IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KIM CARTER, ASHLEY GENNOCK, KENNETH HARRISON, JENNA KASKORKIS, and DANIEL STYSLINGER, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GENERAL NUTRITION CENTERS, INC., a Delaware Corporation, GENERAL HOLDINGS, INC., a Delaware Corporation,

Defendants.

Case No: 2:16-cv-00633-MRH

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

Filed Electronically

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure ("FRCP"), Plaintiffs Kim Carter, Ashley Gennock, Kenneth Harrison, Jenna Kaskorkis, and Daniel Styslinger (collectively, "Plaintiffs") respectfully submit this memorandum of law in support of their unopposed motion for preliminary approval of a class action settlement with Defendants General Nutrition Centers, Inc. and GNC Holdings, Inc. (collectively "GNC"), the terms of which are set forth in the Settlement Agreement and Release of Claims ("SA") attached as **Exhibit A** ("Ex.") to the Declaration of Robert R. Ahdoot ("Ahdoot Decl."), filed concurrently herewith.[1]

The Settlement resolves three separate actions, each of which alleged that GNC falsely advertised the existence of discounts on their website to consumers across the country. Plaintiffs vigorously litigated this case for over three years. Their work included substantial pre-filing investigation, multiple rounds of written discovery and extensive motion practice related thereto, retention and consultation with numerous experts, the drafting of a certification brief, two rounds of mediation, and extensive and painstaking negotiations which resulted in the Settlement. The Settlement establishes a non-reversionary $6,000,000 Settlement Fund and requires GNC to take reasonable steps to ensure its comparative discount advertising on its website complies with then existing law in exchange for a release of all claims. If approved, the Settlement will resolve all pending claims in these actions and provide monetary and non-monetary relief to a nationwide class. The Settlement is an excellent result in a complex, high-risk, hard fought case that provides a substantial financial recovery for GNC's online customers who purchased the products at issue.

Plaintiffs have moved for an order to, among other things: (1) preliminarily approve the terms of the Settlement as fair, reasonable, and adequate; (2) provisionally certify the Class pursuant to Fed. R. Civ. P. 23(b)(3) and (e) for settlement purposes only; and (3) approve the Settlement Administrator, Notice Program, form and content of the Notice, and Claim Form.

The Settlement meets all of the standards for preliminary approval. The information provided is sufficient to permit the Court to provisionally certify the Class under Rule 23 and direct

[1] Unless specified herein, all capitalized terms used herein have the same definitions as those defined in the Settlement Agreement.

Plaintiffs to have notice disseminated. The Notice Program – consisting of individualized emailed and/or mailed notice to each Class Member, and a toll-free number and website maintained by the Settlement Administrator – is the best practicable notice and comports with both Rule 23 and due process. In support of their Motion, Plaintiffs submit the following: (i) proposed Settlement Agreement and its exhibits (Ahdoot Decl. Ex. A), (ii) the Declarations of Plaintiffs: Kim Carter ("Carter Decl."), Ashley Gennock ("Gennock Decl."), Kenneth Harrison ("Harrison Decl."), Jenna Kaskorkis ("Kaskorkis Decl."), and Daniel Styslinger ("Styslinger Decl."); (iii) the Declarations of Class Counsel: Robert R. Ahdoot, Gary F. Lynch ("Lynch Decl."), Trenton R. Kashima ("Kashima Decl."), and Reuben D. Nathan ("Nathan Decl."); (iv) the Declaration of Settlement Administrator expert, Steven Weisbrot, Esq. ("Weisbrot Decl."), (v) a proposed Preliminary Approval Order (SA Ex. C), and (vi) a proposed Final Approval Order and Judgment (SA Ex. D).

I. BACKGROUND

A. Factual Allegations and Procedural History

Plaintiffs filed this consolidated class action Complaint alleging that GNC falsely advertised discounts on their website, GNC.com. *See generally,* Amended Class Action Complaint ("FAC") (ECF No. 62), and Ahdoot Decl. ¶¶ 14-19. Plaintiffs thus alleged that GNC's pricing practices are wrongful and that the action should be certified pursuant to FRCP Rule 23.

The proposed Settlement seeks to redress the claims of three separate class actions previously filed actions; the instant case, as well as two cases pending in the United States District Court for the Southern District of California: the first filed *Kaskorkis v. General Nutrition Centers, Inc. and General Holdings, Inc*., No. 3:16-cv-00990-WQH-AGS (S.D. Cal.) and *Harrison v. General Nutrition Centers, Inc. and GNC Holdings, Inc*., No. 3:16-cv-03086-WQH-AGS (S.D. Cal.). The Parties engaged in vigorous litigation for over three years, conducted extensive discovery, and engaged in substantial motion practice. *See generally*, Ahdoot Decl. ¶¶ 4-13; Lynch Decl. ¶¶ 4-11.

B. Settlement Negotiations

The Parties engaged in mediation in Pittsburgh, PA with third party neutral Carole Katz in December 2016, and again in July 2017. Lynch Decl. ¶ 8; Ahdoot Decl. ¶¶ 20-24. Although these mediations did not result in settlement, the Parties continued with extensive negotiations spanning a number of months, with the assistance of mediator Katz, until a settlement in principle was reached. Lynch Decl. ¶ 9; Ahdoot Decl. ¶¶ 20-24. Thereafter, the Parties engaged in further months long negotiations with respect to the SA and its many exhibits. Plaintiffs also requested bids from a number of settlement administrators and based on such bids, the Parties agreed upon the Angeion Group to serve as the Settlement Administrator. Ahdoot Decl. ¶ 25.

C. Summary of the Proposed Settlement

1. The Class

The Parties stipulate to the certification of the following Settlement Class ("Class") under Rule 23(b)(3), defined as:

> All persons and entities who, from January 1, 2012, through and including the Preliminary Approval Date purchased any product on sale or through a promotion from GNC's Website.

