

NOTE: CHANGES MADE BY THE COURT

JS-6

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

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION**

DAVID WILSON, individually and
on behalf of others similarly
situated,

Plaintiff,

vs.

AIRBORNE, INC., AIRBORNE
HEALTH, INC., KNIGHT-
MCDOWELL LABS, THOMAS
RIDER MCDOWELL, VICTORIA
KNIGHT-MCDOWELL,
and DOES 1-100, inclusive,

Defendants.

CASE No. EDCV 07-770-VAP (OPx)

**FINAL JUDGMENT
AND ORDER OF DISMISSAL**

1 The Court, having granted the parties' Motion for Final
2 Approval of Settlement and finding no just reason for delay in entry
3 of this Final Judgment and Order of Dismissal and good cause
4 appearing therefor, it is hereby ORDERED, ADJUDGED, AND
5 DECREED as follows:

6
7 1. The Stipulation and Agreement of Settlement, including
8 its exhibits (the "Settlement Agreement") and the definitions of
9 capitalized words and terms contained therein, filed with the Court
10 on August 29, 2007, is incorporated in this Order as though fully
11 set forth herein. This Order also incorporates by reference the
12 Court's Order dated August 13, 2008, (1) Granting Motion for Final
13 Approval of Settlement, (2) Granting in Part Motion for Attorneys'
14 Fees and Litigation Expenses, and (3) Granting in Part Motion for
15 Incentive Award to Plaintiff ("Final Approval Order") and the Court's
16 Order dated November 29, 2007, (1) Granting Preliminary Approval
17 of Settlement and (2) Setting Schedule for Final Approval
18 ("Preliminary Approval Order").

19
20 2. As held in the Preliminary Approval Order, the Court has
21 subject-matter jurisdiction over the Action under the Class Action
22 Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2)(A).
23 (Preliminary Approval Order ¶ 1.)

24
25 3. As stated in the Final Approval Order, the Court finds
26 that the Settlement Agreement was arrived at in good faith,
27 following extensive arms'-length negotiations between experienced
28 counsel, and the settlement is fair, reasonable, and adequate as to

1 all members of the Settlement Class within the meaning of Federal
2 Rule 23(e)(2) of the Federal Rules of Civil Procedure. (Final
3 Approval Order 10, 15–24.)

4

5 4. The Court has previously reviewed and overruled the
6 objections filed against approval of the Settlement Agreement.
7 (Final Approval Order 19–23.)

8

9 5. The Court hereby orders final certification of the
10 proposed Class for settlement purposes (the “Settlement Class”),
11 having found that the requirements of Rule 23 of the Federal Rules
12 of Civil Procedure are met. (Final Approval Order 13–14.) The
13 Settlement Class is defined as follows:

14

15 All Persons who purchased any flavor or formulation of any
16 Product in the United States or any of its territories from May
17 1, 2001, through November 29, 2007, except the following:

18

19 (a) the Corporate Defendants, their predecessors,
20 successors, and their current and former directors,
21 officers, employees, agents, attorneys, representatives,
22 affiliates, associates, consultants, advisers, parents, and
23 subsidiaries, as well as the Individual Defendants and
24 their heirs, spouses, executors, administrators, agents,
25 successors, attorneys, consultants, advisers,
26 representatives or assigns;

23

24 (b) Persons who have settled with and validly released
25 Defendants from separate, non-class legal actions against
26 Defendants based on the conduct alleged in the Second
27 Amended Complaint filed in the Action, if any;

26

27 (c) Persons who have purchased the Product for resale;

28

28

1 (d) any Persons who have timely and validly elected to
2 exclude themselves from the Settlement Class pursuant
3 to the Court's Preliminary Approval Order; and

4 (e) the judge presiding over this matter.

5 6. Solely for the purposes of effectuating the Settlement, the
6 Court found in its Preliminary Approval Order that:

- 7
- 8 a. Joinder of all Settlement Class Members in a single
9 proceeding would be impracticable, if not impossible
10 because of their numbers and dispersion;
- 11 b. The Class Representative and Class Counsel have
12 capably prosecuted the claims of the lawsuit;
- 13 c. No conflict exists between the Class Representative
14 or Class Counsel and the Settlement Class;
- 15 d. The Class Representative and Class Counsel are
16 adequate representatives for the Settlement Class;
- 17 e. The Class Representative's claims are typical of the
18 Settlement Class;
- 19 f. The Class Representative is a member of the
20 Settlement Class and has claims representative of
21 the claims and defenses presented in this case;
- 22 g. Commonality is satisfied in this case for settlement
23 purposes as a number of common issues exist
24 among Settlement Class Members;
- 25 h. Common issues predominate over individual issues
26 in the context of settlement; and
- 27 i. Certification of an agreed-upon settlement class is
28 a superior mechanism for resolving these claims.

