UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JEWEL RANKINS and DARREN WONG, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

OLD LYME GOURMET COMPANY (d/b/a DEEP RIVER SNACKS),

Defendant.

Case No.: 1:20-cv-1756-ENV-TAM

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FINAL CERTIFICATION OF SETTLEMENT CLASS

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On December 6, 2024, this Court granted preliminary approval of the Settlement Agreement[1] and certification of the Settlement Class. ECF No. 64 ("Preliminary Approval Order"). Plaintiffs Jewel Rankins ("Rankins") and Darren Wong ("Wong") (collectively "Plaintiffs") and Class Counsel now move this Court for final approval of the Settlement Agreement and final certification of the Settlement Class ("Final Approval").

INTRODUCTION

The Settlement is an excellent result for the Class and should now receive final approval so that Settlement Class Members can be paid. The Settlement resolves the claims of consumers who challenged Defendant's practice of placing a Non-GMO Ingredients seal (the "Seal") on the packaging of their Deep River Snacks brand potato chips (the "Products"). The Seal appeared to be a certificate of approval from an independent third-party, but in fact was created by the Defendant itself, thereby deceiving consumers. The Settlement gives Class Members a fund of $4 million, with each Class Member receiving a minimum of $5, which is **more** than the retail price for the Products and more than Class Members would receive had they won at trial. Accordingly, the Settlement is an excellent result and should now receive final approval from the Court.

Indeed, after the robust notice plan previously approved by this Court was implemented by Epiq Class Action & Claims Solutions, Inc. ("Epiq"), the response from Class Members has been overwhelmingly positive. *See* Declaration of Cameron R. Azari of Epiq ("Azari April 1st Decl."), filed simultaneously with this memorandum. Notably, not a single Class Member has objected, and only 7 people have opted out of the Settlement Class. *See* Azari April 1st Decl. at ¶ 27. In contrast, hundreds of thousands of claims have been filed. *Id.* at ¶ 29.

[1] Unless otherwise indicated, capitalized terms shall have the meaning that the Settlement Agreement ascribes to them. *See* ECF No. 55 ("Settlement" or "Settlement Agreement").

The Settlement easily meets the factors for procedural and substantive fairness enumerated by Federal Rule of Civil Procedure 23(e)(2), as amended in 2018, as well as the standards set forth by the Second Circuit in *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"). Accordingly, the Settlement should be finally approved.

The Settlement also readily satisfies the requirements of Federal Rule of Civil Procedure 23, supporting final certification of the Settlement Class.

BACKGROUND

I. History of the Litigation and Settlement Negotiations

Rankins Action in New York

Plaintiffs have asserted claims on behalf of a class of consumers that Defendant Old Lyme Gourmet Company (d/b/a Deep River Snacks) ("Old Lyme") deceptively and misleadingly marketed and labeled its "Deep River" potato chips (the "Products"), as identified in Exhibit A to the Settlement Agreement. Specifically, during the class period, the Products' labels displayed the Seal that mimicked a third-party certification that the Products were independently verified as not containing any non-GMO ingredients. In truth, the Products were never independently verified.

On April 9, 2020, Plaintiff Jewel Rankins, filed the present lawsuit against Defendants for the misleading Seal. ECF No. 1.[2] On August 24, 2020, the court stayed all discovery on damages and class certification. Over the next year, the parties engaged in limited discovery related primarily to Plaintiff Rankins, including motions to compel.

[2] *See* Declaration of Charles Moore in Support of Plaintiffs' Unopposed Motion for Final Approval ¶ 4 ("Moore Final Decl.") filed with this memorandum of law.

On December 7, 2021, Old Lyme filed a motion to dismiss. ECF No. 34. On June 9, 2022, Magistrate Merkl issued a Report and Recommendation granting in part, and denying in part, the motion. ECF No. 39. On July 14, 2022, Old Lyme filed an Objection to the Report and Recommendation. ECF No. 42. On August 15, 2023, the Court adopted the Report and Recommendation. ECF No. 44. Following the Court's ruling, discovery was opened in full on October 3, 2023. Since that time, the Parties have engaged in meaningful and extensive discovery.

