IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ALLISON GAY, SANDAHL NELSON, MOLLY MARTIN and GENEVIEVE GAMEZ, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. TOM'S OF MAINE, INC., Defendant.	**No**: **14-cv-60604-KMM**

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

Plaintiffs, Allison Gay, Sandahl Nelson, Lorette Kenney, Claudia Morales, Molly Martin and Genevieve Gamez (collectively, "Plaintiffs"), submit this memorandum in support of Plaintiffs' motion for entry of the [Proposed] Order re: Preliminary Approval of Class Action Settlement. The terms of the proposed settlement ("Settlement") are fully set forth in the Joint Stipulation of Settlement ("Agreement") attached as Exhibit "A" to the Declaration of Nathan C. Zipperian in support of Motion for Preliminary Approval of Class Action Settlement ("Zipperian Decl.").[1]

I. INTRODUCTION

Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement of this class action asserting claims arising from the marketing and sales of consumer products including toothpaste, deodorant/antiperspirant, soap, sunscreen, diaper cream, body wash, shampoo, hand/body lotion, lip gloss/shimmer, lip balm, and mouthwash (the "Product(s)") by Defendant, Tom's of Maine, Inc. ("Tom's" or "Defendant"). After extensive, arm's-length settlement negotiations, Plaintiffs and Defendant (the "Parties") have reached a Settlement in this Action.

Plaintiffs allege that Defendant manufactured, marketed, sold, and distributed the Products using a marketing, advertising, and labeling campaign that was centered on representations that were intended to, and did, convey to consumers that the Products were "all natural" products that contained "natural" ingredients ("Natural Claims"). Plaintiffs further alleged that those representations were false and misleading because the Products contained ingredients that were heavily chemically processed, including, among other things, xylitol and

[1] Unless otherwise noted, all capitalized terms have the same meaning as in the Agreement.

sodium lauryl sulfate (the "Covered Ingredients").[2] Accordingly, Plaintiffs allege that Defendant has violated the following state deceptive and unfair trade practices act in connection with the Natural Claims: (1) the Florida Deceptive and Unfair Trade Practices Act, Florida Statutes 501.201, *et seq*.; (2) the Minnesota Prevention of Consumer Fraud Act, Minn. Stat. § 325F.69; (3) the Minnesota Unlawful Trade Practices Act, Minn. Stat. § 325D.13; (4) the Minnesota Deceptive Trade Practices Act, Minn. Stat. § 325D.44; (5) the Minnesota False Advertising Act, Minn. Stat. § 325F.76; (6) the California Consumer Legal Remedies Act, Cal. Civ. Code §§ 1761, *et seq.*,; (7) the California False Advertising Law, Cal. Civ. Code §§ 17500, *et seq.*; (8) the California Unfair Competition Law, Cal Civ. Code §§ 17200, *et seq.*; and (9) the warranty laws of: Alaska, Alaska Stat. § 45.02.313; Arizona, A.R.S. § 47-2313; Arkansas, A.C.A. § 4-2-313; California, Cal. Comm. Code § 2313; Colorado, Colo. Rev. Stat. § 4-2-313; Connecticut, Conn. Gen. Stat. § 42a-2-313; Delaware, 6 Del. C. § 2-313; the District of Columbia, D.C. Code § 28:2-313; Georgia, O.C.G.A. § 11-2-313; Hawaii, HRS § 490:2-313; Idaho, Idaho Code § 28-2-313; Illinois, 810 ILCS 5/2-313; Indiana, Ind. Code § 26-1-2-313; Kansas, K.S.A. § 84-2-313; Kentucky, KRS section 355.2-313; Maine, 11 M.R.S. § 2-313; Massachusetts, Mass. Gen. Laws Ann. ch. 106 section 2-313; Minnesota, Minn. Stat. section 336.2-313; Mississippi, Miss. Code § 75-2-313; Missouri, R.S. Mo. § 400.2-313; Montana, Mont. Code § 30-2-313; Nebraska Neb. Rev. Stat. § 2-313; Nevada, Nev. Rev. Stat. § 104.2313; New Hampshire, RSA 382-A:2-313; New Jersey, N.J. Stat. § 12A:2-313; New Mexico, N.M. Stat. § 55-2-313; New York, N.Y. U.C.C. Law § 2-313; North Carolina, N.C. Gen. Stat. § 25-2-313; North Dakota, N.D. Cent. Code § 41-02-30; Ohio, ORC § 1302.26; Oklahoma, 12A Okl. St. § 2-313; Oregon, Or. Rev. Stat. § 72-3130; Pennsylvania, 13 Pa.C.S. § 2313; Rhode Island, R.I. Gen. Laws section 6A-2-

[2] A comprehensive and exhaustive list of the Covered Ingredients is provided in the Agreement. *See* Agreement § II.A.15.

