UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEANNIE PATORA, individually on behalf of herself and on behalf of all others similarly situated, *Plaintiff,* v. TARTE, INC. *Defendant.*	Case No.: 7:18-cv-11760-KMK

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF NOTICE PLAN

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Plaintiff Jeannine Patora ("Plaintiff"), individually and on behalf of all others similarly situated, respectfully submits this memorandum of law in support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan.[1]

I. INTRODUCTION

This proposed class action settlement would resolve the claims of purchasers of Defendant Tarte Inc.'s ("Defendant's") high-performance naturals®-branded products (the "Products"), who made their purchases between November 13, 2013, through the deadline for claim submission set by the Court. Plaintiff alleges that Defendant misled her and other consumers by claiming that the Products were "High-Performance Naturals," when in fact the Products contain many ingredients Plaintiff contends are artificial, such as butylene glycol, phenoxyethanol and tocopheryl acetate.

To settle the cases Defendant will pay $1.7 million into a Settlement Fund and make meaningful changes to their product marketing and advertising.

II. PROCEDURAL BACKGROUND

On November 13, 2017, Plaintiff notified Defendant by letter that Plaintiff intended to file a class action concerning Defendant's deceptive manufacturing, marketing, labeling and advertising by representing that certain varieties of its personal care products were "High-Performance Naturals." *See* Sultzer Decl., ¶ 8. The pre-suit notice letter enclosed a draft complaint for a civil action to be filed in the United States District Court for the Southern District of New York, and demanded that Defendant preserve certain records related to the allegations in the draft complaint. *See id.*, ¶ 9.

Prior to serving the notice letter, Class Counsel[2] conducted a thorough investigation of

[1] Unless otherwise indicated, capitalized terms shall have the same meaning as they do in the Settlement Agreement. References to "§ _" are to sections in the Settlement Agreement, submitted as Exhibit 1 to the Declaration of Jason P. Sultzer in Support of Plaintiff's Motion for Preliminary Approval of Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan (the "Sultzer Decl.").

[2] The Settlement Agreement defines "Class Counsel" as the Sultzer Law Group, P.C. § 2.8.

the potential claims, ingredients, manufacturing process, and the regulatory framework surrounding the Products at issue. *See id.*, ¶ 5. Specifically, Class Counsel examined the different ingredients and chemicals in Defendant's Products from publicly-available sources. *See id.* As part of the investigation, Class Counsel retained a consultant with expertise in cosmetics. *See id.*

Class Counsel also conducted an analysis of the Products' pricing and the potential damages in the case based on estimates of the potential price premium due to the alleged misrepresentations, and also conducted field research on the actual retail prices of the Products and Defendant's competitor's comparable competing products in retail stores. *See id.*, ¶ 6. Class Counsel thoroughly analyzed the legal landscape to determine if, and in what manner, to approach remedying Defendant's alleged misleading marketing practices, including consideration of the application of multiple state consumer protection laws, recent legal precedents in cosmetics and product labeling litigation, and FDA regulations. *See id.*, ¶ 7.

Through various letters, emails and phone calls, beginning soon after Defendant's receipt of Plaintiff's notice letter, the parties conducted confidential pre-suit settlement negotiations. *See id.*, ¶ 10. As part of the negotiations, Defendant's Counsel provided Class Counsel, pursuant to a confidentiality agreement, with information regarding sales data, distribution and pricing, which Plaintiff required prior to agreeing in principle to the settlement set forth in the Settlement Agreement. *See id.* Plaintiff and her counsel analyzed this data to further hone its understanding of the scope of potential damages in the case. *See id.* Defendant maintained, and continues to maintain, all arguments in support of its position that Plaintiff's allegations are unsupported, and that the allegations would fail initially as a matter of law, and ultimately as a matter of fact. *See id.*, ¶ 11.

On March 23, 2018, Class Counsel and Defendant's Counsel attended an all-day mediation session in New York, New York with the assistance of the Hon. Stephen M. Orlofsky, of Blank Rome LLP. *See id.*, ¶ 12. Although a settlement was not reached at the in-person mediation, the Parties continued to engage in extensive settlement discussions. *See id.* On or

about July 24, 2018, Class Counsel and Defendant's Counsel spoke on the phone and agreed upon a framework for a resolution of the matter. *See id.*, ¶ 13. Over the next several weeks, Class Counsel and Defendant's Counsel negotiated a term sheet setting out the basic outline of a settlement agreement providing for both monetary and injunctive relief for Plaintiff and the putative class, and a broad release for Defendant. *See id.* The term sheet was executed by Class Counsel and Defendant's Counsel on September 18, 2018. *See id.*, ¶ 14. Thereafter, the Parties began drafting and negotiating the precise terms of the Settlement Agreement. These negotiations were lengthy, detailed, arm's-length, and covered all aspects of the settlement. *See id.*, ¶¶ 15-16. After more than a year of arduous negotiations, the Parties finally resolved all outstanding issues and the Settlement Agreement was executed by all parties on December 12, 2018. *See id.*, ¶ 15.

On December 14, 2018, the Complaint in the action was filed on behalf of Plaintiff, Jeannie Patora. *See id.*, Ex. 3. On the same day, Class Counsel and Defendant's Counsel filed a notice of settlement informing the Court that an agreement resolving the case had been reached, and that the present Motion would be filed by January 25, 2019. *See* ECF No. 5.

Plaintiff respectfully asks the Court to (1) grant preliminary approval of the Settlement Agreement; (2) conditionally certify the Settlement Class for purposes of settlement only; (3) approve the proposed Notice Program; (4) appoint the Angeion Group ("Angeion") as Settlement Administrator and direct it to commence the Notice Program; (5) appoint Plaintiff as Class Representative for the Settlement Class and her counsel as Class Counsel for the Settlement Class pursuant to Fed. R. Civ. P. 23(g); and (6) schedule a Fairness Hearing to consider final approval of the Settlement. *See* Fed. R. Civ. P. 23(e).

III. THE TERMS OF THE PROPOSED SETTLEMENT

The Settlement Agreement defines the Settlement Class, describes the Parties' agreed-upon Settlement relief, and proposes a plan for disseminating notice to the Settlement Class members. Plaintiff's objectives in filing the Action were to remedy the allegedly deceptive representations in Defendant's marketing of the Products, and to compensate Settlement Class

members damaged by the alleged misrepresentations. Through the Action and the Settlement Agreement, Plaintiff has achieved both objectives.

A. Certification of the Settlement Class

Plaintiff seeks certification of a nationwide Settlement Class defined as follows:

> All persons and entities that, during the Class Period, both resided in the United States and purchased in the United States any of Defendant's "High-Performance Naturals"-branded products for personal use and not for resale. Excluded from the Settlement Class are: (a) Defendant's board members or executive-level officers, including its attorneys; (b) governmental entities; (c) the Court, the Court's immediate family, and the Court's staff; and (d) any person that timely and properly excludes himself or herself from the Settlement Class in accordance with the procedures approved by the Court.

