UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: DEVA CONCEPTS PRODUCTS LIABILITY LITIGATION This Document Relates To: All Cases	Master File No. 1:20-cv-01234-GHW

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, PROVISIONAL CERTIFICATION OF SETTLEMENT CLASS, APPOINTMENT OF SETTLEMENT CLASS COUNSEL AND CLASS REPRESENTATIVES, APPROVAL TO DISSEMINATE CLASS NOTICE, APPOINTMENT OF THE SETTLEMENT ADMINISTRATOR, AND ADOPTION OF A SCHEDULE FOR THE FINAL APPROVAL PROCESS

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INTRODUCTION

Plaintiffs[1] allege that Defendant Deva Concepts, LLC ("Defendant") designed, manufactured, and sold DevaCurl haircare products (the "Products") that allegedly caused certain users to suffer personal injury including hair loss and/or scalp irritation. Plaintiffs also allege that statements made in connection with the marketing of the Products were false and misleading. The Settlement Agreement that Plaintiffs now submit for preliminary approval provides excellent relief for the Settlement Class Members and is the achievement of months of vigorous, arm's-length negotiation with the guidance of an experienced mediator Honorable Diane Welsh (Ret.).

After approximately six months of settlement negotiations, the Parties agreed on a Settlement that requires Defendant to establish a non-reversionary Settlement Fund of $5.2 million and allows eligible Settlement Class Members to make either: (1) a Tier 1, Undocumented Minor Adverse Reaction and Economic Loss Claim, for a one-time payment of up to $20 for claims of minor personal injury after using DevaCurl or for alleged false statements regarding DevaCurl; or (2) a Tier 2, Documented Significant Adverse Reaction Claim up to $19,000 (up to $18,000 per Claimant for injuries, and up to $1,000 for provable expenses) for claimed adverse reactions causing significant personal injuries such as hair loss or scalp irritation and emotional distress that accompanied such alleged injuries and any claims of misleading marketing.

The Parties reached this Settlement after conducting significant settlement-related discovery and engaging in extensive arm's-length negotiations, including two, day-long in-person mediation sessions with Honorable Dianne Welsh (Ret.) and numerous subsequent communications between each Party and Judge Welsh, amounting to approximately six months of

[1] Capitalized terms shall have the meaning that the Class Settlement Agreement ascribes to them. *See generally* Class Settlement Agreement (filed as Exhibit A to the Declaration of Gary E. Mason).

settlement negotiations. The Settlement is an excellent result because it provides the Settlement Class with multiple forms of meaningful monetary relief, while taking into account the substantial risks the Parties would face if the litigation progressed. Accordingly, Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement so that notice can be provided to the Members of the Settlement Class, and that the Court schedule a Final Approval Hearing to consider final approval of the Settlement. *See* FED. R. CIV. P. 23(e).

Plaintiffs also respectfully request that the Court appoint them as Class Representatives for the Settlement Class and appoint Co-Lead Counsel Gary E. Mason and Charles E. Schaffer as Settlement Class Counsel. *See* FED. R. CIV. P. 23(g). The Court should also approve the robust Notice Program the Parties agreed to in the Settlement, as it meets the requirements of due process and is the best notice practicable under the circumstances. *See* FED. R. CIV. P. 23(c).

FACTUAL AND PROCEDURAL HISTORY

I. Summary of Plaintiffs' Claims

Plaintiffs allege that they were misled by Defendant's misrepresentations and omissions relating to the Products and would have purchased other haircare products if they had not been deceived by the misleading and deceptive marketing and/or labeling of the Products (Consol. Am. Compl. ¶ 156, ECF No. 79 ("CAC")), thereby avoiding both economic loss and personal injury.

Plaintiffs assert that despite Defendant's representations that its Products are safe and gentle and "free of sulfates, parabens, and silicones" and which can be used "to gently cleanse curls without stripping the natural oils they need to look healthy, bouncy and simply gorgeous" (*Id.* ¶ 3), the Products do not live up to these representations and promises. The CAC alleged that Defendant places a promise on the front label of the Products, in all capital letters where it cannot be missed by consumers, that they are "100% SULFATE PARABEN SILICONE FREE" (*Id.* ¶ 7)

as a way of assuring consumers that the Products are safer and less harsh than other haircare products.

Plaintiffs allege that contrary to Defendant's marketing campaign, the Products are not safe, gentle or free of harsh ingredients. Unknown to Plaintiffs, several of the Products contained the formaldehyde donors, which are human carcinogens, toxicants and allergens. Defendant acknowledges in the Products ingredient list and on its website that it uses synthetic fragrances, "some of which are considered allergens." CAC ¶ 121. Plaintiffs also allege that some of the Products contain Propylene Glycol, and Cocamidopropyl Betaine, which may be allergens and irritants which can penetrate the skin and scalp and weaken the protein and cellular structure of the skin, which can cause hair loss. *Id.* ¶ 122. Thousands of customers who purchased and used the Products have reported hair loss, hair damage, thinning, balding, excessive shedding, and scalp irritation. *Id.* ¶¶ 127, 147. The CAC alleges that despite the presence of harmful ingredients and thousands of consumer complaints, Defendant continues to misrepresent that the Products as safe, gentle and superior to other haircare products while omitting material facts regarding known risks associated with their use.

Each of the Named Plaintiffs allege that: the Products they purchased were labeled as being "100% Sulfate Paraben Silicone Free" and formulated specifically for curly hair; the Products they purchased failed to contain a warning that the Products were a potential hazard to consumers and their hair; and they relied upon the representations and omissions made by Defendant and thus reasonably believed that the Products would be safe, gentle, and free of harsh ingredients that could adversely impact hair or scalp. CAC ¶¶ 35, 40, 45, 50, 55, 60, 65, 70, 75, 80, 85, 90.

Each Plaintiff further alleges that as a result of using the Products, they experienced an adverse reaction, such as substantial hair loss, dry and damaged hair, scalp irritation, and/or scalp

sores; suffered economic loss, personal injury, and, had the false, misleading, and deceptive representations and omissions about the Products not been made, they would not have been willing to purchase, or pay as much for, the Products. CAC ¶¶ 36–37, 41–42, 46–47, 51–52, 56–57, 61–62, 66–67, 71–72, 76–77, 81–82, 86–87, 91–92.

In early 2020, individuals across the country filed suit against Defendant alleging various state and nationwide causes of action related to allegations that certain of the Products cause hair loss and/or scalp irritation. The cases were consolidated by this Court, and Court-appointed leadership counsel filed a consolidated complaint on behalf of named Plaintiffs Wendy Baldyga, Marisa Cohen, Tami Nunez, Stephanie Williams, Erika Martinez-Villa, Tahira Shaikh, Lauren Petersen, Jody Shewmaker, Diana Hall, Alanna Hall and Marcy McCreary (collectively, "Plaintiffs") and nationwide classes and state subclasses of individuals who purchased DevaCurl hair products.

