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BRONNER'S MAGIC SOAPS, a California
corporation

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 FOR THE COUNTY OF SAN FRANCISCO

13 ALL ONE GOD FAITH, INC., d/b/a DR.
14 BRONNER'S MAGIC SOAPS, a California
corporation,

15 Plaintiff,

16 v.

17 THE HAIN CELESTIAL GROUP, INC., a
18 Delaware corporation; KISS MY FACE
CORPORATION, a New York corporation;
19 LEVLAD, INC., a California corporation;
ESTEE LAUDER, INC., a Delaware
20 corporation; FLORESTAS ORGANIC
BOTANICAL, INC., a New York
21 corporation; JUICE BEAUTY, INC., a
Delaware corporation; STELLA
22 MCCARTNEY AMERICA, INC., a
Delaware corporation; GIOVANNI
23 COSMETICS, INC., a California
corporation; COSWAY COMPANY, INC.,
24 a California corporation; COUNTRY LIFE,
LLC, a New York limited liability company;
25 ORGANIC AND SUSTAINABLE
INDUSTRY STANDARDS, INC., a
26 Nevada corporation; ECOCERT FRANCE
(SAS), a French corporation; and
27 ECOCERT, INC., a Delaware corporation;

28 Defendants.

Civil Case No.: CGC-08-474701

**JOINT INITIAL CASE
MANAGEMENT CONFERENCE
STATEMENT**

Date: July 30, 2008

Time: 9:30 a.m.

Dept.: 305

Judge: Hon. John E. Munter

Complaint filed: April 28, 2008

Trial Date: None set

1 This Joint Initial Case Management Conference Statement (“Statement”) is
2 jointly submitted by Dr. Bronner’s All One God Faith, Inc., d/b/a Dr. Bronner’s Magic Soaps
3 (“Dr. Bronner’s”) and Defendants The Hain Celestial Group, Inc. (“Hain Celestial”), Kiss My
4 Face Corporation (“Kiss My Face”), Levlad, Inc. (“Levlad”), Estee Lauder, Inc. (“Estee
5 Lauder”), Juice Beauty, Inc. (“Juice Beauty”), Stella McCartney America, Inc. (“Stella
6 McCartney”), Giovanni Cosmetics, Inc. (“Giovanni”), Cosway Company, Inc. (“Cosway”),
7 Country Life, LLC (“Country Life”), Organic and Sustainable Industry Standards, Inc.
8 (“OASIS”), and Ecocert France (SAS) and Ecocert, Inc. (“Ecocert”) (collectively
9 “Defendants”).

10 In the Complaint, Plaintiff Dr. Bronner’s alleges three causes of action, each
11 seeking injunctive relief pursuant to Business and Professions Code Section 17200 *et seq.*
12 (“Section 17200”). The first cause of action is brought against Defendants Hain Celestial, Kiss
13 My Face, Levlad, Juice Beauty, Stella McCartney, Country Life, Giovanni and Cosway only
14 (hereafter, the “Count One Defendants”). Complaint ¶¶ 138-55. The second cause of action is
15 brought against Defendant Estee Lauder only. *Id.* ¶¶ 156-69. The third cause of action is
16 brought against Defendants OASIS and Ecocert only. *Id.* ¶¶ 170-201.

17 **I. STATEMENT OF THE CASE**

18 **A. Plaintiff’s Statement of the Case¹**

19 The word “Organic” has market power. That a personal care product is
20 described as “Organic,” “Organics” or “made with Organic” ingredients is very important to
21 consumers making purchasing decisions in the marketplace in California. Consumers are
22 willing to pay higher prices for organic personal care products and even give up certain
23 characteristics of conventional products—such as the familiar feel of synthetic silicone oils in a
24 lotion or the flash foam of a conventional detergent made with petrochemical compounds in a
25 bodywash or shampoo—in exchange for the comfort of knowing that the products they are

26 _____
27 ¹ The Plaintiff’s Statement of the Case was unedited by Defendants. It contains argument
28 wholly immaterial to the case management purposes served by this rule and is not joined by
Defendants.

