

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KYLE CANNON, LEWIS LYONS, AND
DIANNE LYONS, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY
SITUATED,

PLAINTIFFS,

V.

ASHBURN CORPORATION, ET AL.,

DEFENDANTS.

Civil Action No. 16-1452 (RMB)(AMD)

**ORDER PRELIMINARILY CERTIFYING
SETTLEMENT CLASS, GRANTING
PRELIMINARY
APPROVAL OF SETTLEMENT, AND
APPROVING CLASS NOTICE**

THIS MATTER having been opened to the Court by attorneys for Plaintiffs and attorneys for Defendant, by way of their joint Motion for Preliminary Approval of the proposed Settlement in the above Action;

WHEREAS, the Court having reviewed and considered the joint Motion for Preliminary Approval and supporting materials filed by Settlement Class Counsel and Defendant's Counsel, and

WHEREAS, the Court held a hearing on the joint Motion for Preliminary Approval on November 8, 2017; and

WHEREAS, the Court further reviewed and considered the Revised Settlement Agreement dated November 10, 2017 and all exhibits attached thereto ("Revised Settlement Agreement"),

WHEREAS, this Court has fully considered the record and the requirements of law; and good cause appearing;

Court upon a proper showing by the party seeking such discovery by motion properly noticed and served in accordance with this Court's Local Rules. In addition, pending a determination on final approval of the Settlement, all Settlement Class Members are hereby barred and enjoined from commencing or prosecuting any action involving any Released Claims.

29. The Court shall retain continuing jurisdiction over the Action, the Parties and the Settlement Class, and the administration, enforcement, and interpretation of the Settlement. Any disputes or controversies arising with respect to the Settlement shall be presented by motion to the Court, provided, however, that nothing in this paragraph shall restrict the ability of the Parties to exercise their rights as described above.

A handwritten signature in cursive script, reading "Renee Marie Bumb".

RENEE MARIE BUMB, U.S.D.J.

IT IS THIS 16th day of November 2017 ORDERED that the Settlement (including all terms of the Revised Settlement Agreement and exhibits thereto) is hereby PRELIMINARILY APPROVED. The Court further finds and orders as follows.

1. The Court has subject matter jurisdiction under 28 U.S.C. § 1332(d), and venue is proper in this district.

2. The Court has personal jurisdiction over the Plaintiffs, Settlement Class Members, and the Defendant.

3. To the extent not otherwise defined herein, all defined terms in this Order shall have the meaning assigned in the Revised Settlement Agreement.

4. The Settlement was the result of the Parties' good-faith negotiations. The Settlement was entered into by experienced counsel and only after extensive arm's-length negotiations with the aid of an experienced federal court judge (ret.) during a mediation session. The Settlement is not the result of collusion.

5. The proceedings that occurred before the Parties reached the Settlement gave counsel opportunity to adequately assess this case's strengths and weaknesses and thus to structure the Settlement in a way that adequately accounts for those strengths and weaknesses.

6. The Settlement falls well within the range of reason. The Settlement has no obvious deficiencies. The Settlement does not unreasonably favor the Plaintiffs or any segment of the Settlement Class.

7. Because the Settlement meets the standards for preliminary approval, the Court preliminarily approves all terms of the Settlement included in the Revised Settlement Agreement and all of its Exhibits.

8. The Court finds, for settlement purposes only, that all requirements of Fed.R.Civ.P. 23(a) and (b)(3) have been satisfied. The Court certifies a Settlement Class, as follows:

All residents of the United States who were the original purchasers of one or more wines from WTSO.com, from March 15, 2010 to November 1, 2016. Excluded from the Class are: (1) directors, officers and employees of Defendant; (2) the United States government and any agency or instrumentality thereof; (3) the judge to whom this case is assigned and any member of the judge's immediate family; and (4) Settlement Class Members who timely and validly opt to exclude themselves from the Settlement Class.

9. The Court conditionally certifies the proposed Settlement Class, and finds that the requirements of Rule 23(a) are satisfied, for settlement purposes only, as follows:

(a) Pursuant to Fed.R.Civ.P. 23(a)(1), the members of the Settlement Class are so numerous that joinder of all members is impracticable.

(b) Pursuant to Fed.R.Civ.P. 23(a)(2) and 23(c)(1)(B), the Court determines that there are common issues of law and fact for the Settlement Class as follows:

- i. Whether Defendant used false "Original Prices" in the sale of wines on WTSO.com;
- ii. Whether Defendant violated the New Jersey Consumer Fraud Act;
- iii. Whether Defendant breached its contracts with its customers by failing to provide advertised discounts; and
- iv. Whether the Class Members suffered damages as a result of Defendant's actions.

