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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DAVID WILSON,  
individually and on  
behalf of all others  
similarly situated,  
  
Plaintiff,  
  
v.  
  
AIRBORNE, INC., AIRBORNE  
HEALTH, INC., KNIGHT-  
MCDOWELL LABS, THOMAS  
"RIDER" MCDOWELL,  
VICTORIA KNIGHT-  
MCDOWELL, and DOES 1-  
100, inclusive,  
  
Defendants.)

Case No. EDCV 07-770-VAP  
(OPx)  
  
[Motion filed on August 29,  
2007]  
  
**ORDER (1) GRANTING  
PRELIMINARY APPROVAL OF  
SETTLEMENT AND (2) SETTING  
SCHEDULE FOR FINAL APPROVAL**

The Court has reviewed and considered all papers filed in support of the Joint Motion for Preliminary Approval of Settlement ("Joint Motion"). These include memoranda in support of the Joint Motion filed by Plaintiff and Defendants on August 29, 2007; (2) the declaration of Plaintiff's counsel Melissa M. Harnett, filed on August 31, 2007, and attaching a copy of the settlement agreement; and (3) declarations of Defendants'

1 counsel Gayle E. Rosenstein filed on August 29, August  
2 31, and September 11, 2007.

3  
4 After the Court requested additional information  
5 concerning the parties' proposed settlement, the parties  
6 submitted the following materials on or about October 1,  
7 2007, which the Court has reviewed and considered: (1) a  
8 Mediator's Report, describing the parties' settlement  
9 discussions during a day-long mediation session on May  
10 31, 2007; (2) the declaration of Plaintiff's counsel  
11 Stephen Gardner, explaining, inter alia, the evolution of  
12 Plaintiff's settlement position concerning injunctive  
13 relief; (3) the declaration of Jeffrey L. Fazio  
14 concerning the adequacy of proposed class counsel; (4)  
15 the declaration of Ms. Harnett concerning the adequacy of  
16 proposed class counsel; (5) the declaration of Elise  
17 Donahue, the Chief Executive Officer and a Director of  
18 Defendant Airborne Health, Inc.; and (6) the declaration  
19 of Defendants' counsel Kenneth L. Steinthal. Plaintiff  
20 filed an additional declaration from Ms. Harnett on  
21 October 2, 2007, summarizing the course of discovery and  
22 the development of the parties' settlement agreement.  
23 Pursuant to an Order dated October 22, 2007, an  
24 additional declaration by Mr. Fazio was filed under seal;  
25 it described in particular his analysis of revenue data  
26 obtained from Defendants and provided examples of changes  
27 made by Defendants to their product packaging.

1           Having reviewed and considered these submissions, as  
2 well as the arguments advanced by counsel at the hearing  
3 on September 24, 2007, the Court finds there is a  
4 sufficient basis to grant preliminary approval of the  
5 parties' proposed settlement. The Court also finds a  
6 sufficient basis to disseminate notice of the proposed  
7 settlement to class members, and to authorize steps  
8 necessary to determine whether the proposed settlement  
9 should be approved finally, whether a class should be  
10 certified finally for settlement purposes, and whether  
11 this case should be dismissed.

12  
13           Accordingly, the Court GRANTS the Joint Motion and  
14 further makes the following findings and orders<sup>1</sup>:

15  
16           1. The Court has subject matter jurisdiction over  
17 the Action under the Class Action Fairness Act, 28 U.S.C.  
18 § 1332(d)(2)(A).

19  
20           2. The Court preliminarily certifies, for  
21 settlement purposes only, the following Settlement Class  
22 pursuant to Rule 23(b)(3) of the Federal Rules of Civil  
23 Procedure, defined as follows:

24 ///

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26 \_\_\_\_\_  
27           <sup>1</sup>Capitalized terms appearing in this Order are  
28 defined terms under the parties' settlement agreement,  
which is incorporated by reference.

