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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TAMAR DAVIS LARSEN, on behalf of herself and all others similarly situated, Plaintiff, vs. KING ARTHUR FLOUR COMPANY, INC. Defendant.	Case No.: C11-05495-CRB CLASS ACTION **RESPONSE OF THE KING ARTHUR FLOUR COMPANY, INC. TO PLAINTIFF'S MOTION TO DISMISS ACTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41** **DATE: June 29, 2012** **TIME: 10:00 a.m.** **CTRM: 6, 17th Floor**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Statutes

The King Arthur Flour Company, Inc. ("KAF") hereby submits this Response to Plaintiff's Motion to Dismiss Action Pursuant to Federal Rule of Civil Procedure 41. Contrary to the untruthful contentions of the Motion at 5, KAF has *never* opposed dismissal of this action but, rather, KAF *demanded* the dismissal of this action. Motion at Exh. 2. The basis for KAF's demand was, among other things, that Plaintiff Tamar Davis Larsen ("Larsen") filed a false declaration in support of her Complaint, Doc. 1, at its Exh. A (at pages 28 and 29 of 29), and her counsel made knowingly false averments in the Complaint, *id.* at ¶5 and ¶¶29-30. Larsen and her three law firms specifically contended that she was a customer of KAF and had purchased KAF baking mixes at Berkeley Bowl grocery store within the Northern District of California—even though she was *not* a customer and *did not* purchase KAF baking mixes. Specifically, Larsen falsely claimed that she had purchased the following five baking mixes: Classic Buttermilk Pancake Mix, Blueberry Sour Cream Scone Mix, Multi-Grain Pancake Mix, Belgian Waffle Mix, and Chocolate Lava Cake. *Id.* None of these mixes were or are sold at Berkeley Bowl. For class action purposes, because Larsen never was a customer of KAF, she could never be a "representative party that will fairly and adequately protect the interests of the [alleged] class," as required by Federal Rule of Civil Procedure 23(a).[1] As a result, the Complaint, when filed, was frivolous, and was knowingly frivolous.

KAF obviously believes this action should be dismissed with prejudice and asks this Court to do so *after* the Court evaluates whether to grant attorney's fees and the amount of any fees to be awarded to KAF.[2] Given the egregious nature of the false declaration made by Larsen, and given that the three law firms would not have been able to file this class action suit *at all* without her false declaration, and certainly given the advanced stage of the litigation (discussed supra), KAF should not be forced to bear the burden of the extensive attorneys fees, expenses and cost incurred in this six-month old litigation. Without the mendacity of both Larsen and her three law firms, *none* of the

[1] Larsen eventually filed a First Amended Complaint ("FAC") on March 2, 2012 (Doc. 26) but even this reiterated the false claims that Larsen was a customer of KAF, FAC at ¶5 and that she was an appropriate member of the class Larsen sought to have created, *id*. at ¶¶49-50.

[2] The Court should be aware that KAF refused to agree to the proposed stipulation offered by Larsen *only* because it sought to have KAF waive it rights to seek attorney's fees, expenses and costs. *See* Motion at Exh. 3, page 3.

fees and expenses would have been incurred. Federal Rule of Civil Procedure 41 permits this Court—given these circumstances—to award KAF its reasonable fees, expenses and costs incurred in the defense of this frivolous action.

In addition to the exercise of discretion available under Rule 41, this Court may order Larsen and all her counsel to "show cause" why they should not be sanctioned for initiating this action under false pretenses. Certainly Federal Rule of Civil Procedure 11(c)(3) gives this Court discretion to issue a show cause order. KAF respectfully notes that Rule 11(c)(5)(B) requires this Court to issue a show cause order *prior to* the dismissal of any action.

I. ARGUMENT

A. Introduction

The false claims made by Larsen and the three law firms were made for the purpose of *manufacturing* a class-action claim—where none properly existed—and in an attempt to secure jurisdiction in the Northern District of California over a Vermont company, KAF, that has no principal place of business in California, and does not sell the accused baking mixes at Berkeley Bowl. Most importantly, the baking mixes named in the Complaint are principally sold—not by KAF but—by KAF's subsidiary The Baker's Catalogue, Inc. ("Subsidiary") that has not been named a party to this action. The Subsidiary sells the accused baking mixes through its website, www.kingarthurflour.com (the "Website") and its Baker's Catalogue (the "Catalogue"), from Vermont. *See* Exh. A hereto, Declaration of Michael Bittel ("Bittel Dec.") at ¶¶8-9. (Hereafter KAF will refer to the baking mixes that are named by Larsen in her original Complaint at ¶¶21a to 21mmm (Doc. 1) and her First Amended Complaint at ¶¶36a to 36mmm as the "Named Baking Mixes").

