UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEVERSINK GENERAL STORE, and BRENDA TOMLINSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MOWI USA, LLC, MOWI DUCKTRAP, LLC, MOWI USA HOLDING, LLC, and MOWI ASA,

Defendants.

ECF Case

Case No. 1:20-cv-09293-PAE

ORAL ARGUMENT REQUESTED

MOWI'S RESPONSE TO OBJECTIONS OF ABIGAIL STARR AND ORGANIC CONSUMERS ASSOCIATION TO CLASS SETTLEMENT

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INTRODUCTION

This Court's preliminary approval order found that the Settlement was the "product of arm's length negotiations," was reached after "adequate investigation of the facts and legal issues," and provided adequate relief to the Settlement Class after taking into account the "costs, risks, and delay" of further litigation. Order Granting Prelim. Approval of Class Settlement ("Prelim. Approval Order") (Dkt. 69) at 2–3. Those observations were well founded: the Settlement provides Settlement Class Members the opportunity to obtain greater monetary compensation than they could have expected had they won at trial.[1]

The Court's preliminary assessment has been borne out in the Settlement Class's reaction, which is overwhelmingly positive. An estimated 18% of the Class have filed valid claims, and only one Settlement Class Member opted out of the Settlement.

Just two Class Members have objected to the Settlement. Those objectors—Abigail Starr and Organic Consumers Association ("OCA"), and their shared counsel—are familiar to the Court. The Court rejected an earlier attempt by Ms. Starr to intervene in this case, finding that many of the concerns that she raised about the Settlement were "largely speculative or conclusory" and "refuted by the record," particularly given that Ms. Starr had offered to enter into her own class-action settlement for an amount less than what this Settlement affords the Class. Op. & Order Denying Mot. Intervene ("Op.") (Dkt. 68) at 11, 14–15. Undeterred, Ms. Starr and OCA re-raise many arguments that this Court already rejected, and what new arguments they make provide no reason to deny approval to the Settlement. For the reasons explained below, this Court should overrule their objections and grant final approval to the Settlement.

[1] Unless otherwise indicated, capitalized terms have the meaning ascribed to them by the Settlement Agreement. *See generally* Settlement Agmt. (Dkt. 67-1, Ex. 1) § 1 (Definitions).

BACKGROUND

A. The *Neversink* Action.

Neversink General Store filed this nationwide class action alleging that Mowi misrepresented on the labels of its Ducktrap River of Maine smoked Atlantic salmon products and on its social media pages that the Ducktrap Products were "sustainably sourced," "all natural," and "from Maine." *E.g.*, Compl. (Dkt. 1) ¶¶ 1–2. Brenda Tomlinson later joined this case as a proposed named plaintiff. *See* Second Am. Compl. ("SAC") (Dkt. 45) ¶ 20.[2]

After Mowi filed motions to dismiss the operative complaints, the parties engaged in a mediation before the Honorable Diane M. Welsh, a retired U.S. Magistrate Judge and experienced JAMS neutral. Decl. of Andrew Soukup ("Soukup Decl."), Ex. F (Welsh Decl.) ¶¶ 1–3. As Judge Welsh has explained, "[t]he parties each submitted detailed written statements in advance of the mediation, including a confidential submission that [Mowi] shared only with [her]." *Id.* ¶ 4. With these preparations, the parties reached what Judge Welsh "believe[d] [was] a fair, adequate, and reasonable settlement" "[a]fter several rounds of hard-fought, arms-length negotiations." *Id.* ¶ 7.

B. The Proposed Settlement.

This Court has already granted preliminary approval to the Settlement. *See* Prelim. Approval Order. Under the Settlement, Mowi agreed to pay $1.3 million to cover claims submitted by Settlement Class Members—persons or entities that purchased a Ducktrap Product from March 1, 2017, to May 13, 2021, with packaging that included "sustainably sourced," "all natural," and/or "from Maine"—as well as Notice and Settlement Administration Costs and any Class Representative Service Awards. *See* Settlement Agmt. §§ 1.38, 3.2(d). Mowi also agreed to

[2] The original complaint named Mowi USA, LLC and Mowi Ducktrap, LLC as defendants. *See* Compl. ¶¶ 13–14. The first and second amended complaints added Mowi USA Holding, LLC and Mowi ASA as defendants. *See* First Am. Compl. ("FAC") (Dkt. 24) ¶ 23; SAC ¶ 29. This memorandum refers to all four entities as "Mowi."

remove the phrases "sustainably sourced," "all natural," and "Naturally Smoked Salmon FROM MAINE" from Ducktrap Product packages for at least two years. *Id.* § 3.5.

Mowi also agreed to pay up to $360,000 in fees and costs to Settlement Class Counsel—separate from the $1.3 million in Total Class Consideration—and up to $7,500 and $1,500 in Class Representative Service Awards for Neversink and Ms. Tomlinson, respectively. *Id.* §§ 3.3(a), 3.4(a). As Judge Welsh confirmed, "[t]he parties did not negotiate the attorney's fee payment until after they had reached agreement on the other principal terms of the settlement." Soukup Decl., Ex. F ¶ 8. The parties also agreed that the Settlement would not be conditioned on the Court's approval of attorneys' fees or any Service Awards. Settlement Agmt. §§ 3.3(b), 3.4(b).

The Settlement Class's reaction to the Settlement has been overwhelmingly positive. The Settlement Administrator received 81,781 valid claims. Decl. of Amy Lechner ("Lechner Decl.") (Dkt. 85-3) ¶¶ 5–10. Because the settlement fund is distributed on a *pro rata* basis, each Class Member stands to receive an estimated $1.38 for each Ducktrap Product purchased (up to a maximum of 10 units without Proof of Purchase). *See* Settlement Agmt. §§ 3.2(b)–(d); Lechner Decl. ¶ 11. This amount exceeds the approximate $1.06 price premium class members could have expected to receive through litigation (based on a $7.50 average retail price for a Ducktrap Product). *See* SAC ¶ 6 (alleging class members paid 14.2% more than they would have in reliance on the purportedly misleading statements). Only one class member opted out of the Settlement. Decl. of Steven Weisbrot ("Weisbrot Decl.") (Dkt. 82) ¶ 35.

C. The Objections.

Just two Class Members—represented by the same lawyers—objected to the Settlement.

