UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ALESSANDRO BERNI, GIUISEPPE SANTOCHIRICO, MASSIMO SIMIOLI, and DOMENICO SALVATI, on behalf of themselves and all others similarly situated, Plaintiffs, v. BARILLA G. e R. FRATELLI, S.p.A., and BARILLA AMERICA INC. d/b/a BARILLA USA, Defendants.	)	Case No. 1:16-cv-04196

MEMORANDUM OF LAW IN SUPPORT OF FINAL SETTLEMENT APPROVAL

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Plaintiffs respectfully submit this memorandum of law in support of final class action settlement approval, and the approval of attorneys' fees, expenses, and case contribution awards.[1]

I. PRELIMINARY STATEMENT

Plaintiffs filed this class action alleging that Barilla misled consumers by selling boxes of specialty pasta in violation of federal "slack-fill" regulation. Following a significant pre-filing investigation, legal and factual research, contested motion practice, discovery and extensive arm's-length negotiations with the Court's assistance, Plaintiffs have obtained substantial relief for the Class: Barilla has agreed to change the packaging of its boxes of specialty pasta to include graphics, language, and a clearly-marked fill-line that identifies exactly how much pasta is in each box.

The injunctive relief obtained through this Settlement is broad, complete and directly resolves the claims alleged. These substantial labeling changes were obtained after extensive arm's-length negotiations over several months, involving multiple telephonic and in-person conversations, as well as numerous back-and-forth proposals mediated by the Court.

Given the scope and breadth of this injunctive relief, Plaintiffs have determined that the benefits of the Settlement outweigh the risks of continued litigation to pursue what would potentially be nominal monetary damages for the Class. The Settlement takes into account the substantial risks the Parties would face if the litigation continued. Pursuant to the Court's Order, dated June 12, 2018, DE 57, notice of this Settlement has been distributed. Although the Court-

[1] Unless otherwise set forth, all capitalized terms used herein have the meanings ascribed to them in the Class Action Settlement Agreement, filed with the Court on April 25, 2018 (the "Settlement Agreement"), Docket Entry ("DE") 55-1. Citations to "Joint Decl. ¶ __" are to the Joint Declaration of Daniella Quitt and Ronen Sarraf in Support of Final Class Action Settlement Approval (the "Joint Declaration") accompanying this memorandum.

ordered November 19, 2018 deadline for Class Members to file objections has not yet passed, Class Counsel are unaware of any objections to the Settlement.

Accordingly, Plaintiffs respectfully request that the Court: (1) grant final approval of the Settlement as fair, reasonable, and adequate; (2) confirm certification of the Class for the purpose of the Settlement and continuing the appointment of Plaintiffs as representatives of the Class and their counsel as Class Counsel; (3) approve the fee and expense award, as well as the Case Contribution Awards; and, (4) enter the Order in the form substantially similar to Exhibit E to the Settlement Agreement.

II. FACTUAL AND PROCEDURAL HISTORY

A detailed description of the factual and procedural factual history of the Action is found in the Joint Declaration at ¶¶ 8-33. In the interest of brevity, they will not be repeated here.

III. THE TERMS OF THE SETTLEMENT

The Settlement Agreement, DE 55-1, details the specific terms and procedures for resolving this Action. Joint Decl. ¶¶ 34-40, Exhibit 1. The principal parts of the Settlement are as follows:

A. Labeling Change And Injunctive Relief

Section 2, Exhibit D, of the Settlement Agreement, provides that Barilla will make label modifications to include, *inter alia*, a "fill-line" on products containing less than one pound (16 ounces) of pasta. By clearly identifying that portion of the pasta box that Plaintiffs alleged was misleadingly empty, these label modifications directly resolved Plaintiffs' claims and the alleged "slack-fill."

B. Class Certification

Section 6.1 of the Settlement Agreement provides for the certification of the Class, pursuant to Fed. R. Civ. P. 23(b)(2), defined as follows:

> All consumers in the United States and all U.S. territories (including, but not limited to, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the other territories and possessions of the United States), who purchased one or more of the Products from July 28, 2010 until the date of the preliminary approval of the settlement of this litigation. Excluded from the Class are persons who timely and properly exclude themselves from the Class as provided in the Settlement Agreement.

C. Class Counsel Fees & Expenses

Section 7 of the Settlement Agreement provides that Class Counsel will apply for an award of $450,000 for fees *and* expenses. Barilla will pay up to these amounts, as awarded by the Court. The $450,000 figure includes not only Class Counsel's fees, but the expenses Class Counsel incurred while investigating and litigating this matter, as well as the costs of providing notice to the Class. Deducting for the various expenses associated with this Action and its resolution, the balance that remains for compensating Class Counsel's time in working on this Action is approximately $ 670,000. Joint Decl. ¶ 70. The Parties recognize that the Court shall have the final authority to award the amount of fees and expenses.

D. Awards To The Class Representatives

Section 7 of the Settlement Agreement also provides that Barilla will not oppose an application for awards of up to $1,500 each to named Plaintiffs. As with fees and expenses, the Court shall have the final authority to determine the amount of the awards up to these amounts in recognition of their service as plaintiffs in this action.

IV. NOTICE TO THE CLASS

The Court's Order preliminarily approving the Settlement, dated June 12, 2018, DE 57, approved the Notice Plan outlined in the Settlement Agreement and the appointment of KCC Class Action Services, LLC ("KCC") as the Class Action Administrator. As discussed in connection with preliminary approval, the Parties developed the Notice Plan with the assistance of KCC, a company that specializes in the development and implementation of notice and class action settlement services. The Notice Plan was in KCC's expert opinion the best notice practicable under the circumstances and complies with Rule 23(c)(2)(B).

That Notice Plan provides for the implementation of a multi-platform internet and social media campaign to circulate general information about the Settlement and the creation of a Class Settlement Website that contains Settlement information and important case-related documents.

Shortly following preliminary approval, KCC began carrying out the Notice Plan which is ongoing. Joint Decl. ¶ 65. KCC will file an affidavit concerning implementation of the Notice Plan on or before the Court-ordered December 10, 2018 deadline. DE 57, at ¶ 24.

V. THE SETTLEMENT SHOULD BE FINALLY APPROVED

The Settlement is fair, adequate, and reasonable and provides substantial non-monetary benefits to the Class. By clearly identifying that portion of the pasta box that Plaintiffs alleged was misleadingly empty, these label modifications directly resolved Plaintiffs' claims and the alleged "slack-fill." The Settlement accomplishes this while avoiding both the uncertainty and the delay that would be associated with further litigation. It represents a fair compromise of the Parties' respective positions in the Action and enables each Party to avoid the costs and risks associated with its continuation. Finally, the Settlement was reached through arm's-length negotiations, directly overseen by the Court. Class Counsel, who have significant experience in litigating class

actions, support the Settlement as fair, reasonable, and adequate and providing reasonable relief to the Class.

While Plaintiffs and Class Counsel believe the claims resolved have merit, they also recognize that there is significant expense and risk associated with continuing to prosecute the claims through trial and appeal. Class Counsel has taken those uncertainties into account as well as the delays inherent in such litigation. In the process of investigating and litigating this case, Class Counsel conducted significant research on the various consumer protection statutes at issue as well as the overall legal landscape to determine the likelihood of success and the reasonable parameters for which like settlements have been approved. They believe the Settlement provides significant relief to the Class. Accordingly, Class Counsel have determined that the Settlement is fair, reasonable, and adequate, and in the best interests of the Class.

A. The Settlement Meets The Standards For Final Approval Of A Class Action Settlement In The Second Circuit

In the Second Circuit, "[t]here is a 'strong judicial policy in favor of settlements, particularly in the class action context.'" *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 330 (E.D.N.Y. 2010) (quoting *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d. Cir. 2009)); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (same). "'[C]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation.'" *MetLife*, 689 F. Supp. 2d at 330.

