UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

HEIDI LANGAN, on behalf of herself and all others similarly situated, Plaintiff, v. JOHNSON & JOHNSON CONSUMER COMPANIES, INC., Defendant.	Civil Action No. 3:13-CV-01471-JAM December 17, 2018

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

Treatises

I. INTRODUCTION

Plaintiff, Heidi Langan, hereby submits this Memorandum of Law in support of her Motion for Preliminary Approval of Class Action Settlement pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3).

Plaintiff brought this consumer-products class action in 2013 to challenge the sale and marketing of Aveeno ®Baby Wash and Shampoo (the "Wash Products") and Aveeno ®Baby Calming Comfort Bath baby wash (the "Bath Products") products (collectively the "Covered Products"), which Defendant, Johnson & Johnson Consumer Companies, Inc.'s ("Defendant"), labelled "Natural Oat Formula," even though the Covered Products are comprised of unnatural synthetic ingredients with imperceptible amounts of natural ingredients. In November 2012 and 2013, Defendant reformulated the Wash Products and Bath Products, respectively, and replaced "Natural Oat Formula" with "Natural Oat Extract" on the labels. Defendant asserts that labeling the Covered Products "Natural Oat Formula" was meant to convey that only the oat in the formula was natural, whereas Plaintiff alleges that the Covered Products are all natural.

Plaintiff sought relief and damages for purchasers of the Covered Products up until the time they were relabeled. In October 2018, the Parties[1] agreed to settle this case for two million four hundred thousand dollars ($2,400,000.00). As set forth more fully below, this is an excellent result for the Class and merits preliminary—and ultimately final—approval.

The proposed Settlement was achieved following arm's-length negotiations by the Parties with the assistance of an independent mediator, Professor Eric Green. Based on roughly half a decade of litigation, which included significant investigation, extensive motion practice and

[1] Plaintiff and Defendant will be referenced collectively herein as the "Parties." All capitalized terms used herein have the meanings set forth and defined in the Settlement Agreement (the "SA"). A true and accurate copy of the SA and its exhibits, Exhibit A and Exhibits 1-5 to Exhibit A, are attached to the Declaration of Robert A. Izard in Support of Motion for Preliminary Approval ("Izard Decl."), which is attached hereto as Exhibit 1.

discovery, and an appeal to the Second Circuit, the proposed Settlement is fair, reasonable, and adequate. The Settlement resolves the Class Members'[2] claims against Defendant arising out of the facts at issue in this case, and administration expenses and attorneys' fees and costs.

By this Motion, Plaintiff respectfully requests that the Court take the first step in its approval process[3] and enter an order: (i) certifying, for settlement purposes only, the proposed Settlement Class; (ii) granting preliminary approval of the proposed Settlement; (iii) approving Plaintiff's proposed form and method of giving Notice to the Settlement Class; and (iv) setting a date for a Settlement Hearing.

II. BACKGROUND

A. Summary of Litigation

On October 7, 2013, Plaintiff filed her Complaint in the United States District Court for the District of Connecticut, entitled *Langan v. Johnson & Johnson Consumer Companies*, Inc., No. 3:13-cv-01471.[4] The Complaint alleged violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), as well as violations of thirty other consumer protection statutes. *See* ECF No. 1. Subsequently, on November 27, 2013, Plaintiff filed an Amended Complaint reducing the number of consumer protection statutes claimed to have been violated to twenty-one. *See* ECF No. 12.

On January 24, 2014, Defendant moved to dismiss the Amended Complaint. *See* ECF No. 23. Plaintiff filed a Memorandum in Opposition, and on May 12, 2014, the Court denied

[2] For purposes of this Motion, "Class Members," "Settlement Class," and "Settlement Class Members" will be used interchangeably. All terms are defined as set for in the SA. *See* the SA at 10.

[3] The Manual for Complex Litigation describes a three-step procedure for approval of class action settlements: (1) preliminary approval of the proposed settlement; (2) dissemination of notice of the settlement to all affected class members; and (3) a "fairness hearing" or "final approval hearing," at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented. *See Manual for Complex Litigation (Fourth)* §§ 21.632 – 21.634, at 433-34 (2016).

[4] This followed an initial filing in the United States District Court for the District of New Jersey on January 25, 2013, entitled *Virgil and Langan v. Johnson & Johnson Consumer Companies, Inc.*, Case No. 3:13-cv-00524-MLC-DEA, which was voluntarily discontinued with prejudice on September 30, 2013.

Defendant's Motion to Dismiss. *See* ECF No.'s 30, 37 at 2. Defendant filed its Answer to Plaintiff's Amended Complaint on July 1, 2014. *See* ECF No. 39.

