IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

MARY HARMON and CONNIE CURTS,	)	
Plaintiffs,	)	
	)	**No. 2016-CV17833**
v.	)	
	)	**DIVISION 5**
SCHELL & KAMPETER, INC.,	)	
Defendant.	)	

ORDER GRANTING MOTION FOR CLASS CERTIFICATION

This matter comes before the Court on Plaintiffs' Motion for Class Certification (the "Motion for Class Certification"), filed July 23, 2021. In addition to the Motion for Class Certification, the Court has reviewed and now considers the following submissions of the parties, including all attached exhibits: Plaintiffs' Suggestions in Support of Motion for Class Certification filed July 23, 2021; Defendant's Suggestions in Opposition to Plaintiffs' Motion for Class Certification filed January 21, 2022; and the Reply Suggestions in Support of Plaintiffs' Motion for Class Certification filed February 11, 2022.

Background

This lawsuit involves a claim against Defendant Schell & Kampeter, Inc. ("Defendant") arising under the Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat. § 407.010 et seq. Plaintiffs allege that Defendant falsely and deceptively marketed the quality and healthiness of its Taste of the Wild grain-free dry dog food products. Plaintiffs seek to certify a class of Missouri consumers who purchased Defendant's allegedly misrepresented products at any time since August 27, 2015.

The Class Action Petition filed August 27, 2020 ("Petition") alleges that Defendant has represented to consumers that its Taste of the Wild grain-free dog food is uniquely high-quality, safe, and healthy when, in fact, the dog food is associated with an increased risk of developing

dilated cardiomyopathy ("DCM"), does not have support for the claims of probiotic benefit, and is contaminated with toxins and other harmful substances. (Petition ¶ 1.) Plaintiffs allege that Defendant knew or should have known from FDA reports, scientific studies, consumer complaints, and other sources that Taste of the Wild grain-free dog foods are not the "high quality" product which gives "domestic dogs…the vitality nature intended," and has "all the ingredients and nutrition they need to thrive"; but Defendant continued to falsely and deceptively market the grain-free dog foods as such. (*Id*. ¶¶ 9-16.) Plaintiffs also allege in the Petition that Defendant's marketing and sale of Taste of the Wild grain-free dog food caused uniform economic harm to all consumers who purchased the dog food because those products were worth less than the products as represented by Defendant (i.e., "formulations that provide your pet with complete nutrition for health and vitality"). (*Id.* ¶ 19.)

After full review and consideration of the matter, and being duly advised of the same, the Court determines that Plaintiffs have satisfied the applicable legal standards for class certification and the Motion for Class Certification should be **GRANTED**.

Analysis

"A class action is designed to promote judicial economy by permitting the litigation of the common questions of law and fact of numerous individuals in a single proceeding." *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004). The class action mechanism imparts significant benefits on all interested parties in complex litigation: "a class action is an economical means for disposing of similar lawsuits while simultaneously protecting defendants from inconsistent obligations and the due process rights of absentee class members." *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 601 (Mo. banc 2012) (quotation omitted).

Missouri Rule of Civil Procedure 52.08 governs class action procedures and "provides a mechanism for the certification and conduct of class action lawsuits." *Dale v. DaimlerChrysler Corp*., 204 S.W.3d 151, 164 (Mo. Ct. App. 2006) (internal quotation omitted). Under Rule 52.08, class certification is "a procedural matter" where "the named plaintiffs' allegations are accepted as true" and the determination "is based primarily upon the allegations in the petition." *Elsea v. U.S. Eng'g Co*., 463 S.W.3d 409, 417 (Mo. Ct. App. 2015). "[B]ecause Rule 52.08 is a procedural and not substantive rule, the courts do not conduct an inquiry into the merits of the lawsuit when class certification is at issue." *Hale v. Wal-Mart Stores, Inc*., 231 S.W.3d 215, 222 (Mo. Ct. App. 2007). The merits of the case are relevant only insofar as they identify the essential elements of Plaintiffs' claim that eventually would be litigated on a class-wide basis—*i.e.*, "whether, given the factual setting of the case, if the plaintiff's general allegations are true, common evidence could suffice to make out a prima facie case for the class." *Elsea*, 463 S.W.3d at 416.