"A district court's approval of a settlement is contingent on a finding that the settlement is 'fair, reasonable, and adequate.'" *Blessing v. Sirius XM Radio, Inc.*, 507 F. App'x 1, 3 (2d Cir. 2012) (quoting Fed. R. Civ. P. 23(e)(2)). The "fair, reasonable and adequate" standard effectively requires parties to show that a settlement is both: (1) procedurally fair and (2) substantively fair.

See Charron v. Wiener, 731 F.3d 241, 247 (2d Cir. 2013) (citations omitted); *accord McReynolds*, 588 F.3d at 803-04. In recognition of the "strong judicial policy in favor of settlements, particularly in the class action context," courts evaluating settlement agreements adopt a presumption of both their procedural and substantive fairness. *See McReynolds*, 588 F.3d at 803 (citing *Wal-Mart*, 396 F.3d at 116). As set forth in Sections "B" and "C" below, the Settlement is both procedurally and substantively fair, reasonable, and adequate and thus should be approved.

B. The Settlement Is Procedurally Fair

A proposed settlement is entitled to a "presumption of fairness" where, as here, the process leading to the proposed settlement was fairly conducted by highly qualified counsel who sought to obtain the best possible result for Plaintiffs and the Class. *See McReynolds*, 588 F.3d at 803; *Elkind v. Revlon Consumer Prods. Corp.*, No. CV 14-2484, 2017 U.S. Dist. LEXIS 24512, at **48-49 (E.D.N.Y. Feb. 17, 2017) (finding that "the neutral third party's involvement in settlement discussions, the extent of discovery, and the factual and legal analysis which took place [there] persuade[d] the Court that the settlement agreement was the product of serious, informed settlement negotiations between qualified counsel" which was entitled to a presumption of fairness); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) ("So long as the integrity of the arm's-length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement, and 'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation."); *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008) ("[A] class action settlement enjoys a 'presumption of correctness' where it is the product of arm's-length negotiations conducted by experienced, capable counsel.").

Here, as demonstrated by Class Counsel's biographies and accepted by the Court in preliminarily approving this Settlement, Class Counsel have substantial experience in litigating class actions and negotiating class settlements. *See* DE 55-7 (Harwood Feffer LLP Firm Description); DE 55-8 (Sarraf Gentile LLP Firm Biography); DE 57, at ¶ 8 (Order, recognizing Class Counsel as "experienced and adequate counsel"). Before agreeing to a Settlement, Class Counsel conducted extensive investigation, engaged in discovery, and weighed the risks of continued litigation. Joint Decl. ¶ 42. It was through this process that Class Counsel was able to obtain a thorough understanding of the strengths and weaknesses of their case and Barilla's case and to evaluate and negotiate the Settlement.

The fairness of the Settlement here is bolstered by the fact that the Parties engaged in mediation with the assistance of the Court. Joint Decl. ¶ 59. The participation of an experienced mediator in settlement negotiations further establishes a settlement's fairness. *See Elkind*, 2017 U.S. Dist. LEXIS 24512, at **48-49; *In re Bear Stearns Cos., Inc. Sec., Deriv., & ERISA Litig.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (finding the arm's-length negotiation element "amply satisfied" where the parties, "represented by highly experienced and capable counsel, engaged in extensive arm's-length negotiations, which included multiple sessions mediated by . . . an experienced and well-regarded mediator of complex . . . cases").

C. The Settlement Is Substantively Fair: The Grinnell Factors Weigh In Favor Of Granting Final Approval

To demonstrate the substantive fairness of a settlement, a party must show that as many of the nine factors as possible that the Second Circuit U.S. Court of Appeals set out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"), *abrogated on other grounds by*, *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), weigh in favor of approving the settlement. *Charron*, 731 F.3d at 247 (citations omitted).

The nine *Grinnell* factors are:

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

McReynolds, 588 F.3d at 804 (quoting *Grinnell*, 495 F.2d at 463). The Court need not find that each of the nine factors is satisfied; rather, a court considers the totality of these factors in light of the particular circumstances. *Foti v. NCO Fin. Sys., Inc*., No. 04-cv-00707, 2008 U.S. Dist. LEXIS 16511, at **15-16 (E.D.N.Y. Feb. 19, 2008) (citing *In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 456 (S.D.N.Y. 2004)). These factors favor approval of the Settlement as fair, reasonable, and adequate.

1. The complexity, expense and likely duration of litigation (*Grinnell* factor 1)

Consumer class action lawsuits are complex, expensive, and lengthy. *See, e.g.*, *Dupler v. Costco Wholesale Corp*., 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010). Plaintiffs filed this action over two years ago alleging statutory and common law violations, based on federal slack-fill guidelines issued by the Federal Food Drug and Cosmetics Act, 21 C.F.R. 100.100, pursuant to the class action mechanism outlined in Federal Rule of Civil Procedure 23. Should this Court deny settlement approval, this litigation would resume, with Defendants renewing their motion to dismiss and with numerous disputes likely to occur regarding discovery, class certification, expert testimony, and summary judgment. There is no question that resolving this Action now would avoid significant lengthy and complex factual and legal disputes.

2. The reaction of the Class to the Settlement (*Grinnell* factor 2)

The deadline for Class Members to file objections to the Settlement is November 19, 2018. Order, DE 57, at ¶ 24. Although this deadline has not yet passed and the notice program has been ongoing for several months, Class Counsel are unaware of any objections to the Settlement. *See* Joint Decl. ¶ 7. "'It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy. . . . In fact, the lack of objections may well evidence the fairness of the [s]ettlement.'" *Ebbert v. Nassau County*, No. CV 05-5445 (AKT), 2011 U.S. Dist. LEXIS 150080, at *26 (E.D.N.Y. Dec. 22, 2011) (quoting *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001)); *Babcock v. C. Tech Collections, Inc.*, No. 1:14-CV-3124 (MDG), 2017 U.S. Dist. LEXIS 44548, at **14-15 (E.D.N.Y. Mar. 27, 2017) (quoting *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 357, 362-63 (S.D.N.Y. 2002) (same); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) ("'the absence of objectants may itself be taken as evidencing the fairness of a settlement'") (citation omitted), *aff'd*, 117 F.3d 721 (2d Cir. 1997); *see also In re Luxottica Grp. S.P.A. Sec. Litig.*, 233 F.R.D. 306, 311-12 (E.D.N.Y. 2006).

Even a relatively small number of objections compared to the overall size of the Class would weigh in favor of the proposed Settlement. *McAnaney v. Astoria Fin. Corp.*, No. 04-CV-1101 (JFB)(WDW), 2011 U.S. Dist. LEXIS 114768, at *18 (E.D.N.Y. Feb. 11, 2011) ("small number of objections is convincing evidence of strong support by class members"); *MetLife*, 689 F. Supp. 2d at 372 (collecting cases in which a relatively small number of objectors indicated a fair and favorable settlement which warranted approval).

3. The stage of the proceedings and the amount of discovery completed (*Grinnell* factor 3)

The third *Grinnell* factor—the stage of the proceedings and the amount of discovery completed—considers "whether Class Plaintiffs had sufficient information on the merits of the case to enter into a settlement agreement . . . and whether the Court has sufficient information to evaluate such a settlement." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 224 (E.D.N.Y. 2013) (citations omitted), *rev'd on other grounds*, 827 F.3d 223 (2d Cir. 2016).

With the Court's assistance, the Parties engaged in significant discussions and an exchange of information. While no formal discovery commenced, Class Counsel retained an expert and received from Barilla significant sales information about its specialty pasta products, the method in which such pasta products were packaged and the labeling of such specialty pasta boxes. In all, the Parties amassed and exchanged considerable information on which to make an informed decision about the Settlement.