SA ¶ 56.[2] GNC's records indicate that there are approximately 3.6 million Class Members ("Class Members"). Ahdoot Decl. ¶ 28.

2. Monetary Benefits to the Class

GNC will make available $6,000,000.00 to create the Settlement Fund for the benefit of Class Members. SA ¶ 72. The Settlement Administration Expenses, any Service Payments awarded by the Court to the named Plaintiffs, and any attorneys' fees and expenses awarded by the Court will be deducted from the Settlement Fund. The remaining Net Settlement Fund will be used to pay the consideration to the Class as described below. *Id.*

[2] The Class does not include GNC, any affiliate, parent, or direct or indirect subsidiary, or any entity that has a controlling interest therein, or their current or former directors, officers, managers, employees, partners, advisors, counsel, and their immediate families. The Class also does not include any persons who validly request exclusion from the Class. SA ¶ 56.

Each Class Member may submit a Claim Form and elect to either a $5 cash payment or a $15 Voucher that may be redeemed for Merchandise through GNC's Website. *Id.* ¶¶ 26, 63. The Voucher is fully transferrable and has no expiration date. Further, no cash need be spent to redeem its value. *Id.* ¶ 63. Class Members who either made: (i) a total of five or more purchases (each such qualifying purchase must have been made in a unique transaction on a day separate from any other qualifying transaction) from GNC's Website within the Class Period; or (ii) a purchase in excess of $100.00 in a single transaction from GNC's Website during the Class Period ("Multiple Purchasers") may make a claim for an additional $5 cash payment or an additional $15 Voucher under the Settlement ("Multiple Purchaser Relief"). *Id.* ¶¶ 26, 30. Class Members need not submit a proof of purchase, except for Multiple Purchaser Relief Claims.[3]

In addition, at the same as the notice of the Settlement is sent, Class Members will also receive a Coupon[4] which may be redeemed as a one-time credit in the amount of thirty dollars ($30) off of a purchase otherwise totaling one hundred dollars ($100) or more of Merchandise[5] through GNC's Website. *Id.* ¶¶ 14, 77.[6] These Coupons constitute *additional* consideration on top of relief provided by Vouchers[7] and cash payments, and will not diminish Claimant recoveries.

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[3] In the event the amount of all claimed cash payments and all Vouchers (Aggregate Individual Relief Value) is greater than the Net Settlement Fund, then the cash payments and Voucher value due to Class Members will be proportionately reduced on a *pro rata* basis, so that the Aggregate Individual Relief Value does not exceed the Net Settlement Fund. *Id.* ¶¶ 2, 74.

[4] Notably, it is only in the event the dollar amount of the Aggregate Individual Relief Value is less than the Net Settlement Fund, that the Redeemed Coupon Credit (the total value of Coupons redeemed only by Class Members prior to the Final Approval Hearing) is applied as a credit to GNC's obligation to pay the Settlement Fund. *Id.* ¶ 74. Further, in the event that the sum of (i) the Aggregate Individual Relief Value and (ii) the Redeemed Coupon Credit is still less than the Net Settlement Fund, then the cash payment amount and Voucher value will be increased on a *pro rata* basis until the adjusted Aggregate Individual Relief Value plus the Redeemed Coupon Credit equals the Net Settlement. *Id.*

[5] Class Members need not submit a Claim Form to use their Coupon. Only Class Members may redeem a Coupon. *Id.* ¶ 77.

[6] Any residual (*i.e.* uncashed payments) will be paid to the National Consumer Law Center, a 26 U.S.C. §501(c)(3) non-profit organization that works to help low-income consumers. *Id.* ¶ 85.

[7] The Vouchers have actual cash value, are fully transferable and have no expiration date, and Class Members need not spend any cash to redeem its value. Under the circumstances, the Vouchers are more like "cash" than "coupons." *See Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 256 (E.D. Pa. 2011) (finding $20 gift cards called for by class settlement fair given that the

Further, only the value of *redeemed* Coupons will be counted toward GNC's settlement funding obligation, and only after paying full face value of the Vouchers and cash payments to Claimants.[8]

3. Injunctive Relief

The Settlement also requires GNC to take reasonable steps to ensure its comparative discount advertising on GNC's Website complies with then-existing law, including 16 C.F.R. §§ 233.1 and CAL. BUS. & PROF. CODE § 17501 (if the advertisement will appear in California). SA ¶ 76. Additionally, GNC will disclose, on its website, the basis of their reference pricing or similar practices for so long as it uses such practices. *Id.* ¶ 76(a).

4. The Class Release

If the Settlement is approved, Plaintiffs and only Class Members who do not opt out and are included among the Class Member Information will release GNC from all Claims that "(a) arise out of or relate in any way to allegations set forth in the Actions, which, for the avoidance of doubt includes GNC's alleged discounting of its Merchandise from a regular or original price, advertising of those discounts, and GNC's sales of Merchandise on GNC's Website; or (b) that have been, or could have been, brought in the Actions and arose out of the same nucleus of operative facts as any of the claims asserted in the Actions." *Id.* ¶ 45. Thus, the release is limited and tailored only to apply to allegations alleged in the Actions.

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gift cards had actual cash value, had no expiration date, were freely transferrable, among other things.)

