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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENZO FORCELLATI and LISA ROEMMICH, on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs,

v.

HYLAND'S, INC., STANDARD HOMEOPATHIC LABORATORIES, INC., and STANDARD HOMEOPATHIC COMPANY,

Defendants.

Case No. 2:12-CV-01983 ODW (MRW)

PLAINTIFFS' RESPONSE TO OBJECTIONS TO SETTLEMENT

Date: August 14, 2017
Time: 1:30 p.m.
Courtroom: 5D, 5th Floor

Hon. Otis D. Wright

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I. THE COURT SHOULD OVERRULE THE OBJECTIONS TO THE SETTLEMENT

Only three people have objected to the proposed settlement: Patrick S. Sweeney, Ashley Hammack and Zeynep Vitale. Their objections are entirely without merit.

A. Patrick S. Sweeney Is a Professional Objector

Mr. Sweeney is a "professional objector." *Larsen v. Trader Joe's Co.*, 2014 WL 3404531, at *7 n. 4 (N.D. Cal. July 11, 2014); *see also In re Carrier IQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366, at *5 (N.D. Cal. Aug. 25, 2016) ("Mr. Sweeney is a serial objector."). "Serial" or "professional" objectors file objections merely to extort payments from parties or their counsel:

> Repeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements. The larger the settlement, the more cost-effective it is to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved (even an expedited appeal). Because of these economic realities, professional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose behalf the appeal is purportedly raised, gains nothing.

Barnes v. FleetBoston Fin. Corp., 2006 WL 6916834, at *1 (D. Mass. Aug. 22, 2006).

Judges are cautioned to "[w]atch out…for canned objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests." *Managing Class Action Litigation: A Pocket Guide for Judges*, by Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, p. 11 (2005). Indeed, "courts are increasingly weary of professional objectors: some of the objections were obviously canned objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests."

O'Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003) (citation omitted).

As a "professional objector," Mr. Sweeney has been criticized by numerous courts across the country. In *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 635 (N.D. Ohio 2016), Judge Jack Zouhary described Mr. Sweeney as having "shown bad faith and vexatious conduct, both in prior cases and in this action, in the pursuit of a payoff." *Id.* at 640. Judge Zouhary further declared that the conduct of Mr. Sweeney and the other objectors "resembles scavenger ants on a jelly roll, scrambling to extort money from the approved settlements." *Id.* Other courts, including courts in this District, have similarly criticized Mr. Sweeney. *See, e.g.*, *Chambers v. Whirlpool*, 214 F.Supp.3d 877, 890 n. 7 (C.D. Cal. 2016) (Judge Olguin noting that Mr. Sweeney is "prolific in objecting to class action settlements" and "well-known for routinely filing meritless objections to class action settlements for the purpose of extracting a fee rather than to benefit the Class"); *Roberts v. Electrolux Home Prods., Inc.*, 2014 WL 4568632, at *12-15 (C.D. Cal. Sep. 11, 2014) (Judge Snyder holding that "[t]he Court has considered the objections of Mr. Sweeney, overrules them in their entirety, finds that they are not made for the purpose of benefitting the Class, and finds that they are meritless in all respects."); *In re TRS Recovery Servs.*, 2016 WL 543137, at *6 n.16 (D. Me. Feb. 10, 2016) (overruling Sweeney's objection and stating his "listed objections are without merit and appear to be a form document"); *In re Carrier IQ, Inc.*, 2016 WL 4474366, at *5 (N.D. Cal. Aug. 25, 2016) (overruling objection by Mr. Sweeney and labeling him a "serial objector" who lacked standing to object because the phone number he "provided on his claim form was actually the same number his wife, Pamela Sweeney, previously swore was hers in another case."); *Brown v. Hain Celestial Group*, 2016 WL 631880, at *10 (N.D. Cal. Feb. 17, 2016) (noting that Mr. Sweeney is a "professional objector"); *Larsen*, 2014 WL 3404531, at *7 (overruling objections and recognizing that "attorney Patrick Sweeney also has a long history of

representing objectors in class action proceedings"); *Martin v. Global Marketing Research Services, Inc.*, Case No. 6:14-cv-01290-GAP-KRS, Dkt. No. 139, at 2 (M.D. Fl. Nov. 4, 2016) ("Finally, the Court finds that the objection filed by Patrick Sweeney is frivolous and without merit.").

