

1 Robert B. Hawk (Bar No. 118054)
2 Stacy R. Hovan (Bar No. 271485)
3 HOGAN LOVELLS US LLP
4 4085 Campbell Avenue, Suite 100
5 Menlo Park, CA 94025
6 Telephone: (650) 463-4000
7 Facsimile: (650) 463-4199
8 robert.hawk@hoganlovells.com
9 stacy.hovan@hoganlovells.com

6 Michael J. Shepard (Bar No. 91281)
7 HOGAN LOVELLS US LLP
8 3 Embarcadero Center, Suite 15
9 San Francisco, CA 94111
10 Telephone: (415) 374-2310
11 Facsimile: (415) 374- 2499
12 michael.shepard@hoganlovells.com

10 Attorneys for Defendant
11 STARKIST CO.

12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 PATRICK HENDRICKS, individually and
17 on behalf of all others similarly situated,
18 Plaintiff,
19 v.
20 STARKIST CO.,
21 Defendant.

Case No. 4:13-cv-00729-HSG

**DEFENDANT STARKIST CO.’S JOINDER
IN PLAINTIFF’S MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT AND RESPONSE TO
OBJECTIONS**

Hon. Haywood S. Gilliam, Jr.

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

INTRODUCTION

Defendant StarKist Co. (“StarKist”) joins Plaintiff’s Renewed Motion for Final Approval of Class Action Settlement and Certification of Nationwide Settlement Class (the “Renewed Motion,” ECF No. 347)¹ and responds to objections filed in opposition to that Motion and the settlement. The changes reflected in the Settlement Agreement’s Second Amended Release, filed March 2, 2016 (ECF No. 338), ensure that the release is now consistent with the notice previously provided to the class and comports with the identical factual predicate rule—thereby addressing the specific concerns outlined in this Court’s February 19, 2016 Order Denying Motion for Final Approval, ECF No. 336 (the “February 19 Order”). *See* Second Amendment to Stipulation of Settlement, ECF No. 338. Further, because these changes to the release bring it into conformance with the description contained in the notice provided to the class, and because those changes (compared to prior versions of the release) only benefit the class, additional notice is not necessary, as explained by the authorities cited by Plaintiff. ECF No. 347 at 5-13.

BACKGROUND

Following extensive briefing from the parties and multiple Objectors concerning whether this settlement should be finally approved, the Court held a fairness hearing on December 17, 2015, during which it heard at length from both the parties and objectors. Much of the argument during the hearing concerned objections by certain plaintiffs in antitrust litigation (the “PSP Objectors”) consolidated and pending in the Southern District of California federal court against StarKist and other producers of seafood—*In Re: Packaged Seafood Products Antitrust Litigation*, Case No. 3:15-MD-02670. The PSP Objectors objected to the breadth of the release negotiated as part of this settlement, focusing on the risk that such release would release claims that may be asserted in the antitrust litigation. On February 19, 2016, the Court denied final approval, ruling that the original release “improperly extended beyond the scope of facts in this action” (ECF No.

¹ StarKist’s joinder extends to the request that the Court grant final approval of the settlement, based on the Second Amended Release and without additional notice to the class; the joinder is not and should not be construed as StarKist’s agreement with all legal arguments or factual conclusions in Plaintiff’s Motion or Response to Objections.

1 336 at 4), that the amended release did not cure that over breadth and “fail[ed] to satisfy the
2 identical factual predicate rule,” (*id.* at 5) and that notice to the class was accordingly inadequate.

3 The parties then promptly negotiated a stipulated Second Amended Release to address
4 those specific concerns, filed March 2, 2016 (ECF No. 338), and requested that the Court
5 reconsider its ruling in light of the new release. ECF Nos. 339, 340 (the changes “ensure that the
6 release comports with the identical factual predicate rule and is consistent with the notice
7 previously provided to the class”). At the March 15, 2016 case management conference, at which
8 counsel for the PSP Objectors appeared, the Court directed Plaintiff to file a renewed motion for
9 final approval and set a deadline for further objections and for responses to objections. ECF
10 No. 344. Plaintiff thereafter filed a renewed motion for final approval (ECF No. 347). Six sets of
11 objections were filed. ECF Nos. 349, 350, 351, 352, 354, and 355.

