UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUSAN SWETZ, individually on behalf of herself and all others similarly situated, Plaintiffs, -against- GSK Consumer Health, Inc., Defendant.	:	**CASE NO.** 7:20-cv-04731-NSR

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

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Plaintiff Susan Swetz ("Plaintiff"), along with Plaintiff Phillip White in *White v. GlaxoSmithKline Consumer Healthcare Holdings (US) LLC*, Case No. 5:20-cv-04048-SVK (N.D. Cal.) ("*White*") (collectively, "Plaintiffs"), individually and on behalf of all others similarly situated, respectfully submit this memorandum of law in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.[1]

INTRODUCTION

If final approval is granted, this settlement will create a Gross Settlement Fund of $6.5 million, which was memorialized in a Settlement Agreement, executed May 10, 2021 (the "Agreement"). In granting the Plaintiffs' unopposed Motion for Preliminary Approval of Class Action Settlement, Preliminary Certification of Settlement Class and Approval of Notice Plan ("Motion for Preliminary Approval") on June 8, 2021, the Court made a preliminary determination that the settlement is fair, reasonable, and adequate. *See* Preliminary Approval Order, ECF No. 48 ¶ 2. Plaintiffs, by and through Class Counsel and the Settlement Administrator, successfully implemented the Notice Plan approved by the Court, and the Settlement Class has been notified about the settlement. *Id*. ¶ 21a.; Sultzer Decl. ¶ 3.[2] Although the Settlement Class can file objections through September 7, 2021, the initial reaction to the Agreement is favorable. *See* Preliminary Approval Order ¶ 21e.; Sultzer Decl. ¶ 4. To date, no objections or valid requests for exclusion have been filed.[3] Sultzer Decl. ¶ 5.

[1] Unless otherwise indicated, capitalized terms shall have the same meaning as they do in the Settlement Agreement (ECF No. 46-1). References to "§" are to sections of the Settlement Agreement and all Settlement Agreement exhibits are referred to as "Ex. [#]."

[2] The Declaration of Jason P. Sultzer of The Sultzer Law Group, P.C. ("Sultzer Law"), filed concurrently herewith, is referred to throughout as the "Sultzer Decl."

[3] One request for exclusion was submitted to the Settlement Administrator. The individual stated that she does not want to participate in the settlement but has no interest in pursuing claims against Defendants. The opt out does not comply with the Court's Preliminary Approval Order because the individual failed to include the required information (e.g., a telephone number, email address, and date of birth). Sultzer Decl. ¶ 6.

For the reasons explained below, the settlement represents an excellent recovery and result for the Settlement Class. If approved, it will create a $6.5 million, non-reversionary Gross Settlement Fund and prohibit GSK's use of the challenged "100% Natural" and "clinically proven to curb cravings" claims in its marketing and advertising of the Covered Products. *See* §§ A.1.s, C.5., C.8., C.14. The Gross Settlement Fund will pay all timely and valid Claims submitted by Settlement Class Members, the Settlement Administrator Costs, Attorneys' Fees and Costs, and Service Awards to Plaintiffs. *Id*. In exchange, *inter alia*, Plaintiffs and Settlement Class Members will release Defendants GSK Consumer Health, Inc. and GlaxoSmithKline Consumer Healthcare Holdings (US) LLC ("GSK" or "Defendants") and their affiliates and resellers in the chain of distribution. *Id.* §§ F.29-30. In part because of the risks Plaintiffs faced in pursuing this action through trial and given the positive response to the settlement, this Court should find that the settlement is fair, adequate, and reasonable, and grant final approval.

BACKGROUND

GSK manufactures, markets, and sells fiber supplements Benefiber Original and Benefiber Healthy Shape as "100% Natural" and Benefiber Healthy Shape as "clinically proven to curb cravings." Plaintiffs assert in the Litigation that neither claim is true, and the satiety claim is not substantiated with reliable scientific evidence. First Am. Compl., ECF No. 21 ¶¶ 1-3; *White*, Second Am. Compl., ECF No. 44 ¶¶ 1-7.

A. The Relevant Procedural History

In June 2020, Plaintiffs filed substantively similar class action complaints in *White* and this action (collectively, the "Litigation") against GSK to assert claims under consumer protection statutes and for breach of warranty, unjust enrichment, and fraud based on GSK's alleged false and misleading advertising of the Covered Products as 100% natural and clinically proven to provide satiety benefits. Compl., ECF 1; *White*, Compl., ECF No. 1. At all times, Plaintiffs, by and

through their counsel, have diligently co-prosecuted the Litigation.[4] Throughout the Litigation, GSK has strongly contested jurisdiction, venue, liability, damages, and class certification. Bruce Decl. ¶ 12; Sultzer Decl. ¶ 8.

1. The *Swetz* Matter Pleadings and Law & Motion

Following a significant pre-litigation investigation, on June 19, 2020, Plaintiff Susan Swetz filed a Class Action Complaint against GSK to assert claims based on GSK's false advertisement of the Covered Products as "100% Natural" on behalf of a putative nationwide class. ECF No. 1 ¶¶ 1-2; Sultzer Decl. ¶¶ 9-10. After submitting a robust opposition on the merits to GSK's request for leave to file motions to dismiss and transfer venue (ECF No. 9), pursuant to the parties' stipulation and orders of this Court (ECF Nos. 18, 20), Plaintiff Swetz filed the First Amended Class Action Complaint on (ECF No. 21), to include claims based on GSK's alleged false advertisement of Benefiber Health Shape as "clinically proven to curb cravings" as well as claims for breach of express warranty, violation of the Magnuson Moss Warranty Act, fraudulent misrepresentation, and fraudulent concealment. Sultzer Decl. ¶ 11.

2. The *White* Matter Pleadings and Law & Motion

Following a thorough pre-litigation investigation, on June 17, 2020, Plaintiff Phillip White filed a Class Action Complaint against GSK to assert claims based on GSK's alleged false advertisement of the Covered Products as "100% Natural." *White*, ECF No. 1 ¶¶ 1-7; Bruce Decl.

