UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Jeffrey Worth and Robert Burns, on behalf of themselves and others similarly situated, Plaintiffs, v. CVS Pharmacy, Inc., Defendant.	Case No. 2:16-cv-00498-SMG

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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On May 28, 2019, this Court granted the motion of Plaintiffs Jeffrey Worth and Robert Burns ("Plaintiffs") for preliminary approval of the Settlement Agreement[1] and certification of the Settlement Class (the "Preliminary Approval Motion," ECF No. 108). *See* ECF No. 109. Plaintiffs now move this Court, individually and on behalf of all others similarly situated, for final approval of the settlement and for certification of the Settlement Class.

I. INTRODUCTION

This proposed class action settlement ("Settlement") is an excellent result for the Settlement Class and should be approved. The Settlement would finally resolve the claims of consumers who purchased the in-store brand of Algal-900 DHA dietary supplement from CVS Pharmacy, Inc. ("Defendant," together with Plaintiffs, the "Parties") between November 15, 2008 and September 30, 2016. Plaintiffs allege that Defendant misled them and other consumers by stating in the packaging and marketing of the Products that they were "clinically shown to improve memory" or provided "clinically proven memory improvement" ("Challenged Claims"), when, in fact, they did not. Under the Settlement, all consumers are eligible to receive a full refund of their purchases, and every class member who files a claim form, with or without proof of purchase, will receive an award. The Challenged Claims will also be dropped from the label, protecting consumers prospectively. The Settlement is an exceptional result.

As described in the September 6, 2019 Declaration of Meagan Brunner, Project Manager at KCC ("Brunner Decl."), the Settlement Administrator implemented a wide-ranging notice program using, among other methods, direct email to Defendant's customers and online notification. *See* Brunner Decl. ¶¶ 5-13. Notice reached approximately 86.9% of the potential

[1] Unless otherwise indicated, capitalized terms shall have the same meaning as they do in the Class Settlement Agreement (ECF No. 103-2) ("Settlement Agreement"). References to "§ __" are to sections in the Settlement Agreement.

Settlement Class. Brunner Decl., ¶ 12. The response from the Settlement Class has been overwhelmingly positive: despite receiving notice as of June 24, 2019, to date, not a single Settlement Class Member has objected to the settlement and only four have opted out, with the September 13, 2019 deadline to do so only a week away. *Id.* at ¶¶ 6, 16-17.

This class action readily satisfies the requirements of Federal Rule of Civil Procedure 23, supporting certification of the Settlement Class. Given this, and the standards set forth by the Second Circuit for the procedural and substantive fairness of the Settlement, including in *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"), as well as the factors enumerated by Federal Rule of Civil Procedure 23(e)(2), the Settlement should be finally approved.

II. BACKGROUND

A. History of the Litigation and Settlement Negotiations

On February 1, 2016, the Class Plaintiffs filed the above-captioned Class Action Complaint, alleging that CVS made misleading claims that its Algal-900 DHA product, a dietary supplement containing docosahexaenoic acid (DHA) (the "Algal-900 DHA Product," as further defined below), would improve memory. The Complaint includes claims on behalf of Plaintiffs individually, as well as a putative class of nationwide consumers who purchased the Algal-900 DHA Product. Class Plaintiffs also pleaded claims on behalf of New York and Florida subclasses. The Complaint contains counts against CVS for common law claims of negligent misrepresentation, fraudulent misrepresentation, and unjust enrichment, and for the subclasses for violations of the New York and Florida consumer protection statutes. It further seeks injunctive relief and damages. Prior to filing the Complaint, Class Counsel's attorneys[2] conducted an

[2] The Settlement Agreement defines Class Counsel as "Kaplan Fox & Kilsheimer, LLP, Reese LLP, Mehri & Skalet, PLLC, and Center for Science in the Public Interest ("CSPI")." § 2.10.

extremely thorough investigation of the potential claims, ingredients, and the regulatory framework surrounding the Products at issue. *See* Declaration of Michael R. Reese in Support of Final Approval ("Reese Final Approval Decl."), ¶¶ 5-6.

In April of 2016, and from September 2018 through April 2019, CVS and the Plaintiffs, individually and on behalf of the other members of the Settlement Class, engaged in arm's length, good-faith negotiations in an effort to reach an amicable resolution to the Action through a mediation process conducted by David Geronemus, Esq., of JAMS in New York, New York. As a result of the negotiations, the Parties agreed to settle the Action pursuant to the terms set forth in this Settlement Agreement. CVS, Plaintiffs, and Class Counsel believe that the Settlement Agreement provides valuable benefits to the Settlement Class, is fair, reasonable, and adequate, and is in the best interests of the Parties, including the Plaintiffs and the Settlement Class Members. Reese Final Approval Decl., ¶ 7.

