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

In re Tommie Copper Products Consumer Litigation	Lead Case No.: 7:15-cv-03183-AT Judge: Hon. Analisa Torres

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, AWARD OF ATTORNEYS' FEES AND EXPENSES, AND APPROVAL OF INCENTIVE AWARDS

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Plaintiffs William Lucero, Rhonda Boggs, Jerome Jeffy, and Sandy Kontura (collectively, "Plaintiffs"), respectfully submit this Memorandum of Law in Support of their motion for final approval of the Class Action Settlement, awarding attorneys' fees and reimbursement of expenses, and awarding the payment of incentive awards to the Plaintiffs (the "Motion").[1]

I. INTRODUCTION

Plaintiffs commenced this class action lawsuit against defendants Tommie Copper Inc., Tommie Copper Holdings, Inc., Thomas Kallish, and Montel Williams (collectively, "Defendants" or "Tommie Copper") on behalf of themselves and all others similarly situated, seeking economic damages and prospective relief related to their purchase of Defendants' "copper-infused" or "zinc-infused" compression apparel (collectively, the "Tommie Copper Products") (individually a "Product").[2] Plaintiffs alleged that Defendants misrepresented the ability of the copper and zinc components 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). Although Defendants deny all charges of wrongdoing or liability, the Parties have agreed to settle this matter upon the terms set forth in the Stipulation and Settlement Agreement, which was

[1] Defendants do not oppose Plaintiffs' Motion.

[2] 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.

preliminarily approved by this Court on December 19, 2017 (the "Settlement").[3]

The Settlement, under the circumstances, provides meaningful and immediate economic relief in the form of cash refunds to Settlement Class Members. Specifically, 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 and December 19, 2017. 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.[4]

The Settlement reflects an excellent resolution of the parties' respective claims and defenses, is fair, reasonable, and falls within the range of possible 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, as well as multiple in-person and telephonic court-monitored settlement conferences before the Honorable Lisa Margaret Smith between May 5,

[3] All capitalized terms have the same definition as in the Stipulation and Settlement Agreement ("Stipulation of Settlement") and its exhibits, which are attached as Exhibit 2 to the Declaration of Antonio Vozzolo filed concurrently with the Motion for Preliminary Approval of Class Action Settlement, ECF No. 114-1.

[4] Additionally, Defendants have agreed 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. Moreover, 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 from Tommie Copper a 40% enhancement to the value of the recovery. This 40% enhancement is in addition to the amount paid by Defendants to the Settlement Fund.

2016 and June 15, 2017. All Settlement Class Members are treated fairly under the terms of the Settlement. Because Plaintiffs initially sought monetary and/or injunctive relief for Settlement Class Members based on their purchase of the Products, the provisions for monetary refunds and prospective relief under the Settlement are an excellent result for Class Members.

The reaction of the Class supports approval of the Settlement. Pursuant to the Court's Preliminary Approval Order, as described more fully below, a comprehensive nationwide notice program was implemented, including: direct e-mail notice to more than 1.3 million class members, a dedicated case specific Settlement Website where the *notice* and other court related filings were posted; links to the Settlement Website posted on Tommie Copper's retail website and social media sites; notice posted in Tommie Copper's retail store located in Westchester County, New York; and *notice* published on two separate occasion in the *Journal News* (Westchester edition). To date, 154,115 individual claim forms have been submitted.[5] Further, only two objections have been submitted and only 78 Settlement Class Members have opted out.

Subject to Court approval, Tommie Copper has agreed to Class Counsels' Court-approved fees and expenses up to a maximum of $231,000 or one-third of the Settlement Fund. The attorneys' fees were negotiated separately, apart from the other terms of the agreement. Declaration of Antonio Vozzolo in Support of Motion for Final Approval of Class Action Settlement, Award of Attorneys' Fees and Expenses, and Approval of Incentive Awards ("Vozzolo Decl."), ¶ 16. The payment of Class Counsel's fees and expenses, to the extent approved and ordered by the Court, will be from the Cash Settlement Fund. This method of calculating the fee award, based on a percentage of the fund, is straightforward and fair under the circumstances of the case. Furthermore, cross-checking the agreed upon fee request against a lodestar fee calculation confirms that the amount of attorneys' fees and expenses is fair,

[5] The Claims Administrator is currently in the process of confirming the validity of the claims.

reasonable, and supported by the law of this Circuit. *See infra*. As detailed below, a fee award of $231,000.00 represents a negative multiplier of .35 to Class Counsel's lodestar of $640,557.00. The requested attorneys' fees are well within the acceptable range established by the Second Circuit and the Courts within this District. Vozzolo Decl. ¶ 13; Declaration of Ronald Marron in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, Award of Attorneys' Fees, Costs and Expenses, and Approval of Incentive Awards (the "Marron Decl."). Furthermore, the expenses incurred were necessary to the prosecution of this case and were carefully and reasonably expended. Vozzolo Decl. ¶ 18, Exs. E, F (summary of out-of-pocket expense incurred by Faruqi & Faruqi and Vozzolo LLC in connection with this case); Marron Decl. Exh. 2 (same). Finally, Defendants have agreed to pay Class Representatives incentive awards in the amount of $1,000 each.

As shown below, the Settlement not only satisfies Rule 23's "fair, reasonable, and adequate" standard, it is an excellent result for the Plaintiffs and the Settlement Class. The Court should grant final approval.

II. FACTUAL AND PROCEDURAL SUMMARY

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. Civ. 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 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. On January 4, 2016, the Court granted consolidation of the two cases, and appointed the *Lucero* Plaintiffs' counsel—the Law Offices of Ronald A. Marron (the "Marron Firm") and Faruqi & Faruqi—to serve as Interim Class Counsel for the Consolidated Action. ECF No. 50.

On March 4, 2016, the *Lucero* Plaintiffs filed a consolidated class action complaint, which asserted 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. Com. 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 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* Action to the Southern District of New York New York were granted.

On November 27, 2015, subsequent to the filing of the initial complaints, the Federal Trade Commission ("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. Moreover, pursuant to the consent order, the suspended judgment would be immediately due and owing if Tommie Copper or Kallish misrepresented their financial condition to the FTC.

A. INVESTIGATION AND SETTLEMENT NEGOTIATIONS

Before filing the initial Complaint, 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 evaluate the materiality of the misrepresentations at issue. Settlement Class Counsel also submitted a Freedom of Information Act ("FOIA') request to the FTC to obtain additional information about Defendants. Thereafter, Plaintiffs served a pre-suit notice and demand letter on Defendants 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. ¶ 34.

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 class data (including the number of potential Class members); insurance policies, coverage summaries, correspondence and notices regarding same, and financial

statements and related documents to proposed Settlement Class Counsel. *See id.* ¶ 33. 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.

Defendants, while denying all allegations of wrongdoing and disclaiming all liability with respect to all claims, considers it desirable to resolve the action on the terms stated in the Settlement Agreement in order to avoid further expense, inconvenience and burden and, therefore, has determined that the Settlement is in Tommie Copper's best interests. *See* Stipulation of Settlement, ECF No. 114-1, ¶ 1.22.

On November 22, 2017, Class Counsel filed a Motion for Preliminary Approval of Class Action Settlement and Related Relief. ECF No. 112. On December 19, 2017, the Court issued a Preliminary Approval order that: (1) preliminarily approved the Settlement, (2) provisionally certified a Settlement Class, for settlement purposes only, (3) appointed Class Counsel to represent the Settlement Class, (3) appointed Class Representatives for the Settlement Class, and (4) approved the proposed methods for giving notice. The Settlement Class was defined as: All persons in the United States, its territories, or at any United States military facility or exchange who purchased Tommie Copper Products directly from Defendants through the internet, telephone or at the Tommie Copper retail location in Westchester, New York on or after April 11, 2011 through December 19, 2017 (the "Settlement Class").

