**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.

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

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

# TABLE OF CONTENTS

**SECTION:** **PAGE:**

## TABLE OF AUTHORITIES

**CASES:** **PAGE(S):**

**STATUTES:** **PAGE(S):**



**OTHER AUTHORITIES:** **PAGE(S):**



**RULES:** **PAGE(S):**

Pursuant to Rule 23(e), Plaintiffs[1] Neversink General Store and Brenda Tomlinson ("Plaintiffs"), individually and on behalf of all others similarly situated, respectfully submit this Memorandum of Law in support of Plaintiffs' Motion for Final Approval of the Parties' Settlement Agreement.

## I. INTRODUCTION

On May 13, 2021, this Court preliminarily approved a class action settlement between Plaintiffs and Defendants Mowi USA, LLC, Mowi Ducktrap, LLC, Mowi USA Holding, LLC, and Mowi ASA (collectively, "Mowi" or "Defendants"). Plaintiffs' and Settlement Class Counsel's efforts created a settlement fund of $1,300,000 to provide recovery for Settlement Class Members with or without Proof of Purchase, as well as additional relief in the form of changes to Mowi's advertising language and marketing practices. Specifically, the Agreement provides that Settlement Class Members with no Proof of Purchase can claim up to $2.50 per Ducktrap Product purchased during the Class Period for up to 10 products that they attest to have purchased. Settlement Class Members *with* proof of purchase are eligible to recover $2.50 per unit purchased, *with no individual limit*, provided the Total Class Consideration of $1,300,000 is not exceeded, in which case each Settlement Class Member's claim would be reduced *pro rata*.

Settlement Class Counsel have zealously prosecuted Plaintiffs' claims, achieving the Settlement only after extensive investigation, research, confirmatory discovery, and substantial arm's-length negotiations, including an all-day mediation with esteemed mediator, Hon. Diane Welsh (Ret.) of JAMS.

[1] Unless otherwise indicated, capitalized terms shall have the meaning that the Settlement Agreement ascribes to them. *See generally* Class Settlement Agreement filed as Ex. 1 to the Decl. of Jonathan Shub at ECF No. 67-1 ("Agr.").

After this Court granted preliminary approval, the Settlement Administrator—with the help of the Parties—disseminated Notice to the Settlement Class pursuant to the terms of the Settlement Agreement and the Court's Order granting preliminary approval (ECF No. 69). Notice exceeded that proposed by the Settlement Agreement, included programmatic display advertising, social media advertising, and paid search campaigns, and achieved a reach of approximately 71.79% with an average frequency of 5.41 times. The Notice provided Settlement Class Members with information regarding how to reach the Settlement Website, how to make a claim, and how to opt-out or object to the Settlement.

The Settlement Agreement is an excellent result, and has received an overwhelmingly positive response from the Settlement Class. The claims period ran through September 10, 2021, and netted an exceptional 106,827 claim submissions, representing an estimated 23% claims rate from the Class, which is virtually unheard of in consumer class actions, which often have claims rates ranging from 1–3% of the Class. Upon payment of valid claims, the entirety of the Settlement Fund will be exhausted, with no funds reverting to Defendants. Even more, only two objections have been filed, and only one has requested exclusion.[2]

## II. PROCEDURAL BACKGROUND AND SETTLEMENT NEGOTIATIONS

This case arises from Plaintiffs' claims, asserted on behalf of a nationwide Class that Defendants deceptively and misleadingly labeled and marketed their Ducktrap Products by

[2] The only individual who objected to the Settlement is Abigail Starr. Ms. Starr is represented by Kim E. Richman, Esq. Mr. Richman attempted to intervene in this Action on behalf of Ms. Starr and her co-plaintiff in another action, Lauren Snider, but the motion was denied. ECF No. 68. An objection has also been filed by Mr. Richman on behalf of Organic Consumer Association. It is unclear whether these objections are proper. Plaintiffs are evaluating the objections and will respond in full on November 4, 2021 pursuant to the Court's Order granting preliminary approval. ECF No. 69. In short, the objections are meritless as the proposed Settlement is valued at approximately 80% of Mr. Richman's unsolicited opening offer to settle Ms. Starr's nearly identical case. Further evidence that the objections are meritless is the fact that Ms. Starr's co-plaintiff and Mr. Richman's other client, Ms. Snider, *did not participate in the objection and did not request exclusion from the Settlement*.

misstating and misrepresenting that the Ducktrap Products are (1) sustainably sourced ("Sustainability Representation"), (2) all natural ("Natural Representation"), and (3) sourced from Maine ("Maine Representation").[3]

After a preliminary investigation, Plaintiff Neversink General Store filed its initial Complaint on November 5, 2020, alleging that in in the course of advertising their products, Defendants made material misrepresentations as to the sustainability, natural character, and source of their smoked Atlantic salmon products. Compl. ¶ 2, ECF No. 1; *see* Decl. of Jonathan Shub in Supp. of Pls.' Unopposed Mot. for Prelim. Approval of Class Action Settlement ¶ 6, ECF No. 67-1 ("Shub MPA Decl.").

On December 22, 2020, Defendants filed a motion to dismiss all causes of action brought by Plaintiff Neversink, to which Plaintiff responded by filing its First Amended Complaint on January 12, 2021. *See* Mot. to Dismiss, ECF No. 18; First Am. Compl., ECF No. 24. Defendants filed a second motion to dismiss on February 1, 2021, again challenging all of the causes of action brought by Plaintiff Neversink. Second Mot. to Dismiss, ECF No. 29.

On or about January 6, 2021, the Parties began discussing the potential for early resolution, eventually agreeing to use esteemed mediator Hon. Diane Welsh (Ret.) of JAMS to assist in negotiations. Shub MPA Decl. ¶ 10. In preparation for mediation the Parties continued their investigation of the facts and analyzed the relevant legal issues in regard to the claims and defenses asserted. *Id*. ¶ 11. As part of these efforts, Defendants provided informal and confirmatory discovery to Counsel for Plaintiffs that allowed Counsel to further evaluate the claims and defenses, and assess the value of the claims alleged on behalf of the Class. *Id*. ¶ 12. The Parties then drafted and submitted detailed written statements to the mediator. *Id*. ¶ 13. To further assist

[3] Second Am. Class Action Compl., ECF No. 45.

in negotiations, prior to the mediation Defendants submitted a term sheet to Counsel for Plaintiffs. *Id*. ¶ 14. The proposed term sheet included a detailed outline of the general terms of a possible nationwide class settlement, so that the mediation could focus on the primary points of dispute, including the cash payments to be made available to Class Members and the number of claims that Class Members could submit. *Id*. The term sheet did not contain any specific dollar amounts. *Id*.

On February 8, 2021, the Parties attended a full-day mediation with Hon. Diane Welsh (Ret.). The result of that mediation was a preliminary agreement between the Parties on the central terms of the Settlement. *Id*. ¶ 15. On February 10, 2021, the Parties provided the Court with a Notice of Settlement, proposing the next steps to be carried out in the Settlement process. *Id.* ¶ 16; Not. of Settlement, ECF No. 37.

After agreeing to the essential settlement terms, the Parties began memorializing and negotiating the details of the Settlement Agreement. *Id*. ¶ 17. This began another round of comprehensive negotiations in which each aspect of the Settlement Agreement, including each of the exhibits, were negotiated at length. *Id*. During this process, four class action notice specialists were solicited for bids for their services as notice provider and settlement administrator in this case. *Id*. ¶ 18. After reviewing the bids, the Parties selected experienced class notice specialist, Angeion Group, to advise the Parties and to design the specifics of a Notice program, the cost of which would be capped at $219,500. *Id.* ¶ 19. The Notice program and each document comprising the Notice were designed to make them easy to read and understand, as well as maximize the likelihood of broad proposed Settlement Class Member participation in the Claims process. *Id*. ¶ 35.

