IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

DAVID LEVY, individually and on behalf of all others similarly situated, Plaintiff, v. DOLGENCORP, LLC, DOLLAR GENERAL CORP., and DG RETAIL, LLC, Defendants.	)	Case No. 3:20-cv-01037-TJC-MCR

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND INCORPORATED MEMORANDUM OF LAW

Plaintiff, David Levy, on behalf of himself and a class of similarly situated persons, with the consent of Defendants, Dolgencorp, LLC, Dollar General Corp., and DG Retail, LLC (collectively "Defendants" or "Dollar General"), respectfully requests entry of an order granting preliminary approval of the class action settlement set forth in the Parties' Settlement Agreement ("Settlement Agreement," "Settlement," or "Agreement"), attached as **Exhibit 1**[1], certifying a class for settlement purposes, and providing for issuance of Notice to the Settlement Class.

I. INTRODUCTION

Plaintiff and Defendants have negotiated a global nationwide settlement that provides significant and substantial monetary and injunctive relief to purchasers of Infants' Pain & Fever Acetaminophen—DG™ ("DG Health Infants' Acetaminophen" or "Infants' Products"), which Plaintiff alleges has been deceptively labeled by Dollar General to imply to reasonable consumers that it is specially formulated or otherwise uniquely suitable for infants. Dollar General denies all such allegations, but it has agreed to globally resolve this matter, instead of continuing to litigate

[1] All capitalized terms used herein have the same definitions as those defined in the Agreement.

this action and potential putative class actions across the country. Under the supervision of the Honorable Morton Denlow (ret.), the parties conducted a multi-month, extensive, arm's-length negotiation, which included a lengthy formal mediation and continuing follow-up efforts, and which has resulted in the executed Settlement Agreement.

Pursuant to the Settlement Agreement, Dollar General has agreed, among other things, to offer substantial refunds to Settlement Class Members for their purchases of Infants' Products and to provide important injunctive relief. Notice of this Settlement Agreement will be disseminated to Class Members via, among other things, (i) publication notice, (ii) establishment of a settlement website, and (iii) direct notice (along with a Claim Form) by email or direct mail to available addresses.

If approved, the Settlement will bring an end to what otherwise promises to be contentious and costly litigation centered on unsettled legal questions. Given the immediate and substantial benefits the Settlement Agreement will provide to the Class, there can be no question that the terms of the proposed Settlement Agreement are at least "fair, reasonable, and adequate" and should receive the Court's preliminary approval, so that the Class can be informed and be heard as to their opinions of the Settlement Agreement at the Final Fairness Hearing.

This motion seeks the entry of a Preliminary Approval Order providing for:

1. Preliminary Approval of the Settlement Agreement;
2. Conditional certification of a Settlement Class, and appointment of Plaintiff as Class Representative, and appointment of Plaintiff's counsel as Class Counsel;
3. Approval of the Settlement Administrator, Notice Administrator and Escrow Agent;
4. Approval of the Notice Program describing:

a. The Settlement and the Settlement Class Members' rights;

b. The proposed Release of claims;

c. Class Counsel's request for a Fee Award and Class Representative Service Award; and

d. The procedure for opting-out of or objecting to the settlement.

5. Approval of the Claims Process; and

6. The scheduling of a Final Approval Hearing.

The Parties' proposed Settlement Agreement is fair and well within the range of Preliminary Approval. *See* Declaration of Scott Edelsberg ("Edelsberg Decl.") ¶ 2, attached as **Exhibit 2**. First, it provides relief for Settlement Class Members where their recovery, if any, would otherwise be uncertain, especially given Defendants' ability and willingness to continue its vigorous defense of the case. Second, the Settlement was reached only after first engaging in pre-litigation discovery and extensive arm's-length negotiations, including a mediation that lasted a full day with significant continued negotiation with Judge Denlow. Third, the Parties did not negotiate the amount of attorneys' fees or the service award until they had agreed in principle to all other material terms of the Settlement. The Settlement was not conditioned on any amount of attorneys' fees for Class Counsel or Service Award for Plaintiff, which speaks to the fundamental fairness of the process. Edelsberg Decl. ¶ 5.

II. BACKGROUND

a. Facts

Dollar General sells its DG Health Infants' Acetaminophen, a private-label product, which it compares to brand-name Infants' Tylenol. Compl. ¶¶ 2, 5, 34, ECF No. 1. Ten years ago, liquid acetaminophen marketed for "infants" was available only with a concentration of 80 mg/mL of

acetaminophen, and liquid acetaminophen marketed for "children" was available only with a concentration of 160 mg/5 mL of acetaminophen. *Id.* ¶ 22. In May 2011, after several well-publicized child deaths, manufacturers (including Dollar General) changed infants' acetaminophen to 160 mg/5 mL, the same concentration as children's acetaminophen, to avoid confusion and possible overdose. *Id.* ¶¶ 23-25. Since then, the only differences in liquid acetaminophen marketed for infants versus children have been the price and dosing instrument included with the product (i.e., Dollar General's Infants' Products come with a syringe while the Children's Pain & Fever Acetaminophen—DG™ ("DG Health Children's Acetaminophen" or "Children's Products") come with a plastic cup). *Id.* ¶ 26. Both the Infants' and Children's Products contain the same 160 milligram concentration of acetaminophen and are interchangeable. *Id.* ¶ 27. As such, both Products are suitable for infants and children, adjusting the dosage based only on the weight and age of the child. *Id.*

