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' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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Pursuant to Rule 23(e), Jami Kandel ("**Kandel**"), Mocha Gunaratna ("**Gunaratna**"), and Renee Camenforte ("**Camenforte**") (collectively "**Plaintiffs"**) hereby move the Court for final approval of their class action settlement.

I. INTRODUCTION

After over four years of litigation, Plaintiffs and Court-appointed Class Counsel achieved an outstanding nationwide settlement, securing a $9.2 million non-reversionary common fund, making it one of the largest ever cosmetics false advertising class action settlements. The Settlement also achieved cessation of the challenged "C+Collagen" label attribute, thus fulfilling the dual purpose of consumer protection laws: substantial cash restitution to the Class and labeling changes that protect all consumers.

The Settlement received an unprecedented response, with nearly 23.8% of estimated Class Members submitting valid claims for restitution. Each is expected to receive meaningful monetary relief: approximately $38.05 per qualifying product, which is 73% of the average purchase price. Further demonstrating the strength of the Settlement, not a single person objected to it, and no one opted out.

Based on the substantial relief obtained, the uniformly positive response from the Class following completion of the robust Court-approved Notice program, and the elimination of risk and expense of continued litigation after more than four years of skillful prosecution, the Court should grant final approval of the Settlement.

II. PROCEDURAL HISTORY

Dr. Dennis Gross, LLC ("**Defendant**") manufactures, markets, and sells skincare products labeled "C+Collagen" at stores across the United States. According to Plaintiffs, reasonable consumers interpret the label to mean the Products contain Vitamin C and Collagen, and yet, none

contain any collagen. Dkt. 50, First Amended Complaint, ¶¶ 3-7, 30. Plaintiffs alleged that they were financially harmed by paying a price premium for the Products attributable to the false and deceptive "collagen" representation. *Id.,* ¶¶ 10-11, 38-39, 42, 53. Plaintiffs sued Defendant in both California and New York federal courts.

A. The *California* Case

Plaintiff Gunaratna filed a class action complaint in the Central District of California on March 10, 2020, alleging 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 (ECF No. 1) ("*Gunaratna*."); RJC ¶ 11. Plaintiff Gunaratna later amended her complaint, adding Magnuson Moss Warranty Act and claims for restitution based on quasi-contract/unjust enrichment, and Plaintiff Camenforte joined the action in late 2021. *See Gunaratna* (ECF No. 27, 95); RJC Decl. ¶ 12-13.

In April 2023, after extensive fact and expert discovery and multiple rounds of motion practice, 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).

Despite Plaintiffs winning class certification and overcoming summary judgment, Defendant remained defiant in its litigation approach. (RJC Decl. ¶ 16). Defendant retained an additional scientific expert to try to disprove Plaintiffs' claims and altered its theory of defense by arguing that certain Products, despite labeled as being vegan, contained 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.* Heavy supplemental discovery and additional motion practice followed, with trial set for 2025. *Id.*

B. The *Kandel* Case

In New York, Plaintiff Kandel sought to represent a nationwide class (with the exception of the California certified class), and asserted similar allegations against Defendant, with added claims under the New York General Business Law, Sections 349 and 350, and common law claims for breaches of express and implied warranties, and unjust enrichment. ("***Kandel***"). (*Gunaratna* and *Kandel* are the "**Actions.**") (ECF 1.) (RJC Decl. ¶ 18). 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.")

To consolidate the two Actions into one for the purposes of settlement, 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. (ECF 50).

C. Arms-Length Settlement Negotiations

In over four years of protracted litigation, Class Counsel made reasonable attempts to settle at every turn. In 2019 and 2020, prior to filing the California action; then again in 2021, after obtaining a favorable order on a motion to dismiss in California; then in 2023 after obtaining a series of favorable orders on Plaintiffs' motion to certify California 23(b)(3) and (b)(2) classes, Plaintiffs' motion to strike Defendant's experts, and Defendant's motion for summary judgment.

(RJC Decl. ¶ 20). Defendant did not respond to the settlement efforts and continued to zealously defend the claims in both cases. *Id.*

This approach persisted through and after class certification in California, after 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 practices aimed at testing 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 for the Complex Litigation Division, Hon. Judge Peter Lichtman (Ret.) of Signature Resolution. 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.

D. Preliminary Approval of Settlement

On June 28, 2024, this Court granted Plaintiffs' motion for preliminary approval. The Court conditionally certified the Settlement Class, appointed Clarkson as Class Counsel and Plaintiffs as Class Representatives, approved the Notice Plan, and appointed EAG Gulf Coast, LLC ("**EAG**") as Class Administrator. (ECF 71). Plaintiffs timely filed their motion for an award of attorneys' fees and costs and service awards (ECF 73).

III. COURT-APPROVED NOTICE PROGRAM HAS BEEN COMPLETED

Judge Ramos directed EAG to execute the Notice Plan. In doing so, Judge Ramos found:

> [T]he plan for providing notice to the Settlement Class . . . constitutes the best notice practicable under the circumstances and constitutes due and sufficient notice to the Settlement Class of the terms of the Settlement Agreement and the Final Approval Hearing and complies fully with the requirements of the Federal Rules of Civil Procedure, the United States Constitution, and any other applicable law.

