UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

IN RE DIAL COMPLETE MARKETING AND SALES PRACTICES LITIGATION	)	CASE NO. 11-md-2263-SM
	)	
	)	(MDL DOCKET NO. 2263)
	)	
	)	(ALL CASES)

JOINT MEMORANDUM IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

I. INTRODUCTION

Plaintiffs and Defendant Dial Corporation ("the Parties") seek final approval of the arm's length settlement ("Settlement") they reached after almost eight years of hard-fought litigation. Not only does this Settlement achieve Plaintiffs' goal of revising Defendant's advertising statements regarding the superior efficacy of Dial Complete liquid hand soap that Plaintiffs alleged to be false and misleading through non-monetary injunctive relief, but it also provides for monetary relief to all purchasers of Dial Complete in the United States who submit valid claim forms, in order to receive the alleged price premium sought at trial. The combined result ensures that Class members obtain recovery now, rather than await years for trial, and accomplishes additional injunctive relief—which trial would likely not have afforded. Dial will make a $7.4 million payment into the Settlement Fund. These funds will be used to pay valid claims, attorneys' fees, costs and expenses, and service awards to the Class Representative Plaintiffs. No monies will revert to Dial.[1]

[1] A detailed description of the Settlement is set forth in the Parties' Memorandum in Support of Joint Motion for Preliminary Approval of Proposed Class Action Settlement, Certification of Settlement Class for Settlement Purposes Only, Approval of Notice Plan and Settlement Notice and Appointment of Notice and Claims Administrator and Lead Counsel for Settlement Class ("Preliminary Approval Memorandum" (Doc. 239-1)).

In conducting final review of a proposed class action settlement, courts in this Circuit recognize a presumption in favor of the settlement if the parties negotiated it at arm's length, after conducting meaningful discovery, because public policy favors settlement in complex class action cases. *In re Pharma Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 36 (1st Cir. 2009) ("Achieving settlement in such cases is not easy. District judges must realistically evaluate settlements based on the circumstances of the case."); *see also In re Colgate-Palmolive Softsoap*, No. 12-md-2320-PB, 2015 WL 7282543, at *9 (D.N.H. Nov. 16, 2015); *In re Tyco*, 535 F. Supp. 2d 249, 259 (D.N.H. 2007); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 324, 343 (D. Mass. 2015). As demonstrated below, the proposed Settlement is "fair, reasonable and adequate" under Fed. R. Civ. P. 23(e)(2) and thus merits final approval. Moreover, the absence of any objections confirms that the Settlement satisfies Rule 23(e)(2). For those reasons, as well as for those set forth below, the Court should grant final approval to the Settlement and final certification of the Settlement Class.

II. BACKGROUND

A. Procedural History

Plaintiffs sought injunctive relief and damages for individuals in the United States relating to the allegedly deceptive marketing, advertising, and sale of Dial Complete Foaming Liquid Hand Soap and the use of the active ingredient triclosan and advertising claims related to that product.[2] The Parties reached the proposed Settlement only after substantial discovery; robust motion practice including a motion to dismiss; challenges to plaintiffs' scientific and economic experts; and two rounds of class certification motion practice, culminating in a day-long class certification hearing, with expert testimony from both sides, resulting in the Court's certification of six state-

[2] Principally including a "Kills 99.99% of Germs* (*encountered in household settings)"claim.

wide classes. The Parties engaged in two separate all-day mediation sessions before former U.S. District Judge Layn Phillips, the second of which generated a signed settlement term sheet that ultimately resulted in the proposed Settlement to resolve this action on behalf of all purchasers of Dial Complete in the United States. The Parties set forth the relevant factual and procedural history of this litigation up through the filing of their *Joint Motion for Preliminary Approval* (Doc. 239) in their Preliminary Approval Memorandum. *See* Preliminary Approval Mem. (Doc. 239-1) at pp. 2-14.[3] The Court issued its order granting Preliminary Approval on January 2, 2019 (Doc. 242).

