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12 **UNITED STATES DISTRICT COURT**
 13 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

14 IN RE: PACKAGED SEAFOOD
 15 PRODUCTS ANTITRUST
 LITIGATION

Case No. 3:15-md-02670-JLS-MDD

MDL No. 2670

16 This Document Relates to:

- 17 1. Direct Purchaser Plaintiff
 18 Class Action Track;
 19 2. End Payer Plaintiff Class
 Action; and
 20 3. Commercial Food Preparer
 21 Plaintiffs.

**DEFENDANTS STARKIST CO.'S
 AND DONGWON INDUSTRIES CO.,
 LTD.'S RESPONSE TO PUTATIVE
 CLASS PLAINTIFFS' MOTIONS
 FOR PRELIMINARY APPROVAL
 OF SETTLEMENTS**

Hearing:

Date: May 20, 2021
 Time: 10:30 a.m.
 Court: Room 4D
 Judge: Hon. Janis L. Sammartino

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1 **I. INTRODUCTION**

2 StarKist Co. (“StarKist”) and Dongwon Industries Co., Ltd. (“DWI”) submit
3 this response to Direct Purchaser Plaintiffs’ (“DPPs”), End Purchaser Plaintiffs’
4 (“EPPs”), and Commercial Food Preparer Plaintiffs’ proposed settlement class
5 notice plans, *see* ECF Nos. 2533, 2552, & 2561, because each have critical
6 infirmities.

7 DPPs’ plan for settlement class notice purports to provide notice of a
8 settlement agreement while also simultaneously (a) telling all recipients that they
9 are members of a “*litigation class*” and (b) providing instructions for opting out of
10 that litigation class—despite the Ninth Circuit’s recent decision. *See* ECF No.
11 2533-5 at 53; *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*,
12 No. 19-56514, 2021 WL 1257845, at *12 (9th Cir. Apr. 6, 2021) (vacating and
13 remanding). CFPs’ proposed notice likewise misleadingly tells recipients that “[a]
14 Federal Court has certified a class action, and you or your company may be a
15 member of that Class.” ECF No. 2561-4 at 29. EPPs’ plan for settlement class
16 notice includes unnecessary and misleading characterizations of the significance of
17 the Ninth Circuit’s Opinion. *See* ECF No. 2552-6 at 98, 101. Because all of the
18 proposed notices are inaccurate, misleading, and likely to cause confusion among
19 settlement class member recipients, the Court should direct settlement class
20 counsel to submit revised notices focused solely on the settlement class—and
21 removing all references to any putative litigation classes.

22 **II. FACTUAL AND PROCEDURAL BACKGROUND**

23 The Court issued an Order Granting Class Certification on July 30, 2019.
24 ECF No. 1931. Certain Defendants then petitioned the Ninth Circuit for review of
25 that order under Federal Rule of Civil Procedure 23(f). ECF No. 1935. The Ninth
26 Circuit granted Defendants’ petition on December 20, 2012. ECF No. 2247.

27 Meanwhile, DPPs moved the Court to approve their plan to disseminate
28 notice to the DPP litigation class on August 29, 2019. ECF No. 1945. On

1 January 28, 2020, the Court denied DPPs’ motion without prejudice, holding that
2 “[g]iven the pending appeal . . . the Motion is premature.” ECF No. 2271. On
3 March 31, 2021, having reached a settlement with Chicken of the Sea (“COSI”),
4 DPPs moved for preliminary approval of that settlement and for the Court to
5 approve their notice plan. ECF No. 2533.

6 Among other things, DPPs’ proposed notice repeatedly refers to the
7 certification of a litigation class and prompts class members to opt-out by a certain
8 date or else lose their rights to sue. For example, the notice says:

- 9 • Its purpose is to “[a]nnounce an Order certifying a Litigation Class
10 and the deadline to exclude yourself from the Litigation Class.” ECF
11 No. 2533-5, at 53.
- 12 • “The Court has allowed or ‘certified’ a Class of direct Packaged Tuna
13 purchasers.” *Id.* at 56.
- 14 • “If you are a Class Member and do not exclude yourself, you will be
15 eligible to participate in any monetary distributions to qualified Class
16 Members and you will be bound by the results of the litigation and
17 proposed Settlement.” *Id.* at 57.

18 On April 6, 2021, the Ninth Circuit issued an order “vacat[ing] the district
19 court’s order certifying the classes and remand[ing] with instructions to resolve the
20 factual disputes concerning the number of uninjured parties in each proposed class
21 before determining predominance.” *Olean Wholesale Grocery Coop., Inc. v.*
22 *Bumble Bee Foods LLC*, No. 19-56514, 2021 WL 1257845, at *12 (9th Cir. Apr. 6,
23 2021).

