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UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

RONY ELKIES and DANIELLE ALFANDARY, individually and on behalf of all others situated;

Plaintiffs,  
vs.

JOHNSON & JOHNSON SERVICES, INC., a New Jersey limited liability company, JOHNSON & JOHNSON CONSUMER INC. a New Jersey limited liability company, and DOES 1 through 100, inclusive,

Defendants.

Case No. 2:17-CV-7320-GW-JEM

**DECLARATION OF NOEL J. NUDELMAN IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS AND SERVICE AWARDS**

Hearing Date: June 22, 2020  
Hearing Time: 8:30 a.m.  
Courtroom: 9D  
Judge: Hon. George H. Wu



1           7. After providing statutory notice under California’s Consumer Legal  
2 Remedies Act, Plaintiffs filed their original Class Action Complaint on October 5,  
3 2017 and an amended complaint (“FAC”) on November 21, 2017 against Defendants,  
4 Johnson & Johnson Consumers, Inc. (“JJCI”) and Johnson & Johnson Services,  
5 Inc.(“JJSI”).

6           8. The FAC alleges JJCI violated California’s False and Misleading  
7 Advertising Law (“FAL”), Cal. Bus. & Prof. C. §§17500, *et seq.*; Consumer Legal  
8 Remedies Act (“CLRA”), Cal. Civ. C. §§1750, *et seq.*; and, Unfair Competition Law  
9 (“UCL”), Cal. Bus. & Prof. C. §§17200, *et seq.*

10           9. On December 19, 2017, Defendants filed a Motion to Dismiss. Plaintiffs’  
11 opposed said motion, and after a hearing on the matter, on February 27, 2018 the  
12 Honorable George Wu denied Defendants’ motion to dismiss the FAC under Rules  
13 12(b)(1) and 12(b)(6) in its entirety.

14           10. Thereafter, Defendants’ filed their Answer, and discovery began in  
15 earnest.

16           11. For over a year extensive discovery was taken regarding the marketing  
17 and sale of Infants’ Tylenol throughout the United States.

18           12. Plaintiffs issued multiple sets of Interrogatories, requests for Admissions  
19 and one hundred eighty-one separate document requests. Defendants also issued and  
20 Plaintiffs answered more than thirty (each) Special Interrogatories, one hundred  
21 twenty-seven Requests for Production of Documents and nearly fifty Requests for  
22 Admissions.

23           13. Defendants made more than twenty-one separate document productions,  
24 and produced over 62,000 pages of documents which were reviewed by Class  
25 Counsel.

26           14. Numerous depositions were taken by both parties. These depositions  
27 included four Rule 30(b)(6) designated representatives of the Defendants on  
28 marketing, sales, safety and of Infants’ Tylenol.

1           15. In addition, the designated class representatives, and their treating  
2 physicians were deposed.

3           16. Depositions were conducted in Philadelphia, Washington, D.C. and Los  
4 Angeles.

5           17. The Parties' sought third party discovery, and Plaintiffs issued subpoenas  
6 to third parties seeking sales information on pediatric acetaminophen products sold in  
7 California and the United States.

8           18. The parties also engaged in active motions practice for resolving disputes  
9 between them on the scope of discovery pursuant to Local Rule 37.

10           19. Plaintiffs sought court intervention and successfully obtained order  
11 compelling the Defendants to produce information not only regarding the marketing  
12 and sales of Infants' Tylenol, but also Children's Tylenol which was relevant to  
13 Plaintiffs' claims.

14           20. Defendants sought highly personal and confidential discovery, such as  
15 medical records for Plaintiffs' two minor daughters.

16           21. Plaintiffs also prepared and sat for depositions, searched for requested  
17 documents, produced their daughters' entire medicine cabinet at Ms. Alafandary's  
18 deposition, and responded to the written discovery propounded to them as described  
19 above.

20           22. The Parties met and conferred to discuss Plaintiffs' written discovery  
21 responses on multiple occasions, and Defendants ultimately filed a L.R. 37-2 Joint  
22 Stipulation to compel further responses, which was denied.

23           23. Plaintiffs sought and were granted an Order quashing subpoenas served  
24 on Plaintiffs' treating physicians which limited the scope of the documents that could  
25 be produced and the scope of the subject matter Defendants' were seeking inquire  
26 about from these treating physicians', such that the Defendants' could only inquire  
27 about the medical advice they received pertaining to administering and dosing  
28 pediatric acetaminophen products.

1           24. In addition, when Defendants’ sought leave to depose Plaintiffs again  
2 regarding their recent purchases of pediatric acetaminophen products outside the  
3 Class period, Plaintiffs opposed the Defendants request and the Court entered an  
4 Order prohibiting these additional depositions.

5           25. During the discovery and the Notice period, Plaintiffs were also  
6 completing expert discovery in anticipation of the August 27, 2019 jury trial.

7           26. Testifying experts were designated by all parties and expert reports were  
8 exchanged.

9           27. The Parties exchanged expert reports on April 19, 2019, and rebuttal  
10 reports on May 20, 2019.