313; South Carolina, S.C. Code § 36-2-313; South Dakota, S.D. Codified Laws, § 57A-2-313; Tennessee, Tenn. Code § 47-2-313; Texas, Tex. Bus. & Com. Code § 2.313; Utah, Utah Code § 70A-2-313; Vermont, 9A V.S.A. § 2-313; Virginia, Va. Code § 59.1-504.2; Washington, Wash. Rev. Code § 62A.2-313; West Virginia, W. Va. Code § 46-2-313; and Wyoming, Wyo. Stat. § 34.1-2-313. Plaintiffs also assert claims for unjust enrichment.

Plaintiffs' goals in this consumer protection lawsuit was to (1) provide redress to consumers who have been harmed by the alleged false and misleading practices Defendant has engaged in with respect to the Products and to (2) stop Defendant from further continuing the systematic and continuing practice of disseminating the allegedly false and misleading information. The proposed Settlement accomplishes those goals and provides that:

1. Tom's will create a non-reversionary Settlement Fund in the amount of $4,500,000 from which Settlement Class Members, defined *infra*, can be reimbursed $4.00 for each purchase of a Product covered by the Settlement ("Covered Products")[3] for up to seven Covered Products purchased during the Class Period defined in the Settlement Class, without the need to present proof of purchase.
2. Tom's will make the following labeling and advertising changes as a supplement to its prior disclosures regarding the Covered Products for a period of at least three years:
    a. Tom's will provide information about each of the ingredients in its Products on its website (presently located at www.tomsofmaine.com) in an easy-to-

[3] Under the Agreement, "Covered Products" means any Tom's of Maine, Inc. toothpaste, deodorant/antiperspirant, soap, sunscreen, diaper cream, body wash, shampoo, hand/body lotion, lip gloss/shimmer, lip balm, mouthwash or any other personal or oral care product sold in the United States during the Class Period that contains one or more Covered Ingredients, and which is labeled, advertised or promoted as "natural," or, in the case of deodorant/antiperspirant, is labeled, advertised or promoted as "naturally dry." *See* Agreement, § II.A.16.

access manner, such as the manner identified in the screenshots located at Exhibit 2 of the Agreement. These changes will include at least the following:

i. Mention of "what's inside" Tom's products (or a word or words conveying a similar meaning) on the front page of Tom's main website, along with a link to a page or pages providing information about each of the ingredients in the Covered Products; and

ii. Mention of Tom's "standard" as guided by its Stewardship Model (or a word or words conveying a similar meaning) for the use of terms including at least "natural," "sustainable," and "responsible," along with a link to a page or pages providing information about those terms as used relative to the Covered Products;

b. Tom's will provide the address of its website in a conspicuous location on all of its product packaging, such as the manner identified in the photographs located at Exhibit 3 of the Agreement; and

c. Tom's shall, where practical, print on its product packaging language identifying Tom's stewardship mode and providing a quick way for consumers to access it and Tom's definition of "natural," such as the examples identified in Exhibit 4 of the Agreement.

In addition, Tom's will pay all the costs of Notice and Claims Administration Expenses, Attorneys' Fees and Expenses and Incentive Awards.

Class Notice advising Settlement Class Members of their Settlement benefits and their rights will be provided via internet notice, directed website notice, national publication notice, and, where practicable, direct mail notice under the Notice Program (attached to the Affidavit of Jeffrey D. Dahl with Respect to Settlement Notice Plan which is attached as Exhibit 5 to the Agreement).

The proposed Settlement Class for which the Parties jointly request certification for purposes of the Settlement is:

> All persons who purchased Covered Products in the United States from March 25, 2009 to the date the Court enters the Preliminary Approval Order.
>
> Excluded from the Settlement Class are: (i) those who purchased Covered Products for purpose of resale; (ii) those with claims for personal injuries arising from the use of Covered Products; (iii) Defendant and its officers, directors and employees; (iv) any person who files a valid and timely Request for Exclusion; and (v) the Judges to whom this Action is assigned and any members of their immediate families.

In addition, the Parties move the Court to designate Plaintiffs as the Class Representatives and James F. Clapp of Dostart Clapp & Coveney, LLP; James C. Shah of Shepherd, Finkelman, Miller & Shah, LLP; Michael Reese of Reese, LLP; Melissa Wolchansky of Halunen Law; and Jeff Feinberg of The Feinberg Law Firm, as Class Counsel.

