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

NOTICE OF MOTION AND UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

PLEASE TAKE NOTICE that pursuant to Federal Rule of Civil Procedure 23(e) and Western District of New York Local Rule 7, Plaintiff Megan Holve, ("Plaintiff"), on behalf of herself and all others similarly situated, hereby does move this Court for an order granting preliminary approval of the class action Settlement reached between her and Defendant McCormick & Company, Inc. ("Defendant" or "McCormick") (collectively, the "Parties"), and to enter the [Proposed] Order Granting Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement submitted with this notice of motion.

Preliminary Approval is warranted because the terms of the proposed Settlement are fair, adequate, and reasonable under the law of the Second Circuit and the Federal Rules of Civil Procedure, and provide substantial relief for the Settlement Class. Given the significant risks inherent in this Action, this common fund settlement in the amount of $3,000,000, consisting of: (a) cash payments to Settlement Class Members and (b) injunctive relief in the form of labeling and advertising changes, is an excellent result for Settlement Class Members.

Plaintiff hereby moves, and Defendant does not oppose a request for the Court to (1) preliminarily approve the Class Action Settlement as being within the range of a fair, adequate, and reasonable Settlement; (2) provisionally certify for settlement purposes only the proposed

Settlement Class pursuant to Fed. R. Civ. P. 23; (3) appoint Plaintiff as Class Representative; (4) approve the Notice Program set forth in the Settlement Agreement and approve the form and content of the Notice, attached to the Settlement Agreement as Exhibit B; (5) approve the opt-out and objection procedures set forth in the Agreement; (6) stay the Action against Defendant pending Final Approval of Settlement; (7) appoint Reese, LLP and Eggnatz Pascucci, P.A. as Class Counsel; and (8) schedule a Final Approval Hearing.

This unopposed Motion is based upon this Notice of Motion; the Memorandum of Points and Authorities; the Joint Declaration of Class Counsel; the Declaration of Steven Weisbrot of Angeion Group LLC attached as Exhibit C to the Settlement Agreement; the Settlement Agreement and exhibits submitted therewith; and, all papers and pleadings on file herein.

Pursuant to Local Rule 7, Plaintiff states that she does not intend to file a reply in support of this unopposed motion.

Dated: May 7, 2021

Respectfully submitted,

By: */s/ Michael R. Reese*
REESE LLP
Michael R. Reese
mreese@reesellp.com
100 West 93rd Street, 16th Floor
New York, New York 10025
Telephone: (212) 643-0500
Facsimile: (212) 253-4272

EGGNATZ PASCUCCI, P.A.
Joshua H. Eggnatz
jeggnatz@justiceearned.com
7450 Griffin Road, Suite 230
Davie, Florida 33314
Telephone: (954) 889-3359
Facsimile: (954) 889-5913

Counsel to Plaintiff and the putative Class

Proposed Co-Lead Class Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **May 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*
REESE LLP

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

UNOPPOSED MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION

FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENT

TABLE OF AUTHORITY

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Plaintiff Megan Holve ("Plaintiff") and her Counsel achieved a significant result for the Settlement Class: Defendant McCormick & Company, Inc. ("McCormick" or "Defendant") has agreed to a $3,000,000 common fund settlement and to injunctive relief in the form of labeling and marketing changes. Plaintiff now respectfully requests that the Court grant Preliminary Approval[1] of the Settlement Agreement and Release ("Agreement"), attached hereto as ***Exhibit 1***, which will resolve all claims against McCormick in the above-entitled Action.

Preliminary Approval should be granted because the terms of the proposed settlement are fair, adequate, and reasonable under the law, and provide substantial relief for the Settlement Class. Indeed, given the significant risks inherent in this Action, this $3,000,000 common fund settlement that will make cash payments to consumers, and changes Defendant will make in its business practices, is an excellent result for Settlement Class Members. Because the Settlement provides for a guaranteed, direct, and immediate award for Settlement Class Members, the settlement benefits far outweigh the substantial risks and uncertainties of continued litigation and expense. The Settlement Administrator will distribute cash payments to Settlement Class Members who submit timely and valid claims. Settlement Class Members will not be required to submit proof of purchase to submit a claim. All Claims will be subject to *pro rata* increase or decrease, depending on the value of all approved Claims submitted. No monies will revert to the Defendant. In addition, Defendant will agree to forebear from making the claims challenged as being misleading.

In sum, the Agreement readily satisfies all criteria required for settlement approval in the Second Circuit and under the Federal Rules of Civil Procedure, and the Court should preliminarily approve it.

1. All capitalized terms used throughout this memorandum have the same meanings as those found in the Settlement Agreement.

II. BACKGROUND

A. Procedural History

On October 27, 2016 Plaintiff filed her class action Complaint challenging the labeling, marketing, and advertising of certain of McCormick'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), and Defendant filed a reply on February 27, 2017 (ECF No. 11). On August 14, 2018, the Court issued an order denying in part, and granting in part, Defendant's Motion to Dismiss. (ECF No. 17). Specifically, the Court allowed for claims brought on behalf of the absent class members under GBL §§ 349-50, MCC § 13-301, and Maryland common law to proceed. However, in the same order, the Court 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.

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

On March 9, 2021 a full day mediation session was held by the Honorable Arthur J. Boylan (Ret.). 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 Preliminary Approval ("Joint Decl.") at ¶ 2, filed simultaneously with the Motion for Preliminary Approval. The Agreement was reached as a result of hard-fought negotiations, including many post-mediation negotiation sessions to finalize the terms of the settlement. Joint Decl. ¶ 17.

On May 5, 2021 the Parties finalized the Settlement Agreement.

B. Class Counsel's Investigation

Prior to filing, Class Counsel thoroughly investigated the viability of Plaintiff's claims. Joint Decl. ¶ 6. Before entering into the Agreement, Class Counsel conducted an extensive and thorough examination, investigation, and evaluation of the relevant law, facts, and allegations to assess the merits of the claims, and potential defenses. As part of that investigation, as well as through formal and informal discovery, Class Counsel obtained documents and extensive information from Defendant through discovery, including business records concerning the Products' marketing, label design, formulation, sales and pricing, and distribution. Joint Decl. ¶ 8.

Class Counsel expended significant resources researching and developing the legal claims at issue. Joint Decl. ¶ 9. Indeed, Class Counsel is familiar with the instant claims through their extensive history of litigating and resolving other food labeling cases with similar factual and legal issues to the case at bar. Joint Decl. ¶ 9. Class Counsel was able to leverage this experience in understanding the legal claims and damages at issue here, and what information is important in determining class membership and evaluating the appropriate Notice plan. Joint Decl. ¶ 9. These key issues were to be heavily contested throughout the litigation. Joint Decl. ¶ 9. Defendant is represented by seasoned and competent class action attorneys who were, and remain, committed to contesting both merits and class certification issues absent settlement. Joint Decl. ¶ 9.

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 while also remaining committed to continue litigation rather than accept a settlement not in their best interests. *Id.* Judge Boylan (Ret.) actively participated in the settlement discussions and was instrumental in helping the Parties reach an acceptable compromise. *Id.*

In sum, 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. Joint Decl. ¶ 12. This resulted in the Agreement for which Preliminary Approval is respectfully requested.

C. Summary of the Settlement Terms

1. <u>The Settlement Class</u>

The Settlement Class is a Fed. R. Civ. P. 23(b)(3) class, defined as "all 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 Benefit of The Settlement Class

a. Common Settlement Fund

McCormick has agreed to a $3,000,000.00 common fund to pay: (1) Settlement Class Members who submit valid Claim Forms; (2) Class Notice and Settlement Administration costs; (3) an award of Attorneys' Fees and Expenses that the Court approves; (4) an Incentive Award that the Court approves; (5) and other costs necessary to effectuate the Agreement, including CAFA notice. Agreement 2.28.

b. Settlement Class Member Cash Recovery

Tier 1: Class Members with Proof of Purchase may seek reimbursement of $1.00 per unit bought, with no cap or limit. Agreement 4.2(d).

Tier 2: Class Members without Proof of Purchase may seek reimbursement of $1.00 per unit bought, up to a maximum recovery of 15 products (for $15.00). Agreement 4.2(d)

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. Agreement 4.4.

c. Distribution of Settlement Class Member Payments

The Settlement Administrator will begin paying timely, valid, and approved Claims via first-class mail or other means no later than sixty (60) calendar days after the Effective Date. Agreement 4.3.

d. Disposition of Residual Funds

If, after the calculation of all valid Initial Claim Amounts, Notice and Administration costs, Attorneys' Fees and Expenses, Incentive Awards, and any other costs specified by the Agreement, value remains in the Settlement Fund, it shall increase Settlement Class Members' relief for their Final Claim Amounts on a *pro rata* basis until the Residual Funds are depleted. Agreement 4.4.

It is the Parties' intent to distribute all Settlement Funds to Settlement Class Members. However, if there are any funds remaining in the Settlement Fund Balance, including any checks

that were not cashed, then the Settlement Administrator will distribute the balance to the following non-profit organization: Center for Science in the Public Interest. No funds will be returned to Defendant. Agreement 4.4.

e. Injunctive Relief

McCormick has agreed that, with respect to the Products' labeling and on its website, McCormick 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"). Agreement 4.5.

3. Releases

In exchange for the benefits conferred by the Agreement, all Settlement Class Members will be deemed to have released McCormick from the Released Claims relating to the Products that are the subject matter of the Action. Agreement VII.

4. The Notice Program

The Parties recommend Angeion Group, one of the leading class action settlement administration firms in the United States, as the Settlement Administrator. Agreement 5.1; Declaration of Steven Weisbrot of Angeion Group Re: Proposed Notice Program ("Weisbrot Decl."), ¶¶ 1–10. The Settlement Administrator will oversee the publication Notice Program, which is designed to provide the best notice practicable and is tailored to take advantage of the information McCormick has available about the Settlement Class. Weisbrot Decl. ¶ 11–13. The Notice Program is reasonably calculated to apprise Settlement Class members of the following through the Notice: (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 Settlement Agreement and other related documents and information. Agreement 5.2; Weisbrot Decl. ¶¶ 11-41. The Notice

and Notice Program constitute sufficient notice to all persons entitled to such notice, satisfying all applicable requirements of law, including Rule 23 and constitutional due process. Weisbrot Decl. ¶¶ 11-13.

The Notice Program is comprised of a targeted digital media campaign, including: (1) programmatic banner ads, press release, paid social media campaigns, paid search campaigns, and a custom claims stimulation package; (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 agrees to post or that the Court orders posted. Agreement 5.2; Weisbrot Decl. ¶¶ 11-41.

The Long Form Notice will describe 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 costs, and/or the Class Representative Service Award. Agreement, Ex. B attached thereto. Specifically, opt-outs and objections must be postmarked no later than the last day of the Opt-Out Period (no later than 21 days before the Final Approval Hearing). Agreement 6.2.2; 6.3.2.

The Settlement Administrator will also establish and maintain 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 Decl. ¶ 37.

The Settlement Administrator's responsibilities include, but are not limited to: (1) consulting on and designing the Class Notice, Summary Class Notice, and Claim Form; (2) disseminating the Class Notice, providing notice to each State and Federal official as required by, and pursuant to, the Class Action Fairness Act ("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.

5. Class Representative Service Award

Class Counsel will seek a Service Award of $5,000.00 for Plaintiff as Class Representative. Agreement 8.5. If the Court approves the award, the $5,000.00 will amount to 0.0016% of the Settlement Fund. The Service Award will be paid from the Settlement Fund. This award will compensate the Class Representative for her time and effort and for the risks she assumed in prosecuting the Action. Specifically, Plaintiff provided assistance that enabled Class Counsel to successfully prosecute the Action and reach the Settlement, including: (1) submitting to interviews with Class Counsel; (2) locating and forwarding documents and information to Class Counsel; (3) participating in conferences with Class Counsel; and (4) reviewing settlement documentation. Joint Decl. ¶ 13. In doing so, Plaintiff was integral to the case and Defendant does not object to Class Counsel's request for the Service Award. *Id.*

6. Attorneys' Fees and Costs

Class Counsel has not been paid for their extensive efforts or reimbursed for litigation costs. Class Counsel will request, and McCormick will not oppose, a combined award of attorneys' fees and costs of up to 33.33% of the Settlement Fund. Agreement 8.1. The Parties negotiated and reached an agreement regarding fees, costs, and expenses only 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. Decl. ¶ 14. Such an award is subject to this Court's approval and will serve to compensate for the time, risk, and expense Class Counsel incurred in pursuing claims for the Settlement Class.

