

**IN THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

In re Tommie Copper Products Consumer
Litigation

Lead Case No.: 7:15-cv-03183-AT

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

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Plaintiffs William Lucero, Rhonda Boggs, Jerome Jeffy, and Sandy Kontura (collectively, “Plaintiffs”) hereby submit this memorandum of law in support of Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement with Defendants Tommie Copper Inc., Tommie Copper Holdings, Inc., Thomas Kallish, and Montel Williams (collectively, “Defendants” or “Tommie Copper”).

I. INTRODUCTION

This action challenges Defendants’ sale and marketing practices regarding Tommie Copper athletic compression apparel and accessories, each of which incorporate a proprietary “copper-infused” and/or “copper and zinc-infused” fabric (collectively, the “Tommie Copper Products” or “Products”) (individually a “Product”).¹ Plaintiffs commenced this class action against Defendants on behalf of themselves and all others similarly situated, seeking economic and prospective relief for their purchases of the Tommie Copper Products. Specifically, Plaintiffs allege that Defendants misrepresented the ability of the copper and zinc that is infused in Tommie Copper Products to: relieve pain, including arthritis and other chronic joint and muscular pain; aid in injury management; accelerate or speed muscle and joint recovery; and improve muscular power, strength, and endurance. *See* Consolidated Class Action Complaint (“CAC”) ¶¶ 3-11 (ECF No. 75). Furthermore, Plaintiffs allege that Defendants’ representations regarding the Tommie Copper Products are false and misleading because copper alone cannot be absorbed through the skin and that clinical studies demonstrate that copper has been shown to be no better than a placebo

¹ The Tommie Copper Products include, but are not limited to, Defendants’ Crew Compression Socks, Calf Compression Socks, Back Braces, Men’s Long Sleeve Compression Shirts, Women’s Long Sleeve Compression Shirts, Women’s Compression Tights, Wrist Compression Sleeves, Ankle Compression Sleeves, Calf Compression Sleeves, Elbow Compression Sleeves, Knee Compression Sleeves, Men’s Compression Under-Shorts, Women’s Compression Shorts, Men’s Compression Shirts, Women’s Compression Shirts, Half Finger Compression Gloves, and Full Finger Compression Gloves.

for pain relief for patients with arthritis. *Id.* ¶¶ 113, 118-24. Defendants deny these allegations.

As more specifically set forth in the Parties' Settlement Agreement, and as described in more detail below, the Parties have reached a settlement that provides a real and substantial benefit to Settlement Class Members nationwide.² Without any admission of liability, Tommie Copper has agreed to establish a common settlement fund of \$700,000.00 to satisfy the costs of notice, claims administration, attorneys' fees, expenses and incentive payments, and to fund cash payments to Settlement Class Members who submit valid claims for Tommie Copper Products purchased between April 11, 2011 through the date of preliminary approval. From this fund, purchasers of Tommie Copper Products (who appear in Defendants' records and submit valid claims) are able to recover cash refunds of \$10.00 for each Product purchased during the Settlement Class Period. Settlement Class Members who do not appear in Defendants' records, or do not provide a receipt, but who complete and submit a claim form attesting to their purchase of the Product under penalty of perjury, would receive a total of \$5.00.³

The proposed Settlement, which was reached with the assistance of the Honorable Lisa Margaret Smith, is fair, reasonable, and falls within the range of permissible approval. The Settlement is the product of extensive arm's-length negotiations between experienced attorneys familiar with the legal and factual issues of this case and all Class Members are treated fairly under the terms of the Settlement. Plaintiffs, by and through their respective counsel, have conducted an extensive investigation into the facts and law relating to this matter. The investigation has included consulting industry personnel, extensive consultation with experts, and numerous interviews of witnesses and

² All capitalized terms used and not otherwise defined herein have the definitions set forth in the Settlement Agreement.

³ Additionally, and in lieu of receiving a cash payment, Settlement Class Members may apply their cash recovery to an on-line purchase of Tommie Copper products and would receive a 40% enhancement to the value of the recovery.

putative members of the Class, as well as legal research as to the sufficiency of the claims. Plaintiffs and their counsel hereby acknowledge that in the course of their investigation they received, examined, and analyzed information, documents, and materials, including Defendants' financial statements, that they deem necessary and appropriate to enable them to enter into the Settlement Agreement on a fully informed basis. Because Plaintiffs sought to recover monetary relief for Class Members based on their purchases of the Products, the provision for refunds under the Settlement is an excellent result for Class Members. Indeed, proposed Class Counsel achieved a substantial benefit for the Class in light of the inherent risks, costs, and delay associated with a protracted litigation as well as the current financial condition of the corporate defendant following the enforcement action and resulting consent order obtained by the Federal Trade Commission ("FTC") against the Tommie Copper defendants and Kallish.

Accordingly, Plaintiffs respectfully submit that preliminary approval of the Settlement is appropriate and submit for the Court's review a copy of the Stipulation and Settlement Agreement ("Stipulation of Settlement"), a true and correct copy of which is attached as Exhibit 2 to the Declaration of Antonio Vozzolo ("Vozzolo Decl."). Also submitted herewith is a proposed Order Granting Preliminary Approval of Class Settlement (the "proposed Preliminary Approval Order"). Entry of the proposed Preliminary Approval Order will: (1) grant preliminary approval of the Settlement; (2) conditionally certify the Class on a nationwide basis; (3) designate Plaintiffs as Class Representatives; (4) designate the Law Offices of Ronald Marron, APLC (the "Marron Firm"), Faruqi & Faruqi, LLP ("Faruqi & Faruqi"), and Vozzolo LLC as Class Counsel; (5) establish procedures for giving notice to members of the Settlement Class; (6) approve forms of notice to Class Members; (7) mandate procedures and deadlines for class exclusion requests and objections; and (8) set a date, time, and place for a final approval hearing.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Description And Procedural Posture

On April 22, 2015, Plaintiff George Potzner filed a class action complaint in the United States District Court for the Southern District of New York, Case No. 7:15-cv-3183 (the “*Potzner*” Action) against Defendant Tommie Copper, Inc., alleging causes of action for: (1) violations of New York’s Deceptive Trade Practices Law, NY Gen. Bus. § 349; (2) breach of express warranties; (3) negligent misrepresentation; (4) unjust enrichment; (5) declaratory relief under 28 U.S.C. §§ 2201, *et seq.*; and (6) violation of Iowa’s Consumer Fraud Act, Iowa Code Ann. § 714H.3.

