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 PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF NOTICE PLAN

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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*"), individually and on behalf of all others similarly situated (collectively, "Plaintiffs"), respectfully submits this memorandum of law in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan.[1]

I. INTRODUCTION

This proposed class action settlement would resolve the claims of purchasers of Defendants GSK Consumer Health, Inc.'s and GlaxoSmithKline Consumer Healthcare Holdings (US) LLC's ("GSK" or "Defendants") Covered Products[2].

In the Litigation, Plaintiffs asserted claims seeking to recover damages individually and on behalf of a nationwide class of purchasers of the Covered Products, which Plaintiffs allege were deceptively and misleadingly marketed, advertised, labeled, and sold as "100% Natural" or "natural" and, for Benefiber Healthy Shape, as "clinically proven to cure cravings" and as a weight management product that Plaintiffs claim was sold at a price premium, even though Benefiber Healthy Shape is the same product as Benefiber Original.

GSK has defended the Litigation on several grounds, including, in part, that (a) the Covered Products are properly described as "100% Natural" or "natural" because each consists of a single

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[1] Unless otherwise indicated, capitalized terms shall have the same meaning as they do in the Settlement Agreement. References to "§ __" are to sections in the Settlement Agreement, submitted as Exhibit A to the Declaration of Jason P. Sultzer In Support of Plaintiff's Motion for Preliminary Approval (the "Sultzer Decl.") and all Settlement Agreement Exhibits are referred to as "Ex #."

[2] Covered Products include: Benefiber Healthy Shape Prebiotic Powder Fiber Supplement ("Benefiber Healthy Shape"), Benefiber Original Prebiotic Powder Fiber Supplement, Benefiber Sugar-Free Powder Fiber Supplement, Benefiber Prebiotic Powder Fiber Supplement On-The-Go Stick Packs (Flavored or Unflavored), and Benefiber Prebiotic Fiber Supplement Chewables. ("Benefiber Original") (collectively, "Covered Products").

natural ingredient, wheat dextrin, created by heating natural wheat starch and then filtering out any remaining glucose and starch, leaving behind only wheat dextrin; and (b) the statements concerning Benefiber Health Shape's satiety benefits are substantiated by clinical studies. Nevertheless, GSK has agreed to enter into this Settlement Agreement to avoid further expense, to dispose of burdensome and protracted litigation, and to avoid the uncertain outcome of proceeding in the Litigation. *See* Sultzer Decl., Ex. A

To settle the cases, GSK is making significant changes to the labeling, advertising and marketing of the Covered Products to cure the allegedly deceptive language and will establish a Gross Settlement Fund of $6.5 million, with no right to reversion, that will compensate Eligible Claimants, pay costs of notice and claims administration, and pay Court-approved reasonable attorneys' fees and costs and service awards to the class representatives.

II. PROCEDURAL BACKGROUND

A. The *Swetz* Matter

On June 19, 2020, Plaintiff Susan Swetz, through her counsel The Sultzer Law Group and Pearson, Simon & Warshaw, LLP, filed a Class Action Complaint against Defendant GSK Consumer Health, Inc. asserting that GSK violated New York General Business Law §§ 349 and 350, and was unjustly enriched by deceptively advertising and marketing Benefiber Original as "100% Natural" and/or "natural." Compl., ECF No. 1. On November 3, 2020, GSK Consumer Health, Inc. served Plaintiff with a motion to stay or dismiss the Complaint and a motion to transfer or in the alternative to strike nationwide class allegations. Sultzer Decl. ¶ 3. On December 16, 2020, pursuant to a stipulation with GSK, Plaintiff amended her complaint to add claims related to Benefiber Healthy Shape as well as additional causes of action. Am. Compl., ECF No. 21. The

Amended Complaint also added Cohen Milstein Sellers and & Toll PLLC, Mason Lietz & Klinger LLP, and Levin Sedran & Berman LLP as counsel for Plaintiff and the Class. *Id.*[3]

B. The *White* Matter

On June 17, 2020, Plaintiff Phillip White, through his counsel Clarkson Law Firm and Moon Law APC, filed a Class Action Complaint alleging violations of California Business & Professions Code, section 17200, *et seq.* and section 17500, *et seq.*, the California Consumers Legal Remedies Act, section 1750, *et seq.*, and for breach of express warranty and unjust enrichment. *White*, ECF No. 1.

On November 17, 2020, Plaintiff White successfully defeated a motion to transfer and—almost entirely—a motion to dismiss. *White*, ECF No. 43. Specifically, in its order, the court rejected Defendant's primary jurisdiction argument, explaining that Defendant did not demonstrate that FDA action can be expected imminently. *Id.* The court also rejected Defendant's attempt to dismiss plaintiff White's unjust enrichment claim, plaintiff White's request for damages under the CLRA, and plaintiff White's injunctive relief claims finding standing under Article III to seek prospective relief. *Id.* The court did, however, grant Defendant's motion to dismiss the request for injunctive relief and restitution, while at the same time granting Plaintiff White leave to amend to address this deficiency. *Id*. On November 30, 2020, Plaintiff White filed a Second Amended Complaint addressing the court's concerns and, on December 21, 2020, Defendant filed its answer. Second Am. Complaint, *White*, ECF No. 44.; Answer, *White*, ECF No. 45.

