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the Putative Settlement Class

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 NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF THE COURT'S FEBRUARY 19, 2016 ORDER

Date: _____________
Time: ______________
Courtroom 15, 18th Floor

Hon. Haywood S. Gilliam, Jr.

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, subject to this Court's granting Plaintiff's Motion For Leave To File A Motion For Reconsideration, on ____________________ at ____ p.m., or as soon thereafter as the matter may be heard by the above-captioned Court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Courtroom 15, 18th Floor, in the courtroom of the Honorable Haywood S. Gilliam, Jr., Plaintiff Patrick Hendricks will move, pursuant to Civil Local Rule 7-9, for reconsideration of the Court's February 19, 2016 Order (Doc. No. 336) insofar as that Order denies final approval to the parties' class action settlement without prejudice, and denies Plaintiff's motion for attorneys' fees as moot. The motion is made on the grounds that, subsequent to the Court's issuance of the February 19, 2016 Order, new material facts emerged, that is, the parties have stipulated to an amendment to the proposed settlement agreement that narrows the scope of the release to address the concerns the court cited in denying final approval, without prejudice. With this narrowing of the release, all of those grounds for denying final approval have been addressed, and the Court should now grant final approval to the settlement.

This motion is based on this Notice Of Motion And Motion, the accompanying Memorandum Of Points And Authorities, The Second Amendment To Stipulation Of Settlement, the Declaration Of Scott A. Bursor, the pleadings and papers on file herein, and any other written and oral arguments that may be presented to the Court.

CIVIL RULE 7-4(a)(3) STATEMENT OF ISSUE TO BE DECIDED

Whether the Court should reconsider the February 19, 2016 Order (Doc. 336) and grant final approval to the proposed class action settlement.

Dated: March 3, 2016

Respectfully submitted,

BURSOR & FISHER, P.A.

By: */s/ Scott A. Bursor*
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I. INTRODUCTION

On February 19, 2016 the Court denied final approval of the proposed settlement of this action, without prejudice, ruling that the amended release failed to satisfy the "identical factual predicate rule" because it would "releas[e] claims under the antitrust laws mentioned nowhere in the complaint." 2/19/16 Order at 5 (Doc. No. 336). With the benefit of that ruling, the parties have agreed to a Second Amendment To Stipulation Of Settlement, executed March 1, 2016 (the "Second Amended Release") (Doc. No. 338). This Second Amended Release narrows the release to ensure that it conforms to the identical factual predicate rule and does not release claims under the antitrust laws.

The February 19, 2016 Order also held the class notice was inadequate because it did not inform class members of the prior amendment to the release, which the Court found had not narrowed the release, but rather may have broadened it to cover antitrust claims. 2/19/16 Order at 2-3. The Second Amended Release remedies this concern too; it unambiguously narrows the scope of the release. Because such a narrowing amendment only benefits the class, no additional notice to the class should be required. *See, e.g., In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1111 (10th Cir. 2001) (supplemental notice not required where a proposed amendment merely "expand[s] the rights of class members"); *In re Diet Drugs Prods. Liab. Litig.*, 2010 WL 2735414, at *6 (E.D. Pa. July 2, 2010) (holding an amendment to a class settlement agreement requires supplemental notice only when it "would have a material adverse effect on the rights of class members"); *Harris v. Graddick*, 615 F. Supp. 239, 244 (M.D. Ala. 1985) ("Under these limited circumstances where the amendment is narrow and it is clearly apparent that the interests of the classes are not substantially impaired, the court is of the opinion that the notice already given is adequate and that additional notice is not required pursuant to Rule 23(e)."); *cf.* Manual for Complex Litigation § 21.61 (4th ed.) ("If the fairness hearing leads to substantial changes adversely affecting some members of the class, additional notice, followed by an opportunity to be heard, might be necessary."). In Part III.B, below, we discuss 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 to the class, including a recent order by the Ninth Circuit affirming this practice, a recent decision by Judge

Saundra Brown Armstrong of this District, and eight other cases granting final approval without requiring additional notice to the class.