B. Key Settlement Terms

The Settlement requires Dial to pay a capped, non-reversionary total of $7.4 million dollars to a qualified settlement fund and agree to certain injunctive relief that Plaintiffs' experts have valued at not less than $25 million. Settlement Class Members who submit valid proof of claim forms are eligible for monetary awards for each unit of Dial Complete they purchased during the Class Period with no proof of purchase required for up to 30 units. Under no circumstances will any amount of the Settlement Fund revert to Dial. Although very unlikely given the number of claims filed,[4] if not all of the Settlement Fund is used, the remainder will be distributed to the Children's Health Fund or the Ronald MacDonald House Charities, Settlement Agreement (Doc. 239-2) at §3.3, two organizations that are focused on public health issues that are relevant to the overall subject matter of the case. In addition, the Settlement reflects Dial's voluntary cessation of certain practices during the pendency of the litigation and agreement to injunctive relief going forward, including not only to remove the challenged "Kills 99.99% of Germs*" claim in the

[3] Pursuant to the Settlement Agreement, in conjunction with the filing of their Joint Motion for Preliminary Approval, the Parties filed under seal their walk-away agreement. *See* Settlement Agreement (Doc. 239-2) at § 9.2.1.

[4] In light of the high claims rate, the amount of postage necessary to mail Class Members' checks will be approximately $143,241.45; Angeion's costs related to Notice and Claims administration are $686,402.01 as of March 31, 2019. *See* Weisbrot Declaration attached as Exhibit A at ¶¶ 19-20.

current formulation of the product but also to refrain from using triclosan (the active ingredient) in the product. *Id.* at §§ 3.1 and 8.3. Specifically, Dial agrees to be enjoined for a period of five years from using an advertising or labeling claim that Dial Complete "Kills 99.99% of Germs*" as the product is currently formulated and reintroducing triclosan as an ingredient in the product. *Id.* at §3.1.1. Dial also agrees to make a $1.9 million payment (as part of the $7.4 million capped total) in connection with the injunctive relief component of the Settlement. *Id.* at §§2.2.1 and 8.2.1.1. Class Members will only release non-bodily injury claims that were or could have been brought related to the subject matter of the litigation; claims for bodily injuries are *not* released by the Settlement. *Id.* at §7.

The Settlement represents an excellent recovery for the Settlement Class, as confirmed by the fact that *only two* Settlement Class Members elected to opt-out of the Settlement Class, and *no* Settlement Class Member has objected to the Settlement. *See* Declaration of Steven Weisbrot, Esq. in Support of Motion for Final Approval of Class Action Settlement, attached hereto as Exhibit A ("Weisbrot Decl.") at ¶ 24.

III. THE NOTICE PLAN AND RESPONSE THERETO

A. Implementation of the Notice Plan

Following the Court's Order Granting Preliminary Approval of Class Action Settlement (Doc. 242, the "Preliminary Approval Order"), the Parties supervised the provision of notice to potential Settlement Class Members by the Angeion Group, pursuant to the Court-approved Notice Plan. The Notice program provided for: (1) a settlement website, www.soapsettlement.com, with links to the Claim Form, the Long-Form Notice, relevant pleadings and documents, and frequently-asked questions; (2) comprehensive, state-of-the-art, targeted internet banner notices, using paid banner ads on targeted websites; (3) additional web-based notice using "keyword" searches

displaying banner ads; (4) sponsored notice on two leading class action-related websites; (5) a national press release issued through a well-known newswire service; (6) national media through publication in the widely-read consumer magazine, *People*; and (7) a toll-free telephone helpline (888-576-8327) through which Settlement Class Members were able to obtain additional information about the Settlement and request printed copies of the Long Form Notice and Claim Form. *See* Declaration of Steven Weisbrot in Support of Motion for Preliminary Approval of Class Action Settlement (Doc. 239-6) at pp. 4-11, and Preliminary Approval Mem. (Doc. 239-1) at p. 12.

The Parties commenced implementation of the Notice Plan on January 7, 2019. On January 7, 2019, in compliance with the Class Action Fairness Act, 28 U.S.C. §1715 ("CAFA"), notice of the Settlement and related materials were sent to the Attorneys General of all U.S. states and territories, as well as to the Attorney General of the United States. *See* Weisbrot Decl. at ¶ 4.

Angeion established the Settlement Website on January 11, 2019. In addition to the features outlined above (allowing for the submission of online claims), the Settlement Website also contains a "Contact Us" page, through which Class Members can send an email with any additional questions to a dedicated email address. *Id.* at ¶ 13. As of April 25, 2019, the Settlement website had 369,302 unique visitors and 1,068,760 page views. *Id.* at ¶ 14. On that same date, a link to the Settlement website went live on Class Counsel's website.

