

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No.: 12-21678-CIV-LENARD/GOODMAN

LAURA EGGNATZ and KATRINA GARCIA,  
individually, and on behalf of all others similarly situated,

*Plaintiffs,*

vs.

KASHI COMPANY, a California  
Corporation,

*Defendants.*

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**MOTION AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF  
CLASS ACTION SETTLEMENT**

PLEASE TAKE NOTICE that on January 27, 2016, at 2:30 p.m., or on such date as may be specified by the Court, in the courtroom of the Honorable Joan A. Lenard, United States District Court for the Southern District of Florida, 400 North Miami Avenue, Miami, Florida 33128, Plaintiffs Katrina Garcia and Laura Eggnatz (“Plaintiffs”), on behalf of themselves and the class, will and hereby do move for an entry of an Order granting final approval of the class action settlement agreement.

This motion will be heard concurrent with Plaintiffs’ Motion for Attorneys’ Fees and Expenses, both of which are separately briefed.

This motion is based on this notice; the accompanying Memorandum of Points and Authorities; Class Counsel’s Joint Declaration in Support of Plaintiffs’ Motions for Final Approval, Attorneys’ Fees and Costs (filed concurrently herewith); the Settlement Agreement (ECF 179-1); the complete files and records in this action; and on such further oral and documentary evidence which may be submitted, and any further evidence as the Court may receive.

Dated: December 14, 2015

Respectfully submitted,

/s/ Gillian L. Wade

MILSTEIN ADELMAN, LLP

Mark A. Milstein, Esq. (Admitted *pro hac vice*)

California Bar No. 155513

[mmilstein@milsteinadelman.com](mailto:mmilstein@milsteinadelman.com)

Gillian L. Wade, Esq. (Admitted *pro hac vice*)

[gwade@milsteinadelman.com](mailto:gwade@milsteinadelman.com)

California Bar No. 229124

Sara D. Avila Esq. (Admitted *pro hac vice*)

California Bar No. 263213

[savila@milsteinadelman.com](mailto:savila@milsteinadelman.com)

10250 Constellation Boulevard., Suite 1400

Los Angeles, CA 90067

Tel.: (310) 396-9600

Fax: (310) 396-9635

LAW OFFICE OF L. DEWAYNE LAYFIELD

L. De-Wayne Layfield, Esq. (Admitted *pro hac vice*)

Texas Bar No.: 12065710

[dewayne@layfieldlaw.com](mailto:dewayne@layfieldlaw.com)

P.O. Box 3829

Beaumont, TX 77704-3829

Tel.: (409) 832-1891

Fax: (866) 280-3004

THE LAW OFFICES OF HOWARD W.  
RUBINSTEIN, P.A.

Michael T. Fraser

Florida Bar No. 87411

[mfraser@hwrlawoffice.com](mailto:mfraser@hwrlawoffice.com)

One Embarcadero Center, Suite 500

San Francisco, CA 94111

Tel.: (800) 436-6437

Fax: (415) 692-6607

THE CHAFFIN LAW FIRM

Angela Arango-Chaffin, Esq.

Florida Bar No. 87919

[angela@chaffinlawfirm.com](mailto:angela@chaffinlawfirm.com)

1455 Ocean Drive, Suite 811

Miami Beach, FL 33139

Tel.: (713) 818-2515

Fax: (713) 952-5972

THE CHAFFIN LAW FIRM

Robert A. Chaffin, Esq. (Admitted *pro hac vice*)

Texas Bar No. 04057500

[robert@chaffinlawfirm.com](mailto:robert@chaffinlawfirm.com)

4265 San Felipe, No. 1020

Houston, TX 77027

Tel.: (713) 5281000

Fax: (713) 952-5972

*Counsel for Plaintiffs and the Settlement Class*

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## **I. Introduction**

On September 4, 2015, the Court granted preliminary approval<sup>1</sup> of the Stipulation of Settlement (“Agreement”) between Plaintiffs Katrina Garcia and Laura Eggnatz (“Plaintiffs” or “Class Representatives”) and Kashi Company (“Defendant” or “Kashi”). The Settlement Class consists of a national class of persons (excluding California residents) who purchased a Kashi product labeled “All Natural” or “Nothing Artificial” between May 3, 2008 and September 4, 2015.

Pursuant to the Preliminary Approval Order, Notice to the Class commenced on October 15, 2015, and the deadline to request exclusion or object<sup>2</sup> is December 28, 2015. The deadline to make a claim is January 19, 2016. The Class’ reaction overwhelmingly supports this Settlement. To date, a total of 96,214 Class Members have made claims totaling approximately \$955,750. No Class Members have objected or requested exclusion from the Settlement.

