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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

NOTICE OF MOTION AND 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

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 22, 2020 at 8:30 a.m., or on such date as may be specified by the Court, in the courtroom of the Honorable George Wu, United States Courthouse, 350 West 1st Street, Los Angeles, CA, 90012, Courtroom 9D, 9th Floor, Plaintiffs Rony Elkies and Danielle Alfandary ("Plaintiffs") on behalf of themselves and the class, will and hereby do move for an order, pursuant to Fed. R. Civ. P. 23, granting the following relief:

(1) An award to Class Counsel of $2,083,950 (33% of the Settlement Amount) in attorneys' fees;

(2) An award to Class Counsel of $357,917 in litigation costs;

(3) Settlement Administration Expenses of $516,000; and

(4) Service Awards of $4,000 each to Plaintiffs Rony Elkies and Danielle Alfandary.

This motion will be heard concurrent with Plaintiffs' Motion for Final Approval of Class Action Settlement which will be separately filed.

This motion is based on Notice of Motion, the Memorandum of Points and Authorities in support thereof, the Stipulation of Settlement (previously filed on September 24, 2019 and attached as Exhibit 1 to the Declaration of Gillian L. Wade in Support of Plaintiffs' Motion for Preliminary Approval (Dkt. 162-1)); the Order Granting Preliminary Approval (Dkt. 172); the Declaration of Noel J. Nudelman ("Nudelman Dec".) filed concurrently herewith in support of this Motion; the Declaration of Gillian L. Wade ("Wade Dec.") filed in Support of Plaintiffs' Motion for Final Approval filed concurrently and all of the papers and pleadings on file in this action, and upon such other and further evidence as the Court may be presented at the time of the hearing, including oral argument.

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Dated: May 4, 2020

Respectfully submitted,

Gillian L. Wade
Sara D. Avila
MILSTEIN JACKSON FAIRCHILD & WADE, LLP

Richard D. Heideman
Noel J. Nudelman
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Counsel for Plaintiffs and the Class

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I. Introduction

Plaintiffs respectfully submit this application for an award of attorneys' fees, litigation costs, and class representative service awards to compensate them and their counsel for their work in achieving a class action settlement, which affords the Class with monetary compensation and injunctive relief to a nationwide class of consumers who purchased Infants' Tylenol ("Infants'") for personal or household use.

For nearly two years, the Parties[1] litigated Plaintiffs' allegation that representations on the front packaging for the over-the-counter pediatric pain reliever, Infants', are deceptive. Specifically, Plaintiffs claim the photo of a mother holding a baby and the name of the product may lead reasonable consumers to believe Infants' is unique or specially formulated for infants. After completing all fact and most expert discovery, and a little over two months before a class trial was to commence, Plaintiffs and Defendants Johnson & Johnson Consumers, Inc. ("JJCI") and Johnson & Johnson Services, Inc. ("JJSI") (collectively, "J&J" or "Defendants") negotiated a fair, reasonable and adequate arms' length class settlement with the help of a private mediator, Hon. Charles "Tim" McCoy (Ret.). The details of the settlement are set forth in the Amended Stipulation of Settlement ("Settlement Stipulation") (previously filed on October 24, 2019 at ECF 169).

Plaintiffs seek an award of attorneys' fees based on a percentage of the non-reversionary $6.315 million cash fund (the "Settlement Amount") Class Counsel negotiated for the benefit of the Class. Plaintiffs are requesting $2,083,950 or 33 % of the Settlement Amount, a figure the Ninth Circuit finds reasonable when deciding fee awards. In addition, Plaintiffs request $357,917 for Class Counsel's reimbursable out-of- pocket costs; $516,000 to Kurtzman Carson Consultants, LLC ("KCC") for the costs of Settlement Administration; and, service awards of $4,000 for each of the two named plaintiffs for the integral roles they played in achieving this settlement. In

[1] All capitalized terms have the same meanings as ascribed in the Agreement.

short, because the requested attorneys' fees, costs, and class representative service awards are fair, reasonable, and adequate, the Court should grant this Motion.

II. Relevant Background

A. Summary of Allegations and Defenses

The First Amended Complaint ("FAC") alleges the representations on the front of a box of Infants' (the name Infants' Tylenol and the photo of a mother holding a baby) are likely to deceive reasonable consumers into believing the medicine in Infants' is unique or specially formulated for infants. ECF 31 at ¶¶59-113. Despite the fact that the medicine contained in a bottle of Infants'(160 mg/ 5mL of acetaminophen) is the same as the medicine in Children's Tylenol ("Children's"), Defendants market Infants' and Children's as different products. ECF 31 at ¶20. Plaintiffs allege that the only material differences between Infants' and Children's are the packaging (Infants' is packaged with a plastic syringe and Children's is packaged with a tiny plastic cup) and price. ECF 74, p.3. The FAC alleges JJCI violated California's False and Misleading Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, *et seq*.; Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, *et seq*.; and, Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200.

Plaintiffs further alleged that because Infants' and Children's are the same product in different packaging, they and other consumers overpaid for Infants.' Indeed, they allege Infants' retails for more than double the price of Children's. Although discovery revealed there are some differences in the products' respective cost of goods sold (*e.g.* different costs related to manufacturing, distribution and packaging), Plaintiffs contended those costs differences are miniscule. ECF 74, p.3.

Defendants have denied and continue to deny all claims and contentions alleged by Plaintiffs. ECF 139, p 1; Settlement Stipulation §II(F).[2] Defendants further contend their advertising and marketing for Infants' is not false and misleading, and

[2] A more detailed summary of the Plaintiffs' Allegations and Defendants' Defenses is set forth in Plaintiff's Motion for Final Approval of Class Action Settlement filed contemporaneously with this Motion and is incorporated herein.

the safety benefits of the dosing device that accompanies Infants' (which JJCI contend is more expensive and safer for children under two years of age) renders Infants' a different product from Children's. Settlement Stipulation §II(F).