(Preliminary Approval Order ¶ 7.)

1 7. Except as expressly provided for in the Settlement
2 Agreement (including, without limitation, its exhibits), the Parties
3 agree that the Settlement Agreement (including, without limitation,
4 its exhibits) shall be without prejudice to the rights, positions, or
5 privileges of any Party. This provision is applicable whether or not
6 there shall be a Final Settlement Approval, and shall not be deemed
7 or construed to be an admission or evidence of any violation of any
8 statute, law, rule, regulation, or principle of common law or equity,
9 or of any liability or wrongdoing, by any of the Defendants, or of the
10 truth of any of the Claims, and evidence of the Settlement
11 Agreement and any and all negotiations and discussions associated
12 with it shall not be discoverable or used, directly or indirectly, in
13 any way, whether in this action or in any other action or
14 proceeding, except for purposes of demonstrating, describing,
15 implementing, or enforcing the terms and conditions of the
16 Settlement Agreement or this Order. In no event, however, shall the
17 Settlement Agreement or this Order be construed to preclude
18 Plaintiff or Class Counsel from seeking settlement-related materials
19 in discovery or from seeking to use such material in subsequent
20 litigation. Settlement-related materials include all documents and
21 communications pertaining to investigations by any government or
22 administrative agency (such as the FTC and the various state AGs).
23 Defendants expressly retain the right to assert all objections to such
24 discovery, including but not limited to the Defendants' argument
25 that such information is precluded from discovery by Federal Rule
26 of Evidence 408, or other similar applicable rules. Plaintiff and
27 Class Counsel retain the right to oppose any such arguments.

28

1 8. The Court found that Class Members received adequate
2 notice of the pendency of the Action, the conditional certification of
3 the Settlement Class solely for purposes of this settlement, and the
4 preliminary approval of the Settlement Agreement. The notice
5 procedures used provided the best notice that is practicable under
6 the circumstances as required by Federal Rule of Civil Procedure
7 23(c)(2)(B). (Final Approval Order 10-11.)

8
9 9. Defendants have complied with the applicable
10 requirements of CAFA, including timely notice of the Settlement
11 Agreement to the appropriate state and federal officials and the
12 provision of other required information. (Preliminary Approval
13 Order ¶ 11.)

14
15 10. The Court found that the Settlement Fund's distribution
16 plan, as set forth in Section 4 of the Settlement Agreement, fairly
17 and adequately addresses settlement administration and claims
18 submissions and further insures fair allocation of monetary
19 payments amongst all members of the Settlement Class.
20 (Preliminary Approval Order ¶ 13.)

21
22 11. The Parties shall have no liability with regard to the
23 maintenance, preservation, investment, use, allocation, adjustment,
24 distribution, and/or disbursement of any amount in the Gross
25 Settlement Fund or the Net Settlement Fund, or any dispute by any
26 claimant or putative claimant concerning the handling or resolution
27 of his, her, or its claim with respect to the Net Settlement Fund.
28 With the exception of Tax Payments, which shall be made out of the

1 Settlement Fund, Defendants shall bear all costs associated with
2 the Gross Settlement Fund and the Net Settlement Fund, including
3 but not limited to the costs of administering, maintaining, and
4 making distributions from those funds. Moreover, in no event shall
5 this Order, this provision or any other provision of this Order or the
6 Settlement Agreement absolve the Parties for a breach of the
7 Settlement Agreement, nor shall any provision of this Settlement
8 Agreement prevent an aggrieved Party from enforcing its rights
9 hereunder to the extent such provision is consistent with the terms
10 of this Order.

11

12 12. The Court hereby dismisses, on the merits and with
13 prejudice, without fees or costs to any party (except as provided for
14 in the Settlement Agreement, this Order, or otherwise by this
15 Court), the Second Amended Complaint in favor of the Defendants
16 and against all Settlement Class Members. A list of those members
17 of the Settlement Class who timely and validly filed requests for
18 exclusion from that Class as permitted by the Court is attached
19 hereto as Exhibit A and made a part hereof. Those Persons
20 appearing on Exhibit A shall have no right to receive any payments
21 from the Settlement Fund. Any member of the Settlement Class
22 whose legal name does not appear on Exhibit A failed to timely and
23 validly file a valid request for exclusion from the Settlement Class
24 as permitted by the Court, and is hereby barred and permanently
25 enjoined from asserting otherwise, and is subject to the terms and
26 conditions of the Settlement Agreement, including the Releases set
27 forth therein, and this Order.

