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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ROHINI KUMAR, an individual, on behalf of herself, the general public and those similarly situated, Plaintiff, vs. SALOV NORTH AMERICA CORP., Defendant.	Case No. 4:14-cv-02411-YGR Assigned to: Hon. Yvonne Gonzalez Rogers **DEFENDANT SALOV NORTH AMERICA CORP.'S RESPONSE TO OBJECTIONS TO CLASS ACTION SETTLEMENT** Date: May 30, 2017 Time: 2:00 p.m. Courtroom: 1 **[Declaration Of Sean A. Commons Filed Concurrently]**

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I. INTRODUCTION

Out of a class consisting of millions of households, three individuals have objected. One of the objectors (Ted Frank; Dkt. 157) admits facts that would preclude him from recovering any monetary relief even assuming plaintiff could prevail at trial, and does not dispute that the amount paid per claim fully compensates for the alleged harm. His other objections disregard Ninth Circuit law, ignore the language in the claim form, and incorrectly assume that Defendant sells direct to consumers (it does not). Another objector (Pamela Sweeney; Dkt. 155) raises boilerplate and meritless arguments with no meaningful analysis or discussion of the substantial benefits afforded to class members and robust notice program. The third and final objector (Bradley Griffin; Dkt. 160) believes that Defendant did nothing wrong and, while Defendant agrees, this objection merely reinforces why the settlement is fair and reasonable to the class. The objections should be overruled, and the settlement should receive final approval.

II. THE SETTLEMENT WAS THE PRODUCT OF ARMS-LENGTH NEGOTIATION UNDER THE AUSPICES OF A RESPECTED MEDIATOR.

Mr. Frank objects to the settlement under *In re Bluetooth Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) on the purported ground that it "features all three indicia of impermissible self-dealing identified by the Ninth Circuit: (1) a disproportionate distribution of fees to counsel; (2) a 'clear sailing agreement' that defendants will not challenge the fee request; and (3) a 'kicker that ensures any reduction in fees will revert to the defendant." Frank Objection at 7 (Dkt. 157). Mr. Frank is wrong.

First, this is a claims-made settlement, not a common-fund settlement. Mr. Frank does not argue that there is anything impermissible about a claims-made settlement. Nor could he. "[T]here is nothing inherently objectionable with a claims-submission process, as class action settlements often include this process, and courts routinely approve claimsmade settlements." *Shames v. Hertz Corp.*, No. 07-2174, 2012 WL 5392159, at *9 (S.D. Cal. Nov. 5, 2012) (collecting cases). Nor does Mr. Frank identify any authority that treats a claims-made settlement as a common fund where, as here, Defendant committed to pay all valid claims in full regardless of the number of claims submitted or the amount of a fee award. If anything, by insisting on a claims-made settlement,

Defendant eliminated any possible argument that Plaintiff's counsel could be in a conflicted position with respect to fees. *See* Declaration of Sean A. Commons ("Commons Decl.") ¶ 16; *Shames*, 2012 WL 5392159, at *14 (concluding "kicker" was "simply not a factor" "because the attorneys' fees in this case are wholly separate from the class settlement—and will have no impact one way or the other on the amount the class recovers—a 'savings' for Defendants does not implicate the concerns the Ninth Circuit expressed about the 'kicker' provision in the *Bluetooth* settlement"); *see also In re Bluetooth Headset Prods. Liab. Litig.*, No. 07-ML-1822, 2012 WL 6869641, at *9 (C.D. Cal. July 31, 2012) ("*Bluetooth II*") (expressing concern that requiring defendant to refund fees outside of the common fund context would "improperly intermingle the merits settlement with the fees" and thus "made no sense"); *Blessing v. Serius XM Radio Inc.*, 507 Fed. Appx. 1, 2 (2d. Cir. Dec. 20, 2010) (approving settlement with no cash remedy and $13 million clear sailing fee provision because fees were "negotiated only after settlement terms had been decided and did not … reduce what the class ultimately received" as "the fee award [came] directly from Sirius XM, rather than from funds (or coupons) earmarked for the class").

In a common fund settlement, every penny in fees decreases benefits available to class members; a claims-made settlement, however, does not place class counsel in such a position. *Shames*, 2012 WL 5392159, at *21 n.18 (distinguishing claims-made settlement from common fund settlement because "the 'wealth' available to the class is wholly independent of any attorneys' fees award, which will not reduce the amount available to the class in any way"). Moreover, in negotiating a common fund settlement, negotiating the size of the common fund arguably results in an implicit simultaneous negotiation over fees (due to the presumption that counsel can seek 25-33% of the fund). The same cannot be said about a claims-made negotiation, especially where, as here, fees were negotiated only after agreement on the material terms of a claims-made settlement. *Shames*, 2012 WL 5392159, at *13 (no conflict because "[t]he fee amount was negotiated separately and only after the class settlement was finalized" and the "class settlement would not hinge on whether they could successfully negotiate a fee amount"). Class counsel insisted on a simplified claims process without proof of purchase, as well as a robust notice program, precisely for these reasons. *See* Commons Decl. ¶¶ 6-9.