On July 31, 2015, Plaintiffs William Lucero, Rhonda Boggs, Jerome Jeffy, and Sandy Kontura commenced a putative class action lawsuit in the United States District Court for the Southern District of New York, Case No. 1:15-cv-6055, in a case captioned *Lucero, et al. v. Tommie Copper Inc., et al.* (the “*Lucero*” Action). The *Lucero* Action alleged the following causes of action on behalf of a Nationwide Class and Subclasses under California, New York, Georgia, and Ohio: negligent misrepresentation; unjust enrichment; violation of the federal Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*; New York’s Breach of Express Warranty, N.Y. U.C.C. § 2-313; New York’s Breach of Implied Warranty of Merchantability, N.Y. U.C.C. § 2-314; New York’s Unfair and Deceptive Practices Law, N.Y. Gen. Bus. Law § 349; New York’s False Advertising Law, N.Y. Gen. Bus. Law § 350; California’s Breach of Express Warranty, Cal. Com. Code § 2313; California’s Breach of Implied Warranty of Merchantability, Cal. Com. Code § 2314; California’s Consumers Legal Remedies Act, Cal. Civil Code §§ 1750, *et seq.*; California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*; California’s False Advertising Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*; Georgia’s Breach of Express Warranty, Ga. Code Ann. § 11-2-313; Georgia’s Breach of Implied Warranty of Merchantability, Ga. Code Ann. § 11-

2-314; Georgia's Fair Business Practices Act, Ga. Code Ann. § 10-1-393; Ohio's Breach of Express Warranty, Ohio Rev. Code Ann. § 1302-26; Ohio's Breach of Implied Warranty of Merchantability, O.R.C. § 1302-26; and the Ohio Consumer Sales Practices Act, Ohio Rev. Code Ann. §§ 1345, *et. seq.*

On August 3, 2015, the *Potzner* Complaint was amended to remove the causes of action for declaratory relief and for violations of New York's Deceptive Trade Practices Law.

On November 2, 2015, both the *Potzner* and *Lucero* Plaintiffs filed motions to consolidate, as well as for the appointment of interim lead class counsel. *See* ECF Nos. 38-44 in *Lucero* Action; ECF Nos. 47-53 in *Potzner* Action. On January 4, 2016, the Court granted consolidation of the two cases, and appointed the *Lucero* Plaintiffs' counsel—the Marron Firm and Faruqi & Faruqi—to serve as Interim Class Counsel for the Consolidated Action. ECF No. 50 in *Lucero* Action; ECF No. 64 in *Potzner* Action.

On March 4, 2016, a consolidated class action complaint was filed, bringing claims for unfair and deceptive business practices under N.Y. Gen. Bus. L. § 349; false advertising under N.Y. Gen. Bus. L. § 350; negligent and intentional misrepresentation; violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*, False Advertising Law, *id.* §§ 17500, *et seq.*, and Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*, breach of express and implied warranties, including under Cal. Comm. Code §§ 2313 and 2315; breach of express and implied warranty law and false advertising statutes of various other states as noted above; the federal Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*; and unjust enrichment under the common law.

On November 24, 2015, a substantially similar putative class action lawsuit was filed in the United States District Court for the Southern District of Florida, Case No. 9:15-cv-81611-KAM, styled *Herst v. Tommie Copper, Inc.* (the "*Herst*" Action).

On January 25, 2016, Interim Class Counsel intervened in the *Herst* Action and moved to transfer venue of *Herst* to the Southern District of New York, where the earlier consolidated case was pending. Furthermore, on February 1, 2016, Defendant Tommie Copper moved to transfer the *Herst* Action to the Southern District of New York. On July 15, 2016, the motions to transfer venue of *Herst* to the Southern District of New York New York were granted.

On November 27, 2015, subsequent to the filing of the initial complaints, the FTC filed a substantially similar complaint against Tommie Copper and Thomas Kallish pursuant to Section 13(b) of the Federal Trade Commission Act (the “FTC Action”).

On December 1, 2015, Tommie Copper stipulated to the entry of a Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief in the amount of eighty-six million, eight hundred fifteen thousand, seven hundred seventy-eight dollars (\$86,815,778.00), which was suspended on the payment of one million, three hundred fifty thousand dollars (\$1,350,000.00) to the FTC (the “FTC Settlement”). The FTC’s suspension of part of the judgment was based on the financial statements submitted to the FTC, including financial statements from Defendants Thomas Kallish and Tommie Copper, establishing their inability to pay in excess of the unsuspended judgment. Per the terms of the consent order, the suspended judgment would be immediately due and owing if Tommie Copper or Kallish misrepresented their financial condition. Vozzolo Decl. ¶¶ 10-11, Ex. 1.

B. Investigation And Settlement Negotiations

Before filing the initial Complaint, proposed Settlement Class Counsel conducted extensive investigations into the merits of the case, including reviewing public information records regarding the claims at issue and researching and analyzing potential claims. Additionally, as part of their ongoing efforts, Settlement Class Counsel retained a consulting expert to analyze damages and additional consulting experts to demonstrate materiality of the misrepresentations at issue.

Settlement Class Counsel also submitted a Freedom of Information Act (“FOIA”) request to uncover additional information about Defendants. Vozzolo Decl. n.2. Thereafter, Plaintiffs submitted a pre-suit demand letter identifying the misconduct at issue.

Following the FTC Settlement, the Parties initiated discussions about the prospect of opening settlement discussions to resolve this Action. Thereafter, over the course of several months, the Parties engaged in extensive arm’s-length negotiations and an informal exchange of documents and other information pertaining to Plaintiffs’ claims. These discussions included, at the request of both sides, in-person and telephonic court-monitored settlement conferences before Magistrate Judge Lisa Margaret Smith, on May 5, 2016, June 6, 2016, October 4, 2016, October 31, 2016, November 17, 2016, May 24, 2017, and June 15, 2017. Vozzolo Decl. ¶ 13.

In the subsequent months, the Parties continued to work diligently to finalize the terms of the Settlement, which is the subject of the present Motion. The Parties also engaged in informal discovery, producing insurance policies, coverage summaries, notices regarding same, tax returns, financial statements and related documents to proposed Settlement Class Counsel. In addition, Settlement Class Counsel conducted extensive research into the claims made in this case; the substantiation therefor; insurance available; and the implications of the FTC Settlement.

These efforts culminated in and were memorialized in the Stipulation of Settlement which was executed on November 21, 2017. *See id.* ¶ 14.

Defendants denied, and continue to deny, all of the claims and contentions alleged in this Action, deny any wrongdoing, and deny any liability to Plaintiffs or any members of the putative Class. *See id.* ¶ 15. However, Tommie Copper has considered the risks and potential costs of continued litigation of this Action, on the one hand, and the benefits of the proposed Settlement, on the other hand, and desires to settle the Action upon the terms and conditions set forth in the Stipulation of Settlement. *See id.*

III. THE TERMS OF THE PROPOSED SETTLEMENT

The parties reached agreement on the proposed settlement after vigorous debate of legal and factual theories by counsel, guidance by Magistrate Judge Smith, and extensive arm's-length negotiations over a 12-month period. The Stipulation of Settlement provides real and tangible monetary benefits to Plaintiffs, Settlement Class (defined below) and the general public. As an additional measure to protect consumers in the future, Defendant has agreed, consistent with FTC consent order, to refrain from advertising the Tommie Copper Products with any claims, false representations, or statements that the copper or zinc infused in Tommie Copper Products will relieve pain.

