UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MONIQUE BELL, TREE ANDERSON, and MELISSA CONKLIN, individually and on behalf of all others similarly situated, Plaintiffs, v. CVS PHARMACY, INC., Defendant.	Case No. 1:21-cv-06850-PK Hon. Peggy Kuo

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Dated: April 24, 2023

BURSOR & FISHER, P.A.
Joseph I. Marchese
888 Seventh Avenue
New York, NY 10019
Telephone: (646) 837-7410
Email: jmarchese@bursor.com

GUCOVSCHI ROZENSHTEYN, PLLC
Adrian Gucovschi, Esq.
630 Fifth Avenue, Suite 2000
New York, NY 10111
Telephone: (212) 884-4230
Email: adrian@gr-firm.com

Proposed Class Counsel

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGES

CASES

STATUTES

RULES

OTHER AUTHORITIES

Plaintiffs Monique Bell, Tree Anderson, and Melissa Conklin ("Plaintiffs"), by and through Class Counsel,[1] respectfully submit this memorandum in support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement. The Settlement Agreement ("Settlement") and its exhibits are attached as Exhibit 1 to the Declaration of Joseph I. Marchese ("Marchese Decl.").

INTRODUCTION

In this putative class action, Plaintiffs allege that CVS Pharmacy, Inc. ("CVS" or "Defendant") violated state consumer protection statutes, state warranty acts, New York General Business Law ("GBL") §§ 349-350, New York Warranty Act, N.Y. U.C.C. § 2-313, and The Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq*., and were unjustly enriched. Plaintiffs allege that the packaging of Defendant's CVS-branded maximum strength lidocaine patches, creams and sprays (the "Products") was false and deceptive in that it led purchasers to believe that the Products delivered a "maximum strength" amount of lidocaine available (over the counter or by prescription) and that the patch Products could reliably adhere to the body for up to 8 or 12 hours, depending on the patch.

After several substantive settlement discussions and a full-day mediation with the Honorable Frank Maas (Ret.) of JAMS New York, an experienced and well-respected class action mediator, the Plaintiffs and Defendant ("Parties") have reached a proposed settlement ("Settlement" or "Agreement") pursuant to a mediator's proposal, under which Defendant has agreed to make up to $3,800,000 available to pay valid class member claims, Named Plaintiff awards, and reasonable costs and attorneys' fees. In addition to the $3,800,000 Settlement Sum, Defendant will also pay notice and administration costs separately.

[1] All capitalized terms not otherwise defined herein have the same definitions as set out in the settlement agreement. *See* Marchese Decl., Ex. 1.

Pursuant to the Settlement, each Settlement Class Member will be entitled to submit a claim that will, if valid, entitle him or her to a cash payment. Settlement Class Members who elect to fill out the Claim Form and who do not have valid Proof of Purchase may recover up to $4.50 per Unit, limited to a total of three Units of Products, and Settlement Class Members who elect to fill out the Claim Form and who have valid Proof of Purchase(s) dated within the Class Period may recover up to $4.50 for each Unit of Products contained in the Proof of Purchase(s), without limitation.

Additionally, as part of the Settlement, Defendant agrees to have the Labeling changed on the Products to clearly identify that the Products contain the "maximum strength" of lidocaine available over the counter ("OTC") and to remove any language concerning the length of time the Products in patch form will adhere.

The Court should have no hesitation finding that the Settlement falls within the range of possible approval. Accordingly, Plaintiffs respectfully request that the Court (i) grant preliminary approval of the Settlement; (ii) provisionally certify the Settlement Class under Fed. R. Civ. P. 23(b)(3) in connection with the settlement process; (iii) appoint Bursor & Fisher, P.A. and Gucovschi Rozenshteyn, PLLC as Class Counsel; (iv) appoint Monique Bell, Tree Anderson, and Melissa Conklin as the Class Representatives for the Settlement Class; and (5) approve the specific Notice Program, attached as Exhibits B-C to the Settlement, and direct distribution of the proposed Notice Program.

THE LITIGATION HISTORY AND SETTLEMENT NEGOTIATIONS

On December 11, 2021, Plaintiff Monique Bell filed the original class action complaint in the United States District Court for the Eastern District of New York (the "Complaint"). The material allegations of the complaint were that the packaging of Defendant's lidocaine patches was false and deceptive in that it led purchasers to believe that the lidocaine patches delivered a

"maximum strength" amount of lidocaine available and could reliably adhere to consumers' bodies for up to 8 or 12 hours, depending on the product. (ECF No. 1). Marchese Decl. ¶ 4.

On February 14, 2022, Defendant filed an answer to Plaintiff Bell's operative class action complaint, in which it asserted 15 affirmative defenses. (ECF No. 14). *Id.* ¶ 5.

