

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

M. NORMAN DONNENFELD, on behalf
of himself and all others similarly situated,

Plaintiff,

No. 2:17-cv-02310-JFB-SIL

v.

PETRO, INC., d/b/a PETRO HOME
SERVICES,

Defendant.

**[PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT, CLASS CERTIFICATION FOR SETTLEMENT PURPOSES ONLY,
AND APPROVAL OF NOTICE TO CLASS AND RELATED MATTERS**

On _____, 2019, Plaintiff M. Norman Donnenfeld, acting individually and on behalf of the proposed Settlement Class, as defined below (“Plaintiff”) and Petro, Inc., d/b/a Petro Home Services (“Petro” or “Defendant”) entered into a Class Action Settlement Agreement (“Agreement”). Pursuant to the Agreement, Plaintiff has moved for entry of an order certifying the class pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) for settlement purposes only, granting preliminary approval to the settlement set forth in the Agreement (“Settlement”), and approving notice to the Class and other related matters. All defined terms in this Order (*i.e.*, all capitalized words or phrases) shall have the same definitions and meanings as those set forth in the Agreement.

Having reviewed the Agreement and considered Plaintiff’s submissions in support of class certification for settlement purposes and preliminary approval of the Agreement and having jurisdiction over this action pursuant to 28 U.S.C. § 1332(d)(2), the Court now **FINDS, CONCLUDES, AND ORDERS** as follows:

I. CERTIFICATION OF THE SETTLEMENT CLASS:

The Agreement provides for a nationwide class settlement of the Released Claims, as defined below, for a proposed class of all persons in the United States who, between August 1, 2013 and September 30, 2016, inclusive, had a Ceiling Price Agreement with Petro. Petro has at all times disputed, and continues to dispute, Plaintiff's allegations in the Action, denies any liability for any of the claims that have or could have been alleged by Plaintiff or other members of the Settlement Class, and denies any wrongdoing. As part of the Agreement, however, Petro is not objecting to the certification of the Settlement Class for settlement purposes only. The Agreement settles all Released Claims that were brought or could have been brought in the Action and the related action in the United States District Court, District of New Jersey, entitled *M. Norman Donnerfeld v. Petro Home Services, Petro Holdings Inc. and Petro, Inc.*, Civil Action Number 2:16-cv-00882 JMV-JBC.

A. The Court has considered (1) allegations, information, arguments, and authorities provided by the Parties in connection with pleadings and motions previously filed by each of them in this case; (2) information, arguments, and authorities provided in the memoranda submitted in support of Plaintiff's preliminary approval motion; (3) Petro's decision not to object to certification of the Settlement Class specified in the Agreement; (4) the terms of the Agreement including, but not limited to, the definition of the Settlement Class and the benefits to be provided to the Settlement Class; and (5) the Agreement's elimination of any potential manageability issues, ascertainability issues, and individualized issues of fact and law that could have had a bearing on the certification of this nationwide class for trial. Based on those considerations, the Court reviewed the required factors for class certification under Fed. R. Civ. P. 23(a) and 23(b)(3) and makes the following findings.

1. The Settlement Class is ascertainable. The Settlement Class is defined solely

with reference to objective criteria. It is administratively feasible to determine class membership in the Settlement Class during the Class Period from August 1, 2013 through September 30, 2016, inclusive.

2. Approximately 92,546 customers had Ceiling Price Agreements with Petro for home heating oil between August 1, 2013 and September 30, 2016. That class size readily satisfies the numerosity requirement of Rule 23(a).

3. There are questions of law and fact common to all members of the Settlement Class based on Plaintiff's allegations in the operative complaint. Such questions include, but are not limited to, the following:

- a. Whether Petro misrepresented to its actual and potential customers how its Ceiling Price Agreements would be priced; and
- b. Whether the prices Petro charged its customers who were party to Ceiling Price Agreements were based on market conditions.

