UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AMIT HEZI, JOSEPH NINA, and DANIEL PRESCOD individually and on behalf of all others similarly situated, Plaintiffs, v. CELSIUS HOLDINGS, INC, Defendant.	Case No. 1:21-cv-09892 (JHR) Honorable Jennifer H. Rearden

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

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Pursuant to Rule 23(e), Amit Hezi ("Hezi"), Joseph Nina ("Nina"), and Daniel Prescod ("Prescod") ("Plaintiffs") move the Court for final approval of their class action settlement.

I. INTRODUCTION

The Settlement includes a $7.8 million non-reversionary common fund, making it one of the largest food and beverage false advertising class action settlements on record, and the largest ever involving a "No Preservatives" claim. It also achieves cessation of the challenged "No Preservatives" front label attribute, and thus fulfills the dual purpose of the consumer protection laws: labeling changes that protect consumers, and cash restitution to the Class.

The Settlement received an unprecedented response, with nearly a million Class Members submitting valid claims for restitution in connection with over 100 million units of product. Only one person objected; a mere dozen people opted out. Based on the substantial relief obtained, favorable reaction of the Class, and elimination of risk and expense of continued litigation after more than four years of determined prosecution, the Settlement is fair, adequate, and reasonable. The Court should grant final approval.

II. PROCEDURAL HISTORY

A. The *Prescod* Case

Prescod filed his class action against Celsius in Los Angeles County Superior Court in March 2019. (RJC Decl. ¶ 18.) He asserted violations of California's consumer protection laws and common law regarding the Products' "No Preservatives" attribute due to the presence of citric acid, an alleged preservative. *Prescod v. Celsius Holdings, Inc.*, Case No. 19STCV09321 (L.A.S.C.) ("*Prescod*"). Over four years, Prescod expended considerable time and resources on fact, class, and expert discovery, dispositive law and motion, class certification briefing, merits and expert law and motion, appellate briefing, and multiple mediations. (*Id.* ¶¶ 20-23, 28-29.)

The Honorable Kenneth Freeman certified *Prescod* as a class action. (ECF 34-02.) Prescod's certification bid included reports from experts in food science, conjoint surveys, marketing, and economics. (RJC Decl. ¶ 21.) The parties filed cross-motions to exclude the other's experts, which Prescod overcame while successfully excluding Defendant's expert. (*Id.*; ECF 34-02.) Judge Freeman denied Defendant's motion for summary adjudication and Prescod's cross-motion and set the case for trial. (RJC Decl. ¶¶ 22, 24; ECF 34-03, 34-04.) Defendant then filed two interlocutory petitions for writ of mandate, challenging certification and denial of Defendant's motion for summary adjudication, which the California Court of Appeal summarily denied. (RJC Decl. ¶ 23; ECF 34-05, 34-06.) *Prescod* was set for trial in May 2023. (RJC Decl. ¶ 24.)

B. The *Hezi* Case

Hezi and Nina asserted similar allegations against Celsius, plus violations of New York's GBL Sections 349 and 350, breach of warranty, and unjust enrichment ("*Hezi*"). (*Prescod* and *Hezi* are the "Actions.") (ECF 1.) (RJC Decl. ¶ 25.) The parties in *Hezi* conducted extensive class certification discovery. (RJC Decl. ¶ 26.) Plaintiffs advised Defendant of their intention to add products and causes of action and to seek certification of a nationwide class to litigate those claims. (*Id.* ¶ 27.) Plaintiffs indeed amended their Complaint in *Hezi* to assert the threatened claims regarding all applicable products. (*Id.*; ECF 30, 30-1, 31.)

C. Arms-Length Settlement Negotiations

The Parties negotiated a global settlement over many months, including two full-day mediations with Honorable Lisa Hart Cole (Ret.) and Honorable Peter Lichtman (Ret.) of Signature Resolution in Los Angeles, California. (*Id.* ¶¶ 28-29.) During the last mediation, Judge Lichtman presented a double-blind mediator's proposal, which the Parties accepted, and which forms the basis of the Settlement. (*Id.*)

D. Preliminary Approval of Settlement

In November 2022, Judge Marrero granted Plaintiffs' motion for preliminary approval. He conditionally certified the Settlement Class, appointed Clarkson as Class Counsel and Plaintiffs as Class Representatives, approved the Notice Plan, and appointed Postlethwaite & Netterville ("P&N") as Class Administrator. (ECF 32-37.) Plaintiffs timely filed their motion for an award of attorneys' fees and costs and service awards (ECF 39-45), as well as the Class Administrator's final report disclosing the total number of opt-outs and objections. (ECF 50, 50-1.)