Angeion also established the toll-free hotline devoted to this case to further apprise Class Members of the rights and options in the Settlement. The toll-free hotline uses an interactive voice response ("IVR") system to provide Class Members with responses to frequently asked questions and to provide essential information regarding the Settlement. This hotline is accessible 24 hours

a day, 7 days a week. Weisbrot Dec. at ¶ 15. As of April 25, 2019, the toll-free hotline had received 158 calls totaling 867 minutes. *Id.* at ¶ 16.

On January 12, 2019, Angeion implemented the Court-approved comprehensive media notice program designed to deliver an approximate 70.42% reach, with an average frequency of 3.81 times by serving approximately 9,596,000 digital banner ad impressions and publication via *People* magazine.[5] *Id.* at ¶5. The banner ad notice ran for four (4) consecutive weeks and resulted in serving 10,014,314 impressions, which was 417,317 more impressions than described above. *Id.* at ¶ 6. There was no direct notice program because Dial did not have personal information about unnamed Settlement Class Members; accordingly, the best notice practicable was achievable via the methods described above. *Id.* at ¶ 17.

On January 12, 2019, Angeion also implemented a custom Facebook digital campaign that specifically targets people with an interest in Dial and/or who meet the demographic and/or psychographic profile of a typical Class Member. This portion of the Notice Plan ran concurrently with the internet banner ad campaign described above and served 4,665,105 impressions, which exceeds the 3,000,000 impressions that the campaign was originally designed to serve. *Id.* at ¶ 7.

In addition to the foregoing measurable media campaign, Angeion also caused the Settlement to be promoted on Twitter. Angeion's methodology includes an "active listening" component wherein Angeion monitors Twitter traffic for discussion of the Settlement, and actively provide notice, and/or answers to frequently asked questions via Twitter as appropriate. This

[5] It is important to note that the 70.42% reach the Notice Plan was designed to deliver does ***not*** include the sponsored listings on class action websites, the media generated as a result of the press release, the informational website and the toll-free hotline, all of which aid in informing Class Members of their rights and options under the Settlement but that are difficult to measure in terms of reach percentage. *Id.* at ¶ 5.

service is not measurable in terms of reach and frequency, but provides an invaluable service to Class Members seeking information about the Settlement via Twitter. *Id.* at ¶ 8.

Angeion also caused notice of the Settlement to be disseminated through print media. Angeion caused a copy of the Publication Notice to be published in a half-page, black and white ad in the February 11, 2019 national edition of *People* magazine. The national edition of *People* magazine has a circulation of 3,423,322. *Id.* at ¶ 9.

In addition, notice of the Settlement was disseminated through purchased and earned media. Angeion caused the Settlement to be listed and promoted through two leading class action settlement websites, www.topclassactions.com and www.classaction.org. These sites are known to create awareness of pending settlements among consumers and while not measured in terms of the reported reach percentage, these websites provided another means of informing the public about the underlying settlement. *Id.* at ¶ 10. To further boost awareness of the Settlement, gain online visibility, and gain media pickup, on January 17, 2019, Angeion caused a national press release to be issued through Business Wire, using Business Wire's "Major Markets Circuit," which focuses on major media points in all 50 states, including daily newspapers. Plaintiffs coupled this with Business Wire's "Cosmetics and Home Goods Circuit," which directs the release toward media in those trades. Issuing a press release helps to create earned media via press coverage. *Id.* at ¶ 11.

Neither promotion via the class action settlement websites nor the press release are capable of precise reach calculations and are thus not included in the reach and frequency figures. Nonetheless, these mechanisms helped to stimulate interest in the Settlement and drive Class Members to the dedicated Settlement website to read and understand their rights under the Settlement. *Id.* at ¶ 12.

B. Response to the Notice Program

The Notice Plan delivered an approximate 70.83% measurable reach with an average frequency of 4.29 times each. This 70.83% reach ***exceeds*** the 70.42% reach that the Notice Plan was originally projected to target, resulting in additional Notice of the Settlement being provided to Class Members. The 70.83% reach does not include the sponsored listings on two class action settlement websites, the press release, Settlement Website, and toll-free hotline. *Id.* at ¶ 18.

As of April 18, 2019, Angeion has received 349,232 Claim Forms; only two requests for exclusion from the Class; and no objections from any Class Members. The deadline to submit a Claim Form was April 12, 2019. The deadline to postmark exclusion requests or file an objection to the Settlement Agreement was March 13, 2019. *Id.* at ¶¶ 21-21. Of the Claim Forms received, 331,969 were submitted through the Settlement website,849 were submitted by mail, and 16,417 were submitted by a claim aggregator. *Id.* at ¶ 21.

