

COMMONWEALTH OF KENTUCKY
2nd JUDICIAL CIRCUIT - DIVISION II
MCCRACKEN COUNTY

ENTERED

MW AUG 09 2018
MCCRACKEN CIRCUIT COURT
PADUCAH, KENTUCKY

SANDRA FAYE PURCELL BANKS,
AS EXECUTRIX OF THE ESTATE
OF THE LATE FAYE PURCELL, et al.,

Plaintiffs,

Case No. 14-CI-00729

vs.

UNITED PROPANE GAS, INC. and
its subsidiaries and affiliates,

Defendant.

ORDER GRANTING PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENT AND CERTIFICATION OF A SETTLEMENT CLASS

Factual Background

United Propane Gas, Inc., (hereinafter referred to as "UPG") offered to plaintiffs and its
customers in ten states what is called a "PRE-PURCHASE 'PREBUY KEEPFULL' GAS
SUPPLY AGREEMENT" ("PreBuy" contract). Under the terms of its contract, UPG agreed to
sell to its customer, at a set price per gallon, the customer's anticipated need for propane for the
cold months of the year in its region, specifically October 1st through March 31st. Pl. First
Amended Compl. at ¶¶ 18-19, 25-26. UPG has not contested these allegations.

During the winter of 2013-2014, it is alleged that UPG purchased approximately 9,000,000
gallons of propane to cover their pre-paid obligations. However, UPG chose to store a
considerable amount of this gas in Mont Belvieu, Texas. This fact was not revealed to its
customers; UPG's own managers were unaware of this gas' location. (See e.g. Dep. of B. Parker

43:6-8). From there, the propane was to be transported through various pipelines in order to service UPG's customers.

How much propane UPG could ship from the terminals along these pipelines was determined by its "allocation" on that pipeline. Allocation was determined by usage along the pipeline, i.e., the more propane you shipped along the pipeline, the more space was allocated to you. UPG decided to ship little propane along the pipeline during the summer months in 2013, when demand was low, as they could save money by simply buying propane from terminals closer to it in Paducah, Kentucky. Exh. 2 to Plaintiffs' Renewed Motion for Certification, Response to Plaintiffs' Second Set of Discovery Requests at 4-6. Because UPG shipped little on the pipeline in the summer, its allocation for the 2013-2014 winter was low.

Demand for propane increased in the winter of 2013-2014, in part because of extremely cold temperatures. UPG alleges that this was compounded by a change in how allocations were determined that occurred after the summer of 2013. Because of this, the demand to transport gas on the pipelines was high and UPG could not keep up with demand because of its low allocation.

It is alleged that UPG refused to honor its PreBuy contracts with its customers, despite having "plenty" of propane. UPG defends on the basis that it is excused from honoring the PreBuy contracts under paragraph 5 of its uniform Pre-Purchase contracts, arguing *force majeure*.

Upon Unopposed Motion of the Plaintiffs, Sandra Faye Purcell Banks, as Executor of the Estate of Faye Purcell (hereinafter referred to as "Ms. Banks"), Carolyn Seay (hereinafter referred to as "Ms. Seay"), and Richard Seay (hereinafter "Mr. Seay") (Ms. Banks, Ms. Seay, and Mr. Seay hereinafter collectively referred to as "Named Plaintiffs"), individually, and on behalf of the Class of similarly situated consumers they seek to represent (said class hereinafter referred to as the

“Class”; Named Plaintiffs and the Class hereinafter collectively referred to as “Plaintiffs”), by and through counsel, pursuant to the Kentucky Rules of Civil Procedure,

**IT IS HEREBY ORDERED** that the Plaintiffs’ Unopposed Motion for Preliminary Approval of Settlement and to Certify Settlement Class is **GRANTED**;

- a) The settlement is preliminarily approved and the settlement class certified under Ky. R. Civ. P. 23.01 and Ky. R. Civ. P. 23.02(c), and the settlement class is defined as follows:

A residential customer who entered into a 2013-2014 “PRE-PURCHASE ‘PREBUY KEEPFULL’ GAS SUPPLY AGREEMENT” with United Propane Gas, Inc. or one of its above-named affiliates (collectively referred to as “UPG”), with the exception of:

- (a) those who received payment through the case styled Andy Beshear v. United Propane Gas, Inc., et al., 14-CI-00120, which was filed in Franklin Circuit Court in Franklin County, Kentucky; (b) any Class member who received a delivery from UPG at least fifty (50) gallons of propane at their prebuy contract rate between January 20, 2014, and January 27, 2014; (c) any Class member who had purchased and received all of his or her contract prebuy propane from UPG on or before January 27, 2014; and, (d) any Class members who (i) ordered contracted-for prebuy propane before January 27, 2014 and received the propane during the suspension period (January 27 to February 13, 2014); or (ii) ordered the propane during the suspension period and received the propane after the suspension period; and (iii) were charged the current market rate for it rather than the prebuy contract rate; and (iv) had his or her account credited for this gas on or before June 15, 2014, with the difference between the market rate and the prebuy contract rate.

