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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
12

13 WESTERN SUGAR COOPERATIVE,
a Colorado cooperative, et al.,
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Plaintiffs,
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vs.
16 ARCHER-DANIELS-MIDLAND
COMPANY, a Delaware corporation, et
17 al.,
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Defendants.
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CASE NO. CV11-3473 CBM (MANx)

**PLAINTIFF THE SUGAR
ASSOCIATION, INC.'S
OPPOSITION TO TATE & LYLE
INGREDIENTS AMERICAS LLC'S
AND INGREDION
INCORPORATED'S MOTIONS TO
DISQUALIFY SQUIRE PATTON
BOGGS (US) LLP**

Date: September 23, 2014
Time: 10:00 a.m.
Crtrm.: 2

Assigned to Hon. Consuelo B. Marshall

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I

INTRODUCTION

The manifest purpose of Tate & Lyle Ingredients Americas, LLC's ("Tate") and Ingredion Incorporated's ("Ingredion") respective motions to disqualify Squire Patton Boggs (US) LLC ("SPB") from further participation in this action is to deprive the plaintiffs of their long-time, trusted counsel after three and a half years of hard-fought litigation, just as the case approaches trial. Yet despite abstract references to the duty of loyalty and presumptions of injury, neither Tate nor Ingredion has identified any actual injury that it suffered – or expects to suffer – from SPB's continued representation of the plaintiffs. Depriving a litigant of its chosen counsel is an extreme, potentially devastating step. It is not a matter of merely connecting the dots to show a technical conflict. Despite Tate's and Ingredion's references to "*per se*" rules and automatic outcomes, disqualification of counsel is a disfavored remedy confided to this Court's discretion. Exercising that discretion on the side of fairness counsels denial of these motions.

Plaintiff The Sugar Association joins in the opposition to the disqualification motions filed by SPB. The association files this separate opposition to the disqualification motions, through special counsel appearing solely for that purpose, in order to address two critical points: (a) the enormous, crippling prejudice that plaintiffs, who have done nothing whatsoever to warrant it, would suffer from disqualification of their trusted litigation counsel at this late stage of the case; and (b) the discretion entrusted to the Court to weigh that prejudice in reaching a decision on the motions.

II

BACKGROUND

A. Losing Their Counsel Would Greatly Prejudice The Plaintiffs.

The circumstances concerning the Patton Boggs law firm's respective relationships with Tate and Ingredion, the recent merger of Squire Sanders and

1 Patton Boggs, and the handling of the purported conflict over the past six weeks are
2 set forth in SPB's opposition papers. They are not repeated here.

3 Squire Sanders (US) LLP (f/k/a Squire Sanders & Dempsey LLP)'s
4 relationship with the sugar industry began in 2004, when the firm was retained to
5 prosecute the first major false advertising case brought by The Sugar Association.
6 Declaration of Andrew C. Briscoe, III ("Briscoe Decl."), ¶ 5. That case, which
7 related to claims of false advertising against the makers of Splenda, was
8 aggressively litigated in this District before Judge Dale Fischer and eventually
9 settled shortly before trial in 2008. *Id.*, ¶ 5. After the conclusion of the Splenda
10 Litigation, The Sugar Association and its members found themselves forced to
11 return to the courts to again protect the integrity of sugar. Several attorneys who
12 had worked on the Splenda Litigation were available in 2010 to handle this Action
13 on behalf of the plaintiffs. *Id.*, ¶ 6. Squire Sanders's exceptional handling of the
14 Splenda Litigation was an important factor in The Sugar Association's decision to
15 commence this Action. *Id.*, ¶ 7.

16 Since this Action was filed three and a half years ago, the Squire Sanders
17 (now SPB) lawyers on the case have devoted enormous time and resources to
18 representing the plaintiffs. More than 2,000,000 pages of documents have been
19 produced by various parties and witnesses, all of which have been reviewed and
20 analyzed. Briscoe Decl., ¶¶ 8-9. SPB lawyers have taken and defended the majority
21 of the depositions in the case, identified and prepared expert witnesses, and briefed
22 and argued all but one motion. *Id.*, ¶¶ 10-12. SPB lawyers are responsible for
23 arguing the summary judgment motions set for hearing on the same day as these
24 disqualification motions. *Id.*, ¶ 12. Over the next eighty days, SPB lawyers also are
25 responsible for taking and defending all expert depositions, preparing all pre-trial
26 documents, and otherwise preparing this case for trial. *Id.*, ¶ 13.