Here, dissemination of the class notice cost $404,730.00, which was paid from the settlement fund, reducing the benefits available to class members. Bursor Decl. ¶ 3. Class members' interests are best served by avoiding a repeat of those costs, and by avoiding the delay that necessarily would be caused by a repeat notice. As a result, and for the reasons stated more fully below, the Court should not require additional notice, and should now grant final approval to the settlement.

II. LEGAL STANDARD

Where a district court's ruling has not resulted in a final judgment or order, reconsideration of the ruling may be sought under Federal Rule of Civil Procedure 54(b), which provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment." *See* Fed. R. Civ. P. 54(b). Under Local Rule 7-9, a party seeking reconsideration must "show reasonable diligence in bringing the motion, and one of the following:"

> (1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or
>
> (2) The emergence of new material facts or a change of law occurring after the time of such order; or
>
> (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Local Rule 7-9(b)(1)-(3). Here, the Second Amendment To Stipulation Of Settlement (Doc. No. 338), executed March 1, 2016, which narrowed the proposed release, is a "material difference in fact … from that which was presented to the Court before entry of the [February 19, 2016] order," supporting reconsideration under Local Rule 7-9(b)(1). It is also a "new material fact[] … occurring

after the time of such order" supporting reconsideration under Local Rule 7-9(b)(2). Plaintiff has shown reasonable diligence by seeking leave to file this motion for reconsideration within 13 days after entry of the February 19 Order.

III. ARGUMENT

A. The Second Amended Release Has Been Narrowed To Address The Concerns Set Forth In The February 19, 2016 Order

In light of several parties' objections to the breadth of the release in the original Settlement Agreement, the parties had attempted to narrow the scope of the release through their December 10, 2015 Amendment To Stipulation Of Settlement (Doc. No. 323-2). The Court's 2/19/16 Order reflects the Court's conclusion that those efforts missed the mark. *See* 2/19/16 Order at 3 n.2 ("[I]t is far from certain that the amended release here truly narrowed the scope of the release."). With the benefit of the Court's analysis, the parties have agreed to a Second Amendment To Stipulation Of Settlement, executed March 1, 2016 (the "Second Amended Release") (Doc. No. 338). The Second Amended Release conforms the terms of the release as closely as possible to those set forth in ¶ 24 of the Long Form Class Notice, which was previously disseminated to the Class, and amends those terms to address the overbreadth issues identified in the 2/19/16 Order. A redline showing changes from ¶ 24 of the Long Form Class Notice illustrates how the release has been narrowed:

> 6.1 Release by Settlement Class Members. If the Court grants final approval of the settlement, all members of the Class will release and forever discharge any and all claims or causes of action ~~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, arising from or related to the under-filling of tuna in the StarKist Products~~ arising from the factual allegations and/or legal claims made in the Action, whether in law or equity, whether seeking damages or any other relief (including attorneys' fees), of any kind or character, known or unknown, that are now recognized by law or that may be created or recognized in the future by statute,

1 regulation, judicial decision, or in any other manner, based upon any
2 federal or state statutory or common law, including, without limitation,
3 claims sounding in tort, contract, and the consumer protection laws of
4 the United States or of any state or other jurisdiction within the United
5 States, as well as under the unfair or deceptive trade practices, trade
6 regulation, consumer fraud, misrepresentation, and false advertising
7 law of the United States or any state or other jurisdiction within the
8 United States~~, including, but not limited to, any claims relating to the~~
9 ~~under-filling of tuna in the StarKist Products~~ (the "Released Claims").
10 Excluded from the Released Claims are (a) any and all claims for
11 personal injury, wrongful death, and/or emotional distress arising from
12 personal injury, (b) any claims of any person or entity that purchased
13 StarKist Products for purposes of resale or commercial food
14 preparation and not for his/her/its own consumption (*i.e.*, "Resellers"),
15 and (c) any antitrust claim arising from a conspiracy among, or
16 collusive agreement between, StarKist and one or more of its
17 competitors.