Pursuant to the agreed-upon Settlement terms, on February 23, 2021, Plaintiff moved for leave to amend its First Amended Complaint to add a second Plaintiff, Brenda Tomlinson. *Id.* ¶

21; Unopposed Mot. for Leave to Am. Compl., ECF No. 39. On February 24, 2021, the Court granted that Motion, and Plaintiffs filed their Second Amended Complaint on March 15, 2021. *Id.* ¶ 21; Second Am. Compl., ECF No. 45.

On March 16, 2021, the Parties in this Action finalized and executed the Settlement Agreement. Shub MPA Decl. ¶ 21. The Parties only reached settlement after engaging in a significant exchange of information, confirmatory discovery, and arm's-length negotiations, including a full-day mediation with esteemed mediator Hon. Diane Welsh (Ret.) of JAMS. *Id.* ¶ 22.

After this Court subsequently questioned its authority to certify the injunctive-relief class contemplated in that initial Settlement Agreement, *see* ECF No. 65, the Parties renegotiated that term and replaced the injunction with a substantively identical commitment by Mowi not to use the allegedly deceptive statements on the Ducktrap Product labels. That Settlement Agreement was filed with the Court on May 5, and preliminarily approved on May 13.

Plaintiffs' objectives in filing this action were to remedy the allegedly deceptive representations made on Defendants' labeling, specifically, that the Products are sustainably sourced, all natural, and sourced from Maine, and to compensate Settlement Class Members damaged by the alleged misrepresentations. *See generally*, Second Am. Compl. Through the Settlement Agreement, Plaintiffs have achieved both objectives—providing significant benefits for the Settlement Class Members especially in light of the substantial risks the Parties would face if the Litigation progressed.[4] Settlement Class Counsel believe the Settlement confers substantial benefits upon the Settlement Class Members. Settlement Class Counsel have evaluated the

[4] *See* Settlement Agreement, Shub MPA Decl., Ex. 1, at ECF No. 67-1.

Settlement and determined it is fair, reasonable, and adequate to resolve Plaintiffs' grievances and is in the best interest of the Settlement Class. Shub MPA Decl. ¶ 26.

## III. THE TERMS OF THE PROPOSED SETTLEMENT

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

### A. Certification of the Settlement Class

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

> All persons or entities residing in the United States of America that purchased a Ducktrap Product with packaging that included "sustainably sourced," "all natural," and/or "from Maine" during the period beginning March 1, 2017 and ending on the date of entry of the Preliminary Approval Order.

Agr. ¶ 1.38. Excluded from the Settlement Class are: officers and directors of Mowi and its parents; subsidiaries, affiliates, and any entity in which Mowi has a controlling interest; all judges assigned to hear any aspect of this Litigation, as well as their staff and immediate family; and Settlement Class Counsel, their staff members, and their immediate family. *Id.*

### B. Relief for the Members of the Settlement Class

The Settlement Agreement negotiated on behalf of Plaintiffs and the Settlement Class provides for significant monetary relief and business practice changes.

#### 1. Monetary Relief

With respect to monetary relief, the Settlement Agreement provides for Total Class Consideration in the amount of $1,300,000. Agr. ¶¶ 1.45, 3.2(d). This consideration is available to pay valid Claims, Notice and Settlement Administration Costs, and any Class Representative

Service Awards approved by the Court. Importantly, any approved attorneys' fees and costs will be paid by Defendants separate and apart from the $1,300,000 Total Class Consideration. *Id*.

The Settlement Agreement provides Settlement Class Members who submit a timely and valid Claim Form with compensation regardless of whether they are able to provide a Proof of Purchase.

The Settlement provides that Settlement Class Members with no Proof of Purchase can receive up to $2.50 per product for up to 10 Ducktrap Products purchased per household by attesting under penalty of perjury: (i) that they purchased one or more Ducktrap Products during the Class Period; and (ii) the total number of such units purchased during the Class Period. Agr. ¶ 3.2(c). While Settlement Class Members without Proof of Purchase are only eligible to recover up to $25.00 per household ($2.50 per unit for up to 10 product units), those who are able to provide Proof of Purchase are eligible to recover up to $2.50 per unit purchased, *with no individual limit*, provided that the Total Class Consideration is not exceeded, in which case each Settlement Class Member's claim would be reduced *pro rata*. Agr. ¶ 3.2(b).[5] Each valid Proof of Purchase may only be submitted for a Cash Payment once per household. *Id.*

Here, Plaintiffs alleged that the price premium on eco-labeled foods such as the Ducktrap Products at issue in this Litigation is approximately 14.2%. *See* Shub Decl. ¶ 32; Second Am. Compl. ¶ 6. As the average price of Ducktrap products is $7.50, the price premium on the average Ducktrap Product is approximately $1.06. Shub Decl. ¶ 32. Accordingly, the anticipated $1.30

[5] As the total of the Cash Payments, Notice and Settlement Administration Costs, and any Class Representative Service Awards is estimated to exceed the Total Class Consideration of $1,300,000, the compensation to claimants will be likely be reduced *pro rata*. Although all Claims have not been fully vetted, it is estimated that claimants will receive $1.30 per product claimed. Agr. ¶ 3.2(d); *see also* Decl. of Steven Weisbrot, Esq. of Angeion Group LLC Re: Implementation of Notice to Settlement Class ("Weisbrot Decl."), filed herewith.

per package recovery provides consumers with or without proof of purchase more than the damages they could be expected to win at trial. *Id.*

**2. Business Practice Changes**

Under the Settlement Agreement, Defendants have also agreed to certain business practice changes. Specifically, Defendants have agreed not to use the phrases "sustainably sourced," "all natural," and "Naturally Smoked Salmon FROM MAINE" on the packaging of any Ducktrap Product for a period of two years beginning on the date of the entry of the Judgment; provided, however, that Defendants reserve the right to use the same or similar phrases accompanied by appropriate qualifying or substantiating language or symbols, and to represent that the Products are "smoked in Maine." Agr. ¶ 3.5. The Settlement Agreement creates a binding contract requiring Defendants to implement the label changes. If Defendants fail to implement the changes, Plaintiffs will retain the right to move for enforcement of the Settlement Agreement, sue for breach of contract, or institute a new class action for product misrepresentation. Decl. of Jonathan Shub in Supp. of Pls.' Mot. for Final Approval of Settlement ¶¶ 5–7 ("Shub FA Decl."), filed herewith. Plaintiffs and Settlement Class Counsel will retain the right to sue Defendants to enforce this provision of the Settlement Agreement should Mowi fail to comply.

**3. Release**

The release is tailored to the claims that have been plead or could have been plead in this case. Agr. ¶¶ 1.32, 3.6. Settlement Class Members who do not exclude themselves from the Settlement Agreement will release all claims, whether known or unknown, against Defendants and its affiliates, arising out of or in any way relating to use of the phrases "sustainably sourced," "all natural," "Ducktrap River of Maine," "Ducktrap River Maine," and/or "from Maine" on the packaging of Ducktrap Products, as well as any of the other marketing representations identified

in the Complaint, First Amended Complaint, or Second Amended Complaint, or claims which could have been raised in those Complaints. *Id*. ¶¶ 1.32–1.34, 3.6.

### C. Service Awards and Attorneys' Fees and Expenses

The Settlement Agreement provides that Plaintiffs can seek Class Representative Service Awards of up to $7,500 to Plaintiff Neversink General Store and up to $1,500 to Plaintiff Tomlinson to compensate them for the actions they took in their capacities as Settlement Class Representatives. *Id*. ¶ 3.3. The Service Awards are to come out of the $1,300,000 Total Class Consideration. *Id.* ¶ 3.2(d).

