UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JAMI KANDEL, MOCHA GUNARATNA, and RENEE CAMENFORTE, individually and on behalf of all others similarly situated, Plaintiffs, vs. DR. DENNIS GROSS SKINCARE, LLC, a New York Limited Liability Company, Defendant.	Case No. 1:23-cv-01967-ER Honorable Edgardo Ramos

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

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I. INTRODUCTION

Plaintiffs are consumers who alleged Dr. Dennis Gross Skincare LLC ("Defendant") violated certain consumer protection laws when they manufactured, advertised, and sold skincare products deceptively labeled as containing "C + Collagen" without any collagen. Plaintiffs alleged they paid a premium for the "C + Collagen" attribute, and sought restitution and label changes to conform to the applicable consumer protection laws.

Plaintiffs have achieved an outstanding settlement of their claims on a nationwide class basis, securing a traditional, non-reversionary common fund of $9.2 million in cash, and injunctive relief which ceases Defendant's use of the challenged "C + Collagen" label attribute on Dr. Dennis Gross skincare products. This settlement follows over four years of arduous litigation on both coasts, including extensive fact and expert discovery, class certification briefing, motions to disqualify experts, summary judgment, class and merits discovery, formal mediation, and many months of settlement negotiations. With a trial date quickly approaching in the Central District of California related case, Plaintiffs achieved certain and timely resolution for all consumers nationwide that eliminates the risk of no recovery and ensures greater marketplace transparency and consumer choice.

Each class member who submits an approved claim will receive $50 per unit of Product purchased. Notably, the average retail price of the Products is $52 per unit. Those without proof of purchase can claim up to two units, or $100, while those with proof of purchase can claim up to ten units, or $500. Claimed amounts will be adjusted upward or downward *pro rata* if the amount in the Settlement Fund is either less or more, respectively, than the total amount claimed. Any upward adjustment of claimed amounts will be capped at $200 for those without receipts and $1,000 for those with receipts.

Class Counsel will seek approval of up to $3,900,000 for reasonable attorney fees and expenses incurred during the four-plus years of litigation. Class Counsel will also apply for Plaintiffs' service awards of up to $5,000 each.

Class Notice will be effectuated by the following methods: (1) direct mail and email notice

to class members whose contact information is known; (2) social media, including Facebook, Instagram, TikTok, X, and Reddit; (3) search advertising; (4) a national press release, (5) a settlement website, and (6) a toll-free settlement hotline. The Class Administrator has designed the Notice Plan to satisfy Due Process and has attested to a reach of at least 80% of the Class.

The Settlement and Notice Plan are fair, reasonable, and adequate under controlling law and satisfy all relevant guidelines. Plaintiffs ask the Court to issue an order: (1) provisionally certifying the class for settlement purposes; (2) granting preliminary approval of the Settlement Agreement; (3) appointing Ryan J. Clarkson and Yana Hart of Clarkson Law Firm, P.C. as Class Counsel; (4) appointing Plaintiffs Jami Kandel, Mocha Gunaratna, and Renee Camenforte as Class Representatives; (5) approving the form and manner of the Notice, and directing that it be issued to the Settlement Class; (6) appointing Postlethwaite & Netterville, APAC ("P&N") as the Class Administrator; (7) setting deadlines for claims, opt-outs, and objections, and (8) scheduling a final approval hearing.

II. SUMMARY OF THE LITIGATION AND THE SETTLEMENT

A. Basis for Claims

Defendant manufactures, markets, and sells skincare products bearing the label "C + Collagen" (the "Products") at retail outlets throughout the United States.[1] According to Plaintiffs, Defendant deceptively and unlawfully labeled, marketed, and sold the Products as containing "collagen" and "collagen amino acids" despite containing no collagen. (Dkt. 50, First Amended Complaint ("FAC"), ¶¶ 3-7, 30). Plaintiffs alleged that they were financially harmed when they paid a premium for the Products attributable to the false and deceptive "collagen" representation and other alleged misstatements on the label. *Id*., ¶¶ 10-11, 38-39, 42, 53. Plaintiffs sued in both California and New York federal courts.

[1] All capitalized terms have the meanings set forth and defined in the Settlement Agreement (the "SA") dated June 14, 2024, which is attached as Exhibit A to the Declaration of Ryan Clarkson ("RC Decl.") filed concurrently herewith.

B. The California Suit

a. *Gunaratna* Is Filed in March 2020

After unsuccessful attempts to resolve claims without litigation, Plaintiff Gunaratna filed a class action complaint in the Central District of California on March 10, 2020, asserting five causes of action for violations of (1) California's Consumers Legal Remedies Act, (2) California's False Advertising Law, (3) California's Unfair Competition Law, (4) breach of express warranty, and (5) unjust enrichment. *See Gunaratna v. Dennis Gross Cosmetology LLC & Dennis Gross Dermatology LLC*, No. 20-cv-02311-MFW-GJS ("*Gunaratna*.") (RC Decl. ¶ 3).