The proposed Settlement, reached after years of litigation and three mediation sessions, obliges Defendant to pay \$3.99 million in cash to the Settlement Class. The proceeds of the Settlement, less the costs of settlement administration, attorneys’ fees, expenses and Service Awards,<sup>3</sup> will be distributed to claiming Settlement Class Members. The specific amount of cash eligible claimants will receive depends on the quantity of products purchased, whether they submit receipts and the total amount of valid claims received. Kashi has also agreed to remove the ‘All Natural’ claims from Products containing the Challenged Ingredients and to be subjected to three

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<sup>1</sup> The Order Preliminarily Approving Class Action Settlement, Conditionally Certifying Settlement Class, Providing for Notice and Scheduling Order is docketed at ECF 183(the “Order” or “Preliminary Approval Order”) and 184 (correcting scrivener’s error).

<sup>2</sup> Plaintiffs will respond to objections (if any) on or before January 13, 2015.

<sup>3</sup> Class Counsel seeks \$1.5 million in fees and \$168,204 in costs incurred and Service Awards of \$5,000 for each Class Representative. These requests will be addressed in separate briefs.

years of supervised compliance with a Non-GMO Verification program for certain Products. The Class Action Settlement Administrator, Digital Settlement Group (“DSG” or “the “Settlement Administrator”) administered class notice, is processing claims on an ongoing basis, and estimates the cost of Notice and settlement administration will total approximately \$300,000.

This Settlement is a tremendous result for the Class. Given the significant time and risk involved with continuing litigation, particularly with the uncertainties of securing class certification, proving liability and damages, a settlement that reimburses claiming Settlement Class Members up to \$27.50 without receipts and no limit for claimants with receipts is more than fair and reasonable. Moreover, the amount to be paid to claiming Class Members will be at least \$2 million, as required by the Settlement. Thus, in the face of serious litigation obstacles and legal risks, Settlement Class Members will receive immediate and substantial relief.

The Settlement was reached only after extensive arm’s-length negotiations that included three mediation sessions conducted by a professional mediator working with experienced counsel who were intimately familiar with the facts. The process required counsel to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. At the time the Settlement was reached, Plaintiffs’ Motion for Class Certification and Kashi’s Motion for Summary Judgment were both fully briefed, and Class Members faced the prospect of having judgment entered in Kashi’s favor. Even if Plaintiffs prevailed on one or both of these issues, Defendant would have certainly appealed, further delaying the Litigation. With the benefit of full merits and expert discovery and preliminary trial preparation, Plaintiffs and Class Counsel concluded that the benefits of this Settlement outweigh the risks attendant to continuing to fight over class certification and the merits of Plaintiffs’ claims. The Settlement satisfies all the criteria

for fairness and adequacy and achieves the objectives of Plaintiffs' case—cash payments to the Class to reimburse them for their Kashi purchases and a change in Defendant's conduct. Accordingly, Plaintiffs respectfully request that the Court enter the Final Order and Judgment submitted herewith.

## **II. Factual Background**

### **A. The Litigation**

On May 3, 2012, Plaintiffs Katrina Garcia and Laura Eggnatz filed a class action complaint against Kashi and its parent company, Kellogg Company (“Kellogg”), in this District seeking monetary damages, declaratory relief and injunctive relief. [ECF 1]. Plaintiffs allege the marketing and labeling of certain Kashi food products as “All Natural” and containing “Nothing Artificial” was false and deceptive because the products were made with GMO ingredients. *Id.* Defendants filed a Motion to Dismiss on July 7, 2012, which was fully briefed as of August 6, 2012. [ECF 7, 13]. While the Motion was pending, on January 11, 2013 this action was consolidated with Julie Martin's<sup>4</sup> case (originally filed in the Northern District of California, alleging the same ‘All Natural’ claims under California's consumer protection statutes). [ECF 30]. Plaintiffs filed an Amended Consolidated Class Action Complaint on February 1, 2013, and Kashi filed another Motion to Dismiss on March 1, 2013 [ECF 37], which was fully briefed as of April 19, 2013. [ECF 45].

On October 18, 2013, Plaintiffs filed a Second Amended Consolidated Class Action Complaint (the “SAC”) to add allegations regarding allegedly synthetic ingredients also

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<sup>4</sup> Ms. Martin dismissed her claims [ECF 177] and is excluded from the proposed Class because a settlement on behalf of California residents was reached in *Astiana v. Kashi Co.*, No. 3:11-cv-01967-H-BGS (S.D. Cal.). 2015.

contained in the Products. [ECF 58]. Kashi moved to dismiss for the third time on December 2, 2013 [ECF 71], and briefing on the motion was complete January 6, 2014. [See ECF 84].

On September 5, 2014, the Court entered an Order granting in part and denying in part Kashi's request to dismiss Plaintiffs' SAC. [ECF 99]. The Court held Plaintiffs' claims were not preempted by federal law, and that the primary jurisdiction doctrine did not require referral of claims to the Food and Drug Administration (FDA). *Id.* at 16. The Court also rejected Kashi's efforts to dismiss Plaintiffs' claims for FDUTPA violations, negligent misrepresentation, breach of express warranty and money had and received. *Id.* at 32-48. The Court did, however, dismiss Kellogg as a party defendant, as well as Plaintiffs' claims for breach of implied warranty and declaratory judgment, and limited Plaintiffs' claims to the eight Kashi products Plaintiffs actually purchased by the Class Representatives. *Id.* at 1392-94.