II. Procedural History

Between February 12, 2020 and April 9, 2020, eight class action lawsuits were filed against Defendant in the United States District Court for the Southern District of New York.[2] On April 21, 2020, the Court entered as an Order the Parties' Stipulation to Consolidate Actions and Set

[2] *Dixon v. Deva Concepts, LLC*, No. 1:20-cv-01234-GHW ("*Dixon*") (filed Feb. 12, 2020); *Ciccia v. Deva Concepts, LLC*, No. 1:20-cv-01520-GHW ("*Ciccia*") (filed Feb. 20, 2020); *Schwartz v. Deva Concepts, LLC*, No. 1:20-cv-06157-GHW ("*Schwartz*") (filed Feb. 25, 2020); *Bolash v. Deva Concepts, LLC*, No. 1:20-cv-02045-GHW ("*Bolash*") (filed Mar. 6, 2020); *Abdulahi v. Deva Concepts, LLC*, No. 1:20-cv-02047-GHW ("*Abdulahi*") (filed Mar. 6, 2020); *Reilly v. Deva Concepts, LLC*, No. 1:20-cv-02156-GHW ("*Reilly*") (filed Mar. 10, 2020); *Orner v. Deva Concepts, LLC*, No. 1:20-cv-02662-GHW ("*Orner*") (filed Mar. 30, 2020); and *Souza v. Deva Concepts, LLC*, No. 1:20-cv-02930-GHW ("*Souza*") (filed Apr. 9, 2020).

Scheduling Deadlines. ECF No. 25. Five additional related cases were filed in this Court and consolidated with this action.[3]

On June 12, 2020, certain counsel for Plaintiffs moved for appointment as Co-lead Counsel and for appointment on an Executive Committee. ECF No. 43. The Court heard oral argument on July 17, 2020. Min. Entry (July 17, 2020). The Court entered an Order on July 31, 2019, appointing Co-Lead Counsel. *See* Mem. Op. & Order Appointing Counsel, ECF No. 66.[4] On December 22, 2029, the Court held a conference on Defendant's proposed Motion to Dismiss and entered a briefing schedule. Defendant filed its Motion to Dismiss on January 28, 2021 (ECF No. 97), Plaintiffs filed a Memorandum in Opposition on March 26, 2021 (ECF No. 103), and Defendant replied on April 16, 2021 (ECF No. 196).

On January 6, 2021, the Parties conducted a day-long mediation before Judge Welsh via Zoom. Decl. of Gary E. Mason ¶ 5 ("Mason Decl."). While the case did not settle, the Parties made meaningful progress toward reaching a resolution, and they diligently continued arm's-length settlement discussions with Judge Welsh during the months after the session. *Id.* ¶ 9. As part of the continuing negotiations, the Parties participated in a second full-day mediation with Judge Welsh on February 9, 2021. Mason Decl. ¶ 5. These adversarial discussions involved the exchange

[3] *Crawley v. Deva Concepts, LLC*, No. 1:20-cv-03152-GHW ("*Crawley*") (filed Apr. 21, 2020, consolidated June 23, 2020); *Calabrese v. Deva Concepts*, *LLC*, No. 1:20-cv-03309-GHW ("*Calabrese*") (filed Apr. 28, 2020, consolidated June 25, 2020); *Przybylski v. Deva Concepts*, *LLC*, No. 1:20-cv-03630-GHW ("*Przybylski*") (filed May 8, 2020, consolidated June 26, 2020); *Biles v. Deva Concepts*, *LLC*, No. 1:20-cv-03537-GHW ("Biles"), filed May 6, 2020, consolidated June 30, 2020; and *Bell v. Deva Concepts*, *LLC*, No. 1:20-cv-07136-GHW ("*Bell*") (filed June 1, 2020, consolidated Nov. 5, 2020).

[4] The Court appointed Gary E. Mason, Charles E. Schaffer, Rachel Soffin and Melissa Weiner as Co-Lead Interim Class Counsel. Ms. Soffin and Ms. Weiner have both indicated their intent to withdraw as counsel in this litigation. Their former clients, including those who are serving as Class Representatives, have retained Mr. Mason to represent them in this matter.

of extensive information regarding the claims at issue and the Products sold by Defendant. *Id.* ¶¶ 7–8.

Ultimately, the Parties' settlement discussions resulted in the Settlement Agreement, which was executed on July 23, 2021.

THE TERMS OF THE PROPOSED SETTLEMENT

In exchange for a narrowly tailored release that is limited to the claims that were based upon the specific facts alleged in this case, Defendant has agreed to a non-reversionary payment of $5.2 million to a Common Fund. Settlement Agreement § II.C ("Agr."), filed herewith as Exhibit A to the Declaration of Gary E. Mason.[5] The Settlement's key terms are discussed below.

I. Defendant Agrees to Settlement Class Certification for Settlement Purposes Only.

Under the Agreement, the Parties agree to seek certification under Federal Rule of Civil Procedure 23(a) and (b)(3) of a Settlement Class defined as follows, for Settlement purposes only:

> All persons who purchased and/or used any of the Products in the United States between February 8, 2008 and such date that is thirty (30) days after the Preliminary Approval Date, excluding (a) any officers, directors or employees, or immediate family members of the officers, directors or employees, of Defendant or any entity in which Defendant has a controlling interest, (b) any legal counsel or employee of legal counsel for Defendant, (c) the presiding Judge in the Lawsuit, as well as the Judge's staff and their immediate family members, and (d) all persons who timely and properly exclude themselves from the Class as provided in the Settlement.

II. The Settlement Provides Substantial Monetary Relief for the Settlement Class

The Settlement negotiated on behalf of the Class provides for two categories of relief: (1) a $5,200,000 fund from which Settlement Class Members may make a claim for economic loss and either minor or undocumented adverse reactions *or* significant adverse reactions; and (2)

[5] Unless otherwise specified, all section (§) references herein are to sections of the Settlement Agreement.

equitable relief in the form of label changes to DevaCurl's product packaging. Agr. § II.D. Any and all funds will be distributed within sixty (60) days following the later of the Claims Completion Date or the Effective Date, and the Settlement Administrator will send Settlement benefit checks by mail or electronically if selected by Claimant, to eligible Claimants. Agr. § VII.K. For any remaining money in the Common Fund after distribution of (i) any Court-approved Notice and Administration Costs; (ii) any Attorneys' Fees and Costs awarded by the Court; (iii) any Service Award approved by the Court; (iv) any necessary taxes and tax expenses; and (v) Settlement benefits to Claimants, the Administrator shall pay any such remaining amount as a *cy pres* fund payment to the National Alopecia Areata Foundation. Agr. § VII.L. No funds will revert to Defendant. *Id.*

A. Monetary Relief

Settlement Class Members can submit a claim for one of two different categories of monetary relief. Agr. § VII.

1. Tier 1 – Undocumented Minor Adverse Reaction and Economic Loss Claims.

The first category of monetary relief, referred to in the Settlement Agreement as "Tier 1", makes available $750,000 for valid claimants to recover up to $20 each for minor adverse reactions and economic loss. Agr. § VII.A. Any Class Member who purchased at least one of the Products identified in the Settlement Agreement may submit a Tier 1 claim for a one-time payment of up to $20. *Id*. If Tier 1 Claims made against the Common Fund collectively exceed $750,000, payments made to each Class Member who submitted a valid Tier 1 Claim may be reduced on a *pro rata* basis. *Id*.

