**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| MICHAEL GOLDEMBERG, ANNIE LE, and HOWARD PETLACK, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>JOHNSON & JOHNSON CONSUMER COMPANIES, INC.,<br><br>Defendant. | Civil Action No. 7:13-cv-3073-NSR-LMS<br><br>Hon. Nelson S. Román |

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

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Plaintiffs Michael Goldemberg ("Goldemberg"), Annie Le ("Le"), and Howard Petlack ("Petlack") (collectively, "Plaintiffs"), individually and on behalf of the class (the "Class"), submit this Memorandum of Law In Support Of Uncontested Motion For Final Approval Of Class Action Settlement. Plaintiffs seek final approval of the Joint Stipulation of Settlement ("Settlement Agreement") with Defendant Johnson & Johnson Consumer Companies, Inc. ("Defendant" or "J&JCC") (Plaintiffs and Defendant, collectively, the "Parties"), in the above-captioned action (the "Litigation").

## I. INTRODUCTION

Plaintiffs allege that Defendant engages in false labeling, marketing, and advertising by using the term "Active Naturals" and other such representations and imagery to depict its personal care products ("Products") as comprised entirely of natural ingredients in violation of various states laws. *See* Second Amended Complaint ("Compl.," Dkt. No. 42). Defendant disputes all allegations in the Complaint.

Before initiating this action, Plaintiffs and Class Counsel exhaustively investigated the viability of the claims against Defendant, identified the relevant products, and obtained copies of allegedly false and misleading product labels and advertisements. Declaration of Todd S. Garber ("Garber Decl.") ¶ 3; Declaration of Kim E. Richman ("Richman Decl.") ¶ 9. After filing the Complaint, the Parties engaged in hard-fought litigation for nearly four years before exploring settlement with the help of well-respected mediator Eric Green of Resolutions, LLC. Garber Decl. ¶ 4. During this period, Plaintiffs engaged in extensive motion practice, including but not limited to: (i) defeating Defendant's motions to dismiss (*see* Dkt. Nos. 9-20); defeating Defendant's motion to exclude the expert report of Plaintiffs' expert Dr. Jean-Pierre Dubé (*see* Dkt. Nos. 80-85, 98); (iii) successfully moving for the appointment of Interim Lead Plaintiff and

Co-Lead Class Counsel (*see* Dkt. Nos. 28-31); and (iv) successfully moving for or class certification and appointment of Class Counsel (*see* Dkt. Nos. 69-79, 98). *Id.*; Richman Decl. ¶ 14. Plaintiffs also opposed Defendant's petition for leave to appeal the class certification ruling, which the Second Circuit denied. *See* Garber Decl. ¶ 4; Dkt. No. 104. Plaintiffs also engaged in substantial discovery, serving and responding to requests for production, serving interrogatories and requests for admissions, reviewing Defendant's production consisting of hundreds of thousands of pages of documents, deposing two employees of Defendant, and Defendant deposed each Plaintiff. Garber Decl. ¶ 5; Richman Decl. ¶ 15. Plaintiffs also conferred with experts concerning the status of the case, the Complaint and amendments thereto, discovery requests and responses, and the class certification motion. Garber Decl. ¶ 5. Thus, the activity in the case prior to settlement negotiations informed Plaintiffs' and Class Counsels' understanding of the case and the Parties' decision to settle. The Parties have since obtained preliminary approval of the Settlement (*see* Dkt. Nos. 108-12) and now seek final approval.

Plaintiffs respectfully request that this Court now grant final approval. First, the Settlement is an exceptional achievement because it offers millions of Class Members monetary and injunctive relief without the delay, expense, and risks associated with trial and appeal. It makes $6,750,000.00 (the "Settlement Fund") available to pay Class Members' claims, notice and administration costs and attorneys' fees and expenses. Each Class Member is eligible to receive $2.50 for each purchase of a Covered Product for up to 20 Covered Products purchased during the Class Period, without any proof of purchase. Valid proof of purchase is required for additional purchases. There is no limit to the number of purchases for which a Class Member may submit a claim with a valid proof of purchase.

Further, the Settlement provides for a *pro rata* increase in individual payouts if there are more than enough funds remaining in the Settlement Fund to satisfy all valid claims and other charges (*i.e.*, escrow charges and taxes, settlement administration costs, attorneys' fees and costs, and service awards). The Settlement Fund is non-reversionary, meaning that none of the Settlement Fund will be returned to Defendant under any circumstances. The Settlement also requires Defendant to remove the term "Active Naturals" from the front label of all in-market Covered Products and, if the term "Active Naturals" remains on the back or side labels of Products containing ingredients naturally derived and non-naturally derived, to include specific language noting that fact on the back or side labels.

The Settlement also provides, subject to court approval, for a service award to each named Plaintiff of up to $10,000 and combined attorney's fees and expenses of up to 33% of the Settlement Fund.

