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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID WILSON, individually and on behalf of all others similarly situated, Plaintiff, v. AIRBORNE, INC., AIRBORNE HEALTH, INC., KNIGHT-MCDOWELL LABS, THOMAS "RIDER" MCDOWELL, VICTORIA KNIGHT-MCDOWELL, and DOES 1-100, inclusive, Defendants.	Case No. EDCV 07-770-VAP (OPx) **[Motions filed on May 19, 2008, and May 30, 2008]** **ORDER (1) GRANTING MOTION FOR FINAL APPROVAL OF SETTLEMENT, (2) GRANTING IN PART MOTION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES, AND (3) GRANTING IN PART MOTION FOR INCENTIVE AWARD TO PLAINTIFF**

Plaintiff's Motion for Final Approval of Settlement, Motion for Attorneys' Fees and Litigation Expenses, and Motion for Incentive Award to Plaintiff came before this Court for hearing on June 16, 2008. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court GRANTS the Motion for Final Approval of Settlement, GRANTS in part

the Motion for Attorneys' Fees and Litigation Expenses, and GRANTS in part the Motion for Incentive Award to Plaintiff.

I. BACKGROUND

A. Procedural History

Plaintiff David Wilson filed a Complaint in California Superior Court for the County of San Bernardino on May 17, 2006. The Complaint alleged state law claims against Defendants Airborne Inc., Airborne Health, Inc., and Knight-McDowell Labs, based on their allegedly misleading and deceptive advertising for Airborne, a nutritional supplement. According to the Complaint, Airborne's packaging and advertising falsely promised "100% Satisfaction Guaranteed," (Compl. ¶ 15), and touted Airborne as a "Miracle Cold Buster," (Compl. ¶ 15), that can ward off a cold after its onset. (Compl ¶ 18.) Defendants also were alleged to rely on the results of a clinical study, even though it was conducted by persons who were not scientists or doctors and who were paid by Defendants. (Compl. ¶¶ 22-24.)

Plaintiff Wilson brought the Complaint on behalf of a class of persons who "purchased the Airborne Cold Remedy, and who (1) resided in California during the Class Period; (2) purchased the Product while located in California; or (3) purchased the Product from a source in

California." (Compl. ¶ 30.) The Class Period was defined as the four-year period before the filing of the Complaint, or May 17, 2002, through May 17, 2006. The Complaint alleged causes of action for: (1) violation of the Consumer Legal Remedies Act, Cal. Civ. Code section 1750; (2) violation of the Unfair Competition Act, Cal. Bus. & Prof. Code section 17200; (3) negligent misrepresentation; (4) untrue and misleading advertising in violation of Cal. Bus. & Prof. Code section 17500; (5) unjust enrichment; (6) breach of implied warranty; (7) constructive fraud; and (8) deceit.

Wilson filed a First Amended Complaint ("FAC") on August 30, 2006, continuing to allege claims on behalf of a California class. The FAC narrowed the class definition to include only persons who purchased the Airborne Cold Remedy "while residing in California during the Class Period," between May 17, 2002, and May 17, 2006. (FAC ¶ 33.) The FAC also dropped the claims for negligent misrepresentation, constructive fraud, and deceit. The FAC named as new Defendants Airborne Holdings, Inc., and the founders of Airborne, Thomas Rider McDowell and Victoria Knight-McDowell. Defendants responded by filing a demurrer and a motion to strike on October 10, 2006, and a joinder on January 30, 2007.

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On May 24, 2007, Plaintiff filed a Second Amended Complaint ("SAC") in California Superior Court, and for the first time made claims on behalf of a nationwide class of Airborne purchasers. The SAC defined the class as "[a]ll persons who purchased Airborne while residing in the United States, from May 17, 2002, to the present." (SAC ¶ 58.) The SAC also defined a subclass, "comprising all class members who are 'consumers' within the meaning of California Civil Code section 1761(d)." (SAC ¶ 58.) The SAC stated causes of action for: (1) a declaration that the two individual Defendants are not shielded from liability by Airborne's corporate form; (2) violation of the Consumer Legal Remedies Act, Cal. Civ. Code section 1761; (3) violation of the False Advertising Law, Cal. Bus & Prof. Code section 17500; (4) violation of the Unfair Competition Law, Cal. Bus. & Prof. Code section 17200; and (5) unjust enrichment.

Defendants removed the case to this Court on June 22, 2007, under the removal provisions of the Class Action Fairness Act, 28 U.S.C. section 1453. (Docket No. 1.)