Second, the *Bluetooth* factors merely represent "signs" that a district court should consider when reviewing the record for collusion, not grounds to deny final approval. *Bluetooth*, 654 F.3d at 947; *see also Shames*, 2012 WL 5392159, at *12-13. "[T]he existence of these three signs does not mean a settlement cannot still be fair, reasonable, or adequate[.]" *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015). Tellingly, Mr. Frank does not contend that the amount of relief is inadequate to compensate class members. *See* Objection at 1, 11. Nor could he. The settlement provides each claimant with *more* monetary relief than ever could be recovered after trial, even assuming the validity of plaintiff's damages expert's methodology. *See* Mot. at 1; Commons Decl. ¶ 10.

Third, even though he was an objector in *Bluetooth*, Mr. Frank ignores the opinion on remand, which granted final approval and found no collusion despite the continued presence of all three factors. That settlement provided the class *zero* dollars for economic injury, $100,000 in *cy pres*, $800,000 for class counsel, and $12,000 for the class representatives. *Bluetooth*, 654 F.3d at 938. On remand, the district court found the "clear sailing and reversion agreements [were] less troubling" in light of the defendant's firm belief that the claims were meritless, the fact that it took extensive negotiation over a two-month period to reach a settlement, and that "defense counsel negotiated a maximum fee and cost award of only $850,000, knowing Plaintiffs' counsel contended they had expended far more, and after additional negotiations[.]" *Bluetooth II*, 2012 WL 6869641, at *8. The court recognized that "[f]rom the Defendants' point of view, they had already expended their own attorneys' fees to defend claims that they steadfastly—and reasonably—contended were meritless" and "[a]lthough they were willing to continue to defend their position, business reasons (including the costs of litigation), suggested that Defendants consider settlement." *Id.* Thus, it was "reasonable" that "Defendants did not want the unawarded fees to revert to the class" because in their view "no one was damaged" and "having any portion of the unawarded fees added to the cy pres award would improperly intermingle the merits settlement with the fees." *Id.* at *9. Moreover, it would have "made no sense, as the parties (correctly) did not view [it] as a common fund case." *Id.* Given the foregoing, and because the parties' had submitted declarations stating that "fee discussions were handled separately and after the discussion of substantive relief", the court found

no evidence that the defendants had "bargained away something of value to the class[.]" *Id.*[1] The court also found the substantive terms of the settlement were fair because the "relief was quite possibly more than the class could have achieved" at trial. *Id.* at *10.

Here, the record supporting final approval and weighing against a finding of collusion is stronger than in *Bluetooth II*. Unlike *Bluetooth*, this settlement provides direct monetary relief to class members. *See In re Ferrero Litig.*, 583 Fed. Appx. 665, 667-68 (9th Cir. July 4, 2014) (distinguishing Ninth Circuit's opinion in *Bluetooth* on this ground and affirming final approval of food labeling settlement that capped relief at $550,000 and provided for clear sailing). In all other material respects, the record evidence here is on all fours with *Bluetooth II* or provides stronger grounds for final approval:

- The settlement in *Bluetooth* occurred at the outset of the litigation, after minimal discovery and before a ruling on the pleadings. This settlement occurred only after substantial fact and expert discovery and motion practice, including rulings on a motion to dismiss and class certification, all of which were vigorously litigated. Commons Decl. ¶¶ 2-5.
- As in *Bluetooth II*, SNA and its counsel steadfastly believe to this day that the claims of Plaintiff and the class are meritless. Commons Decl. ¶¶ 2-5; *Bluetooth II*, 2012 WL 6869641, at *8-9.
- As in *Bluetooth II*, the settlement negotiations in this case were contentious and protracted, requiring numerous conferences over several months, including a full-day mediation (10+ hours), before the parties reached an agreement on the substantive terms of a class settlement. Commons Decl. ¶¶ 6-12. Only after this agreement was reached on November 8, 2016, did the parties begin to discuss the issue of fees, which itself took several additional weeks of contentious negotiations. *Id.* ¶¶ 13-14; *Bluetooth II*, 2012 WL 6869641, at *9; *see also Shames*, 2012 WL 5392159, at *13; *Poertner v. Gillette Co.*, 618 Fed. Appx. 624, 630 (11th Cir. 2015), *cert. denied sub nom. Frank v. Poertner*,

[1] In granting final approval, the district court used the lodestar method to calculate fees because it "was not a common fund" settlement, *id.* at *2, but determined that a reasonable fee award was 25% of the lodestar, without reverting the surplus to the class. *Id.* at *8.

136 S. Ct. 1453 (2016) ("Frank devotes a lot of attention to … the 'clear-sailing' and 'kicker' clauses …. But we conclude that Frank's self-dealing contention is belied by the record: the parties settled only after engaging in extensive arms-length negotiations moderated by an experienced, court-appointed mediator.") (internal quotations omitted).

