

SUPREME COURT
FILED

NO. S246490

OCT 10 2018

Jorge Navarrete Clerk

IN THE
SUPREME COURT OF CALIFORNIA

Deputy

JAMES A. NOEL,
Plaintiff, Appellant, and Petitioner,

v.

THRIFTY PAYLESS, INC.,
Defendant/Appellee.

Review of a decision of the Court of Appeal
First Appellate District, Division Four,
Case No. A143026

Marin County Superior Court Case No. CIV 1304712

**REQUEST FOR JUDICIAL NOTICE OF *AMICI CURIAE*
NATIONAL CONSUMER LAW CENTER AND NATIONAL
ASSOCIATION OF CONSUMER ADVOCATES**

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and National Association of Consumer Advocates*

Pursuant to California Evidence Code § 452, *Amici Curiae* National Consumer Law Center and National Association of Consumer Advocates respectfully request that this Court take judicial notice of the following records of the Courts of Riverside County, Santa Clara County, and Los Angeles County:

Exhibit 1: Plaintiffs' motion for class certification filed with the Riverside County Superior Court on April 10, 2009 in *Jeanessa Fenderson, et al. v. Diaz et al.*, No. RIC483005, available on the Westlaw Database at 2009 WL 8150033.

Exhibit 2: Plaintiffs' amended statement regarding class notice and Order, filed with the Riverside County Superior Court on November 24, 2009 in *Jeanessa Fenderson, et al. v. Diaz et al.*, No. RIC483005, available on the Westlaw Database at 2009 WL 8150021.

Exhibit 3: Plaintiffs' motion for class certification filed with the Los Angeles County Superior Court on July 5, 2007 in *Audrey Medrazo et al. v. Honda of North Hollywood, et al.*, No. BC354744, available on the Westlaw Database at 2007 WL 5097819.

Exhibit 4: Complaint for refund, declaratory relief, and injunctive relief filed with the Santa Clara County Superior Court on January 10, 2014 in *Raymond and Michelle Plata v. City of San Jose*, No. 114CV258879.

Exhibit 5: Plaintiffs' motion for class certification filed with the Santa Clara County Superior Court on April 24, 2015 in *Raymond and Michelle Plata v. City of San Jose*, No. 114CV258879, available on the Westlaw Database at 2015 WL 12732872.

Exhibit 6: Defendant City of San Jose's opposition to motion for class certification filed with the Santa Clara County Superior Court on May 15, 2015 in *Raymond and Michelle Plata v. City of San Jose*,

No. 114CV258879, available on the Westlaw Database at 2015 WL 12732869.

Exhibit 7: Motion on Stipulated Distribution Plan and [Proposed] Order, filed with the Los Angeles County Superior Court on June 26, 2016, with an Order dated June 27, 2016 at p. 10 by Hon. David Sotelo of the Los Angeles County Superior Court in *Audrey Medrazo et al. v. Honda of North Hollywood, et al.*, No. BC354744.

Judicial notice of these documents is proper under Evidence Code section 452(d), which provides that a court may take judicial notice of the “[r]ecords of... any court of this state.” Evidence Code § 452(d); *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1569 (finding it is proper to take judicial notice of the existence of court records).

Dated: October 2, 2018

LIEFF CABRASER HEIMANN & BERNSTEIN,
LLP
275 Battery Street, 29th Floor
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By: 

Robert J. Nelson
Roger N. Heller
Melissa Gardner

*Attorneys for Amici Curiae National Consumer
Law Center and National Association of
Consumer Advocates*

DECLARATION OF ROGER N. HELLER

I, ROGER N. HELLER, hereby declare as follows:

1. I am a partner at the law firm of Lieff, Cabraser, Heimann & Bernstein, LLP (“LCHB”) in San Francisco, California, and I am a member in good standing of the Bar of the State of California, duly licensed to practice before this Court.

2. Attached to the concurrently-filed Request for Judicial Notice as **Exhibit 1** is a true and correct copy of a document bearing case caption *Jeanessa Fenderson, et al. v. Diaz et al.*, No. RIC483005, entitled Notice of Motion and Motion for Class Certification; Memorandum of Points and Authorities in Support Thereof, file stamped April 10, 2009 by the Superior Court of California County of Riverside, available on the Westlaw Database at 2009 WL 8150033.