III. COURT-APPROVED NOTICE PROGRAM HAS BEEN COMPLETED

Judge Marrero directed P&N to execute the Notice Plan. In doing so, Judge Marrero found:

> [T]he Parties' plan for providing notice to the Settlement Class . . . constitutes the best notice practicable under the circumstances and constitutes due and sufficient notice to the Settlement Class of the terms of the Settlement Agreement and the Final Approval Hearing and complies fully with the requirements of the Federal Rules of Civil Procedure, the United States Constitution, and any other applicable law.

(ECF 37 ¶¶ 9-10.)

The Notice Plan generated an unprecedented response to the Settlement, which included: (1) an online media notice plan resulting in 168,262,000 digital impressions (almost 9 million more than anticipated); (2) a streaming radio service notice plan generating 1,099,000 banner impressions during the campaign, (168,000 more than expected); (3) search engine advertising, which generated 68,391 impressions; and (4) a press release through PR Newswire's US1 and National Hispanic Newsline, picked up by 377 media outlets, reaching a total potential audience of 170,500,000. (Schwartz Decl. ¶¶ 8-11.) As estimated, the Notice Plan "delivered an 81% reach with an average frequency of 3.0." (*Id.* ¶ 32.) In total, P&N received 906,539 valid claims, one objection, and 12 exclusions. (*Id*. ¶¶ 20, 28, 29.)

P&N created and maintained a Settlement Website which provided Class Members access to the Claim Form (online and mail in versions available in English and Spanish), Class Notices (available in English and Spanish), Settlement Agreement, and other relevant documents. (*Id*. ¶ 12.) The Settlement Website also included important dates, answers to frequently asked questions, instructions for how Class Members may opt-out (request exclusion) from or object to the Settlement, contact information for the Class Administrator, and provided Class Members with the ability to submit a claim using the online Claim Form and instructions. (*Id*.) More than 2,750,300 unique users have generated over 11.8 million views of the Settlement Website. (*Id*. ¶ 13.)

The overwhelmingly positive response to the Settlement confirms the success, strength, and adequacy of the Notice Plan in favor of final approval.

IV. POSITIVE REACTION OF THE CLASS

The reaction of the Class was overwhelmingly positive and supports final approval. The Notice Plan resulted in 906,539 claims, which accounted for 104,640,177 total Products claimed. (Schwartz Decl. ¶ 20.) The number of claims here is significant since many food and beverage class action settlements receive fewer than 100,000 claims and are still court-approved. *See, e.g.*, *In Holve v. McCormick & Co., Inc.*, 334 F. Supp. 3d 535 (W.D.N.Y. 2018) ($3M settlement approved where 65,037 claims submitted); *Iglesias v. Ferrara Candy Co.*, No. 3:17-cv-00849-VC (N.D. Cal. Oct. 25, 2018) (granting final approval of $2.5M where 80,208 claims submitted). Here, the Settlement received nearly *nine times* as many claims. (Schwartz Decl. ¶ 20.)

Only one Class Member objected and just a dozen requested exclusion against nearly a million claims. (RJC Decl. ¶¶ 7, 49, Ex. B (response to objection); Schwartz Decl. ¶¶ 20, 28, 29.) No one objected among the Attorneys General of all 50 states, all territories, including Puerto Rico,

as well as the U.S. Attorney General, all of who were given CAFA notice. (RJC Decl. ¶ 50; Schwartz Decl. ¶¶ 6-7.)

The number of objections and opt-outs is extraordinarily low for a Settlement Class of this size, especially considering the broad reach of the Notice and the high number of claims. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 86-87 (2d. Cir. 2001) (affirming district court's finding that the "small number of objections weighed in favor of the settlement" where 18 objections and 72 exclusions were received out of 28,000 notices delivered); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 379 (S.D.N.Y. Aug. 1, 2013) (finding 11 objections and 134 exclusion requests in class of 2.5 million favors settlement).

A lone objection and a dozen opt-outs against nearly a million claims, as here, is almost unheard of; that is clear proof of fairness and adequacy because courts in this District find it to be "perhaps 'the most significant factor to be weighed'" in considering whether to grant final approval. *In re Veeco Instruments Inc. Sec. Litig.*, 2007 U.S. Dist. LEXIS 85629, at *7 (S.D.N.Y. Nov. 7, 2007). When most class members willingly approve a settlement, attempts to show the settlement is inadequate are generally unpersuasive. *Grinnell*, 495 F.2d at 462. Moreover, a high number of claims with few opt-outs is compelling evidence in favor of granting final approval, even if the amount of relief dispersed to each class member will be small. *D'Amato*, 236 F.3d at 86. The Second Circuit has held that a low rate of objections among a large plaintiff class is evidence of a settlement's fairness, reasonableness, and adequacy. *See In re Facebook*, 343 F. Supp. 3d 394 (S.D.N.Y. 2018), *aff'd, In re Facebook, Inc.*, 822 F. App'x 40 (2d Cir. 2020) (two objections from a plaintiff class of 1.3 million was evidence of the proposed settlement's fairness, reasonableness, and accuracy); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 746 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (noting that two objections in response to

104,000 notices was "rather incredible" and supported approval of the proposed settlement); *Wal-Mart*, 396 F.3d at 118 (finding that 18 objections from five million class members showed "overwhelmingly" class favored settlement and significant indicator of its adequacy).