"The MMPA ... specifically authorizes class actions where an unlawful practice 'has caused similar injury to numerous other persons.'" *Plubell v. Merck & Co*., 289 S.W.3d 707, 712 (Mo. Ct. App. 2009) (quoting Mo. Rev. Stat. § 407.025.2). The Court has discretion in deciding a motion for class certification but should exercise that discretion in favor of class certification in most circumstances. *See McKeage*, 357 S.W.3d at 600 ("courts should err in close cases in favor of certification because the class can be modified as the case progresses"). With this framework in mind, the Court will analyze the requirements for class certification under Missouri law.

I. The Prerequisites of Rule 52.08(a) are Satisfied.

Rule 52.08(a) identifies four prerequisites for class certification, providing that a class may be certified "only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the

representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Mo. R. Civ. P. 52.08(a). These requirements—known as numerosity, commonality, typicality, and adequacy—are all met here.

A. Numerosity is satisfied because the proposed class of Missouri consumers numbers in the thousands or more.

Numerosity is satisfied when joinder of all class members is "impracticable," meaning that "it would be inefficient, costly, time-consuming, and probably confusing." *Dale*, 204 S.W.3d at 167. "Rule 52.08(a) does not require that joinder of all members of a class be impossible, only that it be impracticable." *Elsea*, 463 S.W.3d at 418 (quoting *Dale*, 204 S.W.3d at 167). "A plaintiff does not have to specify an exact number of class members to satisfy the numerosity prerequisite for class certification, but must show only that joinder is impracticable through some evidence or *reasonable, good faith estimate* of the number of purported class members." *Id*. (quoting *Dale*, 204 S.W.3d at 167). In determining whether numerosity is met, "the trial court can accept common sense assumptions." *Id*. In *Dale*, the court noted that classes of 100 or fewer have been granted class certification. 204 S.W.3d at 168.

Here, the Petition alleges that the proposed class of Missouri consumers is so numerous that joinder would be impracticable. (Petition ¶ 22.) The record evidence supports the common sense conclusion that the class comprises thousands of consumers who bought Taste of the Wild grain-free dog food during the class period. Defendant's products are sold nationally and throughout Missouri, and Taste of the Wild grain-free dog foods are sold both online (through retailers such as Amazon.com and Chewy.com) and in pet and other specialty retail stores. Based on the allegations and evidence submitted by Plaintiffs, the Court finds that numerosity is met.

B. Commonality is satisfied because the primary legal and factual issues in this case are amenable to resolution on a class-wide basis.

The commonality prerequisite requires that "the same evidence will suffice for each member to make a prima facie showing as to a given question" of law or fact. *Dale*, 204 S.W.3d at 176. "The common question may be one of fact or law and need not be one of each." *Elsea*, 463 S.W.3d at 418; *see also Meyer ex rel. Coplin v. Flour Corp*., 220 S.W.3d 712, 716 (Mo. banc 2007) ("A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions."). Defendant does not deny that commonality is met.

Missouri courts hold that commonality is often satisfied in cases filed under the MMPA because "the legality of [defendant's] conduct ... is common to all the Missouri class members." *Plubell*, 289 S.W.3d at 713. Here, the common legal issue is whether Defendant violated the MMPA by misrepresenting the quality and healthfulness of its Taste of the Wild grain-free dog food. Plaintiffs allege that Defendant engaged in a consistent pattern of misrepresentation throughout the class period. (See Petition ¶¶ 8-9.) Under Missouri law, these allegations are sufficient to demonstrate commonality. *Id.* at 714 ("Because Plaintiffs alleged Merck misrepresented Vioxx throughout the entire class period, individualized evidence as to the company's representation at the time of each class member's purchase will not be required.").