As required by the notice program set forth in the Agreement/Media Plan and approved by the Court, notice was: (1) directly emailed to all Class Members for whom Tommie Copper had *email* addresses; (2) published on a dedicated case specific Settlement Website (www.tommiecoppersettlement.com) where the *notice* and other court related filings were posted; (3) published on Tommie Copper's retail website and social media sites with links to the Settlement Website; (4) posted in Tommie Copper's retail store located in Westchester County,

New York; and (5) published on two separate occasion in the *Journal News* (Westchester edition) on January 18, 2018 and January 20, 2018. *See* Declarations of Gajan Retnasaba ("Retnasaba Decl."), ¶ 12, and Kimberly Mallard ("Mallard Decl.") which are attached as Exhibits A and B to the Vozzolo Decl. Notice was e-mailed to 1,384,293 customers (more than 94% of the Settlement Class Members) utilizing data from Defendants' proprietary database. Retnasaba Decl. ¶ 4. Additionally, the settlement administrator, CLASSAURA LLC, caused Notice to be served in compliance with the Class Action Fairness Act Notice. *Id.* ¶¶ 8-10.[6]

Classaura LLC also created a dedicated website www.tommiecoppersettlement.com ("Settlement Website"), and set up a toll-free number. *Id.* ¶¶ 15, 18. The Settlement Website maintained copies of: Claim Form, Summary Notice, Long Form Notice, Preliminary Approval Order, the Preliminary Approval Motion and related filings, the Settlement Agreement, the FTC Stipulated Final Judgment, the Amended Class Action Complaint, and a "Frequently Asked Questions" segment. Additionally, the Settlement Website prominently noted the claim filing deadline; the deadline to opt out; the deadline to submit an objection; and the date, time and location of the Fairness Hearing. *Id.* ¶ 18.

To date, Classaura LLC has received over 154,115 individual claim forms. Only two Settlement Class Members have objected to the Settlement and only 78 Settlement Class Members have opted out of the Settlement. *Id.* ¶¶ 19-21.

III. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

Under Federal Rule of Civil Procedure 23, a class action may be maintained if all of the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). Rule 23(a) requires that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of

[6] CAFA notice was served at least 100 days prior to the final approval hearing. Retnasaba Decl., ¶ 10.

law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Rule 23(b)(3) requires the Court to find that:

> questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating of the controversy.

Fed. R. Civ. P. 23(b)(3). In the Second Circuit, "Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" in evaluating class certification. *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (internal citation omitted).

On December 19, 2017, the Court provisionally certified the Settlement Class. Dkt. No. 117. The Court should now grant final certification because the Settlement Class meets all of the requirements of Rule 23(a) and Rule 23(b)(3).

A. THE REQUIREMENTS OF RULE 23(A) ARE MET

1. Numerosity

Federal Rule of Civil Procedure 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." For purposes of Rule 23(a)(1), "[i]mpracticable does not mean impossible." *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). "[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

Here, the Class includes more than 1 million consumers nationwide. Tommie Copper maintain *email* addresses of more than 94% of the Settlement Class Members, amounting to more than one million people. Given the number and geographic distribution of the Class Members, joinder of all Class Members would be impracticable, and the proposed Settlement Class easily satisfies Rule 23's numerosity requirement.

2. Commonality

Rule 23(a)(2) requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This commonality requirement is met "if plaintiffs' grievances share a common question of law or of fact." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Mangaged Care, L.L.C.*, 504 F.3d 229, 245 (2d Cir. 2007). The disputed issue of law or fact must "occupy essentially the same degree of centrality to the named plaintiffs' claim as to that of other members of the proposed class." *Krueger v. N.Y. Tel. Co.*, 163 F.R.D. 433, 442 (S.D.N.Y. 1995) (internal quotations omitted). "[A] single common issue of law will satisfy the commonality requirement." *Michalow v. E. Coast Restoration & Consulting Corp.*, 2011 WL 6942023, at *3 (E.D.N.Y. Nov. 17, 2011); *Monaco v. Stone*, 187 F.R.D. 50, 61 (E.D.N.Y. 1999). A common issue of law will be found if plaintiffs "identify some unifying thread among the members' claims." *Monaco*, 187 F.R.D. at 61 (internal quotations omitted). Further, a court may find a common issue of law even if there is "'some factual variation among class members' specific grievances.'" *Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29, 37 (E.D.N.Y. 2008) (quoting *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 240 (E.D.N.Y. 1998)).

Here, Class members share numerous common questions, including: (a) whether the Tommie Copper Products were effective for their advertised purpose; (b) whether Defendants advertised or marketed the Tommie Copper Products in a way that was false or misleading; (c) whether Defendants concealed from Plaintiffs and other members of the Class that the Tommie Copper Products did not conform to their stated representations; and (d) whether, as a result of Defendants' misrepresentations, Plaintiffs and other members of the Class were injured and the proper measure of their losses as a result of those injuries. Because Plaintiffs have demonstrated that there is at least one question of law or fact in common between Class Members, commonality is satisfied.

3. Typicality

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 it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux*, 987 F.2d at 936-37; *see also Green v. Wolf Corp.*, 406 F.2d 291, 300 (2d Cir. 1968) (stating that denial of class certification "because all of the allegations of the class do not fit together like pieces in a jigsaw puzzle … would destroy much of the utility of Rule 23").

Here, supported by the same legal theories, Plaintiffs and all Settlement Class Members share claims based on the same alleged course of conduct: the alleged misrepresentations 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. Plaintiffs and all Settlement Class Members have been injured in the same manner by this conduct. Plaintiffs therefore satisfy the typicality requirement.

4. Adequacy of Representation

Adequacy requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Generally, adequacy of representation entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class[7] and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation."

[7] "'[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.'" *Dziennik v. Sealift, Inc.*, No. 05 Civ. 4659, 2007 U.S. Dist. LEXIS 38701, at *19 (E.D.N.Y. May 29, 2007) (quoting *Martens v. Smith Barney Inc.*, 181 F.R.D. 243, 259 (S.D.N.Y. 1998)).

Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000). Both of these factors are met here.

First, Plaintiffs have no interests antagonistic to absent Class Members. Plaintiffs, like each absent Class Member, have a strong interest in proving Tommie Copper's common course of conduct, establishing its unlawfulness, demonstrating the impact of the unlawful conduct, and obtaining redress. Further, this Court has already found that Plaintiffs' Counsel are qualified, experienced, and able to conduct the litigation, as evidenced by the Court's December 19, 2017 Preliminary Approval Order appointing Plaintiffs' Counsel as interim co-lead counsel. See ECF No. 117. Additionally, Class Counsel are active practitioners who are highly experienced in complex class actions, including consumer fraud and product defect litigation. *See* Vozzolo Decl. Ex. C, D; Marron Decl Ex. 1. Accordingly, each of Rule 23(a)'s requirements for class certification is met.

B. THE REQUIREMENTS OF RULE 23(B)(3) ARE MET

Rule 23(b)(3) requires that the common questions of law or fact "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Satisfaction of Rule 23(a) "goes a long way toward satisfying the Rule 23(b)(3) requirement of commonality." *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986).

1. Common Questions Predominate

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. 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). Notably, Rule 23(b)(3) calls only for "a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).

As discussed above, the same common questions relevant to the Rule 23(a)(2) analysis predominate, including: whether Defendants misrepresented the effectiveness of the Tommie Copper Products, whether Tommie Copper's challenged product claims were material to consumers in deciding to purchase the Tommie Copper Products, and whether purchasers of the Tommie Copper Products suffered damages as a result of the allegedly deceptive conduct that are measurable on a classwide basis. These issues can be resolved for all members of the proposed class in a single adjudication using common evidence, including Defendants' internal documents and expert testimony. Since common questions present a significant aspect of the case and can be resolved in a single adjudication, Rule 23(b)(3)'s predominance requirement is met.

