UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AMY JOVEL and MICHAEL YEE, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. I-HEALTH, INC., a Delaware Corporation Defendant.	Case No.: 1:12-cv-05614-JG-MDG

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT WITH DEFENDANT I-HEALTH, INC.

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Plaintiffs Amy Jovel and Michael Yee (collectively, the "Plaintiffs") hereby submit this memorandum in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement with Defendant i-Health, Inc. ("Defendant" or "i-Health").

I. INTRODUCTION

This action challenges Defendant's sale and marketing practices of three brain health supplements with docosahexaenoic acid ("DHA"), including BrainStrong Toddler, BrainStrong Kids, and BrainStrong Adult products (collectively, the "BrainStrong Products"). Plaintiffs commenced this class action against Defendant on behalf of themselves and all others similarly situated, seeking economic and prospective relief for their purchase of BrainStrong Products. Specifically, Plaintiffs allege that Defendant misrepresented the efficacy of the BrainStrong Products by representing that the products support brain development and function, improve memory, support mental clarity, and protect against normal cognitive decline. Third Amended Complaint ("3rd Am. Comp.") ¶¶ 1-5 (ECF No. 80). Further, Plaintiffs allege that Defendant's representations regarding the BrainStrong Products are false and deceptive because well-conducted clinical studies demonstrate no causal relationship between intake of DHA algal oil and cognitive function. *Id.* ¶¶ 17–19. Plaintiffs further allege that Defendant's advertising claims are highly material to consumers who purchased BrainStrong Products and that they would not have purchased the BrainStrong Products had they known the truth. *Id.* ¶¶ 26–27. Plaintiffs sought relief for Defendant's breach of express warranty and violations of California's Unfair Competition Law, Bus. & Prof. Code § 17200, *et seq*., California's Consumers Legal Remedies Act, Civil Code § 1750, *et seq*., and New York General Business Law §§ 349 and 350.

After three years, three amended complaints, one removal, one venue transfer, and a motion to dismiss, the parties requested a stay in the action to focus their efforts on settlement negotiations that lasted approximately 19 months. Given the procedural posture, the proposed

settlement is fair, reasonable and adequate. *See infra* at § IV.A. As further explained below, *infra* at § III.A.2, and set forth more fully in the Stipulation of Settlement, the proposed settlement provides monetary refund to Class members who purchased one or more BrainStrong Products and essential prospective relief for future consumers. The parties submit for the Court's review a copy of a fully executed Stipulation of Settlement, which is attached as Exhibit 1 to the Declaration of Patricia N. Syverson in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Syverson Decl.").

In light of the monetary and prospective relief afforded to the Settlement Class under the Stipulation of Settlement and potential risks, costs and delay associated with a protracted litigation, Plaintiffs respectfully request that this Court enter an order: (1) preliminarily approving the Class Action Settlement (the "Settlement"); (2) approving the proposed Notice of Settlement and authorizing its distribution; (3) certifying the proposed settlement class (the "Settlement Class"); (4) designating Plaintiffs as class representatives; (5) designating Bonnett, Fairbourn, Friedman & Balint, P.C. ("Bonnett Fairbourn") and Faruqi & Faruqi, LLP ("Faruqi & Faruqi") as Class Counsel; and (6) scheduling a final approval hearing.

II. PROCEDURAL BACKGROUND

On March 16, 2012, Plaintiff Amy Jovel commenced a putative class action in the Superior Court of the State of California for the County of Los Angeles against Defendant in *Jovel v. i-Health, Inc.*, Case No. BC481048 (the "*Jovel* Action"), in connection with i-Health's marketing and sale of BrainStrong Products. The action asserted claims on behalf of a putative class of California consumers. On March 27, 2012, Plaintiff Michael Yee commenced a putative class action in the United States District Court for the Eastern District of New York against Defendant in *Yee v. i-Health, Inc.*, Case No. 1:12-cv-1504 (the "*Yee* Action"), in connection with i-Health's marketing and sale of BrainStrong Products. The action asserted claims on behalf of a

putative nationwide class. On May 30, 2012, Plaintiff Jovel filed an amended complaint to assert claims individually and on behalf of a putative nationwide class of consumers.

In June 2012, Defendant removed the *Jovel* Action from the Superior Court to the Central District of California. On July 31, 2012, the *Yee* Action was voluntarily dismissed, and counsel for the action formally associated with counsel in the *Jovel* Action on August 10, 2012. In August 2012, Defendant moved to transfer the *Jovel* Action to the Eastern District of New York pursuant to 28 U.S.C. § 1404(a). The Honorable Dean D. Pregerson granted Defendant's motion to transfer the case on November 8, 2012.

Defendant moved to dismiss the *Jovel* Action on several grounds, but this Court denied Defendant's Motion to Dismiss after oral argument by the parties. ECF No. 63. The parties engaged in discovery under Rule 26(f). Plaintiffs' counsel personally reviewed and analyzed a rolling production of 270,000 pages of documents from Defendant. Syverson Decl. ¶ 11. Following this discovery effort, Plaintiff Jovel amended her complaint to add: (1) Michael Yee in the *Yee* Action as a named plaintiff; and (2) a New York subclass. The third amended complaint against Defendant asserted claims for breach of express warranty, and violations of the California's Unfair Competition Law, Bus. & Prof. Code §17200, *et seq*., California's Consumers Legal Remedies Act, Civil Code §1750, *et seq*., New York General Business Law §§ 349 and 350, and various consumer protection laws of the several states. Defendant answered the complaint, denying liability.