[4] *See* Bruce Decl. ¶ 5; Moon Decl. ¶ 5; Weiner Decl. ¶¶ 4-8; Sultzer Decl. ¶¶ 7-13; McNamara Decl. ¶ 5; Mason Decl. ¶ 3; Schaffer Decl. ¶ 10. Since the initiation of the Litigation, additional counsel involved in co-prosecuting the Litigation from six separate firms have appeared to represent Plaintiff Swetz, including Class Counsel. *See* First Am. Compl., 12/16/2020. The Declarations of Christopher D. Moon of Moon Law APC ("Moon Law"), Melissa S. Weiner of Pearson, Simon & Warshaw, LLP ("PSW"), Katherine A. Bruce of Clarkson Law Firm, P.C. ("Clarkson"), Douglas J. McNamara of Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein"), Gary E. Mason of Mason Lietz & Klinger LLP ("MLK"), and Charles E. Schaffer of Levin Sedran & Berman ("LSB") in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Motion for Attorneys' Fees, Costs, and Service Awards are respectively referred to herein as: "Moon Decl.," "Weiner Decl.," "Bruce Decl.," "McNamara Decl.," "Mason Decl.," and Schaffer Decl."

¶¶ 12(a)-(b). After evaluating GSK's motions to transfer venue and dismiss (*White*, ECF Nos. 15-17), Plaintiff White filed a First Amended Class Action Complaint (*White*, ECF No. 23) to narrow the putative class to consumers in the State of California and add a claim for damages under California's Consumers Legal Remedies Act, codified at Cal. Civ. Code § 1782 ("CLRA").

GSK filed modified motions to transfer and dismiss Plaintiff White's amended complaint. *White*, ECF Nos. 33-34. Following extensive briefing in opposition (*White*, ECF Nos. 36-37), analysis of GSK's replies (*White*, ECF Nos. 38-39), further research to address questions raised in the court's tentative order (*White*, ECF No. 40), and protracted oral arguments, Plaintiff White successfully defeated GSK's motion to transfer and—almost entirely—its motion to dismiss with leave to amend (*White*, ECF No. 43). Bruce Decl. ¶ 12(c). With respect to GSK's primary jurisdiction argument, the Court concluded that the FDA action to define "natural" was not sufficiently imminent to defer resolution of that issue to the FDA. Plaintiff White filed a Second Amended Class Action Complaint reasserting the dismissed claims in a manner that addressed the court's concerns (*White*, ECF No. 44) and GSK filed its Answer and Affirmative Defenses to Plaintiff's Second Amended Complaint (*White*, ECF No. 45). Bruce Decl. ¶ 12(c). Additionally, the parties engaged in extensive conferences concerning deadlines, negotiated and finalized joint case management statements, including a proposed scheduling order, and negotiated the terms of a stipulated protective order governing confidentiality. Bruce Decl. ¶ 12(e).

3. Discovery & Investigation

Following the *White* parties' completion of the initial Rule 26(f)[5] conference, Plaintiffs initiated coordinated discovery. Bruce Decl. ¶ 12(d); Sultzer Decl. ¶ 11. Plaintiff White

[5] References to "Rule" or "Rules" herein shall refer to the Federal Rules of Civil Procedure unless expressly stated to the contrary.

immediately served comprehensive Rule 33 interrogatories and Rule 34 document requests to GSK designed to not only gather evidence relevant to class certification, but also to prepare for trial on the merits. Bruce Decl. ¶ 12(d). Plaintiff White and GSK exchanged Rule 26(a)(1) initial disclosures. *Id.* To work efficiently, conserve resources, and serve judicial economy, without any prejudice to the interests of absentee class members, Plaintiffs agreed to hold the outstanding discovery in abeyance, given the pending motions to dismiss and transfer, in exchange for GSK's agreement to engage in early private mediation and produce critical documents and information requested pre-mediation. Bruce Decl. ¶ 12(d); Sultzer Decl. ¶ 12. Class Counsel requested, and GSK produced, critical discovery to enable Plaintiffs to evaluate their claims and position to negotiate a settlement that would be fair and reasonable on behalf of the Settlement Class. This information included information concerning GSK's labels throughout the Class Period, substantiation of the claims at issue, the manufacturing process, market research and related campaign information, and sales figures. Bruce Decl. ¶ 12(d); Sultzer Decl. ¶ 13. Additionally, Class Counsel conducted significant legal research and an investigation into industry reports, scientific literature, and the Covered Products' market segment as follows:

- Class Counsel thoroughly analyzed the legal landscape and evaluated the risks and benefits of prosecuting the Litigation and an early resolution, including research into the various state consumer protection laws and available remedies, and evaluation of certification.
- Class Counsel extensively analyzed, in detail, the claims alleged in the respective complaints, GSK's advertising campaigns, the manufacturing process to derive wheat dextrin, and the industry and scientific literature regarding the ability of fiber supplements to reduce appetite.
- Class Counsel analyzed reports issued by the Better Business Bureau non-profit organizations, the National Advertising Division ("NAD") and NARB, a non-profit industry self-regulatory group that evaluates allegedly deceptive advertising, to use its findings, conclusions, and recommendations regarding the Covered Products' allegedly deceptive advertising claims to advance the Litigation.
- Additionally, Class Counsel conducted research into the market segment related to the Covered Products to understand the potential scope of this matter, economic losses to Class Members, and marketing and sales trends, practices, and patterns.

Bruce Decl. ¶¶ 12(a), 12(d); Sultzer Decl. ¶¶ 14(a)-(d).

B. The History of Settlement Negotiations

Based on the Plaintiffs' receipt of discovery and investigation, they agreed to mediation. Bruce Decl. ¶ 12(d); Sultzer Decl. ¶ 15. The settlement negotiations were conducted at arm's length over a period of several months by counsel experienced in complex litigation, class actions, and false advertising cases. Bruce Decl. ¶¶ 7, 11; Sultzer Decl. ¶ 16. The parties participated in two full-day mediations with the Honorable Morton Denlow (Ret.), a former judge for the United States District Court for the Northern District of Illinois. Bruce Decl. ¶ 8; Sultzer Decl. ¶ 17. The matter did not resolve during the live mediation sessions, however, the parties—with the assistance of Judge Denlow—continued to pursue settlement discussions for several weeks until they reached a settlement in principle. Bruce Decl. ¶ 8; Sultzer Decl. ¶ 18. The parties then spent months working out the details in the Agreement, which is the product of hard-fought, arm's length negotiations. Bruce Decl. ¶ 9; Sultzer Decl. ¶19.

