UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 17-7320-GW(JEMx)	Date	June 22, 2020
Title	*Rony Elkies, et al. v. Johnson and Johnson Services, Inc., et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Terri A. Hourigan	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Sara D. Avila Gillian L. Wade Tracy R. Kalik Noel J. Nudelman	Joseph R. O'Connor Matthew D. Powers Hannah Y. Chanoine

PROCEEDINGS: **PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT [175];**

PLAINTIFF'S MOTION FOR ATTORNEYS' FEES COSTS AND SERVICE AWARDS [176]

Court and counsel confer. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. The Court grants the request for final approval and the motion for fees, costs, and service award in full. Separate Order to issue.

: 02

Initials of Preparer JG

Elkies, et al. v. Johnson & Johnson Servs., Inc., et al., Case No. 2:17-CV-7320-GW-(JEMx)
Tentative Rulings on: (1) Motion for Final Approval of Class Action Settlement, and (2) Motion for Attorneys' Fees Costs and Service Awards

I. Background

Plaintiffs Rony Elkies and Danielle Alfandary ("Plaintiffs") move for final approval of a class action settlement, an award of attorneys' fees and costs to their attorneys (along with other disbursements from the settlement fund), and class representative "service awards" in this action they brought against defendants Johnson & Johnson Services, Inc. and Johnson & Johnson Consumer Inc. (collectively, "Defendants"). At the time of settlement, the operative complaint was the First Amended Class Action Complaint ("FAC"), which presented claims for violation of California's Consumer Legal Remedies Act, Unfair Competition Law, and False and Misleading Advertising Law. As the Court has previously summarized the case, it centers on allegations that Defendants manufacture, market and sell their own brand of pain reliever and fever reducer under the "Tylenol" label, including Infants' Tylenol ("Infants'") and Children's Tylenol ("Children's"), and that they make false and misleading statements, in their advertising of Infants', in order to induce consumers to purchase Infants' on a false premise, and fail to make material disclosures that Infants' is the same product as Children's. The parties have reached a settlement which provides for a $6.315 claim fund, along with injunctive relief.

A class was already certified in the case on October 19, 2018 (a decision the Ninth Circuit declined to review on appeal), *see* Docket Nos. 117-118, and notice to the class was disseminated in connection with that certification, *see* Docket Nos. 131-132. *See* Declaration of Gillian L. Wade in Support of Plaintiff's Motion for Final Approval and Motion for Attorneys' Fees and Costs ("Wade Decl."), Docket No. 175-1, ¶¶ 6-7; Declaration of Noel J. Nudelman in Support of Plaintiffs' Motion for Attorneys' Fees, Costs and Service Awards ("Nudelman Decl."), Docket No. 176-1, ¶¶ 38-41. Prior to that certification, Plaintiffs' case survived a pleadings challenge. *See* Docket Nos. 43, 54. The Court granted preliminary approval of this settlement on December 6, 2019, and notice of that preliminary approval and of this final hearing (and how to participate – or not – in it, along with how to object) was, as discussed further *infra*, disseminated. *See* Docket No. 172. At the time of that preliminary approval, the Court approved an expansion of the class definition, transforming it from only a California class to a nationwide class, explaining the reasons why that was appropriate in the settlement-based situation the Court confronted. *See* Docket No. 166, at pgs. 2-4 of 9.

II. Analysis

A. Jurisdiction

This Court has subject matter jurisdiction over this action based on the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2). *See* FAC ¶ 7. It also has personal jurisdiction over Defendants and all class members who have remained in the class. *See id.* ¶ 6.

B. Notice

Notice is adequate if it is "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1351 (9th Cir. 1980). The notice process the Court ordered and the parties implemented was multi-faceted, involving: a press release; publication of a summary notice in *Parents* magazine; distribution of notice on a variety of websites and social media platforms; a dedicated settlement website; a toll-free hotline; and publication of a summary notice in *Los Angeles Daily News* for four consecutive weeks. *See* Wade Decl. ¶ 16; Declaration of Carla A Peak Regarding Implementation of Settlement Notice Program and Claims Administration ("Peak Decl."), Docket No. 175-2, ¶¶ 3, 8-18, 20.