B. Relief for the Members of the Settlement Class

The Settlement Agreement provides for significant monetary and injunctive relief.

1. Monetary Relief

The Settlement Agreement provides that Defendant will establish a Settlement Fund in the amount of $1,700,000 to pay for (1) cash payments distributed to Settlement Class Members who have submitted timely, valid, and approved claims; (2) all costs and expenses incurred by the Settlement Administrator in disseminating notice to the Settlement Class and administrating the Settlement, including processing the claims of the Settlement Class; (3) any Attorneys' Fees and Expenses award made by the Court to Class Counsel; (4) any Service Award made by the Court to Plaintiff; and (5) any necessary taxes and tax expenses. *See* § 4.1.

Settlement Class Members with proof of purchase will be entitled to a full refund for the Product or Products reflected in the proof of purchase, provided that the Products were bought for personal use during the Class Period, without limit on the number of Products for which a claim can be submitted. *See* § 4.2(j)(i). Settlement Class Members without proof of purchase will be entitled to reimbursement of five dollars per Product purchased for up to five (5) Products per household by stating under penalty of perjury the type(s) and number of Products purchased, and approximate dates of purchases. *See* § 4.2(j)(ii). Alternatively, Settlement Class members without proof of purchase may seek reimbursement of up to five dollars per Product purchased

for up to ten (10) Products per household by stating under penalty of perjury the type(s) and number of Products purchased, approximate dates of purchases, retailer and location of the purchase(s), as well as their satisfaction with the product on a 1-5 scale. *See id.*; Ex. A to Settlement Agreement. The substance of Settlement Class Members' responses to any request for additional information regarding their purchases shall not affect his or her eligibility to receive reimbursement for up to ten (10) Products without proof of purchase — simply providing the additional information entitles Settlement Class Members to receive reimbursement and there is no wrong answer that will reduce the settlement's benefits. *See* § 4.2(j)(ii).

If any monies remain in the Settlement Fund after the payment of all valid Claims, Notice and Administration costs, Attorneys' Fees and Expenses, Service Awards, and any other claims, costs, or fees specified by the Settlement Agreement, these Residual Funds shall be used to increase eligible Settlement Class Members' payments on a *pro rata* basis up to a maximum of 500% of the Settlement Class Members' Initial Claim Amount. *See* § 4.4(a)(i). If there are still excess Residual Funds following the *pro rata* increase, the Parties will meet and confer to determine the best method for distributing the Residual Funds, which may include *cy pres* distribution of the funds, and then will seek Court approval of the agreed-to method. *See* § 4.4(a)(ii).

In the event that the Settlement Fund is insufficient to make the Initial Claim Amount payments to each valid Claimant after the payment of all valid Claims, Notice and Administration costs, Attorneys' Fees and Expenses, Service Awards, and any other claims, costs, or fees specified by the Settlement Agreement, the amount due to each valid Claimant shall be proportionally reduced on a *pro rata* basis. *See* § 4.4(b). No portion of the Settlement Fund will revert to Defendant. *See* § 4.4(a)(iii).

2. Injunctive Relief

The Settlement Agreement also requires Defendant to make significant modifications to its marketing of the Products and to Defendant's website. *See* § 4.5. The primary venues for purchasing the Products are in retail stores, where the Products are displayed at a gondola or

other in-store displays which prominently state that the Products are "High-Performance Naturals," or online, where the Product itself is prominently displayed but the Product's packaging may not be displayed at all. Accordingly, Defendant has agreed to:

- ensure that the following explanatory statement, or a similar statement, is displayed on its Website and on in-store displays where the high-performance naturals™ Products are sold: "Formulated with a blend of naturally-derived and other ingredients designed to perform. Visit www.Tartecostmetics.com /en_US/explore/about-tarte/ to see what high-performance naturals™ means to us;"

- create a separate web page located at www.Tartecosmetics.com/ /en_US/explore/about-tarte/ (or a similar web page on the Tartecosmetics.com website) that explains Defendant's philosophy and definitions regarding its use of natural ingredients;[3] and

- abide by all regulatory labeling standards, including any applicable FDA regulations and state or federal regulations applicable to the labeling and marketing of cosmetics.

See id. Defendant will make these modifications to its marketing materials and website within 90 days after Final Approval, but is permitted to continue using existing marketing materials, and sell existing inventory of the Products, provided the marketing materials and inventory of the Products were in existence as of 90 days after Final Approval. *See id.*

C. Service Awards and Attorneys' Fees and Expenses

The Settlement Agreement provides that Plaintiff will petition the Court for a Service Award of $2,500 from the Settlement Fund to compensate her for the actions she took in representing the Settlement Class. *See* § 8.6. Defendant has also agreed not to oppose an application for payment of Attorneys' Fees and Expenses to Class Counsel in an amount of up to 33% of the Settlement Fund ($566,666), for Class Counsel's work on the Actions. *See* § 8.1.

[3] The website, currently available to the public, makes a number of clarifications to the meaning of "High-Performance Naturals," including by identifying specific controversial ingredients that are not included in the Products. *See id.* ("[A]lways formulated without parabens, mineral oil, phthalates, triclosan, sodium lauryl sulfate, & gluten."). The website does not represent that any of the synthetic ingredients identified in Plaintiff's Complaint are not included in some or all of the Products. *See id.*; *see also* Complaint, ¶ 7.

Under the Settlement Agreement, within five (5) days of the Effective Date, the Settlement Administrator shall cause the Attorneys' Fees and Expenses awarded by the Court to be paid to Class Counsel, and Plaintiff will receive any Service Award ordered by the Court. *See* § 8.5.

D. Settlement Notice

Pursuant to the Settlement Agreement, the Parties request that the Court appoint Angeion as the Settlement Administrator to administer the Notice Program and the claims process. *See* § 2.7. The Parties ultimately selected Angeion based on its excellent work and breadth of experience administering other similar consumer class actions, including the settlement before this court of *Rapoport-Hecht v. Seventh Generation, Inc.*, No. 14-CV-9087 (KMK), 2017 U.S. Dist. LEXIS 218781 (S.D.N.Y. Apr. 28, 2017), which also involved mislabeled "natural" personal care products.

