

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MICHELLE ANN CICCARELLA and)
TANASHA RIETDYK, individually and)
on behalf of all others similarly situated,)

Plaintiffs,)

v.)

CALIFIA FARMS, LLC)

Case No. 7:19-cv-08785-CS

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT**

Pursuant to this Court’s March 20, 2020 order granting preliminary approval of the class action settlement (ECF No. 22)(“Preliminary Approval Order”), plaintiffs¹ Michelle Ann Cicciarella, Tanasha Rietdyk, Daniel Mitchell, Adriana Pena, Kayla Villanueva, and Kristen Landeros (collectively “Plaintiffs”) respectfully submit the following reply in support of Plaintiffs’ Motion for Final Approval of Class Settlement (ECF No. 23). For the reasons stated below and in Plaintiffs’ opening brief in support of Plaintiffs’ Motion for Final Approval (ECF No. 23-1), Plaintiffs’ Motion for Final Approval of the Class Settlement (ECF No. 23) should be approved and judgment entered, thereby bringing this matter to a close and allowing for class members to be paid.

I. INTRODUCTION

The settlement presently before the Court successfully resolves in favor of consumers two actions pending for almost two years against Defendant Califia Farms, LLC (“Defendant” or “Califia”) over its labeling and marketing of its milk-alternative beverage products (“Products”).

On December 14, 2019, Plaintiffs filed a class action settlement with the Court (ECF No. 14-1) along with a motion for preliminary approval (ECF No. 13) and supporting memorandum of law in support of the motion for preliminary approval (ECF No. 14).

On March 20, 2020, this Court granted the motion for preliminary approval of the Settlement Agreement and certification of the Settlement Class and ordered that notice be disseminated to the class. *See* ECF No. 22 (Preliminary Approval Order). As discussed below, the response of class members to the Class Settlement has been overwhelmingly positive.

¹ Unless otherwise indicated, capitalized terms shall have the meaning that the Settlement Agreement ascribes to them. *See* ECF No. 14-1. (“Settlement Agreement”). References to “§ ___” are to sections in the Settlement Agreement.

On May 28, 2020, Class Counsel filed their motion for final approval and payment of attorney fees and costs (ECF No. 23) with supporting memoranda of law (ECF No. 23-1; ECF No. 23-2). On May 28, 2020, Class Counsel also filed the declaration of Carla A. Peak: Re Notice Procedures. (ECF No. 23-6)(“May 28, 2020 Peak Declaration”).

As previously stated in the memorandum of law in support of final approval (ECF No. 23-1), the response from members of the class to the settlement has been overwhelmingly positive. With the date for objection and exclusion expiring on June 11, 2020, only three Settlement Class Members purportedly have objected to the settlement and none have opted out. *See* Supplemental Declaration of Carla A. Peak dated July 2, 2020 at ¶7 (ECF No. 25-1)(“July 2, 2020 Peak Suppl. Decl.”). In stark contrast, to date, more than sixty thousand (60,000) class members have filed claims. July 2, 2020 Peak Suppl. Decl. at ¶ 6. (“To date, KCC has received 60,193 timely-filed claim forms.”).

Moreover, as discussed below in detail, two of the purported objections - one from Shamara Sawyer (“Sawyer”) and one from Kelley Clark (“Clark”)² - may not, in fact, be proper objections. Both Sawyer and Clark sent letters to Class Counsel, which were then sent by Class Counsel to the Claims Administrator. Neither the Sawyer submission (“Sawyer Submission”) nor the Clark submission (“Clark Submission”) followed the protocol for objections as required by this Court’s Preliminary Approval Order. Additionally, neither the Sawyer Submission nor the Clark Submission were sent directly to the Claims Administrator by either Sawyer or Clark as required. Equally important, neither of these two Submissions ever use the words object or objection.

² The submission by Ms. Clark and Ms. Sawyer are attached as Exhibit I to the May 28, 2020 Peak Declaration. (ECF No. 23-6).