Here, the Court-approved class action settlement administrator reports that the notice program effectively reached at least 70% of likely class members via the consumer publication and digital media effort alone, and that the settlement website itself received over 2.2 million hits by May 1, 2020, with 839,528 claim form submissions via that website. *See* Peak Decl. ¶¶ 19, 28. In addition, as of May 1, 2020, the toll-free number had received a total of 2,676 calls. *See id.* ¶ 21. The notice program was clearly tremendously successful, because as of May 1, 2020, approximately 841,426 claim forms had been filed through postal male and the settlement website combined. *See id.* ¶ 22. Of those claims, 22 were received past the April 13, 2020, claim-filing deadline, and 118,175 claims were identified as duplicate submissions, resulting in a total of 723,229 valid claim forms. *See id.*

Ultimately, the Court has determined that the notice issued here was reasonably calculated to apprise interested parties of the pendency of this action and to afford them the opportunity to object. Such notice satisfies the due process requirements of the Fifth Amendment. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009); *Brown v. Ticor Title Inc.*, 982 F.2d 386, 392 (9th Cir.1992); *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 835 (9th Cir. 1976).

C. Certification of the Class

As mentioned above, the Court already certified a California class in this action, and that certification order withstood an attempted appeal. At the preliminary approval stage, the Court approved the parties' requested expansion of the class from a California class to a nationwide class. The class now certified as part of this final approval process is as follows:

> All individuals in the United States who purchased Infants' Tylenol for personal or household use since October 3, 2014 until January 6, 2020. Specifically excluded from the Class are (a) Defendants[;] (b) the officers, directors, or employees of Defendants and their immediate family[;] (c) any entity in which Defendants have a controlling interest[;] (d) any affiliate, legal representative, heir, or assign of Defendants[;] (e) all federal court judges who have presided over this Action and their immediate family; (f) all persons who have submitted a valid request for exclusion from the Class; and (g) those who purchased the Challenged Product for the purpose of resale or for use in a business setting.

Docket No. 175-3, at 1:12-21. The Court now makes final the certification (for settlement purposes) of that nationwide class, for the reasons addressed in connection with the earlier order certifying a California class and the Court's consideration of Plaintiff's motion for preliminary approval of the settlement. *See* Docket Nos. 117, 166.

D. The Merits of the Settlement

1. Legal Standards Governing Settlement

Settlement of a class action lawsuit requires court approval. *See* Fed. R. Civ. P. 23(e). The court must find that a proposed settlement is fundamentally fair, adequate, and reasonable. *See* Fed. R. Civ. P. 23(e)(2); *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). The Ninth Circuit previously instructed district courts that, in determining whether or not to approve a class settlement in accordance with Rule 23(e), the court could consider any or all of the following factors, if applicable:

> the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon, 150 F.3d 1011, 1026 (9th Cir. 1998); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir.1982); *see also Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1121 (9th Cir. 2020). That list was not intended to be exhaustive, and the court was required to consider the applicable factors in the context of the case at hand. *See Officers for Justice*, 688 F.2d at 625.

Recent amendments to Rule 23 of the Federal Rules of Civil Procedure has formalized the consideration somewhat further. Now, in order for a court to determine that a settlement is "fair, reasonable, and adequate," the court must first consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3)[1]; and

[1] Rule 23(e)(3) provides that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." Fed. R. Civ. P. 23(e)(3).

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). Clearly these rule-based mandatory considerations overlap with certain of the factors the Ninth Circuit previously established as permissible to consider.

