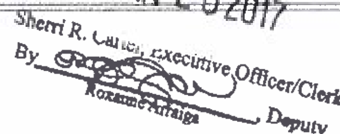

DEPARTMENT 310 - LAW AND MOTION RULINGS

Case Number: BC592773 **Hearing Date:** January 26, 2017 **Dept:** 310

Scheuerman v. Vitamin Shoppe Industries, Inc.

MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION FOR FEES, COSTS, AND INCENTIVE PAYMENT

Final Order

Grant final approval, finding that the settlement is fair, reasonable, and adequate. Award $170,000 for fees and $11,540.76 for costs to class counsel, and $2,500 for service awards to the sole class representative.

Defer approval of payment of administrative costs until a declaration is filed by administrator justifying the amount of costs sought.

DISCUSSION

I. Background

Plaintiff Rebecca Scheuerman ("Plaintiff") commenced this action on August 27, 2015 against Defendant Vitamin Shoppe Industries, Inc. ("Defendant"). Prior to filing her action here, Plaintiff filed a previous action in Case No. 3:15-cv-00025-AJB-NLS (S.D. Cal.) on January 7, 2015, which was dismissed on August 12, 2015, as the federal court had no CAFA jurisdiction due to the amount in controversy being less than $5 million.

This instant action arises out of the Plaintiff's allegations that she relied on allegedly false and misleading statements contained on the labels and in advertisements and marketing materials for Defendant's "Reservie Trans-Resveratrol" dietary supplemental products regarding the lawfulness, composition, and ingredients of the products, and that such statements violated state consumer protection laws.

The complaint, filed on August 27, 2015, alleges causes of action for: (1) violation of Cal. Bus. & Profs. Code, §§17500 et seq. (California's False Advertising Law); (2) violation of Cal. Health & Safety Code, §§110660 (California's Sherman Law); (3) violation of Cal. Bus. & Profs. Code, §§17200 et seq. (California's Unfair Competition Law); (4) negligent misrepresentation; and (5) intentional misrepresentation.

Following mediation, on August 6, 2015, the parties entered into a Stipulation and Agreement of Settlement. Plaintiff filed a Motion for Preliminary Approval of the Settlement Agreement, which was initially set for hearing on March 3, 2016. In advance of the hearing date, the Court issued a Preliminary Approval of Class Action Settlement checklist. [2/23/16 Checklist.] In response to the Court's Checklist, the parties agreed to certain revisions to the settlement and filed the Supplemental Memorandum and supplemental declarations, as well as the Amended Stipulation and Agreement of Settlement.
On April 26, 2016, the Court heard Plaintiff's Motion for Preliminary and directed the parties to make further alterations to the procedural aspect of the Settlement Agreement and submit changes to be taken under submission. On June 1, 2016, the parties filed the Second Amended Stipulation and Settlement Agreement ("Settlement Agreement"). On June 6, 2016, the Court preliminarily approved the Settlement Agreement. Now before the Court is Plaintiff's motion for final approval of the settlement agreement.

II. Notices and Claims Process

In California, the notice must have "a reasonable chance of reaching a substantial percentage of the class members." Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 251 (emphasis added). Importantly, however, the plaintiff need not demonstrate that each member of the class has received notice. As long as the notice had a "reasonable chance" of reaching a substantial percentage of class members, it should be found effective.

Angeion Group is the claims administrator for this settlement. (Declaration of Brian Devery, ¶4). On February 12, 2016, Angeion received the class list from Defendants, which contained 34,993 class members.

(Id. at ¶5). On or about July 1, 2016, Angeion updated the addresses for the 4,682 class members who would be receiving notice via the United States Postal Service ("USPS") using the NCOA. (Id. at ¶6). On July 6, 2016, Angeion emailed the notice to 30,230 class members and mailed the notice via first-class mail to 4,682 class members whose email addresses were unknown or invalid. (Id. at ¶7). On July 12, 2016, Angeion mailed the notice via first-class mail to 3,993 class members whose email notice was returned to Angeion as not deliverable. (Id. at ¶8). Angeion forwarded all notice packets that were returned with forwarding information (29), and performed skip traces on all others (168). (Id. at ¶14). Ultimately 397 notice packets were undeliverable. (Ibid.)