[8] Post-CAFA, courts regularly approve class settlements of this structure—where coupons are offered *in addition* to other forms of relief. *See e.g., McDonough v. Toys R Us, Inc.*, 80 F. Supp. 3d 626 (E.D. Pa. 2015) (approving revised settlement structure with coupons in addition to cash relief); *Brown v. Hain Celestial Grp., Inc.*, No. 3:11-cv-03082-LB, 2016 WL 631880 (N.D. Cal. Feb. 17, 2016) (approving $7.5 million cash / $1.85 million coupon class settlement); *O'Brien v. Brain Research Labs.*, No. 12-204, 2012 WL 3242365 (D.N.J. Aug. 9, 2012) (approving class settlement where relief is either $20 cash (subject to $500k limit total) or coupon for 50% off purchase of certain products); *Meyenburg v. Exxon Mobil Corp.*, No. 3:05-cv-DGW, 2006 WL 5062697 (S.D. Ill. June 5, 2006) (approving class settlement with a $6 million cash fund plus $4 million in coupon relief).

5. Filing a Claim

To obtain monetary benefits of the Settlement in addition to those conferred by the Coupon, a Class Member must submit a Claim Form (*see* SA, Ex. A) within 75 days after entry of the Preliminary Approval Order. SA ¶ 6. The Claim Form requires that Claimants provide the name and e-mail address from which they made their purchases from GNC's Website and attest under penalty of perjury to the best of their knowledge to: (i) having purchased a product during the Class Period on sale or through a promotion from GNC's Website; (ii) not applying a coupon to that purchase; and (iii) never returning that purchase for a refund. *Id.* ¶ 7. Class Members seeking Multiple Purchaser Relief must also provide proof of purchase for their qualifying transaction(s). *Id.* Claim Forms may be submitted online through the Settlement Website or via US Mail. *Id.* ¶ 7. Claims will be paid upon verification and after the Effective Date. *Id.* ¶¶ 81, 114.

6. Notice and Right to Opt Out or Object

Class Members will receive direct notice of this Settlement. GNC will provide the Settlement Administrator with the Class Member Information it possesses. *Id.* ¶ 95(a). The Summary Notice (SA, Ex. E) and Coupon shall be sent to each Class Member identified by GNC *via* email and First Class U.S. Mail for those Class Members for which the email notice is returned as undeliverable.[9] *Id.* ¶¶ 62, 95(f). This is the best practicable notice under the circumstances and fulfills all due process requirements. Weisbrot Decl. ¶ 8.

Additionally, on or before the Notice Date, the Settlement Administrator shall establish and maintain the Settlement Website (www.OnlinePriceSettlement.com) with copies of the Long Form Notice (SA, Ex. B), the SA, the Complaint, any order concerning this Motion, the Claims Form, and other relevant documents. *Id.* ¶¶ 95 (b), 95 (g). This website will also contain instructions on how a Class Member can make a claim, as well as instructions on how a Class

[9] Prior to sending the Notice *via* First Class U.S. Mail, the Settlement Administrator shall utilize the USPS National Change of Address Database to update its mailing list. *Id.* ¶ 95(f)(ii). For any returned mailed Notices, the Settlement Administrator shall either resend Notice to the forwarding address provided or perform a skip trace to identify an update address for the Class Member. *Id.*

Member can request exclusion or file an objection. *Id.* Claim Forms and Opt Out requests may be submitted online. *Id.* ¶¶ 7, 98-99.

GNC, or the Settlement Administrator at GNC's election, will provide notice of this Settlement to appropriate state and federal officials pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715. *Id.* ¶ 92. Class Members will have 75 days after Preliminary Approval to submit objections to the Settlement or request to be excluded. *Id.* ¶ 36.

7. Representative Plaintiff Service Payments and Class Counsel's Attorneys' Fees and Expenses

Class Counsel intend to seek an award of attorneys' fees and reimbursement of expenses from the Settlement Fund. GNC has agreed not to take a position or object to any such request up to $1,500,000 (*i.e.* 25% of the Settlement Fund). SA ¶¶ 126, 129. In addition, Class Counsel intend to seek a Service Payment of $5,000 for each of the named Plaintiffs. *Id.* ¶ 125.

II. THE CLASS SHOULD BE CONDITIONALLY CERTIFIED

In order to effectuate the putative Settlement, Plaintiffs request certification of the Class. "At the preliminary approval stage, a court may conditionally certify the class for purposes of providing notice, leaving the final certification decision for the subsequent fairness hearing." *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191, 199–200 (E.D. Pa. 2014). The Court, however, must still ascertain if the proposed class satisfies the requirement of Rule 23(a) and (b)(3). Accordingly, the class members must be so numerous that joinder of all members is impracticable; there must be questions of law or fact common to the entire class; the claims or defenses of the representative parties are typical of the claims or defenses of the class; and the representative parties fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a).

Additionally, common questions must "predominate over any questions affecting only individual members," and class resolution must be "superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). Here, each of these requirements are met.

A. Numerosity

The Rule 23(a)(1) numerosity requirement does not necessitate a showing that joinder is impossible, but only that joining all class members would be "impracticable," *i.e.*, difficult or inconvenient. *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 477 (W.D. Pa. 1999). "There is no magic minimum number necessary to satisfy the . . . numerosity requirement." *Seidman v. Am. Mobile Sys., Inc.*, 157 F.R.D. 354, 359 (E.D. Pa. 1994). When considering the number of class members necessary to satisfy the numerosity requirement, this Court has recognized that classes as small as 40 may prove sufficient. *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (a class with more than 40 will satisfy the numerosity requirement). In addition, when considering the numerosity of the class, "[i]t is proper for the court to accept common sense assumptions in order to support a finding of numerosity." *Cumberland Farms, Inc. v. Browning-Ferris Indus., Inc.*, 120 F.R.D. 642, 645-46 (E.D. Pa. 1988). Based on GNC's records, there are approximately 3.6 million members within the Class. Ahdoot Decl. ¶ 28. The first prong of Rule 23(a) is readily met. *Stewart*, 275 F.3d at 227 (3d Cir. 2001) (noting that if a class exceeds 40 individuals, the numerosity requirement of Rule 23(a) has been met).