27 The critical and substantial effort that SPB lawyers and paralegals have put
28 into this litigation is illustrated by the legal fees paid to Squire Sanders in

1 connection with this action, which totaled over \$12 million as of August 25, 2014.
2 Briscoe Decl., ¶ 14. This figure reflects more than 20,000 hours of time spent by
3 lawyers and paralegals at the firm on the representation of plaintiffs in this Action.
4 *Id.*

5 All of this time and energy has been spent to make the SPB lawyers on this
6 case experts on extraordinarily complex issues. These complex issues include: (1)
7 the pharmacokinetics and pharmacodynamics of glucose, fructose, sucrose, and the
8 oligosaccharides and reactive α -dicarbonyls that are in the different formulations of
9 high fructose corn syrup; (2) the complex analysis necessary to assess the effect that
10 the defendants' advertising has had on the price of sugar; (3) the application of
11 multivariate regression analysis to prices in two government supported industries
12 that also compete in the world market; (4) corrective advertising damages; and (5)
13 marketing surveys as used in Lanham Act litigation. *Id.*

14 III

15 ARGUMENT

16 A. There Is No Compelling Basis For Disqualifying SPB.

17 SPB's papers filed in opposition to these motions demonstrate that the facts of
18 this case do not support any inference that Patton Boggs's work for either Tate or
19 Ingredion was substantially related to Squire Sanders's work for the plaintiffs on
20 this case. SPB also demonstrates that there is no basis for application of a *per se*
21 rule of disqualification based on any concurrent representation of either Tate or
22 Ingredion. SPB had no pending matters for Ingredion at the time of the merger and
23 SPB had a valid, advance waiver from Tate. The Sugar Association joins in those
24 arguments.

25 B. This Court Has Broad Discretion In Considering Motions For 26 Disqualification.

27 In California, as elsewhere, courts must evaluate "the propriety of
28 disqualification [based] on the circumstances of the particular case in light of

1 competing interests.” *Oaks Mgmt. Corp. v. Super. Ct.*, 145 Cal. App. 4th 453, 464
2 (2006). “A judge’s authority to disqualify an attorney has its origins in the inherent
3 power of every court in the furtherance of justice to control the conduct of
4 ministerial officers and other persons in pending judicial proceedings.” *Oaks Mgmt.*
5 *Corp.*, 145 Cal. App. 4th at 462. The court’s discretion in considering
6 disqualification motions “derives from the court’s equitable powers, and hence, a
7 motion for disqualification is governed by such equitable principles as waiver,
8 estoppel, laches, undue hardship, and a balancing of the equities.” *UMG*
9 *Recordings, Inc. v. MySpace, Inc.*, 526 F. Supp. 2d 1046, 1062 (C.D. Cal. 2007).

10 Thus, in spite of Tate’s and Ingredion’s assertion that disqualification is
11 automatic and the court lacks discretion to do otherwise, California law makes
12 disqualification discretionary:

13 Given this history, we conclude that it is improper to rely on *Flatt* as
14 creating an absolute rule of vicarious disqualification in California.

15 Instead, we believe that neither *Flatt* nor *Speedee Oil* addressed the
16 issue of whether vicarious disqualification is absolute, and the state of
17 the law is that as initially expressed by the appellate courts: (1) a case-
18 by-case analysis based on the circumstances present in, and policy
19 interests implicated by, the case; (2) tempered by the *Henriksen* rule
20 that vicarious disqualification should be automatic in cases of a tainted
21 attorney possessing actual confidential information from a
22 representation, who switches sides *in the same case*.

23 *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 800 (2010) (emphasis
24 added). Because no Patton Boggs lawyer ever represented Tate or Ingredion *in this*
25 *case*, the court has discretion to refuse to disqualify SPB. Exercising that discretion
26 against disqualification is particularly appropriate where, as here, the prior
27 representation by Patton Boggs was exceedingly brief, quite long ago, and only
28 remotely related to this case. SPB’s opposition demonstrates that no confidences

1 were in fact compromised, nor are any such confidences at risk now.

