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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-4524-GHK (VBKx)	Date	June 19, 2013
Title	<i>Mary Henderson v. The J.M. Smucker Company</i>		

Presiding: The Honorable	GEORGE H. KING, CHIEF U.S. DISTRICT JUDGE	
Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None	None	

Proceedings: (In Chambers) Order re: Plaintiff's Motion for Attorneys' Fees and Costs (Dkt. No. 226)

This matter is before us on Plaintiff Mary Henderson's ("Plaintiff") Motion for Attorneys' Fees and Costs ("Fee Motion"). We have reviewed the papers filed in support of and in opposition to this motion and deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows.

I. Introduction

On June 18, 2010, Plaintiff filed this consumer class action against Defendant, alleging that it violated California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumer Legal Remedies Act ("CLRA") by employing certain misleading health and wellness claims in marketing its Uncrustables and Crisco Shortening Products. The health claims are allegedly false and misleading because both products contain amounts of trans fat (from partially hydrogenated vegetable oil ("PHVO")) that make them unhealthful. Uncrustables, in particular, are also allegedly unhealthful because they contain high fructose corn syrup ("HFCS").

On October 23, 2012, we granted Defendant's Motion to Dismiss Plaintiff's individual claims. We concluded that when she reopened her bankruptcy proceedings on December 20, 2011, she conceded that her interest in this action is a pre-petition interest.¹ As a result, the bankruptcy trustee was the real party in interest, and as such, he chose to settle Plaintiff's individual claims with Defendant for

¹ Plaintiff filed for bankruptcy on April 7, 2010 and filed this action on June 18, 2010. Her bankruptcy petition was discharged on August 6, 2010. She did not identify her interest in this lawsuit in her petition. In response to Plaintiff's December 12, 2011 motion for class certification, Defendant argued that Plaintiff's claims are not typical because she is subject to the unique defense of judicial estoppel, given her failure to disclose her interest in this action in her bankruptcy petition. On December 20, 2011, Plaintiff reopened her bankruptcy case to declare her interest in this case.

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\$22,500. Thereafter, Defendant, as the owner of Plaintiff's claims, had the right to move to dismiss her claims.

Plaintiff filed the instant Fee Motion to seek \$3,270,374 in fees² and \$35,138.65 in costs under the fee-shifting provisions of California's Private Attorney General Act, CCP § 1021.5, and CLRA, Cal. Civ. Code § 1780(e). She contends that she is entitled to fees as a "successful" or "prevailing" party under the catalyst theory because this suit prompted Defendant to make the following changes to its business practices: (1) removal of the "wholesome" and "homemade goodness" marketing claims from Uncrustables; (2) removal of trans fat from Uncrustables; and (4) removal of the bar chart comparing Crisco's saturated fat content to butter.³ (Mot. 4).

The question before us is two-fold: whether Plaintiff is entitled to fees under CCP § 1021.5 or Cal. Civ. Code § 1780(e), and if so, whether the fee amount is reasonable. Because we conclude that Plaintiff is entitled to fees under § 1021.5, we do not decide whether she is also entitled to fees under Cal. Civ. Code § 1780(e). At this time, however, we cannot determine whether the requested fee amount is reasonable, given that the billing records are organized by timekeepers, rather than by tasks. As a result, we cannot determine the total hours spent on a particular task, much less decide whether the hours are reasonable in light of the complexity of the task. Accordingly, Plaintiff **SHALL** file, **within fourteen (14) days hereof**, a reorganized spreadsheet that groups entries together by tasks and shows a subtotal of attorney and paralegal/law clerk hours for each task.⁴ Defendant may file any objections to the asserted hours **within fourteen (14) days thereafter**. Plaintiff may file any reply to the objections **within seven (7) days thereafter**.

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II. Discussion

² The requested fee amount is based on a lodestar of \$1,453,499 and a multiplier of 2.25. The lodestar is based on 2,460.3 in attorney hours and 1,411.8 in paralegal/law clerk hours, or a total of 3,872.1 hours.

³ Plaintiff also argues that she is entitled to fees under Cal. Civ. Code § 1780(e) because Defendant paid \$22,500 to resolve her claims. We need not reach this issue because we find that she is entitled to fees under CCP § 1021.5.

⁴ The "tasks" shall include (1) pre-filing investigation and research; (2) complaint; (3) first amended complaint; (4) opposition to motion to dismiss; (5) discovery; (6) first motion for class certification and reply; (7) second motion for class certification and reply; and (8) any other identifiable, groupable tasks. Where appropriate, the tasks shall be broken down into sub-tasks. For instance, discovery could conceivably be broken down into written discovery, discovery motions, and witness depositions.

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A. Whether Plaintiff or Her Counsel Has Standing to Seek Fees

As a preliminary issue, Defendant argues that Plaintiff lacks standing to bring the Fee Motion because in dismissing her individual claims, we had concluded that her claims and any remedy contingent upon the claims had become part of the bankruptcy estate. (Opp'n 9-10). Thus, "Plaintiff and her counsel cannot possess any interest in seeking attorneys' fees." (*Id.* 10). This argument is unconvincing. Unlike a remedy like injunctive relief, "a claim for attorneys' fees is not part of the merits of the action to which the fees pertain"; instead, it "raises legal issues collateral to and separate from the decision on the merits." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988) (internal quotations omitted). Because of this distinction, our conclusion that an injunctive relief remedy was transferred to the bankruptcy estate did not necessarily mean that a claim for attorneys' fees was also transferred.