1 applying to their bodies are indeed “Organic” and are not made from conventional
2 pesticide/herbicide-intensive agriculture or created by the petrochemical industry from
3 processed petroleum. Organic consumers rightly expect organic personal care products are free
4 of petrochemical compounds and pesticide and herbicide residues, and that the cultivation of
5 agricultural material was done organically without runoff polluting waterways. It is a
6 fundamental form of actionable unfair competition for Defendants to represent to consumers
7 that a product is “Organic” when in fact it is not. That misrepresentation to consumers in order
8 unfairly to shift sales and profits is what this case is about. Such misrepresentation constitutes a
9 violation of Section 17200. The Section 17200 claims are not preempted by federal or state
10 regulation because the term “Organic” as represented by Defendants to California consumers of
11 personal care products and understood by those consumers is not regulated by federal or state
12 law and, no federal or state law provides any remedy for the misuse and misrepresentation of the
13 term “Organic” that Plaintiff Dr. Bronner’s is challenging in this case.

14 Dr. Bronner’s is a family-owned company that manufactures and sells,
15 throughout the U.S., personal care and cosmetic products including the nation’s top-selling
16 natural brand of liquid and bar soap. The Count One Defendants manufacture, sell and/or
17 distribute competitive liquid soaps, bodywashes, facial cleaners, shampoos and/or moisturizing
18 lotions. Dr. Bronner’s and these Defendants compete for the business of consumers desiring to
19 purchase “Organic” personal care products.

20 Dr. Bronner’s charges that these companies have labeled their products as
21 “Organic” but the subject products are not actually “Organic” as that term is understood by
22 reasonable consumers. The reason is that these products contain petrochemical compounds or
23 ingredients made with such compounds; that they contain synthetic preservatives; and/or that
24 the main cleansing agents used in the products are not made from organic agricultural material
25 but rather from non-organic agricultural material grown using synthetic fertilizers, pesticides
26 and/or herbicides. In addition to organic consumer concerns about pesticide and herbicide
27 residues in conventionally grown agricultural ingredients, certain formulation practices of
28

1 Defendants result in contamination of their products with petrochemicals presenting health
2 concerns like the known carcinogen, 1,4-Dioxane.²

3 Dr. Bronner's soap products do not contain petrochemicals or synthetic
4 preservatives and their main cleansing agents are made from certified organic oils; the products
5 are properly labeled "made with Organic" ingredients. Dr. Bronner's alleges that, but for the
6 misleading labeling by Defendants, many organic consumers would purchase Dr. Bronner's
7 products instead of Defendants' products. Therefore, Dr. Bronner's asserts, it has lost business
8 to these Defendants and suffered monetary damage as a result of their false and deceptive
9 labeling.

10 As explained below, Defendant Estee Lauder is about to bring onto the market a
11 line of personal care products labeled as "Organic" even though the products use principal
12 cleansing agents not made from organic agricultural material and that have been hydrogenated
13 or sulfated, and synthetically preserved. Estee Lauder argues that because it has not yet brought
14 to the market the products described in the Complaint it is outside of the reach of this action.
15 Section 17200 is clearly to the contrary, however, Estee Lauder's easy solution is to make a
16 binding statement that it will not ever bring to the market products labeled and formulated of the
17 type described in the Complaint and it will be dismissed from the action. However, if the
18 company is planning to bring such products to the market and will not issue such a binding
19 statement, the company is a proper defendant in this action.

20 Defendant Ecocert is a certifying organization that has purported to issue a
21 voluntary industry standard on which Defendant Stella McCartney (and previous Defendant
22 Florestas whom Dr. Bronner's has settled with) relies in labeling their products as "Organic."
23 Defendant OASIS is a pure-industry standard certifying organization, of which Estee Lauder is
24 the dominating industry member, driver and architect, and on which Estee Lauder intends to

25 _____
26 ² The Attorney General of California has filed a Proposition 65 lawsuit against Hain Celestial,
27 one of the defendants in this case, for failing to disclose carcinogenic levels of 1,4 Dioxane, a
28 carcinogen, in the subject products; 1,4-Dioxane is also present in various other Defendants'
organic-labeled products.

1 rely in bringing its products to the market. Both Ecocert and OASIS certify as “Organic”
2 products that use cleansing agents made from non-organic materials that may be hydrogenated
3 and sulfated, and preserved with synthetic petrochemical preservatives. Ecocert allows various
4 petrochemical compounds in cleansing ingredients and requires only 10% organic content.
5 False certification of a product as “organic” is actionable under Section 17200.