3. Attached to the concurrently-filed Request for Judicial Notice as **Exhibit 2** is a true and correct copy of a document bearing case caption *Jeanessa Fenderson, et al. v. Diaz et al.*, No. RIC483005, entitled Plaintiffs’ Amended Statement Regarding Class Notice (Cal. R. Ct. 3.766) & Request for Order Regarding Class Notice; [Proposed] Amended Order, wherein the term “Proposed” has been crossed out, file stamped November 24, 2009 by the Superior Court of California County of Riverside, available on the Westlaw Database at 2009 WL 8150021.

4. Attached to the concurrently-filed Request for Judicial Notice as **Exhibit 3** is a true and correct copy of a document bearing case caption *Audrey Medraza et al. v. Honda of North Hollywood, et al.*, No. BC354744, entitled Plaintiffs’ Memorandum of Points and Authorities in Support of Motion for Class Certification, file stamped July 5, 2007 by the Superior Court of California County of Los Angeles, available on the Westlaw Database at 2007 WL 5097819.

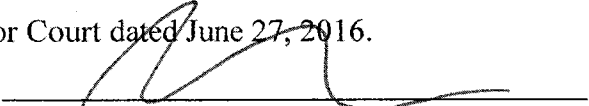
5. Attached to the concurrently-filed Request for Judicial Notice as **Exhibit 4** is a true and correct copy of a document bearing case caption *Raymond and Michelle Plata v. City of San Jose*, No. 114CV258879, entitled Complaint for Refund, Declaratory Relief, and Injunctive Relief, file stamped January 10, 2014 by the Superior Court of California County of Santa Clara.

6. Attached to the concurrently-filed Request for Judicial Notice as **Exhibit 5** is a true and correct copy of a document bearing case caption *Raymond and Michelle Plata v. City of San Jose*, No. 114CV258879, entitled Memorandum of Points and Authorities in Support of Plaintiffs Raymond and Michelle Plata's Motion for Class Certification, file stamped April 24, 2015 by the Superior Court of California County of Santa Clara, available on the Westlaw Database at 2015 WL 12732872.

7. Attached to the concurrently-filed Request for Judicial Notice as **Exhibit 6** is a true and correct copy of a document bearing case caption *Raymond and Michelle Plata v. City of San Jose*, No. 114CV258879, entitled Defendant City of San Jose's Opposition to Motion for Class Certification, file stamped May 15, 2015 by the Superior Court of California County of Santa Clara, available on the Westlaw Database at 2015 WL 12732869.

8. Attached to the concurrently-filed Request for Judicial Notice as **Exhibit 7** is a true and correct copy of a document bearing case caption *Audrey Medraza et al. v. Honda of North Hollywood, et al.*, No. BC354744, entitled Motion on Stipulated Distribution Plan and [Proposed] Order, file stamped June 26, 2016 by the Superior Court of California County of Los Angeles, with an order bearing the signature of Hon. David Sotelo of the Los Angeles County Superior Court dated June 27, 2016.

Dated: October 2, 2018



Roger Heller

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 275 Battery Street, 29th Floor, San Francisco, California 94111. On October 1, 2018, I served true copies of the following document(s) described as:

REQUEST FOR JUDICIAL NOTICE OF *AMICI CURIAE*
NATIONAL CONSUMER LAW CENTER and NATIONAL
ASSOCIATION OF CONSUMER ADVOCATES

on the interested parties in this action as follows:

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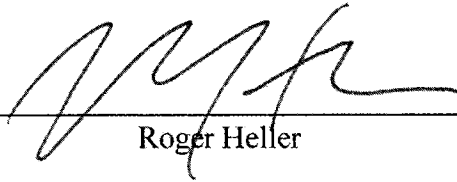
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Attorneys for Plaintiff and Appellant

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on October 2, 2018, at San Francisco, California.