24 On April 9, 2021, CFPs moved for preliminary approval of their proposed
25 settlement with COSI and for approval of their notice plan. *See* ECF No. 2553
26 (withdrawn and replaced by ECF No. 2561). Despite the Ninth Circuit’s *vacatur*,
27 CFPs’ notice tells recipients that:

28

- 1 • “A Federal Court has certified a class action” ECF No. 2561-4 at
2 24.
- 3 • “You have been identified as a Commercial Food Preparer (“CFP”)
4 Class Member.” *Id.* at 2561-4 at 22.

5 On April 9, 2021, EPPs filed a motion for preliminary approval of their
6 settlement with COSI and for the Court to approve their notice plan. ECF
7 No. 2552. EPPs’ proposed notice improperly characterizes the Ninth Circuit’s
8 decision. For example, it says:

- 9 • “On July 30, 2019, the Court certified a class On April 6, 2021,
10 after an appeal, the Court of Appeals vacated the above order on a
11 narrow issue and asked the Court to conduct further analysis.” ECF
12 No. 2552-6, at 98.
- 13 • “In July 2019, the Court certified a class of End Payer Plaintiffs
14 On April 6, 2021, the Court of Appeals vacated this order and directed
15 the Court to further analyze a narrow economic issue.” ECF No.
16 2552-6, at 101.

17 The pending motions were set for a hearing on May 20, 2021. On April 9,
18 2021, the Court also issued an Order to Show Cause “why this hearing date should
19 not be vacated pending resolution of the class certification issues after the Court of
20 Appeals issues a mandate.” ECF No. 2551. On April 23, 2021, the putative
21 classes filed their response to the Court’s Order to Show Cause asking that the
22 Court defer consideration of their motions for preliminary class settlement
23 approval until after the Court “determines whether to recertify the litigation
24 classes.” ECF No. 2565 at 1.

25 On April 28, 2021, the Ninth Circuit issued an order indicating that a judge
26 had *sua sponte* called for a vote on whether to rehear the appeal *en banc* and
27 directed the parties to submit briefs by May 19, 2021 addressing whether the case
28 should be reheard. ECF No. 2571. On April 30, 2021, StarKist and DWI filed

1 their reply to the Court’s Order to Show explaining that StarKist and DWI did not
2 object to the Court proceeding to hear the pending motions for preliminary
3 approval because the standards for *settlement* class certification differ from those
4 governing *litigation* class certification. ECF No. 2581. The putative class
5 plaintiffs filed an amended response to the Order to Show Cause on May 2, 2021,
6 indicating that they wished to proceed with a preliminary approval hearing on their
7 respective settlements and noting that “[a]ny further proceedings on recertification
8 of a litigation class can be deferred until after the Ninth Circuit issues its mandate.”
9 ECF No. 2852 at 2.

10 **III. ARGUMENT**

11 **A. The Legal Standard for Class Notice**

12 Notice to a litigation class should be made “[a]fter the court certifies a class
13 under Federal Rule of Civil Procedure 23(b)(3).” *Cruz v. Dollar Tree Stores, Inc.*,
14 No. 07-2050 SC, 2009 WL 1974404, at *1 (N.D. Cal. July 2, 2009), modified in
15 part, 270 F.R.D. 499 (N.D. Cal. 2010); *see also* Fed R. Civ. P. 23(c)(2)(B) (“[f]or
16 any class *certified* under Rule 23(b)(3) . . . the court must direct to class members
17 the best notice that is practicable under the circumstances”) (emphasis added). “In
18 determining whether the proposed means of giving notice is appropriate, the court
19 should also give careful attention to the content and format of the notice.” Fed R.
20 Civ. P. 23(c)(2)(B) advisory committee’s note on 2018 amendment. Class notice
21 must have only “information that a reasonable person would consider to be
22 material in making an informed, intelligent decision of whether to opt-out or
23 remain a member of the class.” *Patton v. Dollar Tree Stores, Inc.*, No.
24 CV1503813MWF PJWX, 2017 WL 8233883, at *1 (C.D. Cal. Apr. 5, 2017).

25 While plaintiffs typically submit proposed notices, “the Court is ultimately
26 responsible for directing notice to the class members and protecting their due
27 process rights to remain in the class or be excluded.” *Id.* at *2. Courts have
28 required revisions to proposed litigation class notices to a litigation class where the

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