

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

INCHEN HUANG, et al.,
Plaintiffs,
v.
ARTHUR JOSEPH HIGGINS, et al.,
Defendants.

Case No. 17-cv-04830-JST

**ORDER GRANTING MOTIONS FOR
FINAL APPROVAL OF SETTLEMENT
AND ATTORNEY’S FEES; DENYING
MOTION FOR REIMBURSEMENT OF
LITIGATION COSTS**

Re: ECF Nos. 123, 124

Before the Court are two unopposed motions. First, Plaintiffs Arelio Scarpatetti, Manuele Scarpatetti, Mark Madrack, and Duy Vu¹ (“Plaintiffs”) filed a motion for final approval of the settlement. ECF No. 123. Second, Plaintiffs also filed a motion for an award of attorney’s fees and reimbursement of litigation costs. ECF No. 124. The Court held a final fairness hearing on July 28, 2022. The Court will grant both motions.

I. FINAL APPROVAL OF SETTLEMENT AGREEMENT²

1. **Class Certification** – Having reviewed the parties’ briefs and supplemental submissions, the Court will grant Plaintiffs’ motion for final approval of the settlement. The Court has held that the non-opt-out class should be certified for the purpose of this Settlement under Federal Rule of Civil Procedure 23, under the terms of the Settlement. ECF No. 122. The Court confirms that the class preliminarily certified under Rule 23 is appropriate for the reasons set forth

¹ On July 28, 2022, Plaintiffs’ counsel filed a notice that Duy Vu died on February 28, 2022. ECF No. 128. “Mr. Vu is survived by his wife, Wendy Vu, who received his interest in the above-captioned matter through the probate of his estate. Pursuant to Federal Rule of Civil Procedure 25(c), Ms. Vu will serve as Mr. Vu’s representative in this action.” *Id.*

² Unless otherwise defined in this order, the capitalized terms have the same meaning as they have in the Settlement, ECF No. 117-2.

1 in its preliminary approval order, and hereby finally certifies the following non-opt-out class:

2 [A]ll persons who purchased or otherwise acquired common shares
3 of Depomed from July 29, 2015 to August 7, 2017, inclusive.
4 Excluded from the Settlement Class are Defendants and their
5 respective successors and assigns; past and current executive
6 officers and directors of Depomed, Inc. n/k/a Assertio Therapeutics
7 Inc; members of the Immediate Families of the Individual
8 Defendants; the legal representatives, heirs, successors or assigns of
9 the Individual Defendants; any entity in which any of the above
10 excluded persons have or had a majority interest; and any person
11 who validly requests exclusion from the Settlement Class. Also
12 excluded from the Settlement Class are any persons or entities who
13 or which excluded themselves by submitting a request for exclusion
14 that is accepted by the Court.

15 ECF No. 117 at 12; ECF No. 117-2 at 2.

16 2. **Adequacy of Representation** – For purposes of the Settlement, the Court
17 hereby finally certifies Plaintiffs Aurelio Scarpatetti, Manuele Scarpatetti, Mark Madrack, and
18 Duy Vu as class representatives, and Levi & Korsinsky, LLP as settlement class counsel (“Class
19 Counsel”).

20 3. **Notice** – The parties complied in all material respects with the notice plan
21 set forth in the original settlement agreement, ECF No. 117-2, Plaintiffs’ motion for preliminary
22 approval of the class action settlement, ECF No. 117, and the Court’s preliminary approval order,
23 ECF No. 121. The Court finds that Plaintiffs’ notice to the settlement class constituted due and
24 sufficient notice to the class of the pendency of the litigation, the existence and terms of the
25 Settlement, class member’s rights to make claims or object, and the matters to be decided at the
26 final approval hearing. Further, the notice plan satisfied the requirements of the United States
27 Constitution, Rule 23 or the Federal Rules of Civil Procedure, and all other applicable law.

28 4. **CAFA** – All requirements of the Class Action Fairness Act, 29 U.S.C. §
1711, et seq., have been satisfied.