On April 7, 2022, Defendant filed two letters seeking a pre-motion conference regarding its anticipated motion for judgment on the pleadings (ECF No. 26) and requesting adjournment of the Court's Initial Scheduling Conference (ECF No. 27). On April 12, 2022, Plaintiff Bell filed two letters in opposition to the above-referenced letters. (ECF Nos. 28, 29). Id. ¶ 6.

On April 13, 2022, the Court denied Defendant's request for a pre-motion conference and directed the parties to agree on a briefing schedule in anticipation of Defendant's motion for judgment on the pleadings. Furthermore, on April 13, 2022, the Court also denied Defendant's letter to adjourn the Court's Initial Scheduling Conference. *Id.* ¶ 7.

On May 10, 2022, Plaintiff Bell and Defendant, by and through their counsel of record, attended an in-person hearing before Judge Peggy Kuo to discuss the Parties' anticipated motion for judgment on the pleadings and discovery schedule. During the hearing, the Parties also discussed the prospect of settlement and agreed to participate in a settlement conference before the Court on August 23, 2022. Since that time, the Parties continued to engage in informal settlement discussions. *Id.* ¶ 8.

On May 18, 2022, Defendant served, and subsequently filed, its motion for judgment on the pleadings (ECF Nos. 37, 41-43). On June 17, 2022, Plaintiff Bell filed her opposition to Defendant's motion (ECF No. 44), and Defendant filed its reply in further support of its motion on July 1, 2022 (ECF No. 45). *Id.* ¶ 9.

Throughout this time, the Parties continued to engage in settlement discussions, including exchanging written discovery on issues such as the size and scope of the putative class and

Plaintiff Bell's use of Defendant's lidocaine patches. To that end, the Parties agreed in July 2022 to participate in a private mediation before The Honorable Frank Maas (Ret.) of JAMS New York, an experienced class action mediator. Marchese Decl. ¶ 10.

In the weeks leading up to the mediation, the Parties were in regular communication with each other and with Judge Maas, as the Parties sought to crystallize the disputed issues, produce focal information and data, and narrow potential frameworks for resolution. During this period and in connection with the mediation proceedings, Defendant provided Class Counsel with detailed transactional data regarding Defendant's sales of the Lidocaine Products; the Parties exchanged briefing on the key facts, legal issues, litigation risks, and potential settlement structures; and the Parties supplemented that briefing with extensive telephonic correspondence mediated by Judge Maas and in-person meetings in order to clarify the Parties' positions in advance of the mediation. This permitted the Parties to competently assess the strengths and weakness of their claims and defenses and their relative negotiating positions. *Id.* ¶ 11.

On September 28, 2022, the Parties attended a full-day mediation before Judge Maas in JAMS New York. While the Parties engaged in good faith arms-length negotiations, they failed to reach an agreement. However, the mediation culminated in a mediator's proposal on October 4, 2022, that the Parties accepted. After accepting the mediator's proposal, the Parties continued to negotiate on all of the material terms of the class action settlement and executed a term sheet. (ECF No. 48). *Id.* ¶ 12.

TERMS OF THE SETTLEMENT

I. CLASS DEFINITION

The Settlement Class is defined, using objective criteria, as all persons who purchased Products in the United States during the Class Period. Excluded from the Settlement Class are: (a) all persons who purchased or acquired the Products for resale; (b) Defendant and its

employees, principals, affiliated entities, legal representatives, successors, and assigns; (c) any person who makes a valid, timely opt-out request; (d) federal, state, and local governments (including all agencies and subdivisions thereof, but excluding employees thereof), and (e) the judges to whom this Action is assigned and any members of his/her/their immediate family. Settlement ¶ 2.41.

II. MONETARY RELIEF

Settlement Class Members who elect to fill out the Claim Form and who do not have valid Proof of Purchase may recover $4.50 per Unit, limited to three total Units. *Id* ¶ 4.1. Settlement Class Members who elect to fill out the Claim Form and who have valid Proof of Purchase(s) dated within the Class Period may recover $4.50 for each Unit contained in the Proof of Purchase(s), without limitation. *Id.* If the total amount to be paid as a result of Valid Claims exceeds the amount of the Settlement Sum that remains after the payment of Class Representative Service Awards, and Class Counsel's Fee Award, then the Benefit payable to each Claimant shall be proportionately reduced, such that Defendant's maximum liability under this Agreement shall not exceed the Settlement Sum. *Id.* ¶ 4.6.

III. NON-MONETARY RELIEF

As part of the Settlement, Defendant agrees to have the Labeling changed on the Products to clearly identify that the Products contain the "maximum strength" of lidocaine available over the counter ("OTC") and to remove any language concerning the length of time the Products in patch form will adhere. *Id.* ¶ 10.1.