On January 16, 2015, following completion of full merits and expert discovery, Plaintiffs filed a motion for class certification [ECF 118] and Kashi filed a motion for summary judgment. [ECF 142]. Both motions were fully briefed as of March 2, 2015. [ECF 163, 166]. Trial was set to commence June 1, 2015. [ECF 100].

## **B. Settlement Negotiations**

On December 12, 2012, the Parties engaged in preliminary settlement discussions via private mediation with the Honorable Judge J. Richard Haden (Ret.). Agreement § I(K). The Parties did not reach an agreement. Declaration of Gillian L. Wade ISO Unopposed Motion for Final Approval of Class Action Settlement ("Wade Decl.") ¶ 7. On January 9, 2014, the Court referred the Parties back to mediation [ECF 97], which occurred on June 4, 2014 before Judge Haden. *Id.* at ¶ 8. In advance of the negotiations, Kashi provided Plaintiffs with certain

documents regarding the Products, the Challenged Ingredients and the Products' national sales during the class period (May 8, 2008 to present). *Id.* The Parties did not reach an agreement at the second mediation. *Id.*

After the close of fact and expert discovery, fully briefing the class certification motion and Kashi's Motion for Summary Judgment, and following an in-person settlement meeting in Chicago with Defendant's lead counsel, the parties attended another full day of formal mediation before Judge Haden on March 24, 2015. [ECF 160, 163, 166]. *Id.* at ¶ 9. At the final mediation, the Parties had the benefit of fact and expert discovery, including expert reports and depositions, document production, Class Representative and Rule 30(b)(6) depositions. *Id.* With the assistance of Judge Haden, the Parties reached an agreement to resolve this Litigation on a national class basis (except California, in light of the *Astiana* settlement). *Id.* At all times throughout the mediation proceedings and settlement discussions, the negotiations were adversarial, non-collusive and at arm's length. *Id.* at ¶ 10.

On April 6, 2015, the Parties informed the Court that they had reached a settlement of this class action. [ECF 170]. The Parties executed a Settlement Agreement on June 5, 2015 memorializing the agreement reached at mediation [ECF179-1]. Wade Decl. ¶¶ 11-12.

The Court granted Preliminary Approval of the Settlement on September 4, 2015. [ECF 183]. In its Order, the Court preliminarily certified the Settlement Class and ordered the dissemination of Settlement Class Notice in accordance with the terms of the Settlement. *Id.*

### **III. Summary of the Settlement Terms**

The following is a summary of the Agreement's material terms.

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**A. The Class**

For the purpose of implementing the terms of the Agreement, the Court conditionally certified a national Settlement Class of consumers who purchased any of the Products between May 3, 2008 and September 4, 2015. ECF 183; Agreement § II(A)(5).<sup>5</sup> Excluded from the Class are: (a) employees, officers and directors of Kellogg and Kashi; (b) persons or entities who purchased the Products for the purpose of re-sale; (c) retailers or re-sellers of the Products; (d) governmental entities; (e) persons who timely and properly exclude themselves from the Settlement; (f) the Court, the Court's immediate family and Court staff; and (g) California residents. *Id.* The Products are those Kashi products labeled "All Natural," "100% Natural" and/or "Nothing Artificial," including those in Exhibit H to the Agreement. *Id.* at § II(A)(22).

**B. Monetary Relief for the Settlement Class**

Under the Settlement, Kashi has agreed to provide significant monetary compensation to the Class—a \$3.99 million cash payment. Agreement § IV(A)(2). The proceeds of the Settlement, less the costs of settlement administration, attorneys' fees, expenses and Service Awards, will be distributed to claiming Settlement Class Members. *Id.*

Class Members who make valid claims accompanied by written proof of purchase (i.e. receipts) will be fully reimbursed the amount they paid to purchase the Products, with no limit on the number of such units for which they can be reimbursed. Agreement § IV(A)(1)(a). For Class Members who do not submit a proof of purchase with their claims, Kashi will reimburse \$0.55 (fifty-five cents) per package for every Product purchased during the Class Period, with a maximum recovery of fifty (50) boxes, for a total recovery of \$27.50. *Id.* at § IV(A)(1)(b). The

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<sup>5</sup> Plaintiffs' SAC alleged a nearly identical class definition. [ECF 58 at ¶ 60]. Plaintiff later sought to certify a Florida class only (ECF 118).

total amount of money available to pay claims will be at least \$2 million. *Id.* at § IV(A)(1)(a). Claimants' reimbursements may be increased or decreased *pro rata* (on a per-product basis) depending on the amount of eligible claims. *Id.* at § IV(A)(3).

**C. Non-Monetary and Prospective Relief**

Kashi agreed to remove the "All Natural," "100% Natural," and "Nothing Artificial" labels on Products containing any of the Challenged Ingredients, unless such ingredient is approved or determined as acceptable by a federal agency or controlling regulatory body to be designated as "natural."<sup>6</sup> *Id.* at IV(C)(1).

