UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Breeanne Buckley Peni, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

DAILY HARVEST, INC., SECOND BITE FOODS, INC. d/b/a "STONE GATE FOODS", SMIRK'S LTD., AND MOLINOS ASOCIADOS,

Defendants.

Civil Action No.
22-cv-05443
Honorable Denise Cote

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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TABLE OF AUTHORITIES

Cases

Albright v. Daily Harvest Inc., et al. (Case No. 22-cv-05987 DLC) 2

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997). 1, 25, 31, 32, 34

Baker et al. v. SF HWP Management LLC et al. (Sup. Ct. Washington County June 8, 2009) 25

Bellotti v. Smiley Brothers Inc., 2014 WL 10962079 (Sup. Ct. Ulster County December 15, 2014) 25

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Caddick v. Tasty Baking Co., Case No. 2:19-cv-02106-JDW, 2021 WL 1374607 (E.D. Pa. Apr. 12, 2021) 35

Cavalieri v Gen. Elec. Co., No. 06-CV-315 (GLS/DRH), 2009 WL 2426001 (N.D.N.Y. Aug. 6, 2009) 19

Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC, 504 F.3d 229 (2d Cir. 2007) 29

Charron v Pinnacle Group N.Y. LLC, 874 F. Supp. 2d 179 (S.D.N.Y 2012) 35

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) 16, 17, 19

Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473 (2d Cir. 1995) 26

Cruz v Sal-Mark Rest. Corp., 1:17-CV-0815 (DJS), 2019 WL 355334 (N.D.N.Y. Jan. 28, 2019) 19, 20, 21

D'Amato v Deutsche Bank, 236 F3d 78 (2d Cir 2001) 15, 18

Elliot v. Leatherstocking Corp., 3:10-CV-0934 MAD/DEP, 2012 WL 6024572 (N.D.N.Y. Dec. 4, 2012) 19

Flores v. Anjost Corp., No. 11-CV-1531 (AT), 2014 WL 321831 (S.D.N.Y. Jan. 29, 2014) 22

Fort Worth Employees' Ret. Fund v. J.P. Morgan Chase & Co., 301 F.R.D. 116 (S.D.N.Y. 2014) 28

Frank v. Eastman Kodak Co., 228 F.R.D. 174 (W.D.N.Y. 2005) 33

Gilliam v. Addicts Rehabilitation Ctr. Fund, 05 CIV. 3452 (RLE), 2008 WL 782596 (S.D.N.Y. Mar. 24, 2008) 24

Goldberger v. Integrated Resources, Inc., 209 F3d 43 (2d Cir 2000)....................16

Guadagna v Zucker, 332 FRD 86 (E.D.N.Y. 2019) 29

Hanifin v Accurate Inventory and Calculating Serv., Inc., No. 11-CV-1510 (MAD/ATB), 2014 WL 4352060 (N.D.N.Y. Aug. 20, 2014) 21

Hill v. County of Montgomery, No. 9:14-CV-933 (BKS/DJS), 2017 WL 9249663 (N.D.N.Y. Sep. 29, 2017) 27

In re "Agent Orange" Prod Liab. Litig., 597 F. Supp. 740 (E.D.N.Y.1984)....................22

In re Beacon Associates Litig., 282 F.R.D. 315 (S.D.N.Y. 2012) 28

In re Drexel Burnham Lambert Grp., Inc., 960 F.2d 285 (2d Cir. 1992)....................30, 31

In re Facebook, Inc., IPO Sec. and Derivative Litig., 343 F. Supp. 3d 394 (S.D.N.Y 2018), aff'd sub nom. *In re Facebook, Inc.*, 822 Fed Appx 40 (2d Cir 2020) 21

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995)....................22

In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436 (S.D.N.Y. 2004) 21

In re LIBOR-Based Fin. Instruments Antitrust Litig., 11 MD 2262 (NRB), 2018 WL 3475465 (S.D.N.Y. July 19, 2018)....................16

In re Marsh & McLennan Cos., Inc. Sec. Litig., 04 CIV. 8144, 2009 U.S. Dist. LEXIS 120953 (S.D.N.Y. December 23, 2009) 33

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 330 F.R.D. 11 (E.D.N.Y. 2019)....................24

In re Pfizer Inc. Sec. Litig., 282 F.R.D. 38 (S.D.N.Y. 2012)....................28, 29

In re Polaroid ERISA Litig., 240 F.R.D. 65 (S.D.N.Y. 2006) 31

In re Prudential Ins. Co. Am. Sales Practice Litig., 148 F.3d 283 (3d Cir.1998) 19

In re Remicade Antitrust Litig., No. 17-CV-04326, 2022 WL 3042766 (E.D. Pa. Aug. 2, 2022) 35

In re Sadia, S.A. Sec. Litig., 269 F.R.D. 298 (S.D.N.Y. 2010) 29

In re Traffic Exec. Ass'n E. R.Rs., 627 F.2d 631 (2d Cir. 1980) 17, 18

In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108 (2d Cir 2013) 34

In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124 (2d Cir 2001)....................32

In re Vitamin C Antitrust Litig., No. 06– MD–1738 (BMC)(JO), 2021 WL 5289514 (E.D.N.Y. Oct. 23, 2012) 21

In re Vivendi Universal, S.A., 242 F.R.D. 76 (S.D.N.Y. 2007)....................32

In re Warfarin Sodium Antitrust Litig., 391 F.3d 516 (3d Cir. 2004) 14

Jacob v Duane Reade, Inc., 602 Fed. App'x. 3 (2d Cir 2015) 28

Joel A. v Giuliani, 218 F3d 132 (2d Cir 2000) 15

Johnson v. Nextel Commc'ns Inc., 780 F.3d 128 (2d Cir. 2015) 28

Maley v Del Glob. Tech. Corp., 186 F Supp 2d 358 (S.D.N.Y. 2002)....................19

Martens v. Smith, Barney, Inc., 181 F.R.D. 243 (S.D.N.Y. 1998) 31

Matter of Arroyo v State, 12 Misc. 3d 1197(A), 824 N.Y.S.2d 767 (Ct. Cl. 2006) 25

Mazzei v Money Store, 829 F.3d 260 (2d Cir 2016)....................30

McBean v. City of New York, 228 F.R.D. 487 (S.D.N.Y. 2005) 32

Moore v. PaineWebber, Inc., 306 F.3d 1247 (2d Cir. 2002)....................32

Newman v. Stein, 464 F.2d 689 (2d Cir.1972)....................22

Ortega v Uber Tech. Inc., 15-CV-7387 (NGG/JO), 2018 WL 4190799 (E.D.N.Y. May 4, 2018) 36

Richard v Glens Falls Natl. Bank, 120-CV-00734 BKS/DJS, 2022 WL 1102451 (N.D.N.Y. Apr. 13, 2022)....................16

Robidoux v. Celani, 987 F.2d 931 (2d Cir. 1993)....................27, 29

Shapiro v JPMorgan Chase & Co., No. 11-CV7961 (CM), 2014 WL 1224666 (S.D.N.Y. Mar. 24, 2014) 23, 30

Slomovics v All for a Dollar, Inc., 906 F Supp 146 (E.D.N.Y 1995)....................19

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Trinidad v. Breakway Courier Sys., 05 CIV 4116 (RWS), 2007 U.S. Dist. LEXIS 2914 (S.D.N.Y. January 12, 2007) 30

Velez v. Novartis Pharm. Corp., No. 04 CIV 09194 CM, 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010)..24

Wagner v. NutraSweet Co., 95 F.3d 527 (7th Cir. 1996) 30

Wal-Mart Stores v. Visa U.S.A., 396 F.3d 96 (2d Cir. 2005) 14, 15, 17, 18, 22, 27, 35

