UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JENNIFER NICOTRA, individually on behalf of herself and all others similarly situated and JOHN DOES (1-100) on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BABO BOTANICALS, LLC,

Defendant.

Case No.: 2:16-cv-00296-ADS-GRB

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

TO: THE COURT, ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD

NOTICE IS HEREBY GIVEN that on September 21, 2016, at 9 am, or as soon thereafter as counsel may be heard, in Courtroom 840 of the above mentioned Court, located at 100 Federal Plaza, Central Islip, New York, Plaintiff Jennifer Nicotra will, and hereby does, move this Court for preliminary approval of the parties' proposed class action settlement, preliminary certification of a settlement class, and setting a date for a proposed fairness hearing schedule.

In support of this unopposed Motion, Plaintiff relies on this Notice of Motion, the Memorandum of Points and Authorities, the Settlement Agreement, and Proposed Order submitted herewith, the Declaration of Joseph Lipari, the complete court file in this action, and such other matters as may be presented to the Court at the hearing or before the hearing.

Date: August 31, 2016

THE SULTZER LAW GROUP P.C.

/s/ Joseph Lipari

By:_____

Jason P. Sultzer, Esq. (Bar ID # JS4546)
Joseph Lipari, Esq. (Bar ID # JL3194)
14 Wall Street, 20th Floor
New York, NY 10005
Tel: (212) 618-1938
Fax: (888) 749-7747
Liparij@thesultzerlawgroup.com

Attorneys for Plaintiff and the Class

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Jennifer Nicotra, individually on behalf of herself and all others similarly situated and John Does (1-100) on behalf of themselves and all others similarly situated, Plaintiffs, v. Babo Botanicals, LLC, Defendant.	:	**Case No. 2:16-cv-00296-ADS-GRB**

MEMORANDUM OF LAW BY PLAINTIFF JENNIFER NICOTRA IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

Jason P. Sultzer, Esq. (Bar ID # JS4546)
Joseph Lipari, Esq. (Bar ID # JL3194)
The Sultzer Law Group P.C.
14 Wall Street, 20th Floor
New York, NY 10005
Tel: (212) 618-1938
Fax: (888) 749-7747
Liparij@thesultzerlawgroup.com

Attorneys for Plaintiff and the Class

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MEMORANDUM OF LAW IN SUPPORT OF MOTION

Introduction

Plaintiff Jennifer Nicotra, on behalf of herself and the proposed Class, seeks preliminary approval of the proposed settlement of this false advertising action, which asserts that Defendant Babo Botanicals, LLC, deceptively labeled its cosmetic products as "all natural" even though the products contain synthetic preservatives, sodium benzoate and/or potassium sorbate. (R. Doc. 1). The proposed settlement is the culmination of significant negotiations and debate regarding Plaintiff's claims, and was achieved after attending a settlement conference with Magistrate Judge Brown. (Lipari Decl. ¶ 11). The proposed settlement resolves Ms. Nicotra's and class members' stated claims for injunctive relief against Defendant, as well as Ms. Nicotra's stated claim for damages. The proposed non-opt-out class consists of purchasers of Babo Botanical products throughout the United States between January 20, 2012 through the date of the Court's approval. The proposed settlement will result in injunctive relief to the class members. The settlement provides for an award of reasonable attorneys' fees and costs agreed upon by the parties.

After thorough investigation and analysis, all counsel recognize the substantial risks the parties would face if the action progressed. And, class counsel recognizes the significant challenges that would be faced in attempting to certify the class under Fed. R. Civ. Proc. 23(b)(3). (Lipari Decl. ¶ 8). The settlement is the result of vigorous advocacy and arms' length negotiations by counsel for all parties, who are experienced in false and deceptive advertising and labeling and unfair business practices litigation. *Id.* As set forth below, all prerequisites for preliminary approval of the settlement have been met, and thus the settlement should be preliminarily approved and this motion granted.

Factual and Procedural Background

Plaintiff alleges consumers are misled by Babo's use of the claim "all natural" on the labels, advertising, and marketing of its personal care products which consist of shampoos, conditioners, sunscreens, and lotions for babies and adults. (R. Doc. 1). Plaintiff further alleges that the presence of synthetic ingredients, specifically the preservatives sodium benzoate and potassium sorbate, cause the "all natural" claim to be deceptive and misleading. And, Plaintiff alleges Babo's products, labeled with an "all natural" statement on the products' principal display panel, do not meet consumers' expectations because of the presence of these synthetic preservatives. *Id.*

The parties exchanged initial disclosures, including documents and information the parties believed necessary to engage in effective settlement discussions. Plaintiff's counsel preliminarily engaged a consultant to evaluate the claims and potential for establishing a method for calculating damages and determined that it would be difficult to ascertain a principled formula for assessing the value of individual consumers' monetary damages claim. (Lipari Decl. ¶ 8).

In June 2016, the parties attended a settlement conference with Magistrate Judge Brown, which resulted in the proposed settlement. (Lipari Decl. ¶ 11).

The Settlement Agreement

The terms of the settlement are as follows:

- The Settlement Class includes all consumers nationwide who purchased Babo products for personal, family, or household use on or after January 20, 2012, up to and including the Certification Date. The Settlement Class excludes any claims for personal injury. Also excluded from the Settlement Class are officers and directors of Defendant,

members of the immediate families of the officers and directors of Defendant, and their legal representatives, heirs, successors, or assigns and any entity in which they have or have had a controlling interest.

- Injunctive Relief: The proposed Settlement:
  - immediately upon the expiration of six (6) months following the Court's Order and Final Judgment in this matter (the "Grace Period"), Babo shall not manufacture or cause to be manufactured any Product intended to be sold to consumers within the United States labeled, represented, or marketed as "all natural" or "100% natural" if the Products contain any synthetic ingredients or preservatives that are not derived from natural plant or mineral sources; and
  - requires Babo immediately upon the Court's approval of the FRCP R. 23(b)(2) Settlement Class to remove the words "all natural" from the Principal Display Panel of any online images of its Products' labeling appearing on its website or any other internet website on which Babo sells its Products that contain any synthetic ingredients or preservatives that are not derived from natural plant or mineral sources; and
  - immediately upon the Court's approval of the FRCP R. 23(b)(2) Settlement Class prohibits Babo from using "all natural" or "100% natural" in its advertising or marketing for its Products that contain any synthetic ingredients or preservatives that are not derived from natural plant or mineral sources.
- Class Representative Service Payment: Ms. Nicotra will be awarded $1,500 as a service payment.
- Attorneys' Fees and Costs: Class counsel shall be awarded its reasonable attorneys' fees

at an amount agreed upon by, and to be confidential between, the named parties.

- Release: In exchange for the above benefits, Plaintiffs and Class Members have agreed to release certain claims. Upon the court's entry of the Fairness Hearing Order and Final Judgment, each of the Plaintiffs and Class Members will release and forever discharge defendant from liability for any and all actions or claims arising out of or in any way relating to conduct that was or could have been alleged in this Action, however, Class Members do not release Defendant with respect to any claims for monetary relief arising from or related to Babo's labeling, advertising, and or marketing of the Products in the United States.

ARGUMENT

A. The Court Should Preliminarily Approve the Settlement Agreement

Under Rule 23(e)(2) of the Federal Rules of Civil Procedure, a court may approve a class action settlement "only . . .on finding that [the agreement] is fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2). The "fair, reasonable and adequate" standard effectively requires parties to show that a settlement agreement is both: (1) procedurally fair and (2) substantively fair. *See Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013) (citations omitted); *accord McReynolds v. Richards-Cantave*, 588 F.3d 790, 803--04 (2d Cir. 2009). In recognition of the "strong judicial policy in favor of settlements, particularly in the class action context," courts evaluating settlement agreements adopt a presumption of both their procedural and substantive fairness. *See McReynolds*, 588 F.3d at 803 (*citing Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)). The Settlement Agreement here is both procedurally and substantively fair.

a. The Settlement Agreement is Procedurally Fair

To demonstrate the procedural fairness of a settlement agreement, a party must show that the agreement "is the product of arms-length, good faith negotiation." *McReynolds*, 588 F.3d at 804. Factors that demonstrate this include the duration and transparency of negotiations, the experience of counsel, and the extent of discovery in litigation. *Flores v. Mamma Lombardi's of Holbrook, Inc.*, No. 12-cv-3532, 2015 WL 2374515, at *4 (E.D.N.Y. May 18, 2015). Furthermore, participation of a highly qualified mediator in settlement negotiations strongly supports a finding that negotiations were conducted at arm's length and without collusion. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] court-appointed mediator's involvement in precertification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure."); *Tiro v. Pub. House Investments, LLC*, No. 11 CIV. 7679 CM, 2013 WL 2254551, at *2 (S.D.N.Y. May 22, 2013) ("The assistance of an experienced JAMS employment mediator . . . reinforces that the Settlement Agreement is non-collusive."); *In re Bear Stearns Companies, Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012).