11           28. Plaintiffs designated experts to testify about consumers’ perception of the  
12 representations on the Infants’ packaging and the measure of economic damages  
13 suffered by the Class. Plaintiffs’ also designated non-retained experts (the  
14 pediatricians who treated Plaintiffs’ minor daughters and revealed that Children’s is  
15 the same as Infants’, just cheaper).

16           29. Plaintiffs’ experts (Drs. Maronick and Sharp) were deposed.

17           30. In fact, Dr. Sharp was deposed twice—once regarding the contents of his  
18 preliminary expert analysis submitted in support of class certification and again after  
19 Dr. Sharp obtained additional data and produced his formal expert report Rule  
20 26(a)(2)(B).

21           31. At the class certification stage, Dr. Sharp submitted a declaration that  
22 described how he could craft a class-wide damages model in this case. His declaration  
23 also included a preliminary damages estimate, based on the data available to him at  
24 the time.

25           32. He then refined his damages model based on the sales information  
26 provided by both Defendants and third parties (Neilson) and was able to create a  
27 damages model and calculate projected class wide damages.  
28

1 33. His formal report contained a proposed damages model for trial.  
2 Defendants deposed Dr. Sharp a second time and designated a different expert to rebut  
3 Dr. Sharp's Rule 26(a)(2)(B) report.

4 34. Dr. Sharp offered opinions regarding: (1) the average retail prices for  
5 Infants' and Children's in California; (2) the price premium consumers paid for  
6 Infants' (versus Children's); and (3) aggregate damages on behalf of the Litigation  
7 Class.

8 35. JICI designated two retained experts and five non-retained experts, as  
9 well as rebuttal experts to Drs. Maronick and Sharp.

10 36. Four of these designated experts were scheduled to be deposed but only  
11 Dr. Kochanowski's deposition had been completed at the time Parties reached a  
12 settlement.

13 37. Three of Defendant's non-retained experts had already been deposed by  
14 Plaintiffs: Plaintiffs treating physicians, Dr. Shapiro, and Dr. Seligmann, and  
15 Defendants' designated 30(b)(6) representative, Dr. Kuffner.

16 38. On July 27, 2018, Plaintiffs filed their Motion for Class Certification.

17 39. Defendants opposed said Motion arguing that the elements of Fed.R.of  
18 Civ. P. 23 had not been met.

19 40. On October 19, 2018, the Court granted the motion. ECF 117, 118.  
20 Defendants immediately sought interlocutory appellate review in a Rule 23(f)  
21 Petition.

22 41. Plaintiffs opposed, and on December 19, 2018 the Ninth Circuit denied  
23 Defendants' Petition.

24 42. After the class was certified (and while the Rule 23(f) Petition was  
25 pending), Class Counsel researched third party administrators who could provide  
26 notice to the class.

27 43. Plaintiffs selected Kurtzman Carson Consultants, LLC and extensively  
28 met and conferred with Defendants about KCC's notice plan before submitting it to

1 the Court for approval.

2 44. After two hearings on Plaintiffs' contested Motion for Order to Approve  
3 Class Notice Plan and Content of Notice, the Court approved the proposed plan and  
4 appointed KCC as the notice administrator on January 10, 2019.

5 45. A few days later the Court granted the Parties' stipulation to slightly  
6 revise the class definition to "All persons who purchased, in California, Infants'  
7 Tylenol for personal use since October 3, 2014" (the "Litigation Class").

8 46. Notice to the Litigation Class was disseminated on February 1, 2019.

9 47. There were no requests for exclusion.

10 48. While discovery, motions practice and trial preparation was ongoing, the  
11 parties also engaged in court ordered mediation and settlement discussions.

12 49. The Parties agreed to retain a professional JAMS mediator, the Honorable  
13 Charles W. "Tim" McCoy (Ret.). Judge McCoy convened the parties for an in person  
14 mediation session.

15 50. A settlement was not reached during the mediation, but the parties  
16 continued to discuss the possibility of settlement, facilitated by Judge McCoy.

17 51. These extensive settlement discussions were conducted over the course  
18 of three months.

19 52. On the eve of the close of expert discovery, and less than a week before  
20 the deadline to file motions (including summary judgment and *Daubert* motions), the  
21 parties agreed to a proposed settlement for a nationwide class, subject to Court  
22 approval.

23 53. The parties spent three additional months negotiating the details of the  
24 Settlement Stipulation.

25 54. In reaching a settlement, Class Counsel acknowledged the expense and  
26 length of continued proceedings necessary to prosecute the Action against Defendants  
27 through trial and appeals.

28 55. Class Counsel also have a complete understanding of the strengths and

1 weaknesses of the claims and defenses asserted and the potential recovery of the Class  
2 at trial.

3 56. On September 24, 2019, Plaintiffs filed their unopposed Motion for  
4 Preliminary Approval with Proposed Order.

5 57. A revised Order was then filed by the Plaintiffs, and a preliminary  
6 approval hearing was set for October 21, 2019.

7 58. At the hearing, the Court indicated in its tentative ruling that it intended  
8 to grant preliminary approval but requested certain changes be made in the Notice  
9 documents to the class and the Settlement Stipulation.

10 59. The parties made the requested changes and second hearing was set for  
11 November 4, 2020.

12 60. At the hearing, additional changes were ordered by the Court.