Before entering into this Settlement Agreement, in addition to their pre-litigation investigation, Class Counsel thoroughly evaluated relevant law, facts, and allegations to assess the merits of the claims and potential defenses asserted in the Action. Reese Final Approval Decl., ¶ 11. As part of that investigation, Class Counsel obtained documents and other information from Defendant through discovery, including information concerning labeling and sales. *See id*. Defendant has denied, and continues to deny, that the marketing, advertising, and/or labeling of the Products at issue are in any way false, deceptive, or misleading to consumers, breached any warranty, or otherwise violate any legal requirement. *Id.*, ¶ 14. Indeed, Defendant vociferously defended the litigation, including by way of an attempted settlement with a copy-cat plaintiff-—an effort that ultimately failed. Defendant's action nonetheless resulted in additional burdensome litigation and delay for consumers.

B. Terms of the Proposed Settlement

The Settlement Agreement provides for significant monetary and injunctive relief.

1. Monetary Relief

Defendant has agreed to pay any Class Member who submits a valid Claim Form to the Class Action Administrator, on or before the Claim Period Close Date, compensation as follows:

- Proof of Purchase: Class Members who provide a Proof of Purchase with their Claim will be entitled to the following: (a) a full refund of the price paid by the Claimant for the Algal-900 DHA Product, if the Claim Form is accompanied by a valid Proof of Purchase(s) indicating the actual price paid; or (b) a refund based on the average retail price for the Algal-900 DHA Product set out in Exhibit G to the Settlement Agreement, if the Claim Form is accompanied by a valid Proof of Purchase that does not indicate the actual purchase price paid.
- No Proof of Purchase, But Proof of ExtraCare® Account: For Class Members who provide a CVS ExtraCare® account number (or for whom the Claims Administrator can otherwise link to an ExtraCare® account through a phone number or otherwise), and the ExtraCare® account is associated with a purchase of the Product either in-store or online, a credit of the amount paid to the Class Member's ExtraCare® account.
- No Proof of Purchase or ExtraCare® Account, but Record of Online Purchase: For Class Members who do not have proof of purchase or cannot link to an ExtraCare® account to show purchase, but for whom there otherwise is a record of purchase at cvs.com, a CVS voucher in the amount of the Product purchase price.
- No Proof of Purchase or ExtraCare® Account or Online Purchase: For Class Members who do not satisfy any of the above but who submit a valid Claim Form to the Class Action

Administrator will receive, at their election, either (a) a payment of $5.50 or (b) $7.00 in voucher value toward the purchase of any product sold at CVS. Claims in this category are limited to one per Claimant with no more than two Claimants per household.

2. Injunctive Relief

CVS agrees not to make the Challenged Claims for a period of two years from the Final Settlement Approval Date.

C. Notice Provided to Settlement Class

As part of the Settlement, Defendant agreed to pay for the cost of notice. The notice plan, which is discussed in detail in the Brunner Declaration, was robust and included both direct notice as well as online publication of notice.

III. ARGUMENT

A. The Court Should Give Final Approval to the Proposed Settlement

Class Counsel have worked diligently and with utmost commitment to Plaintiffs and the Settlement Class to reach a fair, reasonable, and adequate Settlement. Indeed, Class Counsel believe that they have obtained full or nearly full relief with this resolution. To the extent that they have not, while Plaintiffs' claims are strong, significant expense and risk attend the continued prosecution of all claims through trial and any appeals. *See* Reese Final Approval Decl., ¶¶ 15-16. Plaintiffs and Class Counsel have taken these costs and uncertainties into account, as well as the risks and delays inherent in complex class action litigation. *See id.* Additionally, in the process of investigating and litigating the Action, Class Counsel conducted significant research on the consumer protection statutes at issue, as well as the overall legal landscape, to determine the likelihood of success and reasonable parameters under which courts have approved settlements in comparable cases. *See id.* In light of the foregoing, Class Counsel believe the present Settlement provides significant, if not nearly complete, relief to Settlement Class Members and is fair,

reasonable, adequate, and in the best interests of the Settlement Class. *See id.*

B. Legal Standard

Under Rule 23(e)(2) of the Federal Rules of Civil Procedure, as amended in December 2018, a court may approve a class action settlement "only on finding that [the settlement agreement] is fair, reasonable, and adequate" after considering whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id. The Second Circuit has also articulated its own "fair, reasonable, and adequate" standard, discussed *infra*, that effectively requires parties to show that a settlement agreement is both procedurally and substantively fair. *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013).

