

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

LEONARD PERRY, on behalf of himself)	
and all others similarly situated,)	
)	
Plaintiff,)	Cause No. 2022-CC10425
)	
vs.)	Division: 6
)	
SCHNUCK MARKETS, INC.)	
)	
)	
Defendant.)	

**PLAINTIFF’S UNOPPOSED MOTION AND INCORPORATED MEMORANDUM OF
LAW IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT**

COME NOW Plaintiff Leonard Perry by his undersigned counsel, pursuant to Missouri Supreme Court Rule 52.08, and for Plaintiff’s Motion for Preliminary Approval of Class Action Settlement states:

INTRODUCTION

After more than two and a half years of contentious litigation, following almost three full-day mediation sessions with former Missouri Supreme Court Judge the Honorable Ray Price, Jr.—an experienced mediator and the longest serving Supreme Court member having served more than 20 years on the bench—the Parties are pleased to report that they have reached a classwide settlement that favorably resolves this case. The Parties have entered into a Settlement Agreement,¹ under which Defendant Schnuck Markets, Inc. (“Defendant” or “Schnucks”) has agreed to make available a Class Settlement Amount up to **\$4 million** (the “Class Settlement Amount”) to be distributed to Settlement Class Members who elect to participate in the Settlement.

¹ Unless stated otherwise, capitalized terms used in this Motion are intended to have the meanings given to them in the Parties’ Settlement Agreement (copy of which is attached hereto as Exhibit 1) (hereinafter “Settlement Agreement”).

Plaintiff's pursuit to protect consumer rights has resulted in a Settlement that effectively deters retailers from eluding transparent price advertising. Each Settlement Class Member who timely submits a valid claim will be awarded a significant, one-time **cash payment in the amount of \$11, \$25, or \$72**. No proof of purchase is required for level one payments to eligible settlement class members who file a claim.

By any measure, the Settlement and the relief it provides are a terrific outcome for the Settlement Class Members given the significant risks involved in continued litigation. Plaintiff brought this case against a Defendant with substantial resources, strong legal defenses, and a willingness to litigate through trial and appeals. While Plaintiff maintains that even absent a settlement, he would be able to secure class certification and prevail on the merits at trial, success is not assured, and Schnucks has vigorously defended this case at every stage. Notwithstanding many challenges, Plaintiff and Class Counsel have secured a settlement which includes direct cash payments to Settlement Class Members up to a \$4 million cap. If approved, the Settlement will bring meaningful relief to Missouri consumers as well as certainty and closure to what has been—and likely would continue to be—a highly contentious, costly, and lengthy litigation.

With this Motion, Plaintiff seeks certification of the proposed Settlement Class for purposes of settlement under Missouri Supreme Court Rule 52.08, and preliminary approval of the Settlement Agreement, claims procedure, and the proposed form and method of class notice. As explained in detail below, the terms of the Parties' Settlement are fair, reasonable, and adequate, and consistent with other consumer class settlements that have been approved in Missouri. Certification of the Settlement Class is in the best interests of the putative class members and proper under Missouri Supreme Court Rule 52.08.

Accordingly, Plaintiff respectfully requests that the Court enter an order (1) granting preliminary approval of the Settlement; (2) conditionally certifying the Settlement Class for

settlement purposes only; (3) appointing Plaintiff as Settlement Class Representative; (4) approving the proposed Notice Plan; (5) appointing Daniel J. Orlowsky of Orlowsky Law LLC and Adam M. Goffstein of Goffstein Law, LLC as Class Counsel; and (6) setting a date for the Final Approval Hearing.

