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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JONATHAN RETTA, KIRSTEN  
SCHOFIELD, and JESSICA MANIRE  
on Behalf of Themselves and all Others  
Similarly Situated,

Plaintiffs,

v.

MILLENNIUM PRODUCTS, INC., and  
WHOLE FOODS MARKET, INC.,

Defendants.

Case No. 2:15-cv-01801-PSG-AJW

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT, PROVISIONAL  
CERTIFICATION OF  
NATIONWIDE SETTLEMENT  
CLASS, AND APPROVAL OF  
PROCEDURE FOR AND FORM OF  
NOTICE**

Date: January 30, 2017  
Time: 1:30 p.m.  
Courtroom 880

Judge: Hon. Philip S. Gutierrez

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on January 30, 2017 at 1:30 p.m. or as  
3 soon thereafter as counsel may be heard by the above-captioned Court, located at  
4 255 East Temple Street, Los Angeles, California 90012 in the courtroom of Judge  
5 Philip S. Gutierrez, Plaintiffs Jonathan Retta, Kirsten Schofield, and Jessica Manire  
6 (“Plaintiffs”), by and through their undersigned counsel of record, will move,  
7 pursuant to Fed. R. Civ. P. 23(e), for the Court to: (i) grant preliminary approval of  
8 the proposed Stipulation of Class Action Settlement (“Settlement Agreement”), (ii)  
9 provisionally certify the Class for the purposes of preliminary approval, designate  
10 Plaintiffs as the Class Representatives, and appoint Bursor & Fisher, P.A. as Class  
11 Counsel for the Class, (iii) establish procedures for giving notice to members of the  
12 Class, (iv) approve forms of notice to Class Members, (v) mandate procedures and  
13 deadlines for exclusion requests and objections, and (vi) set a date, time and place  
14 for a final approval hearing.

15 This motion is made on the grounds that preliminary approval of the proposed  
16 class action settlement is proper, given that each requirement of Rule 23(e) has been  
17 met.

18 This motion is based on Plaintiff’s Memorandum of Points and Authorities in  
19 Support of Motion for Preliminary Approval of Class Action Settlement, Provisional  
20 Certification of Nationwide Settlement Class, and Approval of Procedure for and  
21 Form of Notice, the accompanying Declarations of L. Timothy Fisher, Steven  
22 Weisbrot, and GT Dave and attachments thereto, including the Settlement  
23 Agreement, the pleadings and papers on file herein, and any other written and oral  
24 arguments that may be presented to the Court.  
25  
26  
27  
28

1 Dated: November 18, 2016

Respectfully submitted,

2 **BURSOR & FISHER, P.A.**

3  
4 By: /s/L. Timothy Fisher  
L. Timothy Fisher

5  
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**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR  
PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT,  
PROVISIONAL CERTIFICATION  
OF NATIONWIDE SETTLEMENT  
CLASS, AND APPROVAL OF  
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1 **I. INTRODUCTION**

2 Plaintiffs respectfully submit this memorandum in support of Plaintiffs’  
3 Motion for Preliminary Approval of Class Action Settlement.

4 Plaintiffs’ operative complaint, the Fifth Amended Class Action Complaint,  
5 alleges three bases for relief, including: (1) that continued fermentation of  
6 Millennium’s Enlightened kombucha beverages causes an increase in the alcohol  
7 concentration in the beverages to broach allowable legal limits and, accordingly,  
8 causes any alcohol warnings (or lack thereof) on the beverages’ labels to be  
9 misleading and insufficient as a matter of law; (2) that the antioxidant  
10 representations on the labels of Enlightened kombucha beverages are misleading  
11 because the beverages do not contain any antioxidant nutrients as required for such  
12 statements by 21 C.F.R. § 101.54(g) and corresponding state laws; and (3) that the  
13 labels of Millennium’s Enlightened and Classic kombucha beverages are misleading  
14 for the additional reason that they understate the amount of sugar in the beverages.

15 After *three* mediations before Jill R. Sperber, Esq. of Judicate West,  
16 investigations spanning roughly two years, motion practice, protracted discovery,  
17 and ongoing laboratory testing, the parties have reached a settlement that provides  
18 substantial monetary benefit to the class and significant injunctive relief. Defendants  
19 have agreed to provide up to \$8,250,000 to pay claims for those who purchased one  
20 or more flavors of the Subject Products on a claims-made basis.<sup>1</sup> Class Members  
21 can receive a \$3.50 cash payment for each bottle of every Subject Product purchased  
22 up to 10 bottles (\$35) without Proof of Purchase. Alternatively, Class Members can  
23 choose a product voucher redeemable for a free Millennium product for each bottle  
24 of every Subject Product purchased up to 10 bottles without Proof of Purchase. For  
25 claims administration purposes, these vouchers will be assigned a value of \$3.50,

26  
27 <sup>1</sup> All capitalized terms not otherwise defined herein shall have the same definitions  
28 as set out in the Settlement. *See* Fisher Decl. Ex. 1.

1 although their value may be higher or lower depending on the point of sale at issue.<sup>2</sup>  
2 Product Vouchers will have no expiration date and will be redeemable for any  
3 Subject Product at no cost. Class Members with Proof of Purchase can receive up to  
4 \$60 in cash or \$60 in product vouchers at the actual retail price they paid.

5 The Settlement also provides expansive injunctive relief. Millennium has  
6 agreed to (1) cease ordering and printing labels bearing the term “antioxidant”; (2)  
7 include a warning on its labels that “the products contain naturally occurring alcohol  
8 and should not be consumed by individuals seeking to avoid alcohol due to  
9 pregnancy, allergies, sensitivities or religious beliefs”; (3) regularly test samples of  
10 its products (at the time of bottling and the time of expiration) using a third-party  
11 laboratory to ensure compliance with federal and state labeling standards and to  
12 ensure the accuracy of the representations regarding the sugar content of its products;  
13 and (4) include a warning on its labels that the products may be under pressure and  
14 that the failure to refrigerate the products may result in leaking or gushing. Further,  
15 should a new, industrywide standard for testing the alcohol content of kombucha be  
16 developed, Millennium will adopt that testing methodology.

17 In its Order denying Plaintiff’s prior motion for preliminary approval, the  
18 Court expressed a few concerns about the prior settlement. Dkt. 95. Specifically,  
19 the Court was concerned that (a) Plaintiffs’ prior motion did not provide sufficient  
20 explanation of how the amount of relief offered related to the harm suffered by Class  
21 Members; (b) that Plaintiffs did not provide sufficient information for the Court to  
22 evaluate the true value of the voucher option as compared to the cash option; and (c)  
23 that the product giveaway option did not provide a sufficient benefit to the Class.

24  
25 <sup>2</sup> Millennium does not provide MSRP amounts for the Subject Products to its various  
26 distributors, and, accordingly, there is no uniform retail price. Millennium estimates  
27 that the average retail price of the Subject Products is between \$2.99 to \$3.99. *See*  
28 *Decl. of GT Dave at ¶ 4-6*. Thus, \$3.50 was chosen as the closest approximation of  
the average retail price. This figure comports with Plaintiffs’ personal experiences in  
purchasing the Subject Products.

1 On October 7, 2016, the parties participated in a third mediation with Ms.  
2 Sperber and reached an agreement that addresses each of the Court's concerns.  
3 Notably, the value of the cash and voucher claims under the current Settlement is  
4 identical. Class Members can receive either up to \$35 in cash or up to \$35 in  
5 vouchers for the same number (ten) of Subject Products purchased.<sup>3</sup> The value of  
6 voucher claims for settlement purposes is set at \$3.50, the estimated average retail  
7 price of the Subject Products. *See* Dave Decl. at ¶¶ 4-6. Cash claims are likewise  
8 valued at \$3.50 per bottle purchased, a 40 percent increase from the prior settlement.  
9 The Settlement increases the fund available to pay all claims by \$750,000. It also  
10 increases the budget for notice and claims administration by \$125,000, and increases  
11 the mandatory reach of the notice program from 70% to 80%. The Settlement  
12 eliminates the Product Giveaway provision entirely. Further, Plaintiffs' motion  
13 provides the Court with an extensive evaluation of the risks Plaintiffs faced in  
14 continuing to litigate their claims, the relationship between the relief provided and  
15 Plaintiffs' claims, and the fairness and adequacy of the Settlement overall.

16 As in any class action, the Settlement is subject initially to preliminary  
17 approval and then to final approval by the Court after notice to the class and a  
18 hearing. Plaintiffs now request this Court to (1) grant preliminary approval of  
19 Settlement; (2) conditionally certify the Class, designate Plaintiffs as Class  
20 Representatives, and appoint Bursor & Fisher, P.A. as Class Counsel; (3) appoint  
21 Angeion Group as the Settlement Administrator and establish procedures for giving  
22 notice to members of the Class; (4) approve forms of notice to Class Members; (5)  
23 mandate procedures and deadlines for exclusion requests and objections; and (6) set  
24 a date, time and place for a final approval hearing. *See* Proposed Preliminary  
25 Approval Order, Ex. D to Settlement.

26 \_\_\_\_\_  
27 <sup>3</sup> The prior settlement provided up to \$20 in cash for 8 purchases or up to \$30 in  
28 vouchers for 8 purchases. Thus, Class Members can receive up to \$15 more in cash  
or \$5 more in vouchers under the current settlement.

**II. PROCEDURAL BACKGROUND**

1 On March 11, 2015, Plaintiffs filed this case in this Court alleging that  
2 Millennium made false or misleading representations regarding the antioxidant  
3 content of its kombucha beverages. Dkt. No. 1. Millennium moved to dismiss the  
4 complaint and to strike Plaintiffs’ class action allegations. Dkt. 13. In response,  
5 Plaintiffs filed a First Amended Complaint. Dkt. 14. Millennium again moved to  
6 dismiss the complaint and to strike Plaintiffs’ class allegations. Dkt. 17. The Court  
7 denied Millennium’s motion to dismiss as to Plaintiffs’ claims under the CLRA,  
8 UCL, FAL and NY GBL § 349 and denied Millennium’s motion to strike, but  
9 granted the motion to dismiss Plaintiffs’ request for injunctive relief without  
10 prejudice. Dkt. No. 25. Plaintiffs subsequently amended the Complaint to allege  
11 additional facts in support of their claims for injunctive relief. Dkt. No. 68 at ¶¶ 6-8.

12 On October 8, 2015, after commissioning two independent laboratories to test  
13 the alcohol content of Millennium’s Enlightened Kombucha and Synergy beverages  
14 and several months of ongoing investigation, Plaintiffs filed a Third Amended  
15 Complaint adding claims regarding the purportedly high alcohol content of the  
16 products and Millennium’s failure to provide federal alcohol warnings regarding the  
17 same. Dkt. No. 30. On February 11, 2016, Plaintiffs filed a Fourth Amended  
18 Complaint adding Whole Foods as a Defendant. Dkt. No. 53. Millennium answered  
19 on February 29, 2016 and Whole Foods moved to dismiss on April 7, 2016.

20 On June 22, 2016, Plaintiffs filed a Fifth Amended Complaint pleading  
21 additional claims regarding Millennium’s alleged failure to correctly state the sugar  
22 content of its products on the labels after the discovery of a recent study concerning  
23 the sugar content of Millennium’s products and further investigations. Dkt. 68.  
24 Millennium answered the Fifth Amended Complaint on July 6, 2016 and Whole  
25 Foods moved to dismiss on July 11, 2016.

26 After two mediations before Jill R. Sperber, Esq. of Judicate West, Plaintiffs  
27 filed a motion for preliminary approval of class action settlement on August 11,  
28

1 2016. Dkt. 77. The Court vacated all then-scheduled pretrial deadlines on August  
2 18, 2016 pursuant to the parties' stipulation. Dkt. 80. On September 21, 2016, the  
3 Court denied the motion for preliminary approval.

4 The parties participated in a third mediation with Ms. Sperber on October 7,  
5 2016, where they reached an agreement in principle as to all claims for monetary  
6 relief set forth in Section IV(A) of the Settlement, and all injunctive relief  
7 concerning the Plaintiffs' antioxidant, alcohol, and sugar labeling claims set forth in  
8 Section IV(B)(a), (b), (c), (d), and (e) of the Settlement. After reaching the new  
9 agreement in principle, the parties conferred with opposing counsel in *Pedro et al. v.*  
10 *Millennium Products, Inc.*, Case No. 16-cv-03780-PSG-AJW (C.D. Cal 2016).  
11 During these negotiations, the parties stated their position that the claims asserted in  
12 *Pedro* are subsumed within the *Retta* matter, and *Pedro* plaintiffs stated their  
13 position that the *Retta* action, although addressing the bulk of their claims, did not  
14 address a remaining claim for injunctive relief with respect to their allegations that  
15 the bottles of Millennium's products leak, fizz, or spill due to potential pressure  
16 buildup. As a result of these negotiations, the *Retta* Plaintiffs and Defendants agreed  
17 that additional injunctive relief set out in Section IV(B)(f) of the Settlement would be  
18 provided by the *Retta* settlement to address the *Pedro* Plaintiffs' remaining claim.

19 Counsel for Plaintiffs and counsel for Defendants have engaged in substantial  
20 arm's-length negotiations in an effort to resolve this action over a period of roughly  
21 eight months, including participating in *three* mediations. The parties have  
22 considered the risks and potential costs of continued litigation of this action, on the  
23 one hand, and the benefits of the proposed settlement, on the other hand, and desire  
24 to settle the action upon the terms and conditions set forth in the Settlement.

### 25 **III. THE STANDARD FOR PRELIMINARY APPROVAL**

26 Approval of class action settlements involves a two-step process. First, the  
27 Court must make a preliminary determination whether the proposed settlement  
28

1 appears to be fair and is “within the range of possible approval.” *In re Syncor ERISA*  
2 *Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008); *In re Tableware Antitrust Litig.*, 484 F.  
3 Supp. 2d 1078, 1079 (N.D. Cal. 2007). If so, notice can be sent to class members  
4 and the Court can schedule a final approval hearing. *See Manual for Complex*  
5 *Litigation*, § 21.312 at 293-96 (4th ed. 2004) (hereinafter “*Manual*”).

6 The purpose of a preliminary approval hearing is to ascertain whether to send  
7 out notice to putative class members and proceed with a fairness hearing. *See In re*  
8 *Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079. Notice should be disseminated  
9 where “the proposed settlement appears to be the product of serious, informed,  
10 non-collusive negotiations, has no obvious deficiencies, does not improperly grant  
11 preferential treatment to class representatives or segments of the class, and falls  
12 within the range of possible approval.” *Id.* Preliminary approval does not require an  
13 answer to the ultimate question of whether the proposed settlement is fair and  
14 adequate, for that determination occurs only after notice of the settlement has been  
15 given to the members of the settlement class. *See In re Tableware Antitrust Litig.*,  
16 484 F. Supp. 2d at 1079 (finding that “[t]he question currently before the court is  
17 whether this settlement should be preliminarily approved” for the purposes of  
18 notifying the putative class members of the proposed settlement and proceeding with  
19 a fairness hearing, which requires the court to consider whether the settlement  
20 appears to be fair and “falls within the range of possible approval”).

21 While the district court has discretion regarding the approval of a proposed  
22 settlement, it should give “proper deference to the private consensual decision of the  
23 parties.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). Here, the  
24 negotiations were conducted at arm’s length, were non-collusive and were well  
25 informed, with an assessment of the strengths and weaknesses of the claims on both  
26 sides, were conducted between counsel with decades of class action experience, and  
27 utilized at the appropriate time the assistance of a well-respected mediator. Under  
28

1 such circumstances, the Court is entitled to rely upon the opinions and assessments  
2 of counsel that the settlement is fair and reasonable. *Boyd v. Bechtel Corp.*, 485 F.  
3 Supp. 610, 622-23 (N.D. Cal. 1979).

4 Beyond the public policy favoring settlements, the principal consideration in  
5 evaluating the fairness and adequacy of a proposed settlement is the likelihood of  
6 recovery balanced against the benefits of settlement. “[B]asic to this process in  
7 every instance, of course, is the need to compare the terms of the compromise with  
8 the likely rewards of litigation.” *Protective Committee for Independent Stockholders*  
9 *of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). That said,  
10 “the court’s intrusion upon what is otherwise a private consensual agreement  
11 negotiated between the parties to a lawsuit must be limited to the extent necessary to  
12 reach a reasoned judgment that the agreement is not the product of fraud or  
13 overreaching by, or collusion between, the negotiating parties, and that the  
14 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”  
15 *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982).

#### 16 **IV. TERMS OF THE PROPOSED SETTLEMENT**

17 The proposed Class consists of “all persons in the United States and United  
18 States Territories who purchased at retail one or more of the Subject Products during  
19 the Class Period.” Settlement ¶ 7. Excluded from the Class are (a) Defendants and  
20 their employees, principals, officers, directors, agents, affiliated entities, legal  
21 representatives, successors and assigns; (b) the judges to whom the Action has been  
22 or is assigned and any members of their immediate families; (c) those who purchased  
23 the Subject Products for the purpose of re-sale; and (d) all persons who have filed a  
24 timely Request for Exclusion from the Class. *See id.*

##### 25 **A. Monetary Relief for Class Members**

26 Defendants have agreed to pay up to \$8,250,000 to cover all claims filed by  
27 Class Members as well as the costs of settlement administration, incentive awards,  
28

1 and attorneys' fees, costs and expenses. Class Members can receive a cash payment  
2 of \$3.50 for each Subject Product purchased during the Class Period up to \$35 (10  
3 purchases) without proof of purchase. Alternatively, Class Members can receive a  
4 product voucher redeemable for a free Millennium product for each Subject Product  
5 purchased during the Class Period up to \$35 worth of product vouchers. For claims  
6 administration purposes, these vouchers will be assigned a value of \$3.50. Thus,  
7 cash and voucher claims are equally valuable to putative class members (although  
8 the value of vouchers may be higher or lower than \$3.50 depending on the point of  
9 sale at issue). Class Members with proof of purchase can receive a cash payment up  
10 to \$60 or a product voucher up to \$60 at the retail price they paid for each purchase  
11 of the Subject Products during the Class Period. If the aggregate value of the cash  
12 and voucher awards claimed exceeds the Net Cash Amount, then the cash and  
13 voucher awards will be reduced on a pro rata basis, such that the aggregate value of  
14 the awards does not exceed the Net Cash Amount. Settlement ¶ 46.<sup>4</sup>

15 **B. Injunctive Relief**

16 Pursuant to the Settlement, Millennium will cease ordering and printing labels  
17 bearing the term "antioxidant." Millennium will also include warnings on its labels  
18 that "the products contain naturally occurring alcohol and should not be consumed  
19 by individuals seeking to avoid alcohol due to pregnancy, allergies, sensitivities or  
20 religious beliefs" and that "Contents are under pressure. Failure to refrigerate may  
21 increase pressure, causing product to leak or gush." Millennium will also regularly  
22 test samples of its products (at the time of bottling and the time of expiration) using a  
23 third-party laboratory to ensure compliance with federal and state alcohol labeling  
24 standards and to ensure the accuracy of the representations regarding the sugar  
25 content of its products. Should a new, industrywide standard for testing the alcohol

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27 <sup>4</sup> The Net Cash Amount is defined as the value derived by subtracting the value of  
28 any attorneys' fees, expenses, incentives awards, and any settlement administration  
expenses from \$8,250,000. *Id.* at ¶ 18.



