

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 19-3440 FMO (FFMx)	Date	July 21, 2023
Title	Frank Capaci v. Sports Research Corporation		

Present: The Honorable	Fernando M. Olguin, United States District Judge
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Gabriela Garcia
Deputy Clerk

None
Court Reporter / Recorder

None
Tape No.

Attorney Present for Plaintiffs:
None Present

Attorney Present for Defendants:
None Present

Proceedings: (In Chambers) Order Re: Class Notice

Having reviewed: (1) Plaintiff's Proposed Notice Plan Following Class Certification Order (Dkt. 151, "Plf. Plan"); (2) Defendant Sports Research Corporation's ("defendant") Proposed (1) Direct Notice; (2) Online Publication Notice; (3) Press Release; and (4) CLRA Notice (Dkt. 152, "Def. Proposal");¹ and (3) the Declaration of Ronald A. Marron Regarding Class Action Notice Plan (Dkt. 155, "Marron Decl."), the court concludes as follows.

BACKGROUND

On April 14, 2022, the court granted plaintiff's motion for class certification as to five of the six claims asserted in the operative Second Amended Complaint.² (See Dkt. 139, Court's Order of April 14, 2022, at 2, 35). More specifically, the court certified the following classes under Rule 23(b)(3) of the Federal Rules of Civil Procedure³ with respect to plaintiff's claims for: (1) violations

¹ The court will not address defendant's belated argument regarding the "propriety of nationwide class certification[.]" (See Dkt. 152, Def. Proposal at ECF 11095-96). As with defendant's prior filing, defendant is again seeking "another at-bat[.]" (See Dkt. 149, Court's Order of March 26, 2023, at 6) (internal quotation marks omitted). Because defendant did not use page numbers in its proposal, the court will cite to the ECF-generated page numbers at the upper right hand corner of the document.

² The court denied plaintiff's motion as to her breach of implied warranty claim. (See Dkt. 139, Court's Order of April 14, 2022, at 25-26, 35).

³ All "Rule" references are to the Federal Rules of Civil Procedure unless otherwise indicated.

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of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, et seq.; (2) violations of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, et seq.; (3) violations of California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, et seq.; (4) breach of express warranties pursuant to Cal. Com. Code § 2313(1); and (5) negligent misrepresentation:

Nationwide Class: All persons who purchased Sports Research Cambogia that was labeled "weight management" and/or "appetite suppression" ("Product") in the United States since April 26, 2015. The class is limited to those who purchased the Product for personal and household use, and not for resale, and who did not receive a refund or return the Product.

California Sub-Class: All persons who purchased Sports Research Cambogia [] that was labeled "weight management" and/or "appetite suppression" ("Product") in the State of California since April 26, 2015. The class is limited to those who purchased the Product for personal and household use, and not for resale, and who did not receive a refund or return the Product.

(See id. at 35). Plaintiff has since submitted her proposed notice plan, including proposed class notices.

DISCUSSION

"For any class certified under Rule 23(b)(3)[,] . . . the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); see Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1129 (9th Cir. 2017) (Rule 23 "does not insist on actual notice to all class members in all cases and recognizes it might be impossible to identify some class members for purposes of actual notice") (internal quotation and alteration marks omitted; emphasis omitted). "The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means." Fed. R. Civ. P. 23(c)(2)(B). "The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B).

Here, plaintiff proposes Classaura LLC ("Classaura") as "the class action notice provider[.]" (See Dkt. 151, Plf. Plan at 1). The proposed notice program that will be implemented by Classaura consists of: (1) direct notice; (2) an online publication notice; (3) a press release; (4) a CLRA notice; and (5) a case-specific website. (See id.); (Dkt. 151-1, Declaration of Gajan

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Retnasaba in Support of Plaintiff's Proposed Notice Plan ("Retnasaba Decl.") at ¶¶ 12-24).

With respect to direct notice, plaintiff proposes that defendant email the notice to individuals who purchased the Product through defendant's website. (See Dkt. 151, Plf. Plan at 2) ("Plaintiff proposes that Sports Research be ordered to send an email to purchasers of the affected product to provide notice[.]"). Defendant does not object to providing email notice to such class members. (See Dkt. 152, Def. Proposal at ECF 11096-97). Accordingly, the court will direct defendant to email the direct notice to class members who purchased the Product directly through its website.