Instead, we must separately determine whether Plaintiff's claim for attorneys' fee is a "property" transferred into the bankruptcy estate when she filed for bankruptcy. "Generally, property belongs to the debtor for the purposes of [the Bankruptcy Code] if its transfer will deprive the bankruptcy estate of something *which could otherwise be used to satisfy the claims of creditors.*" *In re Bullion Reserve of N. Am.*, 836 F.2d 1214, 1217 (9th Cir. 1988) (emphasis added). Because Plaintiff herself was never entitled to collect an award of attorneys' fees, the fee award could not be used to satisfy the claims of the creditor. Accordingly, her right to attorneys' fees is not a "property" that was transferred into the bankruptcy estate.

Moreover, under California law, attorneys have sufficient "direct and immediate interest in a fee award under [CCP] section 1021.5" to assert the right to fees. *Lindelli v. Town of San Anselmo*, 139 Cal. App. 4th 1499, 1505-06 (Ct. App. 2006). Defendant cites *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566 (9th Cir. 2004) for the contrary position; *Churchill* relied primarily on the well-settled rule "that attorneys lack standing to seek fees under [CCP § 1021.5's] federal analogue, 42 U.S.C. § 1988." *Id.* at 579-80. On questions of state law, however, we "must follow the decision of the intermediate appellate courts of the state unless there is convincing evidence that the highest court of the state would decide differently." *Owen By and Through Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983). Here, *Lindelli* specifically disagreed with *Churchill* on an issue of California law, in an area – i.e., attorneys' fees – where California law has notably diverged from federal law in several important respects. See, e.g., *Graham v. DiamlerChrysler Corp.*, 34 Cal. 4th 553, 566 (2004) (declining to follow *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Resources*, 532 U.S. 598 (2001) and retaining the catalyst theory). Because there is no convincing evidence that the California Supreme Court would disagree with *Lindelli*, we decline to follow *Churchill*.

Defendant also argues that because Plaintiff "had no right to bring this action in the first place," she cannot seek fees, as "California courts have repeatedly refuse to award attorneys' fees to a party that lacks standing under the relevant statutory scheme." (Opp'n 11 citing *California for Population Stabilization v. Hewlett-Packard Co.*, 58 Cal. App. 4th 273, 296 (Ct. App. 1997) ("It is illogical to claim that a party is entitled to attorney's fees pursuant to a statutory scheme wherein it has no standing to

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bring an action.”), *abrogated on other grounds by Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163 (2000); *Cornelius v. L.R. Cty. Metropolitan Transportation Authority*, 49 Cal. App. 4th 1761, 1779 (Ct. App. 1996) (reversing trial court’s award of attorneys’ fees after concluding that plaintiff had no standing to bring an action to challenge the county’s affirmative action program); *Exhibitors’ Serv., Inc. v. Am. Multi-Cinema, Inc.*, 788 F.2d 574 (9th Cir. 1986) (concluding that the plaintiff was “not a proper party to bring the action, so “[i]t follows that we also vacate the award of attorneys’ fees and costs to plaintiffs”). These cases, however, are distinguishable because the plaintiffs there *never* had statutory or Article III standing to bring the actions in the first place. Here, Plaintiff did have Article III and statutory standing to bring the action, i.e., she allegedly suffered an injury-in-fact caused by the defendant, but the bankruptcy trustee stepped into her shoes as the real party in interest when she filed for bankruptcy. Unlike a plaintiff who never had statutory or Article III standing, there were several scenarios under which Plaintiff could have continued to prosecute this action, e.g., if the trustee either abandoned the claims or agreed to confer the right to proceed back to Plaintiff, *see, e.g., Jordan v. Paul Financial, LLC*, 285 F.R.D. 435, 448 (N.D. Cal. 2012), or if Plaintiff managed to buy back her claims from the trustee, *Ortiz v. Sodexho Operations, LLC*, 2011 WL 4499050, at *2-3 (S.D. Cal. Sept. 27, 2011). Given the possibility that Plaintiff could have continued to prosecute this action, Defendants’ cases are inapplicable, as they merely establish that plaintiffs who never had standing to bring an action in the first place cannot recover attorneys’ fees.

Based on the foregoing, we conclude that Plaintiff’s right to attorneys’ fees was not transferred into the bankruptcy estate, and her counsel can assert this right on their own behalf under California law.

B. Entitlement to Fees Under CCP § 1021.5

“Under Cal. Civ. P. Code § 1021.5, California’s private attorney general statute, the Court may award fees to a ‘successful party’ in any action that ‘has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.” *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1169 (C.D. Cal. 2010) (quoting CCP § 1021.5). “Whether [Plaintiff] has proved each of these criteria is a matter primarily vested in the trial court.” *Hogar v. Comty Dev. Comm’n of City of Escondido*, 157 Cal. App. 4th 1358, 1364 (Ct. App. 2007).

1. Whether Plaintiff Is a “Successful Party”

Under California law, the “critical fact” in determining whether a party is a “successful party” for the purposes of section 1021.5 “is the impact of the action, not the manner of its resolution.” *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 566 (2004). “Under this broad, pragmatic view of what constitutes a successful party within the meaning of section 1021.5, a plaintiff need not obtain a judgment in its favor to be a successful party. Rather, a plaintiff is a successful party whenever it obtains the relief sought in its lawsuit, regardless of whether that relief is obtained through a voluntary

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change in the defendant's conduct, through a settlement, or otherwise." *Hogar*, 157 Cal. App. at 1365 (internal citations and quotations omitted).

Plaintiff is a "successful party" under this pragmatic approach if "(1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense . . . and, (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit." *Tipton-Whittingham v. City of L.A.*, 34 Cal. 4th 604, 608 (2004). The Parties dispute only whether the lawsuit was a catalyst that prompted Defendant to provide the reliefs sought and whether the lawsuit had merit.⁵ (See Opp'n 14-18).