- As in *Bluetooth II*, SNA ultimately negotiated a maximum fee award that was substantially lower than Plaintiff's counsel's claimed lodestar, further evidencing the lack of collusion. Commons Decl. ¶ 14; *Bluetooth II*, 2012 WL 6869641, at *9.
- As in *Bluetooth II*, it would have "made no sense" for SNA to agree that fees would revert to the class or for class counsel to seek such a provision. *Bluetooth II*, 2012 WL 6869641, at *9. This is not a common fund case, and the claims process already provides class members with more relief than they could have recovered on average at trial. Mot. at 1; Commons Decl. ¶ 10; *see Shames*, 2012 WL 5392159, at *14; *cf. Hayes v. Arthur Young & Co.*, 34 F.3d 1072 (Table), 1994 WL 463493, at *17 (9th Cir. Aug. 26, 1994) (rejecting pro rata distribution of unclaimed judgment funds to claimants because it would "give the claiming class members a windfall").

Thus, under the very authority relied upon by Mr. Frank, there is no basis to find or suspect collusion. The monetary settlement benefits afforded to each class member—benefits that *exceed* the value any class member would be able to obtain after trial—alone rebut any notion that class counsel compromised the claims of the class. *See In re Ferrero Litig.*, 583 Fed. Appx. at 667-68. Mr. Frank's objections under *Bluetooth* thus should be overruled as the settlement is more than fair, reasonable, or adequate.

III. THE SETTLEMENT DOES NOT ARBITRARILY CREATE A ZERO-RECOVERY SUBCLASS.

Mr. Frank also objects that the settlement creates a "zero-recovery subclass." His theory is that the claim form required class members to attest to "reliance" on the phrase "Imported from Italy." Objection at 21; *see also id*. at 2, 17. He believes that the New Jersey Consumer Fraud Act ("NJCFA") does not require proof of reliance and, thus, that the claim form improperly "exclude[d] from recovery members like Objector Frank, who purchased Filippo Berio olive oil, but did not rely

on the 'Imported from Italy' representation when making his purchase." *Id.* at 17; *see also* Objection at 2 (asserting settlement "unfairly freezes out purchasers who are indifferent to the provenance of their olive oil"). Mr. Frank misstates the content of the claim form and the limitations of recovery under the NJCFA.

The claim form does not ask class members to certify reliance. Rather, it asks claimants to attest that they "would not have paid the price charged and/or made the purchase(s) in the absence of the phrase 'Imported from Italy.'" This is fully consistent with New Jersey law. "Simply showing a violation of the CFA … is insufficient to entitle a private citizen to damages under the Act." *Dabush v. Mercedes-Benz USA, LLC*, 378 N.J. Super. 105, 116 (N.J. App. Div. 2005). To seek damages, "a plaintiff must show that she has suffered an ascertainable loss *as a result of* the defendant's unlawful commercial practice." *Cannon v. Cherry Hill Toyota, Inc.*, 161 F. Supp. 2d 362, 373 (D.N.J. 2011) (emphasis in original) (citing N.J.S.A. 56:8-19); *Mercedes-Benz*, 378 N.J. Super. at 122 ("a private plaintiff must still 'prove a causal nexus between the alleged [misrepresentation]' and his or her damages'") (quoting *New Jersey Citizen Action v. Schering-Plough Corp.*, 367 N.J. Super 8, 15 (App. Div. 2003), *cert. denied*, 178 N.J. 249 (2003)). In particular, New Jersey courts (like many courts) have rejected efforts to prove an ascertainable loss as a result of an alleged misrepresentation simply by asserting "that defendant's advertising of its products [alone] caused the prices to rise". *Mercedes-Benz*, 378 N.J. Super. at 123 (finding "price inflation" theory too attenuated). Instead, to recover damages under the NJCFA, "the 'causal nexus' requirement requires proof that the prohibited act must in fact have misled, deceived, induced, or persuaded the plaintiff to purchase defendant's product or service." *Zebersky v. Bed Bath & Beyond, Inc.*, No. 06-1735, 2006 WL 3454993, *3 (D.N.J. Nov. 29, 2006) (quoting *Fink v. Ricoh Corp.*, 365 N.J. Super. 520, 574 (N.J. Law Div. 2003)); *see also, e.g.*, *Solo v. Bed Bath & Beyond, Inc.*, 06-1908, 2007 WL 1237825, at *4 (D.N.J. April 26, 2007) (no ascertainable loss where plaintiff could not allege he "purchased the sheets in part because of the representation that the sheets were '1000 thread count,' or, that Plaintiff would not have purchased the sheets had they been labeled with the actual thread count").

Rather than impose an "arbitrary" or "irrelevant" requirement, the claim form thus appropriately asked persons to attest that they "would not have paid the price charged and/or made the purchase(s) in the absence of the phrase 'Imported from Italy.'" As the Ninth Circuit recently made clear in a similar class action, and as the Court anticipated in its order certifying a class in this case, "Rule 23 specifically contemplates the need for such individualized claim determinations …." *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1131 (9th Cir. 2017) (affirming that defendant will have opportunity to contest "whether [absent members] relied on the label at issue" "when they file claims for damages"). If anything, Mr. Frank's objection underscores the wisdom of including the attestation, because he concedes he suffered no ascertainable loss as a result of the "Imported from Italy" language—to which he "attribute[d] no meaning"—because "he would have purchased the bottle anyway," and clearly believes others share his feelings. Frank Decl. ¶ 8. On these admitted facts, Mr. Frank's individual claim for damages (as well as others like him) would have been worth $0 had this case proceed to trial, so he cannot complain that the settlement does not provide for greater monetary relief.