Dated: October 2, 2018



Roger Heller

EXHIBIT 1

(4) 5/20

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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

APR 10 2009
N. Tavaglione

DRJ
APR 13 2009

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9 Attorneys for Plaintiffs

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF RIVERSIDE, RIVERSIDE COURT

12	JEANESSA FENDERSON; TRISTA ESSEX;	)	Case No. RIC 483005
	KATHLEEN ROGERS; DIANA SHERBY;)	
13	ANN MARIE WOOD; NANCY MCGREGOR,	)	[Assigned to Judge Michael B. Donner,
	individually and on behalf of all other similarly	)	Dept. 4]
14	situated,)	
		)	CLASS ACTION
15	Plaintiffs,)	
		)	NOTICE OF MOTION AND MOTION FOR
16	v.	)	CLASS CERTIFICATION;
		)	MEMORANDUM OF POINTS AND
17	HEIDI DIAZ; KIMKINS, an unknown business	)	AUTHORITIES IN SUPPORT THEREOF
	entity, and DOES 4 through 100, Inclusive,)	
18		)	DATE: May 20, 2009
	Defendants.	)	TIME: 8:30am
19		)	DEPT: 4
20)	
)	
21		)	Action Filed: October 15, 2007
		)	Trial Date: None Set

23 **TO ALL PARTIES AND ATTORNEYS OF RECORD HEREIN:**

24 PLEASE TAKE NOTICE that on May 20, at 8:30 a.m. or as soon as may be heard
25 in Department 4 of the above-entitled Court located at 4050 Main Street, Riverside, California,
26 Plaintiffs, JEANESSA FENDERSON; TRISTA ESSEX; KATHLEEN ROGERS; DIANA
27 SHERBY; ANN MARIE WOOD; NANCY MCGREGOR, individually and on behalf of all others
28

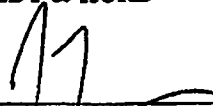
1 similarly situated, will and hereby do move the Court under California Code of Civil Procedure
2 Section 382 to certify this case as a Class Action.

3 Plaintiffs' Motion is and will be based upon this notice of motion and motion, the attached
4 memorandum of points and authorities, the declarations, pleadings and papers on file herein, and
5 upon such other argument and evidence which may be presented to the court at or before the time of
6 the hearing on this matter.

7 Plaintiffs have filed a previously motion for class certification on December 8, 2008, which
8 was scheduled for hearing on January 14, 2009. Defendant Heidi Diaz filed a petition for
9 bankruptcy on January 12, 2009, and furthermore filed a notice of stay with the Riverside Superior
10 court on the same date. Plaintiffs take the position that the motion for class certification can now be
11 entered by the court because defendant Heidi Diaz failed to timely file an opposition to the motion
12 for class certification pursuant to California Code of Civil Procedure Section 382 and California
13 Rules of Court, Rule 3.764(c). In the alternative, Plaintiffs submit this motion for class certification
14 for consideration and hearing by this court.

15 Dated: April 9, 2009

TIEDT & HURD

16
17 By: 
18 JOHN E. TIEDT
19 MARC S. HURD
20 Attorneys for Plaintiffs
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I.

3 **PROCEDURAL HISTORY**

4 The original motion for class certification was filed with this court on December 8, 2008 and
5 was scheduled for hearing on January 14, 2009. The opposition to the motion pursuant to Code of
6 Civil Procedure Section 382 and California Rules of Court, Rule 3.764(c) was due on December 30,
7 2008. That deadline passed and no opposition was filed in connection with said motion. Defendant
8 then elected to file for bankruptcy protection on January 12, 2009, just two days before the hearing
9 on the motion for class certification. (See Supplemental Declaration of John E. Tiedt, paragraphs 4
10 through 8). Defendant made a tactical choice not to file an opposition and pursue a bankruptcy
11 petition. The bankruptcy petition was dismissed by Federal Bankruptcy Judge Meredith Jury on
12 March 27, 2009.

13 Plaintiffs now seek that the Court grant their motion for class certification based on the fact
14 that no opposition had been filed, or in the alternative, to proceed with a noticed hearing.

15 II.

16 **STATEMENT OF FACTS**

17 A. Hope for a safe and effective cure to obesity.

18 Obesity is a medical condition that is the second leading cause of preventable death¹.
19 Millions of Americans struggle with obesity and have resorted to dangerous diet drugs (e.g.,
20 Ephedra, Chitosan, PPA). Each year, thousands of Americans face the prospect of risking bariatric
21 surgery to treat life threatening obesity² or face the prospect of Type 2 diabetes or other related
22 illnesses to obesity³. Americans have sought hope for fast, effective, safe and permanent weight
23 loss methods. Over 40,000 Americans invested their hope and money in an individual known as
24

25
26 ¹ (1998), Obesity and Physical Activity Guidelines, National Heart Lung and Blood Institute, Department of Health and
Human Services, Item No. 98-4083.