Here, Plaintiff and counsel conducted a thorough investigation and evaluation of the claims and defenses prior to filing the action and continued to analyze the claims throughout the pendency of the case. (*See, e.g.*, Lipari Decl. ¶ 7.) Prior to agreeing to the Settlement, Class Counsel conducted significant discovery. Through the investigation, discovery, and ongoing analysis, and through litigation of plaintiffs' claims before this Court, Class Counsel obtained an understanding of the strengths and weaknesses of the case. (*See, e.g.*, *id.* at ¶ 9.)

Class Counsel have substantial experience litigating class actions and negotiating class settlements. (*Id.* at ¶¶ 23-24.) Moreover, the parties participated in serious and informed

negotiations before Magistrate Judge Gary Brown, which led to an agreement in principle to settle the case and, ultimately, the finalized Settlement Agreement. (Lipari Decl. ¶ 11.)

For the foregoing reasons, the Settlement Agreement is procedurally fair.

b. The Settlement Agreement is Substantively Fair

To demonstrate the substantive fairness of a settlement agreement, a party must show that as many of the nine factors the Second Circuit U.S. Court of Appeals set out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"), abrogated on other grounds by *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), as possible weigh in favor of approving the settlement agreement. *Charron*, 731 F.3d at 247 (citations omitted).

The nine Grinnell factors are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement ... in light of the best possible recovery; (9) the range of reasonableness of the settlement ... to a possible recovery in light of all the attendant risks of litigation.

McReynolds, 588 F.3d at 804 (*quoting Grinnell*, 495 F.2d at 463). These factors overwhelmingly favor preliminary approval of the Settlement Agreement. Notably, the decision to approve or reject a proposed settlement is committed to the Court's sound discretion. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

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

Consumer class action lawsuits, like this action, are complex, expensive, and lengthy. *See, e.g., Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010). Should the Court decline to approve the Settlement Agreement, further litigation would resume. As the

discussion of the action's procedural history above shows, litigation to date has been costly and complicated; certainly, further litigation would be yet more costly, complex, and time-consuming. (Decl. Lipari ¶ 12). Such litigation could include contested class certification (and possibly decertification) proceedings and appeals, including competing expert testimony and contested *Daubert* motions; further costly nationwide discovery, including dozens of depositions, interrogatories, and requests for admission, and further document production; costly merits and class expert reports and discovery; and trial. Each step towards trial would be subject to Defendant's vigorous opposition and appeal. Even if the case were to proceed to judgment on the merits, any final judgment would likely be appealed, which would take significant time and resources. These litigation efforts would be costly to all Parties and would require significant judicial oversight. (Decl. Lipari ¶ ¶ 13-17).

d. The reaction of the class to the settlement

It is premature to address the reaction of the Settlement Class to the settlement.

e. The stage of the proceedings and the amount of discovery completed

The third Grinnell factor--the stage of the proceedings and the amount of discovery completed--considers "whether Class Plaintiffs had sufficient information on the merits of the case to enter into a settlement agreement . . . and whether the Court has sufficient information to evaluate such a settlement." *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 986 F. Supp. 2d 207, 224 (E.D.N.Y. 2013) (citations omitted). Here, Plaintiff's counsel have conducted significant discovery, both formally and informally, including reviewing voluminous documents produced by Defendants. *Zeltser v. Merrill Lynch & Co.*, No. 13 CIV. 1531 FM, 2014 WL 4816134, at *6 (S.D.N.Y. Sept. 23, 2014) ("Here, through both formal discovery and an informal exchange of information prior to mediation, Plaintiffs obtained

sufficient discovery to weigh the strengths and weaknesses of their claims and to accurately estimate the damages at issue."). Thus, Plaintiff had sufficient information to evaluate the terms of the proposed settlement.

f. The risks of establishing liability and damages

"Litigation inherently involves risks." *Willix v. Healthfirst, Inc.,* No. 07-cv-1143, 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011) (citation omitted). "[I]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Banyai v. Mazur*, No. 00 CIV.9806 SHS, 2007 WL 927583, at *9 (S.D.N.Y. Mar. 27, 2007) (citation omitted); *accord Zeltser*, 2014 WL 4816134, at *6.

Plaintiff recognizes that, as with any litigation, the actions involve uncertainties as to their outcome. (Lipari Dec. ¶ 20). Defendant continues to deny Plaintiff's allegations, and should this matter proceed, it will vigorously defend itself on the merits. Defendant would likely appeal, if possible, decisions in Plaintiff's favor. Defendant would challenge Plaintiff at every litigation step, presenting significant risks of ending the litigation while increasing costs to Plaintiff and the Settlement Class members. (Lipari Dec. ¶¶ 13-17). Further litigation presents no guarantee for recovery, let alone a recovery greater than the recovery for which the Settlement provides. (Lipari Dec. ¶¶ 13-17). For these reasons, the risks of establishing liability and damages strongly support preliminary approval.

g. The risk of maintaining class action status through trial

The case settled before rulings on class certification, and the current certification is for settlement purposes only. Defendant has stated that but for the Settlement, it would vigorously oppose class certification. (Lipari Decl. ¶ 18.) *See In re Med. X-Ray Film Antitrust Litig.*, No.

CV-93-5904, 1998 WL 661515, at *5 (E.D.N.Y. Aug. 7, 1998) (possibility that defendant would challenge maintenance of class in absence of settlement was risk to class and potential recovery). Furthermore, even if the Court were to certify a litigation class, the certification order would not be an inexorable order. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."); *see also Brazil v. Dole Packaged Foods, LLC*, No. 12-CV-01831-LHK, 2014 WL 5794873, at *15 (N.D. Cal. Nov. 6, 2014) (decertifying Rule 23(b)(3) class in consumer fraud case). Given the risks, this factor weighs in favor of final approval. *See, e.g., Mills v. Capital One, N.A.*, No. 14 CIV. 1937 HBP, 2015 WL 5730008, at *6 (S.D.N.Y. Sept. 30, 2015).

h. The ability of Defendant to withstand a greater judgment

This *Grinnell* factor--the ability of a defendant to withstand a greater judgment--has, in practice, transformed into an acknowledgement that it is more important that a class receive some relief than possibly "yet more" relief. *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y. 2012). A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Viafara v. MCIZ Corp.*, No. 12 CIV. 7452 RLE, 2014 WL 1777438, at *7 (S.D.N.Y. May 1, 2014) (citation omitted). The Settlement Agreement, as discussed above, affords the Settlement Class substantial benefits. The Settlement Agreement achieves the Settlement Class' goal of changing the Products' labeling, advertising, and marketing. Moreover, by resolving the Settlement Class's claims, the Settlement Agreement removes the Settlement Class' costs of maintaining litigation.

i. The range of reasonableness of the settlement in light of the best possible recovery and in light of all the attendant risks of litigation.

The eighth and ninth Grinnell factors are also supported by the Settlement. The relief provided by the Settlement Agreement is within the range of reasonableness, in light of the best possible recovery and in light of all the attendant risks of litigation. Courts have consistently approved injunction-only settlement agreements that resolve mislabeling class actions. *See, e.g.*, *Lilly v. Jamba Juice Co.*, No. 13-cv-02998, 2015 WL 2062858 (N.D. Cal. May 4, 2015); Final Order Approving Class Action Settlement, *In re Quaker Oats Labeling Litig.*, No. 5:10-cv-00502-RS (N.D. Cal. filed July 29, 2014). In doing so, these courts have emphasized that the relief obtained in these settlements--"complete relabeling of . . . challenged products"--"provides meaningful injunctive relief . . . within the range of possible recoveries by the Class." *See Lilly*, 2015 WL 2062858, at *4; Final Order Approving Class Action Settlement at 4, *In re Quaker Oats Labeling Litig.*, No. 5:10-cv-00502-RS, *supra* p. 11.

