UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Zeve Baumgarten, individually and on behalf of himself and all others similarly situated and John Does (1-100) on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CleanWell, LLC,

Defendant.

Index No.: 1:16-cv-01780-AMD-SMG

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL, CLASS CERTIFICATION, AWARD OF ATTORNEY'S FEES AND EXPENSES, AND SERVICE AWARD

Jason P. Sultzer, Esq. (Bar ID # JS4546)
Joseph Lipari, Esq. (Bar ID # JL3194)
Adam Gonnelli, Esq. (Bar ID # AG4782)
The Sultzer Law Group P.C.
14 Wall Street, 20th Floor
New York, NY 10005
Tel: (212) 618-1938
Fax: (888) 749-7747
Gonnellia@thesultzerlawgroup.com

LEEDS BROWN LAW, P.C.
Jeffrey Brown, Esq.
Lenard Leeds, Esq.
One Old Country Road, Suite 347
Carle Place, NY 11514-1851
Tel: (516) 873-9550
jbrown@leedsbrownlaw.com

Attorneys for Plaintiff and the Class

TABLE OF CONTENTS

TABLE OF AUTHORITIES………………………………………………………………....ii

I. Introduction……..……………………………...…………………………………………1

II. The Litigation……..……………………………………………………………….........1

A. The Settlement…………………………………………………………………….......2

B. Preliminary Approval and Notice……………………………………………………2

III. The Court Should Grant Final Approval To The Proposed Settlement……………………3

a. The complexity, expense, and likely duration of litigation……………......4

b. The reaction of the class to the settlement…………………………...…....4

c. The state of the proceedings and the amount of discovery completed…….4

d. The risks of establishing liability and damages………………………...….5

e. The risk of maintaining class action status through trial…………….……..6

f. The ability of Defendant to withstand a greater judgment…………………7

g. The range of reasonableness of the settlement in light of the best possible recovery and in light of all the attendant risks of litigation…………..…....7

IV. Class Certification………..……………………………………………………………..….8

V. Plaintiff's Application For Attorneys' Fees Should Be Granted…………………………..8

A. Time and Labor Expended By Counsel…………………………………………....9

B. The Complexity, Magnitude, and Risks of the Actions……………………..……12

C. The Contingent Nature of the Fee…………………………………………………...14

D. The Result Achieved and the Quality of Representation……………….………..14

E. The Requested Fee in Relation to The Settlement…………………………….….15

F. Public Policy……………………………………………………………………...16

VI. The Court Should Approve The Reimbursement Of The Class Counsel's Expenses…….16

VII. The Court Should Approve The Proposed Service Awards To Mr. Baumgarten…..…….17

VIII. Conclusion……………………………………………………......…………………18

TABLE OF AUTHORITIES

CASES

Ackerman v. Coca-Cola Co.,
2013 U.S. Dist. LEXIS 184232 at *14-15 (E.D.N.Y. July 18, 2013)…………………………...16

Animal Sci. Prods. Inc. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.),
No. 06-MD-1738, 2013 U.S. Dist. LEXIS 182701,
*10-11 (E.D.N.Y. Dec. 30, 2013)…………………………………………………9, 10, 11, 12

Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany and Albany County Board of Elections,
522 F.3d 182, 190 (2d. Cir. 2008)…………………………………………………………...9

Banyai v. Mazur,
No. 00 CIV.9806 SHS, 2007 WL 927583, at *9 (S.D.N.Y. Mar. 27, 2007)…………………..5

Behrens v. Wometco Enters., Inc.,
118 F.R.D. 534, 547–48 (S.D. Fla. 1988)……………………………………………….....14

Brazil v. Dole Packaged Foods, LLC,
No. 12-CV-01831-LHK, 2014 WL 5794873, at *15 (N.D. Cal. Nov. 6, 2014)…………...….6

Charron v. Wiener,
731 F.3d at 247 (2d Cir. 2013)………………………………………………………………3

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2d Cir. 1974)…………………………………………………………3, 4, 7, 8

Comcast v. Behrend,
569 U.S. 27 (2013)……………………………………………………………………...1

Dupler v. Costco Wholesale Corp.,
705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010)………………………………….…………4

Foster, et al. v. EOTEch
(WDMO 6:15-cv-03519-BCW) (Doc 155, ¶ 28)…………………………….…………..10

Gen. Tel. Co. of Sw. v. Falcon,
457 U.S. 147, 160 (1982)…………………………………………………………………6

Goldberger v. Integrated Res., Inc.,
209 F.3d 43 (2d Cir. 2000)………………………………………...……………3, 9

Hall v. Prosource Techs., LLC,
No. 14-CV-2502 (SIL), 2016 U.S. Dist. LEXIS 53791 at *44 (E.D.N.Y. April 11, 2016)……11

