

**IN THE CIRCUIT COURT OF PHELPS COUNTY, MISSOURI**

GARRETT WACKER; COURTNEY  
O'ROURKE; and KARA RUTENBAR  
HATMAKER, individually and on behalf of all  
others similarly situated,

Plaintiffs,

v.

MEAD JOHNSON & COMPANY, LLC, a  
Delaware Company,

Defendant.

Case No. 22PH-CV00808

**PLAINTIFFS' SUGGESTIONS IN SUPPORT OF PLAINTIFFS' UNOPPOSED  
MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

Plaintiffs Garrett Wacker, Courtney O'Rourke, and Kara Rutenbar Hatmaker ("Plaintiffs"), Individually and as Class Representatives on Behalf of All Similarly Situated Persons and a proposed Settlement Class, respectfully request that the Court preliminarily approve the class action Settlement that is described in detail in the Class Action Settlement Agreement and Exhibits attached thereto and filed contemporaneously herewith as Exhibit 1; grant certification of the proposed Settlement Class for the purposes of the Settlement; appoint Kroll Settlement Administration as Settlement Administrator; approve the provision of Notice to the Settlement Class; appoint the Plaintiffs as Class Representatives; appoint the following as Lead Class Counsel: (i) Law Office of L. DeWayne Layfield, PLLC; (ii) KamberLaw LLC; and (iii) Steelman Gaunt Crowley; and appoint the following as Class Counsel: (i) Law Office of L. DeWayne

Layfield, PLLC; (ii) KamberLaw LLC; and (iii) Steelman Gaunt Crowley; (iv) Southern Atlantic Law Group PLLC; and (v) Law Offices of Howard W. Rubinstein PA.<sup>1</sup>

At this preliminary approval stage, the Court need only review the proposed Settlement to determine whether it is within the permissible “range of possible judicial approval” and thus, whether the notice to the class and the scheduling of the formal fairness hearing is appropriate. *See* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, § 21.632 (4th ed. 2004); 4 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 11:25 (4th ed. 2002); *see also* *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 377 (Mo. Ct. App. 1997) (stating that the purpose of a preliminary approval hearing is for the court to make a “preliminary examination of the record before it and make a preliminary determination as to whether it appears that a **settlement class** should be tentatively certified.”).

## **I. BACKGROUND OF THE LITIGATION**

1. This case arises out of Plaintiffs’ allegations that Defendant Mead Johnson & Company, LLC (“Defendant”) deceptively and unlawfully packaged, marketed and labeled its powder baby and infant formulas under the following brands: Enfamil AR; Enfamil Enspire Gentlease; Enfamil Enspire; Enfamil Gentlease Neuro Pro; Enfamil Infant Neuro Pro; Enfamil Sensitive Neuro Pro; Enfamil Nutramigen LGG; Enfamil Neuro Pro Gentlease; and Enfamil Neuro Pro, which are sold in a variety of sizes, and collectively referred to herein as “Products” or a “Product.” Specifically, Plaintiffs allege that Defendant represented that the Products make a certain number of fluid-ounce bottles of formula; however, contrary to these representations, the Products contain nowhere near enough powder formula to make the represented number of bottles of liquid formula when following the “Instructions for Preparation & Use” on the side labels of

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<sup>1</sup> Capitalized terms used herein but not defined herein shall have the meaning ascribed to such terms in the Settlement Agreement.

the Products.

Plaintiffs' Petition and Jury Demand – Class Action was filed on June 16, 2022 and includes claims for violations of the Missouri Merchandising Practices Act (“MMPA”), Unjust Enrichment, Breach of Express Warranty, and Breach of Implied Warranty.

This Settlement is a product of engagement between the Parties, which was preceded by intensive case investigation by Plaintiffs. Since shortly after delivery of a demand letter and an exchange of initial telephone conversations between the Parties, the Parties have been engaged in intensive settlement discussions for over five months. Those settlement efforts included: an initial settlement demand; provision of Plaintiffs' laboratory test results to Defendant; informal discovery from Defendant to Plaintiffs; informal settlement discussions between the parties; a full-day mediation with a neutral mediator, the Hon. Wayne Andersen (Ret.) of JAMS; and an additional 60 days of follow-up negotiations after the mediation, which ultimately resulted in the Settlement Agreement.

