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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES - GENERAL

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|----------|---------------------------------------------------|------|-------------------|
| Case No. | CV 10-4524-GHK (VBKx)                             | Date | November 20, 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: Defendant's Motion for Reconsideration (Dkt. Nos. 297, 305)

This matter is before us on Defendant J.M. Smucker Company's ("Defendant") "Motion for Reconsideration of the Court's Order Granting Plaintiff Attorneys' Fees Under CCP § 1021.5" ("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. Background**

On June 18, 2010, Plaintiff Mary Henderson ("Plaintiff") filed the above-captioned consumer class action against Defendant alleging violations of California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumer Legal Remedies Act ("CLRA") in making its health and wellness claims in marketing its Uncrustables and Crisco Shortening Products. Henderson alleged that the health claims were false and misleading because both products contain amounts of trans fat from partially hydrogenated vegetable oil ("PHVO") and Uncrustables also contains high fructose corn syrup ("HFCS") that make them unhealthful.

On October 23, 2012, we granted Defendant's Motion to Dismiss Plaintiff's individual claims. (Dkt. 219.) We concluded that when Plaintiff reopened her bankruptcy proceedings on December 20, 2011, she conceded that her interest in this action was a pre-petition asset. As a result, the bankruptcy trustee was the real party in interest who chose to settle Plaintiff's individual claims with Defendant for \$22,500.

On January 7, 2013, Plaintiff filed a Motion for Attorneys' Fees and Costs ("Fee Motion"), seeking \$3,270,374 in fees and \$35,138.65 in costs under the fee-shifting provisions of California's Private Attorney General Act, Cal. Civ. Proc. Code § 1021.5 ("CCP § 1021.5"), and the CLRA, Cal.

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Civ. Code § 1780(e).<sup>1</sup> (Dkt. 226.) She contended that she is entitled to fees under CCP § 1021.5 as a “successful” or “prevailing” party under the catalyst theory because this lawsuit 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 (3) removal of the bar chart comparing Crisco’s saturated fat content to butter.

In our June 19, 2013 Order, we concluded that Plaintiff is entitled to fees under CCP § 1021.5 because her lawsuit was a “catalyst” to Defendant’s removal of trans fat from Uncrustables. (Dkt. 268 (“Fee Order”).) But, we rejected Plaintiff’s arguments that her lawsuit was a catalyst to the removal of the “wholesome” and “homemade goodness” claims, and the Crisco bar chart. In so doing, we carefully considered all of the evidence presented by both Parties. (Fee Order at 6-10.)

We determined that the “chronology of events g[a]ve[] rise to the inference that Plaintiff’s suit catalyzed the reformulation of Uncrustables,” and that the Defendant failed to offer sufficient “evidence to show that it had a plan to reformulate Uncrustables independent of Plaintiff’s lawsuit.” (*Id.* at 6.) Specifically, we considered Defendant’s evidence that it had a “general goal” to remove trans fat from all of its products, that its reformulation was in response to consumer demands, that its reformulation was in response to its competitors’ PHVO-free products, and that potential FDA action and negative publicity prompted the reformulation. (*Id.* at 6-8.) Based on our careful review of both Parties’ evidence, “we conclude[d] that this suit was at least a substantial causal factor contributing to Defendant’s removal of PHVO from Uncrustables.” (*Id.* at 8.)

Based on our determination that Plaintiff’s lawsuit served as a catalyst in prompting Defendant to remove trans fat from Uncrustables, we further considered the evidence in determining that Plaintiff was a “successful party,” that the lawsuit resulted in the enforcement of an “important right affecting the public interest,” that a significant benefit had been conferred on a large class of persons, and that the necessity and financial burden of private enforcement made an award of attorneys’ fees appropriate. (*Id.* at 4-14.) Accordingly, we held that Plaintiff is entitled to attorneys’ fees under section 1021.5. Pursuant to Local Rule 7-18(c), Defendant now seeks reconsideration of our Fee Order.

## II. Legal Standard

A motion for reconsideration is an “extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.” *Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). In this District, motions for reconsideration are governed by Local Rule 7-18, which provides that a motion for reconsideration may be granted only when the moving party presents:

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<sup>1</sup> Plaintiff also argued that she is entitled to fees under Cal. Civ. Code § 1780(e) because Defendant paid \$22,500 to resolve her claims. We did not reach the merits of this argument because we found that she is entitled to fees under CCP § 1021.5. (Fee Order at 2 & n. 3.)

