SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

KALMAN ROSENFELD and LOIS RYDER, on behalf of themselves and all others similarly situated,	:	**Index No.: 506882/2023**
Plaintiffs,	:	
-against-	:	**AFFIRMATION OF YITZCHAK KOPEL**
AC2T, INC.,	:	
Defendant.	:	

AFFIRMATION OF YITZCHAK KOPEL IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR SETTLEMENT

I, Yitzchak Kopel, an attorney duly admitted to practice law in the State of New York, declare under penalty of perjury:

1. I am a partner at the firm of Bursor & Fisher, P.A. ("B&F") in New York, New York, Plaintiffs' Counsel herein. B&F is a nationally recognized law firm with offices in New York, Miami, and California, that represents plaintiffs in a wide variety of consumer and employment matters.

2. I am one of the lawyers primarily responsible for prosecuting the claims alleged by Plaintiffs Kalman Rosenfeld and Lois Ryder (together, "Plaintiffs") in this action.

3. I make these statements based on personal knowledge and would so testify if called as a witness at trial.

PROCEDURAL HISTORY & INVESTIGATION

4. Before initiating the instant action, B&F conducted a thorough investigation into Defendant AC2T, Inc. (collectively, "Defendant" or "Spartan") and the products at issue in this case, the Spartan Mosquito Eradicator and Spartan Mosquito Pro Tech (the "Products"). This

investigation included commissioning testing of the efficacy of Product and reviewing tens of thousands of pages of scientific background on the Products and their formulations. B&F also conducted substantial research into the ownership and formation of Defendant and its business practices.

5. Over the past six months, the parties' respective counsel participated in numerous telephone conferences and exchanged many e-mails, discussing the merits of and defenses to the claims, and the possibility of settlement on a class-wide basis.

6. Ultimately, the parties agreed to schedule a private mediation to take place on December 22, 2022 before a retired Southern District of New York Magistrate Judge. Given the extensive exchange of documents that had taken place, Plaintiffs' Counsel was sufficiently able to determine the amount of damages at issue, as well as the strengths and weaknesses of continued litigation.

7. B&F utilized Defendant's ESI document production to evaluate the claims alleged by Plaintiffs in this action and Defendant's defenses thereto and to calculate alleged damages on a class-wide basis. Specifically, B&F reviewed and analyzed numerous documents and excel spreadsheets containing information regarding sales of the products at issue.

8. Prior to the mediation, the parties' respective counsel held multiple conference calls to discuss liability, defenses, and the damages calculations that each prepared.

SETTLEMENT CONFERENCE & SETTLEMENT

9. After a full day of negotiations at private mediation on December 22, 2022, the parties reached a class-wide settlement in principle of Three Million, Six Hundred Thousand Dollars ($3,600,000) ("Gross Settlement Amount"). *See* **Exhibit ("Ex.") A**, Fully Executed Settlement Agreement and Release ¶ 11.8.

10. Over the next three months, the parties also negotiated the remaining terms of the

settlement and drafted the final Settlement Agreement and Release ("Settlement Agreement"), which was fully executed by all parties on April 12, 2023.

11. The parties also drafted and negotiated the terms of the class notice that will be distributed to Class Members[1] if the Court grants preliminary approval of the settlement. At all times during the settlement negotiation process, negotiations were conducted on an arm's-length basis by experienced counsel.

12. On March 6, 2023, Plaintiffs filed a putative class action complaint against Defendant in the Supreme Court of the State of New York, Kings County, alleging that Defendant violated New York GBL §§ 349 & 350 and breached express warranties, among others, in connection with the marketing and sale of the products at issue.

RISK OF CONTINUED LITIGATION

13. The Gross Settlement Amount is a compromise figure. In reaching the settlement, B&F carefully evaluated the merits of the case and proposed settlement, took into account the risks of establishing liability and obtaining class certification, and considered the time, delay, and financial risks in the event of trial and appeal by Defendant. Although Plaintiffs believe that their claims have merit, they recognize the legal, factual and procedural obstacles to recovery, as Defendant has and will continue to contest Plaintiffs' claims if the action does not settle. Moreover, even if this case were to proceed to trial, B&F recognizes that the apparent strengths of Plaintiffs' claims are no guarantee against a complete or partial defense judgment or verdict.

