UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Lauren Biegel, Greg Maroney, Ryan Cosgrove, Clive Rhoden, Stephen Bradshaw, Angela Farve and Christina Henderson, individually and on behalf of all others similarly situated,

No. 7:20-cv-03032-CS

Plaintiffs,

v.

Blue Diamond Growers,

Defendant.

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

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On May 17, 2021, this Court granted the motion of Plaintiffs[1] Lauren Biegel ("Biegel"), Greg Maroney ("Maroney"), Stephen Bradshaw ("Bradshaw"), Angela Farve ("Farve"), Ryan Cosgrove ("Cosgrove"), Clive Rhoden ("Rhoden"), and Christina Henderson ("Henderson") (collectively, the "Plaintiffs") for preliminary approval of the Settlement Agreement and certification of the Settlement Class. *See* ECF No. 53 ("Preliminary Approval Order"). 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.

INTRODUCTION

The proposed class action settlement ("Settlement") is an excellent result for the Settlement Class and should now receive final approval so that class members can be paid. The Settlement would finally resolve the claims of consumers who purchased certain Products[2] of defendant Blue Diamond Growers' ("Defendant", "BDG", or the "Company") sold under its Almond Breeze label between April 15, 2014, to May 17, 2021. Plaintiffs allege that Defendant misled them and other consumers by misrepresenting that the Products contain "Vanilla [with other natural flavors]," when the plaintiffs allege the Products are not flavored mainly from vanilla.

The Settlement Agreement provides excellent relief to Settlement Class Members, providing a refund of $1.00 for each Product purchased, up to a maximum of twenty (20) Products for which a Proof of Purchase is submitted (or more than 100% of the inflated amount paid) and providing a refund of $0.50 for each Product purchased, up to a maximum of ten (10) Products for Settlement Class Members without Proof of Purchase (or over 100% of the inflated amount paid),

[1] Unless otherwise indicated, capitalized terms shall have the meaning that the Settlement Agreement ascribes to them. *See* ECF No. 48-1 ("Settlement Agreement"). References to "§ __" are to sections in the Settlement Agreement.

[2] The Products at issue are described in Section 2.33 of the Settlement Agreement.

for a total value of two million dollars ($2,000,000).

As described in the Declaration of Steven Weisbrot Re: Media Plan ("Weisbrot Notice Decl."), the Settlement Administrator implemented a Notice Program that provides for a media campaign comprised of programmatic display advertising, social media advertising and a paid search campaign. The Notice Plan also includes ads in the California regional edition of the USA Today as described in his previously filed Supplemental Declaration (ECF Docket No. 51-1). *See* Weisbrot Notice Decl. at ¶ 4. The media portions of the Notice Program are designed to deliver an approximate 75.18% reach with an average frequency of 4.77 times each. *Id*. at ¶ 14. The Notice Plan is utilizing social media platforms Facebook and Instagram, which approximately 90% of our Target Audience utilized. The social media campaign uses an interest-based approach to engage with the Target Audience through Facebook and Instagram's desktop sites, mobile sites and mobile apps. Weisbrot Notice Decl. at ¶ 10. As described in his Notice Plan Declaration, the social media campaign was designed to deliver approximately 30,000,000 impressions via Facebook & Instagram. Through July 18, 2021, the social media campaign has delivered approximately 20,024,079 impressions and is scheduled to be completed on or about July 26, 2021. *Id*. at ¶ 11. The internet banner notice program was designed to serve approximately 20,588,235 impressions. Through July 18, 2021, the program has delivered approximately 17,070,274 impressions and is scheduled to be completed on or about July 26, 2021. *Id*. at ¶ 9. The Notice Program includes a paid search campaign on Google to help drive Settlement Class Members who are actively searching for information about the Settlement to the dedicated Settlement Website. Through July 18, 2021, the paid search program has delivered approximately 168,626 impressions. Weisbrot Notice Decl. at ¶ 12.

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 Fed. R. Civ. P. 23(e)(2), the Settlement should be granted final approval.

BACKGROUND

I. History of the Litigation and Settlement Negotiations

On April 15, 2020, Plaintiff Lauren Biegel filed a class action lawsuit against Defendant in the above-captioned action (ECF No. 1), alleging that BDG mislabeled its almondmilk yogurt alternative product purporting to be flavored with vanilla and "natural flavors", under the Almond Breeze brand, which was amended on November 20, 2020, to add Plaintiff Maroney as an additional named plaintiff (ECF No. 18) ("Amended Complaint").