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)..27

Weinberger v. Kendrick, 698 F.2d 61 (2d Cir.1982)..18

Zivkovic v. Laura Christy LLC, 329 F.R.D. 61 (S.D.N.Y. 2018)..27

Statutes

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Federal Food, Drug and Cosmetic Act, 21 U.S.C., § 301 et seq. 28

N.Y. Agric. & Mkts. Law 28

Other Authorities

2 Joseph M. McLaughlin, MCLAUGHLIN ON CLASS ACTIONS § 6:18 (11th ed. 2014)........13

Kabateck and A. Torrijos, *Notice 2.0: How Technology is Changing Class-Action Notice Procedures*, 32 No. 2 Class Action Reports ART 2 (March-April 2011) 35

MANUAL FOR COMPLEX LITIGATION § 21.632-633 (4th ed. 2004) 16, 18

MANUAL FOR COMPLEX LITIGATION, §21.312 34

William B. Rubenstein, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 11.41 (6th ed. 2022) 15

INTRODUCTION

Plaintiff,[1] individually and on behalf of all others similarly situated, by and through her counsel, hereby respectfully moves the Court for preliminary approval of the proposed class action settlement set forth in the Settlement Agreement ("Settlement Agreement" or "SA") attached as Exhibit 1 to the accompanying Joint Declaration of William D. Marler, James R. Peluso, and Jeffrey A. Bowersox ("Joint Decl."). Defendants Smirk's Ltd. ("Smirk's") and Molinos Asociados SAC ("Molinos") consent to the motion. All exhibits referenced herein are attached to the Settlement Agreement.

Plaintiff proposes that, for settlement purposes, a Third Amended Class Action Complaint ("Amended Class Action Complaint") be filed against the Settling Defendants alleging a nationwide class matching the definition in the SA.

"Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Here, the parties have agreed to a class settlement mechanism to resolve the hundreds of individual personal injury claims. The settlement globally resolves these claims without the need to litigate, at hundreds of individual trials in court or arbitration, issues of proof specific to any class member, such as causation or damages. The class mechanism allows all putative Class Members to join the Settlement and will provide certainty and finality to those Class Members who do not opt-out.

The proposed settlement resolves all litigation by members of the putative class against Defendants Smirk's Ltd. and Molinos Asociados SAC, (the "Settling Defendants"), as well as

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[1] All capitalized terms herein shall have the meanings ascribed by the Settlement Agreement.

litigation between the Settling Defendants, arising out of Plaintiff's and the putative Class Members' consumption of Daily Harvest's French Lentil + Leek Crumbles ("the Product" or "the Crumbles"). The Product was manufactured for Daily Harvest by Stone Gate Foods using an ingredient known as tara flour. This tara flour was supplied to Stone Gate Foods by Smirk's, which sourced it from Molinos. Plaintiff alleges that consumption of the tara flour-containing Product caused Plaintiff to experience injury.

As set forth in the Settlement Agreement, the settlement has a total value of seven million, six hundred and seventy-one thousand dollars ($7,671,000). It is the result of extensive arm's length negotiations between the Settling Parties and their counsel, including multiple mediation conferences, both in-person and telephonically, before Magistrate Judge Sarah L. Cave and retired NAM Judge Peter B. Skelos. After a thorough investigation of the facts and analysis of applicable law, the Settling Parties and their counsel submit that the terms of the Settlement Agreement are fair, reasonable, adequate and in the best interests of the Settlement Class. The proposed Settlement Agreement provides significant benefits to the Settlement Class, offering monetary relief to its members, while avoiding the delay and risks inherent in continued litigation including the possibility that a Court or jury may find that the Defendants are not liable to claimants. Under these circumstances, the proposed settlement is the best means to ensure that members of the Settlement Class receive significant compensatory relief in a prompt and efficient manner and without the risk of potentially receiving no compensation at all.

As a putative class settlement under Rule 23(b)(3), the proposed Settlement Agreement requires court approval that its terms are fair, reasonable, and adequate for the class, including (1) preliminary approval of the proposed Settlement Agreement and Settlement Class; (2) dissemination of notice to the class with an opt-out and objection period; and (3) a formal fairness

hearing to determine whether the Court should grant final approval of the proposed Settlement Agreement. *See* Rule 23(e).

As set forth in the Settlement Agreement, the Settling Parties have prepared a draft Settlement Notice to be sent via email to all subscribers who purchased the Product based upon order and delivery records maintained by Daily Harvest and to be posted on a dedicated Settlement Website, together with other information about the settlement. This proposed notice and the plan for its dissemination via email, are designed to satisfy due process requirements by apprising members of the Settlement Class of the proposed Settlement Agreement and advising them of their associated legal rights as members of the Settlement Class.

Plaintiff, with the consent of the Settling Defendants, requests that the Court enter the proposed Preliminary Approval Order that would:

1. Grant preliminary approval of the proposed Settlement in the amount of Seven Million, Six Hundred and Seventy-One Thousand Dollars ($7,671,000.00) with the Settling Defendants Smirk's Ltd. and Molinos Asociados SAC, on behalf of the Settlement Class Members according to the terms of the parties' Settlement Agreement;
2. Have the proposed Third Amended Class Action Complaint serve as the operative complaint for the Settlement of the Litigation against the Settling Defendants;
3. Certify, for settlement purposes only, the Rule 23(b)(3) Class which is defined as "All persons in the United States (including its territories) who purchased, received, or consumed French Lentil + Leek Crumbles ("the Product" or "the Crumbles") and directly suffered personal injuries caused by the consumption of the Crumbles, and all persons in the United States (including its territories) who suffered consequential

monetary damages arising from or related to another person's personal injuries arising from consumption of the Crumbles."

4. Approve the form, substance, and distribution of the proposed Form Notice ("Notice");
5. Approve the proposed Claim Form and Allocation Model;
6. Preliminarily approve the manner of distribution of the Settlement Fund;
7. Appoint Edgar Gentle of Gentle Turner & Benson, LLC as the Settlement Administrator for purposes of administering the Notice and Settlement Program;
8. Appoint Plaintiff Breeanne Buckley Peni as class representative;
9. Appoint Plaintiff's Counsel as attorneys for the class ("Class Counsel");
10. Set deadlines and procedures for persons who fall within the class definition to exclude themselves or object to the proposed Settlement;
11. Set a date for the Final Approval Hearing to determine whether the Proposed Settlement should be granted final approval; and
12. Stay all proceedings in this action with respect to the Settling Parties, other than those necessary to administer and evaluate the proposed Settlement.

FACTUAL AND PROCEDURAL BACKGROUND

A. Summary of the Claims, Defenses, and Proceedings

On June 27, 2022, plaintiff Breeanne Buckley Peni filed a Class Action Complaint alleging Strict Liability, Breach of Warranty, and Negligence against Daily Harvest, Inc., in the Southern District of New York in a case styled *Breeanne Buckley Peni, individually and on behalf of all others similarly situated, v. Daily Harvest, Inc.*, Case No. 1:22-cv-05443. (Doc. 1). Plaintiff's claims arise from her purchase and consumption of the French Lentil + Leek Crumbles ("the Product" or "the Crumbles"). After consuming the Product, Plaintiff experienced gastrointestinal

illness and was hospitalized. Her initial symptoms included fever, nausea, abdominal pain, chills and joint pain. She subsequently had her gallbladder removed. (Doc. 1, ¶¶ 23-33).[2]

Around this same time, a number of related actions were filed against the Settling Defendants. Those filed in federal court were transferred to the District Court for the Southern District of New York and assigned to the Hon. Denise Cote. Those filed in New York State Supreme Court have been consolidated for discovery purposes and remain in that Court; and since that time, they have been following the directives of the Hon. Denise Cote of the Southern District of New York in these proceedings.

These lawsuits and similar unfiled claims (collectively, the "Daily Harvest Litigation" or "Litigation") all seek to recover damages in connection with personal injuries allegedly caused by the consumption of French Lentil + Leek Crumbles manufactured by Stone Gate Foods and distributed and sold by Daily Harvest. Defendants filed their respective answers, which articulated various denials, defenses, and crossclaims.

