UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEVERSINK GENERAL STORE and BRENDA TOMLINSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MOWI USA, LLC, MOWI DUCKTRAP, LLC, MOWI USA HOLDING, LLC, and MOWI ASA,

Defendants.

Case No.: 1:20-cv-09293-PAE

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

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Plaintiffs[1] Neversink General Store and Brenda Tomlinson ("Plaintiffs"), individually and on behalf of all others similarly situated, respectfully submit this memorandum of law in support of Plaintiffs' unopposed motion for preliminary approval of the Parties' Settlement Agreement.

I. INTRODUCTION

This case arises from Plaintiffs' claims, asserted on behalf of a nationwide class that defendants, Mowi USA, LLC, Mowi Ducktrap, LLC, Mowi USA Holding, LLC, and Mowi ASA (collectively, "Mowi" or "Defendants"), deceptively and misleadingly labeled and marketed their Ducktrap River of Maine smoked Atlantic salmon products, including those marketed under the brand names Ducktrap River of Maine, Kendall Brook, Spruce Point, Marine Harvest, and Nova Lox ("Ducktrap Products") by misstating and misrepresenting that the Ducktrap Products are (1) sustainably sourced ("Sustainability Representation"), (2) all natural ("Natural Representation"), and (3) sourced from Maine ("Maine Representation").[2]

The final product of the Plaintiffs' investigation, litigation efforts, discovery, and arm's-length negotiations between proposed Settlement Class Counsel[3] and Defendants' counsel, including a day-long mediation with Hon. Diane Welsh (Ret.), is a Settlement that provides an excellent result—and certainly fair and adequate relief—for Settlement Class Members. For all of the reasons given herein, Plaintiffs respectfully request the Court grant preliminary approval of the Settlement and certification of the Settlement Class, allow the Settlement Administrator to provide notice to the Settlement Class Members, and to schedule a Final Approval Hearing to consider final approval of the Settlement. *See* Fed. R. Civ. P. 23(e); Fed. R. Civ. P. 23(c).

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[1] Unless otherwise indicated, capitalized terms shall have the meaning that the SettlementAgreement ascribes to them. (*See generally* Class Settlement Agreement (filed concurrently herewith as Exhibit 1 to the Declaration of Jonathan Shub) ("Agr.").

[2] Second Amended Class Action Complaint, ECF No. 45.

[3] The Plaintiffs here propose that their Counsel, Shub Law Firm LLC and Mason Lietz & Klinger LLP, be appointed Settlement Class Counsel.

II. PROCEDURAL BACKGROUND AND SETTLEMENT NEGOTIATIONS

After a preliminary investigation, Plaintiff Neversink General Store filed its initial Complaint on November 5, 2020, alleging that in in the course of advertising their products, Defendants made material misrepresentations as to the sustainability, natural character, and source of their smoked salmon products. Complaint, ECF No. 1, ¶ 2; *See* Declaration of Jonathan Shub in Supp. of Pl.s' Unopp. Mot. for Prelim. App. of Class Action Settl., ("Shub Dec."), ¶ 6.

On December 22, 2020, Defendants filed a motion to dismiss all causes of action brought by Plaintiff Neversink, to which Plaintiff responded by filing its First Amended Complaint on January 12, 2021. *See* Motion to Dismiss, ECF No. 18, First Amended Complaint, ECF No. 24. Defendants filed a second motion to dismiss on February 1, 2021, again challenging all of the causes of action brought by Plaintiff Neversink. Second Motion to Dismiss, ECF No. 29.

On or about January 6, 2021, the Parties began discussing the potential for early resolution, eventually agreeing to use esteemed mediator Hon. Diane Welsh (Ret.) of JAMS to assist in negotiations. Shub Dec., ¶ 10. In preparation for mediation the Parties continued their investigation of the facts and analyzed the relevant legal issues in regard to the claims and defenses asserted. *Id*. at ¶ 11. As part of these efforts, Defendants provided informal and confirmatory discovery to Counsel for Plaintiffs that allowed Counsel to further evaluate the claims and defenses, and assess the value of the claims alleged on behalf of the class. *Id*. at ¶ 12. The Parties then drafted and submitted detailed written statements to the mediator. *Id*. at ¶ 13. To further assist in negotiations, prior to the mediation Defendants submitted a term sheet to Counsel for Plaintiffs. *Id*. at ¶ 14. The proposed term sheet included a detailed outline of the general terms of a possible nationwide class settlement, so that the mediation could focus on the primary points of dispute, including the cash payments to be made available to class members and the number of claims that class members could submit. *Id*. The term sheet did not contain any specific dollar amounts. *Id*.

