

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,  
AT KANSAS CITY**

**TONYA KELLY and BRIAN** )  
**MARTENS, on behalf of themselves and** )  
**all others similarly situated,** )  
) )  
**Plaintiffs,** ) **Case No. 1316-CV11037**  
) )  
**v.** ) **Division No. 16**  
) )  
**POPCHIPS, INC.,** )  
) )  
**Defendant.** )

**ORDER GRANTING PRELIMINARY APPROVAL OF  
PROPOSED SETTLEMENT AND  
DIRECTING DISSEMINATION OF NOTICE TO SETTLEMENT CLASS**

This matter comes before the Court on Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Motion for Preliminary Approval") submitted to the Court in this action ("Action"). The Court has carefully reviewed and considered the Motion for Preliminary Approval, the Settlement Agreement dated November 14, 2013 ("Agreement"), as well as all of the exhibits attached to the Motion for Preliminary Approval and the Agreement, and finds that the Motion for Preliminary Approval should be **GRANTED**.

**IT IS THEREFORE ORDERED** that:

### **Preliminary Approval of Settlement**

1. The Court has conducted a preliminary examination of the record and has made a preliminary determination that there is probable cause to find that the proposed settlement set forth in the Agreement (“Settlement”) is fair, reasonable, adequate, and in the best interests of the Settlement Class (defined below in the Class Definition section) pursuant to Missouri Rule of

Civil Procedure 52.08 and applicable case law.<sup>1</sup> In evaluating the fairness of the Settlement, the Court has considered: (1) the existence of fraud or collusion behind the Settlement; (2) the complexity, expense, and likely duration of the Action; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of Plaintiffs' Counsel and Representative Plaintiffs. *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 378, n.6 (Mo. App. 1997). The Court finds that each of these factors favors granting preliminary approval and sending notice of the Settlement to the Settlement Class.

2. In particular, the Court finds that the Settlement is not the product of fraud or collusion, but rather is a fair and reasonable compromise resulting from arm's-length negotiations between adverse parties represented by experienced counsel through a mediation conducted by an experienced mediator, John R. Phillips of Husch Blackwell LLP. This Action presents complex factual and legal issues that would require lengthy and expensive litigation. The benefits afforded to the Settlement Class by the Settlement, including both monetary and non-monetary relief, fall within the reasonable range of possible recovery under the circumstances, particularly when considering the finite assets of Defendant popchips, inc. ("Defendant"), the likely duration and expense of continued litigation necessary to take the case to trial, and the risks that Representative Plaintiffs face in litigating the case. Plaintiffs' Counsel conducted extensive pre-suit investigation and confirmatory discovery sufficient to effectively evaluate the Settlement and to represent the Settlement Class. The Settlement provides immediate, certain, and substantial benefits to the Settlement Class, eliminating the uncertainty

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<sup>1</sup> Capitalized terms used herein shall have the meanings ascribed to such terms in the Agreement, which is incorporated herein and made a part hereof, unless otherwise defined herein.

inherent in litigation on the merits. Accordingly, the Court preliminarily approves the Settlement and directs that members of the Settlement Class whose claims would be settled, compromised, dismissed and/or released pursuant to the Settlement should be given notice and an opportunity to be heard.

### **Appointment of Representative Plaintiffs and Class Counsel**

3. The Court finds that the named plaintiffs in this Action, Tonya Kelly and Brian Martens, are adequate to represent the Settlement Class for settlement purposes under Missouri Rule of Civil Procedure 52.08 and, therefore, appoints them as representatives of the Settlement Class for settlement purposes ("Representative Plaintiffs"). The Court further appoints Shank & Hamilton, P.C. as Plaintiffs' Counsel and as counsel for the Settlement Class ("Class Counsel") for settlement purposes, whom the Court finds to be experienced and adequate counsel for the Settlement Class under Rule 52.08.

