

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 14-670 RGK (AGR _x)	Date	October 2, 2014
Title	AGUIAR v. MERISANT		

Present: The Honorable	R. GARY KLAUSNER, U.S. DISTRICT JUDGE
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Sharon L. Williams (Not Present) Deputy Clerk	Not Reported Court Reporter / Recorder	N/A Tape No.
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Attorneys Present for Plaintiffs: Not Present	Attorneys Present for Defendants: Not Present
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Proceedings: (IN CHAMBERS) Order Re: Plaintiff’s Motion for Preliminary Approval of Class Action Settlement (DE 107)

I. INTRODUCTION

On January 28, 2014, Angel Aguiar (“Plaintiff”) filed a class action lawsuit against Merisant Company and Whole Earth Sweetener Company, LLC (collectively, “Defendants”) on behalf of herself and all other consumers similarly situated (“Class Members”). In the Complaint, Plaintiff alleges the following causes of action:

1. Unjust Enrichment;
2. Breach of Express Warranty;
3. Breach of Implied Warranty;
4. Violation of the Consumer Fraud Laws of the various states;
5. Violations of California Business & Professions Code § 17200 *et seq.* (Fraudulent Acts and Practices);
6. Violations of California Business & Professions Code § 17200 *et seq.* (Unlawful Acts);
7. Violations of California Business & Professions Code § 17200 *et seq.* (Unfair Acts and Practices);
8. Violations of the California Consumers Legal Remedies Act; and
9. Violations of California Business & Professions Code § 17500 *et seq.* (False Advertising).

On February 21, 2014, Defendants filed a Motion to Dismiss, which the Court granted as to the unjust enrichment claims only.

On May 29, 2014, Plaintiff filed a Motion for Class Action Certification. Defendants responded by filing a Motion to Deny Class Certification. In the following months, both parties conducted discovery and investigation. On July 14, 2014, the parties withdrew their motions in anticipation of pursuing a settlement.

Plaintiff now seeks approval of an unopposed Motion for Preliminary Approval of Class Action Settlement, Certification of Settlement Class, Approving Notice Plan, and Scheduling Date for Final Fairness Hearing.

II. FACTUAL BACKGROUND

Plaintiff is an individual consumer who has purchased Pure Via, a sugar-alternative sweetener. Defendants market, advertise, distribute, and sell Pure Via products in California and throughout the United States.

Plaintiff alleges that Defendants market Pure Via as a natural sweetener made primarily from the stevia plant. Plaintiff further alleges that since 2008, Pure Via's top ingredient is synthetic dextrose. While Pure Via also contains the stevia-derived ingredient, Reb A, the ingredient comprises less than 5% of the products. Moreover, according to Plaintiff, Reb A is a highly chemically-processed and purified form of stevia leaf extract.

On January 28, 2014, Plaintiff filed a Complaint alleging that, as part of a scheme to make Pure Via more attractive to consumers and boost their sales, Defendants used terms such as "made from ingredients found in nature" and "the all natural way to keep calories low." According to the Complaint, Defendants' conduct induced consumers into believing that Pure Via is a natural sweetener, free of synthetic or chemically-processed ingredients, primarily made from the stevia plant. Additionally, Plaintiff alleges that Defendants describe the process of obtaining stevia leaf extract as similar to making tea, but do not tell the consumer that Defendants then add ethanol, methanol, or rubbing alcohol to this so-called "tea" in a patented multi-step process to purify it. Based on these facts, Plaintiff asserts that no reasonable consumer would classify Pure Via as a natural product.

On July 8, 2014, the parties reached a settlement. Pursuant to the principal terms of the Settlement, Defendants have agreed to (1) change their marketing and labeling; (2) contribute \$1.65 million into an independently-administered Settlement Fund; and (3) agree to certification of the Settlement Class.

III. JUDICIAL STANDARD

A. Certification of Settlement Class

Before a court may evaluate a class settlement, the court's "dominant concern" is whether the settlement class passes muster under Federal Rule of Civil Procedure ("Rule") 23 Subsections (a) and (b). *Amchem Prod. v. Windsor*, 521 U.S. 591, 621 (1997). This inquiry receives "undiluted, even heightened, attention in the settlement context." *Id.* at 620. Thus, a court must be satisfied that the class meets each of the four prerequisites for certification established by Rule 23(a), which are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a).

