

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE: BLUE BUFFALO COMPANY,)
LTD., MARKETING AND SALES)
PRACTICES LITIGATION)
) Case No. 4:14-MD-2562 RWS
)
)

FAIRNESS HEARING
BEFORE THE HONORABLE RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE
MAY 19, 2016

APPEARANCES:

For Plaintiffs: Scott A. Kamber
Deborah Kravitz
KAMBER LAW, LLC
100 Wall Street, 23rd Floor
New York, NY 10005

Don Downing
GRAY, RITTER & GRAHAM
701 Market Street, Suite 800
St. Louis, MO 63101

John G. Simon
THE SIMON LAW FIRM, P.C.
800 Market Street
Suite 1700
St. Louis, MO 63101

(Appearances Continued on Page 2)

REPORTED BY: SHANNON L. WHITE, RMR, CRR, CSR, CCR
Official Court Reporter
United States District Court
111 South Tenth Street, Third Floor
St. Louis, MO 63102
(314) 244-7966

PRODUCED BY COURT REPORTER COMPUTER-AIDED TRANSCRIPTION

APPEARANCES CONTINUED:

For Plaintiffs: Ryan A. Keane
KEANE LAW LLC
PO Box 16795, Suite 1700
St. Louis, MO 63105

David L. Steelman
STEELMAN, GAUNT & HORSEFIELD
901 Pine Street, Suite 110
Rolla, MO 65402

Joseph I. Marchese
BURSOR AND FISHER, P.A.
888 Seventh Avenue
New York, NY 10019

Matthew H. Armstrong
ARMSTRONG LAW FIRM, LLC
8816 Manchester Road
St. Louis, MO 63144

For Defendant Blue Buffalo: Steven A. Zalesin
PATTERSON AND BELKNAP
1133 Avenue of the Americas
New York, NY 10036

For Third-Party Defendant Diversified Ingredients: Matthew S. McBride
Patrick E. Foppe
LASHLY AND BAER, P.C.
714 Locust Street
St. Louis, MO 63101

For Third-Party Defendant Custom Ag: Edward J. O'Reilly
FRANKE AND SCHULTZ, P.C.
8900 Ward Parkway
Kansas City, MO 64114

Also present: Michael Duggar, Objector

Elizabeth Philippus, Objector

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(PROCEEDINGS BEGAN AT 10:48 AM.)

THE COURT: Good morning. We're here this morning in the case styled *In Re: Blue Buffalo Company, Ltd., Marketing and Sales Practices Litigation*, 4:14-MD-2562. Would counsel for the parties make their appearances, please?

MR. KAMBER: Good morning, Your Honor. Scott Kamber and Deborah Kravitz from Kamber Law on behalf of plaintiffs.

MR. DOWNING: Don Downing on behalf of the plaintiffs.

MR. MARCHESE: Morning, everyone. Joseph Marchese on behalf of the plaintiffs.

MR. SIMON: John Simon on behalf of plaintiffs.

MR. STEELMAN: David Steelman on behalf of plaintiffs.

THE COURT: On behalf of -- I'm sorry. More plaintiffs.

MR. FOPPE: Matt Foppe and Matthew McBride with Lashly & Baer on behalf of Diversified Ingredients. Thank you, Your Honor.

MR. O'REILLY: Ed O'Reilly on behalf of Custom AG.

MR. ZALESIN: Morning, Your Honor. Steve Zalesin on behalf of Blue Buffalo.

THE COURT: And we have some objectors in person; is that correct? Who's present to object? Yes, ma'am.

MS. PHILIPPUS: Correct. Elizabeth Philippus.

1 MR. DUGGAR: Michael Duggar.

2 THE COURT: Thank you, sir.

3 All right. We are here today for a hearing on the
4 settlement agreement, class certification, and award of
5 attorneys' fees in the form of a fairness hearing. So who on
6 behalf of the plaintiffs is going to make the presentation as
7 to the nature of the settlement and whether or not it should
8 be approved?

9 MR. KAMBER: I will, Your Honor.

10 THE COURT: Okay. If you would proceed, please.

11 MR. KAMBER: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. KAMBER: I'm here on behalf of the plaintiffs to
14 present that the settlement should be finally approved and is
15 fair, reasonable, and adequate. When we appeared here a few
16 short months ago, we presented what we believed to be a very
17 good settlement, which we appreciated was approved by the
18 Court preliminarily.

19 When coming back here and looking at the claims
20 experience in this case, we could unequivocally say that the
21 settlement, as good as we thought it was, is actually better
22 in the benefit that it provided to the class members who filed
23 claims and to the success of the notice program and the
24 overall amount of claims.

25 Rather than duplicating what is in our papers, Your

1 Honor, I'd like to focus on the claims process and go through
2 that since most of the -- many of the other arguments are
3 similar to what they were when we were before you for
4 preliminary approval. I wanted to walk through the claims
5 process and how it worked and why we believe it was a success
6 and is deserving of final approval.

7 The claims process, as the Court knows, had two
8 options: Option 1 for people without proofs of purchase, and
9 Option 2 is for people with proof of purchase. As we set
10 forth in the notice, claimants for Option 1 could receive 10
11 percent of up to \$100 worth of purchases. Option 2 purchasers
12 could receive up to 10 percent of purchases of \$2,000, coming
13 to \$200.

14 The reason that there was a requirement for proof of
15 purchase for the larger claims is as has been the case in
16 many, many settlements: There becomes an issue with respect
17 to possible fraud and the need for a process that would wind
18 up being fair yet not unduly burdensome to everyone. In case
19 people did not save all their receipts, there was still a
20 benefit that could be provided but also balancing that with
21 fraud and the issues that are necessarily incumbent in the
22 claims process and people just being able to go online and get
23 up to \$200.

24 A notice went out -- as set forth in the Finegan
25 declaration, notice went out by email to 1.97 million people.

1 That is actually more emails than we thought we had when we
2 made the presentation for preliminary approval. In addition,
3 there was further notice through publication, which
4 collectively, as due process notice, you had great penetration
5 to the class, with the average class member receiving notice
6 from four different places.

7 In addition, there was a stimulation program which
8 was above and beyond the due process notice program. There
9 was social media and other internet forms of notice which were
10 intended to increase the claims rate by making -- by acting as
11 a reminder about filing claims and more of a call to action
12 than just a simple notice from the due process notice.

13 What did that translate to, Your Honor? Overall, it
14 translated to over 100,000 claims being filed. It was 100,000
15 claims were filed prior to the deadline, 100,892. An
16 additional 4,281 were filed after April 14 but before May 10.

17 Collectively, there were -- of purchases for Option
18 1, that is, purchases that were up to a maximum of \$100, there
19 were \$7.7 million worth of claims that were submitted -- with
20 purchases that were submitted in Option 1. With respect to
21 Option 2, there were \$12.5 million worth of purchases.

22 So although we were successful in 100,000 claims, the
23 average -- the claim value was significant, and that 10
24 percent we are able to do better for the class. Coming before
25 you, we're able to say that we have sufficient funds in the

1 pool for the class to pay people 100 percent of the purchases
2 that they claim they made under Option 1 and 100 percent of
3 the valid purchases that they said they made in Option 2. The
4 maximum amount of purchases that there could be for Option 1,
5 Your Honor, would be \$100, as there was originally, because
6 anybody who would have submitted a claim above \$100, it would
7 have been a superfluous submission. There was no motivation
8 for people to submit, if you were Option 1, above \$100 because
9 the maximum you can get was a percentage of that \$100.

10 Similarly, for Option 2, the maximum purchases that
11 could have been submitted that one could have reasonably
12 expected to be utilized to get a claim was up to \$2,000. But
13 instead of paying 10 percent -- and the 10 percent, as you may
14 recall, had a nexus to the amount that plaintiffs have
15 assessed was -- that was derived from the chicken by-product
16 claim, that the 10 percent was the price premium attributed to
17 the chicken by-product claim, that rather than getting the 10
18 percent of the \$100, the Claim 1/Option 1 people would get the
19 full hundred dollars of their purchases.

20 Similarly, for Option 2, up to \$2,000 worth of
21 purchases Option 2 people will get the full amount of their
22 purchases up to that \$2,000 that they submitted as purchases
23 depending on how much their individual experience was.

24 In addition, Your Honor, that amount we want to make
25 sure that there is no, you know, anything besides a de minimis

1 distribution of cy-près at the end of the day. So what we
2 will wind up to -- the claims administrator understands that
3 if the settlement is approved, they will divide up the monies
4 so that all of the claims and the amount claimed will be --
5 all of the monies will be distributed to all of the claimants,
6 which will actually result as, assuming all of the claims that
7 are submitted, that there's no further fraud reductions, et
8 cetera, with a further review, that will yield approximately
9 111 percent. So basically 11 percent beyond their purchase
10 price it will exhaust the fund available to consumers,
11 assuming that the Court was to grant the approval of
12 attorneys, the application for attorneys' fees, and to also
13 approve the administration fee.