18 These amendments narrow the terms of the release in at least four ways. First, the release is
19 now limited to "claims or causes of action arising from the factual allegations and/or legal claims
20 made in the Action." This ensures that only claims "based on the identical factual predicate" as the
21 claims in the lawsuit are being released. *See Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010).

22 Second, we have eliminated the language concerning claims "that have been, might have
23 been, are now, or could have been brought relating to the transactions, actions, conduct and events
24 that are the subject of this action or settlement," which was similar to the language that was
25 disapproved in *Lovig v. Sears, Roebuck & Co.*, 2014 WL 8252583, at *2 (C.D. Cal. Dec. 9, 2014)
26 (holding release overbroad because it would release claims that "could have been asserted in the
27 Action based on the facts pled in any of the complaints filed in the Action"). We also eliminated the
28 "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. 13, 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!'").

Third, the terms now expressly exclude from the release "any claims of any person or entity that purchased StarKist Products for purposes of resale or commercial food preparation and not for his/her/its own consumption." This "Resellers" exclusion was included in the first amendment to the release, executed December 10, 2015 (Doc. 323-2), and the parties have incorporated it into the Second Amended Release as well.

Fourth, the terms now expressly exclude antitrust claims from the release. This is done in belt-and-suspenders fashion, first by limiting the release to claims "arising from the factual allegations and/or legal claims made in the Action," which do not include antitrust claims, and also by expressly excluding 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 resolves the objections filed by the plaintiffs in the *Packaged Seafood Products Antitrust Litigation*, or "*PSP Antitrust Litigation*." *See* Moore *et al.* Objection (Doc. 293); Twitchell Objection (Doc. 287). *See also* 12/17/15 Hearing Tr. at 35:24-36:1 (Ms. Kralowec: "Why not just exclude antitrust claims, which is one of the things we proposed. That would have resolved our objection.").

Each of these four changes accomplishes an unambiguous narrowing of the release, both by comparison to the original release set forth in the Settlement Agreement, and also by comparison to the terms of the release as described in ¶ 24 of the Long Form Class Notice previously disseminated to the Class. And because each of these changes narrows the release, each is either neutral or beneficial to Class members, and none of these changes could cause any prejudice to any Class member.

B. There Is No Need For Additional Notice To Class Members

The February 19, 2016 Order found that "[a]lthough the original notice was 'reasonably calculated' to bring the settlement agreement to each class member's attention," it was rendered inadequate because the December 10, 2015 amendment to the release "specified *new* claims, most

notably claims under federal and state antitrust laws." 2/19/16 Order at 2-3 (Doc. 336). Thus, the Court found the notice inadequate because "class members did not have any notice of the rights they are actually giving up with regard to these new claims." *Id.* at 3.

The Second Amended Release corrects this problem by narrowing the release to exclude antitrust claims and to limit the scope of the release to claims based on the identical factual predicate as the claims set forth in the operative complaint. Since this narrowing of the release does not impair class members' rights, no additional notice is required. *See, e.g.*, *Shaffer v. Continental Cas. Co.*, 362 F. 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."); *In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1111 (10th Cir. 2001) (supplemental notice not required where a proposed amendment "expand[s] the rights of class members"); *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 even indirectly"). Indeed, courts routinely approve agreements to narrow the scope of a class release after notice has been given to the class, and grant final approval of the narrowed agreement without requiring re-notice. We discuss below 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. *Shaffer v. Cont'l Cas. Co.*