C. CAFA Response

As a result of the CAFA notice, representatives of the State Attorneys General of Arizona, California, Missouri, New York, and Texas, as well as the Department of Justice, have had discussions with Class Counsel regarding the Settlement and Settlement Website. Those entities have not filed anything with the Court.

IV. ARGUMENT

In deciding whether to grant final approval to a proposed class action settlement, the Court must first determine whether to certify the settlement class definitively for purposes of settlement under Fed. R. Civ. P. 23(a) and 23 (b), and then whether to approve the settlement under Fed. R. Civ. P. 23(c).

A. Certification of the Settlement Class is Appropriate

As part of its Preliminary Approval Order, the Court conditionally certified a Settlement Class of all persons who purchased the Dial Complete Product from January 1, 2001 to the Notice Date. (Doc. 242). The Court had previously certified six state-wide litigation classes, finding that Plaintiffs satisfied the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b)(3). *See In re Dial Complete Mktg. and Sales Practices Litig.*, 312 F.R.D. 36, 53-76 (D.N.H. 2015).

Because the legal and remedial theories raised by the Plaintiffs are shared with the Settlement Class Members, Class Counsel satisfies the adequacy requirement, and no conflicts exist between Plaintiffs and Settlement Class Members, the requirements of fairness and adequacy have been met with respect to certification of the Settlement Class. *See* Preliminary Approval Mem. (Doc. 239-1) at 18-19. The Court previously ruled that "given the large number of potential class members and small value of individual claims, not only is a class action the superior method of resolving this case, it is the very sort of case for which the Rule 23(b)(3) class action mechanism was intended." *In re Dial Complete Mktg. & Sales Practices Litig.*, 312 F.R.D. at 57. *See also In re Colgate-Palmolive*, 2017 WL 7282543 at *5-9. The Court should definitively certify the Settlement Class for the settlement purposes.

B. Notice to the Prospective Settlement Class was Adequate

In determining whether to grant final approval of a proposed settlement, the Court must find that adequate notice was issued to all prospective class members, in accordance with due process concerns and Rule 23. In order to satisfy due process considerations, notice to class members must be "reasonably calculated to reach the absent class members." *Bezdek*, 79 F. Supp. 3d at 336 (quoting *Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d, 56 (1st Cir. 2004)). Rule 23(c)(2) requires "the best notice that is practicable under the circumstances" and that it inform

class members of (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues or defenses; (iv) the fact that a class member may enter an appearance through an attorney if the class member desires; (v) the fact that the court will exclude from the class any class member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment under Rule 23(c)(3). *See* Fed. R. Civ. P. 23(c)(2). The Court has already determined that the form of the Notice was proper and approved the Long Form Class Notice, the Publication Notice and the Notice Plan. *See* Preliminary Approval Order (Doc. 242) at 3.

In determining whether the notice program, as implemented, is fair, adequate, and appropriate, it is not necessary that every Settlement Class Member receive actual notice to meet due process considerations, as long as class counsel acted reasonably in selecting means likely to inform persons affected. *See In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1110-11(10th Cir. 2001). The notice program "need not be perfect." *Medoff v. CVS Caremark Corp*, No. 09-cv-544, 2016 WL 632238, at *5 (D.R.I. Feb. 2, 2017). However, it should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Int'l Union v. GMC*, 497 F.3d 615, 629-30 (6th Cir. 2007) (internal citations omitted).

The Parties implemented the Notice Program in accordance with the Court-approved Notice Plan. As set forth in Section III, *supra*, the Notice Plan was robust and comprehensive. Notice of the Settlement was disseminated via electronic media (Facebook and Twitter); print media (*People* magazine); purchased and earned media (two class action websites); and a nationwide press release through Business Wire. *See* Weisbrot Dec. at ¶¶ 5-11. There is a case-specific Settlement website, www.soapsettlement.com, which includes links to relevant

documents and pleadings, the Claim Form, the Long-Form Class Notice, and frequently-asked questions (including information on how to opt-out, object and appear at the fairness hearing) and a toll-free number which provided information about the Settlement. *Id.* at ¶13. The Notice Program yielded reach greater than that which was projected in the Notice Plan submitted to the Court with the Preliminary Approval motion. *Id.* at ¶¶ 7, 18. The success of the Notice Program is highlighted by the very large number of claims submitted by the April 12, 2019 claims filing deadline.

