

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI FILED
AT INDEPENDENCE

DIVISION 16

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CIRCUIT COURT OF JACKSON COUNTY, MO

BY



MICHAEL TAYLOR, et al.,)
)
Plaintiffs,)
)
vs.)
)
DYNAMIC PET PRODUCTS, LLC et al.,)
)
Defendants.)

Case No. 1616-CV11531

**FINAL ORDER AND JUDGMENT
OF FINAL SETTLEMENT APPROVAL AND DISMISSAL WITH PREJUDICE**

Pending before the Court is Plaintiffs' Motion for Final Approval of Class Action Settlement (the "Motion") and Plaintiffs' and Class Counsel's Application for an Award of Attorneys' Fees and Expenses and Incentive Awards to the Class Representatives (the "Application"). The Court has considered the papers submitted in support of the Motion and the Application, the objections filed to the settlement, the responses to the objections, and the arguments of counsel and evidence presented at the final approval hearing held on August 3, 2017. Having given the matter due and careful consideration, the Court **GRANTS** the Motion and the Application and makes the findings and conclusions set forth below.

I. Class Certification

1. Having considered the requirements of Missouri Rule of Civil Procedure 52.08 for class certification, the Court finds:

- a. The Class consists of more than 1 million members. The Class is so numerous that joinder would be impracticable.

- b. There are questions of law or fact common to the Class. Common questions include whether Defendants' conduct violates the Missouri Merchandising Practices Act ("MMPA") and whether Class members are entitled to damages.
- c. The claims of the Plaintiffs are typical of the claims of the Class.
- d. The named Plaintiffs in this Action and Class Counsel have fairly and adequately protected the Class and will continue to do so.
- e. Questions of law or fact common to the Class predominate over individual questions and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

2. The Court finds that nationwide class certification for settlement purposes is proper because it is expressly authorized by the MMPA and relevant case law. The MMPA has extraterritorial application in this case because Defendants' alleged misrepresentations were made "from the State of Missouri." Mo. Rev. Stat. § 407.020.1. Furthermore, nationwide class certification is appropriate when, as here, all of the Class members' claims are governed by Missouri law. *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 600 (Mo. banc 2012). Plaintiffs' original Petition asserted claims under the MMPA, and the broadening of the class action allegations in the First Amended Petition to a nationwide class is a reasonable expansion of the original pleading, which does not materially alter the theory of liability in the case or expand the scope of the class in a manner that would not be feasible if the litigation continued.

3. Accordingly, the Class as conditionally certified by the Court in its Preliminary Approval Order on April 19, 2017 is now finally certified for settlement purposes. The Class is defined as follows:

All persons who have purchased a Real Ham Bone For Dogs product in the United States other than for purposes of resale from January 1, 2011 to the first date notice is sent to the class or who suffered pet injury/property damage from use of the Real Ham Bone For Dogs from January 1, 2011 to the first date notice is sent to the class. Excluded from the Class are (1) Defendants, subsidiaries and affiliates of Defendants, members, directors or officers of Defendants, and members of their immediate families; (2) federal, state, and local governmental entities; and (3) any judicial officers presiding over this action, their judicial staff, and members of their immediate families.

4. The Court reaffirms its appointment of the named Plaintiffs, Michael Taylor, Dawn Fortner, and Catherine Gemkow, as Class Representatives and Shank & Moore, LLC as Class Counsel for the Class.

II. Notice and Claim Administration

5. In the Preliminary Approval Order, the Court approved the form of notice to the Class of this action and the proposed Settlement and the Notice Plan for distributing the notice. The notice provided adequate information to Class members about the pendency of the Action and Class members' rights in it, the proposed Settlement, the opportunity to present objections to the Settlement, the opportunity to opt out of the Action, how to file claims, and how to obtain additional information and documents relating to the Action.