2 Where client confidences are not at risk, this court is by no means required to
3 automatically disqualify counsel simply because this case involves an alleged
4 conflict. Indeed, the court possesses “broad” discretion to issue orders less drastic
5 than disqualification, and “even when the court has misgivings about the conduct of
6 the challenged attorney, it is not obligated to disqualify that lawyer merely because
7 he has run afoul of the applicable ethical rules.” *UMG Recordings, Inc.*, 526 F.
8 Supp. 2d at 1063. “In other words, even when counsel has been shown to have
9 committed an ethical rule infraction the court retains discretion to decline to order
10 disqualification, and, in many cases, courts have done just that.” *Id.*

11 **C. Disqualification Motions Are Strongly Disfavored And Subject To Strict**
12 **Scrutiny.**

13 Not only do courts possess broad discretion to evaluate the equities
14 underlying a disqualification motion, but California courts also have uniformly
15 found that “[m]otions to disqualify counsel are strongly disfavored.” *Visa U.S.A.,*
16 *Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1104 (N.D. Cal. 2003); *UMG*
17 *Recordings, Inc.*, 526 F. Supp. 2d at 1062 (disqualification “should only be imposed
18 when absolutely necessary.”). Disqualification “is a drastic measure which courts
19 should hesitate to impose except in circumstances of absolute necessity.” *Kelly v.*
20 *Roker*, No. C 11–05822 JSW, 2012 WL 851558, *2 (N.D. Cal. March 13, 2012);
21 *Roush v. Seagate Tech., LLC*, 150 Cal. App. 4th 210, 219 (2007) (disqualification
22 should not be granted “simply out of hypersensitivity to ethical nuances or the
23 appearance of impropriety”). Moreover, such motions are “subjected to particularly
24 strict judicial scrutiny.” *Optyl Eyewear Fashion Intern. Corp. v. Style Cos., Ltd.*,
25 760 F.2d 1045, 1050 (9th Cir. 1985). “The moving party, therefore, carries a heavy
26 burden and must satisfy a high standard of proof.” *Kelly*, 2012 WL 851558, at *2.

27 The strict standards for ordering disqualification are based on courts’ concern
28 that disqualification motions “are often tactically motivated and . . . tend to derail

1 the efficient progress of litigation.” *Id.*; *Optyl*, 760 F.2d at 1050 (“The cost and
2 inconvenience to clients and the judicial system from misuse of the [disqualification
3 motion] for tactical purposes is significant.”). “[A]s courts are increasingly aware,
4 motions to disqualify counsel often pose the very threat to the integrity of the
5 judicial process that they purport to prevent.” *Gregori v. Bank of America*, 207 Cal.
6 App. 3d 291, 300-01 (1989). As Justice Brennan stated, “the tactical use of
7 attorney-misconduct disqualification motions is a deeply disturbing phenomenon in
8 modern civil litigation. When a trial court mistakenly disqualifies a party’s
9 counsel[,] the court in essence permits the party’s opponent to dictate his choice of
10 counsel.” *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 441 (1985) (Brennan,
11 J., concurring); *Gregori*, 207 Cal. App. 3d at 301 (“attorneys now commonly use
12 disqualification motions for purely strategic purposes.”). Disqualification motions
13 “can be misused to harass opposing counsel, or to intimidate an adversary into
14 accepting settlement on terms that would not otherwise be acceptable.” *Gregori*,
15 207 Cal App. 3d at 301. Tate and Ingredion’s respective disqualification motions
16 are precisely the type of tactical motions that California courts reject.

17 **D. California Courts Have Considered The Changing Nature Of Legal**
18 **Practice In Deciding To Apply Increasingly Flexible Standards For**
19 **Disqualification**

20 In determining the propriety of disqualification, this Court, in its broad
21 discretion and given that disqualification is strongly disfavored, should also consider
22 the changing realities of the legal practice and their implications on the propriety of
23 disqualification in this case.

24 The federal courts and the California Courts of Appeal have acknowledged on
25 numerous occasions that the practice of law has been substantially transformed, and
26 as a result these courts have questioned the assumptions underlying the wooden
27 application of disqualification standards. For example, the court in *Kirk*, in ruling
28 that vicarious disqualification must be applied on a case-by-case basis, stated that,

1 due to “the changing landscape of legal practice,” the conflicted attorney could be
2 “working in a different geographical office and in a different practice group from
3 the attorneys with responsibility for the litigation.” *Kirk*, 183 Cal. App. 4th at 802.
4 The court also noted that other jurisdictions have adopted rules of professional
5 conduct that adapt to these changing realities. *Id.* at 802-03 (noting that almost half
6 of the states have rejected automatic vicarious disqualification).

