UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JENNIFER HASEMANN and DEBBIE HOTH, individually and on behalf of all others similarly situated, Plaintiffs, v. GERBER PRODUCTS CO., Defendant.	Civil Action No. 1:15-cv-02995-EK-RER
WENDY MANEMEIT, individually and on behalf of all others similarly situated, Plaintiffs, v. GERBER PRODUCTS CO., Defendant.	Civil Action No. 2:17-cv-00093-EK-RER

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF NOTICE PLAN

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Plaintiffs[1] Jennifer Hasemann ("Hasemann") and Wendy Manemeit ("Manemeit") (collectively, the "Plaintiffs"), on behalf of themselves and all others similarly situated respectfully submit this memorandum of law in support of Plaintiffs' unopposed motion for preliminary approval of the Parties' Settlement Agreement ("Settlement Agmt.").

INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiffs represent a class of Florida and New York consumers who purchased Defendant's infant formula, Good Start Gentle ("GSG") (the "Product"), between October 10, 2011 and April 23, 2016 (the "Settlement Class") in the above captioned cases (the "Actions"). Plaintiffs allege that during this time period Defendant misled parents about the formula they were choosing to feed their babies—namely, that Defendant falsely claimed (1) that GSG could reduce the risk of an infant's developing "allergies" and (2) that the FDA had endorsed GSG. *See, e.g.*, *Hasemann v. Gerber Prod. Co.*, 331 F.R.D. 239, 244 (E.D.N.Y. 2019). Plaintiffs also allege that Defendant used this misleading advertising in order to charge more for GSG than it otherwise could have, in violation of Florida's and New York's consumer-protection statutes. *Id.* at 245. Defendant denies these allegations. The Settlement Agreement now submitted for preliminary approval provides excellent relief to Settlement Class members, providing an amount greater than a full refund of the premium price that consumers paid for the Products.

As detailed in the declaration of Carlos F. Ramirez in Support of Plaintiffs' Motion for Preliminary Approval ("Ramirez Decl.") (filed concurrently herewith), this matter has been hard-fought for close to ten years now, and has included extensive motion practice — on motions to dismiss, class certification and summary judgment; extensive discovery — with extensive

[1] Unless otherwise indicated, capitalized terms shall have the meaning that the Settlement Agreement ascribes to them. *See generally* Settlement Agreement (ECF No. 281).

document production, interrogatories and depositions of numerous employees of Defendant; depositions of all the named plaintiffs and depositions of both Parties' experts; and two mediation sessions — with the Honorable Barbara S. Jones (Ret.) on September 9, 2019 and then with the Honorable Diane M. Welsh (Ret.) on October 14, 2024. Ramirez Decl. at ¶¶ 11, 21.

On January 23, 2025, just days before a trial in this case was scheduled to begin, the Parties agreed on the material terms for relief for the class members for the resolution of the matter. Ramirez Decl. at ¶ 25. Only after agreement as to these material terms for the Class, did the Parties negotiate attorney fees and costs for Class Counsel for their work. *Id.*

Plaintiffs' objective in filing this matter was to compensate the putative class members damaged by the alleged misrepresentations. Through this litigation that culminated with the Settlement Agreement, Plaintiffs achieved substantial relief for the Settlement Class. Under the Settlement, each Florida Settlement Class member that submits a valid claim will receive $3.00 per unit claimed, up to a maximum limit of five (5) (the maximum total claimable amount is $15), and with proof of purchase, they can claim up to 20 units (the maximum total claimable amount is $60). Each New York Settlement Class member that submits a valid claim will receive $4.00 per unit claimed, up to a maximum limit of five (5) (the maximum total claimable amount is $20), and with proof of purchase, they can claim up to 20 units (the maximum total claimable amount is $80). Defendant has also agreed to pay the costs of notice and claims administration up to a certain amount; service awards to each of the two named plaintiffs of up to $10,000 each for their time and effort in prosecuting this matter (including, but not limited to, producing discovery and sitting for their depositions), and Class Counsel's fees and costs, up to a certain amount. Thus, the Settlement is an outstanding result for the Settlement Class.

The Parties only reached the Settlement after conducting extensive motion practice, full class and merits discovery, class certification, rulings on competing motions for summary judgment, and engaging in extensive arm's-length, good-faith negotiations, including mediation sessions with two esteemed mediators, as well as continuing to evaluate the Litigation's strengths and weaknesses while preparing for trial. Ramirez Decl. at ¶¶ 4-25, 28-33. While providing significant benefits for the Settlement Class members, the Settlement takes into account the substantial risks the Parties would face if the litigation progressed even further. Indeed, the Settlement achieved here is particularly remarkable given that a similar case against Defendant, which was pending in the Central District of California, was dismissed on summary judgment, with the dismissal being upheld by the Court of Appeals for the Ninth Circuit.