C. The Terms of the Settlement Agreement

The settlement recovers $6.5 million for the Settlement Class without any reversion to GSK. *See* § 5. It further prohibits GSK's use of the phrase "100% Natural" claim in advertisements and labels for the Covered Products subject to further guidance from the FDA and/or the products are reformulated. *Id.* § 14. It also prohibits GSK's use of Benefiber Healthy Shape's "clinically proven to cure cravings" claim in advertisements and labels unless and until it is supported by reliable scientific evidence or the product is reformulated. *Id*. The Gross Settlement Fund also will be used to pay the Settlement Administrator Costs not to exceed $675,000 (*id*. §§ A.1.s; D.20; Ex. B at 5), Attorneys' Fees (not to exceed one-third of the fund), Costs of approximately $22,903.98 (*id.* §§ 1.s.; G.35.a; Sultzer Decl. ¶ 21), and Service Awards to Plaintiffs of $3,000 each. §§ A.1.s; 35.b.5. The Net Settlement Fund shall be used to pay valid Claims an estimated $10.00 per unit

of Benefiber Original and an estimated $12.00 per unit of Benefiber Healthy Shape, per household, for a total of five units for each product without proof of purchase subject to Claim volume and validation. § C.8.a-b. There is no limitation for units in excess of five if accompanied by corresponding Qualifying Proof of Purchase. *Id*. In the event of over-or under-subscription, the Settlement Payments will be adjusted *pro-rata* downwards or upwards to fully deplete the fund. *Id.* § C.8.e-f.[6] Unredeemed Settlement Payments will be distributed *cy pres* to the National Consumer Law Center (*id.* at § C.13), an independent, nonprofit organization that works with consumers to create a safe, fair, and transparent marketplace.[7] In exchange, inter alia, Plaintiffs and Settlement Class Members will release GSK and its affiliates and resellers in the chain of distribution. §§ F.29-30.

D. Preliminary Approval and the Fairness Process

On June 8, 2021, the Court granted Plaintiffs' Motion for Preliminary Approval, preliminarily finding the settlement fair, adequate, and reasonable, certifying the action for settlement purposes, and approving the Notice Plan. ECF No. 48. Plaintiffs and the Settlement Administrator JND Legal Administration ("JND") promptly executed the Notice Plan approved by the Court. Sultzer Decl. ¶ 3; JND Decl. ¶¶ 9, 14.[8]

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[6] All Claim Forms from Settlement Class members must be postmarked by no later than October 6, 2021. Accordingly, Plaintiffs will file an update to the Court regarding claim volume and estimated payments per unit following claim validation by the Settlement Administrator.

[7] *See* https://www.nclc.org/about-us/our-story.html (accessed 8/3/2021) ("The talented lawyers of the National Consumer Law Center provide policy analysis, advocacy, litigation, expert witness services, and training for consumer advocates throughout the United States. NCLC also works with federal and state policymakers and participates in major litigation across the nation."). Neither Plaintiffs nor Class Counsel have any interest or involvement in the governance or operation of National Consumer Law Center. Sultzer Decl. ¶ 22.

[8] The Declaration of Gina M. Intrepido-Bowden Regarding Notice Plan and Settlement Administration submitted concurrently with this motion is referred to herein as "JND Decl."

ARGUMENT

II. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

A. Judicial Policy Strongly Favors Settlement

The settlement "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, 116-17 (2d Cir. 2005).[9] The Second Circuit has acknowledged "the strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009). A settlement receives a "presumption of procedural fairness 'where a class settlement [is] reached in arm's length negotiations between experienced, capable counsel after meaningful discovery.'" *In re Parking Heaters, Antitrust Litig*., No. 15MC0940DLIJO, 2019 WL 8137325, at *3 (E.D.N.Y. Aug. 15, 2019) (quoting *McReynolds*, 588 F.3d at 803).

B. Courts Approve Fair, Reasonable and Adequate Class Action Settlements

Rule 23(e) requires that class action settlements must be "fair, reasonable and adequate." Rule 23(e)(2) deems a settlement to be "fair, reasonable, and adequate" if:

> 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 to 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 for processing class-member claims;
> (iii) the terms of any proposed award of attorneys' 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.

The first two prongs address the "procedural fairness" of the settlement, while the last two prongs address the "substantive fairness." Fed. R. Civ. P. 23 Advisory Committee Note (2018).

The Second Circuit has generally considered the nine factors listed in *City of Detroit v.*

[9] Unless otherwise noted, internal citations and quotations are omitted.

Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), known as the *Grinnell* factors, to assist in determining whether the settlement is substantively "fair, reasonable and adequate." *See also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05MD1720MKBJO, 2019 WL 6875472, at *14 (E.D.N.Y. Dec. 16, 2019) ("There is significant overlap between the Rule 23(e)(2) and the *Grinnell* factors," which courts in this Circuit have acknowledged complement one another). 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, and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

See Grinnell, 495 F.2d at 463.