At the preliminary approval stage, the Court need only "make a preliminary determination of the fairness, reasonableness and adequacy of the settlement" so that notice of the Settlement may be given to the Class and a fairness hearing may be scheduled to make a final determination regarding the fairness of the Settlement. *See* 4 Herbert B. Newberg & Abla Conte, *Newberg on Class Actions*, §11.25 (4th ed. 2002); David F. Herr, Annotated Manual for Complex Litigation ("Manual") §21.632 (4th ed. 2008). In so doing, the Court reviews the Settlement to determine if it "is within the range of possible approval or, in other words, if there is probable cause to notify the class of the proposed settlement." *Fresco v. Auto Data Direct, Inc.*, No. 03-61063, 2007 U.S. Dist. LEXIS 37863, at *11-12 (S.D. Fla. May 11, 2007) (internal citations omitted); *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) (A proposed settlement must be "fair, adequate and reasonable and [not] the product of collusion between the parties").

As set forth in further detail below, the proposed Settlement plainly meets the standard for preliminary approval. Thus, the Parties jointly move that the Court enter the [Proposed]

Order re: Preliminary Approval of Class Action Settlement that, among other things: (1) preliminarily approves the terms of the Settlement; (2) approves the form, method, and plan of Class Notice; (3) certifies the Settlement Class for Settlement purposes; and (4) schedules a Final Approval Hearing and related dates at which the request for final approval of the proposed Settlement and entry of the Final Judgment and Order Approving Settlement will be considered.

II. HISTORY OF THE LITIGATION

On March 7, 2014, Plaintiff Gay filed a class action complaint on behalf of herself and all others similarly situated against Tom's in the United States District Court, Southern District Court of Florida, Case No. 14-cv-60604-KMM (the "Complaint"). *See* D.E. No. 1. Before the Complaint was filed, Class Counsel extensively investigated the factual allegations ultimately made in the Complaint. *See* Zipperian Decl., at ¶ 7.[4]

After service of the Complaint was effectuated, counsel for Plaintiff Gay was informed that there was ongoing mediation between Defendant and Plaintiffs Nelson and Martin, who had served letters pursuant to the CLRA on Defendant on, respectively, March 25, 2013 and April 9, 2013, regarding similar claims in California against Defendant and that they had been meeting with Defendant since December 2013. *See* Zipperian Decl. at ¶ 8. With the agreement of Defendant and Plaintiffs Nelson and Martin, Plaintiff Gay and her counsel joined the ongoing mediation proceedings. *See* Zipperian Decl. at ¶ 9. On April 9, 2014, Tom's filed an unopposed

[4] Prior to that, Plaintiff Nelson served a letter pursuant to the California Consumers Legal Remedies Act, Civ. Code § 1750, *et seq.* ("CLRA") regarding the Natural Claims of certain of Tom's products on April 9, 2013, while Plaintiff Martin likewise served a CLRA letter regarding the Natural Claims for certain of Tom's products on April 9, 2013. On April 30, 2014, Plaintiff Gamez filed a lawsuit in the U.S. District Court for the Central District of California, captioned *Gamez v. Tom's of Maine, Inc.*, CV-14-03336-CAS, regarding the Natural Claims for certain of Tom's products. On May 12, 2014, counsel for Plaintiffs Kenney and Morales also served a letter pursuant to the CLRA regarding the Natural Claims of certain of Tom's products, on behalf of themselves and all others similarly situated who purchased Tom's of Maine products.

motion requesting an extension of time to answer the Complaint (D.E. No. 8), which the Court granted in part and denied in part on April 15, 2014, granting an extension of time for Tom's to respond to the Complaint to April 29, 2014 (D.E. No. 9), to facilitate such mediation. *See* Zipperian Decl., at ¶10. Thereafter, on April 21, 2014, counsel for the Parties scheduled a mediation session in an attempt to resolve the dispute and on the following day, and the Parties confirmed the session before the Honorable Peter D. Lichtman (Ret.) of JAMS in Los Angeles, California, for May 27, 2014. *See* Zipperian Decl., at ¶ 11; D.E. 10. On April 23, 2014, counsel for Defendant filed a second unopposed motion requesting an extension of time to response to the Complaint, which the Court granted, extending Tom's time to respond to June 9, 2014. *See* Zipperian Decl., at ¶ 12; D.E. 11. In the meantime, on April 30, 2014, counsel for Plaintiff Gamez filed a similar lawsuit in the Central District of California, captioned *Gamez v. Tom's of Maine, Inc.*, Case No. cv-14-03336, while counsel for Plaintiffs Kenney and Morales also served a CLRA letter regarding similar claims for certain of Tom's products on May 12, 2014. *See* Zipperian Decl. at ¶ 13.

Counsel for Plaintiffs Nelson, Martin, and Gay prepared, exchanged, and submitted mediation briefs, and duly met with counsel for Tom's on May 27, 2014. *See* Zipperian Decl. at ¶ 14. Over the course of the following months, with the assistance of Judge Lichtman, the Parties hammered out the precise terms of the Settlement, finalizing the Settlement Agreement on July 24, 2015.[5] *See* Zipperian Decl. at ¶ 15.