1 content of kombucha be developed, Millennium will adopt that testing methodology.

2 **C. Incentive Awards and Attorneys' Fees, Costs and Expenses**

3 Subject to the Court's approval, Defendants have agreed to pay incentive  
4 awards to Plaintiffs and the Related Plaintiffs in the amount of \$2,000. In addition,  
5 Class Counsel will make an application to the Court for an award of attorneys' fees,  
6 costs and expenses. Defendants have the right to challenge the amount of Plaintiffs'  
7 fees, costs and expenses and there is no formal agreement as to the amount of  
8 attorneys' fees, costs and expenses that will be sought by Class Counsel.

9 **D. Notice and Administrative Fees**

10 The parties propose that Angeion Group act as the Settlement Administrator.  
11 Angeion will develop a notice and claims administration program designed to  
12 achieve at least 80% reach. Defendants shall pay all Settlement Administration  
13 Expenses up to \$400,000. Any reasonable Settlement Administration Expenses  
14 above \$400,000 shall be deducted on a pro rata basis from the cash rewards and  
15 product vouchers claimed by Authorized Claimants, regardless of whether the entire  
16 \$8,250,000 fund is fully exhausted. Notice and claims administration costs will be  
17 paid from the Settlement Fund.

18 **V. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE AND**  
19 **SHOULD BE PRELIMINARILY APPROVED**

20 Rule 23(e)(2) provides that "the court may approve [a proposed class action  
21 settlement] only after a hearing and on finding that it is fair, reasonable, and  
22 adequate." When making this determination, the Ninth Circuit has instructed district  
23 courts to balance several factors: (1) the strength of plaintiffs' case; (2) the risk,  
24 expense, complexity, and likely duration of further litigation; (3) the risk of  
25 maintaining class action status throughout the trial; (4) the amount offered in  
26 settlement; (5) the extent of discovery completed and the stage of the proceedings;

1 and (6) the experience and views of counsel. *Hanlon*, 150 F.3d at 1026;<sup>5</sup> *Churchill*  
2 *Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Here, the balance of  
3 these factors readily establishes that the Settlement should be preliminarily approved.

4 **A. Strength of Plaintiffs' Case**

5 In determining the likelihood of a plaintiff's success on the merits of a class  
6 action, "the district court's determination is nothing more than an amalgam of  
7 delicate balancing, gross approximations and rough justice." *Officers for Justice*,  
8 688 F.2d at 625 (internal quotations omitted). The court may "presume that through  
9 negotiation, the Parties, counsel, and mediator arrived at a reasonable range of  
10 settlement by considering Plaintiff's likelihood of recovery." *Garner v. State Farm*.  
11 *Mut. Auto. Ins. Co.*, 2010 WL 1687832, at \*9 (N.D. Cal. Apr. 22, 2010) (citing  
12 *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)). Here, the  
13 settlement negotiations were hard-fought, requiring multiple mediation sessions over  
14 several months, with both Parties and their counsel thoroughly familiar with the  
15 applicable facts, legal theories, and defenses on both sides. Plaintiffs believe that the  
16 Settlement is an outstanding result considering the issues addressed below.

17 In false or misleading advertising cases concerning beverages or foods,  
18 plaintiffs are typically foreclosed from full-refund theories of damages at class  
19 certification. *See, e.g., In re POM Wonderful LLC*, 2014 WL 1225184, at \*2-\*3  
20 (C.D. Cal. Mar. 25, 2014) (explaining that a full refund damages model is  
21 unavailable where the beverage at issue provided class members with benefits in the  
22 form of calories, hydration, vitamins, and minerals); *Red v. Kraft Foods, Inc.*, 2012  
23 WL 8019257, at \*11 (C.D. Cal. Apr.12, 2012). Here, the Subject Products contain  
24 multiple vitamins, enzymes and probiotics, and provide hydration and calories.

25 \_\_\_\_\_  
26 <sup>5</sup> In *Hanlon*, the Ninth Circuit also instructed district courts to consider "the reaction  
27 of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026. This  
28 consideration is more germane to final approval, and will be addressed at the  
appropriate time.

1 Defendants would have strong arguments against a full damages model for relief.

2 Although Plaintiffs believe that proving price premium damages would be  
3 possible here, there is no guarantee that the ultimate price premium proved would  
4 justify the risk of further litigation. As to the alcohol claims, it would be difficult to  
5 establish a price premium because Millennium’s alcoholic kombucha beverages (the  
6 “Classic” line) and the purported non-alcoholic beverages (the “Enlightened” line)  
7 *retail for the exact same price at the same retail locations*. Even if Plaintiffs were to  
8 establish a alcohol labeling problem, the alcohol levels of kombucha products  
9 necessarily vary over time due to an ongoing fermentation process. Thus, the  
10 amount of alcohol in the accused products varies greatly between purchases, with  
11 some class members potentially receiving Enlightened products below and above the  
12 0.5% alcohol by volume threshold. Further, the alcohol labeling claims would likely  
13 devolve into an uncertain “battle of the experts.” Millennium produced 1,394 tests  
14 of the alcohol concentration of Enlightened kombucha beverages spanning several  
15 years within the Class Period. Every single test showed that the beverages were  
16 *below* the federally mandated 0.5% threshold set for non-alcoholic beverages.

17 With regards to *Plaintiffs’ claims concerning antioxidants*, Plaintiffs would  
18 face a strong hurdle at class certification and summary judgment to establish  
19 damages considering that some antioxidants (*e.g.*, catechins) are actually present in  
20 the Subject Products, just not the antioxidant “nutrients” mandated by federal and  
21 state law. *See, e.g., Khasin v. R. C. Bigelow*, 2016 WL 4504500, at \*3-\*6 (N.D. Cal.  
22 Aug. 29, 2016) (granting summary judgment in favor of defendant in antioxidant  
23 labeling case where it was undisputed that the tea beverage contained *some*  
24 antioxidants). Nonetheless, Plaintiffs’ review of the literature regarding consumer  
25 willingness to pay for labeling statements touting a product’s antioxidant content  
26 shows that class members likely paid a roughly four percent premium based on the  
27 antioxidant representations at issue here. *See Armenak Markosyan, et al., Consumer*  
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1 *Response to Information about a Functional Food Product: Apples Enriched with*  
2 *Antioxidants*, Canadian Journal of Agricultural Economics, 325, 337 (2009)  
3 (concluding that customers are willing to pay a 4 percent price premium for a  
4 product advertised as being enriched with antioxidants).

5 Defendants vigorously deny Plaintiffs' allegations and assert that neither  
6 Plaintiffs nor the Class suffered any harm or damages. In addition, Defendants  
7 would no doubt present a vigorous defense at trial, and there is no assurance that the  
8 Class would prevail – or even if they did, that they would be able to obtain an award  
9 of damages significantly higher than achieved here absent such risks. Thus, in the  
10 eyes of Class Counsel, the proposed Settlement provides the Class with an  
11 outstanding opportunity to obtain significant relief at this stage in the litigation. The  
12 Settlement also abrogates the risks that might prevent them from obtaining *any* relief.

13 **B. The Amount Offered in Settlement**

14 As discussed *supra*, it would be difficult for Plaintiffs to establish price  
15 premium damages above four percent of the purchase price. Assuming that Plaintiffs  
16 were to prevail at trial and prove damages at four percent of the \$3.50 retail price,  
17 damages would be set at 14 cents per Subject Product purchased during the Class  
18 Period. The Settlement, however, provides up to \$35 in cash or vouchers<sup>6</sup> without  
19 proof of purchase. Class members can thus potentially receive full recovery for the  
20 price premium attributable to the purchase of up to 250 Subject Products within the  
21 Class Period without providing proof of purchase. Indeed, even if a class member  
22 were to make a claim for a single cash award of \$3.50, that class member would  
23 recover the price premium attributable to the purchase of 25 products. The

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25 <sup>6</sup> The voucher option is valued at “100 cents on the dollar” here because class  
26 members are given a choice between choosing cash or vouchers, and because the  
27 vouchers have no expiration date, are freely transferrable, and are redeemable at any  
28 retailer that sells the Subject Products. *Hendricks v. Starkist Co.*, 2016 WL 5462423,  
at \*7, \*10 n. 3 (N.D. Cal. Sept. 29, 2016) (finding that “vouchers are valued at 100  
cents on the dollar” where the vouchers have no expiration date, are freely  
transferrable, and are redeemable at any retailer that sells the products).

1 significant relief provided here clearly favors settlement approval. *See, e.g.*,  
2 *Hendricks v. Starkist Co.*, 2016 WL 5462423, at \*5 (N.D. Cal. Sept. 29, 2016)  
3 (“Testing showed that there was an average underfill between 4.5% and 16.7%,  
4 resulting in damages between 3.87 cents and 14.3 cents per can. A \$1.97 cash  
5 payment would provide full recovery for 13 to 50 cans and a voucher of \$4.43 would  
6 provide full recovery for 30 to 114 cans. Accordingly, this factor weighs in favor of  
7 settlement as well.”) (citations omitted).

8         Considering Plaintiffs’ damages theories and real risks inherent in continued  
9 litigation, the total fund available to pay all claims—\$8,250,000—fits squarely  
10 within the “range of reasonableness.” *See id.* The Settlement aims to settle all  
11 claims “from March 11, 2011 up to and including the Notice Date.” Settlement ¶ 10.  
12 From March of 2011 through the end of October of 2016, Millennium sold  
13 approximately 274,715,000 bottles of the Subject Products to its distributors.  
14 Although the precise amount of bottles sold at retail locations during this time period  
15 is not known, it is presumably smaller than the 274 million unit figure due to unsold  
16 inventory at retail locations. However, even assuming that all 274 million bottles  
17 were sold at retail, and assuming that Plaintiffs could prevail in showing damages at  
18 14 cents per bottle as discussed above, the total maximum recovery available at trial  
19 would be roughly \$38 million. Thus, the total fund made available by the Settlement  
20 represents more than 21 percent of potentially recovery at trial. This result is  
21 certainly “within the range of reasonableness in light of the risks and costs of  
22 litigation.” *See id.* (“The \$12,000,000 settlement amount, while consisting only a  
23 single-digit percentage of the maximum potential exposure, is reasonable given the  
24 stage of the proceedings and the defenses asserted in this action.”); *Stovall-Gusman*  
25 *v. W.W. Granger, Inc.*, 2015 WL 3776765, at \*4 (N.D. Cal. June 17, 2015) (granting  
26 final approval of a net settlement amount representing 7.3 % of the plaintiffs’  
27 potential recovery at trial); *Balderas v. Massage Envy Franchising, LLC*, 2014 WL  
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1 3610945, at \*5 (N.D. Cal. July 21, 2014) (granting preliminary approval of a net  
2 settlement amount representing 5 % of the projected maximum recovery at trial); *Ma*  
3 *v. Covidien Holding, Inc.*, 2914 WL 360196, at \*5 (C.D. Cal. Jan. 31, 2014) (finding  
4 a settlement worth 9.1 % of the total value of the action “within the range of  
5 reasonableness”). *See also Downey Surgical Clinic, Inc. v. Optuminsight, Inc.*, 2016  
6 WL 5938722 at \*5 (C.D. Cal. May 16, 2016) (*this* Court granting final approval  
7 where recovery was as low as 3.21 % of potential recovery at trial).

8 Further, “claims-made settlements ... are routinely approved by the Ninth  
9 Circuit and Courts in California.” *See Nur v. Tatitlek Support Services, Inc.*, 2016  
10 WL 3039573, at \*3 (C.D. Cal. Apr. 25, 2016) (characterizing a string-cite of 16  
11 cases as “only a small sample of those cases”). Indeed, this Court granted final  
12 approval to a class action settlement with a reversion clause just last year. *See*  
13 *Hightower v. JPMorgan Chase Bank, N.A.*, 2015 WL 9664959, at \*7 (C.D. Cal. Aug.  
14 4, 2015). Although the \$8,250,000 fund here is to be distributed on a “claims-made”  
15 basis, the Settlement sets aside \$400,000 for notice and claims administration  
16 purposes and mandates a minimum 80 percent reach for the notice program. *See*  
17 Settlement ¶ 48. The notice program anticipates email and U.S. mail service, the  
18 creation of a settlement website, a toll-free number, an expansive internet banner ad  
19 campaign, publication notice, and notice through Millennium’s popular social media  
20 accounts. *See gen. Weisbrot Decl.* As in *Hightower*, Plaintiffs would “not have  
21 been able to negotiate a maximum amount of even [\$8,250,000]” if not for the  
22 claims-made structure of the Settlement “and have taken methods to increase  
23 participation in the Settlement.” *Hightower*, 2015 WL 9664959, at \*7. While there  
24 can be no guarantee the entire \$8,250,000 will be depleted, Plaintiffs have structured  
25 the Settlement to maximize the chance that every cent of the fund is exhausted.<sup>7</sup>

26  
27 <sup>7</sup> Class Counsel was also counsel for the settlement class in *Hendricks*, where a  
28 substantially similar notice program resulted in over 2.5 million claims. *See*  
*Hendricks*, 2016 WL 5462423, at \*3.

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**C. Risk of Continuing Litigation**

As referenced above, proceeding in this litigation in the absence of settlement poses various risks such as failing to certify a class, having summary judgment granted against Plaintiffs, or losing at trial. Such considerations have been found to weigh heavily in favor of settlement. *See Rodriguez*, 563 F.3d at 966; *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, 2008 WL 4667090, at \*4 (N.D. Cal. Oct. 22, 2008) (“Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class.”). Even assuming that Plaintiffs were to survive summary judgment, they would face the risk of establishing liability at trial in light of conflicting expert testimony between their own expert witnesses and Defendants’ expert witnesses. In this “battle of experts,” it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which expert version would be accepted by the jury. The experience of Class Counsel has taught them that these considerations can make the ultimate outcome of a trial highly uncertain. Moreover, even if Plaintiffs prevailed at trial, in light of the possible damage theories that could be presented by both sides, there is a substantial likelihood based on the above analysis that Class Members may be awarded significantly less than is offered to them under this Settlement on an individual basis. By settling, Plaintiffs and the Class avoid these risks, as well as the delays and risks of the appellate process.

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**D. Risk of Maintaining Class Action Status**

In addition to the risks of continuing the litigation, Plaintiffs would also face risks in certifying a class and maintaining class status through trial. For instance, plaintiffs in other antioxidant labeling cases have never obtained class certification of a damages class. *See, e.g., Lanovaz v. Twinings N. Am., Inc.*, 2014 WL 1652338 at \*1, \*4-\*7 (N.D. Cal. Apr. 24, 2014); *Khasin v. R. C. Bigelow, Inc.*, 2016 WL 1213767, at \*1-\*5 (N.D. Cal. Mar. 29, 2016). Further, Plaintiffs are not aware of a single case where a damages class was certified due to a product’s allegedly high

1 alcohol content. Even assuming that the Court were to grant a motion for class  
2 certification, the class could still be decertified at any time. *See In re Netflix*  
3 *Privacy Litig.*, 2013 WL 1120801, at \*6 (N.D. Cal. Mar. 18, 2013) (“The notion that  
4 a district court could decertify a class at any time is one that weighs in favor of  
5 settlement.”) (internal citations omitted). The Settlement eliminates these risks by  
6 ensuring Class Members a recovery that is “certain and immediate, eliminating the  
7 risk that class members would be left without any recovery ... at all.” *Fulford v.*  
8 *Logitech, Inc.*, 2010 U.S. Dist. LEXIS 29042, at \*8 (N.D. Cal. Mar. 5, 2010).

9 **E. The Extent of Discovery and Status of Proceedings**

10 Under this factor, courts evaluate whether class counsel had sufficient  
11 information to make an informed decision about the merits of the case. *See In re*  
12 *Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Beginning in June of  
13 2015, Plaintiffs have conducted extensive research, discovery, and investigation,  
14 including, without limitation: (i) the review of Defendants’ production, including  
15 more than a thousand of Millennium’s alcohol and antioxidant testing results  
16 throughout the Class Period, sales information, distributor information, internal  
17 communications, communications with potential customers, and information  
18 regarding current and former labeling of the Subject Products; (ii) the review of  
19 testing results and other documents produced by the American Herbal Products  
20 Association, Inc. and Kombucha Brewers International in response to Plaintiffs’  
21 subpoenas; (iii) the review of product tests initiated and paid for by Plaintiffs and  
22 Class Counsel; (iv) an in-person inspection of the facilities and equipment of  
23 Brewing & Distilling Analytical Services, LLC, one of the laboratories  
24 commissioned by Plaintiffs to conduct testing of the Subject Products; (v) the review  
25 of other publicly available reports and tests concerning Defendants’ products; and  
26 (vi) the review of publicly available information regarding Defendants, their business  
27 practices and prior litigation. The parties also held numerous telephonic and written  
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1 discussions regarding Plaintiffs’ allegations, discovery and settlement as well as  
2 three mediations with Ms. Sperber, with subsequent follow on negotiations after  
3 those mediations during which the terms of an agreement were extensively debated  
4 and negotiated. The Settlement is thus the result of fully-informed negotiations.

5 **F. Experience and Views of Counsel**

6 “The recommendations of plaintiffs’ counsel should be given a presumption of  
7 reasonableness.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D.  
8 Cal. 2008). Deference to Class Counsel’s evaluation of the Settlement is appropriate  
9 because “[p]arties represented by competent counsel are better positioned than courts  
10 to produce a settlement that fairly reflects each party’s expected outcome in  
11 litigation.” *Rodriguez*, 563 F.3d at 967. Here, the Settlement was negotiated by  
12 counsel with extensive experience in consumer class action litigation. *See* Fisher  
13 Decl. Ex. 2 (firm resume of Bursor & Fisher, P.A.). Based on their experience, Class  
14 Counsel concluded that the Settlement provides exceptional results for the class  
15 while sparing the class from the uncertainties of continued and protracted litigation.

16 For all the foregoing reasons, the Settlement is fair, adequate, and reasonable,  
17 and should be preliminarily approved.

18 **VI. THIS COURT SHOULD PROVISIONALLY CERTIFY THE CLASS**  
19 **AND ENTER THE PRELIMINARY APPROVAL ORDER**

20 **A. The Proposed Settlement Class Should Be Certified**

21 The Ninth Circuit has recognized that certifying a settlement class to resolve  
22 consumer lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. When  
23 presented with a proposed settlement, a court must first determine whether the  
24 proposed settlement class satisfies the requirements for class certification under Rule  
25 23. In assessing those class certification requirements, a court may properly consider  
26 that there will be no trial. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620  
27 (1997) (“Confronted with a request for settlement-only class certification, a district  
28 court need not inquire whether the case, if tried, would present intractable

1 management problems . . . for the proposal is that there be no trial.”). For the  
2 reasons below, the Class meets the requirements of Rule 23(a) and (b).

