

1 2671. (Doc. 1). Plaintiff alleged medical malpractice and personal injuries arising from “employees
2 of federally supported medical clinics.” *Id.* at 1.

3 According to Plaintiff, Clinica Sierra Vista was employed by Adriana Acuna “to diagnose and
4 treat her condition of pregnancy and to do all things necessary for her care and care of her baby [I.A.],
5 including, but not limited to, pre-delivery care, the delivery, and post-delivery care.” (Doc. 1 at 4-5).
6 Plaintiff alleged “Defendant and its agents and employees . . . negligently delivered, examined,
7 treated, cared for, diagnosed, operated upon, attended and otherwise handled and controlled the minor
8 Plaintiff herein, thereby proximately causing injuries and damages to the minor Plaintiff, including but
9 not limited to severe neurological injuries and brain damage.” *Id.* at 5. Specifically, Plaintiff reports
10 Clinica Sierra Vista employees “failed to diagnose and treat neonatal alloimmune thrombocytopenia
11 resulting in a massive intracranial hemorrhage that left Plaintiff with significant cognitive defects.”
12 (Doc. 32 at 2). As a result, “Plaintiff will require daily attendant care for the remainder of his life.”
13 *Id.* Therefore, Plaintiff sought damages for past and future medical damages, as well as damages for
14 loss of future earning and earning capacity. (Doc. 1 at 6).

15 On November 16, 2012, Plaintiff filed the motion now before the Court, asserting the parties
16 reached a settlement agreement, subject to approval of the state court and District Court. (Doc. 32).
17 Under the terms of the agreement, the Government would pay “\$4,800,000, with \$2,000,000 to be
18 paid in up-front cash and \$2,800,000 to purchase installment refund annuity contracts paying \$4,540
19 monthly for the life of Isaac Acuna, increasing at 3 percent compounded annually after the first year of
20 payments.” *Id.* at 2. Defendant filed a notice of non-opposition to the motion on November 16, 2012.
21 (Doc. 33).

22 On November 21, 2012, the Court ordered Plaintiff to file supplemental briefing in support of
23 the motion, noting the information required under the Local Rules was not clearly identified for the
24 Court in the moving papers. (Doc. 34). Further, the Court noted inconsistencies with the fee award
25 request, and requested explanation regarding the relevance of the state court’s approval of the action.
26 *Id.* at 2. In compliance with the Court’s order, Plaintiff filed the supplemental brief on November 26,
27 2012. (Doc. 35).

28 **II. Settlement Approval Standards**

1 No settlement or compromise of “a claim by or against a minor or incompetent person” is
2 effective unless it is approved by the Court. Local Rule 202(b). The purpose of requiring the Court’s
3 approval is to provide an additional level of oversight to ensure that the child’s interests are protected.

4 Toward this end, a party seeking approval of the settlement must disclose:

5 the age and sex of the minor, the nature of the causes of action to be settled or
6 compromised, the facts and circumstances out of which the causes of action arose,
7 including the time, place and persons involved, the manner in which the compromise
8 amount . . . was determined, including such additional information as may be required
to enable the Court to determine the fairness of the settlement or compromise, and, if a
personal injury claim, the nature and extent of the injury with sufficient particularity to
inform the Court whether the injury is temporary or permanent.

9 Local Rule 202(b)(2). Generally, federal courts refer to applicable state law in determining whether to
10 approve the settlement of a minor’s claims. *See e.g., Walden v. Moffett*, 2007 U.S. Dist. LEXIS
11 70507, at *6 (E.D. Cal. Sept. 20, 2007); *MAP v. City of Bakersfield*, 2009 U.S. Dist. LEXIS 7519, at
12 *5 (E.D. Cal. Jan. 23, 2009); *see also* Schwarzer, Tashima & Wagstaffe, *California Practice Guide:*
13 *Federal Civil Procedure before Trial* § 15:138, p. 15-48 (2010). In California, a settlement or
14 compromise of a claim of a minor is not enforceable without court approval. Cal. Prob. Code §§ 2504,
15 3600 *et seq.*; Cal. Code Civ. Proc. § 372 (“The guardian. . . or guardian ad litem so appearing for any
16 minor . . . shall have power, *with the approval of the court* in which the action or proceeding is
17 pending, to compromise the same. . .”) (emphasis added).