B. Procedural Background

1. The Court Denied JJCI's Motion to Dismiss.

After providing statutory notice under the CLRA Plaintiffs filed their original Class Action Complaint on October 5, 2017 and the FAC on November 21, 2017. ECF 1, 31. Plaintiffs, individually and on behalf of a national class, sought restitution, damages, injunctive relief, declaratory relief, attorneys' fees and costs. On December 19, 2017, Defendants filed a Motion to Dismiss Plaintiffs' FAC. ECF 43. Plaintiffs opposed and after a hearing on the matter, the Court denied the motion in its entirety. ECF 54. Thereafter, Defendants' filed their Answer and discovery commenced. ECF 48, 55.

2. The Parties Completed Fact and Expert Discovery and Engaged in Significant Discovery-Related Motions Practice.

The Parties completed full merits discovery before the May 17, 2019 discovery cutoff. The discovery process involved numerous depositions, written discovery, and contentious discovery-related motions practice. *See* ECF 64, 71, 85, 121, 152.

Extensive discovery was exchanged regarding the safety, marketing and sale of Infants' and Children's throughout the United States. Nudelman Dec. at ¶11. Plaintiffs issued multiple sets of Interrogatories, requests for Admissions nearly two hundred separate document requests. Defendants made more than twenty-one separate document productions, and produced over 62,000 pages of documents, which were reviewed by Class Counsel. Nudelman Dec. at ¶13.

Defendants also propounded, and Plaintiffs answered, more than thirty Special Interrogatories (each), 127 Requests for Production of Documents and nearly 50 Requests for Admissions. *Id*. at ¶12. Defendants sought highly personal and confidential discovery, such as medical records for Plaintiffs' two minor daughters.

Id. at ¶20. Plaintiffs also prepared and sat for depositions, searched for requested documents, produced their daughters' entire medicine cabinet at Ms. Alfandary's deposition, and responded to written discovery propounded by Defendants. *Id*. at ¶21.

Numerous depositions were taken. These depositions included Defendants' four Rule 30(b)(6) corporate representatives. Nudelman Dec. at ¶14. In addition, Plaintiffs and their minor daughters' treating physicians were deposed. Nudelman Dec. at ¶15. Depositions were conducted in Philadelphia, Washington, D.C., and Los Angeles. Nudelman Dec. at ¶16. Plaintiffs issued a subpoena to the data analytics company Nielsen, seeking sales information regarding pediatric acetaminophen products. *Id*. at ¶17.

The parties also engaged in active motions practice for resolving disputes between them on the scope of discovery pursuant to Local Rule 37. ECF 64; Nudelman Dec. at ¶18. Plaintiffs sought court intervention and successfully obtained orders compelling Defendants to produce information not only regarding the marketing and sales of Infants' Tylenol, but also Children's Tylenol which was relevant to Plaintiffs' claims. ECF 71; Nudelman Dec. at ¶19. The Parties met and conferred to discuss Plaintiffs' written discovery responses on multiple occasions, and Defendants ultimately filed a L.R. 37-2 Joint Stipulation to compel further responses, which was denied. *Id*. at ¶22. Plaintiffs sought and were granted an Order quashing subpoenas served on Plaintiffs' treating physicians, which limited the scope of the medical records that the physicians could produce and the subject matter of their depositions. ECF 85, Nudelman Dec. at ¶23. In addition, when Defendants sought leave to depose Plaintiffs a second time to inquire about Plaintiffs' post-deposition purchases of pediatric acetaminophen products, Plaintiffs successfully opposed Defendants' motion. ECF 152; Nudelman Dec. at ¶24.

At the time of settlement, the parties were finishing up expert discovery in anticipation of the August 27, 2019 jury trial. *Id*. at ¶25. The Parties exchanged expert designations and reports on April 19, 2019, and rebuttal reports on May 20, 2019.

Nudelman Dec. at ¶¶26,27. Plaintiffs designated experts to testify about consumers' perception of the representations on the Infants' packaging and the measure of economic damages suffered by the Class. Plaintiffs' also designated non-retained experts (the pediatricians who treated Plaintiffs' minor daughters and revealed that Children's is the same as Infants', just cheaper).[3] *Id*. at ¶28. Defendants designated two retained experts and five non-retained experts, as well as rebuttal experts to Drs. Maronick and Sharp. *Id*. at ¶35. Four of these designated experts were scheduled to be deposed[4] but only one deposition had been completed before the parties reached a settlement. *Id*. at ¶36.

3. Plaintiffs' Expert Calculated the Available Range of Class-Wide Restitution and Damages

Based on the sales information produced by Defendants, Plaintiffs' economic damages expert, Dr. D.C. Sharp, was able to create a damages model and calculate projected class wide damages. Nudelman Dec. at ¶¶31-32. At the class certification stage, Dr. Sharp submitted a declaration that described how he could craft a class-wide damages model in this case, and included a preliminary damages estimate, based on the data available to him at the time. *Id*. Defendants deposed Dr. Sharp about his declaration and submitted a rebuttal report from their expert. ECF 102-8. Following certification of the California-only class, Dr. Sharp obtained additional data and produced a report under Rule 26(a)(2)(B). Nudelman Dec. ¶ 33. His report contained a proposed damages model for trial. *Id*. Defendants deposed Dr. Sharp a second time and designated a different expert to rebut Dr. Sharp's Rule 26(a)(2)(B) report. *Id*.

4. A Litigation Class Was Certified, the Ninth Circuit Denied Defendants' Rule 23(f) Petition and Notice was Disseminated to the Litigation Class.

On July 27, 2018, following the depositions of Defendants' corporate

[3] Dr. Sharp was deposed twice—once regarding the contents of his preliminary expert analysis submitted in support of class certification and again after he produced his formal expert report with regard to his damages model. *Id* at ¶30.
[4] Plaintiffs deposed three of Defendant's non-retained experts. *Id*. at ¶37.

representatives, Plaintiffs filed their Motion for Class Certification. ECF 72; Nudelman Dec. at ¶38. Defendants strongly opposed the Motion with their own experts, and simultaneously moved to exclude Plaintiffs' experts. ECF 102; Nudelman Dec. at ¶39. On October 19, 2018, the Court granted the motion. ECF 117, 118. Defendants immediately sought interlocutory appellate review in a Rule 23(f) Petition. Nudelman Dec. at ¶40. Plaintiffs opposed, and on December 19, 2018 the Ninth Circuit denied Defendants' Petition. Nudelman Dec. at ¶41.

