UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN RE: FISHER-PRICE ROCK 'N PLAY SLEEPER MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION	MDL No. 1:19-md-2903 Hon. Geoffrey W. Crawford This Document Relates To: ALL CASES

NOTICE OF PLAINTIFFS' UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

MOTION ON BEHALF OF: All Plaintiffs, by and through their attorneys.

DATE, TIME, AND PLACE OF MOTION: To be determined by this Court before the Hon. Geoffrey W. Crawford, United States District Judge, Robert H. Jackson United States Courthouse, 2 Niagara Square, Buffalo, New York 14202.

RELIEF REQUESTED: An Order of this Court (i) granting preliminary approval of the proposed settlement memorialized in the Parties' Settlement Agreement, together with all exhibits thereto, filed contemporaneously herewith; (ii) preliminarily certifying the proposed Class for settlement purposes only; (iii) approving the form and content of, and directing the distribution of, the proposed Class Notice; (iv) appointing Kroll Settlement Administration LLC as the Settlement Administrator; (v) appointing Demet Basar, James Eubank, and Paul Evans as Class Counsel; (vi) appointing Elizabeth Alfaro, Emily Barton, Linda Black, Luke Cuddy, Rebecca Drover, Megan Fieker, Karen Flores, Nancy Hanson, Jena Huey, Samantha Jacoby, Megan Kaden, Kerry Mandley, Cassandra Mulvey, Joshua Nadel, Melanie Nilius Nowlin, Daniel Pasternacki, Jessie Poppe, Katharine Shaffer, Emily

Simmonds, Josie Willis, and Renee Wray as Class Representatives for settlement purposes only; (vii) setting a date and procedure for a Final Approval Hearing; and (viii) setting forth procedures and deadlines for Settlement Class Members to file objections to the proposed settlement, appear at the Final Approval Hearing, and request exclusion from the proposed Settlement Class; (ix) issuing a preliminary injunction; and (x) issuing related relief as appropriate.

SUPPORTING PAPERS:

A memorandum of law, the Settlement Agreement as all as all exhibits thereto, and the Joint Declaration of Demet Basar, James Eubank, and Paul Evans, together with all prior pleadings and proceedings.

Defendants do not oppose the relief sought by this motion.

GROUNDS FOR RELIEF REQUESTED:

Fed. R. Civ. P. 23; L. R. Civ. P. 23(d).

DATED: New York, New York
July 24, 2024

/s/ Demet Basar

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TO: All Parties of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN RE: ROCK 'N PLAY SLEEPER MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION	MDL No. 1:19-md-2903 Hon. Geoffrey W. Crawford This Document Relates to: ALL CASES

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

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Plaintiffs, individually and on behalf of the proposed Settlement Class, respectfully submit this memorandum of law in support of their motion pursuant to Federal Rule of Civil Procedure 23(e) for preliminary approval of the proposed settlement of this multi-district litigation (the "Settlement"),[1] conditional certification of the proposed Settlement Class for settlement purposes only, approval of Notice and the Notice Plan, and related relief. While Defendants Mattel, Inc. ("Mattel") and Fisher-Price, Inc. ("Fisher-Price") vigorously dispute Plaintiffs' allegations in this and other litigation related to the Rock 'n Play Sleeper ("RNPS"), they do not oppose the relief sought by this motion.[2]

I. INTRODUCTION

In this multi-district class action litigation, the Parties have reached a Settlement, which, if approved, will confer significant cash benefits on a nationwide class of purchasers and owners of more than 4 million Fisher-Price Rock 'n Play Sleepers ("RNPS"), which were jointly recalled by Fisher-Price and the Consumer Product Safety Commission ("CPSC") on April 12, 2019. After the Recall, there have been reports of RNPS being bought and sold on the grey market, being used at day care centers, and otherwise available for use by consumers unaware of the alleged risks of using the product.

The Settlement, which is the culmination of over five years of hard-fought litigation and three-and-a-half years of settlement efforts, including four mediations, accomplishes the twin goals of the litigation. Plaintiffs alleged Defendants marketed the product as fit and safe for infant sleep, which was false, misleading, deceptive and unfair, and sought damages. Plaintiffs also alleged that

[1] The capitalized terms used herein are as defined in Section II of the proposed Settlement Agreement dated July 24, 2024.

[2] Defendants do not agree with Plaintiffs' characterizations and representations with regard to the facts asserted and issues raised in this motion and reserve their right to state their position and to be heard in this or any other litigation regarding those facts and issues and/or any responses thereto.

the Recall was ineffective because the Recall payments were too low and the method of disabling the product was too difficult and deterred consumers from participating in the Recall. As such Plaintiffs sought improvement of the Recall terms. The proposed Settlement compensates past purchasers of the product who Plaintiffs allege were harmed at the point of purchase because they did not and could not have known of the risks of using the product, and also compensates current owners of the product to incentivize them to disable the product so that other consumers will no longer find and be able to use the RNPS.

