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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

EMILY WHALE, et al.,  
Plaintiffs,  
v.  
LINCOLN MILITARY PROPERTY  
MANAGEMENT LP, et al.,  
Defendants.

Case No.: 22-cv-00160-CAB-JLB

**REPORT AND  
RECOMMENDATION FOR ORDER  
GRANTING PETITION FOR  
APPROVAL OF MINORS'  
COMPROMISES**

**[ECF No. 22]**

Before the Court is Plaintiffs' second amended *ex parte* petition for approval of the compromises of the minor plaintiffs' disputed claims.<sup>1</sup> (ECF No. 22.) This Report and Recommendation is submitted to United States District Judge Cathy Ann Bencivengo pursuant to 28. U.S.C. § 636(b)(1) and Local Civil Rule 17.1 of the United States District Court for the Southern District of California. After reviewing the petition and all

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<sup>1</sup> The Court initially struck Plaintiffs' original and first amended petitions because they included the full names and birthdates of the minor plaintiffs, in violation of Fed. R. Civ. P. 5.2, the Local Rules, and the Electronic Case Filing Administrative Policies and Procedures Manual. (ECF Nos. 17; 20.)

1 supporting documents, and for the reasons discussed below, the Court **RECOMMENDS**  
2 that the District Court **GRANT** the petition.

3 **I. BACKGROUND**

4 Plaintiffs are a family of two parents and two minor children. (ECF No. 1-2 at 17,  
5 19, 21.) Plaintiffs A.W. (7 years old) and M.S.<sup>2</sup> (12 years old) are minors (the “Minor  
6 Plaintiffs”) appearing by and through their grandmother and court-appointed guardian *ad*  
7 *litem*, Judith Laverdiere. (ECF No. 1-2 at 16–19.)

8 Plaintiffs leased a property from Defendants located at 10105 Hooper Street, San  
9 Diego, CA 92124 (the “Leased Property”), and Minor Plaintiffs resided at the Leased  
10 Property at all times relevant to the complaint. (ECF Nos. 1-2 at 22 ¶¶ 1–4; 22-1 at 2 ¶ 4.)  
11 Plaintiffs allege that the “grossly negligent maintenance of the [L]eased [P]roperty by  
12 Defendants and employees of Defendants is responsible for Plaintiffs’ exposure to black  
13 mold and other toxic chemicals which negatively impacted the health and well-being of  
14 Plaintiffs.” (*Id.* ¶ 5.) Based on these allegations, Plaintiffs brought ten state-law claims  
15 against Defendants for negligence, nuisance, negligent infliction of emotional distress,  
16 breach of implied warranty of habitability, breach of implied covenant of quiet use and  
17 enjoyment, rent abatement, gross negligence, premises liability, intentional infliction of  
18 emotional distress, and fraud. (ECF No. 1-2 at 21 ¶¶ 51–157.)

19 On December 8, 2021, Plaintiffs commenced the instant action against Defendants  
20 Camp Pendleton & Quantico Housing, LLC (“Camp Pendleton”), Lincoln Military  
21 Property Management LP (“Lincoln”), and LPC Pendleton Quantico PM, LP (“LPC  
22 Pendleton”) in San Diego Superior Court. (ECF No. 1 at 2 ¶ 1.) On February 3, 2022,  
23 Defendants removed the case to this Court. (ECF No. 1.) On February 10, 2022, Defendant  
24 Lincoln filed an answer. (ECF No. 2.) On February 16, 2022, Plaintiffs and Defendants  
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27 <sup>2</sup> M.S. is listed incorrectly as “A.S.” in the Notice of Removal and in the caption on  
28 CM/ECF. (*See* ECF No. 1.) In subsequent filings by Defendants and in Plaintiffs’ instant  
petition, M.S.’s initials appear correctly. (*See, e.g.*, ECF Nos. 2; 22.)

1 Camp Pendleton and LPC Pendleton filed a Joint Motion to Dismiss. (ECF No. 7.) On  
2 February 17, 2022, District Judge Bencivengo dismissed Defendants Camp Pendleton and  
3 LPC Pendleton. (ECF No. 10.) On March 4, 2022, Defendant San Diego Family Housing  
4 LLC (“SDFH”) filed an answer and was added as a party to this case. (ECF No. 12.)

5 On March 29, 2022, Magistrate Judge Daniel E. Butcher held an Early Neutral  
6 Evaluation Conference with Plaintiffs and the two remaining defendants, Lincoln and  
7 SDFH (“Defendants”). (ECF No. 15.) The case settled. (*Id.*) On March 30, 2022,  
8 Magistrate Judge Jill L. Burkhardt was assigned to handle the minors’ compromises in this  
9 case. (ECF No. 14.)