This Circuit has recognized a "strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (quotations omitted). "The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 117 (2d Cir. 2005) ("*Visa*"). A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Id.* at 116.

C. The Proposed Settlement Meets the Requirements of Rule 23(e)(2)

Recent amendments to Rule 23(e)(2) set forth specific criteria that the Court must consider in determining whether a proposed settlement is fair, reasonable and adequate. The proposed Settlement here satisfies each of the Rule's requirements.

1. The Class Representatives and Class Counsel Have Adequately Represented the Class

Plaintiffs and Class Counsel have more than adequately represented the interest of the Settlement Class in this case. Plaintiffs were extensively involved in litigating this Action, including by reviewing the Complaint and other case documents, communicating extensively with Class Counsel regarding the status of the case and participating in the mediations and settlement of the action. *See* Reese Final Approval Decl., ¶ 20. Plaintiffs fulfilled their responsibility of advancing and protecting the interests of the Settlement Class and evaluating the proposed Settlement to determine that it is in the best interests of the Settlement Class.

Class Counsel haves also more than adequately represented the Settlement Class. As detailed herein, Class Counsel performed an extensive investigation into the claims at issue; participated in two rounds of mediation with David Geronemus of JAMs; and conducted extensive discovery into the bases of the potential Settlement. Class Counsel have relied on their significant experience in litigating and resolving class actions, including consumer class actions relating to misleading dietary supplement products, in order to reach a Settlement that Class Counsel believes is an excellent result for the Settlement Class.

This Settlement is comparable to other, similar settlements that have been litigated by Class Counsel and approved by courts in this Circuit, including *Luib v. Henkel Consumer Goods, Inc.*, No. 1:17-cv-03021-BMC (E.D.N.Y.) (granting final approval of class settlement involving allegedly mislabeled consumer products) and *Rapoport-Hecht v. Seventh Generation, Inc.*, No.

7:14-cv-09087-KMK (S.D.N.Y.) (same). For these reasons, Plaintiffs and Class Counsel have adequately represented the Settlement Class.

2. The Settlement was Negotiated at Arm's Length

There is a "presumption of fairness, reasonableness, and adequacy as to the settlement where 'a class settlement is reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *McReynolds*, 588 F.3d at 803 (quoting *Visa*, 396 F.3d at 116). The Settlement here was negotiated at arm's length, spanning numerous phone calls, correspondence, and two in-person mediations with esteemed mediator David Geronemus of JAMs. *See* Reese Final Approval Decl., ¶ 9; *see also Elkind v. Revlon Consumer Prods. Corp.*, No. 14 Civ. 2484 (JS) (AKT), 2017 U.S. Dist. LEXIS 24512, at *48 (E.D.N.Y. Feb. 17, 2017) ("[P]articipation by a neutral third party supports a finding that the agreement is non-collusive."). Plaintiffs also sought and obtained through discovery extensive information regarding the scope of the Class Members' alleged claims and damages. *See* Reese Final Approval Decl., ¶ 11. Finally, the overarching terms of the Settlement were resolved prior to the discussion of any attorneys' fees. *See id.*, ¶ 12.

3. The Substantial Monetary and Injunctive Relief Provided for the Settlement Class is Adequate

The Settlement provides significant and adequate, if not complete, relief for members of the Settlement Class. The Committee Notes on Rules–2018 Amendment to Fed. R. Civ. P. 23 ("2018 Committee Notes") state that this requirement, and the requirement under Fed. R. Civ. P. 23(e)(2)(D) that any settlement treats class members equitably relative to each other,

> focus on what might be called a "substantive" review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important.

Id. Rule 23(e)(2)(C) identifies the following factors to be considered in assessing whether the class relief is adequate:

> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3).

Id.

As an initial, overarching consideration, the Settlement provides significant and meaningful monetary and injunctive relief to the Settlement Class. With respect to monetary relief, Claimants are entitled to a full refund, depending on the proof of purchase they provide in support of their claim. *See* § 3.1. These represent substantial payments. And when a settlement "assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, settlement is reasonable under this factor." *Morangelli v. Roto-Rooter Servs. Co.*, No. 1:10-CV-00876 (BMC), 2014 U.S. Dist. LEXIS 7414, at *22 (E.D.N.Y. Jan. 6, 2014) (internal quotation omitted).

