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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ALEX ANG and LYNN STREIT, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BIMBO BAKERIES USA, INC.,

Defendant.

Case No. 13-CV-01196-HSG-NC

SUPPLEMENTAL JOINT STATEMENT IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Before: Hon. Haywood S. Gilliam, Jr.
Crtrm.: 2, 4th Floor

Pursuant to the Court's February 25, 2020 Order (Dkt. 223) (the "Order"), Plaintiffs Alex Ang and Lynn Streit ("Plaintiffs") and Defendant Bimbo Bakeries USA, Inc. ("BBUSA") (collectively, the "Parties") hereby submit the following Supplemental Joint Statement in support of the pending Joint Motion for Preliminary Settlement Approval filed with the Court on December 13, 2019 (the "Motion"). (Dkt. 217.)

I. No Notice Is Required For An Injunction-Only Class Settlement

The Order expresses concerns about the lack of notice to absent class members proposed under the terms of the Settlement Agreement based on *Grant v. Capital Mgmt. Servs., L.P.*, No. 10-CV-2471-WQH, 2013 U.S. Dist. LEXIS 174190, *3 (S.D. Cal. Dec. 11, 2013). (Dkt. 223.) However, other authority cited in the Motion clearly supports the proposition that no notice is necessary where equitable claims are released on a class-wide basis through a settlement. (*See* Dkt. 217 at 14 (citing *Kline v. Dymatize Enters., LLC*, No. 15-CV-2348-AJB-RBB, 2016 U.S. Dist. LEXIS 142774, *17 (S.D. Cal. Oct. 13, 2016) (class notice is unnecessary because, "under the settlement, Plaintiffs and the class release only those claims they may have for injunctive relief—relief they will receive through the settlement")).)

Kline is consistent with Rule 23 and myriad federal decisions finding that no notice to injunction-only class members is required where class members are releasing only injunctive relief claims pursuant to a settlement. The Parties recognize that it is within the Court's discretion to require notice of the injunctive relief settlement. *See* Fed. R. Civil P. 23(c)(2) ("For any class certified under Rule 23(b)(1) or (b)(2), the court ***may*** direct appropriate notice to the class.") (emphasis added). Here, where allowing class members to opt out and pursue their own injunctive relief claims would frustrate the entire purpose of the settlement agreed to by the Parties, the Court should exercise its discretion to find that notice is not required because it would be unworkable, unduly burdensome and would not serve a practical purpose. (*See* Dkt. 217 at 14.)

"In injunctive relief only class actions certified under Rule 23(b)(2), ***federal courts across the country have uniformly held that notice is not required***." *Stathakos v. Columbia Sportswear Co.*, No. 4:15-CV-04543-YGR, 2018 U.S. Dist. LEXIS 17138, at *8-9 (N.D. Cal. Jan. 25, 2018) (emphasis added) (collecting cases). More specifically, federal courts in California routinely found

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that notice to absent class members was not necessary to approve a settlement containing a broad release of class claims for injunctive and other equitable relief. *See Lilly v. Jamba Juice Co.*, No. 13-cv-02998-JST, 2015 U.S. Dist. LEXIS 34498, at *25-26 (N.D. Cal. Mar. 18, 2015) (preliminarily approving injunctive relief class settlement with no class notice); *Stathakos*, 2018 U.S. Dist. LEXIS 17138, at *8-9 (citing *Lilly* in finding notice to injunctive relief class not required, reasoning that "even if notice was sent, class members would not have the right to opt out"); *see also Moreno v. San Francisco Bay Area Rapid Transit Dist.*, No. 17-cv-02911-JSC, 2019 U.S. Dist. LEXIS 13309, at *9 (N.D. Cal. Jan. 28, 2019) (no notice required where settlement terms "provide for injunctive relief only and class members do not release any claims regarding monetary relief"); *Sciortino v. PepsiCo, Inc.*, No. 14-cv-00478-EMC, 2016 U.S. Dist. LEXIS 83937, at *8-9, *21 (N.D. Cal. June 28, 2016) (granting preliminary approval of "mandatory, non-opt-out" injunctive relief settlement involving class releases of "any and all claims for injunctive and/or declaratory relief of any kind or nature," without formal notice to class); *Chan v. Sutter Health Sacramento Sierra Region*, No. LA CV15-02004 JAK (AGRx), 2016 U.S. Dist. LEXIS 192338, at *6-7, *38 (C.D. Cal. June 9, 2016) (granting preliminary approval of injunctive relief settlement involving release of all class claims for non-monetary relief, finding notice not required because "Class Members' rights will not be prejudiced by the Settlement Agreement"). *See generally Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (noting relief sought in a Rule 23(b)(2) class "perforce affect[s] the entire class at once" and thus, the class is "mandatory" with no opportunity for members to opt out).