1. Ms. Starr's Objection.

After this lawsuit was filed, Ms. Starr filed what this Court has called "largely identical claims" against Mowi in the District of Maine. Op. 1. When she learned of the Settlement, Ms.

Starr sought to intervene in this action, raising many of the same arguments now featured in her objection.[3] *See id.* at 5. The Court denied her motion, holding that Ms. Starr's concerns about the Settlement were "speculative or conclusory" and in many cases "refuted by the record." *Id.* at 11.

In her objection, Ms. Starr rehashes arguments that she raised in her unsuccessful intervention motion by contending that the parties settled too early and without formal discovery, leading her to speculate that the relief afforded the class is inadequate. *See* Abigail Starr's Obj. to Class Settlement ("Starr Obj.") (Dkt. 73) at 11–16. Ms. Starr also argues that the class definition is too broad; that the proposed release is too broad; and that Neversink is not an adequate class representative. *Id.* at 5–11. Finally, Ms. Starr contends that Class Counsel's fee request and Neversink's request for a service award are excessive. *Id.* at 17–20.

2. OCA's Objection.

OCA also filed a lawsuit against Mowi in D.C. Superior Court. Like the other plaintiffs, OCA alleged that Mowi misled consumers by marketing its Ducktrap Products as "sustainably sourced," "all natural," and "from Maine." *See* Soukup Decl., Ex. A (*OCA* Compl.) ¶¶ 3–10. Unlike Neversink and Ms. Starr, OCA did not seek to certify any class or recover damages. *See id.* ¶ 17 ("This is not a class action."); *id.* ¶ 18 ("This action does not seek damages."). Rather, OCA sought only injunctive and declaratory relief. *See id.* at 28 (Prayer for Relief). OCA also did not claim that it had been injured by Mowi's alleged practices. Instead, it sought to assert derivative claims on behalf of District of Columbia consumers, by invoking a provision of District of Columbia law that purports to allow certain entities to bring suit "on behalf of the interests of a consumer or a class of consumers." *Id.* ¶ 15 (quoting D.C. Code § 28-3905(k)(1)(D)(i)).

[3] Lauren Snider, the other named plaintiff in *Starr*, joined Ms. Starr's motion to intervene, but she did not opt out of and has not objected to the Settlement. *See* Weisbrot Decl. ¶¶ 35–36.

After this Court preliminarily approved the Settlement, the D.C. Superior Court stayed the *OCA* case pending the final approval hearing in this case. *See* Soukup Decl., Ex. H (Order Granting Mot. to Stay Proceedings, *Organic Consumers Ass'n v. Mowi ASA*, No. 2020 CA 003368 B (D.C. Super. Ct. June 22, 2021)) at 5. The *OCA* court noted that OCA's claim for injunctive relief likely was moot, because "the labels at issue have been removed as part of the defendants' rebranding project" that began before any of these lawsuits were filed. *Id.* at 3–4; *see also* Decl. of Donald Cynewski Supp. Mowi's Response to Objs. ("Cynewski Decl.") ¶¶ 4–5. The *OCA* court also held that "the settlement in *Neversink* entirely resolves [OCA's] claims" because OCA purports to "represent[] the public of the District of Columbia." Soukup Decl., Ex. H at 3–4.

Facing defeat, OCA switched tactics and tried to inject itself into this litigation. Whereas OCA told the D.C. Superior Court that it *was not* a member of the Settlement Class to avoid a stay, *see* Soukup Decl., Ex. G (OCA Opp.) at 8 ("Nor is OCA a class member in *Neversink*."), OCA's attorney (but not OCA itself) now asserts that OCA *is* a member of the Settlement Class entitled to object to the Settlement, *see* Decl. of Jay R. Shooster (Dkt. 77) ¶ 5 (asserting that "[o]n two occasions, once in 2019 and once in 2020, OCA purchased Ducktrap-branded salmon products as part of its effort to test and evaluate those products on behalf of consumers"). OCA mimics Ms. Starr's objection that the release is too broad and that Settlement Class Counsel's fee request is excessive. *See* OCA's Obj. to Class Settlement ("OCA Obj.") (Dkt. 76) at 5–7, 9–10. OCA also speculates that the Settlement was the result of a "reverse auction," *id.* at 7–9, even though the Court rejected that argument when it denied Ms. Starr's motion to intervene, observing that "[n]ot only has the parties' mediator confirmed that negotiations here were arm's length and hard fought, Welsh Decl. ¶ 7; the resulting settlement likely matched or exceeded the amounts originally sought by the undisputedly arm's-length Intervenors," Op. 15 n.10.

PROCEDURAL STANDARD

Rule 23(e) authorizes courts to "approve a class action settlement if it is fair, adequate, and reasonable, and not a product of collusion." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (marks omitted). "A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement." *Id.* The aim is to determine if "the settlement is within a range that reasonable and experienced attorneys . . . could accept, considering all relevant risks, facts and circumstances," *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *5 (S.D.N.Y. July 27, 2007), not to decide "whether the parties . . . could conceivably have come up with a 'better' agreement," *Godson v. Eltman, Eltman, & Cooper P.C.*, 328 F.R.D. 35, 54 (W.D.N.Y. 2018). "Settlement approval . . . should be exercised in light of the general judicial policy favoring settlement." *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 159–60 (S.D.N.Y. 2011) (Engelmayer, J.).

ARGUMENT

I. THE SETTLEMENT IS FAIR AND REASONABLE.

In addition to the reasons Plaintiffs provide, *see* Mem. Supp. Pls.' Mot. for Final Approval of Class Action Settlement ("Final Approval Mem.") (Dkt. 80), there are other reasons why this Court should approve the Settlement as "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2).

A. Plaintiffs Were Unlikely to Obtain Any Relief Through Further Litigation.

"[T]here is a range of reasonableness with respect to a settlement . . . which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal-Mart*, 396 F.3d at 119 (citation and marks omitted). Here, Plaintiffs' claims all required Plaintiffs to prove that the phrases "sustainably sourced," "all natural," and "from Maine" were false or misleading. *See, e.g.*, SAC ¶¶ 112–92.

Plaintiffs faced significant obstacles in doing so, and the Settlement provides more relief than Settlement Class Members would have received if this case had proceeded to trial.