7 Similarly, the California Court of Appeal has observed: “Large law firms . . .
8 are becoming ever larger, opening branch offices nationwide or internationally . . .
9 Individual attorneys today can work for a law firm and not even know, let alone
10 have contact with, members of the same firm working in a different department of
11 the same firm across the hall or a different branch across the globe.” *Adams v.*
12 *Aerojet-General Corp.*, 86 Cal. App. 4th 1324, 1336 (2001) (rejecting automatic
13 application of vicarious disqualification); *see also In re County of Los Angeles*, 223
14 F.3d 990, 995-97 (9th Cir. 2000) (“The changing realities of law practice call for a
15 more functional approach to disqualification than in the past.”); *UMG Recordings,*
16 *Inc.*, 526 F. Supp. 2d at 1047-48 (observing “the pitfalls that large firms
17 representing powerful clients in high stakes disputes often encounter in complying
18 with ethical and professional requirements that were promulgated in a different
19 era”).¹

21
22 ¹ For example, in the context of class actions, courts in California have cautioned
23 against “rigid application of disqualification rules” to account for “the nature of
24 class representation and the importance of retaining counsel with the most
25 experience on the case.” *Andrews Farms v. Calcot, LTD.*, No. CV-F-07-0464 LJO
26 SKO, 2010 WL 4010146, *4 (E.D. Cal. Oct. 13, 2010); *see also Sharp v. Next*
27 *Entm’t, Inc.*, 163 Cal. App. 4th 410, 430 (2008). In *Andrews*, the court specifically
28 noted that the lawsuit had been “pending for three years, through hard-fought
pleadings, discovery and law and motion practice. . . . The knowledge and
experience gained by counsel during the pendency of this action is irreplaceable.”
Andrews, 2010 WL 4010146 at *4.

1 **E. This Court Should Exercise Its Discretion To Deny Disqualification.**

2 Given the equities in this case, the strict scrutiny applied to disqualification
3 motions, and California courts' application of increasingly flexible standards for
4 disqualification in light of the changing nature of legal practice, neither Tate nor
5 Ingredion has made the requisite showing that disqualification is proper here.

6 In evaluating the propriety of disqualification, courts "must weigh the
7 combined effects of a party's right to counsel of choice, an attorney's interest in
8 representing a client, the financial burden on a client of replacing disqualified
9 counsel and any tactical abuse underlying a disqualification proceeding against the
10 fundamental principle that the fair resolution of disputes within our adversary
11 system requires vigorous representation of parties by independent counsel
12 unencumbered by conflicts of interest." *Oaks Mgmt. Corp.*, 145 Cal. App. 4th at
13 464-65. Preservation of public trust "is *just one* of the many policy interests which
14 must be balanced by a trial court considering a disqualification motion," and the
15 public interest does not always outweigh other interests, such as the right to choose
16 counsel, the burdens of replacing counsel, and the possibility of tactical abuse. *Kirk*,
17 183 Cal. App. 4th at 802 (emphasis in original); *see also Sharp*, 163 Cal. App. 4th at
18 428 (in some cases involving concurrent representation, "the dangers of . . . harm to
19 the interests of protecting the public confidences in the system are outweighed by
20 permitting clients and lawyers to contract with one another and automatic
21 disqualification is not required").

22 Courts have emphasized that there is "an interest in preserving the continuity
23 of the lawyer-client relationship," particularly in complicated or longstanding
24 cases." *UMG Recordings, Inc.*, 526 F. Supp. 2d at 1065. "[O]therwise, if such
25 relationships were easily disrupted, complicated cases . . . would take even longer to
26 resolve, the costs of litigation would be even higher, and unscrupulous attorneys
27 would have an incentive to seize on strained facts and theories to pursue the tactical
28 advantage of ousting their adversary's lawyers." *Id.* (holding that disqualification

1 would be overly harsh given the complicated nature of the case and the “minor
2 nature of the conflict”). Moreover, the disqualified attorney’s client bears the
3 burden and cost of finding a replacement, and “suffers a particularly heavy penalty
4 where ... his attorney is highly skilled in the relevant area of the law.” *Koo v.*
5 *Rubio’s Restaurants, Inc.*, 109 Cal. App. 4th 719, 734 (2003).

6 Here, the balance of interests weighs heavily against disqualification. SPB
7 has represented plaintiffs in this action since its inception, and has vigorously
8 litigated the action at every step of the litigation process, including extensive
9 discovery and motion practice (involving over 2,000,000 pages of documents and
10 over 237 docket entries for filings with the Court). The plaintiffs have incurred over
11 \$12 million in fees from SPB on these matters, reflecting over 20,000 hours of
12 professional time and demonstrating the depth of the firm’s involvement. All of this
13 time and resources have been spent to make the SPB lawyers on this case experts on
14 the extraordinarily complex issues at issue here. *See* Section II.A, *supra*. No
15 replacement firm could master these issues without a near-identical effort.