- b) Upon preliminary review, the Court finds that the proposed settlement is fair, reasonable, adequate, and provides substantial benefits to the Class. Based upon the Defendant’s estimates, eligible class members could receive as much as 207% of their actual damages.

- c) The proposed settlement is the product of serious negotiations, is not the result of collusion, and falls within the range of possible approval. After litigating this case for approximately four (4) years, and substantial discovery, and motion and appellate practice, the parties mediated for two days with a nationally recognized mediator. Attorneys' fees, expenses, and service awards were not negotiated until relief to the Class was agreed upon. The history of this litigation shows that the parties negotiated at arm's length, vigorously pursued claims and defenses, and that there has been no collusion.
- d) Ms. Banks, Mr. Seay, and Ms. Seay are appointed as Class Representatives;
- e) John S. Friend, Robert W. "Joe" Bishop, and Tyler Z Korus, of Bishop Korus Friend, P.S.C., Frank H. Tomlinson, of Tomlinson Law, L.L.C., and Michael M. Pitman, of Haverstock, Bell, and Pitman, L.L.P. are appointed as Co-Lead Counsel for the Class.
- f) The notice program is reasonably calculated to apprise Class Members of the settlement and their rights arising thereunder. Pursuant to Ky. R. Civ. P. 23.03(4)(b), the notice meets due process requirements and includes:
- i. the nature of the action;
  - ii. the definition of the class certified;
  - iii. the class claims, issues, or defenses;
  - iv. that a class member may enter an appearance through an attorney if the member so desires;
  - v. that the court will exclude from the class any member who requests exclusion by a specified date;
  - vi. the time and manner for requesting exclusion; and

- vii. an explanation of the binding effect of a class judgment, whether favorable or not, on members under CR 23.03.
- g) The Court finds that the requested attorneys' fees, expenses, and Named Plaintiffs' service awards are reasonable. The requested attorneys' fees, expenses, and Named Plaintiffs' service awards are not paid from class members' awards, and will be paid separately by the Defendant.
- h) This case satisfies the requirements of Kentucky Rule of Civil Procedure for settlement purposes because:
1. The members of the class are too numerous to make joinder practicable, as the class numbers in the thousands.
  2. This case involves liability revolving around an identical form contract. There are common questions of law and fact for all Class members, such as:
    - a. Did UPG's decision to suspend delivery of prepaid gas to consumers constitute an illegal act under KRS § 367.010, *et seq*?
    - b. Did this decision to suspend delivery of prepaid gas to consumers give rise to an ascertainable loss under KRS § 367.010, *et seq*?
  3. The claims of the named representatives are typical, because the claims of the Named Plaintiffs individually and as representatives of the Class allege violations of KRS § 367.010, *et seq*. There are no unique defenses to liability under KRS § 367.010, *et seq*., that would be available against one representative or other Class member, but not another, nor was UPG's course of conduct towards the named representatives unique.

4. The named representatives will adequately represent the Class. The named representatives have common interests with the Class. The class attorneys will adequately represent the Class as well, as they have extensive experience in class and complex litigation.

e) This case also satisfies the requirements of Kentucky Rule of Civil Procedure 23.02(c) for settlement purposes because questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The court makes the following findings:

1. The individual class members have little or no interest in controlling their own litigation. The amounts of individual damages are small, likely averaging a few hundred dollars or less, each.
2. There are compelling reasons to focus this litigation in McCracken County, Kentucky. McCracken County is the location of UPG's corporate offices. Most of the documentary evidence and witnesses are located in and around McCracken County. Also, the contracts at issue in this litigation include a Kentucky choice of law provision, and a choice of forum provision naming McCracken County as the proper forum.
3. It will be much easier to handle this litigation in a class format, as opposed to the alternatives. It would be far more difficult to litigate these claims individually, or to join them all into a single lawsuit by thousands of individually joined plaintiffs.

**IT IS HEREBY ORDERED** that notice shall be issued within 30 days of the entry of this order.

Date: 8/9/18

  
MCCRACKEN COUNTY CIRCUIT JUDGE

TENDERED BY:

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