<u>Second</u>, the Settlement was the product of arm's length negotiations aided by an independent mediator and conducted by experienced counsel who obtained extensive discovery in the action and, as such, were well-positioned to evaluate the strengths and weaknesses of the claims and defenses asserted, the potential damages incurred by the Class, and the fairness of the Settlement.

<u>Third</u>, the reaction of the Class has been overwhelmingly positive. Only a single class member has opted out, and only two have objected.[1] Notice Declaration of Steven Weisbrot ("Weisbrot Decl.") ¶¶ 18-19. Moreover, although the claim deadline is not until February 4, 2018, a total of 196,997 Class members have already submitted claim forms as of October 11, 2017. *Id.* ¶ 20. According to the Settlement Administrator, the number of claims is "excellent"

[1] These objections are not well taken, as Plaintiffs explain in detail in Plaintiffs' Memorandum of Law in Opposition to the Objections of Ashley Hammack and Pamela Sweeney to Final Approval of the Proposed Class Action Settlement, filed herewith.

compared to similar settlements, and it will only get better with the submission of more claims. *Id.*

In *Vincent v. People Against Dirty, PBC*, No. 16-6936 (S.D.N.Y.), a similar consumer class action alleging *inter alia* deceptive use of the term "Natural," this Court granted final approval to a settlement that provides less than the Settlement here in terms of both monetary and injunctive relief. The Court should similarly grant final approval here where the Settlement creates a settlement fund and authorizes individual payouts more than double those in *Vincent*, provides broader injunctive relief, and has elicited over three times as many claims as were made in *Vincent.* These distinctions are telling and support final approval.

Plaintiffs, therefore, respectfully ask this Court to grant final approval to the Settlement.

## II. PROCEDURAL HISTORY

Plaintiff Goldemberg filed a putative class action complaint (Dkt. No. 1) on May 7, 2013, docketed as Case No. 7:13-cv-3073-NSR-LMS, against J&JCC in the United States District Court for the Southern District of New York. The Complaint raised a cause of action against Defendant for deceptive acts or practices in violation of New York GBL § 349, as well as claims for breach of express warranty and unjust enrichment under New York common law.

On October 9, 2013, pursuant to the Court's briefing schedule, Defendant filed its Motion to Dismiss for Failure to State a Claim (Dkt. No. 9), and Mr. Goldemberg filed his Opposition to Defendant's Motion to Dismiss. Dkt. No. 12.

On March 27, 2014, with the exception of Mr. Goldemberg's unjust enrichment claim, this Court issued an Order denying Defendant's Motion to Dismiss. Dkt. No. 20. *See Goldemberg v. Johnson & Johnson Consumer Cos.*, No. 13-3073 at 9 (S.D.N.Y. Mar. 27, 2014).

On June 26, 2014, the Court appointed Mr. Goldemberg as Interim Lead Plaintiff and appointed Finkelstein, Blankinship, Frei-Pearson & Garber, LLP ("FBFG") and Reese Richman LLP as Interim Co-Lead Class Counsel (Dkt. No. 34). On July 16, 2014, Mr. Goldemberg, joined by Plaintiffs Le and Petlack, filed an Amended Complaint (Dkt. No. 37). On August 29, 2014, Plaintiffs Goldemberg, Le, and Petlack filed a Second Amended Complaint. Dkt. No. 42.

The parties engaged in formal discovery, including written interrogatories and document requests. In sum, Plaintiffs served, and Defendant timely responded to, interrogatories, requests for production, and requests for admission, and Defendant served, and Plaintiff timely responded to, its own discovery requests. Defendant produced hundreds of thousands of pages of documents that Class Counsel reviewed.

On December 18, 2015, after extensive document review, depositions of all three named plaintiffs and two of Defendant's employees, expert discovery and depositions of both Plaintiffs' and Defendant's experts, Plaintiffs filed their Motion for Class Certification (Dkt. No. 69) and Memorandum of Law in Support (Dkt. No. 70), and Defendant filed its Opposition. Dkt. No. 73. Plaintiffs sought to certify three statewide classes of individuals who purchased Products in New York, California, and Florida during the Class period. In support of certification, Plaintiffs proffered a damages model proposal prepared by Dr. Jean-Pierre H. Dubé. On January 19, 2016, Defendant filed a Motion to Exclude the Expert Report of Dr. Jean-Pierre H. Dubé ("*Daubert* Motion"), which Plaintiffs opposed. Dkt. Nos. 80-84.

On October 4, 2016, the Court issued a 47-page opinion certifying this case for class treatment and denying Defendant's *Daubert* motion. Dkt. No. 98. *See Goldemberg v. Johnson & Johnson Consumer Cos.*, 317 F.R.D. 374 (S.D.N.Y. 2016).