28

1 13. Within ten (10) calendar days of the entry of this Final
2 Judgment and Order of Dismissal, the Settlement Fund (including
3 the Gross Settlement Fund and the Net Settlement Fund) shall be
4 established and administered under the Court's continuing
5 supervision and control pursuant to an escrow agreement, as set
6 forth in the Settlement Agreement. Defendants shall deposit
7 \$23,252,500.00 into an interest-bearing account, which shall be
8 created in accordance with the terms of the Settlement Agreement
9 and any applicable Order of this Court.

10
11 14. If the aggregate amount of Valid Claims by Settlement
12 Class Members, as determined by the Settlement Administrator, is
13 higher than the amount of the Net Settlement Fund, then, within
14 ten (10) days of receipt of the notification by the Claims
15 Administrator, Defendants shall deposit, into the Settlement Fund,
16 an additional amount necessary to pay Valid Claims, up to a
17 maximum additional amount of \$250,000.00.

18
19 15. If the aggregate amount of Valid Claims by Settlement
20 Class Members, as determined by the Settlement Administrator,
21 exceeds the amount of the Net Settlement Fund plus the additional
22 \$250,000.00 paid pursuant to paragraph 14 above, then the Claims
23 Administrator shall make available monies from the Fund (the "FTC
24 Fund") established pursuant to the Stipulated Final Judgment and
25 Order for Injunctive and Other Relief entered by this Court in the
26 action entitled *FTC v. Airborne Health, Inc. et al.*, No. CV 08-05300-
27 VAP (the "FTC Order") pursuant to the terms of the FTC Order, up
28 to a maximum amount of \$6,500,000.00 for the purpose of paying

1 Settlement Class Members' claims made pursuant to the settlement
2 in this Action. Any such monies shall be made available for
3 payment of Settlement Class Members' claims according to the
4 provisions of the FTC Order. Settlement Class Members and Class
5 Counsel shall have no control whatsoever over the monies in the
6 FTC Fund.

7
8 16. If the amount of Valid Claims, as determined by the
9 Settlement Administrator, exceeds the sum of the Net Settlement
10 Fund, the additional contribution of \$250,000.00 provided in
11 paragraph 14 above and the FTC Fund (*i.e.*, a total of
12 \$26,507,321.18), this total of settlement proceeds shall be
13 distributed to pay Valid Claims of Settlement Class members on a
14 *pro rata* basis.

15
16 17. The parties have agreed that any amount that remains in
17 the Net Settlement Fund after all valid claims are paid will be
18 distributed *cy pres* to non-profit organizations that the Court
19 approves to receive such funds. The parties have also agreed that
20 the amount remaining in the Net Settlement Fund after all Valid
21 Claims are paid, if any, will have an impact on determining which
22 non-profit organizations should be proposed as potential *cy pres*
23 recipients. Accordingly, Class Counsel shall identify to counsel for
24 Defendants the organizations they propose as recipients of *cy pres*
25 funds within ten (10) court days after all Valid Claims are paid.
26 Pursuant to the Settlement Agreement, Defendants shall notify
27 Class Counsel within ten (10) court days whether they consent to
28 the proposed *cy pres* recipients. The Parties shall then submit a

1 joint order for the Court's approval of the *cy pres* distribution or, in
2 the event that a dispute arises regarding Defendants' withholding of
3 consent, the parties shall meet and confer in an effort to resolve the
4 dispute. If the parties are unable to resolve their dispute regarding
5 Defendants' consent, Plaintiff shall file a motion to resolve the
6 matter within 10 court days of concluding their meet-and-confer
7 session. In no event shall a dispute over *cy pres* distribution delay
8 any other aspect of the administration of the Settlement Agreement.
9

10 18. No funds may be disbursed from the Gross Settlement
11 Fund or Net Settlement Fund unless expressly authorized by the
12 terms of the Settlement Agreement, or applicable Order of this
13 Court. Settlement Class Members who seek payment from the
14 Settlement Fund shall do so in the manner set forth in the
15 Settlement Agreement. Unless the Court orders otherwise, claim
16 forms must be submitted as set forth in the Settlement Agreement
17 and Order Granting Preliminary Approval of Settlement. Valid
18 Claims shall be paid according to the procedures set forth in the
19 Settlement Agreement and this Order.
20

21 19. Upon the Effective Date of Settlement (including, without
22 limitation, the exhaustion of any judicial review, or requests for
23 judicial review, from this Final Judgment and Order of Dismissal),
24 the Representative Plaintiff and each of the Settlement Class
25 Members unconditionally, fully, and finally release the Defendants,
26 their predecessors, successors, and their current and former
27 directors, officers, employees, agents, attorneys, representatives,
28 affiliates, associates, consultants, advisers, parents, and

