UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
(ROCHESTER DIVISION)

MEGAN HOLVE, *individually and on behalf of all others similarly situated*,

Plaintiff,

– against –

MCCORMICK & COMPANY, INC.,

Defendant.

Civil Action No. 6:16-cv-06702-FPG-MWP

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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On September 23, 2021, this Court granted Plaintiff's Unopposed Motion for Preliminary Approval of Class Settlement. *See* ECF No. 52 ("Preliminary Approval Order"). Plaintiff now moves for final approval of the Settlement and for certification of the Settlement Class.[1]

I. INTRODUCTION

The Settlement is an excellent result for the Settlement Class and should now receive final approval so that Class Members can be paid. The Settlement resolves the claims of consumers who purchased certain of Defendant's Products labeled and advertised as "natural" in the Class Period, between January 1, 2013, to September 23, 2021. Plaintiff alleges that Defendant misled her and other consumers by mispresenting the "natural" provenance of ingredients in the Products.

The Agreement provides substantial relief to Settlement Class Members. The Agreement establishes a non-reversionary, total common fund of three million dollars ($3,000,000). With proof of purchase, Settlement Class Members may seek a refund of $1.00 per Product with no cap or limit. With no proof of purchase, Settlement Class Members may seek a refund of $1.00 per Product up to 15 Products. None of the Settlement Fund will be returned to Defendant. If after the calculation of all valid Initial Claim Amounts, payment of Notice and Administration costs, Attorneys' Fees and Expenses, the Service Award, value remains in the Settlement Fund, the respective Final Claim Amounts of Settlement Class Members will be increased on a *pro rata* basis until any Residual Funds are depleted. The Agreement also provides for excellent injunctive relief that requires Defendant to change its labeling so it is no longer potentially misleading to consumers. This recovery is more than consumers would likely receive if the case were to proceed to trial and succeed, which is not a guaranteed result.

[1] Capitalized terms have the meaning ascribed to them in the Settlement Agreement (the "Agreement"). *See* ECF No. 44.

As described in the Declaration of Steven Weisbrot of Angeion Group Re: Implementation of Notice Program dated December 3, 2021 ("Weistbrot Notice Program Decl."), the Settlement Administrator implemented a wide-ranging notice program using, among other methods, the use of internet banner ads and a social media campaign. *See id*. at ¶¶ 6-9. Notice had a reach of 73.22% of the potential Settlement Class, which exceeds that previously approved of by the Court (70.12%). *Id.* at ¶¶ 14-15. Additionally, the response from the Settlement Class has been overwhelmingly positive with 65,037 Class Members having filed claims to date. *Id.* at ¶ 19. No Class Members have objected to the Settlement to date, and no Class Members have opted out with the deadline to do so only two weeks away. *Id.* at ¶¶ 20-21.

The Settlement readily satisfies the requirements of Federal Rule of Civil Procedure 23 and the standards set forth by the Second Circuit for procedural and substantive fairness in *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"). Accordingly, the Settlement should be finally approved.

II. BACKGROUND

A. History of the Litigation and Settlement Negotiations

On October 27, 2016, Plaintiff filed her class action Complaint challenging the labeling, marketing, and advertising of certain of Defendant's Products as "natural," seeking damages and injunctive relief. ECF No. 1.

On January 9, 2017, Defendant filed a Motion to Dismiss Plaintiff's Complaint. ECF No. 8. Plaintiff filed an opposition on February 10, 2017. ECF No. 10. Defendant filed a reply on February 27, 2017. ECF No. 11. On August 14, 2018, the Honorable Frank P. Geraci, Jr. issued an order denying in part, and granting in part, Defendant's Motion to Dismiss. ECF No. 17. Specifically, Judge Geraci allowed for claims brought on behalf of putative class members under GBL §§ 349-50, MCC § 13-301, and Maryland common law to proceed. However, in the same

order, Judge Geraci stayed the matter until February 1, 2019 to see whether the Food and Drug Administration ("FDA") would issue any rules or regulations with respect to use of the term "natural" on food products. *Id.*