10 On May 3, 2022, Plaintiffs filed the instant petition, which included California state  
11 MC-350 forms for each minor and set forth the terms of the settlement and the intended  
12 distribution of the settlement proceeds. (ECF No. 22.) In their MC-350 forms, Plaintiffs  
13 acknowledged that if the settlement is approved by the Court, Minor Plaintiffs will be  
14 forever barred from seeking any further recovery or compensation from the settling  
15 Defendants on the claims that are proposed to be dismissed. (ECF No. 22-1 at 8, 32.)  
16 Pursuant to the applicable briefing schedule, Defendants were required to file any  
17 opposition to the petition by May 5, 2022. (ECF No. 21.) Defendants do not oppose the  
18 petition.<sup>3</sup> (*See* ECF No. 23.) To assist in evaluating the instant petition, the Court held a  
19 hearing on May 26, 2022.<sup>4</sup> (ECF No. 27.)

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23 <sup>3</sup> Although Defendant SDFH is not listed as a party in Plaintiffs’ petition nor  
24 Defendants’ non-opposition, Defendants’ counsel confirmed on the record at the hearing  
25 on May 26, 2022 (*see* ECF No. 27) that Defendant SDFH does not oppose Plaintiffs’  
26 petition. Additionally, counsel for both parties represented that, if approved, the settlement  
at issue will result in a dismissal with prejudice as to both remaining Defendants.

27 <sup>4</sup> Plaintiffs Emily Whale, William Eric Whale, Jr., Minor A.W. and her guardian *ad*  
28 *litem*, Judith Laverdiere, and counsel Christian Ballmer Clark appeared on behalf of  
Plaintiffs. Counsel Timothy Alexander Hanna appeared on behalf of Defendants. Minor  
M.S. was excused from the hearing and did not appear. (*See* ECF Nos. 26; 27.)

## II. LEGAL STANDARD

1  
2 It is well settled that courts have a special duty to safeguard the interests of litigants  
3 who are minors in the context of settlements proposed in civil suits. *Robidoux v.*  
4 *Rosengren*, 638 F.3d 1177, 1181 (9th Cir. 2011); *see also* Fed. R. Civ. P. 17(c) (district  
5 courts “must appoint a guardian *ad litem*—or issue another appropriate order—to protect  
6 a minor or incompetent person who is unrepresented [by a guardian conservator or the like]  
7 in an action.”). “In the context of proposed settlements in suits involving minor plaintiffs,  
8 this special duty requires a district court to ‘conduct its own inquiry to determine whether  
9 the settlement serves the best interests of the minor.’” *Robidoux*, 638 F.3d at 1181 (quoting  
10 *Dacanay v. Mendoza*, 573 F.2d 1075, 1080 (9th Cir. 1978)); *see also Salmeron v. United*  
11 *States*, 724 F.2d 1357, 1363 (9th Cir. 1983) (holding that “a court must independently  
12 investigate and evaluate any compromise or settlement of a minor’s claims to assure itself  
13 that the minor’s interests are protected, even if the settlement has been recommended or  
14 negotiated by the minor’s parent or guardian *ad litem*.”).

15 With respect to the court’s duty to safeguard, Local Rule 17.1(a) provides that “[n]o  
16 action by or on behalf of a minor or incompetent will be settled, compromised, voluntarily  
17 discontinued, dismissed or terminated without court order or judgment.” CivLR. 17.1(a).  
18 The court is required to determine whether the settlement is in the best interests of the  
19 minor, considering not only the fairness of the settlement, but the structure and manner of  
20 the plan for the payment and distribution of the assets for the benefit of the minor. Under  
21 the Local Rules, parties must submit the settlement to a magistrate judge for preliminary  
22 review. *See* CivLR 17(a) (“All settlements and compromises must be reviewed by a  
23 magistrate judge before any order of approval shall issue.”).

24 The Ninth Circuit established that courts reviewing the settlement of a minor’s  
25 federal claim should “limit the scope of their review to the question whether the net amount  
26 distributed to each minor plaintiff in the settlement is fair and reasonable, in light of the  
27 facts of the case, the minor’s specific claim, and recovery in similar cases.” *Robidoux*, 638  
28 F.3d at 1181–82. They should “evaluate the fairness of each minor plaintiff’s net recovery

1 without regard to the proportion of the total settlement value designated for adult co-  
2 plaintiffs or plaintiffs’ counsel—whose interests the district court has no special duty to  
3 safeguard.” *Id.* at 1182 (citing *Dacanay*, 573 F.2d at 1078). “So long as the net recovery  
4 to each minor plaintiff is fair and reasonable in light of their claims and average recovery  
5 in similar cases, the district court should approve the settlement as proposed by the parties.”  
6 *Robidoux*, 638 F.3d at 1182.