B. Predominance and Commonality

The Court must next determine whether questions of law and fact common to the Class are substantially similar and predominate over questions affecting the members individually. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). All questions of fact and law need not be common to satisfy the rule; "[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). The Third Circuit has a very "low threshold for commonality." *See*, *e.g.*, *Flat Glass*, 191 F.R.D. at 478; *In re Asbestos Sch. Litig.*, 104 F.R.D. 422, 429 (E.D. Pa. 1984), *aff'd in part and rev'd in part sub nom. In re Sch. Abestos Litig.*, 789 F.2d 996 (3d Cir. 1986). Similarly, "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."

Amchem v. Windsor, 521 U.S. 591, 623 (1997). Accordingly, courts often examine "commonality under Rule 23(a) together with predominance under Rule 23(b)(3)." *Abante Rooter & Plumbing, Inc. v. Alarm.com Inc*., No. 15-CV-6314-YGR, 2017 WL 1806583, at *6 (N.D. Cal. May 5, 2017), *amended sub nom.*, 2018 WL 558844 (N.D. Cal. Jan. 25, 2018).

This case involves relatively straightforward legal claims and is based on uniform factual allegations. Each Class Member purchased goods *via* GNC's website. FAC ¶¶ 27-28, 38-39. Plaintiffs allege that GNC falsely advertised items on its website as on "sale" from GNC's "Regular Price" when the products were simply being sold for their normal, everyday pricing. *Id*. ¶¶ 40-50. And, Plaintiffs seek a class-wide determination of whether GNC's advertised sale prices were false and misleading. *Id*. ¶ 56. Here, Plaintiffs allege each Class Member was exposed to substantially similar public facing misrepresentation, which was misleading for the same reason, and was injured when they did not receive the discount advertised. Determination of Plaintiffs' claims will turn on common evidence and is capable of "one stroke" resolution. *Wal-Mart Stores, Inc*., 564 U.S. at 350.

The claims of the "proposed classes are [also] sufficiently cohesive to warrant adjudication by representation." *Amchem Prod., Inc.*, 521 U.S. at 623. The issue of whether common questions of law or fact predominate "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co*., 131 S. Ct. 2179, 2184 (2011). In the Third Circuit, the predominance inquiry focuses on "whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan v. DB Investment, Inc.*, 667 F.3d 273, 298 (3d Cir. 2011). This criterion is normally satisfied when there is an essential common factual link between all class members and the defendant for which the law provides a remedy. *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 625 (E.D. Pa. 1994). The legal questions identified above as "common" pursuant to Rule 23(a) and will clearly predominate over any other questions that might arise. Ahdoot Decl. ¶¶ 15-19.

C. Typicality

Plaintiffs must also establish that their claims are "typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). "The typicality inquiry is intended to assess ... whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Baby Neal*, 43 F.3d at 57–58; *see also In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 531-32 (3d Cir. 2004) (finding typicality prong met where "claims of representative plaintiffs arise from the same alleged wrongful conduct").

The typicality requirement is fulfilled because Plaintiffs and the absent Class Members have the same injury, resulting from the same alleged misrepresentations: they each purchased products allegedly falsely advertised as on "sale" on GNC's Website. FAC ¶¶ 29-45. Plaintiffs are aware of no individual claim or defenses which they do not share with at least a portion of the Class. Ahdoot Decl. ¶ 31. Thus, Plaintiffs' claims sufficiently coincide with those of other Class Members.

D. Adequacy

The Third Circuit has articulated two criteria for determining adequacy of representation under Rule 23(a)(4): "[f]irst, the interests of the named plaintiffs must be sufficiently aligned with those of the absentees" and "[s]econd, class counsel must be qualified and must serve the interests of the entire class." *Georgine v. Amchem Prod., Inc*., 83 F.3d 610, 630 (3d Cir. 1996), *aff'd sub nom. Amchem Prod., Inc.*, 521 U.S. 591. Each of the Plaintiffs have litigated their respective case for over two years before settlement, are willing to assume the responsibilities as class representatives, have no disabling conflicts of interest, and intend to vigilantly protect and advance the rights of the Class. There are no fundamental conflicts of interest among Plaintiffs or Class Members, and the named-Plaintiffs do not have interests antagonistic to the Class. *See generally* Carter Decl., Gennock Decl., Harrison Decl., Kaskorkis Decl., and Styslinger Decl. Plaintiffs have also chosen competent and experienced counsel to pursue their claims, as discussed further in the next section. Ahdoot Decl. ¶¶ 35-41; Lynch Decl. ¶¶ 22-25; Kashima Decl. ¶¶ 4, 23-25; Nathan Decl. ¶¶ 4-5. The Class is adequately represented.

E. Superiority

Rule 23(b)(3) requires that class litigation is the superior method for adjudicating this dispute. Factors to be considered include: class members' interest in individually controlling litigation; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing the class action. FED. R. CIV. P. 23(b)(3)(A)–(D). *But see Amchem*, 521 U.S. at 620 (When a court is "[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.")

This case involves millions of Class Members, who have all been injured in a relatively small amount. The individual amounts of recovery at issue would otherwise be too small to warrant individual litigation. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30"). But, even if the individual Class Members were inclined to seek relief, such repetitious litigation would not benefit the parties or the Court. *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. at 202 (E.D. Pa. 2014) ("If the cases filed by Plaintiffs against the NFL Parties were litigated individually, the parties could face decades of litigation and significant expense in many different state and federal courts, potentially resulting in conflicting rulings."). Therefore, Settlement of the instant case as a class action is superior to any alternative and the Class should be conditionally certified for purposes of this Settlement.

F. Ascertainability

The Third Circuit also requires that a Class is ascertainable. *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015). In *Byrd*, the Third Circuit explained that "[t]he ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id.* The definition

of the Class here fulfills these requirements. GNC will provide the Class Member Information necessary to determine who made a qualifying purchase(s). SA ¶ 95(a). This allows for an objective method of verifying which persons falls within the definition of the Class.