On May 16, 2014, the parties requested a temporary stay so they could focus on settlement negotiations. This Court granted the request. In conjunction with settlement negotiations, the parties also engaged in informal discovery. Defendant produced class data, which included the number of potential Class members, the total sales volume of BrainStrong Products in the United States, and has also disclosed the average retail prices for the BrainStrong

products, Syverson Decl. ¶ 9, so that Plaintiffs' counsel could conduct their own damages analysis. Moreover, Plaintiffs' counsel also consulted with multiple experts and industry personnel, and assessed the efficacy of DHA present in BrainStrong Products. Syverson Decl. ¶ 11.

Following Plaintiffs' analysis of information and data, the parties engaged in extensive settlement negotiations. These discussions included, at the request of both parties, in-person and telephonic court-monitored settlement conferences before Magistrate Judge Joan M. Azrack and Magistrate Judge Marilyn D. Go, on November 20, 2014 and December 11, 2014 and on January 23, 2015, February 6, 2015 and March 13, 2015, respectively. In the subsequent months, the parties continued to work diligently to finalize the terms of the Settlement, which is the subject of the present motion.

III. THE PROPOSED SETTLEMENT

The parties reached agreement on the proposed settlement after three years of litigation, vigorous debate of legal and factual theories by counsel, guidance by two magistrate judges, and extensive arm's-length negotiations over a 19-month period. The Stipulation of Settlement provides real and tangible benefits to Plaintiffs, Settlement Class (defined below) and the general public. Subsequent to the filing of the Action, i-Health discontinued marketing and selling the BrainStrong Products. If the Stipulation of Settlement is approved, Plaintiffs and the Settlement Class will receive cash/monetary refunds. As an additional measure to protect consumers in the future, Defendant has agreed to refrain from selling BrainStrong Products unless any representations regarding the health benefits, performance, safety or efficacy of the Products are supported by competent and reliable scientific evidence.

A. Terms Of The Settlement

1. Proposed Nationwide Settlement Class

The proposed settlement class (the "Settlement Class") consists of all persons in the United States who purchased one or more BrainStrong Products on or after January 1, 2011 through the date this Court issues an order preliminarily approving the settlement pursuant to the Stipulation of Settlement. *See* Stipulation of Settlement ¶ 2.38. Excluded from the membership are Defendant and its past and present parents, subsidiaries, divisions, affiliates, assignors, predecessors, successors and assigns; the past and present partners, shareholders, managers, members, directors, officers, employees, agents, attorneys, insurers, accountants and representatives of any and all of the foregoing entities; any government entities; and persons who purchased BrainStrong Products for the purpose of resale. *See id.* ¶ 2.33.

2. Monetary Relief

If the Settlement is approved, Defendant shall offer a full monetary refund of the actual purchase price for any Settlement Class Members who purchased one or more BrainStrong Products and submits a valid Claim Form along with a Proof of Purchase that documents the actual price paid. *See id.* ¶¶ 3.1, 8.3.a. For Settlement Class Members who submit a valid Claim Form along with a Proof of Purchase that does not document the actual price paid, Defendant will offer a monetary refund of the average retail price for every BrainStrong Product purchased by the claimant. *See id.* ¶¶ 3.1, 8.3.b. For Settlement Class Members who submit a valid Claim Form under penalty of perjury, but without documentation of the purchase, Defendant will offer claimants a maximum value of $4.00 in cash value or $6.50 in voucher value. *See id.* ¶¶ 3.1, 8.3.c. There is no limit on the number of claims a Settlement Class Member can make as long as the claim is accompanied by a Proof of Purchase; claimants without Proof of Purchase may submit a maximum of one (1) claim, with a maximum of two (2) claims per household. *See id.*

3. Prospective Relief

Subsequent to the filing of the Action, i-Health discontinued marketing and selling the BrainStrong Products. Under the terms of the Settlement, for prospective relief, i-Health agrees that it shall refrain from selling the Products unless any representations regarding the health benefits, performance, safety, or efficacy of the Products are supported by Competent and Reliable Scientific Evidence. *See id.* ¶ 3.3.

4. Release Of Claims

In exchange for the foregoing relief, the Settlement Class Members who do not opt out of the Settlement will release Defendant from all claims asserted in this action and any related claims which could be asserted against Defendant in connection with the sale and marketing of BrainStrong Products during the relevant class period.

5. Notice, Claims Process And Settlement Administration

Defendant will cause the Settlement Notice, in the form approved by this Court, to be published once in *People* magazine and twice in *USA Today*, as well as 30 days of Internet banner notifications that will contain links to the Settlement Website. *See id.* ¶ 6.6.a. The proposed plan will also include sending direct notice through a combination of electronic mail and postal mail to individuals who have previously expressed an interest in one or more BrainStrong Products and have provided an email address. *See id.* ¶ 6.6.b. This notice provides information to the Settlement Class Members concerning, among other things: (1) terms of the Settlement; (2) instructions on submitting a claim; (3) objection and opt-out rights; and (4) date, time and location of the final approval hearing.

If the Settlement and notice plan is preliminarily approved, the Claims Administrator will establish and maintain a Settlement Website within 45 days of the preliminary approval to provide documents and information concerning the Settlement and the litigation, electronic or

printable version of the Claim Form, instructions for filing a claim, opting out of the Settlement, or objecting to the Settlement, deadlines related to the Settlement, and other information as agreed to by the Parties. *See id.* ¶ 6.6.c.