14. Further, obtaining and maintaining a class action may prove difficult. For instance, in *Scott v. Chipotle Mexican Grill, Inc.*, after 8 years of contested litigation, the court's denial of class certification was upheld by the Second Circuit. *See* 954 F. 3d 502 (2d Cir. 2020). The instant

[1] Capitalized terms used but not defined herein have the meaning given to them in the Settlement Agreement.

settlement in this matter alleviates the uncertainty associated with obtaining and maintaining a class action through trial and makes financial recovery available for Class Members now.

15. In light of the strengths and weaknesses of this case, B&F believes the settlement easily falls within the range of reasonableness because it achieves a significant benefit for Plaintiffs and Class Members in the face of significant obstacles.

16. The settlement negotiations were at all times hard fought at arm's length, and they have produced a result that B&F believes to be in the best interests of Class Members in light of the costs and risks of continued litigation.

17. For example, the claims that the products at issue do not work as advertised were (and are) vigorously contested by Defendant. If Defendant is correct, it would leave Plaintiffs and members of the class without any financial recovery whatsoever.

18. Were the case to proceed in Court, Defendant was prepared to vigorously contest class certification, move for summary judgment, and present expert testimony supporting its defenses to Plaintiffs' claims. As such, continued litigation on this claim represents a substantial risk to Plaintiffs.

19. Moreover, Plaintiffs would have to prove that the products at issue do not work as advertised, an allegation against which Defendant has strongly argued and continues to deny. If Plaintiffs were unable to establish this allegation as fact, they would not be entitled to recover under any of their asserted claims.

TERMS OF THE SETTLEMENT

I. MONETARY AND NON-MONETARY TERMS

20. Defendant collectively and individually agrees to pay a maximum of Three Million, Six Hundred Thousand Dollars ($3,600,000.00) for allocation and calculation purposes, to fully resolve and satisfy all amounts to be paid to all Authorized Claimants and any Court-approved

Costs and Fees. Settlement ¶ 10.5. The Settlement Administrator shall determine each Participating Claimant's Benefit Payment in accordance with the following:

a. **With Proof of Purchase.** Settlement Class Members who submit a valid Claim Form, along with Proof of Purchase establishing purchase of the Covered Products, and revealing the actual price paid for the Covered Products, will receive a full refund of the purchase price for all documented purchases of the Covered Products during the Class Period. Settlement Class Members who submit a valid Claim Form, along with Proof of Purchase that does not reveal the actual price paid for the Covered Products will receive a refund of $10.00 for each such box.

b. **Without Proof of Purchase.** Settlement Class Members who submit a valid Claim Form without Proof of Purchase, but who submit attestation of Claimant's purchase, may recover up to a maximum of $7.00 per box, limited to 1 box per Household.

Id. ¶ 11.7.

The Settlement also provides for significant non-monetary benefits: As of the Final Effective Date, Defendant will no longer manufacture or sell the Spartan Mosquito Eradicator. However, the Parties acknowledge that some third-party wholesalers, distributors, or retailers outside of Defendant's control who previously purchased the Spartan Mosquito Eradicator for resale may continue to list the product for sale, and such sales will not be attributed to Defendant for the purposes of this Section 12.1. This Court shall have continuing jurisdiction if a dispute arises between Class Counsel and Defendant concerning Section 12.1. In addition, during the 18-month period following the Final Effective Date, to the extent not already performed, Defendant will conduct research regarding the efficacy of the Spartan Mosquito Pro Tech. Following the 18-month period, to the extent such testing shows a lack of efficacy for the

Spartan Mosquito Pro Tech, Defendant will either update the formulation or cease sales of the Spartan Mosquito Pro Tech. This Court shall have continuing jurisdiction if a dispute arises between Class Counsel and Defendant concerning Section 12.2. *Id*. ¶¶ 12.1, 12.2.