Under the Settlement, Defendants have agreed to pay $19 million in exchange for a full release of claims that were and could have been brought in this Action. This amount will be placed in a non-reversionary Settlement Fund, and will be used to compensate Settlement Class Members in varying amounts depending on, among other things, (i) whether they participated in the Recall; (ii) currently own the product; (iii) purchased the product, and, if so, whether they have a Proof of Purchase ("POP"); (iv) the date of purchase; and (v) for current owners who do not have a POP, the date of manufacture of the product. Settlement Payments range from the Purchase Price shown on the POP for current owners who purchased a product during the six months preceding the Recall, and $60, $50 or $40 for other current owners depending on when their RNPS was purchased or manufactured; $35 or $25 for purchasers of new RNPS with POP who are not current owners depending on when their RNPS was purchased; and $10 for purchasers of new RNPS who are not current owners, and lack POP, and for Recall Participants. *See* Section III.C, infra.

Plaintiffs believe the Settlement, which provides material benefits to the Settlement Class *now*, is an excellent result given the vagaries of further litigation in this vigorously litigated MDL, in which the first of potentially eleven bellwether classes has been certified as a liability issue class under Rule 23(c)(4) and has yet to go to trial.

Plaintiffs submit the Settlement warrants the Court's preliminary approval pursuant to Federal Rule of Civil Procedure 23(e), which requires Plaintiff to demonstrate the Court "will likely be able to" approve the Settlement as fair, reasonable, and adequate, as well as certify the Settlement Class under Rule 23(a) and 23(b)(3) at the time of final approval. Fed. R. Civ. P. 23(e)(1)(B).

II. PROCEDURAL HISTORY AND SUMMARY OF RELEVANT FACTS

On October 1, 2009, Fisher-Price and Mattel introduced the Fisher-Price Rock 'n Play Sleeper ("RNPS") to the consumer market. Defendants sold—either directly or through retailers—approximately 4.7 million RNPS during the almost ten years the product was on the market. On April 12, 2019, after Plaintiff Emily Barton sent Defendants a February 21, 2019 letter demanding they take corrective action on her statutory consumer protection and warranty claims under California law (ECF 19, Ex. A) and an April 8, 2019 Consumer Reports article reported the RNPS was tied to at least 32 infant deaths, Defendants and the CPSC jointly announced a voluntary Recall of the RNPS entitled "Fisher-Price Recalls Rock 'n Play Sleeper Due to Reports of Deaths." The Recall announcement stated: "Infant fatalities have occurred in Rock 'n Play Sleepers, after the infants rolled from their back to their stomach or side while unrestrained, or under other circumstances," and warned "[c]onsumers should immediately stop using the product." *Id.* at ¶ 12.

Plaintiffs allege that, prior to the Recall, the American Academy of Pediatrics and major consumer groups had issued warnings about the serious dangers of inclined sleepers, and regulators in Canada and Australia did not allow Defendants to market the RNPS as "sleepers." Plaintiff also allege that dozens of infants are reported to have died in the RNPS, and hundreds of injuries have been reported due to use of inclined sleepers such as the RNPS. *Id.* at ¶ 7.

Based on these allegations, consumers who purchased an RNPS or received an RNPS as a gift filed lawsuits against the Defendants, including sixteen class action lawsuits in federal courts

across thirteen states, including six in this District. Plaintiffs in those cases uniformly alleged that Defendants' advertising and marketing of the RNPS was false and misleading, and some alleged the Recall was deficient.

On August 1, 2019, the Judicial Panel on Multidistrict Litigation ("JPML") transferred ten of the Constituent Actions to the Western District of New York for centralized proceedings before the Honorable Geoffrey W. Crawford, Chief Judge of the District of Vermont, sitting in the Western District of New York as a visiting judge, under the caption *In re: Fisher-Price Rock 'n Play Sleeper Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2903. ECF 1. On August 14, 2019 and August 19, 2019, the JPML also transferred *Hanson v. Fisher-Price, Inc.*, C.A. No. 19-00204 (S.D. Iowa) and *Willis v. Fisher-Price, Inc., Willis v. Fisher-Price, Inc.*, C.A. No. 19-00670 (M.D. Tenn.), to the WDNY, respectively. ECF 2, 5.

On September 20, 2019, the Court appointed lead counsel as well as a plaintiffs' committee and liaison counsel in its Initial Case Management Order. ECF 12. Among other things, the Court also ruled that discovery would be bifurcated with discovery relating to class certification issues occurring first, followed by discovery on liability issues if a class were certified.

On October 28, 2019, Plaintiffs filed their Consolidated Amended Complaint asserting claims on behalf of twenty-three individuals and similarly situated class members who purchased or owned an RNPS from 2009 to the present. ECF 19. Plaintiffs alleged violations of various state consumer protection statutes, negligence, breach of express warranty, breach of implied warranty, and unjust enrichment claims as well as violations of the Magnusson Moss Warranty Act, 15 U.S.C. § 2301, *et seq. Id.* Plaintiffs also alleged that the Recall was deficient and sought injunctive relief to improve the terms of the Recall, and for Defendants to engage in a "corrective advertising campaign" to alert consumers to the potential dangers of the RNPS. *Id.*

On December 12, 2019, Defendants filed an answer the Consolidated Amended Response denying in substantive part Plaintiffs' allegations. ECF 28.