Shaffer v. Cont'l Cas. Co., No. 06-cv-02235 (C.D. Cal.) (Gutierrez, J.), was a class action alleging violations of statutory consumer protection laws, as well as claims for fraud and misrepresentation concerning the sales of certain insurance policies. *See Shaffer* First Amended Complaint, Bursor Decl. Ex. A. On December 31, 2007 the parties executed a Stipulation of Settlement that included a broad release of "any and all claims … which the Plaintiffs and the Class Members or any of them ever had, now have, or can have, or shall or may hereafter have against Defendants and Releasees, including, but not limited to [an illustrative list of claims]." *Shaffer* Settlement Agreement ¶ II(II). Bursor Decl. Ex. B. The settlement was preliminarily approved and notice was disseminated to the class. On May 5, 2008, the court held a final fairness hearing during

which the Court raised concerns about the scope of the release. On May 7, 2008, the court entered an order directing the parties to submit a new proposed final approval order that "addresses the Court's discussion with the parties at the Hearing regarding the Release language." 5/19/08 *Shaffer* Stipulation Regarding Amended Stipulation Of Settlement, Bursor Decl. Ex. C. After the final fairness hearing, on May 19, 2008, the parties executed an amended stipulation of settlement that amended the definition of "Released Claims" to refer only to claims "related to" certain matters alleged in the complaint. *See id.* ¶ 4.

On June 11, 2008, with no additional notice to the class, Judge Gutierrez granted final approval of the settlement, and incorporated the amended release language into the final approval order. *See* Shaffer 6/11/08 Amended Final Approval Order ¶ 4, Bursor Decl. Ex. D (setting forth the full text of the amended release). On appeal, the Ninth Circuit affirmed the final approval order in all respects, and specifically overruled an objection based on failure to provide additional notice of the amended release. *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.").

The Ninth Circuit's ruling in *Shaffer* was unpublished, and thus is not precedent under 9th Cir. R. 36-3. Nevertheless, it is still citable under Fed. R. App. Pro. 32.1(a) for its "persuasive value." In the February 19 Order, this Court declined to follow *Shaffer* due to the Court's uncertainty that the December 10, 2015 amendment "truly narrowed the scope of the release," and also due to the lack of "information about the scope of the change in [the *Shaffer*] release." 2/19/16 Order at 3 n.2. Now, however, the exact language of the original and amended *Shaffer* releases are submitted herewith. *See* Bursor Decl. Ex. B (original *Shaffer* settlement); Bursor Decl. Ex. C (stipulation setting forth amended *Shaffer* release). Also, here the Second Amended Release now clearly narrows the scope of the release in a manner similar to the narrowing in *Shaffer*. *See* Part II.A, above.

2. *Moore v. Verizon Communications Inc.*

Moore v. Verizon Communications, Inc., 2013 WL 4610764 (N.D. Cal. Aug. 28, 2013) (Armstrong, J.), was a class action on behalf of Verizon landline customers who were billed for

1 allegedly unauthorized third-party charges submitted to Verizon by billing aggregators on behalf of
2 third-party providers. *Moore*, 2013 WL 4610764, at *1. This practice of placing unauthorized
3 charges on a customer's monthly phone bill is commonly known as "cramming." *Id.* On February
4 28, 2012, the Court issued an order granting preliminary approval to a settlement through which
5 "class members agree to release claims that arise out of or are related to the Third-Party Charges
6 billed by Verizon." *Id.* at *3. Notice to the class was issued beginning from May 4 to May 25,
7 2012. *See* 6/10/13 Declaration of Julie Redell ¶ 9, Bursor Decl. Ex. E. Regarding the terms of the
8 release, the notice stated: "Unless you exclude yourself, you will be in the Class, and if the
9 Settlement is approved, will be bound by it and release claims against Released Persons as defined in
10 the Settlement Agreement." *Id.* at Redell Decl. Exs. B through E.

