**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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| CLAUDIA NEWTON, *et al*.,<br><br>Plaintiffs,<br><br>v.<br><br>R.C. BIGELOW, INC., *et al*.,<br><br>Defendants. | No. 2:22-cv-05660-LDH-SIL<br><br>**Oral Argument Requested** |

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

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Plaintiffs Claudia Newton and Brandy Leandro ("Plaintiffs") respectfully submit this Memorandum of Law in Support of their Motion for Preliminary Approval of Class Action Settlement ("Motion"). Defendant R.C. Bigelow, Inc. ("Bigelow") does not oppose this Motion. Declaration of Aubry Wand ("Wand Decl.") ¶ 5.

## I. INTRODUCTION

Plaintiffs are pleased to present this Settlement to the Court for preliminary approval.[1] Over the course of four years of hard-fought litigation, Plaintiffs completed extensive discovery, certified two litigation classes, and largely briefed competing summary judgment motions, before reaching this Settlement, pursuant to which the full value of the aggregate price premium damages stemming from the challenged conduct will be paid to the Settlement Class. As such, the proposed Settlement is fair, adequate and reasonable, and the Court should approve it on a preliminary basis under Fed. R. Civ. P. 23(e) and Second Circuit law.

The Court has already determined that the requirements of Fed. R. Civ. P. 23(a) and (b)(3) are satisfied when it certified two litigation classes, and because the Settlement Class is materially identical, there are no concerns regarding the propriety of class certification. The Court should also approve the proposed Notice Plan, which is designed to reach at least 70 percent of the Settlement Class, satisfies due process, and adequately advises Class Members of the terms of this Settlement and their rights thereunder.

Accordingly, Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement, provisionally certify the Settlement Class, appoint Aubry Wand of The Wand Law Firm, P.C., Todd M. Schneider and Jason H. Kim of Schneider Wallace Cottrell Kim LLP, and Greg Linkh and Daniella Quitt of Glancy Prongay Wolke & Rotter LLP as Counsel and Plaintiffs

[1] Capitalized terms have the same meaning as defined in the Settlement Agreement unless otherwise indicated.

as Representatives for the Settlement Class, appoint JND Legal Administration ("JND") as the Settlement Administrator, approve the Notice Plan, authorize dissemination of notice to the Class, and schedule a Final Approval Hearing pursuant to Fed. R. Civ. P. 23(e)(2).

## II. RELEVANT PROCEDURAL BACKGROUND

After conducting a thorough pre-suit investigation, Plaintiffs filed a complaint on September 22, 2022, alleging that Bigelow falsely and deceptively represented that some of its tea products were "Manufactured in the USA 100% American Family Owned" (the "Challenged Statement") when the tea and other components were manufactured and sourced from overseas. ECF No. 1.

On February 16, 2023, Plaintiffs filed a First Amended Complaint, which is the operative complaint. ECF No. 18. On March 17, 2023, Bigelow filed an Answer to the First Amended Complaint. ECF No. 23.

On December 12, 2023, the Parties participated in a mediation session with Judge Morton Denlow (Ret.) of JAMS. The Parties did not reach settlement at the conclusion of this mediation. Wand Decl. ¶ 6.

On February 14, 2025, Magistrate Judge Locke issued a Report and Recommendation recommending that Plaintiffs' two proposed classes be certified regarding their GBL claims, and otherwise recommending that Plaintiffs' motion for class certification be denied as to all other claims. ECF No. 49 ("R&R"). On March 31, 2025, Judge D'Arcy Hall adopted the R&R and certified a *Camellia Sinensis* Class and an Herbal Tea Class regarding Plaintiffs' GBL claims. ECF No. 52.

On July 14, 2025, the Parties participated in another mediation session with Jed Melnick of JAMS ("the Mediator"). The Parties did not reach settlement at the conclusion of this mediation, but they continued to engage in settlement discussions through the Mediator. Wand Decl. ¶ 7.

On July 22, 2025, the Court approved Plaintiffs' class notice plan. ECF No. 57. The Settlement Administrator successfully implemented the class notice plan pursuant to the Court's order. ECF No. 62. Only one Class Member (P. Carpenter) timely opted out. *Id.* ¶ 32.

Both sides filed pre-summary judgment papers, and on May 22, 2026, they filed a Consolidated Rule 56.1 Statement in support of their respective motions for summary judgment. ECF No. 84.