Plaintiff alleges the representations made on the front of each of the Infants' Products sold during the Class Period—including the name "Infants'" itself—are misleading because they lead reasonable consumers, like Plaintiff, to believe the Infants' Products are made specially for infants and are uniquely suitable for infants, when in fact, they are identical to the Children's Products (which are sold at a substantially lower price). *Id.* ¶¶ 3-7, 29-39. Based on these misrepresentations, Plaintiff seeks class-wide recovery for Dollar General's violations of the Florida and Deceptive and Unfair Trade Practices Act, Florida Statute § 501.211 *et seq.*; violation of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*; and unjust enrichment.

Defendants deny Plaintiff's claims and contentions.

b. <u>Procedural History</u>

Plaintiff filed this action on September 15, 2020. *See* Compl. Before filing his Complaint, Plaintiff provided pre-suit notice to Defendants. Edelsberg Decl. ¶ 4. During this pre-suit time period, the Parties and their respective counsel first engaged in extensive direct negotiations over multiple months in the spring and summer of 2020. *Id.* Then, after filing, the Parties engaged in extensive arm's-length negotiations under the supervision of Judge Denlow, who is a retired Article III judge from the Northern District of Illinois and now an experienced mediator with JAMS. *Id.* ¶ 3. The Parties' mediation efforts included a formal mediation on October 12, 2020. *Id.* After the mediation, the Parties spoke every few days with Judge Denlow until the final material terms were agreed to. *Id.* In working with the mediator, the Parties exchanged multiple rounds of settlement proposals related to all aspects of settlement, eventually reaching an agreement in principle in early November 2020. *Id.* The result was the Parties' Settlement Agreement, which, if approved, will resolve this Litigation in a manner that is fair, reasonable, and reflects the best interests of the Settlement Class as a whole and avoids the expense, burden, and risks associated with further protracted, complex, class action litigation. *Id.* ¶¶ 2, 7, 16-20.

III. SUMMARY OF THE SETTLEMENT TERMS

a. The Settlement Class

The Settlement Class is defined as:

> All individuals in the United States who purchased DG Health Infants' Acetaminophen within the Class Period for personal or household use.

Agreement § 2(*l*). The Class Period is September 15, 2016, to the date notice to the Settlement Class is first published. *Id.* § 2(p). Excluded from the Class are: (a) Defendants; (b) the officers, directors, or employees of Defendants and their immediate family members; (c) any entity in which Defendants have a controlling interest; (d) any affiliate, legal representative, heir, or assign of Defendants; (e) all federal court judges who have presided over this Action and their immediate

family members; (f) all persons who submit a valid request for exclusion from the Class; and (g) those who purchased the DG Health Infants' Acetaminophen for the purpose of resale or for use in a business setting. *Id.* § 2(*l*).

b. Settlement Consideration

i. Monetary Relief

Defendants have agreed to establish a Claim Fund in the amount of $1.8 million to reimburse Settlement Class Members for $1.70 per Infants' Product for all claims submitted with proof of purchase, and $1.70 per Infants' Product up to a maximum $5.10 without proof of purchase. Agreement §§ 2(g), 5(b). The Claim Fund is a common fund that will also cover attorneys' fees and expenses in an amount to be approved by the Court, a service award to the named plaintiff in an amount to be approved by the Court, if any, certain notice and administration costs, and Claim Fund Expenses, if any. *Id.* Within 10 days of the Court entering the Preliminary Approval Order, Defendants will fund an escrow account with the estimated Settlement Administration Expenses, in an amount not to exceed $300,000. *Id.* § 5(b)(1). Within 3 days of the Court entering the Final Settlement Order and Judgment, Defendants will deposit the remainder of the $1.8 million. *Id.*

i. Injunctive Relief

In addition to the monetary relief described above, the Settlement Agreement also includes important injunctive relief. Dollar General will not sell DG Health Infants' Acetaminophen unless it states that the liquid medicine in the Infants' Product contains the same concentration of liquid acetaminophen that is in DG Health Children's Acetaminophen or language on the labeling/packaging that is substantially similar.[2] Agreement § 5(a)(i)(1).

