UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MONIQUE BELL, TREE ANDERSON, and MELISSA CONKLIN, *individually and on behalf of all others similarly situated*,	:	
Plaintiffs,	:	**DECISION AND ORDER**
-against-	:	21-CV-6850 (PK)
CVS PHARMACY, INC.,	:	
Defendant.	:	

Peggy Kuo, United States Magistrate Judge:

Monique Bell, Tree Anderson, and Melissa Conklin ("Plaintiffs") brought this action against CVS Pharmacy, Inc. ("Defendant"), on behalf of themselves and all others similarly situated, alleging that Defendant violated state consumer protection statutes, state warranty acts, New York General Business Law §§ 349-50, New York Warranty Act, N.Y. U.C.C. § 2-313, and The Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, and was unjustly enriched. (First Amended Complaint ("FAC") ¶¶ 43–106, Dkt. 54.)[1] The parties entered into a settlement agreement contemplating a payment amount of up to $3,800,000.00 in cash refunds, and notice and administration costs of the settlement approximating $500,000.00. (*See* Ex. 1 to Marchese Decl. ("Settlement Agreement") ¶ 2.42, Dkt. 57-1; Marchese Decl. ¶ 14, Dkt. 57.)

Before the Court are Plaintiffs' unopposed Motion for Final Approval of Class Action Settlement ("Final Approval Motion," Dkt. 75) and Motion for Attorneys' Fees, Costs, Expenses, and Incentive Awards ("Fees Motion," Dkt. 65). The Court previously granted the unopposed Motion

[1] Plaintiffs allege that Defendant has violated the consumer protection statutes and warranty acts of dozens of states. (*See* FAC at 19 n.23, 21 n.24.)

for Preliminary Approval of Class Action Settlement on July 18, 2023. (*See* "Preliminary Approval Order," Dkt. 61.)

Plaintiffs filed the unopposed Final Approval Motion on January 25, 2024, attaching the following supporting documentation: a memorandum of law in support of the Final Approval Motion ("Final Approval Mem.," Dkt. 75-1), attorney declarations from Class Counsel ("Marchese Decl.," Dkt. 75-2; "Gucovschi Decl.," Dkt. 75-3), declarations by representatives of Kroll Settlement Administration LLC ("Kroll") ("Finegan Decl.," Dkt. 75-4; "Fenwick Decl.," Dkt. 75-5), and a proposed order and judgment (Dkt. 76). The declaration submitted by Kroll confirmed that the proposed notice program had been carried out pursuant to the Preliminary Approval Order. (Fenwick Decl. ¶¶ 3–9.)

Plaintiffs previously filed the Fees Motion on September 22, 2023, attaching the following supporting documentation: a memorandum of law in support of the Fees Motion ("Fees Mem.," Dkt. 66), attorney declarations ("Marchese Fees Decl.," Dkt. 67; "Gucovski Fees Decl.," Dkt. 68), and Plaintiffs' declarations in support of their request for incentive awards ("Conklin Decl.," Dkt. 69; "Bell Decl.," Dkt. 70; "Anderson Decl.," Dkt. 71). The Fees Motion requested attorneys' fees, costs, and expenses totaling $1,140,000.00 and incentive awards of $3,000.00 each to Plaintiffs Bell, Anderson, and Conklin for their service as representatives of the Settlement Class. (Fees Motion at 1.)

The Final Approval Motion and Fees Motion (together, the "Motions") seek entry of a final judgment and order approving the proposed class-wide settlement and awarding attorneys' fees, costs, and incentive awards. The Motions are unopposed. The Court held a final settlement approval hearing on February 16, 2024. No Settlement Class member objected to the settlement at or before the hearing. Following the hearing and by order of the Court, the parties filed a joint status report on March 13, 2024 to update the Court as to the status of settlement claims and Class Counsel's additional time and costs expended. ("Motions Supplement," Dkt. 79.) As of March 13, 2024, Kroll had received

177,646 valid claims. (*Id.*) Additionally, Class Counsel updated its lodestar calculation for fees to $662,474.50 and costs calculation to $19,775.97, totaling $682,250.47. (*Id.*)

Having considered the Motions, the supporting declarations, the arguments presented at the February 16, 2024 fairness hearing, and the complete record in this matter, for good cause shown, the Court (i) grants final approval of the settlement as memorialized in the Settlement Agreement; (ii) authorizes the distribution of settlement checks; (iii) approves a service award of $3,000.00 each to Plaintiffs Monique Bell, Tree Anderson, and Melissa Conklin; and (iv) approves an award of attorneys' fees, costs, and expenses in the amount of $1,140,000.00.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) The Court grants final approval of the Settlement Agreement, and "so orders" all of its terms which are incorporated herein. This Order incorporates by reference the definitions in the Settlement Agreement and all exhibits, addendums, stipulations, and schedules thereto.

(2) As previously addressed by the Court when it granted preliminary certification of the Settlement Class, the numerosity, commonality, typicality, and adequacy requirements of Federal Rule of Procedure 23(a), and the predominance and superiority requirements of Rule 23(b)(3), have been met, warranting class certification for purposes of effectuating settlement. (*See* Preliminary Approval Order at 4–9.)