### **Class Definition**

4. The Court has conducted a preliminary examination of the record submitted in support of certification of a class for purposes of settlement. The Court finds that the standards for class certification under Rule 52.08 of the Missouri Rules of Civil Procedure and applicable case law have been met and certifies a settlement class ("Settlement Class") defined as follows:

All persons residing in the United States of America who, at any time between January 1, 2007, and November 14, 2013 purchased any "popchips" brand snack products in the United States. The "popchips" brand snack products include, without limitation, "original," "sour cream & onion," "barbeque," "sea salt & vinegar," "sweet potato," "parmesan & garlic," "jalapeno," "cheddar," "salt & pepper," "chili lime," "thai sweet chili," "brown sugar & spice," "nacho cheese tortilla chips," "ranch tortilla chips," "salsa tortilla chips," "chili limón tortilla chips," "katy's kettle corn," "salted caramel corn," "hint of butter corn chips," "cheddar corn chips," "sea salt corn chips," "salsa corn chips," "sea salt rice chips," "wasabi rice chips," "golden cheddar multi grain chips," "salted multi grain chips," "olive oil veggie chips," "tuscan herb veggie chips," and "sea salt veggie chips." Excluded from this definition are the Released Persons, any

government entities, and any judicial officers presiding over this action, their judicial staff, and their immediate families.

5. Settlement Class Members who exclude themselves from the Settlement, pursuant to the procedures set forth in Paragraph 14 below, shall no longer be Settlement Class Members and shall not be bound by this Settlement Agreement and shall not be eligible to make a claim for any benefit under the terms of this Settlement Agreement.

6. Certification of the Settlement Class shall be solely for settlement purposes and without prejudice to the Parties in the event that the Agreement is not finally approved by this Court or otherwise does not take effect.

7. In evaluating whether to certify the Settlement Class for settlement purposes, the Court has considered whether the Settlement Class satisfied the four prerequisites of numerosity, commonality, typicality, and adequacy under Rule 52.08(a) and one of the requirements of Rule 52.08(b). The Court finds that the prerequisites under Rule 52.08(a) have been satisfied to certify a class for settlement purposes, in that: (1) the Settlement Class is so numerous that joinder of all individual Settlement Class Members is impracticable; (2) there are questions of law and fact common to the Settlement Class; (3) the claims of the Representative Plaintiffs are typical of the claims of the Settlement Class; and (4) the Representative Plaintiffs and Class Counsel will fairly and adequately represent the interests of the Settlement Class.

8. The Court also finds that the requirements under Rule 52.08(b)(3) for predominance and superiority have been met to certify a class for settlement purposes. The claims held by members of the Settlement Class arise from the same course of conduct by Defendant – the uniform labeling of popchips Products as “all natural,” “healthier” products that contain “no preservatives,” “no artificial flavors or colors,” and no genetically modified organisms (“GMOs”) – and gives rise to the same remedial theory. Numerous common

questions of law and fact exist, including whether Defendant's representations are false or misleading and whether Defendant's alleged conduct constitutes an unfair and deceptive trade practice. These common questions of law and fact predominate over any issues that may affect the members of the Settlement Class individually. Lastly, because this case involves numerous claims of consumers for relatively small amounts of money, a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Because the Settlement Class is being certified for settlement purposes only, the Court need not determine whether the case would be unmanageable as a class action if the case were tried. *See Byrd*, 956 S.W.2d at 384.

**Form and Content of Class Notice and Method of Dissemination**

9. The Court finds that the long-form Notice of Class Action Settlement and the Short Form Notice for publication (hereinafter collectively, "Class Notice") proposed by the Parties and attached to the Agreement as Exhibits B and C, respectively, are reasonably calculated under the circumstances to apprise interested individuals of the Settlement and afford them an opportunity to exercise all options available to them with respect thereto. The Court finds that the Class Notice fairly and adequately: (a) describes the terms and effect of the Settlement and proposed plan of allocation; (b) notifies the Settlement Class that Class Counsel will seek reimbursement of litigation expenses, an award of attorneys' fees, and incentive awards for the Representative Plaintiffs; (c) notifies the Settlement Class of the time and place of the final approval hearing; (d) advises the Settlement Class that the Court will exclude all members who request exclusion by a specified date; (e) advises the Settlement Class that a judgment in the case, whether favorable or not, will bind all Settlement Class members who do not properly request exclusion; and (f) advises the Settlement Class that members who do not request

exclusion may, if so desired, enter an appearance. For these reasons, the Court approves the form and content of the proposed Class Notice. The Court authorizes the parties to make minor revisions to the Class Notice as they may jointly deem necessary or appropriate, without necessity of further Court action or approval.