2. Tier 2 – Documented Significant Adverse Reaction Claims.

The second category of monetary relief, referred to in the Settlement Agreement as "Tier 2", allows Settlement Class Members to make a claim for up to $19,000 each for documented significant adverse reaction claims. Agr. § VII.B. Settlement Class Members who allege to have suffered personal injury—including hair loss, balding, and significant scalp irritation—as a result of using the Products, may make a claim against the Common Fund for reimbursement of actual and documented amounts spent to redress such alleged injuries, as well as an injury award designed to compensate the Settlement Class Member for any alleged injuries sustained, up to a maximum of $18,000 per Claimant for injuries and $1,000 for provable expenses. *Id*. To be eligible for a Tier 2 payment, Settlement Class Members must submit appropriate evidence documenting the injuries alleged to be suffered after using the Products, with their Claim Form. *Id*. The Settlement Administrator will adjust points to apply credits against a Claimants points where Defendant has already compensated or partially compensated the Claimant.

The amount awarded to each individual Claimant will be determined by the Settlement Administrator using an objective point system agreed upon by the Parties. Agr. § VII.F. The Settlement Administrator will determine the value of all Tier 2 claims, and award points based upon, without limitation, the sufficiency and credibility of the evidence provided, the severity of the hair loss, balding, thinning and/or scalp irritation, duration of the hair loss, balding, thinning, scalp irritation and amount of documented out-of-pocket expenses. *Id.* If necessary to evaluate a claim, the Settlement Administrator may issue a one-time request to the Claimant to provide any information that is missing or improperly submitted on the Tier 2 Claim. *Id*. The Settlement Administrator shall review any revised Tier 2 Claims and adjust the points assigned, if warranted. *Id*.

The final determination of all points awarded shall be subject to final review by Co-Lead Counsel and counsel for Defendant, either of whom may propose additional adjustments to points awarded. Agr. § VII.H. A Special Master, agreed upon by Co-Lead Counsel and counsel for Defendant, will review all claims and points allotted by the Settlement Administrator, the changes proposed by the Parties, if any, and approve a final allocation of points that shall be binding and non-appealable. *Id.* Each Claimant's final award allocation will be based upon the point value obtained by dividing the Net Settlement Amount by the total number of points allotted. *Id*.

B. Equitable Relief.

In addition to the Common Fund, Defendant has committed to providing equitable relief in the form of label changes. Specifically, all new products manufactured by Defendant after July 1, 2021, and for a period of at least two (2) years thereafter, will, where physically possible (taking into consideration packaging format and size), add to the labels (in U.S. and Canada) of all relevant Products language substantially similar to: "Scan for education, how-tos and product safety information." with an accompanying QR code directing consumers to a targeted landing page with further information consistent with that description. Agr. § II.D. The educational information, how-tos, and product safety information include content designed to provide customers with information allowing them to safely use DevaCurl products, without injury.

III. Defendants Will Pay Service Awards to the Class Representatives.

The Settlement Agreement calls for a reasonable Service Award to Plaintiffs in the amount of up to $600 per Plaintiff to be paid from the Common Fund, subject to approval of the Court. Agr. § V.B. The Service Award is meant to compensate Plaintiffs for their efforts on behalf of the Settlement Class, including assisting in Counsel's investigation of the case, reviewing pleadings, maintaining contact with Counsel, providing or helping to provide medical records and other

documents, remaining available for consultation throughout the mediation, answering Counsel's many questions, and reviewing the Settlement Agreement.

IV. Defendant Will Pay Attorneys' Fees and Litigation Costs and Expenses.

Plaintiffs will request Attorneys' Fees and Costs to be paid from the Common Fund in an amount not to exceed $1,733,160, or 33.33% of the Common Fund. Agr. § 5.A. Defendant has not agreed to or consented to the payment of Attorneys' Fees and Costs in any amount and reserves the right to oppose any application once filed. *Id.* Co-Lead Counsel agrees that they will not seek Attorneys' Fees and Costs from the Court that exceed those sums. *Id*.

LEGAL STANDARD

Federal Courts strongly encourage settlements, particularly in class actions and other complex matters where inherent costs, delays, and risks of continued litigation might otherwise outweigh any potential benefit the individual Plaintiff—or the Class—could hope to obtain. *See Cohen v. J.P. Morgan Chase & Co*., 262 F.R.D. 153, 157 (E.D.N.Y 2009) ("There is a strong judicial policy in favor of settlement, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.") (quoting *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 328 (S.D.N.Y. 2005), *aff'd in part & vacated in part*, 443 F.3d 253 (2d Cir. 2006)). "Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. There is a strong public interest in quieting any litigation; this is 'particularly true in class actions.'" *In re Luxottica Grp. S.p.A. Secs. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006).

As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice." Fed. R. Civ. P. 23(e)(1). In

particular, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment of the proposal." Fed. R. Civ. P. 23(e). Under Rule 23(e)(2), a court may finally approve a settlement binding class members "only after a hearing and only on a finding that it 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 . . . ; and (D) the proposal treats class members equitably relative to each other." *Id*.

In granting preliminary approval, courts direct notice to be provided to class members, who are given the opportunity to exclude themselves from or object to the settlement. *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). At the final fairness hearing, settlement class members may be heard by the court prior to its determination of whether to grant final approval of the settlement agreement and dismiss the case. *Id.*

The Settlement Agreement here warrants preliminary approval so that persons in the Settlement Class can be notified of the Settlement and provided an opportunity to voice approval, exclusion or objection.

ARGUMENT

I. The Settlement Class Should be Preliminarily Certified.

Plaintiffs here seek to certify, for settlement purposes, a Class defined as:

> All persons who purchased and/or used any of the Products in the United States between February 8, 2008 and such date that is thirty (30) days after the Preliminary Approval Date, excluding (a) any officers, directors or employees, or immediate family members of the officers, directors or employees, of Defendant or any entity in which Defendant has a controlling interest, (b) any legal counsel or

> employee of legal counsel for Defendant, (c) the presiding Judge in the Lawsuit, as well as the Judge's staff and their immediate family members, and (d) all persons who timely and properly exclude themselves from the Class as provided in the Settlement.

Rule 23(a) sets out four specific prerequisites to class certification: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law and fact common to the class; (3) the claims or defenses of the class representatives must typical of the claims or defenses of the class; and (4) the representative parties must fairly and adequately protect the interests of the class. Further, under Rule 23(b)(3), the Court must find that common questions of law or fact predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

In determining whether to preliminarily approve a class action settlement, courts must first determine that the settlement class, as defined by the parties, is certifiable under the standards of Rule 23(a) and (b). "Before certification is proper for any purpose—settlement, litigation, or otherwise—a court must ensure that the requirements of Rule 23(a) and (b) have been met." *Denney v. Deutsche Bank AG,* 443 F.3d 253, 270 (2d Cir. 2006) (concluding in part that "the District Court conducted a Rule 23(a) and (b) analysis that was properly independent of its Rule 23(e) fairness review"); *see also Lizondro-Garcia v. Kefi LLC*, 300 F.R.D. 169, 174 (S.D.N.Y. 2014).