The Amended Complaint asserted the same claims on behalf of a New York class, alleging that Defendant deceptively and misleadingly labeled its almondmilk yogurt under the Almond Breeze brand by misstating that the Product is flavored with "Vanilla with other natural flavors" with a picture of cured vanilla beans and a vanilla flower, when in fact, the plaintiffs allege, the Product is not flavored mainly from vanilla, and as a result, does not taste like vanilla.

Similar claims were asserted by plaintiffs Ryan Cosgrove and Clive Rhoden in an action that was initiated on September 27, 2019 in the Southern District of New York ("Cosgrove Action")[3] and by plaintiff Angela Farve in an action that was filed on October 28, 2020 in the Northern District of California ("Farve Action"), as well as, by plaintiff Stephen Bradshaw in an action that was filed on October 25, 2020 in the Eastern District of New York ("Bradshaw

[3] After the District Court dismissed the plaintiffs' First Amended Complaint in the Cosgrove Action in full, the plaintiffs appealed the Court's order to the Second Circuit. The plaintiffs later voluntarily dismissed the appeal with prejudice.

Action").

Over the next several months, Sheehan & Associates, PC, Shub Law Firm LLC and Reese LLP ("Class Counsel") engaged in a series of extensive, meaningful, arm's-length, good-faith settlement negotiations with Blue Diamond, including an all-day mediation conducted before esteemed mediator Randall W. Wulff of Wulff Quinby Sochynsky. These efforts ultimately resulted in the excellent Settlement now before your Honor for final approval.

On April 19, 2021, Plaintiffs Biegel and Maroney filed a Second Amended Complaint in the United States District Court for the Southern District of New York (the "Second Amended Complaint") adding Plaintiffs Ryan Cosgrove, Clive Rhoden, Stephen Bradshaw, Angela Farve, and Christina Henderson as additional named plaintiffs (ECF No. 46), asserting the same causes of action and expanding the class definition to assert a nationwide class in accordance with the terms set forth in the Settlement Agreement.

The Settlement in the Action before Your Honor settles the claims in the Biegel Action, the Farve Action, and the Bradshaw Action, and has the full support of all the Plaintiffs in these three Federal Actions (collectively "Actions"). *See* Declaration of Spencer Sheehan in Support of Motion for Final Approval ("Sheehan Final Approval Decl.") at ¶¶ 48, 84; Declaration of Kevin Laukaitis in Support of Motion for Final Approval ("Laukaitis Final Approval Decl.") at ¶ 22; and Declaration of Michael Reese in Support of Motion for Final Approval ("Reese Final Approval Decl.") at ¶ 11.

Plaintiffs' objective in filing the Actions was to compensate Settlement Class members damaged by the alleged misrepresentations. Through the Actions and the Settlement Agreement, Plaintiffs have achieved this objective, obtaining substantial monetary relief for the Settlement Class.

Prior to filing the Actions, Plaintiffs' Counsel's attorneys conducted an extremely thorough investigation of the potential claims, ingredients, and the regulatory framework surrounding the Products at issue, and continued to analyze the claims throughout the pendency of the cases. Sheehan Final Approval Decl. at ¶¶ 49-76; Laukaitis Final Approval Decl. at ¶¶ 11-15; Reese Final Approval Decl. at ¶¶ 7-9.

Before entering into this Settlement Agreement, in addition to their pre-litigation investigation, Plaintiffs' Counsel thoroughly evaluated relevant law, facts, and allegations to assess the merits of the claims and potential defenses asserted in the Actions. Sheehan Final Approval Decl. at ¶¶ 49-76; Laukaitis Final Approval Decl. at ¶¶ 14-15; Reese Final Approval Decl. at ¶¶ 7-9.

As part of that investigation, Plaintiffs' Counsel obtained documents, sales data, and other information from Defendant through discovery, including information concerning labeling and sales. *See id*. Through this investigation, discovery, and ongoing analysis, Class Counsel obtained an understanding of the strengths and weaknesses of the Actions. 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.

