

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS**

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Plaintiffs Jenny Milman and Ellen Thomas (the “Proposed Class Representatives” or “Plaintiffs”) respectfully submit this Memorandum in Support of their Motion for Preliminary Approval of Class Action Settlement, Authorization of Proposed Class Notice, and Setting of Final Approval Hearing. The settlement agreement (“Settlement Agreement”)¹ was executed on December 15 and 16, 2014, and is attached as Exhibit 1 hereto.

I. INTRODUCTION

Plaintiffs seek preliminary approval of the proposed nationwide settlement of this class action against defendant Thermos L.L.C. (“Defendant” or “Thermos”), and authorization to distribute Notice to members of the Class in the manner described herein and in the Settlement Agreement. The Settlement Agreement (the “Settlement”) reached by the parties to this Action was the result of hard-fought litigation and arms’-length negotiation, and the Settlement is fair, reasonable, adequate, and an excellent result for the Class. Under the terms of the Settlement Agreement, Thermos has agreed to make available \$675,000 in cash and \$500,000 in Thermos products to provide to Class Members, and, in addition, to pay the costs of notice, administrative expenses, incentive awards and attorneys’ fees and expenses. Moreover, if the relief Class Members will receive would be less than 25% of the estimated amounts set forth in the Settlement Agreement, Thermos will augment the cash portion of the Settlement to ensure that each Class Member who submits an approved claim receives no less than 25% of the estimated recovery. The Settlement also provides for significant non-monetary benefits consisting of the removal of the word “leak-proof” from Thermos’ packaging and a good faith effort by Thermos to have such language removed from certain third-party retailers’ advertising for the products.

¹ Unless otherwise stated, all capitalized terms not defined herein have the same meaning as set forth in the Settlement Agreement.

All told, this Settlement provides the Class with significant relief, and, given the hurdles facing Plaintiffs in this litigation, the results achieved are well beyond the requirements for preliminary approval of the Settlement.

Plaintiffs' central allegations in this class action are that Thermos' advertising of its "Foogo® Stainless Steel Vacuum-Insulated Straw Bottles (the "Vacuum Bottle") and Foogo® Plastic Straw Bottles (the "Plastic Bottle") (collectively, the "Foogo® Straw Bottles") as "leak-proof" was false, deceptive, and likely to mislead consumers because the Bottles were not leak-proof as claimed by Thermos. Plaintiffs allege that as a result of these misrepresentations, Thermos was able to charge a premium price for the Foogo® Straw Bottles. Plaintiffs alleged causes of action for violations of the New Jersey Consumer Fraud Act § 56:8-1, *et. seq.*, the New York General Business Law § 349, for breach of express warranty and unjust enrichment.

As a result of this Settlement, eligible Class Members will be able to receive monetary compensation, or compensation in the form of Thermos products, based upon one of three benefit options they choose. Class Members who do not provide proof of purchase of their Foogo® Straw Bottles are able to receive, at their election, either a one-time cash payment of up to \$8.50 (if they purchased a Vacuum Bottle) or up to \$4.50 (if they purchased a Plastic Bottle), *or* a replacement product in the form of a new Vacuum Bottle or equivalent adult Thermos® bottle (if they purchased a Vacuum Bottle) or a new Plastic Bottle or equivalent adult Thermos® bottle (if they purchased a Plastic Bottle). *See* Section III, *infra*, and SA ¶ 7(A)(i)-(ii).² Class Members who submit a valid proof of purchase are eligible to receive, at their election, either a one-time cash payment up to the amount they spent on their Foogo® Straw Bottle purchase, or Vacuum Bottle(s) or equivalent adult Thermos® bottle(s) (if they purchased one or more

² References to "SA ¶ ___" refer to the Settlement Agreement, Ex. 1 hereto.

Vacuum Bottles) or Plastic Bottle(s) or equivalent adult Thermos® bottle(s) (if they purchased one or more Plastic Bottles). *See* Section III, *infra*, and SA ¶ 7(A)(iii).

The proposed Class which the parties jointly request that the Court conditionally certify for Settlement purposes is:

All persons who purchased a Foogo® stainless steel vacuum-insulated straw bottle or a Foogo® plastic straw bottle in the United States at any time between January 1, 2007 and **[preliminary approval date]** excluding (a) any such person who purchased for resale and not for personal or household use, (b) any officers, directors or employees, or immediate family members of the officers, directors or employees, of Thermos, and (c) the presiding judges and their immediate families.

As discussed *infra*, at this stage, the Court need only “make a preliminary determination of the fairness, reasonableness and adequacy of the settlement” so that notice of the Settlement may be given to the Class and a fairness hearing may be scheduled to make a final determination regarding the fairness of the Settlement. *See* Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 11.25 (4th ed. 2002); David F. Herr, *Annotated Manual for Complex Litigation* (“*M.C.L.*”) § 21.632 (4th ed. 2013). At the preliminary approval stage, the “court’s task is merely to ‘determine whether the proposed settlement is within the range of possible approval,’ not to conduct a full-fledged inquiry into whether the settlement meets Rule 23(e)’s standards.” *Butler v. Am. Cable & Tel., LLC*, No. 09-cv-5336, 2011 U.S. Dist. LEXIS 115506, at *30 (N.D. Ill. Oct. 6, 2011), quoting *Am. Int’l Grp., Inc. v. ACE INA Holdings, Inc.*, Nos. 07-c-2898, 09-c-2026, 2011 U.S. Dist. LEXIS 84219, at *39 (N.D. Ill. July 26, 2011).

Here, as set forth in further detail below, the proposed Settlement meets the standard for preliminary review. Therefore, Plaintiffs respectfully request that the Court enter the contemporaneously filed [Proposed] Order Authorizing Notice, attached as Ex. 1 to the Settlement Agreement, that, among other things: (1) conditionally certifies the Class for

settlement purposes; (2) conditionally designates Plaintiffs as Class Representatives; (3) appoints Janine L. Pollack of Wolf Haldenstein Adler Freeman & Herz LLP, Lee Shalov of McLaughlin & Stern LLP, and Brett Zinner of Rosenberg Fortuna & Laitman LLP as Class Counsel; (4) approves the proposed Class Notice; and (5) schedules a final approval hearing for the Settlement.

II. HISTORY OF THE LITIGATION³

On October 29, 2013, Plaintiffs filed a class action complaint in this Court. In their Complaint, Plaintiffs, on behalf of a New York and New Jersey class, asserted claims against Thermos for violations of the New Jersey Consumer Fraud Act and New York General Business Law Section 349, breach of express warranty and unjust enrichment, all arising out of Thermos' alleged use of the term "leak-proof" in connection with the advertising and sale of the Foogo® Straw Bottles. Thermos disputes each and every one of these claims, denies any wrongdoing whatsoever, and has filed an Answer to the Complaint denying liability and raising a number of additional defenses.

On June 6, 2014, Judge Rebecca Pallmeyer entered an order referring the case to Magistrate Judge Sheila Finnegan for a settlement conference. Pursuant to Judge Pallmeyer's Order, the Parties participated in a settlement conference on August 14, 2014. As a result of arms'-length negotiations between Class Counsel and Defendant's counsel during the settlement conference, the Parties have agreed to resolve this action based upon the terms in the Settlement Agreement. Plaintiffs and their Counsel, having considered, *inter alia*, the strengths and weaknesses of their claims and Thermos' defenses, and the likelihood of success at trial, have determined that the Settlement Agreement is fair, reasonable, adequate and in the best interests

³ The history of this litigation is described in greater detail in the Declaration of Janine L. Pollack in Support of Motion for Preliminary Approval, submitted contemporaneously herewith.

of Plaintiffs and the Settlement Class. Thermos, denying wrongdoing of any nature and without admitting liability, has agreed to the terms of the Settlement Agreement in order to address claims brought by consumers of the Thermos products at issue, and in order to avoid the burdens of continuing litigation, including the burden and expense of discovery. The Parties have consented to have all further proceedings in this action, including without limitation those relating to the review, approval, administration and enforcement of the Settlement Agreement, conducted by Magistrate Judge Finnegan, and Judge Pallmeyer accordingly reassigned this case on August 19, 2014.

III. SUMMARY OF THE SETTLEMENT

The Settlement Agreement contains the complete terms of the Settlement, which are summarized below.

A. The Settlement Class

The Settlement Agreement defines a national Settlement Class under Rule 23(b)(3) as:

All persons who purchased a Foogo® stainless steel vacuum-insulated straw bottle or a Foogo® plastic straw bottle in the United States at any time between January 1, 2007 and **[preliminary approval date]** excluding (a) any such person who purchased for resale and not for personal or household use, (b) any officers, directors or employees, or immediate family members of the officers, directors or employees, of Thermos, and (c) the presiding judges and their immediate families.

See SA ¶ 3.

B. Relief to Class Members

1. Non-Monetary Relief

Following the filing of the lawsuit, Thermos changed the packaging of the Bottles to remove the phrase “leak-proof.” The cost associated with these packaging changes was approximately \$150,000. *See* SA ¶ 7(F). Additionally, as part of the relief provided to the Settlement Class, Thermos has agreed to use commercially reasonable efforts to communicate to

its top ten retailers of the Foogo® Straw Bottles a request that they revise their online advertising of the Bottles to remove any references to the Foogo® Straw Bottles being “leak-proof.” SA ¶ 8.

2. Economic Benefits

Thermos will provide substantial economic benefits in the form of a \$675,000 cash Settlement Fund and up to \$500,000 of Thermos products for Class Members who properly submit timely, valid claims. Each Class Member will have the option of choosing one of three possible benefit options. The amounts for the cash relief in Options A and C are estimated and may be reduced depending on the number of valid claims:

- **Option A:** Class Members who select Option A will receive, without proof of purchase, either a one-time cash payment estimated to be \$8.50 (50% of the average retail price of the Vacuum Bottle during the Class Period) if he or she purchased one or more Vacuum Bottles, or a one-time cash payment estimated to be \$4.50 (50% of the average retail price of the Plastic Bottle during the Class Period) if he or she purchased one or more Plastic Bottles. See SA ¶ 7(A)(i).
- **Option B:** Class Members who select Option B will receive, without proof of purchase, either (a) a new Vacuum Bottle or a new Thermos® brand Vacuum Insulated 16-ounce Stainless King Beverage Bottle in Midnight Blue (SK2000MB4), if he or she purchased one or more Vacuum Bottles during the Class Period, or (b) a new Plastic Bottle or a new 16-ounce Thermos® brand Plastic Hydration Bottle in Teal (HP4100TLTR16), if he or she purchased one or more Plastic Bottles during the Class Period. See SA ¶ 7(A)(ii).
- **Option C:** Class Members who select Option C, and submit proof of purchase of one or more Bottles in a form sufficient to show the price and quantity of each of the products purchased (e.g., store receipt(s) in paper or electronic form or electronic receipts from online retailers such as Amazon.com), will receive, at the Class Member’s choice, either (a) a one-time cash payment estimated to be equal to the total amount paid by the Class Member for all of the Foogo® Straw Bottles purchased by the Class Member, including any sales tax paid on the Bottles, as established by the proof of purchase; or (b) a new Vacuum Bottle or a new Thermos® brand Vacuum Insulated 16-ounce Stainless King Beverage Bottle in Midnight Blue (SK2000MB4) for each Vacuum Bottle purchased during the Class Period, or a new Plastic Bottle or a new Thermos® brand 16-ounce Plastic Hydration Bottle in Teal (HP4100TLTR16) for each Plastic

Bottle purchased during the Class Period. *See* SA ¶ 7(A)(iii). (Note: Class Members exercising Option C must choose either all product or all cash for all Foogo® Straw Bottles purchased.)

a) Settlement Fund

Thermos will establish a Settlement Fund of \$675,000 to provide monetary relief to Class Members who selection Option A or Option C (see above).

In the event the total cash payments in respect to approved claims submitted under Benefit Options A and C combined would exceed \$675,000, then all payments of such claims shall be reduced *pro rata* proportionate to the amount of the payment. SA ¶ 7(B)(i) and Ex. 2 to the SA. However, under no circumstances will the payments to Class Members who submit valid, timely claims under Option A be reduced by more than 75% of the value of their estimated award (as set forth above). In the event that a reduction of more than 75% would otherwise occur, Thermos will supplement the Settlement Fund by an amount sufficient to ensure that *pro rata* payments to such Class Members are not reduced by more than 75% of the estimated amounts. Similarly, in no event shall any cash amounts paid on individual valid claims submitted by Class Members under Benefit Option C be reduced by more than 75% of the total amount paid by the Class Member for all of the Foogo® Straw Bottles purchased by the Class Member, as established by the Class Member's proof of purchase. In the event such reduction by more than 75% would otherwise occur, Thermos will supplement the Settlement Fund by an amount sufficient to ensure that *pro rata* payments to such Class Members are not reduced by more than 75% of the total amount paid by the Class Member for all of the Foogo® Straw Bottles purchased by the Class Member. SA ¶ 7(D).

In the event the total cash payments with respect to approved claims submitted under Options A and C combined are less than \$675,000, then any unused portion of the Settlement Fund up to \$450,000 shall remain with and/or revert to Thermos. If the total cash payments in

respect to approved claims submitted under Benefit Options A and C combined are less than \$225,000, then the amount of the Settlement Fund in excess of the total cash payments for such claims but less than \$225,000 (the “Excess Funds”) shall be distributed *pro rata* to Class Members who submitted approved claims under Option A, up to a maximum payment of \$16.99 to claimants who purchased a Vacuum Bottle and \$8.99 to claimants who purchased a Plastic Bottle (the respective average retail prices of the Foogo® Straw Bottles). The amount of the Excess Funds to be distributed to each such claimant shall be determined by the Settlement Administrator. Plaintiffs have designated 50% of any unused portion of the Excess Funds to be distributed to Share Our Strength/No Kid Hungry, a not-for-profit organization. Thermos has designated 50% of any unused portion of the Excess Funds to be distributed to the Boomer Esiason Foundation, a not-for profit organization dedicated to finding a cure for cystic fibrosis (“CF”) and supporting the CF community.

b) Cap on Product Portion of Settlement

In the event the Thermos products to be distributed in respect to approved claims submitted under Benefit Options B and C combined would exceed \$500,000 in retail value, then the products will be distributed to claimants who submitted approved claims under Benefit Options B and C in the order in which their claims were received by the Settlement Administrator, until the \$500,000 retail cap is reached. Thereafter, any remaining claimants who submitted approved claims under Benefit Option B will receive a cash payment under Benefit Option A and any remaining claimants who submitted approved claims for product under Benefit Option C will receive a cash payment under Benefit Option C. SA ¶ 7(C).

C. Notice and Administration Costs, Attorneys' Fees and Expenses, and Plaintiffs' Service Awards

All Notice and Claims Administration expenses associated with this Settlement, attorneys' fees, and service awards to named Plaintiffs will be paid by Thermos. SA ¶¶ 9, 21, 22. Thermos shall pay all reasonable costs associated with the implementation of the proposed Settlement, including (a) the reasonable fees and costs incurred by the Settlement Administrator; and (b) the reasonable cost of providing notice of the proposed Settlement to the members of the Class in accordance with the Notice Plan approved by the Court. SA ¶ 21. These costs will *not* be paid out of the Settlement Fund.

Additionally, Thermos has agreed to pay Class Counsel's attorneys' fees and expenses not to exceed \$395,000 subject to Court approval. SA ¶ 22. The payment of attorneys' fees and expenses will not be made from the Settlement Fund. If the Court awards Class Counsel less than \$395,000 in attorneys' fees and expenses, the difference between the attorneys' fee and expenses award and \$395,000 shall be added to the Settlement Fund and distributed according to the terms of the Settlement Agreement. SA ¶ 22.

Finally, subject to this Court's approval, Thermos and Plaintiffs have agreed that each of the named Plaintiffs shall receive a service award in the amount of \$1,500, and these payments shall be made by Thermos, and not out of the Settlement Fund. SA ¶ 9.

D. The Class Notice Plan

The parties have developed a Notice Plan with the help of Rust Consulting, a firm that specializes in developing class action notice plans and administering class action settlements.

At the center of the Class Notice Plan is the website specifically set up for this Settlement ("Settlement Website"), <http://www.foogobottlesettlement.com>. The web address of the Settlement Website will appear on all forms of notice, and will be hyper-linked where a notice

piece appears on the Internet. The short and simple Claim Form can be completed from, and submitted via, the Settlement Website. The Settlement Website will also provide information about the Settlement, including the Class Notice.

The majority of the Foogo® Straw Bottles were purchased at retail stores (such as Buy Buy Baby) or via online retailers (such as Amazon.com) and therefore Thermos does not have mailing addresses for those Class Members. However, some Foogo® Straw Bottles were purchased online via Thermos' website, and these Class Members will receive notice of the Settlement directly via e-mail. SA ¶ 10(B). The majority of Class Members will be notified of the Settlement through publicized notice in a targeted periodical (Women's Day Magazine), hyper-linked "banner advertisements" across numerous web sites, and "mobile advertisements" which will appear on numerous websites when accessed via a smartphone or tablet.

The Summary Notice, which will be published in Women's Day Magazine, is designed to provide potential Class Members with information regarding the Settlement and inform them about their rights. The Summary Notice contains a general description of the Action, the Settlement relief, including how a claim can be filed, and a general description of the Class Members' legal rights. The Summary Notice also directs Class Members to the Settlement Website and provides a toll free number Class Members may use to obtain a copy of the detailed Class Notice, Claim Form, and the Settlement Agreement. SA ¶ 10(C).

Notice will also be provided through the use of Internet and mobile banner ads. Banner ads are short, internet-based advertisements designed to attract attention. When presented with such an ad, an interested viewer can immediately access the Class Website by clicking on a link in the ad. The Internet banner ads for this Settlement will measure 728 x 90 pixels, 300 x 250 pixels and 160 x 600 pixels, and will appear in substantially the forms set forth on Exhibit 5 to

the Settlement Agreement. These banner ads will appear on a rotating basis on websites that are part of the Xaxis network, which includes over 5,000 websites, for a period of time sufficient to deliver approximately 41,000,000 impressions. Publication of the Class Notice by means of banner ads shall commence not later than 30 days after entry of the Preliminary Approval Order directing notice to the Class. SA ¶ 10(D).