13 61. The Court granted preliminary approval for the Class settlement on  
14 December 6, 2019.

15 62. In its Order, the Court conditionally certified the Class and set the Final  
16 Approval Hearing for May 11, 2020<sup>1</sup>.

17 63. The Court directed that Notice be given to the Class and approved the  
18 proposed Publication Notice and Class Notice which were attached to the Amended  
19 Stipulation of Settlement as filed.

20 64. The Court further approved the Claim Form and Press Release.

21 65. The Court found that Notice Plan proposed by the Plaintiffs and the  
22 approved Settlement Administrator, KCC, was the best notice practicable and  
23 sufficient to give notice to all persons entitled.

24 66. After the Court entered the Preliminary Approval Order, the Parties and  
25 the Settlement Administrator carried out their duties in connection with the  
26 administration of the Settlement as set forth in the Amended Stipulation of Settlement.

27 <sup>1</sup> On March 18, the Court entered an Order continuing certain deadlines pertaining to  
28 the Final Approval of the Class Settlement. ECF 174. The Court continued to the  
Final Approval Hearing from May 11, 2020 to June 22, 2020 at 8:30 am. *Id.*

1           67. The Settlement Administration process is not complete. The deadline to  
2 make claims or opt out was April 13, 2020; however, per the Court’s March 18 2020  
3 Order, the deadline to object was extended to May 26, 2020. ECF 174.

4           68. Pursuant to the Court’s Preliminary Approval Order, Class Counsel  
5 provided adequate notice to the Class of their intention to apply for an award of  
6 attorneys’ fees up to \$2,083,950, which is 33% of the Claim Fund, and to Plaintiffs  
7 request reimbursement in the amount of \$357,917. for Class Counsel’s out-of- pocket  
8 costs, \$516,0000 to Kurtzman Carson Consultants, LLC (“KCC”) for settlement  
9 administration costs and service awards of \$4,000 for each of the two named plaintiffs  
10 for the integral roles they played in achieving this

11           69. Specifically, the Notice informed the Class that they could make a claim  
12 and/or opt out of or object<sup>2</sup> to the Settlement until April 13, 2020 and provided  
13 detailed instructions.

14           70. As of the end of the Notice Period, there were 0 objections and 2 requests  
15 for exclusion.

16           71. The Settlement reached will benefit and afford relief to individuals in the  
17 United States who purchased Infants’ Tylenol for personal or household use since  
18 October 3, 2014 until January 6, 2020.

19           72. In exchange for a nationwide release of claims, JJCI will make a non-  
20 reversionary \$6.315 million Claim Fund for the benefit of the Class.

21           73. Based on the preliminary data provided by KCC<sup>3</sup>, due to the robust claims  
22 rate, the amount per bottle available from the fund will be decreased *pro rata* to  
23 approximately \$0.73 per bottle (assuming each claimant seeks the maximum 7  
24 bottles). The vast majority of Class Members who claimed the maximum 7 amount  
25 of bottles without proof of purchase (74.9% of claimants), will receive a total of

26 \_\_\_\_\_  
27 <sup>2</sup> In accordance with the Court’s March 18, 2020 Order, the deadline for objecting  
has been extended until May 26, 2020. ECF 174.

28 <sup>3</sup> See concurrently-filed Declaration of Carla Peak, Vice President of Legal  
Notification Services at KCC.

1 approximately \$5.11 each. This amount is equal to approximately 1.3 price  
2 premiums. Plaintiffs will provide updated claims data in advance of the Final  
3 Approval Hearing.<sup>4</sup>

4 74. Class members are receiving compensation that fairly takes into account  
5 the following risks of proceeding with the litigation: (1) the ultimate results after a  
6 class trial were uncertain; (2) the possibility the Court or jury would reject Plaintiffs’  
7 proposed damages model; (3) the real and imminent threats of J&J’s forthcoming  
8 motions to decertify, exclude Plaintiffs’ experts, and for summary judgment; and, (4)  
9 years of delay as the parties appeal any one or all of these issues.

10 75. In addition, JJCI has agreed to injunctive relief that directly addresses  
11 Plaintiffs’ claims.

12 76. Specifically, within 180 days of the Effective Date or December 31, 2019  
13 (whichever is later), JJCI agreed to do the following for a period of 2 years: (a) change  
14 Infants’ current packaging so that the child depicted on the front of the packaging is  
15 at least two years of age; (b) add text on JJCI-controlled websites to the effect that the  
16 medicine in Infants’ and Children’s contain the same concentration of liquid  
17 acetaminophen; (c) to its customer care center’s protocols regarding comparisons of  
18 Infant’s and Children’s, educate and inform consumers that the medicine in Infants’  
19 and Children’s contains the same concentration of acetaminophen; and (d) continue  
20 to include language on dosing charts that JJCI provides to healthcare providers to the  
21 effect that the medicine in Infants’ and Children’s contains the same concentration of  
22 acetaminophen.

23 77. The settlement will provide benefits for the hundreds of thousands of  
24 Class Members who file valid claims.

25 78. Class Counsel achieved these benefits by representing the class—on a  
26 contingency basis—nearly two years before reaching settlement.