The fact that the false allegations of being a customer of KAF were made by a serial class-action plaintiff compounds the severity of both her actions and those of the three law firms that have represented her in a total of five class cases. The sworn, but nonetheless false, declaration submitted by Larsen, and filed by her counsel, such an egregious breach of the obligations of truthfulness and candor to this Court that both Larsen and each of her counsel should be sanctioned, specifically by being assessed KAF's fees, expenses and costs occurred as a result of having to defend itself against

claims that could not have been asserted without use of the false declaration of Larsen. Simply put, because the three law firms could not find a plaintiff that had bought the Named Baking Mixes and believed themselves damaged by that purchase, the three law firm made one up.

The Motion to Dismiss claims to be based upon three—here again falsely represented—bases: (1) that KAF changed its packaging in response to the filing of the Complaint; (2) that the Ninth Circuit's January 12, 2012 decision in *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581 (9th Cir. 2012) caused Plaintiffs' counsel to realize that they would not be able to prove their case; and (3) that Larsen only learned in April 2012, when KAF produced discovery, that KAF sold only a very small fraction of the accused baking mixes in retail stores where consumers could view the packaging. Motion at 1. Each of these are merely excuses, not legal justifications for Larsen's frivolous claims.

In fact, the *May 4, 2012* filed Motion to Dismiss was filed only because KAF sent notice to Larsen's counsel that KAF intended to move for Rule 11 sanctions, on the ground that Larsen's claims were frivolous, if she did not withdraw each and every asserted claim. *See* Motion at Exh. 2 (Doc. 32-2) (KAF's *April 13th* notice on Rule 11) and Exh. 4 (Doc. 32-4) (KAF's *May 2nd* letter elaborating on the basis for Rule 11 sanctions). Although Larsen now promotes three excuses for moving to dismiss with prejudice, Motion at 1, these excuses are suspect at best.

First, as KAF advised this Court (and Larsen) in the Joint Case Management Statement (Doc. 22) at 3-4:

> [B]y 2010, perceived customer demand for "all natural" products had dropped significantly and KAF made the decision to eliminate reference to "all natural" on its product packaging. By February 2011, and without having had any complaint about its use of "all natural" from any source, KAF redesigned its packaging and, as old packaging was exhausted, the first of its formerly-labeled "all natural" mixes began to be sold in boxes that no longer contained the phrase "all natural." The transition process has been completed as previously planned by KAF and it now has abandoned the use of the term "all natural" for its baking mixes except for its "popover" mix.

See also Exh. A hereto, Declaration of Michael Bittel ("Bittel Dec.") at ¶¶12-14. Thus, both this Court and Larsen were aware, by not later than January 23, 2012, that KAF's decision to remove "all natural" was made by KAF more than six months before it received any communication from Larsen or her counsel. It is false and misleading for Larsen to claim the decision was driven by Larsen's

Complaint.

Further, Larsen's claim that KAF has continued to use packaging bearing "all natural" is not supported by any documents. Larsen relies upon the Declaration of Wyatt Lison (Doc. 32) that, as it happens, is completely inconsistent with the records of KAF. *See* Exh. A, Bittel Dec. at ¶16 (confirming that after an exhaustive inspection, KAF confirmed that, by way of example, the product packaging link for the Chocolate Lava Cake Mix alleged to have been purchased by Larsen was not even *accessed* by *any* customer after December 20, 2011, and thus could not have been accessed by Mr. Lison in February of 2012).

