IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

KARRY PEREZ, JOHN FITZGERALD, KATHY CAPRON, MARK WADE, JESSICA SHROPSHALL, and HADEL TOMA, on behalf of themselves and all others similarly situated, Plaintiffs, vs. BRITAX CHILD SAFETY, INC., Defendant.	Civil Action No. 0:19-cv-01735-JMC **JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Plaintiffs Karry Perez, John Fitzgerald, Kathy Capron, Mark Wade, Jessica Shropshall, and Hadel Toma, on behalf of themselves and others similarly situated ("Plaintiffs"), and Defendant Britax Child Safety, Inc. hereby jointly move this Court to:

1. Certify the Settlement Class for purposes of settlement only;
2. Preliminarily approve the Settlement Agreement;
3. Appoint Gary E. Mason of Mason Lietz & Klinger LLP, Charles Schaffer of LevinSedran & Berman LLP, and D. Aaron Rihn of Robert Pierce & Associates, P.C. as Settlement Class Counsel;
4. Appoint Plaintiffs Karry Perez, John Fitzgerald, Kathy Capron, Mark Wade, Jessica Shropshall, and Hadel Toma as Class Representatives;

5. Approve the direct email notice process described by the parties in the Settlement Agreement, including the timing for such notice;
6. Approve the Notice Plan in the form and manner proposed as set forth in the Settlement Agreement;
7. Set a hearing date and schedule for final approval of the settlement and consideration of Settlement Class Counsel's motion for award of fees, costs, expenses, and service awards; and
8. Stay all proceedings in this action pending the hearing for final approval of the settlement.

This Motion is based upon: (1) this Motion; (2) the Memorandum of Points and Authorities in Support of Joint Motion for Preliminary Approval of Class Action Settlement; (3) the Settlement Agreement; (4) the Declaration of Plaintiffs' Counsel Gary E. Mason filed herewith; (5) the Declaration of Plaintiffs' Counsel Aaron Rihn filed herewith; (6) the Declaration of Plaintiffs' Counsel Charles Schaffer filed herewith; (7) the records, pleadings, and papers filed in this action; and (8) such other documentary and oral evidence or argument as may be presented to the Court at or prior to the hearing of this Motion.

Dated: June 15, 2020

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

KARRY PEREZ, JOHN FITZGERALD, KATHY CAPRON, MARK WADE, JESSICA SHROPSHALL, and HADEL TOMA, on behalf of themselves and all others similarly situated, Plaintiffs, vs. BRITAX CHILD SAFETY, INC., Defendant.	Civil Action No. 0:19-cv-01735-JMC **MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Plaintiffs Karry Perez, John Fitzgerald, Kathy Capron, Mark Wade, Jessica Shropshall, and Hadel Toma, on behalf of themselves and all others similarly situated ("Plaintiffs"), and Defendant Britax Child Safety, Inc. (collectively, the "Parties") submit this Memorandum in Support of Joint Motion for Preliminary Approval of Class Action Settlement.

I. INTRODUCTION

This class action arises out of the manufacture and sale of certain BOB Strollers manufactured prior to September 30, 2015 ("BOB Strollers")[1] as to which Plaintiffs have alleged product defect and increased risk of injury to both children and adults. Since acquiring BOB Trailers Inc. in 2011, Defendant Britax Child Safety, Inc. ("Britax" or "Defendant") has designed, manufactured and sold BOB Strollers, including those at issue in this case. Plaintiffs brought this case on behalf of themselves and all persons who purchased a BOB Stroller in the United States

[1] See class definition below.

that was manufactured prior to September 30, 2015, seeking to recover damages and/or injunctive relief.

As the case progressed, and information was exchanged with Defendant, Plaintiffs' Counsel determined that, since the injuries allegedly caused by the BOB Stroller were both infrequent and relatively minor and could be avoided if instructions are followed, the best remedy that could be obtained for the proposed class would be additional optimization of the BOB Gear Education Campaign, a program that Britax had agreed to implement as part of a settlement with the Consumer Product Safety Commission (the "CPSC"). In this manner, the safety of the greatest number of Class Members would be further protected. At the same time, the proposed Settlement will not release any absent class member's claim for personal injury.

