

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
CIVIL DIVISION

KARA TOWNSEND, LEVON TCHAYELIAN,
and LINDA WILLASON, individually and on
behalf of all others similarly situated,

Plaintiff,

Case No. CV 14-958-4

v.

BLUE DIAMOND GROWERS,

Defendant.

CLASS SETTLEMENT PRELIMINARY APPROVAL ORDER

Plaintiffs Kara Townsend, Levon Tchayelian, and Linda Willason, on behalf of themselves and the Settlement Class, and Defendant Blue Diamond Growers (collectively, the “Parties”) have executed a proposed Settlement Agreement (the “Settlement Agreement” or “Agreement”). Pursuant to the Agreement, the Plaintiffs have moved for an unopposed entry of an order granting preliminary approval to the Settlement provided for in the Settlement Agreement (the “Settlement”). Having reviewed the Settlement Agreement and the Parties’ submissions in support of preliminary approval of the Settlement, the Court now FINDS, CONCLUDES, AND ORDERS as follows:

I. CERTIFICATION OF A NATIONWIDE CLASS

The Settlement Agreement provides for a nationwide class settlement of the claims that are the subject of this litigation. As part of the Agreement, Defendant has conditionally foregone its objections to the certification of a nationwide class.

A. This Class Settlement Preliminary Approval Order (the “Preliminary Approval Order” or “Order”) incorporates by reference the definitions in the Settlement Agreement, and all terms herein shall have the same meanings set forth in the Settlement Agreement.

B. The Court has considered (1) allegations, information, arguments, and authorities provided by the Plaintiffs in their memorandum of points and authorities submitted in support of the Plaintiffs’ Unopposed Motion for Preliminary Approval of the Settlement Agreement; (2) Defendant’s conditional agreement, for purposes of the Settlement, not to object to the certification of the Settlement Class specified in the Settlement Agreement; and (3) the terms of the Settlement Agreement including, but not limited to, the definition of the Settlement Class and the benefits to be provided to the Settlement Class. Based on those considerations, the Court provisionally certifies, for settlement purposes only, a Settlement Class, from which exclusions shall be permitted, consisting of the following:

All Persons who purchased in the United States, from May 28, 2009 up to and including the date of entry of the Preliminary Approval Order, Blue Diamond Almond Breeze and/or Blue Diamond Nut-Thins Products which were manufactured, advertised, or sold by Defendant Blue Diamond Growers and which (1) bore the labeling statement “All Natural” or “Natural” on any portion of the packaging other than the ingredients list; (2) contained the ingredient statement Evaporated Cane Juice; (3) contained an endorsement from the American Heart Association; and/or (4) did not specifically disclose the amount or percentage of almonds in the product.

The following Persons are expressly excluded from the Settlement Class: (a) all Persons who purchased or acquired the at issue Blue Diamond Almond Breeze and/or Blue Diamond Nut-Thins Products for resale; (b) Blue Diamond Growers and its employees, principals, affiliated entities, legal representatives, successors and assigns; (c) any Person who files a valid, timely request for exclusion (“Opt-Out”); (d) federal, state, and local governments (including all agencies and subdivisions thereof, but excluding employees thereof); and (e) the judges to whom is assigned any lawsuit concerning any of the at issue Blue Diamond Almond

Breeze and/or Blue Diamond Nut-Thins Products, and any members of their immediate families.

C. For purposes of Settlement only, the Court finds as follows:

1. Based on the information available to date, it appears that many thousands of consumers fall into the Settlement Class as defined above. This number readily satisfies the numerosity requirement of Arkansas Rule of Civil Procedure 23(a)(1). Defendant does not contest this numerosity.

2. There are questions of law or fact common to all members of the Settlement Class based on Defendant's branding and labeling of its Products. These common questions include, but are not necessarily limited to, whether Defendant engaged in unlawful, unfair, or deceptive business practices by failing to properly package and label the Products.

