

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANTHONY BELFIORE, on behalf of himself
and others similarly situated,

Plaintiff,

v.

PROCTER & GAMBLE CO.,

Defendant.

Case No. 2:14-cv-04090-PKC

ORDER GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT

RECITALS

On May 23, 2014, Anthony Belfiore filed a class action complaint against the Procter & Gamble Company (“P&G”) in the Supreme Court of the State of New York, County of Nassau, Case No. 602364/2014 (the “Action”). On July 1, 2014, P&G removed the Action to the United States District Court, Eastern District of New York, where it was assigned Case No. 2:14-cv-04090-JBW-RML, now 2:14-cv-04090-PKC-RML.

Plaintiff Belfiore (“Class Representative”) has moved the Court for preliminary approval of a proposed class action settlement with P&G, the terms and conditions of which are set forth in the Settlement Agreement filed with the Court on March 5, 2020 (“Settlement Agreement”).

This Action concerns the marketing and labeling of Charmin Freshmates Flushable Wipes and any other pre-moistened wipes sold under the Charmin brand name bearing the word “flushable” on the package label (the “Product”). Plaintiff alleges that the Product is mislabeled as “flushable,” “septic safe,” and “safe for sewer and septic systems” because the Product is not suitable for flushing. In particular, Plaintiff alleges that the Product is not appropriate for disposal in the sewer system and that the Product is not likely to dissolve and disperse in a sufficiently limited amount of time, which made them likely to clog toilets, drainlines, sewer pipes, and sewage treatment facilities.

Plaintiff contends that, by marketing the wipes as “flushable,” “septic safe,” and “safe for sewer and septic systems,” P&G was able to sell the Product at a higher price than it would have been sold without the misstatements. Plaintiff seeks to recover, on behalf of a class of all purchasers who purchased the Product in New York (except for re-sellers), the dollar amount of the price “premium” that is attributable to the alleged misrepresentations. Belfiore alleges in his complaint that P&G is liable for violation of New York General Business Law § 349.

P&G denies that there is any factual or legal basis for Plaintiff’s allegations. P&G contends that the labeling of the Product is truthful and non-misleading. It also denies that purchasers paid a “premium” for the Product as the result of any misrepresentations. P&G therefore denies any liability. P&G also denies that Plaintiff or any other members of the settlement class have suffered injury or are entitled to monetary or other relief. P&G also denies

that this case was properly certified as a class action, except for purposes of settlement.

Substantial discovery was taken by the parties. For example, P&G produced thousands of pages of documents and four 30(b)(6) witnesses for depositions. Plaintiff Belfiore responded to discovery requests, had his home plumbing inspected, and was deposed, as was his wife and plumber. Third parties were subpoenaed. The parties each retained experts, three of whom were deposed.

The terms of the settlement are summarized in the proposed Long Form Notice to Settlement Class Members, which is attached as Exhibit B1 to the Settlement Agreement. In brief, in a 49-state class settlement (excluding New York) approved in *Pettit v. Procter & Gamble Company*, 15-cv-2150 (RGS) (N.D. Cal.) (“*Pettit*”) involving a similar challenge to the Product, P&G agreed to the entry of a court order requiring, until two years after the effective date of the *Pettit* settlement, to change the formulation of the Product, agreed to stricter testing protocols announced by the industry association INDA, and modify its labeling of the Product to include the statements “Use only in well-maintained plumbing systems” and “Your satisfaction is guaranteed. For details of our refund program go to our website at <https://www.charmin.com/en-us/about-us/flushable-wipes-guarantee>.” P&G provides details regarding the satisfaction guarantee on the Charmin website, including reasonable purchase price refunds to consumers who are dissatisfied with the product. P&G agreed to the terms of the *Pettit* settlement partly as a result of this Action and has agreed to continue the injunction in the *Pettit* action for a period of two years from the Effective Date of the settlement.

Additionally, P&G has agreed to modify its labeling on future newly packaged Product to exclude the statements “septic safe,” and “safe for sewer and septic systems.” These changes will be incorporated in a court injunction. In addition, all Settlement Class Members may submit a claim for a refund of \$1.20 per package with proof of purchase (and \$1.00 for any additional Product packages with proof of purchase), up to a total of \$50.20 per household. Valid claims will be paid even without proof of purchase, in the amount of \$0.70 per Product package up to a total of \$6.30 per household.

As part of the settlement, Plaintiff's counsel may apply to this Court to award them up to \$3,200,000 from P&G to pay their attorneys' fees, costs, and expenses. They may also apply to this Court for a payment up to \$10,000 to the Class Representative from P&G. Such amounts must be approved by the Court, and the Court will defer any ruling on the appropriateness of such awards until the final approval hearing.

Having considered all matters submitted to it at the hearing on the motion and otherwise, including the complete record of this Action, and good cause appearing therefore, the Court grants preliminary approval and hereby finds and concludes as follows:

1. The capitalized terms used in this Order shall have the same meaning as defined in the Settlement Agreement except as otherwise expressly provided.