16 To force plaintiffs to find replacement counsel now, after SPB has developed
17 substantial expertise and familiarity with the complex issues, facts, parties, and
18 procedural history involved in this matter over more than three years of litigation in
19 this case and a ten-year relationship, would impose overwhelming prejudice and
20 undue hardship upon the plaintiffs and cause substantial delay and disruption to
21 these proceedings.² *Briscoe Decl.*, ¶¶ 5-16. On the other hand, neither Tate nor

22
23 ² Tate and Ingredion may argue that the presence of SPB’s co-counsel, the Lanier
24 Firm, eliminates or reduces this prejudice. That is demonstrably false. The Lanier
25 Firm has had a limited role to date in the Action; advancing the interests of the ten
26 plaintiffs without SPB’s continued involvement and leadership would be an
27 impossible challenge. For example, the Lanier Firm has had no role in document
28 review. Although lawyers from the Lanier Firm took three depositions, they were
substantially assisted by SPB attorneys in preparing for the depositions, including
the assembling of all pertinent documents. SPB lawyers attended and assisted

1 Ingredion has established a substantial relationship between the matters at issue, nor
2 have they articulated any tangible prejudice in their respective motions.³ Indeed, in
3 making this motion, Tate attempts to strip plaintiffs of their counsel by disclaiming
4 an advance waiver signed by its own general counsel.

5 Even in the absence of an advance waiver, courts have denied disqualification
6 in cases involving concurrent representation based on facts similar to this one. For
7 example, in *SWS Financial Fund A v. Salomon Bros. Inc.*, 790 F. Supp. 1392, 1400
8 (N.D. Ill. 1992), the court denied defendant's motion to disqualify plaintiff's
9 counsel where counsel was simultaneously representing the defendant in an
10 unrelated compliance matter, reasoning that plaintiff would suffer "substantial
11 costs" if disqualification were granted. The *SWS* court specifically cautioned that
12 disqualification would become a tactical tool to "manufacture" potential conflicts:

13 [If disqualification were granted,] the implications would be
14 overwhelming. Clients of enormous size and wealth, and with a large
15 demand for legal services, should not be encouraged to parcel their
16 business among dozens of the best law firms as a means of

17 _____
18 during these depositions. Lawyers from the Lanier Firm have argued only one
19 motion, and they have had a very limited role in the preparation of briefs and expert
20 reports. They are not familiar with the complex issues relating to the metabolism
21 and nutrition of sweeteners or the calculation of damages. Although Mr. Lanier will
22 have a substantial role at trial, the plan always has been that he would share
23 responsibility with the SPB lawyers, who would remain in charge of the many
24 technical factual and legal issues in the case. Briscoe Decl., ¶ 15.

25 ³ Tate and Ingredion essentially seek to vicariously disqualify SPB as a firm, since
26 the disqualification would extend beyond former Patton Boggs lawyers to all of the
27 former Squire Sanders lawyers working on this case. These former Squire Sanders
28 lawyers never worked for Tate or Ingredion, which was represented by Patton
Boggs. Only one former Patton Boggs lawyer had even a passing involvement with
this case. California courts adopt a case-by-case analysis for vicarious
disqualification, and have rejected an automatic rule for vicarious disqualification,
noting that such a rule "can be harsh and unfair to both a law firm and its client."
Kirk, 183 Cal. App. 4th at 794.

1 purposefully creating the potential for conflicts. . . . [T]he law should
2 not give large companies the incentive to manufacture the potential for
3 conflicts by awarding disqualification automatically.

4 *Id.* at 1402-03; *see also Research Corp. Techs., Inc. v. Hewlett-Packard Co.*, 936 F.
5 Supp. 697, 702-03 (D. Ariz. 1996) (denying disqualification motion where
6 plaintiff's counsel simultaneously represented defendant in a minor matter, but had
7 spent 19 months preparing plaintiff's case); *Parkinson v. Phonex Corp.*, 857 F.
8 Supp. 1474, 1477 (D. Utah 1994) (holding that disqualification was not justified
9 where two attorneys in the same law firm simultaneously represented the plaintiff
10 and defendant in two separate matters for a one-month period; one matter was a
11 three-year litigation while the other was a one-month estate planning
12 representation).⁴

13 SPB is a large law firm, employing approximately 1,500 attorneys, in 44
14 offices located in 21 countries around the world, representing thousands of clients.
15 It is the result of a merger so recent that the two merging firms have not even fully
16 integrated their computer systems or offices. Given its large size, it is typical for
17 attorneys to have no knowledge of the matters and clients represented by other
18 attorneys within the same firm. And given the increasing complexity of both law
19 firm structure and commercial litigation, with the best of intentions and conflicts
20 system, a conflict may occasionally and inadvertently escape notice. An innocent
21 error in a conflict check, however, does not require the Court to permit an