(a) Whether the Suit Was a Catalyst That Prompted Defendant to Modify Its Business Practices

To be a catalyst, the lawsuit must have been "a substantial causal factor" contributing to Defendant's conduct, though the lawsuit need not be the only cause of Defendant's conduct. *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 573 (2004); *Hogar*, 157 Cal. App. at 1365. Moreover, a lawsuit may be a sufficient catalyst for the purposes of § 1021.5 if it caused the defendant to act sooner than it otherwise would have. See *Westside Cmty. for Independent Living v. Obledo*, 33 Cal. 3d 348, 354 n.6 (Ct. App. 1983) (suggesting that had the suit "accelerate[d] the process of issuing the final regulations" from the agency's "original timetable," the plaintiff would have been able to sufficiently demonstrate the causal connection between the suit and the defendant's conduct); see also *Tazel v. City of Richmond*, 2007 WL 172379, at *12 (Cal. Ct. App. Jan. 24, 2007) ("A defendant's voluntary action induced by plaintiff's lawsuit will still support an attorney fee award on the rationale that the lawsuit spurred defendant to act or was a catalyst speeding defendant's response.").

"When, after litigation is initiated, a defendant has voluntarily provided the relief a plaintiff is seeking, the chronology of events may raise an inference that the litigation was the catalyst for the relief. The appropriate benchmarks in determining which party prevailed are (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two."⁶ *Hogar*, 157 Cal. App. at 1366 (internal citations

⁵ We also independently find that the removal of trans fat from Uncrustables is among the "primary reliefs" sought by Plaintiff in filing the suit, which primarily contends that Defendant's marketing claims are false and misleading because of the products' trans fat content.

⁶ In viewing the evidence, we also take into account the California Supreme Court's observation that "the defendant . . . knows better than anyone why it made the decision that granted the plaintiff the relief sought, and the defendant is in the best position to either concede that the plaintiff was a catalyst or to document why the plaintiff was not." *Graham*, 34 Cal. 4th at 573; see also *California for Responsible Toxics Mgmt v. Kizer*, 211 Cal. App. 3d 961, 968 (Ct. App. 1989) (noting that "[o]bviously it can be difficult to prove causation where [the] plaintiff seeks to recover on a catalyst theory," and thus, concluding that the "sensible" approach "in evaluating whether a lawsuit has stimulated

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and quotations omitted). Our “factual finding that [Plaintiff’s] lawsuit was a catalyst to [Defendant’s] changed behavior” is evaluated on whether the finding is supported by “substantial evidence.” *Godinez v. Schwarzenegger*, 132 Cal. App. 4th 73, 92 (Ct. App. 2005).

Here, Plaintiff asserts that the lawsuit prompted Defendant to make the following three changes to its business practices: (1) removal of the trans fat from Uncrustables; (2) removal of the “wholesome” and “homemade goodness” claims from Uncrustables’ packaging and website; and (3) removal of the saturated fat comparison chart from Crisco’s packaging. (Mot. 11). Defendant does not dispute that each of the three changes were implemented after the initiation of the lawsuit, but contends that it was already in the process of making these changes before the lawsuit, and therefore, there is no causal connection between the suit and the changes.

(i) Removal of Trans Fat from Uncrustables

The following chronology of events gives rise to the inference that Plaintiff’s suit catalyzed the reformulation of Uncrustables: On June 18, 2010, Plaintiff filed this action alleging, *inter alia*, that the trans fat and HFCS content of Uncrustables makes some of Uncrustables’ marketing claims false or misleading. On September 23, 2010, Plaintiff served the Complaint on Defendant. Less than a month later, on October 11, 2010, Becky Hostetler, a Senior Technologist in Defendant’s “Consumer R&D” department, emailed two people who are presumably members of Defendant’s R&D staff to ask whether there has ever been “any past discussions” about removing PHVO from Uncrustables’ bread, to which the recipients responded in the negative. (Weston Decl. Exs. 5, 6). On January 10, 2011, Hostetler emailed two other members of Defendant’s R&D staff for their “expertise” to “begin[] to explore replacement options” for PHVO in the Uncrustables bread, noting that “[i]t has been recommended from upper management that we begin” such a project. (Weston Decl. Ex. 4). On February 16, 2011, Hostetler sent a follow-up email to the “team” to set up a conference call to “kick-off the discussion for options to consider the replacement of [PHVO] to a fully hydrogenated product.” (Sordina Decl. Ex. L). Together, these documents suggest that soon after Defendant was served with the lawsuit, its R&D staff began inquiring into the background on a potential reformulation project, and about three to four months later, the project was more officially initiated upon “upper management recommendation.”

Defendant, who is in the best position to show why it reformulated Uncrustables when it did, offers little contemporaneous evidence to show that it had a plan to reformulate Uncrustables independent of Plaintiff’s lawsuit. First, Defendant offers evidence that it has long been committed to the removal of trans fat “from *all* its products” since as early as 2003. (Opp’n 15). Evidence of a general goal to reduce or eliminate trans fat, however, does not rebut Plaintiff’s assertion that her lawsuit prompted Defendant to prioritize the reformulation of Uncrustables in particular, especially when much of the evidence offered pertains to Crisco products – suggesting that reformulation projects are product-based and that Defendant was mostly focused on another product. (See Sordina Decl. Exs. A, B, E, F). To the extent Defendant set up a “Trans Fat Task Force” around 2005 with the goal of

bureaucratic action” by the government is to allow the “chronology of events” to give rise to the inference that the lawsuit and the actions taken by the government “are causally related,” and “such inference [then] shifts the burden to defendant to offer rebuttal”).