14 So as a whole, Your Honor, the claimants are --
15 instead of getting 10 percent, they're getting 111 percent of
16 their purchase price. We like to think of it as 100 percent
17 of the purchase price and then a further pro rata increase
18 depending on how much money is in the fund.

19 Out of the process of 100,000 claims, Your Honor,
20 there were only 16 objectors and there were 8 opt-outs. As
21 far as percentages go, we put them in the brief, but that is a
22 particularly low objection rate. And when one looks at the
23 four factors of the Eighth Circuit, one of those factors being
24 the reaction of the class, that the amount of the opposition
25 that there was virtually -- there was very low amount of

1 opposition. And that's not to dismiss or to minimize those
2 who submitted objections, but the objections themselves, Your
3 Honor, the objectors, that is a very, very, very, very small
4 percentage of the overall claimants.

5 It is also probably worth noting that, as Ms. Finegan
6 puts forward in her declaration, that there was a particularly
7 high conversion rate of the number of people who went to the
8 settlement website with the number of people who filed claims.
9 Over a half million class members went to the settlement
10 website, and the conversion rate was over 20 percent. So
11 those people would visit, usually people go back more than
12 once, but that is a unique visit. There's a half million.

13 As put forth by Ms. Finnegan, that is particularly
14 high when looking at the internet and conversion rate for
15 purchases, et cetera. The claims administrator was
16 particularly pleased with that. I understand from that, that
17 we should be particularly pleased with that and the success
18 that that process yielded.

19 So with all of those people, of all of the half
20 million people who visited the website, the number of
21 objectors and opt-outs collectively is less than 25.

22 Does the Court have any questions regarding the
23 claims process or anything regarding --

24 THE COURT: No.

25 MR. KAMBER: Okay. Would the Court like me to turn

1 to argument regarding the specific objectors at this point?

2 THE COURT: Why don't you wait until we hear from the
3 objectors, and then I'll give you a chance to respond.

4 MR. KAMBER: And would the Court like me to address
5 fee at this juncture?

6 THE COURT: Why don't you kind of review the request
7 you have for attorneys' fees. Some of the objectors objected
8 not just to the settlement but to the fees; so let's go ahead
9 and put that on the table.

10 MR. KAMBER: Yes, Your Honor. This case, although
11 relatively short in the grand scheme of litigation, was great
12 amount of work that went into it because of the speed --
13 because of the existing case that was there before, there was
14 a particular speed at which we were able to receive documents
15 in great quantity and information and great quantity in this
16 case in order to be in a position to evaluate the settlement.
17 In addition, as detailed at great length in my declaration,
18 the overall work done by class counsel was particularly
19 substantial.

20 Let's look at what the -- first thing's first, which
21 is that in the Eighth Circuit it is favored to have a fee
22 based on a percentage basis. In this case we were asking for
23 a 25 percent fee as a reasonable percentage. We believe it
24 was a number -- certainly there's case law suggesting higher
25 amounts than that. We think that 25 percent is appropriate in

1 this case. We think that the basis of evaluating fee in the
2 Eighth Circuit by percentage is particularly well established,
3 and we think 25 percent is fair: One example in looking in
4 *In re Xcel*, which awarded a 25 percent fee in a case that
5 resolved particularly quickly.

6 The Eighth Circuit embraces the concept of a lodestar
7 crosscheck. In this case we are looking at a 2.7 as the
8 multiplier. And I think it's important to note when looking
9 at that number -- which, when looking at that number, that we
10 did not submit to be considered as part of that any work that
11 was performed prior to the appointment of lead counsel.

12 Ultimately, you know, frankly, there was -- a lot of
13 times in settlements there are hours that appear to be padded
14 by submitting all the time that went into all of the different
15 complaints that were initially filed in a case. We didn't --
16 as the executive committee, we did not believe that that would
17 be fairly included as time that benefited the class. It would
18 lower our multiplier. Ultimately, we did not think that was
19 fair. Further, we were able to eliminate hours that we
20 believe was overly duplicative or was inefficient and
21 shouldn't be billed to the class.

22 One of the tools that we did that was included as
23 Exhibit B to my declaration, which is a grid of all of the
24 hours expended in the case by numerous topics that went down
25 the left-hand column in that chart and that went through for

1 each -- to try to give the Court guidance as to exactly what
2 we did with our time because, as the Court observed in
3 preliminary approval, you wouldn't get a lot done if you were
4 with us every step of the way. Most of our work takes place
5 outside of the courtroom.

6 Further, we were able to submit to the Court the
7 hours by attorney by rates as part of the declaration. In
8 addition, we provided the expenses detailed by firm. You note
9 in the expenses again there is some firms that do not include
10 legal research, some firms that don't include telephone calls,
11 et cetera. Again, in a case of this size, that went on for as
12 long as it did, we think that the \$150,000 in fee -- although
13 it is part of the \$8 million, it is not over and above -- we
14 think that that also goes to demonstrate the efficiency at
15 which counsel worked and the efforts the counsel went to make
16 sure that in our submission there is not redundancies and that
17 there is fundamental fairness in what we were asking for for
18 the Court.

19 A substantial amount of the hours in this case were
20 spent on document review. We go through in some detail in the
21 fee declaration setting forth what documents were reviewed,
22 the amount of documents, et cetera. To give the Court some
23 comfort that that review process was not just a black hole,
24 the process itself -- one, we made sure that all reviewers on
25 the process had prior experience reviewing documents and were

1 a minimum of three years out. Two, we did not charge
2 irrespective of the seniority of the people who were reviewing
3 documents. All of them would have been justified by, if they
4 were not doing document review, to be at a rate above \$300 an
5 hour. We normalized all document review hours to \$300 an
6 hour.

7 And, finally, Your Honor, we also used -- the entire
8 document review was done electronically. And the vendor that
9 we used was able to provide us metrics through the document
10 review process so that we were able to assure ourselves of the
11 efficiency of the coding of the documents that was being done
12 by each reviewer. So we were able to look at a reviewer,
13 either isolate it by a single reviewer or look collectively at
14 the reviewers, and determine how many documents per hour that
15 person was reviewing, how many -- how their coding was
16 working, et cetera.

17 So this is a process that we were able to oversee the
18 entire way to make sure it was not wasted efforts because,
19 although we were very pleased that the case wound up
20 resolving, at the end of the day the documents were being
21 reviewed and coded and not just to give us maximum leverage at
22 the mediation but also to provide us the ingredients that we
23 need that, if the case weren't to have settled, we would have
24 been able to move forward, move for class certification, and
25 move to trial. And the combination of the work that we had

1 done in combination with the trial lawyers that we have on our
2 team, I think, created and maximized the leverage that we had
3 at mediation in order to get the best possible benefit to the
4 class.

5 And I should mention -- I probably should have
6 mentioned it before, but I should mention that instrumental in
7 all of this in demonstrating the arm's length nature of the
8 settlement was that the entire settlement process was overseen
9 by Judge Andersen out of Chicago, at JAMS in Chicago. And
10 Judge Andersen was involved in each part of the process, and
11 he would be in -- able to walk us through, ensure that fees
12 were never discussed in this case prior to there being an
13 agreement as to the substantive relief. And, frankly, the
14 settlement could never have been done without Judge Andersen.
15 We were very appreciative of his helpfulness here.

16 I think that covers my presentation with respect to
17 fairness and fee. If the Court has any further questions
18 or --

19 THE COURT: Not at this time.

20 MR. KAMBER: Thank you, Your Honor.

21 THE COURT: Anything on behalf of Blue Buffalo at
22 this time?

23 MR. ZALESIN: Good morning. Steve Zalesin on behalf
24 of Blue Buffalo. I will be very brief.

25 Blue Buffalo is pleased to join in the application

1 for final approval of the settlement with the plaintiff class.
2 As Blue Buffalo has said many times both in this court and
3 outside this courtroom, the company never had any intent to
4 sell any product that was mislabeled in any way and an
5 ingredient that was not disclosed on the label. The company
6 is the victim of a fairly substantial fraud, we believe, by an
7 unscrupulous supplier of poultry meal, which caused some of
8 our products for some period of time to be mislabeled. And
9 Blue Buffalo will continue to pursue its claims against its
10 suppliers for reimbursement of the costs of this settlement
11 and other damage that Blue Buffalo has incurred.

12 Our understanding is that the final judgment, if the
13 settlement is approved, will dismiss Blue Buffalo's claims
14 against its third-party defendants without prejudice. All
15 other claims will be dismissed with prejudice.