Hensley v. Eckerhart,
461 U.S. 424, 437 (1983)……………………………………………………….……………8

Hernandez v. Immortal Rise, Inc.,
306 F.R.D. 91, 101 (E.D.N.Y. 2015)………………………………………………...…..17

In re Delta/AirTran Baggage Fee Antitrust Litig.,
2015 U.S. Dist. LEXIS 101474, *75 (N.D. Ga. Aug. 3, 2015)……………………………….12

In re Med. X-Ray Film Antitrust Litig.,
No. CV-93-5904, 1998 WL 661515, at *5 (E.D.N.Y. Aug. 7, 1998)………………………….…6

In re Nasdaq Market-Makers Antitrust Litig.,
187 F.R.D. 465, 1998 U.S. Dist. LEXIS 17557 at * 477 (S.D.N.Y. Nov. 8, 1998)…………..12

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,
991 F. Supp. 2d 437, 448 (E.D.N.Y. 2014)………………………………………………..11

In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.,
986 F. Supp. 2d 207, 224 (E.D.N.Y. 2013)…………………………………………...….5

In re Quaker Oats Labeling Litig.,
2014 U.S. Dist. LEXIS 104941 (N.D. Cal. July 29, 2014)………………...…………………7

In re Sony SXRD Rear Projection TV Class Action Litig.,
2008 U.S. Dist. LEXIS 36093, at *43 (S.D.N.Y. May 1, 2008)……………………………..8, 9

In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.,
724 F. Supp. 160, 164 (S.D.N.Y. 1989)…………………………………………….….12, 14

In re Visa Check/Master Money Antitrust Litig.,
297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003)…………………………………………….…..16

In re WorldCom, Inc. Sec. Litig.,
388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005)……………………………………...………13

Jermyn v. Best Buy Stores, L.P.,
2012 WL 2505644, at *13 (S.D.N.Y. June 27, 2012)………………….9, 12, 13, 14, 15, 16, 17

Lilly v. Jamba Juice Co.,
2015 U.S. Dist. LEXIS 34498, *9 (C.D. Cal. March 18, 2015)……………...…………7, 15

Maley v. Del Global Techs. Corp.,
186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002)……………………………………………...…11

Massiah v. MetroPlus Health Plan, Inc.,
No. 11-CV-05669, 2012 U.S. Dist. LEXIS 166383 at *8 (E.D.N.Y. Nov. 20, 2012)……...…17

McBean v. City of New York,
233 F.R.D. 377, 392 (S.D.N.Y. 2006)……………………………………………………9

McReynolds v. Richards-Cantave,
588 F.3d 790, 804 (2d Cir. 2009) (*quoting* Grinnell, 495 F.2d at 463)……...…………………4

Miller v. Ghirardelli Chocolate Co.,
No. 12-cv-04936-LB, 2015 U.S. Dist. LEXIS 20725, *15 (N.D. Cal. February 20, 2015)……………………………………………………………………………………15

Miltiand Raleigh Durham v. Myers,
840 F Supp. 235, 239 (S.D.N.Y 1993)……………………………………………….………16

Nicotra v. Babo Botanicals, LLC,
No. 2:16-cv-00296 (ADS) (GRB), (E.D.N.Y. September 17, 2016)…………..……………….7

Rapoport-Hecht v. Seventh Generation, Inc.,
(SDNY 14-cv-9087-KMK)…………………………………………………...………10

Roberts v. Texaco, Inc.,
979 F. Supp. 185, 198 (S.D.N.Y. 1997)……………………………………...…………12

Sass v. MTA Bus Co.,
6 F. Supp 3d 238, 261 (E.D.N.Y. 2014)……………………………………...…………11

Shop-Vac Mktg. & Sales Practices Litig.,
No. 2380, 2016 U.S. Dist. LEXIS 170841, at *45-46 (M.D. Pa. Dec. 9, 2016)………...……10

Vincent v. People Against Dirty, PBC.
(SDNY 7:16-cv-06936-NSR)……………….………………………………………..10

Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,
396 F.3d 96, 116 (2d Cir. 2005)……………………………………………………3, 16

Willix v. Healthfirst, Inc.,
No. 07-cv-1143, 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011)………..…………….5, 12

Zeltser v. Merrill Lynch & Co.,
No. 13 CIV. 1531 FM, 2014 WL 4816134, at *6 (S.D.N.Y. Sept. 23, 2014)……………..…..5