Such holdings make sense, as -- unlike claims for monetary damages -- equitable relief cannot be afforded on an individual basis. In other words, if a class member opted out to pursue her own damages claim for $500, that claim could be resolved on an individual basis by payment of $500; however, if a class member wanted to pursue injunctive relief as to a certain product, such relief would have to be afforded product-wide.

The language of Rule 23 supports the conclusion that absent class members do not have the right to opt out of injunctive relief settlements. *See Stathakos*, 2018 U.S. Dist. LEXIS 17138, at *8-9; *Sciortino*, 2016 U.S. Dist. LEXIS 83937, at *8-9, *21. As the Supreme Court explained in *Dukes*, a class certified under Rule 23(b)(2) is "mandatory": "The Rule provides no opportunity for (b)(1)

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or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action." *Dukes*, 564 U.S. at 362; *see also* Rule 23(b)(2) (class treatment for injunctive relief claims is proper where "final injunctive relief or corresponding declaratory relief is appropriate ***respecting the class as a whole***") (emphasis added). On this basis, Judge Tigar concluded in *Lilly* that notice was not necessary "[b]ecause, even if notified of the settlement, the settlement class would not have the right to opt out from the injunctive settlement and the settlement does not release the monetary claims of class members." 2015 U.S. Dist. LEXIS 34498 at *25-26.

Under the Settlement Agreement, BBUSA agreed to provide a single injunction to benefit the entire class. (*See* Dkt. 217 at 10-11; Dkt. 222-1 at §§ 4.4, 4.7.) Class members retain their right to bring individual damages claims. (Dkt. 222-1 at § 8.1.) Unlike in a damages settlement (where individual class members make claims for amounts of money or can opt out and pursue their personal money claims outside of the settlement), there is nothing for class members to share, divide up or opt out of with respect to injunctive relief claims.[1]

Again, individual claims for an injunction have the same effect as if the claims were made by an entire class and, thus, there cannot be an opt out of a settlement of an injunction class action. BBUSA cannot provide piecemeal injunctive relief to individual class members; it is either agreeing to certify that it has made the labeling and product formulation changes identified in the Settlement Agreement and work with Class Counsel regarding certain future changes, or it is not. *See Dukes*, 564 U.S. at 361-62. BBUSA cannot limit the equitable relief it is providing to the named plaintiffs only because labeling and formulation changes to products sold in California must be made ***to all products at issue***, to the benefit of ***all class members***. It follows that an opt out is simply not workable where, as with injunctive relief, a claim by one class member is the equivalent of a claim by all class members because the relief that the company would have to provide would be the same

[1] The Parties acknowledge that this Court previously granted preliminary approval of an injunctive relief class settlement in which notice was provided but that case is distinguishable from this one and the legion of cases finding that no notice is required because notice was not ordered by this Court: The parties in that case voluntarily and independently stipulated to extensive "formal notice and opt-out rights," even going so far as to use a settlement administrator for some reason. *Guttman v. Ole Mexican Foods, Inc.*, No. 14-cv-04845-HSG, 2015 U.S. Dist. LEXIS 154046, at *17 (N.D. Cal. Nov. 13, 2015). The Parties respectfully submit that the parties in *Guttman* went well beyond what Rule 23 and the case law require for injunctive relief class settlements. The steps *voluntarily* taken by the parties in *Guttman* were not necessary and should not bind the Parties here.

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on an individual or class-wide basis. Obtaining releases from only the two named plaintiffs for claims that were certified for class treatment when relief is being afforded to the entire class would not provide BBUSA with adequate protection to safeguard against a future lawsuit seeking the same injunctive relief that it has already agreed to provide.

The Parties understood from the Court's remarks at the preliminary approval hearing that the Court agreed that notice to class members would not be required to obtain preliminary approval, provided the Parties limited the class release to only those injunctive relief claims that were certified by the Court, which the Parties have now done. (*See* Dkt. 221 (February 14, 2020 Minute Order) ("The Court advises the parties that the proposed class settlement, which contains a broad release of claims not certified during class certification, is not suitable for preliminary approval"); Dkt. 222 (Joint Statement); Transcript of February 13, 2020 Preliminary Approval Hearing at 4 ("You would need to conform the release to the scope of what was actually certified, and I don't think you can ask absent class members to waive anything else . . . . If that change is made, then [the Court] would be willing to consider proceeding without notice because the rights of absent class members would not be affected . . . . It's injunctive relief only, and so you're not giving up anything").)