16 But in the meantime, while Blue Buffalo is pursuing
17 its claims against its suppliers, in the meantime the
18 important thing here is that the company's loyal customers
19 don't have to wait any longer for compensation for having
20 purchased products that were different from what they, in
21 fact, paid for.

22 Mr. Kamber explained that, as a result of the actual
23 claims experience, consumers are actually able to recoup more
24 than 100 percent of their purchases up to certain caps: \$100
25 in the case of those consumers who don't have receipts for

1 purchases and \$2,000 in the case of customers who do have
2 receipts.

3 But the Court should not lose sight of the fact that
4 even by plaintiffs' reckoning by their own expert and their
5 own analysis, the premium that the plaintiff customers, the
6 individual members of the class, paid for the chicken meal
7 that turned out not to be chicken meal -- it turned out to be
8 chicken by-product meal in some instances -- the extra price
9 that they paid was in the neighborhood of 10 percent.

10 So working with that 10 percent figure -- and that's
11 why we originally designed the settlement, to provide for 10
12 percent compensation of that, you know, \$10 against \$100 or
13 \$200 against \$2,000. But if we work with the 10 percent, in
14 effect what claimants will be receiving is full -- is their
15 full value, that full 10 percent missing value for purchases
16 up to \$1,000 -- actually a little more than \$1,000 if they
17 don't have receipts, and which is very substantial for
18 customers without receipts and effectively unlimited for those
19 who do have receipts because they can claim the 10 percent or
20 \$2,000 on amounts up to \$20,000 or more.

21 So this is a very substantial and robust settlement.
22 It provides, I think, very fair and more than adequate
23 compensation for class members, and we're very pleased with
24 that outcome.

25 Blue Buffalo didn't want to be here in the first

1 place, but under the circumstances we are pleased to have so
2 thoroughly and quickly been able to resolve the case to the
3 benefit of class members and who are our loyal customers and
4 who we thank for their continued loyalty.

5 Unless the Court has any questions, that's it from
6 Blue Buffalo. Thank you.

7 THE COURT: Thank you, sir.

8 Yes, sir?

9 MR. KAMBER: Just one administrative matter. I
10 believe there might be an issue with the telephone connection,
11 and I'd just ask just because I'm not sure who is on the phone
12 or if anybody who might be class members are on the phone.

13 THE COURT: Is the phone line open?

14 THE CLERK: It is.

15 THE COURT: It's not designed for people to talk.
16 It's only for people to --

17 MR. KAMBER: I just wanted to make sure. I think
18 there was some feedback we had received that there might be
19 people on the phone who are not able to hear.

20 THE CLERK: Let me check with Brian.

21 MR. KAMBER: I just want to make sure at the end of
22 the day -- I just wanted to make sure if there were any class
23 members or people, that everyone who wanted to hear the
24 proceeding was able to hear the proceeding.

25 THE COURT: Do you want to take a break and make sure

1 the phone is working or --

2 THE CLERK: Give me two seconds, and I will.

3 **(RECONNECTING THE CONFERENCE LINE.)**

4 THE COURT: Ready to proceed?

5 Ma'am, do you wish to be heard on your objection this
6 morning? If you would approach the podium, please.

7 MS. PHILIPPUS: First and foremost, I want to
8 apologize for not having legal representation. I exhausted my
9 resources trying to find some sort of representation to find
10 out what my option to be, whether I should opt in or opt out.

11 I did not opt out -- specifically because I didn't
12 think that it was substantial enough amount given the
13 information that we originally had. My understanding, as far
14 as all of the information that was on the website, was the
15 maximum amount that you could receive was \$200 if you had
16 receipts and the maximum amount was \$10 if you did not have a
17 receipt.

18 THE COURT: That was the original --

19 MS. PHILIPPUS: That was the original --

20 THE COURT: That was the original target.

21 MS. PHILIPPUS: That was the original target, but
22 that was the only thing -- the only time that I felt that it
23 changed was on May 12, was when I went to the -- back to the
24 website. And then there was a Mr. Pakter did some sort of
25 like -- I'm not sure who he is. I guess he's a financial

1 analyst, and he's the one that came up with the rest of the
2 monies. But my original understanding was the maximum amount
3 was \$200, which I didn't think was going to be fair enough for
4 all the class.

5 THE COURT: Do you have receipts or don't have
6 receipts?

7 MS. PHILIPPUS: I do have receipts.

8 THE COURT: Okay. So as we sit here today, what's
9 the maximum she can recover?

10 MR. KAMBER: She can receive \$2,000 plus whatever pro
11 rata distribution there would be based on the extra
12 percentage, which might -- as current estimated, 11 percent.
13 So it would wind up being approximately \$2,220. If you had
14 the full amount of \$2,000, it would be about \$2,200.

15 THE COURT: Okay.

16 MS. PHILIPPUS: So that is one of the reasons why I
17 did not opt in. I had not officially opted in because I felt
18 that it was going to be -- or unsubstantial enough. There are
19 other reasons why Mr. Kamber actually -- I found and learned
20 that was different. Well, that doesn't involve this case,
21 where there's -- my animals are suffering with health issues
22 from the food that they're eating.

23 I was a walking advertisement for Blue Buffalo. I
24 did extensive research after one of my prior animals had come
25 down with hyperthyroidism. I did extensive research of why

1 the causes were, and it was because of food products and
2 by-products being placed in foods. So I immediately switched
3 over -- in 2009 I immediately switched over to Blue Buffalo.

4 Then a couple of my other animals have started
5 getting sick. I understand that now this is not what this is
6 about and that's not -- you know, it's not about product
7 liability. I understand that. But I was a walking
8 advertisement. I had people that were -- you know, I said,
9 hey, switch to Blue Buffalo. This is what it is. You know,
10 they've got -- it's all natural, holistic. So I was actually
11 walking advertisement for them, and I got quite a few people
12 to switch over to Blue Buffalo.

13 So currently one of my complaints is that it's not
14 only just getting reimbursed, but I think that there's other
15 things besides health issues, though. I have to just tell you
16 this. I have -- I have two cats that are at home, and I've
17 had them since they were, like, little. They're, like, five
18 weeks old. I raised them. They were foster. They are
19 foster. And they ate Blue Buffalo. They had been eating Blue
20 Buffalo for the last -- they are now five years old. And when
21 I found out about this case, I had to -- I stripped them. I
22 stripped them from the Blue Buffalo, and I won't give it to
23 them. It's like crack cocaine for them.

24 And now they don't get it. Every day I come home --
25 and since March I took the Blue Buffalo away from them, and

1 every day that I come home or every morning that I get up,
2 they're screaming. I kid you not. They're, like, they don't
3 understand. And so psychologically this has totally affected
4 them, and I don't really believe that just a portion of what
5 you paid for the foods is enough. That's one thing that is
6 very upsetting to me.

7 Another thing that I have discovered was I know that
8 on the Blue Buffalo -- or on the Heffler website or the
9 class-action settlement website you could actually submit a
10 claim. You could submit a claim with a receipt, submit -- or
11 submit from Petco and PetSmart. They're, like, two of the
12 major suppliers there. They are the loyalty programs.

13 Well, I had readily got my whole history from 2007
14 from PetSmart. They gladly gave me that. When I went back to
15 Petco, though, who is a partner -- I'll just have to add they
16 are a partner with Blue Buffalo for cancer research; so they
17 are partners with Blue Buffalo. I went to them, and then I
18 had asked them for my purchase history. And I know that I had
19 purchased from them in the past Blue Buffalo food. Well, when
20 I had gotten it, when I had gotten my return, it was only
21 until since, like, two thousand and, like, maybe eleven, or
22 something, and I knew it was prior to that that I had
23 purchased that.

24 So I went back, and I just kind of just happened to
25 go through and, I don't know, I'm a pack rat. I'm not a very

1 organized pack rat, but I'm a pack rat, and I just happened to
2 come up with the receipt, and I knew that I had a receipt from
3 Petco.

4 So contacting the representative, I said, "I have my
5 receipt. I have a receipt from Petco." I said, "Could I have
6 my complete purchase history?"

7 And the guy -- we went back, back and forth, and he
8 said, "Is it under a different loyalty number?"

9 And I said, "No. It's under this number. It's on
10 the receipt. This is it."

11 And we went back and forth until then, after I had
12 gotten -- gave him a photocopy of the receipt, the
13 communication kind of, like, stopped. And then I said, "Hey,
14 I'm Christian. Did you get my receipt, you know?" And still
15 nothing, still nothing, until finally I got ahold of the
16 consumer relations representative and I said, "I have this
17 feeling that records are being expunged because you're
18 partners with Blue Buffalo or they're being expunged and being
19 retained just because of product litigation."