1 All Persons who purchased any flavor or formulation  
2 of any Product in the United States or any of its  
3 Territories from May 1, 2001 through November 29,  
4 2007, except the following:

5  
6 (a) the Corporate Defendants, their predecessors,  
7 successors, and their current and former directors,  
8 officers, employees, agents, attorneys,  
9 representatives, affiliates, associates, consultants,  
10 advisers, parents, and subsidiaries, as well as the  
11 Individual Defendants and their heirs, spouses,  
12 executors, administrators, agents, successors,  
13 attorneys, consultants, advisers, representatives or  
14 assigns;

15  
16 (b) persons who have settled with and validly  
17 released Defendants from separate, non-class legal  
18 actions against Defendants based on the conduct  
19 alleged in the Second Amended Complaint filed in the  
20 Action, if any;

21  
22 (c) persons who have purchased the Product for  
23 resale;

24  
25 (d) any person who has timely and validly elected to  
26 exclude themselves from the Settlement Class pursuant  
27 to paragraphs 15 and 16, below; and  
28

1 (e) the judge presiding over this matter.  
2

3 3. The Court appoints Plaintiff David Wilson to  
4 serve as Class Representative;  
5

6 4. The Court appoints the following law firms to  
7 serve as Class Counsel: Wasserman, Comden & Casselman  
8 LLP; Fazio | Micheletti LLP; and Center for Science  
9 in the Public Interest.  
10

11 5. Neither the preliminary certification of the  
12 Settlement Class for settlement purposes, nor any other  
13 act relating to the negotiation, execution, or  
14 implementation of the Settlement Agreement, shall be  
15 considered as a factor in connection with any class  
16 certification issue(s) if the Settlement Agreement  
17 terminates or Final Settlement Approval does not occur.  
18

19 6. The Court preliminarily approves the Settlement  
20 Agreement, and the settlement contemplated thereby, as  
21 being a fair, reasonable and adequate settlement as to  
22 all members of the Settlement Class, pursuant to Rule 23  
23 of the Federal Rules of Civil Procedure.  
24

25 7. Solely for the purposes of effectuating the  
26 Settlement, the Court further preliminarily finds as  
27 follows: joinder of all Settlement Class Members in a  
28

1 single proceeding would be impracticable, if not  
2 impossible, because of their numbers and dispersion;  
3 the Class Representative and Class Counsel have  
4 adequately prosecuted the claims of the lawsuit; no  
5 conflict exists between the Class Representative or Class  
6 Counsel and the Settlement Class; the Class  
7 Representative and Class Counsel are adequate  
8 representatives for the Settlement Class; the Class  
9 Representative's claims are typical of the Settlement  
10 Class; the Class Representative is a member of the  
11 Settlement Class and has claims representative of the  
12 claims and defenses presented in this case; commonality  
13 is satisfied in this case for settlement purposes as a  
14 number of common issues exist among Settlement Class  
15 Members; common issues predominate over individual issues  
16 in the context of settlement; and certification of an  
17 agreed-upon settlement class is a superior mechanism for  
18 resolving these claims.

19  
20 8. The foregoing preliminary findings and  
21 preliminary and conditional certification that this  
22 Action may be maintained for settlement purposes only as  
23 a class action, and the appointment of Class Counsel,  
24 shall be without force or effect if: (a) the Court does  
25 not give final approval to the Settlement Agreement and  
26 enter judgment as contemplated therein; or (b) the

27 ///

1 Court's approval of the Settlement Agreement and/or entry  
2 of a final approval order and judgment are reversed or  
3 modified on appeal.

4

5 9. The parties entered into the Settlement  
6 Agreement in good faith, following arms-length  
7 negotiation by counsel, including a mediation session  
8 with the Hon. Richard L. Patsey, a retired California  
9 Superior Court judge.

10

11 10. The Court gives its approval to the form and  
12 procedures for disseminating the Notices to the  
13 Settlement Class Members in substantially the same form  
14 as that which appears in Exhibit B to the Settlement  
15 Agreement. The Court finds that the Notices to be  
16 given constitute the best notice practicable under the  
17 circumstances, including individual notice via electronic  
18 mail and, where necessary, by first-class mail to those  
19 Settlement Class Members for whom the Defendants have  
20 contact information and by published notice as described  
21 in the Settlement Agreement at Exhibit B. The Court  
22 finds that the proposed notice plan fully satisfies  
23 Rule 23 of the Federal Rules of Civil Procedure and the  
24 requirements of due process, and is the best notice  
25 practicable under the circumstances.

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1 The Court directs that notice be given pursuant to  
2 the terms set forth in the Settlement Agreement, provided  
3 that the parties, by agreement, may revise the Notices  
4 and Claim Form in ways that are not material, or in ways  
5 that are appropriate to update those documents for  
6 purposes of accuracy.

