SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Dept. No. 14

Date: 2/14/2022 Hon. MICHAEL MARKMAN, Judge

HOWARD CLARK, individually, on behalf of all others similarly situated, and the general public,

Plaintiff,

v.

S.C. JOHNSON & SON, INC. and DOES 1-1000,

Defendants.

Case No. RG20067897

ORDER GRANTING FINAL APPROVAL OF CLASS SETTLEMENT, CERTIFYING SETTLEMENT CLASS, AND APPORTIONING ATTORNEYS FEES

I. OVERVIEW

Plaintiff Howard Clark seeks final approval of a proposed nationwide class action settlement with Defendant S.C. Johnson & Son., Inc. ("SC Johnson"). The proposed settlement imposes an injunction on all SC Johnson Windex-branded home-cleaning products barring use of the marketing claim that the products are "non-toxic" and provides damages to class members. In exchange, it includes a release to SC Johnson concerning claims that use of the "non-toxic" marketing claim was false, deceptive, or misleading as to those products.

The Court GRANTS final approval of the proposed settlement. The Court finds that the settlement is fair and reasonable. The Court also GRANTS Plaintiff's motion for attorney's fees. This Order includes an allocation of fees to counsel for Intervenor Michelle Moran, based on their service to the settlement class in connection with parallel related litigation in federal court.

A. Plaintiff's Claims

Plaintiff alleges that SC Johnson manufactured and marketed a number of Windex-brand home cleaning products as "non-toxic." The products, however, contained several ingredients that raise concerns of toxicity under various standards. The allegedly toxic ingredients in what were supposed to be "non-toxic" home-cleaning products included 2 hexoxyethanol, isopropanolamine, ammonium hydroxide, lauryl dimethyl amine

oxide, sodium dodecylbenzene sulfonate, butylphenyl methylpropinol, linalool, citronellol, butoxypropanol, lauramine oxide, acetic acid, and sodium hydroxide.

Plaintiff seeks to represent a class of all purchasers of the Windex Products as to which SC Johnson made its "non-toxic" marketing claim in the United States. Plaintiffs propose a subclass for California citizens. Plaintiff asserts seven claims: (1) violation of the CLRA [CC §§ 1750 et seq.]; (2) violation of California's unfair competition law (B&PC §§17200 et seq.); (3) violation of California's false advertising law (B&PC §§ 17500 et seq.); (4) breach of express warranty; (5) breach of implied warranty; (6) negligent misrepresentation; and (7) fraud.

B. Procedural Context

Plaintiff and SC Johnson have agreed to a class action settlement of Plaintiff's claims. On July 9, 2021, the Court granted the motion for preliminary approval of the class action settlement. The Court also granted Intervenor's motion to intervene, which it had previously denied, so that Intervenor could raise objections to the settlement relating to "reverse auction" concerns.

SC Johnson does not oppose the motion for final approval. Intervenor Michelle Moran, who is also putative class member and is a lead plaintiff in a federal class action against SC Johnson involving substantially similar claims, opposes the motion and seeks recovery of attorney's fees.

II. LEGAL STANDARDS

Class action settlements must be reviewed and approved by the Court so as to protect the interests of absent class members. (See *Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 95 ["The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement."].) California follows a two-stage procedure for court approval. First, the Court reviews the form of the terms of the settlement and form of settlement notice to the class and approves or denies preliminary approval. Later, the Court considers objections by class members and grants or denies final approval. (Cal. R. Ct. 3.769.)

When evaluating class action settlements, the Court considers a number of factors to determine if the settlement is fair, adequate, and reasonable. These include: (1) the relative strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation of this dispute; (3) therisk of maintaining class status through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and stage of the proceedings; (6) the experience and views of counsel that settlement is reasonable; and (7) the presence or lack of any objections to the proposed settlement. (See *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App.4th 224, 244-45; *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801.) The Court examines the strength of the case for plaintiffs on the merits, balanced against the

amount offered in settlement. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.)

The timing of the proposed settlement in this case occurred prior to formal class certification, which raises concerns about an increased risk of an unfair settlement due to collusion. As the Ninth Circuit explains, "Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement. Accordingly, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required ... before securing the court's approval as fair." (*In re Bluetooth Headset Prods. Liability Litigation*, 654 F.3d 935, 946 (2011) [citations omitted].)

Signs of collusion or other potentially improper influence may include "(1) when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded; (2) when the parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds, which carries 'the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class; and (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." (*Id.* at 947 [citations and ellipses omitted].)