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(a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

The moving party must demonstrate one of the above conditions in order to merit reconsideration. “[A] mere attempt by [the moving party] to reargue its position by directing this Court to additional case law and . . . argument[s] which [it] clearly could have made earlier, but did not . . . is not the purpose of motions for reconsideration under . . . Local Rule [7-18].” *Yang Ming Marine Transp. Corp. v. Oceanbridge Shipping Int’l, Inc.*, 48 F. Supp. 2d 1049, 1057 (C.D. Cal. 1999).

**III. Discussion**

Here, Defendant asserts L.R. 7-18(c)—manifest failure to consider material facts presented to the Court—as the basis for its Motion. Defendant claims that our Fee Order was premised on our failure to consider numerous “material facts,” and thus “several independent avenues exist for reconsideration.” (Mot. at 5.) It claims that we failed to consider: (1) that our Order is an inappropriate extension of California law; (2) that Defendant’s removal of PHVO from Uncrustables was “gratuitous,” (3) that Defendant’s removal of PHVO did not moot any of Plaintiff’s claims; (4) that Plaintiff has not achieved the “primary relief” she sought in her Complaint; (5) Defendant’s evidence that Plaintiff did not motivate its removal of trans fat from Uncrustables; and (6) Defendant’s evidence that Dr. Wong is not a qualified expert. It also claims that we: (7) misapplied the burden of proof; and (8) erred in not holding an evidentiary hearing. Finally, it argues (9) that public policy considerations warrant denying Plaintiff attorneys’ fees.

**A. Improper Legal Arguments**

Procedurally, Defendant’s first four arguments fail because these are legal arguments, and not arguments that we failed to consider material facts as Defendant contends is the basis for reconsideration. *See Chagby v. Target Corp.*, 2009 WL 398972, at \*1 (C.D. Cal. 2009) (“Plaintiff’s arguments in this Motion are legal ones and Plaintiff’s argument that we failed to consider material facts is misplaced. Therefore the Motion is improper because Plaintiff has made no showing that we failed to consider any material facts before us.”). For example, Defendant’s contention that we “failed to consider material factual distinctions between this case and the type of cases that have properly awarded fees,” or that we failed to consider the material fact that our decision is “an inappropriate extension of California law,” or that we “neglected to consider that Smucker removing an ingredient was not part of the relief Plaintiff sought,” cannot be construed as an argument that we failed to consider material facts. Defendant does not set forth one material fact that we failed to consider. Defendant’s attempt to surreptitiously reframe these legal arguments as a failure to consider material facts does not transform

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them into a proper basis for reconsideration. *See id.* Although Defendant “may disagree with [our] application of the facts to the law, [this] is not ‘a manifest showing of a failure to consider material facts.’” *Aventis Pharms. S.A. v. Amphastar Pharms, Inc.*, 2005 U.S. Dist. LEXIS 45949, \*6 (C.D. Cal. Mar. 25, 2005).

Additionally, these arguments are procedurally improper because they were previously raised in Defendant’s Opposition to Plaintiff’s Fee Motion, which we rejected in our Fee Order. Local Rule 7-18 expressly prohibits a party seeking reconsideration from repeating arguments. L.R. 7-18 (“No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.”). Furthermore, to the extent any of these arguments were not raised before, they do not qualify as a basis for reconsideration under L.R. 7-18 (a) or (b) because a motion for reconsideration “may not be used to raise arguments . . . for the first time when they could reasonably have been raised earlier.” *Kona*, 229 F.3d at 890; *see also Union Pac. R.R. Co. v. Coast Packaging Co.*, 236 F. Supp. 2d 1130, 1137 (C.D. Cal. 2002).

Defendant does not offer any convincing reason why any new arguments it raises now could not have been raised in its prior filings with the Court. Defendant’s post-hoc justification in its Reply that “[i]t was not *until* the Court rejected Plaintiff’s claims that she was a catalyst for the labeling changes, and found that Plaintiff only served as a catalyst with respect to changing one ingredient, that these concerns arose,” is not persuasive. Plaintiff’s Fee Motion raised multiple, independent theories on which she argued she was entitled to relief under the catalyst theory, including that her lawsuit prompted Defendant to remove PHVO from Uncrustables. Thus, all of Defendant’s arguments relating to the removal of PHVO were available to it at the time Defendant filed its Opposition.