On October 18, 2016, Defendant filed a Second Circuit petition to appeal the class certification ruling pursuant to Federal Rule of Civil Procedure 23(f), which Plaintiffs opposed. On January 18, 2017, the Second Circuit denied the petition for leave to appeal. *See* Dkt. No. 104.

On January 6, 2017, the Parties engaged in a full-day mediation session before Professor Eric D. Green of Resolutions, LLC. Garber Decl. ¶ 6; Richman Decl. ¶ 18. For weeks following the mediation, the Parties continued negotiations through Professor Green. *Id*. It was only after extended arm's-length negotiations that the Parties reached an agreement in principle with respect to a compromise and settlement of the claims raised in the Litigation. Garber Decl. ¶ 6.

## III. SUMMARY OF THE SETTLEMENT

Plaintiffs have weighed the costs and benefits to be obtained under the Settlement against the costs, risks and delays associated with the continued prosecution of this time-consuming Litigation and the likely appeals of any rulings in favor of either the Class or Defendant. As a result, Plaintiffs believe that the Settlement provides substantial benefits to the Class, and is fair, reasonable, adequate, and in the best interests of Plaintiffs and the Class. Against this backdrop, and in the interest of avoiding protracted and costly litigation, the Parties have agreed to a proposed Settlement as described below.

As part of the consideration for the Settlement Agreement, J&JCC will establish a non-reversionary Settlement Fund in the amount of $6,750,000. A Settlement Class Member is eligible to receive $2.50 for each purchase of a Covered Product for up to 20 Covered Products purchased during the Class Period, from May 7, 2007 through June 7, 2017, without presenting valid proof of purchase. Valid proof of purchase is required for all Covered Products claimed that exceed 20 Covered Products. There is no maximum number of Covered Products for which

any Settlement Class Member may claim with valid proof of purchase. To receive a payment award, each claimant must submit a valid and timely Claim Form (Exhibit 5 of the Settlement Agreement) either by mail or electronically. The actual amount paid to individual claimants will depend upon the number of valid claims made. The total value of the proposed Settlement is $6,750,000.00.

If, after the Claim Period has ended and all Claims have been calculated, the total amount of the timely, valid, and approved eligible claims submitted by Settlement Class Members exceeds the available relief, considering any fees, payments, and costs set forth in the Settlement Agreement that must also be paid from the Settlement Fund, each eligible Settlement Class Member's initial claim amount will be proportionately reduced on a *pro rata* basis, such that the aggregate value of the cash payments does not exceed the Settlement Fund balance. If the total amount of the timely, valid, and approved eligible claims submitted by Settlement Class Members results in there being any remaining value in the Settlement Fund, it will be used to increase eligible Settlement Class Members' relief on a *pro rata* basis such that Settlement Class Members will receive an additional increased payment of up to 100% of the eligible Class Members' initial claim amount. Thus, if the Settlement Class Member submitted an initial claim of $50.00 and sufficient funds are remaining, the Settlement Class Member could receive up to a $100.00 payment from the Settlement Fund. The Settlement Administrator will determine each authorized Settlement Class Member's *pro rata* share based upon each Settlement Class Member's Claim Form and the total number of valid claims. The Settlement administrator confirms that the Settlement Fund will be completely exhausted based on the 196,997 claims received as of October 11, 2017. *See* Weisbrot Decl. ¶ 21.

As additional consideration for the Settlement Agreement, J&JCC agrees to remove the term "Active Naturals" from the front label of all in-market Covered Products, where applicable, and if the term "Active Naturals" remains on the back or side labels of Products not entirely comprised of naturally-derived ingredients, J&JCC agrees to include language on the back or side of the label that the Covered Products contain both naturally derived and non-naturally derived ingredients.

The Settlement Agreement provided for notice to Settlement Class members as follows:

1) a Short-form Notice, which provided the web address of the Settlement Website (described below) and a telephone number for the Settlement Administrator; included the Class definition; briefly described the relief available to the Settlement Class members; and informed Settlement Class members of the right to object and/or opt-out of the Settlement Class and the deadlines to exercise these rights. The Short-form Notice was published via internet notice, directed website notice, and national publication notice, including on the Settlement Website. *See id.* ¶¶ 9-10, 12; Dkt. No. 110-5.

2) a Long-form Notice, posted on the Settlement Website, which described the Litigation and the Settlement; informed Settlement Class members that they may be eligible to receive relief; stated that any award to Settlement Class members is contingent on the Court's final approval of the Settlement Agreement; explained that any judgment or orders entered in the Litigation, whether favorable or unfavorable to the Settlement Class, will include and be binding on all Settlement Class members who have not been excluded; stated the identity of Class Counsel and the amount sought in attorneys' fees and expenses; and described the procedures for participating

in, opting out of, or objecting to the Settlement. *See id.* ¶ 12; Dkt. No. 110-4. Settlement Class members can also request paper copies of the Class Notice and a claim form ("Claim Form").