[5] In the meantime, the Court, upon a *sua sponte* examination of the record, dismissed the instant action without prejudice for want of a joint scheduling report. D.E. 12. The Parties moved to reopen the matter in a joint scheduling report on July 24, 2015 [D.E. 13], and Plaintiffs filed an Amended Complaint on July 24, 2015.

III. THE SETTLEMENT TERMS

A. Nationwide Settlement Class

Under the Agreement, Settlement Class Members who submit a valid and timely Claim Form, either by mail or electronically and without needing to present proof of purchase, will receive $4.00 for each purchase of a Covered Product for up to seven Covered Products purchased in the United States within the Class Period.[6] *See* Agreement § IV.A.4.

In addition, the Settlement provides for injunctive relief. Tom's will provide information about each of the ingredients in its Products on its website, including clarifying its standard of "natural," "sustainable," and "responsible," the address of its website in a conspicuous location on all Product packaging, and, where practical, print on its Product packaging language such that consumers will have quick access as to Tom's definition of "natural." *See* Agreement, § IV.B.

Tom's has also agreed to pay Service Awards to the Class Representatives in the sum of $2,000 per Plaintiff. *See* Agreement, § X.C.

B. Class Notice, Claims Administration, And Attorneys' Fees

The Settlement also provides that Defendant shall pay for the costs of Class Notice[7] and the costs of Claims Administration. *See* Agreement, § V.F. Defendant also agrees not to oppose

[6] If the total amount of the timely, valid, and approved Eligible Claims submitted by Settlement Class Members exceeds the available relief each eligible Settlement Class Member's Initial Claim Amount shall be proportionately reduced on a *pro rata* basis, such that the aggregate value of the cash payments does not exceed the Settlement Fund balance. If the total amount of the timely, valid, and approved Eligible Claims submitted by Settlement Class Members results in there being any remaining value in the Settlement Fund, it shall be used to increase eligible Settlement Class Members's relief on a *pro* rata basis such that Settlement Class Members shall receive an increased payment of up to one hundred percent (100%) of the Eligible Class Members's Initial Claim Amount.

[7] The Notice Plan is explained in more detail in Section VI below.

Plaintiffs' Counsel's application for Attorneys' Fees and Expenses in an amount not to exceed $1.5 million.

IV. THE PROPOSED SETTLEMENT MEETS THE CRITERIA FOR PRELIMINARY APPROVAL

A. The Standard Of Preliminary Approval

The approval of a proposed class action settlement is a matter within the broad discretion of the trial court and will not be overturned unless the district court "clearly abused its discretion in approving the settlement." *Young v. Katz*, 447 F.2d 431, 432 (5th Cir. 1971).[8] In making this determination, the Court should evaluate the settlement's fairness in its entirety. *Bennett*, 737 F.2d at 986.

Settlements of class actions prior to trial are strongly favored. *Nelson v. Mead Johnson & Johnson Co.*, 484 Fed.Appx. 429, 434 (11th Cir. 2012) ("[o]ur judgment is informed by the strong judicial policy favoring settlements as well as by the realization that compromise is the essence of settlement"); *see also In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 207 (5th Cir. 1981). The preliminary approval step requires the Court to make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." *Manual*, 21.632, at 321. At this stage, the Court need only conduct a *prima facie* review of the relief and notice provided by the Agreement to determine whether notice should be sent to the Settlement Class Members. *Id.* "In determining whether to approve a proposed settlement, the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir.

[8] Decisions by the former Fifth Circuit issued before October 1, 1981 are binding precedent to lower courts in the Eleventh Circuit. *See Slater v. Energy Servs. Group Intern., Inc.*, No. 09-13794, 2011 WL 782023, at *6 n.3 (11th Cir. Mar. 8, 2011) (citing *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*)).

1977); *see also Access Now, Inc. v. Claire's Stores, Inc.*, No. 00-14017-CIV, 2002 WL 1162422, at *1 (S.D. Fla. May 7, 2002). This is a minimal threshold:

> In performing this balancing task, the trial court is entitled to rely upon the judgment of experienced counsel for the parties. Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.
>
> In addition to examining the merits of a proposed settlement and ascertaining the views of counsel, the Court should consider other factors.
>
> Practical considerations may be taken into account. It is often said that litigants should be encouraged to determine their respective rights between themselves. Particularly in class action suits, there is an overriding public interest in favor of settlement. It is common knowledge that class action suits have a well deserved reputation as being most complex. The requirement that counsel for the class be experienced attests to the complexity of the class action.

Cotton, 559 F.2d at 1330-31 (citations omitted); *see also Ass'n for Disabled Ams. Inc. v. Amoco Oil Co.*, 21 F.R.D. 457, 466-67 (S.D. Fla. 2002). Here, the proposed Settlement plainly satisfies the standard for preliminary approval.

