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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ALEX ANG, et al.,  
Plaintiffs,  
v.  
BIMBO BAKERIES USA, INC.,  
Defendant.

Case No. [13-cv-01196-HSG](#)

**ORDER DENYING MOTION FOR  
PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT**

Re: Dkt. No. 217

Pending before the Court is the unopposed motion for preliminary approval of class action settlement filed by Plaintiffs Alex Ang and Lynn Streit. Dkt. No. 217. The parties have reached a settlement regarding Plaintiffs’ claims and now seek the required court approval. The Court held a hearing on the motion on February 13, 2020. *See* Dkt. No. 221. For the reasons detailed below, the Court **DENIES** Plaintiffs’ motion for preliminary approval of class action settlement.

**I. BACKGROUND**

**A. Factual Background**

Plaintiffs bring this consumer class action against Defendant Bimbo Bakeries, Inc. alleging that Defendant misbranded its baked goods. *See generally* Dkt. No. 40 (“SAC”). Plaintiffs allege that Defendant owns and has distributed products under various brands, including Arnold, Ball Park, Bimbo, Boboli, Brownberry, Earthgrains, Entenmann’s, Francisco, Freihofer’s, Marinela, Mrs. Baird’s, Oroweat, Sara Lee, Stroehmann, Thomas’, and Tia Rosa. *See id.* at ¶ 1. According to the complaint, many of Defendant’s products are sold with false, misleading, and deceptive labeling. Specifically, Plaintiffs allege that they purchased food products manufactured and sold by Defendant that improperly: (1) applied the American Heart Association’s “Heart-Check Mark” without acknowledging that the mark is a paid endorsement; (2) labeled products as a “good” or

United States District Court  
Northern District of California

1 “excellent source of whole grain”; (3) labeled products as “bread,” even though they contain  
2 added coloring; and (4) labeled products as “100% Whole Wheat,” even though they were made  
3 with non-whole wheat flour. *See id.* at ¶ 4; *see also* Dkt. No. 58 (Order Granting in Part Motion to  
4 Dismiss Amended Complaint, narrowing products at issue).

5 Based on these allegations, Plaintiffs sought injunctive relief and statutory damages,  
6 alleging violations of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code  
7 §§ 17200 *et seq.*; the California False Advertising Law (“FAL”), Cal. Bus. & Prof. Code §§ 17500  
8 *et seq.*; and the Consumers Legal Remedies Act (“CLRA”), Cal. Civil Code §§ 1750 *et seq.* *See*  
9 SAC at ¶¶ 32–40. Plaintiffs also sought to represent four separate classes corresponding to these  
10 violations that include all California consumers who bought the same products (or products  
11 substantially similar to the products) that they purchased at any time from March 18, 2009, to the  
12 present. *See* Dkt. No. 102.

### 13 **B. Procedural History**

14 Plaintiffs initially filed this action on March 18, 2013. *See* Dkt. No. 1. Plaintiffs filed the  
15 operative second amended complaint on November 4, 2013. *See* Dkt. No. 40. On March 13,  
16 2014, the Court granted in part Defendant’s motion to dismiss the SAC, narrowing the claims for  
17 which Plaintiffs could seek relief. *See* Dkt. No. 58. Defendant answered the SAC on April 2,  
18 2014. Dkt. No. 64. On March 31, 2016, the Court stayed this action pending the resolution of  
19 third-party appeals involving legal questions at issue in this case. Dkt. No. 164. On January 5,  
20 2018, in response to an order to show cause, Dkt. No. 171, the parties jointly moved to lift the  
21 stay, Dkt. No. 172, and the Court granted the request, Dkt. No. 174. Following the stay, on  
22 August 31, 2018, the Court granted Plaintiffs’ motion for class certification as to all four classes  
23 under Federal Rule of Civil Procedure 23(b)(2). *See* Dkt. No. 186 (“Class Certification Order”).  
24 However, the Court denied certification of the proposed damages class under Rule 23(b)(3). *Id.* at  
25 18, 28. The Court appointed named Plaintiffs as the Class Representatives and appointed  
26 Fleischman Law Firm, PLLC and Barrett Law Group, P.A. as co-lead counsel, and Pratt &  
27 Associates as local counsel (collectively, “Class Counsel”). *Id.* at 28–29.

