct., Alameda County, Aug. 6, 2012), a case based on facts similar to those alleged here.³
4 Dkt. no. 35, pp. 74-79.

5 Both this Court and the *Strobridge* court considered whether California state honey laws
6 conflict with the “common or usual name” requirement of 21 U.S.C. § 343(i)(1) and, therefore,
7 raise preemption issues. The TAC pleads that the *mislabeling* of the Sue Bee Honey as simply
8 “honey” does indeed violate both federal and state law and that Plaintiff Ross’ claim is, therefore,
9 not preempted. *Id.* at ¶¶ 17-43. This approach takes into consideration comments made during the
10 August 10th hearing and comments made in *Strobridge*.

11 The soundness of the approach taken by Plaintiff Ross in the TAC was recently recognized
12 by this Court in its opinion and order dismissing the *Brod* Action on preemption grounds based on
13 both the unique manner in which Plaintiff Brod’s Counsel interpreted the California Food &
14 Agriculture Code and Plaintiff Brod’s Counsel’s failure to dispute Defendant’s argument that the
15 “common or usual name” of the Sue Bee Honey is “honey.” *Brod*, 2012 U.S. Dist. LEXIS
16 129391, at *23-*25. This Court stated, “**This Court notes that its finding of preemption does**
17 **not imply that California is powerless to act in this arena. For instance, if California required**
18 **disclosure on its labels that the honey was e.g., ‘filtered’ or ‘pollen free,’ that would appear**
19 **not to conflict expressly with § 343(i).”** *Id.* at 13 (emphasis added). Plaintiff Ross has alleged
20 just this – the Sue Bee Honey is *mislabeled* because the label does not disclose the material fact
21 that the Sue Bee Honey is pollen-free. TAC at ¶¶ 47-52.

22 Because Plaintiff Brod’s Counsel argued that Defendant is prohibited from selling the Sue
23 Bee Honey altogether, regardless of appropriate label disclosures, this Court correctly found that
24 federal law preempted Plaintiff Brod’s claims and dismissed the *Brod* action.

25 That Plaintiff Ross considered the well-reasoned comments of this and the *Strobridge*

26
27 ³ The plaintiff in *Strobridge*, similar to Plaintiff Ross, here, alleges that “honey” sold by the
28 defendant was mislabeled because the defendant did not disclose on the label of the “honey” that
the product was devoid of pollen.

1 Courts in amending her pleading demonstrates that Plaintiff Ross and her counsel are responsible
2 advocates who seek to maximize the potential of having the Class' claims upheld.

3 Furthermore, several of Plaintiff Ross' claims are predicated on violations of federal law,
4 which, unlike the state-only claims raised by Plaintiff Brod, are not subject to preemption
5 arguments. By advancing such federal claims, HHP has acted in the best interest of the Class.

6 **3. Plaintiff Brod's Counsel Now Has Conceded that the Legal**
7 **Theory Advanced by HHP Is Proper and Legally Cognizable**

8 Only *after* the Court explained that the appropriate claim in this action is one premised on
9 Defendant's non-disclosure in dismissing Plaintiff Brod's complaint, and only *after* Plaintiff Ross
10 submitted an amended complaint that reflected this Court's reasoning, did Plaintiff Brod's Counsel
11 finally concede that the quality standards theory it devised was fatally flawed and simply wrong.
12 Significantly, the theory advanced in Plaintiff Brod's SAC now mirrors the theory advanced in
13 Plaintiff Ross' TAC. *Compare* SAC ¶ 50 (“[M]embers of the California public are likely to be
14 deceived by Defendant's marketing of the Sue Bee Honey because Sue Bee Honey omits to
15 disclose that it has had its natural pollen unnecessarily removed through notation that it is filtered
16 or pollen-free.”) *with* TAC ¶ 75 (“The Sue Bee Honey label is deceptive because it does not state
17 ‘Honey – Contains No Pollen,’ ‘Honey – No Pollen,’ or ‘Honey Does Not Contain Pollen,’ and
18 does not otherwise disclose the absence of pollen in the Sue Bee Honey.”); and compare SAC ¶ 5
19 (“[H]oney products marketed in California that have had their natural pollen unnecessarily
20 removed must be sold with a notation which discloses this fact.”) *with* TAC ¶ 5 (“The failure to
21 disclose that the Sue Bee Honey does not contain pollen violates: (i) the federal Food, Drug, &
22 Cosmetic Act (“FDCA”), (ii) California's Sherman Law, and (iii) California's Food & Agriculture
23 Code.”).

