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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 IN RE JUUL LABS, INC., MARKETING,
14 SALES PRACTICES, AND PRODUCTS
15 LIABILITY LITIGATION

CASE NO. 19-md-02913-WHO

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

16 _____
17 This Document Relates to:
18 All Class Actions

MOTION HEARING

19 DATE: January 20, 2023
20 TIME: 1:00 p.m.
21 LOCATION: Zoom

HON. WILLIAM H. ORRICK III

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CASES

Bally v. State Farm Life Ins. Co.
2020 WL 3035781 (N.D. Cal. June 5, 2020) 3

Cotter v. Lyft, Inc.
176 F. Supp. 3d 930 (N.D. Cal. 2016) 9

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129 S.Ct. 1749 (2009) 2

Senne v. Kansas City Royals Baseball Corp.
2017 WL 5973487 (N.D. Cal. May 5, 2017) 3

RULES

Fed. R. Civ. P. 23 1, 2, 3

1 **I. INTRODUCTION**

2 Altria has filed the only response and objections to Class Plaintiffs’ motion for
3 preliminary approval, based primarily on its fundamental objection to the certified classes of
4 JUUL purchasers receiving notice of the ongoing litigation against Altria at this time, combined
5 with notice of the proposed settlement before the Court.

6 Altria argues the classes should at most receive notice of the proposed settlement for now,
7 with the question of whether to notify the classes of the certification order to be deferred until
8 after the Ninth Circuit rules on the pending appeal of the Court’s certification order. But JUUL
9 purchasers—who are already going to receive notice of the proposed settlement with JLI and
10 others—should be informed at the same time of the status of the claims against Altria (including
11 the pending appeal) and given an opportunity to opt out the case against Altria, the settlement
12 with JLI, or both. To do otherwise would invite confusion, delay, and additional expense. In
13 contrast, combined notice is efficient, will provide class members a full picture of the status of the
14 litigation, and constitutes the “best notice practicable *under the circumstances.*” Fed. R. Civ. P.
15 23(c)(2)(B) (emphasis added).

16 Altria’s specific objections to the notice documents and its *res judicata* arguments largely
17 rehash points the Court has already rejected in the context of considering the certification notice.
18 Altria also already knows that many of its other objections will be addressed in the revised
19 version of the Long Form Notice that Plaintiffs submit with this reply brief, because the parties
20 have already met and conferred regarding Altria’s objections, many of which are reflected by
21 adjustments to the revised Long Form Notice (*see* Exhibit 12 to the Supplemental Declaration of
22 Dena C. Sharp (“Supp. Sharp Decl.”)). Altria’s remaining challenges likewise lack merit, as they
23 go to standard notice procedures or point to specific iterations of notice that were not included
24 with the motion but will be based on the documents that were.

25 Plaintiffs respectfully request that the Court deny Altria’s objections, approve Plaintiffs’
26 Notice Plan (including the revised Long-Form Notice) as the best practicable notice under the
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1 circumstances here, and direct that notice of both the proposed settlement and the ongoing
2 litigation against Altria be provided to JUUL purchasers without delay.

3 **II. ARGUMENT**

4 **A. Notice of the Certified Class and Claims Against Altria Should Proceed** 5 **Notwithstanding the Pending 23(f) Appeal**

6 An interlocutory appeal of a court’s class certification order under Federal Rule of Civil
7 Procedure 23(f) does “not stay proceedings in the district court unless the district court or the
8 court of appeals so orders.” Fed. R. Civ. P. 23(f). “A stay is not a matter of right, even if
9 irreparable injury might otherwise result.” *Nken v. Holder*, 129 S.Ct. 1749, 1760 (2009) (citation
10 and internal quotation marks omitted). Instead, it is “an exercise of judicial discretion,” and “the
11 propriety of its issue is dependent upon the circumstances of the particular case.” *Id.* (citation and
12 internal quotation and alteration marks omitted). The party seeking a stay bears the burden of
13 justifying the exercise of that discretion. *Id.* Altria does not carry that burden, as it has not
14 established that it is likely to succeed on the merits of its appeal, nor has it established that it is
15 likely to suffer irreparable harm if the proposed notice is disseminated, as discussed further
16 below.