On July 27, 2022, Daily Harvest moved to compel arbitration pursuant to its agreement with Plaintiff. The Court granted that motion on November 10, 2022. *See* Dkt. No. 36. The parties did not proceed with arbitration, however, because global settlement discussions ensued as described below. As part of this settlement, the parties have agreed that a class settlement is the most appropriate vehicle for resolving the various filed and unfiled claims.

On April 28, 2023, the District Court for the Southern District of New York entered a Coordination Order for all Related Actions in the Daily Harvest Litigation. With the oversight of

[2] On August 17, 2022, Plaintiff Peni filed an Amended Class Action Complaint naming Stone Gate Foods as a defendant. (Doc. 21). After the claims were directed to arbitration against Daily Harvest (Doc. 36), Plaintiff stipulated to discontinue her claims against Stone Gate Foods without prejudice. (Doc. 47).

this Court, the case entered the discovery stage. The parties then exchanged many thousands of pages of documents and information, including correspondence among the parties, scientific studies about the use of tara flour in food, and medical reports for hundreds of claimants.

On November 13, 2023, the Settling Parties participated in a full-day mediation session with the Hon. Sarah L. Cave, Magistrate Judge. At the conclusion of the mediation session, Daily Harvest and Stone Gate Foods agreed in principle to settle the claims against them, subject to the negotiation of a separate Settlement Agreement and Court approval. On May 22, 2024, the Court issued an Order Granting Preliminary Approval of a class settlement with defendants Daily Harvest and Stone Gate (Doc. 77) and has scheduled a Final Approval Hearing for October 15, 2024. (Doc. 78).

B. Summary of the Settlement Negotiations

The proposed Settlement Agreement was reached as the result of extensive arm's length negotiations among the Settling Parties and their respective counsel. As set forth in the Joint Declaration of Plaintiff's Counsel, the parties participated in multiple settlement conferences with Magistrate Judge Cave and intense settlement negotiations continued beyond those court conferences in many private sessions. The parties thereafter worked towards drafting and finalizing the proposed Settlement Agreement, which is summarized below.

All parties have vigorously litigated the claims. Through extensive research, investigation, and fact discovery during this litigation, the parties have thoroughly investigated and analyzed all relevant factual and legal issues, assessed the strengths and weaknesses of their claims and defenses, and concluded thereby that the proposed Settlement Agreement is fair, reasonable, and adequate for the Settlement Class as a whole.

Plaintiff's Counsel, in assessing the merits of the proposed Settlement Agreement, considered the risks and uncertainties of ultimately prevailing at trial in light of various factors. As with any litigated case, Plaintiff and the putative Class Members face an uncertain outcome at trial, including the risk of enforcing a judgment because of the limited insurance coverage available to satisfy the hundreds of claims asserted against the Settling Defendants. The proposed Settlement Agreement eliminates the attendant risks of litigation by providing Plaintiff and the Settlement Class a substantial and certain recovery of valuable benefits in a timely manner and avoiding further delay and the risk of loss that might result from further litigation, trial, and appeals.

Pursuant to the Settlement Agreement, upon the Court's granting of the Preliminary Approval Order, Plaintiff shall file the Amended Class Action Complaint against the Settling Defendants (Exhibit A). The claims against the Settling Defendants would then be stayed in all pending actions, and then dismissed if the Court grants a Final Approval Order and Judgment approving the Class Settlement (Exhibit D).

For these reasons discussed below, the proposed Settlement Agreement satisfies all of the prerequisites for preliminary approval and certification of the Settlement Class.

SUMMARY OF THE TERMS OF THE PROPOSED SETTLEMENT

The key components of the proposed Settlement Agreement are set forth below.

A. The Proposed Rule 23(b)(3) Class

For the purposes of settlement, the Settling Parties request that the Court conditionally certify that the proposed settlement class (the "Settlement Class") be defined as follows:

> All persons in the United States (including its territories) who purchased, received, or consumed French Lentil + Leek Crumbles ("the Product" or "the Crumbles") and directly suffered personal injuries caused by the consumption of the Crumbles, and all persons in the United States (including its territories) who suffered consequential monetary damages arising from or related to another

> person's personal injuries arising from consumption of the Crumbles.

(Ex. 1, SA at ¶ 1.12).

B. The Proposed Class Notice

The Settling Insurers, on behalf of Smirk's, will contribute $25,000 towards the payment of the Class Notice. Molinos, which is uninsured, will also contribute $25,000 towards the Notice, for a total of $50,000.

The Settlement Agreement provides for the proposed Class Notice and settlement claims procedure to be administered by a neutral Settlement Administrator, who is responsible for disseminating the Class Notice, establishing the Settlement Website, receiving Opt-Out requests and Objections, receiving Claim Forms, reviewing and evaluating claims, allocating individual awards to class members, and distributing settlement proceeds to approved claimants. A summary of the proposed timetable for the notice and administration process is detailed further below.

The Settlement Agreement provides for dissemination of a Notice of Proposed Class Action Settlement (Exhibit C) within 20 business days of entry of the Preliminary Approval Order. (SA ¶ 7). The Settling Defendants shall provide the Settlement Administrator with the Class Notice List, which will include the names, last known email addresses, and, if no e-mail addresses are available, postal addresses, to the extent available, belonging to Class Members. (SA ¶ 6).

Shortly after receiving the Class List, the Settlement Administrator will send the Notice via email. The parties have email contact information for most class members and the Settlement Administrator will send the Notice by U.S. mail to those for whom email contact information is not available or to whom email transmission is not successful. (SA ¶ 7). The Notice will provide Class Members with pertinent information regarding the Settlement, direct them to the Settlement

Website, and show contact information for Class Counsel. The Notice shall advise the Class Members of their rights under the Settlement, including the procedures specifying how to request exclusion from the Settlement or submit an objection to the Settlement.

On the date of issuance of the Notice, the Settlement Administrator shall post the Settlement Website, which will include the Settlement Agreement, the Notice, relevant pleadings and Court orders regarding the Settlement, and a list of frequently asked questions mutually agreed upon by the Parties. Contact information for the Settlement Administrator, including a toll-free number, as well as Settlement Class Counsel's contact information will also be provided. (SA ¶ 1.44)

The form and method of the Class Notice agreed to by the Settling Parties satisfies all due process considerations and meets the requirements of Rule 23(e)(1)(B). The proposed Class Notice describes plainly: (i) the terms and effect of the Settlement Agreement; (ii) the time and place of the Final Approval Hearing; (iii) how the recipients of the Class Notice may object to the Settlement; (iv) the nature and extent of the release of claims; (v) the procedure and timing for objecting to the Settlement; and (vi) the form and methods by which Class Member may either participate in or exclude themselves from the Settlement. (Exhibit C).

C. Monetary Terms

The proposed Settlement Agreement provides for a monetary settlement of Seven Million, Six Hundred and Seventy-One Thousand Dollars ($7,671,000.00) to be allocated among the Class Members who submit an approved Claim Form through a claims process (the "Settlement Program") to be administered by the court-appointed Settlement Administrator. (SA ¶¶ 32-35). The settlement will completely resolve the litigation of all claims as to the Settling Defendants,

permitting the Court to dismiss said claims and enter judgment if the settlement is approved following the Final Approval Hearing.

The proposed Settlement Agreement provides that the costs to administer the settlement are to be reimbursed and paid from the Settlement Fund. (SA ¶ 1). The proposed Settlement Agreement allocates no more than $500,000 to pay for expenses of the Settlement Administrator, on top of the $500,000 previously designated for the Daily Harvest-Stone Gate Settlement. Any remaining funds shall be distributed to claimants on a pro rata basis. (SA ¶ 31).