Contrary to Plaintiffs' allegations, the "sustainably sourced" statement is not a broad claim of "higher environmental and animal welfare practices," *e.g.*, SAC ¶ 43, but rather a qualified and accurate representation limited to how Mowi sources its salmon. As amici have explained, a reasonable consumer would understand "sustainably *sourced*" to mean only that Mowi *sources* its salmon from sites that are certified as sustainable by reputable, independent organizations like Best Aquaculture Practices ("BAP") and Aquaculture Stewardship Council ("ASC")—in other words, sites that abide by industry best-practices for sustainable aquaculture. *See* Br. of *Amicus Curiae* Global Aquaculture Alliance Supp. Defs.' Mot. Dismiss Compl. ("GAA Amicus Br.") (Dkt. 36) at 6–8; *accord* Mem. Supp. Defs.' Mot. Dismiss FAC ("MTD") (Dkt. 29) at 9–10. The salmon used in the Ducktrap Products is sourced from BAP- or ASC-certified farms, which is "verification that [Mowi is] following best practices to deliver farmed seafood safely and responsibly." GAA Amicus Br. 3–4. "Sustainably sourced" thus is both a qualified and accurate statement.

Courts also routinely dismiss "natural" claims that (like Plaintiffs' claims here) challenge only how a product is produced without alleging that the product contains any unnatural ingredients. *See* MTD at 11–12 (collecting cases). Indeed, the FDA has stated that its "policy concerning the use of the term 'natural' . . . *was not intended to address food production methods*, such as . . . the use of pesticides[] or the use of specific animal husbandry practices, nor did it explicitly address food processing or manufacturing methods." Use of the Term "Natural" in the Labeling of Human Food Products; Request for Information and Comments, 80 Fed. Reg. 69,905-01, 69,906 (Nov. 12, 2015) (emphasis added). Because Plaintiffs do not allege that the Ducktrap Products contain unnatural *ingredients*, they could not have prevailed on their "natural" claims.

Meanwhile, the "from Maine" representation has not appeared on a Ducktrap Product label in several years, well outside the three-year statute of limitations applicable to most of Plaintiffs' claims. *See* Mem. Supp. Mot. Dismiss Compl. (Dkt. 19) at 18. Even if Plaintiffs' "from Maine" claims were timely, that statement reflects only that the Ducktrap Products are smoked in Maine, which is true. Plaintiffs therefore could not prevail on any claim concerning this representation.

To the extent Plaintiffs prevailed on any claim, any monetary recovery would have been limited to the 14.2% price premium alleged in the complaints, *e.g.*, SAC ¶ 6—roughly $1.06 per Ducktrap Product package. Mowi also would have been entitled to have each Class Member provide proof that they purchased Ducktrap Products. The Settlement, by contrast, provides each Class Member submitting a valid claim *more* than their best-case scenario by allowing them to recover approximately $1.38 per package, and Settlement Class Members need not provide proof-of-purchase for the first 10 packages for which they submit a claim. *See* Lechner Decl. ¶¶ 8–11.

Given these weaknesses in Plaintiffs' claims and the limited nature of any potential recovery, it was reasonable for Plaintiffs to accept a definite settlement recovery to avoid the uncertainties and expenses of litigating this case. *See Wal-Mart*, 396 F.3d at 119.

B. The Settlement Secures Business Practice Changes Enforceable by Plaintiffs and Settlement Class Members.

As part of the Settlement, Mowi has agreed to refrain from using "sustainably sourced," "all natural," and "Naturally Smoked Salmon FROM MAINE" on any Ducktrap Product label for two years. Settlement Agmt. § 3.5. In connection with its preliminary approval order, this Court asked the parties to be prepared to address "how this term is likely to be enforced, including who may enforce it and what consequences, if any, attach to its breach." Order (Dkt. 70) at 1.

As an initial matter, Mowi has already removed the statements at issue from its Ducktrap Product labels,[4] and it has no intention to add them back for at least two years. *See* Cynewski Decl. ¶ 5. Nevertheless, if a Settlement Class Member in the future believes that Mowi has violated the "Business Practice Changes" provision of the Settlement Agreement, *see* Settlement Agmt. § 3.5, Plaintiffs or any other Class Member could enforce the term as a matter of contract.[5]

The labeling changes secured by the Settlement are enforceable by this Court. A district court "retain[s] ancillary jurisdiction over enforcement of a settlement agreement" where its order of dismissal either "(1) expressly retain[s] jurisdiction over the settlement agreement," such as by separate provision in the order, or "(2) incorporate[s] the terms of the settlement agreement in the order." *Hendrickson v. United States*, 791 F.3d 354, 358 (2d Cir. 2015). Both the Settlement Agreement and the proposed Final Approval Order and accompanying Judgment contemplate that the Court will retain jurisdiction over enforcement of the terms of the Settlement Agreement. *See* Proposed Final Approval Order (Dkt. 83) ¶ 20; Proposed Judgment (Dkt. 84) ¶ 4.

"Settlement agreements are contracts and must therefore be construed according to general principles of contract law." *Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999). An action to enforce a settlement agreement is thus "fundamentally a claim for

[4] Those statements were removed in connection with a rebranding effort that began before Plaintiffs', Starr's, or OCA's lawsuits were ever filed. *See* Cynewski Decl. ¶¶ 4–5.

[5] Ms. Starr's objection that "[t]his provision is impermissibly vague," Starr Obj. 11, ignores that legal standards exist for determining what constitutes "appropriate qualifying or substantiating language or symbols," Settlement Agmt. § 3.5. As an example, the FTC Green Guides advise that, to prevent deception about environmental claims, companies may use "clear and prominent qualifying language that limits [a] claim [of sustainability] to a specific benefit or benefits." *See* FTC Green Guides, 16 C.F.R. § 260.4(c); *id.* § 260.2 (environmental marketing claims may be substantiated by "competent and reliable scientific evidence . . . based on standards generally accepted in the relevant scientific fields"). In any event, Mowi has no intention of using the statements at issue on Ducktrap Product labels. *See* Cynewski Decl. ¶ 5. Even if it did, and the language used were not "appropriate," any Class Member could enforce Mowi's obligation.

breach of a contract," which is governed by state law. *Hendrickson*, 791 F.3d at 358, 362 (marks omitted). This applies equally to class settlements. *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004).