A. Terms Of The Settlement

1. Proposed Nationwide Settlement Class

The proposed settlement class (the "Settlement Class") consists of all persons in the United States, its territories, or at any United States military facility or exchange who purchased the Tommie Copper Products on or after April 11, 2011 and ending on the date a motion for preliminary approval of the Settlement Agreement is entered. Excluded from the Class are: (a) Tommie Copper employees, officers and directors; (b) persons or entities who purchased the Products for the purpose of re-sale; (c) retailers or re-sellers of the Products; (d) governmental entities; (e) persons who timely and properly exclude themselves from the Class as provided herein; (f) any natural person or entity that entered into a release with Defendants prior to the Effective Date concerning any of the Settlement Class Products; and (g) the Court, the Court's immediate family, and Court staff. *See* Stipulation of Settlement § II.

2. Monetary Relief

Additionally, the Settlement Agreement provides for monetary relief to the proposed Settlement Class by, among other things, requiring Tommie Copper to pay \$700,000.00 into a

common settlement fund. *Id.* § 6.2. Defendants shall fund the Settlement Fund within ten (10) days of the Effective Date. *Id.* § 6.2.2.a. The Settlement Fund shall be applied to pay in full and in order: (i) any necessary taxes and tax expenses; (ii) all costs associated with the Class Action Settlement administration, including costs of providing notice to the Class Members and processing claims; (iii) any Fee and Expense Award made by the Court to Class Counsel under section VIII of the Settlement Agreement; (iv) any Class Representative Incentive Awards made by the Court to Plaintiffs under section VIII of the Stipulation of Settlement; and (v) payments to authorized Claimants and any others as allowed by the Settlement and to be approved by the Court. *Id.* § 6.2.b.

Settlement Class Members may seek reimbursement of \$10.00 per Product for every Product purchased during the Settlement Class Period if they appear in Defendants' computerized records, or if they can present written proof of purchase in the form of a receipt or a retail rewards submission. *Id.* § 6.2.A.1.a. Class Members may make a claim for every package of such Products for which they submit a valid Claim Form. Settlement Class Members who do not provide a valid receipt or a retail rewards submission or whose purchases do not appear in Defendants' records, but who substantiate their claims through a submission of an Affidavit under penalty of perjury attesting to their purchase of the Settlement Class Products, together with additional information requested by the Settlement Administrator on the Claim Form, may seek reimbursement of a total of \$5.00. *Id.* § 6.2.A.1.b.

Alternatively, and in lieu of receiving a cash payment, Settlement Class Members may apply their cash recovery to an on-line purchase of Tommie Copper products at www.tommiecopper.com. Settlement Class Members who apply their cash recovery to a product purchase will receive a 40% enhancement of the cash recovery good toward the purchase of Tommie Copper products (the "Cash Recovery Enhancement"). For example, if a Settlement

Class Member presents written proof of purchase for two Products for a total cash recovery of \$20.00, the Settlement Class Member would be entitled to a \$28.00 (\$20.00 + 40%) credit to apply toward the purchase of Tommie Copper products. *Id.* § 6.2.B.

The amount of each cash payment will depend on the number and amount of authorized claims submitted. If the total amount of eligible claims exceeds the Settlement Fund, then each claimant's award shall be proportionately reduced. If after all valid claims (plus other authorized costs and expenses) are paid, money remains in the Settlement Fund, the remaining amount shall be used to increase pro rata the recovery of each eligible claim. *Id.* § 6.2.3.

To be eligible for a cash payment or a Cash Recovery Enhancement, a Settlement Class Member must timely submit a signed and completed Claim Form, which includes information such as an e-mail address for the Settlement Class Member to facilitate the disbursement of certain Settlement Benefits. Any Class Member eligible to receive the Settlement Benefits may elect to have the benefits paid in the form of a mailed check (at that Settlement Class Member's option); otherwise, they will receive the Settlement Benefit as an electronic payment or direct credit through either PayPal, Amazon, electronic Automated Clearing House ("ACH") transactions, or Venmo (collectively "e-payment"). *Id.* § 6.2.4. Further, all Cash Recovery Enhancement options will receive an electronic code number via email that may be used as a credit towards any purchase on Defendants' website. *Id.* § VI.

Within thirty (30) calendar days after the entry of a Final Approval Order and Judgment and exhaustion of any appeals, the Settlement Administrator will process e-payments. If Settlement Class Members affirmatively opt for physical check payments, checks will be sent out 120 calendar days after entry of Final Approval. *Id.* § 6.2.4.b.

The Settlement Administrator may pay claims that are otherwise valid but untimely filed if there is sufficient money to pay all valid and timely claims in full plus untimely but otherwise

valid claims from the Settlement Fund, and payment of any such untimely but valid claims is administratively feasible and otherwise reasonable, taking into account the need to timely pay claims. The determination of the Class Action Settlement Administrator after consultation with Class Counsel and Defendants' Counsel concerning the eligibility and amount of payment shall be final. In the event a Settlement Class Member disagrees with such a determination, the Class Action Settlement Administrator agrees to reconsider such determination, which includes consultation with Class Counsel and Defendants' Counsel.

All Claimants must include information in the claim form—completed online or in hard copy mailed to the Settlement Administrator—confirming, under penalty of perjury, that they did in fact purchase between April 11, 2011 and the date of preliminary approval the Product(s) for which they seek reimbursement.

3. Prospective Relief

Under the terms of the Settlement, Defendants have agreed, consistent with the FTC Consent Order, to cease and/or not recommence advertising, promoting, distributing, offering for sale, or selling the Tommie Copper Products with unsubstantiated claims, any false representations, or statements (express or implied) that the copper or zinc content in Tommie Copper Products will: relieve pain, including arthritis and other chronic joint and muscular pain; aid in injury management; accelerate or speed muscle and joint recovery; and improve muscular power, strength, and endurance. Additionally, Defendants' marketing and advertising will not feature or provide client testimonials that misrepresent the above claims. *Id.* § 6.2.B.

4. Release Of Claims

In exchange for the foregoing relief, the Settlement Class Members who do not opt out of the Settlement will release Defendants from all claims asserted in this Action and any related claims which could be asserted against Defendants in connection with the sale and marketing of

Tommie Copper Products during the relevant Class Period. *Id.* § VII.

5. Notice, Claims Process, And Settlement Administration

Defendants will cause the Settlement Notice, in the form approved by this Court, to be provided in multiple formats consisting of: (1) multiple email to all Class Members for whom Tommie Copper has *email* addresses; (2) a dedicated case specific Settlement Website (www.tommiecoppersettlement.com) where the *notice* and other court related filings will be posted;⁴ (3) Banner ads with links to the Settlement Website posted on Tommie Copper's retail website and social media sites; (4) notice posted in Tommie Copper's retail store located in Westchester County, New York; (5) *notice* published on two separate occasion in the *Journal News* (Westchester edition) for those consumers who purchased from Tommie Copper's retail store; and (6) a toll-free telephone number where Class Members can call to hear a pre-recorded message and leave a message that will be returned by the Claims Administrator. *Id.* § 5.5. This notice provides information to the Settlement Class Members concerning, among other things: (1) terms of the Settlement; (2) instructions on submitting a claim; (3) objection and opt-out rights; and (4) the date, time, and location of the final approval hearing.