[2] Dollar General agrees to adhere to this restriction by 360 days following the Effective Date (i.e., the Injunctive Relief Effective Date). Agreement § 5(a)(i)(1). Sales of DG Health Infants'

c. The Notice Program

Pending this Court's approval, JND Legal Administration ("JND") will serve as the Settlement Administrator and will be responsible for administrating the Notice Program. Agreement §§ 2(e), 7. The Notice Program consists of notice by publication, mail, and email. *Id.* § 7(b). JND will send Email Notice to the approximately 85,000 currently available emails provided by Defendants (or Mail Notice where an email bounces back or an email is not available, and a mailing address can be located), in addition to the mailing addresses that JND obtains by employing reverse look-up to the approximately 10,000 phone numbers provided by Defendants. *See* Agreement Exs. B (Notice Plan), D (Mailed Notice or Emailed Notice).

The Notice Program is designed to provide the Settlement Class with important information regarding the Settlement Agreement and their rights thereunder, including a description of the material terms of the Settlement Agreement; a date by which Settlement Class Members may Opt-Out of the Settlement Class; a date by which Settlement Class Members may object to the Settlement Agreement, Class Counsel's fee application and/or the request for a Service Award; the date of the Final Approval Hearing; and information regarding the Settlement Website where Settlement Class members may access the Agreement and other important documents. Agreement § 7(b)-(f).

i. Publication Notice

Commencing within two weeks of the Court granting Preliminary Approval or some other date as set by the Court, the Claim Administrator shall cause to be published the Publication Notice

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Acetaminophen manufactured prior to the Injunctive Relief Effective Date, or during the time Dollar General is using reasonably diligent efforts under the circumstances to modify its current packaging as required by the Settlement Agreement, shall not constitute a violation of the Settlement Agreement or be subject to any claims. *Id.* § 5(a)(ii). Dollar General is permitted to sell its existing inventory (including existing packaging and/or labeling) at the time of the Injunctive Relief Effective Date for a period of 360 days after the Injunctive Relief Effective Date. *Id.*

substantially in the form and content of Exhibit C to the Settlement Agreement. Agreement § 7(c). The Notice Plan shall include dissemination of the Publication Notice translated into Spanish. *Id.*

ii. Mailed or Emailed Notice

Commencing within two weeks of the Court granting Preliminary Approval or some other date as set by the Court, the Claim Administrator shall cause the Mailed or Emailed Notice substantially in the form and content of Exhibit D to the Settlement Agreement. Agreement § 7(d) to be disseminated.

iii. Class Notice Package

The Class Notice Package[3] shall be available in electronic format on the Settlement Website and mailed as a hard copy or emailed by the Claim Administrator upon request. Agreement §7(e). The Settlement Website, which will be easily accessible through commonly used internet service providers, for the submission of claims, including the submission of Spanish-language Claim Forms. *Id.* §§ 2(ss), 7(a)(ii)(4). Although the Parties are not currently aware of any other litigation involving the same claims as the Action, if they become aware, within the Claim Submission Period, of pending litigation that concerns false advertising claims related to the Infants' Products, Dollar General shall direct the Claim Administrator to mail or email the Class Notice Package to counsel for the plaintiff in that litigation. *Id.* § 7(e).

d. Claims Process

The Claims Process here is straightforward, easy to understand for Settlement Class members, and designed so that they can easily claim their portion of the Claim Fund. Edelsberg Decl. ¶ 6. Class Members shall have the opportunity to submit a claim to the Claim Administrator

[3] The Class Notice Package shall contain a Class Notice substantially in the form of Exhibit E to the Settlement Agreement and the Claim Form substantially in the form of Exhibit F to the Settlement Agreement. Agreement § 2(o).

during the Claim Submission Period by mail or through the Settlement Website. Agreement § 5(b)(iii); Agreement Ex. F (Claim Form). The Claim Administrator will administer the claim process according to Claims Administration Protocols, and neither Class Counsel nor Defendants shall participate in resolution of such claims. Agreement § 5(b)(vi); Agreement Ex. A.

e. Allocation of the Claim Fund Payments

The Claim Fund shall be distributed to Class Members who submit Approved Claims to the Claim Administrator as set forth below. *See* Agreement § 5(b)(ii)(4).

i. With Proof of Purchase: Class Members who have a proof of purchase for all of their Infants' Acetaminophen during the Class Period will be entitled to a partial refund of $1.70 for every 1 fl. oz. bottle of Infants' Acetaminophen and 2 fl. oz. bottle of Infants' Acetaminophen for which they have a valid proof of purchase, without limitation.

ii. Without Proof of Purchase: Class Members who do not have a proof of purchase for all of their Infants' Acetaminophen purchase(s) during the Class Period will be entitled to a partial refund of $1.70 for every 1 fl. oz. and 2 fl. oz. bottle of Infants' Acetaminophen for a maximum of 3 units, i.e., a total of up to $5.10 per household.

Agreement § 5(b)(ii)(4).

