IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

JULIE GEORGE, HEATHER ERWIN, JANET CHILDERS and FRANK LEVITT, individually, and on behalf of all others similarly-situated, Plaintiffs, v. KEURIG DR PEPPER INC. , and DR PEPPER/SEVEN UP, INC., Defendants.	)))))))))))))	No. 1822-CC11811 Div. 20

PLAINTIFFS' REPLY IN SUPPORT OF FINAL APPROVAL AND APPLICATION FOR SERVICE AWARDS AND ATTORNEYS' FEES, AND IN RESPONSE TO OBJECTOR GARY SIBLEY'S OBJECTION

I. INTRODUCTION

Out of more than 70,000 consumers who submitted timely claims not a single person has objected. Only one person has objected—professional objector and attorney Gary Sibley[1] ("Sibley"). As explained below, Sibley's objection should be stricken for failure to comply with this Court's Order regarding objections or overruled for lacking merit.

"In determining whether a proposed settlement is fair, reasonable and adequate, the reaction of the class is an important factor" and a "[l]ow percentage of objections points to the reasonableness of a proposed settlement and supports its approval." *Lipuma v. American Express Co.,* 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005). Here, no Class Members who submitted claims have objected. This metric alone demonstrates that the Class favors the relief proposed, and that recovery for all should not be sacrificed due to the personal opinion of one professional objector.

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1. *See Gary W. Sibley*, SERIAL OBJECTOR INDEX https://www.serialobjector.com/persons/421 (last visited March 21, 2019).

See Allapattah Servs., Inc. v. Exxon Corp., No. 91-cv-986, 2006 U.S. Dist. LEXIS 88347, at *44 (S.D. Fla. Apr. 7, 2006) ("I infer from [the] absence of a significant number of objections that the majority of the Class found [the settlement agreement] reasonable and fair.").

Professional objectors generally interpose objections in a veiled attempt to extract a payment from the parties in order to drop (or to persuade their client to drop) their objection. *See, e.g.*, *Torres v. Bank of Am. (In re Checking Account)*, 830 F. Supp. 2d 1330, 1361, n. 30 (S.D. Fla. 2011) ("[P]rofessional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose benefit the appeal is purportedly raised, gains nothing.").[2]

As such, the Court should afford little weight to this professional objector. *See In re Law Office of Jonathan E. Fortman, LLC*, 2013 WL 414476, at *5 (E.D Mo. Feb. 1, 2013) ("[W]hen assessing the merits of an objection to a class action settlement, courts consider the background and intent of objectors and their counsel, particularly when indicative of a motive other than putting the interest of the class members first."). Objector Sibley's objection here should be viewed in this light.

Tellingly, Sibley does not object on the grounds that the relief obtained for the Class is not fair, adequate, or reasonable. *See generally*, Sibley Objection ("Sibley Objection"). Rather, the grounds for his objection are boilerplate canned arguments that largely appear to be cut and pasted from other objections he and others have previously filed. As discussed below, none of his objections have merit.

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2. Should Objector Sibley take an appeal from an order of this Court granting final approval to the Settlement or an award of attorneys' fees, Plaintiffs will seek appeal bonds from Objector Sibley to protect against the cost of delay and other expenses associated with what is sure to be a frivolous appeal.

Not only should Sibley's Objection be overruled for lack of substantive merit, it should be stricken for failure to follow the procedure for submitting an objection, as provided in the Settlement Notice (Exhibit B1 to the Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement, as amended by Order dated January 11, 2019) and this Court's Preliminary Approval Order. Specifically, Sibley has violated this Court's Orders for filing objections by failing to show he is even a member of the Class with standing to object and by concealing his full objection history.

Sibley has provided zero credible factual or legal basis to support his objection. Indeed, many of his reasons for objecting are the same verbatim boilerplate objections made in other cases, which demonstrates he is far less concerned with this particular settlement but is rather interested in disrupting class action settlements generally. He offers little or no basis for his assertions, which are readily disputed by the information contained in the settlement documents and approval papers filed in this case.

