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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALAN ALTER, by and through his brother and
guardian ad litem, MARK ALTER,

Plaintiff,

v.

COUNTY OF SAN DIEGO,

Defendant.

Case No.: 21-cv-01709-BLM

**ORDER GRANTING MOTION FOR
ORDER APPROVING SETTLEMENT
INVOLVING INCOMPETENT ADULT
AND DISTRIBUTION OF SETTLEMENT
FUNDS**

Currently before the Court is Plaintiff’s Motion for Order Approving Settlement Involving Incompetent Adult and Distribution of Settlement Funds (“Motion”). ECF No. 30. After reviewing the Motion and all supporting documents, and for the reasons discussed below, the Court **GRANTS** the Motion.

BACKGROUND

On September 30, 2021, Plaintiff¹ (“Mr. Alter”) filed the operative Complaint in this matter, alleging claims for Municipal Liability – Unlawful Policies and Practices under 42 U.S.C. § 1983, and Professional Negligence. ECF No. 1. On October 4, 2021, Mr. Alter filed an unopposed motion to appoint Plaintiff’s brother, Mark Alter, as Mr. Alter’s guardian ad litem in

¹ Plaintiff Alan Alter is a 72-year-old incompetent adult who resides in San Diego County, California. Complaint at 2.

1 this action. ECF No. 5. A guardian ad litem was necessitated due to Mr. Alter’s severe, long term
2 mental disorder. Id. at 2. On October 5, 2021 District Judge Gonzalo P. Curiel granted Mr. Alter’s
3 motion to appoint Mark Alter to be Mr. Alter’s guardian ad litem. ECF No. 6.

4 On April 26, 2023, Mr. Alter filed a Notice of Settlement. ECF No. 26. On May 26, 2023,
5 Mr. Alter filed the instant unopposed Motion seeking approval of the proposed settlement and
6 distribution of funds. Motion. On April 28, 2023, the instant case was referred to the undersigned
7 magistrate judge for review of the proposed settlement, and on May 2, 2023, the Court set a
8 hearing on the Motion. ECF Nos. 28 & 29. On June 6, 2023, the Court presided over the hearing
9 and obtained additional and updated information regarding the Motion and proposed settlement.
10 ECF No. 32. On June 8, 2023 the parties filed a joint Notice, Consent, and Reference of a Civil
11 Action to a Magistrate Judge stipulating to the jurisdiction of the undersigned Judge. ECF No.
12 31.

13 **FACTUAL BASIS**

14 The parties are familiar with the facts underlying this case and the Court adopts the facts
15 as set forth in Mr. Alter’s Motion. See Motion. The Court accepts the summary provided by Mr.
16 Alter’s counsel that “Plaintiff, Alan Alter, is a 73 year-old veteran who has severe mental illness
17 that dates back to 1975 when he was discharged from the Marine Corps after serving in combat
18 in Vietnam.” Motion at 5.

19 On May 13, 2021, The Superior Court for the County of San Diego conducted a hearing
20 in which Mr. Alter was found to be “gravely disabled.” Motion at 7.

21 **LEGAL STANDARD**

22 It is well settled that courts have a special duty to safeguard the interests of litigants who
23 are minors or incompetents in civil litigation. Federal Rule of Civil Procedure (“Fed R. Civ. P.”)
24 17(c) (district courts “must appoint a guardian *ad litem* – or issue another appropriate order –
25 to protect a minor or incompetent person who is unrepresented in the action.”); see also
26 Robidoux v. Rosengren, 638 F.3d 1177, 1181 (9th Cir. 2011)². “In the context of proposed
27

28 ² The Court will apply the standard identified in Robidoux even though Robidoux involved a

1 settlements in suits involving [incompetent] plaintiffs, this special duty requires a district court
2 to 'conduct its own inquiry to determine whether the settlement serves the best interests of the
3 [incompetent person].'" Robidoux, 638 F.3d at 1181 (quoting Dacanay v. Mendoza, 573 F.2d
4 1075, 1080 (9th Cir. 1978)); see also Salmeron v. United States, 724 F.2d 1357, 1363 (9th Cir.
5 1983) (holding that "a court must independently investigate and evaluate any compromise or
6 settlement of a minor's claims to assure itself that the minor's interest are protected, even if the
7 settlement has been recommended or negotiated by the minor's parent or guardian *ad litem*.").
8 To facilitate the Court in satisfying the duty to safeguard, Civil Local Rule 17.1(a) provides that
9 "[n]o action by or on behalf of a minor or incompetent will be settled, compromised, voluntarily
10 discontinued, dismissed or terminated without court order or judgment." CivLR. 17.1(a). This
11 requires the Court to determine if the settlement is in the best interests of the incompetent and
12 to consider not only the fairness of the amount of the settlement, but the structure and manner
13 of distribution of the assets for the benefit of the incompetent.