Smirk's and its insurers shall hold back $753,712.16 from the Citizens/Hanover policies for claims already made against the Citizens/Hanover policies (the "Claims Hold Back Amount"). (SA ¶ 1.25). Within thirty (30) days of The Hanover's closing of all claims related to the Claims Hold Back Amount, Hanover shall provide the plaintiff with a written statement of the amounts paid, along with reference claim numbers used in the resolution of the unrelated pending claims against Smirk's, once all such claims are resolved. If any of the $753,712.16 is not paid on those other claims, within thirty (30) days of The Hanover's closing of all claims related to the Claims Hold Back Amount, Hanover will pay the remainder of the unpaid amount to the Qualified Settlement Fund and it will then be distributed to the members of the Class Action on a pro rata basis.

D. Opt-Out Procedure and Holdback

Class Members have 35 days from the Notice Date to opt-out of the proposed Settlement. (SA ¶ 1.31). Opt-out requests may be submitted online or by mail. (SA ¶ 13). Under the terms of the Settlement, Smirk's shall have 14 days after receipt of the Opt-Out List to determine, what amount, if any, it will hold back from payment into the Settlement Fund to cover its reasonable material exposure relative to the potential litigation or claims by the Opt-Outs (the "Class Action

Hold Back Amount"). (SA ¶ 18). The Settlement Agreement provides a process for the Parties to reach an agreement on any Hold Back Amount exceeding 10% of the total value of the Settlement. (SA ¶ 19). The Hold Back Amount, if any, will be posted promptly on the Settlement Website and information about this process is included in the Notice. Any remaining funds will be paid to members of the Class Action by no later than December 31, 2026. (SA ¶ 23).

Because the final amount of funds available to members of the Settlement Class, net of the Hold Back Amount, will not be known until the Hold Back Amount is determined, the Settlement Agreement provides that the deadline for Settlement Class Members to object to the settlement has been set for a date *after* the Hold Back Amount has been published, coinciding with the deadline for Settlement Class Members to file claims. The parties have departed from the customary procedure of setting the opt-out and objector deadlines for the same date because (1) the Hold Back Amount cannot be set until the number and profile of opt-outs are known, but (2) Settlement Class Members will not be aware of the settlement's exact financial contours until they are made aware of the Hold Back Amount.

E. Claim Forms, Monetary Awards, and Appeals

The net Settlement Funds will be distributed to Class Members who file a Claim Form and meet the Eligibility Requirements for the payment of a Monetary Benefit. Each Claim Form shall be evaluated by the Settlement Administrator pursuant to the Allocation Matrix to determine the amount of the Monetary Benefit award. (SA ¶ 32). The Settlement Program includes a Cure Period to submit any supplemental Required Documentation in support of the Claim. (SA ¶ 36). Class Members shall have the right to serve an Appeal upon the Settlement Administrator if their claim is denied. A Claimant who disagrees with the appeal ruling of the Settlement Administrator may appeal to the Court within fourteen (14) days of the Settlement Administrator's appeal

determination by submitting a written statement to the Court at Attn: Hon. Judge Denise Cote, Case No. 1:22-cv-05443-DLC, United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007, outlining the Claimant's position and why the Claimant believes the Settlement Administrator has erred. The appeals process shall not result in any modification of substantive eligibility criteria. The Court shall issue a determination on the appeal in writing, which shall be served on the Claimant (and the Claimant's counsel, where applicable) and the Settlement Administrator. Decisions of the Court are final and binding. (SA ¶ 37).

By submitting a Claim Form, a Class Member shall be deemed to have submitted to the jurisdiction of the Court with respect to the Claim, including, but not limited to, the terms of the Settlement Agreement and the releases provided for in the Final Approval Order and Judgment. (SA ¶ 38).

F. Attorney's Fees and Costs

The proposed Class Counsel are not requesting an award of attorneys' fees directly from the Settlement Fund. Rather, Class Counsel and the attorneys for individual Class Members shall be compensated pursuant to the retainer agreements between Plaintiffs, Class Members, and their respective counsel. (SA ¶ 55). If a Class Member is not represented by counsel and does not have an attorney lien resulting from previous representation relating to the Crumbles, however, then any Monetary Benefit awarded to said Unrepresented Claimant shall be reduced by one-third (1/3) under the terms of the Settlement Agreement. In effect, Class Counsel is requesting that the Court make a one-third attorney's fee award for any Monetary Benefit paid to Unrepresented Claimants, but the value of said fee award be deposited back into the Settlement Fund. This has the effect of ensuring that class members alleging similar injuries are not compensated differently based on one

class member having engaged counsel and the other not. Class Counsel submits that the proposed one-third reduction represents a fair method of allocating the Settlement Funds to Unrepresented Claimants and treats each Class Member equitably.

G. Dismissal and Release of Claims

Upon entry of the Final Approval Order, the Settlement Class Members shall be deemed to have forever released any and all claim against the Settling Defendants for any damages arising from or related to personal injury caused by the consumption of the French Lentil + Leek Crumbles. (SA ¶ 56). These releases are also described in the proposed Notice (Exhibit C) and Claim Form (Exhibit E).

H. Summary of Proposed Timetable

The parties request that the Court schedule a Final Approval Hearing 143 days after the order granting preliminary approval. *See* 2 Joseph M. McLaughlin, MCLAUGHLIN ON CLASS ACTIONS § 6:18 (11th ed. 2014) ("Courts have consistently held that 30 to 60 days between the mailing (or other dissemination) of class notice and the last date to object or opt out, coupled with a few more weeks between the close of objections and the settlement hearing, affords class members an adequate opportunity to evaluate and, if desired, take action concerning a proposed settlement.").

To afford the putative class adequate notice and opportunity to be heard, Plaintiff proposes the following timetable of settlement-related events:

EVENT	TIME FOR COMPLIANCE
Deadline for Parties to deposit funds into Qualified Settlement Fund ("QSF") for administration costs.	10 business days after entry of preliminary approval order.

Deadline for publication and emailing of settlement notice to begin.	20 business days after entry of preliminary approval order.
Deadline for class members to: • Submit an Opt-Out request to be excluded from the Settlement; • File an Objection to the Settlement; and/or • File intention to appear at Final Approval Hearing.	35 days after first publication/emailing of notice.
Deadline for attorneys representing any Class Member objecting to the Settlement to enter their appearance.	75 days after first publication/mailing of notice.
Deadline for Class Members to submit a Claim Form.	75 days after first publication/emailing of notice.
Deadline for the Settling Parties to file motion for final approval of the proposed Settlement.	No later than fourteen (14) days prior to the Final Approval Hearing.
Deadline for Parties to file all papers in response to any timely and valid Objections.	Fifteen (15) business days prior to Final Approval Hearing.
Final Approval Hearing.	143 days after preliminary approval hearing.

ARGUMENT

POINT I

THE SETTLEMENT SATISFIES THE CRITERIA FOR PRELIMINARY APPROVAL.

Courts emphasize the "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores v. Visa U.S.A.*, 396 F.3d 96, 116 (2d Cir. 2005) ("The

compromise of complex litigation is encouraged by the courts and favored by public policy.") (citing 4 NEWBERG § 11:41, at 87); *see also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged"). As remarked by the Second Circuit:

> A court may approve a class action settlement if it is fair, adequate, and reasonable, and not a product of collusion. A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement. A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.

Wal-Mart Stores, 396 F.3d at 116. A district court's decision to approve a class settlement is given considerable deference. *See Joel A. v Giuliani*, 218 F3d 132, 139 (2d Cir 2000) ("The trial judge's views are accorded 'great weight … because he is exposed to the litigants, and their strategies, positions and proofs.... Simply stated, he is on the firing line and can evaluate the action accordingly.'"). Here, preliminary approval of the proposed Settlement Agreement is appropriate as it satisfies all criteria for preliminary approval. Accordingly, Plaintiff requests that the Court grant the requested relief.