5. **Final Settlement Approval and Dismissal of Claims** – Pursuant to, and in
accordance with, Rule 23 of the Federal Rules of Civil Procedure, the Court hereby fully and
finally approves the Settlement set forth in the Stipulation in all respects (including, without
limitation: the amount of the Settlement; the Releases provided for therein; and the dismissal with
prejudice of the claims asserted against Defendants in the Action). The Court finds that full

1 opportunity has been given, including at the final approval hearing held on July 28, 2022, for the
 2 class members to object to the terms of the Settlement and the request for attorney's fees. To date,
 3 no objections have been submitted. The Court also finds that the Settlement is fair, reasonable,
 4 and adequate to the class members. The Court therefore finally approves the Settlement due to
 5 the fact that the Settlement was the product of arms-length negotiations between competent, able
 6 counsel and conducted with the oversight and involvement of a neutral mediator; the record was
 7 sufficiently developed and motion proceedings enabled counsel for the parties to adequately
 8 evaluate and consider the strengths and weaknesses of their respective positions; the litigation
 9 involved disputed claims, as well as two orders from this Court dismissing the complaints, the
 10 second time with prejudice, which underscores the uncertainty and risks of the outcome in this
 11 matter; and the Settlement provides meaningful remedial benefits for the disputed claims. The
 12 Parties are directed to implement, perform, and consummate the Settlement in accordance with the
 13 terms and provisions contained in the Stipulation.

14 6. The Action and all of the claims asserted therein, as well as all of the
 15 Released Plaintiffs' Claims, are hereby dismissed with prejudice as to all Defendants and any
 16 other Defendants' Releasees. The Parties shall bear their own costs and expenses, except as
 17 otherwise expressly provided in the Stipulation.

18 7. **Binding Effect** – The terms of the Stipulation and of this Judgment shall be
 19 forever binding on Defendants, Plaintiffs and all other Settlement Class Members (regardless of
 20 whether or not any individual Settlement Class Member submits a Claim Form or seeks or obtains
 21 a distribution from the Net Settlement Fund), as well as their respective successors and assigns.

22 8. **Releases** – The Releases set forth in paragraphs 5 and 6 of the Stipulation,
 23 together with the definitions contained in paragraph 1 of the Stipulation relating thereto, are
 24 expressly incorporated herein in all respects. The Releases are effective as of the Effective Date.
 25 Accordingly, this Court orders that:

26 (a) Without further action by anyone, and subject to paragraph 9 below, upon the
 27 Effective Date of the Settlement, Plaintiffs and each of the other Settlement Class
 28 Members and Plaintiffs' Releasees, on behalf of themselves, and their respective

1 heirs, executors, administrators, predecessors, successors, and assigns in their
 2 capacities as such, shall be deemed to have, and by operation of law and of this
 3 Judgment shall have, fully, finally and forever compromised, settled, released,
 4 resolved, relinquished, waived, and discharged each and every Released Plaintiffs'
 5 Claim against the Defendants and the other Defendants' Releasees, and shall
 6 forever be barred, enjoined, and estopped from asserting, commencing,
 7 prosecuting, instituting, assisting, instigating, or in any way participating in the
 8 commencement or prosecution of any or all of the Released Plaintiffs' Claims, in
 9 any capacity, against any of the Defendants' Releasees. This Release shall not
 10 apply to any of the Excluded Claims (as that term is defined in paragraph 1([q]) of
 11 the Stipulation).

12 (b) Without further action by anyone, and subject to paragraph 9 below, upon the
 13 Effective Date of the Settlement, Defendants, on behalf of themselves, and their
 14 respective heirs, executors, administrators, predecessors, successors, and assigns in
 15 their capacities as such, shall be deemed to have, and by operation of law and of
 16 this Judgment shall have, fully, finally and forever compromised, settled, released,
 17 resolved, relinquished, waived, and discharged each and every Released
 18 Defendants' Claim against Plaintiffs and the other Plaintiffs' Releasees, and shall
 19 forever be barred, enjoined, and estopped from prosecuting any or all of the
 20 Released Defendants' Claims against any of the Plaintiffs' Releasees.

21 9. Notwithstanding paragraphs 8(a) – (b) above, nothing in this Judgment shall
 22 bar any action by any of the Parties to enforce or effectuate the terms of the Stipulation or this
 23 Judgment, or any other written agreement between or among the parties.