27 ² Ayaz Virgi, MD, Michael Mass, MD, April 15, 2006, Caring For Patients After Bariatric Surgery, American Family
Physicians, page 1403.

28 ³ Patricia Anderson-Parrado, April 1998, Better Nutrition. Type 2 diabetes and obesity: an all-too-common
combination.

1 "Kimmer" who provided a miraculous diet program known as the Kimkins Diet on her website,
2 Kimkins.com.

3 B. The Kimkins Diet: how it all started.

4 In 2002 a woman who called herself "Kimmer" introduced her version of a low-carb diet
5 on the Low Carb Friends diet discussion board on Low Carb Friends.com. The diet appeared to be
6 miraculous as Kimmer claimed to have lost 200 pounds in only 11 months without exercise.

7 Sample copies of Kimmer's statements with photographs revealing her transformation on the
8 Internet are collectively attached hereto as Exhibit "A". See also, Declaration of Elizabeth Winn,
9 page 2, lines 10-18. She immediately developed a following on the Internet. Kimmer, who is now
10 identified as Heidi Diaz, claimed to have invented the "Kimkins" diet⁴. The Kimkins diet offered
11 various plans wherein members were advised to consume 500 calories or less per day. The
12 impressive representations of Kimmer's weight loss results and Kimmer's purported knowledge of
13 diet and nutrition led to the formation of the Kimkins.com website in June of 2006.

14 Kimkins.com was, and is, a website wherein potential subscribers can access general
15 information about the diet and advertisements for the paid membership to Kimkins.com.
16 However, for a fee, a member can access special web pages including a social network, key details
17 of the Kimkins diet, and personal coaching forum by Kimmer herself. The initial advertising plan
18 was to promote the Kimkins membership subscription on the public access portion of the Kimkins
19 website and by Internet advertisements. The potential Kimkins subscriber was greeted with the
20 following typical statement on the Kimkins homepage:

21 "Millions of overweight people think fast and permanent weight loss is
22 completely out of their reach. They've been told that their entire lives should be
23 happy with slow to one to two pound a week weight loss. How depressing and
24 untrue! What if I told you that you could lose weight at turbo speed? Experience
25 natural appetite suppression? Would you be interested?

26 ...

27 It's called Kimkins and it was developed by me, Kimmer, in 2000 when I
28 weighed a morbidly obese 318 pounds! In less than a year I lost 198 pounds and
kept it off! Are you excited yet? You should be! Kimkins has literally changed

⁴ Diaz Deposition, Vol. IV, page 77, lines 10-13

1 the lives of real people just like you who were at their wit's end about their weight
2 problem." (Emphasis added).

3 A copy of the Kimkins homepage is attached as Exhibit "B".⁵

4 Potential subscribers would also have access to the "meet your team" part of the website
5 wherein Kimmer reiterated her representation that she lost 198 pounds in 11 months. See Exhibit
6 "C".⁶ Kimmer promised she would personally answer questions in a member's only area known
7 as the Kimkins Café Forum.⁷

8 Before purchasing membership, the potential subscriber can also access the success stories.
9 The success stories contain photographs of women who purportedly lost fantastic amounts of
10 weight in extremely short periods of time. Subscribers could read about Susan who was only age
11 21 and had lost an amazing 164 pounds in 9 months. Susan's original weight was 296 but reached
12 a final weight of 132 pounds on the Kimkins diet. Visitors were also treated to the story of
13 Catherine who was 248 pounds and lost 124 pounds in only 7 months. At age 33, Catherine
14 purportedly had a heart attack due to obesity but thanks to Kimkins she was on the road to health.
15 There was also the story of Nikki who at age 33 lost 66 pounds in only 4 ½ months. Nikki made
16 the claim that her weight loss was permanent thanks to Kimkins. There were numerous amazing
17 success stories where morbidly obese women lost a tremendous amount of weight in almost no
18 time. Copies of only success stories are attached hereto collectively as Exhibit "D".

19 Once visitors paid their membership fee, (\$19.95 to \$59.95 during the class period),
20 members had access to a social network wherein they could discuss the Kimkins diet and provide
21 support for each other. Members were promised a life time membership for a onetime fee. See
22 Exhibit "E".