The Parties then engaged in extensive formal discovery directed at class certification issues, including written discovery, voluminous document productions, and depositions of Defendants' employees and twenty-one of the named Plaintiffs. Joint Declaration of Demet Basar, James Eubank, and Paul Evans ("Joint Decl.") at ¶¶ 13, 16. Indeed, Defendants produced (and Plaintiffs possessed and reviewed) hundreds of thousands of documents containing over a million pages of documents related to RNPS, including documents concerning the marketing of the RNPS, the Recall, the development of the RNPS, safety incidents in the RNPS, and other disputed liability issues. *Id*. at ¶ 13. Further, the Parties exchanged reports of independent experts, conducted expert depositions, and briefed motions relating to experts. *Id.* Discovery was contentious and involved several motions to compel filed by both parties. *See* ECF Nos. 36, 96, 98, 103, 155, 175, 293.

On February 8, 2021, informed by the findings of the Parties' respective experts regarding Defendants' marketing and damages issues, Plaintiffs filed their Motion for Class Certification (ECF 125) and memorandum in support seeking, *inter alia*, to certify classes of RNPS purchasers under twelve states' laws as well as for injunctive relief. *See* ECF 125-1. On June 16, 2021, Defendants filed their opposition to Plaintiffs' motion (ECF 165), and, on June 17, 2021, moved to exclude Plaintiffs' damages expert. ECF 168. After Plaintiffs filed their Reply brief in further support of class certification (ECF 202), the Court ordered that the class certification hearing would "focus on the certification issues presented by the New York plaintiffs," and if the New York plaintiffs' motion for certification is granted the Court would "set the certified class claims for trial first." ECF 217. Further, the Court denied Defendants' motion to exclude Plaintiffs' damages expert. ECF 210. Defendants also filed a sur-reply opposing class certification, which

focused on the New York class (ECF 223), to which the Court permitted Plaintiffs to file a sur-sur-reply. ECF 243.

Following a full-day hearing on February 25, 2022, the Court certified a class of RNPS purchasers in New York pursuant to Rule 23(c)(4) of the Federal Civil Rules of Procedure as to liability issues on June 2, 2022, and directed that a jury trial on those issues proceed as soon as the Parties could be ready. ECF 254; ECF 260. Plaintiffs petitioned the Second Circuit Court of Appeal pursuant to Rule 23(f) for leave to appeal the Court's denial of a Rule 23(b)(3) class in its certification order concerning the New York Class, which the Second Circuit denied on October 5, 2022. ECF 269.

The Parties subsequently exchanged further voluminous written and document discovery in preparation for a trial relating to the New York liability class. Joint Decl. at ¶ 20. Plaintiffs processed and reviewed over 270,000 additional documents containing over a million pages related to the RNPS, including, among others, additional documents concerning the development, design, and marketing of the RNPS, reports of incidents that occurred while infants were in a RNPS, and other disputed liability issues. *Id.* at ¶ 22. Additionally, Plaintiffs worked to secure document discovery from third parties, including plaintiffs in certain wrongful death litigation involving the RNPS.

On September 8, 2022, the Court directed the Parties to submit briefing as to whether a California consumer class should be certified. ECF 262. On October 21, 2022, Plaintiffs filed their Motion for Class Certification of the California Class (ECF 283) and memorandum in support thereof (ECF 284) seeking, *inter alia*, to certify a class of RNPS purchasers under California's consumer protection statutes, implied warranty, and unjust enrichment claims. Defendants opposed the motion (ECF 296), to which Plaintiffs filed a reply brief. ECF 301. On March 7,

2023, the Court set a hearing on the motion for April 13, 2023, which, due to the March 2023 settlement efforts described below, was rescheduled for December 15, 2023 and, later, for February 23, 2024. Due to settlement discussions and the Agreement reached between the Parties, the class certification hearing concerning the California class did not move forward.

On October 7, 2022, Defendants moved to dismiss the certified New York class for lack of standing of the named Plaintiffs (ECF 271), which Plaintiffs opposed (ECF 284). The Court denied Defendants' motion to dismiss on February 8, 2023. ECF 286.

On December 1, 2022, the Court advised the Parties of its intent to schedule a trial for the New York liability class to commence in the spring of 2024. ECF 291.

As described below, beginning in 2020, the Parties engaged in settlement negotiations, including a mediation with Christopher Ekman, an experienced mediator selected by the Parties, in September 2020, a second mediation with mediator Jill Sperber in April 2022, and an in-person two-day mediation with the Hon. Margaret Morrow (Ret.) and Mr. Ekman in March 2023. After additional negotiations under the auspices of the Hon. Margaret Morrow and Mr. Ekman, the Parties reached a settlement in principle to fully resolve the Action, subject to the negotiation of a definitive settlement agreement. On February 13, 2024, the Parties informed the Court of the settlement in principle and that they intend to file the settlement agreement and motion for preliminary approval by April 12, 2024. ECF 325.