From July 2014 until August 2015, the Parties engaged in extensive discovery. This included review and analysis, by Plaintiff's counsel, of thousands of pages of documents produced by Defendant, and depositions of several witnesses, including Plaintiff and her experts, Dr. Elizabeth Howlett and Colin B. Weir. *See* ECF No. 69 at 3. Defendant also retained several experts to produce reports on consumer marketing and damages. *Id.* From August to December 2015, the Parties filed numerous motions, memoranda in opposition, and replies.

On August 3, 2015, Plaintiff moved for class certification.[5] *See* ECF No.'s 66 and 67. On September 21, 2015, Defendant filed its opposition to Plaintiff's Motion for Class Certification along with motions to exclude the testimony of Plaintiff's experts. *See* ECF No.'s 78, 83, and 85. In turn, on October 15, 2015, Plaintiff filed her Reply in Further Support of Motion for Class Certification and oppositions to Defendants' motions to exclude. *See* ECF No.'s 105, 106, and 107. On November 18, 2015, the Parties both filed motions for summary judgment. *See* ECF No.'s 128 and 137. On December 11, 2015, the Parties filed their oppositions to the motions for summary judgment. *See* ECF No.'s 147 and 148.

On March 13, 2017, this Court (*Meyer, J.*) denied the motions for summary judgment, denied the motions to exclude the testimony of Plaintiff's experts, and certified the following class:

> All purchasers of the Aveeno Baby Brand Wash and Shampoo until November of 2012 and Aveeno Baby Brand Calming Comfort Bath baby wash until November of 2013, beginning on the following dates in the following states: in Alaska from January 25, 2011 in California, Connecticut, Delaware, the District of Colombia, Illinois, New York and Wisconsin from January 25, 2010; in Florida, Hawaii, Massachusetts, and Washington from January 25, 2009; in Arkansas and Missouri from January 25, 2008; in Michigan, New Jersey, and Vermont from January 25, 2007;

[5] Plaintiff moved for certification of two alternate classes under Rule 23(a) and (b)3; one class relating to Connecticut only and the other relating to seventeen states, including Connecticut, and the District of Columbia.

> in Rhode Island from January 25, 2003; and in any additional states which the Court determines to have sufficiently similar law to Connecticut without creating manageability issues, who purchased the Products primarily for personal, family or household purposes. Specifically excluded from this Class are: the Defendant, the officers, directors and employees of Defendant; any entity in which Defendant has a controlling interest; any affiliate, legal representative of Defendant; the judge to whom this case is assigned and any member of the judge's immediate family; and any heirs, assigns and successors of any of the above persons or organizations in their capacity as such.

See ECF No. 168. Defendant petitioned the United States Court of Appeals for the Second Circuit for permission to appeal the class certification, which was granted. *See Langan v. Johnson & Johnson Consumer Companies, Inc.*, 897 F.3d 88, 91 (2d Cir. 2018). The Second Circuit concluded that "whether a plaintiff can bring a class action under the state laws of multiple states is a question of predominance under Rule 23(b)(3), not a question of standing." *Id.* at 96. The court vacated this Court's grant of class certification and remanded the case, requesting a more thorough analysis of the variations in state consumer protection law. *Id.* at 98.

Subsequently, the parties scheduled a second mediation session with an independent mediator, Professor Eric Green, on September 18, 2018. *See* ECF No. 178. The parties failed to reach an agreement, but settlement negotiations continued in an effort to resolve the Action. On October 18, 2018, the Parties reached an agreement in principle. *See* ECF No.'s 181 and 183; *see also* the SA, attached hereto as Exhibit A.

B. Summary of the Proposed Settlement

For purposes of the Settlement only, Defendant has stipulated to certification of a Settlement Class defined as:

> [A]ll persons and each of their respective spouses, executors, representatives, heirs, successors, bankruptcy trustees, guardians, wards, agents, and assigns (in their capacity as such), and all those who claim through them or who assert duplicative claims for relief on their behalf, who purchased the Wash until November of 2012 and the Bath until November of 2013, beginning on the following dates in the following states: in Alaska from January 25, 2011; in California, Connecticut,

> Delaware, the District of Colombia, Illinois, New York and Wisconsin from January 25, 2010; in Florida, Hawaii, Massachusetts, and Washington from January 25, 2009; in Arkansas and Missouri from January 25, 2008; in Michigan, New Jersey, and Vermont from January 25, 2007; in Rhode Island from January 25, 2003. Excluded from the Settlement Class are current and former officers and directors of Defendant, members of the immediate families of the officers and directors of Defendant, Defendant's legal representatives, heirs, successors, or assigns, and any entity in which they have or have had a controlling interest, and the judicial officer to whom this lawsuit is assigned.