Here, the Settlement Agreement effectuates a relabeling of the Product, requiring Defendant to remove "all natural" on its Products' front label; and prohibiting Defendant from using "all natural" or "100% natural" in its labeling, marketing, or advertising for products that contain synthetic ingredients or preservatives that are not derived from natural plant or mineral sources. This relief constitutes a "complete relabeling of . . . challenged products," and amounts to "meaningful injunctive relief . . . within the range of possible recoveries by the Class." *See Lilly*, 2015 WL 2062858, at *4; Final Order Approving Class Action Settlement at 4, *In re Quaker Oats Labeling Litig.*, No. 5:10-cv-00502-RS, *supra* p. 11. Thus, consideration of the range of reasonableness of the settlement in light of the best possible recovery and in light of all the attendant risks of litigation weighs staunchly in favor of approving the Settlement Agreement.

B. The Court Should Preliminarily Certify the Settlement Class

A court may certify a settlement class upon finding that the action underlying the settlement satisfies all Rule 23(a) prerequisites and the requirements of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619--22 (1997). As set forth more fully below, the proposed settlement class satisfies all of the prerequisites of Rule 23(a) and (b)(2) and, consequently, Plaintiff respectfully asks the Court to certify the Settlement Class for settlement purposes.

a. The Rule 23(a) Prerequisites have been Met

Rule 23(a) has four prerequisites for certification of a class: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequate representation. The Settlement Class meets each of these four prerequisites and, consequently, satisfies Rule 23(a).

i. Numerosity

Under the numerosity prerequisite of Rule 23(a), plaintiffs must show that their proposed class is "so numerous that joinder of all [its] members is impracticable." Fed. R. Civ. P. 23(a)(1). The Second Circuit U.S. Court of Appeals has consistently treated this prerequisite liberally, explaining that numerosity will be found where a proposed class is "obviously numerous." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997); *see also Robidoux v. Celani*, 987 F.2d 931, 935 (2d. Cir. 1993). Though no magic number of class members exists for meeting the numerosity prerequisite, courts "presume [the prerequisite is met] for classes larger than forty members." *Penn. Pub. Sch. Employees' Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 120

(2d Cir. 2014). Here, it is undisputed that the Settlement Class is "obviously numerous," including thousands of consumers. *Marisol* A., 126 F.3d at 376; (Lipari Dec. ¶ 8).

ii. Commonality

Under the commonality prerequisite of Rule 23(a), plaintiffs must show that "questions of law or fact common to the [proposed] class" exist. Fed. R. Civ. P. 23(a)(2). The U.S. Supreme Court has clarified that this prerequisite will be found where proposed class members have brought claims that all centrally "depend upon [the resolution of] a common contention." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The Second Circuit U.S. Court of Appeals has construed this instruction liberally, holding that plaintiffs need only allege injuries "derive[d] from defendants' . . .unitary course of conduct." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 84 (2d Cir. 2015). Here, Settlement Class Members bring claims that centrally depend on the resolution of a common contention—whether the presence of potassium sorbate and/or sodium benzoate cause the "all natural" claim to mislead a reasonable consumer. Plaintiff contends here that whether or not the "all natural" claim was misleading or deceptive to a reasonable consumer is a single question of fact that satisfies the commonality prerequisite, and "plaintiffs are not [further] required to demonstrate that all of the [proposed] class members had identical motivations for purchasing" the Products. *Ackerman v. Coca-Cola Co.*, 2013 U.S. Dist. LEXIS 184232 * 10 (E.D.N.Y. July 17, 2013). Thus, the commonality prerequisite of Rule 23(a) is satisfied here.

iii. Typicality

Under the typicality prerequisite of Rule 23(a), plaintiffs must show that their proposed class representatives' claims "are typical of the [class'] claims." Fed. R. Civ. P. 23(a)(3). The Second Circuit U.S. Court of Appeals has interpreted this prerequisite to require plaintiffs to show that "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented." *Robidoux*, 987 F.2d at 936--37 (citations omitted). District courts in the Second Circuit, moreover, have repeatedly found this prerequisite easily satisfied, particularly in consumer class action cases. *See Enriquez v. Cherry Hill Mkt. Corp.*, 993 F. Supp. 2d 229, 233 (E.D.N.Y. 2014); *Fogarazzao v. Lehman Bros., Inc.*, 232 F.R.D. 176, 180 (E.D.N.Y. 2005) ("The typicality requirement is not demanding." (internal citations and quotation marks omitted)).

Here, Plaintiff contends the claims of the Class Representative are typical of the Settlement Class's claims. The Named Plaintiff and the rest of the Settlement Class all allege that Defendants committed the same unlawful conduct--misleadingly labeling its Product, in violation of New York deceptive trade practices statutes and the common law, as well as the consumer protection laws of each of the 50 states.

iv. Adequate Representation

Finally, under the adequate representation prerequisite of 23(a), plaintiffs must show that their proposed class representatives will "fairly and adequately protect the interests of the [proposed] class." Fed. R Civ. P. 23(a)(4). To do this, plaintiffs must demonstrate that: (1) their class representatives do not have conflicting interests with other class members; and (2) their

class counsel is "qualified, experienced and generally able to conduct the litigation." *Marisol A.*, 126 F.3d at 378. Courts under the purview of the Second Circuit U.S. Court of Appeals have consistently applied a lenient standard for meeting both of the adequate representation prerequisites. *E.g., Diaz v. Residential Credit Solutions, Inc.*, 299 F.R.D. 16, 20--21 (E.D.N.Y. 2014). For the first requirement (adequacy of class representatives), Second Circuit courts have required that plaintiffs merely show that "no fundamental conflicts exist" between a class's representative(s) and its members. *See Charron*, 731 F.3d at 249. For the second requirement (adequacy of class counsel), courts in the Second Circuit generally presume it met, only finding it not met in instances where class counsel represents other clients whose interests are inherently at odds with the class' interests or also acts as a class representative. *See, e.g., Moore v. Margiotta*, 581 F. Supp. 649, 652 (E.D.N.Y. 1984). Here, Plaintiff possesses the exact same interests as the proposed settlement class members because Plaintiff and the settlement class were all allegedly injured in the same manner based on the same misleading representations.

With respect to the second requirement, Class Counsel are qualified, experienced, and generally able to conduct the litigation. Class Counsel are not representing clients with interests at odds with the interests of the Settlement Class Members and are not acting as class representatives. (Lipari Decl.¶ 24.) Further, they have invested considerable time and resources into the prosecution of the Actions. (Lipari Decl. ¶ 25.) They have a proven track record of successful prosecution of significant class actions. Id. "In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to prosecute vigorously the action on behalf of the class." *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 241 F.R.D. 185, 199 n.99 (S.D.N.Y. 2007) (citation omitted).

b. The Settlement Class Meets All Rule 23(b)(2) Requirements

The Settlement Class, as a class seeking injunctive relief, meets all Rule 23(b)(2) requirements, and the Court should preliminarily certify it.

Rule 23(b)(2) reads: "A class action may be maintained if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . . ." Id. The Second Circuit U.S. Court of Appeals has interpreted this to mean that class-wide injunctive relief must provide benefit to all class members (even if in different ways). *Sykes*, 780 F.3d at 97(*citing Wal-Mart Stores, Inc.*, 131 S. Ct. at 2557--58); see also Parsons v. Ryan, 754 F.3d 657, 688 (9th Cir. 2014) (holding the same).

In *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 540-41 (N.D. Cal. 2012), the Northern District of California court certified a class based on Rule 23(b)(2) for allegations of advertising a product as "all natural". The court stated:

> Plaintiffs seek certification under Rule 23(b)(2). To certify a (b)(2) class, the Court must find that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2). Ordinarily, it follows that there is no need "to undertake a case-specific inquiry into whether class issues must predominate or whether class action is the superior method of adjudicating the dispute" under the other subsections of Rule 23(b). *Dukes*, 131 S.Ct. at 2558. Rather, "[p]redominance and superiority are self-evident." *Id.* "Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive." *Ellis*, 657 F.3d at 986 (*quoting Zinser v. Accufix Res. Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir.2001)).
>
> This case exemplifies the kind of action that may be appropriate for certification under Rule 23(b)(2), at least insofar as plaintiffs request: (1) declaratory relief that the alleged practices are unlawful, and (2) injunctive relief prohibiting defendants from continuing them. *See Dukes,* 603 F.3d at 571. Those requests can be

> satisfied with "indivisible" equitable relief that benefits all class members at once, as the Rule suggests.