24 10. **Bar Order** – Upon the Effective Date of the Settlement, the Court hereby
 25 permanently bars, enjoins, extinguishes, and discharges to the fullest extent permitted by law any
 26 and all claims for contribution or indemnity (or any other claim or claim-over, however
 27 denominated on whatsoever theory, for which the injury claimed is that person's or entity's
 28 alleged liability to Plaintiffs or any Class Member) among and against the Defendants' Releasees

1 arising out, relating to, or concerning the purchase, sale, acquisition, disposition, or holding of
 2 Depomed common shares purchased or otherwise acquired from July 29, 2015 to August 7, 2017,
 3 inclusive, and any acts, facts, statements, or omissions that were or could have been alleged in the
 4 Action and the claims that were asserted or could have been asserted therein, whether arising
 5 under state, federal, or foreign law as claims, cross-claims, counterclaims, third-party claims, or
 6 otherwise, in the Court or any other federal, state, or foreign court, or in any arbitration
 7 proceeding, administrative agency proceeding, tribunal, or any other proceeding or forum,
 8 provided however, that nothing in this Bar Order shall release or alter the contractual rights, if any,
 9 under the terms of any written agreement among any of the Releasees.

10 11. **Judgment Reduction** – Any final verdict or judgment obtained by or on
 11 behalf of the Class or a Class Member against any person or entity subject to the Bar Order based
 12 upon, arising out of, relating to, or in connection with in any way in part or in whole any Released
 13 Plaintiffs' Claim shall be reduced by the greater of: (a) an amount that corresponds to the
 14 percentage of responsibility of Defendants for common damages; or (b) the amount paid by or on
 15 behalf of Defendants to the Class or Class Member for common damages.

16 12. **No Admissions** – Neither this Judgment, the Stipulation (whether or not
 17 consummated), including the exhibits thereto and the Plan of Allocation contained therein (or any
 18 other plan of allocation that may be approved by the Court), the negotiations leading to the
 19 execution of the Stipulation, nor any proceedings taken pursuant to or in connection with the
 20 Stipulation and/or approval of the Settlement (including any arguments proffered in connection
 21 therewith):

22 (a) shall be offered against any of the Defendants' Releasees as evidence of, or
 23 construed as, or deemed to be evidence of any presumption, concession, or
 24 admission by any of the Defendants' Releasees with respect to the truth of any fact
 25 alleged by Plaintiffs or the validity of any claim that was or could have been
 26 asserted or the deficiency of any defense that has been or could have been asserted
 27 in this Action or in any other litigation, or of any liability, negligence, fault, or
 28 other wrongdoing of any kind of any of the Defendants' Releasees or in any way

1 referred to for any other reason as against any of the Defendants' Releasees, in any
2 civil, criminal or administrative action or proceeding, other than such proceedings
3 as may be necessary to effectuate the provisions of the Stipulation;

4 (b) shall be offered against any of the Plaintiffs' Releasees, as evidence of, or
5 construed as, or deemed to be evidence of any presumption, concession or
6 admission by any of the Plaintiffs' Releasees that any of their claims are without
7 merit, that any of the Defendants' Releasees had meritorious defenses, or that
8 damages recoverable under the Complaint would not have exceeded the Settlement
9 Amount or with respect to any liability, negligence, fault or wrongdoing of any
10 kind, or in any way referred to for any other reason as against any of the Plaintiffs'
11 Releasees, in any civil, criminal or administrative action or proceeding, other than
12 such proceedings as may be necessary to effectuate the provisions of the
13 Stipulation; or

14 (c) shall be construed against any of the Releasees as an admission, concession, or
15 presumption that the consideration to be given under the Settlement represents the
16 amount which could be or would have been recovered after trial; provided,
17 however, that the Parties and the Releasees and their respective counsel may refer
18 to this Judgment and the Stipulation to effectuate the protections from liability
19 granted hereunder and thereunder or otherwise to enforce the terms of the
20 Settlement.

21 13. The Releasees may file the Stipulation and/or this Judgment in any other
22 action that may be brought against them in order to support a defense or counterclaim based on
23 principles of res judicata, collateral estoppel, full faith and credit, release, good faith settlement,
24 judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar
25 defense or counterclaim. The Parties may file the Stipulation and/or this Judgment in any
26 proceedings that may be necessary to consummate or enforce the Stipulation, the Settlement, or
27 this Judgment.