Further, to capture the growing population of smartphone users, mobile banner advertising, similar to Internet banner advertising, will be provided to those accessing the Internet through their mobile devices. This Mobile Notice will appear in smartphone “apps” and on smartphone web browsers for a period of time sufficient to deliver 5,000,000 impressions. *Id.*

Complementing the Summary Notice is the Class Notice. The Class Notice contains detailed information about the Action, the Settlement benefits, the Release and how to opt-out, object, and exercise other rights under the Settlement, and the Claim Form. The Class Notice is attached to the Settlement Agreement as Exhibit 3. The Class Notice will be available through the Settlement Website and will be mailed or emailed to Class Members upon their request. *See* SA ¶ 10(A). The Class Notice also provides a toll free number Class Members may use to obtain a copy of the detailed Class Notice, Claim Form, and the Settlement Agreement.

IV. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

Before granting preliminary approval of a class action settlement, the Court must determine that the proposed Settlement Class is a proper class for settlement purposes. *MCL* § 21.632 (4th ed. 2013); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). In short, the Settlement Class should satisfy the requirements for class certification pursuant to Federal Rule of Civil Procedure 23 (“Rule 23”). Under Rule 23(a), a class may be certified if: “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the

claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23; *see also Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006); *see also Shvartsman v. Apfel*, 138 F.3d 1196, 1201 (7th Cir.1998); *see also Hinman v. M & M Rental Ctr., Inc.*, 545 F. Supp. 2d 802, 804 (N.D. Ill. 2008). In addition to the requirements under Rule 23(a), plaintiffs must also demonstrate one of the three provisions listed in Rule 23(b) to show class certification is appropriate. *Amchem*, 521 U.S. at 614; *Hinman*, 545 F. Supp. 2d at 804-05. In the instant case, Plaintiffs are seeking certification of the Settlement Class under Rule 23(b)(3), which requires that common questions of fact or law predominate and that proceeding as a class action is superior to all other forms of adjudication. *See Amchem*, 521 U.S. at 615-16; *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 256 F.R.D. 586, 594 (N.D. Ill. 2009). Plaintiffs satisfy all of the above-referenced prerequisites to class certification in this matter.

A. The Proposed Class Satisfies the Requirements of Rule 23(a)

1. Numerosity

One hallmark requirement of any class action is that the proposed class be so large that joinder of all individual class members is impracticable. *See* Federal Rule 23(a)(1). In cases involving classes numbering in the hundreds, the numerosity requirement of Federal Rule 23(a)(1) is easily met. *See Newberg on Class Actions* § 3:05. “‘Although there is no ‘bright line’ test for numerosity, a class of forty is generally sufficient to satisfy Rule 23(a)(1).” *Hinman*, 545 F. Supp. 2d at 805, quoting *McCabe v. Crawford & Co.*, 210 F.R.D. 631, 642 (N. D. Ill. 2002) (internal citations omitted).

Here, the proposed Class encompasses thousands of consumers who purchased the Foogo® Straw Bottles during the Class Period. Accordingly, the proposed Class satisfies the numerosity requirement of Rule 23(a)(1).

2. Common Questions of Law or Fact

Rule 23(a)(2) does not require that all questions of law or fact be common to the class, but only that the plaintiffs share at least one question of fact or law with the rest of the putative class. Indeed, the commonality element is satisfied where, as here, there is a “common nucleus of operative fact,” even if only one common question exists. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). Commonality is often present where defendants have “engaged in standardized conduct toward members of the proposed class.” *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998); *Hinman*, 545 F.Supp. 2d at 806. Courts have certified classes in consumer fraud cases such as this one, finding that the claims “involve common questions of law, including whether Defendants...violated the Consumer Fraud Act.” *Subedi v. Merch.*, No. 09-c-4525, 2010 U.S. Dist. LEXIS 48190, at *9 (N.D. Ill. May 17, 2010). “Further, where a defendant directs standardized conduct toward the class, commonality is typically found.” *Tylka v. Gerber Products Co.*, 178 F.R.D. 493, 496-97 (N.D. Ill. 1998) citing *Moore v. Simpson*, No. 97-cv-2971, 1997 U.S. Dist. LEXIS 48190, at *9 (N.D. Ill. Sept. 5, 1997) (citations omitted).

Here, common issues abound. Indeed, as alleged in the Complaint, all members of the Class share common claims arising out of their purchases and Defendant’s standardized conduct in advertising the Bottles as “leak-proof” on the Foogo® Straw Bottles’ packaging and on websites selling the Foogo® Straw Bottles. The “common questions” for each Class Member include:

- (a) Whether Thermos had adequate support for its representation that the Foogo® Straw Bottles are leak-proof prior to making that representation;
- (b) Whether Thermos’ representations regarding the Foogo® Straw Bottles being leak-proof are true, or are misleading, or reasonably likely to deceive;

- (c) Whether the alleged conduct constitutes violations of the laws asserted in the Complaint;
- (d) Whether Thermos engaged in unfair and/or deceptive advertising with respect to the Bottles;
- (e) Whether members of the Class have been injured by Defendant's conduct; and
- (f) Whether members of the Class are entitled to relief, and the amount and nature of such relief.

Thus, commonality is satisfied.

3. Typicality

Rule 23(a)(3) requires that the claims of the class representative must be "typical" of those of the absent class members. *See Amchem Prods., Inc.*, 521 U.S. at 607 n.11. The typicality requirement focuses on whether the class representative's claims "have the same essential characteristics as the claims of the class at large." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596-97 (7th Cir. 1993). The claims of the named plaintiff must stem from the same course of conduct that gave rise to the claims of the class, and must rest on the same legal theory. *Rosario*, 963 F.2d at 1018; *Hinman*, 545 F. Supp. 2d at 806. Typicality does not require that the claims be "identical," and is generally "liberally construed." *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996); *see also Tylka*, 178 F.R.D. at 500 ("The typicality requirement is not particularly strict and may be satisfied even where there are some factual dissimilarities between the claim of the class representative and the claims of other class members.").

Typicality is met as Plaintiffs and the proposed Class assert the same claims, arising from the same course of conduct – Thermos' uniform, deceptive marketing campaign. Specifically, Plaintiffs allege that the labeling and advertising misrepresented the actual performance of the

Foogo® Straw Bottles. It is Plaintiffs' position that every Class Member was injured when they paid money to purchase the Foogo® Straw Bottles. Based on the claims alleged, Plaintiffs and the Class Members also seek the same relief for the alleged wrongful conduct. In short, because Plaintiffs' claims are the same as those of the other Class Members, the typicality requirement is satisfied.

4. Adequacy of Representation

The final Rule 23(a) prerequisite requires that the representative parties have protected and will continue to "fairly and adequately protect the interests of the class," and Plaintiffs and Class Counsel readily meet this standard. Rule 23(a)(4). This inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625. To satisfy the adequacy requirement Plaintiffs, as class representatives, must establish that: (1) their claims are not antagonistic or in conflict with those of the proposed class; (2) they have sufficient interest in the outcome of the case; and (3) experienced, competent counsel represents them. *Rosario*, 963 F.3d at 1018; *Hinman*, 545 F. Supp. 2d at 807. When attorneys have been found to be adequate class counsel in previous class actions, it is persuasive evidence that they will be adequate in future class actions. *Gomez v. Ill. State Bd. of Educ.*, 117 F.R.D. 394, 401 (N.D. Ill. 1987).

The proposed class representatives have no conflict with any Class Members, and will fairly and adequately protect the interests of the Class. Indeed, Plaintiffs' interests are entirely representative of and consistent with the interests of the proposed Class – all allegedly purchased the Foogo® Straw Bottles based upon Defendant's representations that they were "leak-proof." Moreover, Plaintiffs' pursuit of this matter strongly demonstrates that they are zealous advocates for the Class. Thus, Plaintiffs have the same interests as the Class, with the primary goal of

obtaining relief from Defendant for its alleged misrepresentations regarding the Foogo® Straw Bottles.

Further, proposed Class Counsel are qualified and experienced in class action litigation. *See* Pollack Decl., Exs. A, B, and C. (Firm Resumes). Class Counsel has performed extensive work to date in identifying and investigating potential claims, drafting and filing the Complaint, obtaining discovery from Thermos, and ultimately negotiating and finalizing this Settlement. Pollack Decl. ¶¶ 4-11. Moreover, Class Counsel has been appointed as class counsel in several complex consumer class actions throughout the country. *Id.* Exs. A & B. Janine L. Pollack of Wolf Haldenstein Adler Freeman & Herz LLP has years of experience litigating class actions alleging consumer fraud and other claims relating to the purchase of consumer products; Lee Shalov has been lead and co-lead counsel in commercial class actions for over 25 years, and Brett Zinner has years of experiencing litigating complex commercial actions. Accordingly, Plaintiffs' counsel will adequately represent the Class.

B. The Proposed Class Satisfies the Requirements of Rule 23(b)(3)

In addition to satisfying Rule 23(a), the proposed Class readily meets the predominance and superiority requirements of Rule 23(b)(3). Rule 23(b)(3) requires that common issues “predominate over any questions affecting only individual class members and that a class action is superior to other methods for the fair and efficient adjudication of the controversy.” Rule 23(b)(3). Such an inquiry examines “whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem*, 521 U.S. at 623.

1. Common Questions Predominate

To satisfy predominance under Rule 23(b)(3), each class member “must share common questions of law or fact with the rest of the class, therefore making class-wide adjudication of the common questions efficient compared to the repetitive individual litigation of the same

question.” *Lemon v. Int’l Union of Operating Eng’rs*, 216 F.3d 577, 581 (7th Cir. 2000). While common issues must predominate, they need not be exclusive. *Radamanovich v. Combined Ins. Co. of Am.*, 216 F.R.D. 424, 435 (N.D. Ill. 2003). Common legal and factual issues have been found to predominate where the class members’ claims allege that “Defendants engaged in standardized conduct that violated specified laws, and the class will therefore be cohesive.” *Subedi*, 2010 U.S. Dist. LEXIS 48190 at *16.

As previously discussed, Plaintiffs allege that the Class Members are entitled to the same legal remedies premised on the same alleged wrongdoing. The main issues are substantially the same for every claimant. Plaintiffs allege that Thermos’ advertising and marketing campaigns, including the packaging and related materials, convey the same advertising message – that the Foogo® Straw Bottles are “leak-proof.” It is Plaintiffs’ position that the issue at the heart of this litigation – whether Thermos violated consumer fraud statutes and other laws by advertising the Foogo® Straw Bottles as being “leak-proof” – affects all of the Class Members in precisely the same way. Plaintiffs contend that all of the Class Members would have been exposed to the advertising in question, either on the Foogo® Straw Bottles’ packaging when they purchased the Foogo® Straw Bottles in a store, or online if they purchased the Foogo® Straw Bottles from an online retailer. Thus, common issues predominate over any individual issues in this action.

2. A Class Action Is Superior To Other Methods Of Adjudication

Rule 23(b)(3) provides that, in order to certify a class, class treatment must be the “superior” method of adjudication. To determine whether a class action is a superior method, courts often look to whether it is an “efficient use of both judicial and party resources.” *Hinman*, 545 F. Supp. 2d at 807. The superiority requirement is satisfied where class members have uniform claims governed by the same law. *In re Bridgestone/Firestone, Inc. Tires Prods. Liability Litig.*, 288 F.3d 1012, 1015 (7th Cir. 2002). Additionally, the class action mechanism is

superior to individual actions in consumer cases with thousands of members insofar as “Rule 23(b)(3) was designed for situations such as this, in which the potential recovery is too slight to support individual suits, but injury is sustainable in the aggregate.” *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006).

This case is particularly well suited for class treatment because Plaintiffs’ and the Class Members’ claims are identical. Further, the damages at issue for each Class Member are slight when considered on an individual basis. Therefore, it would neither be economically feasible nor judicially efficient for each Class Member to proceed on an individual basis. Moreover, because this action will now settle, the Court need not be concerned with issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620. Under the circumstances presented here, a class action is superior to any other mechanism for adjudicating the case and the requirements of Rule 23(b)(3) are satisfied.

V. PLAINTIFFS SHOULD BE APPOINTED AS CLASS REPRESENTATIVES AND PLAINTIFFS’ COUNSEL SHOULD BE APPOINTED AS CLASS COUNSEL

Plaintiffs further request that the Court designate them as Class Representatives, and that the Court appoint Plaintiffs’ attorneys as Class Counsel. As set forth *supra*, Plaintiffs will adequately represent the interests of the Class.

Further, Class Counsel is well-suited to represent the Class. Rule 23 states that “a court that certifies a class must appoint class counsel ... [who] must fairly and adequately represent the interests of the class.” Rule 23(g)(1)(B). To make this determination a court must consider counsel’s (1) work in identifying or investigating potential claims; (2) experience in handling class actions or other complex litigation, and the types of claims asserted in the case; (3) knowledge of the applicable law; and (4) resources committed to representing the class. Rule 23(g)(1)(A)(i-iv).

As previously set forth, Wolf Haldenstein, McLaughlin and Rosenberg are experienced and well equipped to vigorously, competently and efficiently represent the Class. *See* Pollack Decl. Ex. A (Wolf Haldenstein Firm Resume); Ex. B (McLaughlin Firm Resume); Ex. C (Rosenberg Firm Resume). Indeed, proposed Class Counsel have diligently investigated Plaintiffs' claims and have devoted, and will continue to devote, significant resources to this litigation. Further, proposed Class Counsel have successfully negotiated the terms of the Settlement Agreement with Defendant for the benefit of the Class. Accordingly, the Court should appoint the proposed attorneys as Class Counsel.

VI. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

The proposed Settlement is fair, reasonable, adequate, and in the best interests of the Class, and thus it should be preliminarily approved by the Court. Courts review proposed class action settlements utilizing a two-step process. *See Newberg on Class Actions*, § 11.25, at 38-39 (4th ed. 2002); *see also Armstrong v. Board of Sch. Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds by Felzen v. Adreas*, 134 F.3d 873 (7th Cir. 1998). The first step is a preliminary, pre-notification hearing to ascertain whether the proposed settlement is “within the range of possible approval.” *Newberg on Class Actions*, § 11.25 at 38-39; *Armstrong*, 616 F.2d at 314. This preliminary approval is not a fairness hearing, but rather a hearing to determine whether to notify the class members of the proposed settlement and to then proceed with a fairness hearing. *Newberg*, § 11.25 at 38-39; *Armstrong*, 616 F.2d at 314. The preliminary approval is an “initial evaluation” of the fairness of the proposed settlement based upon the written submissions and informal presentations of the settling parties. *MCL* § 21.632 (4th ed. 2013). Should a court find a proposed settlement “within the range of possible approval,” the case then proceeds to the second step in the review process, the final approval hearing. *Newberg*, §11.25 at 38-39.

A strong judicial and public policy favors the settlement of class action litigation, and such a settlement should be approved by the Court after inquiry into whether the settlement is “fair, reasonable and adequate.” *Isby v. Bayh*, 75 F.3d 1191, 1198 (7th Cir. 1996). “Although this standard and the factors used to measure it are ultimately questions for the fairness hearing that comes after a court finds that a proposed settlement is within approval range, a more summary version of the same inquiry takes place at the preliminary phase.” *Kessler v. Am. Resorts Intl’s Holiday Network, Ltd.*, Nos. 05-c-5944, 07-c-2439, 2007 U.S. Dist. LEXIS 84450, at *17-18 (N.D. Ill. Nov. 14, 2007), *adhered to on reconsideration sub nom.* 2008 U.S. Dist. LEXIS 18975 (N.D. Ill. Mar. 12, 2008). The factors to be considered are:

(1) the strength of the plaintiffs’ case compared to the amount of the settlement offer; (2) an assessment of the likely complexity of a trial; (3) the length and expense of the litigation; (4) the amount of opposition to settlement among affected parties; (5) the opinion of competent counsel; and (6) the stage of the proceedings and amount of discovery completed at the time of settlement.

Id., citing *Isby*, 75 F.3d at 1199.

Applying the above-referenced six-factor test to this matter shows that the proposed Settlement is “fair, reasonable and adequate.” First, while Plaintiffs believe their claims are strong, they are cognizant of the fact that Thermos has raised several defenses any of which, if successful, could result in the Class receiving no payment at all. Namely, it is Thermos’ position that the Foogo® Straw Bottles were only advertised as being “leak-proof” when the outer lid of the Foogo® Straw Bottle is closed, and that the Foogo® Straw Bottles do not leak when the lid is closed and locked.⁴ Although Plaintiffs do not share this view, if Thermos were able to prove this at trial or on summary judgment, Plaintiffs and the Class would not receive any damages. Moreover, class certification is always difficult to obtain and Thermos would have argued,

⁴ Thermos also raised statute of limitations defenses as to the claims of Class Members who purchased Foogo® Straw Bottles before certain dates. *See* Answer, Dkt. No. 28, at 30.

among other points, that there are too many individual issues to warrant certification of a class, including alleged differences in the packaging of the Foogo® Straw Bottles over time, alleged differences in the way they were advertised by online retailers, alleged differences in consumers' understanding of the "leak-proof" advertising, alleged differences in the reasons why consumers purchased the Foogo® Straw Bottles (and paid a premium for them), and varying consumer experiences with respect to the Foogo® Straw Bottles

Taking into account the risks of litigation, the proposed Settlement is an excellent result for the Class and will result in substantial relief. The proposed Settlement, among other things, will permit Class Members who do not submit proof of purchase to recover either a one-time cash payment of up to half the value of the type of Foogo® Straw Bottle they purchased or a new Foogo® Straw Bottle or similar product; while Class Members who do submit proof of purchase will receive either a one-time cash payment up to the full amount they paid for their Foogo® Straw Bottle(s), or new Foogo® Straw Bottles or similar Thermos® brand products equal to the number and type of Foogo® Straw Bottles purchased by the Class Member. The total potential value of the Settlement Fund is \$675,000 (or more if Thermos adds to the Settlement Fund, as described above), and the total value of Thermos® brand products available to Class Members in connection with the Settlement is \$500,000. This amount does not include the cost to Thermos, approximately \$150,000, for repackaging its Foogo® Straw Bottles as a direct result of this litigation.

