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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JACKIE FITZHENRY-RUSSELL, on behalf of herself, the general public and those similarly situated,

Plaintiff,

v.

The COCA-COLA COMPANY.,
Defendant.

Case No. 5:17-cv-00603-EJD

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

Date: October 3, 2019
Time: 9:00 a.m.
Courtroom: 4
Judge: Honorable Edward J. Davila

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

A. Introduction

Class Members' reactions to the Settlement have been overwhelmingly positive. The settlement website was visited over 300,000 times, and 128,887 claims have been filed for an estimated recovery of $1.3 million out of the $2.45 million common fund. That far exceeds the 75,000 to 100,000 anticipated claims. Further, only 5 people have opted out and no timely objections were filed. This positive response weighs strongly in favor of final approval of the settlement and the requested fees, costs and incentives. *See In re: Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 459 (9th Cir. 2000) (low number of objectors and opt-outs supports trial court's finding that settlement was "fair, adequate and reasonable"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (same).

There was only one purported objection to the Settlement filed by professional objector Charles M. Thompson after the deadline for objections to be received. Mr. Thompson lied in his objection by claiming "he has never filed an objection to a class action settlement" when he has filed at least three, and he did not follow the proper procedures for objecting, so the Court can simply disregard it. Regardless, the only basis for Mr. Thompson's objection is wrong as a matter of binding federal law. He objects that the settlement resolves on a class-wide basis claims under the Alabama Deceptive Trade Practices Act ("ADTPA") despite that state law's specific prohibition on class actions. However, the Supreme Court in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010) rejected the basis for that objection, holding that Rule 23 of the Federal Rules of Civil Procedure authorizes class actions in federal courts on state law claims ***even if*** those claims could not proceed on a class basis in state court. And, in *Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1337-38 (11th Cir. 2015), the Eleventh Circuit applied *Shady Grove* specifically to the ADTPA and held that its prohibition on class actions was preempted by Rule 23 for claims brought in federal court. Because Plaintiffs have demonstrated that this settlement is fair, reasonable and adequate, and that the fee request is justified, the Court should grant its final approval to the settlement and award fees and costs to Class Counsel.

B. Summary of Settlement

The settlement terms are described more fully in Plaintiffs' Motion to Approve the Settlement (Dkt. 84), but Plaintiff provides a brief summary here for ease of reference. After extensive discovery, and once a once a highly similar case had settled on the eve of trial (the "Canada Dry Case"), Coke agreed to settle by permanently removing the phrase "Made With Real Ginger" from its Seagram's ginger ale packaging (collectively, the "Products") and by creating a settlement fund of $2,450,000. Purchasers were allowed to make claims for cash refunds of $0.80 for each Product purchased during the class period, up to a maximum of 13 Products ($10.40) without Proof of Purchase or 100 products ($80) with Proof of Purchase, with a minimum payment for five purchases ($4.00) even if fewer than five purchases were claimed. Should funds remain in the common fund after paying all claims, notice, administration, incentive awards, and fees and costs, the parties have agreed to donate the money cy pres, in equal amounts, to two charitable organizations.

C. Argument

1. Thompson is a professional objector who failed to timely object.

"Courts in the Ninth Circuit have routinely discounted objections from 'professional' objectors." *Retta v. Millennium Prods.*, No. CV15-1801 PSG, 2017 U.S. Dist. LEXIS 220288, at *20 (C.D. Cal. Aug 22, 2017) (citations omitted). This is because "professional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose benefit the appeal is purportedly raised, gains nothing." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 281 F.R.D. 531, 533 n.3 (N.D. Cal. 2012) (quoting *In re Checking Account Overdraft Litigation,* 830 F.Supp.2d 1330, 1361, n. 30 (S.D. Fla. 2011)) (discussing objector who challenges settlements and files appeals to settlement approval "and does not do so to effectuate changes to settlements, but does so for his own personal financial gain")*; see also Dennis v. Kellogg Co.*, 2013 WL 6055326, at *4 n.2 (S.D. Cal. Nov. 14, 2013) ("when assessing the merits of an objection to a class action settlement, courts consider the background and intent of objectors and their counsel, particularly when indicative of a motive other than putting the interest of the class members first") (citations and quotes omitted). Indeed, Rule 23 was recently amended in part

to address these problems. As the Advisory Committee Notes to the amendment to Rule 23(e)(5) recognize:

> [S]ome objectors may be seeking only personal gain and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.

Mr. Thompson is an Alabama attorney who, despite claiming that he has "never personally filed an objection to a class action settlement," (Dkt. 90 at 2), has, in fact, personally objected to at least three class settlements, and represented clients as an attorney in objecting to other class settlements. *See Nwabueze v. AT&T*, Case No. 09-cv-01529, Dkt. 212 (N.D. Cal); *Lerma v. Schiff Nutrition Int'l*, Case No. 11-cv-01056, Dkt. 162 (S.D. Cal); *Faught v. American Home Shield*, Case No. 07-cv-01928, Dkt. 68 (N.D. Al).