On August 26, 2020, Plaintiff Gunaratna amended her complaint, adding causes of action under the Magnuson Moss Warranty Act and Unjust Enrichment. *See Gunaratna.* (RC Decl. ¶ 4). On December 16, 2021, Plaintiff Gunaratna filed a second amended complaint, adding Plaintiff Camenforte. (*See Gunaratna*; RC Decl. ¶ 5).

b. *Gunaratna* Conducts Extensive Fact and Expert Discovery

Over the last four-plus years, Plaintiffs Gunaratna and Camenforte conducted extensive fact and expert discovery and expended considerable time and resources prosecuting *Gunaratna*. For example, Plaintiffs: (1) engaged in multiple rounds of written discovery; (2) pursued and reviewed thousands of business records, including all advertising, labeling, scientific support, and sales records; (3) issued third-party subpoenas regarding sales and manufacturing data; (4) deposed Defendant's corporate designees and experts; (5) deposed a total of seven expert witnesses and eleven lay witnesses; (6) won several contentious discovery disputes; and (7) successfully opposed two motions to dismiss, a motion for summary judgment, a motion to strike, and a motion for judgment on the pleadings. (RC Decl. ¶¶ 6, 9, 22).

On April 4, 2023, the Central District of California certified a class of California purchasers, denied Defendant's motion for summary judgment, and noted that summary judgment *in favor of* Plaintiffs on the issue of the label's falsity seemed "likely" in the future based on the factual record at that time. *Gunaratna*, 2023 U.S. Dist. LEXIS 60796, at *79 (C.D. Cal. Apr. 4, 2023).

Despite Plaintiffs winning class certification and overcoming summary judgment, Defendant remained defiant in its litigation approach. (RC Decl. ¶ 8). Defendant retained an additional scientific expert to try to disprove Plaintiffs' claims and altered its theory of defense by arguing that certain Products did in fact contain amino acids that were in fact derived from animal tissue. *Id.* With its new defense, Defendant sought to significantly narrow the class if not decertify it outright. *Id.* These new alleged facts necessitated significant additional discovery including third party discovery, subpoenas, and discovery motions in the California action. *Id.*

C. The New York Suit

a. *Kandel* Is Filed in Early 2023

On March 7, 2023, Plaintiff Kandel filed a class action complaint in this Court, asserting five causes of action for violations of Sections 349 and 350 of the New York General Business Law, breaches of express and implied warranties, and unjust enrichment. *See Kandel v. Dennis Gross Skincare LLC*, Case No. 23-cv-01967 (referred to herein as "*Kandel*.") (RC Decl. ¶ 10). Defendant moved to dismiss, which this Court largely denied. *Kandel v. Dr. Dennis Gross Skincare, LLC,* 2024 U.S. Dist. LEXIS 38295, at *11 (S.D.N.Y. Mar. 5, 2024) ("[E]ven considering the supposedly clarifying statements …, the Court finds that the packaging as a whole would still be misleading to a reasonable consumer.") Plaintiffs Kandel, Gunaratna, and Camenforte then filed their first amended complaint on behalf of the nationwide class, adding violations of California's Consumers Legal Remedies Act, False Advertising Law, and Unfair Competition Law, as well as the Magnuson Moss Warranty Act, and implied warranty of merchantability under state law.

D. The Parties' Arms-Length Settlement Negotiations

In 2019 and 2020, before the California action was filed in federal court, Plaintiff Gunaratna and her counsel attempted to resolve this matter with Defendant. (RC Decl. ¶ 13). Unable to resolve her claims, Plaintiff Gunaratna filed her lawsuit, and the Parties proceeded to brief Defendant's motion to dismiss. *Id.* After the court in *Gunaratna* issued a favorable order denying Defendant's motion to dismiss, in 2021, Plaintiff Gunaratna again corresponded with

Defendant, inviting Defendant to consider the possibility of a class-wide settlement, to no avail. *Id.* As a result, the Parties proceeded to litigate the California action further, engaging in extensive fact and expert discovery and fully briefing Plaintiffs'[2] motion for class certification, cross-motions to exclude experts, Defendant's motion for summary judgment, and Defendant's motion to strike Plaintiffs' testimony. *Id.* In May 2023, after receiving a favorable ruling on the submitted motions and oppositions in the California actions, Plaintiffs again approached Defendant about the prospect of private mediation to resolve the claims on a nationwide class basis. *Id.* Defendant did not respond. *Id*. The Parties continued to litigate the *Gunaratna* and *Kandel* actions for nearly another year in parallel, during which Defendant raised a new theory of defense that had not been tested by the courts in either action. *Id.* Plaintiffs responded with focused discovery and motion practice aimed to test this new defense. *Id.*

On February 8, 2024, after a hard-fought four-plus years of litigation in *Gunaratna* and approximately one year in *Kandel*, the Parties reached an agreement during a full-day private mediation with the highly respected former judge of the Superior Court of Los Angeles County, Hon. Judge Peter Lichtman (Ret.) of Signature Resolution. *Id.* ¶ 14. Following the settlement in principle, for the next four months, each side continued to negotiate various terms at arm's length to ensure Class Members' rights are protected. *Id*. ¶ 15.

III. TERMS OF THE SETTLEMENT

The Settlement provides for a $9,200,000 cash payment (the "Total Settlement Fund"), of which no portion will revert to Defendant. (SA, ¶ 2.1). In exchange for this monetary relief, Plaintiffs and members of the proposed Settlement Class agree to a broad release of all claims that have or could have been asserted in the Action or relating to the Products. *Id.*, ¶¶ 8.1-8.3. In addition, Defendant agrees to the cessation of the challenged Product label "C + Collagen." *Id.*, ¶ 5.1. The key terms of the Settlement are summarized as follows:

[2] Plaintiff Camenforte joined the lawsuit in December 2021.