After the class was certified (and while the Rule 23(f) Petition was pending), Class Counsel researched third party administrators who could provide notice to the class. Nudelman Dec. at ¶42. Plaintiffs selected KCC and extensively met and conferred with Defendants about KCC's notice plan before submitting it to the Court for approval. ECF 124. Nudelman Dec. at ¶43. After two hearings on Plaintiffs' contested Motion for Order to Approve Class Notice Plan and Content of Notice, the Court approved the proposed plan and appointed KCC as the notice administrator on January 10, 2019. ECF 123, 127, 129, 131. Nudelman Dec. at ¶44. A few days later the Court granted the Parties' stipulation to slightly revise the class definition to "All persons who purchased, in California, Infants' Tylenol for personal use since October 3, 2014" (the "Litigation Class"). ECF 132. Nudelman Dec. at ¶45. Notice to the Litigation Class was disseminated on February 1, 2019. Nudelman Dec. at ¶46. There were no requests for exclusion. Nudelman Dec. at ¶47.

5. The Parties Engaged in Non-Collusive, Arms-Length Settlement Negotiations.

While discovery, motions practice and trial preparation were ongoing, the parties engaged in courtordered mediation and settlement discussions. Nudelman Dec. at ¶48. The Parties agreed to retain a professional JAMS mediator, the Honorable Charles W. "Tim" McCoy (Ret.). Judge McCoy convened the parties for an in-person mediation session. Nudelman Dec. at ¶49. A settlement was not reached during the mediation, but the parties continued to discuss the possibility of settlement, facilitated

by Judge McCoy. Nudelman Dec. at ¶50. These extensive settlement discussions were conducted over the course of three months. Nudelman Dec. at ¶51. On the eve of the close of expert discovery, and less than a week before the deadline to file motions (including summary judgment and *Daubert* motions), the parties agreed to a proposed settlement for a nationwide class, subject to Court approval. Nudelman Dec. at ¶52. The parties spent three additional months negotiating the details of the Settlement Stipulation. Nudelman Dec. at ¶53.

In reaching the proposed settlement, Class Counsel acknowledge the expense and length of continued proceedings necessary to prosecute the Action against Defendants through trial and appeals. Nudelman Dec. at ¶54. Class Counsel also have a complete understanding of the strengths and weaknesses of the claims and defenses asserted and the potential recovery of the Class at trial. Nudelman Dec. at ¶55.

C. The Court Granted Preliminary Approval of the Settlement and Notice to the Settlement Class Was Disseminated.

A portion of the Settlement Amount will be used to pay for Settlement Administration Expenses, up to $516,000. Agreement §§ I(A)(34), III(B)(1)(a), Addendum A. The Settlement Class Notice Program was designed to give the best notice practicable, tailored to reach putative settlement Class Members, and reasonably calculated under the circumstances to apprise them of the Settlement and their right to make a claim for money, opt-out, or object. Peak Dec. at ¶ 29.

On September 24, 2019, Plaintiffs filed their unopposed Motion for Preliminary Approval with Proposed Order. Nudelman Dec. at ¶56; ECF 162. A revised Order was then filed by the Plaintiffs, and a preliminary approval hearing was set for October 21, 2019. Nudelman Dec. at ¶57; ECF 168. At the hearing, the Court indicated in its tentative ruling that it intended to grant preliminary approval but requested certain changes be made in the Notice documents to the class and the Stipulation of Settlement. Nudelman Dec. at ¶58. The parties made the requested changes and second hearing was set for November 4, 2020. Nudelman Dec. at ¶59;

ECF 170, 171. At the hearing, additional changes were ordered by the Court. Nudelman Dec. at ¶60; ECF 171. The Court granted preliminary approval for the Class settlement on December 6, 2019. Nudelman Dec. at ¶61; ECF 172.

In its Order, the Court conditionally certified the Class and set the Final Approval Hearing. Nudelman Dec. at ¶62. It directed that Notice be given to the Class and approved the proposed Publication Notice and Class Notice which were attached to the Amended Stipulation of Settlement as filed. Nudelman Dec. at ¶63. The Court further approved the Claim Form and Press Release. Nudelman Dec. at ¶64. Finally, the Court found that Notice Plan proposed by the Plaintiffs and the approved Settlement Administrator, KCC, was the best notice practicable and sufficient to give notice to all persons entitled. Nudelman Dec. at ¶65.

After the Court entered the Preliminary Approval Order, the Parties and the Settlement Administrator carried out their duties in connection with the administration of the settlement as set forth in the Settlement Stipulation. *See* concurrently-filed Declaration of Carla Peak Dec.¶¶ 4-21; Nudelman Dec. at ¶66. The Settlement Administration process is not complete. The deadline to make claims and/or opt out was April 13, 2020 (only two opt-outs were received). Nudelman Dec. at ¶ 67. The deadline to object is May 26, 2020. ECF 174; Nudelman Dec. at ¶ 67.

To date, KCC has reported that KCC received approximately 841,426 Claim Forms filed through both postal mail and the case website. Peak Dec.¶22. KCC reviewed the claims for duplication, and after removing late submissions and duplications determined that a total of 723,229 Claim Forms are eligible. Based on this information, KCC currently estimates claimants will receive $0.73 per bottle. *Id.*

III. Argument

A. Class Counsel is Providing Adequate Notice to the Class of Their Attorneys' Fees Request.

Federal Rule of Civil Procedure 23(h)(1) requires a claim for attorneys' fees to be made by motion under Rule 54(d)(2) and for notice of the motion to be served on

all parties and, for motions by class counsel, directed to class members in a reasonable manner. Fed. R. Civ. P. 23. "The plain text of the rule requires that any class member be allowed an opportunity to object to the fee 'motion' itself." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993–94 (9th Cir. 2010).