On June 9, 2026, the Parties accepted a proposal from the Mediator regarding the material terms of a settlement. Thereafter, the Parties executed a Settlement Agreement. Wand Decl. ¶ 8, Ex. A ("Settlement Agreement").[2]

## III. THE SETTLEMENT TERMS

### A. The Settlement Class

The Settlement Class is materially identical to the two litigation classes already certified by the Court and defined as:

> All natural persons who purchased at least one 18/20 count box of Bigelow Earl Grey Black Tea Caffeine, Green Tea Caffeine, Constant Comment Black Tea Caffeine, Green Lemon Tea Caffeine, Vanilla Chai Black Tea Caffeine, English Tea Time Black Tea Caffeine, Spiced Chai Black Tea Caffeine, French Vanilla Black Tea Caffeine, Vanilla Caramel Black Tea Caffeine, Cozy Chamomile, Lemon Ginger, Lavender Chamomile, Sweet Dreams, or Orange & Spice, labeled as "Manufactured in the USA 100% American Family Owned," at a retail store in the State of New York, at any time from February 20, 2020 to August 5, 2021.

Excluded from the Settlement Class are: (a) Bigelow and Released Parties, (b) distributors and retailers of the Class Products, (c) the Court and its staff, (d) the Mediator and his staff, (e) counsel of record for the Parties and their immediate family members, and (f) all Persons who have timely and properly excluded themselves from the Settlement Class. Settlement Agreement ¶ 64.

[2] Exhibits to the Settlement Agreement are numbered 1 through 5.

**B. The Gross and Net Settlement Amounts**

Bigelow shall pay a non-reversionary Gross Settlement Amount of $2,500,000. Settlement Agreement ¶ 41. The Net Settlement Amount, which will be distributed as Settlement Benefits to Class Members, means the Gross Settlement Amount less (a) $293,804.60 in Settlement Notice and Administration Costs to the Settlement Administrator, (b) $13,000 in Class Representative Service Awards to Plaintiffs, and (c) $715,413 in attorneys' fees and $506,422.47 in costs to Class Counsel. *Id.* ¶¶ 28, 36, 47, 105. Thus, at least $971,359 will be distributed to the Class.

**C. Settlement Benefits to Claimants**

Settlement Class Members will have 60 days from the date the Notice Plan is completed to submit Claim Forms. *Id.* ¶ 20. Each Settlement Class Member who submits a timely and valid Claim Form will receive a Settlement Benefit, based on the number and type of eligible purchases made during the Class Period, as follows:

- **Option A—Without Proof of Purchase**. Each Claimant who does not submit sufficient Proof of Purchase, or no Proof of Purchase at all, but who submits an attestation of his/her purchase of Class Product(s) under penalty of perjury, may claim $0.50 per Class Product purchased, up to a maximum recovery of $10.
- **Option B—With Proof of Purchase**. Each Claimant who submits sufficient Proof of Purchase, and who submits an attestation of his/her purchase of Class Product(s) under penalty of perjury, may claim $0.50 per Class Product, up to a maximum recovery of $20.

*Id.* ¶ 68(a)-(b).

Settlement Benefits shall be adjusted on a pro rata basis depending on the total aggregate dollar value of all valid and timely Claim Forms submitted as follows:

- **Pro Rata Decrease**. If the aggregate monetary value of all valid and timely Claims submitted by Class Members exceeds the Net Settlement Amount, then each Class

Member's Settlement Benefit shall be reduced on a pro rata basis, based on the number of qualifying purchases.

- **Pro Rata Increase**. If the aggregate monetary value of all valid and timely Claims submitted by Class Members is less than the Net Settlement Amount, then each Class Member's Settlement Benefit shall be increased on a pro rata basis, based on the number of qualifying purchases, up to a maximum of $20 for Option A Claimants, and up to a maximum of $40 for Option B Claimants.

Settlement Agreement ¶ 69(a)-(b).

**D. Distribution of Settlement Benefits to Claimants and *Cy Pres* Recipient**

Settlement Benefits to Claimants shall be in the form of cash via (a) paper checks or (b) electronic payment via Zelle, PayPal, or Venmo, as selected by the Claimant when completing the Claim Form. *Id.* ¶ 70. Paper checks and PayPal are the only payment methods that require Claimants to take action to receive custody of the funds, and if they fail to do so within the required timeframes, the funds shall be considered Unclaimed Settlement Benefits. *Id.* ¶¶ 67, 70(d) Unclaimed Settlement Benefits will not be retained by any vendor under any circumstances. *Id.* ¶ 70(e). Instead, they shall be paid to Feeding America, the designated *Cy Pres* Recipient. *Id.* ¶¶ 30, 72. *Cy pres* distribution is appropriate because a second distribution would be cost prohibitive. Declaration of Gina Intrepido-Bowden ("Intrepido-Bowden Decl.") ¶ 41; *Hesse v. Godiva Chocolatier, Inc.*, No. 1:19-cv-0972-LAP, 2022 WL 22895466, *7 (S.D. N.Y. Apr. 20, 2022) (approving distribution of unclaimed funds to *cy pres* because payment to claimants via re-distribution would be administratively infeasible and would result in a windfall to claimants). Feeding America is a 501(c)(3) non-profit organization that advocates against hunger, Settlement Agreement ¶ 30, and an appropriate recipient of these funds. *Marino v. COACH, Inc.*, No.