22
23 ⁴ Since disqualification does not have a punitive purpose, it "is only justified where
24 the misconduct will have a 'continuing effect' on judicial proceedings." *Baugh v.*
25 *Garl*, 137 Cal. App. 4th 737, 744 (2006). "If . . . the court's purpose is to punish a
26 transgression which has no substantial continuing effect on the judicial proceedings
27 to occur in the future, neither the court's inherent power to control its proceedings
nor [the] Code of Civil Procedure section 128 . . . can be stretched to support the
disqualification." *Koo*, 109 Cal. App. at 734.

1 opportunistic defendant to compel the drastic result of disqualification, particularly
2 given the severe prejudice that the ten plaintiffs in this action would suffer and the
3 lack of prejudice suffered by either Tate or Ingredion.

4 **IV**

5 **CONCLUSION**

6 For the foregoing reasons, The Sugar Association respectfully urges the Court
7 to protect the plaintiffs' attorney-client relationship with SPB and its right to counsel
8 of its choice and to deny Tate's and Ingredion's Motions to Disqualify Counsel For
9 Plaintiffs.

10
11 DATED: September 2, 2014

Respectfully submitted,

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14 Marc E. Masters

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17 By: /s/ A. Howard Matz

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19 Attorneys for Plaintiff THE SUGAR
20 ASSOCIATION, INC.
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BRISCOE DECLARATION

DECLARATION OF ANDREW C. BRISCOE, III

I, Andrew C. Briscoe, III declare as follows:

1. I am a resident of the Commonwealth of Virginia and the President of The Sugar Association, a plaintiff in this action. I have been employed by the Sugar Association since September 2002 and have been the President of The Sugar Association since April 2003. I make this declaration in connection with motions recently filed by defendants and counterclaimants Tate & Lyle Ingredients Americas LLC and Ingredion Incorporated, seeking to disqualify Squire Patton Boggs (US) LLP ("SPB") from acting as counsel to plaintiffs and counter-defendants in this action. Except where otherwise indicated, I make this declaration based on my personal knowledge and I could and would so testify under oath if called upon to do so.

2. The Sugar Association is one of the plaintiffs in this action, styled *Western Sugar Cooperative, et. al. v. Archer-Daniels Company, et al.*, Case No. 11-3473 CBM (the "Action"). The Sugar Association is the trade association for the sugar industry. All but one of the corporate plaintiffs in this Action are members of The Sugar Association. In my position as President of The Sugar Association, I have been personally involved in the selection of counsel for the Action and for coordination with and supervision of counsel in the Action.

3. Promoting the truth about sugar, and protecting sugar from efforts by manufacturers of other sweeteners to portray themselves as being just like sugar is a key objective for The Sugar Association and its members. For the past ten years, the law firm of Squire Sanders, now SPB, has been The Sugar Association's trusted litigation counsel in the handling of major litigation implicating the most significant legal issues affecting the sugar industry, including dealing with companies who through advertising campaigns try to align their sweeteners with sugar and thereby diminish the distinctive qualities of sugar in the minds of consumers. Through its longstanding representation, SPB has become inextricably linked with the association and its members. The lawyers handling this Action for the ten plaintiffs have developed an intimate knowledge and understanding

1 of not merely the facts and law underlying the issues in this case but the way in which
2 those issues affect our industry and the thousands of sugar farmers we represent. They are
3 the counselors who, over the past decade, have earned the special trust, confidence, and
4 reliance of the association and its members. Disqualification of these lawyers and their
5 firm at this late juncture of the case would cripple the ten plaintiffs' efforts to protect their
6 rights and to promote their interests in this Action. Even if the Action were stayed to allow
7 other lawyers a reasonable opportunity to review the files in the Action, it is inconceivable
8 to me that new lawyers could effectively replace our lawyers at SPB.

9 **A. Selection of Squire Sanders**

10 4. I was involved in the decision to retain Squire Sanders (US) LLP (f/k/a
11 Squire Sanders & Dempsey LLP) as counsel in this action in 2010. One of the key factors
12 in the decision was the long and extensive representation that Squire Sanders previously
13 had provided to The Sugar Association and several of its members in the only other major
14 litigation in which the association has been involved.