The claims procedure is simple and convenient. Settlement Class Members are able to sign and submit a Claim Form (Dkt. No. 110-6) that states, to the best of their knowledge, the total number and type of purchased Covered Products, and the location of the claimant's purchases.

Claim Forms were distributed as part of the Notice Program described above and are available for download from the Settlement Website, where claimants can submit completed Claim Forms. In addition, the Settlement Administrator will mail or email Claim Forms to Settlement Class Members upon request.

In return for making these Settlement benefits available to all Settlement Class members, the Class Representatives' claims against Defendant will be dismissed with prejudice, and all Settlement Class members (other than those who properly opted out) will release and be permanently barred from pursuing any "Released Claims" against Defendant and other "Released Parties" in accordance with the provisions of the Settlement Agreement and the proposed Order and Judgment the Parties request the Court to enter upon final approval of the Settlement. *See* Dkt. No. 110-2.

## IV. STANDARDS FOR APPROVAL OF A CLASS ACTION SETTLEMENT

Strong judicial policy favors the settlement of class actions. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) ("There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation.") (citing 3 Newberg, Class Actions § 5570c, at 479–80 (1977); *Williams v. First National Bank*, 216 U.S. 582, 595 (1910)). "Class action suits readily lend themselves to compromise because of

the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. There is a strong public interest in quieting any litigation; this is particularly true in class actions." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) (citations omitted).

Courts assess proposed class action settlements to determine whether they are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). To do so, courts must determine whether both the negotiating process leading to a settlement and the settlement itself are fair, adequate and reasonable. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). Where a settlement is the "product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation," the negotiation enjoys a "presumption of fairness." *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).

The Second Circuit identified nine factors in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462–63 (2d Cir. 1974), that district courts should consider in evaluating a proposed class action settlement:

> (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.

Each of these factors militates in favor of granting final approval of the Settlement.

## V. THE PROPOSED SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE

### A. The Proposed Settlement Is Procedurally Fair.

A class settlement is presumed to be fair, adequate, and reasonable where it is "reached in arm's-length negotiation between experienced, capable counsel after meaningful discovery." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803-04 (2d Cir. 2009); *see also Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 217 (S.D.N.Y. 2015) ("A proposed settlement is procedurally fair when it is reached through arm's length negotiations between experienced, capable counsel and after meaningful discovery.") (citations and internal quotations omitted). This Settlement, reached as a result of arm's length negotiation after protracted, hard-fought litigation and mediation, meets the standard for procedural fairness. In determining whether a settlement is procedurally fair, courts evaluate the "negotiating process, to ensure 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*, 236 F.3d at 85.

The proposed Settlement is procedurally fair. It was reached only after a full-day mediation with "Professor Eric Green, a highly experienced and very well-regarded mediator," and further arm's-length negotiations through him. *Fleisher v. Phoenix Life Ins. Co.*, No. 11-8405, 2015 WL 10847814, at *1 (S.D.N.Y. Sept. 9, 2015) (noting the experience and reputation of Professor Green in finally approving class action settlement). "The assistance of an experienced mediator in the settlement process [] confirms that the settlement is not collusive." *Gonzalez v. Pritzker*, No 10-3105, 2016 WL 5395905, at *3 (S.D.N.Y. Sept. 20, 2016) (granting final approval). Moreover, during the settlement process, the Parties were represented by capable and experienced counsel, including Class Counsel whom the Court has found to be "experienced

and adequate counsel." Dkt. No. 113 at 3. Prior to the mediation, the case had been pending for close to four years. The settlement negotiations were preceded and informed by extensive motion practice (*i.e.*, motions to dismiss, to appoint interim lead counsel, to certify class, and to exclude expert report), discovery, including depositions of the Parties and their respective experts, and the investigation Class and defense counsel conducted to "assess the potential risks and rewards of litigation." *Clark v. Ecolab, Inc.*, No. 04-4488, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) ("In evaluating the settlement, the Court should keep in mind the unique ability of the class and defense counsel to assess the potential risks and rewards of litigation . . .").

The proposed Settlement is thus procedurally fair.

**B. The Proposed Settlement Is Substantively Fair.**

The Second Circuit's *Grinell* factors guide this Court's decision as to whether it should approve the Settlement. "In finding that a settlement is fair, not every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) (internal quotation and citations omitted). "The weight given to any particular factor will vary based on the facts and circumstances of the case." *Ingles v. Toro*, 438 F. Supp. 2d 203, 211 (S.D.N.Y. 2006) (citing 7B Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure: Civil § 1797.1, at 77 (3d ed. 2005)). Here, the *Grinnell* factors weigh heavily in favor of final approval of the proposed Settlement.