Class Members had the option to select their preferred payment method via check or digital payment, such as PayPal. (Schwartz Decl. ¶ 19.) Here, 90% of Class Members elected to receive digital payment, allowing for immediate payout benefiting the Class. (*Id*.); *In re Credit Default Swaps Antitrust Litig*., No. 13-md-2476 (DLC), 2016 WL 2731524, at *9 (S.D.N.Y. Apr. 25, 2016) ("A principal goal of a plan of distribution must be the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund."); *Jenkins v. Nat'l Grid USA Serv. Co., Inc*., No. 15-cv-1219, 2022 WL 2301668, at *3 (E.D.N.Y. June 24, 2022) (class action settlement approved as "fair, reasonable, and adequate [] taking into account, *inter alia*, . . .the proposed method of distributing payments to the Settlement Class (i.e., direct payments by mailed checks or electronic distributions)"); *In Re Facebook Biometric Info. Priv. Litig.*, 522 F. Supp. 3d 617, 622 (N.D. Cal. Feb. 26, 2021) (settlement approved noting payment choice of PayPal and other direct deposit methods benefited the class).

Each Settlement Class Member will receive an average of $4.60 after the pro rata adjustment is applied. (RJC Decl. ¶ 51; Schwartz Decl. ¶ 27.) This number, while lower than P&N originally estimated, is a result of the extraordinarily high number of claims, which is a testament to the adequacy of the Settlement, the strength of the Notice Plan, and unexpected virality of the Settlement on social media. Even with the pro rata adjustment, nearly 60,000 Class Members are estimated to receive a payment greater than $23.00, and about 100,000 Class Members are estimated to receive more than $14.00. *Id*.

A court in this District approved a similar settlement in *Red Bull*[1] where pro rata adjustment was necessary based on the high number of claims. There, the claims administrator initially estimated that class members would receive either $10.00 or $15.00, but due to significant media coverage, the settlement received more than two million claims and was subject to a significant pro rata adjustment down to $4.23 or $6.35.[2] The court approved the settlement stating, "The notice of settlement notified class members that they could receive either more or less than the amounts specified, and explained that the number of claimants could in fact have the effect of reducing or enhancing those amounts." *Id*. at 106:18-22. The court further explained, "To my mind and after looking at everything, the amounts that are proposed to be distributed in products and in cash to individual claimants may well be more than these claimants would have received had the case proceeded. It may be less, but this is the purpose of settlement, to give a certain result now when faced with a very uncertain result in the future." *Id.* at 121:18-24. Like *Red Bull*, the Settlement received an overwhelmingly positive reaction from the Class and unexpected widespread media coverage that significantly contributed to the number of claims; the Class was notified of the possibility of a pro rata adjustment based on over or under subscription of the Settlement Fund (RJC Decl., Ex. A ¶ 4.5); and there is no guarantee that Class Members would receive more if this case proceeded, especially considering the risks of continued litigation.

Like the court in *Red Bull*, other courts have granted final approval despite oversubscription where the settlement was deemed fair, reasonable, and adequate. *See JWD Auto. v. DJM Advisory Grp. LLC*, 2018 U.S. Dist. LEXIS 226603, at *6 (M.D. Fla. Jan. 9, 2018) (class action settlement approved despite pro rata reductions where class members received $120 instead

[1] *Careathers v. Red Bull North America Inc.*, No. 1:13-cv-00369 (S.D.N.Y. May 12, 2015) and *Wolf, et al. v. Red Bull GmbH et al.*, No. 1:13-cv-08008 (S.D.N.Y. May 12, 2015) ("*Red Bull*").
[2] *See Red Bull*, ECF 103 at 106:13-17; 107:1-4 (transcript from final approval motion hearing).

of $500 because settlement fair, reasonable, adequate, in the best interests of affected consumers, made in good faith, result of arms' length negotiations, and non-collusive); *In re Skechers Toning Shoe Prod. Liab. Litig*., 2013 U.S. Dist. LEXIS 67441, at *23-24, 28-37 (W.D. Ky. May 13, 2013) (class action settlement approved because at the "final fairness hearing, [it was] represented to the Court that pro-rata reduction is a possib[ility] because of the large number of claims already received," and because the settlement serves the public interest, is adequate and fair, the result of arms' length negotiations, non-collusive, extensive discovery had occurred, and class counsel endorsed the terms of the settlement); *In re EpiPen Mktg., Sales Practices & Antitrust Litig*., 2021 U.S. Dist. LEXIS 224275, at *35 (D. Kan. Nov. 17, 2021) (affirming approval of class settlement even though fund oversubscribed). Likewise, the Settlement here was reached after arms' length negotiations, is non-collusive, serves the public interest, and is adequate, reasonable, and fair. Also, considering the wide reach of the Notice, significant number of claims, the single unmeritorious objector, and few opt-outs confirm the Class overwhelmingly supports the Settlement.