In the absence of settlement, it is certain that the expense, duration, and complexity of the resulting protracted litigation would be substantial. Further, evidence and witnesses from all over the country would have to be produced. Additionally, given the complexity of the issues involved, there is a strong likelihood that any losing party would appeal. Therefore, the

immediate relief provided to the Class Members under the Settlement Agreement weighs heavily in favor of its approval compared to the inherent risk associated with continued litigation, trial and appeal.⁵

Moreover, Class Counsel have significant experience and have achieved success in litigating false advertising and consumer protection class actions throughout the country. *See* Ex. A (Wolf Haldenstein Firm Resume); Ex. B (McLaughlin Firm Resume); Ex. C (Rosenberg Firm Resume). Thermos' counsel is likewise a highly regarded team of skilled and sophisticated lawyers with extensive class action experience. Class Counsel believe that this Settlement, as the result of a hard-fought, arm's-length negotiation, is fair, adequate and reasonable in their professional judgment. *See* Pollack Decl. ¶ 12. Finally, the instant Settlement was not finalized until Class Counsel engaged in extensive investigation into the claims and defenses of the Class and after Plaintiffs defeated Thermos' motion to dismiss, received information from Thermos prior to the settlement conference and negotiated the proposed Settlement at a settlement conference before this Court. *Id.* ¶¶ 7-11. As such, the fifth requirement regarding the opinion of class counsel is met.

The proposed Settlement's provision for a total potential recovery of at least \$675,000 in cash constitutes a fair and reasonable result permitting all Class Members who submit valid claims to receive reimbursements, potentially up the total retail amount paid by a Class Member,

⁵ Class Counsel is not aware of any objections at this time. Objections, however, would not be expected at this stage of the litigation before Class Notice has been issued. Indeed, "[a]t this point, the only way to gauge any... opposition is to solicit it by sending notice of the settlement to the class and inviting its members to voice their opinions." *Am. Int'l Grp., Inc.*, 2011 U.S. Dist. LEXIS 84219, at *39, citing, *e.g.*, *In re M3 Power Razor Sys. Mktg. & Sales Practice Litig.*, 270 F.R.D. 45, 63 (D. Mass. 2010) ("[T]he only practical way to ascertain the overall level of objection to the proposed settlement is for notice to go forward, and to see how many potential class members choose to opt out of the settlement class or object to its terms at the Final Fairness Hearing.").

including sales tax, of their purchases from Thermos depending on the number of valid claims. This monetary relief, and the ability to choose product, combined with Thermos' repackaging of the Foogo® Straw Bottles and change in the advertising generally of the Foogo® Straw Bottles as a direct result of this litigation, constitutes a Settlement that is fair, reasonable, and adequate when considering the above six factors.

VII. NOTICE TO THE CLASS SHOULD BE APPROVED

When a class is certified under Rule 23(b)(3), the substance of the notice to the settlement class must describe in plain language the nature of the action, the definition of the class to be certified, and the class claims and defenses at issue. Further, the notice must explain that settlement class members may enter an appearance through counsel if so desired, that class members may request to be excluded from the settlement class, and that the effect of a class judgment shall be binding on all class members. Rule 23(c)(2)(B). In addition to the substance of the notice, the manner of dissemination must also satisfy Rule 23 and due process, which require that the class receive "the best notice practicable under the circumstances." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). The proposed Notice in this action (*see* Exs. 3 & 4 to the Settlement Agreement and SA ¶ 10) meets all of the requirements set forth under Rule 23, and thus this Court should approve the Notice and order that it be disseminated to the Class.

What comprises the best possible notice depends on various elements, including the size of the class, whether class members can be easily identified, and the probability notice will in fact reach the intended audience. *See, e.g., Eisen*, 417 U.S. at 177. Although the court generally demands individual notice if lists of class members and their addresses are readily ascertainable, the burden is eased where the class members cannot be identified by name and address without an unreasonable amount of effort. *See Shurland v. Bacci Café & Pizzeria on Ogden, Inc.*, 271 F.R.D. 139, 143 (N.D. Ill. 2010); *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1097-

98 (5th Cir. 1997); *see also* *Nilsen v. York Cnty.*, 382 F. Supp. 2d 206, 210 (D. Me. 2005) (“Notice meets Rule 23(e) and due process requirements if it is reasonably calculated to reach the class members and inform them of the existence of and the opportunity to object to the settlement.”), citing *Newberg on Class Actions* § 11:53, at 164-65; *see also* *Wal-Mart Stores, Inc., v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005). In cases where names and addresses of class members are unreasonably difficult to obtain or not available, notice by publication has been deemed to satisfy the demands of Rule 23(c)(2). *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) (“When individual notice is infeasible, notice by publication in a newspaper of national circulation ... is an acceptable substitute.”), citing Rule 23(c)(2); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950); *In re Agent Orange Prod. Liability Litig.*, 818 F.2d 145, 167–69 (2d Cir. 1987); *Montelongo v. Meese*, 803 F.2d 1341, 1351–52 (5th Cir. 1986).

The proposed forms of Notice of this Settlement more than satisfy the above requirements. Indeed, the parties have negotiated and drafted a Class Notice with the help of Rust Consulting and Kinsella Media, firms with substantial experience in developing and implementing class action notice plans. SA ¶ 11. The Class Notice forms are written in simple terminology and include: (1) basic information about the lawsuit; (2) the Class Members’ opt-out rights; (3) an explanation of how Class Members can object to or opt-out of the Settlement; (4) the names of counsel for the Class Members and information regarding attorneys’ fees and expenses and service awards to the Named Plaintiffs; (5) an explanation of how Class Members can obtain Settlement benefits; (6) a description of the benefits provided by the Settlement; (7) the date of the Final Approval Hearing; (8) an explanation of eligibility for appearing at the Final Approval Hearing; and (9) the Settlement Website Address and a toll free number where

additional information can be obtained. *See* Settlement Agreement Ex. 3 (Class Notice) and Ex. 4 (Summary Notice).

The contents of the proposed Class Notice more than adequately comply with the Federal Judicial Center's model class action notices. *See* www.fjc.gov; *In re Skechers Toning Shoe Liab. Litig.*, No. 3:11-md-2308-TBR, 2012 U.S. Dist. LEXIS 113641, at *47 (W.D. Ky. Aug. 13, 2012) (approving class notices that “comply with the Federal Judicial Center's illustrative class action notices”). Here, the proposed Class Notice provides Class Members with sufficient information upon which to make an informed and intelligent decision regarding whether to object to the Settlement. Therefore, it satisfies the content requirements of Rule 23. *See Air Lines Stewards & Stewardesses Ass'n Local 550 v. Am. Airlines, Inc.*, 455 F.2d 101, 108 (7th Cir. 1972) (explaining that notice is appropriate if it describes fairly, accurately and neutrally the claims and parties in the litigation and the terms of the proposed settlement); *see also Mullane*, 339 U.S. at 313-14.

Additionally, the proposed dissemination of the Class Notice satisfies all due process requirements. The Settlement provides that the Settlement Administrator will send the Class Notice and Claim Form by email to all known email addresses received from Thermos. However, there is no way to reasonably identify the vast majority of individual Class Members. As such, the Notice Plan consists of publishing the Notice in sources specifically targeting Class Members, including Woman's Day Magazine and via Internet banner ads that are part of the Xaxis network which includes over 5,000 websites and will be provided for a period of time sufficient to deliver approximately 41,000,000 impressions, and mobile banner ads that will run for a period of time sufficient to deliver 5,000,000 impressions. Moreover, Class Notice will be

available through a Class Website specifically established for this action, and a toll-free telephone line will also be established.

In short, the proposed notice constitutes the best notice practicable under the circumstances and fully comply with the requirements of Rule 23.

VIII. PROPOSED SCHEDULE OF EVENTS

The key Settlement-related dates, such as the time to complete publication of the Class Notice or to opt-out or object, are based on when preliminary approval of the Settlement is granted and the date of the Final Approval Hearing. The Settlement-related dates calculated in accordance with the provisions of the Settlement are:

DEADLINE	DATE
Deadline for Plaintiffs to file Motion for Preliminary Approval	14 days after execution of Settlement Agreement (SA ¶ 4)
Deadline for Settlement Administrator to mail notice of Settlement to state and U.S. attorneys general	10 days after filing of Motion for Preliminary Approval (SA ¶ 14(B))
Commencement date for the Settlement Administrator to (a) provide email notice to Class Members who can be identified through online purchases made on Thermos website; (b) provide for electronic publication of notice; and (c) activate the Class Website (“Notice Date”)	30 calendar days after the date of entry of the Preliminary Approval Order (SA ¶ 10(B-E))
Deadline for Thermos to request top-ten retailers to remove “leak-proof” from their online advertising	45 days after the date of entry of the Preliminary Approval Order (SA ¶ 7(F))
Deadline for Class Counsel to file with the Court the Motion for Final Approval of the Settlement and application for fee award	60 days before Final Approval Hearing (SA ¶¶ 17, 22)
Deadline for Class Members to file objections and serve such objections on Class Counsel and Defendant’s counsel	45 days before Final Approval Hearing (SA ¶ 12(C))
Deadline for Class Members to submit requests for exclusion from the Settlement	45 days before Final Approval Hearing (SA ¶ 11) (“Opt-Out Date”)
Deadline for Class Counsel to file responses to objections to Settlement	14 days before Final Approval Hearing (SA ¶ 12(F))
Deadline for Settlement Administrator to file affidavit of Notice	14 days before Final Approval Hearing (SA ¶ 14(J))

Deadline for Settlement Administrator to file list of Class Members who filed timely requests for exclusion	30 days after Opt-Out Date (SA ¶ 14(K)).
Final Approval Hearing	No sooner than 150 days after the date of entry of the Preliminary Approval Order (SA ¶ 18)
Deadline for Class Members to submit claims	150 days after Notice Date (SA ¶ 13(C)) (“Claims Date”)
Deadline for Settlement Administrator to provide Thermos and Class Counsel with a report that lists each Class Member who elected to receive a Thermos product in connection with their Settlement award	30 days after Claims Date (SA ¶ 14(L))
Deadline for Thermos to effectuate service payments to named Plaintiffs and pay attorneys’ fees	30 days after Effective Date (as defined in Settlement Agreement – date when the Final Approval Order is no longer subject to review by any court, and has not been reversed or modified in any material aspect) (SA ¶¶ 8, 22)
Deadline for cash payments from the Settlement Fund and distributions of product to be made to Class Members who have submitted approved claims	90 days after Effective Date (SA ¶ 9)

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the proposed order attached to the Settlement Agreement as Exhibit 1 that, among other things: (1) conditionally certifies the Class; (2) appoints Plaintiffs as representatives of the Class; (3) appoints Plaintiffs’ counsel as Class Counsel; (4) preliminarily approves the proposed Settlement Agreement; (5) authorizes distribution of the proposed Class Notice; and (6) schedules a final approval hearing for Settlement.

Dated: December 17, 2014

Respectfully submitted,

/s/ Janine L. Pollack

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on December 17, 2014, she caused the foregoing document to be filed with the clerk of the United States District Court for the Northern District of Illinois by using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Janine L. Pollack
Janine L. Pollack

EXHIBIT

1

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS**

JENNY MILMAN and ELLEN THOMAS,)	
on Behalf of Themselves and All Others)	
Similarly Situated,)	No. 1:13-cv-7750
)	
Plaintiffs,)	
)	
v.)	Magistrate Judge Sheila M. Finnegan
)	
THERMOS L.L.C.,)	
)	
Defendant.)	

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is made and entered into by and between Plaintiffs Jenny Milman and Ellen Thomas (the “Named Plaintiffs”), on behalf of themselves and the Settlement Class defined below, the Named Plaintiffs’ counsel herein (“Class Counsel”), and Thermos L.L.C. (“Thermos”). For the purpose of this Agreement, the Named Plaintiffs and Thermos are described collectively as the “Parties” to this Agreement. Subject to preliminary and final court approval as described below, the Parties state and agree as follows:

1. The Lawsuit. On October 29, 2013, the Named Plaintiffs filed a class action complaint (the “Complaint”) in the United States District Court for the Northern District of Illinois captioned *Milman, et al. v. Thermos L.L.C.*, Case No. 13-cv-7750 (the “Lawsuit”). The Lawsuit asserted claims against Thermos on behalf of a purported New Jersey class and a purported New York class for violation of the New Jersey Consumer Fraud Act, violation of New York General Business Law Section 349, breach of express warranty and unjust enrichment, all arising out of Thermos’ alleged use of the term “leak-proof” in connection with the advertising and sale of Foogo® stainless steel vacuum-insulated straw bottles (the “Foogo® Vacuum Bottle”) and Foogo® plastic straw bottles (the “Foogo® Plastic Bottle”) (collectively,

the “Foogo® Straw Bottles”). Thermos disputes each and every one of these claims, denies any wrongdoing whatsoever, and has filed an answer to the Complaint denying liability and raising a number of additional defenses.

2. Agreement to Resolve the Lawsuit. On June 6, 2014, Judge Rebecca Pallmeyer entered an order referring the case to Magistrate Judge Sheila M. Finnegan for a settlement conference. On August 14, 2014, the Parties participated in a settlement conference with Magistrate Judge Finnegan. As a result of arms-length negotiations between counsel for the Named Plaintiffs and counsel for Thermos during that settlement conference, the Parties have agreed to resolve the Lawsuit on the terms and conditions set forth herein. The Named Plaintiffs and their counsel, having considered, *inter alia*, the strengths and weaknesses of their claims and Thermos’ defenses, and the likelihood of success at trial, have determined that this Agreement is fair, reasonable, adequate and in the best interests of Named Plaintiffs and the Settlement Class. Thermos, denying wrongdoing of any nature and without admitting liability, has agreed to the terms of this Agreement in order to address claims brought by consumers of the Thermos products at issue, and in order to avoid the burdens of continuing litigation, including the burden and expense of discovery. The Parties have consented to have all further proceedings in this action, including without limitation those relating to the review, approval, administration and enforcement of this Agreement, conducted by Magistrate Judge Finnegan (hereafter, the “Court”). On August 19, 2014, Judge Pallmeyer reassigned this case to Magistrate Judge Finnegan for all further proceedings, including this Settlement.

3. Conditional Class Certification for Class Settlement Purposes Only. The Parties stipulate to certification, solely for settlement purposes, of a Settlement Class (the “Class”) defined as follows:

All persons who purchased a Foogo® stainless steel vacuum-insulated straw bottle or a Foogo® plastic straw bottle in the United States at any time between January 1, 2007 and **[preliminary approval date]** excluding (a) any such person who purchased for resale and not for personal or household use, (b) any officers, directors or employees, or immediate family members of the officers, directors or employees, of Thermos, and (c) the presiding judges and their immediate families.

The period from January 1, 2007 through and including the preliminary approval date shall be referred to herein as the “Class Period,” and the members of the Class shall be referred to herein as the “Class Members.”

4. Preliminary Approval Motion. Within 14 days of the execution of this Agreement, Plaintiffs shall file a motion (the “Preliminary Approval Motion”) seeking an Order preliminarily certifying the Class and approving the Settlement and will request that the Court enter the proposed preliminary approval order attached as Exhibit 1 to this Agreement (the “Preliminary Approval Order”), preliminarily certifying the Class, authorizing Notice (defined below), appointing the Named Plaintiffs as representatives of the Class, appointing Class Counsel for the Class, ordering that Notice of the Settlement be disseminated to the Class (see Paragraph 10, *infra*), and scheduling a Final Approval Hearing no sooner than 150 days after entry of the Preliminary Approval Order. As set forth in the proposed Preliminary Approval Order, the Parties agree, subject to Court approval, that Class Counsel shall be: Janine L. Pollack of Wolf Haldenstein Adler Freeman & Herz LLP; Lee S. Shalov of McLaughlin & Stern LLP; and Brett D. Zinner of Rosenberg Fortuna & Laitman LLP.

5. Effect of Termination or Rejection of Agreement. The Parties further agree and stipulate that the preliminary and conditional certification of the Class and appointment of Class Counsel provided for in Paragraphs 3 and 4 of this Agreement shall be binding only if this Agreement is executed, not terminated, and approved by the Court both preliminarily and finally,

and affirmed upon any appeal. If the Agreement is terminated or rejected by this Court or any other court of law, including an appellate court, at any point, the Parties stipulate and agree that they can jointly or separately request that the Court vacate the certification of the Class without prejudice to any Party's position on the issue of class certification, and restore the Parties to their respective litigation positions as they existed as of August 14, 2014.

6. No Admission of Liability or Other Concession by Thermos. The Parties and their respective counsel agree that the settlement of the Lawsuit is not a concession, admission or acknowledgement by Thermos that a litigation class could properly be certified in the Lawsuit. The Parties therefore agree not to argue, in this or any other proceeding, that the fact of this proposed settlement, or any stipulation to certification of the Class, constitutes any concession or admission by Thermos that a litigation class could properly be certified. The Parties and their respective counsel further agree that no aspect of this Agreement, its provisions, the negotiations or the positions of any of the Parties leading to its execution, shall be construed as a concession, admission or acknowledgement by Thermos of the truth of any of the allegations made in the Lawsuit, or of any liability, fault or wrongdoing of any kind on the part of Thermos. Accordingly, this Agreement shall not be offered or received in evidence in any action or proceeding in any court, private forum, administrative proceeding, or other tribunal as any kind of admission or concession by Thermos.

7. Settlement Consideration. In exchange for the releases provided in Paragraph 15 of this Agreement, Thermos agrees to the following:

A. Economic Benefits. Each Class Member who submits a Qualifying Claim Form, as that term is defined below, will be eligible to receive a one-time grant of one of three benefit options – defined below as Benefit Options A, B, and C – subject to the terms set

forth in subparagraphs (i) through (iii) of this Paragraph and the limits set forth in Paragraphs 7.B and 7.C of this Agreement. The right to obtain any of these Benefit Options under this Settlement Agreement may not be assigned, and any settlement claim submitted by an assignee will be deemed invalid.

(i) **Benefit Option A.** If a Class Member submits a Qualifying Claim Form and selects Benefit Option A, he or she will be eligible to receive, without proof of purchase, a one-time cash payment estimated to be \$8.50 (50% of the average retail price of the Foogo® Vacuum Bottle during the Class Period) if he or she purchased one or more Foogo® Vacuum Bottles, or a one-time cash payment estimated to be \$4.50 (50% of the average retail price of the Foogo® Plastic Bottle during the Class Period) if he or she purchased one or more Foogo® Plastic Bottles. As set forth in Paragraph 7.B.i, the dollar amount of cash payments provided to Class Members may vary depending upon the number of Class Members who submit valid claims. Under no circumstances will a Class Member who selects Benefit Option A be eligible to receive more than one payment, regardless of the number of Foogo® Straw Bottles purchased.