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reformulating all products to zero trans fat by June 1, 2006, (Sordina Decl. Ex. C), not only was such a goal clearly not met, but Defendant also provides no evidence that as a result of this Task Force, it set up any specific plan or timetable to remove trans fat from Uncrustables. Likewise, to the extent Defendant participated in an industry-wide “Healthy Weight Commitment” to eliminate PHVO from all of its products by December 31, 2015, (Sordina Decl. Ex. I), there is again no evidence that connects this general goal to any specific steps it took with respect to Uncrustables. Moreover, an internal email suggests that Defendant did not even ultimately commit itself to the 2015 goal because “[t]here were just too many unknowns.” (Persinger Decl. Ex. 1).

Second, Karen Milley, Defendant’s Vice President of Research and Development, asserts that the “research and development process for removing PHVO from the bread used in Uncrustables began in January 2010 as part of the industry-wide ‘Healthy Weight Commitment’” and in response to various “marketplace demands,” including consumer demand, competitor products, potential FDA regulation, and negative publicity.⁷ (Milley Decl. ¶¶ 5-9). The evidence offered in support of this post-hoc testimony, however, is vague and inconclusive. As discussed above, Defendant offers no evidence that research into the removal of PHVO from Uncrustables occurred as a result of the Healthy Weight Commitment – no internal emails, proposals, or agendas link the general goal of trans fat removal to the specific goal of removing trans fat from Uncrustables.

In support of the assertion that the reformulation occurred in response to consumer demand, Defendant offers an excerpted internal spreadsheet that documents and categorizes consumer complaints, which shows that there were two complaints in August 2010 and three complaints in October 2010 about the presence of PHVO in Uncrustables. (Milley Decl. Exs. A-D). Absent context, however, this evidence offers us little relevant information. For instance, how many total complaints did Defendant receive during this time period? Are five complaints during this period significant relative to other complaints it received? If Defendant asserts that it reformulated Uncrustables when it did in response to consumer demand or trend, what is the showing that complaints regarding PHVO had increased over the years? Without such information to place the complaints into context, we accord the spreadsheet little weight.

As for the claim that Defendant began researching into PHVO removal after discovering in January 2010 that a competing product did not list PHVO as an ingredient, no evidence is offered to show that any concrete project or plan was initiated and implemented as a result of this discovery. Instead, Defendant offers an internal email chain that demonstrates only that Defendant’s sales team notified its R&D personnel about the competing product, that someone in R&D explained why PHVO was used, and that at the end of the chain, Milley asked a R&D team member, Dave Volker, whether he wants to “get . . . involved.”⁸ (Milley Decl., Ex. E). Although the R&D member stated that he would

⁷ Thereafter, Defendant began the actual removal of PHVO from the bread in Uncrustables “in Fall 2011 and the process was finalized in September 2012.” (Milley Decl. ¶ 10).

⁸ Immediately preceding Milley’s email, Volker had posited that the biggest problem of not using PHVO might be flavor, but that such problem would be “easy to test.” (Milley Decl. Ex. E). Milley then asked Volker whether he wanted her to “get [him] involved.” (*Id.*).

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be “happy to help in any way [he] can,” (*id.*), there is no evidence that any concrete follow-up plans were initiated and implemented based on this conversation. Instead, later internal emails among the R&D team suggest that the project was not formally initiated until January/February 2011. (See Weston Decl. Ex. 4; Sordina Decl. Ex. L).

The claim that potential FDA action and negative publicity prompted the reformulation project is again supported by little evidence. The only proffered evidence is a single email from Becky Hostetler dated December 7, 2010, wherein she asked for an update on the FDA’s stance on PHVO and “how high of a priority” the reformulation project should be in light of “word that the FDA could be banning the use of [PHVO].” (Milley Decl. Ex. F). No response to this email is provided, and thus, we have no way of determining whether Defendant actually thought FDA action was likely and whether it considered the project a high priority in light of its prediction regarding FDA action. Likewise, the negative publicity assertion is supported by a December 28, 2010 email, in which an analyst from Defendant’s Corporate Communications department alerted the recipients to a December 1, 2010 article from “Times-News” that identified Uncrustables as a “Not Healthful” snack for kid’s lunches “due to fat, sodium, and partially hydrogenated oil, and high-fructose corn syrup.” (Milley Decl. Ex. G). No evidence is offered to show that Defendant took any actions in response to this single article from a paper with a relatively small circulation (around 20,000).

Finally, Defendant points to Hostetler’s February 16, 2011 email as evidence that Defendant wanted to reformulate Uncrustables to “provide a cleaner label.” (Sordina Decl. Ex. L). However, this short email, meant primarily to set up a conference call,⁹ does not preclude Plaintiff’s lawsuit as motivating Defendant’s desire to “provide a cleaner label.”

After carefully reviewing the Parties’ evidence, we conclude that this suit was at least a substantial causal factor contributing to Defendant’s removal of PHVO from Uncrustables.

**(ii) Removal of “Wholesome” and “Homemade Goodness” from
Uncrustables’ Packaging and Website**

With respect to the removal of “wholesome” and “homemade goodness” claims (“Wholesome Language”) from Uncrustables’ packaging and website, the evidence shows that Defendant had a pre-litigation plan to remove the Wholesome Language that was on track to complete when it did (around March-April 2011), independent of this suit.

Specifically, Julie Gerbick and Joseph Stanziano, members of the packaging and brand team directly involved in Uncrustables’ repackaging, testified that the Wholesome Language was removed as part of a dual-orientation redesign requested by retailers before this suit. (Sordina Decl. Ex. P (Gerbick Dep. 31:33-33:5)). They chose to remove the Wholesome Language after determining that it had “no

⁹ The email reads: “Team, Wanted to get something on the calendar to kick-off discussion for options to consider for the replacement of the partially hydrogenated oil to a fully hydrogenated product in the Uncrustable bread formulas to provide a cleaner label. Currently use liquid shortening RM 72573 (I-107). Call-in # x-xxx-xxx-xxxx Passcode: xxxxxxxx.” (Sordina Decl. Ex. L).