The Notice to the Class included Class reimbursement of Class Counsel's out-of-pocket costs in the amount of $357,917[5] and $516,000 for Settlement Administration costs, and service awards of $4,000 for each of the two named plaintiffs for the integral roles they played in achieving this Settlement. Peak Dec. at ¶¶ 8-16, Exs. 4-7. The Notice also informed the Class that they could make a claim and/or opt out of or object to the settlement and provided detailed instructions. Nudelman Dec. at ¶69. The deadline to object is May 26, 2020—three weeks after the date this motion is being filed. *Id.*

B. The Requested Fee Award is Reasonable.

To calculate the reasonableness of an award of attorneys' fees, the Court may use either the percentage-of-the-fund method or the lodestar method. *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994) ("the district court has discretion to use either method in common fund cases"). Regardless of the method used, the district court should be guided by the common fundamental principle that fee awards out of common funds must be "reasonable under the circumstances." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d at 1296. Here, the requested award is fair and reasonable under both methods.

1. A Fee Award Totaling Approximately 33% of the Settlement Amount is Fair and Reasonable.

Courts must conduct an independent inquiry into the reasonableness of the fee request, but they have a great deal of discretion in awarding attorneys' fees. *See Id.* "To calculate the reasonableness of an award of attorneys' fees, the Court may use

[5] This is less than the "up to $385,000" permitted in the Settlement Stipulation and preliminarily approved by the Court. ECF 172.

either the percentage-of-the-fund method or the lodestar method." *Ahdoot v. Babolat VS N. Am., Inc.*, No. CV 13-02823-VAP VBKX, 2015 WL 1540784 (C.D. Cal. Apr. 6, 2015), at *9 (C.D. Cal. April 6, 2015) (citing *In re Washington Public Power Supply*, 19 F.3d at 1295 ("[T]he district court has discretion to use either method in common fund cases")). "Despite this discretion, use of the percentage method in common fund cases appears to be dominant." *Bd. of Commissioners of the Port of New Orleans v. Virginia Harbor Servs., Inc.,* No. SACV-1100437-GW-FFM, 2012 U.S. Dist LEXIS 199501, at *16 (C.D. Cal. Jan. 19, 2012) *citing Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). Here, whether the Court uses a percentage-of-the-recovery or lodestar method to assess the requested fees, the proposed award is fair and reasonable.

a. Plaintiffs' Fee Request is Reasonable Under California Law.

At the conclusion of a successful class action, class counsel may apply to the Court for an award of attorneys' fees. *See* Fed. R. Civ. P. 23(h). The first issue in assessing any fee application is to identify the governing law. Here, the Court's jurisdiction arises under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), which means the Court is sitting in diversity. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 571, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) ("CAFA confers federal diversity jurisdiction over class actions …"). Pursuant to *Erie R. Co. v. Thompkins*, 304 U.S. 64 (1938), the Court therefore applies California state law in assessing Plaintiffs' fee application, as both the availability of a fee award and the method of calculating that award are considered substantive issues reflecting important state policy. *See, e.g., Mangold v. California Pub. Utilities Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995) ("The method of calculating a fee is an inherent part of the substantive right to the fee itself, and a state right to an attorney's fee reflects a substantial policy of the state"). The state law governing the underlying claims also

governs the award of fees. *Id.* Because Plaintiffs brought their claims under the UCL, FAL and CLRA, California law governs. ECF 1, 31.

Under California law, the Court may use either a percentage-of-the-fund fee or a lodestar method of recovery to calculate attorneys' fees where the fees will be paid from a common fund, as they are here. *Zubia v. Shamrock Foods Co.*, No. CV1603128ABAGRX, 2017 WL 10541431, at *6 (C.D. Cal. Dec. 21, 2017). A review of common fund cases shows that an award in the range of 30% is appropriate. *In re Activision Sec. Litig.*, 723 F.Supp.1373, 1377-78, (N.D. Cal. 1989). The common fund method for awarding attorneys' fees is appropriate where, as here, attorneys have been instrumental in creating the fund. *See Serrano v. Priest*, 20 Cal. 3d 25, 35, 569 P.2d 1303 (1977) (noting that federal and state courts have long recognized that when attorneys create a common fund that benefits a class, the attorneys have an equitable right to be compensated from that fund).

Although California has no benchmark, District Courts in California have granted fee awards based on either a lodestar or percentage-of-the-fund calculations using either 30-33%. *See, e.g.*, *Syed v. M-I, L.L.C.*, No. 112CV01718DADMJS, 2017 WL 3190341, at *4, 6–8 (E.D. Cal. July 27, 2017) (awarding one-third in fees when the common fund represents 35% of damages); *Richardson v. THD At-Home Servs., Inc.*, No. 1:14-CV-0273-BAM, 2016 WL 1366952, at *12 (E.D. Cal. Apr. 6, 2016) (awarding 30% of the gross fund amount as attorneys' fees where the per-class member award was substantial); *Boyd v. Bank of Am. Corp.*, No. SACV 13-0561-DOC, 2014 WL 6473804, at *9–12 (C.D. Cal. Nov. 18, 2014) (awarding one-third in fees when the common fund represents 36% of damages); *Moreyra v. Fresenius Med. Care Holdings, Inc.*, No. SACV10517JVSRZX, 2013 WL 12248139, at *3–4 (C.D. Cal. Aug. 7, 2013) (awarding one-third in fees when the common fund represents 32% of damages); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 450 (E.D. Cal. 2013) (collecting cases in this district that have granted approximately 33% of the gross fund). The same holds true for California cases of similar complexity.

See Smith v. CRST Van Expedited, Inc., No. 10-CV-1116- IEG WMC, 2013 WL 163293, at *5 (S.D. Cal. Jan. 14, 2013) ("Under the percentage method, California has recognized that most fee awards based on either a lodestar or percentage calculation are 33 percent."). Here, Plaintiffs seek an award of attorneys' equal to 33% of the Settlement Amount. Given the complexity of the issues and the amount of work Class Counsel performed, the fee request of $2,083,950 (which is less than Class Counsel's loadstar) is reasonable under California law.

b. Other Factors Support Plaintiffs' Fee Request.