C. The Proposed Settlement is Procedurally Fair

1. Rule 23(e)(2)(A) – Plaintiffs and Class Counsel Have Adequately Represented the Class

First, the Court determines adequacy by considering whether "the class representatives' interests are aligned with the interests of the Settlement Class" because they suffered the same injuries as the other class members. *Melito v. Am. Eagle Outfitters, Inc*., No. 14-CV-2440 (VEC), 2017 WL 3995619, at *8 (S.D.N.Y. Sept. 11, 2017), *aff'd in part, appeal dismissed in part sub nom*. *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85 (2d Cir. 2019). Adequacy must be assessed independent of the settlement's fairness, and the Court must look to whether the proposed settlement class is "sufficiently cohesive to warrant adjudication." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 232 (2d Cir. 2016). Plaintiffs here have the same interests as Settlement Class Members and vigorously prosecuted the Litigation because they

all allegedly were deceived into paying a premium to purchase the Covered Products that GSK allegedly falsely advertised as "100% Natural" and/or "natural," and/or "clinically proven to curb cravings." *See In re Petrobras Sec. Litig.*, 317 F. Supp. 3d 858, 869 (S.D.N.Y. 2018) (holding adequacy satisfied where class representatives and claimants "suffered the same injury"); *In re SunEdison, Inc.*, 329 F.R.D. 124, 142 (S.D.N.Y. 2019) (finding class representative "vigorously pursued claims on behalf of the class, and there is no contention that its interests are antagonistic to other class members"); *see also* First Am. Compl., ECF No. 21 ¶¶ 26-27, 56-62, 78-89, 90-94, 98-99, 102 (describing Plaintiff and the Settlement Class suffering the same injury caused by the same misconduct); *White*, Second Am. Compl., ECF No. 44 ¶¶ 4-7, 11, 32-38 (same). Accordingly, the Settlement Class is sufficiently cohesive, and Plaintiffs are adequate representatives as they have exhibited an "interest in vigorously pursuing the claims of the class." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006).

Second, as for the adequacy of Class Counsel, this Court previously appointed attorneys from the firms of Sultzer Law, PSW, Cohen Milstein, MLK, LSB, Clarkson, and Moon Law as Class Counsel in its Preliminary Approval Order. ECF No. 48 ¶ 4. By appointing the firms, the Court made an initial determination about counsel's adequacy. *Id*. At this later stage, however, the focus shifts to the performance of counsel, considering the extent of litigation, settlement negotiations, and the results obtained. *See* Fed. R. Civ. P. 23 Advisory Committee Note (2018); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (directing courts to analyze the negotiation process and discovery undertaken). There is significant overlap between this Rule 23(e) factor and the third *Grinnell* factor, which evaluates the stage of the proceedings and the amount of discovery completed.

Before commencing the Litigation, Class Counsel extensively investigated and analyzed,

among other things, GSK's marketing campaign, manufacturing process to derive wheat dextrin, studies that purportedly supported the satiety claim, and market share. Bruce Decl. ¶ 12(a); Sultzer Decl. ¶ 9. Counsel vigorously prosecuted claims on behalf of the Settlement Class including opposing and largely, if not entirely, prevailing on a motion to dismiss in the *White* action. Bruce Decl. ¶ 12(c); Sultzer Decl. ¶¶ 10-12. Counsel bolstered their independent investigation with formal and informal discovery, which included GSK's production of critical documents and information regarding the Covered Products' labels throughout the Class Period, substantiation of the claims at issue, the products' manufacturing process, market research and related campaign information, and sales figures. Bruce Decl. ¶ 12(d); Sultzer Decl. ¶ 13. Not only have Class Counsel conducted robust legal research and an extensive factual investigation into complex matters, but they also procured key documentation to ensure they were "well-informed of the facts and strength of their claims against" GSK. *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775, (JG)(VVP), 2015 WL 5918273, at *3 (E.D.N.Y. Oct. 9, 2015).

Class Counsel also zealously negotiated the settlement and terms of the Agreement. Bruce Decl. ¶¶ 8-9; Sultzer Decl. ¶¶ 17-19; Moon Decl. ¶¶ 8-9; Schaffer Decl. ¶¶ 13-14; Mason Decl. ¶ 5; Weiner Decl. ¶¶ 10-13; McNamara Decl. ¶¶ 7-8. As demonstrated in the firm resumes, Class Counsel possesses the skill and knowledge necessary to evaluate the settlement considering the risks of continued litigation of which Class Counsel were also keenly aware.[10] As set forth below in Section I.D.1, the results obtained by Class Counsel through the settlement further demonstrate counsel's adequacy.

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[10] *See* Class Counsel firm resumes attached to Class Counsel's declarations.

2. Rule 23(e)(2)(B) – the Settlement Was Negotiated at Arm's Length

The 2018 Amendments to Rule 23(e) reflect the Second Circuit's long-standing rule that "a strong initial presumption of fairness attaches to [a] proposed settlement," when the "integrity of the arm's length negotiation process is preserved." *See In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). According to the 2018 Amendments, "the involvement of a neutral or court-affiliated mediator or facilitator . . . may bear on whether [negotiations] were conducted in a manner that would protect and further the class interests." Fed. R. Civ. P. 23 Advisory Committee Note (2018). Here, each party, represented by sophisticated and capable counsel, engaged in a bona fide hard-fought negotiation process. *See*, *supra*, § I.C.1. Further, the negotiations were overseen by a neutral and seasoned mediator and conducted at arm's length over a period of several months. Sultzer Decl. ¶¶ 17-18.

D. The Proposed Settlement is Substantively Fair

At the final approval stage, courts need not "decide the merits of the case or resolve unsettled legal questions," nor "foresee with absolute certainty the outcome of the case." *Shapiro v. JPMorgan Chase & Co.*, No. 11 CIV. 7961 CM, 2014 WL 1224666, at *10 (S.D.N.Y. Mar. 21, 2014). Instead, courts "assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004).

1. Rule 23(e)(2)(C)(i) – the Relief Provided to the Class is Superior to Continued Litigation

The Second Circuit's *Grinnell* factors are effectively codified in Rule 23(e)(2)(C)(i), which guide the analysis of a proposed settlement's substantive fairness.[11]

[11] Seven of the *Grinnell* factors are covered by Rule 23(e)(2)(C)(i): the complexity, expense and likely duration of the litigation (factor 1); the risks of establishing liability (factor 4); establishing damages (factor 5); the likelihood of

(a) Settlement Avoids Significant Costs and Risks in Establishing Liability and Damages, Maintaining the Class Through Trial and on Appeal, and the Lengthy Delays of this Process

These factors warrant neither a dispositive analysis nor a quantification of Plaintiffs' chances of success; rather, it requires balancing "the benefits afforded to the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation." *City of Providence v. Aéropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *7 (S.D.N.Y. May 9, 2014).