For all of the reasons given herein, Plaintiffs respectfully ask the Court to grant preliminary approval of the Settlement, allow the Claims Administrator to provide notice to the Settlement Class members, and to schedule a Fairness Hearing to consider final approval of the Settlement. *See* FED. R. CIV. P. 23(e). Plaintiffs also respectfully request to be appointed as representatives for the Settlement Class and for their counsel to be appointed as Co-Lead Class Counsel.[2] *See* FED. R. CIV. P. 23(g). The Court should also approve the notice program to which the Parties agreed in the Settlement, as it meets the requirements of due process and is the best notice practicable under the circumstances. *See* FED. R. CIV. P. 23(c).

The Settlement defines the Settlement Class (which is the same definition as the Court's previous order granting class certification), describes the Parties' agreed-upon Settlement relief, and proposes a plan for disseminating notice to the members of the Settlement Class.

[2] "Co-Lead Class Counsel" are Brett Cebulash of Taus, Cebulash and Landau LLP; Michael R. Reese of Reese LLP; Shanon J. Carson of Berger Montague PC; and Jean Martin of Morgan & Morgan Complex Litigation Group.

A. The Settlement Has Been Reached as to the Previously Certified Class

Under the Settlement Agreement, the settlement is reached on behalf of the Settlement Class defined as follows:

> All persons who purchased, other than for resale, GSG in the State of New York or State of Florida between October 10, 2011 and April 23, 2016 (the "Class Period") as previously certified by the Court on March 31, 2019.
>
> Excluded from this definition is the judge or magistrate assigned to this case; Defendant; any entity in which Defendant has a controlling interest; Defendant's officers, directors, legal representatives, successors, and assigns; persons who purchased Good Start infant formula for the purpose of resale; and any government or government entity participating in the WIC program. The term "purchased" does not include formula received by a person via the WIC program.

See Settlement Agmt. at § 2.bb. This definition conforms to, and does not deviate from, the two state classes that the Court previously certified and of which notice was given to Class members.

B. Relief for the Members of the Settlement Class

The Settlement Agreement provides for significant substantial monetary relief. Under the Settlement, each Florida Settlement Class member who submits a valid claim can receive $3 per unit purchased (subject to certain limitations based upon proof) and each New York Settlement Class member who submits a valid claim can receive $4 per unit purchased (subject to the same proof requirements as the Florida Settlement Class members). Settlement Agmt. at§ 4. Defendant has also agreed to pay up to $750,000 for Class Notice and administration costs, as well as Attorneys' Fees and Costs and Service Awards to Plaintiffs as described below. *Id.* at §§ 7, 8.

C. Service Awards and Attorneys' Fees and Expenses

If approved by the Court, Defendant agrees to pay (i) up to $11,250,000 for attorneys' fees and litigation expenses to Class Counsel for their work on the Actions and (ii) Service Awards of up to $10,000 to each of the named Plaintiffs (for a total of $20,000) to compensate them for the actions and risk they took in their capacities as class representatives. Settlement Agmt. at § 8.

D. Settlement Notice

The Settlement Agreement proposes that the Court appoint Angeion Group, LLC ("Angeion") to administer the notice process. The Settlement Agreement also outlines the forms and methods by which notice of the Settlement Agreement will be given to the Settlement Class members, including notice of the deadlines to opt out of, or object to, the Settlement. *Id.* at §§ 2.aa., 7. Angeion has developed a robust notice program that includes: (1) a comprehensive digital media-based notice, which includes providing notice via email and on websites where members of the target audience are most likely to visit and on social media platforms like Facebook and Instagram, (2) a dedicated Settlement Website and (3) a toll-free helpline through which Settlement Class members can obtain more detailed information about the Settlement. *See* Declaration of Steven Weisbrot of Angeion Group, LLC Regarding Angeion Qualifications and Proposed Notice Plan ("Weisbrot Decl.") at ¶¶ 17-44. The notice plan has been designed to deliver an approximate 75.33% reach with an average frequency of 3.06 times each with over 14.46 million impressions of the notice targeted towards Settlement Class members. *Id.* at ¶ 49.