The Settlement Class will also benefit from the injunctive relief secured by the Settlement Agreement. *See* § 3.3. Defendant has agreed not to make the Challenged Claims for at least two years. This labeling change will greatly benefit both the Settlement Class Members and future consumers. *See, e.g.*, *In re Tracfone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d 993, 1005 (N.D. Cal. 2015) (settlement's change to marketing materials was "significant value for both class members and the general public" because it was "designed to make it clear to customers exactly what" the defendant was selling).

a. The costs, risks, and delay of trial and appeal weigh in favor of final approval

The substantial relief to the Settlement Class is also more than adequate in light of the costs, risks, uncertainty, and time required to litigate this action through trial and appeal. "Litigation inherently involves risks." *Willix v. Healthfirst, Inc.*, No. 07 Civ. 1143 (EVN) (RER), 2011 U.S. Dist. LEXIS 21102, at *11 (E.D.N.Y. Feb. 18, 2011). "[I]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Banyai v. Mazur*, No. 00 Civ. 9806 (SHS), 2007 U.S. Dist. LEXIS 22342, at *30 (S.D.N.Y. Mar. 27, 2007). "The greater the 'complexity, expense and likely duration of the litigation,' the stronger the basis for approving a settlement." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 663 (S.D.N.Y. 2015). Consumer class action lawsuits by their very nature are complex, expensive, and lengthy. *See, e.g.*, *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010).

This Action is no different, where litigating the case to a successful judgment providing class-wide relief will require that Plaintiffs, *inter alia*, prevail in their motion to certify a class; defend against a summary judgment motion; and, ultimately, obtain a class judgment following trial. This process, as with any class action litigation, will be fraught with risks at every stage, and, at the end of the day, while Plaintiffs believe a reasonable consumer would find the Challenged Claims to be misleading, a jury might not agree. As the history of this litigation shows, additional litigation would also incur substantial costs and expenses that ultimately would likely be assessed against any recovery by the Settlement Class and may not result in any tangible recovery for years, especially if any appeal(s) were taken. Throughout that period, consumers would continue to be deceived.

Further, if Plaintiffs were successful in obtaining certification of a litigation class, the certification would not be set in stone. *See Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147,

160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."); *Long v. HSBC USA Inc.*, No. 14 Civ. 6233 (HBP), 2015 U.S. Dist. LEXIS 122655, at *11 (S.D.N.Y. Sep. 11, 2015) ("A contested motion for certification would likely require extensive discovery and briefing, and, if granted, could potentially result in an interlocutory appeal pursuant to Fed. R. Civ. P. 23(f) or a motion to decertify by defendants, requiring additional briefing."). Given the risks, costs, and potential delays inherent in litigating this Action to judgment, this factor weighs heavily in favor of final approval. *See Babcock v. C. Tech Collections, Inc.*, No. 1:14-CV-3124 (MDG), 2017 U.S. Dist. LEXIS 44548, at *16 (E.D.N.Y. Mar. 27, 2017) (class settlement "eliminates the risk, expense, and delay inherent in the litigation process.") (citations omitted).

The Settlement Agreement's substantial relief compares very favorably to the relief that Plaintiffs would seek—but that would not be guaranteed—were the case to proceed to trial and beyond.

b. The effectiveness of any proposed method of distributing relief to the Settlement Class and processing class-member claims weighs in favor of final approval

The Settlement Administrator, KCC, is highly skilled in processing class claims and distributing the proceeds to Claimants. As described above, the Settlement Agreement provides that Claimants will receive payments based on type of proof of purchase provided. Claimants who provide Proof of Purchase may submit claims for an unlimited number of purchased Products for a full refund; Claimants who do not have Proof of Purchase, but records exist of their purchase in Defendant's database, will also receive a full refund. § 3.1. Finally, Claimants who do not provide Proof of Purchase, and there are no records of their purchases within Defendant's own database, will still receive $5.50 in cash or $7.00 in credit, depending on which payment form the Claimant chooses. *See id.* As explained by the 2018 Committee Notes, a "claims processing method should

deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." The proposed method of processing claims here strikes that delicate balance, and this factor weighs in favor of final approval.

c. The terms of the proposed award of attorneys' fees weigh in favor of final approval

The Settlement Agreement provides that Class Counsel may apply for an award of Attorneys' Fees and Expenses of $477,000. *See* § 4.2. As discussed in Plaintiffs' separately filed motion for payment of fees and costs, since the attorney's fees and costs sought here are in line with typical awards in this Circuit, this factor weighs in favor of final approval.

d. Agreements required to be identified under Rule 23(e)(3)

As previously disclosed to the Court pursuant to Federal Civil Procedure Rule 23(e)(3) and Eastern District of New York Local Rule 23.1, Class Counsel have a fee split agreement whereby from the fee and costs amount awarded by the Court, each of the Class Counsel will first be reimbursed for their costs. After payment of costs, Class Counsel have agreed to split the fee as follows: Kaplan Fox & Kilsheimer, LLP: 11%; Reese LLP: 30%; Mehri & Skalet, PLLC: 30%; and CSPI: 29% ("Fee Split Agreement").