Because a court evaluating certification of a class action that settled is considering certification only in the context of settlement, the court's evaluation is somewhat different than in a case that has not yet settled. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). In some ways, the court's review of certification of a settlement-only class is lessened: as no trial is anticipated in a settlement-only class case, the case management issues inherent in the

ascertainable class determination need not be confronted. *See id.* Other certification issues however, such as "those designed to protect absentees by blocking unwarranted or overbroad class definitions" require heightened scrutiny in the settlement-only class context "for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Id*. In this Circuit, courts have found that "[i]n deciding certification, 'courts must take a liberal rather than restrictive approach in determining whether the plaintiff satisfies these requirements and may exercise broad discretion in weighing the propriety of a putative class.'" *Cohen v. J.P. Morgan Chase & Co*., 262 F.R.D. at 158 (quoting *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 72 (E.D.N.Y. 2004)); *see also Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) ("Rule 23 is given a liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" in deciding whether to grant certification.). Because the Settlement Class meets all requirements for certification under Rule 23, this Court should grant Plaintiffs' request.

A. The Proposed Class is Sufficiently Numerous.

Numerosity requires "the class [be] so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). While there is no numerical requirement for satisfying the numerosity requirement, forty class members generally satisfies the numerosity requirement. *Alcantara v. CNA Mgmt., Inc*., 264 F.R.D. 61, 64 (S.D.N.Y. 2009); *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 370 (S.D.N.Y. 2007); *see also Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, the Parties have identified that approximately 665,000 individuals purchased or used the Products during the Class Period. Mason Decl. ¶ 10. The large number of persons in the Settlement Class clearly renders joinder impracticable. As such, the numerosity requirement is easily satisfied.

B. 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 meeting this prong is not high—commonality does not require that every question be common to every member of the class, but rather that the questions linking class members are substantially related to the resolution of the litigation and capable of generating common answers even where the individuals are not identically situated. *Lizondro-Garcia v. Kefi LLC*, 300 F.R.D. at 175 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). A plaintiff may meet the commonality requirement where the individual circumstances of class members differ, but "their injuries derive from a unitary course of conduct by a single system." *Marisol A. v. Giuliani*, 126 F.3d at 377 (per curiam). "Even a single common legal or factual question will suffice." *Jackson v. Bloomberg, L.P.*, 298 F.R.D. 152, 162 (S.D.N.Y. 2014) (quoting *Freeland v. AT & T Corp.*, 238 F.R.D. 130, 140 (S.D.N.Y. 2006)).

Here, the commonality requirement is met because Plaintiffs can demonstrate numerous common issues exist. For example, whether Defendant had exclusive knowledge that the Products and their ingredients were defective and harmful or potentially harmful to hair and the scalp and failed to disclose this to consumer or purchasers is a central question common across the entire class. Other specific common issues include but are not limited to:

- Whether the representations discussed herein that Defendant made about the Products were or are true, misleading, or likely to deceive a reasonable consumer;

- Whether the Products are defective such that they cause hair loss, scalp irritation or other adverse reactions;

- Whether Defendant omitted material facts and/or failed to warn reasonable consumers regarding the known risks and hazards such as hair loss or scalp irritation from using the Products;

- Whether the representations discussed herein were material to a reasonable consumer;
- Whether Defendant breached its warranty in the sale of the Products; and
- Whether Defendant engaged in false or misleading advertising.[6]

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

C. Plaintiffs' Claims and Defenses are Typical of the Class.

Typicality under Rule 23(a)(3) is satisfied where "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *In re Flag Telecom Holdings, Ltd. Secs. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (internal quotation omitted); *see also Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. 144, 155 (S.D.N.Y. 2002). The crux of the typicality requirement is to ensure that "maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Marisol A. v. Guiliani*, 126 F.3d 372, 376 (2d Cir. 1997).

Here, Plaintiffs' and Settlement Class Members' claims all stem from the same course of events—the use of Products that caused hair loss and/or scalp irritation—and the misleading labeling with which Defendant marketed its products. Thus, Plaintiffs' claims are typical of the Settlement Class Members' and the typicality requirement is satisfied.

[6] These common questions, and others, are described in Plaintiffs 'Consolidated Amended Complaint at ECF No. 79 ("CAC").

D. Plaintiffs' Will Provide Fair and Adequate Representation of the Class.

Representative plaintiffs must be able to provide fair and adequate representation for the class. To satisfy the adequacy of representation requirement, plaintiffs must establish that: (1) the there is no conflict of interest between the class representatives and other members of the class; and (2) the plaintiffs' counsel is qualified, experienced, and generally able to conduct the litigation. *Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. at 156 (quoting *Marisol A. v. Giuliani,* 126 F.3d at 378); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. at 624.

Here, Plaintiffs' interests are aligned with those of Settlement Class Members in that they seek relief for the same injuries arising out of their use of or the purchase of the same line of Defendant's Products. While the extent of injury does vary, the Settlement negotiated provides for a range of recoveries from up to $20 for economic loss and/or minor adverse reactions, to up to $19,000 for economic loss and significant adverse reactions claimed to be caused by the Products. Moreover, all users and potential users of the Products will be better protected and informed in the future due to the labeling changes made as a part of the Settlement.

Further, Co-Lead counsel here have decades of combined experience as vigorous class action litigators and are well suited to advocate on behalf of the class. *See* Mason Decl. ¶ 22.

E. Because Common Issues Predominate Over Individualized Ones, Class Treatment is Superior.

To show that common issue predominate, Plaintiffs must demonstrate that common questions of law or fact relating to the class predominate over any individualized issues. *Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. at 157. This requirement "tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. at 623. The predominance requirement is met when the defendant's wrongful acts involve common practices, or when the defendant has a common defense. *Fox v. Cheminova*,

213 F.R.D. 113, 130 (E.D.N.Y. 2003) (citing *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 166–67 (2d Cir. 1987)). Commonality is regularly met in cases where the focus is on the conduct of a defendant rather than that of individual plaintiff, making it particularly susceptible to common, generalized proof. *Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. at 159.

In this case, the key predominating questions are two-fold: (1) whether the Products cause hair loss and other adverse effects; and (2) whether Defendant improperly labelled and marketed its Products as safe for curly hair users. These two common questions, arising from Defendant's conduct, predominate over any individualized issues. Other courts have recognized that the types of common issues arising in near identical cases predominate over individualized issues. *See, e.g.*, *Friedman v. Guthy-Renker, LLC*, No. 2:14-cv-06009, 2016 WL 6407362 (C.D. Cal. Oct. 28, 2016) (finding individualized issues with respect to degree of hair loss insufficient to preclude class certification, and granting preliminary approval); *Reid v. Unilever U.S., Inc.*, No. 1:12-cv-06058 (E.D. Ill. July 29, 2014) (finding issues regarding the chemical composition of the subject hair product and the warranties regarding its use, safety, and purported effectiveness satisfied the predominance requirement, and granting preliminary approval).