## **II. NATURE OF THE SETTLEMENT**

As explained in the proposed Settlement Agreement, Defendant has agreed to provide both monetary and substantial injunctive relief that will correct the issue identified in the Complaint. Defendant has agreed to a two-tiered structure for monetary relief to class members, under which Defendant will provide cash benefits to Settlement Class Members who timely file Claims by the Claims Deadline and who provide all the necessary information to the Settlement Administrator. Defendant has agreed to pay a maximum of \$15.00 per Household to Settlement Class Members who do not have a valid Proof of Purchase and a maximum of \$45.00 per Household to Settlement Class Members who provide a valid Proof of Purchase. Defendant will provide a Maximum Settlement Amount of US \$8,400,000 in the aggregate. In addition, Defendant will provide

Programmatic Relief through the removal of the Challenged Language from the labels of the Products (the “Injunctive Relief”).

### **III. MATERIAL TERMS OF THE SETTLEMENT**

The key terms of the Settlement Agreement are detailed below.

#### **A. Definitions**

1. Section II. (2.51) of the Settlement Agreement defines the “Settlement Class” as: All residents of the United States who purchased in the United States the Products during the Class Period for personal and household use and not for resale. Excluded from the Settlement Class are the following: (a) Persons who purchased or acquired any Products for resale; (b) the Released Parties; (c) all Persons who file a timely and valid Opt-Out; (d) Plaintiffs’ Counsel, their employees and counsel as well as the household members of Plaintiffs’ employees and counsel; (e) Defendant’s Counsel, their employees, and counsel as well as the household members of Defendant’s employees and counsel; (f) federal, state, and local governments, political subdivisions or agencies of federal, state and local governments; and (g) the judicial officers, courtroom staff, and members of their households overseeing the Action.

2. Paragraph XII. (12.2) of the Settlement Agreement defines “Released Claims” and provides that:

The Releasing Parties hereby fully release and forever discharge the Released Parties from any and all actual, potential, filed, known or unknown, fixed or contingent, claimed or unclaimed, suspected or unsuspected, asserted or unasserted, claims, demands, liabilities, rights, debts, obligations, liens, contracts, agreements, judgments, actions, suits, causes of action, contracts or agreements, extra

contractual claims, damages, punitive, exemplary or multiplied damages, expenses, costs, penalties, fees, attorneys' fees, and/or obligations of any nature whatsoever (including "Unknown Claims" as defined below), whether at law or in equity, accrued or unaccrued, whether previously existing, existing now or arising in the future, whether direct, individual, representative, or class, of every nature, kind and description whatsoever, based on any federal, state, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction outside the United States, against the Released Parties, or any of them, relating in any way to any conduct prior to the date of the Preliminary Approval Order and that: (a) is or are based on any act, omission, inadequacy, misstatement, representation (express or implied), harm, matter, cause, or event related to any Product; (b) involves legal claims related to the Products that have been asserted in the Action or could have been asserted in the Action; or (c) involves the advertising, marketing, promotion, purchase, sale, distribution, design, testing, manufacture, application, use, performance, warranting, packaging or Labeling of the Products (collectively, the "Released Claims"). The Parties acknowledge and agree that personal injury claims are not part of any of the facts alleged by Class Representatives and that personal injury claims are not included within the Released Claims Section II (2.47) of the Settlement Agreement defines "Released Parties" to mean all retailers, manufacturers, distributors, sellers and resellers of any Products, including Defendant Mead Johnson & Company, LLC, and Reckitt Benckiser Group PLC, together with each of the foregoing Persons' direct and indirect parent companies, predecessor entities, successor entities, related

companies, direct and indirect subsidiaries, divisions, holding entities, past and present affiliates and banners, franchisees, distributors, wholesalers, retailers, advertising and production agencies, licensors, and agents, including all current and former officers, directors, managers, members, partners, owners, employees, shareholders, consultants, attorneys, legal representatives, insurers, agents, assigns, and other equity interest holders of any of the foregoing, and their heirs, executors, administrators, and assigns.

**B. The Requested Settlement Class**

The Parties stipulate to and request the certification of the Class as defined in the Settlement Agreement, for settlement purposes only, pursuant to Rules 52.08(a), (b)(2) and (b)(3) of the Missouri Rules of Civil Procedure. “Among current applications of Rule 23(b)(3), the ‘settlement only’ class has become a stock device.” *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 377 (Mo. Ct. App. 1997), quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). *Amchem* specifically approved of the use of a temporary settlement class in order to facilitate settlement. *Id.*

**C. Monetary Relief**

The Settlement Agreement provides that Defendant will pay or cause to be paid, by cash benefits, all Valid Claims based on one of the two tiers the Settlement Class Member elects. The monetary relief shall be administered by the Settlement Administrator.