If the total amount to be paid for eligible claims exceeds the Claim Fund Balance, then each Class Member's award shall be proportionately reduced on a pro rata basis. *Id.* § 5(b)(ii)(5). If the Claim Fund Balance is greater than the total amount to be paid for eligible claims, then each Class Member's award shall be proportionately increased on a pro rata basis such that the Claim Fund Balance is exhausted. *Id.* § 5(b)(ii)(6).

f. Opt-Out Procedures

All Class Members shall have the right to elect to Opt-Out of the monetary portion of the Settlement Agreement. Agreement § 8(b). Class Members seeking to be excluded from the Settlement Agreement must send to the Settlement Administrator a letter by U.S. mail that includes their name, address, phone number, a statement that they want to be excluded from the Class, the case name and number, and their signature. *Id.* § 8(b)(i). Opt-Out letters must be postmarked by the Opt-Out deadline specified in the Preliminary Approval Order, which shall be no later than 17 days before the Final Approval Hearing. *Id.* §§ 7(f), 8(b)(ii).

g. Objection Procedures

Any Class Member who does not Opt-Out may object to the approval of this Settlement Agreement, the Class Representative Service Award, or the Fee Award by filing with the Court a written objection at least 17 days before the Final Approval Hearing. Agreement § 8(c)(i). Objectors must also send copies of the written Objections and supporting documents to the Parties' counsel and the Claim Administrator. *Id.*

Objections must include: (1) the objector's name, address, email address, and phone number; (2) counsel information, if any; (3) a written statement explaining the factual and legal grounds for the Objection; (4) a statement, under penalty of perjury, evincing their Class membership; (5) indication of whether they will speak at the Final Approval Hearing; (6) a signature; (7) the name and case number; and (8) a list of any other class action objections by the objector and their counsel in the past five years. *Id.* § 8(c)(ii).

If the objector wants to appear and speak at the Final Approval Hearing, the Objection must also contain a detailed description of the evidence they will offer and the names and any addresses of any witnesses expected to testify at the Final Approval Hearing. *Id.* § 8(c)(iii).

Objecting Class Members agree to make themselves available for deposition in their county of residence. *Id.* § 8(c)(iv). A Class Member who objects to the settlement may also submit a Claim Form, which shall be processed in the same way as all other Claim Forms. *Id.* § 8(d).

h. Release of Claims

Payment, and other consideration paid or provided by Defendants in accordance with the Settlement Agreement, shall constitute the full and final settlement of the Litigation, and upon the Effective Date, the Released Parties shall have no further liability or obligation to any Releasing Party, except as specifically set forth in this Settlement Agreement or in the Final Judgment and Order. Agreement § 9. Upon the Effective Date, each Releasing Party shall release and discharge the Released Parties from any claims, causes of action, or liabilities which the Releasing Parties have or may have concerning the Infants' Products arising from or in any way relating to the conduct alleged in the Complaint, except claims of breach of the Settlement Agreement. *Id.* However, claims for medical harm or personal injuries are not barred by this Release. *Id.*

i. Contingencies

The Parties shall each have the right to unilaterally terminate the Settlement Agreement if the Settlement does not obtain final approval (including through any appeals) or if the settlement is approved by the Court with material modifications to the Preliminary Approval Order or the Settlement Agreement. Agreement § 11. In addition, Defendants have the right to terminate the settlement if more than 100 Settlement Class Members Opt-Out. *Id.*

j. Class Counsel Fees and Expenses and Plaintiff's Service Award

Class Counsel shall apply for an award of attorneys' fees and expenses not to exceed one-third of the Claim Fund, which shall be paid from the Claim Fund. Agreement § 6(a). Class Counsel may also ask the Court to award a Class Representative Service Award for the named

Plaintiff in an amount not to exceed $5,000, which shall be paid from the Claim Fund. *Id.* § 6(b). The Parties agree that these amounts are to be determined by the Court, and the denial or decrease in the amount sought shall have no effect on the validity of the Settlement Agreement. *Id.* §§ 6(a)(iii), 11(a).

IV. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

a. The Legal Standard for Preliminary Approval

Before a class action may be dismissed or compromised, notice must be given in the manner directed by the court, and judicial approval must be obtained. Fed. R. Civ. P. 23(e). As a matter of public policy, courts favor the pretrial settlement of class action lawsuits. *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). The policy favoring settlement is especially relevant in class actions and other complex matters, where the inherent costs, delays and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See, e.g.*, *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) ("There is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex.") (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)).

Rule 23(e)(2) was amended in 2018 to require parties to provide courts with sufficient information to determine that it will likely be able to approve the settlement as fair, reasonable, and adequate. Prior to the amendments, Rule 23 did not specify standards for courts to follow when deciding whether to grant preliminary approval. Now, "Rule 23(e)(2)(A-B) requires counsel demonstrate the proposed settlement has satisfied certain 'procedural' concerns, and Rule 23(e)(2)(C-D) requires the proposed settlement satisfy a 'substantive' review." *In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, 2020 WL 8256366, at *6 n.4 (N.D. Ala.

Nov. 30, 2020). Specifically, to determine whether a settlement is fair, reasonable, and adequate, courts must consider whether (a) the adequacy of representation of the class; (b) negotiations were at arm's length; (c) the adequacy of the relief provided (including consideration of: (i) the costs, risks, and delay of continued litigation; (ii) how claims will be processed and relief distributed to the class; (iii) the terms and timing of any proposed award of attorneys' fees; and (iv) any agreements made in connection with the proposed settlement); and (d) class members are treated equitably relative to each other. Fed. R. Civ. P. 23(e)(2).