On August 29, 2007, the parties filed a Joint Motion for Order Granting Preliminary Approval of Settlement (Docket No. 24), along with supporting declarations and exhibits. On the same day, the parties also filed a Joint Motion for Injunction (Docket No. 30), requesting

an order enjoining parallel litigation in the United States District Court for the District of New Jersey. On September 24, 2007, the Court held a hearing on the Motions and requested additional briefing by the parties concerning their settlement agreement. By Order dated November 28, 2007, the Court denied the request to enjoin the New Jersey litigation. (Docket No. 116.) By Order dated November 29, 2007 ("Preliminary Approval Order," Docket No. 117), the Court granted preliminary approval to the parties' settlement agreement, provisionally certified a class for settlement purposes, approved the proposed form and manner of notice to class members, and set a schedule for final approval.

On May 19, 2008, Plaintiff filed a Motion for Attorneys Fees and Litigation Expenses ("Fee Motion," Docket No. 135) and Motion for Incentive Award to Plaintiff ("Incentive Award Motion," Docket No. 132). In support of the Fee Motion, Plaintiff also filed a Memorandum of Points & Authorities ("Fee Mem. P. & A.," Docket No. 135)[1] and the declarations of Jeffrey L. Fazio ("Fazio Decl.," Docket No. 136) and Stephen Gardner ("Gardner Decl.," Docket No. 133). In support of the

[1]On May 21, 2008, Plaintiff filed an "Erratum Re Memorandum of Points and Authorities in Support of Motion for Award of Attorney Fees and Litigation Expenses" (Docket No. 141). The Court's citations herein to Plaintiff's Memorandum of Points and Authorities are to the corrected version filed on May 21.

Incentive Award Motion, Plaintiff filed his own declaration ("Wilson Decl.," Docket No. 132). In support of both Motions, Plaintiff filed the declaration of Melissa M. Harnett ("Harnett Decl.," Docket No. 134).

On May 30, 2008, Plaintiff filed a "Motion and Memorandum of Points and Authorities in Support of Final Approval of Settlement ("Settlement Approval Motion," Docket No. 146), along with the declarations of Katherine Kinsella ("Kinsella Decl.," Docket No. 147), Eric C. Hudgens ("Hudgens Decl.," Docket No. 148), Richard M. Pearl (Docket No. 149), and Dina E. Micheletti (Docket No. 150).[2] Also on May 30, 2008, Defendants filed a "Memorandum of Law in Support of Final Settlement Approval" ("Def.'s Brief," Docket No. 144) and the declaration of Lucy Morris (Docket No. 145).

Two persons have filed with the Court objections to the Settlement Approval Motion and Plaintiff's request for attorneys' fees. On May 19, 2008, objectors Kervin M. Walsh and Joel Shapiro, appearing through their respective counsel, filed objections to approval of the settlement and the award of attorneys' fees ("Walsh

[2]On June 2, 2008, Plaintiff filed an Erratum providing the exhibits to the Pearl Declaration, which had been omitted from the initial filing. (Docket No. 153.)

Objections," Docket No. 139, and "Shapiro Objections," Docket No. 140).[3]

Plaintiff filed a "Consolidated Response to Objections to Settlement Agreement" ("Pl.'s Response," Docket No. 151) on May 30, 2008.[4] On June 13, 2008, objectors Joel Shapiro and Kervin M. Walsh each filed a Reply.[5] [Docket Nos. 160, 161 ("Shapiro Reply").]

B. Terms of Settlement Agreement

The parties' settlement agreement provides that Defendants will create a $23.25 million non-reversionary settlement fund.[6] (Settlement Agreement at 13, ¶ 2(a).)

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[3]On May 21, 2008, objectors Denise Fairbank and Falicia Estep attempted to file their objections, but their filings were rejected for failure to file electronically pursuant to General Order 08-02. (Docket No. 143.)

[4]On June 2, 2008, Plaintiff filed an Erratum to correct the absence of a table of authorities in his original Response. (Docket No. 153.)

[5]On June 12, 2008, Denise Fairbank filed a Reply to Plaintiff's Response (Docket No. 159), despite her failure properly to file an objection with the Court. Nevertheless, Plaintiff has responded to Fairbank's objections, and Fairbank's counsel appeared at the June 16, 2008, hearing on the Motions. The Court therefore considers Fairbank's objections as set forth below. Fairbank's objections are included as Exhibit H to the Hudgens Declaration ("Fairbank Objections," Docket No. 148).

[6]A copy of the parties' "Stipulation and Agreement of Settlement" was provided to the Court in connection with their joint Motion for preliminary approval of the settlement. [See Declaration of Melissa M. Harnett in Support of Joint Motion for Order Granting Preliminary

(continued...)