Kashi will also provide Plaintiffs' Counsel with compliance information regarding "Non-GMO Project Verified" and "GMO free" label designations on certain Kashi Products. Agreement at § IV(C)(2). This compliance information will be provided on a bi-annual basis for three years. *Id.* Specifically, Kashi will provide Class Counsel with a list of Products that are being manufactured without GMO ingredients, and the following for Products with "Non-GMO Project Verified" and "GMO free" label designations: (i) documents identifying its third party technical administrator for the Non-GMO Project Verification; (ii) copies of all licensing agreements for the Products between Kashi and the Non-GMO Project Verified; (iii) copies of all documents provided for evaluation purposes to Kashi's third party administrator for the Non-GMO Verified Project; (iv) copies of all press releases regarding the Products' Non-GMO Project Verification; and (v) copies of all Product label modifications that are introduced into the stream of commerce. *Id.*

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<sup>6</sup> Kashi also agreed to remove the 'All Natural' claims from the Products' packaging in *Astiana*. Although the Settlement reached in *Astiana* applies only to California residents, the Settlement there does not mention removing the 'natural claims' from packaging distributed nationally.

**D. Class Release**

In exchange for the benefits conferred by the Settlement, all Class Members who do not opt out will be deemed to have released Kashi and Kellogg from claims arising out of or relating to the packaging, marketing, distribution or sale by Kashi of the Products which have been or could have been asserted in the SAC or in any previous complaints. Personal injury claims will not be released. The detailed release language can be found in Sections II(A)(23)-(24) and VII of the Agreement.

**E. Class Notice**

The Parties selected and the Court approved Digital Settlement Group, LLC (“DSG”) as the notice and Settlement Administrator for this Settlement. Agreement §§ II(A)(6), V(C); ECF 183. The Notice Program is comprised of three parts: (1) print publication notice; (2) digital publication notice; and, (3) long form notice with expanded detail, which will be available on the Settlement Website and via e-mail and mail upon request. *Id.* All forms of Notice to the Class will include, among other information: a description of the Settlement; dates by which Class Members may make a claim, exclude themselves from the Settlement Class, or object to the Settlement; the address of the Settlement Website; and, the toll-free telephone line. *See* Appendices A, B and C to the Schey Declaration. The Notice and Media Plan constitute sufficient notice to all persons entitled to notice, and satisfy all applicable requirements of law, including Rule 23 and the constitutional requirements of due process. The cost of Class Notice and Settlement Administration, estimated to be approximately \$300,000, will be paid from the Settlement payment by Kashi. *Id.* at § IV(A)(7)(a).

Requests for exclusion and Claim Forms must be sent to the Claims Administrator and



postmarked or uploaded before their respective deadlines. *Id.* at § VI(B)(1). Objections must be filed with the Court with copies of the objection<sup>7</sup> sent to lead Class Counsel and Defendant's Counsel by the objection deadline. *Id.* at § VI(C)(3). The deadline for both objections and requests for exclusion is December 28, 2015. *Id.* at §§ V(A)(2)(a), V(C)(1).

### **1. The Publication Notice Program**

The Published Notice Program is comprised of (1) a one-time print publishing of the summary notice in the December 2015 issues of *Food Network Magazine* and *Prevention*; and (2) thirty days of targeted website and portal banner advertisements with embedded links to the Settlement Website on Google, Yahoo and their partner sites. Declaration of Mark Schey Regarding Class Notice and Administration. ("Schey Decl.") at ¶¶ 9-12.

### **2. The Settlement Website and the Toll-Free Settlement Phone Line**

The Administrator established the Settlement Website ([www.allnaturalsettlement.com](http://www.allnaturalsettlement.com)) as an additional means for Settlement Class Members to obtain notice of, and information about, the Settlement. Agreement § II(A)(30). The Settlement Website was activated on September 10, 2015. Schey Decl. ¶ 12. The Settlement Website includes information about the Litigation and the Settlement (*e.g.* the SAC, the Agreement, the Preliminary Approval Order, long-form Notice) in electronic and printable form. *Id.* at ¶14. The Claim Form (attached as Appendix E to Schey Decl.), which can be submitted online or printed and mailed, is also available on the Settlement Website. *Id.* The long-form notice and relevant documents are also available in Spanish at

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<sup>7</sup> For an objection to be valid, it must be a writing signed by the objecting Class Member and include: (1) the name of the Litigation, the objector's name and address; (2) the name, address and telephone number of the objector's lawyer; (3) all grounds for the objection, accompanied by any legal support; (4) a statement of whether the objector or his/her lawyer intends to personally appear or testify at the Settlement Hearing; and, (5) a list of persons the objector or his/her lawyer intends to call to testify at the Settlement Hearing. *Id.* at § VI(C)(1)-(2).

www.allnaturalsettlementespanol.com. *Id.* at ¶ 15.

The Administrator also established and maintains an automated toll-free telephone line (1-877-342-0808) for Class Members to call with Settlement-related inquiries. *Id.* at ¶ 17.