The Notice Plan provides that the Settlement Administrator will use a Long-Form Notice and a Summary Class Notice to disseminate notice of the Settlement Agreement to the Settlement Class members through a variety of means discussed *infra*. *See* § 5.1(a); Settlement Agreement, Exs. B, D. The Long-Form Notice is designed to provide notice of the full terms of the Settlement Agreement. It provides, among other things,

- A description of the claims, issues and defenses in the Action;
- How to tell if a consumer is a member of the proposed Settlement Class;
- A description of the proposed settlement and the relief offered;
- A list of the options presented to the members of the proposed class, *i.e.* applying for settlement benefits, objecting to the settlement, opting out of the settlement or doing nothing, as well as the right to appear at the Fairness Hearing through an attorney or otherwise;
- A description of the release of claims being sought by Defendant as part of the settlement;
- The time and date of the final approval hearing; and
- The binding effect of a class judgment on Settlement Class members under Rule 23(c)(3).

See Settlement Agreement, Ex. B.

The Parties developed a robust notice program[4] with the assistance of Angeion that includes: (1) a sophisticated and comprehensive web-based notice using paid banner ads on websites targeted based on Defendant's consumers' demographics; (2) a quarter-page ad in the California regional edition of *USA Today*, to run one time per week in four consecutive weeks; (3) a dedicated Settlement Website through which Settlement Class members can obtain more detailed information about the Settlement and access case documents; and (4) a toll-free telephone helpline through which Settlement Class members can obtain additional information about the Settlement and request the class notice and/or a Claim Form. *See* Weisbrot Decl.

Angeion estimates that the notice program will reach at least 70% of the proposed class with an average frequency of three times each. *See id.*, ¶ 10. Angeion developed the program by targeting the demographic profile of purchasers of the Products using multimedia audience research. *See id.,* ¶¶ 15-19. The audience selected by Angeion to be targeted by the media plan is predominantly women aged 18-54 (average age 43) who are "heavy" internet users (averaging 23 hours per week) and who read an average of 6 newspapers per month. *See id.,* ¶ 17.

The internet banner portion of the notice campaign will place banner ads for four weeks on both desktop and mobile devices. Search terms chosen to be most likely to reach the target demographic will be used. *See id.,* ¶ 21. The banner notice is designed to serve 45,767,000 impressions. *See id.,* ¶ 25.

Once directed to the Settlement Website, class members will be able to submit their claim online, making claim submission as simple as possible. The Settlement Website will also post Settlement-related and case-related documents such as the Settlement Agreement, the Summary Notice, the Long-Form Notice, the Preliminary Approval Order, and easy to understand "FAQs"

4. The details of the Notice Program are set forth in the Notice Plan and Declaration of Steven Weisbrot, Executive Vice President of Notice & Strategy at the Angeion Group, in support of the Notice Plan ("Weisbrot Decl."), attached as Exhibit C to the Settlement Agreement.

about the settlement. *See* § 2.33; Weisbrot Decl., ¶ 29. The Settlement Website will also include procedural information regarding the status of the Court approval process and important deadlines, such as announcements of the Fairness Hearing date, when the Final Order and Judgment has been entered, and when the Final Settlement Date has been reached. *See* Weisbrot Decl., ¶ 29. The Settlement Website will be activated within 21 days of entry of the Preliminary Approval Order, and will remain active until 120 days after the Effective Date. *See* § 5.1(a)(iv).

E. Processing of Claims and Method of Distributing Relief

Angeion has set forth the details of its method for processing claims and distributing relief in the Weisbrot Declaration. *See* Weisbrot Decl., ¶¶ 38-40. Claimants who can provide proof of purchase are entitled to submit claims for a full refund, without any limitation as to the number of Products purchased, while Claimants without proof of purchase are entitled to five dollars per Product purchased for up to 5 or 10 Products per household by depending on the amount of information the Claimant can provide. *See* § 4.2(j)(i), (ii).

Once all valid claims have been tallied, Angeion will cause all electronic and hard copy claims to be processed, reviewed and de-duplicated prior to preparing the finalized Distribution List. *See* Weisbrot Decl., ¶ 38. Once the finalized Distribution List has been prepared, Angeion will issue traditional bank checks to Claimants at the addresses that the Claimants provided during the claims process. *See id.*, ¶ 39. And in an effort to assure that the checks will reach the intended Claimant, any checks returned as undeliverable by the USPS which have a forwarding address will be re-mailed to that forwarding address, and any checks that are returned as undeliverable by the USPS without a forwarding address will be subject to address verification searches ("skip tracing"), utilizing a wide variety of data sources, including public records, real estate records, electronic directory assistance listings, etc. to locate updated addresses. Checks will then be re-mailed to updated addresses located through skip tracing. *See id.*, ¶ 40.

IV. ARGUMENT

A. The Court Should Preliminarily Approve the Settlement Agreement

Class Counsel have worked steadfastly to reach a fair, reasonable, and adequate

settlement. Plaintiff and her counsel believe her claims are strong and are optimistic about obtaining class certification and succeeding on the merits. However, significant expense and risk attend the continued prosecution of the claims through trial and any appeals. In addition, should the case continue through trial, Defendant has indicated that it believes it has meritorious defenses to each of Plaintiff's claims, and that it will aggressively assert them. In negotiating and evaluating the settlement, Plaintiff and Class Counsel have taken these costs and uncertainties into account, as well as the risks and delays inherent in complex class action litigation. Additionally, in the process of investigating and litigating the Action, Class Counsel conducted significant research on the consumer protection statutes at issue, as well as the overall legal landscape, to determine the likelihood of success and reasonable parameters under which courts have approved settlements in comparable cases. In light of the foregoing, Class Counsel believe the present settlement provides significant relief to the Settlement Class members and is fair, reasonable, adequate, and in the best interests of the Settlement Class.

B. Legal Standard

Under Rule 23(e)(2) of the Federal Rules of Civil Procedure, as amended in December 2018, a court may approve a class action settlement "only on finding that [the settlement agreement] is fair, reasonable, and adequate" after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorneys' fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Id.[5] The Second Circuit has also articulated its own "fair, reasonable, and adequate" standard, discussed *infra*, that effectively requires parties to show that a settlement agreement is both procedurally and substantively fair. *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013).

This Circuit has recognized a "strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (quotations omitted). "The compromise of complex litigation is encouraged by the courts and favored by public policy." *Springer v. Code Rebel Corp.*, No. 16-cv-3492 (AJN), 2018 U.S. Dist. LEXIS 61155, at *7 (S.D.N.Y. Apr. 10, 2018) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 117 (2d Cir. 2005) ("*Visa*")); *see also Hadel v. Gaucho*, LLC, No. 15 Civ. 3706, 2016 U.S. Dist. LEXIS 33085, at *4 (S.D.N.Y. Mar. 14, 2016) ("Courts encourage early settlement of class actions, when warranted, because early settlement allows class members

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[5] Fed. R. Civ. P. 23(e)(2) was amended in 2018 to add these explicit "core concerns of procedure and substance that should guide the decision whether to approve the proposal." Committee Notes on Rules – 2018 Amendment to Fed. R. Civ. P. 23 (the "2018 Committee Notes"). The 2018 Committee Notes explain that:

> Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.
>
> A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).
>
> This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Id.

to recover without unnecessary delay and allows the judicial system to focus resources elsewhere."). A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Visa* at 116 (quoting Manual for Complex Litigation (Third) § 30.42 (1995)).