I. BACKGROUND

A. Plaintiff's Factual Allegations

Schnucks markets, distributes, and sells a variety of personal, family, or household products, including the alcohol products (wine and spirits) that are the subject of this settlement. *Petition*, ¶ 2. Plaintiff alleges that Schnucks engaged in a systematic false-price comparison scheme in which Schnucks advertises fake “Regular” and “Original” prices with lower “Sale” prices to convince consumers that they can buy certain Schnucks Products at prices with significant savings. Plaintiff claims that Schnucks’ conduct unambiguously violates Missouri law, which prohibits a seller from implying a price reduction unless it is from a bona fide regular price in effect immediately prior to the advertisement.

Plaintiff claims that the purported false and misleading price comparisons appear in a variety of places, including on signs posted in Schnucks’ markets and stores, on in-store shelf signs located below the Products, in print advertisements, on Schnucks’ website, and on Schnucks’ receipts. *Petition*, ¶ 3. Through these mediums, Schnucks represents that consumers can buy the Schnucks Products on “sale” and at a substantial discount from its “Regular” or “Original” prices. *Id.* Plaintiff claims that purported “sales” and discounts are illusory, fictitious and in violation of Missouri law because Schnucks has not sold substantial quantities of the Products at the higher “Regular” and “Original” prices in the recent past, nor has it offered to sell the Products at those prices for a reasonable and substantial period of time preceding the advertised “sale.” *Id.* As a

result, Plaintiff claims that he and the Class have not received the “savings” and benefit of the bargain that Schnucks promises them because the Products that they purchased from Schnucks do not have the higher value and worth that Schnuck’s represents they have through its false and misleading “Regular” and “Original” price comparisons. *Id.*

In the lawsuit, Plaintiff claims that Schnucks took full advantage of the fact that consumers rely on comparative prices to provide information concerning a product’s value using misleading and illegal advertisements on in-store shelf signs and its website that were not based on actual historical sales or offers. *Petition*, ¶ 7. On November 7, 2020, Schnucks told Plaintiff he could purchase an alcohol product worth \$28.99 for only \$15.99, claiming it would “Save” Plaintiff \$13.00 off its “Regular” price. *Petition*, ¶ 37. Also, on November 7, 2020, Schnucks told Plaintiff he could purchase another alcohol product worth \$30.99 for only \$13.99, claiming it would “Save” Plaintiff \$17.00 off its “Regular” price. *Petition*, ¶ 38. In reality, Plaintiff alleges, those Products were not worth \$28.99 and \$30.99, respectively, because, in violation of Missouri law, Schnucks had not in the recent past offered those same products for a substantial period of time or sold those same products in substantial quantities at the higher “Regular” price. *Petition*, ¶ 44. Since Plaintiff did not get products worth the higher value represented on Schnuck’s in-store shelf sign, Plaintiff alleges that did not receive the benefit of his bargain and suffered an ascertainable loss. *Petition*, ¶ 49.

Plaintiff subsequently brought this suit on his own behalf and on behalf of a putative statewide class, asserting claims under two counts for: (1) violations of the Missouri Merchandising Practices Act (“MMPA”) Mo. Ann. Stat. 407.010 *et seq.*, and (2) unjust enrichment. *Id.* at ¶¶ 47-73.

B. Procedural History and The Parties' Settlement Negotiations

Plaintiff initiated this lawsuit on December 3, 2020. The Parties subsequently engaged in lengthy motion practice related to the pleadings. On February 12, 2021, Defendant filed a motion to dismiss the case pursuant to Rule 55.27(a)(6). The motion was heard by the Court on April 7, 2021.

Following briefing and the hearing, the Court issued an order on August 31, 2021. In the Court's Order, the Court held that Plaintiff had sufficiently stated a claim against Defendant for violating the MMPA, including misrepresentations and/or false advertisements. 8/31/21 Order at 4. The Court dismissed Plaintiff's unjust enrichment claim and ruled that Plaintiff's claim for punitive damages at the onset of this litigation was barred by the recent amendments to the MMPA. *Id.*

On November 2, 2021, Schnucks filed its Petition for Writ of Prohibition of this Court's decision on its Motion to Dismiss in the Eastern District Court of Appeals. The following day, November 3, 2021, Schnucks' writ was denied. On November 12, 2021, Schnucks filed a subsequent Petition for Writ of Prohibition in the Missouri Supreme Court. On November 22, 2021, Plaintiff filed his Suggestions in Opposition to Issuance of Writ of Prohibition. And on December 21, 2021, the Missouri Supreme Court denied Schnucks' writ.