IV. RELEASE

In exchange for the relief described above, Defendant, as well as all "Released Parties" as defined in Settlement ¶ 2.38, will receive a full release, including of all claims that (a) are based on, related to, or arise out of, any act, omission, inadequacy, misstatement, representation, harm,

matter, cause, or event pertaining to the Products that has occurred at any time from the beginning of time up to and including the entry of the Preliminary Approval Order, (b) arise from or are related in any way to this Action or the marketing, advertising, promoting, or Labeling of the Products, or (c) were or could have been asserted in the Action. *See id.* ¶¶ 12.1-12.7 (full releasing language).

V. NOTICE AND ADMINISTRATION EXPENSES

Defendant shall pay all Settlement Administration Expenses in accordance with the schedule set forth in the Settlement Agreement. Settlement ¶ 5.2. Settlement Administration Expenses shall be paid in addition to, and separate from, any awards paid to Settlement Class Members, and shall not derogate in any way from any relief due to the Class. *Id.*

VI. INCENTIVE AWARDS

In recognition for their efforts on behalf of the Class, Defendant has agreed not to oppose Class Representatives' request, subject to Court approval, for incentive awards of up to $3,000 each as appropriate compensation for their time and effort serving as Class Representatives and as parties to the Litigation. *Id.* ¶ 2.14. Any incentive awards shall be paid by Defendant from the Settlement Sum. *Id.* ¶¶ 2.42, 7.2.

VII. ATTORNEYS' FEES AND EXPENSES

Subject to approval by the Court, Class Counsel will petition, and Defendant will pay, attorneys' fees, costs, and expenses of no more than one million one-hundred-forty thousand dollars and zero cents ($1,140,000.00). *Id.* ¶ 2.3. Any attorneys' fees, costs, and expenses shall be paid by Defendant from the Settlement Sum. *Id.* ¶¶ 2.3, 7.2.

ARGUMENT

I. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

"Preliminary approval is the first step in the settlement process. It allows notice to be provided and affords interested parties the opportunity to comment on or object to the settlement." *Holick v. Cellular Sales of New York, LLC*, 2022 WL 3265133, at *2 (N.D.N.Y. July 25, 2022) (cleaned up). "Following notice, the Court can hold a hearing, receive input on the proposed settlement, and make a final judgment as to the propriety and fairness of the settlement." *Id.* (cleaned up).

There is a "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (internal quotations omitted); *see also* NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). "Courts have discretion regarding the approval of a proposed class action settlement." *Jara v. Felidia Restaurant, Inc.*, 2018 WL 11225741, at *1 (S.D.N.Y. Aug. 20, 2018) (Carter, J.). "In exercising this discretion, courts should give weight to the parties' consensual decision to settle class action cases because they and their counsel are in unique positions to assess potential risks." *Id*. "Due to the presumption in favor of settlement, absent fraud or collusion, courts should be hesitant to substitute their judgment for that of the parties who negotiated the settlement." *Peoples v. Annucci*, 180 F. Supp. 3d 294, 307 (S.D.N.Y. 2016) (cleaned up).

"Preliminary approval of a settlement agreement requires only an initial evaluation of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties." *Holick*, 2022 WL 3265133, at *2. "To grant preliminary approval, a court need only find probable cause to submit the settlement proposal to class members." *Pacheco v. Guyer*, 2022 WL 16647755, at *1 (cleaned up). "If the preliminary

evaluation of the proposed settlement does not disclose grounds to doubt its fairness … and appears to fall within the range of possible approval," the court should permit notice of the settlement to be sent to class members. NEWBERG § 11.25. "Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116 (internal quotations omitted); *Wright v. Stern*, 553 F. Supp. 2d 337, 343 (S.D.N.Y. 2008) (same).

In evaluating a class action settlement, courts in the Second Circuit consider the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"). The *Grinnell* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (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; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463.

Courts should also consider the "four enumerated factors in the new [Federal Rule of Civil Procedure] Rule 23(e)(2), in addition to the nine *Grinnell* factors." *Johnson v. Rausch, Sturm, Israel, Enerson & Hornik, LLP*, 333 F.R.D. 314, 420 (S.D.N.Y. 2019). The Rule 23(e) factors are whether: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account (i) the costs, risks, and delay of trial and appeal; (ii) the

effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2). "There is significant overlap between the Rule 23(e)(2) and *Grinnell* factors, which complement, rather than displace each other." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 2019 WL 6875472, at *14 (E.D.N.Y. Dec. 16, 2019) ("*In re Payment Card II*").