[3] Counsel for Plaintiff White were admitted *pro hac vice* as counsel for Plaintiff Swetz on February 11, 2011. *See* ECF Nos. 34-37; Declaration of Ryan Clarkson In Support of Plaintiffs' Motion for Preliminary Approval of Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan ("Clarkson Decl.") ¶ 2. And, on February 23, 2021, Ryan Clarkson entered an appearance as counsel for Plaintiff Swetz. ECF No. 38.

In addition, Plaintiff White and Defendant exchanged Fed. R. Civ. P. 26(a)(1) initial disclosures on September 25, 2020 and January 5, 2021, and plaintiff White served a first set of discovery on Defendant on September 30, 2020. Clarkson Decl. ¶ 5.

C. Legal Investigation and Settlement Negotiations

Counsel for Plaintiffs in the *White* and *Swetz* actions embarked on the settlement process jointly, and all Class Counsel worked together to thoroughly analyze the legal landscape, including conducting research into the various state consumer protection laws and available remedies, and evaluating matters relating to class certification, in order to fully evaluate the risks and benefits to potential early resolution. Sultzer Decl. ¶ 7; Clarkson Decl. ¶ 6.a.

Class Counsel conducted a detailed and extensive analysis of the claims alleged in the respective complaints, including labeling claims and advertising campaigns for the Covered Products, the manufacturing process to derive wheat dextrin, and the industry and scientific literature regarding the ability of fiber supplements to reduce appetite or otherwise "curb cravings." Sultzer Decl. ¶ 8; Clarkson Decl. ¶ 6.b. Class Counsel also analyzed a report issued by the National Advertising Division ("NAD"), a Better Business Bureau nonprofit program, issued on May 14, 2020. Sultzer Decl. ¶ 9; Clarkson Decl. ¶ 6.c.

Specifically, NAD, a Better Business Bureau nonprofit program charged with monitoring and evaluating truth and accuracy in national advertising, conducted an investigation and determined that marketing Benefiber as "100% Natural" had the potential to mislead reasonable consumers who may not agree that the wheat dextrin, which is created from wheat starch through a multi-step chemical process involving hydrochloric acid, is a natural ingredient. Accordingly, NAD concluded that Defendant's "100% Natural" label should be discontinued. *Swetz* Am. Complaint, ECF No. 21, ¶4. NAD also found that Defendant's claim that Healthy Shape is

"clinically proven to curb cravings" was not sufficiently supported by clinical studies in a relevant population and should be discontinued. *Id.* at ¶5. Additionally, Plaintiffs' counsel conducted research into the market segment related to the Covered Products in order to understand the potential scope of this matter and understand marketing and sales trends, practices, and patterns for the relevant industry. Sultzer Decl. ¶ 10; Clarkson Decl. ¶ 6.d.

Based on the parties' exchange of discovery to-date and their respective investigations into the claims and defenses asserted in the actions, the parties agreed to engage in settlement negotiations with a private mediator. In connection with the mediation and as part of Defendant's response to plaintiff White's Fed. R. Civ. P. 34 requests for documents, Class Counsel requested significant mediation discovery in order to evaluate the claims and position themselves to negotiate a settlement that would be fair and reasonable on behalf of the Settlement Class. Specifically, Class Counsel requested, and GSK produced, documents regarding the Covered Products' labels throughout the Class Period, substantiation of the claims at issue, including their manufacturing process, market research and related campaign information, and sales figures. Sultzer Decl. ¶ 11; Clarkson Decl. ¶ 6.e.

The settlement negotiations were conducted at arm's length over a period of several months. Sultzer Decl. ¶ 12; Clarkson Decl. ¶ 6.f. On January 21, 2021 and February 10, 2021, the parties participated in mediation with Hon. Morton Denlow (ret.) via Zoom. Sultzer Decl. ¶ 13; Clarkson Decl. ¶ 6.f. The matter did not resolve at mediation, however, the parties—with the assistance of Judge Denlow—continued to pursue settlement discussions for several weeks until a settlement in principle was reached. Sultzer Decl. ¶ 14; Clarkson Decl. ¶ 6.f. The parties spent months working out the details of the settlement, which are the product of hard-fought, arm's length negotiations. Sultzer Decl. ¶ 15; Clarkson Decl. ¶ 6.f.

The Settlement Agreement resolves claims regarding Defendants' use of allegedly misleading labels on, and marketing and promotion concerning, the Covered Products. The Settlement Agreement provides significant monetary relief to the Settlement Class Members by way of a Gross Settlement Fund of $6.5 million and meaningful injunctive relief that will end the use of the labels bearing the "100% Natural" statement on the Benefiber Original products and the use of the "clinically proven to curb cravings" statement on the Benefiber Healthy Shape products. These claims also will be excluded from marketing and promotion created by or at the direction of Defendants.