Despite the importance of fairness, the court must also be mindful of the Ninth Circuit's policy favoring settlement, particularly in class action lawsuits. *See, e.g.*, *Officers for Justice*, 688 F.2d at 625 ("Finally, it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation . . . ."). While balancing all of these interests, the court's inquiry is ultimately limited "to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Id.* The court, in evaluating the agreement of the parties, is not to reach the merits of the case or to form conclusions about the underlying questions of law or fact. *See id.*

"It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon*, 150 F.3d at 1026. "The settlement must stand or fall in its entirety." *Id.* The court may not delete, modify, or rewrite particular provisions of a settlement. *See id.* "Settlement is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Id.* at 1027.

2. The Settlement is Fair

a. The Settlement Enjoys a Presumption of Fairness

Generally speaking, courts afford a presumption of fairness to a settlement, if: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004). *But see Roes, 1-2 v. SFBSC Mgmt., Inc.*, 944 F.3d 1035, 1049 n.12 (9th Cir. 2019) (calling into question this presumption after recent amendments to Rule 23(e)). Plaintiffs – who are represented by experienced counsel (including with respect to consumer class actions), *see* Wade Decl. ¶¶ 27-33; Nudelman Decl. ¶¶ 81-82, 84-93 – reached a settlement with the assistance of a mediator after fending off a challenge to the pleadings, certifying a class, and surviving an attempted appeal of that certification. *See* Wade Decl. ¶¶ 5-7, 12; Nudelman Decl. ¶¶ 9, 38-41, 48-53. A considerable amount of discovery informed their efforts, as discussed further below. There have been no proper objections filed in connection with the settlement, *see* Nudelman Decl. ¶ 70, and even if the Court were to consider the three responses counsel – but not the Court – received as qualifying as proper objections, that number pales in comparison to the over-700,000 valid claims made.

As a result of the foregoing, the Court has no doubt that a presumption of fairness operates with respect to this settlement. In any event, even if no presumption was in effect, this would not preclude the Court's determination that the settlement, in fact, meets the requisite fairness standard.

b. The Settlement is Fair, Adequate, and Reasonable

The Court will first consider the factors traditionally recognized by the Ninth Circuit, followed by a review of those factors now specifically mentioned in the amended Rule 23(e)(2).

i. The Strength of the Case

As noted, Plaintiffs' case survived a challenge at the motion-to-dismiss stage. *See* Docket Nos. 43, 54. In addition, Plaintiffs were successful in their quest for class certification. This is no guarantee that a factfinder would have found their case of alleged misrepresentations and/or omissions persuasive, of course, and Plaintiffs recognized that risk. Yet, Defendants were concerned enough about that prospect that they were willing to settle the case for over $6 million (in addition to injunctive relief).

Wherever the case ultimately falls along the relative-strength spectrum, the settlement obviously achieves certainty for a nationwide class of consumers and produces meaningful injunctive relief as well. Thus, this factor certainly does not *dis*favor a reasonableness finding.

ii. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

The expense and possible duration of the litigation should be considered in evaluating the reasonableness of a settlement. *See Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 458 (9th Cir.2000); *see also Nat'l Rural*, 221 F.R.D. at 526 ("[U]nless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results."). This lawsuit was filed in October 2017, survived a hard-fought pleadings-based challenge, and produced a certified class that survived an attempted appeal. There is, of course, no guarantee that the certified class would have remained certified. *See* Wade Decl. ¶ 23. Nor is there any guarantee that, now-certified, the class's claims would have survived further planned merits challenges, or ultimately convinced a factfinder and produced a workable damages model. *See* Wade Decl. ¶ 22. With a certified class, the risk of a loss is of course all the more impactful.

The lawsuit easily could have continued for several more years, both at the trial and appellate levels. Time and resources spent in all those endeavors would have delayed and likely diminished any future result Plaintiffs might have achieved on behalf of the class. Consequently, attorneys' fees could have eaten up a substantial portion of any eventual likely recovery figure.