Any Settlement Class Member may enforce the labeling changes as a matter of contract. As parties to the Settlement Agreement, Plaintiffs plainly are entitled to enforce its terms, on their own behalf and on behalf of the Settlement Class. *See, e.g.*, *Gomez v. Terri Vegetarian LLC*, 2021 WL 2349509, at *4 (S.D.N.Y. June 9, 2021) (finding, where defendant failed to satisfy payment obligations under settlement, that "[the named plaintiff] (and the class) is entitled to judgment in the full amount owed pursuant to the Settlement Agreement's terms"); *see also* Decl. of Jonathan Shub (Dkt. 81) ¶¶ 6–7 (attesting that Plaintiffs and Settlement Class Counsel will "remain vigilant" in assuring that Defendants adhere to the changes and, if not, will move to enforce the Agreement, sue for breach of contract, or initiate another lawsuit against Mowi). Settlement Class Members also may sue to enforce the Settlement Agreement's terms as third-party beneficiaries, because the Settlement Agreement confers upon them certain rights (such as entitlement to a cash payment for valid claims) and imposes certain obligations (such as releasing certain claims against Mowi). *See, e.g.*, *Brown v. Wal-Mart Store, Inc.*, 2021 WL 51713, at *1, *6–7 (N.D. Cal. Jan. 6, 2021) (class members could seek relief for violations of settlement that required defendant to implement a seating program for cashiers); *Byrd v. Long Island Lighting Co.*, 565 F. Supp. 1455, 1469–70 (E.D.N.Y. 1983) (member of the class that a conciliation agreement between the EEOC and an employer was intended to benefit could enforce agreement in Title VII action). This is because "a third party may enforce a contract if it is within the class of intended beneficiaries of the contract even if not named or known of at the time." *Southridge Cap. Mgmt., LLC v. Lowry*, 188 F. Supp. 2d 388, 397 (S.D.N.Y. 2002); *Ancile Inv. Co. v. Archer Daniels Midland Co.*, 784 F. Supp. 2d 296,

303 (S.D.N.Y. 2011) (similar); *cf. In re Spong*, 661 F.2d 6, 10 (2d Cir. 1981) ("In a third party beneficiary contract, benefits flow to both the promisee and the third party, and either may sue to enforce the contract.").

II. THE CLASS HAS OVERWHELMINGLY SUPPORTED THE SETTLEMENT.

"The reaction of the class to the settlement is perhaps the most significant factor to be weighted in considering its adequacy." *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 410 (S.D.N.Y. 2018) (marks omitted), *aff'd sub nom. In re Facebook, Inc.*, 822 F. App'x 40 (2d Cir. 2020); *see also Wal-Mart*, 396 F.3d at 119 ("[T]he favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in our *Grinnell* inquiry."). Here, the Settlement Class's reaction has been overwhelmingly positive. The exact number of Settlement Class Members can never be known, which is why a claims process was necessary. But based on Plaintiffs' estimate that the Settlement Class contains 450,000 individuals, *see* Final Approval Mem. 14 n.6, the Settlement Administrator has approved claims from more than 18% of the Settlement Class.[6] *See* Lechner Decl. ¶ 10. "Claims-made settlements typically have a participation rate in the 10-15 percent range," but "in the consumer class action context a claim participation rate as low as 3 percent is not unusual and does not suggest that the settlement is inadequate or unfair." 2 McLaughlin on Class Actions § 6:24 (18th ed.). Courts have readily approved class settlements with similar, or even far lower, participation rates than the estimated claims rate here. *See, e.g.*, *Hernandez v. Immortal Rise, Inc.*, 306 F.R.D. 91, 100 (E.D.N.Y. 2015) (20% participation rate "is well above average in class action settlements" and thus favored final approval); *Pollard v. Remington Arms Co.*, 320 F.R.D. 198, 214–15 (W.D.

[6] The actual participation rate, when accounting for claims that the settlement administrator received but deemed invalid, is 23%. *See* Lechner Decl. ¶¶ 5–10.

Mo. 2017) (noting that "[c]ourts around the country have approved settlements where the claims rate was less than one percent" or "in the single digits"), *aff'd,* 896 F.3d 900 (8th Cir. 2018).

Meanwhile, just one Settlement Class Member requested exclusion from the Settlement, and only two Settlement Class Members—represented by the same counsel—filed objections. *See* Weisbrot Decl. ¶¶ 35–36. The *only* objections thus come through counsel who, as this Court previously suggested, appear concerned with "reap[ing] the pecuniary benefit of their investigation into Mowi's allegedly misleading practices" in connection with their separate lawsuits. Op. 9. "The fact that the vast majority of class members neither objected nor opted out is a strong indication that the proposed settlement is fair, reasonable, and adequate." *Wright v. Stern*, 553 F. Supp. 2d 337, 344–45 (S.D.N.Y. 2008) (approving settlement where 13 out of 3,500 class members objected and three opted out); *see also Wal-Mart*, 396 F.3d at 118 ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.").

III. THE OBJECTIONS TO THE SETTLEMENT LACK MERIT.

A. The Settlement Provides Fair Compensation.

Under the Settlement, each Settlement Class Member that submitted a valid claim will receive about $1.38 for each Ducktrap Product purchased, up to 10 packages per household. Lechner Decl. ¶ 11. Class Members that provided proofs of purchase can receive more. *See* Settlement Agmt. § 3.2(b), (d). This monetary relief exceeds what any Settlement Class Member reasonably could expect to obtain in litigation, which would amount to at most approximately $1.06 per package based on Plaintiffs' allegation of a 14.2% price premium. *See* SAC ¶ 6. The compensation offered to the Settlement Class in this case is reasonable, given that Class Members who submitted claims stand to receive *more* than the price premium they allegedly paid.

Ms. Starr claims that the settlement amount is too low, but it is within the range of what she was willing to accept to settle her nearly identical case on a class-wide basis. Before the

mediation in this case, Objectors' counsel twice made unsolicited nationwide class settlement offers to Mowi. In October 2020, Objectors' counsel wrote to Mowi that a "resolution acceptable to [Ms.] Starr would also include a class settlement fund, equaling 1-5% of Mowi's total sales of the Products during the class period." *See* Soukup Decl., Ex. B (Oct. 19, 2020 Letter) at 2. This fund, Ms. Starr offered, would encompass claims by class members, notice-and-administration costs, attorneys' fees, and a class representative incentive award for Ms. Starr. *Id.* Later, on February 4, 2021—still before any discovery had occurred—Ms. Starr again "propose[d] a[n] [all-in] class settlement fund equaling 5% of Mowi's total sales of the Products during the class period." Soukup Decl., Ex. D (Feb. 4, 2021 Letter) at 1.