3. Plaintiffs' claims are typical of those of the Settlement Class. Plaintiffs are members of the Settlement Class and allege that they have been damaged by the same conduct of Defendant that they allege have damaged other members of the Settlement Class. Plaintiffs' claims are not in conflict with or antagonistic to the claims of the Settlement Class as a whole. The claims of Plaintiffs and other members of the Settlement Class are based upon corresponding theories, such as violation of similar state consumer protection acts (including the Arkansas Deceptive Trade Practices Act), breach of express and implied warranties, unjust enrichment, and negligence, which arise out of substantially similar laws.

4. The Settlement Class is ascertainable by reference to objective criteria. Namely, whether or not a person purchased any of the Products during the Class Period. *See Philip Morris Cos. v. Miner*, 2015 Ark. 73, at 16-17, 462 S.W.3d 313, 322-23.

5. Plaintiffs can fully, fairly, and adequately protect the interests of the Settlement Class. Plaintiffs' counsel are experienced in prosecuting complex class-action litigation, and Plaintiffs and their counsel have no interests that conflict with, or are adverse to, the interests of the Settlement Class.

6. For settlement purposes, questions of law and fact common to all members of the Settlement Class predominate over any questions affecting only individual members.

7. A nationwide class action for settlement purposes is superior to other available methods for the fair and efficient adjudication of this controversy.

D. If, for any reason, the Settlement Agreement ultimately does not become effective or is terminated as provided therein, this Order certifying the Settlement Class shall be automatically vacated and Defendant may fully contest certification of any class as if no Settlement Class had been certified. In addition, the Parties shall return to their respective positions in this lawsuit as they existed immediately before the Parties executed the Settlement Agreement, and nothing stated herein or in the Settlement Agreement shall be deemed an admission or waiver of any kind by any of the Parties or used as evidence against, or over the objection of, any of the Parties for any purpose in this action or in any other action.

II. PRELIMINARY APPROVAL OF THE TERMS OF THE SETTLEMENT

A. Defendant has at all times disputed, and continues to dispute, Plaintiffs' allegations in the lawsuit and maintained, and continues to maintain, that it has defenses to the claims asserted. Nonetheless, to avoid the burdens and costs of protracted litigation and to provide timely relief to the Settlement Class, the Parties have agreed to an arrangement

providing financial recovery to each Settlement Class Member who submits a valid Claim Form and injunctive relief.

B. On a preliminary basis, and taking into account that (1) the Settlement Agreement provides immediate relief to the Settlement Class; (2) the defenses that have been asserted by Defendant; (3) the risks to members of the Settlement Class that Defendant would successfully defend the claims asserted by Plaintiffs; and (4) the length of time that would be required by the Plaintiffs and the Class to obtain a final judgment through one or more trials and appeals, the Settlement appears to be fair, reasonable, and adequate. Moreover, the Parties have reached the settlement after extended, arm's length negotiations with a skilled and qualified mediator. For all these reasons, the Settlement falls within the appropriate range of reasonableness for preliminary approval and does not appear in any way to be the product of collusion.

C. Accordingly, it is ORDERED and ADJUDGED that the Settlement Agreement and corresponding Settlement are hereby preliminarily APPROVED.

III. APPROVAL OF THE CLASS ACTION SETTLEMENT NOTICE

A. As provided for in the Settlement Agreement, Plaintiffs have submitted a proposed long-form class Notice ("Class Notice"), a copy of which is attached to the Settlement Agreement as Exhibit B, and a notice plan ("Notice Plan"), a copy of which is attached to the Settlement Agreement as Exhibit C. Plaintiffs have also submitted the proposed text of the Print notice ("Print Notice") to be published in Cooking Light, Good Housekeeping, and National Geographic, a copy of which is attached to Plaintiffs' Unopposed Motion for Preliminary Approval of the Settlement Agreement as Exhibit 3. The Class Notice, Notice Plan and Print Notice are collectively referred to as the Settlement Notice. The Court finds that the Settlement Notice fairly, accurately, and reasonably provides members of the Class with (1) appropriate

information about the nature of this litigation and the essential terms of the Settlement Agreement; (2) appropriate information about how to obtain additional information regarding this matter and the Settlement Agreement; (3) appropriate information about how to challenge or exclude themselves from the Settlement, if they desire to do so. The Settlement Notice also fairly, accurately, and reasonably informs members of the Settlement Class that failure to comply with the provisions contained therein could constitute a waiver of their right to challenge or object to the Settlement, and the Fairness Hearing or otherwise, or to appeal from any order or judgment entered by this Court in connection with the Settlement.