Approval of a class action settlement is a two-step process. *Fresco v. Auto Data Direct, Inc.*, 2007 WL 2330895, at *4 (S.D. Fla. 2007). Preliminary approval is the first step, requiring the Court to "make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." *Id*. (citations omitted). In the second step, after notice to settlement class members and time and opportunity for them to object or otherwise be heard, the court considers whether to grant final approval of the settlement as fair and reasonable under Rule 23. *Id*.

The standard for granting preliminary approval is low—a proposed settlement will be preliminarily approved if it falls "within the range of possible approval" or, otherwise stated, if there is "probable cause" to notify the class of the proposed settlement and "to hold a full-scale hearing on its fairness." *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983). Thus, "[p]reliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are not obvious deficiencies, and the settlement falls within the range of reason." *In re Checking Account Overdraft Litig.*, 275 F.R.D. 654, 661-62 (S.D. Fla. 2011). This standard requires courts to "make a preliminary finding that the proposed settlement is sufficiently fair, reasonable, and adequate on its face to warrant presentation to the class members." *In re Blue Cross Blue Shield Antitrust Litig.*, 2020 WL 8256366, at *14.

Class Counsel and Defendants respectfully request that the Court take the first step in the process and preliminarily approve the Settlement. Here, the proposed Settlement Agreement is the product of arm's-length negotiations before an experienced and respected mediator, by counsel with significant experience in complex class action litigation, carries no obvious deficiencies, and falls well within the range of possible approval. The Court should therefore grant preliminary approval.

b. <u>The Settlement Satisfies the Criteria for Preliminary Approval</u>

The Settlement meets the standard for preliminary approval. First, the process of reaching the Settlement Agreement bears all the hallmarks of a non-collusive, good-faith agreement. *In re Blue Cross Blue Shield Antitrust Litig.*, 2020 WL 8256366, at *6 n.4; Fed. R. Civ. P. 23(e)(2)(A)-(B). Settlement was reached in the absence of collusion, and is the product of good-faith, informed and arm's length negotiations by competent counsel. Second, the Settlement Agreement is substantively fair, reasonable, and a good result for Settlement Class Members. *In re Blue Cross Blue Shield Antitrust Litig.*, 2020 WL 8256366, at *6 n.4; Fed. R. Civ. P. 23(e)(2)(C)-(D). A preliminary review of the factors related to the fairness, adequacy and reasonableness of the Settlement Agreement demonstrates that it fits well within the range of possible approval, such that preliminary approval is appropriate.

i. The Settlement Agreement Is Procedurally Adequate

A class action settlement should be approved so long as a district court finds that "the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton*, 559 F.2d at 1330; *see also Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 318-19 (S.D. Fla. 2005) (approving class settlement where the "benefits conferred upon the Class are substantial, and are the result of informed, arms-length negotiations by experienced Class Counsel").

The Settlement Agreement here is the result of extensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues of this Action. Edelsberg Decl. ¶ 10. The Parties engaged in formal mediation before an experienced and respected mediator. *Id.* ¶ 3. Even before formal mediation, the parties negotiated for months. *Id.* ¶ 4. And following the conclusion of a full-day mediation, the Parties continued to negotiate through the mediator's ongoing efforts until they had reached an agreement in principle on all material terms of the Settlement. There is no question that the mediation and the negotiations were arm's-length and extensive. *See Pierre-Val v. Buccaneers Ltd. P'ship*, No. 8:14-CV-01182-CEH, 2015 WL 3776918, at *2 (M.D. Fla. June 17, 2015) ("The assistance of an experienced wage and hour class action mediator, James Brown, reinforces that the Settlement Agreement is non-collusive."); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (concluding that class settlement was not collusive in part because it was overseen by "an experienced and well-respected mediator"); Fed. R. Civ. P. 23(e)(2)(B).

Similarly, Plaintiff and Class Counsel have adequately represented the Settlement Class. *See* Fed. R. Civ. P. 23(e)(2)(A). Plaintiff shares the same interests as those of the Settlement Class Members, is prepared and committed to litigate this action vigorously if the Settlement Agreement is not approved, and retained Class Counsel experienced in consumer class action litigation. Compl. ¶ 54. Likewise, Class Counsel are particularly experienced in the litigation, certification, trial, and settlement of nationwide class action cases. *See* Edelsberg Decl. ¶ 11; Ex. 3. Class Counsel zealously represented their client and the Settlement Class Members throughout the pre-suit investigation and course of months-long negotiations concerning the Settlement Agreement. *Id.* ¶¶ 3-4, 12.