Under the Settlement Agreement, the Settlement Website shall contain: (i) information concerning the deadline for filing a Claim Form, and the dates and locations of the Final Approval Hearing; (ii) the toll-free phone helpline number; (iii) copies of the Settlement Agreement, the Claim Form, the Long Form Notice, Court orders regarding this Settlement, and other relevant Court documents, including any Motion for Approval of Attorneys' Fees, Costs, and Service Awards; and (iv) information concerning the submission of Claim Forms, including the ability to submit Claim Forms (and accompanying documents) electronically, through the Settlement Website. To allow for the maximum convenience of the Settlement Class members, claims may be submitted online. *Id.*

ARGUMENT

A. The Court Should Preliminarily Approve the Settlement Agreement

Class Counsel have worked steadfastly for close to ten years to reach a fair, reasonable, and adequate Settlement. *See generally* Ramirez Decl. Plaintiffs and their counsel believe claims asserted in the Actions are strong and have merit. Ramirez Decl. at ¶ 34. They recognize, however, that significant expense and risk are associated with continuing to prosecute the claims through trial and any appeals. *Id.* In negotiating and evaluating the Settlement, Plaintiffs and Class Counsel have taken these costs and uncertainties into account, as well as the delays inherent in complex class action litigation. *Id.* Additionally, in the process of litigating the Actions, Class Counsel conducted significant research on the consumer protection statutes at issue, as well as the overall legal landscape, to determine the likelihood of success and reasonable parameters under which courts have approved settlements in comparable cases. *Id.* at ¶ 31. For the foregoing reasons, Class Counsel believe this Settlement provides significant relief to the Settlement Class members and is fair, reasonable, adequate, and in the best interests of the Settlement Class. *Id.* at ¶ 34.

1. Legal Standard

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

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

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

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

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

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

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

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

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

(D) The proposal treats Class Members equitably relative to each other."

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

The Second Circuit has recognized a "strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds*, 588 F.3d at 803 (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.

"Preliminary approval is the first step in the settlement of a class action whereby the court 'must preliminarily determine whether notice of the proposed settlement . . . should be given to Class Members in such a manner as the court directs, and an evidentiary hearing scheduled to determine the fairness and adequacy of settlement.'" *Manley v. Midan Rest. Inc.*, 2016 WL 1274577, at *8 (S.D.N.Y. Mar. 30, 2016) "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.* "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." *Id.* at *8.

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

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

The first two factors under Rule 23(e)(2) concern the procedural fairness of the settlement, that is, "the conduct of the litigation and of the negotiations leading up to the proposed settlement[.]" *In re Restasis*, 2022 WL 3043103, at *5. To demonstrate a settlement's procedural fairness, a party must show "that the settlement resulted from 'arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001); *see also Hall v. ProSource Techs., LLC*, 2016 WL 1555128, at *5 (E.D.N.Y. Apr. 11, 2016); *Puddu v. 6D Glob. Techs, Inc.*, 2021 WL 1910656, at *4 (S.D.N.Y. May 12, 2021).

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

Here, Plaintiffs and their counsel conducted a thorough evaluation of the claims and defenses prior to filing the Actions and continued to analyze the claims throughout the 10-year pendency of the case. Ramirez Decl. at ¶ 31. Through their investigation and ongoing analysis, Class Counsel obtained a full understanding of the strengths and weaknesses of the Actions. *Id.*

Class Counsel have substantial experience litigating class actions and negotiating class settlements. *Id.* at ¶ 11; Ex. 1 (Taus, Cebulash and Landau LLP's firm résumé); Ex. 2 (Reese LLP's firm résumé); Ex. 3 (Berger Montague's firm résumé); Ex. 4 (Morgan & Morgan Complex Litigation Group's firm résumé). Moreover, the Parties participated in serious and informed arms-length negotiations before highly qualified mediators which, ultimately, led to the finalized Settlement Agreement. Ramirez Decl. at ¶¶ 21, 25.

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

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

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

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

Grinnell, 495 F.2d at 463. Critically, "[t]he goal of the [2018] amendment was 'not to displace any factors, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision. . . District courts in this Circuit, accordingly, have considered the *Grinnell* factors 'in tandem' with the factors set forth in Rule 23(e)(2), and the Second Circuit has continued to endorse the use of the *Grinnell* factors following the 2018 amendment." *In re Restasis*, 2022 WL 3043103, at *5.

