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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PATRICK HENDRICKS, individually and on behalf of all others similarly situated,

Plaintiff,

v.

STARKIST CO.,

Defendant.

Case No. 13-CV-00729-HSG

PLAINTIFF'S REPLY IN SUPPORT OF RENEWED MOTION FOR FINAL APPROVAL

Date: April 21, 2016
Time: 2:00 p.m.
Courtroom 10, 19th Floor

Hon. Haywood S. Gilliam, Jr.

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I. INTRODUCTION

Six additional objections were filed in response to Plaintiff's renewed motion for final approval. *See* Dkt. Nos. 349, 350, 351, 352, 354, 355. Only two, the objections of Twitchell, Dkt. No. 351, and Moore, *et al.*, Dkt. No. 352, addressed the scope of the release. The other four simply repeated or re-hashed prior objections concerning other issues. But, as this Court observed during the March 15, 2016 conference, "nothing about the renewed, revised release changes those issues." 3/15/16 Hearing Tr. at 4:21-22. "[W]hat [the Court] would be considering is the sole issue of the amended release." *Id.* at 4:17-19.

The continuing objections to the release language have no merit. They should be overruled, and final approval to the proposed settlement should be granted without further delay.

II. THE SECOND AMENDED RELEASE SUBSTANTIVELY CORRECTED EVERY ISSUE RAISED BY THE 2/19/16 ORDER

The parties carefully analyzed the 2/19/16 Order, Dkt. No. 336, and crafted the Second Amended Release, Dkt. No. 338, to address every concern raised by the objectors and by the Court. *See* 3/15/16 Hearing Tr. at 4:1-2 ("The parties now, as I understand it, have substantively corrected the release issue that was the focus of my order ….").

A. The Second Amended Release Has No Effect On Any Claim Pending In The PSP Antitrust Litigation

The *Packaged Seafood Products Antitrust Litigation*, or "*PSP Antitrust Litigation*," includes at least 44 lawsuits, including several class actions, alleging StarKist and its competitors conspired to fix prices for packaged seafood products, which have been centralized in the Southern District of California before Judge Sammartino. *See* 12/9/15 MDL Transfer Order at 1-2, Bursor Decl. Ex. C. The claims in the *PSP Antitrust Litigation* are brought under "federal and state antitrust laws (and related state unfair competition laws)." 11/20/15 Moore *et al*, Objection at 1:13-14, Dkt. No. 293. There is no claim in the *PSP Antitrust Litigation* for underfilling, whether unilaterally or through a conspiracy. There is no overlap between the claims in this action and in the *PSP Antitrust Litigation*. And the Second Amended Release has been carefully crafted to ensure that it does not affect any claim pending in the *PSP Antitrust Litigation*.

On March 24, 2016, Judge Sammartino appointed interim lead counsel for four groups of plaintiffs in the *PSP Antitrust Litigation*. 3/24/16 Order Apppointing Interim Lead Counsel, Bursor Decl. Ex. D. Objector Twitchell's counsel, Wolf Haldenstein Adler Freeman & Herz LLP, was appointed Interim Lead Counsel for the Indirect Purchaser End Payer Plaintiffs (EPPs). *Id.* at 2:4-5, 6:19-24. Judge Sammartino also appointed Interim Lead Counsel for the Direct Action Plaintiffs (DAPs), who are direct purchasers proceeding against Defendants individually, for the Direct Purchaser Plaintiffs (DPPs), who are direct purchasers proceeding on behalf of a putative class, and for the Indirect Purchaser Commercial Food Preparer Plaintiffs (CFPs), who are indirect purchasers proceeding on behalf of a putative class. *See id.* at 1:26-2:5. Objector Moore's counsel were not appointed to a leadership position.

Three of these groups, the DAPs, DPPs, and CFPs, have made no objection to the proposed settlement here. Twitchell, however, through Interim Lead Counsel for the EPPs, has filed an objection "in the exercise of caution to preserve the rights" of the EPP plaintiffs. Twitchell Objection at 5:24-25, Dkt. No. 351. Twitchell "feels that … minor alterations to the revised release language" would preserve the rights of the EPPs. *Id.* at 5:27-6:1. The parties, however, viewed Twitchell's minor revisions as unnecessary, since none of the claims asserted by the EPPs are affected by the proposed release. "Should the Court find that the revised release language currently proposed by the parties already adequately protects Objector and the End-User Purchaser Plaintiffs she seeks to represent, [Twitchell] respectfully requests that any order approving the parties' settlement so state." *Id.* at 6:3-5. Plaintiff views this as a reasonable request, and would support the inclusion of such language in the final approval order.

