

FILED

Clerk of the Superior Court

JUL 19 2024

By 
DEPUTY CLERK

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7 **IN THE SUPERIOR COURT OF CALIFORNIA**
8 **IN AND FOR THE COUNTY OF SOLANO**
9 **DEPARTMENT SEVEN**
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<p>11 DANIELLE SKARPNES 12 13 Plaintiff 14 vs. 15 16 ELIXIR COSMETICS OPCO, LLC 17 Defendant</p>	<p>11 CASE NO: CU23-04638 12 13 RULING AND ORDER DENYING 14 WITHOUT PREJUDICE MOTION FOR 15 FINAL APPROVAL OF NATIONWIDE 16 CLASS ACTION SETTLEMENT. 17 18</p>
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20 On May 20, 2024, the Court heard oral arguments on the Motion for Final
21 Approval of Class Action Settlement. Plaintiff(s) and Defendant appeared through their
22 Counsel, Peter J. Farnese and Thomas J. Cunningham, respectively. Objectors,
23 (Cohen and Wohl) appeared through Counsel Michael D. Braun and New York based
24 Counsel Maia C. Kats. The Court heard extensive argument from all parties and at
25 the conclusion of the hearing the Court took the matter under submission.
26

27 On July 9, 2024, Cohen and Wohl Objectors filed a supplemental brief. On July
28 11 and July 12, 2024, respectively, Defendant Elixir and Plaintiff Skarpnes filed

1 supplemental responses. The supplemental briefing is STRICKEN where argument
2 on the matter has closed. The Court does not consider the supplemental briefing in its
3 ruling. The Court finds as follows:

4
5 **1. TIMELINESS OF OBJECTIONS.**

6 As a preliminary matter, the court finds that the Objectors are not time-barred
7 from raising objections to the settlement terms.

8 CRC 3.769(f) authorizes any proposed class members to appear at the final
9 approval hearing and raise objections to the settlement.
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11 **“Notice to class of final approval hearing** If the court has certified the action
12 as a class action, notice of the final approval hearing must be given to the class
13 members in the manner specified by the court. The notice must contain an
14 explanation of the proposed settlement and procedures for class members to
15 follow in filing written objections to it and in arranging to appear at the
16 settlement hearing and state any objections to the proposed settlement.”

17 Even if the preliminary approval order the court issued in January referenced a
18 specific “Objection Deadline” by which class members had to submit to the Settlement
19 Administrator written objections, by U.S. Mail, the Objectors filed declarations claiming
20 they never received these notices. The court finds credible those claims, particularly
21 given that service by nontraditional manner, such as by email or internet notices, was
22 designed as “best possible notice” to be provided to a substantial number of class
23 members.

24 In addition, the Settlement Agreement itself contains a provision acknowledging
25 the right of a class member to appear at the final approval hearing and raise
26 objections then.

27
28 **“Settlement Class Members have the option to appear at the Final Approval
Hearing, either in person or through counsel hired at the Settlement Class
Member’s expense, to object to the fairness, reasonableness, or adequacy of**

1 the Agreement, or to the award of attorneys' fees regardless of whether they
2 have timely submitted a written objection to the Settlement Administrator."

3 A federal court explained why courts typically consider late objections by class
4 members:

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6 Though the Court is not required to entertain late objections, it will do so in an
7 effort to give all absent class members a chance to voice their concerns. See
8 *Moore v. PetSmart, Inc.*, 728 Fed. Appx. 671, 674 (9th Cir. 2018) (finding no
9 error in the district court's entertaining of procedurally defective objection); see
10 also 4 *Newberg on Class Actions* § 13:29 (5th ed.) ("Arguably, courts need not
11 consider untimely objections [to class action settlements], but they have the
12 discretion to do so, and most courts typically will do so"). *Carlin v.*
13 *DairyAmerica, Inc.* (E.D.Cal. 2019) 380 F. Supp. 3d 998, 1013 n.4.