Eligible class members who submit claims can be reimbursed for the purchase price of any Airborne product with a proof of purchase. (Id. at 15.) Class members who do not have proofs of purchase can be reimbursed for the purchase price of up to six packages of Airborne. (Id. at 15.) If the claims submitted by the end of the claims period indicate that this initial fund will be depleted, Defendants will deposit an additional $250,000 to pay valid claims. (Id. at 13, ¶ 2(b).)

If the claims made exceed the available settlement funds, the funds are to be distributed pro rata to claimants. (Id. at 15.) Conversely, if settlement funds remain after the payment of claims, the parties have agreed to cy pres distribution to non-profit organizations suggested by the parties and approved by the Court. (Id. at 16.)

The settlement agreement also calls for class counsel's fees and expenses to be paid from the settlement fund. (Id. at 26.) The agreement provides that class counsel may apply to the Court for a fee and expense award not to exceed 25 percent of the gross settlement fund, after deduction of tax payments, plus a pro rata share of interest, dividends, and other

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[6](...continued)
Approval of Settlement (Docket No. 37), Ex. 3 ("Settlement Agreement").]

distributions accrued by the fund. (Id. at 26.) Defendants' counsel agreed not to oppose the fee application.

The settlement allows for an incentive payment to the named Plaintiff, David Wilson, in an amount to be approved by the Court, but not to exceed $10,000. (Id. at 15.) Defendants will pay this amount separately, and in addition to, the amount deposited in the settlement fund for the payment of claims. (Id. at 15.)

Though the SAC sought injunctive relief requiring Airborne to change its packaging and advertising, the settlement agreement makes no provision for such changes. Instead, the parties agreed to defer to any equitable relief that may result from ongoing administrative inquiries by the Federal Trade Commission and various state attorneys general. (Id. at 22, ¶ 5(a).) Defendants have represented that they are close to entering into a settlement with government authorities. (Defs.' Brief at 1 n.1.)

Finally, Defendants agreed to pay for the costs associated with giving notice to class members and administering the settlement fund. (Id. at 29.)

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II. DISCUSSION

A. Motion for Final Approval of Settlement

Rule 23 of the Federal Rules of Civil Procedure provides that the "claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). Rule 23(e) further states: "If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

1. Notice to the class

As an initial matter, the Court finds that class members received adequate notice of the pendency of the action and the preliminary approval of the settlement agreement. As set forth in the Declaration of Kathleen Kinsella, notice to the class was disseminated via print media advertisements in large-circulation publications, including in-flight travel magazines, and online advertisements. (Kinsella Decl. ¶¶ 24-35.) Where possible, direct notice was sent to identifiable class members. (Id. ¶ 23.) Notice also was provided online at www.AirborneHealthSettlement.com. (Id. ¶ 36.) Finally, though it was not part of the plan for disseminating notice, initial media coverage of the settlement agreement provided additional opportunities for class members to learn about the settlement. (Id. ¶ 40.) The

measurements used to estimate the reach of the print and Internet advertisements suggest that 80 percent of adults learned of the settlement. (Kinsella Decl. ¶ 38.)

The Court finds these notice procedures provided "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B).

Objector Shapiro has raised a concern that the settlement class did not receive adequate notice of the Fee Motion, as required by Rule 23(h). (Shapiro Objections at 3-4.) That Rule provides:

> In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. . . . A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

Fed. R. Civ. P. 23(h)(1). Here, print media advertisements informed potential settlement class members that the proposed settlement fund included the amount from which court-awarded attorneys' fees would be

paid, and that the proposed settlement would come before the Court for a hearing on June 16, 2008. (Kinsella Decl. ¶ 24 & Ex. 2.) Where settlement class members could be contacted directly, the notice they received stated that up to 25 percent of the proposed settlement fund could be approved by the Court for attorneys' fees, and that the Court would consider the amount of any attorneys' fee award at the June 16, 2008, hearing. (Kinsella Decl. ¶ 23 & Ex. 1 at ¶¶ 7, 15.)

The Court finds the parties provided notice of the attorneys' fees request in a "reasonable manner," as required by Rule 23(h)(1). Where, as here, settlement class members are retail purchasers of Defendants' consumer product, whose identities and contact information cannot readily be ascertained, the summary nature of the information provided by the parties in their print media advertisements was reasonable. In the cases Objector Shapiro attempts to distinguish from this one, the classes comprised current and former employees of the defendants and securities investors. (Shapiro Reply at 4-5); see Bessey v. Packerland Plantwell, Inc., No. 4:06-cv-95, 2007 WL 3173972, *1 (W.D. Mich. Oct. 26, 2007); In re Bisys Secs. Litig., No. 04 Civ. 3840(JSR), 2007 WL 2049726 (S.D.N.Y. July 16, 2007). Contact information for the class members in those cases presumably could be ascertained more readily than the

potential class members here. Furthermore, Shapiro's objection does not specify how knowing Plaintiff's counsel's precise hourly billing rates or number of hours billed would have altered materially his ability to object to the overall amount of attorneys' fees available under the settlement agreement.