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

i. The complexity, expense, and likely duration of litigation

"The greater the 'complexity, expense and likely duration of the litigation,' the stronger the basis for approving a settlement." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 663 (S.D.N.Y. 2015) (citations omitted). Consumer class action lawsuits, like the Actions, are complex, expensive, and lengthy. *Manley*, 2016 WL 1274577, at *9 ("Most class actions are inherently complex[.]"). Should the Court decline to approve the Settlement Agreement, the Parties will be proceeding to what will undoubtedly a hard-fought, costly trial anticipated to last several weeks. Indeed, just days before executing the Settlement Term Sheet, the parties had already spent considerable time and expense preparing for trial. And at trial, Plaintiffs expected to present the testimony of approximately seventeen (17) fact witnesses and the testimony of three (3) expert witnesses. Defendant indicated that it expected to present testimony of approximately eighteen (18) fact witnesses and four (4) expert witnesses. Ramirez Decl. at ¶ 32. Even after trial, any jury verdict would likely be appealed, which would take significant time and resources. *Id.* These litigation efforts would be costly to all Parties and would require significant judicial oversight. *Id.*

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

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

ii. The reaction of the class to the settlement

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

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

The third *Grinnell* factor considers whether "the parties have conducted a factual investigation sufficient for the court to evaluate the proposed settlement and confirm that pretrial negotiations were adequately adversarial." *In re N. Dynasty Minerals Ltd. Sec. Litig.*, 2024 WL 308242, at *11 (E.D.N.Y. Jan. 26, 2024).

Here, there is no questions that "discovery has advanced sufficiently to allow the parties to resolve the case responsibly," as the Parties were literally days away from trial after almost ten years of litigation and extensive factual and expert discovery. *Manley*, 2016 WL 1274577, at *9. Class Counsel have conducted extensive discovery related to claims, including interrogatories, requests for production of documents and fact and expert depositions. *See* Ramirez Decl. at ¶ 8. Consequently, Plaintiffs have sufficient information to evaluate the terms of the proposed Settlement. *D.S. ex rel. S.S. v. New York City Dep't of Educ.*, 255 F.R.D. 59, 77 (E.D.N.Y. 2008) ("The amount of discovery undertaken has provided plaintiffs' counsel sufficient information to act intelligently on behalf of the class in reaching a settlement.").

iv. The risks of establishing liability and damages

"Litigation inherently involves risks." *Willix v. Healthfirst, Inc.*, 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011). "[I]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Banyai v. Mazur*, 2007 WL 927583, at *9 (S.D.N.Y. Mar. 27, 2007). "In considering this factor, the Court need not adjudicate the disputed issues or decide unsettled questions; rather, 'the Court need only assess the risks of litigation against the uncertainty of recovery under the proposed settlement.'" *In re. N. Dynasty*, 2024 WL 2024 WL 308242, at *11 (citation omitted).

Plaintiffs recognize that, as with any litigation, the Actions involve uncertainties as to their outcome. Ramirez Decl. at ¶ 31. Defendant has and continues to deny all of Plaintiffs' allegations, and should this matter proceed, it will vigorously defend itself on the merits. *Id.* at ¶ 32. Defendant would likely appeal, if possible, decisions in Plaintiffs' favor. *Id.* Defendant would challenge Plaintiffs at every litigation step, presenting significant risks of ending the litigation while increasing costs to Plaintiffs and the Settlement Class members. *Id.* Further litigation presents no guarantee for recovery, let alone a recovery greater than the recovery for which the Settlement provides. Indeed, in light of these factors, this Settlement is an outstanding result for Plaintiffs and the Settlement Class. The amount the Settlement makes available to pay claims exceeds three of the four damage estimates calculated by Plaintiffs' damages experts. Specifically, plaintiffs' expert Gregory Pinsonneault calculated the average per-unit damages for Florida and New York Class members to be $1.77 (based on Gerber's price increases), $1.77 (based on Gerber's estimate of overall impact of allergy claims), or $1.09 (based on Gerber's sales forecasting of impact of allergy claims). These damage estimates could only be recovered by Class members if they and Plaintiffs fully litigated their case, won at trial, and upheld a successful judgment through the appeal process. Pursuant to the Settlement, however, New York Class Settlement Members may receive $4.00 per unit, and Florida Class Members may receive $3.00 per unit. *Id.*