15 5. Squire Sanders had represented The Sugar Association, The Amalgamated
16 Sugar Company ("Amalgamated"), American Sugar Cane League ("ASCL"), American
17 Sugar Refining, Inc. ("ASR"), C&H Sugar Company, Inc. ("C&H"), Michigan Sugar,
18 Minn-Dak Farmers' Cooperative ("Minn-Dak"), Rio Grande Valley Sugar Growers, Inc.
19 ("Rio Grande"), and Western Sugar Cooperative ("Western Sugar") in a false advertising
20 lawsuit against McNeil PPC-Inc. and McNeil Nutritionals, LLC, Case No. CV-04-10077
21 DSF (RZx) (C.D. Cal.), relating to the advertising of the chemical sweetener Splenda®
22 (the "Splenda Litigation"). Squire Sanders filed the Splenda Litigation in December 2004.
23 The Splenda Litigation involved many of the same false advertising issues presented in
24 this case and, like this case, it was an effort by the sugar industry to protect the integrity of
25 its product and the reputation of that product in the marketplace. Sugar is known
26 worldwide as the gold standard of sweeteners and there are 27 other sweeteners in the
27 U.S., many of which are striving to be viewed as just like sugar. The Splenda Litigation
28

1 proceeded through the final pre-trial conference and ultimately settled before trial, in
2 November 2008.

3 6. After the conclusion of the Splenda Litigation, The Sugar Association and its
4 members found themselves forced to return to the courts to again protect the integrity of
5 sugar. Several attorneys who had worked on the Splenda Litigation were available in 2010
6 to handle this Action on behalf of the plaintiffs. These lawyers included Daniel Callister,
7 Adam Fox, and John Burlingame, who remain actively involved today. Callister, Fox, and
8 Burlingame had gained considerable expertise concerning the U.S. sugar industry through
9 their substantial work on the Splenda Litigation. This expertise included knowledge about
10 the economics of the U.S. sugar industry, the sugar companies that are plaintiffs in this
11 case, and an understanding of the different challenges and concerns of the many members
12 of The Sugar Association, who, despite having shared interests producing or marketing
13 sugar, are also competitors.

14 7. Squire Sanders's exceptional handling of the Splenda Litigation was a critical
15 factor in The Sugar Association's decision to commence this Action. Before we filed the
16 Action, we expected that the high fructose corn syrup industry would devote its
17 considerable resources to waging a fierce legal battle. The Sugar Association and each of
18 the other nine companies that are plaintiffs in this case placed our trust and confidence in
19 Squire Sanders based upon the firm's outstanding representation of The Sugar Association
20 and member companies in the Splenda Litigation.

21 **B. The Action**

22 8. This Action was filed on April 22, 2011. During the past three and half
23 years, the scope of the case and the resources that the lawyers responsible for prosecuting
24 it have had to devote to the matter have been huge. I am informed and believe that the
25 defendants have produced 944,589 pages of documents. I also understand that non-parties
26 in the Action have produced 877,800 pages of documents. SPB has been responsible for
27 reviewing all the documents associated with these productions. SPB also was responsible
28

1 for all aspects of Plaintiffs' document production, which I am informed and believe totaled
2 443,258 pages of documents.

3 9. As a result of its consistent devotion to the plaintiffs' collective interests,
4 SPB has mastered the issues and the evidence in this case. SPB has devoted considerable
5 time and resources to understanding the documents and testimony in the Action, the extent
6 to which the evidence bears on the issues in the case, and how that evidence can be used to
7 advance the plaintiffs' interests in the Action. The amount of time, effort, and expense that
8 would be necessary for new counsel to invest in reviewing and understanding the
9 documents would be enormous.

10 10. SPB has been responsible for taking and defending most of the depositions in
11 the Action. SPB also has prepared all of the motions and oppositions to motions that have
12 been filed, and will be filed, in this case. For example, in just over the past two weeks
13 alone, SPB has prepared or is in the process of preparing the following filings:

- 14 • Opposition to Defendants' Motion to Re-Open Discovery (filed on
15 August 15, 2014)
- 16 • Opposition to Defendants' Motion to Certify Appeal (filed on August
17 26, 2014)
- 18 • Motion for Summary Judgment regarding Defendants' counterclaim
19 (filed on August 26, 2014)
- 20 • Opposition to Defendants' Motion for Summary Judgment regarding
21 liability (to be filed on September 2, 2014)
- 22 • Opposition to Defendants' Motion for Summary Judgment regarding
23 damages (to be filed on September 2, 2014).

24 11. SPB lawyers have been responsible for identifying and working with our
25 expert witnesses, both testifying experts and consulting experts. SPB also has been
26 responsible for identifying and working with experts to evaluate and, when necessary,
27 rebut the opinions expressed by experts designated by the defendants. On August 29,
28 2014, the defendants served ten expert reports. Rebuttal reports to these ten expert reports

1 must be prepared and served by September 30, 2014. SPB also will be responsible for
2 taking and defending all expert depositions.