The court must also be satisfied that a plaintiff seeking class certification satisfies one of the three requirements of Rule 23(b) regarding predominant questions of facts and law. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). These requirements are: (1) the prosecution of separate actions would create a risk of (a) inconsistent or varying adjudications, or (b) individual adjudications dispositive of the interests of the other class members not parties to those adjudications; (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class; or (3) the questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and

efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(1)–(3).

B. Preliminary Approval of Settlement

A class action may not be dismissed, compromised, or settled without court approval. Fed. R. Civ. P. 23(e). Such approval of a class action settlement by a district court must follow a determination that the settlement is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). To determine whether a settlement agreement meets these standards, courts must consider a number of factors, including:

(1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

Churchill Vill., L.L.C. v. GE, 361 F.3d 566 (9th Cir. 2004).

IV. DISCUSSION

A. Class Certification

For settlement purposes only, Plaintiff requests that the Court conditionally certify the Settlement Class defined as:

All persons who, during the Class Period, both resided in the United States and purchased in the United States any of the Pure Via Consumer Products for their household use or personal consumption and not for resale. Excluded from the Settlement Class and Settlement Class Members are: (a) Merisant’s board members or executive-level offices, including its attorneys; (b) governmental entities; (c) the Court, the Court’s immediate family, and Court staff; and (d) any person that timely and properly excludes himself or herself from the Settlement Class in accordance with the procedures approved by the court.

(Class Settlement Agreement §§ 2.12, 2.19.)

As discussed below, the Court finds that the proposed Settlement Class satisfies all of the Rule 23 certification requirements for the purposes of settlement.

1. Rule 23(a) Requirements are Satisfied

a. *Numerosity*

The prerequisite of numerosity is met if “the class is so large that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a). Courts generally find that this requirement is met “when the class comprises 40 or more members.” *Ansari v. N.Y. Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y. 1998); *see also Ma v. Covidien Holding, Inc.*, SACV 12-02161-DOC 2014 U.S. Dist. LEXIS 13296, at *4 (C.D. Cal. Jan. 31, 2014).

Here, Plaintiff has presented evidence showing an estimation that the Settlement Class Members number between 1.2 and 2.4 million. (Dahl Aff. ¶11, ECF 109 Attach. 4). The Court is satisfied that the numerosity requirement has been met.

b. *Commonality*

The commonality requirement is fulfilled when “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “[T]he key inquiry is not whether the plaintiffs have raised common questions, ‘even in droves,’ but rather, whether class treatment will ‘generate common answers apt to drive the resolution of the litigation.’” *Abdullah v. U.S. Sec. Assoc., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). “This does not, however, mean that every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is ‘a single significant question of law or fact.’” *Id.*

Based on the allegations of the Complaint, the following issues are central to Plaintiff’s claims:

1. whether Defendants’ marketing, advertising, labeling, and selling of Pure Via constitute (a) an unfair, unlawful, or fraudulent practice and (b) false advertising;
2. whether Defendants materially misrepresented to the Class members that Pure Via is “natural,”
3. whether Defendants’ alleged misrepresentations and omissions were material to reasonable consumers, and
4. whether Defendants’ alleged conduct injured consumers and, if so, the extent of the injury.

It appears that these issues are common to all Class Members, and resolution of these issues will resolve all claims against all Class Members.

The Court finds these common issues of law and fact satisfy Rule 23(a)(2)’s commonality test.

c. *Typicality*

Typicality is established when “[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The assessment of typicality focuses on “the defendant’s conduct and the plaintiff’s legal theory.” *Simpson v. Fireman’s Fund. Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005). “Under the rule’s permissive standards, representative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *see also Duke’s v. Wal-Mart, Inc.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005).

Here, Plaintiff and Class Members’ claims all arise from the same factual basis: that consumers were deceived by Defendants’ marketing and labeling of a purportedly “all natural” sugar alternative that actually contains synthetic ingredients and is heavily chemically processed. (Pl.’s Mot. Prelim. Approval Class Action Settlement 14, ECF 108.)