(c) Pursuant to Fed.R.Civ.P. 23(a)(3), the claims of the Plaintiffs are typical of the claims of the Settlement Class that they represent in that the Class Representatives allege that they are purchasers of wines from WTSO.com. The Court hereby appoints the following Plaintiffs as Class Representatives for the Class: Kyle Cannon, Lewis Lyons, Dianne Lyons, and David Samuels.

(d) Pursuant to Fed.R.Civ.P. 23(a)(4), the Class Representatives will fairly and adequately protect and represent the interests of all members of the Settlement Class and the interests of the Class Representatives are not antagonistic to those of the Settlement Class. The Class Representatives are represented by counsel who are experienced and competent in the prosecution of complex class action litigation.

10. The Court further finds that the requirements of Rule 23(b)(3) are satisfied, as follows:

(a) Questions of law and fact common to the members of the Settlement Class, as described above, predominate over questions that may affect only individual members; and

(b) A class action is superior to all other available methods for the fair and efficient adjudication of this controversy.

11. The Court has reviewed and finds that the content of the proposed forms of Notice attached as Exhibit C and Exhibit H to the Revised Settlement Agreement and the Frequently Asked Questions and Answers (“FAQ”) attached as Exhibit D to the Revised Settlement Agreement to be displayed, along with the Revised Settlement Agreement and its Exhibits, on the Settlement Website satisfy the requirements of Fed.R.Civ.P. 23(c)(2), Fed.R.Civ.P. 23(e)(1), and Due Process and accordingly approves the Notice, the Verification Form, and the FAQs .

12. This Court further approves the proposed methods for giving notice of the Settlement to the Members of the Settlement Class, as reflected in the Revised Settlement Agreement. The Court has reviewed the plan for distributing the Notice to the Settlement Class (“Notice Plan”), and finds that the Members of the Settlement Class will receive the best notice practicable under the circumstances. The Court specifically approves the Parties’ proposal to (a)

email an electronic copy of the Notice attached as Exhibit C to all Class Members; (b) send a postcard Notice attached as Exhibit H to all Class Members at the last mailing address provided by each Class Member to Defendant; (c) send Notice to the last known mailing address, as determined by the National Change of Address database, to any Class Member for whom the postcard Notice was returned as undeliverable; and (c) post a link to the Settlement Website on WTSO.com in accordance with the Revised Settlement Agreement. The Court also approves payment of notice costs as provided in the Revised Settlement Agreement. The Court finds that these procedures, carried out with reasonable diligence, will constitute the best notice practicable under the circumstances and will satisfy the requirements of Fed.R.Civ.P. 23(c)(2), Fed.R.Civ.P. 23(e)(1), and Due Process.

13. The Court preliminarily finds that the following counsel fairly and adequately represent the interests of the Settlement Class and hereby appoints Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C., Giskan, Solotaroff, & Anderson, LLP, Law Offices – Thomas S. Rosenthal, and Hernstadt Atlas PLLC, as Class Counsel for the Settlement Class.

14. The Court directs that pursuant to Fed.R.Civ.P. 23(e)(2) a hearing will be held on March 19, 2018 *at 10:00 a.m.* [120 days after entry of Order], to consider final approval of the Settlement (the “Fairness Hearing”) including, but not limited to, the following issues: (1) to determine whether to grant final approval to (a) the certification of the Settlement Class, (b) the designation of Plaintiffs as the representatives of the Settlement Class, (c) the designation of Class Counsel as counsel for the Settlement Class, and (d) the settlement; (2) to rule on Class Counsel’s request for an award of attorneys’ fees and reimbursement of costs and for Service Awards to Class Representatives; and (3) to consider whether to enter the Final Approval Order. The Fairness Hearing may be adjourned by the Court and the Court may address the matters set

out above, including final approval of the Settlement, without further notice to the Settlement Class other than notice that may be posted at the Court and on the Court's and Claims Administrator's websites.

15. Persons wishing to object to the proposed Settlement and/or be heard at the Fairness Hearing shall follow the following procedures:

(a) To object, a member of the Settlement Class, individually or through counsel, must file a written objection with the Clerk of the Court, and must also serve a copy thereof upon the following, by February 16, 2018 [90 days after entry of Order]:

Counsel for Plaintiffs

Oren Giskan
GISKAN SOLOTAROFF &
ANDERSON LLP
217 Centre Street, 6th Floor
New York, NY 10013

James E. Cecchi
CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO,
P.C.
5 Becker Farm Road
Roseland, New Jersey 07068

Counsel for Defendants

Suzanne Ilene Schiller
MANKO, GOLD, KATCHER &
FOX, LLP
401 City Avenue, Suite 901
Bala Cynwyd, PA 19004