First, by their very nature, class actions create substantial uncertainty. *See Shapiro*, 2014 WL 1224666, at *10 ("It has long been recognized that complex class actions are difficult to litigate. The legal and factual issues involved are always numerous and uncertain in outcome."); *see also*, *e.g.*, *In re NJOY Consumer Class Action Litig.*, 120 F. Supp. 3d. 1050, 1117-22 (C.D. Cal. 2015) (denying certification of false advertising action for failure to show predominance in discussing difficulties and nuances of using surveys and statistical analyses to isolate the price premium and establish class-wide proof of damages).

Although Plaintiffs and Class Counsel are confident that they would ultimately prevail, GSK has contended all along that it has strong defenses. GSK has argued that the Covered Products, with a single contested ingredient GSK maintains is minimally processed natural wheat, were properly labeled and marketed as "100% Natural" and that GSK's evidence of clinical studies substantiate the satiety claims. Moreover, the core "100% Natural" claim could be impacted by pending FDA guidance which could specifically address the issue here, which concerns the degree of processing of a natural ingredient that is permissible for the product to be considered "natural."

maintaining a class action through trial (factor 6); the ability of the defendants to withstand a greater judgment (factor 7); the range of reasonableness of the settlement fund in light of the best possible recovery (factor 8); and the amount of the settlement in light of all the attendant risks of litigation (factor 9).

See Use of the Term "Natural" in the Labeling of Human Food Products; Request for Information and Comments, 80 Fed. Reg. 69905, 69905 (Nov. 12, 2015). Resolution of that issues could either weaken (or strengthen) Plaintiffs' claims depending on the FDA's ultimate views. Even then beyond what the FDA might do, there is risk that a jury could find that the "100% Natural" claim is justified. There, thus, are no guarantees that Plaintiffs would successfully prove liability and damages to the level of the settlement amount, if at all. *See Parker v. Time Warner Entm't Co. L.P.*, 631 F. Supp. 2d 242, 260 (E.D.N.Y. 2009) (approving settlement where "Class faced substantial obstacles to proving damages, having the Class certified for trial and establishing the defendant's liability."). If Litigation proceeds, GSK's arguments could completely defeat, or significantly narrow, the scope of the Litigation, claims, and damages through, *inter alia*, successful dispositive motions or opposition to class certification. Sultzer Decl. ¶ 25.

Second, if the Litigation proceeded to trial, both sides would offer expert testimony on liability and damages. Sultzer Decl. ¶ 26. Plaintiffs would undoubtedly face a challenge to their class-wide damages expert who would proffer a methodology for calculating aggregate class-wide economic injury. Sultzer Decl. ¶ 27. Such an expert undertaking is costly, and Plaintiffs expect GSK would challenge Plaintiffs' ability to calculate a price premium class-wide. *Id*. Complex litigation, such as this case, often result in a "battle of the experts" on proof of damages, which makes it "difficult to predict with any certainty which testimony would be credited" by the trier of fact. *In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 465, 476 (S.D.N.Y. 1998). There is a substantial risk that a jury may accept GSK's experts' testimony and damages arguments or award far less than the settlement amount or nothing at all. Sultzer Decl. ¶ 29. While Plaintiffs prevailed, in substantial part, at the pleading stage, Plaintiffs nonetheless face significant risks in establishing liability. Sultzer Decl. ¶ 30. A rigorous battle of the experts would include survey

analyses regarding the natural and satiety claims and disputed damages analyses. Sultzer Decl. ¶ 28. Plaintiffs acknowledge the complexity in the resolution of whether advertising claims deceive reasonable consumers. *Id*.

Third, if the Litigation continues, Plaintiffs expect GSK to continue to defend vigorously all aspects of Plaintiffs' claims including at class certification and summary judgment. Sultzer Decl. ¶ 31. As discussed above, there is risk that an intervening FDA regulation concerning the term "natural" could undermine Plaintiffs' claims and a risk that the jury could find that the natural and satiety claims are not false or misleading. Moreover, the existence or amount of any economic losses—to wit, the alleged price premium consumers paid for natural products or sating benefits that consumers did not receive—may be difficult to prove depending on the pricing of comparable products and the possible defense that individuals received what they bargained for. The outcome of these proceedings cannot be certain, and if the Litigation proceeds to trial, it will be a lengthy and complex affair with appeals likely to follow. Sultzer Decl. ¶ 32. For the Settlement Class to succeed, Plaintiffs must be successful on each of challenge, while GSK would have to succeed only once to significantly reduce its exposure. Thus, the risks of establishing liability and damages underscore the reasonableness of the settlement.

Fourth, even if Plaintiffs succeeded at trial, post-trial motions and the potential for appeal could prevent Class Members from obtaining any recovery for several years, if at all. *See*, *e.g.*, *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 WL 238298, at *1-2 (N.D. Cal. Sept. 6, 1991) (ordering new trial for corporate defendant following $100 million jury verdict for plaintiffs); *see also Malev v. Del Global Techs. Corp*., 186 F. Supp. 2D 358, 362 (S.D.N.Y. 2002) ("Delay, not just at the trial stage but through post-trial motions and the appellate process, would cause Class Members to wait years for any recovery, further reducing its value.").

In balancing "the benefits afforded to the Class, including immediacy and certainty of recovery, against the continuing risks of litigation" (*City of Providence*, 2014 WL 1883494, at *7), the benefit—a certain, immediate recovery of $6.5 million and cessation of the deceptive advertising claims—is a favorable result that tilts this factor in favor of approval given the substantial risks of continued litigation.