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

v. The risk of maintaining class action status through trial

Plaintiffs also risk maintaining class action status through trial. Rule 23(c)(1)(C) provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C); *In re Med. X-Ray Film Antitrust Litig.*, No. CV–93–5904, 1998 WL 661515, at *5 (E.D.N.Y. Aug. 7, 1998) (possibility that defendant could challenge maintenance of class at a time before judgment in absence of settlement was risk to class and potential recovery); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."); *Price v. L'Oreal USA, Inc.*, 17 Civ. 614 (LGS), 2021 WL 4459115, at *6 (S.D.N.Y. Sept. 29, 2021) (decertifying Rule 23(b)(3) class in consumer fraud case after summary judgment stage). Given the risks, this factor weighs in favor of final approval, under both *Grinnell* and Rule 23(e)(2)(C)(i).

vi. The ability of Defendant to withstand a greater judgment

It is more important that the Settlement Class receive some relief than possibly "yet more" relief. *See Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y. 2012); *see also Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 83 (1st Cir. 2015) ("The fact that a better deal for Class Members is imaginable does not mean that such a deal would have been attainable in these negotiations, or that the deal that was actually obtained is not within the range of reasonable outcomes."). Further, "[c]ourts have recognized that a [defendant's] ability to pay is much less important than the other *Grinnell* factors, especially where the other factors weigh in favor of approving the settlement." *In re Sinus Buster Products Consumer Litig.*, 2014 WL 5819921, at *11 (E.D.N.Y. Nov. 10, 2014). A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Viafara v. MCIZ Corp.*, 2014 WL 1777438, at *7 (S.D.N.Y. May 1, 2014). For these reasons, this factor is neutral.

vii. The range of reasonableness of the settlement in light of the best possible recovery and 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. "In other words, the question for the Court is not whether the settlement represents the highest recovery possible . . . but whether it represents a reasonable one in light of the many uncertainties the class faces[.]" *Bodon v. Domino's Pizza, LLC*, 2015 WL 588656, at *6 (E.D.N.Y. Jan. 16, 2015).

Here, the relief for which the Settlement Agreement provides is within the range of reasonableness, especially in light of the best possible recovery and in light of all the attendant risks of litigation. The gravamen of the Actions alleges that Defendant deceived consumers by misrepresenting the Product's ability to prevent the risk of allergies. Furthermore, the cash compensation to which eligible Settlement Class members will be entitled goes a significant way toward compensating Settlement Class members for the alleged damages they incurred on account of Defendant's allegedly deceptive representations about the Products. The Settlement Agreement provides that Florida Settlement Class members may receive a cash payment of $3.00 for each Product claimed up to a limit of 5 units, and to the extent that they could provide proof of purchase, they could claim up to 20 units. The Settlement Agreement provides that New York Settlement Class members may receive a cash payment of $4.00 for each Product claimed up to a limit of 5 units, and to the extent that they could provide proof of purchase, they could claim up to 20 units. Settlement Agmt. at § 4. This stands in stark contrast to the potential recovery of $2.26 for New York Class members and $1.71 for the Florida Class members calculated by Plaintiffs' expert Pinsonneault - but only ***if*** Plaintiffs were successful at trial.

As discussed above, Plaintiffs believe their claims are strong but recognize that continuation of this litigation poses significant risks. While continuation of the litigation might not result in an increased benefit to the Settlement Class, it would lead to substantial expenditure by both Parties. Taking into account the risks and benefits Plaintiffs have outlined above, the Settlement falls within the "range of reasonableness." Class Counsel have achieved the best possible recovery considering the merits of the Settlement weighed against the cost and risks of further litigation. Ramirez Decl. at ¶ 30.

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

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

As detailed in the Weisbrot Declaration, the notice plan meets the standards set by the Federal Judicial Center. The notice plan is designed with a 75.33% reach and 3.06 frequency with over 14.46 million impressions of the notice being targeted to Settlement Class members. *See* Weisbrot Decl. at ¶¶ 20, 49. Equally Class members will be able to submit claims via the settlement website or request a claim form via the website. *Id.* at ¶ 42. A toll-free number is also available to answer Class members' questions, and Class members can request a mailed copy of the claim form. *Id.* at ¶ 44. As such, Rule 23(e)(2)(C)(ii) factor weighs in favor of the Settlement.

The Settlement provides substantial relief to the class. The anticipated fee and expense request of up to $11,250,000 is well within the range awarded in this Circuit.[3] Thus the Rule 23(e)(2)(C)(iii) factor weighs in favor of the settlement.

[3] Co-Lead Class Counsel will make a separate motion for the payment of fees and expenses at a later date to be set forth in the Preliminary Approval Order.

