UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LaShawn Sharpe, et al., *individually on behalf of herself and all others similarly situated*,

Plaintiffs,

– against –

A&W Concentrate Company and Keurig Dr. Pepper Inc.,

Defendants.

Case No.: No. 19-cv-00768-BMC

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, APPROVAL OF NOTICE PLAN, AND LEAVE TO FILE AMENDED COMPLAINT

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Plaintiffs[1] LaShawn Sharpe ("Sharpe"), Jim Castoro ("Castoro"), as well as Steve Dailey ("Dailey") who is also named in the proposed Second Amended Complaint attached as Exhibit E to the Settlement Agreement (collectively, the "Plaintiffs"), on behalf of themselves and on behalf of those similarly situated, hereinafter the Settlement Class Members, respectfully submit this memorandum of law in support of Plaintiffs' unopposed motion for preliminary approval of the Parties' Settlement Agreement.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiffs have asserted claims that defendants A&W Concentrate Company and Keurig Dr. Pepper Inc., ("Defendants"), deceptively and misleadingly marketed their root beer and cream soda beverages sold under the A&W brand that were labeled as being "Made With Aged Vanilla" ("Products"). Specifically, Plaintiffs alleged that the Made with Aged Vanilla representation was misleading given that the source of vanilla flavor in the Products came from ethyl vanillin, which is not from the vanilla plant, but rather is an artificial flavor. The Settlement Agreement that Plaintiffs now submit for preliminary approval provides excellent relief to Settlement Class Members, providing close to a full refund of the premium price that consumers paid for the Products.

As detailed in the declaration of Michael Reese in Support of Plaintiffs' Unopposed Motion for Preliminary Approval ("Reese Decl.") (filed concurrently herewith) this matter has been hard-fought since its inception, and has included, but is not limited to, extensive motion practice - on motions to dismiss; class certification; and, summary judgment; extensive discovery - with extensive document production, interrogatories, requests for admission, and depositions of

[1] Unless otherwise indicated, capitalized terms shall have the meaning that the Settlement Agreement ascribes to them. (*See generally* Class Settlement Agreement (filed at ECF No. 119.) References to "§ __" are to sections in the Settlement Agreement.

numerous employees of the defendants, depositions of all the named plaintiffs and depositions of defendants' and plaintiffs' experts; and, numerous mediation sessions – first with the Honorable John Mott (Ret.) and then with the Honorable Wayne Andersen (Ret.). *Id.* at ¶ 9.

On February 1, 2023, the Parties accepted a mediator's proposal made by the Hon. Wayne Andersen (Ret.) after several mediation sessions and follow-up discussions that were held with Judge Andersen. *Id.* at ¶¶ 9-10. Only after agreement as these material terms for the Class, did the Parties discuss attorney fees and costs. *Id.*

Plaintiffs' objective in filing this matter was to compensate Settlement Class members damaged by the alleged misrepresentations. Through this litigation that culminated with the Settlement Agreement, Plaintiffs achieved substantial relief for the Settlement Class. The Settlement requires Defendants to make available fifteen million dollars ($15,000,000) that will be used to pay for eligible claims from Settlement Class members; the costs of notice and claims administration; service awards to each of the three named plaintiffs of $5,000 each for their time and effort in prosecuting this matter (including, but not limited to, producing discovery and sitting for their depositions), and, Class Counsel's fees and costs. Each Settlement Class member receives a minimum of $5.50, and can receive up to $25 dollars with proof of purchase. Thus, the Settlement is an outstanding result for members of the Settlement Class.

The Parties only reached the Settlement after conducting extensive motion practice and discovery and engaging in extensive arm's-length, good-faith negotiations, including mediation sessions with two esteemed mediators. Reese Decl. ¶¶ 8-10. While providing significant benefits for the Settlement Class members, the Settlement also takes into account the substantial risks the Parties would face if the litigation progressed even further. *Id.*

For all of the reasons given herein, Plaintiffs respectfully ask the Court to grant preliminary approval of the Settlement, allowing the Claims Administrator to provide notice to the Settlement Class members, and to schedule a Fairness Hearing to consider final approval of the Settlement. *See* FED. R. CIV. P. 23(e). Plaintiffs also respectfully request to be appointed as representatives for the Settlement Class and for their counsel to be appointed as Class Counsel.[2] *See* FED. R. CIV. P. 23(g). The Court should also approve the notice program to which the Parties agreed 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). Finally, Plaintiffs respectfully request the Court grant leave to file the proposed Second Amended Complaint attached as Exhibit E to the Settlement Agreement.