Ries v. Arizona Beverages USA LLC, 287 F.R.D. 523, 540-41 (N.D. Cal. 2012). Similarly here, Plaintiff has individually relinquished her demand for monetary damages and seeks only class-wide injunctive relief. Like the class members in *Sykes* and *Arizona Beverage*, this relief would, in remedying the Products' labeling, benefit each Settlement Class Member at once. Moreover, as the court in *Ackerman* held, "equitable relief in the form of an injunction would be an appropriate remedy" for the Settlement Class. *Ackerman*, 2013 WL 7044866, at *17 (defendants clearly "acted ... on grounds generally applicable to the class," and injunctive relief constitutes a significant aspect of the relief sought. If, as plaintiffs allege, the name "vitaminwater" is misleading to a reasonable consumer, then equitable relief in the form of an injunction would be an appropriate remedy.); see also *Jermyn I*, 256 F.R.D. at 434 (certifying class under Rule 23(b)(2) and noting that New York law "place[s] a high value on this type of injunctive relief.").

Accordingly, the Settlement Class should be found to meet Rule 23(b); and, as the Settlement Class also satisfies the Rule 23(a) prerequisites, the Class should be preliminarily certified for injunctive relief.

C. The Court Should Schedule the Final Approval Hearing Date

Finally, pursuant to Rule 23(e)(2), Plaintiff requests that the Court schedule the time, date, and place of the Final Approval Hearing Date.

D. Proposed Schedule of Events

In connection with preliminary approval of the Settlement Agreement, the Court must set the Final Approval Hearing Date. Plaintiffs respectfully requests that the court do so as soon as practicable.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this court: (1) certify the Settlement Class for the purpose of settlement; (2) preliminarily approve the Settlement Agreement; and (3) set a date and time for the Final Approval Hearing Date.

Date: August 31, 2016

THE SULTZER LAW GROUP P.C.

/s/ Joseph Lipari

By:_____

Jason P. Sultzer, Esq. (Bar ID # JS4546)
Joseph Lipari, Esq. (Bar ID # JL3194)
14 Wall Street, 20th Floor
New York, NY 10005
Tel: (212) 618-1938
Fax: (888) 749-7747
Liparij@thesultzerlawgroup.com

Attorneys for Plaintiff and the Class

UNITED STATES DISTRICT COURT
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LIPARI DECLARATION IN SUPPORT OF NOTICE OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS

Pursuant to 28 U.S.C. § 1746, I, Joseph Lipari, declare as follows

1. I am a partner at The Sultzer Law Group, P.C., counsel for plaintiff in the above-captioned action.
2. I am a member in good standing of the state bars of New York, New Jersey, and Pennsylvania, as well as the bars of numerous federal courts, including the U.S. District Courts for the Southern, Eastern, and Northern Districts of New York and the District of New Jersey.
3. I respectfully submit this declaration in support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement and Preliminary Certification of Settlement Class
4. The facts set forth in this declaration are based on my personal knowledge, and I would competently testify to them if called upon to do so.

5. The Sultzer Law Group represents Jennifer Nicotra in the Action. We have been responsible for prosecution of the Action and for the negotiation of the Settlement Agreement. We have vigorously represented the interests of the Settlement Class Members throughout the course of the litigation and settlement negotiations.
6. Plaintiff Jennifer Nicotra, on behalf of herself and the proposed Class, seeks preliminary approval of the proposed settlement of this false advertising action, which asserts that Defendant Babo Botanicals, LLC, deceptively labeled its cosmetic products as "all natural" even though the products contain synthetic preservatives, sodium benzoate and/or potassium sorbate. (R. Doc. 1).
7. Plaintiff and counsel conducted a thorough investigation and evaluation of the claims and defenses prior to filing the action and continued to analyze the claims throughout the pendency of the case.
8. After thorough investigation and analysis, all counsel recognize the substantial risks the parties would face if the action progressed. And, class counsel recognizes the significant challenges that would be faced in attempting to certify the class under Fed. R. Civ. Proc. 23(b)(3). While it is undisputed that the Settlement Class is "obviously numerous," including thousands of consumers, Plaintiff's counsel preliminarily engaged a consultant to evaluate the claims and potential for establishing a method for calculating damages and determined that, in this case, it would be difficult to ascertain a principled formula for assessing the value of the individual consumers' monetary damages claim.
9. Prior to agreeing to the Settlement, class counsel conducted significant discovery. Through the investigation, discovery, and ongoing analysis, and through litigation of

plaintiff's claims before this Court, class counsel obtained an understanding of the strengths and weaknesses of the case.

10. Additionally, in the process of investigating and litigating the Action, class counsel conducted significant research on the consumer protection statutes at issue, as well as the overall legal landscape, to determine the likelihood of success and reasonable parameters under which courts have approved settlements in comparable cases.

11. The proposed settlement is the culmination of significant negotiations and debate regarding plaintiff's claims, and was achieved after attending a settlement conference in June 2016 with Magistrate Judge Brown.

12. As the discussion of the action's procedural history above shows, litigation to date has been costly and complicated; certainly, further litigation would be yet more costly, complex, and time-consuming.

13. Such litigation could include contested class certification (and possibly decertification) proceedings and appeals, including competing expert testimony and contested *Daubert* motions; further costly nationwide discovery, including multiple depositions, interrogatories, and requests for admission, and further voluminous document production; costly merits and class expert reports and discovery; and trial.

14. Each step towards trial would be subject to defendant's vigorous opposition and appeal.

15. Even if the case were to proceed to judgment on the merits, any final judgment would likely be appealed, which would take significant time and resources.

16. Defendant would challenge plaintiff at every litigation step, presenting significant risks of ending the litigation while increasing costs to plaintiff and the Settlement Class members.

17. Further litigation presents no guarantee for recovery, let alone a recovery greater than the recovery for which the settlement provides.

18. Defendant has stated that but for the settlement, it would vigorously oppose class certification.

19. These litigation efforts would be costly to all parties and would require significant judicial oversight.

20. Plaintiff recognizes that, as with any litigation, the action involves uncertainties as to the outcome.

21. In light of all of the foregoing, class counsel believe the settlement confers substantial benefits upon the Settlement Class Members. Class Counsel has evaluated the Settlement and determined it is fair, reasonable, and adequate to resolve plaintiffs' grievances and is in the best interest of the Settlement Class

22. Defendant continues to deny plaintiff's allegations, and should this matter proceed, it will vigorously defend itself on the merits.

23. Class Counsel have substantial experience litigating class actions and negotiating class settlements. (Exhibit 1).

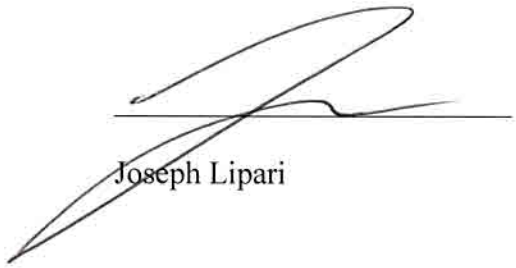
24. Class Counsel are qualified, experienced, and generally able to conduct the litigation. Class Counsel are not representing clients with interests at odds with the interests of the Settlement Class Members and are not acting as class representatives. (Id.)

25. Further, they have invested considerable time and resources into the prosecution of the Action. Class counsel has a proven track record of successful prosecution of significant class actions.

26. Plaintiff performed an important and valuable service for the benefit of the Settlement Class. She met, conferred, and corresponded with Class Counsel as needed for the efficient process of the litigation. Plaintiff has participated in numerous interviews by Class Counsel, provided personal information concerning the litigation, and remained intimately involved in the litigation processes

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 30, 2016, at New York, New York.



Joseph Lipari

EXHIBIT 1

The Sultzer Law Group P.C.
A Complex Litigation & Trial Practice
NEW YORK | PENNSYLVANIA | NEW JERSEY | CALIFORNIA

The Sultzer Law Group, P.C. focuses on complex civil litigation, including consumer class actions. The firm is headquartered in New York, and maintains offices in California, New Jersey, and Pennsylvania. Since its founding in 2013, The Sultzer Law Group, P.C. has served as counsel in numerous high-profile consumer class action cases. The firm is included in Martindale-Hubbell's Bar Register of Preeminent Lawyers for its class action practice. All partners are AV rated by Martindale-Hubbell and have been selected as Super Lawyers. The firm's founding partner, Mr. Sultzer, has earned selection as a Fellow of the Litigation Counsel of America (LCA), recognizing the country's top trial attorneys. The firm's attorneys have contributed to or been featured in various well known publications, regarding their class action practice, including: *Law360*, Inside Counsel Magazine, Risk Management Magazine, and CNBC News. More detail about the firm, its practice areas, and its attorneys appear on its website: www.thesultzerlawgroup.com

I. Representative Practice Areas

Consumer Protection Class Action Litigation

Attorneys at The Sultzer Law Group, P.C. have advocated for consumers' rights, successfully challenging some of the nation's largest and most powerful corporations for a variety of improper, unfair, and deceptive business practices in a wide range of industries including, the financial, cosmetic, food, and supplement industries. Through our efforts, we have recovered significant benefits for our consumer clients.