As Rule 23(c)(2) requires, the Class Notice informed Class Members of the claims alleged in the action, the definition of the certified Settlement Class, the Settlement terms, the scope of the release, and their rights as members of the Settlement Class to opt out of or otherwise object to the Settlement, including Plaintiffs' request for attorney's fees, expenses, and service awards, and their right to request exclusion from the Class. *See* Exhibit G to Weisbrot Dec.

As the foregoing demonstrates, the Notice Program fairly apprised Class Members of the Settlement and their options in accordance with Rule 23(c)(2) and due process. Thus, the Court should find that Notice was given to Settlement Class Members by the best means "practicable under the circumstances." Fed. R. Civ. P. 23(c)(2).

C. The Settlement is Fair, Reasonable, and Adequate Under Fed. R. Civ. P. 23(e)(2) and Merits Final Approval

Fed. R. Civ. P. 23(e)(2) requires that if a settlement proposal "would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." "District courts may only approve class action settlements that are fair, reasonable, and adequate." *Voss v. Rolland*, 592 F.3d 242, 251 (1st Cir. 2010) (*citing City P'ship Co. v. Atl. Acquisition Ltd.*, 100 F.3d 1041, 1043 (1st Cir. 2003)). Over the years, courts have developed a number of factors they considered in determining whether a settlement is fair, reasonable, and

adequate. In December 2018, Rule 23(e) was amended in its discussion of final approval. "The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision and whether to approve the proposal. . . . This amendment therefor directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal." *Federal Civil Judicial Procedure and Rules*, Rule 23, comment to 2018 amendments, p. 122 (2019 ed). Thus, in determining whether the proposed settlement is fair, reasonable, and adequate, the court must consider whether: "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members relative to one another." Fed. R. Civ. P. 23(e)(2).

1. Class Counsel And Class Representatives Have Adequately Represented The Settlement Class

Class counsel vigorously prosecuted this case for almost eight years, successfully obtaining certification of six state-wide classes, and successfully negotiating a settlement that provides both monetary and injunctive relief to a class of all purchasers of Dial Complete across the United States—injunctive relief likely incapable of being achieved at trial. Class Representatives participated throughout the litigation, actively responding to Dial's discovery requests, sitting for their depositions, and providing input regarding the proposed settlement. The extensive efforts of

Class Counsel and Class Representatives, the Court's recognition of their adequacy in granting class certification, together with the value of the Settlement achieved, evidence that they have and continue to adequately represent the interests of the Settlement Class.

2. Settlement Was Reached Only After Lengthy Arm's Length Negotiations

Settlement was reached only after two separate mediation sessions before a neutral mediator held over two years apart. Prior to settlement, the Parties had engaged in extensive merits discovery, including exchanging document requests, interrogatories and requests for admission, reviewing over 210,000 pages of documents, and taking more than a dozen depositions. The Parties engaged in robust motion practice commencing with Dial's motion to dismiss, highly adversarial challenges to Plaintiffs' scientific, economic, and conjoint analysis experts, including two *Daubert* challenges by Dial, and two rounds of class certification motion practice. After the Court's first class certification order, the Parties engaged in an unsuccessful day-long mediation in May 2016 before former Judge Phillips. Plaintiffs then filed their renewed motion for class certification, which the Court granted in March 2017. Dial filed a Rule 23(f) petition for permission to appeal with the First Circuit, which was denied in July 2017. Dial timely filed a petition for rehearing *en banc*. In early 2018, while the *en banc* petition was still pending, the Parties rekindled settlement discussions. They engaged in a second day-long mediation with Judge Phillips in October 2018, during which they signed a settlement term sheet in order to achieve this proposed Settlement. *See also* Preliminary Approval Mem., Doc. 239-1 at 3-6, 16-17. During extensive discovery and motion practice, the Parties evaluated the relative merits of their respective positions, and the risks they faced if the case were to proceed to trial. Also factoring into their respective positions was Dial's conduct since the case was filed, specifically, Dial's

change in its marketing from "Kills 99.99% of germs" to "Kills 99.99% of bacteria" and its reformulation of the Dial Complete product.[6]

As explained in the Preliminary Approval motion, the Parties conducted the settlement negotiations at arm's length based on each side's independent assessment of the case. The Settlement, which provides substantial monetary relief and injunctive relief, was achieved after many months of negotiation that commenced in 2016, and only reached successful resolution in late 2018. Where a settlement is negotiated at arm's length, after sufficient discovery, the settlement is entitled to a presumption of reasonableness. *City P'ship Co.,* 100 F.3d at 1043. Here, the quality and extent of the negotiation process highlight the arm's length nature of the negotiations and underscore why final approval is merited.

