

SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000612-123

DATE: March 31, 2016

IN THE PRESENCE OF: THE HONOURABLE THOMAS M. DAVIS, J.S.C.

EMIL FOCSA
Petitioner

v.

DIAMOND PET FOODS INC.
and
SCHELL & KAMPETER, INC.
and
COSTCO WHOLESALE CORPORATION
and
COSTCO WHOLESALE CANADA LTD.
and
TRACTOR SUPPLY COMPANY
Respondents

JUDGMENT

Introduction

[1] The Court is seized of a Motion by the Petitioner for the Approval of an Amendment to the Class Action Settlement and Modification of the Notice Program.

Background

[2] On January 28, 2016, this Court approved a Settlement Agreement with respect to the Parties in relation to the following class:

“All residents in Canada who purchased and/or whose pets consumed Pet Food Products that were manufactured, distributed, sold, and/or placed onto the market by the Respondents and which were subsequently recalled on April 6, April 26, April 30, and May 4/5 of 2012.”

[3] On February 5, 2016, the Honourable Mr. Justice Smith, Judge of the Ontario Superior Court of Justice, in the parallel proceeding of *Potestio et al. v. Diamond Pet Foods Inc. et al.*, 12CV55608CP approved a Discontinuance Order of the Ontario class action, as the matter had already been approved by this Court.

[4] As appears from the Settlement Agreement, the Approval Notice is to be disseminated in three (3) ways [see paragraph 11 (c)-(e) of the Settlement Agreement]:

- “c) Within 24 hours of obtaining the Courts’ Approval, the Respondents shall issue a CNW News Release in a form substantially the same as Appendix III to this Agreement;
- d) Within 10 days of obtaining the Courts’ Approval, Costco (or the Claims Administrator on its behalf) shall e-mail all potential Class Members (i.e. Costco customers who purchased the Products from Costco) for whom Costco possesses e-mail address information in a form substantially the same as Appendix IV to this Agreement;
- e) Where:
 - i) Costco does not possess an e-mail address for a potential Class Member, but possesses a mailing address for that person, or
 - ii) Costco possesses both an e-mail address and a mailing address for the potential Class member, but the e-mail sent to that person in accordance with paragraph 11 d) is undeliverable

then Costco shall send a postcard to the person in question, by ordinary mail, in a form substantially the same as Appendix V to this Agreement. The mailing of all postcard notices under this paragraph 11 e) shall be completed within 30 days after the e-mails are sent pursuant to paragraph 11 d).”

[5] On February 8, 2016, the Approval Notice was published as a CNW News Release in both English and French [thereby satisfying paragraph 11(c) of the Settlement Agreement].

[6] On February 2, 2016, it was discovered by the Claims Administrator that there might be a problem with Respondents Costco Wholesale Corporation and Costco Wholesale Canada Ltd.'s (collectively "Costco") email database of their customers. This information was communicated to Class Counsel on February 5, 2016.

[7] As it turned out, Costco only had usable e-mail addresses for approximately 34,000 Class Members out of the approximately 144,000 Class Members who purchased the recalled products at Costco, thus rendering the e-mail component of the Notice Program provided for in paragraph 11 d) of the Settlement Agreement less effective than had been anticipated.

[8] A strict application of paragraph 11 e) of the Settlement Agreement would cost over \$100,000 in mailing postcards to all potential Class Members, effectively using up a major portion of the settlement proceeds and reducing recovery to Class Members. Therefore, Counsel for the Parties began discussions to come up with an alternate notice plan that would be more cost effective.

[9] On the advice of the Claims Administrator, Counsel for the Parties agreed that the email blast to the 34,000 potential Class Members for whom Costco had email addresses should be put on hold, so that everything could be handled together. The modified notice program described below is in addition to the emails that will be sent pursuant to paragraph 11 d) of the Settlement Agreement.

