

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

Sandusky Wellness Center, LLC,

Case No. 3:12 CV 1470

Plaintiff,

FINAL APPROVAL ORDER AND  
JUDGMENT OF CLASS WIDE  
SETTLEMENT

-vs-

Heel, Inc.,

JUDGE JACK ZOUHARY

Defendant.

This matter is before this Court on the parties' request for final approval of a class action settlement (Docs. 87 & 90).

On November 1, 2013, this Court entered an Order (Doc. 78) granting preliminary approval (the "Preliminary Approval Order") to the settlement reached between Plaintiff Sandusky Wellness Center, LLC ("Plaintiff" or "Class Representative"), the Settlement Class (as defined below), and Heel, Inc. ("Heel" or "Defendant"), as memorialized in the parties' Settlement Agreement filed with this Court (Doc. 77-1).

On March 10, 2014, this Court held a fairness hearing (the "Fairness Hearing"), for which members of the preliminary Settlement Class had been given notice. An opportunity to be heard was given to all persons requesting to be heard in accordance with the Preliminary Approval Order.

Having considered the parties' request, the Settlement Agreement, and all other evidence submitted concerning final approval,

IT IS HEREBY ORDERED THAT:

1. This Court adopts the terms and definitions set forth in the Settlement Agreement, which was previously filed as Doc. 77-1, Ex. A.
2. This Court has jurisdiction over Plaintiff, the members of the Class, Defendant, and the claims asserted in this lawsuit.
3. This Court finds that the Settlement Agreement was entered into in good faith, following arm's-length negotiations, and that it was not collusive.
4. This Court grants final approval of the Settlement Agreement, including, but not limited to, the releases therein, and finds that the Settlement is in all respects fair, reasonable, and adequate, and in the best interests of all those affected by it. No objections were filed. Accordingly, all members of the Class who did not opt out are bound by this Final Judgment and Order.

**Class Certification**

5. Pursuant to Federal Civil Rule 23(b)(3), the Settlement Class as finally certified shall consist of:

All persons who (1) between June 11, 2008 and November 1, 2010, (2) were sent telephone facsimile messages of material advertising the commercial availability of any property, goods, or services by or on behalf of Defendant, and (3) which did not display a proper opt out notice.

(the "Settlement Class"). Excluded from the Settlement Class are Heel, any parent, subsidiary, affiliate or controlled person of Heel, as well as the officers, directors, agents, servants or employees of Heel and the immediate family members of such persons, the named counsel in this litigation, and any member of their office and/or firm, any licensed insurance company, and the members of the federal judiciary. The parties expressly agreed to the use of this class definition for settlement purposes. This Court finds that the above Settlement Class definition satisfies the requirements of

Federal Civil Rule 23 in the context of the approved Settlement because: (1) the Settlement Class is so numerous that joinder of all members is impracticable; (2) there are common questions of fact or law that predominate over any questions affecting only individual members; (3) the claims of the Court-appointed Class Representative are typical of the claims of the Settlement Class members; (4) the Court-appointed Class Representative and Class Counsel will fairly and adequately protect the interests of the Settlement Class members; and (5) a class action is a superior method for the fair and efficient adjudication of the controversy. Certification of the Settlement Class shall be solely for settlement purposes and without prejudice to the parties in the event that the Settlement does not take effect in accordance with the terms of the Settlement Agreement.

#### **Class Notice**

6. This Court finds that the “Notice of Class Action and Proposed Settlement” and the process by which such Notice was sent, fully complied with the requirements of Federal Civil Rule 23 and due process under the United States Constitution, constituted the best notice practicable under the circumstances, and was due and sufficient notice to all persons entitled to notice of the settlement of this lawsuit.

#### **Objections and Opt-Outs**

7. No members of the Settlement Class filed an objection to the Settlement.

8. The following eight (8) persons have validly requested exclusion from the Settlement Class: (1) M. Kelly Sutton; (2) Payne Family Pharmacy; (3) S.M.S. DO PA d/b/a Gulf Coast Medical Center; (4) Gulf Coast Medical Center, Physical Therapy, Inc.; (5) Florida Institute for Advanced Diagnostic Imaging; (6) Dynamic Care, Inc.; (7) Upstream Animal Healing Center; and (8) Windrose Naturopathic Clinic.