116CV1122VECOTW, 2021 WL 827647, at *4 (S.D.N.Y. Mar. 3, 2021) (approving Feeding America as a *cy pres* recipient in a consumer class action). The Parties have designated the National Consumer Law Center ("NCLC") as a backup recipient. Settlement Agreement ¶ 30. NCLC is a 501(c)(3) non-profit organization that advocates for consumers and is also an appropriate *Cy Pres* Recipient. Neither the Parties nor their counsel are involved in the governance or work of Feeding America or NCLC. *Id.*

**E. Release of Settlement Class Members' Claims**

Upon the Effective Date of the Settlement, Plaintiffs and all Settlement Class Members who do not submit a valid and timely Request for Exclusion shall release the following claims against Bigelow and the other Released Parties:

> Any claim, cross-claim, liability, right, demand, suit, matter, obligation, damage, restitution, disgorgement, loss or cost, attorneys' fee, cost or expense, action or cause of action, of every kind and description that the Releasing Parties have or had, including assigned claims, whether in arbitration, administrative, or judicial proceedings, whether as individual claims or as claims asserted on a class basis or on behalf of the general public against any of the Released Parties that are based on, arise out of, or relate to the allegations or claims in the Action that the Class Products were falsely or deceptively advertised as Manufactured in the USA.

Settlement Agreement ¶ 57.

## IV. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

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). The Court's prior class certification decision applies because the Settlement Class is materially identical to the already certified litigation classes. Bigelow also consents to certification of the Settlement Class. In any event, the Rule 23 requirements are satisfied, as explained below.

### A. The Settlement Meets the Rule 23(a) Criteria

#### 1. Rule 23(a)(1) – Numerosity is Satisfied

Numerosity is met if "the class is so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1); *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("numerosity is presumed at a level of 40 members[.]"). The Court has already held that numerosity is satisfied, R&R p.12, and nothing has changed since the Court made this finding. Thus, the numerosity requirement is satisfied.

#### 2. Rule 23(a)(2) – Commonality is Satisfied

Class certification requires "questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). The commonality requirement examines whether the class's claims "depend upon a common contention . . . . capable of classwide resolution" such that "its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). There are several common questions of law or fact in this case, including whether the Challenged Statement is false/deceptive and material to the reasonable consumer. R&R p.13 (finding that the commonality requirement was satisfied); *Ebin v. Kangadis Food, Inc*., 297 F.R.D. 561, 565 (S.D.N.Y. Feb. 25, 2014) (holding commonality requirement was satisfied where a "common question [was] whether . . . conduct violated New York's General Business Law"). Thus, the commonality requirement is satisfied.

#### 3. Rule 23(a)(3) – Typicality is Satisfied

The typicality requirement of 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." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009). "The typicality requirement is not highly demanding, because the claims need only share the same essential characteristics and need not be identical." *Rosenfeld v. Lenich*, No. 18-

CV-6720 (NGG) (PK), 2021 WL 508339, at *9 (E.D.N.Y. Feb. 11, 2021). Here, Plaintiffs' and Settlement Class Members' claims arise out of the same theory of liability predicated on the same course of underlying conduct. R&R p.14 (finding that the typicality requirement was satisfied); *Ebin*, 297 F.R.D. at 565 (holding that typicality was satisfied where "the lead plaintiffs' and other class members' claims [arose] out of the same course of conduct by the defendant" and were therefore "injured in the same manner as other class members"). Thus, the typicality requirement is satisfied.

**4. Rule 23(a)(4) – Adequacy is Satisfied**

Rule 23(a) also requires that the representative plaintiffs "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is satisfied if the plaintiff: (1) is represented by counsel who is "qualified, experienced and able to conduct the litigation[;]" and (2) does not possess interests "antagonistic to the interest of other class members." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). Here, Plaintiffs' interests are aligned with those of the Settlement Class, and they have provided valuable assistance in the investigation and prosecution of this matter. Plaintiffs are therefore "adequate" class representatives. *Baudin v. Res. Mktg. Corp., LLC*, No. 1:19-cv-386 (MAD/CFH), 2020 WL 4732083, at *5 (N.D.N.Y. Aug. 13, 2020) (named plaintiffs adequate where no evidence that interests of plaintiffs and class members were at odds). Class Counsel is also "adequate" because they have extensive experience in class action litigation. Wand Decl. ¶¶ 9-22. The Court has already held that the adequacy requirement is satisfied, R&R p.15, and Plaintiffs and Class Counsel have diligently represented the classes since then. Thus, the adequacy requirement is satisfied.

**5. Class Members Are Readily Identifiable and Ascertainable**

While some circuits impose a requirement that a proposed class be identifiable and ascertainable, the Second Circuit has "conclude[d] that a freestanding administrative feasibility

requirement is neither compelled by precedent nor consistent with Rule 23, joining four of our sister circuits in declining to adopt such a requirement." *In re Petrobras Sec.*, 862 F.3d 250, 264 (2d Cir. 2017) (holding that the class need only "be defined using objective criteria that establish a membership with definite boundaries"). The Court already held that the "relatively minimal ascertainability standard" is satisfied. R&R p.19.