Wong Action in California

The *Wong* action was filed on October 12, 2020. On February 4, 2021, Old Lyme moved to dismiss. Following full briefing, on March 22, 2021, the court stayed the action under the first-filed rule. Ever since, the parties have been providing periodic status updates to the court.

Resolution of Both Matters

On March 28, 2024, the Parties conducted a full day mediation with Jill R. Sperber, Esq. During the mediation, the Parties made significant process towards agreement on the material terms. Moore Final Decl. ¶ 5. The Parties had a second mediation with mediator Sperber on April 18, 2024, which ended with a mediator's proposal that both sides accepted. *Id.* The Parties then worked on the terms of the settlement, eventually culminating in the Agreement. *Id.*

Plaintiffs' objective in filing the Actions was to compensate Settlement Class Members damaged by the alleged misrepresentations. Through the Actions and the Settlement, Plaintiffs achieved substantial relief for the Settlement Class. The Settlement establishes a $4,000,000 common fund to pay claims for the Settlement Class Members, as well as cover the costs of notice and administration, attorney fees and costs to Class Counsel, and service awards to the Class Representatives. Per the Settlement, each Settlement Class Member can receive $5.00 for the first Product claimed, plus $0.50 for each additional Product without proof of purchase up to ten (10)

additional Products and no cap on the number of claims a Settlement Class Member can make with proof of purchase. Thus, the Settlement is an outstanding result for Plaintiffs and the members of the Settlement Class.

II. The Terms of the Proposed Settlement

The Settlement Agreement defines the Settlement Class, describes the Parties' agreed-upon Settlement relief, and proposes a plan for disseminating notice to the Settlement Class Members.

A. Certification of the Settlement Class

Under the Settlement Agreement, the Parties agreed to seek certification of a nationwide Settlement Class defined as follows:

> All persons in the United States who purchased any of the Products during the Class Period for personal or household use.
>
> Excluded from this definition are (a) the Released Parties; (b) all distributors, wholesalers, retailers, and licensors of the Products; (c) judges presiding over the Actions and any members of their immediate families and/or staff; (d) Persons who made a valid, timely request for exclusion; (e) the mediator Jill Sperber; and (f) any government entity.

See Settlement at § 2.47.

B. Relief for the Members of the Settlement Class

The Settlement Agreement provides for significant monetary relief. Old Lyme will pay $4,000,000.00 into a Settlement Fund. Settlement § 2.48. The Settlement Fund will first be used to pay for Class Notice and administration costs or other costs pursuant to the terms of Section III of this Agreement, and all Attorneys' Fees and Costs and Service Awards, prior to any distribution from the payments to Settlement Class Members. *Id.*

C. Service Awards and Attorneys' Fees and Expenses

Old Lyme has agreed not to oppose an application for payment of Service Awards of up to $5,000 to each of the named Plaintiffs (for a total of $10,000) to compensate them for the actions and risk they took in their capacities as class representatives. *Id.* at § 5.2. Old Lyme has also agreed

not to oppose an application for payment of $1,333,333.33 for attorneys' fees to Class Counsel for Class Counsel's work on the Actions. *Id.* at § 5.1. Class Counsel shall also separately apply for the reimbursement of costs and expenses. *Id.* Class Counsel filed their motion for payment of fees and expenses to Class Counsel and payment of service awards to the Class Representatives on February 18, 2025. *See* ECF No. 67. Not a single Class Member objected to this motion.

D. Settlement Notice

The Settlement proposed that the Court appoint Epiq to administer the notice process and outlines the forms and methods by which notice of the Settlement Agreement would be given to the Settlement Class Members, including notice of the deadlines to opt out of, or object to, the Settlement. Settlement at §§ 4.1-4.7, 6.5-6.13. In accordance with the Settlement Agreement, Epiq developed a robust notice program that includes: (1) a comprehensive digital media-based notice (2) a dedicated Settlement Website, and (3) and a toll-free helpline through which Settlement Class Members can obtain more detailed information about the Settlement. *See* Azari April 1st Decl. at ¶¶ 6-26. The notice plan was designed to deliver a reach of approximately 70% of the targeted audience. *Id*. at ¶ 7.