The Court therefore overrules the objections to the adequacy of the notice made by Shapiro. The Court further overrules the objections to the adequacy of notice made by Objector Walsh, who provided no authority for his assertion that the notice should have included information such as the size of the class or the dollar amount of Defendants' products sold during the class period. (Walsh Objections at 2.)

2. Certification of a settlement class

In its Preliminary Approval Order, the Court provisionally certified a nationwide settlement class for purposes of disseminating notice. No arguments against class certification have been raised, and the Court finds that final certification of the class is appropriate.

The class members satisfy the applicable criteria for class certification under Federal Rule of Civil Procedure 23(a) and 23(b)(3). See also Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) (addressing class

certification for settlement purposes). The numerosity requirement is met based on the hundreds of thousands of claims made in this case to date. Fed. R. Civ. P. 23(a)(1); Hudgens Decl. ¶ 29. The class members share common issues of law and fact, including the content of Airborne's packaging and its alleged deceptive nature. Fed. R. Civ. P. 23(a)(2). The named Plaintiff's claims, arising from his use of Airborne as set forth in his declaration, are typical of the claims that other class members would raise. Fed. R. Civ. P. 23(a)(3); Wilson Decl. Both the named Plaintiff and his counsel have demonstrated that they will fairly and adequately represent the interests of the class, by their vigorous investigation and litigation of this case. Fed. R. Civ. P. 23(a)(4). Finally, in light of the size of the class, common issues predominate over class members' individual issues, and resolution of the common claims in a class action case provides a superior method of adjudication. Fed. R. Civ. P. 23(b)(3).

Accordingly, the Court certifies the proposed class for settlement purposes.

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3. Fairness, reasonableness, and adequacy of settlement agreement

In determining whether a settlement agreement's terms are fair, reasonable, and adequate, courts balance several factors, including:

> the strength of 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.

Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1291 (9th Cir. 1992). The Ninth Circuit has recognized the "overriding public interest in settling and quieting litigation," which is "particularly true in class action suits." Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976). The Court must give "proper deference to the private consensual decision of the parties," Hanlon v. Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir. 1998), while also fulfilling its role as a guardian for absent class members who will be bound by

the settlement. Ficalora v. Lockheed Cal. Co., 751 F.2d 995, 996 (9th Cir. 1985).

Based on the analysis of relevant factors set forth below, the Court finds the parties' settlement agreement to be fair, adequate, and reasonable.

a. Arms-length negotiations

The Court finds that the settlement agreement is the result of arms-length negotiations between experienced counsel who thoroughly researched the legal issues and understood the relevant facts. As recounted by Plaintiff's counsel, Jeffrey Fazio, in support of the request for attorney's fees, it was not clear at the outset that the parties would reach a settlement agreement. (Fazio Decl. ¶¶ 96-101, 142.) In the period between execution of a memorandum of understanding and the completion of a final agreement, differences of opinion arose that risked Defendants' rejection of the proposed terms. (Id. ¶¶ 150-51.) The mediator who presided over the parties' day-long session also described the hard-fought nature of the negotiations. (Fazio Decl. Ex. 2.) The absence of collusion supports approval of the settlement as fair, adequate, and reasonable.

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b. Strength of case, and expense and duration of further litigation

Though Plaintiff's counsel believe they could prevail on the merits at trial, they face some significant legal and procedural hurdles that could preclude a trial. The issue of federal preemption, under the Food, Drug, and Cosmetic Act, remains in flux before appellate courts. (Settlement Approval Mot. at 12-13.) The certification of a nationwide class bringing claims under California law would also have to be addressed. Continuing with the litigation would require Plaintiff's counsel, on behalf of the class, to address complex legal and procedural issues without guarantee of success. This further supports approval of the parties' settlement.

c. Extent of discovery completed

Defendants have produced some 600,000 documents, and Plaintiff's counsel also reviewed information concerning Airborne sales revenue in connection with the settlement negotiations. (Settlement Approval Mot. at 15.) Plaintiff's counsel provided the revenue information to the Court, under seal, as part of the preliminary settlement approval process. The discovery conducted supports a conclusion that the parties entered into the settlement agreement with enough information concerning the facts of the case to support a fair, adequate, and reasonable compromise.

d. Experience and views of counsel

Counsel for the class have established their experience in class action litigation, and their support of the settlement supports final approval. (Fazio Decl. ¶ 25; Gardner Decl. ¶ 12; Harnett Decl. ¶¶ 14-18.)