14 The Ninth Circuit established that courts reviewing the settlement of a minor's federal
15 claim should "limit the scope of their review to the question of whether the net amount
16 distributed to each minor plaintiff in the settlement is fair and reasonable, in light of the facts of
17 the case, the minor's specific claim, and recovery in similar cases. Robidoux, 638 F.3d 1181-82.
18 They should "evaluate the fairness of each minor plaintiff's net recovery without regard to the
19 proportion of the total settlement value designated for adult co-plaintiffs or plaintiffs' counsel –
20 whose interests the district court has no special duty to safeguard." Id. at 1182 (citing Dacanay,
21 573 F.2d at 1078). "So long as the net recovery to each minor plaintiff is fair and reasonable in
22 light of their claims and average recovery in similar cases, the district court should approve the

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24 minor because for this analysis, the terms "minor" and "incompetent person" are
25 interchangeable. Banuelos v. City of San Bernardino, 2018 WL 6131190, at *2 (C.D. Cal., Apr.
26 26, 2018) (citing Mugglebee v. Allstate Ins. Co., 2018 WL 1410718, at *2 (S.D. Cal., Mar. 21,
27 2018) (applying Robidoux to a case involving an incompetent plaintiff); see also G.C. BY and
28 Through Clark v. San Diego Unified School District, 2021 WL 3630112, at *2 (S.D. Cal., Aug. 17,
2021) (District courts have extended the Robidoux inquiry to cases involving the approval of an
incompetent plaintiff's settlement") (citing Banuelos, 2018 WL 613190 at *2; Mugglebee, 2018
WL 1410718 at *2; Smith v. City of Stockton, 185 F.Supp.3d 1242 (E.D. Cal. 2016).

1 settlement as proposed by the parties.” Robidoux, 638 F.3d at 1182.

2 The Ninth Circuit limited its decision in Robidoux to “cases involving the settlement of a
3 minor’s federal claims.” Id. at 1181-82 (emphasis added). Where a settlement involves state
4 law, federal courts are generally guided by state law rather than Robidoux. J.T. by & Through
5 Wolfe v. Tehachapi Unified Sch. Dist., 2019 WL 954783, at *2 (E.D. Cal. Feb. 27, 2019). See
6 also A.M.L. v. Cernaianu, 2014 WL 12588992, at *3 (C.D. Cal. Apr. 1, 2014) (collecting cases).
7 The court in A.M.L. noted that, although federal courts generally require claims by minors to “be
8 settled in accordance with applicable state law,” the Ninth Circuit in Robidoux held such an
9 approach “places undue emphasis on the amount of attorney’s fees provided for in a settlement,
10 instead of focusing on the net recovery of the minor plaintiffs.” Id. at *2 (quoting Robidoux, 638
11 F.3d at 1181) (other citation omitted). But see Mitchell v. Riverstone Residential Grp., 2013 WL
12 1680641, at *1 (E.D. Cal. Apr. 17, 2013) (“[A] number of district courts have applied the rule
13 provided in Robidoux to evaluate the propriety of a settlement of a minor’s state law claims as
14 well”) (collecting cases).

15 The California Probate Code provides the applicable statutory scheme for approval of a
16 minor’s compromise under state law. See Cal. Prob. Code §§ 3601 *et seq.* Under California law,
17 the Court is tasked with evaluating the reasonableness of the settlement and determining
18 whether the compromise is in the best interest of the minor. A.M.L. 2014 WL 12588992, at *3
19 (citations omitted). The Court is afforded “broad power ... to authorize payment from the
20 settlement – to say who and what will be paid from the minor’s money – as well as direct certain
21 individuals to pay it.” Goldberg v. Superior Court, 23 Cal.App.4th 1378, 1382 (Cal. Ct. App.
22 1994); see also Pearson v. Superior Court, 136 Cal.Rptr.3d 455, 459 (Cal. Ct. App. 2012)
23 (explaining that the purpose of requiring court approval of a minor’s settlement is to “allow[]
24 the guardians of a minor to effectively negotiate a settlement while at the same time protect[ing]
25 the minor’s interest by requiring court approval before the settlement can have a binding effect
26 on the minor”).