2. Class Treatment Is Superior To Alternative Methods Of Adjudication

Rule 23(b)(3) also requires that the class action be "superior to other available methods for fair and efficient adjudication of the litigation." Fed. R. Civ. P. 23(b)(3). "Courts have found that the superiority requirement is satisfied where[] '[t]he potential class members are both significant in number and geographically dispersed[,] [and] [t]he interest of the class as a whole in litigating the many common questions substantially outweighs any interest by individual members in bringing and prosecuting separate actions.'" *Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, at *13 (S.D.N.Y. Sept. 4, 2014) (quoting *Cromer Finance Ltd. v. Berger, et al.*, 205 F.R.D. 113, 133 (S.D.N.Y. 2001)). "Class adjudication … is superior to individual adjudication

because it will conserve judicial resources and is more efficient for class members, particularly those who lack the resources to bring their claims individually." *Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *4 (S.D.N.Y. Oct. 2, 2013).

Class treatment here will facilitate the favorable resolution of all Settlement Class Members' claims. Given the large numbers of Settlement Class Members and the multitude of common issues present, the class device is also the most efficient and fair means of adjudicating these claims. Class treatment is superior to individual adjudication because it will "conserve judicial resources and is more efficient for Class Members, particularly those who lack the time and other resources to bring their claims individually." *See Beckman v. Keybank, N.A.*, 293 F.R.D. 467, 473 (S.D.N.Y. 2013); *Morris v. Affinity Health Plan*, 859 F. Supp. 2d 611, 617 (S.D.N.Y. 2012) (same). In addition, each Class Member's claim, individually, is of relatively low value. As a practical matter, absent the use of the class action device, it would be too costly and inefficient for any individual plaintiff to finance a lawsuit asserting such claims through trial and appeal.[8] Therefore, a class action is the superior method of adjudicating the Settlement Class Members' claims.

IV. THE BENEFITS OF THE PROPOSED SETTLEMENT

A. TERMS OF THE PROPOSED SETTLEMENT

i. Monetary Relief. 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. See Stipulation of Settlement, ECF No. 114-1, § 6.2.D.2. In addition to providing monetary awards to members of the Settlement Class, the Settlement Fund covers taxes and expenses, costs associated with the administration of the settlement, Class

[8] Finally, concentrating the litigation in this Court is desirable because Defendant is a New York corporation.

Counsels' fees and costs, and any incentive award to class representatives. Id. § 6.2(2)(B). The Settlement Agreement creates two categories of recovery for members of the Settlement Class. Class members whose purchase appears in Defendants' computerized records or who provide written proof of their purchase in the form of a receipt or a retail rewards submission may recover $10.00 for each Tommie Copper Product they purchased. Id. § 6.2(A)(1)(a). Class members who lack documentation of their purchase and whose purchase is not in Defendants' computerized records, but who substantiate their claim by submitting an affidavit attesting to their purchase may recover a maximum of $5.00. Id. § 6.2(A)(1)(b). Alternatively, 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, a class member who presents written proof of their purchase of two Products would receive a $28.00 credit on Tommie Copper's website ($20.00 + ($20.00 x 40%)). Id.[9] This credit is absorbed by Tommie Copper and is in addition to the amount paid as part of the settlement fund.

ii. Remedial Measures. As a measure to protect consumers in the future, the Settlement Agreement prohibits Defendants from making false or misleading statements concerning the pain-relieving benefits of Tommie Copper Products in the future. *Id*. § 6.2(B)(1). 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 claims, any false representations, or statements (express

[9] 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.

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*. § 6.2.6(B).

iii. Release Of Claims. In exchange for the foregoing relief, the Settlement Class Members who do not opt out of the Settlement will release Defendant from all claims asserted in this action and any related claims which could be asserted against Defendant in connection with the sale and marketing of Tommie Copper Products during the relevant class period.

V. COSTS, FEES, AND REPRESENTATIVE AWARDS

All Notice and Claims Administration costs, attorneys' fees and Class Representatives Enhancement Awards shall also be paid out of the Settlement Fund in accordance with the Settlement Agreement. This is a benefit to the class, since plaintiffs are ordinarily required to bear the burden of notice in class actions. In addition to the relief discussed above, Defendants have agreed to pay incentive fee awards to each Representative Plaintiff in the amount of $1,000, for service provided to the Settlement Class. *See id.* ¶ 8.3. The Parties agreed to these amounts (attorneys' fees and incentive awards) only after the other substantive settlement terms were resolved and filed with the Court. Vozzolo Decl. ¶¶ 37, 84. Further, the Stipulation of Settlement and Plaintiffs' support of the Settlement are not conditioned upon the Court's approval of the amounts listed in this paragraph.

VI. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE GRANTED FINAL APPROVAL BY THE COURT

Final approval of the Settlement is appropriate here because it is procedurally and substantively fair, adequate and reasonable. *See* Fed. R. Civ. P. 23(e)(2). To determine whether to approve a settlement, "'[c]ourts examine procedural and substantive fairness in light of the 'strong judicial policy in favor of settlement' of class action suits.'" *Tiro v. Public House Invs.*,

LLC, 2013 WL 4830949, at *5 (S.D.N.Y. Sept. 10, 2013) (quoting *Matheson v. T-Bone Rest., LLC*, 2011 WL 6268216, at *4 (S.D.N.Y. Dec. 13, 2011)). "Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). "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, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (internal quotations omitted).

Importantly, courts and public policy considerations favor settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. "The compromise of complex litigation is encouraged by the courts and favored by public policy," and is particularly encouraged for the compromise of class actions. *Id*. at 117 (internal quotations omitted). Indeed, "[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. There is a strong public interest in quieting any litigation; this is 'particularly true in class actions.'" *In re Luxottica Grp. S.p.A. Secs. Litig*., 233 F.R.D. 306, 310 (E.D.N.Y. 2006). If the settlement was achieved through arm's-length negotiations by experienced counsel, "[a]bsent 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.*, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

A. THE PROPOSED SETTLEMENT IS PROCEDURALLY FAIR

The circumstances surrounding the Settlement support the finding that the Settlement is procedurally fair. The procedural fairness prong requires that the settlement "be the result of arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests."

Weinberger v. Kendrick, 698 F.2d 61, 74 (2d Cir. 1982). Negotiation processes are presumed fair when these elements are present. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).

Here, the negotiations leading to the Settlement were conducted by highly qualified counsel, who respectively sought to obtain the best possible result for their clients. The Settlement 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. *See* Vozzolo Decl. ¶¶ 34, 36.

Additionally, the parties here negotiated the Settlement at arm's-length with the assistance of Magistrate Judge Smith, who presided over numerous in-person and telephonic court-monitored settlement conferences between May 5, 2016 and May 24, 2017. *Id.* at ¶ 34. 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. *Id.* at ¶ 35. The assistance of Judge Smith should assure the Court that the negotiations were conducted at arm's-length and in a non-collusive manner. *See In re*

Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 462 (S.D.N.Y. 2004) (settlement negotiation occurring "under the aegis of Magistrate Judge Dolinger, assigned to oversee the settlement negotiations … 'helped to ensure that the proceedings were free of collusion and undue pressure.'") (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001); *see also In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02 Civ. 3400 (CM) (PED), 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010) ("The presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached [after protracted settlement negotiations] supervised by Judge Weinstein."); *In re AMF Bowling*, 334 F. Supp. 2d 462, 465 (S.D.N.Y. 2004) (the participation of a respected mediator "gives [the court] confidence that [the negotiations] were conducted in an arm's-length, non-collusive manner").

B. THE PROPOSED SETTLEMENT IS SUBSTANTIVELY FAIR

In addition to being procedurally fair, the Settlement is also substantively fair, reasonable, and adequate. "Courts in the Second Circuit evaluate the substantive fairness, adequacy, and reasonableness of a settlement according to the factors set out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)." *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 (E.D.N.Y. Oct. 23, 2012). The nine *Grinnell* factors include: "(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 trial; (7) the ability of defendants 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 *4 (quoting *Grinnell*, 495 F.2d at 463) (alteration in original). However, in reviewing and approving a settlement, "a court need not conclude that all of the *Grinnell* factors weigh in favor of a settlement," rather courts

"should consider the totality of these factors in light of the particular circumstances." *Id.* Here, the *Grinnell* factors weigh in favor of final approval.