Again, against all of this, the settlement offers the parties immediate and certain relief. This factor therefore weighs in favor of approving the settlement.

iii. The Risk of Maintaining Class Action Status Through-out Trial

Although the Court believes its decision to certify a California class in this action (prior to the expansion to a nationwide class for settlement purposes) was justified, and has the Ninth Circuit's refusal to consider the attempted appeal to inform that belief, there is no guarantee that further developments in the case would not have caused consideration anew of that conclusion. While the Court does not presently perceive a significant risk in that regard, this risk factor is certainly no worse than neutral with

respect to whether settlement should be approved.

iv. The Amount Offered in the Settlement

"Basic to [the process of deciding whether a proposed compromise is fair and equitable] in every instance…is the need to compare the terms of the compromise with the likely rewards of litigation." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). Thus, in determining whether the relief offered by way of settlement is fair, the Ninth Circuit has suggested that the Court compare the settlement to the parties' "estimates of the maximum [recovery] in a successful litigation." *See Dunleavy*, 213 F.3d at 459; *see also Rodriguez*, 563 F.3d at 965. *But see Lane v. Facebook, Inc.*, 696 F.3d 811, 823 (9th Cir. 2012) ("While a district court must of course assess the plaintiffs' claims in determining the strength of their case relative to the risks of continued litigation, it need not include in its approval order a specific finding of fact as to the potential recovery for each of the plaintiffs' causes of action.") (omitting internal citation).

The settlement makes available a $6.315 million claim fund (along with relevant, meaningful injunctive relief). *See* Nudelman Decl. ¶¶ 72, 75-76. Plaintiffs indicate that their damages expert calculated the best-case-scenario in a successful trial to produce a $2.41 per ounce price premium, or a blended rate of $3.89 per bottle. *See* Wade Decl. ¶ 24; *see also* Nudelman Decl. ¶ 55. Though the ultimate per-bottle/per-class member recovery is not large – as of now, only an estimated $0.73 per bottle, *see* Peak Decl. ¶ 22, meaning $5.11 for the 75% of claimants who requested the maximum seven bottle-recovery for claims with no proof of purchase, *see* Nudelman Decl. ¶ 73 – a significant reason for that result is that the settlement was popular enough to attract an amount of claimants far-exceeding everyone's expectations.

This enormous interest from the class only bolsters the Court's conclusion that the amount offered in the settlement is a factor reflecting a fair compromise and substantially-favoring approval of the settlement.

v. The Extent of Discovery Completed and the Stage of the Proceedings

Class plaintiffs must be armed with sufficient information about the case to have been able to reasonably assess strengths and value and to broker a fair class settlement. Here, in addition to proceeding through all the stages of this litigation mentioned above, the parties had completed merits discovery (including battling through numerous discovery-related disputes) and were all-but-finished with expert discovery at the time they reached settlement. *See* Wade Decl. ¶¶ 8-11; Nudelman Decl. ¶¶ 11-30, 35-37. The Court sees absolutely no reason to doubt that Plaintiffs were in a sufficient position to know the strengths (and weaknesses) of their case, its value, and whether or not the settlement figure "output" properly accounted for those "inputs."

vi. The Experience and Views of Counsel

In assessing the adequacy of the terms of a settlement, the trial court is entitled to, and should, rely upon the judgment of experienced counsel for the parties. *See Nat'l Rural*, 221 F.R.D. at 528 ("Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation") (internal

quotations and citations omitted). The basis for such reliance is that "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir.1995). Obviously, class counsel – who are experienced in this type and scale of litigation – consider the settlement to be fair, adequate and reasonable. *See* Nudelman Decl. ¶¶ 48-55, 71-72, 74-75, 77, 97-102; Wade Decl. ¶¶ 10, 12, 19-24.

This factor therefore weighs in favor of approving the settlement.

vii. The presence of a governmental participant

No governmental entity participated in the settlement of this case, though the settlement administrator provided notice to the U.S. Attorney General and the Attorneys General of each of the 50 states in which class members reside and the District of Columbia. *See* Peak Decl. ¶¶ 5-7. This factor is therefore neutral.

viii. The Reaction of the Members of the Class to the Proposed Settlement

"It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action [*sic*] are favorable to the class members." *Nat'l Rural*, 221 F.R.D. at 529. Here, at most, three individuals have objected (though, as explained below, the Court concludes those objections were procedurally improper, and therefore do not actually constitute objections), and only two opted out of the settlement. *See* Peak Decl. ¶¶ 24-25; Nudelman Decl. ¶ 70. In contrast, over 700,000 valid claims were made for monetary benefits from the settlement. Therefore, this factor fairly obviously strongly supports approving the settlement.