3 **1. The Class Satisfies Rule 23(a)**

4 *a. Numerosity*

5 Rule 23(a)(1) requires that “the class is so numerous that joinder of all  
6 members is impracticable.” *See* Rule 23(a)(1). “As a general matter, courts have  
7 found that numerosity is satisfied when class size exceeds 40 members, but not  
8 satisfied when membership dips below 21.” *Slaven v. BP Am., Inc.*, 190 F.R.D. 649,  
9 654 (C.D. Cal. 2000). Here, the proposed Class is comprised of millions of  
10 consumers who purchased the Subject Products – a number that obviously satisfies  
11 the numerosity requirement. Accordingly, the proposed Class is so numerous that  
12 joinder of their claims is impracticable.

13 *b. Commonality*

14 Rule 23(a)(2) requires the existence of “questions of law or fact common to  
15 the class.” *See* Rule 23(a)(2). Commonality is established if plaintiffs and class  
16 members’ claims “depend on a common contention,” “capable of class-wide  
17 resolution . . . meaning that determination of its truth or falsity will resolve an issue  
18 that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*  
19 *Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Because the commonality  
20 requirement may be satisfied by a single common issue, it is easily met. H. Newberg  
21 & Conte, 1 Newberg on Class Actions § 3.10, at 3-50 (1992).

22 There are ample issues of both law and fact here that are common to the  
23 members of the Class. All of the Class Members’ claims arise from a common  
24 nucleus of facts and are based on the same legal theories. Plaintiffs allege that  
25 Defendants mislabeled the Subject Products by (1) using the term “antioxidant” on  
26 the labels when the products allegedly do not contain antioxidant nutrients, (2)  
27 labeling the products as non-alcoholic when in fact they allegedly contain two to  
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1 seven times the amount of alcohol permitted for non-alcoholic beverages, and (3)  
2 allegedly understating the sugar content of the products. Accordingly, commonality  
3 is satisfied by the existence of these common factual issues. *See Arnold v. United*  
4 *Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994) (commonality  
5 requirement met by “the alleged existence of common discriminatory practices”).

6 Second, Plaintiffs’ claims are brought under legal theories common to the  
7 Class as a whole. Alleging a common legal theory alone is enough to establish  
8 commonality. *See Hanlon*, 150 F.3d at 1019 (“All questions of fact and law need not  
9 be common to satisfy the rule. The existence of shared legal issues with divergent  
10 factual predicates is sufficient, as is a common core of salient facts coupled with  
11 disparate legal remedies within the class.”). Here, all of the legal theories asserted  
12 by Plaintiffs are common to all Class Members. Given that there are virtually no  
13 issues of law which affect only individual members of the Class, common issues of  
14 law clearly predominate over individual ones. Thus, commonality is satisfied.

15 *c. Typicality*

16 Rule 23(a)(3) requires that the claims of the representative plaintiffs be  
17 “typical of the claims ... of the class.” *See* Rule 23(a)(3). “Under the rule’s  
18 permissive standards, representative claims are ‘typical’ if they are reasonably co-  
19 extensive with those of absent class members; they need not be substantially  
20 identical.” *See Hanlon*, 150 F.3d at 1020. In short, to meet the typicality  
21 requirement, the representative plaintiffs simply must demonstrate that the members  
22 of the settlement class have the same or similar grievances. *Gen. Tel. Co. of the*  
23 *Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

24 The claims of the named Plaintiffs are typical of those of the Class. Like those  
25 of the Class, their claims arise out of the purchase of Millennium’s kombucha  
26 beverages and the alleged mislabeling of those products. Each named Plaintiff  
27 purchased several of Millennium’s kombucha products and was exposed to the  
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1 allegedly false or misleading labels. The named Plaintiffs have precisely the same  
2 claims as the Class, and must satisfy the same elements of each of their claims, as  
3 must other Class Members. Supported by the same legal theories, the named  
4 Plaintiffs and all Class Members share claims based on the same alleged course of  
5 conduct. The named Plaintiffs and all Class Members have been injured in the same  
6 manner by this conduct. Therefore, Plaintiffs satisfy the typicality requirement.

7 *d. Adequacy*

8 The final requirement of Rule 23(a) is set forth in subsection (a)(4) which  
9 requires that the representative parties “fairly and adequately protect the interests of  
10 the class.” *See* Rule 23(a)(4). A plaintiff will adequately represent the class where:  
11 (1) plaintiffs and their counsel do not have conflicts of interests with other class  
12 members; and (2) where plaintiffs and their counsel prosecute the action vigorously  
13 on behalf of the class. *See Staton v. Boeing Co.*, 327 F.3d 938, 958 (9th Cir. 2003).  
14 Moreover, adequacy is presumed where a fair settlement was negotiated at arm’s-  
15 length. *2 Newberg on Class Actions, supra*, §11.28, at 11-59.

16 Class Counsel have vigorously and competently pursued the Class Members’  
17 claims. The arm’s-length settlement negotiations that took place and the  
18 investigation they undertook demonstrate that Class Counsel adequately represent  
19 the Class. Moreover, the named Plaintiffs and Class Counsel have no conflicts of  
20 interests with the Class. Rather, the named Plaintiffs, like each absent Class  
21 Member, have a strong interest in proving Defendants’ common course of conduct,  
22 and obtaining redress. In pursuing this litigation, Class Counsel, as well as the named  
23 Plaintiffs, have advanced and will continue to advance and fully protect the common  
24 interests of all members of the Class. Class Counsel have extensive experience and  
25 expertise in prosecuting complex class actions. Class Counsel are active  
26 practitioners who are highly experienced in class action, product liability, and  
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1 consumer fraud litigation. *See* Fisher Decl. Ex. 2 (firm resume of Bursor & Fisher,  
2 P.A.). Accordingly, Rule 23(a)(4) is satisfied.

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

4 In addition to meeting the prerequisites of Rule 23(a), Plaintiffs must also  
5 meet one of the three requirements of Rule 23(b) to certify the proposed class. *See*  
6 *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Under  
7 Rule 23(b)(3), a class action may be maintained if “the court finds that the questions  
8 of law or fact common to the members of the class predominate over any questions  
9 affecting only individual members, and that a class action is superior to other  
10 available methods for fairly and efficiently adjudicating the controversy.” *See* Rule  
11 23(b)(3). Certification under Rule 23(b)(3) is appropriate and encouraged  
12 “whenever the actual interests of the parties can be served best by settling their  
13 differences in a single action.” *Hanlon*, 150 F.3d at 1022.

14 **a. Common Questions of Law and Fact Predominate**

15 The proposed Class is well-suited for certification under Rule 23(b)(3)  
16 because questions common to the Class Members predominate over questions  
17 affecting only individual Class Members. Predominance exists “[w]hen common  
18 questions present a significant aspect of the case and they can be resolved for all  
19 members of the class in a single adjudication.” *Hanlon*, 150 F.3d at 1022. As the  
20 U.S. Supreme Court has explained, when addressing the propriety of certification of  
21 a settlement class, courts take into account the fact that a trial will be unnecessary  
22 and that manageability, therefore, is not an issue. *Amchem*, 521 U.S. at 620.

23 In this case, common questions of law and fact exist and predominate over any  
24 individual questions, including in addition to whether this settlement is reasonable  
25 (*see Hanlon*, 150 F.3d at 1026-27), *inter alia*: (1) whether Defendants’  
26 representations regarding the Subject Products were false and misleading or  
27 reasonably likely to deceive consumers; (2) whether the Subject Products are  
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1 misbranded; (3) whether Defendants violated the CLRA, UCL, FAL and NY GBL  
2 §349; (4) whether Defendants breached an express or implied warranty; (5) whether  
3 Defendants had defrauded Plaintiff and the Class Members; and (6) whether the  
4 Class has been injured by the wrongs complained of, and if so, whether Plaintiffs and  
5 the Class are entitled to damages, injunctive and/or other equitable relief, including  
6 restitution or disgorgement, and if so, the nature and amount of such relief.

7 *b. A Class Action Is the Superior Mechanism for*  
8 *Adjudicating This Dispute*

9 The class mechanism is superior to other available means for the fair and  
10 efficient adjudication of the claims of the Class Members. Each individual Class  
11 Member may lack the resources to undergo the burden and expense of individual  
12 prosecution of the complex and extensive litigation necessary to establish  
13 Defendants' liability. Individualized litigation increases the delay and expense to all  
14 parties and multiplies the burden on the judicial system presented by the complex  
15 legal and factual issues of this case. Individualized litigation also presents a  
16 potential for inconsistent or contradictory judgments. In contrast, the class action  
17 device presents far fewer management difficulties and provides the benefits of single  
18 adjudication, economy of scale, and comprehensive supervision by a single court.

19 Moreover, since this action will now settle, the Court need not consider issues  
20 of manageability relating to trial. *See Amchem*, 521 U.S. at 620 ("Confronted with a  
21 request for settlement-only class certification, a district court need not inquire  
22 whether the case, if tried, would present intractable management problems, see Fed.  
23 Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial.").  
24 Accordingly, common questions predominate and a class action is the superior  
25 method of adjudicating this controversy.

26 **3. The Class Also Satisfies Rule 23(b)(2)**

27 The proposed class is also well suited for certification under Rule 23(b)(2).  
28 *See gen. Lilly v. Jamba Juice Co.*, 2015 WL 1248027 (N.D. Cal. Mar. 18, 2015)

1 (granting preliminary approval of a Rule 23(b)(2) class of smoothie kit purchasers).  
2 *See also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 978 (9th Cir. 2011)  
3 (explaining that the district court may certify a Rule 23(b)(2) class and a separate  
4 Rule 23(b)(3) class). In the Court’s Order Denying in Part and Granting in Part  
5 Motion to Dismiss and Denying Motion to Strike, the Court dismissed Plaintiffs’  
6 claims for injunctive relief “because Plaintiffs do not allege that they would purchase  
7 GT’s Kombucha Beverages again in the future, so long as Millennium changed the  
8 purportedly deceptive labeling.” Dkt. 25, at 17. The Court “allow[ed] Plaintiffs to  
9 amend the [Complaint] to remedy this pleading deficiency.” *Id.* Plaintiffs have  
10 subsequently amended the Complaint to allege just that. *See Fifth Am. Class Action*  
11 *Compl.* at ¶¶ 6-8 (alleging that Plaintiffs “would still be willing to purchase the  
12 current formulations of [the Subject Products], absent the price premium, so long as  
13 Millennium engages in corrective advertising”). Accordingly, Plaintiffs have  
14 standing to seek certification of a Rule 23(b)(2) class. As discussed above, the  
15 Settlement provides precisely the injunctive relief sought in the Complaint,  
16 consisting of, *inter alia*, removal of the word “antioxidant” from the labels of the  
17 Subject Products, the addition of an alcohol warning on the labels of Millennium’s  
18 Enlightened kombucha products, requirements that Millennium regularly pay for  
19 testing of the Subject Products to be conducted by an independent laboratory, and  
20 changing the labels of the Subject Products with regards to the declared sugar  
21 content if testing shows that the declared amounts are inconsistent. Further, should a  
22 new, industrywide standard for testing the alcohol content of kombucha be  
23 developed, Millennium will adopt that testing methodology. Absent the Settlement,  
24 this type of injunctive relief would only be available to Class Members after  
25 prevailing at trial on the merits.

1 **VII. THE PROPOSED NOTICE PROGRAM CONSTITUTES ADEQUATE**  
2 **NOTICE AND SHOULD BE APPROVED**

3 Once preliminary approval of a class action settlement is granted, notice must  
4 be directed to class members. For class actions certified under Rule 23(b)(3), “the  
5 court must direct to class members the best notice that is practicable under the  
6 circumstances, including individual notice to all members who can be identified  
7 through reasonable effort.” Rule 23(c)(2)(B). In addition, Rule 23(e)(1) applies to  
8 any class settlement and requires the Court to “direct notice in a reasonable manner  
9 to all class members who would be bound by a proposal.” Rule 23(e)(1).

10 When a court is presented with class notice pursuant to a settlement, both the  
11 class certification notice and notice of settlement may be combined in the same  
12 notice. *Manual*, § 21.633 at 321-22 (“For economy, the notice under Rule 23(c)(2)  
13 and the Rule 23(e) notice are sometimes combined.”). This notice allows Class  
14 Members to decide whether to opt out of or participate in the class and/or to object to  
15 the Settlement and argue against final approval by the Court. *Id.* The proposed  
16 notice program here, which is described in detail in the Fisher and Weisbrot  
17 Declarations, informs the Class of their rights and includes a comprehensive plan for  
18 delivery of notice by e-mail, U.S. Mail, a settlement website, publication in the  
19 California edition of USA Today, and Internet banner ads and constitutes the best  
20 notice practicable under the circumstances of this case.

21 The Notices accurately inform Class Members of the salient terms of the  
22 Settlement, the Class to be certified, the final approval hearing and the rights of all  
23 parties, including the rights to file objections and to opt out of the class. The Parties  
24 in this case have created and agreed to perform the following forms of notice, which  
25 will satisfy both the substantive and manner of distribution requirements of Rule 23  
26 and due process. *See* Exs. E and F to the Settlement, at Fisher Decl. Ex. 1:

27 **Email and U.S. Mail Notice:** A notice substantially in the form attached as  
28 Exhibit E to the Settlement shall be e-mailed or mailed to the last known e-  
mail address or U.S. mailing address of any Class Member whose contact



1 information is reasonably available to Millennium. E-Mail Notice will be  
2 followed by U.S. Mail Notice to any recipient for whom E-Mail Notice is  
unsuccessful.

3 **Settlement Website:** The parties will post a copy of the Long Form Notice  
4 (Ex. 3) on a website to be maintained by the Administrator, which will  
5 additionally contain the settlement documents, an online claim form, a list of  
6 important dates, and any other information to which the parties may agree.  
7 The website shall also contain a Settlement Email Address and Settlement  
Telephone Number, where Class Members can submit questions and receive  
further information and assistance.

8 **Internet Banner Ad Campaign:** The Administrator will implement an  
9 Internet banner ad campaign that contains an embedded link to the Settlement  
10 Website, which will be designed to reach at least 85% of the Class Members,  
11 without even taking account of other forms of notice contemplated by the  
notice program. The internet banner ad campaign is estimated to result in  
more than 12,900,000 impressions. Weisbrot Decl. ¶¶ 10, 18.

12 **Publication Notice:** The parties shall supplement direct notice by publishing  
13 the Summary Notice, attached as Exhibit F to the Settlement, for four  
14 consecutive weeks in the California edition of USA Today. The Summary  
Notice shall not be less than 1/4 of a page in size.

15 **Millennium's Social Media Accounts:** Millennium has also agreed to post a  
16 link to the Settlement website on its company website and on its Facebook,  
Instagram and Twitter pages. *Id.* ¶ 22.

17 **CAFA Notice:** The parties shall also cause to be disseminated the notice to  
18 public officials required by the Class Action Fairness Act ("CAFA") in  
accordance with the provisions of that Act. *Id.* ¶ 8.

19 This proposed notice program provides a fair opportunity for Class Members  
20 to obtain full disclosure of the conditions of the Settlement and to make an informed  
21 decision regarding the Settlement. This notice program is designed to reach at least  
22 85 percent of the Class Members. Weisbrot Decl. ¶ 22. Thus, the notices and notice  
23 procedures amply satisfy the requirements of due process.

## 24 **VIII. CONCLUSION**

25 For the foregoing reasons, Plaintiffs and Class Counsel respectfully request  
26 that the Court grant preliminary approval, provisionally certify the Class, approve the  
27 proposed notice plan, and enter the Proposed Preliminary Approval Order.

1 Dated: November 18, 2016

Respectfully submitted,

2 **BURSOR & FISHER, P.A.**

3  
4 By: /s/L. Timothy Fisher  
L. Timothy Fisher

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10 Attorneys for Defendants  
11 Millennium Products, Inc.

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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

JONATHAN RETTA, *et al.*,  
Plaintiffs,

v.

MILLENNIUM PRODUCTS, INC.,  
*et al.*,  
Defendants.

Case No. 15-CV-1801-PSG-AJW

**DECLARATION OF GT DAVE IN  
SUPPORT OF MOTION FOR  
PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT**

Judge: Hon. Philip S. Gutierrez

FAC Filed: June 22, 2016  
Trial Date: Not Set

**DECLARATION OF GT DAVE**

I, George Thomas “GT” Dave, hereby declare and state as follows:

1. I am the founder of Millennium Products, Inc. (“Millennium”) and have been its Chief Executive Officer since 1994. I submit this declaration in support of preliminary approval of the Stipulation of Class Action Settlement in the above-captioned action. I have personal knowledge of the facts stated herein and could testify to them if called upon to do so.

2. Millennium is the manufacturer of the “GT’s Classic Kombucha” and “GT’s Enlightened Kombucha” products at issue in this action (“Products”).

3. Millennium is a manufacturer of kombucha beverages and, with few exceptions, does not ship and/or distribute such beverages for resale directly to retailers. Instead, Millennium ships and/or distributes products to third-party distributors, who in turn receive and process purchase orders and ship Millennium products to retailers. These third-party distributors ship products to many different combinations of states and do not provide Millennium with records sufficient to show to what states Millennium products were shipped and when. As a result, Millennium does not have business records sufficient to show which specific Products were sold in any particular state at any given time.

4. As a manufacturer and not a retailer, Millennium does not set the retail price for the Products. Within the exception of a few local stores who receive shipments of the Products directly from Millennium, Millennium sells the Products to distribution companies who subsequently ship them to downstream retailers nationwide. These downstream retailers set the retail price for the Products.

5. Based on my observation of sales trends for the Products, in my capacity of the Chief Executive Officer of Millennium, the retail price of the Products has varied significantly over time and between states, and even within stores in the same market due to varying promotions offered by retailers.



**BURSOR & FISHER, P.A.**

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*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JONATHAN RETTA, KIRSTEN  
SCHOFIELD, and JESSICA MANIRE  
on Behalf of Themselves and all Others  
Similarly Situated,

Plaintiffs,

v.

MILLENNIUM PRODUCTS, INC., and  
WHOLE FOODS MARKET, INC.,

Defendants.

Case No. 2:15-cv-01801-PSG-AJW

**DECLARATION OF L. TIMOTHY  
FISHER IN SUPPORT OF  
PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR  
PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT**

Date: January 30, 2017

Time: 1:30 p.m.