28 14. **Retention of Jurisdiction** – Without affecting the finality of this Judgment

1 in any way, this Court retains continuing and exclusive jurisdiction over: (a) the Parties for
2 purposes of the administration, interpretation, implementation, and enforcement of the Settlement;
3 (b) the disposition of the Settlement Fund; (c) any motion for an award of attorneys’ fees and/or
4 Litigation Expenses by Lead Counsel in the Action that will be paid from the Settlement Fund; (d)
5 any motion to approve the Plan of Allocation; (e) any motion to approve the Class Distribution
6 Order; and (f) the Settlement Class Members for all matters relating to the Action.

7 15. Separate orders shall be entered regarding approval of a plan of allocation.
8 Such orders shall in no way affect or delay the finality of this Judgment and shall not affect or
9 delay the Effective Date of the Settlement.

10 16. **Modification of the Agreement of Settlement** – Without further approval
11 from the Court, Plaintiffs and Defendants are hereby authorized to agree to and adopt such
12 amendments or modifications of the Stipulation or any exhibits attached thereto to effectuate the
13 Settlement that: (a) are not materially inconsistent with this Judgment; and (b) do not materially
14 limit the rights of Settlement Class Members in connection with the Settlement. Without further
15 order of the Court, Plaintiffs and Defendants may agree to reasonable extensions of time to carry
16 out any provisions of the Settlement.

17 17. **Termination of Settlement** – If the Settlement is terminated as provided in
18 the Stipulation or the Effective Date of the Settlement otherwise fails to occur, this Judgment shall
19 be vacated, rendered null and void and be of no further force and effect, except as otherwise
20 provided by the Stipulation, and this Judgment shall be without prejudice to the rights of Plaintiffs,
21 the other Settlement Class Members and Defendants, and the Parties shall revert to their respective
22 positions in the Action as of February 26, 2021, as provided in the Stipulation.

23 18. **Entry of Final Judgment** – Finding no just reason to delay entry of this
24 order as a final judgment with respect to the claims asserted in this action, the Clerk of the Court is
25 directed to enter judgement pursuant to Rule 54(b) against Defendants.

26 **II. ATTORNEY’S FEES AND COSTS**

27 **A. Attorney’s Fees**

28 “While attorneys’ fees and costs may be awarded in a certified class action where so

1 authorized by law or the parties' argument, . . . courts have an independent obligation to ensure
2 that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an
3 amount." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011) (internal
4 citation omitted). "Where a settlement produces a common fund for the benefit of the entire
5 class," as here, "courts have discretion to employ either the lodestar method or the percentage-of-
6 recovery method" to assess the reasonableness of the requested attorney's fee award. *Id.* at 942.
7 "Because the benefit to the class is easily quantified in common-fund settlements," the Ninth
8 Circuit permits district courts "to award attorneys a percentage of the common fund in lieu of the
9 often more time-consuming task of calculating the lodestar." *Id.*

10 The Ninth Circuit maintains a well-established "benchmark for an attorneys' fee award in a
11 successful class action [as] twenty-five percent of the entire common fund." *Williams v. MGM-*
12 *Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). Courts in the Ninth Circuit generally
13 start with the 25% benchmark and adjust upward or downward depending on: "the extent to which
14 class counsel 'achieved exceptional results for the class,' whether the case was risky for class
15 counsel, whether counsel's performance 'generated benefits beyond the cash settlement fund,' the
16 market rate for the particular field of law (in some circumstances), the burdens class counsel
17 experience while litigating the case (e.g., cost, duration, foregoing other work), and whether the
18 case was handled on a contingency basis." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d
19 934, 954-55 (9th Cir. 2015) (quoting *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th
20 Cir. 2002)). Beyond this analysis, courts often crosscheck the amount of fees against the lodestar.
21 "Calculation of the lodestar, which measures the lawyers' investment of time in the litigation,
22 provides a check on the reasonableness of the percentage award." *Vizcaino*, 290 F.3d at 1050.
23 "The lodestar figure is calculated by multiplying the number of hours the prevailing party
24 reasonably expended on the litigation (as supported by adequate documentation) by a reasonable
25 hourly rate for the region and for the experience of the lawyer." *In re Bluetooth*, 654 F.3d at 941.
26 Regardless of whether the court uses the lodestar or percentage approach, the main inquiry is
27 whether the fee award is "reasonable in relation to what the plaintiffs recovered." *Powers v.*
28 *Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000).