V. LEGAL STANDARD FOR FINAL APPROVAL

Rule 23(e) requires that class action settlements must be both procedurally and substantively "fair, reasonable and adequate." Fed. R. Civ. P. 23(e). To evaluate procedural fairness, courts examine the negotiating process leading to the settlement. *Wal-Mart*, 396 F.3d at 116. In determining the "substantive fairness" of a settlement, courts in the Second Circuit look to the factors set forth in *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974) (the "*Grinnell* factors"), which are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages;

(6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement 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.* Not every factor needs to be satisfied, "rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003) (citing *D'Amato*, 236 F.3d at 86).

VI. THE SETTLEMENT SATISFIES RULE 23(E)

The law encourages 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." *In re Advanced Battery Techs. Secs. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014); *see also In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) ("Class 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."); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) ("the courts have long recognized that [complex class action] litigation 'is notably difficult and notoriously uncertain,' . . . and that compromise is particularly appropriate.") (citation omitted). When evaluating the fairness and adequacy of a class action settlement, courts should be "mindful of the 'strong judicial policy in favor of settlements.'" *Wal-Mart*, 396 F.3d at 116 (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)). The public policy favoring class action settlements would be well-served by approving the Settlement, which is procedurally and substantively fair, reasonable, and adequate.

A. The Settlement Is Procedurally Fair

The Settlement is entitled to a presumption of fairness because it was achieved through "arm's-length negotiations between experienced, capable counsel" who sought the best possible result for the Class. *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) ("So long as the integrity of the arms' length negotiation process is preserved [] a strong initial presumption of fairness attaches to the proposed settlement, [] and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.")

Counsel for the Parties are well-versed and have substantial experience in consumer class actions. Class Counsel has extensive experience prosecuting similar consumer class actions, particularly those involving false advertising and mislabeling and therefore, can thoroughly and effectively represent the interests of the Settlement Class. (RJC Decl. ¶¶ 58-64, Ex. C (CLF Resume).) The Settlement was the result of extensive arm's-length negotiations and hard-fought litigation over the last four years. (*Id*. ¶¶ 8, 9, 20-23, 66-67.) During that time, Plaintiffs and Class Counsel achieved class certification, overcame Defendant's motions to exclude, successfully excluded the expert opinion of Defendant's gastroenterologist, engaged in extensive fact and expert discovery, conducted several hours of fact and expert depositions, overcame a motion for summary adjudication, and defeated two separate interlocutory appeals. (*Id*.)

Furthermore, in evaluating the fairness and propriety of settlement, the recommendation of counsel should be given "great weight," especially where, as here, negotiations are facilitated by an experienced, third-party mediator. *See In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 408-09 (S.D.N.Y. 2018), aff'd, 822 F. App'x 40 (2d Cir. 2020) (finding settlement procedurally fair in part because it was "based on the suggestion by a neutral mediator"); *D'Amato*,

236 F.3d at 85 (mediator's involvement "helps to ensure that the proceedings were free of collusion and undue pressure."); *Yang v. Focus Media Holding, Ltd.*, 2014 U.S. Dist. LEXIS 126738, *14 (S.D.N.Y. Sept. 4, 2014) ("[t]he participation of this highly qualified mediator strongly supports a finding that negotiations were conducted at arm's length and without collusion.")

The Parties attended two separate full-day mediations with neutral, well-respected retired Los Angeles County Superior Court judges. (RJC Decl. ¶¶ 28-29.) A double-blind proposal presented by mediator, Hon. Peter Lichtman (Ret.), was accepted and formed the basis of the Settlement. (*Id*. ¶ 29.); *see Tiro v. Public House Invs., LLC*, 2013 U.S. Dist. LEXIS 72826, at *9 (S.D.N.Y. May 22, 2013) ("The assistance of an experienced JAMS employment mediator . . . reinforces that the Settlement Agreement is non-collusive."); *Morris v. Affinity Health Plan*, 2012 U.S. Dist. LEXIS 64650, at *14-15 (S.D.N.Y. May 8, 2012) (parties were entitled to a presumption of fairness where mediator facilitated arm's-length negotiations); *In re Citigroup, Inc.*, 296 F.R.D. 147, 155 (S.D.N.Y. Aug. 20, 2013) (settlement was procedurally fair where negotiations were overseen by a neutral mediator and parties engaged in "extensive and contested" discovery). Because the Settlement is the product of arm's length negotiations between experienced counsel, was preceded by an exhaustive investigation of Plaintiffs' claims and extensive discovery, and was overseen and facilitated by a neutral mediator, the Settlement is procedurally fair.