Courtroom 880

Judge: Hon. Philip S. Gutierrez

**DECLARATION OF L. TIMOTHY FISHER**

I, L. Timothy Fisher, declare as follows:

1. I am an attorney at law licensed to practice in the State of California. I am a member of the bar of this Court, and I am a partner at Bursor & Fisher, P.A., counsel for Plaintiffs in this action. I make this declaration in support of Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement, Provisional Certification of Nationwide Settlement Class, and Approval of Procedure for and Form of Notice. I have personal knowledge of the facts set forth in this declaration, and, if called as a witness, could and would competently testify thereto under oath.

2. Bursor & Fisher, P.A. (“Class Counsel”), working in tandem with attorneys at Lehrman Beverage Law, PLLC, conducted extensive research, discovery, and investigation during the prosecution of this Action, including, without limitation: (i) the review of Defendants’ production, including more than a thousand of Millennium’s alcohol and antioxidant testing results throughout the Class Period, sales information, distributor information, internal communications, communications with potential customers, and information regarding current and former labeling of the Subject Products; (ii) the review of testing results and other documents produced by the American Herbal Products Association, Inc. and Kombucha Brewers International in response to Plaintiffs’ subpoenas; (iii) the review of product tests initiated and paid for by Plaintiffs and Class Counsel; (iv) an in-person inspection of the facilities and equipment of Brewing & Distilling Analytical Services, LLC, one of the laboratories commissioned by Plaintiffs to conduct testing of the Subject Products; (v) the review of other publicly available reports and tests concerning Defendants’ products; and (vi) the review of publicly available information regarding Defendants, their business practices and prior litigation.

3. Class Counsel and counsel for Defendants have engaged in substantial arm’s length negotiations in an effort to resolve the Action over a period of roughly

1 eight months, including conducting numerous telephone conferences, and three  
2 mediations before Jill Sperber, Esq. of Judicate West with subsequent follow-up  
3 negotiations, during which the terms of an agreement were extensively discussed and  
4 debated.

5 4. This Settlement constitutes an excellent recovery for Class members,  
6 and is within the reasonable range of probable recoveries. Defendants have agreed  
7 to provide up to \$8,250,000 to pay claims for those who purchased one or more  
8 flavors of the Subject Products on a claims-made basis.<sup>1</sup> Class Members can receive  
9 a \$3.50 cash payment for each bottle of every Subject Product purchased up to 10  
10 bottles (\$35) without Proof of Purchase. Alternatively, Class Members can choose a  
11 product voucher redeemable for a free Millennium product for each bottle of every  
12 Subject Product purchased up to 10 bottles without Proof of Purchase. For claims  
13 administration purposes, these vouchers will be assigned a value of \$3.50, although  
14 their value may be higher or lower depending on the point of sale at issue.<sup>2</sup> Product  
15 Vouchers will have no expiration date and will be redeemable for any Subject  
16 Product at no cost. Class Members with Proof of Purchase can receive up to \$60 in  
17 cash or \$60 in product vouchers at the actual retail price they paid.

18 5. The Parties propose that Angeion Group shall serve as the Settlement  
19 Administrator. The Parties will work with the Settlement Administer to develop a  
20 notice program designed to achieve at least 80% reach. As discussed in detail in the  
21 Weisbrot Declaration, the Parties expect that the notice program will in fact achieve  
22 at least an 85% reach. The notice program will consist of a Summary Notice to be  
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24 <sup>1</sup> All capitalized terms not otherwise defined herein shall have the same definitions  
as set out in the Settlement. *See* Fisher Decl. Ex. 1.

25 <sup>2</sup> According to information and belief, Millennium does not provide MSRP amounts  
26 for the Subject Products to its various distributors, and, accordingly, there is no  
27 uniform retail price. Millennium estimates that the average retail price of the Subject  
28 Products is between \$2.99 to \$3.99. *See* Decl. of GT Dave at ¶ 4-6. Thus, \$3.50 was  
chosen as the closest approximation of the average retail price. This figure comports  
with Plaintiffs' personal experiences in purchasing the Subject Products.



1 published on the Settlement Website and once a week, for four successive weeks, in  
2 the California edition of USA Today. The notice program will also have an  
3 expansive internet advertising component, consisting of both digital banner ads and  
4 links to the Settlement Website on Millennium’s website and on its Facebook,  
5 Instagram, and Twitter accounts. The Settlement Administrator will also establish a  
6 Settlement Website where Class Members will be able to submit claims and receive  
7 notice regarding all applicable deadlines, the Agreement, Class Notice, all papers  
8 filed by the Parties in support of the settlement, orders pertaining to the settlement,  
9 and contact information for reaching the Settlement Administrator via a toll-free  
10 telephone number, e-mail, and U.S. mail. Further, the Settlement Agreement  
11 mandates that Millennium provide direct notice to all Class Members that can be  
12 identified through reasonable effort. The Parties and the Claims Administrator will  
13 also cause to be disseminated the notice to public officials required by the Class  
14 Action Fairness Act (“CAFA”) in accordance with the provisions of that Act.

15           6. Class Counsel have vigorously and competently pursued the Class  
16 Members’ claims. The arm’s-length settlement negotiations that took place and the  
17 investigation they undertook demonstrate that Class Counsel adequately represent  
18 the Class. Moreover, the named Plaintiffs and Class Counsel have no conflicts of  
19 interests with the Class. Rather, the named Plaintiffs, like each absent Class  
20 Member, have a strong interest in proving Defendants’ common course of conduct,  
21 and obtaining redress. In pursuing this litigation, Class Counsel, as well as the named  
22 Plaintiffs, have advanced and will continue to advance and fully protect the common  
23 interests of all members of the Class. Class Counsel have extensive experience and  
24 expertise in prosecuting complex class actions. Class Counsel are active practitioners  
25 who are highly experienced in class action, product liability, and consumer fraud  
26 litigation.





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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JONATHAN RETTA *et al.*,  
Plaintiffs,  
  
v.  
  
MILLENNIUM PRODUCTS, Inc., *et al.*  
Defendants

Case No. 2:15-CV-01801-PSG-AJW  
**STIPULATION OF CLASS  
ACTION SETTLEMENT**  
  
Judge: Hon. Philip S. Gutierrez  
5AC Filed: June 27, 2016

1 Subject to Court approval pursuant to Rule 23 of the Federal Rules of Civil  
2 Procedure, Plaintiffs Jonathan Retta, Kirsten Schofield, and Jessica Manire  
3 (“Plaintiffs”), on behalf of themselves and each of the Class Members, and  
4 Defendants Millennium Products, Inc. (“Millennium”) and Whole Foods Market, Inc.  
5 (“Whole Foods”) (“Defendants”) (collectively, the “Parties”), by and through their  
6 respective counsel, authorized to settle this Action on their behalf, in consideration  
7 for and subject to the promises, terms, and conditions contained in this Stipulation of  
8 Class Action Settlement (“Agreement”), hereby stipulate and agree, as follows:

9 **I. RECITALS**

10 A. On March 11, 2015, Plaintiffs filed a proposed nationwide (or, in the  
11 alternative, California and New York) class action lawsuit against Millennium in the  
12 United States District Court for the Central District of California, Case No. 15-CV-  
13 1801-PSG-AJW, which asserted claims for violations of the California Consumers  
14 Legal Remedies Act (Cal. Civ. Code §§ 1750, *et seq.*) (“CLRA”), California’s Unfair  
15 Competition Law (Cal. Bus. & Prof. Code §§ 17200, *et seq.*) (the “UCL”),  
16 California’s False Advertising Law (Cal. Bus. & Prof. Code §§ 17500, *et seq.*) (the  
17 “FAL”), New York’s Deceptive and Unfair Trade Practices Act, and the New York  
18 General Business Law § 349 (“NYGBL”), that related to the advertising, labeling,  
19 and marketing of the antioxidant content of the Subject Products.

20 B. On April 28, 2015, Millennium filed a motion to dismiss or strike the  
21 above-referenced complaint. In response, on May 19, 2015 Plaintiffs filed a First  
22 Amended Complaint asserting additional facts regarding their claims for injunctive  
23 relief, standing, and clarifying the details regarding their purchases of Millennium’s  
24 products.

25 C. On June 19, 2015, Millennium filed a motion to dismiss or strike  
26 Plaintiffs’ First Amended Complaint, which the Court granted in part (as to claims for  
27 injunctive relief) and denied in part (as to the remainder of the claims at issue). In  
28 response, on October 2, 2015, Plaintiffs filed a Second Amended Complaint pleading

1 additional facts in support of their claims for injunctive relief.

2 D. After commissioning two independent laboratories to test the alcohol  
3 content of Millennium products and several months of ongoing investigation,  
4 Plaintiffs filed a Third Amended Complaint adding claims regarding the purported  
5 alcohol content of Millennium products and Millennium's alleged failure to provide  
6 federal alcohol warnings regarding the same on October 8, 2015. Millennium  
7 answered the Third Amended Complaint on November 3, 2015.

8 E. On February 11, 2016, Plaintiffs filed a Fourth Amended Complaint  
9 adding Whole Foods as a Defendant. Millennium answered the Fourth Amended  
10 Complaint on February 29, 2016 and Whole Foods moved to dismiss the Fourth  
11 Amended Complaint on April 7, 2016.

12 F. After discovery of a recent study concerning the sugar content of  
13 Millennium products and further investigation, Plaintiffs filed a Fifth Amended  
14 Complaint on June 22, 2016 adding additional claims for damages and injunctive  
15 relief and pleading additional causes of action regarding Millennium's alleged failure  
16 to correctly state the sugar content of its products on the labels of the products. The  
17 Fifth Amended Complaint asserted claims for violations of the CLRA, UCL, FAL,  
18 and NYGGBL, and for breach of express warranty, breach of the implied warranty of  
19 merchantability, negligent misrepresentation, fraud, and unjust enrichment.  
20 Millennium answered the Fifth Amended Complaint on July 6, 2016 and Whole  
21 Foods moved to dismiss the Fifth Amended Complaint on July 11, 2016.<sup>1</sup>

22 G. Before entering into this Agreement, the Parties exchanged and met and  
23 conferred concerning several sets of discovery requests, including interrogatories and  
24 requests for production. In response, Millennium produced thousands of pages of  
25 \_\_\_\_\_

26 <sup>1</sup> Whole Foods Market, Inc. moved to dismiss, in part, on the grounds that as a Texas  
27 holding company with no business operations, employees or any other contact with  
28 the state of California, it is not subject to the jurisdiction of the courts in California.  
This stipulation shall in no way be interpreted to waive future challenges Whole  
Foods Market, Inc. has to jurisdiction in California.

1 documents to Plaintiffs, including Millennium’s test results, sales information,  
2 distributor information, internal communications, communications with potential  
3 customers, and information regarding current and former labeling of its products.  
4 Plaintiffs also produced documents to Millennium, including their test results,  
5 consumer surveys, consumer research, and other materials. Plaintiffs also served  
6 subpoenas pursuant to Fed. R. Civ. P. 45 on American Herbal Products Association,  
7 Inc. and Kombucha Brewers International. After an extensive meet and confer  
8 process, the American Herbal Products, Inc. and Kombucha Brewers International  
9 produced testing results concerning Millennium’s products and other information.  
10 Plaintiffs reviewed all of the documents produced by Millennium, American Herbal  
11 Products Association, Inc. and Kombucha Brewers International as well as  
12 documents and information obtained through their own research and investigation.

13 H. Before entering into this Agreement, the Parties, by and through their  
14 respective counsel, conducted a thorough examination, investigation, and evaluation  
15 of the relevant law, facts, and allegations to assess the merits of the claims and  
16 potential claims to determine the strength of liability, potential remedies, and all  
17 defenses thereto, including an extensive investigation into the facts and law relating  
18 to (i) label design and product formulation; (ii) the marketing and advertising of the  
19 products; (iii) sales, pricing, and financial data; and (iv) the sufficiency of the claims  
20 and appropriateness of class certification.

21 I. This Agreement was reached as a result of extensive arm’s-length  
22 negotiations between the Parties and their counsel. The Parties have engaged in  
23 extensive settlement discussions to determine if the Parties could reach a resolution  
24 short of protracted litigation. This included a full day of mediation before Jill R.  
25 Sperber, Esq. of Judicate West on March 25, 2016, several weeks of follow-on  
26 settlement discussions amongst counsel, and a further half day of mediation with Ms.  
27 Sperber via telephone on May 20, 2016 before a settlement in principle was reached.

28 J. On August 11, 2016, Plaintiffs filed a Motion for Preliminary Approval

1 of Class Action Settlement. On September 21, 2016, the Court denied the motion for  
2 preliminary approval.

3 K. After the Court's order, the Parties renewed their settlement negotiations  
4 to address the Court's concerns stated in the September 21, 2016 Order. On October  
5 7, 2016, Plaintiffs and Millennium participated in another mediation with Jill R.  
6 Sperber, Esq. of Judicate West, where the Plaintiffs and Millennium were able to  
7 reach another settlement agreement in principle.

8 L. After the Parties reached another settlement in principle as to all claims  
9 for monetary relief set forth in Section IV(A) of this agreement, and all injunctive  
10 relief concerning Plaintiffs' antioxidant, alcohol, and sugar labeling claims set forth  
11 in Section IV(B)(a), (b), (c), (d), and (e) of this agreement, the Parties met and  
12 conferred with opposing counsel in *Pedro et al. v. Millennium Products, Inc.*, Case  
13 No. 16-cv-03780-PSG-AJW (C.D. Cal 2016). During these negotiations, the Parties  
14 stated their position that the claims asserted in *Pedro* are subsumed within the *Retta*  
15 matter, and *Pedro* plaintiffs stated their position that the *Retta* action, although  
16 addressing the bulk of their claims, did not address a remaining claim for injunctive  
17 relief with respect to their allegations that the bottles of Millennium's products leak,  
18 fizz, or spill due to potential pressure buildup. As a result of these negotiations, the  
19 Parties agreed that additional injunctive relief set out in Section IV(B)(f) of this  
20 agreement would be provided by the *Retta* settlement to address the *Pedro* plaintiffs'  
21 remaining claim. Before and during these settlement negotiations, the Parties had an  
22 arm's-length exchange of sufficient information to permit Plaintiffs and their counsel  
23 to evaluate the claims and potential defenses and to meaningfully conduct informed  
24 settlement discussions.

25 N. Based upon their review, investigation, and evaluation of the facts and  
26 law relating to the matters alleged in the pleadings, Plaintiffs, as settlement class  
27 representatives, believe that the claims settled herein have merit. However, they and  
28 their counsel recognize and acknowledge the expense and length of continued



1 proceedings necessary to prosecute the claims through trial, appeal, and ancillary  
2 actions. Plaintiffs and their counsel have also taken into account the uncertain  
3 outcome and risk of litigation, and the difficulties and delay inherent in such  
4 litigation, and they believe that the settlement set forth in this Agreement confers  
5 important benefits upon the Class Members (defined herein). Accordingly, based  
6 upon their evaluation, after considering, among other things: (i) the benefits to the  
7 Class Members under the terms of this Agreement; (ii) the risks, costs, and  
8 uncertainty of protracted litigation, especially in complex actions such as this, as well  
9 as the difficulties and delays inherent in such litigation; and (iii) the desirability of  
10 consummating this Agreement promptly to provide effective relief to Class Members,  
11 Plaintiffs and their counsel have determined that the settlement set forth in this  
12 Agreement is in the best interests of the Class and, on behalf of Plaintiffs and the  
13 Class, have agreed to settle the Action pursuant to the provisions of this Agreement.

14 O. Defendants deny and continue to deny all charges of wrongdoing or  
15 liability against them arising out of any of the conduct, statements, acts or omissions  
16 alleged, or that could have been alleged, in the Action. Defendants specifically deny  
17 all allegations that the Subject Products (i) did not contain antioxidants as labeled at  
18 any time; (ii) owing to their specific alcohol content, failed to bear alcohol warnings  
19 required by any applicable laws; (iii) failed to accurately state their sugar content; or  
20 (iv) caused spillage, leakage, spoilage, or other product loss owing to the secondary  
21 fermentation of the Subject Products. Whole Foods further denies that Whole Foods'  
22 retail locations (which are wholly owned and operated by subsidiaries of Whole  
23 Foods Market, Inc.) can be held liable, in whole or in part, for the acts and omissions  
24 alleged in the Action, as these retail locations merely sell the Subject Products, and  
25 do not manufacture or label them. As a result, Defendants believe they cannot be  
26 held liable for any of the alleged conduct, statements, acts, or omissions at issue in  
27 the Action.

28 P. Defendants also denied and continue to deny, amongst other things,

1 allegations that Plaintiffs, the Class, or any member of the Class have suffered  
2 damage or harm by reason of any alleged conduct, statement, act, or omission of  
3 Defendants, or that Plaintiffs could establish damages or entitlement to injunctive  
4 relief on a classwide basis. Defendants further have denied and continue to deny that  
5 the Action meets the requisites for certification as a class action under federal,  
6 California, or New York law, except for purposes of settlement, or that the evidence  
7 is sufficient to support a finding of liability on an individual or classwide basis.  
8 Nonetheless, Defendants have concluded that further defense of the Action would be  
9 protracted and expensive, and that it is desirable that the Action be fully and finally  
10 settled in the manner and upon the terms and conditions set forth in the Agreement.  
11 Defendants also have taken into account the uncertainty and risks inherent in any  
12 litigation. Defendants, therefore, have determined that it is desirable and beneficial to  
13 it that the Action be settled in the manner and upon the terms and conditions set forth  
14 in this Agreement.

15 Q. This Agreement, and the proposed certification, for settlement purposes  
16 only, of the Class, effectuates the resolution of disputed claims and is for settlement  
17 purposes only.

18 NOW THEREFORE, it is hereby STIPULATED AND AGREED, by and  
19 between the Parties, through their respective counsel, that: (a) the Action and all  
20 Released Claims be fully and finally compromised, settled, and released upon final  
21 settlement approval by the Court after the hearings as provided for in this Agreement;  
22 and (b) upon such approval by the Court, a Final Order and Final Judgment,  
23 substantially in the form attached hereto as Exhibits A and B, respectively, be entered  
24 dismissing the Action with prejudice upon the following terms and conditions:

## 25 **II. DEFINITIONS**

26 As used in this Agreement and the attached exhibits, the following terms have  
27 the following meanings, unless this Agreement specifically provides otherwise.  
28 Other capitalized terms used in this Agreement but not defined below shall have the

1 meaning ascribed to them in this Agreement and the exhibits attached hereto:

2 1. "Action" shall mean the proposed class action lawsuit entitled *Retta et*  
3 *al. v. Millennium Products, Inc.*, Case No. 15-CV-1801-PSG-AJW pending in the  
4 United States District Court for the Central District of California.

5 2. "Agreement" means this Stipulation of Settlement and its exhibits,  
6 attached hereto and incorporated herein, including all subsequent amendments agreed  
7 to in writing by the Parties and any exhibits to such amendments.