Intervenor's co-pending class action raises a significant red flag, which calls for further examination. Specifically, between May and July 2020, four other sets of plaintiffs filed putative class action lawsuits challenging the non-toxic labels on Windex glass cleaners. The lawsuits are captioned:

(1) Rivera v. S.C. Johnson & Son, Inc., S.D.N.Y 1:20-cv-03588-RA, filed May 7, 2020;
(2) Moran v. S.C. Johnson & Son Inc., N.D. Cal. 4:20-cv-03184-HSG, filed May 8, 2020;
(3) Waddell v. S.C. Johnson & Son Inc., N.D. Cal. 4:20-cv-3820-HSG, filed June 10, 2020;
(4) Rosenberg v. S.C. Johnson & Son Inc., E.D. Wisc. 2:20-cv-00869-JPS, filed June 8, 2020; and
(5) Clark v. S.C. Johnson & Son, Inc., Superior Court of the State of California for the County of Alameda Case No. RG20067897, filed July 15, 2020.

The four federal cases are consolidated under federal Multi-District Litigation rules before the Honorable Haywood Gilliam in the Northern District of California. The MDL is captioned *In re: S.C. Johnson & Son, Inc. Windex Non-Toxic Litigation* (No. 4:20-cv-03184-HSG).

Mediation in Moran/Waddell started on August 31, 2020. The mediation did not result in a settlement. Mediation in Clark started on September 8, 2020. A retired magistrate judge served as a mediator and helped the parties reach a proposed settlement on December 2, 2020. The parties amended the proposed settlement on April 19, 2021.

Intervenor raises concerns that Clark's counsel engaged in a "reverse auction" to settle all the cases around Intervenor's counsel, who represent the putative class in the MDL. A

reverse auction scenario can render a proposed settlement unfair by allowing the defendant in a series of class actions to shop for the most favorable settlement terms among different groups of plaintiffs' attorneys. This can happen by contacting multiple plaintiffs' attorneys or by inducing them to compete against each other, with the low bidder among the plaintiffs' attorneys winning the right to settle with the defendant. (See generally John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1354 (1995).)

In a fundamentally unfair reverse auction, the defendant agrees to pay generous attorney's fees in exchange for an overall settlement amount that is low, where injunctive relief is absent and/or meaningless, and where the attorney appears to be breaching their duties to the class in exchange for payment of fees. (*Reynolds v. Beneficial National Bank*, 288 F.3d 277, 282 (7th Cir. 2003).)

Potential unfairness may exist whenever more than one class action lawsuit involving the same claims is filed. But, not every reverse auction-like scenario in which a defendant settles class claims with one set of plaintiffs' counsel and not with another is an unfair and/or unreasonable proposed settlement. Rather, settlements that involve the possibility of a reverse auction must be scrutinized more closely to ensure that the settlement is fair and reasonable. (See *In re Community Bank of Northern Virginia*, 418 F.3d 277, 308 (3d Cir. 2005); *Reynolds*, 288 F.3d at 283.)

ANALYSIS OF APPROVAL FACTORS

Strength of Plaintiff's Case

The relative strengths of Plaintiff's claims favor the proposed settlement. This litigation is at a fairly early stage. Based on input from Plaintiff and from Intervenor, who has been litigating substantially similar claims in federal court, the CLRA, UCL, and false advertising claims are relatively strong on the merits. SC Johnson does not appear to contest its use of the "non-toxic" labeling. The contents of the products ought not to be difficult to determine. Expert testimony would be required to explain why the ingredients alleged to be "non-toxic" are, in fact, "poisonous" or "very harmful or unpleasant in a pervasive or insidious way" (drawing from the dictionary definition of "toxic"). The presence of most (if not all) the objectionable ingredients on various regulatory lists of products of concern would likely reduce problems associated with a battle of the experts (or else make the discussion rather one-sided in plaintiffs' favor).

The claims for breach of express and implied warranty, negligent misrepresentation, and fraud would be more challenging to prove. Plaintiffs would need to develop evidence of intent, which would probably be circumstantial in nature. Even more challenging, the element of reliance would likely require an individualized inquiry difficult to pursue on a class-wide basis.

Plaintiff has reason to be relatively confident in her ability to obtain injunctive relief regarding the use of the "non-toxic" marketing claim. Setting aside the more challenging issue

of reliance, Plaintiff has a strong argument that the term "non-toxic" is misleading and confusing to consumers when placed on the label of household cleaning products that contain at least a subset of the ingredients identified by Plaintiff. Any fair settlement would need to address this issue. The proposed settlement provides immediate injunctive relief and insures the label will not be used in the future.

The strength of Plaintiffs' claim for monetary damages is much more difficult to assess. That difficulty speaks to potentially serious weaknesses in Plaintiffs' claims.