After these initial proceedings and motion practice, the Parties then engaged in months of extensive discovery, including the exchange of document requests, interrogatories, and requests for admission; review and production of thousands of pages of documents; numerous telephonic meet-and-confer discovery conferences; and thorough analysis of Schnucks' customer transaction data and pricing history of the Products at issue.

During the summer of 2022, the Parties began to actively discuss settlement. Over the next few months, the Parties held numerous telephone conferences negotiating the parameters of a

potential settlement. The Parties subsequently agreed to participate in a private mediation with retired Missouri Supreme Court Judge the Honorable Ray Price, Jr. to serve as the designated neutral for the Parties' mediation.

On November 30, 2022, the Parties attended a full-day mediation session before Judge Price at his law firm, Armstrong Teasdale LLP's, St. Louis offices. Although the mediation session was productive and lasted late into the evening, the Parties were unable to reach a resolution. However, the progress made during the mediation session gave Plaintiff's counsel confidence that a settlement was possible. To that end, the Parties participated in a second mediation before Judge Price, to be held remotely.

On December 19, 2022, the Parties remotely attended a second, full-day mediation session before Judge Price. Although the second mediation session was productive and lasted late into the evening, the Parties again were unable to reach a resolution. However, the progress made during this second mediation again gave Plaintiff's counsel confidence that a settlement was possible. To that end, on December 20, 2022, the Parties participated in a third remote session. Following this third session, the Parties reached an agreement in principle by which to resolve the claims in this matter on a classwide basis.

Over the months that followed, the Parties negotiated the contours of the Settlement Agreement, including the scope of the release, the form of class notice, the claims submission process, and the various provisions governing implementation of the Settlement Agreement. Once negotiations concluded, Plaintiff and the Parties' counsel executed the final Settlement Agreement which is now being submitted to the Court for approval.

II. THE PROPOSED SETTLEMENT

A. The Proposed Settlement Class Definition

The proposed Settlement would establish a Settlement Class defined as follows:

[A]ll persons who, as a resident of the state of Missouri, purchased an Alcohol Product from Schnucks (either online or in a store located in the state of Missouri) for personal, family, or household use during the Class Period.

Ex. 1 at ¶ 1.36. The Class Period “means from December 3, 2015 through February 15, 2023.”

Id. at ¶ 1.12.

B. Monetary Relief and the Settlement Fund

As part of the Settlement, Schnucks has agreed to pay a Class Settlement Amount up to but never exceeding \$4,000,000.00 (Four million dollars and xx/100). *Id.* at ¶ 4.1. The entire Class Settlement Amount will be available for distribution to Settlement Class Members who submit approved claims following deductions for Notice and Administration Costs and an Incentive Award payment to Plaintiff. *Id.* at ¶¶ 4.1.1-4.1.2. Claimants will receive payment as follows:

Group 1: All Settlement Class members who submit a valid Claim attesting that they purchased between one (1) and twenty-four (24) Units of Alcohol Products from Schnucks during the Class Period will be eligible to recover a one-time payment of \$11.00. No Proof of Purchase is necessary to receive compensation in Group 1.

Group 2: All Settlement Class members who submit a valid Claim, to include Proof of Purchase, demonstrating that they purchased between twenty-five (25) and sixty (60) Units of Alcohol Products from Schnucks during the Class Period will be eligible to recover a one-time payment of \$25.00.