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1 **DISCUSSION**

2 **A. Proposed Settlement**

3 The proposed settlement requires The County to pay seven hundred and sixty thousand
4 dollars (\$760,000.00) for the benefit of Mr. Alter. Mr. Alter’s counsel explained that the
5 settlement amount would be divided as follows: \$253,333.33 for the attorney’s fees
6 (approximately 33.333% of the total settlement amount) and \$506,666.67 (the remainder of
7 the settlement amount) to Mr. Alter. Motion at 8. Approximately \$56,666.67 will be directly
8 deposited into Mr. Alter’s Special Needs Trust for the benefit of Mr. Alter. Id. The remaining
9 \$450,000.00 will be used to purchase one or more structured settlement annuities to provide
10 monthly income for the benefit of Mr. Alter. Id. at 11.

11 The first issue is whether the terms of the settlement, including the net distribution to
12 Mr. Alter, are fair and reasonable. Given the unique facts of this case, Mr. Alter and the Court
13 have been unable to locate any similar cases that could provide guidance on the reasonableness
14 of the settlement amount. However, the Court finds the settlement fair and reasonable based
15 on the following analysis.

16 First, the facts underlying this case are unusual, and liability, causation, and damages
17 were intensely disputed. The County raised significant legal challenges to Mr. Alter’s Complaint
18 including statute of limitations and statutory immunity. Both arguments presented obstacles that
19 could have foreclosed any recovery for Mr. Alter. Even if Mr. Alter were to prevail in the trial
20 court, it is likely that this case would have been appealed due to the novelty of the facts and
21 legal issues. The settlement alleviates the risk of both zero recovery should Mr. Alter not prevail
22 at trial, and a potential years-long legal battle. Mr. Alter is 74 years-old and protracted litigation
23 presents the risk that he may pass away without receiving any funds. Another significant
24 challenge raised by The County concerned causation and damages. The County argued that Mr.
25 Alter needed to be housed in a psychiatric facility due to his medical condition regardless of any
26 errors by The County. This argument also had the potential to eliminate or greatly reduce any
27 recovery by Mr. Alter, and also may have resulted in an appellate challenge. Based upon the
28 uncertainties and challenges, the Court finds that the proposed net distribution to Mr. Alter is

1 reasonable and weighs in favor of the settlement being fair and reasonable.

2 Second, the net payment to Mr. Alter will provide him with additional amenities that will
3 improve his life.³ More than \$50,000 will immediately be made available to Mr. Alter via his
4 Special Needs Trust and the remaining money will be used to fund a structured settlement
5 annuity that will provide Mr. Alter with monthly income of approximately \$4,011.54, guaranteed
6 for at least 12 years. See ECF No. 30-4 at Exh. A; see also ECF No. 30-3, Declaration of Attorney
7 Michael R. Marrinan in Support for Approval of Settlement Involving Incompetent Adult and
8 Distribution of Settlement Funds ("Marrinan Decl.") at 2. The initial settlement payment and
9 monthly annuity payments may only be used to benefit Mr. Alter during his lifetime so this is a
10 significant benefit to him. Motion at 12. As discussed above, the fact that Mr. Alter will receive
11 the settlement funds immediately as opposed to after a trial and/or appeal (or receiving no
12 money if Mr. Alter is unsuccessful at trial) is a significant benefit to him. The settlement money
13 will improve Mr. Alter's quality of life for the remainder of his expected lifetime, which favors
14 finding that it is fair and reasonable.

15 Finally, while not determinative, counsel and guardian ad litem for Mr. Alter believe that
16 the net settlement amount is fair and reasonable. See ECF 30-2, Declaration of Guardian Ad
17 Litem Mark Alter in Support of Motion for Approval of Settlement Involving Incompetent Adult
18 and Distribution of Settlement Funds ("Alter Decl.") at ¶ 6; see also ECF 30-3, Marrinan Decl. at
19 ¶ 5.

20 Based upon all of the evidence and information, the Court finds that the net amount being
21 provided to Mr. Alter is fair and reasonable, given the legal and factual issues involved in the
22 case, and the undoubted benefit the settlement sum will have on Mr. Alter's quality and
23 enjoyment of life.

