

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
CIVIL DIVISION

KARA TOWNSEND, LEVON TCHAYELIAN,
and LINDA WILLASON, individually and on
behalf of all others similarly situated,

Plaintiffs,

Case No. CV 14-958-4

v.

BLUE DIAMOND GROWERS,

Defendant.

FINAL ORDER AND JUDGMENT

Plaintiffs Kara Townsend, Levon Tchayelian, and Linda Willason, on behalf of themselves and the Settlement Class, petitioned the Court for final approval of a settlement with Defendant Blue Diamond Growers (collectively, the "Parties"). The Parties previously submitted a settlement agreement (the "Settlement Agreement" or "Agreement") to this Court for preliminary approval of the class action settlement provided for in the document (the "Settlement"). On November 18, 2016, the Court entered a Class Settlement Preliminary Approval Order (the "Preliminary Approval Order"), which included provisional certification of a nationwide class (the "Settlement Class"). Now, the matter having come before the Court for hearing on March 29, 2017, on the Parties' request for entry of an order granting final approval of the proposed Settlement and for entry of final judgment in this matter, the Court FINDS, CONCLUDES, ORDERS, AND ADJUDGES as follows:

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I. JURISDICTION OF THE COURT

The Parties and the members of the nationwide Settlement Class (the “Class Members”) have submitted to the jurisdiction of this Court for purposes of the Settlement; the Court has personal jurisdiction over the Parties and the members of the Settlement Class; the Court has subject matter jurisdiction to release all claims and causes of action released in the Settlement; and the Court has subject matter jurisdiction to approve the Settlement and issue the stipulated injunction.

II. CLASS CERTIFICATION

In the Preliminary Approval Order, this Court granted conditional class certification to the above-referenced Settlement Class, which was defined as follows:

All Persons who purchased in the United States, from May 28, 2009 up to and including the date of entry of the Preliminary Approval Order, Blue Diamond Almond Breeze and/or Blue Diamond Nut-Thins products which were manufactured, advertised, or sold by Defendant Blue Diamond Growers and which (1) bore the labeling statement “All Natural” or “Natural” on any portion of the packaging other than the ingredients list; (2) contained the ingredient statement Evaporated Cane Juice; (3) contained an endorsement from the American Heart Association; and/or (4) did not specifically disclose the amount or percentage of almonds in the product.

The following Persons are expressly excluded from the Settlement Class: (a) all Persons who purchased or acquired the at issue Blue Diamond Almond Breeze and/or Blue Diamond Nut-Thins Products for resale; (b) Blue Diamond Growers and its employees, principals, affiliated entities, legal representatives, successors and assigns; (c) any Person who files a valid, timely request for exclusion (“Opt-Out”); (d) federal, state, and local governments (including all agencies and subdivisions thereof, but excluding employees thereof); and (e) the judges to whom is assigned any lawsuit concerning any of the at issue Blue Diamond Almond Breeze and/or Blue Diamond Nut-Thins Products, and any members of their immediate families.

The Court found and concluded that the Settlement Class satisfied all the requirements of due process and other applicable laws and made certain decisions relating to the Settlement Class. The Court appointed one set of attorneys to serve as Almond Breeze Class Counsel, and another to serve as Nut-Thins Class Counsel (collectively, "Settlement Class Counsel"). In addition, the Court appointed separate groups of individuals to serve, respectively, as Almond Breeze Class Representatives and Nut-Thins Class Representatives (collectively, the "Class Representatives"). Having considered all submissions timely filed with the Court pursuant to the Preliminary Approval Order, the Court now finds and concludes that those and other provisional class certification findings and conclusions should be, and hereby are, confirmed in all respects as a final class certification order under Arkansas Rule of Civil Procedure 23 for the purposes of implementing the nationwide class action settlement provided for in the Settlement Agreement and entering final judgment in this action.

III. NOTICE

The Preliminary Approval Order authorized the form and content of a publication notice of Settlement designed to reach 70% of the members of the Settlement Class (the "Settlement Notice"). The Court now finds that the Settlement Notice has been implemented in accordance with the terms of the Court's Preliminary Approval Order. The Court further finds that the published Settlement Notice (including appearances in magazines with nationwide circulation and targeted internet advertisements), together with the presence of the Class Notice on the Class Action Settlement Administrator's website, has provided the best notice practicable to the Settlement Class under the circumstances of this case.