B. The Settlement Is Substantively Fair, Reasonable, and Adequate

As the Court determined at preliminary approval, analysis of the *Grinnell* factors show the Settlement is substantively fair, reasonable, and adequate (ECF 37). Courts in this circuit and nationwide have found the *Grinnell* factors satisfied and in favor of final approval where, as here, the facts supporting preliminary approval remain unchanged. *See, e.g.*, *Moukengeshcaie v. Eltman*, 2020 U.S. Dist. LEXIS 71018 (E.D.N.Y. Apr. 21, 2020).

Further, courts in this District and others have approved class action settlements as fair, reasonable, and adequate involving falsely labeled food and beverage products with comparable settlement terms. *See, e.g.*, *Fishbein v. All Market, Inc*., No. 1:11-cv-5580-JPO (S.D.N.Y. Aug. 22, 2012) (court approved $10M class action settlement with label changes regarding nutritious coconut water claims); *Astiana v. Kashi Co.*, 2014 U.S. Dist. LEXIS 127624, at *10, 15 (S.D. Cal. Sep. 2, 2014) (court approved $5M class action settlement with removal of "All Natural" claim from products with synthetic ingredients); *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig*., 2013 U.S. Dist. LEXIS 205352, at *22 (E.D. Mo. Feb. 26, 2013) (court approved $7.5M class action settlement regarding organic dairy claims); *In re Nutella Mktg. & Sales Practices Litig*., 2012 U.S. Dist. LEXIS 181913, at *2 (D.N.J. Jul. 30, 2012) (court approved $2M class action settlement with ad changes for nutritious claims for chocolate-hazelnut spread).

1. Litigation Through Trial Would Be Complex, Costly, and Lengthy

Unless a proposed settlement is clearly inadequate, courts grant final approval where continued litigation would be protracted, expensive, and would yield uncertain results. *TBK Partners, Ltd. v. Western Union Corp.*, 517 F. Supp. 380, 389 (S.D.N.Y. 1981), aff'd, 675 F.2d 456 (2d Cir. 1982); *see also Slomovics v. All for a Dollar*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995) (settlement approval appropriate where litigation is likely "to result in great expense and has the potential to continue for a long time . . ."); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d at 381-82 ("the more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court.")

Litigating the Actions through trial would require the Parties, and the Court, to expend substantial time and resources to brief and otherwise litigate the various complex issues of law and fact bearing on Plaintiffs' claims. (RJC Decl. ¶¶ 79-80); *see In re Austrian & German Bank*

Holocaust Litig., 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), aff'd sub. nom. *D'Amato*, 236 F.3d 78 ("Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them.") At the time the Settlement was reached, trial was quickly approaching in *Prescod* and, due to the number and complexity of issues in dispute, the Parties would have incurred considerable costs in preparing their respective cases for trial with no guarantee of success. (RJC Decl. ¶¶ 24, 68-69, 76-77); *see Hicks v. Morgan Stanley & Co.*, 2005 U.S. Dist. LEXIS 24890, at *16 (S.D.N.Y. Oct. 19, 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.") For example, the Parties would have to conduct further fact and expert discovery, retain new experts, subpoena third parties, prepare witnesses, and prepare and litigate various pretrial motions. (RJC Decl. ¶ 77.) Additionally, the *Hezi* Plaintiffs were preparing to file their motion for class certification, which would require additional fact and expert discovery and extensive briefing. (*Id.* ¶ 79.) If Plaintiffs' achieved class certification in *Hezi*, they would then need to litigate summary judgment motions, any appeals, trial, and post-trial motions, all of which would be costly and time-consuming for the Parties and the Court. (*Id.*) Ultimately, it would take several years to litigate both *Prescod* and *Hezi* through trial, with no guarantee that Plaintiffs and the Settlement Class would achieve a better result than the recovery provided by the Settlement, or any recovery at all. (*Id.* ¶ 80.) The Settlement therefore ensures certain and prompt resolution of the Actions on terms that are fair, reasonable, and adequate to the Settlement Class without any of the risk or expense of further litigation.

2. The Class has Reacted Overwhelmingly Positively to the Settlement

As more fully discussed in Section IV, *supra*, the reaction of the Class has been overwhelmingly positive with only one objection, a dozen exclusions, and almost a million claims

received. (RJC Decl. ¶¶ 7, 51; Schwartz Decl. ¶ 20); *Nat'l Rural Telecommunications Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 528-29 (C.D. Cal. Jan. 5, 2004) ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members."). The undeniable positive reaction of the Class therefore further demonstrates the Settlement is fair, reasonable, and adequate and warrants final approval.