10. The Court also finds that the proposed method of dissemination outlined in the Media Plan attached to the Agreement as Exhibit D provides the best notice practicable under the circumstances and satisfies the requirements of Missouri law and due process. The Parties propose to publish the Short Form Notice in various online advertisements and in print media targeted to the estimated demographic profile of consumers of popchips Products. The Court directs the Parties and the Settlement Administrator to disseminate the Class Notice and Claim Form as provided in the Media Plan. The first date on which the Short Form Notice is published in print media shall be no later than January 7, 2014 ("Notice Date").

11. The Court approves the designation of Rust Consulting, Inc. as the Court-appointed Settlement Administrator for the Settlement. The Court authorizes and directs the Settlement Administrator to establish and maintain a Settlement Website on which all significant Settlement-related documents will be made available for review by Settlement Class members, as well as to establish a post office box and toll-free number to facilitate communication with Settlement Class members. The Settlement Administrator shall establish the Settlement Website, post office box, and toll-free telephone number on or before the Notice Date.

12. Accordingly, the Court approves the proposed dissemination plan. Commencing on or before the Notice Date, the Settlement Administrator shall arrange for publication of the Short Form Notice in *Ladies' Home Journal*. The Settlement Administrator also shall create internet banner advertisements on or before the Notice Date and arrange for the online

advertising campaign to begin on or before the Notice Date. All costs and expenses associated with providing Class Notice to members of the Settlement Class and administering the Settlement will be paid from the Settlement Fund and in accordance with the Agreement.

**Procedure for Settlement Class Members to Participate in the Settlement**

13. The Court approves the proposed Claim Form attached to the Agreement as Exhibit A. To be eligible to receive a monetary benefit under the Settlement Fund, Settlement Class members must complete and timely submit the Claim Form, which will be published on the Settlement Website. All Claim Forms must be submitted to the Settlement Administrator, as directed in the Claim Form, by July 7, 2014. Any Settlement Class member who fails to submit a valid, timely Claim Form will be forever barred from receiving any distribution from the Settlement Fund or payment pursuant to the Settlement, but will in all other respects be bound by all of the terms of the Settlement and any judgment entered in this matter, including the releases provided therein.

**Procedure for Requesting Exclusion from the Settlement Class**

14. All persons who fall within the Settlement Class definition and who wish to exclude themselves from the Settlement Class shall request exclusion within the time and manner set forth in the Class Notice, including mailing or delivering a written exclusion request to the Parties' counsel at the addresses set forth in the Class Notice such that it is received on or before February 21, 2014. Unless the Court orders otherwise, no request for exclusion shall be valid until it is made within the time and in the manner set forth in the Class Notice. Persons who have properly excluded themselves from the Settlement Class: (a) will not participate in any distribution of the Settlement Fund benefits and will not receive a cash payment or popchips Product vouchers; (b) will not be bound by the terms of the Agreement or any judgment entered

in this matter, including the releases provided therein; and (c) will not be able to object to the Settlement.

15. Persons who fall within the Settlement Class definition and who do not properly exclude themselves from the Settlement Class shall be bound by all determinations and judgments in the Action concerning the Settlement, whether favorable or unfavorable to the Settlement Class, and shall be bound by all terms of the Settlement if it is finally approved by the Court.

#### **Objections to the Settlement**

16. Any member of the Settlement Class may appear and show cause why the Settlement should or should not be approved based on the fairness, reasonableness, or adequacy of the Settlement, the proposed requests for litigation expenses, attorneys' fees and/or incentive awards, or any other objection or submission that the Settlement Class member may wish to bring to the attention of the Court. The Settlement Class member may enter an appearance in the Action individually or through counsel at his or her own expense.