Additionally, because the claims are being certified for purposes of settlement, there are no issues with manageability, and resolution of thousands of claims in one action is far superior to individual lawsuits. *Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

The resolution of hundreds of thousands of claims in one action is far superior to litigation through individual lawsuits. Class certification—and class resolution—guarantee an increase in judicial efficiency and conservation of resources over the alternative of individually litigating

hundreds of thousands of individual economic loss and personal injury cases arising out of the purchase and use of the *same* Products. Because the common questions of fact and law that arise from Defendants' conduct predominate over any individualized issues, a class action is the superior vehicle by which to resolve these issues, and the requirements of Rule 23(b)(3) are met. Accordingly, the class should be certified for settlement purposes.

II. The Terms of the Settlement are Fair, Reasonable, and Adequate.

After determining that certification of the Settlement Class is appropriate, the court must determine whether the Settlement Agreement itself is worthy of preliminary approval and of providing notice to the class. Under the current iteration of the Rule, notice is only justified where the parties can show that the court will "likely" be able to approve the proposed settlement. Fed. R. Civ. P. 23(e)(1)(i). Thus, consideration on preliminary approval requires an initial assessment of factors to be fully considered on final approval, namely that (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 . . . ; and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(A)–(D). In determining whether the relief provided is adequate, Courts must consider: (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). *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. 2019); Fed. R. Civ. P. 23(e)(2)(C)(i)–(iv).

Before the 2018 revisions to Rule 23(e), the Second Circuit had developed its own list of factors for consideration, finding preliminary approval of a proposed class action settlement is

warranted where it is the result of "serious, informed, non-collusive ("arm's length") negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies . . . and where the settlement appears to fall within the range of possible approval." *See Cohen v. J.P. Morgan Chase & Co*., 262 F.R.D. at 157; *In re Nasdaq*, 176 F.R.D. at 102; *Bourlas v. Davis L. Assocs.,* 237 F.R.D. 345, 354 (E.D.N.Y. 2006); *see also Manual for Complex Litigation* § 30.41. In making this determination, Second Circuit Courts considered nine *Grinnell* factors:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In re Initial Pub. Offering Secs. Litig., 260 F.R.D. 81, 88 (S.D.N.Y. 2009) (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (abrogated on other grounds)).

In reviewing the Settlement for substantive fairness, reasonableness, and adequacy, Plaintiffs will examine the Settlement for satisfaction of both the Rule 23 factors, as well as the *Grinnell* factors historically considered by Second Circuit Courts in order to demonstrate that the Settlement falls well within the "range of possible approval," is "likely" to be granted final approval, and warrants preliminary approval so that notice can issue to the class.

A. The Settlement Warrants Preliminary Approval Under Rule 23(e).

1. Class Representatives and Class Counsel have adequately represented the Settlement Class.

Under Rule 23(e)(2)(A), the first factor to be considered is whether the class representatives and class counsel—or here, Co-Lead Counsel—have adequately represented the class, including the nature and amount of discovery undertaken in the litigation. *See* Fed. R. Civ. P. 23(e)(2)(A), 2018 Advisory Committee Notes. Here, the Class Representatives have assisted in

Counsel's investigation of the case, reviewed pleadings, maintained contact with counsel, provided or helped to provide medical records and other documents, remained available for consultation throughout the mediation, answered counsel's many questions, and reviewed the Settlement Agreement. Mason Decl. ¶ 19. Plaintiffs do not have any conflicts with the proposed Class and have adequately represented them in the litigation.

Co-Lead Counsel has also adequately represented the class. As discussed *supra* at Section V.A.4, Co-Lead Counsel has extensive experience in class action litigation generally, and defective product cases in particular. *See* ECF No. 45, Exs. 1 (Mason Lietz & Klinger Firm Resume) & 2 (Levin Sedran & Berman Firm Resume). In negotiating the Settlement, Co-Lead Counsel was thus well positioned and able to benefit from years of experience and familiarity with the factual and legal bases for this case.

The Settlement was only reached after Co-Lead Counsel, by and through a combination of attorneys at their firms and other class members' counsel firms, interviewed and collected documents from hundreds of putative Class Members about their experiences with the Products, and conducted a survey of more than 5,000 putative Class Members Mason Decl. ¶ 7. Moreover, Co-Lead Counsel organized efforts and discussions with multiple experts who were retained and tested certain Products, designed case studies to further test the effects of Product use, and provided preliminary opinions and findings. *Id*. ¶ 8. Simultaneously, Defendant engaged in informal discovery and produced critical information regarding Product formulas, labeling, and sales. *Id*. ¶ 9. All the information collected and exchanged allowed Co-Lead Counsel to fully evaluate the claims and defenses at issue, as well as to assess the actual potential value of the case. *Id*. ¶ 10. As such, Co-Lead Counsel were well prepared and had "obtained sufficient information to understand

the claims and negotiate the settlement terms." *Castagna v. Madison Square Garden, L.P.*, No. 09-cv-10211, 2011 WL 2208614, at *6 (S.D.N.Y. June 7, 2011).

Although formal discovery had not been completed, such discovery is not required for a settlement to be adequate. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 87 (2d Cir. 2007) (finding "although no formal discovery had taken place, the parties had engaged in an extensive exchange of documents and other information"); *Castagna v. Madison Square Garden, L.P.*, 2011 WL 2208614, at *6 (approving settlement where no formal discovery had taken place but the parties had "completed enough investigation to agree on a reasonable settlement"); *Willix v. Healthfirst, Inc*., No. 07–cw–1143, 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011) ("The pertinent question is whether counsel had an adequate appreciation of the merits of the case before negotiating") (internal quotations omitted). "In fact, informal discovery designed to develop a settlement's factual predicate is encouraged because it expedites the negotiation process and limits costs which could potentially reduce the value of the settlement." *Castagna v. Madison Square Garden, L.P.*, 2011 WL 2208614, at *6 (citing *Jones v. Amalgamated Warbasse Houses, Inc*., 97 F.R.D. 355, 360 (S.D.N.Y. 1982) ("Although little formal discovery has occurred, the parties freely exchanged data during settlement talks. In view of the way this speeds the negotiation process, informal 'discovery' is to be encouraged")).

Accordingly, Plaintiffs and Co-lead Counsel here have adequately represented the Class, and this factor weighs in favor of preliminary approval.

2. The Settlement was negotiated at arm's length.

"A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion." 2 *McLaughlin on Class Actions* § 6:7 (8th ed. 2011); *see also Wal–Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d 96, 116 (2d Cir. 2005) (internal

quotation omitted). Participation in settlement negotiations by a neutral third party supports a finding that the agreement is non-collusive. *In re Penthouse Exec. Club Comp. Litig.*, No. 10-1145, 2013 WL 1828598, at *2 (S.D.N.Y. Apr. 30, 2013) ("[a] settlement . . . reached with the help of third-party neutrals enjoys a presumption that the settlement achieved meets the requirements of due process") (internal quotations omitted); *Hernandez v. Merrill Lynch & Co., Inc.*, No. 11-civ-8472, 2012 WL 5862749, at *2 (S.D.N.Y. Nov. 15, 2012) ("[t]he assistance of an experienced mediator . . . reinforces that the Settlement Agreement is non-collusive"); *Elkind v. Revlon Consumer Prods. Corp.*, No. CV 14-2484, 2017 WL 9480894, at *17 (E.D.N.Y. Mar. 9, 2017) (noting "participation by a neutral third party supports a finding that the agreement is non-collusive") (collecting cases).