4. The risks of establishing liability, damages and of maintaining the class action through the trial (*Grinnell* factors 4, 5 and 6)

The fourth, fifth, and sixth *Grinnell* factors—the risks of effecting class certification, establishing or incurring liability, damages and burdens of prosecuting the class action through the trial—weigh in favor of approving the Settlement Agreement. "'Litigation inherently involves risks,' both in establishing liability and damages." *Babcock*, 2017 U.S. Dist. LEXIS 44548, at *16 (quoting *In re PaineWebber*, 171 F.R.D. at 126); *Willix v. Healthfirst, Inc.*, No. 07-cv-1143 (ENV) (RER), 2011 U.S. Dist. LEXIS 21102, at *11 (E.D.N.Y. Feb. 18, 2011) (citation omitted) (same).

In the absence of a settlement, this litigation would continue on, with no guaranteed or inevitable favorable outcome. Although Plaintiffs believe that they could succeed in obtaining a

favorable ruling on the motion to dismiss here, they also recognize that they face several obstacles to obtaining and maintaining class certification. First, it may be difficult (although not impossible) to quantify the precise amount of monetary damages suffered by the C lass. Plaintiffs recognize the challenge of quantifying the effect of slack-fill across more than a dozen separate products, where the time periods during which the challenged claim appeared on the Products' packaging vary not only among the Products but also among the various package sizes in which each Product was sold. The variations in the labeling dates also may create difficulties in ascertaining class members, as consumers may have difficulty recalling which variety and which package size they purchased during a particular time period. Class Counsel is also mindful of the inherent problems of proof related to the claims and defenses asserted in the Action.

5. The ability of Defendants to withstand a greater judgment (*Grinnell* factor 7)

The seventh *Grinnell* factor—the ability of a defendant to withstand a greater judgment—has, in practice, transformed into an acknowledgement that it is more important that a class receive some relief than possibly "yet more" relief. *Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y. 2012). Should Plaintiffs succeed at trial, damages could be calculated under various theories, including purchase price, premium price and/or statutory damages. Barilla is a dominant multi-national corporate entity. As such, Plaintiffs have no reason to believe that it could not withstand a judgment under any of these theories. However, the fact that a defendant may be able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate. *In re Painewebber*, 171 F.R.D. at 129.

The Settlement affords the Class substantial non-monetary benefits, the primary relief being the assurance that the Products will not be sold and labeled in a misleading manner.

Moreover, by resolving the Class' claims, the Settlement removes the Class' costs of maintaining the Action.

6. The range of reasonableness of the Settlement in light of the best possible recovery and in light of all the attendant risks of litigation (*Grinnell* factors 8 and 9)

The relief provided by the Settlement is within the range of reasonableness, in light of the best possible recovery and in light of all the attendant risks of litigation. Courts have consistently approved injunction-only settlement agreements that resolve deceptive food labeling class actions. *See, e.g., In re Frito-Lay N. Am., Inc. "All Natural" Litig.*, No. 1:12-MD-02413-RRM-RLM, Final Order Approving Class Action Settlement (E.D.N.Y. Nov. 14, 2017) (attached as Exhibit A); *Lilly v. Jamba Juice Co.*, No. 13-cv-02998-JST, 2015 U.S. Dist. LEXIS 57637, at **8-9 (N.D. Cal. May 1, 2015); *In re Quaker Oats Labeling Litig.*, No. 5:10-cv-00502-RS, 2014 U.S. Dist. LEXIS 104817 (N.D. Cal. July 29, 2014). Courts have emphasized that the relief obtained in these settlements – "complete relabeling of . . . challenged products" – "provides meaningful injunctive relief . . . within the range of possible recoveries by the Class." *See Lilly*, 2015 U.S. Dist. LEXIS 57637, at *4; *In re Quaker Oats*, 2014 U.S. Dist. LEXIS 104817, at *8. This Action caused Barilla to modify the packaging challenged by Plaintiffs. The Settlement provides for a clear notification of the fill-size in Barilla's specialty pasta boxes, providing consumers with unquestionable clarity regarding how much pasta they are buying. This notification is composed of graphics designed by the Parties and which will require a change to Barilla's manufacturing process. This relief constitutes a "complete relabeling of . . . challenged products," and amounts to "meaningful injunctive relief . . . within the range of possible recoveries by the Class." *See Lilly*, 2015 U.S. Dist. LEXIS 57637, at *8; *In re Quaker Oats*, 2014 U.S. Dist. LEXIS 104817, at *8. Thus,

consideration of the range of reasonableness of the Settlement in light of the best possible recovery and in light of all the attendant risks of litigation weighs staunchly in favor of final approval.

In sum, the *Grinnell* factors warrant a conclusion that the Settlement is fair, adequate and reasonable.

VI. THE COURT SHOULD CONFIRM CERTIFICATION OF THE CLASS

A court may certify a settlement class upon finding that the action underlying the settlement satisfies all Rule 23(a) prerequisites and the requirements of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-22 (1997). The proposed settlement class satisfies all of the prerequisites of Rule 23(a) and (b)(2). In its June 12 Order, the Court previously certified the Class under Rule 23(b)(2), while providing Class Members who do not wish to participate in the Settlement the right to submit written requests to be "excluded from" or to "opt-out" of the Settlement. DE 57. Plaintiffs respectfully ask the Court to confirm certification of the Class for settlement purposes.

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

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

1. Numerosity under Rule 23(a)(1)

Under the numerosity prerequisite of Rule 23(a), plaintiffs must show that their proposed class is "so numerous that joinder of all [its] members is impracticable." Fed. R. Civ. P. 23(a)(1). The Second Circuit has consistently treated this prerequisite liberally, explaining that numerosity will be found where a proposed class is "obviously numerous." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997); *see also Robidoux v. Celani*, 987 F.2d 931, 935 (2d. Cir. 1993). Though

no magic number of class members exists for meeting the numerosity prerequisite, courts "presume [the prerequisite is met] for classes larger than forty members." *Pa. Pub. Sch. Empls. Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 120 (2d Cir. 2014); *Spread Enters., Inc. v. First Data Merch. Servs. Corp*., 298 F.R.D. 54, 67 (E.D.N.Y. 2014) ("'a court may also make common sense assumptions without the need for precise quantification of the class'") (citation omitted).

Here, the Class is "obviously numerous." *Marisol A.*, 126 F.3d at 376. The Products are ubiquitous, heavily-marketed, and available nationwide. Accordingly, the Class here clearly meets the numerosity prerequisite of Rule 23(a). *See* Joint Decl. ¶ 56.

2. Commonality under Rule 23(a)(2)

Under the commonality prerequisite of Rule 23(a), plaintiffs must show that "questions of law or fact common to the [proposed] class" exist. Fed. R. Civ. P. 23(a)(2). The Supreme Court has clarified that this prerequisite will be found where a proposed class' members have brought claims that all centrally "depend upon [the resolution of] a common contention." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The Second Circuit has construed this instruction liberally, holding that plaintiffs need only allege injuries "'derive[d] from defendants' . . . unitary course of conduct . . . .'" *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 84 (2d Cir. 2015) (citation omitted).

Here, Class Members bring claims that centrally depend on the resolution of a common contention whether the Products' packaging would mislead a reasonable consumer. *See In re Scotts EZ Seed Litig*., 304 F.R.D. 397, 409-10 (S.D.N.Y. 2015); *Ebin v. Kangadis Food Inc*., 297 F.R.D. 561, 568 (S.D.N.Y. 2014); *Kurtz v. Kimberly-Clark Corp*., 321 F.R.D. 529-32 (E.D.N.Y. 2017); *Hughes v. Ester C Co*., 317 F.R.D. 333, 344-46 (E.D.N.Y. 2016). Courts have found that the standards for evaluating unjust enrichment are materially the same throughout the country.