II. THE TERMS OF THE PROPOSED SETTLEMENT

The Settlement Agreement defines the Settlement Class, describes the Parties' agreed-upon Settlement relief, and proposes a plan for disseminating notice to the Settlement Class members.

A. Certification of the Settlement Class

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

> All consumers in the United States who purchased the Products during the Class Period.
>
> Excluded from this definition are the Released Parties, any government entities, persons who made such purchase for the purpose of resale, persons who made a valid, timely request for exclusion, and the Hon. Brian M. Cogan, the Hon. John Mott (Ret.) and the Hon. Wayne Andersen (Ret.), and any members of their immediate family.

[2] "Class Counsel" are Michael R. Reese and Sue J. Nam of the law firm of Reese LLP and Spencer Sheehan of Sheehan & Associates, P.C.

B. Relief for the Members of the Settlement Class

The Settlement Agreement provides for significant substantial monetary relief.

With respect to monetary relief, the Settlement Agreement provides that Defendants will pay up to fifteen million dollars ($15,000,000) to be used for the following: refunds to Class Members for a minimum of $5.50 and up to $25.00 (depending on proof of purchase); costs of notice and claims administration; judicially approved Service Awards; and, judicially approved Attorneys' Fees and Expenses.

C. Service Awards and Attorneys' Fees and Expenses

There is no agreement between the Parties on payment of Services Awards. Each of the named Plaintiffs will seek Service Awards of $5,000 each (for a total of $15,000) to compensate them for the work they did on this matter, including sitting for their depositions, they took in their capacities as class representatives. With respect to attorney fees and costs, there is no agreement between the Parties as to the amount to be paid to Class Counsel for their fees and costs. Class Counsel will seek payment of up to $7.83 million for attorneys fees, costs and expenses, including the costs of experts. Ultimately, the decision on payment of Service Awards to the class representatives and payment of Class Counsel's fees, costs and expenses is up to the Court.

D. Settlement Notice

The Settlement Agreement proposes that the Court appoint Kroll Settlement Administration ("Kroll") to administer the notice process and outlines the forms and methods by which notice of the Settlement Agreement will be given to the Settlement Class members, including notice of the deadlines to opt out of, or object to, the Settlement.

In terms of the methods of notice, Kroll developed a robust notice program that includes: (1) comprehensive digital media based notice; (2) a dedicated Settlement Website through which

Settlement Class members can obtain more detailed information about the Settlement and access case documents; and (3) a toll-free telephone helpline through which Settlement Class members can obtain additional information about the Settlement and request the class notice and/or a Claim Form. *See* Declaration of Jeanne C. Finnegan**,** Managing Director and Head of Kroll Notice Media Solutions Class ("Finnegan Declaration") at ¶ 4; Declaration of Scott M. Fenwick, Senior Director of Kroll Settlement Administration LLC ("Fenwick Declaration") (both filed simultaneously with the Motion for Preliminary Approval). The notice plan has been designed to deliver an approximate 76% reach with an average frequency of 4 times each.

Under the Settlement Agreement, the Settlement Website will post Settlement-related and case-related documents such as the Long Form Notice; answers to frequently asked questions; a contact information page that includes the address for the Claim Administrator and addresses and telephone numbers for Plaintiffs' Counsel and Defendants' Counsel; the Agreement; the signed order of Preliminary Approval; a downloadable and online version of the Claim Form; a downloadable and online version of the form by which Settlement Class Members may exclude themselves from the Settlement Class; and (when they become available) the motion for final approval and Plaintiffs' application(s) for Attorneys' fees, costs and service awards. The Settlement Website will also include procedural information regarding the status of the Court approval process, such as announcements of the Fairness Hearing date, when the Final Order and Judgment has been entered, and when the Final Settlement Date has been reached. To allow for the maximum convenience of the Settlement Class Members, claims may be submitted online.