The Settlement here was negotiated at arm's length with the assistance of the highly experienced mediator the Honorable Diane Welsh (Ret.). The Parties participated in two, full day mediation sessions conducted by Zoom with the Honorable Dianne Welsh (Ret.). The first occurred on January 6, 2021 and the second occurred on February 9, 2021. Mason Decl. ¶ 5. Prior to the first mediation on January 6, 2021, the Parties had extensive and productive discussions regarding the discovery each side needed prior to mediation. *Id*. ¶ 6. The Parties have engaged in informal discovery and exchanged substantial, confidential written materials pursuant to these settlement discussions that have allowed Co-Lead Counsel to evaluate the strengths and weaknesses of the claims asserted on behalf of the proposed Settlement Class and Defendants' defenses. *Id*. ¶ 7. This informal discovery and confidential information additionally allowed Co-Lead Counsel to evaluate the Settlement Class' potential damages. Based on the information supplied by Defendant, Co-Lead Counsel determined that there are approximately 665,000 users of the Devacurl Products at issue. *Id*. ¶ 8. While there was no settlement after the two mediation sessions, the Parties made

meaningful progress toward reaching a resolution, and Co-Lead Counsel diligently continued arm's-length settlement discussions with Judge Welsh. *Id*. ¶ 9. Ultimately, Judge Welsh was prepared to make a mediator's proposal. Co-Lead Counsel rejected the offer of a mediator's proposal and instead made its own final and best offer. The Defendant accepted that offer and the Parties reached agreement on the Gross Settlement Amount and some but not all of the material terms of the Settlement. *Id*. ¶ 10. Thereafter, the Parties continued to negotiate and agree on the remaining terms of the Settlement.

Accordingly, this factor weighs in favor of preliminary approval.

3. The relief provided for the Class is adequate.

Fed. R. Civ. P. 23(e)(2)(c) requires examination of the relief provided by the Settlement. The Settlement negotiated on behalf of the Class provides for significant relief. First, a $5,200,000 Common Fund will be created from which Settlement Class Members may make a claim for either minor adverse reactions and economic loss in an amount up to $20 per person *or* for significant adverse reactions in an amount up to $19,000 per person. Agr. § VII.B. Second, Defendant will implement labeling changes giving Settlement Class Members and future purchasers of Defendant's Product purchasers more detailed information about the safe use of the Products. *Id.* As the relief provided is well within the range of possible approval when considered in light of the Rule 23(e)(2)(c)(i)–(iv) factors, preliminary approval should be granted.

The Settlement compares favorably to the settlement reached in *Friedman v. Guthy-Renker*, *LLC*, No. 2:14-cv-06009 (C.D. Cal. June 28, 2016) ("*WEN*"), a similar class action arising from a haircare product alleged to have caused thousands of women to suffer hair loss and scalp injuries. Like the proposed Settlement, the *WEN* Settlement provided two tiers of benefits. Tier 1 provided a one-time flat payment of $25 per person. *WEN* Settlement § 6.A. (Exhibit B to Mason

Decl.). Here, Tier 1 claimants will be able to claim up to $20. While this Settlement appears to offer a slightly lower Tier 1 benefit, the Parties agreed upon the payment amount after assessing the strengths and weaknesses of this case. Class Counsel, having carefully studied the data and modelled the Settlement are confident that sufficient funds have been allocated to Tier 1 such that the benefit will not need to be reduced. Mason Decl. ¶ 20. The *WEN* Settlement offered a maximum of $20,000 per Class Member to Tier 2 Claimants. *WEN* Settlement § 6.B. Here, Tier 2 Claimants are eligible to receive as much as $19,000. Class Counsel's investigation of the *WEN* Settlement revealed that the average payout to eligible Tier 2 claimants was around $3,200. Mason Decl. ¶ 20. Class Counsel are similarly estimating that the average for Tier 2 payments will be at least $3,200. *Id*.

a. The costs, risks, and delay of trial and appeal are great.

The relief provided for by the Settlement Agreement is significant, especially in light of the costs, risks, and delay of further litigation. The Settlement Agreement guarantees Settlement Class Members the opportunity to make a claim for up to $19,000. The value achieved through the Settlement Agreement is guaranteed, where chances of prevailing on the merits are uncertain. While Plaintiffs strongly believe in the merits of their case, they also understand that Defendant will assert a number of potentially case-dispositive defenses such as the Products and their ingredients are safe and do not cause hair loss or scalp irritation. Rather, the Plaintiffs and other class member's hair loss or scalp irritation resulted from something other than the use of its Products. Proceeding with litigation would open up Plaintiffs to the risks inherent in trying to achieve and maintain class certification, and prove liability including causation—both factors considered under the test for final approval established by *Grinnell*. In fact, should litigation continue, Plaintiffs would have to first survive the already-filed motion to dismiss filed in order to

proceed past the pleading stage and into litigation. Next, Plaintiffs would have to overcome the hurdle of getting the class certified especially a personal injury class. And then Plaintiffs would have to overcome the liability and causation defenses—the Products and their ingredients are safe and do not cause hair loss or scalp irritation. Lastly, class certification and any verdict and a class wide trial would certainly be appealed by the Parties. As such, the costs, risks, and delay of trial and appeal are substantial and the Settlement eliminates these altogether while providing the class with tremendous relief.

b. The proposed method of distributing relief, including the method of processing class-member claims, is objective, efficient, and fair.

As described in detail in Section III.B, *supra*, the Settlement Administrator will be responsible for allocating and distributing relief amongst valid claimants. Class Members will have ninety (90) days from the initiation of Notice to complete and submit a claim under either Tier 1 or Tier 2 to the Settlement Administrator. Agr. § VII. The Settlement Administrator will be responsible for evaluating the claims and the evidence submitted and awarding points to each valid Claimant based on an objective point system agreed to by the Parties. *Id*. § VII.F. Co-Lead Counsel and Defense Counsel will have the opportunity to review the allocations and all allocations are subject to review by a Special Master. *Id.* § VII.H. Net Settlement Funds will be divided and distributed based on the number of points allocated. *Id*. Funds will be sent to eligible claimants by check or electronically within sixty (60) days of the Claims Completion Date or the Effective Date, whichever is later. *Id.* § VII.J. Any unused funds will be provided via a *cy pres* fund to the National Alopecia Areata Foundation, an organization deeply tied to hair loss. *Id.* § VII.L. No funds will revert to Defendant. *Id.* § VII.M.

c. The attorneys' fees, costs and service awards that Plaintiffs will request this Court approve are reasonable.