A third submission – an email to Class Counsel by Dalicia Reales (“Reales Submission”) on June 11, 2020 – uses the word objection, but, like the Sawyer and Clark Submissions, it did not follow the protocol required to object. The Reales Submission was not sent to the Claims Administrator as required, but rather sent as an email to Class Counsel the night of June 11, 2020.³

Nonetheless, even if the Clark and Sawyer’s submissions are treated as objections, neither they, nor the Reales Submission, have merit such that the settlement, for which 60,000 class members have already made a claim, should be rejected. Rather, the objections should be overruled and the settlement granted final approval so that the case is closed and class members can be paid.

For the reasons set forth below and in Plaintiffs’ opening briefs in support of final approval and payment of counsels’ fees and costs and payment of incentive awards to the named plaintiffs (ECF No. 23-1; ECF No. 23-2), the Court should (1) strike or overrule the objections; (2) grant Final Approval of the Settlement; (3) approve the request for Incentive Awards for the Plaintiffs; (4) approve Class Counsel’s applications for Attorneys’ Fees and Expenses; and (5) enter Final Judgment dismissing the Action with prejudice.

³ Class Counsel provided a copy of the Reales Submission to the Claims Administrator. A copy of the Reales Submission is attached as Exhibit A to the July 2, 2020 Peak Suppl. Decl.

ARGUMENT

I. THE SAWYER, CLARK AND REALES SUBMISSIONS ARE NOT PROPER OBJECTIONS

The Court's Preliminary Approval Order states that any objection must include the following:

- a. A heading which refers to the action
- b. The objector's name, address, telephone number, and, if represented by counsel, of his/her counsel;
- c. A declaration submitted under penalty of perjury that the objector purchased the Products during the period of time described in the Settlement Class definition or receipt(s) reflecting such purchase(s);
- d. A statement whether the objector intends to appear at the Final Approval Hearing, either in person or through counsel;
- e. A statement of the objection and the grounds supporting the objection;
- f. Copies of any papers, briefs, or other documents upon which the objection is based;
- g. The name and case number of all objections to class action settlements made by the objection in the past five (5) years; and
- h. The objector's signature.

Preliminary Approval Order at 7-8.

Moreover, any objections had to be sent by the objector to the Claims Administrator at:

Cicciarella v. Califia Farms LLC Settlement Administrator
P.O. Box 43092
Providence, Rhode Island 02940-3092

See Class Action Settlement Notice at p. 7 (attached as Exhibit F to the May 28, 2020 Peak Declaration)(ECF No. 23-6).

Here, neither the Sawyer nor Clark nor Reales Submissions contain a declaration under penalty of perjury that they purchased the Products during the class period. Nor do they state whether they intend to appear at the Final Approval Hearing. None were submitted to the Claims Administrator at the address stated in the notice. July 2, 2020 Peak Suppl. Decl. at ¶ 7. Instead, they were mailed - or in the case of Reales, emailed - to Class Counsel.

Nonetheless, though neither the Sawyer nor Clark submission state that they are objections to the Settlement, and the Reales Submission was not submitted to the Claims Administrator as required, Class Counsel has had them filed with the Court out of an abundance of caution in case they were intended to be properly submitted objections. But even if they are treated as properly submitted objections (which they are not), examination of each reveals that they do not provide grounds for rejection of the Class Action Settlement for which more than 60,000 consumers have already made a claim.

II. THE OBJECTIONS LACK MERIT AND SHOULD BE OVERRULED

It first should be highlighted that the Sawyer, Clark and Reales Submissions **do not** contest or object to the type or reach of notice; **do not** contest or object to the injunctive relief; **do not** contest or object to the amount sought for attorneys' fees and costs; and, **do not** contest or object to the amount sought in incentive awards. Rather, the only aspect of the settlement at issue in the Sawyer, Clark and Reales Submissions is the amount of compensation they are to receive personally.