III. ARGUMENT

A. The Court Should Preliminarily Approve the Settlement Agreement

Class Counsel have worked steadfastly to reach a fair, reasonable, and adequate Settlement. (*See generally* Reese Decl.). Plaintiffs and their counsel believe the claims the Settlement resolves are strong and have merit. (*Id.* at ¶ 12.) They recognize, however, that significant expense and risk are associated with continuing to prosecute the claims through trial and any appeals. (*Id.*) In negotiating and evaluating the Settlement, Plaintiffs and Class Counsel have taken these costs and uncertainties into account, as well as the delays inherent in complex class action litigation. (*Id.*) Additionally, in the process of investigating and litigating the action, Class Counsel conducted significant research on the consumer protection statutes at issue, as well as the overall legal landscape, to determine the likelihood of success and reasonable parameters under which courts have approved settlements in comparable cases. (*Id.*). In light of all of the foregoing reasons, Class Counsel believe this Settlement provides significant relief to the Settlement Class members and is fair, reasonable, adequate, and in the best interests of the Settlement Class. (*Id.* at ¶ 15.)

1. Legal Standard

Under Rule 23(e)(2) of the Federal Rules of Civil Procedure, a court may approve a class action settlement "only . . . on finding that [the settlement agreement] is fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). The "fair, reasonable, and adequate" standard effectively requires parties to show that a settlement agreement is both procedurally and substantively fair. *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013); *accord McReynolds v. Richards-Cantave*, 588 F.3d 790, 803–04 (2d Cir. 2009).

"In 2018, Rule 23 was amended to list specific factors relating to the court's approval of the class settlement." *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.,* 2022 WL 3043103, at *4 (E.D.N.Y. Aug. 2, 2022). "Rule 23(e)(2) now provides that, in determining whether a settlement is 'fair, reasonable, and adequate,' the Court must consider whether:"

(A) The class representatives and class counsel have adequately represented the class;

(B) The proposal was negotiated at arm's length;

(C) The relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3);

(D) The proposal treats class members equitably relative to each other.

Id. quoting Fed. R. Civ. P. 23(e).

The Second Circuit recognizes a "strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds*, 588 F.3d at 803. "The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005); *see also Hadel v. Gaucho, LLC*, 2016 WL 1060324, at *2 (S.D.N.Y. Mar. 14, 2016) ("Courts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere."). A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Visa*, 396 F.3d at 116.

"Preliminary approval is the first step in the settlement of a class action whereby the court 'must preliminarily determine whether notice of the proposed settlement . . . should be given to class members in such a manner as the court directs, and an evidentiary hearing scheduled to determine the fairness and adequacy of settlement.'" *Manley v. Midan Rest. Inc.*, 2016 WL 1274577, at *8 (S.D.N.Y. Mar. 30, 2016) (citations omitted). "To grant preliminary approval, the court need only find that there is 'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *Id.* (citations and internal quotation marks omitted); *accord Tart v. Lions Gate Entm't Corp.*, 2015 WL 5945846, at *5 (S.D.N.Y. Oct. 13, 2015). "If the proposed settlement appears to fall within the range of possible approval, the court should order that the class members receive notice of the settlement." *Manley*, 2016 WL 1274577, at *8.

Here, the Settlement Agreement is both procedurally and substantively fair and falls well within the range of possible approval.

2. The Settlement Is Procedurally Fair, as It Is the Result of Good Faith, Arm's-Length Negotiations by Well-Informed and Highly Experienced Counsel

The first two factors under Rule 23(e)(2) concern the procedural fairness of the settlement, that is "the conduct of the litigation and of the negotiations leading up to the proposed settlement[.]" *In re Restasis*, 2022 WL 3043103, at *5. To demonstrate a settlement's procedural fairness, a party must show "that the settlement resulted from 'arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001); *see also Puddu v. 6D Glob. Techs, Inc.*, 2021 WL 1910656, at *4 (S.D.N.Y. May 12, 2021) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel").

Furthermore, participation of a highly qualified mediator in settlement negotiations strongly supports a finding that negotiations were conducted at arm's length and without collusion. *See D'Amato*, 236 F.3d at 85 ("[A] court-appointed mediator's involvement in precertification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure."); *Tiro v. Pub. House Investments, LLC*, 2013 WL 2254551, at *2 (S.D.N.Y. May 22, 2013) ("The assistance of an experienced JAMS employment mediator . . . reinforces that the Settlement Agreement is non-collusive."); *Puddu*, 2021 WL 1910656, at *4 (there is "a presumption of fairness when a settlement is reached with the assistance of a mediator").

Here, Plaintiffs and their counsel conducted a thorough investigation and evaluation of the claims and defenses prior to filing the Action and continued to analyze the claims throughout the pendency of the case. (Reese Decl. ¶¶ 8, 12.) Prior to agreeing to the Settlement, Class Counsel conducted extensive motion practice and discovery, including both factual and expert discovery. (*Id.* at ¶ 8.) Through this investigation, motion practice, discovery, and ongoing analysis, Class Counsel obtained an understanding of the strengths and weaknesses of the Actions. (*Id.* at ¶ 12.)