**1. The Action Is Complex And Will Be Expensive And Lengthy.**

The Settlement Agreement provides substantial monetary and non-monetary benefits to the Class while avoiding the significant expenses, delays, and risks attendant to motion practice related to summary judgment, not to mention trial. Indeed, "[m]ost class actions are inherently

complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 174. While Plaintiffs are confident of defeating any summary judgment motion, Defendant is confident that it can achieve dismissal. The ultimate outcome of the Litigation, if litigated further, is not certain. Moreover, a fact-intensive trial would require the Court's time and resources, and would result in significant expenses to the Parties as well. Any final judgment would likely be appealed (just as Defendant appealed the Court's class certification ruling, which the Second Circuit denied), further increasing the expense and duration of the Litigation. The Settlement Agreement, on the other hand, will result in prompt and equitable payments to the Class. *See In re Hi-Crush Partners L.P. Securities Litig.*, No. 12-8557, 2014 WL 7323417, at *6 (S.D.N.Y. Dec. 19, 2014) ("[T]he Settlement offers the opportunity to provide definite recompense to the Class now -- making the instant Settlement a particularly valuable 'bird in the hand.'"); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery").

Thus, this factor weighs in favor of final approval of the Settlement.

**2. The Reaction Of The Class Is Overwhelmingly Positive.**

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Raniere*, 310 F.R.D. at 211. There is a "strong indication of fairness" where the "vast majority of class members neither objected nor opted out." *Silverstein v. AllianceBernstein, L.P.*, No. 09-5904, 2013 WL 7122612, at *5 (S.D.N.Y. Dec. 20, 2013).

Here, the reaction of the Class has been overwhelmingly positive. The Class easily consists of millions of consumers who purchased the Products. Yet, as of the close of the exclusion and objection period, only a single Class member has opted out, and only two have objected. *See* Weisbrot Decl. ¶¶ 18-19. Moreover, although the claim deadline is not until February 4, 2018, 196,997 Class Members have already submitted claims. *Id.* ¶ 20. This claim response rate is "excellent" compared to similar settlements and will only get higher as more claims are submitted. *Id.*

That there were a *de minimis* number of opt-outs and no objectors in this class action is especially noteworthy, as "the notice and approval process generally solicits negative feedback regarding a settlement, because it is designed to solicit opt outs and objections by advising class members of the procedures and deadlines for filing such responses with the court . . . in litigation involving a large class, such as that here, it would be extremely unusual not to encounter objections." *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 197 (S.D.N.Y. 2012). "In fact, the lack of objections may well evidence the fairness of the Settlement." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (citing *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997); *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d at 175 ("If only a small number of objections are received [18 objections in a class of 27,833 class members], that fact can be viewed as indicative of the adequacy of the settlement"). And courts routinely find that the reaction of the class is positive and weigh this factor in favor of approval even when there are more objections and opt-outs. *See, e.g., Charron*, 874 F. Supp. 2d at 196 (118 objectors from a class of 22,000); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 457 (S.D.N.Y. 2004) (noting that there were 12 objectors and 9 opt-outs from a class

of a million and holding that "[t]hese extremely low numbers of objectors and opt-outs strongly support settlement approval.").

The small number of objectors and opt-outs, combined with the high claims rate, weigh heavily in favor of the Settlement.

**3. The Current Stage Of The Litigation And The Extensive Discovery That Has Occurred Favor Final Approval.**

The third *Grinnell* factor asks "whether counsel had an adequate appreciation of the merits of the case before negotiating." *Siler v. Landry's Seafood H. - N. Carolina, Inc.*, No. 13-587, 2014 WL 2945796, at *6 (S.D.N.Y. June 30, 2014). "To satisfy this factor, the parties 'need not have engaged in extensive discovery as long as they have engaged in sufficient investigation of the facts to enable the Court to intelligently make an appraisal of the settlement.'" *In re Sinus Buster Prods. Consumer Litig.*, No. 12-2429, 2014 WL 5819921, at *9 (E.D.N.Y. Nov. 10, 2014) (internal quotation marks and citations omitted); *see also Siler*, 2014 WL 2945796, at *6 (holding that this factor may be satisfied through "an efficient, informal exchange of information" and "participation in a settlement conference"); *Johnson v. Brennan*, No. 10-4712, 2011 WL 4357376, at *9 (S.D.N.Y. Sept. 16, 2011) (granting final approval where parties engaged in informal discovery and no depositions were taken); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 176 ("'To approve a proposed settlement, the Court need not find that the parties have engaged in extensive discovery . . . Instead, it is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to 'intelligently make . . . an appraisal' of the Settlement . . . Additionally, 'the pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . [, but] an aggressive effort to ferret out facts helpful to the prosecution of the suit.'") (citing *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982) and quoting *Martens v. Smith Barney, Inc.,* 181

F.R.D. 243, 263 (S.D.N.Y. 1998)).