**F. Claims Process**

To obtain relief from Defendant, the Agreement requires Class Members to submit a Claim Form before the deadline set by the Court—January 19, 2016—which is eight days before the Settlement Hearing. (ECF 183 at ¶ 20). Class Members may download the Claim Form on the Settlement Website or request a copy by calling or writing to the Settlement Administrator and submit claims online or via U.S. Mail. *Id.* at § IV(A)(5). The Settlement Administrator will then review the claims and make the final determination of the amount owed each claiming Class Member, and will send a deficiency letter to any applicable Settlement Class Member explaining the rejection of any claim no later than thirty (30) days after the Effective Date.<sup>8</sup> *Id.* at § IV(A)(4)(a). The Settlement Administrator will then have ninety (90) days after the Effective Date to distribute checks to eligible claimants. *Id.* at § IV(A)(4)(b).

**G. Class Representatives' Service Awards and Class Counsel's Attorneys' Fees and Litigation Expenses**

The Court has already appointed Class Counsel to represent the Settlement Class. (D.E. 183 at ¶ 5). Kashi will not oppose Class Counsel's request for attorneys' fees of up to \$1.5 million, plus reimbursement of litigation costs incurred up to \$180,000. *Id.* at § VIII(A). Kashi will also not oppose Service Awards of \$5,000 for each of the two Class Representatives. The Service Awards will compensate the Class Representatives for their time, effort and risks they

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<sup>8</sup> The Effective Date is the date after which Final Judgment is entered and either the appeals period expires or the completion of any and all appeals are affirmed and exhausted. Agreement §§ II(A)13, IX(A).

undertook in prosecuting the Litigation. *Id.*

The Service Awards, attorneys' fees and litigation expenses will be deducted from the cash payment. *Id.* at §§ IV(A)(2)(b). Class Counsel is filing separate briefs requesting these awards, and the Court will consider whether to grant or deny these awards separate and apart from its analysis of the fairness, reasonableness, and adequacy of the Settlement.

#### **H. The Class Expressed Its Positive Reaction to the Settlement**

To date, a total of 96,214 Class Members have made claims totaling approximately \$955,750, and there have been no requests for exclusion or objections. Schey Decl. at ¶ 19. The deadline for objections and requests for exclusion is December 28, 2015, and the deadline to submit a claim is January 19, 2016. [ECF 183]. Updated claims statistics will be submitted to the Court after the close of the claims period and in advance of the Settlement Hearing. Schey Decl. at ¶ 20.

#### **IV. The Court Should Grant Final Approval of the Settlement.**

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of the compromise of claims brought on a class basis. In exercising their discretion to approve class settlements, courts are mindful of the "strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). This policy is especially relevant in class actions, where the inherent costs, delays and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See, e.g., Association for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. Feb. 19, 2002) ("There is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation of being the most

complex.”) (citing *Cotton v. Hinton*, 559 F.3d 1326, 1331 (5th Cir. 1977)); *See also* 4 *Newberg on Class Actions* § 11.41 (4th ed. 2002) (citing cases). “The court is not called upon to determine whether the settlement reached by the parties is the best possible deal, nor whether class members will receive as much from a settlement as they might have recovered from victory at trial.” *Gevaerts v. TD Bank, N.A.*, No. 11:14-cv-20744-RLR, at \*5 (S.D. Fla. Nov. 5, 2015) (granting final approval) (internal citation omitted).

A class settlement should be approved if it is “fair, adequate, reasonable and not the product of collusion.” *Leverso v. SouthTrust Bank of Al., N.A.*, 18 F.3d 1527, 1530 (11th Cir. 1994); *see also Bennett*, 737 F.2d at 986. A settlement is fair, reasonable and adequate when “the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued.” *In re Lorezepam & Clorazepate Antitrust Litig.*, MDL No. 1290, 2003 WL 22037741, at \*2 (D.D.C. June 16, 2003) (quoting *Manual for Complex Litigation* (Third) 30.42 (1995)). While Rule 23(e) itself does not particularize standards for approval, those standards have been articulated in case law. They include: “(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved.” *Bennett*, 737 F.2d at 986; *see also Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1240 (11th Cir. 2011) (same); *Braynen v. Nationstar Mortgage, LLC*, No. 14-cv-20726-GOODMAN, 2015 WL 6872519, at \*6 (S.D. Fla. Nov. 9, 2015) (same).

Analysis of these factors here compels the conclusion that the Court should approve the proposed settlement.

**A. The Settlement is the Product of Good Faith, Informed and Arms'-Length Negotiations Involving Experienced Counsel.**

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 to the Court for approval.” *Newberg*, § 11.41; *see also In re Employee Benefit Plans Sec. Litig.*, No. 3-92-708, 1993 WL 330595, \*5 (D. Minn. June 2, 1993) (“[t]he court is entitled to rely on the judgment of experienced counsel in its evaluation of the merits of a class action settlement”).