II. RELEASE

21. The Settlement Agreement provides that each individual Class Member who does not timely opt-out pursuant to this Agreement shall release and absolutely and forever discharge Defendant and all Released Parties from any and all Released Claims. *Id.* ¶ 14.1.

III. CLASS ACTION SETTLEMENT PROCEDURE

22. The parties respectfully submit the following proposed schedule for final resolution of this matter for the Court's consideration and approval:

a. Within 60 days of the entry of this Order, the Settlement/Claims administrator shall disseminate long form, internet, and email Class Notice. The Settlement/Claims administrator shall also establish a Settlement Website. *Id*. ¶¶ 6.1-6.4.

b. If the Court grants Plaintiffs' Motion for Final Approval of the Settlement, the Court will issue a Final Approval Order. The Final Effective Date shall be the latest of the following: (i) the date of final affirmance of the Final Approval Order following any and all appeals of such Order; (ii) the date of final dismissal with prejudice of any and all appeals from the Final Approval Order; and (iii) if no appeal is filed, the expiration date of the time for filing or noticing any valid appeal from the Final Approval Order. *Id.* ¶ 2.14.

c. Within 10 days after the resolution of any objections, Defendant shall wire to the Settlement Administrator the sum necessary to pay the amounts payable to

Participating Claimants. *Id.* ¶ 10.3.

LEGAL ARGUMENT

I. THE PROPOSED SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

23. CPLR § 908 requires judicial approval for any compromise of claims brought on a class basis. "A class action shall not be dismissed, discontinued, or compromised without the approval of the court." CPLR § 908; *see also Milton v. Bells Nurses Registry & Employment Agency, Inc.*, 2015 WL 9271692 at *1-2 (N.Y. Sup. Ct. Dec. 21, 2015); *Ryan v. Volume Servs. Am., Inc.*, 2013 WL 12147011 at *1 (N.Y. Sup. Ct. Mar. 07, 2013); *Fiala v. Metro. Life Ins. Co., Inc.*, 899 N.Y.S.2d 531, 537 (Sup. Ct. 2010). New York courts regularly refer to the federal standards in making this determination, in recognition that the two statutory schemes are similar. *Fernandez v. Legends Hospitality, LLC*, 2015 WL 3932897 at *2 (N.Y. Sup. Ct. June 22, 2015) (citing *Fiala*, 899 N.Y.S.2d at 537-38 (collecting cases)). Courts examine "the fairness of the settlement, its adequacy, its reasonableness and the best interests of the class members." *Mancia v. HSBC Securities (USA) Inc.*, 2016 WL 833232 at *1 (N.Y. Sup. Ct. Feb. 19, 2016) (quoting *Milton*, 2015 WL 9271692, at *1 (N.Y. Sup. Ct. Kings County, Dec 14, 2015), at *2 (citing *Fiala*, 899 N.Y.S.2d at 531)); *see also Rosenfeld v. Bear Stearns & Co.*, 237 A.D.2d 199 (1st Dep't 1997); *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000).

24. Preliminary approval is subject to a less rigorous standard than final approval. In the final approval determination, the Court's consideration of whether the proposed settlement is fair and adequate "balance[es] the value of that settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation." *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 73 (2d Dept. 2006); *see also Matter of Colt Indus. S'holder Litig.*, 155 A.D.2d 154, 160 (1st Dept. 1990). Courts may also consider "support of the class members, the opinion of counsel, lack of collusion and counsels' and class

representatives' adherence to fiduciary standards." *Fiala v. Metro. Life Ins. Co., Inc.*, 27 Misc. 3d 599, 607 (Sup. Ct. 2010).