6. The Notice Plan has been fully executed in compliance with the Preliminary Approval Order. Distribution of the notice to class members has been extensive and robust. Direct notice was provided by mail to more than 800,000 Class members. This direct notice was supplemented by a digital notice campaign that generated more than 16.1 million impressions. The digital notice program reached approximately 75% of the target audience with an estimated frequency of two times per recipient. Through July 29, 2017, 37,302 claims have been filed, further demonstrating that this broad notice program has been very successful and effective in informing Class members about the Settlement.

7. The notice given to the Class (a) fully and accurately informed the Class of all material terms of the Settlement, (b) was adequate to protect the interests of the Class members and the parties, (c) was the best notice practicable under the circumstances, and (d) fully complied with the requirements of due process and Missouri law.

8. Because Class members had adequate notice, were given an opportunity to be heard, had an opportunity to opt out of the Action, and were adequately represented, the Court can exercise jurisdiction over the Class members.

9. The claim form and claim submission process, as implemented by the claims administrator, Dahl Administration, were and are fair and reasonable for Class members to demonstrate their entitlement to recover benefits under the Settlement. The claims process provides an appropriate procedure for handling Class members' claims fairly and efficiently.

10. The claims administration process is reasonably designed to implement the Settlement.

III. Evaluation of the Settlement

11. In evaluating whether a class settlement is fair, reasonable, and adequate, a court must consider the following factors: “(1) the existence of fraud or collusion behind the Settlement; (2) the complexity, expense, and likely duration of the Action; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the plaintiffs’ success on the merits; (5) the range of possible recovery; and (6) the submissions of Class Counsel, Class Representatives, and absent class members.” *Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260, 266 (Mo. App. 2011) (quoting *Ring v. Metro. St. Louis Sewer Dist.*, 41 S.W.3d 487, 492 (Mo. App. 2000)). The decision to approve a class settlement as fair, reasonable and adequate is left to the sound discretion of the trial court. *Ring*, 41 S.W.3d at 492.

12. The Court has conducted a thorough examination of the record and finds that each of the *Ring* factors supports approval of the Settlement in this case.

13. The Settlement is the result of arm's length negotiations between adverse parties and was fairly negotiated. Counsel on both sides are competent and have represented their clients vigorously. There is no evidence of fraud or collusion behind the Settlement, which was reached after two all-day mediation conferences supervised by John R. Phillips, a mediator with substantial experience in resolving complex class actions. The negotiation process was transparent and inclusive, and the Settlement is not the product of a reverse auction.

14. The factual and legal issues in this case are complex and would require expensive and protracted litigation to resolve, including disputed questions concerning whether Defendants Dynamic Pet Products, LLC and Frick's Meat Products, Inc. ("Defendants") made any false and misleading representations in the marketing of the Real Ham Bone For Dogs, whether Defendants' Real Ham Bone For Dogs caused injuries or deaths to pets, whether Defendants violated the Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010 *et seq.*, and whether members of the Proposed Class incurred any damages, and, if so, the extent of the damages incurred by members of the Proposed Class. The Settlement serves judicial economy and allows the Parties to avoid the expense of protracted litigation.

15. The Settlement was reached by parties with sufficient information to effectively evaluate the terms of the Settlement and represent the Class. Prior to filing the action, Class Counsel conducted an extensive investigation into Defendants and their Real Ham Bone For Dogs. The parties also exchanged written discovery responses and Defendants produced more than 39,000 pages of documents. The parties continued exchanging information during the mediation, including information about Defendants' insurance coverage relevant to evaluating the Proposed

Settlement. The information obtained by the Class Representatives and Class Counsel supports the fairness of the Proposed Settlement.

16. The Plaintiffs' ability to succeed on the merits is far from certain. Defendants have available several complete defenses to liability, and have asserted other defenses and arguments that may reduce or eliminate any potential recovery by the Class. While the parties agreed to class certification for purposes of this Settlement, Defendants have reserved the right to challenge a contested class certification motion. Thus, there is a risk that a contested class certification motion might not be granted or, if granted, that a class might later be decertified. There are also significant risks attendant with trying the case. The Settlement eliminates the risk of an adverse outcome and will provide the Class with immediate benefits.