On July 6, 2016, Angeion commenced a banner ad media campaign to target class members likely to be affected by the settlement. (Id. at ¶9). The banner ad has generated 2,100,126 impressions and 2,604 clicks through the website. (Id. at ¶10). On July 6, 2016, Angeion implemented a toll-free hotline devoted to this action to provide potential settlement class members with response to frequently asked questions and important information regarding the settlement. (Id. at ¶11). The hotline has received 268 calls for a total of 1,393 minutes. (Ibid.) On July 6, 2016, Angeion launched a website devoted to the settlement containing information about the settlement, court documents, frequently asked questions, and important dates and deadlines relevant to this settlement. (Id. at ¶12). Settlement class members could submit claims and exclusion on the website. (Ibid.) As of December 13, 2016, the website has received 91,611 sessions, from 76,103 visitors culminating in 219,095 page views. (Id. at ¶13)

The last day for class members to submit a request for exclusion or object to the settlement was September 23, 2016. (Id. at ¶15)

- As of September 23, 2016, Angeion received no objections. (Id. at ¶15)

- After the September 23, 2016 exclusion/objection deadline, Angeion received one objection. (Id. at ¶16)

- As of September 23, 2016, Angeion received 8 requests for exclusion. (Id. at ¶15)

Prior to the close of the claims period, the parties and claims administrator believed there to be fraudulent claims and sought guidance from the Court as to how to address the issue. (Declaration of Abbas Kazerounian, ¶33). This was based on their being more claims submitted than the total potential population of class members. (Devery Decl., ¶17). Pursuant to the Court's guidance, the parties stipulated to work with the claims administrator to issue a supplemental questionnaire to be emailed to individuals who submitted a claim but could not be matched to the Class Member List provided by Defendant. (Kazerounian Decl., ¶34; Devery Decl., ¶19). The questionnaire contained 6 questions. (Devery Decl., ¶19 and Exhibit B). Angeion received a total of 6,501 responses to the email questionnaire. (Id. at ¶22). After discussing with the parties, Angeion analyzed the returned questionnaire and implemented a point value system whereby each incorrect answer was assigned a point value depending on the relevance of the question and the ease in which a class member who had purchased the product should be able to answer the question. (Id. at ¶23). Angeion and counsel for the parties agreed that a score of 6 or more would disqualify a potential class member from participating in the benefits of this class action. 4,444 (68.36%) of the Potential Class Members received a score of 5 or less and 2,057 (31.64%) of the Potential Class Members received a score of 6 or more. (Id. at ¶24). Of the 2,057 Potential Class Members who received a score of 6 or more, 118 were determined to be potential matches to the Class Member List and were reclassified as valid claims for distribution, reducing the disqualified Potential Class members to 1,939. (Id. at ¶25, fn. 1). As a result of the final claims review, a total of 6,128 claims remain for distribution. (Id. at ¶26)

After the deadline for objections had passed (September 23, 2016), Angeion received one objection from Jason Bowerman dated November 2, 2016. (Id at ¶16 and Exhibit A). The objection deals specifically with the supplemental questionnaire that was instituted as a result of the suspected fraud. The Court notes that it was informed by the parties of the suspected fraud in the claims process at a hearing on September 21, 2016. At the September 21, 2016 hearing, the Court approved the plan suggested by Class Counsel and the claims administrator to send out the supplemental questionnaire as there was a valid basis to believe there were numerous fraudulent claims. As such, even if the objection was timely submitted, the Court overrules the objection as it did not relate to the fairness, reasonableness, or adequacy of the class settlement, but to the supplemental questionnaire that was instituted as a result of the suspected improprieties.

Based on the above, the Court finds that the notice procedure satisfies due process.