27 <sup>4</sup> Claimants may be reimbursed for a maximum of 7 bottles without documentation.  
28 If they submitted valid proofs of purchase with their claims, claimants may be  
reimbursed for more, up to the number of bottles for which they have proof.

1           79. In doing so, Class Counsel incurred hundreds of thousands of dollars of  
2 expenses and required counsel to forgo significant other work.

3           80. Class Counsel is not seeking reimbursement from the Claim Fund for any  
4 future expenses (i.e. related expenses incurred after the date this motion is filed).

5           81. Prosecuting the claims asserted by Plaintiffs requires knowledge of  
6 consumer law that few attorneys possess. Class Counsel has handled significant  
7 matters of complex litigation in various state and federal courts throughout the United  
8 States, as well as numerous class actions, including multiple class cases alleging  
9 similar product design defects.

10           82. Class Counsel is not only skilled practitioners in the litigation field, but  
11 we also have a successful track record in complex litigation including class actions  
12 and mass torts.

13           83. As demonstrated by the above recitation of procedural history for this  
14 matter, Class Counsel has prosecuted this action vigorously and to dedicate the  
15 resources and expertise necessary to represent the Class and successfully manage this  
16 class action to its conclusion.

17           84. As appointed Class Counsel, HNK has the expertise to represent this  
18 Class.

19           85. HNK is a boutique litigation law firm based in Washington, D.C. HNK  
20 has more than forty years' experience leading and prosecuting complex litigation.

21           86. HNK served as lead counsel in *Katz v. Garmin*, a case litigated in the  
22 United States District Court for the District of Utah for the defective product design  
23 of the Forerunner 610 watchband.

24           87. HNK was also lead *Klinger v. Motorola*, a case litigated in the District of  
25 Maryland as a consumer class action for defective product design of the antenna  
26 attached to the Motorola Star-Tac cellular phone.

27           88. The firm also served as co-lead counsel in *Bernard v. Microsoft*, a District  
28 of Columbia indirect purchaser class action, which resulted in a significant recovery

1 for indirect purchasers of Microsoft products in the District of Columbia.

2 89. HNK was co-lead counsel in *Sherrill, et al. v Amerada Hess, et al*, a case  
3 litigated in the state court's in Charlotte, North Carolina wherein over 500 individuals  
4 who resided next to or near oil tank farms owned by 16 different oil companies sued  
5 these oil companies for their environmental claims for personal injuries and other  
6 damages.

7 90. In addition, HNK also has served as lead counsel in numerous cases  
8 wherein we represent victims and their family members who have been killed or  
9 injured in terrorist attacks in Europe and Israel. To date, the firm has worked on  
10 matters in which in excess of \$4 billion has been collected on behalf of victims of  
11 terrorism of which in excess of \$700 million dollars of which was collected on behalf  
12 of clients' of HNK.

13 91. I am a partner at HNK. I have been with HNK for over 25 years. I  
14 graduated from Boston University (B.A. 1990 Business Administration and  
15 Economics) and Brooklyn Law School (J.D. 1993).

16 92. My partner Richard D. Heideman founded HNK first as the Heideman  
17 Law Group, P.C. in Louisville, KY in 1974. He graduated from the University of  
18 Michigan (B.A. 1969 Legal Studies) and George Washington University National  
19 Law Center (J.D. 1972). Mr. Heideman has been admitted to practice law in the State  
20 and Federal courts of Kentucky, Indiana, Wyoming, Maryland and the District of  
21 Columbia. He has been admitted *pro hac vice* in this matter.

22 93. My partner Tracy Reichman Kalik joined HNK as an associate in 1996.  
23 She became a named partner in 2003. She graduated from Emory University in 1993  
24 (B.A. Political Science and History). She graduated from George Washington  
25 University National Law Center (J.D. 1996). Ms. Kalik has been admitted to practice  
26 law in the State and Federal courts of Maryland, Missouri and the District of  
27 Columbia. She has been admitted *pro hac vice* in this matter.

28

1           94. Class Counsel took on significant contingent risk when it agreed to  
2 represent the Plaintiffs in this matter.

3           95. The risk of non-payment and loss was real, and as described above,  
4 settlement was only reached on the eve of trial, after extensive discovery and motions  
5 practice.

6           96. Not only was there risk had the matter gone to trial, but there was also  
7 risk that any post-trial motions and appeals would also further delay the resolution of  
8 this case and relief to the class.

9           97. Plaintiffs believe their claims are meritorious, but J&J raised, and would  
10 continue to raise, challenges to the legal and factual basis for such claims.

11           98. To prevail at trial, Plaintiffs would need to prove not only that the  
12 challenged representations mislead consumers into believing Infants' was specially  
13 formulated for infants, but also that J&J's omission of an express statement telling  
14 consumers that Infants' contains the same medicine as Children's is material; that the  
15 representations and/or omissions caused injuries; that restitution (under the UCL)  
16 and/or damages (under the CLRA) was recoverable; and that J&J's conduct  
17 constitutes fraud, oppression or malice.

18           99. There was also risk as to what remedies model the Court would ultimately  
19 adopt, if any.