17. The Settlement falls within the range of possible recovery the Class could achieve at trial if they were to succeed on the merits. Furthermore, the Settlement provides for more relaxed standards of proof than may be required at trial, allowing more members of the Class to obtain benefits. Accordingly, the Settlement provides immediate and certain benefits to the Class that may not be available through continued litigation.

18. The opinion of the Class Representatives and Class Counsel that the Settlement is fair, adequate, and reasonable weighs in favor of final approval. The Class Representatives and Class Counsel have extensive knowledge of the factual and legal issues in the case and were actively involved in the negotiations and mediation. Their assessment of the benefits provided by the Settlement in light of the risks associated with litigation is entitled to appropriate weight. Only a small percentage of class members objected to the Settlement, further demonstrating that the Settlement is fair, reasonable, and adequate.

19. Accordingly, the Court has determined that the Settlement is fair, reasonable, and adequate pursuant to Missouri Rule of Civil Procedure 52.08 and applicable case law.

IV. Final Approval of the Settlement

20. The Court hereby grants final approval of the Settlement. The Court finds it was entered into in good faith and is in all respects non-collusive, fair, reasonable, and adequate. It is in the best interests of each of the settling parties and the members of the Class. The Class has been adequately represented at all times. Therefore, all members of the Class who have not timely elected to be excluded from the Class are bound by the terms of the Settlement Agreement. This Final Order and Judgment shall have *res judicata* and preclusive effect in all pending and future lawsuits maintained by the named Plaintiffs, Class members, and the Released Parties as set forth in the Settlement Agreement, including all claims for restitution, damages, injunctive relief or other forms of relief addressed therein.

21. This judgment is on the merits, with prejudice, as to the named Plaintiffs and all members of the Class who did not opt out pursuant to the terms of the Settlement Agreement. As set forth in the Settlement Agreement, all Class members who have not timely elected to be excluded from the Class are hereby deemed to have released and discharged the Released Persons for settled claims pursuant to the Settlement Agreement. This release applies to all claims relating to, regarding, or arising out of (i) the manufacture, distribution, marketing, advertising or sale of the Real Ham Bone For Dogs, (ii) any Class member's purchase or use of the Real Ham Bone For Dogs, or (iii) any pet injury, pet death, or property damage allegedly resulting from use of the Real Ham Bone For Dogs.

22. Each Class member (except any such person who has filed a proper and timely Request For Exclusion) will be forever barred and permanently enjoined from directly, indirectly,

representatively or in any other capacity, filing, commencing, prosecuting, continuing, litigating, intervening in, participating in as class members or otherwise, or receiving any benefits or other relief from any other lawsuit, any other arbitration, or any other administrative, regulatory, or other proceeding against the Released Persons involving the Released Claims; and all persons and entities shall be forever barred and permanently enjoined from filing, commencing, or prosecuting any other lawsuit as a class action against the Released Persons (including by seeking to amend a pending complaint to include class allegations or by seeking class certification in a pending action in any jurisdiction) on behalf of Class members who have not timely excluded themselves from the Class if such other lawsuit is based on or arises from the Released Claims.

23. The Court finds that the most appropriate method for awarding attorneys' fees and costs is the percentage of the fund method. The Court assesses the attorneys' fee request as a percentage of the \$2,400,000 settlement fund. The Court finds that Class Counsel's application for \$655,000 in attorneys' fees and costs, which amounts to 27.3% of the settlement fund, is fair and reasonable and should be granted. This percentage of the fund is well within the range that Missouri courts and other courts have held to be reasonable in similar class action settlements. The reasonableness of the fee award is also supported by a lodestar cross-check. Class Counsel's lodestar for the work done in this case (which is not yet complete) is \$613,385.00, which the Court finds to be reasonable under the factors Missouri courts apply to determine the reasonable value of attorneys' fees. *See Berry v. Volkswagen Group of America, Inc.*, 397 S.W.3d 425, 431 (Mo. banc 2013). Other factors outlined in *Berry* that support the fee request include the positive result achieved for the class, the nature of services rendered and the degree of professional ability required in this class action, the importance of enforcing consumer protection laws, and the vigor of the opposition. *See id.* The \$655,000 requested for fees and expenses represents a multiple of