4. The Class Representative's claims are typical of the Settlement Class's. The Class Representative is a member of the Settlement Class and he alleges that he has been damaged by the same conduct of Petro that he alleges has damaged other members of the Settlement Class. The Class Representative's claims are not in conflict with or antagonistic to the claims of the Settlement Class as a whole. The claims of the Class Representative and other members of the Settlement Class are based upon corresponding theories.

5. The Class Representative can fairly, fully, and adequately protect the interests of the Settlement Class. Class Counsel are experienced in prosecuting complex class-action litigations, and Class Representative and Class Counsel have no interest that conflicts with, or is adverse to, the interests of the Settlement Class.

6. Questions of law and fact are common to all members of the Settlement Class, which predominate over any questions affecting only individual members of the Settlement Class for settlement purposes.

7. A nationwide class action for settlement purposes is superior to other available methods for the fair and efficient adjudication of this controversy.

B. Thus, the Court certifies the following Settlement Class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3) for settlement purposes only:

All Persons in the United States who, between August 1, 2013 and September 30, 2016, inclusive, had a Ceiling Price Agreement with Petro.

Excluded from the Class are: Petro; former Petro employees; any entity in which Petro has a controlling interest; any affiliate or legal representative of Petro; the Judge to whom this case is assigned and any member of the Judge's immediate family; and any heirs, assigns, and successors of any of the above persons or organizations in their capacity as such.

C. The Court appoints Plaintiff M. Norman Donnenfeld as the Class Representative of the Settlement Class.

D. The Court appoints NAGEL RICE, LLP as Class Counsel for the Settlement Class.

E. If for any reason the Agreement ultimately does not become effective, Petro's conditional decision not to object to the certification of the Settlement Class shall be null and void in its entirety; this Order certifying a nationwide class shall be vacated; and Petro and Plaintiff shall return to their respective positions in the Action as those positions existed immediately before the February 22, 2019 mediation of this Action.

II. PRELIMINARY APPROVAL OF THE TERMS OF THE SETTLEMENT

A. The Settlement requires Petro to pay (i) Administration Expenses, (ii) Valid Claims for Cash Benefits to Settlement Class Members, and (iii) an award to Class Counsel for Attorneys' Fees and Costs and (iv) a service award to the Class Representative. The total amount of Valid Claims shall not exceed three million dollars (\$3,000,000.00), as more particularly described in the

Agreement.

B. Settlement Class Members who timely submit Valid Claims will receive a Cash Benefit, the amount of which will depend on their Calculated Delivery Benefit Amount, which calculates the difference between what the Class Member paid pursuant to the Ceiling Price Agreement during the Claim Period versus what the Class Member would have paid at the Variable Price during the same period. If the Calculated Delivery Benefit Amount is less than \$5.00, then the Class Member will be entitled to receive a \$5.00 Cash Benefit. In the event that the payment of all Valid Claims, in the aggregate, exceeds three-million dollars and zero cents, then all Cash Benefits will be reduced, pro rata, such that Defendant's maximum liability, in the aggregate, shall not exceed \$3,000,000.00.

C. On a preliminary basis, therefore, taking into account (1) the defenses asserted by Petro, (2) the risks to the members of the Settlement Class that Petro would successfully defend against claims arising out of the facts and legal theories pled and asserted in the Action, whether litigated by members of the Settlement Class themselves or on their behalf as a class action, and (3) the length of time that would be required for members of the Settlement Class, or any group of members of the Settlement Class, to obtain a final judgment through one or more additional trials and appeals, the Court finds that the proposed settlement, which includes the benefits described above in exchange for, *inter alia*, dismissal of the Action with prejudice and the release of certain claims filed or that could have been filed against Defendant by Plaintiff and Class Members, as set forth in the Agreement, is within the range of approvable settlements. Moreover, the Parties have reached the Settlement after extensive litigation, discovery, and engaging in arm's-length settlement negotiations. See *Victoria Perez v. Allstate Ins. Co.*, No. CV 11-1812 (AKT), 2019 WL 1568398, at *1 (E.D.N.Y. Mar. 29, 2019) ("Preliminary approval of a settlement agreement requires only an 'initial evaluation' of the fairness of the proposed settlement on the basis of written submissions