III. ARGUMENT

A. Legal Standard for Preliminary Approval

Courts, including the Second Circuit, emphasize the "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores v. Visa U.S.A.*, 396 F.3d 96, 116 (2d Cir. 2005); *Ray v. 1650 Broadway Associates Inc.*, 2020 WL 5796203, at *3 (S.D.N.Y. Sept. 29, 2020) ("The parties and their counsel are in a unique position to assess the potential risks of litigation, and thus district courts often give weight to the fact that the parties have chosen to settle."). Accordingly, at the preliminary approval stage, the court "need only decide whether the terms of the Proposed Settlement are at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard." *Hill v. County of Montgomery*, 2020 WL 5531542, at *2 (N.D.N.Y. Sept. 15, 2020).

At the final approval stage, the following factors will weigh in favor of granting final approval in determining whether the settlement agreement is fair, reasonable, and adequate:

> (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, if required;
> (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.

Fed. R. Civ. P. 23(e)(2).

In assessing fairness, the court "examines both the negotiating process leading to the settlement, and the settlement's substantive terms." *In re Signet Jewelers Limited Securities Litig.*, No. 1:16-cv-06728-CM-SDA, 2020 WL 4196468, at *1 (S.D.N.Y. July 21, 2020) (citations omitted).

B. The Settlement Satisfies the Criteria for Preliminary Approval

The relevant factors weigh in favor of Preliminary Approval.

First, the Agreement is the product of good-faith, informed, and arm's length negotiations by competent counsel, reached in the absence of collusion, and with the assistance of an experienced and well-respected mediator. Joint Decl. ¶ 15. A review of the factors related to the fairness, adequacy, and reasonableness of the Agreement demonstrates that settlement warrants Preliminary Approval.

Any settlement requires the parties to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. Class Counsel believes that the claims asserted are meritorious and would prevail if this matter proceeded to trial. Joint Decl. ¶ 16. McCormick, on the other hand, contends that Plaintiff's claims are unfounded, denies any potential liability as well as Plaintiff's ability to certify a class, and up to the point of settlement stated a willingness to litigate those claims vigorously. Joint Decl. ¶ 16. Ultimately, the Parties concluded that, on balance, the benefits of settlement outweigh the risks and uncertainties of continued litigation, as well as the attendant time and expenses associated with contested class certification proceedings and possible interlocutory appellate review, completing merits discovery, pretrial motion practice, trial, and finally appellate review. Joint Decl. ¶ 16.

1. <u>This Settlement Is The Product of Good Faith, Informed, and Arm's Length Negotiations</u>

"In evaluating the procedural fairness of a proposed settlement, the court must determine whether the settlement was 'achieved through arms-length negotiations by counsel with the experience and ability to effectively represent the class's interests.'" *Massrre v. Mullooly, Jeffrey, Rooney & Flynn LLP*, 2020 WL 6321480, at *11 (E.D.N.Y. Aug. 28, 2020). Particularly, courts examine the negotiating process leading up to the settlement. *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir. 2001). A strong initial presumption of fairness attaches to the proposed settlement if, as here, the settlement is reached after there has been discovery obtained by experienced counsel and after arm's length negotiations. *Wal-Mart Stores, Inc.*, 396 F.3d at 116. Further, a neutral

mediator's involvement in settlement negotiations also lends to a finding that the Settlement is procedurally fair. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 35 (E.D.N.Y. 2019).

The Settlement is the result of intensive, arm's length negotiations between experienced attorneys familiar with the legal and factual issues of this Action, with the assistance of a highly respected retired judge who guided such negotiations without undue pressure or collusion. Joint Decl. ¶ 17. Furthermore, Class Counsel is particularly experienced in food labeling litigation, and settlement of nationwide consumer class action cases. Joint Decl. ¶ 17. Class Counsel thoroughly investigated and analyzed Plaintiff's claims and engaged in briefing on McCormick's motion to dismiss and FDA rulemaking, and engaged in significant data and damage analysis. Joint Decl. ¶ 17. Class Counsel was also well-positioned to evaluate Plaintiff's claims' strengths and weaknesses, and the appropriate basis upon which to settle them, by litigating similar claims in courts across the country. Joint Decl. ¶ 17. Thus, the settlement process was procedurally fair. *See Kirby v. FIC Restaurants, Inc.*, 2020 WL 3501398, at * 3 (N.D.N.Y. June 29, 2020) (settlement result of arm's length negotiations where attorneys were "well-versed in prosecuting wage and hour class and collective actions" and engaged a private mediator for a full-day mediation session).

2. <u>The Facts Support a Preliminary Determination That The Settlement Is Fair, Adequate, and Reasonable</u>

A preliminary review of the Settlement supports preliminary approval under Rule 23(e)(2), as amended effective December 1, 2018, and Second Circuit case law. As detailed below, the Settlement meets all of the Rule 23(e)(2) factors.

The Second Circuit has identified nine factors (the *Grinnell* factors) that should be considered in determining the substantive fairness of a proposed settlement:

> (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 the 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; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 454 (2d Cir. 1974), abrogated on other grounds by *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). While the *Grinnell* factors apply directly to final approval, these factors can also be considered a "useful guide" at the preliminary approval stage. *Am. Medical Ass'n v. United Healthcare Corp.,* 2009 WL 1437819, at *3-4 (S.D.N.Y. May 19, 2009). And even after Rule 23 was amended to enumerate additional factors to consider in evaluating a proposed settlement, "[t]he Advisory Committee Notes to the 2018 amendments indicate that the four new Rule 23 factors were intended to supplement, rather than displace the[] '*Grinnell*' factors." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019). *See also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. at 29. Importantly, "not every factor must weigh in favor of settlement, rather, the court should consider the totality of these factors in light of the particular circumstances." *Marroquin v. Champlain Valley Specialty of N.Y., Inc.*, 2016 WL 3406111, at *4 (N.D.N.Y. June 17, 2016) (citations omitted). The *Grinnell* factors weigh heavily in favor of Preliminary Approval.[2]

[2]. The sole *Grinnell* factor that does not tilt the scales in favor settlement is McCormick's ability to withstand a larger settlement; however, "this factor, standing alone, does not suggest that the settlement is unfair." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001) (citing *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 178 n. 9 (S.D.N.Y. 2000)).

a. The Risks of Establishing Liability and Damages Demonstrate That This Settlement Is Within the Range of Reasonableness in Light of All Attendant Risks of Litigation and Relative to The Best Possible Recovery

Courts typically analyze the final two factors together: the range of reasonableness of settlement in light of the best possible recovery, and the range of reasonableness of the settlement fund in light of all the attendant risks of litigation. *See e.g., Beebe v. V&J National Enterprises, LLC*, 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). "Determining whether a settlement is reasonable is not susceptible of a mathematical equation yielding a particularized sum." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 178 (S.D.N.Y. 2000) (internal quotation and citation omitted). Rather, 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). In making this determination, the court should compare the settlement amount with that of the best possible recovery in litigation. *Godson*, 328 F.R.D. at 58.

The Action challenges the labeling, marketing, and advertising of certain of McCormick's Products as "natural," seeking damages and injunctive relief. (ECF No. 1). The Settlement achieves both of Plaintiff's desired goals. Joint Decl. ¶ 18. This Agreement compensates class members for a significant proportion of their purchase price (approximately 47% based on the average purchase price of the Products) for each claim submitted for a Product purchased. Joint Decl. ¶ 18. Given the price premium damages model likely to be advanced by Plaintiff's Counsel at trial – a model which, based on Plaintiff's Counsel's investigation, estimated as10% - a 47% effective premium likely exceeds the individual relief that would be available to a class member at the time of trial. Joint Decl. ¶ 18. Moreover, there was a substantial risk that Plaintiff would not achieve such a result, or any recovery at all, given the various merits and class certification issues

presented. Joint Decl. ¶ 18. Prior to Settlement, McCormick sought dismissal. Although that motion was denied, in part, success on the merits is far from guaranteed. Joint Decl. ¶ 18. Thus, although Plaintiff believes she has a strong chance on the merits, Plaintiff could certainly fail to obtain class certification or lose at summary judgment or trial or on appeal. Joint Decl. ¶ 18.

Similar risk-reward evaluations have been found to "reasonably balance[] the damages potentially recoverable by the plaintiffs with the genuine risks of continued litigation." *Odom,* 275 F.R.D. at 412 (finding settlement amount that was approximately one-third of the total damages recoverable by plaintiffs if they prevailed fully to represent a reasonable compromise); *Beebe*, 2020 WL 2833009, at *7 (holding a "$2.35 million settlement is reasonable where the potential recovery is $14.8 million," especially when taking into consideration the risks of litigation). Ultimately, however, "the fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell,* 495 F.2d at 455. Even in theory, a settlement amounting "to a hundredth or even a thousandth part of a single percent of the potential recovery" is passable. *Id.* at 455 n.2.

The success of Plaintiff's claims in continued ligation turns on factual and legal questions that are certain to arise in the context class certification, summary judgment, and at trial, as they have in other similar cases. Joint Decl. ¶ 19. Moreover, the uncertainty of future FDA action presents a significant risk that could potentially bar Plaintiff's claims entirely. Joint Decl. ¶ 19. Under the circumstances, Plaintiff and Class Counsel appropriately determined that Settlement outweighs the gamble of continued litigation. Joint Decl. ¶ 19.

Moreover, even if Plaintiff prevailed at summary judgment or trial, any recovery could be delayed for years by appeals. "In assessing the adequacy of a settlement, a court must balance the benefits of a certain and immediate recovery against the inherent risks of litigation." *In re Med. X-Ray Film Antitrust Litig.,* 1998 WL 661515, at *11 (E.D.N.Y. Aug. 7, 1998). This guaranteed and

immediate recovery outweighs the consequential risks of continued litigation, and is particularly true given the small amount of damages typically available in consumer class action litigation. *See Garland v. Cohen & Krassner*, 2011 WL 6010211, at *7 (E.D.N.Y. Nov. 29, 2011). The Settlement provides substantial relief without further delay.

Further, as discussed above, the Settlement is the product of arm's-length negotiations conducted by the Parties' experienced counsel with the assistance of a well-respected mediator and additional negotiation thereafter. As a result, the Parties have reached a Settlement that Class Counsel believes to be fair, reasonable, and in the Settlement Class's best interests. Class Counsel's assessment in this regard is entitled to considerable deference. The $3,000,000 common fund, combined with injunctive relief, is more than fair and reasonable in light of McCormick's defenses, and the challenging and unpredictable litigation path in the absence of settlement.

b. The Expense, Complexity, and Likely Duration of Further Litigation

The proposed Settlement provides Settlement Class Members with a substantial, guaranteed, and immediate recovery that would typically take several years of continued litigation and significant expense to achieve. In fact, in this case, the litigation has been pending five years. "[M]ost class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184-85 (W.D.N.Y. 2005). Indeed, where settlements of such complex actions are favored by courts, this factor "weighs heavily" in the court's analysis in evaluating the reasonableness of a class action settlement. *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d at 174.

