

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

In re: Dial Complete Marketing
and Sales Practices Litigation

MDL Case No. 11-md-2263-SM
ALL CASES

O R D E R

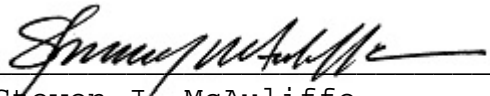
The revised proposed order is adopted as an order of the court, with the following additional comments. This is a somewhat unusual case as consumer product class action settlements generally go, in that all class members who filed timely and qualified claims are being fully compensated for the price premium paid associated with the allegedly inaccurate marketing claims, up to a reasonable number (without receipts or other documentation) of products purchased, and fully with respect to documented purchases (documented by means in addition to consumer affidavits of purchase). The settlement is reasonable, fair to class members, and is just. While the agreed upon injunctive relief is probably illusory with respect to precluding the reintroduction of triclosan (as the Food and Drug Administration has finally, after decades of consideration, prohibited its use in the product), enjoining use of the challenged claim ("Kills 99% of Germs") is of significant value to the class, for the reasons articulated by counsel to the settling parties at the fairness hearing held this date. While

the value of the injunctive relief ascribed by plaintiffs' expert is, as pointed out by Attorney Skinner (representing a number of state attorneys general) not well grounded, and probably vulnerable to other doubts and challenges, the court is not inclined to disrupt the negotiated settlement in this aged litigation merely to obtain a better assessment of "value" of the useful aspect of the injunctive relief agreed upon as a means of assessing the appropriate fee for the value obtained. First, a different (and presumably a substantially lower) value would not result, as a practical matter, in more revenue going to class members - all class members who have properly filed timely and valid claims will be fully compensated with respect to a reasonable number of products purchased (reasonable in light of the difficulties in establishing that number with precision, the unlikely existence of receipts for such small consumables given the lengthy agreed upon period, and the necessary reliance on simple affidavits of purchase by class members). Quibbling about the fee properly awarded for the injunctive relief obtained will not, in this case, result in more being paid to already fully compensated class members. Secondly, even reducing the claimed value of the useful injunctive relief by half, as plaintiffs' counsel proposed, the attorneys' fee claimed, and agreed to, for that relief is reasonable, given the unchallenged hours invested and reasonable

hourly rates and loadstar suggested. That defendant ceased using the challenged marketing claim "voluntarily" in 2017 is also not a weighty factor in diminishing the value of the relief and consequent fair fee, in that the parties recognize, as does the court, that that cessation was in direct response to the pending litigation and, at the very least, plaintiffs' counsels' extended efforts over many years served as at least a catalyst, if not a direct cause, of that cessation. The additional five year ban agreed to by defendant additionally serves to protect the class (and all consumers of anti-bacterial hand soaps for that matter) from the challenged claim, while allowing some leeway for resumption of its use should future product formulations prove consistent with the broad claim. All in all, plaintiffs' counsel have served the class well in that they have recovered the full price premium loss for all timely class claimants, policed the marketplace with respect to the challenged claim and price premium charged, and have done so in a case that suffered from (in the court's view) not only obvious merits weaknesses and burden of proof difficulties, but potentially fatal legal weaknesses as well, had it gone to trial. Defendant's agreement to the settlement is both responsible, efficient, and well serves its interests in that for a fixed and limited sum it has bought peace, limited its costs of litigation and potential exposure to more substantial

liability, reserved the option to employ the broad marketing claim should future technological developments warrant the claim after five years, and avoided perhaps years of delay should this case travel the appellate path, on which path complicated and now familiar class certification issues and damages issues would no doubt demand the expenditure of substantial sums to litigate.

SO ORDERED.



Steven J. McAuliffe
United States District Judge

May 31, 2019

cc: All counsel of record

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

IN RE DIAL COMPLETE MARKETING AND) CASE NO. 11-md-2263-SM
SALES PRACTICES LITIGATION)
) (MDL DOCKET NO. 2263)
)
) (ALL CASES)

**ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND
JUDGMENT OF DISMISSAL WITH PREJUDICE**

WHEREAS, in this Action,¹ Plaintiffs Michelle Carter, Jonathan Cessna, Sonia Herrera, Jenny Marazzi, Kristina Pearson, Elizabeth Poynter, and Sven Vogtland (collectively, “Plaintiffs”), in their individual capacities and on behalf of all others similarly situated (the “Settlement Class”), assert Claims against Defendant Dial Corporation (“Dial” or “Defendant”). Dial has denied each of the Claims asserted against it in this Action and denies any and all liability or damages. Plaintiffs maintain that the Claims have merit and that a class should be certified in this Action;