Second, as to the *Mazza* decision, it issued on January 12, 2012, before KAF even filed its Answer to Larsen's original Complaint (*see* Doc. 9) (Answer of KAF). Still, Larsen continued on with this action and, two months later, amended her Complaint by filing a First Amended Complaint ("FAC") asserting a new cause of action under the Federal Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. § 2301 *et seq.*, in the (apparent) mistaken belief that the MMWA applies some amorphous federal warranty law rather than, as it does, the warranty law of the jurisdiction of each separate class action member. *See*, *e.g.*, *Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 n.2 (9th Cir. 2009) ("Under [the Magnuson-Moss Act], the court applies state warranty law."); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) ("[C]laims under the Magnuson-Moss Act stand or fall with his express and implied warranty claims under state law. Therefore, . . . disposition of the state law warranty claims determines the disposition of the Magnuson-Moss Act claims."). In other words, the issuance of the January 2012 opinion in *Mazza* did not prompt Larsen to dismiss her claims but, rather, it prompted Larsen's counsel to amend her claims in a futile and mistaken attempt to avoid the limitation of *Mazza*.

Third, the information concerning the modest amount of retail sales of Named Baking Mixes that Larsen now claims to have learned only through discovery from KAF was publicly available before the filing of the Complaint. Given the alleged inspection performed by Mr. Lison, it is simply not possible for Larsen to have been unaware that the Named Baking Mixes were sold principally through the Website. Indeed, Mr. Lison alleges to have done his pre-filing investigation by *reviewing the Website* that is operated in Vermont. He does not state that he or anyone visited any

retail stores to see whether and how the Named Baking Mixes were sold, if they were sold in stores at all. *See generally*, Lison Dec. (Doc. 32) and see Exh. B hereto, Declaration of Cynthia E. Kernick ("Kernick Dec.") at ¶13 and its App at 16-34 (documents produced as Larsen's February 24, 2012 Initial Disclosures). In short, Larsen has no evidence of any sales or purchases at retail but rather has only evidence that KAF, a Vermont Company, and its Subsidiary, sold product over the Internet from *Vermont*.

None of the excuses that Larsen promotes as justifications for its Motion to Dismiss are credible. The simple fact is that Larsen is dismissing this case because KAF has threatened to move for Rule 11 sanctions and for no other reasons. Notably, KAF was notified that Larsen would dismiss with prejudice only days before Larsen was scheduled to be deposed and the timing of the Motion, when coupled with the refusal to produce Larsen for deposition, certainly suggests, if not outright confirms, that the reason for the Motion is that Larsen's counsel—having realized that KAF had learned and could prove the Larsen was not a customer—would vigorously challenge her credibility in her deposition and do so for support for its planned Rule 11 motion. Because Larsen did not want to be questioned about her so clearly false declaration that began this litigation, she refused to present herself for a deposition that was schedule to have occurred on May 3, 2012, *prior to the filing of the Motion to Dismiss*. *Id*. at page 3, last paragraph ("Plaintiff will not attend any deposition that day.")

B. <u>The Plaintiff and Her Counsel</u>

Plaintiff Larsen is a serial class action plaintiff that, in short order, filed multiple class actions in the Northern District of California, all based on purported allegations of misuse of the term "all natural." The cases she has filed were:

Larsen v. Nonni's Foods, Civ. Action No. 3:11-cv-4758-SI (filed September 23, 2011);

Larsen v. Trader Joe's Company, Civ. Action No. 3:11-cv-5188-SC (filed October 24, 2011);

Larsen v. The King Arthur Flour Company, Inc., Case No. C11-05495-CRB (filed November 14, 2011); and

Littlehale v. The Hain Celestial Group, Inc., Case No. C4:11-cv-06342-PJH (filed Dec. 15, 2011).

In each case,[3] Larsen was represented by a consortium of the same three law firms: The Law Offices of Janet Lindner Spielberg; Stember Feinstein Doyle Payne & Kravec, LLC; and Braun Law Group, P.C. (the "Consortium"). Among their targeted companies was KAF, a Vermont company, Complaint (Doc. 1) at ¶ 6, having no place of business in California. *See* Exh. A hereto, Bittel Dec., at ¶5 .

On June 8, 2011, Janet Spielberg, on behalf of Larsen and the Consortium, notified KAF by a letter sent to its Vermont headquarters, that Spielberg represented Larsen and potentially a "California and nationwide class consisting of all consumers who have purchased the products that are the subject of this letter." *See* Exh. B, Kernick Dec. at ¶5 and its App 1-3. This letter complained only that Larsen had purchased (unidentified) products that Spielberg alleged "contained alkalized cocoa or cocoa processed with alkali as an ingredient" (*i.e.*, potassium carbonate). *Id.* No where in the letter were the alleged products specifically identified, despite the fact that the letter purported to be sent in accordance with The California Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.* ("CLRA") (the letter is hereafter referred to as the "June 8 CLRA letter"). Nowhere in the letter did Spielberg identify *where or when* Larsen purportedly purchased the baking mixes, or how much she allegedly paid for the mixes.