Statutes

7 U.S.C. § 6502(21)…………………………………………………………………2

Organic Foods Production Act of 1990……………………………………………..…………2

Rule 23…………………………………………………………………………………1, 8

Rule 23(a)……………………………………………………………………………....8

Rule 23(b)(2)………………………………………………………………………..…….8

Rule 23(c)(2)(A)……………………………………………………………………………….2

Rule 23(e)…………………………………………………………………………………….2

Rule 23(e)(2)…………………………………………………………......……………………3

I. Introduction

On August 21, 2017 this Court granted preliminary approval to the proposed injunctive-only settlement submitted on April 3, 2017. Plaintiff Zeve Baumgarten, on behalf of himself and the class of purchasers of defendant's products he represents, now moves the Court:

1. to grant final approval of the proposed settlement;
2. to grant final certification of the proposed class under Rule 23;
3. to grant counsel an award of reasonable attorneys' fees and costs totaling $120,000; and
4. to grant Plaintiff's request for a service award of $1500.

II. The Litigation

Plaintiff alleged that defendant CleanWell, LLC deceptively labeled its soaps and hand sanitizers as "Natural" and "All Natural" because the products contain ingredients that plaintiffs believe are synthetic, such as the preservatives sodium citrate and sodium coco-sulfate.

CleanWell, following a pre-motion conference before the Court on June 1, 2016, moved to dismiss the claims. The parties submitted full briefing to the Court on September 12, 2016. In the meantime, and while the motion to dismiss was pending before this Court, the parties exchanged documentary discovery which included sales and financial information.

With a view toward a contested class certification motion, and to satisfy Comcast v. Behrend, 569 U.S. 27 (2013) and its progeny, Plaintiffs' Counsel also retained a consultant to build an appropriate price premium damages model linked to the alleged misrepresentations. See Gonnelli Decl. ¶ 9. Counsel also retained a consultant to analysis the ingredients and production methods used in the manufacture of the preservatives Plaintiff believed were synthetic.

Following extensive discovery, the parties agreed to a settlement under which CleanWell agreed to entirely eliminate the use of the terms "natural" and "all natural" on the label of its products that contain synthetic ingredients. There is no monetary relief as part of the settlement and class members retain their rights to bring damages claims.

A. The Settlement

The primary relief provided in this settlement is that no longer than 90 days after the settlement is approved, CleanWell will stop using the terms "Natural" or "All Natural" in its advertising or marketing for its Products that contain any synthetic ingredients or preservatives that are not derived from natural plant or mineral sources.

In an amendment to the Settlement Agreement submitted to the Court on June 30, 2017, the parties clarified that CleanWell will abide by the definition of "synthetic" from the Organic Foods Production Act of 1990, 7 U.S.C. § 6502 (21), which defines synthetic as a product which contains "any substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes."

B. Preliminary Approval and Notice

In its preliminary approval Order of August 21, 2017 (the "August 21 Order," Docket Entry 47) the Court found that notice to the class was not required under either Rule 23(c)(2)(A) or Rule 23(e). August 21 Order at 2-4.

Accordingly, notice did not issue to the class.

III. The Court Should Grant Final Approval To The Proposed Settlement

In granting final approval of a proposed settlement under Rule 23(e)(2), courts consider both the procedural and substantive fairness of the proposed settlement. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 116 (2d Cir. 2005).

The Court has already described the procedural fairness of the settlement in the August 21 Order. The Court noted: "…the parties appear to be represented by sophisticated counsel and the history of this case suggests that the proposed settlement agreement was the product of diligent, arms-length negotiations rather than collusion." Id. at p.4. The Court's finding indicates the settlement was procedurally fair. See Wal-Mart Stores at 116 (discussing presumption of fairness of settlement reached after arms' length negotiations and sufficient discovery).

The Court's finding of procedural fairness supports final approval.

With respect to the substantive fairness of the settlement, the relevant factors under City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) ("Grinnell"), *abrogated on other grounds by* Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000), are analyzed in Plaintiff's April 3, 2017 preliminary approval motion and below.

To demonstrate the substantive fairness of a settlement agreement, a party must show that as many of the nine factors set out in Grinnell as possible weigh in favor of the settlement agreement. *See* Charron v. Weiner, 731 F.3d at 247 (2d Cir. 2013) (citations omitted).

The nine Grinnell factors are:

(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining

the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement ... in light of the best possible recovery; (9) the range of reasonableness of the settlement ... to a possible recovery in light of all the attendant risks of litigation. McReynolds v. Richards-Cantave, 588 F.3d 790, 804 (2d Cir. 2009) (*quoting* Grinnell, 495 F.2d at 463). These factors overwhelmingly favor preliminary approval of the Settlement Agreement.