Between February 13, 2024 and the filing of this Motion, the Parties engaged in intense, arms' length negotiations regarding settlement terms, including those relating to the scope of relief and complex allocation issues. During these protracted negotiations, the Parties filed and the Court granted joint motions to extend the deadline for the Parties to enter into a settlement agreement and for Plaintiffs to file their motion for preliminary approval. ECF 331-343.

Despite their continued efforts, the Parties were unable to reach agreement on certain terms of the settlement and participated in yet another mediation via Zoom with Judge Morrow and Mr. Ekman on July 2, 2024. After additional extensive negotiations, the Parties entered into the Settlement Agreement on July 24, 2024.

III. THE SETTLEMENT

A. Settlement Negotiations

The Parties' proposed Settlement was reached after extended arm's-length negotiations over four years under the auspices of three highly regarded mediators. Joint Decl. at ¶¶ 27-30. Before agreeing to settle the Action, counsel for Plaintiffs conducted years of extensive formal discovery and litigation, and were thoroughly familiar with the relevant facts and the law. *Id.* at ¶¶ 7-30, 47-49.

On or about March 27, 2020, Christopher Ekman of CooganEkman LLC was chosen as mediator to explore a potential settlement with the Parties, and, later, to facilitate and oversee any settlement discussions among the Parties. Joint Decl. at ¶¶ 14-15, 27. On September 10, 2020, after submitting mediation statements, the Parties conducted their first mediation with Mr. Ekman. *Id.*

The Parties later agreed to conduct a mediation via Zoom with Ms. Jill R. Sperber, which occurred on April 12, 2022. *Id.* at ¶ 19, 27. Prior to the mediation, the Parties prepared detailed mediation statements addressing the facts, posture, liability, and damages in the case. *Id.* After the mediation, the Parties continued settlement communications amongst themselves and with Ms. Sperber via telephone and Zoom. *Id.* Many written settlement proposals and counterproposals were exchanged among the Parties during this period. *Id.*

Subsequently, the Parties agreed to a two-day, in-person mediation with the Hon. Margaret M. Morrow (Ret.) and Mr. Ekman, which took place in Los Angeles, California, on March 27-28, 2023. *Id.* at ¶ 27. Prior to mediation, the Parties again prepared detailed mediation statements

addressing the facts, posture, liability, and damages in the case. *Id.* After the two-day mediation, the Parties continued settlement communications amongst themselves as well as with Judge Morrow and Mr. Ekman. *Id.* Following these discussions, the Parties reached a settlement in principle, and, on February 13, 2024, informed the Court that they had reached a settlement in principle to fully resolve this multi-district litigation. *Id*. at ¶ 28; ECF 325.

The Parties then devoted substantial time and effort to further negotiating the terms of this Settlement over a period of five months. The negotiations were intense, arms' length, protracted and involved numerous negotiating sessions among counsel via zoom, other communications, and the exchange of multiple drafts of the settlement agreement. As stated above, the Parties were unable to reach agreement on certain terms and participated in another lengthy mediation before Judge Morrow and Mr. Ekman via Zoom on July 2, 2024. *Id*. at ¶ 29. Thereafter, the Parties spent a substantial amount of time negotiating the remaining terms of the Settlement Agreement and its exhibits, including important notice documents and the claim form.

Throughout the settlement process, the settlement negotiations were conducted by highly qualified and experienced counsel on both sides. Class Counsel submit that the proposed Settlement is fair and reasonable and is a highly successful result for members of the proposed Settlement Class. *Id*. at ¶¶ 4-6, 47-51. The negotiations were hard-fought and clearly non-collusive. *Id.* at ¶¶ 4-6, 27-31, 47-51. Class Counsel analyzed all contested legal and factual issues to thoroughly evaluate Defendants' contentions and defenses as well as advocated in the settlement negotiation process for a fair and reasonable settlement that serves the best interests of the Settlement Class. *Id.* at ¶¶ 27-30, 31-35, 47-51.

B. The Settlement Class Definition

The Settlement Agreement defines the Settlement Class as follows:

All Persons in the United States, the District of Columbia, Puerto Rico, and all

other United States territories and/or possessions who, during the Class Period, (a) purchased (including to be given as a gift to another Person) or acquired (including by gift) an RNPS, or (b) have an RNPS in their possession.

Excluded from the Class are: (i) Persons who participated in the Recall and received a cash refund; (ii) Persons who purchased an RNPS for the sole purpose of resale to consumers at wholesale or retail, (iii) Defendants, their subsidiaries, and their legal representatives, successors, assignees, officers, directors and employees; (iv) Plaintiffs' Counsel; and (v) judicial officers and their immediate family members and associated court staff assigned to this case. In addition, persons or entities are not Settlement Class Members once they timely and properly exclude themselves from the Class, as provided in this Settlement Agreement, and once the exclusion request is finally approved by the Court.

Settlement Agreement at II.A.55.