In negotiating this Settlement Agreement, Class Counsel had the benefit of years of experience in litigating and settling complex class actions and a familiarity with the facts of the Action. *Id.* ¶ 13. As detailed above, Class Counsel conducted a thorough analysis of Plaintiff's claims. *Id*. ¶ 14. There are no questions about how Defendants labeled the Products here. And Class Counsel obtained and reviewed informal discovery as part of the mediation process, including information about Defendants' sales in dollars and units. *Id.* Class Counsel's review of that discovery, analysis of similar cases, and experience in numerous consumer class actions enabled them to gain an understanding of the evidence related to central questions in the Action and prepared them for well-informed settlement negotiations. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991) (although "no formal discovery had occurred," the "evidence obtained through informal discovery yielded sufficient undisputed facts to support" settlement's approval); *Lee v. Ocwen Loan Servicing, LLC*, No. 14-CV-60649, 2015 WL 5449813, at *24 (S.D. Fla. Sept. 14, 2015) ("To avoid squandering the parties' resources, informal discovery can be *preferred* in class settlements.").

ii. The Settlement Agreement Is Substantively Adequate

The Settlement Agreement is substantively fair because the relief provided to the Class is adequate and because the Settlement treats Class Members equitably relative to each other. *See* Fed. R. Civ. P. 23(e)(2)(C)-(D).

The Settlement Agreement is an excellent result for the Settlement Class. The $1.8 million cash recovery in this case—in a non-reversionary common fund—is more than reasonable. Any settlement requires the parties to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. Class Counsel are confident in the strength of the case, but they are also pragmatic in their awareness of the various defenses available to Defendants,

and the risks inherent in trial and post-judgment appeal. Edelsberg Decl. ¶ 15; *see also* Fed. R. Civ. P. 23(e)(2)(C)(i). The success of Plaintiff's and Settlement Class Members' claims turns on questions that would arise at class certification, summary judgment, trial and appeal. Class Counsel is aware of two cases with virtually identical infants' acetaminophen products, challenged representations and claims, one of which settled nationwide[4] and the other which prevailed on a motion to dismiss.[5] However, Class Counsel is also aware of *Lokey v. CVS Pharmacy, Inc.*, No. 20-CV-04782-LB, 2020 WL 6822890, at *5 (N.D. Cal. Nov. 20, 2020), in which the court determined that as a matter of law, no reasonable consumer could be deceived by the packaging. *Id.* at *5. While Class Counsel is confident the *Lokey* decision was incorrect and is distinguishable, and that the analysis in *Elkies* and *Youngblood* is better reasoned, the *Lokey* decision highlights the risks of continued litigation. Under the circumstances, Class Counsel appropriately determined that settlement outweighs the risks of continued litigation. Edelsberg Decl. ¶ 16.

When evaluating "the terms of the compromise in relation to the likely benefits of a successful trial . . . the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Cotton*, 559 F.2d at 1330. "Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id.* Courts have determined that settlements may be reasonable even where plaintiffs recover only part of their actual losses. *See Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) ("[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate"). "The existence of strong defenses to the claims presented makes the possibility of a low recovery quite reasonable." *Lipuma*, 406 F. Supp. 2d at 1323.

[4] *Elkies v. Johnson & Johnson Servs., Inc.*, Case No. cv-17-7320-GW (C.D. Cal. 2017).
[5] *Youngblood v. CVS Pharmacy*, No. 2:20-cv-06251, ECF No. 31 (C.D. Cal. Oct. 15, 2020).

That is precisely the case here. Experienced Class Counsel, who participated in a mediation process guided by a former Article III judge and experienced mediator, submit that this Settlement presents an excellent result for the Settlement Class. Class Counsel had the benefit of informal discovery, including relevant sales data. Edelsberg Decl. ¶ 14. Under these circumstances, the Court should confirm Class Counsel's view that the Settlement is fair and reasonable. Further, even if Plaintiff and the Settlement Class prevailed at trial, any recovery could be delayed for years by an appeal. *Lipuma*, 406 F. Supp. 2d at 1322 (likelihood appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement). This Settlement Agreement provides substantial relief to Settlement Class Members, without further delay.

The other factors under Rule 23(e)(2)(C) likewise support preliminary approval. There will be no difficulties in distributing relief to the Class, since the Parties have agreed to work with an experienced Settlement Administrator, who will provide notice and administer the claims in an efficient, effective, and professional manner, as discussed above. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii). Class Counsel's application for a Fee Award and Class Representative Service Award to be paid from the Claim Fund will be subject to Court approval, and the Court's eventual decision on those items is analytically distinct from the key question of whether the $1.8 million common fund is adequate—or more precisely, whether there is "probable cause" to hold a hearing on its fairness. *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. at 1384.