B. The Proposed Settlement Resulted From Serious, Informed, And Non-Collusive, Arm's-Length Negotiations

The requirement that a settlement be fair is designed to protect against collusion among the parties. Typically, "[t]here is a presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for Court approval." *Newberg*, §11.41; *see also Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1380 (S.D. Fla. 2007) ("the court 'must rely upon the judgment of experienced counsel and, absent fraud, should be hesitant to substitute its own judgment for that of counsel'").

Here, the Parties only reached the Settlement after intensive and extensive mediation, beginning December 2013 and refereed and administered by a very experienced and respected mediator, the Hon. Peter D. Lichtman (Ret.), one of the founders and former supervising judge of

the Los Angeles County Superior Court's Complex Civil Litigation program and a former head of the Superior Court's Mandatory Settlement Program.[9] Moreover, the mediation process only occurred after both sides prepared, exchanged, and submitted thorough briefs on their respective positions and strengths. So by the time of the Parties reached the Settlement, Plaintiffs and Class Counsel, who are experienced in prosecuting complex class action claims, had "a clear view of the strengths and weaknesses" of their case and were in a strong position to make an informed decision regarding the reasonableness of a potential settlement. *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985); *see also Manchaca v. Chater*, 927 F. Supp. 962, 967 (E.D. Tex. 1996). And even then, the Settlement was only reached on principle; it took almost a year for all of the details to be ironed out in the Agreement to ensure that the execution of the Settlement will have the practical effects that achieve the intended goals of the Actions.

Indeed, through the Agreement, the root cause of the Actions will be resolved - Tom's has changed its labeling and advertising to provide, in the most practical and conspicuous way possible, disclosures as to its definition of "natural" so that consumers will receive the necessary notice to make informed decisions when purchasing the Covered Products. Moreover, Tom's has also agreed to compensate consumers who purchased the Covered Products prior to the modified disclosures, without requiring proof of purchase. Together, Class Counsel negotiated a comprehensive and fair resolution for the claims asserted in the Actions. Thus, it can hardly be said that the Settlement was not a result of informed, adversarial, and arm's-length negotiations.

C. The Proposed Settlement Is Fair

The proposed Settlement is fair because, as discussed above, it squarely addresses and resolves the issues raised by Plaintiffs in this action. Moreover, the proposed Service Awards of

[9] *See* http://www.jamsadr.com/lichtman/.

$2,000 per Plaintiff are well within the range commonly approved by courts. *See, e.g.*, *Curry v. AvMed, Inc.*, No. 10-CV-24513-JLK, 2014 WL 7801286, at *3 (S.D. Fla. Feb. 28, 2014) (approving $5,000 service/incentive awards for each plaintiff); *Fresco v. Auto. Directions, Inc.,* No. 03-CIV-61063-MARTINEZ, 2009 WL 9054828, at *6 (S.D. Fla. Jan. 20, 2009) (approving $15,000 service/incentive awards for each plaintiff); *Pinto v. Princess Cruise Lines*, 513 F. Supp. 2d 1334, 1344 (S.D. Fla. 2007) (approving $7,500 service/incentive awards for each plaintiff).

D. The Terms Of The Settlement Compel Preliminary Approval

The Settlement easily meets the standard for preliminary approval. *See Cotton*, 559 F.2d 1326. The Settlement provides economic benefits to Settlement Class Members and protects future consumers of Tom's Products without the risk and delays of continued litigation, trial, and appeal. The expense, complexity, and duration of litigation are significant factors considered in evaluating the reasonableness of a settlement. Litigating this class action through trial would undoubtedly be time-consuming and expensive, while the results achieved may be no better than the terms reached by the Parties in the Settlement. As with most class actions, this Action is complex. *Cotton*, 559 F.2d at 1331 ("class action suits have a well deserved reputation as being most complex"). Determining whether Tom's engaged in unfair methods of competition, unconscionable acts and practices, unfair and deceptive acts and practices, and whether the "Natural Claims" were material and false, would require experts and extensive briefing for both Parties before the issues can be presented to the factfinder. At a minimum, absent the Settlement, litigation would likely continue for years before Plaintiffs or the Settlement Class might see any recovery. That a settlement would eliminate the delay and expenses strongly weighs in favor of approval. *See Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984).

By reaching this Settlement, the Parties will avoid protracted litigation and will establish a means for prompt resolution of the claims against Tom's. These avenues of relief provide meaningful benefits to Settlement Class Members. Given the alternative of long and complex litigation before this Court (and other courts), the risks involved in such litigation, and the possibility of further appellate litigation, the availability of prompt relief under the Settlement is highly beneficial to the Settlement Class Members.