With respect to the responses received from the three particular class members, *see* Docket No. 177-1, as Plaintiffs note, those responses did not comply – in numerous respects – with the requirements for objecting set out plainly in the class notice. Moreover, those responses do not concern the reasonableness or adequacy of the settlement as a whole, but instead at most only take issue with individual recoveries. If any class members were dissatisfied in that regard, they had available to them the option of opting-out, which these three individuals did not select. As a result, the Court concludes that the responses do not constitute sufficient objections, and disregards them (though it would not be persuaded by them even if it considered their merits).

ix. Adequate Representation of the Class (Rule 23(e)(2)(A)

As discussed further elsewhere herein, both Plaintiffs and their counsel fought this litigation aggressively, both through the pleadings, discovery and class certification. The Court has no hesitation in concluding that they adequately represented the class.

x. Arm's-Length Negotiation (Rule 23(e)(2)(B)

There is no reason for the Court to suspect, much less conclude, that the instant settlement was in any way the product of collusion. The parties achieved settlement after significant challenges to the pleadings, after certification of a class, after an unsuccessful appeal of that certification, after the completion of merits discovery, nearing completion

of expert discovery, with the aid of a mediator, and after several months of negotiations following an agreement-in-principle (with the mediator's continued help). *See* Wade Decl. ¶¶ 5-12; Nudelman Decl. ¶¶ 9, 11-30, 35-41, 48-53. There will be no reversion of any uncashed checks, *see* Nudelman Decl. ¶ 72, with any remaining amounts being directed to Nurse Family Partnerships (which the Court concludes is a suitable *cy pres* recipient).

xi. Adequate Relief for the Class (Rule 23(e)(2)(C)

The Court has already considered above "the costs, risks, and delay of trial and appeal."

With respect to "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," the parties' notice and administration design and procedures have worked remarkably well, producing over 700,000 valid claims, with an easy-to-use claim form, *see* Peak Decl., Exh. 8, a simplified-calculation for a per-bottle recovery and a minimum number of bottles that a class member can recover for without need for proof of purchase. Plaintiffs indicate in their supporting brief that payments will be disbursed directly to eligible claimants. *See* Docket No. 175, at 20:14-15. Again, while the ultimate per-bottle figure is smaller than originally anticipated, that is a result of an overwhelming number of claims being made. It is not a product of a flaw in the settlement.

"[T]he terms of any proposed award of attorney's fees, including timing of payment" will be discussed further in connection with the Court's consideration of the attorney's fee motion, *infra*. However, Plaintiffs' counsel seeks no more than class action attorneys normally seek in connection with settlements of such cases – 33% (and here, as discussed below, the Court actually concludes that such a figure is warranted, unlike many of the class cases it handles). As for timing, fees will not be paid to Plaintiffs' counsel until after the "Effective Date," post-dating both the entry of a final judgment and any appeals process. There is nothing here to trouble the Court in connection with a determination that the settlement is fair, adequate and reasonable.

Finally, other than the settlement agreement (and a later stipulated amendment), Plaintiffs report that there is no agreement made in connection with the proposal.

xii. Equitable Treatment of Class Members (Rule 23(e)(2)(D)

All class members will receive the same per-bottle amount. Those who are able to satisfactorily document their purchases can recover for the total number of purchases they can demonstrate, while all those who cannot may still recover for up to seven bottles. The only class members who are treated differently are the two named plaintiffs, who seek "service awards." Those awards are well-established as legitimate in the Ninth Circuit, and there is no decision post-dating the amendments to Rule 23 which suggest that they are no longer appropriate due to Rule 23(e)(2)(D).

c. Conclusion re Reasonableness of Settlement

Upon consideration of the above-stated factors, the Court easily concludes that the settlement reached in this case is reasonable, fair and adequate. It therefore grants the motion for final approval of the settlement.