28 On July 31, 2019, the parties engaged in an all-day mediation before the Hon. Philip M.

1 Pro (Ret.), former Chief Judge for the United States District Court for the District of Nevada, now  
2 a professional mediator with JAMS. *See* Dkt. No. 217 at 4. Through these efforts, the parties  
3 reached settlement, formally executing the settlement agreement in December 2019. *Id.*; *see also*  
4 Dkt. No. 217-2, Ex. 1. Plaintiffs then filed the unopposed motion for preliminary settlement  
5 approval on December 13, 2019. *See* Dkt. No. 217. The settlement agreement provides for  
6 injunctive relief altering the product labeling statements and formulations challenged in the SAC.  
7 *See* Dkt. No. 217-2, Ex. 1 at § 4.4.

8 During the hearing on the motion for preliminary settlement approval, the Court raised  
9 several concerns about the scope of the proposed release and the lack of notice to absent class  
10 members. *See* Dkt. No. 225. Critically, as initially drafted, the release contained claims that the  
11 Court did not certify in its Class Certification Order. *See id.* at §§ 1.2, 8.2 (releasing Defendant  
12 from all claims, known or unknown, relating to and arising out of “all allegations, demands and  
13 assertions in the SAC and any other filings or documents in the Class Action regarding the alleged  
14 improper labeling of any of the Products”). Moreover, although absent class members would be  
15 giving up significant legal rights under the settlement, the parties argued that notice was not  
16 required because of the nature of the injunctive relief. *See* Dkt. No. 217 at 7–8.

17 In response to the Court’s concerns, the parties filed a joint statement in support of the  
18 motion for preliminary approval and included a revised settlement agreement. *See* Dkt. No. 222-1,  
19 Ex. A. However, the Court still had concerns about the structure of the settlement. Although the  
20 parties revised the language of the release, under the revised settlement absent class members  
21 would still release “any Claims for injunctive, declaratory or other equitable relief that were  
22 certified for class treatment in the Class Certification Order.” *See id.* at §§ 1.14, 8, 8.2. And as  
23 before, absent class members would not receive any notice of this release and would not have any  
24 opportunity to object or opt out of the class if they found the injunctive relief somehow deficient.  
25 *See* Dkt. No. 217 at 7–8. The Court accordingly sought supplemental briefing from the parties on  
26 this issue. *See* Dkt. No. 223. In response, the parties urged that notice was not required to release  
27 equitable claims on a class-wide basis. *See* Dkt. No. 226. The parties reasoned that even if an  
28 absent class member objected to the settlement, he or she could not opt out. *See id.* at 2–5.

1 The Court then set a case management conference on March 10, 2020, to discuss its  
 2 concerns about the lack of notice to absent class members. *See* Dkt. No. 227. During the case  
 3 management conference, the parties discussed the feasibility of notice by publication and agreed to  
 4 meet and confer and submit a proposed notice plan for the settlement class. *See* Dkt. No. 230.  
 5 The parties filed their proposed notice plan on March 20, 2020, and have proposed posting notice  
 6 only on Class Counsel’s websites. *See* Dkt. No. 231.

## 7 **II. LEGAL STANDARD**

8 Federal Rule of Civil Procedure 23(e) provides that “[t]he claims, issues, or defenses of a  
 9 certified class—or a class proposed to be certified for purposes of settlement—may be settled . . .  
 10 only with the court’s approval.” Fed. R. Civ. P. 23(e). “The purpose of Rule 23(e) is to protect  
 11 the unnamed members of the class from unjust or unfair settlements affecting their rights.” *In re*  
 12 *Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). Accordingly, before a district court  
 13 approves a class action settlement, it must conclude that the settlement is “fundamentally fair,  
 14 adequate and reasonable.” *In re Heritage Bond Litig.*, 546 F.3d 667, 674–75 (9th Cir. 2008).

15 Courts may preliminarily approve a settlement and notice plan to the class if the proposed  
 16 settlement: (1) appears to be the product of serious, informed, non-collusive negotiations; (2) does  
 17 not grant improper preferential treatment to class representatives or other segments of the class;  
 18 (3) falls within the range of possible approval; and (4) has no obvious deficiencies. *In re Lenovo*  
 19 *Adware Litig.*, No. 15-MD-02624-HSG, 2018 WL 6099948, at \*7 (N.D. Cal. Nov. 21, 2018).

20 Courts lack the authority, however, to “delete, modify or substitute certain provisions. The  
 21 settlement must stand or fall in its entirety.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th  
 22 Cir. 1998).

## 23 **III. DISCUSSION**

24 The Court has been open with the parties about its concerns regarding the fairness of the  
 25 proposed settlement in this action and the need for adequate notice to absent class members.  
 26 Under Rule 23(c)(2), “any class certified under Rule 23(b)(1) or (b)(2), the court may direct  
 27 appropriate notice to the class.” *See* Fed. R. Civ. P. 23(a). Additionally, Rule 23(h) requires that  
 28 notice of any motion for attorneys’ fees “*must* be served on all parties and, for motions by class

1 counsel, directed to class members in a reasonable manner.” Fed. R. Civ. P. 23(h)(1) (emphasis  
2 added).