Recent Representative matters include:

- *Assis, David et al. v. Ernest Supplies LLC (Kings County Supreme Court 505605/2016)*
- *Condon, Timothy et al. v. Commonwealth Dairy LLC (SDNY 16-cv-02295)*
- *Cordoba, Kelly et al. v. Virgin Scent, Inc., et al. (Westchester County Supreme Court 56355/2016)*
- *Dayan, Eli et al. v. Swiss-American Products, Inc. (EDNY 15-cv-06895)*
- *Douek, Vivian et al. v. McNabb LLC (EDNY 16-cv-01763)*
- *Gurkov, Levi et al. v. Frederick Hart Company Inc. et al. (Nassau County Supreme Court 601706/2016)*
- *Harabedian, Paul et al. v. Hammer Nutrition, LTD (EDNY 14-cv-0459)*
- *Hecht, Shea, et al. v. Wells Fargo Bank, N.A., et al. (EDNY 15-cv-02338)*
- *Huzarsky, Jonathan et al. v. Little Kids, Inc. (U.S. District Court District of Massachusetts 15-cv-13613)*
- *Jones, Maureen et al. v. John WM Macy Cheesesticks, Inc. (Kings County Supreme Court 509337/2015)*
- *Kaatz, Marie and Gagliardi, Abigail, et al. v. Hyland's Inc., et al. (SDNY 16-cv-00237)*

- *Maor, Marshall et al v. Paramount Country Club, LLC, et al. (Rockland County Supreme Court 032284/2016)*
- *Markos, Jaish et al. v. Russell Brands, LLC (SDNY 16-cv-4362)*
- *Moschetta, Marc et al. v. Wal-Mart Stores, Inc. d/b/a Great Value (SDNY 16-cv-01377)/MDL: 2705 & 2708*
- *Principe, Mark et al. v. Edison Nation, LLC et al. (EDNY 15-cv-05453)*
- *Rosner, Ari v. CleanWell LLC (EDNY 16-cv-01780)*
- *Silva, Christopher et al. v. Smucker Natural Foods, Inc. and J.M. Smucker Co. (EDNY 14-cv-6154)*
- *Sullivan, Noelky et al. v. Church & Dwight Inc. (EDNY 15-cv-04737)*
- *Thomas, Jenny v. YCC et al. (Dutchess County Supreme Court 5456/2014)*
- *Weisberg, Cynthia et al. v. Aladdin Bakers, Inc. (Kings County Supreme Court 503704/2015)*

Commercial Litigation

Attorneys at The Sultzer Law Group, P.C. handle high-stakes commercial cases for both plaintiffs and defendants. We specialize in significant liability exposure involving issues such as business torts, intellectual property matters in which we have pursued and defended against patent and trademark infringement claims, breach of contract, UCC sale of goods, predatory lending, misappropriation of trade secrets/customers, fraud, unfair competition, breach of fiduciary duty, conversion, business transactions, and land use actions. We have successfully represented municipalities as well as companies and individuals in a wide range of industries, including real estate, telecommunications, retail, manufacturing, construction, and alarm/emergency response systems. As a result of our aggressive representation, we have recovered millions of dollars on behalf of clients embroiled in contentious business disputes.

Recent representative matters include:

- *101 Imaging LLC DBA Acuscan v. Dr. Rossi, MD., P.C. et al. (Nassau County Supreme Court 601008/2014)*
- *Asset Enhancement Solutions, LLC v. Lifewatch, Inc. (Nassau County Supreme Court 601542/2014)*
- *Brune & Richard LLP v. Daniel Beyda et al. (New York County Supreme Court 650443/2015)*
- *CDP Holdings Group, LLC v. Daniel Beyda (New York County Supreme Court 650261/2016)*

- *Craig C. Goldberg v. GA Capital Partners LLC et al. (New York County Supreme Court 652748/2015)*
- *Daniel Beyda v. Daniel DiPietro et al. (Nassau County Supreme Court 600916/2015)*
- *Dover Madison Capital Management LLC v. Clearwater Systems Corp. et al. (New York County Supreme Court 652315/2015)*
- *Eddie Sitt, individually and derivatively and on behalf of Sitt Asset Management LLC and Sitt Leasing, LLC v. Ralph Sitt et al. (New York County Supreme Court 652490/2016)*
- *Enterprise Radiology, P.C. d/b/a Washington Heights Imaging v. CDP Holdings Group, LLC et al. (Nassau County Supreme Court 601786/2015)*
- *Federal Trade Commission et al. v. Lifewatch Inc. et al. (U.S. District Court, Northern District of Illinois 15-cv-05781)*
- *Lease-It Capital Corp. d/b/a Acculease v. I.M.S./Imaging Medical Solutions, Inc. et al. (New York County Supreme Court 151316/2015)*
- *Life Alert Emergency Response, Inc. v. Lifewatch, Inc., 2:08-cv-02184-CAS (FFMx) (C.D. Cal)*
- *Long Island Radiology Associates, P.C. v. Daniel Beyda M.D. et al. (Nassau County Supreme Court 602572/2015)*
- *Scanner Guard Corporation v. Excelsis Investments, Inc. et al. (EDPA 16-cv-00516)*
- *Walker Winslow Group, LLC d/b/a Paradigm Health Plans v. Ross Krasnow, et al. (U.S. District Court District of New Jersey 14-cv-7772)*

Mass Tort Litigation

Attorneys at The Sultzer Law Group, P.C. have successfully defended companies against mass toxic tort cases docketed throughout the United States. Our cases have ranged from single-plaintiff, single-defendant, and single-product claims of personal injury to matters which involved hundreds of plaintiffs and hundreds of products. We have obtained defense verdicts and summary judgment orders in a number of asbestos, lead, latex, and benzene cases.

II. Partner Biographies

Jason P. Sultzer

Jason P. Sultzer represents clients throughout the United States and has substantial experience in class actions, product liability, mass torts, business disputes, personal injury litigation, and intellectual property-related issues.

Mr. Sultzer has successfully defended and prosecuted nationally recognized companies in highly publicized class action lawsuits in state and federal courts, including proceedings before the

Judicial Panel on Multidistrict Litigation. These class actions involved a wide variety of matters, including unfair competition, breach of warranty, product-related issues, employment discrimination, civil rights, overtime wages, the Fair Debt Collection Practices Act, the Telephone Consumer Protection Act, and consumer protection statutes of nearly all fifty states. Mr. Sultzer has successfully opposed class certification and has obtained dismissals in cases prior to class certification by asserting defenses such as federal preemption, primary jurisdiction, and lack of standing. Mr. Sultzer is a frequent author and lecturer about class action lawsuits and has been quoted in national publications concerning the Class Action Fairness Act and class action settlements.

Mr. Sultzer also has successfully litigated hundreds of product liability cases involving a wide range of products, including catastrophic injury and wrongful death matters resulting from fires and electrocutions. Most recently, Mr. Sultzer conducted a trial in which the court returned a favorable verdict in a case involving allegations that his client's product caused a fire and property damage in excess of $10 million.

Additionally, Mr. Sultzer has extensive experience in mass tort cases, including those involving asbestos and the alleged health effects of cell phone use. Given Mr. Sultzer's significant experience in mass tort matters, he regularly advises his clients during corporate crisis situations associated with product recalls, federal agency investigations, state attorney general inquiries, and mass tort and class action litigation threats.

Mr. Sultzer also routinely litigates matters involving complex commercial disputes. He represents both plaintiffs and defendants in these cases. These matters include contractual disputes, business fraud, predatory lending, misappropriation of trade secrets/customers, land use actions, and unfair competition. These clients have been engaged in the real estate, retail, financial, telecommunications, construction, and manufacturing industries. Most recently, Mr. Sultzer obtained a multi-million dollar recovery on behalf of a real estate developer in a breach of contract action involving the development of waterfront property in New York City.