By separate motion, Plaintiffs will seek Court approval of attorneys' fees and costs *combined* in the amount of 33.33% of the Common Fund, as well as service awards in the amount of $600 per Class Representative. Agr. § V.A. Such requests are well with the range of those regularly accepted by Second Circuit Courts. *See Warren v. Xerox Corp*., No. 01-CV-2909 (JS), 2008 WL 4371367, at *22 (E.D.N.Y. Sept. 19, 2008) (awarding class counsel attorneys' fees and expenses at 33.33% of the total settlement value, and finding such a sum "comparable to sums allowed in other cases"); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (finding 33% in attorneys' fees alone to be reasonable) (collecting cases); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481–83 (S.D.N.Y. 2013) (granting an award of $5,000 to $7,500 to plaintiffs); *In re Polaroid ERISA Litig.*, No. 03 Civ. 8335(WHP), 2007 WL 2116398, at *3 (S.D.N.Y. July 19, 2007) (granting award of $10,000 to named plaintiffs); *Dornberger v. Metro. Life Ins. Co*., 203 F.R.D. 118 (S.D.N.Y. 2001) (noting in class actions representative plaintiff awards from $2,500 to $85,000 are commonly accepted). While Plaintiffs will fully brief their request by separate motion prior to Settlement Class Members' deadline to object to or exclude themselves from the Settlement, the attorneys' fees, costs, and service awards sought clearly fall within the range of possible approval.

d. No additional agreement related to the settlement exist.

There are no additional agreements that require identification and/or examination under Rule 23(e)(3).

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

Under the terms of the Settlement, the Class Members will be treated equitably to each other. Every Settlement Class Member who makes a claim under Tier 1 may receive up to $20,

subject to *pro rata* reduction only if the value of Tier 1 claims approaches the aggregate Tier 1 cap of $750,000. Agr. § VII.A. For Tier 2 claimants, an objective points system will be used to allocate funds that will be based upon factors including but not limited to the sufficiency and credibility of the evidence, the severity of the hair loss, balding, thinning and/or scalp irritation, duration of the hair loss, balding, thinning, scalp irritation and amount of documented out-of-pocket expenses. *Id.* § VII.B. The allocations are subject to review by Co-lead Counsel, Counsel for Defendant, and a Special Master to ensure objectivity of the allocations. *Id.* § VII.H. Each Claimant's final award allocation will be based upon the point value obtained by dividing the Net Settlement Amount by the total number of points allotted. *Id*.

This method of allocation ensures equitable treatment of Class Members, based on the evidence submitted by the Settlement Class Members themselves. Point systems like the ones proposed are regularly found to be sufficiently equitable. *See e.g.*, *Spann v. J.C. Penney Corp.,* 211 F. Supp. 3d 1244, 1251 (C.D. Cal. 2016) (granting final approval of settlement allocating amount of store credit or cash that each claimant receives using a system of points); *Alexander v. Nat'l Football League*, No. 4-76-CIVIL-123, 1977 WL 1497, at *17 (D. Minn. Aug. 1, 1977) (finding method of distributing class action settlement funds using a point system is fair and reasonable).

B. The Settlement Warrants Preliminary Approval After Consideration of the *Grinnell* Factors.

Prior to the revisions to Rule 23, the Second Circuit relied upon the nine factors set forth in *City of Detroit v. Grinnell Corp.* to guide its assessment of whether a class action settlement should be approved. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (abrogated on other grounds). While preliminary approval requires only an initial evaluation of the settlement and Rule 23 has been since amended, the factors remain instructive and have been used

by Second Circuit Courts in evaluating settlements even after 2018. *See Johnson v. Rausch, Sturm, Israel, Enerson & Hornik, LLP*, 333 F.R.D. 314, 320 (S.D.N.Y. 2019) (considering both the Rule 23 and *Grinnell* factors on consideration of a motion for preliminary approval).

First, the complexity, expense, and likely duration of the litigation support preliminary approval. As discussed *supra*, at Section V(B)(1)(c)(ii), continued litigation is likely to be complex, long, and expensive. Plaintiffs would have to immediately survive a motion to dismiss to even begin litigation, and would later likely need to prevail on summary judgment and both gain and maintain class certification through trial. Additionally, the amount of expert testing and testimony needed to bring this case to trial would increase costs significantly, as well as add to the length of time needed to resolve the matter. Thus, this factor weighs in favor of approval.

Second, the reaction of Class Members is not yet apparent. While the named Plaintiffs and proposed representatives have reviewed and approved the Settlement Agreement, other Settlement Class Members have not had the opportunity to. As such, this factor is appropriately examined after Notice has issued to the Class and Settlement Class Members have had the opportunity to make a claim, exclude themselves, or object to the Settlement.

Third, the stage of the proceedings and the amount of discovery completed supports settlement approval. During 17 months of litigation, the Parties have informally exchanged significant discovery, and Co-Counsel has completed interviews and document collection for hundreds of putative Class Members and worked with experts to assess and evaluate the Products and their ingredients. Early settlement where, as here, the Parties are adequately informed to negotiate, is to be commended. *Castagna v. Madison Square Garden, L.P.*, 2011 WL 2208614, at *6 (commending plaintiffs' attorneys for negotiating early settlement an avoiding hundreds of hours of legal fees); *In re Interpublic Secs. Litig.*, No. 02 Civ. 6527, 2004 WL 2397190, at *12

(S.D.N.Y. Oct. 26, 2004) (early settlements should be encouraged when warranted by the circumstances of the case). As discussed more fully above at Section V(B)(1)(a), the Parties had more than enough information to adequately evaluate the claims and defenses at issue. As such, this factor weighs in favor of approval.

Fourth, Fifth, and Sixth, the risks of establishing liability, damages, and maintaining a class through trial weigh in favor of Settlement Approval. Although Plaintiffs firmly believe in the merits of the case, litigating in such an evolving area of law involves significant risk. "Litigation inherently involves risks." *In re Painewebber Ltd. P'ships Litig*., 171 F.R.D. 104, 126 (S.D.N.Y. 1997). "If settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Id.* (quoting *In re Ira Haupt & Co*., 304 F. Supp. 917, 934 (S.D.N.Y. 1969)); *see also Velez v. Majik Cleaning Serv*., *Inc.*, No. 03 Civ. 8698, 2007 WL 7232783, at *6 (S.D.N.Y. June 25, 2007) (noting "there are always risks in proceeding to trial and these risks are compounded by virtue of the nature of class action litigation.") (citing *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 185 (W.D.N.Y. 2005)). While Plaintiffs remain confident in the strength of their claims, additional litigation leaves open the risk that they will be unable to meet the burdens of establishing liability, causation, proving damages, and gaining and maintaining certification through trial. Thus, these factors weigh in favor of Settlement approval.

Seventh, the ability of Defendant to withstand a greater judgment is not at issue here. In fact, even if Defendant could withstand a greater judgment, its ability to do so, "standing alone, does not suggest that the settlement is unfair." *Frank v. Eastman Kodak Co.*, 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)). Thus, this factor is neutral and does not preclude the Court from granting preliminary approval.

Eighth and Ninth, the Settlement provides for substantial relief for the Settlement Class, especially in light of all attendant risks of litigation. The Settlement guarantees eligible Settlement Class Members up to $19,000 per person in monetary relief for harms and provides them access to more information about Products in the future. The value achieved through the Settlement Agreement is guaranteed, where chances of prevailing on the merits are uncertain. While Plaintiffs strongly believe in the merits of their case, they also understand that Defendant will assert a number of potentially case-dispositive defenses. Proceeding with litigation would open up Plaintiffs to the risks inherent in trying to achieve and maintain class certification, and prove liability, causation and damages. Through the Settlement, Plaintiffs and Settlement Class Members gain significant benefits without having to face further risk of not receiving any relief at all.