23 C. The Big Break: Kimkins on the Cover of Woman's World Magazine.

24 The big break for Kimkins.com occurred when Woman's World Magazine featured the
25 Kimkins diet on the cover of its magazine on June 12, 2007. The title of the story was "Better

26
27 ⁵ Diaz Deposition, Vol. 1, page 39 lines 25, page 40, lines 1-25, page 4, line 1.

⁶ Diaz Deposition, Vol. 1, page 26, lines 6-25, page 27, lines 1-9

⁷ Id.

28

1 Than Gastric Bypass!” The article featured the miraculous transformation of Kimmer and
2 presented her dramatic before and after pictures. Heidi Diaz told the public that Kimmer’s true
3 name was Kim Drake. Kimmer again bragged about her 198 pound weight loss after serious
4 injury. She claimed to have lost that weight in 11 months and went from a size 26 dress size to a
5 size 6. A true and correct copy of the Woman’s World Magazine article about Kimkins.com is
6 attached hereto as Exhibit “F”.

7 In just one month, Kimkins.com registered \$1,252,059.95 in sales collected!⁸ See Exhibit
8 “G”. Suddenly tens of thousands of Americans swarmed the Kimkins.com website for a miracle
9 obesity cure that had worked for Kimmer, Susan, Catherine and dozens of other advertised success
10 stories. Many had been advised by their doctors to undergo gastric bypass surgery or seek
11 treatment for Type 2 diabetes, but they turned to the Kimkins diet for a safe, fast and permanent
12 method of weight loss.

13 D. The Unraveling of America’s Worst Internet Diet Scam.

14 Almost all of the material representations of the Kimkins.com website and advertisements
15 were in fact false. There was no “Kimmer”, “Susan”, “Catherine” or “Nikki”. The success stories
16 were pure fiction and photographs were stolen from other Internet sites. The Kimkins diet was not
17 ever proven safe or effective.

18 “Kimmer”, aka Heidi Diaz, never lost 198 pounds in 11 months. “Kimmer” was purely a
19 fictional character created to defraud the public. The perpetrator of this scam is Heidi Diaz, who
20 habitually lied about the Kimkins diet and her alleged weight loss on the Internet for years from
21 her home in Corona, California. She regularly used false names on the Internet, lied about her
22 weight loss, created countless false success stories, falsely claimed celebrities such as Jessica Alba
23 and Lindsay Lohan used her diet, lied about the safety and efficacy of the Kimkins diet, falsely
24 impersonated consumers in order to induce sales, used unlawful labels and Metatags to misdirect
25 Internet traffic and fraudulently tried to conceal her assets to avoid repaying customers. Heidi
26

27 ⁸ Diaz Deposition, Vol. 1, Page 133, lines 11-22
28

1 Diaz was caught red-handed but still continues to engage in false and misleading advertising on the
2 Internet while making a substantial profit.

- 3 1. Kimmer is not Kim Drake the thin diet expert; Kimmer is Heidi Diaz,
4 a morbidly obese Internet swindler from Corona, California.

5 The beautiful woman in the red dress featured on the Kimkins Internet site named Kim
6 Drake aka "Kimmer," does not exist!⁹ Ms. Diaz also admitted that she had posed as Kimmer in a
7 "public apology" that was posted on Kimkins.com after she was successfully exposed by an
8 investigative report on the KTLA news. A copy of said apology is attached hereto as Exhibit "H".
9 The Kimkins "poster girl" is actually a model named Lesya whose image was lifted by Heidi Diaz
10 from a Russian bride Internet site. Heidi Diaz used her own picture to depict the "before Kimkins
11 diet" image of Kimmer, and unlawfully misappropriated the photograph of Lesya as the "after
12 Kimkins diet" image of Kimmer. A copy of the original Internet Russian bride advertisement of
13 the model in the red dress misrepresented as Kimmer is attached here as Exhibit "I". Heidi Diaz
14 has been and remains a morbidly obese woman.

15 Heidi Diaz created false identities to sell or promote the Kimkins Diet. She admitted under
16 oath that she had used such names as Kimmer, Jennifer Danser, Brad Curtis, Kimberly Stewart,
17 Kimberly Drake, Vanessa Sharp, Dennis Sharp and numerous other monikers.¹⁰

18 With regard to her use of other names such as Kimmer, Heidi Diaz testified as follows:

19 "Question: When you use false names, aren't you giving the impression
20 that your company is much bigger than it really is, as far as staff?