24 By amending Plaintiff Brod's complaint to advance the very same theory advanced in
25 Plaintiff Ross' complaint, Plaintiff Brod's Counsel has recognized two very critical facts: (1) the
26 theory premised upon Plaintiff Brod's Counsel's original interpretation of the California Honey
27 Standard and the FDCA was wrong; and (2) the theory advanced by Plaintiff Ross is correct and
28 legally tenable. The fact that Plaintiff Brod's Counsel suddenly adopted the mislabeling theory

1 argued by HHP further demonstrates that Plaintiff Brod’s Counsel is not adequate to represent the
2 class. *In re iPhone 4S Consumer Litig.*, No. C 12-1127 CW, dkt. no. 58 at 2-3 (N.D. Cal. Jul. 5,
3 2012) (holding that counsel who copied much of the complaint drafted by another plaintiff’s
4 counsel did not deserve appointment as lead counsel) (quoting 5 MOORE’S FED. PRAC. §
5 23.120[3][a]).

6 **4. HHP Seeks to Represent the Entire Class**

7 Plaintiff Ross and HHP seek to represent the proposed Class of all persons who purchased
8 Sue Bee Honey in California at any time from April 2, 2008, through the present. TAC ¶¶ 1, 60.
9 Plaintiff Ross alleges that Defendant has violated the California honey standard since its enactment
10 and that Defendant has violated the federal common or usual name regulation throughout the
11 UCL’s four-year statute of limitations period. *Id.* ¶¶ 2-5, 34-52. Plaintiff Ross and HHP,
12 therefore, seek to represent the Class for the entire statute of limitations period.

13 Plaintiff Brod and his counsel, on the other hand, seek to represent “a Class of all persons
14 who purchased [Sue Bee Honey] from any store located in California at any time from January 1,
15 2010 through the present.” SAC ¶ 2. However, this proposed class is over one and a half years
16 shorter than Plaintiff Ross’ Class Period and excludes Class members that made purchases within
17 that time frame, class members with viable claims.

18 Because Plaintiff Brod’s Counsel has chosen to exclude those with viable legal claims by
19 defining the proposed class as those who purchased Sue Bee Honey from January 1, 2010 through
20 the present only, Plaintiff Brod’s Counsel is not best suited to serve as Interim Lead Class Counsel.

21 **C. Courts Have Recognized that HHP Is Highly Experienced in 22 Litigating Consumer Class Actions and Is Knowledgeable of the 23 Applicable Law**

24 Courts applying Rule 23(g) must analyze the proposed class counsel’s experience and
25 knowledge of the applicable law. *See, e.g., Schulken v. Wash. Mut. Bank*, No.: 09-CV-02708-
26 LHK, 2012 U.S. Dist. LEXIS 2005, at *39 (N.D. Cal. Jan. 5, 2012) (appointing class counsel
27 because, among other things, “the firm has demonstrated experience in handling complex
28 consumer class actions in the applicable area of law.”); *In re Terazosin Hydrochloride Antitrust
Litig.*, 220 F.R.D. 672, 702 (S.D. Fla. 2004) (“The consideration that the Court finds to be the most

1 persuasive, however, relates to [proposed class counsel's] experience in, and knowledge of, the
2 applicable law in this field.”); *In re Cree, Inc. Sec. Litig.*, 219 F.R.D. 369, 373 (M.D.N.C. 2003)
3 (appointing class counsel in securities case where firm had “extensive experience in representing
4 institutional investors in securities actions throughout the country and . . . long been heavily
5 engaged in securities and corporate litigation”).