B. The Court also finds that the proposed plan for publication of the Settlement via three magazines with national circulation and through targeted advertising on Conversant, Yahoo! and Facebook and proposes to reach 70% of all Settlement Class Members, is the best notice that is practicable under the circumstances and is reasonably calculated to reach the members of the Settlement Class and to apprise them of the Action, the terms and conditions of the Settlement Agreement, their right to opt-out and be excluded from the Class, to object to the Settlement Agreement, and to appear at the Fairness Hearing. The Settlement Notice satisfies the requirement of Arkansas Rule of Civil Procedure 23 and due process.

C. Accordingly, the Court hereby ORDERS as follows:

1. That the form and content of the proposed Settlement Notice is hereby approved.

2. Promptly following the entry of this Order, Plaintiffs shall prepare final versions of the Class Notice and Print Notice, incorporating into the notice the Fairness Hearing dates and deadlines set forth in Section V of this Order.

3. The Class Action Settlement Administrator shall commence the publication of the Class Notice (Exhibit B) on the Settlement Website between 20 to 40 days after preliminary approval. The Class Action Settlement Administrator shall cause the publication of the Print Notice in Cooking Light, Good Housekeeping, and National Geographic no later than 90 days after preliminary approval. The Class Action Settlement Administrator shall cause the commencement of the publication of the Internet notice between 20 to 40 days after preliminary approval. The first date on which notice via the Settlement Website, Print Notice, or Internet notice commences shall be referred to herein as the "Notice Live Date". A copy of the Class Notice also will be posted on the Class Action Settlement Administrator's website and Class Counsel's websites.

4. Heffler Claims Group is hereby approved as the Class Action Settlement Administrator, whose reasonable costs in administering the Settlement and Notice Plan are at the cost of \$450,000 and are to be paid from the Settlement Amount.

5. The Class Action Settlement Administrator shall perform the following functions in accordance with the Settlement Agreement, this Order, and subsequent orders that may be entered by the Court in this case:

- a. Effectuate publication of notice of the Settlement, in accordance with the Notice Plan approved by this Order;
- b. Establish an internet website that enables Class Members to read the Class Notice online;
- c. Process requests for exclusion in accordance with the provisions of the Settlement Agreement;
- d. On a weekly basis, the Class Action Settlement Administrator will provide Class Counsel and Defendant's Counsel with a report consisting of the number of claim forms and, to the extent there are

any, any Requests for Exclusion or objections, received during the prior week;

- e. Not later than twenty (20) business days after the deadline for submission of Requests for Exclusion, provide to Class Counsel and Defendant's counsel copies of the Requests for Exclusion, if any, and a written list of the names and addresses of all persons who submitted Requests for Exclusion;

7. Class Counsel shall report in writing to the Court, no later than three (3) days before the Final Fairness Hearing, the following:

- a. That the Settlement Notice was made in the manner directed by the Court, including a description of the manner in which the publication notice occurred;
- b. The names of all Class Members who sought to be excluded, the date each such Class Member sought to be excluded, and whether the Class Member's request for exclusion was timely and properly made.

8. The Court hereby approves the Claim Form proposed as Exhibit A to the Settlement Agreement.

9. Class Members shall make all claims on or before the ninetieth (90th) day after the Notice Live Date pursuant to Paragraph III.C.3. of this Order. All Claim Forms must be received by the Class Action Settlement Administrator online or postmarked no later than the ninetieth (90th) day after the Notice Live Date pursuant to Paragraph III.C.3. of this Order.