(ECF 71 ¶¶ 11.)

Based on Defendant's records, the parties conservatively estimated the class size to be about 287,001. The Notice Plan, which generated an unprecedented response to the Settlement, included: (1) email and mail notice to 177,769 Settlement class members whose information the parties obtained from retailers and Defendant; (2) an online media notice plan resulting in over 137,047,000 digital impressions, which was 811,000 more than originally anticipated by the Class Administrator; (3) search engine advertising, which generated 48,427 impressions; (4) a press release through PR Newswire's US1, picked up by 454 media outlets, reaching a total potential audience of 109,900,000; (5) a Settlement Website that received 18,831,609 page views from 6,371,857 unique visitors (Declaration of Brandon Schwartz ("Schwartz Decl."), ¶¶ 10-20.) As estimated, the Notice Plan "delivered a reach of more than 85% with an average frequency of 2.58." (*Id.*, ¶ 42.) In total, EAG received 68,245 valid claims, accounting for 381,709 products; no objections or exclusions were filed. (*Id*., ¶¶ 27, 39-40.) The Class Members who submitted valid claims will receive a payment of $38.05 per each qualifying product, with up to ten products with proof of purchase, and up to two products without proof of purchase. (*Id.* ¶ 38.) The average payment to Class Members is approximately $73.63 for non-documented claims, and $127.44 for documented claims. (*Id.* fn. 9).

EAG created and maintained a Settlement Website which provided Class Members access to the Claim Form, Class Notices, Settlement Agreement, and other relevant documents. (*Id*., ¶¶ 2, 19.) The Settlement Website also included important dates, listed answers to frequently asked questions, provided information for the Class Administrator and Class Counsel, and detailed instructions on how Class Members may submit a claim, object to the Settlement, or request exclusion. EAG also partnered with ClaimScore LLC to implement robust fraud protection and

detection measures and to ensure the integrity of the claim submission process to identify fraudulent claims. Schwartz Decl., ¶ 30.

The overwhelmingly positive response to the Settlement with a 23.8% claims rate confirms the success, strength, and adequacy of the Notice Plan in favor of final approval.

IV. POSITIVE REACTION OF THE CLASS

"It is well-settled that the reaction of the class to a settlement is [considered] . . . the most significant factor to be weighed in considering its adequacy." *Maley v. Del Glob. Techs. Corp.,* 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002). Here, the Class's response was overwhelmingly positive, with 23.8% of Class Members filing a claim, which strongly supports final approval. *Cf. 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); *Pollard v. Remington Arms Co., LLC,* 320 F.R.D. 198, 214 (W.D. Mo. 2017) (collecting cases across the country where courts have approved settlements with the claim rate of less than 1%). All Class Members had the option to select their preferred payment method via check or digital payment, such as Venmo, Zelle, Digital MasterCard, or ACH. (Schwartz Decl. ¶ 26.) Here, 50.9% of Class Members elected to receive digital payment, allowing for immediate payout benefiting the Class. (*Id*., ¶ 28); *In re Credit Default Swaps Antitrust Litig*., No. 13-md-2476 (DLC), 2016 WL 2731524, at *28 (S.D.N.Y. Apr. 25, 2016) ("A principal goal of a plan of distribution must be the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund."); *Jenkins v. Nat'l Grid USA Serv. Co., Inc*., No. 15-cv-1219, 2022 WL 2301668, at *3 (E.D.N.Y. June 24, 2022) (class action settlement approved as "fair, reasonable, and adequate [] taking into account, *inter alia*, . . .the proposed method of distributing payments to the Settlement Class (i.e., direct payments by mailed checks or electronic distributions)").

The Second Circuit has also held that a low rate of objections among a large plaintiff class is evidence of a settlement's fairness, reasonableness, and adequacy. *See In re Facebook*, 343 F. Supp. 3d 394, 410-12 (S.D.N.Y. 2018), *aff'd, In re Facebook, Inc.,* 822 F. App'x 40 (2d Cir. 2020) (two objections from a plaintiff class of 1.3 million was evidence of the proposed settlement's fairness, reasonableness, and accuracy); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 746 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (noting that two objections in response to 104,000 notices was "rather incredible" and supported approval of the proposed settlement); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (finding that 18 objections from five million class members showed "overwhelmingly" class favored settlement and significant indicator of its adequacy). Here, the Notice Plan resulted in 68,245 valid claims. (Schwartz Decl. ¶ 27.) Not a single Class Member objected to the Settlement, nor did anyone request to be excluded from it. (*Id*., ¶¶ 39-40; RJC Decl. ¶ 40.) No one objected among the Attorneys General of all 50 states, all territories, including Puerto Rico, as well as the U.S. Attorney General, all of whom were given CAFA notice. (Schwartz Decl. ¶ 7.) In light of an extraordinary claims rate, the broad reach of the Notice, and lack of objections or opt-outs, the Court should grant the final approval of the settlement. *See In re Veeco Instruments Inc. Sec. Litig.*, 2007 U.S. Dist. LEXIS 85629, at *7 (S.D.N.Y. Nov. 7, 2007) (finding that a significantly smaller class had "overwhelmingly endorsed" the settlement because there was only one exclusion request); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86-87 (2d. Cir. 2001) (affirming district court's finding that the "small number of objections weighed in favor of the settlement" where 18 objections and 72 exclusions were received out of 28,000 notices delivered); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 379 (S.D.N.Y. Aug. 1, 2013) (finding 11 objections and 134 exclusion requests in class of 2.5 million favors settlement).

