

relief is individualized and divisible injunctive relief under Rule 23(b)(3), and to explain that Self-Funded Accounts that opt out of the Settlement Damages Class retain the right to sue Settling Defendants for monetary damages and individualized injunctive relief even though they will release all other claims for declaratory or indivisible injunctive relief. The Objections should be overruled.

II. Argument

A. The Alaska Air Movants and GM Misquote the Supplemental Notice in their Objections.

The proposed Supplemental Notice filed by Subscriber Plaintiffs on January 10, 2022 states:

As a member of the Rule 23(b)(2) Injunctive Relief Class, you will still release all other claims for declaratory or **indivisible** injunctive relief that are released under the Settlement Agreement.

Supp. Notice Mot. Ex. B (proposed postcard notice under the section titled “Opt Out or Exclude Yourself”) & C (proposed email notice under heading “What are my Options?”). Alaska Air Movants and GM (who joined Alaska Air’s objection), however, have based their objection on a misquote of the Supplemental Notice. ECF No. 2887 1, n.1. Alaska Air Movants’ objection incorrectly quotes the proposed Supplemental Notice as stating:

As a member of the Rule 23(b)(2) Injunctive Relief Class, you will still release all other claims for declaratory or injunctive relief that are released under the Settlement Agreement.

Id. Then, Alaska Airlines and GM argue that the following sentence should be inserted in place of the sentence they incorrectly cited, above:

As a member of the Rule 23(b)(2) Injunctive Relief Class, you will still be precluded from seeking any injunctive relief that infringes upon the Rule 23(b)(2) indivisible injunctive relief approved by the court.

The Alaska Air Movants’ and GM’s proposed language is merely a rephrasing of the fact

that the indivisible injunctive relief is, in fact, indivisible, and like the indivisible injunctive relief afforded to any other Rule 23(b)(2) injunctive class, a class member cannot opt out of it. *See Wal-Mart*, 564 U.S. 338, 360 (2011) (“[T]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.”).

Here, the Supplemental Notice makes clear that any Self-Funded Accounts that choose to opt out of the Settlement Damages Class keep their right to sue Settling Defendants for monetary damages and individualized injunctive relief related to the claims in this case, and they release claims for *indivisible* injunctive and declaratory relief. Supp. Notice Mot. Ex. B & C. Indeed, in their Objection, Alaska Air Movants recognize that opting out would preclude them from seeking injunctive relief that infringes upon the Rule 23(b)(2) indivisible injunctive relief approved by the Court. ECF No. 2887 at 1 (“Movants recognize and accept that approval of the Settlement will preclude them from seeking certain injunctive relief (i.e., ‘injunctive relief that infringes upon the Rule 23(b)(2) indivisible injunctive relief approved by the Court’.”). That is exactly what the Supplemental Notice states.

B. Contrary to Home Depot’s Claims, the Proposed Supplemental Notice Satisfies Rule 23.

The proposed Supplemental Notice satisfies Rule 23 because, contrary to Home Depot’s claims, it provides information “reasonably necessary” for class members to decide whether to opt out or remain in the class. In this Circuit, Rule 23 requires that class members be given “information reasonably necessary to make a decision [whether] to remain a class member and be bound by the final judgment or opt-out of the action, though the notice need not include ‘every material fact’ or be ‘overly detailed.’” *See Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1239 (11th Cir. 2011) (internal citation omitted); *see also Greco v. Ginn Dev. Co., LLC*, 635 F. App’x.

628, 633 (11th Cir. 2015) (citing *Faught*, 668 F.3d at 1239). Home Depot's Objection mistakenly claims that the Settling Parties have taken inconsistent positions and that the Supplemental Notice obscures the Settling Parties' alleged disagreement and the scope of the release.

First, Home Depot is conflating whether an opt out would be precluded by the (b)(2) settlement and release from pursuing a particular remedy with whether it would be precluded from raising particular arguments in support of a claim for that remedy. *See* ECF No. 2865, Tr. II at 23-24. As fully briefed in Subscribers' Post-Hearing Brief in Support of Final Approval² and in Defendants' Post-Hearing Brief in Support of Final Approval,³ any opt out can seek monetary and individualized injunctive relief, including claims for more than one Blue bid, and they can do so by asserting "any and all legal theories that would entitle them to [such] an award." Subscribers' Post-Hearing Reply Brief in Support of Final Approval of Class Settlement, ECF No. 2880 at 35.⁴ Indeed, the Settling Parties agreed during the Final Fairness Hearing that the Second Blue Bid relief is properly construed as Federal Rule of Civil Procedure 23(b)(3) relief, *see* ECF No. 2865 at Tr. II 25-27; 42-44, 95, and that it is individualized, divisible relief. The proposed Supplemental Notice explains that any class member who opts out of the Settlement Damages Class keeps its right to sue Settling Defendants for monetary damages *and individualized injunctive relief*. Supp. Notice Mot. Ex. B & C.⁵

Second, Home Depot claims the proposed Supplemental Notice is vague in order to

² ECF No. 2868 at 13.