See, e.g., *In re Toshiba Am. HD DVD Mktg. & Sales Prac. Litig.*, Civ. No. 08-939 (DRD), 2009 U.S. Dist. LEXIS 82833, at *42 (D.N.J. Sept. 10, 2009); *In re McCormick & Co.*, 215 F. Supp. 3d 51, 61-62 (D.D.C. 2016) (denying dismissal of nationwide unjust enrichment claims in a "slack-fill" case noting that the time for addressing differing state laws is on a motion for class certification); *Hawkins v. Nestle U.S.A. Inc.*, 309 F. Supp. 3d 696, 708 (E.D. Mo. 2018) (denying dismissal of nationwide unjust enrichment claim in a "slack-fill" case). Thus, the commonality prerequisite of Rule 23(a) is satisfied here.

3. Typicality under Rule 23(a)(3)

Under the typicality prerequisite of Rule 23(a), plaintiffs must show that their proposed class representatives' claims "are typical of the [class'] claims." Fed. R. Civ. P. 23(a)(3). The Second Circuit has interpreted this prerequisite to require plaintiffs to show that "the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . . ." *Robidoux*, 987 F.2d at 936-37 (citations omitted). Courts within the Second Circuit, moreover, have repeatedly found this prerequisite easily satisfied, particularly in consumer class action cases. *See Enriquez v. Cherry Hill Mkt. Corp.*, 993 F. Supp. 2d 229, 233 (E.D.N.Y. 2014); *Fogarazzo v. Lehman Bros., Inc.*, 232 F.R.D. 176, 180 (E.D.N.Y. 2005) ("The typicality requirement is not demanding") (footnotes and quotation marks omitted).

Here, the claims of the representative Plaintiffs are typical of the Class' claims. The Plaintiffs and the rest of the Class purchased the Products, challenge the slack-fill in the Products and contend that the boxes were misleading. Again, as with the numerosity and commonality prerequisites, the typicality prerequisite is met.

4. Adequacy of representation under Rule 23(a)(4)

Finally, under the adequate representation prerequisite of 23(a), Plaintiffs must show that their proposed class representatives will "fairly and adequately protect the interests of the [proposed] class." Fed. R Civ. P. 23(a)(4). Plaintiffs must demonstrate that: (1) their class representatives do not have conflicting interests with other class members; and, (2) their class counsel is "qualified, experienced and generally able to conduct the litigation." *Marisol A.*, 126 F.3d at 378 (internal quotation marks omitted).

Courts in the Second Circuit have consistently applied a lenient standard for meeting both of the adequate representation prerequisites. *Diaz v. Residential Credit Solutions, Inc.*, 299 F.R.D. 16, 20-21 (E.D.N.Y. 2014). For the first requirement (adequacy of class representatives), courts in this Circuit have required that plaintiffs show that "no fundamental conflicts exist" between a class' representative(s) and its members. *See Charron*, 731 F.3d at 249. For the second requirement (adequacy of class counsel), courts in the Second Circuit generally presume it has been met, except where class counsel represents other clients whose interests are inherently at odds with the class' interests. *Moore v. Margiotta*, 581 F. Supp. 649, 652 (E.D.N.Y. 1984); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 241 F.R.D. 185, 199 n.99 (S.D.N.Y. 2007) ("[i]n the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to prosecute vigorously the action on behalf of the class") (citations omitted).

Here, the adequate representation prerequisite is satisfied. Plaintiffs have no fundamental conflicts with other Class Members' interests, as they seek the same type of relief (injunctive relief) and assert the same legal claims, as other Class Members. As their declarations detail, Joint Decl. Exhibits 5-8, Plaintiffs have diligently served as class representatives throughout this litigation, conferred frequently with Class Counsel and made themselves available during settlement

discussions. Similarly, Class Counsel are qualified, experienced and able to conduct the litigation and have extensive experience in class action litigation and consumer advocacy. *See* DE 55-7; DE 55-8; DE 57, at ¶ 8 (Order, recognizing Class Counsel as "experienced and adequate counsel"). Thus, the adequate representation prerequisite is met.

B. The Class Meets The Requirements Of Rule 23(b)(2)

In addition to satisfying all Rule 23(a) prerequisites, a settlement class must also satisfy Rule 23(b), which reads: "A class action may be maintained if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . . ." The Second Circuit has interpreted this to mean that class-wide injunctive relief must provide benefit to all class members (even if in different ways). *Sykes*, 780 F.3d at 99 (citing *Dukes*, 564 U.S. at 356-67); *see also Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014).

Plaintiffs seek only class-wide injunctive relief. Like the class members in *Sykes*, this relief would, in remedying the Products' packaging, benefit each Class Member at once. Equitable relief in the form of an injunction would be an appropriate remedy. *See Ackerman v. Coca-Cola Co.*, No. 09 CV 395(DLI (RML), 2013 U.S. Dist. LEXIS 184232, at *71 (E.D.N.Y. July 17, 2013). Accordingly, the Class should be found to meet Rule 23(b)(2). And as the Class also satisfies the Rule 23(a) prerequisites, the Class should be certified for injunctive relief.

VII. THE NOTICE TO THE CLASS SATISFIES THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

Rule 23(e) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by" a proposed settlement. Fed. R. Civ. P. 23(e)(1). For a Rule 23(b)(2) class such as the one in this Settlement, Rule 23(c)(2)(A) states that "the court may direct appropriate notice to the class." Here, the Parties developed a notice program with the assistance

of KCC, which in KCC's expert opinion, provides the best notice practicable under the circumstances to the members of the Class and complies with Rule 23(c)(2)(B).[2] *See, e.g., In re Quaker Oats,* 2014 U.S. Dist. LEXIS 104817, at *6.

A. The Method Of Notice Is Appropriate

The Court is given broad power over which procedures to use for providing notice so long as those procedures are consistent with the standards of reasonableness imposed by the due process clause. *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986) (the court "has virtually complete discretion as to the manner of giving notice to class members."). "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; 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.'" *Visa U.S.A. Inc*., 396 F.3d at 114.

The proposed Notice Plan meets the notice guidelines established by the Federal Judicial Center's *Manual for Complex Litigation, 4th Edition* (2004), as well the Federal Judicial Center's *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* (2010) and is consistent with notice programs approved previously by both State and Federal Courts.

The Notice Plan provided numerous methods for Class Members to learn of the Settlement. The plan consisted of a comprehensive web-based media campaign with ads on targeted websites based on sales of the Products, and displaying ads, social media ads and a toll-free telephone helpline. The Notice was also available on the Class Settlement Website (www.barillaclassaction.com) since shortly after the Settlement was preliminarily approved, along

[2] The Notice Plan is described in section 4 of the Settlement Agreement (DE 55-1) and detailed in the Media Notice Program attached thereto as Exhibit C. *See also* Joint Decl.¶ 62 (describing the crafting and implementation of the Notice Plan).

with relevant pleadings from the Action. The Notice, Joint Decl. Ex. 2. (along with the most relevant court documents available on the website) has provided Class Members with all the relevant details about the Action and the Settlement, along with detailed instructions regarding the Settlement. The Notice defines the Class, explains Class Members' rights, releases, and applicable deadlines, and describes in detail the injunctive terms of the Settlement. It plainly indicates the time and place of the hearing to consider approval of the Settlement, and the method for objecting to or opting out of the Settlement. It details the provisions for payment of attorneys' fees and expenses and case contribution awards to the class representatives, and provides contact information for Class Counsel.

The Notice Plan also provided Class Members with sufficient time to decide whether to consider the Settlement. Indeed, the Notice Plan commenced shortly after the Settlement was preliminarily approved in June 2018, meaning Class Members were given several months – until the November 19, 2018 objection deadline – to voice any concerns they might have with the Settlement.

Accordingly, Plaintiffs respectfully request final approval of the Notice Plan.