Prior to opening The Sultzer Law Group P.C., Mr. Sultzer was an equity partner at one of the largest law firms in the country where he served as the co-chairman of its class action practice group. Earlier in his career, Mr. Sultzer was in-house counsel for Owens Corning, a Fortune 500 Company, where he was involved in defending the company against tens of thousands of asbestos lawsuits throughout the country.

Mr. Sultzer has received the Martindale-Hubbell AV rating, indicating that his legal peers rank him at the highest level of professional excellence. He was also named as a "Mass Tort Lawyer of the Year" by American Law Media, and has been recognized as a Super Lawyer for the last 6 years. Mr. Sultzer, was also featured on the front cover of the Wall Street Journal's Legal Leader's magazine in 2014 and 2015 designating him as one of New York's top rated lawyers. In

addition, Mr. Sultzer has earned selection as a Fellow of the Litigation Counsel of America (LCA), recognizing the country's top trial attorneys. The LCA is an invitation-only honorary society that is composed of less than one-half of one percent of American lawyers.

Joseph Lipari

Joseph Lipari has litigated in state and federal courts throughout the United States, and he has appeared before binding arbitration panels. Mr. Lipari has achieved numerous successful outcomes as counsel for plaintiffs and defendants, including verdicts and settlements.

He has successfully represented businesses in complex suits arising out of high-profile, catastrophic events including: underground mining accidents in Alabama; steel mill explosions in Pennsylvania and Louisiana; and extended unplanned shutdowns and outages in mills, plants, and factories located across the United States and abroad.

He is admitted to the bars of New York, Pennsylvania, and New Jersey. He has also appeared as counsel, by way of pro hac vice admission, in over twenty states. Mr. Lipari has lectured and published on topics including trial strategy, patent disputes, hydrofracking in the Marcellus Shale, and risk management practices.

Mr. Lipari is a 2002 graduate of Seton Hall University School of Law. Before law school, he attended Officer Candidate School in Quantico, Virginia and was offered a commission as Second Lieutenant in the United States Marine Corps.

Prior to joining The Sultzer Law Group P.C., Mr. Lipari was a partner at a prominent national litigation firm. Earlier in his career, he was associated with one of the largest law firms in the country.

Mr. Lipari has received the Martindale-Hubbell AV rating, indicating that his legal peers rank him at the highest level of professional excellence. He was also named as a "Mass Tort Lawyer of the Year" by American Law Media, and has been recognized as a Super Lawyer.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JENNIFER NICOTRA, individually on behalf of herself and all others similarly situated and JOHN DOES (1-100) on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BABO BOTANICALS, LLC,

Defendant.

Case No.: 2:16-cv-00296-ADS-GRB

[PROPOSED] ORDER PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT, CERTIFYING SETTLEMENT CLASS, AND SCHEDULING DATE FOR FINAL FAIRNESS HEARING

Upon consideration of Plaintiff Jennifer Nicotra's ("Plaintiff") unopposed motion for preliminary approval, and the entire record herein, the Court grants preliminary approval to the Settlement contained in the Parties' Settlement Agreement upon the terms and conditions set forth in this Order. The Court makes the following:

FINDINGS OF FACT

1. Plaintiff brought her unopposed motion for preliminary approval before the court on August 31 2016, with the consent of Babo Botanicals, LLC. ("Defendant").
2. On January 20, 2016, Nicotra, through her counsel, filed a putative class action complaint against Defendant (the "Lawsuit").
3. In the Lawsuit, Plaintiff alleges consumers are misled by Defendant's use of the claim "all natural" on the labels, advertising, and marketing of its personal care products, which consist of shampoos, conditioners, sunscreens, and lotions for babies and adults. Plaintiff further alleges that the presence of synthetic ingredients, specifically the preservatives sodium benzoate and potassium sorbate, cause the "all natural" claim to be deceptive and misleading. And, plaintiff alleges Defendant's products, labeled with an "all natural" statement on the products' principal display panel, do not meet consumers' expectations because of the presence of these synthetic preservatives.
4. Before entering into the Settlement Agreement, Plaintiff's counsel conducted an extensive and thorough examination, investigation, and evaluation of the relevant law, facts, and allegations to assess the merits of the claims, potential claims, and potential defenses in the Lawsuit. As part of that investigation, as well as through formal discovery, Plaintiff's counsel obtained information from Defendant, including information concerning marketing, labeling, product formulation, sales, and pricing.

5. The Parties have entered into a Settlement Agreement in which the Parties have agreed to settle the Lawsuit, pursuant to the terms of the Settlement Agreement, subject to the approval of the Court.

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

6. **Stay**. All non-settlement-related proceedings in the Lawsuit are hereby stayed and suspended until further order of the Court.

7. **Preliminary Class Certification for Settlement Purposes Only**. The Court hereby preliminarily certifies a nationwide plaintiff class for settlement purposes only, pursuant to Federal Rule of Civil Procedure 23(b)(2), in accordance with the terms of the Settlement Agreement (the "Settlement Class"). The Court preliminarily finds, based on the terms of the Settlement described in the Settlement Agreement and for settlement purposes only, that: (a) the Settlement Class is so numerous that joinder of all members is impracticable; (b) there are issues of law and fact that are typical and common to the Class, and that those issues predominate over individual questions; (c) a class action on behalf of the certified Class is superior to other available means of adjudicating this dispute; and (d) as set forth below, Plaintiff Nicotra and Class Counsel are adequate representatives of the Class. As provided for in the Settlement Agreement, if the Court does not grant final approval of the Settlement set forth in the Settlement Agreement, or if the Settlement set forth in the Settlement Agreement is terminated in accordance with its terms, then the Settlement Agreement, and the certification of the Settlement Class provided for herein, will be vacated and the Lawsuit shall proceed as though the Settlement Class had never been certified, without prejudice to any party's position on the issue of class certification or any other issue. Defendant retains all

rights to assert that the Action may not be certified as a class action, other than for settlement purposes.

8. **Class Definition**. All consumers nationwide who, on or after January 20, 2012, up to and including the Preliminary Certification Approval Order date, purchased the Products for personal, family, or household use. Excluded from the Settlement Class are officers and directors of Defendant, members of the immediate families of the officers and directors of Defendant, and their legal representatives, heirs, successors, or assigns and any entity in which they have or have had a controlling interest. "Products" means any of the Babo products referenced in the Lawsuit.

9. **Class Representatives and Class Counsel**. The Court appoints Jason Sultzer and Joseph Lipari of The Sultzer Law Group as counsel for the Settlement Class. Jennifer Nicotra is hereby appointed as Class Representative.

10. **Preliminary Settlement Approval**. The Court preliminarily approves the Settlement set forth in the Settlement Agreement as being within the range of possible approval as fair, reasonable, and adequate, within the meaning of Rule 23 and the Class Action Fairness Act of 2005, subject to final consideration at the Fairness Hearing provided for below.

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

12. **Fairness Hearing**. A Fairness Hearing shall be held on _____, ___, 2016, at __:__ _.m. at the United States District Court for the Eastern District of New York, in Courtroom 840, 100 Federal Plaza P.O. Box 9014 Central Islip, NY 11722-9014, to determine, among other things: whether the Lawsuit should be finally certified as a

nationwide class action for settlement purposes pursuant to Rule 23(b)(2); whether the Lawsuit should be dismissed with prejudice pursuant to the terms of the Settlement Agreement; whether Settlement Class Members should be bound by the release set forth in the Settlement Agreement; and whether the application of the named Plaintiff for an Incentive Award should be approved. Additional submissions of the Parties in support of the Settlement shall be filed with the Court no later than seven (7) days prior to the Fairness Hearing. Defendant's California counsel may appear at the Fairness Hearing via telephone conference to be arranged with the court.

13. **No Notice.** Because this Settlement Agreement contemplates certification of a class comprised of Settlement Class Members under FRCP 23(b)(2) only, notice is not required and will not be sent by the Parties.

14. **No Opt Out**. Because the Settlement Class is being certified as a mandatory class under FRCP 23(b)(2), Settlement Class Members shall not be permitted to opt out.

15. **Termination of Settlement**. This Order shall become null and void and shall not prejudice the rights of the Parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if: (a) the Settlement is not finally approved by the Court, or does not become final, pursuant to the terms of the Settlement Agreement; (b) the Settlement is terminated in accordance with the Settlement Agreement; or (c) the Settlement does not become effective as required by the terms of the Settlement Agreement for any other reason. In such event, the Settlement and Settlement Agreement shall become null and void and be of no further force and effect, and neither the Settlement Agreement nor the Court's orders, including this Order, relating to the Settlement shall be used or referred to for any purpose.