At the time of preliminary approval, the claims rate was estimated to be approximately 15% (a common rate for class settlements of this type and size) and thus recovery was estimated at approximately $50 per qualifying product. (ECF 64 p. 6.) Upon completion of Notice, the claims rate was even better than anticipated, reflecting the strength of both the Settlement and Notice plan. At the final claims rate of 23.8%, and due to the robust $9.2 million common fund, Class Members will still receive significant relief, now calculated at $38.05 per qualifying product, which is 73% of the average purchase price. Together with the risks of continued litigation and other factors that supported preliminary approval, this recovery supports final approval of the Settlement. *See JWD Auto. v. DJM Advisory Grp. LLC*, 2018 U.S. Dist. LEXIS 226603, at *6 (M.D. Fla. Jan. 9, 2018) (class action settlement approved despite *pro rata* reductions where class members received $120 instead of $500 because the settlement was fair, reasonable, adequate, in the best interests of affected consumers, made in good faith, the result of arms' length negotiations, and non-collusive); *In re Skechers Toning Shoe Prod. Liab. Litig*., 2013 U.S. Dist. LEXIS 67441, at *23-24, 28-37 (W.D. Ky. May 13, 2013) (class action settlement approved because at the "final fairness hearing, [it was] represented to the Court that pro-rata reduction is a possib[ility] because of the large number of claims already received," and because the settlement serves the public interest, is adequate and fair, the result of arms' length negotiations, non-collusive, extensive discovery had occurred, and class counsel endorsed the terms of the settlement); *In re EpiPen Mktg., Sales Practices & Antitrust Litig.*, 2021 U.S. Dist. LEXIS 224275, at *35 (D. Kan. Nov. 17, 2021) (affirming approval of class settlement even though fund oversubscribed). Likewise, the Settlement here was reached after arms' length negotiations, is non-collusive, serves the public interest, and is adequate, reasonable, and fair. Also, the wide reach of the Notice, significant

number of claims, lack of objections and opt-outs confirms the Class's overwhelming support of the Settlement.

V. LEGAL STANDARD FOR FINAL APPROVAL

Rule 23(e) requires that class action settlements must be both procedurally and substantively "fair, reasonable and adequate." Fed. R. Civ. P. 23(e). To evaluate procedural fairness, courts examine the negotiating process leading to the settlement. *Wal-Mart*, 396 F.3d at 116. In determining the "substantive fairness" of a settlement, courts in the Second Circuit look to the factors set forth in *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974) (the "*Grinnell* factors"), which are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Id.* Not every factor needs to be satisfied, "rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003) (citing *D'Amato,* 236 F.3d at 86).

VI. THE SETTLEMENT SATISFIES RULE 23(E)

The law encourages settlement, "particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation." *In re Advanced Battery Techs. Secs. Litig*., 298 F.R.D. 171, 174 (S.D.N.Y. 2014); *see also In re Luxottica Grp. S.p.A. Sec. Litig*., 233 F.R.D. 306, 310 (E.D.N.Y. 2006) ("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."); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) ("the courts have long recognized that [complex class action] litigation 'is notably difficult and notoriously uncertain,' . . . and that compromise is particularly appropriate.") (citation omitted). When evaluating the fairness and adequacy of a class action settlement, courts should be "mindful of the 'strong judicial policy in favor of settlements.'" *Wal-Mart*, 396 F.3d at 116 (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)). The public policy favoring class action settlements would be well-served by approving the Settlement, which is procedurally and substantively fair, reasonable, and adequate.

A. The Settlement Is Procedurally Fair

The Settlement is entitled to a presumption of fairness because it was achieved through "arm's-length negotiations between experienced, capable counsel" who sought the best possible result for the Class. *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) ("So long as the integrity of the arms' length negotiation process is preserved [] a strong initial presumption of fairness attaches to the proposed settlement, [] and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.")

Counsel for the Parties are well-versed and have substantial experience in consumer class actions. Class Counsel has extensive experience prosecuting similar consumer class actions, particularly those involving false advertising and mislabeling and therefore, can thoroughly and effectively represent the interests of the Settlement Class. (RJC Decl. ¶¶ 50-56, **Ex. B** (Clarkson Resume).) The Settlement was the result of extensive arm's-length negotiations and hard-fought

litigation over the last four years. (*Id*., ¶¶ 8, 9, 20-23, 57-64.) During that time, Plaintiffs and Class Counsel achieved class certification, overcame Defendant's motion for summary judgment, successfully excluded portions of Defendant's three expert opinions, engaged in extensive fact and expert discovery, conducted several hours of fact and expert depositions. (*Id.,* ¶ 14-17.)