See SA at 10-11.

Pursuant to the SA, Defendant will contribute $2.4 million to a "Settlement Fund." *Id.* at 12. After payment of notice and claims administration expenses, service awards, and attorneys' fees and expenses, all as approved by the Court, the Settlement Fund will be used to pay Eligible Claims. *Id.* at 14. Class Members who properly and timely submit the Claim Form may recover one dollar ($1.00) for each purchase up to fifteen (15) Covered Products per household, without the need to submit proof of purchase. *Id.* at 13-14. There is no maximum number of Covered Products for which any Settlement Class Member may claim with proof of purchase. *Id.* at 14. In exchange for these benefits, Class Members will release Defendant from any and all claims "arising out of or relating to the allegations in the Action concerning [Defendant's] labeling, marketing, advertising, packaging, and/or promotion of the Covered Products." *See id.* at 25. Any amounts remaining in the Settlement Fund shall be distributed to Nurse-Family Partnership as a *cy pres* recipient. *Id*. at 15. No funds will be returned to Defendant. *Id.* at 10 ("Settlement Fund is non-reversionary").

The Settlement provides that Plaintiff's counsel, upon being appointed by this Court as Class Counsel, may submit an application to the Court for an award of attorneys' fees not to exceed thirty percent (30%) of the Settlement Fund. *See id.* at 27. Additionally, Class Counsel may make

an application for expenses and for a Plaintiff's Service Award in the amount of five thousand dollars ($5,000.00) to be paid from the Settlement Fund. *Id.*

Notice of the Settlement will be provided by several methods. First, notice will be published nationwide in English and Spanish that provides potential Class Members with basic information about the Settlement and explains how to object to or opt out of the Settlement, how to submit a claim, and how to obtain additional information on the Settlement. *Id.* at 20-21; *see also* Exhibits 2 and 4 of the SA. There will be a Settlement Website that contains all the relevant information about the Settlement. *Id.* at 10-11, 20-21. There will also be an internet-based ad campaign, conducted by the Claim Administrator, that will alert potential Class Members to the existence of the Settlement and direct them to the Settlement Website. *See* Exhibit 2 of the SA. Plaintiff believes these methods are the most effective means of reaching the Settlement Class Members.

III. THE COURT SHOULD PRELIMINARILY CERTIFY THE CLASS FOR SETTLEMENT PURPOSES

As discussed, this Court certified the proposed Class in its Omnibus Ruling. *See* ECF No. 168 at 21-28. To that extent, this Court found that the proposed Class satisfies the requirements of all the prongs of Rule 23(a) and (b)(3). *See id.* Although the Second Circuit raised issues on appeal concerning the Rule 23(b)(3) analysis, this Court's analysis finding that the proposed Class satisfies the Rule 23(a) requirements stands. *See id.* at 22-24. That analysis is equally applicable to the present Motion because nothing has changed that would impact that analysis. Likewise, this Court already found that the implied requirement of ascertainability was satisfied. *See id.* at 27-28. Therefore, there is no need to readdress the requirements of Rule 23(a) or ascertainability, both of which support preliminary approval.

A. The Rule 23(b)(3) Requirements Are Met

As to Rule 23(b)(3), the only issue that was the subject of the Second Circuit's ruling was whether common issues predominate because of potential variances in state law. This Court's finding that Plaintiff has "shown that common issues predominate over individual issues" otherwise stands. *See* ECF No. 168 at 25. However, in light of Second Circuit's concerns about the issue of predominance, s*ee Langan*, 897 F.3d at 96-99, Plaintiff will readdress that requirement.

Consumer fraud cases based on uniform representations are appropriate class actions. *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging consumer or securities fraud"). The express language of Rule 23(b)(3) does not require that common questions be exclusive; it only requires that they predominate. *See Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010) (Predominance is satisfied "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof."). In such cases, the court's inquiry is focused on "the conduct of the defendant rather than that of individual plaintiffs, making it particularly susceptible to common, generalized proof." *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1115 (E.D.N.Y. 2006).

It is well-established that in determining whether common questions predominate, the Court's inquiry should be directed primarily toward the issue of liability. *See McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005). As the Second Circuit held in *Sykes v. Mel S. Harris and Associates LLC*, 780 F.3d 70 (2d Cir. 2015), "[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Id.* at 81; *see also Mahon v. Chicago Title Ins. Co.*, 296 F.R.D. 63, 75 (D. Conn. 2013) ("In particular, courts should 'focus on the liability issue ... and if the liability issue is common to

the class, common questions are held to predominate over individual ones.'") (quoting *Dura–Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 93 (S.D.N.Y. 1981)).

