IN THE CIRCUIT COURT OF DUPAGE COUNTY, ILLINOIS
18TH JUDICIAL CIRCUIT

EMILY MORRISSEY, TAMMY CARPENTER, ALIZA EJAZ, and JULIE GURDIN, *individually and on behalf of all others similarly situated,* Plaintiffs, v. TULA LIFE, INC., Defendant.	Case No. 2021L0000646

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

In this putative class action, Plaintiffs Emily Morrissey, Tammy Carpenter, Aiza Ejaz, and Julie Gurdin ("Plaintiffs") allege that they were misled into believing that live cultures existed in skincare products that TULA advertised as containing "probiotics." TULA denies these and all allegations of wrongdoing including because it claims its products contain probiotic extracts designed for use in skincare, and represented that it is agreeing to settle this litigation to avoid the uncertainties and expenses associated with ongoing litigation. After several substantive settlement discussions and a full-day mediation with Jill R. Sperber, Esq. of Judicate West, an experienced and well-respected class action mediator, the Parties have reached a proposed settlement ("Settlement" or "Agreement") that creates a Settlement Fund of up to $5 million, which will be used to pay approved class member claims, notice and administration costs, service awards to the Plaintiffs, and attorneys' fees, costs, and expenses to Proposed Class Counsel. The Agreement also requires TULA to change applicable product descriptions on its website, as well as its product labeling and packaging, to state that the products at issue do not contain live cultures. If approved, the Settlement will bring certainty, closure, and significant and valuable relief for individuals to what otherwise would likely be contentious and costly litigation regarding Defendant's alleged false and misleading advertising.

Plaintiffs now seek preliminary approval of the Settlement, certification of a settlement class, appointment of class counsel, approval of the proposed form and method of class notice, and approval of a claims procedure. This memorandum describes in detail the reasons why preliminary approval is in the best interests of the class and is consistent with 735 ILCS 5/2-801. As discussed in more detail below, the most important consideration in evaluating the fairness of a proposed class action settlement is the strength of Plaintiffs' case on the merits balanced

against the relief obtained in the settlement. *See Steinberg v. Software Associates, Inc.*, 306 Ill. App. 3d 157, 170 (1st Dist. 1999); *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 972 (1st Dist. 1990); *see also Am. Intn'l Grp., Inc. et al. v. ACE INA Holdings, et al.*, 2012 WL 651727 (N.D. Ill. Feb. 28, 2012).[1] While Plaintiffs believe they could secure class certification and prevail on the merits at trial, success is not guaranteed, particularly given the difficulties of litigating and certifying false advertising consumer class actions, and Defendant is prepared to vigorously defend this case and oppose certification of a litigated class. The terms of the Settlement, which include a Settlement Fund providing Settlement Class Members the ability to receive meaningful cash compensation and injunctive terms that require labeling and packaging changes, meet and exceed the applicable standards of fairness. Accordingly, the Court should preliminarily approve the Settlement so that Settlement Class Members can receive notice of their rights and the claims administration process may begin.

II. BACKGROUND OF THE LITIGATION

A. Overview Of The Litigation

Prior to commencing litigation, Plaintiffs' counsel conducted an extensive pre-suit investigation, which included the retention of a consulting expert. Declaration of L. Timothy Fisher ¶ 9. After completing that investigation and consulting with their expert, Plaintiffs' counsel sent a demand letter to Defendant TULA Life, Inc. based on an allegation that the "probiotic" claim used on the labeling and in connection with the marketing of TULA Skincare Products (the "TULA Products") is false or misleading because the TULA Products cannot contain probiotics because (a) the microbial derived ingredients assigned the "probiotic" moniker

[1] Section 2-801 is modeled after Rule 23 of the Federal Rules of Civil Procedure and, therefore, "federal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois." *Avery v. State Farm Mut. Ins. Co.*, 216 Ill. 2d 100, 125 (2005).

are purchased in a dead state, and (b) the preservatives, *i.e.* antimicrobial chemicals employed in the TULA Products would render any probiotic cultures inert and therefore useless. *Id.* ¶ 10.