Plaintiffs respectfully ask the Court to grant preliminary approval of the settlement, appoint the Settlement Administrator to carry out the Notice Plan, and to schedule a Final Approval Hearing. *See* Fed. R. Civ. P. 23(e). Plaintiffs also respectfully request to be appointed as representatives for the Settlement Class and for their counsel to be appointed as Class Counsel. *See* Fed. R. Civ. P. 23(g). Plaintiffs also ask the Court to approve the Notice Plan encapsulated in the Settlement Agreement, because it meets the requirements of due process and is the best notice practicable under the circumstances. *See* Fed. R. Civ. P. 23(c).

III. THE TERMS OF THE PROPOSED SETTLEMENT

The Settlement Agreement defines the Settlement Class, describes the parties' agreed upon exchange of consideration, and proposes a plan for disseminating notice and administering claims for the Settlement Class Members.

A. Certification of the Settlement Class

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

> All individuals who purchased Benefiber Healthy Shape Prebiotic Powder Fiber Supplement, Benefiber Original Prebiotic Powder Fiber Supplement, Benefiber Sugar-Free

> Powder Fiber Supplement, Benefiber Prebiotic Powder Fiber Supplement On-The-Go Stick Packs (Flavored or Unflavored), and/or Benefiber Prebiotic Fiber Supplement Chewables for personal or household use, and not for resale, in the United States during the Class Period. Specifically excluded from the Class are (i) GSK, its officers, directors, affiliates, legal representatives, employees, successors, and assigns, and entities in which GSK has a controlling interest; (ii) judges presiding over the Litigation; and (iii) local, municipal, state, and federal governmental entities.

§ A.1.mm.

B. Relief for the Settlement Class Members

The Settlement Agreement provides for significant injunctive and monetary relief. With respect to monetary relief, the Settlement Agreement provides that Defendant will establish a Gross Settlement Fund in the amount of $6.5 million, which will be exhausted to pay all Claims of Eligible Claimants, as well as any Attorneys' Fee, Cost and Service Award, and Settlement Administration Costs that are approved by the Court. §§ A.1.s; C.5.

Eligible Claimants will receive an estimated $10.00 per qualifying purchase of Benefiber Original, up to a maximum of five units without proof of purchase, or an estimated $12.00 per qualifying purchase of Benefiber Healthy Shape, up to a maximum of five units without proof of purchase. § C.8.a-b. There is no limitation for units in excess of five, for either Benefiber Original or Benefiber Healthy Shape, if each unit claimed is accompanied by a Qualifying Proof of Purchase. *Id.* If the total amount to be paid for eligible claims exceeds or fails to exceed the Net Settlement Fund, then each Settlement Class Member's award will be proportionately reduced or increased, respectively, on a pro rata basis. § C.8.e-f. If checks issued to Eligible Claimants remain uncashed or otherwise not redeemed for 180 days, then the total amount of those unclaimed checks shall be donated to the National Consumer Law Center. § C.13. Settlement Class Members will be given the option of selecting payment by electronic means as well.

The Settlement Agreement provides meaningful injunctive relief that cures the alleged deception in the Litigation. Specifically, GSK has agreed that it will (1) cease manufacturing the Covered Products with labels bearing the "100% Natural" statement and will exclude the "100% Natural" statement from any future marketing or advertisements created by GSK or at GSK's direction that describes the Covered Products, and (2) cease manufacturing Benefiber Healthy Shape with labels bearing the statement "clinically proven to cure cravings" and will exclude the statement "clinically proven to cure cravings" from any future marketing or advertisements created by GSK or at GSK's direction that describes Benefiber Healthy Shape. § C.14.

C. Attorneys' Fee, Cost, and Service Award

Within the time period established by the Court, and no later than thirty-five (35) days prior to the Objection and Opt-Out Deadline, Class Counsel will file a Motion for Approval of Attorneys' Fee, Cost, and Service Awards to be paid from the Gross Settlement Fund, which shall be included on the Settlement Website. Class Counsel in the Litigation can apply for the following: (a) attorneys' fees not to exceed 33% of the Gross Settlement Fund (or $2,166,666) and (b) reimbursement of verifiable litigation costs plus reasonable costs incurred through the filing of the motion for Final Approval. § G.35.a. In recognition of their time, costs, and effort in the Litigation, including their undertaking of related risks and burdens, Defendants have agreed not to oppose an application to the Court for payment of Service Awards of up to $3,000 to each of the named Plaintiffs. § G.35.b.