The ultimate goal in determining fees is to reasonably compensate counsel for their efforts in creating the common fund. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) *citing Paul, Johnson, Alston & Hunt*, 886 F.2d at 271–72. California courts and the Ninth Circuit have considered various factors for determining the reasonableness of the fee requested under the percentage-of-the-fund or lodestar method[6], including: (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) benefit of settlement to the public. *Vizcaino*, 290 F.3d at 1048–50 (approving district court's consideration of some of these factors as "relevant circumstances" in determining reasonableness of fee under percentage-of-the-fund analysis). The Ninth Circuit has explained these factors should not be used as a rigid checklist or weighed individually, but, rather, should be evaluated in light of the totality of the circumstances. *Id.* As set forth below, an analysis of these factors underscores the reasonableness of the requested fee award.

i. Class Counsel Achieved an Excellent Result on a Purely Contingent Basis.

The settlement here will benefit and provide relief to eligible claimants in the United States who purchased Infants' Tylenol for personal or household use since

[6] As discussed in Section III(2), *infra*, courts also consider these factors in determining whether a lodestar multiplier is appropriate. Consideration of these factors here supports the fee request and confirms its reasonableness.

October 3, 2014 until January 6, 2020. Nudelman Dec. ¶71. Based on the preliminary data provided by KCC[7], due to the robust claims rate, the amount per bottle available from the fund will be decreased *pro rata* to approximately $0.73 per bottle (this estimate assumes that all Class Members who submitted a Claim Form without proof of purchase will receive an award per bottle claimed, up to a maximum of 7 bottles, and Class Members who submitted a Claim Form with documentation will receive the amount substantiate). The vast majority of Class Members who claimed the maximum 7 amount of bottles without proof of purchase (74.9% of claimants), will receive a total of approximately $5.11 each. This amount is equal to approximately 1.3 price premiums.[8] Peak Decl. ¶22; Nudelman Dec. ¶73. Class members are receiving compensation that fairly takes into account the following risks of proceeding with the litigation: (1) the uncertainty of the ultimate results after a class trial; (2) the possibility the Court or jury would reject Plaintiffs' proposed damages model; (3) the real and imminent threats of J&J's forthcoming motions to decertify, exclude Plaintiffs' experts, and for summary judgment; and, (4) years of delay as the parties appeal any one or all of these issues. Nudelman Dec. ¶74.

In addition, JJCI has agreed to injunctive relief that directly addresses Plaintiffs' claims. Nudelman Dec. ¶75. Specifically, JJCI agreed to do the following for a period of 2 years: (a) change Infants' current packaging so that the child depicted on the front of the packaging is at least two years of age; (b) add text on JJCI-controlled websites to the effect that the medicine in Infants' and Children's contain the same concentration of liquid acetaminophen; (c) in response to inquiries and complaints to its customer care center's protocols regarding comparisons of Infant's and Children's, educate and inform consumers that the medicine in Infants' and

[7] *See* concurrently-filed Declaration of Carla Peak, Vice President of Legal Notification Services at KCC.

[8] Claimants may be reimbursed for a maximum of 7 bottles without documentation. 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.

Children's contains the same concentration of acetaminophen; and (d) continue to include language on dosing charts that JJCI provides to healthcare providers to the effect that the medicine in Infants' and Children's contains the same concentration of acetaminophen. Settlement Stipulation §III(A)(1); Nudelman Dec. ¶76. The settlement will provide benefits for the hundreds of thousands of Class Members who file valid claims. Nudelman Dec. ¶77. Class Counsel achieved these benefits by representing the class—on a contingency basis—for nearly two years before reaching the settlement. Nudelman Dec. ¶78. In doing so, Class Counsel was required counsel to forgo a significant amount of other work. Nudelman Dec. ¶ 79.

ii. The Skill of Counsel and Work Performed Support the Fee Request.

Prosecuting the Class' claims required knowledge of consumer and class action law that few attorneys possess. As set forth in the supporting declaration, Class Counsel has handled significant matters of complex litigation in various state and federal courts throughout the United States, as well as numerous class actions, including multiple class cases alleging similar consumer fraud allegations. Wade Dec. at ¶ 27; Nudelman Dec. at ¶81. Class Counsel demonstrated a willingness and ability to prosecute this action vigorously and to dedicate the resources and expertise necessary to represent the Class and successfully manage this class action to its conclusion. Wade Dec. at ¶ 26; Nudelman Dec. at ¶83.

Milstein Jackson Fairchild & Wade, LLP ("MJFW"), a local law firm, has extensive experience in class action and complex litigation. Wade Dec. at ¶ 28. MJFW specializes in representing plaintiffs in mass actions and class actions. *Id.* MJFW has extensive experience representing parties in cases involving consumer deception and unfair, unlawful and fraudulent business practices. *Id.* Lawyers in its class action department have served as Class Counsel, Lead or Co-Lead Counsel in over a dozen class actions protecting the rights of consumers and employees. *Id.*

Likewise, Washington, D.C. based Heideman Nudelman & Kalik ("HNK") has extensive experience and has served as Class Counsel, Lead Counsel and co Lead-

Counsel in cases litigated throughout the United States. Nudelman Dec. at ¶¶85-90. These include many consumer class action cases that have focused on defective product design, misleading marketing, and indirect purchaser claims for consumers of retail products. Nudelman Dec. at ¶¶86-88. The firm has also represented hundreds of plaintiffs in toxic tort litigation and served as lead counsel in numerous mass tort litigation cases. Nudelman Dec. at ¶89, 90.

iii. The Risks Involved with the Litigation Support the Fee Request.

Class Counsel undertook this litigation on a purely contingent basis, thereby bearing the full risk of non-recovery. Lost time and effort was not the only risk; Class Counsel also advanced all of the costs. Nudelman Dec. at ¶94. Class Counsel will not seek reimbursement from the Claim Fund for any future expenses (i.e. related expenses incurred after the date this motion is filed).

The risk of non-payment and loss in a consumer class case is real. *Vizcaino*, 290 F.3d 1043 (risk is a relevant consideration in calculating attorney fee award). *See In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (holding fees justified "because of the complexity of the issues and the risks"). Here settlement was only reached on the eve of trial, after full discovery and protractive motions practice. Nudelman Dec. ¶52. Even when a plaintiff's case is strong there are always substantial hurdles, including anticipated challenges to her experts and damage models. *See Beaver v. Tarsadia Hotels*, No. 11-CV-01842-GPC-KSC, 2017 WL 4310707, at *4 (S.D. Cal. Sept. 28, 2017) (recognizing the hurdles of adverse summary judgment rulings). Adverse rulings lead to appeals and litigation can be expensive, long and time consuming. A trial and any post-trial motions and appeals would also further delay the resolution of this case and relief to the class. Nudelman Dec. ¶96; *Beaver*, 2017 WL 4310707, at *4.