Mowi valued those unsolicited, opening offers as proposing an all-in settlement fund of between $440,000 and $2.2 million. *See* Soukup. Decl., Ex. F ¶ 5 (stating that Mowi valued the high-end offer, which proposed a nationwide settlement with an all-inclusive fund equal to 5% of sales during the applicable limitations period, at $2.2 million). The Settlement in this case creates a settlement fund of up to $1.3 million to be used to pay claims to Settlement Class Members, Notice and Settlement Administration Costs, and any Class Representative Service Awards. Settlement Agmt. § 3.2(d). Mowi also has agreed to pay attorneys' fees up to $360,000. *Id.* § 3.4(a). Altogether, Mowi has agreed to pay up to $1.66 million under the Settlement. As this Court previously observed, Plaintiffs have thus "secured class-wide relief on the higher end of the range proposed by [Objectors' counsel] in [his] *opening bids* to Mowi," and the Settlement "likely matched or exceeded the amounts originally sought" by Objectors' counsel. Op. 15 & n.10.

Faced with this result, Ms. Starr accuses Mowi of misrepresenting its sales numbers. Mowi has not done so, and the attached declaration confirms the veracity of the sales figures that Mowi provided during the mediation. *See* Cynewski Decl. ¶ 6. Critically, sales of the Ducktrap Product

that included the "sustainably sourced" representation—the central focus of Plaintiffs' *and* Objectors' claims—represent less than 5 percent of this number. *Id.* ¶¶ 6–7.

Ms. Starr's arguments to the contrary are based on what she admits are "guesses and extrapolation" from two newspaper articles. Starr Obj. 14–15. She ignores that the revenue and sales figures reported in those articles represent *all* of Ducktrap's products—some of which are at issue in this case, and many of which are not. Cynewski Decl. ¶¶ 9–10. Sales of the Products at issue here have never reached the levels she speculates they have reached. *Id.*

Ms. Starr then contends that, as one of the largest salmon producers in the world, Mowi can afford to pay more. Starr Obj. 16. But the "ability of defendants to pay more, on its own, does not render the settlement unfair. Rather, the reasonableness of the Settlement is better analyzed in light of the amount of the Settlement compared to the substantial risks . . . [p]laintiff[s] faced in proving liability and damages . . . ." *Guevoura Fund Ltd. v. Sillerman*, 2019 WL 6889901, at *9 (S.D.N.Y. Dec. 18, 2019) (citation omitted); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001) (district court did not abuse its discretion in approving settlement, even though defendants were able to withstand higher judgment, where other factors weighed heavily in favor of approval). Mowi's alleged ability to pay more is not a reason to deny approval to the Settlement.

B. The Settlement Is Not the Product of a Reverse Auction, and Plaintiffs Had Sufficient Information to Assess Their Case.

OCA argues that the Settlement was "hastily reached" and the "result[] of a reverse auction." OCA Obj. 5, 7–9. Ms. Starr likewise claims that "Plaintiffs and their counsel did not have sufficient information to properly evaluate any settlement offer by Defendants." Starr Obj. 12. Neither contention has merit.

OCA does not try to substantiate its speculation that a reverse auction has occurred, and this Court already rejected that argument when Ms. Starr made it in her motion to intervene. *See*

Op. 15 n.10. The parties reached a settlement only after a day-long mediation led by a retired federal magistrate judge with extensive experience settling class actions, and no reverse auction occurred. *See* Soukup Decl., Ex. F ¶¶ 2, 6–7. To be sure, Mowi disclosed to Judge Welsh that it had received unsolicited class-settlement offers from Ms. Starr to settle for up to 5 percent of Ducktrap Product sales. *Id.* ¶ 5. But Mowi also "asked that [Judge Welsh] not disclose the existence or terms of the Richman firm's offer to Plaintiffs, and [she] heeded that request." *Id.* ¶ 6. Plaintiffs' counsel confirmed that they had no knowledge of the settlement proposal from Objectors' counsel. Decl. of Gary M. Klinger (Dkt. 50-1) ¶¶ 11–12. Judge Welsh explained why she refused to share this information during the mediation: "As an experienced mediator who has settled many class actions, I had no intention of reverse auctioning a class-action settlement by sharing the offer with Plaintiffs." Soukup Decl., Ex. F ¶ 6. That is why this Court already concluded that the Settlement was not the product of a reverse action. *See* Op. 15 n.10.

Likewise, as this Court previously observed, Ms. Starr's contention that Plaintiffs and their counsel settled too quickly "is difficult to credit—and cynical—insofar as [Ms. Starr] attempted to do the same thing upon filing the Maine Action." Op. 14. Objectors' counsel made their unsolicited class settlement offer *before Ms. Starr even filed suit*, and before either Objector obtained any discovery from Mowi. *See* Soukup Decl., Ex. B at 1–2.

"Even had [Ms. Starr] not undermined [her] criticisms by seeking to settle [her] own class action on a record similarly sparse to the one here, the fact that plaintiffs opted to seek—and obtained—early settlement does not suggest inadequacy of representation." Op. 15. As this Court has observed, "[d]iscovery has costs, and further discovery would have taken additional time and resulted in expenditure of additional funds on both sides, neither of which is in the plaintiffs' interest." *Id.* (citation and marks omitted). That is why there is a "strong judicial policy in favor

of settlements, particularly in the class action context," *Wal-Mart*, 396 F.3d at 116, and "courts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere," *Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *5 (S.D.N.Y. Oct. 2, 2013).