Accordingly, and in reliance on the following memorandum of points and authorities, the Declaration of Plaintiffs' Counsel Gary E. Mason, and the exhibits attached thereto, and the Declarations of additional proposed class counsel Charles Schaffer and D. Aaron Rihn, Plaintiffs and Britax respectfully request the Court preliminarily approve the Parties' Settlement Agreement and enter an order that:

(1) Certifies the Rule 23(b)(2) Settlement Class for purposes of settlement only;

(2) Preliminarily approves the Settlement Agreement;

(3) Appoints Gary E. Mason of Mason Lietz & Klinger LLP, Charles Schaffer of Levin Sedran & Berman LLP, and D. Aaron Rihn of Robert Pierce & Associates, P.C. as Settlement Class Counsel;

(4) Appoints Plaintiffs Karry Perez, John Fitzgerald, Kathy Capron, Mark Wade, Jessica Shropshall, and Hadel Toma as Class Representatives;

(5) Approves notice to be emailed to Settlement Class Members who have given Defendant consent to contact them via email (the "Notice") in a form substantially similar to that attached as Exhibit A to the Settlement Agreement;

(6) Directs Notice to be sent to the Settlement Class in the form and manner proposed as set forth in the Settlement Agreement;

(7) Sets a hearing date and schedule for final approval of the settlement and consideration of Settlement Class Counsel's motion for award of fees, costs, expenses, and service awards; and

(8) Stays all proceedings in this action pending the hearing for final approval of the settlement.

II. CASE SUMMARY

a. Factual Allegations

Defendant designs, manufactures, and sells child safety products, including car seats and strollers. ECF No. 1 ("Compl.") ¶¶ 12-13. In 2011, Defendant acquired BOB Trailers Inc. (now "BOB Gear"), a company that designed, manufactured, and sold trailers and strollers. *Id.* ¶ 14. After the acquisition, Defendant continued to design, manufacture and sell BOB Strollers. *Id.* ¶ 15.

The strollers at issue here were manufactured and imported between 1997 and September 2015, with 493,000 BOB Strollers imported into the United States between December 2011 and September 2015 and an additional unknown number of BOB Strollers manufactured and imported before that time. *Id.* at ¶ 16. The BOB Strollers at issue include IRONMAN, IRONMAN Duallie, IRONMAN Sport Utility Stroller, Revolution, Revolution 12" AW, Revolution CE, Revolution Duallie, Revolution Duallie 12" AW, Revolution FLEX, Revolution FLEX Duallie, Revolution

PRO, Revolution PRO Duallie, Revolution SE, Revolution SE Duallie, Sport Utility Stroller, Sport Utility Stroller D'Lux, Sport Utility Stroller Duallie, Stroller Strides, Stroller Strides Duallie, Stroller Strides Fitness Stroller, Stroller Strides Fitness Stroller Duallie (hereinafter collectively referred to as "BOB Strollers" or "Strollers"). *Id.* at ¶ 19. BOB Strollers were sold both direct from the manufacturer and by retailers and have not been manufactured by Defendant since at least September 30, 2015. *Id.* at ¶ 16.

BOB Strollers are designed with a single front wheel marketed as making the strollers suitable for jogging and for use in rough terrain. *Id.* at ¶ 17. The wheel is attached to the body of the stroller by a "fork" that holds the front wheel and axle, which includes a "quick release" mechanism (hereafter the "Mechanism") that allow users to quickly and easily remove the front wheel. *Id.*

Plaintiffs allege the Mechanism is defectively designed and manufactured, allowing use of the stroller without the front wheel being properly secured, which purportedly can allow the wheel to detach unexpectantly while the stroller is being used. *Id.* at ¶ 18. Plaintiffs further allege that, when the front wheel detaches, the stroller can tip forward, causing the fork to dig into the ground in front of the stroller and cause injury both to any child in the stroller and the person pushing it. *Id.*