1. Factor One: Given The Complexity, Expense And Likely Duration Of The Litigation, Final Approval Is Appropriate

The first factor requires the Court to consider "the complexity, expense and likely duration of the litigation." *Id*. (quoting *Grinnell*, 495 F.2d at 463). 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.

In the absence of the Settlement, the Action would have likely required resolution of motions to dismiss, extensive fact and expert discovery, a litigated class certification motion, summary judgment motions, litigating *Daubert* motions, proving Plaintiffs' claims at trial, and post-trial motion practice. Vozzolo Decl. ¶¶ 55. Assuming Plaintiffs were to survive all dispositive motions, the risks of establishing liability posed by conflicting expert testimony would be exacerbated by the unpredictability of a lengthy and complex trial. *Id.* ¶ 49. In this "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which expert would be accepted by the jury. *Id.* Moreover, even if Plaintiffs could recover an equally large judgment after a trial and recover from Defendants – both of which are far from certain given the risks discussed herein – the additional delay through post-trial motions and the appellate process could deny the Settlement Class any recovery for years, further reducing its value.

Significantly, as discussed more fully below, due to Tommie Copper's financial condition and FTC Settlement, insurance coverage was large source of the recovery, and these funds would have been reduced by defense costs if this Action had continued. Accordingly, there is a very significant risk that further litigation might yield a smaller recovery – or no recovery at all – several years in the future. *See, e.g., Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL

2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs; justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."); *In re Am. Bank Note Holographics, Inc. Sec. Litig*., 127 F. Supp. 2d 418, 424-25 (S.D.N.Y. 2001) (protracted litigation could force a company experiencing financial difficulties into bankruptcy and foreclose significant recovery for the class).

The Settlement, on the other hand, permits a prompt resolution of this Action on terms that are fair, reasonable, and adequate to the Class, undiminished by significant expenses, and without the delay, risk, and uncertainty of continued litigation. Simply put, "[l]itigation through trial would be complex, expensive, and long." *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *3 (E.D.N.Y. Nov. 16, 2012). The Settlement eliminates the expense and delay of continued litigation, the depletion of existing insurance coverage, and the risk that the Settlement Class could receive no recovery.

2. Factor Two: The Class's Favorable Reaction To The Settlement

With the second *Grinnell* factor, the Court judges "the reaction of the class to the settlement." *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *4 (quoting *Grinnell*, 495 F.2d at 463). "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 re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 333 (E.D.N.Y. 2010) (internal quotation marks omitted). This "significant" factor thus weighs heavily in favor of final approval.

Here, the reaction of the Class Members to the Settlement has been overwhelmingly positive. Following an extensive direct notice campaign, only 2 objections were filed and 78 Class Members have opted out of the Settlement. Retnasaba Decl. ¶¶ 4, 20, 21, Exs. E and F. In contrast, CLASSAURA received over 154,115 claims. *Id.* ¶ 19. In entering final approval, courts have

recognized that "[t]he fact that the vast majority of class members neither objected nor opted out is a strong indication" of fairness. *Massiah*, 2012 WL 5874655, at *4 (internal quotation marks omitted); *see also In re Bear Stearns Companies, Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) (the absence of significant number of exclusions or objections "weighs strongly in favor of approval."). Further, CLASSAURA caused to be served by Certified First Class U.S. Mail, a Notice of Settlement to the United States Attorney General and the 56 State and Territorial Attorney Generals in which potential Settlement Class Members may reside. *See* Retnasaba Decl. ¶ 10. To date, no objections from service of that CAFA Notice have been received. This second factor weighs in favor of final approval.

Moreover, neither of the two lone objections have substantive merit. Ms. Mary Burke, who suffers from deep vein thrombosis, objected that the claims and the settlement do not address representations regarding circulatory benefits of the Tommie Copper Products, which in her opinion merit compensation apparently for personal injury of $10,000 per claim rather than $10.00. Retnasaba Decl. Ex. E. Such a claim for medical conditions unique to Ms. Burke is not suited for class treatment. Nevertheless, Ms. Burke chose not to opt out of the class settlement and in fact expressly opted into the settlement, though such an opt-in was not required. Meanwhile, Richard Coolidge objected because "[t]he science is still unclear," based upon a 2011 FDA "promotional item." *Id.* Ex. F. Thus, Mr. Coolidge does not object to the terms of the Settlement, but rather seems to question whether it is necessary.

3. Factor Three: Plaintiffs Had Sufficient Information To Allow The Parties To Responsibly Resolve The Case

The third *Grinnell* factor, which looks to the "stage of the proceedings and the amount of discovery completed," *Wal-Mart*, 396 F.3d at 117, examines "whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs'

causes of action for purposes of settlement." *Bear Stearns*, 909 F. Supp. 2d at 267. Extensive pre-trial discovery or formal discovery under the Federal Rules of Civil Procedure is not a prerequisite to approval of a settlement. *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012) ("The threshold necessary to render the decisions of counsel sufficiently well informed, however, is not an overly burdensome one to achieve—indeed, formal discovery need not have necessarily been undertaken yet by the parties."). In fact, informal discovery designed to develop a settlement's factual predicate is encouraged because it expedites the negotiation process and limits costs which could potentially reduce the value of the settlement. *See Jones v. Amalgamated Warbasse Houses, Inc.*, 97 F.R.D. 355, 360 (S.D.N.Y. 1982) ("Although little formal discovery has occurred, the parties freely exchanged data during settlement talks. In view of the way this speeds the negotiation process, informal 'discovery' is to be encouraged.").

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 detailed 85-page initial complaint 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, and financial statements. *See* Vozzolo Decl. ¶ 33. Thus Plaintiffs' counsel were well positioned to have scrutinized the facts of the Actions from the earliest stages of the litigation and developed an informed basis from which to negotiate a reasonable compromise.

4. Factors Four, Five and Six: The Continued Litigation Risks Related To Establishing Liability, Damages, And Maintaining A Class Action Through Trial Support Settlement

"The fourth, fifth, and sixth *Grinnell* factors all relate to continued litigation risks," *i.e.*, the risks of establishing liability, damages and maintaining the class action through trial. *In re Vitamin*

C Antitrust Litig., 2012 WL 5289514, at *5. "'Litigation inherently involves risks.'" *Willix v. Healthfirst, Inc.,* 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011) (quoting *In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997)). "One purpose of a settlement is to avoid the uncertainty of a trial on the merits." *Id*. Analyzing these risks "does not require the Court to adjudicate the disputed issues or decide unsettled questions; rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. Nov. 24, 2004); *AOL Time Warner*, 2006 WL 903236, at *11 (same). In other words, "the Court should balance the benefits afforded to members of the Class and the immediacy and certainty of a substantial recovery for them against the continuing risks of litigation." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 364 (S.D.N.Y. 2002).

To be sure, this case involved significant risks related to establishing, on a nationwide basis, that Defendants' engaged in unfair, deceptive, or unlawful conduct in marketing the Tommie Copper Products. While Plaintiffs believe the evidence they have uncovered and would uncover through additional discovery in the case would aid the trier of fact in reaching a favorable decision for Plaintiffs and the Class Members, the reality remains that the trier of fact could nevertheless disagree with Plaintiffs. 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.

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 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, the risk of maintaining the class status through trial is also present. The Court has not yet certified the proposed Class and the Parties anticipate that such a determination would be reached only after exhaustive briefing that would require expensive expert testimony. Defendants would undoubtedly have raised vigorous challenges to class certification, and such disputes "could well devolve into yet another battle of the experts." *Bear Stearns*, 909 F. Supp. 2d at 268. Should the Court have certified the Class, Defendants would have likely challenged certification and moved to decertify, forcing another round of briefing. Tommie Copper might have also sought permission to file an interlocutory appeal under Fed. R. Civ. P. 23(f). *Global Crossing*, 225 F.R.D. at 460 ("[E]ven if plaintiffs could obtain class certification, there could be a risk of decertification at a later stage."). Risk, expense, and delay permeate such a process. The proposed Settlement eliminates this risk, expense, and delay. Accordingly, the fourth, fifth, and sixth *Grinnell* factors weigh in favor of the Settlement.