**B. The Settlement Meets the Rule 23(b)(3) Criteria**

To meet the requirements of Fed. R. Civ. P. 23(b)(3), the Court must conclude "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

**1. Common Questions Predominate Over Individual Issues**

"As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of a defense will not automatically foreclose class certification under Rule 23(b)(3)." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 138 (2d Cir. 2001). The predominance test "is a test that has been held to be 'readily met' in cases involving alleged consumer fraud." *Elkind v. Revlon Consumer Prods. Corp.*, No. CV 14-2484 (JS) (AKT), 2017 WL 9480894, at *14 (E.D.N.Y. Mar. 9, 2017). As Plaintiffs explained in their motion for class certification, the central issues of whether the Challenged Statement was false/deceptive and material to the reasonable consumer can be proved with common evidence. ECF No. 46 at 17-22. The Court agreed. R&R p.25. Thus, the predominance requirement is satisfied.

**2. A Class Action is Superior to Alternative Methods of Adjudication**

A class action is superior to other forms of litigation, as "proceeding individually would be prohibitive" due to the minimal recovery. *Seijas v. Republic of Argentina*, 606 F.3d 53, 58 (2d Cir.

2010). The only method to ensure the fair and efficient adjudication of this Action is through a class action, which will allow individual Settlement Class Members to bring together claims that would be economically infeasible to litigate on an individual basis. R&R p.31 (finding that the superiority requirement was satisfied); *Rivera v. Harvest Bakery Inc*., 312 F.R.D. 254, 277 (E.D.N.Y. 2016) (superiority requirement was satisfied where "the potential recovery for each individual class member [was] relatively small"). Thus, the superiority requirement is satisfied.

## V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

Courts encourage, and public policy favors, compromise and settlement of class actions. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (emphasizing the "strong judicial policy in favor of settlements, particularly in the class action context"). Whether a settlement is granted final approval is determined at the final fairness stage in accordance with the nine factors articulated in *City of Detroit v. Grinnell Corp*., 495 F.2d 448 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), and the requirements of Fed. R. Civ. P. 23. On the other hand, "[w]here the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representative [*sic*] or segments of the class and falls within the reasonable range of approval, preliminary approval is granted." *Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 355 (E.D.N.Y. 2006) (citations omitted). As explained below, the Settlement satisfies both the Rule 23(e)(2) and the *Grinnell* factors that merit final approval, and thus, preliminary approval is certainly appropriate.

### A. Procedural Fairness – Rule 23(e)(2)(A-B)

"Rule 23(e)(2)(A), which requires adequate representation, and Rule 23(e)(2)(B), which requires arm's-length negotiations, constitute the procedural analysis of the fairness inquiry." *Christine Asia Co., Ltd. v. Jack Yun Ma*, No. 1:15-md-02631 (CM) (SDA), 2019 WL 5257534, at

*9 (S.D.N.Y. Oct. 16, 2019). A settlement "will enjoy a presumption of fairness" where it "is the product of arms-length negotiations conducted by experienced counsel, knowledgeable in complex class litigation." *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp.2d 164, 173-74 (S.D.N.Y. 2000), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001).

This Settlement is the result of extended arm's-length negotiations through the assistance of Jed D. Melnick, an experienced mediator. This is a "strong indicator of procedural fairness." *Morris v. Affinity Health Plan, Inc.*, 859 F.Supp.2d 611, 618 (S.D.N.Y. 2012). *See also Gordon v. Vanda Pharmaceuticals Inc*., No 19 CV 1108 (FB)(LB), 2022 WL 4296092, at *4 (E.D. N.Y. Sep. 15, 2022) (recognizing that Mr. Melnick's participation as a "highly qualified mediator strongly support[ed] a finding that negotiations were conducted at arm's length and without collusion."). Further, and as set forth above, the Court has already found that Plaintiffs have adequately represented the classes. Accordingly, Rule 23(e)(2)(A) and Rule 23(e)(2)(B) are satisfied.

**B. Substantive Fairness – Rule 23(e)(2)(C-D)**

Rule 23(e)(2)(C) "focus[es] on what might be called a 'substantive' review of the terms of the proposed settlement." Committee Notes on Rules—2018 Amendment. The substantive fairness inquiry considers whether 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). Fed. R. Civ. P. 23(e)(2)(C). The Court must also consider whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). The Settlement satisfies both factors.