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

Consumer class action lawsuits, like this action, are complex, expensive, and lengthy. *See, e.g.,* Dupler v. Costco Wholesale Corp., 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010). Should the Court decline to approve the Settlement Agreement, further litigation would include significant document discovery, depositions and expert testimony for both a class certification motion and on the merits; contested Daubert motions on damages and merits experts; and possible summary judgment motions. Each step towards trial would be subject to Defendant's vigorous opposition (and possible interlocutory appeal). Even if the case were to proceed to judgment on the merits, any final judgment would likely be appealed, which would take significant time and resources. These litigation efforts would be costly to all Parties and would require significant judicial oversight. (Gonnelli Decl. ¶¶ 15-19).

b. The reaction of the class to the settlement

Since notice did not issue, this factor does not weigh either for or against the proposed settlement.

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

The third Grinnell factor--the stage of the proceedings and the amount of discovery completed--considers "whether Class Plaintiffs had sufficient information on the merits of the

case to enter into a settlement agreement . . . and whether the Court has sufficient information to evaluate such a settlement." In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig., 986 F. Supp. 2d 207, 224 (E.D.N.Y. 2013) (citations omitted). Here, Plaintiff's counsel conducted sufficient informal discovery to evaluate the case, especially on the damages issue. (Gonnelli Decl. ¶¶ 11-12, 18). *See* Zeltser v. Merrill Lynch & Co., No. 13 CIV. 1531 FM, 2014 U.S. Dist. LEXIS 135635, at *14 (S.D.N.Y. Sept. 23, 2014) ("Here, through both formal discovery and an informal exchange of information prior to mediation, Plaintiffs obtained sufficient discovery to weigh the strengths and weaknesses of their claims and to accurately estimate the damages at issue."). That information, combined with the analysis done in connection with the motion practice, ensured that Counsel had sufficient information to evaluate the settlement.

d. The risks of establishing liability and damages

"Litigation inherently involves risks." Willix v. Healthfirst, Inc., No. 07-cv-1143, 2011 U.S. Dist. LEXIS 21102, at *11 (E.D.N.Y. Feb. 18, 2011) (citation omitted). "[I]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." Banyai v. Mazur, No. 00 CIV.9806 SHS, 2007 U.S. Dist. LEXIS 22342, at *29 (S.D.N.Y. Mar. 27, 2007) (citation omitted); accord Zeltser, 2014 U.S. Dist. LEXIS 135635, at *14.

Plaintiff recognizes that, as with any litigation, the actions involve uncertainties as to their outcome. (Gonnelli Decl. ¶¶ 15-18). The largest risk in this case is the simple one of an uncollectible judgment. Even if Plaintiff succeeded at every step of the way, there would be no compensation to the class. See August 21 Order at 2 (noting CleanWell's inability to pay more than a de minimis judgment).

In any case, if the litigation continued, Plaintiff's challenges would include demonstrating that an objectively reasonable consumer would be misled, that a class encompassing multiple products at multiple price points could be certified, and that a price premium could be established to show damages. Defendant would challenge Plaintiff at every litigation step, presenting significant risks of ending the litigation while increasing costs to Plaintiff and the Settlement Class members. Further litigation presents no guarantee for recovery or injunctive relief that is an improvement over that obtained here. (Gonnelli Dec. ¶¶ 15-18). For these reasons, the risks of establishing liability and damages strongly support final approval.

e. The risk of maintaining class action status through trial

The case settled before a ruling on CleanWell's motion to strike Plaintiff's class allegations, let alone a ruling on class certification. If the case were litigated, Defendant would vigorously oppose class certification. See In re Med. X-Ray Film Antitrust Litig., No. CV-93-5904, 1998 U.S. Dist. LEXIS 14888, at *14 (E.D.N.Y. Aug. 7, 1998) (possibility that defendant would challenge maintenance of class in absence of settlement was risk to class and potential recovery). Furthermore, even if the Court were to certify a litigation class, the certification order would not be set in stone. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."); *see also* Brazil v. Dole Packaged Foods, LLC, No. 12-CV-01831-LHK, 2014 U.S. Dist. LEXIS 157575, at *49 (N.D. Cal. Nov. 6, 2014) (decertifying Rule 23(b)(3) class in consumer fraud case based in part on flawed damage analysis). Given the risks, this factor weighs in favor of final approval.

f. The ability of Defendant to withstand a greater judgment

In its August 21 Order, the Court, having reviewed CleanWell's financial submissions of July 7, 2017, concluded that "Defendant has submitted several documents filed under seal which corroborate counsels' representation regarding CleanWell LLC's ability to pay more than a de minimis judgment, and by extension, a meaningful monetary settlement." August 21 Order at 2.

This finding supports final approval.