5. Factor Seven: Defendants' Ability to Withstand A 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. Jenkens & Gilchrist*, 230 F.R.D. 317, 338 (S.D.N.Y. 2005). Even if Plaintiffs were able to overcome the significant risks described above and prevail at trial, they would still face the very

real risk that Defendants would be unable to satisfy any judgment obtained due to Defendants financial condition.

As the Court is aware, 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. ECF 113-1. 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 $86,815,778.00 would be immediately due. *Id.*

Courts have consistently held that a defendant's inability to with stand a greater judgement weighs heavily in favor of approval of the settlement. *See Garcia v. Pancho Villa's of Huntington Vill., Inc.*, 2012 WL 5305694, at *5 (S.D.N.Y. Oct. 4, 2012) ("It is likely that [d]efendants could not have withstood a greater judgment due to the financial conditions they faced. . . . [T]he Settlement Agreement eliminates the risk of collection."); *Chavarria v. New York Airport Service, LLC*, 875 F. Supp. 2d 164, 174 (E.D.N.Y. 2012) ("The risk that defendants would not be able to satisfy a larger judgment was a significant factor in plaintiffs' decision to settle their claims. The Settlement Agreement eliminates the risk of collection from defendants who may not be operating after a lengthy litigation.") (internal citations omitted).

Additionally, a substantial portion of the settlement funds is made up of insurance proceeds, which would be largely consumed by defense costs if this litigation were to continue. And the bulk of those funds could be lost entirely, if the parties are not able to secure the money through the proposed settlement. Thus, without the proposed Settlement, Class Members might well receive far less than the settlement would provide to them, even if they could prevail

on their claims. *See, e.g., Teachers' Retirement Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814, 2004 WL 1087261, at *4 (S.D.N.Y. May 14, 2004) (likely depletion of D & O insurance supports settlement approval); *Maley*, 186 F. Supp. 2d at 365 (approving settlement where insurance "would be significantly depleted by defense costs"). 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, 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"). By contrast, the Settlement avoids the risks inherent in protracted litigation, and provides a prompt and favorable resolution to the Class. Thus, this factor weighs in favor of final approval of the Settlement.

6. Factors Eight and Nine: The Range Of Reasonableness Of The Settlement In Light Of The Best Possible Recovery

Courts typically analyze the last two Grinnell factors together. *See Grinnell*, 495 F.2d at 463. In so doing, courts "consider[] and weigh[] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV3400 (CM) (PED), 2010 WL 4537550, at *20 (S.D.N.Y. Nov. 8, 2010) (quoting *Grinnell*, 495 F.2d at 462). The determination of whether a settlement amount is reasonable "does not involve the use of a mathematical equation yielding a particularized sum." *Frank*, 228 F.R.D. at 186 (internal quotation marks omitted). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id.*

(quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972)). Because a settlement provides certain and immediate recovery, courts often approve settlements even where the benefits obtained as a result of the settlement are less than those originally sought. As the Second Circuit stated in *Grinnell*, "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery." 495 F.2d at 455 n.2.

Plaintiffs submit that the settlement is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation, particularly Defendants' ability to pay. Under the Settlement, 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.

"While additional years of litigation might well have resulted in a higher settlement or verdict at trial, continued litigation could also have reduced the amount of insurance coverage available and not necessarily resulted in a greater recovery." *In re Blech Sec. Litig.,* No. 94 CIV. 7696 (RWS), 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000). Insurance coverage would have been swiftly depleted because, among other reasons, different defense firms were retained to represent the Company and the Individual Defendants. Given that Tommie Copper's insurance was a significant source of funding to pay any judgment, and the fact that the available insurance coverage would be further eroded as the litigation continued, the Court should consider that the Settlement provides for payment now without any further risk to the Settlement Class, rather than a speculative and likely lower payment years later. *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-11814, 2004 WL 1087261, at *5 (S.D.N.Y. May 14, 2004) ("[T]he proposed Settlement provides for payment to Class members now, not some speculative payment of a hypothetically larger amount years down the road . . . Given the obstacles and uncertainties

attendant to this complex litigation, the proposed Settlement is within the range of reasonableness, and is unquestionably better than the other likely possibility – little or no recovery.") (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.")).[10]

Weighing the benefits of the Settlement against the risks associated with proceeding in litigation, the Settlement is more than reasonable. Moreover, when a settlement assures immediate payment of substantial amounts to class members, and does not "sacrific[e] 'speculative payment of a hypothetically larger amount years down the road,'" a settlement is reasonable under this factor. *See Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05-3452 (RLE), 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (quoting *Teachers' Ret. Sys. of Louisiana v. A.C.L.N., Ltd.*, No. 01 Civ. 11814 (MP), 2004 WL 1087261, at *5 (S.D.N.Y. May 14, 2004)).

Thus, taking into account the risks of continued litigation, and the fact that the Settlement was reached after intensive, arm's-length negotiations by experienced counsel, the eighth and ninth *Grinnell* factors favor final approval.

In sum, the *Grinnell* factors – including Plaintiffs' well-developed understanding of the strengths and weaknesses of the case, and the significant risks, expense, and delay of further litigation – support a finding that the Settlement is fair, adequate, and reasonable.

VII. THE COURT-APPROVED NOTICE PROGRAM SATISFIES DUE PROCESS

[10] *See also In re Currency Conversion Fee Antitrust Litig.*, 2006 U.S. Dist. LEXIS 81440 (S.D.N.Y. Nov. 8, 2006), *16 (Instead of the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery for the Class. In the circumstances of such a case as this, it may be preferable "to take the bird in the hand instead of the prospective flock in the bush." (citing *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995).

"The adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015). The Notice satisfied Fed. R. Civ. P. 23(e)(1), which requires that notice of a settlement be "reasonable" – *i.e.*, it 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." *Pierson*, 607 F. App'x at 73-74. Both the substance of the Notice and the method of dissemination to potential members of the Settlement Class satisfies these standards. The Class Members were fully apprised of the existence of the Action, the Settlement, and the information needed to make informed decisions about their participation in the case.

In accordance with the Preliminary Approval Order, Notice was e-mailed to 1,384,293 potential Class Members identified from Defendant's records. *See* Retnasaba Decl. ¶ 3. Subsequently, on February 14, 2018, Tommie Copper sent out the second Email Notice from its servers to all Settlement Class Members maintained in its database. *See* Mallard Decl., ¶ 8. Due to the nature of the consumer product at issue here, email notice was particularly appropriate as 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."); *see also* proposed

Rule 23.[11] Here Tommie Copper collected Class Members' email addresses at the time of product purchase and communicated with them through email. Specifically, Tommie Copper maintains *email* addresses of more than 94% of the Settlement Class Members. ECF 113.

The Settlement Notice was also published: twice in the *Journal News* (Westchester edition), where Tommie Copper's retail store is located (on January 18, 2018 and January 30, 2018. Retnasaba Decl. ¶ 12. Moreover, commencing on January 18, 2018, links to the dedicated Settlement Website posted on Tommie Copper's retail website (www.tommiecopper.com) and social media sites, including Facebook and Twitter accounts. Mallard Decl., ¶ 3-7. Additionally, on January 18, 2018, Tommie Copper displayed a poster containing the Court approved notice language at Tommie Copper's retail location in Westchester County, New York. *Id.* ¶ 6.

Classaura also created a website dedicated to the Settlement, www.tommiecoppersettlement.com. Retnasaba Decl. ¶ 10. The website provides details about the Settlement, key documents concerning the Settlement and the litigation, a copy of the claim form, instructions for filing a claim form, Settlement Administrator contact information, opting out of the Settlement, or objecting to the Settlement, and information concerning applicable Settlement deadlines. *See id*. To date, the website has been viewed 226,762 times. *See id.* ¶ 18.

Additionally, Classaura, also established a toll-free telephone number is in place to service potential Class Member inquiries. *See id.* ¶ 13. Potential Class Members can, by calling the toll-free number, obtain general information, request to receive the Notice Packet via direct mail.