### **Class Compensation**

9. Heel agreed to make a total of up to \$6,000,000 available as a common fund (the “Settlement Amount”) to pay all valid claims; a *cypres* award if claims total less than \$615,000; Class Counsel’s attorney fees and costs; an incentive award to Plaintiff; and the costs of notice and administration of this settlement by a third-party administrator. After deducting the cost of settlement administration, Class Counsel’s attorney fees and costs, and the incentive award to the Class Representative, Heel shall pay to the Claims Administrator an amount sufficient to pay each Class member who submitted a valid and timely claim, its pro rata share of the Settlement Fund determined with respect to the number of facsimile transmissions to each such Class member ( $\$6,000,000 / 97,102 = \$61.79$ ), and the Claims Administrator shall make such payments to each Class member who submitted a valid and timely claim. Because only 6,774 Class members submitted valid claims for a total of \$418,565.46, Paragraph 8 of the Settlement Agreement requires Heel to pay the difference from \$615,000 to charities. After full consideration by this Court, including additional briefing (Docs. 90–91, 94), this Court approves a *cypres* award in the amount of One Hundred Ninety-Six Thousand, Four Hundred Thirty-Four Dollars and Fifty-Four Cents (\$196,434.54) to the following four charities, to be distributed equally to each: (1) Crohn’s and Colitis Foundation of America; (2) the Juvenile Diabetes Research Association; (3) Celiac Disease Foundation; and (4) St. Jude Children’s Research Hospital.

10. Checks issued to the claiming Class members will be void 181 days after issuance.

### **Awards of Incentive Award and Attorney Fees and Costs**

11. It is hereby ordered that Class Representative, Sandusky Wellness Center, LLC, shall receive Fifteen Thousand Dollars (\$15,000) from the Settlement Amount for serving as the class representative in this matter, in accordance with the terms of the Settlement Agreement.

12. Class Counsel, Brian Wanca of Anderson + Wanca shall receive attorney fees totaling Two Million Dollars (\$2,000,000) (one-third of the Settlement Fund), plus its reasonable out-of-pocket litigation expenses not to exceed One Hundred Seventy Thousand Dollars (\$170,000) (inclusive of Settlement Administrator costs), and this Court finds that such fees and expenses are fair and reasonable. Such amounts shall be paid from the Settlement Amount in accordance with the terms of the Settlement Agreement.

### **Releases and Dismissal**

13. All claims or causes of action of any kind by Class Representative, and all Settlement Class members are forever barred and released pursuant to the terms of the releases set forth in the parties' Settlement Agreement.

14. This lawsuit is dismissed with prejudice as to Class Representative and all members of the Settlement Class (except that the dismissal is without prejudice as to those persons identified above who submitted valid exclusions from the Settlement Class), and without fees or costs except as provided above.

### **Other Provisions**

15. This Court retains jurisdiction over this action, Class Representative, all members of the Settlement Class, Class Counsel, Defendant, and Defendant's counsel to determine all matters relating in any way to this Final Judgment and Order, the Preliminary Approval Order, or the Settlement Agreement, including, but not limited to, their administration, implementation, interpretation, or enforcement.

16. This Court adopts and incorporates all of the terms of the Settlement Agreement by reference here. The parties to the Settlement Agreement shall carry out their respective obligations thereunder.

17. If (a) the Settlement Agreement is terminated pursuant to its terms, or (b) the Settlement Agreement or Final Approval Order and Judgment do not for any reason become effective, or (c) the Settlement Agreement or Final Approval Order and Judgment are reversed, vacated, or modified in any material or substantive respect, then any and all Orders entered pursuant to the Settlement Agreement shall be deemed vacated. If the settlement does not become final in accordance with the terms of the Settlement Agreement, this Final Approval Order and Judgment shall be void and shall be deemed vacated.

18. This Court finds that there is no just reason to delay the enforcement of or appeal from this Final Approval Order and Judgment.

19. Heel has filed documents with this Court to show compliance with 28 U.S.C. § 1715(b), which requires notification to the Attorney General of the United States, and the Attorney General of each state where a class member resides. This Court finds that Heel has complied with this statute.

IT IS SO ORDERED.

s/ Jack Zouhary  
JACK ZOUHARY  
U.S. DISTRICT JUDGE

April 25, 2014