After several rounds of briefing and status reports to the Court regarding FDA rulemaking concerning "natural" labeling on food products, Judge Geraci lifted the stay on October 9, 2020 and ordered the Parties to file a joint status report. ECF No. 25. On January 13, 2021, this Court held a scheduling conference. ECF No. 38. On January 14, 2021, this Court entered a scheduling order. ECF No. 39. As part of the scheduling order, the Court ordered that mediation occur by April 7, 2021. Plaintiff served discovery requests, and the Parties engaged in discovery.

On March 9, 2021, a full day mediation session was held by the Honorable Arthur J. Boylan (Ret.), a former federal magistrate judge. The mediation session resulted in a settlement in principal and written term sheet.

The terms of the final Agreement were negotiated over the course of several months following mediation. *See* Joint Declaration of Class Counsel Michael R. Reese and Joshua H. Eggnatz in Support of Motion for Final Approval ("Joint Final Approval Decl.") at ¶¶ 2, 14-17, filed simultaneously herewith. The Agreement was reached as a result of hard-fought negotiations, including many post-mediation negotiation sessions to finalize the terms of the settlement. *Id*.

Class Counsel mediated fully informed of the merits of the case and negotiated the proposed Settlement while zealously advancing the position of Settlement Class Members. At all times, Class Counsel remained committed to continuing the litigation rather than accepting a settlement not in the Settlement Class Members' best interests. *Id.* ¶ 11. Judge Boylan (Ret.) actively participated in the settlement discussions and was instrumental in helping the Parties reach an acceptable compromise. *Id.*

Prior to negotiating the settlement, Class Counsel spent significant time investigating facts, researching the law, preparing a well-pleaded complaint, engaging in contested motion practice, engaging in discovery, and reviewing important documents and data. *Id.* ¶ 12.

On May 5, 2021, the Parties finalized the Agreement. Plaintiffs' objectives in filing the Action were to remedy the allegedly deceptive representations in Defendant's labeling of the Products and to compensate Settlement Class Members damaged by the alleged misrepresentations. Plaintiff has achieved both objectives in the Agreement.

On May 7, 2021, Plaintiff filed her Unopposed Motion for Preliminary Approval of Class Action Settlement. ECF No. 45. On September 23, 2021, the Court entered the Preliminary Approval Order. ECF No. 52.

B. Terms of the Proposed Settlement

The Agreement defines the Settlement Class, describes the Parties' agreed-upon Settlement relief, and sets forth the plan for disseminating notice to the Settlement Class Members.

1. The Settlement Class

The Settlement Class is a Fed. R. Civ. P. 23(b)(3) class, defined as:

> [A]ll persons and entities who, during the Class Period, both resided in the United States, including, but not limited to its territories, and purchased in the United States any of the Defendant Products for their household use or personal consumption and not for resale. Excluded from the Settlement Class are: (a) Defendant's board members or executive-level officers, including its attorneys; (b) governmental entities; (c) the Court, the Court's immediate family, and the Court staff; and (d) any person that timely and properly excludes himself or herself from the Settlement Class in accordance with the procedures approved by the Court. Agreement §2.27.

2. Relief for the Settlement Class Members

The Agreement provides for significant injunctive and monetary relief. Defendant has agreed to a $3,000,000 common Settlement Fund to pay: (1) Settlement Class Members who submit valid Claim Forms; (2) Class Notice and Settlement Administration costs; (3) payment of Attorneys' Fees and Expenses that the Court approves; (4) a Service Award that the Court approves; (5) and other costs necessary to effectuate the Agreement, including notice pursuant to the Class Action Fairness Act ("CAFA"). Agreement §2.28.