On June 30, 2011, KAF's counsel replied, seeking information regarding the identity of the products purchased, as well as the "when and where" of its purchase, and copies of the packaging. *See* Larsen's Lison Dec. at Exh. 1 (Doc. 32-1) (copy of the June 30 letter). None of the requested information was received in response to this letter.

As admitted in the Motion to Dismiss, the Consortium began its investigation into KAF in earnest in August 2011 (*after* sending its CLRA letter), by having Mr. Lison, an associate with the Stember Feinstein firm, research the Website to identify products sold through the website. Lison Dec. (Doc. 32) at ¶9. Mr. Lison's Declaration does not mention any investigation performed in any

[3] Larsen also has been a class action plaintiff in a S.D. CA (San Diego) action commenced by the Stember Feinstein firm: Bates v. Kashi, Case No. 3:11-cv-01967-H-BGS (filed Aug. 24, 2011). She was not represented by either the Spielberg or Braun firms in that action.

retail stores, only on the Website. Indeed, Larsen's Initial Disclosures (under which Larsen produced, rather than described its Federal Rule of Civil Procedure 26(a)(1)(ii) documents) (*see* Exh. A, Kernick Dec. at ¶12 and its App 13-15)) confirm what Larsen had learned about the sales of the Named Baking Mixes, i.e., that KAF's Subsidiary uses photographs of finished baked goods, and not packaging, to market its baking mixes, and the descriptions that accompany the photographs do not reference "all natural." *See id*. ¶13 and its App 16-34. Further, Larsen was aware that the Named Baked Goods were sold through the Website. Lison Dec. (Doc. 32) at ¶9. But as of August 9, 2011, Larsen had performed no investigation into whether the Named Baking Mixes were sold in retail stores within this jurisdiction. But, by that time (August 2011), she and the Consortium had already learned the information that she now attempts to claim was not disclosed to her until KAF produced its documents in April 2012.

On November 2, 2011, Mr. Lison, in an apparent attempt to find a store within this district that sold the Named Baking Mixes, sent an email to Berkeley Bowl that asked the following irrelevant question: "Do you sell King Arthur Flour *products*." (emphasis added). *See* Exh. A, Kernick Dec. at ¶¶14-15 and its App 35-36 (Larsen Initial Disclosures). Berkeley Bowl, even though it *does not sell* any of the Named Baking Mixes responded "Yes" because it does sell KAF's bagged *flour* (a KAF "product"). Exh. A, Bittel Dec. at ¶17. But the answer from Berkeley Bowl was not relevant to the Named Baking Mixes that are the subject of Larsen's Complaint. Other than this irrelevant inquiry to Berkeley Bowl, nothing in Larsen's Initial Disclosures provided any evidence that Larsen had actually purchased any of the Named Baking Mixes—no sales receipts and no copies of packaging that she alleges to have purchased. Nothing. Exh. B, Kernick Dec. at ¶19.

Indeed, after discovery began, and in response to KAF document requests, Larsen was forced to admit that she has *no* evidence that she purchased *any* KAF products at Berkeley Bowl, i.e., no packaging, no receipts or any other evidence according to Larsen's discovery responses. *See* Exh. B, Kernick Dec. at ¶¶21-24, and its App at 40-42. Except for Lison's misdirected research generally into KAF *products* and *not* mixes, coupled with an investigation into the sales made through the Vermont-based Website, *see* Lison Dec. (Doc. 32), as far as KAF has been able to ascertain given the refusal by Larsen to make herself available for deposition, Larsen did not make any attempt to

determine if Berkeley Bowl actually sold KAF *mixes* rather than *flour*.

It is an incontestible fact that Berkeley Bowl *has not sold* the Named Baking Mixes, *see* Exh. A, Bittel Dec. at ¶¶17-22, and, as a result, neither Larsen nor the Consortium *would ever* be able to produce evidence to support that Larsen is or was a customer of KAF. Indeed, KAF's Subsidiary that operates the Website has confirmed through a search of its records, that Larsen does not buy any product from the Website or Catalogue. Exh. A, Bittel Dec. at ¶23. Because she is not a KAF customer, she cannot be a representative plaintiff for purposes of Larsen's attempt to certify a class.