17 The important counterweight that Altria does not address is why class members *who are*
18 *already receiving notice* of the settlement should not also be fully advised of the pending
19 litigation against Altria. Even a settlement-only notice would need to inform class members that
20 not all of their claims will be resolved through the settlement, which in turn would require class
21 members to be informed of the litigation against Altria. As a result, the combined notice Plaintiffs
22 propose is the “best practicable notice *under the circumstances*,” consistent with both Rule
23 23(c)(2)(B) as to certification notice and Rule 23(e)(1) as to settlement notice. *See* Fed. R. Civ. P.
24 23(c)(2)(B) (explaining that notice, whether for certification purposes or for settlement purposes,
25 must be the best practicable “under the circumstances”).

26 Altria’s indefinite “wait and see” approach to the certification notice, in contrast, would
27 amount in practice to class members receiving incomplete and limited information about the
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1 litigation against Altria. Altria has provided no justification or authority for pursuing that half-
2 measure, or how it would satisfy the requirement for the best notice practicable under the
3 circumstances, as opposed to the best notice from Altria’s perspective. The cases Altria cites
4 involve only class certification notice, where any risk of confusion and duplication may be
5 alleviated by delaying notice—telling class members *nothing yet*, as opposed to the vague,
6 piecemeal notice Altria appears to propose here. *See Bally v. State Farm Life Ins. Co.*, No. 18-CV-
7 04954-CRB, 2020 WL 3035781, at *5 (N.D. Cal. June 5, 2020) (deferring notice while Rule 23(f)
8 petition was pending); *Senne v. Kansas City Royals Baseball Corp.*, No. 14-CV-00608-JCS, 2017
9 WL 5973487, at *3 (N.D. Cal. May 5, 2017) (same).

10 Altria also alludes to potential “risks” associated with sending a second notice if the Ninth
11 Circuit alters the class certification decision. Opp. at 2-3. But this argument again ignores the fact
12 that notice is already going to the classes, and that notice will need to say something about the
13 existence of litigation against Altria in any event. As discussed below, the greater risk of
14 confusion in these circumstances exists if class members are given incomplete information about
15 the ongoing litigation now. And even if there is some risk of confusion created by sending
16 multiple notices, Altria’s proposal invites and multiplies confusion by *requiring* two notices to be
17 sent (settlement notice now and litigation notice later) regardless of the outcome of the appeal. As
18 noted below, Altria’s proposal would also entail the substantial expense of a second notice plan.

19 Plaintiffs’ proposal promotes efficiency, in that the class incurs the costs of disseminating
20 a single notice which may, depending on how the Ninth Circuit rules, be the only notice the Altria
21 litigation classes must receive before the case promptly proceeds to trial (which would otherwise
22 also be delayed by the dissemination of a second notice). The notice informs class members
23 accurately and fully about the status of the ongoing litigation and directs them to the class website
24 for updates on Altria’s appeal. In the interest of efficiency and completeness, Plaintiffs ask the
25 Court to exercise its discretion and permit the proposed combined notice being sent to class
26 members to include the details of the litigation against Altria and provide class members with the
27 opportunity to opt out of that litigation.
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1 **B. A Combined Settlement and Class Certification Notice Benefits Class**
2 **Members and is Not Prejudicial to Altria**

3 While Altria broadly argues that the combined notice would prejudice class members, the
4 only specific objection it lodges is that the opt-out options “present[] . . . opportunity for
5 confusion and human error.” Opp. at 4. But Altria never explains why this is the case, and these
6 are considerations Class Counsel and the proposed claims administrator took into account in
7 designing the proposed notice. The Long-Form Notice provides a general overview of the impact
8 of opting out for both the Settlement Class and the Litigation Class. Supp. Sharp Decl. Ex. 12
9 (revised Long-Form Notice) at 12 and 16. It then contains a single section that describes the opt
10 out options for all class members. *Id.* at 16-17. During the parties’ meet and confers, Altria made
11 no suggestions for how this language might be improved, and provides no tangible basis for its
12 position now.

13 Altria also ignores the ways in which combined notice would *benefit* the class members
14 the notice is designed to reach. First, a combined notice avoids wasted costs (which would
15 ultimately be deducted from the gross class recovery) on a separate notice regarding the Court’s
16 class certification decision should the claims against Altria survive appeal. Second, a combined
17 notice ensures that as long as class members are being informed of the pendency of the Altria
18 litigation, they are provided with full and complete information and chance to opt out at this
19 time—benefits Altria would deny them. Third, the combined notice will likely be even more
20 effective at providing notice than a delayed standalone notice, because the potential for payment
21 from the settlement will drive class members to the website who otherwise might not read or
22 respond to a class-only notice. *See* Supplemental Declaration of Cameron R. Azari (“Suppl Azari
23 Decl.”) at ¶¶ 8, 11.