III. Dunk Factors

It is the duty of the Court, before finally approving the settlement, to conduct an inquiry into the fairness of the proposed settlement. California Practice Guide, Civil Procedure Before Trial, The Rutter Group, ¶14:139.12 (2012). The trial court has broad discretion in determining whether the settlement is fair. In exercising that discretion, it normally considers the following factors: strength of the plaintiff's case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status through trial; amount offered in settlement; extent of discovery completed and stage of the proceedings; experience and views of counsel; presence of a governmental participant; and reaction of the class members to the proposed class settlement. Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801; In re Microsoft I-V Cases (2006) 135 Cal.App.4th 706, 723. This list is not exclusive and the Court is free to balance and weigh the factors depending on the circumstances of the case. Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 244-245.

The proponent bears the burden of proof to show the settlement is fair, adequate, and reasonable. 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1165-1166; Wershba, supra, 91 Cal.App.4th at 245. There is a presumption that a proposed fairness is fair and reasonable when it is the result of arm's-length negotiations. 2 Herbert Newburg & Albert Conte, Newburg on Class Actions §11.41 at 11-88 (3d ed. 1992); Manual for Complex Litigation (Third) §30.42.

Strength of the plaintiff's case

Plaintiff and Defendant both had the Reservie Trans-Resveratrol product tested for the alleged Polygonum cuspidatum (Japanese Knotweed), and concluded that Japanese Knotweed was in fact used as the source of Resveratrol in Defendant's product without being labeled as such. (Motion for Final Approval ("Motion"), pg. 17).

The first challenge to Plaintiff's claim is that Defendant used two manufacturers to produce their product (Rasi Laborities prior to June 2013 and Gemini Pharmaceuticals, Inc. after June 2013). (Id.) Both manufacturers contained resveratrol from Japanese Knotweed, however, only the product made by Rasi listed Japanese Knotween on the supplement facts label. (Id.) During the class period, products manufactured by both Rasi and Gemini were sold to consumers simultaneously. (Id.) Because of this overlap it was nearly impossible to identify which class members purchased which versions of the product. (Id.)

The second challenge here is that typically, a plaintiff has an argument that consumers paid a premium for the mislabeled product. (Id. at pg. 18). Here, however, because the price point of Defendant's product was always relatively low, Defendant could argue that class members paid no more for the mislabeled product than they would have had the product been properly labeled. (Id. at pgs. 17-18)

Because of the strength of Plaintiff's claim, Plaintiff was able to obtain a settlement in which individual payouts would amount to $17-$25 a claim which is nearly the full value of the product purchased. (Id. at pgs. 18-19)

The risk of maintaining class action status through trial.

There is always a risk of decertification. [Weinstat v. Dentsply Intern., Inc. (2010) 180 Cal.App.4th 1213, 1226 ("Our Supreme Court has recognized that trial courts should retain some flexibility in conducting class actions, which means, under suitable circumstances, entertaining successive motions on certification if the court subsequently discovers that the propriety of a class action is not appropriate.").]

The amount offered in settlement

As part of the Court's analysis of this factor, the Court should take into consideration the admonition in Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 133. In Kullar, objectors to a class settlement argued the trial court erred in finding the terms of the settlement to be fair, reasonable, and adequate without any evidence of the amount to which class members would be entitled if they prevailed in the litigation, and without any basis to evaluate the reasonableness of the agreed recovery. The Court of Appeal agreed with the objectors that the trial court bore the ultimate responsibility to ensure the reasonableness of the settlement terms. Although many factors had to be considered in making that determination, and a trial court was not required to decide the ultimate merits of class members' claims before approving a proposed settlement, an informed evaluation could not be made without an understanding of the amount in

controversy and the realistic range of outcomes of the litigation.

The Settlement Agreement provides for a financial benefit of up to $638,384 and no less than $125,000, as well as injunctive relief to approximately 37,522 class members. (Motion, pg.1; Settlement Agreement §III ¶¶3-5). If all 37,522 class members participate, the maximum amount that Defendant will pay out is $638,384 ($17 x 37,522 class members).