Recovery by any means other than Settlement would require additional years of litigation here, and likely, in the Second Circuit. This delay would inevitably force the Settlement Class to wait longer for potential recovery. At a minimum, Class Counsel would anticipate continued discovery disputes regarding McCormick's electronically stored information, ongoing document review, further involvement with a damages expert to analyze and calculate class-wide damages,

and several depositions relating to McCormick's practices, policies and practices. The anticipated costs associated with litigation tasks of this nature weigh in favor of finding the Agreement is presumptively fair. *See Frank,* 228 F.R.D. at 185; *see also Odom,* 275 F.R.D. at 410.

Although Plaintiff is confident that the Action has merit and would ultimately result in recovery for the class, the aforementioned risks of extended litigation and its given uncertainties, such as failing to achieve class certification before trial on the merits, are very real. *See Godson,* 328 F.R.D. at 55 (acknowledging motions and the potential for subsequent appeals will produce delay of resolution and undermine value of potential recovery); *Garland,* 2011 WL 6010211, at *7 ("If the Settlement is not approved, protracted discovery and litigation will likely ensue."). Thus, the proposed Settlement is the best vehicle for the Settlement Class to promptly and efficiently receive the relief to which they believe they are entitled.

c. The Risk of Maintaining Class Action Status Throughout Trial

It is uncertain that this Action would be certified in the absence of settlement. If the Settlement were disapproved, McCormick would oppose class certification, creating an "appreciable risk to the class members' potential for recovery and even if plaintiff[] could obtain class certification, there could be a risk of decertification at a later stage." *Godson,* 328 F.R.D. at 57 (citations and internal quotation marks omitted). And given McCormick's defense of this Action thus far, McCormick would also likely appeal any grant of class certification. Indeed, while Plaintiff might prevail, "the risk that the case might not be certified is not illusory and weighs in favor of Class Settlement." *Frank,* 228 F.R.D. at 186.

d. The Extent of Discovery Completed and The Stage of The Proceedings

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). Rather, it inquires "whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and

the value of plaintiff's causes of action of purposes of settlement." *In re Bear Stearns Co. Sec. Derivative and ERISA Litig.,* 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012). Indeed, this factor is satisfied even where only informal discovery occurred. *See In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d at 176.

Here, Class Counsel devoted substantial time and resources to investigating, litigating, and resolving this case. Plaintiff settled the Action with the benefit of Class Counsel's years of experience litigating cases like this one. Due to their extensive experience, the Parties' counsel are well aware of the relative strengths and weaknesses of their respective cases, informing the negotiations between counsel. They confidently evaluated the likelihood of success at class certification and trial, the risks of continued litigation, and the benefits of settlement. Discovery to date enabled Class Counsel to understand Defendant's potential exposure and the customer profile of the Class and generated sufficient data to analyze a viable class wide damages calculation. Thus, "while this case is still in the relatively early stages of discovery, the information exchanged and analyzed has been sufficient to" inform the negotiations between counsel and to allow them to evaluate, with confidence, the strengths and deficiencies of Plaintiff's claims, and to craft a fair settlement structure for the Class. *Frank,* 228 F.R.D. at 185; *Odom*, 275 F.R.D. at 411.

e. The Effectiveness of Distributing Relief, The Release and Equitable Treatment of Class Members

Various provisions regarding the adequacy of the Settlement's relief under Fed. R. Civ. P. 23(e)(2)(C) also favor preliminary approval. For example, Rule 23(e)(2)(C)(ii) examines "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." The Settlement'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. Further, 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. Agreement, 4.2. Pro rata allocation and distribution plans have been found to satisfy the Rule. *See e.g., In re Payment Card*, 330 F.R.D. at 41 (settlement that provided each claimant with pro rata share of settlement fund based on interchange fees paid attributable to their transactions to be an effective form of relief distribution); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 519 (E.D.N.Y. 2003) (fair and reasonable allocation plan where class members received a monetary award "directly proportional to their debit and credit purchase volume").

Rule 23(e)(2)(D) asks whether class members are treated equally, and such consideration "could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23, Advisory Committee's note on 2018 amendment. Here, 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*, 414 F. Supp. 3d at 698-99; *In re Payment Card*, 330 F.R.D. at 47. Further, because each Settlement Class Member will be required to give the same Releases, which uniformly releases McCormick from all claims relating to the subject matter of the Action during the Class Period, and does not affect the apportionment of relief to Settlement Class Members, this factor favors preliminary approval. *In re GSE Bonds*, 414 F. Supp. 3d at 699.

f. The Terms of Any Proposed Award of Attorneys' Fees

"Federal courts have long recognized that a lawyer whose efforts create a common fund may recover a reasonable fee from the fund as a whole." *Kommer v. Ford Motor Co.*, 2020 WL 7356715, at *5 (N.D.N.Y. Dec. 15, 2020). Under the Agreement, Class Counsel are entitled to request, and McCormick will not oppose, a combined attorneys' fee and cost award of up to

33.33% of the Settlement Fund. Agreement, 8.1. This requested fee award is well within the accepted range in this Circuit. *See Stefaniak v. HSBC Bank U.S.A., N.A.*, 2008 WL 7630102, at * (W.D.N.Y. June 28, 2008) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."). However, such award remains subject to this Court's approval and the Court should reserve a full analysis of this factor for the final approval stage. *See Kirby,* 2020 WL 3501398, at * 4.

In light of each of these factors, this Court should find that the Settlement warrants Preliminary Approval.

C. Certification of the Settlement Class Is Appropriate

Plaintiff respectfully requests, and Defendant does not oppose (for settlement purposes only), that the Court certify the Settlement Class. In approving provisional class certification, "because the litigation is being settled, rather than litigated, the Court need not consider the manageability issues that litigation would present." *Berkson v. Gogo LLC,* 147 F. Supp. 3d 123, 159 (E.D.N.Y. 2015); *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 620 (1997). Further, applying the December 2018 amendments to Rule 23(e)(1), the Court should conclude that it is likely to certify the Settlement Class and approve the Settlement as fair, adequate, and reasonable. Certification will allow notice of the proposed Settlement to issue to the Settlement Class to inform them of the Settlement's existence and terms; of their right to be heard on its fairness; of their right to opt-out and/or object; and of the date, time, and place of the Final Approval Hearing. *See Manual for Compl. Litig.,* §§ 21.632, 21.633.

Certification under Rule 23(a) requires that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the Settlement Class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the Settlement Class; and (4) the representative parties will fairly and adequately protect the interests of the Settlement Class. Rule 23(b)(3) certification is appropriate if (1) questions of law or fact

common to the class members predominate over individual issues of law or fact; and (2) if a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Numerosity. Numerosity is readily satisfied here because the Settlement Class consists of tens of thousands of members, and joinder of all such persons would be impracticable. *See* Fed. R. Civ. P. 23(a)(1); *see also Consol. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir. 1995) (noting that "numerosity is presumed at a level of 40 members"); *In re Beacon Assocs. Litig.,* 282 F.R.D. 315, 339 (S.D.N.Y. 2012) ("Because joinder of the thousands of members of the class would obviously be impracticable, we conclude that numerosity is satisfied.").

Commonality. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and the plaintiff's common contention "must be of such a nature that it is capable of class wide resolution — which means 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, 389-90 (2011) (citation omitted). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Johnson v. Nextel Commc'ns Inc.,* 780 F.3d 128, 137 (2d Cir. 2015). Here, commonality is satisfied. There are multiple questions of law and fact — centering on McCormick's alleged misleading labeling practices — that are common to the Settlement Class, alleged to have injured all Settlement Class Members in the same way, and that generate common answers central to the viability of the claims were the Action proceed to trial.

The ultimate common jury question will be whether reasonable consumers are likely to be deceived by Defendant's natural claims. Claims for consumer deception based on uniform labels are well-suited for class certification. New York courts and across the country routinely certify classes based on similar deceptive advertising claims. *See In RE: Kind LLC "Healthy and Natural" Litigation*, Case No.: 1:15-md-02645-WJP (S.D.N.Y. March 24, 2021) (granting contested class

certification on "healthy" and "natural" labels); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397 (S.D.N.Y. 2015) (labels on grass seed); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 564 (S.D.N.Y. 2014) (labels on olive oil); *Rikos v. Procter & Gamble Co.*, No. 14-4088, 2015 WL 4978712 (6th Cir. Aug. 20, 2015) (affirming certification relating to labels on probiotic nutritional supplement); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919 (C.D. Cal. 2015) (labels on cooking oil); *Brown v. Hain Celestial Grp., Inc.*, No. 11-03082, 2014 WL 6483216, at *2 (N.D. Cal. Nov. 18, 2014) (organic labeling for products that "contain insufficient organic content to lawfully make such claims"); *Guido v. L'Oreal, USA, Inc.*, No. 11-01067, 2014 WL 6603730, at *19 (C.D. Cal. July 24, 2014) (certifying a class of California consumers when L'Oreal failed to label its serum with a flammability warning); *Guido v. L'Oreal, USA, Inc.*, No. 11-01067, 2013 WL 3353857, at *19 (C.D. Cal. July 1, 2013) (same for New York consumers).

Typicality. Since the typicality requirement "tend[s] to merge" with that of commonality, *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982), for similar reasons, Plaintiff also satisfies Rule 23(a)(3) typicality. Typicality "is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 252 (2d Cir. 2011) (citation omitted). Importantly, this factor "does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Hill*, 2020 WL 5531542, at *3. Plaintiff's claims are typical of the absent 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.

Adequacy. Generally, the adequacy factor inquires "whether: 1) plaintiff's interests are antagonistic to the interest of the other members of the class, and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). Plaintiff's interests are coextensive with, not antagonistic to, the Settlement Class's interests. Plaintiff and the absent Settlement Class Members have the same interests in the relief afforded by the Settlement, and the absent Settlement Class Members have no diverging interests. Joint Decl. ¶ 20. Further, Plaintiff is represented by qualified and competent counsel who have extensive experience and expertise prosecuting complex class actions, including consumer actions similar to the instant case. Joint Decl. ¶ 20. Class Counsel has devoted substantial time and resources to this Action, and will continue to vigorously protect the interests of the Settlement Class. Joint Decl. ¶ 20.

Predominance. Certification of the Settlement Class is also appropriate because the questions of law or fact common to Settlement Class members predominate over any questions affecting only individual members. *See* Fed. R. Civ. P. 23(b)(3). Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation" and is generally "satisfied when (1) resolution of any material legal or factual questions can be achieved through generalized proof, and (2) these common issues are more substantial than the issues subject only to individualized proof." *Hill*, 2020 WL 5531542, at *4. This is satisfied here because liability questions common to all Settlement Class Members substantially outweigh any possible issues that are individual to each Settlement Class Member. Here, each Settlement Class Member was subjected to the same Product labels purporting to be "natural" during the Class Period, and that contained the same or substantially similar ingredients that Plaintiff contends are not "natural." Joint Decl. ¶ 20. The answer to the question of whether the "labels on a product are accurate is binary" and is the "same for each [person] who purchased" the Products." *In RE: Kind*, at p. 23. Likewise, "the question of materiality predominates" because "a determination that the labels are

materially misleading would be the same for the entire class." *Id*. (citing *Amgen Inc. v. Conn. Ret. Plans and Tr. Funds*, 568 U.S. 455, 468 (2013)).

Superiority. As far as Plaintiff's Counsel is aware, there are no pending related cases. Decl. ¶ 21. *See* W.D.N.Y. Local Rule 23(d)(4). Moreover, the Settlement will resolve thousands of claims in one action; this is superior to individual lawsuits because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3).

For each of these reasons, the Court should certify the Settlement Class.

D. The Proposed Notice Program Is Constitutionally Sound

Rule 23(e)(1)(B) requires that notice of the Settlement be directed "in a reasonable manner to all class members who would be bound by the proposal[.]" In comporting with the Due Process Clause and the Federal Rules, "[t]here are no rigid rules," rather, "the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart Stores, Inc.*, 396 F.3d at 113-14 (citations omitted). A proposed notice plan typically satisfies this standard where it provides class members information regarding:

> (1) the nature of the litigation and claims asserted; (2) the preliminarily approved Settlement Agreement and its terms, including the formula used to calculate individual settlement payments; (3) the claim form; (4) the options available to each member of the class or collective; (5) the consequences of each option; (6) how they may exercise their options; (7) the deadlines they have to make their decisions; and (8) the final settlement fairness hearing date.