The cases Mr. Frank cites in support of his zero-recovery subclass theory are readily distinguishable. They involved unfair treatment of a subclass with potentially viable claims for monetary relief.

- In *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010), the settlement provided extra cash payments to members that had made a documented complaint with the defendant or class counsel prior to settlement, on the purported ground that they deserved the "extra award" because they "had taken steps towards litigation[.]" *Id.* at 1067. The court held it was unfair to exclude members that had not made such complaints because they had "identical" and viable legal claims to those that had. *Id.* at 1069.
- In *Ferrington v. McAfee, Inc.*, No. 10-cv-01455, 2012 WL 1156399 (N.D. Cal. April 6, 2016), the settlement excluded from monetary relief class members that had downloaded software, on the purported grounds that they had received what they paid for and the download was not inadvertent. *Id.* at *9. However, because members of this subclass

were "misled into downloading the software," and their rights were violated even if they had intended to download the software, the court found they still had viable claims. *Id.* at *9-10.[2]

- In *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012), the class was arbitrarily divided—based solely on claims rates for the various car models at issue—into a reimbursement group with priority to the common fund and a residual group that would be paid only if and after the reimbursement group's claims had been satisfied. *Id.* at 187. The court held this was unfair because the claims of the residual group were no less viable than the reimbursement group. *See Id.* 179-80, 187-90.
- In *Daniels v. Aeropostale West*, No. C 12-05755, 2014 WL 2215708 (N.D. Cal. May 29, 2014), the majority of absent *opt-in* members in a collective action were forced to release claims for unpaid wages in return for zero dollars, based on the parties' determination that employment data purportedly showed they were not owed a "true up," notwithstanding that class members disputed their right to a true up by *opting into* the action. *Id.* at 2-3.
- *Allen v. Similasan Corp.*, 318 F.R.D. 423 (S.D. Cal. 2016) did not involve a subclass; the settlement was rejected because it provided injunctive relief *only* in return for a broad release of *all* monetary claims, except personal injury. *Id.* at 428.

Here, any individuals with potentially viable claims for monetary relief can submit a claim to receive complete compensation. Moreover, this Court already has found the "Claim Form … [was] written in plain English, [] easy to comprehend, and fully compl[ied] with the requirements of … [all] applicable law", and separately required the parties to submit a mock-up of the claim form for review prior to granting preliminary approval. Dkt. 151 at 5 ¶ 7. In addition, neither Mr. Frank nor any other objector can contend that they would have received greater monetary relief if this case had proceeded to trial. As a result, the settlement affords reasonable monetary relief in return for a

[2] *See also* Objection at 21 (implicitly conceding this distinction: "A decisive factor was that the settlement released all of the uncertified subclasses claims 'despite the potential *viability* of some of [them]'") (emphasis added).

carefully limited release of claims arising out of the "Imported from Italy" allegations, and Mr. Frank's objections should be overruled. Dkt. 140-1, Ex. 1 at §§ 4.4, 8.3.

IV. THE SETTLEMENT DOES NOT INCENTIVIZE CLASS COUNSEL TO LIMIT CLAIMS, NOR WAS THE CLAIMS PROCESS DESIGNED TO DO SO

Finally, Mr. Frank objects that the settlement put "the interest of class counsel at direct odds with the class's interest in maximizing its recovery" by reserving for SNA a limited right to terminate the settlement if the total costs from notice, administration, and claims were projected to exceed $5 million. Objection at 18. The exact opposite is true.

Under the terms of the settlement, the amount paid to the class, individually or in the aggregate, is not impacted by the amount paid to class counsel. Similarly, the settlement does not require class counsel to accept less in fees or costs depending on the number of valid claims submitted. As a result, the only possible incentive class counsel has ever had under the settlement was to maximize the number of claims to support their fee request. For this reason, class counsel insisted during negotiations that the claim form be simple, straightforward, and easy to submit. Commons Decl. ¶¶ 6-9. Class counsel categorically rejected any language or requirement that they believed might complicate the claims process or discourage the submission of claims. *Id.* ¶ 9.

During the course of the mediation, the claim form and claims process became so simplified that SNA became concerned about the potential for invalid or fraudulent claims. Commons Decl. ¶ 11. As a condition of settling, SNA required a narrow window of time to evaluate whether to withdraw from the settlement in the event that the number of seemingly valid claims submitted far exceeded what, based on everything SNA knows about its customers, could have been validly submitted. *Id.* ¶ 12. Mr. Frank suggests that the provision created an incentive for class counsel to suppress claims, but the provision was designed so that it would not have been triggered even if more than 100% of putative class members with potential eligibility for monetary relief submitted claims. *Id.* It was truly meant as a safety valve for SNA to avoid incurring runaway liability for seemingly valid claims that, based on SNA's knowledge, could not all be valid. *Id.*

The sole case Mr. Frank cites questioning the fairness of a settlement based on a termination provision is readily distinguishable. The provision was much broader, making the settlement

"terminable upon the mutual agreement of the Representative, Plaintiff and Defendant" without any qualification, and the parties provided the Court with "no reason" for including it in the settlement. *See Newman v. Americredit Fin. Servs. Inc.*, No. 3:11-cv-03041, 2014 U.S. Dist. LEXIS 15728 (S.D. Cal. Feb. 3, 2014).[3] Moreover, that settlement was rejected for multiple other reasons not at issue here, including because the class was not certifiable, the settlement did not provide class members an opportunity to object to counsel's fee application, and the parties had not complied with notice requirements. *Id.* at *11-12, 18-20.