Amendment to Settlement Agreement

[10] Subject to the approval of this Court, the Parties have agreed on the following amended plan to replace the notice plan provided for in paragraph 11 e) of the Settlement Agreement:

- a) Costco will place a notice inside all of the Costco stores on their bulletin board where recall notices and other important notices are put up;
- b) Costco will place a notice on its Canadian website; and
- c) Robocalls will be made to all Costco clients that purchased the products during the relevant time period.

[11] By agreement executed on March 18, 2016, the Parties therefore modified the original Settlement Agreement in the following way, as it relates to the Approval Notice (hereinafter referred to as the "Amendment to Settlement Agreement" / "l'Avenant à l'Entente de règlement"):

- a) The Claims Administrator will be responsible for the implementation of the modified notice program [paragraph 5 of the Amendment to Settlement

Agreement to replace paragraph 10 h) of the original Settlement Agreement];

- b) Within 10 days from judgment being rendered herein, the Claims Administrator will start making automated telephone calls to potential Class Members using the script as substantially set out in Appendix A of the Amendment to Settlement Agreement [paragraph 6 of the Amendment to Settlement Agreement to replace paragraph 11 e) of the original Settlement Agreement];
- c) Within 10 days from judgment being rendered herein, Costco will post a notice on the recall notice boards in all Costco retail stores in Canada as substantially set out in Appendix B of the Amendment to Settlement Agreement, which will remain in place until the end of the Claims Period [paragraph 7 f) of the Amendment to Settlement Agreement];
- d) Within 10 days from judgment being rendered herein, Costco will post a notice in the Product Information section of its website as substantially set out in Appendix C of the Amendment to Settlement Agreement, which will remain in place until the end of the Claims Period [paragraph 7 g) of the Amendment to Settlement Agreement];
- e) The Claims Period will be extended to 120 days from judgment being rendered herein [paragraph 8 of the Amendment to Settlement Agreement to replace paragraph 20 of the original Settlement Agreement].

[12] The automated telephone calls will cost approximately \$11,500.

[13] To date, the Claims Administrator has stated that 165 Class Members have submitted claims under the Settlement Agreement.

Approval of Amendment to Settlement Agreement

[14] The Court approves the Amendment to Settlement Agreement as fair, reasonable and in the best interest of Class Members in the circumstances.

[15] More specifically, the Court finds that the replacement notice plan is just and that it observes the principle of proportionality as set out in article 18 of the *Code of Civil Procedure*¹.

POUR CES MOTIFS, LE TRIBUNAL :

WHEREFORE, THE COURT:

[16] **ACCUEILLE** la présente requête;

[16] **GRANTS** the present motion;

[17] **APPROUVE** l'Avenant à l'Entente de règlement en accord avec l'article 590 du *Code de procédure civile*;

[17] **APPROVES** the Amendment to Settlement Agreement in accordance with article 590 of the *Code of Civil Procedure*;

¹ CQLR, c C-25.01.

[18] **DÉCLARE** que l'Avenant à l'Entente de règlement fait partie intégrale du présent jugement;

[18] **DECLARES** that the Amendment to Settlement Agreement is an integral part of this judgment;

[19] **APPROUVE** le nouveau calendrier relatif à l'administration de la Convention de règlement, à savoir :

[19] **APPROVES** new schedule regarding the administration of the Settlement Agreement, namely:

- a) L'échéance pour exercice du droit d'exclusion : 60 jours après les approbations des Cours; pas avant le 30 mai 2016;
- b) L'échéance pour transmettre une réclamation conforme à la Convention de règlement : 120 jours après les approbations des Cours; pas avant le 29 juillet 2016;

- (a) The deadline for opting out of the Settlement Agreement: 60 days after the Courts' Approval; i.e. not before May 30, 2016;
- (b) The deadline to file a claim under the Settlement Agreement: 120 days after the Courts' Approval; i.e. not before July 29, 2016;