James Farrell
LATHAM & WATKINS
885 Third Avenue
New York, NY 10022-4834

(b) Any member of the Settlement Class who files and serves a written objection by the deadline stated in Paragraph 26 of this Order containing a written statement of intent to appear at the Fairness Hearing in the manner prescribed by the Notice, may appear at the Fairness Hearing, to the extent permitted by the Court, either in person or through an attorney hired at the Settlement Class member's expense, to object

to the fairness, reasonableness or adequacy of the proposed Settlement. Any attorney representing a member of one of the Settlement Class for the purpose of making objections must also file a Notice of Appearance with the Clerk, and must also serve copies by mail to the counsel listed above. Only Class Members who specify in their objections that they intend to appear personally or through counsel at the Fairness Hearing will have the right to present their objections orally at the Fairness Hearing.

(c) Any objection to the Settlement must include (i) the Class Member's full name and current address and telephone number; (ii) the identification of at least one Settlement Wine purchased; (iii) a description of all of the Class Member's objections, the specific reasons therefore, and any and all supporting papers, including, without limitation, all briefs, written evidence, and declarations; and (iv) the Class Member's signature.

16. Any Class Member who does not make his, her, or its objection in the manner provided herein shall be deemed to have waived his, her, or its right to object to any aspect of the proposed Settlement and/or Class Counsel's motion for attorneys' fees and reimbursement of litigation expenses. Such Class Member shall forever be barred and foreclosed from objecting to the fairness, reasonableness, or adequacy of the Settlement, or the requested attorneys' fees and litigation expenses, and otherwise from being heard concerning the Settlement, or the attorneys' fees and expense request in this or any other proceeding.

17. The Court appoints Kurtzman Carson Consultants ("KCC") as the Settlement Administrator. The Parties are hereby authorized to retain the Settlement Administrator to supervise and administer the Notice Procedure as well as the processing of Claims. Notice of the Settlement and the Settlement Hearing shall be given by Class Counsel as follows:

(a) Defendant shall provide to the Settlement Administrator the name, last known mailing address, telephone number and email address for all Class Members (the “Class List”) within twenty (20) days after the Preliminary Approval Order is entered;

(b) Thirty-Five (35) days after the Preliminary Approval Order is entered, the Settlement Administrator will email using state-of-the-art methods and best practices for direct email an electronic copy of the Class Notice provided in Exhibit C to all Class Members and also mail a postcard of the Class Notice in the form provided in Exhibit H to all Class Members by mail;

(c) On the date upon which the Settlement Administrator emails and mails the Class Notice, the Settlement Administrator shall make the Settlement Website, as further detailed in the Settlement Agreement, publicly accessible, and the Settlement Website shall remain accessible until Class Member Codes are mailed as set forth in Paragraph 22 of this Order;

(d) On the date upon which the Settlement Administrator emails and mails the Class Notice, Defendant shall cause to be published a link to the Settlement Website on WTSO.com as further detailed in the Settlement Agreement; and

(e) Within thirty (30) days after the emailing and mailing of the Class Notice, entry of this Order, the Settlement Administrator shall file with the Court a declaration of compliance with the notice requirements.

18. **Participation in Settlement** – Class Members who complete a Verification Form as described in the Settlement Agreement April 19, 2018 [no later than thirty (30) days after the Fairness Hearing] will receive Credits based on the Settlement Wines purchased during the Class Period as follows:

(a) For every bottle of wine listed on Exhibit A to the Settlement Agreement purchased during the Class Period for \$12.99 or less, for which no prior refund was given, the Class Member will receive a credit of \$1.75.

(b) For every bottle of wine listed on Exhibit A purchased during the Class Period for \$13.00-\$18.99, for which no prior refund was given, the Class Member will receive a credit of \$2.00.

(c) For every bottle of wine listed on Exhibit A purchased during the Class Period for \$19.00 or greater, for which no prior refund was given, the Class Member will receive a credit of \$2.25.

(d) For every bottle of wine listed on Exhibit B to the Settlement Agreement purchased during the Class Period for \$19.99 or less, for which no prior refund was given, the Class Member will receive a credit of \$0.50.

(e) For every bottle of wine listed on Exhibit B purchased during the Class Period for \$20.00 or greater, for which no prior refund was given, the Class Member will receive a credit of \$0.75.

(f) For every bottle of wine not listed on Exhibit A or B purchased during the Class Period, for which no prior refund was given, the Class Member will receive a credit of \$0.20.

The total value of the Credits to be provided to the Class is approximately \$10.8 million.

19. Credits will be applied against purchases of any wine the first time it is offered on WTSO.com (unless use of the Credit would result in a violation of laws relating to the sale of wine or such wine is first offered during a "Marathon" day), and on certain other wines offered on WTSO.com, all as more fully described in the Settlement Agreement, at the rate of \$2.00 off per bottle, or for the full or remaining credit amount if less than \$2.00, for a period of one (1) year following the date the Credit codes are emailed to the Class Members.