In addition, Mr. Frank fails to identify any basis for believing that the claims process and notice program "throttled" claims. Aside from mistakenly construing the claim form as requiring "reliance," *see supra* Section III, he faults the parties for not providing individualized notice. But SNA does not sell direct to consumers. It distributes to retailers and wholesalers. SNA had no practicable way to identify class members beyond publication notice. The Ninth Circuit recently explained that individualized notice was not required under analogous circumstances in a cooking oil class action because "Rule 23 requires only the 'best notice that is *practicable under the circumstances*[.]'" *ConAgra Foods*, 844 F.3d at 1128-29 (emphasis in original); *id.* at 1129 ("Courts have routinely held that notice by publication in a periodical, on a website, or even at an appropriate physical location is sufficient to satisfy due process."). Mr. Frank suggests that the parties could have identified absent class members through shopper loyalty programs, but SNA

[3] *Americredit* has not been followed or cited by any published decision. Mr. Frank also cites *Dewey v. Volkswagen AG*, 681 F.3d 170, 189 n.19 (3d Cir. 2015) to argue the purported "conflict defeats the adequacy regardless of whether the termination provision has actually caused the representatives to act contrary to the class's interest." Objection at 18. But *Dewey* did not involve a termination provision. As discussed *supra*, at 8, it denied final approval because the settlement arbitrarily prioritized claims of the representatives above absent class members. *Rodriquez v. West Publishing Corp.*, 563 F.3d 958 (9th Cir. 2009) also did not concern a termination provision, but instead conflicts created by undisclosed incentive agreements between class counsel and contracting class representatives, which obligated counsel to request from any common fund arbitrarily high incentive awards that increased with the amount of recovery. *Id.* at 959. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718-21 (6th Cir. 2013) did not concern a termination provision either; rather, it rejected a settlement where class counsel had egregiously pursued their own interests by giving unnamed class members "illusory" injunctive relief and no monetary relief, while awarding named plaintiffs $1,000 per child and class counsel—who did not take a single deposition, serve any discovery, or even file a response to the defendant's motion to dismiss—$2.73 million in fees. And *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 622 F.3d 913, 917 (7th Cir. 2011) is inapposite because it did not concern a settlement; rather, the court denied class certification because class counsel had perpetrated multiple lies to recruit the named plaintiff.

does not have such data, plaintiff was unable to obtain it via third-party subpoenas, and California and other states prohibit retailers from disclosing such data. *See, e.g.*, Cal. Civ. Code § 1749.65. The only case Mr. Frank cites for this argument, *Larson v. AT&T Mobility LLC*, 687 F.3d 109, 128 (3d Cir. 2012), also is inapposite because the defendant could have searched its *own* billing records to provide individualized notice, but chose not to do so.

Significantly, Mr. Frank does not identify any other aspect of the notice program that was purportedly inadequate or suggest any practicable way the program could have been improved. The notice program was robust and tailored to reach class members, which is why this Court already found that it was "reasonably calculated … and complies fully with the requirements of the Due Process Clause …, Rule 23 …, and any other applicable law." Dkt. 151 ¶ 8. Where, as here, notice satisfies due process, "the number of claims submitted at any particular time is not a relevant factor in evaluating the fairness, reasonableness, or adequacy of the settlement." *Hall v. Bank of Am.*, No. 1:12-cv-22700-FAM, 2014 WL 7184039, at *8 (S.D. Fla. Dec. 17, 2014). And, in fact, since Mr. Frank's objection, the number of claims nearly doubled.

For these reasons, Mr. Frank's remaining objections should be overruled.

V. MS. SWEENEY'S BOILERPLATE OBJECTIONS SHOULD BE OVERRULED BECAUSE SHE CONCEDES HER PROPOSALS ARE "NOT THE 'USUAL' PROCEDURE IN CLASS ACTION PROCEEDINGS" AND SHE PROVIDES NO MEANINGFUL ANALYSIS OR LEGAL SUPPORT FOR THEM

Ms. Sweeney does not challenge the adequacy of relief afforded to class members under the settlement. Instead, she requests that the court "withhold a portion of Class Counsel's fee until the entire distribution process is complete" and posits that it "would also be judicious" to require counsel "to report back … with a final summary and accounting of the disbursement process" before giving "its final stamp of approval[.]" Dkt. 155 ¶¶ 1-2. Because Ms. Sweeney does not provide any authority for her requests, which impracticably purport to require disbursement of monetary relief *before* final approval, no analysis showing why the settlement is not fair, reasonable, or adequate, and concedes that "this is not the 'usual' procedure in Class Action proceedings", her objection should be overruled.