8 3. "Attorneys' Fees and Expenses" means such funds as may be awarded  
9 by the Court to Plaintiffs' Counsel to compensate Plaintiffs' Counsel for their fees  
10 and expenses in connection with the Action and the Settlement, as described more  
11 particularly in Section VI of this Agreement.

12 4. "Authorized Claimant" means a member of the Class who timely  
13 submits a valid Claim Form in accordance with the terms of this Agreement.

14 5. "Claim Deadline," means the final time and date by which a valid Claim  
15 Form must be postmarked or received by the Settlement Administrator for a Class  
16 Member to be eligible for any of the settlement consideration contemplated in this  
17 Agreement. The Claim Deadline shall be clearly set forth in the Court orders  
18 granting preliminary and final approval of the Settlement, the Long Form Notice and  
19 Summary Notice, on the Settlement Website, and on the front page of the Claim  
20 Form.

21 6. "Claim Form" means the proof of claim and release form(s),  
22 substantially in the form attached hereto as Exhibit C, the format of which may be  
23 modified to meet the requirements of the Settlement Administrator, to be submitted  
24 by Class Members seeking to recover settlement consideration pursuant to this  
25 Agreement.

26 7. "Class" means all persons in the United States and United States  
27 Territories who purchased at retail one or more of the Subject Products during the  
28 Class Period. Specifically excluded from the Class are: (a) Defendants and their

1 employees, principals, officers, directors, agents, affiliated entities, legal  
2 representatives, successors and assigns; (b) the judges to whom the Action has been  
3 or is assigned and any members of their immediate families; (c) those who purchased  
4 the Subject Products for the purpose of re-sale; and (d) all persons who have filed a  
5 timely Request for Exclusion from the Class.

6 8. "Class Member(s)" means any member of the Class.

7 9. "Class Notice" means, collectively, the Long Form Notice and Summary  
8 Notice provided to the Class as provided herein and directed by the Court, and the  
9 Internet advertising to be facilitated by the Settlement Administrator.

10 10. "Class Period" means the period from March 11, 2011 up to and  
11 including the Notice Date.

12 11. "Court" means the United States District Court for the Central District of  
13 California and all judges assigned to the Action.

14 12. "Defense Counsel" means the law firms of O'Melveny & Myers LLP as  
15 to Millennium and LTL Attorneys LLP as to Whole Foods.

16 13. "Effective Date" means the first date after which all of the following  
17 events and conditions have been met or have occurred:

- 18 (a) The Court has entered the Preliminary Approval Order;  
19 (b) The Court has entered the Final Order and Final Judgment;  
20 (c) Unless the Parties otherwise agree in writing to waive all or any  
21 portions of the following provision, there has occurred: (i) in the event there is a  
22 properly and timely filed objection to entry of the Final Order and Final Judgment,  
23 the expiration (without the filing or noticing of an appeal) of the time to appeal from  
24 the Final Order and Final Judgment; (ii) if the Final Order and Final Judgment is  
25 appealed, the final dismissal of an appeal from the Final Order and Final Judgment or  
26 the affirmance on appeal of the Final Order and Final Judgment in its entirety; (iii) if  
27 a ruling or decision is entered by an appellate court affirming the Final Order and  
28 Final Judgment, the time to petition for a writ of certiorari with respect to such ruling

1 or decision has expired; or (iv) if a petition for a writ of certiorari with respect to the  
2 Final Order and Final Judgment is filed, the petition has been denied or dismissed or,  
3 if granted, has resulted in affirmance of the Final Order and Final Judgment in  
4 substantial form.

5 14. “Fairness Hearing” means the hearing that is to take place after the entry  
6 of the Preliminary Approval Order and after the Notice Date for purposes of: (a)  
7 determining the fairness, adequacy and reasonableness of the Agreement in  
8 accordance with applicable jurisprudence; (b) if the Court so decides, entering the  
9 Final Order and Final Judgment and dismissing the Action with prejudice; (c) ruling  
10 upon an application by Class Counsel for Attorneys’ Fees and Expenses and  
11 Plaintiffs’ incentive awards. The Parties shall request that the Court schedule the  
12 Fairness Hearing for a date that is in compliance with the provisions of 28 U.S.C. §  
13 1715(d).

14 15. “Final Order and Final Judgment” means the Court’s order and judgment  
15 fully and finally approving the Settlement and dismissing the Action with prejudice,  
16 substantially in the form attached hereto as Exhibits A and B.

17 16. “Long Form Notice” means the long form notice of settlement,  
18 substantially in the form attached hereto as Exhibit E.

19 17. “Millennium” means Millennium Products, Inc., and includes, without  
20 limitation all related entities, including but not limited to parents, subsidiaries, agents,  
21 employees and assigns, predecessors, successors and affiliates of Millennium  
22 Products, Inc., and their related entities and owners, including George Thomas Dave.

23 18. “Net Cash Amount” means the value derived by subtracting the value of  
24 Attorneys’ Fees and Expenses to be awarded to Plaintiffs’ Counsel, any incentive  
25 awards to be awarded to any Plaintiffs or Related Plaintiffs, and any Settlement  
26 Administration Expenses from eight million two hundred and fifty thousand dollars  
27 (\$8,250,000).

28 19. “Notice Date” means the first date upon which the Class Notice is

1 disseminated.

2 20. "Objection Deadline" means the date, to be set by the Court, by which  
3 Class Members must file objections, if any, to the Agreement in accordance with  
4 Section IX of this Agreement. The Parties shall request that the Court set an  
5 Objection Deadline coinciding with the Opt Out Date.

6 21. "Opt Out Date" means the date, to be set by the Court, by which a  
7 Request For Exclusion must be sent to Settlement Administrator for a Class Member  
8 to be excluded from the Settlement Class. The Parties shall request that the Court set  
9 an Opt Out Date coinciding with the Objection Deadline.

10 22. "Parties" means Plaintiffs, Millennium, and Whole Foods collectively,  
11 as each of those terms are defined in this Agreement.

12 23. "Plaintiffs" means Jonathan Retta, Kirsten Schofield, and Jessica  
13 Manire.

14 24. "Plaintiffs' Counsel" and/or "Class Counsel" means the law firm of  
15 Bursor & Fisher, P.A.

16 25. "Preliminary Approval Order" means the order, substantially in the form  
17 attached hereto as Exhibit D, conditionally certifying, for settlement purposes only,  
18 the Class; appointing Plaintiffs' Counsel as counsel for the Class; setting the date of  
19 the Fairness Hearing; preliminarily approving this Agreement; approving the Class  
20 Notice program and Claim Form; and setting dates for the Claim Deadline, Opt Out  
21 Date, Objection Deadline, and Notice Date.

22 26. "Proof of Purchase" means receipts, Millennium packaging, or other  
23 documentation from a third-party commercial source reasonably establishing the  
24 purchase during the Class Period of one or more of the Subject Products. Packaging,  
25 including bar codes or UPCs, shall constitute Proof of Purchase only if the Subject  
26 Product(s) claimed to have been purchased by the Class Member can be identified  
27 from the packaging submitted.

28 27. "Related Actions" means *Samet v. Millennium Products, Inc.*, No. 1-15-

1 CV-286908 (Santa Clara Sup. Ct. 2015), *Pedro et al. v. Millennium Products, Inc.*,  
2 Case No. 16-cv-03780-PSG-AJW (C.D. Cal 2016), and *Hood v. Millennium*  
3 *Products, Inc.*, No. 1-15-CV-286910 (Santa Clara Sup. Ct. 2015).

4 28. “Related Plaintiffs” means Janet Hood, Rosalind Lewis, Nina Pedro, and  
5 Sarah Samet.

6 29. (a) “Released Claims” means and includes any and all claims,  
7 demands, rights, damages, obligations, suits, debts, liens, and causes of action under  
8 common law or statutory law (federal, state, or local) of every nature and description  
9 whatsoever, monetary, injunctive, or equitable, ascertained or unascertained,  
10 suspected or unsuspected, existing or claimed to exist, including Unknown Claims as  
11 of the Notice Date by Plaintiffs and all Class Members (and Plaintiffs’ and Class  
12 Members’ respective heirs, guardians, executors, administrators, representatives,  
13 agents, attorneys, partners, successors, predecessors-in-interest, and assigns) that:

14 (i) were asserted or that could have been reasonably asserted in the Action  
15 against the Released Parties (as hereinafter defined), or any of them, and that  
16 arise out of or are related in any way to any or all of the acts, omissions, facts,  
17 matters, transactions, or occurrences that were or could have been directly or  
18 indirectly alleged or referred to in the Action (including, but not limited to,  
19 alleged violations of the CLRA, UCL, FAL, NYGBL or similar laws of any  
20 state or United States territory, and alleged claims for injunctive relief, breach  
21 of warranty, breach of the implied warranty of merchantability, negligent  
22 misrepresentation, fraud, and unjust enrichment); or

23 (ii) were asserted or that could have been reasonably asserted by any Class  
24 Member against the Released Parties (as hereinafter defined), or any of them,  
25 and that arise out of or are related in any way to any or all of the acts,  
26 omissions, facts, matters, transactions, or occurrences that were or could have  
27 been directly or indirectly alleged or referred to, including all claims for  
28 monetary, injunctive, or equitable relief that relate in any way to

1 communications, disclosures, representations, statements, claims,  
2 nondisclosures and/or omissions, packaging, advertising, labeling, and/or  
3 marketing of or concerning the Subject Products, in the Related Actions; or  
4 (iii) relate in any way to communications, disclosures, representations,  
5 statements, claims, nondisclosures and/or omissions, packaging, advertising,  
6 labeling, and/or marketing of or concerning the Subject Products related to the  
7 nutritional value and/or content, including but not limited to the antioxidant  
8 content, of the Subject Products, including, but not limited to statements that  
9 the Subject Products contain “antioxidants,” “powerful antioxidants,” or “more  
10 antioxidants than blueberries,” made through any medium; or  
11 (iv) relate in any way to communications, disclosures, representations,  
12 statements, claims, nondisclosures and/or omissions, packaging, advertising,  
13 labeling, testing, and/or marketing of or concerning the Subject Products  
14 related to the alleged alcohol content of the products; or  
15 (v) relate in any way to communications, disclosures, representations,  
16 statements, claims, nondisclosures and/or omissions, packaging, advertising,  
17 labeling, testing, and/or marketing of or concerning the Subject Products  
18 related to the consequences of continued fermentation of the products,  
19 including but not limited to the consequences of continued fermentation of the  
20 products, including but not limited to the consequences of excessive  
21 carbonation, bottle pressure, or product spillage, leakage, or spoilage; or  
22 (vi) relate in any way to communications, disclosures, representations,  
23 statements, claims, nondisclosures and/or omissions, packaging, advertising,  
24 labeling, testing, and/or marketing of or concerning the Subject Products  
25 related to the alleged sugar content of the products.

26 (b) Notwithstanding any other provision of this Agreement, “Released  
27 Claims” do not include claims for personal injuries. Plaintiffs and Class Members are  
28 not releasing any claims, demands, rights, damages, obligations, suits, debts, liens,



1 and causes of action relating to personal injuries.

2 30. "Released Parties" shall be defined and construed broadly to effectuate  
3 a complete and comprehensive release, and means Millennium and any entity that  
4 made, manufactured, tested, inspected, audited, certified, purchased, distributed,  
5 supplied, licensed, transported, donated, marketed, advertised, promoted, sold or  
6 offered for sale any Subject Product, including but not limited to Whole Foods,  
7 Target Corporation, Costco Wholesale Corporation, Wal-Mart Stores, Inc., the  
8 Kroger Company, Safeway, Inc., and Albertsons, Inc., other distributors or retailers,  
9 or any entity that contributed to any labeling, sale, distribution, supply, advertising,  
10 marketing, or packaging of any Product, including all of their respective  
11 predecessors, successors, assigns, parents, subsidiaries, divisions, departments, and  
12 affiliates, and any and all of their past, present and future officers, directors,  
13 employees, shareholders, partners, principals, agents, servants, successors, attorneys,  
14 insurers, representatives, licensees, licensors, customers, subrogees and assigns. It is  
15 expressly understood that, to the extent a Released Party is not a Party to this  
16 Agreement, all such Released Parties are intended third party beneficiaries of this  
17 Agreement.

18 31. "Releasing Parties" means Plaintiffs, Plaintiffs' Counsel, and all Class  
19 Members, and any person claiming by or through each Class Member, including but  
20 not limited to spouses, children, wards, heirs, devisees, legatees, invitees, employees,  
21 associates, co-owners, attorneys, agents, administrators, predecessors, successors,  
22 assignees, representatives of any kind, shareholders, partners, directors, or affiliates.

23 32. "Request For Exclusion" means the written communication that must be  
24 sent to the Settlement Administrator and postmarked on or before the Opt Out Date  
25 by a Class Member who wishes to be excluded from the Class.

26 33. "Settlement" means the settlement embodied in this Agreement,  
27 including all attached exhibits (which are an integral part of this Agreement and are  
28 incorporated in their entirety by reference).

1           34. “Settlement Administrator” means Angeion Group.

2           35. “Settlement Administration Expenses” means the expenses incurred by  
3 the Settlement Administrator assisting with the implementation of this Agreement,  
4 which shall primarily result from administering the notice program and processing all  
5 claims made by Class Members.

6           36. “Subject Products” means all products sold by Defendants during the  
7 Class Period under Millennium’s Enlightened Kombucha, Enlightened Synergy,  
8 Classic Kombucha, and Classic Synergy product lines: Classic Kombucha Original,  
9 Classic Kombucha Citrus, Classic Kombucha Gingerade, Classic Kombucha Multi-  
10 Green, Classic Kombucha Third Eye Chai, Classic Synergy Cosmic Cranberry,  
11 Classic Synergy Maqui Berry Mint, Classic Synergy Divine Grape, Classic Synergy  
12 Gingerberry, Classic Synergy Raspberry Rush, Classic Synergy Strawberry Serenity,  
13 Classic Synergy Superfruits, Classic Synergy Trilogy, Enlightened Kombucha  
14 Botanic No. 3, Enlightened Kombucha Botanic No. 7, Enlightened Kombucha  
15 Botanic No. 9, Enlightened Kombucha Citrus, Enlightened Kombucha Gingerade,  
16 Enlightened Kombucha Multi-Green, Enlightened Kombucha Original, Enlightened  
17 Synergy Black Chia, Enlightened Synergy Cosmic Cranberry, Enlightened Synergy  
18 Cherry Chia, Enlightened Synergy Gingerberry, Enlightened Synergy Grape Chia,  
19 Enlightened Synergy Green Chia, Enlightened Synergy Guava Goddess, Enlightened  
20 Synergy Mystic Mango, Enlightened Synergy Passionberry Bliss, Enlightened  
21 Synergy Raspberry Chia, Enlightened Synergy Strawberry Serenity, and Enlightened  
22 Synergy Trilogy.

23           37. “Summary Notice” means the summary notice of the proposed  
24 Settlement, substantially in the form attached hereto as Exhibit F.

25           38. “Unknown Claims” means any and all Released Claims that a Class  
26 Member, or anyone acting on behalf of or in the Class Member’s interest, does not  
27 know or suspect to exist against any of the Released Parties relating to any Subject  
28 Product, which, if known, might have affected his or her decision to enter into or to

1 be bound by the terms of this Agreement. The Plaintiffs and Class Members  
2 acknowledge that they may hereafter discover facts in addition to or different from  
3 those that they now know or believe to be true concerning the subject matter of this  
4 Agreement, but nevertheless fully, finally, and forever settle and release any and all  
5 Released Claims, monetary, injunctive, or equitable, known or unknown, suspected  
6 or unsuspected, contingent or non-contingent, which now exist, may hereafter exist,  
7 or heretofore have existed which arise from, or in any way relate to, the labeling,  
8 packaging, sale, distribution, supply, marketing, testing, or advertising, regardless of  
9 medium, of any Subject Product, without regard to subsequent discovery or existence  
10 of such different or additional facts concerning each of the Released Parties.

11 Notwithstanding this paragraph or any other paragraph herein, this Agreement shall  
12 not be deemed to release any individual, class, representative, group or collective  
13 claim, liability, right, demand, suit, matter, obligation, damage, loss, action or cause  
14 of action, of any kind or description that a Releasing Party has or may have for  
15 personal injuries.

16 39. "Whole Foods" means Whole Foods Market, Inc., and includes, without  
17 limitation all related entities, including but not limited to parents, subsidiaries, agents,  
18 employees and assigns, predecessors, successors and affiliates of Whole Foods  
19 Market, Inc., and its related entities.

20 **III. SUBMISSION OF THE SETTLEMENT TO THE COURT FOR**  
21 **REVIEW AND APPROVAL**

22 40. As soon as is practicable following the signing of this Agreement, Class  
23 Counsel shall apply to the Court for entry of the Preliminary Approval Order  
24 (substantially in the form attached as Exhibit D), for the purpose of, among other  
25 things:

26 (a) Approving the Class Notice, including the Long Form Notice and  
27 Summary Notice, substantially in the form set forth at Exhibits E and F;  
28

1 (b) Finding that the requirements for preliminary certification of the  
2 Class have been satisfied, appointing Plaintiffs as the representatives of the Class and  
3 their counsel as Class Counsel, and preliminarily approving the Settlement as being  
4 within the range of reasonableness such that the Class Notice should be provided  
5 pursuant to this Agreement;

6 (c) Scheduling the Fairness Hearing on a date ordered by the Court,  
7 provided in the Preliminary Approval Order, and in compliance with applicable law,  
8 to determine whether the Settlement should be approved as fair, reasonable, and  
9 adequate, and to determine whether a Final Order and Final Judgment should be  
10 entered dismissing the Action with prejudice.

11 (d) Determining that the notice of the Settlement and of the Fairness  
12 Hearing, as set forth in this Agreement, complies with all legal requirements,  
13 including but not limited to the Due Process Clause of the United States Constitution;

14 (e) Preliminarily approving the form of the Final Order and Final  
15 Judgment;

16 (f) Appointing Angeion Group as the Settlement Administrator;

17 (g) Directing that Class Notice shall be given to the Class as provided  
18 in Section V of this Agreement.