(ii) **Benefit Option B.** If a Class Member submits a Qualifying Claim Form and selects Benefit Option B, he or she will be eligible to receive, without proof of purchase, (a) a new Foogo® Vacuum Bottle or a new Thermos® brand Vacuum Insulated 16-ounce Stainless King Beverage Bottle in Midnight Blue (SK2000MB4), if he or she purchased one or more Foogo® Vacuum Bottles during the Class Period, or (b) a new Foogo® Plastic Bottle or a new Thermos® brand 16-ounce Plastic Hydration Bottle in Teal (HP4100TLTR16), if he or she purchased one or more Foogo® Plastic Bottles during the Class Period. Under no

circumstances will a Class Member who selects Benefit Option B be eligible to receive more than one bottle, regardless of the number of Foogo® Straw Bottles purchased.

(iii) **Benefit Option C.** If a Class Member submits a Qualifying Claim Form, selects Benefit Option C, and submits proof of purchase of one or more Foogo® Straw Bottles in a form sufficient to show the price and quantity of each of the products purchased (e.g., store receipt(s) in paper or electronic form or electronic receipts from online retailers such as Amazon.com), he or she will be eligible to receive, at the Class Member's choice, either (a) a one-time cash payment estimated to be equal to the total amount paid by the Class Member, including any sales tax paid, for all of the Foogo® Straw Bottles purchased by the Class Member during the Class Period, as established by the proof of purchase; or (b) a new Foogo® Vacuum Bottle or a new Thermos® brand Vacuum Insulated 16-ounce Stainless King Beverage Bottle in Midnight Blue (SK2000MB4) for each Foogo® Vacuum Bottle purchased by the Class Member during the Class Period, and a new Foogo® Plastic Bottle or a new Thermos® brand 16-ounce Plastic Hydration Bottle in Teal (HP4100TLTR16) for each Foogo® Plastic Bottle purchased by the Class Member during the Class Period, as established by the proof of purchase. As set forth in Paragraph 7.B.i, the dollar amount of cash payments provided to Class Members is an estimate and may vary depending upon the number of Class Members who submit valid claims. Under no circumstances will a Class Member who selects Option C be eligible to receive *both* Thermos product *and* a cash payment (*i.e.*, a Class Member must select exclusively Thermos product *or* exclusively a cash payment under Option C). The Settlement Administrator shall have full and final authority to determine the sufficiency of the submitted proof of purchase and the total amount paid as established by the proof of purchase, in consultation with Thermos and Class Counsel.

B. Settlement Fund. Subject to the limitations, conditions and terms hereof, Thermos will make available a maximum aggregate sum of \$675,000 (the “Settlement Fund”) for payments by the Settlement Administrator to Class Members under Benefit Options A and C.

(i) In the event the total cash payments in respect to approved claims submitted under Benefit Options A and C combined would exceed \$675,000, then all payments of such claims shall be reduced *pro rata* proportionate to the amount of the payment, as illustrated in Exhibit 2. Calculation of the amount of the *pro rata* reduction with respect to each claim shall be determined by the Settlement Administrator.

(ii) In the event the total cash payments in respect to approved claims submitted under Benefit Options A and C combined are less than \$675,000, then any unused portion of the Settlement Fund up to \$450,000 shall remain with and/or revert to Thermos. If the total cash payments in respect to approved claims submitted under Benefit Options A and C combined are less than \$225,000, then the amount of the Settlement Fund in excess of the total cash payments for such claims but less than \$225,000 plus any Excess Attorneys’ Fees (as defined in Paragraph 22) (the “Excess Funds”) shall be distributed *pro rata* to Class Members who submitted approved claims under Benefit Option A, up to a maximum payment of \$16.99 to claimants who purchased a Foogo® Vacuum Bottle and \$8.99 to claimants who purchased a Foogo® Plastic Bottle (the respective average retail prices of the Bottles). The amount of the Excess Funds to be distributed to each such claimant shall be determined by the Settlement Administrator. Plaintiffs have designated 50% of any portion of the Excess Funds not distributed to Class Members to be distributed to Share Our Strength/No Kid Hungry, a not-for-profit organization. Thermos has designated 50% of any portion of the Excess Funds not distributed to Class Members to be distributed to the Boomer Esiason Foundation, a not-for-

profit organization dedicated to finding a cure for cystic fibrosis (“CF”) and supporting the CF community.

C. Cap on Product Portion of Settlement. In the event the Thermos products to be distributed in respect to approved claims submitted under Benefit Options B and C combined would exceed \$500,000 in retail value, then the products will be distributed to claimants who submitted approved claims under Benefit Options B and C in the order in which their claims were received by the Settlement Administrator, until the \$500,000 retail cap is reached. Thereafter, any remaining claimants who submitted approved claims under Benefit Option B will receive a cash payment under Benefit Option A pursuant to paragraphs 7.A.(i) and 7.B, and any remaining claimants who submitted approved claims for product under Benefit Option C will receive a cash payment under Benefit Option C pursuant to paragraph 7A.(iii) and 7.B, subject to the terms relating to cash payments contained in this Settlement Agreement.

D. Pro Rata Reduction Limit. In no event shall the amounts estimated to be paid on individual valid claims submitted by Class Members under Benefit Option A be reduced by more than 75% of the estimated amounts stated in Paragraph 7.A.i. In the event such reduction by more than 75% would otherwise occur, Thermos will supplement the Settlement Fund by an amount sufficient to ensure that *pro rata* payments to such Class Members are not reduced by more than 75% of the estimated amounts stated in Paragraph 7.A.i. Similarly, in no event shall any cash amounts paid on individual valid claims submitted by Class Members under Benefit Option C be reduced by more than 75% of the total amount paid by the Class Member for all of the Foogo® Straw Bottles purchased by the Class Member, including any sales tax paid on the Foogo® Straw Bottles, as established by the proof of purchase. In the event such reduction by more than 75% would otherwise occur, Thermos will supplement the Settlement

Fund by an amount sufficient to ensure that *pro rata* payments to such Class Members are not reduced by more than 75% of the total amount paid by the Class Member for all of the Foogo® Straw Bottles purchased by the Class Member, including any sales tax paid on the Foogo® Straw Bottles, as established by the proof of purchase.

E. Changes to Packaging. Thermos changed the packaging of its Foogo® Straw Bottles after the filing of the Lawsuit to remove the phrase “leak-proof.” The cost associated with these packaging changes was approximately \$150,000.

F. On-Line Advertising. Thermos agrees to use commercially reasonable efforts to communicate to its top 10 retailers of the Foogo® Straw Bottles, within 45 days of entry of the Preliminary Approval Order as defined in Paragraph 4 of this Agreement, a request that they revise their on-line advertising of the Foogo® Straw Bottles to remove references to “leak-proof” in respect to the Foogo® Straw Bottles.

8. Payments to Named Plaintiffs. Subject to approval by the Court, the Parties agree that the Named Plaintiffs shall each receive a payment of \$1,500. These payments are service payments intended to compensate the Named Plaintiffs for bringing the Lawsuit, and in consideration of the time and effort they expended in prosecuting the Lawsuit. The Parties agree that the Named Plaintiffs may submit claims as Class Members under the terms and provisions of this Agreement and the award of a service payment for service as a putative class representative shall not in any way bar or limit their entitlement to seek recovery under this Settlement. Subject to Court approval, the service payments shall be paid by Thermos within 30 days of the Effective Date defined in Paragraph 19 of this Agreement. Payments shall be made by check, payable to the Named Plaintiffs, and sent by first-class mail to Class Counsel.

9. Timing of Payments and Distribution of Product. No payments or distributions of product shall be made to any Class Member until after the Effective Date defined in Paragraph 19 of this Agreement. Within 90 days after the Effective Date, cash payments from the Settlement Fund and distributions of product shall be made to Class Members who have submitted approved claims. Cash payments to Class Members shall be paid by check from the Settlement Fund and sent by the Settlement Administrator by first-class mail. All checks issued to Class Members on claims submitted pursuant to this Agreement shall state that they must be cashed within 120 days from the date issued. The Settlement Administrator will make its best efforts to contact any Class Member who has not cashed a claim check within 120 days from the date issued, or whose check has been returned as undeliverable, and will have the power to void, reissue and re-mail checks as appropriate. Any Class Member who receives a check in connection with a claim submitted under this Agreement and does not cash that check within 120 days of its date will be deemed to have withdrawn that claim and neither the Settlement Administrator nor Thermos will have any obligation to pay that claim. Product shall be shipped by first-class mail by the Settlement Administrator or by Thermos, at Thermos's option, to the address indicated on the Claim Form by the Class Member or as updated by the Class Member thereafter and communicated to the Settlement Administrator prior to shipping. Neither the Settlement Administrator nor Thermos will have any obligation to attempt to re-ship any product that is returned as undeliverable unless the Settlement Administrator determines that the product could not be delivered because of an error by the shipper.

10. Notice To The Settlement Class. As described below, the Parties have developed a Notice Plan with the help of Rust Consulting and Kinsella Media, firms with substantial experience in developing and implementing class action notice plans. The Parties

acknowledge and agree that Thermos's ability to identify individual Class Members is limited to those Class Members who purchased one or more Foogo® Straw Bottles through the Thermos website during the Class Period, as defined in Paragraph 3; with the exception of that limited group, individual notice to the Class is not practicable. The Parties accordingly have developed the following Notice Plan to provide broad notice to Class Members consistent with the requirements of due process:

A. **Contents of the Class Notice.** The Class Notice shall be in a form substantially similar to the document attached to this Agreement as Exhibit 3, and shall advise Class Members of the following:

(i) **General Terms:** The Class Notice shall contain a plain and concise description of the Lawsuit, the history of the litigation of the claims, the preliminary certification of the Class, and the proposed Settlement, including a description and definition of the Class, how the proposed Settlement would provide relief to the Class and Class Members, what claims are released under the proposed Settlement and other relevant terms and conditions.

(ii) **Opt-Out Rights:** The Class Notice shall inform Class Members that they have the right to opt out of the Settlement. The Class Notice shall provide the deadlines and procedures for exercising this right.

(iii) **Objection to Settlement:** The Class Notice shall inform Class Members of their right to object to the proposed Settlement and appear at the Final Approval Hearing. The Class Notice shall provide the deadlines and procedures for exercising these rights.

(iv) **Fees and Expenses:** The Class Notice shall inform Class Members about the amounts being sought by Class Counsel as Attorneys' Fees and Expenses and individual service payments to the Named Plaintiffs, and shall explain that Thermos will pay the fees and

expenses awarded to Class Counsel and individual service payments to the Named Plaintiffs, none of which shall affect the relief to the Class Members.

(v) **Claim Form:** The Class Notice shall describe the process for making a claim under the Settlement, shall inform Class Members about the options for obtaining a Claim Form, and shall inform Class Members that they must fully complete and timely return the Claim Form within the Claim Period to be eligible to obtain relief pursuant to this Agreement.

B. **E-Mail Notice.** The Class Notice and Claim Form will be provided by e-mail to Class Members who can be identified from records maintained by SureSource LLC of online purchases made through the Thermos website, not later than 30 days after entry of the Preliminary Approval Order.

C. **Publication Notice – Woman’s Day Magazine.** Notice will be provided by publication of a Summary Notice substantially in the form of the document attached as Exhibit 4 to this Agreement in Woman’s Day, a national magazine with an estimated circulation of 3,250,000 that covers topics of interest to women such as health, fashion, home-decorating, food, family and fitness. The Summary Notice is designed to provide potential Class Members with information regarding the Settlement and inform them about their rights. The Summary Notice contains a general description of the Lawsuit, the Settlement relief, including how a claim can be filed, and a general description of Class Members’ legal rights. The Summary Notice also directs Class Members to the Class Website (described below) and provides a toll-free number that Class Members can call for further information and to obtain copies of documents including the detailed Class Notice, the Claim Form and this Agreement

D. **Publication Notice – Internet and Mobile Banner Advertisements.** Notice will also be provided through the use of Internet and mobile banner ads. Banner ads are

short, internet-based advertisements designed to attract attention. When presented with such an ad, an interested viewer can immediately access the Class Website by clicking on a link in the ad. The internet banner ads for this Settlement will measure 728 x 90 pixels, 300 x 250 pixels and 160 x 600 pixels, and will appear in substantially the forms set forth on Exhibit 5 hereto. These banner ads will appear on a rotating basis on websites that are part of the Xaxis network, which includes over 5,000 websites, for a period of time sufficient to deliver approximately 41,000,000 impressions. Publication of the Class Notice by means of banner ads shall commence not later than 30 days after entry of the Preliminary Approval Order directing notice to the Class. The commencement date of such electronic publication of notice shall be referred to in this Settlement Agreement as the “Notice Date.” Notice will also be provided through mobile advertising and will run in-app and in-browser for a period of time sufficient to deliver 5,000,000 impressions. Publication of the mobile advertising shall commence not later than the Notice Date.

E. Website Notice. Within 30 days after the Court enters the Preliminary Approval Order directing notice to the class, but not later than the Notice Date, the Settlement Administrator shall activate the Class Website, which shall be <http://www.foogobottlesettlement.com>. The Class Website shall be designed to be easily viewed on computers, tablets and mobile devices, and shall include, in .pdf format, the Complaint, the Answer and Additional Defenses, this Agreement (including exhibits), the Class Notice, the Summary Notice, the Preliminary Approval Order, the Claim Form, the Final Approval Order (upon entry by the Court), and other information as appropriate during the course of the administration of this Settlement, as agreed by the Parties and/or ordered by the Court.

F. Toll-Free Telephone Number. The Settlement Administrator shall establish, not later than the Notice Date, a toll-free telephone number that will provide Settlement-related information to Class Members, as described more fully below at Paragraph 14.D.

11. Opt-Out Procedures. Any potential Class Member who wishes to be excluded from the Settlement and the Class may submit a written request to opt out of the Class. Any such request must be prepared in the manner directed in the Class Notice, must be postmarked no later than 45 days prior to the Final Approval Hearing, and must be mailed to the Settlement Administrator at the address specified in the Class Notice. Requests for exclusion must be exercised individually by a potential Class Member, not as or on behalf of a group, class or subclass, and must be signed by the Class Member. The Settlement Administrator shall promptly log each request for exclusion received and provide copies of the log and all requests for exclusion to counsel for the Parties within 5 business days of receiving the request for exclusion.

A. Effect of Not Opting Out. All potential Class Members who do not timely and properly exclude themselves from the Class shall be bound by this Agreement, and all their claims shall be dismissed with prejudice and released as provided for in this Agreement. The Named Plaintiffs shall not elect or seek to opt out or exclude themselves from the Class.

12. Objections. Class Members who do not submit a timely request for exclusion from the Class and who wish to object to the fairness, reasonableness, or adequacy of this Agreement or the proposed Settlement, including the award of attorneys' fees, must submit their objection no later than 45 days before the Final Approval Hearing and comply with the procedures set forth below:

A. **Written Notice of Objection.** To be effective, any objection must be in writing, and must contain the following information (the “Written Notice of Objection”): (1) a heading referring to the Lawsuit; (2) a statement whether the objector intends to appear at the Final Approval Hearing, either in person or through counsel, and if through counsel, information identifying all counsel representing the objector by name, address, bar number, and telephone number; (3) a statement of the legal and factual bases for the objection; (4) a description of any and all evidence the objecting Class Member may offer at the Final Approval Hearing, including but not limited to the names and expected testimony of any witnesses, and copies of any exhibits; (5) proof of purchase of at least one of the Bottles during the Class Period; and (6) the signature of the Class Member. The right to object to the proposed Settlement must be exercised individually by a Class Member or his or her attorney, and not as a member of a group, class or subclass. The Written Notice of Objection must be signed by the Class Member and his or her counsel (if the Class Member is represented by counsel); an objection signed by counsel alone shall not be sufficient.

B. **Objections From Class Members Represented by Counsel.** Class Members who are represented by counsel must file an appearance and the Written Notice of Objection with the Clerk of the Court for the United States District Court for the Northern District of Illinois no later than 45 before the Final Approval Hearing. These materials must also be served upon the Settlement Administrator by first class mail, postmarked no later than 45 days before the Final Approval Hearing.

C. **Objections From Class Members Not Represented by Counsel.** Class Members who are not represented by counsel and wish to object must serve their Written Notice of Objection upon the Settlement Administrator by first class mail, postmarked no later than 45

days before the Final Approval Hearing. The Settlement Administrator shall promptly provide copies to the Court and to counsel for the Parties.

D. Effect of Failure to Comply. Failure to comply timely and fully with these procedures shall result in the invalidity and dismissal of any objection, subject to Court approval. Class Members who fail to file and serve timely written objections in accordance with this Agreement shall be deemed to have waived any objections, shall not be heard at the Final Approval Hearing, and shall be foreclosed from making any objection (whether by appeal or otherwise) to the Settlement.

E. Jurisdiction and Discovery. By submitting an objection to the Settlement, Class Members agree not to challenge the jurisdiction of the Court, and agree to be bound by all judgments and orders issued by the Court. Class Counsel, on behalf of Plaintiffs, may serve discovery requests, including for deposition, on any Class Member who submits an objection without requiring any further order or decree from the Court or any other court.

F. Response to Objections. Thermos and/or Class Counsel shall file any response to any properly submitted objections with the Court no later than 14 days before the Final Approval Hearing.

13. Claim Form and Time Period.

A. Contents of Claim Form. All claims shall be submitted on a Claim Form substantially in the form of Exhibit 6 to this Agreement. The Claim Form shall require (a) the name, mailing address and e-mail address, if available, of the claimant, (b) identification of the type of Foogo® Straw Bottle(s) the claimant purchased, (c) a statement that one of the reasons the claimant purchased the Foogo® Straw Bottle(s) was the advertised leak-proof feature of the Bottle(s) and that claimant was dissatisfied with the product, (d) a statement that the claimant

wishes to make a claim for one of the Benefit Options, and if so which one, (e) for claimants making a claim under Benefit Option B, identification of the product that the claimant would like to receive if the claim is approved, and (f) the signature of the claimant attesting under penalty of perjury that the statements contained in the Claim Form are true. A Class Member must submit a completed, signed Claim Form in order to be eligible for any of the Benefit Options described in Paragraph 7.A of this Agreement. In addition, to be eligible for Benefit Option C, a Class Member must submit with the completed and signed Claim Form (a) proof of purchase of the Foogo® Straw Bottle(s) in respect to which he or she requests a refund or Thermos product, in the form of legible copies of store receipts or electronic receipts from online retailers, sufficient to show the price and quantity of Bottles purchased; and (b) a statement of the total amount of the cash payment or number of Thermos® brand products to which he or she believes he or she is entitled. All submitted Claim Forms will be subject to verification by the Settlement Administrator, Thermos, or Class Counsel at their respective options. All Claim Forms that meet the requirements of this Paragraph 13.A, and are accepted by the parties and the Settlement Administrator, shall be referred to as “Qualifying Claim Forms” in this Agreement.