A. The *Grinnell* Factors

1. Litigation Through Trial Would Be Complex, Costly, And Long (*Grinnell* Factor 1)

"[C]lass 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." *Pearlstein v. BlackBerry Ltd.*, 2022 WL 4554858, at *3 (S.D.N.Y. Sept. 29, 2022). As such, courts have consistently held that unless the proposed settlement is clearly inadequate, its acceptance and approval are preferable to the continuation of lengthy and expensive litigation with uncertain results. *TBK Partners, Ltd. v. Western Union Corp.*, 517 F. Supp. 380, 389 (S.D.N.Y. 1981), *aff'd,* 675 F.2d 456 (2d Cir. 1982).

As discussed above, the Parties have engaged in informal discovery. Marchese Decl. ¶ 10. The next steps in the litigation would presumably include Defendant refiling its motion for judgment on the pleadings. If Plaintiffs prevailed on that motion, the Parties would engage in depositions of witnesses, substantial electronically stored discovery, third-party and expert discovery, and contested motions for summary judgment and class certification, which would be costly and time-consuming for the Parties and the Court and create a risk that a litigation class would not be certified and/or that the Settlement Class would recover nothing at all. *See*

McLaughlin v. IDT Energy, 2018 WL 3642627, at *10 (E.D.N.Y. July 30, 2018) (finding the first *Grinnell* factor weighed in favor of settlement approval where "the parties would likely need to brief motions for class certification, summary judgment, and potentially proceed to trial"). Thus, while Plaintiffs are confident in the merits of this case, there is no guarantee that they will safely land the proverbial plane. Moreover, "[e]ven assuming that plaintiffs [are] successful in defeating any pretrial motions filed by defendant[], and [is] able to establish defendant['s] liability at trial, there is always the potential for an appeal, which would inevitably produce delay." *Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 55 (W.D.N.Y. 2018) (internal quotations omitted).

The Settlement, on the other hand, permits a prompt resolution of this action on terms that are fair, reasonable, and adequate to the Settlement Class. It includes up to $3.8 million in monetary relief, plus the costs of notice and administration, and the additional value of the injunctive relief. Settlement ¶ 2.42. This *Grinnell* factor weighs in favor of preliminary approval.

2. The Reaction Of The Class (*Grinnell* Factor 2)

"Since no notice has been sent, consideration of this factor is premature." *In re Warner Chilcott Ltd. Sec. Litig.*, 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008). Plaintiffs are unaware of any opposition to the Settlement at this juncture.

3. Discovery Has Advanced Far Enough To Allow The Parties To Responsibly Resolve The Case (*Grinnell* Factor 3)

"This factor asks[] whether … counsel possessed a record sufficient to permit evaluation of the merits of Plaintiff[s'] claims, the strengths of the defenses asserted by Defendants, and the value of Plaintiff[s'] causes of action for purposes of settlement." *Pearlstein*, 2022 WL 4554858, at *4 (cleaned up). As discussed above, the Parties conducted informal discovery. Marchese Decl. ¶ 10. Both sides have also prepared mediation statements setting forth their

relevant positions and participated "in a day-long mediation allowed them to further explore the claims and defenses." *Beckman v. KeyBank*, 293 F.R.D. 467, 475 (S.D.N.Y. 2013); *see also* Marchese Decl. ¶¶ 10-11. Class Counsel's experience in similar matters, as well as the efforts made by counsel on both sides and the mediator, confirms that "Plaintiff[s] obtained sufficient discovery to weigh the strengths and weaknesses of their claims and to accurately estimate the damages at issue." *Beckman*, 293 F.R.D. at 475.

4. Plaintiffs Would Face Real Risks If The Case Proceeded, And Establishing A Class And Maintaining It Through Trial Would Not Be Simple (*Grinnell* Factors 4, 5, And 6)

"Courts generally consider the fourth, fifth, and sixth Grinnell factors together." *Pearlstein*, 2022 WL 4554858, at *5 (internal quotations omitted). In weighing the risks of certifying a class and establishing liability and damages, "the Court is not required to decide the merits of the case, resolve unsettled legal questions, or to foresee with absolute certainty the outcome of the case." *Lowe v. NBT Bank, N.A.*, 2022 WL 4621433, at *8 (N.D.N.Y. Sept. 30, 2022) (cleaned up). "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Flores v. CGI Inc.*, 2022 WL 13804077, at *7 (S.D.N.Y. Oct. 21, 2022) (internal quotations omitted).

"Here, while Plaintiffs and Class Counsel believe that they would prevail on their claims asserted against [Defendant], they also recognize the risks and uncertainties inherent in pursuing the action through class certification, summary judgment, trial, and appeal." *Lowe*, 2022 WL 4621433, at *8. In particular, Plaintiffs would face "[t]he risk of obtaining … class certification and maintaining [it] through trial," which "would likely require extensive discovery and briefing." *Beckman*, 293 F.R.D. at 475. And "[e]ven assuming that the Court granted certification, there is always the risk of decertification after the close of discovery." *Lowe*, 2022 WL 4621433, at *8; *see also Flores*, 2022 WL 13804077, at *8 ("The risks attendant to

certifying a class and defending any decertification motion supports approval of the settlement."). Approval of the Settlement obviates the "[r]isk, expense, and delay" of further litigation, so these factors support preliminary approval. *Lowe*, 2022 WL 4621433, at *8.

