

COPY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CHAVEZ & GERTLER LLP
JONATHAN E. GERTLER (Bar No. 111531)
NANCE F. BECKER (Bar No. 99292)
42 Miller Avenue
Mill Valley, CA 94941
Telephone: (415) 381-5599
Facsimile: (415) 381-5572

LEGAL AID OF MARIN
DAVID LEVIN (Bar No. 193801)
30 North San Pedro Road, Suite 220
San Rafael CA 94903
Telephone: (415) 492-0230
Facsimile: (415) 492-0947

Attorneys for Plaintiffs Scott Yancy,
Luigi Venezia, and Susan Deixler, individually,
and the Certified Plaintiff Classes

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MARIN
UNLIMITED JURISDICTION

SCOTT YANCY, LUIGI VENEZIA, and
SUSAN DEIXLER, individually, and on
behalf of all others other similarly situated,

Plaintiffs,

v.

PETALUMA BUTANE DISTRIBUTORS,
INC., dba DECARLI'S PETALUMA
BUTANE DISTRIBUTORS, and DOES
ONE THROUGH TWENTY, inclusive,

Defendants.

) Marin County Superior Court
) Case No: CIV-090406

) CLASS ACTION

) ~~PROPOSED~~ ORDER

BY FAX

FILED

JAN 09 2017

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Berg, Deputy

1 Plaintiffs' Motion for Enforcement of Settlement and Judgment, Order to Show Cause re
2 Contempt, and Award of Attorneys' Fees and Costs came on regularly for hearing as scheduled
3 on December 6, 2016. All parties were represented by counsel. The Court, having reviewed the
4 pleadings, evidence, and arguments presented by the parties and good cause appearing, hereby
5 adopts its Tentative Ruling granting the Motion in part, as modified herein.

6 1. The court rejects defendant Petaluma Butane Distributor's ("PBD") contention
7 that the Settlement Agreement terminated in 2013 and is no longer enforceable. The three-year
8 duration limitation cited by defendant applies to "successors and assigns." (Settlement
9 Agreement, ¶ 61.) The "Summary of Proposed Class Action Settlement" attached as Exhibit C
10 to the Settlement Agreement is not binding. Defendant has identified no language in the
11 Settlement Agreement limiting its term as to the signatories of the Settlement Agreement.

12 2. The Court finds defendant violated the terms of the Settlement Agreement on or
13 after November 2011 by admittedly failing to mail invoices to current Metered Customers
14 within 45 days of the vapor meter reading upon which the charge is based. (Settlement
15 Agreement, ¶ 24; Declaration of Angela DeCarli, ¶15.) Defendant is enjoined from demanding
16 collection of, or making any further effort to collect, payment of billing statements sent to
17 Metered Customers more than 45 days after the vapor meter reading upon which the charge is
18 based. Defendant shall, no later than 90 days after the date of this Order, provide an accounting
19 and make restitution to any Metered Customer who paid invoices sent more than 45 days after
20 the vapor meter reading in violation of the Settlement Agreement. Said accounting shall be
21 certified by a neutral party (the "Auditor") to be selected and agreed to by the parties. Defendant
22 shall file and serve a declaration attaching the Auditor's report and attesting that it has made any
23 refunds necessary to comply with this Order and provide a copy to plaintiffs' counsel within 90
24 days of the date of this Order.

25 3. By the implementation of new billing software in May or June 2016, defendant
26 appears finally to have brought itself into compliance with the billing and pricing agreements set
27 forth in the Settlement Agreement. Accordingly, plaintiffs' request for an order directing PBD
28 prospectively to comply with the previous injunction is denied as unnecessary. Such denial is,

1 however, without prejudice.