The Settlement Agreement also provides that Plaintiffs may move for up to $360,000 in combined attorneys' fees and reimbursement of litigation costs/expenses. This amount constitutes fair and reasonable compensation for Settlement Class Counsel's work on the Litigation. *Id.* ¶ 3.4. Any attorneys' fees and costs approved by the Court will be paid by Defendants *separate and apart* from the Total Class Consideration. *Id*.

Plaintiffs fully briefed and filed their Motion for Award of Attorneys' Fees to Plaintiffs' Counsel, Reimbursement of Litigation Expenses, and Service Awards to the Class Representatives in this Court on August 11, 2021. *See* ECF Nos. 71–72.

### D. Settlement Notice

#### 1. CAFA Notice

Pursuant to 28 U.S.C. § 1715(b), on March 26, 2021, Angeion caused Notice regarding the Settlement to be sent to the Attorneys General of all states and the Attorney General of the United States, and officials for Guam, Puerto Rico, and the U.S. Virgin Islands. Weisbrot Decl. ¶ 13, Ex. A, filed herewith. On May 14, 2021, Angeion caused a second, amended notice to be sent to the same entities. *Id.* ¶ 14, Ex. B.

**2. Class Notice**

The Notice plan implemented here met and in fact surpassed that promised in Plaintiffs' Motion for Preliminary Approval and approved by the Court in its Preliminary Approval Order. Notice included a state-of-the-art media campaign comprised of internet programmatic display advertising, social media advertising, and a paid search campaign. Additionally, a dedicated Settlement Website and toll-free telephone line were also implemented to provide Class Members with additional information about the Settlement. *Id.* ¶ 15.

The Notice Plan delivered an approximate 71.79% reach with an average frequency of 5.41 times. *Id.* ¶ 25. What this means in practice is that 71.79% of the Target Audience saw a digital advertisement concerning the Settlement an average of 5.41 times each. *Id.* It is important to note that the approximate 71.79% reach is separate and apart from the Settlement Website and toll-free hotline. *Id.* ¶ 26. The Federal Judicial Center states that a publication notice plan that reaches 70% of class members is one that reaches a "high percentage" and is within the "norm". Barbara J. Rothstein & Thomas E. Willging, Fed. Jud. Ctr., *Managing Class Action Litigation: A Pocket Guide or Judges* 27 (3d ed. 2010).

*a. Programmatic Display Advertising*

Angeion utilized a form of internet advertising known as programmatic display advertising, which is the leading method of buying digital advertisements in the United States, to provide notice of the litigation to absentee Class Members. Weisbrot Decl. ¶ 16. The media notice was strategically designed to provide notice of the litigation to these individuals by driving them to the dedicated Settlement Website where they could learn more about the Settlement, including their rights and options. *Id.*

Programmatic display advertising is a trusted advertising method specifically utilized to reach defined target audiences. *Id.* ¶ 17. It has been reported that U.S. advertisers spent nearly $65.74 billion on programmatic display advertising in 2020 and it is estimated that almost 86.5%, or $81.58 billion, of all U.S. digital display ad dollars will transact programmatically in 2021. *Id.* In laymen's terms, programmatic advertising is a method of advertising where an algorithm identifies and examines demographic profiles and uses advanced technology to place advertisements on the websites where members of the audience are most likely to visit (these websites are accessible on computers, mobile phones and tablets). *Id.* Angeion's media team used sophisticated media platforms to create and target a specific audience: "Fish and Seafood Fresh or Frozen: Households: Used in the last 6 months: Fresh" and "Eating Habits/Diet Control – Buy Food Labeled as: Natural or Organic". *Id.* ¶ 18. Specifically, Angeion targeted users who were currently browsing or were known purchasers of *Ducktrap River of Maine Smoked Atlantic Salmon* to qualify impressions and ensure that messaging was served to the most relevant audience. *Id.* ¶ 19.

The programmatic display advertising ran from June 11, 2021, to August 10, 2021, delivering approximately 39,722,479 impressions. *Id.* ¶ 20, Ex. D.

*b. Social Media Advertising*

In addition to the programmatic display advertising, the Notice Plan utilized Facebook and Instagram, two of the leading social media platforms in North America. *Id.* ¶ 21. The social media campaign used an interest-based approach which focused on the interests that users exhibited while on the social media platforms. *Id.* The social media campaign engaged with the target audience via a mix of news feed and story units to optimize performance via the Facebook and Instagram desktop sites, mobile sites and mobile apps. Facebook image ads appeared natively in desktop

newsfeeds (on Facebook.com) and mobile app newsfeeds (via the Facebook app or Facebook.com mobile site), and on desktops via right-column ads. *Id.* ¶ 22. Instagram Photo and Stories ads appeared on the desktop site (on Instagram.com) and mobile app feed (via the Instagram app or Instagram.com mobile site), and in users' story feeds. *Id.*

The social media portion of the media campaign ran from June 11, 2021 to August 10, 2021, to coincide with the programmatic display advertising and delivered an approximate 1,172,728 impressions. *Id.* ¶ 23, Ex. E.

*c. Paid Search Campaign*

On June 11, 2021, Angeion implemented a paid search campaign via Google to help drive Settlement Class Members who were actively searching for information about the Settlement to the dedicated Settlement Website. *Id.* ¶ 24. The paid search ads complemented the media campaign as search engines are frequently used to locate a specific website, rather than an individual typing in the exact URL. *Id.*

*d. Website and Toll-Free Telephone Number*

On or before June 11, 2021, Angeion established the following website devoted to this Settlement: www.SmokedSalmonSettlement.com ("Settlement Website"). *Id.* ¶ 28. The Settlement Website contains general information about the Settlement, including answers to frequently asked questions, important dates and deadlines pertinent to this matter, and copies of important documents. *Id.* Visitors to the Settlement Website can view and download (1) a Notice of Proposed Class Action Settlement, (2) a Claim Form, (3) the Second Amended Class Action Complaint, (4) the Amended Motion for Preliminary Approval and Memorandum in Support; (5) the Order Granting Preliminary Approval, (6) the Class Action Settlement Agreement, and (7) the Motion for Attorneys' Fees, Costs and Plaintiffs' Service Awards and Memorandum in Support.

*Id.* The Settlement Website also has a "Contact Us" page whereby Settlement Class Members can submit questions regarding the Settlement to a dedicated email address: info@smokedsalmonsettlement.com. *Id.* The Settlement Website address was set forth in the Notice of Proposed Class Action Settlement. *Id.*, Ex. F. As of September 10, 2021, the Settlement Website has had 180,693 page views and 105,213 sessions, which represents the number of individual sessions initiated by all users. *Id.* ¶ 30.

On or before June 11, 2021, Angeion also established the following toll-free telephone line dedicated to this case: 1 (833) 693-1335. *Id.* ¶ 31. The toll-free line utilizes an interactive voice response ("IVR") system to provide Settlement Class Members with responses to frequently asked questions, the ability to request a Claim Form, and includes information about filing a claim and important dates and deadlines. *Id.* The toll-free line was accessible 24 hours a day, 7 days a week through the claims period, and received 24 calls for a total of 203 minutes through September 10, 2021. *Id.* ¶ 32.

**3. Claims, Exclusions, Objections**

The timing of the claims process was designed to give Settlement Class Members adequate time to access and review Notice documents, determine whether they would like to make a claim, opt-out, or object, and gather any supporting documents necessary to do so. Shub MPA Decl. ¶ 39.