Another common issue is the economic damage that Missouri consumers allegedly suffered in connection with their purchase of Defendant's allegedly misrepresented grain-free dog food. Plaintiffs allege that they and the other class members were deprived of the benefit of their bargain when they purchased grain-free dog food that did not have the quality and healthiness represented by Defendant. Damages under the benefit-of-the-bargain rule are objectively measured by the difference between actual value of the product and the value of the product as represented, and this

rule is "applicable in MMPA cases to meet the element of ascertainable loss." *Plubell*, 289 S.W.3d at 715. All that is required to certify a class is "identification of the benefit of the bargain theory as a potentially viable theory [of damages]." *Craft v. Phillip Morris Cos*., 190 S.W.3d 368, 385 (Mo. Ct. App. 2005). Plaintiffs have done so, and Missouri law allows them to "prove recoverable damages on a uniform, class-wide basis under the benefit of the bargain rule." *Id*. Given the allegations and Plaintiffs' theory of recovery, the question of damages is a common issue susceptible to class-wide resolution based on common evidence. This is discussed further below.

C. Typicality is satisfied because Plaintiffs' MMPA claim is similar (if not identical) to the class members' claims.

Typicality is satisfied if: "(1) the representative's and the class members' claims arise from the same event or course of conduct by the defendant, (2) the conduct and facts give rise to the same legal theory, and (3) the underlying facts are not 'markedly different.'" *Plubell*, 289 S.W.3d at 715. More simply, typicality "means that class members share the same interest and suffer the same injury." *Hale*, 231 S.W.3d at 223. "The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *Id*. In an MMPA action, typicality is satisfied when the named plaintiff's claim and the class members' claims "arise from [defendant's] sale of [the subject product] in Missouri and its alleged misrepresentations as to the [subject product], giving rise to the legal theory of an unlawful practice under the MMPA." *Plubell*, 289 S.W.3d at 715-16.

Here, the MMPA claims of Plaintiffs and the class arise from the same alleged misconduct by Defendant in misrepresenting the quality and healthfulness of its grain-free dog food via a uniform marketing campaign used throughout the class period. Under the circumstances, the basis for finding typicality is similar to the basis for finding commonality discussed above. *See Lucas Subway MidMo, Inc. v. Mandatory Poster Agency, Inc*., 524 S.W.3d 116, 130 (Mo. Ct. App. 2017)

("The commonality and typicality requirements often merge, because each serves as a guidepost for judging whether a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."). Thus, the Court does not believe that Plaintiffs' claims are atypical of the class members' claims and finds that typicality is satisfied.

D. Adequacy is satisfied because Plaintiffs and their attorneys have no conflicts of interest with the class.

For class certification, the named plaintiffs and their counsel must fairly and adequately protect the interests of the absent class members. *Elsea*, 463 S.W.3d at 420-21. "In determining whether the adequacy prerequisite is satisfied as to a class representative, the circuit court must consider whether the named representative has, or may develop during the course of litigation, any conflicts of interest that will adversely affect the interests of the class." *Elsea*, 463 S.W.3d at 421 (quoting *Vandyne v. Allied Mortgage Capital Corp*., 242 S.W.3d 698 (Mo. banc 2008)). In other words, the interests of the class representative and that of the absent class members must be compatible. *Id*. Here, Plaintiffs' interest in vigorously prosecuting this lawsuit and pursuing relief for Defendant's alleged violation of the MMPA is compatible with the interests of the class. Plaintiffs have no conflict of interest with the class members (Petition ¶ 27), which makes them adequate class representatives. Defendant has not challenged the adequacy requirement or suggested any conflict of interest between Plaintiffs and their counsel on one hand, and the class members on the other. Defendant also does not deny that Plaintiffs' counsel are similarly committed to the vigorous prosecution of the lawsuit and have substantial experience in complex litigation and class actions, including consumer protection lawsuits.

On this record, the Court finds no conflict of interests between Plaintiffs, their counsel, and the class. The adequacy prerequisite is satisfied with respect to Plaintiffs as class representatives and the law firm of Shank & Heinemann, LLC as class counsel.