"Preliminary approval is the first step in the settlement of a class action whereby the court must preliminarily determine whether notice of the proposed settlement . . . should be given to class members in such a manner as the court directs, and an evidentiary hearing scheduled to determine the fairness and adequacy of settlement." *Manley v. Midan Rest. Inc.*, 14 Civ. 1693 (HBP), 2016 U.S. Dist. LEXIS 43571, at *21 (S.D.N.Y. Mar. 30, 2016) (internal quotations omitted).

C. The Proposed Settlement Meets the Requirements of Rule 23(e)(2)

Recent amendments to Rule 23(e)(2) set forth specific criteria that the Court must consider in determining whether a proposed settlement is fair, reasonable and adequate. The proposed Settlement here satisfies each of the Rule's requirements.

1. The Class Representative and Class Counsel Have Adequately Represented the Class

Plaintiff and Class Counsel have more than adequately represented the interest of the Settlement Class in this case. Plaintiff was heavily involved in litigating this action, including by reviewing the complaint and other case documents and through extensive communications with Class Counsel regarding the status of the case. *See* Sultzer Decl., ¶ 24. Plaintiff also participated in crafting the injunctive relief in the Settlement, in particular modifications to Defendant's in-store promotional materials, based on her own experience purchasing the Products. *See id.* Through Plaintiff's work she was able to fulfill her responsibility of advancing and protecting the interests of the Class and evaluating the proposed Settlement to determine that it was in the best interests of the Settlement Class.

Class Counsel has also more than adequately represented the Settlement Class. As

detailed herein, Class Counsel performed an extensive investigation into the claims at issue; participated in a mediation with the Honorable Stephen M. Orlofsky, conducted informal discovery into the bases of the potential settlement, and conducted vigorous negotiations for more than a year. Class Counsel have relied on their significant experience in litigating and resolving class actions, including consumer class actions relating to "natural" products,[6] in order to reach the Settlement that Class Counsel believes is an excellent result for the Settlement Class. This determination was buttressed by information Defendant provided to Plaintiff as part of settlement negotiations, namely sales data and pricing information. This Settlement is also comparable to other, similar settlements that have been litigated by Class Counsel and approved by courts, including this one, such as *Rapoport-Hecht v. Seventh Generation, Inc.*, No. 7:14-cv-09087-KMK (S.D.N.Y.) (consumer fraud class action involving products mispresented as natural resulting in settlement fund of $4,500,000 and changes to product marketing); *Mayhew v. KAS Direct, LLC*, 7:16-cv-06981-VB (S.D.N.Y.) (consumer fraud class action involving "natural" misrepresentations resulting in settlement fund of $2,215,000 and changes to product marketing); *Vincent v. People Against Dirty, PBC.*, Case No. 7:16-cv-06936 (S.D.N.Y.) (consumer fraud class action involving "natural" misrepresentations resulting in settlement fund of $2,800,000 and changes to product marketing). For these reasons, Plaintiff and Class Counsel have adequately represented the Settlement Class.

2. The Settlement was Negotiated at Arm's Length

There is a "presumption of fairness, reasonableness, and adequacy as to the settlement where 'a class settlement is reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *McReynolds*, 588 F.3d at 803 (quoting *Visa*, 396 F.3d at 116) (internal brackets omitted). The Settlement here was negotiated at arm's length over a year of negotiations spanning numerous phone calls, emails and mediation with a former Federal judge. *See* Sultzer Decl., ¶ 16; *see also Elkind v. Revlon Consumer Prods. Corp.*, No. CV 14-

[6] *See* Sultzer Decl., Ex. 2 (Firm Resume).

2484 (JS) (AKT), 2017 U.S. Dist. LEXIS 24512, at *48 (E.D.N.Y. Feb. 17, 2017) ("participation by a neutral third party supports a finding that the agreement is non-collusive."). Plaintiff also sought, and Defendant provided, significant information regarding the scope of the potential claims and damages in the Action, including sales data and information regarding the Products' distribution and pricing. *See* Sultzer Decl., ¶ 10. Finally, the overarching terms of the Settlement were resolved prior to the discussion of any attorneys' fees, *see id.*, ¶ 16, and the Settlement ultimately provides that Class Counsel may apply for an award of attorneys' fees and expenses not exceeding one-third of the Settlement Fund, while Defendant has the right to withdraw from the Settlement Agreement in the event of an award of attorneys' fees in excess of such amount. *See* § 8.1.

3. The Substantial Monetary and Injunctive Relief Provided for the Settlement Class is Adequate

The Settlement provides significant and adequate relief for members of the Settlement Class. The 2018 Committee Notes state that this requirement, and the requirement under Fed. R. Civ. P. 23(e)(2)(D) that any settlement treats class members equitably relative to each other,

> focus on what might be called a "substantive" review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important.

Id. Rule 23(e)(2)(C) identifies the following factors to be considered in assessing whether the class relief is adequate:

> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3).

Id. As an initial, overarching consideration, the Settlement provides significant and meaningful monetary and injunctive relief to the Settlement Class. With respect to monetary relief,

Claimants with proof of purchase are entitled to full refunds for an unlimited number of Products, whereas those without proof of purchase are entitled to payments of $5.00 per Product purchased for up to 5-10 Products for Claimants, depending on the information provided. This is a substantial payment where the average retail price of the Products is $25-$35. *See* Sultzer Decl., ¶ 18. Moreover, if there is a Residual Fund following full payment to Claimants of their base amounts, Claimants' relief is to be increased on a *pro rata* basis up to 500% of the Initial Claim Amount.