2 4. In the tentative ruling, the Court found that the evidence does not support
3 plaintiffs' contention that defendant violated the Settlement Agreement by recently sending a
4 new series of "catch up" bills for service dating as far back as 2008 "for which PBD had
5 previously billed." On 8/26/2011, Judge Lynn Duryee found that defendant was acting in good
6 faith and "taking necessary steps to comply with all aspects of the settlement agreement," that
7 PBD priced its catch up billings appropriately, that the plaintiffs' motion appeared to be
8 generated by a "very small percentage" of the class action plaintiffs since 50 out of the 54
9 plaintiffs that had responded (out of 62 total possible class members) either paid their bills in full
10 or entered into post-settlement payment agreements. Therefore, in the Court's tentative ruling, it
11 found that the 8/26/2011 ruling corroborates defendant's contention that PBD had complied or
12 substantially complied with the "catch up" billing provision, which required PBD to "become
13 current" on all customer billings; the metered sub-class no later than 60 days after Preliminary
14 Approval [September 11, 2010]; the entire class no later than March 31, 2011; and the provision
15 requiring PBD to offer a 24-month payment plan for service not previously billed; for members
16 of the metered subclass, the payment plan was to be offered no later than 45 days after the
17 Preliminary Approval Date [August 27, 2010.] Plaintiffs contend, however, that PBD has not
18 complied with the Settlement Agreement with respect to gallons customers. **[Pltf. Proposed**
19 **Language:** Plaintiffs also contend, and the Court finds, that the requirement that PBD "become
20 current" on "all customer billings" (Settlement Agreement ¶22) and "all charges" (Settlement
21 Agreement ¶ 28) applies to tank rental fees.] **[Def. Proposed Language:** Plaintiffs also contend
22 that the billing requirements apply to "all charges" including tank rental fees. and the Court
23 allows such fees to be included in the audit.]

24 5. While PBD may not have sent "past due" statements on a regular basis or sought
25 to collect on long outstanding accounts, this has not been shown to be violation of the Settlement
26 Agreement. PBD has submitted evidence that gallons customers received statements of charges
27 at the time of delivery and by mail after delivery, tracking the date and time of delivery, amount
28 of propane delivered, price per gallon, and total charge, and that its ledger accounts, which were

1 sent to customers on request, support the "Balance Forward" amounts included in the 6/30/16
2 billing statements challenged by the four gallons customers who submitted declarations in
3 support of the underlying motion. (DeCarli Decl., ¶¶ 5, 25(g)-(j).) Plaintiffs contend, on the other
4 hand, and have submitted evidence that they contend shows that PBD's system for leaving the
5 "delivery tags" by which gallons customers were billed was unreliable, and that not all such
6 "bills" were received. Plaintiffs further contend that to the extent the "Balance Forward"
7 amounts include charges for which PBD did not currently bill, the bills violate the Settlement
8 Agreement and PBD should not be allowed to collect them. In addition, Plaintiffs contend and
9 have submitted evidence that it is not reasonably possible to tell from the ledgers the date the
10 propane being charged for was delivered, as required by Settlement Agreement ¶ 28(a).

11 6. Given plaintiffs' contentions, the Court has allowed plaintiffs an audit procedure
12 and additional briefing. Due to the large number (about 2,000) of gallons customers and in order
13 to avoid putting an undue burden on PBD, the Court denies plaintiffs' request that a full audit of
14 those customers' accounts be performed. Instead, the Parties shall identify a sample of 30 former
15 and/or current gallons customers for an accounting of such customers. The audit shall include
16 tank rental fees. Each side shall select 15 customers to be included in the sample, for a total of
17 30. The parties shall meet and confer about the details of the audit and may modify the size of
18 the sample, the procedures for selecting the sample, and/or the information to be included in the
19 audit by mutual agreement.

20 7. PBD shall file and serve the certification of the accounting on or before Tuesday,
21 March 7, 2017. Plaintiffs may submit Supplemental Briefing on or before March 21, 2017; PBD
22 may submit a response and supplemental briefing on or before April 4, 2017; and Plaintiff may
23 submit a reply brief on or before April 11, 2017. Further hearing on all issues taken under
24 submission is set for Tuesday, April 25, 2017, following which the court will issue its final order
25 and judgment.