Class Members with Proof of Purchase may seek reimbursement of $1.00 per unit bought with no cap or limit. *Id.* §4.2(d). Class Members without Proof of Purchase may seek reimbursement of $1.00 per unit bought up to a maximum recovery for 15 Products (*i.e.*, $15.00). *Id.* §4.2(d). No portion of the Settlement Fund will be returned to Defendant. The ultimate cash recovery to be paid to Class Members is subject to *pro rata* increase or decrease, depending on the value of all approved Claims submitted. *Id.* §4.4.

3. Notice Provided to Settlement Class

Angeion Group, one of the leading class action settlement administration firms in the United States, is the Court approved Settlement Administrator. Agreement §5.1; Declaration of Steven Weisbrot of Angeion Group Re: Notice Program filed on May 7, 2021 ("Weisbrot May 7, 2021 Decl.," ECF No. 44-3) at ¶¶ 1–10. The Settlement Administrator is overseeing the publication Notice Program, which is designed to provide the best notice practicable. Weisbrot May 7, 2021 Decl. ¶¶ 11–13. The Notice Plan is reasonably calculated to apprise Settlement Class Members of the following: (a) description of the material terms of the Settlement; (b) deadline to exclude themselves from the Settlement Class; (c) a deadline to object to the Settlement; (d) the Final Approval Hearing date; (e) and the Settlement Website address to access the Agreement and other

related documents and information. Agreement §5.2; Weisbrot May 7, 2021 Decl. ¶¶ 11-41. The Notice Program constitutes sufficient notice to all persons entitled to such notice, satisfying all applicable requirements of law, including Rule 23 and constitutional due process. *Id.* ¶¶ 11-13.

The robust Notice Plan is comprised of a targeted digital media campaign, including: (1) programmatic banner ads and paid social media campaigns; (2) a Settlement Website to appraise potential class members about the Settlement, including a Long Form Notice containing detailed information about the Settlement, and hyperlinks to the Agreement, the Preliminary Approval Order, and all other documents the Parties agree to post or that the Court orders posted. Agreement §5.2; Weisbrot May 7, 2021 Decl. ¶¶ 11-41; Weisbrot Notice Program Decl. ¶¶ 6-18.

The Class Notice describes the procedure that Settlement Class Members must follow to opt-out of the Settlement or object to the Settlement, Class Counsel's application for attorneys' fees and expenses, and/or the Class Representative Service Award. *See* Agreement, Ex. B. Specifically, opt-outs and objections must be postmarked no later than December 21, 2021.

The Settlement Administrator also established and is maintaining an automated toll-free telephone line for the Settlement Class to call with Settlement-related inquiries and to receive automated responses, and to accept requests for Long Form Notices. Weisbrot Notice Program Decl. ¶ 16.

The Settlement Administrator is carrying out its on-going responsibilities, including, but not limited to: (1) consulting on and designing the Class Notice, Summary Class Notice, and Claim Form; (2) disseminating the Class Notice and providing notice to each State and Federal official as required by CAFA; (3) implementing the terms of the Claim Process and related administrative activities, including communications with Settlement Class Members; (4) reviewing and approving Claim Forms; (5) keeping an accurate and updated accounting via a database of the

number of Claim Forms received and the amount claimed on each Claim Form; (6) sending payments to all eligible Settlement Class Members with valid, timely, and approved Claims; and (7) reporting to the Court. Agreement §§ 5.2; 5.4; Weisbrot Notice Program Decl. ¶¶ 6-18.

Pursuant to the notice plan, 36,461,383 digital impressions were disseminated. Weisbrot Notice Program Decl. ¶ 8. The notice plan had a minimum 73.22% reach with an average frequency of 3.90 times each. *Id.* ¶¶ 14-15.

III. ARGUMENT

A. The Court Should Give Final Approval to the Settlement

Class Counsel have worked diligently and with utmost commitment to Plaintiff 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. *See* Joint Final Approval Decl. ¶ 18. To the extent that they have not achieved full relief for the Class, significant expense and risk attend the continued prosecution of all claims through trial and any appeals, which justify the Settlement. *Id*. In agreeing to the Settlement, Class Counsel have taken these costs and uncertainties into account, as well as the risks and delays inherent in complex class action litigation. *Id* at ¶¶ 18-19. 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. *Id.* at ¶¶ 7-12. Considering 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. *Id.* at ¶ 25.