Thereafter, on March 3, 2021, Plaintiff Carpenter filed a Class Action Complaint in the United States District Court for the Southern District of New York (the "Federal Action"). *Id.* ¶ 11. The Parties then litigated the Federal Action, including pre-answer motions to dismiss and an initial scheduling conference.[2] Id.

From the outset of the case, the Parties engaged in settlement discussions and, to that end, agreed to participate in a private mediation with Ms. Sperber. *Id.* ¶ 12. Prior to the mediation, the Parties exchanged information and conferred about it at length. . *Id.* ¶ 13. For example, Defendant provided critical information concerning its sales and pricing of its products, and the size of the putative class. *Id.* The Parties also engaged in pre-mediation settlement negotiations and exchanged detailed mediation statements airing their respective legal arguments. *Id.*

On June 9, 2021, the Parties participated in a full-day mediation with Ms. Sperber. *Id.* ¶ 15. At the conclusion of the mediation, the Parties executed a binding term sheet setting out the material terms of the Settlement Agreement. *Id.* Thereafter, Defendant produced confirmatory discovery regarding the size and scope of the putative class, and the Parties ultimately drafted and executed the Settlement Agreement, which is annexed to the Fisher Declaration as Exhibit 1. *Id.* ¶ 17.

On June 11, 2021, Plaintiffs filed this case. Plaintiffs asserted claims for (i) breach of express warranty; (ii) breach of implied warranty; (iii) unjust enrichment; (iv) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, et seq.; (v) violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/2, et seq.; (vi) violation of

[2] The Federal Action has since been voluntarily discontinued.

New York's General Business Law ("GBL") § 349; (vii) violation of New York's GBL § 350; (viii) violation of the New Jersey Consumer Fraud Act, N.J.S.A. §§ 56:8-1, *et seq.*; (ix) fraud; and (x) violation of State Consumer Fraud Acts. *Id*. ¶ 16.

B. The Parties' Reasons For Settling

Plaintiffs and Plaintiffs' counsel have agreed to the Settlement after considering the risks and uncertainties of further litigation. Further considerations supporting Plaintiffs' decision to enter into the proposed Settlement on behalf of the proposed Settlement Class are (i) the favorable settlement terms and class recovery; (ii) the substantial monetary and non-monetary benefits the Settlement confers upon the Settlement Class; and (iii) the deterrence of similar future alleged conduct by Defendant.

TULA asserts that its conduct with respect to the matters complained of was at all respects, and at all times, entirely proper, lawful, and fair. Among other things, TULA claims its products contain probiotic extracts designed for use in skincare and therefore nothing in its advertising, labeling, or product packaging was false or misleading, and that ordinary consumers would not understand "probiotics" to mean live cultures in the context of skincare products like the ones Plaintiff purchased. TULA also maintained that Plaintiffs could not certify any class, among other reasons, because what each class member understood "probiotics" to mean would require individualized inquires, thereby rendering class certification improper. And, in all events, TULA believes that Plaintiffs' claim is novel and presents inherent risks to success for this reason alone. TULA desires, notwithstanding its view that Plaintiffs' claims lack merit, to settle the litigation to avoid further expense, inconvenience, and interference with ongoing business operations, and to dispose of burdensome litigation, and therefore believes settlement is appropriate without any admission of liability.

III. TERMS OF THE PROPOSED SETTLEMENT

The proposed Settlement Class consists of all persons in the United States (including its states, districts or territories) who purchased TULA Products from January 1, 2013, to the present. Settlement Agreement ¶ 1.28. Excluded from the Class are (1) any Judge presiding over this Action and members of their families; (2) the Defendant, Defendant's subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest and their current or former officers, directors, agents, attorneys, and employees; (3) persons who properly execute and file a timely request for exclusion from the class; and (4) the legal representatives, successors, or assigns of any such excluded persons. *Id*.