The CPSC filed an administrative complaint against Defendant in February 2018. *Id.* at ¶ 22. In November 2018, the CPSC and Defendant entered into an agreement providing that Defendant would (1) engage in an information campaign to further instruct consumers as to the proper use of the BOB Strollers' quick release and (2) provide incentives to promote the effectiveness of the campaign, such as free parts or discounts, to consumers who purchased a stroller manufactured between January 1, 2009 and September 30, 2015. *Id.* at ¶ 23. A subsequent

Washington Post article reported that the information campaign agreed to by the CPSC simply did not reach consumers: for example, an approximate nine-minute Educational Video issued as part of the campaign in January 2019 was claimed to have been viewed only 195 times over the course of three months. Declaration of Gary E. Mason ("Mason Dec."), at ¶ 10.

Plaintiffs allege that they reasonably relied on Defendant's statements when purchasing BOB Strollers, and further allege that the Mechanism, by failing to work properly, failed to conform to Defendant's representations. Compl. at ¶¶ 31, 33. Plaintiffs contend that they, and proposed Class Members, sustained damages as a direct and proximate result of Defendant's conduct and BOB Strollers' defects. *Id.* at ¶ 34.

Plaintiffs brought three nationwide counts for unjust enrichment, breach of express warranty, and breach of implied warranty of merchantability. Additionally, Plaintiffs brought state specific counts on behalf of state subclasses for alleged violations of: the California Business and Professions Code § 17200, *et seq.*; the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*; the Michigan Consumer Protection Act, Mich. Comp. Laws Ann. § 445.903, *et seq.*; the Nevada Deceptive Trade Practices Act, N.R.S. § 598, *et seq.*; the New Hampshire Consumer Protection Act, N.H. Rev. Stat. Ann. § 358-A, *et seq.*; and the New Jersey Consumer Fraud Act , N.J. Stat. Ann. § 56:8-2 *et seq.* *See generally,* Compl.

b. Procedural Posture and Settlement Negotiations

Plaintiffs filed their Complaint on June 17, 2019. Mason Dec., ¶ 10. Defendant filed its Answer on August 19, 2019, denying any and all wrongdoing. ECF No. 13.

Plaintiffs and Defendant's Counsel met to discuss the case as well as potential settlement on August 27, 2019. Mason Dec. ¶ 12. Settlement negotiations between the parties continued for

months, with numerous calls and correspondence amongst Plaintiffs' Counsel as well as with Counsel for Defendant. *Id.* at ¶ 13.

During the settlement negotiations, Defendant provided Counsel for Plaintiffs with information and statistics regarding consumer response rates to the BOB Gear Information Campaign initiated by Britax pursuant to its settlement agreement with the CPSC. *Id.* at ¶ 15. This information demonstrated that the consumer response was robust. *Id.* Owners of the BOB Strollers who were directed to and watched the Educational Video often did not request an incentive (e.g., replacement part or discount), the implication being that they were satisfied with the Educational Video and did not need to elect further action. *Id.* As a result of the exchange of information with counsel for Britax, Counsel for Plaintiffs concluded that it would be in the best interest of the class to further optimize the BOB Gear Information Campaign to help ensure that the greatest number of class members were aware of the Educational Video. *Id.*

In early March 2020, the Parties reached a tentative agreement with regard to the terms of the settlement; the Settlement Agreement was finalized and signed on June 10, 2020 *Id.* at ¶ 16.

III. SUMMARY OF SETTLEMENT

a. The Settlement Class

As part of the Settlement Agreement, the Parties agreed to certification of a Rule 23(b)(2) class. Settlement Agreement, Mason Dec., Ex. A ("Agr."), § III.A. The Settlement Class is defined as all persons who owned a BOB Gear Jogging Stroller in the United States that was manufactured on or before September 30, 2015. Agr. § I.T. The Settlement Class excludes: (a) counsel for Plaintiffs; (b) counsel for Britax; and (c) Britax's employees, shareholders, distributors, investors, owners, consultants, agents, servants, employees, representatives, joint venturers, general and limited partners, officers, directors. *Id.*

b. Settlement Benefits

The Settlement Agreement negotiated on behalf of the class provides that Defendant will implement a mutually agreeable protocol to optimize web searches for terms related to the BOB Gear Information Campaign in order to make the link to the Educational Video or modified Educational Video on BOBGear.com or Britax.com appear on or near the first page of Google search results. Agr. § III.B. The proposed protocol will be provided to Settlement Class Counsel for approval within 30 days of entry of the Final Approval Order. Agr. § III.C. Defendant has agreed to implement the protocol until March 31, 2021. Agr. § III.B.