Plaintiff and Intervenor provide conflicting evidence about the value of the class claim for monetary damages. Plaintiff submits a declaration from Alan Goedde, an expert on damages modeling with a Ph.D. in Economics. Goedde opines that monetary damages can be calculated by using an analysis of unit sales and price data from sales of the products at issue over a two-year period. He concludes that although it is theoretically possible that the "non-toxic" product labels could help SC Johnson command higher prices in the marketplace, in this case review of average selling prices in 2018 and 2019, demonstrates that the sales prices of the Windex Products did not increase significantly, and, in fact, increased by less than the rate of inflation.

Intervenor contends that Goedde's methodology is a mess, and has been rejected by a number of courts in labeling cases. (See *Weiner v. Snapple Beverage Corp.*, 2010 WL 3119452, at *1 (S.D.N.Y. Aug. 5, 2010); *Gucci Am., Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, 234 (S.D.N.Y. 2012); *Barton v. RCI, LLC*, 2014 WL 1292236, at *1 (D.N.J. Mar. 31, 2014).) Intervenor submits a declaration from Stephan Boedeker, also a damages modeling expert, with an MA in Economics. Boedeker argues that Goedde's approach is flawed because he fails to "isolate the value of the 'non-toxic' statement when the consumers know at the point of purchase that the 'non-toxic' statement is not true." Boedeker suggests a conjoint analysis, which uses a well-crafted survey to "explor[e] respondents' preferences over multiple sets of choices, which produces rich data sets and numerous data points from which to estimate the value of the attribute feature of interest." (Boedeker Decl. at para. 26.)

Other than suggesting the possibility of a conjoint analysis, however, Boedeker does not explain how he might craft the survey or how one might obtain an appropriate survey sample. Nor does Boedeker note the many other risks associated with such an approach, including the possibilities that either a jaded public might not place any value on a claim that a cleaning product is "non-toxic," or respondents might assume all cleaning products are "non-toxic" unless they have a "toxic" warning label on them and so ascribe no value to the claim. It is not at all clear that Plaintiff could draft an appropriate survey and obtain useful data from a sufficiently large sample to allow one to draw conclusions based on it. As the Court noted in connection with its order granting preliminary approval, the bottom line is that obtaining admissible survey data is extremely expensive, and there is no guarantee that the trier of fact will find it at all persuasive.

Boedeker criticizes Goedde's efforts to value damages based on what Goedde suggested were comparable goods, thereby "masking the price premium with 'apples-to-oranges' comparisons, and thus grossly underestimating the economic loss to the class members." As the Court previously noted, Boedeker still seems to be treating the "non-toxic" claim as more of a claim that the products at issue were "eco-friendly," to use his words, or perhaps even "organic," to use another marketing claim that has been the subject of frequent litigation. The Court is not aware of evidence that SC Johnson was charging a true price premium for products labeled as "non-toxic," as one might expect if it had been marketing a product as "eco-friendly" or "organic" or otherwise a healthy alternative to other less-healthy/more-toxic products it or its competitors offer.

Boedeker also opines it might be possible to use a hedonic pricing model to assess damages. The general concept of hedonic pricing is to break down a product into its component parts and the determine how the market values those parts. Hedonic pricing, however, is extremely challenging and models can be fairly easy to attack. It is somewhat similar to methodologies used in patent cases to assess damages under the entire market value rule, which can and does frequently descend into a morass. (*See, e.g., VirnetX, Inc. v. Cisco Systems, Inc.* (Fed. Cir. 2014) 767 F.3d 1308, 1326-27; *Versata Software, Inc. v. SAP Am., Inc.* (Fed. Cir. 2013) 717 F.3d 1255, 1268.) Frequently, hedonic pricing will require obtaining good survey data, which is difficult and expensive, as previously noted by the Court. In situations involving the ability to substitute products, like cleaning products at issue in this case, hedonic pricing may also require identifying products to compare and marketing and, once selected, pricing data for the comparison. All of this requires significant effort and expense, and the result is not pre-ordained. There is substantial risk that use of the hedonic pricing model could result in nominal damages rather than an enhanced award.

Intervenor also provides declarations from Steven P. Gaskin and Colin B. Weir, who are damages experts. Gaskin opines that a price premium can be reliably isolated through a conjoint analysis. (Gaskin Decl., ¶ 12.) Both Gaskin and Weir assert that this methodology is routinely accepted by court to calculate class-wide damages in similar cases. (Gaskin Decl., ¶ 14; Weir Decl., ¶ 33, n. 19.) Both damages experts assert that a survey can be devised to measure this price premium, and based on their survey results, the most conservative low-end price premium results in damages of $13,040,786.52 to the class in 2019, 2020, and the first two months of 2021, and the less conservative premium shows that the class suffered damages of $21,339,468.84. (Weir Decl., ¶¶ 68-70, Table 2; Gaskin Decl., ¶¶ 12, 63-64 n. 52.)