V. THE SETTLEMENT CLASS SOULD BE CONDITIONALLY CERTIFIED

The Eleventh Circuit recognizes the strong public policy favoring the pretrial settlement of class action lawsuits. *See, e.g.*, *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 492 (11th Cir. 1992); *Cotton*, 559 F.2d at 1331. This is especially true of national settlements such as this. *Hanlon v. Chrysler Corp.*, 150 F.2d 1011 (9th Cir. 1998) (certifying nationwide settlement class); *In re Prudential Ins. Co. of Am. Sales Prac. Litig.*, 148 F.3d 283, 314-15 (3d Cir. 1998) (nationwide settlement classes are commonly certified). When presented with a proposed settlement, a court must determine whether the proposed settlement class satisfies the requirements for class certification under Federal Rule of Civil Procedures 23. *Id.* But in assessing those certification requirements, a court may properly consider that there will be no trial. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial").

A. The Settlement Class Satisfies Federal Rule Of Civil Procedure 23(a)

Rule 23(a) enumerates four prerequisites for class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. Each of the requirements is met by the Settlement Class, defined as:

> [A]ll persons who purchased Covered Products in the United States from March 25, 2009 to the date the Court enters the Preliminary Approval Order. Excluded from the Settlement Class are: (i) those who purchased Covered Products for purpose of resale; (ii) those with claims for personal injuries arising from the use of Covered Products; (iii) Defendant and its officers, directors and employees; (iv) any person who files a valid and timely Request for Exclusion; and (v) the Judges to whom this Action is assigned and any members of their immediate families.

1. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23. The proposed Settlement Class includes, at a minimum, hundreds of thousands of members. Thus, the numerosity element is easily satisfied.

2. Commonality

The commonality requirement is met if there is at least one question of law or fact common to the members of the Class. Fed. R. Civ. P. 23(a)(2). The commonality requirement is a "relatively light burden" that "does not require that all the questions of law and fact raised by the dispute be common." *Vega v. T-Mobile USA, Inc*., 564 F.3d 1256, 1268 (11th Cir. 2009) (citations omitted). It "simply requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Fitzpatrick v. General Mills, Inc.*, 263 F.R.D. at 696 (S.D.Fla. 2010), *citing Williams v. Mohawk Indus., Inc*., 568 F.3d 1350, 1355 (11th Cir. 2009). Commonality is satisfied where questions of law refer to standardized conduct by the defendant toward members of the proposed class. *In re Amerifirst Sec. Litig.*, 139 F.R.D. 423, 428 (S.D. Fla. 1991). Here, Defendant's uniform representations regarding the Covered Products communicated toward Plaintiffs and the public easily satisfies the requirement.

3. Typicality

The Rule 23(a) typicality requirement ensures that class representatives have the same interests as the class. That is, "typicality measures whether a sufficient nexus exists between the

claims of the named representatives and those of the class at large." *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1322 (11th Cir. 2008). The typicality requirement, like commonality, is not demanding. *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 532 (M.D. Fla. 1996). Similarly, typicality does not require that all putative class members share identical claims. Rather, all that is required is that the claims of the named plaintiff have the same essential characteristics as the class at large. "[A] strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences." *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985). Here, Plaintiffs' and Settlement Class Members' claims arise from the same course of conduct, *i.e.*, Defendant's uniform representations and advertisements regarding the Covered Products. Thus, the typicality element is easily satisfied.

4. Adequacy Of Representation

Finally, Rule 23(a) requires a showing that the representative party will fairly and adequately protect the interests of the class. This requirement has two components: (1) the proposed representative has interests in common with, and not antagonistic to, the interests of the class; and (2) the plaintiff's attorneys are qualified, experienced and generally able to conduct the litigation. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987).

Adequacy is plainly met in this case. No conflict exists between Plaintiffs and the Settlement Class, and Class Counsel are qualified and experienced in class action litigation. *See* Zipperian Decl. at ¶ 4 and Exhibit B (Firm Résumés).

B. The Settlement Class Should Be Preliminarily Approved Under Federal Rule Of Civil Procedure 23(b)(3)

In addition to the requirements of Rule 23(a), in the context of the proposed Settlement, the Parties do not dispute that Plaintiffs also satisfy the requirements of Rule 23(b)(3), which requires that common questions of law or fact predominate over individual questions and that

class action treatment be superior to all other available methods of adjudication. As set forth below, this Action meets the criteria set forth in Rule 23(b)(3). Accordingly, this Court should conditionally certify the Settlement Class proposed by the Parties.

1. Common Questions Predominate Over Individual Issues

Common questions of law or fact predominate over individual questions when the issues in the class action are subject to generalized proof that applies to the case as a whole. *Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228, 1233 (11th Cir. 2000); *Amchem*, 521 U.S. at 625 ("[p]redominance is a test readily met in certain cases alleging consumer or securities fraud"). Thus, in deciding whether common questions predominate under Rule 23(b)(3), the focus is generally on whether there are common liability issues that may be resolved on a class-wide basis. *See*, *e.g.*, *Klay v. Humana*, 382 F.3d 1241, 1269 (11th Cir. 2004). "[I]t is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions." *Busby*, 513 F.3d at 1324.