Kirby, 2020 WL 3501398, at *3.

The Notice Program satisfies all of these requirements. It is designed to reach a high percentage of the Settlement Class through a comprehensive digital media campaign and exceeds the requirements of constitutional due process. Fed. R. Civ. P. 23(c)(2)(B) and 23(e)(1). Thus, Plaintiff respectfully requests that the Court approve the Notice Program and the proposed Notice and Claim form attached to the Agreement as Exhibits A and B.

E. Notice Is Satisfied Pursuant to the Class Action Fairness Act ("CAFA")

CAFA requires that settling defendants give notice of a proposed class action settlement to appropriate state and federal officials, and such notice must supply all of the information and documents set forth under 28 U.S.C. § 1715(b)(1)-(8). McCormick, through the Settlement Administrator, will serve CAFA Notice within the proper period. Agreement 5.3.

F. Plaintiff's Counsel Should Be Appointed Class Counsel

Under Rule 23, "a court that certifies a class must appoint class counsel . . . [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). The Court must consider counsel's work in identifying or investigating potential claims; experience in handling class actions or other complex litigation, and the types of claims asserted in the case; knowledge of the applicable law; and resources committed to represent the class. Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

As illustrated above, Class Counsel diligently investigated and litigated Plaintiff's claims and the feasibility of class certification, and have and will continue to devote substantial time and resources to this litigation. Class Counsel have extensive experience with similar class action litigation and have been appointed class counsel in many class actions, including "natural" food litigation cases like the instant case. Decl. ¶¶ 3, 4. As such, Class Counsel have in-depth knowledge of the laws applicable to the Settlement Class members' claims and class certification. Accordingly, the Court should appoint Plaintiff's counsel to serve as Class Counsel for the proposed Settlement Class pursuant to Rule 23(g).

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court: (1) grant Preliminary Approval of Class Action Settlement; (2) certify for settlement purposes only the proposed Settlement Class pursuant to Federal Rule of Civil Procedure 23; (3) appoint Plaintiff as Class Representative; (4) approve the Notice Program set forth in the Agreement and approve the form and content of the Notice and Claim Form, attached to the Agreement as Exhibits A and B; (5) approve the opt-out and objection procedures set forth in the Agreement; (6) stay the Action against McCormick pending Final Approval of Settlement; (7) appoint Reese, LLP and Eggnatz Pascucci, P.A. as Class Counsel; and (8) schedule a Final Approval Hearing no sooner than 110 days after the order granting Preliminary Approval. For the Court's convenience, Plaintiff attaches hereto a Proposed Order Preliminarily Approving Class Action Settlement and Certifying Settlement Class and setting forth the various applicable deadlines referenced herein and outlined in the Agreement.

Dated: May 7, 2021

Respectfully submitted,

By: */s/ Michael R. Reese*

REESE LLP
Michael R. Reese
mreese@reesellp.com
100 West 93rd Street, 16th Floor
New York, New York 10025
Telephone: (212) 643-0500
Facsimile: (212) 253-4272

EGGNATZ PASCUCCI, P.A.
Joshua H. Eggnatz
jeggnatz@justiceearned.com
7450 Griffin Road, Suite 230
Davie, Florida 33314
Telephone: (954) 889-3359
Facsimile: (954) 889-5913

Counsel to Plaintiff and Proposed Co-Lead Class Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **May 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*
REESE LLP

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

JOINT DECLARATION OF CLASS COUNSEL MICHAEL REESE AND JOSHUA H. EGGNATZ IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

We, Michael Reese and Joshua H. Eggnatz declare as follows:

1. We are counsel of record for Plaintiff and the proposed Class Counsel for the Settlement Class in the above-captioned matter. We submit this declaration in support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement. Unless otherwise noted, we have personal knowledge of the facts set forth in this declaration and could and would testify competently to them if called upon to do so.

2. After several months of arms-length negotiation and settlement discussions, including a full-day mediation session with the Honorable Arthur J. Boylan (Ret.), Plaintiff, Class Counsel, and McCormick entered into a Settlement Agreement in this matter, a true and correct copy of which has been filed with the Court.[1]

3. The firm resume of Reese LLP is attached as *Exhibit 1* to this declaration.

4. The firm resume of Eggnatz Pascucci P.A. is attached as *Exhibit 2* to this declaration.

1. The capitalized terms used herein are defined in and have the same meaning as used in the Settlement Agreement unless otherwise stated.

5. As can be seen from these resumes, Class Counsel have substantial experience in the litigation, certification, and settlement of class action cases, specifically in the food labeling context. McCormick's counsel is also highly experienced in this type of litigation. It is thus our considered opinion that counsel for each side have fully evaluated the strengths, weaknesses, and equities of the Parties' respective positions and believe that the proposed settlement fairly resolves their respective differences.

6. Prior to filing, Class Counsel thoroughly investigated the viability of Plaintiff's claims.

7. Before entering into the Agreement, Class Counsel conducted an extensive and thorough examination, investigation, and evaluation of the relevant law, facts, and allegations to assess the merits of the claims, and potential defenses.

8. As part of that investigation, as well as through formal and informal discovery, Class Counsel obtained documents and extensive information from Defendant through confidential, informal discovery, including business records concerning the Products' marketing, label design, formulation, sales and pricing, and distribution.

9. Class Counsel expended significant resources researching and developing the legal claims at issue. Indeed, Class Counsel is familiar with the instant claims through their extensive history of litigating and resolving other food labeling claims with similar factual and legal issues to the case at bar. Class Counsel was able to leverage this experience in understanding the damages at issue, and what information is important in determining class membership and evaluating the appropriate Notice plan. These key issues were to be heavily contested throughout the litigation. Defendant is represented by seasoned and competent class action attorneys who were, and remain, committed to contesting both merits and class certification issues absent settlement.

10. Class Counsel spent a significant amount of time analyzing data regarding McCormick's sales and distribution of the Products. This data and analysis evaluating potential damages at issue was used in preparation for the Parties' meditation and to further drive the viability of resolution.

11. Class Counsel mediated fully informed of the merits of Settlement Class Members' claims and negotiated the proposed Settlement while zealously advancing the position of Plaintiff and the Settlement Class members. All the while, Class Counsel remained fully prepared to continue litigation rather than to accept a settlement that was not in their best interests. Judge Arthur J. Boylan (Ret.) actively participated as the mediator in the settlement discussions and was instrumental in helping the Parties reach an acceptable compromise. The Parties' negotiations were principled, with each side basing their offers and counteroffers on the facts and law.

12. In sum, prior to negotiating the settlement, Class Counsel spent significant time conferring with Defendant's Counsel, investigating facts, researching the law, preparing a well-pleaded complaint, engaging in contested motion practice, engaging in discovery, and reviewing important documents and data.

13. Likewise, Plaintiff provided assistance that enabled Class Counsel to successfully prosecute the Action and reach the Settlement, including: (1) submitting to interviews with Class Counsel; (2) locating and forwarding documents and information to Class Counsel; (3) participating in conferences with Class Counsel; and (4) reviewing settlement documentation. In doing so, Plaintiff was integral to the case and Defendant does not object to Class Counsel's request for the Service Award.

14. The Parties negotiated and reached an agreement regarding fees, costs, and expenses only 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.

15. The Agreement was reached in the absence of collusion, and is the product of good-faith, informed, and arm's length negotiations by competent counsel and with the assistance of an experienced and well-respected mediator.

16. While, Class Counsel believes that the claims asserted are meritorious and would prevail if this matter proceeded to trial, McCormick contends that Plaintiff's claims are unfounded, denies any potential liability as well as Plaintiff's ability to certify a class, and up to the point of

settlement stated a willingness to litigate those claims vigorously. Given the risks, uncertainties, and litigation burdens, McCormick agreed to the Agreement terms.

17. The settlement is the result of intensive, arm's length negotiations between experienced attorneys familiar with the legal and factual issues of this Action, with the assistance of a highly respected retired federal magistrate judge – the Honorable Arthur J. Boylan (Ret.) - who guided such negotiations without undue pressure or collusion. Furthermore, Class Counsel is particularly experienced in food labeling litigation, and settlement of nationwide consumer class action cases. Class Counsel thoroughly investigated and analyzed Plaintiff's claims and engaged in briefing on McCormick's motion to dismiss and FDA rulemaking, and engaged in significant data and damage analysis. Class Counsel was also well-positioned to evaluate Plaintiff's claims' strengths and weaknesses, and the appropriate basis upon which to settle them, by litigating similar claims in courts across the country.

18. The settlement reached achieved both of Plaintiff's desired goals. This Agreement compensates class members for significant premium of their purchase price (approximately 47% based on the average purchase price of the Products) for each claim submitted for a Product purchased. Given the price premium damages model likely to be advanced and accepted at trial (which Class Counsel's investigation determined to be approximately 10%), a 47% premium likely exceeds the individual relief that would be available to a class member at the time of trial. Moreover, there was a substantial risk that Plaintiff would not achieve such a result, or any recovery at all, given the various merits and class certification issues presented. Prior to Settlement, McCormick sought dismissal. Although that motion was denied, in part, success on the merits is far from guaranteed. Thus, although Plaintiff believes she has a strong chance on the merits, Plaintiff could certainly fail to obtain class certification or lose at summary judgment or trial or on appeal.

19. The success of Plaintiff's claims in continued ligation turns on factual and legal questions that are certain to arise in the context class certification, summary judgment, and at trial, as they have in other similar cases. Moreover, the uncertainty of future FDA action presents a

significant risk that could potentially bar Plaintiff's claims entirely. Under the circumstances, Plaintiff and Class Counsel appropriately determined that Settlement outweighs the gamble of continued litigation.

20. Plaintiff's interests are coextensive with, not antagonistic to, the Settlement Class's interests. Plaintiff and the absent Settlement Class Members have the same interests in the relief afforded by the Settlement, and the absent Settlement Class Members have no diverging interests. Each Settlement Class Member was subjected to the same Product labels purporting to be "natural" during the Class Period, and that contained the same or substantially similar ingredients that Plaintiff contends are not "natural." Further, Plaintiff is represented by qualified and competent counsel who have extensive experience and expertise prosecuting complex class actions, including consumer actions similar to the instant case. Class Counsel has devoted substantial time and resources to this Action, and will continue to vigorously protect the interests of the Settlement Class.

21. As far as Plaintiff's Counsel is aware, there are no pending related cases.

22. In summary, this Action was litigated and contested prior to negotiating the Settlement.

23. With the Court's approval, the Settlement Administrator will oversee the Notice Program and Settlement Administration. The Notice Program is designed to provide the best notice practicable and is tailored to take advantage of the information McCormick has available about the Settlement Class. The Notice Program is reasonably calculated to apprise Settlement Class members of: the material Settlement terms; a date by which Settlement Class members may exclude themselves from the Settlement Class; a date by which Settlement Class Members may object to the Settlement; the Final Approval Hearing date; and the Settlement Website address where the Settlement Class may access the Agreement and other related documents. The Notice Program constitutes sufficient notice to all persons entitled to notice. The Notice Program satisfies all applicable requirements of law, including, but not limited to, Federal Rule of Civil Procedure 23 and constitutional due process.

24. As part of the Settlement, McCormick has agreed not to oppose Plaintiff's request for a Service Award of up to $5,000.00, which will be formally requested when Final Approval of the Settlement is sought. The Service Award will compensate the Class Representative for her time and effort and for the risks they assumed in prosecuting the Action.