14
15 For all of these reasons, the court has considered the objections raised by the
16 Objectors, both in their written filings preceding the hearing, and at the hearing itself.

17 **2. FAIRNESS OF THE PROPOSED SETTLEMENT.**

18 The court also is required on final approval motion to "conduct an inquiry into
19 the fairness of the proposed settlement" before final approval of the settlement." CRC
20 3.679(g).

21 **A. ADEQUACY OF WARNINGS**

22 The Court finds that the adequacy of the warnings provided for in the
23 settlement agreement are insufficient. Plaintiff's complaint, filed after the parties had
24 reached a tentative settlement, included claims that the Elixir products "fail to disclose
25 (in a clear and prominent manner) the existence and severity of potential side effects
26 of ICP and synthetic prostaglandin analogues" [¶36]; "prostaglandin analogues, like
27 ICP, . . . come with the risk of severe side effects, including eye color change,
28 darkening of eyelid skin, droopy eyelids, sunken eyes, stinging, eye redness, and

1 itching. These side effects are associated with all drugs in the class, including ICP”
2 [¶37]; “Many users of the Products have gone online to report a variety of side effects
3 from use of the Products (and reciting three examples of customer complaints) [¶38];
4 and that the “FDA . . . noted the harmful side effects associated with prostaglandin
5 analogs: other potential adverse events associated with prostaglandin analogs for
6 ophthalmic use include ocular irritation, hyperemia, iris color change, macular edema,
7 ocular inflammation, and interference with glaucoma therapy” [¶21].
8

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10 Under C.C.P. §128.7(b)(3), an attorney’s signing of a pleading and presenting it
11 to the court amounts to a certification that to the best of that attorney’s knowledge,
12 “The allegations and other factual contentions have evidentiary support or, if
13 specifically so identified, are likely to have evidentiary support after a reasonable
14 opportunity for further investigation or discovery.” C.C.P. §128.7(b)(3).
15

16 The parties to this settlement failed to provide sufficient foundational evidence
17 to support a substantially lesser warning than approved by the San Francisco court in
18 the Lash Boost case. *Scherr v. Rodan & Fields, LLC and Rodan & Fields, LLC*, No.
19 CGC-18-565628, Lash Boost Cases, JCCP No. 4981 (California Superior Court,
20 County of San Francisco). The Lash Boost warning advised against use “if you have
21 ever experienced conjunctivitis, dry eyes, eye infections, styes, irritation from other
22 cosmetics applied in the eye area, or any eye-related disorder or illness”; disclosed
23 that some users had reported “eye redness and itchiness, dry eyes, watering of the
24 eyes, sensitivity, styes, inflammation of eyelid and eye, temporary darkening of skin
25 around the eye area, lash loss and/or visible enhancement of hair around or outside
26 the eye area”; and reports of “other reactions, including iris discoloration, the
27
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1 appearance of droopy eyelids, and the exacerbation of meibomian gland dysfunction,
2 among others, and that “[t]hese and other reactions have been associated with other
3 product containing prostaglandin analogs”.

4
5 Very few of these warnings appear in the warning required in the settlement
6 agreement at issue in the present case, despite the clear allegations raised in the
7 complaint about the concerns raised by the FDA about this ingredient. (Proposed
8 Warnings, Declaration of Peter J. Farnese, filed 5/6/2024, Exhibit F).

9
10 The Court further notes that no mediator or other independent party was
11 involved in negotiating this settlement.

12 13 **B. NATIONWIDE CLASS ACTION.**

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15 Most class action cases filed in California state courts limit the proposed class
16 to California residents. There are some reported California cases which have found
17 nationwide class certification appropriate. But they have typically involved a California
18 manufacturer. See, e.g., Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th
19 224. The defendant manufacturer in the present case is located in Texas [Complaint,
20 ¶7].