On February 8, 2021, the Parties attended a full-day mediation with Hon. Diane Welsh

(Ret.). The result of that mediation was a preliminary agreement between the Parties on the central terms of the Settlement. *Id*. at ¶ 15. On February 10, 2021, the Parties provided the Court with a Notice of Settlement, proposing the next steps to be carried out in the Settlement process. *Id.* at ¶ 16; Notice of Settlement, ECF No. 37.

After agreeing to the essential settlement terms, the Parties began memorializing and negotiating the details of the Settlement Agreement. *Id*. at ¶ 17. This began another round of comprehensive negotiations in which each aspect of the Settlement Agreement, including each of the exhibits, were negotiated at length. *Id*. During this process, four class action notice specialists—Postlethwaite & Netterville, Epiq, KCC Class Action Services, and Angeion Group—were solicited for bids for their services as notice provider and settlement administrator in this case. *Id*. at ¶ 18. After reviewing the bids, the Parties selected experienced class notice specialist, Angeion Group, to advise the Parties and to design the specifics of a Notice program, the cost of which would be capped at $219,500. *Id.* at ¶ 19. The Notice program and each document comprising the Notice were designed to make them easy to read and understand, as well as maximize the likelihood of broad proposed Settlement Class Member participation in the Claims process. *Id*. at ¶ 35.

Pursuant to the agreed-upon Settlement terms, on February 23, 2021, Plaintiff moved for leave to amend their Complaint to add a second Plaintiff, Brenda Tomlinson. *Id.* at ¶ 21; Unopp. Mot. for Leave to Am. Compl., ECF No. 39. On February 24, 2021, the Court granted that motion, and Plaintiffs filed their Second Amended Complaint on March 15, 2021. *Id.* at ¶ 21; Second Am. Compl., ECF No. 45.

On March 16, 2021, the parties in this Action finalized and executed the Settlement Agreement. Shub Dec., ¶ 21. The Parties only reached settlement after engaging in a significant exchange of information, confirmatory discovery, and arm's-length negotiations, including a full-day mediation with esteemed mediator Hon. Diane Welsh (Ret.) of JAMS. *Id.* at ¶ 22. Plaintiffs' objectives in filing the Action were to remedy the allegedly deceptive representations made on

Defendants' labeling, specifically, that the Products are sustainably sourced, all natural, and sourced from Maine, and to compensate Settlement Class Members damaged by the alleged misrepresentations. *See generally,* Second Am. Compl. Through the Settlement Agreement, Plaintiffs have achieved both objectives—providing significant benefits for the Settlement Class Members especially in light of the substantial risks the Parties would face if the Action progressed.[4] Class Counsel believe the Settlement confers substantial benefits upon the Settlement Class Members. Class Counsel have evaluated theSettlement and determined it is fair, reasonable, and adequate to resolve Plaintiffs' grievances andis in the best interest of the Settlement Class. Shub Dec., ¶ 26.

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.

A. Certification of the Settlement Class

Under the Settlement Agreement, the Parties agree to seek certification of a nationwide Settlement Class defined as follows:

> All persons or entities residing in the United States of America that purchased a Ducktrap Product with packaging that included "sustainably sourced," "all natural," and/or "from Maine" during the period beginning March 1, 2017 and ending on the date of entry of the Preliminary Approval Order.

Agr. ¶ 1.38. Excluded from the Settlement Class are: officers and directors of Mowi and its parents, subsidiaries, affiliates, and any entity in which Mowi has a controlling interest; all judges assigned to hear any aspect of this Litigation, as well as their staff and immediate family; and Settlement Class Counsel, their staff members, and their immediate family. *Id.*

B. Relief for the Members of the Settlement Class

The Settlement Agreement negotiated on behalf of Plaintiffs and the Settlement Class provides

[4] *See* Settlement Agreement, Exhibit 1.

for significant injunctive and monetary relief.

1. Monetary Relief

With respect to monetary relief, the Settlement Agreement provides for Total Class Consideration in the amount of $1,300,000. Agr., ¶ 1.45; 3.2(d). This consideration is available to pay valid claimants, notice and settlement administration costs, and any service awards approved by the Court. Importantly, any approved attorneys' fees and costs will be paid by Defendants separate and apart from the $1,300,000 Total Class Consideration. *Id*.

The Settlement Agreement provides Settlement Class Members who submit a timely and valid Claim Form with compensation regardless of whether they are able to provide a Proof of Purchase.