Courts also routinely strike objections for failure to comply with Court-ordered requirements for objections, such as requirements that the objection be ***received*** by a specific date, and include specific information. *See, e.g.*, *Moore v. PetSmart, Inc.*, 728 F. App'x 671, 673 (9th Cir. 2018) ("the district court did not err in striking Loomis's objection" since the objection was "not timely filed"). *Moore v. Verizon Communs., Inc.*, No. C 09-1823 SBA, 2013 U.S. Dist. LEXIS 122901, at *42-43 (N.D. Cal. Aug. 28, 2013) ("The Class Notice (long form) instructs class members that any objection to the Settlement must include . . . the caption and case number appearing on the Settlement Class Notice. . . . Specifically, Mr. and Mrs. Fix's objection is OVERRULED because it does not contain the caption and case number appearing on the Settlement Class Notice."). Here, the Court's preliminary approval order held that any "Objection must satisfy the requirements set forth in the long form notice and must be filed as a written objection with the Clerk of the Court, postmarked by mail, express mail, or personal delivery, such that the Objection is postmarked, and ***received by, the Clerk on or before the Objection Deadline***" of September 5, 2019. (Dkt. 89, ¶ 14 (emphasis added).) Mr. Thompson's objection was not received until September 9, 2019, four days ***after*** the deadline. Mr. Thompson argues in a footnote

that the "Federal Rules of Civil Procedure recites [sic] that placing same in the U.S. Mail is deemed served" with a "cf" cite to Rule 5(b). Rule 5(b) establishes what constitutes service of a pleading on an attorney. It does not provide that mailing an item by a certain date satisfies a court order that a document be postmarked (i.e. mailed) such that it is ***received*** by a specific deadline.

2. Thompson's Objection is Meritless

Even if the Court were to treat Thompson's submission as a proper objection, it is meritless. He objects because the settlement resolves ADTPA claims on a class basis despite the fact that the ADTPA prohibits consumers from maintaining class actions. However, it has been settled law for nearly ten years that, "Rule 23 permits all class actions that meet its requirements, and a State cannot limit that permission by structuring one part of its statute to . . . prevent[] the class actions it covers from coming into existence at all." *Shady Grove*, 559 U.S. at 401. In short, although this is a diversity case and state substantive law governs the ultimate claims, the Federal Rules of Civil Procedure still apply and displace any conflicting state law provisions so long as the federal rules do not "abridge enlarge or modify any substantive right." *Id.* at 407, 410. In *Shady Grove*, the Supreme Court held that Rule 23 controlled over a provision of New York state law that prohibited class actions for claims seeking statutory penalties, determining that Rule 23 did not abridge, enlarge, or modify any substantive rights under New York law. *Id.* at 407, 410-11.[1]

Following *Shady Grove*, the Eleventh Circuit analyzed whether Rule 23 supplanted the ADTPA's prohibition on class actions and concluded that "The Alabama statute restricting class actions, like the New York statute at issue in *Shady Grove*, does not apply in federal court. Rule 23 controls." *Lisk*, 792 F.3d at 1336. As the Court reasoned, "The [*Shady Grove*] holding controls our case. There is no relevant, meaningful distinction between a statutorily created penalty of the kind at issue in *Shady Grove*, on the one hand, and a statutorily created claim for deceptive practices of the kind at issue here, on the other hand." *Id* at 1335. As for why Rule 23 did not alter any

[1] As other courts have noted, the majority in *Shady Grove* fractured on the proper approach for deciding whether a federal rule abridges, enlarges, or modifies a substantive right. *E.g., Id.* However, "all five justices agreed that applying Rule 23 to allow a class action for a statutory penalty created by New York law did not abridge, enlarge, or modify a substantive right; Rule 23 controlled. Regardless of which *Shady Grove* opinion is binding, the *holding* is binding. On this there can be no dispute." *Lisk*, 792 F.3d at 1335.

substantive rights under the ADTPA, the Eleventh Circuit explained as follows:

> A substantive right is one that inheres in the rules of decision by which the court will adjudicate the petitioner's rights. [Defendant]'s substantive obligation was to comply with the ADTPA—to make only accurate representations about its product. The substantive right of [Plaintiff] and other buyers was to obtain wood that complied with [Defendant's] representations. These are the rules of decision that will govern the ADTPA claim. Under Alabama law, Plaintiff and other buyers were and are entitled to seek redress. Rule 23 alters these substantive rights and obligations not a whit; with or without Rule 23, the parties have the same substantive rights and responsibilities. The disputed issue is not whether [Plaintiff] and other buyers are entitled to redress for any misrepresentation; they are. The disputed issue is only whether they may seek redress in one action or must instead bring separate actions. . . . Because Rule 23 does not abridge, enlarge or modify any substantive right, Rule 23 is valid and applies in this action.

Id. at 1337-38. Because Rule 23 supplants the ADTPA's (or any other state's similar) prohibition on class actions, the Court should overrule Thompson's objection.