B. Mr. Sweeney's Objection Is Frivolous and Ill-Informed

Mr. Sweeney's objection in this case consists of nearly identical arguments from a multitude of other objections filed by him in the past. In fact, it appears that Mr. Sweeney has simply cut-and-pasted from his prior objections in other cases as virtually all of his grounds for objecting are word-for-word identical to objections he has made in other cases.[1] *See* Exhs. 1-10 to the Fisher Decl.

Even taken at face value, Mr. Sweeney's objection is wholly without merit. First, Mr. Sweeney complains that the "claims administration process fails to require reliable future oversight, accountability and reporting about whether the claims process actually delivers what was promised." Sweeney Objection at 1. That statement is false. In the proposed final approval order, the Court "retains continuing jurisdiction over, (a) implementation, enforcement, administration of the settlement, including any releases in connection therewith; (b) resolution of any disputes concerning class membership or entitlement to benefits under the terms of the Stipulation of Settlement; and (c) all parties hereto, for the purpose of enforcing and administering the settlement and the Action until each and every act agreed to be performed by the parties has been performed pursuant to the Stipulation of Settlement." [Proposed] Settlement Approval Order and Final Judgment at 5. In other words, if Class Counsel and the parties do not implement the settlement as they have promised, this Court retains jurisdiction over them to enforce its order approving the settlement. In addition, Class Counsel is highly experienced and has

[1] In fact, paragraphs 5 and 7 of Mr. Sweeney's objection are virtually identical and demonstrate that Mr. Sweeney did not even bother to read his objection prior to filing it.

implemented and overseen dozens of settlements without problem or complaint. *See* Exh. A to 6/19/17 Fisher Decl., Dkt. 292-2 (Bursor & Fisher's firm resume); Exh. A to the 6/19/17 Vozzolo Decl., Dkt. 292-3 (Faruqi & Faruqi's firm resume). There is no basis to conclude that anything different will happen here.

Second, Mr. Sweeney argues that the Court should withhold some amount of Class Counsel's attorneys' fees "to assure Class Counsel's continuing oversight and involvement in implementing the settlement." Sweeney Objection at 3. Again, it appears Mr. Sweeney has not read the Stipulation of Settlement to which he objects. The Stipulation of Settlement already limits the immediate payment of attorneys' fees, and instead requires that the fees be paid "in quarterly installments ***over four years from the date of final approval***." Stipulation of Settlement at § 4.2(a) (emphasis added). Furthermore, Mr. Sweeney cites no case requiring Class Counsel's fees to be withheld. Nor is such a withholding necessary as Class Counsel intends to continue their vigorous representation of the Class and ensure that payments are promptly made to the Class when the settlement becomes final and effective. Fisher Decl. at ¶ 3. Accordingly, no court-ordered withholding of attorneys' fees is necessary.

Third, Mr. Sweeney protests that "Attorney fees do not depend upon how much relief is actually paid to the Class Members." Sweeney Objection at 3. That objection is contrary to the law. In *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997), the Ninth Circuit held it was reversible error to base attorneys' fees on the amount of money class members claimed. Instead, courts should use the lodestar method or the total amount made available to the class to determine attorneys' fees. *Id*. ("We conclude that the district court abused its discretion by basing the fee on the class members' claims against the fund rather than on a percentage of the entire fund or on the lodestar."); *see also Boeing v. Van Gemert*, 444 U.S. 472, 480 (1980) (class plaintiffs' "right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the

fund created by the effort of class representatives and their counsel"). Thus, it would be inconsistent with Ninth Circuit and Supreme Court precedent to determine the reasonableness of Class Counsel's fee request based on consideration of the actual amount paid to class members instead of the amount made available, which in this case is a full refund for each class member without any cap on the total amount that could be claimed. *See* Stipulation of Settlement at § 3.1 ("To each Settlement Class Member who follows the procedures set forth in Section VI of this Stipulation of Settlement and submits a valid Claim Form, Hyland's will pay ***a full refund of the MSRP or the actual purchase price***….") (emphasis added).