WHEREAS, after lengthy negotiation, the parties reached a proposed settlement of disputes between them, embodied in the Settlement Agreement and Release previously filed with the Court (Dkt. No.239-2);

WHEREAS, on January 2, 2019, the Court issued a Preliminary Approval Order conditionally certifying a Settlement Class and preliminarily approving the settlement of this Action as set forth in the Settlement Agreement (“Preliminary Approval Order”) (Dkt. No. 242);

WHEREAS, objections to the Settlement had to be postmarked no later than March 13, 2019 (the “Objection Date”);

¹ Capitalized terms shall have the meaning ascribed to them in the Definitions section of the Settlement Agreement.

WHEREAS, Class Counsel filed their motion for attorneys' fees, costs, and expenses three weeks in advance of the Objection Date (Dkt. No. 244);

WHEREAS, in the Preliminary Approval order, the Court scheduled the Final Approval Hearing for May 29, 2019;

WHEREAS, notice of the Settlement was disseminated in the manner approved by the Court, including a Long Form Notice and Publication Notice. Specifically,

- (a) On January 7, 2019, a notice that meets the requirements of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, was served upon all U.S. States' Attorneys General, the Attorney General for the United States, and the Attorneys General of the U.S. Territories;
- (b) On January 11, 2019, the Class Settlement website containing the Preliminary Approval Order, the Long-Form Notice, the Summary Notice, the Settlement Agreement, and other pleadings and documents relevant to the Settlement Agreement went live;
- (c) The Settlement was advertised through contextually-targeted Internet banner ads and Facebook from January 12, 2019 through February 10, 2019 and through Twitter and www.classaction.org and www.topclassactions.com ;
- (d) On February 11, 2019, the Publication Notice was published in the national edition of *People* magazine.

WHEREAS, on May 29, 2019, a final approval hearing ("Final Hearing") was held before this Court at which all Parties were represented; counsel from the United States Department of

Justice, Consumer Protection Branch and the Arizona Attorney General (speaking for a coalition of 12 State Attorneys General²) were represented and heard; and no objectors appeared;

WHEREAS, the Court received no written objections;

WHEREAS, Plaintiffs have moved, pursuant to FRCP 23(a) and (b)(3), for a final judgment certifying the class solely for purposes of settlement and pursuant to FRCP 23(e) for a final judgment approving the settlement of this Action as set forth in the Settlement Agreement; and

WHEREAS, the Court having considered all matters and papers submitted to it in connection with the Final Hearing and otherwise being fully informed, concludes that substantial and sufficient ground exists for entering the Final Approval Order and Judgment.

WHEREFORE, this Court finds and ORDERS as follows:

1. The Settlement Agreement and any attachments thereto, are expressly incorporated by reference into this Final Approval Order and made a part thereof for all purposes.
2. The Court has personal jurisdiction over the parties and all Settlement Class Members and has subject matter jurisdiction over this Action.
3. Solely for the purpose of settlement, in accordance with the Settlement Agreement, the Court finds and concludes that the prerequisites to a class action, as identified in FRCP 23(a) and 23(b)(3) are satisfied, and the Court hereby certifies the following Settlement Class, pursuant to FRCP 23(b)(3):
 - a. all persons who purchased the Dial Complete Product in the United States from January 1, 2001, up to and including January 12, 2019;
 - b. Defendant and its officers, directors, employees, and agents are excluded from the Settlement Class definition;

² Arizona, Arkansas, Florida, Idaho, Indiana, Louisiana, Michigan, Missouri, Oklahoma, Rhode Island, Tennessee, and Texas

- c. Persons who are neither citizens nor residents of the United States or its territories are excluded from the Settlement Class definition; and
- d. Any Judge or Magistrate presiding over the Action and members of their families are excluded from the Settlement Class definition.

4. Pursuant to the Settlement Agreement, and for settlement purposes only, the Court finds as to the Settlement Class that:

- a. The Settlement Class Members are so numerous that joinder of all such Settlement Class Members is impracticable;
- b. There are questions of law and fact common to the Settlement Class;
- c. Plaintiffs' claims are typical of the claims of the other Settlement Class members;
- d. Plaintiffs and Class Counsel have fairly and adequately protected the Settlement Class's interests;
- e. The Action seeks monetary and injunctive relief;
- f. The numerosity, commonality, typicality and adequacy requirements of Rule 23(b)(2) and the predominance and superiority requirements of Rule 23(b)(3) are satisfied as to the Settlement Class;
- g. Defendant has acted or refused to act on grounds that apply generally to the Settlement Class, so that the final monetary and injunctive relief provided by the Settlement Agreement is appropriate respecting the Settlement Class as a whole;
- h. Because this Action is being settled and not litigated, the Court need not consider manageability issues that might be presented by the trial of statewide class actions involving the issues in this case. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1977).