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. Standard for Preliminary Approval of the Settlement

"[S]ettlement of litigation is especially favored by courts in the class action setting." *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 144 (D.N.J. 2013) (citations omitted). The procedure for review of a proposed class action settlement is a well-established two-step process – preliminary and final approval – that was recently codified under amended Rule 23(e). Fed. R. Civ. P. 23(e)(1)-(2) (eff. Dec. 1, 2018); *see also Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 438-39 (E.D. Pa. 2008); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, at *1-2 (E.D. Pa. May 11, 2004); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 562 (D.N.J. 1997). When deciding preliminary approval, a court does not conduct a "definitive proceeding on the fairness of the proposed settlement[.]" *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983). That definitive determination must await the final hearing, at which the fairness, reasonableness, and adequacy of the settlement are more fully assessed. *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 638 (E.D. Pa. 2003).

Before the Court can grant preliminary approval and direct notice to the class, a plaintiff must "show[] that the court will likely be able to . . . approve the proposal under Rule 23(e)(2)[.]" Fed. R. Civ. P. 23(e)(1)(B) (eff. Dec. 1, 2018). Approval under amended Rule 23(e)(2) requires that the settlement be fair, reasonable, and adequate, taking into consideration the following factors: (1) whether "the class representatives and class counsel have adequately represented the class"; (2) whether the settlement "was negotiated at arm's length"; (3) whether "the relief provided for the class is adequate"; and (4) whether the settlement "treats class members equitably relative to each other." *Id.* (e)(2)(A)-(D). There is, not surprisingly, overlap between the 2018 amendment's fairness, reasonableness, and adequacy considerations and those set out in the Third

Circuit test in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975).[10] Amended Rule 23(e)(2), however, establishes a uniform set of core approval factors that the Advisory Committee Note states "should always matter to the decision" of the district court as to whether to approve the proposal. Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. Plaintiffs, therefore, will predominantly address the amended Rule 23(e) factors now and fully address each of the *Girsh* factors in their motion for final approval of the Settlement.

Generally, a court's "first and primary concern is whether there are any obvious deficiencies that would cast doubt on the proposed settlement's fairness." *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191, 198 (E.D. Pa. 2014), *final approval aff'd*, 821 F.3d 410 (3d. Cir. 2016). "A settlement falls within the range of possible approval," if there is a conceivable basis for presuming that the standard applied for final approval—fairness, adequacy, and reasonableness—will be satisfied." *Silvis v. Ambit Energy L.P*, No. 14-5005, 2018 WL 1010812, at *6 (E.D. Pa. Feb. 22, 2018). After making such findings, a settlement agreement is entitled to a presumption of fairness and should be preliminarily approved. *See Gates*, 248 F.R.D. at 439; *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995); *In re Am. Invs. Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 263 F.R.D. 226, 238 (E.D. Pa. 2009). Ultimately, "[t]he decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh*, 521 F.2d at 156.

As discussed below, the Settlement, which provides Class Members with valuable monetary relief and savings, is entitled to a presumption of fairness because the negotiations

[10] The factors considered for final approval of a class settlement as "fair, reasonable and adequate" include: "(1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through trial . . . ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; [and] (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation[.]" *Id.* (ellipses in original); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534-35 (3d Cir. 2004); *Prudential*, 962 F. Supp. at 562.

occurred at arm's-length over a period of many months, supervised by an experienced neutral mediator; Class Counsel are experienced in this type of complex litigation; the Parties were well-informed of the strengths and weakness of each side's positions as a result of significant discovery; and the Settlement treats Class Members equitably relative to each other.

B. The Adequacy of Class Counsel and Representative Plaintiffs Supports Preliminary Approval

"A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 116 (2d Cir. 2005) (*quoting* Manual for Complex Litigation (Third) § 30.42 (1995)) (internal quotations marks omitted). Indeed, the "the discovery and other investigations that the parties have undertaken render them sufficiently informed to make a determination about the fairness of a settlement." *Delandro v. Cty. of Allegheny*, No. CIV.A. 06-927, 2011 WL 2039099, at *12 (W.D. Pa. May 24, 2011). Thus, "the Court should not without good cause substitute its judgment for [counsel's]." *Boyd v. Bechtel Corp*., 485 F. Supp. 610, 622 (N.D. Cal. 1979).

Nothing suggests that Class Counsel's recommendation of Settlement is unreasonable. Class Counsel has extensive class action experience. Ahdoot Decl. ¶¶ 35-41 & Ex. A; Lynch Decl. ¶¶ 22-25 & Ex. 1; Kashima Decl. ¶¶ 4, 23-25 & Ex. A; Nathan Decl. ¶¶ 4-5 & Ex. A. Additionally, Class Counsel had secured a sample of the transaction information from GNC's Website that enabled Counsel to both weigh the likely success of Plaintiffs' claims and estimate individual damages associated with Plaintiffs' claims. Ahdoot Decl. ¶ 7; Lynch Decl. ¶ 6. Based on this experience, and information gleaned from discovery in this case, Class Counsel was able to negotiate a substantial recovery for the Class.

The Representative Plaintiffs have demonstrated their adequacy in selecting well-qualified Class Counsel, monitoring the Litigation, and participating in discovery. Ahdoot Decl. ¶ 31; Lynch Decl. ¶ 18. Thus, this factor weighs in favor of granting preliminary approval.

C. The Negotiation Process Supports Preliminary Approval

Settlements that result from arm's-length negotiations between experienced counsel are generally entitled to deference from the court. *In re Auto. Refinishing Paint Antitrust Litig*., 2003 WL 23316645, at *6; *Linerboard*, 292 F. Supp. 2d at 640 (holding that "[a] presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel"). This deference reflects an understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness considerations of Rule 23(e). *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 184 (E.D. Pa. 1997) (concluding that the settlement was the product of "good faith, arms' length negotiations[,]" which eliminated "the risk that a collusive settlement agreement may [have been] reached").