SC Johnson responds to Intervenor's objection that the monetary component of the settlement is inadequate by citing cases in which Dr. Gaskin and Mr. Weir's conjoint analyses of restitution were excluded because they were flawed or inconsistent with the plaintiff's theory of liability. SC Johnson contends that the proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received. (*Colgan v. Leatherman Tool Group, Inc.*, (2006) 135 Cal.App.4th 663, 700.) SC Johnson argues that even if the court accepts Gaskin's opinion that consumers paid 5.5% to 9.0% more for their products, which were about $4.00 apiece, they

would be entitled to restitution of $0.22 to $0.36 for each products purchased, which is less than the estimated amount of $0.46 that is the basis for funding the settlement. SC Johnson also argues that the data used by Intervenor to calculate damages was obtained from Information Resources, Inc., but no foundation is laid for the accuracy of that date. Further, the data appears to be based on data from sales to consumers, but SC Johnson does not sell directly to consumers.

The Court concludes that the issue of the damage suffered by the class members raises complex and difficult issues of proof, as it explained in the order granting preliminary approval. It is exceptionally difficult to prove whether and how the use of the "non-toxic" claim on cleaning product labels, in and of itself, led to an increase in profits. As before in connection with its preliminary approval order, the Court agrees that there is some merit to the criticisms of Goedde's approach. Alternative approaches, however, are at least as vulnerable to attack (and perhaps even more so). Regardless of the approach used to calculate damages, proof for trial will require a significant outlay of time, effort, and funds, with no guarantee of success.

The Court concludes that Plaintiff does not have a strong claim for damages, and in particular does not have a strong claim for damages in the range proposed by Intervenor and her experts. The Court also finds that the settlement adequately compensates claimants for any loss they suffered as a result of the misleading label.

Downsides of Further Litigation

Assessment of the risk, expense, complexity, and likely duration of further litigation of this dispute favor the proposed settlement. The litigation is at a comparatively early stage; it appears somewhat more progress has been made in the federal case. The case in this Court would take a year or more to get to trial. As noted above, Plaintiff faces challenges in proving the elements of the warranty, misrepresentation, and fraud claims; the elements of intent and reasonable reliance may be particularly challenging to prove. As also noted above, proving monetary damage would involve significant risk and expense. Plaintiff Clark's proposed damages methodology is flawed, as Intervenor's expert highlights, but Intervenor's proposed damages methodology is also potentially vulnerable to attack, depending in large part on choices that must be made when crafting and deploying consumer surveys and on analyzing comparable products. Proving damages based on consumer surveys would likely be very expensive and time consuming, and it is not clear that this approach would lead to a better result than the damages theory proposed by Clark's expert.

Proving that ingredients in Windex products labeled "non-toxic" are actually "toxic" would require expert analysis and further expense. Plaintiffs also face some down-side risk that the trier of fact might conclude using "non-toxic" in connection with a product that is free of ammonia is a reasonable marketing claim under the circumstances.

Finally, the injunctive relief in the Settlement Agreement in this case would be effective immediately. SC Johnson has already stopped producing Windex products with a "non-toxic"

label. If the settlement is not approved, SC Johnson would be free to resume labeling its Windex products "non-toxic." Counsel for SC Johnson also confirmed on the record in connection with the hearing on the motion for preliminary approval that SC Johnson will not seek to revisit use of the "non-toxic" marketing claim on the cleaning products at issue here absent specific guidance concerning use of the claim by the FDA following further rulemaking. The Court relies on that representation, which is a key component to the fairness of the settlement. Those representations buttress the Court's conclusion that the injunctive relief provided in the proposed settlement is real and will benefit class members and other potential future purchasers of Windex cleaning products.

Risk of Maintaining Class Status Through Trial

Risks associated with maintaining class status through trial favor the proposed settlement. First, Plaintiffs' warranty, misrepresentation, and fraud claims may all be difficult to maintain on a class basis. For example, the element of reasonable reliance is often a highly individualized inquiry. It is difficult to infer that all purchasers of the "nontoxic" labeled cleaning products relied on that marketing claim. Indeed, it is entirely possible that many consumers would not even recall seeing that part of the label before buying the product, let alone relying on the "non-toxic" claim rather than some other attribute of the product (including other aspects of the product branding) in making the decision to purchase it. Second, while the CLRA, UCL, and false advertising are likely easier to maintain on a class basis, SC Johnson could well attempt to avoid certification by using survey data gathered in connection with efforts to prove damages using the conjoint analysis or hedonic pricing methodologies referenced by Intervenor's expert.