Settlement Class Members with no Proof of Purchase can receive $2.50 for up to 10 Ducktrap Products purchased per household by attesting under penalty of perjury: (i) that they purchased one or more Ducktrap Products during the Class Period; and (ii) the total number of such units purchased during the Class Period. Agr., ¶ 3.2(c). While Settlement Class Members without Proof of Purchase are only eligible to recover up to $25.00 per household ($2.50 per unit for up to 10 product units), those who are able to provide Proof of Purchase are eligible to recover $2.50 per unit purchased, *with no individual limit*, provided that the Settlement Cap is not exceeded. Agr. ¶ 3.2(b).[5] Each valid Proof of Purchase may only be submitted for a Cash Payment once per household. *Id.*

Here, Plaintiffs alleged that the price premium on eco-labeled foods such as the Ducktrap Products at issue in this litigation is approximately 14.2%. *See* Shub Dec., ¶ 32; Second Am. Compl., ¶ 6. As the average price of Ducktrap products is $7.50, the price premium on the average Ducktrap Product is approximately $1.06. Shub Dec. ¶ 32. Accordingly, the $2.50 per package

[5] Cash Payments payable to Settlement Class Members Eligible for a Cash Payment would be reduced on a *pro rata* basis if the total of the Cash Payments, Notice and Settlement Administration Costs, and any Class Representative Service Awards would otherwise exceed the Total Class Consideration of $1,300,000. Agr. ¶ 3.2(d).

recovery provides consumers with or without proof of purchase more than 100% of the damages they could be expected to win at trial. *Id.*

2. Equitable Relief

The Settlement Agreement also provides for injunctive relief. Upon approval, Defendants will be prohibited from using the phrases "sustainably sourced," "all natural," and "Naturally Smoked Salmon FROM MAINE" on the packaging of any Ducktrap Product for a period of two years beginning on the date of the entry of the Judgment; provided, however, that the injunction will not prohibit Mowi from using the same or similar phrases accompanied by appropriate qualifying or substantiating language or symbols, or from representing that the Products are "smoked in Maine." Agr. ¶ 3.5

3. Release

The release is tailored to the claims that have been plead or could have been plead in this case. Agr. ¶¶ 1.32, 3.6. Settlement Class Members who do not exclude themselves from the Settlement Agreement will release all claims, whether known or unknown, against Defendants and its affiliates. *Id*. at ¶¶ 1.32-.34, 3.6.

C. Service Awards and Attorneys' Fees and Expenses

Defendants have agreed not to oppose an application for payment of Class Representative Service Awards of up to $7,500 to Plaintiff Neversink General Store and up to $1,500 to Plaintiff Tomlinson to compensate them for the actions they took in their capacities as class representatives. *Id*. at ¶ 3.3. The Service Awards are to come out of the $1,300,000 Total Class Consideration. *Id.* at ¶ 3.2(d).

Defendants have also agreed not to oppose an application for a single payment to Settlement Class Counsel of up to $360,000 in combined Attorneys' Fees and reimbursement of Litigation Costs/Expenses. This amount constitutes fair and reasonable compensation for Class Counsel's work on the Actions. *Id.* at ¶ 3.4. Any attorneys' fees and costs approved by the Court

will be paid by Defendants *separate and apart* from the Total Class Consideration. *Id*.[6]

D. Settlement Notice

The Settlement Agreement proposes that the Court appoint Angeion Group ("Angeion") to administer the notice process and outlines the forms and methods by which notice of the Settlement Agreement will be given to the Settlement Class Members, including notice of the deadlines to opt out of, or object to, the Settlement. Agr., ¶¶ 1.37, 2.2.

In terms of the methods of notice, direct notice to the Settlement Class Members is not possible, as there is no comprehensive record of the identity of purchasers of Defendants' Ducktrap Products. As a consequence, the Parties developed a robust notice program[7] with the assistance of Angeion that includes: (1) targeted digital advertising on search engines, social media, and consumer websites; (2) a dedicated Settlement Website through which Settlement Class Members can submit a claim, obtain more detailed information about the Settlement, and access case documents; and (3) 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* Shub Dec. ¶¶ 35. The Notice Plan has been designed to reach an estimated 70.01% of the target audience with a frequency of 3.95x across all media tactics. Shub Dec., ¶ 37.

Under the Settlement Agreement, the Settlement Website will provide links to Settlement-related and case-related documents such as the Settlement Agreement, the Long-Form Notice, and the Preliminary Approval Order. *Id.* at ¶ 36. The Settlement Website will also include procedural information regarding the status of the Court approval process, such as announcements of the Final Approval Hearing date and when the Final Order and Judgment has been entered. *Id.* at ¶ 37.

[6] Plaintiffs will file a separate motion for attorneys' fees, costs, and service awards 30-days prior to the deadline for Settlement Class Members to exclude themselves or object to the Settlement. *See* Proposed Preliminary Approval Order at Shub Dec., Ex. 1A.

[7] Should the Court wish, Plaintiffs can submit a declaration from Angeion further detailing the proposed Notice process.