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

Decl. at ¶97. To prevail at trial, Plaintiffs would need to prove not only that the challenged representations mislead consumers into believing Infants' was specially formulated for infants, but also that J&J's omission of an express statement telling consumers that Infants' contains the same medicine as Children's is material; that the representations and/or omissions caused injuries; that restitution (under the UCL) and/or damages (under the CLRA) was recoverable; and that J&J's conduct constitutes fraud, oppression or malice. Nudelman Decl. at ¶98.

Plaintiffs also faced great risk as to what damages model the Court would ultimately adopt, if any. Nudelman Dec. ¶99. Plaintiffs believe their restitution model, created by Plaintiffs' Ph.D. economist, Dr. Sharp, using average retail price and a weighted average to calculate the price premium Class Members paid as a result of J&J's misrepresentations was valid. Nudelman Dec. ¶100. The Defendants attacked Dr. Sharp's methodology both at class certification and formal during expert discovery and had their own expert suggest a different damages model which resulted in significantly less restitution to the Class. *Id.* There was no certainty about which methodology the Court would apply had the class action trial gone forward (and Plaintiffs prevailed). Nudelman Dec. ¶101. Courts in this Circuit have considered the risks as to what remedies model a Court would ultimately adopt as a factor when determining the risk for assessing attorneys' fees and costs. *See Beaver*, 2017 WL 4310707, at *5 (Plaintiffs faced great risk as to what remedies model the Court would ultimately adopt). Accordingly, while Plaintiffs have a strong case and there is no clear-cut damages model, the Class faced serious risk in continuing to litigate this action against Defendants who had a track record of success. These factors weigh in favor of approving the fees and costs sought here.

2. The Fairness and Reasonableness of the Fee Request Under the Lodestar Method is Reasonable Under a Lodestar Cross-Check.

Although not required, a lodestar cross-check confirms that the percentage requested is reasonable. *Jasper v. C.R. England, Inc.*, No. CV 08-5266-GW(CWX),

2014 WL 12577426, at *9 (C.D. Cal. Nov. 3, 2014). *See also Vizcaino*, 290 F.3d at 1050 ("while the primary basis of the fee award remains the percentage method, the lodestar may provide a perspective on the reasonableness of a given percentage award"). Indeed, under Ninth Circuit precedent the court "need not necessarily engage in such a cross-check to reach its conclusion that the sought fees are reasonable under the circumstances. *In re Aftermarket Auto. Lighting Prod. Antitrust Litig.*, No. 09 MDL 2007-GW(PJWX), 2014 WL 12591624, at *6 (C.D. Cal. Jan. 10, 2014). Under the lodestar method, a court calculates the fee award by multiplying the number of hours reasonably spent by a reasonable hourly rate and then enhancing that figure, if necessary, to account for the risks associated with representation. *Paul, Johnson, Alston & Hunt*, 886 F.2d at 272. Detailed billing records are not required for a lodestar cross-check. *Jasper*, 2014 WL 12577426, at *9 (court used lodestar cross-check method without detailed billing records recognizing the hotly litigated docket, the cases complexity, the participation of senior attorneys during the case's lifespan and the aggressive litigation approach).

Here, Class Counsel has spent 4,025.50 hours on this litigation, resulting in lodestar fees of $2,387,154 to date. Nudelman Dec. at ¶105.[9] Nevertheless, Class Counsel only seek $2,083,950 in fees, which is approximately 87% of the time billed.

a. Class Counsel's Hourly Rates are Reasonable

Courts may find hourly rates reasonable based on evidence of other courts approving similar rates or other attorneys engaged in similar litigation charging similar rates. *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172 (C.D. Cal. 2010). When determining a reasonable hourly rate, courts generally consider several factors, including: (1) the experience, skill, and reputation of the attorney requesting fees; (2) the prevailing rate in the community for comparable attorneys;

[9] Class Counsel will need to spend additional time responding to objections (if any), continuing to monitor the claims administration, preparing for and attending the Final Approval hearing, responding to inquiries from Class Members, handling any settlement-related appeals, and otherwise ensuring the terms of the Settlement Stipulation are satisfied. Nudelman Dec. at ¶110.

and (3) the novelty or difficulty of the issues presented. *Addison v. Monarch & Assocs., Inc.*, No. EDCV 14-358-GW(CWX), 2018 WL 6616662, at *3 (C.D. Cal. Jan. 25, 2018) *citing Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 946 (9th Cir. 2007); *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210–11 (9th Cir. 1986).

Moreover, "lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees". *Parkinson*, 796 F. Supp. 2d at 1172 (in contingency fee cases "the payoff is too uncertain, as to both the result and the amount of fee.... The court should defer to the winning lawyer's professional judgment [regarding hours]; after all, he won, and might not have, had he been more of a slacker" (citations omitted)). Rates are reasonable if they are "within the range of reasonable rates charged by and judicially awarded to comparable attorneys for comparable work." *Children's Hosp. and Med. Ctr. v. Bonta*, 97 Cal. App. 4th 740, 783 (2002). To determine reasonableness, the court may consider "affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, rate determination in other cases, particularly those setting a rate for plaintiffs' attorney rate, are satisfactory evidence of the prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990).

Here, Class Counsel's hourly rates range from $295.00to $950.00[10]. Wade Dec. at ¶ 35; Nudelman Dec. at ¶112. These hourly rates are consistent with those charged by attorneys in the consumer law field within this Circuit and with similar levels of experience. Wade Dec. at ¶ 38; Nudelman Dec. at ¶113 *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 & Accurate Credit Transactions Act (FACTA) Litig.*, 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

[10] The top rate of $950.00 is charged by Richard D. Heidman, a partner at HNK with over four decades of experience. He billed approximately 23.82 hours in this matter.