Here, the Parties did not reach the Settlement until after years of litigation, negotiation, multiple mediation sessions, full merits and expert discovery, as well as extensive and hard-fought motion practice. Wade Decl. at ¶ 32. Class Counsel conducted a thorough investigation and analysis of Plaintiffs’ claims and Kashi’s defenses, and reviewed the discovery and expert testimony, which enabled them to gain an understanding of the evidence related to central questions in the case and prepared counsel for well- informed settlement negotiations.<sup>9</sup> *Id.*

Indeed, the Settlement ultimately required three formal, full-day mediation sessions before Judge Haden over the span of nearly three years.<sup>10</sup> *Id.* at ¶ 33. By this time, Plaintiffs and Class Counsel, who have significant experience in prosecuting complex consumer class actions, had a

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<sup>9</sup> *See Francisco v. Numismatic Guaranty Corp. of Am.*, No. 06-61677-CIV, 2008 WL 649124, \*11 (S.D. Fla. Jan. 31, 2008) (“Class Counsel had sufficient information to adequately evaluate the merits of the case and weigh the benefits against further litigation” where counsel conducted 30(b)(6) depositions and obtained “thousands” of pages of discovery).

<sup>10</sup> That the Parties received the assistance from an experienced mediator over the period of three mediation sessions is a factor evidencing that the Settlement is fair and non-collusive. *See, e.g., Adams v. Inter-Con Sec. Sys., Inc.*, No. C-06-5428 MHP, 2007 WL 3225466, \*3 (N.D. Cal. Oct. 30, 2007) (“The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive”); *In re Indep. Energy Holdings PLC*, No. 00 Civ. 6689(SAS), 2003 WL 22244676, \*4 (S.D.N.Y. Sept. 29, 2003) (“fact that the settlement was reached after exhaustive arm’s length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable”).

“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. *See In re Warner Comm. Sec. Litig*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985). The extensive nature of the negotiations, the experience of Class Counsel, and the more than fair result reached illustrate the arm’s-length negotiations that led to the Settlement and the execution of the Agreement.

**B. Plaintiffs Would Have Faced Significant Obstacles to Obtaining Relief.**

While Plaintiffs and Class Counsel are confident in the strength of their case, they are also pragmatic in their awareness of the fact that in order to succeed at trial, Plaintiffs would be required to succeed on their pending Motion for Class Certification and overcome Kashi’s defenses on the merits. Wade Decl. ¶ 34. Kashi vigorously opposed Plaintiffs’ Motion for Class Certification, which was filed weeks after an order from the Honorable Beth J. Bloom denying class certification in a similar consumer class action regarding ‘All Natural’ claims. *Id.* Specifically, Judge Bloom found the class was not ascertainable<sup>11</sup> because the variation in the challenged products and labels created a “subjective memory problem,” as consumers would have to “remember whether they purchased the challenged products.” *See Randolph v. J.M. Smucker Co.*, No. 13-CIV-80581, 303 F.R.D. 679, 685-692 (Dec. 23, 2014).

Moreover, Defendant put forward evidence, including internal consumer surveys and expert testimony, demonstrating consumers have varying definitions of the term ‘natural,’ and that the ‘All Natural’ claims on the Kashi Products are not material to reasonable consumers. [ECF 142

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<sup>11</sup> At the time the Parties settled, the issue of whether class members can self-identify where retailers have no records identifying class members was on appeal before the Eleventh Circuit, and has since been decided. Wade Decl. ¶ 35; *Karhu v. Vital Pharmaceuticals*, No. 14-11648, 2015 WL 3560722 (11th Cir. 2015) (affirming order denying class certification) (unpublished). This decision, albeit unpublished, would have presented serious obstacles to class certification in this Litigation, as most class members do not have receipts.

at pp. 11-14]. Although Plaintiffs and Class Counsel are confident they could have overcome Kashi's challenges with their own expert's consumer survey and testimony regarding commonality and typicality, Plaintiffs recognize the risks associated with proving materiality, reliance and class-wide damages. Wade Decl. ¶ 36. If they were to prevail on their Motion for Class Certification, with Kashi's summary judgment motion under submission, Plaintiffs also faced an imminent risk of judgment being entered against the entire class. *Id.*

Protracted litigation carries inherent risks that would have delayed and endangered Class Members' recovery. Wade Decl. at ¶ 37. Even if Plaintiffs prevailed at trial, recovery could be delayed for years by an appeal. *Id.*; *see also Lipuma v. Am. Express Co.*, 406 F.Supp.2d 1298, 1322 (S.D. Fla. Dec. 20, 2005) (likelihood that appellate proceedings could delay class recovery "strongly favor[s] approval of a settlement). This Settlement provides relief to Class Members without further delay. Wade Decl. at ¶ 37. Under the circumstances, the Plaintiffs and Class Counsel appropriately determined the Settlement outweighs the risks of continued litigation.