19 (h) Providing that Class Members will have until the Claim Deadline  
20 to submit Claim Forms;

21 (i) Providing that any objections by any Class Member to the  
22 certification of the Class and the proposed Settlement contained in this Agreement,  
23 and/or the entry of the Final Order and Final Judgment, shall be heard and any papers  
24 submitted in support of said objections shall be considered by the Court at the  
25 Fairness Hearing only if, on or before the Objection Deadline set by the Court, such  
26 objector files with the Court a written objection and notice of the objector's intention  
27 to appear, and otherwise complies with the requirements in Section IX of this  
28 Agreement;

1 (j) Establishing dates by which the Parties shall file and serve all  
2 papers in support of the application for final approval of the Settlement and/or in  
3 response to any valid and timely objections;

4 (k) Providing that all Class Members will be bound by the Final  
5 Order and Final Judgment dismissing the Action with prejudice unless such members  
6 of the Class timely file valid written Requests for Exclusion in accordance with this  
7 Agreement and the Class Notice;

8 (l) Providing that Class Members wishing to exclude themselves  
9 from the Settlement will have until the Opt Out Date to submit a valid written  
10 Request for Exclusion to the Settlement Administrator, in accordance with the  
11 procedures set forth in Section IX of this Agreement;

12 (m) Directing the Parties, pursuant to the terms and conditions of this  
13 Agreement, to take all necessary and appropriate steps to establish the means  
14 necessary to implement the Settlement;

15 (n) Pending the Fairness Hearing, staying all proceedings in the  
16 Action, other than proceedings necessary to carry out or enforce the terms and  
17 conditions of this Agreement and the Preliminary Approval Order; and

18 (o) Pending the Fairness Hearing, enjoining Plaintiffs and Class  
19 Members, or any of them, from commencing or prosecuting, either directly or  
20 indirectly, any action in any forum (state or federal) asserting any Released Claims.

21 41. Following the entry of the Preliminary Approval Order, the Class Notice  
22 shall be given and published in the manner directed and approved by the Court, as set  
23 forth in fuller detail in Section V of this Agreement.

24 42. At the Fairness Hearing, the Parties shall seek to obtain from the Court a  
25 Final Order and Final Judgment in the form substantially similar to Exhibits A and  
26 Exhibit B, respectively. The Final Order and Final Judgment shall, among other  
27 things:

28 (a) Find that the Court has personal jurisdiction over all Class

1 Members, the Court has subject matter jurisdiction over the claims asserted in the  
2 Action, and that venue is proper;

3 (b) Finally approve the Agreement and the Settlement pursuant to  
4 Rule 23 of the Federal Rules of Civil Procedure;

5 (c) Certify the Class for settlement purposes only;

6 (d) Find that the notice to the Class complied with all laws and  
7 requirements, including, but not limited to, the Due Process Clause of the United  
8 States Constitution;

9 (e) Incorporate and effectuate the release set forth in the Agreement  
10 and make the Release effective as of the date of the Final Order and Final Judgment;

11 (f) Authorize the Parties to implement the terms of the Settlement;

12 (g) Dismiss the Action with prejudice; and

13 (h) Notwithstanding the aforementioned dismissal with prejudice,  
14 retain jurisdiction relating to the administration, consummation, enforcement, and  
15 interpretation of the Agreement, the Final Order and Final Judgment, any final order  
16 approving Attorneys' Fees and Expenses and incentive awards, and for any other  
17 necessary purpose.

18 43. The Parties acknowledge that each intends to implement the terms of this  
19 Agreement. The Parties shall, in good faith, cooperate and assist with and undertake  
20 all reasonable actions and steps to accomplish all required events on the schedule set  
21 by the Court, and shall use reasonable efforts to implement all terms and conditions  
22 of this Agreement. In the event the Court does not preliminarily or finally approve  
23 this Agreement, the Parties further agree to continue to cooperate in good faith in an  
24 attempt to address any deficiencies raised by the Court in an expeditious manner.

25 **IV. THE SETTLEMENT CONSIDERATION**

26 The Net Cash Amount will be distributed in the form of cash payments and  
27 product vouchers as follows:

28 **A. Settlement Fund and Awards to Class Members**

1           44. Total Financial Commitment: Defendants' maximum financial  
2 commitment under the Settlement shall be eight million two hundred and fifty  
3 thousand dollars (\$8,250,000.00). This amount shall include any Court ordered  
4 Attorneys' Fees and Expenses, Plaintiffs' incentive awards, any and all Settlement  
5 Administration Expenses, and the monetary value of all cash awards and product  
6 vouchers paid to or issued to Class Members. All Settlement Administration  
7 Expenses will be paid by Millennium to the Settlement Administrator as incurred and  
8 on terms to be negotiated between Millennium and the Settlement Administrator.

9           45. Cash or Voucher Option: Class Members who (a) execute and submit a  
10 valid Claim Form on or before the Claim Deadline; (b) attest under the penalty of  
11 perjury that they purchased one or more of the Subject Products during the Class  
12 Period; and (c) provide all required Proof of Purchase or other required  
13 documentation (as necessary), and comply with all other conditions and requirements  
14 specified herein, may opt to receive either a cash award or a product award (but not  
15 both) as follows:

16           (a) Cash Award Option: The relief to be provided to each Authorized  
17 Claimant who (i) submits a valid Claim Form on or before the Claim Deadline  
18 pursuant to the terms and conditions of this Agreement, and (ii) and opts to receive a  
19 cash award, is a \$3.50 cash award for each Subject Product the Authorized Claimant  
20 purchased during the Class Period, up to a maximum of ten (10) claims (or \$35.00 in  
21 cash) if the Authorized Claimant does not provide Proof of Purchase. Authorized  
22 Claimants who claim more than \$35.00 in cash awards must submit Proof of  
23 Purchase establishing their purchase during the Class Period of each Subject Product  
24 claimed and may receive up to \$60.00 in cash awards based on the retail value of the  
25 Subject Products shown in the Proof of Purchase.

26           (b) Product Voucher Option: The relief to be provided to each  
27 Authorized Claimant who (i) submits a valid Claim Form on or before the Claim  
28 Deadline pursuant to the terms and conditions of this Agreement, and (ii) and opts to

1 receive a product voucher award in lieu of the cash award described in section (a)  
2 above, is a product voucher redeemable for a free Millennium product for each  
3 Subject Product the Authorized Claimant purchased during the Class Period, up to a  
4 maximum \$35.00 in product vouchers if the Authorized Claimant does not provide  
5 Proof of Purchase. For claims administration purposes, each voucher will be  
6 assigned a cash value of \$3.50, although the actual value of the voucher will depend  
7 on the point-of-sale price of the product purchased when the voucher is redeemed.  
8 Authorized Claimants who claim more than \$35.00 worth of product vouchers must  
9 submit Proof of Purchase establishing their purchase during the Class Period of each  
10 Subject Product claimed and may receive up to \$60.00 in product vouchers based on  
11 the retail value of the Subject Products shown in the Proof of Purchase. Millennium  
12 shall determine rules for voucher use, and voucher redemption by retailers will be  
13 administered in accordance with procedures prescribed by Millennium. The product  
14 vouchers (a) shall have no expiration date; (b) shall be freely transferrable, subject to  
15 reasonable measures to prevent fraud, and duplicating or counterfeiting of vouchers  
16 (including but not limited to requirements concerning printing and authentication, use  
17 of serial numbers, UPC coding, specialized ink and/or paper, watermarks, and/or  
18 holograms, and/or physical delivery – all subject to specification by Millennium); (c)  
19 shall, subject to retailer policies, be redeemable at any retailer that sells the Subject  
20 Products; and (d) shall be redeemable in exchange for any variety or flavor of the  
21 Subject Products.

22 (c) Timing of Awards: All Class Members who submit Claim Forms  
23 shall be sent cash awards or product vouchers or, as applicable, a letter explaining the  
24 rejection of their Claim Forms, within forty-five (45) calendar days of the Effective  
25 Date (the “Award Issuance Date”). Millennium shall pay the Settlement  
26 Administrator the aggregate value of all cash awards to be distributed to Class  
27 Members no later than fifteen (15) calendar days before the Award Issuance Date.  
28 All cash awards to Class Members will be in the form of checks, and such checks will



1 state that they must be redeemed within 120 calendar days of the Award Issuance  
2 Date (the “Expiration Date”) or they will become void. Millennium shall provide the  
3 Settlement Administrator with all product vouchers no later than fifteen (15) calendar  
4 days before the Award Issuance Date. The product vouchers will have no expiration  
5 date.

6 46. Insufficient Funds: If the aggregate value of the cash rewards and  
7 product vouchers claimed by Authorized Claimants pursuant to valid and timely  
8 Claim Forms exceeds the Net Cash Amount, then the monetary value of the awards to  
9 be provided to each Authorized Claimant shall be reduced on a pro rata basis, such  
10 that the aggregate value of the awards does not exceed the Net Cash Amount. After  
11 the Award Issuance Date, the Settlement Administrator, in consultation with the  
12 Parties as necessary, shall determine each Authorized Claimant’s pro rata share based  
13 upon each Authorized Claimant’s Claim Form and the aggregate value of the awards  
14 claimed by Authorized Claimants.

15 **B. Injunctive Relief**

16 47. In consideration for the Release contained in this Agreement, and as a  
17 result of the efforts of the Plaintiffs and their counsel:

18 (a) No later than 120 days after the Effective Date, Millennium will  
19 cease ordering and/or printing labels for the Subject Products bearing the term  
20 “antioxidant.” This agreement will not prevent Millennium from implementing label  
21 changes regarding the antioxidant content of Millennium’s products that are (a)  
22 reasonably necessary to comply with any statute, regulation, or other law of any kind;  
23 (b) necessitated by product and/or ingredient changes; or (c) permitted by subsequent  
24 statute, regulation, or case law concerning the use of the term “antioxidant” on food  
25 and beverage labels.

26 (b) No later than 120 days after the Effective Date, Millennium will  
27 begin ordering and/or printing labels, for Subject Products within Millennium’s  
28 Enlightened Kombucha and Enlightened Synergy product lines, that state that the

1 products contain naturally occurring alcohol and should not be consumed by  
2 individuals seeking to avoid alcohol due to pregnancy, allergies, sensitives, or  
3 religious beliefs. This agreement will not prevent Millennium from implementing  
4 label changes regarding the alcohol content of Millennium’s products that are (a)  
5 reasonably necessary to comply with any statute, regulation, or other law of any kind;  
6 (b) necessitated by product and/or ingredient changes; or (c) permitted by subsequent  
7 statute, regulation, or case law concerning alcohol disclosures and/or alcohol  
8 warnings on food and beverage labels.

9 (c) To ensure that all such products continue to comply with federal  
10 and state labeling standards, Millennium will regularly test samples from every  
11 Subject Product line (at the time of bottling and the time of expiration) using a third-  
12 party laboratory.

13 (d) Should the working group formed by the Association of Official  
14 Agricultural Chemists (“AOAC”), the Alcohol and Tobacco Tax and Trade Bureau  
15 (“TTB”), and Kombucha Brewers International (“KBI”), develop an industry-wide  
16 standard testing methodology for ethanol in kombucha that differs from Millennium’s  
17 methodology, Millennium will adopt that standard no later than 60 days after the  
18 standard is announced as an official AOAC testing methodology.

19 (e) To ensure that all such products continue to comply with federal  
20 and state labeling standards, Millennium will, every three months, test the sugar  
21 content of multiple product samples, drawn from every Subject Product line, using a  
22 third-party laboratory. If such testing reveals that the sugar content of a product  
23 sample varies from the declared sugar content on that product’s label to a greater  
24 extent than allowed by federal or state labeling standards, Millennium will review the  
25 testing and sampling methodology employed by its third-party laboratory, including  
26 repeating the testing for the product line at issue, and, if the variability is repeated,  
27 make label adjustments regarding sugar content as necessary.

28 (f) To ensure that all such products continue to comply with federal

1 and state labeling standards, no later than 120 days after the Effective Date, the labels  
2 of the Subject Products s will state that the products may be under pressure and that  
3 the failure to refrigerate the products may result in leaking or gushing.

4 **V. NOTICE TO THE CLASS**

5 48. The Parties shall jointly recommend and retain Angeion Group as the  
6 Settlement Administrator. Following the entry of the Preliminary Approval Order  
7 and the Court's appointment of the proposed Settlement Administrator, the  
8 Settlement Administrator shall disseminate the Class Notice as specified in the  
9 Preliminary Approval Order and in this Section, to comply with all applicable laws  
10 and requirements, including, but not limited to, the Due Process Clause of the United  
11 States Constitution. The Settlement Administrator shall develop a notice and claims  
12 administration program, subject to the approval of the Parties and the Court, designed  
13 to achieve at least 80% reach. Defendants shall pay all Settlement Administration  
14 Expenses up to \$400,000. Any reasonable Settlement Administration Expenses  
15 above \$400,000 shall be deducted on a pro rata basis from the cash rewards and  
16 product vouchers claimed by Authorized Claimants, regardless of whether the entire  
17 \$8,250,000 fund is fully exhausted. Following the dissemination of the Class Notice,  
18 the Settlement Administrator shall submit a declaration under the penalty of perjury  
19 attesting that the Class Notice has achieved at least 80% reach.

20 49. The Long Form Notice: The Long Form Notice, which shall be made  
21 available on the Settlement Website, to Class Members requesting a hard copy from  
22 the Settlement Administrator and to Class Members that Millennium can identify in  
23 its records through reasonable effort, shall be in a form substantially similar to the  
24 document attached to this Agreement as Exhibit E and shall comport to the following  
25 terms and requirements:

26 (a) General Terms: The Long Form Notice shall contain a plain and  
27 concise description of the nature of the Action and the proposed Settlement, including  
28 information on the definition of the Class, the identity of eligible Class Members,

1 how the proposed Settlement would provide relief to Class Members, what claims are  
2 released under the proposed Settlement, and other relevant information.

3 (b) Opt Out Rights: The Long Form Notice shall inform Class  
4 Members that they have the right to opt out of the Settlement. The Long Form Notice  
5 shall provide the deadlines and procedures for exercising this right.

6 (c) Objection to Settlement: The Long Form Notice shall inform  
7 Class Members of their right to object to the proposed Settlement and appear at the  
8 Fairness Hearing. The Class Notice shall provide the deadlines and procedures for  
9 exercising these rights.

10 (d) Fees and Expenses: The Long Form Notice shall inform Class  
11 Members about the amounts being sought by Class Counsel as Attorneys' Fees and  
12 Expenses and Plaintiffs' incentive awards, and shall explain that the Attorneys' Fees  
13 and Expenses and Plaintiffs' incentive awards, in addition to amounts being made  
14 available for relief to Class Members, will be deducted from the Settlement Fund and  
15 be paid out of the Settlement Fund.

16 (e) Claim Form: The Long Form Notice and Settlement Website  
17 shall include the Claim Form, which shall inform Class Members that they must fully  
18 complete and timely return the Claim Form prior to the Claim Deadline to be eligible  
19 to obtain relief pursuant to this Agreement.

20 50. The Summary Notice: Upon the Notice Date, the Settlement  
21 Administrator shall cause the Summary Notice, in the form substantially similar to  
22 Exhibit F, to be published once a week, for four successive weeks, in the California  
23 edition of USA Today.

24 51. Internet Advertising Program: No later than the Notice Date, the  
25 Settlement Administrator shall cause notice of the settlement to be provided through  
26 digital advertising, pursuant to the Settlement Administrator's notice plan set forth in  
27 the declaration of the Settlement Administrator to be filed in support of preliminary  
28 approval of the Settlement. Millennium shall also cause notice of the settlement to be

1 posted on Millennium’s website and on Millennium’s Facebook, Instagram, and  
2 Twitter accounts, in the form of a link to the Settlement Website.

3 52. Settlement Website: No later than the Notice Date, the Settlement  
4 Administrator shall establish and caused to be published an Internet website (the  
5 “Settlement Website”), [www.millennium-settlement.com](http://www.millennium-settlement.com). All Internet advertising  
6 that is part of the Class Notice program will direct Class Members to the Settlement  
7 Website. The Settlement Website will allow Class Members to submit Claim Forms  
8 online and will contain information relevant to Class Members, including but not  
9 limited to all applicable deadlines, the Agreement, Class Notice, a downloadable  
10 Claim Form, all papers filed by the Parties in support of this Agreement (including  
11 Plaintiffs’ anticipated motion for Attorneys’ Fees and Expenses), orders of the Court  
12 pertaining to this Agreement, and contact information for reaching the Settlement  
13 Administrator via a toll-free telephone number, e-mail and U.S. mail. The Parties  
14 shall use reasonable efforts to agree on all information and documents to be posted on  
15 this website and no information shall be posted or provided on the website without  
16 the Parties’ express approval. The website shall be rendered inactive one hundred  
17 fifty (150) days after the Award Issuance Date. Settlement Administration Expenses  
18 include the costs associated with maintenance of the Settlement Website.

19 53. Toll-Free Telephone Number: Prior to the dissemination of the Class  
20 Notice, the Settlement Administrator shall establish a toll-free telephone number that  
21 will provide Settlement-related information to Class Members, pursuant to the terms  
22 and conditions of this Agreement. Settlement Administration Expenses include the  
23 costs associated with maintenance of this toll-free telephone number. The Parties  
24 shall also create a protocol for the Settlement Administrator to refer Class Member  
25 inquiries to Class Counsel. The toll-free telephone number shall be rendered inactive  
26 one hundred fifty (150) calendar days after the Award Issuance Date.

27 54. Nothing contained herein shall limit Class Counsel’s ability to  
28 disseminate notice by publishing a link to the Settlement Website on their firm or

1 attorneys' websites, Facebook pages, or social media accounts, provided that any  
2 such dissemination must comply with Paragraph 109 of this Agreement.

3 **VI. ATTORNEYS' FEES AND EXPENSES AND CLASS**  
4 **REPRESENTATIVE INCENTIVE AWARD**

5 55. In recognition of the time and effort the representative Plaintiffs  
6 expended in pursuing this action and in fulfilling their obligations and responsibilities  
7 as class representatives, and of the benefits conferred on all Class Members by the  
8 Settlement, Class Counsel may ask the Court for the payment of incentive awards to  
9 the representative Plaintiffs and Related Plaintiffs. Millennium will not oppose and  
10 Plaintiffs and Class Counsel will submit an application for an incentive award of two  
11 thousand dollars (\$2,000.00) to each Plaintiff and Related Plaintiff. Any court-  
12 ordered incentive award will be paid to Plaintiffs by Millennium no later than fifteen  
13 (15) calendar days after the Effective Date.

14 56. Class Counsel will make an application to the Court for an award of  
15 Attorneys' Fees and Expenses in the Action. Defendants will not have the right to  
16 challenge Class Counsel's entitlement to Attorneys' Fees and Expenses. Defendants  
17 will have the right to challenge the amount of Attorneys' Fees and Expenses  
18 requested by Class Counsel. The Parties have no agreement between themselves as  
19 to the amounts of Attorneys' Fees and Expenses that Class Counsel will request or  
20 that Defendants will oppose. The Attorneys' Fees and Expenses ordered by the Court  
21 shall represent Class Counsel's sole compensation under the Settlement, will be in  
22 lieu of statutory fees Plaintiffs and/or their attorneys might otherwise have been  
23 entitled to recover from Millennium, and shall be inclusive of all fees and costs of  
24 Class Counsel to be paid by Millennium. Plaintiffs and Class Counsel agree that  
25 Millennium shall not pay or be obligated to pay Class Counsel in excess of any award  
26 of Attorneys' Fees and Expenses ordered by the Court. And in no event shall  
27 Millennium be obligated to pay Attorneys' Fees and Expenses (or any other  
28 payments) that would make Millennium's total payment towards the Settlement an

1 amount in excess of eight million two hundred and fifty thousand (\$8,250,000.00).