16. **Nationwide Stay and Preliminary Injunction**. Effective immediately, any actions or proceedings pending in any state or federal court in the United States involving Defendant's Products, except any matters necessary to implement, advance, or further approval of the Settlement Agreement or settlement process, are stayed pending the final Fairness Hearing and the issuance of a final order and judgment in this Action. The Court finds no bond is necessary for issuance of this injunction.

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

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

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

SO ORDERED:

DATED: _____, 2016

_____

Honorable Gary R. Brown

CLASS SETTLEMENT AGREEMENT AND RELEASE

This Class Settlement Agreement and Release is entered by and between Plaintiff Jennifer Nicotra ("Nicotra" or "Plaintiff"), individually and on behalf of the FRCP R. 23(b)(2) Settlement Class, and Defendant Babo Botanicals, LLC. ("Babo"), (collectively, Plaintiffs and Defendant are the "Parties"). The Parties intend for the Settlement Agreement to fully, finally, and forever resolve, discharge, and settle Nicotra's individual claims and the FRCP R. 23(b)(2) Settlement Class Released Claims, subject to the terms and conditions set forth herein.

RECITALS

a. On January 20, 2016, Nicotra, through her counsel, filed a putative class action complaint against Babo in the Eastern District of New York under case number 16-cv-00296. (the "Lawsuit"). In the Lawsuit, Plaintiff alleges consumers are misled by Babo's use of the claim "all natural" on the labels, advertising, and marketing of its personal care products which consist of shampoos, conditioners, sunscreens, and lotions for babies and adults. Plaintiff further alleges the presence of synthetic ingredients, specifically the preservatives sodium benzoate and potassium sorbate, cause the "all natural" claim to be deceptive and misleading and, as a result, Babo's products, labeled with an "all natural" statement on the products' principal display panel, do not meet consumers' expectations because of the presence of these synthetic preservatives.

b. After conducting discovery, participating in a settlement conference before Magistrate Judge Gary Brown, and engaging in extensive negotiations, the Parties now desire to reach a settlement.

c. Before entering into the Settlement Agreement, Plaintiff's counsel conducted an extensive and thorough examination, investigation, and evaluation of the relevant law, facts, and allegations to assess the merits of the claims, potential claims, and potential defenses in the Lawsuit. As part of that investigation, as well as through discovery,

Plaintiff's counsel obtained information from Babo, including information concerning marketing, labeling, product formulation, sales, and pricing.

d. This Settlement Agreement is the product of extensive, arms-length settlement negotiations and an exchange of information.

e. The Lawsuit has not been certified as a class action. Subject to the approval of the court, the Parties agree that a class may be certified under FRCP 23(b) (2) for the purpose of settlement only.

f. After thorough investigation and analysis, all counsel recognize the substantial risks the Parties would face if the action progressed. And, Class Counsel recognized the significant challenges that would be faced in attempting to certify the class under FRCP 23(b)(3).

g. The parties have evaluated the settlement set forth herein, and have determined that it is fair, reasonable, and adequate to resolve their grievances, and in the best interest of the settlement class.

h. Babo denies the material factual and legal allegations and any wrongdoing, and enters this Settlement Agreement only for the purpose of compromising the Lawsuit and avoiding the time and expense of litigation and appeals.

NOW, THEREFORE, in consideration of the recitals and mutual promises contained in this Settlement Agreement, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

2. **Definitions**:

a. "Agreement" or "Settlement" or "Settlement Agreement" means this Class Settlement Agreement and Release and its exhibits, attached hereto or incorporated herein, including any subsequent amendments agreed to by the Parties and any exhibits to such amendments

b. "Class Counsel" means The Sultzer Law Group, 85 Civic Center Plaza, Suite 104, Poughkeepsie, NY, 12601.

c. "Cosmetics" shall have the same meaning as that provided by the Federal Food, Drug, & Cosmetics Act as "articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body...for cleansing, beautifying, promoting attractiveness, or altering the appearance."

d. "Grace Period" shall mean a period of six (6) months immediately following the Court's entry of the Order and Final Judgment.

e. "FRCP R. 23(b)(2) Settlement Class" or "FRCP R. 23(b)(2) Settlement Class Member" means all consumers nationwide who, on or after January 20, 2012, up to and including the Preliminary Certification Order date, purchased any Babo Products for personal, family, or household use. The Settlement Class excludes any claims for personal injury. Also excluded from the Settlement Class are officers and directors of Defendant, members of the immediate families of the officers and directors of Defendant, and their legal representatives, heirs, successors, or assigns and any entity in which they have or have had a controlling interest.

f. "FRCP R. 23(b)(2) Settlement Class Released Claims" means those Claims that the Rule 23(b)(2) Class Members are releasing, as set forth in Section 5.

g. "Order and Final Judgment" means the final order to be entered by the Court approving the FRCP R. 23(b)(2) Settlement pursuant to the terms and conditions of this Agreement, dismissing the lawsuit with prejudice, releasing claims, and otherwise directing as the Court or the Parties deem necessary and appropriate to effectuate the terms and conditions of this Agreement.

h. "Preliminary Approval" means the order preliminarily approving the Class Settlement Agreement, preliminarily certifying the FRCP R. 23(b)(2) Settlement Class and issuing any necessary related orders.

i. The "Principal Display Panel" shall have the same meaning as that provided by the Labeling Regulations Applicable to Cosmetics, Title 21 of the Code of Federal Regulations § 701.10 as the portion of the Product's label most likely to be displayed, presented, shown, or examined under customary conditions of display for retail sale.

j. "Products" shall mean Cosmetics which Babo manufactures or causes to be manufactured for distribution and/or sale to consumers in the United States.

k. "Service Award" means the one-time payment to Nicotra for the time and resources she has put into representing the FRCP 23(b)(2) Settlement Class.

3. **Incorporation of Recitals**. The Recitals set forth above are expressly incorporated herein by reference as though fully set forth herein.

4. **FRCP R. 23(b)(2) Settlement Class.** For the purposes of settlement and the proceedings contemplated herein, the parties stipulate and agree that a nationwide FRCP R. 23(b)(2) Settlement Class should be certified. Class certification shall be for settlement purposes only and shall have no effect for any other purpose. The certification of the FRCP R. 23(b)(2) Settlement Class shall be binding only with respect to this Settlement Agreement. In the event that the final approval of the FRCP R. 23(b)(2) Settlement Class does not occur for any reason, this Action shall revert to its status that existed prior to the date of this Settlement Agreement.

5. **Injunctive Relief Requirements**. The FRCP R. 23(b)(2) Settlement Class relief is injunctive only, and:

- requires that immediately upon the expiration of the Grace Period, Babo shall not manufacture or cause to be manufactured any Product intended to be sold to

consumers within the United States labeled, represented, or marketed as "all natural" if the Products contain any synthetic ingredients or preservatives that are not derived from natural plant or mineral sources; and

- requires Babo immediately upon the Court's approval of the FRCP R. 23(b)(2) Settlement Class to remove the words "all natural" from the Principal Display Panel of any online images of its Products' labeling appearing on its website or any other internet website on which Babo sells its Products that contain any synthetic ingredients or preservatives that are not derived from natural plant or mineral sources; and
- immediately upon the Court's approval of the FRCP R. 23(b)(2) Settlement Class prohibits Babo from using "all natural" or "100% natural" in its advertising or marketing for its Products that contain any synthetic ingredients or preservatives that are not derived from natural plant or mineral sources.

Nothing in this Agreement shall prohibit or limit Babo's right or ability to use or permit others to use, in accordance with all applicable laws and regulations, its licenses, logos, taglines, product descriptors, or registered trademarks.

6. **Grace Period for Products Manufactured**. Liability for Products manufactured prior to the end of the Grace Period shall be subject to the release of liability pursuant to this Settlement, without regard to when such Products were, or are in the future, put into the stream of commerce. Nothing in this Agreement shall cause or be construed as requiring Babo to initiate a recall of Product already in the stream of commerce.

7. **Effect of Modifications**. Plaintiff and the FRCP R. 23(b)(2) Settlement Class agree that the agreed modifications to the labeling, marketing, and advertising of the Products are satisfactory to Plaintiff and the FRCP R. 23(b)(2) Settlement Class and alleviate each and every alleged deficiency with regard to the labeling, packaging, advertising, and marketing

of the Products and their ingredients set forth in or related to the Lawsuit, or otherwise.

