SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

MINUTE ORDER

DATE: 02/07/2025 TIME: 10:00:00 AM DEPT: CX105

JUDICIAL OFFICER PRESIDING: Randall J. Sherman
CLERK: J. Phu
REPORTER/ERM: Tracy Aaron Hunt CSR# 7925
BAILIFF/COURT ATTENDANT: C. Urinsco, None

CASE NO: **30-2022-01298406-CU-BT-CXC** CASE INIT.DATE: 12/21/2022
CASE TITLE: **Clevenger vs. Welch Foods Inc.**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

EVENT ID/DOCUMENT ID: 74423356

EVENT TYPE: Status Conference

EVENT ID/DOCUMENT ID: 74423357

EVENT TYPE: Motion - Other
MOVING PARTY: Darren Clevenger, David Bloom
CAUSAL DOCUMENT/DATE FILED: Motion - Other For class certification, appointment of class representatives and appointment of class counsel, 07/31/2024

APPEARANCES
Robert J. Stein, III, from DiVicenzo Schoenfield Stein, present for Defendant,Plaintiff(s).
Anthony L. Lanza, from Lanza & Smith, PLC, present for Plaintiff(s).
Daniel S. Silverman, from Venable LLP, present for Defendant(s).

Tentative Ruling posted on the Internet .

The Court hears oral argument.

The Court confirms the tentative ruling as follows:

Plaintiffs' Motion for Class Certification, Appointment of Class Representatives and Appointment of Class Counsel is granted. Defendants' Evidentiary Objections are overruled as to #1, 6 and para. 4, and sustained as to #2-5 and para. 5.

The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. In turn, the community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal. 4th 1004, 1021. These elements are typically referred to as (1) ascertainability; (2) numerosity; (3) commonality; (4) typicality; (5) adequacy; and (6) superiority. Capitol People First v. State Dept. of Developmental Services (2007) 155 Cal. App. 4th 676, 681. Plaintiffs bear the burden of proof on these elements.

Plaintiffs seek certification of the following classes:

The Retail (Comparative Analysis) Class
All persons who made retail purchases in the State of California of Welch's ® Fruit Snacks, Welch's® Reduced Sugar Fruit Snacks, Welch's® Fruit 'n Yogurt™ Snacks, sold in an 8, 10, 18, 22, 26 or 85 count box or any other box containing less Welch's Fruit Snacks (of any variety or flavor) than Defendants include or previously included in the same size box, except for Welch's Fruit Snacks sold in a box measuring 5.75" x 1.75" x 7.5" and containing ten .9 oz pouches of Fruit Snacks or a box containing 22 .9 oz pouches of Fruit Snacks. The class period will be from June 30, 2016 through the date a class is certified.

The Costco Class
All persons who made retail purchases from Costco in the State of California of Welch's ® Fruit Snacks in a box containing either 80 or 90 pouches of Fruit Snacks. The class period will be from June 30, 2016 through the date a class is certified.

Excluded from the classes are the officers, directors, or employees of each Defendant; any entity in which any Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any Defendant. Also excluded from the Classes are the judge to whom this case is assigned and any member of the judge's immediate family.

The court notes that plaintiffs filed a motion for class certification of two similar classes in federal court, which the federal court granted on September 13, 2023. Clevenger v. Welch Foods, Inc. (C.D. Cal. 2022) 342 F.R.D. 446.

Ascertainability: Plaintiffs have defined the class in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary, which is sufficient to allow a member of the class to identify himself or herself as having a right to recover based on the class description. Sarun v. Dignity Health (2019) 41 Cal. App. 5th 1119, 1132–33. Defendants' contention that the class is not ascertainable because class members will not be able to recall the products they purchased is speculative and unsupported by evidence. Defendants' argument that the class cannot be ascertained because some class members included in the class were satisfied with their purchase is without merit as customer satisfaction is not a factor in determining the validity of a class members' claim or qualification to be a member of the class. The court previously rejected this consumer expectations argument in overruling defendants' demurrer to the complaint in this action. This case involves a UCL claim based on non-functional slack fill, not misrepresentation or fraud, so the class is not ascertained based on their satisfaction or lack thereof in the product, its pricing or its packaging.