Both parties provided a proposed Direct Notice. (See Dkt. 152-2, [Proposed] Notice of Class Action Certification ("Def. Direct Notice")); (Dkt. 155, Marron Decl. at ¶ 4); (Dkt. 155-3, Exhibit ("Exh.") 3, "direct notice"). Because plaintiff's proposed "direct notice" primarily directs class members to the class website, (see Dkt. 155-3, Exh. 3), the court will construe plaintiff's proposed "Long Form Notice[.]" (see Dkt. 155, Marron Decl. at ¶ 2); (Dkt. 155-1, Exh. 1, "Plf. Direct Notice"), as her proposed Direct Notice.⁴ Having reviewed both proposals, the court finds that plaintiff's Direct Notice clearly sets forth in plain terms the requirements of Rule 23(c)(2)(B)(i)-(vii). Thus, the court will direct defendant to email plaintiff's proposed Direct Notice (Dkt. 155-1, Exh. 1) to class members.

However, plaintiff shall first revise the Direct Notice to conform to the class definition set forth in the court's certification order. (See Dkt. 139, Court's Order of April 14, 2022, at 35). Plaintiff's proposed Direct Notice repeatedly refers to labels that include the term "appetite control,"⁵ (see Dkt. 155-1, Exh. 1), despite the fact the court did not include that term in the certification order and in defining the certified classes. (See Dkt. 139, Court's Order of April 14, 2022, at 35). Once revised and finalized, the Direct Notice shall be emailed to class members, and also posted on the class website.⁶

The court has also reviewed plaintiff's proposed online publication notice,⁷ (see Dkt. 151-1,

⁴ Because defendant will be emailing the Direct Notice, there is no need to provide a truncated notice.

⁵ This incorrect reference to "appetite control" is repeated in each of plaintiff's proposed notices. The court will not address this further, but expects plaintiff to correct this across all notices. Because the court will not approve defendant's notice, the court will not address its class definition issues here.

⁶ The court finds plaintiff's "Short Form Notice" notice unnecessary.

⁷ The court declines to reduce the number of publications as urged by defendant. (See Dkt. 152, Def. Plan at ECF 11097).

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Retnasaba Decl. at ¶¶ 18-21); (Dkt. 155-5, Exh. 4, Plf. Proposed Online Notice), press release, (see Dkt. 151-1, Retnasaba Decl. at ¶ 22); (Dkt. 155-5, Exh. 5, Press Release), and CLRA notice,⁸ (see Dkt. 151-1, Retnasaba Decl. at ¶ 23); (Dkt. 155-6, Exh. 6, CLRA Notice), and finds that the manner and content of such notices are consistent with Rule 23, and the CLRA.⁹

Turning to the costs of providing notice to the class, estimated to be approximately \$34,395, plaintiff requests that the defendant bear such costs. (See Dkt. 151, Plf. Plan at 4); (Dkt. 152, Def. Proposal at ECF 11099). “The usual rule is that a plaintiff must initially bear the cost of notice to the class.” Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 178, 94 S.Ct. 2140, 2153 (1974); Hunt v. Imperial Merchant Services, Inc., 560 F.3d 1137, 1143 (9th Cir. 2009) (same). And while the court has some discretion in allocating the costs of notice, see Hunt, 560 F.3d at 1139; see also e.g., Cal. Civ. Code § 1781(d) (“If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action.”), the Supreme Court has cautioned courts “not [to] stray too far from the principle underlying [Eisen] that the representative plaintiff should bear all costs relating to the sending of notice because it is [s]he who seeks to maintain the suit as a class action.” Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 359, 98 S.Ct. 2380, 2393 (1978); see Hunt, 560 F.3d at 1143 (noting same). Here, plaintiff has not meaningfully made a case for shifting the burden of providing class notice to defendant. (See Dkt. 151, Plf. Plan at 4). According, the court will order plaintiff to pay for the costs of notice.

CONCLUSION

This Order is not intended for publication. Nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

1. Plaintiff’s Proposed Notice Plan Following Class Certification Order (Dkt. 151) is **granted** upon the terms and conditions set forth in this Order.

2. Subject to the revisions and modifications noted above, the court approves the form, substance, and requirements of the class notices. (See Dkt. 155-1, Exh. 1); (Dkt. 155-4, Exh. 4); (Dkt. 155-5, Exh. 5); (Dkt. 155-6, Exh. 6).

3. Classaura is hereby appointed as “the class action notice provider[.]” Classaura shall supervise and administer the notice program.

4. Publication and class notice shall be commenced no later than **August 7, 2023**. Class

⁸ Such publication shall be in the *LA Daily News*.

⁹ The court also approves the proposed case specific website. (See Dkt. 151-1, Retnasaba Decl. at ¶¶ 12-15).

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members shall be given 45 days to exclude themselves.

5. No later than 14 days after completion of the notice program, plaintiff and Classaura shall provide the court with a status report that sets forth the program and provides copies of the notices provided. Defendant shall also file a declaration attesting to service by email, including the number of class members who were served by email.

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