20           100. Plaintiffs believe their restitution model, created by Plaintiffs' Ph.D.  
21 economist, Dr. Sharp, using average retail price and a weighted average to calculate  
22 the price premium Class Members paid as a result of J&J's misrepresentations was  
23 valid, but the Defendants strenuously argued that this methodology would not be  
24 appropriate and had their own expert suggest a different damages model which  
25 resulted in significantly less restitution to the Class.

26           101. There was no certainty about which methodology the Court would apply  
27 had the class action trial gone forward (and Plaintiffs prevailed).

28           102. Therefore, the Class faced serious risk in continuing to litigate this action

1 against Defendants who had a track record of success and aggression.

2 103. Plaintiffs are seeking an award of attorneys' fees up to \$2,083,950, which  
3 is 33% of the Claim Fund.

4 104. As described above, Class Counsel expended significant time in  
5 prosecuting this claim.

6 105. As of March 12, 2020, the total hours billed by Class Counsel for this case  
7 is combined 4,025.50 hours. The total lodestar based on Class Counsel's current  
8 rates<sup>5</sup> is \$2,387,154.

9 106. As a general practice of most law firms each of the attorneys and support  
10 staff at HNK are responsible for keeping track of their billable time. I have personally  
11 reviewed HNK's time entries and have used billing judgment to ensure that  
12 duplicative or unnecessary time has been excluded and that only time reasonably  
13 devoted to the litigation has been included.

14 107. I understand that Gillian Wade, on behalf of MJFW has done the same.

15 108. Class Counsel worked in cooperation with one another to ensure that case  
16 management, including dividing tasks and avoiding duplicative work between the two  
17 firms.

18 109. The time and descriptions maintained in HNK's billing records were  
19 regularly and contemporaneously recorded by me and other timekeepers/employees  
20 of the firm and have been maintained in the computerized records of HNK.

21 110. Class Counsel's lodestar does not include the additional time they will  
22 need not devote to implementing the Settlement Stipulation (should the Court grant  
23 final approval). Class Counsel will need to spend additional time responding to  
24 objections (if any), continuing to monitor the claims administration, preparing for and  
25 attending the Final Approval hearing, responding to inquiries from Class Members,  
26

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27 <sup>5</sup> The Supreme Court and other courts have held that the use of current rates is  
28 proper since such rates compensate for inflation and the loss of use of funds. *See*  
*Missouri v. Jenkins*, 491 U.S. 274,283-84 (1989).

1 handling any settlement-related appeals, and otherwise ensuring the terms of the  
2 Settlement Stipulation are satisfied.

3 111. Class Counsel's hours spent were reasonable. Below is a summary of  
4 hours worked by Class Counsel in this Action<sup>6</sup>:

- 5 a. extensive pre-filing investigation and research into the medicine  
6 contained in Infants' and Children's;
- 7 b. extensive legal research into the viability of the legal claims to be  
8 asserted on behalf of Plaintiffs and class members;
- 9 c. communicating with and interviewing Plaintiffs regarding their  
10 potential claims against Defendants;
- 11 d. communicating with experts/consultants regarding the active  
12 ingredients in Infants' and Children's;
- 13 e. drafting CLRA notice letter, required by Cal. Civ. C. § 1782(a).
- 14 f. preparing initial complaint;
- 15 g. routinely communicating with Plaintiffs throughout the lifetime of the  
16 Action, including reports and discussions regarding status of case,  
17 Plaintiffs' discovery responses and search for documents and  
18 medicine responsive to Defendants' Requests for production,  
19 mediation, and settlement;
- 20 h. Preparing Plaintiffs for their depositions and defending those  
21 depositions;
- 22 i. meeting and conferring with counsel for Defendants regarding  
23 extension of time for Defendants to respond to the complaint,  
24 preparing stipulations regarding same;
- 25 j. meeting and conferring with counsel for Defendants regarding  
26 extension of time for Plaintiff to file motion for class certification

27  
28 <sup>6</sup> At the Court's request, Class Counsel can submit itemized time sheets for *in camera* inspection.

- 1                   pursuant to L.R. 23-3; preparing stipulation regarding same;
- 2           k.       drafting FAC;
- 3           l.       meeting and conferring with counsel for Defendants regarding
- 4                   Defendant’s Rule<sup>7</sup> 12(b)(6) motion to dismiss the FAC;
- 5           m.       Reviewing and opposing Defendant’s Rule 12(b)(6) Motion to
- 6                   Dismiss FAC;
- 7           n.       preparing for and attending the hearing on Defendants’ Rule 12(b)(6)
- 8                   Motion to Dismiss FAC;
- 9           o.       engaging in meeting of counsel pursuant to Rule 26(f) and preparing
- 10                   Joint Rule 26(f) Discovery Plan;
- 11           p.       reviewing the Court’s Standing Order in this Action;
- 12           q.       reviewing and analyzing Court’s Order Denying Defendants’ Rule
- 13                   12(b)(6) Motion to Dismiss FAC;
- 14           r.       meeting and conferring with counsel for Defendants regarding
- 15                   Stipulation for Protective Order; preparing same;
- 16           s.       reviewing and analyzing Defendants’ Answer to FAC;
- 17           t.       drafting numerous Motions to Seal various documents and court
- 18                   filings in accordance with Protective Order; drafting Notices of
- 19                   Manual Filing regarding same;
- 20           u.       drafting written discovery (including multiple sets of interrogatories,
- 21                   requests for admissions and document requests) and deposition notice
- 22                   per Rule 30(b)(6));
- 23           v.       drafting and serving subpoenas to third party, Nielsen; extensive
- 24                   communications with counsel for Nielsen and Defendant regarding
- 25                   same;
- 26           w.       communicating with counsel for Nielson regarding subpoena;

27 \_\_\_\_\_

28 <sup>7</sup> For purposes of this Declaration, “Rule” refers to the Federal Rules of Civil Procedure, unless otherwise stated.