2. The Court preliminarily approves the Settlement Agreement as within the range of possible final approval, and as meriting submission to the Settlement Class for its consideration. The Settlement Agreement was reached as a result of arm's length negotiations between the Parties and their counsel. Additionally, before entering into the Agreement, Plaintiff's Counsel reviewed thousands of pages of documents produced by P&G, took depositions of P&G's employees, requested and received written discovery responses from P&G and third parties, and conducted expert discovery. The Parties also briefed numerous motions, including: a motion for class certification which was granted by the Court, although P&G has appealed that decision; multiple motions by P&G to decertify the Class; and motions to dismiss and for summary judgment. Thus, Plaintiff and his counsel had sufficient information to evaluate the strengths and weaknesses of the case and to conduct informed settlement discussions.

3. For purposes of the settlement only, the Court certifies the Settlement Class, which consists of all Persons who purchased the Product in the United States between May 24, 2011 and the date of Preliminary Approval, excluding purchases made outside the State of New York and purchases made for purposes of resale. Excluded Persons from the settlement are (1) Honorable Pamela K. Chen, Honorable Jack B. Weinstein, Honorable Robert M. Levy and

Honorable Steven M. Gold, and any member of their immediate families; (2) any government entity; (3) P&G; (4) any entity in which P&G has a controlling interest; (5) any of P&G's subsidiaries, parents, affiliates, and officers, directors, employees, legal representatives, heirs, successors, or assigns; (6) any person or entity who purchased the Product for resale; and (7) any persons who timely excludes themselves from the Settlement Class.

4. The Court preliminarily finds and concludes, solely for purposes of considering this settlement, that the requirements of Rule 23 of the Federal Rules of Civil Procedure are conditionally satisfied for certification of the Settlement Class to pursue claims under the consumer protection law of New York. Plaintiff has met the requirements of Rule 23 for the reasons set forth in Plaintiff's motion for preliminary approval, as well as for the reasons stated in the Court's order granting certification of the class and the briefing and arguments provided by Mr. Belfiore in support of that motion. For those reasons, this Court finds that common issues predominate with respect to the Settlement Class.

5. The Court conditionally designates the law firm of Wolf Popper LLP as Settlement Class Counsel and Anthony Belfiore as Class Representative for purposes of this settlement. The Court preliminarily finds that the Class Representative and Class Counsel fairly and adequately represent and protect the interests of the absent Settlement Class Members. The Court designates, and approves, Heffler Claims Group to serve as Claim Administrator.

6. Since the Settlement Agreement is within the range of reasonableness and possible final approval, notice shall be provided to the Settlement Class pursuant to the Settlement Agreement as set forth in the Notice Plan. The Claim Administrator shall provide notice in compliance with 28 U.S.C. § 1715. As set forth in the Notice Plan, the Claim Administrator shall do the following:

a. At least ten (10) business days prior to the Notice Date, the Claim Administrator shall establish the Settlement Website, which shall contain the Long Form Notice in both downloadable PDF format and HTML format with a clickable table of contents; answers to frequently asked questions; a Contact Information page that includes the address for the Claim

Administrator and addresses and telephone numbers for Plaintiff's Counsel; the Settlement Agreement; the signed order of Preliminary Approval and publicly filed motion papers and declarations in support thereof; a downloadable and online version of the Claim Form; and a downloadable and online version of the form by which Settlement Class Members may exclude themselves from the Settlement Class. The Claim Administrator shall add to the Settlement Website all other material filings by the Parties or the Court regarding the settlement, including Plaintiff's application for attorneys' fees, costs, expenses and/or a payment to the Class Representative, the motion for final approval, and any orders with respect to such applications and motions.

b. The Claim Administrator shall cause the Published Notice to be published in accordance with the Notice Plan as soon as practicable after the Notice Date.

c. The Claim Administrator shall initiate the process of providing the Online Notice on websites as set forth in the Notice Plan, so that overall notice of the Settlement (including the Online Notice and the Publication Notice) is reasonably calculated to apprise the Settlement Class Members of the Settlement.

d. The Claim Administrator shall issue the Published Notice as a press release, as further described in the Notice Plan.

e. The Claim Administrator shall set up the toll-free number as further described in the Notice Plan.

7. A Final Approval Hearing shall be held before this Court at **11:00 a.m. on July 23, 2020**, in Courtroom 4F North, at the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn NY 11201, to address: (a) whether the proposed settlement should be finally approved as fair, reasonable, and adequate, and whether the Final Approval Order should be entered, and (b) whether Class Counsel's application for attorneys' fees, costs, expenses and payment to the Class Representative should be approved.