c. Notice

Notice shall be provided to Settlement Class Members via direct email to every Settlement Class Member who has provided Defendant with consent to be contacted via email. Agr. § IV.B. The email notice provided to Settlement Class Members will include links to both the Settlement website and the Educational Video approved as part of the BOB Gear Information Campaign. *Id.* Britax will establish a toll-free telephone number that will provide the Settlement Class with access to pre-recorded information regarding the Settlement website page. *Id.* Further, no later than 30 days after the Court enters a Preliminary Approval Order, Defendant will establish a webpage, in both English and Spanish, that describes the Settlement Agreement and that contains the Preliminary Approval Order, the Notice, the Settlement Agreement, and other relevant information regarding the Lawsuit as shall be ordered by the Court. *Id.*

Defendant will also provide notice to appropriate federal and state officials as required under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, within ten days after the filing of the Settlement Agreement. Agr. § IV.A.

d. Objections

The parties agreed to a 30-day period, starting the date Notice commences, within which any objectors to the Settlement Agreement must provide notice of their objection. Agr. § IV.C. Any Settlement Class Member wishing to object to the Settlement Agreement can submit a written notice of his or her objection stating: (i) the objector's full name, address, telephone number, and email address (if any); (ii) information identifying the objector as a Settlement Class Member, including proof that the objector is a member of the Settlement Class (e.g., a photo of the manufacturing codes on the relevant BOB Stroller); (iii) a written statement of all grounds for the objection, accompanied by any legal support for the objection the objector believes applicable; (iv) the identity of all counsel representing the objector; (v) a statement whether the objector and/or his or her counsel will appear at the Final Fairness Hearing; (vi) the objector's signature and the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation); and (vii) a list, by case name, court, and docket number, of all other cases in which the objector and/or the objector's counsel has filed an objection to any proposed class action settlement within the last three years. *Id.* Notice must be filed with the Clerk of Court and served concurrently on Proposed Class Counsel Gary E. Mason, Mason Lietz & Klinger LLP, 5101 Wisconsin Avenue NW, Ste. 305, Washington, DC 20016; and counsel for Defendant, Lori B. Leskin, Arnold & Porter Kaye Scholer LLP, 250 West 55th Street, New York, NY 10019-9710. *Id.*

e. Releases

Under the terms of the Settlement Agreement, Defendant will obtain a release of any further liability or obligation to Plaintiffs and absent Settlement Class Members that arise or could have arisen out of the facts pleaded in Plaintiffs' Complaint. Agr. § VII.A. The release expressly

exempts the claims of absent class members for personal injury and personal property damage that may arise from their use of the BOB Strollers. Agr. § VII.B.

IV. LEGAL DISCUSSION

a. The Settlement Class Should be Preliminarily Approved.

To be certified, a proposed Settlement Class must meet the requirements set forth under Rule 23(a) and one of the subsections of 23(b). *Gunnel v. Healthplan Servs., Inc.*, 348 F. 3d 417, 423 (4th Cir. 2003). The policy in the Fourth Circuit is "'to give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case best serve the ends of justice for affected Parties and . . . promote judicial efficiency.'" *Id. quoting In re A.H. Robbins*, 880 F.2d 709,740 (4th Cir. 1989) (abrogated on separate grounds by *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 591 (1997)).