Here, the Parties considered the merits of the Litigation before negotiating. They had close to four years to do so. During that time, numerous legal issues, touching upon the merits of their claims and defenses, including the propriety of class certification and the method to calculate the existence of injury and amount of damages, were thoroughly vetted through fully-briefed motions. Moreover, the Parties also obtained substantial formal discovery. Given the extent of motion practice and discovery that preceded and informed the settlement negotiations, final approval of the proposed Settlement is warranted. *See In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 176 (citations omitted).

**4. Plaintiffs Face Substantial Hurdles In Establishing Liability.**

The Settlement Agreement should be finally approved, because Plaintiffs face substantial hurdles establishing liability. Indeed, "[l]itigation inherently involves risks." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. at 126 (granting final approval to class settlement). And "[e]stablishing liability [is] no sure thing for the plaintiffs." *Wal-Mart Stores, Inc.*, 396 F.3d at 118 (affirming final approval of class settlement). The "primary purpose of settlement is to avoid the uncertainty of a trial on the merits." *Flores v. Anjost Corp.*, No. 11-1531, 2014 WL 321831, at *5 (S.D.N.Y. Jan. 29, 2014) (granting final approval to class settlement) (citations omitted).

J&JCC disputes each of the Class's allegations. Among other issues, J&JCC contends that individual understandings of "Active Naturals" and causation predominate. Indeed, a jury might not agree that use of the term "Active Naturals" is inconsistent with the fact that the Products contain some ingredients that are not naturally derived. J&JCC further contends that Plaintiffs cannot establish the existence of any injury by class-wide proof, and that Plaintiffs are inadequate class representatives. Based on these and other defenses raised by J&JCC, whether the claims asserted

herein meet the prerequisites of Rule 23(a) and (b)(3), including whether the lawsuit would be manageable for purposes of a trial on the merits, is contested. While the Court has already certified the class, certainty that Defendant would move to decertify the Class highlights the inherent risk and expense of maintaining a class through trial irrespective of the particular arguments Defendant proffers. *See Torres v. Gristede's Operating Corp.*, No. 04-3316, 2010 WL 5507892, at *5 (S.D.N.Y. Dec. 21, 2010) *aff'd,* 519 F. App'x 1 (2d Cir. 2013) ("The risk of maintaining class status throughout trial also weighs in favor of final approval. Defendant would likely move to decertify, requiring another round of briefing. Defendant may also seek permission to file an interlocutory appeal under Fed. R. Civ. P. 23(f). Settlement eliminates the risk, expense, and delay inherent in this process."); *Willix v. Healthfirst, Inc.*, No. 07-1143, 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011) ("The risk of maintaining class status throughout trial also weighs in favor of final approval. A motion to decertify the class would likely require extensive discovery and briefing, possibly followed by an appeal, which would require additional rounds of briefing. Settlement eliminates the risk, expense, and delay inherent in this process. The fifth *Grinnell* factor weighs in favor of final approval.").

While Plaintiffs' counsel are confident in their ability to prove Plaintiffs' (and the Class's) claims, the Settlement Agreement nonetheless avoids the risks inherent in further litigation, and therefore this factor weighs in favor of final approval.

### 5. Factors Related To Difficulties In Proving Damages, Maintaining The Class Action Through Trial, And The Ability Of Defendant To Pay A Judgment Are The Only Factors That Do Not Heavily Weigh In Favor Of Approving The Proposed Class Settlement.

Putting aside the substantial difficulties that Defendant contends Plaintiffs face in establishing liability, Plaintiffs do not expect significant hurdles in proving each Class member's damages or in maintaining the class action through trial. Nor are Plaintiffs concerned that Defendant cannot pay a

substantial judgment. However, "[i]n applying [*Grinnell*] factors, 'not every factor must weigh in favor of the settlement, but rather the court should consider the totality of these factors in light of the particular circumstances.'" *Fleisher*, 2015 WL 10847814, at *5 (citations omitted). Moreover, a "defendant['s] ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *In re Austrian and German Bank Holocaust Litig.,* 80 F. Supp. 2d at 178 n. 9.

**6. The Settlement Amounts Are Reasonable In Light Of The Best Possible Recovery And In Light Of All The Attendant Risks Of Litigation.**

Settlement Class members stand to receive $2.50 for each purchase of a Covered Product for up to 20 Covered Products purchased during the Class Period defined in the Settlement Agreement, without presenting valid proof of purchase. Settlement Class Members may provide valid proof of purchase for all Covered Products claimed that exceed 20 Covered Products. There is no maximum number of Covered Products for which any Settlement Class Member may claim with valid proof of purchase. Such a substantial recovery merits approval of the proposed Settlement, particularly in light of the time and uncertainty involved in continued class litigation and inevitable appeals.