Even if we were to consider the merits of Defendant’s arguments, they fail to provide an adequate substantive basis for reconsideration. First, Defendant argues that our Fee Order is an inappropriate extension of California law because “no court-ordered relief or binding settlement agreement” enforced Plaintiff’s relief. This argument misunderstands the nature of the catalyst theory, which is premised on the very notion that “[a] plaintiff need not obtain a judgment in its favor to be a ‘successful party.’” *Hogar v. Cmty. Dev. Comm’n of City of Escondido*, 157 Cal. App. 4th 1358, 1365 (2007). Under the catalyst theory, “a plaintiff is a ‘successful party’ whenever it obtains the relief sought in its lawsuit, regardless of whether it is obtained ‘through a voluntary change in the defendant’s conduct, through a settlement, or otherwise.’” *Id.* (quoting *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 567 (2004)); *see also In re Head*, 42 Cal. 3d 223, 228-29 (1986) (“How the party achieves the goal of enforcing the right in question is not determinative of the right to an award of attorneys fees under section 1021.5. The impact of the litigation is.”). In fact, in *Graham*, there was neither court-ordered relief nor a binding settlement agreement. Rather, DaimlerChrysler mooted the litigation by offering to repurchase or replace the defective automobile at issue from all customers. *Graham*, 34 Cal. 4th at 563.

None of the cases cited by Defendant compels a contrary conclusion. All of these cases are just examples of courts denying attorneys’ fee awards, and none of the courts based their reasoning on the

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grounds Defendant contends. In the first case cited by Defendants, *Ebbets Pass Forest Watch v. Cal. Dep't of Forestry & Fire Prot.*, 187 Cal. App. 4th 376, 385-89 (2010), the court determined that plaintiffs were not a “successful party” because, although their lawsuit may have resulted in a legal opinion that clarified the law, the actual relief they were seeking was denied because their factual contentions were defective. The court reasoned that the plaintiffs could not bring a lawsuit, lose on the merits, and still recover attorneys’ fees. *Id.* at 387. In the second case, *Marine Forests Soc’y v. Cal. Coastal Comm’n*, 160 Cal. App. 4th 867, 878-80 (2008), the court determined that the plaintiffs were not a “successful party,” not because the plaintiffs were only seeking relief based on a legislative change rather than judicially-sanctioned relief or a binding settlement, but because the legislative change made did not provide the relief plaintiffs sought in their lawsuit. Finally, the third case cited by Defendants, *Concerned Citizens of La Habra v. City of La Habra*, 131 Cal. App. 4th 329 (2005), is not even a catalyst theory case. *Id.* at 334 n.3 (“[Plaintiffs] conceded at oral argument that the catalyst theory does not apply to this case.”).

Second, Defendant argues that its removal of PHVO was “gratuitous” and, therefore, does not satisfy *Graham*’s “required by law” requirement. Contrary to Defendant’s contention, however, *Graham* never adopted the “required by law” prong—or at least not Defendant’s interpretation of it. In *Graham*, the court explained that a number of circuits, in applying the catalyst theory, required: (1) a “causal connection,” and (2) that “defendant’s conduct was required by law.” *Graham*, 34 Cal. 4th at 575. The court clarified that, “generally speaking, the ‘required by law’ prong was tantamount to a finding that the lawsuit was ‘not frivolous, unreasonable, or groundless.’” *Id.* The court went on to adopt this requirement, holding that, “[t]he trial court must determine that the lawsuit is not ‘frivolous, unreasonable, or groundless,’ in other words that [plaintiff’s] result was achieved ‘by threat of victory, not by dint of nuisance and threat of expense.’” *Id.* (internal citation omitted). In the Fee Order, we explicitly found that Plaintiff’s lawsuit was not “frivolous, unreasonable, or groundless.” (Fee Order at 10-11.)

Third, Defendant argues that we improperly granted Plaintiff attorneys’ fees because none of Plaintiff’s claims has been mooted, given that the same claims are raised in another lawsuit that is currently pending before us. This argument, however, puts the form of Plaintiff’s pleading over the substance of Plaintiff’s claims. While both lawsuits contain false advertising claims, each claim is premised on multiple theories of why Defendant’s advertising is purportedly false. To the extent the new lawsuit is seeking relief based on the presence of trans fat in Uncrustables, such a claim has been mooted by the very removal we determined was the basis of Plaintiff’s prevailing party status in this lawsuit. And, as California courts recognize, “[a] plaintiff’s partial success is a factor considered in determining the amount of any fee award,” but does not necessarily preclude a determination that a plaintiff was a “successful party.” *Robinson v. City of Chowchilla*, 202 Cal. App. 4th 382, 393 (2011). In our Fee Order, we recognized this, stating: “That Plaintiff did not obtain every relief she sought in this lawsuit affects the amount of, not [her] entitle[ment] to, fees.” (Fee Order at 12.)