Apart from the Fee Split Agreement and the Settlement Agreement, there are no additional agreements between the Parties or with others made in connection with the Settlement. *See* Reese Final Approval Decl., ¶¶ 21-22. Accordingly, this factor weighs in favor of final approval of the Settlement.

4. The Settlement Treats Class Members Equitably Relative to Each Other

The 2018 Committee Notes to Rule 23 explain that this factor "calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members *vis-a-vis* others. Matters of concern could include whether the apportionment of relief among class

members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." *See* 2018 Committee Notes.

None of the concerns raised by the 2018 Committee Notes are present here. Each member of the Settlement Class is treated in the same manner with respect to the claims they are releasing and their eligibility for an award, with the amount of the award dependent on whether or not the Settlement Class member can provide Proof of Purchase. *See* § 3.1. This does not mean that the Settlement creates different tiers of Settlement Class Members who are not treated equally. Instead, the Settlement provides any Claimant the ability to obtain a refund commensurate with the purchase price of their purchased Products for an unlimited number of purchases during the Class Period if they are able to provide Proof of Purchase, and a lesser, but still significant payment, if they cannot. *See id.* Requiring proof of purchase for claims for a full refund is fully in line with the 2018 Committee Notes' directive to "deter or defeat unjustified claims" without being "unduly demanding." *See id.*

D. The Proposed Settlement Is Procedurally and Substantively Fair Under Second Circuit Jurisprudence

The 2018 Committee Notes suggest that the new factors set forth in Rule 23 to determine whether to grant approval of a class settlement are meant to supersede the various tests that have evolved in each Circuit over the years. However, as the amendments to Rule 23 have only been in effect since December 1, 2018, Plaintiffs here also analyze the proposed Settlement under longstanding Second Circuit standards.

1. Procedural Fairness

To demonstrate a settlement's procedural fairness, a party must show "that the settlement resulted from 'arm's-length negotiations and that Class Counsel have possessed the experience

and ability, and have engaged in the discovery, necessary to effective representation of the class's interests.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citation omitted); *accord McReynolds*, 588 F.3d at 804; *see also Hall v. Prosource Techs., LLC*, No. 14-CV-2502 (SIL), 2016 U.S. Dist. LEXIS 53791, at *18 (E.D.N.Y. Apr. 11, 2016) (concluding settlement procedurally fair in light of mediation and ample discovery).

As discussed *supra*, the negotiations were conducted at arm's length and were undertaken by counsel who are well versed in complex class action litigation as well as litigating mislabeled dietary supplement products. *See* Reese Final Approval Decl. ¶¶ 1, 8, 12, 17. Plaintiffs and Class Counsel also conducted a thorough investigation and evaluation of the claims and defenses prior to filing the Action and continued to analyze the claims throughout the pendency of the case. *See id.*, ¶ 6. Class Counsel conducted extensive discovery, including sales data, and information on the efficacy of Defendant's Products. *See id.*, ¶ 8. Through this investigation, discovery, and ongoing analysis, including through participation in mediation, Class Counsel obtained an understanding of the strengths and weaknesses of the Action.

For the foregoing reasons, the Settlement Agreement is procedurally fair.

2. Substantive Fairness

To demonstrate the substantive fairness of a settlement agreement, a party must show that the factors the Second Circuit set forth in *Grinnell*, 495 F.2d 448, weigh in favor of approving the agreement. *See Charron*, 731 F.3d at 247. The *Grinnell* factors, many of which overlap with the newly amended Rule 23(e)'s standard, are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the

> range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

McReynolds, 588 F.3d at 804 (quoting *Grinnell*, 495 F.2d at 463). Here, the *Grinnell* factors overwhelmingly favor final approval of the Settlement Agreement.

a. The complexity, expense, and likely duration of litigation

This factor is the same as newly amended Rule 23(e)(2)(C)(i), and as discussed *supra*, Section III.C.3.a, weighs strongly in favor of final approval of the Settlement.

b. The reaction of the class to the settlement

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Babcock*, 2017 U.S. Dist. LEXIS 44548 at *14–15 (internal quotations omitted). Here, the Settlement Class Members have until September 13, 2019 to object to or opt-out of the Settlement. As of September 6, 2019, only four persons have opted out and no one has objected. *See* Brunner Decl., ¶¶ 16-17. This suggests nearly universal support for the Settlement and constitutes strong circumstantial evidence supporting its fairness. *See Fleisher v. Phx. Life Ins. Co.*, No. 11-cv-8405 (CM), 2015 U.S. Dist. LEXIS 121574, at *23 (S.D.N.Y. Sep. 9, 2015) ("The absence of objections may itself be taken as evidencing the fairness of a settlement.") (internal quotations omitted).

c. The stage of the proceedings and the amount of discovery completed

The third *Grinnell* factor—the stage of the proceedings and the amount of discovery completed—considers "whether Class Plaintiffs had sufficient information on the merits of the case to enter into a settlement agreement . . . and whether the Court has sufficient information to evaluate such a settlement." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 224 (E.D.N.Y. 2013) (citations omitted).