- 1 x. performing legal research related to Nielsen subpoena;
- 2 y. responding to written discovery propounded by Defendants on
- 3 Plaintiffs, including review of documents and things (medicine) and
- 4 production of same to Defendants;
- 5 z. meeting and conferring (in person and over the phone) with counsel
- 6 for Defendants regarding Plaintiffs' discovery responses;
- 7 aa. performing extensive legal research regarding production of
- 8 Plaintiffs' minor daughters' medical information in false advertising
- 9 action;
- 10 bb. reviewing and analyzing tens of thousands of pages of documents
- 11 produced by Defendants, including advertisements, emails,
- 12 memoranda, presentations, and safety information regarding Infants'
- 13 and Children's;
- 14 cc. performing extensive legal research regarding Rule 23 certification of
- 15 claims under the UCL, CLRA, FAL;
- 16 dd. drafting, reviewing and revising Motion for Class Certification and
- 17 supporting documents; reviewing Opposition and performing
- 18 additional legal research; preparing Reply to Opposition and
- 19 supporting documents;
- 20 ee. performing factual research and investigation regarding Defendants'
- 21 supporting documents and evidence filed with Defendants'
- 22 Opposition to Motion for Class Certification; perform extensive legal
- 23 research regarding the Federal Rules of Evidence and evidentiary
- 24 objections in connection with Rule 23; draft and edit Objections/  
25 Motions to Strike declarations Defendants filed in support of  
26 Opposition to Motion for Class Certification and supporting  
27 documents; reviewing Defendants' Responses to Objections;
- 28 ff. investigating Defendants' factual contentions;

- 1 gg. meeting and conferring with counsel for Defendant regarding  
2 discovery responses and depositions as required by Local Rule 37 on  
3 many occasions; preparing, responding to, and filing several joint  
4 Rule 37 Motions regarding discovery disputes;
- 5 hh. extensive communications with counsel for Defendants regarding  
6 plan for Litigation Class notice, both before and after the Court  
7 ordered the Parties to meet and confer regarding the dispute; perform  
8 extensive legal research regarding Rule 23 class notice; draft and edit  
9 Plaintiff's Motion for an Order to Approve Class Notice Plan and  
10 Form of Notice and supporting documents; prepare for and attend  
11 hearings regarding Litigation Class notice; review Defendant's  
12 Opposition and prepare Reply in response thereto; review the Court's  
13 Order regarding Notice;
- 14 ii. performing extensive research regarding class notice and interview  
15 potential third party claims administrators for litigation notice;
- 16 jj. communicating with third party claims administrator regarding a  
17 myriad of issues regarding litigation notice, including estimated cost,  
18 form and content of notice, the class action website, publications for  
19 print notice, the scope and timeframe of notice;
- 20 kk. preparing for and appearing at numerous motion hearings, including  
21 hearings on Motion to Dismiss, Motion for Class Certification,  
22 Motion for Preliminary Approval; and additional hearings regarding  
23 class notice and the class action settlement;
- 24 ll. communicating with and interview potential experts and consultants  
25 regarding key liability and damages issues; negotiate terms of  
26 agreements with experts and prepare/ edit retainers for experts;
- 27 mm. reviewing documents, information and data with experts and to  
28 formulate and refine Plaintiff's legal theories regarding Rule 23 and

1 Plaintiff's claims under the UCL, FAL and CLRA;

2 nn. reviewing documents and information regarding the damages model  
3 proposed by Plaintiff's expert, Dr. Sharp;

4 oo. spending significant time preparing for and taking the depositions of  
5 Defendant's Rule 30(b)(6) corporate witnesses in Philadelphia;

6 pp. meeting and conferring with counsel for Defendant regarding trial  
7 date and related deadlines following class certification;

8 qq. reviewing experts' draft reports and discuss experts' opinions;

9 rr. reviewing and analyzing rebuttal reports served by Defendant's  
10 experts; extensive communications with Plaintiff's experts regarding  
11 same;

12 ss. spending significant time preparation for defending the depositions of  
13 Plaintiff's two experts; defending experts' three depositions (Dr.  
14 Sharp was deposed twice);

15 tt. spending significant time preparing for, traveling to, and taking the  
16 depositions of Defendant's experts;

17 uu. drafting and revising motions to exclude Defendant's rebuttal experts;

18 vv. reviewing, analyzing drafting oppositions to Defendant's evidentiary  
19 motion to exclude Dr. Sharp and Dr. Maronick;

20 ww. reviewing, analyzing and drafting oppositions to Defendant's four  
21 Motions *in Limine*;