6 HHP has the experience necessary to litigate zealously on behalf of the Class. As set forth
7 in the Firm’s resume (*See* Tufaro Decl. Ex. A), HHP’s attorneys have extensive experience
8 prosecuting consumer class actions. For example, HHP was appointed lead or co-lead counsel in
9 the following actions: *In re Toyota Motor Corp. Hybrid Brake Mktg, Sales Prac., & Prod. Liab.*
10 *Litig.* MDL No. SAML 10-2172-CJC(RNBx) (C.D. Cal.); *In re Saturn Timing Chain Prods. Liab.*
11 *Litig.*, MDL Docket No. 1920 (D. Neb.); *In re American Honda Motor Co. Oil Filter Prods. Liab.*
12 *Litig.*, 06-cv-1737 (C.D. Cal.). Tufaro Decl. Ex. A.

13 The efforts undertaken by the attorneys at HHP on behalf of the class in *In re Ticketmaster*
14 *Sales Prac. Litig.*, No. 09-0912 (JCx), were recognized by retired United States District Judge
15 Dickran Tevrizian of the Central District of California, who stated that counsel “consistently
16 demonstrated the highest level of skill, competence and professionalism in handling this securities
17 fraud litigation, and zealously represented the interests of Class members at all times.” *See* Tufaro
18 Decl. Ex. B at 8.

19 Accordingly, HHP’s experience will ensure that the claims asserted on behalf of the Class
20 will be zealously litigated.

21 **D. Courts Have Recognized that HHP Has the Resources Necessary to**
22 **Represent the Class**

23 Rule 23(g) also mandates that the Court consider the resources the proposed class counsel
24 will commit to the lawsuit’s prosecution. *Schulken*, 2012 U.S. Dist. LEXIS 2005 at *39
25 (appointing class counsel because, among other things, “Plaintiffs’ counsel has the necessary
26 resources to commit to representing the class.”); *LeBeau v. U.S.*, 222 F.R.D. 613, 618 (D.S.D.
27 2004) (“In considering the resources that counsel will commit to representing the class, the Court
28 may consider the staff, supplies and professional commitments of that attorney.”) (citing 5 JAMES

1 WM. MOORE, ET AL., MOORE'S FED. PRAC., § 23.25[5][b][iii] (3d ed. 2003)).

2 HHP has already expended considerable resources in investigating and identifying
3 Plaintiffs' claims and prosecuting this matter. In particular, HHP has devoted significant
4 resources to the testing of the Sue Bee Honey. Additionally, HHP is able and committed to
5 dedicating additional resources as needed to ensure the full and vigorous prosecution of this action
6 on behalf of the Class.

7 HHP is part of a national firm that was founded in 1924, with offices in both New York and
8 Chicago and over 20 attorneys and four paralegals. HHP's Class Action Litigation Group
9 comprises attorneys who have a combined total of more than 60 years of experience prosecuting
10 complex class actions, including consumer class actions such as this case. Courts across the
11 United States that have appointed HHP as Lead or Co-Lead Counsel in numerous complex class
12 actions have repeatedly recognized HHP's attorneys' vast experience and successes. Each of these
13 courts has recognized that HHP and its attorneys possess the skills, breadth of knowledge,
14 financial resources, and talent required to prosecute class actions claims successfully.

15 HHP's ability and willingness to expend the resources necessary to maximize recoveries on
16 behalf of class members was recognized by retired California Appellate Court Justice Howard
17 Wiener who commented,

18 [T]hroughout the entirety of the mediation and litigation, Lead Counsel consistently
19 demonstrated an indefatigable work ethic and extremely high level of skill,
20 competence and professionalism in handling this securities fraud litigation and
zealously represented the interests of Class members at all times . . .

21 Tufaro Decl. Ex. C.

22 HHP has already expended numerous hours investigating the facts underlying the claims
23 against Defendant, conferring with experts, researching federal and state law and legislative
24 histories, and drafting pleadings. By these actions, HHP has demonstrated its commitment to the
25 Class and its ability to devote the necessary time, effort, skill, and resources to represent the Class
26 effectively.