11 On August 17, 2012, the Federal Trade Commission ("FTC") filed a motion for leave to file
12 an *amicus* brief objecting to the Settlement. *Moore*, 2013 WL 4610764, at *4. The FTC's *amicus*
13 brief expressed concerns about, among other things, provisions in the Settlement Agreement relating
14 to the release of claims and the claims process. *Id.* Also on August 17, 2012, the United States
15 Department of Justice ("DOJ") filed a "statement of interest" objecting to the Settlement. *Id.* The
16 DOJ's statement of interest expressed concerns regarding the release of claims, the claims process,
17 and the method for notifying potential class members of the Settlement. *Id.*

18 Following discussions with the FTC and DOJ, on March 1, 2013, the parties filed a
19 stipulation outlining several modifications to the Settlement Agreement relating to the release of
20 claims and the claims process. *Id.* The stipulation amended the release by "(1) no longer releasing
21 Third-Party Service Providers – the parties alleged to have fraudulently billed consumers through
22 Verizon; [and] (2) limiting the release for Aggregators by making it clear that the FTC or any other
23 government agency may obtain full restitution, disgorgement, or compensation for consumers
24 without this lawsuit having any preclusion effect." *Id.*; *see also* 3/1/13 Stipulation Regarding FTC
25 and DOJ Filings Regarding The Settlement, Bursor Decl. Ex. F.

26 On August 28, 2013, Judge Saundra Brown Armstrong granted final approval to the
27 settlement agreement as modified, without requiring additional notice to class members. *See Moore*,
28 2013 WL 4610764, at *15 ("The terms of the Settlement Agreement as modified by the parties are

incorporated into this Order and are APPROVED."); *see also id.* at *14 ("The contents of the various forms of notice and the methods of dissemination are sufficient ….").

3. *Zamora v. Ryder Integrated Logistics*

Zamora v. Ryder Integrated Logistics, Inc., 2014 WL 9872803 (S.D. Cal. Dec. 23, 2014) (Bencivengo, J.) was a wage and hour lawsuit alleging that Ryder's "piece-rate pay structures do not properly compensate its drivers in accordance with California law." *Id.* at *3. On August 28, 2014, the court granted preliminary approval to the proposed settlement and approved the dissemination of notice to the class. *Id.* at *5. After the issuance of notice, on November 24, 2014, the parties "determined that a minor revision to the release contained in the Settlement Agreement is desired in order to clarify that the release applies only to the workweeks in which the class member received any piece rate compensation." 11/24/14 Joint Motion/Stipulation To Amend/Clarify The Joint Stipulation Of Settlement And Release Agreement at 3, Bursor Decl. Ex. G. The parties amended the release by adding the language: "provided however that this release shall only apply to those workweeks in which a class member received any piece rate compensation." *Id.* at 4; *Zamora*, 2014 WL 9872803, at *3. With no additional notice to the class, on December 23, 2014, Judge Bencivengo granted the parties' motion to amend the release and also granted final approval to the settlement. *Id.* at *3. In doing so, Judge Bencivengo noted that the revised language "does not broaden the release being provided by the plaintiff class, and if anything narrows the release." *Id.*

4. *In re Payment Card Interchange Fee And Merchant Discount Antitrust Litig.*

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 986 F. Supp. 2d 207 (E.D.N.Y. 2013) (Gleeson, J.) involved a settlement of class claims on behalf of merchants alleging that major credit card companies and issuing and acquiring banks had conspired to fix interchange fees in violation of the Sherman Act. The court granted preliminary approval of the settlement on November 27, 2012. *Id.* at 217. The notice plan was carried out between January 29, 2013 and February 22, 2013. *Id.* Thereafter, a number of state attorneys general objected "that while the releases do not extend to *parens patriae* claims that States assert in their sovereign capacity, the releases bar claims that States may assert in a representative capacity on behalf of state residents that

are members of the … settlement class." *Id.* at 237-38. To resolve the concerns raised by the states attorneys general, on September 9, 2013 the defendants proposed that certain language be added to clarify that the release "do[es] not bar an investigation or action, whether denominated as *parens patriae*, law enforcement, or regulatory, by a state, quasi-state, or local governmental entity to vindicate sovereign or quasi-sovereign interests." *Id.* at 238. On December 13, 2013, without further notice to the class, Judge Gleeson granted final approval to the settlement, adopted defendants' proposed amendment to the release language, and incorporated it into the final settlement order and judgment. *Id.*