Nonetheless and without any proof of purchase, on November 14, 2011, a Complaint was filed by the Consortium on behalf of their serial-plaintiff Larsen.

The Complaint, in contrast to Larsen's June 8th CLRA letter giving notice regarding only alkalized cocoa, identified five ingredients used by KAF that Larsen alleges to be synthetic. *Compare* Exh. A Kernick Dec. at ¶5, and its App 1-3 (letter) with Complaint (Doc. 1) at ¶¶6-8. The four new ingredients not mentioned in the June 8th CLRA were Disodium Phosphate, Monocalcium Phosphate, Sodium Pyrophosphate and Ascorbic Acid.

As admitted in her Complaint, (Doc. 1), at ¶75, Larsen never sent a CLRA letter regarding these other four ingredients named in the Complaint until after the Complaint was filed, *see* Exh. A, Kernick Dec., at ¶¶9-10, and its App 6-11(Nov. 15 and Dec. 30, 2011 Spielberg letters). By that time, however, the late-sent CLRA letters were defective and could not support the CLRA claims related to Disodium Phosphate, Monocalcium Phosphate, Sodium Pyrophosphate and Ascorbic Acid. *See Outboard Marine Corp. v. Superior Court,* 52 Cal.App.3d 30, 40-41, 124 Cal.Rptr. 852 (1975) (the "notice" requirement of the CLRA is strictly construed); and *Galindo v. Financo Financial, Inc.*, No. C07-03991, 2008 WL 4452344, at ¶5 (N.D. Cal. Oct 3, 2008) (*see* Exh. C) (when the notice requirement of the CRLA has not been met, "other disciplinary ways [exist] to deal with any willful disregard of the law, such as attorney's fees awards to name just one.").

Once the Complaint was filed, KAF's counsel repeatedly advised the Consortium lawyers that they had not done a proper pre-filing investigation and that they, apparently, did not understand that, although KAF's *flours* were widely sold in retail grocery stores, its *baking mixes* were principally sold through KAF's website and Catalogue, neither of which market the products by

using the packaging that contained the phrase "all natural." Specifically, these discussions first occurred on January 25, 2012 and again on March 21 and, in each, Consortium lawyers were advised that KAF's sales of baking mixes were principally made through its website and the Catalogue and not through retail store sales. Exh. A, Kernick Dec. at ¶11, and its App 12.

Despite now arguing in its Motion that Larsen was unaware of KAF's business model when it filed the Complaint, Larsen's February 24, 2012 Initial Disclosures rely *exclusively* on material downloaded from the Website for proof of KAF's sales. Larsen did not produce even a single copy of any actual package sold by KAF in any retail store. Exh. B Kernick, Dec at ¶¶19, 23-24. Further, the exemplars produced by Larsen confirm that the Website does not promote the mixes as being "all natural." *See* Kernick Dec. at ¶13 and its App at 16-34. Although Larsen never bothered to request, and thus never reviewed, a copy of the Catalogue that issues several times a year, the Catalogue too confirms that KAF does not rely upon the packaging of its baking mixes to sell the products but relied, just as on the website, on photographs of finished baked goods to help customers make their purchasing decisions. *See* Exh. A, Bittel Dec. at ¶29 at its App 10-11 (representative pages of an exemplary Catalogue that pre-dates the June 8 CLRA notice letter), and *see generally* Exh. D.

C. KAF's Business and Baking Mixes

KAF is a 220 year old flour company, based in Vermont, and is 100% employee-owned. Exh. A, Bittel Dec. at ¶5. There is extensive information about KAF, its business and products that is available to anyone through a free on-line. Indeed, its website, www.kingarthurflour.com, describes the company as follows:

> King Arthur Flour is America's oldest flour company, founded in Boston in 1790 to provide pure, high-quality flour for residents of the newly formed United States. More than 220 years later, we're the nation's premier baking resource, offering everything from top-quality baking products to inspiring educational programs – all backed by the passion and commitment of our dedicated employee-owners.