B. Legal Standard

Under Federal Civil Procedure Rule 23(e)(2) a court may approve a class action settlement "on finding that it 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;
> >
> > (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 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 recognizes 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). 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." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)("*Visa*"). As Chief Judge Wolford recently held, "[c]ourts should give proper deference to the private consensual decision of the parties and bear in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation." *Beebe v. V&J National Enterprises, LLC,* Case No. 17-cv-06075 EAW, 2020 WL 2833009, *7 (W.D.N.Y. June 1, 2020).

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

The Settlement here satisfies the Rule 23(e)(2) requirements.

1. Plaintiff and Class Counsel Have Adequately Represented the Class

Plaintiff and Class Counsel have adequately represented the interest of the Settlement Class. Plaintiff was involved in litigating the Action, including by reviewing the complaint and other case documents, regularly communicating with Class Counsel regarding the status of the case, and participating in the settlement of the Action. Plaintiff fulfilled her responsibility of advancing and protecting the interests of the Settlement Class and evaluating the Settlement to determine that it is in the best interests of the Class. Class Counsel also more than adequately represented the Settlement Class. Class Counsel performed an extensive investigation into the claims at issue; defeated Defendant's dismissal motion; participated in a full day mediation session; and conducted formal and informal discovery before reaching the Settlement. Class Counsel leveraged 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. Joint Final Approval Decl. ¶¶ 24-42.

This Settlement is comparable to other, similar settlements that have been litigated by Class Counsel and approved by courts in this Circuit, including *Rapoport-Hecht v. Seventh Generation, Inc.*, Case No. 7:14-cv-09087, 2017 WL 5508915 (S.D.N.Y. Apr. 28, 2017). For these reasons, Plaintiff and her 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. Courts examine the

negotiating process leading up to the settlement. *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir. 2001). The Settlement here was negotiated at arm's length with the assistance of a former federal magistrate acting as mediator. *Huerta v. West 62 Operating LLC*, Case 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."). Plaintiff sought and obtained through discovery extensive information regarding the scope of the Class Members' alleged claims and damages. Joint Final Approval Decl. ¶ 8. Class Counsel mediated fully informed of the merits of the case while also remaining committed to continue litigation. *Id.* Judge Boylan (Ret.) actively participated in the settlement discussions and was instrumental in helping the Parties reach an acceptable compromise. *Id.* This resulted in the Agreement for which Final Approval is respectfully requested. *Id*. The Parties did not negotiate attorneys' fees and expenses until after the Parties agreed to the material terms of the Agreement, including the total value of the Settlement Fund and the individual relief to Settlement Class Members. *Id.* at ¶ 14.

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

The Agreement provides significant and adequate, if not complete, relief for Settlement Class Members. Rule 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 Agreement provides significant and meaningful monetary and injunctive relief to the Settlement Class—both of Plaintiff's desired litigation goals. The Agreement provides excellent relief to Settlement Class Members. It provides a $1.00 refund (approximately 47% of the purchase price based on the average purchase price of the Products) for consumers with proof of purchase with no limitation and up to 15 Product purchases (*i.e.*, $15.00) for consumers with no proof of purchase, for a total non-reversionary common fund value of three million dollars ($3,000,000.00). Joint Final Approval Decl. ¶ 18. Given the price premium damages model likely to be advanced at trial (which, based on Class Counsel's investigation, is estimated at 10%), a 47% effective premium likely exceeds the individual relief that would be available to a class member even if Plaintiff were to succeed at trial on a class basis. *Id.* at ¶ 18.