5. *Alexander v. Washington Mutual, Inc.*

Alexander v. Washington Mutual, Inc., 2012 WL 6021098 (E.D. Pa. Dec. 4, 2012) was a class action on behalf of borrowers alleging the defendant bank entered into captive reinsurance arrangements for the purpose of receiving kickbacks, referral payments and unearned fee splits, which were collected in the form of excessive reinsurance premiums from private mortgage insurers to whom the bank referred borrowers in violation of the Real Estate Settlement Procedures Act (RESPA). On June 25, 2012 the court granted preliminary approval to a proposed settlement and directed the issuance of notice to the class. *Id.* at *2. In November 2012 the Attorney General of Texas contacted defendants with a concern that the scope of the proposed release could restrict the State's civil enforcement authority. *Id.* at *8. To address that concern the parties agreed to amend the release language so that it would release only claims brought by the government "seeking actual damages or disgorgement on behalf of a class member or class members." *Alexander v. Washington Mutual, Inc.*, 2012 WL 6021194, at *2 n.1 (E.D. Pa. Dec. 4, 2012). Without further notice to the class, the court incorporated this amended release language into its order granting final approval. *Id.* The court's memorandum opinion noted that the amended language "narrows the scope of the release and thus has no adverse impact on the rights of class members under the proposed settlement." 2012 WL 6021098, at *8.

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6. *In re American Invsestors Life Ins. Co. Annuity Marketing & Sales Practices Litig.*

In re American Investors Life Ins. Co. Annuity Marketing & Sales Practices Litig., 263 F.R.D. 226 (E.D. Pa. 2009) was a class action alleging defendants perpetrated a scheme to sell investments in long-term deferred annuities products through misrepresentations and omissions about the characteristics of those investments. The court granted preliminary approval to the proposed settlement on July 28, 2009. *Id.* at 246. The settlement included a release providing that class members "will not institute, maintain, assert, join, or participate in any action or proceeding against those released that are based on or related to the facts alleged in the complaints filed in this action." *Id.* at 232. Class notice was disseminated on August 28, 2009. *Id.* at 234. On November 6, 2009, the Pennsylvania Attorney General's Office appeared at the final approval hearing and "explained the attorney general's views regarding class member participation in state regulatory actions and the release's impact on claims and relief in pending and future state regulatory actions." *Id.* at 234. To address those concerns, the parties presented the Court with an amendment to the release stating:

> Nothing in this Order shall be construed to impede, impinge, impair or prevent in any fashion any Named Plaintiff and/or Class Member from responding to, cooperating in or communicating with any state, federal or local government body or official or any attorney representing a private party, including, without limitation, appearance as a witness for testimony or the production of information.

Id. at 234. Without further notice to the class, the court accepted this amendment, granted final approval, and incorporated the full text of the release, including the amendment, into the final approval order. *Id.* at 251.

7. *Williams v. Sprint/United Management Co.*

Williams v. Sprint/United Management Co., 2007 WL 2694029 (D. Kan. Sept. 11, 2007) was a 1,697-member collective action brought pursuant to the Age Discrimination in Employment Act.[1] On May 30, 2007 the court granted preliminary approval of the proposed settlement and directed the

[1] Though *Williams* was a collective action on behalf of "opt-in Plaintiffs," the Court evaluated the proposed settlement under the same criteria applicable to class actions. *See Williams*, 2007 WL 269049, at *2 (applying Fed. R. Civ. P. 23 and the standards for approval of a "proposed class action settlement").