and, in some cases, an informal presentation by the settling parties. . . . To grant preliminary approval, the court need only find that there is ‘probable cause to submit the [settlement] proposal to class members and hold a full-scale hearing as to its fairness’”) (internal citation omitted); *see id.* (approving settlement that was “the result of extensive, arms'-length negotiations by counsel”). For all these reasons, the Settlement before the Court falls within the appropriate range of possible approval and does not appear in any way to be the product of collusion.

D. Accordingly, it is ORDERED and ADJUDGED that the Agreement is preliminarily approved and the Settlement Class should be provided notice of it.

III. APPROVAL OF THE FORM OF THE CLASS NOTICE TO THE CLASS AND CLAIM FORM, THE PLAN FOR DISSEMINATION OF THE CLASS NOTICE, AND APPOINTMENT OF SETTLEMENT ADMINISTRATOR

A. As provided for in the Agreement, the Parties have submitted the following proposed Class Notice: (i) a Long Form Notice (Exhibit B to the Agreement), and (ii) a Personal Notice (Exhibit C to the Agreement). A proposed Claim Form also has been submitted to the Court, which is attached as Exhibit A to the Agreement.

B. The notice plan provides that no later than thirty (30) days after the Court grants Preliminary Approval, the Settlement Administrator shall disseminate the Personal Notice with a unique Class Member identifier by either (1) email to the email address of Class Members if an e-mail address was provided by the Class Member to Petro, or (2) mail to the last known postal address to those Class Members who did not provide an email address. The Agreement sets forth adequate provisions for the handling of any returned mail or emails.

C. Prior to mailing any Personal Notices, the Settlement Administrator shall compare the information provided by Petro for each Class Member with a national change of address database and update Class Member addresses as required.

D. Not later than thirty (30) days after entry of this Order, the Settlement Administrator will create and maintain a website, which will provide, among other things, copies of the applicable Long Form Notice, the Agreement, the Settlement Administrator's and Class Counsel's contact information, certain pleadings and Court orders from this Action, a method for the electronic submission of Claim Forms, a method for requesting the Claim Form(s) by mail, and a list of frequently asked questions likely to be made by Settlement Class Members and answers thereto.

E. The standard for the adequacy of a settlement notice in a class action is measured by reasonableness. See Fed. R. Civ. P. 23(e). In this Circuit, Rule 23 requires that a "settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (quotation marks omitted); *see also McReynolds v. Richards-Cantave*, 588 F.3d 790, 797 (2d Cir. 2009) (finding notice sufficient where it is the "the best notice practicable.").

F. As required, the Class Notice and Settlement Website will fairly, accurately, and reasonably inform members of each Settlement Class of (1) appropriate information about the nature of this Action and the essential terms of the Agreement; (2) appropriate information about how to obtain additional information regarding the Action and the Agreement; (3) appropriate information about, and means for obtaining, a Claim Form; (4) appropriate information about, and means for submitting, a Claim Form for compensation under the Settlement; and (5) appropriate information about how to challenge, or opt out from, the Settlement. The Class Notice and Settlement Website also will fairly and adequately inform members of the Settlement Class that failure to complete and submit a Claim Form in the manner and time specified in the Class Notice,

Settlement Website, and Claim Form shall constitute a waiver of any right to obtain any compensation or Cash Benefit under the Settlement. The Class Notice and Settlement Website also will fairly and adequately inform members of the Settlement Class that if they do not comply with the specified procedures and the deadline for objections, they will lose any opportunity to have any Objection considered at the Fairness Hearing or otherwise to contest certification of the Settlement Class or approval of the Settlement or to appeal from any order or judgment entered by the Court in connection with the Settlement. Thus, the proposed notices satisfy the notice requirements of Fed. R. Civ. P. 23(e) and all applicable federal law.