20 And then just in one breath -- and I actually have my
21 emails, them telling me that I could get my complete purchase
22 history from the loyalty cards. In one breath they said that,
23 and then all of a sudden, when they found out, uh-oh, you
24 know, this is, you know, this has to do with product
25 liability, they couldn't find my purchase history. They

1 couldn't come back and give me the entire purchase history.
2 They came up with some trumped-up excuse because due to the
3 volume or something like that that they don't have the records
4 that go back to 2010. But I actually have a receipt from
5 Petco from 2010. So I believe because they are partners --

6 THE COURT: How many receipts do you have from
7 PetSmart?

8 MS. PHILIPPUS: I actually don't have any receipt --
9 well, I actually don't have any receipts from PetSmart, but
10 from PetSmart I actually got my complete purchase history. It
11 was over -- it was over \$3,300.

12 THE COURT: Okay.

13 MS. PHILIPPUS: \$3,300 from PetSmart. But I only had
14 the one receipt from Petco, but I know that I had, like, gone
15 to Petco in the past. It was for convenience purposes. I
16 ended up shopping for the most part at, like, PetSmart, and
17 it -- actually, Petco was more expensive than PetSmart.

18 So -- and that -- I just don't think that everybody
19 is getting an opportunity to, like, opt in with the -- because
20 I think that the purchase histories are being expunged because
21 they are partners with Blue Buffalo. That's about it.

22 THE COURT: Okay. I really appreciate your time,
23 ma'am, in taking the effort to come to court today.

24 MS. PHILIPPUS: Thank you.

25 THE COURT: Thank you.

1 Mr. Duggar?

2 MR. DUGGAR: Good morning, Your Honor. My complaints
3 when I wrote the objection -- and I'm a class member, and my
4 wife is the normal purchaser and I get stuck doing the work,
5 but --

6 THE COURT: So you're the abnormal purchaser --

7 MR. DUGGAR: That's right.

8 THE COURT: -- and she's the normal purchaser?

9 MR. DUGGAR: That's correct, exactly, yes, sir. And
10 that's on the record so I don't get in any more trouble than
11 I'm already in. So thanks. You've helped me out today.

12 My first complaint as far as the settlement was the
13 Frequent Buyers Program that Blue Buffalo has. There's no
14 class for that. Those people have already provided
15 documentation to Blue Buffalo that they bought 12 bags, and
16 they had to buy it within a year's time. And it seemed to me
17 they could have created an additional class to include those
18 people such as my wife.

19 And based on the fact, if I heard correctly,
20 1.97 million emails were sent, 105,000 claims filed, that goes
21 to less than 5 percent. And so that implies that 95 percent
22 of all the people that received an email either surrendered,
23 didn't file a claim because of the claim process, or they
24 chose not to file a claim or it was duplicative or whatever
25 the problem, but that doesn't sound like a very high ratio.

1 And I realize there's no way of detailing those
2 statistics to say how do we determine who gave up and who
3 surrendered? My argument at first, based on the original
4 settlement, was -- and it goes to what the Blue Buffalo
5 counsel said, Your Honor -- was the people that were the most
6 loyal customers were going to be the most damaged by the
7 restrictions that had been put into the settlement. The
8 maximum was \$200. And ten bucks -- hey, here's ten bucks.
9 You don't have proof; so here's ten over here, and here's
10 \$200.

11 So the people that were in the Frequent Buyer
12 Program, if they only bought one bag during the time of
13 injury, that's 92 bags. And at 50 bucks a pop for a 30-pound
14 bag, you're talking 420 bucks -- excuse me -- \$460, and they
15 were going to be limited to \$200.

16 So to me, at first, now that Mr. Kamber has come in
17 with the -- because there's been so few claims filed, we have
18 more money.

19 THE COURT: I mean, you understand the original idea
20 was we're not going to have a remainder. To the extent the
21 full amount isn't claimed, it will be redistributed among the
22 claimants. It's not going to go anywhere else.

23 MR. DUGGAR: Right. Right.

24 THE COURT: To make sure that the people who had a
25 claim were -- that's where the money went, not elsewhere.

1 MR. DUGGAR: Absolutely.

2 THE COURT: You understand the motive and the goal.

3 MR. DUGGAR: Absolutely. And, again, like I said, I
4 am comfortable -- like I said, I want them to get paid. Let
5 them get paid. They worked hard. I'm not here to yell about
6 the amounts. I'm just -- my complaint was -- the first
7 primary complaint was the Frequent Buyer Program, the fact
8 that it wasn't included. It wouldn't have been that hard.

9 If you look at my objection, every place that I went
10 to notwithstanding -- which was Petco, PetSmart, Tractor
11 Supply, it's a stealth settlement. I asked them about it, and
12 I go, "Okay. What are you guys doing for the settlement?"

13 "What do you mean?"

14 And either they were advised by management not to
15 talk about the settlement or they were totally clueless about
16 the settlement. And some of the stores, Your Honor, they have
17 a prime position. That's premium food. And notwithstanding
18 the 10 percent that they used as their standard, that's fine;
19 that they say, well, since we sold you a chicken by-product.

20 I mean, when I go into a store to buy pet food and if
21 I'm paying for premium food, I'm expecting there to be some
22 testing that goes behind that. I mean, we're implying there's
23 seven years of poor quality control. That's the implication
24 from the injury period. The time that we're going is from
25 2008 to 2015.

1 And, oh, by the way, those of you that are here,
2 please keep your pet food purchase receipts for seven years.
3 I mean, that's what we read in the notice that came in the
4 emails. I mean, that's what they told us: You get 200 bucks
5 here max, ceiling, and you get -- or you get ten bucks if you
6 can't prove it. And, again, using the term "loyal
7 customers" -- and my wife, she bought Blue Buffalo for years.
8 And it's like that was just discouraging, and I don't know how
9 many other people, Your Honor, just wouldn't file a claim
10 based on that. And I'll just leave it at that.

11 Now that they've changed it, I mean, it does change
12 it, but I'm wondering if you should either extend the notice
13 provision and the notice period to give an opportunity for
14 more people to file a claim. I'm not trying to open a
15 Pandora's Box, but just when you only have a 5 percent return,
16 I don't consider that a tremendous return.

17 Thanks, Your Honor. Thanks for the time.

18 THE COURT: Thank you, sir.

19 MS. PHILIPPUS: Can I say one more thing?

20 THE COURT: Come on up. Nobody leaves without
21 getting to say everything they wanted to say.

22 MS. PHILIPPUS: Well, Mr. Duggar brought up a good
23 point. I never received an email. I mean, like, I was on --
24 that was one of my generalized complaints there too. And I
25 totally forgot about that. But I never received an email.

1 I was on the Blue Buddies -- the Blue Buffalo email
2 list, their list, their contact information, their Blue
3 Buddies. And also I entered contests for Blue Buffalo. I
4 never received an email. I never knew anything.

5 I don't have a FaceBook account. I don't go and I
6 don't surf the internet; so I don't know any of that stuff. I
7 did not even know about this case until February 27. And my
8 brother said, "Hey, do you think we're going to get any money
9 out of this?"

10 He probably spent about a hundred bucks compared to
11 my \$3,300. He probably spent about \$100, you know, on Blue
12 Buffalo food. He's the one that said it. And I go, "Well, I
13 don't know. What is that all about?"

14 I never got a post card. I never got an email. So
15 he is correct where they didn't even, like, touch half these
16 people. And I don't believe it for a minute that they sent
17 out the 1,800,000 emails because, first of all, they didn't
18 even contact the people that are on their website. They
19 didn't even post a -- I think that Blue Buffalo should have
20 posted something blatantly on their website. And if you go to
21 their website, there is absolutely zero, zilch, nothing on
22 there. And I don't think that they contacted enough people.

23 And I really believe that he's right when he says
24 that. And I was one of the people that they never contacted,
25 and I found out through word of mouth about it. I even talked

1 to -- I talked to people at work, people that I've recommended
2 Blue Buffalo to, and, "Oh, I didn't know about that. I didn't
3 know about that."

4 And so he's right. He's correct. I think it needs
5 to be extended or something else needs to be modified, but
6 he's right. And I don't think that they touched enough people
7 that they could have.

8 THE COURT: Thank you, ma'am.

9 Anything in response to the objections both orally
10 and obviously there are a number of written objections as
11 well?

12 MR. KAMBER: Yes, Your Honor.

13 Let me address first the objections from the
14 courtroom. And certainly, look, we appreciate the class
15 members coming this way and showing sufficient interest in the
16 settlement to come here. Even though they may not agree with
17 us, their efforts are appreciated, by both Mr. Duggar and Ms.
18 Philippus.