**1. Rule 23(e)(2)(C)(i) – The Costs, Risks, and Delay of Trial and Appeal**[3]

Rule 23(e)(2)(C)'s first factor, the "costs, risks, and delay of trial and appeal, subsumes several *Grinnell* factors, including the complexity, expense and likely duration of litigation, the risks of establishing liability, the risks of establishing damages, and the risks of maintaining the class through trial." *Rosenfeld*, 2021 WL 508339, at *5–6. Unless the proposed settlement is clearly inadequate, its acceptance and approval are preferable to the continuation of lengthy and expensive litigation with uncertain results. *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194(CM), 2010 WL 4877852, at *14 (S.D.N.Y. Nov. 30, 2010) ("As federal courts in this Circuit have consistently recognized, litigation inherently involves risks, and the purpose of settlement is to avoid uncertainty."). Analyzing these risks "does not require the Court to adjudicate the disputed issues or decide unsettled questions; rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. Nov. 24, 2004).

As a general matter, settlement avoids the risk inherent with continued litigation. *In re Prudential Sec. Inc. Ltd. P'ships Litig*., 163 F.R.D. 200, 210 (S.D.N.Y. 1995) ("[I]t may be preferable to take the bird in the hand instead of the prospective flock in the bush.") (internal quotation marks omitted). Here, Plaintiffs considered the significant risks of proceeding with the litigation, including the risks of maintaining class certification and prevailing on the merits of their claims before reaching this Settlement. While confident in the strength of their case, proceeding through summary judgment and trial would present meaningful risk. Wand Decl. ¶ 23.

Relatedly, proof of classwide damages based on Plaintiffs' price premium theory of liability necessarily presents an uncertain proposition. *Shapiro v. JPMorgan Chase & Co*., Nos.

[3] This factor overlaps with *Grinnell* factors 1, 4, 5, and 6.

11 Civ. 8831(CM)(MHD), 11 Civ. 7961(CM), 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014) ("[p]roof of damages in complex class actions is always complex and difficult and often subject to expert testimony"). This is a particularly salient concern, as Bigelow retained five experts who proffered opinions in support of multiple arguments contesting both liability and damages. Wand Decl. ¶ 24; *In re Am. Bank Note Holographics, Inc. Sec. Litig*., 127 F.Supp.2d 418, 426-27 (S.D.N.Y. 2001) ("Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Class Defendants, who could minimize or eliminate the amount of Plaintiffs' losses."); *In re Warner Commc'ns Sec. Litig.*, 618 F.Supp. 735, 744 (S.D.N.Y. 1985) ("In this 'battle of the experts' it is virtually impossible to predict with any certainty which testimony would be credited . . . ."). This Settlement provides significant compensation to the Class while avoiding that risk.

Bigelow also zealously litigated this Action, and absent this Settlement, there is no reason to believe it would not continue to do so through summary judgment and trial. Any favorable judgment to the Class would likely be the subject of post-trial motions and appeals. This Settlement, on the other hand, guarantees a quicker recovery to the Class. *City of Providence v. Aeropostale, Inc*., No. 11 Civ. 7132(CM)(GWG), 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014) (recognizing that "[e]ven if the Class could recover a judgment at trial, the additional delay through trial, post-trial motions, and the appellate process could prevent the Class from obtaining any recovery for years."); *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd*., 2004 WL 2997957, at *5 (S.D.N.Y. Dec. 27, 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.").

In sum, when the risks of litigation, the uncertainties involved in maintaining class certification, the burdens of proof necessary to establish liability and damages, and the probability of appeal of a favorable judgment are balanced against the merits of Plaintiffs' claims, the Settlement amount is fair, adequate, and reasonable. Wand Decl. ¶ 26. Class Counsel's views should be afforded considerable weight. *City of Providence*, 2014 WL 1883494, at *5 (holding lead counsel's opinion supporting the settlement entitled to "great weight.").

**2. Rule 23(e)(2)(C)(ii) – Effectiveness of Proposed Method of Distributing Relief**

Pursuant to Fed. R. Civ. P. 23(e)(2)(C)(ii), the Court should "consider the effectiveness of the parties' proposed method of distributing relief to the class, including the method of processing class-member claims." *Rosenfeld*, 2021 WL 508339, at *6. "[A] plan of allocation need not be perfect," *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240(CM), 2007 WL 2230177, at *11 (S.D.N.Y. July 27, 2007), and instead "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *In re WorldCom, Inc. Sec. Litig.*, 388 F.Supp.2d 319, 344 (S.D.N.Y. 2005).

The proposed plan of distribution meets this standard. To receive a Settlement Benefit, Claimants need only complete a straightforward Claim Form that answers basic questions about class membership. Settlement Agreement ¶ 21, Exs. 1-2. Claim Forms can be submitted through the settlement website or via mail to the Settlement Administrator. *Id.* This procedure is claimant-friendly and is "rational and fair, as it treats class members equitably while taking into account variations in the magnitude of their injuries." *Rosenfeld*, 2021 WL 508339, at *6.