7         Significantly, the Ninth Circuit limited its decision in *Robidoux* to “cases involving  
8 the settlement of a minor’s federal claims.” *Id.* at 1181–82 (emphasis added). Where a  
9 settlement involves state law claims, federal courts are generally guided by state law rather  
10 than *Robidoux*. *J.T. by & Through Wolfe v. Tehachapi Unified Sch. Dist.*, No. 16cv01492-  
11 DAD-JLT, 2019 WL 954783, at \*2 (E.D. Cal. Feb. 27, 2019). *See also A.M.L. v.*  
12 *Cernaianu*, No. LA CV12-06082-JAK-RZx, 2014 WL 12588992, at \*3 (C.D. Cal. Apr. 1,  
13 2014) (collecting cases). The *A.M.L.* court noted that, although federal courts generally  
14 require claims by minors to “be settled in accordance with applicable state law,” the Ninth  
15 Circuit in *Robidoux* held such an approach “places undue emphasis on the amount of  
16 attorney’s fees provided for in a settlement, instead of focusing on the net recovery of the  
17 minor plaintiffs.” *Id.* at \*2 (quoting *Robidoux*, 638 F.3d at 1181) (other citation omitted).  
18 *But see Mitchell v. Riverstone Residential Grp.*, No. Civ. S-11-2202-LKK-CKD, 2013 WL  
19 1680641, at \*1 (E.D. Cal. Apr. 17, 2013) (“[A] number of district courts have applied the  
20 rule provided in *Robidoux* to evaluate the propriety of a settlement of a minor’s state law  
21 claims as well”) (collecting cases).

22         The California Probate Code provides the applicable statutory scheme for approval  
23 of a minor’s compromise under state law. *See* Cal. Prob. Code §§ 3601 *et seq.* Under  
24 California law, the Court is tasked with evaluating the reasonableness of the settlement and  
25 determining whether the compromise is in the best interest of the minor. *A.M.L.*, 2014 WL  
26 12588992, at \*3 (citations omitted). In carrying out that task, the Court is afforded “broad  
27 power . . . to authorize payment from the settlement—to say who and what will be paid  
28 from the minor’s money—as well as direct certain individuals to pay it.” *Goldberg v.*

1 *Superior Court*, 23 Cal. App. 4th 1378, 1382 (1994). *See also Pearson v. Superior Court*,  
2 202 Cal. App. 4th 1333, 1340 (2012) (explaining that the purpose of requiring court  
3 approval of a minor’s settlement is to “allow[] the guardians of a minor to effectively  
4 negotiate a settlement while at the same time protect[ing] the minor’s interest by requiring  
5 court approval before the settlement can have a binding effect on the minor”).

6 Because the substantive claims in this case are governed by California law, the Court  
7 will review the settlement with an eye towards the state standard, which focuses on the  
8 “best interests of the minor.” However, to ensure that all potentially relevant factors are  
9 considered, the Court will also apply the *Robidoux* standard of determining whether the net  
10 amount distributed to the minor plaintiffs (without regard to the proportion of the  
11 settlement allocated to adult co-plaintiffs or attorney’s fees) is “fair and reasonable.” *See*  
12 *A.M.L.*, 2014 WL 12588992, at \*3 (finding it unnecessary for the court to resolve whether  
13 *Robidoux* or state rules applied to approval of minor’s compromise in case involving state  
14 tort law claims, because the proposed settlement would satisfy both standards).

### 15 **III. DISCUSSION**

16 To fulfill the special duty of the court to safeguard the interests of minors in the  
17 context of settlements proposed in a civil suit, this Court will analyze the proposed  
18 settlement, the method of disbursing Minor Plaintiffs’ net recoveries, and the proposed  
19 attorney’s fees and costs.