Ms. Sweeney also asserts boilerplate objections that class counsel's fees are excessive, based on her review of the docket, and because they will be awarded "notwithstanding the amount of monetary relief paid to Class Members." *Id.* ¶¶ 3-4, 7-8. As discussed above, because Defendant committed to pay all valid claims in full regardless of the number of claims submitted or the amount of a fee award, and Ms. Sweeney does not object that the relief is inadequate or provide any substantive analysis how the settlement is unfair or unreasonable, her objection should be overruled.

Finally, Ms. Sweeney's baseless objection that notice was defective because "the objection filing date is impossible to determine" is plainly contradicted by (i) her concession that the "Notice states … '[the objection] must be electronically filed via the court's ECF system, or delivered to the Clerk of the Court by mail, express mail or personally [sic] delivery such that the objection is *received by* the Clerk of the Court (or postmarked) on or before May 2, 2017'", *compare id.* ¶ 5, *with id.* ¶ 6; and (ii) her compliance with that deadline. The Notice clearly and repeatedly states the objection deadline,[4] as recognized by this Court when it held that "the notices are written in plain English, are easy to comprehend, and fully comply with … [all] applicable law." Dkt. 151, ¶ 7.

Each of Ms. Sweeney's objections are baseless and without support, and should be overruled.

Dated: May 16, 2017

SIDLEY AUSTIN LLP

By: /s/ Sean A. Commons
Sean A. Commons
Attorneys for Defendant
SALOV NORTH AMERICA CORP.

[4] *See* Long Form Notice at p. 2 & 8, available at: http://www.snaoliveoilsettlement.com/DocumentHandler.ashx?DocPath=/Documents/Kumar_v_Salov_Long_Form_Notice_2_28_17.pdf

CERTIFICATE OF SERVICE

On May 16, 2017, I caused this **DEFENDANT SALOV NORTH AMERICA CORP.'S RESPONSE TO OBJECTIONS TO CLASS ACTION SETTLEMENT** to be served on counsel of record through the ECF system.

/s/ Sean A. Commons
Sean A. Commons

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ROHINI KUMAR, an individual, on behalf of herself, the general public and those similarly situated,

Plaintiff,

vs.

SALOV NORTH AMERICA CORP.,

Defendant.

Case No. 4:14-cv-02411-YGR

Assigned to: Hon. Yvonne Gonzalez Rogers

DECLARATION OF SEAN A. COMMONS IN SUPPORT OF DEFENDANT SALOV NORTH AMERICA CORP.'S RESPONSE TO OBJECTIONS TO CLASS ACTION SETTLEMENT

Date: May 30, 2017
Time: 2:00 p.m.
Courtroom: 1

[Memorandum Of Points And Authorities Filed Concurrently]

I, Sean A. Commons, declare as follows:

1. I am an attorney admitted to the bar of this Court and a member of the law firm of Sidley Austin, LLP, counsel of record to Defendant SALOV North America Corp. ("SNA") in the above-captioned matter. I have personal knowledge of the facts and circumstances stated herein and, if called and sworn as a witness, I could and would testify competently thereto. I submit this declaration in support of SNA's Response to Objections to the Class Action Settlement.

2. Before a class was certified, from time to time during the course of this litigation, Plaintiff's counsel informally broached the possibility of settlement. The initial discussions were limited to whether a settlement might be possible. During those informal discussions, I informed Plaintiff's counsel that SNA was not willing to pay any amount to resolve this litigation because of its views about the lack of merit of the claims and the available grounds for defeating class certification.

3. In addition to holding strong views about the lack of merit of this case, SNA also was not open to settlement at the time in part due to the hard-fought nature of the litigation. Discovery had placed significant demands on the organization, its leadership team, and employees, as well as cost substantial money (e.g., gathering and processing ESI) and lawyer time (e.g., reviewing documents, responding to motions, conferences and letters, travel for depositions, etc.). The parties had held multiple contentious "meet and confer" sessions, engaged in multiple rounds of discovery motion practice, and exchanged multiple letters on discovery-related matters. SNA was reluctant to consider a settlement given the amount of time and expense already incurred in the course of the litigation and, instead, viewed class certification as a better option for resolving the litigation.

4. Prior to moving for class certification, the parties stipulated to Plaintiff's voluntary dismissal of its claims about the quality of the extra virgin olive oil, for the reasons set forth in the January 7, 2016 stipulation. *See* Dkt. #81. Plaintiff then moved for certification of her claims about the "Imported from Italy" labelling. Again, no settlement discussions occurred during this time.

5. After the Court's July 15, 2016 order certifying a class, the parties renewed informal settlement discussions beginning approximately in early August 2016. For the first time, I indicated

a willingness on behalf of SNA to entertain a settlement, so long as the settlement was nationwide in scope. Even though SNA steadfastly remained of the view that the claims were meritless, and was willing to defend its position through trial and appeal if necessary (views it holds to this day), SNA had business reasons for being open to the possibility of a settlement at that time, including the substantial costs and risks of litigation. Given the relatively small amount in controversy for the California class, SNA viewed a California-only settlement class as impracticable; among other things, notice and administration costs would far outstrip any possible direct benefits that could be efficiently provided to consumers via a California-only settlement. SNA also was not willing to incur the substantial notice and administration expenses needed for any class settlement when a California-only settlement might merely trigger copy-cat class actions across the country about use of the phrase "Imported from Italy," especially since the Court had granted a class certification motion in this case.