1.07 times the present lodestar, which is supported by the factors applied in *Berry* for awarding a multiplier, including that counsel's fee award was always contingent and that work on this case necessarily traded off with counsel's work on other matters. *See Berry*, 397 S.W.3d at 432-33. The modest multiplier of 1.07 is well within the range of multipliers regularly approved in class actions in Missouri. The Court also finds that the requested Incentive Awards of \$5,000 each to the named Plaintiffs (Michael Taylor, Dawn Fortner, and Catherine Gemkow) are appropriate to compensate them for their initiative and efforts in bringing this action.

24. The Court has considered the objections to the Settlement filed by Khristie Reed Paulson, Rebecca Brandel, Diane Canutt, Rod Canutt, Crystal Lewis, Rene Lucht, Diane Ortman, Debra Porwoll, Kris Vosburgh, and Stephanie Brown (the "Reed Objectors"), Pamela Sweeney, Victoria Mateer, David Marklein, and Tisha Carey and overrules all of the objections.

25. Counsel for the Reed Objectors, Timothy Blood, was provided notice of the Court's preliminary approval hearing and had the opportunity to object to the notice plan, the claim form, and other aspects of the Settlement at that time. No objections were raised, but had they been, many of Mr. Blood's concerns could easily have been addressed and eliminated. None of the objections prevent settlement approval, but Mr. Blood's failure to appear at the preliminary approval hearing and his waiting to object to the Settlement until the final approval hearing has impeded the timely consideration of many of the objections he later raised to the settlement process in which he was a significant participant.

26. The Court rejects the suggestion by the Reed Objectors that the Settlement is the product of collusion or a reverse auction. The declarations of the parties' counsel and the mediator amply demonstrate that the Settlement resulted from vigorous, arm's length negotiations between accomplished attorneys on both sides. Counsel for the Reed Objectors were involved extensively

in the mediations that led to the Settlement and were in no way excluded from this process. When given the opportunity to identify changes to the Settlement that they believed were desirable, they did not respond. These facts and the other evidence in the record concerning the settlement negotiations refute any notion that the Settlement is collusive or a reverse-auction settlement.

27. The Court overrules the objection by the Reed Objectors and certain other objectors to the reversionary aspect of the Settlement. Based on the evidence and arguments presented in connection with final settlement approval, the Court reaffirms its finding at the preliminary approval hearing that reversion of unclaimed funds is appropriate in this case. The objectors' suggestion that unclaimed funds should be donated to charity through the *cy pres* doctrine is without merit, as donations to charity do not benefit the Class members.

28. The Court finds that the \$1,025,000 amount allotted to product refund claims is fair, adequate, and reasonable based on the low complaint rate from consumers about the product, and the per-claim limits on these claims are reasonable and appropriate given the low cost of the product. Indeed, similar limits on product refund claims are a common feature of class action settlements. The information requested by the claim form is not unreasonable, and the Court rejects the assertion that the claim form and caps on product purchase claims were designed to minimize the payout on these claims. The fact that more than 37,000 product purchase claims have been made through July 29, 2017 demonstrates that the Settlement is beneficial to class members who purchased the product and wish to participate in the Settlement. Accordingly, the Court overrules the objections addressing the product purchase refund component of the Settlement.