No effort was made by Objector Sibley to reach out to counsel prior to lodging his objection in order to better understand the Settlement or improve the Settlement. Undersigned Counsel contacted Sibley after he filed his objection to determine what additional information, if any, could be provided to Sibley to assist in his understanding of the settlement. All Sibley requested was information already in the Court file, such as Class Counsel's fee application. Sibley's Objection is just another attempt by a professional objector to hold ransom settlement benefits to a certified class in an effort to extract money for himself.

For the reasons explained below, the Court should (1) strike and/or overrule Sibley's Objection; (2) grant Final Approval to the Settlement; (3) approve the request for Service Awards to the Plaintiffs; (4) approve Class Counsel's application for Attorneys' Fees and Expenses; and (5) enter Final Judgement dismissing the Action with prejudice.

II. SIBLEY'S OBJECTION SHOULD BE STRICKEN BECAUSE IT VIOLATES THE COURT'S ORDER GRANTING PRELIMINARY APPROVAL

Sibley's Objection should be stricken on its face because he blatantly violated the Court's Preliminary Approval Order. The Preliminary Approval Order approving the Class Notice (as amended by Order dated January 11, 2019) requires all objectors to provide with their objection a statement that includes:

> " . . . (c) a written statement of all grounds for the Objection, accompanied by any **legal support for such Objection**; . . . (e) a **statement of his/her membership in the Settlement Class, including all information required by the Claim Form**; and (f) a detailed **list of any other objections** submitted by the Settlement Class Member, or his/her counsel, to any class actions submitted in any court, whether state or otherwise, in the United States in the previous five (5) years.
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> ***
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> Failure to include this information and documentation may be grounds for overruling and rejecting your Objection."
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> *See* Long Form Notice, at para. 11 (emphasis added).

First, as discussed more fully below, Sibley failed to provide any legal support to back up his conclusory assertions. The only authority he did provide stands for the general proposition that the Court must assess the reasonableness of the fee – Plaintiffs and Class Counsel agree that. Sibley does not object to the amount of Class Counsel's fees, he just admonishes the Court to award a fee that is consistent with governing law. Sibley's objection makes clear that he either did not read, or simply does not understand, the Settlement Agreement in this case. This is not a "lump sum settlement" as Sibley mischaracterizes it since the attorney's fees in this case were separately negotiated and are being paid separate and apart from the funds available to the Class.

Second, and perhaps most importantly, Sibley failed to provide any information establishing his membership in the Settlement Class, let alone all information required by the

Claim Form. Sibley did not even state that he is a purchaser of the product. Therefore, Sibley's Objection fails to provide sufficient proof of his membership in the Class to establish standing to even lodge his Objection.

Last, Sibley failed disclose his complete objector history. Class Counsel has been able to locate at least two undisclosed Sibley objections from the past 5 years. *See In re: Blue Buffalo Company, Ltd. Marketing and Sales Practices Litigation,* No. 14-02562 (E.D. Mo. Apr. 14, 2016); *Kolinek v. Walgreen Co.*, No. 13-04806 (N.D. Ill. July 17, 2015) (Sibley's objections in both of these cases were overruled and with his appeals dismissed). This list only includes cases Plaintiffs could locate online and does not include the likely additional cases filed in state courts or in cases where Sibley was not referenced by name.

For the one prior objection that he did disclose, although he generally references the "BMW convertible top-class action," he failed to provide any detailed information such as the actual case name, court, jurisdiction, or date, thereby requiring Class Counsel to research the various dockets throughout the county to find his objections.[3]

Perhaps recognizing that his history of objections does him little credit, Sibley failed to comply with the requirement. Sibley's objections are so numerous, in fact, that they figure prominently in the Federal Judicial Center's 2013 "Study of Class Action Objector Appeals in the Second, Seventh, and Ninth Circuit Courts of Appeal."[4] Sibley has likewise "made the list" of prominent serial objectors.[5]

A review of Sibley's various objections reveals a pattern of boilerplate formulaic

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3. Objector Sibley merely states that he has "objected to the following class actions in the last five years: BMW convertible top class action from several years ago."
4. *See* Marie Leary, Federal Judicial Center, Study of Class Action Objector Appeals in the Second, Seventh, and Ninth Circuit Courts of Appeals (October 2013), *available at https://www.fjc.gov/sites/default/files/2015/Class-Action-Objector-Appeals-Leary-FJC-2013.pdf*
5. *See Gary W. Sibley*, Serial Objector Index https://www.serialobjector.com/persons/421 (last visited March 21, 2019).