Finally, the Settlement Agreement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). As discussed above, each Settlement Class Member who submits a claim will receive the same compensation. Specifically, Class Members who submit proofs of purchase will receive a refund of $1.70 for every Infants' Product they purchased, and Class Members without proofs of purchase will receive a refund of $1.70 for every Infants' Product they purchased

up to a total of $5.10 per household. Agreement § 5(b)(ii)(4). Those claims are subject to pro rata increase or decrease across the board. *Id.* § 5(b)(ii)(5)-(6). Further, all class members will benefit from the injunctive relief Plaintiff was able to obtain.

c. Certification of the Settlement Class Is Appropriate

The Court should conditionally certify the Settlement Class for settlement purposes only. Although the requirements of Rule 23(a) and (b) must be satisfied to certify a settlement class, "a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). As set forth below, Plaintiff and the Settlement Class satisfy the requirements of Rule 23(a) and (b).

i. Rule 23(a) Is Satisfied

Rule 23(a) requires a showing of (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. Plaintiff and the Settlement Class satisfy these requirements. First, there are thousands of Settlement Class Members throughout the United States, making their joinder impracticable. *See* Fed. R. Civ. P. 23(a)(1); *Kilgo v. Bowman Trans.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity satisfied where plaintiffs identified at least 31 class members "from a wide geographical area").

Second, common questions that are capable of class-wide resolution will drive the resolution of the litigation. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and the plaintiff's common contention "must be of such a nature that it is capable of classwide resolution – which means 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) (citation omitted). "Even a single common question will do." *Id.* at 359 (internal alterations omitted).

The Settlement Class Members' claims depend on the common contention that Defendants deceptively labeled, packaged, and marketed the Infants' Product. All members of the putative class were allegedly injured in the same manner: they were deceived by Defendants' conduct (i.e., the alleged misrepresentations and omissions on the Infants' Product packaging), which caused them to pay too much for a product sold not as advertised. *Davidson v. Apple, Inc.*, No. 16-cv-04942-LHK, 2018 WL 2325426, at *182 (N.D. Cal. May 8, 2018) (courts "presume class members who purchased products with misleading packaging . . . were exposed to misleading statements on that packaging"). Thus, critical common questions include (1) whether Defendants' labeling, packaging and marketing of the Infants' Product is deceptive to a reasonable consumer; (2) whether Defendants engaged in unfair and deceptive trade practices; (3) whether Defendants breached their warranty; and (4) whether Defendants were unjustly enriched. *See Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 985-86 (11th Cir. 2016) ("[U]nder FDUTPA, the plaintiff must only establish three *objective* elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.").

Notably, the reasonable consumer standard is an objective one—meaning it is the same for every class member—and thus ideal for class certification. *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 467 (2013). Thus, courts routinely certify the types of claims at issue in this Action. *See, e.g.*, *Carriuolo*, 823 F.3d at 985-89 (class certification of FDUTPA claim proper because deception, injury and causation are all determined by objective standard and common evidence); *In re Checking Account Overdraft Litig.*, 307 F.R.D. 656, 675 (S.D. Fla. 2015) (certifying multi-state unjust enrichment class, including Florida, "where common circumstances

bear upon whether the defendant's retention of a benefit from class members was unjust"); *Nelson v. Mead Johnson Nutrition Co.*, 270 F.R.D. 689, 697 (S.D. Fla. 2010) (certifying FDUTPA claim); *see also Nowell*, 372 F. Supp. 3d at 1222 (D.N.M. 2019) ("A breach of warranty presents an objective claim that the goods do not conform to a promise, affirmation, or description."); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 505 (S.D. Cal. 2013) ("Determinations of whether Defendant misrepresented its products and, as a result, whether warranties were breached, are common issues appropriate for class treatment.").

Third, for similar reasons, Plaintiff's claims are reasonably coextensive with those of the Settlement Class Members, such that the typicality requirement is satisfied. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (typicality satisfied where claims "arise from the same event or pattern or practice and are based on the same legal theory"); *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (named plaintiffs are typical of the class where they "possess the same interest and suffer the same injury as the class members"). Defendants allegedly packaged and labeled the Infants' Products in a manner that was misleading and deceptive to a reasonable consumer, as a result of which, Plaintiff, like all absent Settlement Class Members, did not receive the Product he paid for and paid too much as a result.

Finally, Plaintiff and Class Counsel also satisfy the adequacy requirement. Adequacy relates to (1) whether the proposed class representative has interests antagonistic to the class; and (2) whether the proposed class counsel has the competence to undertake this litigation. *Fabricant v. Sears Roebuck,* 202 F.R.D. 310, 314 (S.D. Fla. 2001). The determinative factor "is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000) (internal quotation marks omitted). Plaintiff's

interests are coextensive with, not antagonistic to, the interests of the Settlement Class, because Plaintiff and the absent Settlement Class members have the same interest in the relief afforded by the Settlement Agreement, and the absent Settlement Class members have no diverging interests. Compl. ¶ 54. Further, Plaintiff and the Settlement Class are represented by qualified and competent Class Counsel who have extensive experience and expertise prosecuting complex class actions, as reflected in Class Counsel's firm resumes, which are attached as composite **Exhibit 3**.

ii. Rule 23(b)(3) Is Satisfied

Rule 23(b)(3) requires showing "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." However, in the settlement context, manageability concerns are not considered. *Amchem*, 521 U.S. at 620.