24 Nor is Altria correct that the Long-Form Notice describes the litigation in “barebone
25 fashion.” Opp. at 3. The Court previously approved a proposed long-form notice that described
26 the relevant claims and options for class members in a similar level of detail. Altria has not
27 pointed to any material information that is excluded from the Long-Form Notice. And while it
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1 appears to complain about the length of the Long-Form Notice (Opp. at 3), Altria later objects to
 2 the brevity of the summary notices and ignores that what most class members will read—the
 3 settlement website—will include “an easy-to-navigate FAQ.” ECF 3724 at 21.

4 **C. The Court Should Reject Altria’s Objections to the Content of the Long-**
 5 **Form and Short-Form Notices**

6 Altria acknowledges that “the Court previously overruled some of [its] objections but
 7 raises them again for preservation purposes.” Opp. at 4 n.4. Other objections to the content of the
 8 notices were resolved by changes Plaintiffs agreed to make prior to Altria filing its opposition.¹
 9 Altria’s specific objections are addressed below.

10 *Failure to Advise the Class of the Pending Appeal:* Altria raised this objection during the
 11 parties’ meet and confers, and in response, Plaintiffs proposed more robust language concerning
 12 the appeal. *See* Supp. Sharp Decl., Ex. 12 at 8, 14 (redlined language). Altria’s counsel indicated
 13 that it had no objection to the revised language. Plaintiffs therefore understand this objection to be
 14 moot. *Id.*, ¶ 11.

15 *Res Judicata Impact:* Altria argues that the notice fails to advise class members that
 16 remaining in certain classes “would preclude” subsequent actions. Opp. at 5-6. Altria raised, and
 17 lost, this argument during the briefing concerning notice immediately following the Court’s class
 18 certification decision. *See* ECF 3413 at 1-2 (defendants’ *res judicata* objections); ECF 3426 at 2
 19 (“Defendants’ objections to the text of the long-form notice are OVERULED.”). The Court
 20 ultimately found that language saying that remaining in the class “may” impact class members’
 21 ability to bring other claims was sufficient, which is the language used in the proposed notice.

22 *Ability to Bring Personal Injury Claims:* Altria did not raise this objection during the
 23 parties’ meet and confers, and the Court already rejected Altria’s *res judicata* arguments as to
 24 personal injury claims. *See* ECF 3413 at 4-5 (arguing that notice should advise class members
 25 _____

26 ¹ Altria sent comments and redlines to the Long-Form Notice on December 21, Plaintiffs sent
 27 proposed revisions on December 29, and the parties met and conferred on January 4.
 28 Supplemental Sharp Decl. at ¶¶ 6-11. During the January 4 meet and confer, Plaintiffs’ counsel
 suggested that Altria should base any objections on the revisions Plaintiffs had agreed to make at
 that point. *Id.* at ¶12. Altria agreed, but has nonetheless lodged its objections.

1 that remaining in the class would preclude personal injury claims); ECF 3426 at 2 (overruling
2 objections). Plaintiffs, however, agree to make a similar edit to the one they made during the prior
3 notice briefing: instead of saying that remaining the classes “does not” affect or impact an
4 individual’s personal injury claims, Plaintiffs will revise the long form notice to say that staying
5 in the classes does not “preclude you from bringing any personal injury claims you may have.”
6 See ECF 3413 at 3 (previously proposing similar language, which the Court accepted).

