

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RALPH MILAN and ELIZABETH ARNOLD
on behalf of themselves, those similarly
situated and the general public,

Plaintiffs,

v.

CLIF BAR & COMPANY,

Defendant.

Case No. 18-cv-02354-JD

**ORDER RE PRELIMINARY APPROVAL
OF CLASS SETTLEMENT**

The Court denied a prior application for preliminary approval of a proposed class settlement. Dkt. No. 232. The parties revised the application, Dkt. No. 251, which the Court now approves. This order is based on a proposed order lodged by the parties, after a substantial delay on their part. It is modified to conform to the Court's conclusions and practices. The parties are advised to read the order for changes.

1. The terms of the Settlement Agreement dated October 30, 2023, including all exhibits thereto (the "Settlement Agreement"), are preliminarily approved as fair, reasonable and adequate, are sufficient to warrant sending Notice to the Settlement Class, and are subject to further consideration at the Final Approval Hearing referenced below. This Order incorporates the Settlement Agreement, and its exhibits and related documents. Unless otherwise provided herein, the terms defined in the Settlement Agreement shall have the same meanings in this Order.

2. The Court preliminarily finds that this Settlement complies with the Northern District of California's Procedural Guidance for Class Action Settlements and this Court's standard for preliminary approval of class action settlements. The Court finds that the Settlement embodied in the Settlement Agreement is within the range of reasonableness so that Notice of the Settlement should be given to the Class as provided in the Settlement Agreement and this Order. In making this determination, the Court has considered the current posture of this litigation and the risks and

benefits to the Parties involved in both settlement of these claims and continuation of the litigation.

3. The Court certifies the following Settlement Class for settlement purposes only (the “Settlement Class”):

All persons in the United States who, during the “Class Period” as defined in Section 2.13 of the Settlement Agreement, purchased in the United States, for household use and not for resale or distribution, either original Clif Bars in packaging bearing the phrase “Nutrition for Sustained Energy,” or Clif Kid ZBars in packaging bearing the Challenged Claims (as identified in the Complaint in the Action).¹

4. The Court finds, for settlement purposes only, that the Settlement Class meets the requirements of Fed. R. Civ. P. 23(a) and (b)(3). The Court finds, in the specific context of this Settlement Agreement, that: (a) the number of Class Members is so numerous that their joinder in one lawsuit would be impractical; (b) there are some questions of law or fact common to the Settlement Class; (c) the claims of the Class Representatives are typical of the claims of the Class Members they seek to represent; (d) the Class Representatives have fairly and adequately represented the interests of the Settlement Class and the Class Representatives have retained adequate counsel to represent her and the Settlement Class, whom the Court finds have satisfied the requirements of Fed. R. Civ. P. 23(a)(4) and 23(g); (e) the questions of law and fact common to the Settlement Class predominate over any questions affecting any individual Class Member; and (f) a class action is superior to the other available methods for the fair and efficient adjudication of the controversy through settlement.

5. The Court designates Plaintiffs Ralph Milan and Elizabeth Arnold as Class Representatives for the Settlement Class.

6. The Court designates Fitzgerald Joseph LLP’s predecessor, Fitzgerald Monroe Flynn PC and its attorneys as Class Counsel for the Settlement Class pursuant to Fed. R. Civ. P. 23(g).

7. If the Settlement Agreement is not finally approved by the Court, or for any reason a Final Judgment and Order Approving Settlement is not entered as contemplated in the Settlement

¹ Excluded from the Settlement Class are: (a) Clif Bar’s board members or executive-level officers including its attorneys; (b) governmental entities; (c) the Court, the Court’s immediate family, and the Court’s staff; and (d) any person that timely and properly excludes himself or herself from the Settlement Class.

Agreement, or if the Settlement Agreement is terminated pursuant to its terms for any reason, or if the Effective Date does not occur for any reason, then:

(a) This and other orders for the Settlement Agreement may not be used or referred to for any purposes whatsoever, and shall not be admissible or discoverable in this or any other proceeding;

(b) The provisional certification of the Settlement Class pursuant to this Order will be vacated automatically and the Action will proceed as though the Settlement Class had never been certified;

(c) Nothing contained in this Order will be construed as a presumption, concession or admission by or against Defendant or Class Representatives of any default, liability or wrongdoing as to any facts or claims alleged or asserted in the Action;

(d) Nothing in this Order pertaining to the Settlement Agreement may be used as evidence in any further proceeding in the Action.