G. The proposed plan for distributing the Class Notice by mail or email directly to members of the proposed Settlement Class and establishing the Settlement Website appear reasonably likely to notify members of the Settlement Class of the Settlement. Thus, the proposed notice plan satisfies the notice requirements of due process, Fed. R. Civ. P. 23(e) and all applicable federal law.

H. The Court will appoint the Settlement Administrator by separate order. The Settlement Administrator shall, subject to the supervision of the Court, administer the relief provided by the Agreement by processing Claim Forms in a rational, responsive, cost effective, and timely manner. The Settlement Administrator shall maintain reasonably detailed records of its activities under the Agreement. The Settlement Administrator shall maintain all records as are required by applicable law in accordance with its normal business practices, and such records will be made available to Class Counsel, Petro's counsel, the Parties, and their representatives promptly upon request.

I. The Settlement Administrator shall be responsible for, among other things, providing the Class Notices, processing Claim Forms, and administering the Settlement Website, Objection process, Opt-Out process, and Settlement claims process described herein. The

Settlement Administrator will use adequate and customary procedures and standards to prevent the payment of fraudulent claims including but not limited to: validating Claims against Petro's records, determining the Cash Benefit based solely upon Petro's business records and reports, requiring manual entry of a unique Class Member identifier to access the Claim Form via the Settlement Website, matching the Class Member identifier on the Claim Form to the notice list, and screening for multiple or fraudulent claims. Any individual that lost their Class Member identifier, may obtain a copy from the Settlement Administrator by providing appropriate proof that they are a Class Member. The Settlement Administrator shall have the right to audit claims, and the Settlement Administrator may request additional information from Class Members submitting claims. If any fraud is detected or reasonably suspected, the Settlement Administrator may request further information from the Settlement Class Member and deny such claims, subject to the ultimate oversight by the Court. The Settlement Administrator shall approve or deny all claims, and its decision, in conjunction with Class Counsel, shall be final and binding.

J. The Court, having reviewed the proposed Class Notice, the proposed Claim Form, and the proposed plan for distributing and disseminating each of them, finds and concludes that the proposed plan for distributing and disseminating each of them will provide the best notice practicable under the circumstances and satisfies all requirements of federal and state laws and due process. Accordingly, the Court ORDERS as follows:

1. The form and content of the proposed Class Notice and Claim Form are approved.
2. Promptly following the entry of this Order, the Parties and Settlement Administrator shall prepare final versions of the Class Notices and Claim Form, incorporating into each of them the Fairness Hearing date and other deadlines set forth in this Order.

3. Within ten (10) days of entry of this Order, Petro shall provide to the Settlement Administrator the following information for each Class Member: (a) full name; (b) last known email address (if available) and postal address; (c) Account number; (d) the Cash Benefit to which the Class Member is entitled pursuant to Section V, *infra*; and (e) an available service address (if different from last known postal address), which Petro shall certify that such information represents the most current and up to date information that Petro has for Class Members.

4. The "Notice Commencement Date" shall be the date that the Personal Notice is first disseminated. The Parties shall determine in advance the date the mailing and emailing will occur and shall calculate and set forth in the Notices the applicable Opt-Out Deadline and the Objection Deadline, which shall be sixty (60) days from the Notice Commencement Date.

5. No later than twenty-one (21) days prior to the Final Approval Hearing, the Settlement Administrator shall certify to the Court its compliance with the notice provisions of this Order.