Class Counsel have conducted discovery related to Plaintiffs' claims, including review of

scientific journals regarding the efficacy of the Products and information produced by Defendant regarding the sales of the Products. *See* Reese Final Approval Decl., ¶¶ 6, 8. Consequently, Plaintiffs had sufficient information to evaluate the claims of the class. *See, e.g.*, *Morangelli*, 2014 U.S. Dist. LEXIS 7414, at *19 ("The pertinent question is whether counsel had an adequate appreciation of the merits of the case before negotiating."); *Asare v. Change Grp. N.Y., Inc.*, No. 12 Civ. 3371 (CM), 2013 U.S. Dist. LEXIS 165935, at *22 (S.D.N.Y. Nov. 18, 2013) (approving settlement where parties engaged in "discovery which consisted of the exchange, analysis, and discussion regarding a significant amount of data and information as well as extensive discussions on the legal merits of the claims"); *Long*, 2015 U.S. Dist. LEXIS 122655, at *9–10 (finding the third *Grinnell* factor was met where the parties had engaged in informal discovery even though settlement was reached before the action was commenced).

d. The risks of establishing liability and damages

This factor is addressed by the newly amended Rule 23(e)(2)(C)(i), and as discussed *supra*, Section III.C.3.a, weighs strongly in favor of final approval of the Settlement.

e. The risk of maintaining class action status through trial

This factor is addressed by the newly amended Rule 23(e)(2)(C)(i), and as discussed *supra*, Section III.C.3.a, weighs strongly in favor of final approval of the Settlement.

f. The ability of Defendant to withstand a greater judgment

"Courts have recognized that a [defendant's] ability to pay is much less important than the other *Grinnell* factors, especially where the other factors weigh in favor of approving the settlement." *In re Sinus Buster Prods. Consumer Litig.*, No. 12-CV-2429 (ADS) (AKT), 2014 U.S. Dist. LEXIS 158415, at *25 (E.D.N.Y. Nov. 10, 2014) (citations omitted). A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Morangelli*, 2014 U.S. Dist. LEXIS 7414, at * 21 (internal quotations omitted). Although

Defendant here may be able to withstand a greater judgment, the agreed-to Settlement is fair and adequate when weighed against the likelihood of success and overall value of each Settlement Class Member's individual damages should this Action proceed to trial. For these reasons, this factor is neutral.

g. The range of reasonableness of the Settlement in light of the best possible recovery and in light of all the attendant risks of litigation

"There is a range of reasonableness with respect to a settlement . . . which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion[.]" *Visa*, 396 F.3d at 119 (citation omitted). "In other words, the question for the Court is not whether the settlement represents the highest recovery possible . . . but whether it represents a reasonable one in light of the many uncertainties the class faces[.]" *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 384 (S.D.N.Y. 2013).

This factor is addressed by the newly amended Rule 23(e)(2)(C), and as discussed *supra*, Section III.C.3.a, weighs strongly in favor of final approval of the Settlement. Thus, collectively and independently, the *Grinnell* factors warrant the conclusion that the Settlement Agreement is fair, adequate, and reasonable. As such, Plaintiffs respectfully request that the Court grant final approval of the Settlement.

E. The Court Should Certify the Settlement Class

Plaintiffs further ask the Court to certify the Settlement Class, consisting of all persons and entities that, during the Class Period, both resided in the United States (including both states and territories of the United States) and purchased any of the Products at issue in the United States.[3] The Class Period means the period from November 15, 2008 through September 30, 2016.

[3] The Products at issue are described in Section 2.4 of the Settlement Agreement.

Excluded from the Settlement Class are: (1) Defendant's officers, directors, employees and attorneys; (2) governmental entities; (3) the Court, the Court's immediate family, and the Court staff; and (4) any person who timely and properly excludes himself or herself from the Settlement Class in accordance with the procedures approved by the Court. As Plaintiff sets forth below, the proposed Settlement Class satisfies each of the requirements of Rule 23(a), (b)(2), and (b)(3), and, consequently, Plaintiffs respectfully ask the Court to certify the Settlement Class for settlement purposes.