A. Class Definition

The "Settlement Class" includes:

> All persons who, between March 10, 2016, and the date of entry of preliminary approval of this Agreement (the "Class Period"), purchased in the United States, for personal or household use and not for resale or distribution, one of the Class Products, as defined herein. [3] (*Id.*, ¶ 1.8).

B. Defendant Will Establish A $9,200,000 Non-Reversionary Common Fund

Defendant will establish, or cause to be established, a $9,200,000 non-reversionary Total Settlement Fund, which shall be used to pay all "(1) Settlement Class Members' claims, (2) the costs of class notice, (3) the costs of settlement administration, (4) Plaintiffs' service awards, (5) Plaintiffs' litigation expenses (in an amount awarded by the Court), and (6) Plaintiffs' attorneys' fees (in an amount awarded by the Court)." *Id.*, ¶ 2.1. The Class Payments will come out of the Net Settlement fund, which is the amount of the Total Settlement Fund "less any notice costs, settlement administration costs, Plaintiffs' attorneys' fees, and litigation expenses (in an amount awarded by the Court), and service awards (in an amount awarded by the Court)." *Id.*

Each class member who submits an approved claim will receive $50 per unit of Product purchased. *Id.*, ¶ 4.1.3. (Notably, the average retail price of the Products is $52 per unit.) Those without proof of purchase can claim up to two units, or $100, while those with proof of purchase can claim up to ten units, or $500. *Id.* Claimed amounts will be adjusted upward or downward *pro rata* if the amount in the Settlement Fund is either less or more, respectively, than the total amount claimed. *Id.* Any upward adjustment of claimed amounts will be capped at $200 for those without receipts and $1,000 for those with receipts. *Id.* Any unclaimed funds will be distributed *cy pres* to one or more charities chosen by the Parties. *Id.* ¶ 4.1.5.

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[3] Excluded from the Settlement Class are: (1) the presiding judges in the Actions; (2) any member of those judges' immediate families; (3) Defendant; (4) any of Defendant's subsidiaries, parents, affiliates, and officers, directors, employees, legal representatives, heirs, successors, or assigns; (5) counsel for the Parties; and (6) any persons who timely opt-out of the Settlement Class.

C. The Settlement Release

In exchange for the monetary and non-monetary relief provided for in the Settlement Agreement, Defendant and affiliated entities will receive a release of claims concerning the Products, including unknown claims, and claims that could have been brought, arising prior to the date of the Preliminary Approval Order. *Id.*, ¶¶ 8.1-8.3.

D. Defendant Will Stop Production of "C + Collagen" Label Products

As memorialized in the Settlement Agreement, Defendant has discontinued its sale of all products bearing the "C + Collagen" label attribute and has agreed not to relaunch any cosmetics using this label without actual collagen. *Id.* ¶ 5.1.

E. Class Notice and Claims Administration

The Parties have agreed, subject to Court approval, that a Settlement Administrator be appointed. Postlethwaite & Netterville, APAC ("P&N") has ample experience in class action administration and will implement a robust Notice Plan that satisfies Due Process. (RC Decl. ¶ 17). As Class Administrator, P&N will: (1) establish and operate the Settlement Fund; (2) disseminate Class Notice; (3) handle mailing of postcards and emailing summary notices/reminder notices; (4) answer inquiries from Settlement Class Members and/or forward to Class Counsel; (5) receive and maintain Exclusions; (6) create a Settlement Website; (7) establish a toll-free informational telephone number for Settlement Class Members; (8) process Settlement Class Member Claims and distribute payments; (9) provide regular status updates to counsel for all Parties; (10) prepare a compliance declaration for the Court at Final Approval; and (11) otherwise assist and administer the Settlement. (Declaration of Brandon Schwartz ("Schwartz Decl.") ¶ 8)).

P&N estimates that implementation of the Notice Plan will cost approximately $470,131, inclusive of postage costs. (Schwartz Decl. ¶ 10). The Settlement Fund will be used to pay all costs associated with administration of the Settlement. (SA, ¶ 2.1). P&N estimates sending direct notice (via email and postcard) to the individual consumers whose mail and email information the Parties gathered from Defendant, Defendant's key-seller, and several other vendors. (Schwartz Decl. ¶¶ 16-23). P&N will also conduct a comprehensive digital campaign. (Schwartz Decl. ¶¶ 24-30).

P&N will collaborate with Defendant to identify the specific demographic, behavioral, interest, contextual targeting mechanisms to reach the Class Members through Facebook, Instagram, TikTok, X (formerly Twitter), Reddit, and sponsored search advertising (using Google ads and Bing). *Id.* ¶¶ 25, 26, 28, 29. P&N will also distribute a press release to more than 20,000 media outlets and contacts in the U.S., including newspapers, magazines, wire services, television, radio, and online media outlets. *Id.* ¶ 32. P&N will maintain a settlement website dedicated to this case and a toll-free information hotline available 24 hours per a day, 7 days per week (using an interactive voice response system) where Class Members can obtain essential information regarding this case, and responses to frequently asked questions. *Id.* ¶ 34. P&N's Notice plan is intended to reach at least 80% of Class Members. *Id.* ¶¶ 14, 40. P&N will work with ClaimScore, LLC ("ClaimScore") to review claims submitted in this case and apply its proprietary software solution to each claim during the review process to minimize fraud and protect Class Members by helping to ensure that only legitimate claims are approved for payment. (Schwartz Decl. ¶ 39). The negotiated rate for ClaimScore's cutting edge technology is a reasonable 2.5 cents per claim. (Declaration of Bryan Hellar Decl. ¶ 6).