The *Grinnell* factors weigh in favor of approval of the Settlement—and certainly at least support preliminary approval. As such, this Court should grant Plaintiffs' motion and allow notice to issue.

III. The Court Should Approve the Form and Content of the Proposed Notice to the Settlement Class Members.

Rule 23(e)(1) requires the Court to "direct reasonable notice to all class members who would be bound by" a proposed Settlement. For classes like this one, certified under Rule 23(b)(3), parties must provide "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Rule 23(c)(2)(B) specifically permits notice to be sent by "U.S. Mail, electronic mail, or other appropriate means." In its notes to the 2018 amendment, the Advisory Committee emphasized that courts should consider technological innovation to determine what constitutes the best method of notice in a particular case. *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, No. 18-md-2819, 2021 WL 1439629 (E.D.N.Y. Mar. 15, 2021) (noting a notice

plan that reaches between 75 and 90 percent of the class is reasonable and approving a notice plan with 80% reach).

"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." *Wal–Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d at 113–14.There are no rigid rules for determining whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice merely 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." *Id.* at 114. Second Circuit Courts have explained that a Rule 23 Notice will satisfy due process where it describes the terms of the settlement generally, and informs the class about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing. *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 191 (S.D.N.Y. 2012) (internal citations omitted). The notice must also "contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment." *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977); *Achtman v. Kirby, McInerney & Squire*, *LLP*, 464 F.3d 328, 338 (2d Cir. 2006).

Here, the Parties developed a robust Notice Plan with the assistance of KCC that more than satisfies the aforementioned requirements, including the mandates of due process.[7] With respect to the methods of notice, the Notice Plan includes: (1) the short form notice, attached as Exhibit 6 to the Settlement Agreement, which will be directly emailed to approximately 330,000 Settlement

[7] The details of the Notice Plan are set out in the Declaration of Carla A. Peak in Support of Settlement Notice Program, ("Peak Decl.") filed herewith.

Class Members; (2) electronic publication notice, including (a) online display banner advertising specifically targeted to reach 85.5% of Settlement Class Members, (b) keyword search targeting Settlement Class Members, (c) social media through Facebook and Instagram, and (d) the Settlement Website, which will be established at www.CurlyHairSettlement.com, on which the Notices and other important case documents will be posted and which Settlement Class Members can use to electronically file their Claim Forms; (4) a toll-free telephone number that will be established which Settlement Class Members will be able to call 24 hours per day, 7 days per week, for more information about the Settlement, including but not limited to requesting copies of the Long Form Notice, Exhibit 5 to the Settlement Agreement; and (6) the Claim Form, attached as Exhibit 1 to the Settlement Agreement. Notice to the Settlement Class will begin as soon as practicable after entry of the Preliminary Approval Order. The means by which Settlement Class Members will receive notice are the best practicable in the circumstances.

The information in the Notice is provided in "plain English," is presented in a format that is accessible to the reader. The Notice defines the Settlement Class, explains all Settlement Class Member rights, releases, and applicable deadlines, and describes in detail the monetary terms of the Settlement Agreement, including the procedures for allocating and distributing settlement funds among the Settlement Class Members. The Notice plainly indicates the time and place of the Final Approval Hearing, and the method for objecting to or opting out of the Settlement. It details the provisions for payment of Attorneys' Fees and Costs and Service Award Payments to the Class Representatives, and it provides contact information for Settlement Class Counsel. Substantially similar formats have been approved by courts in this Circuit, which further supports its approval. *See, e.g.*, *In re Crocs, Inc. Secs. Litig.*, 306 F.R.D. 672, 693 (D. Colo. 2014) (approving notice that provided information including the anticipated recovery, reasons for the

settlement, the amount of attorneys' fees or costs sought, and a summary of the plan of allocation); *McNeely v. Nat'l Mobile Health Care, LLC*, No. CIV-07-933-M, 2008 WL 4816510, at *14 (W.D. Okla. Oct. 27, 2008) (approving content of notice because it was "drafted in plain, easily understood language, and clearly and concisely describes the nature of the action, contains the class definition, and sets forth the class claims and issues"). Thus, the proposed Notice is "the best notice practicable under the circumstances" and should be approved by the Court. Accordingly, the Court should approve the form and plan of dissemination of Class Notice concerning the proposed Settlement.

The Court should also appoint KCC as the Settlement Administrator. KCC is highly experienced in implementing both notice plans that satisfy the requirements of due process and a claims administration plans that are user-friendly and streamlined and that provide settlement class members, settlement class counsel, and the Court with the necessary support. Peak Decl. ¶¶ 2–5.

PROPOSED SCHEDULE FOR FINAL APPROVAL PROCEEDINGS

Finally, pursuant to Rule 23(e)(2), Plaintiffs request that the Court schedule the time, date, and place of the Final Approval Hearing to decide whether the settlement is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). Plaintiffs also request that the Court set deadlines for mailing the Notice, publishing the Summary Notice, and requesting exclusion from the Settlement Class, objecting to the Settlement, submitting Proof of Claim forms, and filing papers in support of the Settlement. Plaintiffs respectfully propose the following schedule:

Event	Deadline
Deadline for establishment of Settlement Fund	No later than 60 days after the Effective Date
First mailing of Notice ("Notice Date")	As soon as practicable after the Court enters the Preliminary Approval Order
Deadline for filing of Claims	90 days after the Notice Date

Motion for Final Approval of Settlement due	14 days before the Final Approval Hearing
Motion for Attorneys' Fees, Litigation Costs and Expenses and Class Representative Service Award Payments due	21 days before the Opt-out and Objection Deadlines
Opt-out Deadline	60 days after the Notice Date
Objection Deadline	60 days after the Notice Date
Affidavit attesting to implementation of the Notice Plan in accordance with Preliminary Approval Order and report identifying all opt-outs and objectors due	14 days prior to the Final Approval Hearing
Objection Response Deadline	14 days before the Final Approval Hearing
Replies in Support of Objections	7 days before the Final Approval Hearing
Final Approval Hearing	To be decided by the Court

CONCLUSION

Plaintiffs have negotiated a fair, adequate, and reasonable Settlement that guarantees Settlement Class Members significant relief. The Settlement Agreement is well within the range of reasonable results, and an initial assessment of both Rule 23 and the *Grinnell* factors demonstrates that final approval is likely, and Notice should issue to the class. For these and the above reasons, Plaintiffs respectfully request this Court (1) preliminarily approve the Settlement Agreement; (2) provisionally certify the Settlement Class for settlement purposes only; (3) appoint the Named Plaintiffs as Class Representatives; (4) appoint Gary E. Mason of Mason Lietz & Klinger LLP and Charles E. Schaffer of Levin Sedran & Berman LLP as Settlement Class Counsel; (5) approve the form and manner of the Notice Plan and claims process; (6) appoint KCC as Settlement Administrator for the Settlement; and (7) set the schedule for the final approval process as set forth above, including a date and time for the Final Approval Hearing.

Dated: July 26, 2021

Respectfully submitted,

/s/ Gary E. Mason

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