Numerosity: It is undisputed that plaintiffs have demonstrated that there is a sufficient number of class members to satisfy the numerosity requirement. (Lanza Dec. ¶¶15-16.)

Commonality: Plaintiffs have demonstrated that there are common questions of law and fact regarding the subject products with respect to whether they contain non-functional slack fill, with respect to defendants' defenses, and with respect to calculating the restitution owed to the class. The court does not agree with defendants that the existence of multiple products sold at multiple price points creates such complexity that individualized issues of fact and law would predominate. The court also rejects defendants' argument that repeat purchasers would automatically be excluded from the class due to some perceived satisfaction with the products or pricing. Defendants have provided no binding legal authority in support of this argument. The court also rules that defendants' argument that individual inquiries will predominate due to a statute of limitations defense is without merit. As the federal court noted, "purchasing products prior to the limitations period does not mean a class member cannot recover for subsequent purchases that occurred within the limitations period". Clevenger, supra, 342 F.R.D. at

458. "This is so because the class member still overpaid for the fruit snacks purchased during the limitations period." Id. After all, "separate, recurring invasions of the same right can each trigger their own statute of limitations". Aryeh v. Canon Business Solutions, Inc. (2013) 55 Cal. 4th 1185, 1198.

Typicality: Plaintiffs have shown that their claims are typical of the class, since plaintiffs' claims and defendants' defenses arise from the same conduct and concern the same legal theories, and plaintiffs seek the same recovery. Again, defendants' arguments that plaintiffs' claims are not typical because of lack of standing is without merit. As the court noted in overruling defendants' demurrer in this action, plaintiffs do not need to demonstrate that they were deceived to have standing for this UCL claim. "A private plaintiff has UCL standing . . . if the plaintiff lost money or property as a result of the practice at issue." California Medical Assn. v. Aetna Health of California Inc. (2023) 14 Cal. 5th 1075, 1096. "Nonfunctional slack fill in packaging is prohibited by section 12606 without the necessity of an independent showing of fraud or deceit." Hobby Industry Assn. of America, Inc. v. Younger (1980) 101 Cal. App. 3d 358, 372. Here, plaintiffs have alleged they purchased products that allegedly contain non-functional slack fill, which the court finds sufficient for purposes of standing to bring the UCL claim. Defendants' argument that plaintiffs' claims are barred by the UCL's four-year statute of limitation simply because some of plaintiffs' purchases were outside the four-year statute of limitations also fails as a matter of law, because each new purchase triggers its own statute of limitations. Aryeh, supra, 55 Cal. 4th at 1198.

Adequacy: Plaintiffs have demonstrated that they and their counsel will be adequate class representatives and class counsel, based on their vigorous advocacy to date in this action and the federal action, and based on plaintiffs' counsel's experience. (Lanza Dec. ¶4; Clevenger Dec. ¶¶9-10; Bloom Dec. ¶¶8-9; Stein Dec. ¶¶3-4.) The court finds no merit to defendants' claims that plaintiffs lack credibility, lack standing, or that plaintiffs' friendship with one of plaintiffs' counsel disqualifies plaintiffs from adequately representing the class. Further, contrary to defendants' contentions, plaintiff Clevenger can adequately represent class members who purchased other, but similar products to the Welch's products he purchased. In re Tobacco II Cases (2009) 46 Cal. 4th 298, 319 (typicality and adequacy elements concern whether class representatives may be allowed to present claims on behalf of others who have similar, but not identical, interests).

Superiority: Plaintiffs have shown that a class action is the superior means for litigating this non-functional slack-fill claim and would be manageable as a class action. Plaintiffs' proposed restitution model may rely on individualized facts, but defendants have not adequately established that this would render this class action unmanageable. "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal. 4th 1004, 1022.

A Status Conference is also set for today and will go forward.

Joint Statement filed on 1/28/2025 is read and considered.

Discussions held between the Court and counsel regarding the status of this case and the class notice, as set forth on the record.

The next Status Conference is scheduled for 05/23/2025 at 09:00 AM in Department CX105.

A Joint Status Report must be filed at least one week before the hearing.

Parties waive notice.