Answer: I see it as a creative outlet. I get tired of seeing my own name.

21 Question: You don't see that as dishonest or deceptive?

Answer: No.¹¹

22 In order to promote Kimkins.com, Heidi Diaz would post false statements about Kimkins
23 and used false names.

24 "Question: When you appeared on Google Answers, did you use Kimmer
25 or Heidi Diaz?

26 ⁹ Diaz Deposition, Vol. I, page 26, lines 6-20

27 ¹⁰ Diaz Deposition, Vol. I, page 9, lines 8-23, Diaz Deposition, Vol. III, page 98, lines 2-16

28 ¹¹ Diaz Deposition, Vol. I, page 84, lines 13-26

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Answer: Neither.
Question: Which one did you use?
Answer: I don't know. Assorted.
Question: Assorted names?
Answer: Yes."¹²

2. Use of False Pictures of Kimmer.

Under oath and by way of public apology, Heidi Diaz has established that she has used false pictures to depict the weight loss success story of Kimmer. For example, the photograph of Kimmer featured in Exhibit "C" of this motion was shown to Heidi Diaz. Under oath she stated that the picture of the Kimmer was not her and was actually "a model."¹³ Ms. Diaz' decision to use a false picture to advertise Kimkins was even questioned by her technical support staff. Her technical consultant, Aliyar Firat, wanted to use a real picture of Heidi Diaz but Ms. Diaz refused and insisted on using the picture of the model for Kimmer's after diet photographs.¹⁴

Exhibit "B" was also shown to Heidi Diaz during the course of her deposition and she not only identified that the picture of Kimmer is false but she also indicated that three other photographs used to promote the Kimkins website featuring Bambi and Tana were also false photographs.¹⁵

Heidi Diaz was shown a series of four photographs that had been used on her website and advertisements. True and correct copies of said photographs are attached hereto collectively as Exhibit "J". She admitted under oath that the first photograph was a picture of her which was featured in the "before" diet photographs. However, the subsequent three photographs of models used on her website as "after diet" images were not in fact her.¹⁶

3. Heidi Diaz Lied About Her Alleged Weight Loss.

Under oath, and by way of public apology, Heidi Diaz admitted that she lied about the alleged weight loss success of Kimmer on Internet and print advertisements. With regard to Exhibit

¹² Diaz Deposition, Vol. III, page 61, line 25, page 62, lines 1-24; see also page 62, line 25, page 63, lines 1-6, wherein Heidi Diaz corrected her testimony and that it was actually Yahoo Answers she visited not Google Answers
¹³ Diaz Deposition, Vol. I, page 26, lines 12-20, page 27, lines 8-9
¹⁴ Diaz Deposition, Vol. I, page 32, lines 10-25, page 33, lines 1-10
¹⁵ Diaz Deposition, Vol. I, page 39, line 25, page 40, lines 1-25, page 41, line 1

1 "C" she admitted that her statement that Kimmer lost an amazing 198 pounds in 11 months was in
2 fact a statement that she prepared but was false.¹⁷ Ms. Diaz also admitted that the woman identified
3 as Vanessa in Exhibit "C" does not actually exist and her story was a fictional creation by Ms.
4 Diaz.¹⁸

5 With respect to Kimkins' homepage attached here as Exhibit "B", Ms. Diaz admits that her
6 testimony on said homepage was derived from the interview wherein she claims to have lost a
7 purported 198 pounds in 11 months was false.¹⁹ Variations of the homepage of Kimkins.com were
8 accessible to the public throughout the class period. Variations of the Kimkins.com home pages
9 from July, 2006 through June, 2007 are collectively attached hereto as Exhibit "K".²⁰

10 To promote Kimkins, Heidi Diaz made phenomenal misrepresentations on the Internet
11 program known as the "Livin La Vida Low Carb" show hosted by Jimmy Moore on July 19, 2007.

12 Heidi Diaz made the following statement:

13 "I started at 318, and then my final weight now is between 118-122 pounds or
14 just between there. And it did take 11 months. That includes losing 11 pounds
15 the first day."²¹
(A copy of the original transcript of said interview is attached hereto as
16 Exhibit "L".)