Furthermore, in evaluating the fairness and propriety of settlement, the recommendation of counsel should be given "great weight," especially where, as here, negotiations are facilitated by an experienced, third-party mediator. *See In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 408-09 (S.D.N.Y. 2018), aff'd, 822 F. App'x 40 (2d Cir. 2020) (finding settlement procedurally fair in part because it was "based on the suggestion by a neutral mediator"); *D'Amato*, 236 F.3d at 85 (mediator's involvement "helps to ensure that the proceedings were free of collusion and undue pressure."); *Yang v. Focus Media Holding, Ltd.*, 2014 U.S. Dist. LEXIS 126738, *14 (S.D.N.Y. Sept. 4, 2014) ("[t]he participation of this highly qualified mediator strongly supports a finding that negotiations were conducted at arm's length and without collusion.")

The Parties attended a full-day mediation with a neutral, well-respected retired Los Angeles County Superior Court judge, Hon. Peter Lichtman (Ret.), the founder of the Los Angeles Superior Court's Complex Civil Litigation program. (RJC Decl. ¶ 21). *See Tiro v. Public House Invs., LLC*, 2013 U.S. Dist. LEXIS 72826, at *9 (S.D.N.Y. May 22, 2013) ("The assistance of an experienced JAMS employment mediator . . . reinforces that the Settlement Agreement is non-collusive."); *Morris v. Affinity Health Plan*, 2012 U.S. Dist. LEXIS 64650, at *14-15 (S.D.N.Y. May 8, 2012) (parties were entitled to a presumption of fairness where mediator facilitated arm's-length negotiations); *In re Citigroup, Inc.*, 296 F.R.D. 147, 155 (S.D.N.Y. Aug. 20, 2013) (settlement was procedurally fair where negotiations were overseen by a neutral mediator and parties engaged in "extensive and contested" discovery). Because the Settlement is the product of arm's length

negotiations between experienced counsel, was preceded by an exhaustive investigation of Plaintiffs' claims and extensive discovery, and was overseen and facilitated by a neutral mediator, the Settlement is procedurally fair.

B. The Settlement Is Substantively Fair, Reasonable, and Adequate

As the Court determined at preliminary approval, analysis of the *Grinnell* factors show the Settlement is substantively fair, reasonable, and adequate (ECF 71). None of the facts supporting that determination have changed, and thus final approval is also warranted under *Grinnell. See, e.g.*, *Moukengeshcaie v. Eltman*, 2020 U.S. Dist. LEXIS 71018 (E.D.N.Y. Apr. 21, 2020).

Further, courts in this District, and others, have granted final approval to false advertising class action settlements with comparable settlement terms. *See*, *e.g.*, Order Granting Final Approval of Class Action Settlement, *Vincent v. People Against Dirty, PBC*, No. 7:16-cv-6936 (S.D.N.Y. June 20, 2017) (Dkt. 55) (approving $2.8 million fund); Order Approving Class Action Settlement and Final Judgment, *Rapoport-Hecht v. Seventh Generation Inc.*, No. 7:14-cv-9087 (S.D.N.Y. Apr. 28, 2017) (Dkt. 76) (approving $4.5 million fund); *Fishbein v. All Market, Inc*., No. 1:11-cv-5580-JPO (S.D.N.Y. Aug. 22, 2012) (court approved $10 million class action settlement with label changes regarding nutritious coconut water claims); *Astiana v. Kashi Co*., 2014 U.S. Dist. LEXIS 127624, at *10, 15 (S.D. Cal. Sep. 2, 2014) (court approved $5 million class action settlement with removal of "All Natural" claim from products with synthetic ingredients); *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig*., 2013 U.S. Dist. LEXIS 205352, at *22 (E.D. Mo. Feb. 26, 2013) (court approved $7.5M class action settlement regarding organic dairy claims); *In re Nutella Mktg. & Sales Practices Litig*., 2012 U.S. Dist. LEXIS 181913, at *2 (D.N.J. Jul. 30, 2012) (court approved $2 million class action settlement with ad changes for nutritious claims for chocolate-hazelnut spread).

1. Litigation Through Trial Would Be Complex, Costly, and Lengthy

Unless a proposed settlement is clearly inadequate, courts grant final approval where continued litigation would be protracted, expensive, and would yield uncertain results. *TBK Partners, Ltd. v. Western Union Corp.*, 517 F. Supp. 380, 389 (S.D.N.Y. 1981), aff'd, 675 F.2d 456 (2d Cir. 1982); *see also Slomovics v. All for a Dollar*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995) (settlement approval appropriate where litigation is likely "to result in great expense and has the potential to continue for a long time . . ."); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d at 381-82 ("the more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court.")