issuance of notice to the class. *Id.* at *1. Thereafter, during settlement administration, some class members sought assurance from their counsel that participation in the settlement and signing the waiver and release would not interfere with the retirement benefits they were receiving. *Id.* at *6. To address those concerns, the parties advised the Court that they had agreed that nothing in the settlement agreement or in any of the releases executed pursuant to the Settlement Agreement "is intended to modify any rights that exist under the Sprint Retirement Pension Plan, the Sprint Nextel 401(k) Plan, and, if applicable, any similar pension plan sponsored by Embarq, as those plans may be amended from time to time, in which plaintiffs are, or may become, vested beneficiaries." *Id.* Accordingly, the parties requested that language to this effect be included in the Court's Final Approval Order. *Id.* Without further notice to the class, on September 11, 2007 the court granted final approval to the proposed settlement and incorporated the language amending the release into the final approval order. *Id.* at *7.

8. *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*

Reade-Alvarez v. Eltman, Eltman & Cooper, P.C., 2006 WL 3681138 (E.D.N.Y. Dec. 11, 2006) was a class action against a law firm and several of the firm's officers and directors alleging violations of the Fair Debt Collection Practices Act (FDCPA). The proposed settlement included a release stating:

> The named Plaintiffs and each of the class members not opting out shall, as of the Effective Date, be deemed to release and discharge forever Defendants and its [sic] heirs, the current and former officers, directors, successors, predecessors, executors, administrators, assigns, shareholders, affiliated companies, and employees ("Released Parties"), from all claims, controversies, actions, causes of actions, demands, torts, damages, costs, attorneys' fees, moneys due on account, obligations, judgments, alleged violations of the Fair Debt Collection Practices Act, 15 U.S.C. section 1692 et. seq. or liabilities of any kind whatsoever in law or equity, arising out of agreement or imposed by federal or state statute, common law or otherwise, from the beginning of time to the date this Agreement is signed, whether or not known now, anticipated, suspected or claimed, fixed or contingent, whether yet accrued or not and whether damage has resulted from such or not.

Id. at *10. After granting preliminary approval and issuing notice, a class member objected that this release was overbroad. The court agreed:

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

> [T]he release must be modified to be limited to claims involving "identical factual predicate." The release as it is currently worded does not contain this necessary limit. Accordingly, the settlement can only be approved subject to the parties' modification of the release.

Id. at 11. The court granted final approval subject to the parties narrowing of the release:

> The settlement is approved provided the parties consent in writing to the modification of the settlement on or before January 5, 2007. Following the submission of such consent, the parties shall settle a final order on five (5) days notice.

Id. No additional notice was provided to class members concerning the amendment to the release. On December 15, 2006, Judge Sifton entered a final order approving the settlement with the amended release language, including what appear to be the court's own handwritten edits to the release language. 12/15/06 Final Order ¶ 5, Bursor Decl. Ex. H.

9. *In re Lupron® Marketing & Sales Practices Litig.*

In re Lupron® Marketing & Sales Practices Litig., 228 F.R.D. 75 (D. Mass. May 12, 2005) was a class action alleging a scheme by pharmaceutical manufacturers to inflate the retail price of Lupron, a prescription drug. At the final approval hearing for the proposed settlement, objectors argued that the release was overbroad because it "might conceivably be interpreted as immunizing other pharmaceutical companies" alleged to have conspired in the manipulation of pricing of other drugs. *Id.* at 94-95. In response to those concerns, class counsel agreed "that the only claims extinguished by the release are those related to defendants' marketing, pricing, and sale of Lupron." *Id.* at 95. In granting final approval despite these concerns about the breadth of the release, the court noted:

> I agree with Intervenors that as written the release does not make the point as clearly as did MDL counsel at the Fairness Hearing that it is intended to cover only conduct related to defendants' alleged fraudulent activity in marketing Lupron®. I will ask that the Proposed Final Judgment clarify the scope of the release in this respect.