*a. Claims*

The deadline for Settlement Class Members to submit a Claim Form was September 10, 2021. *Id.* ¶ 33. As of October 6, 2021, Angeion has received a total of 502 paper Claim Form submissions and 106,325 Claim Form submissions via the Settlement Website—an estimated

23.7% of the Class. *Id.*[6] This claims rate far exceeds the 23% typically claimed in consumer class actions, and signifies the excellent result achieved for and approval of the Class. These Claim Form submissions are still subject to final audits, including the full assessment of each claim's validity and timeliness, and a review for duplicate submissions (*i.e.*, claims submitted by the same person and also claims submitted by individuals from the same household). *Id.* Angeion estimates, based on its prior experience, that after vetting the claims and removing duplicative and fraudulent claims, the resulting total amount claimed at $2.50 per product claimed would exceed the Total Class Consideration, and Angeion estimates that after adjusting for a *pro rata* distribution, valid claimants will be compensated approximately $1.30 per product claimed. *Id.*.[7]

*b. Requests for Exclusion and Objections*

The deadline for Class Members to request exclusion from the Settlement was September 10, 2021. *Id.* ¶ 33. As of October 6, 2021, Angeion has received one timely-postmarked request for exclusion. *Id.*, Ex. H.

Similarly, the deadline for Class Members to object to the Settlement was September 10, 2021. *Id.* ¶ 36. Thus far, the only objections are from Abigail Starr and Organic Consumers Association, who filed their objections with the Court. *See Id.*, Ex. H; ECF Nos. 73, 76.

## IV. LEGAL STANDARD

Plaintiffs bring this Motion pursuant to Federal Rule Civil Procedure 23(e), under which a class action may not be settled without approval of the Court. In determining whether to finally

[6] The Parties have estimated that the Class has approximately 450,000 members. 106,827 claimants therefore represent 23.7% of the Settlement Class.

[7] The $1,300,000 Total Class Consideration covers the approximate $219,500 in Notice and Settlement Administration costs (Weisbrot Decl. ¶ 15), and the $9,000 in Plaintiffs' service awards (subject to Court approval). As such, there is approximately $1,071,500 available for distribution, meaning the value of each claim will be reduced *pro rata* to $1.30 per product. The value of $1.30 per product still substantially exceeds the actual calculated premium of $1.06 per unit, and thus exceeds the damages that Class Members could be expected to win at trial. *See* Shub MPA Decl. ¶ 33.

approve a class action settlement, courts must first determine that the settlement class, as defined by the parties, is certifiable under the standards of Rule 23(a) and (b). "Before certification is proper for any purpose—settlement, litigation, or otherwise—a court must ensure that the requirements of Rule 23(a) and (b) have been met." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006) (concluding in part that "the District Court conducted a Rule 23(a) and (b) analysis that was properly independent of its Rule 23(e) fairness review"); *see also Lizondro-Garcia v. Kefi LLC*, 300 F.R.D. 169, 174 (S.D.N.Y. May 29, 2014).[8] This Court has considered and granted preliminary approval of class certification. For the same reasons described in Plaintiffs' Amended Motion for Preliminary Approval (ECF No. 67), this Court should certify the Class for purposes of final approval of the Settlement.

Then, courts must determine whether a proposed settlement is fair, reasonable, and adequate under Rule (23)(e). Prior to the 2018 amendment of Rule 23, to determine procedural fairness Second Circuit Courts looked to the negotiating process that led to settlement, and to determine substantive fairness they would review the settlement in light of the factors set forth in *City of Detroit v. Grinnell Corp.* (the "*Grinnell* factors"). *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d 96, 116 (2d Cir. 2005); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001); *City of Detroit v. Grinnell Corp*., 495 F.2d 448 (2d Cir. 1974). Since the amendments were instituted, the Second Circuit examines the settlement in light of both the new requirements of Rule 23 and the *Grinnell* factors, many considerations of which overlap. *See e.g.*, *In re GSE Bonds Antitrust Litig.*, No. 19-cv-1704 (JSR), 2020 WL 3250593, slip. op. (S.D.N.Y. June 16, 2020) (granting final approval of class action settlement after consideration of both Rule 23 and the *Grinnell* factors).

[8] Class Certification issues were fully briefed by Plaintiffs in their Amended Motion for Preliminary Approval at ECF No. 67.

Courts examine both procedural and substantive fairness in light of the strong judicial policy in favor of settlement—especially in class action suits. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d at 116; *Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 52 (W.D.N.Y. 2018) ("Settlements are strongly favored as a matter of policy, because, '[b]y lessening docket congestion, settlements make it possible for the judicial system to operate more efficiently and more fairly while affording plaintiffs an opportunity to obtain relief at an earlier time.") (internal quotations omitted); *Springer v. Code Rebel Corp.*, No. 16-cv-3492 (AJN), 2018 U.S. Dist. LEXIS 61155, at *7 (S.D.N.Y. Apr. 10, 2018) (same); *Cohen v. J.P. Morgan Chase & Co*., 262 F.R.D. 153, 157 (E.D.N.Y 2009) ("There is a strong judicial policy in favor of settlement, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.") (quoting *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 328 (S.D.N.Y. 2005), *aff'd in part & vacated in part*, 443 F.3d 253 (2d Cir. 2006)); *see also In re Luxottica Grp. S.P.A. Secs. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) ("*In re Luxottica Grp. Litig.*"); *see also Hadel v. Gaucho*, *LLC*, No. 15 Civ. 3706, 2016 U.S. Dist. LEXIS 33085, at *4 (S.D.N.Y. Mar. 14, 2016) ("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.").

## V. ARGUMENT

### A. The Settlement Administrator Provided Notice Pursuant to this Court's Preliminary Approval Order and Satisfied Due Process as well as Rule 23.

To satisfy due process, notice to class members must be the best practicable, and reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Fed. R. Civ. P. 23(e); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Notice provided to the class must be sufficient

to allow class members "a full and fair opportunity to consider the proposed decree and develop a response." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950). While individual notice should be provided where class members can be located and identified through reasonable effort, notice may also be provided by U.S. Mail, electronic means, or other appropriate means. Fed. R. Civ. P. 23(c)(2)(B); *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 702 (S.D.N.Y. 2019). "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 702 (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d at 112). Under Rule 23(c)(2)(B), the notice must:

> clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

First, the content of the Notice provided adequately informed Settlement Class Members of the nature of the action, the definition of the class, the claims at issue, the ability of a class member to object or exclude themselves, and/or enter an appearance through and attorney, and the binding effect of final approval and class judgment. *See* Weisbrot Decl. ¶ 28, Ex. F. The Notice utilized clear and concise language that is easy to understand, and organized the Notice in a way that allowed Class Members to easily find any section that they may be looking for. *Id.* Thus, it was substantively adequate. *See Hernandez v. Immortal Rise, Inc.*, 306 F.R.D. 91, 99 (E.D.N.Y. 2015); *see Hall v. ProSource Techs., LLC*, No. 14-CV-2502 (SIL), 2016 WL 1555128, at *5 (E.D.N.Y. 2016) (finding the notice sufficient where "[t]he Notice and Claim Form described essential and relevant information in plain terms, including, among other things, relevant background information, the terms of the Settlement Agreement, the allocation methods applicable

to the respective subclasses, and the various rights of potential class members, such as the right to opt out of the Settlement Class or object to the instant Final Approval Motion"); *Torres v. Gristede's Operating Corp.*, No. 04-CV-3316 (PAC), 2010 WL 2572937, at *3 (S.D.N.Y. June 1, 2010) ("The Notice is appropriate because it describes the terms of the settlement and provides specific information regarding the date, time, and place of the final approval hearing.").