8. The Court approves, as to form and content, Notices that are substantially similar to the forms attached as Exhibits B1 to B3 to the Settlement Agreement, as well as a Claim Form

that is substantially similar to the form attached to this Order as Exhibit 1. The Claim Form and all the notices are written in plain English and are easy to comprehend. The Parties shall have discretion to jointly make non-material minor revisions to the claim form and Notices before publishing. Responsibility for settlement administration, including, but not limited to, notice and related procedures, shall be performed by the Claim Administrator, subject to the oversight of the Parties and this Court as described in the Settlement Agreement.

9. The Court finds that the Parties' plan for providing notice to the Settlement Class is reasonably calculated to provide notice to the Settlement Class of the pendency of the Action, certification of the Settlement Class, the terms of the Settlement Agreement, and the Final Approval hearing, and complies fully with the requirements of the New York and United States Constitutions, Rule 23 of the Federal Rules of Civil Procedure, and any other applicable law. The Parties and the Claim Administrator shall comply with the Notice Plan as set forth in the Settlement Agreement.

10. Any member of the Settlement Class who desires to be excluded from the Settlement Class, and therefore not be bound by the terms of the Settlement Agreement, must submit a request for exclusion to the Claim Administrator, pursuant to the instructions set forth in the Long Form Notice. The request must be submitted online no later than **June 25, 2020**, or if mailed, it must be received by the Claim Administrator (not just postmarked) no later than **June 25, 2020**. No one shall be permitted to exercise any exclusion rights on behalf of any other Person, whether as an agent or representative of another or otherwise, except upon proof of a legal power of attorney, conservatorship, trusteeship, or other legal authorization, and no one may exclude other Persons within the Settlement Class as a group, class, or in the aggregate.

11. No later than three (3) days after **June 25, 2020**, the Claim Administrator shall prepare and deliver to the Parties a list of the names of the Persons who, pursuant to the Long Form Notice, have excluded themselves from the Settlement Class in a valid and timely manner. Plaintiff's Counsel shall file that list with the Court no later than **July 9, 2020**. The Court retains jurisdiction to resolve any disputed exclusion requests.

12. Any member of the Settlement Class who elects to be excluded shall not receive any benefits of the settlement, shall not be bound by the terms of the Settlement Agreement, and shall have no standing to object to the settlement or intervene in the litigation. If the settlement is granted final approval, all Settlement Class Members who do not timely submit a valid request for exclusion will be bound by the order of final approval and final judgment, and enjoined from bringing or prosecuting any action relating to the released claims.

13. Any Settlement Class Member who does not submit a valid and timely request for exclusion may submit an objection to the Settlement Agreement. The written objection must satisfy the requirements described in the Long Form Notice. An objection must be electronically filed or received (and not just postmarked) no later than **June 25, 2020**, or it will be rejected.

14. Any Settlement Class Member shall have the right to appear and be heard at the Final Approval hearing, either personally or through an attorney retained at the Settlement Class Member's own expense, provided they file a request to be heard and/or objection as described in the Long Form Notice. However, if the Settlement Class Member wishes to object to the settlement at the Final Approval hearing (either personally or through counsel), the Settlement Class Member must submit a written objection as set forth in the prior paragraph of this Order.

15. Immediately upon receipt of any objection, the Claim Administrator shall forward the objection and all supporting documentation to counsel for the Parties. No later than **July 9, 2020**, Plaintiff's Counsel shall file all such objections and supporting documentation with the Court.

16. Plaintiff shall file his motions for Final Approval and for any award of attorneys' fees, costs, expenses, and Class Representative Payment no later than **June 11, 2020**, and the reply in support of that motion and responses to any objections and requests to intervene no later than **July 9, 2020**. Those motions and all supporting documentation shall simultaneously be posted to the Settlement Website.

17. No later than **July 9, 2020**, the Claim Administrator shall provide a declaration to the Court regarding the number and dollar amount of claims received to date.

18. In the event that the proposed settlement is not finally approved by the Court, or in the event that the Settlement Agreement becomes null and void or terminates pursuant to its terms, this Preliminary Approval Order and all orders entered in connection herewith shall become null and void, shall be of no further force and effect, and shall not be used or referred to for any purposes whatsoever in these cases or in any other case or controversy; in such event the Settlement Agreement and all negotiations and proceedings directly related thereto shall be deemed to be without prejudice to the rights of any and all of the Parties, who shall be restored to their respective positions as of the date and time immediately preceding the execution of the Settlement Agreement.

19. This Order shall not be construed as an admission or concession by P&G of the truth of any allegations made by the Plaintiff or of liability or fault of any kind. This Order shall also not be construed as an admission or concession by Plaintiff of any weakness or infirmity of any claim or allegation made by the Plaintiff in this Action.

20. The Court may, for good cause, extend any of the deadlines set forth in this Order without further notice to the Settlement Class Members. The Final Approval Hearing may, from time to time and without further notice to the Settlement Class Members, be continued by Order of the Court. However, any continuance by the Court will be noted on the Settlement Website.

SO ORDERED.

/s/ Pamela K. Chen

Pamela K. Chen

United States District Judge

Dated: March 6, 2020
Brooklyn, New York