B. Obtaining Claim Forms. Class Members may obtain the Claim Form online from the Class Website, by calling the toll-free telephone number to be maintained by the Settlement Administrator pursuant to Paragraph 14.D of this Agreement, or by writing to the Settlement Administrator at the address contained in the Class Notice.

C. Submission of Claim Forms. To be eligible to receive any of the Benefit Options described in Paragraph 7.A of this Agreement, a Class Member must submit his or her completed and signed Claim Form, along with proof of purchase as set forth in Paragraph 14.A if the Class Member is requesting Benefit Option C, to the Settlement Administrator no later than

150 days after the Notice Date. That submission may be made in one of four ways: (1) by email to the Settlement Administrator in signed, PDF form, sent no later than 11:59 P.M. Eastern Standard Time on the 150th day after the Notice Date, (2) by U.S. postal delivery that is mailed and postmarked no later than the 150th day after the Notice Date, (3) by hand or courier delivery that is received by the Settlement Administrator no later than 11:59 P.M. Eastern Standard Time on the 150th day after the Notice Date, or (4) by online submission with an electronic signature through the Class Website, submitted no later than 11:59 P.M. Eastern Standard Time on the 150th day after the Notice Date.

14. Settlement Administration. The parties have selected Rust Consulting, an experienced Settlement Administrator, to perform the settlement administration services described in this Agreement, subject to the approval of the Court. Thermos shall enter into an agreement with the Settlement Administrator regarding settlement administration. Among its other duties, the Settlement Administrator shall:

A. Provide Class Notice in accordance with the Notice Plan set forth in Paragraph 10 of this Agreement;

B. Mail notice of this Settlement to the state attorneys general and the United States Attorney General, in accordance with the Class Action Fairness Act, within 10 days of the filing of the Preliminary Approval Motion with the Court;

C. Create and maintain the Class Website for this Settlement, as set forth in Paragraph 10.E of this Agreement;

D. Maintain a toll-free VRU telephone system containing recorded answers to frequently asked questions, along with an option permitting callers to leave messages in a voicemail box and receive a return call from a live operator or Class Counsel;

E. Respond, as necessary, to inquiries from Class Members and potential Class Members;

F. Receive and provide to counsel for the Parties, within 5 business days of receipt, copies of all requests for exclusion from the Settlement Class;

G. At the request of counsel for the Parties, provide copies of Claim Forms and supporting materials submitted by Class Members;

H. Evaluate, and determine the validity of, claims submitted pursuant to this Agreement;

I. Seasonably report to the Court and counsel for the Parties regarding the number of claims submitted to the Settlement Administrator, the number of claims determined by the Settlement Administrator to be valid, and the dollar amounts of such valid claims;

J. No later than 14 days before the Final Approval Hearing, file with the Court an affidavit or declaration detailing the scope and methods of the Notice program and certifying that Notice has been effectuated in accordance with this Agreement;

K. Within 30 days after the deadline for Class Members to submit requests for exclusion from the Settlement, prepare and provide to the Court and counsel for the Parties a list or lists of all persons who timely request exclusion from the Class and any necessary affidavit or declaration of the Settlement Administrator concerning such list or lists;

L. Within 30 days of the final date for the submission of claims under the Agreement, prepare and provide to Thermos and Class Counsel a report that lists each Class Member who is entitled to receive Thermos product pursuant to paragraphs 7.A(ii) and (iii) and 7.C of this Agreement, listed in the order in which the claims were received, the specific product or products that Class Member is entitled to receive, and the total number of each product that is

to be distributed to Class Members who submitted approved claims under Benefit Options B and C;

M. No later than 90 days after the Effective date, mail cash payments to Class Members who have submitted approved claims under Benefit Options A and C as specified in this Agreement; and

N. No later than 90 days after the Effective date, ship products to be provided by Thermos to Class Members who have submitted approved claims under Benefit Options B and C as specified in this Agreement.

15. Releases.

A. **Timing and Scope.** As of the Effective Date as defined in Paragraph 19 of this Agreement, the Named Plaintiffs and all other members of the Class who do not exclude themselves from the Class, for themselves and their heirs, successors and assigns, hereby fully and finally release and discharge Thermos, its parents and affiliates, and all of their respective present and former officers, directors, employees, shareholders, attorneys, agents, successors and assigns (the “Released Parties”) of and from all claims that were or could have been raised in the Lawsuit to the full extent of *res judicata* protection arising out of or related to any purchase of the Foogo® Straw Bottles during the Class Period by any Class Member, regardless of whether any such claim is known or unknown, asserted or as yet unasserted (the “Released Claims”). Notwithstanding the language in this section and/or this Agreement, the Named Plaintiffs and the other members of the Class are not releasing any claims of or relating to bodily and/or personal injury.

B. No Further Right to Sue Released Parties for the Released Claims.

The Named Plaintiffs and other Class Members who have not been excluded from the Class,

for themselves and their successors and assigns, expressly agree that they shall not now or hereafter initiate, maintain, or assert against the Released Parties any causes of action, claims, rights or demands arising out of or related in any way to the Released Claims, whether based on federal, state, or local law, statute, ordinance, regulation, tort, contract, common law, or any other sources.

C. Confirmation of Release of Attorneys' Fees and Expenses. Without in any way limiting the scope of the Release, this Release covers any and all claims for attorneys' fees, costs or disbursements incurred by Class Counsel or any other counsel representing the Named Plaintiffs or any member of the Class, in connection with or related in any manner to the Lawsuit, the settlement of the Lawsuit, the administration of the Settlement and/or the Released Claims, except to the extent otherwise specified in this Agreement.

D. Release Under All Applicable Statutes. The Named Plaintiffs, both individually and on behalf of the Class, expressly understand, have been advised, and have had the opportunity to consult with counsel regarding potentially applicable legal principles and codes, such as Section 1542 of the Civil Code of the State of California. In giving the Releases granted by this Agreement, the Named Plaintiffs and all Class Members who have not been excluded from the Class, for themselves and their successors and assigns, also expressly waive all rights under Section 1542 of the Civil Code of the State of California, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

The Named Plaintiffs and the Class Members, for themselves and their successors and assigns, hereby agree that they knowingly and voluntarily waive and relinquish the provisions of Section 1542 and all similar federal or state laws, rights, rules, or legal principles of any other jurisdiction which may apply, to the fullest extent permitted by law. The Named Plaintiffs and the Class, for themselves and their successors and assigns, hereby agree and acknowledge that this waiver is an essential term of this Release. In connection with this Release, the Named Plaintiffs and the Class acknowledge that they are aware that they may hereafter discover claims presently unknown or unsuspected, or facts in addition to or different from those which they now know or believe to be true with respect to the matters released herein. Nevertheless, it is the intention of Named Plaintiffs and the Class in executing this Release fully, finally and forever to settle, resolve and release all of their Released Claims against the Released Parties, for themselves and their successors and assigns.

E. No Release of Settlement Terms. Nothing in this Release shall preclude any action to enforce the terms of this Agreement.

F. Release Regardless of Notice. Subject to Court approval, all members of the Class who do not exclude themselves shall be bound by this Agreement, and all of their claims shall be dismissed with prejudice and released, even if they never received actual notice of the Lawsuit or its settlement.

16. Reservation of Right Not to Be Bound.

A. Thermos reserves the right not to be bound to this Agreement, at Thermos's option, if any one of the following occurs:

(i) If one or more overlapping classes are certified in any other case at any time before the entry of the Final Approval Order as defined in Paragraph 17 of this Agreement;

(ii) If more than 350 actual Class Members timely and properly request exclusion from the Class; or

(iii) If the Court or a reviewing court modifies in any material respect the definition of the Settlement Class or the scope of the Releases provided to Thermos under this Agreement; or

(iv) If the Court or a reviewing court modifies any of the following components of this Settlement in a way that would increase the total potential aggregate cost of the Settlement to Thermos by more than \$150,000: (a) the cost of notice; (b) cash payments to Class Members; (c) the value of product to be provided to Class Members; or (d) service payments to the Named Plaintiffs.

17. Motion for Final Approval of Settlement and Award of Attorneys' Fees, Expenses, and Service Awards. The Named Plaintiffs shall file a Motion for Final Approval of Class Action Settlement and Petition for Award of Attorneys' Fees, Expenses, and Service Payments to Named Plaintiffs ("Final Approval Motion") no later than 60 days before the Final Approval Hearing. The Final Approval Motion will seek entry of an Order Granting Final Approval of Class Action Settlement and Final Judgment (the "Final Approval Order") substantially in the form of Exhibit 7 to this Agreement.

18. Final Approval Hearing and Judgment. The Parties shall request in the Preliminary Approval Motion that the Court schedule a Final Approval Hearing no sooner than 150 days after entry of the Preliminary Approval Order. If none of the events described in

Paragraph 16 occurs and this Agreement (including any modification of this Agreement made with the written consent of all Parties) is approved by the Court following the Final Approval Hearing, the Parties will request entry of the Final Approval Order. Upon entry of the Final Approval Order, the Lawsuit shall be dismissed with prejudice.

19. Effective Date. The “Effective Date” of this Agreement shall be the date when each and all of the following conditions have occurred: (a) this Agreement has been fully executed by the Parties and their counsel; (b) the Court has entered an Order granting preliminary approval of this Agreement and approving the Notice Plan and Class Notice, as provided in Paragraph 4 of this Agreement; (c) the Website Notice has been duly posted as ordered by the Court and Notice Plan has been executed; (d) the Court has entered a Final Approval Order, as provided in Paragraph 18 of this Agreement; and (e) the Final Approval Order is no longer subject to review by any court, and has not been reversed or modified in any material respect.

20. Failure to Become Effective. If, for any reason, this Agreement fails to become effective pursuant to the foregoing paragraph, the Parties stipulate and agree that they can jointly or separately request that (a) the orders, judgment and dismissal to be entered pursuant to this Agreement shall be vacated, (b) the terms of the Agreement, including its recitation of definitions and stipulations, shall be deemed to have been made without prejudice to any Party’s position in the Lawsuit, and (b) the Parties shall be restored to their respective litigation positions existing as of August 14, 2014.

21. Administrative Costs and Expenses. Thermos shall pay all reasonable costs associated with the implementation of the proposed Settlement, including (a) the reasonable fees and costs incurred by the Settlement Administrator and (b) the reasonable cost of providing

notice of the proposed Settlement to the members of the Class in accordance with the Notice Plan approved by the Court.

22. Attorneys' Fees and Expenses. Thermos and Class Counsel reached agreement upon all substantive terms of this Agreement before discussing payment for attorneys' fees and expenses. The Named Plaintiffs and Class Counsel do not condition their willingness to enter into, or perform under, this Agreement on any other agreement or accord regarding the attorneys' fees or costs of Class Counsel. Class Counsel will petition the Court for an award of their attorneys' fees and expenses not to exceed \$395,000 no later than 60 days before the Final Approval Hearing, as set forth in paragraph 17. If awarded by the Court, Thermos agrees to pay attorneys' fees and expenses in that amount within 30 days after the Effective Date. If the Court or any other reviewing court awards Class Counsel less than \$395,000 in attorneys' fees and expenses, the difference between the attorneys' fee and expenses award and \$395,000 (the "Excess Attorneys' Fees") shall be added to the Settlement Fund and distributed pursuant to Paragraph 7 of this Agreement.

23. Execution of Documents. The Parties to this Agreement shall execute all documents and perform all acts necessary and proper to effectuate its terms. The execution of documents must take place prior to the date scheduled for the Final Approval Hearing.

24. Communications With The Settlement Class. The Class Notice shall list the names and addresses of Class Counsel and the Settlement Administrator, as well as the toll-free number for the telephone system described in Paragraph 14.D, above. Other than as provided in this Agreement, after entry of the Preliminary Approval Order communications with potential Class Members relating to the Lawsuit or this Settlement, after preliminary certification of the class, shall be handled through Class Counsel and the Settlement Administrator; provided,

however, that nothing in this Agreement shall be construed to prevent Thermos from communicating orally, electronically, or in writing with potential Class Members in the ordinary course of business. The Named Plaintiffs, Class Counsel, Thermos and counsel for Thermos hereby agree not to disparage any other Party, Counsel, this Settlement, or any Thermos products, in any communications with the media or press or in any other public forum and further agree to consult with one another regarding written mutually agreeable message points to be used in the event of press inquiries regarding the settlement.

25. Resolution of Other Issues. In the event that there are any developments in the effectuation and administration of this Agreement that are not addressed by the terms of this Agreement, then such matters shall be addressed as agreed upon by counsel for the Parties, and, failing agreement, as shall be ordered by the Court.

26. Entire Agreement. This Agreement constitutes the entire agreement between and among the Parties with respect to the settlement of the Lawsuit. The Exhibits to this Agreement are an integral part of the Agreement and are hereby incorporated and made part of the Agreement. This Agreement supersedes all prior negotiations and agreements and may not be modified or amended except by a writing signed by Thermos and by Class Counsel.

27. Choice of Law. This Agreement shall be governed by the substantive law of the State of Illinois, without regard to Illinois choice of law provisions. The terms of the Agreement shall not be construed more strictly against one Party than another merely because of the fact that it may have been prepared by counsel for one of the Parties, it being recognized that, because of the arms-length negotiations resulting in the Agreement, both Parties have contributed substantially and materially to the preparation of the Agreement.

28. Execution in Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

29. Notices and Dates. With respect to dates, the parties agree that if the last day of any period mentioned in this Agreement falls on a weekend or legal holiday, that period shall include the next business day.

DATED: December 15, 2014

Counsel for Named Plaintiffs and the Putative Class

By: Janine L. Pollack

Janine L. Pollack
Lydia Keaney Reynolds
Wolf Haldenstein Adler Freeman & Herz LLP
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New York, NY 10016
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666 Old Country Rd.
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Lee Shalov
McLaughlin & Stern LLP
260 Madison Ave.
New York, NY 10016

Thermos L.L.C.

By: _____

Title: _____

Thermos L.L.C.

By: 

Title: PRESIDENT, C.O.O.

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

JENNY MILMAN and ELLEN THOMAS,)	
on Behalf of Themselves and All Others)	
Similarly Situated,)	
)	Case No: 1:13-cv-7750
Plaintiffs,)	
)	Magistrate Judge Sheila Finnegan
v.)	
)	
THERMOS L.L.C.,)	
)	
Defendant.)	

**ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT AND DIRECTING NOTICE TO SETTLEMENT CLASS**

Plaintiffs Jenny Milman and Ellen Thomas (collectively, the “Named Plaintiffs”), on behalf of themselves and as putative representatives of the settlement class (the “Class”) defined in Paragraph 5 below, have entered into a Class Action Settlement Agreement including exhibits (the “Agreement”) with Defendant Thermos L.L.C. (“Thermos” or “Defendant”), to settle the above-captioned suit (the “Action” or “Lawsuit”). The Agreement provides for the resolution of all claims that were or could have been raised in the Lawsuit, as further provided in the Agreement. This Preliminary Approval Order (“Order”) will refer to the Named Plaintiffs and Thermos as the “Parties” to the Agreement.

The Named Plaintiffs have filed a Motion for Preliminary Approval of the Proposed Settlement (the “Motion for Preliminary Approval”). Having reviewed the Agreement, the Motion for Preliminary Approval, and the pleadings and other papers on file in this Action, and having also considered the statements of counsel, the Court finds that the Motion for Preliminary Approval should be granted and that this Order should be entered. The Court hereby gives its preliminary approval to the settlement, orders that notice be sent to the Class, enjoins pending or

future proceedings in aid of its jurisdiction, and schedules a Final Approval Hearing to determine whether the proposed settlement is fair, reasonable, and adequate.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Agreement is hereby incorporated by reference in this Order, and all terms and phrases used in this Order shall have the same meaning as in the Agreement.

2. This Court has personal jurisdiction over all Class Members and subject matter jurisdiction to approve the Agreement.

3. The Court finds that the Named Plaintiffs have made a sufficient showing for purposes of preliminary approval that the requirements for certifying the Class under Federal Rule of Civil Procedure 23 have been satisfied. The Court finds that the proposed settlement and Agreement are sufficiently fair, reasonable, and adequate to allow dissemination of notice of the proposed settlement to potential Class Members, and to hold a Final Approval Hearing.

4. The Court further finds that neither the certification of the Class, nor the settlement of this Action, shall be deemed to be a concession by Thermos of the propriety of the certification of a litigation class, in this Action or any other action, and Thermos shall retain all rights to assert that the Action may not be certified as a class action except for settlement purposes. Furthermore, the preliminary certification of the Class, appointment of the class representatives and Class Counsel, and all other actions associated with preliminary approval are undertaken on the condition that the certification and other actions shall be vacated if the Agreement is terminated or disapproved in whole or in part by the Court, any appellate court, and/or any other court of review, or if Thermos invokes its right to revoke the settlement according to the terms of the Agreement, in which case the Agreement and the fact that it was entered into shall not be offered, received, or construed as evidence for any purpose, including

but not limited to an admission by Thermos of liability or of the certifiability of a litigation class, as further provided in the Agreement.

5. For purposes of the Agreement and for settlement only, the Court preliminarily certifies the following Class pursuant to Federal Rule of Civil Procedure 23:

All persons who purchased a Foogo® stainless steel vacuum-insulated straw bottle or a Foogo® plastic straw bottle in the United States at any time between January 1, 2007 and **[preliminary approval date]** excluding (a) any such person who purchased for resale and not for personal or household use, (b) any officers, directors or employees, or immediate family members of the officers, directors or employees, of Thermos, and (c) the presiding judges and their immediate families.