21
22 In the Declaration of July Bocabeille, submitted by Defendant Elixir, filed on
23 May 13, 2024, Elixir states that the largest number of product sales occurred in
24 California and that approximately 10% of Elixir products sold between June 1, 2019
25 through January 19, 2024 were sold in California. Elixir estimates that more than
26 70,000 consumers bought Elixir products in California during this time frame. More
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1 than 478 retail stores in California sell Elixir products. Two officers of the company
2 live in California. (Declaration of July Bocabeille, filed on May 13, 2024).

3 Regarding nationwide class actions, the Court in *Washington Mutual Bank v.*
4 *Superior Court* (2001) 24 Cal.4th 906 explained,

5
6 "In sum, in the absence of an effective choice-of-law agreement to
7 the contrary, California law may be used on a classwide basis so long as
8 its application is not arbitrary or unfair with respect to nonresident class
9 members (*Phillips Petroleum Co. v. Shutts, supra*, 472 U.S. at pp. 821-
10 822 [105 S. Ct. at p. 2979]), and so long as the interests of other states
11 are not found to outweigh California's interest in having its law applied
12 (*Bernhard v. Harrah's Club, supra*, 16 Cal. 3d at p.
13 320; *Clothesrigger, supra*, 191 Cal. App. 3d at p. 614). *Washington*
14 *Mutual Bank v. Superior Court, supra*, 24 Cal.4th at 921.

15 Similarly, "The burdens placed by a State upon an absent class-action plaintiff
16 are not of the same order or magnitude as those it places upon an absent defendant."

17 *Phillips Petroleum v. Shutts* (1985) 472 U.S. 797, 808.

18 As explained, in. *Shutts*,

19 "Because States place fewer burdens upon absent class plaintiffs
20 than they do upon absent defendants in nonclass suits, the Due Process
21 Clause need not and does not afford the former as much protection from
22 state-court jurisdiction as it does the latter. The Fourteenth
23 Amendment does protect "persons," not "defendants," however, so
24 absent plaintiffs as well as absent defendants are entitled to some
25 protection from the jurisdiction of a forum State which seeks to
26 adjudicate their claims. In this case we hold that a forum State may
27 exercise jurisdiction over the claim of an absent class-action plaintiff,
28 even though that plaintiff may not possess the minimum contacts with
the forum which would support personal jurisdiction over a defendant. If
the forum State wishes to bind an absent plaintiff concerning a claim for
money damages or similar relief at law, it must provide
minimal procedural due process protection. The plaintiff must receive
notice plus an opportunity to be heard and participate in the litigation,
whether in person or through counsel. The notice must be the best
practicable, "reasonably calculated, under all the circumstances, to
apprise interested parties of the pendency of the action and afford them
an opportunity to present their objections." Mullane, 339 U.S., at 314-

1 315; cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174-175 (1974). The
2 notice should describe the action and the plaintiffs' rights in it.
3 Additionally, we hold that due process requires at a minimum that an
4 absent plaintiff be provided with an opportunity to remove himself from
5 the class by executing and returning an "opt out" or "request for
6 exclusion" form to the court. Finally, the Due Process Clause of course
7 requires that the named plaintiff at all times adequately represent the
8 interests of the absent class members. Hansberry, 311 U.S., at 42-43,
9 45." Phillips Petroleum v. Shutts, (1985) 472 U.S. at 811-812.

10 In the present case, based upon the declaration of July Bocabeille, the Parties'
11 settlement agreement applying California law to the entire class does not appear
12 arbitrary.

13 As to fairness, however, the Parties have failed to present evidence showing
14 that residents of other states would not be eligible for significantly greater recoveries
15 or protections under the laws of those states than under California law, so as to justify
16 a California court's certification of a nationwide class action.

