SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

KELLY ROMERO and RICHARD H. JOSEPH on behalf of themselves and all others similarly situated, Plaintiffs, v. LOACKER USA, INC., a Delaware corporation, Defendant.	Case No. 1-14-CV-274434 Assigned to Department 1 Hon. Peter H. Kirwan ~~[PROPOSED]~~ **ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

This is a putative class action by plaintiffs Kelly Romero and Richard H. Joseph ("Plaintiffs") on behalf of themselves and other consumers of packaged Quadratini wafer products or sandwich packaged wafer products sold by defendant Loacker USA, Inc. ("Defendant"). Plaintiffs allege that Defendant misbranded its products as "All Natural" and having "All Natural Ingredients Guaranteed" or statements of similar import, but that the products actually contain artificial, synthetic, chemical and highly processed ingredients, as well as artificial chemical preservatives and flavorings, including cocoa processed with a synthetic alkali, sodium acid pyrophosphate, soy lecithin, sodium hydrogen carbonate, glucose syrup and dextrose.[1]

[1] Class Action Complaint ("CAC") ¶¶ 2-4.

The operative Class Action Complaint ("CAC"), filed on December 12, 2014, asserts eleven causes of action for: (1) unlawful business practices in violation of Business and Professions Code section 17200 et seq.; (2) unfair business practices in violation of Business and Professions Code section 17200 et seq.; (3) fraudulent business practices in violation of Business and Professions Code section 17200 et seq.; (4) misleading advertising in violation of Business and Professions Code section 17500 et seq.; (5) untrue advertising in violation of Business and Professions Code section 17500 et seq.; (6) violation of the Consumer Legal Remedies Act, California Civil Code section 1750 et seq.; (7) breach of express warranty; (8) restitution based on quasi-contract/unjust enrichment; (9) common law fraud; (10) negligent misrepresentation; and (11) breach of contract.

The putative class is defined as "[a]ll persons in the United States who, at any time from March 6, 2010 to the present, made retail purchases of one or more of the Misbranded Products that were labeled 'All Natural' and contained one or more of the following ingredients: cocoa processed with alkali, sodium acid pyrophosphate, soy lecithin, sodium hydrogen carbonate, glucose syrup, dextrose, milk powders, coffee powders, fruit powders, sugar, and coconut oil."[2]

The case has reached a tentative settlement, and Plaintiff now moves for preliminary approval.

Under the parties' Stipulation of Class Action Settlement (the "Stipulation"),[3] Defendant agrees to the creation of a common fund in the amount of $1,200,000.00, and each "Settlement Class Member" is eligible for a $3.29 refund for every product for which they submit a valid and adequate "Proof of Purchase," which includes receipts, product packaging, or other documentation from a third-party commercial source reasonable establishing the fact and date of purchase during the Settlement Class Period of qualifying products.[4] Settlement Class Members who do not have valid Proofs of Purchase are eligible for a $3.29 refund for each product they purchased up to a maximum of five (5) products.[5] Each Settlement Class Member must complete and sign a Claim Form within 60 days of the Notice Date (30 days after preliminary approval) to

[2] CAC ¶ 60.
[3] See Exh. 1 to Decl. Anthony J. Orshansky ISO Pltfs' Mot. for Prelim. Approv.
[4] See Stip. of Class Action Settl. §§ II.27, III.C.3.b, d.
[5] *Id.* § III.C.3.c.

receive an award.[6] Claims can be submitted online through the settlement website or via mail. Any remaining funds will be distributed as *cy pres* to an appropriate charity consistent with applicable law.[7] Defendant also agrees that labels bearing the representation that the challenged Quadratini products are "All Natural" or "natural" will no longer be used, and Defendant will remove all statements from its websites representing that its Quadratini products are "All Natural" or "natural."[8]

The common fund will also be used to pay for incentive awards of $2,500 for each of the named Plaintiffs, attorney's fees in the amount of $400,000, and payment of litigation expenses not to exceed $25,000.[9]

The proposed class notice will be provided through a combination of print publication, Internet banner ads, a settlement website, and a toll-free number.

The proposed settlement administrator is CPT Group ("CPT").

Discussion

"The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.' [Citations.] This list 'is not exhaustive and should be tailored to each case.' [Citation.]" (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.) "[A] presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. [Citation.]" (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.)

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[6] *Id.* §§ II.A.21, III.D.1.
[7] *Id.* § 3.C.4.
[8] *Id.* § III.C.1.
[9] *Id.* § III.H.1.