Moore objects to releasing "all claims or causes of action arising from the factual allegations and/or legal claims made in the Action." Moore Objection at 4:20-26, Dkt. No. 352. Moore asserts the phrase "and/or legal claims" should be stricken because it "arguably seeks to release claims in the *PSP Antitrust Litigation*." *Id.* at 5:7. Moore's concern is that StarKist "might" argue that all UCL claims, based on any facts whatsoever, are being released, because one of the claims being settled here was brought under the UCL. But it is difficult to imagine any scenario under which such

an application of the release would be arguable, let alone reasonable. By its terms the Second Amended Release would not release all UCL claims of any kind. It would release only the UCL claims "made in the Action." *See* Second Amended Release at 1:17-19, Dkt. No. 338. This Court has already made clear that the claims made in this Action "were limited to the underfilling of StarKist tuna cans." 2/19/16 Order at 4:14, Dkt. No. 336. In any event, the phrase "made in the Action" clearly tethers the release to the identical factual predicate of the claims made in this Action.

The limitation to claims "made in the Action" also distinguishes the release here from those at issue in *Daniels v. Aeropostale West, Inc.*, 2014 WL 2215708 (N.D. Cal. May 29, 2014), and *Adderley v. Nat'l Football League Players Ass'n*, 2009 WL 4250786 (N.D. Cal. Nov. 23, 2009), cited at page 10 of Moore's objection brief. Those cases involved releases that extended to any claims "relating to" the facts alleged in *Daniels*, 2014 WL 2215708, at *4, or to claims "that relate in any way to the subject of the claims certified or alleged," *Adderly*, 2009 WL 4250786, at *2 n.4. This is the same issue the Parties addressed by eliminating the "related to" language, which no longer appears in the Second Amended Release. *See* Plaintiff's Renewed Motion for Final Approval at 4:3-8, Dkt. No. 347 ("We also eliminated the 'related to' language that was similar to some of the broad language disapproved in *Willner v. Manpower, Inc.*, 2014 WL 4370694, at *7 (N.D. Cal. Sep. 3, 2014), and also in *Custom LED, LLC v. eBay, Inc.*, 2013 WL 6114379, at *7 (N.D. Cal. Nov. 20, 2013) (holding that the original scope of the release 'was overly broad because it improperly released any claim, known or unknown, 'arising out of or relating in any way to Featured Plus!').'"). *Tijero v. Aaron Brothers, Inc.*, 2013 WL 60464 (N.D. Cal. Jan. 2, 2013), cited at page 12 of Moore's objection, also involved this same issue. *See id.* at *9 ("any and all claims … arising out of or in any way relating to their employment with and/or termination of employment with Defendant") (underlining added).

The two other cases Moore cites at page 12, footnote 6 of his brief are easily distinguished. *Kakani v. Oracle Corp.*, 2007 WL 1793774 (N.D. Cal. June 19, 2007) involved a proposed settlement that would have released "any and all claims that were asserted or could have been asserted in the Complaint." *Id.* at *2 (court's emphasis). *Bond v. Ferguson Enterprises, Inc.*, 2011

WL 284962 (E.D. Cal. Jan. 25, 2011) similarly involved a release of any claims that "were or could have been asserted in the Lawsuit." *Id.* at *7 (underlining added). The Second Amended Release has already addressed that problem by removing similar language. *See* Plaintiff's Renewed Motion for Final Approval at 4:3-8, Dkt. No. 347 ("[W]e have eliminated the language concerning claims 'that have been, might have been, are now, or could have been brought relating to the transactions, actions, conduct and events that are the subject of this action or settlement.'"). Furthermore, the limitation to "legal claims made in the Action" again distinguishes the Second Amended Release from the releases in *Kakani* and *Bond*.

B. The Antitrust Carve-Out Is Exactly What Objectors Demanded

Both Moore and Twitchell had previously sought to have antitrust claims carved out of the release. Indeed, Moore's counsel, Ms. Kralowec, argued at the final approval hearing: "Why not just exclude antitrust claims, which is one of the things we proposed. That would have resolved our objection." 12/17/15 Hearing Tr. at 35:24-36:1 (underlining added). So the parties did that. The Second Amended Release, Dkt. No. 338, expressly excludes from the Released Claims "any antitrust claim arising from a conspiracy among, or collusive agreement between, StarKist and one or more of its competitors." This language was crafted specifically in response to Ms. Kralowec's statement at the hearing, and the language in the 2/19/16 Order at 5:17-24 concerning a "possible future antitrust action." *See also id.* at 5:23-24 ("[A]n antitrust claim requires a collusive agreement between StarKist and its competitors, and the agreement itself is the basis of the violation.").