6. Costs, Fees, And Representative Awards

Settlement Class Counsel will move the Court for an award of reasonable attorneys' fees and unreimbursed expenses incurred in the Action to be paid from the Settlement Fund. Subject to Court approval, Plaintiffs will seek a fee award of up to a maximum of one third or 33% of the Settlement Fund. *Id.* § 8.1. In addition to the relief discussed above, and subject to Court approval, the Class Representatives shall be entitled to an Incentive Award, not to exceed \$1,000 per

⁴ Settlement Website, which will be established within ten (10) days of the preliminary approval, will provide (among other information): documents and information concerning the Settlement and the litigation, electronic or printable version of the Claim Form, instructions for filing a claim, opting out of the Settlement, or objecting to the Settlement, deadlines related to the Settlement, and other information as agreed to by the Parties. *Id.* § II.RR.

representative plaintiff, to be paid from the Settlement Fund. *Id.* § 8.3. Furthermore, all costs of providing notice to the Settlement Class and the costs of claims administration will be paid from the Settlement Fund.⁵

IV. ARGUMENT

A. The Proposed Settlement Is Fair, Reasonable, And Adequate

This Court should approve the Stipulation of Settlement. The Settlement is the result of 12-months of arm's-length negotiations among the Parties and their counsel, and informed by the exchange of significant information through the settlement process and the guidance of Magistrate Judge Smith. The Settlement provides favorable monetary benefits to Class Members considering all of the risks associated with litigation, including the financial condition of Defendants. Prior to reaching resolution, Class Counsel thoroughly investigated the case, and in doing so, gathered ample information to assess the strengths and weaknesses of the Parties' positions. Having weighed the likelihood of success and inherent risks and expense of litigation, Plaintiffs and counsel strongly believe that the proposed settlement is "fair, reasonable, and adequate" as required by Fed. R. Civ. P. 23(e)(2).

1. Standard For Preliminary Approval Of Class Action Settlement

Courts encourage, and public policy favors, compromise and settlement of class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (emphasizing the "strong judicial policy in favor of settlements, particularly in the class action context") (internal quotation marks omitted); *see also* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("Newberg") § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). It is within the Court's discretion to approve a proposed

⁵ Notice costs also include notification of the Attorney General of the United States, and the attorneys general of each state or territory in which a Settlement Class Member resides in accordance with the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715(b).

class action settlement upon determination that the proposed settlement is fair, reasonable, and adequate. *McReynolds v. Richards-Cantave*, 588 F.3d 790, 800 (2d Cir. 2009). “The central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable, and adequate. There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation[.]” *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982).

Preliminary approval is the first step in a settlement process. It may be granted if the court finds there is “probable cause to submit the [proposed settlement] to class members and hold a full-scale hearing as to its fairness.” *Waterford Twp. Police & Fire Ret. Sys. v. Smithtown Bancorp, Inc.*, No. 10-CV-864 (SLT) (RER), 2015 U.S. Dist. LEXIS 73276, at *17 (E.D.N.Y. Apr. 17, 2015) (quoting *In re Traffic Exec. Ass’n E. R.R.s.*, 627 F.2d 631, 634 (2d Cir. 1980)).⁶ At this stage, the Court need only conduct an “‘initial evaluation’ of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties.” *Id.*; see also Newberg § 11.25.

Fairness is assessed by an examination of the terms of the proposed settlement and the negotiating process leading to the settlement. *Garcia v. Pancho Villa’s of Huntington Vill., Inc.*, No. 09-CV-486 (ETB), 2012 U.S. Dist. LEXIS 144446, at *6 (E.D.N.Y. Oct. 4, 2012). “A ‘presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.’” *Wal-Mart Stores*, 396 F.3d at 116 (quoting Manual for Complex Litigation (Third) § 30.42 (1995)). Where a settlement is achieved through arm’s-length negotiations by experienced counsel and

⁶ See also *Danieli v. IBM Corp.*, No. 08-3688 (SHS), 2009 U.S. Dist. LEXIS 106938, at *12-13 (S.D.N.Y. Nov. 16, 2009) (granting preliminary approval where settlement “has no obvious defects” and proposed allocation plan is “rationally related to the relative strengths and weaknesses of the respective claims asserted.”).

there is no evidence of fraud or collusion, “[courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.” *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 U.S. Dist. LEXIS 57918, at *12 (S.D.N.Y. July 27, 2007).

When evaluating the terms of a proposed class settlement, courts in this Circuit are guided by the factors enumerated in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

These 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 defendant to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation[.]

Id. at 463 (citations omitted).

2. The Settlement Is Procedurally Fair And Not A Product Of Collusion

The Settlement here is the product of intense arm’s-length negotiations conducted by experienced counsel, knowledgeable in complex consumer class actions and lasting 12 months. *See In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000) (a settlement will enjoy a presumption of fairness if the court finds that it is the product of “arm’s length negotiations conducted by experienced counsel knowledgeable in complex class litigation”), *aff’d sub nom., D’Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). Plaintiffs’ counsel conducted a thorough examination and investigation of the factual and legal aspects of this Action. Prior to and during the course of negotiations, Plaintiffs engaged in informal discovery, receiving significant sets of class data, as well insurance policies, coverage summaries,

notices regarding same, and financial statements and related documents. In addition, Settlement Class Counsel conducted extensive research into the claims made in this case; the substantiation therefor; insurance available; and the implications of the FTC Consent Order and suspended judgment.

The Parties engaged in good-faith negotiations, which included in-person and telephonic court-monitored settlement conferences before Magistrate Judge Smith between on May 5, 2016 and May 24, 2017. The Parties reached a tentative settlement under the guidance of Judge Smith. During and subsequent to these conferences, the Parties engaged in protracted, hard-fought negotiations to reach a final agreement on the terms of the Settlement. *See In re Sinus Buster Prods. Consumer Litig.*, No. 12-CV-2429 (ADS)(AKT), 2014 U.S. Dist. LEXIS 158415, at *19 (E.D.N.Y. Nov. 10, 2014) (finding that the settlement negotiations satisfied procedural fairness because of: (i) the length of the negotiation; (ii) exchange of significant information between the parties; and (iii) negotiation efforts were assisted by the magistrate judge); *Satchell v. Fed. Express Corp.*, No. C 03-2659 SI, 2007 U.S. Dist. LEXIS 99066, at *17 (N.D. Cal. Apr. 13, 2007) (“The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.”)

Moreover, Plaintiffs’ counsel involved in the negotiations have considerable experience in handling consumer class actions and are clearly capable of assessing the strengths and weaknesses of their respective positions. *See infra* at § IV.D, Exs. 4-6 to Vozzolo Decl. The Marron Firm, Faruqi & Faruqi, and Vozzolo LLC, and/or their partners, regularly engage in major complex litigation and have extensive experience in consumer class actions that are similar in size, scope, and complexity to the present case. Vozzolo Decl. ¶ 27. The combined experience of the firms and attorneys involved demonstrate that the Settlement Class Members were well-represented at the bargaining table.

