

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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	: <b><u>ORDER</u></b>
In re DENTAL SUPPLIES ANTITRUST	:
LITIGATION	:
	: 16 Civ. 696 (BMC)
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	: <b>ALL CASES</b>
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COGAN, District Judge.

By order dated January 8, 2019, the Court preliminarily approved a class-wide settlement of this action, including the parties’ proposed form of notice of the settlement to the putative class. Burkhart Dental Supply Co. – which was previously a named defendant in this action but was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2) – has filed a letter requesting that the Court approve three proposed revisions to the notice. Defendants Henry Schein Inc., Patterson Companies, Inc., and Benco Dental Supply Company – who are all participating in the settlement – object to Burkhart’s proposed revisions, and its standing to make them.

As an initial matter, defendants’ argument that Burkhart does not have standing to challenge specific language in the notice lacks merit. It is true that generally, non-parties cannot object to a class action settlement, but Burkhart is an atypical “non-party” here. Burkhart used to be a named defendant and its customers are participating members of the class-wide settlement. Burkhart claims that these connections to the settlement, which are apparent in the notice, affect its substantive rights. Even if that is not enough to confer standing for the limited purpose of filing this letter, the Court has an independent obligation to ensure that the notice sent to the putative class is clear and not misleading. See Erhardt v. Prudential Group, Inc., 629 F.2d 843, 846 (2d Cir. 1980). The Court may consider Burkhart’s proposals in ensuring that the notice sent

to the putative class is clear, regardless of whether Burkhart has standing to object to the underlying settlement.

Although the articles that Burkhart has provided report information about the class-wide settlement that is technically accurate, the Court sees Burkhart's point that readers – and by extension, putative class members – might interpret the articles and the notice to suggest that Burkhart is a participating member of the settlement. It is clear to any lawyer that an entity which is no longer a defendant to a class action would not be a participating member of the class-wide settlement, but it is not necessarily the case that a lay person or lay dentist would read these articles or the notice to understand that even though Burkhart customers are class members who may participate in the settlement, Burkhart itself is not participating. Thus, Burkhart's request to modify the notice to make clear that it is not participating in the settlement is granted, but only to the extent that Burkhart's proposed revisions achieve the single goal with which the Court is concerned: to make sure that the putative class members are not confused about the class-wide settlement. The Court will address each of Burkhart's proposed revisions in turn.

With respect to Burkhart's proposal to clarify that it is not participating in the settlement, the notice should read as follows:

Burkhart Dental Supply Company ("Burkhart") was at one time named as a defendant in this lawsuit, but the case was subsequently dismissed as against Burkhart on personal jurisdiction grounds. Because Burkhart is no longer a defendant in this action, it is not paying any portion of the Settlement funds or otherwise participating in the Settlement. This does not, however, affect the ability of any class members who were Burkhart customers to participate in the Settlement.

The first sentence already appears in the notice approved by the Court, is true and correct, and the Court sees no reason to change it. The second sentence, which was not previously in the Court-approved notice but which Burkhart requests to be added, accurately reflects Burkhart's non-participation in the settlement and the Court agrees that it is necessary to clarify Burkhart's

rights and avoid confusion among the putative class. The third sentence, which also was not in the Court-approved notice, avoids any resulting confusion to Burkhart customers who are putative class members about their rights with respect to the class-wide settlement notwithstanding Burkhart's lack of participation. Although neither party proposed adding language similar to this third sentence, the Court believes that it is necessary to clarify the statement that Burkhart is not participating in the settlement.

But the Court sees no reason for Burkhart's proposal to move this language to the first bullet point on the first page in the notice. This is by no means the most important point of the notice, nor is it one of the first pieces of information that putative class members must learn. Thus, the two additional sentences which the Court directs class counsel to add to the notice should follow the first sentence where it appears in the Court-approved notice.

Finally, the Court agrees with defendants that the notice is not a forum for advancing anyone's positions. It is intended to notify and inform the putative class members about the settlement in a neutral and objective way. Thus, Burkhart's proposed language that it "continues to categorically and emphatically deny the allegations and claims that were previously asserted against it in the lawsuit" has no place in the notice form.<sup>1</sup> This language is not necessary to effectuate the purpose of the notice, nor is it necessary to clarify any points that otherwise might have been confusing or misleading in the notice.

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<sup>1</sup> Neither, for that matter, does defendants' proposed revision to the language about Burkhart's dismissal on personal jurisdiction grounds. The interested parties have provided a series of emails about their negotiations over the notice, and one of defendants' revisions proposes striking "on personal jurisdiction grounds" and replacing it with "solely because it does not do business in New York." It is not entirely clear from the briefing whether this proposed revision is before the Court, but in case it is, this proposed revision is rejected. Burkhart was dismissed pursuant to Rule 12(b)(2) – lack of personal jurisdiction – and the Court-approved language accurately reflects that dismissal. Defendants' proposed revision would not benefit the putative class members in learning about the class-wide settlement and would only serve to advance defendants' view on any liability Burkhart might face.

Class counsel is directed to modify the notice accordingly.

**SO ORDERED.**

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U.S.D.J.

Dated: Brooklyn, New York  
January 31, 2019