Moreover, Mr. Sweeney's objection fails to recognize that the payment of any attorneys' fees to Class Counsel is separate and apart from the relief to the Class and that any fee payment does not derogate in any way from the Class' recovery. *See* Stipulation of Settlement at § 4.2 (b) ("The Fee and Expense Award shall be the total obligation of Hyland's to pay for attorneys' fees, costs, and /or expenses of any kind (including, but not limited to, travel, filing fees, court reporter, and videographer expenses, expert fees, and costs, and document review and production costs) related to this Consolidated Action or any claims asserted in the Consolidated Action."). Regardless, 142,517 class members have submitted claims in this case. Supplemental Lucchesi Decl. at ¶ 3. As a result, the settlement has been a resounding success and will provide significant monetary relief to the Class.

Fourth, Mr. Sweeney contends that the "fee request is not reasonable in the absence of documentation, including detailed billing records (including hourly rates of the professionals, hours accumulated and reasonable costs incurred), which can be evaluated by the Class and the Court to determine the reasonable nature (or not) of the fee request." Sweeney Objection at 3. Mr. Sweeney overlooks the fact that Class Counsel have submitted all of the information he demands to the Court and posted that information on the settlement website (https://www.hylandslawsuit.com) for review by Mr. Sweeney and the Class. If Mr. Sweeney had simply reviewed the

settlement website prior to filing his objection, he would have discovered the exact information he claims should have been provided.

Finally, Mr. Sweeney bizarrely asserts that "[s]ome *cy pres* procedure needs to be articulated so that Class Members and the Court can intelligently comment, object or approve the appropriateness of the *cy pres* procedure, recipient and amount of the *cy pres* distribution." Sweeney Objection at 4. This settlement does not include any *cy pres* procedure. Class members who submit claims will get a full refund. There is no *cy pres* distribution of any kind set forth in the Stipulation of Settlement.

The Court should overrule Mr. Sweeney's objection.

C. Ashley Hammack and Her Counsel Are Also Serial Objectors

Like Mr. Sweeney, Ashley Hammack is also a serial objector to class action settlements. For instance, last year Ms. Hammack objected to the settlement in *Lerma v. Schiff Nutrition International, Inc.*, 2016 WL 773219, at *3 (S.D. Cal. Feb. 29, 2016). In that case, the court rejected Ms. Hammack's objection and ordered her to post an appeal bond of $2,500 after concluding that her appeal was "meritless." *Id*. at *3. Ms. Hammack has also already filed two other unsuccessful objections this year. *See Rapoport-Hecht v. Seventh Generation, Inc.*, Case No. 7:14-cv-09087-KMK (S.D.N.Y. 2014), Dkt. Nos. 56 and 76 (approving settlement and rejecting Hammack's objection); *see also Vincent v. People Against Dirty, PBC*, Case No. 7:16-cv-06936-NSR (S.D.N.Y. 2016), Dkt. Nos. 44 and 55 (overruling Hammack's objection in its entirety and noting that "many of Ms. Hammack's arguments do not even apply to this settlement and are irrelevant").

Ms. Hammack's counsel Michael Creamer is also well-known for representing objectors to class action settlements. *See Warner v. Toyota Motor Sales, U.S.A., Inc.*, 2017 U.S. Dist. LEXIS 77576, at *36-38 (C.D. Cal. May 21, 2017) (finding objections to be "without merit"); *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122 (N.D. Cal. 2015) (rejecting objections); *Cotter v. Lyft, Inc.*, 2017 WL 1033527, at *6 (N.D. Cal. Mar. 16, 2017) (overruling objections); *Roos v.*

Honeywell Internat., Inc., 241 Cal. App. 4th 1472, 1486-1497 (2015) (rejecting objections on appeal).

D. Ms. Hammack's Objection Is Without Merit

Ms. Hammack first complains that "class counsel has not posted its fee motion on the class action website as of the date of filing of this objection." Hammack Objection at 2. That is incorrect. Ms. Hammack filed her objection on June 28, 2017 (Dkt. No. 295) yet Class Counsel's motion for attorneys' fees was posted on the website on June 20, 2017, the day after it was filed with this Court (Dkt. No. 293). Fisher Decl. at ¶ 4.