6. The Court finds, solely for purposes of preliminary approval of a settlement class, that (a) members of the proposed Class are so numerous as to make joinder of all members impracticable; (b) there are questions of law or fact common to the proposed Class; (c) the claims of the Named Plaintiffs are typical of the claims of the proposed Class; (d) the Named Plaintiffs and Class Counsel will fairly and adequately protect the interests of the proposed Class; (e) questions of law or fact common to the members of the proposed Class predominate over any questions affecting only individual members; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

7. The Court preliminarily appoints the Named Plaintiffs as class representatives of the proposed Class.

8. The Court preliminarily appoints the following attorneys to act as Class Counsel: Janine Pollack of Wolf Haldenstein Adler Freeman & Herz LLC, New York, New York; Lee Shalov of McLaughlin & Stern LLP, New York, New York; and Brett Zinner of Rosenberg Fortuna & Laitman LLP, Garden City, New York.

9. The Court appoints Rust Consulting as Settlement Administrator to administer the settlement in accordance with the terms and conditions of this Order and the Agreement.

10. The Court finds preliminarily that the Notice Plan described in Paragraph 10 of the Agreement is (i) the best practicable notice; (ii) reasonably calculated, under the circumstances, to apprise Class Members of the pendency of the Action and of the proposed settlement, and of their right to object or to exclude themselves from the proposed settlement; (iii) reasonable, due, adequate, and sufficient notice to all persons entitled to receive notice; and (iv) compliant with applicable law and due process.

11. The Court approves the Class Notice substantially in the form attached to the Agreement as Exhibit 3 and described in Paragraph 10.A of the Agreement, e-mail notice as described in Paragraph 10.B of the Agreement, the Summary Notice substantially in the form attached to the Agreement as Exhibit 4 and described in Paragraph 10.C of the Agreement, and notice by means of Internet and mobile banner advertisements substantially in the form attached to the Agreement as Exhibit 5 and described in Paragraph 10.D of the Agreement. The Court also approves the Class Website as described in Paragraph 10.E of the Agreement, which may be amended during the course of the settlement as appropriate and agreed to by the Parties, and which shall be maintained for at least 60 days after the expiration of the period for submission of Claim Forms.

12. The Court directs the Settlement Administrator to maintain a toll-free VRU telephone system containing recorded answers to frequently asked questions, along with an option permitting potential Class Members to leave messages in a voicemail box and receive a return call.

13. The Court approves the use of claim forms without material alteration from Exhibit 6 of the Agreement (the “Claim Form”). The Court directs that the Claim Form be made available with the e-mailed and Website Notice. To be considered for a possible benefit, Claim Forms must be submitted: (1) by email in signed, PDF form, sent no later than 11:59 P.M. Eastern time on the 150th day after the Notice Date, (2) by U.S. postal delivery that is mailed and postmarked no later than the 150th day after the Notice Date, (3) by hand or courier delivery that is received by the Settlement Administrator no later than 11:59 P.M. Eastern time on the 150th day after the Notice Date, or (4) by online submission with an electronic signature through the Class Website, submitted no later than 11:59 P.M. Eastern time on the 150th day after the Notice Date. Each Claim Form must be signed under penalty of perjury by the Class Member.

14. The Court orders the Settlement Administrator, not later than 14 days before the Final Approval Hearing, to file with the Court an affidavit or declaration detailing the scope and methods of the Notice program and certifying that Notice has been effectuated in accordance with the Agreement.

15. Any Class Member who wishes to be excluded from the Class must comply with the terms set forth in the Agreement and the Notice, and mail to the Settlement Administrator an appropriate and timely request for exclusion postmarked no later than 45 days before the Final Approval Hearing, that complies with the requirements of Paragraph 11 of the Agreement. Requests for exclusion must be exercised individually by a Class Member, not as or on behalf of a group, class, or subclass.

16. Any Class Member who timely requests exclusion from the Class in accordance with the Class Notice shall not be bound by any judgments entered in this Action and shall not be entitled to receive any benefits provided by the settlement in the event it is finally approved by

the Court. The Court orders the Settlement Administrator, no later than thirty days after the deadline for Class Members to submit requests for exclusion from the Settlement, to prepare and provide to the Court and counsel for the Parties a list of all persons who timely and properly request exclusion from the Class along with a declaration or affidavit attesting that such list is complete and correct.

17. Any Class Member who does not timely request exclusion as set forth in the Class Notice shall be bound by all proceedings, orders, and judgments in the Action, even if such Class Member has previously initiated or subsequently initiates individual litigation or other proceedings encompassed by the Released Claims, as defined in the Agreement, and even if he or she never received actual notice of the Action or the settlement.

18. Unless and until the Court determines in the Final Approval Order that Class Members have timely and properly excluded themselves from the Class as set forth in the Notice and Agreement, Class Members and their legally authorized representatives are preliminarily enjoined: (i) from filing, commencing, prosecuting, intervening in, or participating as plaintiff, claimant, or class member in any other lawsuit or administrative, regulatory, arbitration, or other proceeding in any jurisdiction based on, relating to, or arising out the Released Claims, or the facts and circumstances relating to any of them; (ii) from filing, commencing, or prosecuting a lawsuit or administrative, regulatory, arbitration, or other proceeding as a class action on behalf of Class Members who have not timely excluded themselves (including by seeking to amend a pending complaint to include class allegations or seeking class certification in a pending action), based on, relating to, or arising out of the Released Claims, or the facts and circumstances relating to any of them; and (iii) from attempting to effect an opt-out of a class of individuals in any lawsuit or administrative, regulatory, arbitration, or other proceeding based on, relating to, or

arising out of the Released Claims, or the facts and circumstances relating to any of them, in the Action and/or the Released Claims.

19. Any Class Member who does not timely request exclusion as set forth in the Notice, and any governmental entity, who wishes to object to the fairness, reasonableness, or adequacy of the proposed settlement, including the Attorneys' Fee Award, must submit an objection no later than 45 days before the Final Approval Hearing that complies with the requirements for objections as set forth in the Settlement Agreement and the Class Notice. The objection must contain at least the following: (1) a heading referring to the Lawsuit; (2) a statement whether the objector intends to appear at the Final Approval Hearing, either in person or through counsel, and if through counsel, information identifying that all counsel representing the objector by name, address, bar number, and telephone number; (3) a statement of the legal and factual bases for the objection; (4) a description of any and all evidence the objecting Class Member may offer at the Final Approval Hearing, including but not limited to the names and expected testimony of any witnesses, and copies of any exhibits; (5) proof of purchase of at least one of the Bottles during the Class Period; and (6) the signature of the Class Member. The Written Notice of Objection must be signed by the Class Member and his or her counsel (if the Class Member is represented by counsel); an objection signed by counsel alone shall not be sufficient. The objection must be mailed to the Settlement Administrator, postmarked no later than 45 days before the Final Approval Hearing. Failure to adhere to these requirements will bar the objection.

20. Any Class Member who timely serves a written objection in accordance with Paragraph 19 of this Order and Paragraph 12 of the Agreement may appear at the Final Approval

Hearing, either in person or through an attorney. Class Members who do not adhere to these requirements will not be heard at the Final Approval Hearing.

21. By submitting an objection to the settlement, Class Members agree not to challenge the jurisdiction of the Court, and agree to be bound by all judgments and orders issued by the Court. Class Counsel may serve discovery requests, including for deposition, on any Class Member who submits an objection, without any further decree or order from this Court or any court.

22. The right to object to the proposed settlement must be exercised individually by a Class Member or his or her attorney, not as a member of a group, class, or subclass.

23. The Settlement Administrator shall maintain a post office box to be used for receiving requests for exclusion, objections, notices of intention to appear, and any other communications.

24. The Settlement Administrator shall promptly furnish Class Counsel and Defendant's counsel with copies of any and all written objections, requests for exclusion, notices of intention to appear, or other communications that come into its possession, except as otherwise provided in the Agreement.

25. A Final Approval hearing shall be held on _____, at _____.m. before the undersigned for the purpose of determining (a) whether the proposed settlement is fair, reasonable, and adequate and should be finally approved by the Court and (b) whether to issue a Final Order and Judgment without material alteration from Exhibit 7 of the Agreement. The Court reserves the right to adjourn or continue the Final Approval Hearing, or any further adjournment or continuance thereof, without further notice other than announcement at the Final Approval Hearing or at any adjournment or continuance thereof, and to approve the settlement

with modifications, if any, consented to by Class Counsel and Defendant's Counsel without further notice.

26. All pretrial proceedings in the Action, other than those relating to discovery of objectors as stated in paragraph 12.E of the Agreement and Paragraph 21 of this Order, are stayed and suspended until further order of this Court.

Dated: _____

Magistrate Judge Sheila M. Finnegan
United States District Court, Northern District of Illinois

Pro Rata Allocation Illustration

Allocation Summary

In the event the total cash payments in respect to approved claims submitted under Benefit Options A and C combined would exceed \$675,000, then all payments of such claims shall be reduced *pro rata* proportionate to the ratio of each Claimant's claim amount to the total amount claimed.

Allocation Method

1. **Calculate Total Individual Claims** by summing all approved claims.
2. **Determine if Total Claims Exceed \$675,000 Cap** by comparing the Total Individual Claims amount in Step 1 to the \$675,000 cap.
3. **Determine the Pro Rata Factor** by dividing the Cap Amount by the Total Individual Claims amount.

For example:

Cap Amount	\$675,000
Divided by Total Individual Claims Amount	\$687,500
Pro Rata Factor	.981818

4. **Prorate each Individual Claim** by multiplying each claim by the pro rata factor.

For example:

Claim 1 \$8.50 under Benefit Option A multiplied by .981818 equals \$8.34
Claim 2 \$25 under Benefit Option C multiplied by .981818 equals \$24.55
In total, \$687,500 multiplied by .981818 equals \$674,999.87 (due to rounding)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**If you purchased a Foogo® Straw Bottle in the U.S.
between January 1, 2007 and [DATE], you may be
eligible to receive a benefit under a class action
settlement.**

A federal court authorized this Notice. This is not a solicitation from a lawyer.

- This settlement will provide for cash payments or products to fully settle and release claims of consumers who purchased a Foogo® Stainless Steel Vacuum-Insulated Straw Bottle (“Foogo® Vacuum Bottle”) or a Foogo® Plastic Straw Bottle (“Foogo® Plastic Bottle”) (collectively, the “Bottles”) in the United States between January 1, 2007 and [DATE] because the Bottles were advertised as “leak-proof,” and were dissatisfied with the Bottles.
- The settlement resolves a lawsuit brought against Thermos L.L.C. (“Thermos” or “Defendant”) by Plaintiffs Jenny Milman and Ellen Thomas (“Plaintiffs”). Plaintiffs allege that the advertising of the Bottles as “leak-proof” was false or misleading. Thermos denies that its advertising was false or misleading and denies any wrongdoing whatsoever.
- Your legal rights are affected whether you act or don’t act. Read this notice carefully.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:	
SUBMIT A CLAIM FORM BY [DATE]	The only way to receive a settlement benefit.
EXCLUDE YOURSELF BY [DATE]	Get no benefit. This is the only option that allows you to ever be part of any other lawsuit against Thermos or the other Released Parties about the “leak-proof” advertising for the Bottles.
OBJECT BY [DATE]	Write to the Court about why you don’t like the settlement.
GO TO A HEARING	Ask to speak in Court about the fairness of the settlement.
DO NOTHING	Get no benefit. Give up rights.

- These rights and options—**and the deadlines to exercise them**—are explained in this notice.
- The Court in charge of this case still has to decide whether to approve the settlement. Benefits will be distributed only if the Court approves the settlement and after appeals are resolved. Please be patient.

WHAT THIS NOTICE CONTAINS

BASIC INFORMATION PAGE 3

1. What is this lawsuit about?
2. Why is this a class action?
3. Why is there a settlement?

WHO IS IN THE SETTLEMENT CLASS PAGE 3

4. How do I know if I am part of the Settlement Class?
5. If I purchased a Bottle but I was satisfied with it, am I included?
6. Are there other exceptions to being included?
7. I'm still not sure if I am included.

THE SETTLEMENT BENEFITS—WHAT YOU GET PAGE 4

8. What does the settlement provide?
9. What are the settlement benefits?

HOW YOU GET A BENEFIT—SUBMITTING A CLAIM PAGE 5

10. How can I get a benefit?
11. What supporting documents am I required to submit, if any?
12. When would I get my settlement benefit?
13. What am I giving up to get a benefit or stay in the Class?

EXCLUDING YOURSELF FROM THE SETTLEMENT PAGE 6

14. How do I exclude myself (opt out) from the settlement?
15. If I don't exclude myself, can I sue Thermos for the same thing later?
16. If I exclude myself, can I get a benefit from this settlement?

THE LAWYERS REPRESENTING YOUPAGE 7

17. Do I have a lawyer in the case?
18. How will the lawyers and other expenses be paid?

OBJECTING TO THE SETTLEMENT PAGE 8

19. How do I tell the Court that I don't like the settlement?
20. What is the difference between objecting and excluding?

THE COURT'S FINAL APPROVAL HEARINGPAGE 9

21. When and where will the Court decide whether to approve the settlement?
22. Do I have to come to the hearing?
23. May I speak at the hearing?

IF YOU DO NOTHINGPAGE 9

GETTING MORE INFORMATION PAGE 10

24. Are there more details about the settlement?
25. How do I get more information?

BASIC INFORMATION

1. What is this lawsuit about?

Plaintiffs filed a lawsuit claiming that Defendant misled consumers into purchasing the Bottles by advertising the Bottles as “leak-proof” (the “Lawsuit”). Plaintiffs asserted the Bottles have a tendency to leak. Defendant denies that its advertising was false or misleading, denies wrongdoing of any kind, and denies that the Bottles have a tendency to leak, provided that the Bottle lid is in a closed and locked position.

2. Why is this a class action?

In a class action, one or more people, called Class Representatives (in this case, Jenny Milman and Ellen Thomas), sue on behalf of themselves and other people. All consumers who purchased at least one Bottle between January 1, 2007 and [Date Preliminary Approval Order Entered] may be in the Settlement Class (the “Class”), except for those who are excluded or who exclude themselves from the Class. One Court resolves the issues for all Class Members. Here, the Court has preliminarily certified a class for settlement purposes only. United States Magistrate Judge Sheila M. Finnegan is in charge of this class action.

3. Why is there a settlement?

The Court did not decide in favor of Plaintiffs or Defendant. Instead, both sides agreed to a settlement. That way, they avoid the potential risks and cost of a trial, and the Class Members who timely submit a claim supported by appropriate documentation as needed (see Question 11) may receive a benefit. The Class Representatives and counsel for the Class (“Class Counsel”) believe the settlement is best for all Class Members.

WHO IS IN THE SETTLEMENT?

To be eligible to submit a claim for a settlement benefit, you must be a Class Member.

4. How do I know if I am part of the Settlement Class?

You may be a Class Member if you fit this description:

All persons who purchased a Foogo® stainless steel vacuum-insulated straw bottle or a Foogo® plastic straw bottle in the United States at any time between January 1, 2007 and **[preliminary approval date]** excluding (a) any such person who purchased for resale and not for personal or household use, (b) any officers,

directors or employees, or immediate family members of the officers, directors or employees, of Thermos, and (c) the presiding judges and their immediate families.

5. If I purchased a Bottle but I was satisfied with it, can I get a settlement benefit?

No. In order to obtain any settlement benefit, you must affirm under penalty of perjury that you purchased the Bottle(s), the purchase was based in part on the advertised leak-proof feature of the Bottle(s), *and* that you are dissatisfied with the product.

6. Are there other exceptions to being included?

The following categories of people are not included in the Class and cannot receive a settlement benefit:

- Persons who purchased a Bottle or Bottles for resale and not for personal or home use;
- Officers, directors or employees, or immediate family member of officers, directors, or employees, of Thermos; and
- The presiding judges in the Lawsuit and their immediate family members.

7. I'm still not sure if I'm included.

If you are still not sure whether you are eligible to submit a claim for settlement benefits, you can call [phone] or visit www.foogobottlesettlement.com for more information.

THE SETTLEMENT BENEFITS—WHAT YOU GET

8. What does the settlement provide?

Defendant has agreed to make available a settlement fund (the “Settlement Fund”) of up to \$675,000 from which cash payments will be made to eligible Class Members who submit approved claims, and to provide up to \$500,000 in retail value of certain Thermos® brand products for eligible Class Members who submit approved claims and who choose to receive a replacement product instead of a cash payment.

The Settlement also provides for certain non-monetary benefits. Thermos changed its packaging to remove the phrase “leak-proof” and has agreed to request that its top ten retailers change the online advertising of the Bottles to remove any reference to the Bottles being “leak-proof.”

9. What are the settlement benefits?

Any Class Member who purchased at least one Bottle and does not timely request exclusion (see Question 14) may submit a claim for one of the following benefits:

Option A: Without proof of purchase, a Class Member may opt to receive a one-time estimated cash payment of \$8.50 if he or she purchased one or more Foogo® Vacuum Bottles, or a one-time estimated cash payment of \$4.50 if he or she purchased one or more Foogo® Plastic Bottles. If a Class Member selects Benefit Option A, he or she may only receive one such payment, regardless of the number of Bottles purchased. The amounts for Option A represent 50% of the average retail price of the Bottles, respectively.

Option B: Without proof of purchase, a Class Member may opt to receive a new Foogo® Vacuum Bottle or a new Vacuum Insulated 16-ounce Thermos® brand Stainless King Beverage Bottle in Midnight Blue (SK2000MB4) if he or she purchased one or more Foogo® Vacuum Bottles, or a new Foogo® Plastic Bottle or a new 16-ounce Thermos® brand Plastic Hydration Bottle in Teal (HP4100TLTR16) if he or she purchased one or more Foogo® Plastic Bottles. If a Class Member selects Option B, he or she may receive only one product, regardless of the number of Bottles purchased.

Option C: With proof of purchase of one or more Bottles in a form sufficient to show the price and quantity of the Bottles purchased (e.g., store receipt(s) in paper or electronic form or electronic receipts from online retailers such as Amazon), a Class Member may opt to receive a one-time cash payment estimated to be the total amount paid by the Class Member for the Bottles (including sales tax paid), as shown by the proof of purchase submitted, or a replacement product as described in Option B above for each Bottle purchased, as shown by the proof of purchase submitted.