Pursuant to the Settlement Agreement, the Settlement Website contains the Long Form Notice; answers to frequently asked questions; a contact information page; the Settlement Agreement; the signed order of Preliminary Approval; this motion for Final Approval; Plaintiffs' application(s) for payment of Attorneys' Fees and Costs to Class Counsel and payment of Service Awards to the Class Representatives; and any Order on Final Approval. *See* www.PotatoChipsSettlement.com. The Settlement Website also includes procedural information regarding the status of the Court approval process, such as announcements of the Fairness Hearing date and when the Final Order and Judgment has been entered. *Id.* at ¶ 23.

ARGUMENT

I. The Court Should Grant Final Approval of the Settlement Agreement.

The Second Circuit has recognized a "strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Visa*")). "The compromise of complex litigation is encouraged by the courts and favored by public policy." *Visa*, 396 F.3d at 117 (citation omitted). Under Rule 23(e)(2) of the Federal Rules of Civil Procedure, a court may approve a class action settlement "on finding that [the settlement agreement] is fair, reasonable, and adequate." *Moses v. The New York Times Co.*, 79 F.4th 235, 242 (2d Cir. 2023) (citing Fed. R. Civ. P. 23(e)(2)).

The "fair, reasonable, and adequate" standard effectively requires parties to show that a settlement agreement is both procedurally and substantively fair. *Moses*, 79 F.4th 235 at 242-246. "To evaluate the fairness, reasonableness, and adequacy of a class settlement, [the Second Circuit has] historically applied the nine factors set out in *Grinnell*[.]" *Id.* at 242. Those factors are:

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

Moses, 79 F.4th 235 at 242, n. 3 (citing *Grinnell*).

In 2018, Rule 23 was amended to list specific factors relating to the court's approval of the class settlement:

> (A) The class representatives and class counsel have adequately represented the class;
>
> (B) The proposal was negotiated at arm's length;
>
> (C) The relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;
(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
(iii) the terms of any proposed award of attorney's fees, including timing of payment; and
(iv) any agreement required to be identified under Rule 23(e)(3);

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

Moses, 79 F.4th at 242 (citing Fed. R. Civ. P. 23(e)).

"The first two factors are procedural in nature and the latter two guide the substantive review of a proposed settlement." *Moses*, 79 F.4th at 242. As the Second Circuit explained, "the revised Rule 23(e)(2) does not displace our traditional *Grinnell* factors, which remain a useful framework for considering the substantive fairness of a settlement." *Moses*,79 F.4th at 243. However, revised Rule 23(e)(2) "now mandates courts to evaluate factors that may not have been highlighted in our prior case law, and its terms prevail over any prior analysis that are inconsistent with its requirements." *Id.* at 243. Thus, district courts in this Circuit consider the factors set forth in Rule 23(e)(2) along with the *Grinnell* factors.

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

A. The Class Representative and Class Counsel Have Adequately Represented the Class.

"Determination of adequacy typically entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007) (internal quotation marks omitted).

First, Plaintiffs' interests are not antagonistic to the interests of the other Class Members. By virtue of the Class definition, Plaintiffs and the unnamed Class Members suffered the same harms — paying a premium for the Products based on the Seal. Plaintiffs and the other Class

Members seek the same relief from these harms, namely monetary damages. Thus, Plaintiffs' interests are aligned with the interests of the other Class Members' interests. *See Grissom v. Sterling Infosystems, Inc.*, 2024 WL 4627567, at *4 (S.D.N.Y. Oct. 30, 2024) (named plaintiff's interests were not antagonistic to interests of other class members when all suffered the same harms and seek the same relief).