Second, Ms. Hammack argues that "this Court should reduce the attorneys' fees to 25 percent of what the class will actually recover." Hammack Objection at 2. Specifically, Hammack claims that "there is no minimum amount for the class to receive" and the "class could theoretically receive almost nothing and the attorneys would still receive millions." Like Mr. Sweeney, Ms. Hammack is wrong on the law and the facts.[2] The Ninth Circuit has made clear in cases like this one where the class recovery depends on the number of claims submitted, the fee award is to be based on lodestar or the amount made available to the class whether or not it is actually claimed. *See Williams*, 129 F.3d at 1027 ("We conclude that the district court abused its discretion by basing the fee on the class members' claims against the fund rather than on a percentage of the entire fund or on the lodestar."); *Boeing*, 444 U.S. at 480 (class plaintiffs' "right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the effort of class representatives and their counsel"). Here, the settlement provides full

[2] Ms. Hammack claims that Class Counsel seeks $2.9 million in attorneys' fees. Hammack Objection at 2. That is wrong. Class Counsel only seeks $2,145,195.80 of its $5,515,329.75 lodestar. Dkt. No. 292-1, at *3. That information was publically available to Ms. Hammack and her counsel prior to her objection. Fisher Decl., at ¶ 4.

refunds to class members with no cap on the total amount that can be claimed. The settlement has been an unqualified success as 142,517 class members have submitted claims. Supplemental Lucchesi Decl. at ¶ 3. Ms. Hammack argues that the "settlement is unfair in that it gives the class attorneys no incentive to actually create a robust notice program that will encourage class members to fill out claim forms." Hammack Objection at 2. That argument misses the mark as the notice program approved by this Court was clearly robust. Direct notice was sent to nearly 1.4 million class members. *See* 6/19/17 Lucchesi Decl., Dkt. 291-2, at ¶¶ 7-12. The Facebook campaign was also a success as it generated more than 45 million impressions. *Id.* at ¶ 13.

Finally, Ms. Hammack argues that the "class representative's award is too high." Hammack Objection at 3. Ms. Hammack cites no authority in support of her contention and ignores the numerous cases that have approved $5,000 incentive awards. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457 (9th Cir. 2000) (approving $5,000 incentive award); *In re Toys R Us–Delaware, Inc. FACTA Litig.*, 295 F.R.D. 438, 470–72 (C.D. Cal. 2014) (holding that a $5,000 incentive award is "consistent with the amount courts typically award as incentive payments"); *McNeal v. RCM Technologies USA, Inc.*, 2017 WL 1807595, at *6-7 (C.D. Cal. March 16, 2017) (approving $10,000 incentive awards to two named plaintiffs); *Gonzalez v. Southern Wine & Spirits of America, Inc.*, 2012 WL 12887533, at *6 (C.D. Cal. March 29, 2012) (approving incentive award of $5,000 to class plaintiff); *In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 592 (N.D. Cal. 2015)("a $5,000 payment is presumptively reasonable"); *Hawthorne v. Umpqua Bank*, 2015 WL 1927342, at *8 (N.D. Cal. Apr. 28, 2015) (finding that "$5,000 is the typical enhancement award in this Circuit"); *Harris v. Vector Marketing Corp.*, 2012 WL 381202, at *6-7 (N.D. Cal. Feb. 6, 2012) (holding that "as a general matter, $5,000 is a reasonable amount"); *Hopson v. Hanesbrands Inc.*, 2009 WL 928133, at *1 (N.D. Cal. Apr. 3, 2009) (approving $5,000 incentive award to one named plaintiff).

The $5,000 incentive awards are particularly appropriate in this case as Plaintiffs Forcellati and Roemmich have been actively involved in this case for more than four years, were deposed and took this case to the brink of trial. *See* 6/19/17 Fisher Decl., Dkt. 292-2, at ¶¶ 64-66; 6/19/17 Vozzolo Decl., Dkt. 292-3, at ¶¶ 34-36.

The Court should overrule Ms. Hammack's objection.

E. Zeynep Vitale's Objection Is Also Without Merit

Unlike Mr. Sweeney and Ms. Hammack, Ms. Vitale does not appear to be a professional objector. Ms. Vitale describes herself as "a mother of two daughters currently ages seven and five." Vitale Objection at 1. She says that she has used "homeopathic remedies" for her children's illnesses and has been a "loyal customer of Hyland's … over the last eight years." *Id.*[3] She states that upon receiving the notice in this case she further investigated "the effectiveness of homeopathic products" and learned that such products are considered to be "pseudoscience" and that studies have shown that "these products are no more effective than placebos." *Id.* She further states that, in her view, this case was filed to "hold Hyland's accountable for their misleading of parents, such as [herself], who believed that a product that claimed to be safe and has been around for more than 100 years could be trusted." *Id.* Nevertheless, she objects that the "suit is little more than a means by which the attorneys who filed the case will make an enormous amount of money." *Id.* She also complains that Defendants will only reimburse class members "an average cost of $9.35." *Id.*

[3] It is unclear if Ms. Vitale is actually a class member. She does not identify which Hyland's products she purchased nor does she explicitly state that she purchased any of the products at issue in this case. Hyland's sells numerous products for children that are not at issue in this case. *See* http://www.hylands.com/4kids/products.