17 *"Accordingly, we hold that a class action proponent must credibly
18 demonstrate, through a thorough analysis of the applicable state laws,
19 that state law variations will not swamp common issues and defeat
20 predominance. Additionally, the proponent's presentation must be
21 sufficient to permit the trial court, at the time of certification, to make a
22 detailed assessment of how any state law differences could be managed
23 fairly and efficiently at trial, for example, through the creation of a
24 manageable number of subclasses. Trial courts, in assessing the
25 propriety of nationwide class certification, must consider these factors,
26 as well as all the other factors relevant to certification, including the
27 potential recovery of each individual claimant and whether the proposed
28 class suit is the only effective way to redress the alleged wrongdoing or
to prevent unjust advantage to the defendant. (See Linder v. Thrifty Oil
Co., supra, 23 Cal. 4th at p. 446; [****41] Blue Chip Stamps v. Superior
Court (1976) 18 Cal. 3d 381, 385 [134 Cal. Rptr. 393, 556 P.2d
755].) Adherence to these procedures should ensure that nationwide
class actions are certified only where they will result in substantial
benefits both to the litigants and the courts. (See City of San Jose v.
Superior Court, supra, 12 Cal. 3d at p. 459.)" Washington Mutual v
Superior Court, supra, 24 Cal.4th at 926.*

1 Similarly,


2 "Put another way, the court cannot accept "on faith" an assertion that
3 variations in state laws relevant to the case do not exist or are
4 insignificant; rather, the party seeking certification must affirmatively
5 demonstrate the accuracy of the assertion. (Castano v. American
6 Tobacco Co., supra, 84 F.3d at pp. 741-742; Walsh v. Ford Motor
7 Co., supra, 807 F.2d at p. 1016.) Moreover, it is insufficient to merely
8 refer the district court to densely worded articles, graphs, and charts
9 pertaining to each state's laws. As one court explained, "class action
10 proponents "should not expect the court to ferret [****37] through,
11 disseminate, and craft manageable schemes" from such materials when
12 that burden "clearly rests" with the proponents. (Tylka v. Gerber
13 Products Co., supra, 178 F.R.D. at p. 498, fn. 3.)" *Id.* at 924.

14 **ORDER**

15 The Motion for Final Approval of the Nationwide Class Action Settlement is
16 DENIED WITHOUT PREJUDICE to a settlement of more limited geographic scope,
17 and/or with significantly different terms. Should the Parties continue to seek a
18 nationwide class action, they must also present the "thorough analysis of the
19 applicable state laws" called for in *Washington Mutual*.

20 It is further ordered that the matter is set for case management conference on
21 **October 30, 2024, at 9:00 a.m.**, Department Seven.

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25 Dated: July 19, 2024

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TIM P. KAM
JUDGE OF THE SUPERIOR COURT
COUNTY OF SOLANO

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SOLANO
580 TEXAS STREET
FAIRFIELD, CA 94533
DEPARTMENT SEVEN**

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Case No.: CU23-04638
CERTIFICATE OF MAILING

I, the undersigned, certify under penalty of perjury that I am a judicial assistant/deputy clerk of the above-entitled court and not a party to the within action; that I am familiar with the County of Solano's procedure for collection and processing of correspondence for mailing with the United States Postal Service. This document will be deposited with the United States Postal Service on the date shown below in the ordinary course of business. This document was sealed and placed for collection and mailing on the date shown below at 580 Texas Street, Fairfield, California for deposit in the United States Postal Service and following ordinary business practices. Said envelopes were addressed to the attorneys for the parties, or the parties as shown below:

Document Mailed: **RULING AND ORDER DENYING WITHOUT PREJUDICE
MOTION FOR FINAL APPROVAL OF NATIONWIDE
CLASS ACTION SETTLEMENT.**

PETER J. FARNESE FARNESE P.C. 700 S. FLOWER STREET, STE 1000 LOS ANGELES, CA 90017	THOMAS J. CUNNINGHAM LOCKE LORD LLP 300 S. GRAND AVENUE, STE 2600 LOS ANGELES, CA 90071
MICHAEL D. BRAUN KUZYK LAW, LLP 2121 AVENUE OF THE STARS, STE 800 LOS ANGELES, CA 90067	MAIA C. KATS JUST FOOD LAW 5335 WISCONSIN AVENUE, NW, STE 440 WASHINGTON, DC 20015

Dated: JUL 19 2024


N. Washington
Judicial Assistant