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

The eighth and ninth Grinnell factors also support final approval. The relief provided by the Settlement Agreement is within the range of reasonableness, in light of the best possible recovery and in light of all the attendant risks of litigation. Courts have consistently approved injunction-only settlement agreements that resolve mislabeling class actions. See, *e.g.*, Nicotra v. Babo Botanicals, LLC, No. 2:16-cv-00296 (ADS) (GRB), (E.D.N.Y. September 17, 2016) (final approval order attached as Exhibit 3 to the Gonnelli Decl.); Lilly v. Jamba Juice Co., 2015 U.S. Dist. LEXIS 34498, *9 (C.D. Cal. March 18, 2015); In re Quaker Oats Labeling Litig., 2014 U.S. Dist. LEXIS 104941 (N.D. Cal. July 29, 2014). In doing so, these courts have emphasized that the relief obtained in these settlements--"complete relabeling of . . . challenged products"--"provides meaningful injunctive relief . . . within the range of possible recoveries by the Class." See Lilly at *18.

Here, the Settlement Agreement requires relabeling of the Product to remove the terms "Natural" and "All Natural" on its Products' front label and prohibits Defendant from using "Natural" or "All Natural" in its labeling, marketing, or advertising for products that contain synthetic ingredients or preservatives. This relief constitutes a "complete relabeling of . . .

challenged products," and amounts to "meaningful injunctive relief . . . within the range of possible recoveries by the Class." Lilly at *18.

In addition, from a practical standpoint, CleanWell's inability to pay a judgment of any significance would mean that any victory would be a Pyrrhic one. Thus, consideration of the range of reasonableness of the settlement in light of the best possible recovery and in light of all the attendant risks of litigation weighs in favor final approval.

Accordingly, since an application of the Grinnell factors favors the settlement, the Court should grant final approval.

IV. Class Certification

In the August 21 Order the Court also preliminarily approved the proposed settlement for settlement purposes. The Court ordered that "in all other respects, the proposed order submitted to the Court, Docket Entry [35-5], is approved and hereby entered as an Order of the Court."

In adopting the Proposed Order at 35-5, the Court found that the requirements of Rule 23 were satisfied (for purposes of settlement only) in ¶¶ 7-9. The Court preliminarily certified the class under Rules 23(a) and 23(b)(2), defined the class, and appointed Mr. Baumgarten and his counsel class representative and class counsel.

Since circumstances have not changed since August 21, 2017, those findings should remain undisturbed. Accordingly, the Court should grant final certification to the proposed class.

V. Plaintiff's Application For Attorney's Fees Should Be Granted

Plaintiffs' Counsel requests approval of an award of fees and expenses totaling $120,000.

The United States Supreme Court has held that negotiated, agreed-upon attorneys' fee provisions are the ideal toward which the parties should strive. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). "A request for attorney's fees should not result in a second major litigation."

Id. "Ideally, of course, litigants will settle the amount of a fee." Id.

Where, like here, there is no common fund from which attorney's fees and costs are deducted, there is no conflict between the class and the lawyers of which the judge needs to be mindful. "[R]egardless of the size of the fee award . . . the fee award does not reduce the recovery to the class. Under these circumstances, the danger of conflicts of interest between attorneys and class members is diminished." In re Sony SXRD Rear Projection TV Class Action Litig., 2008 U.S. Dist. LEXIS 36093, at *43 (S.D.N.Y. May 1, 2008). In such cases, "the Court's fiduciary role in overseeing the award is greatly reduced." Jermyn v. Best Buy Stores, L. P., 2012 U.S. Dist. LEXIS 90289, 2012 WL 2505644 ("Best Buy") quoting McBean v. City of New York, 233 F.R.D. 377, 392 (S.D.N.Y. 2006).

Nonetheless, the court must still assess the reasonableness of the fee award. In re Sony at*44.

The courts are "guided by the traditional criteria in determining a reasonable common fund fee, including: '(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.'" Goldberger, 209 F.3d at 50.

A. Time and Labor Expended By Counsel

Where there is no common fund, courts use the lodestar/multiplier method to arrive at a reasonable fee. Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany and Albany County Board of Elections, 522 F.3d 182, 190 (2d. Cir. 2008). First, counsel's lodestar is calculated by multiplying the hours spent on the case by a reasonable hourly rate, then adjusting the lodestar up or down using a multiplier based on case-specific factors. Animal Sci.

Prods. Inc. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.), No. 06-MD-1738, 2013 U.S. Dist. LEXIS 182701, *10-11 (E.D.N.Y. Dec. 30, 2013) (quoting Arbor Hill).

Plaintiffs' Counsel spent a total of 248.55 hours on this case for a total lodestar of $164,427.00.

The hourly rates of the attorneys who worked on the case are listed below.