As discussed above, the Settlement is the result of good faith, arm's length negotiations between Class Counsel and GNC's counsel with two mediations occurring approximately seven months apart with experienced mediator Carole Katz. Although a settlement was not reached during the mediations, the parties continued to negotiate in good faith with the assistance of mediator Katz. Class Counsel and GNC's counsel vigorously advocated their respective clients' positions in the settlement negotiations and were prepared to proceed to the class certification, summary judgment, and trial phases if no settlement was reached. Finally, Class Counsel's attorneys' fees, costs, and expenses and Service Payments were not discussed until after the Parties agreed on the material terms of the Settlement. That the Settlement was achieved through well-informed and arm's-length negotiations weighs in favor of granting preliminary approval under Rule 23(e)(2)(B). Ahdoot Decl. ¶ 22; Lynch Decl. ¶¶ 13, 21.

D. The Adequacy of the Settlement Benefits in Light of the Risks of Continued Litigation Supports Preliminary Approval

When considering whether "the relief provided for the class is adequate," Rule 23(e)(2)(C) requires the Court to take into account: "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of

processing class-member claims; [and] (iii) the terms of any proposed award of attorney's fees, including timing of payment[.]" Fed. R. Civ. P. 23(e)(2)(C)(i)-(iii) (eff. Dec. 1, 2018).

1. The Relief Provided to the Class Is Substantial

"[S]ettlement of litigation is especially favored by courts in the class action setting." *In re Ins. Brokerage Antitrust Litig*., 297 F.R.D. at 144 (*citing Gen. Motors*, 55 F.3d at 784). Here, the Settlement provides the very remedies that the Plaintiffs sought in the First Amended Complaint: *monetary relief for the alleged represented discounts* and *an actual discount of GNC's everyday pricing that they advertised*. Each Class Member is entitled to a $30 off $100 coupon and may claim up to two $5 cash payments or two $15 Vouchers. The value of this relief can increase or decrease depending on the number of claims made. Additionally, GNC has committed to take reasonable steps to ensure its comparative discount advertising on its website complies with then existing federal or California law.

The Settlement's proposed relief is proportional to damages occurred by each Class Member. A review of a sample of transactions during the Class Period revealed that the advertised discount on GNC's website was approximately 29 percent. Ahdoot Decl. ¶ 30. This is similar to the percent offered by the coupon provided to Class Members. Additionally, the average Sale Price of the transactions sampled was $12.96. Had Class Members received the actual average 29 percent discount advertised, they would have paid approximately $3.11 less. Accordingly, $5 cash payments and $15 Vouchers are a fair compromise of the Class's claims and are well within the bounds of reasonableness for a consumer class action settlement. *City of Omaha Police & Fire Ret. Sys. v. LHC Grp*., No. 6:12–1609, 2015 WL 965696, at *7-8 (W.D. La. Mar. 3, 2015) (finding that a "7.4%–10.3% [recovery] of estimated provable damages" amounts to "a high degree of success" because "[t]he typical recovery in most class actions generally is three-to-six cents on the dollar."). Such payments are also similar to a recently approved settlement in a similar misrepresented discount case. *Russell v. Kohl's Dep't Stores*, Inc., No. EDCV151143RGKSPX,

2016 WL 6694958, at *2-3 (C.D. Cal. Apr. 11, 2016) (providing approximately $3,597,500 in gift cards to the class).

2. The Risks of Continued Litigation Are Significant

When evaluating the Settlement benefits, the Settlement should be weighed against the uncertainty of protracted litigation. "It can be difficult to ascertain with precision the likelihood of success at trial. The Court cannot and need not determine the merits of the contested facts and legal issues at this stage, [Citation], and to the extent courts assess this factor, it is to 'determine whether the decision to settle is a good value for a relatively weak case or a sell-out of an extraordinary strong case.'" *Misra v. Decision One Mortg. Co*., No. SACV070994, 2009 WL 4581276, at *7 (C.D. Cal. Apr. 13, 2009).

Plaintiffs remain confident regarding their claims and the Court's class certification ruling, but concede success is not guaranteed. Should the litigation continue, Plaintiffs would have to certify a class, to maintain the class through trial, which has proven difficult in similar cases. *In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 273 (E.D. Pa. 2012) ("Plaintiffs not only face the risk that they will not succeed in establishing liability and damages, but also the risks associated with certifying and maintain a class."); *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 487 (E.D. Pa. 2010) ("If it would be difficult for a plaintiff to establish liability, this factor favors settlement."). Moreover, even if Plaintiffs were successful through trial in the district court, there would very likely be one or more lengthy appeals, including potentially an interlocutory appeal under Fed. R. Civ. P. 23(f). *In re Remeron End-Payor Antitrust Litig.*, No. Civ. 02-2007 FSH, 2005 WL 2230314, at *17 (D.N.J. Sept. 13, 2005). The degree of uncertainty supports preliminary approval of the proposed Settlement Agreement. *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995).

Even if Plaintiffs could maintain the class, their ability to prove the merits of the case present a further risk. There are a number of Courts that have been skeptical of Plaintiffs' claims,

suggesting that false discounts to do not cause any actual compensable injury.[11] Additionally, GNC would undoubtedly oppose the methods employed to measure the damages associated with Plaintiffs' claims. *See e.g. Chowning v. Kohl's Dep't Stores, Inc.*, No. CV1508673RGKSPX, 2016 WL 1072129, at *10 (C.D. Cal. Mar. 15, 2016), *aff'd*, 735 F. App'x 924 (9th Cir. 2018). "The Settlement eliminates these and other risks of continued litigation, including the very real risk of no recovery after several years of litigation." *In re Nvidia Derivs. Litig.* , No. C-06-06110, 2008 WL 5382544, at *3 (N.D. Cal. Dec. 22, 2008).