3. Attorneys' Fees and Expenses

Plaintiff's' counsel moves for approval of their request for $2,083,950 in attorneys' fees, representing 33% of the settlement amount, reimbursement of $357,917 in litigation costs, $516,000 in settlement administration expenses, and "service awards" of $4,000 for each of the two class representatives. *See* Nudelman Decl. ¶¶ 3-6.

It is well established that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of [its] litigation, including attorneys' fees." *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *see also Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liability Litig.)*, 654 F.3d 935, 941 (9th Cir. 2011). This rule, known as the "common fund doctrine," is designed to prevent unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of the litigants and their counsel. *See Paul, Johnson, Alston, & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989).

Where jurisdiction is based upon diversity, California law controls whether an attorney is entitled to fees and the method of calculating such fees. "California has long recognized, as an exception to the general American rule that parties bear the costs of their own attorneys, the propriety of awarding an attorney fee to a party who has recovered or preserved a monetary fund for the benefit of himself or herself and others." *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 488-89 (2016). In awarding fees in connection with a common fund, courts generally use either a percentage method or a "lodestar" method. "The choice of a fee calculation method is generally one within the discretion of the trial court, the goal under either the percentage or lodestar approach being the award of a reasonable fee to compensate counsel for their efforts." *Id.* at 504. In *Lafitte*, the California Supreme Court affirmed a trial court's decision to employ the percentage-of-the-fund method with a "lodestar cross-check" (without *requiring* a lodestar cross-check). *See id.* at 488, 503, 506.

In the Ninth Circuit, use of the percentage method in common fund cases appears to be dominant. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir.); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson*, 886 F.2d at 272. The advantages of using the percentage method have been described thoroughly by other courts, and need not be repeated here. *See, e.g., In re Activision Sec. Litig.*, 723 F.Supp. 1373, 1374-77 (N.D.Cal.1989) (collecting authority and describing benefits of the percentage method over the lodestar method). The ultimate goal under either method of determining fees is to reasonably compensate counsel for their efforts in creating the common fund. *See Paul, Johnson*, 886 F.2d at 271-72.

All of the factors that district courts in the Ninth Circuit normally consider weigh here in favor of awarding counsel the sizable fee award they request (which actually amounts to a *negative* lodestar multiplier).[2] Counsel took up a case, on contingency, that

[2] The Ninth Circuit has approved a number of factors which may be relevant to the district court's determination: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. *See Vizcaino*, 290 F.3d at 1048-50. *Laffitte* presents these factors as ones to take

depended on their ability to ultimately convince a factfinder that representations were misleading, omissions were material, and that these representations/omissions caused injury. *See* Wade Decl. ¶¶ 19-21; Nudelman Decl. ¶¶ 94-102. None of these tasks were foolproof. They had to overcome significant challenges at multiple stages of the litigation, along with the costly and time-consuming course of near-complete discovery efforts. *See* Wade Decl. ¶ 26; Nudelman Decl. ¶¶ 11-30, 35-37. The risk was relatively high, the expense was enormous, and the total result achieved for the class – with no possibility of reversion to Defendants, *see* Nudelman Decl. ¶ 72 – is deserving of reward, even if the per-bottle recovery wound up being relatively small due to the overwhelming positive claims-response. This is especially true considering that the monetary portion of the settlement is just that, a *portion* – counsel also obtained significant injunctive relief as a result of their efforts. That counsel performed all this work on a contingency basis (for nearly two years) is an always-risky practice, particularly in a case that had to survive the number of challenges, and incur the amount of expenses, as this one did. Here, with all this in mind, the Court believes that 33% of the common fund is a well-deserved percentage-figure. In performing a non-mandatory lodestar cross-check, the Court concludes that the amount of time counsel actually spent on this litigation – which, as noted, would result in a negative lodestar multiplier – was reasonable, as are their rates. *See* Wade Decl. ¶¶ 26-39; Nudelman Decl. ¶¶ 103-05, 108-18.