Predominance exists here. The central issue for every Settlement Class Member is whether the Natural Claims Tom's represented and advertised for its Covered Products were false and misleading. *Fitzpatrick v. General Mills, Inc*., 635 F.3d 1279, 1282 (11th Cir. 2011) (citing *Klay*, 382 F.3d at 1255) ("Common issues of fact and law predominate if they have a direct impact on every class member's entitlement to injunctive and monetary relief").

2. The Class Action Device Is The Superior Method Of Adjudicating This Litigation

Rule 23(b)(3) lists four factors that the Court should consider in taking into account whether a class action is superior to other methods of adjudicating this action: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or

against class members; (d) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D). "[T]he improbability that large numbers of class members would possess the initiative to litigate individually" further compels a finding of superiority. *Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 318 (S.D. Fla. 2001); *Amchem*, 521 U.S. at 617 (same); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (same).

An assessment of the Rule 23(b)(3) "superiority" factors shows that a class action is the preferred procedure in this case. The amount of damages suffered by the vast majority of Settlement Class Members is not large. *See Outten v. Capital Mgmt. Servs., L.P.*, No. 09-22152-CIV, 2010 WL 2194442, at *4 (S.D. Fla. Apr. 9, 2010). It is neither economically feasible, nor judicially efficient, for thousands of Class Members to pursue their claims against Defendant on an individual basis. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980); *Francisco v. Numismatic Guar. Corp. of Am.*, No. 06-61677-CIV, 2008 WL 649124, at *8 (S.D. Fla. Jan. 31, 2008) ("[c]ertification is also supported given the relatively small amount of damages that members of the Class suffered on an individual basis, such that it would not justify their prosecution in separate lawsuits"). Additionally, the difficulties of managing a class action are vitiated by the facts of this Settlement. When "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620.

VI. THE PROPOSED CLASS NOTICE PROGRAM IS APPROPRIATE AND THE CLASS NOTICE SHOULD BE APPROVED

The threshold requirement concerning class notice is whether the means employed to distribute the notice was reasonably calculated to apprise the class of the pendency of the action,

of the proposed settlement, and of the class members' rights to opt out or object. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974); *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 315 (1950). The mechanics of the notice process are left to the discretion of the court, subject only to the broad "reasonableness" standards imposed by due process. In this Circuit, it has long been the case that a notice of settlement will be adjudged satisfactory if it reaches the parties affected and conveys the required information. *In re Nissan Motor Corp. Antitrust Litig.*, 552 F. 2d 1088, 1104-05 (5th Cir. 1977) (the class members' "substantive claims [must] be adequately described [and] the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment").

The proposed Class Notice easily satisfies these requirements. *See* Agreement, § VII. The Parties have retained Dahl Administration, a respected Settlement Administrator, which has worked with the Parties to develop a comprehensive Notice Plan to reach Settlement Class Members, which is attached to the Affidavit of Jeffrey D. Dahl with Respect to Settlement Notice Plan which is attached as Exhibit 5 to the Agreement. In addition to internet notice, directed website notice, and national publication notice, the Settlement Administrator will also, where practicable, effect direct mail notice using a database Tom's will provide containing the names, last-known addresses, and last-known telephone numbers of any individuals who purchased any Covered Product directly from Tom's during the Class Period with a shipping address in the United States. *See* Agreement, § VII.A. Settlement Class Members will receive a general description of the instant action, an explanation the terms of the Settlement, the relief offered, and the claim process, and a general description of their legal rights, including the right to opt-out or object.

First, a Short-form Notice will be published no later than 30 days from an Order of Preliminary Approval. *See* Agreement, § VII.C and D. The Short-form Notice will, *inter alia*, (a) include the web address of the Settlement Website and a telephone number for the Settlement Administrator; (2) include the Settlement Class definition; (3) include a brief description of relief available to the Settlement Class Members; and (4) inform Settlement Class Members of the right to object and/or opt-out of the Settlement Class and the deadlines to exercise these rights. A mock-up of the Short-form Notice is attached as Exhibit 6 to the Agreement. Publication of the Short-form Notice will include online media, national publication, electronic notice, and, where practicable, direct mail notice.