The benefits described above are only estimates and are subject to the terms and limits described in the Settlement Agreement, which is available for viewing at www.foogobottlesettlement.com. In the event the Thermos® brand products to be distributed in respect to approved claims submitted under Benefit Options B and C combined would exceed \$500,000 in retail value, then the products will be distributed to claimants who submitted approved claims under Benefit Options B and C in the order in which their claims were received by the Settlement Administrator until the \$500,000 retail cap is reached. Thereafter, any remaining claimants who submitted approved claims under Benefit Option B will receive a cash payment under Benefit Option A, and any remaining claimants who submitted approved claims for product under Benefit Option C will receive a cash payment under Benefit Option C. In the event the total cash payments in respect to all approved claims under all Options would exceed \$675,000, then all payments of such claims shall be reduced pro rata proportionate to the amount of the payment. However, under no circumstances will such pro rata cash payment reductions exceed 75%. Defendant has agreed to supplement the Settlement Fund, if necessary, to ensure that Class Members who submit valid claims receive no less than 25% of the approved estimated amount of the claim.

In the event that total cash payments with respect to approved claims submitted under Benefit Options A and C combined are less than \$675,000, then any unused portion of the Settlement Fund up to \$450,000 shall remain with and/or revert to Thermos. If the total cash payments in respect to approved claims submitted under Benefit Options A and C combined are less than \$225,000, then the amount of the Settlement Fund in excess of the total cash payments for such claims but less than \$225,000 shall be distributed *pro rata* to Class Members who submitted approved claims under Benefit Option A, up to a maximum payment of \$ 16.99 to claimants who purchased a Foogo® Vacuum Bottle and \$ 8.99 to claimants who purchased a Foogo® Plastic Bottle (the respective average retail prices of the Bottles). If any funds remain after this distribution, Plaintiffs have designated 50% of such funds to be distributed to Share Our Strength/No Kid Hungry, a not-for-profit organization, and Thermos has designated 50% of such funds to be distributed to the Boomer Esiason Foundation, a not-for profit organization dedicated to finding a cure for cystic fibrosis.

Defendant may elect not to be bound by the Settlement, thereby effectively cancelling the Settlement, if any of the following occur: (a) an overlapping class is certified in another case; (b) more than 350 Class Members opt out of the Class; (c) a court modifies the definition of the Class or the scope of the Release; or (iv) a court modifies the Settlement such that the aggregate cost to Defendant would increase by more than \$150,000.

HOW YOU GET A BENEFIT — SUBMITTING A CLAIM

10. How can I get a benefit?

To qualify for a benefit, you must complete and submit the Claim Form, signed by you under penalty of perjury. In addition, if you choose Option C, you must also submit proof of purchase supporting documents along with the Claim Form. If you received this Notice by e-mail, the Claim Form is included with this Notice. Otherwise, the Claim Form and instructions for submitting it are available at www.foogobottlesettlement.com. A Claim Form and instructions can also be obtained by calling [phone]. Read the instructions carefully, complete the Claim Form, include all the documents it asks for, sign it and submit it with the supporting documents no later than [150 days after Notice Date], in one of the following ways:

(1) Submit a claim form with an electronic signature online at www.foogobottlesettlement.com no later than 11:59 p.m. Eastern time on [150 days after Notice Date].

OR

(2) Mail the completed and signed Claim Form and supporting documents, if necessary, postmarked by [150 days after Notice Date], to the Settlement Administrator at:

INSERT ADDRESS

OR

(3) Deliver the completed and signed Claim Form and supporting documents, if necessary, by hand or courier delivery, for receipt no later than 11:59 p.m. Eastern time on [150 days after Notice Date], to the Settlement Administrator at:

INSERT ADDRESS

OR

(4) E-mail the completed and signed Claim Form and supporting documents, if necessary, in pdf form to [e-mail] for receipt no later than 11:59 p.m. Eastern time on [150 days after Notice Date].

11. What supporting documents am I required to submit, if any?

If you choose Benefit Option A or Option B on the Claim Form, you do not need to submit documentation other than the Claim Form itself. To be eligible for a payment under Benefit Option C, however, you must submit to the Settlement Administrator, in addition to a completed Claim Form, the store receipt(s) or online receipt(s) demonstrating the number of Bottles you purchased and the amount you paid.

12. When would I get my settlement benefit?

The Court will hold a hearing at [time] on [date no sooner than 150 days after entry of Preliminary Approval Order] to decide whether to approve the settlement. If Magistrate Judge Finnegan approves the settlement, after that, there may be appeals. Settlement benefits will be paid only after any appeals have been resolved with no reversal or material modification of Magistrate Judge Finnegan's approval of the settlement. Please be patient.

13. What am I giving up to get a benefit or stay in the Class?

Unless you exclude yourself, you are staying in the Class, and that means that you cannot sue, continue to sue, or be part of any other lawsuit against any of the "Released Parties" concerning the claims that were or could have been raised in the Lawsuit to the full extent of *res judicata* protection arising out of or related to any purchase of the Bottles during the Class Period by any Class Member, regardless of whether any such claim is known or unknown, asserted or as yet unasserted. You will not, however, release your right to bring an action for personal or bodily injury against the Released Parties. The Released Parties are: Thermos L.L.C. and its successors, assigns, agents, employees, consultants, independent contractors, parents, subsidiaries and other corporate affiliates. Staying in the Class means that you will have the right to submit a Claim Form, and will also mean that you release all claims against the Released Parties that were or could have been raised in the Lawsuit to the full extent of *res judicata* protection arising out of or related to any purchase of the Bottles, regardless of whether such claim is known or unknown, asserted or as yet unasserted. Staying in the Class also means that all of the Court's orders will apply to you and legally bind you.

EXCLUDING YOURSELF FROM THE SETTLEMENT

If you don't want to submit a claim for payment from the settlement, but you want to keep the right to sue or continue to sue Thermos (or any of the other Released Parties) in the future about the "leak-proof" advertising regarding the Bottles, then you must take steps to remove yourself from the Class. This is called excluding yourself, also sometimes referred to as opting out of the Class.

14. How do I exclude myself (opt out) from the settlement?

To exclude yourself from the settlement, you must send a letter by mail saying that you want to be excluded from the settlement. Be sure to include the case name and number (*Milman v. Thermos L.L.C.*, N.D. Ill. No. 1:13-cv-7750), your name, address, telephone number, and your signature. You must mail your exclusion request postmarked no later than [45 days before the Final Approval Hearing], to the Settlement Administrator at Foogo Class Action Administrator, c/o [address].

Requests for exclusion must be exercised individually, not as or on behalf of a group, class or subclass. You cannot exclude yourself online, by phone, or by e-mail. If you ask to be excluded, you will not get any settlement benefit, and you cannot object to the settlement. You will not be legally bound by anything that happens in the Lawsuit. You may be able to sue (or continue to sue) Thermos (or the other Released Parties) in the future, after the settlement is finally approved. Do not submit both a Claim Form and a request for exclusion.

15. If I don't exclude myself, can I sue Thermos for the same thing later?

No. Unless you exclude yourself, you give up any right to sue Thermos for claims about the "leak-proof" advertising for the Bottles. If you have a pending lawsuit, speak to your lawyer in that lawsuit immediately. You must exclude yourself from *this* Class to continue your own lawsuit. Remember, the exclusion deadline is [45 days before the Final Approval Hearing].

16. If I exclude myself, can I get a benefit from this settlement?

No. If you exclude yourself, do not send in a Claim Form to ask for a benefit. However, you may be able to sue, continue to sue, or be part of a different lawsuit against Thermos in the future.

THE LAWYERS REPRESENTING YOU

17. Do I have a lawyer in this case?

The Class is represented by: Janine Pollack of Wolf Haldenstein Adler Freeman & Herz LLC in New York, New York; Lee Shalov of McLaughlin & Stern LLP in New York, New York; and Brett Zinner of Rosenberg Fortuna & Laitman LLP in Garden City, New York. These lawyers

are called Class Counsel. You will not be charged for these lawyers. If you want to be represented by your own lawyer, you may hire one at your own expense.

18. How will the lawyers and other expenses be paid?

Class Counsel will ask the Court for an award of attorneys' fees and expenses in an amount not to exceed \$395,000, and to approve a payment of \$1,500 each to Jenny Milman and Ellen Thomas for their time and service as Class Representatives. Defendant will separately pay the attorneys' fees and expenses that the Court awards, as well as the awards to the Class Representatives. Class Counsel estimate that their total expenses in this case will not exceed \$28,000, subject to increase if appeals are filed. These amounts will not come out of the funds for payments to Class Members. Defendant will also separately pay the costs of Notice to the Class and to administer the settlement. If the Court decides to award Class Counsel less than \$395,000, the difference between the amount awarded to Class Counsel and \$395,000 will be added to the Settlement Fund.

OBJECTING TO THE SETTLEMENT

If you are a Class Member, you can tell the Court that you don't agree with the settlement or some part of it.

19. How do I tell the Court that I don't like the settlement?

If you are a Class Member, you can object to the settlement if you don't like any part of it. You can give reasons why you think the Court should not approve it. The Court will consider your views. To be effective, any objection must be in writing, and must contain the following information ("Written Notice of Objection"): (1) a heading referring to the Lawsuit; (2) a statement whether you intend to appear at the Final Approval Hearing, either in person or through counsel, and if through counsel, information identifying all counsel representing you by name, address, bar number, and telephone number; (3) a statement of the legal and factual bases for your objection; (4) a description of any and all evidence you may offer at the Final Approval Hearing, including but not limited to the names and expected testimony of any witnesses, and copies of any exhibits; (5) proof of purchase of at least one of the Bottles between January 1, 2007 and **[preliminary approval date]**; and (6) your signature.

If you are represented by your own lawyer (*i.e.*, not Class Counsel) then your lawyer must file an appearance and your Written Notice of Objection with the Clerk of the United States District Court for the Northern District of Illinois by [no later than 45 days before the Final Approval Hearing], and must also mail these materials to the Settlement Administrator at Foogo Class Action Administrator, c/o [address], postmarked no later than [45 days before the Final Approval Hearing]. If you are not represented by your own lawyer you must mail your Written Notice of Objection to the Settlement Administrator at Foogo Class Action Administrator, c/o [address], postmarked no later than [45 days before the Final Approval Hearing].

By submitting an objection to the Settlement, you agree not to challenge the jurisdiction of the Court and to be bound by all judgments and orders issued by the Court. Class Counsel may, without further order from any court, serve discovery requests, including for deposition, on any Class Member who submits an objection.

The right to object to the settlement must be exercised individually by a Class Member or his or her attorney, and not as a member of a group, class or subclass.

20. What is the difference between objecting and excluding?

Objecting is simply telling the Court that you don't like something about the settlement. You can object only if you stay in the Class. Excluding yourself is telling the Court that you don't want to be part of the Class. If you exclude yourself, you have no basis to object because the case no longer affects you.

THE COURT'S FINAL APPROVAL HEARING

The Court will hold a hearing to decide whether to approve the settlement. You may attend personally or through your own lawyer, at your own expense, and you may ask to speak, but you don't have to do either.

21. When and where will the Court decide whether to approve the settlement?

The Court will hold a Final Approval Hearing at [time] on [date no sooner than 150 days after entry of Preliminary Approval Order – by statute must be at least 90 days after notice to AGs], at the United States District Court for the Northern District of Illinois, 219 S. Dearborn Street, Chicago, Illinois in Courtroom 2214. At this hearing the Court will consider whether the settlement is fair, reasonable and adequate. If there are objections, the Court will consider them. Magistrate Judge Finnegan will listen to people who have asked to speak at the hearing and who have complied with the requirements for submitting objections set forth in Question 19 above. After the hearing, the Court will decide whether to approve the settlement. We do not know how long that decision will take.

22. Do I have to come to the hearing?

No. Class Counsel will answer questions Magistrate Judge Finnegan may have. However, you are welcome to come at your own expense. If you submit an objection, you do not have to come to Court to talk about it. As long as you submitted your objection on time in accordance with the procedures set forth in Question 19 above, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

23. May I speak at the hearing?

You may ask the Court for permission to speak at the Final Approval Hearing, but only in connection with an objection that you have timely submitted in accordance with the procedure set forth in Question 19 above. You cannot speak at the Final Approval Hearing if you have excluded yourself.

IF YOU DO NOTHING

If you do nothing, you will get no benefit from this settlement. If you do not submit a Claim Form, your claim will not be considered. If you do not exclude yourself, you will not be able to start a new lawsuit, continue with a lawsuit, or be part of any other lawsuit against Defendant (or the other Released Parties) about the “leak-proof” advertising for the Bottles, during the Class Period, ever again.

GETTING MORE INFORMATION

24. Are there more details about the settlement?

This notice summarizes the proposed settlement. More details are in a Settlement Agreement. You can get a copy of the Settlement Agreement by visiting www.foogobottlesettlement.com, by calling the Settlement Administrator toll free at [phone], by sending an email to the Settlement Administrator at [email address] or by writing to Class Counsel at any of these addresses:

Janine Pollack
Wolf Haldenstein Adler
Freeman & Herz LLP
270 Madison Ave.
New York, NY 10016

Brett Zinner
Rosenberg Fortuna & Laitman
LLP
666 Old Country Rd.
Suite 810
Garden City, NY 11530

Lee Shalov
McLaughlin & Stern LLP
260 Madison Ave.
New York, NY 10016

25. How do I get more information about the settlement?

You can call [phone] toll free, write to the Settlement Administrator at Foogo Class Action Administrator, c/o [address], or visit the website at www.foogobottlesettlement.com, where you will find answers to common questions about the settlement, the Claim Form and instructions for submitting it, plus other information to help you determine whether you are a Class Member and whether you are eligible for a payment.

PLEASE DO NOT CALL THE COURT FOR INFORMATION OR ADVICE

LEGAL NOTICE

If you purchased a Foogo® Straw Bottle in the U.S. between January 1, 2007 and [DATE], you could get a payment from a class action settlement.

A settlement has been reached in a class action lawsuit against Thermos L.L.C (“Thermos”). Plaintiffs allege that Thermos falsely advertised Foogo® Stainless Steel Vacuum-Insulated Straw Bottles and Foogo® Plastic Straw Bottles (collectively, the “Bottles”) as “leak-proof.” Thermos denies that its description of the Bottles was false or misleading, or that it did anything wrong. To avoid litigation costs and potential risks for both sides, the parties have reached a class action settlement, which was preliminarily approved by the U.S. District Court for the Northern District of Illinois (the “Court”) on [Date Preliminary Approval Order Entered].

You may be in the Settlement Class (the “Class”) and entitled to a benefit if you purchased a Bottle in the United States at any time between January 1, 2007 and [Date Preliminary Approval Order Entered]. Qualifying Class Members may submit a claim for one of three benefit options: A) an estimated cash payment of either \$4.50 or \$8.50, depending on the Bottle purchased; B) a new Foogo® Bottle or a specified new adult Thermos® brand beverage bottle; or C) payment estimated to be the amount paid for the Bottle(s), with proof of purchase. To qualify, you must complete and submit a Claim Form, signed under penalty of perjury, along with any necessary supporting documents, on or before [150 days after Notice Date]. Claim Forms and instructions are available at www.foogobottlesettlement.com or by calling [phone]. The dollar amounts in A and C above are estimates and may decrease depending on the number of valid claims in the settlement. As such, your claim may be reduced by up to 75% of the estimated amounts above.

If you qualify for the settlement but don’t want to be legally bound by it, you must exclude yourself by [45 days before the Final Approval Hearing]. Information on how to exclude yourself from the settlement is available at www.foogobottlesettlement.com or by calling [phone]. If you do not exclude yourself, you will be bound by the Settlement.

If you are a Class Member and do not exclude yourself, you can object to any part of the settlement. Your objection must be timely, in writing, and contain certain specific information as described at www.foogobottlesettlement.com or available by calling [phone].

The Court will hold a hearing at [time] on [no sooner than 150 days after entry of Preliminary Approval Order], in Chicago, Illinois to determine whether to approve the settlement. The Court will consider whether the settlement is fair, reasonable and adequate and whether to approve Class Representatives’ incentive awards and attorneys’ fees and expenses to be paid by Thermos. You may attend the hearing, and you may hire your own lawyer, but you are not required to do either.

This Notice is just a summary. Detailed notice, as well as the Settlement Agreement and other documents, can be found online at www.foogobottlesettlement.com. For more information, you may contact the Settlement Administrator by phone at [phone], by e-mail at [e-mail] or by mail at [address].

BANNER ADVERTISEMENTS



CLAIM FORM

FOOGO® BOTTLE SETTLEMENT

PLEASE READ THIS CLAIM FORM AND THE NOTICE CAREFULLY TO DETERMINE YOUR ELIGIBILITY. THIS CLAIM FORM MUST BE SUBMITTED NO LATER THAN [DATE]. If you have any questions about your eligibility, please call the Settlement Administrator toll-free at [phone].

If you are a member of the Settlement Class as defined below (and have not excluded yourself), then, by properly filling out, signing and returning this Claim Form with any required documentation, you may be eligible to receive a settlement benefit. Submission of this Claim Form, however, does not guarantee that you will receive a benefit.

If you have any questions about filling out this Claim Form, please visit www.foogobottlesettlement.com, call the Settlement Administrator toll-free at [phone], or e-mail the Settlement Administrator at [e-mail].

ELIGIBILITY

You must be a member of the Settlement Class (the “Class”) in order to submit a claim. The Class includes:

All persons who purchased a Foogo® stainless steel vacuum-insulated straw bottle or a Foogo® plastic straw bottle in the United States at any time between January 1, 2007 and **[preliminary approval date]** excluding (a) any such person who purchased for resale and not for personal or household use, (b) any officers, directors or employees, or immediate family members of the officers, directors or employees, of Thermos, and (c) the presiding judges and their immediate families.

In order to be a Class Member and obtain any settlement benefit, you must affirm under penalty of perjury that you purchased a Foogo® Stainless Steel Vacuum-Insulated Straw Bottle or a Foogo® Plastic Straw Bottle (collectively, the “Bottles”) during the period stated above, that one of the reasons you purchased one of the Bottles is because it was advertised as being leak-proof, and that you are dissatisfied with the product.

INSTRUCTIONS FOR SUBMITTING A CLAIM

THIS FORM MAY BE COMPLETED ELECTRONICALLY, OR PRINTED OUT AND COMPLETED BY PRINTING (OR TYPING) THE REQUESTED INFORMATION CLEARLY IN BLUE OR BLACK INK. In order for you to be considered for a payment, this Claim Form must be fully completed, signed under penalty of perjury, and submitted (1) by email to [address], in signed, PDF form, sent no later than 11:59 P.M. Eastern time on **[the 150th day after the Notice Date]**, (2) by U.S. postal delivery that is mailed and postmarked no later than **[the 150th day after the Notice Date]**, (3) by hand or courier delivery that is received by the Settlement Administrator no later than 11:59 P.M. Eastern time on **[the 150th day after the Notice Date]**, or (4) by online submission with an electronic signature through the Class Website, www.foogobottlesettlement.com, submitted no later than 11:59 P.M. Eastern time on **[the 150th day after the Notice Date]**.