The Court finds this sufficient to establish typicality under Rule 23(a)(3).

d. *Adequacy of Representation*

Plaintiff must show that “the representative parties will fairly and adequately protect the interests

of the class.” The Ninth Circuit applies a two-pronged test to determine adequacy of representation: “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Hanlon*, 150 F.3d at 1020.

The court is unaware of any conflicts between Plaintiff, her Counsel, and other proposed Class Members. Plaintiff asserts that, as a member of the class, she seeks remedies equally applicable and beneficial to the Settlement Class. Plaintiff also asserts that she has demonstrated her adequacy of representation by diligently advancing litigation of this case. The Court finds no reason to disagree. Finally, the record shows that Class Counsel has significant experience in litigating complex class actions. (Lawrence Decl. ¶17, ECF 109; Lawrence Decl. Exs. 2, 3, ECF 109 Attachs. 14, 15.)

Accordingly, the Court finds that the adequacy of representation requirement is satisfied.

2. Rule 23(b)(3)

Plaintiff asserts that the proposed Settlement Class meets the standards of Rule 23(b)(3). Under Rule 23(b)(3), the Court must determine whether “the questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

a. *Predominance of Common Issues*

The predominance inquiry focuses on the relationship between the common and individual issues. *Hanlon*, 150 F.3d at 1022. “When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.” *Id.* (quoting 7A Charles Alan Wright, Arthur R Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1778 (2d ed. 1986)).

In this case, the common questions pertain to Defendant’s alleged deceptive and misleading marketing of Pure Via products. Because the proposed Settlement Class is comprised of consumers who purchased Pure Via Consumer Products for their household or personal use, it follows that resolution of the issues in this case would apply to all Class Members. *See generally In re Tobacco II Cases*, 46 Cal. 4th 298, 324 (2009).

The Court finds that, for the purposes of settlement, this is sufficient to satisfy the predominance requirement of 23(b)(3).

b. *Superiority Over Other Available Methods*

The superiority inquiry under Rule 23(b)(3) requires “determination of whether the objectives of the particular class action procedure will be achieved in the particular case.” *Hanlon*, 150 F.3d at 1023. This determination necessarily inquires whether alternative mechanisms exist to resolve the dispute. *Id.* Class actions not only serve to permit litigation of a suit involving common questions when there are too many plaintiffs for proper joinder, but they also “permit the plaintiffs to pool claims which would be uneconomical to litigate individually.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

Plaintiff asserts that the objective of this case is to determine whether Defendants labeled Pure

Via products in such a way that was likely to deceive the reasonable consumer, and that the establishment of Defendants' deceptive conduct for one Class Member would apply to all. Plaintiff additionally asserts that it is not economically feasible for the estimated 1.2 to 2.4 million Settlement Class members to pursue their claims against Defendants on an individual basis given the average retail price of Pure Via products compared to the expense of establishing these claims.

The Court finds that, for the purposes of settlement, a class action is superior to individual suits.

3. *The Court Appoints Class Counsel for the Settlement Class*

A court that certifies a class must appoint class counsel. In appointing class counsel, courts must consider: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate. Fed. R. Civ. P 23(g)(1)-(2), (4).

Plaintiff has submitted evidence showing that Class Counsel has significant experience in litigating complex class actions. This evidence includes the declarations and affidavits of proposed Counsel Members, as well as firm bios for their respective firms. Records also show that Counsel obtained a full understanding of the processing of Pure Via ingredients and Defendants' basis for Pure Via's labeling. Additionally, Counsel evaluated the various state consumer protection laws as well as the legal landscape to determine the strength of the claims, the likelihood of success, and the parameters within which courts have assessed settlements similar to the instant proposed Settlement. (Lawrence Decl. ¶1-17, ECF 109; Lawrence Decl. Exs. 2, 3, ECF 109 Attachs. 14, 15.) Upon reviewing the record, the Court finds the proposed Class Counsel to be adequate in representing Class Members. Accordingly, the Court appoints Scott+Scott, Attorneys at Law, LLP and the Wood Law Firm, LLC as Class Counsel for the Settlement Class.