18 **III. Discussion and Analysis**

19 The petition identifies I.A. as a four-year old male born on November 6, 2008, who is suing
20 Defendant for medical malpractice and negligence for actions related to his birth, as set forth above.
21 (Doc. 32-3 at 53; Doc. 35 at 1). I.A. suffers from a brain injury that caused “permanent right-sided
22 hemiparesis, seizures and significant developmental delays.” (Doc. 32-3 at 10, 53). As a result, I.A.
23 “will require specialized medical care and 24-hour per day attendant care, 7 days weekly.” *Id.* at 10.

24 **A. Settlement Amount**

25 Plaintiff’s GAL “approves of the settlement and requests th[e] court to approve of the
26 settlement for the minor, her child.” (Doc. 32 at 5). Under the terms of settlement, the Government
27 has agreed to pay \$4,800,000.00 to I.A. and his parents. *Id.* at 2. The petition proposes that
28 \$250,000.00 go “to Leobardo Acuna Gutierrez and Adriana Acuna for combined waiver of a future

1 wrongful death cause of action . . .” (Doc. 32-3 at 46). Thus, the amount designated for settlement of
2 I.A.’s claims totals \$4,550,000.00. Of this amount, \$2,800,000.00 would be used “to purchase
3 installment refund annuity contracts” paying \$4,535.65 monthly, increasing at 3 percent compounded
4 annually after the first year of payments. (Doc. 32 at 2; Doc. 32-3 at 81). The remaining funds, after
5 the deductions set forth below, will be placed into the Special Needs Trust, established by the state
6 court on November 16, 2012. (Doc. 32-3 at 55; Doc. 35 at 3).

7 Based upon the information provided in the petition and the supporting documents, and
8 considering the totality of the facts and circumstances of this case, the Court finds the settlement in the
9 amount of \$4,550,000.00 is fair, reasonable, and in the best interests of the child. Accordingly, the
10 Court recommends the proposed settlement total be approved.

11 **B. Attorney’s Fees and Costs**

12 In addition to approval of the settlement itself, any attorney’s fee to be paid for representation
13 of a minor must be approved by the court. Cal. Prob. Code § 3601. To determine whether a request
14 for attorney’s fee is reasonable, the Court may consider the time and labor required, whether the
15 minor’s representative consented to the fee, the amount of money involved and the results obtained,
16 and whether the fee is fixed, hourly, or contingent. *See* California Rule of Court 7.955(b).

17 The parties agreed “that any attorney’s fees owed . . . shall not exceed twenty-five percent of
18 the Settlement Amount.” (Doc. 32-3 at 59). The petition proposes \$730,213.67 be paid in attorney
19 fees to Plaintiff’s counsel, the Law Offices of Bruce G. Fagel. (Doc. 35 at 2). This amount was
20 calculated based on Cal. Bus. & Prof. Code § 6146, which provides in relevant part:

21 An attorney shall not contract for or collect a contingency fee for representing
22 any person seeking damages in connection with an action for injury or damage against
23 a health care provider based upon such person’s alleged professional negligence in
24 excess of the following limits:

- 25 (1) Forty percent of the first fifty thousand dollars (\$50,000) recovered.
- 26 (2) Thirty-three and one-third percent of the next fifty thousand dollars
27 (\$50,000) recovered.
- 28 (3) Twenty-five percent of the next five hundred thousand dollars
(\$500,000) recovered.
- (4) Fifteen percent of any amount on which the recovery exceeds six
hundred thousand dollars (\$600,000).

The limitations shall apply regardless of whether the recovery is by settlement,
arbitration, or judgment, or whether the person for whom the recovery is made is a
responsible adult, an infant, or a person of unsound mind.

1
2 Cal. Bus. & Prof. Code § 6146(a). Thus, under California law, the fee award for representation of
3 I.A.'s claims is limited to fifteen percent, which is less than the amount requested by Plaintiff's
4 counsel. However, under the Federal Tort Claims Act, a party may recover fees up to twenty-five
5 percent of the judgment. 28 U.S.C. § 2678. Because the fees requested fall within the amount
6 specified under the Federal Tort Claims Act and Plaintiff's GAL has indicated her assent to the fee
7 award (Doc. 32 at 5), the Court finds the fee award of \$730,213.67 is reasonable.

8 **C. Attorney's Costs**

9 The parties "request holding the sum of \$100,000 for costs." (Doc. 32-3 at 46, 54). According
10 to the parties, the attorneys incurred costs in the amount of \$72,643.76 as of August 23, 2012, and as a
11 result, they request \$27,356.24 be held in a Client Trust Account at the Law Offices of Bruce G.
12 Fagel. *Id.* at 54. The parties explain that "any money remaining in the cost reserve, less 15% attorney
13 fees, will be paid to the [I.A.] Special Needs Trust" sixty days after its approval. *Id.* at 46, 74.