17. Any member of the Settlement Class who desires to object to the Settlement, including the requested attorneys' fees and expenses or the incentive awards to the Representative Plaintiffs, must timely file with the Clerk of Court a written notice of the objection(s). A valid and proper objection or submission must be filed no later than February 21 2014 ("Objection Date") with the Clerk of the Court, Circuit Court of Jackson County, Missouri at Kansas City, 415 E. 12th Street, Kansas City, Missouri 64106. In addition to the filing with this Court, copies of such objection or submission must be delivered or mailed to the Parties' counsel at the addresses listed in the Class Notice such that they are received no later than February 21 2014. The Parties may respond to any objection or submission regarding the



Settlement, application for reasonable attorneys' fees and reimbursement of expenses, or the incentive awards to the Representative Plaintiffs so long as such response is filed and served no later than March 3, 2014.

18. A valid and proper objection or submission must include: (a) the name, address, and telephone number of the person appearing; (b) a clear statement that the objection or submission is made with respect to the Settlement in the case of *Kelly, et al. v. Popchips, Inc.*, Case No. 1316-CV11037; (c) information sufficient to demonstrate membership in the Settlement Class; (d) a concise statement of the objection(s) and the grounds supporting the objection(s), along with any legal support or evidence that such person wishes to bring to the Court's attention; (e) a statement whether the objector intends to appear at the fairness hearing, either in person or through counsel; (f) copies of any papers, briefs, or other documents supporting the objection(s); and (g) the objector's signature. Any member of the Settlement Class who does not make his or her objection or submission in the manner provided will be deemed to have waived such objection and will forever be foreclosed from making any objection to the fairness, reasonableness, or adequacy of the Settlement, the proposed requests for litigation expenses, attorneys' fees and/or incentive awards, or any other objection or submission that the Settlement Class member may wish to bring to the attention of the Court.

19. The filing of any submission or objection allows Class Counsel or counsel for Defendant to notice such person for and to take his or her deposition pursuant to the Missouri Rules of Civil Procedure and to seek any documentary evidence or other tangible things that are relevant to the objection or submission. The failure of any objecting member of the Settlement Class to make himself or herself available for a deposition or to respond to other discovery

requests may result in the Court striking the objection and otherwise denying the opportunity for the Settlement Class member to make an objection or submission to the Court.

20. Attendance at the fairness hearing is not necessary; however, any member of the Settlement Class who files and serves a written submission or objection as described above wishing to be heard orally may appear at the fairness hearing, either in person or through counsel hired at the Settlement Class member's expense, to show cause why the Settlement should or should not be approved or to object to any aspect of the fairness, reasonableness, or adequacy of the Agreement, including the requested attorneys' fees and expenses or the incentive awards to the Representative Plaintiffs. Settlement Class members or their attorneys who intend to make an appearance at the fairness hearing must serve a notice of intention to appear on the Parties' counsel, and file the notice of appearance with the Court, no later than Fourteen(14) days before the fairness hearing. Members of the Settlement Class who do not oppose the settlement or the applications for attorneys' fees, litigation expenses, and incentive awards need not take any action to indicate their approval.

#### **Final Approval of the Settlement**

21. A fairness hearing is scheduled for March 13, 2014 before the Court at 8:30 a.m. in Division 16 of the Circuit Court of Jackson County, Missouri, in the courtroom of the Honorable Marco A. Roldan, Jackson County Courthouse, 412 E. 12th Street, 5th Floor, Kansas City, MO 64106, to determine: (a) whether the proposed Settlement should be approved by the Court as a fair, reasonable, and adequate Settlement; (b) whether the notice to the Settlement Class was sufficient under the circumstances; (c) whether a judgment should be entered pursuant to the terms of the Agreement, dismissing this Action with prejudice; and (d) whether the

applications for litigation expenses, attorneys' fees, and incentive awards to the Representative Plaintiffs should be approved.