8. The Court finds that the forms of Class Notice and methodology for its publication and dissemination as described in the Settlement Agreement and in the Declaration of the Settlement Administrator: (a) meet the requirements of due process and Fed. R. Civ. P. 23(c) and (e); (b) constitute the best notice practicable under the circumstances to all persons entitled to notice; and (c) satisfy the Constitutional requirements regarding notice. In addition, the forms of Class Notice: (a) apprise Class Members of the terms of the proposed Settlement and their rights and deadlines under the Settlement; (b) are written in simple terminology; (c) are readily understandable by Class Members; and (d) comply with the Federal Judicial Center's illustrative class action notices and the Northern District of California's Procedural Guidance for Class Actions. The Court approves, as to form and content, each of the forms of Class Notice and the methodology for its publication and dissemination as described in the Settlement Agreement and in the Declaration of the Settlement Administrator in all respects.

9. The Parties have requested three weeks before commencing Class Notice so that they may serve subpoenas on the top four retailers of the Class Products (Walmart, Target, Kroger, and Amazon), to obtain contact information sufficient to provide direct notice of the Settlement

Agreement to Class Member customers who purchased the Class Products, as defined in Section 2.14 of the Settlement Agreement, at any time during the Class Period, as defined in Section 2.13 of the Settlement Agreement. *See* Fed. R. Civ. P. 23(c)(2)(B) (Requiring “individual notice to all [class] members who can be identified through reasonable effort.”). The Court approves the request. The parties are directed to serve the subpoenas within seven (7) days of this Order. The Court orders that Class Notice be commenced within twenty-one (21) days of this Order.

10. The Court approves the establishment of an internet website, www.BarsClassAction.com, for the Settlement by the Settlement Administrator (the “Settlement Website”). The Settlement Administrator shall post on the Settlement Website the Long-form Class Notice, a copy of this Settlement Agreement and its Exhibits, the Preliminary Approval Motion, the Preliminary Approval Order, the operative Complaint, the Motion for Final Approval and Motion for Attorneys’ Fees and Expenses, the Final Approval Order, answers to frequently asked questions, the number for the toll-free hotline maintained by the Settlement Administrator for this Settlement, Settlement-related deadlines, and any other materials or information the Parties agree to include on the Settlement Website. These documents will be available on the Settlement until sixty (60) days after the Settlement benefits are distributed. The Notice and Claim Administration Expenses are to be paid in accordance with the Settlement Agreement. The Parties are hereby authorized to establish the means necessary to implement the Class Notice and other terms of the Settlement Agreement.

11. The Court permits Amazon, a third-party retailer who will receive a subpoena for Class Member contact information, to send the approved Class Notice directly to the email addresses associated with Amazon customers that Amazon’s records indicate purchased the Class Products during the Class Period. Within seven (7) days after sending the email notice, Amazon will provide the parties a declaration indicating compliance with this Order and setting forth the total number of Class Members to whom it sent email notice, and the total number of those emails that were delivered successfully as reported by Amazon’s email server.

12. The Court appoints Postlethwaite & Netterville, APAC (“P&N”) to be the Settlement Administrator. Responsibilities of the Settlement Administrator are found in the Settlement Agreement.

13. Class Members who wish to be excluded from the Settlement Class must send to the Settlement Administrator a written Request for Exclusion that is postmarked no later than eighty-one (81) days after the Settlement Notice Date. A request for exclusion may also be submitted online at the Settlement Website no later than eighty-one (81) days after the Settlement Notice Date (the “Opt-Out Date”). The Request for Exclusion must be personally signed by the Class Member and contain a statement that indicates a desire to be excluded from the Settlement Class. No person may opt out of the Settlement Class for any other person or be opted-out by any other person, and no Class Member shall be deemed opted-out of the Settlement Class through any purported “mass” or “class” opt-outs.

14. Any Class Member who does not submit a timely, written Request for Exclusion shall be bound by all subsequent proceedings, orders and the Final Judgment and Order Approving Settlement in this Action, even if he or she has pending, or subsequently initiates, litigation, arbitration, or any other proceeding against Defendant asserting the Released Claims.