Now, having gotten exactly what they asked for, both Moore and Twitchell object to the antitrust carve-out. Twitchell demands that the word "antitrust" be stricken from the release. Twitchell Objection at 5:10-11, Dkt. No. 351. Moore demands that the word "antitrust" be used twice, by expanding the language to carve out "any claims under federal antitrust, state antitrust, state unfair competition or state consumer protection laws." Moore Objection at 5:3-5, Dkt. No. 352. It is impossible to meet both of these demands. Moreoever, these word-changes would accomplish nothing.

The objectors' concern for the UCL and state law claims in the *PSP Antitrust Litigation* is already addressed through the existing release language. A carve-out for "antitrust claims" is sufficient to protect antitrust claims under both state and federal law. There is no need to say it twice. Furthermore, claims challenging an alleged price-fixing agreement under California's Unfair Competition Law and similar state consumer protection statutes are antitrust claims. Moore's original objection characterized them as such. *See* 11/20/15 Moore *et al*, Objection at 1:13-14, Dkt. No. 293 (explaining the claims in the *PSP Antitrust Litigation* are brought under "federal and state antitrust laws (and related state unfair competition laws)"). California's UCL is an antitrust statute. *See, e.g., Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999) (holding that "the word 'unfair'" in California's Unfair Competition Law (UCL) "means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws"). The existing carve-out for antitrust claims thus preserves any antitrust claim, brought under any state unfair competition or consumer protection statute.

Here again, the continued objections are based on sophistry and word-play. We were told by Ms. Kralowec, on the record, that a carve-out for "antitrust claims … would have resolved our objection." We took that seriously and gave her exactly what she demanded. Now she is trying to move the goal posts. She should be held to her statement on the record.

C. The Release Need Not Reference The Opt-Outs

Twitchell and Moore also demand that the release include language stating that opt outs will not be bound. Twitchell Objection at 4:27-5:1, Dkt. No. 351; Moore Objection at 5:15-17 (objecting that the Second Amended Release "omits this reference to opt-outs"). This is another demand for an unnecessary word-change that would accomplish nothing. Opt-outs are not bound by the release as a matter of law. The class notice has already advised class members that opt-outs will not be bound. *See* Class Notice ¶ 12, Dkt. No. 184-1 ("If you exclude yourself from the Class – which is sometimes called 'opting-out' of the Class – you won't get any Settlement Benefits from the Proposed Settlement. However, you may then be able to separately sue or continue to sue StarKist for the legal claims that are the subject of this lawsuit."). A statement that opt-outs are not bound is

typically included in the final approval order, and the parties have done so here. *See* [Proposed] Amended Settlement Approval Order And Final Judgment ¶ 10, Dkt. No. 339-6 ("Effective as of the Final Settlement Approval Date, each and all of the Settlement Class members (except any such person who has filed a proper and timely request for exclusion) shall release …."). There is no need to repeat this a third time in the text of the release.

Moore argues that "the opt outs in particular have been prejudiced" by the absence of this language in the release. Moore Objection at 15:15-16, Dkt. No. 352. That argument is wrong. By definition, the rights of opt outs are not affected by a class settlement. Thus, opt outs cannot be prejudiced in any way. That is why, for example, opt outs lack standing to object. This too is a basic element of black letter law that is explained in the class notice. *See* Class Notice ¶ 15, Dkt. No. 184-1 ("If you exclude yourself, you have no basis to object because the case no longer affects you.").

D. The Reference To The "Class" As Opposed To "Settlement Class" Is Immaterial

Moore objects that "[t]he term 'Class' is not defined in the Second Amended Release … [and] should be replaced with 'Settlement Class Members.'" Moore Objection at 5:19-20, Dkt. No. 352. This is another demand for an unnecessary word-change that would accomplish nothing. The term "Class" was used in the Second Amended Release to track as closely as possible the language in the class notice. *See* Class Notice ¶ 24, Dkt. No. 184-1 ("If the Court grants final approval of the settlement, all members of the Class will release …."). The class notice consistently uses the phrase "Class" and does not use the phrase "Settlement Class." *See, e.g.*, at p. 1, 2d bullet point ("You are a Class Member if …."); *id.* ¶ 2 ("the Class"); *id.* ¶ 3 ("Class" or "Class Members"); *id.* ¶ 4 ("If you fit into the following description, you are a Class Member:"); *id.* ¶ 12 ("If you exclude yourself from the Class …."). In any event, in the context of the proposed settlement, it makes no difference whether the word "Settlement" is inserted before the word "Class," in the release, or elsewhere. *See infra* footnote 2 and accompanying text.