Attorney	Total Amount of Hours	Hourly Rate
Jason P. Sultzer	48.4	$750.00[1]
Jason P. Sultzer	4.00	$375.00 (Travel)
Adam R. Gonnelli	118.95	$750.00
Adam R. Gonnelli	4.7	$375.00 (Travel)
Joseph Lipari	39.7	$750.00
Jeremy B. Francis	5.00	$400.00
Jeffrey K. Brown	1.30	$530.00
Michael Tomkins	3.10	$405.00
Brett Cohen	4.50	$350.00
Brittany Cangelosi	1.20	$125.00
Maria Pellegrini	1.30	$125.00
Tama Lynch	0.60	75.00

[1] The rates of Messrs. Gonnelli and Sultzer have been approved by distant federal courts around the country. See, e.g., Shop-Vac Mktg. & Sales Practices Litig., No. 2380, 2016 U.S. Dist. LEXIS 170841, at *45-46 (M.D. Pa. Dec. 9, 2016) (approving rate of $750 per hour for Gonnelli). The Sultzer firm rates were impliedly approved as reasonable, over objections, in Rapoport-Hecht v. Seventh Generation, Inc., No.14-cv-9087-KMK, Doc 76, ¶ 17 (S.D.N.Y. April 28, 2017) (approving award of attorney's fees and stating at the fairness hearing: "I don't have any question about … the quality of the work or any of the methods that have been used to calculate the fees."). The relevant excerpt of the transcript from the Seventh Generation fairness hearing is attached as Exhibit 4 to the Gonnelli Declaration.

	Total Lodestar	$164,427.00

That these rates are based on rates in the Southern District of New York is not necessarily an obstacle to their application. See Vitamin C Antitrust Litig. at *15 (rejecting "forum rule" in complex antitrust action to apply Southern District of New York rates and noting the "unique permeability of the border between the Southern District of New York and the Eastern District of New York."). The Vitamin C court also noted that even using the forum rule, rates in the Eastern District for partners can be $650 per hour for more complex cases.

However, this Court has recognized that in this District, courts have approved hourly rates from $300 to $450 for partners, $200 to $325 for senior associates, and $100 to $200 for junior associates. See Sass v. MTA Bus Co., 6 F. Supp. 3d 238, 261 (E.D.N.Y. 2014) (collecting cases). But even applying these lower rates, Counsel's lodestar is still $97,140.00[2].

Under this approach, the requested fee is still reasonable because it yields a multiplier of 1.235. This multiplier falls well within the acceptable range awarded by courts within the Second Circuit. Hall v. Prosource Techs., *LLC*, No. 14-CV-2502 (SIL), 2016 U.S. Dist. LEXIS 53791 at *44 (E.D.N.Y. April 11, 2016) (awarding a 2.08 multiplier as reasonable); Sierra v. Spring Scaffolding LLC, No. 12-cv-05160 (JMA) 2015 U.S. Dist. LEXIS 178006 at *21 (E.D.N.Y. September 30, 2015) (awarding a multiplier of 1.54 as reasonable); In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 991 F. Supp. 2d 437, 448 (E.D.N.Y. 2014) (awarding a multiplier of 3.41 as reasonable); Maley v. Del Global Techs. Corp., 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (finding multiplier of 4.65 to be "well within the range awarded by

[2] All partners (Sultzer, Lipari, Gonnelli, Brown have been reduced to $450.00), Associates (Francis, Tompkins, Cohen have been reduced to $250.00), Support staff (Cangelosi, Pellegrini, Lynch have been reduced to $75.00)

courts in this Circuit and throughout the country"); Roberts v. Texaco, Inc., 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (awarding multiplier of 5.5 as reasonable). Here, taking into account the significant complexity of the issues, the risks of this litigation, and the contingent nature of the fee, a multiplier of 1.235 is certainly reasonable. See Best Buy at *26 (noting multiplier is used "to account for the contingent nature of the engagement and the risk of such a case.") (quotation omitted); In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig., 724 F. Supp. 160, 164 (S.D.N.Y. 1989) ("[C]ontingent fee risk is the single most important factor in awarding a multiplier . . . .").

It should be noted that most of the work was done by partners with considerable experience. This is also not a reason to reduce the requested fees. Vitamin C Antitrust Litig *11 ("It is also well known that plaintiffs' law firms frequently follow a different model than large mega-firms in terms of the allocation of work between partners and associates, placing much more responsibility at higher levels. I see no general infirmity in using this model."); In re Delta/AirTran Baggage Fee Antitrust Litig., 2015 U.S. Dist. LEXIS 101474, *75 (N.D. Ga. Aug. 3, 2015) (citing cases and noting that "Plaintiffs' counsel's small firms are not structured like large defense firms," and "[t]hey should not suffer consequences in a fee award because a significant amount of the work fell on [partners'] shoulders due to the size of their firms.").