Fourth, Defendant argues that Plaintiff did not achieve the “primary relief” she sought in her lawsuit as required by *Graham*. We specifically addressed this argument in our Fee Order, and

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Defendant's attempt to reassert it fails for the same reasons. As we explained, removal of PHVO from Uncrustables and removal of the allegedly false advertising are essentially two sides of the same coin. "Defendant could remedy the alleged violations by either removing the purportedly misleading health claims or by removing PHVO from the products." (Fee Motion at 12.) Thus, Plaintiff obtained the "primary relief" she sought because "from a practical perspective, Plaintiff has enforced California consumer protection laws to the extent [she] induced Defendant to remove PHVO from Uncrustables." (*Id.*)

In sum, these four legal arguments are not proper grounds for reconsideration under L.R. 7-18, and even if we were to consider them, they fail on the merits.

**B. Arguments That We Failed to Consider Defendant's Evidence**

Next, Defendant contends that we failed to properly consider its evidence in determining that Plaintiff's lawsuit prompted Defendant to remove PHVO from Uncrustables and in determining that the removal of PHVO conferred a "significant benefit" on a large class of people. However, again, Defendant fails to identify any "manifest showing of a failure to consider material facts."

First, Defendant's contention that we failed to properly consider its evidence in determining that Plaintiff's lawsuit prompted Defendant to remove PHVO from Uncrustables is without any merit. In its Motion, Defendant states that we failed to consider its evidence that it removed PHVO to "improve its marketing position," based on its "competitors' elimination of PHVO from certain products," based on "customer complaints," and due to "concerns that the FDA may ban PHVO." However, as our Fee Order makes clear, we "carefully review[ed] the Parties' evidence," including Defendant's evidence on each of these arguments. (Fee Order at 6-8.) For example, we considered Defendant's "evidence that it has long been committed to the removal of trans fat 'from all its products' since as early as 2003," but determined that it did "not rebut Plaintiff's assertion that her lawsuit prompted Defendant to prioritize the reformulation of Uncrustables." (Fee Order at 6.) We also considered Defendant's evidence regarding its "Trans Fat Task Force" and "an industry-wide 'Healthy Weight Commitment' to eliminate PHVO," but determined that there was no evidence of "any specific plan or timetable to remove trans fat from Uncrustables" or any evidence connecting the "general goal" to remove trans fat to "any specific steps taken with respect to Uncrustables." (*Id.*) With respect to Defendant's claim that the reformulation was based on potential FDA action, we determined that based on the "single email" offered by Defendant "we ha[d] no way of determining whether Defendant actually thought the FDA action was likely and whether it considered the project a high priority in light of its prediction." (Fee Order at 7-8.) After reviewing all of the evidence, we ultimately concluded that Defendant's evidence failed "to show that it had a plan to reformulate Uncrustables independent of Plaintiff's lawsuit." (Fee Order at 6-8.) Accordingly, because we had considered the evidence submitted by Defendant, this cannot be the basis for reconsideration under L.R. 7-18(c).

Second, Defendant argues that in making the determination that the removal of PHVO conferred a "significant benefit" on a large class of people we "improperly credited" the declaration of Plaintiff's

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expert, Dr. Nathan Wong, a Professor of Medicine and Epidemiology at the University of California, Irvine, and failed to consider its rebuttal evidence. This contention is equally without merit to warrant reconsideration under L.R. 7-18(c). As we acknowledged in our Fee Order, in its Opposition, “Defendant criticize[d] Dr. Wong’s Declaration as ‘flawed’ and Dr. Wong as ‘arguably lack[ing] [in] expertise in this field,’ but offer[ed] no arguments or supporting evidence for these conclusory remarks.” (Fee Order at 13.) Now Defendant contends that we should have considered evidence that was available to Defendant at the time it filed its Opposition but that it did not present to us.

Defendant argues that we should have considered “its portions of the unfiled joint summary judgment motion,” even though Defendant first submitted these portions of the unfiled motion as part of this Motion. Similarly, Defendant argues that we should have considered Dr. Wong’s April 4, 2012 deposition, even though Defendant did not present it to us to rebut Dr. Wong’s testimony in Defendant’s opposition to the Fee Motion. Finally, Defendant argues that we should have considered the reports of its experts, Dr. Stettler and Dr. Hunter, which it contends refute Dr. Wong’s testimony and his credibility. Defendant argues that because it filed these expert reports as exhibits in opposition to Plaintiff’s Motion for Class Certification in 2011, we should have found and considered these reports.<sup>2</sup> Although Defendant’s expert reports “may have been lurking somewhere in the . . . record, . . . [Defendant] did not identity this evidence in [its] Opposition.” *Grisham v. Philip Morris, Inc.*, 2009 WL 9102320, at \*5-6. And, “it is not this Court’s duty to ‘comb the record’ in search of potential arguments and evidence to support a party’s claims.” *Id.* Accordingly, because this evidence was not presented to us as part of Defendant’s opposition to the Fee Motion, this is not a proper basis for reconsideration under L.R. 7-18(c).<sup>3</sup>