3. The Criteria For Settlement Approval Are Satisfied

While it is “not necessary to exhaustively consider the [*Grinnell*] factors applicable to final approval,” *In re Platinum & Palladium Commodities Litigation*, No. 10cv3617, 2014 U.S. Dist. LEXIS 96457, at *38 (S.D.N.Y. July 15, 2014), all of the factors heavily favor granting preliminary approval.

a. Litigation Through Trial Would Be Complex, Expensive, And Lengthy

The Stipulation of Settlement provides favorable monetary and injunctive benefits to the Settlement Class and future consumers while avoiding the significant expenses and delays associated with litigation. Indeed, “[m]ost class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them.” *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 174. Courts have consistently held that, unless the proposed settlement is clearly inadequate, its acceptance and approval are preferable to the continuation of lengthy and expensive litigation with uncertain results.

The first factor weighs in favor of approval of the Settlement. Here, significant time, effort, and expense would be incurred to brief complex dispositive motions (including a motion to certify the class), resolve discovery disputes, prepare for and complete trial, and submit post-trial submissions. Even if the Class were to recover a larger judgment after trial, which is certainly not guaranteed, the additional delay, through summary judgment, trial, post-trial motions, and the appellate process, would deny the Class any recovery for years. The Settlement secures a substantial and certain benefit (up to a monetary payment of \$10.00 per product purchased) for the Class in this consumer class action, undiminished by significant expenses, and without the delay, risk, and uncertainty of continued litigation.

b. Class’ Reaction Will Likely Be Positive

At this stage, it is not possible to conclusively measure the reaction of the Settlement Class

because Notice of Settlement has yet to be issued to the Class. However, the Stipulation of Settlement proposes to offer essential prospective relief and favorable monetary benefits that include cash refunds or a Cash Recovery Enhancement. Moreover, the fact that Plaintiffs and their experienced counsel support the Stipulation of Settlement is a strong indication that the Settlement Class will likely view the terms of the Stipulation of Settlement positively.

c. Discovery Has Advanced To A Stage Where The Parties Can Responsibly Resolve The Case

Extensive pre-trial discovery is not a prerequisite to approval of a settlement. Instead, discovery efforts by the parties must: (1) produce sufficient facts to enable the court to make an intelligible appraisal of the Settlement; and (2) aggressively uncover valuable facts key to the merits of the action. *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 263 (S.D.N.Y. 1998). Here, the proposed Settlement was reached after Plaintiffs' counsel conducted a thorough investigation and evaluated the claims, and after extensive negotiations between the Parties. The initial and Consolidated Amended Complaints filed by Plaintiffs demonstrates that proposed Class Counsel thoroughly investigated and analyzed the legal claims and factual allegations. Furthermore, the Parties have engaged in meaningful informal discovery, receiving significant sets of class data, insurance policies and coverage letters, tax returns, and financial statements.

Regardless, the issue of Defendants' liability does not turn on any documents or information uniquely in the possession and control of Defendants. To the contrary, the essential inquiry here is whether Defendants are able to deliver promised health benefits. Efficacy of copper is publicly available and not uniquely in Defendants' possession. Further, Plaintiffs' counsel have present and past experience in consumer fraud litigation, and they have substantial understanding of the issues presented by this case. Thus, Plaintiffs' counsel are well positioned to evaluate the scientific evidence concerning the type of health claims made by Defendants.

Efforts by both sides demonstrate that the Parties have a thorough understanding of the

strengths and weaknesses of their respective positions, and are sufficiently apprised of the pertinent facts of this Action to make a conscientious analysis of the proposed Settlement.

d. Plaintiffs Would Face Real Risks If This Action Proceeded

Despite the relative strength of their case, Plaintiffs face substantial hurdles as to whether continued litigation will result in the full set of relief that Plaintiffs seek. Indeed, “[l]itigation inherently involves risks.” *In re PaineWebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997). In response to Plaintiffs’ CAC, Defendants raised various legal defenses to which Plaintiffs’ claims could be subject to, including, but not limited to: (1) that the allegations in the CAC are similar to those asserted by the FTC; (2) that Plaintiffs’ claims were already subject to a Final Judgment; and (3) that a class action is not superior as a matter of law for addressing the claims of the proposed Class. Notwithstanding Plaintiffs’ confidence in the strength of their position, Plaintiffs recognize that factual difficulties or legal defenses could pose a substantial risk of non-recovery.

Plaintiffs must establish that Defendants’ representations suggesting that the Tommie Copper Products relieve pain, aid in injury management, and/or accelerate or speed muscle and joint recovery are false, misleading, and deceptive and/or that members of the public are likely to be deceived by Defendants’ advertising and labeling. While Plaintiffs are confident that their expert can prove that the Tommie Copper Products do not deliver the promised health benefits, there is always the risk that Plaintiffs could lose. Moreover, due to the documented benefits of compression without copper infusion and a large placebo effect, Defendants will likely argue that there are numerous satisfied customers, and that the effectiveness of the Tommie Copper Products varies based on a host of individual issues unique to the particular consumer, such as health condition and length and manner of use. While Plaintiffs believe that they would prevail over this argument, it certainly poses a risk. Apart from the factual uncertainty regarding proof of falsity in

Defendants' representation, there is also uncertainty in establishing damages. Unlike the anticipated claims process in the proposed Settlement, Plaintiffs must meet certain burdens in order to prove damages at trial. Plaintiffs' reliance on expert testimony to establish liability and damages as well as "a jury's acceptance of expert testimony is far from certain, regardless of the expert's credentials." *In re The Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 539 (D.N.J. 1997); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744 (S.D.N.Y. 1985) ("In this 'battle of the experts' it is virtually impossible to predict with any certainty which testimony would be credited . . .").

Additionally, there are significant concerns regarding the financial stability of Tommie Copper. Specifically, Tommie Copper stipulated to the entry of a Stipulated Final Judgment and Order for Permanent Injunction in the amount of \$86,815,778.00, which was suspended on the payment of \$1,350,000.00 to the FTC. The FTC suspension of part of the judgment was based on the financial statements submitted to the FTC, including financial statements from Defendant Thomas Kallish and Defendant Tommie Copper, establishing their inability to pay in excess of the unsuspended judgment. More significantly, if Tommie Copper or Kallish misrepresented their financial condition, the suspended judgment would be immediately due. Accordingly, these financial difficulties present the risk that Defendants may not be able to satisfy an adverse judgment in the event that the case goes to trial and the Plaintiffs prevail. Such risk necessitates a settlement that guarantees compensation for the Class should Tommie Copper become insolvent through protracted litigation. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) ("[R]isk that the class will lose should the suit go to judgment on the merits justifies a compromise that affords a lower award with certainty"). By contrast, the Stipulation of Settlement avoids the risks inherent in protracted litigation, and provides a prompt and favorable resolution to the Class.

e. Establishing A Class And Maintaining A Class Action Through Trial Would Be Challenging

Plaintiffs are confident in their ability to maintain this Action as a class through trial. Nonetheless, they recognize that they face substantial hurdles in certifying a class. Defendants will likely contend that individual reliance, materiality, causation, and damages preclude class certification. Further, class determination will require extensive and expensive briefing by both sides, the outcome of which is by no means assured. Should the class be certified, Defendants will likely challenge certification or seek permission to file an interlocutory appeal under Fed. R. Civ. P. 23(f). *See Park v. Thomson Corp.*, No. 05 Civ. 2931 (WHP), 2008 U.S. Dist. LEXIS 84551, at *9 (S.D.N.Y. Oct. 22, 2008); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (“A district court retains the authority to decertify or modify a class at any time during the litigation if it proves to be unmanageable.”). The proposed Settlement here eliminates these risks, expenses, and delays.