Amount Offered in Settlement

The proposed settlement includes a $1.3 million Settlement Fund, which will pay claims by class members who submit a valid claim, attorney's fees and expenses as ordered by the court, class notice, and costs of administration. Claimants who file a valid Claim Form for purchases of the Products with Proof of Purchase may obtain reimbursement of up to $1.00 per Product purchased during the Class Period, without any limitation on the number of Products purchased. Claimants who file a valid Claim Form for purchases of Products without Proof of Purchase may obtain reimbursement of up to $1.00 per Product purchased for up to ten Products purchased during the Class Period. This sum will not revert to SC Johnson if it is not fully depleted by the claims of class members, although the parties and Intervenor all appear to agree that it will be fully depleted. Intervenor asserts that based on the number of claims received, claimants will receive $.46 per Product purchased.

The proposed injunctive relief also has substantial value to consumers of Windex products. Plaintiff alleges in this action that using "non-toxic" on the label of Windex products at issue is misleading. SC Johnson has agreed to provide the following injunctive relief: "Beginning within ninety (90) days after the Effective Date, SC Johnson shall begin manufacturing Products without the allegedly misleading 'non-toxic' claim on the Product

labels. Within ten days of the Effective Date, SC Johnson will modify the content of SC Johnson's Website(s) to correspond to the labeling changes." The injunctive relief removes the possibility that the future consumers will be misled by labels claiming the ingredients are "non-toxic," which is the main type of harm claimed in this action. In addition, it is foreseeable that withdrawing the "non-toxic" label may lead consumers to view the re-labeled product as toxic, so the injunction may adversely impact SC Johnson sales of Windex. In light of the benefit to consumers, and the down-side risk to SC Johnson of having to publicly withdraw its earlier "non-toxic" marketing claim, the economic value of the injunctive relief should not be understated.

The injunctive relief provision is broad and remediates the alleged harm to consumers that Plaintiff claims in this action. At the hearing for preliminary approval, counsel for Defendant re-confirmed that the injunction will bar SC Johnson from using the "non-toxic" marketing claim on any household cleaning products unless and until there is some material change in fact, such as SC Johnson ceasing use of the ingredients identified by Plaintiff in the complaint as problematic, or in law, as where the FDA adopts regulations governing the use of that claim and a product complies with that new regulation.

The Release in the settlement agreement is not overly broad. It is limited to "only those claims that arise out of or relate to the allegations in the Action or Defendant's advertising, formulation, labeling, marketing, and advertising of the Products." (Settlement Agreement at ¶ 2.24.) The Released Claims do not include "any claim for damages sought for any type of personal injury regardless of legal theory or the law under which such action may be brought." The Court interprets this to mean that only the products at issue are covered by the release, and only with respect to the "non-toxic" label, and the Settlement is approved based on that construction of the release.

Extent of Discovery and Stage of Litigation

As noted above, this litigation is at an early stage. The parties here have not engaged in extensive discovery. The federal case is at a more advanced stage.

Input of Counsel Regarding Reasonableness

Counsel for Clark has provided a declaration describing their bases for concluding the proposed settlement is reasonable. Counsel for intervenor vehemently disagrees. The Court is not particularly persuaded by either set of declarations. The declarations seem to under-value the injunctive relief to which Defendant has agreed. Instead, they focus on the proposed monetary component. That debate serves primarily to underscore the difficulty under existing law of proving substantial damages in a product labeling case.

Objections to Settlement

Intervenor objects that the injunctive relief is illusory and the release is overly broad. The court does not agree those objections as reasoned above.

Intervenor Moran's primary objection to the proposed settlement is based on her contention that the settlement fund of $1.3 million is unreasonably low when compared to the damages suffered by the class. The evidence offered by Plaintiff and Intervenors on the issue of potential monetary damages is discussed above. The Court does not agree with Intervenor that the monetary settlement amount is strong evidence of an unfair settlement. In addition to the difficulty in proving the damages claimed, which Intervenor does not acknowledge, Intervenor has not given sufficient weight to the injunctive relief provided by the agreement, which must be considered in evaluating its overall fairness.

Intervenor argues that the circumstances surrounding the settlement support the conclusion that it is the product of collusion and a reverse auction scenario, which eliminates the usual presumption that the settlement was reasonable or fair. Intervenor contends that after she filed her cases against SC Johnson, she litigated them vigorously, including preparing oppositions to dispositive motions filed by SC Johnson, serving discovery, preparing a motion to compel responses, consulting with experts regarding the toxicity of the products, and expending $100,000 in costs to, among other things, conduct a consumer survey and conjoint analysis to demonstrate the economic loss suffered by the class. She asserts that her counsel spent more than 1,000 hours to prosecute this action.