25. Preliminary approval is appropriate "'[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 representatives or segments of the class and falls within the range of possible approval[.]'" *In re Initial Pub. Offerings Sec. Litig.*, 226 F.R.D 186, 191 (S.D.N.Y. 2005) (quoting Manual for Complex Litig., Third § 30.41(1995)); *In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (same); *see also e.g.*, *Almonte v. Marina Ice Cream Corp.*, No. 16 Civ. 660 (GBD), 2016 WL 7217258, at *1 (S.D.N.Y. Dec. 8, 2016) (granting preliminary approval as it "requires only an 'initial evaluation' of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties"); *Hadel v. Gaucho, LLC*, No. 15 Civ. 3706 (RLE), 2016 WL 1060324, at *1 (S.D.N.Y. Mar. 14, 2016) (same); *Chhab v. Darden Restaurants, Inc.*, No. 11 Civ. 8345 (NRB), 2016 WL 3004511, at *1 (S.D.N.Y. May 20, 2016) (same); *Bravo v. Palm West Corp.*, No. 14 Civ. 9193 (SN), 2015 WL 5826715, at *1 (S.D.N.Y. Sept. 30, 2015) (same); *Gonqueh v. Leros Point To Point, Inc.*, No. 14 Civ. 5883 (GHW), 2015 WL 9256932, at *3-4 (S.D.N.Y. Sept. 2, 2015) (same); *Ryan v. Volume Servs. Am., Inc.*, No. 652970/2012, 2012 WL 6065987 (Sup. Ct. Dec. 6, 2012) (granting preliminary approval where the settlement was "the result of extensive, arm's length negotiations by counsel well-versed in the prosecution of wage and hour class and collective actions, and [ ] the proposed settlement has no obvious deficiencies").

A. <u>The Proposed Settlement is Fair, Adequate, and Reasonable</u>

1. The Proposed Settlement Is The Product Of Extensive Arm's Length Negotiations

26. The settlement is the product of extensive, arm's-length negotiations. As discussed

above, the parties engaged in extensive pre-litigation discovery relating to liability issues and class-wide damages issues. Subsequently, B&F was able to perform detailed damages calculations based on the data Defendant provided. In addition, the parties engaged in protracted settlement negotiations, which included an in-person settlement conference before a retired Southern District of New York Magistrate Judge who has significant experience with consumer class actions.

2. The Settlement Contains No Obvious Deficiencies

27. The proposed settlement contains no obvious deficiencies. As explained above, the proposed settlement was reached only after protracted, arm's-length negotiations between the parties and their counsel, who considered the advantages and disadvantages of continued litigation. Class Counsel believes that this settlement achieves all of the objectives of the litigation, namely a substantial monetary settlement to Class Members allegedly purchased mosquito prevention products that did not work as advertised. Class Counsel, who has a great deal of experience in the prosecution and resolution of class actions, has carefully evaluated the merits of this case and the proposed settlement. Even if this case were to proceed to trial, Class Counsel recognizes that the apparent strengths of Plaintiffs' claims are no guarantee against a complete or partial defense judgment verdict. Furthermore, even if a judgment were obtained against Defendant at trial, the relief might be no greater, and indeed might be less, than that provided by the proposed settlement.

II. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

28. Plaintiffs bring claims against Defendant for violation of GBL §§ 349 & 350, breach of express warranty, and fraud in connection with the advertising and sale of the products at issue. Defendant denies these allegations. Nevertheless, the instant motion seeks an Order pursuant to Article 9 of the CPLR certifying the following class: all Persons who purchased one or more Covered Products during the Class Period.

29. The proposed settlement class satisfies each of the five statutory requirements of

CPLR § 901 and the factors in CPLR § 902. *See e.g.*, *Pludeman v. Northern Leasing Sys., Inc*., 74 A.D.3d 420, 421-22 (1st Dept. 2010) (citing *Weinberg v. Hertz Corp*., 116 A.D.2d 1, 4 (1986) aff'd. 69 N.Y.2d 979 (1987); *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 191 (1998)). Thus, for the reasons set forth below, the proposed settlement class should be certified.