Lastly, on or about January 18, 2018, the settlement administrator, Classaura, in compliance with the Class Action Fairness Act Notice, caused to be served by Certified First Class U.S. Mail, a Notice of Settlement to the Unites States Attorney General, and the Attorneys General

[11] *Available at* http://www.uscourts.gov/sites/default/files/2016-08-preliminary_draft_of_rules_forms_published_for_public_comment_0.pdf.

of each of the 50 States and the District of Columbia, the Attorneys General of the 5 recognized U.S. Territories, as well as parties of interest to this Action. *See id.* ¶ 10; 28 U.S.C. § 1715.

As such, the notice program provided a fair opportunity for members of the Settlement Class to obtain full disclosure of the conditions of the Settlement Agreement and to make an informed decision regarding the proposed Settlement. Given the number of claims made to date (154,115 claims), the notice process has been remarkably successful. Thus, the notices and the procedures embodied in the notices amply satisfy all of the legal requirements of Rule 23, as well as the constitutional due process requirements.

VIII. THE ATTORNEYS' FEES AND EXPENSES PROVIDED UNDER THE SETTLEMENT AGREEMENT ARE FAIR AND REASONABLE

District courts have awarded attorneys' fees to prevailing class counsel under either a "percentage of the fund" or "lodestar" method in common fund cases. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 121 (2d Cir. 2005). However, the Second Circuit disfavors the lodestar method because it "create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits." *Id.* at 121 (internal citation omitted). Rather, the percentage method is preferable "because it reduces the incentive for counsel to drag the case out to increase the number of hours billed; also, fewer judicial resources will be spent in evaluating the fairness of the fee petition." *Hicks*, 2005 WL 2757792, at *8 (citation omitted). Thus, "[t]he trend in this Circuit is toward the percentage method." *Wal-Mart*, 396 F.3d at 121; *see also In re Colgate*, 36 F. Supp. 3d at 348 ("The percentage method directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation."); *Johnson v. Brennan*, No. 10 Civ. 4712 (CM), 2011 WL 4357376, at *14 (S.D.N.Y. Sept. 16, 2011) (same). Although the percentage approach is the prevailing method of determining attorneys' fees in the Second Circuit, the Lodestar method "remains useful as a baseline" and as a "cross-check"

for percentage awards. *See In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 385 (S.D.N.Y. 2005). As set forth below, Plaintiffs' requested attorneys' fees are reasonable under both the percentage and lodestar methods.

A. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE UNDER THE PERCENTAGE-OF-THE-FUND METHOD

Pursuant to the Settlement Agreement, Class Counsel seeks one-third of the settlement fund - or $ 231,000.00 - as attorneys' fees and costs, representing approximately 33% of the total settlement fund value. Vozzolo Decl. ¶ 13. Class Counsel's fee request falls within the range of percentage fees that have been awarded in this the Second Circuit in comparable class actions and by this Court. *See, e.g., Flores v. Anjost Corp.*, 11 Civ. 1531, 2014 U.S. Dist. LEXIS 11026, at *23-24 (S.D.N.Y. Jan. 29, 2014) ("Class Counsel's request for one third of the settlement fund is reasonable and 'consistent with the norms of class litigation in this circuit.'"); *Hernandez v. Merrill Lynch & Co., Inc.*, No. 11-8472, 2013 WL 1209563, at *8 (S.D.N.Y. Mar. 21, 2013) (awarding attorneys' fees in the amount of "$2,310,000 which is 33% of the settlement fund," plus costs); *Beckman v. KeyBank, N.A.*, No. 12-7836, 2013 WL 1803736, at *12 (S.D.N.Y. Apr. 29, 2013) (awarding attorneys' fees equal to 33% of $4.9 million settlement fund, plus costs); *Hayes v. Harmony Gold Mining Co.*, No. 08- 03653, 2011 WL 6019219, at *1 (S.D.N.Y. Dec. 2, 2011) (awarding attorneys' fees equal to 33.3% of $9 million settlement fund), *aff'd*, 509 F. App'x 21 (2d Cir. 2013); *In re Marsh Erisa Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010) (awarding attorneys' fees equal to 33.33% of $35 million settlement, plus costs); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06-4270, 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (noting that "Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit"); *Gilliam v. Addicts Rehab. Ctr. Fund*, No. 05-3452, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (fee equal to one-third of the settlement fund is reasonable and "consistent with the norms of class litigation in this circuit") (citations omitted).

One of the merits of awarding fees on a percentage basis is that it does not penalize attorneys for achieving a prompt resolution of a case, where, as here, Class Counsel have developed sufficient information concerning the strengths and weaknesses of the case necessary to make an informed decision about the value of the claims. *See Wal-Mart*, 396 F.3d at 121 (one of the merits of the percentage method is that it "provides a powerful incentive for the efficient prosecution and early resolution of litigation"); *Savoie v. Merchs. Banks*, 166 F.3d 456, 461 (2d Cir. 1999) (the percentage method "removes disincentives to prompt settlement").

B. THE *GOLDBERGER* FACTORS FURTHER SUPPORT THE REASONABLENESS OF THE AGREED-UPON ATTORNEYS' FEES

Courts in the Second Circuit also look to the factors specified in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000) to evaluate the reasonableness of percentage-based fee awards. These factors 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 representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Id.* at 50 (internal quotation marks omitted). Additionally, "[t]he negotiation of fee agreements is generally encouraged." *In re Sony*, 2008 WL 1956267 (S.D.N.Y. May 1, 2008), at *15 (citing *Hensley*, 461 U.S. at 437 ("A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.")). A review of these factors support Class Counsel's fee request.

1. Time And Labor Expended By Counsel

Settlement Class Counsel have expended significant time and effort pursuing this case on behalf of the Class. Since its inception five years ago, Settlement Class Counsel have devoted more than 1,211.90 hours to litigating this case. *See* Vozzolo Decl. ¶ 14; Exs. E and F; *see also* Marron Decl. ¶ 28. Settlement Class Counsel negotiated a settlement only after, among other things, conducting an extensive investigation of the issues involved in this case and drafting a

highly-detailed complaint; engaging in pre-motion letters; reviewing documents through informal discovery from Defendant; and attending in-person conferences before Magistrate Judge Smith. Then Plaintiffs moved for preliminary approval and worked with notice experts to develop and implement an adequate and far-reaching notice plan.

Given the extensive amount of time Settlement Class Counsel have expended in this Action, the requested fee award here is reasonable. And, Settlement Class Counsel will expend additional time finalizing the Settlement in this action, such as responding to objectors. This factor has been met.

2. Magnitude And Complexity Of The Litigation

"[C]lass actions have a well deserved reputation as being most complex." *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) (internal citation and quotations omitted). This case was no exception, both factually and legally.

Settlement negotiations included multiple formal and informal discussions, which required substantial work and significant risk that Settlement Class Counsel's efforts (and their out-of-pocket costs) would go uncompensated. Given this landscape, the fact that Settlement Class Counsel negotiated this Settlement is a notable achievement.

Therefore, the fee award requested in this matter is well within the parameters used throughout this Circuit. In light of the complexity of this case, the work it required, and concomitant risks to Settlement Class Counsel, a substantially higher multiplier would be justified. "In the 'usual' case, the multiplier applied to the lodestar typically is positive, to account for the contingent nature of the engagement and the risk of such a case," or to reflect "the result obtained,

and the quality of the attorney's work." *In Re NTL, Inc. Sec. Litig.*, No. 02 Civ. 3013 (LAK) (AJP), 2007 U.S. Dist. LEXIS 13661, at *30 (S.D.N.Y. Mar. 1, 2007); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010). Thus, the negative multiplier further supports the reasonableness of the fee request.

3. The Risk Of Litigation

This factor recognizes the risk of non-payment in cases prosecuted on a contingency basis where claims are not successful, which can justify higher fees. *See, e.g., In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk."); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008) (noting risk of non-payment in cases brought on contingency basis). "It is well settled that class actions are notoriously complex and difficult to litigate." *Shapiro*, 2014 WL 1224666, at *21 (internal citation omitted).