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

Finally, each Florida Settlement Class member that submits a valid claim can receive $3.00 per unit claimed, up to a maximum limit of five (5) (the maximum total claimable amount is $15), and with proof of purchase, they can claim up to 20 units (the maximum total claimable amount is $60). Thus, each Florida Settlement Class member will be treated equally. Each New York Settlement Class member that submits a valid claim can receive $4.00 per unit claimed, up to a maximum limit of five (5) (the maximum total claimable amount is $20), and with proof of purchase, they can claim up to 20 units (the maximum total claimable amount is $80). Thus, each New York Settlement Class member will be treated equally.

B. The Settlement Is On Behalf of the Previously Certified Classes

A court may grant approval of a class action settlement only if the settlement class is certifiable in that it satisfies all Federal Civil Procedure Rule 23(a) prerequisites and at least one prong of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 619–22 (1997). Here, the Settlement is on behalf of two classes that were already certified. *See Hasemann*, 331 F.R.D. at 279. "If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted." Fed. R. Civ. P. 23 at Committee Notes on Rules – 2018 Amendment. Because the terms of the Settlement do not present any issues that would change the Court's class certification analysis, and because no intervening circumstances have arisen since the Court's prior grant of certification, and for the same reasons identified in the Court's Certification Order, ECF No. 137 at 20–71, the Settlement Class satisfies the numerosity, commonality, typicality, and adequacy requirements under Rule 23(a), and the predominance and superiority requirements of Rule 23(b)(3).

C. The Court Should Approve the Proposed Notice Plan

"Rule 23(e)(1)(B) requires the court to 'direct notice in a reasonable manner to all Class Members who would be bound by a proposed settlement, voluntary dismissal, or compromise' regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.312 (2004). "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Visa*, 396 F.3d at 113. The Court is given broad power over the procedures to use in providing notice so long as they are consistent with the standards of reasonableness that the due process. *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986) ("[T]he district court has virtually complete discretion as to the manner of giving notice to Class Members.").

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

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

The proposed notice program also provides sufficiently detailed notice. The notice defines the Settlement Class which conforms to and does not deviate from the previously Classes certified for which Class members were given notice; explains all Settlement Class members' rights, the Parties' releases, and the applicable deadlines; and describes in detail the monetary terms of the Settlement, including the procedures for allocating and distributing Settlement funds among the Settlement Class members. *See* Settlement Agmt. At Exs. B-C. It will plainly indicate the time and place of the Fairness Hearing, and it plainly explains the methods for objecting to, or opting out of, the Settlement. *Id*. Finally, it details the provisions for payment of Attorneys' Fees and Expenses and class representative Service Awards. *Id*.

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

PROPOSED SCHEDULE OF EVENTS

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

ACTION	DATE
Notice Commences (Notice Date)	Within 30 days following entry of the Court's Order Granting Preliminary Approval of the Class Action Settlement
Plaintiffs File Motion for Attorneys' Fees, Expenses, and Service Awards	30 days after the Notice Date (and 30 days prior to the Objection and Opt-Out Deadline)
Plaintiffs File Motion for Final Approval of Class Action Settlement	30 days after the Notice Date
Opt-Out and Objection Deadline	60 days after Notice Date
Deadline for Lawyers Asserting Objections on Behalf of Settlement Class Members	14 days before the Final Approval Hearing
Response to Objections Due (if applicable)	14 days after Objection and Opt-Out Deadline
Final Approval Hearing	90 days after the entry of the Court's Order Granting Preliminary Approval of the Class Action Settlement (or the first date thereafter available to the Court)
Claims Submission Deadline	84 days after Notice Date

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court: (1) preliminarily approve the Settlement Agreement for the previously certified New York and Florida Classes; (2) appoint Brett Cebulash of Taub, Cebulash & Landau, LLP; Michael R. Reese of Reese LLP; Shanon J. Carson of Berger Montague; and Jean Martin of Morgan & Morgan Complex Litigation Group as Co-Lead Class Counsel; (3) approve the form and manner of the class action settlement notice; and, (4) set a date and time for the Fairness Hearing.

Dated: March 5, 2025 Respectfully submitted,

/s/ Michael R. Reese

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CERTIFCATE OF COMPLIANCE WITH LOCAL RULE 7.1(c)

I, Michael R. Reese, do hereby certify that the above memorandum of law complies with Eastern District of New York Local Rule 7.1(c) word count limitation of 8,750 words in that the brief contains 5,863 words.

/s/ Michael R. Reese
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