3. The Settlement Provides Adequate Relief to the Class

In determining whether the Settlement provides adequate relief to the Settlement Class, the "key question is whether the relief provided by the settlement is reasonable in relation to the likely outcome were the case to proceed to trial. In assessing the reasonableness of a proposed settlement, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the proposed settlement." *Bezdek*, 79 F. Supp. at 345 (internal quotations and citations omitted). Here the Settlement includes both monetary and injunctive relief. The monetary relief to Class Members is predicated on the price premium Plaintiffs allege that Class Members paid for the product because of the challenged aspects of Dial Complete. As the *Bezdek* court observed, "[w]ere this case to proceed to trial, the damages under a price premium theory would amount to something less than the market

[6] Dial made these changes before the U.S. Food and Drug Administration issued its final rule regarding triclosan in September 2016. Dial continues to maintain that Dial Complete containing triclosan provided superior health benefits.

value of the [product] as purchased with its purported health benefits, and the difficulties in proving this amount could prove fatal to meaningful recovery in the case." *Id.* Even if Plaintiffs prevailed at trial, the "best case" recovery would likely not be better that the monetary and injunctive Settlement remedy Plaintiffs have negotiated, and could be substantially less given the attendant costs and expenses that would be incurred to achieve the "best case" award at trial. Dial disputes Plaintiffs' claim that any price premium actually exists, as well as Plaintiffs' damages analysis and methodology. Hence, if the case were to proceed to trial, Plaintiffs submit that it is likely that Class Members (which would be limited to the six state-wide certified classes) would recover no more than the monetary relief achieved through the Settlement and Class Members who lacked proof of purchase (which is likely the majority) would receive no recovery at all. Settlements that provide close to complete relief to class members on a claims-made basis have been recognized by courts to be ripe for approval. *Braynen v. Morningstar Mortg., LLC,* No. 14-CV-20726-Goodman, 2015 WL 6872519, at *4 (S.D. Fla. Nov. 9, 2015) (internal citations omitted).

The injunctive relief that the Settlement provides includes Dial's commitment to refrain from using the "Kills 99.99% of Germs*" claim in the product as currently formulated. This injunctive relief "prevents the defendant from engaging in precisely the conduct that caused the alleged injury in the first place" under Plaintiffs' theory of the case. *Bezdek,* 79 F. Supp. 3d at 346. Accordingly, given the value of the monetary and injunctive relief in the Settlement, this Court should find the Settlement "reasonable and adequate especially in light of the uncertainty of a better outcome at trial." *Bezdek,* 79 F.Supp.3d. at 347. *See also Almanzar v Select Portfolio Servicing, Inc.,* No. 1:14-CV-22586-FAM, 2016 WL 1169198, at *3 (S.D. Fla. Mar. 25, 2016 ("Factoring in the injunctive relief...the settlement very likely exceeds what Plaintiffs could have

won at trial.") (quoting *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 693 (S.D. Fla. 2014)).

a. The risks associated with the cost and delay of trial and appeal are great.

The risks of proceeding to trial are great and it is unclear whether there would be any recovery at all for the Class Members in the six state certified cases, and certainly there would be no class recovery for all purchasers of Dial Complete across the United States if the litigation had continued. At the time of settlement, Dial's petition for rehearing *en banc* was pending in the First Circuit. Had the First Circuit granted the petition, there would have been the cost and delay of the Rule 23(f) interlocutory appeal. Plaintiffs sought damages for the alleged price premium attributable to the challenged claims, whereas Dial steadfastly defended Dial Complete and denied that plaintiffs could establish liability or damages on the merits. Had Plaintiffs prevailed on the interlocutory appeal and the case proceeded to trial, Dial would mount a vigorous defense to Plaintiffs' claims that the challenged claims were misleading and that there was a price premium, likely have moved to decertify the state-wide classes, and would have continued to challenge Plaintiffs' price premium damages methodology. In addition, there was also the risk of remand to the respective district courts where each underlying action was filed, thus increasing the costs and risks of ongoing litigation for Settlement Class Members.

b. The effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims

The Parties, with the assistance of Angeion, the Court-approved notice and claims administrator, implemented a robust and highly effective notice program based on the Court-approved Notice Plan, resulting in Class Members filing more than 332,815 claims.[7] *Weisbrot Dec.* at ¶ 25. Class

[7] This does not include the 16,417 claims submitted by a claim aggregator which were denied because they lack individual Class Members' attestations and addresses. *See* Weisbrot Dec. at ¶¶ 22-25.