Here, the Parties seek certification of the Settlement Class under Rule 23(b)(2). As such, they must demonstrate that the Class meets the requirements of both Rule 23(a) and 23(b)(2): (1) the proposed class is so numerous as to make joinder of all members impracticable; (2) there are questions of law or fact common to the class; (3) the claims and defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the defendant has acted or refused to act on grounds that apply generally to the class as a whole so that final injunctive or declaratory relief is appropriate. Fed. R. Civ. Proc. 23. When considering a request for a settlement-only class certification, a district court need not inquire as to the manageability of a case at trial, as the proposal is that there be no trial. *Amchem Prods.* 521 U.S. at 620.

i. The proposed class is sufficiently numerous.

There is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied. *Kelly v. Norfolk & W. Ry. Co.*, 584 F.2d 34, 35 (4th Cir. 1978). The proposed class here—consisting of hundreds of thousands of owners of BOB Strollers—clearly meets Rule 23(a)'s numerosity requirement. Fourth Circuit courts have upheld certification of much smaller classes. *See Gunnells*, 348 F.3d at 456 (declining to overturn the district court's determination that subclasses with 11 members and 21 members, respectively, met the numerosity requirement). Joinder of the hundreds of thousands of individuals who would be part of the Settlement Class here is clearly impractical, and the numerosity prong is thus satisfied.

ii. Questions of law and fact are common to the class.

Commonality requires Plaintiffs to demonstrate "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The threshold for commonality under Rule 23(a)(2) is a low one: there need be only a single issue common to the class. *Soutter v. Equifax Information Servs., LLC*, 307 F.3d 183, 199 (2015), *citing Cent. Wesleyan Coll. v. W.R. Grace & Co*., 143 F.R.D. 628, 636 (D.S.C. 1992), aff'd 6 F.3d 177 (4th Cir. 1993). Plaintiffs meet the commonality requirement of Rule 23(a)(2) by alleging a defect common to all BOB Strollers at issue. Plaintiffs allege the Mechanism on the BOB Strollers is defectively designed and manufactured, allowing use of the stroller without the front wheel being properly secured, which purportedly can allow the wheel to detach unexpectantly while the stroller is being used. Thus, Plaintiffs allege BOB Strollers are not safe to operate as they are marketed. Specific common questions raised by these facts include but are not limited to:

- Whether Defendant falsely, deceptively and/or misleadingly misrepresented BOB Strollers as being high-quality, safe, and reliable;

- Whether Defendant's alleged misrepresentations and/or omissions were reasonably likely to deceive a reasonable customer;
- Whether Defendant knowingly made false, misleading statements and omitted material information in connection with a consumer sale;
- Whether the representations and claims Defendant made regarding BOB Strollers were unfair, deceptive and misleading to consumers; and
- Whether Defendant's acts violated consumer fraud and unfair trade practice statutes.

These common questions, and others alleged by Plaintiffs in their Complaint, are central to the causes of action brought and can be addressed on a class wide basis. Thus, Plaintiffs have met the commonality requirement of Rule 23.

iii. Plaintiff's claims and defenses are typical to those of the Settlement Class.

A plaintiff will meet Rule 23(a)'s typicality requirement where that plaintiff "establishes that his claims or defenses are 'typical of the claims or defenses of the class.'" *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). While a plaintiff's claims and those of class members need not be perfectly identical or aligned, they must not be so different that the claims of the class will not be advanced by a plaintiff's proof of his or her own individual claim. *George v. Duke Energy Retirement Cash Balance Plan*, 259 F.R.D. 225, 232 (D.S.C. 2009), *citing Deiter*, 436 F.3d at 466-467.

Here, Plaintiffs' claims are typical of those of other Settlement Class Members because, like Settlement Class Members, Plaintiffs each purchased and used a BOB Stroller with the Mechanism that is purportedly defective. Thus, the typicality requirement is met.

iv. Plaintiff will adequately protect the interests of the class.

Representative Plaintiffs must be able to provide fair adequate protection for the interests of the class. That protection involves two factors: 1) whether the plaintiff has any interest antagonistic to the rest of the class; and 2) whether plaintiff's counsel is qualified, experienced and generally able to conduct the proposed litigation. *George*, 259 F.R.D. at 232; *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 325, 330 (D.S.C. 1991).