A. The Monetary Relief To The Settlement Class

Defendant has agreed to pay up to $5,000,000 to cover all claims filed by Class Members as well as the costs of settlement administration, service awards, and attorneys' fees, costs, and expenses. *Id.* ¶ 1.30. Class Members can receive a cash payment of $4.00 per household for purchases during the class period. Settlement Class Members submitting such claims need only attest to the information on the claim form. In the alternative, Settlement Class Members who submit documentation showing proof of purchase for one or more products may submit a claim for a refund of 10% of the amounts they paid for the TULA Products they purchased, subject to a cap of $25.00 per household, or $4.00, whichever is greater. *Id.* ¶ 2.34(a).

B. The Injunctive Relief

The Settlement also provides significant injunctive relief. Defendant has agreed to implement labeling and/or packaging changes to sellable products as follows: (a) for each TULA Product outer carton packaging, Defendant shall state "does not contain live cultures" on the side of such packaging; (b) for TULA Products that do not contain outer carton packaging, such

products shall state "does not contain live cultures" on the back; and (c) for each TULA Product advertised online on TULA's website, each such product page shall state "does not contain live cultures." *Id.* ¶ 2.7

C. Notice And Administration Expenses

The Settlement Fund will be used to pay the costs of sending Notice set forth in the Agreement and any other notice as required by the Court, as well as all costs of administration of the Settlement. *Id.* ¶ 1.30. The Parties anticipate sending direct notice to approximately 35% of the Class.

D. Service Awards

Class Counsel shall submit to the Court an application seeking service awards to Plaintiffs in an amount of not more than $5,000.00 to each as compensation for their efforts in bringing their claims and achieving the benefits of the Settlement on behalf of the Settlement Class. *Id.* ¶ 3.3. Courts routinely approve service awards to compensate named plaintiffs for the services they provide and the risks they incur during the course of class action litigation. *See* 299 F.R.D. 160, NACA Guideline 5 (West 2014) ("Consumers who represent an entire class should be compensated reasonably when their efforts are successful and compensation would not present a conflict of interest."); *see also Cook v. Niedert,* 142 F.3d 1004 (7th Cir. 1998) (value of settlement was $ 14 million; service award to class representative of $25,000). Here, Plaintiffs have spent substantial time on this action, have assisted with the investigation of this action and the drafting of the complaint, have been in contact with counsel frequently, and have stayed informed of the status of the action, including settlement.

E. Attorneys' Fees

Defendant has agreed that the Settlement Fund may also be used to pay Class Counsel reasonable attorneys' fees and to reimburse costs and expenses in this Action, in an amount to be approved by the Court. *Id.* ¶ 3.1. Class Counsel has agreed to petition the Court for attorneys' fees, costs, and expenses of no more than one-third of the Settlement Fund. *Id.* "If a statute or contractual agreement expressly authorizes an award of attorney fees, the court may award fees 'so long as they are reasonable.'" *McNiff v. Mazda Motor of Am., Inc.*, 892 N.E.2d 598, 602 (Ill. 2008) (citing and quoting *Career Concepts, Inc. v. Synergy, Inc.*, 865 N.E.2d 385, 394 (Ill. App. Ct. 2007)). Indeed, where "an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees and expenses, ... the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class, with the agreed-on fee amount constituting the upper limit on the fees that can be awarded to counsel." Manual for Complex Litigation (Fourth) § 21.7 (2004). Thus, the Court should consider the value of the entire benefit conferred by the Settlement – at minimum, $5,000,000 (the value of the relief available to Class Members and attorney's fees, expenses, and costs) – when deciding to grant preliminary approval.

F. Release And Final Judgment

Upon the entry of a final order approving the Settlement and following the expiration of the time for appeal or the entry of a decision on such appeal, then (i) Plaintiffs and each and every member of the Settlement Class who has not timely filed a request to be excluded from the Settlement Class will release and forever discharge the Released Parties as further explained in the Settlement Agreement, and (ii) the Court will be asked to enter final judgment in favor of

Defendant, dismissing with prejudice all claims asserted in, or that could have been asserted in, this action.