A. <u>The Class Certification Statute Should be Liberally Construed</u>

30. It is well established that, in deciding whether to certify a class, "a court must be mindful of [the Appellate Division's] holding that the class certification statute should be liberally construed." *Kudinov v. Kel-Tech Constr. Inc.*, 65 A.D.3d 481, 481 (1st Dept. 2009) (citing *Englade v. Harper Collins Publs., Inc.*, 289 A.D.2d 159, 159 (1st Dept. 2001); *see also Pruitt v. Rockefeller Ctr. Properties, Inc.*, 167 A.D.2d 14, 21 (1st Dept. 1991) ("[a]ppellate courts in this state have repeatedly held that the class action statute should be liberally construed . . . any error, if there is to be one, should be . . . in favor of allowing the class action"); *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 90-92 (2d Dept. 1980); *Galdamez v. Biordi Constr. Corp.*, 2006 WL 2969651 (N.Y. Sup. Ct. Oct. 17, 2006), *aff'd* 855 N.Y.S.2d 104 (1st Dept. 2008); *Pajaczek v. Cema Constr. Corp.*, 2008 WL 541298, at *2 (N.Y. Sup. Ct. Feb. 21, 2008) (citing *Brandon v. Chefetz*, 106 A.D.2d 162, 168 (1st Dept. 1985)).

31. The flexible scheme of Article 9 was enacted to replace the previously rigid and undesirable restrictions that existed under former law. This legislative intent was acknowledged by the Appellate Division in *Brandon v. Chefetz*:

> In his scholarly and persuasive opinion in *Friar v. Vanguard Holding*, cited above [78 A.D.2d 83, 434 N.Y.S.2d 698 (2d Dept. 1980)], Justice Lazer stated that the criteria for class certification should be broadly construed not only because of the general command for liberal construction of all CPLR sections (*see* CPLR 104), but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it.

106 A.D.2d at 168.

32. Class certification is routinely granted in consumer protection class action settlements such as this one. *See, e.g.*, *In re Sony SXRD Rear Projection Television Class Action Litig.*, 2008 WL 1956267 (S.D.N.Y. May 1, 2008); *Saska v. Metro. Museum of Art*, 50 N.Y.S.3d 28 (N.Y. Sup. Ct. 2016); *Hart v. BHH, LLC*, 334 F.R.D. 74 (S.D.N.Y. 2020); *Gregorio v. Premier Nutrition Corp.*, 2018 WL 6033378 (S.D.N.Y. Sept. 14, 2018).

33. Moreover, though the instant action clearly meets the requirements for class certification, as demonstrated below, any doubts must be resolved in favor of class certification. *Pruitt*, 167 A.D.2d at 21 ("any error, if there is to be one, should be . . . in favor of allowing the class action"); *Friar*, 78 A.D.2d at 90-92; *Brandon*, 106 A.D.2d at 168.

B. <u>This Action Satisfies All the Prerequisites of CPLR § 901</u>

34. CPLR § 901(a) provides that one or more members of a class may sue as representative parties on behalf of a class if: (1) the class is so numerous that joinder of all members whether otherwise required or permitted is impracticable ["numerosity"]; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members ["predominance"]; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"]; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy ["superiority"].

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

35. Section 901(a)(1) requires that the class be so numerous that joinder of all class members is impracticable. Courts have held the general threshold for impracticability of joinder to be around 40, although numerosity has been satisfied with less than 40 class members. *See e.g.*,

Pesantez, 251 A.D.2d 11. Here, the class consists of thousands of individuals. Under these circumstances, joinder is both impracticable and undesirable, and the "numerosity" requirement has clearly been satisfied.