Here Plaintiffs' interests are aligned with those of the Settlement Class in that they seek injunctive relief in the form of further optimization of the BOB Gear Information Campaign. Because Plaintiffs here do not seek redress for personal injury and have specifically exempted the personal injury claims of absentee Settlement Class Members from the negotiated release, their interests cannot be said to be antagonistic to those of the Settlement Class.

Further, counsel for Plaintiff have decades of combined experience as vigorous class action litigators and are well suited to advocate on behalf of the class. *See* Mason Dec., ¶ 4, Ex. B; Declaration of Charles Schaffer ("Schaffer Dec."), ¶¶ 2-3, Ex. A; Declaration of D. Aaron Rihn ("Rihn Dec."), ¶¶ 2-3, Ex. A.

v. The Settlement Class satisfies the requirements of Rule 23(b)(2).

Parties seeking certification under Rule 23(b)(2) must show that a defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole. Simply stated, Rule 23(b)(2) certification is proper where "members of the proposed class would benefit from the injunctive relief." *Cuming v. S.C. Lottery Comm'n*, No. 3:05-cv-03608-MBS, 2008 WL 906705, at *6 (D.S.C. Mar. 31, 2008).

Plaintiffs here allege that Defendant's marketing emphasized the suitability of BOB Strollers for jogging over varied terrain, and omitted warnings that would help ensure the safe use

of BOB Strollers. The injunctive relief agreed to by the Parties in the Settlement Agreement—namely further optimization of the BOB Gear Information Campaign, and an extension of the time for which an instructional video will be linked to web searches—will benefit the class as a whole because it will further provide easily accessible information to users of BOB Strollers about the safe operation of their strollers in accordance with its instructions and warnings. While Defendant maintains that it has always acted in compliance with the law, the fact that the Settlement modifies Defendants' conduct as to the Settlement Class as a whole makes it appropriate for certification under Rule 23(b)(2). *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) ("The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'") (citation omitted).

Thus, the Settlement Class will benefit from the injunctive relief, and Plaintiffs have met the requirements of Rule 23(b)(2).

b. The Settlement Terms Should be Approved as Fair, Adequate, and Reasonable.

The Court may approve a settlement after a hearing on finding that the settlement "fair, adequate, and reasonable to Class Members." Fed. R. Civ. P. 23(e)(2). Approval of a class action settlement is committed to the "sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in light of the relevant circumstances." *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001). However, "there is a strong initial presumption that the compromise is fair and reasonable." *S.C. Nat'l Bank*, 139 F.R.D. at 339. Courts have recognized that settlements, by definition, are compromises that need not satisfy every single concern of the plaintiff class, but may fall anywhere

within a broad range of upper and lower limits. *Id.*, *citing Alliance to End Repression v. Chicago*, 561 F. Supp. 537, 548 (N.D. Ill. 1982).

The primary concern for the Court in reviewing a proposed class settlement is to ensure that the rights of class members have received sufficient consideration in settlement negotiations. *In re Jiffy Lube Sec. Litig*., 927 F.2d 155, 158 (4th Cir.1991). At the preliminary approval stage, the Court must make a determination as to the fairness, reasonableness, and adequacy of the settlement terms. Fed. R. Civ. P. 23(e)(2; *Manual for Complex Litigation (Fourth)* ("MCL"), § 21.632 (4th ed. 2004). The Fourth Circuit has bifurcated this analysis into consideration of the fairness of settlement negotiations and the adequacy of the consideration to the class. *In re Jiffy Lube*, 927 F.2d at 158-59. However, at the preliminary approval stage, the Court need only find that the settlement is within "the range of possible approval." *Horton v. Merrill Lynch, Pierce, Fenner & Smith*, 855 F. Supp. 825, 827 (E.D.N.C. 1994), *citing In Re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983).

i. The settlement negotiations were fair.

The Fourth Circuit has listed four factors that a court should consider in concluding whether a proposed settlement agreement was fair, and reached in good faith and without collusion: (1) the posture of the case at the time it settled; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the relevant experience of counsel. *S.C. Nat'l Bank*, 139 F.R.D. at 339, *citing In re Jiffy Lube*, 927 F.2d 1at 158-159.