F. Class Counsel Will Apply for Service Awards to be Distributed to Class Representatives

Class Counsel will apply for Service Awards to the Settlement Class Representatives to be paid from the Settlement Fund. (SA, ¶ 3.2). Each Settlement Class Representative will seek a Service Award of no greater than $5,000. *Id.*, ¶ 3.4.

G. Class Counsel Will Apply for Attorneys' Fees, Costs, and Expenses

Class Counsel will file a motion, set for hearing on the same date as the Final Approval Hearing, requesting any Fees and Costs Award to be paid from the Settlement Fund. *Id.*, ¶ 3.1. Class Counsel intends to seek reimbursement of fees and costs of up to $3,900,000 in the aggregate.

IV. ARGUMENT

At preliminary approval, the Court determines whether the Parties have shown "the [C]ourt will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purpose of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Plaintiffs satisfy the requirements for class certification under Rule 23(a) and Rule 23(b), as well as for settlement under Rule 23(e)(2). The Court should preliminarily certify the proposed class for settlement purposes and preliminarily approve the Settlement.

A. The Court Should Certify the Settlement Class

The first prerequisite for preliminary approval is to certify the class for judgment on the proposed settlement. Fed. R. Civ. P. 23(e)(1)(B)(ii). Courts in the Second Circuit impose a judicially created ascertainability requirement as a precursor to certification. Additionally, all four elements of Rule 23(a) and at least one prong under Rule 23(b) must be satisfied. Finally, the Court must assess whether the proposed forms of notice to the class are the "best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B).

Plaintiffs respectfully request the Court conditionally certify the Settlement Class to implement the Settlement. Here, the proposed Settlement Class satisfies the ascertainably requirement, the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy, and at least one of the requirements in Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (describing the requirements of Rule 23); 4 William Rubenstein, *Newberg and Rubenstein on Class Actions* § 13:18 (6th ed. 2022) (same).

a. Ascertainability

A class is ascertainable "if it is defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras Secs*., 862 F.3d 250, 257 (2d Cir. 2017). "[T]he touchstone of ascertainability is whether the class is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Id*. at 264. "A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each

case." *Id*.

Here, the Class is ascertainable because it is defined using objective criteria involving the "who, what, when, where, and why" of the Products purchased. As defined, the Class consists of all persons who, between March 10, 2016, and the date of entry of preliminary approval, purchased one of the Class Products in the United States, for personal or household use only. (RC Decl., ¶ 8, Ex. C). Because the Class is defined using these objective criteria so as to identify a sufficiently definite set of consumers, ascertainably is met.

b. Numerosity

Rule 23(a)(1) requires that a proposed Settlement Class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Impracticability does not mean impossibility, but rather difficulty or inconvenience." *Primavera Familienstiftung v. Askin*, 178 F.R.D. 405, 409 (S.D.N.Y. 1998). Ordinarily, a proposed class that exceeds 40 members is considered presumptively numerous for purposes of this requirement. *Pa. Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co., Inc.,* 772 F.3d 111, 120 (2d Cir. 2014) ("Numerosity is presumed for classes larger than forty members."). Here, approximately 614,183 units of Products were sold, and P&N estimates that the class consists of approximately 287,001 individuals. (Schwartz Decl. ¶ 9). Thus, the Class is so numerous that joinder is not practical, satisfying Rule 23(a)(1).

c. Commonality

Rule 23(a)(2) requires "questions of law or fact common to the class." A common question is one that is "capable of class wide resolution—which means 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). A single common question can satisfy commonality. *Id.* at 359 (internal quotations omitted). "The claims for relief need not be identical for them to be common." *Zivkovic v. Laura Christy LLC*, 329 F.R.D. 61, 69 (S.D.N.Y. 2018). Rather, Rule 23(a)(2) is a "low hurdle." *Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 131 (S.D.N.Y. 2014).

Here, determination of whether the uniform "C + Collagen" representation deceived the public would resolve the issues that are central to the validity of the Class's claims in one stroke. (FAC ¶ 51 listing many common questions of fact and law). Because "the same conduct" (a uniform alleged misrepresentation) "gives rise to the same kind of claims for all class members," commonality is met. *Johnson v. Nestel Commc'ns Inc.,* 780 F.3d 128, 137-138 (2d Cir. 2015).

d. Typicality

To satisfy typicality, Plaintiffs "must show that each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009). If it is "alleged that the same unlawful conduct was directed at or affected both the named plaintiff and class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying the individual claims." *Robidoux v. Celani,* 987 F.2d 931, 936-37 (2d Cir. 1993). Like all other Class Members, Plaintiffs were faced with the same allegedly deceptive "C + Collagen" label on the Products and were allegedly harmed in the same manner (payment of the price premium) as a result. *See e.g. Polvay v. FCTI, Inc.,* 2024 U.S. Dist. LEXIS 15399, at *18 (S.D.N.Y. Jan. 29, 2024) (typicality was met where plaintiff challenged defendant's uniform use of the "continue/cancel prompt" screen of ATMs). Therefore, typicality is met.

e. Adequacy

The final requirement for Rule 23(a) requires that representative parties fairly and adequately protect the interest of the class. "The adequacy requirement exists to ensure that the class representatives will have an interest in vigorously pursuing the claims of the class, and . . . have no interests antagonistic to the interests of other class members." *Toure v. Cent. Parking Sys*., 2007 U.S. Dist. LEXIS 74056, at *18-19 (S.D.N.Y. Sept. 28, 2007) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)). "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Martens v. Smith Barney Inc*., 181 F.R.D. 243, 259 (S.D.N.Y. 1998) (internal citation omitted). The interests of Plaintiffs and Class Counsel are not antagonistic to the Settlement Class. (RC Decl. ¶ 18). The named Plaintiffs

and Settlement Class Members all purchased DDG Products with the same "C + Collagen" representation on the label, have the same interest in recovering damages, and have no other cognizable, conflicting interests. *Id.* Thus, the named Plaintiffs will fairly and adequately protect Settlement Class Members' interests.