2. The Questions Of Law And Fact Common To The Class Predominate Over Questions Affecting Only Individual Class Members.

36. "To satisfy this requirement, a plaintiff must show that 'the nature of the claims is such as to indicate a predominance of common issues of law and fact over individual questions of damages.'" *Weinstein v. Jenny Craig Operations, Inc.*, 41 Misc. 3d 1220(A), at *3 (N.Y. Sup. Ct. 2013); *Borden v. 400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382, 399 (2014) ("[T]he predominant legal question involves one that applies to the entire class."). This standard requires "predominance, not identity or unanimity, among class members." *Krebs v. The Canyon Club*, 880 N.Y.S.2d 873, at *6 (N.Y. Sup. Ct. Jan. 2, 2009) (holding that the differences in the manner in which the defendants obtained money from potential class members does not mean that individual questions predominate over common questions) (quoting *Friar*, 78 A.D.2d at 98); *see also generally Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.").

37. "The fundamental issue . . . is whether the proposed class action asserts a common legal grievance, *i.e.*, whether the common issues predominate over or outweigh the subordinate issues that pertain to individual members of the class." *Geiger v. Amer. Tobacco Co.*, 181 Misc.2d 875, 883 (N.Y. Sup. Ct. 1999) (quoting 3 Weinstein-Korn-Miller, N.Y. Civil Practice § 901.11); *see also Pesantez*, 251 A.D.2d at 12 (citing *Pruitt*, 167 A.D.2d at 22)). Whether common questions of law or fact predominate "should not be determined by any mechanical test, but rather, whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity

of decision as to persons similarly situated." *Friar*, 78 A.D.2d at 97 (internal punctuation omitted). In determining whether the claims of the Plaintiffs and putative Class Members share common questions of law or fact, "factual identity between the [p]laintiffs' claim and those of the class he seeks to represent is not necessary if these claims arise, at least in part, from a common wrong or set of wrongs regardless of individual factors." *Pajaczek*, 2008 WL 541298, at *4 (quoting *Senter v. General Motors Corp.*, 532 F.2d 511, 524 (6th Cir. 1975), *cert. denied*, 429 U.S. 870 (1976). "The statute clearly envisions authorization of class actions even when there are subsidiary questions of law or fact not common to the class." *Krebs*, 880 N.Y.S.2d at *6 (citing *Weinberg*, 116 A.D.2d at 6); *Borden*, 24 N.Y.3d at 399 ("It should be noted that the legislature enacted CPLR 901(a) with a specific allowance for class actions in cases where damages differed among the plaintiffs, stating the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class if the important legal or factual issues involving liability are common to the class.") (internal quotation marks and citation omitted).

38. Here, Plaintiffs and Class Members are unified by common factual allegations, namely that they were exposed to the same representations on Defendant's packaging and purchased the products at issue in reliance on those representations. *See* Complaint ¶ 18. Given these common factual allegations and what would be Defendant's common defenses, common questions of law and fact predominate over questions affecting only individual Class Members.

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

39. Section 901(a)(3) requires that the named plaintiff's claims be "typical" of the proposed class. The typicality requirement is satisfied when the named plaintiff's claims "derive[] from the same practice or course of conduct that gave rise to the remaining claims of the class members and is based upon the same legal theory." *Friar*, 78 A.D.2d at 99; *Pajaczek*, 2008 WL

541298, at *4; *Galdamez*, 2006 WL 2969651, at *3 (quoting *Pruitt*, 167 A.D.2d at 22). The essence of typicality is that the representative party must have an individual cause of action and that the representative's interest must be closely identified with that of the class members. *See* 2 Weinstein, Korn & Miller, N.Y. Civ. Practice, § 901.09.

40. To demonstrate typicality, "it is not necessary that the claims of the named [p]laintiffs be identical to those of the class." *Super Glue v. Avis Rent-A-Car System, Inc.*, 132 A.D.2d 604, 607 (2d Dept. 1987), *aff'd as mod., on other grounds*, 159 A.D.2d 68 (2d Dept. 1990). Nevertheless, the named plaintiff's "claims must not be antagonistic to or in conflict with the interest of other class members." *Gilman v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 93 Misc.2d 941, 945 (N.Y. Sup. Ct. Apr. 5, 1978). Where an alleged defense may affect an individual's right to recover, but does not affect the liability issues for the class, this defense does not make the named plaintiffs' claims atypical. *See Lessard v. Metro. Life Ins. Co.*, 103 F.R.D. 608, 613 (D. Me. 1984).