The Settlement Class and the public will also benefit from the significant injunctive relief secured by the Settlement Agreement, including Defendant's modifications to its marketing materials and website that explain the basis for the Products' labeling and direct consumers to more information about Defendant's labeling as "natural." *See* § 4.5. The gravamen of the Action is that Defendant is deceiving consumers in labeling and marketing its "High-Performance Naturals" Products. The Settlement's injunctive relief will cure the alleged deception by requiring Defendant to provide an explanatory statement regarding the basis for its claim of "High-Performance Naturals," making clear that the Products contain both "naturally-derived and other ingredients," and directing interested consumers to Defendant's website for further information. *See id.* The explanatory statement will be placed on the Products' displays in retail stores, the primary venue for purchasing the Products, as well as on Defendant's website, and provides a significant benefit both for the Settlement Class members and future consumers. *See, e.g., In re Tracfone Unlimited Serv. Plan Litig.,* 112 F. Supp. 3d 993, 1005 (N.D. Cal. 2015) (settlement's change to marketing materials was "significant value for both class members and the general public" because it was "designed to make it clear to customers exactly what" the defendant was selling).

a. The costs, risks, and delay of trial and appeal weigh in favor of preliminary approval

The relief to the Settlement Class is also more than adequate in light of the costs, risks and time required to litigate this action through trial and appeal. "Litigation inherently involves

risks." *Willix v. Healthfirst, Inc.*, No. 07 Civ. 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, 2007 U.S. Dist. LEXIS 22342, at *30 (S.D.N.Y. Mar. 27, 2007) (citation omitted); *accord Zeltser v. Merrill Lynch & Co.,* No. 13 Civ. 1531, 2014 U.S. Dist. LEXIS 135635, at *14 (S.D.N.Y. Sep. 23, 2014). "The greater the 'complexity, expense and likely duration of the litigation,' the stronger the basis for approving a settlement." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 663 (S.D.N.Y. 2015) (citations omitted). Consumer class action lawsuits by their very nature are complex, expensive, and lengthy. *See, e.g., Dupler v. Costco Wholesale Corp.,* 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010); *see also Manley*, 2016 U.S. Dist. LEXIS 43571, at *23-24 ("Most class actions are inherently complex [.]") (internal quotations omitted).

This Action is no different, where litigating the case to a successful judgment providing classwide relief will require that Plaintiff, *inter alia*, succeed in defeating any motions to dismiss or for summary judgement, prevail in her motion for class certification, and ultimately obtain a class judgment following trial. This process, as with any class action litigation, will be fraught with risks at every stage, and at the end of the day, while Plaintiff believes a reasonable consumer would find the term "High-Performance Naturals" and similar statements on the Products labeling to be misleading, Defendant takes the opposite view, and a jury might agree with either Plaintiff or Defendant. *See* Sultzer Decl., ¶¶ 22-23. Litigation would also incur immense costs and expenses that ultimately would likely be assessed against any recovery by the Class, and may not result in any tangible recovery for years, especially if any appeal (or appeals) were taken. *See id*.

An additional challenge is the calculation of classwide damages, because attributing a price premium to a single component of a label is a complicated and costly process. While Plaintiff is confident that she could establish the existence of such a premium to the Court's satisfaction, this proposed settlement eliminates that risk. *See id.*, ¶ 21. Further, if Plaintiff were successful in obtaining certification of a litigation class, the certification would not be set in

stone. *See Gen. Tel. Co. of the 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."); *Long v. HSBC USA Inc.*, No. 14 Civ. 6233 (HBP), 2015 U.S. Dist. LEXIS 122655, at *11 (S.D.N.Y. Sep. 11, 2015) ("A contested motion for certification would likely require extensive discovery and briefing, and, if granted, could potentially result in an interlocutory appeal pursuant to Fed.R.Civ.P. 23(f) or a motion to decertify by defendants, requiring additional briefing."). Given the risks, costs, and potential delays inherent in litigating this class action to judgment, this factor weighs heavily in favor of preliminary approval. *See Sukhnandan v. Royal Health Care of Long Island L.L.C.*, No. 12cv4216 (RLE), 2014 U.S. Dist. LEXIS 105596, at *21 (S.D.N.Y. July 31, 2014) (class settlement "eliminates the risk, expense, and delay inherent in the litigation process.").

The Settlement Agreement's substantial and immediate injunctive relief compares favorably to the relief that Plaintiff would seek—but that would not be guaranteed—were the case to proceed to trial and beyond. For example, Plaintiff's ability to achieve a permanent injunction in the litigation context is uncertain, as courts within the Second Circuit have recently held plaintiffs lack standing to seek injunctive relief where they are aware of the misrepresentations at issue. *See, e.g., Hughes v. The Ester C Co.*, 317 F.R.D. 333, 357 (E.D.N.Y. 2016); *In re Avon Anti-Aging Skincare Creams & Prod. Mktg. & Sales Practices Litig.*, No. 13-CV-150 JPO, 2015 U.S. Dist. LEXIS 133484, at *22 (S.D.N.Y. Sept. 30, 2015) (denying certification of Rule 23(b)(2) class); *but see Ackerman v. Coca-Cola Co.*, No. 09 CV 395 (DLI) (RML), 2013 U.S. Dist. LEXIS 184232, at *56, n.23 (E.D.N.Y. July 18, 2013) (plaintiffs had standing to seek injunctive relief).

b. The effectiveness of any proposed method of distributing relief to the Settlement Class and processing class-member claims weighs in favor of preliminary approval

The Parties have retained a very experienced Settlement Administrator, Angeion, who is highly skilled in processing class claims and distributing the proceeds to Claimants. As described *supra*, Section III.B.1, the Settlement Agreement provides that Claimants will receive

varying payments based on their number of purchases, whether they can provide proof of purchase, and the types of information they provide regarding their purchases and the total number of claims received. As explained by the 2018 Committee Notes, a "claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." The proposed method of processing claims here strikes that delicate balance, and this factor weighs in favor of preliminary approval.

c. The terms of the proposed award of attorneys' fees weigh in favor of preliminary approval

The Settlement Agreement provides that Class Counsel may apply for an award of attorneys' fees and expenses not exceeding one-third of the Settlement Fund. S*ee* ¶ 8.1. If Plaintiff does in fact choose to seek attorneys' fees and expenses amounting to a full third of the Settlement Fund, such request has frequently been granted in class actions in this Circuit, including consumer class actions. *See, e.g., Rapoport-Hecht v. Seventh Generation, Inc.*, No. 14-CV-9087 (KMK), 2017 U.S. Dist. LEXIS 219060, at *8-9 (S.D.N.Y. Apr. 28, 2017) (awarding 33.3% of $4.5 million settlement fund); *Mayhew v. KAS Direct, LLC*, 7:16-cv-06981-VB (S.D.N.Y.), ECF No. 149 (awarding 33.3% of $2,215,000 settlement fund); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) (33.3% of $11.5 million settlement fund); *Puglisi v. TD Bank, N.A.*, No. 13 Civ. 637 (GRB), 2015 U.S. Dist. LEXIS 100668, at *3-4 (E.D.N.Y. July 30, 2015) (33.3% of $9.9 million settlement fund); *Khait v. Whirlpool Corp.*, No. 06 Civ. 6381 (ALC), 2010 U.S. Dist. LEXIS 4067, at *4, *23 (E.D.N.Y. Jan. 20, 2010) (33.3% of $9.25 million settlement fund). One-third of the Settlement Fund is even more reasonable where, like here, the size of the fund is relatively small. *See Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("[T]he percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement" and 33% aware is not excessive "because the requested amount is consistent with the norms of class litigation in this circuit") (internal quotations omitted); *In re Gilat Satellite Networks, Ltd.*, No. 02 Civ. 1510 (CPS) (SMG), 2007 U.S. Dist. LEXIS 68964, at *49, *52 n.41