Group 3: All Settlement Class members who submit a valid Claim, to include Proof of Purchase, demonstrating that they purchased more than sixty-one (61) Units of Alcohol Products from Schnucks during the Class Period will be eligible to recover a one-time payment of \$72.00.

Id. at ¶ 4.1.3.

Should the total dollar amount of the valid Claims to be paid pursuant to Paragraph 4.1.3 exceed the remaining Class Settlement Amount after deductions are made for the costs of Notice, Administration, and a Service Award, the payments to Settlement Class Members shall be reduced *pro rata* as follows: All Settlement Class Members in Group 3 with a valid claim will receive a one-time payment of \$72.00; All Settlement Class Members in Group 2 with a valid claim will

receive a one-time payment of \$25.00; and All Settlement Class Members in Group 1 with a valid claim will receive a pro rata share of the funds remaining in the Class Settlement Amount after deductions are made for the costs of Notice, Administration, Service Award and Payments to Valid Claimants in Groups 2 and 3. *Id.* at ¶ 4.1.4. In the unlikely event that the Class Settlement Amount is exhausted from payments made to Settlement Class Members in Group 3 and/or Group 2 leaving zero remaining funds for Settlement Class Members in Group 1, there will be *pro rata* reductions to Group 2 and Group 3. *Id.* Whatever *pro rata* reduction is used for Group 2, Group 3's reduction will be 50% of the reduction amount used for Group 2 until the funds referenced in Paragraph 4.1 are extinguished. *Id.*

C. Notice and Settlement Administration

The Parties have engaged Epiq Class Action & Claims Solutions, Inc. (“Epiq”), an industry-leading class action settlement administrator, to carry out the Notice Plan and Settlement Services subject to Schnucks and Class Counsel’s supervision. Decl. of Cameron R. Azari, Esq. (hereinafter “Azari Decl.”). With the assistance of Epiq, the Parties have developed a robust Notice Plan that will attempt to provide direct notice to each and every Schnucks Rewards Members whose email addresses is known. Ex. 1 at ¶ 6.2.5. Schnucks will provide Epiq with the name, address (if known), and email address of potential Settlement Class Members based on the Schnucks’ Rewards Database. *Id.* at ¶ 6.2.1. Schnucks represents that it has email addresses for more than seventy-five (75) percent of its Schnucks Rewards Members. *Id.* at ¶ 1.35.

The Notice Plan, outlined in Exhibit 1, along with Exhibits A, B, C, and D thereto, and the Azari Decl., consists of direct notice via email, with postcard notice being mailed to Schnucks Rewards Members without email addresses if a physical address is known. Ex. 1 at ¶ 6.2.5(a); Azari Decl. at ¶¶ 18-24; Exs. B, C. Epiq will send a short form notice describing the Settlement via email (“Email Notice”) to Schnucks Rewards Members whose email addresses are known. Ex.

1 at ¶¶ 6.2.4, 6.2.5; Ex. B. The Email Notice will: (1) notify Settlement Class members of the Settlement and relevant terms; (2) provide them with the URL to the Settlement Website where they will find the Settlement details, including the Settlement Agreement and Long Form Notice, and a telephone number they can call to obtain additional information about the Settlement; (3) instruct them on how to make a Claim for Settlement Funds, object, or opt-out; and (4) provide a link to instructions advising Rewards Members how they can access their purchase history linked to their rewards number through their Rewards Account. Ex. 1 at ¶¶ 6.2.2, 6.2.4, 6.2.5; Ex. B.

Email delivery attempts will be tracked, and if the email “bounces back” or is undeliverable, and a physical address is readily available, Epiq will send notice via U.S. Mail within twenty-one (21) days of learning of the “bounce back” or undelivered mail. Ex. 1 at ¶¶ 6.2.4, 6.2.5; Ex. C. If a physical address is known for a Rewards Member, but not email address, the Rewards Member will be sent a postcard notice at the time the email notices are sent. Ex. 1 at ¶¶ 6.2.4, 6.2.5(a).