There are several common questions relevant to Defendant's liability, which predominate over individual issues, including: (a) whether Defendant misrepresented that the Covered Products contained natural formula; (b) whether Defendant's labeling of the Covered Products was likely to deceive a reasonable consumer;[6] and (c) whether Defendant's labeling of the Covered Products constitutes an unfair or deceptive act or practice in the conduct of trade or commerce under the consumer protection laws of the various states. The Second Circuit has recognized that when plaintiffs are exposed to a common advertising campaign, common issues predominate. *See In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013) (finding predominance was met because "alleged misrepresentation was uniform and susceptible to generalized proof"); *see also Sykes*, 780 F.3d at 285 F.R.D. at 293 (finding that the "district court did not abuse its discretion in finding that these issues, even if they are individualized in certain respects, do not predominate over class issues.").

1. The Consumer Protection Laws of the Various States Are Substantially Similar and Do Not Predominate Over the Interests of the Class

In remanding this case, the Second Circuit made clear that district courts have a "'duty,' before certifying a class, to 'take a close look' at whether the common legal questions predominate over individual ones." *Langan*, 897 F.3d at 97. The court has not explained what a "close look" requires but suggested that analyzing the variations in the consumer protection laws, "including whether intent to deceive is required and whether causation can be presumed," is one manner in which this Court could comply with the "close look" requirement. *See id.* at 97-98. Notably, the

[6] This Court found that "the question of whether [D]efendant's claim was deceptive to a reasonable consumer is a central question in this litigation," and that Plaintiff "adduced evidence that it can be shown by class-wide proof." *See* ECF No. 168 at 25.

Second Circuit acknowledged that "[v]ariations in state laws do not necessarily prevent a class from satisfying the predominance requirement." *Id.* at 97.

Here, Plaintiff submits that the core overlapping elements in the consumer protection laws of the proposed states certainly predominate over any minor variations. As this Court found, none of the "minor differences between the consumer protection laws of the[] 17 states overwhelm the questions common to the class." *See* ECF No. 168 at 26. While some states have different provisions with respect to the availability of attorneys' fees and trial by jury, such differences are not material because the claims of every member will not "rise or fall on the resolution of [those] question[s]." *See Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757 (7th Cir. 2014) (Reversing a district court's decision to deny certification of a class of persons in eight states because all eight states' consumer protection laws included at least one common requirement: that the defendant's statement about its product be either literally false or likely to mislead a reasonable consumer); *see also In re U.S. Foodservice Inc.*, 729 F.3d at 127 ("[T]he crucial inquiry is not whether the laws of multiple jurisdictions are implicated, but whether those laws differ in a material manner that precludes the predominance of common issues.").

Materiality, is a common issue because, as this Court found, Plaintiff "identified internal documents from [D]efendant that show that [D]efendant itself recognized that consumers are willing to pay a premium for natural products," which "alone is powerful evidence that the labeling claims were material in general across the class of consumers. *See* ECF No. 168 at 25.

Reliance is a common issue because ***none*** of the states in the proposed Class require individual reliance. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 97-98 (D. Mass. 2008) (finding that the consumer protection laws of states including Connecticut, Delaware, D.C., Illinois, New York, Florida, Hawaii, Massachusetts, Washington, Arkansas,

Missouri, Michigan, New Jersey, Vermont and Rhode Island did not require individual reliance)[7]; *see also* ECF No. 105 at 19.

Intent is not an issue because there is no dispute that Defendant intentionally labelled the Covered Products with the phrase "Natural Oat Formula," with full knowledge of the ingredients in the Covered Products. *See* ECF No. 105 at 20. Further, ***none*** of the proposed states require intent. *See* ECF No. 67 Memo. ISO at 21, Exhibit B; *see also* ECF No. 105 at 18-20.

Causation is not an issue because all Class Members paid an excessive price regardless of the reason they purchased the Covered Products, and the injury was caused by the purchase. In *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561 (S.D.N.Y. 2014), the court expressly rejected the argument that some consumers may have purchased the product (which was labelled as 100% Olive Oil) based on factors "that had nothing to do with [the] labels and thus did not suffer any damages as a result of their purchase." *Id.* at 569. Instead, the court found that "even if a class member actively wanted to buy pomace instead of 100% pure olive oil, they nevertheless paid too much for it." *Id.* at 568-69. The court further found "that the common actual injury consisted of the payment of the price of olive oil for a product that was pomace oil and the associated receipt of an inferior product different from that which the consumers purchased." *Id.* at 569. Here too, consumers of the Covered Products may have purchased them for a myriad of reasons unconnected to the labels. Regardless, however, of the reason Class Members purchased the Covered Products, they still paid a premium they should not have paid, and this injury was caused when they made

[7] The only state on Plaintiff's list that the *In re Pharm.* court *declined* to certify was California (plaintiffs did not seek to certify classes for Alaska or Wisconsin). However, the court noted that the California Supreme Court had granted review in two cases that might clarify the issue, at which point the Court indicated it could revisit its decision. *Id.* at 99. The California Supreme Court's subsequent ruling established that material misrepresentations establish the necessary causal connection under California law and there is no requirement for individual class member reliance. *In re Tobacco II Cases*, 46 Cal. 4th 298, 327 (2009).

the purchase. Thus, even in states where the consumer protection laws do not presume causation, causation can be established.