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traction” with consumers and therefore was not a “high priority term.” (Sordina Decl. Ex. Q (Stanziano Dep. 106:25-107:4)). Both Gerbick and Stanziano affirmatively testified that this suit had no bearing on the decision. (Gerbick Dep. 32:7-9; Stanziano Dep. 108:1-8). Gerbick further testified that at the time the Wholesome Language was removed, she was not aware of this lawsuit, and that she became aware of this lawsuit in 2011. (Gerbick Dep. 33:9-14).

The assertion that there was a prelitigation redesign plan and that it already excluded the Wholesome Language is supported by contemporaneous mock-ups created by Defendant’s outside vendor. The first, dated January 8, 2010, does not include the Wholesome Language. Another follow-up mock-up, dated September 23, 2010 (the date on which Plaintiff served her suit), continues to exclude the Wholesome Language. This suggests that Defendant independently decided to remove the Wholesome Language even before becoming aware of this suit. This timing is also consistent with the declaration of Christopher Resweber, Vice President of Marketing Communications, who stated that “[o]n or around March-April 2011, Uncrustables without the ‘wholesome’ claim hit retailers’ shelves.” (Dkt. No. 125, ¶ 18). This means that after Defendant reviewed the mock-ups around September/October 2010, it took them about six months – a reasonable timeline – to finalize the design and implement it, which presumably entailed discontinuing the old design, printing new packages, and distributing them to retailers.

Plaintiff points to an email from Dan Connor, a subordinate of Gerbick, in which Connor asked “Julie” whether they should “have ‘wholesome’ removed from the web page given our legal situation.” (Weston Decl. Ex. 2). According to Plaintiff, this email undermines Gerbick’s testimony that she did not know about the lawsuit when she participated in the decision to remove the Wholesome Language; moreover, the email proves that Defendant had modified at least one aspect of Uncrustables’ marketing in response to the lawsuit. We, however, find the email to be inconclusive. The email is undated and includes no recipient email address, which suggests that it was unsent. Thus, it could have been written in 2011, when Gerbick testified she learned about this suit and when the packaging redesign was already underway, i.e., when Defendant was already in the process of removing the Wholesome Language from all marketing materials. Moreover, the email does not undermine Defendant’s showing that months before this lawsuit was filed, it was already considering redesigns that did not include the Wholesome Language.

Plaintiff also points to Resweber’s statement that Defendant “began the process of removing ‘wholesome’ from the packaging of Uncrustables in October 2010,” (Dkt. No. 125, ¶ 18) as proof that Defendant did not begin the redesign process at all until October 2010. Given Defendant’s large corporate structure, however, we find reasonable Defendant’s explanation that the October 2010 date refers to the actual roll-out of the redesigned packages, which began *after* a nine-month process whereby Defendant considered *how* to redesign the product label. (See Resweber Decl. 111:14-112:3 (describing “a routing system that every piece of art goes through that requires sign-off by a whole host of people in a lot of different areas”). In other words, after Defendant received a request for dual-orientation design from retailers, it began to consider how to redesign the packaging by requesting mock-ups from vendors between January to September 2010, during which time the proposed new design(s) had to be reviewed and approved by various personnel within Defendant’s corporate structure. After it decided on the new

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design, it began the process of implementing or rolling out the design around October 2010, and it took about six months for products with the new design to hit the shelf.

After carefully reviewing the Parties' evidence, we conclude that Defendant had a prelitigation plan to redesign the Uncrustables packaging to remove the Wholesome Language. Accordingly, there is no causal relationship between this suit and the removal of the Wholesome Language.

(iii) Removal of Bar Chart from Crisco Shortening's Packaging

The evidence shows that Defendant had a prelitigation plan to remove the bar chart that was on track to be implemented in late 2010. Defendant's representative, Kelly Grouse, testified that the entire line of Crisco Products, including cooking oil and shortening, underwent a package redesign starting in 2008/2009, in preparation for the 100-year anniversary of the Crisco brand. (Grouse Dep. 165:17-166:4). She estimated that the redesign process for the entire Crisco line took place from "2009 into 2010," with Crisco Shortening "scheduled for quarter 4, 2010." (*Id.* 161:5-22). A presentation entitled "Crisco Package Redesign," dated January 12, 2009, details the results of a consumer survey regarding several proposed designs for each product in the Crisco line, including shortening. (Sordina Decl., Ex. M). A mock-up label from one of its vendors dated November 20, 2009 does not include the bar chart. (Sordina Decl., Ex. O). The timing of these documents support Grouse's assertion that the redesign process occurred from 2009 into 2010, and that the new design for Crisco Shortening was scheduled for implementation in the fourth quarter of 2010.

Plaintiff's only argument against Defendant's showing is that "Smucker had the materials and opportunity to revise the packaging months before suit, and thus, the fact that it "only finally did so after [the suit] *demonstrates* the lawsuit finally prompted Smucker to make the change." (Reply 18-19). This argument ignores the reality that the redesign process takes planning and time. After carefully reviewing the evidence, we conclude that Defendant has made a sufficient showing that the bar chart was removed from Crisco Shortening in 2010 as part of a prelitigation plan to redesign the packaging of Crisco products.

In sum, we conclude that Plaintiff's lawsuit was only a catalyst in prompting Defendant to remove trans fat from Uncrustables.