D. Settlement Administrator and the Notice Plan

The Settlement Agreement seeks appointment of JND Legal Administration ("JND") as the Settlement Administrator to effectuate and administer the Notice Plan. *See generally* § D.15. Before selecting JND, the Parties engaged in a competitive bidding process whereby they reviewed

bids from several notice administrators. Sultzer Decl. ¶ 19; Clarkson Decl. ¶ 7. The Parties selected JND based on its reputation for excellent work and breadth of experience administering other similar consumer class actions. Sultzer Decl. ¶ 20; Clarkson Decl. ¶ 7.

The Settlement Administrator will use a long form and various short form notices to disseminate notice of the Settlement Agreement to the Settlement Class Members. § D.20.a; Exs. 2 and 3. The long form notice is designed to provide notice of the full terms of the Settlement Agreement and includes: a description of the claims in the Litigation and the Covered Products at issue; information defining the Settlement Class; a description of the proposed settlement and the relief provided; a list of the options presented to the members of the proposed Settlement Class, i.e., applying for settlement benefits, objecting to the settlement, opting out of the settlement, or doing nothing; a description of the release of claims provided for in the Settlement Agreement; and the time and date of the Final Approval Hearing.

The parties, with the assistance of JND, developed the Notice Plan that includes: (1) Notice of Settlement and Claim Form sent by electronic mail if an e-mail address is available or in the alternative mailed, first class postage prepaid, to all members of the Settlement Class who are identifiable to the Settlement Administrator through reasonable means; (2) print and digital/internet publication designed to target purchasers of the Covered Products; (3) a dedicated Settlement Website though which Settlement Class Members can obtain more detailed information about the settlement and access case documents; (4) a toll-free telephone number through which Settlement Class Members can obtain additional information about the settlement and directs them to the Settlement Website; (5) a press release that will increase visibility, transparency, and circulation of the Notices of Settlement; and (6) all required notices in accordance with GSK's obligations pursuant to 28 U.S.C. §1715. Exs. 2, 4, 5; Sultzer Decl., Ex. B

JND analyzed the demographic and media usage of potential Settlement Class Members to ensure the notice effectively targets the Settlement Class. Sultzer Decl., Ex. B. Specifically, JND designed a 6-week media campaign that is estimated to reach above 70% of potential Settlement Class members. *Id*. at 3. The media campaign will consist of a digital effort with the leading digital network (Google Display Network) and the top social media site (Facebook). *Id*. The digital effort utilizes best practices in targeting the Settlement Class and will directly link users to the Settlement Website where they can access more information, as well as file an online claim. *Id*.

In addition to the digital effort, direct notice by email and postcard to any known Settlement Class Members, an internet search effort and the distribution of a joint national press release in English and Spanish will extend notice exposure further. *Id.*

IV. ARGUMENT

A. The Court Should Preliminarily Approve the Settlement

Class Counsel have worked persistently to reach a fair, reasonable, and adequate settlement. Plaintiffs and Class Counsel believe their claims are strong and are optimistic about obtaining class certification and succeeding on the merits. However, significant expense and risk attend the continued prosecution of the claims through trial and any appeals. In negotiating and evaluating the settlement, Plaintiffs and Class Counsel have taken these costs and uncertainties into account, as well as the risks and delays inherent in complex class action litigation. Class Counsel believe the proposed Settlement provides significant relief to the Settlement Class members and is fair, reasonable, adequate, and in the best interests of the Settlement Class.

B. Legal Standard

Under Rule 23(e)(2) of the Federal Rules of Civil Procedure, a court may approve a class action settlement "only . . . on finding that [the settlement agreement] is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The "fair, reasonable, and adequate" standard effectively requires parties to show that a settlement agreement is both procedurally and substantively fair. *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013).

The Second Circuit Court of Appeals has recognized a "strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds*, 588 F.3d 700, 803 (2d Cir. 2009) (quoting *Wal- Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Visa*")). "The compromise of complex litigation is encouraged by the courts and favored by public policy." *Visa*, 396 F.3d at 117 (citation omitted); *see also Hadel v. Gaucho, LLC*, No. 15 Civ. 3706, 2016 U.S. Dist. LEXIS 33085, at *4 (S.D.N.Y. Mar. 14, 2016) ("Courts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere."). A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Visa*, 396 F.3d at 116 (quoting MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.42 (1995)).

"Preliminary approval is the first step in the settlement of a class action whereby the court 'must preliminarily determine whether notice of the proposed settlement . . . should be given to class members in such a manner as the court directs, and an evidentiary hearing scheduled to determine the fairness and adequacy of settlement.'" *Manley v. Midan Rest. Inc.*, No. 14 Civ. 1693, 2016 U.S. Dist. LEXIS 43571, at *21 (S.D.N.Y. Mar. 30, 2016) (citations omitted). "To grant preliminary approval, the court need only find that there is 'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *Id*. (citations and

quotations omitted); *accord Tart v. Lions Gate Entm't Corp.*, No. 14-CV-8004, 2015 U.S. Dist. LEXIS 139266 (S.D.N.Y. Oct. 13, 2015). "If the proposed settlement appears to fall within the range of possible approval, the court should order that the class members receive notice of the settlement." *Manley*, 2016 U.S. Dist. LEXIS 43571, at *8 (citation omitted). The settlement is both procedurally and substantively fair and falls well within the range of possible approval.