II. This Case is Properly Maintained as a Class Action Under Rule 52.08(b)(3).

In addition to satisfying the four prerequisites of Rule 52.08(a), certification of a class action requires that one of the elements of Rule 52.08(b) is also fulfilled. Here, Plaintiffs seek certification under Rule 52.08(3), which authorizes a class action if "the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Mo. R. Civ. P. 52.08(b)(3). These requirements—commonly known as predominance and superiority—are both satisfied on the facts in this case.

A. Predominance is satisfied because common issues of law and fact in this case predominate over any individual issues that might exist.

Under Missouri law, "[t]he predominance inquiry for class certification asks whether the class is seeking to remedy a common legal grievance." *Plubell*, 289 S.W.3d at 712. The requirement "does not demand that every single issue in the case be common to all the class members, but only that there are substantial common issues which 'predominate' over the individual issues." *Elsea*, 463 S.W.3d at 422 (quoting *McKeage*, 357 S.W.3d at 600). The predominant issues "need not be dispositive of the controversy or even be determinative of the liability issues involved," and the predominance standard in Missouri may be satisfied by just one issue: "A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." *Dale*, 204 S.W.3d at 175. The United States Supreme Court has noted that "[p]redominance is a test readily met in certain cases alleging consumer . . . fraud." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

In *Plubell* and *Hope*, Missouri courts found predominance based on the common question whether defendant violated the MMPA. *Plubell*, 289 S.W.3d at 713 (finding that predominance was satisfied "[b]ecause that issue—the legality of Merck's conduct—is common to all the Missouri class members, and because that issue is at the core of the case, the court did not abuse its discretion in finding the predominance requirement satisfied"); *Hope*, 353 S.W.3d at 84 (finding that predominance was satisfied because "[a]ll of the MMPA claims rely only on evidence regarding Nissan's conduct, which is common to the class as a whole"). And in *Craft*, the court found predominance based on the common application of the benefit-of-the-bargain theory of damages. *Craft*, 190 S.W.3d at 385 (affirming trial court's conclusion that predominance was satisfied because "the class members could prove recoverable damages on a uniform, class-wide basis under the benefit of the bargain rule"). As in *Plubell*, *Hope*, and *Craft*, there are two common issues in this case that satisfy the predominance requirement: (1) the question of liability stemming from Defendant's alleged uniform misrepresentation of the Taste of the Wild grain-free dog food; and (2) the question of damages based on the alleged uniform economic harm suffered by Missouri consumers who purchased the grain-free dog food and allegedly were denied the benefit of the bargain because the product did not have the represented quality and healthfulness.

B. Superiority is satisfied because the class action mechanism is the superior method for adjudicating the claims in this case.

The superiority inquiry "requires the trial court to balance, in terms of fairness and efficiency, the merits of a class action in resolving the controversy against those of alternative methods of adjudication." *Dale*, 204 S.W.3d at 182. "The primary focus of the superiority analysis is the efficiency of the class action over other available methods of adjudication." *Id*. "In balancing the relative merits of a class action. . .the trial court may consider: the inability of the poor or

uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." *Id*. at 182-83.

Missouri case law indicates that class treatment of claims under the MMPA can "reasonably be viewed as a superior method of adjudicating such claims" when the defendant's conduct is the focus of the claim. *Hope*, 353 S.W.3d at 92. Representative adjudication of MMPA claims is often preferable to a massive case load resulting from individual prosecution of such claims. *Janson v. LegalZoom.com, Inc*., 271 F.R.D. 506, 512 (W.D. Mo. 2010).