5. Defendant's Ability To Withstand A Greater Judgment (*Grinnell* Factor 7)

While the Defendant could likely withstand a greater judgment, "this factor standing alone does not mean that the settlement is unfair." *Philemon v. Aries Capital Partners, Inc.*, 2019 WL 13224983, at *12 (E.D.N.Y. July 1, 2019).

6. The Settlement Amount Is Reasonable In Light Of The Possible Recovery And The Attendant Risks Of Litigation (*Grinnell* Factors 8 And 9)

"It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not *per se* render the settlement inadequate or unfair." *Philemon*, 2019 WL 13224983, at *12. Instead, "[w]hen the proposed settlement provides a meaningful benefit to the class when considered against the obstacles to proving plaintiff's claims with respect to damages in particular, the agreement is reasonable." *Id*. Moreover, when a settlement assures immediate payment of substantial amounts to Settlement Class Members and does not "sacrific[e] speculative payment of a hypothetically larger amount years down the road," the settlement is reasonable. *See Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 WL 782596, *5 (S.D.N.Y. Mar. 24, 2008) (cleaned up).

In the Second Circuit, courts are required to calculate the value of a Settlement in terms of the amount of relief *made available* to Settlement Class Members, as opposed to the amount that may actually be claimed. *Cf. Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (basing award of attorneys' fees on "the total funds made available, whether claimed or not" because "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class."). To that end, Class Counsel has made up

to $3.8 million available to Settlement Class Members, plus the costs of class notice and administration. Settlement, ¶ 2.42. On top of this, the Defendant's agreement to have Labeling changes implemented provides additional non-monetary relief that the Court must account for in valuing the Settlement. *Id.* ¶ 10.1. *See Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *1 (S.D.N.Y. Sept. 9, 2015) ("The non-monetary benefits also provide very substantial benefits to the Class."); *Perks v. TD Bank, N.A.*, *Stinson v. City of New York*, 256 F. Supp. 3d 283, 294 (S.D.N.Y. 2017) ("Given the risks possessed by both sides, the Settlement's Class Fund of $56.5 million and the many non-monetary remedial measures Defendants will take, make this Settlement fall within the bounds of reasonableness."). Thus, the monetary and injunctive relief is reasonable, especially given the litigation risks and the case's partial-refund theory of damages.

B. The Rule 23(e)(2) Factors

1. The Class Representatives And Class Counsel Have Adequately Represented The Class (Rule 23(e)(2)(A)

"Determination of adequacy typically entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 30 (E.D.N.Y. 2019) ("*In re Payment Card I*") (internal quotations omitted). Here, Plaintiffs' "interests are aligned with other class members' interests because they suffered the same injuries": they purchased Products that were allegedly falsely and deceptively labeled. *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019). "Because of these injuries, [P]laintiffs have an interest in vigorously pursuing the claims of the class." *Id.* (internal quotations omitted). Further, courts have previously found that Plaintiffs' attorneys adequately meet the obligations and responsibilities of

Class Counsel. Marchese Decl. at Ex. 2 (Firm Resume); Declaration of Adrian Gucovschi at Ex. 1 (Firm Resume).

2. The Settlement Was Negotiated At Arm's Length

"If a class settlement is reached through arm's-length negotiations between experienced, capable counsel knowledgeable in complex class litigation, the Settlement will enjoy a presumption of fairness." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 693 (internal quotations omitted). Further, "[a] settlement like this one, reached with the help of a third-party neutral, enjoys a presumption that the settlement achieved meets the requirements of due process." *Jara*, 2018 WL 11225741, at *2 (cleaned up). Here, both counsel for Plaintiffs and for Defendant are experienced in class action litigation. Moreover, the Parties participated in a mediation before Judge Maas and engaged in protracted settlement discussions. Marchese Decl. ¶¶ 10-12.

3. The Settlement Provides Adequate Relief To The Class

Whether relief is adequate considers "(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, if required; (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)." Rule 23(e)(2)(C)(i-iv).

"The costs, risks, and delay of trial and appeal." This factor "subsumes several *Grinnell* factors … including: (i) the complexity, expense and likely duration of the litigation; (ii) the risks of establishing liability; (iii) the risks of establishing damages; and (iv) the risks of maintaining the class through the trial." *In re Payment Card I*, 330 F.R.D. at 36. As noted *supra*, the Settlement has met each of these *Grinnell* factors. *See* Argument §§ I.A, *supra*.