29. The Court similarly overrules the objections addressing the amounts provided for pet injury/property damage claims both in the aggregate and on a per-claim basis. The Court finds

that the \$325,000 assigned to pet injury/property damage claims is fair, reasonable and adequate. This capped amount per claim year was appropriately determined based on the low complaint rate for the product, the number of claims Defendants had separately paid before and during the litigation, and the average amount of the claims paid by Defendants. The \$2,500 per-claim cap for these claims also is reasonable given the average amount of the claims paid by Defendants and filed to date. The Court finds it is appropriate and reasonable to condition payment on pet-injury claims on satisfactory proof that the product caused the asserted injuries, and to limit the recovery on these claims to out-of-pocket losses for veterinary expenses as opposed to subjective claims for lost property value arising out of pet deaths. The requirements of the claims process are a reasonable trade-off to protect against fraudulent or otherwise illegitimate claims and they also reflect the compromise nature of this settlement.

30. The Court finds that Class members were provided sufficient notice about the amount Class Counsel would request for attorneys' fees and expenses and were given a reasonable opportunity to assert objections to this request, notwithstanding that the deadline for objections was prior to the filing of the Application. Although the Court recognizes that a different sequence of events might have had some advantages, the procedure followed in this case satisfies due process and has been approved by the Missouri Court of Appeals. *See City of O'Fallon v. CenturyLink, Inc.*, 491 S.W.3d 276, 286 (Mo. Ct. App. 2016).

31. The Court overrules the objections to the injunctive relief afforded by the Settlement. The Court finds that this injunctive relief is a valuable component of the Settlement and represents a strong practical deterrent against future sale of the product in its present form, which has now been discontinued. The injunctive relief included in the Settlement places significant restraints on Defendants before they can resume sales of cooked pig bone products for

dogs. These restrictions require Defendants to reformulate the product to make it safer than an uncooked bone or to obtain insurance to compensate pet owners whose pets become ill or die from consuming the product. The insurance condition will require Defendants to adopt sufficient consumer protections to satisfy insurers before they can resume selling the product, should they choose to do so. Either avenue identified in the Settlement ensures as a practical matter that the Defendants are enjoined from selling the same product to dog owners in the future.

32. The Court has carefully considered all of the other objections to the Settlement and overrules them based on the arguments raised by the Parties in their responses to the objections and at the final approval hearing and the evidence in the record supporting the fairness, adequacy and reasonableness of the Settlement.

33. Within thirty (30) days of the date of this Order, the Parties shall file an agreed listing of each Person who submitted a request for exclusion from the Class in compliance with the procedures set forth in the Notice. The Persons so identified shall not be bound by the Settlement and shall not be eligible to receive benefits under the Settlement. All Persons who meet the Class definition and have not submitted a proper and timely exclusion request shall be bound by this Final Order and Judgment.

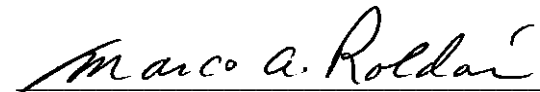
34. This Order shall not be construed as an admission, concession, or declaration by or against Defendants of any fault, wrongdoing, breach, or liability, and Defendants specifically deny any such fault, wrongdoing, breach, or liability. Nor shall this Order be construed or used as an admission, concession, or declaration by or against Plaintiff or the Class that their claims lack merit or that the relief request in the action is inappropriate, improper, or unavailable. Neither the fact of, nor any provision contained in the Agreement or the documents submitted in connection with the Settlement, nor any actions taken thereunder shall be deemed evidence of a concession or

admission of any kind as to the truth of any fact alleged or validity of any legal argument that has been, could have been, or in the future might be asserted.

35. Without affecting the finality of the Judgment, the Court hereby retains continuing jurisdiction to implement the Settlement through enforcement of this Judgment and to construe, enforce, and administer the Agreement pursuant to its terms. Specifically, the Court retains continuing jurisdiction over the Action to enforce Defendants' and the Settlement Administrator's obligations under the Agreement to provide compensation to the Class as provided in the Agreement, enforce, as necessary, any injunctive relief included as part of the settlement, pay the Class Representatives' incentive awards as provided in this Final Order and Judgment, and pay Class Counsel the award of attorneys' fees and expenses made by the Court in this Final Order and Judgment.

IT IS SO ORDERED.

Date: _____ August 11, 2017 _____



Hon. Marco A. Roldan, Circuit Judge