6. Costs, Fees And Representative Awards

Defendant has agreed to bear the costs of providing notice and administration of the Settlement, including processing claim forms and requests for exclusion ("Notice and Other Administrative Costs"). *See id.* ¶ 7.1. As a matter negotiated after the relief to the Settlement Class was agreed to, Class Counsel will petition the Court for fees and costs that do not exceed $250,000, the payment of which is separate from and in addition to the relief afforded to the Settlement Class Members. *See id.* ¶¶ 4.1, 4.2. The allowance or disallowance by the Court of the petition by Class Counsel for fees and costs will not be a basis for rescinding the Stipulation of Settlement. *See id.* ¶ 4.4. Similarly, Class Counsel will petition the Court for incentive fee payments to each Representative Plaintiff of the amount of one thousand dollars ($1,000), for service provided to the Settlement Class. *See id.* ¶ 5.1. The Stipulation of Settlement and Plaintiffs' support of the Settlement are not conditioned upon the Court's approval of the amounts listed in this paragraph. *See id.*

IV. ARGUMENT

A. The Proposed Settlement Is Fair, Reasonable And Adequate

This Court should approve the Stipulation of Settlement. The Settlement is the result of 19 months of arm's-length negotiations among the parties and their counsel, and informed by the exchange of significant information through the settlement process. The Settlement provides favorable monetary benefits to class members considering all of the risks associated with litigation, and with reasonable financial exposure to Defendant. Prior to reaching resolution, Class Counsel thoroughly investigated the case, and in doing so, gathered ample information to

assess the strengths and weaknesses of the parties' positions. Having weighed the likelihood of success and inherent risks and expense of litigation, Plaintiffs and counsel strongly believe that the proposed settlement is "fair, reasonable, and adequate" as required by Fed. R. Civ. P. 23(e)(2).

1. Standard For Preliminary Approval Of Class Action Settlement

Courts encourage, and public policy favors, compromise and settlement of class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (emphasizing the "strong judicial policy in favor of settlements, particularly in the class action context") (internal quotation marks omitted); *see also* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("Newberg") § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). It is within the court's discretion to approve a proposed class action settlement upon determination that the proposed settlement is fair, reasonable and adequate. *McReynolds v. Richards-Cantave*, 588 F.3d 790, 800 (2d Cir. 2009). "The central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable and adequate. There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation[.]" *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982).

Preliminary approval is the first step in a settlement process. It may be granted if the court finds there is "'probable cause to submit the [proposed settlement] to class members and hold a full-scale hearing as to its fairness.'" *Waterford Twp. Police & Fire Ret. Sys. v. Smithtown Bancorp, Inc.*, No. 10-CV-864 (SLT) (RER), 2015 U.S. Dist. LEXIS 73276, at *17 (E.D.N.Y. Apr. 17, 2015) (quoting *In re Traffic Exec. Ass'n E. R.Rs.*, 627 F.2d 631, 634 (2d Cir.

1980)).[1] At this stage, the court need only conduct an "'initial evaluation' of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties." *Id.*; *see also* Newberg § 11.25.

Fairness is assessed by an examination of the terms of the proposed settlement and the negotiating process leading to the settlement. *Garcia v. Pancho Villa's of Huntington Vill., Inc.*, No. 09-CV-486 (ETB), 2012 U.S. Dist. LEXIS 144446, at *6 (E.D.N.Y. Oct. 4, 2012). "A 'presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Wal-Mart Stores*, 396 F.3d at 116 (quoting Manual for Complex Litigation (Third) § 30.42 (1995)). Where a settlement is achieved through arm's-length negotiations by experienced counsel and there is no evidence of fraud or collusion, "[courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 U.S. Dist. LEXIS 57918, at *12 (S.D.N.Y. July 27, 2007).

When evaluating the terms of a proposed class settlement, courts in this Circuit are guided by the factors enumerated in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), *abrogated on other grounds*. These 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 defendant to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation[.]

[1] *See also Danieli v. IBM Corp.*, No. 08-3688 (SHS), 2009 U.S. Dist. LEXIS 106938, at *12-13 (S.D.N.Y. Nov. 16, 2009) (granting preliminary approval where settlement "has no obvious defects" and proposed allocation plan is "rationally related to the relative strengths and weaknesses of the respective claims asserted.").

Id. at 463 (citations omitted).

2. The Settlement Is Procedurally Fair And Not A Product Of Collusion

The settlement was the product of intense arm's-length negotiations conducted by experienced counsel, knowledgeable in complex, consumer class actions and lasting well over one year. *See In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000) (a settlement will enjoy a presumption of fairness if the court finds that it is the product of "arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation"), *aff'd sub nom., D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). Plaintiffs' counsel conducted a thorough examination and investigation of the factual and legal aspects of this action. Prior to and during the course of negotiation, Plaintiffs served discovery and requested and obtained substantial documents from Defendant. In addition, Plaintiffs requested and were provided with a significant set of class data. Plaintiffs' counsel personally reviewed and analyzed a rolling production of 270,000 pages of documents and class data produced by Defendant, consulted with experts and industry personnel, and assessed the efficacy of DHA on brain health.