Moreover, the Settlement Administrator—with the assistance of the Parties—has taken extraordinary measures to ensure notice reached as many of the Settlement Class Members as possible. Because direct notice was not possible (*see* ECF No. 67 at 23), Notice here was provided through a robust campaign comprised of programmatic display advertising, social media advertising, and paid search campaigns. Weisbrot Decl. ¶¶ 16–27. The program resulted in a reach of 71.79% with an average frequency of 5.41—exceeding the reach anticipated by and described in Plaintiffs' Preliminary Approval Motion of 70.01% with an average frequency of 3.95 times. *See id.* ¶¶ 25–27; *compare* Am. Mot. for Prelim. Approval at 7, ECF 67. Such Notice complies with the program approved by this Court in its Preliminary Approval Order and is consistent with Notice Programs approved in the Second Circuit and across the United States, and is considered a "high percentage" and within the "norm." Barbara J. Rothstein & Thomas E. Willging, Fed. Jud. Ctr., *Managing Class Action Litigation: A Pocket Guide or Judges* 27 (3d ed. 2010); *see also, i.e.*, *Cicciarella v. Califia Farms, LLC*, No. 7:19-cv-08785-CS, 2020 WL 1320866 (S.D.N.Y Mar. 20, 2020) (approving notice that was projected to reach 70% of class members with an average frequency of 2.5 times).

### B. The Settlement Class Should be Certified.

A court may certify a settlement class upon finding that the action underlying the settlement satisfies all Rule 23(a) prerequisites and at least one prong of Rule 23(b). *Amchem Prods., Inc. v.*

*Windsor*, 521 U.S. 591, 614, 619–22 (1997). As Plaintiffs described at length in their Amended Motion for Preliminary Approval (ECF No. 67), the proposed Settlement Class satisfies all of the requirements of Rules 23(a) and 23(b)(3). As the Class still meets the requirements of numerosity, commonality, typicality, and adequacy, and because common issues predominate and a class action is the superior means by which to resolve Class Member claims, the Court should certify the Settlement Class for settlement purposes.[9]

**1. The Settlement Terms are Fair, Adequate, and Reasonable, and Warrant Approval.**

Rule 23(e)(2) requires certain factors to be considered by a court before granting final approval of a class action settlement: (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 . . . ; and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(A)–(D). In determining whether the relief provided is adequate, Courts must consider: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).

Before the 2018 revisions to Rule 23(e), the Second Circuit had developed its own list of factors for consideration in determining whether to approve a class action settlement. These factors, known as the *Grinnell* factors, include:

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

[9] Plaintiffs will address the objection made on the grounds of typicality in their response to the objection, to be filed on November 4, 2021.

> 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.

*In re Initial Pub. Offering Secs. Litig.*, 260 F.R.D. 81, 88 (S.D.N.Y. 2009) (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d at 463 (abrogated on other grounds)).

While there is some overlap between the two sets of standards, as is consistent with practice in the Southern District of New York, Plaintiffs will examine the Settlement for satisfaction of both the Rule 23 factors, as well as the *Grinnell* factors historically considered by Second Circuit Courts. *See e.g.*, *In re GSE Bonds Antitrust Litig.*, 2020 WL 3250593 (granting final approval of class action settlement after consideration of both Rule 23 and the *Grinnell* factors). As the Agreement reached by Parties here meets the standards set forth by the Federal Rules of Civil Procedure and the *Grinnell* factors weigh in favor, the Court should grant final approval.

**2. The Settlement Agreement Meets the Requirements of Rule 23 and Should be Approved.**

*a. The Class Representatives and Class Counsel Have Adequately Represented the Class.*

Rule 23(e)(2)(A) requires a Court determine whether "the class representatives and class counsel have adequately represented the class" before approving a settlement. "Determination of adequacy typically entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *In re GSE Bonds Antitrust Litig.,* 414 F. Supp. 3d at 692 (quoting *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc*., 502 F.3d 91, 99 (2d Cir. 2007) (internal quotation of *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp*., 222 F.3d 52, 60 (2d Cir. 2000) omitted)).

The named Plaintiffs and Settlement Class Counsel have more than adequately represented the interests of the Settlement Class in this case. The named Plaintiffs have no interests antagonistic to those of the Settlement Class. They suffered the same injury as Class Members in that they and Class Members purchased Ducktrap Products based on allegedly false representations. With the exception of any court-approved service award, the named Plaintiffs will receive compensation based on the number of Ducktrap Products they purchased and can provide Proof of Purchase for, utilizing the same process and same metrics as all other members of the Settlement Class. Moreover, the named Plaintiffs have been directly involved in this Litigation, reviewing the pleadings and Settlement Agreement, and communicating extensively with Settlement Class Counsel regarding the status of the case. Through the work of the named Plaintiffs, Settlement Class Counsel were able to fulfill their responsibility of advancing and protecting the interests of the Settlement Class and evaluating the proposed Settlement to determine that it was in the best interests of the Settlement Class. The named Plaintiffs thus have served as adequate Class Representatives.

Settlement Class Counsel has also more than adequately represented the Settlement Class. As detailed in Plaintiffs' Preliminary Approval Motion, Settlement Class Counsel performed an extensive investigation into the claims at issue; engaged in confirmatory discovery into the basis of the potential settlement; and conducted vigorous negotiations through a respected JAMS mediator. *See* Shub MPA Decl. ¶¶ 6–21. Settlement Class Counsel have relied on their significant experience in litigating and resolving class actions, including consumer class actions relating to mislabeled food products, in order to reach a Settlement that Settlement Class Counsel believes is an excellent result for the Settlement Class. Shub MPA Decl., Ex. 2 (firm resume); *see also* Decl. of Gary M. Klinger in Supp. of Pls.' Mot. for Prelim. Approval ("Klinger MPA Decl."), Ex. 1,

ECF 67-2. This determination was buttressed by information Defendants provided to Plaintiffs as part of voluntary discovery during the initial settlement negotiations. Shub MPA Decl. ¶¶ 12–13.

The adequacy of Plaintiffs and Settlement Class Counsel, and the fairness of the Settlement, is further supported by the fact that this Settlement compares favorably to other, similar settlements that have been approved by courts in this Circuit, which involved consumer products, including *Rapoport-Hecht v. Seventh Generation, Inc.*, No. 7:14-cv-09087-KMK, 2017 WL 5508915 (S.D.N.Y Apr. 28, 2017) (consumer fraud class action involving consumer products); *Frohberg v. Cumberland Packing Corp.*, No. 14-cv-00748 (E.D.N.Y. Apr. 6, 2016) (settlement for label misrepresentations regarding sugar-substitute sweetener); *Cicciarella. v. Califia Farms, LLC*, No. 7:19-cv-08785-CS (S.D.N.Y. Mar. 20, 2020) (settlement for misstating the quantity of ingredients in dairy-alternative beverage products).

*b. The Settlement was Negotiated at Arm's Length.*

Rule 23(e)(2)(B) requires procedural fairness, as evidenced by the fact that "the proposal was negotiated at arm's length." Where a class settlement is reached through arm's length negotiations between experienced counsel, the settlement will enjoy a presumption of fairness. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 692 (citing *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173–74 (S.D.N.Y. 2000)). A mediator's involvement in negotiations can help demonstrate their fairness. *In re Payment Card Interchange Fee & Merch. Disc. Litig.*, 330 F.R.D. 11, 34–35 (E.D.N.Y. 2019) (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d at 116); *see also* 2 *McLaughlin on Class Actions* § 6:7 (15th ed. 2018) ("[a] settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion." (citing cases)).

Here, the Settlement has certainly earned the presumption of fairness. Both Parties were represented by counsel experienced in class action litigation. *See* Shub MPA Decl., Ex. 2; Klinger MPA Decl., Ex. 1. Moreover, the Agreement was negotiated through a virtual full-day mediation with Hon. Diane Welsh (Ret.), a respected JAMS mediator. *See* Shub MPA Decl. ¶¶ 10–15; *Elkind v. Revlon Consumer Prods. Corp.*, No. 14-CV-2484(JS)(AKT), 2017 U.S. Dist. LEXIS 24512, at *48 (E.D.N.Y. Feb. 17, 2017) ("participation by a neutral third party supports a finding that the agreement is non-collusive."). Thus, the settlement negotiations were free from collusion, conducted at arm's length, and meet the requirements of Rule 23(e)(2)(B).