(3) The Court hereby grants final certification to the following Settlement Class for settlement purposes pursuant to Rule 23(e): "all persons who purchased Products [as defined in paragraph 2.33 of the Settlement Agreement] in the United States [from December 11, 2017 through July 18, 2023]." (*See* Settlement Agreement ¶ 2.41.) Excluded from the Settlement Class are: "(a) all persons who purchased or acquired the Products for resale; (b) Defendant and its employees, principals, affiliated entities, legal representatives, successors, and assigns; (c) any person who makes a valid, timely opt-out request; (d) federal, state, and local governments (including all

agencies and subdivisions thereof, but excluding employees thereof), and (e) the judges to whom this Action is assigned and any members of his/her/their immediate family." (*Id.*) Also excluded from the Settlement Class are the two individuals, identified in Exhibit F to the Fenwick Declaration (Dkt. 75-5) as Record IDs 68899D65CW6RH and 68899NMS6HQ2C, who submitted timely exclusion requests. (Fenwick Decl. ¶ 19.)

(4) In preliminarily approving the Settlement Agreement, the Court previously considered the requirements of Fed. R. Civ. P. 23(e)(2), weighed the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F. 2d 448 (2d Cir. 1974), and found that it would likely be able to approve the proposed settlement as fair, reasonable, and adequate. (Preliminary Approval Order at 10.)

(5) The Court now finds that Plaintiffs and Class Counsel have adequately represented the Settlement Class pursuant to Rule 23(e)(2)(A), the settlement was reached through arm's-length negotiations between experienced counsel pursuant to Rule 23(e)(2)(B), the relief was adequate for the Settlement Class pursuant to Rule 23(e)(2)(C), and the Settlement Class members were treated equitably relative to each other pursuant to Rule 23(e)(2)(D).

(6) The Court also finds that the remaining *Grinnell* factors—the stage of the proceedings and the amount of discovery completed, the ability of the Defendant to withstand a greater judgment, the range of the settlement fund in light of the best possible recovery, and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation—weigh in favor of final approval.

(7) The only factor the Court could not address in the Preliminary Approval Order was the reaction of the class to the settlement. (Preliminary Approval Order at 17.) With respect to that factor, the response to the settlement has been positive. As of January 25, 2024, the claims administrator, Kroll, had sent the Notice directly to 3,467,472 email addresses and received 1,297,233 Claim Forms by mail and online, reflecting a participation rate of at least 37.4%. (Fenwick Decl. ¶¶ 9–

10.) This participation rate is above a typical range of class action settlement participation rates. *See Hernandez v. Immortal Rise, Inc.*, 306 F.R.D. 91, 100 n.8 (citing 2 McLaughlin on Class Actions § 6:24 (8th ed.) and observing that class action settlements based on claims submission "typically have a participation rate in the 10–15 percent range").

(8) No Settlement Class member objected to the settlement, and only two members requested to opt out of the Class. (Fenwick Decl. ¶ 19.) Thus, the reaction of the class to the settlement also weighs in favor of final approval of the Settlement Agreement.

(9) The Court finds that sufficient notice of the proposed settlement was given, pursuant to Rule 23(e)(1), to bind all Settlement Class members. The claims administrator distributed the Notice (Dkt. 57-1 at 61 (ECF pagination)) and Claim Form (Dkt. 57-1 at 57) pursuant to the notice program preliminarily approved by the Court (*see* Preliminary Approval Order at 19), including by mail and e-mail, publication of notice on the settlement website www.lidocainesettlement.com, use of a toll-free phone number with pre-recorded information about the settlement, and designating a post office box to receive claims and correspondence from Class Members. (Fenwick Decl. ¶¶ 5–9.) The Court finds that the Notice and Claim Form were the best notice practicable to allow Settlement Class members a full and fair opportunity to consider the proposed settlement and develop a response, and that the distribution of the Notice and Claim Form was the best reasonable method to reach all Settlement Class members who would be bound by the Settlement Agreement.

(10) Accordingly, because the Rule 23(e)(2) and *Grinnell* factors all weigh in favor of approval, the Court approves the proposed settlement as fair, reasonable, and adequate.

(11) The Court previously appointed Bursor & Fisher, P.A. and Gucovschi Rozenshteyn, PLLC as Class Counsel (Preliminary Approval Order at 9), and now finds that Bursor & Fisher, P.A. and

Gucovschi Rozenshteyn, PLLC have satisfied the requirements of Rule 23(a)(4) and fairly and adequately protected the interests of the Settlement Class in this action.

(12) Class Counsel have extensive experience in class actions related to false advertising of consumer goods and were, therefore, well equipped to have negotiated a fair settlement for the Settlement Class. (*See* Fees Mem. at 13–14.) The Court grants Plaintiffs' request for attorneys' fees and costs, and awards Class Counsel $1,140,000.00 in attorneys' fees, costs, and expenses, reflecting 26.5% of the cash value of the settlement ($4,300,000.00). (*See id.* at 15.) The Court finds that this award of a percentage of the Settlement Amount is reasonable. The requested award of attorneys' fees represents a multiplier of 1.72 based on the contemporaneous billing records submitted by Class Counsel. (*See* Dkts. 67, 68, 79.) The fee award is justified by the work that Class Counsel did conducting the litigation, negotiating the settlement, achieving the ultimate recovery, and by the risk that Class Counsel undertook in bringing the claims.

(13) The Court finds the service award of $9,000.00 to Plaintiffs, in the amount of $3,000.00 each to Monique Bell, Tree Anderson, and Melissa Conklin, to be reasonable.

(14) This action is hereby dismissed with prejudice.

(15) The Court retains jurisdiction over the case until all installments have been paid by Defendant as provided for in the Settlement Agreement.

(16) Final Judgment is hereby entered pursuant to Federal Rules of Civil Procedure 54 and 58 consistent with the terms of the Settlement Agreement.

SO ORDERED:

Peggy Kuo

PEGGY KUO
United States Magistrate Judge

Dated: August 26, 2024
Brooklyn, New York