The parties engaged in good-faith negotiations, which included in-person and telephonic court-monitored settlement conferences before Magistrate Judge Azrack and Magistrate Judge Go between November 20, 2014 and March 13, 2015. The parties reached a tentative settlement under the guidance of both magistrate judges. During and subsequent to these conferences, the parties engaged in protracted, hard-fought negotiations to reach a final agreement on the terms of the settlement. *See In re Sinus Buster Prods. Consumer Litig.*, No. 12-CV-2429 (ADS)(AKT), 2014 U.S. Dist. LEXIS 158415, at *19 (E.D.N.Y. Nov. 10, 2014) (finding that the settlement negotiations satisfied procedural fairness because of: (i) the length of the negotiation; (ii) exchange of significant information between the parties; and (iii) negotiation efforts were

assisted by the magistrate judge).

Moreover, Plaintiffs' counsel involved in the negotiations have considerable experience in handling consumer class actions and are clearly capable of assessing the strengths and weaknesses of their respective positions. *See infra* at § IV.D, Exs. 2 and 3 to Syverson Decl. Bonnett Fairbourn has successfully litigated more than 100 class action lawsuits and recovered substantial monetary benefits for Class members. Syverson Decl. ¶ 19. Faruqi & Faruqi and Mr. Antonio Vozzolo, a former partner at the firm, regularly engage in major complex litigation and have extensive experience in consumer class actions that are similar in size, scope and complexity to the present case. *Id.* The combined experience of the firms and attorneys involved demonstrate that the Settlement Class Members were well-represented at the bargaining table.

3. The Criteria For Settlement Approval Are Satisfied

While it is "not necessary to exhaustively consider the [*Grinnell*] factors applicable to final approval," *In re Platinum & Palladium Commodities Litig.*, No. 10cv3617, 2014 U.S. Dist. LEXIS 96457, at *38 (S.D.N.Y. July 15, 2014), all of the factors heavily favor granting preliminary approval.

a. Litigation Through Trial Would Be Complex, Expensive And Lengthy

The Stipulation of Settlement provides favorable monetary and injunctive benefits to the Settlement Class and future consumers while avoiding the significant expenses and delays associated with litigation. Indeed, "[m]ost class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 174.

While there has been significant formal and informal discovery, additional discovery would be required before the case would be ready for trial; this includes depositions of named

plaintiffs, Defendant, Defendant's personnel, personnel from retailers, and expert witnesses for both sides. Furthermore, Defendant would vigorously oppose class certification and seek summary judgment on the merits if a class were certified. Assuming the case proceeded to trial, preparing and putting on evidence with respect to various state consumer protection statutes would also be time consuming and costly. Absent an approved settlement, the parties will be forced to continue a fact-intensive litigation, which will burden the court and result in significant expenses to all parties involved. Any judgment will likely be appealed, thus elevating the costs and extending the duration of the litigation. By contrast, the Stipulation of Settlement provides an expeditious resolution of this action by offering prompt, reasonable payments to the Settlement Class and important prospective relief to protect the Class and future consumers of Defendant's products. Accordingly, this factor weighs in favor of preliminary approval of the Stipulation of Settlement.

b. Class' Reaction Will Likely Be Positive

At this stage, it is not possible to conclusively measure the reaction of the Settlement Class because Notice of Settlement has yet to be issued to the Class. However, the Stipulation of Settlement proposes to offer essential prospective relief and favorable monetary benefits that include: (1) full monetary refund of the actual purchase price; (2) monetary refund of the average retail price; or (3) maximum of $4.00 in cash or $6.50 in voucher value. Moreover, the fact that Plaintiffs and their experienced counsel support the Stipulation of Settlement is a strong indication that the Settlement Class will likely view the terms of the Stipulation of Settlement positively.

c. Discovery Has Advanced To A Stage Where Parties Can Responsibly Resolve The Case

This present action commenced in 2012 and the proposed settlement was reached after Plaintiffs' counsel conducted a thorough investigation and evaluated the claims, and after extensive negotiations between the parties. Extensive pre-trial discovery is not a prerequisite to

approval of a settlement. Instead, discovery efforts by the parties must: (1) produce sufficient facts to enable the court to make an intelligible appraisal of the Settlement; and (2) aggressively uncover valuable facts key to the merits of the action. *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 263 (S.D.N.Y. 1998).

The legal issues have been thoroughly vetted through Defendant's aggressive motion to dismiss. Moreover, the parties have engaged in substantial formal and informal discovery. Plaintiffs' counsel have since reviewed approximately 270,000 pages of documents produced by Defendant, and conducted a thorough investigation of Plaintiffs' claims as well as extensive research regarding the efficacy of ingredients present in BrainStrong Products, including consulting with an expert. Defendant's counsel has engaged in similar discovery efforts as well. Responses to written discovery requests, including verified admissions and interrogatories, were served in accordance with the schedule set by this Court.

Moreover, the issue of Defendant's liability does not turn on any documents or information uniquely in the possession and control of Defendant. To the contrary, the essential inquiry here is whether Defendant is able to deliver promised health benefits. Efficacy of DHA is publicly available and not uniquely in Defendant's possession. Further, Plaintiffs' counsel have present and past experience in DHA related litigation, and they have substantial understanding of the issues presented by this case. Thus, Plaintiffs' counsel are well positioned to evaluate the scientific evidence concerning the type of health claims on the BrainStrong Products' labels.