Here, the proposed settlement is entitled to a presumption of fairness. It was reached through arm's-length bargaining after formal mediation with the Honorable Edward A. Infante (Ret.) of JAMS. According to Plaintiffs' counsel, although the case did not settle during the full-day mediation, the parties continued to negotiate with the assistance of Judge Infante before ultimately reaching the agreement in principal.[10] Regarding investigation and discovery, Plaintiffs' counsel states that they began investigating Plaintiffs' claims before filing suit by sending a letter to Defendant on March 6, 2014 and engaging in preliminary discussions and exchanging information and documents.[11] After filing suit, the parties engaged in written discovery, and Plaintiffs' counsel reviewed documents produced by Defendant such as data sheets for the challenged ingredients containing information about their production processes and sales.[12] Plaintiffs' counsel also consulted with food scientists, economists, and consumer-marketing analysts, conducted preliminary consumer surveys, and interviewed putative class members.[13] Plaintiffs' counsel demonstrates his firm's experience in consumer protection class actions.[14]

"Although [t]here is usually an initial presumption of fairness when a proposed class settlement … was negotiated at arm's length by counsel for the class, … it is clear that the court should not give rubber-stamp approval. Rather, to protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished. To make this determination, the factual record before the … court must be sufficiently developed… . The proposed settlement cannot be judged without reference to the strength of plaintiffs' claims. The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. The court must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case, but nonetheless it must eschew any rubber stamp approval in favor of an independent

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[10] Decl. Orshansky ¶ 6.
[11] Decl. Orshansky ¶¶ 2, 3.
[12] Decl. Orshansky ¶¶ 4, 11.
[13] *Ibid.*
[14] Decl. Orshansky ¶¶ 24-25.

evaluation." (*Kullar*, *supra*, 168 Cal.App.4th at p. 130, internal citations and quotation marks omitted.)

Here, Plaintiff's counsel evaluates the merits of the claims in this case. He submits that although he believes the claims have merit, there were many obstacles to full recovery including having to prove Defendant's marketing and advertising was likely to deceive reasonable consumers, establishing that the misrepresentations and omissions were material to reasonable consumers, demonstrating class certification requirements such as the predominance of common questions of law and fact (especially as to the class members' understanding of product labels) and the ascertainability of the class (given that Defendant does not sell directly to consumers), and establishing the class members' right to more than nominal damages. According to counsel, many food-mislabeling actions have not been certified or have lost at summary judgment post-certification, and many are on appeal in the Ninth Circuit. Plaintiffs' counsel submits that continued litigation would involve further costs and risks such as extensive discovery of voluminous sales data from Defendant and third parties, deposing witnesses overseas (Defendant is an Italian company), subpoenaing documents from Defendant's ingredient suppliers (some also overseas), designing and conducting sophisticated, rigorous and expensive consumer surveys and damage models, and preparing expert reports from economists, food scientists, and consumer marketing analysts.[15] Balanced against these obstacles and risks of continued litigation, Plaintiff's counsel submits that the settlement amount is better than the class members only being awarded the premium they paid for the products owing to the misrepresentations, and the amount compares favorably to other food-mislabeling cases. The Court finds that Plaintiffs sufficiently balance the strength of their case against the amount offered in settlement. The proposed settlement provides a fair and reasonable compromise to Plaintiffs' claims, and also includes meaningful injunctive relief that addresses the core misrepresentations alleged in this action.

The Court also has an independent right and responsibility to review the attorney fee provision of the settlement agreement and award only so much as it determines reasonable. (*Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123,

[15] Decl. Orshansky ¶ 13.

127-128.) Plaintiffs' counsel seeks an award of $400,000 in fees. This represents one-third of the common fund, which is not an uncommon contingency fee allocation. This award is presumptively reasonable under the "common fund" doctrine, which allows a party recovering a fund for the benefit of others to recover attorney's fees from the fund itself. (See *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-111.) In advance of the final approval hearing, Plaintiffs' counsel shall submit evidence to support a lodestar cross-check as a further way of evaluating the reasonableness of the attorney's fee award. (See *Lealao v. Beneficial Cal. Inc.* (2000) 82 Cal.App.4th 19, 46-47.) Plaintiffs' counsel shall also submit documentary evidence supporting their litigation expenses.

Regarding class representative awards, "'[t]he rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class.' [Citation.] An incentive award is appropriate '"if it is necessary to induce an individual to participate in the suit[.]" ... [Citation.]' [Citation.] '[C]riteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. [Citations.]' [Citation.] These 'incentive awards' to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit. [Citation.]" (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395.) The requested $2,500 award per Plaintiff is facially reasonable, and Plaintiffs' counsel provides a general statement that Plaintiffs have vigorously pursued this action over nearly a year and a half.[16] In advance of the final approval hearing, Plaintiffs must provide more detailed evidence in support of the amount of time and effort spent, but the Court will preliminarily approve of the class representative awards.

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[16] Decl. Orshansky ¶ 22.