1 Here, the settlement fund total is \$1,000,000, ECF No. 123 at 25, and Class Counsel seeks
2 the standard 25% benchmark in attorney’s fees, totaling \$250,000, ECF No. 124. The briefs and
3 declarations adequately support the amount of requested fees. Exhibit A contains a chart that
4 breaks down, by individual attorney, the attorney’s work on this case by general category, and the
5 total number of hours worked in each category. See ECF No. 125 at 26. Exhibit B consists of a
6 summary of work conduct by each attorney, along with their total number of hours. *Id.* at 27.
7 Plaintiffs state that “[t]he current hourly rate for Lead Counsel range from \$900 to \$1000 for
8 partners, \$850 for ‘Of Counsel,’ and \$600 to \$675 for associates.” ECF No. 124 at 28. Plaintiffs
9 provide a chart with the specific hourly rates charged by each attorney in this case, as well as a
10 chart of cases where judges in this district and others approved similar hourly rates for attorneys in
11 the same field and with the same level of expertise. *Id.*; ECF No. 125 at 26.

12 Based on the total number of hours claimed, which Plaintiffs have adequately
13 substantiated, the requested fee results in a negative multiplier of 0.23. “The fact that Plaintiff[s]’
14 counsel are seeking substantially less in fees than they reasonably incurred further demonstrates
15 the reasonableness of the fee award.” *Taylor v. Shutterfly, Inc.*, No. 18-cv-00266-BLF, 2021 WL
16 5810294, at *9 (N.D. Cal. Dec. 7, 2021) (collecting cases in this district where courts approved
17 attorney’s fees with negative multipliers).

18 The Court will grant the request for attorney’s fees because it is supported by both the
19 percentage-of-recovery method and the lodestar cross-check.

20 **B. Reimbursement**

21 An attorney is entitled to “recover as part of the award of attorney’s fees those out-of-
22 pocket expenses that would normally be charged to a fee paying client.” *Harris v. Marhoefer*, 24
23 F.3d 16, 19 (9th Cir. 1994) (internal quotation marks and citations omitted). To support an
24 expenses by category and total amount advanced for each category, allowing the court to assess
25 whether the expenses are reasonable. *Wren v. RGIS Specialists*, No. C-06-05778 JCS, 2011 WL
26 1230826, at *29-30 (N.D. Cal. Apr. 1, 2011, *supplemented*, 2011 WL 1838562 (N.D. Cal. May 13,
27 2011).

28 Plaintiffs incurred \$42,656.41 in costs. ECF Nos. 125; 130. The Court has reviewed

1 Plaintiffs' expenses and finds them reasonable. Therefore, the Court grants the request for
2 reimbursement of costs.

3 **CONCLUSION**


4 For the reasons stated above, the Court grants Plaintiffs' motions for final approval of the
5 class action settlement, attorney's fees, and reimbursement.

6 Class counsel shall file a post-distribution accounting within 21 days after the distribution
7 of settlement funds. In addition to the information contained in the Northern District of
8 California's Procedural Guidance for Class Action Settlements, available at
9 <https://cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/>, the post-
10 distribution accounting shall discuss any significant or recurring concerns communicated by class
11 members to the settlement administrator or counsel since final approval, any other issues in
12 settlement administration since final approval, and how any concerns or issues were resolved.

13 The Court will withhold 10% of the attorney's fees granted in this order until the post-
14 distribution accounting has been filed. Class counsel shall file a proposed order releasing the
15 remainder of the fees when they file their post-distribution accounting. This matter is set for a
16 further case management conference on February 7, 2023 at 2:00 p.m. with a case management
17 statement due on January 31, 2023. The parties may request that the case management conference
18 be continued if additional time is needed to complete the distribution. The conference will be
19 vacated if the post-distribution accounting has been filed and the Court has released the remaining
20 attorney's fees.

21 **IT IS SO ORDERED.**

22 Dated: August 29, 2022

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24 _____
25 JON S. TIGAR
26 United States District Judge
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United States District Court
Northern District of California