C. Cash Benefits to the Settlement Class

Settlement Class Members who do not opt out of the Settlement will be entitled to substantial cash benefits if the Settlement is approved. SA, § III.A-C. The amount of the Settlement Payments to Settlement Class Members will depend on whether they currently own an RNPS, participated in the RNPS Recall, or have a Proof of Purchase. Settlement Payments can range from a full refund of the Purchase Price to $10 per RNPS, as set forth below:

Settlement Class Members who Currently Own An RNPS		
Date of Retail Purchase / Date of Manufacture	Have Proof of Purchase?*	Settlement Payment Amount
Purchased between October 12, 2018 and April 12, 2019 and submit a Proof of Purchase	Yes	Purchase Price
Purchased between October 12, 2018 and April 12, 2019, ***or*** Manufactured on or after October 12, 2018, but do not have a Proof of Purchase	No	$60
Purchased or Manufactured between April 12, 2017 and October 11, 2018	N/A	$50
Purchased or Manufactured on or before April 11, 2017	N/A	$40
* For Current Owners who submit a Claim without Proof of Purchase, the date the RNPS was manufactured, evidenced by a date code stamped on the hub of the RNPS, will be used to determine the amount of the Settlement Payment.		

Settlement Class Members who Purchased a new RNPS but no Longer Own it.		
Date of Retail Purchase / Date of Manufacture	Have Proof of Purchase?*	Settlement Payment Amount
Purchased ***new*** between April 12, 2017 and April 12, 2019 ***and*** did not return the RNPS pursuant to the Recall	Yes	$35
Purchased ***new*** on or before April 11, 2017 ***and*** did not return the RNPS pursuant to the Recall	Yes	$25
Purchased ***new and*** did not return pursuant to the Recall	No	$10

Settlement Class Members who Participated in the Recall and Received a Voucher or a Fisher-Price Toy for Returning an RNPS			
Returned Prior to Initial Notice Date	Date of Retail Purchase / Date of Manufacture	Received Voucher or Fisher-Price Toy?	Settlement Payment Amount
Yes	Any Date	Yes	$10

Plaintiffs submit this is an equitable allocation of Settlement proceeds among the four categories of Settlement Class Members, with Current Owners being entitled to amounts that will incentivize them to disable their RNPS and participate in the Settlement; and POP-Purchasers and No POP-Purchasers receiving different amounts in recognition of the relative strength of their claims. Recall Participants who did not receive cash in the Recall are also entitled to a cash payment. Plaintiffs believe that the Settlement is a vast improvement over the Recall for Current Owners, and retail purchasers of RNPS who no longer own them finally stand to be compensated for their out-of-pocket damages after more than five years of litigation, if the Settlement is approved.

D. The Net Settlement Fund

All Settlement Payments to Settlement Class Members will be paid from the Net Settlement Fund, which is the Settlement Fund less any Attorneys' Fees and Expenses and Class Representative Service Awards that may be awarded by the Court, Taxes, and Settlement Administration Expenses.

The Settlement provides for different capped funds for Settlement Payments to Current Owners, POP-Purchasers and No POP-Purchasers, as follows: the Current Owners' Fund is capped at $4,750,000 (SA, § III.B.2.f), the POP-Purchasers' Fund is also capped at $4,750,000 (SA, § III.B.3.c), and the No-POP Purchasers' Fund is capped at $1,000,000 (SA, § III.B.5). The Settlement also provides for set-aside funds of at least $250,000 each for Current Owners (SA, § III.B.2.g) and POP-Purchasers (SA, § III.B.3.d) to make Settlement Payments for Settlement Class Members who claim they did not receive notice or were unaware of the Settlement until after the Claims Deadline.

Because the Current Owners' Fund may be undersubscribed while the POP-Purchasers Fund may be oversubscribed (or vice versa), the Settlement provides a method for monies to be moved from one fund to the other with the goal of paying the maximum number of Settlement Class Members in each category. This includes reallocation of remaining funds into each fund's respective set-aside fund to pay Settlement Class Members who may not have learned of the Settlement until after the Settlement Claims Deadline, which is 90 days issuance of the Final Judgment (SA, § III.E).

If the total amount of Settlement Payments for Approved Claims for the Current Owners' Fund or POP-Purchasers' Fund exceeds the respective caps for those Funds and additional funds are not available under reallocation formula (SA, § III.B.4) then Settlement Payments for each

Approved Claim under Sections III.B.2-3 are to be reduced pro rata within each Fund to equal the total amount of each Fund's respective cap. SA, §§ III.B.2.h and III.B.3.e

However, if the total value of Settlement Payments for Approved Claims for Current Owners or POP-Purchasers is less than the Funds' respective cap "(Undersubscribed"), then any remaining funds will be allocated as follows:

> **Undersubscribed Current Owners' Fund:** The first $375,000 of remaining funds shall be placed in the Current Owners' Set-Aside Fund. If the Current Owners' Fund is still not exhausted, and if Approved Claims for POP-Purchasers exceed the POP-Purchasers' Fund, remaining funds shall be moved to the POP-Purchasers' Fund, up to the amount required to avoid a pro rata reduction in Settlement Payments to POP-Purchasers. If the Current Owners' Fund is still not exhausted, any remaining funds shall be placed in the Current Owners' Set-Aside Fund.
>
> **Undersubscribed POP-Purchasers Fund:** The first $375,000 of remaining funds shall be placed in the POP-Purchasers' Set-Aside Fund. If the POP-Purchasers' Fund is still not exhausted, and if Approved Claims for Current Owners exceed the Current Owners' Fund, remaining funds shall be moved to the Current Owners' Fund, up to the amount required to avoid a pro rata reduction in Settlement Payments to Current Owners. If the POP-Purchasers' Fund is still not exhausted, any remaining funds shall be placed in the POP-Purchasers' Set-Aside Fund.
>
> **Both Funds Undersubscribed:** Any funds remaining in the Current Owners' Fund shall be placed in the Current Owners' Set-Aside Fund and any funds remaining in the POP-Purchasers' Fund shall be placed in the POP-Purchasers' Set-Aside Fund.