6. From the outset, Plaintiff's counsel made clear that any nationwide settlement would need to extend the damages analysis Plaintiff's expert developed for class certification to account for SNA's total sales volume nationwide, and that Plaintiff would need sufficient information to assess nationwide exposure. In other words, Plaintiff's counsel made plain that they would not provide any type of "discount" off of the liability or exposure analysis if the settlement occurred on a nationwide instead of a California-only basis. In addition, from the outset, Plaintiff's counsel insisted that any settlement needed to provide monetary and injunctive relief, that any claims process be streamlined and accessible online, that class members should be able to receive some amount of monetary relief without proof of purchase (subject to caps to be negotiated), that class members who provide proof of purchase should not be subject to any caps on monetary relief, and that any notice program be robust. Plaintiff's counsel was only willing to proceed with negotiations based on these basic understandings.

7. The parties engaged in numerous telephone conferences and other exchanges in an effort to reach agreement on the substantive terms of a settlement before agreeing that the parties needed the assistance of a mediator. The parties agreed to mediate before Randy Wulff of Wulff

Quinby & Sochynsky, a well-known and respected mediator among the class action bar, who came highly recommended. SNA committed to bring its chief executive, Marco de Ceglie, to the mediation on November 8, 2016.

8. Even with the able assistance of the mediator, the negotiations on November 8, 2016 proved contentious and challenging. It took hours of the mediator going back and forth between the parties, as well as periodic joint sessions, to make progress. SNA eventually agreed to materially move off of its positions regarding almost every substantive settlement term, including the minimum payout for submitting a valid claim, the amount to be paid per qualifying purchase (including that the amount of payments per purchase would not decrease for purchases over certain thresholds),[1] the number of purchases that could be claimed without proof of purchase, the maximum amount that would be paid without proof of purchase, the information required for valid claim forms, and that claim forms would not require a physical signature.

9. During the course of the mediation, Plaintiff's counsel rejected SNA's position that claimants should be required to select from among a list of "reasons" for each purchase and for the amount of settlement benefits or validity of claims to be determined based on the reasons selected by a claimant. Plaintiff's counsel refused to consider any such proposal on the ground that it would make the claims process burdensome and could potentially confuse claimants. Plaintiff's counsel likewise rejected SNA's position that claimants should be required to select from a list of retailers for each purchase and that such a list should include one or more retailers who never sold Filippo Berio branded products during the class period. SNA asked for such a list as a way to identify fraudulent claims. Plaintiff's counsel believed that including such a list in the claim form would not only complicate the form and add to the burden of submitting claims, but also could result in claims being denied because of innocent errors (e.g., misremembering where a purchase occurred) or oversights (e.g., failing to check a box).

10. From SNA's perspective, the settlement overcompensates putative class members apart from the fact that SNA believes their claims to be meritless. Even if one were to accept the

[1] SNA's position has been and remains that putative class members who purchased multiple bottles were more likely to have read the back label disclosing the countries of origin.

damages methodology of Plaintiff's expert, SNA has agreed to pay on average more than 100% of the maximum potential litigation value of claims for putative class members. SNA objected to doing so during the mediation, but ultimately agreed to pay $0.50/purchase with a $2 minimum per claim because paying a lower amount per bottle or setting a lower minimum payment for submitting a valid claim would have been administratively impracticable due to, among other things, the inherent costs of processing and mailing payments.

11. One of many issues that proved contentious and required substantial assistance from the mediator was how to address the potential risk of invalid or fraudulent claims. Plaintiff's counsel took the position that the risk of invalid or fraudulent claims by persons who had not purchased a qualifying product during the class period, or purchased fewer qualifying products than listed on a claim form, would be low and immaterial. Based on my experience and review of other class settlements, I nonetheless had significant concerns about invalid or fraudulent claims, especially because by that point in the mediation SNA had agreed to a streamlined, online claims form process that would allow putative class members to claim $5 with minimal information or effort, and no proof of purchase whatsoever. I was not willing to recommend that SNA accept a settlement that could obligate it to pay an unlimited number of claims by any person within the U.S. when SNA would have no way to determine if claimants had in fact ever purchased a Filippo Berio product, much less if they had purchased one or more during the class period. At the same time, Plaintiff's counsel was unwilling to accept any settlement that provided a cap on the number of claims under a claims-made settlement structure.