See http://www.kingarthurflour.com/about/history.html. This page invites readers to click on a link to a video of the history of KAF leading up to its present day configuration as a baking company whose principal product remains its many varieties of flours sold wholesale, for use in bakeries and for resale in grocery stores. This video also confirm that KAF (through it Subsidiary), in addition to its line of flour products, also sells related baking products (such as mixes) through the Website and

Catalogue. *See* KAF's marketing video *"History in the Baking,"* available *id.* by clicking on the hyperlink "watch our history video" and which described the birth and growth of KAF's Vermont-based website and Catalogue. (A representative copy of a Baker's Catalogue is submitted as Exh. D). Information about KAF's business structure and products also is widely and easily available through other basic Internet searches, including on a "Company Description" published by Hoovers.com that states:

> While other millers are feeling the effect of fewer home bakers, The King Arthur Flour Company is doing its best to make its sales rise. King Arthur sells its all-natural flours to retailers, bakeries, and foodservice companies nationwide. It also sells its flours, baking ingredients, and equipment at its retail store in Norwich, Vermont; through its website; and its catalogs. To drum up confident new customers, the company sends baking instructors across the US to teach classes and runs a baking school at its Vermont headquarters. Founded in 1790, King Arthur Flour claims it is the oldest flour company in the US. The company is 100% employee owned.

Available at http://www.hoovers.com/company/The_King_Arthur_Flour_Company_Inc/rfchtif-1.html.

Myriad YouTube videos are available to anyone interested in learning more about KAF, including Larsen and the Consortium. A simple search for the term "King Arthur Flour" uncovers such things as (1) the "Google Chrome:King Arthur Flour," available at http://www.youtube.com/watch?v=QFLP7HD1s7k, (2) "King Arthur Flour: Recipe for Success," available at http://www.youtube.com/watch?v=nx23RqdqiRA, (3) "King Arthur Flour and their Goggle+ Story," available at http://www.youtube.com/watch?v=isJLd0c4rg4, and (4) "See How King Arthur Flour Has Endured for Over 200 Years," ("the core to the Company has always been our flour," and "we also have a Catalogue business, a direct business, we sell literally thousands of products that people need for home baking"), available at http://www.youtube.com/watch?v=n261ixJpb0w. All of these, and the many more that are and were publicly available to Larsen and her Consortium with the simple click of a mouse, explain that KAF's direct to consumer sales are made through its Website and Catalogue whereas its flour sales are sold wholesale to bakeries and retail stores (like Berkeley Bowl) for resale. *See* Exh. A, Bittel Dec. at ¶¶8-9. Critically, Larsen produced copies of two of these videos (## 1 and 4) with its Initial Disclosures. Its production

confirmed that Larsen's counsel had downloaded these videos on December 20, 2011. *See* Exh. B, Kernick Dec. at ¶¶7-9 (marked as PLAINTIFF 141 and 142).[4] These videos and the fact that they have been in the files of Larsen's counsel since December 20, 2011—a date long before KAF's Answer was due—confirms that the excuse not offered by Larsen that she only just learned that KAF sells its principally through the Website and Catalogue is just that, an excuse, and is not a justification for a dismissal without KAF being made whole.

The Motion to Dismiss also makes false allegations concerning *when* KAF made its decision to cease using "all natural" on its packaging. Motion at 3-4. It does so by citing to Mr. Lison's "research" which apparently was of the same poor quality of his pre-filing investigation into whether Berkeley Bowl sold the Named Baking Mixes. In fact, by the end of 2010, as this Court was advised in the Joint Case Management Statement (Doc. 22) at 3-4, KAF made the decision—without having had a single complaint from a customer or any governmental agency—that the use of "all natural" on its packaging was not significant to KAF consumers and could be dropped from the packaging. *See* Exh. B, Bittel Dec. at ¶13. As confirmed by both the Website and the Catalogue, as shown in Exh. B, Bittel Dec. at ¶10 and its App 1-4, 10-11, KAF uses photographs of the finished product photographs, and not its boxes, to market its baking mixes. By February 2011, KAF and its Subsidiary began the process of exhausting old "all natural" packaging and replacing it with "Just Like Homemade" packaging. Compare Exh. A Bittel Dec. at ¶13, and its App 5 and 6.