Litigating the Actions through trial would require the Parties, and the Court, to expend substantial time and resources to brief and otherwise litigate the various complex issues of law and fact bearing on Plaintiffs' claims. (RJC Decl. ¶¶ 72, 74); *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*, 236 F.3d 78 ("Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them.") At the time the Settlement was reached, trial was quickly approaching in *Gunaratna* and, due to the number and complexity of issues in dispute, the Parties would have incurred considerable costs in preparing their respective cases for trial with no guarantee of success. (RJC Decl. ¶ 59); *see Hicks v. Morgan Stanley & Co.*, 2005 U.S. Dist. LEXIS 24890, at *16 (S.D.N.Y. Oct. 19, 2005) ("Further litigation would necessarily involve further costs; justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.") For example, the Parties would have to conduct further extensive fact and expert discovery relating to Defendant's newly developed defense, retain new experts, subpoena third parties, prepare witnesses, and prepare and litigate various pretrial motions. (RJC

Decl. ¶ 74.) Additionally, the *Kandel* Plaintiff was preparing to file her motion for class certification, which would require additional fact and expert discovery and extensive briefing. (*Id.*) If Plaintiff Kandel achieved class certification, she would then need to litigate summary judgment motions, any appeals, trial, and post-trial motions, all of which would be costly and time-consuming for the Parties and the Court. (*Id.*) Ultimately, it would take several years to litigate both *Gunaranta* and *Kandel* through trial, with no guarantee that Plaintiffs and the Settlement Class would achieve a better result than the recovery provided by the Settlement, or any recovery at all. (*Id.* ¶ 75.) The Settlement therefore ensures certain and prompt resolution of the Actions on terms that are fair, reasonable, and adequate to the Settlement Class without any risk or expense of further litigation.

2. The Class's Reaction to the Settlement has been Uniformly Positive

As more fully discussed in Section IV, *supra*, the reaction of the Class has been overwhelmingly positive with zero objections, zero exclusions, and 68,245 valid claims received. (RJC Decl. ¶¶ 7, 40); *Nat'l Rural Telecommunications Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 528-29 (C.D. Cal. Jan. 5, 2004) ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members."). The undeniable positive reaction of the Class therefore further demonstrates the Settlement is fair, reasonable, and adequate, thus warranting final approval.

3. The Settlement Is the Product of Extensive Discovery and Factual Investigation

In evaluating the fairness and adequacy of the Settlement under the third *Grinnell* factor, courts consider whether plaintiffs and class counsel are sufficiently informed about the merits of

the claims and defenses, and the value thereof. *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. Nov. 8, 2012) ("the question is whether the 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.") This factor favors final approval of the Settlement because Plaintiffs and Class Counsel "had more than enough information to make an informed and intelligent decision." *In re Citigroup*, 965 F. Supp. 2d at 382.

Over the course of litigating both *Gunarana* and *Kandel*, the Parties engaged in extensive, adversarial discovery with the intention of certifying and trying the Actions. (RJC Decl. ¶¶ 14-16, 57-61). The Parties conducted multiple rounds of written discovery and document production, fact and expert depositions, and third-party discovery. (*Id.*) Class Counsel dedicated many hours to analyzing thousands of documents regarding the labeling and advertising, ingredients, consumer complaints, sales information, studies, and market research related to the Products and Plaintiffs' claims. (*Id.* ¶ 58.) Plaintiffs also deposed several of Defendant's corporate designees and experts. (*Id.* ¶¶ 14, 57-58.) The Parties fully briefed class certification and summary judgement in *Gunaratna*, prior to the mediation in 2024. (*Id.* ¶¶ 16, 20, 58.) Through this adversarial discovery and motion practice, Plaintiffs and Class Counsel became fully and completely informed of the facts supporting the claims and potential defenses, and carefully evaluated the strength of each party's position in arriving at the Settlement. Thus, the third *Grinnell* factor weighs in favor of final approval.

4. Plaintiffs Would Face Risk in Establishing Liability and Damages if the Actions Proceeded

In evaluating substantive fairness, courts must consider the "risks of establishing liability [and] the risks of establishing damages." *Grinnell*, 495 F.2d at 463; *Wal-Mart*, 396 F.3d at 117. The fourth and fifth *Grinnell* factors do not require the Court to "adjudicate the disputed issues or decide unsettled questions; rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 2006 U.S. Dist. LEXIS 17588, *39 (S.D.N.Y. Apr. 6, 2006) (same). In doing so, the Court should balance "the benefits afforded to members of the Class and the immediacy and certainty of a substantial recovery for them against the continuing risks of litigation." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 364 (S.D.N.Y. 2002).

Litigation inherently involves risks and uncertainty. *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). This is especially true of complex class actions where, as here, liability depends on Plaintiffs' ability to establish elements requiring subjective determinations of fact. To establish liability under New York and California consumer protection laws, Plaintiffs would have to convince a jury that a reasonable consumer would be misled by Defendant's alleged misrepresentation. (RJC Decl. ¶ 71.) Such a determination is inherently subjective and introduces a large degree of uncertainty and risk into the litigation. (*Id.*) Additionally, Plaintiffs arguably would need to demonstrate that the purported "collagen" ingredients within the Products are neither collagen nor derived from collagen. (*Id.*) Due to the highly technical and science-driven nature of this inquiry, the outcome of the actions would inevitably turn on competing expert testimony offered at trial. (*Id.*) Where the outcome of the case

depends on a "battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited." *In re Telik, Inc. Sec. Litig*., 576 F. Supp. 2d 570, 579-80 (S.D.N.Y. 2008). Thus, Plaintiffs "would have faced significant legal and factual obstacles to proving their case." *Global Crossing*, 225 F.R.D. at 459.