41. In this case, Plaintiffs' claims are typical of the Class Members' claims they seek to represent because their claims arise out of the same course of conduct. Complaint ¶ 19. Typicality is therefore satisfied. *See, e.g.*, *Galdamez*, 2006 WL 2969651, at *3 (the plaintiffs' claims are typical where they arise out of same course of conduct as class members' claims and are based on same cause of action).

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

42. Section 901(a)(4) requires that a class representative is "part of the class and possess[es] the same interest and suffer[s] the same injury as the class members." *Weinstein*, 41 Misc. 3d 1220(A), at *4. Adequacy of representation further requires that "counsel for the named plaintiff[] be competent and that the interests of the named plaintiff[] and the members of the class

not be adverse." *Pajaczek*, 2008 WL 541298, at *4 (citing *Pruitt*, 167 A.D.2d at 24).

43. Here, Plaintiffs stand to gain a pecuniary benefit through the successful prosecution of this action. Plaintiffs seek the same relief as all other Class Members – compensation for money spent on allegedly ineffective products. Furthermore, Plaintiffs are familiar with the lawsuit and are fully aware of their alleged claims, as well as the alleged claims of the Class Members they seek to represent. Additionally, Plaintiffs are represented by counsel who is very experienced in class actions. Indeed, courts have specifically noted the skill and resources with which B&F prosecutes class actions, finding that B&F has significant knowledge and experience prosecuting and settling complex class actions. As such, the adequacy requirement is met. *See Borden*, 24 N.Y.3d at 399-400 (upholding certification where the court "found no substantiated conflicts between the [class members] and a representative with adequate understanding of the case, and competent attorneys.") (internal quotation marks and citations omitted).

5. A Class Action Is Superior To Other Available Methods.

44. A class action here is superior to any other method of resolving this Action because it provides many geographically dispersed purchasers with modest losses with viable means to recover damages allegedly tied to the Defendant's products. Thus, "a class action is not only superior [here] but, indeed, the only practical method of adjudication." *Pruitt*, 167 A.D.2d at 24; accord *Billhofer*, 281 F.R.D. at 164 (finding superiority and reasoning that "[a]djudicating individual claims would be a significant waste of judicial resources"); *see also In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 787- 88 (E.D.N.Y. 1980) (when common issues predominate, courts generally find the class procedure to be the best and only realistic means of disposing of a large number of claims arising out of the same operative facts). Subjecting the court and the litigants to the expense and time of multiple trials would be wasteful, and resolving

the common issues on a class-wide basis will create uniform resolution of the issues, thereby providing a framework for the adjudication or settlement of whatever individual damage issues remain. *See Friar*, 78 A.D.2d at 97.

45. Employing the class device here will achieve economies of scale for Class Members, conserve judicial resources, and preserve public confidence in the system by avoiding repetitive proceedings and preventing inconsistent adjudications. Accordingly, a class action is clearly superior to any alternative means of obtaining relief for class members. *Borden*, 24 N.Y.3d at 400 ("[T]o preserve judicial resources, class certification is superior to having these claims adjudicated individually").

C. Consideration of CPLR § 902 Factors Supports Conditional Certification

46. CPLR § 902 directs the Court to also consider the following factors in exercising its discretion in favor of class certification:

a. the interest of members of the class in individually controlling the prosecution or defense of separate actions;

b. the impracticability or inefficiency of prosecuting or defending separate actions;

c. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

d. the desirability or undesirability of concentrating the litigation of the claim in the particular forum; and

e. the difficulties likely to be encountered in the management of a class action.

47. A number of the § 902 factors mimic the requirements of § 901. See *Gilman*, 93 Misc.2d at 948.

48. The existence of thousands of Class Members, in and of itself, is a testament to both "the impracticability and inefficiency of prosecuting or defending separate actions." *See* CPLR § 902(2). Moreover, this forum is appropriate insofar as the Court has jurisdiction over this matter. *See* CPLR § 902(4). Finally, there are very few difficulties in managing a class action based upon the claims herein, particularly when compared to complications of managing multiple actions. *See* CPLR § 902(5).