Second, Class Counsel have demonstrated the necessary qualifications and skill in this matter. *See* Moore Final Decl. at ¶¶ 11; Ex. 1 (Reese LLP's firm résumé); Ex. 2 (Sheehan & Associates, P.C.'s firm résumé). Class Counsel engaged in meaningful discovery and achieved a successful mediated settlement. *Id.* at ¶¶ 4, 7-8. Therefore, Rule 23(e)(2)(A)'s adequacy of representation prong weighs in favor of approval.

B. The Settlement Was Negotiated at Arm's Length.

Rule 23(e)(2)(b) requires a court to consider whether a proposed settlement "was negotiated at arm's length." Here, the Parties participated in serious and informed arms-length negotiations before a highly qualified mediator, Jill R. Sperber, Esq. This ultimately led to a mediator's proposal, which the Parties accepted then finalized over the course of months in the Settlement Agreement. Moore Prelim. Decl. at ¶ 5. All of this suggests that the Settlement is the result of good faith arm's-length negotiations. *See Grissom*, 2024 WL 4627567, at *4 (finding existence of arm's-length negotiations where parties reached a final agreement with assistance of a mediator); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] court-appointed mediator's involvement in precertification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure."); *Tiro v. Pub. House Investments, LLC*, 2013 WL 2254551, at *2 (S.D.N.Y. May 22, 2013) ("The assistance of an experienced JAMS employment mediator . . . reinforces that the Settlement Agreement is non-collusive.").

C. The Relief Provided for the Class Is Adequate.

1. The costs, risks, and delay of trial and appeal

"In assessing the adequacy of a settlement under Rule 23(e)(2)(C)(i), courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results. This inquiry overlaps with the *Grinnell* factors of complexity, expense, and likely duration of the litigation along with the risks of establishing liability, the risks of establishing damages and the risks of maintaining the class action through the trial." *Grissom*, 2024 WL 4627567, at *4 (internal quotation and citations omitted).

"If settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Banyai v. Mazur*, 2007 WL 927583, at *9 (S.D.N.Y. Mar. 27, 2007). "In considering this factor, the Court need not adjudicate the disputed issues or decide unsettled questions; rather, 'the Court need only assess the risks of litigation against the uncertainty of recovery under the proposed settlement.'" *In re N. Dynasty Minerals Ltd. Sec. Litig.*, 2024 WL 308242, at *11 (E.D.N.Y. Jan. 26, 2024)(Merkl, J.).

Consumer class action lawsuits, like this action, are complex, expensive, and lengthy. *Manley v. Midan Rest. Inc.*, 2016 WL 1274577, at *9 (S.D.N.Y. Mar. 30, 2016) ("Most class actions are inherently complex[.]"). Should the Court decline to approve the Settlement Agreement, further litigation would resume. Such litigation could include contested class certification, competing expert testimony and contested *Daubert* motions; further costly factual discovery; costly merits and class expert reports and discovery; and trial. Moore Final Decl. ¶ 8. Each step towards trial would be subject to Old Lyme's vigorous opposition and appeal. *Id.* Even if the case were to proceed to judgment on the merits, any final judgment would likely be appealed, which would take significant time and resources. *Id.* These litigation efforts would be costly to all Parties and would require significant judicial oversight. *Id.*

In short, "litigation of this matter . . . through trial would be complex, costly and long." *Manley*, 2016 WL 1274577, at *9. "The settlement eliminates [the] costs and risks" associated with further litigation. "It also obtains for the class prompt [] compensation for prior [] injuries." *Id.* Indeed, Class Counsel recognize that, as with any litigation, the action involves uncertainties as to their outcome. *See* Moore Final Decl. ¶ 8. Further litigation presents no guarantee for recovery, let alone a recovery greater than the recovery for which the Settlement provides.

Accordingly, this factor weighs in favor of final approval of the Settlement under both Rule 23(e)(2)(C)(i) and *Grinnell*.