IV. PROCEDURES FOR FINAL APPROVAL OF THE SETTLEMENT

A. Fairness Hearing

The Court will hold a Final Approval Hearing (also known as a "Fairness Hearing") at _____ a.m./p.m. on _____ in Courtroom _____ of the United States District Court for the Eastern District of New York, Long Island Courthouse, 100 Federal Plaza, Central Islip, NY 11722. At the Final Approval Hearing, the Court will consider the certification of the Settlement Class, the appointment of the Class Representative, the appointment of Class Counsel, the Agreement, and whether the Settlement should receive final approval.

At that time, the Court also will consider any request that may be made by Class Counsel for an award of attorneys' fees and costs to Class Counsel and for service awards to the Plaintiff to be paid out of the total attorneys' fees and costs that may be awarded by the Court, all in accordance with the terms of the Agreement. The Parties shall file their motions for final approval of the Settlement and any briefs in support of such motions on or before _____. The Parties shall file their motions for attorneys' fees, costs and expenses, and service awards to the named Plaintiff and any briefs in support of such motions on or before _____. These motions and supporting papers will be posted on the Settlement Website within one day of their being filed. Objections to these motions must be made in accordance with the Agreement, Long Form Notice and this Order on or before the Objection Deadline.

B. Deadline for Members of the Settlement Class to Opt Out from the Settlement Class and Settlement

Settlement Class Members who wish to be excluded from the Settlement Class must mail their written and signed requests to opt out to the Settlement Administrator in the form required by the Agreement and as set forth in the Long Form Notice by first-class or priority United States Mail, received by the Settlement Administrator no later than sixty (60) days after the Notice Commencement Date ("Opt-Out Deadline").

C. Deadline for Filing Objections to Matters to Be Heard at the Fairness Hearing and for Filing Requests to Appear and Present Argument or Evidence

All objections by Class Members to the final approval of the Settlement or any provision of the Agreement shall be made in writing in accordance with the terms of the Agreement and Long Form Notice, no later than sixty (60) days after the Notice Commencement Date ("Objection Deadline"), filed with or mailed to Clerk of the Court, United States District Court, Eastern District of New York, Long Island Courthouse, 100 Federal Plaza, Central Islip, NY 11722, with copies served contemporaneously on Class Counsel, Petro's counsel, and the Settlement Administrator.

Any papers not submitted in the manner and time set forth in the Agreement and Long Form Notice will not be considered at the Fairness Hearing, and all objections not made in the prescribed manner and time shall be deemed waived. Responses to objections shall be filed five (5) days before the Fairness Hearing, unless otherwise permitted by the Court.

All persons wishing to appear at the Fairness Hearing, either in person or by counsel, for the purpose of objecting to any aspect of the matters to be addressed at the Fairness Hearing, must include a written notice of their intention to appear at the Fairness Hearing, including identifying any counsel who will appear on their behalf, with their objections filed with or mailed to Clerk of the Court, United States District Court, Eastern District of New York, Long Island Courthouse, 100 Federal Plaza, Central Islip, NY 11722, with copies served contemporaneously on Class Counsel, Petro's counsel, and the Settlement Administrator, on or before the Objection Deadline, in accordance with the terms of the Agreement and Long Form Notice.

D. Deadline for Submitting Claim Forms

Class members will have 90 days from the Notice Commencement Date to submit a Claim Form for any of the benefits available under the Settlement.

V. ABSENCE OF ANY ADMISSION; DENIAL OF ANY WRONGFUL ACT OR OMISSION AND OF ANY LIABILITY

The Parties entered into the Agreement solely for the purpose of compromising and settling disputed claims. Petro has at all times denied, and continues to deny, any wrongful act or omission alleged by Plaintiff in the Action and any liability of any sort to Plaintiff or any member of the Settlement Class. Nothing contained in the Agreement, in the documents relating to the Agreement, or in this Order shall be construed, deemed, or offered as an admission or waiver by any of the Parties, or by any member of the Settlement Class, for any purpose in any judicial or administrative action or proceeding, whether in law or in equity.

IT IS SO ORDERED.

DATED: This _____, day of _____, 2019

Judge _____, United States District Court,
Eastern District of New York