12. With the assistance of the mediator, after 10+ hours of mediation, the parties agreed to a settlement that contains no cap on the total number or value of claims, but instead gave SNA a narrow window of time (3 days) to evaluate whether it would withdraw from the settlement upon being advised by the settlement administrator that the expected value of claims, notice, and administration exceeds a specified threshold ($5 million).

a. SNA viewed the threshold as an essential protection against invalid or fraudulent claims because, based on everything SNA knows about its business, SNA was not aware

of a scenario that could generate more than 910,000 legitimate claims, which is the number of claims that would be needed to reach the $5 million threshold (assuming the average value of a claim was $5 and that notice and administration would cost approximately $450,0000).

b. SNA believes that no more than 2-7% of it customers consider country of origin to be of primary importance when purchasing olive oil. Of those customers, only a subset could potentially claim to have misinterpreted "Imported from Italy" to mean "100% Italian Olive Oil." Of that subset of customers, only a subset could claim to have maintained that mistaken belief after multiple purchases (because, among other things, customers who purchase multiple bottles are more likely to have read the back label disclosing the country-of-origin of the oils).

c. Even assuming 7% of SNA's customers during the class period considered country of origin to be of primary importance, if 100% of those customers believed the products at issue were "100% Italian Olive Oil," and 100% of those customers held that belief for each purchase during the class period, then the class would need to consist of at least 13 million households to possibly generate 910,000 legitimate claims. SNA knew from available market data (which Class Counsel independently confirmed) that it sold Filippo Berio products to a fraction of 13 million households and, in any event, all of the above-stated assumptions already were unrealistically high. As a result, from SNA's perspective, the $5 million threshold was a necessary protection against the possibility of being obligated to pay for a substantial number of invalid or fraudulent claims.

d. Plaintiff's counsel took the position that the claim form adequately eliminated the risk of invalid or fraudulent claims and only accepted the $5 million threshold after the parties discussed that, as a practical matter, the significant sunk costs of notice and administration (borne entirely by SNA), as well as SNA's legal fees, would ensure that SNA would not withdraw from the settlement lightly even if the threshold was exceeded. The parties also discussed that, as a practical matter, SNA would have little incentive to withdraw from the settlement even if the threshold was exceeded because SNA could become liable for substantial notice expenses for a California-only litigation class, as well as the cost of potentially needing to

take a California-only class to trial and through an appeal. The parties also discussed that SNA had a disincentive to withdraw even if the threshold was exceeded because Plaintiff likely would have additional leverage in any future settlement negotiations.

13. The parties reached agreement on the substantive terms of the settlement currently before the Court on the evening of November 8, 2016. Only then, under the oversight of the mediator, did the parties begin to discuss the amount of fees and costs to be paid to Plaintiff's counsel. The issue of fees and costs was contentious. After consulting with the parties separately and jointly, the mediator ultimately agreed that no further progress appeared likely after what had been an exhausting day.

14. The parties continued to vigorously negotiate fees and costs over the next three weeks, engaging in more than a dozen telephone conferences. The discussions were adversarial and, at times, heated, as each side laid out their respective positions. Because the parties had separately negotiated the substantive terms of the settlement first, SNA had every incentive to *minimize* the amounts potentially recoverable by Class Counsel and Plaintiff, as SNA alone would bear those expenses, not the settlement class. SNA negotiated hard over each dollar, and both sides moved off their last-best-and-final positions before agreement was reached on fees and costs, at a number significantly below what Plaintiff's counsel had represented to be their total lodestar incurred as of that date.

15. The settlement before the Court follows the substantive terms reached during the mediation. Plaintiff's counsel continued to take aggressive positions during the process of working out the details of the online claim form process. For instance, SNA proposed what it believed would be a streamlined two-factor authentication process for claims to be able to readily confirm that only one claim would be submitted per household. Under SNA's proposal, a claimant would either be supplied with a control number to include on a claim form or could click on a link in an email from the settlement administrator to submit a claim. Plaintiff's counsel categorically rejected any two-factor authentication requirement as potentially discouraging persons from completing the claims process and, in general, as complicating the process. Even though I pointed out that two-

factor authentication has been approved in similar consumer class actions (e.g., to identify individuals who submit multiple claims from the same computer and/or from the same household using different email addresses), Plaintiff's counsel was adamant that they would walk away from the settlement if SNA insisted on a two factor process out of concern that it might discourage legitimate claims. Plaintiff's counsel would not agree to anything beyond possibly a "CAPTCHA" – a process that prevents persons from using computers to automatically complete and submit claim forms (e.g., by requiring a person to type out words contained in an image) – but a CAPTCHA ultimately was not used.

16. Throughout this litigation, all of my dealings on the subject of settlement have been with Adam Gutride (though, at the mediation, I also interacted with other class counsel). Both Mr. Gutride and I confirmed at the outset of our discussions in August 2016 that neither side would attempt to negotiate fees unless and until the parties had reached agreement in principle on the substantive terms of a settlement. Based on my work on prior class action settlements, I did not want any possible question to be raised that class counsel was put in a conflicted position, and Mr. Gutride clearly shared my view. For this reason, in advance of the mediation, I advised Mr. de Ceglie that the parties would not (and should not) discuss attorneys' fees or costs unless and until they reached agreement on the substantive terms of a class settlement. The mediator likewise required the parties to reach agreement on the substantive terms of a settlement before allowing the subject of fees to be negotiated.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on the 16th day of May, 2017, in Los Angeles, California.

/s/ Sean A. Commons
Sean A. Commons

CERTIFICATE OF SERVICE

On May 16, 2017, I caused this **DECLARATION OF SEAN A. COMMONS IN SUPPORT OF DEFENDANT SALOV NORTH AMERICA CORP.'S RESPONSE TO OBJECTIONS TO CLASS ACTION SETTLEMENT** to be served on counsel of record through the ECF system.

/s/ Sean A. Commons
Sean A. Commons