The Parties acknowledge that Settlement Class Members may include individuals that are not Schnucks Reward Members. *Id.* at ¶ 6.2.5. The Claims Administrator will use a focused internet and social media advertisement campaign to provide notice to these Settlement Class Members by the Notice Date. *Id.* Epiq has devised a detailed media plan, outlined in the Azari Decl., that will provide digital notice on desktop, mobile and tablet devices which consists of: “geofencing” adults age 21 and older who visited Schnucks’ Missouri locations in the last 12 months; online banner ads across the Google Display Network, Facebook, and Instagram “geotargeting” adults age 21 and older in 10 mile radius around Schnucks’ Missouri locations; and remarketing to adults who have clicked on the banner notice. Azari Decl. at ¶¶ 25-30. The duration of the media plan is 30 days, and the total estimated impressions are 18,870,000. *Id.*

As discussed, the Settlement Agreement also provides for the establishment of a Settlement Website. All Notices will direct the Settlement Class Members to visit the Settlement Website, which will host copies of all relevant documents, including the Settlement Agreement and its exhibits, the Long Form Notice explaining the terms of the Settlement Agreement in plain language, and other important court filings. Ex. 1 at ¶ 6.2.2; Exs. B, C, D. The Website will provide instructions advising Rewards Members how they can access their purchase history linked to their rewards number through their Rewards Account. Ex. 1 at ¶ 6.2.2.

Multiple payment methods will be available including electronic payments and mailed checks. *Id.* at ¶ 6.6.

The costs of providing notice, communicating with Settlement Class Members, establishing the Settlement Website, and disbursing individual payments shall be paid by Schnucks as part of the Class Settlement Amount. *Id.* at ¶ 10.1.

D. Exclusion and Objection Procedure

Settlement Class Members will have the opportunity to exclude themselves from the Settlement or object to its approval. The procedures and deadlines for filing opt-out requests and objections are explained on the Settlement Website and the Notice which will advise Settlement Class Members of their rights: (a) to exclude themselves from this Settlement Agreement and forego its benefits but preserve any rights they may have to pursue claims against Schnucks; and (b) to object to this Settlement Agreement personally or through counsel. Exs. 1 at ¶¶ 8.1-8.2; Exs. B, C, D. Further, any Settlement Class Member other than Plaintiff may object to this Settlement Agreement by filing any valid objection with this Court and mailing a copy of their objection to Class Counsel, and Defense Counsel at the addresses provided on the Settlement Website and in the Long Form Notice before the Objection/Exclusion Deadline. Ex. 1 at ¶¶ 8.1-8.34.

The Settlement Website and Notice also informs Settlement Class Members that there will be a final approval hearing, which will be their opportunity to appear and have any objections heard. Exs. B, C, D. Finally, the Settlement Website and Notice also explains that all Settlement Class Members will be bound by the release contained in the Settlement Agreement unless they properly exercise their right to exclude themselves. *Id.*

E. Release of Liability

In exchange for the relief described above, Settlement Class Members who do not exclude themselves will provide Defendant and its affiliated entities and other Releasees a full release of all claims arising out of, related to, or connected with the alleged facts, circumstances, and occurrences underlying the claims in this matter, as detailed in Section 5 of the Settlement Agreement. Ex. 1 at ¶ 5.1.

F. Incentive Award

Plaintiff Leonard Perry requests an incentive award of up to \$5,000 for his services as class representative.

G. Attorneys' Fees

Class Counsel intends to request an award of attorneys' fees of \$1,320,000.00 (33% of the \$4,000,000.00 Class Settlement Amount). This percentage falls well within the range of attorneys' fees awarded in similar settlements. Courts in the Eighth Circuit and in Missouri "have frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (affirming fee award representing 36% of the settlement as reasonable). *See also Tussey v. ABB, Inc.*, 2019 WL 3859763, at *4 (W.D. Mo. Aug. 16, 2019) (While fee award percentages vary from case-to-case, "a one-third fee is a common benchmark in private contingency fee cases," and courts in this

Circuit and this District have “frequently awarded attorney fees of 33 1/3%–36% of a common fund.”).