Rule 23(b)(3) requires that "[c]ommon issues of fact and law . . . ha[ve] a direct impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc*., 601 F.3d 1159, 1170 (11th Cir. 2010) (internal quotation marks omitted). Plaintiff readily satisfies the Rule 23(b)(3) predominance requirement because liability questions common to all Settlement Class members substantially outweigh any possible issues that are individual to each Settlement Class member. As discussed above with regard to commonality, the central questions to the resolution of this litigation turn on the objective question of whether a reasonable consumer would have been deceived or misled by Defendants' labeling and packaging of the Infants' Products. Courts routinely find predominance

met and certify such claims for class treatment. *See, e.g.*, *Carriuolo*, 823 F.3d at 985-89; *In re Checking Account Overdraft Litig.*, 307 F.R.D. at 675; *Nelson*, 270 F.R.D. at 697.

The fact that common issues predominate also weighs in favor of a finding of superiority. *Nelson*, 270 F.R.D. at 698. Further, Plaintiff and Settlement Class Members possess negative-value claims, which militates in favor of superiority. *See Dickens v. GC Servs. Ltd. P'ship*, 706 F. App'x 529, 538 (11th Cir. 2017) ("[T]he high likelihood of a low per-class-member recovery militates in favor of class adjudication."); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

d. <u>The Court Should Approve the Proposed Notice Program</u>

Notice must be provided "in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). To satisfy this standard, "[n]ot only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt-out of the action." *Twigg v. Sears, Roebuck & Co*., 153 F.3d 1222, 1227 (11th Cir. 1998) (internal quotation marks omitted).

The Notice Program satisfies all of these criteria. The Notice Program is designed to reach a high percentage of Settlement Class Members. *See* Agreement Ex. B (Notice Plan). The Notice Program will inform Settlement Class Members of the substantive terms of the Settlement Agreement. *See* Agreement Ex. E (Class Notice). It will advise Settlement Class members of their options for remaining part of the Settlement Class (including submitting a claim, objecting, or both). *Id.* The Notice Program further explains that a Settlement Class Member may object to the

Settlement, the requested Fee Award, the requested Class Representative Service Award, or any combination thereof. *Id.* Notice will be provided in plain language, in both English and Spanish. Agreement §§ 2(ss), 7(c)-(d). Therefore, the Court should approve the Notice Program and the form and content of the Notices.

V. PROPOSED SCHEDULE OF EVENTS

In connection with Preliminary Approval of the Settlement Agreement, the Court should also set a date and time for the Final Approval Hearing. Other deadlines in the Settlement Agreement approval process, including the deadlines for requesting exclusion from the Settlement Class or objecting to the Settlement Agreement, will be determined based on the date of the Final Approval Hearing or the date on which the Preliminary Approval Order is entered. Class Counsel propose the following schedule:

Event/Deadline	Date
Deadline for case website and toll-free hotline to go live	[no later than 10 days after Court's entry of Preliminary Approval Order]
Deadline to commence notice program	[no later than 12 days after Court's entry of Preliminary Approval Order]
Deadline for Requests for Exclusion to be postmarked	[17 days before the Final Approval Hearing]
Deadline for Objections to be filed with the Court and served upon Class Counsel and Defendants' Counsel	[17 days before the Court's Final Approval Hearing]
Deadline for Claim Forms to be postmarked or submitted online	[100 days from Court's entry of Preliminary Approval Order]
Deadline for Class Counsel to file a Motion seeking a Fee Award	[21 days prior to Objection Deadline]
Deadline for Plaintiffs to file a response to any objections	[7 days prior to Final Approval Hearing]
Dollar General shall submit a report to the Court confirming notices pursuant to 28 U.S.C. § 1715 were sent.	[7 days prior to the Final Approval Hearing]
Claim Administrator shall file a declaration or affidavit with the Court that: (i) includes a list of those persons who have opted out or excluded themselves from the Settlement; and (ii) describes	[5 days prior to the Final Approval Hearing]

the scope, methods, and results of the notice program.	
Final Approval Hearing	[at least 125 days after Court's entry of preliminary approval order]

VI. CONCLUSION

Based on the foregoing, Plaintiff and Class Counsel respectfully request that the Court: (1) preliminarily approve the Settlement Agreement; (2) conditionally certify, for settlement purposes, the proposed Settlement Class, pursuant to Rule 23(b)(3) and (e) of the Federal Rules of Civil Procedure; (3) approve the Notice Program set forth in the Agreement and approve the form and content of the Notices and Claim Form, attached to the Settlement Agreement as Exhibits B-F; (4) approve and order the opt-out and objection procedures set forth in the Agreement; (5) appoint Plaintiff, David Levy, as Class Representative; (6) appoint the undersigned counsel of record as Class Counsel; and (7) schedule a Final Approval Hearing. A Proposed Preliminary Approval Order is attached as Exhibit G to the Settlement Agreement.

Dated: February 2, 2021

By: */s/ Rachel Dapeer*

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