Id. at 95 n.36. Thereafter, without additional notice to the class, the court entered a final judgment that "specifically incorporates herein the comments made on pages 40-42 of the May 12 Memorandum regarding the appropriate scope of the release." 8/26/05 Final Order And Judgment ¶ 10, Bursor Decl. Ex. I.

1 **10. *In re Auction Houses Antitrust Litig.***

2 *In re Auction Houses Antitrust Litig.* was a class action arising from alleged price-fixing by
3 Christies' and Sotheby's, the two leading houses specializing in the auction sale of fine art. In
4 November 2000, the court preliminarily approved a settlement which included a release "for all
5 claims 'based on any allegedly collusive activity or activities … *wherever occurring or located*." *In*
6 *re Auction Houses Antitrust Litig.*, 2001 WL 170792, at *2 (S.D.N.Y. Feb. 22, 2001) (italics in
7 original). A number of "Mixed Class Members," those that alleged losses on U.S. and foreign
8 auctions, objected to the scope of the proposed release because the settlement provided no
9 consideration for overcharges in foreign auctions, arguing that Mixed Class Members should not be
10 forced to surrender claims for such injuries as the price of receiving compensation for injuries
11 allegedly suffered in U.S. auctions. *Id.* at *11. The district court agreed with that objection. *Id.*
12 at *13 ("In these circumstances, approval of the settlement as long as it contains this objectionable
13 feature of the release would be inappropriate."). But the court did not deny final approval. Instead it
14 granted final approval "on the condition[] that the parties, no later than March 1, 2001, amend …
15 [t]he settlement documents to conform the releases to the requirements of this opinion." *Id* at *18.
16 The parties eventually did amend the agreement to conform it to the district court's opinion:

17 > Pursuant to the Final Agreement, the Original Release was replaced
18 > with one that did not impair Class members' rights to bring foreign
> auction claims in United States courts or pursuant to United States law,
19 > with all other material aspects of the settlement – including the amount
> and type of compensation – remaining the same.

20 *In re Auction Houses Antitrust Litig.*, 42 Fed. App'x 511, 514 (2d Cir. 2002). On May 15, 2001, the
21 district court approved the modified settlement without additional notice to the class. *Id.* at 515.
22 The Second Circuit affirmed the order approving the modified settlement. *Id.* at 522 ("[T]he District
23 Court did not abuse its discretion in approving the settlement as modified by the Final Agreement.
24 Accordingly, we … affirm the judgment of the District Court.").

25 * * * * *

26 As these ten cases illustrate, courts routinely permit modifications narrowing release
27 language, and routinely grant final approval of class settlements without requiring additional notice
28 to the class concerning the narrowing of the release.

C. The Settlement Is Fair, Reasonable And Adequate

The Court has already received thorough briefing on the objections to the proposed settlement, the parties' responses to those objections, and on the requirements for final approval of the proposed settlement. The Court also held a final fairness hearing on December 17, 2015 during which all objectors were heard. Aside from the overbreadth of the release and related notice issues, which have now been remedied by the Second Amended Release (Doc No. 338), the Court identified no other defect in the proposed settlement. Thus, for the same reasons set forth in the parties' prior briefing, and as stated on the record of the December 17, 2015 hearing, the Court should find the proposed settlement, as modified by the Second Amended Release, to be fair, reasonable and adequate.

IV. CONCLUSION

For the foregoing reasons, the parties respectfully request that the Court reconsider and vacate its order of February 19, 2016 (Doc. No. 336) denying final approval, and that the Court enter a new order overruling all objections to the proposed settlement, certifying the Settlement Class, and granting final approval to the Settlement Agreement as modified by the Second Amended Release. The Court should also reach the merits of the motion for attorneys' fees, costs and expenses, and incentive awards for the class representative and interested parties (Doc. No. 262), which was denied as moot without prejudice by the February 19, 2016 Order (Doc. No. 336).

Dated: March 3, 2016

Respectfully submitted,

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