UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CRYSTAL HILSLEY, et al.,

Plaintiffs,

v.

GENERAL MILLS, INC. et al.,

Defendants.

Case No.: 3:18-cv-00395-L-BLM

CLASS ACTION

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND GRANTING MOTION TO INTERVENE

[ECF Nos. 45, 52]

In this putative class action alleging deceptive food labeling, Plaintiffs filed an unopposed motion for preliminary settlement approval. (ECF No. 45, "Prelim. Approval Mot."). David Hayes, a named plaintiff in a related putative class action pending in the Northern District of Illinois, filed a motion to intervene, which Plaintiffs opposed. (ECF No. 52.) The Court decides these matters on the briefs without oral argument. *See* Civ. L. R. 7.1(d)(1). For the reasons stated below, the Preliminary Approval Motion is denied and the motion to intervene is granted.

I. BACKGROUND

Plaintiffs, consumers who purchased fruit flavored snacks manufactured by Defendant General Mills, Inc. ("General Mills"), brought this putative class action

alleging that the product label was misleading because it falsely claimed that the snacks had "no artificial flavors" and were "naturally flavored," although they contained d-l malic acid as an artificial flavoring. (ECF no. 1-2, Class Action Compl. ("Compl.") ¶¶ 46, 47, 53.) According to the complaint, d-l malic acid is a "synthetic petrochemical." (*Id.* ¶ 50.) Plaintiff claimed that it "simulates, resembles, and reinforces the characterizing fruit flavor of the Products." (*Id.* ¶ 72; *see also id.* ¶52.) Specifically, d-l malic acid "confers a tart, fruit-like flavor" to "help[] make the Products – which are over 50% corn syrup and sugar – taste more like fruit." (*Id.* ¶¶ 50 (internal quotation marks omitted), 59.)

The initial complaint alleged violations of California Unfair Competition Law, California False Advertising Law, and California Consumer Legal Remedies Act, as well as breach of express and implied warranties. Plaintiff filed the complaint in State court. Defendants removed the action to federal court. The court has subject matter jurisdiction pursuant to 28 U.S.C. §1332.

Defendants filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). They argued that General Mills used d-l malic acid as a pH control agent and not as an artificial flavor. (*See generally* ECF no. 13-1 (Defs' mot. to dismiss).) At the pleading stage, the court did not resolve the factual dispute whether malic acid in the fruit snacks was used as a flavoring ingredient or a pH balancing agent. (ECF no. 17 (order) at 4.) *See Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997, 999 n.3 (9th Cir. 2006) (the court must assume the truth of the factual allegations in the complaint and construe them most favorably to the moving party). Defendants' motion was denied insofar as Plaintiff's theory of liability was based on the contention that the products were mislabeled because the packaging falsely stated they were "naturally flavored" and had "no artificial flavors."

Defendants answered the complaint, the parties participated in an early neutral evaluation conference, and commenced discovery. (ECF no. 45-2, Decl. of Ronald A. Marron ("Marron Dec.") at 2.) During discovery, the parties entered settlement

negotiations and mediation. (*Id*. at 3.) The negotiations included a related action, prosecuted by the same counsel who represent Plaintiffs herein, pending in the Central District of California, *Morris et al. v. Motts LLP at al.*, case no. 18cv1799 (the "Morris Action"). (*Id.*) The Morris Action alleged essentially the same claims about fruit flavored snacks manufactured by General Mills which were sold under the Motts brand. (*Id*. at 2.) General Mills was one of the named defendants. (*Id* at 3.) On March 9, 2020, the parties "finalized the terms of the settlement." (*Id.* at 4.)

As a part of the settlement, the Morris Action was dismissed and incorporated into the amended complaint filed in this action. (*See* ECF no. 45-3, Marron Dec. Ex. 1 ("Settlement Agreement") ¶¶ 1.6, 1.7.) Consistent with the Settlement Agreement, the amended complaint expanded what was previously a class of California consumers to a nationwide class action.[1] (*Cf.* Compl. ¶ 116 *with* ECF no. 41, First Am. Compl. ("FAC" or "amended complaint")[2] ¶ 88; *see also* Settlement Agreement ¶ 2.3.)

