

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

In Re:)
)
MIDWESTERN PET FOODS MARKETING,) No. 3:21-cv-00007-MPB-MJD
SALES PRACTICES AND PRODUCT)
LIABILITY LITIGATION)
)

FINAL APPROVAL ORDER OF CLASS ACTION SETTLEMENT

On August 21, 2023, the Court held a Fairness Hearing in this matter, in which it heard Plaintiffs’ Unopposed Motion for Final Approval of Class Action Settlement (Docket No. 150) and Plaintiffs’ Unopposed Motion for Attorney Fees, Reimbursement of Expenses, and Class Representative Service Awards (Docket No. 145). At the hearing, Plaintiffs were present and represented by counsel, Jeffrey Goldenberg of Goldenberg Schneider LPA; Rosemary M. Rivas, Gibbs Law Group LLP; Jeffrey Ahlers, Kahn Dees Donovan & Kahn; and, telephonically, Melinda Morales of Wexler Boley & Elgersma LLP. Class Member, Julie Purvis was also present.¹ Defendants were represented by counsel, Justin Penn of Hinshaw & Culbertson, LLP. The Court Reporter was Amy Hooten. For the reasons discussed on the record and set forth below, the Court **GRANTS** both of Plaintiff’s motions.

I. Background

This consolidated Action arises from voluntary recalls in December 2020, January 2021, and March 2021 of aflatoxin and *Salmonella* contaminated pet foods manufactured, marketed, sold, and distributed by Defendants Midwestern Pet Foods, Inc. (“Midwestern”) and Nunn

¹ Ms. Purvis did not file a written objection or request to otherwise comment at the hearing (*see* Docket No. 137 at ECF p. 13, ¶ 33), so she did not testify, but was permitted to observe the proceedings.

Milling Co. (“Nunn”) (collectively, “Defendants”). In the operative consolidated complaint (Docket No. 48), Plaintiffs alleged various tort and consumer fraud claims on behalf of a nationwide class (and state-specific subclasses) of pet food purchasers.

In early January 2023, Plaintiffs and Defendants (together, the “Parties”) executed a Class Action Settlement Agreement (“Settlement Agreement”) on behalf of themselves and the Settlement Class that Plaintiffs seek to certify. (Docket No. 134-1, "Settlement Agreement"). Plaintiffs moved for Preliminary Approval of Class Action Settlement on January 9, 2023 (Docket No. 133), and the Court granted the motion on February 6, 2023, finding the Settlement would likely be approved and directing that Notice be provided to the Settlement Class as Set forth in the Settlement Agreement (Docket No. 137). Notice was disseminated by the Court-appointed claim administrator Epiq Class Action and Claims Solutions, Inc. (“Epiq”), and Class Members had until August 3, 2023, to submit claims, object, or request exclusion from the Settlement. According to the Settlement Administrator’s declaration, two Class Members² opted out of the Settlement and no timely objections³ to the Settlement were filed.

At the conclusion of the notice period and pursuant to the terms of the Settlement Agreement, Class Plaintiffs filed their Unopposed Motion for Final Approval of Class Action Settlement and supporting papers on August 7, 2023 (Docket No. 150), and on August 21, 2023, the Court held a hearing on Plaintiffs’ Motion. Plaintiffs also timely filed their Motion for Award of (1) Attorney Fees, (2) Reimbursement of Expenses, and (3) Service Awards (“Attorney Fee Motion”) (Docket No. 145).

² As of August 7, 2023, there were approximately 266,785 potentially Valid Claims to process. (Docket No. 151-1, ¶ 47; Decl. of Cameron R. Azari)

³ On August 18, 2023, Plaintiffs notified the Court of an Objection received August 16, 2023, from a Class Member. (Docket No. 156). This objection is not accepted for review because it is untimely, given the deadline to submit objections passed on August 3, 2023. (Docket No. 137). Even if it were timely, it would be overruled given Plaintiffs' assurance that the objector's claim has not been flagged by the Claims Administrator for presenting indicia of fraud.