20. Class Counsel, or any partner, member, shareholder or employee of Class Counsel, and Apperson Crump, PLC, or any partner, member, shareholder or employee of Apperson Crump, PLC, who are Class Members are ineligible to receive Credits or any

compensation as Class Members and any Claim Verification Form submitted by any of them shall be deemed null, void and invalid.

21. Within thirty (30) days after the Effective Date, Defendant shall calculate and provide to Class Counsel the total amount of Credits to be issued to Class Members and a unique non-transferrable individualized code (the "Code") shall be generated for each Class Member who has submitted a valid Verification Form that may be used on WTSO.com by the Class Member to access their Credits.

22. Forty (40) days after the Effective Date the Settlement Administrator will email each Class Member who has submitted a valid Verification Form that Class Member's Code.

23. All Class Members shall have the right to opt out of the class at any time during the opt-out period. The opt-out period shall run for ninety (90) days following the entry of this Preliminary Approval Order. Any Class Member who elects to opt out of the Class (i) shall not be bound by any orders or judgments entered in this Action; (ii) shall not be entitled to relief under, or be affected by, this Agreement; (iii) shall not gain any rights by virtue of this Agreement; and (iv) shall not be entitled to object to any aspect of this Agreement. Any Class Member who wishes to opt out of the Class may do so by mailing a letter clearly stating the Class Member's desire to opt out to the Settlement Administrator. Any Class Member who has opted out and wishes to revoke his or her request for exclusion may do so by mailing a letter stating clearly the desire to revoke the previous request for exclusion to the Settlement Administrator before the opt-out deadline.

24. Any member of the Settlement Class failing to properly and timely mail such a written notice of exclusion shall be automatically included in the Settlement Class and shall be bound by all the terms and provisions of the Settlement Agreement and the Settlement, including

the Release, and Order of Final Judgment. The Court shall resolve any disputes concerning the opt-out provisions of the Settlement Agreement.

25. Upon Final Approval, all Class Members who do not opt out of the Settlement will have released any and all claims, allegations, actions, causes of action, administrative claims, demands, debts, damages, costs, attorneys' fees, obligations, judgments, expenses, or liabilities, whether known or unknown, existing or potential, suspected or unsuspected, liquidated or unliquidated, legal, statutory or equitable, that result from, arise out of, are based upon, or relate to the conduct, omissions, duties or matters during the Class Period that were, or could have been, alleged in the Action or arising out of the Action against Releasees (defined in the Settlement Agreement), including, without limitation, any and all claims related to or arising from Defendant's selling, marketing and advertising of wine pricing, discounting, ratings, reviews, and/or pairing recommendations, without regard to subsequent discovery of different or additional facts or subsequent changes in the law. With respect to these claims, Plaintiffs and the Settlement Class expressly waive any and all rights or benefits under California Civil Code Section 1542 (or any similar authority in any jurisdiction), which provides:

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.

26. The following are the operative dates for the following events:

<u>EVENT</u>	<u>DATE</u>
Notice E-Mailed and Mailed Settlement Website Accessible	35 days after entry of this Order
Affidavit of Compliance with Notice Requirements	65 days after entry of this Order

Filing Motion for Attorney Fees, Service Awards and Reimbursement of Expenses	Within 60 days after entry of this Order
Postmark/Filing Deadline for Requests for Exclusions, and Objections	Within 90 days after entry of this Order
Service/Filing Notice of Appearance at Fairness Hearing	Within 90 days after entry of this Order
Filing Reply to Objections to Settlement and/or Attorneys' Fees and Expenses	Within 105 days after entry of this Order
Filing Motion for Final Approval Fairness Hearing	Within 105 days after entry of this Order <i>March 19, 2018</i> [120 days after entry of this Order]

27. In the event that the Settlement does not become effective for any reason, this Preliminary Approval Order shall be rendered null and shall be vacated, and all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Agreement. If the Settlement does not become effective, the Defendant and any other Releasees shall have retained any and all of their current defenses and arguments thereto (including but not limited to arguments that the requirements of Fed.R.Civ.P. 23(a) and (b)(3) are not satisfied for purposes of continued litigation). These actions shall thereupon revert immediately to their respective procedural and substantive status prior to the date of execution of the Settlement Agreement and shall proceed as if the Settlement Agreement and all other related orders and papers had not been executed.

28. All other proceedings are hereby stayed until such time as the Court renders a final decision regarding approval of the proposed Settlement. No discovery with regard to the Action, or with respect to this Settlement, shall be permitted other than as may be directed by the