The proposed form of notice to the class is through publication, with one 1/3-page advertisement in *People Magazine*, at least one 1/8-page advertisement in *National Geographic*, a settlement website, Internet banner ads that link to the settlement website, and a toll-free number. It seems that individual notice by direct mailing is impracticable given the size of the nationwide class and the fact that customers did not purchase directly from Defendant. "The notice given should have a reasonable chance of reaching a substantial percentage of the class members who do not while away their spare time by browsing among fictitious name statements and notices of trustees sales." (*Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974.) Plaintiffs submit that general interest publications like *People* and *National Geographic* each have a circulation of approximately 3.5 million.[17] Data from GfK MediaMark Research & Intelligence, LLC ("MRI") shows that publication in *People* will likely reach 18.08 percent of Settlement Class Members, publication in *National Geographic* will likely reach 14.86 percent of Settlement Class Members, and Internet banner ads will likely reach 71-80 percent of Settlement Class Members.[18] The proposed administrator, CPT, will use xAxis MRI analysis to place banner ads ranging in various sizes on various demographic specific targeted audience centered websites.[19] CPT estimates that if notice appears in the aforementioned print and Internet advertisements, the overall reach would likely exceed 89 percent.[20] The Court finds that the proposed notice procedure has a reasonable chance of reaching a substantial percentage of the putative Settlement Class.

"The content of a class notice is subject to court approval. If class members are to be given the right to request exclusion from the class, the notice must include the following:

> A brief explanation of the case, including the basic contentions or denials of the parties;
> A statement that the court will exclude the member from the class if the member so requests by a specified date;
> A procedure for the member to follow in requesting exclusion from the class;
> A statement that the judgment, whether favorable or not, will bind all members who do not request exclusion; and
> A statement that any member who does not request exclusion may, if the member so desires, enter an appearance through counsel."

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[17] Decl. Orshansky ¶ 20.
[18] Decl. Orshansky ¶ 20.
[19] Decl. Orshansky ¶ 20.
[20] Decl. Orshansky ¶ 20.

(Cal. Rules of Court, rule 3.766(d).) Here, the Long-Form Notice is Exhibit 3 to the Stipulation and it complies with rule 3.766(d). The deadline for submitting claim forms,[21] objections, and requests for exclusion is 60 days from the "Notice Date," which is September 28, 2015, assuming preliminary approval on August 28, 2015. This is a reasonable amount of time for putative class members to receive notice and participate in the settlement process.

Plaintiffs also move for provisional certification of a settlement class. "The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. [Citations.] The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. [Citation.] [¶] The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' [Citation.] A trial court ruling on a certification motion determines 'whether … the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.]" (*Sav-On, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description. (*Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 977.) The numerosity requirement requires that it is impracticable to join all of the class members all before the court." (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class. [Citations.]" (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450-451.) "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members

[21] The Claim Form is Exhibit 2 to the Stipulation.

have been injured by the same course of conduct." (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) The party moving for class certification must also establish "by a preponderance of the evidence that the class action proceeding is superior to alternate means for a fair and efficient adjudication of the litigation." (*Washington Mutual Bank v. Superior Court (Briseno)* (2001) 24 Cal.4th 906, 914 [class treatment must "provide substantial benefits both to the courts and the litigants"].)

Here, the proposed class is ascertainable because the Settlement Class Members can likely self-identify based on the objective characteristics in the class definition (e.g., purchase of Defendant's products labeled "All Natural" at any time from March 6, 2010 to the present). The proposed class is sufficiently numerous to make joinder impracticable, as it is estimated to be in thousands, if not millions.[22] As discussed above, Plaintiffs' counsel has experience in similar litigation, which supports counsel's adequacy to represent the class, and there is no reason to suggest that Plaintiffs' interests are antagonistic to the interests of the putative class, or that her claims are not typical of the proposed class. Plaintiffs submit that common issues of law and fact predominate because the proposed class members' claims all stem from the same misleading statements which appear on the product labels.[23] Thus, the Court grants provisional certification of the proposed class for settlement purposes.

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[22] Decl. Orshansky ¶ 14.
[23] Decl. Orshansky ¶¶ 15-16.

For all of these reasons, the motion for preliminary approval is **GRANTED**. The Court adopts Plaintiffs' proposed schedule of events as follows:

- The deadline for commencing publication of the Class Notice in *National Geographic*, *People Magazine*, and through Internet banner ads is no later than **September 28, 2015;**
- The deadline for submitting Claim Forms, requesting exclusion from the Settlement Class, and objecting to the Stipulation or serving notice of appearance at the final approval hearing is no later than **November 30, 2015**;
- The deadline for filing the motion for attorneys' fees, expenses and incentive payments is no later than **November 16, 2015**;
- The deadline for filing the motion for final approval is **December 15, 2015**; and
- The final approval hearing shall take place on **January 8, 2016** at 9:00 a.m. in Dept. 1.

IT IS SO ORDERED.

Dated: 9/3/15

Hon. Peter H. Kirwan
Judge of the Superior Court