IV. THE SETTLEMENT AGREEMENT IS WITHIN THE RANGE OF POSSIBLE APPROVAL

The settlement of class action litigation serves the public interest. *See Langendorf v. Irving Trust Co.*, 224 Ill. App. 3d 70, 78 (1992), *abrogated on other grounds, Brundidge v. Glendale Fed. Bank, F.S.B.*, 168 Ill. 2d 235, 659 N.E.2d 909 (1995). Courts have wide discretion in deciding whether to approve a settlement as "fair, reasonable, and adequate." *People ex rel. Wilcox v. Equity Funding Life Ins. Co*., 61 Ill.2d 303, 317 (1985). "Since the result is a compromise, the court in approving it should not judge the legal and factual questions by the same criteria applied in a trial on the merits. Nor should the court turn the settlement approval hearing into a trial. To do so would defeat the purposes of a compromise such as avoiding a determination of sharply contested issues and dispensing with expensive and wasteful litigation." *GMAC Mortg. Corp. of Pa. v. Stapleton*, 603 N.E.2d 767, 773 (1992). In making a reasonableness determination, courts typically consider the following factors: "(1) the strength of the case for plaintiffs on the merits, balanced against the money or other relief offered in settlement; (2) the defendant's ability to pay; (3) the complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of proceedings and the amount of discovery completed." *Id.* For each of the reasons described below, settlement is appropriate here.

A. Strength Of The Case On The Merits

Although Plaintiffs and Class Counsel feel that their claims would succeed on the merits, "a class that is suitable for settlement purposes might not be suitable for litigation purposes

because the settlement might eliminate all of the contested issues that the court would have to resolve if the case went to trial." *Lebanon Chiropractic Clinic, P.C. v. Liberty Mut. Ins. Co.,* 2016 Ill. App. 5th 150111 (Ill. App. Ct. 2016), ¶ 35. Here, Class Counsel engaged in arms-length negotiations with Defendant's counsel before, during and after mediation; and Class Counsel was thoroughly familiar with the applicable facts, legal theories, and defenses on both sides. Although Plaintiffs and Class Counsel have confidence in their claims, a favorable outcome was not assured. They also recognize that they would face risks at class certification, summary judgment, and trial. Defendant vigorously denies Plaintiffs' allegations and asserts that neither Plaintiffs nor the Class suffered any harm or damages. In addition, Defendant would no doubt present a vigorous defense at trial, and there is no assurance that the Class would prevail – or even if they did, that they would not be able to obtain an award of damages significantly more than achieved here absent such risks. The Settlement also abrogates the risks that might prevent them from obtaining any relief. These factors, "balanced against the money or other relief offered in settlement" show that the benefits recovered for the Class Members are substantial. *See GMAC Mortg. Corp. of Pa.*, 603 N.E.2d at 774.

B. A Class-Wide Judgment Would Be Devastating To Defendant

The second factor considers Defendant's ability to satisfy a judgment at trial. *See City of Chicago*, 206 Ill. App. 3d at 972. Although Defendant operates a profitable business, very few businesses could satisfy a judgment for tens of millions of dollars — which, in Plaintiffs' view, is the amount potentially at stake on a class-wide basis at trial in this case. Accordingly, the second factor weighs in favor of granting preliminary approval.

C. The Complexity Of This Litigation

The third factor asks whether the settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation. *City of Chicago v. Korshak*, 206 Ill. App.3d 968, 972 (1st Dist. 1990); *see also Nat'l Rural Telecomm's Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("The Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.").

This would be lengthy and very expensive litigation if it were to continue, involving extensive motion practice, including, *inter alia*, a motion for class certification (and possibly a motion for decertification), motions for summary judgment, and various pretrial motions, as well as the retention of experts, preparation of expert reports, and conducting expert depositions. See *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("[C]lass action suits have a well-deserved reputation as being most complex."). The case would probably not go to trial for over a year. And even if Settlement Class Members recovered a judgment at trial greater than the up to $5 million in cash that Defendant has agreed to make available under the Settlement, post-trial motions and the appellate process would deprive them of any recovery for years, and possibly forever in the event of a reversal.