2. Diminished Concern Regarding Variations in State Law for Certification of the Class for Settlement Purposes

To be certain, "settlement is relevant to class certification." *Amchem*, 521 U.S. at 619. As the Supreme Court held, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial."[8] *Id.* at 620. Therefore, "variations [in state laws] are irrelevant to certification of a settlement class since a settlement would eliminate the principal burden of establishing the elements of liability under disparate laws." *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 303–04 (3d Cir. 2011) (quotations and citations omitted). The *Sullivan* court went on to find that considering variations in state laws "in the context of predominance has primarily focused on manageability of a litigation class." *Id.* at 304. Parties should be careful that they do not "conflate the predicate predominance analysis for certification of a settlement class with that required for certification of a litigation class." *Id.*

Here, Plaintiff seeks preliminary class certification ***for settlement purposes only***. Even if this Court were to find variations in the state laws during its "close look," those variations (which are minor) are largely irrelevant to the certification of the Class for settlement purposes. Indeed,

[8] The *Amchem* Court noted that "other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions" require close attention, even in the context of settlement. However, *Amchem* involved a nationwide class of people seeking money damages arising from their exposure to asbestos. The Supreme Court held that the named parties were not adequate representatives of the class as a whole, because some class members had immediate medical needs while others had long-term needs for medical monitoring – thus making the financial interests of those with current illnesses directly antagonistic to those in need of monitoring. *See Amchem*, 521 U.S. at 626. The conflicts that existed among the *Amchem* class do not exist within the proposed Class here, which seeks only monetary relief for a common injury stemming from a misrepresentation. Further, there is no issue of overbroad class definitions in this case because the Class period is limited based on Defendant's relabeling of the Covered Products in 2012 and 2013.

the Second Circuit has long acknowledged the propriety of certifying classes solely for settlement purposes. *See Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982). Defendant's arguments to the Second Circuit regarding the variations in state law largely concerned manageability issues, which are irrelevant in the present context of settlement. Further, any concerns about variations in state law should be assuaged by the fact that Settlement Class members can opt out of the settlement. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810–11 (1985). Accordingly, this Court should find the predominance requirement is satisfied.

IV. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT BECAUSE IT IS FAIR, ADEQUATE, AND REASONABLE

Preliminary approval of the proposed Settlement is appropriate here because it is procedurally and substantively fair, adequate and reasonable. *See* Fed. R. Civ. P. 23(e). Rule 23(e) provides that "[t]he claims, issues, or defenses of a certified class --or a class proposed to be certified for purposes of settlement-- may be settled ... only with the court's approval." *Id.* Importantly, courts and public policy considerations favor settlement, particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005). However, "[b]efore such a settlement may be approved, the district court must determine that a class action settlement is fair, adequate, and reasonable, and not a product of collusion." *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000). "Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). "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.'" *Wal-Mart*, 396 F.3d at 116 (quoting *Manual for Complex Litigation (Third)* § 30.42 (1995)).

A. The Proposed Settlement is Procedurally Fair

The circumstances surrounding the proposed Settlement support the finding that it is procedurally fair. Courts examining the procedural fairness of a settlement do so "in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 WL 3077396, at *6 (E.D.N.Y. Sept. 25, 2009) (internal quotation marks omitted).

Here, the negotiations leading to the proposed Settlement were conducted by highly qualified counsel, who respectively sought to obtain the best possible result for their clients. The proposed Settlement, reached after roughly five years of litigation and arm's-length negotiations among the Parties and their counsel, including two separate mediation sessions with Professor Green, was informed by the exchange of significant information throughout the discovery and settlement process. *See* Declaration of Robert A. Izard in Support of Preliminary Approval of Class Action Settlement ("Izard Decl."), ¶ 8, attached hereto as Exhibit A. In such situations, courts, including the Second Circuit, adopt "an initial presumption of fairness." *See McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) ("We have recognized a presumption of fairness, reasonableness, and adequacy as to the settlement where a class settlement [is] reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery. Such a presumption is consistent with the strong judicial policy in favor of settlements, particularly in the class action context.") (alteration in original) (citation and internal quotation marks omitted).