II. Legal Standard

Class actions were designed as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 155 (1987) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979)). Any settlement that results in the dismissal of a class action requires court approval. *See* Fed. R. Civ. P. 23(e); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002).

After preliminary review and a hearing, a "district court may approve a settlement of a class action if it concludes that it is fair, reasonable, and adequate." *Kaufman v. Am. Express Travel*, 877 F.3d 276, 283 (7th Cir. 2017) (quoting Fed. R. Civ. P. 23(e)(2)). "[D]istrict courts should act as the 'fiduciary of the class,' subject to the high duty of care that the law requires of fiduciaries." *Id.*

III. Discussion

Having thoroughly reviewed the Motion and Memorandum in Support of Unopposed Motion for Final Approval of Class Action Settlement ("Memorandum"); the Settlement Agreement (Docket No. 134-1); the Declaration of Cameron R. Azari, Esq. on Implementation and Adequacy of Notice Plan and Notices ("Azari Decl."); the Amazon Declaration Regarding Notice (Docket No. 151-2, "Amazon Decl."); the Attorney Fee Motion (Docket No. 145-147); exhibits, records, pleadings, and other papers filed in this action; and the arguments presented to the Court at the hearing of this Motion, the Court hereby finds, for the reasons stated herein and those in the Order Granting Preliminary Approval of the Class Action Settlement (Docket No. 137) that the Motion for Final Approval and the Motion for Attorney Fees, Reimbursement of Expenses, and Class Representative Service Awards are **GRANTED**.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Court has jurisdiction over the subject matter of this litigation and over the Parties to the Settlement Agreement, including Plaintiffs and all members of the Settlement Class (also referred to herein as the “Class”), and Defendants.

2. For purposes of this Order, except as otherwise set forth herein, the Court adopts and incorporates the definitions contained in the Settlement Agreement.

3. Pursuant to Fed. R. Civ. P. 23(g), Jeffrey S. Goldenberg, Rosemary M. Rivas, and Kenneth A. Wexler are appointed Co-Lead Counsel, having previously been appointed by the Court as Interim Co-Lead Counsel as they have, and will, fairly and competently represent the interests of the Class.

4. Pursuant to Federal Rule of Civil Procedure 23, the Court determines that the following Settlement Class be certified: “All persons and entities residing in the United States who purchased one or more of the Midwestern Pet Food Products.” Specifically excluded from the Settlement Class are the following:

- (a) the plaintiffs in *Simmons v. Midwestern Pet Foods, Inc.*, Case No. 6:21-cv- 03012 (W.D. Mo. 2021);
- (b) persons or entities whose claims are solely based upon the purchase of Midwestern Pet Food Products for resale;
- (c) persons or entities who previously entered into with Defendants a settlement and release of their claims related the Midwestern Pet Food Products;
- (d) corporate officers, members of the board of directors, and senior management of Defendants;
- (e) any and all judges and justices, and chambers’ staff, assigned to hear or adjudicate any aspect of this litigation;

- (f) any members of the Settlement Class that opt out prior to the opt out deadline;
- (g) any entity in which Defendants have a controlling interest, and their legal representatives, officers, directors, employees, assigns and successors; and
- (h) Class Counsel.

5. The Court further finds that the prerequisites to a class action under Rule 23 are satisfied for settlement purposes in that: (a) there are hundreds of thousands of geographically dispersed class members, making joinder of all members impracticable; (b) there are questions of law and fact common to the class that predominate over individual issues; (c) the claims or defenses of the named plaintiffs are typical of the claims or defenses of the class members; (d) the named plaintiffs will fairly and adequately protect the interests of the class, and have retained counsel experienced in class action litigation who have, and will continue to, adequately represent the class; and (e) a class action is superior to individual actions.

6. The Court hereby finally approves and confirms the settlement set forth in the Settlement Agreement and finds that said Settlement is, in all respects, fair, reasonable, and adequate to the Class pursuant to Rule 23 of the Federal Rules of Civil Procedure.

7. There is no question that the Parties are at arm's length. The Settlement Agreement is the result of extensive, non-collusive, arm's-length negotiations between experienced counsel who were thoroughly informed of the strengths and weaknesses of the case through mediation- related discovery and whose negotiations were supervised by respected class-action mediator, the Honorable Wayne R. Andersen (Ret.) of JAMS.