These represent substantial payments. Moreover, there was a substantial risk that Plaintiff would not achieve such a result, or any recovery at all, given the various defenses presented and the risk associated with a jury trial. Joint Final Approval Decl. ¶ 18. When, as here, 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.*, Case No. 16-cv-7466, 2019 WL 3712125, *2 (S.D.N.Y. Aug. 7, 2019) (internal quotation omitted).

The Settlement Class also will benefit from the injunctive relief secured by the Agreement. Defendant has agreed that, with respect to the Products' labeling and on its website, Defendant shall be prohibited from distributing, marketing, advertising, labeling, packaging, or selling any of the Products with a "Natural" or "All Natural" representation on the Products label and/or advertising, except as may be expressly authorized by the FDA (*i.e.,* "natural flavor" or "natural

color"). *See* Agreement §4.5. This labeling change will greatly benefit both 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 also 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). *See also Beebe,* 2020 WL 2833009 at *7 (W.D.N.Y. June 1, 2020); *Godson v. Eltman, Eltman, & Cooper, P.C.,* 328 F.R.D. 35, 58 (W.D.N.Y. 2018); *Odom v. Hazen Transport, Inc.,* 275 F.R.D. 400, 412 (W.D.N.Y. 2011); *Frank v. Eastman Kodak Co.,* 228 F.R.D. 174, 184-85 (W.D.N.Y. 2005). "[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*, Case No. 00-cv-9806, 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). A settlement is within the "range of reasonableness" where it "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking litigation to completion." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir. 1972).

This Action is no different, where litigating the case to a successful judgment providing classwide relief will require that Plaintiff prevail in her motion to certify a class that Defendant would likely contest but for this Settlement; defend against a summary judgment motion; and, ultimately, obtain a class judgment following a jury trial. This process, as with any class action litigation, will be fraught with risks at every stage. Although Plaintiff believes 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 also would incur substantial costs and expenses that likely would be assessed against any recovery by the Settlement Class and may not result in any tangible recovery for years, especially if any appeals were taken. Moreover, the uncertainty of future FDA action presents a significant risk that could potentially bar Plaintiff's claims entirely. Joint Final Approval Decl. ¶ 19. Under the circumstances, Plaintiff and Class Counsel appropriately determined that Settlement outweighs the gamble of continued litigation. *Id.* .

Further, if Plaintiff 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.*, Case 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 Agreement's substantial relief compares very favorably to the relief that Plaintiff 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, Angeion Group, is highly skilled in processing class claims and distributing the proceeds to Claimants. The Agreement's plan for allocation of the Settlement benefits is straightforward: Settlement Class Members will receive a cash payment based on their respective claims submitted, on a *pro rata* basis. Agreement §4.2, 4.4. The Agreement's plan for distribution is efficient in that it allows class members without proof of purchase to submit a claim for up to 15 Product purchases and allows class members with proof of purchase to submit a claim for all Product purchases with no cap. *Id.* §4.2. The ultimate cash recovery to be paid to class members is subject to *pro rata* increase or decrease, depending on the value of all approved Claims submitted. *Id.* §4.4. Pro rata allocation and distribution plans have been found to satisfy Rule 23. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,* 330 F.R.D. 11, 35 (E.D.N.Y. 2019). The proposed method of processing claims is fair and weighs in favor of final approval.

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

The Agreement provides that Class Counsel may apply for a combined award of Attorneys' Fees and Expenses of up to $1,000,000.00 (*i.e.*, 1/3 of the common Settlement Fund). Agreement §8.3. As discussed in Plaintiff's separately filed motion for payment of attorneys' fees and costs, this factor weighs in favor of final approval because the attorneys' fees and costs sought here are in line with typical awards in this Circuit.

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

Class Counsel have agreed to split the fee amount granted by the Court, after being reimbursed for their respective costs. After payment of costs, Class Counsel have agreed to split the fee as follows: Reese LLP: 50% and Eggnatz Pascucci, P.A.: 50%. Agreement §8.2. After

reimbursement for their costs, Reese LLP and Eggnatz Pascucci, P.A. will pay 6% of their fees to David M. Kaplan, Attorney at Law, for his work as local counsel.