Class Counsel have substantial experience litigating class actions and negotiating class settlements. (*Id.* at ¶ 16; Ex. 1 Reese Decl. (Reese LLP's firm résumé); Ex. 2 (Sheehan & Associates, P.C. firm résumé). Moreover, the Parties participated in serious and informed arms-length negotiations before two highly qualified mediators, first the Honorable John Mott (Ret.) and then the Honorable Wayne Andersen (Ret.), which led to an agreement in principle to settle the case and, ultimately, the finalized Settlement Agreement. (*Id*. at ¶ 9 .)

For the foregoing reasons, the Settlement Agreement is procedurally fair.

3. The Settlement Is Substantively Fair, as Application of the Factors Set Out in *City of Detroit v. Grinnell Corp.* Demonstrates

Factors (C)-(D) of Rule 23(e) "are 'substantive,' addressing 'the terms of the proposed settlement." *In re Restasis*, 2022 WL 3043103, at *5. In this Circuit, to demonstrate the substantive fairness of a settlement agreement, a party must show that the factors the Second Circuit set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"), weigh in favor of approving the agreement. *Charron*, 731 F.3d at 247.

The *Grinnell* factors are:

> (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 action 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; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

McReynolds, 588 F.3d at 804 (quoting *Grinnell*, 495 F.2d at 463).

Critically, "[t]he goal of the [2018] amendment was 'not to displace any factors [developed in any circuit], but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision.'" *Id.* (quoting Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment). "District courts in this Circuit, accordingly, have considered the *Grinnell* factors 'in tandem' with the factors set forth in Rule 23(e)(2), and the Second Circuit has continued to endorse the use of the *Grinnell* factors following the 2018 amendment. *Id.*

Here, both the Rule 23(e)(2) factors and *Grinnell* factors overwhelmingly favor preliminary approval of the Settlement Agreement.

(i) The complexity, expense, and likely duration of litigation

"The greater the 'complexity, expense and likely duration of the litigation,' the stronger the basis for approving a settlement." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 663 (S.D.N.Y. 2015) (citations omitted). Consumer class action lawsuits, like the action here, are complex, expensive, and lengthy. *See, e.g.*, *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010); *see also Manley*, 2016 WL 1274577, at *9 ("Most class actions are inherently complex[.]"). Should the Court decline to approve the Settlement Agreement, further litigation would resume. Such litigation could include possible decertification proceedings and appeals, including competing expert testimony and contested *Daubert* motions; contested summary judgment proceedings; and trial. (*Id.*) Each step towards trial would be subject to Defendant's vigorous opposition and appeal. (*Id.*) Even if the case were to proceed to judgment on the merits, any final judgment would likely be appealed, which would take significant time and resources. (*Id.*) These litigation efforts would be costly to all Parties and would require significant judicial oversight. (*Id.*)

In short, "litigation of this matter . . . through trial would be complex, costly and long." *Manley*, 2016 WL 1274577, at *9 (citation omitted). "The settlement eliminates [the] costs and risks" associated with further litigation. *Meredith Corp.*, 87 F. Supp. 3d at 663. "It also obtains for the class prompt [] compensation for prior [] injuries." *Id.*

For all of these reasons, this factor weighs strongly in favor of preliminary approval.

(ii) The reaction of the class to the settlement

It is premature to address the reaction of the Settlement Class to the Settlement.

(iii) The stage of the proceedings and the amount of discovery completed

The third *Grinnell* factor—the stage of the proceedings and the amount of discovery completed—considers "whether Class Plaintiffs had sufficient information on the merits of the case to enter into a settlement agreement . . . and whether the Court has sufficient information to evaluate such a settlement." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 224 (E.D.N.Y. 2013) (citations omitted).

Here, "discovery has advanced sufficiently to allow the parties to resolve the case responsibly." *Manley*, 2016 WL 1274577, at *9. Class Counsel have conducted discovery related the claims - including review of voluminous document production; interrogatories; requests for admission; and depositions of Defendants' fact witnesses and expert witnesses. (Reese Decl. ¶ 8), *see also Zeltser v. Merrill Lynch & Co.*, 2014 WL 4816134, at *6 (S.D.N.Y. Sept. 23, 2014) ("Here, through both formal discovery and an informal exchange of information prior to mediation, Plaintiffs obtained sufficient discovery to weigh the strengths and weaknesses of their claims and to accurately estimate the damages at issue."). Consequently, Plaintiffs had sufficient information to evaluate the terms of the proposed Settlement. *See D.S. ex rel. S.S. v. New York City Dep't of Educ.*, 255 F.R.D. 59, 77 (E.D.N.Y. 2008) ("The amount of discovery undertaken has provided plaintiffs' counsel 'sufficient information to act intelligently on behalf of the class' in reaching a settlement.").