In this case, a class action is the superior method to adjudicate the individual MMPA claims that may otherwise be filed. First, the language of the MMPA authorizes class actions when a defendant's alleged unlawful practice "has caused similar injury to numerous other persons." Mo. Rev. Stat. § 407.025.2. This authorization is "pertinent to consideration of class certification motions," *Hope*, 353 S.W.3d at 82, and Defendant has not argued or identified any countervailing consideration. In addition, the MMPA claim in this case is similar to those that have been certified in *Plubell*, *Hope*, *Craft*, and *Dale*, as well as non-MMPA cases such as *Elsea* and *Lucas Subway*. As in those cases, a class action is the superior method to adjudicate the MMPA claims of Plaintiffs and other Missouri consumers who allegedly have suffered economic injury from the purchase of Defendant's Taste of the Wild grain-free dog food. Without a class action, the claims of the absent class members would either remain unlitigated or result in a massive, unnecessary burden on the judicial system caused by the filing of thousands of individual lawsuits. Accordingly, the Court finds that the superiority requirement is satisfied.

III. The Class is Sufficiently Definite and is Not Overbroad.

In addition to the express provisions of Rule 52.08, an implicit requirement for class certification is that the class "cannot be amorphous, vague, or indeterminate." *Dale*, 204 S.W.3d

at 178. "[A] sufficiently definite class exists to justify class certification[ ] if its members can be ascertained by reference to objective criteria." *Elsea*, 463 S.W.3d at 425. Here, the proposed class includes: "All consumers who have purchased Grain-Free Taste of the Wild Dog Food in the State of Missouri for personal, family, or household purposes at any time from August 27, 2015, to the present and who were citizens of the State of Missouri on August 27, 2020." The qualifications for class membership under this definition are objective and definite. Similar classes of Missouri consumers suing under the MMPA have been found to be appropriately defined. *See, e.g., Craft*, 190 S.W.3d at 388 (holding that class of "all Missouri residents who purchased [the product] during the relevant time period" was properly based on "objective criteria that do not depend on the consumer's subjective state of mind or the merits of the case").

Defendant's arguments concerning standing are misplaced because Missouri courts hold that "[t]he issue of class certification is antecedent to the issue of standing" and "[o]nly once a class has been certified are standing requirements assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs." *Lucas Subway*, 524 S.W.3d at 131. Defendant's other arguments seeking to debate the merits of Plaintiffs' claims are not suited for analysis of class certification. *Hope*, 353 S.W.3d at 75

As noted above, all members of the proposed class have allegedly suffered uniform and objective economic injury under the benefit-of-the-bargain model because they purchased misrepresented grain-free dog food that did not have the advertised quality and healthfulness. *Hope*, 353 S.W.3d at 83 (noting that plaintiff states "an objectively ascertainable loss under the MMPA using the benefit-of-the-bargain rule"). Given this alleged injury suffered by all class members and the objective criteria used to define the proposed class, the Court finds that the class

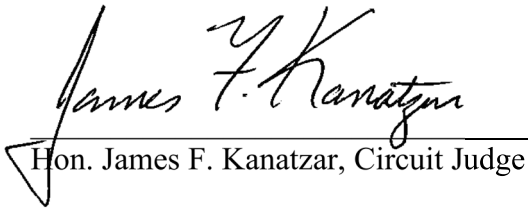
as defined is appropriate for certification. If discovery later reveals that the class definition should be modified, the Court will consider an appropriate request at that time.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Class Certification is hereby **GRANTED**. Finding that all the explicit and implicit requirements of Rule 52.08 have been satisfied, the Court certifies a class of Missouri consumers to pursue relief under the MMPA, appoints Plaintiffs Connie Curts and Mary Harmon as class representatives, and appoints Shank & Heinemann, LLC as class counsel. The certified class is defined as follows:

> All consumers who have purchased Grain-Free Taste of the Wild Dog Food in the State of Missouri for personal, family, or household purposes at any time from August 27, 2015, to the present and who were citizens of the State of Missouri on August 27, 2020 (the "Class"). Excluded from the Class are (1) Defendant, subsidiaries and affiliates of Defendant, directors and officers of Defendant, and members of their immediate families; (2) federal, state, and local governmental entities; and (3) any judicial officers presiding over this action, their judicial staff, and members of their immediate families.

IT IS SO ORDERED.

Date: 22-Sep-2022



Hon. James F. Kanatzar, Circuit Judge