7  
8 11. The Court finds that Defendants properly and  
9 timely notified the appropriate state and federal  
10 officials of the Settlement Agreement, as required by the  
11 Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §  
12 1715. The Court has reviewed the Defendants' notices and  
13 accompanying materials, and finds that they complied with  
14 the applicable requirements of CAFA. Defendants also  
15 have provided a copy of these submissions to Class  
16 Counsel.

17  
18 12. Rust Consulting is appointed Claims  
19 Administrator to supervise and administer the settlement  
20 notice and claims process, as more fully set forth in the  
21 Settlement Agreement.

22  
23 13. The Court preliminarily determines that the  
24 plan of distribution in Sections 2 through 4 of the  
25 Settlement Agreement fairly and adequately addresses the  
26 matters of settlement administration, claims submission,  
27 ///

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1 and allocation of monetary payments among Settlement  
2 Class Members.

3

4 14. No funds may be disbursed from the Gross  
5 Settlement Fund or Net Settlement Fund unless expressly  
6 authorized by the terms of the Settlement Agreement.

7

8 15. Settlement Class Members who or which want to  
9 seek payment from the Settlement Fund shall do so in the  
10 manner set forth in the instructions accompanying the  
11 Claim Form (which are reflected in the Settlement  
12 Agreement). Unless the Court orders otherwise,  
13 Claim Forms must be submitted in compliance with the  
14 instructions provided to Settlement Class Members, which  
15 are set forth in the Settlement Agreement. Valid Claims  
16 shall be paid in accordance with the requirements set  
17 forth in the Settlement Agreement.

18

19 16. Any Settlement Class Member shall have the  
20 right to opt out of the Settlement Class by sending a  
21 written request for exclusion from the Settlement Class  
22 to the addresses listed in the Notices, postmarked no  
23 later than Monday, **May 12, 2008**. To be effective, the  
24 request for exclusion (or opt-out request) must: (a) be  
25 signed by that member of the Settlement Class; (b)  
26 include that person's full name and current address; and  
27 (c) include a statement identical or substantially  
28

1 similar to the following: "I request to be excluded from  
2 the Settlement Class in Wilson v. Airborne. Inc., et al.,  
3 No. EDCV 07-770 VAP (OPx)."

4  
5 17. No request for exclusion will be valid unless  
6 the request is sent timely and in substantial compliance  
7 with the requirements of the preceding paragraph. If a  
8 timely and valid request for exclusion is made by a  
9 member of the Settlement Class, then that member will not  
10 be entitled to participate in the Settlement and cannot  
11 object to the Settlement.

12  
13 18. All Class Members (whether or not he/she  
14 submits a Claim Form) who have not validly excluded  
15 themselves from the Settlement Class shall be bound by  
16 all determinations and judgments concerning the  
17 Settlement Agreement and the settlement contemplated  
18 thereby. Within twenty (20) business days after the  
19 Court-ordered deadline for timely and properly opting out  
20 from the Settlement Class, the Claims Administrator shall  
21 provide to the Parties' Counsel the names and addresses  
22 of the Class Members who or which timely and properly  
23 have opted out of the Settlement Class as permitted by  
24 the Court, as well as the total number of such persons.

25  
26 19. Any Settlement Class Member who wishes to  
27 object to the fairness of the Settlement Agreement must  
28

1 do so (either personally or through an attorney), by  
2 filing a written objection, together with any supporting  
3 written or documentary materials with the Clerk of the  
4 Court, postmarked on or before Monday, **May 19, 2008**. Any  
5 such written notice of objection must include: (a) a  
6 statement that the person objecting is a Settlement Class  
7 Member; (b) his or her complete name, current address,  
8 and telephone number (or, if represented by an attorney,  
9 the Settlement Class Member's complete name, and the  
10 name, current address, and telephone number of the  
11 Settlement Class Member's attorney); (c) a statement of  
12 the Settlement Class Member's specific objections to any  
13 such matter, and an explanation of the grounds for those  
14 objections; and (d) all documents that the Settlement  
15 Class Member desires the Court to consider.