The Settlement affords Class Members immediate, certain, and substantial monetary and injunctive relief, and eliminates the substantial risk that Plaintiffs would be unsuccessful at trial (and therefore receive less or no recovery). Absent the Settlement, Defendant was prepared to oppose certification and move for summary judgment in *Kandel* and move to decertify *Gunaratna*. (RJC Decl. ¶ 72.) Although Plaintiffs are confident in their case and believe that they could overcome Defendant's challenges, briefing these issues would require the expenditure of substantial time and resources with no guarantee of success. (*Id.*) The Settlement alleviates these risks, and provides a timely, substantial benefit to the Settlement Class. (*Id.*)

5. The Risks of Maintaining the Class Action Through Trial

Where there is a substantial risk that the defendant may successfully oppose class certification or move for decertification of a previously certified class, the sixth *Grinnell* factor weighs in favor of approval. *See Stinson v. City of New York*, 256 F. Supp. 3d 283, 294 (S.D.N.Y. Jun. 7, 2017); *Garcia v. Pancho Villa's of Huntington Vill., Inc.*, 2012 U.S. Dist. LEXIS 144446, *13 (E.D.N.Y. Oct. 4, 2012) ("The risk of maintaining a class through trial is also present. While, the Court has already certified a class and collective action in this matter, maintaining it through trial may not be easy.")

Plaintiffs faced significant risks related to maintaining certification of the Class through trial. (RJC Decl. ¶¶ 71-72, 74-75.) At the time the Settlement was reached, *Kandel* had not yet been certified, and achieving class certification would have required exhaustive briefing and

extensive resources. (*Id*. ¶ 74.) Moreover, disputes regarding certification are likely "devolve into yet another battle of the experts," introducing additional risk and uncertainty to the action, adding another layer of complexity, and driving up costs. *Bear Stearns*, 909 F. Supp. 2d at 268. While Plaintiffs are confident that they would have achieved certification in *Kandel,* doing so would have been costly and time consuming for both parties, and would likely necessitate further discovery and additional experts. (RJC Decl. ¶¶ 74-75.) Furthermore, Defendant presented evidence in support of its defenses – establishing that some of the products contained animal based amino acids. This new defense has not yet been tested in either court, and this Court could narrow the products and/or class size in the *Kandel* action. Defendant also conducted a survey purportedly establishing that "C + Collagen" could be interpreted by some consumers as "boosting" collagen. While Plaintiffs believed they could overcome their hurdles of certifying the class, they also carefully considered the risks of decertification. Even if *Kandel* was certified, Defendant could move to decertify the class at any time. *See Global Crossing*, 225 F.R.D. at 460 ("[E]ven if plaintiffs could obtain class certification, there could be a risk of decertification at a later stage.")

The certified action in California, too, involved ongoing risks, including a threat of decertification based on late-revealed evidence with trial fast approaching. (RJC Decl. ¶¶ 72, 74.) Defendant likely would have argued that individual questions predominate over common questions, that a class action is not a superior vehicle for resolving Plaintiffs' claims, and that a class trial would not be manageable. (*Id*., ¶ 74) While Plaintiffs could overcome Defendant's arguments, opposing the motion would require extensive briefing, increasing risk, expense, and delay, not to mention the inherently subjective and risky proposition of presenting the claims, based on complex science, to a jury in the fast-approaching trial in the California action. (*Id.,* ¶¶ 71-72, 74)

The Settlement eliminates these risks and achieves the primary objectives of this litigation by providing the Settlement Class with meaningful injunctive relief and a substantial monetary recovery that is fair, immediate, and certain.

6. The Ability of Defendant to Withstand a Greater Judgment

In evaluating the fairness and adequacy of a settlement, "[t]his factor typically weighs in favor of settlement where a greater judgment would put defendant at risk of bankruptcy or other severe economic hardship." *AOL Time Warner*, 2006 U.S. Dist. LEXIS 17588, at *12. Discovery did not reflect that an even greater judgment would pose severe economic hardship to Defendant,[1] but even if Defendant could withstand a greater judgment, courts routinely find that a "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178 n.9). And where the other *Grinnell* factors weigh in favor of approval, courts do not find a defendant's ability to withstand a greater judgment to be a barrier to settlement. That's because a defendant is not required to "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); *see also PaineWebber*, 171 F.R.D. at 129 ("[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate.")