17 Heidi Diaz also stated in the interview that she had kept the weight off for a total of 5 to 5-
18 ½ years.²² At the time of the interview, Heidi Diaz weighed over 300 pounds. She was
19 photographed several times shortly after the interview. Copies of said photographs are attached
20 hereto collectively as Exhibit "M".²³

21 4. Material Misrepresentations Contained in the Woman's World
22 Magazine Article "Make Heidi Diaz a Millionaire."

23 In June of 2006, the story of Kimmer and the Kimkins diet reached millions of

24 ¹⁸ Diaz Deposition, Vol. 1, page 47, lines 18-25, page 48, lines 1-19
25 ¹⁷ Diaz Deposition, Vol. 1, page 26, lines 21-25, page 27, lines 1-2. See also Exhibit "H"
26 ¹⁸ Diaz Deposition, Vol. 1, page 36, lines 17-25, page 37, lines 1-16
27 ¹⁹ Diaz Deposition, Vol. 1, page 40, lines 22-25, page 41, lines 1-24
28 ²⁰ See also, Declaration of Elizabeth Winn, page 2, lines 20-25

²¹ See Kimkins homepage attached hereto as Exhibit "B" and the Affidavit of Jimmy Moore, page 2, lines 17-19.

²² *Id.*

²³ See Declaration of John E. Tiedt, page 3, lines 11-17.

1 Americans.²⁴ Heidi Diaz admitted that she supplied her own "before diet" photograph for the
2 article but used a photograph of another model for her "after diet" photograph.²⁵ When asked
3 where she obtained the picture of the model, she stated: "from the Internet. I don't remember the
4 site. Just again, I wanted to be anonymous."²⁶ Ms. Diaz does not dispute the fact that she also
5 used the false name "Kim Drake" and another false picture in the article. With regard to the issue
6 of the importance of making truthful statements weighed against her privacy interests, she
7 provided the following testimony:

8 "Question: Did you ever weigh it out in your mind that your privacy interests
9 are not outweighed by the need of your customers to know the truth about your
10 purported weight loss using the Kimkins Diet?

11 Answer: No, I don't -- I think differently. And I do not.

12 Question: Why?

13 Answer: Well, privacy is something that is important to me, and I wanted to
14 encourage others towards weight loss, which we've done. That's it.

15 Question: Didn't you feel that your customers who signed up for a lifetime
16 memberships with Kimkins were entitled to know the truth about your personal
17 weight loss with the Kimkins Diet?

18 Answer: In retrospect, yes. At the time, no.²⁷

19 Her statements in the article were a phenomenal act of fraud by Heidi Diaz. In the article
20 she falsely stated she had lost 200 pounds in 11 months. She also falsely represented that she
21 soared up to 318 pounds after a serious injury. She falsely claimed she went from a dress size 26 to
22 a size 6.²⁸ As a result of such blatant false advertising, sales shot up immediately. In June of 2007,
23 there were 15,330 paid memberships.²⁹

24 5. The Use of Forty-One (41) False Success Stories with Misappropriated Photographs.

25 Numerous Kimkins' success stories used on the websites and on advertisements were
26 FALSE. The photographs featured in each of the success stories were lifted from Russian Bride
27 websites.^{30 31} Exhibit "D" contains twenty-eight (28) fraudulent advertisements for Kimkins.com.

28 ²⁴ See Exhibit "F"

²⁵ Diaz Deposition, Vol. I, page 74, lines 1-24

²⁶ Diaz Deposition, Vol. I, page 74, line 25, page 75, lines 1-6

²⁷ Diaz Deposition, Vol. I, page 181, lines 13-25, page 182, lines 1-2

²⁸ See Exhibit "F"

²⁹ Diaz Deposition, Vol. I, page 107, lines 3-25, page 108, lines 1-10.

³⁰ Diaz Deposition, Vol. I, page 206, lines 22-25, page 207, lines 1-8

³¹ The false success advertisements along with a copy of the corresponding Russian bride Internet screenshots

1 Ms. Diaz admitted that each and every person featured did not use the Kimkins diet and did not
2 lose the weight as advertised.³² In describing one of the Russian models who appeared in the
3 advertisement, Heidi Diaz testified as follows:

4 "Question: It says (referring to the advertisement), "Joann, a model perfect size
5 6." Is that a particular shot that had been used on Kimkins advertisements before?