E. Robust Notice Plan

Plaintiffs have proposed Kroll Settlement Administration LLC ("Kroll") to serve as Settlement Administrator (SA, § II.A.53) to provide notice, administer the Settlement, and provide other services necessary to implement the Settlement. SA, §§ III.C-G. Kroll has been the notice and/or claims administrator in some of the largest class action settlements providing for cash payments.[3]

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[3] *See* SA Ex. 7, Declaration of Jeanne C. Finnegan Re: Settlement Notice Plan ("Finnegan Decl."), ¶¶ 5-13, filed contemporaneously herewith.

As detailed in Section VI below, under the guidance of Jeanne Finnegan of Kroll, a highly qualified expert in her field (SA, Ex. 7 at ¶¶ 2, 5-15) , Kroll will implement a Notice Plan (SA, Ex. 3), designed to reach a targeted audience of potential Settlement Class Members using a combination of Direct Notice (SA, Ex. 5), Publication Notice (including through digital and social media notice), notice through the Settlement Website, including via a fulsome Long Form Notice (SA, Ex. 4) that will be available on website, in English and Spanish. There will also be a toll-free information line. All of these methods of Class Notice provide Settlement Class Members with clear, plainly stated information about their rights, options, and deadlines in connection with this Settlement. SA, Exs. 3, 4, 5.

Direct Notice will be sent via email or U.S. mail, if no email address is available, to known purchasers of the RNPS whose contact information is provided by Defendants and/or third party retailers to Kroll. Under the Publication Notice plan, Class Notice is estimated to reach over 80% of potential Class Members who have a higher likelihood of using or having used the RNPS, an average of 3.7 times. SA, Ex. 3 at 1. In comparison, the Federal Judicial Center states that a publication notice plan that reaches over 70% of targeted class members is considered a high percentage and the "norm" of a notice campaign. *Id*. at 4.

Importantly, both the Direct Notice and Long Form Notice inform Settlement Class Members begin with informing potential Settlement Class Members that the RNPS was recalled by the CPSC and Fisher-Price due to reported infant fatalities and have prominently state:

> If you currently own an RNPS, **DO NOT** use your product under any circumstances. Instead, please **disable your product as shown on the video on the Settlement website, www.FisherPriceRockNPlaySettlement.com**, and follow the instructions to file a claim form to receive a cash payment under this Settlement.

Thus, with this Settlement, Plaintiffs have secured the "state of the art notice program for the wide dissemination of a factually accurate recall notice for the Rock 'n Play Sleeper and the

implementation of a corrective advertising campaign by Defendants" they sought in the CAC. ECF 19, ¶ 300.

F. Claims Administration and Distribution

Kroll, with input from the Parties, has designed a claims process that places minimum burdens on Class Members who are eligible to receive payment under the Settlement. To be eligible for payment via the Claims Process, qualifying Class Members are required to timely complete and submit a simple Claim Form with Proof of Disablement of their RNPS if they are Current Owners and/or Supporting Documentation corroborating a retail purchase of an RNPS. SA, § III.C.; SA, Ex. 6. Settlement Class Members will be able to track their Claims using the unique identifier assigned to their Claim Form. SA, § III.C.1; SA, Ex. 6.

The Claim Forms have only five basic questions (SA, Ex. 6) and may be submitted online via the Settlement Website or in hard copy. If submitted online, Settlement Class Members have the option to receive any Settlement Payment via a digital method, such as Venmo, PayPal, or digital payment card, or by physical check. Claim Forms submitted by mail may receive any Settlement Payment by physical check. SA, § III.D.1.

Unlike in the Recall in which Current Owners were required to dismantle their RNPS and mail back the bulky hubs to Defendants (ECF 19 at ¶ 166), in the Settlement, Current Owners need only disable their RNPS and submit photos documenting same. SA, §§ II.A.38, III.B. The Settlement Website will contain a video and written instructions for Settlement Class Members. Photos can be uploaded with online Claim Forms or mailed in with paper Claim Forms.