"The effectiveness of any proposed method of distributing relief to the class." Settlement Class Members need only submit a simple claim form to receive monetary relief. This is a reasonable method of distributing relief to Settlement Class Members. *See Mendez v. MCSS Rest. Corp.*, 2022 WL 3704591, at *6 (E.D.N.Y. Aug. 26, 2022) ("The Settlement Agreement and the Claim Form mechanism is an effective means to guarantee that the Settlement Administrator will be able to send settlement checks to all Settlement Class Members who wish to participate in the Settlement. The claim form mechanism is commonly approved in the Second Circuit.") (citing cases).

"The terms of any proposed award of attorneys' fees." In the Second Circuit, an award of attorneys' fees is based on "the total funds made available, whether claimed or not" because "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class." *Masters*, 473 F.3d at 437. Here, Class Counsel has agreed to petition the Court for no more than one million one-hundred-forty thousand dollars ($1,140,000) in costs and fees. Settlement ¶¶ 2.3, 7.2. This approximates a reasonable 27% of the total monetary relief made available (assuming notice and settlement administration costs of $450,000). *See Rosenfeld v. Lenich*, 2022 WL 2093028, at *3 (E.D.N.Y. Jan. 19, 2022) ("Where, as here, the requested fee totals one-third of a settlement fund under $10 million, courts in this Circuit routinely find that fee well within the range of reasonableness."). And this valuation does not account for the significant non-monetary relief Class Counsel has procured, which also must be taken into consideration. *See* Settlement ¶ 10.1; *Perks*, 2022 WL 1451753, at *2.

"Any agreement required to be identified by Rule 23(e)(3)." This factor requires identification of "any agreement made in connection with the proposal." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 696. No such agreement exists other than the Settlement.

4. The Settlement Treats All Class Members Equally

This Rule 23(e)(2) factor discusses "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." *In re Payment Card I*, 330 F.R.D. at 47. Here, Settlement Class Members are entitled to choose from the same Claim options, and provided that Valid Claims for refunds exceed $3.8 million, rewards to Settlement Class Members will be reduced proportionally. Settlement ¶ 4.6. *See Gordon v. Vanda Pharmaceuticals Inc.*, 2022 WL 4296092, at *5 (E.D.N.Y. Sept. 15, 2022) (finding class members were treated equally where "all class members will be subject to the same formula for the distribution of the fund") (cleaned up).

II. CONDITIONAL CERTIFICATION OF THE RULE 23 CLASS IS APPROPRIATE

"Before approving a class settlement agreement, a district court must first determine whether the requirements for class certification in Rule 23(a) and (b) have been satisfied." *In re Payment Card I*, 330 F.R.D. at 50. Under Fed. R. Civ. P. 23(a), a class action may be maintained if all of the prongs of Fed. R. Civ. P. 23(a) are met, as well as one of the prongs of Fed. R. Civ. P. 23(b). Fed. R. Civ. P. 23(a) requires that:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

As relevant here, Fed. R. Civ. P. 23(b)(3) requires the court to find that "questions of law or fact common to the members of the class 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."

A. The Proposed Settlement Class Meets the Requirements of Rule 23(a)

1. Numerosity

Numerosity is satisfied when the class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Here, a total of 9,514,038 Product Units have been sold from December 11, 2017 through January 3, 2023 during the Class period. Marchese Decl. ¶ 13. Numerosity is therefore met. *Lowe*, 2022 WL 4621433, at *4 ("Numerosity is presumed at a level of 40 members.") (cleaned up).

2. Commonality

Commonality is satisfied when the claims depend on a common contention, the resolution of which will bring a class-wide resolution of the claims. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011). "Although the claims need not be identical, they must share common questions of fact or law." *Lowe*, 2022 WL 4621433, at *4. Instead, "Rule 23(a)(2) simply requires that there be issues whose resolution will affect all or a significant number of the putative class members." *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 137 (2d Cir. 2015) (cleaned up). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Id.* (cleaned up)

Here, there are common issues of law and fact because the claims of Settlement Class Members arise from similar alleged false and deceptive labeling. *See* First Amended Complaint ("FAC") ¶¶ 12, 39. "Because exactly the same representations were made to all class members

via product packaging . . . a classwide proceeding is well suited to 'generate common answers apt to drive the resolution of the litigation.'" *Milan v. Clif Bar & Co.*, 340 F.R.D. 591, 599 (N.D. Cal. 2021) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). Further, the Products' labeling presents a question = which "is common to all class members." *De Lacour v. Colgate-Palmolive Co.*, 338 F.R.D. 324, 337 (S.D.N.Y. 2021), *leave to appeal denied*, 21-1234, 2021 WL 5443265 (2d Cir. Sept. 16, 2021) ("As other courts in this district have held, whether a label that is uniform across products is false and/or misleading is common to all class members and is apt to drive the resolution of the litigation, because the same generalized evidence will be used to prove plaintiffs' claims.") (citation omitted). Accordingly, commonality is satisfied.