VIII. THE MEDIATED ATTORNEYS' FEE AND EXPENSE REQUEST AMOUNT PROVIDED UNDER THE SETTLEMENT AGREEMENT IS FAIR AND REASONABLE AND SHOULD BE APPROVED

Plaintiffs' Counsel seek approval of the mediated amount of $450,000 as compensation for the work they performed, and for the reimbursement of costs and expenses they incurred, in litigating this Action. After deducting Class Counsel's expenses from the total amount requested, the requested fees represent an amount ***less*** than counsel's combined lodestar and, if paid from a common fund, would be supported by the traditional factors for analyzing the fairness and reasonableness of a common fund fee request in this Circuit as promulgated in *Goldberger*, 209

F.3d at 47. For the reasons stated below, Class Counsel respectfully request that the Court issue an order granting their request for payment of $450,000 in fees and expenses.

A. Negotiated Fee Agreements Are Favored

The requested $450,000 in fees and expenses were agreed to by the Parties, with the assistance of the Court, after the Parties had reached agreement on the substantive terms of the Settlement and following extensive negotiation. Joint Decl. ¶ 29. Such negotiated fees are favored, and courts have endorsed such negotiated fee and expense awards. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("Ideally, of course, litigants will settle the amount of a fee"); *Blessing*, 507 F. App'x at 4 (upholding fee award by District Court that was agreed to by the parties, stating that "the fee was negotiated only after settlement terms had been decided and did not, as the district court found, reduce what the class ultimately received"); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 568-70 (7th Cir. 1992) (market factors, best known by the negotiating parties themselves, should determine the quantum of attorneys' fees); *McBean v. City of New York*, 233 F.R.D. 377, 386 (S.D.N.Y. 2006) (involvement of judicial mediator weighs strongly in favor of approval of negotiated fee); *Shapiro v. JPMorgan Chase & Co.*, Nos. 11 Civ. 8331 (CM) (MHD); 11 Civ. 7961 (CM), 2014 U.S. Dist. LEXIS 37872, at *85 (S.D.N.Y. Mar. 21, 2014) ("That the Attorneys' Fee Payment was later separately negotiated weighs in favor of its reasonableness.").

The fact that the Parties were able to avoid a "second major litigation," as to the fees and expenses through extensive negotiations, weighs in favor of the award. *Hensley*, 461 U.S at 437

B. The Mediated Fee And Expense Award Will Not Reduce The Value Of The Settlement

The requested fees and expenses sought here will not affect the benefits available for the Class. Where the settlement in a class action provides injunctive relief only, payment of attorneys' fees and costs "cannot reduce the value of the settlement." *Peoples v. Annucci*, No. 11-cv-2694

(SAS), 2016 U.S. Dist. LEXIS 43556, at *18 (S.D.N.Y. Mar. 31, 2016). Courts recognize that reduction of a negotiated fee would benefit only the defendant in such circumstances. *See, e.g.*, *Foti*, 2008 U.S. Dist. LEXIS 16511, at *21 (finding proposed amount of fees to be fair in case where class settlement was not a monetary common fund, and attorneys' fees were not to "come out of the pocket of class members"; the court noted that "were the Court to reduce the agreed-upon amount of attorneys' fees, the only beneficiary would be [defendant] – not the class").

Even where a class settlement includes monetary benefits, courts in this Circuit often approve reasonable fee requests when the award will be paid separately and does not impact the relief provided to class members. "In a case where the requested attorneys' fees will be paid directly by defendant rather than drawn from a common fund, 'the Court's fiduciary role in overseeing the award is greatly reduced, because there is not conflict of interest between attorneys and class members.'" *Babcock*, 2017 U.S. Dist. LEXIS 44548, at *24 (quoting *Dupler*, 705 F. Supp. 2d at 231). *See also United States v. City of New York*, No. 13-CV-3123 (NGG) (RLM), 2016 U.S. Dist. LEXIS 78755, at *13 (E.D.N.Y. June 15, 2016) (noting that "the $9.5 million in attorneys' fees are not being taken from the class common fund at all. Instead, the attorneys' fees here were negotiated separately from the class recovery and are being paid directly by Defendant"); *In re Sinus Buster Prods. Consumer Litig.*, No. 12-CV-2429 (ADS) (AKT), 2014 U.S. Dist. LEXIS 158415, at *33 (E.D.N.Y. Nov. 10, 2014) ("In addition, where, as here, 'the attorneys' fees are to be paid directly by defendant and, thus, money paid to the attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members . . . .'") (quoting *Dupler*, 705 F. Supp. 2d at 243).

C. The Fee And Expense Request Is Fair And Reasonable Under The Lodestar Method And Less Than Plaintiffs' Counsel's Lodestar

1. The fee request is fair and reasonable under the lodestar method

"In class actions where the only relief obtained is injunctive in nature, 'courts often use a lodestar calculation because there is no way to gauge the net value of the settlement or any percentage thereof.'" *Van Oss v. N.Y. State*, No. 10 Civ. 7524 (SAS), 2012 U.S. Dist. LEXIS 91684, at *5 (S.D.N.Y. June 26, 2012) (quoting *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1029 (9th Cir. 1998)). "[W]here a settlement is not monetary in nature . . . at least one court has determined that the 'lodestar' method . . . is the 'most useful starting point' in determining an appropriate fee award," *Foti*, 2008 U.S. Dist. LEXIS 16511, at *19-20 (citing *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, No. CV-04-2195 (CPS), 2006 U.S. Dist. LEXIS 89226, at *28 (E.D.N.Y. Dec. 11, 2006)).

The lodestar method confirms the fairness and reasonableness of the requested fee amount. "Courts employ the 'lodestar' method in calculating reasonable attorneys' fees, multiplying the number of hours reasonably spent by counsel on the matter by a reasonable hourly rate." *Saucedo v. On the Spot Audio Corp*., No. 16 CV 00451 (CBA) (CLP), 2016 U.S. Dist. LEXIS 177680, at *47 (E.D.N.Y. Dec. 21, 2016); *see also Pucciarelli v. Lakeview Cars, Inc*., 16-CV-4751 (RRM) (RER), 2017 U.S. Dist. LEXIS 98641, at *3 (E.D.N.Y. June 23, 2017) ("The lodestar figure is the product of the attorney's reasonable hourly rate and the number of hours reasonably expended in the litigation.") (citing *Millea v. Metro-N. R.R. Co*., 658 F.3d 154, 166 (2d Cir. 2011)). "Once that initial computation has been made, the district court may, in its discretion, increase the lodestar by applying a multiplier based on other less objective factors, such as the risk of the litigation and the performance of the attorneys." *Pucciarelli*, 2017 U.S. Dist. LEXIS 98641, at *3 (quoting *Goldberger*, 209 F.3d at 47).

The lodestar calculation has been described by the Second Circuit as a "presumptively reasonable fee." *Millea*, 658 F.3d at 166 ("Both this Court and the Supreme Court have held that the lodestar . . . creates a 'presumptively reasonable fee.'"). "When assessing whether legal fees are reasonable, the Court determines the "presumptively reasonable fee" for an attorney's services by looking to what a reasonable client would be willing to pay." *Saucedo*, 2016 U.S. Dist. LEXIS 177680, at *48 (citing *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 183-84 (2d Cir. 2007) ("*Arbor Hill*")); *see also Logan v. World Luxury Cars*, 15-CV-248 (RRM)(PK), 2017 U.S. Dist. LEXIS 157979, at *22 (E.D.N.Y. Sep. 25, 2017) ("A reasonable hourly rate is the rate a 'reasonable, paying client would be willing to pay.'"). A lodestar cross-check confirms that the negotiated requested fee is fair and reasonable and should be approved.

a. Plaintiffs' Counsel's hours are reasonable

The first step under the lodestar method is to determine whether the number of hours devoted by counsel are reasonable. *In re Prudential Sec. Litig.*, 985 F. Supp. 410, 416 (S.D.N.Y. 1997). To date, Plaintiffs' Counsel have spent over 990 hours on the investigation, prosecution, and settlement of this complex action over the course of more than five years. *See* Joint Decl. ¶ 70, and Exhibits 3-4. Given the magnitude and duration of the litigation, and the many disputed issues throughout its course, the time Plaintiffs' Counsel spent prosecuting this Action on behalf of the Class is reasonable.

b. Plaintiffs' Counsel's hourly rates are reasonable

The second step of the lodestar analysis is the examination of counsel's hourly rate. *In re Prudential*, 985 F. Supp. at 416. The hourly billing rate to be applied is the hourly rate that is normally charged in the community where the counsel practices, that is, the "market rate." *See*

Blum v. Stenson, 465 U.S. 886, 895 (1984). "When an application for attorneys' fees seeks to recover for services that 'were performed many years before the award is made, the rates used by the court . . . should be 'current rather than historic hourly rates.'' " *Escobar v. Del Monaco Bros. Indus*., No. 14-CV-3091 (ADS) (SIL), 2017 U.S. Dist. LEXIS 123588, at **5-6 (E.D.N.Y. Aug. 3, 2017) (quoting *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998)).