A. The Legal Standard for Preliminary and Final Approval.

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval for the settlement of class actions. *See generally*, William B. Rubenstein, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 11.41 (6th ed. 2022) ("NEWBERG"). "The District Court determines a settlement's fairness by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms." *D'Amato v Deutsche Bank*, 236 F3d 78, 85 (2d Cir 2001). The 2018 amendments to Rule 23 enumerate four principal factors for the Court to consider as part of this inquiry: (1) adequacy of representation, (2) existence of arm's-length negotiations,

(3) adequacy of relief, and (4) equitableness of treatment of class members. *See* Rule 23(e)(2). Specifically, Rule 23(e)(2) provides that final approval of a class settlement requires:

> (2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Rule 23(e)(2) (effective December 1, 2018).

The approval process is a two-step process. "Preliminary approval of a proposed settlement is the first [step] … [a]t this stage, [the court] need only decide whether the terms of the proposed Settlement are at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard.]" *Richard v Glens Falls Natl. Bank*, 120-CV-00734 BKS/DJS, 2022 WL 1102451, at *1 (N.D.N.Y. Apr. 13, 2022) (internal quotations and citations omitted). "This analysis 'is a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness.'" *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 11 MD 2262 (NRB), 2018 WL 3475465, at *1 (S.D.N.Y. July 19, 2018) (quoting *In re Traffic Exec. Ass'n E. R.Rs.*, 627 F.2d 631, 634 (2d Cir. 1980)); *see also* MANUAL FOR COMPLEX LITIGATION § 21.632-633 (4th ed. 2004). After the fairness hearing, the court may grant final approval of the settlement.

Prior to the 2018 amendments, courts in the Second Circuit considered whether a settlement was "fair, reasonable, and adequate" under the nine-factor test enunciated in *City of*

Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974).[3] The Advisory Committee Notes to the 2018 amendments state that the revised Rule 23 factors were intended to focus rather than displace the *Grinnell* factors. See Rule 23(e)(2), Advisory Committee Notes (2018) ("The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal."). The *Grinnell* factors are:

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

See 495 F.2d at 463 (citations omitted); *see also Wal-Mart Stores*, 396 F.3d at 116 (applying *Grinnell* factors).

As stated above, at the preliminary approval stage, a court need not address every factor; and the determinative inquiry is whether the proposed settlement appears sufficiently fair,

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[3] The part of the decision in *Grinnell* related to attorney fee awards was abrogated by *Goldberger v. Integrated Resources, Inc.*, 209 F3d 43 (2d Cir 2000).

reasonable and adequate. *See In re Traffic Exec. Ass'n E. R.Rs.*, 627 F.2d at 634 (noting that preliminary approval is a "determination" of whether there "might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness"). Here, the proposed Settlement is fair on both procedural and substantive grounds.

B. The Settlement is the Product of Good Faith, Informed and Arm's Length Negotiations.

"A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Wal-Mart Stores, Inc. v Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir 2005) (quoting MANUAL FOR COMPLEX LITIGATION, Third § 30.42)); *see also Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir.1982) (same). Here, as set forth in the accompanying Joint Declaration of William D. Marler, James R. Peluso, and Jeffrey A. Bowersox, Plaintiff's counsel believes that the terms of the proposed Settlement are fundamentally fair, reasonable, and adequate, especially when considering all the risks associated with litigating this matter further. Notably, the proposed Settlement is the product of arm's length negotiations between experienced counsel who are knowledgeable in class litigation, thoroughly investigated the claims, engaged in significant fact and expert discovery, duly considered and analyzed the complex legal issues in this case, and have experience with cases involving similar personal injury claims arising from foodborne illnesses, including class settlement of such claims.

Further, the Parties participated in multiple, extensive settlement conferences with Magistrate Judge Cave and retired Judge Peter B. Skelos. The participation of Judge Cave and retired Judge Skelos ensured that the settlement negotiations were conducted at arm's length and without collusion between the Parties. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting that a neutral "mediator's involvement in . . . settlement negotiations helps to

ensure that the proceedings were free of collusion and undue pressure"); *Cavalieri v Gen. Elec. Co.*, No. 06-CV-315 (GLS/DRH), 2009 WL 2426001, at *2 (N.D.N.Y. Aug. 6, 2009) (same).

C. The Settlement is Fair, Adequate and Reasonable.

The proposed Settlement Agreement should be granted preliminary approval under Rule 23(e) and the *Grinnell* factors. The terms of the Settlement are at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard.

1. Complexity, Expense, and Likely Duration of the Litigation.

Settlements are favored in class actions, which "'are generally complex … and consume tremendous time and financial resources.'" *Elliot v. Leatherstocking Corp.*, 3:10-CV-0934 MAD/DEP, 2012 WL 6024572, at *4 (N.D.N.Y. Dec. 4, 2012). "Litigation through trial would be complex, expensive, and long. Therefore, the first *Grinnell* factor weighs in favor of final approval." *Cruz v Sal-Mark Rest. Corp.*, 1:17-CV-0815 (DJS), 2019 WL 355334, at *4 (N.D.N.Y. Jan. 28, 2019); *see also In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 318 (3d Cir.1998) (stating that a settlement is favored where "trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court"). Here, the action has been diligently and extensively litigated by both sides. Significant work has been done, including but not limited to: motion practice at the pleading stage; extensive document and electronic discovery practice; motion practice on discovery issues; review and analysis of a significant volume of documents produced; consultation with experts; extensive research and evaluation of complex legal issues; and participation in extensive court assisted settlement negotiations. "Settlement at this juncture results in a substantial and tangible present recovery, without the attendant risk and delay of trial. These factors weigh in favor of the proposed Settlement." *Maley v Del Glob. Tech. Corp.*, 186 F Supp 2d 358, 362 (S.D.N.Y. 2002);

see also Slomovics v All for a Dollar, Inc., 906 F Supp 146, 149 (E.D.N.Y 1995) ("The potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class."). Accordingly, this factor warrants the granting of preliminary approval.

2. Reaction of the Class to the Settlement.

Class Notice has not yet been disseminated. Consequently, Class Members have not yet had the opportunity to consider or opine on the Settlement. As such, Class Counsel will address this factor at the Final Approval Hearing. However, the signatory Plaintiff's counsel to the Settlement Agreement supports the Settlement.

3. Stage of the Proceedings and the Amount of Discovery Completed.

Plaintiff's Counsel has adequate appreciation of the facts and merits of this case to recommend settlement. *See Cruz*, 2019 WL 355334, at *5 ("The parties have completed enough discovery to recommend settlement."). As discussed, the Settling Parties engaged in extensive investigation and other litigation efforts throughout the prosecution of the Litigation, including, inter alia: (1) researching and drafting the initial and amended complaints in the Litigation; (2) researching the applicable law with respect to the claims in the Litigation and the potential defenses thereto; (3) engaging in significant witness and fact discovery, including exchanging many thousands of pages of documents and information, including correspondence among the parties, scientific studies about the use of tara flour in food, and disclosure of medical records for hundreds of claimants; (4) engaging in extensive settlement discussions; and (5) participating in court-assisted mediation and settlement conferences. See Joint Decl. ¶ 19. All of the foregoing has allowed Plaintiff to develop a comprehensive picture of the liability and damages at issue, as well as Defendants' ability to pay.