Based on the foregoing, the Court hereby finds and concludes that members of the Settlement Class have been provided the best notice practicable of the Settlement and that such

notice satisfies all requirements of applicable laws, including the Due Process Clause of the United States Constitution.

IV. FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT

In the Preliminary Approval Order, the Court found that the Settlement Agreement appeared to be fair, reasonable, and adequate and fell within the appropriate range of possible approval. In essence, the Settlement provides that each member of the Settlement Class who submits a valid Claim Form will receive monetary compensation. The Settlement also provides important injunctive relief. Having considered (1) the merits of Plaintiffs' case weighed against the terms of the Settlement Agreement; (2) the Defendant's financial condition; (3) the complexity and expense of further litigation; (4) the amount of opposition to the settlement after implementation of a successful Notice Plan; (5) the defenses available to the Defendant; (6) the risks to members of the Settlement Class that Defendant would successfully defend some or all of the claims asserted by Plaintiffs, whether litigated by members of the Settlement Class themselves or on their behalf in a class action; (7) the length of time that would be required for members of the Settlement Class, or any group thereof, to obtain a final judgment through one or more trials and appeals; and (9) the number of members of the Settlement Class who have elected to be excluded from the Settlement, the Court finds the Settlement to be fair, reasonable, and adequate. Moreover, the Court finds that the Settlement is the result of extended, arm's-length negotiations and is non-collusive.

In consideration of the foregoing, the Court grants final approval of the Settlement Agreement and enters this Final Order and Judgment implementing its terms, including but not limited to the releases in the Settlement Agreement. There have been four (4) objections filed by the members of the Settlement Class and two (2) of those objections have been withdrawn. The

remaining two (2) Objectors did not appear or present any evidence. The Court has considered those objections and for reasons stated in the Responses to Objections, regards them as unpersuasive, finding instead that the Settlement Agreement is in all respects fair, reasonable, adequate, and in the best interest of the Settlement Class. As such, the Court now adopts and incorporates the terms of the Settlement Agreement for purposes of this Final Order and Judgment, including the definitions set forth in the Settlement Agreement. The parties are directed to consummate the Settlement Agreement in accordance with its terms.

V. EXCLUSIONS FROM THE SETTLEMENT CLASS

The Class Action Settlement Administrator has received, from certain members of the Settlement Class, requests for exclusion from the Settlement Class and has provided Settlement Class Counsel and Defendant's Counsel copies of those requests. Settlement Class Counsel and Defendant's counsel have jointly filed with the Court a list of those persons/entities, who have timely elected to be excluded. All persons/entities named in the list on file with the Court as having filed timely exclusions with the Class Action Settlement Administrator are hereby excluded from the Settlement Class and will not be bound by the terms of the settlement. Named Plaintiffs and each individual or entity who falls within the definition of the Settlement Class whom the Court has not expressly excluded from the Settlement Class in this paragraph, shall be bound by the terms of the Settlement.

VI. STIPULATED INJUNCTION

As part of the Settlement Agreement, Defendant has agreed to a stipulated injunction for as long as the Products contain any of the Challenged Ingredients or unless and until the United States Food and Drug Administration ("FDA") issues binding regulations, or an appellate court issues a binding decision, that each of the Challenged Ingredients can be described as "natural"

and/or that the term “evaporated cane juice” is the common or usual name for the ingredient.

The Court approves of and hereby enters the stipulated injunction. The terms of the injunction are as follows:

1. Defendant shall effect relabeling of all Products so that they do not describe the Products as “all natural” or “natural” on packaging or other advertising; however, Defendant is not precluded from using the term “natural” in the ingredient lists for the Products in accordance with FDA regulations;

2. Defendant shall effect changes on its website pages so that they do not describe the Products as “all natural” or “natural;” however, as stated above, Defendant is not precluded from using the term “natural” in the ingredient lists for the Products in accordance with FDA regulations;

3. Defendant shall effect relabeling of all Products so that they do not include the ingredient statement, “evaporated cane juice”;