The Settlement in this case is the result of a fair process. While the Parties were still in the early stages of litigation, Counsel for Plaintiffs had conducted a significant investigation before filing and had the benefit of litigating with the knowledge of the CPSC administrative proceedings that pre-dated the filing of Plaintiffs' complaint. Such circumstances made it possible for Counsel

for Plaintiffs to negotiate with a fulsome understanding of the BOB Strollers and the realm of potential remedies. Negotiations were drawn out, taking place over the course of a few months, and ultimately culminated in an agreement that will, if approved, lead to further optimization of the BOB Gear Information Campaign to further educate consumers as to the safe operation of BOB Strollers in accordance with its instructions and warnings.

Counsel for Plaintiffs relied not only on the CPSC matter, but also on their investigation and conversations with Plaintiffs, and combined decades of experience litigating consumer class actions. *See* Mason Dec., ¶ 4, Ex. B; Schaffer Dec., ¶ 3, Ex. A; Rihn Dec., ¶¶ 3, Ex. A. Counsel for Plaintiffs endorse the settlement as fair and adequate under the circumstances. *See* Mason Dec., ¶ 5; Schaffer Dec., ¶ 2; Rihn Dec., ¶ 2. Courts recognize that the opinion of experienced and informed counsel in favor of settlement should be afforded substantial consideration in determining whether a class settlement is fair and adequate. *See, e.g.*, *In re MicroStrategy Inc.*, 148 F. Supp.2d at 665; *Stewart v. Rubin*, 948 F. Supp. 1077, 1087 (D.D.C. 1996).

ii. The settlement terms are adequate and reasonable.

In analyzing the adequacy of a proposed settlement, the Court can consider such factors as: (1) the relative strength of the case on the merits, (2) any difficulties of proof or strong defenses the plaintiff and class would likely encounter if the case were to go to trial, (3) the expected duration and expense of additional litigation, (4) the solvency of the defendants and the probability of recovery on a litigated judgment, (5) the degree of opposition to the proposed settlement, (6) the posture of the case at the time settlement was proposed, (7) the extent of discovery that had been conducted, (8) the circumstances surrounding the negotiations, and (9) the experience of counsel in the substantive area and class action litigation. *See In re Jiffy Lube*, 927 F.2d at 159; *Clark v. Experian Information Solutions, Inc.*, 2004 WL 256433 (D.S.C. 2004).

1. *Plaintiffs' claims are heavily disputed and would encounter substantial defenses.*

Defendant has disputed Plaintiffs' claims since before the inception of this case. From the start of the CPSC's initial investigation, which ultimately resulted in a settlement, Defendant has vigorously denied wrongdoing. Should the case move forward in litigation, Plaintiffs would invariably face a number of difficult challenges including likely motions for summary judgment and the difficulties in getting and maintaining class certification on both a nationwide and state sub-class basis. Moreover, the longer that Plaintiffs litigate, the more time that will pass before resolution. These factors support the adequacy of the settlement. *See Temp. Servs., Inc. v. America Intern. Group, Inc.*, 2012 WL 4061537 at * 12 (D.S.C. Sept. 14, 2012) (finding that risks associated with continued litigation supported adequacy of settlement amount).

2. *Continuing litigation will result in significant an unjustifiable burdens on the Class, Defendant, and the Court.*

Aside from the potential that either side will lose at trial, the Parties anticipate incurring substantial additional costs in pursuing this litigation further. The level of additional costs would significantly increase as Plaintiffs began their preparations for the certification argument and if successful an inevitable interlocutory appeal attempt. Thus, the likelihood of substantial future costs favors approving the Settlement Agreement. *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 833 (E.D.N.C. 1994).

3. *Class Member reaction to the Settlement is not available at this time.*

Because Class Members have yet to receive notice of the Proposed Settlement, their reaction cannot yet be gauged. However, despite the size of the primary class, to date no consumer has filed or is pursuing his or her own individual claim for the claims resolved here.