**D. Non-Monetary Relief**

In addition to the payments described above, and as described in detail in the Settlement Agreement, beginning no later than the date of Preliminary Approval, each of the Released Parties that manufactures Products shall commence the process necessary to remove the Challenged Language from the labels of the Products; provided, however, that the Released Parties shall be

permitted to exhaust remaining label inventory and sell existing Product inventory in the ordinary course of business.

#### **E. Notice**

The Settlement Agreement provides for a Settlement Notice, Publication Notice, a Settlement Website, and telephonic support of the notice campaign. The full cost of notice and administration and effectuation of the Settlement Agreement shall be paid by Defendant.

#### **F. Opt Outs and Objectors**

The Settlement Agreement provides mechanisms by which members of the Class may Opt-Out of, or Object to, the proposed Settlement. Any Settlement Class Member who intends to Object to the Settlement must do so within 60 days after the Notice date (the “Objection Deadline”). In order to Object, the Settlement Class Member must file with the Court, and provide a copy to the Settlement Administrator, Lead Class Counsel, and Defendant’s counsel, a document that includes all of the following:

1. The case name and number, *Garrett Wacker, et al. v. Mead Johnson & Company, LLC.*, Case No. 22PH-CV00808 (Phelps Circuit Court, MO.);
2. The name, address, telephone number, and, if available, the email address of the Person objecting;
3. The name and address of the lawyer(s), if any, who is representing the Person objecting in making the Objection or who may be entitled to compensation in connection with the Objection;
4. A detailed statement of Objection(s), including the grounds for Objection(s);
5. Copies of any papers, briefs, or other documents upon which the Objection is based;
6. A statement of whether the Person objecting intends to appear at the Final Approval Hearing, either with or without counsel;
7. The identity of all counsel (if any) who will appear on behalf of the Person objecting at the Final Approval Hearing and all Persons (if any) who will be called to testify in support of the Objection;

8. A statement of his/her membership in the Settlement Class, including all information required by the Claim Form;
9. The signature of the Person objecting, in addition to the signature of any attorney representing the Person objecting in connection with the Objection; and
10. A detailed list of any other objections by the Settlement Class Member, or his/her counsel, to any class actions submitted in any court, whether state or otherwise, in the United States in the previous five (5) years. If the Settlement Class Member or his/her counsel has not objected to any other class action settlement in any court in the United States in the previous five (5) years, he/she shall affirmatively state so in the written materials provided in connection with the Objection to this Settlement. This information is requested in order to assist the Court in determining whether the Objection is made by a professional objector seeking financial consideration for their efforts. Failing to provide this information will not effect the validity of the Objection, but may result in the Court presuming that the Objection is made by a professional objector.

A Settlement Class Member who wishes to opt out of the Settlement Class must do so within 60 days after the Notice Date (the “Opt-Out Deadline”). In order to Opt-Out, a Settlement Class Member must complete and mail to the Settlement Administrator, Lead Class Counsel and Defendant’s Counsel a Request for Exclusion that is postmarked no later than the Opt-Out Deadline.

#### **G. Service Award**

Lead Class Counsel shall submit to the Court an application seeking leave to pay Plaintiffs, as Class Representatives, a Service Award in the amount of \$3,750 each, for their efforts in bringing the Action and achieving the benefits of this Agreement on behalf of the Settlement Class.

#### **H. Attorneys’ Fees**

Lead Class Counsel will submit to the Court an application seeking a Fee and Expense Award of not more than \$2,100,000 in attorneys’ fees, expenses, and costs (exclusive of settlement administration fees and costs which will be paid directly by Defendant). Defendant agrees that it will not object to the amount of Lead Class Counsel’s Application for a Fee Award up to this

amount and agree that it will, contingent on entry of the Final Approval Order, pay the amounts approved by the Court.

#### **I. Release**

Upon the entry of a final order approving this Settlement and following the expiration of the time for appeal or the entry of a decision on such appeal, the Class Representatives and each and every member of the Settlement Class who has not timely filed a request to be excluded (Opt-Out) from the Settlement Class will release and forever discharge The Released Parties as further explained in the attached Settlement Agreement.

#### **IV. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully ask that the Court grant preliminary approval of the proposed Settlement Agreement and enter the proposed order separately submitted herewith (a copy of which is attached as Exhibit D to the Settlement Agreement) and grant such further relief as the Court deems reasonable and just.

Dated: June 23, 2022

Respectfully submitted,

Garrett Wacker, Courtney O'Rourke, and Kara Rutenbar  
Hatmaker, Individually, and on Behalf of a Class of  
Similarly Situated Individuals, Plaintiffs

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document has been served by email to all counsel of record on this 23<sup>rd</sup> day of June, 2022.

/s/ Bryce C. Crowley \_\_\_\_\_  
Bryce C. Crowley