Under the proposed settlement, Defendants promised to change the product packaging to "display an asterisk or a similar reference immediately following or adjacent to the 'No Artificial Flavors' claim that directs the consumer to the statement '*Learn More at [the General Mills website].'" (Settlement Agreement ¶ 5.2.b.) In this regard, the General Mills website would

> disclose[] in substance the following points: (1) that . . . the flavors in the Products bearing the Challenged Claims come from all natural sources; (2) that General Mills identifies "natural flavors" in the ingredient list in

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[1] The amended complaint also added David Cook as a plaintiff residing in Minnesota, omitted the breach of warranty claims, added certain fraud and unjust enrichment claims, added a claim under a Minnesota consumer fraud statute, and included additional products. (*Cf.* Compl. at 5, 11, 17-24 *with* FAC at 3-4, 19-27 and Ex. 1.)

[2] Plaintiffs neglected to accompany the amended complaint with a redlined version showing the variances between the initial and first amended complaints. *See* Civ. L. R. 15.1(c).

> accordance with FDA regulations; and (3) that . . . the Products may also contain synthetic malic acid or other acidulants. Malic acid is intended for use not as a flavor or to impart the characterizing flavor of these Products, but is a substance the FDA approves for multiple uses including a flavor enhancer, a flavoring agent or adjuvant, or as a pH control agent. 21 C.F.R. § 184.1069.

(Settlement Agreement ¶ 5.2.a.) These statements would be provided on General Mills website for four years. (*Id.* ¶ 5.2.b.) In addition, General Mills promised not to object to Plaintiffs' application for $725,000 in attorneys' fees, costs and expenses, and a $5,000 incentive award to each of the four named Plaintiffs. (*Id.* ¶ 10.1.) Finally, Defendants agreed to pay the costs of notice and settlement administration. (*Id.* ¶ 6.1.) In exchange, the nationwide class would broadly release all of its claims against Defendants, including the claims for monetary relief pled in the amended complaint.[3] (*Cf. id.* ¶ 7.1 *with* FAC at 29.)

II. DISCUSSION

A. Motion for Preliminary Approval

According to the terms of the settlement, Plaintiffs filed the pending Settlement Approval Motion. (*See* Settlement Agreement ¶ 9.1.) Defendants filed a non-opposition, together with three expert reports. (ECF no. 46 ("Non-Opp'n").) For the reasons stated below, the motion is denied.

To order notice to the putative class of the proposed settlement, the court must find that it

> will likely be able to
> (i) approve the proposal under Rule 23(e)(2); and
> (ii) certify the class for purposes of judgment on the proposal.

Fed. R. Civ. Proc. 23(e)(1)(B).

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[3] The release also appears to exceed the permissible scope. *See Hesse v. Sprint Corp.*598 F.3d 581, 590 (9th Cir. 2010).

If, as here, the proposed settlement "would bind the class members, the court may approve it . . . only on finding that it is fair, reasonable, and adequate." Fed. R. Civ. Proc. 23(e)(2). "[S]ettlement of class actions present[s] unique due process concerns for absent class members [in part because] class counsel may collude with the defendants, tacitly reducing the overall settlement in return for a higher attorney's fee." *In re Bluetooth Headset Prod. Liability Litig.*, 654 F.3d 935, 946 (9th Cir. 2011);[4] *see also Evans v. Jeff D.*, 475 U.S. 717, 733 (1986) (noting the possibility of tradeoff between merits relief and attorneys' fees often implicit in class action settlement negotiations.) The court's role in reviewing class action settlements "is to police the inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees." *Staton v. Boeing Co.*, 327 F.3d 938, 972 n.22 (9th Cir. 2003); *see also Bluetooth*, 654 F.3d at 946.

In this regard, the court considers whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. Proc. 23(e)(2).

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[4] Unless otherwise noted, internal quotation marks, citations, brackets, and footnotes are omitted from citations.

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