e. Reaction of class members

The claims administrator has received 419,606 claims through May 25, 2008, with an aggregate face value of $21.7 million. (Hudgens Decl. ¶ 29.) More than 100,000 of these claims appear to have been made falsely, however, because they are based on the purchase of Airborne products that either were not on the market at the time of the claimed purchase, or were not available in the geographic area of the claimed purchase. (Id. ¶¶ 23-26.) An additional group of claims, approximately 40,000, request reimbursement for more than the six boxes of Airborne allowed by the settlement agreement without proofs of purchase. (Id. ¶ 28.) Though the claims administrator is still sorting out these issues, it has provided 282,717 as the total number of claims that have not been rejected and are not subject to follow-up auditing. (Id. ¶ 29.) When the $6.8 million value of the false claims is subtracted from the initial $21.7 million face value of the claims, the result is $14.9 million in claims made on the $23.25 million initial settlement fund. (Id.)

The claims administrator has received 230 timely requests to opt out of the settlement, and 2 requests submitted after the May 12, 2008, deadline. (Id. ¶ 17 & Ex. D.) The claims administrator also has received 17 objections submitted personally by potential class members, who did not file their objections with the Court as required by the Preliminary Approval Order. Two objectors have filed their objections with the Court. (Id. ¶ 18 & Ex. E; Walsh Objections; Shapiro Objections)

In absolute numbers, the objections and number of potential class members requesting to opt out of the suit are small compared with the 282,717 class members who have filed apparently valid claims to date. Though these numbers indicating support of the settlement by class members weigh in favor of approval of the settlement, the Court also considers the specific objections that have been made.

i. Objections by potential class members without counsel

The majority of the 17 objections submitted by potential class members address the filing of the lawsuit, or the objector's support for Airborne, rather than the fairness or adequacy of the settlement terms. (Hudgens Decl. Ex. E.) One objector, for example, wrote a letter stating, "I object to this suit." (Id. at 1.)

Another potential class member objected to the "superfluous class action lawsuit." (Id at 3.) The Court therefore overrules all of the objections making similar statements, (Hudgens Decl. Ex. E at 1-16), on the ground that they do not object to the settlement terms, and separately addresses the two remaining objections.

One of the two remaining objections, attached as page 17 to Exhibit E of Mr. Hudgens's declaration, does not include the name of the objector. Moreover, the objections raised appear to be addressed adequately by the settlement agreement and the parties. The objector's first concern that fraudulent claims may be filed, because proofs of purchase are not required for up to six boxes, has been addressed by the use of Rust Consulting, an experienced claims administrator. As set forth in Mr. Hudgens's declaration, the claims administrator used its experience in setting the available refund without proof of purchase at six boxes while cognizant of the risk of fraudulent claims. Rust Consulting also has rejected and audited apparently fraudulent claims and appears to be reviewing the claims with appropriate rigor. (See Hudgens Decl. ¶¶ 23-26, 28.) Airborne also has responded to the objector's concern that he submitted his proofs of purchase to Airborne for a rebate program, thereby precluding him from using those proofs of purchase to submit a claim to the settlement fund for more than six

boxes. The objector, and others in the same position, may obtain copies of their proofs of purchase from Airborne, which has retained those documents. (Pl.'s Response at 5.) The Court therefore overrules these objections.

Another objector, Jarrod Joseph LaMothe, suggests that the maximum recovery per claimant should be one package of Airborne, since each package contains multiple tablets. (Hudgens Decl. Ex. E at 18.) After purchasing one package, a class member would be able to determine whether he or she had been misled by any allegedly false claims and could then cease using the product. (Id.) Mr. LaMothe argues that class members therefore should not be reimbursed for more than one package of Airborne. (Id.) The Court overrules this objection. The legal remedies sought by Plaintiff in this case included restitution, disgorgement, and punitive damages. (SAC at 30.) By entering into a settlement agreement to resolve the claims of the SAC, the parties reasonably could have used the purchase price of multiple boxes of Airborne as a measuring stick to determine a fair settlement. In other words, the parties were not limited to a settlement encompassing only the amount of Airborne a class member may have been induced to purchase by allegedly misleading claims.

ii. Objections raised through counsel

Objector Shapiro argues that the settlement is inadequate, because it does not provide for equitable relief and defers to government agencies on this issue. (Shapiro Objections at 2.) The Court raised a similar concern during the preliminary settlement approval process, and has been satisfied that a release of claims on behalf of the class without obtaining equitable relief was reasonable. Defendants represent that they are in the process of negotiating an agreement with the Federal Trade Commission that would include equitable relief. (Def.'s Brief at 1 n.1.) Shapiro's objection on this ground therefore is overruled.[7]

The Court also overrules the objections filed by Objector Walsh, who argues that the settlement is inadequate in limiting recovery for class members without proofs of purchase to the price of six boxes of Airborne. (Walsh Objections at 1-2.) This is essentially a dispute with the form of compromise Plaintiff and his counsel chose to accept by settling, and not a basis for deeming the settlement agreement's terms unfair or inadequate.