*c. The Substantial Monetary Relief Provided for the Settlement Class is Adequate.*

Rule 23(e)(2)(c) requires examination of the relief provided by the Settlement. The Settlement provides significant and meaningful monetary relief to the Settlement Class. Each Settlement Class Member was eligible to receive a payment of up to $2.50—and due to the high claims rate in this case will actually receive an estimated $1.30—for each Ducktrap Product package purchased in the United States during the Class Period for which the Settlement Class Member provides valid Proof of Purchase, *without any limit* on the number of packages for which a Settlement Class Member can claim (provided they can provide a valid Proof of Purchase). The Settlement further provides that each Settlement Class Member would receive a payment for up to ten Ducktrap Product packages per household that the Settlement Class Member attests, on the Claim Form, to have purchased in the United States during the Class Period, and for which the Settlement Class Member cannot provide valid Proof of Purchase. This is significant, given that damages in this matter would be measured based on the inflated amount, or price premium, that consumers paid for the Products. Here, Plaintiffs allege that the price premium on eco-labeled foods such as the Ducktrap Products at issue in this litigation is approximately 14.2%. *See* Shub

MPA Decl. ¶ 33; Second Am. Compl. ¶ 6. As our investigation shows the average price of Ducktrap Products is $7.50, the price premium on the average Ducktrap Product would be approximately $1.06. Shub Decl. ¶ 33. Accordingly, consumers with or without Proof of Purchase here will likely receive more than 100% of the damages they could be expected to win at trial. This represents a considerable amount, given the risk inherent in further litigation. Moreover, when a settlement "assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, settlement is reasonable under this factor." *Morangelli v. Roto-Rooter Servs. Co.*, No. 10-cv-00876 (BMC), 2014 U.S. Dist. LEXIS 7414, at *22 (E.D.N.Y. Jan. 6, 2014).

The Settlement Class and the public will also benefit from the significant business practice changes secured by the Settlement Agreement, including Defendants' agreement to adhere to extensive modifications to the labeling of the Products. *See* Agr. ¶ 3.5. The gravamen of the Litigation is that Defendants allegedly are deceiving consumers in the marketing and labeling of their Ducktrap Products, leading consumers to believe that the Products are sustainably sourced, all natural, and sourced from Maine. Defendants' commitment to modify the labeling of the Products will cure the alleged deception. These changes will greatly benefit both the Settlement Class Members and future consumers. *In re Tracfone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d 993, 1005 (N.D. Cal. 2015) (settlement's change to marketing materials was "significant value for both class members and the general public" because it was "designed to make it clear to customers exactly what" the defendant was selling).

And finally, as noted above, this Settlement compares favorably to other, similar settlements approved by courts in this Circuit. For example, in *Cicciarella v. Califia Farms, LLC*, No. 7:19-cv-08785-CS (S.D.N.Y. Mar. 20, 2020), the Southern District of New York approved a

settlement involving the misstatement of the quantity of ingredients in dairy-alternative beverage products that provided for: payment of 50 cents per product for up to ten products without proof of purchase; payment of $1.00 per product for up to ten products with proof of purchase; and label changes to products. In *Frohberg v. Cumberland Packing Corp.*, No. 14-cv-00748 (E.D.N.Y.), a class action regarding label misrepresentations pertaining to a sugar-substitute sweetener, the Eastern District approved a settlement that provided for settlement class members to receive $2.00 per product purchased, up to a maximum of 8 products, and required the Defendant to make certain changes to its product labels. The Settlement here, which will provide Settlement Class Members with approximately $1.30 per product for up to 10 products *without* Proof of Purchase, and $1.30 per product for *all* products claimed to have been purchased *with* Proof of Purchase, plus significant changes to Mowi's advertising and labeling—thus compares favorably with similar settlements approved in this Circuit.

i. The costs, risks, and delay of trial and appeal weigh in favor of preliminary approval.

The relief to the Settlement Class is more than adequate in light of the costs, risks, and time required to litigate this action through trial and appeal. "Litigation inherently involves risks." *Willix v. Healthfirst, Inc.*, No. 07-CV-1143 (ENV) (RER), 2011 U.S. Dist. LEXIS 21102, at *11 (E.D.N.Y. Feb. 18, 2011). "[I]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Banyai v. Mazur*, No. 00 Civ. 9806, 2007 U.S. Dist. LEXIS 22342, at *30 (S.D.N.Y. Mar. 27, 2007); *accord Zeltser v. Merrill Lynch & Co.*, No. 13 Civ. 1531, 2014 U.S. Dist. LEXIS135635, at *14 (S.D.N.Y. Sept. 23, 2014). "The greater the 'complexity, expense and likely duration of the litigation,' the stronger the basis for approving a settlement." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 663 (S.D.N.Y. 2015). Consumer class action lawsuits by their very nature are complex, expensive, and lengthy. *See, e.g.*, *Dupler v.*

*Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010); *see also Manley v. Midan Rest. Inc.*, No. 14 Civ. 1693, 2016 U.S. Dist. LEXIS 43571, at *9 (S.D.N.Y. 2016) ("Most class actions are inherently complex[.]").

This Litigation is no different. Based on extensive investigation and confirmatory discovery, Plaintiffs believe they could obtain class certification, defeat any dispositive motions Defendants may file, and proceed to a trial on the merits. Shub MPA Decl. ¶ 23. Plaintiffs and Settlement Class Counsel recognize, however, the costs and risks involved, including the expense and length of continued proceedings necessary to prosecute the claims through trial and any appeals and the uncertainty of the ultimate outcome of the case. *Id.* Settlement Class Counsel took into account these factors, as well as the difficulties and delays inherent in complex class action litigation, when negotiating and evaluating the Settlement and entering into the Settlement Agreement. *Id.*

Specifically, litigating the case to a successful judgment providing class wide relief will require that Plaintiffs, *inter alia*, defeat a motion to dismiss, prevail in their motion for class certification, and ultimately obtain a class judgment following trial. This process, as with any class action litigation, will be fraught with risks at every stage, and at the end of the day, while Plaintiffs believe Defendants' labeling to be misleading, a jury might not agree. Litigation would also incur immense costs and expenses that ultimately would likely be assessed against any recovery by the Settlement Class, and may not result in any tangible recovery for years, especially if any appeal (or appeals) were taken.

Further, if Plaintiffs were successful in obtaining certification of a litigation class, the certification would not be set in stone. *Long v. HSBC USA Inc.*, No. 14-cv-6233 (HBP), 2015 U.S. Dist. LEXIS 122655, at *11 (S.D.N.Y. Sept. 11, 2015) ("A contested motion for certification would likely require extensive discovery and briefing, and, if granted, could potentially result in

an interlocutory appeal pursuant to Fed. R. Civ. P. 23(f) or a motion to decertify by defendants, requiring additional briefing."). Given the risks, costs, and potential delays inherent in litigating this class action to judgment, this factor weighs heavily in favor of preliminary approval. *See Babcock v. C. Tech Collections, Inc.*, No. 1:14-CV-3124 (MDG), 2017 U.S. Dist. LEXIS 44548, at *16 (E.D.N.Y. Mar. 27, 2017) (class settlement "eliminates the risk, expense, and delay inherent in the litigationprocess.").