8. The Settlement creates a \$6,375,000 Settlement Fund from which Settlement Class Members may submit Pet Injury Claims and/or Consumer Food Purchase Claims. Settlement Class Members who file valid Pet Injury Claims and / or valid Consumer Food

Purchase Claims shall have those claims adjudicated and paid according to the Plan of Allocation attached as Exhibit D to the Settlement Agreement and Release which the Court has reviewed and has already preliminarily approved. (Docket No. 137).

9. The Settlement Agreement and the Plan of Allocation provide adequate relief to the proposed Settlement Class. If the Settlement Agreement had not been reached, the Parties planned to vigorously contest class certification and anticipated motions for summary judgment from Defendants, and Plaintiffs' chances at trial also would have been uncertain. In light of the costs, risks and delay of trial and appeal, the compensation offered by this Settlement is at least adequate for purposes of Rule 23(e)(1).

10. No agreements exist between the Parties aside from those referred to in the Settlement Agreement and/or submitted to the Court.

11. The Settlement Agreement and the Plan of Allocation treat members of the proposed Settlement Class equitably relative to each other because all members of the proposed Settlement Class were eligible to submit Pet Injury Claims and/or Consumer Food Purchase Claims. The Settlement is specifically designed to apportion relief among class members in proportion to the harms they have suffered and the relative strengths of their claims. For instance, Settlement Class members with documentation supporting their claimed damages are entitled to a greater share of the Settlement proceeds than those do not. These are equitable terms.

12. The Court approves the payments provided for in the Settlement Agreement to the Settlement Class Members consistent with the Plan of Allocation.

13. The notice given to the Class was the best notice practicable under the circumstances. Said notice provided due and adequate notice of the proceedings and of the matters set forth therein, including the proposed settlement set forth in the Settlement

Agreement, to all persons entitled to such notice, and said notice fully satisfied the requirements of due process.

14. No timely objections to the Settlement were filed, and this is a strong indication that the Settlement was well received by the Class and is fair, adequate and reasonable.

15. This Court hereby dismisses with prejudice the action against the Settling Defendants, with each party to bear their own costs and fees, including attorneys' fees, except as provided in the Settlement Agreement.

16. The Court incorporates the releases defined in the Settlement Agreement, and Settlement Class Members are hereby and forever barred from commencing or continuing against the Defendants any of the Released Claims as defined in the Settlement Agreement.

17. The Defendants are hereby and forever released from all Released Claims as defined in the Settlement Agreement.

18. Any member of the Class who failed to timely and validly request to be excluded from the Class shall be subject to and bound by the provisions of the Settlement Agreement, the Released Claims contained therein, and this Order (and the related Final Judgment) with respect to all Released Claims, regardless of whether such members of the Class seek or obtain any distribution from any Settlement Fund. This Release includes equitable, injunctive, and monetary claims within the scope of the Settlement Class definition.

19. The two persons who validly requested to be excluded from the Class are listed in Exhibit 10 to the Azari Declaration and shall be excluded from the Class.

Continuing Jurisdiction and Final Judgment

20. Without affecting the finality of this Final Judgment in any way, this Court hereby retains continuing exclusive jurisdiction over: (a) consummation, administration,

interpretation, and implementation of the Settlement Agreement and distribution to Settlement Class members pursuant to further orders of this Court; (b) disposition of the Settlement Fund; (c) hearing and determining applications by plaintiffs for attorneys' fees, costs, expenses, and interest; (d) the actions in this litigation until the Final Judgment has become effective and each and every act agreed to be performed by the Parties all have been performed pursuant to the Settlement Agreement; (e) hearing and ruling on any matters relating to any plan of allocation or distribution of proceeds from the Settlements; (f) the parties to the Settlement Agreements for the purpose of enforcing and administering the Settlement Agreement and the releases contemplated by, or executed in connection with the Settlement Agreement; (g) the enforcement of this Final Judgment; and (h) over any suit, action, proceeding, or dispute arising out of or relating to the Settlement Agreement or the applicability of the Settlement Agreement, that cannot be resolved by negotiation and agreement.