The current hourly rates of Plaintiffs' Counsel are reflected in the declarations submitted by Plaintiffs' Counsel. Joint Decl. ¶ 76, and Exhibits 3-4. Applying Plaintiffs' Counsel's current hourly rates to the hours expended in this Action yields a lodestar value of over $670,000. Joint Decl. ¶ 70, and Exhibits 3-4. Plaintiffs' Counsel's hourly rates are competitive market hourly rates in their respective legal communities for cases of this sort and are the same regular current rates charged for their services in non-contingent matters and/or which have been used in the lodestar cross-check accepted by courts in other class litigation. For example, the hourly rates for partners in Plaintiffs' Counsel's submission ranges from $700 to $850 per hour. *See* Joint Decl., Exhibits 3-4.

This Circuit has approved partners' hourly billing rates of up to $995 per hour. *Woburn Ret. Sys. v. Salix Pharm., Ltd*., No. 14-CV-8925 (KMW), 2017 U.S. Dist. LEXIS 132515, at *15 (S.D.N.Y. Aug. 18, 2017) ("The lodestar value of counsel's work . . . reflects the various hourly billing rates for partners, which ranged from $700 to $995 at Bernstein Litowitz, $715 to $980 at Robbins Geller, and $550 to $695 at Hach Rose . . . . "). *See also Steinberg v. Nationwide Mut. Ins. Co*., 612 F. Supp. 2d 219, 224 (E.D.N.Y. 2009) (approving hourly rates up to $790 in 2009); *In re Telik, Inc.*, 576 F. Supp. 2d at 589 (approving hourly rates to $750 in 2008). Plaintiffs' Counsel's hourly rates, here, appropriately reflect the reputation, experience, care, and success

records of Plaintiffs' Counsel. No time spent by Plaintiffs' Counsel in the preparation of this fee petition is included as part of their lodestar herein. *See* Joint Decl., Exhibits 3-4.

Again, the negotiated fees requested by Plaintiffs' Counsel here is substantially less than counsel's straight lodestar and includes no multiplier, *i.e.* Plaintiffs' Counsel's fee request amounts to less than their time, without any enhancements to compensate counsel for the risk and delay of payment. Accordingly, the negotiated fee request is fair and reasonable.

D. The Fee Request Is Fair And Reasonable Under A *Goldberger* Analysis

Even though the fee request will not be awarded from a "common fund" created for the Class, the traditional criteria in this Circuit for determining a reasonable common fund fee also support the requested fee here. The six factors for analyzing the reasonableness of a common fund fee request in this Circuit as promulgated by *Goldberger* are: "'(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of the representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." 209 F.3d at 50 (quoting *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989)). *See Schleifer v. Berns*, 17 Civ. 1649 (BMC), 2017 U.S. Dist. LEXIS 146469, at *6 (E.D.N.Y. Sept. 8, 2017) ("The Second Circuit has made clear that district courts should be guided by the traditional [*Goldberger*] criteria in determining a reasonable . . . fee . . . .") (internal quotations omitted). These factors support the approval of the fee and expense.

1. Plaintiffs' Counsel expended significant time and labor in this litigation [*Goldberger* factor 1: The time and labor expended by Class Counsel]

Plaintiffs' Counsel have dedicated over 990 hours to the investigation, prosecution, and settlement of this complex action on behalf of the Class. Joint Decl. ¶ 70, and Exhibits 3-4.

Plaintiffs' Counsel's efforts included, for example: (1) extensive work identifying and investigating potential claims and drafting and filing the initial and amended complaints including consultation with an expert; (2) opposing Defendants' motion to dismiss; (3) extensive communications with Barilla, both directly and through the Court to reach a substantive resolution; (4) drafting the Settlement Agreement and related documents; and, (5) working with claims administrator to implement the Settlement. *See* Joint Decl., Exhibits 3-4.

"Fees representing multiples above the lodestar are often awarded to reflect the risk and contingent nature of the litigation, the result obtained, and the quality of the attorney's work." *See, e.g.*, *MetLife.*, 689 F. Supp. 2d at 359; *Pucciarelli*, 2017 U.S. Dist. LEXIS 98641, at **4-5 ("When applying the lodestar method, courts generally 'apply a multiplier to take into account the contingent nature of the fee, the risks of non-payment, the quality of representation, and the results achieved.'"). Here, there is no multiplier; rather the fee request of $415,776.87 is substantially less than counsel's straight time, without any enhancement. *See Jermyn v. Best Buy Stores, L.P.*, No. 08 Civ. 214 (CM), 2012 U.S. Dist. LEXIS 90289, at **26-27 (S.D.N.Y. June 27, 2012) (finding that a "negative" lodestar multiplier was "further indication of the reasonableness of the negotiated fee"); *Ersler v. Toshiba Am. Inc.*, No. CV-07-2304 (SMG), 2009 U.S. Dist. LEXIS 14374, at *21 (E.D.N.Y. Feb. 24, 2009) ("Here, although there was no guarantee *any* fee would be awarded when plaintiffs' counsel took on this action, counsel seek no multiplier above and beyond the presumptively reasonable fee amount."); *Babcock*, 2017 U.S. Dist. LEXIS 44548, at *28 (approving counsel's fee request, finding that the fees sought by counsel were "less than their lodestar" and "seeks no multiplier"). This factor weighs in favor of approving Class Counsel's attorneys' fee request.

2. The underlying litigation was large and involved complex factual and legal issues [*Goldberger* factor 2: The magnitude and complexities of the litigation]

Consumer class action lawsuits, like this action, are complex, expensive, and lengthy. *See, e.g.*, *Dupler*, 705 F. Supp. 2d at 239; *Steinberg,* 612 F. Supp. 2d at 223 (finding this factor to support the fee request in a consumer class action). Plaintiffs filed this Action more than two years ago on behalf of a nationwide class of consumers, alleging statutory and common law violations, based on federal slack-fill guidelines issued by the Federal Food Drug and Cosmetics Act, 21 C.F.R. 100.100, pursuant to the class action mechanism outlined in Federal Rule of Civil Procedure 23. Should this Court deny settlement approval, this litigation would resume, with Defendants renewing their motion to dismiss and with numerous disputes likely to occur regarding discovery, class certification, expert testimony, and summary judgment. There is no question that resolving this Action now would avoid significant lengthy and complex factual and legal disputes.

Moreover, the benefits of reverting to litigation and the likelihood of success would be uncertain. *See, e.g.*, *In re Sinus Buster*, 2014 U.S. Dist. LEXIS 158415, at *20 (finding this factor to weigh in favor of settlement, where "[i]f the litigation continued, the parties would have to undergo the time and expense of deposition discovery, contest motions for class certification, and a likely motion for summary judgment by the Defendants . . . . Further, the Defendants and the Plaintiffs would likely have to obtain experts to establish both liability and damages. A trial consisting of a 'battle of experts' as would be complex and lengthy, with an uncertain outcome.").