8. **Expiration**. The injunctive relief requirements by which Babo agrees to abide as part of this Settlement Agreement and as described in Paragraph 5 shall expire on the date upon which there are changes to any applicable statute, regulation, pronouncement, guidance, or other law that Babo reasonably believes would require a modification to any of the product labeling in order to comply with the applicable statute, regulation, pronouncement, guidance, or other law, including but not limited to changes in U.S. Food and Drug Administration ("FDA"), Federal Trade Commission, U.S. Department of Agriculture, U.S. Environmental Protection Agency, and other state or federal governmental agencies' regulations, guidance, or pronouncements.

9. **No Opt Out**. Because the FRCP R. 23(b)(2) Settlement Class is being certified as a mandatory class under FRCP 23(b)(2), Settlement Class Members shall not be permitted to opt out.

10. **Motion for Preliminary Approval**. As soon as reasonably practicable after the signing of this Settlement Agreement, Plaintiff shall file with the Court a Motion for Preliminary Approval of the Proposed Settlement, Conditional Certification of the FRCP 23(b)(2) Class, and Appointment of Class Counsel.

11. **Class Definition**. For purposes of settlement only, and upon the express terms and conditions set forth in this Settlement Agreement, Named Plaintiff and Babo agree to seek certification of a mandatory, nationwide FRCP 23(b)(2) Settlement Class as follows: all consumers nationwide who, on or after January 20, 2012, up to and including the Preliminary Certification Order date, purchased the Products for personal, family, or household use. Also excluded from the Settlement Class are officers and directors of Defendant, members of the immediate families of the officers and directors of Defendant, and their legal representatives,

heirs, successors, or assigns and any entity in which they have or have had a controlling interest.

12. **California Civil Code § 1542 Waiver**. Plaintiff and the FRCP R. 23(b)(2) Settlement Class Members acknowledge they are aware they may hereafter discover facts in addition to or different from those they or Class Counsel now know or believe to be true with respect to the subject matter of this Lawsuit and the FRCP R. 23(b)(2) Settlement Class Released Claims, but it is their intention to, and they do upon the Effective Date of this Settlement Agreement, fully, finally, and forever settle and release any and all FRCP Rule 23(b)(2) Settlement Class Released Claims, without regard to the subsequent discovery or existence of such different additional facts. Nicotra and FRCP 23(b)(2) Settlement Class Members waive any and all rights and benefits afforded by California Civil Code § 1542, which provides as follows:

> 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.

Nicotra, the FRCP 23(b)(2) Settlement Class Members, and Class Counsel understand and acknowledge the significance of this waiver of California Civil Code Section 1542 and/or of any other applicable federal or state law relating to limitations on releases.

13. **Understanding as to Facts**. Plaintiff and FRCP R. 23(b)(2) Settlement Class Members fully understand that the facts upon which this Settlement Agreement is executed may hereafter be other than or different from the facts now believed to be true and nevertheless agree that this Settlement Agreement and the Release shall remain effective notwithstanding any such difference in facts. The Parties assume the risk that the facts or law may be other than the Parties believe. The Parties acknowledge and agree that this Settlement is given and accepted as part of a compromise and settlement of doubtful and disputed claims.

14. **Releases**. Upon the court's entry of the Fairness Hearing Order, Plaintiff and FRCP R. 23(b)(2) Settlement Class Members, this Settlement is a full, final, and binding resolution between Plaintiff and the FRCP R. 23(b)(2) Settlement Class Members and Babo.

a. Nicotra's Individual Release: In consideration of the promises and agreements contained herein, Plaintiff, on behalf of herself, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims, including, without limitation, all actions and causes of action, in law or equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent, that were brought or could have been brought against Babo and its affiliates, subsidiaries, and their respective officers, directors, representatives, shareholders, agents, employees, and sister and parent companies, licensors, licensees, retailers, franchisees, distributors, dealers, customers, owners, subsidiaries, and their respective officers, directors and predecessors or successors (collectively "Babo Releasees") with regard to or concerning Babo's and each of the Babo Releasees' alleged sale or advertising for sale of Products in the United States labeled as "all natural" or "100% natural," to the extent such Products were manufactured by or caused to be manufactured by Babo prior to or within the Grace Period. Except as provided herein, each party is to bear its own fees, expenses, and costs.

b. FRCP R. 23(b)(2) Settlement Class Release: In consideration of the promises and agreements contained herein, Plaintiff on behalf of herself and the FRCP R. 23(b)(2) Settlement Class Members will release and forever discharge the Babo Releasees from liability for any and all injunctive, declaratory, or non-monetary equitable claims arising out of or in any way relating to conduct that was or could have been alleged in this Lawsuit. Notwithstanding, the FRCP R. 23(b)(2) Settlement Class Members, other than Nicotra, do

not release Babo with respect to any claims for monetary relief arising from or related to its labeling, advertising, and or marketing of the Products in the United States.

15. **Attorneys' Fees and Service Payment**. Class counsel shall be awarded its reasonable attorneys' fees at an amount agreed upon by and between the named Parties. Ms. Nicotra will be awarded $1,500 as a service payment to be paid within seven days of the Court's entry of the Order and Final Judgment.

16. **Warranties**. Plaintiff and Class Counsel warrant and represent they have no intention of initiating any other claims or proceedings against Babo, and, except for the claims hereby settled, Plaintiff and Class Counsel warrant and represent they have no present knowledge and are not presently aware of any factual or legal basis for any such claims or proceedings.

a. The Parties and their respective counsel agree to use their best efforts and to cooperate fully with one another (i) in seeking approval of this FRCP R. 23(b)(2) Settlement Class; and in effectuating the full consummation of the settlement provided for herein.

b. Each counsel or other person executing this Settlement Agreement on behalf of any Party hereto warrants that such person has the authority to do so.

17. **Miscellaneous Provisions**. This Settlement Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument. Executed counterparts shall be deemed valid if delivered by mail, courier, electronically, or by facsimile.

a. This Settlement Agreement shall be binding upon and inure to the benefit of the settling Parties, their respective agents, attorneys, insurers, employees, representatives, officers, directors, partners, divisions, subsidiaries, affiliates, associates, assigns, heirs, successors in interest, and shareholders, and any trustee or other officer appointed in the event of a bankruptcy. The waiver by any Party of a breach of this Settlement Agreement by

any other Party shall not be deemed a waiver of any other breach of this Settlement Agreement.

b. No amendment, change, or modification of this Settlement Agreement or any part thereof shall be valid unless in writing, signed by all Parties and their counsel, and approved by the Court.

c. The Parties to this Settlement Agreement each represent to the other that they have received independent legal advice from attorneys of their own choosing with respect to the advisability of making the settlement provided for in this Settlement Agreement, and with respect to the advisability of executing this Settlement Agreement, that they have read this Settlement Agreement in its entirety and fully understand its contents, and that each is executing this Settlement Agreement as a free and voluntary act.

d. The Court shall retain jurisdiction with respect to the implementation and enforcement of the terms of the Settlement Agreement and the Parties to the Settlement Agreement submit to the jurisdiction of the Court for those purposes.

18. **Governing Law and Conflict Resolution**. This Settlement Agreement shall be construed in accordance with, and governed by, the laws of the State of New York. Venue for enforcement of this Settlement Agreement shall be in the federal or state courts located in New York.

IN WITNESS WHEREOF, the Parties hereto each have approved and executed this Settlement Agreement effective as of the last date signed below.

Signatures on the following page

I have read the foregoing agreement and understand its terms. The CLASS SETTLEMENT AGREEMENT AND RELEASE consists of eleven (11) pages inclusive of this signature page.

Jennifer Nicotra

Date: August 31, 2016

Babo Botanicals, LLC

By: Kate Solomon

Date: August __, 2016

DATED: August 31, 2016

The Sultzer Law Group

By: _____
Joseph Lipari, Esq.
Attorneys for Plaintiff Jennifer Nicotra

APPROVED AS TO FORM AND CONTENT:

DATED: August 30, 2016

Gilbert, Kelly, Crowley & Jennett LLP

By: _____
Angela L. Diesch, Esq.
Attorneys for Babo Botanicals, LLC

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Jennifer Nicotra

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Babo Botanicals, LLC

By: Kate Solomon

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By: _____
Joseph Lipari, Esq.
Attorneys for Plaintiff Jennifer Nicotra

APPROVED AS TO FORM AND CONTENT:

DATED: August 30, 2016

Gilbert, Kelly, Crowley & Jennett LLP

By: _____
Angela L. Diesch, Esq.
Attorneys for Babo Botanicals, LLC