

**IN THE CIRCUIT COURT OF PHELPS COUNTY, MISSOURI**

DACIA TRENTHAM,	)	
Individually and on behalf of all	)	
others similarly situated,	)	
	)	
Plaintiff,	)	No. 18PH-CV00751
	)	
v.	)	
	)	
TASTE OF NATURE, INC.,	)	
	)	
Defendant.	)	

**PLAINTIFF’S SUGGESTIONS IN SUPPORT OF PLAINTIFF’S UNOPPOSED  
MOTION FOR PRELIMINARY APPROVAL  
OF CLASS SETTLEMENT**

Dacia Trentham, Individually and as Class Representative on Behalf of All Similarly Situated Persons and a proposed Settlement Class, respectfully requests that the Court preliminarily approve the class action Settlement that is described in detail in the *Class Action Settlement Agreement* and exhibits attached thereto and filed contemporaneously herewith; grant certification of the proposed Settlement Class for the purposes of the Settlement; approve the provision of Notice to the Settlement Class; and appoint the Plaintiff as Class Representative and her counsel as Class Counsel.<sup>1</sup>

At this preliminary approval stage, the Court need only review the proposed settlement to determine whether it is within the permissible “range of possible judicial approval” and thus, whether the notice to the class and the scheduling of the formal fairness hearing is appropriate. (See FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, § 21.632 (4th ed. 2004); 4 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 11:25 (4th ed. 2002); see also

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<sup>1</sup> Capitalized terms used herein but not defined herein shall have the meaning ascribed to such terms in the Settlement Agreement.

*State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 377 (Mo. Ct. App. 1997) (stating that the purpose of a preliminary approval hearing is for the court to make a “preliminary examination of the record before it and make a preliminary determination as to whether it appears that a **settlement class** should be tentatively certified.”).

## **I. BACKGROUND OF THE LITIGATION**

This case arises out of Plaintiff’s allegations that Defendant Taste of Nature engaged in deceptive and unlawful conduct in packaging its “theater box” candy Products in non-transparent, cardboard containers, which contain non-functional slack-fill. Plaintiff’s Class Action Petition and Jury Demand includes claims for violations of the Missouri Merchandising Practices Act (“MMPA”) and unjust enrichment.

This Settlement is a product of thorough case investigation by Plaintiff and comprehensive engagement between the Parties. Initially, on April 6, 2017, Class Counsel sent Defendant a letter pursuant to Section 1770 of the Civil Code of California (the “CLRA”) on behalf of a California plaintiff, notifying Defendant of violations of the CLRA and demanding corrective action. On March 13, 2018, Counsel filed a lawsuit against Defendant in the Central District of California, alleging nationwide and California claims. Subsequently, on May 18, 2018, Plaintiff filed the instant action. Class counsel is aware of one other case, which alleges parallel claims on behalf of a California-only class, filed in Superior Court County of Los Angeles in February 2017, *Tsuchiyama v. Taste of Nature*, Case No. BC651252.

Although the parties to the instant case could have entered into protracted litigation, they chose instead to engage constructively and were able to achieve a swift and favorable outcome on behalf of the Class. Among other things, once settlement negotiations began, Class Counsel demanded production of documents in order to adequately represent the Class’s interest in

settlement discussions. Defendant produced all of the necessary documents, which Plaintiff subsequently learned corresponded to the production in *Tsuchiyama*. Armed with this material, the parties appeared before an experienced third party mediator in California, the Honorable Judge Biderman (Ret.). Class Counsel was concerned that a no-holds-barred litigation strategy would only serve to delay and potentially foreclose any benefit to the class due to Defendant's financial situation. With this in mind, and with the assistance of Judge Biderman and the benefit of confidential information relating to Defendant's financials, the parties were able to achieve a swift and favorable outcome on behalf of the Class. As described in detail in the Settlement Agreement, consumers nationwide will benefit in the near term from the injunctive and monetary relief provided by this Settlement.

## **II. NATURE OF THE SETTLEMENT**

As explained in the proposed settlement, Defendant Taste of Nature has agreed to provide both monetary and injunctive relief that will correct the issue identified in the Petition. Taste of Nature has agreed to a two-tiered structure for monetary relief to class members, under which Taste of Nature will provide cash benefits to Settlement Class Members who timely file Claims by the Claims Deadline. Taste of Nature will provide this monetary benefit without a cap on the gross potential payout and will provide a per-product payment of \$0.25 (subject to a cap on the number of Products) pursuant to the two-tier structure set forth in the Settlement Agreement and described below. As to the injunctive relief, Taste of Nature has agreed that it will immediately evaluate the level of fill in the Products and will commence working on the design, fill-level, development and/or production of proposed modifications, fill-level and/or replacements for its existing packaging so as to reduce, where possible, the amount of slack-fill (the "Injunctive Relief").