(iv) The risks of establishing liability and damages

"Litigation inherently involves risks." *Willix v. Healthfirst, Inc.*, 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011) (citation omitted). "[I]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Banyai v. Mazur*, 2007 WL 927583, at *9 (S.D.N.Y. Mar. 27, 2007) (citation omitted).

Plaintiffs recognize that, as with any litigation, the Action involve uncertainties as to its outcome. (Reese Decl. ¶ 12.) Defendants continue to deny all of Plaintiffs' allegations, has strongly contested the Action through repeated motion practice and discovery, and should this matter continue to proceed, will continue to vigorously defend themselves on the merits through trial and appeal. (*Id.* at ¶¶ 12-13.) Defendants would likely appeal, if possible, decisions in Plaintiffs' favor. (*Id.* at ¶ 13.) Defendants would continue to challenge Plaintiffs at every litigation step, presenting significant risks of ending the litigation while increasing costs to Plaintiffs and the Settlement Class members. (*Id.*) Further litigation presents no guarantee for recovery, let alone a recovery greater than the recovery for which the Settlement provides. (*Id.* at ¶ 15.)

For these reasons, the risks of establishing liability and damages strongly support preliminary approval under both *Grinnell* and Rule 23(e)(2)(C)(i).

(v) The risk of maintaining class action status through trial

Defendant has stated that but for the Settlement, it would continue to vigorously oppose class certification, including through its pending motion to decertify and also on appeal. (Reese Decl. ¶ 13.) *See In re Med. X-Ray Film Antitrust Litig.*, 1998 WL 661515, at *5 (E.D.N.Y. Aug. 7, 1998) (possibility that defendant would challenge maintenance of class in absence of settlement was risk to class and potential recovery); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.") *Brazil v. Dole Packaged Foods LLC*, 2014 WL 5794873, at *15 (N.D. Cal. Nov. 6, 2014) (decertifying Rule 23(b)(3) class in consumer fraud case). Given the risks, this factor weighs in favor of final approval, under both *Grinnell* and Rule 23(e)(2)(C)(i).

(vi) The ability of Defendants to withstand a greater judgment

It is more important that the Settlement Class receive some relief than possibly "yet more" relief. *See Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y. 2012); *see also Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 83 (1st Cir. 2015) ("The fact that a better deal for class members is imaginable does not mean that such a deal would have been attainable in these negotiations, or that the deal that was actually obtained is not within the range of reasonable outcomes."). Further, "[c]ourts have recognized that a [defendant's] ability to pay is much less important than the other *Grinnell* factors, especially where the other factors weigh in favor of approving the settlement." *In re Sinus Buster Products Consumer Litig.*, 2014 WL 5819921, at *11 (E.D.N.Y. Nov. 10, 2014). A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." For these reasons, this factor is neutral.

(vii) The range of reasonableness of the settlement in light of the best possible recovery and in light of all the attendant risks of litigation

"There is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion[.]" *Visa*, 396 F.3d at 119 (citation omitted). "In other words, the question for the Court is not whether the settlement represents the highest recovery possible . . . but whether it represents a reasonable one in light of the many uncertainties the class faces[.]" *Bodon v. Domino's Pizza, LLC*, 2015 WL 588656, at *6 (E.D.N.Y. Jan. 16, 2015) (citation omitted).

Here, the relief for which the Settlement Agreement provides is within the range of reasonableness, especially in light of the best possible recovery and in light of all the attendant risks of litigation. The gravamen of the actions is that Defendants are deceiving consumers by

misrepresenting one of the key ingredients in its Products. Furthermore, the cash compensation to which eligible Settlement Class members will be entitled goes a significant way toward compensating Settlement Class members for the damages they incurred on account of Defendants' allegedly deceptive representations about the Products. Each Class Member who makes a claim is guaranteed a minimum payment of $5.50 (with or without Proof of Purchase), with the potential of receiving $25 if they provide Proof of Purchase. Thus Settlement Class Members will receive near full compensation for their injury.