25. McCormick has also agreed not to oppose Class Counsel's request for attorneys' fees and costs of up to 33.33% of the Settlement Fund. Class Counsel will seek no more than 33.33% of the Settlement Fund. Class Counsel will formally request attorneys' fees when Final Approval of the Settlement is sought. Class Counsel has not been paid anything to date for their extensive efforts or reimbursed for litigation costs and expenses. The parties did not discuss attorneys' fees and costs or any potential Service Award until they first agreed on the material terms of the Settlement, including the definition of the Settlement Class, class benefits, and scope of relief.

I declare under penalty of perjury that the foregoing is true of my own personal knowledge. Executed in New York, New York. this 7th day of May, 2021.

/s/ Michael Reese
MICHAEL REESE

I declare under penalty of perjury that the foregoing is true of my own personal knowledge. Executed in Davie, Florida this 7th day of May, 2021.

/s/ Joshua H. Eggnatz
JOSHUA H. EGGNATZ

EXHIBIT 1

REESE LLP

Reese LLP represents consumers in a wide array of class action litigation throughout the nation. The attorneys of Reese LLP are skilled litigators with years of experience in federal and state courts. Reese LLP is based in New York, New York with offices also in California.

Recent and current cases litigated by the attorneys of Reese LLP on behalf of consumers include the following:

The Praxis Project, Pastor William Lamar and Pastor Delman Coates v. The Coca-Cola Co., case no. 2017 CA0040801-B (Superior Court of the District of Columbia)(consumer action against Coca-Cola for misrepresentations to minority communities in effort to discredit scientific link between sugar sweetened beverages and diabetes and other adverse health effects); *Hasemann v. Gerber Products Co.*, case no. 15-cv-02995-MKB-RER (E.D.N.Y.)(case involving misrepresentation of health benefits of baby formula in violation of New York consumer protection laws); *Worth v. CVS Pharmacy, Inc.*, case no. 16-cv-00498 (E.D.N.Y.); (E.D.N.Y.)(class action for alleged misrepresentations regarding health benefits of dietary supplement); *Roper v. Big Heart Pet Brands, Inc.*, case no. 19-cv-00406-DAD (E.D. Cal.)(class action regarding pet food); *Ackerman v. The Coca-Cola Co.*, 09-CV-0395 (JG) (RML) (E.D.N.Y.)(class action for violation of California and New York's consumer protection laws pertaining to health beverages); *Rapaport-Hecht v. Seventh Generation, Inc.*, 14-cv-9087-KMK (S.D.N.Y.)(class action for violation of California and New York's consumer protection laws pertaining to personal care products); *Berkson v. GoGo, LLC,* 14-cv-1199-JWB-LW (E.D.N.Y.)(class action regarding improper automatic renewal clauses); *Chin v. RCN Corporation*, 08-cv-7349 RJS (S.D.N.Y.)(class action for violation of Virginia's consumer protection law by I.S.P. throttling consumers' use of internet); *Bodoin v. Impeccable L.L.C.*, Index. No. 601801/08 (N.Y. Sup. Ct.)(individual action for conspiracy and fraud); *Young v. Wells Fargo & Co.*, 08-CV-507 (S.D. Iowa)(class action for violation of the RICO Act pertaining to mortgage related fees); *Murphy v. DirecTV, Inc.*, 07-CV-06545 FMC (C.D. Cal.)(class action for violation of California's consumer protection laws); *Bain v. Silver Point Capital Partnership LLP,* Index No. 114284/06 (N.Y. Sup. Ct.)(individual action for breach of contract and fraud); *Siemers v. Wells Fargo & Co.*, C-05-4518 WHA (N.D. Cal.)(class action for violation of § 10(b) of the Securities Exchange Act of 1934 pertaining to improper mutual fund fees); *Dover Capital Ltd. v. Galvex Estonia OU*, Index No. 113485/06 (N.Y. Sup. Ct.)(individual action for breach of contract involving an Eastern European steel company); *All-Star Carts and Vehicles Inc. v. BFI Canada Income Fund*, 08-CV-1816 LDW (E.D.N.Y.)(class action for violation of the Sherman Antitrust Act pertaining to waste hauling services for small businesses on Long Island); *Petlack v. S.C. Johnson & Son, Inc.*, 08-CV-00820 CNC (E.D. Wisconsin)(class action for violation of Wisconsin consumer protection law pertaining to environmental benefits of household cleaning products); *Wong v. Alacer Corp.*, (San Francisco Superior Court)(class action for violation of California's consumer protection laws pertaining to deceptive representations regarding health benefits of dietary supplement's ability to improve immune system); *Howerton v. Cargill, Inc.* (D. Hawaii)(class action for violation of various consumer protection laws regarding sugar substitute); *Yoo v. Wendy's International, Inc.*, 07-CV-04515 FMC (C.D. Cal.)(class action for violation of California's consumer protection laws pertaining to adverse health effects of partially hydrogenated oils in popular food products).

The Attorneys of Reese LLP

Michael R. Reese

Mr. Reese litigates consumer protection and antitrust cases as class actions and on behalf of individual clients. Prior to entering private practice in 2000, Mr. Reese served as an assistant district attorney at the Manhattan District Attorney's Office where he served as a trial attorney prosecuting both violent and white-collar crime.

Achievements by Mr. Reese on behalf of consumers span a wide array of actions. For example, in *Yoo v. Wendy's International Inc.*, Mr. Reese was appointed class counsel by the court and commended on achieving a settlement that eliminated trans-fat from a popular food source. *See Yoo v. Wendy's Int'l Inc.*, No. 07-CV-04515-FMC (JCx) (C.D. Cal. 2007) (stating that counsel "***has conducted the litigation and achieved the Settlement with skill, perseverance and diligent advocacy***"). In *Chin v. RCN Corporation*, Mr. Reese was appointed class counsel and commended by the court for stopping RCN's practice of throttling its Internet customers through adverse network management practices. *See Chin v. RCN Corp.*, No. 08-CV-7349(RJS)(KNF), 2010 WL 3958794, 2010 U.S. Dist. LEXIS 96302 (S.D.N.Y. Sept. 8, 2010) (stating that "***class counsel is qualified, experienced, and able to conduct the litigation***").

Victories by Mr. Reese and his firm include a $6.1 million class action settlement in *Howerton v. Cargill, Inc.* (D. Hawaii) for consumers of Truvia branded sweetener; a $6.4 million class action settlement in the matter of *Wong v. Alacer Corp.* (S.F. Superior Court) for consumers of Emergen-C branded dietary supplement; and, a $25 million dollar settlement for mortgagees in *Huyer v. Wells Fargo & Co.* (S.D. Iowa).

Mr. Reese and his firm are frequently appointed as co-lead counsel in food related multi-district litigations, including, but not limited to: *In re Vitaminwater Sales and Marketing Practices Litigation*, case no. 11-md-2215-DLI-RML (E.D.N.Y.); *In re Frito-Lay N.A. "All-Natural" Sales & Marketing Litigation*, case no. 12-md-02413-RRM-RLM (E.D.N.Y.); and, *In re Hill's Pet Nutrition, Inc. Dog Food Products Liability Litig.*, case no. 19-md-2887-JAR-TT (D. Kansas).

Mr. Reese is a frequent lecturer and author on issues of class actions and food law. Mr. Reese co-hosts an annual two day food law conference with Professor Michael Roberts of UCLA; presents at the annual conference of the Consumer Brands Association (formerly known as the Grocery Manufacturers' Association); presented at Union Internationale des Advocats Annual Congress in Porto, Portugal. Recent articles on food law and class actions appear in publications by the American Bar Association and the Union Internationale des Advocats.

Mr. Reese is also the chairperson of the Cambridge Forum Conference on Food Fraud and is also an executive committee member of the Plaintiffs' Class Action Roundtable, where he lectures on an annual basis on issues related to class actions.

Mr. Reese is also an adjunct professor at Brooklyn Law School where he teaches on class actions as well as food law.

Mr. Reese also is on the advisory boards for the University of California, Los Angeles School of Law Resnick Center for Food Law and Policy and Wellness in the Schools in New York, New York.

Mr. Reese is a member of the state bars of New York and California as well as numerous federal district and appellate courts. Mr. Reese received his juris doctorate from the University of Virginia in 1996 and his bachelor's degree from New College in 1993.

Carlos F. Ramirez

Mr. Ramirez is based in New York, and he focuses his practice on the litigation of consumer class actions. Prior to entering private practice in 2001, Mr. Ramirez served as an Assistant District Attorney at the Manhattan District Attorney's Office where he served as a trial attorney prosecuting both violent and white-collar crimes.

Previous and current consumer fraud class actions litigated by Mr. Ramirez include *Coe v. General Mills, Inc.*, No. 15-cv-5112-TEH (N.D. Cal.) (involving false advertisement claims relating to the Cheerios Protein breakfast cereal); *In re Santa Fe Natural Tobacco Company Marketing & Sales Practices Litigation*, 16-md-2695-JB/LF (D.N.M.)(involving the deceptive marketing of cigarettes as "natural" and "additive free"); *Lamar v. The Coca-Cola Company, et al.*, No. 17-CA-4801 (D.C. Superior Ct.) (involving the deceptive marketing of sugar drinks as safe for health); and *Hasemann v. Gerber Products Co.*, case no. 15-cv-02995-MKB-RER (E.D.N.Y.)(case involving misrepresentation of health benefits of baby formula in violation of New York consumer protection laws).

Mr. Ramirez is a member of the state bars of New York and New Jersey. He is also a member of the bars of the U.S. District Courts for the Eastern District of New York and Southern District of New York. Mr. Ramirez received his juris doctorate from the Fordham University School of Law in 1997 and his bachelor's degree from CUNY-Joh Jay College in 1994.

Sue J. Nam

Ms. Nam is based in New York where she focuses on consumer class actions.

Prior to joining the firm, Ms. Nam was the General Counsel for NexCen Brands, Inc., a publicly traded company that owned a portfolio of consumer brands in food, fashion and homeware.

Previously, Ms. Nam was Intellectual Property Counsel and Assistant Corporate Secretary at Prudential Financial, Inc., and she was an associate specializing in intellectual property and litigation at the law firms of Brobeck Phleger & Harrison LLP in San Francisco, California and Gibson Dunn & Crutcher LLP in New York, New York.

Ms. Nam clerked for the Second Circuit prior to joining private practice.

Ms. Nam received her juris doctorate from Yale Law School in 1994. She received a bachelor's degree with distinction from Northwestern University in 1991.

George V. Granade II

Mr. Granade is a partner at Reese LLP based in Los Angeles, California, where he focuses on consumer class actions. Cases Mr. Granade has worked on include:

- *Barron v. Snyder's-Lance, Inc.*, No. 0:13-cv-62496-JAL (S.D. Fla.) (involving "Snyder's," "Cape Cod," "EatSmart," and "Padrinos" brand food products labeled as "natural" and allegedly containing genetically-modified organisms and other synthetic ingredients);

- *In re: Frito-Lay North America, Inc. "All Natural" Litigation*, No. 1:12-md-02413-RRM-RLM (E.D.N.Y.) (involving "SunChips," "Tostitos," and "Bean Dip" products labeled as "natural" and allegedly containing genetically-modified organisms); and

- *Martin v. Cargill, Inc.*, No. 0:13-cv-02563-RHK-JJG (D. Minn.) (involving "Truvia" sweetener product labeled as "natural" and allegedly containing highly processed ingredients).

Mr. Granade received his juris doctorate from New York University School of Law in 2011. He received a master's degree from the University of Georgia at Athens in 2005 with distinction and a bachelor's degree from the University of Georgia at Athens in 2003, *magna cum laude* and with High Honors.

Mr. Granade is a member of the state bars of Georgia, New York, and California. He is also a member of the bar of the U.S. Courts of Appeals for the Second Circuit and Ninth Circuit, as well as the bars of the U.S. District Courts for the Eastern District of New York, Southern District of New York, Western District of New York, Southern District of Illinois, Northern District of Illinois, Northern District of California, Southern District of California, Central District of California, and Eastern District of California.