A. Terms of the Proposed Settlement

The Settlement Agreement defines the Settlement Class, describes the Parties' agreed-upon Settlement relief, and proposes a plan for disseminating notice to the Settlement Class members.

1. The Settlement Class

Under the Settlement Agreement, the Parties agree to seek certification of a nationwide Settlement Class defined as follows:

All consumers in the United States who purchased the Products from April 15,

2014, through May 17, 2021.

The Settlement Class excludes the Released Parties, any government entities, persons who made such purchase for the purpose of resale, persons who made a valid, timely request for exclusion, and Hon. Cathy Seibel and Randall W. Wulff, and any members of their immediate family.

2. Monetary Relief for the Members of the Settlement Class

The Settlement Agreement provides for significant substantial monetary relief. Indeed, the Settlement Agreement provides that Defendant will provide refunds in an amount up to $2,000,000 to pay timely, valid, and approved Claims. The plaintiffs assert that consumers paid an inflated price of 40 cents per 32-ounce Product. Specifically, the cost of a 32 ounce of Defendant's Blue Diamond Vanilla Almond Milk is sold for $2.19 (or 6.8 cents per ounce) at Target. The cost of a 32 ounce of Defendant's competitor Good & Gather Vanilla Almond Milk is sold at Target for $1.79 (or 5.5 cents per ounce). This amounts to a premium of 1.3 cents per ounce, which equates to 40 cents for the 32-ounce example above. Consumers with proof of purchase will get a refund of $1.00 for each Product purchased, up to a maximum of twenty (20) Products, (or more than 100% of the inflated amount paid). Consumers without proof of purchase will get a refund of $0.50 for each Product purchased, up to a maximum of ten (10) Products, (or over 100% of the inflated amount paid). Defendant will also separately pay all costs of notice and claims administration; judicially approved Incentive Awards; and judicially approved Attorneys' Fees and Expenses. (§ 3.13; 5.4; 8.3).

3. Notice Provided to Settlement Class

The Court appointed Angeion Group ("Angeion") to administer the notice process. Preliminary Approval Order at 5 (ECF No. 53). In terms of the methods of notice, the Parties developed a robust notice program with the assistance of Angeion that included: (1) comprehensive digital media based notice; (2) a dedicated Settlement Website through which

Settlement Class members can obtain more detailed information about the Settlement and access case documents; and (3) a toll-free telephone helpline through which Settlement Class members can obtain additional information about the Settlement and request the class notice and/or a Claim Form.. Pursuant to the notice plan, through July 18, 2021, the program has delivered approximately 17,070,274 impressions and is scheduled to be completed on or about July 26, 2021; the social media campaign has delivered approximately 20,024,079 impressions and is scheduled to be completed on or about July 26, 2021; and the paid search program has delivered approximately 168,626 impressions. Weisbrot Notice Decl. at ¶¶ 9, 11, 12. The media portions of the Notice Program are designed to deliver an approximate 75.18% reach with an average frequency of 4.77 times each. Weisbrot Notice Decl. at ¶ 14.

Under the Settlement Agreement, the Settlement Website posted Settlement-related and case-related documents such as the Long Form Notice in both downloadable PDF format and HTML format with a clickable table of contents; answers to frequently asked questions; a Contact Information page that includes the address for the Claim Administrator and addresses and telephone numbers for Plaintiffs' Counsel and Defendant's Counsel; the Agreement; the signed order of Preliminary Approval; a downloadable and online version of the Claim Form; a downloadable and online version of the form by which Settlement Class Members may exclude themselves from the Settlement Class; and (when they become available) the motion for final approval and Plaintiffs' application(s) for Attorneys' Fees, Costs and an Incentive Award. The Settlement Website also included procedural information regarding the status of the Court approval process, such as announcements of the Final Approval Hearing date. To allow for the maximum convenience of the Settlement Class Members, claims may be submitted online. *Id.*

As part of the Settlement, Defendant agreed to pay for the cost of notice. The Notice

Program discussed above and in detail in the Weisbrot Notice Declaration, provides for a media campaign comprised of programmatic display advertising, social media advertising and a paid search campaign. The Notice Plan also includes ads in the California regional edition of the USA Today. The objective syndicated data shows that members of the Target Audience are "heavy" internet users and nearly 90% of the Target Audience have used Facebook in the last 30 days. As such, Angeion carefully crafted a robust internet advertising campaign in conjunction with a strategic social media campaign to reach Class Members.