1 subsidiaries, and all distributors, wholesalers, and retailers that are
2 passive conduits in the marketing chain of distribution of the
3 Product, as well as Victoria Knight-McDowell and Thomas Rider
4 McDowell, their heirs, spouses, executors, administrators, agents,
5 successors, attorneys, consultants, advisers, representatives, or
6 assigns, from all Settled Claims by Plaintiff and the Settlement
7 Class Members as provided in the Settlement Agreement. In
8 addition, any rights of Settlement Class Members to the protections
9 afforded under Section 1542 of the California Civil Code and/or any
10 other similar, comparable, or equivalent laws, are terminated.

11

12 20. If for any reason the Settlement Agreement becomes null
13 and void before the Effective Date of Settlement (including, without
14 limitation, the exhaustion of any judicial review, or requests for
15 judicial review from this Final Judgment and Order of Dismissal),
16 then the certification of the Settlement Class shall be deemed
17 vacated, and the operative complaint in the Action shall be the
18 Second Amended Complaint filed on May 24, 2007. In that event,
19 the Parties shall return to the *status quo ante* in the Action, without
20 prejudice to the right of any party to assert any right or position
21 that it could have asserted if the Settlement Agreement had never
22 been reached or proposed to the Court. The certification of the
23 Settlement Class for settlement purposes shall not be considered as
24 a factor in connection with any subsequent class certification issues
25 or be introduced as evidence against Defendants for any purpose in
26 any other litigation.

27

28

1 21. Class Counsel's Motion for Award of Attorneys' Fees and
2 Litigation Expenses is hereby GRANTED in part as follows. The
3 Court finds that Class Counsel shall be awarded fees and expenses
4 as follows:

5
6 **Fazio | Micheletti LLP:**

7 Fees: \$1,574,925.00

8
9 Expenses: \$8,458.64

10
11 **Wasserman, Comden, & Cassleman LLP:**

12 Fees: \$1,316,551.00

13
14 Expenses: \$20,993.58

15
16 **Center for Science in the Public Interest:**

17 Fees: \$568,470.00

18
19 Expenses: \$3,280.60

20
21 Accordingly, not later than ten (10) calendar days from the Effective
22 Date of the Settlement, the Claims Administrator shall pay, from
23 the Gross Settlement Fund, separately to each firm appointed as
24 Class Counsel, the amounts set forth above.

25
26 22. The motion for the issuance of an incentive award to
27 Plaintiff David Wilson is GRANTED IN PART. Accordingly, the
28

1 Claims Administrator shall pay to Plaintiff, from the Gross
2 Settlement Fund, the amount of \$4,500,.

3

4 23. Upon the Effective Date of Settlement, the Releasors shall
5 be bound by the Releases of the Released Parties pursuant to the
6 terms of the Settlement Agreement.

7

8 24. Pursuant to Section 27 of the Settlement Agreement, any
9 disputes between the Defendants and their attorneys and
10 Settlement Class Members and their attorneys concerning the
11 matters contained in this Settlement Agreement, the Preliminary
12 Approval Order, or this Order shall, if they cannot be resolved by
13 negotiation and agreement, be submitted to this Court. The Court
14 hereby reserves exclusive personal and subject matter jurisdiction
15 over the implementation and enforcement of the Settlement
16 Agreement, the Preliminary Approval Order, the Final Approval
17 Order, and this Order, including, but not limited to the approval of
18 any distribution to be made *cy pres*, any disputes between the
19 Defendants and their attorneys and Settlement Class Members and
20 their attorneys relating to or arising out of the Releases, the Waiver
21 of Rights, the timeliness and/or validity of any opt out, and/or any
22 Claim Form submitted for payment from the Net Settlement Fund.
23 In no event, however, shall this Settlement Agreement be construed
24 to require that any claim that was not resolved by this Settlement
25 Agreement be litigated in the Central District of California, provided,
26 however, that this Section of the Settlement Agreement also shall
27 not be construed to preclude any claim that was not resolved by

28

1 this Settlement Agreement from being litigated in the Central
2 District of California.

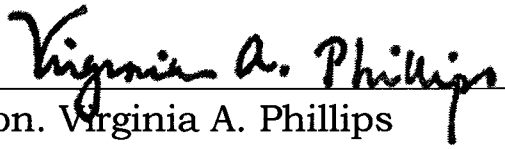
3

4 SO ORDERED this 1st day of October, 2008.

5

6

7



8 Hon. Virginia A. Phillips
9 United States District Judge

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28