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 the ranges accepted by other Courts in this District and market surveys.") (citation omitted."); *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2015 WL 2438274, at *5 (N.D. Cal. May 21, 2015) (approving partner rates up to $975 and associate rates up to $495 in a consumer class action)).

In addition, HNK's rates are consistent with the Laffey Matrix, available at www.laffeymatrix.com ("Laffey Matrix"). The Laffey Matrix is the primary tool for assessing legal fees in the Washington-Baltimore area. *See Save Our Cumberland Mountains v. Hodel*, 857 F.2d1516, 1525(D.C. Cir. 1988) (en banc) (The Laffey Matrix is very useful as a guide to Market Rate attorney fees for the Baltimore/ Washington area.). For 2019-2020, the Laffey Matrix' prevailing rate for lawyers with 1-3 years' experience out of law school is $372; for 4-7 years' experience it is $458; for 8-10 years' experience it is $661; for 11-19 years' experience it is $747 and for lawyers with 20 or more years, the prevailing rate is $899. For paralegals and law clerks the prevailing rate is $203. *See* Laffey Matrix. Nudelman Dec. at ¶¶114,115. All of the rates sought by HNK and MJFW for work by their attorneys and staff fall within the Laffey Matrix guidelines. Nudelman Dec. at ¶116.

In California, a number of courts including in this District have cited the *Laffey* Matrix as a means for determining whether they hourly rates sought are in line with those prevailing in the community. *See Smith v. Cty. of Riverside*, No. EDCV16227JGBKKX, 2019 WL 4187381, at *2 (C.D. Cal. June 17, 2019)(*citing*

Weiss v. City of Santa Rosa Police Dep't, No. 415CV01639YGRKAW, 2017 WL 1315850, at *3 (N.D. Cal. Apr. 10, 2017); *Ramirez v. Escondido Unified Sch. Dist.*, No. 11CV1823 DMS (BGS), 2014 WL 12675859, at *2 (S.D. Cal. Apr. 17, 2014).

Therefore, as demonstrated above and as all of the rates sought by HNK and MJFW for work by their attorneys and staff fall within the *Laffey* Matrix guidelines, and Class Counsel's hourly rates are consistent with prevailing rates in this market and the Washington, D.C area, for cross-check purpose, these rates are reasonable.

b. The Hours Billed by Class Counsel are Reasonable.

Moreover, the hours expended by Class Counsel to prosecute this action were reasonable. Class Counsel spent significant time litigating this case, including the following tasks: drafting and responding to pleadings; reviewing over 62,000 pages of discovery; preparing for, taking, and defending multiple depositions; researching, contacting and working with consulting and testifying experts; moving for and obtaining class certification (and overcoming Defendants' Rule 23(f) petition); engaging in many L.R. 37-1 meetings of counsel and filing multiple L.R. 37-2 motions, both as the moving party and the respondent; conferring with third parties to whom subpoenas were served; researching, retaining and monitoring KCC for both rounds of class notice and the claims administration process; spending hours of time over a three month period negotiating a class action settlement through Judge McCoy, and another four months memorializing the agreement; moving for and obtaining preliminary approval of the proposed settlement; and appearing at hearings before the Court. Nudelman Dec. at ¶111; (detailing the work expended by Class Counsel in this matter). Additionally, Class Counsel took care to ensure that there was no unreasonable overlap of tasks performed by counsel. Nudelman Dec. at ¶112.

c. Although Not Requested, Class Counsel Would be Entitled to a Multiplier.

Even a lodestar star cross-check, the Class Counsel would be entitled and the Court would be justified in awarding a multiplier to the lodestar value of Class

Counsel's time. *Vizcaino*, 290 F.3d at 1051. A district court may adjust a lodestar figure upward or downward to account for various factors. *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 570–571 (9th Cir. 2019) Among the factors the court may consider include "the complexity of this case, the risks involved and the length of the litigation." *Id. citing Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69–70 (9th Cir. 1975). The bar against risk multipliers in statutory fee cases does not apply to common fund cases. *Vizcaino*, 290 F.3d at 1051. *See also In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d at 1299-00. This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases. *Id.* at 1299. In common fund cases, "attorneys whose compensation depends on their winning the case[ ] must make up in compensation in the cases they win for the lack of compensation in the cases they lose." *Id.* at 1300–01.

The $2,083,950 attorneys' fees sought are less than Class Counsel's lodestar, thus a multiplier is not necessary to award their requested fees. However, should the Court determine that a reduction of Class Counsel's lodestar would be warranted during its lodestar cross-check, Class Counsel suggest that lodestar multiplier would be appropriate given the complexity of this case and the contingent risks involved. For wholly-contingent consumer class actions like this one, California courts have approved fee awards with multipliers of two and even higher. *See*, *e.g.*, *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001) ("Multipliers can range from 2 to 4 or even higher."). Similarly, in the Ninth Circuit, multipliers "ranging from one to four are frequently awarded […] when the lodestar method is applied." *Vizcaino*, 290 F.3d at 1051 (internal quotation marks omitted); *see also Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298–99 (N.D. Cal. 1995) (holding that multiplier of 3.6 was "well within the acceptable range for fee awards in complicated class action litigation" and explaining that "[m]ultipliers in the 3–4 range are common"). And in

In re Hyundai, the Ninth Circuit recently held that a 1.5521 multiplier was "modest or in-line with others we have affirmed." 926 F.3d at 572.

Consistent with this authority, other District Courts in California have also approved higher multipliers in similar class actions. *See*, *e.g.*, *Gergetz v. Telenav, Inc.*, No. 16-CV-04261-BLF, 2018 WL 4691169, at *7 (N.D. Cal. Sept. 27, 2018) (approving 2.625 multiplier on lodestar "in light of the facts that Class Counsel accepted this case on a contingency basis, had to forego other work to litigate this case, and achieved a truly excellent result for the class."); *Sheikh v. Tesla, Inc.*, No. 17-CV-02193-BLF, 2018 WL 5794532, at *8 (N.D. Cal. Nov. 2, 2018) ("[A] multiplier of 2.36 is within the range of reasonableness."). Accordingly, consistent with California and Ninth Circuit law, a multiplier would be warranted here.