(b) The Recovery is Reasonable Considering the Best Possible Recovery and Attendant Risks of Litigation

Courts often consider the range of reasonableness of the recovery in light of the best possible outcome and the attendant risks of continued litigation. In determining the reasonableness of a settlement, the analysis "does not involve the use of a mathematical equation yielding a particularized sum." *Fleisher v. Phoenix Life Ins. Co*., No. 11-CV-8405 (CM), 2015 WL 10847814, at *10 (S.D.N.Y. Sep. 9, 2015) (quoting *Massiah v. MliboretroPlus Health Plan, Inc*., No. 11-cv-05669 (BMC), 2012 WL 5874655, at *5 (E.D.N.Y. Nov. 20, 2012)). Indeed, the ratio of the settlement "to the maximum potential recovery need not be the sole, or even the dominant, consideration when assessing the settlement's fairness." *In re LIBOR-Based Fin. Instruments Antitrust Litig.,* 327 F.R.D. 483, 495 (S.D.N.Y. 2018) (approving settlements where the plaintiffs did not provide total damages estimate). This is because "some risks would be attendant upon continuing to litigate." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 696 (S.D.N.Y. 2019). Accordingly, courts analyze "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal-Mart*, 396 F.3d at 119; *see also Fleisher*, 2015 WL 10847814, at *8 (the settlement amount should not be judged "in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case"). "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the

proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455.

Consistent with Second Circuit jurisprudence, in settling the Litigation, Plaintiffs accounted for the estimated damages, the benefits and risks of continuing litigation against GSK, and the range of possible outcomes should the Litigation continue. Sultzer Decl. ¶ 33. Although Plaintiffs allege that GSK sold millions of Covered Products during the Class Period, the damages calculation is inherently complex and subject to varying interpretations. Sultzer Decl. ¶ 34. The $10 and $12 estimated claim amounts for each unit of Benefiber Original and Healthy Shape likely significantly exceeds each consumer's best case economic loss per unit. An adjustment based on the product purchased ensures fair and equitable treatment of Settlement Class Members who bought Benefiber Original based on one alleged false advertising claim (100% Natural) and those who bought Healthy Shape based on two alleged false advertising claims (100% Natural and "clinically proven to curb cravings"). The claimed economic loss to Benefiber Healthy Shape customers is greater than Benefiber Original as a result of the additional falsely advertised satiety benefits and increased purchase price, warranting an increased allocation. Sultzer Decl. ¶ 35. In Class Counsel's experience litigating natural and weight loss related false advertising class actions, these recovered amounts likely exceed the economic losses per unit of product. Sultzer Decl. ¶ 36. Moreover, during the mediation, GSK took the position that, after a risk assessment, any potential damages are *de minimis* and the best-case value of the case falls well below $6.5 million. Sultzer Decl. ¶ 37. Accordingly, the Settlement Amount is well within the range of reasonableness. *See Grinnell*, 495 F.2d at 455 & n.2 ("In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 48 (E.D.N.Y. 2019) (stating that the Second Circuit did not take issue with original

settlement recovery of 2.5% of the largest possible class award).[12]

Additionally, the Agreement requires complete cessation of the "100% Natural" and satiety claims on the Covered Products. *See* § C.14. Regardless of whether Class Members submit a Claim, they and the consuming public will avoid millions in economic losses from potentially being duped into buying Covered Products that allegedly are not worth the purchase price. Sultzer Decl. ¶ 38. Cessation of deceptive advertising claims facilitates a highly visible and competitive marketplace by promoting credibility and fair competition, raises the floor of truth telling in advertising by elevating the customary standard of practice across the industry, and ensures fidelity to consumer protection laws that benefits consumers, the public, and the market. Sultzer Decl. ¶ 39. Plaintiffs do not attempt to calculate any value associated with the injunctive relief, but simply note its value to the public and enhancement generally of the settlement.

The settlement provides a significant, immediate, and certain cash payment to the Settlement Class. *See Gay v. Tri-Wire Eng'g Solutions, Inc.*, No. 12-cv-2231 (KAM) (JO), 2014 WL 28640, at *9 (E.D.N.Y. Jan. 2, 2014) (quoting *Massiah*, 2012 WL 5874655, at *5) ("When a settlement 'assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, settlement is reasonable under this factor.'"); *Sykes v. Mel Harris & Assocs., LLC*, 2016 WL 3030156, at *14 (S.D.N.Y. May 24, 2016) ("[M]uch of the value of a settlement lies in the ability to make funds available promptly"). The settlement also will avoid "the substantial burdens and costs that continued and uncertain litigation would impose on the parties, non-party witnesses, and the

[12] *See also*, *e.g.*, *McLaughlin v. IDT Energy*, No. 14CV4107ENVRML, 2018 WL 3642627, at *13 (E.D.N.Y. July 30, 2018) (finding $1.9 million monetary recovery reasonable despite possible recovery exceeding $900 million); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984) ("The dollar amount of the settlement by itself is not decisive in the fairness determination. The fact that the settlement amount may equal but a fraction of potential recovery does not render the settlement inadequate.").

courts." *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 332 (E.D.N.Y. 2010). Furthermore, there are many steps between here and any potential verdict. Sultzer Decl. ¶ 40. Even assuming *arguendo* that continued litigation might result in a larger recovery than the settlement, it would occur only after the expenditure of hundreds of thousands of dollars in costs and expenses (at best) that would eat up much of any increased recovery. Sultzer Decl. ¶ 41.

(c) While GSK May Be Able to Sustain a Larger Judgment, that Factor Alone Does Not Undermine Final Approval

In an action against a large corporation, such as GSK, the defendant "is likely to be able to withstand a more substantial judgment." *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2012 WL 5289514, at *6 (E.D.N.Y. Oct. 22, 2012). However, this alone does not undermine the reasonableness of the settlement. *See id.*; *LIBOR*, 327 F.R.D. at 494 (settlement "fairness does not require that the [defendant] empty its coffers before this Court will approve a settlement").