Efforts by both parties demonstrate that they have a thorough understanding of the strengths and weaknesses of their respective positions, and are sufficiently apprised of the pertinent facts of this action to make a conscientious analysis of the proposed settlement.

d. Plaintiffs Would Face Real Risks If Case Proceeded

Despite the relative strength of Plaintiffs' case, Plaintiffs face substantial hurdles as to whether continued litigation will result in the full set of relief that Plaintiffs sought. Indeed, "[l]itigation inherently involves risks." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997). In Defendant's answer to Plaintiffs' third amended complaint, Defendant raised various legal defenses to which Plaintiffs' claim could be subject to, including, but not limited to: (1) failure to state a claim; (2) preemption by the Food, Drug and Cosmetic Act ("FDCA"); (3) primary jurisdiction of the Food & Drug Administration ("FDA"); and (4) statute of limitations. Notwithstanding Plaintiffs' confidence in the strength of their position, Plaintiffs recognize that factual difficulties or legal defenses could pose a substantial risk of non-recovery.

Plaintiffs must establish that Defendant's representations suggesting that the BrainStrong Products support brain health and function are false, misleading and deceptive and/or that members of the public are likely to be deceived by Defendant's advertising and labeling. This is an expensive and challenging task. While Plaintiffs are confident that their expert can prove that the BrainStrong Products do not deliver the promised health benefits, there is always the risk that Plaintiffs could lose. The task is further complicated by the fact that some of the BrainStrong Products contain ingredients other than DHA algal oil, and Plaintiffs' expert must analyze these ingredients to determine whether they are capable of delivering the promised health benefits. Due to the large placebo effect, Defendant will likely argue that there are numerous satisfied customers, and that the effectiveness of dietary supplements varies based on a host of individual issues unique to the particular consumer, such as health condition and length and manner of use. While Plaintiffs believe that they would prevail over this argument, it certainly poses a risk.

Apart from the factual uncertainty regarding proof of falsity in Defendant's representation, there is also uncertainty in establishing damages. Unlike the anticipated claims

process in the proposed settlement, Plaintiffs must meet certain burdens in order to prove damages at trial. By contrast, the Stipulation of Settlement avoids the risks inherent in protracted litigation, and provides a prompt and favorable resolution to the Class.

e. Establishing A Class And Maintaining A Class Action Through Trial Would Be Challenging

Plaintiffs are confident in their ability to maintain this action as a class through trial. Nonetheless, they recognize that they face substantial hurdles in certifying a class. Defendant will likely contend that individual reliance, materiality, causation and damages preclude class certification. In addition, Defendant would have raised issues pertaining to the ascertainability of the Settlement Class in light of the fact that many consumers do not retain receipts for the products they have purchased. Further, class determination will require extensive and expensive briefing by both parties, the outcome of which is by no means assured. Should the class be certified, Defendant will likely challenge certification or seek permission to file an interlocutory appeal under Fed. R. Civ. P. 23(f). *See Park v. Thomson Corp.*, No. 05 Civ. 2931 (WHP), 2008 U.S. Dist. LEXIS 84551, at *9 (S.D.N.Y. Oct. 22, 2008); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) ("A district court retains the authority to decertify or modify a class at any

time during the litigation if it proves to be unmanageable."). The proposed settlement eliminates these risks, expenses and delays.

f. Defendant May Not Be Able To Withstand A Substantially Greater Judgment

The seventh *Grinnell* factor considers whether a defendant could withstand a judgment substantially higher than the proposed settlement amount if the case were to proceed to trial. *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 338 (S.D.N.Y. 2005). While Defendant has the ability to meet its obligations under the Stipulation of Settlement, there is no certainty that

Defendant could bear the enormously large compensatory damages award that could be assessed if the case was to proceed through trial and survive challenge on appeal. Even if Defendant could withstand a greater judgment, its ability to do so, "standing alone, does not suggest that the settlement is unfair." *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178 n.9.

g. The Settlement Amount Is Reasonable In Light Of The Possible Recovery And Attendant Risks Of Litigation

The adequacy of a settlement amount offered should be judged "in light of the strengths and weaknesses of the plaintiff[s'] case." *In re Med. X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 U.S. Dist. LEXIS 14888, at *15 (E.D.N.Y. Aug. 7, 1998) (internal quotation marks omitted). That the settlement amount is less than the maximum potential recovery is not a barrier to approval. *See Grinnell*, 495 F.2d at 455 n.2 ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.").[2] Indeed, judging whether a settlement is reasonable "is not susceptible of a mathematical equation yielding a particularized sum." *In re Michael Milken and Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993).

Although Plaintiffs believe their claims have merit, they recognize that they face significant legal, factual, and procedural obstacles to recovery. Defendant continues to vigorously deny any wrongdoing and denies any liability to the Plaintiffs or any members of the Class. Although Plaintiffs have confidence in the claims and ability to certify a class action, a favorable outcome is not assured. *See, e.g., In re POM Wonderful LLC Mktg. and Sales Practices Litig.*, No. 10-02199, 2014 U.S. Dist. LEXIS 40415 (C.D. Cal. Mar. 25, 2014) (decertifying nationwide class). Even if judgment were entered against Defendant, any appeal in

[2] *See also Cagan v. Anchor Sav. Bank FSB*, No. CV-88-3024, 1990 U.S. Dist. LEXIS 11450, at *34 (E.D.N.Y. May 22, 1990) (approving $2.3 million class settlement where maximum potential recovery was approximately $121 million).

the Second Circuit would likely take years to resolve. By settling, Plaintiffs and the Settlement Class avoid these risks, as well as the delays and risks of a lengthy trial and appellate process. The Settlement will provide Settlement Class members with monetary benefits that are immediate, certain and substantial, and avoid the obstacles that might have prevented them from obtaining relief.