5. For the purpose of this Settlement, the Court appoints as Michelle Carter, Jonathan Cessna, Sonia Herrera, Jenny Marazzi, Kristina Pearson, Elizabeth Poynter, and Sven Vogtland Settlement Class Representatives, and appoints Lucy J. Karl as Settlement Class Counsel pursuant to Fed. R. Civ. P. 23(g).

6. The Court finds and concludes that the Parties provided adequate notice pursuant to Fed. R. Civ. P. 23(e) and the Court's Preliminary Approval Order.

7. The above-described Settlement Class is certified solely for the purpose of the settlement embodied in the Settlement Agreement. The Court finds and orders that the Defendant has not conceded that this Action or any similar case is amenable to class certification for purposes of litigation, and orders that nothing in this Final Order or in the Settlement Agreement shall prevent the Defendant or Plaintiffs from opposing or supporting class certification, or seeking decertification, if this Final Order approving the Settlement Agreement is reversed or invalidated, on appeal or otherwise, for any reason.

8. The Court finds that the Settlement Agreement is fair, reasonable, and adequate based on the following factors, among other things:

- a. The Settlement Agreement was reached after good faith, arm's-length negotiations, warranting a presumption in favor of approval;
- b. Counsel for the Parties are highly experienced in this type of litigation, with full knowledge of the risks inherent in this Action and they are in a position to enable the Parties to make an informed decision as to the fairness and adequacy of the settlement, and their judgment and experience weigh in favor of settlement;
- c. The Class Representatives have adequately represented the Class;
- d. Plaintiffs' likelihood of success on the merits balanced against the amount and form of relief offered weighs in favor of settlement;
- e. The complexity, expense, and likely duration of the litigation weigh in favor of settlement;
- f. The stage of the proceeding and the amount and results of discovery weigh in favor of settlement;
- g. The nature of the negotiations weighs in favor of the settlement;
- h. That no objections was raised by any Settlement Class Member weigh in favor of settlement;
- i. The effectiveness of the proposed method of distributing relief to the Settlement Class, including the method of processing class-member claims weighs in favor of the settlement

- j. The public interest weighs in favor of settlement. *See In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F.Supp.2d 249, 259 (D.N.H. 2007).

9. Accordingly, this Court finds that the terms of the Settlement Agreement, including any and all amendments and exhibits thereto, have been entered into in good faith and are fully and finally approved as fair, reasonable, and adequate as to, and in the best interests of, Plaintiffs and the other Settlement Class, and in full compliance with all applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), and any other applicable law.

10. The Court, therefore, approves the settlement set forth in the Settlement Agreement. The Court directs the settlement to be consummated in accordance with the terms and conditions set forth in the Settlement Agreement.

11. Subject to the terms and conditions of the Settlement Agreement, the Court enters an injunction against the Defendant requiring it to comply with the requirements of the Settlement Agreement. The Court finds this injunction is necessary to provide relief to the Settlement Class. Accordingly, the Court ORDERS the following injunction:

- a. For a period of the earlier of five years following the Final Effective Date, or the date upon which there are changes to any applicable statute, regulation, or other law that Defendant reasonably believes would require a modification to the labeling and marketing of Dial Complete in its current formulation required by the Injunctive Relief provisions in order to comply with the applicable statute, regulation, or law, Defendant shall not use an advertising or labeling claim that Dial Complete “Kills 99.99% of Germs*” as that product is currently formulated;
- b. Defendant shall not reintroduce triclosan as an active ingredient in Dial Complete.
- c. Provided that Defendant shall have taken or cause to be taken all actions set forth in the Settlement Agreement, Defendant shall be deemed to have complied with the injunction set for in this Paragraph.

12. The Court releases and forever discharges the Released parties from each of the Released Claims, as provided in the Settlement Agreement.

13. The Action is hereby dismissed with prejudice as to (i) all of Plaintiffs' Claims and (ii) the Settlement Class Members' Claims.