6 **1. Consumer Expectations**

7 Based on consumer research, reasonable consumers of organic skin, body and
8 hair care products in California expect and believe that such products labeled as “Organic,”
9 “Organics,” “100% Organic Active Ingredients” and the like will:

- 10 • Not contain any petrochemicals or petrochemical compounds whatsoever in the
11 ingredients and will be entirely free of any petrochemical contaminants that could
12 pose any concern;
- 13 • Not contain any petrochemical preservatives;
- 14 • Not contain cleansing or moisturizing agents derived from conventionally-produced
15 agricultural material that may have been grown using synthetic fertilizers, pesticides
16 or herbicides.

17 **2. Dr. Bronner’s Products**

18 Dr. Bronner’s liquid soap products use cleaning and moisturizing ingredients
19 made solely from truly organic material and do not contain any petrochemicals, petrochemical
20 preservatives or synthetic cleansing agents. These products are truthfully represented as being
21 “Made with Organic [specified ingredients],” and are so labeled. Dr. Bronner’s line of body
22 balms, lotions, shaving gels and organic hair care products contain more than 95% certified
23 organic ingredients and are truthfully labeled as being USDA-certified “Organic.”

24 **3. Claim Against Count One Defendants**

25 The Count One Defendants have labeled their products using terms such as
26 “Organic,” “Organics,” “100% Organic Active Ingredients,” and the like, clearly representing to
27 consumers that that these products are “Organic” within the ordinary meaning of that word as
28 understood by consumers. However, these products are not in fact “Organic” as that term is

1 understood by reasonable consumers, because the products contain petrochemical compounds or
2 ingredients made with such compounds; they contain synthetic preservatives; and/or that the
3 main cleansing and/or moisturizing agents used in the products are not made from organic
4 agricultural material but rather from conventionally-grown agricultural material grown using
5 synthetic fertilizers, pesticides and/or herbicides and as a result may still contain residues of
6 those products.

7 Dr. Bronner's alleges that if consumers wanting to buy an "organic" product, or
8 one "made with Organic [specified ingredients]," were aware of the ingredients of Defendants'
9 products, they would not purchase those products but would purchase Dr. Bronner's products.
10 Dr. Bronner's asserts that these Defendants' labeling of their products as "Organic" is
11 misleading consumers to purchase Defendants' personal care products rather than Dr. Bronner's
12 products. This is particularly true, it is alleged, of those products so labeled which in fact
13 contain main cleansing and moisturizing ingredients made from petrochemicals and/or
14 conventional non-organic agricultural material, which Dr. Bronner's products do not. Yet a
15 reasonable consumer would assume that a product labeled as "Organic" or "Made with Organic
16 Ingredients" (without specifying ingredients and thus implying *all* ingredients are organic) is
17 *more* "organic" than a certified product labeled merely "Made with Organic [specified
18 ingredients]," and that the main cleansing and moisturizing ingredients are made from organic
19 material.

20 Thus, Dr. Bronner's alleges, these Defendants' labeling practices constitute an
21 unfair and unlawful business practice and false and deceptive advertising, in violation of Section
22 17200; and Dr. Bronner's has been monetarily damaged and directly lost business as a result of
23 these violations. Thus Dr. Bronner's is a person who has lost money as a result of these
24 Defendants' unfair competition, within the meaning of Business and Professions Code Section
25 17204 as amended by Proposition 64.

26 **4. Claim Against OASIS and Ecocert**

27 There are two voluntary purported industry standards relied upon by one or more
28 of the Defendants in the labeling of their products. Defendant OASIS is an industry-based

1 group, led and to Dr. Bronner's understanding, dominated by Defendant Estee Lauder, that has
2 developed a purported "industry standard" that would allow a product to be labeled outright as
3 "Organic" even if its main cleansing and moisturizing ingredients are made from non-organic
4 conventional agricultural material, are sulfated or hydrogenated, and/or are preserved with
5 synthetic petrochemicals. Far from restricting itself to an academic forum of debate, OASIS has
6 been actively soliciting companies to apply for certification of their products as "Organic" under
7 the OASIS standard. Dr. Bronner's asserts that certification of products as "Organic" by OASIS
8 is inaccurate and will constitute unfair and fraudulent business practices and false and deceptive
9 advertising in violation of Section 17200 and that in the absence of injunctive relief, Dr.
10 Bronner's will wrongfully lose money and business to companies labeling their products as
11 "Organic" based on certification by OASIS.