IV. APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL

A. Based on and pursuant to the criteria of Arkansas Rule of Civil Procedure 23, the Court appoints the following as Almond Breeze Class Counsel: Kenneth R. Shemin of Shemin Law Firm, PLLC; Thomas P. Thrash of the Thrash Law Firm, P.A; Chant Yedalian of Chant &

Company A Professional Law Corporation; Pierce Gore of Pratt & Associates; Dewitt M. Lovelace of Lovelace Law Firm, P.A., and Charles J. LaDuca of Cuneo Gilbert & LaDuca.

B. The Court finds and concludes that Kara Townsend, Ashley Melvin, Taline Keshishian, Claire Harlam, Casley Vass, and Levon Tchayelian will fairly and adequately represent and protect the interests of members of the Settlement Class who purchased Almond Breeze Products during the Class Period, and appoints them to serve as Almond Breeze Class Representatives.

C. Based on and pursuant to the criteria of Arkansas Rule of Civil Procedure 23, the Court appoints the following as Nut-Thins Class Counsel: Chant Yedalian of Chant & Company A Professional Law Corporation; Scott B. Cooper of The Cooper Law Firm, P.C.; and Samuel A. Wong of the Aegis Law Firm, P.C.

D. The Court finds and concludes that Larry Tran, Linda Willason, and Daniel Mitchell will fairly and adequately represent and protect the interests of members of the Settlement Class who purchased Nut-Thin Products during the Class Period, and appoints them to serve as Nut-Thin Class Representatives.

V. PROCEDURES FOR FINAL APPROVAL OF THE SETTLEMENT

A. Fairness Hearing

1. The Court hereby schedules a hearing at 9:00 a.m. on March 29, 2017 [the seventy-fifth day after the Notice Live Date pursuant to Paragraph III.C.3. of this Order (*see* Settlement Agreement ¶ II.A.7.)], at the Washington County Circuit Court, Civil Division, 280 North College Avenue, Fayetteville, Arkansas 72701 (the “Fairness Hearing”), to determine whether the certification of the Settlement Class, the designation of the class representatives, the appointment of class counsel, the Settlement Agreement,

and the Settlement should receive final approval (the “Fairness Hearing”). At that time, the Court also will consider any request that may be made by class counsel for an award of attorneys’ fees and costs to class counsel and for an incentive award to the class representatives, all in accordance with the terms of the Settlement Agreement.

2. The Plaintiffs will have up to and including five (5) days prior to the date of the Fairness Hearing to file their motion for final approval of the Settlement and any briefs in support of such motion.

3. The Court stays all further proceedings in this Arkansas Litigation as between Plaintiffs and Defendant pending the Fairness Hearing and final determination of whether the Settlement Agreement should be approved.

4. The Court enjoins the members of the Settlement Class, pending the Fairness Hearing and final determination of whether the Settlement Agreement should be approved, from challenging in any action or proceeding any matter covered by this Settlement Agreement or its release, except for proceedings in this case related to effectuating and complying with the Settlement Agreement.

B. Deadline for Members of the Settlement Class to Request Exclusion from the Settlement

1. Any member of the Settlement Class who does not desire to participate in the Settlement Class shall have thirty (30) days after the last date of publication of the Print Notice to submit a request for exclusion from the Settlement Class.

2. A member of the Settlement Class may effect such exclusion by sending a written request to the Class Action Settlement Administrator. The written request must be signed by requester, and provide all of the following information:

a. The name of this lawsuit, *Townsend v. Blue Diamond Growers*, Case No. CV-14-958-4 (Circuit Court of Washington County, Arkansas);

b. A statement of the Settlement Class Member's full name, address, telephone number, and the period of time (including approximate dates) in which the Settlement Class Member purchased the Products; and

c. A statement that the Settlement Class member is a Settlement Class member and desires to be excluded from the Settlement Class.