Finally, class counsel must be "qualified, experienced and able to conduct the litigation." *Baffa*, 222 F.3d at 60. Here, certifying the class of California consumers in the *Gunaratna* action, Central District of California Federal Court Judge, Hon. Michael Fitzgerald commented on Plaintiffs' counsel's adequacy as follows: "[I]t is clear to the Court that the Clarkson lawyers are experienced, knowledgeable, and competent; that they will zealously advocate on behalf of the class; and that they will dedicate substantial time and resources to litigating this action." *Gunaratna,* 2023 U.S. Dist. LEXIS 60796, at *74 (appointing Ryan Clarkson and Yana Hart as Class Counsel in the related California action). Class Counsel is experienced and competent in the prosecution of complex class actions, including complex questions that arise in consumer protection litigation, and is capable and committed to achieving the best result for Plaintiffs and the Class. (*See* RC Decl. ¶ 20, Ex. D). Plaintiffs have fairly protected the interest of the Class, actively participated in the litigation, and Class Counsel are abundantly qualified and have extensive experience in class actions, and consumer protection and false advertising actions. *Id.*; *see also id*. at ¶ 30. The adequacy requirement is therefore satisfied.

f. Predominance

The Rule 23(b)(3) predominance requirement addresses whether the Defendant's liability is common enough to be resolved on a class basis, *Dukes*, 564 U.S. at 359, and whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Where Plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005). The predominance requirement "is designed to determine whether 'proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 183 (W.D.N.Y. 2005) (quoting *Amchem*, 521 U.S. at 623).

Defendant's liability can be resolved on a class basis because it is premised on conduct that affected all Settlement Class Members in the same manner. *Gunaratna*, 2023 U.S. Dist. LEXIS 60796, *39-40 (finding that predominance requirement was satisfied in the related California action under the California law). The challenged labels were uniform throughout the Class Period. (RC Decl. ¶ 18). All Products, irrespective of differences in use and/or size, contained the allegedly false "C + Collagen" representation. *Id.* Although Defendant would have challenged that all Settlement Class Members were exposed to and relied on the "C + Collagen" representation in making their purchase, the Settlement eliminates this inquiry, and Plaintiffs allege that all Settlement Class Members suffered injury in fact when they paid a premium for the Products based on the challenged representations. *Id.* Thus, Plaintiffs and the Settlement Class are unified by a common legal theory and common facts. *Id.* For purposes of the Settlement, predominance is satisfied.

g. Superiority

The second part of the Rule 23(b)(3) analysis examines whether "the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968). "To satisfy the superiority requirement, the moving party must show that the class action presents economies of 'time, effort and expense, and promote[s] uniformity of decision.'" *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,* 330 F.R.D. 11, 57 (E.D.N.Y. 2019) (internal citation omitted).

Given the small size of individual Settlement Class Members' claims (average purchase price of approx. $52 per Product), few, if any, Settlement Class Members could afford to, or would, individually seek legal redress. RC Decl. ¶ 19. Resolving this controversy on a class-wide basis will achieve economies of scale for Settlement Class Members, promote efficiency and preserve the resources of the judicial system, and prevent inconsistent adjudications of similar issues and claims. *See In re Air Cargo Shipping Servs. Antitrust Litig.,* 2014 U.S. Dist. LEXIS 180914, *64 (E.D.N.Y. Oct. 15, 2014) (discussing where predominance is satisfied through economies of time, effort, and expense, superiority is also satisfied.). Further, no other lawsuits have been filed by

Settlement Class Members arising from the same allegations. (RC Decl. ¶ 19). A class action is the most suitable mechanism to resolve the Settlement Class Members' claims.

All the Rule 23 requirements are met and warrant certification of the Settlement Class. In addition to meeting certification requirements for settlement purposes, Defendant consents to this provisional class certification. *Id.*; *see Xiao Ling Chen v. Xpresspa at Terminal 4 Jfk, LLC*, 2019 U.S. Dist. LEXIS 195988, at *15 (E.D.N.Y. Aug. 20, 2019) ("[w]hen the court has not yet entered a formal order determining that the action may be maintained as a class action, the parties may stipulate that it be maintained as a class action for the purpose of settlement only") (citing 4 Alba Conte, et al., *Newberg on Class Actions* § 11.27 (4th ed. 2002)).

B. The Court Should Preliminarily Approve the Settlement

Plaintiffs seek preliminary approval of the proposed Settlement for the Settlement Class, which may be granted where the settlement "is the result of serious, informed, non-collusive negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies … and where the settlement appears to fall within the range of possible approval." *Passafiume v. NRA Grp., LLC*, 274 F.R.D. 424, 430 (E.D.N.Y. 2010) (internal quotations omitted).