Schnucks has agreed to pay attorneys’ fees totaling \$1,320,000.00 (33% of the \$4,000,000.00 Class Settlement Amount) subject to approval by the Court. The Parties did not discuss or agree upon payment of attorneys’ fees until after they agreed on all material terms of relief to the Settlement Class. Ex. 1 at ¶ 11.2. The fee award will be paid within 21 days of the Effective Date of Settlement and will not be applied to the settlement cap. *Id.* at ¶ 11.3.

This provision does not make final approval unlikely because the final say on attorneys’ fees will be with the Court. But, whatever the fee award, again, it will *not* be applied to the settlement cap. Thus, these fees will not reduce the Class Settlement Amount available for distribution to Settlement Class Members who elect to participate in the Settlement and whose claims are approved. Class Counsel will submit their request for attorneys’ fees and costs in a separate motion.

Class Counsel will explain in greater detail in their motion and at the time of final approval why the requested fee award is reasonable given the work Class Counsel has performed and the risk they took on in bringing this case. Class Counsel agreed to bring this case on a contingent basis against a retailer with substantial resources, with the real possibility of an unsuccessful outcome and no fee of any kind. Decl. of Daniel J. Orlowsky at ¶¶ 7-8, 15-18 (hereinafter “Orlowsky Decl.”). When Plaintiff filed his Complaint nearly three years ago, there was no guarantee that a settlement would be reached or that litigation would be successful. *Id.*

III. CERTIFICATION OF THE SETTLEMENT CLASS FOR SETTLEMENT PURPOSES IS APPROPRIATE

To preliminarily approve a class action settlement, the Court must determine whether it should preliminarily approve certification of a settlement class. Missouri Supreme Court Rule

52.08 (“Rule 52.08”) provides that the requirements of Rule 52.08(a) and the requirements of Rule 52.08(b)(1), (b)(2), or (b)(3), must be satisfied to certify a class.

Regarding the settlement of class actions, Rule 52.08(e) states:

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Here, as detailed below, the requirements of Rule 52.08(a) and Rule 52.08(b)(3) are satisfied. Thus, certification of the Settlement Class for settlement-purposes only is appropriate.

A. The Requirements of Rule 52.08(a) Are Satisfied

Missouri has adopted four express prerequisites which must be met before a class may be certified. These four prerequisites are generally referred to as (1) Numerosity; (2) Commonality; (3) Typicality; and (4) Adequacy. 52.08(a); *Dale v. Daimler-Chrysler Corp.*, 204 S.W.3d 151, 177-78 (Mo. Ct. App. 2006). Each of these elements is established for settlement purposes in the instant case.

1. Numerosity

Numerosity exists when “the class is so numerous that joinder of all members is impracticable.” Rule 52.08(a)(1). Missouri Courts have held that joinder is “impracticable” when it would be inefficient, costly, time-consuming, and confusing. *Dale*, 204 S.W.3d, at 167. Rule 52.08(a)(1) does not require that joinder be impossible, only that it be “impracticable.” *Id.* The determination whether joinder is impracticable must be made on a case-by-case basis. *Id.*

Here, the Settlement Class readily satisfies numerosity. Given that the Settlement Class Members potentially number between 950,000 – 1,000,000 members, and are scattered throughout the state, joinder would be impracticable and the numerosity requirement is readily met. *See Azari Decl.* at ¶ 18.

2. Commonality

The commonality element requires that there be “questions of law or fact common to the class.” Rule 52.08(a)(2). Missouri courts have interpreted this requirement to be satisfied as long as there is at least one question of law or fact which is common to the class. *Bradford v. AGCO Corp.*, 187 F.R.D. 600, 604 (Mo. Ct. App. 1999); *Renstcher v. Carnahan*, 160 F.R.D. 114, 116 (Mo. Ct. App. 1995).