Rather than embarking on years of protracted and uncertain litigation, Plaintiffs and their counsel negotiated a Settlement that provides immediate, certain, and meaningful relief to all Settlement Class members. *See DIRECTV, Inc.*, 221 F.R.D. at 526. Accordingly, the third factor weighs in favor of finding the Settlement fair, reasonable and adequate. *See City of Chicago*, 206Ill. App. 3d at 972; *see also Borcea v. Carnival Corp.*, 238 F.R.D. 664, 674 (S.D. Fla. 2006)

(noting "[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush").

D. The Positive Reaction To The Settlement

For the fourth and sixth factors, Plaintiffs have already had an opportunity to evaluate and provisionally approve of the Settlement's Benefits and the terms of the Settlement Agreement. The Settlement Agreement also provides a robust notice program that comports "with the requirements of 735 ILCS 5/2-803 and due process under the Illinois and United States Constitutions, constitute[s] the best practicable notice under the circumstances, and provide[s] due and sufficient notice to all persons entitled to notice of settlement of this lawsuit." *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co*., 2016 Ill. App. 2d 150236 (Ill. App. Ct. 2016), ¶ 37, 52. Plaintiffs expect little to no opposition to the Settlement by any Settlement Class Member in the future.

E. The Lack Of Collusion In The Settlement Process

For the fifth factor, the Settlement Agreement resulted from extensive arm's-length negotiations by experienced class action attorneys, and there has been no collusion in the settlement process. On June 9, 2021, the Parties participated in a full-day mediation with Jill Sperber, Esq. of Judicate West, an experienced and well-respected class action mediator. At the conclusion of the mediation session, the Parties executed a binding term sheet setting out the material terms of this Agreement.

F. Counsels' Opinions Favor Preliminary Approval

For the seventh factor, by the time the Parties reached agreement on the terms of the Settlement Agreement, counsel for the Parties had conducted an independent investigation, analyzed discovery, and developed detailed theories of the case. Further, the Settlement was

negotiated by counsel with extensive experience in consumer class action litigation. *See* Fisher Decl., ¶¶ 7-8; *id.* Ex. 2 (firm resume of Bursor & Fisher); *id*. Ex. 3 (firm resume of Barbat, Mansour, Suciu & Tomina PLLC). Accordingly, the Parties' counsel were extremely knowledgeable about the factual and legal issues in the case and able to assess the merits of the proposed settlement. Plaintiffs' counsel and Defendant's counsel each independently concluded that the terms of the Settlement were fair, reasonable, and adequate. Such considerations have been found to weigh heavily in favor of settlement. *See GMAC Mortg*. *Corp*. *of Pa*., 603 N.E.2d at 774 (disagreeing with objectors that the opinion of counsel should be given little weight).

Plaintiffs are also aware of the general risks faced by consumers in class actions, and that consumer class actions often settle for substantially less than the damages alleged due to the difficulties in proving damages and certifying any class. *See, e.g.*, *In re Whirlpool Corp. Frontloading Washer Prods. Liab. Litig.*, 2016 WL 5338012, at *15 (N.D. Ohio Sept. 23, 2016) (approving settlement providing each class member with cash refunds of 17.9%-20.9% of alleged damages as fair and reasonable); *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 246 (E.D. Pa. 2011) (invoking difficulty in proving damages as justification for approval of settlement that amounted to a range of recovery of 2%-20% of claimed damages); *cf. Weiner v. Snapple Beverage Corp.*, 2010 WL 3119452, at *5–10 (S.D.N.Y. Aug. 5, 2010) (denying class certification "[b]ecause individualized inquiries as to causation, injury, and damages" and reliance would predominate); *Kitzes v. Home Depot, U.S.A., Inc.*, 872 N.E.2d 53, 61 (Ill. Ct. App. 2007) (affirming denial of certification because differences in consumers' knowledge defeated predominance).

In light of the substantial difficulties that Plaintiffs would face in certifying any class, the benefits provided to members of the Settlement Class here are generous and provide a significant recovery.