15. Any Class Member who timely and validly excludes themselves from the Settlement Class shall not: (a) be bound by any orders or judgments entered in the Action relating to the Settlement Agreement; (b) be entitled to submit a Claim, or be affected by, the Settlement Agreement; (c) gain any rights by virtue of the Settlement Agreement; or (d) be entitled to object to any aspect of the Settlement Agreement. No later than three (3) days after the Opt-Out Date, the Settlement Administrator shall provide the parties with a final list of timely Requests for Exclusion. Class Counsel shall file this list in connection with the Final Approval Hearing.

16. Any Class Member who intends to object to the fairness of the Settlement Agreement must do so in writing no later than eighty-one (81) days after the Settlement Notice Date (the “Objection Date”). The written objection must be filed with the Court no later than the Objection Date.

17. To be considered by the Court, any objection must be in writing and include the following information: (a) a heading which refers to Action (*Ralph Milan, et al. v. Clif Bar & Company*, Case No. 18-cv-02354-JD); (b) the objector’s name, address, telephone number and if represented by counsel, the name, address, and telephone number of his/her counsel; (c) a statement

of the objection and the specific grounds supporting the objection; (e) a statement whether the objection applies only to the objector, to a specific subset of the class, or to the entire class; (f) copies of any papers, briefs, or other documents upon which the objection is based; and (g) the objector's signature.

18. Any Class Member who files and serves a written objection, as described above, may appear at the Final Approval Hearing, either in person or through counsel hired at the Class Member's expense, to object to any aspect of the fairness, reasonableness, or adequacy of this Settlement Agreement. Class Members or their attorneys who intend to make an appearance at the Final Approval Hearing must serve a notice of intention to appear on Class Counsel and Defendant's Counsel and file the notice of appearance with the Court, no later than seven (7) days before the Final Approval Hearing. The written notice and objection requirements may be excused by the Court upon a showing of good cause.

19. The Parties may ask the Court for document discovery from and take depositions of any Objecting Class Member on topics relevant to the objection. The Parties may, either jointly or individually, to respond to any objection, with a written response due the same day as the Motion for Final Approval.

20. Absent a showing of good cause, any Class Member who fails to substantially comply with the provisions of above shall waive and forfeit any and all rights he or she may have to appear separately and/or to object and shall be bound by all of the terms of this Settlement Agreement and by all proceedings, orders, and judgments, including, but not limited to, the Release, in the Action.

21. The Final Approval Hearing will be held by the Court on November 14, 2024, at 10:00 a.m. California time, at the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, in Courtroom 11, on the 19th Floor, to consider, *inter alia*, the following: (a) whether the Settlement Class should be certified for settlement purposes; (b) whether the settlement and Settlement Agreement should be finally approved as fair, reasonable and adequate; and (c) whether the Court should grant the Class Representatives' and Class Counsel's requests for Service Awards and a Fee Award.

22. No later than forty-five (45) calendar days before the Objection Date, Class Counsel and the Class Representatives shall file a Motion for a Fee Award and Service Awards, which shall be posted on the Settlement Website. No later than fourteen (14) calendar days before the Final Approval Hearing and eighteen (18) calendar days after the Objection Deadline, Class Counsel and Class Representatives shall make a Motion for Final Approval, seeking an Order and Judgment that grants final approval of this Settlement Agreement and final certification of the Settlement Class; authorizes the Settlement Administrator to administer the Settlement benefits to members of the Settlement Class; authorizes the creation of the qualified Settlement Fund by the Class Administrator to receive payments under this Settlement Agreement; awards a Fee Award and Service Awards; rules on timely objections to this Settlement Agreement (if any); and authorizes the entry of a final Judgment and dismissal of the Action with prejudice.

23. The deadlines set forth in this Order, including, but not limited to, adjourning the Final Approval Hearing, may be extended by Order of the Court, for good cause shown, without further notice to the Class Members – except that notice of any such extensions shall be included on the Settlement Website, www.BarsClassAction.com. Class Members should check the Settlement Website regularly for updates and further details regarding extensions of these deadlines.

24. Class Counsel and Defendant’s Counsel may use all reasonable procedures in connection with approval and administration of the Settlement Agreement that are not materially inconsistent with this Order or the Settlement Agreement, including making, without further approval of the Court, minor changes to the Settlement Agreement, to the form or content of the Class Notice or to any other exhibits that the parties jointly agree are reasonable or necessary.

25. The Court will retain continuing jurisdiction over these settlement proceedings to assure the effectuation thereof for the benefit of the Settlement Class.

IT IS SO ORDERED.

Date: July 12, 2024



JAMES DONATO
UNITED STATES DISTRICT JUDGE