Apart from the fee splits identified immediately above and in the Agreement, there are no additional agreements between the Parties in connection with the Settlement. Accordingly, this factor weighs in favor of final approval of the Settlement.

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

Each Settlement Class Member 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. Agreement §4.2(d).

This does not mean that the Settlement treats Settlement Class Members unequally. Requiring proof of purchase for no cap on claims, while allowing claims with no proof of purchase but with a cap, is in line with the directive of Rule 23's 2018 Committee Notes to "deter or defeat unjustified claims" without being "unduly demanding." Because the Settlement allows class members to submit claims based on the number of Products purchased and then distributes payments on a *pro rata* basis, Settlement Class Members will be treated equitably. *In re GSE Bonds Antitrust Litig.,* 414 F. Supp. 3d 686, 698-99 (S.D.N.Y. 2019); *In re Payment Card,* 330 F.R.D. at 47.

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

The 2018 Committee Notes suggest that the 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 federal Circuit over the years. However, as the amendments to Rule 23 have only been in effect since December 1, 2018, Plaintiff here also analyzes 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*, 236 F.3d at 85.

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 food products. Plaintiff and her Counsel also conducted a thorough investigation and evaluation of the claims and defenses prior to filing the Action, while continuing to analyze the claims throughout the pendency of the case. Class Counsel conducted discovery, including analysis of sales and distribution data, ingredients, and labeling of the Products. 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. *See supra* III.C.3.

For the foregoing reasons, the 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). In applying these factors, "not every factor must weigh in favor of the settlement, but rather the court should consider the totality of these factors in light of the particular circumstances." *Fleisher v. Phoenix Life Ins. Co.*, Case Nos. 11-cv-8405, 14-cv-8714, 2015 WL 10847814, *5 (S.D.N.Y. Sept. 9, 2015). Here, the *Grinnell* factors overwhelmingly favor final approval of the Settlement.

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

This factor is the same as the amended Rule 23(e)(2)(C)(i), and as discussed *supra*, Section III.C.3, 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*, Case No. 07-cv-09227, 2020 WL 1030983, *4 (S.D.N.Y. March 2, 2020) (citing *Grinnell*). Courts have recognized that a favorable reaction by the settlement class members strongly supports final approval of the settlement. *Wright v. Stern*, 553 F. Supp. 2d 337, 344-45 (S.D.N.Y. 2008) ("The fact that the vast majority of class members neither objected nor opted out is a strong indication" of fairness). Here, the Settlement Class Members have until December 21, 2021 to object to or opt-out of the Settlement. As of the date of this motion, no persons have opted out and or objected to the Settlement. *See* Weisbrot Notice Program Decl. ¶¶ 20-21. At the same time, and in stark contrast, 65,037 consumers have submitted claims. *Id.* at ¶ 19. 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). This factor does not require the Court to find the parties have engaged in extensive discovery. *Plummer v. Chemical Bank,* 668 F.2d 654 (2d Cir. 1982).

This Action has been pending for over 5 years. Class Counsel defeated, in part, Defendant's Motion to Dismiss. ECF No. 8. However, the matter was then stayed until February 1, 2019, pending FDA rulemaking with respect to use of the term "natural" on food products. After several rounds of briefing and status reports to the Court, the stay was lifted on October 9, 2020. The Parties then participated in discovery. Class Counsel obtained documents and extensive information from Defendant, including business records concerning the Products' marketing, label design, formulation, sales and pricing, and distribution. Joint Final Approval Decl. ¶ 8. Consequently, Plaintiff had sufficient information to evaluate the claims of the class. *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 amended Rule 23(e)(2)(C)(i), and as discussed *supra*, Section III.C.3, 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 amended Rule 23(e)(2)(C)(i), and as discussed *supra*, Section III.C.3, 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 v. Change Grp. N.Y., Inc.*, Case No. 12-cv-3371, 2013 WL 6144764, *12 (S.D.N.Y. Nov. 18, 2013). 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); *see also Newman,* 464 F.2d at 693.