ARGUMENT

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

Plaintiffs' Counsel have worked diligently and with utmost commitment to Plaintiffs and the Settlement Class to reach a fair, reasonable, and adequate Settlement. Indeed, Plaintiffs' 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* Sheehan Final Approval Decl. at ¶¶ 81-82; Laukaitis Final Approval Decl. at ¶ 17; Reese Final Approval Decl. at ¶ 9. Plaintiffs' 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 Actions, Plaintiffs' 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.* Considering the foregoing, Plaintiffs' Counsel believe the present Settlement provides significant, if not nearly complete, relief to Settlement Class Members, confers substantial benefits upon the Settlement Class Members, and is fair, reasonable, adequate, and in the best interests of the Settlement Class. Sheehan Final Approval Decl. at ¶¶ 47-48, 81-84;

Laukaitis Final Approval Decl. at ¶¶ 9, 23; Reese Final Approval Decl. at ¶¶ 4-5.

A. Legal Standard

Under Rule 23(e)(2), 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).

The Second 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).

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.

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

Relatively 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. Plaintiffs and Their Counsel Have Adequately Represented the Class

Plaintiffs and their Counsel have more than adequately represented the interest of the Settlement Class in this case. Plaintiffs were extensively involved in litigating these Actions, including by reviewing the complaints and other case documents, communicating extensively with Plaintiffs' Counsel regarding the status of the cases and participating in the settlement of the action. 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. Plaintiffs' Counsel also more than adequately represented the Settlement Class. As detailed above, Plaintiffs' Counsel performed an extensive investigation into the claims at issue; participated in a full day mediation session; and conducted 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 food and beverage products, to reach a Settlement that Class Counsel believes is an excellent result for the Settlement Class. *See* Sheehan Final Approval Decl. at ¶¶ 4, 47-48; Laukaitis Final Approval Decl. at ¶¶ 10, 21; Reese Final Approval Decl. at ¶¶ 4-5.

This Settlement is comparable to other, similar settlements that have been litigated by Plaintiffs' Counsel and approved by courts in this Circuit, including, for example, *Cicciarella v. Califia Farms, LLC*, 7:19-cv-08785 (CS) (S.D.N.Y.). For these reasons, Plaintiffs and their

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. The Settlement here was negotiated at arm's length, spanning numerous phone calls, correspondence, extensive, good-faith negotiations, and a full day mediation session with an experienced mediator. *Huerta v. West 62 Operating LLC*, No. 16-cv-3876, 2018 WL 10601810, *2 (S.D.N.Y. Jan. 11, 2018) ("The assistance of an experienced mediator… reinforces that the Settlement Agreement is non-collusive. A settlement like this one, reached with the help of a third- party neutral, enjoys a presumption that the settlement achieved meets the requirements of due process.").

Plaintiffs also sought and obtained through discovery information regarding the scope of the Class Members' alleged claims and damages. Sheehan Final Approval Decl. at ¶ 82; Laukaitis Final Approval Decl. at ¶ 16; Reese Final Approval Decl. at ¶ 10. Finally, the overarching terms of the Settlement were resolved prior to the discussion of any attorneys' fees. Sheehan Final Approval Decl. at ¶ 85; Laukaitis Final Approval Decl. at ¶ 24; Reese Final Approval Decl. at ¶ 12.

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

The Settlement provides significant and adequate, if not complete, relief for members of the Settlement Class. Fed. R. Civ. P. 23(e)(2)(C) identifies the following factors to be considered:

> (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).

As an initial, overarching consideration, the Settlement provides for significant, meaningful, and substantial monetary relief to the Settlement Class. Indeed, the Settlement Agreement provides excellent relief to Settlement Class Members, providing that Settlement Class Members with Proof of Purchase shall receive a cash payment of $1.00 for each Product purchased, up to a maximum of twenty (20) Products for which a Proof of Purchase is submitted (or more than 100% of the inflated amount paid) and Settlement Class Members without Proof of Purchase shall receive a cash payment of $0.50 for each Product purchased, up to a maximum of ten (10) Products (or over 100% of the inflated amount paid), for a total value of two million dollars ($2,000,000). 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." *Tuy Guit v. 38 Water Street & Inc.*, No. 16-cv-7466, 2019 WL 3712125, *2 (S.D.N.Y. Aug. 7, 2019)(internal quotation omitted).