12 Defendant Ecocert holds itself out as a French certifying organization
13 purportedly operating around the world. This organization has issued standards by which it will
14 certify a product as "Organic" when it clearly is not because it contains main cleansing agents
15 made from non-organic conventional agricultural and/or petrochemical material. In addition,
16 Ecocert has even certified some of Defendants' products to be labeled "Organic," in violation of
17 its own standards. Dr. Bronner's alleges these labeling practices have misled and deceived
18 consumers who rely on Ecocert's misrepresentations of "Organic" into purchasing Ecocert-
19 certified "organic" products instead of Dr. Bronner's products. These certification practices
20 constitute unfair and fraudulent business practices and false and deceptive advertising in
21 violation of Section 17200; and Dr. Bronner's is a person who has lost money as a result of
22 these practices within the meaning of Business and Professions Code Section 17204.

23 **5. Claim Against Estee Lauder**

24 Defendant Estee Lauder has made clear its intention to begin labeling as
25 "Organic," personal care products under its "Aveda" brand, which products use principal
26 cleansing agents that are hydrogenated, sulfated and preserved with petrochemical
27 preservatives. In so labeling their products, Estee Lauder will rely on certification of the
28 products as "Organic" by Defendant OASIS. Estee Lauder products thus sold as "Organic"

1 would not be organic as understood by consumers within the ordinary meaning of “Organic.”
2 Representing such products as “Organic” is deceptive to consumers seeking to purchase
3 “Organic” products. Implementation of such deception in the market and the threat of such
4 implementation constitutes unfair competition in violation of Sections 17200, 17203 et seq.. Dr.
5 Bronner’s alleges that the certification by OASIS of such products as “Organic” will mislead
6 consumers into purchasing Estee Lauder products instead of Dr. Bronner’s products, again, in
7 violation of Section 17200.

8 **6. Pre-Emption**

9 Dr. Bronner’s Section 17200 claims are not preempted by federal or California
10 regulations. The federal National Organic Program (“NOP”), administered by the U.S.
11 Department of Agriculture (“USDA”) does not purport to regulate use of the term “Organic” on
12 personal care products as long as no specific USDA certification is implied. In the original
13 Complaint, Dr. Bronner’s noted that USDA certifies agricultural personal care, and regulates
14 such certified agricultural personal care; however, to be clear, USDA does not regulate personal
15 care that is not certified to the USDA or that does not make any representations of such
16 certification. The USDA does not provide recourse, and there is no remedy under that federal
17 law to redress the injury Dr. Bronner’s is suffering and will suffer as a result of the Count One
18 Defendants’ false and deceptive labeling of their products, Estee Lauder’s imminent plans to
19 label its products in the same way or the misleading certifications of products by OASIS and
20 Ecocert. The U.S. Food and Drug Administration does not regulate use of the term “Organic” in
21 the labeling personal care products. The federal NOP and the California Organic Products Act
22 may influence what consumers understand “Organic” to mean but are not dispositive as to the
23 understanding of that term by California consumers.

1 **B. Defendants' Statement of the Case**³

2 In its first cause of action, Dr. Bronner's alleges that the Count One Defendants
3 have misled consumers by reference to certain forms and uses of the word "organic" in various
4 marketing materials with regard to personal care products. Dr. Bronner's claims that
5 manufacturers of organic personal care products are required to certify their products in strict
6 accordance with the standards promulgated by the USDA's National Organic Program⁴ or to an
7 independent standard in whose development Dr. Bronner's is participating. Complaint ¶¶ 47-
8 51, 56-61, 139. In its second cause of action, Dr. Bronner's alleges that, although Dr. Bronner's
9 has not suffered an injury in fact or lost any money as a result of any conduct on the part of
10 Estee Lauder, Dr. Bronner's "will" suffer injury and "will" lose money "if" Estee Lauder
11 "begins" at some indeterminate point in the future to market personal care products as organic
12 based on the prospective organic certification standard being developed by OASIS. *Id.* ¶¶ 158,
13 167-68. In its third cause of action, Dr. Bronner's alleges that Ecocert has misled, and that
14 OASIS will mislead, consumers by certifying pursuant to their own standards which personal
15 care products are organic. *Id.* ¶¶ 176, 191. Defendants also contend that Plaintiff's claims are
16 without merit and Defendants specifically deny that they have engaged, or will engage, in unfair
17 competition or misleading advertising regarding their products; Defendants contend that their
18 practices are lawful, fair, and not misleading.

19 Defendants contend that Dr. Bronner's has no standing pursuant to Proposition
20 64 to pursue the claims alleged in the Complaint. Estee Lauder has already filed a Demurrer to
21 the Complaint on this ground, and the Count One Defendants and Ecocert plan to do the same.