2. The effectiveness of the proposed method of distributing relief to the class

Under Rule 23(e)(2)(c)(ii), a court must evaluate the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." "A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." *Lea v. Tal Educ. Grp.*, 2021 WL 5578665, at *11 (S.D.N.Y. Nov. 30, 2021) (internal quotation marks omitted). "When formulated by competent and experienced class counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis." *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014) (internal quotation marks omitted).

Here, the distribution plan and claims process was formulated and is being overseen by Epiq — a nationally recognized expert in the field of legal notice, which has served as an expert in hundreds of federal and state cases involving class action notice plans. Azari April 1st Decl. ¶ 2. Class Members were allowed to make their claims online, thereby making the claims process as easy as possible for Class Members *Id.* ¶ 23. Additionally, Class Members have the option of being paid electronically, thereby making the distribution process efficient. As such, the Rule 23(e)(2)(c)(ii) factor weighs in favor of granting final approval of the Settlement.

3. The terms of the proposed award of attorney's fees

In assessing the adequacy of the relief, Rule 23 also requires the court to examine the proposed attorneys' fees. Fed. R. Civ. P. 23(e)(2)(c)(iii). Here, Class Counsel seek a fee award of one-third of the Settlement Fund plus reasonable out-of-pocket costs. *See* Plaintiffs' Motion for Payment of Attorney's Fees ("Motion for Fees"), ECF No. 67-1, at 2. This approach is consistent with what other courts within the Second Circuit have approved. *See, e.g.*, *Mendez v. MCSS Rest. Corp.*, 2022 WL 3704591, at *9 (E.D.N.Y. Aug. 26, 2022) ("Class Counsel's fee request of one-third (33.33%) of the Settlement Fund is reasonable and consistent with the norms of class litigation in this circuit and should be awarded on the basis of the total funds made available"); *Sarit v. Westside Tomato, Inc.*, 2021 WL 2000328, at *1 (S.D.N.Y. May 19, 2021) ("District courts in the Second Circuit…routinely approve fees to counsel totaling one third of the recovery amount."); *In re Akazoo S.A. Securities Litig.*, 2022 WL 14915812, at *2 (E.D.N.Y. Oct. 7, 2022) (awarding 33-1/3% of class action settlement); *Suarez v. Rosa Mexicano Brands Inc.*, 2018 WL 1801319, at *1 (S.D.N.Y. Apr. 13, 2018) (same); *Zorrilla v. Carlson Rests., Inc.*, 2018 WL 1737139, at *2 (S.D.N.Y. Apr. 9, 2018) (same); *Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 216, 220–22 (S.D.N.Y. 2015) (same); *Zeltser v. Merrill Lynch & Co.*, 2014 WL 4816134, at *8 (S.D.N.Y. Sept. 23, 2014) (same).

4. Any agreement required to be identified under Rule 23(e)(3)

Finally, a court must consider "any agreement required to be identified under Rule 23(e)(3)," which includes "any agreement made in connection with the proposal." Fed. R. Civ. P. 23(e)(2)–(3). There is no such agreement here. Accordingly, this consideration does not weigh against final approval of the Settlement.

D. The Settlement Treats Class Members Equitably Relative to Each Other.

Rule 23(e)(2)(D) requires the Court to consider whether "the proposal treats class members equitably relative to each other." Here, each Settlement Class Member can receive $5.00 for the first Product claimed, plus $0.50 for each additional Product without proof of purchase up to ten (10) additional Products and no cap on the number of claims a Class Member can make with proof of purchase. Settlement at § 3.4. Thus, each Class Member is treated equally relative to each other depending on the number of Products they purchased, and whether they provide proof of purchase.