4. Defendant agrees to continue not using the American Heart Association’s (“AHA”) “heart check-mark” symbol on any of the Products unless and until a future certification is obtained from the AHA;

5. Defendant shall effect relabeling of its Almond Breeze Products to remove the image of two hands holding almonds from the packaging;

6. Defendant shall effect relabeling of its Almond Breeze Products to change the phrase “Made from Real Almonds” to “Made with Real Almonds;” and

7. Defendant shall effectuate the changes set forth in Section VI.(1)-(6), above, by November 30, 2016 and provide Plaintiffs with a declaration setting forth compliance with the above obligations and shall maintain records necessary to demonstrate compliance with

the same. Defendant is not required to remove or recall any of the Products in the market, inventory, or elsewhere; nor is Defendant required to discontinue the use of, or destroy, any packaging inventory that was in existence prior to this Final Order and Judgment. Instead, Defendant shall not order any Product labels after November 30, 2016 that do not comply with Paragraphs VI.(1)-(6), above. However, Defendant may now, or after November 30, 2016 , exhaust all existing packaging inventory and thereafter sell and distribute Products bearing labeling printed on or before the final approval date of this agreement, without violating the terms of this injunction.

8. If Plaintiffs or Class Counsel object to any of the changes made to Defendant's website in connection with this injunction or any future website changes, Plaintiffs must provide Defendant with written notice of the specific issue(s) and must provide Defendant a 60-day opportunity to cure before any enforcement or litigation action is taken.

9. Plaintiffs and all members of the Settlement Class shall be forever enjoined from filing any action seeking injunctive relief for as long as this stipulated injunction remains in effect against Defendant prohibiting it from labeling the Products containing the Challenged Ingredients as "natural" or "all natural" (except in the ingredients list as permitted by FDA regulations), as containing the ingredient statement "evaporated cane juice," as containing the American Heart Association's "heart check-mark" symbol (except if new certification is obtained), as containing carrageenan or gellan gum, and any claims related to allegations that Defendant has not properly declared the almond content in any of the challenged Products.

VII. FEES, EXPENSES, COSTS, AND INCENTIVE AWARDS

The Court hereby awards Almond Breeze Class Counsel \$2,410,981.00 for attorneys' fees and \$31,000.00 in expenses and costs, all of which shall be paid from the Almond Breeze settlement fund consistent with the terms of the Settlement Agreement.

The Court hereby awards Nut-Thins Class Counsel \$480,589.00 for attorneys' fees and \$11,000.00 in expenses and costs, all of which shall be paid from the Nut-Thins settlement fund consistent with the terms of the Settlement Agreement.

The Court awards \$5,000.00 each as incentive awards to Almond Breeze Class Representatives Ashley Melvin and Taline Keshishian, and \$3,000.00 each for all other Almond Breeze Class Representatives Kara Townsend, Claire Harlam, Casley Vass, and Levon Tchayelian, Paul George, Tracy Albert, Dimitrios Malaxianis and Tatyana Oshkina; and \$3,000.00 each to all Nut-Thins Class Representatives Larry Tran, Linda Willason, and Daniel Mitchell. These amounts shall be paid from the applicable Almond Breeze or Nut-Thins settlement fund consistent with the terms of the Settlement Agreement.

VIII. RELEASE, COVENANT NOT TO SUE, AND EFFECT OF SETTLEMENT

A. Release

In consideration of the terms of the Settlement Agreement all members of the Settlement Class, including Plaintiffs, whom the Court did not expressly exclude in Section V of this Order, and each of their heirs, guardians, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns, shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims against the Released Persons (as defined in the Settlement Agreement).

In connection with the Released Claims, the release specifically extends to claims that Plaintiff and Settlement Class Members do not know or expect to exist in their favor as of the date of entry of the Preliminary Approval Order and each Settlement Class Member shall be deemed to have forever waived any and all provisions, rights, and benefits conferred by § 1542 of the California Civil Code and any statute, rule, or legal doctrine similar, comparable or equivalent to California Civil Code § 1542, which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

This Judgment further effects the release of all actions, causes of action, claims, administrative claims, demands, debts, damages, costs, attorneys' fees, obligations, judgments, expenses, compensation, or liabilities, in law or in equity, whether now known or unknown, contingent or absolute, that Blue Diamond Growers now has against Plaintiffs, Settlement Class Members, or Almond Breeze Class Counsel or Nut-Thins Class Counsel by reason of any act, omission, harm, matter, cause, or event whatsoever arising out of the initiation, prosecution, or settlement of any of the Lawsuits or the claims and defenses asserted in any of the Lawsuits.