Rule 23(e) requires courts to ensure that a class settlement is both procedurally and substantively fair, reasonable, and adequate. Fed. R. Civ. P. 23(e). To ensure procedural fairness, courts examine the negotiating process. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005). "To determine substantive fairness, courts determine whether the settlement's terms are fair, adequate, and reasonable according to the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)." *Garcia v. Pancho Villa's of Huntington Vill., Inc.,* 2012 U.S. Dist. LEXIS 144446, at *6 (E.D.N.Y. Oct. 4, 2012).

a. The Settlement is Procedurally Fair

A settlement is determined to be procedurally fair when the settlement was "achieved through arms-length negotiations by counsel with the experience and ability to effectively represent the class's interests." *Massre v. Mullooly, Jeffrey, Rooney & Flynn LLP*, 2020 U.S. Dist. LEXIS 158459, at *30 (E.D.N.Y. Aug. 28, 2020) (internal citation omitted). Here, Plaintiffs' meet

multiple indicators of the arm's length nature of the negotiations. *Reyes v. Summit Health Mgmt., LLC*, 2024 U.S. Dist. LEXIS 21061, at *7-8 (S.D.N.Y. Feb. 6, 2024) (identifying factors of arm's length negotiations including extensive discovery, giving the parties "a full opportunity to acquaint themselves with the strength of the case prior to initiating negotiations;" representation by experienced counsel; and mediation by an experienced mediator.)

Class Counsel has extensive experience in class action litigation and particularly consumer class actions against companies for false and misleading advertising. (RC Decl. ¶ 20, Ex. D; Declaration of Yana Hart, ¶¶ 12, 15-16, 19). In litigating this action, Class Counsel conducted extensive investigation relating to the claims, events, and transactions alleged, including through formal written discovery and multiple depositions in the California action, substantial informal exchanges of information in both actions, sets of transactional data and analyses, and the retention of four subject matter experts to investigate the claims, damages, and relevant consumer-behaviors. RC Decl. ¶ 6, 8, 22. The Parties also retained an experienced mediator, and former Judge of the Superior Court of Los Angeles County, the Hon. Judge Peter Lichtman (Ret.) of Signature Resolution to aid them during their full day mediation, which culminated in a settlement. The Settlement was negotiated at arm's-length and is thus procedurally fair in accordance with Rule 23(e).

b. The Settlement is Substantively Fair

"To determine substantive fairness, courts determine whether the settlement's terms are fair, adequate, and reasonable according to the factors set forth in *City of Detroit v. Grinnell Corp*., 495 F.2d 448 (2d Cir. 1974)." *Morris v. Affinity Health Plan, Inc*., 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012). Here, the Court analyzes (1) the costs, risks, and delay of trial and appeal; (2) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (3) the terms of any proposed award of attorney's fees, including timing of payment; and (4) any agreement required to be identified under Rule 23(e)(3). Fed. R. Civ. P. 23(e)(2)(C). To further the analysis, the Second Circuit incorporates the *Grinnell* factors, ensuring the Settlement provides fair and adequate relief. "[N]ot 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 v. Phx. Life Ins. Co.,* 2015 U.S. Dist. LEXIS 121574, at *19 (S.D.N.Y. Sep. 9, 2015).

i. Litigation Through Trial Would be Complex, Costly, and Lengthy (*Grinnell* factor 1)

Unless a proposed settlement is clearly inadequate, courts have held that its acceptance and approval are preferable to continuation of lengthy, expensive litigation with uncertain results. *Slomovics v. All for a Dollar, Inc*., 906 F. Supp. 146, 149 (E.D.N.Y. 1995) (settlement in best interest of Class when litigation has potential "to result in great expense and has the potential to continue for a long time . . .").

Gunaratna is a complex class action that has been, and would continue to be, very costly to litigate through trial. (RC Decl. ¶ 25). *See In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001) ("Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them."). *Kandel,* which filed a first amended complaint in March 2024, is in the initial stages of litigation. With *Gunaratna* stayed and *Kandel* still in its infancy, further litigation in both cases would require additional fact and expert discovery, depositions, class certification briefing, summary judgment briefing, any appeals, and trial preparation, all of which would be costly and time-consuming for the Parties and the Court. *Id.* Finally, it would take years to litigate both Actions through trial and potential appeals.

In contrast, the Settlement ensures prompt resolution of the Actions on terms that are fair, reasonable, and adequate to the Settlement Class, and $50 per unit of Product represents a nearly full refund of the average purchase price ($52) of the Products. *Id*. ¶ 24. It provides a favorable result for Class Members many years earlier than continued litigation through trial and/or appeals might. *Id*. The benefits to Class Members are also certain whereas continued litigation could result in full or partial defeat for the Settlement Class on certification, at summary judgment, at trial, or on appeal. *Id*. Therefore, the first *Grinnell* factor favors preliminary approval of the Settlement.

ii. The Reaction of the Class to the Settlement (*Grinnell* factor 2)

Because Class Notice has not yet issued, the parties cannot evaluate the reaction of the Settlement Class. Class Counsel anticipate that with their highly targeted and comprehensive Notice program, it is possible that the claims rate could be higher than in similar matters. *See, e.g.*, *Schneider v. Chipotle Mexican Grill, Inc.,* 336 F.R.D. 588, 599 (N.D. Cal. 2020) (noting that claims rate between 1-2% are typical in consumer actions); *Krommenhock v. Post Foods, LLC*, No. 16-cv-4958-WHO (N.D. Cal.) (Dkt. 299, at pg. 13-14) (approving class settlement with 1.61% claims rate in similar food and beverage false labeling class action). Settlement Class members are likely to react positively to this Settlement because the anticipated $50 per Product represents a nearly full refund of the average purchase price ($52) of the Products. Plaintiffs will provide a comprehensive analysis of the Settlement Class's reaction to the Settlement at Final Approval, after Class Notice has been issued.