As part of this factor, the Court must consider the incentive payments proposed in the Settlement. *Moses*, 79 F.4th at 244-45. "Rule 23(e)(2)(D) does not forbid incentive awards." *Moses*, 79 F.4th at 245. Here, the Settlement provides for a $5,000 service award to each Plaintiff as the class representative. Settlement at § 5.2. This award is within the range of service awards approved by courts in this Circuit. *See In re N. Dynasty Minerals Ltd. Sec. Litig.*, 2024 WL 308242, at * 17 (Merkl, J.) (awarding $20,000 to one lead plaintiff and $5,000 to the other); *Hezi v. Celsius Holdings, Inc.*, 2023 WL 2786820, at *6 (S.D.N.Y. Apr. 5, 2023) (approving service awards of $5,000 and $10,000); *see also Grissom*, 2024 WL 4627567, at *6 (finding a $10,000 service award reasonable); *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at*8 (E.D.N.Y. Nov. 20, 2012) (collecting case approving service awards between $5,000 and $30,000).

E. The Remaining *Grinnell* Factors Support Final Approval.

The *Grinnell* factors not expressly assessed under Rule 23(e)(2)(C)(i) include "the reaction of the class to the settlement; the stage of the proceedings and the amount of discovery completed; ... the ability of the defendants to withstand a greater judgment;…the range of reasonableness of the settlement fund in light of the best possible recovery; and…the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Grinnell*, 495 F.2d at 463. Here, all of these factors favor final approval of the Settlement.

1. The reaction of the class to the settlement

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002). The Settlement Class overwhelmingly approve of the Settlement with an estimate of 200,000 valid claims. *See* Azari April 1st Decl. at ¶ 29. There were no objections, and only seven class members opted out. *Id.* ¶ 27.

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

This *Grinnell* factor considers whether "the parties have conducted a factual investigation sufficient for the court to evaluate the proposed settlement and confirm that pretrial negotiations were adequately adversarial." *In re N. Dynasty*, 2024 WL 308242, at *11. Here, discovery has advanced sufficiently to allow the parties to resolve the case responsibly. Class Counsel have conducted discovery related to claims sufficient to evaluate the terms of the proposed Settlement. *See* Moore Final Decl. ¶ 7. Accordingly, this factor supports final approval. *See Zeltser*, 2014 WL 4816134, at *6 (granting approval because "through both formal discovery and an informal exchange of information prior to mediation, Plaintiffs obtained sufficient discovery to weigh the strengths and weaknesses of their claims and to accurately estimate the damages at issue"). Consequently, Plaintiffs have sufficient information to evaluate the terms of the proposed Settlement. *D.S. ex rel. S.S. v. New York City Dep't of Educ.*, 255 F.R.D. 59, 77 (E.D.N.Y. 2008) ("The amount of discovery undertaken has provided plaintiffs' counsel sufficient information to act intelligently on behalf of the class in reaching a settlement.").

3. The ability of Defendant to withstand a greater judgment

It is more important that the Settlement Class receive some relief than possibly "yet more" relief. *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F.Supp.2d 179, 201 (S.D.N.Y. 2012); *see also Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 83 (1st Cir. 2015) ("The fact that a better deal for Class

Members is imaginable does not mean that such a deal would have been attainable in these negotiations, or that the deal that was actually obtained is not within the range of reasonable outcomes."). Further, "[c]ourts have recognized that a [defendant's] ability to pay is much less important than the other *Grinnell* factors, especially where the other factors weigh in favor of approving the settlement." *In re Sinus Buster Products Consumer Litig.*, 2014 WL 5819921, at *11 (E.D.N.Y. Nov. 10, 2014). A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Viafara v. MCIZ Corp.*, 2014 WL 1777438, at *7 (S.D.N.Y. May 1, 2014). For these reasons, this factor is neutral.

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

"The final two *Grinnell* factors [, *i.e.*, the range of reasonableness of the settlement in light of the best possible recovery and all attendant risks,] are typically considered together." *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 432 (S.D.N.Y. 2016). "There is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion[.]" *Visa*, 396 F.3d at 119. "In other words, the question for the Court is not whether the settlement represents the highest recovery possible . . . but whether it represents a reasonable one in light of the many uncertainties the class faces[.]" *Bodon v. Domino's Pizza, LLC*, 2015 WL 588656, at *6 (E.D.N.Y. Jan. 16, 2015).