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

The seventh *Grinnell* factor considers whether a defendant could withstand a judgment substantially higher than the proposed settlement amount if the case were to proceed to trial. *Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317, 338 (S.D.N.Y. 2005), *affirmed in part and vacated in part on other grounds by Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006). The resources available to fund a substantial recovery were a factor considered by proposed Settlement Class Counsel in accepting the Settlement. *See, e.g., In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 456-57 (S.D.N.Y. 2004) (recognizing that “protracted litigation could deprive the class members of the substantial amount of insurance money the partial settlement would provide,” and that the settlement “would maximize the recovery of insurance money for the class”). Moreover, Settlement Class Counsel is aware that if Defendants misrepresented their financial

condition to the FTC, the suspended judgment \$86,815,778.00 would be immediately due. Thus, this factor weighs in favor of final approval of the Settlement.⁷

g. The Settlement Amount Is Reasonable In Light Of The Possible Recovery And Attendant Risks Of Litigation

The adequacy of a settlement amount offered should be judged “in light of the strengths and weaknesses of the plaintiff[s’] case.” *In re Med. X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 U.S. Dist. LEXIS 14888, at *15 (E.D.N.Y. Aug. 7, 1998) (internal quotation marks omitted). That the Settlement amount is less than the maximum potential recovery is not a barrier to approval. *See Grinnell*, 495 F.2d at 455 n.2 (“[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.”).⁸ Indeed, judging whether a settlement is reasonable “is not susceptible of a mathematical equation yielding a particularized sum.” *In re Michael Milken and Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993). “Courts examine procedural and substantive fairness in light of the ‘strong judicial policy favoring settlements’ of class action suits.” *Flores v. Anjost Corp.*, No. 11 Civ. 1531 (AT), 2014 U.S. Dist. LEXIS 11026, at *11 (S.D.N.Y. Jan. 29, 2014) (quoting *WalMart*, 396 F.3d at 116).

Although Plaintiffs believe their claims have merit, they recognize that they face significant legal, factual, and procedural obstacles to recovery. Defendants continue to vigorously deny any wrongdoing and deny any liability to the Plaintiffs or any members of the Class. Although

⁷ Even if Defendants could withstand a greater judgment, their ability to do so, “standing alone, does not suggest that the settlement is unfair.” *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178 n.9.

⁸ *See also Cagan v. Anchor Sav. Bank FSB*, No. CV-88-3024, 1990 U.S. Dist. LEXIS 11450, at *34, *43 (E.D.N.Y. May 22, 1990) (approving \$2.3 million class settlement where maximum potential recovery was approximately \$121 million); *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 U.S. Dist. LEXIS 86266, at *17 (N.D. Cal. Nov. 16, 2007) (“settlement, as a product of compromise, typically offers less than a full recovery.”)

Plaintiffs have confidence in the claims and ability to certify a class action, a favorable outcome is not assured. *See, e.g., In re POM Wonderful LLC Mktg. and Sales Practices Litig.*, No. 10-02199 DDP (RZx), 2014 U.S. Dist. LEXIS 40415 (C.D. Cal. Mar. 25, 2014) (decertifying nationwide class). Even if judgment was entered against Defendants, any appeal in the Second Circuit would likely take years to resolve. By settling, Plaintiffs and the Settlement Class avoid these risks, as well as the delays and risks of a lengthy trial and appellate process. The Settlement will provide Settlement Class Members with monetary benefits that are immediate, certain, and substantial, and avoid the obstacles that might have prevented them from obtaining relief.

Here, each Class Member is able to recover cash refunds of between \$5.00 and \$10.00 per product, or alternatively a 40% Cash Recovery Enhancement for Products purchased during the Settlement Class Period. Given the potential of a non-recovery, the Stipulation of Settlement provides a favorable resolution of this Action, including sizable refunds to consumers with and without documentation of their purchases, important prospective relief and effective notice to the Class that falls well within the range that courts have traditionally found to be fair and adequate under the law.

Moreover, the fact that the Stipulation of Settlement provides for a prompt payment to claimants favors approval of the Settlement. *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-11814(MP), 2004 U.S. Dist. LEXIS 8608, at *16 (S.D.N.Y. May 14, 2004) (“[T]he proposed Settlement provides for payment to Class members now, not some speculative payment of a hypothetically larger amount years down the road Given the obstacles and uncertainties attendant to this complex litigation, the proposed Settlement is within the range of reasonableness, and is unquestionably better than the other likely possibility – little or no recovery.”) (quoting *In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985), *modified on other grounds*, 818 F.2d 179 (2d Cir. 1987) (“[M]uch of the value of a settlement lies in the ability

to make funds available promptly.”)). Therefore, these factors militate in favor of preliminarily approving the Settlement.

B. Provisional Certification Of The Settlement Class Is Appropriate

Under Federal Rule 23(c)(1), “the court can make a conditional determination of whether an action should be maintained as a class action, subject to final approval at a later date.” *Ayzelman v. Statewide Credit Servs. Corp.*, 238 F.R.D. 358, 362 (E.D.N.Y. 2006) (internal quotation marks omitted). “Certification of a class for settlement purposes only is permissible and appropriate[.]” *Reade–Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 31 (E.D.N.Y. 2006). Where a class is proposed in connection with a motion for preliminary approval, “a court must ensure that the requirements of Rule 23(a) and (b) have been met.” *Deutsche Bank*, 443 F.3d at 270. Courts employ a “liberal rather than restrictive construction” of Rule 23, “adopt[ing] a standard of flexibility” in deciding certification. *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (quoting *Sharif ex rel. Salahuddin v. N.Y. State Educ. Dep’t*, 127 F.R.D. 84, 87 (S.D.N.Y. 1989)).

Because the proposed Settlement Class satisfies requirements under Rule 23(a) and at least one of the subsections of Rule 23(b), and Defendants consent to conditional certification of a class action for settlement purposes only, Plaintiffs respectfully request that this Court provisionally certify the nationwide Settlement Class defined above.

1. Rule 23(a) Is Met

a. Joinder Of All Members Is Impracticable

Numerosity is met if “the class is so numerous that joinder of all members is impracticable[.]”⁹ Fed. R. Civ. P. 23(a)(1). Here, the Settlement Class includes potentially thousands of consumers nationwide who purchased the Tommie Copper Products. Given the

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

number and geographic dispersion of potential Class Members, joinder would be impracticable. Accordingly, the requirement is met.

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

To be certified as a class action, there must be “questions of law or fact common to the class[.]” Fed. R. Civ. P. 23(a)(2). The requirement of commonality does not require identical claims and arguments. “To satisfy commonality, ‘even a single common question will do.’” *In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 1775, No. 06-MD-1175 (JG)(VVP), 2014 U.S. Dist. LEXIS 180914, at *178 (E.D.N.Y. Oct. 15, 2014) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011)).