Here, each Class member may receive either: (1) full monetary refund of the actual purchase price; (2) monetary refund of the average retail price; or (3) a maximum of $4.00 in cash or $6.50 in voucher value, depending upon whether documentation of the purchase price is provided. Stipulation of Settlement ¶¶ 3.1, 8.3.a. In addition, Defendant has agreed to pay the costs of notice and administration and has agreed to pay reasonable counsel fees and costs for Class Counsel, up to a maximum of $250,000. *See id.* ¶ 4.1. The payment by Defendant of attorneys' fees and expenses is separate from and in addition to the relief afforded the Class Members. *See id.* ¶ 4.2. Given the potential of a non-recovery, the Stipulation of Settlement provides a favorable resolution of this action, including sizable refunds to consumers with and without documentation of their purchases, important prospective relief and effective notice to the Class that falls well within the range that courts have traditionally found to be fair and adequate under the law.

Moreover, the fact that the Stipulation of Settlement provides for a prompt payment to claimants favors approval of the settlement. *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-11814, 2004 U.S. Dist. LEXIS 8608, at *16 (S.D.N.Y. May 14, 2004) ("[T]he proposed Settlement provides for payment to Class members now, not some speculative payment of a hypothetically larger amount years down the road . . . Given the obstacles and uncertainties attendant to this complex litigation, the proposed Settlement is within the range of reasonableness, and is unquestionably better than the other likely possibility – little or no

recovery.") (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985), *modified on other grounds*, 818 F.2d 179 (2d Cir. 1987) ("[M]uch of the value of a settlement lies in the ability to make funds available promptly.")). Therefore, these factors militate in favor of preliminarily approving the Settlement.

B. Provisional Certification Of The Settlement Class Is Appropriate

Under Federal Rule 23(c)(1), "the court can make a conditional determination of whether an action should be maintained as a class action, subject to final approval at a later date." *Ayzelman v. Statewide Credit Servs. Corp.*, 238 F.R.D. 358, 362 (E.D.N.Y. 2006) (internal quotation marks omitted). "Certification of a class for settlement purposes only is permissible and appropriate[.]" *Reade–Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 31 (E.D.N.Y. 2006). Where a class is proposed in connection with a motion for preliminary approval, "a court must ensure that the requirements of Rule 23(a) and (b) have been met." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006). Courts employ a "'liberal rather than restrictive construction'" of Rule 23, "'adopt[ing] a standard of flexibility'" in deciding certification. *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (quoting *Sharif ex rel. Salahuddin v. N.Y. State Educ. Dep't*, 127 F.R.D. 84, 87 (S.D.N.Y.1989)).

Because the proposed Settlement Class satisfies requirements under Rule 23(a) and at least one of the subsections of Rule 23(b), and Defendant consents to conditional certification of a class action for settlement purposes only, Plaintiffs respectfully request that this Court provisionally certify the nationwide Settlement Class defined above.

1. Rule 23(a) Is Met

a. Joinder Of All Members Is Impracticable

Numerosity is met if "the class is so numerous that joinder of all members is

impracticable[.]"[3] Fed. R. Civ. P. 23(a)(1). Here, the Settlement Class includes potentially thousands of consumers nationwide who purchased the BrainStrong Products. Given the number and geographic dispersion of potential Class members, joinder would be impracticable. Accordingly, the requirement is met.

b. There Are Questions Of Law Or Fact Common To The Class

To be certified as a class action, there must be "questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). The requirement of commonality does not require identical claims and arguments. "To satisfy commonality, 'even a single common question will do.'" *In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 1775, No. 06-MD-1175 (JG)(VVP), 2014 U.S. Dist. LEXIS 180914, at *178 (E.D.N.Y. Oct. 15, 2014) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011)).

Here, the criterion is satisfied because there are numerous issues of fact and law common to the Settlement Class, including: (a) whether Defendant's representations regarding the BrainStrong Products are false; (b) whether consumers have been misled and deceived by the advertisements and labels; (c) whether Defendant's conduct violates various state consumer protection laws; (d) whether Plaintiffs and other Class members have been injured and the proper measure of their losses as a result of those injuries; and (e) whether Plaintiffs and Class members are entitled to injunctive, declaratory or other equitable relief in connection with Defendant's alleged unlawful conduct.

c. Plaintiffs' Claims Are Typical Of The Claims Of The Class

Rule 23(a)(3) is satisfied when "'each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.'" *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (quoting

[3] *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("[N]umerosity is presumed at a level of 40 members[.]").

Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993)). "When the same unlawful conduct was directed at both the named plaintiff and the class to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims." *Labbate-D'Alauro v. GC Servs. Ltd. P'ship*, 168 F.R.D. 451, 456–57 (E.D.N.Y. 1996) (internal quotation marks omitted).