Finally, the Court finds the objections raised by Objector Fairbank to be without merit in this case.

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[7]Shapiro's remaining objection concerning the award of attorney's fees is addressed separately below.

Fairbank suggests that the settlement agreement should be altered to (1) withhold part of the claims administrator's fees until the distribution process is completed, (2) withhold part of the fees awarded to Plaintiff's counsel until the distribution process is completed, and (3) require that Plaintiff's counsel post a bond to ensure repayment of their fees should the settlement agreement be rejected on appeal. (Fairbank Objections at 2-3.) While such provisions are supported by a practical concern for ensuring that all class members are remunerated in a timely fashion, the terms of the settlement agreement in this case adequately protect the class members' interests. For example, the agreement provides that class counsel's fees will not be paid until any appeals are resolved, unless such appeals concern only the issues of attorneys' fees or Plaintiff's incentive award. (Settlement Agreement at 25-26, ¶ 8.) In other words, class counsel will not receive their attorneys' fees while the finality of the recovery to class members remains in doubt. In addition, the declaration filed by a representative of the claims administrator illustrates its diligence and good faith in overseeing disbursement of settlement funds. (See Hudgens Decl.) The Court thus overrules Fairbank's objections.

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In light of the factors set forth above supporting final approval of the parties' settlement agreement, the Court grants the Settlement Approval Motion.

B. Motion for Award of Attorney Fees and Litigation Expenses

Class counsel seek an award of $5,812,500 for attorneys' fees and litigation expenses, which represents the maximum amount the parties' settlement agreement allowed them to request. (Fee Mem. P. & A. at 2:6-9.) The amount represents 25 percent of the $23,250,000 that Defendants initially must deposit into the settlement fund. (Id.)

Plaintiff asserted claims under California law, and California law also governs the award of attorneys' fees here. Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002). California recognizes the common fund doctrine for the award of attorneys' fees to a prevailing plaintiff whose efforts result in creation of a fund benefitting others. Serrano v. Priest, 20 Cal. 3d 25, 35 (1977). Under both California and Ninth Circuit precedent, a court may exercise its discretion to award attorneys' fees from a common fund by applying either the lodestar method or the percentage-of-the-fund method. Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224, 253 (2001); Fischel v. Equitable Life Assur. Soc'y of

U.S., 307 F.3d 997, 1006 (9th Cir. 2002) (citing Vizcaino, 290 F.3d at 1047). In support of their request for fees amounting to 25 percent of the initial settlement fund, Plaintiff's counsel cite Ninth Circuit authority suggesting that the percentage method is favored in common fund cases such as this one, where the value of the benefit to the class is fixed. (Fee Mem. P. & A. at 7, 11.)

Here, the Court finds that the lodestar method and application of a multiplier is a more reasonable approach to the circumstances of the case.[8] Plaintiff's counsel settled the case relatively early in the litigation, before seeking class certification and beginning deposition discovery. Though counsel emphasize that 600,000 pages of documents were produced by Defendants, (Fee Mem. P. & A. at 14:18), the relatively modest 3,383.1 hours expended by Plaintiff's counsel, by the standards of complex class action litigation, supports the use of the lodestar method here to prevent a "windfall" award. See In re Washington Pub. Power Supply Sys. Secs. Litig., 19 F.3d 1291, 1298 (9th Cir. 1994); Vizcaino, 290 F.3d at 1050 (noting that where time spent "is minimal, as in the case of an early settlement, the

[8]The Court's use of the lodestar method addresses one of Objector Shapiro's objections. The Court would have found application of the lodestar method appropriate in the absence of Shapiro's objections, and thus they are overruled.

lodestar calculation may convince the court that a lower percentage is reasonable"). The Court thus begins its analysis with a calculation of the lodestar.

1. Lodestar amount

To calculate the amount of attorney's fees under the lodestar method, a court must "multiply the number of hours reasonably expended by the attorney on the litigation by a reasonable hourly rate." McElwaine v. US West, Inc., 176 F.3d 1167, 1173 (9th Cir. 1999); PLCM Group v. Drexler, 22 Cal.4th 1084, 1095 (2000).

Plaintiff's counsel provided a lodestar amount as an alternative to their preferred percentage method of calculating attorneys' fees in this case. (Fee Mem. P. & A. at 22.) Plaintiff has been represented by Jeffrey L. Fazio and Dina E. Micheletti, who are partners in Fazio | Micheletti LLP; Melissa M. Harnett, a partner in Wasserman, Comden & Casselman L.L.P. ("WCC"); and Stephen Gardner of the Center for Science in the Public Interest ("CSPI"). In their declarations, Mr. Fazio, Ms. Harnett, and Mr. Gardner have provided information concerning their hourly rates and the number of hours billed to date.