As discussed above, while Plaintiffs believe their claims are strong, continuation of this litigation poses significant risks. (Reese Decl. ¶ 15.) While continuation of the litigation might not result in an increased benefit to the Settlement Class, it would lead to substantial expenditure by both Parties. (*Id.*) Taking into account the risks and benefits Plaintiffs have outlined above, the Settlement falls within the "range of reasonableness." Class Counsel have achieved the best possible recovery considering the merits of the Settlement weighed against the cost and risks of further litigation. (*See id.* at ¶¶ 13-15.)

Thus, collectively and independently, the *Grinnell* factors warrant the conclusion that the Settlement Agreement is fair, adequate, and reasonable. As such, Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement.

(viii) The remaining Rule 23(e)(2)(C) & (D) factors weigh in favor of approval

The notice plan is designed with a 76% reach and average 4 times frequency, which meets the standards set by the Federal Judicial Center. *See* Finnegan Declaration at ¶ 4. Class members will be able to submit claims via the settlement website or request a claim form via the website or toll-free hotline. *See* Fenwick Declaration. As such, this Rule 23(e)(2)(c)(ii) factor weighs in favor of the settlement.

Class Counsel will seek up to $7.83 million for their fees and costs, which is in line with that approved by the Second Circuit before. *Torres v. Gristede's Operating Corp.,* 519 F. App'x 1, 3 (2d Cir. 2013).

There are no other agreements amongst the parties, and thus the Rule 23(e)(2)(C)(iv) factor weighs in favor of the settlement.

Finally, all class members are eligible to receive the same relief - a minimum of $5.50 that can be increased to as much as $25 if proof of purchase is provided. All class members are treated equally, and thus, Rule 23(e)(2)(D) weighs in favor of the settlement.

B. The Court Should Preliminarily Certify the Settlement Class

A court may certify a settlement class upon finding that the action underlying the settlement satisfies all Rule 23(a) prerequisites and at least one prong of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 619–22 (1997). As Plaintiffs set forth below, the proposed Settlement Class satisfies all of the requirements of Rule 23(a) and Rule 23(b)(3), and, consequently, Plaintiffs respectfully ask the Court to certify the Settlement Class preliminarily for settlement purposes.

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

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

(i) Numerosity

Plaintiffs must show that the proposed class is "so numerous that joinder of all [its] members is impracticable." FED. R. CIV. P. 23(a)(1); *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). Here, there is no dispute that hundreds of thousands of people nationwide purchased the Products after during the Class Period. Numerosity is easily satisfied. *Id.*

(ii) Commonality

Under Rule 23(a)(2), plaintiffs must show that "questions of law or fact common to the [proposed] class" exist. FED. R. CIV. P. 23(a)(2). Commonality requires that the proposed class members' claims all centrally "depend upon a common contention," which "must be of such a nature that it is capable of classwide resolution," meaning that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "[F]or purposes of Rule 23(a)(2) even a single common question will do[.]" *Id.* The Second Circuit has construed this instruction liberally, holding that plaintiffs need only show that their injuries "derive[d] from defendants' . . . unitary course of conduct." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 84 (2d Cir. 2015).

Here, there are common questions of law and fact that will generate common answers apt to drive the resolution of the litigation, including but not limited to whether Defendants deceived consumers as to one of the key ingredients in the Products. Resolution of this common question requires evaluation of the question's merits under an objective standard, *i.e.*, the "reasonable consumer" test. *Mantikas v. Kellogg Co.*, 910 F.3d 633, 363 (2nd Cir. 2018) ("To state a claim for false advertising or deceptive practices under New York or California law, a plaintiff must plausibly allege that the deceptive conduct was 'likely to mislead a reasonable consumer acting reasonably under the circumstances"). Thus, commonality is satisfied.

(iii) Typicality

Under Rule 23(a)(3), plaintiffs must show that the proposed class representatives' claims "are typical of the [class'] claims." FED. R. CIV. P. 23(a)(3). Plaintiffs must show that "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented." *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993) (citations omitted).

"[D]ifferences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative's claims." *In re Nissan Radiator/Transmission Cooler Litig.*, 2013 WL 4080946, at *19 (S.D.N.Y. May 30, 2013).

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

Here, typicality is met because the same unlawful conduct by Defendants—*i.e.*, its allegedly misleading marketing of a key ingredient in the Products - was directed at, or affected, both Plaintiffs and the members of the proposed Settlement Class. *Robidoux*, 987 F.2d at 936–37.