Maurice L. Hudson

Mr. Hudson is based in Los Angeles, California, where he brings over a decade of legal experience to our efforts to protect clients and consumers from harmful corporate practices. As a former Assistant Corporation Counsel for the City of New York, Mr. Hudson successfully resolved dozens of federal civil cases brought in the district courts, obtained a favorable jury verdict as co-lead counsel in a multi-party SDNY civil suit, taught CLEs on litigation and constitutional law, trained junior attorneys on conducting depositions, and received the Division Chief's Award for outstanding legal work. After returning to the private sector, Mr. Hudson participated in litigating and negotiating claims on behalf of ordinary patients and consumers alleging injuries by powerful medical and pharmaceutical companies, and has continued to serve vulnerable communities as a volunteer immigration clinic attorney and as a California Social Welfare Archives board member.

While earning a juris doctorate in international law from Case Western Reserve University, Mr. Hudson received numerous honors and awards, including the Community Service Award, the Student Bar Leadership Award, appearances on the Dean's List, and a CALI award for corporate governance. Prior to attending law school, Mr. Hudson taught African American studies at UC Berkeley while earning a master's degree in social welfare and served as director of the Resource Center for Sexual & Gender Diversity at UC Santa Barbara.

In addition to his ongoing work with our firm, Mr. Hudson consults for local education and law enforcement agencies, supervises direct-practice social work interns, and teaches evidence-based practice, program development and social innovation to masters and doctoral students at USC.

Kate J. Stoia

Ms. Stoia is based in San Francisco, California from where she litigates securities and consumer class actions. Ms. Stoia previously worked at the law firms of Brobeck Phleger & Harrison LLP and Gibson Dunn & Crutcher LLP. Prior to her work as a civil litigator, Ms. Stoia clerked for the Hon. Charles A. Legge of the Northern District of California.

Ms, Stoia is a member of the state bar of California and several federal courts. Ms. Stoia received her juris doctorate from Boalt Hall School of Law, University of California at Berkeley and her bachelor's degree from Columbia University.

Lance N. Stott

Mr. Stott is based in Austin, Texas from where he litigates consumer class actions. Previous and current consumer fraud class actions litigated by Mr. Stott include *Davis v. Toshiba America Consumer Products* for allegedly defective DVD players; *Bennight v. Pioneer Electronics (USA) Inc. et al.* for allegedly defective television sets; *Spencer v. Pioneer Electronics (USA) Inc. et al.* for allegedly defective DVD players; and, *Okland v. Travelocity.com, Inc.*, for deceptive pricing for online hotel reservations.

Mr. Stott is a member of the state bar of Texas. Mr. Stott received his juris doctorate from the University of Texas in 1996 and his bachelor's degree from New College in 1993.

Belinda L. Williams

Ms. Williams is based in New York from where she focuses her practice on class actions on behalf of defrauded consumers and investors. Ms. Williams has extensive experience in litigating complex commercial cases.

Ms. Williams is admitted to the bars of several federal courts as well as the state bars of New York and Maryland. Ms. Williams received her juris doctorate from the University of Virginia School of Law in 1986 and her undergraduate degree from Harvard University in 1982.

EXHIBIT 2

Office Located at:

7450 Griffin Road, Suite 230
Davie, FL 33314
Ph.: (954) 889-3359

Eggnatz Pascucci, P.A. is a multi-jurisdictional law firm located in Davie, Florida. Eggnatz | Pascucci's civil justice practice is concentrated on consumer class actions in both federal and state courts. The firm has successfully achieved changes to corporate business practices, including to the labeling and marketing of various popular consumer products. The lawyers at Eggnatz | Pascucci have successfully negotiated settlements in a variety of class action matters, with a focus on food and dietary supplement, and consumer privacy litigation.

Some of the firm's nationwide class action experience and court appointment leadership positions include: *Moore, et al. v. GNC Holdings, Inc.*, 0:12-cv-61703-WPD (S.D. Fla.) (Class Counsel in a contested Nationwide class action involving creatine dietary supplement labeling); *Teufel v. Karlin Foods Corp.*, 1:14-cv-23100 (S.D. Fla.) (Class Counsel in Nationwide class action involving "All Natural" food labeling); *Barron, et al. v. Snyder's-Lance*, 0:13-cv-62496 (S.D. Fla.) (Class Counsel in Nationwide class action involving "All Natural" food labeling); *Markley v. Whole Foods Marketing, Inc.*, 8:14-cv-01892 (M.D. Fla.) (Centralized in W.D. of Texas, In re: Whole Foods Market, Inc., plaintiffs' executive committee) (class action involving sugar content mislabeling); *Riveron v. Home Depot USA, Inc.*, 9:14-cv-81175 (S.D. Fla.) (Centralized in the N.D. Georgia, In re: Home Depot, Inc. Customer Data Security Breach Litigation, plaintiff's class representative vetting committee) (data breach of consumer's personal identifiable information); *Dudley v. Premera Blue Cross*, 8:15-cv-01139-JSM-AEP (M.D. Fla.) (Centralized in the District of Oregon, In re: Premera Blue Cross Customer Data Security Breach Litigation, plaintiff's class representative vetting committee) (data breach of insured's personal identifiable information); *Brattain v. Santa Fe Natural Tobacco Company, Inc., et al.*, 15-cv-4705 (N.D. Cal.) (Centralized in the District of New Mexico, In re: Sante Fe Natural Tobacco Company Marketing & Sales Practices Litigation, plaintiff's expert committee) (class action involving "natural" cigarette labeling); *Bandell, et al. v. Massage Envy Franchising, LLC*, 3:16-cv-.01236 (S.D. Cal.) (Class Counsel in Nationwide class action involving unfair and unconscionable consumer services contracts); *Holliday v. Vitacost.com, Inc.* 2015-CA-010160 (AA) (15th Judicial Circuit, Palm Beach County, FL) (Class Counsel in Nationwide class action involving magnesium dietary supplement labeling); *Vincent, et al. v. Method Products, PBC* (7:16-cv-06936-NSR (S.D.N.Y.) (Class Counsel in Nationwide class action involving mislabeled cleaning and household products); *Hughley, et al. v. University of Central Florida Board of Trustees*, 6:16-cv-204 (M.D. Fla.) (Class Counsel in Nationwide class action involving data breach of student and employee private information); *In Re: Apple Inc. Device Performance Litigation*, 5:18-md-02827 (Centralized in the N.D. Cal., Plaintiffs' Steering Committee) (nationwide class action involving defective Apple devices); *George, at al. v. Keurig Dr. Pepper, Inc., et al.*, 1822-CC11811 (Cir. Ct. City of St. Louis, Missouri) (Class Counsel in Nationwide class action involving beverage labeling); *Medgebow v.*

Checkers Drive-In Restaurants, Inc., 19-cv-80090 (S.D. Fla.) (Class Counsel in Nationwide class action involving TCPA violations); (*Pet Parade, Inc. v. Stokes Healthcare, Inc*, 20-cv-24279 (S.D. Fla.) (Co-lead interim Class Counsel in Nationwide TCPA class action).

The firm has also been involved with other various multi-district litigations and notable consumer class actions throughout the country, including but not limited to: *Altman v. Frito-Lay North America, Inc.*, 1:12-cv-06105-RRM-RLM (S.D. Fla.) (Centralized in the E.D. NY, In re: Frito-Lay North America, Inc. All-Natural Litigation, MDL No.: 2413) (nationwide class action involving "All Natural" food labeling); *Feiner v. Innovation Ventures, LLC*, 0:12-cv-62495 (S.D. Fla.) (Centralized in the C.D. CA, In re: 5-Hour Energy® Marketing and Sales Practices Litigation, MDL No.: 2438) (proposed class action involving energy drink supplement labeling); *Mackenzie v. The Blue Buffalo Company, Inc.*, 9:14-cv-80634 (S.D. Fla.) (Centralized in the E.D. of Missouri, In re: Blue Buffalo Company LTD Litigation, MDL No.: 2562) (Plaintiff's counsel in nationwide class action involving pet food mislabeling); *Birken-Sikora, et al. v. 21st Century Oncology Holdings, Inc.*, 2:16-cv-334 (M.D. Fla.) (Centralized in the M.D. of Florida, In re: 21st Century Oncology Customer Data Security Breach Litigation) (class action involving data breach of medical records and other private information); *Cordover, et al. v. BMW, et al.*, 17:-cv-61528-DPG (S.D. Fla.) (Centralized in the N.D. of California, In re: German Automotive Manufacturers Antitrust Litigation) (antitrust class action involving collusion between German automobile manufacturers); *Eppy v. Equifax*, 17-cv-61833-BB (S.D. Fla.) (class action involving data breach of consumers' personal identifiable information); *Leo v. Pepperidge Farm, Inc.*, 13-cv-2866 (Dist. Colorado) (formerly S.D. Fla. 9:13-cv-80598-KLR (proposed Florida class action involving improper "All Natural" food labeling); *Mirabella v. Vital Pharmaceuticals, Inc.*, 0:12-cv-62086-WJZ (S.D. Fla.) (proposed nationwide class action involving energy drink supplement labeling); *Cruz v. Tropicana Products, Inc. et al.*, No.: 10-62926 CA 08, Circuit Court, Miami-Dade County, Florida (proposed class action involving improper food labeling; appeal to be filed); *Kloszewski v. Bank of America, N.A.* No.: 12-35513 CACE 14, Circuit Court, Broward County, Florida (individual banking action brought under the Fair Credit Reporting Act and common law claims); *Griffith, et al. v. Gruma Corporation*, 14-cv-00833-YRG (N.D. Cal.) (formerly S.D. Fla. 9:13-cv-80791) (proposed class action involving "All Natural" food labeling) *Mazzeo v. USPLabs, LLC.*, 13-62639 (S.D. Fla) (proposed Florida class action involving dietary supplement labeling); *Foster v. Chattem, Inc.*, 6:14-cv-00346 (M.D. Fla.) (proposed Florida class action involving cosmetic mouthwash labeling); *Batalla v. The Hain Celestial Group, Inc.*, 14-80246-CV (S.D. Fla) (proposed class action involving "All Natural" food labeling); *Bohlke v. The Hain Celstial Group, Inc.*, 14-80300 (S.D. Fla) (proposed class action involving "All Natural" food labeling); *Erye v. T. Marzetti Co.*, 9:14-cv-80626 (S.D. Fla) (proposed class action involving "All Natural" food labeling); *Dye v. Bodacious Food Co.*, 9:14-cv-80627 (S.D. Fla) (proposed class action involving "All Natural" food labeling); *Epstein v. Aidells Sausage Company, Inc.*, 9:14-cv-80916 (S.D. Fla) (proposed class action involving "All Natural" food labeling); *Monka v. JAG Specialty Foods, LLC.*, 9:14-cv-80764 (S.D. Fla) (proposed class action involving "All Natural" food labeling); *Sturdivant v. Bob's Red Mill Natural Foods*, 9:14-cv-80765 (S.D. Fla) (proposed class action involving "All Natural" food labeling); *Vandenberg v. Medora Snacks, LLC*, 9:14-cv-81010 (S.D. Fla) (proposed class action involving "All Natural" food labeling; *Laboon v. Unilever United States, Inc.* and *Pepsico, Inc.*, 0:15-cv-60914 (S.D. Fla.) (proposed class action involving "All Natural" food labeling); *Hulse v. Wal Mart Stores, Inc.*, 2015 CA 000274 (7th Judicial Circuit, In and For Flagler County, FL) (proposed class action involving deceptive juice labeling); *Romero, et al. v. General Nutrition Corporation, Inc.*, 15-019703 (17th Judicial Circuit, Broward County, FL) (proposed class action involving dietary supplement labeling); and *Jones v. Waffle House, Inc., et al.*, 6:15-cv-01637 (M.D. Fla.).