B. The Complexity, Magnitude, and Risks of the Actions

"Class actions have a well deserved reputation as being most complex." Best Buy at *27 quoting In re Nasdaq Market-Makers Antitrust Litig., 187 F.R.D. 465, 1998 U.S. Dist. LEXIS 17557 at * 477 (S.D.N.Y. Nov. 8, 1998). In addition, "[l]itigation inherently involves risks." Willix v. Healthfirst, Inc., No. 07-cv-1143, 2011 U.S. Dist. LEXIS 21102 at *11 (E.D.N.Y. Feb. 18, 2011)

In this case, the complexity arose from the need to establish that objectively reasonable consumers would not find the preservatives used in the soap and hand sanitizers to be "natural" and to establish a damages model that would link the alleged misleading labels to an actual premium paid by consumers. Both these issues would likely require expert testimony and attendant motion practice.

When it became apparent that CleanWell would not be able to pay a substantial judgment these efforts were halted, but plaintiff and his counsel had already started down that road.

As discussed in the final approval analysis above, had the litigation continued plaintiff would have faced many obstacles, including:

(a) A pending motion to dismiss and motion to strike class allegations;

(b) Both class and merits discovery, including pricing policies and drivers, market competition, and changes in labels and/or ingredients in multiple products over time;

(c) Establishing that reasonable consumers would have been misled by the labels on multiple products;

(d) A complicated class certification motion with expert testimony on damages and Daubert motions involving multiple products at different price points;

(e) Possible summary judgment motion practice;

(f) Trial preparation, including evidentiary battles and trial itself; and

(g) Possible interlocutory appeals of favorable rulings and appeals of final judgment.

See also Best Buy at *28-29 (noting similar risks in class case supported fee award).

This factor supports the fee request.

C. The Contingent Nature of the Fee

The risk of litigation that Class Counsel undertook was significant in light of the considerable time and resources they devoted to this case strictly upon a contingency basis. From the commencement of this litigation, Class Counsel have been paid nothing for their efforts. The outlay of cash and personnel resources by Class Counsel has been completely at risk. Payment for their services was wholly dependent on obtaining some benefit for the Settlement Class.

This factor strongly supports the application of a multiplier. *See* Best Buy at *26 (noting multiplier used "to account for the contingent nature of the engagement and the risk of such a case.") (quotation omitted); In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig., 724 F. Supp. 160, 164 (S.D.N.Y. 1989) ("[C]ontingent fee risk is the single most important factor in awarding a multiplier . . . .").

D. The Result Achieved and the Quality of Representation

The result achieved and the quality of the services provided are also important factors to consider in determining the amount of reasonable attorneys' fees under a lodestar/multiplier analysis. Scharff v. Cnty. of Nassau, No. CV 10-4208 (DRH)(GRB), 2016 U.S. Dist. LEXIS 67643 at * 15-16 (E.D.N.Y. May 20, 2016) (approving attorneys' fees based on the "complexity of the action" and the "successful results achieved."); *see also* Behrens v. Wometco Enters., Inc., 118 F.R.D. 534, 547–48 (S.D. Fla. 1988) ("Perhaps no better indicator of the quality of representation here exists than the result obtained.").

Here, given CleanWell's inability to pay a judgment of any significance, the result was as good as could be achieved. CleanWell is now prevented from marketing its soaps and hand sanitizers in a manner that Plaintiff contended was false and misleading.

Although such relief does not lend itself to precise valuation, in Miller v. Ghirardelli Chocolate Co., No. 12-cv-04936-LB, 2015 U.S. Dist. LEXIS 20725, *15 (N.D. Cal. February 20, 2015) the court estimated the value of a label change by valuing the price premium saved by consumers in future sales. The court concluded that the elimination of allegedly false "all natural" labelling would save consumers millions of dollars in artificial price premiums. Although sales of CleanWell products are much lower than sales of Ghirardelli chocolates, any calculation of a future price premium would yield future savings large enough to support Plaintiff's fee request.

In addition, even if a future price premium calculation cannot be reasonably estimated, courts have held that similar injunctive changes are very valuable. See Best Buy at *20 (…the benefits of the injunctive relief provided for in this settlement are substantial."); Lilly v. Jamba Juice Co., 2015 U.S. Dist. LEXIS 34498, *9 (C.D. Cal. March 18, 2015) (noting in food labeling case that "Basic economics also supports the notion that the past-purchaser plaintiff will suffer a potential injury in the absence of an injunction.").