Here, Settlement Class Counsel had sufficient opportunity to assess the strengths and weaknesses of their case and to recommend settlement. *See id.* at *6 ("The pertinent question is 'whether counsel had an adequate appreciation of the merits of the case before negotiating.'"). Mowi briefed two motions to dismiss that identified key weaknesses in Plaintiffs' claims, and the parties' submissions to Judge Welsh and day-long "mediation allowed them to further explore the[ir] claims and defenses." *Id.* The parties also engaged in "an efficient, informal exchange of information" that included sales data for the Ducktrap Products. *Id.*; *see also* Decl. of Jonathan Shub (Dkt. 67-1) ¶ 12 (noting the parties engaged in informal, confirmatory discovery). Because Plaintiffs—unlike Ms. Starr and OCA—actually alleged a particular price premium, *see* SAC ¶ 6, this sales data allowed Plaintiffs to assess the value of their claims, *see, e.g.*, *Yuzary*, 2013 WL 5492998, at *6 ("efficient, informal exchange of information" coupled with mediation gave plaintiffs enough information "to weigh the strengths and weaknesses of their claims and to accurately estimate the damages at issue"); *deMunecas v. Bold Food, LLC*, 2010 WL 3322580, at *5 (S.D.N.Y. Aug. 23, 2010) (similar).

Tellingly, Ms. Starr does not say what discovery should have occurred, or how it would have resulted in a better settlement. She faults Plaintiffs for not estimating the class's size, *see* Starr Obj. 12, but Plaintiffs' papers include an estimate, *see* Mot. for Final Approval at 14 n.6, and Ms. Starr herself made a settlement offer without knowing the class's size. She also criticizes Plaintiffs for not "confirm[ing] OCA's assessment of how consumers understand or value the three

label statements," Starr Obj. 12–13, but she offers no competing estimate of the premium she believes she or others paid to purchase Ducktrap Products, and her settlement offers suggest she assigns roughly the same premium to the statements as Plaintiffs do. As with her prior motion, Ms. Starr's concerns are "speculative or conclusory" and "refuted by the record." Op. 11.

In sum, there is no basis to conclude that this Settlement was the product of any collusion or reverse auction when, as the Court has noted, it "likely matched or exceeded the amounts originally sought by the undisputedly arm's-length Intervenors." Op. 15 n.10.

C. The Class Definition Is Not Impermissibly Overbroad.

Objectors next claim that the Settlement Class definition is overbroad because it includes businesses whose claims are supposedly "markedly different" from those of individual consumers. Starr Obj. 5. There is nothing *per se* impermissible about a class that includes both individuals and businesses. *See, e.g.*, *In re SunEdison, Inc. Sec. Litig.*, 329 F.R.D. 124, 132–33, 138–48 (S.D.N.Y. 2019) (certifying classes consisting of "all persons or entities" who purchased certain shares where the claims at issue arose from the same misleading statements or omissions). That is particularly so here, where the Settlement Class Representatives include both an individual and a business that allegedly purchased Ducktrap Products for personal use. *See* SAC ¶¶ 19–20.

Objectors nevertheless complain that the Settlement Class definition is overbroad because it includes wholesalers and retailers of Ducktrap Products that—Objectors assume—may have resold the Ducktrap Products they purchased for a profit. *See* Starr Obj. 5; OCA Obj. 7 n.5. They raise two concerns in this regard, neither of which undermines the fairness of the Settlement.

First, there is no issue with a class definition that includes resellers that, according to Objectors, would not have cognizable claims against Mowi under state consumer fraud statutes. *See* Starr Obj. 5, 7. Even assuming that certain Settlement Class Members would not have cognizable claims, that fact alone is not enough to demonstrate that the Settlement Class cannot

be certified. "In the Second Circuit, plaintiffs are entitled to settle even entirely non-meritorious claims," because including such claimants in the settlement class may be necessary for defendants to buy "global peace." *In re Petrobras Sec. Litig.*, 317 F. Supp. 3d 858, 866 (S.D.N.Y. 2018), *aff'd,* 784 F. App'x 10 (2d Cir. 2019); *see also In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 243 (2d Cir. 2012) ("Defendants in class action suits are entitled to settle claims pending against them on a class-wide basis even if a court believes that those claims may be meritless . . . .").

Second, Ms. Starr's speculation that wholesalers and retailers stand to receive a disproportionate amount of the available settlement funds, *see* Starr Obj. 6–7, is unfounded because no wholesalers or retailers appear to have submitted claims. *See* Lechner Decl. ¶ 12.[7] Additionally, of the handful of businesses that submitted claims, none stand to recover for more than 10 product units, *see id.*, refuting Starr's speculation that claims submitted by businesses will "swallow[] the entire settlement fund," Starr Obj. 7.[8]

[7] It makes sense that wholesalers and retailers would not have submitted claims: the gravamen of the complaints is that consumers were misled into purchasing products for personal consumption that they believed had qualities other than what was allegedly represented on the product label. It is unlikely that any reseller would have been misled, as the product would have been purchased for reasons other than personal consumption. Any claim a reseller might have asserted thus would have had virtually no value.

[8] Any argument that wholesalers and retailers would have paid a lower wholesale price and thus would have received a higher-value settlement payment than individual consumers who purchased Ducktrap Products at retail, *see* Starr Obj. 6, thus is beside the point. The same can be said of individual consumers, who might have paid more or less for the Ducktrap Products than other consumers depending on when and from whom they purchased the Products. "[A] plan of allocation need not be perfect." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 667 (S.D.N.Y. 2015) (Engelmayer, J.). It "need only have a reasonable, rational basis." *Id.* In this case, allocating the available settlement funds among Settlement Class Members on a *pro rata* basis based on the number of Ducktrap Products each Settlement Class Member claims to have purchased is reasonable. *See, e.g.*, *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 316–17 (S.D.N.Y. 2020) (granting final approval of settlement that allocated the net settlement fund to class members on a *pro rata* basis based on claimed purchases).

D. The Claims Released Under the Settlement Are Not Overly Broad.

Ms. Starr and OCA also object that the release in the Settlement is too broad. *See* Starr Obj. 8–11; OCA Obj. 5–7. Their principal concerns are that the Settlement cannot release claims arising from (1) marketing statements that Mowi allegedly made online and (2) allegations that the Ducktrap River of Maine brand name misrepresents that Ducktrap Products use salmon sourced from Maine. Both Objectors also criticize the Settlement because it would block OCA from pursuing injunctive relief in D.C. Superior Court. These objections lack merit.