6 Answer: It was one of the model photos that we had used.

7 Question: Okay. And that's one of the Russian bride model photos; is that
8 correct?

9 Answer: Yes.

10 Question: So Joann does not really exist in real life, as Joann, a user of Kimkins;
11 is that right?

12 Answer: No.

13 Question: That would be a "yes"?

14 Answer: Yes."³³

15 (The advertisement containing Joann's image is attached hereto as Exhibit "N").
16 Raquel was an alleged Kimkins model who purportedly lost 141 pounds in just 10 months.

17 A copy of said advertisement is attached hereto as Exhibit "O". Ms. Diaz testified that she
18 acquired Raquel's picture and that the story is one that she "wrote."³⁴

19 She admitted to fabricating success stories and using false photographs in connection with
20 the advertisements attached to the Volume II of her deposition as Exhibits 96, 99, 100, 101, 102,
21 103, 104, 105, 106, and 107.³⁵ The aforementioned false success stories used in the Kimkins
22 advertisements are collectively attached hereto as Exhibit "P".

23 She also created fraudulent success stories on the Kimkins Newsletter which was
24 accessible to the general public and designed to promote Kimkins.com subscriptions. Ms. Diaz
25 used the photograph and alleged success story of a German woman by the name of Ariana who
26 purportedly was a homemaker in Florida. Ariana purportedly lost 63 pounds in only 3 ½ months
27 on the Kimkins diet. However, Ms. Diaz testified that she lied about Ariana using Kimkins and
28 that she created Ariana's statement which was all fiction.³⁶ A copy of said fraudulent Newsletter is
attached hereto as Exhibit "Q".

³² *Id.*
³³ Diaz Deposition, Vol. III, page 153, lines 24-25, page 154, lines 1-10;

³⁴ Diaz Deposition, Vol. II, page 163, lines 11-23

³⁵ Diaz Deposition, Vol. II, page 162, line 11 through page 170, line 25

³⁶ Diaz Deposition, Vol. III, page 197, lines 17-25, page 198, lines 1-5, see also, deposition Exhibit "Q"

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6. False Celebrity Endorsements.

Heidi Diaz admitted that she had represented to the public that celebrity Jessica Alba, a famous actress, used the Kimkins diet. She testified that she did not know if Jessica Alba used the diet but repeated the "rumor" on the Internet.³⁷ She admitted in retrospect, she thought it was deceptive to repeat the rumor that Jessica Alba used the Kimkins diet.³⁸

Heidi Diaz also falsely claimed and advertised that Lindsay Lohan was a user of the Kimkins diet. In fact, she misappropriated a picture of Lindsay Lohan wearing a T-shirt. The Kimkins logo is superimposed on Ms. Lohan's t-shirt.³⁹ A copy of said advertisement is attached hereto as Exhibit "R". Ms. Diaz admitted that she has never had any contact with Lindsay Lohan. She also testified that she never believed the photograph of Lindsay Lohan with the doctored image displaying Kimkins across Ms. Lohan's chest was real.⁴⁰

7. Unlawful Use of Labels and Metatags to Misdirect Internet Traffic.

Many of the Kimkins.com advertisements have labels or tags that are used as a basis to direct traffic to the Kimkins.com site. Heidi Diaz was an expert on how to misdirect traffic on the Internet. For example, in the attached Exhibit "S", Heidi Diaz took a popular Internet topic such as the "Geico Caveman" which generated a lot of Internet activity at the time. Heidi Diaz placed the labels: "Caveman, Geico, Kimkins" together so that when "Geico" and "Caveman" would be searched, the Kimkins advertisement would appear. With respect to Exhibit "S," Heidi Diaz admitted that she prepared the graphic and text without the permission of the Geico Insurance Company.⁴¹ Heidi Diaz admitted that labels were also used as tags and that if a search were conducted with respect to the terms "Geico" or "Caveman," the subject advertisement would show up in a ranking.⁴²

³⁷ Diaz Deposition, Vol. II, page 180, lines 15-20, page 181 lines 1-8, see also Vol. III, page 155, lines 19-22
³⁸ Diaz Deposition, Vol. II, page 181, lines 18-21
³⁹ Diaz Deposition, Vol. III, page 149 lines 23-25, page 156, lines 16-19
⁴⁰ Diaz Deposition, Vol. III, page 157, lines 7-15
⁴¹ Diaz Deposition, Vol. III, page 180, lines 11-25, page 181, lines 1-9
⁴² Diaz Deposition, Vol. III, page 181, lines 19-25, page 182, lines 1-6