3. Typicality

Fed. R. Civ. P. 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "Minor variations in the fact patterns underlying individual claims do not preclude a finding of typicality when it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented." *Buffington v. Progressive Advanced Ins. Co.*, 342 F.R.D. 66, 72 (S.D.N.Y. 2022) (cleaned up). Here, "Plaintiffs say that they, like all other proposed class members, would not have purchased [Defendant's] Products if they knew that their labeling claims were false and misleading . . . . This is the same deception and the same injury the classes are said to have suffered. Typicality and adequacy are established." *Milan v. Clif Bar & Co.*, 340 F.R.D. 591, 597 (N.D. Cal. 2021); *see also* FAC ¶ 40. Accordingly, typicality is satisfied.

4. Adequacy

"Determination of adequacy typically entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced, and able to conduct the litigation." *Lowe*, 2022 WL 4621433, at *5

(internal quotations omitted). Here, Plaintiffs—like each and every one of the Settlement Class Members—purchased Products that were allegedly falsely and deceptively labeled in a similar manner. FAC ¶¶ 3, 23-26. "The fact that [P]laintiffs' claims are typical of the class is strong evidence that their interests are not antagonistic to those of the class; the same strategies that will vindicate plaintiffs' claims will vindicate those of the class." *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 158 (S.D.N.Y. 2008).

Likewise, proposed Class Counsel is more than qualified to represent the Settlement Class. "Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims … The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in five [now six] class action jury trials since 2008." *Ebin v. Kangadis Food Inc.*, 297 F.R.D 561, 566 (S.D.N.Y. 2014); *see also* Marchese Decl. Ex. 2 (Firm Resume of Bursor & Fisher, P.A.). In addition, Gucovschi Rosenshteyn PLLC is an experienced class action law firm that has successfully litigated and settled numerous consumer class action cases involving allegedly deceptive business practices, like here. Gucovschi Decl. Ex. 1 (Firm Resume of Gucovschi Rosenshteyn PLLC). Class Counsel has devoted substantial resources to the prosecution of this action by investigating Plaintiffs' claims and that of the Settlement Class, aggressively pursuing those claims, conducting informal discovery, participating in a private mediation with Judge Maas, and ultimately, negotiating a favorable class action settlement. Marchese Decl. ¶ 10-12.

B. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3)

Rule 23(b)(3) requires that common questions of law "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." Fed. R. Civ. P. 23(b)(3). Both predominance and superiority are met here.

1. Predominance

"Under Rule 23(b)(3), a proposed class must be sufficiently cohesive and common issues must predominate in order to warrant adjudication as a class." *Philemon*, 2019 WL 13224983, at *9. "Predominance is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (internal quotations omitted). And here, the Products' labeling constitutes generalized evidence that is likely to drive the litigation. *See De Lacour*, 338 F.R.D. at 337 (S.D.N.Y. 2021).

Courts have found that predominance is satisfied in deceptive advertising cases like this one. *See Milan v. Clif Bar & Co.*, 340 F.R.D. 591, 599 (N.D. Cal. 2021) ("As the Supreme Court has stated, 'predominance is a test readily met in certain cases alleging consumer fraud.' In the Court's view, this is one of those cases.") (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (cleaned up). Here, the common evidence of the alleged deceptive advertising would include, but not be limited to, the Products' packaging as well as consumer survey evidence and expert testimony as to damages and merits-liability issues. Predominance is therefore met.

2. Superiority

Under Rule 23(b)(3)'s superiority requirement, Plaintiffs must demonstrate that a "class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Philemon*, 2019 WL 13224983, at *9 (citing *Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010)). Fed. R. Civ. P. 23(b)(3) sets forth a non-exclusive list of relevant factors, including whether individual class members wish to bring, or have already brought, individual

actions; and the desirability of concentrating the litigation of the claims in the particular forum.[2]

Here, "a class action is far superior to requiring the claims to be tried individually given the relatively small awards that each Settlement Class [M]ember is otherwise entitled." *Lowe*, 2022 WL 4621433, at *6. Further, "litigating this matter as a class action will conserve judicial resources and is more efficient for the Settlement Class [M]embers, particularly those who lack the resources to bring their claims individually." *Id*. Thus, a class action is the most suitable mechanism to fairly, adequately, and efficiently resolve the Settlement Class's claims, while "the individual damages may be too small to make litigation worthwhile." *In re Sony SXRD Rear Projection Television Class Action Litig.*, 2008 WL 1956267, at *14.