22 ³ This summary of the case should not be interpreted to be, and is not intended to be, an
23 admission by Defendants, or by any of them, of any allegation(s) in the Complaint. In an effort
24 to be concise, the Count One Defendants have not described their particular products in this
Statement.

25 ⁴ Defendants note that the USDA has recently stated that, while personal care product
26 manufacturers are permitted to voluntarily certify their products as organic according to NOP,
27 such manufacturers may instead elect to certify their products as organic according to other,
28 privately developed standards. USDA, Agricultural Marketing Service, NOP, "Cosmetics,
Body Care Products, and Personal Care Products," available at
<http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5068442> (last visited July
10, 2008).

1 Certain Defendants contend that Plaintiff’s claims must be dismissed on grounds
2 of, *inter alia*, federal preemption, failure to exhaust administrative remedies, and/or primary
3 jurisdiction (collectively, the “Federal Preemption Arguments”). These Defendants note that
4 Dr. Bronner’s assertion in this Case Management Statement that “the term ‘Organic’ as
5 represented by Defendants to California consumers of personal care products and understood by
6 those consumers is not regulated by federal or state law” (*see* Section I(A), p. 3, lines 10-12,
7 *supra*) stands in contradiction to Dr. Bronner’s allegations in the Complaint. *See, e.g.*,
8 Complaint ¶ 51 (“Thus, the NOP regulations apply to the labeling of personal care products that
9 contain agricultural materials and are labeled ‘Organic’ or ‘Made with Organic’ ingredients.”).
10 Because more than one federal agency is involved in regulating personal care products, their
11 contents, and their marketing materials, Defendants intend to present several Federal
12 Preemption Arguments requiring dismissal of Plaintiff’s claims in their entirety.

13 In respect of the various federal agency rules involved, certain Defendants plan
14 to sharpen the presentation of the several Federal Preemption Arguments by filing separate
15 demurrers to Plaintiff’s causes of action. The individual filings will preserve each Defendant’s
16 separate views and rights, and, when taken together, will embody an appropriate spectrum of
17 Federal Preemption Arguments. Defendants anticipate that each of the separate grounds
18 advanced, although not identical, will independently be dispositive of this Court’s lack of
19 subject matter jurisdiction with respect to Plaintiff’s causes of action.

20 Since the issues of standing and federal preemption are fundamental as to
21 whether Dr. Bronner’s may even state a cause of action, the Defendants recommend that the
22 Court cause these matters to be addressed temporally before any others.

23 Defendant OASIS contends the Third Cause of Action attacks its constitutional
24 rights pursuant to the First Amendment to the United States Constitution and the Liberty of
25 Speech Clause of the California Constitution. OASIS is a nonprofit membership organization
26 that seeks to offer its opinion, for its members and the public, of what the word “organic” means
27
28

1 for personal care and beauty products.⁵ OASIS's opinion will take the form of a standard. The
2 relief sought against OASIS—a permanent injunction—would bar OASIS from disseminating
3 this standard, and as such, would be an unconstitutional prior restraint. As the Third Cause of
4 Action as pled against OASIS arises from the exercise of free speech rights by OASIS, the cause
5 of action is subject to a special motion to strike pursuant to the California anti-SLAPP statute.

6 Depending on the applicable allegations against them, individual Defendants
7 may assert additional defenses available to them.

8 **II. SERVICE, APPEARANCES, AND STATUS OF THE PLEADINGS**

9 Dr. Bronner's filed its Complaint on April 28, 2008. On May 29, 2008, Estee
10 Lauder filed a Demurrer to the single cause of action (Second Cause of Action) alleged by Dr.
11 Bronner's against Estee Lauder.⁶ Estee Lauder's Demurrer is still pending. By stipulation filed
12 on June 5, 2008, the remaining Defendants' time to file responsive pleadings was extended to
13 June 27, 2008. Following the Court's setting of the July 30, 2008 Case Management
14 Conference, the parties agreed to extend the remaining Defendants' time to file responsive
15 pleadings to August 8, 2008. The Court entered its order thereon on July 1, 2008.

16 By order of the Court dated July 1, 2008, OASIS's time to file its intended
17 Special Motion to Strike under CCP section 425.16 has been extended to a date to be set at the
18 Case Management Conference.

19 All Defendants have been served. All Defendants have entered appearances
20 and/or entered stipulations with Plaintiff other than Ecocert France.