If, as Larsen now argues, her counsel investigated the Website in August 2011, Doc. 32, Lison Dec. at ¶ 4, this review *confirms* two facts that are critical to this Court's consideration of whether fees should be awarded to KAF upon dismissal of this action which fact were clear from Larsen's Initial Disclosures: (1) that Larsen had inspected the Website four months prior to filing the Complaint; and (2) this inspection necessarily confirmed that (a) the Named Baking Mixes were almost exclusively sold through a Website that (b) did not market the mixes by showing the consumer packaging but, rather, used photographs of finished baked goods to encourage customers

[4] KAF will bring copies of these videos to the June 29, 2012 hearing for the Court's consideration, along with the original production disk confirming the dates that Larsen had this information in the files of her counsel.

to buy its mixes. *See id.;* and see Exh. B, Kernick Dec. at ¶13 and its App 16-34 (Larsen Initial Disclosures 118-135). Its attempt to argue in its Motion that this information was unknown to it until KAF produced documents is simply not believable and supports the issuance of fees to KAF.

The evidence that Larsen's claims were false is unambiguous. After receiving the Complaint, KAF looked through its own records to see if *it* had sold baking mixes to Berkeley Bowl. It had not. Next, it confirmed that the distributor that sells KAF *flour* to Berkeley Bowl had not distributed any baking mixes to Berkeley Bowl. The distribution had not. Finally, to rule out all possibility that Berkeley Bowl had somehow acquired the Named Baking Mixes through other sources, KAF sent a sales representative, Mark Roberts, to Berkeley Bowl in January 2012, along with the SKUs for each of the six products Larsen claims to have purchased. Roberts was advised that Berkeley Bowl's records of sales go back only two years, but after the store checked its records, it was unable to find sales of any of the Named Baking Mixes claimed to have been purchased by Larsen. He reported this information to his supervisor Mr. Bittel. *See* Exh. A, Bittel Dec. at ¶¶17-22.

Once KAF checked and then double-checked that Berkeley Bowl could not have stocked or sold the Named Baking Mixes, KAF began in earnest to seek to depose the Plaintiff but Larsen's counsel dragged their fee. The first correspondence requesting dates for Larsen's deposition was February 24, 2012. Exh. A, Kernick Dec. at ¶20. The Consortium did not even respond to this for a month. After months of negotiation, KAF was finally able to force Larsen's counsel into agreeing to schedule a deposition of Larsen for May 3, 2012. Just days before the deposition, Larsen's counsel unilaterally cancelled the deposition. *See* Motion at Exh. 3, page 3.

D. Attorneys Fees Are Properly Awardable Under Rule 41.

As properly noted by Federal Rule of Civil Procedure 41(a)(2), after the pleadings have closed (as now), a plaintiff may only voluntarily dismiss an action "by order of court, on terms that the court considers proper." But it is always appropriate for the district court, in assessing any Rule 41(a)(2) motion, to consider whether "costs and attorneys fees should be imposed as a condition of the dismissal without prejudice, and if so, in what amount." *Westlands Water Dist. v. United States,* 100 F.3d 94, 97-98 (9th Cir. 1996) (remanding to the district court to determine whether to award fees and the amount to be awarded), and *Stevedoring Servs. of Am. v. Armilla Int'l. B.V.*, 889 F.2d

919, 921 (9th Cir. 1989). Ordinarily the decision to award attorney's fees under Rule 41(a)(2) is a matter within the trial court's discretion, and the normal rules governing a court's exercise of its discretion are applicable. *Stevedoring*, 889 F.2d at 921; and *see Woodfin Suite Hotels, LLC v. City of Emeryville*, No. C06-1254, 2007 WL 81911, at *5 (N.D. Cal. Jan 9, 2007). Further, as noted in *Galindo* 2008 WL 4452344 (*see* Exh. C) an award of fees is appropriate exercise of the Court's discretion when (as here) it is necessary to deal with the willful disregard of the law.

Here, there are multiple grounds for this Court to exercise its discretion under Federal Rule of Civil Procedure 41(a)(2) and award fees, expenses and costs to KAF:

(1) The false declaration of a serial plaintiff that claimed that Larsen purchased any of the Named Baking Mixes from Berkeley Bowl in Berkeley California (Complaint (Doc. 1) at pages 28 and 29 of 29 and ¶5, and FAC at ¶5)—when it is not possible for her to have done so.