The Parties respectfully submit that based on the above-cited authorities and the *Kline* case cited in the Motion, notice is not required and providing notice would be unduly burdensome and would not serve any useful purpose. If the Court still believes that notice is required in this case, the Parties respectfully request that the Court set a further preliminary approval hearing so the Parties can better explain their positions and their concerns about providing class notice to the Court so that the settlement can be maintained and preliminarily approved.

II. The "100% Whole Wheat" Products Never Contained Soy Flour

The Court's Order seeks clarification of the injunctive relief provided in relation to the "100% Whole Wheat" products. (Dkt. 223 at 2.) As the Court notes, BBUSA agreed as part of the settlement to certify that soy flour was removed from the ingredients list of various products listed in the Settlement Agreement. (*See id.*; Dkt. 222-1 at § 4.4.) As BBUSA argued throughout this case, including in its motion to dismiss, and as BBUSA's former director of regulatory affairs testified at his deposition, soy flour was never an ingredient in BBUSA's products; soy flour was listed as an

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ingredient in the "100% Whole Wheat" products "as a precaution" in case of possible cross-contamination but the products did not actually contain soy flour. (*See* Dkt. 21 at 13 n.7; *see also* Dkt. 38 at 16 (Court Order Granting in Part and Denying in Part Motion to Dismiss) (noting BBUSA's argument that "the disclosure of its use of 'soy flour' is simply an effort to alert consumers who have soy allergies to the possibility of soy residue in the product from cross-contact with other grains").)[2]

Because the "100% Whole Wheat" products never contained soy flour, BBUSA could not certify that soy flour was removed from those product formulations, as it was not in those formulations in the first place and, thus, could not be "removed." For the avoidance of doubt, BBUSA represents and reaffirms that soy flour is not -- and was never -- present in the formulations of the "100% Whole Wheat" products as Plaintiffs alleged in the complaint, but was only listed on the ingredient lists. Those statements have now been removed, which obviates Plaintiffs' claims. (*See* Dkt. 222-1 at § 4.4.). Moreover, if for some reason BBUSA decided it wished or wanted, at some future point in the time period agreed to in the Settlement Agreement, to list soy flour as an ingredient or otherwise alter the label, the settlement provides an articulated process for the Parties and their counsel to address any such changes. (*See* Dkt 222-1, §§ 4.7, 4.8.)

If the Court requires additional evidence from BBUSA to support this assertion, BBUSA is willing to submit a supplemental declaration or further revise to the Settlement Agreement to expressly certify this fact.

III. Conclusion

For the foregoing reasons and the reasons set forth in the Motion, the parties' prior Joint Statement (Dkt. 222) and argued at the hearing on the Motion, the Parties respectfully request that the Court find that notice to absent class members is not required in this case and grant preliminary approval of the settlement.

[2] It is for the same reason that, in its opposition to Plaintiffs' motion for class certification, BBUSA submitted a declaration attesting to the fact that soy flour had been removed from the ingredient lists on the labels of several "100% Whole Wheat" products, mooting Plaintiffs' claims as to those products. (Dkt. 121-3 at 5; *see also* Dkt. 121 at 24-25 (arguing that Plaintiffs lack standing to pursue injunctive relief relating to products where "soy flour" was removed from the product labels).) BBUSA further attested to the fact that no products labeled as "100% Whole Wheat" contained any non-whole wheat flour in its responses to Plaintiffs' discovery requests.

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Dated: March 3, 2020

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ATTESTATION

I hereby attest that I have on file all holographic signatures corresponding to any signatures indicated by a conformed signature (/s/) within this e-filed document.

By:/s/ Anne Kelts Assayag
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U.S. District Court

California Northern District

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Document Number: 226

Docket Text:
Statement re [217] JOINT MOTION for Preliminary Approval of Proposed Class Action Settlement, [223] Order, Set Deadlines *Supplemental Joint Statement In Support of Preliminary Approval of Class Action Settlement* by Bimbo Bakeries USA, Inc.. (Kelts, Anne) (Filed on 3/3/2020)

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