³ ECF No. 2881 at 16-17.

⁴ *See also id.* at 33 ("[T]he Settling Parties are in complete agreement that an opt-out would be free to assert any legal challenge to the lawfulness of the Defendants' rules that they may devise, but they may do so only in support of a request for damages or for individualized injunctive relief."); ECF No. 2881 at 16 (Defendants' acknowledgment that opt-outs "can ..., consistent with the law and the Settlement Agreement, assert that service areas are illegal as part of a claim for monetary or divisible injunctive relief").

⁵ *See* ECF No. 2864, Tr. I at 170-173.

obscure the Settling Parties' alleged disagreement and fails to include specifics about the nature of the individualized injunctive relief. That is not correct — the notice provides an appropriate level of guidance. Notice need not include “every material fact” about a settlement, nor must it be “overly detailed.” *Faught*, 668 F.3d at 1239 (internal citation omitted). Here, the proposed Supplemental Notice provides the information reasonably necessary for class members to make an informed decision, and further directs class members to the website where further information can be found. *See, e.g.*, Supp. Notice Mot. Ex. B (“QUESTIONS? Visit www.BCBSsettlement.com, email info@BCBSsettlement.com, call (888) 681-1142, or write Blue Cross Blue Shield Settlement c/o JND Legal Administration, P.O. Box 91390, Seattle, WA 98111.”).

However, if the Court shares any of Home Depot's concerns about the proposed Supplemental Notice, Subscribers propose the following modified language:

Opt Out or Exclude Yourself: If you opt out or exclude yourself from the Settlement Damages Class, you will not receive any ~~monetary damages of the benefits of the Settlement Damages Class, including a distribution from the Settlement Fund~~ or individualized injunctive relief, including the right to request a Second Blue Bid, under the Settlement. ~~You~~As an opt-out, you will keep your right to sue Settling Defendants for monetary damages and individualized injunctive relief related to the claims in this case. ~~As a member of the Rule 23(b)(2) Injunctive Relief Class, you will still release all other claims for declaratory or indivisible injunctive relief that are released under the Settlement Agreement. Whether such a remedy is merited will depend on the individual business and fact circumstances surrounding your individual claim. Divisible injunctive relief may include the right to pursue in litigation more than one Blue bid based upon a claimant's individual business and the facts and circumstances of the individual claims.~~⁶ However, you may not request indivisible injunctive or declaratory relief, as the relief pursued by you may not undermine or infringe on the Rule 23(b)(2) indivisible injunctive relief or (b)(2) release approved by the court. As a member of the Rule 23(b)(2) Injunctive Relief Class, you will be precluded from pursuing indivisible declaratory or injunctive relief to the extent claims for those remedies are released under the Settlement Agreement.

If you opt out and you previously filed a claim, your claim will automatically be

⁶ ECF No. 2865, Tr. II at 17-19.

withdrawn. If you previously opted out and you want to now remain in the Settlement Damages Class, you must withdraw your opt out request.

C. The Self-Funded Subclass Definition Time Period Is Proper under Eleventh Circuit Precedent.

The Bradley objectors again raise their argument that the time period for the Self-Funded Subclass should begin at the same time as for Fully Insured class members, on February 7, 2008. This objection is meritless. As shown at the final approval hearing, ECF No. 2965, Tr. II at 149:2 to 150:24, 159:18 to 162:15, and fully briefed on several occasions, including in Subscribers' Post-Hearing Brief in Support of Final Approval, ECF No. 2868 at 25-27, Eleventh Circuit case law would not permit the damages claims of Self-Funded Subclass members to relate back because Defendants were not put on notice that they would be facing claims from ASO customers. *See Cliff v. Payco General American Credits, Inc.*, 363 F.3d 111, 1131 (11th Cir. 2004). The original *Cerven* Complaint expressly defined the product market as the "sale of full-service commercial health insurance products to individuals and small groups." *Cerven v. Blue Cross and Blue Shield of North Carolina*, 12-cv-17 (W.D.N.C.) ECF No. 1 at ¶ 124. Further, it explicitly differentiated the fully-insured market from the ASO market. *Cerven* Complaint at ¶ 129. The objection to the time period for the Self-Funded Subclass in the Supplemental Notice should be overruled.

III. Conclusion

For the reasons discussed above and in the post-hearing briefing, Subscribers request that the Court overrule the oppositions to Subscribers' Motion for Supplemental Notice to Self-Funded Accounts and approve the proposed Supplemental Notice.

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Respectfully submitted,

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I hereby certify that on January 25, 2022, the foregoing Subscribers' Reply in Support of Motion for Supplemental Notice to Self-Funded Accounts was filed with the Clerk of the Court and served on counsel of record via ECF.

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