iii. The Settlement Is the Product of Extensive Discovery and Thorough Factual Investigation (*Grinnell* factor 3)

The third *Grinnell* factor favors approving the Settlement because Plaintiffs "had more than enough information to make an informed and intelligent decision." *In re Citigroup Inc. Sec. Litig*., 965 F. Supp. 2d 369, 382 (S.D.N.Y. 2013); *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) ("[T]he parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement.") (internal citations, quotation marks, and alterations omitted). As previously discussed, the Parties have engaged in extensive discovery in *Gunaratna,* including written discovery, multiple rounds of document productions, fact and expert depositions, and third-party discovery; have analyzed the labeling and advertising, ingredients, consumer complaints, sales information, studies, and market research; and deposed over a dozen of Defendant's corporate

designees, witnesses, and experts. Thus, the third *Grinnell* factor favors preliminary approval of the Settlement.

iv. The Risks of Establishing Liability and Damages at Trial, and Maintaining the Class (*Grinnell* factors 4-6)

In assessing *Grinnell* factors four through six: risk of establishing labiality, risk of establishing damages, and risk of maintaining the class action through trial; the Court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 177. Litigation inherently involves risks and uncertainty. While Plaintiffs had successfully certified the California class and overcame a motion for summary judgment in the *Gunaratna* action, it is unclear what would happen with Defendant's untested defenses discovered at the end of the parties' fact discovery in *Gunaratna.* There was a possibility that Defendant's new defense could significantly narrow the products at issue in either one or both actions. Plaintiffs are also cognizant of unpredictable jury verdicts, especially in New York, where Defendant's brand is popular.

Furthermore, the risk of maintaining class status in both Actions, through trial, is significant. This Court has not yet certified *Kandel* as a class action, and such a determination would be reached only after exhaustive briefing. (RC Decl. ¶ 29). If the Parties did not settle, Plaintiffs would have to also move for certification of the nationwide action in this case for trial purposes and "creditably demonstrate, through an extensive analysis of state law variances, that certification does not present insuperable obstacles." *Haymount Urgent Care PC v. GoFund Advance, LLC*, 650 F. Supp. 3d 204, 212 (S.D.N.Y. 2023); *see also Garcia*, 2012 U.S. Dist. LEXIS 144446, at *13 ("While, the Court has already certified a class and collective action in this matter, maintaining it through trial may not be easy.")

At trial the jury would hear from Defendant that some of the Products did in fact contain collagen. While that fact is disputed, it could pose a risk to establishing liability and damages in whole or in part if credited by the jury. Defendant also could be expected to argue that Class Members suffered no cognizable damages given the purported efficacy of the Products. Thus,

settlement now avoids these risks of less or no recovery with significant, certain, and immediate relief to Class Members.

v. The Ability of Defendant to Withstand a Greater Judgment (*Grinnell* factor 7)

Grinnell factor seven looks to the ability of the Defendant to withstand a greater judgment than the Settlement provides. A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Frank*, 228 F.R.D. 174, 186 (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178 n.9). Courts do not require that a defendant "empty its coffers before a settlement can be found adequate." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012) (internal citation omitted). Here, Defendant agreed to pay a $9,200,000 non-reversionary cash settlement, where Settlement Class Members will recover $50 per product purchased. Thus, even if Defendant were able to withstand a greater judgment, the robust Settlement Fund is adequate. The seventh *Grinnell* factor favors approval.

vi. The Settlement Is Reasonable in Light of the Possible Recovery and the Attendant Risk of Litigation (*Grinnell* factors 8 and 9)

The last two *Grinnell* factors weigh the reasonableness of the Settlement, with the risk of continued litigation. The determination of whether a settlement amount is reasonable "does not involve the use of a mathematical equation yielding a particularized sum." *Frank*, 228 F.R.D. at 186. "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.'" *Id*. (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). Courts often approve settlements even where the recovery is less than the amount recoverable at trial. *Grinnell*, 495 F.2d at 455 n. 2 ("There is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery.")

Through this Settlement, Class Members who submit approved claims would be entitled to receive $50 per Product purchased. Such relief is both adequate and reasonable in light of a

possible recovery of only a portion of the purchase price under the price premium theory. Where, as here, a settlement assures immediate payment of substantial amounts to class members and does not "sacrific[e] speculative payment of a hypothetically larger amount years down the road," the Settlement is reasonable. *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 U.S. Dist. LEXIS 23016, *5 (S.D.N.Y. Mar. 24, 2008) (internal citation omitted). Thus, the eighth and ninth *Grinnell* factors weigh in favor of approval.

C. Plaintiffs' Counsel Should be Appointed as Class Counsel

In appointing class counsel, the Court considers proposed Class Counsel's: (1) work in identifying or investigating the claims; (2) experience in handling class actions and the types of claims asserted in the Actions; (3) knowledge of the applicable law; and (4) resources they will commit to representing the class. Fed. R. Civ. P. 23(g). Class Counsel satisfies all four factors.