7 *Res Judicata as to Antitrust Claims:* Altria already unsuccessfully objected to language
8 indicating that class members who do not opt out would not be able to bring claims “based on the
9 same legal claims.” See ECF 3413 at 1-2 (defendants’ objections to nearly identical language);
10 ECF 3426 at 2 (“Defendants’ objections to the text of the long-form notice are OVERULED.”).
11 Altria’s objection is also baseless because the language it points to on page 11 refers to what
12 claims class members could bring against “*JUUL Labs, and the persons and entities on whose*
13 *behalf it settled*” based on the scope of the settlement release. Altria, of course, has no basis to
14 object to the scope of the claims class members release against non-Altria entities. Altria also
15 fails to mention that during the parties’ meet and confers, Plaintiffs agreed to add language stating
16 “You may be unable to recover against Altria for economic harm resulting from JUUL
17 purchases,” which resolves Altria’s objection. And although not raised by Altria, Plaintiffs have
18 proposed revisions to similar language on page 16 (which, unlike page 11, refers to claims against
19 Altria) to say that class members “may” not be able to bring lawsuit based on similar legal claims.
20 The use of conditional “may” language is similar to what the Court previously approved.²

21 *Description of Claims Against Altria:* The relevant language on page 15 says: “The
22 Nationwide Youth Class *alleges* that the enterprise that Altria was a part of unlawfully marketed
23 to minors.” See Supp. Sharp Decl., Ex. 12 at 15 (emphasis added). Plaintiffs’ description of what
24

25 ² Although not in response to an objection by Altria, Plaintiffs’ revised Long-Form Notice also
26 adds language on pages 11 and 16 that explicitly informs class members that the Class Settlement
27 Agreement does not release claims asserted in *In re Juul Labs, Inc. Antitrust Litigation*, Case No.
28 3:20-cv-02345-WHO that arise from alleged anticompetitive conduct. See Supp. Sharp Decl., Ex.
12 at 11, 16 (redlined language); see also Supp. Sharp Decl. Ex. 13, revised Proposed
Preliminary Approval Order (clarifying scope of release for antitrust claims); Supp. Sharp Decl.
Ex. 14, Amended Class Settlement Agreement (same).

1 they *allege* is consistent with the Court’s order. And during the parties’ meet and confers,
2 Plaintiffs agreed to clarify the temporal scope of Altria’s conduct and to explain that Altria denies
3 Plaintiffs’ allegations. *See id.* at 15 (redlined language). As to the language on page 8, Plaintiffs
4 are willing to revise the language to read “JUUL purchasers would not have purchased JUUL
5 products if they had not been marketed to minors.” These revisions should resolve any concern
6 Altria has about implying it conducted the marketing first-hand.

7 *Red Font:* The notice uses blue font for sections that pertain only to the settlement, red
8 font for sections that only pertain to the ongoing litigation against Altria, and purple font for
9 sections that involve both. Altria is not prejudiced by the Long-Form notice’s use of color, which
10 is designed to help class members better understand the information provided.

11 *Lack of Detail in Short Form Notices:* The proposed postcard notice (ECF 3724-5) and
12 video scripts (ECF 3724-9) inform class members that there is a settlement, and separately
13 informs class members of “an ongoing lawsuit” that “could affect your rights.” Such language
14 sufficiently advises class members of the ongoing litigation against Altria and directs them to the
15 settlement website for more information. Supp. Azari Decl. at ¶¶ 9-10. Altria’s request that the
16 *short* form notices contain more information would be counterproductive: overly long notices that
17 end up using tiny font are unlikely to grab readers’ attention or provide effective notice. As for
18 social media and internet banner advertisements, those notices allow for only a limited amount of
19 text and are designed to drive class members to the website to get more information. Notice via
20 banner advertisements is commonplace in class action notice programs. *Id.* at ¶ 10.

21 **D. The Proposed Notice Plan Is Sufficiently Documented in the Preliminary**
22 **Approval Motion**

23 Plaintiffs’ motion for preliminary approval includes as exhibits the documents that
24 represent the core of the proposed class notice: the Long-Form Notice, summary notices, internet
25 publication notices, and video script. As Plaintiffs noted in their motion, other notice materials—
26 such as the email notice and press release—are derivative of the notice materials Plaintiffs
27 submitted to the Court. *See* ECF 3724 at 20 n.9.

1 Altria nonetheless objects to the lack of inclusion of drafts of these materials in the
2 preliminary approval motion, an objection that it first advised Plaintiffs of on January 3 (more
3 than two weeks after the motion was filed). Plaintiffs nonetheless provided draft email notice,
4 press release, and phone script to Altria on January 10. Plaintiffs expect that Altria will offer
5 similar objections to these materials; namely that Altria does not believe they sufficiently describe
6 the litigation against it. Aside from that overarching objection, Plaintiffs will endeavor to resolve
7 any additional objections Altria may have to the language of these additional materials, and will
8 be prepared to address any lingering issues at the hearing on this motion.