B. The Proposed Settlement is Substantively Fair

In addition to being procedurally fair, the Settlement is also substantively fair, reasonable, and adequate. "Courts in the Second Circuit evaluate the substantive fairness, adequacy, and reasonableness of a settlement according to the factors set out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)." *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012). The nine *Grinnell* factors include: (1) the complexity, expense, and likely duration

of the litigation; (2) the reaction of the class; (3) the stage of the proceedings and discovery completed; (4) the risks of establishing liability; (5) the risks of proving damages; (6) the risks of maintaining a class action through trial; (7) the ability of defendants to withstand greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of the attendant risks of litigation. *See Grinnell*, 495 F.2d at 463, *abrogated on other grounds, Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir.2000); *see also Wal–Mart*, 396 F.3d at 117–19 (applying *Grinnell* factors). However, in reviewing and approving a settlement, "a court need not conclude that all of the *Grinnell* factors weigh in favor of a settlement," rather courts "should consider the totality of these factors in light of the particular circumstances." *In re Vitamin C*, 2012 WL 5289514, at *4. Here, the *Grinnell* factors weigh in favor of preliminary approval.

1. Factor One: Given the Complexity, Expense and Likely Duration of the Litigation, Preliminary Approval is Appropriate

The first factor requires the Court to consider "the complexity, expense and likely duration of the litigation." *Id.* (quoting *Grinnell*, 495 F.2d at 463). This factor weighs in favor of preliminary approval.

This litigation has been pending for roughly half a decade and involves complex legal and factual issues. The parties have engaged in extensive motion practice and discovery, which included the production and review of thousands of pages of documents, fact and expert depositions, and an appeal to the Second Circuit. *See* Izard Decl. at ¶ 8. The next step would have been Plaintiff's renewed motion for class certification, which Defendant would likely have opposed, which would be costly and time-consuming for the Parties and the Court. Assuming the Court granted Plaintiff's renewed motion, the risks of establishing liability would be significant. In a battle of experts, it is virtually impossible to predict with any certainty which expert's

testimony would be credited and accepted by the fact-finder. Even if Plaintiff prevailed on the issue of liability, there would still be risks in establishing damages. Plaintiff would then have to defend any successful outcome from appellate review. The experience of proposed Class Counsel has taught that the above-described factors can make the outcome extremely lengthy and uncertain. The Settlement, on the other hand, permits a more prompt resolution of this action on terms that are amply fair, reasonable, and adequate to the Class.

Simply put, "[l]itigation through trial would be complex, expensive, and long." *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *3 (E.D.N.Y. Nov. 16, 2012). The proposed Settlement satisfies the first *Grinnell* factor.

2. Factor Two: The Court Cannot Assess the Reaction of the Class Until After Notice Issues But It Will Likely Be Positive

Because Class Members have not been notified of the Settlement at this stage, the Court will be in a better position to more fully analyze this factor after Notice issues and Class Members have had an opportunity to opt out or object to the Settlement. However, the fact that the Parties and their experienced counsel support the Settlement is a strong indication that members of the Settlement Class will also view it positively. This factor is neutral and does not preclude the Court from granting preliminary approval.

3. Factor Three: Discovery is Complete, Which Favors Preliminary Approval

The third factor, "the stage of the proceedings and the amount of discovery completed," also weighs in favor of final approval. *In re Vitamin C*, 2012 WL 5289514, at *4 (quoting *Grinnell*, 495 F.2d at 463). "Extensive discovery ensures that the parties have had access to sufficient material to evaluate their case and to assess the adequacy of the settlement proposal in light of the

strengths and weaknesses of their positions." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 333–34 (E.D.N.Y. 2010) (citation omitted).

Here, the Parties are at an advanced stage in the case. *See* ECF No. 69. The issues in this Action have been thoroughly vetted through extensive motion practice and completion of both fact and expert discovery. Izard Decl. at ⁋ 11. The Parties have a thorough understanding of the case and are well positioned to evaluate the merits of the Action. *Id.* Clearly, this *Grinnell* factor weighs in favor of preliminary approval.

4. Factors Four, Five and Six: Plaintiff Faces Substantial Hurdles in Establishing Liability, Damages, and Maintaining A Class Action Through Trial

"The fourth, fifth, and sixth *Grinnell* factors all relate to continued litigation risks,"(i.e., the risks of establishing liability, damages and maintaining the class action through trial). *See In re Vitamin C*, 2012 WL 5289514, at *5. "'Litigation inherently involves risks.'" *Willix v. Healthfirst, Inc.*, 2011 WL 7584862, at *4 (E.D.N.Y. Feb. 18, 2011) (quoting *In re PaineWebber*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) *aff'd sub nom. In re PaineWebber Inc. Ltd. Partnerships Litig.*, 117 F.3d 721 (2d Cir. 1997)). "One purpose of a settlement is to avoid the uncertainty of a trial on the merits." Id.