24 **B. Attorney's Fees and Costs**

25 In addition to assessing whether the settlement is fair and reasonable, the Court must

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27 ³ Counsel for Mr. Alter explained that Mr. Alter's basic living expenses are covered so the
28 settlement funds will be used to buy items or services that will improve his quality of life such
as a nicer bed or television, or new clothes or other items that he needs or wants.

1 approve the attorney's fees and costs to be paid for representation of an incompetent person.
2 See Cal. Prob. Code § 3601; Cal. Rule of Ct. 7.955.⁴ To determine whether a request for
3 attorney's fees is reasonable, the Court may consider factors such as the

4 (1) The fact that a minor person with a disability is involved and the circumstances
5 of that minor person with a disability. (2) The amount of the fee in proportion to
6 the value of the services performed. (3) The novelty and difficulty of the questions
7 involved and the skills required to perform the legal services properly. (4) The
8 amount involved and the results obtained. (5) The time limitations or constraints
9 imposed by the representative of the minor or person with a disability or by the
10 circumstances. (6) The nature and length of the professional relationship between
11 the attorney and the representative of the minor or person with a disability. (7)
12 The experience, reputation, and ability of the attorney or attorneys performing the
13 legal services. (8) The time and labor required. (9) The informed consent of the
14 representative of the minor or person with a disability of the fee. (10) The relative
15 sophistication of the attorney and the representative of the minor or person with
16 a disability. (11) The likelihood, if apparent to the representative of the minor or
17 person with a disability when the representative agreement was made, that the
18 attorney's acceptance of the particular employment would preclude other
19 employment. (12) Whether the fee is fixed, hourly, or contingent. (13) If the fee
20 is contingent: (A) The risk of loss borne by the attorney; (B) The amount of costs
21 advanced by the attorney; and (C) The delay in payment of fees and
22 reimbursement of costs paid by the attorney. (14) Statutory requirements for
23 representation agreements applicable to particular cases of claims.

24 See California Rules of Court 7.955(b).

25 Mr. Alter's attorneys are seeking \$253,333.33, which is thirty-three and one third percent
26 (33.333%) of the gross recovery. Motion at 8-11. In support of the request, Mr. Alter's counsel
27 states that Michael Marrinan has been practicing for over 40 years, primarily handling civil rights
28 litigation. Joseph McMullen has been practicing for over 16 years as both a criminal defense and
civil rights litigator. Thomas Robertson has been practicing for over 14 years as a civil rights
litigator and appellate attorney. Id. at 10. This case has involved over 400 hours of legal work
since 2021. Id. at 11. Mr. Alter's counsel reviewed thousands of pages of documents and court
records relating to Mr. Alter's court files, prison records, jail records, and state hospital records
going back as far as 1987. Id. at 3-4. This case was legally and factually complex and as stated
above, involved hundreds of hours of research and litigation. Id. at 8.

⁴ Similarly, San Diego Superior Court Civil Rule 2.4.6.2 states that, regarding a minor's
compromise, "the court will determine the amount of costs, expenses, and attorney's fees to be
allowed from the proceeds of the settlement."

1 Further, Mr. Alter's brother and guardian ad litem has consented to the settlement
2 amount, distribution, and the attorney's fees to Mr. Alter's counsel. Id. at 10-11; see also ECF
3 30-2, Alter Decl. at ¶ 6.

4 Mr. Alter's attorneys and guardian ad litem, Mark Alter, executed a retainer agreement
5 which provides that counsel would receive forty (40%) of the gross settlement amount. Id. at
6 8. As a part of the proposed settlement, Mr. Alter's counsel agreed to reduce their recovery to
7 thirty-three and one third percent (33.333%) of the net settlement amount. Id. ("This motion
8 requests approval for attorney fees of 33 1/3% of the gross settlement amount, which counsel
9 for Plaintiff has reduced from 40%").

10 Given the extensive experience of Mr. Alter's attorneys, the length of the litigation, the
11 difficult and complex legal and factual issues raised in the litigation, and the significant success
12 achieved by counsel, the Court finds that counsel's requested attorney's fee award of
13 \$253,333.33, which is thirty-three and one third (33.333%) of Mr. Alter's settlement, is
14 reasonable.