III. NO FURTHER NOTICE IS REQUIRED

Plaintiff's renewed motion for final approval cited 10 cases where the parties stipulated to narrow the scope of a class release after notice had been given, and courts granted final approval without requiring additional notice.[1] During the March 15 hearing, the Court commented that "the parties are proposing that we not do repeat notice – and I read the cases to support that approach." 3/15/16 Hearing Tr. at 5:2-3. Moore persists in objecting that the notice was inadequate, but neither Moore nor any other objector addresses any of the 10 cases Plaintiff's cited on this point – or any other authority.

Indeed, Moore concedes the point by stating that "Only when there is finally a release narrow enough that it does not violate the identical factual predicate rule will the rights of the Class be protected, and no further notice be required." Moore Objection at 14:16-18, Dkt. No. 352.[2] Moore's contention that the release has not been so narrowed is wrong. *See, e.g.*, 3/15/16 Hearing Tr. at 4:1-2 ("The parties now, as I understand it, have substantively corrected the release issue that was the focus of my order ….").

Twitchell makes no objection concerning notice, and implicitly concedes that additional notice is not necessary by stating repeatedly that her objection seeks only modest or minor changes to the release language. *See* Twitchell Objection at 2:25, Dkt. No. 351 ("modest changes"); *id.* at 4:1 ("only minor modifications"); *id.* at 4:2 ("minor revisions"); *id.* at 5:13-14 ("not substantively necessary"); *id.* at 5:27 ("minor alterations"). Since these "minor revisions" are "not substantively

[1] *See* Plaintiff's Renewed Motion For Final Approval at 5:23-14:6, Dkt. No. 347, *citing Shaffer v. Cont'l Cas. Co.*, 362 Fed. App'x 627, 631 (9th Cir. 2010) ("Although changes were made to the release after potential class members received the notice, the changes did not render the notice inadequate because they narrowed the scope of the release."); *Moore v. Verizon Communications, Inc.*, 2013 WL 4610764 (N.D. Cal. Aug. 28, 2013) (Armstrong, J.); *Zamora v. Ryder Integrated Logistics, Inc.*, 2014 WL 9872803 (S.D. Cal. Dec. 23, 2014) (Bencivengo, J.); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013) (Gleeson, J.); *Alexander v. Washington Mutual, Inc.*, 2012 WL 6021098 (E.D. Pa. Dec. 4, 2012); *In re American Investors Life Ins. Co. Annuity Marketing & Sales Practices Litig.*, 263 F.R.D. 226 (E.D. Pa. 2009); *Williams v. Sprint/United Management Co.*, 2007 WL 2694029 (D. Kan. Sept. 11, 2007); *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 2006 WL 3681138 (E.D.N.Y. Dec. 11, 2006); *In re Lupron® Marketing & Sales Practices Litig.*, 228 F.R.D. 75 (D. Mass. May 12, 2005); and *In re Auction Houses Antitrust Litig.*, 42 Fed. App'x 511, 514 (2d Cir. 2002).

[2] Here Ms. Kralowec's brief referred to the "rights of the Class" and not the "Settlement Class." This, and the numerous other instances of the capitalized term "Class" without "Settlement" in Ms. Kralowec's brief, caused us no confusion at all. *See id.* at 1:11, 2:22, 13:18, 13:19, 13:24, 15:14.

necessary," and would not impair class members' rights regardless, no additional notice is required. *See, e.g.*, *Jones v. Gusman*, 296 F.R.D. 416, 467 (E.D. La. 2013) (supplemental notice not required for "minor modifications" to settlement agreement that "did not impair class members' rights").

IV. A SECOND FAIRNESS HEARING IS NOT REQUIRED

The Parties' 3/8/16 Joint Case Management Statement, Dkt. No. 342, also cited three cases where the parties to a class action settlement amended and narrowed the release after the final fairness hearing, and the courts granted final approval without requiring a second fairness hearing.[3] Again, none of the objectors addressed those cases, or cited any contrary authority suggesting that a second fairness hearing would be required here.

V. CONCLUSION

For the foregoing reasons, none of the objections to final approval of the proposed settlement has any merit. All of them should be overruled and final approval should be granted.

Dated: April 5, 2016

Respectfully submitted,

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[3] *See id.* at 1:16-3:9, *citing Shaffer v. Cont'l Cas. Co.*, No. 06-cv-02235 (C.D. Cal.) (Gutierrez, J.), *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 2006 WL 3681138 (E.D.N.Y. Dec. 11, 2006) (Sifton, J.), and *In re Auction Houses Antitrust Litig.*, 2001 WL 170792, at *2 (S.D.N.Y. Feb. 22, 2001) (Kaplan, J.).

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