16  
17 This written objection must also be served by hand,  
18 overnight mail, or by first-class mail, postmarked no  
19 later than Monday, **May 19, 2008**, on the Claims  
20 Administrator, as set forth in the Notices. The Claims  
21 Administrator shall promptly, and in any event within one  
22 business day after receipt, provide copies of such  
23 written objections to the Parties' Counsel.

24  
25 Any Settlement Class Member who or which does not  
26 make his, her, or its objection in the manner provided  
27 for herein shall be deemed to have waived such objection  
28

1 and shall be foreclosed from making any objection to the  
2 fairness, reasonableness, or adequacy of the proposed  
3 settlement contemplated by the Settlement Agreement, the  
4 issue of the allocation of the Net Settlement Fund among  
5 Settlement Class Members, or the issues of any Fee and  
6 Expense Award and/or the Incentive Award to  
7 Representative Plaintiff. Any Settlement Class Member  
8 who does not file a timely objection that includes the  
9 foregoing required information shall be foreclosed from  
10 objecting to the Settlement Agreement and shall be  
11 foreclosed from seeking any adjudication or review of the  
12 Settlement Agreement by appeal or otherwise.

13

14       20. All further proceedings in the Litigation  
15 (including, but not limited to, any existing discovery  
16 obligations) are ordered stayed until Final Settlement  
17 Approval or termination of the Settlement Agreement,  
18 whichever occurs earlier, except for those matters  
19 necessary to obtain and/or effectuate Final Settlement  
20 Approval.

21

22       21. A hearing on entry of a Final Judgment and  
23 Order of Dismissal (the "Fairness Hearing") will be held  
24 on Monday, **June 16, 2008**, at 10 a.m., in Courtroom 2 at  
25 the United States District Court for the Central District  
26 of California, 3470 Twelfth Street, Riverside. At the  
27 Fairness Hearing the Court will also consider: whether

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1 the settlement on the terms and conditions provided for  
2 in the Settlement Agreement is fair, reasonable and  
3 adequate and should be approved by the Court; the amount  
4 of attorneys' fees and expenses that should be awarded to  
5 Settlement Class Counsel; and whether an incentive  
6 payment to the Representative Plaintiff should be  
7 awarded, and, if so, the amount of that award.

8  
9 22. The date and time of the Fairness Hearing shall  
10 be set forth in, inter alia, the Notices. The Court  
11 reserves the right to adjourn or continue the date of the  
12 Fairness Hearing. In the event the date is changed, that  
13 information shall be posted on the website maintained by  
14 the Claims Administrator, and the parties shall not be  
15 required to re-send or re-publish the Notices.

16  
17 23. The Parties' Counsel shall file memoranda or  
18 other materials in support of the final approval of the  
19 Settlement Agreement, including any response to a timely  
20 and properly filed Objection no later than Friday, **May**  
21 **30, 2008.**

22  
23 24. On or before Monday, **May 12, 2008**, Class  
24 Counsel may apply to the Court for an award of attorneys'  
25 fees and costs. At such time, Class Counsel may also  
26 submit an application for an incentive award to the  
27 ///

28

1 Plaintiff, to be paid by the Defendants and not to exceed  
2 \$10,000.

3  
4 25. Following the Fairness Hearing and based upon  
5 the entire record in this matter, the Court will decide  
6 whether the Settlement Class should be certified, whether  
7 the Settlement Agreement should be approved and, if so,  
8 what attorneys' fees and cost award should be awarded to  
9 Class Counsel and whether an incentive award should be  
10 awarded to the Plaintiff, and, if so, in what amount.

11  
12 26. If a Settlement Class Member wishes to appear  
13 at the Fairness Hearing either in person or through  
14 counsel, the Settlement Class Member must file with the  
15 Clerk of the Court and serve upon the Claims  
16 Administrator at the address specified in the Notice a  
17 Notice of Intention to Appear, postmarked no later than  
18 Monday, **June 2, 2008**. The Notice of Intention to Appear  
19 must include copies of any papers, exhibits, or other  
20 evidence or information the Settlement Class Member  
21 and/or his or her counsel will present to the Court at  
22 the Fairness Hearing. Any Settlement Class Member and/or  
23 his or her attorney who does not file a timely Notice of

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Intention to Appear in accordance with these provisions  
may be foreclosed from speaking at the Fairness Hearing.

Dated: 11/29/07

Virginia A. Phillips  
VIRGINIA A. PHILLIPS  
United States District Judge