3 Here, the parties repeatedly urged that class notice was not required at all because the  
4 settlement only provides for injunctive relief. *See* Dkt. Nos. 217, 222, 226. As the Court has  
5 explained, however, notice in this case is not about allowing absent class members to opt out of  
6 the injunctive relief, but rather is about giving them the opportunity to understand how their rights  
7 will be affected by the proposed settlement; object to the settlement if they believe it is  
8 insufficient; and weigh in on the anticipated motions for attorneys’ fees and incentive awards for  
9 the named Plaintiffs. Aware of the parties’ effort to reach settlement in this action, the Court  
10 provided them with ample opportunity to remedy the identified deficiencies. Yet at each turn the  
11 parties have appeared reluctant to provide absent class members with meaningful notice of the  
12 terms of the settlement and the nature of the rights they are releasing.

13 In *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1127 (9th Cir. 2020), the Ninth Circuit  
14 recently noted the oddity of parties arguing that class notice is not required, even in settlements  
15 involving injunctive relief:

16  
17 It does seem odd that the parties repeatedly emphasized the  
18 informational value of the settlement while simultaneously arguing  
19 that it was unnecessary to provide class members formal notice that  
20 this information exists and that, if they had been dissatisfied with the  
21 settlement terms, they could have objected.

22 *Id.* Although the Ninth Circuit in *Campbell* ultimately affirmed the district court’s approval of the  
23 settlement, critically the district court *did* require notice that was likely to reach absent class  
24 members in that case. *Id.* at 1127, & n.15. As the Court explained to the parties during the case  
25 management conference in this case, the Court reads *Campbell* as a signal that district courts  
26 should be particularly cautious where the parties are loath to provide notice to absent class  
27 members. If the class action settlement is “fundamentally fair, adequate and reasonable,” as  
28 required under Rule 23, the parties should have no fear or hesitation about disclosing its terms to  
absent class members. *See In re Heritage Bond Litig.*, 546 at 674–75.

In light of Rule 23 and *Campbell*, the Court discussed with the parties the feasibility of

1 notice by publication on Defendant's websites during the case management conference. But in  
 2 their proposed notice plan, the parties have only proposed notice by publication on *Class*  
 3 *Counsel's* websites. See Dkt. No. 231. The Court finds that there is a fundamental disconnect  
 4 between the need for adequate notice and the parties' proposal: How will an absent class member  
 5 know to look at Class Counsel's websites for information about the settlement? Only those absent  
 6 class members who happen to know about the class action already would possibly think to review  
 7 Class Counsel's website for information about Defendant's products. The parties offer no  
 8 explanation as to why notice could not be similarly provided on Defendant's own websites or on  
 9 some other forum likely to be seen by absent class members. In the absence of such notice, the  
 10 Court finds that the parties' proposal is tantamount to no notice at all and does not adequately  
 11 account for the rights of absent class members.

12 **IV. CONCLUSION**

13 The Court **DENIES** the motion for preliminary approval of class action settlement. The  
 14 Court further **SETS** a telephonic case management conference on April 14, 2020, at 2:00 p.m. All  
 15 counsel shall use the following dial-in information to access the call:

16 Dial-In: 888-808-6929

17 Passcode: 6064255

18 For call clarity, parties shall not use speaker phone or earpieces for these calls, and where at all  
 19 possible, parties shall use landlines. The parties are further advised to ensure that the Court can  
 20 hear and understand them clearly before speaking at length. The parties are **DIRECTED** to  
 21 submit a case management conference by April 7, 2020, with a proposal for how this case may  
 22 move efficiently toward resolution.

23 **IT IS SO ORDERED.**

24 Dated: 3/31/2020

25   
 26 HAYWOOD S. GILLIAM, JR.  
 27 United States District Judge  
 28

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California Northern District

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**Case Number:** [4:13-cv-01196-HSG](#)

**Filer:**

**Document Number:** [232](#)

**Docket Text:**

**ORDER by Judge Haywood S. Gilliam, Jr. DENYING [217] MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT. Case Management Statement due by 4/7/2020 and Further Case Management Conference set for 4/14/2020 02:00 PM in Oakland, Courtroom 2, 4th Floor. (ndrS, COURT STAFF) (Filed on 3/31/2020)**

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