21 **III. AGREEMENTS AND STIPULATIONS**

22 In response to an unopposed motion by the Ecocert parties, this case has been
23 designated as a Complex Case.

24
25
26
27 ⁵ OASIS disputes Plaintiff's characterization of it and its planned activities.

28 ⁶ Estee Lauder was served with the Complaint on May 2, 2008.

1 A Settlement Agreement has been entered by Dr. Bronner’s with one of the
2 Defendants—Florestas Organic Botanical, Inc.—and that Defendant has been dismissed from
3 the case.

4 Another Defendant, Juice Beauty, has agreed in principle to enter a standstill
5 agreement with Dr. Bronner’s under which it will change the formulation of its products and, as
6 to labeling, abide by the outcome of the case. The language of the agreement is currently under
7 negotiation.

8 **IV. MOTIONS PENDING**

9 **A. Consolidation**

10 The issue of consolidation of this case with *Ecocert France v. All One God*
11 *Faith*, Case No. CGC-08-474413, is pending before the Court by virtue of the filing, by the
12 Ecocert parties, of a Notice of Related Case.

13 **B. Estee Lauder’s Pending Demurrer**

14 Estee Lauder’s Demurrer argues that the Complaint contains no allegations that
15 Dr. Bronner’s has been harmed in any way by Estee Lauder’s actions. Dr. Bronner’s speculates
16 that Estee Lauder will, at some indeterminate point in the future, label, advertise, and sell
17 products as “organic” under the planned certification standard under development by Defendant
18 OASIS, at which point Dr. Bronner’s alleges that it “will suffer” injury in fact and “will lose”
19 money. Such allegations of speculative injury are insufficient to establish standing under
20 Business and Professions Code Section 17204, which requires that a person “has suffered injury
21 in fact and has lost money or property as a result of” the challenged practices. If Dr. Bronner’s
22 cannot allege that it has already been harmed by Estee Lauder’s actions, it cannot properly
23 allege injury in fact, which is necessary to state a cause of action against Estee Lauder. Because
24 Plaintiff’s Complaint is fatally deficient to satisfy the mandatory provisions governing this
25 Court’s jurisdiction over actions “for any relief” under Section 17200, Plaintiff’s cause of action
26 against Estee Lauder must be dismissed without leave to amend. (Bus. & Prof. Code, § 17204.)

27 Dr. Bronner’s intends to oppose the Demurrer and contends that its pleading is
28 adequate as to Estee Lauder because Proposition 64 retains the provision for injunctive relief to

1 prevent future violations of Section 17200, including authority in this Court to make orders to
2 prevent unlawful activities from occurring in the future. “Injury in fact” includes prospective
3 injury, if such injury is concrete and imminent. Estee Lauder plans imminently to label a major
4 existing line of body care products as “Organic,” even though these products include primary
5 cleansing agents that are hydrogenated and/or sulfated, and preserved with synthetic
6 petrochemical preservatives; and even though such agents may derived from non-organic
7 agricultural material. Such labeling will cause substantial and immediate harm to Dr. Bronner’s
8 business, clearly constituting loss of “money or property.”

9 Prior to the transfer of this case to Department 305, Estee Lauder’s Demurrer
10 was set to be heard on July 1, 2008, in Department 301. Upon transfer, the Demurrer hearing
11 was taken off calendar to be rescheduled at a date and time available for Department 305. Dr.
12 Bronner’s and Estee Lauder jointly propose the following revised briefing and hearing schedule
13 with respect to Estee Lauder’s Demurrer:

- 14 • Opposition due on Monday, August 4, 2008, to be served to ensure same-day service
15 upon counsel for Estee Lauder.
- 16 • Reply due on Wednesday, August 13, 2008, to be served to ensure same-day service
17 upon counsel for Plaintiff.
- 18 • Hearing on Friday, August 22, 2008, at 11:00 a.m. in Department 305, so as to be
19 heard in coordination with the hearing on OASIS’s special motion to strike.

20 **V. ANTICIPATED MOTIONS⁷**

21 **A. Demurrers by Count One Defendants and Ecocert**

22 The Count One Defendants and Ecocert plan to file demurrers to the Complaint
23 on August 8, 2008, or on such other date as set by this Court. The Count One Defendants and
24 Ecocert intend to file demurrers based on Plaintiff’s lack of standing under Proposition 64
25 and/or preemption of Count One by federal law. In its Complaint, Dr. Bronner’s fails to allege

26 _____
27 ⁷ Various Defendants may assert other defenses in this case which are not set forth or alluded to
28 in this Statement; no party other than Estee Lauder has of yet filed an Answer or other
responsive pleading.