C. The Settlement Agreement Is Procedurally Fair

To demonstrate a settlement's procedural fairness, a party must show "that the settlement resulted from 'arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citation omitted); *accord McReynolds*, 588 F.3d at 804; *see also Hall v. Prosource Techs., LLC*, No. 14-CV-2502, 2016 U.S. Dist. LEXIS 53791, at *18 (E.D.N.Y. Apr. 11, 2016).

First, the negotiations were conducted at arms' length over a period of several months. *See* Sultzer Decl. ¶ 12; Clarkson Decl. ¶ 6.f. The parties participated in two mediation sessions with JAMS mediator Hon. Morton Denlow (ret.), and while the matter did not resolve at the mediation, the parties, with the assistance of Judge Denlow, continued to pursue settlement discussions until a settlement was reached. Sultzer Decl. ¶¶ 13, 14; Clarkson Decl. ¶ 6.f. The negotiations were hard fought, and counsel for all parties participated vigorously with competing agendas.

Second, the discussions were undertaken by counsel who are well versed in complex litigation and, more specifically, consumer class actions. Sultzer Decl. ¶ 16; Clarkson Decl. ¶ 8. Seven separate law firms, located in several states across the nation, advocated for the interests of the Settlement Class throughout negotiations, utilizing their combined experience of several decades litigating consumers class actions, including false and deceptive advertising cases, to

ensure the proposed settlement serves the best interests of the Settlement Class. *See* Sultzer Decl., Exs. C-I (Class Counsels' firm resumes).

Third, Plaintiffs and Class Counsel conducted a thorough investigation and evaluation of the claims and defenses and continued to analyze the merits, likelihood the respective courts would certify the Litigation for class treatment, and likelihood of success at trial, throughout the pendency of the cases. Sultzer Decl. ¶ 17; Clarkson Decl. ¶ 6.b; 6.g. Class Counsel obtained significant mediation discovery in order to evaluate the claims and position themselves to negotiate a settlement that would be fair and reasonable on behalf of the Class. Through this investigation, discovery, ongoing analysis, and litigation in two jurisdictions, Class Counsel obtained an understanding of the strengths and weaknesses of the Litigation. For the foregoing reasons, the Settlement Agreement is procedurally fair.

D. The Settlement Is Substantively Fair

To demonstrate the substantive fairness of a settlement agreement, a party must satisfy the factors the Second Circuit set forth in *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"); *Charron*, 731 F.3d at 247. The *Grinnell* factors are:

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

McReynolds, 588 F.3d at 804 (quoting *Grinnell*, 495 F.2d at 463). The *Grinnell* factors are used to evaluate settlements at the final approval stage, and guide courts at the preliminary approval stage, at which Plaintiffs have a lower burden. Here, the *Grinnell* factors overwhelmingly favor preliminary approval of the Settlement Agreement.

1. The complexity, expense, and likely duration of the litigation

"The greater the 'complexity, expense and likely duration of the litigation,' the stronger the basis for approving a settlement." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 663 (S.D.N.Y. 2015) (citations omitted). Consumer class action lawsuits by their very nature are complex, expensive, and lengthy. *See, e.g.*, *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010); *see also Manley*, 2016 U.S. Dist. LEXIS 43571, at *9 ("Most class actions are inherently complex [.]"). Should the Court decline to approve the proposed settlement and litigation were to resume, it would be costly, complex, and time-consuming.

There would undoubtedly be a contested class certification motion, and Defendants would likely dispute that damages could be calculated on a class wide basis and whether individual purchasing decisions were relevant and/or would predominate over class wide issues. Class issues involving damages would likely generate expert discovery and *Daubert* motions as well. Although Plaintiffs are confident in their ultimate success in certifying a class—including based on this case's similarities to another matter before this Court, *Goldemberg v. Johnson & Johnson Consumer Cos.*, No. 13 Civ. 3073, 2016 U.S. Dist. LEXIS 137780 (S.D.N.Y. Oct. 4, 2016) (certifying class of consumers who purchased products labeled "Active Naturals")—a positive ruling would no doubt be challenged by a decertification motion and/or an appeal.

Plaintiffs expect there would likely be a lengthy and expensive battle of the experts about the meaning of the terms "natural" and "clinically proven" to a reasonable consumer; whether the satiety benefits were supported by competent and reliable scientific evidence; the reliability of competing damages models, as well as the reliability of consumer surveys and statistical analysis employed to derive the price premium consumers paid for each falsely advertised product attribute. Each step towards trial would be subject to Defendants' vigorous opposition and possible

interlocutory appeal. Even if the case were to proceed to judgment on the merits, any final judgment would likely be appealed, which would take significant time and resources.