This factor weighs especially strongly in favor of approval of the requested fees and cost payment because this case presented a substantial risk of non-payment for Class Counsel.

Had the case not settled, there would have been contested motions for class certification and summary judgment, which would have been costly, time-consuming, and very risky for Class Members and Class Counsel. *See* Vozzolo Decl. ¶ 52. Assuming Plaintiffs were to survive all motions to dismiss and all motions for summary judgment, the risks of establishing liability posed by conflicting expert testimony would have been exacerbated by the unpredictability of a lengthy and complex trial. *See id.* ¶ 49. In this "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which expert would be accepted by the jury. *Id.*

Class Counsel undertook this representation understanding that the risk of losing on class certification, or summary judgment or trial were significant. Defendants retained prominent and well regarded counsel who would vigorously litigate at every stage of the case, and through appeals. The fact that Class Counsel undertook this representation, despite the significant risk of nonpayment, supports a substantial fee award. *See id.* ¶ 82.

4. The Quality Of Representation

Class action litigation presents unique challenges, and Class Counsel proved that they have the ability and resources to litigate this case zealously and effectively. In addition, "[t]he quality of the opposition should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance." *In re MetLife Demutalization Litig.*, 689 F. Supp. 2d 297, 362 (E.D.N.Y. 2010). Class Counsel achieved a positive result in this case while facing well-resourced and experienced defense counsel. *See Marsh ERISA Litig.*, 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.").

Settlement Class Counsel vigorously and competently pursued the Settlement Class Members' claims. The arm's-length settlement negotiations that took place demonstrate that Settlement Class Counsel adequately represented the Settlement Class. Moreover, Plaintiffs and Settlement Class Counsel have no conflicts of interests with the Settlement Class. Rather, Plaintiffs, like each absent Settlement Class Member, have a strong interest in proving Tommie Copper's common course of conduct, establishing its unlawfulness, and obtaining redress. In pursing this litigation, Settlement Class Counsel, as well as Plaintiffs, have advanced and will continue to advance and fully protect the common interests of all members of the Class. Settlement Class Counsel have extensive experience and expertise in prosecuting complex class actions. Settlement Class Counsel are active practitioners who are highly experienced in class action,

product liability, and consumer fraud litigation. *See* Vozzolo Decl., Exs. C and D; Marron Decl. Ex. 1 for Settlement Class Counsel's firm resumes. Additionally, Class Counsel were appointed Co-Lead Class Counsel for the Settlement Class on December 19, 2017.

5. The Requested Fee In Relation To The Settlement

The fifth factor cited by the Second Circuit for determining the appropriate percentage fee award in class actions is the "requested fee in relation to the settlement," i.e., whether the fee represents a fair percentage of the settlement achieved. *Goldberger*, 209 F.3d at 50. As discussed in detail in Sec. VI. B above, the one-third fee requested here is commonly awarded in this Circuit and others throughout the rest of the country in similar circumstances. Given the significant risks at stake, including the financial condition of Defendants, the depletion of existing insurance coverage, and the risks of succeeding on the motion to dismiss, class certification, a likely motion for summary judgment, or at trial and ultimately collecting on a judgment, one-third of the Settlement is reasonable. In light of the Settlement's benefits, the requested fees/costs amount, resulting in a negative lodestar multiplier, is modest and reasonable in relation to the Settlement.

6. Public Policy Considerations

Finally, public policy considerations favor the requested fee award here. "Skilled counsel must be incentivized to pursue complex and risky claims [that protect the public on a contingency basis]." *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666 (S.D.N.Y. Mar. 24, 2014), at *24. As such, reasonable fee awards must be provided in order to ensure that attorneys are incentivized to litigate class actions, which serve as private enforcement tools to police defendants who engage in misconduct. *See id.* "Where relatively small claims can only be prosecuted through aggregate litigation, 'private attorneys general' play an important role." *Massiah v. MetroPlus Health Plan, Inc.*, No. 11-cv-05669 (BMC), 2012 WL 5874655, at *7 (E.D.N.Y. Nov. 20, 2012) (citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980)). As a result, "[a]ttorneys who fill the

private attorney general role must be adequately compensated for their efforts," otherwise the public risks an absence of a "remedy because attorneys would be unwilling to take on the risk." *Id.* (citing *Goldberger,* 209 F.3d at 51). As a result, this sixth *Goldberger* factor, like the others before it, has been met here. Accordingly, the requested attorneys' fees are reasonable.[12]

C. THE AGREED-UPON ATTORNEYS' FEES ARE REASONABLE UNDER A LODESTAR CROSS-CHECK

The lodestar cross-check tests the reasonableness of a percentage-based fee. *See Goldberger*, 209 F.3d at 50 ("[T]he lodestar remains useful as a baseline even if the percentage method is eventually chosen.") (internal citations omitted). Where the lodestar is "used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50; *see also Cassese v. Williams*, 503 F. App'x 55, 59 (2d Cir. 2012) (noting the "need for exact [billing] records [is] not imperative" where the lodestar is used as a "mere cross-check").

To calculate lodestar, counsel's reasonable hours expended on the litigation are multiplied by counsel's reasonable rates. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986); *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Parker v. Time Warner Entertainment Co., L.P.*, 631 F. Supp. 2d 242, 264 (E.D.N.Y. 2009). The resulting figure may be adjusted at the court's discretion by a multiplier, taking into account various equitable factors. *See*

[12] Moreover, Members of the Class, were informed that they could object to the amount of attorneys' fees or expenses requested. "[N]umerous courts have noted that the lack of objection from members of the class is one of the most important factors in determining the reasonableness of a requested fee." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *29 (citing *Maley*, 186 F. Supp. 2d at 374 ("The reaction by members of the Class is entitled to great weight by the Court.")); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 912 F. Supp. 97, 103 (S.D.N.Y. 1996) (court determined that an "isolated expression of opinion" should be considered "in the context of thousands of class members who have not expressed themselves similarly"), *aff'd*, *Toland v. Prudential Sec. P'ship Litig.*, 107 F.3d 3 (2d Cir. 1996). Co-Lead Counsel, therefore, submits that the lack of objections here further indicates support for the fee request.

Parker, 631 F. Supp. 2d at 264; *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *24 (S.D.N.Y. Mar. 24, 2014) ("Additionally, under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors.") (internal quotations and citations omitted).

The hourly billing rate to be applied is the hourly rate that is normally charged in the community where the counsel practices, *i.e.*, the "market rate." *See Blum*, 465 U.S. at 895; *see also Luciano v. Olsten Corp*., 109 F.3d 111, 115-116 (2d Cir. 1997). Here, the hourly rates used by Class Counsel are comparable to rates charged by attorneys with similar experience, skill, and reputation, for similar services in the New York legal market. *See* Vozzolo Decl. ¶¶ ___. [13] The rates for each individual attorney and paralegal are set forth in the Declarations and in the charts and exhibits to the Declarations. The lodestar rates are based on a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer. Such rates necessarily reflect the reputation, experience, care, and successful records of Settlement Class Counsel. The work performed to date, along with the work anticipated going forward, supports Settlement Class Counsel's lodestar.

Here, Settlement Class Counsel devoted a total of 1,211.90 hours successfully prosecuting this litigation and negotiating its Settlement and have incurred $ 6,374.40 in out-of-pocket expenses. Vozzolo Decl. ¶ 14, Exs. G, H; Marron Decl. ¶28, Ex. 2. Settlement Class Counsel has exercised used billing judgment and discretion to ensure that duplicative or unnecessary time

[13] The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (recognizing "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise"); *LeBlanc-Sternberg v. Fletcher,* 143 F. 3d 748, 764 (2d Cir. 1998) ("The lodestar should be based on 'prevailing market rates' … and current rates, rather than historical rates, should be applied in order to compensate for the delay in payment") (citation omitted).

has been excluded and that only time reasonably devoted to the litigation has been included. Vozzolo Decl. ¶¶ 15, 66. By way of example, Settlement Class Counsel has eliminated billable attorney time recorded for the motion for appointment of lead counsel, even though they were directed towards the benefit of the Class. These efforts – after the exercise of billing discretion – have resulted in a total lodestar of $ 640,557.00.00. *Id.* at ¶ 14. This current lodestar, a detailed summary of which is attached to the Declaration of Antonio Vozzolo and Declaration of Ronald Marron submitted herewith, represents the total work Settlement Class Counsel have undertaken since the inception of this case. Thus, the one third fee request reflects a negative .35 multiplier on Settlement Class Counsel's combined lodestar, which will further be reduced by the work that remains to oversee the Settlement to its conclusion. *Id.* at ¶ 75.