Members were not required to provide proof of purchase for claims comprising thirty (30) products or less. Angeion has reviewed and processed 332,164 Claim Forms where Class Members have claimed 30 products or less. Of these, 260,188 claims totaling 7,031,519 products were approved; 1,592 claims, totaling 36,121 products were determined to be fraudulently filed[8] and denied; 70,133 claims totaling 1,885,318 products were determined to be duplicate filings[9] and denied; and 251 claims totaling 6,339 products were rejected for other reasons such as not being in the United States. *Id.* at ¶ 27.

Angeion has processed and reviewed 651 Claim Forms where Class Members have claimed more than 30 products claiming a total of 1,576,316 products. Of these, 8 claims, totaling 609 products, contained the required documentation and were approved for the additional products. 392 claims totaling 1,153,013 products were rejected for providing fraudulent or fake documentation, 243 claims totaling 314,528 products failed to provide adequate documentation wherefore the number of products claimed was reduced to the maximum of 30 products per claim resulting in total products of 7,290 and 8 claims for 108,166 products were rejected for other reasons such as not being in the United States or being a duplicate of another claim. *Id.* at ¶ 26.

In total, Angeion has preliminarily determined that 260,439 claims are valid and timely filed, representing a total of 7,039,418 products. Each payable class member averages 27 products per claim. *Id.* at ¶ 28.[10]

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[8] Angeion reviews claims filed and compares claims data against its proprietary list of known fraudulent filers. Additionally, Angeion manually reviews all claims filed for patterns and indicia of fraud. Upon discovery of such claims, the information is reviewed, and a determination is made to allow or exclude the claims. *Id. at FN 2.*

[9] Angeion reviews claims filed and compares the claim form information against the remainder of the claims data to establish a correlation between claims which may indicate that the claim is a duplicate. Where it is determined that multiple claims have been filed for the same Class Member and the data does not reflect indicia of fraud, all but one claim for the Class Member is marked as a duplicate. *Id. at FN 3.*

[10] Angeion also preliminarily determined that 72,376 claims are invalid representing a total of 3,188,957 products. Each invalid claim averages 44 products per claim. *Id.* at ¶ 29.

After the final review of all claims filed and upon the Final Effective date of this Court's anticipated order finally approving the Settlement, Angeion will calculate each Class Member's gross award by multiplying the number of products claimed by $0.27. If the aggregate of the gross awards, as calculated, including administrative costs relating thereto, exceeds the Net Settlement Fund, gross awards will be reduced on a *pro rata* basis. *Id.* at ¶ 31. Checks will then be issued and mailed to those Class Members who have been determined to have filed valid and timely claims. *Id.*

Checks issued as described above will bear a time limitation for negotiation based on the agreement of the parties or as directed by this Court. Any check that is returned to Angeion with a forwarding address will be forwarded to the new address provided by the United States Postal Service. Checks returned without a forwarding address will be subjected to a skip trace and where a new address located, checks shall be reissued and mailed to the updated address. *See* Weisbrot Decl. *at* ¶ 32.

c. The terms of any proposed award of attorney's fees, including timing of payment

Plaintiffs filed their Motion for Award of Attorneys' Fees, Expenses and Representative Plaintiffs' Service Awards of February 21, 2019, ("Fee Petition") (Doc. 244).[11] In their Fee Petition, Plaintiffs' seek $3.825 million in attorney's fees, $573,141 for attorneys' expenses and costs and $35,000 for the seven representative plaintiffs' service awards. Pursuant to the Settlement Agreement, Class Counsel agreed not to seek more than $3.825 million in attorneys' fees and Dial takes no position with respect to Plaintiffs' Fee Petition. *See* Settlement Agreement

[11] Plaintiffs' Motion for Attorney's Fees is posted on the Settlement website, www.soapsettlement.com.

(Doc 239-2) at §§8.2.1-8.2.4. There was no discussion of attorneys' fees until after the substantive terms of the Settlement were agreed upon.