objections being filed, and then once a court (inevitably) overrules Sibley's meritless objection, he immediately files an appeal of the settlement approval, which is then typically withdrawn or rejected at the appellate level. Thus, if this Court overrules Sibley's objection and finally approves the settlement, it can expect Sibley to file a notice of appeal of the final approval order, thereby further delaying relief to the Class.[6]

Having failed to provide a complete list of objections in the past five years, Sibley has waived any objections to the Settlement and the Court should summarily strike and hold that his objection is invalid without the necessity of delving in to the substantive lack of merit of his Objection.[7]

III. SIBLEY LACKS CREDIBILITY AND HIS OBJECTION SHOULD BE GIVEN LITTLE WEIGHT

When evaluating the credibility of Sibley, the Court should give his Objection little to no weight. While it is understood that objectors can provide, at times, valuable assistance to a class in identifying potential issues in a proposed settlement, it should also be acknowledged that there does exist a whole culture of "serial" and "professional" objectors. These serial/professional objectors make objections solely to promote their own financial agenda, by attempting to strong arm payments out of attorneys by delaying settlements with frivolous objections and appeals.

As many courts have acknowledged, serial objectors, who hold up large class action settlements for a payout, serve no constructive role in class action litigation. "[M]ost if not all . . . are motivated by things other than a concern for the welfare of the Settlement Class." *Torres v. Bank of Am. (In re Checking Account),* 830 F. Supp. 2d at 1361 n.30 (S.D. Fla. 2011) (King, J.).

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6. Class Counsel has been able to locate at least 14 objections filed by Sibley in other class actions – the settlements in every single of those cases were approved.

7. As an officer of the court, Sibley is held to an even higher standard than a layperson objector. Sibley's failure to disclose the complete list of objections he has filed is a violation of his professional obligations and amounts sanctionable conduct.

Such individuals make their living "simply by filing frivolous appeals and thereby slowing down the execution of settlements." *Barnes v. FleetBoston Fin. Corp.*, 2006 U.S. Dist. LEXIS 71072, at *3-4 (D. Mass. Aug. 22, 2006). Their "sole purpose is to obtain a fee by objecting to whatever aspects of the Settlement they can latch on to" and levying "what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors." *Torres v. Bank of Am. (In re Checking Account),* 830 F. Supp. 2d at 1361 n.30 (quoting *Barnes*, 2006 U.S. Dist. LEXIS 71072, at *3-4). For this reason, "federal courts are increasingly weary of professional objectors." *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003).

Accordingly, "when assessing the merits of an objection to a class action settlement, courts consider the background and intent of objectors and their counsel, particularly when indicative of a motive other than putting the interest of the class members first." *Dennis v. Kellogg Co.*, No. 09-cv- 1786-L (WMc), 2013 U.S. Dist. LEXIS 163118, at *11 n.2 (S.D. Cal. Nov. 14, 2013); *In re Law Office of Jonathan E. Fortman, LLC*, No. 4:13MC00042, 2013 U.S. Dist. LEXIS 13903, at *3 (E.D. Mo. Feb. 1, 2013).

As one commentator has stated, class action objectors are "the least popular parties in the history of civil procedure." *See also* Brunet, Edward, "Class Action Objectors: Extortionist Free Riders or Fairness Guarantors," 2003 U. CHI. LEGAL F. 403, 438-42 (providing a summary of several scholarly and judicial commentaries on objector "blackmail").

Sibley does not contend that the settlement benefits obtained for the Class are unfair, inadequate or unreasonable. Rather, his objections are primarily pontifications about the settlement, all of which are answered in the Settlement Agreement and other approval papers. Many of Sibley's veiled concerns are based upon his failure to read the materials filed in this case, thereby highlighting that the true motive behind his Objection is not out of a desire to improve the general welfare of the Class. Based on publicly available information, it appears that every one of

Sibley's prior objections have either been overruled, or withdrawn, presumably because some attorneys chose to pay Sibley off to withdraw his objection.