49. To B&F's knowledge, no other individual has instituted an action against Defendant for the claims being sought by Plaintiffs in this case.

III. B&F SHOULD BE APPOINTED AS CLASS COUNSEL

50. B&F has done substantial work identifying, investigating, prosecuting, and settling the claims; has substantial experience prosecuting and settling consumer product class actions; is well-versed in consumer product class action law; and is well-qualified to represent the interests of the class. Moreover, courts have found B&F to be adequate class counsel in class actions. *See* **Ex. D**, Class Counsel's Firm Resume.

IV. AICS CLAIMS SERVICE AS SETTLEMENT/CLAIMS ADMINISTRATOR

51. B&F has engaged Artificial Intelligence Class Solutions ("AICS") as Settlement/Claims administrator to provide notification services in this matter. As Settlement/Claims administrator, AICS's duties will include: a) preparing, printing and mailing of the Notice of Proposed Class Action Settlement, attached hereto as **Ex. B**; b) tracking of written requests to opt-in or opt-out and objections; c) drafting and mailing Settlement Payments to Class Members; and d) such other tasks as the Parties mutually agree or the Court orders KCC to perform.

52. AICS is a competent and experienced claims administration firm and has been approved by many courts to administer class action settlements. *See* **Ex. E**, Curriculum Vitae.

V. THE PROPOSED CLASS NOTICE IS APPROPRIATE

53. CPLR § 908 requires that "[n]otice of the proposed . . . compromise [of a class action] shall be given to members of the class in such manner as the court directs." The Settlement Agreement provides that the Settlement/Claims administrator will mail the Notice and Claim Forms to all Class Members, and also send via email to known purchasers. Ex. A, Settlement Agreement ¶ 6.

54. The Class Notice and Claim Form clearly describes the terms of settlement and the relief available to Class Members. Moreover, the Class Notice details the procedures for participating, opting-out of, or objecting to the settlement and a 60-day deadline for same. Ex. B, Class Notice and Claim Form. The Class Notice also describes the fees and costs that B&F will seek and the proposed enhancement award to Plaintiffs. Ex. A, Settlement Agreement ¶ 6.1. Finally, the Class Notice provides contact information for B&F and will disclose the date, time, and place of the Fairness Hearing. *Id*.

CONCLUSION

55. For the reasons set forth above, Plaintiffs respectfully request that the Court preliminarily approve the settlement, conditionally certify the settlement class, appoint B&F as Class Counsel, appoint AICS as Settlement/Claims administrator, approve the Class Notice, and enter the Proposed Order.

EXHIBITS

56. Attached as Exhibit A is a true and correct copy of the Settlement and Release Agreement ("Settlement Agreement"), which was fully executed by the parties on April 12, 2023.

57. Attached as Exhibit B is a true and correct copy of the proposed Notice and Claim Form of the Proposed Class Action Settlement ("Class Notice").

58. Attached as Exhibit C is a true and correct copy of Plaintiffs' Proposed Order

Granting Plaintiffs' Unopposed Motion for Settlement.

59. Attached as Exhibit D is a true and correct copy of Class Counsel's Firm Resume.

60. Attached as Exhibit E is a true and correct copy of a list of various court-approved settlements administered by AICS.

I declare under penalty of perjury that the foregoing is true and correct.

New York, New York
Dated: May 17, 2023

Respectfully submitted,

/s/ *Yitzchak Kopel*
Yitzchak Kopel

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CERTIFICATE OF WORD COUNT

I, Yitzchak Kopel, hereby certify that the Affirmation of Yitzchak Kopel in Support of Plaintiffs' Motion for Settlement contains 5593 words, per Uniform Rules for the Trial Courts, 22 N.Y.C.R.R. Part 202.

/s/ Yitzchak Kopel
Yitzchak Kopel