(iv) Adequacy of representation

Under Rule 23(a)(4), plaintiffs must show that the proposed class representatives will "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). Plaintiffs must demonstrate that: (1) the class representatives do not have conflicting interests with other class members; and (2) class counsel is "qualified, experienced and generally able to conduct the litigation." *Marisol A.*, 126 F.3d at 378.

To satisfy the first requirement, Plaintiffs must show that "the members of the class possess the same interests" and that "no fundamental conflicts exist" between a class' representative(s) and its members. *Charron*, 731 F.3d at 249. Here, Plaintiffs possess the same interests as the proposed Settlement Class members because Plaintiffs and the Settlement Class members were all allegedly injured in the same manner based on their purchase of the Products.

With respect to the second requirement, Class Counsel are qualified, experienced, and able to conduct the litigation. Class Counsel are not representing clients with interests at odds with the interests of the Settlement Class Members and they have invested considerable time and resources

into the prosecution of the actions. (Reese Decl. at ¶ 16.) They have qualified as lead counsel in other class actions and have a proven track record of successful prosecution of class actions. (Reese Decl. ¶ 16; Ex. 1, (Reese LLP's firm résumé), Ex. 2 (Sheehan & Associates, P.C. firm résumé). "In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to prosecute vigorously the action on behalf of the class." *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 241 F.R.D. 185, 199 n.99 (S.D.N.Y. 2007).

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

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

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prods., Inc.*, 521 U.S. at 614. Plaintiffs seek certification under Rule 23(b)(3). Under that rule, the court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

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

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 623. The Second Circuit has held that "to meet the predominance requirement . . . a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof." *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006). In the context of a request for settlement-only class certification, concerns about whether individual issues "would present intractable management problems" at trial drop out because "the proposal is that there be no trial."

Id. at 620. As a result, "the predominance inquiry will sometimes be easier to satisfy in the settlement context." *Tart*, 2015 WL 5945846, at *4. Furthermore, consumer fraud cases readily satisfy the predominance inquiry. *Amchem Prods., Inc.*, 521 U.S. at 625.

Here, for settlement purposes, the central common questions predominate over any questions that may affect individual Settlement Class members. The central common questions include whether Defendants' Made With Aged Vanilla representation on the Products was misleading and likely to deceive reasonable consumers regarding a key ingredient of the Products. These issues are subject to "generalized proof" and "outweigh those issues that are subject to individualized proof." *In re Nassau Cty. Strip Search Cases*, 461 F.3d at 227–28 (citation omitted). The Settlement Class meets the predominance requirement for settlement purposes.

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

Rule 23(b)(3) also requires that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). Here, the class action mechanism is superior to individual actions for numerous reasons. First, "[t]he potential class members are both significant in number and geographically dispersed" and "[t]he interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions." *Meredith Corp.*, 87 F. Supp. 3d at 661 (citation omitted).

Additionally, a class action is superior here because "it will conserve judicial resources" and "is more efficient for Class Members, particularly those who lack the resources to bring their claims individually." *Zeltser*, 2014 WL 4816134, at *3 (citation omitted). As a result of the false and misleading labeling, the Products are sold at a premium price. The cost to purchase any of the Products is less than $20; thus, the potential recovery for any individual Settlement Class member

is relatively small. As a result, the expense and burden of litigation make it virtually impossible for the Settlement Class members to seek redress on an individual basis. By contrast, in a class action, the cost of litigation is spread across the entire class, thereby making litigation viable. *See, e.g.*, *Tart*, 2015 WL 5945846, at *5. "Employing the class device here will not only achieve economies of scale for Class Members, but will also conserve judicial resources and preserve public confidence in the integrity of the system by avoiding the waste and delay repetitive proceedings and preventing inconsistent adjudications." *Zeltser*, 2014 WL 4816134, at *3.For all of the foregoing reasons, a class action is superior to individual suits.

In sum, because the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, the Court should preliminarily certify the Settlement Class.

C. The Court Should Approve the Proposed Notice Plan

"Rule 23(e)(1)(B) requires the court to 'direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise' regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.312 (2004). "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Visa*, 396 F.3d at 113 (citations omitted).

The Court is given broad power over which procedures to use for providing notice so long as the procedures are consistent with the standards of reasonableness that the due process clauses in the U.S. Constitution impose. *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986) ("[T]he district court has virtually complete discretion as to the manner of giving notice to class members.").