The Settlement Administer will process all Claims. If a Claim is determined to be deficient, the Settlement Administrator will email a notice to the Claimant if an email address was provided or, if no email address was provided, mail a notice of deficiency letter to the Claimant requesting that the Claimant complete and/or correct the deficiencies and resubmit the Claim Form within

thirty (30) days of the date of the notice. SA, § III.C.7. Deficient claims that are not corrected/completed will be denied. *Id.*

Settlement Class Members with Approved Claims will be paid digitally or by check, as elected. Settlement checks will state that the check will become null and void unless cashed within ninety (90) days after the date of issuance. For any checks that are uncashed by Class Members after 90 days, the Settlement Administrator will seek to contact the Settlement Class Members with the uncashed checks and have them promptly cash the checks, including, but not limited to, by reissuing checks. SA, § III.D.4. If an electronic deposit and digital payment to a Settlement Class Member is unable to be processed, the Settlement Administrator will attempt to contact the Class Member within 30 days to correct the issue. Any checks, electronic deposits, or digital payments including re-issued checks, that are uncashed or unable to be processed within 90 days of the first attempt, will remain in the Settlement Fund for disposition. SA, § III.F.

The Settlement Administrator will use reasonable efforts to complete the initial distribution of Settlement Payments on all timely filed Approved Claims as soon as practicable, but no later than six (6) months after the Effective Date. SA, § III.F.1. Additional distributions will be made at six-month intervals for late-filed Claims during 24 months after the Effective Date, with a final distribution occurring 45 days thereafter. SA, § III.F.2. If there is money left in the Net Settlement Fund after all Approved Claims are paid, Class Counsel, in its sole discretion, may direct additional distributions be made to Class Members if economically feasible, subject to Court approval. Any Unclaimed Funds remaining in the Net Settlement Fund after distribution of Settlement Payments shall be paid to the Non-Profit Residual Recipient, the Children's Health Fund, whose mission is to bring comprehensive healthcare to children in under-resourced communities and advocating for the health and well-being of children. SA, § III.F.4.

G. Settlement Oversight

During the twenty-four (24) months after the Effective Date, the Settlement Administrator shall provide monthly reports to Class Counsel concerning the implementation of and Settlement Class Member participation in the Settlement. The Settlement Administrator shall promptly provide documents and data in response to reasonable requests from Class Counsel, including, without limitation, data concerning approval and denial of Claims.

H. The Release

The Settlement includes an appropriate release, as follows:

> In consideration of the benefits provided to the Settlement Class Members by Defendants as described in this Settlement Agreement, upon the Effective Date, each Settlement Class Member, on his or her own behalf and on behalf of his or her respective predecessors, successors, assigns, assignors, representatives, attorneys, agents, trustees, insurers, heirs, estates, beneficiaries, executors, administrators, and any natural, legal, or juridical person or entity to the extent he, she, or it is or will be entitled to assert any claim on behalf of any Class Member (the "Releasors"), hereby waive and release, forever discharge and hold harmless the Released Parties, and each of them, of and from any and all past, present and future claims, counterclaims, actions, rights or causes of action, liabilities, suits, demands, damages, losses, payments, judgments, debts, dues, sums of money, costs and expenses (including, without limitation, attorneys' fees and costs), accounts, bills, covenants, contracts, controversies, agreements, obligations, or promises, in law or in equity, contingent or non-contingent, known or unknown, suspected or unsuspected, foreseen or unforeseen, matured or unmatured, accrued or unaccrued, liquidated or unliquidated, whether patent or latent, concealed or overt, direct, representative, class or individual in nature, in any forum ("Claims") that the Releasors, and each of them, had, has, or may have in the future arising out of, in any way relating to, or in connection with, the RNPS that were or could have been asserted in the Action, including claims alleging false advertising, breach of implied warranties, Released Parties' statements or omissions or conduct regarding the Recall, and Released Parties' marketing, representations or omissions regarding the RNPS, including relating to the safety, detection or resolution of alleged concerns regarding the RNPS, including unknown claims ("Released Claims"); provided, however, that the Released Claims shall not include claims for wrongful death, personal injury and property damage.

SA, § VII.A. This Release, which will be made part of the Final Order and Final Judgment (SA § VII.B), will be attached to the Long Form Notice, and will be available on the Settlement Website. SA, §§ IV.E-F.

The Release is attached to the Long Form Notice and will be posted on the Settlement Website.

I. Payments of Attorneys' Fees, Expenses, and Plaintiffs' Service Awards

Prior to the Final Approval Hearing, Class Counsel will file a motion for an award of Attorneys' Fees and Expenses, as well as Class Representative Service Awards. Plaintiffs anticipate seeking Attorneys' Fees in an amount no greater than $5,320,000 to be paid from the Settlement Fund, which represents 28% percent of the Settlement Fund. Joint Decl. at ¶ 37. Class Counsel will also seek reimbursement of litigation expenses incurred by Plaintiffs' Counsel of up to $825,000, and Class Representative Service Awards of $3,500 for each of the 21 Class Representatives who have monitored this litigation for over five years, responded to discovery requests, and sat for depositions, most of which were full day depositions, to be paid from the Settlement Fund. *Id.* at ¶¶ 37-38. Notice to the Settlement Class Members will advise them of these planned requests and advise them of the procedures for them to comment on or object to the fee petition before Final Approval. SA, Exs. 4, 5.