(E.D.N.Y. Sept. 18, 2007) (approving a fee of 30% of the common fund "[g]iven the modest size of the [$20 million] settlement"). As the maximum attorneys' fees and expenses that Plaintiff may seek are in line with typical awards in this Circuit, and the fee and expense request will be reviewed by the Court (and available for review by the Settlement Class), this factor weighs in favor of preliminary approval of the Settlement.

d. Agreements required to be identified under Rule 23(e)(3)

Apart from the Settlement Agreement and other materials associated with the negotiation of the Settlement (and disclosed herein), there are no additional agreements between the Parties or with others made in connection with the Settlement. *See* Sultzer Decl., ¶ 26. Accordingly, this factor weighs in favor of preliminary approval of the Settlement.

4. The Settlement Treats Class Members Equitably Relative to Each Other

The 2018 Committee Notes explain that this factor "calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief."

None of the concerns raised by the 2018 Committee Notes are present here. Each member of the Settlement Class is treated in the same manner with respect to the claims they are releasing and their eligibility for an award, with the amount of the award dependent on whether or not the Settlement Class member can provide proof of purchase or not. *See* § 4.2(j)(i), (ii). This does not mean that the Settlement creates different tiers of Settlement Class members who are not treated equally, but instead provides any Claimant the ability to obtain a full refund for an unlimited number of purchases during the Class Period if they are able to provide proof of their purchase, and a lesser, but still significant payment for a limited number of purchases, if they cannot. *See id.* Requiring proof of purchase for claims for more than 10 products, while providing such claimants with a full refund, is fully in line with the 2018 Committee Notes'

directive to "deter or defeat unjustified claims" without being "unduly demanding." *See id.*

D. The Proposed Settlement is Procedurally and Substantively Fair Under Second Circuit Jurisprudence

The 2018 Committee Notes make clear that the new factors set forth in Rule 23 to determine whether to grant preliminary approval of a class settlement are meant to supersede the various tests that have evolved in each Circuit over the years. *See id.* However, as the amendments to Rule 23 have only been in effect since December 1, 2018, Plaintiff here also analyzes the proposed Settlement under longstanding Second Circuit standards.

1. Procedural Fairness

To demonstrate a settlement's procedural fairness, a party must show "that the settlement resulted from 'arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citation omitted); *accord McReynolds*, 588 F.3d at 804; *see also Hall v. Prosource Techs., L.L.C.*, No. 14-CV-2502 (SIL), 2016 U.S. Dist. LEXIS 53791, at *18 (E.D.N.Y. Apr. 11, 2016) (concluding settlement procedurally fair in light of mediation and ample discovery).

As discussed *supra*, the negotiations were conducted at arm's length and were undertaken by counsel who are well versed in complex class action litigation as well as cases involving misrepresentations concerning the term "natural" as applied to consumer products. *See* Sultzer Decl. ¶ 16. Plaintiff and Class Counsel also conducted a thorough investigation, with the assistance of a consultant, and evaluation of the claims and defenses prior to filing the Action, and continued to analyze the claims throughout the pendency of the case. *See, e.g.*, *id.*, ¶¶ 5-7, 10. Class Counsel obtained significant informal discovery, including obtaining sales data and information on the Products' distribution and pricing. *See id.*, ¶ 10. Through this investigation, discovery, and ongoing analysis, including through participation in mediation, Class Counsel gained an understanding of the strengths and weaknesses of the Action.

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

2. Substantive Fairness

To demonstrate the substantive fairness of a settlement agreement, a party must show that the factors the Second Circuit set forth in *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"), weigh in favor of approving the agreement. *See Charron*, 731 F.3d at 247. The *Grinnell* factors, many of which overlap with the newly amended Rule 23(e)'s standard, 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 fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

McReynolds, 588 F.3d at 804 (quoting *Grinnell*, 495 F.2d at 463). The *Grinnell* factors are used to evaluate settlements at the final approval stage, but can also be utilized for guidance at the preliminary approval stage. *See Parker v. City of N.Y.*, No. 15 CV 6733 (CLP), 2017 U.S. Dist. LEXIS 203579, at *12 (E.D.N.Y. Dec. 11, 2017) (citations omitted); *but see Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 355 n.7 (E.D.N.Y. 2006) ("Little is gained . . . in applying Grinnell at such an early stage since the proposed settlement has yet to be tested in a fairness hearing . . . [and] it is apparent that several of the Grinnell factors themselves were designed for application at a later stage in the class settlement approval process.") (internal citations omitted). Here, the *Grinnell* factors overwhelmingly favor preliminary approval of the Settlement Agreement.

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

This factor is the same as newly amended Rule 23(e)(2)(C)(i), and as discussed *supra*, Section IV.C.3.a, weighs strongly in favor of preliminary approval of the Settlement.

b. The reaction of the class to the settlement

As the Settlement Class has not yet had an opportunity to react to the Settlement, it is premature to address this factor.

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 & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 224 (E.D.N.Y. 2013) (citations omitted) (citations omitted).

Here, "discovery has advanced sufficiently to allow the parties to resolve the case responsibly." *Manley*, 2016 U.S. Dist. LEXIS 43571, at *9. Class Counsel have conducted significant informal discovery related to Plaintiff's claims, including review of sales and pricing information. *See* Sultzer Decl., ¶ 10. Plaintiff also conducted an analysis of the Products' ingredients with the assistance of a consultant. *See id.*, ¶¶ 5-7. Consequently, Plaintiff has sufficient information to evaluate the claims of the class. *See, e.g., Asare v. Change Grp. N.Y., Inc.*, No. 12 Civ. 3371 (CM), 2013 U.S. Dist. LEXIS 165935, at *22 (S.D.N.Y. Nov. 15, 2013) (approving settlement where parties engaged in "informal discovery which consisted of the exchange, analysis, and discussion regarding a significant amount of data and information as well as extensive discussions on the legal merits of the claims"); *Long*, 2015 U.S. Dist. LEXIS 122655, at *9-10 (finding the third *Grinnell* factor was met where the parties had engaged in informal discovery even though settlement was reached before the action was commenced).

d. The risks of establishing liability and damages

This factor is addressed by the newly amended Rule 23(e)(2)(C)(i), and as discussed *supra*, Section IV.C.3.a, weighs strongly in favor of preliminary approval of the Settlement.