19 One thing I wanted to touch on -- a couple things,
20 one just very basic factual. The notice program. Obviously,
21 there's a declaration; that there's an affidavit submitted to
22 the Court by Ms. Finegan going through the details of the
23 notice program and what emails were sent, et cetera.

24 In addition, we had checked on which objectors had
25 received email notice as well as which ones had received

1 regular mail notice. Ms. Philippus was one of the people who
2 was listed on having received email notice. You know, again,
3 emails are an imperfect device. They can only -- you know,
4 one can't make them go into the right box or make --

5 THE COURT: Put the wrong period on it or, you know,
6 transpose some initials.

7 MR. KAMBER: It was from a computer record. That is
8 possible. When they were bounced back -- just the way the
9 process worked --

10 THE COURT: So what did you do with bounce backs?

11 MR. KAMBER: With bounce backs we actually had --
12 there was a pool, and it's detailed in Ms. Finegan's
13 declaration. I think there was about a half million bounce --
14 ones that weren't delivered. And then they spent dollars to
15 go and research what current addresses for those people
16 because they had, they thought, enough information.

17 Those five hundred and something thousand people
18 actually resulted in an additional, I think, seven or eight
19 hundred thousand email addresses because some of those people
20 actually had more than one email address. So that process,
21 the idea was where we took a list originally from Blue Buffalo
22 of about 1.7 million email addresses, actually 1.9 million
23 emails were delivered at the end of the day.

24 THE COURT: So when you say "delivered," does that
25 mean delivered and received, or does that include the 500,000

1 bounce backs?

2 MR. KAMBER: No, that does not. That's the ones that
3 net the bounce backs and then adding back in the further
4 research that it made it for the additional email -- for the
5 additional emails that were delivered. We can't know for sure
6 who read their emails or what they did with them, but we know
7 that they were delivered and they weren't bounce backs.

8 Also wanted to mention that any further delay -- you
9 know, proof of purchase is obviously -- it is an imperfect
10 system, but at the end of the day, delaying the settlement
11 whether -- certainly there are more people with proof of
12 purchase today than there would be, you know, 28 months from
13 now, after trial, and a claims period after trial.

14 The claims process itself -- if somebody submitted
15 receipts yet they checked off the Option 1 blank, my
16 understanding from the claims administrator is they would have
17 been treated as Option 2 because they submitted receipts.
18 Basically, if somebody didn't understand the difference and
19 they checked the wrong blank, they would be considered that
20 way.

21 We certainly in an implementation -- Mr. Duggar's
22 point regarding the Frequent Buyers Program. We certainly
23 can, without changing anything that's been done in the
24 settlement, we can certainly ask that anybody that filed an
25 Option 1 claim who had mentioned that they were -- or that was

1 a member of the Frequent Buyers Program, we can certainly make
2 sure that they submitted what it is that they had. We want to
3 make sure that everyone who submitted a claim put their best
4 foot forward, Your Honor. That's part of the review process
5 that the claims administrator --

6 THE COURT: You'll allow a clarification period for
7 them to -- what are you contemplating by that?

8 MR. KAMBER: Well, I don't think it's even
9 necessary -- I think all the information the claims
10 administrator has, I think all the -- the idea is that what
11 was submitted to the claims administrator to make sure that
12 they have treated everybody as fairly as they can.

13 For instance, if somebody checked Option 1 but they
14 had some form of proof of purchase, they should certainly be
15 treated as Option 2. Similarly, just because somebody checked
16 Option 1, if they didn't submit any receipts it doesn't mean
17 they're not going to be treated as Option 1.

18 That is the process the claims administrator is going
19 through as the matter of course in their job as claims
20 administrator. What I'm saying is that we should -- we will
21 bring to the claims administrator's attention, if it hasn't
22 already been brought to their attention, that the Frequent
23 Buyers Program -- that if people are referencing the Frequent
24 Buyers Program, that they should examine whether that provided
25 adequate information to appropriately put them into Category 2

1 where they may have checked Category 1 on their blank. Trying
2 to make sure -- doing a little error checking for mistakes
3 that may have been made during the claims process.

4 I think it's probably also useful to add that the
5 retailers themselves, they certainly knew about the
6 settlement. There's nothing we could do to make them put up
7 notice in particular ways, but the information that we've
8 learned from Blue Buffalo and my understanding is -- and Mr.
9 Zalesin can confirm it on the record as well -- is that the
10 big box stores, the Petco and PetSmart, actually had to hire
11 additional people to staff their phones in order to deal with
12 the increase in volume of requests dealing with proof of
13 purchase and people trying to get printouts from their
14 programs.

15 I think that their -- you know, while they may not
16 have put -- certainly every store didn't put notice up or
17 whatever it is that they decided to do because that was in
18 their discretion. They knew about it, and they assisted in
19 the process by answering the questions as part of their
20 loyalty program, and I think that is worth noting for the
21 record.

22 Finally, on just these specific little rebuttal
23 points, it's worth noting that I think that the ten and the
24 two -- the notice was very clear in saying that there was an
25 opportunity for a pro rata increase. We represented the 10

1 percent as a baseline because 10 percent was the number that
2 had a nexus to the reality of the price premium paid for
3 chicken by-product. The reality of the claims process is we
4 can pay a higher percentage. Were we being -- whether it was
5 because we were conservative, whether it was because the
6 claims rate was a little bit lower, but the overall dollars
7 that were submitted was a substantial amount of dollar claims
8 that were submitted.

9 I think that is important to make that the focus
10 here, is that almost, you know -- actually just over \$20
11 million worth of purchases were submitted as part of the
12 claims process and that the issues regarding this not
13 happening again is something that is the injunctive relief
14 although it is not something that is part of our claim for
15 fees. It is not part of the overall valuation of the
16 settlement.

17 The injunctive relief was something that was
18 bargained for. It was something that was an important part of
19 the mediation. It is something that being able to take steps
20 to make sure or do the best that we can through negotiation
21 that we have improved the lay of the land moving forward. I
22 think that that's significant.

23 I'm just looking down to see if there's anything
24 further with respect to the objectors who are -- there is --
25 you know, the great majority of the objectors -- basically all

1 of the objectors except for, I believe, five of the objectors
2 are non-serial objectors. And by "serial objectors," as we
3 make clear in the papers, are people who repeatedly -- who
4 object to -- who seem to have some way that they make their
5 living by holding up settlements and trying to get paid.

6 But looking at the others, looking at other ones,
7 almost all of them deal with these objections -- Combs -- I
8 won't read through the list that's laid out in our objector
9 brief -- they almost all deal with the proof of purchase issue
10 and/or the fee issue. You know, some refer to the fact that a
11 cap is unfair. Obviously, not all of them -- in fact, none of
12 the objectors would have known exactly what the pro rata
13 increase would be. Nobody seems to know that until after the
14 claims --

15 THE COURT: Well, nobody knows until we're done.

16 MR. KAMBER: That's right. Nobody knows until we're
17 done. But that's the way it was laid out in the notice. The
18 proof of purchase -- and I think the one thing that's just
19 common throughout that I want to emphasize again is that proof
20 of purchase is not something that improves over time. There's
21 comments that were made today that it's hard to get proof back
22 earlier than 2011. Well, the distance -- you know, today
23 we're closer to 2011 than after trial we would be till 2011 or
24 doing a different settlement a year or two from now would be
25 to 2011 or going back to 2007.

1 I think it's particularly significant that proof of
2 purchase -- a claims process is likely, no matter when money
3 is to be distributed to the class, the claims process will
4 look much like this claims process does. This is not an
5 extraordinary claims process. This is the way claims
6 processes that are done right tend to work. And I think it's
7 significant to look at the class member experience, and it
8 just won't improve over time.

9 By getting the settlement done quickly and being able
10 to provide the benefit quickly, we actually maximize the
11 opportunity for people to be able to have proofs of purchase.

12 I think it is useful that another observation Ms.
13 Philippus made was that she was able to get back from
14 PetSmart, was able to get back all of her receipts back to
15 2007, from Petco back to 2011, and that she was able to call
16 Petco and obtain assistance, which is consistent with what
17 we've heard from Blue Buffalo; that in the industry that the
18 retailers have not been terribly happy about the idea about
19 the number of phone calls they have gotten.

20 In addition, Your Honor, it's also time to focus on
21 what Ms. Finegan says. We had set up a phone line for the
22 claims administrator; so any -- there was a phone number
23 clearly put on the notice and also on the website that would
24 allow people to call and get assistance. There were also FAQs
25 provided on the website to provide people additional

1 information including screen shots for how one could use their
2 PetSmart and Petco memberships in order to submit proofs of
3 purchase.