Here, there were 6,138 valid claims filed by class members. (Devery Decl., ¶26). Pursuant to the agreement, each of these 6,138 class members will receive a payment of $21.00 for a total distribution of $128,898. (Motion pg. 5).
The Settlement Agreement provides for injunctive relief as well. Pursuant to the Settlement Agreement, Vitamin Shoppe shall either revise the labels on Reservie Trans-Resveratrol or withdraw from the marketplace all Reservie Trans-Resveratrol with labels that do not list Japanese Knotweed as an ingredient. (Motion, pgs. 5-6; Settlement Agreement, §III ¶5)
No later than 5 business days after the Effective Date, Vitamin Shoppe will provide the Class Settlement Payment to the settlement administrator to fund the settlement. (Settlement Agreement, §III.1). No later than 30 days after the Effective Date, the claims administrator will mail the settlement payments to class members. (Id. at §III.2). All checks will expire and become null and void unless cashed within 180 days after the date of issuance. (Ibid.) For checks not cashed within 180 days after the date of issuance, the check will be void and the funds will revert to the settlement administrator's Trust account. (Ibid.) Within 7 days after the 180th days after the date of issuance of the settlement checks, the claims administrator will notify the bank that issued these checks to stop payment on them. (Ibid.)

The extent of discovery completed and the stage of the proceedings

Discovery has been completed including sets of written discovery, the deposition of Defendant's PMK, and the exchange of documents. (Motion, pg. 22). Discovery verified the parameters of the class and identified the best means in which Defendant could convey contact information to a class administrator. (Ibid; Kazerounian Decl., ¶17)

Experience and views of counsel
Class Counsel is experienced in class actions, including consumer related actions. (Declaration of Abbas Kazerounian ISO Preliminary Approval, ¶¶50-62; Declaration of Jessica Dorman ISO Preliminary Approval, ¶¶5-12; Declaration of Joshua Swigart, ¶¶6-15). Class Counsel is confident that this settlement is fair, reasonable, and adequate and in the best interest of the class. (Kazerounian Decl., ¶¶44-45).

Reaction of the class members to the proposed class settlement

The class reacted positively in that no class member objected (there was one untimely objection submitted and 8 opted out. (Devery Decl., ¶¶15-16)

Conclusion on Dunk factors

On balance, this is a fair settlement that satisfies the Dunk factors, such that final approval is warranted.

IV. Attorney's Fees, Costs, and Incentive Payments

A. Attorneys' Fees

Class counsel requests attorney fees of $170,000.
In general, the Court employs the lodestar method in awarding fees, as opposed to a "percentage of the common fund" method. This amount would reflect the actual work performed, plus a multiplier (if applicable) to recognize counsel's efforts. In true common fund cases, the Court may utilize the percentage method, as cross-checked by the lodestar. (Laffitte v. Robert Half Int'l, Inc. (2016) 1 Cal.5th 480, 503.)

Here, fees are sought pursuant to the percentage method. (Motion for Attorneys' Fees, pg. 12)
The $170,000 fee request constitutes 26.6% of the potential recovery of $638,384 (without consideration as to the value of the injunctive relief), which is within the average range. The determination of what constitutes an appropriate percentage "is somewhat elastic and depends largely on the facts of a given case, but certain factors are commonly considered. Specifically, the court may address the percentage likely to have been negotiated between private parties in a similar case, percentages applied in other class actions,

the quality of class counsel, and the size of the award." [In re Ikon Office Solutions, Inc., Securities Litigation (E.D. Pa. 2000) 194 F.R.D. 166, 193.]

These factors favor the $170,000 award. As for the first factor, private contingency fee agreements are routinely 30% to 40% of the recovery. [Id. at 194.] As for the second factor, although the median percentage of attorney fees in class actions is 25%, "most fees appear to fall in the range of nineteen to forty-five percent." [Id.] As for the third factor, Class Counsel has experience in class actions, including consumer related actions. Most importantly, Class Counsel achieved good results for the class as evidenced by the class members' reaction to the settlement. As for the fourth factor, Class Counsel negotiated a settlement agreement in which Settlement Agreement provides for a financial benefit in which $128,898 is distributed to 6,138 class members, as well as injunctive relief. Each class member will receive a payment of $21.00.
The lodestar cross-check supports the fee request as well.