### 3. Rule 23(e)(2)(C)(iii) – The Timing and Terms of Class Counsel's Proposed Award of Attorneys' Fees

The next factor under Rule 23 is the "terms of any proposed award of attorneys' fees, including timing of payment[.]" Fed. R. Civ. P. 23(e)(2)(C)(iii). The terms and timing of the requested attorneys' fees are fair and reasonable. The Fee Award is comprised of $715,413 in attorneys' fees and $506,422.47 in litigation expenses. Settlement Agreement ¶ 36. The requested attorneys' fees represent less than 30 percent of the Gross Settlement Amount, and, as Plaintiffs will explain in a forthcoming Fee Application, they constitute a considerable implied negative multiplier on Class Counsel's lodestar and are therefore reasonable. *In re Bear Stearns Cos. Sec. Derivative & ERISA Litig*., 909 F.Supp.2d 259, 271 (S.D .N.Y.2012) (approving requested fee with a negative multiplier and noting that the negative multiplier was a "strong indication of the reasonableness of the [requested] fee"); *Rosenfeld*, 2021 WL 508339, at *6 ("Courts in this Circuit routinely find that requests for attorney's fees totaling one-third of the settlement fund are well within the range of reasonableness" — particularly "in cases with funds of less than $10 million.") (quotation marks omitted). Lastly, any Fee Award will be paid when Settlement Benefits are distributed to Claimants, Settlement Agreement ¶ 99, so there are no issues with respect to the timing of payment.

### 4. Rule 23(e)(2)(C)(iv) – Additional Agreements

Fed. R. Civ. P. 23(e)(2)(C)(iv) concerns any additional agreements. There are no agreements between Plaintiffs and Bigelow other than the Settlement Agreement. Wand Decl. ¶ 8.

### 5. Rule 23(e)(2)(D) – Class Members Are Treated Equitably

The final Rule 23 inquiry is whether the Settlement Agreement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Each Class Member will be eligible to recover $0.50 per qualifying purchase, Settlement Agreement ¶ 68(a)-(b), and thus, Class

Members are treated equitably relative to one another. *Mikhlin v. Oasmia Pharmaceutical AB*, No. 19-CV-4349 (NGG) (RER), 2021 WL 1259559, at *8 (E.D. N.Y. Jan. 6, 2021) ("apportionment of the settlement funds among putative class members on a *pro rata* basis that takes into account the timing, duration, price, and volume of their shares" was fair under Rule 23(e)(2)(D)). The Settlement also provides for Class Representative Service Awards of $6,500 to each Plaintiff. Settlement Agreement ¶ 28. "Service awards are common in class action cases…," *Times v. Target Corp*., No. 18 Civ. 02993, 2019 WL 5616867, at *5 (S.D.N.Y. Oct. 29, 2019) and permissible in this Circuit. *Moses v. New York Times Co.*, 79 F.4th 235, 255 (2d Cir. 2023). The amount of the service award is also reasonable. *Sand v. Greenberg*, No. 08–cv–7840 (PAC), 2011 WL 1338196 (S.D.N.Y. Mar. 22, 2011) (proposed $10,000 service award "appears to be reasonable, and is very similar to allocation plans that courts routinely approve in the context of settlement") (citation omitted). Additional information will be set forth in Plaintiffs' Fee Application, but as pertinent here, the Class Representative Service Awards are reasonable and not an impediment to preliminary approval.

### C. The Remaining *Grinnell* Factors

Below Plaintiffs explain why the remaining *Grinnell* factors (i.e., 2, 3, 7, 8, and 9) that are not encompassed within Rule 23(e) are satisfied.

#### 1. *Grinnell* Factor No. 2 – Settlement Class Members' Reaction

As Settlement Class Members have not yet had an opportunity to react to the Settlement, it is premature to address this factor. *See Rosenfeld*, 2021 WL 508339, at *4 n.2. Prior to Final Approval, Plaintiffs will apprise the Court of the Class's reaction to the Settlement.

#### 2. *Grinnell* Factor No. 3 – The Stage of the Proceedings and the Amount of Discovery Completed Warrants Preliminary Approval

The next factor is "whether the parties' . . . counsel possessed a record sufficient to permit

evaluation of the merits of Plaintiffs' claims, the strengths of the defenses asserted by Defendants, and the value of Plaintiffs' causes of action for purposes of settlement." *In re Signet Jewelers Ltd. Sec. Litig.*, No. 1:16-cv-06728-CM-SDA, 2020 WL 4196468, at *7 (S.D.N.Y. July 21, 2020). "The relevant inquiry for this factor is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc. Sec. and "ERISA" Litig.*, No. MDL 1500, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006).

Here, Bigelow produced tens of thousands of pages of documents, and both sides retained expert witnesses in the fields of statistics and economics and consumer surveys. The Parties took 19 depositions, including fact, expert, Rule 30(b)(6), and third-party witness depositions. Settlement Agreement ¶ 9. Moreover, Plaintiffs certified two litigation classes, and summary judgment was largely briefed. Thus, Plaintiffs were well-apprised of the salient factual and legal issues before reaching this Settlement, and this *Grinnell* factor is satisfied. *Vaccaro v. New Source Energy Partners L.P.*, No. 15 CV 8954 (KMW), 2017 WL 6398636, at *5 (S.D. N.Y. Dec. 14, 2017) (granting preliminary approval when "action did not proceed to formal discovery," but plaintiffs reviewed publicly available information and consulted with experts).