C. Deadline for Filing Objections to Matters to be Heard at the Fairness Hearing and for Filing Requests to Appear and Present Argument or Evidence

1. All objections to certification of the Settlement Class, the designation of Almond Breeze Class Representatives or Nut-Thins Class Representatives, the appointment of Almond Breeze Class Counsel or Nut-Thins Class Counsel, the Settlement, the Settlement Agreement, or the amount of fees and expenses that Almond Breeze Class Counsel or Nut-Thins Class Counsel may apply for at the Fairness Hearing, or the amount of incentive awards to the Almond Breeze Class Representatives or Nut-Thins Class Representatives, shall be made in writing and, no later than thirty (30) days after the last date of publication of the Print Notice, filed with this Court and mailed to class counsel and Defendant's counsel, by first-class United States Mail, at the address listed in the Class Notice.

2. Any written objection must include all of the following:

a. The name of this lawsuit, *Townsend v. Blue Diamond Growers*, Case No. CV-14-958-4 (Circuit Court of Washington County, Arkansas);

b. The objector's full name, address, telephone number;

c. Information sufficient to establish that the objector is a member of the Settlement Class, including all information required by the Claim Form;

d. A written statement of all grounds for the objection, accompanied by any legal support for the objection;

e. Copies of any papers, briefs, or other documents upon which the objection is based;

f. A statement of whether the objector intends to appear at the Settlement Hearing.

g. A list of all persons who will be called to testify in support of the objection;

h. The identity of all counsel representing the objector, including the identity of all counsel representing the objector who will appear at the Fairness Hearing;

i. The objector's signature or the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation);

j. A list, by case name, court, and docket number, of all other cases in which the objector (directly or through counsel) has filed an objection to any proposed class action settlement in the United States in the previous five (5) years;

k. A list, by case name, court, and docket number, of all other cases in which the objector's counsel (on behalf of any person or entity) has filed an

objection to any proposed class action settlement in the United States in the previous five (5) years;

1. If the Settlement Class member or his/her counsel has not objected to any other class action settlement in any court in the United States in the previous five (5) years, he/she shall affirmatively so state in the written materials provided in connection with the Objection to this settlement; and

m. A list, by case name, court, and docket number, of all other cases in which the objector or any of his attorneys has been named plaintiff in any class action or served as lead plaintiff class counsel.

3. All persons who will appear at the Fairness Hearing, either in person or by counsel, for the purpose of objecting to any aspect of the certification of the Settlement Class, the designation of Almond Breeze Class Representatives or Nut-Thins Class Representatives, the appointment of Almond Breeze Class Counsel or Nut-Thins Class Counsel, the Settlement, the Settlement Agreement, the amount of fees and expenses for which Almond Breeze Class Counsel or Nut-Thins Class Counsel may apply at the Fairness Hearing, or the amount of incentive awards to the Almond Breeze Class Representatives or Nut-Thins Class Representatives, must file with the Court and serve on class counsel and Defendant's counsel, no later than thirty (30) days after the last date of publication of the Print Notice, a notice of their intention to appear. The notice shall set forth the basis of their objections, summarize the nature and source of any evidence they intend to present at the Fairness Hearing, and identify the name, position, address, and telephone number of each person who intends to appear at the final approval hearing on behalf of the objector.


4. At least five (5) days before the Fairness Hearing, class counsel will file and serve on Defendant's counsel all supporting papers seeking the Court's final approval of the Settlement Agreement, and the Court's approval of any attorneys' fee awards, expense awards, or incentive awards with respect to this Settlement Agreement.

VI. ABSENCE OF ANY ADMISSION; DENIAL OF ANY WRONGFUL ACT OR OMISSION AND OF ANY LIABILITY

The Parties entered in to the Settlement Agreement solely for the purpose of compromising and settling disputed claims. Nothing contained in this Order, the Settlement Agreement, or any documents relating to the Settlement Agreement or the Settlement shall be construed, deemed, or offered as an admission by any Party, or by any member of the Settlement Class, for any purpose in any judicial or administrative action or proceeding, whether in law or equity. In entering this Order with this provision and other limiting provisions, this Court specifically refers to and invokes the Full Faith and Credit Clause of the United States Constitution and the doctrine of comity, and requests that any court in any other jurisdiction reviewing, construing, or applying this Order implement and enforce each such limiting provision.

IT IS SO ORDERED.

DATED: November 17, 2016


The Honorable Doug Martin
Circuit Judge