Here, Plaintiffs allege that Defendant made false and misleading representations concerning BrainStrong Products' ability to support brain health. 3rd Am. Comp. ¶¶ 1, 2**.** Plaintiffs allege that these material misrepresentations caused them injury because they would not have purchased BrainStrong Products had they known that the products could not deliver the promised benefits. *Id.* ¶¶ 26, 27. Plaintiffs allege that they suffered damages in the amount of the purchase price paid for BrainStrong Products because they did not receive any of the represented benefits. *Id.* Defendant's conduct caused similar injury to members of the Settlement Class. All of Defendant's BrainStrong Products were advertised as supporting brain health and function and had labels stating that the products provided these benefits. *Id.* ¶ 2, Ex. A. Moreover, Defendant's alleged misrepresentations regarding the BrainStrong Products would be material to any reasonable consumer. *See Bildstein v. MasterCard Int'l Inc.*, 329 F. Supp. 2d 410, 414 (S.D.N.Y. 2004) ("[A] material claim is one that involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.") (internal quotation marks omitted). Indeed, the predominant reason for why a consumer would purchase and/or consume a BrainStrong Product is to obtain cognitive benefits represented by Defendant to be present in its products. Because Plaintiffs will seek to prove that they were harmed by the same overall course of conduct and in the same way as the Class, their claims are typical of the class.

d. Plaintiffs Will Fairly And Adequately Protect Class Interests

The final prerequisite mandates that "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The requirement is met if the plaintiff: (1) is represented by counsel who is "qualified, experienced and able to conduct the litigation[;]" and (2) does not possess interests "antagonistic to the interest of other members of the class[.]" *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000).

Plaintiffs' interests are consistent with, and not antagonistic to, the interests of other Settlement Class members. Here, Plaintiffs' claims are co-extensive with those of the Settlement Class. Plaintiffs and each Class member were injured in the same manner, and Plaintiffs assert the same legal claims as those of the Class. Thus, they share a common interest in establishing liability and securing maximum possible recovery. Plaintiffs have taken their obligations to the Settlement Class seriously. They engaged in the prosecution of this matter, have consistently conferred with their counsel, reviewed the various complaints, and consulted with counsel regarding the propriety of the settlement. Syverson Decl. ¶ 13.

Moreover, Plaintiffs' counsel has extensive experience in handling class actions and the types of claims asserted in this action. *Id.* ¶ 19. As noted above, Plaintiffs' counsel has considerable experience in consumer class action and their combined experience demonstrates that the Settlement Class Members were well-represented.

e. Class Members Are Readily Identifiable And Ascertainable.

Rule 23 also contains an "implicit requirement that the class be precise and ascertainable." *Guzman v. VLM, Inc.*, No. 07-CV-1126 (JG) (RER), 2008 U.S. Dist. LEXIS 15821, at *13 (E.D.N.Y. Mar. 2, 2008) (internal quotation marks omitted). Here, the Class is readily identifiable because it consists of all persons in the United States who purchased for personal use a BrainStrong Product between January 1, 2011 and the Preliminary Approval Date.

All Class members are able to determine their membership in the Class. The Settlement Class is thus precise and readily identifiable.

2. The Settlement Class Satisfies Rule 23(b)(3).

To qualify for certification under Rule 23(b)(3), the class must meet two criteria. First, common questions of law or fact must "predominate" over any purely individual questions. Fed. R. Civ. P. 23(b)(3). Second, the class must demonstrate that class treatment is superior to other available methods for the fair and efficient adjudication of the controversy. *Id*. In the context of a settlement class, the issue of manageability "drop[s] out of the predominance analysis because the proposal is that there be no trial." *In re Am. Int'l Grp. Sec. Litig*., 689 F.3d 229, 240 (2d Cir. 2012) (internal quotation marks omitted). Instead, the court must take care to determine the legal or factual questions in each class member's case "are sufficiently similar to yield a cohesive class." *Id*.

a. Common Questions Predominate Over Individual Issues

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). To meet this requirement, "a plaintiff must show that those issues in the proposed action that are subject to generalized proof outweigh those issues that are subject to individualized proof." *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 226 (2d Cir. 2006).

Predominance is satisfied here, where the pertinent issues center on whether Defendant's representations concerning BrainStrong Products are false, misleading and likely to deceive the public. Every Class member's claim may be proven by the same set of facts regarding the efficacy of the BrainStrong Products. Indeed, the resolution of whether DHA algal oil can, as a matter of scientific fact, deliver the promised health benefits is integral each class members' case and can be achieved through generalized proof. Therefore, the predominance requirement is

met.

b. A Class Action Is Superior To Alternative Methods of Adjudication

For certification under Rule 23(b)(3), the court must determine that class treatment is superior to other available methods of adjudication. *See* Fed. R. Civ. P. 23(b)(3). Class treatment is appropriate where, as here, "the proposed class members are sufficiently numerous and seem to possess relatively small claims unworthy of individual adjudication due to the amount at issue [and] there is reason to believe that class members may lack familiarity with the legal system, discouraging them from pursuing individual claims." *Jankowski v. Castaldi*, No. 01-cv-0164 (SJF) (KAM), 2006 U.S. Dist. LEXIS 4237, at *13 (E.D.N.Y. Jan. 13, 2006) (internal quotation marks omitted).

Class treatment is not merely superior, but is the only manner in which to ensure fair and efficient adjudication of this action. Given that each Class member's claim, individually, is of a relatively low value, individual Class members will likely have little incentive to pursue his/her claim on an individual basis. A class action will allow individual class members to bring together claims that would be economically infeasible to litigate otherwise. Class treatment in the settlement context is also superior to individual suits or piecemeal litigation because it facilitates favorable resolution of all Settlement Class members' claims and conserves scarce judicial resources. Therefore, a class action is a superior method of adjudicating this case.