### 3. *Grinnell* Factor No. 7 – Defendant's Ability to Withstand a Greater Judgment

Another of the *Grinnell* factors is the defendant's ability to withstand a greater judgment. *Grinnell*, 495 F.2d at 463. However, not all the *Grinnell* factors must be satisfied or are necessarily relevant in every case. *City of Providence*, 2014 WL 1883494, at *9 (granting final approval and finding this factor is not an "impediment to settlement when the other factors favor the settlement."). This factor poses no impediment to approval of the Settlement.

**4. *Grinnell* Factor Nos. 8-9 – Range of Reasonableness**

The final *Grinnell* factors involve consideration of both "the range of reasonableness of the settlement fund in light of the best possible recovery" and "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013). These factors "are often combined for the purposes of analysis." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 47-48 (E.D.N.Y. 2019). In analyzing these factors, the Court should consider the risks of litigation, as outlined above, as "[t]he range of reasonableness for a settlement is 'a range which recognizes the uncertainties of law and fact in any particular case and concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Rosenfeld*, 2021 WL 508339, at *8 (quoting *Wal-Mart Stores*, 396 F.3d at 119). As explained below, the Settlement reflects an excellent recovery by any measure.

Each Class Member who submits a timely and valid Claim Form will receive compensation of $0.50 per product, up to an aggregate amount of $10 without Proof of Purchase and $20 with Proof of Purchase. This compensation is more than the price premium damages on a per-product basis that Class Members could have recovered at trial. Specifically, Plaintiffs' economics expert conducted a conjoint analysis that yielded an 11.38% price premium based on Plaintiffs' theory of liability, which results in damages of $0.36 per-product when multiplied by the Class Products' average retail price. Plaintiffs' expert also determined that $971,359 is the maximum price premium damages on aggregate basis that Plaintiffs could expect to recover at trial. Wand Decl. ¶ 25. The Net Settlement Amount will be at least $971,359, and thus, the Settlement guarantees that Class Members will be made whole under Plaintiffs' price premium theory. Accordingly, this *Grinnell* factor is satisfied. *Grinnell*, 495 F.2d at 455 n.2. ("there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single

percent of the potential recovery."); *Morris v. Affinity Health Plan, Inc.*, 859 F.Supp.2d 611, 621 (S.D.N.Y. 2012) ("[i]t is well-settled that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair").

## VI. THE COURT SHOULD APPROVE THE NOTICE PLAN

### A. The Court Should Appoint JND as Settlement Administrator

JND, an experienced and well-qualified claims administrator, has been selected to provide notice to the Class and administer the Settlement. Settlement Agreement ¶ 62. The Court previously authorized JND to provide notice to the certified litigation classes of this action and JND completed that notice successfully. Bigelow will bear the Settlement Notice and Administration Costs, which includes costs for providing notice after the Court granted class certification, and which are estimated to be $251,804.60, and which shall not exceed $293,804.60, unless otherwise agreed to by the Parties for good cause expressly approved by the Court. Settlement Agreement ¶ 105; Intrepido-Bowden Decl. ¶¶ 2, 42. Accordingly, the Court should appoint JND as Settlement Administrator.

### B. The Court Should Approve the Class Notice Plan

Under Rule 23(e)(1)(B), the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal[.]" "Such notice to class members need only be reasonably calculated under the circumstances to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144(CM), 2009 WL 5178546, at *12 (S.D.N.Y. Dec. 23, 2009). As explained below, the Notice to be provided to the Settlement Class satisfies this standard, and it mirrors the plan that the Court already approved when notice was disseminated to the certified litigation classes. ECF No. 57; Intrepido-Bowden Decl. ¶ 7.

**1. Forms of Notice**

Notice must clearly state essential information regarding the settlement, including the nature of the action, terms of the settlement, and class members' options. Fed. R. Civ. P. 23(c)(2)(B). The proposed forms of notice consist of a Direct Notice and Long Form Notice, attached as Exhibits 3 and 4 to the Settlement Agreement, respectively. These notice documents provide Class Members with sufficient information to make an informed decision about the Settlement. They are written in simple, straightforward language that includes: (1) basic information about the lawsuit, (2) a description of the benefits provided by the settlement and an explanation of how Class Members can obtain them, (3) an explanation of how Class Members can exercise their right to request exclusion from or object to the settlement, (4) an explanation that any claims against Bigelow that could have been litigated in this action will be released if the Class Member does not request exclusion from the settlement, (5) information regarding Plaintiffs' Fee Application, and (6) the Final Approval hearing date (subject to change). Accordingly, the Notice forms satisfy the content requirements of Rule 23(e). *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) ("The settlement notice 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.'") (quoting *Weinberger*, 698 F.2d at 70).