- Mr. Fazio, a 1989 law graduate, states that his 2008 hourly rate is $575, and his partner, Ms.

Micheletti, a 1996 law graduate, bills an hourly rate of $475.[9] (Fazio Decl. ¶¶ 4, 184.) Based on 826.1 hours billed by Mr. Fazio and 657.8 hours billed by Ms. Micheletti, the lodestar amount they provide for their firm's work is $787,462.50. (Fazio Decl. ¶ 191.)

- Ms. Harnett, a 1992 law graduate, states that her hourly rate is $500. (Harnett Decl. ¶ 35.) She also has provided information concerning other attorneys and paralegals at her firm who worked on this case. The rates requested for these other attorneys and staff range from $100 for a law clerk, to $600 for a more senior partner. (Harnett Decl. ¶ 35.) Based on 1,033.1 hours billed by Ms. Harnett, as well as 526.7 hours billed by others in her firm, Ms. Harnett provides a lodestar amount for her firm of $65,8275.50. (Id.)
- Mr. Gardner, a 1975 law graduate, states that his hourly rate is $700. (Gardner Decl. ¶ 22.) He has billed 404.7 hours to this case and estimates that this figure will increase to 500 hours after the settlement agreement finally is implemented. (Id.) He also estimates that another lawyer in his office, Katherine

[9]Mr. Fazio has submitted a survey of hourly rates showing that their requested rates are reasonable. (Fazio Decl. ¶ 185 & Ex. 3.)

> Campbell, a January 2007 law graduate, will spend 23.5 hours at an hourly rate of $270. (Id. ¶ 23.) Mr. Gardner thus provides a lodestar amount of $356,245 for his office. (Id. ¶ 24.)

According to counsel's declarations, then, the total lodestar figure for all three firms is $1,802,083.

The Court finds that this amount -- roughly $1.8 million -- represents the upper limit of a reasonable attorneys' fee award under the lodestar method. Based on its own observation of the conduct of this litigation, a reduction in the hours billed to date is warranted. For example, it is unclear why counsel from all three law firms were necessary for prosecution of this case. The attorney with the highest hourly rate, Stephen Gardner, is described as having expertise in areas such as food supplements and their regulation by federal authorities. (Fazio Decl. ¶¶ 32-33.) He and his organization, CSPI, joined the litigation to provide their knowledge in these areas. (Id. ¶ 33.) While such specialized knowledge may have been helpful in Plaintiff's counsel's initial investigation of the case, it is unclear why such specialized knowledge has been necessary to Plaintiff's counsel's ongoing efforts to obtain final settlement approval and implement the settlement agreement.

Even if it was necessary or prudent for counsel from all three firms to conduct the litigation, Plaintiff's counsel have not established that the division of their labor avoided duplication, or that the hours billed do not include excessive time spent in conferences or corresponding with one another. As a result, even though Plaintiff's counsel have not included time spent at the final settlement approval hearing or time spent after the hearing in their calculation of a lodestar amount, this omission is balanced by the reductions the Court certainly would have made to the hours billed to date. (Fazio Decl. ¶¶ 189-190; Harnett Decl. ¶ 35.) Mr. Fazio estimates, based on his past experience, the additional time Plaintiff's counsel will spend on this case to be 350 to 400 hours. (Fazio Decl. ¶ 32.) Moreover, the Court deducts the additional hours Mr. Gardner estimates he and another lawyer with his organization will spend on the case, or 95.3 hours for him and 20 hours for Katherine Campbell. (Gardner Decl. ¶¶ 22-23.) The Court therefore fixes the lodestar attorneys' fees as follows:

- Fazio | Micheletti LLP: $ 787,462.50
- WCC: $ 658,275.50
- CSPI: $ 284,235.00

Total: $1,729,974.00

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2. Lodestar multiplier

Though Plaintiff's counsel have not made specific arguments in support of a multiplier for the lodestar amount, the Court finds their arguments concerning the reasonableness of their request for 25 percent of the settlement fund to apply here. Specifically, Plaintiff's counsel argue that (1) their efforts produced "exceptional" and "extraordinary" results, (Fee Mem. P. & A. at 13-17), and (2) they capably dealt with complex issues and the risks presented by those issues, (Id. at 17-19).