9 **E. Plaintiffs' Proposed Notice Plan Would Reach a Sufficient Percentage of the**
10 **Litigation Class Against Altria**

11 There is no dispute that the proposed notice plan will reach a sufficient share of the
12 classes. Altria's proffered notice expert concludes that the notice plan will reach between 78 and
13 88 percent of potential class members. Lancaster Decl., ¶¶ 35-36. But Altria argues that the notice
14 may reach a smaller percentage of the litigation classes—which are a subset of the settlement
15 class. Altria provides no tangible reason, however, for the suggestion that if notice is sufficient to
16 reach the larger group, it would not also be sufficient to reach the smaller group. In addition, there
17 is not a separate website or Long Form Notice for the settlement class and the litigation class. If
18 the notices are sufficient to direct JUUL purchasers to the website or Long Form Notice because
19 of the settlement, then the notices will be sufficient to advise class members of both the
20 settlement and ongoing litigation. *See* Supp. Azari Decl. at ¶¶ 8-12.

21 In addition, and contrary to Altria's assertions as noted above, combining litigation notice
22 with the settlement notice *increases* the reach of the litigation notice. As explained in the
23 supplemental declaration of Cameron Azari of Epiq, consumers are more likely to respond to and
24 obtain information in response to a notice that provides the prospect of money. Supp. Azari Decl.
25 at ¶ 11. The projected reach of this combined notice campaign is also more extensive than typical
26 notice of only a class certification decision. *Id.* at ¶ 8. Accordingly, increased reach overall is yet
27 another way in which class members would benefit from the use of a combined notice.
28

1 **F. Plaintiffs’ Motion and Notice Materials Provide Sufficient Information About**
2 **the Separate Settlement Agreements JLI Reached with Non-Class Plaintiffs**

3 Altria argues that the terms of settlements resolving personal injury or government entity
4 claims would somehow be relevant to the fairness of the class settlement, but does not explain how.
5 The class settlement does not release personal injury claims, the government entities are not part of
6 the proposed settlement class, and the authority Altria cites in its motion to compel production of
7 the non-class settlement agreements is inapposite.

8 In support of its argument that details of the separate settlement agreements are relevant to
9 the fairness assessment of the Class Settlement Agreement, Altria cites *Cotter v. Lyft, Inc.*, 176 F.
10 Supp. 3d 930, 935 (N.D. Cal. 2016). ECF 3733 at 12. But *Cotter* says no such thing, and involved
11 no analysis of separate settlement agreements by different sets of plaintiffs at all. Instead, the
12 settlement in *Cotter* included both prospective and monetary relief, and the court analyzed all parts
13 of the agreement in its fairness inquiry. *See* 176 F. Supp. 3d at 942 (“perhaps such a low monetary
14 recovery would warrant preliminary approval if the prospective relief were more significant” but
15 the nonmonetary relief was “not nearly significant enough to excuse these serious monetary
16 defects”).

17 As Altria’s argument makes clear, its objection is less about fairness to class members and
18 more about Altria’s motion to compel production of the personal injury and government entity
19 settlement agreements. Altria’s position requires no adjustment to Plaintiffs’ notice plan in any
20 event.

21 **G. Altria’s Reservation of Rights Is Irrelevant**

22 In Sections VII and VIII of its opposition, Altria seeks to preserve its objections to class
23 certification and to reserve its right to seek a variety of settlement-related information. As Altria
24 seems to acknowledge, none of these issues is ripe for resolution as a part of (or relevant to)
25 Plaintiffs’ preliminary approval motion. While Plaintiffs may ultimately dispute the arguments
26 that Altria is preserving or reserving, Altria is of course free to preserve or reserve them.

27 **III. CONCLUSION**

1 Plaintiffs respectfully request that the Court deny Altria’s objections and enter an order
2 approving Plaintiffs’ Notice Plan (including the revised Long-Form Notice) as the best
3 practicable notice under the circumstances here, and directing that notice of both the proposed
4 settlement and the ongoing litigation against Altria be provided to JUUL purchasers without
5 delay.

6
7 Dated: January 10, 2023

Respectfully submitted,

8 By: /s/ Dena C. Sharp

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2023, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will automatically send notification of the filing to all counsel of record.

By: /s/ Dena C. Sharp
Dena C. Sharp