22 xx. Drafting responses to Defendants' motions to exclude;

23 yy. researching and preparing a detailed mediation brief; attending  
24 mediation with the Honorable Charles (Tim) McCoy (Ret.) at JAMS;

25 zz. extensive settlement negotiations over a period of three months, both  
26 with and without the assistance of Judge West;

27 aaa. negotiating many details of the terms of settlement and the Settlement  
28 Agreement and exhibits thereto for months after a settlement in

1 principle was reached;

2 bbb. drafting and revising the motion for preliminary approval and  
3 supporting documents; performing legal research regarding approval  
4 of class action settlement;

5 ccc. communicating with defense counsel throughout the pendency of the  
6 litigation;

7 ddd. communicating with KCC regarding Settlement Class Notice, Claim  
8 Forms, Settlement Class Notice (including content, timeline,  
9 publications, internet notice), creating the Settlement Website,  
10 reviewing and negotiating cost estimates for same. Receiving and  
11 reviewing weekly reports regarding claims, opt-outs, website views  
12 and responding to various questions from unnamed class members;

13 eee. communicating with unnamed class members regarding the  
14 Settlement;

15 fff. drafting and revising the motion for final approval and supporting  
16 documents; performing legal research regarding approval of class  
17 action settlement; and,

18 ggg. drafting and revising the motion for attorneys' fees and costs and  
19 accompanying documentation.

20 112. Additionally, Class Counsel took care to ensure that there was no  
21 unreasonable overlap of tasks performed by counsel.

22 113. Provided below is a time report reflecting the total hours spent by Class  
23 Counsel and their support including their respective hourly rates and their lodestar as  
24 of March 12, 2020.

25

Name	Hours	Rate	Lodestar
<b>Richard D. Heideman (P)</b>	23.82	\$950.00	\$22,629.00

Name	Hours	Rate	Lodestar
<b>Noel J. Nudelman(P)</b>	558.93	\$850.00	\$475,090.50
<b>Tracy R. Kalik(P)</b>	887.09	\$750.00	\$665,317.50
<b>Ben Alkon (PL)</b>	74.76	\$200.00	\$14,952.00
<b>Keyauna Fogle(PL)</b>	19.40	\$200.00	\$3,880.00
<b>Gillian Wade(P)</b>	707.75	\$700.00	\$495,425.00
<b>Sara Avila ()</b>	913.25	\$550.00	\$502,287.50
<b>Andrew Whitman (A)</b>	603.00	\$295.00	\$177,885.00
<b>David Marin (PL)</b>	237.50	\$125.00	\$29,687.50

114. These rates are consistent with those charged by attorneys in the consumer law field within this Circuit and with similar levels of experience and should be deemed reasonable pursuant to the following authorities and approved rates in this Circuit. *See, e.g., Fitzhenry-Russell v. Keurig Dr Pepper Inc., et al*, Case No. 5:17- cv-00564 (N.D. Cal. Feb 03, 2017) (ECF Nos. 327-1, 350) (approving partner rates up to \$894 and associate rates up to \$658); *In re Toys R Us–Delaware, Inc.—Fair and Accurate Credit Transactions Act (FACTA) Litigation*, 295 F.R.D. 438, 462 (C.D.Cal.2014) (approving rates of between \$595 and \$600 for partners, \$220 to \$595 for other attorneys and associates, and \$95 to \$195 for paralegals); *Tom v. Com Dev USA, LLC*, No. 16CV1363PSGGJSX, 2017 WL 10378629, at \*8 (C.D. Cal. Dec. 4, 2017)(In Los Angeles, partners have an hourly rate ranging from \$400 to \$847, and associates from \$300 to \$595 citing the 2016 *Real Rate Report: Lawyer Rates, Trends, and Analysis* as a reasonable guidepost to assess the reasonableness of hourly rates in the Central District); *In re Optical Disk Drive Prod. Antitrust Litig.*, No. 3:10-md-2143 RS, 2016 WL 7364803, at \*8 (N.D. Cal. Dec. 19, 2016) (approving partner rates up to \$950 and associate rates up to \$605, holding that “these ranges are within

1 the ranges accepted by other Courts in this District and market surveys.”) (citation  
2 omitted.”); *Koller et al. v. Med Foods, Inc., et al.*, Case No. 3:14-CV-2400-RS (N.D.  
3 Cal. Aug. 29, 2018) (approving rates of \$950-\$975 for partners and \$77% for  
4 associate); *Kumar v. Salov North America Corp.*, Case No. 14-cv-2411 (N.D. Cal.  
5 Jul. 7, 2017) (approving rates of \$925-\$950 for partners and \$725 for associates);  
6 *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2015 WL 2438274, at  
7 \*5 (N.D. Cal. May 21, 2015) (approving partner rates up to \$975 and associate rates  
8 up to \$495 in a consumer class action).

9 115. In addition, these rates are consistent with the Laffey Matrix, available  
10 at [www.laffeymatrix.com](http://www.laffeymatrix.com). The Laffey Matrix is the primary tool for assessing legal  
11 fees in the Washington-Baltimore area. *See Save Our Cumberland Mountains v.*  
12 *Hodel*, 857 F.2d1516, 1525(D.C. Cir. 1988) (en banc)(The Laffey Matrix is very  
13 useful as a guide to Market Rate attorney fees for the Baltimore / Washington area.)