Notwithstanding the above, this Court retains continuing jurisdiction over the Parties and the Settlement Agreement with respect to the future performance of the terms of the Settlement Agreement, and to assure that all payments and other actions required of any of the Parties by the Settlement are properly made or taken. All Parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the agreements embodied in the Settlement Agreement.

B. Settlement Agreement as Exclusive Remedy for Released Claims

Upon entry of this Order and Judgment, enforcement of the Settlement Agreement shall be the exclusive remedy for all members of the Settlement Class, including Plaintiffs, whom the Court did not expressly exclude in Section V of this Order, all of whom are hereby permanently barred and enjoined from instituting, commencing, prosecuting or continuing to prosecute, either directly or indirectly, any claims released under the Settlement Agreement against Defendant, as the release provisions of the Settlement Agreement define these terms. Settlement Class Members who are prosecuting or asserting any of the Released Claims are ordered to take whatever measures necessary to effectuate dismissal of their claims.

C. Effect of a Final Judicial Determination of Invalidity or Unenforceability

If, after entry of this Final Order and Judgment by the Court, a notice of appeal of this Final Order and Judgment is timely filed by any party, objector, claimant, or other person or entity, and if an appellate court makes a final determination that this Final Order and Judgment is in any respect invalid, contrary to law, or unenforceable (except for such determinations that are limited to the attorneys' fees and/or incentive awards), this Order shall be automatically vacated, the Settlement Agreement shall be null and void, and Defendant may fully contest certification of any class as if no Settlement Class had been certified. In addition, the Parties shall return to their respective positions in this lawsuit as they existed immediately before the Parties executed the Settlement Agreement, and nothing stated herein or in the Settlement Agreement shall be deemed an admission or waiver of any kind by any of the Parties or used as evidence against, or over the objection of, any of the Parties for any purpose in this action or in any other action.

IX. NO ADMISSION OF LIABILITY

The Parties entered into the Settlement Agreement solely for the purpose of compromising and settling disputed claims. Nothing contained in the Settlement Agreement, any documents relating to the Settlement, the Preliminary Approval Order, or this Final Order and Judgment shall be construed, deemed, or offered as an admission by any of the Parties or any member of the Settlement Class for any purpose in any judicial or administrative action or proceeding of any kind, whether in law or equity. In entering this Order with this provision and other limiting provisions, this Court specifically refers to and invokes the Full Faith and Credit Clause of the United States Constitution and the doctrine of comity and requests that any court in any other jurisdiction reviewing, construing, or applying this Order implement and enforce such limiting provision.

X. ENTRY OF FINAL JUDGMENT

The Court hereby dismisses with prejudice all claims alleged in this action. The Court further orders the entry of, and enters, this Final Order and Judgment on all claims, counts, and causes of action alleged in this action by Plaintiffs, on behalf of themselves, the Settlement Class, or both. In entering this Final Order and Judgment, this Court specifically refers to and invokes the Full Faith and Credit Clause of the United States Constitution and the doctrine of comity, and requests that any court in any other jurisdiction reviewing, construing, or applying this Judgment implement and enforce its terms in their entirety.

Without affecting the finality of this Final Order and Judgment in any way, this Court hereby reserves jurisdiction over (1) implementation of this Settlement and this action; (2) all matters relating to the administration and consummation of the Settlement; (3) all matters relating to the payment and distribution of fees and expenses and service/incentive awards; and (4) all Parties to this action for the purpose of implementing, enforcing, and monitoring compliance with,

effectuating, administering, and interpreting the provisions of the Settlement Agreement and this Final Order and Judgment.

IT IS SO ORDERED.

DATED: March 29, 2017


The Honorable Doug Martin
Circuit Judge