B. Preliminary Approval of Class Action Settlement

In determining whether to preliminarily approve a class action settlement, the Court must examine the submitted materials and determine whether the proposed settlement appears fair on its face and is appropriate for submission to the Class Members.

Here, Parties began to discuss settlement during the motion and discovery practice for Class Certification. This Motion is the result of a resolution reached after both parties engaged in litigation of the matter, including document review and numerous depositions. (Lawrence Decl. ¶10). Additionally, Class Counsel investigated the ingredients in Pure Via, including the methods for producing stevia leaf extract. Class Counsel evaluated the various consumer protection laws, as well as the legal landscape, to determine the strength of the claims, the likelihood of success, and the parameters within which courts have assessed settlements similar to the proposed Settlement in this Action. (Lawrence Decl. ¶11). Furthermore, Class Counsel are experienced litigators who are qualified to represent the Class members. (Lawrence Decl. ¶17, ECF 109; Lawrence Decl. Exs. 2, 3, ECF 109 Attachs. 14,15.)

Pursuant to the terms of the settlement, Defendants agree to pay \$1.65 million into a Settlement Fund to compensate consumers who purchased Pure Via products. Under the terms of the Settlement, each Class Member with a valid claim will receive \$5.00 to \$30.00, depending on the dollar amount or number of their purchases during the Class Period. Any Residual Funds remaining will result in

increased claim values, increased on a *pro rata* basis, up to one hundred percent of the eligible Settlement Class Member's original claim amount. Following these calculations and claim modifications, the Settlement Administrator will distribute any remaining Residual Funds to the American Diabetes Association.

Additionally, Defendants agree to change the labeling of Pure Via. Specifically, they will add an asterisk on Pure Via packaging with a statement directing consumers to purevia.com for more information about the ingredients and "natural" classification of the product. The statement will be placed below the ingredients panel or somewhere of equal or greater prominence. Defendants will amend the purevia.com website to further explain the manufacturing process, Pure Via's ingredients, and why Defendants believe it is natural. This will provide consumers with the information to make their own determination as to Pure Via's status as a "natural" product.

Finally, Defendants agree to Class Certification for purposes of achieving the Settlement. The Settlement Agreement allocates Attorneys' Fees, not to exceed 30% of the total sum of the Settlement Fund, to be awarded separately from the Settlement Fund. The Settlement Agreement also allocates an Incentive Award to Plaintiff, not to exceed \$4,000.00, to be paid by the Settlement Fund.

Based on the facts above, the settlement appears to be fair and reasonable for purposes of preliminary approval.

C. The Court Approves the Proposed Notice Plan

Rule 23(e) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by" a proposed settlement. Fed. R. Civ. P. 23(e)(1). In addition, "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be reasonably identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Churchill Vill.*, 361 F.3d at 575 (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)); see also *Rodriguez v. West*, 563 F.3d 948, 962 (9th Cir. 2009).

Here, the Notice Plan includes several ways to reach proposed Class Members, including website searches and advertisements, social media, national media, an information website, direct mailing, and a toll-free help line. Furthermore, the proposed Notice provides details sufficient to explain the terms of the Settlement Agreement and provide information to Class Members about their rights, releases, and application deadlines. The Notice informs Class Members of how funds will be allocated, and how Residual Funds will be handled. Class Members are also put on notice of Attorneys' Fees and Expenses awarded and an Incentive Award to the Class Representative. Finally, the Notice plainly indicates the time and place of the hearing to consider approval of the settlement and the method of objecting to or opting out of the settlement.

Based on the above facts, the Court approves the proposed Notice Plan.

IV. CONCLUSION

The Court finds that, for the purposes of settlement, the proposed Settlement Class meets the requirements under Rule 23 Sections (a) and (b), and **GRANTS** Plaintiff's Motion for Certification of

the Settlement Class.

The Court finds that the proposed Settlement Agreement appears to be fair and reasonable on its face, and thereby **GRANTS** Plaintiff's Motion for Preliminary Approval of the Settlement Agreement.

The Court finds the proposed Notice is sufficiently balanced, accurate, and informative way to satisfy due process concerns and **APPROVES** the proposed Notice Plan.

IT IS SO ORDERED.

Initials of Preparer _____ : _____