4 And then, finally, Your Honor, to address the serial
5 objectors, I think we do that to some extent in the papers in
6 detail, and I don't want to really take a lot of the Court's
7 time right now because I don't think I have a lot more new to
8 add since that.

9 I think it is worth mentioning Ms. Houser stands a
10 little bit different than the other serial objectors in that
11 she herself is not a serial objector. I think she is a
12 well-meaning class member who was concerned about the
13 settlement. She is somebody who -- I mean, I actually was the
14 person who deposed her. I just didn't want her to get grouped
15 in with serial objectors.

16 But her attorney certainly falls under the category
17 of serial objector. And I think what was of particular
18 concern to me was she was a class member who wanted more
19 information -- according to her deposition, she was a class
20 member who wanted more information about the settlement.

21 She Googled the information about the settlement.
22 Not looking for an attorney. She didn't actually know this
23 was pending in Missouri. She got what it appeared from the
24 record on the deposition to be an ad word to call an attorney
25 in St. Louis. And her and her attorney -- in this instance

1 Mr. Jones -- represented her and counseled her to her
2 objection.

3 On the record in the deposition, her own personal
4 concerns about the settlement were very different than what
5 was reflected in the writing. In fact, when we were
6 addressing, I think, one of the points that we made in the
7 objector brief was that it was kind of brought home to roost
8 is that she said that a percentage was the appropriate way for
9 an attorney to be paid a fee in a case like this; yet she
10 spends a good deal of time in her objections saying that it
11 should be a lodestar and not a percentage basis. And when she
12 was asked what percentage would be appropriate, she said she
13 didn't know.

14 And, you know, I asked her was 40 percent an
15 appropriate percentage, and she said she didn't know what an
16 appropriate percentage was. She just knows that it should be
17 a percentage rather than lodestar. Why do I mention this?
18 One, I didn't want Ms. Houser to be categorized exactly the
19 same, but her attorney was certainly somebody who falls in
20 that category of a serial objector, who certainly put together
21 an objection, it would appear -- obtained a client from an
22 advertisement -- no judgment on that, just an observation to
23 the Court -- put together an objection that didn't reflect
24 their client's concerns.

25 And probably most telling, Your Honor -- and I think

1 this is not inconsistent with some of the other information on
2 some of the other objectors -- she did not have a retainer
3 agreement with her lawyer. She didn't know how her lawyer was
4 going to be paid in this case or if her lawyer was going to be
5 paid in this case or if she would have to pay her lawyer in
6 this case. And that was a concern. That was concerning to me
7 as class counsel, to me as an attorney, to me as a member of
8 the bar.

9 It doesn't help matters when there's clients who are
10 being represented in things and have no idea how they're
11 supposed to compensate their counsel. You know, is it
12 necessary for this argument? Probably not. Is it something I
13 just thought was not exactly a story told in the papers but
14 worth telling here? I did.

15 But as a whole, Your Honor, I think that tells the
16 tale of the objectors in conjunction with what we wrote on
17 that.

18 Unless the Court has questions, I don't have anything
19 else to add on that.

20 MR. ZALESIN: Again, just very briefly, Your Honor.
21 You can't force people to file claims. The notice that was
22 given in this case was above and beyond what was preliminarily
23 approved by the Court and was above and beyond what is
24 customarily done in class-action litigation.

25 We know, Blue Buffalo knows from its social media

1 contacts, that there are many consumers who receive notice and
2 simply elected not to file claims. Why? They're happy with
3 the product, they're satisfied, they may feel that Blue
4 Buffalo is a victim of a fraud and don't want to get involved.
5 As it happens, filing a claim would not cost Blue Buffalo one
6 more dollar here, but you'd have to read the settlement with
7 some care to understand that.

8 I know that I get -- personally, I get class-action
9 notices in the mail, and if I'm satisfied with the product or
10 service, sometimes I just toss them in the circular bin. You
11 can't make people file claims. And here the experience is
12 that we have well in excess of 100,000 claims, and that is a
13 very significant and robust number for any consumer
14 class-action settlement.

15 And I want to echo what Mr. Kamber said about how
16 things would go differently if we had litigated the case
17 instead of settled it. So if the plaintiffs had succeeded in
18 certifying a class, which is certainly no guarantee, and if
19 they had succeeded at the merits on trial and if they had
20 recovered as much money from a verdict that they did through
21 this settlement, which would be years down the road, and so
22 that money, just by normal discounting rates, discounting to
23 present value, would be worth less, if all those things had
24 happened, we would have still had to have gone through a
25 claims process. And there is absolutely no indication that

1 the claims process that we would have gone through two or
2 three years down the road would have produced either more
3 claims than we received at this time or better claims. In
4 fact, there's every reason to think the claims would have been
5 less well documented because of the additional passage of
6 time.

7 Remember, we're talking about a period of time mostly
8 that occurred between 2011 and 2014 when this supplier fraud
9 went on and the products were -- some products were
10 mislabeled. And if we had a verdict in 2018, for example,
11 that would not help in terms of getting compensation into the
12 hands of people who deserve it and certainly deserve it
13 quickly.

14 So I share in Mr. Kamber's comments that a settlement
15 today actually results in a better claims process than would a
16 verdict, if there were such a verdict, years down the road.

17 Thank you.

18 THE COURT: All right.

19 MR. KAMBER: Your Honor, just to add one thing for
20 the record. There was plaintiffs' desire to submit
21 additional -- the declarations. They're not substantive.
22 They basically just confirm the information that's provided,
23 but I thought it might be useful for the record to have each
24 of the members of the executive committee submit a declaration
25 confirming the hours and expenses that were already --

1 THE COURT: Aggregate declaration that you submitted?

2 MR. KAMBER: Yes. I don't know if you would like

3 us -- I can step forward and hand you a copy or just make --

4 THE COURT: Why don't you just go ahead and hand up a
5 copy.

6 MR. KAMBER: Okay. Thank you.

7 THE COURT: I'm going to take a twenty-minute recess.

8 We'll reconvene at -- yes, sir? I guess I should back up.

9 Anyone else wish to be heard?

10 MR. MCBRIDE: Thank you, Your Honor. Very short.

11 Matt McBride for Diversified.

12 Just wanted to address the statement made by Mr.

13 Zalesin that the claims against Diversified and claims against

14 Wilbur-Ellis will be dismissed with prejudice.

15 MR. ZALESIN: Without prejudice.

16 MR. MCBRIDE: I'm sorry. Without prejudice. Our

17 issue is --

18 THE COURT: I wasn't going to argue with you, but --

19 MR. MCBRIDE: Our issue is that the last time we were

20 in front of Your Honor, in December, that there was

21 contemplated that a motion to dismiss would be filed and that

22 at that point in time we'd respond to the motion to dismiss.

23 As you recall, there's a duplicative claim for

24 indemnification and contribution in the Nestle Purina --

25 THE COURT: You think I forgot about Purina against

1 Blue Buffalo?

2 MR. MCBRIDE: I imagine you had not, Your Honor. So
3 we just anticipate that there still would be a motion to
4 dismiss that would be filed under Rule 41 and that we would
5 respond to that at that point in time.

6 THE COURT: So what's your response to their proposal
7 to dismiss you in this case without prejudice?

8 MR. MCBRIDE: We would -- our response is that it
9 should be dismissed in this case with prejudice because
10 there's an exact duplicate of the claim for indemnification
11 and contribution with the exact same relief including the
12 relief for damages paid in this case in the Nestle Purina
13 lawsuit.

14 THE COURT: Why would we -- but aren't you going to
15 argue in that case that the claims against you were dismissed
16 in this case with prejudice; therefore, there's nothing left
17 to do?

18 MR. MCBRIDE: Your Honor, we would -- whatever would
19 occur in the Nestle Purina case would be the claims that are
20 currently pending in the Nestle Purina case. We have other
21 claims against them on the merits, but we initially had filed
22 a motion to dismiss --

23 THE COURT: Are you asking for leave to file a
24 written response to their proposal? I mean, today is the
25 fairness hearing on the settlement. Are you asking leave for

1 additional time to respond to their proposal to dismiss you
2 without prejudice?

3 MR. MCBRIDE: We have not seen it. There's not been
4 a motion to dismiss us with or without prejudice, Your Honor.
5 We are seeking clarification on that single issue.

6 THE COURT: Okay. Very good.

7 MR. ZALESIN: So let me be very clear, then, Your
8 Honor. I thought this was well understood by all parties, but
9 if the Court wishes a written motion, we can certainly file
10 one.

11 Mr. McBride is correct. We have, effectively,
12 duplicative claims pending in the Nestle Purina action for
13 indemnification and reimbursement of our expenses including
14 attorneys' fees and the settlement costs of this case against
15 both Wilbur-Ellis and Diversified in the Nestle Purina action.