2. Rule 23(e)(2)(C)(ii) – the Claims Process Is Fair and Rational

Under this factor, courts examine the proposed "method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). "A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." Fed. R. Civ. P. 23 Advisory Committee Note (2018). "[T]he plan of allocation must also meet the standards by which the settlement was scrutinized – namely, it must be fair and adequate . . . . An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re WorldCom Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005). The claim process under the Agreement is a fair, reasonable, and adequate method of equitably distributing the Gross Settlement Fund to Settlement Class Members who make valid claims using a simple form. The proposed allocation also represents a reasonable method to ensure that Settlement Class Members "get as much of the available damages

remedy . . . as possible and in as simple and expedient a manner as possible." 4 Rubenstein, Newberg on Class Actions § 12:15 (5th Ed.) (Westlaw 2018); *see also In re Credit Default Swaps Antitrust Litig*., No. 13-md-2476 (DLC), 2016 WL 2731524, at *9 (S.D.N.Y. Apr. 25, 2016) ("A principal goal of a plan of distribution must be the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund."). Numerous courts have held that "a plan of allocation need not be perfect" to warrant court approval. *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, File No., 05 Civ. 10240 (CM), 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007) (collecting cases).

Pursuant to the Agreement, each Settlement Class Member is eligible to receive an estimated $10 per unit of Benefiber Original and an estimated $12 per unit of Benefiber Healthy Shape. *See* § C.8.a-b. Claimants need only complete a simple two-page Claim Form to provide contact information, purchase information, payment instructions, and an affirmation under penalty of perjury that the information provided is true and correct, the Claimant bought the Covered Product(s) in the United States for purposes other than resale, and the Claimant knowingly agrees to the Release. *Id.* at Ex. 1. Claims submitted without proof of purchase are capped at 5 units for each product line per household, while claims with proof of purchase are unlimited. *Id.* § C.8.a-c. Settlement Payments in the event of over- or under-subscription will be adjusted *pro rata* downwards or upwards to ensure equal treatment. *Id.* § C.8.e-f.

An adjustment based on the product purchased ensures fair and equitable treatment of Settlement Class Members who bought Benefiber Original based on one false advertising claim (100% Natural) and those who bought Healthy Shape based on two false advertising claims (100% Natural and "clinically proven to curb cravings"). *See supra* § D(1)(b). The cap on claims per household without proof of purchase mitigates the risk of fraudulent claims. Sultzer Decl. ¶ 42. At

the same time, claims supported by some reasonably reliable proof of purchase (e.g., receipts or photos of UPCs), which serve as additional evidence of the claim's validity and warrant eligibility for unlimited corroborated claims. *Id*.

The Net Settlement Fund is approximately $3,629,425 after deduction of Settlement Administrator Costs (not to exceed $675,000), Attorneys' Fees ($2,166,666 million), Costs (approximately $22,903.98), and Service Awards (approximately $6,000 total) (all together, approximately $2,879,570). At this time, Plaintiffs cannot calculate a final amount for each Settlement Class Member's share of the Net Settlement Fund until all claims are submitted and validated and any *pro rata* adjustments are applied. Sultzer Decl. ¶ 43. After the Claim Deadline lapses on October 6, 2021, and the Settlement Administrator provides any necessary supplemental declaration on November 12, 2021, Plaintiffs can better estimate how much each Claimant will receive.[13] Sultzer Decl. ¶ 44. Regardless, the entire Net Settlement Fund will be allocated to Settlement Class Members in a fair, reasonable, and adequate manner, warranting approval.

3. Rule 23(2)(C)(iii) – the Proposed Award of Attorneys' Fees Supports Final Approval

Concurrently with this motion, Class Counsel are applying for attorneys' fees of one-third (1/3) the Gross Settlement Fund, reimbursement of litigation expenses of $22,903.98, and a $3,000 service award to each Class Representative. For purposes of final approval, the requested fee is firmly within the reasonable range of fees granted from comparable class settlements.[14] Under the Agreement, Class Counsel will receive the applied-for fees and expenses only upon notice and this Court's scrutiny and approval.

[13] The Agreement provides for a cure period for any Claim Form deficiencies, which may still be ongoing on November 12, 2021, and thus, the numbers provided will be a best estimate.

[14] *See* concurrently filed Memorandum of Law in Support of Motion for Attorneys' Fees, Litigation Costs, and Service Awards, which discusses in detail the reasonableness of Plaintiffs' application for attorneys' fees and costs.

4. Rule 23(e)(C)(iv) – Any Agreements Required to Be Identified Under Rule 23(e)(3)

There are no agreements to be identified pursuant to Rule 23(e)(3).

5. Rule 23(e)(2)(D) – the Settlement Treats Class Members Equitably Relative to One Another

This factor includes "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." Fed R. Civ. P. 23, 2018 Advisory Committee Note. As discussed in Section II.D.2 above, Settlement Class Members' individual share of the recovery will be apportioned based upon their purchases and estimated economic losses. Moreover, the Release is tailored from the factual predicate for the Litigation and treats all Settlement Class Members equitably relative to one another. *See* § E.29; *see also Melito*, 923 F.3d at 95 ("The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct."); *Wal-Mart*, 396 F.3d at 109 (approving release of non-parties where the claims released are based on the same underlying factual predicate as the claims asserted against the parties, reasoning in part that "it is hard to imagine that defendants . . . would have settled without also releasing [the non-parties] from liability; to do so would have invited relitigation of the same factual allegations").

III. NOTICE ADEQUATELY APPRISED CLASS MEMBERS OF THEIR RIGHTS

Due process requires "the best notice practical under the circumstances." *In re Drexel Burnham Lambert Grp., Inc.*, 995 F.2d 1138, 1144 (2d. Cir. 1993). It does not impose "rigid rules," but instead imposes a "reasonableness" standard that is satisfied when notice "fairly apprise[s] 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." *Wal-Mart*, 396 F.3d at 114. Notice must explain the general terms of the settlement, proposed attorneys' fees, and the date, time and place of the fairness hearing, in a way that would be "understood by the average class member." *Id*. at 114. As detailed below, the Notice Plan satisfies due process.