G. The Procedural Posture Of This Litigation

The eighth and final factor considers the stage of the proceedings and the amount of discovery that has been completed at the time the settlement is reached. *City of Chicago*, 206 Ill. App. 3d at 972; *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).

Prior to commencing this litigation, Plaintiffs' counsel conducted a wide-ranging investigation into every aspect of the case, including retaining a consulting expert to assist with their investigation. *See* Fisher Decl. ¶ 9. The Parties collectively prepared multiple complaints and comprehensive pre-mediation briefs, among numerous other materials. *See id*. ¶¶ 11, 12, 17. The Parties engaged in informal discovery over the course of several months prior to entering into the proposed Settlement Agreement. *See id.* ¶ 13, 17. Armed with this information, Plaintiffs and their counsel had "a clear view of the strengths and weaknesses" of the case, *see In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), aff'd 798 F.2d 35 (2d Cir. 1986), and were in a strong position to negotiate a fair, reasonable, and adequate settlement on behalf of the Settlement Class, at mediation and beyond. *See* Fisher Decl. ¶ 14. Settlement negotiations were also hard fought. The parties engaged in multiple rounds of negotiation prior to mediation. Fisher Decl. ¶ 12. The parties then engaged in over ten hours of contentious, arm's-length negotiations before Jill Sperber via remote mediation. Fisher Decl. ¶ 15.

Negotiations over the remaining terms continued for days, and the final Settlement Agreement was not executed until Class Counsel had obtained further discovery to confirm, *inter*

alia, the size and scope of the Settlement Class. Fisher Decl. ¶ 17. Where, as here, a proposed settlement is the product of arm's-length negotiations between experienced counsel after significant discovery has occurred, the Court may presume the settlement to be fair, adequate, and reasonable. *See Rodriguez v. W. Publishing*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."); Newberg § 11.41 (proposed class settlement may be presumed fair if it "is the product of arm's length negotiations, sufficient discovery has been taken to allow the parties and the court to act intelligently, and counsel involved are competent and experienced.").

Accordingly, the eighth and final factor weighs in favor of finding the Settlement fair, reasonable and adequate, warranting its preliminary approval.

V. THE PROPOSED CLASS NOTICE SHOULD BE APPROVED

Under 735 ILCS 5/2-803, the Court may provide class members notice of any proposed settlement so as to protect the interests of the class and the parties. *See Cavoto v. Chicago Nat. League Ball Club, Inc.*, 2006 WL 2291181, at *15 (Ill. App. 1st Dist. 2006) (collecting authorities and noting that "section 2-803 makes it clear that the statutory requirement of notice is not mandatory"). Notice must be provided to absent class members to the extent necessary to satisfy requirements of due process. *Id*. at *15 (citing *Frank v. Teachers Ins. & Annuity Assoc. of America*, 71 Ill. 2d 583, 593 (1978)); *see also* Fed. R. Civ. P. 23(d)(2) (advisory committee note) ("mandatory notice…is designed to fulfill requirements of due process to which the class action procedure is of course subject"). As explained by the United States Supreme Court, due process requires that the notice be the "best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'" as well as "'describe the action and the plaintiffs' rights

in it.'" *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 36 (citing *Phillips Petroleum Co. v. Shuts*, 472 U.S. 797, 812 (1985)).

The proposed Notice in this case satisfies both the requirements of 735 ILCS 5/2-803 and due process. As set forth in detail above, the Settlement Agreement contemplates a notice plan that provides email or traditional mail notice, which is designed to reach directly as many potential individuals in the Settlement Class as possible. Settlement Agreement ¶ 4. The direct notice process should be very effective at reaching the Class Members given the relationship between Defendant and the Class Members (a significant percentage of whom purchased TULA Products directly from TULA unlike in many consumer class actions, *see* Fisher Decl. ¶13). In addition, the proposed Notice includes an online publication component, which will direct internet banner advertisements and/or social media advertisements at Class Members, and link them to the Settlement Website where they will have the ability to file claims and review important documents. *Id.* The proposed Notice and Claim Form are attached to the Settlement Agreement as Exhibits A-D, and should be approved by the Court. The proposed methods of notice comport with 735 ILCS 5/2-803 and the requirements of due process.