15 **C. Method of Disbursement**

16 Pursuant to CivLR 17.1(b)(1), any money recovered by an incompetent who resides in
17 California must be disbursed in accordance with the California Probate Code, regardless of
18 whether the incompetent's claims arise under state or federal law. Courts may use a wide variety
19 of methods for the disbursement of settlement funds to an incompetent. See Cal. Prob. Code §
20 3600 et. seq. Specifically,

21 the court making the order or giving the judgment referred to in Section 3600
22 shall, upon application of counsel for the minor or person with a disability, order
23 any one or more of the following:

24 (a) That a guardian of the estate or conservator of the estate be appointed and
25 that the remaining balance of the money and other property be paid or delivered
to the person so appointed.

26 (b) That the remaining balance of any money paid or to be paid be deposited in
27 an insured account in a financial institution in this state, or in a single-premium
28 deferred annuity, subject to withdrawal only upon the authorization of the court,
and that the remaining balance of any other property delivered or to be delivered
be held on conditions the court determines to be in the best interest of the minor
or person with a disability.

1 (c) After hearing by the court, that the remaining balance of any money and other
2 property be paid to a special needs trust established under Section 3604 for the
3 benefit of the minor or person with a disability. Notice of the time and place of the
4 hearing and a copy of the petition shall be mailed to the State Director of Health
5 Care Services, the Director of State Hospitals, and the Director of Developmental
6 Services at the office of each director in Sacramento at least 15 days before the
7 hearing.

8 []

9 (i) That the remaining balance of the money and other property be paid or
10 delivered to the person with a disability.

11 Prob. Code § 3611.

12 As discussed above and during the hearing, the parties are working with Manuel R.
13 Valdez, a Certified Structured Settlement Consultant, to find a structured settlement annuity (or
14 annuities) with the goal of providing monthly income that will enhance Mr. Alter's quality and
15 enjoyment of life for the remainder of his lifetime. Motion at 11; see also ECF 30-3, Marrinan
16 Decl. at ¶ 3. The settlement provides \$450,000.00 to fund the structured settlement annuity.
17 Motion at 11. While the terms are not yet finalized, Mr. Valdez has identified an annuity that will
18 provide guaranteed payments of \$4,011.54 for twelve (12) years for the benefit of Mr. Alter.
19 See ECF No. 30-4 at Exh. A; see also ECF 30-3, Marrinan Decl. at ¶ 3.

20 Mr. Alter's counsel and guardian ad litem have consulted with and intend to retain the
21 services of Secured Futures to establish a Special Needs Trust for the benefit of Mr. Alter. Motion
22 at 11. Approximately \$56,666.67 of the settlement money will be immediately deposited into
23 the Special Needs Trust for the benefit of Mr. Alter. Id. This will preserve Mr. Alter's Medi-Cal
24 benefits that currently pay for his living and other expenses. Id. All subsequent annuity payments
25 also will be placed directly into the Special Needs Trust, for the benefit of Mr. Alter. Id. at 12.
26 Any disbursement of the funds from the Special Needs Trust may only be made with the approval
27 of the trustee of the Trust, and only for the direct benefit of Mr. Alter, under government
28 guidelines.

In light of the above, the Court finds that the proposed annuity or annuities and the use
of the Special Needs Trust created and administered by Secured Futures are appropriate and in
the best interest of Mr. Alter.

1 **CONCLUSION**

2 After conducting an independent inquiry and evaluation of the proposed settlement, the
3 Court finds that the proposed settlement is fair, reasonable, and in the best interests of Mr.
4 Alter, given the factual and legal issues involved in the case. See Robidoux et al. 638 F.3d at
5 1181-82 (holding that district courts should limit the scope of their review of a compromise or
6 settlement of a minor’s claims “to the question whether the net amount distributed to each
7 minor plaintiff in the settlement is fair and reasonable, in light of the facts of the case, the
8 minor’s specific claim”). The Court also finds that the proposed attorney’s fees are fair and
9 reasonable. Finally, the Court finds that the method of distribution, including the use of Secured
10 Futures, is fair, reasonable, and in the best interest of Mr. Alter.

11 Plaintiff’s Motion for Order Approving Settlement Involving Incompetent Adult and for
12 Distribution of Settlement Funds is hereby **GRANTED** in its entirety.

13 **IT IS SO ORDERED.**

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15 Dated: 6/22/2023


16 Hon. Barbara L. Major
17 United States Magistrate Judge
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