3. The Settlement Is the Product of Extensive Discovery and Factual Investigation

In evaluating the fairness and adequacy of the Settlement under the third *Grinnell* factor, courts consider whether plaintiffs and class counsel are sufficiently informed about the merits of the claims and defenses, and the value thereof. *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. Nov. 8, 2012) ("the question is 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.") This factor favors final approval of the Settlement because Plaintiffs and Class Counsel "had more than enough information to make an informed and intelligent decision." *In re Citigroup*, 965 F. Supp. 2d at 382.

Over the course of litigating both *Prescod* and *Hezi*, the Parties engaged in extensive, adversarial discovery with the intention of certifying and trying the Actions. (RJC Decl. ¶¶ 8, 20, 26, 66.) The Parties conducted multiple rounds of written discovery and document production, fact and expert depositions, and third-party discovery. (*Id.*) Class Counsel dedicated many hours to analyzing thousands of documents regarding the labeling and advertising, ingredients, consumer complaints, sales information, studies, and market research related to the Products and Plaintiffs'

claims. (*Id.* ¶¶ 10-15, 20.) Plaintiffs also deposed Celsius' corporate designees and experts. (*Id.* ¶ 20.) The Parties fully briefed class certification and summary adjudication in *Prescod*, prior to the first mediation in 2021. (*Id.* ¶ 28.) The Parties had conducted all discovery in *Hezi* and briefed both of Defendant's interlocutory appeals before the second mediation took place in 2022, which resulted in the mediator's proposal that formed the basis of the Settlement. (*Id.* ¶ 29.) Through this adversarial discovery and motion practice, Plaintiffs and Class Counsel became fully and completely informed of the facts supporting the claims and potential defenses, and carefully evaluated the strength of each party's position in arriving at the Settlement. Thus, the third *Grinnell* factor weighs in favor of final approval.

4. Plaintiffs Would Face Risk in Establishing Liability and Damages if the Actions Proceeded

In evaluating substantive fairness, courts must consider the "risks of establishing liability [and] the risks of establishing damages." *Grinnell*, 495 F.2d at 463; *Wal-Mart*, 396 F.3d at 117. The fourth and fifth *Grinnell* factors do 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 Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 2006 U.S. Dist. LEXIS 17588, *39 (S.D.N.Y. Apr. 6, 2006) (same). In doing so, 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 Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 364 (S.D.N.Y. 2002).

Litigation inherently involves risks and uncertainty. *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997), aff'd, 117 F.3d 721 (2d Cir. 1997). This is especially true

of complex class actions where, as here, liability depends on Plaintiffs' ability to establish elements requiring subjective determinations of fact. To establish liability under New York and California consumer protection laws, Plaintiffs would have to convince a jury that a reasonable consumer would be misled by Defendant's alleged misrepresentation. (RJC Decl. ¶ 76.) Such a determination is inherently subjective and introduces a large degree of uncertainty and risk into the litigation. (*Id.*) Additionally, Plaintiffs arguably would need to demonstrate that citric acid is a preservative and acts as a preservative in the Products. (*Id.*) Due to the highly technical nature of this inquiry, the outcome of the actions would inevitably turn on competing expert testimony offered at trial. (*Id.* ¶ 68.) Where the outcome of the case depends on a "battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579-80 (S.D.N.Y. 2008). Thus, Plaintiffs "would have faced significant legal and factual obstacles to proving their case." *Global Crossing*, 225 F.R.D. at 459.

The Settlement affords Class Members immediate, certain, and substantial monetary and injunctive relief, and eliminates the substantial risk that Plaintiffs would be unsuccessful at trial (and therefore receive less or no recovery). Absent the Settlement, Defendant was prepared to oppose certification and move for summary judgment in *Hezi* and move to decertify *Prescod*. (RJC Decl. ¶ 80.) Although Plaintiffs are confident in their case and believe that they could overcome Defendant's challenges, briefing these issues would require the expenditure of substantial time and resources with no guarantee of success. (*Id.*) The Settlement alleviates these risks, and provides a timely, substantial benefit to the Settlement Class. (*Id.*)

5. The Risks of Maintaining the Class Action Through Trial

Where there is a substantial risk that the defendant may successfully oppose class certification or move for decertification of a previously certified class, the sixth *Grinnell* factor

weighs in favor of approval. *See Stinson v. City of New York*, 256 F. Supp. 3d 283, 294 (S.D.N.Y. Jun. 7, 2017); *Garcia v. Pancho Villa's of Huntington Vill., Inc.*, 2012 U.S. Dist. LEXIS 144446, *13 (E.D.N.Y. Oct. 4, 2012) ("The risk of maintaining a class through trial is also present. While, the Court has already certified a class and collective action in this matter, maintaining it through trial may not be easy.")