E. Claims, Exclusions, and Objections

1. Claims

The timing of the claims process is designed to give Settlement Class Members adequate time to access and review notice documents, determine whether they would like to make a claim, opt-out, or object, and gather any supporting documents necessary to do so. Shub Dec. ¶ 39. Class Members will have until one-hundred twenty (120) days after entry of the Preliminary Approval Order to complete and submit their Claim Form to the Claims Administrator, either by mail or online. Agr. ¶¶ 1.5, 4.3(b). The Notice and Claim Form are written in plain language to facilitate Settlement Class Members' ease in completing it. *See* Shub Dec., ¶ 34; Exs. 1B and 1C. To allow for the maximum convenience of the Settlement Class Members, claims may be submitted online. Shub Dec., ¶ 41. The Settlement Administrator is tasked with the responsibility of reviewing and determining the validity of the claims. *Id.* at ¶ 42; Agr. ¶ 4.3(c).

2. Requests for Exclusion and Objections

The timing of the exclusion and objection process is similarly structured to give Settlement Class Members the ability to assess their options. Shub Dec., ¶ 43. Settlement Class Members will have up to and including one-hundred twenty (120) days following entry of the Preliminary Approval Order to object to or to submit a request for exclusion from the Settlement. *Id.* at ¶ 44; Agr. at ¶ 1.12. The process for exclusion and objections is clearly outlined in both the Settlement Agreement and Notice documents. *See* Shub Dec., ¶ 45, Ex. 1B; Agr., 4.4, 4.6.

IV. LEGAL STANDARD

Under Rule 23(e)(1) of the Federal Rules of Civil Procedure, as amended in December 2018, a court may preliminarily approve a class action settlement such that notice may be disseminated to class members if the Court will likely be able to find "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 attorney's 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.

Fed. R. Civ. P. 23(e)(1).

The Second 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). "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, 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 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 [later] to determine the fairness and adequacy of settlement." *Manley v. Midan Rest. Inc.*, 14 Civ. 1693, 2016 U.S. Dist. LEXIS 43571, at *21 (S.D.N.Y. Mar. 30, 2016). Courts often grant preliminary settlement approval without requiring a hearing or a court appearance. *Id.*, *see also Hernandez v. Merrill Lynch & Co., Inc.*, 2012 U.S. Dist. LEXIS 165771 (S.D.N.Y. Nov. 15, 2012) (granting preliminary approval of class action settlement based on plaintiffs' memorandum of law, attorney declaration, and exhibits).

V. ARGUMENT

A. The Court Should Preliminarily Approve the Settlement Agreement

Class Counsel have worked steadfastly to reach a fair, reasonable, and adequate Settlement. *See generally* Shub Dec. Plaintiffs and their counsel believe the claims resolved by the Settlement are strong and have merit. *Id.* at ¶ 23. They recognize, however, that significant expense and risk are associated with continuing to prosecute the claims through trial and any appeals. *Id.* In negotiating and evaluating the Settlement, Plaintiffs and Settlement Class Counsel have taken these costs and uncertainties into account, as well as the delays inherent in complex class action litigation. *Id.* Additionally, in the process of investigating and litigating the Action, Settlement 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. *Id.* at ¶ 24. In light of all of the foregoing, the Settlement provides significant relief to the Settlement Class Members and is fair, reasonable, adequate, and in the best interests of the Settlement Class. *Id.* at ¶ 25. Thus, it meets the requirements of Federal Rule of Civil Procedure 23(e).

(A). The Class Representatives and Class Counsel Have Adequately Represented the Class.

The named Plaintiffs and Settlement Class Counsel have more than adequately represented

the interests of the Settlement Class in this case. The named Plaintiffs were extensively involved in this Action, including reviewing the complaints and Settlement Agreement and through extensive communications with Settlement Class Counsel regarding the status of the case. Through the named Plaintiffs' work, they were able to fulfill their responsibility of advancing and protecting the interests of the Settlement Class and evaluating the proposed Settlement to determine that it was in the best interests of the Settlement Class. The named Plaintiffs also have no interests antagonistic to those of the Settlement Class, and (with the exception of any service award) will receive compensation utilizing the same process and same metrics as all other members of the Settlement Class. The named Plaintiffs thus have served as adequate Class Representatives, and should be appointed as Settlement Class Representatives by this Court.

Settlement Class Counsel has also more than adequately represented the Settlement Class. As detailed herein, Settlement Class Counsel performed an extensive investigation into the claims at issue; engaged in confirmatory discovery into the basis of the potential settlement; and conducted vigorousnegotiations through a respected JAMS mediator. Settlement Class Counsel have relied on their significant experience in litigating and resolving class actions, including consumer class actions relating to mislabeled food products, in order to reach a Settlement that Settlement Class Counsel believes is an excellent result for the Settlement Class. Shub Decl. Ex. 2 (firm resume). This determination was buttressed by information Defendants provided to Plaintiffs as part of voluntary discovery during the initial settlement negotiations.