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

E. The Court Should Finally Certify the Settlement Class

The Court has already preliminarily certified the Settlement Class. Plaintiff now asks the Court to grant final certification of the Settlement Class. As Plaintiff sets forth below, the proposed Settlement Class satisfies each of the requirements of Federal Civil Procedure Rule 23(a) and (b)(3), and, consequently, Plaintiff respectfully asks 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). Numerosity is presumed at a level of 40 members. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, there is no dispute that at least tens of thousands of people nationwide purchased Defendant's Products during the proposed class period. Indeed, to date 65,037 Class Members have submitted claims. Therefore, numerosity is easily satisfied.

b. Commonality

Under Rule 23(a)(2), a plaintiff must show that "questions of law or fact common to the [proposed] class" exist. "Commonality occurs where the class members' class share a common question of law or fact." *Beebe*, 2020 WL 2833009 at *5. "[F]or purposes of Rule 23(a)(2) even a single common question will do[.]" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 38, 350 (2011). The Second Circuit has construed this instruction liberally. *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 generate common answers that drive the resolution of the litigation, including 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.*, 910 F.3d 633, 636 (2d Cir.2018). Thus, commonality is satisfied.

c. Typicality

Under Rule 23(a)(3), a plaintiff must demonstrate that his or her 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) (internal 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.*, Case No. 10-cv-7493, 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, Plaintiff's allegations on behalf of herself and the proposed Settlement Class focus on the same conduct. Plaintiff's claims are typical of the other Settlement Class Members because they were subjected to the same labeling practices, suffered the same injuries, and will benefit equitably from the relief in the Settlement. Accordingly, typicality is satisfied.

d. Adequacy of representation

Under Rule 23(a)(4), a plaintiff must demonstrate she will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requires that: (1) the class representative does 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 v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997).

A plaintiff must show that "the members of the class possess the same interests" as the named plaintiff and that "no fundamental conflicts exist" between the class members. *Charron*, 731 F.3d at 249. Here, Plaintiff possesses the same interests as the Settlement Class Members because all were allegedly injured in the same manner based on the same allegedly misleading marketing and labeling of the Products. Joint Final Approval Decl. ¶ 20. With respect to the second requirement, Class Counsel are highly qualified and experienced in consumer class actions. *Id.* at ¶¶ 3-5. Class Counsel also have performed extensive work to date identifying and litigating the claims in this case. *Id*. at ¶¶ 6-12, 26-37. For the foregoing reasons, Plaintiff has satisfied the adequacy requirement.

e. Ascertainability

The Second Circuit has recognized an implied ascertainability requirement. "'[A] class is ascertainable if it is defined using objective criteria that establish a membership with definite boundaries.'" *Price v. L'Oreal USA, Inc.*, Case No. 17-cv-614, 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 Declarations of Steven Weisbrot of Angeion Group that was appointed by the Court to be the notice provider and claims administrator, Angeion Group has identified potential Settlement Class Members through its targeted demographics, such that the Notice Plan reached 73.22% of potential Settlement Class Members. Weisbrot May 7, 2021 Decl. ¶¶ 11-39; Weisbrot Notice Program Decl. ¶¶ 6-18.

2. 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). Plaintiff seeks 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). 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.*, Case 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 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 County Strip Search Cases*, 461 F.3d 219, 227–28 (2d Cir. 2006). 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." 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.

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) (internal citation omitted). Here the Products cost, at most, only a few dollars per item. 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 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 of 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.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court certify the Settlement Class for settlement purposes and grant final approval of the Settlement.

Dated: December 7, 2021

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Court Appointed Class Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **December 7, 2021,** a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served upon interested counsel via transmission of Notices of Electronic Filing generated by CM/ECF.

By: */s/ Michael R. Reese*
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