14. The Releasing Parties are permanently barred and enjoined from instituting, maintaining, or prosecuting, either directly or indirectly, any litigation that asserts the Released Claims. This permanent bar and injunction is necessary to protect and effectuate the Settlement Agreement, this Final Order, and this Court's authority to effectuate the Settlement Agreement, and is ordered in aid of this Court's jurisdiction and to protect its judgments. This Final Order and the Settlement Agreement may be pleaded as a full and complete defense to any action, suit, or other proceeding that has been or may be instituted, prosecuted or attempted against the Released Parties in such capacity with respect to any of the Released Claims, and may be filed, offered, received into evidence, and otherwise used for such defense.

15. This Final Order and the Settlement Agreement, whether or not it shall become final, the monetary and injunctive relief provided by the Defendants, and any and all negotiations, discussions and/or communications associated with the Settlement Agreement, shall not:

- a. Be construed as or deemed to be evidence of an admission or concession by the Released Parties of (i) any liability or wrongdoing or of the truth of any allegations in the Complaint against Dial, or (ii) any infirmity of, or strength of any alleged defense against, the allegations in the Complaint; and neither this Agreement nor any statement, transaction, or proceeding in connection with the negotiation, execution, or implementation of this Agreement shall be admissible in evidence for any such purpose in any proceeding, or (iii) the propriety of any litigation class in this or any other litigation, or (iv) as a waiver of the Defendants' right to challenge class certification if this Settlement Agreement is terminated for any reason, or (v) violation of any statute or law, any

liability or wrongdoing by any of the Released Parties.

- b. Be deemed, or used, offered, or received against Plaintiffs or the other Settlement Class Members, or each or any of them, as an admission, concession, or evidence of, the infirmity or strength of any Released Claims raised in the Action, the availability or lack of availability of meritorious defenses to the Released Claims raised by the Defendants in the Action, or an admission, concession or evidence of lack of suitability of this Action for class certification under Fed. Civ. R. 23(b)(1) or (b)(3) on the part of Plaintiffs.

However, this Final Order and the Settlement Agreement, and any acts performed and/or documents executed in furtherance of or pursuant to the Settlement Agreement may be used in any proceedings as may be necessary to effectuate the provisions thereof. In addition, any party or any of the Released Parties may file this Final Approval Order and Judgment and/or the Settlement Agreement in any action that may be brought against such party or parties in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

16. Dial's capped payment of a total of \$7.4 million (inclusive of the \$350,000 that it previously advanced toward notice costs) reflects the sum total of its monetary obligations under this settlement, including for the attorneys' fees, service awards, and other amounts described in this Order.

17. The Court approves an award to Class Counsel in the amount of \$3,825,000 covering Class Counsel's reasonable fees and \$573,141 covering Class Counsel's reasonable costs and expenses pursuant to Fed. R. Civ. P. 23(h).

18. The Court approves service awards of \$5,000 to each of the seven (7) Class Plaintiffs.

19. The Court approves payment of reasonable notice and claims administration fees from the Rule 23(b)(3) monetary relief.

20. The Court approves payment of settlement compensation to Settlement Class Members who submitted valid claims forms pursuant to the Settlement Agreement, subject to any pro rata reduction as required by the number of Claims submitted and additional Claims administration expenses deducted.


21. The Court has jurisdiction to enter this Final Approval Order and Judgment. Without in any way affecting the finality of this Final Approval Order and Judgment, this Court expressly retains exclusive and continuing jurisdiction over the Settlement Class Members, and all matters relating to the administration, consummation, validity, enforcement, and interpretation of the Settlement Agreement and of this Final Approval Order and Judgment, including, without limitation, for the purpose of:

- a. interpreting, enforcing, modifying, or setting aside the terms and conditions of the Settlement Agreement and resolving any disputes, claims, or causes of action that, in whole or in part, are related to or arise out of the Settlement Agreement and/or this Final Approval Order and Judgment (including without limitation: whether a Person is a Settlement Class Member; whether claims or causes of action allegedly related to this Action are or are not barred or released by this Final Approval Order and Judgment; and whether any Person is enjoined from pursuing any claims);
- b. entering such additional orders, if any, as may be necessary or appropriate to protect or effectuate this Final Approval Order and Judgment, or to ensure the fair and orderly administration of the Settlement Agreement; and
- c. entering any other necessary or appropriate orders to protect and effectuate this Court's retention of continuing jurisdiction over the Settlement Agreement, the Parties and the Settlement Class Members.

22. Pursuant to Fed. R. Civ. P 54(b), there is no just reason for delay in the entry

of this Final Approval Order and Judgment and immediate entry by the Clerk of the Court is expressly directed.

SO ORDERED this 31st day of May, 2019.


The Honorable Judge Steven J. McAuliffe
United States District Court
District of New Hampshire