The adequacy of Plaintiffs and Counsel, and the fairness of the Settlement, is further supported by the fact that this Settlement compares favorably to other, similar settlements that have been approved by courts in this Circuit, which involved consumer products, including *Rapoport-Hecht v. Seventh Generation, Inc.*, No. 7:14-cv-09087-KMK (S.D.N.Y.) (consumer fraud class action involving consumer products); *Frohberg v. Cumberland Packing Corp.*, case no. 14-cv-00748 (E.D.N.Y.) (settlement for label misrepresentations regarding sugar-substitute

sweetener); *Cicciarella, et al. v. Califia Farms, LLC*, Case No. 7:19-cv-08785-CS (S.D.N.Y.) (settlement for misstating the quantity of ingredients in dairy-alternative beverage products).

(B). The Settlement was Negotiated at Arm's Length.

The Settlement here was negotiated at arm's-length through an in-person full day mediation with a respected JAMS mediator. *See* Shub Decl., ¶ 17, n.2; *Elkind v. Revlon Consumer Prods. Corp.*, 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.").

(C). 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. 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 attorney's 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, each Settlement Class Member will receive a payment of up to $2.50 for each Ducktrap Product package purchased in the United States during the Class Period for which the Settlement Class Member provides valid Proof of Purchase, without any limit on the number of packages for which a Settlement Class member can claim (provided they can provide a valid Proof of Purchase). The proposed Settlement further provides that each Settlement Class Member will receive a payment of up to $2.50 for up to ten Ducktrap Product packages per household that the Settlement Class

Member attests, on the Claim Form, to have purchased in the United States during the Class Period, and for which the Settlement Class Member cannot provide valid Proof of Purchase. This is significant, given that damages in this matter would be measured based on the inflated amount, or price premium, that consumers paid for the products. Here, Plaintiffs allege that the price premium on eco-labeled foods such as the Ducktrap Products at issue in this litigation is approximately 14.2%. *See* Shub Dec., ¶ 33; Second Am. Compl., ¶ 6. As our investigation shows the average price of Ducktrap products is $7.50, the price premium on the average Ducktrap Product would be approximately $1.06. Shub Dec., ¶ 33. Accordingly, consumers with or without proof of purchase here are receiving more than 100% of the damages they could be expected to win at trial. This represents a considerable amount, given the risk inherent in further litigation. Moreover, when a settlement "assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, settlement is reasonable under this factor." *Morangelli v. Roto-Rooter Servs. Co.*, 2014 U.S. Dist. LEXIS 7414, at *22 (E.D.N.Y. Jan. 6, 2014).

The Settlement Class and the public will also benefit from the significant injunctive relief secured by the Settlement Agreement, including Defendants' extensive modifications to the labeling of the Products. *See* Agr., ¶ 3.5. The gravamen of the Action is that Plaintiffs allege Defendants are deceiving consumers in the marketing and labeling of their Products, leading consumers to believe that the Products are sustainably sourced, all natural, and sourced from Maine. The injunctive relief the Settlement provides will cure the alleged deception. These changes will greatly benefit both the Settlement Class members and future consumers. *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).

(i). 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.*, 2011 U.S. Dist. LEXIS 21102, at *11 (E.D.N.Y. Feb. 18, 2011). "[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*, 2007 U.S. Dist. LEXIS 22342, at *30 (S.D.N.Y. Mar. 27, 2007); *accord Zeltser v. Merrill Lynch & Co.,* No. 13 Civ. 1531, 2014 U.S. Dist. LEXIS135635, 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). Consumer class action lawsuits by theirvery 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 v. Midan Rest. Inc.*, 2016 U.S. Dist. LEXIS 43571, at *9 (S.D.N.Y. 2016) ("Most class actions are inherently complex[.]").

This Action is no different. Based on extensive investigation and confirmatory discovery, Plaintiffs believe they could obtain class certification, defeat any dispositive motions Defendants may file, and proceed to a trial on the merits. Shub Dec., ¶ 23. Plaintiffs and proposed Class Counsel recognize, however, the costs and risks involved, including the expense and length of continued proceedings necessary to prosecute the claims through trial and any appeals and the uncertainty of the ultimate outcome of the case. *Id.* Proposed Class Counsel took into account these factors, as well as the difficulties and delays inherent in complex class action litigation, when negotiating and evaluatingthe Settlement and entering into the Settlement Agreement. *Id.*

Specifically, litigating the case to a successful judgment providing class wide relief will require that Plaintiffs, *inter alia*, defeat a motion to dismiss, prevail in their 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 Plaintiffs believe Defendants' labeling to be misleading, a jury might not agree. Litigation would also incur immense costs and expenses that ultimately would likely be assessed against any recovery by the Settlement Class, and may not result in any tangible recovery for years, especially ifany appeal (or appeals) were taken.