The Court further notes that none of the three written responses from class members to the settlement – which, as noted above, the Court does not accept as proper objections – mention the requested attorneys' fees. Yet, the class notice specifically revealed that class counsel would request up to $2,083,950 in fees. *See* Nudelman Decl. ¶ 68; Docket No. 169-1, Exhs. C, E. In addition, Plaintiffs filed the fee motion *before* the final date for class members to submit objections such that class members had a full opportunity to examine their fee application. *See* Wade Decl. ¶ 18.

For all of the foregoing reasons, a 33% award – in the amount of $2,083,950.00 – appears warranted here.

Counsel also requests reimbursement in the amount of $357,917.00 in litigation costs.[3] *See* Nudelman Decl. ¶ 119. This is *less* than the $385,000 figure that counsel might have requested under the terms of the settlement agreement (and revealed in the class notice). *See* Docket No. 169-1, Exhs. C, E. There does not appear to be any reason these expenses should not be reimbursed. They were reasonably incurred in connection with services that are, in this Court's experience, customarily billed to clients. *See* Nudelman Decl. ¶¶ 119-23. And, again, the Court received no objections as to this issue. *See* Nudelman Decl. ¶ 70.

Counsel also requests disbursement of $516,000 in settlement administration costs (which was the maximum amount revealed to be potentially requested in the settlement agreement and class notice). *See* Nudelman Decl. ¶ 68; Docket No. 169-1, Exhs. C, E. Given the large number of claims in the settlement, the settlement administrator advises

---

into consideration under the lodestar approach in deciding whether to apply a positive or negative "multiplier." 1 Cal.5th at 489.

[3] According to the settlement administrator, the notice process for the class-certification notice alone cost $64,838.63. *See* Peak Decl. ¶ 26.

that the full $516,000 allocated under the settlement agreement will be required to reimburse the costs it has incurred. *See* Nudelman Decl. ¶ 27.

Finally, the fee motion also asks for service awards for the two named Plaintiffs in the amount of $4,000 each. This too was disclosed in the notice sent out to the class, *see* Nudelman Decl. ¶ 68 & Docket No. 169-1, Exhs. C, E, and, again, there were no objections addressing this issue. *See* Nudelman Decl. ¶ 70.

The decision whether to award an incentive payment to a class representative, and the size of that award, is entirely within the trial court's discretion. *See, e.g.*, *Dunleavy*, 213 F.3d at 458, 462. The criteria courts may consider in determining whether to make an incentive award include:

> (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation and; (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

Van Vranken v. Atlantic Richfield Co., 901 F.Supp. 294, 299 (S.D. Cal. 1995). The Court believes that the amounts requested are well-warranted here, despite the considerably-lower recovery for the class members. Plaintiffs were obviously catalysts for this action, and spent the time and committed the effort – including via their participation in discovery – necessary to initiate it and see it through. *See* Nudelman Decl. ¶ 124. But in addition to the normal difficulties and inconveniences class representatives face, here they also had to withstand Defendants' aggressive attempts to procure their daughters' pediatricians and medical information. *See* Nudelman Decl. ¶¶ 125-26. In addition, $4,000 is on the low-end for such awards, in this Court's experience (though, of course, there are *two* such awards here).

The dearth of opposition from class members perhaps speaks most loudly in favor of approving the fee, litigation cost, settlement administration cost and service award requests. Therefore, the Court should grant the motion in full.

III. Conclusion

For the reasons stated above, the Court grants the request for final approval and the motion for fees, costs, and service award in full. Unless there is an objection raised at the June 22, 2020 hearing on the motions, the Court will sign off on the proposed Final Settlement Order and Judgment (Docket No. 175-3).