Here, the relief provided by the Settlement Agreement is within the range of reasonableness, especially in light of the best possible recovery and all the risks of litigation. The gravamen of the Actions are that the Products deceived consumers that they had third-party certification regarding GMO ingredients. Furthermore, the cash compensation to which eligible Settlement Class Members will be entitled goes a significant way toward compensating Settlement

Class Members for the damages they incurred on account of Old Lyme's allegedly deceptive representations about the Products. The Settlement Agreement provides that Settlement Class Members shall receive a minimum cash payment of $5.00 for the first product claimed, more than the Products' retail price. Class Members can then receive $0.50 per Product up to ten additional Products without proof of purchase, or without limit for claims with proof of purchase. Settlement § 3.4. Thus, Settlement Class Members will receive full or nearly full compensation for their injury.

As discussed above, Plaintiffs believe their claims are strong but recognize that continuation of this litigation poses significant risks. Moore Final Decl. ¶ 10. While continuation of the litigation might not result in an increased benefit to the Settlement Class, it would lead to substantial expenditure by both Parties. *Id.* Taking into account the risks and benefits Plaintiffs have outlined above, the Settlement falls within the "range of reasonableness." *Id.* Class Counsel have achieved the best possible recovery considering the merits of the Settlement weighed against the cost and risks of further litigation. *Id.*

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

II. The Court Should Certify the Settlement Class.

A court may certify a settlement class upon finding that the action underlying the settlement satisfies all Rule 23(a) prerequisites and at least one prong of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 619–22 (1997). As set forth below, the proposed Settlement Class satisfies all of the requirements of Rule 23(a) and Rule 23(b)(3), and, consequently, Plaintiffs respectfully asks the Court to certify the Settlement Class.

A. The Settlement Class Meets All Prerequisites of Rule 23(a).

Rule 23(a) has four prerequisites for certification of a class: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequate representation. The Settlement Class meets each prerequisite and, as a result, satisfies Rule 23(a).

1. Numerosity

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

2. Commonality

Under Rule 23(a)(2), Plaintiffs must show that "questions of law or fact common to the [proposed] class" exist. Commonality requires that the proposed Class Members' claims all centrally "depend upon a common contention," which "must be of such a nature that it is capable of classwide resolution," meaning that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "[F]or purposes of Rule 23(a)(2) even a single common question will do[.]" *Id.* (citation, quotation marks, and brackets omitted). The Second Circuit has construed this instruction liberally, holding that plaintiffs need only show that their injuries "derive[d] from defendants' . . . unitary course of conduct." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 84 (2d Cir. 2015).

Here, there are common questions of law and fact that will generate common answers apt to drive the resolution of the litigation, including but not limited to whether Old Lyme used a deceptive Seal on the Products. Resolution of this common question requires evaluation of the

merits under an objective standard, *i.e.*, the "reasonable consumer" test. *Mantikas v. Kellogg Co.*, 910 F.3d 633, 363 (2nd Cir. 2018) ("To state a claim for false advertising or deceptive practices under New York or California law, a plaintiff must plausibly allege that the deceptive conduct was 'likely to mislead a reasonable consumer acting reasonably under the circumstances"). Thus, commonality is satisfied.

3. Typicality

Under Rule 23(a)(3), Plaintiffs must show that his claims "are typical of the [class'] claims." Plaintiffs must show that "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented." *Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993) (citations omitted). "[D]ifferences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative's claims." *In re Nissan Radiator/Transmission Cooler Litig.*, 2013 WL 4080946, at *19 (S.D.N.Y. May 30, 2013).

District courts within the Second Circuit have repeatedly found typicality easily satisfied in the context of approving a settlement class. *E.g.*, *Manley*, 2016 WL 1274577, at *4; *Fogarazzao v. Lehman Bros.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005) ("The typicality requirement is not demanding."). Here, typicality is met because the same unlawful conduct by Old Lyme—its allegedly misleading use of the Seal on the Products—was directed at both Plaintiffs and the other members of the proposed Settlement Class. *Robidoux*, 987 F.2d at 936–37.