Intervenor notes that she filed the first class action lawsuit involving SC Johnson's "non-toxic" marketing claim. She asserts that after four lawsuits had been filed against SC Johnson, Plaintiff filed a fifth lawsuit that mirrors the complaints filed in the first filed cases. She points out that SC Johnson did not demur or move to strike Plaintiff's complaint in this action, even though it had filed dispositive motions in the other cases, but instead answered. Intervenor asserts that she did not know this action had been filed, because Plaintiff and Defendant did not provide notice of related cases and serve it on her or the other named Plaintiffs and their counsel, in violation of Rule 3.300(b) of the California Rules of Court.

Intervenor asserts that SC Johnson initially tried to reach settlement with another attorney in Connary et al. v. S.C. Johnson & Son, Inc., Case No. RG20061675, Superior Court of California, County of Alameda, who had filed a class-action lawsuit involving SC Johnson's Method cleaning products by adding Windex products to the settlement. She asserts that after she filed a motion to intervene in that case, Windex was removed from the settlement in that case.

Intervenor explains that she entered into mediation with SC Johnson on August 31, 2020, by SC Johnson failed to convince her to accept what she believed was an unreasonably low offer. She asserts that one week later, SC Johnson mediated with Defendant and was eventually able to convince Defendant to accept the same offer that Intervenor had rejected as

inadequate. She asserts that the settlement was reached on September 8, 2020, before SC Johnson had filed an answer in this case. Intervenor asserts that SC Johnson concealed the existence of the settlement agreement by failing to disclose that fact at a hearing in her case on November 16, 2020, and asking for extensions of time to respond to discovery in late 2020 with the intent to refuse to respond.

Intervenor contends that Plaintiff had not conducted any discovery to evaluate Defendant's defenses, without confirming the reliability of Defendant's sales figures, and without reviewing documentation or taking depositions regarding Defendant's costs for truly non-toxic ingredients, market research regarding the materiality of non-toxic advertising claims, price and sales volume fluctuations for the Products with and without the non-toxic advertising claim, or Product formulations.

SC Johnson argues that the circumstances surrounding the settlement do not point to collusion or a reverse auction. It contends that it could not disclose the settlement in principle with Plaintiff at the November 8, 2020, hearing to appoint counsel because it was not finalized until December 2, 2020, and remained subject to mediation confidentiality obligations. SC Johnson contends that before any of the Windex "non-toxic" label class actions were filed, the plaintiff's counsel in the *Connory* case approached SC Johnson about adding Windex products to the settlement in that case, so the attempted settlement in that case was not the result of a reverse auction. SC Johnson also asserts that Plaintiff did not diligently prosecute the Moran lawsuit, but instead failed to depose SC Johnson during the seventeen months from the date of filing until this court issued a stay, and only moved to compel responses to discovery after the court granted preliminary approval of the settlement in this case.

The Court has not applied any presumption favoring the proposed settlement, given concerns relating to an unfair or unreasonable reverse auction. Rather, the Court has attempted to start from "square one" in reviewing the proposal. The Court concludes that the proposed settlement lacks the sort of "odor of mendacity" that has caused other courts to refuse to approve proposed class settlements and PAGA settlements, as previously discussed in the order granting preliminary approval. (See *Neutron Holdings Wage and Hour Cases* (Case No. CJC-19-005044 (S.F. Super. Ct. Feb. 18, 2021) at 2-3 [quoting *Negrete v. Allianz Life Ins. Co.* (9th Cir. 2008) 523 F.3d 1091, 1099 [citations omitted].)

The parties negotiated the proposed settlement with the assistance of a former federal magistrate judge as a mediator. The court gives "considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in [concluding] that [the] settlement agreement represents an arm's length transaction entered without self-dealing or other potential misconduct." (*Kullar*, 168 Cal.App.4th at 129; see also *In re Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 504.) In addition, the terms of the Settlement Agreement do not indicate an attempt to maximize attorney's fee or other indicia of collusion. The entirety of the circumstantial evidence of possible collusion or reverse auction conduct, when viewed in the context of the terms of the Settlement Agreement, does not rise

to a level that would support a finding of bad faith on the part of Plaintiff's counsel, or a finding that SC Johnson did anything except mediate a reasonable resolution of the case.

Further, the amount of the proposed settlement is within the range of reasonableness given the case law concerning damages in a labeling case, and the injunction is a significant victory; it is meaningful and valuable to the class. The release is narrow. The deal lacks indicia that it was reached at the expense of absent class members, or other indicia of collusion or bad faith. The terms of the Settlement Agreement appear fair and reasonable, given the strength of the claims against SC Johnson on the merits.

Intervenor's claim that she incurred substantial costs and spent numerous hours prosecuting Moran and the consolidated Moran/Waddell action is not a basis for challenging the settlement. While the Court sympathizes with counsel, the parties have not pointed to authority for the proposition that the interests of counsel in parallel class actions are relevant to the fairness of a class settlement. Whenever more than one class action lawsuit is filed with regard to a particular type of claim, there is an inherent risk to counsel in all the cases that another case will settle first.