Further, if Plaintiffs were successful in obtaining certification of a litigation class, the certification would not be set in stone. *Long v. HSBC USA Inc.*, 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 Babcock v. C. Tech Collections, Inc.*, No. 1:14-CV-3124 (MDG), 2017 U.S. Dist. LEXIS 44548, at *16 (E.D.N.Y. Mar. 27, 2017) (class settlement "eliminates the risk, expense, and delay inherent in the litigation process.").

(ii). 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 Group, who is highly skilled in processing class claims and distributing the proceeds to claimants. As described above, the Settlement Agreement provides that Settlement Class Members Eligible for a Cash Payment will receive payments based on the number of Ducktrap Products they purchased, as provided on their submitted Claim Forms. *See* Agr., ¶ 3.2; *see also* Ex. C. Specifically, each Settlement Class Member will receive a payment of up to $2.50 for each Ducktrap Product package purchased in the United States during the Class Period for which the Settlement Class Member has

provided valid Proof of Purchase, and up to $2.50 for up to ten Ducktrap Product packages per household that the Settlement Class Member attests, on the Claim Form, to have purchased in the United States during the Class Period for which the Settlement Class Member cannot provide valid Proof of Purchase. *See id.* As explained by the 2018 Committee Notes, a "claims processing method should deter or defeat unjustified claims, but the courtshould 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.

(iii). The terms of the proposed award of attorneys' fees weigh in favor of preliminary approval.

The Settlement Agreement provides that Settlement Class Counsel may apply for an award ofattorneys' fees and expenses of up to $360,000, which equates to 27.7% of the value of the Total Class Consideration, and less than 22% of the total potential benefit to the Class. *See* Agr. § 3.4.[8] Such requests have frequently been granted in class actions in this Circuit, including in consumer class actions. *See, e.g., Mayhew v. KAS Direct, LLC*, 7:16-cv-06981-VB (S.D.N.Y.), ECF No. 149 (33.3% of $2,215,000 settlement); *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) (33.3% of $4.5 million settlement); *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) (awarding 33.3% of $9.9 million settlement); *Khait v. Whirlpool Corp.*, No. 06 Civ. 6381, 2010 U.S. Dist. LEXIS 4067, at *4, *23 (E.D.N.Y. Jan. 20, 2010) (33.3% of $9.25 million settlement). As the maximum attorneys' fees and expenses Plaintiffs may seek are in line with and in fact modest in comparison to typical awards in this Circuit, and

[8] Attorneys' fees are considered a benefit to the class. Manual for Complex Litigation Section 21.7 at p. 335; *Johnston v. Comerica Mortg. Corp.,* 83 F.3d 241, 246 (8th Cir. 1996) (finding that even where fees are agreed to be paid separate and apart from a settlement fund, they are still viewed as an aspect of the class' recovery); *see also In Re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F. 3d, 768, (3d Cir. 1995) (noting same). Thus, should the attorneys' fees be approved by this Court, the total potential benefit to the class (not including the value of the label changes) is $1,660,000, the sum of the $1,300,000 and the $360,000 in attorneys' fees.

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.

(iv). There are no agreements required to be identified under Rule 23(e)(3).

Apart from the Settlement Agreement, there are no additional agreements between the Parties or with others made in connection with the Settlement. *See* Shub Decl., ¶ 40. Accordingly, this factor weighs in favor of preliminary approval of the Settlement.

(D). The Settlement Treats Class Members Equitably Relative to Each Other.

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 solely dependent on the number of Ducktrap Products the Settlement Class Member purchased and the Settlement Class Member's ability to provide valid Proof of Purchase. Agr. ¶ 3.2. Specifically, each Settlement Class Member will receive a payment of up to $2.50 for each Ducktrap Product package purchased in the United States during the Class Period for which the Settlement Class Member has provided valid Proof of Purchase, and up to $2.50 for up to ten Ducktrap Product packages per household that the Settlement Class Member attests, on the Claim Form, to have purchased in the United States during the Class Period for which the Settlement Class Member cannot provide valid Proof of Purchase. Requiring proof of purchase for a refund for all purchases is fully in line with the 2018 Committee Notes' directive to "deter or defeat unjustified claims" without being "unduly demanding." *See id.*

B. The Court Should Preliminarily Certify the Settlement Class

A court may certify a settlement class upon finding that the action underlying the settlement satisfies all Rule 23(a) prerequisites and at least one prong of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 619–22 (1997). As Plaintiffs set forth below, the proposed Settlement

Class satisfies all of the requirements of Rules 23(a), 23(b)(2) and 23(b)(3), and, consequently, Plaintiffs respectfully ask the Court to certify the Settlement Class preliminarily for settlement purposes.