Joshua H. Eggnatz handles a variety of actions in civil litigation with an emphasis on consumer protection and personal injury. Josh's Class Action practice focuses on obtaining justice for consumers who have suffered financial harm due to unfair, false, deceptive, and/or misleading business practices. He represents consumers nationwide in a variety of fields, including but not limited to food and dietary supplement litigation, actions brought pursuant to the Telephone Consumer Protection Act, data breaches, and other consumer protection related matters. Josh has been appointed as Class Counsel by several Courts throughout the country in a number of high-profile nationwide actions and has helped consumers recover millions of dollars. Josh obtained his law degree from Nova Southeastern University, Shepard Broad Law Center, *Magna Cum Laude*, and a bachelor of science in legal studies from The University of Central Florida, *Magna Cum Laude*. He is licensed to practice law in the State of Florida, and is admitted to practice before the following federal courts: Supreme Court of the United States; Eleventh Circuit Court of Appeals; United States District Court, Southern District of Florida; United States District Court, Northern District of Florida; United States District Court, Middle District of Florida; United States District Court, District of Colorado; United States District Court, Western District of New York; and United States District Court, Northern District of Illinois. He has also litigated consumer class actions throughout the United States as part of coordinated multi-district litigations, and on a *pro hac vice* basis. He has been named to the *Florida Super Lawyers, Rising Stars* list for the past nine years (2013-2021) and he was a finalist for the *Lifestyle Media Group's* Leaders in Law award in 2014.

Michael J. Pascucci is a trial lawyer with a strong background in consumer advocacy, personal injury and insurance claims including homeowner's insurance claims, automobile accidents, premises liability, products liability and other bodily injury claims. Mike's Class Action practice focuses on obtaining justice for consumers who have suffered financial harm as a result of deceptive or unfair corporate behavior. He represents consumers in a variety of matters including false advertisement, improper product labeling, employment matters, violations of the Fair Credit Reporting Act (FCRA), violations of the Telephone Consumer Protection Act (FTCPA), violations of the Fair and Accurate Credit Transactions Act (FACTA), violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), data breaches, and other consumer protection related matters. Mike has been appointed as Class Counsel by several Courts throughout the country in a number of high profile, nationwide Class Actions and has helped consumers recover millions of dollars. He obtained his law degree from Nova Southeastern University, Shepard Broad Law Center, and a bachelor of science in finance from The University of Central Florida. Prior to co-founding EP, Mr. Pascucci worked for a large Plaintiff's law firm where he handled hundreds of cases at various stages from pre-suit through trial. Prior to that, Mr. Pascucci also worked as a defense litigation attorney where he represented several insurance companies and some of the largest retail corporations in the country. Mr. Pascucci is licensed to practice law in the State of Florida, and is admitted to practice before the following federal courts: Supreme Court of the United States; United States District Court, Southern District of Florida; United States District Court, Middle District of Florida; and the Eleventh Circuit Court of Appeals. He was named to the National Trial Lawyers Top 40 under 40 list in 2017 and was named to the *Florida Super Lawyers*, *Rising Star* list in 2018 - 2021.

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

[PROPOSED] PRELIMINARY APPROVAL ORDER

Having fully considered the Unopposed Motion for Preliminary Approval of Class Settlement ("Motion") of Plaintiff, Megan Holve, ("Plaintiff"), (ECF No. 45), the entire record herein, the Parties' submissions concerning the Motion, and the applicable facts and law, the Court hereby grants preliminary approval to the Settlement contained in the Parties' Settlement Agreement (ECF No. 44) upon the terms and conditions set forth in this Order. Capitalized terms and phrases in this Order shall have the same meaning as they have in the Settlement Agreement. The Court makes the following:

FINDINGS OF FACT

1. Plaintiff brought her unopposed motion for preliminary approval before the Court on May 7, 2021, with the consent of McCormick & Company, Inc. ("McCormick" or "Defendant").

2. On October 27, 2016, Plaintiff, on behalf of herself and all others similarly situated, filed her Complaint challenging the labeling, marketing, and advertising of certain of McCormick's Products. (ECF No. 1). Plaintiff alleges that certain of McCormick's Products are inaccurately and deceptively labeled as "natural." The action alleged the following causes of

action: (1) unlawful and deceptive business practices in violation of Maryland's consumer protection law codified at Maryland Commercial Code §13-301; (2) violation of unjust enrichment under Maryland law; (3) unlawful and deceptive business practices in violation of New York General Business Law section 349 ("GBL § 349); (4) false advertising in the conduct of business in violation of New York General Business Law section 350 ("GBL § 350"); and (5) unjust enrichment.

3. On August 14, 2018, the Court issued an order denying in part, and granting in part, Defendant's Motion to Dismiss. (ECF No. 17). The Court allowed for claims brought on behalf of the absent class members under GBL §§ 349-50, MCC § 13-301, and Maryland common law to proceed. However, in the same order, the Court stayed the matter until February 1, 2019 to see whether or not the Food and Drug Administration ("FDA") would issue any rules or regulations with respect to use of the term "natural" on food products.

4. On October 9, 2020, the Court lifted the stay (ECF No. 25).

5. On March 10, 2021, the Parties alerted the Court that the matter had settled. (ECF No. 42).

6. On March 11, 2021, the Court granted the stay request and gave the Parties until May 7, 2021 to file a status report by May 7, 2021. (ECF No. 43).

7. In reviewing the record and the Parties' submissions, the Court finds the Settlement Agreement was entered into in good faith, and was the product of extensive, arms-length, and settlement negotiations. The Settlement Agreement was achieved with the assistance of an esteemed neutral mediator – the Honorable Arthur J. Boylan (Ret.) – who conducted a full day mediation session with the Parties.

8. The Parties conducted an extensive and thorough examination, investigation, and evaluation of the relevant law, facts, and allegations to assess the merits of the potential claims to determine the strength of both the defenses and liability sought in the Action.

9. As part of that investigation, Plaintiffs' Counsel obtained extensive information and documents from Defendants through informal discovery, including examination of verified party and third-party documents produced, pricing and damages analysis, and speaking with Defendant's representatives.

10. The Parties have entered into a Settlement Agreement in which the Parties have agreed to settle the Action, pursuant to the terms of the Settlement Agreement, subject to the approval and determination by the Court as to the fairness, reasonableness, and adequacy of the Settlement, which, if approved, will result in dismissal of the Action with prejudice; and the Court having reviewed the Settlement Agreement, including the exhibits attached thereto, and all prior proceedings herein, and having found good cause based on the record,

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. **Preliminary Settlement Approval**. The provisions of the Settlement Agreement are hereby preliminarily approved. The Court preliminarily approves the Settlement set forth in the Settlement Agreement as being within the range of possible approval as fair, reasonable, and adequate, within the meaning of Rule 23 and the Class Action Fairness Act of 2005, and free of collusion or indicia of unfairness, subject to final consideration at the Fairness Hearing provided for below. The Court also finds that the Settlement resulted from arm's length negotiations and is sufficient to warrant the dissemination of Class Notice to the Settlement Class.

2. **Stay of the Action**. Pending the final determination of whether the Settlement Agreement should be approved, all proceedings and pending deadlines in this Action, except as may be necessary to implement the terms of the Settlement or comply with the terms of the Settlement, are hereby stayed and suspended.

3. **Preliminary Class Certification for Settlement Purposes Only**. Having made the findings set forth below, the Court hereby preliminarily certifies a plaintiff class for settlement purposes only, pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), in accordance with the terms of the Settlement Agreement (the "Settlement Class"). The Court preliminarily finds, based on the terms of the Settlement described in the Settlement Agreement and for settlement purposes only, that: (a) the Settlement Class is so numerous that joinder of all members is impracticable; (b) there are issues of law and fact that are typical and common to the Class, and that those issues predominate over individual questions; (c) a class action on behalf of the certified Class is superior to other available means of adjudicating this dispute; and (d) as set forth below, Plaintiff and Class Counsel are adequate representatives of the Class. As provided for in the Settlement Agreement, if the Court does not grant final approval of the Settlement set forth in the Settlement Agreement, or if the Settlement set forth in the Settlement Agreement is terminated in accordance with its terms, then the Settlement Agreement, and the certification of the Settlement Class provided for herein, will be vacated and the Action shall proceed as though the Settlement Class had never been certified, without prejudice to any party's position on the issue of class certification or any other issue. In such event, Defendants retain all rights to assert that the Action may not be certified as a class action, other than for settlement purposes.

4. **Class Definition**. The Settlement Class is defined all 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.

"Class Period" means the period from January 1 2013, up to and including the date of the Court's Preliminary Approval Order.

The "Products" means Defendant's products as identified in Exhibit E of the Settlement Agreement.

5. **Class Representatives and Class Counsel**. The Court appoints REESE LLP, 100 West 93rd Street, 16th Floor, New York, New York 10025 and EGGNATZ PASCUCCI, P.A., 7450 Griffin Road, Suite 230, Davie, Florida 33314 as counsel for the Settlement Class. Plaintiff Megan Holve is hereby appointed as Class Representative.

6. **Jurisdiction**. The Court has subject-matter jurisdiction over the Action pursuant to 28 U.S.C. §§ 1332 and 1367 and personal jurisdiction over the Parties before it. Additionally, venue is proper in this District pursuant to 28 U.S.C. § 1391.

7. **Fairness Hearing**. A Fairness Hearing shall be held on [No less than 110 days from the date of the order granting preliminary approval] at _____a.m/p.m., at the United States District Court for the Western District of New York, 100 State Street, Rochester, New York 14614, to determine, among other things: (a) whether the Action should be finally certified as a class action

for settlement purposes pursuant to Rule 23(a) and (b)(3); (b) whether the settlement of the Action should be finally approved as fair, reasonable, and adequate pursuant to Rule 23(e); (c) whether the Action should be dismissed with prejudice pursuant to the terms of the Settlement Agreement; (d) whether Settlement Class Members should be bound by the release set forth in the Settlement Agreement; (e) whether Settlement Class Members and related persons should be permanently enjoined from pursuing lawsuits based on the transactions and occurrences at issue in the Action; (f) whether the application of Class Counsel for an award of Attorneys' Fees and Expenses should be approved pursuant to Rule 23(h); and (g) whether the application of the named Plaintiff for a Service Award should be approved. The submissions of the Parties in support of final approval of the Settlement, including Class Counsel's application for Attorneys' Fees and Expenses and Service Awards, shall be filed with the Court no later than fourteen (14) days prior to the deadline for the submission of objections and may be supplemented up to seven (7) days prior to the Fairness Hearing.

8. **Administration**. In consultation with, and with the approval of, Defendant, Class Counsel is hereby authorized to establish the means necessary to administer the Proposed Settlement and implement the Claim Process, in accordance with the terms of the Settlement Agreement.

9. **Fund Institution**. Western Alliance Bank shall serve as the third-party Fund Institution where Defendant shall deposit the Settlement Funds under the terms of the Agreement into an interest-bearing Qualified Settlement Fund account.

10. **Class Notice**. The proposed Class Notice and Notice Plan, the notice methodology described in the Settlement Agreement and in the Declaration of the Notice Administrator are hereby approved.

a. Pursuant to the Settlement Agreement, the Court appoints Angeion Group, to be the Notice Administrator and Settlement Administrator to help implement the terms of the Settlement Agreement.

b. Not later than thirty (30) days after the entry of the Preliminary Approval Order, whichever occurs first, the Notice Administrator shall establish an Internet website, www.McCormickSettlement.com, that will inform Settlement Class Members of the terms of the Settlement Agreement, their rights, dates and deadlines, and related information. The website shall include, in Portable Document Format ("PDF"), materials agreed upon by the Parties and as further ordered by this Court.

c. Not later than thirty (30) days after the entry of the Preliminary Approval Order, whichever occurs first, the Notice Administrator shall establish a toll-free telephone number that will provide Settlement-related information to Settlement Class Members.

d. During the Claim Period, the Notice Administrator shall also publish the Settlement Notice as described in the Declaration of the Notice Administrator and in such additional other media outlets as shall be agreed upon by the Parties.

e. The Notice Administrator shall timely disseminate any remaining notice, as stated in the Settlement Agreement and/or the Declaration of the Notice Administrator.

f. Not later than seven (7) calendar days before the date of the Fairness Hearing, the Notice Administrator shall file with the Court: (a) a list of those persons who have opted out or excluded themselves from the Settlement; (b) the details outlining the scope, methods, and results of the notice program; and (c) compliance with the obligation to give notice to each appropriate State and Federal official, as specified in 28 U.S.C. § 1715, and any other applicable

statute, law or rule, including, but not limited to, the Due Process Clause of the United States Constitution.