[20] **APPROUVE** la forme et le contenu de l'Avis, essentiellement comme il est reproduit aux Annexes A, B, et C de l'Avenant à l'Entente de règlement;

[20] **APPROVES** the form and content of the Notice, substantially in the form as set forth in Appendices A, B, and C to the Amendment to Settlement Agreement;

[21] **ORDONNE** que l'Avis soit publié essentiellement en conformité avec l'Avenant à l'Entente de règlement dans la manière suivante :

[21] **ORDERS** that the Notice shall be disseminated substantially in accordance with the Amendment to Settlement Agreement in the following manner:

- a) Dans les 10 jours de la date du Jugement Additionnel, l'Administrateur des Réclamations devra déclencher des appels téléphoniques automatisés à tous les Membres du Groupe potentiels dont Costco possède le numéro de téléphone;
- b) Dans les 10 jours de la date du Jugement Additionnel, Costco devra afficher des avis sur les babillards se trouvant dans tous les magasins Costco de vente au détail situés au Canada et les avis devront continuellement rester en place jusqu'à la fin de la Période de réclamations;
- c) Dans les 10 jours de la date du Jugement Additionnel, Costco devra diffuser un avis dans la section Avis sur les Produits de son site internet et l'avis devra continuellement rester en place jusqu'à la fin de la Période de réclamations;

- a) Within 10 days of the Supplementary Judgment Date, the Claims Administrator shall cause automated phone calls to be made to all potential Class Members for whom Costco possesses a telephone number;
- b) Within 10 days of the Supplementary Judgment Date, Costco shall post notices on the recall notice boards in all Costco retail stores in Canada and the notices shall remain continuously in place until the end of the Claims Period;
- c) Within 10 days of the Supplementary Judgment Date, Costco shall post a notice in the Product Information section of its website and the notice shall remain continuously in place until the end of the Claims Period;

[22] **DÉCLARE** que la forme de l'Avis constitue un avis juste et raisonnable pour toutes les personnes ayant droit d'être avisées de la Convention de règlement;

[22] **DECLARES** that the form and manner of Notice herein represents fair and reasonable notice to all persons entitled to notice of the Settlement Agreement;

[23] **ORDONNE** qu'un exemplaire du présent jugement soit affiché sur le site web de l'Administrateur des Réclamations à www.petfoodclaim.ca;

[23] **ORDERS** that a copy of this Judgment shall be posted on Claims Administrator's website at www.petfoodclaim.ca;

[24] **DÉCLARE** que dans le cas de divergence entre les conclusions françaises et anglaises du jugement, la version française prévaudra;

[24] **DECLARES** that in the case of any discrepancy between the French and English conclusions of this Judgment, the French version will prevail;

[25] **DÉCLARE** que la version anglaise de l'Avenant à l'Entente de règlement constitue l'entente entre les parties et que dans l'éventualité d'un conflit quant à son interprétation ou son application, la version anglaise aura préséance sur la traduction française;

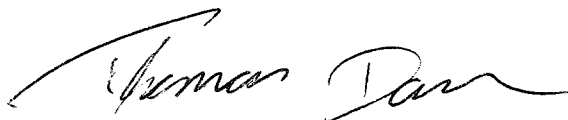
[25] **DECLARES** that the English version of the Amendment to Settlement Agreement is the true agreement between the parties and shall prevail over the French translation in the event of any contradiction between the two;

[26] **RÉSERVE** le droit des parties de s'adresser au tribunal pour solutionner quelque différend que ce soit découlant de la Convention de règlement ou l'Avenant à l'Entente de règlement ;

[26] **RESERVES** the right of parties to ask the Court to settle any dispute arising from the Settlement Agreement or the Amendment to Settlement Agreement ;

LE TOUT, sans frais de justice.

THE WHOLE, without legal costs.



THOMAS M. DAVIS, J.S.C.

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Date of hearing: March 23, 2016