Here, Settlement Class Members each suffered the same alleged injury: all purchased Alcohol Products from Schnucks that were subject to Schnucks’ alleged false price comparison scheme. Thus, Class Members’ claims involve the same alleged misrepresentations (*i.e.*, an advertised discount from a fake “regular” or “original” price). Moreover, Class Members share other common questions of law and fact, such as whether Schnucks’ pricing scheme violates the MMPA. Thus, the commonality requirement is readily satisfied.

3. Typicality

The typicality element requires that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” Rule 52.08(a)(3). This requirement is satisfied by a showing that the class members have the same or similar grievances as the named plaintiff. *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir. 1977). Typicality is usually satisfied when (a) the claim arises from the same event or course of conduct of the defendant as the class claims, (b) the underlying facts are not markedly different, and (c) the conduct and facts give rise to the same legal or remedial theory. *Dale*, 204 S.W.3d at 171-72 (Mo. Ct. App. 2006).

Here, Plaintiff’s claims are typical to those of the Settlement Class Members. Plaintiff and each of the Settlement Class Members were subject to the same alleged false price comparison scheme in which Schnucks advertises fake “Regular” and “Original” prices with lower “Sale” prices to convince consumers that they can buy certain Schnucks Products at prices with significant

savings. Further, there are no defenses unique to Plaintiff that would destroy typicality here. Because the Settlement Class Members assert the same types of claims based on the same underlying facts, similar legal theories, the same allegedly unlawful conduct, and all have suffered the same type of economic harm, Plaintiff's claims are typical of those of the class he seeks to represent.

4. Adequacy

The Adequacy element requires that “the representative parties will fairly and adequately protect the interests of the class.” Rule 52.08(a)(4). This element has been refined to require adequacy of class representative and adequacy of class counsel. *Dale*, 204 S.W.3d at 172. A class representative's adequacy is judged by whether they have any conflicts of interest with the class that would adversely affect the interests of the class. *Id.* The court must “determine whether the class representative has ‘interests antagonistic to those of the class.’” *Id.* at 173 (internal citations omitted).

Here, Plaintiff's interests are entirely representative of and consistent with the interests of the proposed Settlement Class; all have been subject to Schnucks' allegedly unlawful practice of false price comparisons in which Schnucks advertises fake “Regular” and “Original” prices with lower “Sale” prices to convince consumers that they can buy certain Schnucks Products at prices with significant savings. Plaintiff has no interest that is antagonistic to, or in conflict with, the interests of the Settlement Class he seeks to represent. To the contrary, Plaintiff's interests are coextensive with those of the Settlement Class in establishing liability and recovering damages. Further, Plaintiff has retained qualified attorneys who are experienced in consumer protection litigation. Orłowsky Decl. at ¶¶ 2-6. Plaintiff's pursuit of this matter and Class Counsel's

successful prosecution of this litigation demonstrates that they have been, and will remain, zealous advocates for the Settlement Class Members. Thus, the adequacy requirement is also satisfied.

B. The Requirements of Rule 52.08(b)(3) Are Satisfied

Once the four elements of rule 52.08(a) are satisfied, the analysis shifts to Rule 52.08(b). For the requirements of Rule 52.08(b)(3) to be satisfied, the Court must find: (1) that questions of law or fact common to the members of the Settlement Class predominate over questions affecting only individual members; and (2) that a class action is the superior method to fairly and efficiently adjudicate this controversy. *See* Rule 52.08(b)(3).