7. The Settlement Is Reasonable Given the Possible Recovery and the Attendant Risks of Litigation

Courts typically consider the last two *Grinnell* factors together. *See Grinnell*, 495 F.2d at 463. The determination of whether a settlement amount is reasonable "does not involve the use of

[1] *See* RJC Decl. ¶ 75.

a mathematical equation yielding a particularized sum." *Frank*, 228 F.R.D. at 186 (W.D.N.Y. 2005). "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)). Thus, courts regularly find settlements fall within the "range of reasonableness," even where the settlement amount is substantially less than the amount otherwise recoverable at trial. *Grinnell*, 495 F.2d at 455 n. 2 (Second Circuit: "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."); *see also Global Crossing*, 225 F.R.D. at 461 ("'The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.'") (quoting *Grinnell*, 495 F.2d at 455).

As explained *supra*, the $9,200,000 common fund represents a favorable outcome for the Settlement whereby Class Members will receive an average cash payment of $38.05/per qualifying product and valuable injunctive relief by way of a significant label change that helps dispel consumer deception and thus, benefits Class Members, the public, and the marketplace at large. (RJC Decl. ¶¶ 42, 68.)

Furthermore, a settlement is reasonable where, as here, it assures "immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road." *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 U.S. Dist. LEXIS 23016, *5 (S.D.N.Y. Mar. 24, 2008) (internal citation omitted); *see also Union Carbide*, 718 F. Supp. at 1103 ("The Court of Appeals has held that a settlement can be approved

even though the benefits amount to a small percentage of the recovery sought . . . The essence of settlement is compromise.") (internal citation omitted).

Here, over 50.9% of the Class will be receiving immediate payment via digital means. (RJC Decl. ¶ 43; Schwartz Decl. ¶ 28.) The Settlement also offers substantial injunctive and monetary relief to Plaintiffs and members of the Settlement Class. (RJC Decl. ¶¶ 64, 68.) Considering the complex issues of law and fact that exist in this litigation, and the various attendant risks of continuing to litigate the action through trial, the Settlement represents a fair and adequate compromise that is within the "range of reasonableness."

8. The Settlement Satisfies Rule 23(e)(2) Requirements

The amended Rule 23(e)(2) factors are intended to complement the *Grinnell* factors. *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. Nov. 7, 2019) ("The Advisory Committee Notes to the 2018 amendments indicate that the four new Rule 23 factors were intended to supplement rather than displace these '*Grinnell*' factors."). The Rule 23(e)(2) factors include:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Most of these factors overlap with the *Grinnell* factors fully discussed above, and each of the remaining applicable Rule 23(e) factors are sufficiently satisfied in support of final approval.

i. The Attorneys' Fees Sought Are Reasonable

In evaluating the fairness of a settlement, Rule 23(e)(2)(C)(iii) instructs courts to consider "the terms of any proposed award of attorney's fees, including timing of payment." As detailed in the Memorandum of law in support of Plaintiffs' motion for an award of attorneys' fees and costs

and service awards ("Fee Motion"), filed August 28, 2024 (ECF 73), Class Counsel seeks an award of attorneys' fees amounting to one-third of the Settlement Fund, in the amount of $3,066,700, as well as reimbursement of reasonable litigation costs in the amount of $457,416.66. (ECF 73.) Fees and costs are to be paid by Defendant within fourteen (14) calendar days after the entry of Judgment, and the Class Administrator will distribute the Fees and Costs Award to Class Counsel within fourteen (14) calendar days of entry of Judgment. (RJC Decl., ¶ 34; *Id.*, Ex. A. ¶ 3.3.)

As demonstrated in the Fee Motion, the Fees and Costs Award sought are squarely within the reasonable range of fees granted in comparable class settlements in this Circuit. *See, e.g., Celsius Holdings, Inc.*, 2023 U.S. Dist. LEXIS 60249, *14-15 (S.D.N.Y. Apr. 5, 2023) (awarding Clarkson one-third of total settlement in a false advertising action); *Battaglia v. Bre Select Hotels Corp.*, 2019 U.S. Dist. LEXIS 252506, at *10 (E.D.N.Y. Nov. 30, 2019) (awarding attorneys' fees of "36 to 37 [%] of the settlement fund, which is consistent with awards in this District and Circuit for cases yielding seven figure settlements"); *Swetz v. Gsk Consumer Health*, 2021 U.S. Dist. LEXIS 227209, at *3 (S.D.N.Y. Nov. 22, 2021) (awarding Clarkson one-third of the total settlement fund in attorneys' fees where the case settled shortly after an order on a motion to dismiss); *Mendez v. QL Wholesome Food, Inc.*, 2018 U.S. Dist. LEXIS 58570, at *4 (Hon. Ramos) (S.D.N.Y. Apr. 4, 2018) (awarding one-third of the overall settlement and recognizing that one-third contingency fees are commonly accepted in the Second Circuit albeit in FLSA actions).[2]

[2] *See also In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) ("Traditionally, courts in this Circuit . . . have awarded fees in the 20%–50% range in class actions."); *Rivera v. Wichcraft Operating LLC*, 2017 U.S. Dist. LEXIS 233168, at * 11-12 (S.D.N.Y. Jan. 27, 2017) (awarding 40% of the Settlement Fund in attorneys' fees, finding it to be "fair and reasonable based on: the number of hours worked by Class Counsel during this litigation; the results achieved on behalf of the Class; the contingent nature of Class Counsel's representation; the complexity of the issues raised by this litigation; a lodestar cross-check; and Class Counsel's recognized