IV. THE OBJECTION LACKS MERIT AND SHOULD BE OVERRULED

A. *Adequacy of Class Compensation*

Sibley states that the estimate of possible recovery to class members is impossible to determine. However, the Settlement Agreement and Notice documents clearly state that $11,200,000.00 is the monetary Settlement Amount available to pay valid claims. The Settlement Agreement and Notice also set forth the total amount available to each class member depending on if they submit a claim with or without proof of purchase.

B. *Injunctive Relief*

Sibley questions whether removal of the "Made with Real Ginger" claim has any value. First, as set forth Motion for Final Approval, one of the principal objectives of the litigation was to force Defendants to stop using the phrase – Plaintiffs accomplished that goal. Sibley's contention that all Defendants are agreeing to do is what it is required to do under current law is erroneous. One of Defendants' primary defenses is that there is no federal or state regulation or law prohibiting it from using the at-issue phrase.

Notwithstanding the strength of these defenses, Defendants have agreed to a permanent injunction barring the phrase "Made from Real Ginger" in any labeling of the Products. The proposed Settlement resolves all allegations in the Action relating to deceptive labeling and advertising of the Products as "Made from Real Ginger" and does so at a significant price. The cost to Defendants in implementing the negotiated for injunctive relief is hundreds of thousands of dollars.

C. *Objections to the Proposed Attorney's Fees*

Sibley states that the general proposition that the Court must assess the reasonableness of

the fee – Plaintiffs and Class Counsel agree. However, Sibley does not object to the amount of Class Counsel's fees, he just admonishes the Court to award a fee that is consistent with governing law. Sibley's objection makes clear that he either did not read, or simply does not understand, the Settlement Agreement in this case. His remarks about the Court fairly allocating the Class' damages and attorney's fees from the "lump sum settlement" is irrelevant since the attorney's fees in this case were separately negotiated and are being paid separate and apart from the funds available to the Class – this is not a "lump sum settlement" as mischaracterized by Sibley.

Because the fee was negotiated separately and independent of the claims-made class recovery, Sibley is without standing to challenge the fee.[8] "In the class action context, simply being a member of the class does not automatically confer standing to challenge a fee award to class counsel—the objecting class member must be 'aggrieved' by the fee award."[9]

Moreover, Class Counsel did file a fee motion outlining the hours incurred and the hourly rate, despite Sibley's contention otherwise.

D. *Cy Pres* Appropriate?

Sibley states that there is no provision for *cy pres* awards in the Settlement. The Settlement Agreement provides that Defendants must pay all valid claims up to the total Settlement Amount of $11,200,000.00. Sibley seems to misunderstand that this is a claims-made settlement, not a common fund settlement. As such, there is no *cy pres* available.

VI. CONCLUSION

Based on the foregoing, the Court should (1) Strike or overrule Sibley's Objection; (2)

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8. *See Glasser v. Volkswagen of Am., Inc.*, 645 F.3d 1084, 1088 (9th Cir. 2011); *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1326 (9th Cir. 1999) ("Class actions commonly produce a common fund from which attorneys' fees are drawn, with the residue to be paid to the class. The particularized, traceable, remediable injury necessary for an objector's standing arises from his claim on his share of whatever is left in the pot after attorneys' fees are withdrawn.").
9. *Id.* (*citing In re First Capital Holdings Corp. Financial Prods. Sec. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994))

grant Final Approval to the Settlement; (3) approve the request for Service Awards to the Plaintiffs; (4) approve Class Counsel's application for attorneys' fees and expenses; and (5) enter Final Judgement dismissing the Action with prejudice. Moreover, the Court should find Sibley's Objection to be frivolous and made for an improper purpose, and tax all costs attorneys' fees incurred in responding to his objection.

Class Counsel has conferred with counsel for Defendants and counsel for Defendants does not oppose this request.

Respectfully submitted,

Dated: March 25, 2019 By: */s/ Matthew H. Armstrong*

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon all parties of record in this cause enrolled in the Missouri E-filing System by electronic service on March 25, 2019.

/s/ Matthew H. Armstrong