1. The Settlement Class Meets Each Prerequisite of Rule 23(a)

Rule 23(a) has four prerequisites for certification of a class: (1) numerosity; (2) commonality; (3) typicality; and (4) adequate representation. *See* Fed. R. Civ. P. 23(a). The Settlement Class satisfies each prerequisite.

a. Numerosity

A plaintiff must show that the proposed class is "so numerous that joinder of all [its] members is impracticable." Fed. R. Civ. P. 23(a)(1). The Second Circuit has found numerosity met where a proposed class is "obviously numerous." *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). Here there is no dispute that at least tens of thousands of people nationwide purchased Defendant's Products during the proposed class period. Brunner Decl. ¶ 5 (identifying 181,292 persons as class members). Therefore, numerosity is easily satisfied.

b. Commonality

Under Rule 23(a)(2), Plaintiffs must show that "questions of law or fact common to the [proposed] class" exist. Fed. R. Civ. P. 23(a)(2). Commonality requires that the proposed Settlement Class members' claims all centrally "depend upon a common contention," which "must be of such a nature that it is capable of class wide resolution," meaning that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "[F]or purposes of Rule 23(a)(2) even a single common question will do[.]" *Id.* at 359 (citation, quotation marks, and brackets omitted). The Second Circuit has construed this instruction liberally, holding that plaintiffs need only show that their injuries stemmed from a defendant's "unitary course of conduct." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 85 (2d Cir. 2015).

Here, there are common questions of law and fact that will generate common answers apt to drive the resolution of the litigation, including, *inter alia*, whether the labeling of the Products was likely to deceive reasonable consumers. Resolution of this common question would require evaluation of the question's merits under a single objective standard, *i.e.*, the "reasonable consumer" test. *Mantikas v. Kellogg Co.*, No. 17-2011, 2018 U.S. App. LEXIS 34756, at *7 (2d Cir. Dec. 11, 2018). Thus, commonality is satisfied.

c. Typicality

Under Rule 23(a)(3), a plaintiff must demonstrate that their claims "are typical of the [class'] claims." Fed. R. Civ. P. 23(a)(3). This includes whether "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented." *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993) (citations omitted). "[D]ifferences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative's claims." *In re Nissan Radiator/Transmission Cooler Litig.*, No. 10-CV-7493

(VB), 2013 U.S. Dist. LEXIS 116720, at *53 (S.D.N.Y. May 30, 2013); *Fogarazzo v. Lehman Bros.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005) (typicality requirement "is not demanding") (citation omitted).

Here, Plaintiffs' allegations on behalf of themselves and the proposed Settlement Class focus on the same thing: Defendant's use of the Challenged Claims of "clinically shown to improve memory" or "clinically shown memory improvement" on the labeling of the Products. Plaintiffs contend that they and the proposed Settlement Class were affected by these statements. *See Robidoux*, 987 F.2d at 936–37. Accordingly, typicality is satisfied.

d. Adequacy of representation

Under Rule 23(a)(4), Plaintiffs must demonstrate they will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requires that: (1) the class representatives do not have conflicting interests with other class members; and (2) class counsel is "qualified, experienced and generally able to conduct the litigation." *Marisol A.*, 126 F.3d at 378.

To satisfy the first requirement, Plaintiffs must show that "the members of the class possess the same interests" as Plaintiffs and that "no fundamental conflicts exist" between the class members. *Charron*, 731 F.3d at 249. Here, Plaintiffs possess the same interests as the proposed Settlement Class Members because all were allegedly injured in the same manner based on the same allegedly misleading marketing and labeling of the Products. With respect to the second requirement, Class Counsel are highly qualified and experienced in consumer class actions. *See* Reese Final Approval Decl., ¶¶ 1, 7. Class Counsel have also performed extensive work to date in identifying and investigating the claims in this litigation. *See id.*, ¶ 6. This work culminated in the detailed class Complaint and successful negotiation of the proposed Settlement Agreement. For the foregoing reasons, Plaintiffs have satisfied the adequacy requirement.

e. Ascertainability

The Second Circuit has recognized an implied requirement of ascertainability in Rule 23. "'[A] class is ascertainable if it is defined using objective criteria that establish a membership with definite boundaries.'" *Price v. L'Oreal USA, Inc.*, No. 17 Civ. 614 (LGS), 2018 U.S. Dist. LEXIS 138473, at *11 (S.D.N.Y. Aug. 15, 2018) (quoting *In re Petrobras Sec. Litig.*, 862 F.3d 250, 257 (2d Cir. 2017)). Satisfying the ascertainability requirement "does not 'require a showing of administrative feasibility at the class certification stage.'" *Id.* As in *Price*, here the Settlement Class is ascertainable because it "can be determined with reference to one objective criterion with definite boundaries: whether an individual purchased a Product during the class period." *Id.* As explained in the Brunner Declaration, KCC has identified potential Settlement Class Members through its targeted demographics and Defendant's internal records, such that the Notice Plan alone reached approximately 86.9% of potential Settlement Class Members. Brunner Decl., ¶ 12.