16 To dismiss them with prejudice here would mean that
17 they've been adjudicated on the merits and that Blue Buffalo
18 takes nothing on those claims, and that would carry over to
19 the Nestle Purina action and any other action that might
20 subsequently be filed. So that clearly would be
21 inappropriate, in Blue Buffalo's view.

22 The thing to do, in our view, clearly, is to dismiss
23 them in this case without prejudice and to allow those claims
24 to go forward in the Nestle Purina action, and they can raise
25 whatever defenses they have in that action and they will be

1 adjudicated as part of that case.

2 But there is no set of circumstances in which those
3 claims should be dismissed with prejudice in this case.

4 THE COURT: I mean, today is not a surprise. So what
5 are you thinking?

6 MR. MCBRIDE: No, it's not a surprise, Your Honor.
7 But the issue is that there was -- we were not a -- this is
8 the issue. The issue is that we were not party to a
9 stipulated settlement before the Court.

10 THE COURT: Correct.

11 MR. MCBRIDE: The stipulated settlement before the
12 Court is only between Blue Buffalo and its successors,
13 assigns, et cetera --

14 THE COURT: And they're asking me to dismiss the
15 claims against your client without prejudice so that they can
16 pursue those claims in the other pending litigation, which
17 both you and Blue Buffalo have identified as essentially
18 duplicative.

19 MR. MCBRIDE: That's correct, Your Honor.

20 THE COURT: So if they dismiss them here with
21 prejudice, you're going to -- the first thing you're going to
22 file in the other case is "That case is over."

23 So the question under the Rule of Civil Procedure is,
24 in order for them to dismiss your claims against you at this
25 point without prejudice, one of two things have to happen:

1 Either you consent or they get leave of Court.

2 MR. MCBRIDE: And that's the issue right now --

3 THE COURT: Right.

4 MR. MCBRIDE: -- is that we are -- it's not been
5 formally placed before the Court. It's not been an issue that
6 we've had to address or respond to with any information. So
7 right now it's not before the Court.

8 MR. ZALESIN: I believe it is before the Court by
9 virtue of the discussion we've had on the record here today.
10 But, again, to the extent that the Court would prefer, we'd be
11 very happy to file a brief -- I don't mean a brief. I mean a
12 very short document seeking dismissal without prejudice so
13 that our identical claims can proceed in the parallel Nestle
14 Purina versus Blue Buffalo case.

15 THE COURT: Any response by the plaintiffs to this?

16 MR. KAMBER: I mean -- no. It's kind of not our
17 fight. We're here -- we think it was pretty clear. We think
18 it's pretty clear that everyone was on notice as to what's
19 discussed here. It certainly -- it seems appropriate that
20 Blue Buffalo can have this dismissed without prejudice.
21 Everyone knows the substance of this is going to be litigated,
22 and it's a cleaner order from this Court, whatever the Court
23 may wish to do. But if the Court is going to approve the
24 settlement, it's a cleaner order, and it's a cleaner
25 disposition of the case if everything is resolved in the sense

1 that the other claims are dismissed without prejudice. It
2 seems that's Blue Buffalo's right to do that, and it seems
3 kind of form over substance to just require them to submit
4 another piece of paper when everybody knows what's before the
5 Court.

6 MR. MCBRIDE: Not to belabor this, but the proposed
7 order before this Court is for dismissal of all claims with
8 prejudice.

9 THE COURT: Custom AG wish to be heard?

10 MR. O'REILLY: No, Your Honor.

11 THE COURT: I'll be back at 12:15. Short recess.

12 **(COURT RECESSED FROM 11:55 AM UNTIL 12:20 PM.)**

13 THE COURT: All right. So there's no reason to send
14 everybody home, we wait two or three weeks, see what we get in
15 the mail. I'm going to announce my determinations today. It
16 will be followed by a written order, which will obviously be
17 more lengthy, but I can explain things perhaps a little better
18 verbally.

19 Well, the record will speak for itself in terms of
20 the notices that were provided and the opportunities to be
21 heard given to all those who wished to be heard in this case.

22 And after conducting the fairness hearing today and
23 considering all arguments -- and I have to say my appreciation
24 to the objectors for taking the time and energy to
25 participate. And the points are well taken, and, hopefully, I

1 can accommodate those issues in some fashion in this
2 determination. It is my determination to certify the
3 settlement class. I'm going to approve the final settlement
4 over the objections both orally and those that were provided
5 in writing because it is my determination that the settlement
6 agreement is fair, reasonable, and adequate under the totality
7 of the circumstances, and I will approve the incentive awards
8 to the named plaintiffs and award the attorneys' fees and
9 expenses as requested.

10 As I said, this oral pronouncement of my
11 determination will be followed by a more detailed written
12 order for the record.

13 It's my determination to certify the settlement class
14 solely for the purpose of this settlement because I find that
15 the requirements of a class action under Rules 23(a) and
16 (b)(3) of the Federal Rules of Civil Procedure have been
17 satisfied.

18 Except for those people who are excluded from the
19 settlement class as stated in the agreement, the settlement
20 class is defined to include all residents of the United States
21 who, from May 7, 2008, through the preliminary approval date,
22 purchased any of the Blue Buffalo products which are listed in
23 Exhibit 1 to the settlement agreement.

24 When you look at the universe of class members, it is
25 my finding that each requirement of Rule 23(a) has been

1 satisfied; that there is numerosity; that there is
2 commonality; that there is typicality; and there is certainly
3 adequacy of representation.

4 I also find that the proposed class meets the
5 requirements of 23(b)(3), authorizing certification of a class
6 where, quote, "questions of law or fact common to class
7 members predominate over any questions affecting only
8 individual members," end quote, and, quote, "a class action
9 superior to other available methods for fairly and efficiently
10 adjudicating the controversy," end quote.

11 I also approve the settlement agreement as being
12 fair, reasonable, and adequate as to all parties and in
13 compliance with all requirements of due process and applicable
14 law.

15 It is my finding that notice was sufficiently
16 provided to class members in the manner directed in my
17 preliminary approval order and that notice met all applicable
18 requirements of due process and any other applicable law and
19 considerations.

20 While there have been objections, they are small in
21 number, which speaks well of the class reaction to the
22 settlement. As of May 9, there have been 105,172 claims
23 filed. In contrast, there were only 16 timely objections.
24 That's less than .01 percent of the claims made and only 8
25 requests for exclusion from the class, or opt-outs.

1 Following the directives of the Eighth Circuit, I
2 considered the fairness of the settlement to the class as a
3 whole. The factors identified in this circuit for assessing
4 fairness of the settlement have all been considered, and based
5 on those factors, and mindful of the general policy favoring
6 settlements, I conclude that the settlement is fair,
7 reasonable, and adequate.

8 I also find that the settlement agreement was
9 negotiated at arm's length with no collusion by well-informed
10 counsel and with the assistance of a neutral mediator -- in
11 this case retired Federal Judge Wayne Andersen -- a strong
12 indication of any lack of collusion and arm's length
13 negotiation.

14 There is no evidence in the record calling Blue
15 Buffalo's financial condition into question, and, indeed, Blue
16 Buffalo has already deposited \$32 million into the settlement
17 fund. Having taken the risk and benefits into consideration,
18 the parties and their counsel agree that the settlement is
19 fair and reasonable, and these views are entitled to
20 considerable weight based upon the case law and my
21 determination here today.

22 I have thoroughly considered each of the objections
23 submitted in this matter, and each of the objections are noted
24 but are not, in my mind, sufficient to persuade me not to
25 approve the settlement.

1 I find the relief provided to the class is fair,
2 reasonable, and adequate. This is especially true in light of
3 the pro rata increase claimants will receive. Likewise, the
4 objections to the provision of variable relief depending on
5 whether class members have proof of purchase -- I think that
6 that's actually a necessary consideration in any class
7 settlement in order to avoid and discourage fraudulent
8 activity by those who actually didn't or weren't victims of
9 the -- giving rise to a claim.

10 In addition, it's been made clear that proofs of
11 purchase were readily available through big box retailers, of
12 which class members were informed; so the burden of obtaining
13 proofs of purchase, while not insubstantial, is comparatively
14 and relatively low.

15 The relatively few individuals who expressed a belief
16 that he or she suffered divergent or substantial greater
17 injury than the class as a whole does not defeat class
18 certification or settlement. For example, there were a number
19 of objections the settlement was inadequate because it did not
20 provide compensation for harm allegedly suffered by a class
21 member's pet. As observed by the individual objector, the
22 suit, however, addresses claims of false advertising and
23 breach of warranty, not products liability or other claims
24 that could possibly result in actual harm to a pet. The
25 appropriate remedy for class members who wish to assert those

1 claims related to injury to pets is for them to opt out of the
2 class and pursue those claims separately.