The Settlement Administrator’s mailing address is:

[INSERT SETTLEMENT ADMINISTRATOR ADDRESS]

All information provided in the Claim Form and all documentation submitted in support of the claim is subject to further inquiry and verification. Failure to complete all parts of the Claim Form, or to submit any required supporting documentation, may result in denial of the claim, may delay processing, or may otherwise adversely affect the claim.

To submit a claim, complete the following steps:

- (1) **STEP 1:** Fill out the Class Member Information, including the approximate date and place of your purchase of the Bottle(s), and select a settlement benefit. If you select Benefit Option B or the product award under Option C, you must also select the specific product you would like to receive.
- (2) **STEP 2:** Sign and date the completed Claim Form under penalty of perjury.
- (3) **STEP 3:** If you choose Option C below, provide proof of purchase.
- (4) **STEP 4:** Electronically file the completed and signed Claim Form and, if you choose Option C below, documentation of your purchase, through the Class Website by **[11:59 p.m. Eastern time on the 150th day after the Notice Date]**; or mail the completed and signed Claim Form and, if you choose Option C below, documentation of your purchase, to the Settlement Administrator at the address above so that it is postmarked by **[the 150th day after the Notice Date]**; or deliver, by hand or courier delivery, the completed and signed Claim Form and, if you choose Option C below, documentation of your purchase, to the address above for receipt by the Settlement Administrator by **[11:59 p.m. Eastern time on the 150th day after the Notice Date]**; or e-mail the completed and signed Claim Form and, if you choose Option C below, documentation of your purchase in pdf form, to the Settlement Administrator at the e-mail address above for receipt by **[11:59 p.m. Eastern time on the 150th day after the Notice Date]**.

If you do not comply with all these requirements, you will not be eligible for a benefit.

Once you have sent your Claim Form and documentation to the Settlement Administrator, please be patient. The Settlement Administrator will send you a benefit if you are to receive a benefit. This could take time. **Do not send a copy of your completed Claim Form to the Court.**

CLAIM FORM**FOOGO® BOTTLE SETTLEMENT****1. STEP ONE: PROVIDE CLASS MEMBER INFORMATION AND SELECT A BENEFIT.****Last Name of Class Member:****First Name:****Middle Initial:****Mailing Address of Class Member:****City:****State:****Zip Code:****E-mail Address of Class Member:****Type of Bottle(s) Class Member Purchased (i.e. Foogo® Stainless Steel Vacuum- Insulated Straw Bottle and/or Foogo® Plastic Straw Bottle):****Place Where Class Member Purchased the Bottle(s) (if known):****Date(s) of Purchase (if known)**

I purchased the Foogo® Bottle(s) referenced above during the period from January 1, 2007 through [DATE]. My purchase was based in part on the advertised leak-proof feature of the Bottle(s), and I am dissatisfied with the product.

I wish to make a claim for benefits as a part of the Class. I understand that I may only make a claim for one of the options set forth below. I opt to claim the following benefit (select only one of Option A, Option B or Option C), and I understand that for Options A and C, the cash payment amounts are estimated and could decrease depending on the number of valid claims in the Settlement:

☐

Option A: A one-time cash payment estimated to be \$8.50 (or less) if you purchased one or more Foogo® Stainless Steel Vacuum-Insulated Straw Bottles, or a one-time cash payment estimated to be \$4.50 (or less) if you purchased one or more Foogo® Plastic Straw Bottles. You may only receive one payment, regardless of the number of bottles purchased.

☐

Option B: A new Foogo® Stainless Steel Vacuum-Insulated Straw Bottle or a new Thermos® brand Vacuum Insulated 16-ounce Stainless King Beverage Bottle in Midnight Blue (SK2000MB4) if you purchased one or more Foogo® Stainless Steel Vacuum-Insulated Straw Bottles, or a new Foogo Plastic Straw Bottle or a new 16-ounce Thermos® brand Plastic Hydration Bottle in Teal (HP4100TLTR16) if you purchased one or more Foogo® Plastic Straw Bottles. (Photos of the alternative replacement products may be viewed at www.foogobottlesettlement.com.)

Indicate your selection below (select only one):

- ☐ I purchased one or more Foogo® Stainless Steel Vacuum-Insulated Straw Bottles and I would like a new Foogo® Vacuum Insulated Stainless Steel Straw Bottle; OR
- ☐ I purchased one or more Foogo® Stainless Steel Vacuum-Insulated Straw Bottles and I would like a new Thermos® brand Vacuum Insulated 16-ounce Stainless King Beverage Bottle in Midnight Blue (SK2000MB4); OR
- ☐ I purchased one or more Foogo® Plastic Straw Bottles and I would like a new Foogo® Plastic Straw Bottle; OR
- ☐ I purchased one or more Foogo® Plastic Straw Bottles and I would like a new 16-ounce Thermos® brand Plastic Hydration Bottle in Teal (HP4100TLTR16).

Please note that for Option B, if the total of all approved claims requesting product exceeds \$500,000 in value, Class Members will be automatically put into the Option A category and will be given cash instead, based upon the order in which claims are received.

- ☐ **Option C:** I have attached to this Claim Form proof of purchase for at least one Bottle.

If you selected Option C, please check only one box below. If you check the second box, please fill out the request for alternative replacement product information that follows. Photos of the alternative replacement products may be viewed at www.foogobottlesettlement.com

- ☐ I would like a one-time cash payment estimated to be equal to the total amount I paid for the Bottle(s) I purchased between January 1, 2007 and [preliminary approval date], as established by the proof of purchase documentation attached to this Claim Form. The total amount I paid for the Bottle(s), including sales tax, was \$_____; OR
- ☐ I would like a replacement for each Bottle I purchased between January 1, 2007 and [preliminary approval date], as established by the proof of purchase documentation attached to this Claim Form. I purchased ____ Foogo® Stainless Steel Vacuum-Insulated Straw Bottle(s) and ____ Foogo® Plastic Straw Bottle(s).

For each Foogo® Stainless Steel Vacuum-Insulated Straw Bottle you purchased, please specify on the line below whether you would like a new Foogo® Stainless Steel Vacuum-Insulated Straw Bottle **or** a new Thermos® brand Vacuum Insulated 16-ounce Stainless King Beverage Bottle in Midnight Blue (SK2000MB4).

For each Foogo® Plastic Straw Bottle you purchased, please specify on the line below whether you would like a new Foogo® Plastic Straw Bottle **or** a new 16-ounce Thermos® brand Plastic Hydration Bottle in Teal (HP4100TLTR16).

Please note that for the product component of Option C, if the total of all approved claims requesting product exceeds \$500,000 in value, Class Members will be automatically put into the Option C cash component category and will receive a cash payment based on the amount of the value of the Bottles as indicated on their receipts, based upon the order in which claims are received.

PLEASE NOTE: The benefits described above are only estimates, and are subject to the terms of the Settlement Agreement, which are described in the Settlement Notice and Settlement Agreement, both of which are available to be viewed at www.foogobottlesettlement.com. Depending on the number of valid claims in the settlement, you might not receive the full estimated value of your claim; however, Class Members who submit valid claims will receive no less than 25% of the approved estimated amount of the claim.

2. STEP TWO: READ THE CERTIFICATIONS BELOW. IF TRUE, SIGN AND DATE YOUR CLAIM FORM.

I certify under penalty of perjury that I have read this Claim Form and completed it to the best of my ability consistent with its instructions and that all of the information on this Claim Form is true and correct to the best of my knowledge.

Signature

Date

(MM)

(DD)

(YY)

3. STEP THREE: PROVIDE DOCUMENTATION OF YOUR PURCHASE IF YOU SELECTED BENEFIT OPTION C.

If you selected Option C above, you must provide proof of purchase documentation establishing the price you paid for the Bottle(s). Documentation may be in the form of either store receipt(s) or online purchase receipts. If you do not submit supporting documentation, you will not receive a payment under Option C, and will instead receive either an Option A or an Option B benefit.

4. STEP FOUR: SUBMIT YOUR CLAIM FORM AND DOCUMENTATION.

Your completed and signed Claim Form and any necessary proof of purchase documentation must be electronically signed and filed through the Class Website, www.foogobottlesettlement.com, by 11:59 P.M. Eastern time on [the 150th day after the Notice Date].

Or your completed and signed Claim Form and any necessary proof of purchase documentation must be postmarked by [the 150th day after the Notice Date] and mailed to:

[Insert Settlement Administrator Address]

Or your completed and signed Claim Form and any necessary proof of purchase documentation must be emailed in pdf form to the Settlement administrator at _____ for receipt by 11:59 p.m. Eastern time on [the 150th day after the Notice Date].

Or your completed and signed Claim Form and any necessary proof of purchase documentation must be delivered by hand or courier delivery and received by the Settlement Administrator by 11:59 p.m. Eastern time on **[the 150th day after the Notice Date]**:

[Insert Settlement Administrator Address]

YOUR CLAIM FORM AND ANY OTHER DOCUMENTATION YOU SUBMIT WILL NOT BE RETURNED TO YOU. PLEASE RETAIN A COPY FOR YOUR RECORDS. ONCE YOU HAVE SENT YOUR CLAIM FORM AND ANY DOCUMENTATION TO THE SETTLEMENT ADMINISTRATOR, PLEASE BE PATIENT. THE SETTLEMENT ADMINISTRATOR WILL SEND YOU A BENEFIT IF YOU ARE TO RECEIVE A BENEFIT.

PLEASE DO NOT CALL THE COURT, THE JUDGE, THE CLERK OF COURT, OR THERMOS REGARDING THIS MATTER.

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

JENNY MILMAN and ELLEN THOMAS,)	
on Behalf of Themselves and All Others)	
Similarly Situated,)	
)	Case No: 1:13-cv-7750
Plaintiffs,)	
)	Magistrate Judge Sheila Finnegan
v.)	
)	
THERMOS L.L.C.,)	
)	
Defendant.)	

**ORDER GRANTING FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AND FINAL JUDGMENT**

On _____, 2014, the Court entered an Order Granting Preliminary Approval of Class Action Settlement and Directing Notice to Settlement Class (the “Preliminary Approval Order”). After notice was provided to the members of the settlement class (hereafter, the “Class”) as set forth in the Settlement Agreement (hereafter, “Agreement”), this Court held a Final Approval Hearing on _____, 2015, for the purpose of determining (1) whether the proposed settlement, on the terms set forth in the Agreement, is fair, reasonable, and adequate, and should be finally approved by this Court; (2) whether, pursuant to the terms of the proposed settlement, a judgment should be entered dismissing Defendant Thermos L.L.C. (“Thermos”) and releasing Thermos and the other Released Parties from all Released Claims (as those terms are defined in the Agreement); and (3) whether to award attorneys’ fees and expenses to Class Counsel and the agreed payments for compensation of time to Named Plaintiffs Jenny Milman and Ellen Thomas. This Order will refer to the Named Plaintiffs and Thermos as the “Parties” to the Agreement.

The Court, having reviewed the Agreement and all papers submitted in connection with the proposed settlement, and having considered all arguments of counsel **[and objectors; if none, state that there were none]**, finds that the Parties have evidenced full compliance with the Preliminary Approval Order, and that there are substantial and sufficient grounds for entering this Order Granting Final Approval of Class Action Settlement and Final Judgment (“Final Order and Judgment”). The Court therefore directs the Parties and their counsel to implement and consummate the Agreement and directs the administration of the settlement in accordance with the terms and provisions of the Agreement.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Court has federal subject matter jurisdiction of this Lawsuit and jurisdiction to approve the settlement.
2. The Court has personal jurisdiction over the Named Plaintiffs and all members of the Class.
3. The Agreement is hereby incorporated by reference in this Order, and all terms and phrases used in this Final Order and Judgment shall have the same meaning as in the Agreement.
4. Pursuant to Federal Rule of Civil Procedure 23, the Court finds that (a) members of the proposed Class are so numerous as to make joinder of all members impracticable; (b) there are questions of law or fact common to the proposed Class; (c) the claims of the Named Plaintiffs are typical of the claims of the proposed Class; (d) the Named Plaintiffs and Class Counsel fairly and adequately protected and will continue to protect the interests of the members of the Class; (e) questions of law or fact common to the members of the Class predominate over any questions affecting only individual members; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the Lawsuit.

5. The Court therefore finds that the requirements for certifying a settlement class have been met and are appropriate under the circumstances of this case pursuant to Federal Rule of Civil Procedure 23(b)(3). The Court certifies for settlement purposes only the following Class, with the Named Plaintiffs representing the Class as follows:

All persons who purchased a Foogo® stainless steel vacuum-insulated straw bottle or a Foogo® plastic straw bottle in the United States at any time between January 1, 2007 and **[preliminary approval date]** excluding (a) any such person who purchased for resale and not for personal or household use, (b) any officers, directors or employees, or immediate family members of the officers, directors or employees, of Thermos, and (c) the presiding judges and their immediate families.

6. The Court gives final approval to the settlement as fair, reasonable, and adequate to the Named Plaintiffs and to each member of the Class, and in their best interests, and in full compliance with all requirements of due process and federal law. The settlement is finally approved in all respects.

7. Neither the certification of the Class, nor the settlement of this Lawsuit, shall be deemed to be a concession by Thermos of the propriety of the certification of a litigation class, in this Lawsuit or any other action, and Thermos shall retain all rights to assert that class certification for purposes other than settlement is not appropriate. Furthermore, the Agreement shall not be deemed to be an admission of liability or of unlawful conduct by or on the part of Thermos or its future, current, or former officers, agents, and employees, and shall not serve as evidence of any wrongdoing by or on the part of Thermos or its future, current, or former officers, agents and employees. However, reference may be made to the settlement and the Agreement as may be necessary to effectuate the provisions of the Agreement.

8. The Court finds that the notice described in the Agreement and implemented by the Settlement Administrator pursuant to the Agreement (i) constituted the best practicable

notice; (ii) constituted notice that is reasonably calculated, under the circumstances, to apprise members of the Class of the pendency of the Action, of the proposed settlement, of their right to object or to exclude themselves from the proposed settlement and to appear at the Final Approval Hearing, and their right to seek monetary relief; (iii) was reasonable and constituted due, adequate, and sufficient notice to all persons entitled to receive notice; and (iv) met all applicable requirements of due process and federal law.

9. The Court finds that Class Counsel and the Named Plaintiffs adequately represented the Class for the purpose of entering into and implementing the Agreement. The Court further finds that Rust Consulting, the Court-appointed Settlement Administrator, has met all requirements of the Court as set forth in the Preliminary Approval Order and the Agreement.

10. **[Revise as appropriate before Final Approval Hearing.]** The Court has considered all properly raised objections. After considering the objections, and all briefing and oral argument offered in support of or in opposition to same, and for the reasons stated in open court at the Final Approval Hearing, the Court finds that the objections are without merit. Accordingly, all objections are hereby overruled.

11. The Court hereby dismisses the Lawsuit with prejudice and without fees or costs except as expressly provided in this Order and the Agreement.

12. The Court finds that the Named Plaintiffs and each member of the Class have conclusively compromised, settled, discharged, dismissed, and released all Released Claims against Thermos and the other Released Parties, as follows:

The Named Plaintiffs and each member of the Class who do not exclude themselves from the Class, for themselves and their heirs, successors and assigns, hereby fully and finally release and discharge Thermos, its parents and affiliates, and all of their respective present and former officers, directors, employees, shareholders, attorneys, agents, successors and assigns (the “Released Parties”) of and from all claims that were or could have been raised in the Lawsuit to the full

extent of *res judicata* protection arising out of or related to any purchase of the Foogo® Straw Bottles during the Class Period by any Class Member, regardless of whether any such claim is known or unknown, asserted or as yet unasserted (the “Released Claims”).

13. Accordingly, upon the Effective Date, the Named Plaintiffs and all members of the Class who have not been excluded from the Class, whether or not they returned a Claim Form within the time and in the manner provided for, are barred from asserting any Released Claims against Thermos and the other Released Parties, and any such members of the Class are deemed to have released any and all Released Claims as against Thermos and the other Released Parties. The settlement and this Final Order and Judgment are binding on, and shall have *res judicata* and preclusive effect in, any pending and future lawsuits or other proceedings encompassed by the Released Claims maintained by or on behalf of the Named Plaintiffs and all other members of the Class.

14. The Court approves the payment of attorneys’ fees, costs, and expenses to Class Counsel (the “Attorneys’ Fee Award”) in the amount of \$_____.

15. The Court approves payment to Named Plaintiff Jenny Milman in the amount of \$1,500, and payment to Ellen Thomas in the amount of \$1,500, in compensation for their time and service, distributed in accordance with the Agreement.

16. The Court hereby bars and enjoins all members of the Class who have not been excluded from the Class from (i) filing, commencing, prosecuting, intervening in, or participating as plaintiff, claimant, or class member in any other lawsuit or administrative, regulatory, arbitration, or other proceeding in any jurisdiction based on, relating to, or arising out of the Released Claims, or the facts and circumstances relating to any of them; and (ii) from filing, commencing, or prosecuting a lawsuit or administrative, regulatory, arbitration, or other proceeding as a class action on behalf of members of the Class who have not been excluded from

the Class (including by seeking to amend a pending complaint to include class allegations or seeking class certification in a pending action), based on, relating to, or arising out of the Released Claims, or the facts and circumstances relating to any of them.

17. **[Revise as appropriate before Final Approval Hearing.]** The Court approves the Opt-Out List (attached hereto as Exhibit 1) and determines that the Opt-Out list is a complete list of all potential Class Members who have properly and timely requested exclusion from the Class and who therefore shall neither share in nor be bound by this Final Order and Judgment.

18. In the event this settlement does not become effective in accordance with the terms of the Agreement, then the Agreement, this Final Order and Judgment, and all orders entered into regarding this settlement shall be null and void and vacated, in accordance with the Agreement.

19. The Court hereby authorizes the Parties, without further approval from the Court, to agree to and adopt such amendments, modification, and expansions of the Agreement as (a) are consistent in all material respects with this Final Order and Judgment and (b) do not limit the rights of the Class Members under the terms of the Agreement.

Dated: _____

Magistrate Judge Sheila M. Finnegan
United States District Court, Northern District of Illinois