(b) Whether the Lawsuit Had Merit

A lawsuit has merit for the purposes of the catalyst theory if it is not "frivolous, unreasonable or groundless, in other words that its result was achieved by threat of victory, not by dint of nuisance and threat of expense." *Graham*, 34 Cal. 4th at 575 (internal citations and quotations removed). *Graham* instructs that the determination we must make is "not a final decision on the merits but a determination at a minimum that the questions of law or fact are grave and difficult." *Id.* at 575-76. "At the very least, a plaintiff must establish the precise factual/legal condition that it sought to change or affect as a prerequisite for establishing the catalytic effect of its lawsuit." *Id.* at 576 (internal quotations and alteration removed). The requirement for the suit to have merit is "designed to screen out nuisance suits." *Id.*

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Here, Plaintiff refers us to a draft Motion for Summary Judgment she had prepared a few months before we dismissed her individual claims as evidence that the suit was not “frivolous, unreasonable or groundless.” In particular, she asserts that the following advertising claims on Defendant’s Crisco Shortening Products violates CLRA, FAL, and UCL: (1) “50% Less Saturated Fat Than Butter”; (2) “All-Vegetable”; (3) “Use instead of butter or margarine for baking; and (4) a bar chart comparing the saturated fat content of Crisco Shortening with that of butter. She asserts that the following claims on Uncrustables’ packaging violates CLRA, FAL, and UCL: (1) Whole Grain 16g or more per serving”; (2) “Whole Wheat”; (3) “wholesome”; and (4) “made with homemade goodness.” Plaintiff argues that these advertising claims are false, misleading, and deceptive because they create the impression that these Products are healthful, when, in fact, they contain trans fat, which is unhealthy in any amount. (See FAC ¶¶ 64-67; 68-69). Moreover, with respect to Uncrustables, these health claims are also misleading because Uncrustables contain a large amount of HFCS. (See FAC ¶ 71). In Plaintiff’s Motion for Summary Judgment, she refers to expert testimony that associates an increased risk of coronary heart disease, colorectal cancer, dementia, and stroke with regular consumption of Crisco Shortening. (Weston Decl. Ex. 14, at 8-10). Further, she argues that the health claims at issue are material because even Defendant’s documents show that nutrition is an important factor to consumers when choosing food. Plaintiff also discusses at length why her claims are not preempted under the various provisions of the Nutritional Labeling and Education Act (“NLEA”).

Based on the draft motion for summary judgment and our review of various motions during the course of this action, we find that Plaintiff has sufficiently established “the precise factual/legal condition that [she] sought to change,” i.e., removing certain health claims regarding, or the allegedly harmful PHVO and HFCS from, its Uncrustables and Crisco Shortening products. Moreover, whether Plaintiff’s claims are preempted by the NLEA is also a complex and difficult issue. Accordingly, we conclude that this suit is not “frivolous, unreasonable, or groundless.”¹⁰

(c) Whether Plaintiff Reasonably Attempted to Settle the Litigation Prior to Filing the Suit

“[A] plaintiff seeking attorney fees under a catalyst theory must first reasonably attempt to settle the matter short of litigation.” *Graham*, 34 Cal. 4th at 577. While “[l]engthy prelitigation negotiations

¹⁰ Defendant argues that the suit has no merit because the fact that we denied Defendant’s motion to dismiss is irrelevant. (Opp’n 17). As discussed above, however, our determination is not based solely on the fact the suit survived a motion to dismiss. Defendant also argues that the suit has no merit because “she never had standing to bring it in the first place.” (Opp’n 18). However, as discussed in Part II.A. *supra*, Plaintiff did have standing in the statutory and Article III sense. The bankruptcy trustee merely stepped into her shoes as the real party in interest when she filed for bankruptcy. There are circumstances under which a plaintiff who has filed for bankruptcy may still proceed as the class representative; those circumstances just did not apply here. Thus, the issue of Plaintiff’s bankruptcy does not go to the merit of this action; instead, it goes to the wisdom of Plaintiff’s counsel’s decision to select Plaintiff as the putative class representative. The latter question goes to the amount of, not entitlement to, fees.

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are not required, . . . a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time.” *Id.* At the same time, an insufficient prelitigation attempt at settlement may not preclude attorneys’ fees under § 1021.5 if “undisputed evidence shows a prelitigation demand would have been futile.” *Cates v. Chiang*, 213 Cal. App. 4th 791, at 817 (Ct. App. 2013) (“Exercising its broad discretion, the court did not err in concluding that because the undisputed evidence shows a prelitigation demand would have been futile, Cates was not barred from recovering section 1021.5 attorney fees.”). Here, even though Plaintiff’s Motion specifically argued that she had reasonably attempted to settle this matter prior to filing the suit by exchanging correspondence with Defense counsel, Defendant does not respond to this argument, even though it addresses Plaintiff’s argument on every other element of § 1021.5. (See Opp’n 17-22). We construe Defendant’s silence as its concession that Plaintiff’s prelitigation CLRA notice was adequate, or that a prelitigation demand would have been futile.

2. Whether the Lawsuit Resulted in the Enforcement of an Important Right Affecting the Public Interest

The “enforcement of the California consumer protection laws” qualifies as “an important right affecting the public interest.” *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 703 (Ct. App. 2006) (citing *Lavie v. Proctor & Gamble Co.*, 105 Cal. App. 4th 496, 503 (Ct. App. 2003) (noting that the evaluation of whether an advertisement is deceptive under the Unfair Competition Law “has important public policy implications for California consumers and businesses”). We must “realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right.” *Folsom v. Butte Cty. Assn’t of Governments*, 32 Cal. 3d 668, 685 (1982).