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

The substantial relief to the Settlement Class is more than adequate considering the costs, risks, uncertainty, and time required to litigate this action through trial and appeal. "Most class actions are inherently complex, and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000).

"[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-cv-9806 (SHS), 2007 WL 927583, *9 (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).

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.

Further, if Plaintiffs were successful in obtaining certification of a litigation class, the certification would not be set in stone. *See e.g. Long v. HSBC USA Inc.*, No. 14-cv-6233, 2015 WL 5444651,*4 (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.

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

5. 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, Angeion, is highly skilled in processing class claims and distributing the proceeds to Claimants. *See* Declaration of Steven Weisbrot of Angeion Group Re: Proposed Notice Plan (ECF No. 48-2). As described above, the Settlement Agreement provides that Claimants will receive payments based on type of proof of purchase provided. Settlement Class Members with Proof of Purchase shall receive a cash payment of $1.00 for each Product purchased, up to a maximum of twenty (20) Products for which a Proof of Purchase is submitted (or more than 100% of the inflated amount paid) and Settlement Class Members without Proof of Purchase shall receive a cash payment of $0.50 for each Product purchased, up to a maximum of ten (10) Products (or over 100% of the inflated amount paid), for a total value of two million dollars ($2,000,000). The proposed method of processing claims here is fair and this factor weighs in favor of final approval.

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

The Settlement Agreement provides that Plaintiffs' Counsel that worked on the Actions may apply for an award of Attorneys' Fees, Costs, and Expenses of $550,000. *See* § 5.1. 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.

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

As previously disclosed to the Court and the Class pursuant to Federal Civil Procedure Rule 23(e)(3) and Southern District of New York Local Rule 23.1, Plaintiffs' Counsel have a fee split agreement whereby from the fee and costs amount awarded by the Court, each of the

Plaintiffs' Counsel will first be reimbursed for their costs. After payment of costs, Plaintiffs' Counsel have agreed to split the fee as follows: Sheehan & Associates, P.C.: 33.33% (i.e., one-third); Shub Law Firm LLC: 33.33% (i.e., one-third); and Reese LLP: 33.33% (i.e., one-third). 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. Accordingly, this factor weighs in favor of final approval of the Settlement.

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

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 the Settlement Class member can provide Proof of Purchase. *See* Settlement Agreement, § III. 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 more than 100% of the inflated amount paid regardless of whether the Claimant can provide Proof of Purchase. *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).

As discussed *supra*, the extensive, good-faith 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 food and beverage products. Plaintiffs and their Counsel also conducted a thorough investigation and evaluation of the claims and defenses prior to filing the Actions and continued to analyze the claims throughout the pendency of the case. Plaintiffs' Counsel conducted discovery, including sales data and labeling of Defendant's Products. Through this investigation, discovery, and ongoing analysis, including through participation in mediation, Plaintiffs' Counsel obtained an understanding of the strengths and weaknesses of the Action. *See supra* II.A and III.C.3.a.

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 *Grinnell* factors 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 Fed. R. Civ. P. 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." *Rodriguez v. It's Just Lunch International*, No. 07-cv-09227, 2020 WL 1030983, *4 (S.D.N.Y. March 2, 2020) (citing *Grinnell*). Here, the Settlement Class Members have until August 4, 2021, to object to or opt-out of the Settlement. As of July 18, 2021, 0 persons have objected. This suggests nearly universal support for the Settlement and constitutes strong circumstantial evidence supporting its fairness. *Rodriguez*, 2020 WL 1030983 at *4 ("The extremely low number of objectors as a percentage of the Classes strongly supports approval of the Settlement.")

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." *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 discovery of sales data regarding the sales of Defendant's Products, and obtained documents, sales data, and other information from Defendant through discovery, including information concerning labeling and sales. *See* Sheehan Final Approval Decl. at ¶ 82; Laukaitis Final Approval Decl. at ¶ 16; Reese Final Approval Decl. at ¶ 10.