**C. The Benefits Provided by the Settlement are Fair, Reasonable and Adequate When Considered Against the Possible Range of Recovery.**

When evaluating "the terms of the compromise in relation to the likely benefits of a successful trial...the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Cotton*, 559 F.2d at 1330. "Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id.* Courts have found settlements may be reasonable even where the plaintiffs recover only part of their actual losses. *See Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. Jan. 8, 1988) ("[T]he fact that a proposed settlement amounts only to a fraction of the potential recovery does not mean

the settlement is unfair or inadequate”). “[S]trong defenses to the claims presented makes the possibility of a low recovery quite reasonable.” *Lipuma*, 406 F.Supp. 2d at 1323.

Class Counsel have a thorough understanding of the practical and legal issues they would continue to face taking this case to verdict, based on their experience in other consumer fraud class actions and the procedural posture of this Litigation at the time settlement was reached. Wade Decl. at ¶¶ 38-48, Ex. 1. Plaintiffs faced a number of serious challenges, class certification and the materiality of the ‘All Natural’ claims chief among them. *Id.*

The cash available to the Class is reasonable given the stage of the Litigation, the complexity of the factual and legal issues and the significant barriers that stood between now and any final judgment in favor of Plaintiffs and the Class: denial of class certification; interlocutory Rule 23(f) appeal of class certification; subsequent decertification; summary judgment; proving liability; obtaining a damages award; and, post-trial appeals. *Id.* at ¶ 49. Additionally, the non-monetary relief—Kashi’s agreement to remove the ‘All Natural’ claims from Products containing at least one of the Challenged Ingredients and provide bi-annual compliance reports to Class Counsel regarding Kashi’s Non-GMO labels on certain products for three years—also provides meaningful benefits. *Id.*

Damages under FDUTPA are limited to the “price premium,” or, the difference between the value of the product as advertised and the value of the product received. *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006). Based on the opinion of Plaintiffs’ damages expert, Ph.D. economist David Sharp of EconOne, Defendant’s use of the ‘All Natural’ claims increased the Products’ prices by an average of 14.5% per ounce, which is approximately four cents (\$0.04) per ounce. [ECF 114-8 at ¶¶ 9, 14-17]. Thus, the full refund available to Class



Members who submit receipts with their claims through the Settlement achieves an excellent recovery, which would be achieved at trial only if the trier of fact determined the Products are valueless (which is unlikely given they are food items which arguably provide some benefit to the consumer). Wade Decl. ¶ 50. Likewise, the fifty-five cents (\$0.55) per package (up to \$27.50) available *without* a proof of purchase is also a successful achievement based on the estimated recovery given the extraordinary obstacles Plaintiffs faced in the litigation. *Id.* Indeed, this per-person recovery exceeds the amount made available in the *Astiana* action, which involved the same ‘All Natural’ claims on the same Products. *See Astiana, et al., v. Kashi Company*, No. 3:11-cv-01967-H-BGS, ECF 242 (Sept. 2, 2014) (entering final judgment and approving settlement of \$0.50 per package with a maximum recovery of \$25 per household, even where claimants had a proof of purchase).<sup>12</sup> *Id.* at ¶ 51.

**D. The Issues Presented Were Highly Complex, and Settlement Approval Will Save the Class Years of Extremely Costly Litigation in this Court and on Appeal.**

The traditional means for handling claims like those at issue here would unduly tax the court system, require a massive expenditure of public and private resources, and given the relatively small value of the claims of individual Class Members, would be impracticable. The Settlement is the best vehicle for Class Members to receive the relief to which they are entitled in a prompt and efficient manner. Wade Decl. at ¶ 52. The Parties already expended significant resources, including retaining and deposing experts and preparing for trial, and additional pretrial and trial proceedings in this Court and the appellate courts would have involved additional

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<sup>12</sup> The *Astiana* Court noted that the common fund there was not exhausted by claims, and claiming class members would receive approximately \$4.30 per unit. *Id.* at 13, n. 3. Notice there also generated approximately 18,176 claims and no opt-outs. *Id.* The Parties had the benefit of this data in determining an appropriate remedy for the Class here. Wade Decl. at ¶ 51.

substantial and expensive resources. Absent the Settlement, this case would take at least another two years to exhaust all appeals. *Id.*

**E. The Factual Record Was Sufficiently Developed to Enable Class Counsel to Make a Reasoned Judgment Regarding the Settlement.**

Courts consider the stage of proceedings at which settlement is achieved “to ensure that Plaintiff had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation.” *Lipuma*, 406 F. Supp. 2d at 1324. This Settlement was reached at a pivotal stage in the Litigation: after full merits and expert discovery, with motions for class certification and summary judgment pending, and less than eight weeks before trial. Wade Decl. at ¶ 52. Settling the Litigation with the benefit of full fact and expert discovery and trial preparation enabled Class Counsel to evaluate with confidence the strength and weaknesses of Plaintiffs’ claims and Kashi’s defenses. *Id.* Plaintiffs also faced the very real prospect of being foreclosed from any recovery at all in this Court, depending on the outcome of either motion. *Id.*

**V. The Best Notice Practicable Was Provided to the Class.**

“Rule 23(e)(1) requires the Court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3).” *Manual for Compl. Lit., supra*, at § 21.312 (internal quotation marks omitted). The test is whether the method 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). To satisfy this standard, “[n]ot only must the substantive claims be adequately described but the notice must also contain information

reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action.” *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) (internal quotation marks omitted).