Judging whether a settlement is reasonable "is not susceptible of a mathematical equation yielding a particularized sum." *In re Michael Milken & Assocs. Sec. Lit.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993). "[T]he dollar amount of the settlement by itself is not decisive in the fairness determination . . ." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D at 131. Instead, "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." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir. 1972) (approving settlement for $5 million where potential liability was $35 million). Even where a

settlement is for substantially less than the maximum potential recovery, approval may be appropriate. *See Grinnell Corp.*, 495 F.2d at 455 n. 2 ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even an thousandth part of a single percent of the potential recovery."); *see also Chambery v. Tuxedo Junction, Inc.*, No. 12-6539, 2014 WL 3725157, at *7 (W.D.N.Y. July 25, 2014) ("[A] $200,000 settlement is reasonable where the potential recovery is $3 million, especially when taking into consideration Defendant's financial position and the risks of litigation."); *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 621 (S.D.N.Y. 2012) (approving settlement of $2.5 million over objection that best possible recovery was $125 million); *Cagan v. Anchor Sav. Bank FSB*, No. 88-3024, 1990 WL 73423, at *12 (E.D.N.Y. May 22, 1990) (approving $2.3 million class settlement where maximum potential recovery was approximately $121 million). Moreover, the "overall value of the settlement comprises monetary as well as non-monetary relief." *Fleisher*, 2015 WL 10847814, at *10; *see, e.g.*, *Velez v. Novartis Pharm. Corp.*, No. 04-9194, 2010 WL 4877852, at *8, *18 (S.D.N.Y. Nov. 30, 2010) (both monetary and non-monetary relief considered in calculating value of settlement).

Here, Settlement Class members who submit valid claims without any proof of purchase stand to receive $2.50 for each purchase of a Covered Product for up to 20 Covered Products purchased during the Class Period defined in the Agreement. Claimants who provide valid proof of purchase for all Covered Products claimed that exceed 20 Covered Products stand to receive $2.50 for each purchase of a Covered Product. There is no maximum number of Covered Products for which any Settlement Class Member may claim with valid proof of purchase. The individual amounts Settlement Class members will receive may be substantial depending on how many Covered Products a Settlement Class member claims and whether the claimant can

produce valid proof of purchase. In addition to monetary relief, the Settlement provides for injunctive relief. On the other hand, Defendant could prevail on its legal arguments to defeat monetary and injunctive relief, resulting in no recovery for Settlement Class members.

Given this broad range of possible damages, the Settlement Agreement falls well within the range that courts have traditionally found to be fair and adequate. In fact, this Settlement compares favorably to the settlement approved by this Court in *Vincent v. People Against Dirty, PBC*, No. 16-6936 (S.D.N.Y.). There, as here, the plaintiffs alleged that certain products were falsely labeled and advertised as "Natural" or "Naturally Derived." *See* Plaintiff's Memorandum of Law in Support of Motion for Final Approval of Settlement ("*Vincent* Plaintiffs' Final Approval Brief"), Dkt. No. 41 at 2. However, the settlement in *Vincent* was far less generous, creating a fund less than half the Settlement Fund here and paying each class member less than half the individual payout here. *See id.* at 7-8. Its injunctive relief was also less extensive in that the defendants could continue to use the challenged terms if they properly listed product ingredients, defined the challenged terms, and issued the proper disclaimer concerning "hypoallergenic" products (*see id.* at 8-9). Here, Defendant agreed to remove the term "Active Naturals" from front labels and, where found on the back or side labels of Products containing ingredients naturally derived and non-naturally derived, must include specific language noting that fact on the back or side labels. Moreover, the class response rate in *Vincent* (54,641 valid claims), although "favorable" according to this Court, pales when compared with the number of claims received here – 196,997 as of October 11, 2017, with still over three months left in the claim period. *See Vincent* Final Approval Order, Dkt. No. 55 at 3 ("54,641 class members submitted valid claims); *see also Vincent* Plaintiffs' Final Approval Brief, Dkt. No. 41 at 2 (touting a "very good response rate"). These distinctions are telling and support final approval.

Moreover, the fact that the Settlement Agreement provides for prompt payment to claimants favors approval. *See Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-11814, 2004 WL 1087261, at *5 (S.D.N.Y. May 14, 2004) ("[T]he proposed Settlement provides for payment to Class members now, not some speculative payment of a hypothetically larger amount years down the road. Given the obstacles and uncertainties attendant to this complex litigation, the proposed Settlement is within the range of reasonableness, and is unquestionably better than the other likely possibility—little or no recovery.") (citing *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985) ("[M]uch of the value of a settlement lies in the ability to make funds available promptly.") (modified on other grounds)).

