UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STEVEN PRESCOTT, et al.,

Plaintiffs,

v.

BAYER HEALTHCARE LLC, et al.,

Defendants.

Case No. 20-cv-00102-NC

ORDER DENYING WITHOUT PREJUDICE MOTION FOR PRELIMINARY APPROVAL

Re: Dkt. No. 81

Plaintiffs Mike Xavier and Steven Prescott ("Plaintiffs") bring a putative class action against Bayer Healthcare LLC and Beiersdorf, Inc. ("Defendants"). Defendants manufacture, market, and sell Coppertone sunscreen products throughout the United States. Plaintiffs allege that the "mineral-based" label on Defendants' products deceive consumers into believing they contain only mineral active ingredients when they contain chemical active ingredients as well. *See* Dkt. No. 1. Before the Court is Plaintiffs' motion for preliminary approval of class action settlement. Dkt. No. 81 ("Mot."). The Court held a hearing on this motion on April 21, 2021. Having considered the Plaintiffs' motion, the arguments of counsel at the April 21, 2021, hearing, and the record in this case, the Court DENIES without prejudice Plaintiffs' motion for preliminary approval of class action settlement.

I. LEGAL STANDARD

Federal Rule of Civil Procedure 23(e) provides that "[t]he claims, issues, or defenses of a certified class . . . may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e). "The purpose of Rule 23(e) is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). Accordingly, in order to approve a class action settlement under Rule 23, a district court must conclude that the settlement is "fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). In determining whether the proposed settlement meets this standard, the Court does not have the ability "to delete, modify, or substitute certain provisions . . . The settlement must stand or fall in its entirety." *Id.* at 1026.

Where "the parties negotiate a settlement before the class has been certified, settlement approval requires a higher standard of fairness and a more probing inquiry than may normally be required under Rule 23(e)." *Roes, 1–2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048 (9th Cir. 2019) (internal quotation marks and citations omitted). In such cases, the Court must apply "an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). Signs of potential collusion include:

> "(1) when counsel receive a disproportionate distribution of the settlement; (2) when the parties negotiate a 'clear sailing' arrangement" (i.e., an arrangement where defendant will not object to a certain fee request by class counsel); and (3) when the parties create a reverter that returns unclaimed fees to the defendant."

Allen v. Bedolla, 787 F.3d 1218, 1224 (9th Cir. 2015) (quoting *In re Bluetooth*, 654 F.3d at 947) (internal quotations omitted). "The Court may grant preliminary approval of a settlement and direct notice to the class if the settlement: '(1) appears to be the product of

serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval." *Harris v. Vector Mktg. Corp.*, No. 08-cv-05198-EMC, 2011 WL 1627973, at *7 (N.D. Cal. 2011); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1079–80 (N.D. Cal. 2007).

II. DISCUSSION

The Court denies without prejudice the motion for preliminary approval of the class action settlement for the following reasons: (1) the proposed release in the settlement agreement is overbroad, (2) the parties lack an explanation regarding a non-collusive relationship to the *cy pres* beneficiary, (3) the justification for the exceeding administrative expenses and attorneys' fees request is inadequate, (4) the parties' proposed notice is incomplete, and (5) the settlement fails to comply with Northern District procedural guidance regarding claim forms.

A. The Proposed Release Is Overbroad

1. Release of Claims

The Court concludes that the release contained within the proposed settlement agreement conflicts with Ninth Circuit precedent, which only allows release of claims "where the released claim[s] [are] based on the identical factual predicate as that underlying the claims in the settled class action." *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (internal quotations and citation omitted); *see also Chavez v. PVH Corp.*, No. 13-cv-01797-LHK, 2015 WL 581382, at *5 (N.D. Cal. Feb. 11, 2015) ("District courts in this Circuit have declined to approve settlement agreements where such agreements would release claims based on different facts than those alleged in the litigation at issue.").

Here, the releases contained in the settlement agreement contain sweeping language and are not consistently reflected in the motion for preliminary approval or the proposed order seeking final approval. Under the settlement agreement, "Released Claims" is defined as claims arising out of, or "*relat[ing] in any way to*: (a) allegations, claims, or contentions that were or could have been asserted in the Litigation;" (b) the Products

including but not limited to, their performance as well as any advertising, labeling . . . of *any type whatsoever* regarding such Products;" and "(c) all labels or packaging for the Coppertone sunscreen products that conform to the terms of the Settlement." Dkt. No. 81-4 "Settlement Agr." § 2.35 (emphasis added). In contrast, the proposed order for final approval attached to the settlement agreement specifies that the claims to be released must arise out of, or relate in any manner to "the purchase of Coppertone sunscreen products *that contain a 'mineral-based' label* on or before [Notice Date]." Dkt. No. 81-4, Ex. D (emphasis added).

In light of the sweeping language in the agreement itself, the settlement releases claims that are not "based on the identical factual predicate as that underlying the claims in the settled class action." *Hesse*, 598 F.3d at 590. The parties must narrow the scope of the release in the settlement agreement to be more specific about the claims being released to specify that it only pertains to claims about the purchase of Coppertone sunscreen products that contain a "mineral-based" label.

2. Release of Parties

Furthermore, under the settlement agreement, the released parties are defined as "Defendants and each and all of their predecessors in interest, former, present and future direct and indirect subsidiaries . . . successors . . . whether specifically named and whether or not participating in the settlement by payment or otherwise." Settlement Agr. § 2.36. Similarly, the language of the release is too broad for class members to ascertain which party is released from future claims. Accordingly, the parties must narrow the scope of the release of parties.

3. Waivers

Finally, the settlement agreement contains a waiver of Cal. Civ. Code § 1542. Section 1542 provides that "a general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party." Cal. Civ. Code § 1542. The Court finds that

without written acknowledgement of this waiver from the class members in the agreement, the Court cannot ascertain whether the class members knowingly waive this protection. In any subsequent motion for preliminary approval, the parties must more clearly explain the class members' acknowledgment of this waiver and must narrow the scope of the released claims and parties.

B. *Cy Pres* Beneficiary

The parties designated Look Good Feel Better as the *cy pres* beneficiary. Settlement Agr. § 2.40. Under the settlement agreement, Defendants agreed to pay a total monetary benefit of $2.25 million into a common fund, with no right of reversion. *See* Mot. at 1. After paying valid claims from settlement class members, attorneys' fees, litigation expenses, service awards, and administrative expenses, any remaining amount will be disbursed to Look Good Feel Better. Settlement Agr. § 3.10. At the hearing on April 21, 2021, the parties indicated that they selected Look Good Feel Better because it is a company that targets cancer, and these Products are often used to avoid cancer. *See* Dkt. No. 86 ("Prelim. Appr. Hearing (Apr. 21, 2021)"). Counsel for the parties also indicated that they are not aware of any connection between the attorneys and the *cy pres* beneficiary, and although Bayer has supported Look Good Feel Better in the past, numerous companies have done so as well. *Id.* Despite those remarks, the Court cannot conclude that there is a non-collusive relationship between the *cy pres* beneficiary and Bayer, or between the *cy pres* beneficiary and counsel. In any subsequent motion for preliminary approval, the parties must more clearly explain how no collusion or conflict of interest exists.

C. Administrative Expenses and Attorney's Fees

Under the settlement agreement, notice and claims administration costs are to be paid from the fund, up to $530,000 plus postage. *See* Settlement Agr. § 5.7. The Court cannot conclude that this amount reflects a fair and adequate distribution of settlement funds. Although counsel posits that the budget is on par with market rates for other class actions where consumer data is unavailable, *see* Dkt. No. 81-2 "Bruce Decl." ¶ 7, and that

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.