e. The risk of maintaining class action status through trial

This factor is addressed by the newly amended Rule 23(e)(2)(C)(i), and as discussed *supra*, Section IV.C.3.a, weighs strongly in favor of preliminary approval of the Settlement.

f. The ability of Defendant to withstand a greater judgment

"Courts have recognized that a [defendant's] ability to pay is much less important than the other *Grinnell* factors, especially where the other factors weigh in favor of approving the

settlement." *In re Sinus Buster Prods. Consumer Litig.*, No. 12 -CV-2429, 2014 U.S. Dist. LEXIS 158415, at *25 (E.D.N.Y. Nov. 10, 2014) (citations omitted). A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Viafara v. MCIZ Corp.*, No. 12 Civ 7452 (RLE), 2014 U.S. Dist. LEXIS 60695, at *21 (S.D.N.Y. Apr. 30, 2014) (citation omitted). Although Defendant here may be able to withstand a greater judgment, the agreed-to Settlement Fund is fair and adequate when weighed against the likelihood of success and overall value of each Settlement Class Member's individual damages should this Action proceed to trial. For these reasons, this factor is neutral.

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

"There is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion [.]" *Visa*, 396 F.3d at 119 (citation omitted). "In other words, the question for the Court is not whether the settlement represents the highest recovery possible . . . but whether it represents a reasonable one in light of the many uncertainties the class faces[.]" *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 384 (S.D.N.Y. 2013).

This factor is addressed by the newly amended Rule 23(e)(2)(C), and as discussed *supra*, Section IV.C.3, weighs strongly in favor of preliminary approval of the Settlement. Thus, collectively and independently, the *Grinnell* factors warrant the conclusion that the Settlement Agreement is fair, adequate, and reasonable. As such, Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

E. The Court Should Preliminarily Certify the Settlement Class

A court may preliminarily certify a settlement class upon finding that the court will, *inter alia*, "likely be able to . . . certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(b)(ii). As Plaintiff sets forth below, the proposed Settlement Class satisfies each of the requirements of Rule 23(a) and Rule 23(b)(3), and, consequently, Plaintiff respectfully

asks the Court to preliminarily certify the Settlement Class for settlement purposes.

1. The Settlement Class Meets Each Prerequisite of Rule 23(a)

Rule 23(a) has four prerequisites for certification of a class: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequate representation. *See* Fed. R. Civ. P. 23(a). The Settlement Class satisfies each prerequisite.

a. Numerosity

A plaintiff must show that the proposed class is "so numerous that joinder of all [its] members is impracticable." Fed. R. Civ. P. 23(a)(1). The Second Circuit has found numerosity met where a proposed class is "obviously numerous." *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). Here there is no dispute that at least thousands of people nationwide purchased Defendant's Products during the proposed class period. *See* Sultzer Decl., ¶ 25. Therefore, numerosity is easily satisfied.

b. Commonality

Under Rule 23(a)(2), Plaintiff must show that "questions of law or fact common to the [proposed] class" exist. Fed. R. Civ. P. 23(a)(2). Commonality requires that the proposed class members' claims all centrally "depend upon a common contention" which "must be of such a nature that it is capable of class wide resolution[,]" meaning that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "[F]or purposes of Rule 23(a)(2) even a single common question will do[.]" *Id.* at 359 (citation, quotation marks, and brackets omitted). The Second Circuit has construed this instruction liberally, holding that plaintiffs need only show that their injuries stemmed from a defendant's "unitary course of conduct." *Sykes v. Mel S. Harris & Assocs. L.L.C.*, 780 F.3d 70, 85 (2d Cir. 2015).

Here there are common questions of law and fact that will generate common answers apt to drive the resolution of the litigation, including, *inter alia*, whether Defendant's marketing of the Products as "High-Performance Naturals" was likely to deceive reasonable consumers. Resolution of this common question would require evaluation of the question's merits under a

single objective standard, *i.e.*, the "reasonable consumer" test. *Mantikas v. Kellogg Co.*, No. 17-2011, 2018 U.S. App. LEXIS 34756, at *7 (2d Cir. Dec. 11, 2018). Thus, commonality is satisfied.

c. Typicality

Under Rule 23(a)(3), a plaintiff must demonstrate that their claims "are typical of the [class'] claims." Fed. R. Civ. P. 23(a)(3). This includes whether "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993) (citations omitted). "[D]ifferences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative's claims." *In re Nissan Radiator/Transmission Cooler Litig.*, No. 10-CV-7493 (VB), 2013 U.S. Dist. LEXIS 116720, at *53 (S.D.N.Y. May 30, 2013); *Fogarazzo v. Lehman Bros.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005) (typicality requirement "is not demanding.") (citation omitted) (typicality requirement "is not demanding.") (citation omitted).

Here, the same unlawful conduct by Defendant—*i.e.*, their allegedly misleading marketing of the Products—was directed at, and affected, Plaintiff and the members of the proposed Settlement Class. *See Robidoux*, 987 F.2d at 936-37. Accordingly, typicality is satisfied.

d. Adequacy of representation

Under Rule 23(a)(4), a plaintiff must show that the proposed class representatives will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requires that: (1) the class representatives do not have conflicting interests with other class members; and (2) class counsel is "qualified, experienced and generally able to conduct the litigation." *Marisol A.*, 126 F.3d at 378.

To satisfy the first requirement, Plaintiff must show that "the members of the class possess the same interests" and that "no fundamental conflicts exist" between the class members. *Charron*, 731 F.3d at 249. Here, Plaintiff possesses the same interests as the proposed Settlement Class members because Plaintiff and the Settlement Class members were all allegedly

injured in the same manner based on the same allegedly misleading marketing concerning the Products. With respect to the second requirement, the proposed Class Counsel are highly qualified and experienced in consumer class actions. *See* Sultzer Decl., Ex. 16. Proposed Class Counsel have also performed extensive work to date in identifying and investigating the claims in this litigation, including by retaining a consultant. *See id.*, ¶ 5-7, 10. This work culminated in the detailed class Complaint and successful negotiation of the proposed Settlement Agreement. For the foregoing reasons, Plaintiff has satisfied the adequacy requirement.

e. Ascertainability

The Second Circuit has recognized an implied requirement of ascertainability in Rule 23. "'[A] class is ascertainable if it is defined using objective criteria that establish a membership with definite boundaries.'" *Price v. L'Oreal USA, Inc.*, 17 Civ. 614 (LGS), 2018 U.S. Dist. LEXIS 138473, at *11 (S.D.N.Y. Aug. 15, 2018) (quoting *In re Petrobras Sec. Litig.*, 862 F.3d 250, 257 (2d Cir. 2017)). Satisfying the ascertainability requirement "does not 'require a showing of administrative feasibility at the class certification stage.'" *Id.* (quoting *Petrobas*, 862 F.3d at 265) (internal brackets omitted). As in *Price*, here the Settlement Class is ascertainable because it "can be determined with reference to one objective criterion with definite boundaries: whether an individual purchased a Product during the class period." *Id.*