4. Adequacy of representation

Under Rule 23(a)(4), Plaintiffs must show that the proposed class representatives will "fairly and adequately protect the interests of the class." Plaintiffs must demonstrate that: (1) the class representatives do not have conflicting interests with other Class Members; and (2) class counsel is "qualified, experienced and generally able to conduct the litigation." *Marisol A.*, 126 F.3d at 378.

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

With respect to the second requirement, Class Counsel are qualified, experienced, and able to conduct the litigation. Class Counsel are not representing clients with interests at odds with the interests of the Settlement Class Members and are not acting as class representatives. Moore Final Decl. ¶ 11. Further, they have invested considerable time and resources into the prosecution of the Action. *Id*. They have qualified as lead counsel in other class actions and have a proven track record of successful prosecution of significant class actions. *Id.* at ¶ 11; Exs. 1-2. "In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to prosecute vigorously the action on behalf of the class." *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 241 F.R.D. 185, 199 n.99 (S.D.N.Y. 2007) (citation omitted).

For the foregoing reasons, Plaintiffs have satisfied the adequacy prerequisite.

B. The Settlement Class Meets All Rule 23(b)(3) Requirements.

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prods., Inc.*, 521 U.S. at 614. Plaintiffs seek final certification of the Settlement Class under Rule 23(b)(3). Under that rule, the court must find that "questions of law or fact common to Class Members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

1. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 623 (citation omitted). The Second Circuit has held that "to meet the predominance requirement . . . a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof." *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (citation omitted). In the context of a request for settlement-only class certification, concerns about whether individual issues "would present intractable management problems" at trial drop out because "the proposal is that there be no trial." *Id.* at 620 (citation omitted). As a result, "the predominance inquiry will sometimes be easier to satisfy in the settlement context." *Tart v. Lions Gate Entm't Corp.*, 2015 WL 5945846, at *4 (S.D.N.Y. Oct. 13, 2015). Furthermore, consumer fraud cases readily satisfy the predominance inquiry. *Amchem Prods.*, 521 U.S. at 625.

Here, the central common questions predominate over any questions that may affect individual Settlement Class Members. The central common questions include whether Old Lyme's Seal on the Products was misleading and likely to deceive reasonable consumers. These issues are subject to "generalized proof" and "outweigh those issues that are subject to individualized proof." *In re Nassau Cty. Strip Search Cases*, 461 F.3d at 227–28 (citation omitted). The Settlement Class meets the predominance requirement for settlement purposes.

2. Superior means of adjudication

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

litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions." *Meredith Corp. v. SESAC, LLC*, 87 F.Supp.3d 650, 661 (S.D.N.Y. 2015) (citation omitted).

Additionally, a class action is superior here because "it will conserve judicial resources" and "is more efficient for Class Members, particularly those who lack the resources to bring their claims individually." *Zeltser*, 2014 WL 4816134, at *3 (citation omitted). As a result of the false and misleading labeling, the Products were sold at a premium price. The cost to purchase any of the Products is less than $5.00, thus, the potential recovery for any individual Settlement Class Member is relatively small. As a result, the expense and burden of litigation make it virtually impossible for the Settlement Class Members to seek redress on an individual basis. By contrast, in a class action, the cost of litigation is spread across the entire class, thereby making litigation viable. *See, e.g.*, *Tart*, 2015 WL 5945846, at *5. "Employing the class device here will not only achieve economies of scale for Class Members, but will also conserve judicial resources and preserve public confidence in the integrity of the system by avoiding the waste and delay repetitive proceedings and preventing inconsistent adjudications." *Zeltser*, 2014 WL 4816134, at *3 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998); other citations omitted). For all of the foregoing reasons, a class action is superior to individual suits.

In sum, because the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, the Court should grant final certification of the the Settlement Class.

CONCLUSION

For the foregoing reasons, Plaintiffs and Class Counsel respectfully request that the Court grant their motion for Final Approval.

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Respectfully submitted,

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