3 The objections that raise individual state law claims
4 are not well taken, as a settlement is evaluated in its
5 entirety rather than on a claim-by-claim basis. As a result,
6 and in viewing the settlement as a whole, I find that it
7 satisfies the Rule 23 requirements and that the objections do
8 not defeat that determination.

9 The relief obtained through the settlement when
10 weighed against the complexities and uncertainties of ongoing
11 litigation and the uncertain length of litigation in the
12 absence of a settlement support a settlement, which avoids
13 significant risk and delay and affords meaningful relief to
14 the settlement class members.

15 Upon consideration of all relevant factors, I find
16 the settlement is in the best interest of the class as a whole
17 and is fair, reasonable, and adequate. I approve the payment
18 of the balance of costs and expenses due and owing to the
19 claims administrator in an amount no greater than the
20 \$1.4 million maximum expense set forth in the preliminary
21 approval.

22 I also approve an incentive award to each named
23 plaintiff in the amount of \$1,500.

24 I find that class counsel and named plaintiffs
25 adequately represented the settlement class for purposes of

1 entering into and implementing the settlement agreement.

2 I also approve the plaintiffs' application for
3 attorneys' fees and expenses and award them fees and expenses
4 in the amount requested.

5 I make this order under Federal Rules of Civil
6 Procedure 23(h) and specifically make these findings and
7 decisions pursuant to Rule 52(a).

8 Notice of class counsel's fee motion was directed to
9 the class in a reasonable manner pursuant to Federal Rules of
10 Civil Procedure 23(h) and 54(d).

11 While the parties have agreed on the amount of
12 attorneys' fees and expenses, I do have discretion over the
13 amount to be awarded. Settlement counsel has applied for an
14 award of fees in the amount of \$7,847,946 and expenses in the
15 amount of \$152,054, which correspond to the \$8 million amount
16 enumerated in the proposed settlement agreement.

17 As discussed here today, this represents a 25 percent
18 fee award and corresponds to a lodestar multiplier of 2.7,
19 which is within the range permissible and understood by the
20 Eighth Circuit to be acceptable.

21 I find the payment of attorneys' fees and expenses to
22 class counsel as set forth in the settlement agreement to be
23 fair, reasonable, and adequate. Accordingly, I approve the
24 award of attorney fees and expenses as stated.

25 So there's no confusion, I have reviewed all factors

1 relevant to the award of attorneys' fees including the novelty
2 and difficulty of the legal questions presented, the
3 contingent nature of the action, and the result obtained on
4 behalf of the class. I mean, Blue Buffalo and the plaintiffs
5 obviously deserve a lot of credit for proceeding and moving
6 this case speedily so that the benefit to the consumers is
7 known sooner rather than later and, as was discussed today,
8 not something we find out in the year 2018 or 2019 or, God
9 forbid, after the Eighth Circuit gets to spend some time
10 thinking about it who knows when. Don't let any of the three
11 guys up there read that.

12 Although not required to do so, I have cross-checked
13 the fee request under a lodestar analysis and find the
14 information submitted pertaining to lodestar hours and rates
15 to be sufficient, the hours and rates to be reasonable, and
16 the resulting multiplier in line with multipliers used in
17 other cases.

18 I have also considered factors approved in this
19 circuit for assessing reasonableness of fee requests and find
20 them supported as requested in this case.

21 I have also thoroughly considered the objections to
22 the fee requests, which are few in number, and find them not
23 persuasive. None of the objections demonstrated the requested
24 fee and expense award to be unfair.

25 I find the total time expended by plaintiffs' counsel

1 was reasonable, particularly in light of the speedy result
2 achieved. I further reviewed the geographic location and
3 experience of the attorneys who worked on this matter and find
4 the hourly rate charged by counsel reflected in the fee
5 application to be reasonable.

6 So what I'm going to consider some housekeeping
7 matters: Those who have objected I'm going to give you two
8 weeks to clarify whether you intended your objection to be a
9 claim and let the claims administrator know that in some
10 fashion.

11 I don't know if we can put that in the order, if you
12 all can help me draft some language, but those who objected, I
13 think, should have the opportunity to clarify their objection
14 to whether it's a claim or an intention to opt out so that
15 there's no confusion at a later time as to what the purpose
16 and the -- not having defeated the settlement, did they intend
17 that objection to have the effect of, well, if my objection
18 fails, I want to participate, or if my objection fails, I want
19 to opt out of the case.

20 I'm not reopening any time frame for all parties, but
21 those who did object I think deserve the benefit of the
22 opportunity to clarify the purpose of their objection beyond
23 the objections stated for the record today.

24 So we need to work out an order to those folks who
25 did file objections giving them two weeks to clarify for the

1 claims administrator and the Court whether they want to use --
2 their objections should be considered a claim and pursue the
3 claim remedies available or whether they considered it an
4 opt-out and permit them to opt out of the settlement.

5 This was a multidistrict litigation action
6 consolidated by the Multidistrict Panel -- the Panel of
7 Multidistrict Litigation, the JPML. Those seven judges
8 considered this litigation and consolidated it for the
9 purposes of the consumer class actions against Blue Buffalo,
10 and we bring that litigation to a close by approving the
11 settlement agreement. By no means did the JPML intend to
12 certify, to the best of my understanding, any third-party
13 claims that already exist in the Purina against Blue Buffalo
14 case filed by Blue Buffalo.

15 So to the extent there needs to be any clarification,
16 the oral request by Blue Buffalo to dismiss the third-party
17 claims without prejudice will be granted today by the Court,
18 and those claims will survive in the -- I hate to call it a
19 companion case -- but the other matter pending before me in
20 Purina against Blue Buffalo.

21 But the settlement obviously brings to a close the
22 multidistrict litigation class action that was consolidated
23 for the original purposes intended by the Multidistrict
24 Litigation Panel, and an order will follow consistent with
25 that opinion.

1 Are there any other matters for the Court's
2 consideration today on behalf of the plaintiffs?

3 MR. KAMBER: No, Your Honor.

4 MR. ZALESIN: Not on behalf of Blue Buffalo.

5 THE COURT: Anyone else? Yes, sir?

6 MR. MCBRIDE: We have pending third-party claims
7 ourselves against both Custom AG and Wilbur-Ellis; so we would
8 ask --

9 THE COURT: Dismissals without prejudice as well? I
10 will also, consistent with the Court's ruling, dismiss all
11 third-party third-party third-party claims, however you want
12 to follow down the progeny of issues here. But when I look at
13 the case and the purposes for which they were consolidated in
14 front of me, those purposes have been satisfied.

15 To the extent Blue Buffalo or any other parties on
16 that side of the ledger have claims against each other or
17 others, we have finished this piece of the litigation. Those
18 claims will be dismissed without prejudice to be pursued in
19 the appropriate litigation at the appropriate time. So I
20 appreciate you bringing that to my attention. We'll dismiss
21 all of those claims without prejudice.

22 And to go to Mr. Duggar's objection, I expect the
23 claims administrator will review the Option 1 class group to
24 make sure if they were Frequent Buyer Program members that
25 they be treated consistent with being in a Frequent Buyer

1 Program and not just a "here I am" and take counsel at its
2 word that that happened.

3 Any other matters for the Court's consideration
4 today? All right. Thank you all very much.

5 I'll need a proposed order to go out to the objectors
6 giving them the time to either opt in or opt out, if you will,
7 based upon denial of their objection.

8 MR. KAMBER: Yes, Your Honor.

9 THE COURT: Mr. Duggar, you understand what I'm
10 saying?

11 MR. DUGGAR: Thank you.

12 THE COURT: Ma'am, do you understand what I'm saying
13 when I say that? You'll be given two weeks now to decide
14 whether you want to participate in the settlement as it is or
15 opt out and pursue your claims as you deem appropriate.

16 MS. PHILIPPUS: Are the attorneys going to contact
17 me, or do I contact them?

18 THE COURT: You'll get an order or you can tell --
19 you will file something today with the claims administrator if
20 you know what you want to do, not that you have to make up
21 your mind at this time.

22 But given the nature of the objection, I wanted to
23 make sure you had the opportunity to clarify the final purpose
24 of the objection.

25 MR. KAMBER: We will make sure that she has the

1 contact information for counsel and claims administrator.

2 THE COURT: All right. Thank you very much.

3 MR. KAMBER: Thank you, Your Honor.

4 **(PROCEEDINGS CONCLUDED AT 12:37 PM.)**

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

I, Shannon L. White, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 58 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 26th day of May, 2016.

/s/Shannon L. White
Shannon L. White, CRR, RMR, CCR, CSR
Official Court Reporter