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

The Parties have retained a very experienced Settlement Administrator, Angeion Group, who is highly skilled in processing class claims and distributing the proceeds to claimants. As described above, the Settlement Agreement provides that Settlement Class Members Eligible for a Cash Payment will receive payments based on the number of Ducktrap Products they purchased, as provided on their submitted Claim Forms. *See* Agr. ¶ 3.2; *see also id.* at Ex. C. Specifically, each Settlement Class Member will receive a payment of approximately $1.30 for each Ducktrap Product package purchased in the United States during the Class Period for which the Settlement Class Member has provided valid Proof of Purchase, and $1.30 for up to 10 Ducktrap Product packages per household that the Settlement Class Member attests, on the Claim Form, to have purchased in the United States during the Class Period for which the Settlement Class Member cannot provide valid Proof of Purchase. *See id.*; *see also* Weisbrot Decl. ¶ 33. As explained by the 2018 Committee Notes, a "claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." The proposed method of processing claims here strikes that delicate balance, and this factor weighs in favor of approval.

iii. The terms of the proposed award of attorneys' fees weigh in favor of preliminary approval.

On August 11, 2021, Plaintiffs moved for an award of attorneys' fees and expenses of up to $360,000, which equates to 27.7% of the value of the Total Class Consideration, and less than 22% of the total potential benefit to the Class. *See* Agr. § 3.4.[10] By the close of this case, the requested fees are also likely to represent a negative multiplier.[11] Such requests have frequently been granted in class actions in this Circuit, including in consumer class actions. *See, e.g.*, *Mayhew v. KAS Direct, LLC*, No. 7:16-cv-06981-VB (S.D.N.Y. Nov. 30, 2018), ECF No. 149 (33.3% of $2,215,000 settlement); *Rapoport-Hecht v.Seventh Generation, Inc.*, No. 14-CV-9087 (KMK), 2017 U.S. Dist. LEXIS 219060, at *8–9 (S.D.N.Y. Apr. 28, 2017) (33.3% of $4.5 million settlement); *Puglisi v. TD Bank, N.A.*, No. 13 Civ. 637 (GRB), 2015 U.S. Dist. LEXIS 100668, at *3–4 (E.D.N.Y. July 30, 2015) (awarding 33.3% of $9.9 million settlement); *Khait v. Whirlpool Corp.*, No. 06 Civ. 6381, 2010 U.S. Dist. LEXIS 4067, at *4, *23 (E.D.N.Y. Jan. 20, 2010) (33.3% of $9.25 million settlement); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d at 123 (approving multiplier of 3.5 on appeal); *Zeltser v. Merrill Lynch & Co.*, No. 13-cv-1531 FM, 2014 WL 4816134, *9–10 (S.D.N.Y. Sept. 23, 3014) (approving multiplier of 5.1 and citing numerous cases, including referring to cases where multiplier ranged as high as 19.6); *Shapiro v. JPMorgan Case & Co.*, No. 11-cv-7961 CM, 2014 WL 1224666, at *24 (S.D.N.Y. Mar. 24, 2014)

[10] Attorneys' fees are considered a benefit to the class. *Manual for Complex Litigation* § 21.7 at 335; *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) (finding that even where fees are agreed to be paid separate and apart from a settlement fund, they are still viewed as an aspect of the class's recovery); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F. 3d, 768, (3d Cir. 1995) (noting same). Thus, should the attorneys' fees be approved by this Court, the total potential benefit to the Class is $1,660,000, the sum of the $1,300,000 and the $360,000 in attorneys' fees.

[11] At the time of filing Plaintiffs' Motion for Attorneys' Fees, at ECF No. 72, Class Counsel had incurred a lodestar of $331,020.75. Since filing, Class Counsel has continued to monitor the claims process, review requests for exclusion and objections, and to brief this motion for final approval. By the close of the case, Class Counsel will have also responded to the objection and prepared for and appeared at the final approval hearing.

(approving multiplier of 3.05). As the attorneys' fees and expenses Plaintiffs seek are in line with and in fact modest in comparison to typical awards in this Circuit, this factor weighs in favor of preliminary approval.

iv. There are no agreements required to be identified under Rule 23(e)(3).

Apart from the Settlement Agreement, there are no additional agreements between the Parties or with others made in connection with the Settlement. *See* Shub MPA Decl. ¶ 40. Accordingly, this factor weighs in favor of preliminary approval of the Settlement.

*d. The Settlement Treats Class Members Equitably Relative to Each Other.*

Each member of the Settlement Class is treated in the same manner with respect to the claims they are releasing and their eligibility for an award, with the amount of the award solely dependent on the number of Ducktrap Products the Settlement Class Member purchased and the Settlement Class Member's ability to provide valid Proof of Purchase. Agr. ¶ 3.2. Specifically, each Settlement Class Member will receive a payment of approximately $1.30 for each Ducktrap Product package purchased in the United States during the Class Period for which the Settlement Class Member has provided valid Proof of Purchase, and approximately $1.30 for up to ten Ducktrap Product packages per household that the Settlement Class Member attests, on the Claim Form, to have purchased in the United States during the Class Period for which the Settlement Class Member cannot provide valid Proof of Purchase. Requiring proof of purchase for a refund for all purchases is fully in line with the 2018 Committee Notes' directive to "deter or defeat unjustified claims" without being "unduly demanding." *See id.*

**3. The Settlement Also Warrants Approval in Light of the *Grinnell* Factors Traditionally Considered by Second Circuit Courts.**

*a. Grinnell Factor 1: The complexity, expense, and likely duration of litigation weighs in favor of approval.*

The costs, risks, and delay of continued litigation weigh in favor of settlement approval. Although Plaintiffs are confident in the merits of their claims, the risks cannot be disregarded. Aside from the potential that either side will lose at trial, Plaintiffs anticipate incurring substantial additional costs in pursuing this litigation further. As discussed above, should litigation continue Plaintiffs would likely need to immediately defeat a motion to dismiss. Then, Plaintiffs would have to meet the hurdle of obtaining—and maintaining—class certification. The level of additional costs would significantly increase as Plaintiffs began their preparations for the certification argument and if successful, a near inevitable interlocutory appeal attempt. Even if they prevail on certification initially, Plaintiffs would likely need to counter a motion for summary judgement, potentially file one of their own—and all the while maintain certification of the Class.

*b. Grinnell Factor 2: Class reaction signals approval of the Settlement Agreement.*

Courts consistently determine that the reaction of a class to settlement is "perhaps the most significant factor to be weighed in considering its adequacy." *Maley v. Del Glob. Techs. Corp*., 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002); Fed. R. Civ. P. 23(e). Here, over 100,000 individuals have filed claims, the Total Class Consideration will be fully paid out and no money will revert to Defendants. Indeed, nearly a quarter of the entire Class filed claims in this case. This is an outstanding result and a clear signal of the Settlement Class's approval of the Settlement.

Moreover, a lack of class member objections "may itself be taken as evidencing the fairness of a settlement." *RMED Int'l, Inc. v. Sloan's Supermkts., Inc*., No. 94 Civ. 5587, 2003 WL 21136726, at *1 (S.D.N.Y. May 15, 2003); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96 (2d Cir. 2005) (affirming approval of class action settlement with 18 merchant objectors). Here, the reaction of the Class has been overwhelmingly positive. Only one Class Member has

requested exclusion, and only two objections have been filed.[12] Weisbrot Decl. ¶¶ 35–36; ECF Nos. 73, 76.