First, Plaintiffs' counsel invested substantial time and resources into the prosecution of the Actions, across over four years of litigation in *Gunaratna* and *Kandel,* including: (1) relentlessly pursuing and reviewing thousands of business records; (2) deposing over a dozen of Defendant's corporate designees, witnesses, and experts; (3) subpoenaing third parties for sales and manufacturing data; (4) retaining and working with experts in multiple disciplines, all of whom conducted in-depth studies and produced thorough expert reports on cosmetic science, marketing, and conjoint analysis/damages; (5) concurrently litigating *Gunaratna* and *Kandel*; (6) obtaining class certification on behalf of California consumers in *Gunaratna*; (7) successfully defending against Defendant's motions for summary adjudication, dismissal, and a judgment on the pleadings in *Gunaratna*; and (8) attending a full-day mediation that led to the Settlement together with four months of additional negotiations to finalize the Settlement. (RC Decl. ¶ 22).

Second, Plaintiffs' counsel has extensive experience and knowledge in prosecuting similar consumer class actions involving false advertising and mislabeling. (*Id.*, ¶ 20 Ex. D [Clarkson's Firm Resume]).

Third, Plaintiffs' counsel has committed substantial resources to this case, including thousands of attorney and staff hours and hundreds of thousands of dollars paid to: (a) damages

experts to prepare, conduct, and defend their conjoint survey analysis; (b) consumer behavior expert to prepare, conduct, and defend his consumer surveys depicting consumers' reliance on the product labels; and (c) scientific expert and consultants to prepare and analyze Product ingredients to opine on whether they come from or constitute collagen. (*Id.* ¶ 23). These tireless efforts and significant costs were advanced without any guarantee of success, ultimately resulting in a significant common fund Settlement and meaningful injunctive relief to avoid the alleged consumer deception in the future. The Court should therefore appoint Ryan Clarkson and Yana Hart of Clarkson Law Firm, P.C. as Class Counsel.

D. The Court Should Approve the Class Notice Plan

Pursuant to Rule 23(c)(2)(B), notice to class members must satisfy general requirements to provide the best notice possible to the most class members through reasonable effort. Plaintiffs' proposed Notice satisfies these requirements, as it includes all material terms and the options available to Class Members. (RC Decl. ¶ 31; SA, Ex. 2). Within the Class Notice are: (1) a summary of the Actions; (2) a comprehensive summary of the Settlement terms; (3) Class Counsel's intent to request attorneys' fees, reimbursement of expenses, and Service Awards for Plaintiffs; (4) detailed information about the Released Claims and their binding effect; (5) information about the Fairness Hearing; (6) Settlement Class Members' rights to seek exclusion from the Class or to object to the Settlement (as well as the deadlines and procedure for doing so); and (7) the procedure to receive additional information about the Settlement. *Id*. Settlement Class Members will have fair, adequate, and reasonable notice of the Settlement that satisfies Due Process and Rule 23(c).

Class Notice will commence within 21 calendar days following entry of the Preliminary Approval Order. P&N has determined that the most reasonable and practicable way to reach Settlement Class Members is through a multifaceted approach of: (1) direct mail and email notice to all known individuals obtained from various vendors including a top seller of the Products; (2) reminder email notice; (3) comprehensive social media (e.g., Facebook, Instagram, Tik Tok, X, Reddit) notice; (4) search advertising; (5) a national press release; (6) a Settlement Website; and

(7) a toll-free settlement hotline. (Schwartz Decl. ¶ 11). P&N has designed the Notice Plan and attests that Notice will reach at least 80% of the Class. (*Id.* ¶¶ 14, 40); *In re Emulsion (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.,* 527 F. Supp. 3d 269, 273 (E.D.N.Y. 2021) ("a notice plan that reaches between [70% and 95%] of the class is reasonable").

V. PROPOSED SCHEDULE OF EVENTS

Plaintiffs propose the following schedule of events leading to the Fairness Hearing:

Event	Date
Deadline for Settlement Website to go live	21 calendar days following entry of this Preliminary Approval Order
Deadline to commence Notice Plan ("Settlement Notice Date")	30 calendar days following entry of this Preliminary Approval Order
Deadline for Claim Forms to be postmarked or submitted online	60 calendar days after the Settlement Notice Date
Deadline for Objections to be postmarked	60 calendar days after the Settlement Notice Date
Deadline for Opt-Out Requests to be postmarked	60 calendar days after the Settlement Notice Date
Deadline for Plaintiffs' application for attorneys' fees and costs and Plaintiffs' service awards	30 calendar days after Settlement Notice Date
Deadline for Plaintiffs to file motion for final approval of class action settlement	14 calendar days prior to Final Approval Hearing
Deadline for Parties to file all papers in response to any timely and valid Objections	14 calendar days prior to Final Approval Hearing
Final Approval Hearing	120 calendar days after entry of this Preliminary Approval Order of class action settlement

VI. CONCLUSION

Plaintiffs ask this Court to enter an order: (1) preliminarily approving the Settlement, including all exhibits, (2) provisionally certifying the Settlement Class, (3) appointing Plaintiffs

Jami Kandel, Mocha Gunaratna, and Renee Camenforte as Class Representatives, (4) appointing Clarkson Law Firm, P.C. as Class Counsel, (5) appointing Postlethwaite & Netterville as Class Administrator, (6) approving the form and manner of Notice, and (7) approving the proposed schedule of events and scheduling a Final Approval Hearing.

Dated: June 25, 2024

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