C. Class Counsel's Out-of-Pocket Expenses are Reasonable and Compensable from the Settlement's Claim Fund

An attorney is entitled to "recover as part of the award of attorney's fees those out-of-pocket expenses that would normally be charged to a fee paying client. *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) *citing Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). Plaintiffs are entitled to recover the litigation expenses they reasonably incurred in investigating, prosecuting, and settling this case. *See In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d at 1048(allowing recovery of "expenses relat[ing] to photocopying, printing, postage and messenger services, court costs, legal research on Lexis and Westlaw, experts and consultants, and the costs of travel for various attorneys and their staff throughout the case."); *Mendoza v. Hyundai Motor Co., Ltd*, No. 15-CV-01685-BLF, 2017 WL 342059, at *14 (N.D. Cal. Jan. 23, 2017) (J. Freeman) (holding that costs are compensable under the CLRA and Cal. Civ. Code § 1021.5).

The Nudelman Declaration includes a summary of expenses by category and the total amount advanced in each category as proof of the reasonable out of pocket expenses for which they seek reimbursement. Nudelman Dec. at ¶119. As the Court will note, the bulk of these costs ($210,219.29) are attributable to expert witness fees,

and their as associated deposition time. Nudelman Decl. at ¶120. Although these expert costs were expensive, it is compensable. *See generally Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013) (holding that class counsel's "necessary expenses also included the retention of three experts" which allowed class counsel "to effectively and accurately evaluate both the potential damages in this case, as well as the strengths and weaknesses of the damage calculations they would be prepared to present at trial").

This expert work was necessary in two respects. *First*, Dr. Maronick's marketing expertise and consumer survey regarding the Infants' packaging enabled him to opine on the merits of Plaintiffs' claims, which was also relevant to show Rule 23(b)(3) predominance at class certification. Nudelman Dec. at ¶ 121. *Second*, the onus was on Plaintiffs to proffer a viable classwide damages model to obtain class certification and to later actually execute the model and calculate damages for trial. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 34, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013). Dr. Sharp's damages analysis enabled Plaintiffs to intelligently evaluate the damages at issue, which was critical to Plaintiffs' ability to negotiate the proposed class settlement. *See* Fed. R. Civ. P. 23(e)(2)(C) (requiring courts to consider whether "the relief provided for the class is adequate."). Another significant out-of-pocket expense Class Counsel incurred was $64,838.63 to KCC for the cost of giving notice to the Litigation Class. Nudelman Dec. at ¶122.

The remaining amount also includes costs for: (1) the numerous other depositions in this matter, including transcript and travel costs; (2) mediation fees; (4) filing and service fees; and (4) other typical costs such as printing, copying, and telephone charges. Nudelman Dec. at ¶123. These costs were also necessary to secure the resolution of this litigation and should be approved. *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d at 1048.

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D. Service Awards to the Class Representative Plaintiffs are Appropriate

"[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977. Class representative service awards "are fairly typical in class action cases," *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009), and such awards are discretionary "intended to compensate class representatives for work done on behalf of the class [and] make up for financial or reputational risk undertaken in bringing the action and . . . to recognize their willingness to act as a private attorney general." *Id.* at 958–59. A district court must evaluate service awards individually, using relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort the plaintiff expended in pursuing the litigation. *Staton*, 327 F.3d at 977. District courts must also scrutinize "all incentive awards to determine whether they destroy the adequacy of the class representatives." *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013).

The "Ninth Circuit has established $5,000 as a reasonable benchmark [for service awards]." *In re Yahoo Mail Litig.*, No. 13-CV-4980-LHK, 2016 WL 4474612, at *11 (N.D. Cal. Aug. 25, 2016); *See* also *Harris v. Vector Mktg. Corp* No. C-08-5198 EMC, 2012 WL 381202, at *7 (N.D. Cal. Feb. 6, 2012) ("Several courts in this District have indicated that $5,000 is a reasonable amount."). Here, Ms. Alfandary and Mr. Elkies each seek a service award of $4,000, which is 20% lower than the Ninth Circuit's benchmark. The service awards Plaintiffs seek are particularly reasonable considering the significant contributions each made for the benefit of the class. For example, each spent significant time preparing for and enduring highly contentious day-long depositions (which occurred simultaneously), and spent many hours answering written discovery, searching for and collecting requested documents, reviewing case-related documents, and communicating with counsel to assist counsel in the development of their case. Nudelman Dec. at ¶124.

Moreover, Plaintiff endured J&J's relentless pursuit of their daughters' pediatricians and medical information. Nudelman Decl. at ¶125. J&J sought, revealed, and scrutinized the medical information that was produced (which was narrowed by court order from the broader scope J&J sought). Nudelman Decl. at ¶126. Ultimately, the pediatricians were deposed and their daughters' medical information was revealed and painstakingly analyzed during depositions and in motion practice. This was all for the benefit of the class. *Id.* Even where (unlike here) there is no record of actual retaliation or personal difficulties, class representatives merit recognition for assuming the risk of such for the sake of absent class members. *Guippone v. BH S & B Holdings, LLC*, No. 09 CIV. 01029 CM, 2011 WL 5148650, at *7 (S.D.N.Y. Oct. 28, 2011).

Finally, their combined service awards represent a small portion (.001%) of the overall $6.315 million Settlement Amount, and are thus reasonable. *See*, *e.g.*, *Online DVD-Rental Antitrust Litigation*, 779 F.3d 934 at 947-48 (9th Cir. 2015) (approving $5,000 service award because in assessing propriety of service award, courts should focus on "… proportion of the total settlement that is spent on incentive awards."); *Rhom v. Thumbtack, Inc.*, No. 16-CV-02008-HSG, 2017 WL 4642409, at *8 (N.D. Cal. Oct. 17, 2017). Accordingly, this Court should approve and award the $4,000 service awards to Mr. Elkies and Ms. Alfandary.

VII. Conclusion

Based on the foregoing, Plaintiffs request that the Court award Class Counsel attorneys' fees of $2,083,950 (33% of the fund and less than their lodestar); award $516,000 in Settlement Administration Expenses; award $357,917.51 in attorney advanced expenses (less than the amount permitted under the settlement); and, award $4,000 each to Mr. Elkies and Ms. Alfandary as service awards.

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