The Notice Program—collectively, print publication in two magazines, *Food Network Magazine* and *Prevention Magazine*, targeted website and online advertisements, a dedicated Settlement Website and a toll free number—easily satisfies these requirements. Because Kashi does not sell the Products directly to consumers, but rather to retailers, there is no way to identify the vast majority of individual Class Members. Individual Settlement Class Members cannot otherwise be identified through reasonable efforts due to the nature of the consumer products at issue and the wide geographical area over which they are spread. *See Smith v. Wm. Wrigley Jr. Co.*, No. 09–60646–CIV, 2010 WL 2401149, at \*6 (S.D. Fla. June 15, 2010), at \*6 (approving notice plan consisting of notice given “in two widely-read magazines” as well as several popular websites). Therefore, Class Notice was provided as set forth in Exhibit G to the Agreement. The Notice Program reached over 69% of Class Members. Schey Decl. at ¶ 13.

As noted in the various forms of Notice, attached to the Schey Declaration and described above, Notice informed Class Members of their options for opting-out or objecting to the Settlement, information about the Settlement Hearing, the salient terms of the Settlement and how to obtain additional information. The language in the Notice and Claim Form are plain and easy to understand and provide neutral and objective information about the nature of the Settlement. Accordingly, the Notice Plan satisfies all due process requirements. *See Poertner v. The Gillette Co.*, No 14-13882, --- Fed. Appx. ---, 2015 WL 4310896, at \*5 (11th Cir. 2015) (affirming final approval and noting “the claiming process—completing a one-page form and submitting it online

or by mail—[was not] particularly difficult or burdensome”); Agreement §V(A) (acknowledgement by the Parties that notice to the class shall conform with the Federal Rules of Civil Procedure, including the Due Process Clause).

Class Notice was designed to give the best notice practicable, tailored to reach putative Class Members, and reasonably calculated under the circumstances to apprise the Class of the pendency of the Litigation, Class Members’ rights to make a claim for money, opt-out of the Settlement Class or object to the Settlement the terms of the Settlement, and Class Counsel’s fee application and request for Service Awards.

## **VI. Conclusion**

For the reasons set forth herein, Plaintiffs respectfully request that the Court grant Final Approval of this Settlement and enter judgment.

Dated: December 14, 2015

Respectfully submitted,

/s/ Gillian L. Wade

MILSTEIN ADELMAN, LLP

Mark A. Milstein, Esq. (Admitted *pro hac vice*)

California Bar No. 155513

[mmilstein@milsteinadelman.com](mailto:mmilstein@milsteinadelman.com)

Gillian L. Wade, Esq. (Admitted *pro hac vice*)

[gwade@milsteinadelman.com](mailto:gwade@milsteinadelman.com)

California Bar No. 229124

Sara D. Avila Esq. (Admitted *pro hac vice*)

California Bar No. 263213

[savila@milsteinadelman.com](mailto:savila@milsteinadelman.com)

10250 Constellation Boulevard., Suite 1400

Los Angeles, CA 90067

Tel.: (310) 396-9600

Fax: (310) 396-9635

LAW OFFICE OF L. DEWAYNE LAYFIELD

L. De-Wayne Layfield, Esq.(Admitted *pro hac vice*)

Texas Bar No.: 12065710  
[dewayne@layfieldlaw.com](mailto:dewayne@layfieldlaw.com)  
P.O. Box 3829  
Beaumont, TX 77704-3829  
Tel.: (409) 832-1891  
Fax: (866) 280-3004

THE LAW OFFICES OF HOWARD W.  
RUBINSTEIN, P.A.

Michael T. Fraser  
Florida Bar No. 87411  
[mfraser@hwrlawoffice.com](mailto:mfraser@hwrlawoffice.com)  
One Embarcadero Center, Suite 500  
San Francisco, CA 94111  
Tel.: (800) 436-6437  
Fax: (415) 692-6607

THE CHAFFIN LAW FIRM

Angela Arango-Chaffin, Esq.  
Florida Bar No. 87919  
[angela@chaffinlawfirm.com](mailto:angela@chaffinlawfirm.com)  
1455 Ocean Drive, Suite 811  
Miami Beach, FL 33139  
Tel.: (713) 818-2515  
Fax: (713) 952-5972

THE CHAFFIN LAW FIRM

Robert A. Chaffin, Esq. (Admitted *pro hac vice*)  
Texas Bar No. 04057500  
[robert@chaffinlawfirm.com](mailto:robert@chaffinlawfirm.com)  
4265 San Felipe, No. 1020  
Houston, TX 77027  
Tel.: (713) 5281000  
Fax: (713) 952-5972

*Counsel for Plaintiffs and the Settlement Class*