### C. Argument That We Misapplied the Burden of Proof

Defendant also moves for reconsideration on the grounds that we did not apply the proper burden of proof under CCP § 1021.5. Specifically, Defendant argues that we improperly placed the burden on it to prove that Plaintiff’s lawsuit was not the catalyst for change. Defendant, however, misapprehends the Court’s ruling. Relying on the framework to prove causation under the catalyst theory set forth in *Graham and California for Responsible Toxics Mgmt. v. Kizer*, 211 Cal. App. 3d 961

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<sup>2</sup> This argument is particularly without merit given that we never ruled on Plaintiff’s Motion for Class Certification.

<sup>3</sup> Further, Defendant’s argument that we failed to analyze the admissibility of Dr. Wong’s testimony under Rule 702 also fails. Defendant did not raise a specific objection to the admissibility of Dr. Wong’s testimony, and we are not “required, *sua sponte*, to make explicit on-the-record rulings regarding the admissibility of expert testimony.” *Hoult v. Hoult*, 57 3d. 1, 4 (1st Cir. 1995); *accord Macsenti v. Becker*, 237 F.3d 1223, 1232 (10th Cir. 2001).

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(1989), we first found that Plaintiff's evidence of the "chronology of events gives rise to the inference that Plaintiff's suit catalyzed the reformulation." (Fee Order at 5.) Then, we "shift[ed] the burden to defendant to offer rebuttal," because "the defendant is in the best position to either concede that the plaintiff was a catalyst or document why the plaintiff was not." *Graham*, 34 Cal. 4th at 573; *Kizer*, 211 Cal. App. 3d at 968. After considering Defendant's proffered evidence, we then determined that it failed to rebut the inference established by Plaintiff's evidence that her lawsuit catalyzed Defendant's reformulation. (Fee Order at 6-8.) Accordingly, we did not misapply the burden, and reconsideration is not warranted on this ground.

**D. Argument That We Erred in Not Holding Evidentiary Hearing**

Defendant also argues that reconsideration is warranted because we did not hold an evidentiary hearing to determine if Plaintiff was entitled to attorneys' fees. In addition to not being a proper basis for reconsideration under L.R. 7-18, this argument also lacks merit. First, Defendant never requested an evidentiary hearing. See *Sbalan v. Dep't of Finance of N. Mar. I.*, 856 F.2d 1317, 1322 (9th Cir. 1988) ("The government is not in a position to challenge the lack of a hearing because it did not request an evidentiary hearing on the 'prevailing party' issue. The district judge was not required to hold an evidentiary hearing sua sponte."). Although *Graham* discussed that an "abbreviated evidentiary hearing" may be warranted in determining fees under the catalyst theory, it recognized that an evidentiary hearing is often not required. *Graham*, 34 Cal. 4th at 576. The court acknowledged that the development of the factual record "may generally be established during the attorney fee proceeding by declarations." *Id.* Further, there was no factual dispute warranting an evidentiary hearing. Our Fee Order did not say that we disbelieved any of Defendant's evidence. Rather, we accepted Defendant's evidence as such but determined that it was legally insufficient to rebut Plaintiff's showing that the lawsuit catalyzed Defendant's reformulation of Un crustables. (Fee Order at 6-8.) Accordingly, no evidentiary hearing was required.

**E. Policy Arguments**

Lastly, Defendant argues that policy weighs against awarding Plaintiff attorneys' fees in this case. Defendant offers two policy arguments: (1) that California's *Tipton-Wittingham* exception barring recovery under the catalyst theory for mere acceleration of government action should apply to private businesses, and (2) that the catalyst theory, as applied here, runs counter to the policy expressed in Federal Rule of Evidence 407, excluding admission of subsequent remedial changes at trial based on "social policy of encouraging people to take . . . steps in furtherance of added safety." Given that both of these arguments are new arguments raised for the first time on this Motion, neither is a proper basis for reconsideration under L.R. 7-18.

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**III. Conclusion**

Defendant's Motion is without merit and betrays an abuse of Local Rule 7-18. Based on the foregoing reasons, Defendant's Motion is **DENIED**.

**IT IS SO ORDERED.**

Initials of Deputy Clerk

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