*c. Grinnell Factor 3: The stage of litigation and discovery completed favors approval.*

Courts encourage the efficient resolution of class actions where warranted. Early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere. *See Castagna v. Madison Square Garden, L.P.*, No. 09 Civ. 10211, 2011 WL 2208614, at *6 (S.D.N.Y. June 7, 2011) (commending Plaintiffs' attorneys for negotiating early settlement and avoiding hundreds of hours of legal fees); *Diaz v. E. Locating Serv. Inc.*, No. 10 Civ. 4082, 2010 WL 5507912, at *3 (S.D.N.Y. Nov. 29, 2010) (granting final approval of pre-suit class settlement in wage and hour case); *In re Interpublic Secs. Litig.*, No. 02 Civ. 6527, 2004 WL 2397190, at *12 (S.D.N.Y. Oct. 26, 2004) (early settlements should be encouraged when warranted by the circumstances of the case). The central question often considered by courts in examining the stage of litigation is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d. Cir. 2004) (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) (internal quotation marks omitted)). Here the Parties acted responsibly in reaching an early settlement of this case. Settlement Class Counsel is experienced in class action and consumer product litigation and the Settlement was reached only after extensive investigation by Settlement Class Counsel, review of information produced in preparation for mediation, informal discovery, and briefing and conversations with a mediator well-versed in issues surrounding consumer class actions. *See* Shub MPA Decl. ¶¶ 5–17, Ex. 2; Klinger MPA Decl., Ex. 1. Despite the early stage of litigation,

[12] As noted above, Plaintiffs will respond to the objection in full on November 5, 2021, pursuant to the Court's Order granting preliminary approval. ECF No. 69.

Plaintiffs here were able to complete an independent investigation of the facts to reach a full understanding of the value of the case, as well as the attendant risks of continued litigation. *Id*. ¶¶ 3, 22. Accordingly, early settlement was appropriate, and this factor weighs in favor of approval.

*d. Grinnell Factors 4, 5, and 6: The risks of establishing liability, damages, and maintaining a class action through trial weigh in favor of Settlement approval.*

Although Plaintiffs firmly believe in the merits of the case, as discussed above, continued litigation involves significant risk. *See In re Painewebber Ltd. P'ships Litig*., 171 F.R.D. 104, 126 (S.D.N.Y. 1997). "If settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Id.* (quoting *In re Ira Haupt & Co*., 304 F. Supp. 917, 934 (S.D.N.Y. 1969)); *see also Velez v. Majik Cleaning Serv*., *Inc.*, No. 03 Civ. 8698, 2007 WL 7232783, at *6 (S.D.N.Y. June 25, 2007) (noting "there are always risks in proceeding to trial and these risks are compounded by virtue of the nature of class action litigation.") (citing *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 185 (W.D.N.Y. 2005)). In weighing the risks of establishing liability and damages, the court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 177 (internal quotation marks omitted).

As discussed above, should litigation continue Plaintiffs will likely be met with significant hurdles including a motion to dismiss, obtaining and maintaining certification, and prevailing on potential motion(s) for summary judgment. Moreover, should litigation continue Defendants will also undoubtedly maintain that the class cannot be certified because class members differ in their personal reasons for purchasing Ducktrap Products, their reliance on specific advertising and label language, and their ability to prove damages. The proposed Settlement eliminates the risks Plaintiffs and Settlement Class Members would incur should they proceed with litigation, and provides immediate relief that: (1) provides a reimbursement to Settlement Class Members who

purchased Ducktrap Products; and (2) ensures Mowi changes its advertising practices and does not misrepresent the nature of its products in the future. Without settlement, none of these benefits could be guaranteed. As such, this factor weighs in favor of final approval.

*e. Grinnell Factor 7: The ability of the Defendants to withstand a greater judgment is not at issue here.*

Defendants provided no evidence demonstrating that they could not withstand a greater judgment here. However, even if Defendants could withstand a greater judgment, their ability to do so, "standing alone, does not suggest that the settlement is unfair." *Frank v. Eastman Kodak Co.*, 228 F.R.D. at 186 (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178 n.9). Thus, this factor is neutral and does not preclude the Court from granting final approval.

*f. Grinnell Factors 8 and 9: The Settlement provides for substantial relief for the Settlement Class, especially in light of all attendant risks of litigation.*

As discussed *supra* at Section (V)(B)(1)(c), the Settlement guarantees Settlement Class Members real relief for harms and assurance that Mowi will not continue to make the representations Plaintiffs allege are false with regard to its Ducktrap Products. Settlement Class Members who have submitted valid claims will receive approximately $1.30 per product—up to $13.00 in reimbursements without Proof of Purchase, and an *uncapped* amount per individual for claims presented with Proof of Purchase. As the price premium on the average Ducktrap Product would be approximately $1.06, this recovery is significant, and in fact greater than what any Class Member could expect to receive at trial. Shub MPA Decl. ¶ 33.

The total potential value of this Settlement is substantial. Combined, the value of the Settlement is no less than $1,660,000, and includes $1,300,000 in claimable cash compensation and Settlement Administration costs, as well as a separate $360,000 in agreed-upon attorneys' fees

and costs (subject to approval by the Court). *See* Mem. in Supp. of Pls.' Mot. for Att'ys' Fees, Costs, & Service Awards, ECF No. 72.

The value achieved through the Settlement Agreement is guaranteed, whereas the chances of prevailing on the merits are uncertain. While Plaintiffs strongly believe in the merits of their case, they also understand that Mowi will assert a number of potentially case-dispositive defenses. Proceeding with litigation would open up Plaintiffs to the risks inherent in trying to achieve and maintain class certification, and prove liability—both factors considered under the test for final approval established by *Grinnell*. In fact, should litigation continue, Plaintiffs would likely have to survive a motion to dismiss filed in order to proceed past the pleading stage and into litigation.

Plaintiffs dispute the defenses it anticipates Mowi will likely assert—but it is obvious that Plaintiffs' success at trial is far from certain. Moreover, every day that passes is another day that the Plaintiffs and Settlement Class Members go without the reimbursement provided by the Settlement. Through the Settlement, Plaintiffs and Settlement Class Members gain significant benefits without having to face further risk of not receiving any relief at all.

## VI. CONCLUSION

Plaintiffs have negotiated a fair, adequate, and reasonable settlement that will provide Class Members with both significant monetary and equitable relief, and that has achieved an exceptional level of approval from the Settlement Class. For the reasons discussed above, and for those described in Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (ECF Nos. 66–67) and Plaintiffs' Motion for Attorneys' Fees, Costs and Service Awards (ECF No. 72), Plaintiffs respectfully request this Court enter the proposed Final Approval Order filed herewith, finally certify the Settlement Class and appoint Settlement Class Counsel and Plaintiffs as representatives for the Class, award Plaintiffs a service award in the amount of $7,500 for

Neversink General Store and $1,500 for Brenda Tomlinson, grant Settlement Class Counsel attorneys' fees and costs in the amount of $360,000 (less than 22% of the total Settlement value), and grant final approval of this Settlement.[13]

Date: October 15, 2021

Respectfully submitted,

**SHUB LAW FIRM LLC**

By: */s/ Jonathan Shub*
Jonathan Shub
Kevin Laukaitis (admitted *pro hac vice*)
134 Kings Highway East, 2nd Floor
Haddonfield, NJ 08033
Telephone: (856) 772-7200
Facsimile: (856) 210-9088
jshub@shublawyers.com
klaukaitis@shublawyers.com

**MASON LIETZ & KLINGER LLP**
Gary M. Klinger (admitted *pro hac vice*)
227 W. Monroe Street, Ste. 2100
Chicago, Illinois 60606
Telephone: (202) 429-2290
Facsimile: (202) 429-2294
gklinger@masonllp.com

**MASON LIETZ & KLINGER LLP**
Gary E. Mason
5101 Wisconsin Avenue NW, Suite 305
Washington, D.C. 20016
Telephone: (202) 429-2290
Facsimile: (202) 429-2294
gmason@masonllp.com

*Counsel for Plaintiffs and the Class*

[13] The Proposed Order Granting Final Approval is attached as Exhibit E to the Settlement Agreement, at ECF No. 67-1.