C. The Proposed Class Notice And Notice Plan Are Reasonable

Rule 23(e)(1) requires the court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). The best notice practicable under the circumstances includes individual notice to all members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). The proposed forms of notices should "fairly apprise the prospective members of the class of the pendency of the class action,

the terms of the proposed settlement, and the options that are open to them in connection with the proceedings, including the option to withdraw from the settlement." *Reade-Alvarez*, 237 F.R.D. at 34.

The proposed forms of notices, attached as Exhibits B and C to the Stipulation of Settlement and discussed at Section 6 of the Stipulation of Settlement, satisfy the criteria in Rule 23(c)(2)(B). The notice contains all the necessary information, including: (1) a summary of the action and the claims asserted; (2) a plain definition of the Settlement Class; (3) a clear and concise description of the terms of the settlement; (4) information regarding the claim criteria and instructions on how to make a claim; (5) disclosure of the release of claims by Class members who do not opt out of the settlement; (6) an explanation of opt-out rights and information on how to do so; (7) instructions on how and when to object to the Settlement; (8) the date, time and location of the final approval hearing; (9) the address for the Settlement Website; and (10) the names and contact information for Class Counsel representing the Settlement Class.

Due to the nature of the consumer product at issue, a majority of individual Class members cannot be identified through reasonable effort. Under the Stipulation of Settlement, Defendant will cause the Settlement Notice to be published once in *People* magazine and twice in *USA Today* to inform Class members of their rights under the terms of the agreement. Defendant will also post Internet banner advertising to direct Class members to the Settlement Website for a period of 30 days. Indeed, "when class members' names and addresses may not be ascertained by reasonable effort, publication notice has been deemed adequate to satisfy due process." *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 107 (S.D.N.Y. 2007).[4] In

[4] *See also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987) (holding that individual notice is not necessary for each of 2.4 million Vietnam veterans potentially exposed to Agent Orange where "no easily accessible list of veterans" existed, and "such a comprehensive list could [not] reasonably have been compiled.").

addition, Defendant will cause the Settlement Notice to be sent to through a combination of electronic and postal mail to persons identified as a potential class member who has previously expressed an interest in one or more BrainStrong Products during the Class Period and provided their email address. Where a class member's email address is known, the Settlement Notice will be sent by electronic mail. In the event an email notice is bounced back as undeliverable, the Settlement Notice will be sent by postal mail, if possible. This proposed form of direct notice has been approved in *Ebin v. Kangadis Food Inc*., Case No. 13-2311 (S.D.N.Y. Feb. 24, 2014) at ECF No. 96, and *Browning v. Yahoo! Inc*., No. C04-01463 HRL, 2006 U.S. Dist. LEXIS 100686, at *24 (N.D. Cal. Dec. 27, 2006).

The proposed notices are clear and straight forward. Further, the notice plan, designed by a respective expert on the means of providing effective class notice, is calibrated to provide broad and effective dissemination of the notice to the consumers of the BrainStrong Products. Syverson Decl. ¶ 17. Therefore, the content of the notices and comprehensive notice plan satisfies the requirement under Rule 23.

D. Plaintiffs' Counsel Should Be Appointed As Class Counsel

Rule 23(g) requires a court to appoint class counsel when it certifies a class. In appointing class counsel, the court considers several factors: (1) work done by counsel in identification or investigation of the claims in the action; (2) counsel's experience; (3) counsel's knowledge of the applicable law; and (4) counsel's resources committed to representing the proposed class. Fed. R. Civ. P. 23(g)(1)(A).[5] All of these factors militate in favor of appointing Bonnett Fairbourn and Faruqi & Faruqi as Class Counsel.

Both firms spent a significant amount of time identifying and investigating Plaintiffs'

[5] *See also deMunecas v. Bold Food, LLC*, No. 09 Civ. 00440 (DAB), 2010 U.S. Dist. LEXIS 38229, at *8 (S.D.N.Y. Apr. 19, 2010) ("The work that [plaintiffs' counsel] has performed both in litigating and settling this case demonstrates their commitment to the class and to representing the class's interests.").

claims before filing the instant motion. Syverson Decl. ¶¶ 11, 12. Thereafter, the parties engaged in discovery and Plaintiffs' counsel has reviewed more than 270,000 pages of documents. *See supra* at §§ IV.A.2 and IV.A.3.c. Counsel has extensive experience in class actions, particularly those involving alleged consumer frauds, as demonstrated by the numerous times the firms and their attorneys have been appointed Class Counsel. Syverson Decl. ¶ 19, Exs. 2 and 3. This experience has provided counsel with extensive knowledge on the applicable law. Finally, both firms are established practices that are currently litigating dozens of cases in state and federal courts throughout the nation, and they have more than sufficient resources to represent the Class. *See id.*

For the purposes of 23(g), the Court should appoint Plaintiffs' counsel to act as Class Counsel for this Settlement Class.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant the relief requested herein. A Proposed Order granting preliminary approval, certifying the Settlement Class, designating Plaintiffs as Class Representatives, appointing Class Counsel, approving the forms of notices, and setting deadlines related to class notice and final approval, is submitted herewith.

Dated: January 29, 2016

Respectfully submitted,

BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2016, I caused true and correct copies of the foregoing to be filed with the Clerk of Court using the CM/ECF system and served via the CM/ECF system upon all counsel of record listed on the Mailing Information for Case No. 1:12-cv-05614-JG-JMA.

DATED: January 29, 2016

/s/ Patricia N. Syverson
Patricia N. Syverson