Plaintiff faces substantial hurdles in establishing liability and damages. This case involves complex issues of consumer perception of the Covered Products and the amount of alleged loss attributable to the challenged advertising. Defendant firmly contends that the Covered Products are not falsely or deceptively advertised. Defendant further maintains that Plaintiffs' expert opinions are unreliable and irrelevant. *See* ECF No. 82 and 87. In the context of this litigation, Plaintiff and the proposed Class face risks in establishing both liability and damages. The proposed

Settlement, however, alleviates these risks and provides a monetary benefit to the Class in a timely fashion.

Moreover, the Class is not certified in this case. If, in response to the Second Circuit's remand, the Court again certified a class, Defendant would likely challenge that certification ruling, thereby forcing another round of briefing. Also, there is, "no assurance of obtaining class certification through trial, because a court can re-evaluate the appropriateness of certification at anytime [sic] during the proceedings." *Bellifemine v. Sanofi-Aventis US. LLC*, 2010 WL 3119374, at *4 (S.D.N.Y. 2010); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) ("[I]f insurmountable management problems were to develop at any point, class certification can be revisited at any time.").

If Plaintiff was able to successfully obtain class certification, she would still, as discussed, have to bear the risk of proving the merits of the case. Even if liability were established, Plaintiff would still have to prove damages on a class-wide basis. Although reliable and convincing expert testimony in support of Plaintiff's liability and damages positions is available, victory is by no means assured. It is possible that in the unavoidable "battle of the experts" the fact-finder might disagree with the Class's experts, find Defendant's experts more persuasive, or agree with the Class's experts but award a reduced amount of damages to the Class. *See In re PaineWebber*, 171 F.R.D. at 129 ("The issue would undoubtedly devolve into a battle of experts whose outcome cannot be accurately ascertained in advance."). There is ample risk, expense, and delay in such a process. *See* Izard Decl. at ⁋⁋ 12-13. The proposed Settlement eliminates this risk, expense, and delay. Accordingly, the fourth, fifth, and sixth *Grinnell* factors weigh in favor of preliminary approval of the Settlement.

5. Factor Seven: Defendant Could Probably Withstand A Greater Judgment

Regarding the seventh factor, the Court considers Defendant's ability "to withstand a greater judgment." *In re Vitamin C*, 2012 WL 5289514, at *4 (quoting *Grinnell*, 495 F.2d at 463). Defendant probably could withstand a greater judgment. However, a "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Frank*, 228 F.R.D. at 186 (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 178 n.9 (S.D.N.Y. 2000)); *see also In re Vitamin C*, 2012 WL 5289514, at *6 ("[A]gainst the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement.") (citation and quotation omitted). Thus, this factor is neutral.

6. Factors Eight and Nine: The Settlement Amount is Reasonable in Light of the Best Possible Recovery

The determination of whether a settlement amount is reasonable "does not involve the use of a mathematical equation yielding a particularized sum." *Frank*, 228 F.R.D. at 186 (internal quotation marks omitted). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972)). The adequacy of a settlement amount offered should be judged "in light of the strengths and weaknesses of the plaintiff[s'] case." *In re Med. X-Ray*, No. 93-5904, 1998 WL 661515, at *5 (E.D.N.Y. Aug. 7, 1998). Because a settlement provides certain and immediate recovery, courts often approve settlements even where the benefits obtained as a result of the settlement are less than those originally sought. As the Second Circuit stated, "there is no reason, at least in theory,

why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2.

Here, the Settlement Amount is more than reasonable in light of the potential recovery. Each Class Member will receive up to $1.00 per purchase, which represents approximately the estimated premium price that Plaintiff believes Defendant applied to the Covered Products. Moreover, Plaintiff's expert calculated Class damages at no more than $4 million. *See* Izard Decl. at ¶10. Thus, the aggregate Settlement is roughly 60% of maximum actual damages after trial. *Id.*

The fact that the Settlement provides for a prompt payment to claimants also favors approval of the settlement. *See Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB), 2016 WL 6542707, at *10 (D. Conn. Nov. 3, 2016) (stating "the guaranteed payment of the settlement amount … 'increases the settlement's value in comparison to some speculative payment of a hypothetically larger amount years down the road,' had the parties proceeded with litigation") (citing *In re Global Crossing Securities and ERISA Litig.*, 225 F.R.D. 436, 461 (S.D.N.Y. 2004)). Thus, factors eight and nine weigh in favor of preliminary approval.