### III. MATERIAL TERMS OF THE SETTLEMENT

The key terms of the Settlement Agreement are detailed below.

#### A. Definitions

1. Section II. (2.47) of the Settlement Agreement defines the “Settlement Class” as: all Persons who purchased Products in the United States during the Class Period. Excluded from the Settlement Class are: (a) all Persons who purchased or acquired the Product for resale; (b) Defendant and its employees, principals, affiliated entities, legal representatives, successors and assigns; (c) any Person who files a valid, timely Opt-Out request; (d) federal, state, and local governments (including all agencies and subdivisions thereof, but excluding employees thereof) and (e) the judge(s) to whom this Action is assigned and any members of their immediate families.

2. Section XII. (12.2) of the Settlement Agreement defines “Released Claims” and provides that:

The Releasing Parties hereby fully release and forever discharge the Released Parties from any and all actual, potential, filed, known or unknown, fixed or contingent, claimed or unclaimed, suspected or unsuspected, asserted or unasserted, Claims, demands, liabilities, rights, debts, obligations, liens, contracts, agreements, judgments, actions, suits, causes of action, contracts or agreements, extra contractual Claims, damages, punitive, exemplary or multiplied damages, expenses, costs, penalties, fees, attorneys’ fees, and/or obligations of any nature whatsoever (including “Unknown Claims” as defined below), whether in law or in equity, accrued or unaccrued, existing now or arising in the

future, whether direct, individual, representative, or class, of every nature and description whatsoever, based on any federal, state, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction outside the United States, against the Released Parties, or any of them, relating in any way to any conduct prior to the date of the settlement and arise, in any manner whatsoever, out of any facts alleged by Plaintiff in the lawsuit that: a) is or are based on any act, omission, inadequacy, misstatement, representation, harm, matter, cause, or event; b) involves legal Claims that have been asserted in the lawsuit; or c) involves legal Claims about the Products or the marketing, advertising, packaging, or filling of the Products. The Parties acknowledge and agree that personal injury Claims are not part of any of the facts alleged by Class Representative in this lawsuit and that personal injury Claims are not included within the Released Claims.

3. Section II. (2.43) of the Settlement Agreement defines “Released Parties” to mean Taste of Nature and its direct and indirect parent companies, predecessor entities, successor entities, related companies, direct and indirect subsidiaries, holding entities, past and present affiliates, franchisees, distributors, wholesalers, retailers, advertising and production agencies, licensors, and agents, including all current and former officers, directors, managers, members, partners, owners, employees, shareholders, consultants, attorneys, legal representatives, insurers, agents, assigns, or other equity interest holders of any of the foregoing, and their heirs, executors, administrators, and assigns. For the

avoidance of doubt, Released Parties shall include all retailers, distributors, sellers and resellers of Products.

**B. The Requested Settlement Class**

The Parties stipulate to and request the certification of the Class as defined in the Settlement Agreement, for settlement purposes only, pursuant to Rules 52.08(a), (b)(2) and (b)(3) of the Missouri Rules of Civil Procedure. “Among current applications of Rule 23(b)(3), the ‘settlement only’ class has become a stock device.” *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 377 (Mo. Ct. App. 1997), quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). *Amchem* specifically approved of the use of a temporary settlement class in order to facilitate settlement. *Id.*

**C. Monetary Relief**

The Settlement Agreement provides that Taste of Nature will pay or cause to be paid, by cash benefits, all Valid Claims based on one of the two Tiers of payment the Settlement Class Member elects. Specifically, Settlement Class Members who elect to fill out the Claim Form section for Tier 1 and who do not have valid Proof of Purchase may recover \$0.25 per Product purchased for up to a maximum of four Units (\$1 per Household); or Settlement Class Members who elect to fill out the Claim Form for Tier 2 and who provide valid Proof of Purchase may recover \$0.25 per Product purchased for up to a maximum of fifty Units (\$12.50 per Household). The monetary relief shall be administered by the Settlement Administrator.

**D. Non-Monetary Relief**

In addition to the payments described above, Defendant Taste of Nature will also provide the following relief pursuant to the Settlement Agreement: Within sixty (60) calendar days after entry of the Final Approval Order, Taste of Nature will immediately evaluate the level of fill in the Products and will commence working on the design, fill-level, development and/or

production of proposed modifications, fill-level and/or replacements for its existing packaging (the “Injunctive Relief”).