2 57. Any Attorneys' Fees and Expenses ordered to be paid to Class Counsel  
3 shall be paid by Millennium to Class Counsel no later than thirty (30) calendar days  
4 after the Court's order awarding Attorneys' Fees and Expenses, provided that,  
5 pursuant to the terms of the undertaking attached as Exhibit G to this Agreement, any  
6 such Attorneys' Fees and Expenses will be repaid to Millennium by Class Counsel  
7 should the Court's order awarding Attorneys' Fees and Expenses or Final Approval  
8 Order be reversed on appeal and/or should the Settlement be terminated according to  
9 its terms.

10 58. In the event that any dispute between Class Counsel and any other  
11 counsel arises relating to the allocation of fees, Class Counsel agree to hold  
12 Millennium harmless from, and indemnify Millennium with respect to, any and all  
13 such liabilities, costs, and expenses, including attorneys' fees and dispute costs, of  
14 such dispute.

15 **VII. RELEASES AND DISMISSAL OF ACTION**

16 59. Upon the Effective Date, the Releasing Parties shall be deemed to have,  
17 and by operation of the Final Order and Final Judgment shall have, fully, finally and  
18 forever released, relinquished, and discharged all Released Claims against the  
19 Released Parties. In connection with the Released Claims, each Releasing Party shall  
20 be deemed as of the Effective Date to have expressly, knowingly, and voluntarily  
21 waived any and all provisions, rights, benefits conferred by Section 1542 of the  
22 California Civil Code, and any statute, rule, and legal doctrine similar, comparable, or  
23 equivalent to Section 1542, which provides as follows:

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

1 In connection with such waiver and relinquishment, the Releasing Parties hereby  
2 acknowledge that they are aware that they or their attorneys may hereafter discover  
3 claims or facts in addition to or different from those that they now know or believe  
4 exist with respect to Released Claims, but that it is their intention to hereby fully,  
5 finally, and forever settle and release all of the Released Claims, whether known or  
6 unknown, suspected or unsuspected, that they have against the Released Parties. In  
7 furtherance of such intention, the release herein given by the Releasing Parties shall  
8 be and remain in effect as a full and complete general release notwithstanding the  
9 discovery or existence of any such additional different claims or facts. Each of the  
10 Releasing Parties expressly acknowledges that he/she/it has been advised by its  
11 attorney of the contents and effect of Section 1542, and with knowledge, each of the  
12 Parties hereby expressly waives whatever benefits he/she/it may have had pursuant to  
13 such section. Plaintiffs and Class Members are not releasing any claims for personal  
14 injuries. Plaintiffs acknowledge, and the Class Members shall be deemed by  
15 operation of the Final Judgment to have acknowledged, that the foregoing waiver was  
16 separately bargained for and a material element of the Settlement of which this  
17 release is a part.

18 60. Upon the Effective Date, the Action shall be dismissed with prejudice.  
19 Plaintiffs and Class Counsel shall have the responsibility for ensuring that the Action  
20 is dismissed with prejudice in accordance with the terms of this Agreement.

21 61. The Court shall enter an order retaining jurisdiction over the Parties to  
22 this Agreement with respect to the future performance of the terms of this Agreement.  
23 In the event that any applications for relief are made, such applications shall be made  
24 to the Court.

25 62. Upon the Effective Date: (a) the Agreement shall be the exclusive  
26 remedy for any and all Released Claims of Plaintiffs and Class Members; and (b)  
27 Plaintiffs and the Class Members stipulate to be and shall be permanently barred and  
28 enjoined by Court order from initiating, asserting, or prosecuting against the Released



1 Parties in any federal or state court or tribunal any and all Released Claims.

2 **VIII. ADMINISTRATION OF THE SETTLEMENT**

3 63. Millennium shall, subject to the approval of Class Counsel, retain  
4 Angeion Group as the Settlement Administrator to help implement the terms of the  
5 Agreement. Subject to the terms and conditions of this Agreement, Millennium shall  
6 pay all costs associated with the Settlement Administrator, including costs of  
7 providing Class Notice and reviewing and processing claims.

8 64. In fulfilling its responsibilities, the Settlement Administrator shall be  
9 responsible for, without limitation: (a) consulting on and designing the notice to be  
10 disseminated to Class Members; (b) arranging for the publication of the Summary  
11 Notice and dissemination of Class Notice; (c) responding to requests from Class  
12 Counsel and/or Defense Counsel; and (d) otherwise assisting with administration of  
13 the Settlement.

14 65. The Settlement Administrator also shall be responsible for, without  
15 limitation, the dissemination of Class Notice and implementing the terms of the claim  
16 process and related administrative activities that include communications with Class  
17 Members concerning the Settlement, claim process, and their options thereunder. In  
18 particular, the Settlement Administrator shall be responsible for: (a) printing, e-  
19 mailing, mailing or otherwise arranging for the mailing of the Class Notice in  
20 response to Class Members' requests; (b) making any mailings required under the  
21 terms of this Agreement; (c) establishing the Settlement Website; (d) establishing a  
22 toll-free voice line to which Class Members may refer for information about the  
23 Action and the Settlement; (e) receiving and maintaining any Class Member  
24 correspondence regarding requests for exclusion and objections to the Settlement; (f)  
25 forwarding inquiries from Class Members to Class Counsel or their designee for a  
26 response, if warranted; (g) establishing a post office box for the receipt of Claim  
27 Forms, exclusion requests, and any correspondence; (h) reviewing Claim Forms  
28 according to the review protocols agreed to by the Parties and standards set forth in

1 this Agreement; and (i) otherwise implementing and/or assisting with the claim  
2 review process and payment of the claims.

3 66. The Settlement Administrator shall administer the Settlement in  
4 accordance with the terms of this Agreement and, without limiting the foregoing,  
5 shall: (a) treat any and all documents, communications and other information and  
6 materials received in connection with the administration of the Settlement as  
7 confidential and shall not disclose any or all such documents, communications or  
8 other information to any person or entity except as provided for in this Agreement or  
9 by court order; and (b) receive Requests for Exclusion and provide to Class Counsel  
10 and Defense Counsel a copy thereof within three (3) business days of receipt. If the  
11 Settlement Administrator receives any Requests for Exclusion after the deadline for  
12 the submission of such forms and requests, the Settlement Administrator shall  
13 promptly provide Class Counsel and Defense Counsel with copies thereof and receive  
14 and maintain all correspondence from any Class Member regarding the Settlement.

15 67. The Claim Form will be available for downloading and may be  
16 completed and submitted online at the Settlement Website, and, at Class Counsel's  
17 option, the Claim Form will be available for downloading on Class Counsel's  
18 websites. The Claim Form may also be requested by calling the toll-free number  
19 provided by the Settlement Administrator or by writing to the Settlement  
20 Administrator.

21 68. To be eligible for a cash award or product voucher, each Class Member  
22 must submit or postmark a Claim Form, on or before the Claim Deadline, containing  
23 his or her name, mailing address, and e-mail address, and an attestation, under  
24 penalty of perjury, that the Class Member purchased one or more Subject Products  
25 during the Class Period. The Claim Form will also direct Class Members to submit  
26 Proof of Purchase for any awards claimed in excess of \$35.00 in cash or \$35.00 in  
27 product vouchers. The Claim Form will be deemed to have been submitted when the  
28 Claim Form, including any necessary Proof of Purchase, is posted, if received with a

1 postmark, or equivalent mark by a courier company indicated on the envelope or  
2 mailer and if mailed with pre-paid postage and addressed in accordance with the  
3 instructions set out in the Claim Form. In the case of online claims, the Claim Form  
4 shall be deemed to have been submitted when it is fully uploaded, including any  
5 necessary Proof of Purchase, to the Settlement Website.

6 69. Any Class Member who, in accordance with the terms and conditions of  
7 this Agreement, neither seeks exclusion from the Class nor submits a valid and timely  
8 Claim Form, will not be entitled to receive any relief pursuant to this Agreement, but  
9 will be bound together with all Class Members by all of the terms of this Agreement,  
10 including the terms of the Final Order and Final Judgment to be entered in the Action  
11 and the releases provided for herein, and will be barred from bringing any action in  
12 any forum (state or federal) against any of the Released Parties concerning the  
13 Released Claims.

14 70. The Settlement Administrator shall use adequate and customary  
15 procedures and standards to determine whether a Claim Form meets the requirements  
16 set forth in this Agreement and to prevent the payment of fraudulent claims and/or  
17 pay only valid and eligible claims. Each Claim Form shall be submitted to and  
18 reviewed by the Settlement Administrator, who shall determine the extent, if any, to  
19 which each claim shall be allowed. The Settlement Administrator shall use all  
20 reasonable efforts and means to identify and reject duplicate and/or fraudulent claims,  
21 including, without limitation, indexing all awards provided to Class Members.

22 71. Claim Forms that do not meet the terms and conditions of this  
23 Agreement shall be promptly rejected by the Settlement Administrator. The  
24 Settlement Administrator shall have forty-five (45) calendar days from the Effective  
25 Date to exercise the right of rejection. The Settlement Administrator shall notify the  
26 Class Member using the contact information provided in the Claim Form of the  
27 rejection, including via electronic mail. Class Counsel and Defense Counsel shall be  
28 provided with copies of all such notifications to Class Members. If any claimant

1 whose Claim Form has been rejected, in whole or in part, desires to contest such  
2 rejection, the claimant must, within fifteen (15) business days from receipt of the  
3 rejection, transmit to the Settlement Administrator by e-mail or U.S. mail a notice and  
4 statement of reasons indicating the claimant's grounds for contesting the rejection,  
5 along with any supporting documentation, and requesting further review by the  
6 Settlement Administrator, in consultation with Class Counsel and Defense Counsel,  
7 of the denial of the claim. If Class Counsel and Defense Counsel cannot agree on a  
8 resolution of claimant's notice contesting the rejection, the disputed claim shall be  
9 presented to the Court or a referee appointed by the Court for summary and non-  
10 appealable resolution.

11 72. No person shall have any claim against Defendants, Defense Counsel,  
12 Plaintiffs, Plaintiffs' Counsel, the Class, Class Counsel, and/or the Settlement  
13 Administrator based on any eligibility determinations, distributions, or awards made  
14 in accordance with this Agreement. This provision does not affect or limit in any  
15 way the right of review by the Court or referee of any disputed Claim Forms as  
16 provided in this Agreement.

17 73. Class Counsel and Defense Counsel shall have the right to inspect the  
18 Claim Forms and supporting documentation received by the Settlement Administrator  
19 at any time upon reasonable notice.

20 74. Not later than seven (7) calendar days before the date of the Fairness  
21 Hearing, the Settlement Administrator shall file with the Court: (a) a list of those  
22 persons who have opted out or excluded themselves from the Settlement; and (b) the  
23 details regarding the number of valid Claim Forms received and processed by the  
24 Settlement Administrator.

25 75. The Settlement Administrator may retain one or more persons to assist in  
26 the completion of its responsibilities.

27 76. The Settlement Administrator shall distribute benefits to eligible Class  
28 Members only after the Effective Date and pursuant to the deadlines set forth in

1 Section 45(e) of this Agreement.

2 77. If the Settlement is not approved or for any reason the Effective Date  
3 does not occur, no payments or distributions of any kind shall be made pursuant to  
4 this Agreement, except for the costs and expenses of the Settlement Administrator,  
5 for which Plaintiffs and/or Plaintiffs' Counsel are not responsible.

6 78. In the event the Settlement Administrator fails to perform its duties,  
7 and/or makes a material or fraudulent misrepresentation to, or conceals requested  
8 material information from, Class Counsel, Defendants, and/or Defense Counsel, then  
9 the party to whom the misrepresentation is made shall, in addition to any other  
10 appropriate relief, have the right to demand that the Settlement Administrator  
11 immediately be replaced. No party shall unreasonably withhold consent to remove  
12 the Settlement Administrator. The Parties will attempt to resolve any disputes  
13 regarding the retention or dismissal of the Settlement Administrator in good faith,  
14 and, if they are unable to do so, will refer the matter to the Court for resolution.

15 79. The Settlement Administrator shall coordinate with Defense Counsel to  
16 provide notice as required by 28 U.S.C. § 1715, and the costs of such notice shall be  
17 considered Settlement Administration Expenses.

18 80. Defendants and the Released Parties are not obligated to (and will not be  
19 obligated to) compute, estimate, or pay any taxes on behalf of any Plaintiffs, any  
20 Class Member, Plaintiffs' Counsel, Class Counsel, and/or the Settlement  
21 Administrator.

22 **IX. OBJECTIONS AND REQUESTS FOR EXCLUSION**

23 81. Members of the Class who fail to file, no later than the Objection  
24 Deadline, through the Court's Case Management/Electronic Case Files ("CM/ECF")  
25 system or through any other method in which the Court will accept objections, if any,  
26 and serve upon the Settlement Administrator, Class Counsel, and Defense Counsel,  
27 written objections in the manner specified in this Agreement and the Class Notice  
28 shall be deemed to have waived all objections and shall be foreclosed from making

1 any objection (whether by appeal or otherwise) to the Settlement.

2 82. Any Class Member who intends to object to the fairness, reasonableness,  
3 and/or adequacy of the Settlement must, in addition to filing the written objection  
4 with the Court through the Court's CM/ECF system (or any other method in which  
5 the Court will accept filings, if any) no later than the Objection Deadline, provide a  
6 copy of the written objection by U.S. mail or e-mail to the Settlement Administrator  
7 with a copy by U.S. Mail or e-mail to Class Counsel and Defense Counsel (at the  
8 addresses set forth below) postmarked no later than the Objection Deadline. Class  
9 Members who object must set forth in their written objection: (a) their full name; (b)  
10 current address; (c) a written statement of their objection(s) and the reasons for each  
11 objection; (d) a statement of whether they intend to appear at the Fairness Hearing  
12 (with or without counsel); (e) their signature; (f) a statement, sworn to under penalty  
13 of perjury, attesting to the fact that he or she purchased one or more of the Subject  
14 Products during the Class Period; (f) details of their purchase of the Subject Products,  
15 including the Subject Products purchased, and the date and location of purchase; and  
16 (g) the case name and number of the Action. Objections must be served on Class  
17 Counsel and Defense Counsel as follows:

18 *Upon Class Counsel at:*

19 L. Timothy Fisher  
20 Yeremey Krivoshey  
21 **BURSOR & FISHER P.A.**  
22 1990 North California Blvd., Suite 940  
23 Walnut Creek, California 94596  
24 ltfisher@bursor.com  
25 ykrivoshey@bursor.com

26 *Upon Defense Counsel at:*

27 Scott M. Voelz  
28 Daniel J. Faria  
**O'MELVENY & MYERS LLP**  
400 South Hope Street  
Los Angeles, California 90071-2899

1 svoelz@omm.com  
2 dfaria@omm.com

3 James M. Lee  
4 David Crane  
5 **LTL ATTORNEYS LLP**  
6 601 South Figueroa Street, Suite 3900  
7 Los Angeles, California 90017  
8 james.lee@ltmlattorneys.com  
9 david.crane@ltmlattorneys.com

10 83. The Parties shall request that the Court allow any interested party to file  
11 a reply to any objection no later than seven (7) calendar days before the Fairness  
12 Hearing, or as the Court may otherwise direct.

13 84. Members of the Class may also elect to opt out of the Settlement,  
14 relinquishing their rights to benefits hereunder. Members of the Class who opt out of  
15 the Settlement will not release their claims pursuant to this Agreement. Proposed  
16 Class Members wishing to opt out of the Settlement must send to the Settlement  
17 Administrator by U.S. Mail a Request for Exclusion postmarked no later than the Opt  
18 Out Date. The Request for Exclusion must be a personally signed letter from the  
19 Class Member including (a) their full name; (b) current address; (c) a clear statement  
20 communicating that they elect to be excluded from the Class, do not wish to be a  
21 Class Member, and elect to be excluded from any judgment entered pursuant to the  
22 Settlement; (d) their signature; and (e) the case name and case number of the Action.  
23 Members of the Class who fail to submit a valid Request for Exclusion on or before  
24 the Opt Out Date shall, in accordance with Paragraph 68 of this Agreement, be bound  
25 by all terms of this Agreement and the Final Order and Final Judgment, regardless of  
26 whether they have requested exclusion from the Settlement.

27 85. Any member of the Class who submits a timely Request for Exclusion or  
28 opt out may not file an objection to the Settlement and shall be deemed to have  
waived any rights or benefits under this Agreement. So-called “mass” or “class” opt

1 outs shall not be allowed.

2 86. The Settlement Administrator shall promptly provide copies of all  
3 Requests for Exclusion, objections, and/or related correspondence from Class  
4 Members to Class Counsel and Defense Counsel. Not later than three (3) business  
5 days after the deadline for submission of Requests for Exclusion, the Settlement  
6 Administrator shall provide to Class Counsel and Defense Counsel a complete list of  
7 Class Members requesting exclusion from the Settlement together with copies of the  
8 Requests for Exclusion. Notwithstanding any other provision of this Agreement, if  
9 more than one thousand (1,000) members of the Class opt out of the Settlement,  
10 Defendants, in their sole discretion, may rescind and revoke the entire Settlement and  
11 this Agreement, thereby rendering the Settlement null and void in its entirety, by  
12 sending written notice that Defendants revoke the settlement pursuant to this  
13 paragraph to Class Counsel within ten (10) business days following the date the  
14 Settlement Administrator informs Defendants of the number of Class members who  
15 have requested to opt out of the Settlement pursuant to the provisions set forth above.  
16 If Defendants rescind the Settlement pursuant to this paragraph, they shall have no  
17 further obligations to pay into the settlement and Millennium shall be responsible for  
18 only the fees and expenses actually incurred by the Settlement Administrator, for  
19 which Plaintiffs and his Counsel are not liable.

20 87. On the date set forth in the Preliminary Approval Order, a Fairness  
21 Hearing shall be conducted to determine final approval of the Settlement. A Motion  
22 in support of the Fairness Hearing shall be filed no later than fourteen (14) calendar  
23 days after the deadline to object or opt out of the Settlement. Upon final approval of  
24 the Settlement by the Court at or after the Fairness Hearing, the Parties shall present  
25 the Final Order and Final Judgment, substantially in the form attached to this  
26 Agreement as Exhibits A and B, and a final order approving Attorneys' Fees and  
27 Expenses and incentive award, to the Court for approval and entry. Class Members  
28 who wish to be heard at the Fairness Hearing (whether individually or through



1 separate counsel) and are objecting to the Settlement shall comply with the provisions  
2 of this Agreement. Class Members who wish to be heard at the Fairness Hearing  
3 (whether individually or through separate counsel) and are not objecting to the  
4 Settlement shall file a notice of appearance with the Court's CM/ECF system or  
5 through any other method in which the Court will accept filings, if any, and serve  
6 upon Class Counsel and Defense Counsel at the addresses indicated above at least  
7 seven (7) calendar days before the Fairness Hearing.