FINAL CLASS CERTIFICATION

The settlement class consists of "all persons that, during the Class Period, both resided in the United States and purchased in the United States any Product for personal and household use and not for resale" (the "Settlement Class"). The "class period" is "the time period from the date when SC Johnson initially labeled the Products as non-toxic to the date of" this Order. The "Products" are "all Windex products with a 'non-toxic formula' label, including: Windex Original, Windex Vinegar, Windex Ammonia-Free, and Windex Multi-Surface." Excluded from the Settlement Class are SC Johnson board members, SC Johnson executive-level officers, SC Johnson attorneys, governmental entities, the Court and the Court's immediate family, Court staff, and anyone who timely and properly excludes themselves from the Settlement Class in accordance with the procedures approved by the Court.

Twelve people have opted out of the class and shall not be bound by the terms of the Settlement Agreement. The list of opt-outs is attached as Exhibit D to the Declaration of Jeanne Finegan that has been filed with Plaintiff's Motion for Final Approval.

The court has jurisdiction over the subject matter of this action, the parties to this action, and the members of the settlement class.

The Court has determined that the case meets requirements for certification. (See *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-627 (1997).) The concerns of manageability and due process for absent class members, which counsel against class certification in a trial context, are eliminated or mitigated in the context of settlement. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 fn. 19.) Class certification in California courts is governed by Code of Civil Procedure section 382.

This Court has discretion to certify a class if it meets three criteria: "[1] the existence of an ascertainable and sufficiently numerous class, [2] a well-defined community of interest, and [3] substantial benefits from certification that render proceeding as a class superior to the alternatives." (Alberts v. Aurora Behavioral Care (2015) 241 Cal. App. 4th 388, 397 [quoting Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal. 4th 1004, 1021].) The "community of interest" element requires consideration of three subfactors: "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Id.*)

The proposed class here is sufficiently numerous. Both the California sub-class and the nationwide class consist of thousands of purchasers of Windex products that had the "non-toxic" label on them. Class members are "ascertainable" for purposes of a settlement as defined by case law, though finding them must be accomplished through the detailed steps that the parties thoughtfully outlined in their proposed settlement.

The Court finds that the class has sufficient common questions of law and fact to support a community of interest, given their allegations concerning the single marketing claim at issue and the lessened manageability concerns in the settlement context. The named plaintiff's claims are sufficiently typical of those of the class, given the lessened manageability concerns in the settlement context, because named plaintiff and absent class members have suffered similar injuries. The named plaintiff and their counsel will be adequate representatives of the class. The Court further finds that class treatment for settlement purposes will provide substantial benefits that render it a superior alternative to individual litigations.

The court finds that the Settlement is fair, reasonable, and adequate. The Settlement is entitled to a presumption of fairness, as it was negotiated at arms' length by counsel with the assistance of a former federal magistrate judge as a mediator. (See *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2001) 85 Cal. App. 4th 1135, 1151.) Given the concerns raised by Intervenor, however, the Court did not allow the presumption to play a significant role in the Court's analysis. Plaintiffs have made a sufficient showing that the results achieved are significant and beneficial to the class of consumers who previously purchased Windex products labeled "non-toxic" and future purchasers of those products. Intervenor has not made a persuasive showing that the settlement is unfair to class members.

The Court appoints the Law Offices of Ronald A. Marron, APLC, as class counsel for the settlement ("Settlement Class Counsel").

Intervenor's objection is OVERRULED.

CLASS NOTICE

The Class Notice conforms with the requirements of California Code of Civil Procedure section 382, California Rules of Court 3.766 and 3.769, the California and United States Constitutions, and any other applicable law, and constitutes the best notice practicable under the circumstances, by providing due and adequate notice to Settlement Class Members of the proceedings and of the matters set forth therein. The Class Notice informed the Settlement Class of the terms of the Settlement, of their right to receive their proportional Settlement payment, of their right to request exclusion from the Settlement Class and the Settlement, of their right to comment upon or object to the Settlement and to appear in person or by counsel at the final approval hearing on this date. The Class Notice satisfied the requirements of due process.

Intervenor contends that the Notice should have named other class action lawsuits, including the Marran/Waddell action, so that class members would be apprised of the options open to them. The existence of other class action lawsuits involving the same issues might have been useful to class members in deciding whether to opt out in the context of these cases, but the class claims all involve purchases of cleaning products and mostly de minimis individual damage claims. On balance, the potential benefits of identifying other class actions could be outweighed by the potential confusion created by including such information, and the Court is not persuaded that requiring a further notice be sent to the class is called for by the facts of the case, particularly given that counsel in the other class actions has been permitted to intervene in this case for purposes of challenging the fairness and reasonableness of the proposed settlement.