14 116. For 2019-2020, the Laffey Matrix prevailing rate for lawyers with 1-3  
15 years’ experience out of law school is \$372; for 4-7 years’ experience it is \$458; for  
16 8-10 years’ experience it is \$661; for 11-19 years’ experience it is \$747 and for  
17 lawyers with 20 or more years the prevailing rate is \$899. For paralegals and law  
18 clerks the prevailing rate is \$203.

19 117. All of the rates sought by HNK and MJFW for work by their attorneys  
20 and staff fall within the Laffey Matrix guidelines.

21 118. In California, a number of courts including in this District have cited the  
22 *Laffey* matrix as a means for determining whether hourly rates are in line with those  
23 prevailing in the community. *See Smith v. Cty. of Riverside*, No.  
24 EDCV16227JGBKX, 2019 WL 4187381, at \*2 (C.D. Cal. June 17, 2019)(citing  
25 *Weiss v. City of Santa Rosa Police Dep’t*, 2017 WL 1315850, at \*3 n. 1 (N.D. Cal.  
26 Apr. 10, 2017); *Ramirez v. Escondido Unified Sch. Dist.*, 2014 WL 12675859, at \*2  
27 (S.D. Cal. Apr. 17, 2014)

1 119. Furthermore, Class Counsel expended \$357,917.51 in out of pocket costs  
 2 and expenses associated with the prosecution of this case. Provided below is a  
 3 summary listing of the costs and expenses incurred by Class Counsel. These expenses  
 4 include fees for filing, legal research, courier and mailing services, expert expenses,  
 5 and deposition costs. These expenses do not include the costs and expenses that Class  
 6 Counsel expects to incur after the filing of the instant approval and award motions.  
 7

<b>AMOUNT</b>	<b>DESCRIPTION</b>
\$ 4,211.35	Total Filing Fees/Process Server Fees/Courtesy Copy Filings/Subpoenas
\$ 13,192.10	Total Research/Investigation Expenses
\$ 217,519.29	Total Professional Expenses (Experts/Consultants/Mediator)
\$ 23,250.97	Total Court Reporting/Deposition Expenses
\$ 30,379.57	Travel/Meal Expenses (External)
\$ 2,858.27	Total Production Copy Expenses
\$ 261.55	Total Telephone/Expenses
\$ 64,838.63	Total Class Certification Notice Expenses
\$ 969.14	Total Postage/FedEx Expenses
\$ 436.64	Miscellaneous Expenses
<b>\$357,917.51</b>	<b>Total Expenses</b>

25 120. The bulk of these costs (\$210,219.29) are attributable to expert witness  
 26 fees to Dr. Sharp (damages expert) and Dr. Maronick, J.D., D.BA (marketing  
 27 expert), as well as associated deposition expenses.  
 28

1           121. This expert work was necessary in two respects. First, Dr. Maronick's  
2 marketing expertise was relevant to the Class Certification Motion and was able to  
3 opine as to merits of alleged deceptive marketing to consumers based on the  
4 consumer surveys he was able to administer. Second, the onus was on Plaintiffs to  
5 proffer a viable method of calculating damages on a class-wide basis in order to  
6 obtain class certification. Dr. Sharp's damages analysis enabled Plaintiffs to  
7 intelligently evaluate the damages at issue, which was critical to Plaintiffs' ability to  
8 negotiate and secure preliminary approval of the class settlement.

9           122. Another out-of-pocket expense Class Counsel incurred was \$64,838.63  
10 to KCC for the cost of giving notice to the California class certified for litigation.

11           123. The remaining amount also includes costs for: (1) the numerous other  
12 depositions in this matter, including transcript and travel costs; (2) mediation fees,  
13 including travel costs; (4) filing and service fees; and (4) other typical costs such as  
14 printing, copying, and telephone charges.

15           124. Finally, in support of Plaintiffs' service awards, Ms. Alfandary and Mr.  
16 Elkies each spent significant time preparing for and enduring highly contentious day-  
17 long depositions (which occurred simultaneously), and spent tens of hours answering  
18 written discovery, searching for and collecting requested documents, reviewing case-  
19 related documents, and communicating with counsel to assist counsel in the  
20 development of their case.

21           125. Ms. Alfandary and Mr. Elkies, endured J&J's relentless pursuit of their  
22 daughters' pediatricians and medical information.

23           126. J&J sought, revealed, and scrutinized the medical information that was  
24 produced (which was narrowed by Court order from the broader scope J&J sought).  
25 Ultimately, the pediatricians were deposed and their daughters' medical information  
26 was revealed and painstakingly examined and analyzed during Ms. Alfandary's  
27 deposition, the pediatricians' depositions, and in motion practice, all for the benefit  
28 of the class.

1 I declare under penalty of perjury under the laws of the District of Columbia  
2 and the United States of America that the foregoing is true and correct.

3  
4 Executed on May 4, 2020 at District of Columbia.

5  
6 /s/ Noel J. Nudelman  
7 Noel J. Nudelman, Declarant