4. Risks of Establishing Liability and Damages.

Plaintiff and her counsel are confident in the strength of their case, but they are also pragmatic about the risks inherent to litigation and establishing liability and damages. Here, the Plaintiff's claims against the Settling Defendants present unique factual and legal issues related to the injuries caused by the Crumbles, including issues related to liability and causation concerning the supply, manufacture, sale, and consumption of tara flour. "Those risks include[] an unfavorable decision on summary judgment, an unfavorable outcome at trial, and lengthy appeals even if Plaintiff[] prevailed. Such risks could limit recovery, or eliminate it altogether." *In re Facebook, Inc., IPO Sec. and Derivative Litig.*, 343 F. Supp. 3d 394, 412 (S.D.N.Y 2018), aff'd sub nom. *In re Facebook, Inc.*, 822 Fed Appx 40 (2d Cir 2020). Further, "[t]he risk of maintaining the class status through trial is also present. Although Plaintiff has not yet moved for Rule 23 class certification, any such motions would be highly contested." *Cruz*, 2019 WL 355334, at *5.

5. Risks of Maintaining the Action Through Trial.

The risk of obtaining class certification and maintaining it through trial also supports settlement. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004) (concluding an "appreciable risk to the class members' potential for recovery" should defendants contest class certification, including the risk of decertification at a later stage in the litigation). The Parties would have to first litigate a motion for class certification, and then if granted, Defendants might seek to file an appeal. *See Hanifin v Accurate Inventory and Calculating Serv., Inc.*, No. 11-CV-1510 (MAD/ATB), 2014 WL 4352060, at *6 (N.D.N.Y. Aug. 20, 2014) (discussing the risk of a motion to decertify the class and that "[s]ettlement eliminates the risk, expense, and delay inherent in the litigation process").

6. Ability of Defendant to Withstand a Greater Judgment.

"A defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Flores v. Anjost Corp.*, No. 11-CV-1531 (AT), 2014 WL 321831, at *6 (S.D.N.Y. Jan. 29, 2014) (internal quotations and citations omitted). This factor alone is not an impediment to settlement when other factors favor the settlement. *See In re Vitamin C Antitrust Litig.*, No. 06– MD–1738 (BMC)(JO), 2021 WL 5289514, at *6 (E.D.N.Y. Oct. 23, 2012) (acknowledging that "'in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and . . . this fact alone does not undermine the reasonableness of the instant settlement.'"). Although Smirk's and Molinos together may have the ability to withstand a greater judgment, the outstanding result—a $7,671,000 settlement—is still fair, reasonable, and adequate to compensate the proposed Settlement Class, and weighs in favor of preliminary approval.

7. Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All the Attendant Risks of Litigation.

"[T]here 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—and the judgment will not be reversed if the appellate court concludes that the settlement lies within that range." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.1972); *see also Wal-Mart Stores*, 396 F.3d at 119 (same). "This inquiry measures the value of the settlement itself to determine whether the decision to settle represents a good value for a relatively weak case or a sell-out of an otherwise strong case." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 806 (3d Cir. 1995). However, "[t]he reasonableness of the Settlement must be judged 'not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and

weaknesses of plaintiffs' case.'" *Shapiro v JPMorgan Chase & Co.*, No. 11-CV7961 (CM), 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014) (quoting *In re "Agent Orange" Prod Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y.1984)).

Here, the proposed Settlement Agreement confers a substantial and real benefit on the Settlement Class in a case involving a novel and complex product liability claim. As discussed in the Joint Declaration of Plaintiff's Counsel, the instant litigation alleging foodborne illness caused by the consumption of tara flour is the first of its kind, and the proposed $7,671,000 settlement represents the remainder of Smirk's insurance coverage. Accordingly, it is submitted that the settlement is within the range of reasonableness in light of the best possible recovery and attendant risks of litigation.

8. The Method of Distributing the Settlement Funds, the Release, and Equitable Treatment of Class Members Favors Preliminary Approval.

The proposed method of distributing the settlement funds, the proposed release, and the equitable treatment of class members relative to each other also favors approval under Rule 23(e)(2). Consideration under this factor "could include 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, Advisory Committee Notes (2018).

Here, the Settlement Administrator will consider each Class Members' claim pursuant to a set of uniform criteria in considering, evaluating and making individual settlement awards. (Ex. G, Allocation Model). Any Class Member has the right to exclude themselves from the Settlement Class and pursue their own claim. Further, the proposed release's scope applies uniformly to the members of the Settlement Class and does not affect apportionment of the relief among the Class Members. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D.

11, 47 (E.D.N.Y. 2019) (approving release that applies uniformly to all class members and has no effect on apportionment of settlement proceeds).

9. Attorneys' Fees and Costs.

Finally, the Class Counsel are not seeking compensation for attorneys' fees directly from the Settlement Fund. Pursuant to the Settlement Agreement, Class Counsel and the attorneys for individual claimants shall be compensated pursuant to the retainer agreements between plaintiffs, claimants, and their respective counsel, if any. (SA ¶ 55). The Settlement Administrator will make any Settlement Benefit awarded to a Class Member payable in the name of the Class Member and/or their attorneys.

If a Class Member is not represented by counsel and does not have an attorney lien resulting from previous representation relating to the Crumbles, then any Monetary Benefit awarded to said Unrepresented Claimant shall be reduced by one-third (1/3) under the terms of the Settlement Agreement. In effect, Class Counsel is requesting that the Court make a 33.33 percentage attorney's fee award for any Monetary Benefit paid to Unrepresented Claimants, however, that the value of said fee award be deposited back into the Settlement Fund. Plaintiff and Class Counsel submit that the proposed one-third (1/3) reduction for Unrepresented Claimants represents a fair method of allocating the Settlement Fund among Unrepresented Claimants and treats each Class Member equitably.[4]

[4] *See e.g., Gilliam v. Addicts Rehabilitation Ctr. Fund*, 05 CIV. 3452 (RLE), 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (approving class settlement and awarding class counsel fees of "one-third of the common fund after deduction of legal costs, which is consistent with the norms of class litigation in this circuit"); *Velez v. Novartis Pharm. Corp.*, No. 04 CIV 09194 CM, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) ("The federal courts have established that a standard fee in complex class action cases like this one, where plaintiff's counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit," which includes the value of both monetary and nonmonetary relief, and "[d]istrict courts in the Second Circuit routinely award attorneys' fees that are 30 percent or greater.").

Thus, all applicable factors support preliminary approval of this proposed Settlement.

POINT II

THE PROPOSED CLASS MERITS CERTIFICATION FOR SETTLEMENT PURPOSES.

A. The Rule 23(b)(3) Class Should Be Certified as Provided For in the Settlement Agreement.

Plaintiff requests that the Court certify the proposed Rule 23(b)(3) class for settlement purposes. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Here, the parties have agreed to a class settlement to resolve the hundreds of individual personal injury claims arising from the consumption of the Crumbles. The settlement provides an efficient and resource savings mechanism to globally resolve these claims, without the need to litigate at hundreds of individual trials, issues of proof specific to any class member, such as causation or damages.

Moreover, courts have certified, pre-settlement, personal injury actions arising out of a common nucleus of operative facts, including outbreaks of food and waterborne illness.[5] *See* Ex. G & Ex. H.

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[5] *Bellotti v. Smiley Brothers Inc.*, 2014 WL 10962079 (Sup. Ct. Ulster County December 15, 2014) (certifying class action on behalf of hundreds of persons who suffered personal injuries and gastrointestinal illness from norovirus outbreak); *Matter of Arroyo v State,* 12 Misc. 3d 1197(A), 824 N.Y.S.2d 767 (Ct. Cl. 2006) (certifying class action on behalf of 2,500 persons who suffered personal injuries and gastrointestinal illness from cryptosporidium outbreak); *see also Baker et al. v. SF HWP Management LLC et al*. (Sup. Ct. Washington County June 8, 2009) (certifying class action on behalf of hundreds of persons who suffered personal injuries and gastrointestinal illness from norovirus outbreak) (Unreported decision attached to Joint Decl. at Ex. H).

Further, applying the 2018 amendments to Rule 23(e), it is appropriate for the Court to preliminarily certify the class for settlement purposes as fair, adequate, and reasonable. Here, the proposed Settlement Class plainly satisfies the four elements of Rule 23(a), and the applicable factors under Rule 23(b)(3).

B. Rule 23(a) Requirements Are Satisfied.

To certify a class under Rule 23(a), a plaintiff must establish that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the settlement class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the settlement class; and (4) the representative parties will fairly and adequately protect the interests of the settlement class. Rule 23(b)(3) certification is appropriate if questions of law or fact common to the class members predominate over individual issues of law or fact, and if a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Here, all elements are clearly satisfied.

1. <u>23(a)(1) - "Numerosity."</u>

The proposed Class is sufficiently numerous. Class certification under Rule 23(a)(1) is appropriate where a class contains so many members that joinder of all would be "impracticable." Fed. R. Civ. P. 23(a). "Impracticable does not mean impossible," *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993), but "only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 244-45 (2d Cir. 2007). A plaintiff does not need show that joinder is impossible, and need not show the "exact class size or identity of class members." *Hill v. County of Montgomery*, No. 9:14-CV-933 (BKS/DJS), 2017 WL 9249663,

at *16-17 (N.D.N.Y. Sep. 29, 2017). Numerosity is presumed when a class consists of forty members or more. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

Here, the Settlement Class easily satisfies the numerosity requirement. The Settlement Class is comprised of all consumers of the Product. This includes eighty-four (84) active lawsuits filed in New York federal and state courts, of which sixty-one (61) are pending in the Southern District of New York. Four hundred forty-nine (449) Class Members are represented by counsel who have signed the proposed Settlement Agreement. *See* Joint Decl. ¶ 18. Furthermore, the Court has found that it was necessary to enter into a Coordination Order to enhance judicial efficiency, avoid undue burden and promote the just and coordinated resolution of all the cases. Given the number of cases currently pending and the number of prospective plaintiffs, the proposed Settlement Class amply satisfies the numerosity requirement.

2. Rule 23(a)(2) – "Commonality."

The proposed Class also satisfies the commonality requirement. *See generally Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 357-360 (2011). Not all questions of fact and law need to be common. "[F]or the purposes of Rule 23(a)(2) 'even a single [common] question' will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (internal quotations and citations omitted). A question of law or fact is common to the class if "capable of classwide resolution—which means that its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350). "In other words, the relevant inquiry is whether a classwide proceeding is capable of 'generat[ing] common answers apt to drive the resolution of the litigation.'" *Jacob v Duane Reade, Inc.*, 602 Fed. App'x. 3, 6 (2d Cir 2015) (quoting *Dukes*, 564 U.S. at 350). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 137

(2d Cir. 2015) (quoting *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014)).

Moreover, "[t]he claims for relief need not be identical for them to be common; rather Rule 23(a)(2) simply requires that there be issues whose resolution will affect all or a significant number of the putative class members." *Zivkovic v. Laura Christy LLC*, 329 F.R.D. 61, 69 (S.D.N.Y. 2018). Rule 23(a)(2) is a "low hurdle." *Fort Worth Employees' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 131 (S.D.N.Y. 2014) ("the commonality requirement is met if plaintiffs' grievances share a common question of law or of fact"); *See also In re Beacon Associates Litig.*, 282 F.R.D. 315, 327 (S.D.N.Y. 2012) ("In general, where putative class members have been injured by similar material misrepresentations and omissions, the commonality requirement is satisfied."); *In re Pfizer Inc. Sec. Litig.*, 282 F.R.D. 38, 44 (S.D.N.Y. 2012) (commonality requirement is satisfied where it is alleged that "putative class members have been injured by similar material misrepresentations and omissions").

Here, commonality exists because the Class Members' claims are predicated on common core issues:

1. Whether Settling Defendants placed into the stream of commerce a food ingredient, namely tara flour, that was unreasonably dangerous, defective, adulterated, and/ or otherwise not fit for human consumption;

2. Whether Settling Defendants failed to exercise reasonable care in the importation, testing, and distribution of the food ingredient to ensure that it was not unreasonably dangerous, defective, adulterated, and or otherwise not fit for human consumption prior to its incorporation into a larger food product;

3. Whether Settling Defendants failed to adequately monitor the safety of the food ingredient tara flour;

4. Whether Settling Defendants failed to adequately warn Plaintiff and the putative Class of the dangers that accompanied the use and consumption of any product that contained tara flour as an ingredient, here specifically French Lentil + Leek Crumbles;

5. Whether Settling Defendants failed to take reasonable steps to prevent the public's exposure to gastrointestinal illness via consumption of the tara flour contained in the French Lentil + Leek Crumbles;
6. Whether Settling Defendants violated applicable laws, rules, and regulations including, but no limited to sections 199-a and 200 of the NYS Agriculture and Markets Law and section 331 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C., § 301 et seq.
7. Whether certification of the Class proposed herein is appropriate under Rule 23;

As such, the Rule 23 Class raises common questions of law and fact which arise from a "common nucleus of operative facts" with respect to their claims against Defendant. *See Guadagna v Zucker*, 332 FRD 86, 93 (E.D.N.Y. 2019) ("Where the question of law involves standardized conduct of the defendant to the plaintiff, a common nucleus of operative fact is typically presented and the commonality requirement is usually met.").

3. Rule 23(a)(3) – "Typicality."

Rule 23(a)(3) requires that the claims of the class representatives be "typical" of the claims of the class. Fed. R. Civ. P. 23(a)(3). Typicality is established where "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Cent. States Se. v. Merck-Medco*, 504 F.3d 229, 245 (2d Cir. 2007); *In re Pfizer Inc. Sec. Litig*, 282 F.R.D. 38, 44 (S.D.N.Y. 2012); *In re Sadia, S.A. Sec. Litig.*, 269 F.R.D. 298, 304-05 (S.D.N.Y. 2010). "Minor variations in the fact patterns underlying individual claims" do not defeat typicality when the defendant directs "the same unlawful conduct" at the named plaintiff and the class. *Robidoux*, 987 F.2d at 936-37. "One purpose of the typicality requirement is to ensure that the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Mazzei v Money Store*, 829 F.3d 260, 272 (2d Cir 2016) (internal quotations, ellipses and citation omitted). "When it is alleged that the same unlawful conduct was directed at or affected both the

named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux*, 987 F.2d at 936. Accordingly, courts evaluate typicality "with reference to the company's actions, not with respect to particularized defenses it might have against certain class members." *Trinidad v. Breakway Courier Sys.*, 05 CIV 4116 (RWS), 2007 U.S. Dist. LEXIS 2914, at *15 (S.D.N.Y. January 12, 2007) (quoting *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996)).

Here, the claims of Plaintiff and all other members of the proposed Settlement Class are based on the same alleged strict liability and negligence of the Settling Defendants. Each Class Member suffered damages arising from consumption of the French Lentil + Leek Crumbles containing Molinos' tara flour, imported by Smirk's. Plaintiff's experiences were typical of all other persons who consumed the Crumbles. Plaintiff and each member of the Settlement Class suffered gastrointestinal illness. Accordingly, Plaintiff's claims arise from the same course of events as the claims of the putative Class, are based on the same legal theories, and would be proven by the same evidence. Notably, the Court has already consolidated the related claims for common discovery and pretrial proceedings. As such, the Plaintiff's claims are typical of the claims of members of the Settlement Class.

4. Rule 23(a)(4) – "Adequacy."

Finally, Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This inquiry "serves to uncover conflicts of the interest between named parties and the class they seek to represent." *Amchem Products. Inc. v. Windsor*, 521 U.S. 591, 625 (1997). The Court must measure the adequacy of representation by two standards: (1) whether the claims of the proposed class representatives conflict with those of the class; and (2) whether their counsel are qualified, experienced, and generally able to conduct

the litigation. *See In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992); *Shapiro*, 2014 WL 1224666, at *15. "Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Martens v. Smith, Barney, Inc.*, 181 F.R.D. 243, 259 (S.D.N.Y. 1998) (quoting *Krueger v. N.Y. Tel. Co.*, 163 F.R.D. 433, 443 (S.D.N.Y. 1995)).

Here, adequacy is readily met, and Plaintiff satisfies both prongs. First, Plaintiff has no interests adverse or "antagonistic" to absent Class Members. Plaintiff seeks to hold the Settling Defendants accountable for, among other things, the sale of food products that were not fit for human consumption. Further, Plaintiff and her counsel have demonstrated allegiance and commitment to the prosecution of the claims, including coordination of the litigation among pending claimants and their counsel. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members.") (citing *In re Drexel Burnham Lambert Grp.*, 960 F.2d. at 291). As such, Plaintiff's interests are perfectly aligned with the interests of absent Class Members, thereby meeting the first adequacy prong.

Second, Plaintiff's counsel is qualified, experienced, and competent in litigating complex food product liability claims, and has an established a successful track record in certifying class claims for foodborne illness. *See* Joint Decl. ¶¶ 26-27. Plaintiff's counsel has and will continue to fairly and adequately represent the interests of the Settlement Class. Therefore, Rule 23(a)(4) is satisfied.

5. Rule 23(b) Requirements Are Satisfied Here.

Under Rule 23(b)(3), a class action should be certified when the court finds that common questions of law or fact predominate over individual issues and a class action would be superior

to other methods of resolving the controversy. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 594, 623. Predominance is satisfied where "'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 Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir 2001) (abrogated on other grounds). Superiority asks the court "to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative methods of adjudication." *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 91 (S.D.N.Y. 2007), affd sub nom. 838 F.3d 223 (2d Cir. 2016); *see also* Fed. R. Civ. P. 23 Advisory Committee Notes, 1966 Amendment, at 385 ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."). The instant case satisfies both requirements.

First, as to predominance, "[c]lass-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 04 CIV. 8144, 2009 U.S. Dist. LEXIS 120953, at *34 (S.D.N.Y. December 23, 2009) (*quoting Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002)). Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005). The predominance requirement "is designed to determine whether 'proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 183 (W.D.N.Y. 2005). Here,

the common issues that exist in this case—such as whether the Settling Defendants breached their statutory and common law duty of care to Plaintiff and the members of the Settlement Class by failing to ensure that the Crumbles were reasonable safe for consumption and to warn of any dangers accompanying such use—clearly predominate over any individual issues that may exist. Notably, the Product consumed by each claimant was uniform, containing the same ingredients, packaging and warnings.

Second, Rule 23(b) factors for weighing superiority each favor class certification. Specifically: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)–(D). Here, the high cost of individualized litigation makes it likely that many Class Members would be unable to obtain relief absent certification of the Settlement Class. Nor is it practical to separately prosecute hundreds of individual claims given the relative amount of damages compared to the enormous investment of time and money required to litigate them. Individual lawsuits would further needlessly waste judicial resources. *See In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 130 (2d Cir 2013) ("Here, substituting a single class action for numerous trials in a matter involving substantial common legal issues and factual issues susceptible to generalized proof will achieve significant economies of 'time, effort and expense, and promote uniformity of decision.'") (quoting Rule 23 Advisory Committee Notes).

Considering these factors, a class action is clearly "superior to other available methods for fairly and efficiently adjudicating" the claims. Moreover, any potential difficulties of managing the class action in further litigation and at trial need not be considered here because the parties

seek to certify the class solely for the purposes of settlement. *See*, *Amchem Products*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial."). In sum, the requirements of Rule 23(b)(3) are satisfied.

Accordingly, the Court should enter an order certifying the Class for settlement purposes only.

POINT III

THE PROPOSED SETTLEMENT NOTICE TO THE CLASS MERITS APPROVAL.

"Rule 23(e)(1)(B) requires the Court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL FOR COMPLEX LITIGATION, §21.312 (internal quotations omitted). "For any class certified under Rule 23(b)(3)--or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)--the court must direct to class members the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). "The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means." *Id*. (emphasis added). The 2018 Amendments to Rule 23 added email as a permissible method of notice. *See* Rule 23 Advisory Committee Notes, 2018 Amendments (noting that "technological change since 1974 has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice").[6]

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[6] "In fact, e-mail notice can be more reliable than traditional mail because it can be effectively tracked. By linking to a website within an e-mail, it is possible to identify which class members have actually received the notice, visited the class website and even whether they downloaded

Such notice "must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." *Id*. "There are no rigid rules for determining whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice merely must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Charron v Pinnacle Group N.Y. LLC*, 874 F. Supp. 2d 179, 191 (S.D.N.Y 2012) (quoting *Wal-Mart Stores, Inc.*, 396 F.3d at 113-14), aff'd sub nom. *Charron v Wiener*, 731 F.3d 241 (2d Cir 2013).

Here, the Parties' proposed notice plan includes email, direct mail (where an email address is unavailable or the email is returned as undeliverable), and a dedicated Settlement Website. (Ex. C, SA at ¶¶ 7, 33). This comprehensive notice plan is intended to fully inform Class Members of the proposed Settlement, and the information they require in order to make informed decisions about their rights. *See Ortega v Uber Tech. Inc.*, 15-CV-7387 (NGG/JO), 2018 WL 4190799, at *11 (E.D.N.Y. May 4, 2018) (approving notice of class settlement via email and then by physical mail if the email is returned as undeliverable); *In re Remicade Antitrust Litig.*, No. 17-CV-04326, 2022 WL 3042766, at *10 (E.D. Pa. Aug. 2, 2022) (finding notice sufficient where notice was sent via email, then by postcard if an email bounced back). The 35-day opt-out period is also consistent "with opt-out periods that other courts in this circuit have approved." *Ortega*, 2018 WL 4190799

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documents from the site." B. Kabateck and A. Torrijos, *Notice 2.0: How Technology is Changing Class-Action Notice Procedures*, 32 No. 2 Class Action Reports ART 2 (March-April 2011).

at *11.

The proposed summary and long form Class Notices contain "simple and straightforward language and not legalese" and "the notice program is robust and is likely to ensure that all members receive notice of the claims and their rights with respect to the settlement." *Caddick v. Tasty Baking Co.*, Case No. 2:19-cv-02106-JDW, 2021 WL 1374607, *2 (E.D. Pa. Apr. 12, 2021).

Accordingly, this Court should approve the form of notice and the method of publication that Plaintiff proposes as they satisfy the due process requirements of Fed. R. Civ. P. 23.

POINT IV

THE PROPOSED PLAINTIFF'S COUNSEL SHOULD BE APPOINTED AS CLASS COUNSEL.

Fed. R. Civ. P. 23(g) requires the Court to examine the capabilities and resources of counsel to determine whether they will provide adequate representation to the class. Here, the proposed Class Counsel easily meet the requirements of Rule 23(g). *See* Joint Decl. at Exhibit G, Firm Resumes. Importantly, Plaintiff is represented by counsel experienced in class action litigation including directly analogous cases. Indeed, proposed Class Counsel have been appointed class counsel in some of the largest outbreaks of food and waterborne illnesses in New York State and the nation. *See* Joint Decl. at Exhibit H. Moreover, Class Counsel's work in this case on behalf of the plaintiff and putative class members in the Related Litigation has been substantial. As such, this Court should not hesitate in appointing Marler Clark, Inc. P.S., Dreyer Boyajian LLP, Heisman Nunes & Hull LLP, O'Connor & Partners, PLLC, and Bowersox Law Firm P.C. as Class Counsel.

CONCLUSION

The proposed Settlement Agreement is fair, reasonable, and adequate. Thus, for all the reasons set forth above, preliminary approval should be, respectfully, granted and the Preliminary Approval Order entered so as to permit the Parties to effectuate notice of the Settlement to the

putative Class.

Dated: October 8, 2024

Respectfully submitted,

/s/ *William D. Marler*

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