21. In the event that the settlement does not become effective in accordance with the terms of the Settlement Agreement, then the Final Judgment shall be rendered null and void and shall be vacated, and in such event, all orders entered, and releases delivered in connection herewith shall be null and void and the Parties shall be returned to their respective positions *ex ante*.

22. The Court finds, pursuant to Rules 54(a) and (b) of the Federal Rules of Civil Procedure, that judgment should be entered and further finds that there is no just reason for delay in the entry of final judgment as to the parties to the Settlement Agreement. Accordingly, the Clerk is hereby directed to enter this Final Judgment forthwith.

**Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses,
and Class Representative Service Awards**

23. This Court has also fully assessed and grants Plaintiffs' Motion for Award of

(1) Attorneys' Fees, (2) Reimbursement of Expenses, and (3) Class Representative Service Awards. Class Counsel's requested attorneys' fee award of \$2,124,788 represents 33.33 percent of the total Settlement Fund, well within the 33 to 40 percent range commonly awarded by courts in the Seventh Circuit in common fund cases and is therefore reasonable. *See e.g., Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) (noting typical contingent fee is between 33 and 40% and upholding award of 38% of a \$20 million settlement); *Heekin v. Anthem, Inc.*, Case No. 1:05-cv-01908-TWP-TAB, 2012 WL 5878032, *3 (S. D. Ind. Nov. 20, 2012) (compiling cases awarding 33.33% or more of the common fund in attorneys' fees). Additional factors set forth in Plaintiffs' motion papers support the fee request, including: the substantial risk of non-payment; Class Counsel's performance; the complexity, length, and expense of the litigation; and the stakes of the litigation. *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *8 (S.D. Ill. Dec. 16, 2018) (citing *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718-19 (7th Cir. 2001)). The Court also notes that no objections to Class Counsel's request were filed. Co-Lead Counsel, Jeffrey S. Goldenberg, Rosemary M. Rivas, and Kenneth A. Wexler are authorized to, and shall, allocate the attorneys' fees and expense reimbursement funds to those attorneys for the Plaintiffs and the Class based upon Co-Lead Counsel's determination of each such attorney's contributions and efforts to this litigation.

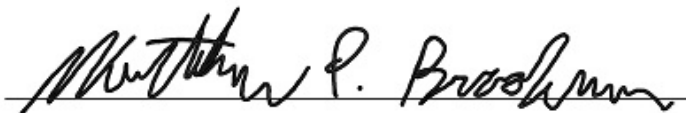
24. The Court also grants Class Counsel's request for reimbursement of litigation expenses totaling \$71,759.16, finding the expenses to have been reasonably incurred to litigate the Action in the best interests of the Class and to achieve the favorable Settlement. *See Mills v. Elec. Auto-Lite Co.*, 396 U.S. 275, 392 (1970) (recognizing counsel's right to reimbursement of expenses where a common fund has been established for the benefit of a class). *See also In re Ready-Mixed Concrete Antitrust Litig.*, Case No. 1:05-cv-00979-SEB-TAB, 2010 WL 3282591, at *3 (S. D. Ind. Aug. 17, 2010).

25. The Court approves the requested service award to each named Class Representative of \$3,500 for their considerable time and effort in initiating, prosecuting, and supporting the case. *Cook v. Neidert*, 142 F.3d 1004, 1016 (7th Cir. 1998). The Court has reviewed declarations from each of the named Class Representatives (Docket No. 147-2) reflecting the time and effort Class Representatives contributed to protect the interests of the Class in pursuing the litigation and finds that the Class has benefitted from those actions as manifested in the favorable Settlement that has been achieved. *Cook*, 142 F.3d at 1016.

Judgment consistent with this Order shall now issue by separate entry.

SO ORDERED.

Date: 8/21/2023

A handwritten signature in black ink, reading "Matthew P. Brookman", written over a horizontal line.

Matthew P. Brookman, Judge
United States District Court
Southern District of Indiana

Distributed electronically to all CM/ECF counsel of record.