**2. Method of Providing Notice**

Notice will consist of direct notice and publication notice. Direct Notice will be provided to every person for whom Bigelow maintains an e-mail address, and who may be a potential Class Member. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (A notice program must provide the 'best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort."). There are approximately 5,752 unique potential Class Members. JND will email the Direct Notice to each of these Persons. Settlement Agreement

¶ 83(c); Intrepido-Bowden Decl. ¶ 11.

If the names and addresses of class members cannot be determined by reasonable efforts, notice by publication is sufficient to satisfy the requirements of the due process clause and Rule 23. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317-18 (1950). The publication portion of the Notice Plan alone is designed to reach at least 70% of the Class. Settlement Agreement ¶ 82; Intrepido-Bowden Decl. ¶ 5. This satisfies the reach standard set forth in the Federal Judicial Center's Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide (2010). As this Court has recognized, a class notice that is "consistent with the model notices provided on the Federal Judicial Center's" model notices are generally appropriate. *Mendez v. U.S. Nonwovens Corp.*, No. CV 12-5583 (ADS) (SIL), 2017 WL 11726150, at *2 (E.D. N.Y. Aug. 2, 2017) (Locke, J.); *See also In re Restasis (Cyclosporine Emulsion) Antitrust Litig.*, 527 F.Supp.3d 269, 723 (E.D. N.Y Mar. 15, 2021) (recognizing that the Federal Judicial Center's Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide's 70-95 percent reach satisfied the "lynchpin in an objective determination of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the class").

Publication notice will be disseminated in multiple formats consisting of internet banner and social media advertisements, with embedded hyperlinks to a dedicated case-specific Settlement Website where the Notices and other court filings will be posted. Settlement Agreement ¶ 83; Intrepido-Bowden Decl. ¶¶ 30-31, Exs. B and C. The targeted digital campaign is designed to deliver roughly 31 million digital impressions to adults 18 years of age and older throughout the State of New York. Intrepido-Bowden Decl. ¶ 25. A toll-free number with live support that Class Members can call will also be provided. In sum, the Notice Plan constitutes the best notice

practicable under the circumstances. Intrepido-Bowden Decl. ¶ 43.

### C. CAFA Notice

JND will also provide notice of the Settlement to the appropriate State and Federal officials, in compliance with 28 U.S.C. § 1715(b), within ten days of the filing date of this Motion. Settlement Agreement ¶ 83(e).

## VII. THE COURT SHOULD REAFFIRM ITS APPOINTMENT OF CLASS COUNSEL

Rule 23(g) requires a court to appoint class counsel when it certifies a class. In appointing class counsel, the court considers several factors: (1) work done by counsel in identification or investigation of the claims in the action; (2) counsel's experience; (3) counsel's knowledge of the applicable law; and (4) counsel's resources committed to representing the proposed class. Fed. R. Civ. P. 23(g)(1)(A). As explained above, each of these factors is satisfied. Accordingly, the Court should reaffirm its appointment of Aubry Wand of The Wand Law Firm, P.C., Todd M. Schneider and Jason H. Kim of Schneider Wallace Cottrell Kim LLP, and Greg Linkh and Daniella Quitt of Glancy Prongay Wolke & Rotter LLP as Class Counsel.

## VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion. Assuming a preliminary approval order is issued on October 5, 2026, Plaintiffs propose that the Court adopt the implementation dates set forth in the following chart. A proposed preliminary approval order that contains this chart (with blank dates so that the Court can adjust the dates depending on when it may issue a preliminary approval order) is being submitted concurrently with this Motion.

| Event | Date |
|---|---|
| Deadline to commence Notice to the Class | Monday, **10/26/2026** (21 days after preliminary approval) |
| Completion of Notice Plan | Monday, **12/7/2026** (6 weeks after Notice commences) |
| Deadline to File Fee Application | Wednesday, **12/2/2026** (35 days before Objection/Exclusion Deadline) |
| Objection/Exclusion Deadline | Wednesday, **1/6/2027** (30 days after Notice Plan is completed) |
| Claim Deadline | Friday, **2/5/2027** (60 days after Notice Plan is completed) |
| Deadline to Complete Claim/Fraud Review | Sunday, **3/7/2027** (30 days after Claim Deadline) |
| Deadline to File Motion for Final Approval | Monday, **3/15/2027** (28 days before Final Approval Hearing) |
| Deadline to file declaration from Settlement Administrator attesting to its final costs / Deadline to Respond to Any Objections | Monday, **4/5/2027** (7 days before Final Approval Hearing) |
| Hearing on Motion for Final Approval | Monday, **4/12/2027** (28 days after filing of Motion for Final Approval) |

DATED: September 3, 2026

Respectfully submitted,

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