Further, Thompson's objection ignores that the settlement resolves other common law claims, such as fraud and unjust enrichment that would independently support the relief provided. Thompson cites no provision of state or federal law prohibiting class treatment of those claims. And, in the Ninth Circuit, a court may release not only those claims actually certified, but any claim "based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented *and might not have been presentable in the class action*." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992) (emphasis in original). Accordingly, regardless of whether the ADTPA claim is subject to class treatment in federal court, it can still be released on a class basis in this settlement because it is based on the same underlying facts as Plaintiffs' fraud and unjust enrichment claims.

3. Class Notice Was Reasonable and Adequate as Are the Number of Claims.

Class Members' reactions to the Settlement have been overwhelmingly positive. Notice was effectuated according to the proposed plan and more than 26 million impressions of the settlement notice were delivered in a variety of methods (i.e., print, online, mobile). Baldwin Decl., ¶ 7 & Ex. C. The Settlement Website received almost 300,000 unique visits, and the claims administrator responded to numerous of inquiries regarding the settlement made via e-mail, and the toll-free number. Id. ¶¶ 5-6. There were 128,887 claims, representing approximately 3.2% of the estimated 4 million class members, and only 5 people opted out of the settlement. The claims-rate was

significantly higher than the predicted 75,000-100,000 claims (Dkt. 84, p.14). Moreover, Class Counsel and the claim administrator undertook several actions above and beyond the notice plan to provide notice and encourage claims. For example, GSLLP attorneys reviewed, tested, and requested changes to several initial versions of the Settlement Website, including improving the clarity and operation of the claim form and debugging certain aspects of the claim processing; corresponded with the claims administrator to discuss improvements to the notice program and the claim process, to increase the claim rate; and responded to numerous inquiries from class members about the settlement and filing claims. Gutride Reply Decl. ¶ 2. At GSLLP's request, the claims administrator also took steps to stimulate claims. In particular, the claims administrator utilized Facebook Retargeting to show additional advertisements to individuals who either visited the Settlement Website landing page and did not file a claim or started a claim form and did not submit it. The claims administrator also requested that the website TopClassActions.com give the Settlement "Primary Newsletter Focus," which featured the settlement in the website's bi-weekly newsletter sent to over 770,000 subscribers. *Id.* ¶ 3.

"A court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it", as is the case here. *Evans v. Linden Research, Inc.*, No. C-11-01078 DMR, 2014 WL 1724891, at *4 (N.D. Cal. April 29, 2014); *see also Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1257 (C.D. Cal. 2016) ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members."). And where, as here, notice satisfies due process, "the number of claims submitted at any particular time is not a relevant factor in evaluating the fairness, reasonableness, or adequacy of the settlement." *Hall v. Bank of Am.*, No. 1:12-cv-22700-FAM, 2014 WL 7184039, at *8 (S.D. Fla. Dec. 17, 2014). Importantly, "Courts around the country have approved settlements where the claims rate was less than one percent"—far lower than the 3.2% claims rate here—because "the claims rate does not dictate whether the notice provided was the best notice practicable under the circumstances" and "does not govern whether the settlement is fair, reasonable, or adequate." *Pollard v. Remington Arms Co.*, LLC, 320 F.R.D. 198, 214-15 (W.D. Mo. 2017) (collecting

cases). This is particularly true in cases such as this, where direct notice is not possible because the identity of putative class members is unknown and notice was reasonably delivered via publication through national periodicals and popular internet outlets. *See Spann*, 211 F. Supp. 3d at 1257 (holding that 2.75% claim rate was reasonable where "direct notice could not be provided to more than half of the class"); *see also In re Online DVD–Rental Antitrust Litig.*, 779 F.3d 934, 941 (9th Cir. 2015) (upholding settlement in which the parties did send direct notice to 35,000,000 class members and received 1,183,444 claims, representing a 3.4% claim rate). As in these cases, the notice program employed here is the same type of program that would have been employed had this been litigated.

D. Plaintiffs' Counsel's Fees and Expenses Are Reasonable.

Plaintiffs seek payment from the common fund of their out of pocket expenses, which are currently $73,821.15, plus attorneys' fees equal to 30% of the fund ($735,000). No one has objected to Plaintiff's fee request. Although it represents a slight increase on the benchmark of 25% in common fund cases, that increase is justified for the reasons set forth in Plaintiff's motion to approve the settlement. It also represents less that the Plaintiffs' total lodestar of $796,887.50, representing a "negative multiplier" (i.e., a multiplier below 1) of 0.92. Courts have found negative multipliers an indication that a percentage of the fund slightly higher than the benchmark 25% is reasonable. *E.g. Covillo v. Specialtys Café,* No. C-11-00594 DMR, 2014 U.S. Dist. LEXIS 29837, at *22-23 (N.D. Cal. Mar. 6, 2014) ("Plaintiffs' requested fee award is approximately 65% of the lodestar, which means that the requested fee award results in a so called negative multiplier, suggesting that the percentage of the fund [33%] is reasonable and fair.").

E. Conclusion

For the reasons stated above, Plaintiffs respectfully request that this Court enter final judgment approving the settlement, granting their applications for a Class Representative Service Award of $5,000 for Plaintiff Fitzhenry-Russell, $1,000 for the remaining named Plaintiffs, and awarding Class Counsel $730,000 in attorneys' fees and $73,821.15 in costs.

Dated: September 19, 2019

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