As explained in the memorandum of law in support of preliminary approval and the memorandum on law in support of final approval, the amount of damages recoverable by consumers in the this case is the amount they overpaid for the products. That amount is 61 cents. Class members with receipts are entitled to 139% recovery (or \$1.00 per unit purchased), and

consumers without receipts receive 81% recovery (or 50 cents per unit purchased). *See* Memorandum of Law in Support of Final Approval (ECF No. 23-1) at 5. This reflects an outstanding recovery for consumers, especially in light of the numerous hurdles that class action litigation presents, such that, if this case were to proceed to trial, consumers could possibly recover no monies. *See Tuy Guit v. 38 Water Street & Inc.*, Case No. 16-cv-7466, 2019 WL 3712125, *2 (S.D.N.Y. Aug. 7, 2019) (And when a settlement “assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, settlement is reasonable under this factor”).

The Sawyer Submission and the Reales Submission both assert that this amount is not high enough of a recovery for them and assert that they should receive significantly higher recoveries under the Federal Trade Commission Act (“FTC Act”). Specifically, Ms. Sawyer claims she is entitled to receive \$121,962.00 under the Federal Trade Commission Act for her three purchases of Califia Products. Sawyer Submission at 1. (“Under the Federal Trade Commission Act, Section 5; Unfair or Deceptive Act of Practices. Under this act, I am entitled to \$40,654 per deceptive act or practice...Based on my emotional distress and purchases of [three Califia products]...I am entitled up to \$121,962.00”). Ms. Reales believes she is entitled to \$43,280. Reales Submission at 1 (“Violation of the Federal Trade Commission Act serves a penalty of \$43,280 per violation”).

Unfortunately for Ms. Sawyer, Ms. Reales, and other consumers, there is no a private right of action under the FTC Act. *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557, 561 (2d Cir. 1978) (“[I]t is clear that no private right of action arises under that Act,” referring to the FTC Act, 15 U.S.C. § 45(a)(1)); *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974) (“[T]he provisions of the Federal Trade Commission Act may be enforced only by the Federal Trade Commission. Nowhere does the Act bestow upon either competitors or consumers standing

to enforce its provisions.”); *see also Weight Watchers International, Inc. v. Noom, Inc.*, 403 F. Supp.3d 361, 372 (S.D.N.Y. 2019) (“there is no private right of action under the FTC Act”); *Oliver v. U.S. Bancorp*, No. 14-cv-8948, 2015 WL 4111908, at *6 (S.D.N.Y. July 8, 2015)(“Notwithstanding plaintiffs' conclusory reference to the FTC Act, it is well settled that there is no private right of action under the statute.”). Accordingly, Ms. Sawyer and Ms. Reales cannot recover damages under the FTC Act against Califia in this class action. For this reason, their objections should be overruled.

With respect to the Clark Submission, she states that she “would like to request for mediation” because she thinks more money should be made available to consumers, but does not state how much more money should be made available to consumers. Nor does the Clark Submission address the fact that consumers with receipts are receiving over 100% of their potential damages, and 81% of their damages even if the consumers do not have a proof of purchase. Courts have recognized that this type of recovery is more than sufficient, particularly when the risks of litigation are taken into amount, as they must in any settlement. *See Tuy Guit*, 2019 WL 3712125 at *2. For this reason, the Clark objection should be overruled.

Accordingly, for the reasons stated above, if the Sawyer, Reales and Clark Submissions are treated as properly submitted objections, they should be overruled and the settlement should be granted final approval, judgment entered and the case closed so that the more than 60,000 class members who have already made claims can recover their damages.

III. CONCLUSION

Based on the foregoing, the Court should (1) strike or overrule the objections; (2) grant Final Approval of the Settlement; (3) approve the request for Incentive Awards for the Plaintiffs; (4) approve Class Counsel's applications for Attorneys' Fees and Expenses; and (5) enter Final Judgment dismissing the Action with prejudice.

Date: July 2, 2020

Respectfully submitted,

/s/ Michael R. Reese

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Class Counsel for Plaintiffs and the Certified Class

CERTIFICATE OF SERVICE

I, Michael R. Reese, hereby certify that on July 2, 2020, I cause an electronic copy of the foregoing document to be served on all counsel of record via the Court's CM/ECF system.

/s/ Michael R. Reese
Michael R. Reese