The lodestar amount may be enhanced by application of a multiplier to account for the contingent nature of the fee award and the extent to which the litigation precluded counsel from pursuing other paid work. Serrano, 20 Cal. 3d at 49. Though a multiplier may be applied where the litigation involved complex legal issues presented by skillful attorneys, such factors should not be considered where they are already encompassed in the calculation of the lodestar. For example, the skill of the lawyers or the difficulty of the legal questions they faced "appear[] susceptible to improper double counting," because they are accounted for by a higher hourly rate and more attorney hours. Ketchum v. Moses, 24 Cal. 4th 1122, 1138-39 (2001).

Here, the Court finds that a multiplier of 2.0 would reasonably account for the particular circumstances faced by Plaintiff's counsel in this case. The most persuasive factor in setting this amount is the risk Plaintiff's counsel faced that they would achieve no recovery, in light of the legal questions concerning class certification and possible federal preemption of their claims. (Fee Mem. P. & A. at 18-19.) Another important consideration is that Plaintiff's case may have been a factor in a subsequent investigation by the Federal Trade Commission and the attorneys general of many states. (Fee Mem. P. & A. at 17.) The hourly rates of Plaintiff's counsel and the hours they billed adequately account for their level of experience and the difficulty of the issues they addressed, however. The Court is not persuaded that the "extraordinary" results obtained by Plaintiff's counsel justifies a higher multiplier. Though the result is "extraordinary" in terms of the total value of the settlement fund, it is not apparent that those funds will redress an injury keenly felt by class members. Several class members were compelled to write letters objecting to the lawsuit itself, and, as discussed above, the number of class members submitting apparently valid claims to date will not deplete the amounts in the settlement fund.

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Applying such a multiplier to Plaintiff's counsel's lodestar calculation would result in an award of $3,459,946 in fees. This amount represents 14.8 percent of the $23.25 million initial settlement fund, a percentage the Court also finds to be reasonable.

3. Litigation expenses

The Court further awards the litigation expenses requested by Plaintiff's counsel, in the amounts of $8,458.64 to Fazio | Micheletti LLP, (Fazio Decl. ¶ 192); $20,993.58 to WCC, (Harnett Decl. ¶ 49); and $3,280.60 to CSPI, (Gardner Decl. ¶ 25.).[10] The total amount awarded for litigation expenses is $32,732.82.

Accordingly, the Court grants Plaintiff's Fee Motion in part and awards $3,459,946 in attorneys' fees and $32,732.82 in litigation expenses.

C. Motion for Incentive Award to Plaintiff

Plaintiff David Wilson requests a $10,000 incentive award for his contributions as the named plaintiff in this case. (Incentive Award Mot. at 1:1-3.) As set forth in the parties' settlement agreement, any court-approved incentive award to Plaintiff would be paid by

[10]The amount awarded to Wasserman, Comden & Casselman, L.L.P., reflects the deduction of $2,089.37 in expenses described only as "Other Costs." (Harnett Decl. ¶ 49.)

Defendants in addition to the amounts they already have agreed to pay to settle this case. (Id. at 1:6-9.)

The Court has discretion to grant an incentive award to the class representative. Van Vraken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995). Factors a court may consider in exercising its discretion 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.

Id. (citations omitted).

The Court has reviewed and considered Plaintiff Wilson's declaration, which describes how he came to be involved in this case, the research he conducted before and during the litigation, the time he spent reviewing documents and conferring with counsel during the course of the litigation, and the media attention he endured after announcement of the settlement. (Wilson Decl. ¶¶

3-9.) Having done so, the Court grants an incentive award of $2,500.

In reducing the requested amount of the incentive award, the Court notes the low degree of risk undertaken by Wilson in commencing the lawsuit, the fleeting nature of the media attention he experienced, and the relatively limited duration of the litigation, including the modest 55 hours he estimates he spent on the case. (Wilson Decl. ¶¶ 6-9.) For example, Mr. Wilson was never deposed and did not testify at a trial, in contrast with the class representatives who have received incentive awards in other cases. See Van Vraken, 901 F. Supp. at 299-300 (awarding $50,000 to named plaintiff who was deposed twice and testified at trial during litigation lasting more than a decade); In re Domestic Air Transportation Antitrust Litig., 148 F.R.D. 297, 357-58 (N.D. Ga. 1993) (awarding $2,500 to class representatives who produced documents and $5,000 to those who were deposed); see also Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998) (upholding award of $25,000 to named plaintiff who risked workplace retaliation and "spent hundreds of hours with his attorneys").

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff's Motion for Final Approval of Settlement and

GRANTS in part Plaintiff's Motion for Attorneys' Fees Litigation Expenses and Plaintiff's Motion for Incentive Award to Plaintiff. The parties shall submit a proposed Judgment and Order of Dismissal forthwith.

Dated: August 13, 2008

Virginia A. Phillips

VIRGINIA A. PHILLIPS
United States District Judge