III. PLAINTIFFS' COUNSEL SHOULD BE APPOINTED AS CLASS COUNSEL

Under Rule 23, "a court that certifies a class must appoint counsel … [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the Court considers proposed Class Counsels': (i) work in identifying or investigating the potential claim, (ii) experience in handling class actions, other complex litigation, and the types of claims asserted in the action, (iii) knowledge of the applicable law, and (iv) resources that it will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

As discussed above, proposed Class Counsel have extensive experience successfully litigating and resolving consumer class actions, including those involving false and deceptive labeling. Marchese Decl. Ex. 2 (Firm Resume of Bursor & Fisher, P.A.); Gucovschi Decl. Ex. 1

[2] Another factor, whether the case would be manageable as a class action at trial, is not of consequence in the context of a proposed settlement. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class 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"); *Hill v. County of Montgomery*, 2020 WL 5531542, at *4 (N.D.N.Y. Sept. 14, 2020) ("Whether the case would be manageable as a class action at trial is not of consequence here in the context of a proposed settlement.").

(Firm Resume of Gucovschi Rozenshteyn, PLLC.). And, as a result of their zealous efforts in this case, proposed Class Counsel have secured substantial monetary and non-monetary relief for the Settlement Class Members. Thus, the Court should appoint Bursor & Fisher, P.A. and Gucovschi Rozenshteyn, PLLC as Class Counsel.

IV. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

A. The Content Of The Proposed Class Notice Complies With Rule 23(c)(2)

For notice to be satisfactory, the notice must provide:

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. … The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion, (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

Here, the Notice Program provides detailed information about the Settlement, including: (i) a comprehensive summary of its terms; (ii) Class Counsels' intent to request attorneys' fees, reimbursement of expenses, and incentive awards for the Class Representatives; and (iii) detailed information about the Released Claims. Settlement Exhibits B, C-1, and C-2. In addition, the Notice Program provides information about the Fairness Hearing date, the right of Settlement Class Members to seek exclusion from the Settlement Class or to object to the proposed Settlement (as well as the deadlines and procedure for doing so), and the procedure to receive additional information. *Id.*

In short, the Notice Program fully informs Settlement Class Members of the lawsuit, the proposed Settlement, and the information they need to make informed decisions about their rights. This information is adequate to put Settlement Class Members on notice of the proposed

Settlement and is well within the requirements of Fed. R. Civ. P. 23(c)(2)(B). *George*, 2021 WL 3188314, at *7 (approving similar notice form and collecting cases that have done the same); *Jara*, 2018 WL 11225741, at *4 ("The Proposed Notice is also appropriate because it describes the terms of the settlement, informs the classes about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing.").

B. The Plan For Distribution Of The Class Notice Will Comply With Rule 23(c)(2)

The Parties have agreed upon a Notice Program that easily satisfies the requirements of both Fed. R. Civ. P. 23 and Due Process. Declaration of Jeanne C. Finegan, APR ¶¶ 3, 13-16. Upon Preliminary Approval of the Settlement, the Settlement Administrator will send Direct Notice to all Settlement Class Members by e-mail for whom Defendant has such information through its ExtraCare program, and Publication Notice for all Settlement Class Members for whom Defendant do not have an email address. Settlement ¶¶ 8-8.2. In addition, the Settlement Administrator will establish a Settlement Website that shall contain all salient Settlement documents, including the Long-Form Notice, as well as access to important Court documents, upcoming deadlines, and direct Settlement Class Members on how to submit Claim Forms. *Id.* ¶ 8.3. The Settlement Administrator will also establish a toll-free telephone support line that will provide Settlement Class Members with general information about the Action and will respond to frequently asked questions about the Action and claim procedure. *Id.* ¶ 8.4. Finally, the Settlement Administrator will provide notice of the Settlement to the appropriate state and federal officials as required by the Class Action Fairness Act, 28 U.S.C. § 1715. *Id.* ¶ 5.7(b). In sum, the proposed methods for providing notice to the Settlement Class comports with both Fed. R. Civ. P. 23 and Due Process, and thus, should be approved.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant the Unopposed Motion for Preliminary Approval of the Settlement. A Proposed Order granting preliminary approval, certifying the Settlement Class, appointing Class Counsel, and approving the proposed notice program and notice documents, attached to the Settlement as Exhibits B, C-1 and C-2, is submitted herewith as Exhibit D to the Settlement Agreement.

Dated: April 24, 2023

Respectfully submitted,

By: */s/ Joseph I. Marchese*
Joseph I. Marchese

BURSOR & FISHER, P.A.
Joseph I. Marchese
888 Seventh Avenue
New York, NY 10019
Telephone: (646) 837-7410
Email: jmarchese@bursor.com

GUCOVSCHI ROZENSHTEYN, PLLC
Adrian Gucovschi, Esq.
630 Fifth Avenue, Suite 2000
New York, NY 10111
Telephone: (212) 884-4230
E-Mail: adrian@gr-firm.com

Proposed Class Counsel