Moreover, Defendants would be expected to offer substantial defenses at trial concerning the nature and degree that wheat is processed to create wheat dextrin and clinical studies that Defendants will argue substantiate the satiety claims. Although Plaintiffs believe they would ultimately prevail, "litigation of this matter . . . through trial would be complex, costly and long." *Manley*, 2016 U.S. Dist. LEXIS 43571, at *9 (citation omitted). "The settlement eliminates [the] costs and risks" associated with further litigation. *Meredith Corp.*, 87 F. Supp. 3d at 663. "It also obtains for the class prompt [] compensation for prior [] injuries." *Id.* For all of these reasons, this factor weighs strongly in favor of preliminary approval.

2. The reaction of the class to the settlement

It is premature to address the reaction of the Settlement Class at the preliminary approval stage where no data is yet available.

3. The stage of the proceedings and the amount of discovery completed

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

Here, "discovery has advanced sufficiently to allow the parties to resolve the case responsibly." *Manley*, 2016 U.S. Dist. LEXIS 43571, at *9. As set forth more fully above, Class Counsel have conducted significant informal discovery related to Plaintiffs' claims, including extensive sales, distribution and marketing information regarding the Covered Products. *See* Sultzer Decl. ¶ 11; Clarkson Decl. ¶ 6.e. Consequently, Plaintiffs had sufficient information to

evaluate the claims of the class. *See D.S. v. New York City Dep't of Educ.*, 255 F.R.D. 59, 77 (E.D.N.Y. 2008) ("The amount of discovery undertaken has provided plaintiffs' counsel 'sufficient information to act intelligently on behalf of the class' in reaching a settlement.").

4. The risks of establishing liability and damages

"Litigation inherently involves risks." *Willix v. Healthfirst, Inc.*, No. 07 Civ. 1143, 2011 U.S. Dist. LEXIS 21102, at *11 (E.D.N.Y. Feb. 18, 2011) (citation omitted). "[I]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Banyai v. Mazur*, No. 00 Civ. 9806, 2007 U.S. Dist. LEXIS 22342, at *30 (S.D.N.Y. Mar. 27, 2007) (citation omitted); *accord Zeltser v. Merrill Lynch & Co.*, No. 13 Civ. 1531, 2014 U.S. Dist. LEXIS 135635, at *14 (S.D.N.Y. Sep. 23, 2014).

Plaintiffs recognize that, as with any litigation, uncertainties exist. Defendant continues to deny Plaintiffs' allegations, and should this matter proceed, Plaintiffs expect Defendant will vigorously defend themselves on the merits, at each stage of litigation and likely on appeal.

Most fundamentally, while Plaintiffs believe a reasonable consumer would be misled by the "100% Natural," "natural," and "clinically proven" claims and similar labeling statements on the Covered Products, a jury might not agree. In addition, Plaintiffs anticipate a zealous "battle of the experts" with respect to Defendant's "natural" and "clinically proven" claims and the calculations of damages. For these reasons, although Plaintiffs are confident in the merits of their case, the risks of establishing liability and damages strongly support preliminary approval.

5. The risk of maintaining class action status through trial

The Litigation settled before rulings on class certification, and the current certification is for settlement purposes only. § B.2. As discussed above, in addition to the challenges inherent in certifying a potential national class, Plaintiffs must proffer a suitable mechanism for calculating

damages in the form a class-wide price premium. While Plaintiffs believe they could establish the existence of such a premium to the Court's satisfaction, this proposed settlement eliminates the unavoidable risk that they cannot. Furthermore, even if the Court were to certify a litigation class, the certification would not be set in stone. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."). Given the risks, this factor weighs in favor of final approval. *See, e.g.*, *Mills v. Capital One, N.A.*, No. 14 Civ 1937, 2015 U.S. Dist. LEXIS 133530, at *10-11 (S.D.N.Y. Sept. 30, 2015).

6. The ability of Defendant to withstand greater judgment

"Courts have recognized that a [defendant's] ability to pay is much less important than the other *Grinnell* factors, especially where the other factors weigh in favor of approving the settlement." *In re Sinus Buster Prods. Consumer Litig.*, No. 12 -CV-2429, 2014 U.S. Dist. LEXIS 158415 *25 (E.D.N.Y. Nov. 10, 2014) (citations omitted). A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Viafara v. MCIZ Corp.*, No. 12 Civ 7452, 2014 U.S. Dist. LEXIS 60695, at *21 (S.D.N.Y. Apr. 30, 2014) (citation omitted). Although Defendants may be able to withstand a greater judgment, the agreed-to settlement fund is fair and adequate when weighing the likelihood of success and overall value of Settlement Class Member's individual damages should the Litigation proceed to trial. For these reasons, this factor is neutral.

7. The range of reasonableness of the settlement in light of the best possible recovery and in light of all the attendant risks of litigation

"There is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion[.]" *Visa*, 396 F.3d at 119 (citation

omitted). "In other words, the question for the Court is not whether the settlement represents the highest recovery possible . . . but whether it represents a reasonable one in light of the many uncertainties the class faces[.]" *Bodon v. Domino's Pizza, LLC*, No. 09-CV-2941, 2015 U.S. Dist. LEXIS 17358, at *18 (E.D.N.Y. Jan. 16, 2015) (citation omitted).