Additionally, continuing to litigate this action would incur additional expenses, coupled with considerable time to proceed through trial and post-trial motions. This litigation has already been pending for approximately three years. If Plaintiffs would continue the litigation, it would likely be additional years before this case would be prepared for trial. But even if Plaintiffs secured a favorable judgment, it would not end the dispute. Any judgment can be appealed, which will likely take further additional years. All of these facts weigh in favor of the Settlement. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 642 (noting that the "protracted nature of class action antitrust litigation means that any recovery would be delayed for several years," and "substantial and immediate benefits" to class members favors settlement approval); *Slomovics v. All for a Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995) (where litigation is potentially lengthy and will result in great expense, settlement is in the best interest of the class members).

3. The Proposed Method of Distributing Relief to the Class Is Effective

"Approving a plan for the allocation of a class settlement fund is governed by the same legal standard that applies to the approval of the settlement terms: the distribution plan must be 'fair, reasonable and adequate.'" *Edwards v. Nat'l Milk Producers Fed'n*, No. 11-CV-04766, 2017

[11] *See, e.g., Kim v. Carter's Inc.,* 598 F.3d 362, 365-66 (7th Cir. 2010) (dismissing a comparative discount case for lack of damages); *Johnson v. Jos. A. Bank Clothiers, Inc.*, No. 2:13-cv-756, 2014 WL 4129576, at *4 (S.D. Ohio Aug. 19, 2014) (same); *Shaulis v. Nordstrom Inc.*, 120 F.Supp.3d 40, 52-53 (D. Mass. 2015) (same); *Belcastro v. Burberry Ltd.*, No. 16-cv-1080, 2017 WL 744596, at *3-5 (S.D.N.Y. Feb. 23, 2017) (same). *But see Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1103 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013).

WL 3616638, at *4 (N.D. Cal. June 26, 2017). All Class Members receive the benefit of the Coupon without having to submit a claim. Class Members may receive the additional benefits of the Settlement *via* a clear and uncomplicated claims process. Individuals are only required to submit a simple claims form providing their name and e-mail address and attesting that they are a member of the Class. SA ¶ 7. Only those individuals who wish to claim Multiple Purchaser Relief need to provide any proof of purchase. *Id.* In return, Class Members with valid claims are provided a payment or a Voucher. *Id.* ¶ 26. This process is common to class settlements, and has been approved in other consumer class actions. *Hanlon v. Aramark Sports, LLC*, CIV.A. 09-465, 2010 WL 374765, at *7 (W.D. Pa. Feb. 3, 2010) (approving claims process that resulted in voucher payments to class members); *Palamara v. Kings Fam. Restaurants*, CIV. A. 07-317, 2008 WL 1818453, at *6 (W.D. Pa. Apr. 22, 2008) (same); *Rougvie v. Ascena Retail Group, Inc.*, CV 15-724, 2016 WL 4111320, at *23 (E.D. Pa. July 29, 2016) (approving settlement giving class members a choice between a voucher award or cash award).

Moreover, the Settlement envisions a *pro rata* distribution of any unallocated funds to the participating Class Members to prevent any reversion of Settlement Funds to GNC. *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) ("Reversion to the defendant risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement."). Any unclaimed residual funds are provided to a non-profit recipient who works to prevent the same type of misrepresentations at issue here. *See* https://www.nclc.org/ (last visited August 1, 2019); *In re Baby Prods.*, 708 F.3d at172 (non-profit distributions "more closely tailor the distribution to the interests of class members, including those absent members who have not received individual distributions" when compared to settlements where excess settlement funds escheat to the state). This ensures that the maximum amount of the Settlement Fund is distributed to the Class. Newberg on Class Actions § 12:28 (5th ed. 2015) ("as a general matter, 'a court's goal in distributing class action damages is to get as much of the money to the class members in as simple a manner as possible'").

4. Class Counsel's Request for Attorneys' Fees, Expenses, and Costs Will Be Subject to Approval by the Court

In discharging its duty to determine the fairness of attorneys' fees in a class action settlement, the Court's primary concern is to ensure that the process of negotiation leading to the fee has "adequately protected the class from the possibility that class counsel were accepting an excessive fee at the expense of the class." *Staton v. Boeing Co*., 327 F.3d 938, 977 (9th Cir. 2003). The amount of attorneys' fees and costs that Class Counsel intends to request is approximately 25 percent of the benefits to be received by the Class, demonstrating that the fee and cost award to be requested will not be extraordinary. In the Third Circuit, "[t]he percentage-of-recovery method is 'generally favored' in cases involving a common [settlement] fund...." *In re Ravisent Techs., Inc. Sec. Litig*., No. CIV.A.00-CV-1014, 2005 WL 906361, at *10 (E.D. Pa. Apr. 18, 2005) *citing In re Cendant Corp. PRIDES Litig*., 243 F.3d 722, 732 (3d Cir. 2001). And Courts within the Third Circuit "have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses." *Id.* at *11. At the time of the Fairness Hearing, Class Counsel will request that the Court award fees based upon the value of the benefits achieved in the proposed Settlement and will present their time and expense declarations to allow for a cross-check under the lodestar/multiplier method.