And, no later than five days from an Order of Preliminary Approval, the Settlement Administrator will post a Long-form Notice and Claim Form on a website created for the Settlement. *See* Agreement, § VII.B and D. The Long-form Notice will, *inter alia*,: (a) include a short, plain statement of the background of the instant Action and the proposed Agreement; (b) describe the proposed Settlement relief as set forth in this Agreement; (c) inform Settlement Class Members that, if they do not exclude themselves from the Settlement Class, they may be eligible to receive relief; (d) describe the procedures for participating in the Settlement, including all applicable deadlines, and advise Settlement Class Members of their rights, including their right to submit a Claim to receive an Award under the Agreement by submitting the Claim Form; (e) explain the scope of the Release; (f) state that any Award to Settlement Class Members under the Agreement is contingent on the Court's final approval of the Agreement; (g) state the identity of Class Counsel and the amount sought in Attorneys' Fees and Expenses; (h) explain the procedures for opting out of the Settlement Class, including the applicable deadline for opting out; (i) explain the procedures for objecting to the Agreement, including the applicable deadline;

and (j) explain that any judgment or orders entered in the Action, whether favorable or unfavorable to the Settlement Class, shall include and be binding on all Settlement Class Members who have not been excluded. A mock-up of the Long-form Notice is attached Exhibit 7 to the Agreement. Upon request, the Long-form Notice and the Claim Form will be sent via electronic or U.S. mail to Settlement Class Members.

The contents of the proposed Class Notice are more than adequate. The Class Notice provides Settlement Class Members with sufficient information to make an informed and intelligent decision as to whether to participate in the Settlement. As such, it satisfies the content requirements of Rule 23. *See In re Compact Disc. Minimum Advertised Price Antitrust Litig*., 216 F.R.D. 197, 203 (D. Me. 2003) ("notice must describe fairly, accurately and neutrally the claims and parties in the litigation, the terms of the proposed settlement, and the options available to individuals entitled to participate, including the right to exclude themselves from the class").

To facilitate the claims process, Class Notice and Claim Forms will be available through the Settlement Website maintained by the Settlement Administrator and on Class Counsel's website. In sum, the contents and dissemination of the proposed Class Notice constitute the best notice practicable under the circumstances and fully comply with the requirements of Rule 23. Accordingly, the Parties request that the Notice Plan be approved and that the Court approve Dahl Administration as Settlement Administrator to effectuate the Notice plan and disseminate Class Notice after the Court preliminarily approves the Settlement.

VII. CONCLUSION

For the reasons set forth above, the Parties respectfully request the Court enter the

[Proposed] Order: (1) certifying the Class; (2) designating Plaintiffs as Class Representatives; (3) appointing James F. Clapp of Dostart Clapp & Coveney, LLP; James C. Shah of Shepherd, Finkelman, Miller & Shah, LLP; Michael Reese of Reese, LLP; Melissa Wolchansky of Halunen Law; and Jeff Feinberg of The Feinberg Law Firm, as Class Counsel; (4) granting preliminary approval of the Settlement; (5) approving the proposed Notice Plan and directing that it be implemented; and (6) scheduling a Final Approval Hearing.

Dated: July 24, 2015

SHEPHERD, FINKELMAN, MILLER & SHAH, LLP

/s/ Nathan C. Zipperian

Nathan C. Zipperian (#61525)
Scott R. Shepherd (#69655)
1640 Town Center Circle, Suite 216
Weston, FL 33326
Telephone: (954) 515-0123
Facsimile: (866) 300-7367
Email: nzipperian@sfmslaw.com
sshepherd@sfmslaw.com

James C. Shah
Natalie Finkelman Bennett
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
35 E. State Street
Media, PA 19063
Telephone: (610) 891-9880
Facsimile: (866) 300-7367
Email: jshah@sfmslaw.com
nfinkelman@sfmslaw.com

Jeffrey Feinberg
THE FEINBERG LAW FIRM
382 Springfield Ave, Suite 201
Summit, NJ 07901
Telephone: (212) 372-0297
Email: jfeinberg@nfcounsel.com

James F. Clapp
James T. Hannink
Zach P. Dostart
DOSTART CLAPP & COVENEY, LLP
4370 La Jolla Village Drive, Suite 970
San Diego, CA 92122-1253
Telephone: (858) 623-4200
Facsimile: (858) 623-4299
Email: jclapp@sdlaw.com
jhannink@sdlaw.com
zdostart@sdlaw.com

Clayton D. Halunen (Bar No. 219721)
Melissa Wolchansky (Bar No. 0387900)
HALUNEN LAW
1650 IDS Center
80 S 8th Street
Minneapolis, MN 55402
Telephone: 612.605.4098
Facsimile: 612.605.4099
Email: Halunen@halunenlaw.com
wolchansky@halunenlaw.com

Michael R. Reese
REESE LLP
875 Avenue of the Americas, 18th Floor
New York, NY 10001
Telephone: (212) 643-0500
Facsimile: (212) 253-5272
Email: mreese@reeserichman.com
krichman@reeserichman.com

Aashish Desai
DESAI LAW FIRM, P.C.
3200 Bristol Street, Suite 650
Costa Mesa, CA 92626
Telephone: (949) 614-5830
Facsimile: (949) 271-4190
Email: aashish@desai-law.com

Attorneys for Plaintiffs and the
Proposed Class