When placing a valuation on the total settlement from which the court calculates a fee award, indirect benefits to the class such as injunctive relief or *cy pres* awards, are properly included. *See Poertner v. Gillette Co.*, 618 F. App'x 624, 629 (11th Cir. 2015). Here, the change in Dial's "Kills 99.99% of Germs*" marketing component of the injunctive relief has been valued by Plaintiffs' expert at not less than $25 million (*see* Report of Stefan Boedeker (Doc. 246) at p. 2-3) and Dial has agreed to pay a gross settlement amount of $7.4 million. Thus, a fee award of $3.825 million is less than 12% of what Plaintiffs submit to be the aggregate value of the settlement including the injunctive relief, and is significantly less than the fees incurred to date. As of the date of their fee petition, Plaintiffs submit that Class Counsel had expended more than 12,800 hours litigating this case and their then-current lodestar was 52% and their then-historical lodestar was 57% of the attorneys' fees requested. Since filing their Fee Petition, Class Counsel have expended additional time and expenses in furtherance of the Settlement, including conference calls with representatives of State Attorneys General and the Department of Justice, communications with Angeion regarding the Notice Program, and preparing the final approval pleadings. They will continue to expend time and incur expenses preparing for and attending the Final Approval hearing. Thus, if the Court were to award Plaintiffs the requested amount, the negative lodestar would be even greater.

4. The proposal treats all Class Members equitably

The Settlement treats all Settlement Class Members equitably, with the caveat that Plaintiffs have requested that the Court grant service awards to the seven Class Representatives

who have pursued this litigation expending time and resources for almost eight years. There are no subclasses or other restrictions which hindered any Class Member from filing a claim.

5. The Settlement Also Satisfies the Modified *Grinnell* Factors Applied in this Circuit

Prior to the 2018 amendments to Rule 23(e)(2), courts in this Circuit often considered a modified list of *Grinnell* factors in evaluating the fairness of a settlement, including: (1) the value of the settlement: (2) a comparison of the proposed settlement with the likely result of continued litigation; (3) the risk, complexity, expense and duration of the case; (4) the stage of litigation and the amount of discovery completed; (5) the quality of counsel and conduct during litigation and settlement; and (6) the reaction of the class to the settlement. *See Bezdek,* 79 F.Supp. 3d at 343-48; *In re Colgate-Palmolive,* No. 12-md-2320-PB, 2015 WL 7282543, at *9-13 (D.N.H. Nov. 16, 2015). Many of these factors overlap with the amended Rule 23(e)(2) factors. The Settlement satisfies all of these factors as well.

As discussed *supra* at Section IV.C.1-3, the results achieved through Settlement meet, if not exceed, what could be achieved at trial. Indeed, whereas the Court previously certified state-wide classes for the residents of six states, the Settlement provides relief on behalf of all purchasers of Dial Complete across the United States, thus providing concrete monetary benefits to persons who would have faced serious challenges based on the statute of limitations and other defenses. Further, the risks on the merits of continuing the litigation are substantial and the Settlement was achieved at arm's length only after substantial discovery and motion practice.

Both Class Counsel and Dial counsel are represented by experienced consumer class action attorneys, who, having invested thousands of hours of work, completed extensive discovery and motion practice, engaged in months of negotiations and mediation, are extremely knowledgeable about the strengths and weaknesses of their respective positions. They reached this Settlement

only after arm's length negotiations. This factor "weighs heavily in favor of approving the settlement." *In re Colgate-Palmolive*, 2015 WL 7282543, at *12 (finding the same class counsel as in this case adequately represented the interests of the settlement class).

Lastly, the reaction of the Settlement Class has been overwhelmingly positive. There are potentially millions of Settlement Class Members. There were more than 369,302 unique visits to the Settlement website and more than 349,232 Claim Forms received. claims filed. No Settlement Class Member has filed an objection to the Settlement and only two have opted out of the Settlement. The date for filing objections and opt-outs was March 13, 2019. Additionally, no one has filed an objection to Plaintiffs' Fee Petition, which was filed on February 21, 2019. This further supports the reasonableness of the Settlement. *See In re Colgate-Palmolive, 2015 WL* 7282543, at *12 (internal citations and quotations omitted).

V. CONCLUSION

For the foregoing reasons, the Parties request that the Court grant their Joint Motion.

Respectfully submitted,

Dated: April 29, 2019

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 29, 2019, she caused this document to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of filing to registered counsel of record for each party.

/s/ Lucy J. Karl
Lucy J. Karl (NH Bar # 5547)