Here, Plaintiff’s suit primarily alleges that certain health claims relating to Uncrustables and Crisco Shortening Products violate California consumer protection laws because the products contain PHVO. Thus, Defendant could remedy the alleged violations by either removing the purportedly misleading health claims or by removing PHVO from the products. Indeed, Plaintiff’s Settlement Conference Statement states that “a settlement would need to involve injunctive relief in the form of removing PHVO from the products within a reasonable time period and/or modifying the offending labeling claims so long as the products contain PHVO.” (Weston Decl. Ex. 8, at 10). As discussed at length above, evidence shows that Plaintiff’s suit was at least a substantial causal factor that prompted Defendant to reformulate Uncrustables to be PHVO-free. Accordingly, from a practical perspective, Plaintiff has enforced California consumer protection laws to the extent it induced Defendant to remove PHVO from Uncrustables.

Defendant argues that the fact that Plaintiff’s counsel filed a virtually identical suit before this Court “in and of itself is evidence that this suit has not enforced ‘important rights affecting the public interest.’” (Opp’n 19). We disagree. That Plaintiff did not obtain *every* relief she sought in this lawsuit affects the amount of, not entitle to, fees. *Robinson v. City of Chowchilla*, 202 Cal. App. 4th 382, 393 (Ct. App. 2011) (“[A] plaintiff’s partial success is a factor considered in determining the amount of any fee award.”).

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3. Whether a Significant Benefit Has Been Conferred on the General Public or a Large Class of Persons

“[I]n deciding whether to award attorney fees under the statute, a trial court should determine realistically the significance of the benefit, and the size of the class receiving the benefit, in light of all pertinent circumstances.” *Baxter v. Salutary Sportsclubs, Inc.*, 122 Cal. App. 4th 941, 945 (Ct. App. 2004). A consumer class action may confer a significant benefit on a large class of persons if it “caus[es] [the defendant] to change its labeling and advertising practices and by enjoining it from making future misleading representations.” *Colgan*, 135 Cal. App. 4th at 703.

Here, although Plaintiff’s suit did not induce Defendant to change its advertising claims, it prompted Defendant to remove a component of Uncrustables that made the claims allegedly false or misleading. Moreover, Plaintiff offers an expert declaration from Dr. Nathan Wong, an epidemiologist,¹¹ that estimates that the Uncrustables’ reformulation reduces the amount of trans fat in the stream of commerce by about 12.6 million grams.¹² (Wong Decl. ¶ 30). “It is well-established that artificial trans fat consumption is strongly linked to the development of many chronic diseases.” (*Id.* ¶ 9). According to him, a person who eats one Uncrustables sandwich a day would see an increase of coronary heart disease by 2.51% over a 168-month period, of colorectal cancer by 3.55% over a 13-month period, of Alzheimer’s Disease by 16.8% over a 27-month period, and of stroke by 1.2% over a 96-month period. (*Id.* ¶ 25). He further points out that the FDA has recognized that “trans fatty acids are not essential and provide no known benefit to human health.” 75 Fed. Reg. 76526.

Defendant criticizes Dr. Wong’s Declaration as “flawed” and Dr. Wong as “arguably lack[ing] [in] expertise in this field,” but offers no arguments or supporting evidence for these conclusory remarks. (Opp’n 20). Defendant also argues that no significant benefit was conferred because “Plaintiff has never received any judgment . . . on the merits of her case.” (Opp’n 19-20). This argument misunderstands the very premise of the catalyst theory, which does not require a judicial determination in favor of a party before she can be considered a successful party. Instead, the focus is on whether Plaintiff obtained any primary relief she sought in filing this lawsuit, which we concluded above that she did, as to the reformulation of Uncrustables.

¹¹ Dr. Wong is a Professor of Medicine and Epidemiology at the University of California, Irvine School of Medicine and School of Public Health. He is also Director of UCI’s Heart Disease Prevention Program. (Wong Decl. ¶ 2).

¹² This estimate is based on (1) the sales figure of Uncrustables from a 2008 article, which estimates Uncrustables’ sales at about \$126 million; (2) the approximate retail price of Uncrustables in 2008 at \$2.50 per package; and (3) the estimate that prior to the removal of PHVO, each Uncrustable sandwich contained about 0.125 grams of trans fat. (Wong Decl. ¶ 29). At the time Dr. Wong calculated the 12.6 million grams figure, he reduced the amount of the trans fat from each sandwich only by half, because at the time, he believed that Defendant only removed PHVO from the peanut butter filling (and not the bread). Defendant’s opposition concedes that PHVO was also removed from the bread. (See Milley Decl. ¶ 10).

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In sum, Plaintiff has offered evidence that Uncrustables are a widely distributed consumer product, that trans fat has been strongly linked to certain diseases in various studies, and that Defendant removed PHVO from Uncrustables in response to this suit. For the purposes of this Fee Motion, we find that such evidence is sufficient to establish that the removal of PHVO from Uncrustables conferred a significant benefit to a large class of persons.

4. Whether the Necessity and Financial Burden of Private Enforcement Make the Award Appropriate

“[T]he necessity and financial burden requirement really examines two issues: whether private enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing the successful party’s attorneys.” *In re Conservatorship Whitley*, 50 Cal. 4th 1206, 1214 (2010).¹³

“The ‘necessity’ of private enforcement looks to the adequacy of public enforcement and seeks economic equalization of representation in cases where private enforcement is necessary.” *Id.* at 1215. California courts have specifically recognized the “significant role . . . private consumer enforcement plays for many categories of unfair business practices,” including misrepresentations in labels and advertising. *Kwikset Corp. v. Superior Court*, 51 Cal 4th 310, 330-31 (2011) (construing the standing requirement under UCL in a way that would not “end private consumer enforcement of bans on many label misrepresentations” because otherwise, the fact “[t]hat public prosecutors can still sue is of limited solace, given the significant role . . . [of] private consumer enforcement.”). Here, Plaintiff contends that private enforcement was necessary because “no government agency” has sought to enforce California’s false advertising laws against Defendant. *See Keith v. Volpe*, 858 F.2d 467, 486 (9th Cir. 1988) (concluding that the plaintiff met the necessity requirement of CCP § 1021.5 based on district court’s finding that “no governmental agency was willing to protect [the plaintiff’s] rights under Cal. Gov. Code § 65008).