11. **Findings Concerning Notice**. The Court finds that the form, content, and method of giving notice to the Class as described in the Settlement Agreement and the Declaration of the Settlement Administrator: (a) will constitute the best practicable notice; (b) are reasonably calculated, under the circumstances, to apprise the Settlement Class Members of the pendency of the Action, the terms of the Proposed Settlement, and their rights under the Proposed Settlement, including but not limited to their rights to object to or exclude themselves from the Proposed Settlement and other rights under the terms of the Settlement Agreement; (c) are reasonable and constitute due, adequate, and sufficient notice to all Settlement Class Members and other persons entitled to receive notice; and (d) meet all applicable requirements of law, including but not limited to 28 U.S.C. § 1715, Rule 23(c) and (e), and the Due Process Clause(s) of the United States Constitution. The Court further finds that all of the notices are written in simple terminology, are readily understandable by Settlement Class Members, and are materially consistent with the Federal Judicial Center's illustrative class action notices.

12. **Exclusion from Settlement Class**. Any Settlement Class Member who wishes to be excluded from the Class may elect to opt out of the Class Settlement, relinquishing his or her rights to monetary compensation under this Agreement. Settlement Class Members who opt out of the Settlement will not release their claims that accrued during the Class Period. Settlement Class Members wishing to opt out of the Settlement must send to the Class Action Settlement Administrator by U.S. mail a personally signed letter including their name and address and providing a clear statement communicating that they elect to be excluded from the Settlement Class. Any request for exclusion or opt-out must be postmarked on or before the opt-out deadline

specified in this Preliminary Approval Order. The date of the postmark on the return-mailing envelope shall be the exclusive means used to determine whether a request for exclusion has been timely submitted. The Settlement Administrator shall forward copies of any written requests for exclusion to Class Counsel and Defendant's Counsel. The Settlement Administrator shall file a list reflecting all requests for exclusion with the Court no later than seven (7) calendar days before the Fairness Hearing. Any potential Settlement Class Member who does not file a timely written request for exclusion shall be bound by all subsequent proceedings, orders, and judgments, including, but not limited to, the release in the Settlement Agreement.

13. **Objections and Appearances**. A Settlement Class Member may object to the Settlement pursuant to Section 6 of the Settlement Agreement. A Settlement Class Member may object to the Settlement Agreement either on his or her own without an attorney, or through an attorney hired at his or her expense. Any objection must be in writing, signed by the Settlement Class Member (and his or her attorney, if individually represented, including any former or current counsel who may be entitled to compensation for any reason related to the objection), filed with the Court, with a copy delivered to Class Counsel and Defendants' Counsel, at the addresses set forth in the Class Notice, no later than 21 days before the Fairness Hearing. Any objection shall contain a caption or title that identifies it as "Objection to Class Settlement in *Holve v. McCormick & Company, Inc., case no. 6:16-cv-06702-FPG (W.D.N.Y.).*

14. Any objection shall contain information sufficient to identify and contact the objecting Settlement Class Member (or his or her individually-hired attorney, if any), including address, telephone number and, if available, e-mail address, as well as a clear and concise statement of the Settlement Class Member's objection, the facts supporting the objection, and the legal grounds and authority on which the objection is based, and whether he or she intends to

appear at the Final Approval Hearing, either with or without counsel. Any objection shall include documents sufficient to establish the basis for the objector's standing as a Settlement Class Member, such as (i) a declaration signed by the objector under penalty of perjury, with language similar to that included in the Claim Form, that the Settlement Class Member purchased at least one Product during the Class Period; or (ii) receipt(s) reflecting such purchase(s).

15. Any objection shall also include a detailed list of any other objections submitted by the Settlement Class member, or his or her counsel, to any class action submitted in any court, whether state or otherwise, in the United States in the previous five (5) years. If the Settlement Class member or his or her counsel has not objected to any other class action settlement in any court in the United States in the previous five (5) years, he or she shall affirmatively state so in the written materials provided in connection with the objection to this Settlement.

16. The filing of an objection permits Class Counsel or Defendants' Counsel to notice such objecting person for his or her deposition consistent with the Federal Rules of Civil Procedure at an agreed-upon location, and to seek any documentary evidence or other tangible things that are relevant to the objection. Failure by an objector to make himself or herself available for a deposition or to comply with expedited discovery requests may result in the Court striking said objector's objection and otherwise denying that person the opportunity to make an objection or be further heard. The Court reserves the right to tax the costs of any such discovery to the objector or the objector's counsel should the Court determine that the objection is frivolous or is made for an improper purpose. Any Settlement Class Member who fails to comply with the provisions of this Order shall waive and forfeit any and all rights he or she may have to object, and shall be bound by all terms of the Settlement Agreement, this Order, and by all proceedings, orders, and judgments, including, but not limited to, the release in the Settlement Agreement in the Action.

a. Any Settlement Class Member, including Settlement Class Members who file and serve a written objection, as described above, may appear at the Fairness Hearing, either in person or through personal counsel hired at the Settlement Class Member's expense, to object to or comment on the fairness, reasonableness, or adequacy of the Settlement Agreement or proposed Settlement, or to the award of Attorneys' Fees and Expenses or the Service Award to the Plaintiff. Settlement Class Members who intend to make an appearance at the Fairness Hearing must file a Notice of Intention to Appear with the Court, listing the name, address and phone number of the attorney, if any who will appear, no later than twenty-one (21) days before the Fairness Hearing, _____**, 2021**, or as the Court may otherwise direct.

b. Class Counsel and Defendant shall have the right to respond to any objection no later than seven (7) days prior to the Fairness Hearing, _____**, 2021**, or as the Court may otherwise direct. The Party so responding shall file a copy of the response with the Court, and shall serve a copy, by regular mail, hand or overnight delivery, to the objecting Settlement Class Member or to the individually-hired attorney for the objecting Settlement Class Member; to all Class Counsel; and to Defendant's Counsel.

17. **Disclosures.** The Settlement Administrator, Defendant's Counsel, and Class Counsel shall promptly furnish to each other copies of any and all objections or written requests for exclusion that might come into their possession.

18. **Termination of Settlement**. This Order shall become null and void and shall not prejudice the rights of the Parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if: (a) the Settlement is not finally approved by the Court, or does not become final, pursuant to the terms of the Settlement Agreement; (b) the Settlement is terminated in accordance with the Settlement Agreement; or (c)

the Settlement does not become effective as required by the terms of the Settlement Agreement for any other reason. In such event, the Settlement and Settlement Agreement shall become null and void and be of no further force and effect, and neither the Settlement Agreement nor the Court's orders, including this Order, relating to the Settlement shall be used or referred to for any purpose.

19. **Nationwide Stay and Preliminary Injunction**. Effective immediately, any actions or proceedings pending in any state or federal court in the United States involving Defendant's Products, except any matters necessary to implement, advance, or further approval of the Settlement Agreement or settlement process, are stayed pending the final Fairness Hearing and the issuance of a final order and judgment in this Action.

In addition, pending the final Fairness Hearing and the issuance of a final order and judgment in this Action, all members of the Settlement Class and their legally authorized representatives are hereby preliminarily enjoined from filing, commencing, prosecuting, maintaining, intervening in, participating in (as class members or otherwise), any other lawsuit, arbitration, or administrative, regulatory, or other proceeding or order in any jurisdiction arising out of or relating to the Products or the facts and circumstances at issue in the Action against the Released Parties, provided that this injunction shall not apply to the claims of any Class Members who have timely and validly requested to be excluded from the Class.

Also, pending the final Fairness Hearing and issuance of a final order and judgment in this Action, all members of the Settlement Class and their legally authorized representatives are hereby preliminary enjoined from filing, commencing, prosecuting, or maintaining any other lawsuit as a class action (including by seeking to amend a pending complaint to include class allegations, or

by seeking class certification in a pending action in any jurisdiction), on behalf of members of the Settlement Class, if such other class action is based on or relates to Defendant's Products.

Such injunction shall remain in force until the Effective Date or until such time as the Parties notify the Court that the Settlement has been terminated. Under the All Writs Act, the Court finds that issuance of this nationwide stay and injunction is necessary and appropriate in aid of the Court's jurisdiction over this action. The Court finds no bond is necessary for issuance of this injunction.

20. **Effect of Settlement Agreement and Order**. Class Counsel, on behalf of the Settlement Class, and Defendants entered into the Settlement Agreement solely for the purpose of compromising and settling disputed claims. This Order shall be of no force or effect if the Settlement does not become final and shall not be construed or used as an admission, concession, or declaration by or against Defendant of any fault, wrongdoing, breach, or liability. The Settlement Agreement, the documents relating to the Settlement Agreement, and this Order are not, and should not in any event be (a) construed, deemed, offered or received as evidence of a presumption, concession or admission on the part of Plaintiffs, Defendants, any member of the Settlement Class or any other person; or (b) offered or received as evidence of a presumption, concession or admission by any person of any liability, fault, or wrongdoing, or that the claims in the Action lack merit or that the relief requested is inappropriate, improper, or unavailable for any purpose in any judicial or administrative proceeding, whether in law or in equity.

21. **Retaining Jurisdiction**. This Court shall maintain continuing jurisdiction over these settlement proceedings to assure the effectuation thereof for the benefit of the Class.

22. **Continuance of Hearing**. The Court reserves the right to adjourn or continue the Fairness Hearing without further written notice.

23. The Court sets the following schedule for the Fairness Hearing and the actions which must precede it:

a. Claims Administrator shall begin publication notice and effectuate all provisions of the Notice Plan [no later than 30 days after this Order Granting Preliminary Approval] _____, **2021**.

b. Plaintiff shall file her Motion for Final Approval of the Settlement by no later than [14 days prior to the Objection Deadline] _____, **2021**.

c. Plaintiff shall file her Motion for Attorneys' Fees, Costs and Expenses, and Motion for Incentive Awards by no later than [14 days prior to the Objection Deadline] _____, **2021**.

d. Settlement Class Members must file any objections to the Settlement and the Motion for Attorneys' Fees, Costs, and Expenses, and/or the Motion for Incentive Awards by no later than [21 days before Fairness Hearing] _____, **2021**.

e. Settlement Class Members must exclude themselves, or opt-out, from the Settlement by no later than [21 days before Fairness Hearing] _____, **2021**.

f. Settlement Class Members who intend to appear at the Final Fairness Hearing must file a Notice of Intention to Appear at the Final Fairness Hearing by no later than [21 days before Fairness Hearing] _____, **2021**.

g. The Notice Administrator shall file: (a) a list of those persons who have opted out or excluded themselves from the Settlement; (b) the details outlining the scope, methods, and results of the notice program; and (c) compliance with the obligation to give notice to each appropriate State and Federal official, as specified in 28 U.S.C. § 1715, and any other applicable statute, law or rule, including, but not

limited to, the Due Process Clause of the United States Constitution by no later than [7 days before Fairness Hearing] _____**, 2021**.

h. Class Counsel and Defendants shall have the right to submit supplemental briefing and respond to any objections no later than [(7) days prior to the Fairness Hearing] _____**, 2021**.

i. The Fairness Hearing will take place on [no less than 110 days from date of Preliminary Approval] _____**, 2021** at _____ a.m. at the United States District Court for the Western District of New York, 100 State Street, Rochester, New York 14614.

SO ORDERED

DATED: May __, 2021

_____
Honorable Frank P. Geraci, Jr