12 **THE COURT SHOULD APPROVE THE SETTLEMENT**
13 **WITH THE SECOND AMENDED RELEASE**

14 The objections and other papers filed in opposition to Plaintiff’s Renewed Motion concern
15 in large part points that were made in prior objections and were previously addressed by Plaintiff
16 and StarKist; the Court has already heard argument on these points and has had the opportunity to
17 consider them. Starkist does not further address these points. Other objector arguments pertain to
18 Plaintiff’s motion for attorneys’ fees, about which StarKist previously stated its position and
19 likewise has nothing further to add. StarKist accordingly restricts its arguments here only to
20 objections concerning the Second Amended Release or notice issues in light of that amendment—
21 *i.e.*, the objections by PSP Plaintiffs set forth in ECF Nos. 351 (“Pritzker objections”) and 352
22 (“Kralowec objections”). Those latter objections—in sum—set forth no reason why the Second
23 Amended Release violates the identical factual predicate rule or is otherwise overbroad, or how or
24 why the settlement is not fair, reasonable and adequate to the settlement class.

25 **A. A Class Settlement May Properly Release Claims Actually Asserted and**
26 **Unasserted Claims Based on an Identical Factual Predicate**

27 In settling a class action, a defendant may obtain a release of (1) all claims that were
28 actually asserted in the action, and (2) other claims that could have been brought arising from the
facts actually alleged in this action. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287

1 (9th Cir. 1992) (quoting *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir.
2 1982)) (“The weight of authority holds that a federal court may release not only those claims
3 alleged in the complaint, but also a claim ‘based on the identical factual predicate as that
4 underlying the claims in the settled class action even though the claim was not presented and
5 might not have been presentable in the class action.’”); *see also Hesse v. Sprint Corp.*, 598 F.3d
6 581, 590 (9th Cir. 2010). The Second Amended Release seeks to accomplish precisely that, and
7 in fact accomplishes nothing more—releasing “all claims or causes of action arising from the
8 factual allegations and/or legal claims made in the Action. . . .” ECF No. 338.

9 PSP Objectors claim to be concerned that the simple, concise language of the Second
10 Amended Release could somehow be construed to release claims made under legal theories
11 asserted in this action, but based on facts not alleged in the action. ECF No. 352 at 4, 9-10
12 (“StarKist might later argue that class members released their claims under California Unfair
13 Competition Law, regardless of whether such claims have anything to do with the facts alleged in
14 the action”). They suggest that the release of “legal claims made in the Action” encompasses
15 CLRA, UCL, FAL, negligent misrepresentation, fraud, and breach of warranty claims having
16 nothing to do with underfilling. ECF No. 352 at 9. PSP Objectors are wrong. It is neither what
17 the release language says nor what the parties intended. Rather than “introduc[ing] ambiguity”
18 into the release (ECF No. 351 at 4), the Second Amended Release’s reference to “legal claims
19 made in the Action” merely sets forth—explicitly—that the release reaches the very legal claims
20 that were asserted in this action.

21 Releasing claims actually asserted in the underlying action, of course, comprises the most
22 basic kind of release generally negotiated in settlements of any kind. Indeed, the identical factual
23 predicate rule does not even come into play *except* as to claims not actually asserted in the
24 underlying action. *See Class Plaintiffs*, 955 F.2d at 1287. Thus, releasing claims arising from
25 “legal claims made in this Action” does no more and no less than release the legal claims *as*
26 *asserted* in this action, *i.e.*, based on the factual allegations made in the action. Simply put,
27 claims made in the action are claims made in the action: *the UCL, CLRA and every other claim*
28 *made in this action necessarily concern and are defined by the counts asserted and the facts*