Plaintiffs and JND executed the Court-approved Notice Plan. *See* Preliminary Approval Order, ECF No. 48 ¶ 9; JND Decl. ¶¶ 9, 14, 19. Emails and postcards were sent to readily identifiable Settlement Class Members based on contact information that GSK provided. Ex. B at 4; JND Decl. ¶ 9. The Notice Plan included an extensive 6-week media campaign through the leading digital network (Google Display Network) and the top social media site (Facebook). Preliminary Approval Order, ECF No. 48 ¶ 9; § F.20; Ex. B. at 4-5; JND Decl. ¶¶ 5, 14. The ads targeted Settlement Class Members and provided a direct link to the Settlement Website, where Settlement Class Members could review information about the case, the settlement, and file a claim online. § F.20; Ex. B. at 3, 4; JND Decl. ¶ 14. Plaintiffs also caused a national press release to be distributed to over 15,000 English and Spanish media outlets via PR Newswire. § F.20; Ex. B. at 5; JND Decl. ¶ 19. JND also established a toll-free telephone number that provides information regarding the settlement. § F.20; Preliminary Approval Order, ECF No. 48 ¶ 21; JND Decl. ¶ 22. The Settlement Website, live since June 18, 2021, posts the long-form and short-form (emails and postcards) notices, frequently asked questions, downloadable and online claim forms, and pertinent documents (including the Agreement, operative complaints, pertinent orders, and motions related to the settlement). *See* § F.20; Ex. B. at 3; Preliminary Approval Order, ECF No. 48 ¶ 21; https://www.nationalbenefibersettlement.com/ (accessed 8/3/2021); JND Decl. ¶ 20.

Plaintiffs and JND designed the Notice Plan that provides Settlement Class Members with the best notice practicable under the circumstances to reach 70% of Settlement Class Members.

JND Decl. ¶ 31; Sultzer Decl. ¶¶ 45; Ex. B. at 5. The Notice Plan was the most cost-effective means because Plaintiffs and GSK had limited information on the identity of customers who bought the Covered Products. Courts have recently acknowledged that, under similar circumstances, a notice plan such as that here satisfied due process.[15]

The Notice Plan was clearly successful. Although Settlement Class Members may submit their claims by no later than October 6, 2021, as of August 3, 2021, JND has tracked 197,288 unique users with 1,502,099 page views to the Settlement Website, and 130,831 Claim Forms received. JND Decl. ¶¶ 21, 29. Thus far, the digital ad campaign has provided 392,031,082 impressions, which is 4,031,082 more impressions than originally estimated. JND Decl. ¶ 14; Ex. B. at 4 (estimated 388 million impressions). In its entirety, the Notice Plan accomplished a reach of more than the estimated 70%. JND Decl. ¶ 31.[16]

IV. THE REACTION OF THE SETTLEMENT CLASS FAVORS APPROVAL

"It is well settled that the reaction of the class to the settlement is perhaps the most

[15] *See In re Pokémon Go Nuisance Litigation*, No. 3:16-cv-04300, ECF No. 131 (N.D. Cal. May 2, 2019); *Holt, et al., v. Murphy Oil USA*, 17-cv-00911-RV-HTC, ECF No. 24 (N.D. Fla. Mar. 18, 2019); *Langan v. Johnson & Johnson Consumer Companies, Inc.,* No. 3:13-cv-01471, ECF No. 188 (Unpublished Order) (D. Conn. Feb. 4, 2019) (granting preliminary approval of settlement with digital ad and social media campaign); *Schneider v. Chipotle Mexican Grill, Inc.*, 2020 WL 511953, at *11 (N.D. Cal. Jan. 31, 2020) ("Given that direct notice appears to be infeasible, the third-party settlement administrator will implement a digital media campaign[.]"); *Warciak v. One, Inc.*, 2018 Ill. Cir. LEXIS 9002, at *2-3 (Ill. Cir. Ct. Oct. 3, 2018) (digital campaign that "included an online media campaign and the creation of the Settlement Website, constituted the best notice practicable under the circumstances"). Courts in this Circuit have held that individual notice is not required. *See Handschu v. Special Services Div.*, 787 F.2d 828, 833 (2d Cir. 1986) (publication "adequately served to notify class members that a potential compromise had been reached"); *New York by Vacco v. Reebok Int'l*, 903 F. Supp. 532, 533 n.1 (S.D.N.Y. 1995) (publication notice was the best notice practicable "given the enormous number of potential class numbers who had purchased products, the lack of warranty cards to identify customers and the high costs of individual notice"); *Katz v. ABP Corp.*, 2014 WL 4966052, at *4 (E.D.N.Y. Oct. 3, 2014) (approving notice via national and regional publication).

[16] *See also Free Range Content, Inc. v. Google, LLC*, No. 14-CV-02329-BLF, 2019 WL 1299504, at *6 (N.D. Cal. Mar. 21, 2019) ("Notice plans estimated to reach a minimum of 70 percent are constitutional and comply with Rule 23."); *Edwards v. Nat'l Milk Producers Fed'n*, No. 11-CV-04766-JSW, 2017 WL 3623734, at *4 (N.D. Cal. June 26, 2017), *aff'd sub nom. Edwards v. Andrews*, 846 F. App'x 538 (9th Cir. 2021) (same); *Gergetz v. Telenav, Inc.*, No. 16-CV-04261-BLF, 2018 WL 4691169, at *4 (N.D. Cal. Sept. 27, 2018) (same); Fed. Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, at 1 (2010), accessible at https://www.fjc.gov/sites/default/ files/2012/NotCheck.pdf (endorsing a 70-95% reach as consistent with due process).

significant factor to be weighed in considering its adequacy. In fact, the lack of objections may well evidence the fairness of the Settlement." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2019 WL 6875472, at *16. Although the claim, objection, and opt-out periods are still ongoing, the Settlement Class's initial reaction to the settlement is favorable. *Wal-Mart*, 396 F.3d at 118 ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."). To date, no objectors have come forward or filed an objection. JND Decl. ¶ 27. Furthermore, only one invalid exclusion request has been received. JND Decl., ¶ 25. By contrast, claims activity has been robust indicating that the class is satisfied with the remedy, with approximately 130,831 Claim Forms received as of the filing of this motion.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Final Approval of Class Action Settlement should be GRANTED.[17]

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Respectfully submitted,

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[17] When Plaintiffs file their supplemental briefing on or before November 11, 2021, they will submit the Final Approval Order to the Court.

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