Here, the criterion is satisfied because there are numerous issues of fact and law common to the Settlement Class, including: (a) whether Defendants’ representations regarding the Tommie Copper Products are false; (b) whether consumers have been misled and deceived by the advertisements and labels; (c) whether Defendants’ conduct violates various state consumer protection laws; (d) whether Plaintiffs and other Class Members have been injured and the proper measure of their losses as a result of those injuries; and (e) whether Plaintiffs and Class Members are entitled to injunctive, declaratory, and/or other equitable relief in connection with Defendants’ alleged unlawful conduct.

c. Plaintiffs’ Claims Are Typical Of The Claims Of The Class

Rule 23(a)(3) is satisfied when “‘each class member’s claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant’s liability.’” *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (quoting *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)). “When the same unlawful conduct was directed at both the named plaintiff and the class to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.” *Labbate-*

D'Alauro v. GC Servs. Ltd. P'ship, 168 F.R.D. 451, 456–57 (E.D.N.Y. 1996) (internal quotation marks omitted).

Here, Plaintiffs allege that Defendants made false and misleading representations concerning the Products' ability to relieve pain, including arthritis and other chronic joint and muscular pain; aid in injury management; accelerate or speed muscle and joint recovery; and improve muscular power, strength, and endurance. CAC ¶ 3. Plaintiffs allege that these material misrepresentations caused them injury because they would not have purchased Tommie Copper Products or they would not have paid as much had they known that the Products could not deliver the promised benefits. *Id.* ¶¶ 14, 137-146. Defendants' conduct caused similar injury to members of the Settlement Class. Plaintiffs allege that all of Defendants' Tommie Copper Products were advertised as relieving pain, including arthritis and other chronic joint and muscular pain; aid in injury management; accelerate or speed muscle and joint recovery; and improve muscular power, strength, and endurance. *Id.* ¶ 2, Ex. A. Moreover, Defendants' alleged misrepresentations regarding the Tommie Copper Products would be material to any reasonable consumer. *See Bildstein v. MasterCard Int'l Inc.*, 329 F. Supp. 2d 410, 414 (S.D.N.Y. 2004) (“[A] material claim is one that involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.”) (internal quotation marks omitted). Indeed, the predominant reason for why a consumer would purchase and/or consume a Tommie Copper Product is to obtain pain relieving benefits represented by Defendants to be present in its products. Because Plaintiffs will seek to prove that they were harmed by the same overall course of conduct and in the same way as the Class, their claims are typical of the class.

d. Plaintiffs Will Fairly And Adequately Protect Class Interests

The final prerequisite mandates that “representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The requirement is met if the plaintiff:

(1) is represented by counsel who is “qualified, experienced and able to conduct the litigation[;]” and (2) does not possess interests “antagonistic to the interest of other members of the class[.]” *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000).

Plaintiffs’ interests are consistent with, and not antagonistic to, the interests of other Settlement Class Members. Here, Plaintiffs’ claims are co-extensive with those of the Settlement Class. Plaintiffs and each Class Member were injured in the same manner, and Plaintiffs assert the same legal claims as those of the Class. Thus, they share a common interest in establishing liability and securing the maximum possible recovery. Plaintiffs have taken their obligations to the Settlement Class seriously. They engaged in the prosecution of this matter, have consistently conferred with their counsel, reviewed the various complaints, and consulted with counsel regarding the propriety of the settlement. Vozzolo Decl. n. 3.

Moreover, Plaintiffs’ counsel has extensive experience in handling class actions and the types of claims asserted in this action. *Id.* ¶ 27-30. As noted above, Plaintiffs’ counsel have considerable experience in consumer class action, and their combined experience demonstrates that the Settlement Class Members at all times were, and are, well-represented.

e. Class Members Are Readily Identifiable And Ascertainable

Rule 23 also contains an “implicit requirement that the class be precise and ascertainable.” *Guzman v. VLM, Inc.*, No. 07-CV-1126 (JG)(RER), 2008 U.S. Dist. LEXIS 15821, at *13 (E.D.N.Y. Mar. 2, 2008) (internal quotation marks omitted). Here, the Class is readily identifiable because it consists of all persons in the United States who purchased for personal use a Tommie Copper Products between January 1, 2011 and the Preliminary Approval Date. All Class Members are able to determine their membership in the Class. The Settlement Class is thus precise and readily identifiable.

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

To qualify for certification under Rule 23(b)(3), the class must meet two criteria. First, common questions of law or fact must “predominate” over any purely individual questions. Fed. R. Civ. P. 23(b)(3). Second, the class must demonstrate that class treatment is superior to other available methods for the fair and efficient adjudication of the controversy. *Id.* In the context of a settlement class, the issue of manageability “drop[s] out of the predominance analysis because the proposal is that there be no trial.” *In re Am. Int’l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 240 (2d Cir. 2012) (internal quotation marks omitted). Instead, the court must take care to determine the legal or factual questions in each class member’s case “are sufficiently similar to yield a cohesive class.” *Id.*

a. Common Questions Predominate Over Individual Issues

The predominance requirement “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). To meet this requirement, “a plaintiff must show that those issues in the proposed action that are subject to generalized proof outweigh those issues that are subject to individualized proof.” *Heerwagen v. Clear Channel Commc’ns*, 435 F.3d 219, 226 (2d Cir. 2006).

Predominance is satisfied here, where the pertinent issues center on whether Defendants’ representations concerning the Tommie Copper Products are false, misleading, and/or likely to deceive the public. Every Class Member’s claim may be proven by the same set of facts regarding the efficacy of the Tommie Copper Products. Indeed, the resolution of whether the Tommie Copper Products, as a matter of scientific fact, can deliver the promised health benefits is integral each Class Members’ case, and can be achieved through generalized proof. Therefore, the predominance requirement is met.

b. A Class Action Is Superior To Alternative Methods Of Adjudication

For certification under Rule 23(b)(3), the court must determine that class treatment is superior to other available methods of adjudication. *See* Fed. R. Civ. P. 23(b)(3). Class treatment is appropriate where, as here, “the proposed class members are sufficiently numerous and seem to possess relatively small claims unworthy of individual adjudication due to the amount at issue [and] there is reason to believe that class members may lack familiarity with the legal system, discouraging them from pursuing individual claims.” *Jankowski v. Castaldi*, No. 01-cv-0164 (SJF)(KAM), 2006 U.S. Dist. LEXIS 4237, at *13 (E.D.N.Y. Jan. 13, 2006) (internal quotation marks omitted).

Class treatment is not merely superior, but is the only manner in which to ensure fair and efficient adjudication of this Action. Given that each Class Member’s claim, individually, is of a relatively low value, individual Class Members will likely have little incentive to pursue their claims on an individual basis. A class action will allow individual Class Members to bring together claims that would be economically infeasible to litigate otherwise. Class treatment in the settlement context is also superior to individual suits or piecemeal litigation because it facilitates favorable resolution of all Settlement Class Members’ claims and conserves scarce judicial resources. Therefore, a class action is a superior method of adjudicating this case.