14 Although counsel has demonstrated the costs of \$72,643.76 are reasonable by filing a cost
15 report (Doc. 32-3 at 74-78), the petition does not explained that the reasonableness of holding
16 \$27,356.24. Likewise, counsel has failed to explain why he should be entitled to earn an addition 15%
17 on this money without regard for whether any further legal efforts will be required. Accordingly, the
18 Court recommends \$72,643.76 be awarded in costs.

19 **D. Medical Lien**

20 Medi-Cal advanced the cost of medical services for Plaintiff, and the State has the right to be
21 reimbursed pursuant to the California Welfare and Institutions Code. (Doc. 32-3 at 89; *see also* Cal.
22 Welf. & Inst. Code §§ 14124.70- 14124.794, 14024). Specifically, Medi-Cal advanced the sum of
23 \$81,618.02 for Plaintiff's medical care. (Doc. 32-3 at 89). Accordingly, Plaintiff's counsel requests
24 this sum be deducted from the settlement fund. (Doc. 32-3 at 46). Notably, however, the Department
25 of Health Care Services notified Plaintiff's counsel that "[r]eimbursement in the amount of \$61,213.52
26 will satisfy our lien." *Id.* at 89. Counsel has not explained why the child should reimburse Medi-Cal
27 for an amount that is higher than demanded. Thus, the Court finds that the \$61,213.52 amount
28

1 demanded by Medi-Cal is reasonable, and the Court recommends payment be made to the Department
2 of Health and Care Services in the amount of \$61,213.52.

3 Inexplicably, Plaintiff's counsel requests twenty-five percent of the lien paid as attorney fees to
4 counsel. (Doc. 32-3 at 46). Therefore, counsel appears to seek the difference between the sum
5 advanced and the reimbursement requested by the Department of Health Care Services in fees, which
6 amounts to \$20,404.50. Although the counsel asserts the request for attorney fees is based upon
7 Section 14124.76(d) of the California Welfare and Institutions Code (*id.* at 46), he fails to direct the
8 Court to any provision of this statute which supports he, rather than the child, should receive the
9 benefit of the reduced Medi-Cal lien.

10 Moreover, counsel fails to explain why, in addition to the fee amount sought above—which is
11 *greater* than the 15% maximum imposed by California law—he should be entitled to a percentage of
12 the amount advanced by Medi-Cal for the child's medical care. Therefore, the Court finds counsel has
13 failed to support this supplemental fee amount and award of this amount is not reasonable. *See* Cal.
14 Welf. & Inst. Code § 14124.76(d); *see also* *See* California Rule of Court 7.955(b). Accordingly, the
15 Court recommends the request for twenty-five percent of the lien in attorney fees be **DENIED**.

16 **IV. Order**

17 Having reviewed the motion and its supporting documents, the Court determined the matter
18 was suitable for decision without a hearing pursuant to Local Rule 230(g). Accordingly, **IT IS**
19 **HEREBY ORDERED**: the hearing date of January 7, 2013, is **VACATED**.

20 **V. Findings and Recommendations**

21 Based upon the foregoing, it is **HEREBY RECOMMENDED**: that the petition to approve
22 settlement of the minor's claims be **GRANTED IN PART** as follows:

- 23 1. The settlement of \$4,550,000.00 for the claims of I.A. be **APPROVED**;
- 24 2. The motion to approve attorney fees be **GRANTED** in the amount of \$730,213.67;
- 25 3. The motion to approve costs be **GRANTED** in the amount of \$72,643.76;
- 26 4. Payment to the Department of Health Care Services be **AUTHORIZED** in the amount
27 of \$61,213.52;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5. The balance of the initial payment amount attributable to the child (\$1,750,000 of \$4,550,000) after the lien, fees and costs are paid--which equals \$885,929.05--be **ORDERED** deposited in the “[] A[]. Special Needs Trust;”

6. The remainder of the settlement proceeds, \$2,800,000, be **ORDERED** to be used to purchase installment refund annuity contracts which pay at least \$4,535.65 monthly and increase at least by 3 percent compounded annually, after the first year of payments.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within 14 days after being served with these findings and recommendations, any party may file written objections with the Court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that failure to file objections within the specified time may waive the right to appeal the district judge’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: November 28, 2012

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE