UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROSEMARY QUINN, ALAN DUCORSKY, LUIS GUILIN, and KAY ECKLER on behalf of themselves and all others similarly situated, Plaintiffs, v. WALGREEN CO., WAL-MART STORES, INC., and PERRIGO COMPANY OF SOUTH CAROLINA, INC., Defendant.	Civil Action No. 7:12-CV-8187-VB

MEMORANDUM OF LAW IN SUPPORT OF UNCONTESTED AMENDED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Rules

Other Authorities

Plaintiffs Rosemary Quinn, Alan Ducorsky, Luis Guilin, and Kay Eckler hereby submit this Memorandum of Law in support of their amended motion for preliminary approval of the class action settlement pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3).

I. INTRODUCTION.

This action and eight other actions that are part of this proposed class action settlement[1] (collectively, the "Actions") challenge glucosamine chondroitin products manufactured by Perrigo Company of South Carolina, Inc. ("Perrigo") and sold by various retail stores, including Walgreen Co., Supervalu, Inc. and Wal-Mart Stores, Inc. (collectively, with Perrigo, "Defendants"). Plaintiffs respectfully request that the Court grant preliminary approval of the proposed settlement of this class action. After extensive and hard-fought litigation, which included extensive motion practice and investigation, and after extended settlement negotiations that took place over a six month span (with the assistance of two highly regarded mediators), the Plaintiffs in the *Quinn* action, along with the named plaintiffs Brian Calvert, Marc Group, John J. Gross, Randy Nunez, and Christopher Nelson), and Defendants have agreed to a global settlement that will resolve all of the Actions. Plaintiffs' goals in this consumer protection lawsuit were to end what they viewed as misleading representations regarding glucosamine based joint health dietary supplements (the "Covered Products") and to provide monetary relief to customers who purchased the Covered Products. Plaintiffs believe that the Settlement Agreement substantially achieves those goals.

Plaintiffs allege that Defendants market and sell the Covered Products by making misleading representations, contrary to their obligations under various consumer protection laws. First Amended Complaint ("1st Am. Comp."), ¶¶1-3. The labels of the Covered Products state

[1] The eight actions are *Rosemary Quinn, Alan Ducorsky, Luis Guilin, and Kay Eckler v. Walgreen Co., Wal-Mart Stores, Inc., and Perrigo Company of South Carolina, Inc.*, No. 7:12-cv-08187 (S.D.N.Y.); *Guilin v. Walgreen Co.*, No. 1:11-cv-7763 (N.D. Ill.); *Eckler v. Wal-Mart Stores, Inc.*, No. 3:12-cv-00727 (S.D. Cal.); *Nunez v. Supervalu, Inc.*, No. 3:13-cv-00626 (S.D. Cal.); *Calvert v. Walgreen Co.*, No. 2:13-cv-001161 (W.D. Pa.); *Group v. Walgreen Co.*, No. 9:13-cv-81105 (S.D. Fla.); *Gross v. Walgreen Co.*, No. 13-cv-06630 (D. N.J.); *Nelson v. Walgreen Co.*, No. 1:13-cv-01871 (D. Del.). This Motion is being filed on behalf of the named Plaintiffs in all eight actions.

that the products "help rebuild cartilage", "lubricate joints" and "help provide joint comfort." *Id.* Plaintiffs allege these representations are false and deceptive because, among other reasons, it is biologically impossible to rebuild cartilage that has been lost or damaged. *Id.* ¶19. Plaintiffs allege that numerous large scale well-conducted clinical studies (including three sponsored and conducted by the National Institutes of Health) have found no causative relationship between the primary active ingredients in the Covered Products – glucosamine hydrochloride and chondroitin sulfate (alone or in combination) – and improved joint function, regeneration of joint cartilage, or relief from joint discomfort. *Id.* ¶17. Plaintiffs also allege that they purchased the Covered Products because they believed that they would receive the represented benefits and that they would not have purchased the Covered Products if they had known the truth. *Id.* ¶¶20, 21. Defendants deny these allegations and contend that the challenged representations are neither false nor misleading because they are supported by numerous studies that have demonstrated the efficacy of glucosamine and chondroitin. Defendants also argued that they have strong defenses against class certification.

Defendants filed a motion to dismiss Plaintiffs' Complaint, which this Court granted in part and denied in part on August 6, 2013.[3] Thereafter, the parties engaged in multiple full-day, in-person mediation sessions in an attempt to reach a fair settlement. Defendants responded to formal discovery requests as part of the litigation and voluntarily provided substantial discovery in connection with settlement negotiations, including information regarding the number of potential class members, the total sales volume of Covered Products in the United States, and wholesale prices. This information has allowed Plaintiffs to assess the potential damages incurred by the class, as well as the fairness of the settlement. Following numerous and detailed discussions, the parties entered into the Settlement

[3] The Court dismissed Plaintiffs' Breach of Warranty claim but denied dismissal of Plaintiffs' claims under the New York and Connecticut Consumer Protection Statutes and for unjust enrichment.

Agreement (attached as Exhibit 1 to the Declaration of Todd S. Garber ("Garber Dec.')), which resolves all of the claims asserted in all of the Actions.

Thus, Plaintiffs hereby apply for the entry of an order that will: (1) preliminarily approve the Class Action Settlement; (2) preliminarily certify the proposed class described in the Settlement Agreement (the "Settlement Class") for purposes of the settlement; (3) preliminarily designate Plaintiffs and their counsel, Todd S. Garber and Finkelstein, Blankinship, Frei-Pearson & Garber, LLP ("FBFG"), Elaine A. Ryan and Bonnett, Fairbourn, Friedman & Balint, P.C. ("Bonnett Fairbourn"), and Stewart M. Weltman and Stewart M. Weltman, LLC ("Weltman"); R. Bruce Carlson and Edwin J. Kilpela, Jr. of Carlson Lynch, LTD ("Carlson Lynch"); Todd Carpenter and Carpenter Law Group; and James Patterson and Patterson Law Group, APC as Class Counsel for the Settlement Class and FBFG, Bonnett Fairborn, Carlson Lynch, and Weltman as representatives of the Settlement Class Counsel; (4) preliminarily approve the terms of the Settlement Agreement; (5) direct that notice be published pursuant to the terms of the proposed notice plan; (6) find that such notice constitutes the best notice practicable under the circumstances; (7) schedule dates by which the parties and Settlement Class members are to comply with their requirements and obligations as more fully described in the proposed Order filed concurrently herewith; and (8) set a hearing date for the final approval of the proposed settlement and an award of attorneys' fees and costs.

The Court has good cause to grant preliminary approval of this settlement, which is the product of more than six months of vigorous arm's-length negotiations by experienced counsel. The resulting settlement is a fair, reasonable and adequate resolution of all claims. All of the parties were fully aware of the relevant facts and legal claims at issue in the litigation. While this case involves hotly contested factual and legal issues, they are relatively narrow in scope. At issue is whether reasonable consumers would understand Defendants' labels to promise certain health benefits, and whether such claims are supported by reliable science or, as Plaintiffs contend, whether such claims are precluded by

established scientific and medical principles. In particular, Plaintiffs' Counsel are well positioned to evaluate the strengths and weaknesses of the Plaintiffs' claims owing to their review of the Covered Products' labels, their extensive experience and knowledge regarding the scientific and medical issues regarding the efficacy of glucosamine products, and their collective experience litigating cases against other manufacturers of glucosamine products as well as consumer products class actions matters, generally. That the parties reached a settlement before they, and the Court, incurred substantial time and resource costs is not a reason to question the fairness and reasonableness of the settlement, given that Plaintiffs' claims are based on publicly available scientific studies and the labels of the Covered Products, rather than information that is uniquely in Defendant's possession. To the contrary, the parties should be commended for efficiently and expeditiously reaching a fair and reasonable settlement without incurring unnecessary costs.

Preliminary approval of the settlement and conditional certification of the Settlement Class will allow the parties to notify putative Class members of the settlement and of their right to participate, object or opt out. Preliminary approval does not require the Court to rule on the ultimate fairness of the settlement, but only to make a "preliminary determination" of the "fairness, reasonableness, and adequacy" of the proposed settlement. *See* Federal Judicial Center, Manual for Complex Litigation, § 21.632 (4th ed. 2004). As set forth herein, the Court should order notice of the settlement to be published, as the settlement is fair and reasonable, and the form of the notice is the most practicable under the circumstances and comports with due process.

II. BACKGROUND OF THE LITIGATION.

On November 9, 2012, Plaintiffs Rosemary Quinn and Alan Ducorsky filed this action against Walgreen Co. on behalf of New York and Connecticut classes of purchasers of Walgreen's Covered Products. Plaintiffs asserted claims for violations of N.Y. General Business Law § 349, Conn. Gen. Stat. Ann. §42-110a, *et seq*., breach of express warranty, and unjust enrichment. On

August 7, 2013, the Court denied Defendant's motion to dismiss with respect to Plaintiffs' consumer protection and unjust enrichment claims. (Dkt. No. 31).

On November 1, 2011, Plaintiff Luis Guilin filed a class action in the Northern District of Illinois on behalf of a multi-state and California class of purchasers of Walgreen's Covered Products. Plaintiff Guilin asserted claims for violations of California's Unfair Competition Law, Bus. & Prof. Code §17200 *et seq*., and violations of the Consumers Legal Remedies Act, Civil Code §1750 *et seq*.

On March 26, 2012, Plaintiff Kay Eckler filed a class action in the Southern District of California against Wal-Mart Stores, Inc., on behalf of a multi-state and California class of purchasers of Wal-Mart's Equate Glucosamine Chondroitin MSM Advanced Triple Strength. Plaintiff Eckler asserted claims for violations of California's Unfair Competition Law, Bus. & Prof. Code §17200 *et seq*., California's False Advertising Law, Bus. & Prof. Code §17500 *et seq*., and violations of the Consumers Legal Remedies Act, Civil Code §1750 *et seq*.

On March 15, 2013, Plaintiff Randy Nunez filed a class action in the Southern District of California against Supervalu Inc., on behalf of a multi-state and California class of purchasers of Equaline products, including Glucosamine Chondroitin Complex Triple Strength and Glucosamine Chondroitin Complex Advanced with MSM & Vitamin D. Plaintiff Nunez asserts claims for violations of California's Unfair Competition Law, Bus. & Prof. Code §17200 *et seq*., the Consumers Legal Remedies Act, Civil Code §17500 *et seq*., and Breach of Express Warranty.

On August 12, 2013, Plaintiff Brian Calvert filed a class action in the Western District of Pennsylvania against Walgreen Co. on behalf of a Pennsylvania class of purchasers of Walgreen's Glucosamine Products. Plaintiff Calvert asserts claims for violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law and Breach of Express Warranty, 13 Pa. Cons. Stat. Ann. § 2313.

On October 28, 2013, Plaintiff Marc Group filed a class action in the Southern District of Florida against Walgreen Co. on behalf of a Florida class of purchasers of Walgreen's Glucosamine Products. Plaintiff Group asserts claims for violations of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201 *et seq.*, and Breach of Express Warranty.

On November 1, 2013, Plaintiff John Gross filed a class action in the District of New Jersey against Walgreen Co. on behalf of a New Jersey class of purchasers of Walgreen's Glucosamine Products. Plaintiff Gross asserts claims for violations of New Jersey's Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 *et seq.*, and Breach of Express Warranty, U.C.C. § 2-313 (N.J. Stat. Ann. 12A:2-313).

On November 7, 2013, Plaintiff Christopher Nelson filed a class action in the District of Delaware against Walgreen Co. on behalf of a Delaware class of purchasers of Walgreen's Glucosamine Products. Plaintiff Nelson asserts claims for violations of Delaware's Consumer Fraud Act, Del. Code Ann. tit. 6 § 2513 and Breach of Express Warranty, U.C.C. § 2-313 (Del. Code Ann. Tit. 6 § 2-313).

Following this Court's denial in part of Walgreen's motion to dismiss the *Quinn* Complaint, the parties agreed to attempt to negotiate a fair and reasonable settlement of all claims. On December 12, 2013, the parties engaged in a full-day mediation in San Diego, California before Justice Howard Wiener. While significant progress was made at that mediation, a resolution was not reached. A second mediation was held before Justice Wiener on January 14, 2014, and even then a resolution was not reached. Justice Wiener continued to facilitate settlement discussions by telephone and e-mail, and by March 24, 2014, the counsel for Plaintiffs in the *Quinn, Guilin* and *Eckler* actions and counsel for Defendants reached an agreement to settle all claims arising from all Actions. Thereafter, counsel for Plaintiffs in the *Calvert, Group, Gross* and *Nelson* matters joined in further settlement discussions, which were thereafter assisted by Hon. Wayne R. Andersen (retired), acting as mediator appointed by

the Court in the *Calvert* case. Through those additional discussions, counsel for Defendants and Plaintiffs in the *Quinn, Guilin, Eckler, Calvert, Group, Gross, Nelson,* and *Nunez* actions reached a new global resolution which will settle all claims arising from all Actions.

Prior to the settlement, the parties vigorously litigated the Actions. Defendants filed motions to dismiss in all eight actions. This Court denied the *Quinn* motion to dismiss as to all but the breach of warranty claim and the court in *Calvert* denied the motion to dismiss, but the court *Eckler* granted the Defendant's motion to dismiss with leave to amend; a second motion to dismiss the amended complaint is fully briefed and pending. The courts in *Guilin, Nelson, Gross, Group,* and *Nunez* have not entered an order on Defendant's motion to dismiss. The litigation in all but this case has already been stayed (or by the agreement of the parties, will be stayed or administratively closed), pending a ruling on this preliminary approval of Class Action Settlement motion, but there is no assurance that the complaints in *Eckler, Guilin, Nelson, Gross, Group,* and *Nunez* would survive the dismissal motions should the litigation go forward (although plaintiffs in those cases are confident they would).

Plaintiffs and Defendants in the *Quinn* and *Calvert* actions began the discovery process by engaging in a Rule 26(f) Conference, Plaintiffs served Requests for Production and Interrogatories, and this Court and the *Calvert* court entered Civil Case Management Plans after holding Initial Case Management Conferences. Garber Dec. ¶6; Kilpela Dec. ¶6. Defendants served formal responses to the discovery in *Calvert.* The parties also engaged in informal discovery in connection with settlement negotiations, which, as detailed above, included the number of potential class members, the total sales volume of Glucosamine Products in the United States, and wholesale prices. Garber Dec. ¶7; Ryan Dec. ¶10; Weltman Dec. ¶10; Kilpela Dec. ¶7. Moreover, Plaintiffs' counsel had done extensive pre-filing and post-filing investigation of the scientific evidence regarding the ingredients in Defendants' products, including the engagement of one of the foremost experts in this area. Garber Dec. ¶3; Ryan Dec. ¶4; Weltman Dec. ¶4; Kilpela Dec. ¶3, Carpenter Dec. ¶2.

As a result of these efforts, both sides were able to enter into settlement negotiations with an informed view of the strengths and weaknesses of their respective cases, and with an informed basis for determining what form of monetary and injunctive relief would be reasonable and appropriate in the settlement context. The proposed settlement is the result of many months of arm's-length and vigorous negotiations between experienced counsel, with the benefit of their clients' involvement, all of whom are thoroughly familiar with the issues involved in this action.

III. SUMMARY OF THE SETTLEMENT.

The gravamen of Plaintiffs' First Amended Complaint is that Defendants represented that their Covered Products will help rebuild/protect joint cartilage, lubricate joints and help provide joint comfort when, as a matter of scientific fact, cartilage that has been lost or damaged cannot be rebuilt. Defendants contend that their representations regarding the Covered Products are not false nor misleading because they are supported by mainstream science and peer reviewed studies. The parties have investigated the facts and analyzed the relevant legal issues with the assistance of scientific experts. While Plaintiffs and their counsel believe that the claims asserted have merit, Defendants dispute the factual allegations made by Plaintiffs and the science underlying them, deny liability with respect to any of the claims alleged by Plaintiffs, and will contest class certification should the case proceed. Plaintiffs have weighed the costs and benefits to be obtained under the Settlement Agreement as balanced against the costs, risks and delays associated with the continued prosecution of this complex and time-consuming litigation and the likely appeals of any rulings in favor of either the Settlement Class or the Defendants. As a result, Plaintiffs believe that the Settlement Agreement provides substantial benefits to the Settlement Class, and is fair, reasonable, adequate and in the best interests of Plaintiffs and the Settlement Class. Against this backdrop, and in the interest of avoiding protracted and costly litigation, the parties have agreed to a proposed settlement as described below.

The Settlement Class consists of all residents of the United States who purchased for personal use, and not resale or distribution, a Covered Product between November 1, 2005 and the date the Court preliminarily approves the settlement. Defendants have agreed to pay a total of $2.8 million to settle the claims in this litigation. Each Settlement Class Member who submits a valid and timely claim form will receive the actual receipt price for each and every Covered Product for which that Settlement Class member submits a receipt evidencing proof of purchase as defined in the Settlement Agreement, with no cap or limit on the number of such claims a Settlement Class Member may make. *See* Settlement Agreement pp. 14-15. Settlement Class members who do not have such proofs of purchase may make claims for up to eight purchases of Covered Products, for which they will receive $12.00 per purchase. Settlement Agreement p. 15. If these payments exceed the Net Settlement Fund (which is the Settlement Fund less the monies used to pay notice and claim administration expenses, as well as Class Counsel's attorneys' fees and expenses and any incentive award to the Plaintiffs), the payments will be reduced pro rata, but if there are monies still available in the Net Settlement Fund, payment to each Settlement Class Member with proof of purchase will be tripled. *Id.* If, after that, there are still leftover monies available in the Net Settlement Fund, payment to each Settlement Class Member who does not have proof of purchase will be doubled. *Id.* If, after that, there are still leftover monies available in the Net Settlement Fund, the remaining funds will be distributed pro rata to all claimants until the Net Settlement Fund is exhausted. *Id.* Settlement Class Members will be required to sign the claim form under penalty of perjury attesting to the truth of their purchases.

Perrigo has also agreed to make significant changes to its labels on the Covered Products. There are two main product claims made by Defendants: (1) that they rebuild/renew cartilage; and (2) that they provide pain palliation through purported greater flexibility/mobility/ comfort. For a period of twenty four (24) months commencing nine (9) months after the settlement is finally

approved, Perrigo will: (i) remove all claims that the products "rebuild", "renew", "regrow", "grow", "add" or "regenerate" cartilage on the labels of the Covered Products; and (ii) with regard to the palliation claims, will include the language "individual results may vary" on the labels of the Covered Products.[5] The Settlement Agreement provides a significant incentive for Defendants to keep the injunctive relief in place after the expiration of the 24 month period, because if they do they will not be subject to suit by the settling class members regarding new purchases.

Thus, the Settlement Agreement provides value to Defendants' existing and future customers. Existing customers can get very substantial refunds; indeed, class members with receipts will receive 100% refunds. Existing and future customers will benefit from what Plaintiffs believe to be more truthful information on the packaging and labeling. These are real and tangible benefits to millions of consumers in the United States.

In addition, Perrigo has agreed to pay the costs of providing notice and administration of the Settlement from the Settlement Fund, up to $800,000.00, including processing claim forms and requests for exclusion ("Administration Costs"). The Parties propose to have Heffler Claims Group and Garden City Group, Inc. as the settlement administrator ("Settlement Administrator"). Heffler Claims Group will administer the Class Notice and Garden City Group will administer the Class Settlement.

Perrigo has also agreed not to object to an application by Class Counsel for up to one third of the Settlement Fund for attorneys' fees, costs and other litigation expenses, and to pay an award the Court approves up to that amount. The allowance or disallowance by the Court of the application by Class Counsel for attorneys' fees will not be a basis for rescinding the Settlement Agreement. Defendants have also agreed to pay from the Settlement Fund an incentive award to Named Plaintiffs Rosemary Quinn, Alan Ducorsky, Luis Guilin, Kay Eckler, Brian Calvert, Marc Group, John J. Gross,

[5] This notice language takes into account that fact that there is a large placebo effect for these products.

Christopher Nelson, and Randy Nunez in the amount of five thousand dollars ($5,000) each, in recognition of their time and effort in this action, subject to Court approval.

In return for making these settlement benefits available to all Settlement Class Members, the Settlement Class Members' claims against Defendants will be dismissed with prejudice and all Settlement Class Members (other than those who opt-out of the Settlement Class) will release and be permanently barred from pursuing any claims in accordance with the Settlement Agreement.

IV. STANDARD FOR APPROVAL OF A CLASS ACTION SETTLEMENT.

Rule 23(e) governs the settlement of class actions. The Rule provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). Compromise and settlement of class actions is favored. *See Wal-Mart Stores v. Visa U.S.A.*, 396 F.3d 96, 116 (2d Cir. 2005) (emphasizing the "strong judicial policy in favor of settlements, particularly in the class action context") (quotation omitted); *see also* Herbert B. Newberg & Alba Conte, Newberg on Class Actions ("Newberg"), § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). Thus, at the preliminary approval stage, the Court need only "make a preliminary determination of the fairness, reasonableness and adequacy of the settlement" so that notice of the settlement may be given to the Class and a fairness hearing may be scheduled to make a final determination regarding the fairness of the Settlement. *See* Newberg § 11.25; Manual for Complex Litigation §21.632**.** The Court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Ass'n*, 627 F.3d 631, 634 (2d Cir. 1980); Newberg § 11.25 ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness . . . and [it] appears to fall within the range of possible approval," the court should permit notice of the

settlement to be sent to class members).[6]

Moreover, "[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 (quoting Manual for Complex Litigation (Third) § 30.42 (1995)) (internal quotations marks omitted). Where a settlement is achieved through arm's-length negotiations by experienced counsel and there is no evidence of fraud or collusion, "[courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05-10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007). "The central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable and adequate. There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation." *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (citation omitted).

V. THE COURT SHOULD GRANT PRELIMINARY APPROVAL TO THE SETTLEMENT AGREEMENT.

When evaluating the fairness and adequacy of a proposed class settlement, courts in this Circuit are guided by the factors enunciated in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (abrogated on other grounds). Those factors are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (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 defendant to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

[6] *See also Danieli v. IBM*, No. 08-3688, 2009 WL 6583144, at *4–5 (S.D.N.Y. Nov. 16, 2009) (granting preliminary approval where settlement "has no obvious defects" and proposed allocation plan is "rationally related to the relative strengths and weaknesses of the respective claims asserted.").

Grinnell, 495 F.2d at 463. These factors heavily favor granting preliminary approval.

A. The Litigation Is Complex And Will Be Expensive And Lengthy.

The Settlement Agreement provides substantial monetary and injunctive benefits to the Settlement Class and future consumers while avoiding the significant expenses and delays attendant to discovery and motion practice related to summary judgment and class certification. Indeed, "[m]ost class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000). The Settlement Class includes consumers that purchase approximately 17,000,000 Covered Products from November 1, 2005 to the present. Having to engage in motion practice with respect to the consumer protection laws of seven states (New York, Connecticut, California, Pennsylvania, Florida, New Jersey, and Delaware) would be extremely time consuming and expensive. Moreover, while Defendant Walgreen Co. has responded to document requests and answered interrogatories, the Defendants have not yet otherwise produced formal discovery relating to Plaintiffs' claims but would be shortly required to do so in the *Calvert* matter. That exercise alone, and the subsequent related expert reports and potential discovery disputes, will result in the expenditure of substantial time and expense.

Moreover, continued litigation would necessitate numerous additional depositions of all named plaintiffs in each of the eight actions, Defendants' personnel, personnel from retailers, and expert witnesses for both named plaintiffs and Defendants. Indeed, absent an approved settlement, the parties in all of the Actions will be forced to continue litigation, which will burden the courts hearing those cases. The resulting fact-intensive trials will also result in significant expenses to all parties. Any judgment will likely be appealed, extending the costs and duration of the litigation. The Settlement Agreement, on the other hand, will result in prompt and equitable payments to the Settlement Class and important injunctive relief that will protect current class members and future

consumers of Defendants' products. Thus, this factor weighs in favor of settlement.

B. The Reaction Of The Class Will Likely Be Positive.

While the reaction of absent class members cannot be conclusively gauged until notice has been sent, the fact that all of the Plaintiffs in the *Quinn, Guilin, Eckler, Calvert, Group, Gross Nelson,* and *Nunez* actions and their experienced counsel support the Settlement Agreement is a strong indication that members of the Settlement Class will also view it positively.

C. The Current Stage Of The Instant Litigation And The Discovery That Has Occurred Favors Preliminary Approval.

The first-filed of the cases in this settlement was filed nearly three years ago, and this case has been litigated for approximately 21 months. The legal issues have been thoroughly vetted through Defendants' aggressive motions to dismiss in the instant litigation and in the other Actions. Moreover, Plaintiffs' counsel and Defendants have engaged in informal discovery in preparation for settlement negotiations. In the mediations, as well, the parties exchanged briefs that cited the extensive clinical studies and scientific research upon which they rely, as well as other facts. Plaintiffs' counsel conducted a thorough investigation of Plaintiffs' claims and conducted extensive research regarding the science of the effects of Covered Products including the engagement of one of the foremost authorities in this area. Defendants' counsel has done so as well; each side has a thorough understanding of the science and the clinical studies. The parties are not required to engage in extensive discovery for the Court to preliminarily approve the settlement.[7] This is especially true here. Whether Defendants are liable does not turn on any documents or information uniquely in the possession and control of Defendants. To the contrary,

[7] *See In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) ("'To approve a proposed settlement, the Court need not find that the parties have engaged in extensive discovery . . . it is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to intelligently make . . . an appraisal of the Settlement.' Additionally, 'the pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . [but] an aggressive effort to ferret out facts helpful to the prosecution of the suit.'") (citing *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982) and quoting *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 263 (S.D.N.Y. 1998)).

the essential issue here is whether the labels on the Covered Products promised health benefits that they cannot deliver. The science regarding the efficacy of glucosamine and chondroitin is publicly available and not uniquely in Defendants' possession. Further, plaintiffs' counsel in *Guilin, Eckler, Calvert, Group, Gross, Nelson* and *Nunez* are currently counsel in numerous other glucosamine related litigation and Class Counsel all have prior experience representing plaintiffs in glucosamine related litigations; they have substantial understanding of the issues presented by these cases. Class Counsel are thus well positioned to evaluate the medical science regarding the health claims on the Covered Products' labels. Thus, Plaintiffs did not require extensive discovery from Defendants to be able to adequately evaluate the strength of their cases.

D. Plaintiffs Face Substantial Hurdles In Establishing Liability.

The Settlement Agreement should be preliminarily approved because Plaintiffs face substantial hurdles in establishing liability. Indeed, "[l]itigation inherently involves risks." *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997).

First, Defendants argue that the representations on the product labels are neither false nor misleading because the representations are supported by science. Defendants argue that they made modest, defensible claims regarding their Covered Products, such as that the Products are "*Formulated to Help*" joint comfort, lubrication and rebuilding, and point to certain clinical studies that they contend confirm the accuracy of those statements. Second, Defendants argue that Plaintiffs' reliance on clinical studies examining the effectiveness of glucosamine and/or chondroitin in treating osteoarthritis is inapplicable to Defendants' Covered Products because none of the clinical studies actually involved Defendants' Covered Products. Defendants also argue that they expressly disclaim the Covered Products' use as a treatment for any disease (including osteoarthritis) by stating on the packing that the Covered Products are "not intended to diagnose, treat, cure, or prevent any disease." Third, Defendants argue that claims in certain Actions are preempted by the Federal Food, Drug, and Cosmetic Act

("FDCA") because Plaintiffs assert that the Covered Products implicitly claim to treat osteoarthritis, and therefore violate the FDCA. These are but a few of the hurdles and difficulties that Plaintiffs may face in establishing liability against Defendants.

Plaintiffs' counsel are confident in their ability to prove their cases. Nonetheless, the Settlement Agreement avoids the risks inherent in further litigation, and therefore this factor weighs in favor of preliminary approval.

E. Plaintiffs Face Substantial Hurdles In Proving Damages.

In order to prove damages, Plaintiffs must prove that Defendants' representations that the Covered Products rebuild joint cartilage, lubricate joints and help provide joint comfort are false, misleading and deceptive and/or that members of the public are likely to be deceived by Defendants' advertising and labeling. This is an expensive and challenging task. While Plaintiffs are confident that their expert can prove that the Covered Products do not deliver the promised health benefits, there is always the risk that Plaintiffs could lose. The task is further complicated by the fact that some of the Covered Products contain ingredients other than glucosamine and chondroitin, and Plaintiffs' expert must analyze these ingredients to determine whether they are capable of delivering the promised health benefits. Due to the large placebo effect, Defendants' will argue that there are numerous satisfied customers, and that the efficacy of dietary supplements varies based on a host of individual issues unique to the particular consumer, such as health condition and length and manner of use. While Plaintiffs believe that they would prevail over this argument, it certainly poses a risk.

Thus, there are substantial obstacles Plaintiffs must overcome to prove damages in this case, a factor favoring approval of the Settlement Agreement.

F. Maintaining The Class Action Through Trial May Be Challenging.

Plaintiffs are confident in their ability to maintain this action as a class through trial. Nonetheless, they recognize that there are substantial hurdles in being able to do so. Defendants most

certainly will raise what they claim are individual reliance, causation and damages issues. And class certification is never a given in any case. A class determination outside of settlement proceedings will require extensive and expensive briefing by both parties, the outcome of which is by no means assured. This factor therefore favors preliminary approval.

G. The Defendants May Not Be Able To Withstand A Substantially Greater Judgment.

While Plaintiffs have no concern that Perrigo has the ability to pay all claims made in the context of this Settlement Agreement, there is no certainty that any company could bear the enormously large compensatory damages award that could be assessed were the case to proceed through trial and survive challenge on appeal. In any event, a "defendant['s] ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178 n.9.

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

The adequacy of a settlement amount offered should be judged "in light of the strengths and weaknesses of the plaintiff[s'] case." *In re Med. X-Ray*, No. 93-5904, 1998 WL 661515, at *5 (E.D.N.Y. Aug. 7, 1998). That the settlement amount is less than the maximum potential recovery is not a barrier to approval. *See Grinnell Corp.*, 495 F.2d at 455 n.2 ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.").[8] Indeed, judging whether a settlement is reasonable "is not susceptible of a mathematical equation yielding a particularized sum." *In re Michael Milken and Associates Sec. Lit.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993).

Here, there is a broad range of potential recovery if the case were to be litigated to judgment

[8] *See also Cagan v. Anchor Sav. Bank FSB*, No. 88-3024, 1990 WL 73423, at *12 (E.D.N.Y. May 22, 1990) (approving $2.3 million class settlement where maximum potential recovery was approximately $121 million).

by trial. On the one hand, Plaintiffs could prevail on their claims and recover the total retail sales amount of more than $100 million. On the other hand, Defendants could prevail on their legal arguments to defeat liability entirely or defeat class certification, resulting in no recovery for Class members. Given this broad range of possible damages, the Settlement Agreement provides a substantial recovery, including sizable refunds to consumers with and without documentation of their purchases, important injunctive relief and effective notice to the Class that falls well within the range that courts have traditionally found to be fair and adequate under the law.

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

Therefore, these factors militate in favor of approving the Settlement Agreement.

VI. THE COURT SHOULD CONDITIONALLY CERTIFY THE CLASS.

"Under Federal Rule 23(c)(1), 'the court can make a conditional determination of whether an action should be maintained as a class action, subject to final approval at a later date.'" *Ayzelman v. Statewide Credit Services Corp.*, 238 F.R.D. 358, 362 (E.D.N.Y. 2006) (citation and quotation marks omitted). "Certification of a class for settlement purposes only is permissible and appropriate." *Reade–Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 31 (E.D.N.Y. 2006) (citation omitted). Where a class is proposed in connection with a motion for preliminary

approval, "a court must ensure that the requirements of Rule 23(a) and (b) have been met." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006). Courts employ a "'liberal rather than restrictive construction' of Rule 23, 'adopt[ing] a standard of flexibility' in deciding . . . certification." *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997).

Plaintiffs seek the conditional certification of the following Rule 23 class for purposes of effectuating the settlement:

> All residents of the United States who purchased for personal use, and not resale or distribution, a Covered Product between November 1, 2005 and the [Preliminary Approval Date].

Excluded from the Settlement Class are Defendants and their respective affiliates, employees, officers, directors, agents and representatives and their immediate family members; Settlement Class Counsel; and the judges who have presided over the Actions and their immediate family members.

Because all of the certification requirements for settlement purposes are met and Defendants consent to conditional certification of a class action for settlement purposes, Plaintiffs respectfully request that the Court conditionally certify the Settlement Class.

A. The Settlement Class Satisfies Rule 23(a).

There are five Rule 23(a) requirements (numerosity, commonality, typicality, adequacy and ascertainability), all of which the Settlement Class satisfies.

1. The Class Is So Numerous That Joinder Of All Members Is Impracticable.

Joinder of the millions of Class members that purchased more than 17,000,000 Covered Products is impracticable, and therefore the numerosity requirement is met here.[9]

[9] *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("[N]umerosity is presumed at a level of 40 members.") (citation omitted).

2. There Are Questions Of Law Or Fact Common To The Class.

Rule 23(a)(2) provides that there must be "questions of law or fact common to the class" for a suit to be certified as a class action. Fed. R. Civ. P. 23(a)(2). "Commonality does not mandate that all class members make identical claims and arguments, only that common issues of fact or law affect all class members. Generally, courts have liberally construed the commonality requirement to mandate a minimum of one issue common to all class members." *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198-99 (S.D.N.Y. 1992) (citations omitted).

Here, there are many common issues of fact and law, to wit, whether Defendants' representations regarding their Covered Products are false, whether consumers have been misled and deceived by the advertisements and labels, whether Defendants' conduct constitutes violations of various states' consumer protection laws, whether Plaintiffs and other Class members have been injured and the proper measure of their losses as a result of those injuries, and whether Plaintiffs and Class members are entitled to injunctive, declaratory or other equitable relief.

3. The Plaintiffs' Claims Are Typical Of The Claims Of The Class.

Rule 23(a)(3) provides that the claims of the Plaintiffs must be "typical of the claims of . . . the class." Fed. R. Civ. P. 23(a)(3). Rule 23(a)(3) is satisfied "when 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." *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) (citation omitted). "When the same 'unlawful conduct was directed at both the named plaintiff and the class to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.'" *D'Alauro v. GC Services Ltd. P'ship*, 168 F.R.D. 451, 456-57 (E.D.N.Y. 1996) (citations omitted).

Here, the claims of the Plaintiffs and those of the members of the Settlement Class arise from the same conduct. Defendants represent that their Covered Products have the ability to

rebuild joint cartilage, lubricate joints and provide joint comfort. 1st Am. Comp., ¶15**.** Plaintiffs allege that these are material misrepresentations that caused them injury because they would not have purchased the Covered Products had they known that they could not provide the promised benefits. Plaintiffs allege that they were damaged in the amount of the purchase price of the Covered Products because they did not receive any of the represented benefits. *Id.* ¶22. This same conduct caused the same injury to members of the Settlement Class. All of Defendants' Covered Products were advertised as providing joint health benefits and had labels stating that the products provided joint health benefits. *Id.* ¶2. Moreover, Defendants' alleged misrepresentations regarding their Covered Products would be material to any reasonable consumer. *See Bildstein v. MasterCard Int'l Inc.*, 329 F. Supp. 2d 410, 414 (S.D.N.Y. 2004) ("[A] material claim is one that involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.") (citation omitted). Indeed, the only reason to take a glucosamine product is to improve joint health.

4. Plaintiffs Will Fairly And Adequately Protect The Interests Of The Class.

Rule 23(a)(4) requires that "the representative parties fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To determine adequacy, the Court must inquire 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." *Brooklyn Ctr. for Independence of the Disabled v. Bloomberg*, No. 11-6690, 2012 WL 5438849, at *8 (S.D.N.Y. Nov. 7, 2012) (quotation omitted). Here, there is no indication that Plaintiffs, who purchased Covered Products after relying on advertisements and labels (1st Am. Comp., ¶¶4-7, 20-22), have any interests antagonistic to the Settlement Class.

To the contrary, Plaintiffs Quinn, Ducorsky, Calvert, Group, Gross, Guilin, Eckler, Nunez, and Nelson have actively protected the interests of the Class. They engaged in the prosecution of

this matter since its inception, have consistently conferred with their counsel, reviewed the various complaints, and consulted with counsel regarding the propriety of the settlement. Garber Dec. ¶10; Ryan Dec. ¶12; Weltman Dec. ¶12; Kilpela Dec. ¶10; Carpenter Dec. ¶6. Moreover, Plaintiffs' attorneys are qualified, experienced and able to conduct the litigation. Garber Dec. ¶¶12-19; Ryan Dec. ¶¶13-16; Weltman Dec. ¶¶13-15; Kilpela Dec. ¶¶11-17; Carpenter Dec. ¶¶7-10.

5. Class Members Are Readily Identifiable And Ascertainable.

Rule 23 also contains an "implicit requirement" that the class be precise and ascertainable. *Guzman v. VLM, Inc.*, No. 07-1126, 2008 WL 597186, at *4 (E.D.N.Y. Mar. 2, 2008). Here, the Class is readily identifiable because it consists of all residents in the United States who purchased for personal use a Covered Product between November 1, 2005 and the Preliminary Approval Date. All Class members are able to determine their membership in the Class. The Settlement Class is thus precise and readily identifiable.

B. The Settlement Class Satisfies Rule 23(b)(3).

Rule 23(b)(3) provides that questions of law or fact common to class members must "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). In addition, Plaintiffs must demonstrate that "[a] class action is superior to other methods for fairly and efficiently adjudicating the controversy." *Id.*

1. Common Questions Predominate Over Individual Issues.

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Predominance thus requires 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 Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001) (abrogated on other grounds). Here, Defendants' liability turns on

whether their representations regarding their Covered Products are deceptive and misleading, and every Class member's claim may be proven by the same set of facts regarding the efficacy of the Covered Products. Indeed, the question of whether glucosamine and chondroitin cannot, as a matter of scientific fact, deliver the promised health benefits is at the common core of all Class members' claims. Even if the measure of damages differs amongst Class members, when common questions of law or fact predominate regarding liability, "the existence of individual questions as to damages is generally unimportant." *Guzman v. VLM, Inc.*, No. 07-1126, 2008 WL 597186, at *8 (E.D.N.Y. Mar. 2, 2008). In addition, the Settlement Class satisfies Rule 23(a)'s requirements, which "goes a long way toward satisfying the Rule 23(b)(3) requirement of commonality." *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986) (citation omitted).

2. A Class Action Is The Superior Method For Adjudicating This Controversy.

Rule 23(b)(3) also requires a determination as to whether a class action is the superior means to adjudicate the class' claims. The rule sets forth a list of relevant factors: class members' interest in bringing individual actions; the extent of existing litigation by class members; the desirability of concentrating the litigation in one forum; and potential issues with managing a class action. Fed. R. Civ. P. 23(b)(3)(A-D). It is well settled that a class action is the superior method of adjudication where, as here, "the proposed class members are sufficiently numerous and seem to possess relatively small claims unworthy of individual adjudication due to the amount at issue . . . [and] there is reason to believe that class members may lack familiarity with the legal system, discouraging them from pursuing individual claims." *Jankowski v. Castaldi*, No. 01-0164, 2006 WL 118973, at *4 (E.D.N.Y. Jan. 13, 2006). Certification of the Settlement Class will allow for efficient adjudication of claims that would likely not be brought owing to prohibitive legal expenses, while at the same time preserving scarce judicial resources. Therefore, a class action is a superior method of adjudicating this case.

VII. PLAINTIFFS' COUNSEL SHOULD BE APPOINTED AS CLASS COUNSEL.

Finkelstein, Blankinship, Frei-Pearson & Garber, LLP ("FBFG"), Bonnett, Fairbourn, Friedman & Balint, P.C. ("Bonnett Fairbourn"), Stewart Weltman LLC; Carlson Lynch, LTD; Carpenter Law Group; and Patterson Law Group, APC should be appointed as Class Counsel, with FBFG, Bonnett Fairbourn, Carlson Lynch, and Stewart Weltman LLC as representatives of the Class Counsel. Rule 23(g) enumerates four factors for evaluating the adequacy of proposed counsel:

> (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and types of claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(C)(i).[10] All of these factors militate in favor of appointing these firms as Class Counsel. These firms spent a significant amount of time identifying and investigating Plaintiffs' claims before filing the instant actions. Garber Dec. ¶3; Ryan Dec. ¶4; Weltman Dec. ¶4; Kilpela Dec. ¶3; Carpenter Dec. at ¶2. Class Counsel have extensive experience in class actions, particularly those involving alleged consumer frauds, as demonstrated by the numerous times the firms and their attorneys have been appointed Class Counsel. Garber Dec. ¶¶12-19; Ryan Dec. ¶¶13-16; Weltman Dec. ¶¶13-15; Kilpela Dec. ¶¶11-17; Carpenter Dec. ¶7-10. Finally, Class Counsel are established law firms that are currently litigating dozens of cases in state and federal courts throughout the nation, and they have more than sufficient resources to represent the Class. *Id.*

[10] *See also deMunecas v. Bold Food, LLC*, No. 09-00440, 2010 WL 2399345, at *3 (S.D.N.Y. Apr. 19, 2010) ("The work that [plaintiffs' counsel] has performed both in litigating and settling this case demonstrates their commitment to the class and to representing the class's interests.").

VIII. THE PROPOSED CLASS NOTICE IS APPROPRIATE.

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

Here, Defendants have agreed to publish a notice of Class Settlement on various social media, web sites and print publications of broad and targeted circulation so that all potential Class members have adequate notice of the Class Settlement. Indeed, "when class members' names and addresses may not be ascertained by reasonable effort, publication notice has been deemed adequate to satisfy due process." *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 107 (S.D.N.Y.2007).[11] The form of Notices attached as Exhibits 2 and 3 to Declaration of Todd S. Garber provide all of the information required under Rule 23(b)(2)(B), and they "fairly apprise the prospective members of the class of the pendency of the class action, the terms of the proposed settlement, and the options that are open to them in connection with the proceedings, including the option to withdraw from the settlement." *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 34 (E.D.N.Y. 2006). The Notice also directs class members to an Internet website where they can find further information, including the date of the fairness hearing, procedures for submitting a claim form, and procedures for opting out or objecting to the settlement. Therefore,

[11] *See also In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987) (holding that individual notice is not necessary for each of 2.4 million Vietnam veterans potentially exposed to Agent Orange where "no easily accessible list of veterans" existed, and "such a comprehensive list could [not] reasonably have been compiled.").

Plaintiffs respectfully request that the Court approve the forms of Notice attached as Exhibits 2 and 3 to Declaration of Todd S. Garber.

Heffler Claims Group, which will administer the Class Notice, will publish the Publication Notice according to the following plan: (1) print the Publication Notice on a Sunday newspaper supplement (Parade Magazine), inserted into more than 700 newspapers; (2) publish the Publication Notice twice on People Magazine; (3) post banner advertising on appropriately selected websites including Yahoo! Network, Prevention.com, AARP.com, Facebook, and Xaxis; and (4) disseminate a press release over PR Newswire, which will be distributed broadly to thousands of media outlets. The notice plan is calibrated to provide broad and effective dissemination of the notice to the consumers of the Covered Products. The notice plan was designed by a respected expert on the means of providing effective class action notice. Declaration of Jeanne C. Finegan, ¶¶ 5-10.

IX. THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION BARRING ANY OTHER LITIGATION BY CLASS MEMBERS ARISING OUT OF THE CLAIMS AND CAUSES OF ACTION OR THE FACTS AND CIRCUMSTANCES AT ISSUE.

The All Writs Act grants federal courts authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). And the Anti-Injunction Act specifically excludes from its scope injunctions of state court proceedings from a federal court "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. "'Whether viewed as an affirmative grant of power to the courts or an exception to the Anti-Injunction Act, the All-Writs Act permits courts to certify a national class action and to stay pending federal and state cases brought on behalf of class members.'" *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 149738, at *40 (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. 32, 37 (E.D.N.Y. 1990)).

As part of the Settlement Agreement, the Plaintiffs and Defendants have agreed to the terms

of a preliminary injunction to be entered as part of the Preliminary Approval Order. *See* Stipulation of Settlement at ¶25(u); Proposed Order at ¶18. The proposed preliminary injunction would not preclude consumers from excluding themselves from the settlement Class in order to pursue their individual claims (which is their right) but would preclude class members who remain in the proposed settlement Class from pursuing competing class actions, solely during the pendency of these settlement approval proceedings. The proposed preliminary injunction provides:

> In further aid of the Court's jurisdiction to implement and enforce the Settlement, the Named Plaintiffs and members of the Settlement Class and their counsel are preliminarily enjoined and barred (solely during the period from entry of this Order until the decision whether to grant a Final Order and Judgment after the Fairness Hearing) from (i) filing, commencing, prosecuting, intervening in or participating (as a plaintiff, claimant, class member, or otherwise) in any other lawsuit or administrative, regulatory, arbitration or other proceeding in any jurisdiction based on, relating to or arising out of the claims and causes of action or the facts and circumstances giving rise to the Litigation and/or the Released Claims as set forth in the Settlement Agreement (unless and until they have timely excluded themselves from the Settlement Class); (ii) filing, commencing, participating in or prosecuting (including by seeking to amend a pending complaint to include class allegations or seeking class certification in a pending action) a lawsuit or administrative, regulatory, arbitration or other proceeding as a class action based on, relating to or arising out of the claims and causes of action or the facts and circumstances giving rise to the Litigation and/or the Released Claims as set forth in the Settlement Agreement where the purported class would include any member of the Settlement Class; and (iii) attempting to effect Opt-Outs of a class of individuals in any lawsuit or administrative, regulatory, arbitration or other proceeding based on, relating to or arising out of the claims and causes of action or the facts and circumstances giving rise to the Litigation and/or the Released Claims as set forth in the Settlement Agreement. Any Person who knowingly violates such injunction shall pay the attorneys' fees and costs incurred by Defendants and/or any other Released Person (as defined in the Settlement Agreement) and Class Counsel as a result of the violation. This injunction does not prevent members of the Settlement Class from participating in any action or investigation initiated by a state or federal agency.

Proposed Order at ¶18.

"This type of injunctive relief is commonly granted in preliminary approvals of class action settlements pursuant to the All Writs Act and the Anti-Injunction Act." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-MDL-1958, 2012 U.S. Dist. LEXIS 149738, at *33 (D. Minn. Oct. 18,

2012) (granting preliminary approval and enjoining all actions or proceedings pending in any court in the United States pending final approval of the settlement). Indeed, such injunctions are particularly appropriate where, as here, "parties to complex, multidistrict litigation have reached a settlement agreement after lengthy, protracted, and difficult negotiations," because in such cases, "it is likely that almost any parallel litigation in other fora presents a genuine threat to the jurisdiction of the federal court." *Id.* at *36 (internal quotations omitted).[12]

X. CONCLUSION

Plaintiffs respectfully request that the Court preliminarily approve the Settlement Agreement, conditionally certify the Settlement Class, appoint Plaintiffs' counsel as Class Counsel, approve the proposed notices of settlement, and enter the contemporaneously-filed Proposed Order.

Dated: White Plains, New York
July 16, 2014

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[12] *See also, e.g., In re Baldwin-United Corp.*, 770 F.2d 328, 337-38 (2d Cir. 1985) (affirming injunction enjoining class members from filing related state court proceedings under the All Writs Act as "necessary or appropriate" in aid of the court's jurisdiction because the filing of state actions "threatened to seriously impair the federal court's flexibility and authority to approve settlements in the multi-district litigation") (internal quotations omitted); *Liles v. Del Campo*, 350 F.3d 742, 746-47 (8th Cir. 2003) (affirming district court's injunction of related litigation and holding that "[i]njunctions of related proceedings in other federal courts are appropriate when necessary for adjudication or settlement of a case"); *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220, 239 (3d Cir. 2002) (affirming district court's injunction of parallel state court proceedings); *In re Sketchers Toning Shoe Prods. Liab. Litig.*, No. 11-MD-2308, 2012 U.S. Dist. LEXIS 113641, at *33-37 (W.D. Ky. Aug. 13, 2012) (granting preliminary approval of settlement and granting a preliminary injunction enjoining related litigation); *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, No. 11-MD-2247, 2012 U.S. Dist. LEXIS 5339, at *23-34 (D. Minn. Jan. 18, 2012) (same); *Holman v. Student Loan Xpress, Inc.*, No. 08-cv-305, 2009 U.S. Dist. LEXIS 113491, at *17-19 (M.D. Fla. Nov. 19, 2009) (same); *Wright v. Linkus Enters., Inc.*, 259 F.R.D. 468, 477-78 (E.D. Cal. 2009) (same); *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 697 (D. Col. 2006) (granting preliminary approval of class action settlement preliminarily enjoining members of the settlement class and sub-class from pursuing related claims in federal or state court "as numerous other courts have done in connection with preliminary approval of proposed class action settlements") (citing cases).

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