3. Plaintiffs' Counsel faced significant risks at every stage of the litigation [*Goldberger* factor 3: The risk of the litigation]

The fairness and reasonableness of the requested fee is also supported by an evaluation of the litigation risks undertaken by Plaintiffs' Counsel in prosecuting this consumer class action. "Litigation inherently involves risks." *Willix*, 2011 U.S. Dist. LEXIS 21102, at *11 (citation

omitted). Class Counsel's evaluation is accorded considerable weight in view of "the unique ability of class and defense counsel to assess the potential risks and rewards of litigation." *Padro v. Astrue*, No. 11-CV-1788(CBA) (RLM), 2013 U.S. Dist. LEXIS 150494, at *21 (E.D.N.Y. Oct. 17, 2013) (quoting *Newberg on Class Actions* § 11:47 (4th ed.)).

As this Court has noted, "[t]he risk of the litigation is often cited as the first, and most important, *Goldberger* factor." *MetLife*, 689 F. Supp. 2d at 361. *See Anyoku v. World Airways (In re Nigeria Charter Flights Litig.)*, No. 04-MD-1613 (RJD) (MDG), 2011 U.S. Dist. LEXIS 155180, at *26 (E.D.N.Y. Aug. 25, 2011) ("Courts of this Circuit have recognized the risk of litigation to be perhaps the foremost factor to be considered in determining the award of appropriate attorneys' fees."); *Steinberg*, 612 F. Supp. 2d at 223 ("Courts in the Second Circuit have recognized that the attendant risks of a particular case are a critical factor to be considered in setting an award of attorneys' fees.") (citing *Goldberger*, 209 F.3d at 59); *Goldberger*, 209 F.3d at 54 ("We have historically labeled the risk of success as 'perhaps the foremost factor' to be considered in determining whether to award an enhancement.") (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 236 (2d Cir. 1987) (quoting *Grinnell*, 495 F.2d at 471).

The Second Circuit has also recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success.

Grinnell, 495 F.2d at 470. "'Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.'" *MetLife*, 689 F. Supp. 2d at 361 (citation omitted); *see also Am. Bank Note Holographics*, 127 F. Supp. 2d at 432-33 (finding it "appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award").

Plaintiffs' Counsel undertook this litigation purely on a contingency basis notwithstanding the considerable risk confronting them, including nonpayment after prosecuting the case for over two years. *Jermyn*, 2012 U.S. Dist. LEXIS 90289, at *28 ("[T]his factor recognizes the risk of non-payment in cases prosecuted on a contingency basis where claims are not successful. This can justify higher fees."); *see also Shapiro*, 2014 U.S. Dist. LEXIS 37872, at **73-76 ("It is well settled that class actions are notoriously complex and difficult to litigate . . . . Clearly, Co-Lead Counsel undertook enormous financial risks in representing Customers on a contingency basis.").

In the absence of this Settlement, this expensive and protracted litigation would continue on, with no guaranteed or inevitable favorable outcome for the Class. In particular, while Plaintiffs believe they would have prevailed on the motion to dismiss, ultimately, they faced a hard-fought battle on Barilla's affirmative defenses, establishing damages, and maintaining a class action through trial. *See* Joint Decl. ¶ 49. While Plaintiffs' Counsel believe that the Class satisfied all the necessary prerequisites of Rule 23 and would have been certified, class motions in cases of this magnitude are heavily contested and would have likely involved expert testimony from both sides. *See Id.* Plaintiffs bear the risk of class certification and, even if successful, withstanding interlocutory appeal under Rule 23(f). *See In re Sinus Buster*, 2014 U.S. Dist. LEXIS 158415, at *25 ("Were the Court to reject the settlement, the parties would likely contest certification, which would present a possibility of decertification. A settlement therefore avoids the risk of decertification and thus weighs in favor of approval."); *Shapiro*, 2014 U.S. Dist. LEXIS 37872, at *40 ("The possibility of decertification thus favors settlement."); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02 Civ. 5575 (SWK), 2006 U.S. Dist. LEXIS 17588, at *41 (S.D.N.Y. Apr. 6, 2006) ("[E]ven the process of class certification would have subjected Plaintiffs to

considerably more risk than the unopposed certification that was ordered for the sole purpose of the Settlement.").

Although Plaintiffs believe that they could succeed in obtaining the certification of a class here, they also recognize that they face several obstacles to obtaining and maintaining class certification. First, it may be difficult (although not impossible) to quantify the precise amount of damages suffered by the Class. Plaintiffs recognize the challenge of quantifying the effect of the slack-fill claims. Product packaging vary not only among the Products but also among the various package sizes in which each Product is sold. So it may be difficult (although not impossible) to quantify the precise amount of damages suffered by the Class. The variations in the labeling dates also may create difficulties in identifying certain class members, as consumers may have difficulty recalling which variety and which package size they purchased during a particular time period. Plaintiffs' Counsel is also mindful of certain potential challenges as to the proof of their claims and to rebutting defenses to the claims asserted in the Litigation. While Plaintiffs remain confident in their ability to prove their claims and to effectively rebut Defendants' defenses, they recognize that their ability to prove liability is far from certain. One cannot predict how a jury will weigh competing experts' testimony, especially after listening to multiple complex models for determining damages. *See Shapiro*, 2014 U.S. Dist. LEXIS 37872, at *39 ("Proof of damages in complex class actions is always complex and difficult and often subject to expert testimony."). The crucial element of damages would likely be reduced at trial to a "battle of the experts." *See In re Sinus Buster*, 2014 U.S. Dist. LEXIS 158415, at **23-24 ("Here, as described above, proof of liability and damages would require both parties to retain separate experts. Trial would be largely a 'battle of the experts,' where it would be difficult to predict whose testimony would be credited and accepted by the jury."); *Ebbert*, 2011 U.S. Dist. LEXIS 150080, at *31 ("On liability and

damages, this case likely would have ended up in a classic 'battle of the experts.' With that comes the inherent risk that a jury could be swayed by an expert for the Defendants who could minimize the amount of the Plaintiffs' losses.").

Accordingly, this factor weighs in favor of approving the fee and expense award, particularly where they prosecuted the case on a contingent basis and, "the requested amount falls below Class Counsel's combined lodestar for their work on the case." *Jermyn*, 2012 U.S. Dist. LEXIS 90289, at *28.

4. There was a high quality of representation [*Goldberger* factor 4: The quality of representation]

"As a consideration, the Court also looks to the quality of the representation on behalf of the . . . Class Members." *Ebbert*, 2011 U.S. Dist. LEXIS 150080, at *46. "To make that determination, courts review, among other things, the backgrounds of the lawyers involved in the lawsuit and the recovery obtained." *Id.* Here, the fairness and reasonableness of Class Counsel's requested attorneys' fees are further supported by Plaintiffs' Counsel's significant experience and qualifications for litigating the complex issues and claims presented in this Action. Plaintiffs' Counsel possess decades of experience in class action litigation. *See* DE 55-7; DE 55-8; DE 57, at ¶ 8 (Order, recognizing Class Counsel as "experienced and adequate counsel"). Plaintiffs' Counsel were ultimately able to achieve a significant result for the Class, all in the absence of contemporaneous compensation and reimbursement of expenses.

The Settlement provides the primary relief sought by the Class—injunctive relief to modify the packaging to allow a consumer to easily determine the amount of pasta therein. This slack-fill case was unique in so far as the consumer's familiarity with the packaging. The substantial experience of Plaintiffs' Counsel in prosecuting consumer protection class action cases was an important factor in achieving this broad, multi-faceted injunctive relief.

Another consideration for assessing the quality of the services rendered is the quality of the opposing counsel in the case. *See Hall v. Prosource Techs., LLC*, No. 14-CV-2502 (SIL), 2016 U.S. Dist. LEXIS 53791, at *49 (E.D.N.Y. Apr. 11, 2016) ("'[T]he quality of opposing counsel is also important in evaluating the quality of [class counsel's] work.'") (citing *Tiro v. Pub. House Invs., LLC*, No. 11 Civ. 7679, 2013 U.S. Dist. LEXIS 129258, at *42-43 (S.D.N.Y. Sept. 10, 2013)). Defendants are represented by highly experienced counsel at Much Shelist PC and Sher Tremonte LLP. DE 13, 14, 20, 21, 22. The ability of Plaintiffs' Counsel to obtain this Settlement for the Class in the face of such formidable legal opposition further reflects favorably on the quality of their work.