#### **E. Notice**

The Settlement Agreement provides for a Settlement Notice, Publication Notice, a Settlement Website, and telephonic support of the notice campaign. The full cost of notice and administration and effectuation of the Settlement Agreement shall be paid by Defendant.

#### **F. Opt Outs and Objectors**

The Settlement Agreement provides mechanisms by which members of the Class may opt out of, or object to, the proposed settlement. Any Settlement Class Member who intends to object to the Settlement must do so on or before seventy-five (75) days after the Notice Date on which the Settlement Administrator disseminates the Settlement Notice (the “Objection Deadline”). In order to object, the Settlement Class Member must file with the Court, and provide a copy to the Settlement Administrator, Class Counsel, and Defendant’s counsel, a document that includes all of the following:

1. The case name and number, *Trentham v. Taste of Nature, Inc.*, Case No. 18PH-CV00751 (Phelps County Circuit Court, MO.)
2. The name, address, telephone number, and, if available, the email address of the Person objecting;
3. The name and address of the lawyer(s), if any, who is representing the Person objecting in making the Objection or who may be entitled to compensation in connection with the Objection;
4. A detailed statement of Objection(s), including the grounds for Objection(s);
5. Copies of any papers, briefs, or other documents upon which the Objection is based;
6. A statement of whether the Person objecting intends to appear at the Final Approval Hearing, either with or without counsel;
7. The identity of all counsel (if any) who will appear on behalf of the Person objecting at the Final Approval Hearing and all Persons (if any) who will be called to testify in support of the Objection;

8. A statement of his/her membership in the Settlement Class, including all information required by the Claim Form;
9. The signature of the Person objecting, in addition to the signature of any attorney representing the Person objecting in connection with the Objection; and
10. A detailed list of any other objections by the Settlement Class Member, or his/her counsel, to any class actions submitted in any court, whether state or otherwise, in the United States in the previous five (5) years. If the Settlement Class Member or his/her counsel has not objected to any other class action settlement in any court in the United States in the previous five (5) years, he/she shall affirmatively state so in the written materials provided in connection with the Objection to this Settlement.

A Settlement Class Member who wishes to opt out of the Settlement Class must do so on or before seventy-five (75) calendar days after the Notice Date (the “Opt-Out Deadline”). In order to opt out, a Settlement Class Member must complete and mail to the Settlement Administrator, Class Counsel and Defendant’s Counsel a Request for Exclusion that is postmarked no later than the Opt-Out Deadline.

#### **G. Service Award**

Class Counsel shall submit to the Court an application seeking leave to pay a Class Representation Service Award of not more than \$3,000 per Class Representative to no more than five (5) Class Representatives for their efforts in bringing the Action and achieving the benefits of this Agreement on behalf of the Settlement Class. The Service Awards do not reduce the benefit to the Class in any way.

#### **H. Attorneys’ Fees**

Class Counsel will submit to the Court an application seeking a Fee and Expense Award of not more than one million dollars (\$1,000,000) in total compensation for attorneys’ fees, expenses, and costs (exclusive of settlement administration fees and costs which will be paid directly by Taste of Nature), comprised of \$440,000 in cash payments over a five-year period



and assignment of an Insurance Policy. The Fee amount is fair in light of the work performed in achieving this Settlement. Taste of Nature agrees that it will not object to the amount of Class Counsel's Application for Fee Award and agrees that it will, contingent on entry of the Final Approval Order, pay the amounts approved by the Court as set forth in Section VII. (7.1 (a) and (b)) of the Settlement Agreement. The Attorneys Fee and Expense Award does not reduce the benefit to the Class in any way.

#### **I. Release**

Upon the entry of a final order approving this settlement and following the expiration of the time for appeal or the entry of a decision on such appeal, the Class Representatives and each and every member of the Settlement Class who has not timely filed a request to be excluded from the Settlement Class will release and forever discharge Taste of Nature as further explained in the attached Settlement Agreement.

#### **IV. CONCLUSION**

For the foregoing reasons, Plaintiff respectfully asks that the Court grant preliminary approval of the proposed Settlement Agreement and enter the proposed order separately submitted herewith (a copy of which is attached as Exhibit D to the Settlement Agreement), and grant such further relief as the Court deems reasonable and just.

Dated: June 15, 2018

Respectfully submitted,

DACIA TRENTHAM, Individually, and on Behalf of a  
Class of Similarly Situated Individuals, Plaintiff

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**COUNSEL FOR PLAINTIFF**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document has been served by email to all counsel of record on this 15<sup>th</sup> day of June, 2018.

By: /s/ Stephen F. Gaunt  
Stephen F. Gaunt