VI. THE COURT SHOULD PROVISIONALLY CERTIFY THE CLASS, AND ENTER THE PRELIMINARY APPROVAL ORDER

The Parties stipulate to and request the certification of the Settlement Class as defined in the Settlement Agreement, for settlement purposes only, pursuant to ILCS 735 5/2-801. "Among current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618 (1997)). *Amchem* specifically approved of the use of a temporary settlement class to facilitate settlement. *Id*.

Section 2–801 of the Illinois Code of Civil Procedure, which is patterned after Rule 23 of the Federal Rules of Civil Procedure, sets forth the prerequisites needed to maintain a class

action. *Uesco Indus., Inc. v. Poolman of Wisconsin, Inc.,* 993 N.E.2d 97, 108 (Ill. App. Ct. 2013) (citing 735 ILCS 5/2–801 (West 2008)). "Given the relationship between these two provisions, federal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois." *Id*. Under section 2–801, a class may be certified only if the following four requirements are established: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interests of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy." *Id*. "To determine whether the proposed class should be certified, the court accepts the allegations of the complaint as true." *Clark v. TAP Pharmaceutical Prods., Inc.*, 343 Ill.App.3d 538, 544–45, 278 Ill. Dec. 276, 798 N.E.2d 123 (2003). "The trial court has broad discretion to determine whether a proposed class satisfies the requirements for class certification and should err in favor of maintaining class [certifications]." *Id*.

A. The Settlement Class Is So Numerous That Joinder Of All Members Is Impracticable

Plaintiffs maintain that the Settlement Class satisfies the numerosity requirement because there are hundreds of thousands, if not millions, of Settlement Class Members. *See Cruz v. Unilock Chicago*, 383 Ill. App. 3d 752, 767–68, 892 N.E.2d 78, 94 (2008) (finding 80 or 90 class members supports a finding of numerosity). Where there are a number of potential claimants, and the individual amount claimed by each is small, making redress on an individual level difficult, if not impossible, Illinois courts have been particularly receptive to proceeding on a class action basis. *Phillips v. Ford Motor Co.*, No. 99-L-1041, 2003 WL 23353492, at *2 (Ill. Cir. Ct. Sept. 15, 2003).

B. There Are Questions Of Fact And Law Common To The Settlement Class, And Common Questions Predominate Over Any Questions Affecting Only Individual Members

To satisfy the second requirement of section 2–801, namely that a common question of fact or law predominates over other questions affecting only individual class members, it must be shown that successful adjudication of the purported class representative's individual claims will establish a right of recovery in other class members. *Ramirez v. Midway Moving & Storage, Inc.*, 378 Ill. App. 3d 51, 54–55 (2007). As long as there are questions of fact or law common to the Settlement Class and these predominate over questions affecting only individual members of such class, the statutory requisite is met. *Id*. (citing *Slimack v. Country Life Ins. Co.*, 227 Ill.App.3d 287, 292 (1992)). Determining whether issues common to the Settlement Class predominate over individual issues requires the Court to identify the substantive issues that will control the outcome, assess which issues will predominate, and then determine whether these issues are common to the class. *Id*.

Certification requires only that there be either a predominating common issue of law or fact, not both. *Martin v. Heinold Commodities, Inc.*, 117 Ill.2d 67, 81 (1994). "A class action can properly be prosecuted where a defendant is alleged to have acted wrongfully in the same basic manner as to the entire class." *Phillips v. Ford Motor Co.,* 2003 WL 23353492, at *2 (Ill. Cir. Ct. Sept. 15, 2003). A common question may be shown when class members are aggrieved by the same or similar conduct. *Id*.