5. The fee request is fair and reasonable in relation to the Settlement [*Goldberger* factor 5: The requested fee in relation to the Settlement]

The fee request is fair and reasonable in relation to the Settlement. *See* Joint Decl. ¶¶ 68-80. The Parties had already agreed on the substantive terms of the Settlement before negotiating the award of fees and expenses. Thus, the Parties knew when negotiating the fees and expenses that the proposed Settlement would provide non-monetary benefits to the Class, not a common fund, and took this into consideration when negotiating the amount to be paid by Defendants as an appropriate fee and expense. The requested fee is less than the accrued lodestar and does not affect the benefits available for the Class.

While it is difficult to place a monetary value on an injunction-only settlement class action, the label changes agreed to by Barilla and the injunctive provisions in the Settlement represent significant and valuable benefits. *See* Joint Decl. ¶ 7. These non-monetary benefits should be considered in determining the appropriate fee to award counsel. *See Fleisher v. Phoenix Life Ins. Co.*, No. 11-cv-8405 (CM), 2015 U.S. Dist. LEXIS 121574, at **34-35 (S.D.N.Y. Sept. 9, 2015) (including the "substantial" non-monetary benefits in the valuation of the relief provided by the

settlement); *Velez v. Novartis Pharms. Corp.*, No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945, at *13 (S.D.N.Y. Nov. 30, 2010) (considering both monetary and non-monetary relief in calculating value of settlement); *In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 388 (S.D.N.Y. 2005) (considering the value of injunctive relief obtained in determining the appropriate fee, while noting that "[t]he value of the Structural Changes is more difficult to quantify"), *aff'd sub nom., McCoy v. United Parcel Serv.*, 222 F. App'x 87 (2d Cir. 2007).

6. Public policy favors approving Class Counsel's mediated fee request [*Goldberger* factor 6: Public policy considerations]

"Public policy favors the award of reasonable attorneys' fees in class action settlements." *Jermyn*, 2012 U.S. Dist. LEXIS 90289, at *31. The relatively small claims of the vast majority of the members of the Class, when taken separately, would not justify the expense of litigation. Courts in this Circuit have recognized "the importance of private enforcement actions and the corresponding need to incentivize attorneys to pursue such actions on a contingency fee basis . . . ." *Shapiro*, 2014 U.S. Dist. LEXIS 37872, at *82 (quoting *In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515-16 (S.D.N.Y. 2009)); *see also Anyoku*, 2011 U.S. Dist. LEXIS 155180, at **29-30 ("'The fees awarded must be reasonable, but they must also serve as an inducement for lawyers to make similar efforts in the future. In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.'") (internal citations omitted).

Here, the Settlement provides substantial non-monetary benefits to the public as discussed herein. This factor favors approving Plaintiffs' Counsel's requested attorneys' fees as fair and reasonable.

E. The Court Should Approve The Reimbursement Of Plaintiffs' Counsel's Costs And Expenses

Barilla agreed to pay a global amount for all fees and expenses incurred up to $450,000 including the expenses and notice costs incurred by Plaintiffs' Counsel in litigating this Action. As set forth in the Joint Declaration and counsel's individual declarations attached thereto, these costs total $ 34,223.13 and were necessary and integral to the prosecution and resolution of this Action, including the Court-ordered Notice Plan. *See* Joint Decl. ¶ 70 and Exhibits 3-4.

"'Courts routinely note that counsel is entitled to reimbursement . . . for reasonable litigation expenses.'" *Fleisher*, 2015 U.S. Dist. LEXIS 121574, at *76; *see also Anyoku*, 2011 U.S. Dist. LEXIS 155180, at *30 ("courts typically allow counsel to recover their reasonable out of pocket expenses"); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003) (in awarding counsel reimbursement for $18,716,511.44 in costs and expenses, holding that: "I see no reason to depart from the common practice in this circuit of granting expense requests.").

The requested expenses were reasonably incurred in the prosecution of this Litigation and have been adequately documented by Plaintiffs' Counsel and were incurred for the benefit of the Class. *See, e.g., In re Visa Check/Mastermoney*, 297 F. Supp. 2d at 525 (awarding counsel reimbursement of costs and expenses, where "[t]he lion's share of these expenses reflects the costs of experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses"); *Anyoku*, 2011 U.S. Dist. LEXIS 155180, at *30 (finding reimbursement of $109,734.06 in expenses reasonable where "Counsel's disbursements consisted of court fees, deposition transcripts, travel and accommodation, working meal costs, photocopies, telephone charges and expert fees. Such expenses are reasonable and were necessary to the representation of the class").

IX. THE COURT SHOULD APPROVE THE PROPOSED AWARDS TO THE CLASS REPRESENTATIVES

Class Counsel also requests that the Court award $1,500 each to Plaintiffs Alessandro Berni, Giuseppe Santochirico, Massimo Simioli, and Domenico Salvati as compensation for their time and effort spent in the Action. These awards are not opposed by Barilla and will not affect the benefits available for the Class.

"'In the Second Circuit, the Courts have, with some frequency, held that a successful Class action plaintiff, may, in addition to his or her allocable share of the ultimate recovery, apply for and, in the discretion of the Court, receive an additional award, termed an incentive award.'" *McAnaney*, 2011 U.S. Dist. LEXIS 114768, at **32-33. Indeed, "'service awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs.'" *Hernandez v. Immortal Rise, Inc.*, 306 F.R.D. 91, 101 (E.D.N.Y. 2015) (citation omitted) (approving awards of $2,500 and $7,500 to named plaintiffs as reasonable); *see also Sykes v. Mel Harris & Assocs., LLC*, No. 09 Civ. 8486 (DC), 2016 U.S. Dist. LEXIS 74566, at **53-54 (S.D.N.Y. May 24, 2016) ("Courts acknowledge that service awards are important to compensate plaintiffs for the contributions they make to advance the prosecution of their case.").

The requested awards for Plaintiffs are comparable to awards that have been approved in similar cases in the Second Circuit. *See, e.g.*, *Massiah v. MetroPlus Health Plan, Inc.*, No. 11-CV-05669 (BMC), 2012 U.S. Dist. LEXIS 166383, at **21-23 (E.D.N.Y. Nov. 16, 2012) (collecting cases approving awards ranging from $5,000 to $30,000); *Dupler*, 705 F. Supp. 2d at 245-46 (awarding $25,000 to the lead plaintiff in a consumer class action and $5,000 to another plaintiff). The efforts of each representative Plaintiff on behalf of the Class confirm the

appropriateness of the requested case contribution awards. Each performed important and valuable service for the benefit of the Class, conferring regularly with Class Counsel, providing personal information concerning their Product purchases, and remaining involved and available throughout the litigation and settlement processes.[3] Plaintiffs' actions have benefitted the Class to a significant degree, culminating in the Settlement. Plaintiffs respectfully request that the Court approve the case contribution awards.

X. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court: (1) grant final approval of the Settlement as fair, reasonable, and adequate; (2) confirm certification of the Class for the purpose of the Settlement and continuing the appointment of Plaintiffs as representatives of the Class and their counsel as Class Counsel; (3) approve the fee and expense award, as well as the Case Contribution Awards; and, (4) enter the Order in the form substantially similar to Exhibit E to the Settlement Agreement (DE 55-1).

Dated: New York, New York
November 2, 2018

Respectfully submitted,

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[3] *See* Declarations of Plaintiffs Alessandro Berni, Giuseppe Santochirico, Massimo Simioli, and Domenico Salvati, attached as Exhibits 6 through 9 to the Joint Declaration.

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