With all due respect, Ms. Vitale lacks some critical information about the settlement and this action.[4] First, she does not appear to know that more than 142,000 people have submitted claims and will get full refunds for their purchases. Supplemental Lucchesi Decl. at ¶ 3. Second, she missed the fact that class members can receive full refunds for not just one, but two purchases without proof of purchase. Stipulation of Settlement at § 3.1. In addition, class members can get a full refund for three or more purchases with proof of purchase. Accordingly, her complaint that class members are limited to an average cost of $9.35 is incorrect. Tellingly, Ms. Vitale does not propose an alternate method of compensating class members. This is understandable because it is difficult to conceive of a better settlement than one that pays class members a full refund. Third, Ms. Vitale overlooks the benefit of the class notice in this case, which has provided many class members, including her, with insight into Hyland's homeopathic products. Indeed, the injunctive relief provides future purchasers of the Hyland's products with total relief should they come to the same conclusions as Ms. Vitale. *See* Stipulation of Settlement at § 3.2. Fourth, Ms. Vitale does not appear to know that over the course of this challenging litigation, Class Counsel incurred more than $750,000 in costs and expenses with no guarantee that they would ever be reimbursed. The lion's share of these expenses involved the burden of class notice and costs associated with expert reports and depositions – expenses incurred to prosecute the claims that Ms. Vitale feels so strongly about. Class Counsel also worked on the case without payment for more than four years and had a lodestar in excess of $5.5 million. And yet, they are only seeking fees in the amount of $2,145,195.80, which is a negative multiplier of .39. Fifth, Ms. Vitale questions whether the settlement is meant to help consumers because there is no apology from Defendants. A basic tenet of a

[4] Class Counsel attempted to contact Ms. Vitale to discuss her objection and explain more to her about the settlement. Fisher Decl. ¶ 5. Ms. Vitale did not return phone calls from Class Counsel nor did she respond to their emails. *Id.*

settlement is reaching a compromise; not securing an admission of liability or apology. Indeed, "the very essence of a settlement is compromise…." *Browne v. Am. Honda Motor Co.*, 2010 WL 9499072, at *12 (C.D. Cal. July 29, 2010) (citing *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 625 (9th Cir. 1982)). "This Court hereby decrees that neither the Settlement Agreement, nor this preliminary approval order, nor the fact of a settlement, are an admission or concession by the Defendant of any liability or wrongdoing." *Jaffe v. Morgan Stanley & Co.*, 2008 WL 346417, at *12-13 (N.D. Cal. Feb. 7, 2008) (approving a class action settlement after objections were evaluated and ruling that the settlement did not constitute any admission of liability). As is explicitly stated in the Stipulation of Settlement, the payments to Plaintiffs and the Class are not an admission of liability by Defendants, and Defendant is not required to apologize. Settlement, § VII., 7.3, p. 26. Instead, these payments are being offered to consumers by Defendants as a compromise of the claims at issue. This allows both parties to avoid substantial risks. Namely, while Defendant does not have to apologize, Plaintiffs and the Class avoid the very real risk that the Class recovers nothing. Ms. Vitale's hardline position indicates that she is unaware of the outcome in *Allen v. Hyland's, Inc.*, Case No. 12-cv-01150-DMG-MAN, Dkt. 426 (Verdict Form). There, plaintiffs advanced nearly identical claims against Defendants as those in this action and lost at trial *on every claim*. *See also Lewert v. Boiron, Inc.*, Case No. 11-cv-10803, Dkt. 447 (Verdict Form) (another homeopathic efficacy case that failed at trial). *Allen* and *Lewert* class members recovered nothing. Here, in contrast, the settlement will make near total relief available to class members.

Class Counsel are proud of this settlement and the work they did on this case. Through their diligence and hard work, they have achieved a tremendous victory for the class. The Court should overrule Ms. Vitale's objection.

Dated: July 28, 2017

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