8 **X. SCOPE AND EFFECT OF CONDITIONAL CERTIFICATION OF THE**  
9 **CLASS SOLELY FOR PURPOSES OF SETTLEMENT**

10 88. For purposes of settlement only, the Parties agree to seek preliminary  
11 certification, pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3), of a  
12 damages and injunctive relief Class on a nationwide basis, including United States  
13 territories. The Parties further agree that the Court should make preliminary findings  
14 and enter the Preliminary Approval Order (substantially in the form attached at  
15 Exhibit D) granting preliminary certification of the Class subject to final findings and  
16 ratification in the Final Order and Final Judgment, and appointing Plaintiffs as the  
17 representative of the Class and Class Counsel as counsel for the Class.

18 89. Defendants do not consent to certification of the Class for any purpose  
19 other than to effectuate the Settlement of the Action or otherwise admit that the  
20 litigation of any claims that have or could have been asserted in the Action on a  
21 classwide basis is appropriate under applicable laws and standards. Defendants'  
22 agreement to conditional certification does not constitute an admission of  
23 wrongdoing, fault, liability, or damage of any kind to Plaintiffs or any of the putative  
24 class members.

25 90. If this Agreement is terminated pursuant to its terms, disapproved by any  
26 court (including any appellate court), and/or not consummated for any reason, or the  
27 Effective Date for any reason does not occur, the order certifying the Class for  
28 purposes of effectuating this Agreement, and all preliminary and/or final findings

1 regarding that class certification order, shall be automatically vacated upon notice of  
2 the same to the Court, the Action shall proceed as though the Class had never been  
3 certified pursuant to this Agreement and such findings had never been made, the  
4 Action shall return to the procedural status quo in accordance with this paragraph,  
5 and nothing in this Agreement or other papers or proceedings related to the  
6 Settlement shall be used as evidence or argument by any Party concerning whether  
7 the Action may properly be maintained as a class action, whether the purported class  
8 is ascertainable, or whether Class Counsel or the Plaintiffs can adequately represent  
9 the Class Members under applicable law.

10 **XI. MODIFICATION OR TERMINATION OF THE SETTLEMENT**

11 91. If the preconditions necessary to trigger the Effective Date (as set forth  
12 in Paragraph 13 of this Agreement) are not met, this Agreement shall be cancelled  
13 and terminated unless Defense Counsel and Class Counsel mutually agree in writing  
14 to proceed with and effectuate this Agreement.

15 92. The terms and provisions of this Agreement may be amended, modified,  
16 or expanded by written agreement of the Parties and approval of the Court; provided,  
17 however that, after entry of the Final Order and Final Judgment, the Parties may by  
18 written agreement effect such amendments, modifications, or expansions of this  
19 Agreement and its implementing documents (including all exhibits hereto) without  
20 further notice to the Class or approval by the Court if such changes are consistent  
21 with the Court's Final Order and Final Judgment and do not materially alter, reduce  
22 or limit the rights of Class Members under this Agreement.

23 93. Either Party may terminate this Agreement by providing written notice  
24 to the other Party and the Court within ten (10) days of the occurrence of the  
25 following: (a) The preliminary or final approval of this Agreement is not obtained  
26 without substantial modification, which modification the Parties did not agree to and  
27 which modification the terminating Party deems in good faith to be material (*e.g.*,  
28 because it significantly increases the costs of the settlement or deprives the

1 terminating party of an expressly stated benefit of the settlement); or (b) The Final  
2 Order and Final Judgment is reversed, vacated, or modified in any material respect by  
3 another court, except that it is expressly agreed by the Parties that any reduction of  
4 the Court's award of Attorneys' Fees and Expenses shall not be grounds to terminate  
5 this Agreement.

6 94. In the event that this Agreement is not approved by the Court or the  
7 settlement set forth in this Agreement is terminated or fails to become effective in  
8 accordance with its terms, the Parties shall be restored to their respective pre-  
9 settlement positions in the Action, including with regard to any agreements  
10 concerning tolling and similar agreements, and this entire Agreement shall be null  
11 and void, shall have no further force and effect with respect to any Party in the  
12 Action, and shall not be offered in evidence or used in any litigation for any purpose,  
13 including the existence, certification, or maintenance of any purported class or  
14 Defendants' liability with respect to the claims that are, were or could have been  
15 asserted in the Action. In the event of such, this Agreement and all negotiations,  
16 proceedings, documents prepared, and statements made in connection with it shall be  
17 without prejudice to the Parties, and shall not be deemed or construed to be an  
18 admission or confession by any Party of any fact, matter, or proposition of law, and  
19 shall not be used in any manner for any purpose, and all Parties to the Action shall  
20 stand in the same position as if this Agreement had not been negotiated, made, or  
21 filed with the Court.

22 95. In the event of termination, the terminating Party shall cause the  
23 Settlement Administrator to post information regarding the termination on the  
24 Settlement Website.

25 96. In the event of termination, all Parties shall be restored to their  
26 respective positions as of immediately prior to the date of execution of this  
27 Agreement. Upon termination, Paragraphs 88-98 herein shall survive and be binding  
28 on the Parties, but this Agreement shall otherwise be null and void.

**XII. SETTLEMENT NOT EVIDENCE AGAINST PARTIES**

1  
2 97. The Parties expressly acknowledge and agree that this Agreement and its  
3 exhibits, along with all related drafts, motions, pleadings, conversations, negotiations,  
4 and correspondence, constitute an offer of compromise and a compromise within the  
5 meaning of Federal Rule of Evidence 408 and any equivalent state law or rule. In no  
6 event shall this Agreement, any of its provisions or any negotiations, statements or  
7 court proceedings relating to its provisions in any way be construed as, offered as,  
8 received as, used as, or deemed to be evidence of any kind in the Action, any other  
9 action, or in any judicial, administrative, regulatory or other proceeding, except in a  
10 proceeding to enforce this Agreement or the rights of the Parties or their counsel.  
11 Without limiting the foregoing, neither this Agreement nor any related negotiations,  
12 statements, or court proceedings shall be construed as, offered as, received as, used as  
13 or deemed to be evidence or an admission or concession of any liability or  
14 wrongdoing whatsoever on the part of any person or entity, including, but not limited  
15 to, Defendants, the Released Parties, Plaintiffs, or the Class, or as a waiver by  
16 Defendants, the Released Parties, Plaintiffs, or the Class of any applicable privileges,  
17 claims or defenses.

18 98. The provisions contained in this Agreement are not and shall not be  
19 deemed a presumption, concession, or admission by Defendants of any default,  
20 liability or wrongdoing as to any facts or claims alleged or asserted in the Action, or  
21 in any actions or proceedings, nor shall they be interpreted, construed, deemed,  
22 invoked, offered, or received in evidence or otherwise used by any person in the  
23 Action, or in any other action or proceeding, whether civil, criminal or administrative.  
24 Defendants expressly deny the allegations in the Action. Defendants do not admit  
25 that it or any of the Released Parties has engaged in any wrongful activity or that any  
26 person has sustained any damage by reason of any of the facts complained of in the  
27 Action. And Defendants do not consent to certification of the Class for any purpose  
28 other than to effectuate the Settlement of the Action or otherwise admit that the

1 treatment of any claims that have been or could have been asserted in the Action on a  
2 classwide basis is appropriate.

3 **XIII. BEST EFFORTS**

4 99. Class Counsel shall take all necessary actions to accomplish approval of  
5 the Settlement, the Class Notice, and dismissal of the Action. The Parties (including  
6 their counsel, successors, and assigns) agree to cooperate fully and in good faith with  
7 one another and to use their best efforts to effectuate the Settlement, including  
8 without limitation in seeking preliminary and final Court approval of the Agreement  
9 and the Settlement embodied herein, carrying out the terms of this Agreement, and  
10 promptly agreeing upon and executing all such other documentation as may be  
11 reasonably required to obtain final approval by the Court of the Settlement. In the  
12 event that the Court fails to approve the Settlement or fails to issue the Final Order  
13 and Final Judgment, the Parties agree to use all reasonable efforts, consistent with  
14 this Agreement and subject to Section XI, to cure any defect identified by the Court.

15 100. Each party will cooperate with the other party in connection with  
16 effectuating the Settlement or the administration of claims thereunder. Any requests  
17 for cooperation shall be narrowly tailored and reasonably necessary for the requesting  
18 party to recommend the Settlement to the Court, and to carry out its terms.

19 **XIV. MISCELLANEOUS PROVISIONS**

20 101. The Parties agree that the recitals are contractual in nature and form a  
21 material part of this Agreement.

22 102. This Agreement and its accompanying exhibits set forth the entire  
23 understanding of the Parties. No change or termination of this Agreement shall be  
24 effective unless in writing and signed by Plaintiffs' Counsel and Defense Counsel.  
25 No extrinsic evidence or parol evidence shall be used to interpret this Agreement.

26 103. Any and all previous agreements and understandings between or among  
27 the Parties regarding the subject matter of this Agreement, whether written or oral,  
28 are superseded and hereby revoked by this Agreement. The Parties expressly agree

1 that the terms or conditions of this Agreement will control over any other written or  
2 oral agreements.

3 104. All of the Parties warrant and represent that they are agreeing to the  
4 terms of this Agreement based upon the legal advice of their respective attorneys, that  
5 they have been afforded the opportunity to discuss the contents of this Agreement  
6 with their attorneys and that the terms and conditions of this document are fully  
7 understood and voluntarily accepted.

8 105. The waiver by any party of a breach of any term of this Agreement shall  
9 not operate or be construed as a waiver of any subsequent breach by any party. The  
10 failure of a party to insist upon strict adherence to any provision of the Agreement  
11 shall not constitute a waiver or thereafter deprive such party of the right to insist upon  
12 strict adherence.

13 106. The headings in this Agreement are inserted merely for the purpose of  
14 convenience and shall not affect the meaning or interpretation of this document.

15 107. This Agreement may be executed by facsimile signature and in  
16 counterparts, each of which shall be deemed an original and all of which, when taken  
17 together, shall constitute one and the same instrument. The date of execution shall be  
18 the latest date on which any party signs the Agreement.

19 108. This Agreement has been negotiated among and drafted by Class  
20 Counsel and Defense Counsel. Plaintiffs, Plaintiffs' Counsel, Class Members, and  
21 Defendants shall not be deemed to be the drafter of this Agreement or of any  
22 particular provision, nor shall they argue that any particular provision should be  
23 construed against its drafter or otherwise resort to the contra proferentem canon of  
24 construction. Accordingly, this Agreement should not be construed in favor of or  
25 against one party as to the drafter, and the Parties agree that the provisions of  
26 California Civil Code § 1654 and common law principles of construing ambiguities  
27 against the drafter shall have no application. All Parties agree that counsel for the  
28 Parties drafted this Agreement during extensive arm's-length negotiations. No parol

1 or other evidence may be offered to explain, construe, contradict, or clarify its terms,  
2 the intent of the Parties or their counsel, or the circumstances under which this  
3 Agreement was made or executed.

4 109. Except in connection with any court filing or proceeding, or the  
5 dissemination of notice to the Class or as otherwise provided in this Agreement,  
6 Plaintiffs and Class Counsel will not issue any press releases regarding the Settlement  
7 or the Action without prior approval of Defendants. Plaintiffs and Class Counsel  
8 agree not to disparage Defendants, Millennium Products, Defense Counsel, or the  
9 Settlement in the media, through any public statements, or otherwise. Defendants  
10 agree not to disparage Plaintiffs, Class Counsel, or the Settlement.

11 110. Each individual Defendant represents and warrants that the individual(s)  
12 executing this Agreement on behalf of that Defendant are authorized to enter into this  
13 Agreement on behalf of that Defendant.

14 111. Any disagreement and/or action to enforce this Agreement shall be  
15 commenced and maintained only in the Court in which this Action is pending.

16 112. Whenever this Agreement requires or contemplates that one of the  
17 Parties shall or may give notice to the other to the addresses set forth in Section 81,  
18 such notice shall be provided by e-mail and/or next-day (excluding Saturdays,  
19 Sundays and Legal Holidays) express delivery service.

20 113. The Parties reserve the right, subject to the Court's approval, to agree to  
21 any reasonable extensions of time that might be necessary to carry out any of the  
22 provisions of this Agreement.

23 114. Plaintiffs expressly affirm that the allegations contained in the  
24 consolidated complaints filed in the Action were made in good faith and have a basis  
25 in fact, but consider it desirable for the Action to be settled and dismissed because of  
26 the substantial benefits that the proposed Settlement will provide to Class Members.

27 115. In the event any one of the provisions contained in this Agreement shall  
28 for any reason be held to be invalid, illegal, or unenforceable in any respect, such

1 invalidity, illegality, or unenforceability shall not affect other provisions if Defense  
2 Counsel and Class Counsel, on behalf of the Parties, mutually elect to proceed as if  
3 such invalid, illegal, or unenforceable provision had never been included in this  
4 Agreement.

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Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
Whole Foods Market, Inc.

By: \_\_\_\_\_

Its: \_\_\_\_\_

**AGREED AS TO FORM:**

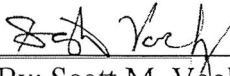
**PLAINTIFFS' COUNSEL**

Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
By: L. Timothy Fisher  
Bursor & Fisher P.A.  
Attorneys for Plaintiffs and the Class

**DEFENSE COUNSEL**

Dated: November 14, 2016

  
\_\_\_\_\_  
By: Scott M. Vogelz  
O'Melveny & Myers LLP  
Attorneys for Millennium Products, Inc.

Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
By: James M. Lee  
LTL Attorneys LLP  
Attorneys for Whole Foods Market, Inc.

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Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
Whole Foods Market, Inc.

By: \_\_\_\_\_

Its: \_\_\_\_\_

**AGREED AS TO FORM:**

**PLAINTIFFS' COUNSEL**

Dated: \_\_\_\_\_, 2016


\_\_\_\_\_  
By: L. Timothy Fisher  
Bursor & Fisher P.A.  
Attorneys for Plaintiffs and the Class

**DEFENSE COUNSEL**

Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
By: Scott M. Voelz  
O'Melveny & Myers LLP  
Attorneys for Millennium Products, Inc.

Dated: November 17, 2016

  
\_\_\_\_\_  
By: James M. Lee  
LTL Attorneys LLP  
Attorneys for Whole Foods Market, Inc.

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Dated: \_\_\_\_\_, 2016

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Whole Foods Market, Inc.

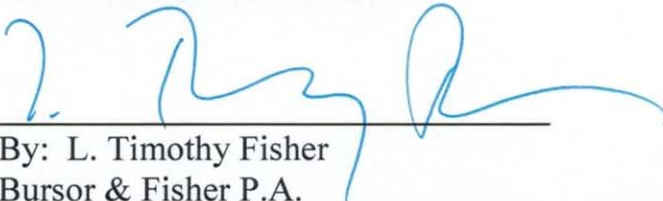
By: \_\_\_\_\_

Its: \_\_\_\_\_

**AGREED AS TO FORM:**

**PLAINTIFFS' COUNSEL**

Dated: November 15, 2016

  
\_\_\_\_\_  
By: L. Timothy Fisher  
Bursor & Fisher P.A.  
Attorneys for Plaintiffs and the Class

**DEFENSE COUNSEL**

Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
By: Scott M. Voelz  
O'Melveny & Myers LLP  
Attorneys for Millennium Products, Inc.

Dated: \_\_\_\_\_, 2016

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By: James M. Lee  
LTL Attorneys LLP  
Attorneys for Whole Foods Market, Inc.

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Dated: November 17, 2016

DocuSigned by:  
Roberta Lang  
08714681587149  
Whole Foods Market, Inc.

By: Roberta Lang

Its: Global Vice President of Legal Affairs

**AGREED AS TO FORM:**

**PLAINTIFFS' COUNSEL**

Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
By: L. Timothy Fisher  
Bursor & Fisher P.A.  
Attorneys for Plaintiffs and the Class

**DEFENSE COUNSEL**

Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
By: Scott M. Voelz  
O'Melveny & Myers LLP  
Attorneys for Millennium Products, Inc.

Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
By: James M. Lee  
LTL Attorneys LLP  
Attorneys for Whole Foods Market, Inc.

1 IN WITNESS WHEREOF, the Parties hereto, by and through their respective  
2 attorneys, and intending to be legally bound hereby, have duly executed this  
3 Agreement as of the date set forth below.

4  
5 **AGREED AND ACCEPTED:**

6 **PLAINTIFFS**

7 Dated: \_\_\_\_\_, 2016

8 \_\_\_\_\_  
Jonathan Retta  
9 Plaintiff

10 Dated: \_\_\_\_\_, 2016

11 \_\_\_\_\_  
Kirsten Schofield  
12 Plaintiff

13 Dated: \_\_\_\_\_, 2016

14 \_\_\_\_\_  
Jessica Manire  
15 Plaintiff

16  
17 **DEFENDANTS**

18  
19 Dated: NOVEMBER 14, 2016

20 \_\_\_\_\_  
21 Millennium Products, Inc.

22 By: GT DAVE

23 Its: CEO

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25  
26  
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28

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6 **PLAINTIFFS**

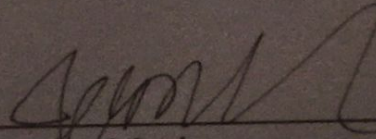
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8 Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
Jonathan Retta  
Plaintiff

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10  
11 Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
Kirsten Schofield  
Plaintiff

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13  
14 Dated: 11/10/16, 2016

\_\_\_\_\_  
  
Jessica Manire  
Plaintiff

15  
16  
17 **DEFENDANTS**

18  
19  
20 Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
Millennium Products, Inc.

21  
22 By: \_\_\_\_\_

23  
24 Its: \_\_\_\_\_

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IN WITNESS WHEREOF, the Parties hereto, by and through their respective attorneys, and intending to be legally bound hereby, have duly executed this Agreement as of the date set forth below.

**AGREED AND ACCEPTED:**

**PLAINTIFFS**

Dated: 11/11/2016, 2016



\_\_\_\_\_  
Jonathan Retta  
Plaintiff

Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
Kirsten Schofield  
Plaintiff

Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
Jessica Manire  
Plaintiff

**DEFENDANTS**

Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
Millennium Products, Inc.

By: \_\_\_\_\_

Its: \_\_\_\_\_

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4  
5 **AGREED AND ACCEPTED:**

6 **PLAINTIFFS**

7  
8 Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
Jonathan Retta  
Plaintiff

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10  
11 Dated: 11 Nov. \_\_\_\_\_, 2016

\_\_\_\_\_  
Kirsten Schofield  
Plaintiff

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13  
14 Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
Jessica Manire  
Plaintiff

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17 **DEFENDANTS**

18  
19  
20 Dated: \_\_\_\_\_, 2016

\_\_\_\_\_  
Millennium Products, Inc.

21  
22 By: \_\_\_\_\_

23 Its: \_\_\_\_\_