1. The Settlement Class Meets All Prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure

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

(i) Numerosity

Under Rule 23(a)(1), plaintiffs 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. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). Here, there is no dispute that tens of thousands of people nationwide purchased the Products during the Class Period. *See* Shub Dec. ¶ 27. Thus numerosity is easily satisfied. *Id.*

(ii) Commonality

Under Rule 23(a)(2), plaintiffs 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*, 131 S. Ct. 2541, 2551 (2011). "[F]or purposes of Rule 23(a)(2) even a single common question will do[.]" *Id.* The Second Circuit has construed this instruction liberally, holding that plaintiffs need only show that their injuries "derive[d] from defendants' . . . unitary course of conduct." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 84 (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 but not limited to whether Defendants misrepresented that the Products are sustainably sourced, all natural, and sourced from Maine. (Second Am. Compl., ECF No. 45.) Resolutionof this common question requires evaluation of the question's merits under an objective standard,*i.e.*, the "reasonable consumer" test. *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *Ackerman v. Coca-Cola Co.*, No. CV-09-0395 (JG), 2010 WL 2925955, at *16 (E.D.N.Y. July 21, 2010). Thus, commonality is satisfied.

(iii) Typicality

Under Rule 23(a)(3), plaintiffs must show that the proposed class representatives' claims "are typical of the [class'] claims." Fed. R. Civ. P. 23(a)(3). "[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*,* 2013 U.S. Dist. LEXIS 116720 at *19 (S.D.N.Y. May 30, 2013*)*.

District courts within the Second Circuit have repeatedly found typicality easily satisfied in the context of preliminary approval of a settlement class. *Fogarazzao v. Lehman Bros.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005) ("The typicality requirement 'is not demanding.'").

Here, typicality is met because the same allegedly unlawful conduct by Defendants—*i.e.*, their allegedly misleading marketing and material representations of the Ducktrap Products (that they are sustainably sourced, all natural, and sourced from Maine)—was directed at both Plaintiffs and the members of the proposed Settlement Class.

(iv) Adequacy of representation

Under Rule 23(a)(4), plaintiffs must show that the proposed class representatives will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Plaintiffs must demonstrate 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, Plaintiffs must show that "the members of the class possess the same interests" and that "no fundamental conflicts exist" between a class' representative(s) and its members. *Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013). Here, Plaintiffs possess the same interests as the proposed Settlement Class Members because Plaintiffsand the Settlement Class Members were all allegedly injured in the same manner based on their purchase of the Products, in that they paid inflated prices for the Products. Moreover, their recovery will be sought under, and measured pursuant to, the exact same standards applied to all other Settlement Class Members.

With respect to the second requirement, Settlement Class Counsel are qualified, experienced, and generally able to conduct the litigation. Settlement Class Counsel are not representing clients with interestsat odds with the interests of the Settlement Class Members and are not acting as class representatives. They have qualified as lead counsel in other class actions and have a proventrack record of successful prosecution of significant class actions. Shub Dec. ¶¶ 37-39, Ex. 2; Declaration of Gary M. Klinger in Sup. Of Pl.'s Unopp. Mot. for Prelim. App. of Class Action Settl. ("Klinger PA Dec."), ¶¶ 3-11, Ex. 1. "In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to prosecute vigorously the action on behalf of the class." *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 241 F.R.D. 185, 199 n.99 (S.D.N.Y. 2007).

For the foregoing reasons, Plaintiffs have satisfied the adequacy prerequisite.

2. The Settlement Class Meets All Rule 23(b)(2) Requirements

"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)." *Amchem Prods., Inc.*,521 U.S. at 614.

Here, the proposed injunctive class satisfies the requirements of Rule 23(b)(2), and thus

should be certified.

Rule 23(b)(2) reads: "A class action may be maintained if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . . ." *Id.* The Second Circuit has interpreted this to mean that class-wide injunctive relief must provide benefit to all class members (even if in different ways). *Sykes* 780 F.3d at 97.

Plaintiffs here seek class-wide injunctive relief. Like the class members in *Sykes*, this relief would, in remedying the Ducktrap Product's allegedly misleading labeling, benefit each Settlement Class Member atonce. Accordingly, the Settlement Class should be found to meet Rule 23(b); and, as the Settlement Class also satisfies the Rule 23(a) prerequisites, the Settlement Class should be certified for injunctive relief.

3. The Settlement Class Also Meets All Rule 23(b)(3) Requirements

Plaintiffs also seek certification under Rule 23(b)(3). Under that rule, the court must 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." Fed. R. Civ. P. 23(b)(3).