Class Counsel has presented evidence from which the lodestar may be calculated. Kazerouni Law Group, APC has spent 64.7 hours in this matter with a billing rate of $610 for a total lodestar of $77,531. (Declaration of Abbas Kazerounian ISO Motion for Attorneys' Fee, ¶72). Attorney Jessica Dorman of Hyde & Swigart has spent 200.8 outs in this matter with a billing rate of $375 for a total lodestar of $75,300. (Declaration of Joshua Swigart ISO Motion for Attorneys' Fees, ¶41). Attorney Joshua Swigart of Hyde & Swigart has spent 14.5 hours on this matter with a billing rate of $610 for a total lodestar of $8,814.50.

The hourly rate for class counsel and the hours spent appear to be reasonable. Accordingly, the total lodestar calculation is $161,645.5. It appears that Class Counsel utilized skill in litigating this case, and by all accounts, have good reputations in the legal community; at the very least, there is no evidence before the Court to indicate that the attorneys have negative reputations in the legal community. It also appears that Class Counsel spent appreciable time on the case, which time could have been spent on other meritorious fee-generating cases.
For the foregoing reasons, the fee request of $170,000 is granted. The Court notes that the notice advised class members of the maximum fee request of $170,000 and not a single class member objected to it.

B. Costs

Class Counsel requests costs in the amount of $11,540.76, which is lower than the Settlement Agreement's estimate of $15,000. Class Counsel's actual costs, as of August 23, 2016, amount to $11,540.76. (Kazerouni Decl. ISO Motion for Attorneys' Fees, ¶¶76-78; Swigart Decl. ISO Motion for Attorneys' Fees, ¶¶49-52). Class Counsel's actual costs consist of court fees ($2,735.34), mediation ($3,144.50), copying costs ($698.80), travel expenses ($2,164.02), and consultant fees ($2,200). (Id.; Id.). All of the items of cost appear to be reasonable in amount and necessary to the litigation.

C. Cost of Administration

The Settlement Agreement provides all costs of providing notice (including the costs of direct mail, email, and internet notices) and all costs of administering the settlement will be borne by Defendant. (Settlement Agreement, §§VI.1-2). Class Counsel requests the Court to order payment from Defendant to the claims administrator. (Motion, pg. 23).

The Court acknowledges that the Motion for Final Approval of Class Action Settlement states "the costs invoiced are $66,056.24 with additional charges yet to be invoiced" regarding costs for settlement administration. (Motion, pg. 8). However, the claims administrator fails to state in its declaration the amount it requests in costs nor does it provide evidence of the actual costs it has incurred.
The Court is unable to order payment from Defendant to the claims administrator without being provided information and/or evidence of the costs it has incurred.

D. Incentive Payments

Finally, Class Counsel seeks an incentive payments of $2,500 to the sole class representative.

The Court considers the following factors, among others, in determining whether to pay an incentive or enhancement award to a class representative:
Whether an incentive was necessary to induce the class representative to participate in the case;

- Actions, if any, taken by the class representative to protect the interests of the class;
- The degree to which the class benefited from those actions;
- The amount of time and effort the class representative expended in pursuing the litigation;
- The risk to the class representative in commencing suit, both financial and otherwise;
- The notoriety and personal difficulties encountered by the class representative;
- The duration of the litigation; and
- The personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

California Practice Guide, Civil Procedure Before Trial, ¶14:146.10 (The Rutter Group 2012) (citing Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 804; Bell v. Farmers Ins. Exch. (2004) 115 Cal.App.4th 715, 726; In re Cellphone Fee Termination Cases (2010) 186 Cal.App.4th 1380, 1394; Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles (2010) 186 Cal.App.4th 399, 412).

Rebecca Scheuerman is the sole class representative in this action. (Declaration of Rebecca Scheuerman, ¶1). Ms. Scheuerman assisted in preparing and evaluating the case for filing and mediation, assisted class counsel in reviewing discovery, and provided class counsel with guidance to evaluate and approve the proposed settlement on behalf of the settlement class. (Kazerounian Decl. ISO Motion for Attorneys' Fees, ¶86)

The Court grants a $2,500 incentive award to the class representative for the following reasons:
- Her time and efforts in prosecuting this action on behalf of the class
- The benefits achieved for the class
- The employment risks she undertook

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