1 that any consumer has actually relied on any of the allegedly misleading labeling or statements,
2 fails to show that Dr. Bronner's has suffered an injury in fact, and fails to show that it has lost
3 any money. These requirements must be met for Dr. Bronner's to have standing under
4 Proposition 64, and Dr. Bronner's has not and cannot satisfy the necessary requirements.

5 Dr. Bronner's will oppose the demurrer asserting lack of standing on the ground
6 that the Complaint clearly alleges that consumers have actually been misled and continue to be
7 misled, by Count One Defendants' deceptive and false labeling of their products as "Organic,"
8 into buying Defendants' products rather than Dr. Bronner's products. Accordingly, the
9 Complaint alleges, Defendants have taken business away from Dr. Bronner's through their
10 labeling practices that violate Section 17200, causing Dr. Bronner's to have lost market share,
11 and thus revenue. Accordingly Dr. Bronner's will assert that it clearly has standing under
12 Proposition 64.

13 The Count One Defendants and Ecocert suggest that any demurrers filed on
14 August 8, 2008 be heard on or about September 4 or 5, 2008, with oppositions due on August
15 22, 2008 and replies due on August 29, 2008. Dr. Bronner's agrees with this proposed schedule.

16 **B. Special Motion to Strike by Defendant OASIS**

17 Defendant OASIS plans to file a special motion to strike the cause of action
18 against it under Code of Civil Procedure Section 425.16. By order entered on July 1, 2008,
19 OASIS's time to file this motion was postponed until after the Case Management Conference.

20 This special motion to strike will be based on the grounds that OASIS is
21 exercising its First Amendment right to participate in the ongoing debate of considerable public
22 interest, namely the debate regarding the meaning of the word "organic" for personal care
23 products. If OASIS establishes that the Complaint arises from OASIS's exercise of its free
24 speech rights, the burden will shift to Dr. Bronner's to establish a likelihood of success on the
25 merits of its claims. OASIS contends that Dr. Bronner's will not be able to meet its burden
26 because: (a) Dr. Bronner's lacks standing under Section 17200 to sue OASIS because OASIS
27 has not yet established a final standard or allowed anyone to use it for certification; (b) Dr.
28 Bronner's lacks admissible evidence that OASIS's proposed standard would be misleading; (c)

1 the Complaint encroaches on OASIS's First Amendment rights and (d) the relief sought is an
2 unconstitutional prior restraint.

3 Dr. Bronner's will oppose the special motion to strike on the grounds that (a) Dr.
4 Bronner's has standing because the imminent labeling of products by Estee Lauder and others
5 based on the OASIS certification will immediately cause Dr. Bronner's to lose business; (b) Dr.
6 Bronner's has alleged, and is prepared to prove, that no reasonable consumer would consider
7 body care products certified as "Organic" by OASIS to be organic because such products can
8 contain cleansing agents made from non-organic materials that has been hydrogenated or
9 sulfated and/or preserved with synthetic petrochemicals; and (c) the application of Section
10 17200 to restrain false and deceptive labeling of products is a permissible regulation of
11 commercial speech that does not violate the First Amendment.

12 The motion will be ready for service and filing on the date of the CMC. OASIS
13 proposes that the special motion to strike be heard on August 22, 2008, at 11:00 a.m., so as to be
14 heard in coordination with the hearing on Estee Lauder's Demurrer.

15 **C. Summary Judgment Motions**

16 Defendants also anticipate filing summary judgment motions on certain issues
17 depending on how the case is managed and phased.

18 **VI. STATUS OF DISCOVERY**

19 On June 17, 2008, Dr. Bronner's served on all Defendants except OASIS a First
20 Request to Defendants for Production of Documents, which Defendants believe is extremely
21 broad. With one exception, Defendants have refrained from serving discovery requests pending
22 the Case Management Conference. Pursuant to stipulation of the parties, the Defendants' time
23 to respond to the Plaintiff's Requests has been extended to August 15, 2008, to allow the parties
24 to discuss the scope and timing of any initial discovery at the Case Management Conference,
25 and to allow this Court to reset the date in accordance with the outcome of that discussion.
26 Defendants have also agreed not to require Dr. Bronner's to respond to discovery prior to
27 August 15.