22. The Court reserves the right to adjourn the date of the fairness hearing and to reconvene such hearing at a later date and time without further notice to the members of the Settlement Class, and may approve the Settlement, with such modifications as agreed by the Parties, if appropriate, without further notice to the members of the Settlement Class.

**Application for Attorneys' Fees, Costs, and Expenses, and Incentive Awards**

23. Class Counsel shall file and serve all documents in support of the Settlement, including a motion for final approval of the Settlement, and any application for an award of reasonable attorneys' fees, costs and expenses, and incentive awards to Representative Plaintiffs, no later than February 17, 2014. Any application for reasonable attorneys' fees, costs and expenses, and incentive awards will be considered separately from the fairness, reasonableness, and adequacy of the Settlement. At or following the fairness hearing, the Court will rule on any such application for attorney's fees, costs, expenses, and incentive awards, and if it grants such application, shall determine and award an amount for reasonable attorneys' fees, costs and expenses, and incentive awards to Representative Plaintiffs.

**Termination of the Settlement**

24. If the Settlement is not approved by the Court or the Agreement is terminated in accordance with its terms, this Order shall become null and void, *ab initio*, and shall be without prejudice to the rights of the Parties, all of whom shall be restored to their respective positions.

**Use of Order**

25. Neither this Order, nor any terms or provisions of the Agreement, shall be admissible as evidence for any purpose against the Parties in any pending or future litigation

involving any of the parties. Neither this Order, the Agreement, nor any act performed or document executed pursuant to or in furtherance of the Settlement shall be construed or used as an admission, concession, or declaration by or against Defendant of any fault, wrongdoing, breach, or liability in any civil, criminal, or administrative proceeding in any court, administrative agency or other tribunal, and Defendant specifically denies any such fault, wrongdoing, breach, or liability. Nor shall this Order or the Agreement be construed or used as an admission, concession, or declaration by or against the Representative Plaintiffs or the Settlement Class members that their claims lack merit or that the relief requested in the action is inappropriate, improper, or unavailable. Neither the fact of, nor any provision contained in the Agreement or the documents submitted in connection with the Settlement, nor any actions taken thereunder, shall be deemed evidence of a concession or admission of any kind as to the truth of any fact alleged or the validity of any legal argument that has been, could have been, or in the future might be asserted. Nothing in this Order shall be relied upon, cited as, constitute evidence of, or constitute an admission that class or collective action certification is or may be appropriate in any other action.

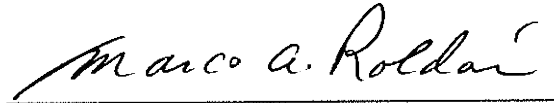
26. Counsel for the Parties are hereby authorized to utilize all reasonable procedures in connection with the administration of the Settlement that are not materially inconsistent with either this Order or the terms of the Agreement.

27. Except as agreed to by the parties, or for any actions necessary to effectuate the Settlement or this Order, or pertaining to final approval of the Settlement, all discovery, pretrial deadlines, and pretrial proceedings in this Action, and in any other action in which the plaintiffs' claims have been released by the Agreement, are stayed and suspended until further order of the Court. Pending final approval, no class member shall commence, continue, or prosecute against

any Released Party any action or proceeding in any court or tribunal asserting any of the matters, claims, or causes of action that are to be released upon final approval pursuant to the Agreement, and they are hereby enjoined from so proceeding. Upon final approval, all class members who have not filed a timely notice of exclusion shall be forever enjoined and barred from asserting any of the matters, claims, or causes of action released pursuant to the Agreement, and any such class member shall be deemed to have forever released any and all such matters, claims, and causes of action as provided for in the Agreement.

**IT IS SO ORDERED.**

Date: November 14, 2013

A handwritten signature in black ink, reading "Marco A. Roldan". The signature is written in a cursive style with a horizontal line underneath it.

Hon. Marco A. Roldan  
Circuit Judge