4. *The case is at a proper posture for settlement.*

While litigation is still in its early stages, Plaintiffs have a complete understanding as to the issues they will face should litigation continue. Thanks in large part to the investigations of and publications by the CPSC, as well the extensive experience of Counsel and ongoing investigations and communications between proposed Settlement Class Counsel and Counsel for Defendant, Plaintiffs have reached a point where early settlement is not only fair and adequate but is the best means of providing prompt injunctive relief to the class.

Given this analysis and the possibility that Plaintiff and class members ultimately will not prevail on their claims at trial or on appeal, the *Jiffy Lube* factors weigh heavily in favor of the adequacy and reasonableness of the settlement.

c. The Proposed Notice Plan Meets Rule 23's Requirements.

Once preliminary approval of a settlement class is granted, 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." Fed. R. Civ. P. 23(e)(1)(B). "The court has complete discretion in determining what constitutes a reasonable notice scheme, both in terms of how notice is given and what it contains." 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1797.6 (3d ed. 2006). The manner of the settlement notice need only comply with due-process "reasonableness" requirements, which will vary based on the circumstances of the case. *See Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979).

Neither Rule 23 nor relevant case law requires individualized, mailed notice for a Rule 23(b)(2) settlement class especially where, as here, there are nearly hundreds of thousands of class members receiving injunctive relief, and where class members do not have the opportunity to opt out of the settlement and are not required to take any affirmative action to receive the benefits of the settlement. Federal Rule of Civil Procedure 23(c)(2)(A) is explicit that even a litigated Rule

23(b)(2) class does not require any notice. Fed. R. Civ. P. 23(c)(2)(A). "For any class certified under Rule 23(b)(1) or (2), the court *may* direct appropriate notice to the class.") (emphasis added); *see also* Annotated Manual for Complex Litigation § 21.311 (4th ed. 2004) (stating that notice in Rule 23(b)(2) actions is "within the district judge's discretion" and that "[i]f notice is appropriate, it need not be individual notice because, unlike a Rule 23(b)(3) class, there is no right to request exclusion from Rule 23(b)(1) and (b)(2) classes"). Unlike class actions certified under Rule 23(b)(3), which require individual notice to class members and the opportunity to opt out of the settlement, class actions certified under Rule 23(b)(2) ordinarily do not require individual notice to class members because there is greater cohesion of interests in a (b)(2) class, as individual damage claims are not at stake. *See Assn. for Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002). "Notice (and exclusion opportunity) is not required in Rule 23(b)(2) actions."); 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1793 (3d ed. 2006) (stating that while Rule 23(b)(3) classes require mandatory notice, notice is not as important for Rule 23(b)(2) classes "because the class typically will be more cohesive"); Fed. R. Civ. P. 23 advisory committee's note (2003 Amendments) (explaining that "[t]he authority to direct notice to class members in a (b)(1) or (b)(2) class should be exercised with care" because there is no right to request exclusion and because of the potentially "crippling]" cost of providing notice).

Here, anticipating that notice is appropriate in this case, the Parties have negotiated a direct email notice to be sent to every BOB Stroller purchaser who had previously consented to receive emails from Defendant. In doing this, the Parties go above and beyond the requirements of due process and Rule 23(b)(2). The email notice will consist of language mutually agreed upon by the Parties and will direct Settlement Class Members to a settlement website where they can access a description the Settlement Agreement as well as the Notice, the Settlement Agreement, the

Preliminary Approval Order, and other relevant information regarding the Lawsuit as shall be ordered by the Court. The email will also contain a link directing Settlement Class Members to the Educational Video, approved by the CPSC, designed to further facilitate safe operation of the BOB Strollers in accordance with instructions and warnings.

V. CONCLUSION

Plaintiffs have negotiated a fair, adequate, and reasonable settlement that will provide Settlement Class members with injunctive relief. For this and the above reasons, the Parties respectfully request this Court grant their Joint Motion for Preliminary Approval of Class Action Settlement.

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Respectfully submitted,

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