In response, Defendant argues only that *Keith* is distinguishable because it reached a judgment on the merits, and that agency enforcement is not necessary “because [Defendant’s] advertising and labeling complies with all FDA regulations.” (Opp’n 20). This argument is unconvincing. This suit does not seek to enforce FDA regulations.¹⁴ To the extent Defendant is arguing that compliance with FDA regulation preempts Plaintiff’s state law claims, such argument not only assumes Defendant’s

¹³ The Parties do not dispute the “financial burden” prong, which considers “whether the financial burden placed on the party is out of proportion to its personal stake in the lawsuit.” *Lyons v. Chinese Hosp. Ass’n*, 136 Cal. App. 4th 1331, 1352 (Ct. App. 2006). This requirement compares “the estimated value of the plaintiff’s individual stake in the action . . . and the cost of the litigation.” *Id.* at 1354. Here, Plaintiff asserts that her purchases of the relevant Products “totaled just \$214.25” over ten years. (Mot. 17). We find that Plaintiff meets the “financial burden” prong.

¹⁴ Nor does the suit seek to modify only Defendant’s advertising or labeling practice. To the extent it contends that certain health claims are misleading because of the presence of trans fat, the suit seeks removal of trans fat as one of its primary remedies.

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nonliability but also ignores the relevant standard under CCP § 1021.5, which, as *Graham* makes clear, focuses on “the impact of the action, not the manner of its resolution.” *Graham*, 34 Cal. 4th at 566. We need not determine that Defendant is liable before awarding attorneys’ fees to Plaintiff, so long as all requirements under CCP § 1021.5 are met. *Id.*; see also *Planned Parenthood v. Aakhus*, 14 Cal. App. 4th 162, 174 (Ct. App. 1993) (“Appellants also err by focusing the issue of attorney fees on their asserted nonliability. An opposing party’s admission or nonadmission of liability is irrelevant for purposes of an award pursuant to section 1021.5.”). Defendant has made no relevant showing that private enforcement was unnecessary because the public rights at issue were adequately vindicated by government action. See *Ciani v. San Diego Trust & Savings Bank*, 25 Cal. App. 4th 56, 585-86 (Ct. App. 1994) (concluding that plaintiff’s suit was unnecessary because it was duplicative of a suit filed by the Coastal Commission).

Given California courts’ specific recognition of the significance of private enforcement in the area of consumer protection and the absence of any showing of parallel government action, we conclude that Plaintiff’s action was necessary, and the financial burden makes the award appropriate.

Based on the foregoing, we conclude that Plaintiff is entitled to fees under CCP § 1021.5.

C. Reasonableness of Fees Sought

Having determined that Plaintiff is entitled to fees under CCP § 1021.5, we must then determine how much fee to award. Plaintiff’s counsel asserts a lodestar of \$1,453,499 based on 3,872.1 hours (2,460.3 attorney hours and 1,411.8 paralegal/law clerk hours). Additionally, they seek a multiplier of 2.25, bringing their total fee request to \$3,270,374. Plaintiff’s counsel also requests costs of \$35,138.65.¹⁵

“The fee setting inquiry in California ordinarily begins with the ‘lodestar,’ i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys’ fee award. The reasonable hourly rate is that prevailing in the community for similar work. The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. Such an approach anchors the trial court’s analysis to an objective determination of the value of the attorney’s services, ensuring that the amount awarded is not arbitrary.” *Ctr. for Biological Diversity v. Cty. of San Bernardino*, 185 Cal. App. 4th 866, 895-96 (Ct. App. 2010).

Here, Plaintiff submits billing records organized by a total of 21 timekeepers. Because the records are organized by timekeepers, we have no way of easily determining how much total attorney and paralegal time was spent on a particular task, and whether such total time is reasonable in light of the complexity of the task. As a result, we cannot determine whether the number of hours asserted are reasonable. Accordingly, Plaintiff **SHALL** file, **within fourteen (14) days hereof**, a reorganized spreadsheet that groups entries together by tasks and shows a subtotal of attorney and paralegal/law

¹⁵ Defendant does not contest the request for cost. (See Opp’n 23-25).

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clerk hours for each task. The “tasks” shall include (1) pre-filing investigation and research; (2) complaint; (3) first amended complaint; (4) opposition to motion to dismiss; (5) discovery; (6) first motion for class certification and reply; (7) second motion for class certification and reply; and (8) any other identifiable, groupable tasks.¹⁶

III. Conclusion

Based on the foregoing, we conclude that Plaintiff is entitled to fees under CCP § 1021.5. Plaintiff **SHALL** submit revised billing records in a manner consistent with this Order **within fourteen (14) days hereof**. Defendant may file any objections to the asserted hours **within fourteen (14) days thereafter**. Plaintiff may file any reply to the objections **within seven (7) days thereafter**. The Motion as to the amount of fees to be awarded shall be submitted without oral argument thereafter.

IT IS SO ORDERED.

Initials of Deputy Clerk

____ : ____
Bea

¹⁶ Where appropriate, the tasks shall be broken down into sub-tasks. For instance, discovery could conceivably be broken down into written discovery, discovery motions, and witness depositions.