V. THE COURT SHOULD APPROVE THE NOTICE PLAN

The standard for the adequacy of settlement notice in a class action is that of reasonableness. *See Wal–Mart*, 396 F.3d 96 at 113–14. "Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y.2008).

Pursuant to Rule 23(c)(2)(B), the Notice must provide:

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
>
> (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 requests exclusion;
>
> (vi) the time and manner for requesting exclusion; and
>
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

The proposed forms of Notice, attached as Exhibits 2 and 4 to the SA, satisfy each of these requirements because the form is written in plain English and organized so that Class Members can clearly understand the terms of the Settlement and what they will receive if it is ultimately approved. They clearly describe the terms of the Settlement, inform the Class Members about the allocation of attorneys' fees and costs, and provide specific information regarding the date, time, and place of the final approval hearing and Class Members' ability to object and exclude themselves from the settlement. *See* Ex. 2 of the SA.

Here, as in many similar consumer class actions, actual notice to each class member is not feasible because Defendant does not have records showing the people that purchased the Covered Products, much less their contact information. *See In re Initial Pub. Offering Securities Litig.*, 671 F. Supp. 2d 467, 488 n. 159 (S.D.N.Y. 2009) (Finding "the Second Circuit has held that 'each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members.' *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir.1988).") Accordingly, Plaintiff has retained JND to develop and (with the

Court's approval) execute a notice plan that is based on the demographics of the Class and is calculated to provide notice of the Settlement to over 70% of Class Members. *See* Exhibit 4 (the "Notice Plan") of the SA. JND has successfully served as the Claim Administrator for a number of other consumer class action settlements implementing a similar notice plan. *See* http://www.jndla.com/cases/class-action-administration. Accordingly, Plaintiff requests the Court's approval and appointment of JND as the Claims Administrator for the Settlement and the proposed Notice Plan.

The Notice Plan proposes placing banner advertisements in the newsfeed of Facebook as 78% of Aveeno customers visit Facebook within 30 days and are 22% more likely to visit Facebook as compared to the general population. *See* Ex. 2 of the SA. The Notice Plan will also use Google Ad Display Network that can reach 90% of internet users. *Id.* When keywords relating to the case are searched, a paid ad with a hyperlink to the case website may appear on the search engine results page. *Id.* The Notice Plan also calls for a press release issued nationwide to 11,000 English and 150 Spanish media outlets, which will assist in getting "word of mouth" out about the litigation. *Id.* In addition, JND will provide a Settlement Website where class members can get additional information and fill out online claim forms, as well as toll-free telephone support. *See* the SA at 10-11. JND is highly confident that the proposed Notice Plan will be both effective in reaching the great majority of class members, and efficient in terms of cost to the class. All in all, the Notice Plan constitutes the best notice practicable under the circumstances, satisfying the requirements of Rule 23(c). Therefore, Plaintiff requests that the Court approve the forms of Notice attached as Exhibit 2 to the SA.

VI. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING

The last step in the approval process is a final approval hearing at which the Court may hear all evidence and argument necessary to make its settlement evaluation. Proponents of the Settlement may explain the terms and conditions of the Settlement Agreement and offer argument in support of final approval. The Court will determine after the final approval hearing whether the settlement should be approved, and whether to enter a final order and judgment under Rule 23(e).

Plaintiff requests that the Court schedule further settlement proceedings pursuant to the schedule set forth below:

Action	Date
Preliminary Approval Order Entered	At Court's Discretion
Notice Deadline	Within 45 days following entry of Preliminary Approval Order
Exclusion/Objection Deadline	No later than 30 days before the date set for the Final Approval Hearing
Motion for Final Approval and Attorneys' Fees and Expenses	No later than 21 days before the date set for the Final Approval Hearing
Deadline to Submit Claims	No later than 14 days prior to the date set by the Court for the Final Approval Hearing
Final Approval Hearing	No earlier than 90 days after the Notice Deadline
Final Approval Order Entered	At the Court's discretion

VII. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court (1) preliminarily certify the Settlement Class for settlement purposes only, appoint Heidi Langan as Class

Representative, and appoint Izard, Kindall & Raabe, LLP as Class Counsel; (2) preliminarily approve the proposed Settlement Agreement; (3) approve the form and manner of Notice to the Settlement Class; and (4) set a Settlement Hearing date for final approval of the proposed Settlement.

Dated: December 17, 2018

Plaintiff,

By: */s/ Robert A. Izard*

Robert A. Izard
Mark P. Kindall
Seth R. Klein
Izard, Kindall & Raabe, LLP
29 South Main Street Suite 305
West Hartford, CT 06107

Nicole Anne Veno
Law Office of Nicole A. Veno, LLC
573 Hopmeadow Street Simsbury, CT 06070