1 *alleged.*

2 Moreover, even if PSP Plaintiffs were correct that StarKist might someday argue for a
 3 construction of the release language that would reach broadly any of the legal theories asserted in
 4 this action, “untethered” to the facts alleged in this action, such fear is wholly unrealistic. This
 5 Court’s prior Order, the parties’ amendment of the release a second time to accord with that
 6 Order, and *this very briefing* all preclude any such argument in the future. The Second Amended
 7 Release does not and is not intended² to do anything but release the actual claims asserted in the
 8 underlying action plus claims that could have been brought arising from the facts alleged in this
 9 action. As such, the Second Amended Release is entirely proper. *See, e.g., Custom LED, LLC v.*
 10 *eBay, Inc.*, No. 12-cv-00350, 2014 US Dist. LEXIS 87180, at *24 (N.D. Cal. June 24, 2014)
 11 (objection denied where settlement release covered all claims “arising out of or relating in any
 12 way to any of the legal, factual, or other allegations made in the [a]ction”).³

13 **B. The Second Amended Release, Excluding Antitrust Claims, Cannot Be**
 14 **Construed to Release Claims Based on Antitrust Principles**

15 In another instance of trying to create a problem where one does not exist, the PSP
 16 Objectors contend that the Second Amended Release’s specific exclusion of “any antitrust claim”
 17 from the released claims somehow fails to exempt claims that this Court has held should not be
 18 subject to the release, *i.e.*, antitrust claims. According to PSP Objectors, the release should have
 19 explicitly excluded “any [c]laims under federal antitrust, state antitrust, state unfair competition
 20 and consumer protection laws. . . .” ECF No. 352 at 11-12. This objection too is baseless.

21 _____
 22
 23 ² The interpretation of a release is governed by the same principles applicable to any other
 24 contractual agreement. *See Benedek v. PLC Santa Monica, LLC*, 104 Cal. App. 4th 1351, 1355
 25 (2002). Courts must interpret the release so as to give effect to the parties’ mutual intent as it
 26 existed when they contracted. *See Cal. Civ. Code § 1636; Bank of the W. v. Superior Court*, 2
 27 Cal. 4th 1254, 1264-65 (1992).

28 ³ StarKist submits that there is no justification for further amendment of the release language to
 effectuate the parties’ intent and implement a release consistent with this Court’s February 19,
 2016 Order. There is, in all events, no colorable dispute over the substance of the release that the
 parties intend to effect. If the Court has remaining concerns regarding the release language,
 however, StarKist respectfully requests that the Court grant final approval of the settlement
 subject to the parties’ execution of an amended release with language that the Court considers
 appropriate.

1 The last sentence of the Second Amended Release excludes “any antitrust claim arising
2 from a conspiracy among, or collusive agreement between, StarKist and one or more of its
3 competitors.” ECF No. 338. The language does not purport to limit its exclusion to claims
4 arising under the Sherman Act, the Cartwright Act, the UCL *or any other state or federal*
5 *antitrust* statute or antitrust common law cause of action. Rather, the release excludes antitrust
6 claims without regard to the source of antitrust law, *i.e.*, it instead excludes claims that concern a
7 “conspiracy” or “collusive agreement.”

8 PSP Objectors well understand that “antitrust claims” are not limited to claims arising
9 under the Sherman Act or any other particular federal or state law. Virtually every state has its
10 own antitrust laws, many of which were enacted prior to the Sherman Act, and such laws have
11 been enacted through a variety of different ways, including statutes denominated as “consumer
12 protection” and “unfair competition” laws. *See generally* 1 ABA Section of Antitrust Law, *State*
13 *Antitrust Practice and Statutes* § 1-1 (4th ed. 2009). PSP Objectors even make the point
14 themselves (ECF No. 352 at 13) in quoting from their prior-filed objection, which asserted that
15 “allegations of *conspiracy, violations of antitrust laws and UCL violations based on antitrust*
16 *claims* are distinct from the unilateral claims. . . .” (emphasis in original). Again there is nothing
17 to object to: The Second Amended Release exclusion could not be clearer—it excludes any
18 antitrust claims that would involve, as this Court described, “a collusive agreement between
19 StarKist and its competitors.” ECF No. 336 at 5.