Therefore, evaluated collectively, these nine factors militate in favor of final approval of the proposed Settlement.

## VI. THE CLASS NOTICE SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

Rule 23(c)(2)(B) requires that class members receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The Rule also requires that any such notice clearly and concisely state, in plain and easily understood language, the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through an attorney if the member so desires; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on class members under Rule 23(c)(3). Fed. R. Civ. P. 23(b)(2)(B).

As directed by the Court and pursuant to the Notice Program set forth in Exhibit 6 to the Settlement Agreement, Plaintiffs effected notice to the Settlement Class via internet banner

notice, directed website notice, and publication in *People* magazine. *See* Dkt. No. 110-7; Weisbrot Decl. ¶¶ 9-10. *See In re Platinum and Palladium Commodities Litig.*, No. 10-3617, 2014 WL 3500655, at *14 (S.D.N.Y. July 15, 2014) ("Given the greater difficulties in contacting Physical Class members, the proposed publication notice is the best practicable notice plan under the circumstances."); *State of N.Y. by Vacco v. Reebok Intern. Ltd.*, 903 F. Supp. 532, 533 (S.D.N.Y. 1995) (publication notice "was plainly the best notice practicable under the circumstances 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"); *In re MetLife Demutualization Litig.*, 262 F.R.D. 205, 208 (E.D.N.Y. 2009) ("The best practicable notice under the circumstances is notice by publication in newspapers. In view of the millions of members of the class, notice to class members by individual postal mail, email, or radio or television advertisements, is neither necessary nor appropriate.").

Here, the internet notice campaign achieved 99,403,761 impressions, more than five times those in *Vincent*. *See* Weisbrot Decl. ¶ 9. This most likely explains the substantially higher claim rate in this case. The Settlement Administrator attests that it over-delivered on the amount of digital impressions, originally estimating that the media portion (internet and print) of the Notice Program would "reach" approximately 75% of the Class.[2] *See id.* ¶ 11 (citing Weisbrot Decl ¶ 9, Dkt. 110-7). The actual reach is 82.26%, which is better than the 70% reach that the Federal Judicial Center already considers "a high percentage" and as "within the norm." *See id.* (citing Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, "Managing Class

[2] "'Reach' is generally defined among media professionals as the percentage of people within a target audience exposed to an advertising program. Moreover, the net reach, as reported here, de-duplicates between the various notice mediums that will be utilized. What this means in practice, is that if someone saw the Notice in a print publication, and also saw the notice via an internet advertisement, they would only be counted once, for purposes of reporting the net reach percentage." Weisbrot Decl. ¶ 10, Dkt. No. 110-7.

Action Litigation: A Pocket Guide or Judges," at 27 (3d Ed. 2010)).

Further, the Settlement Administrator created a Settlement website that posted, among other information, the Class Notice (Exhibit 3 to the Settlement Agreement). *See id.* ¶ 12. The Class Notice, which Settlement Class members can also obtain directly from the Settlement Administrator, provides a detailed description of the proposed Settlement, the requests by Class Counsel and the Class Representatives for an award of fees and expenses and service awards, respectively, and Settlement Class members' various rights and options. According to the Settlement Administrator, the Settlement website, as of October 11, 2017, 2017, has had 710,242 sessions and 1,712,125 page views. *See id.* ¶ 15.

"It is well-established class-action jurisprudence in this Circuit that courts focus the due process lens on the notice efforts made by counsel, not whether class members actually received notice." *In re Marsh & McLennan Companies, Inc. Sec. Litig.*, No. 04-8144, 2009 WL 5178546, at *23 (S.D.N.Y. Dec. 23, 2009). "[T]he question is not whether some individual got adequate notice, but whether the class as a whole had notice adequate to flush out whatever objections might reasonably be raised to the settlement." *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 248 (E.D.N.Y 2010) (internal quotation marks and ellipses omitted). As the Settlement Notices were in compliance with this Court's directives, and notice to Class members was conducted in the best practicable manner with actual reach of 82.26%, this Court should grant final approval of the Settlement.

## VII. THE COURT SHOULD FINALLY CERTIFY THE SETTLEMENT CLASS

The Court conditionally certified the Settlement Class for settlement purposes only. Dkt. Nos. 112-13. For all the reasons set forth in Plaintiffs' Memorandum of Law in Support of Uncontested Motion for Preliminary Approval of Class Action Settlement and the Preliminary

Approval Order, the Court should finally certify the Settlement Class. *See* Dkt. Nos. 109, 112-13.

## VIII. CONCLUSION

Plaintiffs respectfully request that the Court finally approve the Settlement Agreement, and enter the proposed Final Approval Order, attached as Exhibit 1 to the Settlement Agreement. *See* Dkt. No. 110-2.

Dated: White Plains, New York
October 13, 2017

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