#### 20 **A. Proposed Net Settlement Amounts for Minor Plaintiffs**

##### 21 **1. Terms of Settlement**

22 As set forth in the petition, the total settlement amount is \$137,500. (ECF No. 22 at  
23 4.) The proceeds are to be divided as follows: \$127,500 to Plaintiffs Emily Whale and  
24 William Eric Whale, Jr. (Minor Plaintiffs’ parents); and \$5,000 each to Minor Plaintiffs.  
25 (*Id.*) Minor Plaintiffs “experienced various symptoms believed to be caused by the mold  
26 infestation [of the Leased Property, including] frequent headaches and migraines, along  
27 with numerous bloody noses.” (ECF No. 22-1 at 2 ¶ 6.) Minor Plaintiffs’ headaches were  
28 treated successfully with over-the-counter medications. (ECF No. 27.) Minor Plaintiffs

1 also “possibly contracted allergies to mold.” (ECF No. 22-1 at 2 ¶ 6.) M.S. recovered  
2 completely and “did not receive any special care for the symptoms he experienced.” (*Id.*  
3 at 31 ¶¶ 7–8.) Although A.W. suffers from Chiari Malformation 1 and Syringomyelia,  
4 “A.W.’s treating physicians have not opined whether the mold exposure caused these  
5 injuries, exacerbated the injuries, or if the injuries are completely unrelated to the mold  
6 exposure.” (*Id.* at 7 ¶ 8.) Plaintiffs’ counsel represented at the hearing on May 26, 2022,  
7 that the investigation conducted to date has yielded no evidence that A.W.’s Chiari  
8 Malformation 1 and Syringomyelia were caused or exacerbated by mold exposure.<sup>5</sup> (ECF  
9 No. 27.) Plaintiffs Emily Whale and William Eric Whale, Jr.’s injuries include “medical  
10 issues and damages related to overpayment for the Leased Property . . . [and] damages for  
11 costs for moving, cleaning personal property via an independent restoration company, and  
12 replacing personal property that was exposed to mold spores but could not be effectively  
13 cleaned.”<sup>6</sup> (ECF No. 22-1 at 2 ¶ 7.)

14 Minor Plaintiffs’ counsel seeks \$1,250 in attorney’s fees from each minor, a sum  
15 that represents 25% of each minor’s gross settlement. (ECF No. 22-1 at 10 ¶ 13; 11 ¶¶14,  
16 16; 34 ¶ 13; 35 ¶¶ 14, 16.) Each minor’s net settlement after deducting \$1,250 of attorney’s  
17 fees is \$3,750. (*See* ECF No. 22 at 4.)

## 18 2. Analysis

19 Minor Plaintiffs’ net recoveries of \$3,750 each reflect fair compensation for their  
20 relatively modest damages. Minor Plaintiffs suffered from headaches, sometimes  
21 accompanied by nausea, that responded well to over-the-counter medications. (ECF No.  
22 27.) They also suffered from periodic nose bleeds. (*Id.*) As stated at the hearing, Minor  
23 Plaintiffs and their parents moved into a new unit on one of Defendants’ properties in  
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26 <sup>5</sup> Consequently, the Court does not consider these medical conditions, or the treatment  
27 for them, to be part of A.W.’s damages.

28 <sup>6</sup> Plaintiffs represented at the hearing that a substantial portion of the parents’ damages  
was attributable to overpayment for the property. (ECF No. 27.)

1 October 2021 and are no longer in contact with any mold. (*Id.*) Minor Plaintiffs’ mother,  
2 Emily Whale, also represented at the hearing that both minors have not experienced any  
3 adverse consequences of their mold exposure since moving to their new home. (*Id.*)

4 The proposed recoveries are similar to the approved recoveries garnered by settling  
5 minors in two other cases from this District which the Court finds directly applicable. Both  
6 cases were brought by the same plaintiffs’ counsel, involved mostly the same defendants,  
7 and arose out of very similar mold allegations. *See Smith, et al. v. AMETEK, Inc., et al.*,  
8 No. 20cv02359-TWR-BLM, 2021 WL 4077580, at \*1–3 (S.D. Cal. Sept. 8, 2021),  
9 *adopted*, No. 20cv02359-TWR-AGS, 2021 WL 4805532 (S.D. Cal. Oct. 14, 2021) (finding  
10 fair and reasonable net settlement amounts of \$3,669.50 and \$2,206.72 for minor plaintiffs  
11 who underwent “wheezing, coughing, and allergic reactions” as a result of the failure of  
12 defendants to adequately clean mold, but who fully recovered from the mold exposure);  
13 *Doe v. Lincoln Mil. Prop. Mgmt. LP*, No. 20cv00224-GPC-AHG, 2020 WL 5587488, at  
14 \*1, \*10 (S.D. Cal. Sept. 18, 2020), *adopted*, No. 20cv00224-GPC-AHG, 2020 WL  
15 5810168 (S.D. Cal. Sept. 30, 2020) (finding net recovery of \$1,277.04 to be fair and  
16 reasonable where one minor plaintiff suffered minor respiratory illnesses due to mold  
17 exposure, and finding a net recovery of \$19,793.29 appropriate for second minor plaintiff  
18 whose “exposure to toxic mold also exacerbated his autism, regressing his behavioral  
19 speech therapy progress” and caused his “withdraw[al] from school”).