Consequently, Plaintiffs had sufficient information to evaluate the terms and the claims of

the Class. *Asare v. Change Grp. N.Y., Inc.*, No. 12-cv-3371, 2013 WL 6144764, **10-11 (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 WL 5444651 at *4 (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 Fed. R. Civ. P. 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 also 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." *Asare*, 2013 WL 6144764, *12. 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 Settlement is Within the Range of Reasonableness

"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.

II. The Court Should Certify the Settlement Class

Plaintiffs further ask the Court to certify the Settlement Class, consisting of all consumers in the United States who purchased the Products[4] from April 15, 2014, to May 17, 2021. Excluded from the Settlement Class are the Released Parties, any government entities, persons who made such purchase for the purpose of resale, persons who made a valid, timely request for exclusion, and Hon. Cathy Seibel and Randall W. Wulff, and any members of their immediate family. As Plaintiffs set forth below, the proposed Settlement Class satisfies each of the requirements of Federal Civil Procedure Rule 23(a) and (b)(3), and, consequently, Plaintiffs respectfully ask the Court to certify the Settlement Class for settlement purposes.

A. 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

[4] The Products at issue are described in Section 2.33 of the Settlement Agreement. After a meet and confer, the parties revised the class notices that were submitted with the plaintiffs' Unopposed Motion for Preliminary Approval to ensure the notices properly reflected the definition of "products" as originally stated in the Settlement Agreement.

Settlement Class satisfies each prerequisite.

1. 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 Class Period. Therefore, numerosity is easily satisfied.

2. 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, and whether Defendant failed to represent and disclose that its Products contain non-vanilla flavors.

Resolution of these common questions would require evaluation of the questions' merits

under a single objective standard, *i.e.*, the "reasonable consumer" test. *Mantikas v. Kellogg Co.*, 910 F.3d 633, 636 (2d Cir. Dec. 11, 2018). Thus, commonality is satisfied.

3. 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 WL 4080946, *19 (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 allegedly misleading marketing of the amount of vanilla in the Products. Plaintiffs contend that they and the proposed Settlement Class were affected by these statements. Accordingly, typicality is satisfied.

4. 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. by Forbes*, 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 and based on their purchase of the Products. With respect to the second requirement, Plaintiffs' Counsel are highly qualified and experienced in consumer class actions. *See* Sheehan Final Approval Decl. at ¶¶ 4, 11, 23-28; Laukaitis Final Approval Decl. at ¶¶ 7, 8, 12; Reese Final Approval Decl. at ¶¶ 1-5.

Plaintiffs' Counsel have also performed extensive work to date in identifying and investigating the claims in this litigation. Sheehan Final Approval Decl. at ¶¶ 49-76; Laukaitis Final Approval Decl. at ¶¶ 11-15; Reese Final Approval Decl. at ¶¶ 4-9. This work culminated in the detailed class complaints and successful negotiations of the proposed Settlement Agreement. For the foregoing reasons, Plaintiffs have satisfied the adequacy requirement.

5. 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-cv-614 (LGS), 2018 WL 3869896, *4 (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 Weisbrot Notice Declaration, Angeion has identified potential Settlement Class Members through its targeted demographics and Defendant's internal records, such that the media portions of the Notice Program are designed to deliver an approximate 75.18% reach with an average frequency of 4.77 time each . Weisbrot Notice Decl., ¶ 14.

B. 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 Fed. R. Civ. P. 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.*

1. 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, 2015 WL 5945846, *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 Defendant's front label statement of the Products ("vanilla" or "vanilla with other natural flavors") was misleading and likely to deceive reasonable consumers regarding the amount of and source of vanilla flavor in the Products. For purposes of settlement, this issue is

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

2. 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." Here, the class action mechanism is superior to individual actions for several 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.

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, 2014 WL 4816134, *8 (S.D.N.Y. Sept. 23, 2014)(citation omitted).

As a result of the false and misleading labeling, the Products are sold at a premium price. The cost to purchase any of the Products is no less than $2.19 per 32 ounces, with the estimated amount of inflation due to the alleged misrepresentation calculated to be $0.51 per 32 ounces—thus, the potential recovery for any individual Settlement Class member is relatively small. 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 WL 5945846 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 WL 4816134, at *3. For all the foregoing reasons, a class action is superior to individual suits.

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

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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