MOTION FOR ATTORNEY FEES

Plaintiff's counsel requests an award of $411,529.12 for attorney's fees and $17,470.88 in attorney's costs. The total amount sought, $429,000, is 33% of the total fund of $1,300,00. When using the percentage of recovery approach, the court's benchmark for fees is 30% of a total fund. (*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 495; *Schulz v. Jeppesen Sanderson, Inc.* (2018) 27 Cal.App.5th 1167, 1175; *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557 fn. 13; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn. 11.)

Counsel for Intervenor seek a share of the fee award and, after reflection, the Court agrees that they deserve to share in the award. Intervenor's action was first-filed; Intervenor unquestionably helped "plow" the proverbial ground for the Settlement. (*See Harvey v. Morgan Stanley Smith Barney LLC* (N.D. Cal. Mar. 3, 2020 (Orrick, J.)) 2020 WL 1031801 at * 20.) In mediation, Intervenor obtained injunctive relief as a concession from SC Johnson, which became a core part of the Settlement.

The request for an award of $17,470.88 in costs to counsel for Plaintiff is GRANTED. Plaintiff's counsel has provided evidence in the Marron declaration that their out-of-pocket costs for this litigation are $17,470.88.

The request for an award of $19,444.57 in costs to counsel for Intervenor is GRANTED. Intervenor's counsel has presented evidence that out-of-pocket expenses through the mediation of the Moran case in that amount. (See Supp. Bruce Decl., filed 12/3/21.) The Court declines to award costs to counsel for Intervenor that were incurred after the mediation. The class benefitted from Intervenor's work leading up to the mediation. The costs incurred after the mediation, however, were a calculated risk taken because counsel believed the proposed Settlement under-valued the case. As noted above, the Court finds the Settlement is fair and reasonable; counsel's calculated risk simply did not pan out as Intervenor had hoped, and so the class did not obtain a benefit associated with the post-mediation costs that Intervenor incurred.

Plaintiff's counsel has provided evidence that they spent approximately 640.5 hours of work on this case, including paralegal work, at a blended hourly rate of $520, for a lodestar of $382,348.50. Plaintiff seeks a multiplier of 1.0763, to compensate for risk involved, the complexity of the case, and the results achieved. $382,348.50 multiplied by 1.0763 is $411,521.69.

Intervenor's counsel has provided evidence that they spent approximately 1,103.9 hours of work on the federal cases and objecting and then intervening in this case, including paralegal work, at a blended average hourly rate of $712, for a total of $786,912.50. Using the lodestar, counsel for Intervenor estimates $365,213.40 represents fees and costs incurred before the parties executed the settlement agreement in this case at the conclusion of the mediation. Intervenor's counsel's proposed hourly rate is considerably higher than Plaintiff's counsel, and bringing the two lodestars closer into line is a basis for the Court's allocation below.

The total fund for fees and costs in the Settlement is $429,000. As allocated above, the Court is awarding an aggregate of $36,915.45 in costs to the two sets of counsel, and the Court is also granting representative incentive awards to Plaintiff and to Intervenor of $2,500 each ($5,000 total).

The Court awards aggregate attorneys' fees of $387,084.55. The Court apportions the fees with $265,346.75 to counsel for Plaintiff and $121,737.80 (which represents approximately 33% of the lodestar Intervenor incurred through the mediation) to counsel for Intervenors. The award is appropriate in light of the aggregate work performed, the risks of class action litigation, and the results obtained.

The Court ORDERS that 10% of the total fee award to be kept in the administrator's trust fund until the completion of the distribution process and Court approval of a final accounting.

The Court will set a compliance hearing of August 16, 2022 in Dept. 14, which should be after the completion of the distribution process and the expiration of the time to cash checks for counsel for plaintiff and the Administrator to comply with section 384(b) of the Code of Civil Procedure and to submit a summary accounting how the funds have been distributed to the

class members and the status of any unresolved issues. If the distribution is completed, the Court will at that time release any hold-back of attorney fees.

REPRESENTATIVE INCENTIVE AWARD

Plaintiff Howard Clark's request for a service award of $2,500 is GRANTED. The Court also grants a service award to Intervenor Moran of $2,500.

SETTLEMENT ADMINISTRATION

The Court APPROVES the employment of Kroll Settlement Administration as the Settlement Administrator. Administration costs not to exceed $360,388.65 shall be paid from the Settlement Fund according to the terms of the Settlement Agreement to the Settlement Administrator.

February 14, 2022

Michael M. Markman
Judge, Superior Court of California
Alameda County