27 ///

28 ///

1 310. HHP has not “switched sides,” as Rule 3-310 requires. Rather, the scenario Plaintiff Brod’s
2 Counsel has presented is a class action in which the class members have differing views. *See*
3 *Broin v. Phillip Morris Cos.*, 84 So. 3d 1107, 1111-12 (Fla. Ct. App. 3d. Dist. 2012)(interpreting
4 corresponding Florida rule).

5 **2. Even If Rule 3-310 Applied, Plaintiffs Ross’ and Brod’s**
6 **Interests Have Been Aligned and Continued to Be Aligned**

7 Finally, even if Rule 3-310 did apply here, which it does not, HHP has not taken any
8 positions that are “materially adverse” to Plaintiff Brod. HHP and Plaintiff Ross viewed staying
9 both her action and Plaintiff Brod’s action as a beneficial means of conserving judicial resources
10 pending the MDL Motion. More importantly, HHP and Plaintiff Ross seek to represent a class
11 similar to that which Plaintiff Brod seeks to represent, a class in which Plaintiff Brod, himself, is a
12 member. Both HHP and Plaintiff Ross, on the one hand, and Plaintiff Brod on the other hand,
13 seek to hold Defendant accountable for its fraudulent and deceptive acts committed in furtherance
14 of the sale of the Sue Bee Honey. Accordingly, the interests of HHP, Plaintiff Ross, and Plaintiff
15 Brod are materially aligned, not “materially adverse.” Any suggestion that the interests of HHP,
16 Plaintiff Ross, and Plaintiff Brod are “materially adverse” is simply false and unsupported by any
17 rational interpretation of the facts.

18 **3. HHP Has Not Attacked Plaintiff Brod’s Ability to Serve as a**
19 **Class Representative but Rather Contends that Plaintiff**
20 **Brod’s Counsel Are Not Able to Represent the Class**

21 Plaintiff Brod repeatedly argues that HHP has taken positions adverse to Plaintiff Brod, as
22 demonstrated by the purported fact that Plaintiff Ross and HHP have attacked Plaintiff Brod’s
23 ability to represent the Class’ interests. Brod Reply at 6-7. A review of Plaintiff Ross’ Motion,
24 however, makes clear that Plaintiff Ross and HHP have not attacked Plaintiff Brod’s ability to
25 represent the Class, but rather have only attacked the ability of Plaintiff Brod’s Counsel to
26 represent the Class. *See* dkt. no. 46 at 8 (“Plaintiff Brod lacks adequate counsel . . . This point is
27”); *see also* Section III, *supra*, (“HHP believed that Lax’s legal theory was untenable and
28 unsupported by law and that to pursue such a claim was not in the best interests of the Class.”).

1 This Court’s recent dismissal of Plaintiff Brod’s legally untenable claims further highlighted that
2 Plaintiff Brod’s Counsel cannot adequately represent the interests of the Class.

3 **F. The Three-Firm Leadership Structure Proposed by Plaintiff Brod’s**
4 **Counsel Is Unnecessary and Unwieldy for a Case of this Complexity**

5 The single-firm leadership structure proposed by Plaintiff Ross accurately reflects the
6 complexity of this matter and is designed to best protect the interests of members of the Class. In
7 contrast, Plaintiff Brod’s Counsel proposes a three-firm leadership structure, which is both
8 unwieldy and unnecessary for a case of this size and complexity. *E.g., Tanne v. Autobyte, Inc.*,
9 226 F.R.D. 659, 673 (C.D. Cal. 2005) (“[T]he court concludes, a co-lead plaintiff structure is
10 unnecessary, and might harm the class by dividing responsibility for the supervision of class
11 counsel.”); *In re Crude Oil Commodity Futures Litig.*, No. 11 Civ. 3600 (WHP), 2012 U.S. Dist.
12 LEXIS 23084, at *10 (S.D.N.Y. Feb. 14, 2012) (declining to appoint more than two firms as
13 interim co-lead counsel because it could “lead to substantially increased costs and unnecessary
14 duplication of efforts”); *Deborah G. Mallow IRA SEP Inv. Plan v. McClendon*, No. CIV-12-436-
15 M, 2012 U.S. Dist. LEXIS 97476, at *16 (W.D. Okla. July 13, 2012) (finding “that the
16 appointment of three law firms as co-lead counsel is ripe for wasteful, duplicative work-product,
17 excessive billing, and internal conflicts.”); *Vincelli v. National Home Health Care Corp.*, 112 F.
18 Supp. 2d 1309, 1315 (M.D. Fla. 2000) (“The potential for duplicative services and the
19 concomitant increase in attorneys’ fees work against the approval of more than one law firm . . .”).