Plaintiffs faced significant risks related to maintaining certification of the Class through trial. (RJC Decl. ¶ 80.) At the time the Settlement was reached, *Hezi* had not yet been certified, and achieving class certification would have required exhaustive briefing and extensive resources. (*Id*. ¶ 79.) Moreover, disputes regarding certification are likely "devolve into yet another battle of the experts," introducing additional risk and uncertainty to the action, adding another layer of complexity, and driving up costs. *Bear Stearns*, 909 F. Supp. 2d at 268. While Plaintiffs are confident that they would have achieved certification in *Hezi*, doing so would have been costly and time consuming for both parties, and would likely necessitate further discovery and additional experts. (RJC Decl. ¶¶ 79-80.) Even if *Hezi* was certified, Defendant could move to decertify the class at any time. *See 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.")

Defendant was also preparing to move to decertify *Prescod* before the Parties reached the Settlement. (RJC Decl. ¶ 80.) Defendant likely would have argued that individual questions predominate over common questions, that a class action is not a superior vehicle for resolving Plaintiffs' claims, and that a class trial would not be manageable. (*Id*.) While Plaintiffs could overcome Defendant's arguments, opposing the motion would require extensive briefing, increasing risk, expense, and delay. (*Id.*) The Settlement eliminates these risks and achieves the

primary objectives of this litigation by providing the Settlement Class with meaningful injunctive relief and a substantial monetary recovery that is fair, immediate, and certain.

6. The Ability of Defendant to Withstand a Greater Judgment

In evaluating the fairness and adequacy of a settlement, "[t]his factor typically weighs in favor of settlement where a greater judgment would put defendant at risk of bankruptcy or other severe economic hardship." *AOL Time Warner*, 2006 U.S. Dist. LEXIS 17588, at *12.

It is unclear whether Defendant could withstand a greater judgment. However, in the final quarter of 2022, Celsius reported record financial losses. (RJC Decl. ¶ 81.) The company, in its publicly filed 10-Q, reported negative net income of $181.9 million, a 2,086.2% decrease from the prior quarter. (*Id*.) Thus, it is possible that a greater judgment may impose severe economic hardship on Celsius, and that Celsius may be unable to withstand such a judgment. (*Id*.)

Even if Celsius could withstand a greater judgment, courts routinely find that a "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178 n.9). And where the other *Grinnell* factors weigh in favor of approval, courts do not find a defendant's ability to withstand a greater judgment to be a barrier to settlement. Indeed, a defendant is not required to "empty its coffers before a settlement can be found adequate." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012) (internal citation omitted); *see also PaineWebber*, 171 F.R.D. at 129 ("[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate.")

7. The Settlement Is Reasonable Given the Possible Recovery and the Attendant Risks of Litigation

Courts typically consider the last two *Grinnell* factors together. *See Grinnell*, 495 F.2d at 463. 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 (W.D.N.Y. 2005). "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)). Thus, courts regularly find settlements fall within the "range of reasonableness," even where the settlement amount is substantially less than the amount otherwise recoverable at trial. *Grinnell*, 495 F.2d at 455 n. 2 (Second Circuit: "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."); *see also Global Crossing*, 225 F.R.D. at 461 ("'The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.'") (quoting *Grinnell*, 495 F.2d at 455).

As explained *supra*, the $7,800,000 common fund represents a favorable outcome for the Settlement whereby Class Members will receive an average of $4.60 and valuable injunctive relief by way of a significant label change that helps dispel consumer deception and thus, benefits Class Members, the public, and marketplace. (RJC Decl. ¶¶ 41, 51.)

Furthermore, a settlement is reasonable where, as here, it assures "immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road." *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008

U.S. Dist. LEXIS 23016, *5 (S.D.N.Y. Mar. 24, 2008) (internal citation omitted); *see also Union Carbide*, 718 F. Supp. at 1103 ("The Court of Appeals has held that a settlement can be approved even though the benefits amount to a small percentage of the recovery sought . . . The essence of settlement is compromise.") (internal citation omitted).

Here, 90% of the Class will be receiving immediate payment via digital means. (RJC Decl. ¶ 52; Schwartz Decl. ¶ 19.) The Settlement also offers substantial injunctive and monetary relief to Plaintiffs and members of the Settlement Class. (RJC Decl. ¶¶ 39-40.) Considering the complex issues of law and fact that exist in this litigation, and the various attendant risks of continuing to litigate the action through trial, the Settlement represents a fair and adequate compromise that is within the "range of reasonableness."