20 The proposed settlement allows for the certainty of recovery for Minor Plaintiffs, as  
21 opposed to the uncertainty associated with a trial. Here, Minor Plaintiffs would likely  
22 encounter “several costly medical battles to prove causation and damages, not to mention  
23 the potential delay caused by additional years of litigation.” *See Smith*, 2021 WL 4077580,  
24 at \*2. Accordingly, based upon a consideration of the facts, Minor Plaintiffs’ claims, the  
25 risks associated with trial, and the recoveries in similar actions, the Court concludes the  
26 proposed settlement is fair and reasonable under both California and federal law standards.

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1       **B. Method of Disbursement**

2           Courts can use a wide variety of methods for the disbursement of settlement funds  
3 to a minor. *See* Cal. Prob. Code §§ 3600 *et. seq.*<sup>7</sup> Here, the proposed procedure for  
4 disposition of the funds—delivering them to be held in trust by the parents until Minor  
5 Plaintiffs reach the age of majority—is consistent with the California Probate Code,  
6 because the resulting net estate for each minor is less than \$5,000. *See* Cal. Prob. Code  
7 §§ 3401, 3611(e); (ECF No. 22 at 4.)

8       **C. Attorney’s Fees and Costs**

9           Attorney’s fees and costs are typically controlled by statute, local rule, or local  
10 custom. Under California law, courts are required to approve the attorney’s fees to be paid  
11 for representation of a minor. *See* Cal. Prob. Code § 2601; Cal. Rule of Ct. 7.955.<sup>8</sup>

12           Minor Plaintiffs’ counsel seeks \$1,250 in attorney’s fees from each minor, a sum  
13 that represents 25% of each minor’s gross settlement. (ECF No. 22-1 at 10 ¶ 13; 11 ¶¶14,  
14 16; 34 ¶ 13; 35 ¶¶ 14, 16.) No hard costs will be deducted from either of Minor Plaintiffs’  
15 settlements. (ECF No. 22 at 4.) The Court finds the requested amount of attorney’s fees  
16 is reasonable and does not suggest that the settlement was unfair. *See Napier v. San Diego*,  
17 No. 15-cv-581-CAB-KSC, 2017 WL 5759803, at \*9 (S.D. Cal. No. 28, 2017) (“Generally,  
18 fees in minors[’] cases have historically been limited to 25% of the gross recovery.”).

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25 <sup>7</sup> California probate law governs the proposed methods of disbursement of minors’  
26 settlement funds. *See* CivLR.17.1(b)(1).

27 <sup>8</sup> Similarly, San Diego Superior Court Civil Rule 2.4.6.2 states that, regarding a  
28 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. Absent extraordinary  
circumstances, attorney’s fees will not exceed 25% of the gross proceeds of the settlement.”

1 **IV. CONCLUSION**

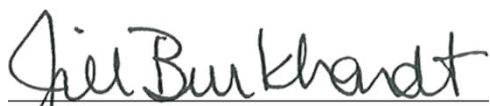
2 For the reasons discussed above, **IT IS HEREBY RECOMMENDED** that the  
3 District Court issue an Order: (1) adopting this Report and Recommendation; and (2)  
4 **GRANTING** Plaintiffs' *Ex Parte* Petition for Approval of Minors' Compromises (ECF  
5 No. 22).

6 **IT IS ORDERED** that, pursuant to 28 U.S.C. § 636(b)(1)(C), any party to this action  
7 may file written objections with the Court and serve a copy on all parties no later than  
8 **June 14, 2022**. The document should be captioned "Objections to Report and  
9 Recommendation." If objections are filed, any reply is due by **June 21, 2022**.

10 Although the federal statutory scheme provides for a 14-day objections period to a  
11 Magistrate Judge's Report and Recommendation, the Court notes that the petition in this  
12 case is unopposed. (*See* ECF No. 23; *supra* n. 3, at 3.) Therefore, **if all parties wish to**  
13 **waive the objections period, they should file a joint stipulation to that effect**  
14 **immediately**, to allow the Court to adopt this Report and Recommendation without further  
15 delay. However, there shall be no adverse consequences to any party who files objections  
16 or otherwise chooses not to waive the objections period.

17 **IT IS SO ORDERED.**

18 Dated: May 31, 2022

19   
20 Hon. Jill L. Burkhardt  
21 United States Magistrate Judge  
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