(i) Common legal and factual questions predominate in this action

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 Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (citation omitted). In the context of a request for settlement-only class certification, concerns about whether individual issues "would present intractable management problems" at trial drop out because "the proposal is that there be no trial." *Amchem Prods., Inc.*, 521 U.S. at 620. As a result, "the predominance inquiry will sometimes be easier to satisfy in the settlement context."

Tart v. Lions Gate Entm't Group, 2015 U.S. Dist. LEXIS 5945846, at *4 (S.D.N.Y. 2015). Furthermore, consumer fraud cases readily satisfy the predominance inquiry. *Amchem Prods., Inc.*, 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 Defendants had a reasonable basis for claiming the Sustainability, Natural and Maine Representations, and whether the marketing, advertising, packaging, labeling, and other promotional materials for the Products caused consumers to pay inflated prices. These issuesare subject to "generalized proof" and "outweigh those issues that are subject to individualized proof." *In re Nassau Cty. Strip Search Cases*, 461 F.3d at 227–28. The Settlement Class meets the predominance requirement for settlement purposes.

(ii) A class action is the superior means to adjudicate Plaintiffs' claims

Rule 23(b)(3) also requires that "a class action is 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 numerous 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 is superior here because "it will conserve judicial resources" and "is more efficient for Class Members, particularly those who lack the resources to bring their claims individually." *Zeltser v. Merrill Lynch & Co*, 2014 U.S. Dist. LEXIS 135635, *3 (S.D.N.Y. Sept. 23, 2014). Counsel understand and have estimated that the cost to purchase any of the Products is approximately $7.50—thus, the potential recovery for any individual Settlement Class

member is relatively small. And the estimated overcharge, or price premium, for the Products is approximately $1.06. Shub Dec., ¶ 33. 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 acrossthe entire class, thereby making litigation viable. *See, e.g.*, *Tart*, 2015 U.S. Dist LEXIS 139266at *7. "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 (sic) repetitive proceedings and preventing inconsistent adjudications." *Zeltser*, 2014 U.S. Dist. LEXIS 135635, at *3. 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.

C. 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, voluntary dismissal, or compromise' regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.312 (2004). "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 due process clauses in the U.S. Constitution impose. *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) (citing 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.

Here, direct notice is not possible. When purchasing a package of Defendants' product, the Settlement Class Members are not required to identify themselves, nor is there generally any record of their identities associated with their purchases. The robust proposed notice program, which designed to reach an estimated 70.01% of the target audience with a frequency of 3.95x across all media tactics meets the requirements of due process and the Federal Rules of Civil Procedure. The proposed methods Plaintiffs identified above for providing notice to the Settlement Class members are reasonable, and include: (1) targeted digital advertising on search engines, social media, and consumer websites; (2) establishment of a dedicated Settlement Website through which Settlement Class Members can submit a claim, obtain more detailed information about the Settlement, and access case documents; and (3) creation and maintenance of 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 supra* § III.D. Notice to the Settlement Class will be achieved thirty (30) days after entry of the Preliminary Approval Order, providing Settlement Class Members sufficient time to decide whether to participate in the Settlement,

object, or opt out Agr. ¶ 4.2. The Notice will be. Agr., ¶¶ 4.3, 4.4, 4.6.

The proposed notice program also provides sufficiently detailed notice. The proposed Notice defines the Settlement Class; explains all Settlement Class Members' rights, the Parties' releases,and the applicable deadlines; and describes in detail the injunctive and monetary terms of the Settlement, including the procedures for allocating and distributing Settlement funds among the Settlement Class Members. *See* Shub Dec., Ex. 1B. It clearly indicates the time and place of the Final Approval Hearing, and it plainly explains the methods for objecting to, or opting out of, the Settlement. *Id*. It details the provisions for payment of Settlement Class Counsel Attorneys' Fees and Costs Award and Class Representative Service Awards, and it provides contact information for Settlement Class Counsel. *Id*.

For the foregoing reasons, Plaintiffs respectfully request the Court approve the Notice plan.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court: (1) certify the Settlement Class and appoint Plaintiffs as the Settlement Class Representatives and Shub Law Firm LLC and Mason Lietz & Klinger LLP as Settlement Class Counsel; (2) preliminarily approve the Settlement Agreement; (3) approve the form and manner of the class action settlement notice; and (4) set a date and time for the Final Approval Hearing, as well as dates for publishing the Notice and deadlines for objecting to, or opting out of, the Settlement and filing papers in support of the Settlement as outlined in the Parties' agreed-upon Proposed Preliminary Approval Order.[9]

[9] The Parties' agreed-upon Proposed Preliminary Approval Order is attached as Exhibit 1X to the Shub Dec., filed herewith).

Date: March 16, 2021

Respectfully submitted,

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