20 What is more, PSP Objectors now contradict themselves by arguing that the release is
21 objectionable even though it does precisely what they previously demanded. At the December
22 17, 2015 Final Approval hearing, Ms. Kralowec—who is now the principal voice asserting this
23 objection—stated, “Why not just exclude antitrust claims, which is one of the things we proposed.
24 That would have resolved our objection.” Dec. 17, 2015 Hrg. Tr. at 35:24-36:1, ECF No. 333;
25 *see also* ECF No. 293-1, Kralowec Decl. ¶ 15. PSP Objectors surely should not be heard to make
26 this objection now.

1 **C. Because the Release Was Narrowed, and It Now Accords with the Identical**
 2 **Factual Predicate Rule, Notice Was Adequate**

3 The PSP Objectors’ arguments about notice assume that the Second Amended Release is
 4 broader and less favorable to the class than the release described in notice to the class. ECF
 5 No. 352 at 5, 14 (“changes in the Second Amended Release . . . since they amount to a broadened
 6 release of claims, result in inadequate notice to the class”). But for the reasons set forth in
 7 Plaintiffs’ Renewed Motion and above, the Second Amended release is, in fact, narrower than the
 8 original release or the Amended Release; it now accords with both the identical factual predicate
 9 rule and the description of the release in the class notice. As such, the PSP Objectors make no
 10 argument suggesting that further notice is required: Rather, they say “[o]nly when there is finally
 11 a release narrow enough that it does not violate the identical factual predicate rule will the rights
 12 of the Class be protected and no further notice required.” *Id.* That is now the case.

13 **D. Opt-Outs Are Excluded from the Class**

14 In a frivolous argument, the PSP Objectors contend that the Second Amended Release
 15 sweeps opt-outs back into the class and binds them to the release, without notifying them. *See*
 16 ECF No. 352 at 14-15. This is nonsense. The essential point of permitting people who otherwise
 17 fall within the class definition to opt-out is, of course, so that they will not be bound by the
 18 settlement and any release. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)
 19 (notice requirement “intended to insure that the judgment, whether favorable or not, would bind
 20 *all class members who did not request exclusion* from the suit” (emphasis added)). Moreover, the
 21 proposed judgment in this case, just as judgments ordinarily do in class settlements, makes clear
 22 that those who exclude themselves from the class “shall not be bound by the Settlement
 23 Agreement.” ECF No. 347-4 at ¶¶ 3, 10; *see also* Fed. R. Civ. P. 23(c)(3) (“the judgment in a
 24 class action must: . . . for any class certified under Rule 23(b)(3), include and specify or describe
 25 those to whom the Rule 23(c)(2) notice was directed, *who have not requested exclusion*, and
 26 whom the court finds to be class members.” (emphasis added)).⁴

27 ⁴ The authorities cited in Plaintiffs’ Motion make clear beyond dispute that no further class notice
 28 is required where changes to the release favor the class. ECF No. 347 at 5-13. If the Court has
 concerns regarding notice to opt-outs who might have otherwise have wanted to remained
 members of the class, however, StarKist respectfully requests that the Court grant final approval

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

CONCLUSION

For the foregoing reasons, StarKist respectfully requests that the Court grant final approval to the settlement in this action.

Dated: April 5, 2016

HOGAN LOVELLS US LLP

By: /s/ Robert B. Hawk
Robert B. Hawk
Attorneys for Defendant
STARKIST CO.

subject to appropriate notice (with an opportunity to rescind their opt out and make a claim) being provided to the 93 class members who timely requested exclusion. ECF No. 322 at ¶ 3, Ex. A.