26 8. The underlying motion brought by Plaintiffs did not concern PBD's right to bill
27 for current deliveries. PBD may continue to invoice customers for current deliveries and may
28 seek to collect payment for current deliveries of propane, including deliveries and other charges

1 invoiced under the new billing software. While the above audit is pending until the hearing on
2 April 25, 2017, however, PBD shall not demand collection from gallons customers, or assess
3 interest or finance charges on, dates prior to April 15, 2016. PBD may seek agreement of
4 Plaintiff, or modification of this order from the Court, for specific customers or for the gallons
5 customers as a whole, in the interim.

6 9. PBD shall give individual notice of the terms of this Order to its current metered
7 and gallons customers, and to former customers who received "Balance Forward" bills. The
8 parties shall meet and confer about the timing, form and content of the notice. In the event they
9 cannot agree, the court will address the issue through an ex parte motion.

10 10. Plaintiffs' request for costs and reasonable attorney fees is granted in part, with
11 the amount of such award taken under submission. Plaintiffs may provide updated information
12 about the costs and fees incurred as part of their Supplemental Briefing.

13 11. The Court denies plaintiffs' request for an Order to Show Cause directing PBD
14 and its principals to show cause why they should not be held in contempt and sanctioned for their
15 misconduct.

16
17 APPROVED.

18 Dated: December 22, 2016

PERKINS COIE, LLP



James G. Snell
Amanda Beane
Attorneys for Defendant

19
20
21
22
23 SO ORDERED.

JAN 09 2017

24 Dated: ~~December~~ 9, ~~2016~~

GEOFFREY M. HOWARD

Hon. Geoffrey Howard
JUDGE, Marin County Superior Court

1 **PROOF OF SERVICE**

(C.C.P. §1013a(3))

2 STATE OF CALIFORNIA)
3) ss.
4 COUNTY OF MARIN)

5 I am employed by Chavez & Gertler LLP in the County of Marin, State of California. I
6 am over the age of 18 years and not a party to the within action; my business address is Chavez &
7 Gertler LLP, 42 Miller Avenue, Mill Valley, CA 94941.

8 On January 17, 2017, I served the foregoing documents:

- 9 • **January 9, 2017 ORDER RE: PLAINTIFFS' MOTION FOR ENFORCEMENT OF SETTLEMENT**

10 on the interested parties in this action addressed to each as follows:

11 James G. Snell
12 PERKINS COIE LLP
13 3150 Porter Drive
14 Palo Alto, CA 94304-1212
15 Tel: 650.838.4300
16 Email: JSnell@perkinscoie.com

Jacqueline E. Young
PERKINS COIE LLP
505 Howard St., Suite 1000
San Francisco, CA 94105
Tel: 415-344-7000
JYoung@perkinscoie.com

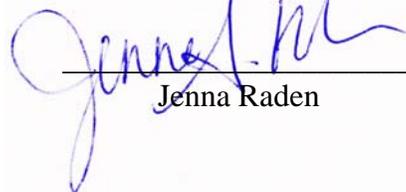
14 Amanda J. Beane
15 PERKINS COIE LLP
16 1201 Third Ave., Suite 4900
17 Seattle, WA 98191-3099
18 Tel: 206-359-3965
19 ABeane@perkinscoie.com

Vincent DeMartini
DeMartini & Walker
175 N. Redwood Dr. Suite 250
San Rafael, CA 94903-1978
Phone: (415) 472-7880
vincedw@sbcglobal.net

20 *Attorneys for Defendant DeCarli's Petaluma Butane Distributors*

21 **[X] BY EMAIL:** The above mentioned document was served on the interested parties in this
22 action by transmitting them via email, addressed to the person to be served at the email addresses
23 shown above.

24 Executed on January 17, 2017. I declare under penalty of perjury under the laws of the United
25 States of America that the above is true and correct. I declare that I am employed in the office of
26 a member of the bar of this court at whose direction the service was made.

27 
28 _____
Jenna Raden