"When a class settlement is proposed, the court 'must direct to class members the best notice that is practicable under the circumstances.'" *Vargas v. Capital One Fin. Advisors*, 559 F. App'x 22, 26 (2d Cir. 2014) (summary order) (citing FED. R. CIV. P. 23(c)(2)(B), (e)(1)). The notice must include: "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who request exclusions; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." FED. R. CIV. P. 23(c)(2)(B). "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Visa*, 396 F.3d at 114.

Here, the robust proposed notice program meets the requirements of due process and the Federal Rules of Civil Procedure. The proposed methods Plaintiffs identified above for providing notice to the Settlement Class members are reasonable. (*See supra* Part II.D.) Notice to the Settlement Class will be achieved shortly after entry of the Preliminary Approval Order. The Notice will be provided to Class members so they have sufficient time to decide whether to participate in the settlement, object, or opt out.

The proposed notice program also provides sufficiently detailed notice. The notice defines the Settlement Class; explains all Settlement Class members' rights, the Parties' releases, and the applicable deadlines; and describes in detail the monetary terms of the Settlement, including the procedures for allocating and distributing Settlement funds among the Settlement Class members. It will plainly indicate the time and place of the Fairness Hearing, and it plainly explains the

methods for objecting to, or opting out of, the Settlement. It details the provisions for payment of Attorneys' Fees and Expenses and class representative Service Awards.

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

IV. PROPOSED SCHEDULE OF EVENTS

In connection with preliminary approval of the Settlement Agreement, the Court should set the Final Approval Fairness Hearing, as well as dates for publishing the notice and deadlines for objecting to, or opting out of, the Settlement and filing papers in support of the Settlement. Plaintiffs respectfully propose the following schedule:

Event	Proposed Date/Deadline
Deadline for dissemination of notice to the Settlement Class members	60 days prior to Final Approval Hearing
Deadline for filing papers in support of final approval of Settlement, and Class Counsel's application for Attorneys' Fees and Expenses	30 calendar days prior to the Final Approval Hearing
Deadline for receipt of objections and opt-outs	21 calendar days prior to the Final Approval Hearing
Deadline for Settlement Class Members to file a Notice of Intention to appear at the Fairness Hearing	15 calendar days before the Fairness Hearing
Deadline for Settlement Administrator to file report to the Court	14 calendar days before the Fairness Hearing
Deadline for filing reply papers	14 calendar days before the Fairness Hearing
Fairness Hearing	At least 100 calendar days after entry of the Preliminary Approval Order

V. LEAVE TO FILE THE PROPOSED AMENDED COMPLAINT

Finally, Plaintiffs respectfully request the Court grant them leave to file the proposed Second Amended Complaint attached as Exhibit E to the Settlement Agreement. Federal Rule of Civil Procedure 15 provides that courts "should freely give leave" to amend. Fed. R. Civ. P. 15(a)(2). This permissive standard is consistent with the Second Circuit's "strong preference for resolving disputes on the merits." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015); *Foman v. Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.")).

The proposed Second Amended Complaint allows the Parties to resolve all claims in the most efficient manner and conserve precious judicial resources. First, it makes Plaintiff Dailey a named party, and thereby alleviates the unneeded duplication of effort necessitated of litigating a separate action in California and seeking contemporaneous approval for the same settlement from a California court. Second, it incorporates a nationwide class under a single set of uniform claims (*i.e.* the Texas Deceptive Trade Practices Act and related consumer protection laws). This has the dual benefit of bringing uniformity to the claims, and ensuring a nationwide resolution; both of which provide the maximum benefit to the nationwide class. Third, it avoids the necessity of filing fifty actions in fifty states to reach the same conclusion. Not only does this preserve judicial resources; it also avoids the potential for competing and contrary resolutions. Finally, it creates greater ease and clarity for class members by directing them to a single settlement through a single administrator. As such, Plaintiffs respectfully request the Court grant them leave to file the proposed Second Amended Complaint.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court: (1) certify the Settlement Class and appoint Plaintiffs as the class representatives and Michael R. Reese and Sue J. Nam of Reese LLP and Spencer Sheehan of Sheehan & Associates, P.C. as Class Counsel; (2) preliminarily approve the Settlement Agreement; (3) approve the form and manner of the class action settlement notice; (4) set a date and time for the Fairness Hearing; and (5) grant them leave to file the proposed Second Amended Complaint.

Date: June 2, 2023

Respectfully submitted,

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By: */s/ Michael R. Reese*

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