The predominance inquiry simply requires the court to determine whether the class seeks “to remedy a common legal grievance.” *Karen S. Little, L.L.C. v. Drury Inns, Inc.*, 306 S.W.3d 577, 580 (Mo. App. 2010) (quoting *Dale*, 204 S.W.3d at 175). Predominance does not require that all questions of law or fact be common to the class, but that “common issues substantially predominate over individual ones.” *Id.* at 581. To determine whether a question is common or individual, the court looks at the “nature of the evidence required to show the allegations of the petition.” *Id.* A question is common, and therefore predominates, if the same evidence is necessary to answer the pertinent question of law or fact for each class member. *Id.*

In this case, common questions predominate as to the Settlement Class Members’ claims because all of their claims arise out of Schnucks’ single, uniform practice of allegedly false price comparisons in which Schnucks advertises fake “Regular” and “Original” prices with lower “Sale” prices to convince consumers that they can buy certain Schnucks Products at prices with significant savings. For each individual Settlement Class Member, the answers to the following questions are the same: whether they purchased an Alcohol Product from Schnucks (either online or in a store located in the state of Missouri); and whether the Alcohol Product was part of Schnucks’ allegedly

unlawful false price comparisons scheme. These common questions are central to the Settlement Class Members' claims such that even if any individual questions were to remain, they would be outweighed in terms of significance. As a result, the predominance element is met. *Id.*

The superiority requirement is satisfied when “the court finds that ... a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Rule 52.08(b)(3). Superiority requires the court to balance “in terms of fairness and efficiency, the merits of a class action in resolving the controversy” against available alternative methods for resolving the controversy. *Dale*, 204 S.W.3d at 181 (internal citation omitted). To aid in this balancing, Rule 52.08(b)(3) provides a non-exhaustive list of factors to consider: (1) individual control and autonomy; (2) the extent and nature of ongoing litigation by or against class members; (3) the desirability or undesirability of forum concentration; and (4) manageability.

Resolving all claims in a single case as part of a settlement is in the best interest of the Settlement Class Members and the court system. Indeed, piecemeal litigation of the claims at issue here would be an extraordinary waste of judicial time, effort, and expense given that the same legal theories and evidence will be used by all Settlement Class Members, and given the low value of each individual claim. Accordingly, a class action is the superior method of adjudicating the Settlement Class Members' claims and the proposed Settlement Class should be certified. Thus, the requirements of Rule 52.08 are satisfied.

CONCLUSION

The Parties believe that the settlement of this action on the terms and conditions set forth in the Class Settlement Agreement is fair, reasonable and adequate, and is in the best interests of the Class and this Court.

WHEREFORE, Plaintiff, individually and on behalf of the Settlement Class, by and through counsel, respectfully request that this Court enter an order which:

- a) Grants this Motion;
- b) Grants preliminary approval of the proposed settlement;
- c) Preliminarily approves the settlement set forth in the Settlement Agreement as fair, reasonable, and adequate within the meaning of Missouri Rule of Civil Procedure 52.08, subject to final consideration at the final fairness hearing provided for below;
- d) Certifies the proposed settlement class for settlement purposes only;
- e) Appoints Leonard Perry as class representative and Daniel J. Orłowski of Orłowski Law, LLC and Adam M. Goffstein of Goffstein Law, LLC as Class Counsel;
- f) Approves Epiq Class Action & Claims Solutions, Inc. as the settlement administrator;
- g) Approves the class notice and notice plan as set forth in the Settlement Agreement;
- h) Provides class members an opportunity to object to or opt-out of the proposed settlement, as is provided in the Settlement Agreement;
- i) Makes the other findings as are set forth in the proposed preliminary approval order;
- j) Schedules a date for hearing on final approval of the settlement and a hearing on Plaintiff's application for attorney's fees and costs; and
- k) Grants such further relief as the Court deems reasonable and just.

Respectfully submitted,

Orlowsky Law, LLC

/s/ Daniel J. Orlowsky

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2023, the foregoing was filed electronically with the Clerk of Court and served via the Court's CM/ECF system to all attorneys of record.

/s/Daniel J. Orlowsky