A class action settlement "may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint." *Wal-Mart*, 396 F.3d at 108. "There is no impropriety in including in a settlement a description of claims that is somewhat broader than those that have been specifically pleaded." *Id.* at 107 n.13. "Broad class action settlements are common, since defendants . . . would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country," and "[p]ractically speaking, '[c]lass action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability.'" *Id.* at 106. A class-action release may therefore include claims that the plaintiffs did not plead if they arise out of the "identical factual predicate"—meaning, they "share the same integral facts"—"as [the] settled claims." *Id.*

The Settlement's release is consistent with this rule, as all of the released claims arise out of or relate to the same factual predicate as the claims that Plaintiffs have asserted. *See Pucciarelli v. Lakeview Cars, Inc.*, 2017 WL 2778029, at *3 (E.D.N.Y. June 26, 2017) (approving release that encompassed claims that "arise out of or relate to the facts, acts, transactions, occurrence, events or omissions alleged in the lawsuit or which could have been alleged in the action"); *In re AOL Time Warner ERISA Litig.*, 2006 WL 2789862, at *12 n.7 (S.D.N.Y. Sept. 27, 2006) (overruling

objection that release was too broad because it included "all claims . . . arising out of or in anyway related to, directly or indirectly, any or all of the . . . matters . . . that . . . could have been alleged").

Online and Social Media Representations. Ms. Starr and OCA first object that the release encompasses statements Mowi made online or on social media. *See* Starr Obj. 9–10; OCA Obj. 5–6. But Neversink's initial complaint alleged that these statements—that "WE CARE for the ecosystem" and that Ducktrap Products are "sustainably sourced," "farm[ed] sustainably," "environmentally sustainable," "eco-friendly," "all natural," "100% natural," "100% all natural," "from Maine," and "from the coast of Maine"—were all misleading for the same reasons that the Ducktrap Product labels were allegedly misleading. Compl. ¶¶ 3–11, 22–28, 63–76. The release simply tracks the allegations in Neversink's original complaint. *Compare* Settlement Agmt. § 1.32, *with* Compl. ¶¶ 3, 5, 7, 20, 24–28, 62–63, 67, 72–73.

It makes no difference that Plaintiffs' amended complaints focused on just the Ducktrap Product labels. Claims that Ducktrap's packaging and online marketing both misrepresented Ducktrap Products as "sustainably sourced," "all natural," "from Maine," and similar phrases all arise from the same factual predicate. By releasing the claims that Plaintiffs asserted in each version of their complaint, the Settlement confers finality by preventing Settlement Class Members from suing again on related claims that could have been—and, in this case, were—asserted in this litigation. *See, e.g.*, *Urackchin v. Allianz Asset Mgmt. of Am., L.P.*, 2018 WL 3000490, at *5 (C.D. Cal. Feb. 6, 2018) ("Although the release includes both the original and First Amended Complaints, the Court concludes that the allegations and causes of action brought were substantially similar and is not concerned that the inclusion of the original complaint would result in an overly broad release.").

In any event, claims arising out of Mowi's online representations are weak. Neversink dropped these claims after Mowi pointed out that it could not allege, much less prove, that it relied on these statements when it purchased Ducktrap Products. *See* Mot. Dismiss Compl. (Dkt. 19) at 9–10. And though Ms. Starr laments the release of these claims, she does not even challenge the online statements in her operative complaint, presumably because she never relied upon them and so cannot show that they were material to her own purchases. *See* Soukup. Decl., Ex. E (*Starr* First Am. Compl.).

Maine Representations. Ms. Starr also objects to a release that prevents her from suing Mowi on the theory that Ducktrap's brand name—"Ducktrap River *of Maine*"—is misleading because it implies that Ducktrap Products use salmon sourced from Maine. Starr Obj. 10. Again, any claim arising out of the phrase "of Maine" arises from the same factual predicate as the "of/from Maine" claim that Plaintiffs have asserted in this case. Using nearly identical language, both sets of plaintiffs allege that Ducktrap Product labels have misled consumers into believing that Ducktrap salmon is "sourced from Maine or off the coastline of Maine," when the salmon comes from farms in Chile, Scotland, Ireland, and Norway. *Compare* SAC ¶¶ 44, 81–83, *with* Soukup Decl., Ex. E ¶¶ 29, 31. The concern that has sometimes prevented the Second Circuit from approving releases in past class actions is thus absent from this case: Plaintiffs and Ms. Starr are part of the same class, they "had the same interest in maximizing the value" of their claim that Ducktrap Product packaging misled buyers into believing its salmon is sourced from Maine, and the Settlement compensates the class for releasing that exact claim. *See, e.g.*, *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 462 (2d Cir. 1982).

Moreover, Ms. Starr's claim that the brand name "Ducktrap River of Maine" is misleading lacks any merit. Ms. Starr thought so little of this claim that she failed to include it in her original

complaint, and OCA has never attempted to assert such a claim. *See* Soukup Decl., Ex. C (*Starr* Compl.), Ex. A. (*OCA* Compl.). Ms. Starr added that claim to her amended complaint only after she learned of this Settlement. *See* Soukup Decl., Ex. E ¶¶ 28–29. When she did so, she conceded that Mowi Ducktrap has its principal place of business in Maine, *id.* ¶¶ 86–87, 90, and relied on sources that expressly acknowledge that "Ducktrap River of Maine" has been "smoking fish on the Maine coast" for more than 40 years, *see id.* ¶ 52 n.45. The decades-old Ducktrap brand name accurately conveys the company's long-standing ties to Maine, and no reasonable consumer would interpret it as a guarantee that every fish in every Ducktrap Product was caught in Maine.

Injunctive Relief. Objectors also argue that the Settlement cannot bar OCA from pursuing injunctive relief in D.C. Superior Court because the Settlement does not include a Rule 23(b)(2) class, *see* Starr Obj. 10, and because OCA brought suit in D.C. Superior Court under a "unique" D.C. statute that "is not subject to Rule 23 requirements or any form of class certification," *see* OCA Obj. 5–7. This is nothing more than a collateral attack on the D.C. Superior Court's order staying the *OCA* action, and it should be summarily dismissed.

Under Second Circuit precedent, a class-action settlement may release a claim that "was not presented and might not have been presentable in the class action" provided that the claim arises from the same factual predicate as the "claims in the settled class action." *TBK Partners*, 675 F.2d at 460. Given its accusations that Neversink copied its complaint, *see, e.g.*, OCA Obj. 2, OCA cannot dispute that its claims for injunctive relief arise from the same factual predicate as the *Neversink* claims. That is why the D.C. Superior Court observed that "the settlement in *Neversink* entirely resolves the claims raised by" OCA. Soukup Decl., Ex. H at 3.