2. The Settlement Class Meets the Requirements of Rule 23(b)(3)

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *See Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997). Plaintiff seeks certification under Rule 23(b)(3), which requires the Court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.*

a. Common legal and factual questions predominate in this action

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623 (citations

omitted). The Second Circuit has held that "to meet the predominance requirement . . . a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof." *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227-28 (2d Cir. 2006) (citations omitted). In the context of a request for settlement-only class certification, concerns about whether individual issues "would present intractable management problems" at trial are misplaced because "the proposal is that there be no trial." *Amchem*, 521 U.S. at 620 (citation omitted). As a result, "the predominance inquiry will sometimes be easier to satisfy in the settlement context." *Tart v. Lions Gate Entm't Corp.*, No. 14-CV-8004, 2015 U.S. Dist. LEXIS 139266, at *4 (S.D.N.Y. Oct. 13, 2015) (citation omitted). Furthermore, consumer fraud cases have been held to readily satisfy predominance. *See, e.g.*, *Amchem*, 521 U.S. at 625.

Here, for settlement purposes, the central common questions predominate over any questions that may affect individual Settlement Class members. The central common questions include whether Defendant's marketing of the Products as "High-Performance Naturals" was likely to deceive reasonable consumers, and whether the representations were material. These issues are subject to "generalized proof" and "outweigh those . . . subject to individualized proof." *In re Nassau Cty. Strip Search Cases*, 461 F.3d at 227–28 (citation omitted); *see also Mayhew v. KAS Direct, LLC*, 7:16-cv-06981-VB (S.D.N.Y.), ECF No. 149 (certifying nationwide settlement class in consumer fraud class action involving "natural" misrepresentations); *Vincent v. People Against Dirty, PBC.*, Case No. 7:16-cv-06936 (S.D.N.Y.), ECF No. 55 (same).

Moreover, Plaintiff's claim of unjust enrichment on behalf of a nationwide class has been held by this Court and others to offer sufficient cohesion for the certification of a nationwide settlement class in a consumer fraud action. *See Rapoport-Hecht*, 2017 U.S. Dist. LEXIS 218781, at *11 (citing *In re Nissan Radiator/Transmission Cooler Litig.*, 2013 U.S. Dist. LEXIS 116720, at *59 (certifying nationwide settlement class raising, among others, claims for unjust enrichment); *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06-CV-5173,

2008 U.S. Dist. LEXIS 36093, at *38 (S.D.N.Y. May 1, 2008) (same));[7] *see also in re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 58 (D.N.J. 2009) ("While there are minor variations in the elements of unjust enrichment under the laws of the various states, those differences are not material and do not create an actual conflict.") (citations omitted). Accordingly, the Settlement Class meets the predominance requirement for settlement purposes.

b. A class action is the superior means to adjudicate Plaintiff's claims

Rule 23(b)(3) also requires that the proposed class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Here, the class action mechanism is superior to individual actions for a number of reasons. First, "[t]he potential class members are both significant in number and geographically dispersed" and "[t]he interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions." *Meredith Corp.*, 87 F. Supp. 3d at 661 (citation omitted).

Additionally, a class action "will conserve judicial resources" and "is more efficient for Class Members, particularly those who lack the resources to bring their claims individually." *Zeltser,* 2014 U.S. Dist. LEXIS 135635, at *8 (citation omitted). The average purchase price of the Products is $25-$35—thus, the potential recovery for any individual Settlement Class member is relatively small. As a result, the expense and burden of litigation make it virtually impossible for the Settlement Class members to seek redress on an individual basis. By contrast, in a class action, the cost of litigation is spread across the entire class, thereby making litigation viable. *See, e.g., Tart*, 2015 U.S. Dist. LEXIS 139266, at *5. "Employing the class device here will not only achieve economies of scale for Class Members, but will also conserve judicial resources and preserve public confidence in the integrity of the system by avoiding the waste and delay repetitive proceedings and preventing inconsistent adjudications." *Zeltser* at *8-9 (citing,

[7] *See also, e.g., Dupler,* 705 F. Supp. 2d at 240-41; *Mirakay v. Dakota Growers Pasta Co.*, Civil Action No. 13-cv-4429 (JAP), 2014 U.S. Dist. LEXIS 148694, at *16-17 (D.N.J. Oct. 20, 2014); *Vista Healthplan, Inc. v. Warner Holdings Co. III, Ltd.*, 246 F.R.D. 349, 359 (D.D.C. 2007).

inter alia, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998)). For all of the foregoing reasons, a class action is superior to individual suits.

In sum, because the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, the Court should preliminarily certify the Settlement Class.

F. The Court Should Approve the Proposed Notice Plan

Rule 23(e)(1)(B) requires the court to "direct notice in a reasonable manner to all class members who would be bound by [a proposed settlement] if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the [proposed settlement]." As part of this process the "parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class." Rule 23(e)(1)(A). As discussed *supra*, Plaintiff contends that the Court will likely be able to approve the proposed Settlement, and certify the Settlement Class for purposes of judgment.

The substance of the Notice Program also satisfies Rule 23. "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Visa*, 396 F.3d at 113 (citations omitted). The Court is given broad power over which procedures to use for providing notice so long as the procedures are consistent with the standards of reasonableness that the Constitution's due process guarantees impose. *See Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986) ("[T]he district court has virtually complete discretion as to the manner of giving notice to class members.").

"When a class settlement is proposed, the court 'must direct to class members the best notice that is practicable under the circumstances.'" *Vargas v. Capital One Fin. Advisors*, 559 F. App'x 22, 26 (2d Cir. 2014) (summary order) (quoting Fed. R. Civ. P. 23(c)(2)(B), (e)(1)). The notice must include: "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who

request exclusions; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B). "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Visa*, 396 F.3d at 114. And the recent amendment to Rule 23(e)(2)(B) now makes explicit that notice may be provided by electronic or "other appropriate means."

Here the robust proposed notice program, described *supra*, Section III.D, handily meets the requirements of due process and the Federal Rules of Civil Procedure. Indeed, in a class case where records of purchasers are not readily available, Plaintiff's proposed Notice Program may be the only type of notice practicable.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court: (1) certify the Settlement Class and appoint Plaintiff as the class representative and her counsel as Class Counsel; (2) preliminarily approve the Settlement Agreement; (3) approve the form and manner of the class action settlement notice; (4) preliminarily certify the Settlement Class for purposes of settlement only; (5) appoint Angeion as Settlement Administrator and direct it to commence the Notice Program; and (6) schedule a Fairness Hearing to consider final approval of the Settlement.

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