28

1 Defendants' position is that OASIS's special motion to strike will stay discovery
2 in the case once it is filed. *See* Code of Civil Procedure section 425.16(g).⁸

3 Estee Lauder's position is that, because Dr. Bronner's admits it has not suffered
4 an injury in fact and has not lost money as a result of any conduct of Estee Lauder, Dr.
5 Bronner's cannot meet its burden of proving that any amendment of its Complaint would cure
6 the fatal defects inherent in its cause of action against Estee Lauder. Therefore, Estee Lauder
7 respectfully requests that all discovery against Estee Lauder be stayed until 30 days after a
8 determination by the Court as to whether Dr. Bronner's has standing to assert a cognizable
9 cause of action against Estee Lauder. Estee Lauder disagrees with Dr. Bronner's contention
10 (*see* below) that discovery related to standing encompasses "prospective" conduct pertaining to
11 what Estee Lauder "plans to do with respect to labeling of products" based on the standard
12 being developed by OASIS.

13 Alternatively, Defendants respectfully propose that discovery proceed in stages,
14 with the initial stage of discovery limited to the issue of whether Dr. Bronner's has standing to
15 pursue its claims and whether federal preemption deprives the Court of jurisdiction. Defendants
16 believe that it will be more cost-efficient and effective for all parties to focus initial discovery
17 efforts on dispositive issues such as standing and preemption. Defendants contend that the
18 document requests served by Dr. Bronner's on June 17 are overbroad, with virtually no factual
19 or subject matter limitations on the requested responsive productions. (A true copy of Plaintiff's
20 June 17 Request for Production is attached as Exhibit 1.) Defendants submit that they should
21 not be required to respond to these scattergun requests, and that instead the parties should focus
22 their discovery efforts on limited, specific issues, as directed by the Court. Defendants also note
23 that an appropriate Protective Order or Orders will need to be fashioned, because various of
24

25 _____
26 ⁸ CCP § 425.16(g) provides that: "All discovery proceedings in the action shall be stayed upon
27 the filing of a notice of motion made pursuant to this section. The stay of discovery shall
28 remain in effect until notice of entry of the order ruling on the motion. The court, on noticed
motion and for good cause shown, may order that specified discovery be conducted
notwithstanding this subdivision."

1 the disclosures at issue may call for the production of documents and/or information that
2 concern confidential business matters.

3 Dr. Bronner's agrees that discovery will be stayed until 30 days after a
4 determination by the Court of OASIS's special motion to strike. However, Dr. Bronner's does
5 not agree that all discovery should be stayed against Estee Lauder or that discovery should
6 proceed in stages or be stayed until the disposition of demurrers based on preemption or
7 standing. Dr. Bronner's proposes that discovery against Estee Lauder be limited to issues
8 relating to standing—i.e., what Estee Lauder plans to do with respect to labeling of products
9 based on the OASIS standard and the timing of such labeling—until the disposition of Estee
10 Lauder's demurrer. With respect to discovery against other Defendants, Dr. Bronner's submits
11 that preemption is a question of law not requiring discovery and that standing is so integrally
12 intertwined with the merits of the case—i.e., whether Defendants' labeling practices have in fact
13 misled consumers—that it does not make sense to phase discovery as proposed by Defendants.

14 Dr. Bronner's agree that an appropriate Protective Order or Orders will need to
15 fashioned as suggested by Defendants.

16 **VII. RELATED OR COMPANION CASES**

17 Ecocert filed a declaratory judgment complaint against Dr. Bronner's and
18 Organic Consumers Association, Inc. ("OCA"), and Dr. Bronner's and OCA made a cross-
19 complaint, in the following matter: *Ecocert France (SAS) & Ecocert, Inc. v. All One God Faith,*
20 *Inc. et al.* (Case No. CGC-08-474413). This case is currently pending in Department 212 and
21 presents similar issues. Ecocert believes that it would be appropriate to consolidate the cases, as
22 noted in its motion to declare this case complex.

23 Ecocert propounded discovery (a form interrogatory regarding entity status) to
24 Dr. Bronner's (in this case) and OCA (in Case No. CGC-08-474413), to which both Dr.
25 Bronner's and OCA have responded.

26 * * *

27 The parties look forward to the Initial Case Management Conference on July 30,
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and thereafter to litigating this matter as directed by the Court.

DATED: July 25, 2008

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