Plaintiffs maintain that the common and predominate issues with respect to this Settlement Class, for settlement purposes only, are (a) whether Defendant made false and/or misleading statements to the consuming public concerning the probiotic content of TULA Products; (b) whether Defendant omitted material information to the consuming public concerning the probiotic content of TULA Products; (c) whether Defendant's labeling and

packaging for the TULA Products is misleading and/or deceptive; (d) whether Defendant's representations and omissions concerning the TULA Products were likely to deceive a reasonable consumer; (g) whether Defendant represented to consumers that TULA Products have characteristics, benefits, or qualities that they do not have; (h) whether Defendant advertised the TULA Products with the intent to sell them not as advertised; (i) whether Defendant falsely advertised TULA Products; (e) whether Defendant made and breached express and/or implied warranties to Plaintiffs and Class and Subclass Members about TULA Products that caused Plaintiffs damages; and (f) whether Plaintiffs and Class and Subclass Members are entitled to damages. These common questions, which target the allegations against Defendant in the Complaint, satisfy section 2–801.

C. The Class Representatives Will Fairly And Adequately Protect The Interests Of The Settlement Class

The purpose of the adequate representation requirement is to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim. *Walczak v. Onyx Acceptance Corp.*, 365 Ill.App.3d 664, 678 (2006). The test to determine the adequacy of representation is whether the interests of those who are parties are the same as the interests of those who are not joined. Plaintiffs' claim that their interests are the same as the Settlement Class members because each were allegedly harmed in the same way, and each has the same interest in recovering for Defendant's alleged false advertising.

D. A Class Action Is The Appropriate Method For The Fair And Efficient Adjudication Of The Controversy

The fourth requirement for class certification is that a class action is an appropriate method for fairly and efficiently adjudicating the controversy. *Ramirez v. Midway Moving & Storage, Inc.*, 378 Ill. App. 3d 51, 56 (2007). In deciding whether the fourth requirement is met,

a court considers whether a class action can best secure economies of time, effort, and expense or accomplish the other ends of equity and justice that class actions seek to obtain. *Id*. For this Settlement Class, this class action can best secure economies of time, effort, and expense or accomplish the other ends of equity and justice that class actions seek to obtain, because no individual Settlement Class member would have the resources to pursue his claims absent the class mechanism, considering the amount in controversy for each claimant. *See Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757 (7th Cir. 2014); *see also Phillips v. Ford Motor Co.*, 2003 WL 23353492, at *9 (Ill. Cir. Ct. Sept. 15, 2003) ("The evidence presented to the Court supports the conclusion that, not only is a class action an appropriate method for the fair adjudication of the disputes between Ford and the Classes, but also that it may be the only means by which these disputes may be efficiently resolved.").

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully asks that the Court grant preliminary approval of the proposed Settlement Agreement, and enter the proposed order separately submitted herewith, and grant such further relief the Court deems reasonable and just.

Dated: July 15, 2021

Respectfully submitted,

By: */s/ L. Timothy Fisher*
L. Timothy Fisher

BURSOR & FISHER, P.A.
L. Timothy Fisher* (DuPage Attorney ID: 362363)
Brittany S. Scott**
1990 North California Blvd.,
Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
Email: ltfisher@bursor.com
bscott@bursor.com

BURSOR & FISHER, P.A.
Philip L. Fraietta**
888 Seventh Avenue
New York, NY 10019
Tel: (646) 837-7150
Fax: (212) 989-9163
Email: pfraietta@bursor.com

BARBAT MANSOUR SUCIU & TOMINA PLLC
Nick Suciu III* (DuPage Attorney ID: 6338108)
6905 Telegraph Rd., Suite 115
Bloomfield Hills, MI 48301
Telephone: (313) 303-3472
Email: nicksuciu@bmslawyer.com

Attorneys for Plaintiffs and the Putative Class

NICK LARRY LAW LLC
J. Dominick Larry (DuPage Attorney ID: 361759)
8 S. Michigan Ave., Suite 2600
Chicago, IL 60603
Tel: (773) 694-4669
Fax: (773) 694-4691
Email: nick@nicklarry.law

Local Counsel for Plaintiffs and the Putative Class

** Pro Hac Vice*
*** Pro Hac Vice Application Forthcoming*