3 12. It is particularly distressing that this issue of potential disqualification is
4 being raised more than three years into this litigation, at a critical juncture in the Action.
5 The final pre-trial conference in the case is set for November 17, and the Court presumably
6 will set a trial date at that time. In the weeks ahead, the plaintiffs are relying on SPB
7 lawyers to handle all of the critical tasks necessary to bring the case to trial on a timely
8 basis. SPB lawyers are responsible for arguing the summary judgment motions set for
9 hearing on September 23, 2014.

10 13. In addition, plaintiffs are relying on SPB lawyers to effectively and
11 efficiently meet the following pre-trial deadlines:

- 12 • Rebuttal expert reports are due on September 30, 2014;
- 13 • Expert depositions must be completed by October 31, 2014;
- 14 • Pre-trial designation of witnesses, exhibits, deposition excerpts, contentions
15 of fact and law, and stipulations of facts not in dispute are due on October 8, 2014;
16 and
- 17 • A memorandum of contentions of fact and law, a joint exhibit list and a final
18 witness list are due on October 27, 2014.

19 14. The critical and substantial effort that SPB has put into this litigation is
20 illustrated by the legal fees paid to Squire Sanders in connection with this Action, which
21 totaled over \$12 million as of August 25, 2014. I am informed and believe that this figure
22 reflects more than 20,000 hours of time spent by lawyers and paralegals at the firm on the
23 representation of plaintiffs in this Action. All of this time and energy has been spent to
24 make the SPB lawyers on this case experts on extraordinarily complex issues. These
25 complex issues include: (1) the pharmacokinetics and pharmacodynamics of glucose,
26 fructose, sucrose, and the oligosaccharides and reactive α -dicarbonyls that are in the
27 different formulations of high fructose corn syrup; (2) the complex analysis necessary to
28 assess the effect that the defendants' advertising has had on the price of sugar; (3) the

1 application of multivariate regression analysis to prices in two government supported
2 industries that also compete in the world market; (4) corrective advertising damages; and
3 (5) marketing surveys as used in Lanham Act litigation.


4 15. SPB's co-counsel, the Lanier Firm, has had a limited role to date in the
5 Action; advancing the interests of the ten plaintiffs without SPB's continued involvement
6 would be an impossible challenge. The Lanier Firm has had no role in document review.
7 Although lawyers from the Lanier Firm took three depositions, they were substantially
8 assisted by SPB attorneys in preparing for the depositions, including the assembling of all
9 pertinent documents. SPB lawyers attended and assisted during these depositions.
10 Lawyers from the Lanier Firm have argued only one motion, and they have had a very
11 limited role in the preparation of briefs and expert reports. They are not familiar with the
12 complex issues relating to the metabolism and nutrition of sweeteners or the calculation of
13 damages. Although Mr. Lanier will have a substantial role at trial, the plan always has
14 been that he would share responsibility with the SPB lawyers, who remain in charge of the
15 many technical factual and legal issues in the case.

16 **C. Disqualification of SPB Would Work a Profound Hardship on the**
17 **Plaintiffs**

18 16. Disqualification of SPB would result in the loss of years of study,
19 preparation, and knowledge developed by the law firm that the U.S. Sugar industry relies
20 on for its major litigation. This Action is only the second civil litigation that the sugar
21 industry has been forced to file against competing entities that have attempted to mislead
22 consumers about their products. Squire Sanders (now SPB) has handled both of those
23 cases. The deep base of knowledge that Squire Sanders has developed over that decade of
24 work cannot be replaced by any new firm stepping into this representation. Moreover,
25 beyond that expertise, the individual lawyers involved in the representation have earned
26 the respect and confidence of a disparate array of plaintiffs. Even the extraordinary
27 investment of time and other resources that new lawyers would have to make to attempt to
28 master the vast record of this Action could not possibly confer on those lawyers an

1 appreciation for the critical details and unique nuances of the case that our lawyers at SPB
2 have developed. I am absolutely convinced that plaintiffs would be grievously injured by
3 the loss of its chosen counsel at this late date in the Action in a manner that could not
4 effectively be mitigated by new counsel.

5 I declare under penalty of perjury under the laws of the United States of America
6 that the foregoing is true and correct and that I executed this declaration on September 2,
7 2014, in Washington, D.C.

8
9
10 
11 Andrew C. Briscoe, III