The Service Payments that GNC have agreed to pay to each Plaintiff, upon court approval, are likewise well within the customary range of awards in cases of this magnitude and are not extraordinary. Courts "'routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.'" *Cullen v. Whitman Med. Corp*., 197 F.R.D. 136, 145 (E.D. Pa. 2000). Here, a $5,000 award is not unreasonable. *Brown v. Rita's Water Ice Franchise Co. LLC*, 242 F. Supp. 3d 356, 372 (E.D. Pa. 2017). Incentive awards typically range from $5,000 to $10,000. *Huffman v. Prudential Ins. Co. of Am*., No. 2:10-CV-05135, 2019 WL 1499475, at *8 (E.D. Pa. Apr. 5, 2019). Accordingly, an incentive award "of $ 5,000 is at the low end of the typical range." *Id.* at *9. Nonetheless, at the Fairness Hearing, Plaintiffs will supply declarations establishing that Plaintiffs contributed value to the resolution of the case and that the requested Service Payments are reasonable.

The Settlement is not conditioned on the Court's approval of either Class Counsel's fee request or Plaintiffs' Service Payments. Any payment of any attorney's fees or Service Payments will only occur upon the payment of funds to the Settlement Administrator for distribution to the Class. Here, any payment to Class Counsel and Plaintiffs are aligned with that of the Class.

E. That Class Members Are Treated Equitably Relative to Each Other Supports Preliminary Approval

The Settlement does not improperly discriminate between any segments of the Class. FED. R. CIV. P. 23(e)(2)(C). Each Class Member is entitled to the same relief calculated based on the same formula. Indeed, the only variation between Class Members' recovery is a function of the amount of their purchase or number of qualifying products purchased during the Class Period (*i.e.* Single Purchaser v. Multiple Purchaser Relief). SA ¶ 26. Given that both restitution and damages accrued by Class Members would be logically proportional to the number of products purchased and the price of those products, the payment formula forwarded in the SA is both rationally based and directly related to the claims asserted. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1045 (N.D. Cal. 2008) ("It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits."). The equal treatment of each Class Member further demonstrates that the proposed settlement is fair and reasonable.

The Settlement was a product of extensive arm's length negotiations, and involved counsel experienced in class litigation. It provides the Class meaningful relief, likely more than that which could have been achieved at trial. The Settlement does not suffer any obvious deficiencies. It is for these reasons that Plaintiffs request that the Settlement be preliminarily approved.

IV. THE PROPOSED NOTICE WILL ADEQUATELY APPRISE THE CLASS OF THEIR RIGHTS UNDER THE SETTLEMENT

Should the Court grant preliminary approval, due process requires the best notice practicable, reasonably calculated under the circumstances to apprise a class member of the settlement and to give that class member a chance to be heard. FED. R. CIV. P. 23 (e)(1)(B). The parties have agreed to retain an experienced class notice and claims administrator: the Angeion

Group. *See generally* Weisbrot Decl. ¶¶ 1-7. The proposed Notice plan provides for direct and individual notice and the content of the notice allows the Class to make an educated decision regarding this Settlement.

Rule 23(c)(2)(B) provides that for Rule 23(b)(3) classes, the Court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Collectively, the Notice regime described above is predicted to directly reach a vast majority (if not all) of the Class. Weisbrot Decl. ¶¶ 19, 28.

The proposed Notice plan is based on a similar regime that was previously approved in similar cases. *Minter v. Wells Fargo Bank*, N.A., 283 F.R.D. 268, 273-76 (D. Md. May 22, 2012) (approving class notice by direct mail, even absent email); *Robinson v. Fountainhead Title Grp. Corp*., No. WMN–03–3106, 2009 WL 2842733 *1 (D. Md., Sep. 4, 2009) (direct mailed notice with additional notice on website satisfied Rule 23 without supplement publication notice). And given that this case involves online transactions, email is likely the most appropriate method to reach the Class. Thus, the method of distribution should be approved.

Additionally, Class notice "must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members." FED. R. CIV. P. § 23(c)(2)(B). The purpose of these requirements to ensure that class members would be fully informed of their rights under the Settlement. The Notice forms here meet these requirements. Weisbrot Decl. ¶¶ 8, 28. The proposed Notice, combined with the right to exclude themselves from the Settlement, ensures that absent Class Members' due process rights are amply protected. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985). The Court should accordingly approve the Notice plan because it satisfies the notice requirements of Rule 23 and due process.

V. THE PROPOSED TIMELINE FOR SETTLEMENT

If the Court preliminarily approves the SA, it envisions the following schedule:

Event Date	Event
	PRELIMINARY APPROVAL DATE
No later than ten (10) days after entry of the Preliminary Approval Order (SA ¶ 95(a))	Last day for GNC to provide the Settlement Administrator with the Class Member Information.
Within fourteen (14) days after the entry of the Preliminary Approval Order and to be substantially completed no later than thirty (30) days after the entry of the Preliminary Approval Order.(Proposed Preliminary Approval Order ¶ 15(a))	Dissemination of Summary Notice via e-mail or U.S. Mail
At least twenty-one (21) days prior to the Opt-Out and Objection Deadline (Proposed Preliminary Approval Order ¶ 15(b))	Last day for Class Counsel to file a Request for a Fee And Expense Award and/or a request for Service Payments.
Seventy-five (75) days after the entry of the Preliminary Approval Order	The Claim Deadline
Seventy-five (75) days after the entry of the Preliminary Approval Order (Proposed Preliminary Approval Order ¶ 15(c)-(d))	Opt-Out and Objection Deadline
_____, 2019.	Last day for the Parties to submit any motion and supporting documentation/ evidence to the Court in support of Final Approval
_____, 2019. A date that is in compliance with the provisions of 28 U.S.C. § 1715(d) (SA ¶ 20)	FAIRNESS HEARING

The Parties respectfully request that the Court adopt the above Settlement schedule and provide the Parties a hearing date for Final Approval.

VI. CONCLUSION

Plaintiffs respectfully request that the Court enter the proposed Preliminary Approval Order submitted concurrently herewith and set a hearing for Final Approval on the first available date convenient to the Court.

DATED: August 6, 2019

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