While the Objectors lament that the Settlement releases injunctive-relief claims, those claims have no actual value. Courts routinely dismiss such claims in mislabeling cases because

"past purchasers of a product . . . are not likely to encounter future harm of the kind that makes injunctive relief appropriate." *Berni v. Barilla S.p.A.*, 964 F.3d 141, 147 (2d Cir. 2020); *see also* MTD at 24–25. And as the D.C. Superior Court already noted, Mowi's labeling changes have mooted any claim OCA might have had for injunctive relief. *See* Soukup Decl., Ex. H at 4.[9]

OCA's objection appears to be directed at the D.C. Superior Court's decision to stay the *OCA* action based on that court's assessment that the already-implemented label changes, along with this Settlement, will moot OCA's claims.[10] *See, e.g.*, OCA Obj. 3, 8. For example, OCA objects that "it should not be precluded from pursuing [its D.C.] claims (which are ***not*** addressed in this Settlement)," *id.* at 8, even though the D.C. Superior Court has already held that "the settlement in *Neversink* entirely resolves the claims raised by" OCA, Soukup Decl., Ex. H at 3. The D.C. Superior Court's decision is not at issue here, and OCA's objections to the Settlement in this case are not an appropriate vehicle for collaterally attacking that court's ruling. *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (whether settlement release

[9] To the extent OCA also implies that the release is too broad because it would include claims arising from representations "similar to the representations" challenged in Plaintiffs' complaints, *see* OCA Obj. 6, the release merely affords Mowi the broadest possible release consistent with the identical factual predicate rule. *See, e.g.*, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 46–47 (E.D.N.Y. 2019) (approving settlement release that encompassed "[c]laims based on rules in the future that are *substantially similar*" where parties clarified that "the Release Provision should not be read to release any rules or conduct not based on an identical factual predicate"). The "release need not expressly state that it is limited by 'the identical factual predicate doctrine' in order to be so limited." *Gascho v. Global Fitness Holdings, LLC*, 2014 WL 1350509, at *31 (S.D. Ohio Apr. 4, 2014) (citing *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 342 n.36 (S.D.N.Y. 2005)). And unlike in the one case cited by OCA, the release here is not intended to "bar all future marketing-related claims by Class Members . . . whether or not [they] aris[e] from" the same factual predicate as the alleged misrepresentations at issue in this litigation. *Oladapo v. Smart One Energy, LLC*, 2017 WL 5956907, at *15 (S.D.N.Y. Nov. 9, 2017).

[10] OCA's contention that it is still challenging the online and social media representations that Neversink dropped from its original complaint ignores that any claims based on those online marketing statements arise from the same factual predicate as the settled claims and so are fairly released by this Settlement. *See supra* at 20–21.

bars objector's claims in separate action is not a determination that needs to be made for purposes of final approval of settlement); *Smith v. CRST Van Expedited, Inc.*, 2012 WL 5873701, at *4 (S.D. Cal. Nov. 20, 2012) (noting that issues regarding preclusive effect of release in another case, if the dispute ever arises, are "for the Court hearing the dispute, with full briefing, to decide").

E. The Objectors' Criticism of Neversink's Ability to Serve as a Class Representative Is Not a Reason to Deny Approval of the Settlement.

Ms. Starr's objection to Neversink's appointment as a Class Representative is based on her assumption that Neversink purchased the Ducktrap Products for resale. This ignores Neversink's allegation that it is not a reseller, but instead "purchased the Products for personal use at the General Store." *E.g.*, SAC ¶ 19.

Regardless, a class needs only one adequate representative, and neither Ms. Starr nor OCA challenge Ms. Tomlinson's adequacy. *See* Wright & Miller, 7A Fed. Prac. & Proc. Civ. § 1765 (4th ed.) (Nov. 2021) ("[I]f there is more than one named representative, it is not necessary that all the representatives meet the Rule 23(a)(4) standard; as long as one of the representatives is adequate, the requirement will be met."). The settlement may therefore be approved no matter how the Court views Neversink's typicality and adequacy.[11] *See, e.g.*, *Vincent v. Money Store*, 304 F.R.D. 446, 456–60, 462–63 (S.D.N.Y. 2015) (certifying class even though two plaintiffs were not adequate representatives because "the remaining named plaintiff" was adequate).

F. The Objectors' Criticism of Plaintiffs' Proposed Fee and Service Awards Do Not Affect Whether the Court Should Approve the Settlement.

Finally, both Objectors argue that Settlement Class Counsel's fee request is excessive, *see* Starr Obj. 17–18, OCA Obj. 9–10, and Ms. Starr says the same of Neversink's request for a Service

[11] Ms. Starr's argument that Neversink's claims are not typical of individual consumers ignores this Court's observation that "[t]he class definition in the proposed settlement agreement includes 'entities' that bought the products at issue during the class period, such that Neversink . . . may well be representative of such absent class members." Op. 12 n.7.

Award, *see* Starr Obj. 19–20. Mowi takes no position on these issues, other than to observe that their resolution is separate from the decision whether to approve the Settlement.

The Settlement Agreement is not conditioned on the Court's approval of any fee request or service award. *See* Settlement Agmt. §§ 3.3(b); 3.4(b). And any award of attorneys' fees and costs will not impact the relief awarded to the class. There also is no indication that the fee requests are the product of collusion, because the parties did not discuss attorneys' fees until after they had agreed to the other principal terms of the Settlement. Soukup Decl., Ex. F ¶ 8. As a result, the Objectors' challenge to the fee and service awards is not a reason to deny approval to the Settlement. *See Blessing v. Sirius XM Radio, Inc.*, 507 F. App'x 1, 4 (2d Cir. 2012) (approving similar provision where the "the fee was negotiated only after settlement terms had been decided and did not . . . reduce what the class ultimately received"); *Shames v. Hertz Corp.*, 2012 WL 5392159, at *13 (S.D. Cal. Nov. 5, 2012) (explaining that the court "placed little to no value on the fact that Plaintiffs' fee request is uncontested" and found no evidence of collusion where "[t]he fee amount was negotiated separately and only after the class settlement was finalized").

CONCLUSION

Mowi respectfully requests that the Court overrule Ms. Starr's and OCA's objections and enter the proposed Final Approval Order.

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Respectfully submitted,

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