(2) the Motion to Dismiss contains intentional misstatements regarding the reasons for the dismissal about purported "new facts" which, in reality, was merely information that Larsen should have learned in its review of the Website, or what it could have learned if it had inspected the Catalogue prior to filing the Complaint or doing even basic on-line research for information such at that available through www.hoovers.com or YouTube;

(3) Larsen failed to send the required pre-filing notice letters under the California Legal Remedies Act ("CLRA") and the Magnusson Moss Warranty Act ("MMWA"), even though the Motion misleadingly suggests otherwise (Motion at 3, first paragraph). Neither of these omissions are curable post-filing. *See See*, *e.g.*, *Rooney v. Sierra Pac. Windows*, No. 10-cv-00905, 2011 WL 5034675, *4 (N.D. Cal. Oct. 11, 2011) (granting defendant's motion for judgment on the pleadings with prejudice and holding: "In order to state an actionable claim for breach of warranty and/or violation of the Magnuson-Moss Act, a plaintiff must demonstrate that . . . the seller was given reasonable opportunity to cure any defects [and] the seller failed to cure the defects within a reasonable time or a reasonable number of attempts.") (internal citations omitted).

(4) the advanced state of the litigation has forced KAF to interview more than two dozen witnesses, interview, select and begin to work with two experts (including a survey expert), collect tens of thousands of documents in response to 99 document requests propounded by Larsen, and

respond to 220 Requests for admissions and respond to 16 interrogatories (including subparts) propounded by Larsen. In addition, because Larsen's counsel refused to produce Larsen at the last minute, significant steps to prepare for her deposition already had been taken. KAF has expended significant legal fees as a result of Larsen's false claims. *See* Exh. B, Kernick Dec. at ¶29.

Each of the actions by Larsen and the Consortium justify sanctions in the nature of fees and expenses that may be granted in the exercise of this Court's discretion. If the Court were to issue a show cause order under Rule 11, the assessment of any sanction would be "what suffices to deter repetition of the conduct or comparable conduct by other similarly situated." Fed. R. Civ. P. 11(c)(4). If the Court does not exercise this discretion, the Consortium and others similarly situated will receive the message that there is no risk to instituting a legal action that is predicated on a knowingly false declaration.

E. The Harm To KAF Justifies An Award of Fees

As noted above, KAF has been forced to invest huge resources in preparing itself to defend against the motion for class certification that was to be filed on August 17, 2012 as ordered by this Court. Doc. 28. In contrast to the Motion's assurances that this case is in the "early stage," KAF already has had to respond to 220 Requests for Admissions from Larsen, as well as 99 document requests and 17 interrogatories (including sub-parts). Exh. B, Kernick Dec. at ¶25. It has gathered and prepared for production tens of thousands of documents that needed only the long delayed agreement from Larsen's counsel to a Stipulated Protective Order before the documents could be produced. *Id. at* ¶29. KAF's counsel has interviewed dozens of potential witnesses and has searched for, interviewed and finally, selected from all the interviewees, two experts, all at great expense. *Id.* KAF sought to depose Larsen, and has tried to do that since February, but Larsen's lawyers have refused to produce her for deposition, first by delaying the deposition and then by canceling it altogether but not until KAF had expended significant sums in preparing to take the deposition. *Id.* This case, in no way, is in its preliminary stages. To prepare to defend against Larsen's claims, KAF has now expended hundreds of thousands of dollars in attorneys' fees and expenses. Morever, this frivolous action has caused significant disruption to the operation of KAF's employee-owned business. Litigation holds were put into place, employee-owners were required to

put aside their day-to-day jobs to be interviewed by counsel and to collect documents and relevant information necessary to defend KAF against the false claims asserted by Larsen and the Consortium. *Id.*

II. CONCLUSION

As demanded in writing by KAF to Larsen, this action should be dismissed with prejudice because it has no foundation and because Larsen filed a false affidavit in an effort to secure jurisdiction in the Northern District of California. But, as explained above, KAF should also be awarded its fees, costs and expenses that were unnecessarily incurred as a result of Larsen's deception. Should the Court grant KAF's request for an award of fees, KAF will promptly submit—under seal—a detailed submission documenting the work reasonable performed, the hours worked and the fees, expenses and costs incurred.

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Dated: May 18, 2012

By: ***/s/ Cynthia E. Kernick***

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