With respect to the quality of representation, the substantial experience of Class Counsel in prosecuting similar class action cases was an important factor in achieving this result. See Sultzer Firm Resume, attached as Exhibit 2 to the Gonnelli Declaration.

E. The Requested Fee in Relation to the Settlement

Where, like in this case, an injunctive settlement leaves the rights of class members to seek monetary redress intact and provides "substantial and immediate" benefits to consumers, this factor supports a fee award. Best Buy at *30-31 (approving injunctive-only settlement and awarding fees where injunctive relief improved consumer experience and class members did not release monetary claims).

F. Public Policy

"Public policy favors the award of reasonable attorneys' fees in class action settlements." Best Buy at *31 quoting In re Visa Check/Master Money Antitrust Litig., 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) ("The fees awarded must be reasonable, but they must also serve as an inducement for lawyers to make similar efforts in the future."), *aff'd sub nom.* Wal-Mart Stores, Inc., 396 F.3d 96).

This settlement, and those like it, serve the important public policy of accurate labeling on food and cosmetics. See Ackerman v. Coca-Cola Co., 2013 U.S. Dist. LEXIS 184232 at *14-15 (E.D.N.Y. July 18, 2013) (noting in case involving deceptively labeled beverages that California and New York consumer protection laws were designed to protect the public). Also, like in Best Buy, albeit on a smaller scale, the efforts of plaintiff and counsel "will improve the experience of customers … and achieved this settlement independently of parallel law enforcement or public regulatory prosecutions." Id. at *31-32.

All these factors support the fee request.

VI. The Court Should Approve the Reimbursement of Class Counsel's Expenses

Class Counsel have also expended $2,328.35 in costs for which they should now be reimbursed. These costs were necessary to the prosecution of this matter, including expert consulting fees.

"Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation of those clients." Best Buy at *23 (awarding expenses in injunctive-only settlement) (citing Miltiand Raleigh Durham v. Myers, 840 F Supp. 235, 239 (S.D.N.Y 1993).

Since these expenses were necessary to the prosecution of the case, they should be reimbursed.

VII. The Court Should Approve the Proposed Service Awards to Mr. Baumgarten

Plaintiff has also moved the Court to approve a service award of $1500. "[S]ervice awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs." Hernandez v. Immortal Rise, Inc., 306 F.R.D. 91, 101 (E.D.N.Y. 2015) (citation omitted) (approving service awards of $2,500 and $7,500 to named plaintiffs as reasonable); see also Massiah v. MetroPlus Health Plan, Inc., No. 11-CV-05669, 2012 U.S. Dist. LEXIS 166383 at *8 (E.D.N.Y. Nov. 20, 2012) (collecting cases approving service awards ranging from $5,000 to $30,000); 4 William B. Rubenstein et al., Newberg on Class Actions §11:38 (4th ed. 2008).

In approving a request for a $1000 service award in an injunctive-relief only consumer class action, the Best Buy court stated, "Courts in this district and elsewhere routinely approve incentive awards of the type sought here." Id. at 22. The Best Buy court also noted that $1000 was "far below those awarded to named plaintiffs in other class action litigation" and cited authority where awards between $50,000 and $300,000 were granted. *Id.*

Here, like in Best Buy, a similarly modest award is warranted. Mr. Baumgarten was not the original plaintiff in this case. He learned of the action at its inception, and remained interested in the litigation throughout its pendency. Once it became clear that his services to the class would be required, he proceeded with great alacrity to become more familiar with the case, assume the responsibilities of a class representative, and consult with Mr. Sultzer about the settlement and what could potentially be achieved in the litigation if it continued. See

Declaration of Zeve Baumgarten in Support of Final Approval of Settlement, submitted concurrently, ¶¶ 11-18.

Without Mr. Baumgarten, the results of the case and the benefits to consumers would not have occurred. Accordingly, the modest $1500 service award should be granted.

VIII. CONCLUSION

For the reasons stated above, Plaintiff's motion for final approval, class certification, attorneys' fees and expenses, and for a service award should be granted.

Date: September 29, 2017

THE SULTZER LAW GROUP P.C.

By: /s/ Adam Gonnelli
Jason P. Sultzer, Esq. (Bar ID # JS4546)
Joseph Lipari, Esq. (Bar ID # JL3194)
Adam Gonnelli (Bar ID # AG4782)
14 Wall Street, 20th Floor
New York, NY 10005
Tel: (212) 618-1938
Fax: (888) 749-7747
Gonnellia@thesultzerlawgroup.com

LEEDS BROWN LAW, P.C.
Jeffrey Brown, Esq.
One Old Country Road, Suite 347
Carle Place, NY 11514-1851
Tel: (516) 873-9550
jbrown@leedsbrownlaw.com

Attorneys for Plaintiff and the Class