Here, the relief for which the Settlement Agreement provides is within the range of reasonableness, especially in light of the best possible recovery and all the attendant risks of litigation. The gravamen of the Litigation is that Defendant is deceiving consumers by labeling Benefiber Original as "100% Natural" and "natural" and Benefiber Healthy Shape as "clinically proven to curb cravings" when, in fact, those claims are untrue. The injunctive relief provided under the Settlement Agreement—i.e., removal of the statements "100% Natural" and "clinically proven to curb cravings" from all labels, marketing advertisements and sales of Benefiber Original and Benefiber Healthy Shape—is the *best possible* outcome both for the Settlement Class Members and future consumers. It 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. Furthermore, the cash compensation to which eligible Settlement Class Members will be entitled is significant relative to the purchase prices.

As discussed above, while Plaintiffs believe their claims are strong, continuation of this litigation poses significant risks. Ongoing litigation may not result in an increased benefit to the Settlement Class, it would lead to substantial expenditure by both Parties and Court resources. Taking into account the risks and benefits Plaintiffs have outlined above, the Settlement falls

within the "range of reasonableness." Thus, collectively and independently, the *Grinnell* factors warrant the conclusion that the Settlement Agreement is fair, adequate, and reasonable.

E. The Court Should Preliminarily Certify the Settlement Class

As Plaintiffs set forth below, the proposed Settlement Class satisfies all of the requirements of Rule 23(a) and Rule 23(b)(3).

1. The Settlement Class meets all prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure

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

(a) Numerosity

Under Rule 23(a)(1), plaintiffs must show that the proposed class is "so numerous that joinder of all [its] members is impracticable." Fed. R. Civ. P. 23(a)(1). The Second Circuit has found numerosity met where a proposed class is "obviously numerous." *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). Here, there is no dispute that at least hundreds of thousands of people nationwide purchased the Covered Products during the proposed class period. Numerosity is easily satisfied. *Id.*

(b) Commonality

Under Rule 23(a)(2), plaintiffs must show that "questions of law or fact common to the [proposed] class" exist. Fed. R. Civ. P. 23(a)(2). Commonality requires that the proposed class members' claims all centrally "depend upon a common contention," which "must be of such a nature that it is capable of class wide resolution," meaning that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "[F]or purposes of Rule 23(a)(2) even a

single common question will do[.]" *Id.* at 359 (citations omitted). Plaintiffs need only show that their injuries stemmed from defendants' "unitary course of conduct." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 85 (2d Cir. 2015). Here, common questions include, but are not limited to, whether Defendant's representations were likely to deceive reasonable consumers. Resolution of this common question would require evaluation of the question's merits under a single objective standard, i.e., the "reasonable consumer" test. *Williams v. Gerber Prods. Co.*, 552 F.3d 934 (9th Cir. Cal. 2008); *Ackerman v. Coca-Cola Co.*, 2010 U.S. Dist. LEXIS 73156, at *56 (E.D.N.Y. July 21, 2010). Thus, commonality is satisfied.

(c) Typicality

Under Rule 23(a)(3), plaintiffs must show that the proposed class representatives' claims "are typical of the [class'] claims." Fed. R. Civ. P. 23(a)(3). Plaintiffs must show that "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993). "[D]ifferences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative's claims." *In re Nissan Radiator*, No. 10 CV 7493, 2013 U.S. Dist. LEXIS 116720, at *53 (S.D.N.Y. May 30, 2013); *Fogarazzo v. Lehman Bros.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005) ("The typicality requirement is not demanding."). Here, typicality is met because the same allegedly unlawful conduct by Defendant was directed at, or affected, Plaintiffs and the members of the proposed Settlement Class. *Robidoux*, 987 F.2d at 936–37.

(d) Adequacy of representation

Under Rule 23(a)(4), Plaintiffs must show that the proposed class representatives will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Plaintiffs must demonstrate that: (1) the class representatives do not have conflicting interests with other class

members; and (2) class counsel is "qualified, experienced and generally able to conduct the litigation." *Marisol A.*, 126 F.3d at 378.

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

With respect to the second requirement, Class Counsel are qualified, experienced, and generally able to conduct the Litigation. Class Counsel have invested considerable time and resources into the prosecution of the Litigation, and possessing a long and proven track record of the successful prosecution of class actions, including false advertising cases, and numerous appointments as class counsel. *See* Sultzer Decl. ¶ 22, Exs. C-I (Class Counsel firm resumes).