20 Because the leadership structure proposed by HHP will protect the interest of members of
21 the Class more efficiently than the unnecessary, unwieldy three-firm structure proposed by
22 Plaintiff Brod’s Counsel, HHP is best suited to serve as Interim Lead Class Counsel.

23 **G. The Court Should Consolidate the *Ross* and *Brod* Actions**

24 **1. Legal Standard for Consolidation under Rule 42(a)**

25 FED. R. CIV. P. 42(a) provides that “[i]f actions before the court involve a common question
26 of law or fact, the court may . . . consolidate the actions . . .” District courts have broad
27 discretion to consolidate cases pending in the same district. *Investors Research Co. v. U.S. Dist.*
28 *Court for Cent. Dist. of Cal.*, 877 F.2d 777, 777 (9th Cir. 1989). In deciding whether to

1 consolidate actions under Rule 42(a), the court must balance the savings of time and effort
2 consolidation will produce against any inconvenience, delay, or expense that it would cause.
3 *Huene v. U.S.*, 743 F.2d 703, 704 (9th Cir. 1984).

4 **2. The *Ross* and *Brod* Actions Raise Nearly Identical Factual**
5 **and Legal Issues**

6 The *Ross* and *Brod* actions should be consolidated under FED. R. CIV. P. 42(a) because the
7 actions involve nearly identical questions of facts and law such that efficiency would be enhanced
8 by their consolidation.

9 The actions raise numerous, nearly identical common factual and legal issues. Each action
10 alleges economic injuries based on the deceptive and misleading labeling of the Sue Bee Honey by
11 the same Defendant. *Ross* TAC ¶¶ 55-60; *Brod* SAC ¶¶ 23-26. Both cases raise the issues of
12 whether the Sue Bee Honey contains pollen, whether the pollen was unnecessarily removed, and
13 whether a reasonable consumer would be deceived by the labeling of the honey as simply pollen.
14 *Ross* TAC ¶¶ 62, 104; *Brod* SAC ¶¶ 23, 50. As explained above, Plaintiff *Ross* seeks to represent
15 the entire Class while Plaintiff *Brod* seeks to represent a subclass of Plaintiff *Ross*' Class. *Ross*
16 TAC ¶¶ 1, 60; *Brod* SAC ¶¶ 2, 27. In addition, by adopting the mislabeling theory advanced by
17 Plaintiff *Ross*, Plaintiff *Brod*'s claims are nearly identical to Plaintiff *Ross*' claims.

18 Because the related actions are based on the same facts and involve the same subject
19 matter, the same discovery will be relevant to both lawsuits. *Levitte v. Google, Inc.*, 2009 U.S.
20 Dist. LEXIS 18198 at *4 (consolidating class actions alleging virtually identical factual and legal
21 issues); *Hohenberg v. Ferrero U.S.A., Inc.*, No. 11-CV-205, 2011 U.S. Dist. LEXIS 38471, at *4
22 (S.D. Cal. Mar. 22, 2011) (consolidating consumer class action allege economic injuries based on
23 the deceptive and misleading labeling on Ferrero's Nutella® spread because the same discovery
24 would be relevant to both lawsuits). Therefore, consolidation is appropriate to save time and effort
25 and will not produce inconvenience, delay, or expense on the litigants or trial judge. *Id.*

26 **V. CONCLUSION**

27 For the foregoing reasons, HHP respectfully requests that: (i) this Court appoint HHP as
28 Interim Lead Class Counsel on behalf of the Class and (ii) consolidate the *Ross* and *Brod* actions.

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