8. The Settlement Satisfies Rule 23(e)(2) Requirements

The amended Rule 23(e)(2) factors are intended to complement the *Grinnell* factors. *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. Nov. 7, 2019) ("The Advisory Committee Notes to the 2018 amendments indicate that the four new Rule 23 factors were intended to supplement rather than displace these '*Grinnell*' factors."). The Rule 23(e)(2) factors include:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Most of these factors overlap with the *Grinnell* factors fully discussed above, and each of the remaining applicable Rule 23(e) factors are sufficiently satisfied in support of final approval.

i. The Attorneys' Fees Sought Are Reasonable

In evaluating the fairness of a settlement, Rule 23(e)(2)(C)(iii) instructs courts to consider "the terms of any proposed award of attorney's fees, including timing of payment." As detailed in the Memorandum of law in support of Plaintiffs' motion for an award of attorneys' fees and costs and service awards ("Fee Motion"), filed January 13, 2023 (ECF 40), Class Counsel seeks an award of attorneys' fees amounting to one-third of the Settlement Fund, or $2,600,000, as well as reimbursement of reasonable litigation costs not to exceed $300,000 in the amount of $242,294.01. (ECF 39-45.) Fees and costs are to be paid by Defendant within fourteen (14) calendar days after the entry of Judgment, and the Class Administrator will distribute the Fees and Costs Award to Class Counsel within twenty-one (21) calendar days of entry of Judgment. (RJC Decl., ¶ 43, Ex. A. ¶¶ 2.3.2., 3.2.)

As demonstrated in the Fee Motion, the Fees and Costs Award sought are squarely within the reasonable range of fees granted in comparable class settlements in this Circuit. (ECF 40 at 5-6); *see also Okla. Police Pension Fund & Ret. Sys. v. Teligent, Inc.*, 2021 U.S. Dist. LEXIS 232636, at *3 (S.D.N.Y. Dec. 1, 2021) (awarding one-third of the total $6 million settlement fund in attorneys' fees and finding this sum to be fair and reasonable); *Swetz v. Gsk Consumer Health*, 2021 U.S. Dist. LEXIS 227209, at *3 (S.D.N.Y. Nov. 22, 2021) (awarding one-third of the total settlement fund in attorneys' fees and finding "the requested amount of attorneys' fees to be fair, reasonable, and appropriate" pursuant to *Goldberger*, 209 F.3d 43); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, 2009 U.S. Dist. LEXIS 27899, at *16-17 (S.D.N.Y. Mar. 31, 2009) ("Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit.")

The reasonableness of Plaintiffs' fee request is also further supported by the fact that no Class Member has objected to it. *See Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 478 (S.D.N.Y. 2013) ("[N]o Class Member objected to Class Counsel's request for 33% of the fund, which also provides support for Class Counsel's fee request"); *In re Telik*, 576 F. Supp. 2d at 593 (finding "the overwhelmingly positive response of the Class to the Settlement," including out of 54,000 notices, only 3 consumers have opted out and only one has objected, favor awarding the requested attorney's fees). The lodestar cross-check shows the requested fee applies a presumptively reasonable *negative* multiplier. This factor weighs in favor of final approval.

ii. Settlement Class Members Are Treated Equitably

This factor includes "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed R. Civ. P. 23, 2018 Advisory Committee Note. The Settlement treats all Class Members equitably relative to one another by providing that each Claimant shall receive a pro rata share of the Settlement Fund based on (1) the variety and quantity of Products they purchased, and (2) whether they provide proof of purchase. (RJC Decl., Ex. A ¶ 4.5.) Moreover, the Release is tailored from the factual predicate for the Litigation and treats all Settlement Class Members equitably relative to one another. (*Id*. ¶ 8.1.-8.2.) *See Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 95 (2d Cir. 2019). ("The law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct."); *Wal-Mart*, 396 F.3d at 109 (approving release of non-parties where the claims released are based on the same underlying factual predicate as the claims asserted against the parties, reasoning in part that "it is hard to

imagine that defendants . . . would have settled without also releasing [the non-parties] from liability; to do so would have invited relitigation of the same factual allegations").

VII. THE CLASS SHOULD BE CERTIFIED FOR SETTLEMENT

In the Preliminary Approval Order (ECF 37), Judge Marrero found that Plaintiffs had satisfied the prerequisites for class certification set forth in Rules 23(a) and 23(b)(3) and preliminarily certified the Class (ECF 37 at ¶ 4.) Since entry of the Preliminary Approval Order, the facts supporting certification have not changed to alter the propriety of class certification. (RJC Decl. ¶ 83); *see also Cancilla v. Ecolab, Inc.*, 2016 U.S. Dist. LEXIS 818, at *2 (N.D. Cal. Jan. 5, 2016) ("[C]onclusions" at preliminary approval that the settlement class should be certified "hold at this final approval stage.") For the reasons stated in Plaintiffs' unopposed Motion for preliminary approval (ECF 33), and Judge Marrero's order granting the Motion (ECF 37), both of which explained that the Rule 23(a) and Rule 23(b)(3) factors are satisfied, Plaintiffs respectfully request that the Court finally certify the Settlement Class pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3).

VIII. CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court certify the Settlement Class, grant final approval of the Settlement, and enter judgment.

Dated: March 17, 2023

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