Regardless, the negative multiplier sought in this action is well below that range of reasonableness, within the accepted range in this Circuit. *See Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at * 10 (S.D.N.Y. Oct. 2, 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers") (internal citation and quotations omitted). *See also Spicer v. Pier Sixty LLC*, No. 08 Civ. 10240, 2012 WL 4364503, at *4 (S.D.N.Y. Sept. 14, 2012) (3.36 multiplier is well within the range of reasonableness.); *In re Lloyd's Am. Trust Fund Litig*., No. 96 Civ.1262, 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002) (2.09 multiplier "is at the lower end of the range of multipliers awarded by courts within the Second Circuit"). Moreover, a fee request which produces an inverse or negative lodestar multiplier further supports an inference of reasonableness. *See*, *e.g.*, *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146, 149 (S.D.N.Y. 2010) (fact that counsel sought only 87.6% of their lodestar "strongly suggests that the requested fee is reasonable"). Indeed, such a negative multiplier demonstrates that "not only are Lead Counsel not receiving a premium on their lodestar, their fee

request amounts to a deep discount from their lodestar." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 WL 5178546, at *20 (S.D.N.Y. Dec. 23, 2009).[14]

Moreover, the multiplier is also reasonable because it will further diminish over time. "[A]s class counsel is likely to expend significant effort in the future implementing the complex procedure agreed upon for collecting and distributing the settlement funds, the multiplier will diminish over time." *Parker v. Jekyll & Hyde Entm't Holdings, LLC*, 2010 WL 532960, at * 2 (S.D.N.Y. Fed. 9, 2010). Here, "[t]he fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward, also supports their fee request." *Yuzary*, 2013 WL 5492998, at *11 (quoting *McMahon v. Olivier Cheng Catering & Events, LLC*, 2010 WL 2399328, at *8 (S.D.N.Y. Mar. 3, 2010)).

IX. CLASS COUNSEL'S LITIGATION EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED ON BEHALF OF THE CLASS

To date, Settlement Class Counsel incurred out-of-pocket costs and expenses in the aggregate amount of $6,374.40in prosecuting this litigation on behalf of the class. Vozzolo Decl. ¶ 76, Exs. G, H; Marron Decl. ¶ 29. These expenses are categorized in the declarations submitted to the Court herewith. The incurred costs include court fees, copying fees, courier charges, legal research charges, telephone/facsimile fees, travel costs, postage fees, and other related *costs. Id.*

[14] *See also In re Initial Pub. Offering*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009) (there is "no real danger of overcompensation" where negative multiplier is sought); *In re Portal Software, Inc. Sec. Litig.*, No. 03-cv-5138 (VRW), 2007 WL 4171201, at *16 (N.D. Cal. 2007) ("The resulting so called negative multiplier suggests that the percentage-based amount is reasonable and fair based on the time and effort expended by class counsel."); *Schiller v. David's Bridal, Inc.*, No. 1:10-cv-00616 (AWI)(SKO), 2012 WL 2117001, at *23 (E.D. Cal. June 11, 2012) ("An implied negative multiplier supports the reasonableness of the percentage fee request").

"Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation of those clients." *Miltland Raleigh-Durham v. Myers*, 840 F Supp. 235, 239 (S.D.N.Y. 1993) (internal quotation marks omitted). The expenses categorized in the attorney declarations submitted herewith reflect commonly reimbursed expenses. *See, e.g., In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 525 (E.D.N.Y. 2003) (awarding costs and expenses, noting "these expenses reflect the costs of experts and consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses," adding "I see no reason to depart from the common practice in this circuit of granting expense requests"), *aff'd*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005).

Each of these costs was necessarily and reasonably incurred to bring this case to a successful conclusion, and they reflect market rates for various categories of expenses incurred.

X. THE SETTLEMENT ADMINISTRATOR'S FEES SHOULD BE APPROVED

Classaura, a third-party settlement administrator, was retained to administer the settlement. The Settlement Administrator's fees are estimated to be $91,300.00, including fees incurred and anticipated future costs for completion of the administration. Retnasaba Decl. ¶¶ 22, 23. Accordingly, Plaintiffs respectfully request that the Court approve payment of the Settlement Administrator's fees in the amount of $91,300.00 subject to Class Counsel's review of the Settlement Administrator's invoices.

XI. THE REQUESTED INCENTIVE AWARDS FOR CLASS REPRESENTATIVES ARE REASONABLE AND STANDARD

In recognition of their efforts on behalf of the Class, and subject to the approval of the Court, Defendants have agreed to pay Class Representatives up to $1,000 each, as appropriate compensation for their time and effort serving as the class representatives in this litigation.

While by no means a matter of right or guarantee, "[c]ourts often grant incentive awards to representative plaintiffs." *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514, at *11. "'The amount of the incentive award is related to the personal risk incurred by the individual or any additional effort expended by the individual for the benefit of the lawsuit.'" *Id*. (quoting *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, 2012 WL 3878825, at *2 (S.D.N.Y. Aug. 22, 2012)). Additionally, "[i]n granting an incentive award, 'a court must ensure that the named plaintiffs, as fiduciaries for the class, have not been tempted to receive high incentive awards in exchange for accepting suboptimal settlements for absent class members,'" as "'[a] particularly suspect arrangement exists where the incentive payments are greatly disproportionate to the recovery set aside for absent class members.'" *Id.* (quoting *Sheppard v. Consol. Edison Co. of N.Y., Inc.*, No. 94-CV-0403, 2002 WL 2003206, at *6 (E.D.N.Y. Aug. 1, 2001)).

Here, the involvement of the Class Representatives in this action was important to the ultimate success of the case. Each Class Representative has diligently performed their obligations as a class representative. Settlement Class Counsel consulted with the Class Representatives throughout the investigation, filing, prosecution, and settlement of this litigation. Vozzolo Decl. ¶¶ 84-86. They consulted with Settlement Class Counsel frequently and reviewed a wide variety of documents related to this case including the complaints and Settlement Agreement. *Id.* Moreover, Class Representatives were prepared to "go the distance" in this litigation to continue to properly represent the Class and fight to obtain significant relief on their behalf. *Id*. Their actions and dedication have conferred a significant benefit on Class Members across the United States.

Moreover, the amount requested is fair and consistent with what courts have awarded in this District. *See, e.g., McAnaney v. Astoria Fin. Corp.*, No. 04-cv-1101 (JFB) (WDW), 2011 U.S. Dist. LEXIS 114768, at *33 (E.D.N.Y. Feb. 11, 2011) (authorizing incentive payments of $7,500 each to seven named plaintiffs in a real-estate closing fee case alleging violations of TILA, state consumer protection statutes, breach of contract, fraud and unjust enrichment); *Dupler,* 705 F. Supp. 2d at 245 (approving $25,000 and $5,000 service awards to two plaintiffs in a settlement involving allegations that the warehouse chain's backdating of membership renewals was a deceptive practice under New York's consumer fraud statute).

The requested amounts of $1,000 for each Class Representative reflect the involvement and time each Class Representative dedicated to the case. Accordingly, incentive fee awards of $1,000 for each of the Class Representatives is fair and reasonable.

XII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion and enter the Final Approval Order submitted herewith, and grant final approval of the Settlement Agreement in its entirety.

Dated: April 16, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, under the pains and penalties of perjury, that on April 16, 2018, I electronically filed a true copy of the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the docket and the below Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing. I am an attorney admitted to practice before this Court.

/s Antonio Vozzolo
Antonio Vozzolo