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

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997). Plaintiffs seek certification under Rule 23(b)(3) which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

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

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 623 (citation

omitted). The Second Circuit has held that "to meet the predominance requirement . . . a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof." *Augustin v. Jablonsky (In re Nassau County Strip Search Cases)*, 461 F.3d 219, 227-28 (2d Cir. 2006) (citations omitted). In the context of a request for settlement-only class certification, concerns about whether individual issues "would present intractable management problems" at trial drop out because "the proposal is that there be no trial." *Id.* at 620. As a result, "the predominance inquiry will sometimes be easier to satisfy in the settlement context." *Tart*, 2015 U.S. Dist. LEXIS 139266, at *4 (citation omitted). Consumer fraud cases readily satisfy the predominance inquiry. *See Amchem Prods.*, 521 U.S. at 625.

Here, for settlement purposes, the central common questions predominate over any questions that may affect individual Settlement Class Members. The central common questions include whether Defendant's marketing of the Covered Products as "100% Natural," "natural," and "clinically proven," and similar statements was likely to deceive reasonable consumers and whether the representations were material. These issues are subject to "generalized proof" and "outweigh those issues that are subject to individualized proof." *In re Nassau Cty. Strip Search Cases*, 461 F.3d at 227–28 (citation omitted). The Settlement Class meets the predominance requirement for settlement purposes.

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

Rule 23(b)(3) also requires that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Here, the class action mechanism is superior to individual actions for numerous reasons. First, "[t]he potential class members are both significant in number and geographically dispersed" and "[t]he interest of the

class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions." *Meredith Corp.*, 87 F. Supp. 3d at 661 (citation omitted).

Additionally, a class action is superior here because "it will conserve judicial resources" and "is more efficient for Class Members, particularly those who lack the resources to bring their claims individually." *Zeltser*, 2014 U.S. Dist. LEXIS 135635, at *8 (citation omitted). As a result of the Covered Products retail price, the expense and burden of litigation make it virtually impossible for the Settlement Class Members to seek redress on an individual basis. By contrast, in a class action, the cost of litigation is spread across the entire class, thereby making litigation and recovery economically viable. *See, e.g.*, *Tart*, 2015 U.S. Dist. LEXIS 139266, at *5. "Employing the class device here will not only achieve economies of scale for Class Members, but will also conserve judicial resources and preserve public confidence in the integrity of the system by avoiding the waste and delay repetitive proceedings and preventing inconsistent adjudications." *Zeltser*, 2014 U.S. Dist. LEXIS 135635, at *8-9 (citations omitted). For all of the foregoing reasons, a class action is superior to individual suits. The requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, and the Court should preliminarily certify the Settlement Class.

F. The Court Should Approve the Proposed Notice Plan

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

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

Courts "must direct to class members the best notice that is practicable under the circumstances." *Vargas v. Capital One Fin. Advisors*, 2014 U.S. App. LEXIS 4689, at *26 (2d Cir. 2014) (summary order). Here, the robust proposed Notice Plan meets the requirements of due process and the Federal Rules of Civil Procedure. The proposed methods Plaintiff identified above for providing notice to the Settlement Class members are reasonable, designed to reach a *bare minimum* of 70% of the Settlement Class, and utilize the best practicable and economically efficient means to notify consumers of the proposed Settlement. *See*, Sultzer Decl., Ex. B; Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* (2010) at 3 ("It is reasonable to reach between 70-95%. A study of recent published decisions showed that the median reach calculation on approved notice plans was 87%"); Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* (3d Ed. 2010) at 27 (explaining the "reach" of a proposed class action notice plan is normally within a range of 70-95%). Direct notice through email and postcards will go to consumers readily identifiable. *See*, Sultzer Decl., Ex. B. A digital advertising campaign targeting consumers of the Covered Products will be used to drive them to the Settlement Website. *Id.* Press releases will be used to further proliferate notice of the Settlement and drive consumers to the Settlement Website and toll-free telephone number to provide further information regarding the Settlement. *Id.*

Substantively, Rule 23(C)(2)(B) requires, and the Notices of Settlement provides, information, written in easy-to-understand plain language, regarding: "(i) the nature of the action;

(ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who request exclusions; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(C)(2)(B). "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Visa*, 396 F.3d at 114. The Notices of Settlement define the Settlement Class; explain all Settlement Class Members' rights, the scope and impact of Released Claims, and the applicable deadlines for submitting claims, objecting, and opting out; and they describe in detail the injunctive and monetary relief of the Settlement, including the procedures for allocating and distributing the Gross Settlement Fund amongst the Settlement Class Members, Plaintiffs, Class Counsel, and the Settlement Administrator. Exs. 2-5. They also plainly indicate the time and place of the Final Approval, and explain the methods for objecting to, or opting out of, the settlement. Exs. 2-5. They detail the provisions for payment of Attorneys' Fees, Costs and Service Awards, and they provide contact information for Class Counsel. Exs. 2-5.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court: (1) certify the Settlement Class and appoint Plaintiffs as the class representatives and their counsel as Class Counsel; (2) preliminarily approve the Settlement Agreement; (3) approve the Notice Plan; and (4) set a date and time for the Final Approval Hearing.

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Respectfully submitted,

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