2. The Settlement Class Meets the Requirements of Rule 23(b)(2)

The proposed injunctive class satisfies the requirements of Rule 23(b)(2), and thus should be certified.

Rule 23(b)(2) reads: "A class action may be maintained if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . . ." *Id.* The Second Circuit has interpreted this to mean that class-wide injunctive relief must provide benefit to all class members (even if in different ways). *Sykes* 780 F.3d at 97.

Plaintiffs here seek class-wide injunctive relief. Like the class members in *Sykes*, this relief would, in remedying the Product's misleading labeling, benefit each Class Member at once. Accordingly, the Class should be found to meet Rule 23(b); and, as the Class also satisfies the Rule 23(a) prerequisites, the Class should be certified for injunctive relief.

3. The Settlement Class Meets the Requirements of Rule 23(b)(3)

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *See Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997). Plaintiffs seek certification under Rule 23(b)(3), which requires the Court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.*

a. Common legal and factual questions predominate in this action

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623 (citations omitted). The Second Circuit has held that "to meet the predominance requirement . . . a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof." *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227–28 (2d Cir. 2006). In the context of a request for settlement-only class certification, concerns about whether individual issues "would present intractable management problems" at trial are misplaced because "the proposal is that there be no trial." *Amchem*, 521 U.S. at 620. As a result, "the predominance inquiry will sometimes be easier to satisfy in the settlement context." *Tart v. Lions Gate Entm't Corp.*, No. 14-CV-8004 (AJN), 2015 U.S. Dist. LEXIS 139266, at *4 (S.D.N.Y. Oct. 13, 2015). Furthermore, consumer fraud cases have been held to readily satisfy predominance. *See, e.g.*, *Amchem*, 521 U.S. at 625.

Here, for settlement purposes, the central common questions predominate over any questions that may affect individual Settlement Class Members. These common questions include, among others, whether the Challenged Claims on the labels of the Products were likely to deceive reasonable consumers. For purposes of settlement, this issue is subject to "generalized proof" and

"outweigh those . . . subject to individualized proof." *In re Nassau Cty. Strip Search Cases*, 461 F.3d at 227–28. Accordingly, the Settlement Class meets the predominance requirement for settlement purposes.

b. A class action is the superior means to adjudicate consumers' claims

Rule 23(b)(3) also requires that the proposed class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Here, the class action mechanism is superior to individual actions for a number of reasons. First, "[t]he potential class members are both significant in number and geographically dispersed" and "[t]he interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions." *Meredith Corp.*, 87 F. Supp. 3d at 661 (citation omitted).

Additionally, a class action "will conserve judicial resources" and "is more efficient for Class Members, particularly those who lack the resources to bring their claims individually." *Zeltser v. Merrill Lynch & Co.,* No. 13-cv-1531 (S.D.N.Y. Sept. 23, 2014), 2014 U.S. Dist. LEXIS 135635, at *8 (citation omitted). The average purchase price of the 30 count container of the Products is less than $10.00—thus, the potential recovery for any individual Settlement Class member is minimal. *See* Settlement Agreement, Exhibit G. As a result, the expense and burden of litigation make it virtually impossible for the Settlement Class Members to seek redress on an individual basis. By contrast, in a class action, the cost of litigation is spread across the entire class, thereby making litigation viable. *See, e.g.*, *Tart*, 2015 U.S. Dist. LEXIS 139266, at *5. "Employing the class device here will not only achieve economies of scale for Class Members, but will also conserve judicial resources and preserve public confidence in the integrity of the system by avoiding the waste and delay repetitive proceedings and preventing inconsistent

adjudications." *Zeltser*, 2014 U.S. Dist. LEXIS 135635, at *8–9 (citing, *inter alia*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998)). For all of the foregoing reasons, a class action is superior to individual suits.

In sum, because the requirements of Rule 23(a), (b)(2), and (b)(3) are satisfied, the Court should confirm its certification of the Settlement Class.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the accompanying proposed Final Approval Order certifying the proposed Settlement Class and granting final approval of the proposed Settlement.

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