C. The Proposed Class Notice And Notice Plan Are Reasonable

The Notice to be provided to the Settlement Class satisfies the requirements of Rule 23(c)(2)(B), which requires “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). However, the “best practicable” notice standard does not require that every class member actually receive notice. *In re Adelpia Commc’ns Corp. Sec. & Derivatives Litig.*, 271 F. App’x 41, 44 (2d Cir. 2008) (holding that the fact that some class members may not actually

receive timely notice does not render the notice inadequate so long as the notice was reasonably calculated to reach all members) (quoting *Weigner v. New York*, 852 F.2d 646, 649 (2d Cir. 1988) (“It is clear that for due process to be satisfied, not every class member need receive actual notice, as long as class counsel ‘acted reasonably in selecting means likely to inform persons affected.’”). Additionally, the proposed forms of notices should “fairly apprise the prospective members of the class of the pendency of the class action, the terms of the proposed settlement, and the options that are open to them in connection with the proceedings, including the option to withdraw from the settlement.” *Reade-Alvarez*, 237 F.R.D. at 34.

The proposed forms of notices, attached as Exhibits B, C, and D to the Stipulation of Settlement and discussed at Section 6 of the Stipulation of Settlement, satisfy the criteria in Rule 23(c)(2)(B). The notice contains all the necessary information, including: (1) a summary of the action and the claims asserted; (2) a plain definition of the Settlement Class; (3) a clear and concise description of the terms of the Settlement; (4) information regarding the claim criteria and instructions on how to make a claim; (5) disclosure of the release of claims by Class Members who do not opt out of the Settlement; (6) an explanation of opt-out rights and information on how to do so; (7) instructions on how and when to object to the Settlement; (8) the date, time and location of the final approval hearing; (9) the address for the Settlement Website; and (10) the names and contact information for Class Counsel representing the Settlement Class.

Under the Stipulation of Settlement, Settlement Notice will be sent in multiple formats consisting of: (1) direct email notice to all Class Members for whom Tommie Copper has email addresses (by both Defendant Tommie Copper and the claims Administrator); (2) a dedicated case specific Settlement Website (www.tommiecoppersettlement.com) where the notice and other court related filings will be posted; (3) Banner ads with links to the Settlement Website posted on Tommie Copper’s retail website and social media sites; (4) notice posted in Tommie Copper’s

retail store in Westchester, New York; (5) notice published in the *Journal News* (Westchester edition) where Tommie Copper's retail store is located; and (6) a toll-free telephone number where Class Members can call to hear a pre-recorded message and leave a message that will be returned by the Claims Administrator. A copy of Notice Program developed by CLASSAURA LLC (Declaration of Gajan Retnasaba) is attached as Exhibit 3 to the Vozzolo Declaration.

Due to the nature of the consumer product at issue, email notice is particularly appropriate where the majority of the Defendants' contact and communications with class members occurred electronically. See *Ramirez v. eWork, Inc.*, No. 06-cv-00686-WDM-BNB, 2008 U.S. Dist. LEXIS 69700, at *5 (D. Colo. Sept. 15, 2008) ("In particular, e-mailed individual notices were the best notice practicable under the circumstances, which included the fact that eWork Markets, Inc. communicated with the Class primarily through e-mail."); *Morgan v. Public Storage*, No. 14-cv-21559, 2016 U.S. Dist. LEXIS 54937, at *10 (S.D. Fla. Mar. 9, 2016) (finding email notice appropriate where "Public Storage primarily communicates with its customers through email and had the email addresses of more than 90% of the Settlement Class members."); *Browning*, 2007 U.S. Dist. LEXIS 86266, at *13 ("Email notice was particularly suitable in this case, where settlement class members' claims arise from their visits to Defendants' Internet websites."); accord *Fulford v. Logitech, Inc.*, No. 08-cv-02041 MMC, 2010 U.S. Dist. LEXIS 29042, at *3-4 (N.D. Cal. Mar. 5, 2010); see also proposed Rule 23.¹⁰ Here Tommie Copper collected Class Members' email addresses at the time of product purchase and communicated with them through email. Specifically, Tommie Copper maintain *email* addresses of more than 94% of the Settlement Class

¹⁰ Available at http://www.uscourts.gov/sites/default/files/2016-08-preliminary_draft_of_rules_forms_published_for_public_comment_0.pdf.

Members. Vozzolo Decl. ¶ 23.^{11 12}

In sum, the proposed notices are clear and straightforward. Further, the notice plan, designed by a respective expert on the means of providing effective class notice, is calibrated to provide broad and effective dissemination of the notice to the consumers of Tommie Copper Products. Therefore, the content of the notices and comprehensive notice plan satisfies the requirement under Rule 23.

D. Plaintiffs' Counsel Should Be Appointed As Class Counsel

Rule 23(g) requires a court to appoint class counsel when it certifies a class. In appointing class counsel, the court considers several factors: (1) work done by counsel in identification or investigation of the claims in the action; (2) counsel's experience; (3) counsel's knowledge of the applicable law; and (4) counsel's resources committed to representing the proposed class. Fed. R. Civ. P. 23(g)(1)(A).¹³ All of these factors militate in favor of appointing The Marron Firm, Faruqi & Faruqi, and Vozzolo LLC as Settlement Class Counsel.

Proposed Settlement Class Counsel spent a significant amount of time identifying and investigating Plaintiffs' claims before filing the instant motion. Vozzolo Decl. ¶ 12. Proposed Settlement Class Counsel is particularly experienced in the litigation, certification, trial, and settlement of nationwide consumer class action cases like the instant Action. In negotiating this

¹¹ Additionally, Settlement Class Counsel has partnered with an experienced third-party vendor that specializes in mass email notifications in class action settlements. To ensure a high degree of deliverability of the email notice and to avoid spam filters, the third-party vendor used a number of industry-recognized best practices and complied with the Can-Spam Act. Vozzolo Decl. at ¶ 23.

¹² Further, a significant majority of Class Members' claims arise from their visits to the Defendants' Internet business.

¹³ See also *deMunecas v. Bold Food, LLC*, No. 09 Civ. 00440 (DAB), 2010 U.S. Dist. LEXIS 38229, at *8 (S.D.N.Y. Apr. 19, 2010) ("The work that [plaintiffs' counsel] has performed both in litigating and settling this case demonstrates their commitment to the class and to representing the class's interests.").

Settlement, proposed Class Counsel had the benefit of years of relevant experience and a familiarity with the facts of this case and the substantive case law at issue. Vozzolo Decl. ¶¶ 27-30, Exs. 1- 3. Finally, the firms are established practices that are currently litigating dozens of cases in state and federal courts throughout the nation, and they have more than sufficient resources to represent the Class. *See id.* For the purposes of 23(g), the Court should appoint Plaintiffs' counsel to act as Class Counsel for this Settlement Class.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant the relief requested herein. A Proposed Order granting preliminary approval, certifying the Settlement Class, designating Plaintiffs as Class Representatives, appointing Class Counsel, approving the forms of notices, and setting deadlines related to class notice and final approval, is submitted herewith.

Dated: November 22, 2017

Respectfully submitted,

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