The lodestar cross-check shows the requested fee applies a *negative* multiplier, making the requested fee also presumptively reasonable. *See In re Bear Stearns Cos.,* 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) (noting that a negative lodestar multiplier is a "strong indication of the reasonableness of the proposed fee."); *Seijas v. Republic of Arg.*, 2017 U.S. Dist. LEXIS 64398, at *36 (S.D.N.Y. Apr. 27, 2017) (even "[w]here a percentage fee is on the higher end of the range of reasonable fee, but still represents 'a negative multiplier to the total lodestar, there is 'no real danger of overcompensation.'") Furthermore, the requested fee is supported by the exceptional results obtained for the class–recovery of 73% of the average purchase price for qualifying products and meaningful injunctive relief. *See e.g. See Alaska Elec. Pension Fund v. Bank of Am. Corp.,* 2018 U.S. Dist. LEXIS 202526, at *10 (S.D.N.Y. Nov. 29, 2018) (explaining that when a settlement yields "between 33% to 73% of their expected trial demand," the results are considered "exceptional"); *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.").

The reasonableness of the attorneys' fees is further supported by the fact that no Class Member has objected to the fee request, or any other aspect of the Settlement, and none requested to be excluded from the Settlement. *See Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 478 (S.D.N.Y. 2013) ("[N]o Class Member objected to Class Counsel's request for 33% of the fund, which also provides support for Class Counsel's fee request"); *In re Telik*, 576 F. Supp. 2d at 593 (finding "the overwhelmingly positive response of the Class to the Settlement," including out of 54,000

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experience and expertise in the market."); *Birch v. Office Depot, Inc.*, 2007 U.S. Dist. LEXIS 102747 (S.D. Cal. Sept. 28, 2007) (awarding a 40% fee on a $16 million class action settlement); *Rippee v. Boston Mkt. Corp.*, 2006 U.S. Dist. LEXIS 101136 (S.D. Cal. Oct. 10, 2006) (awarding a 40% fee on a $3.75 million class action settlement); *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 189 (W.D.N.Y. 2005) (awarding attorneys' fees of 38.26% of settlement fund); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (affirming fee award of 36% in a class settlement).

notices, only 3 consumers have opted out and only one has objected, favor awarding the requested attorney's fees).

Thus, this factor weighs in favor of final approval.

ii. Settlement Class Members Are Treated Equitably

This factor includes "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed R. Civ. P. 23, 2018 Advisory Committee Note. The Settlement treats all Class Members equitably relative to one another by providing that each Claimant shall receive a pro rata share of the Settlement Fund based on (1) the quantity of Products they purchased, and (2) whether they provide proof of purchase. (RJC Decl., **Ex. A** ¶ 4.1.3.) Moreover, the Release is tailored from the factual predicate for the Litigation and treats all Settlement Class Members equitably relative to one another. (*Id*. ¶ 35; *see also* **Ex. A** ¶ 8.1.-8.2.) *See Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 95 (2d Cir. 2019). ("The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct."); *Wal-Mart*, 396 F.3d at 109 (approving release of non-parties where the claims released are based on the same underlying factual predicate as the claims asserted against the parties, reasoning in part that "it is hard to imagine that defendants . . . would have settled without also releasing [the non-parties] from liability; to do so would have invited relitigation of the same factual allegations").

VII. THE CLASS SHOULD BE CERTIFIED FOR SETTLEMENT

In the Preliminary Approval Order (ECF 71), Judge Ramos found that Plaintiffs had satisfied the prerequisites for conditional class certification set forth in Rule 23 and preliminarily

certified the Class (ECF 71 at ¶¶ 3-6.) Since entry of the Preliminary Approval Order, the facts supporting certification have not changed. (RJC Decl. ¶ 76); *see also Cancilla v. Ecolab, Inc.*, 2016 U.S. Dist. LEXIS 818, at *2 (N.D. Cal. Jan. 5, 2016) ("[C]onclusions" at preliminary approval that the settlement class should be certified "hold at this final approval stage.") Therefore, for the reasons stated in Plaintiffs' unopposed Motion for preliminary approval, which explained that the Rule 23(a) and Rule 23(b)(3) factors are satisfied (ECF 64), and Judge Ramos' order granting the Motion (ECF 71), Plaintiffs respectfully request that the Court grant final certification of the Settlement Class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3) and enter a final judgment.

VIII. CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court enter an Order: (a) finding Settlement fair, reasonable and adequate; (b) granting final certification of the Settlement Class; (c) awarding Plaintiffs' requested reasonable attorneys' fees, costs, and service awards; (d) directing the parties to undertake the obligations set forth in the Settlement Agreement; (e) entering Final Judgment; and (f) maintaining jurisdiction over this matter for purpose of enforcing the Final Judgment.

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