No order of the Court, or modification or reversal or appeal of any order of the Court, concerning the amount(s) of any Attorneys' Fees and Expenses awarded by the Court to Class Counsel, or concerning the amounts of any Class Representative service awards that are awarded by the Court to Class Representatives, shall affect whether the Final Order and Final Judgment are final and shall not constitute grounds for cancellation or termination of the Settlement. SA, § IX.B.

IV. THE COULD SHOULD GRANT PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT

A. The Standard and Procedures for Granting Preliminary Approval

The Second Circuit has a "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (internal quotations omitted); *see also* NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). "Courts have discretion regarding the approval of a proposed class action settlement[,]" and when exercising this discretion, "courts should give weight to the parties' consensual decision to settle class action cases because they and their counsel are in unique positions to assess potential risks." *Jara v. Felidia Restaurant, Inc.*, 2018 WL 11225741, at *1 (S.D.N.Y. Aug. 20, 2018). There is a "presumption in favor of settlement, absent fraud or collusion." *Peoples v. Annucci*, 180 F. Supp. 3d 294, 307 (S.D.N.Y. 2016).

Federal Rule of Civil Procedure 23(e) sets forth a streamlined protocol for preliminary approval of class action settlements. As a first step, the "parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class." Fed. R. Civ. P. 23(e)(1)(A). The Court must direct notice if the parties have shown that the court "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for the purposes of judgment on the proposal." If these requirements are met, notice of the proposed settlement will be disseminated to the class. Fed. R. Civ. P. 23(e)(1).

Under Rule 23(e)(2), in determining whether a court will be able to approve a proposed settlement as fair, reasonable, and adequate, the court should consider whether: (A) the class representatives and class counsel have adequately represented the class; (B) whether the proposal was negotiated at arms' length; (C) whether the relief provided for the class is adequate, taking

into account the factors set forth in subsections (i)-(iv); and (D) whether the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(D). These factors are not intended to "displace" any factor previously adopted by the courts, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2), advisory committee's notes to 2018 amendments. For this reason, the traditional factors that are utilized by courts in the Second Circuit—known as the "*Grinnell* factors"—to evaluate the propriety of a class action settlement, which overlap with Rule 23(e)(2), are still relevant.[4] *See In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 2019 WL 6875472, at *14 (E.D.N.Y. Dec. 16, 2019) ("*In re Payment Card II*") (there is significant overlap between the Rule 23(e)(2) factors and the nine Grinnell factors such that they "complement, rather than displace each other.").[5]

Thus, Rule 23(e) remains entirely consistent with the long-standing rule that preliminary approval, "is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n-E. Railroads*, 627 F.2d 631, 634 (2d Cir. 1980) (citing MANUAL FOR COMPLEX LITIGATION

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[4] The *Grinnell* factors are (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 the 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; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *See generally City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). Because notice to the proposed Class has not yet been issued, the second *Grinnell* factor cannot be assessed. *In re Warner Chilcott Ltd. Sec. Litig.*, 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008) "Since no notice has been sent, consideration of this factor is premature."). However, all Plaintiffs support the Settlement.

[5] *Cymbalista v. JPMorgan Chase Bank, N.A.*, No. 20-CV-456 (RPK) (LB), 2021 WL 7906584, at *5 (E.D.N.Y. May 25, 2021) ("Courts in this Circuit now look to the factors set forth in the Rule and then turn to the *Grinnell* factors to fill in any gaps and complete the analysis.") (citation omitted).

§ 1.46 at 55 n.10 (1977)); *see also Davis v. J.P. Morgan Chase & Co.*, 775 F. Supp. 2d 601, 607 (W.D.N.Y. 2011) (internal quotations and citations omitted); *Dover v. Brit. Airways, PLC (UK)*, 323 F. Supp. 3d 338, 349 (E.D.N.Y. 2018) ("In contrast to the rigorous inquiry the court must conduct at the final approval stage, at preliminary approval, the court need only determine that there is . . . probable cause to submit the proposed settlement.") (citation omitted).

As set forth below, the proposed Settlement satisfies all of the Rule 23(e)(2) factors and relevant *Grinnell* factors, and should be preliminarily approved as fair, reasonable, and adequate.

B. The Rule 23(e)(2) Factors Are Satisfied

Each of the Rule 23(e)(2) factors is satisfied here:

1. Rule 23(e)(2)(A): Plaintiffs and Plaintiffs' Counsel Adequately Represented the Class

The "[d]etermination of adequacy typically entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 30 (E.D.N.Y. 2019) ("*In re Payment Card I*") (internal quotations omitted).

First, the Class Representatives' "interests are aligned with other class members' interests because they suffered the same injuries": they purchased an allegedly defective and misleadingly marketed RNPS. *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019). "Because of these injuries, plaintiffs have an interest in vigorously pursuing the claims of the class." *Id.* (internal quotations omitted). Additionally, the Class Representatives vigorously prosecuted the claims on behalf of the Class throughout litigation and settlement negotiations. Each fully participated in the litigation by responding to written discovery, producing documents,

sitting for a deposition, and remaining informed of the progress of the litigation and mediation, all of which weigh in favor of preliminary approval.

Second, Plaintiffs' Counsel zealously represented Plaintiffs and the Settlement Class by researching the viability of asserting various claims; successfully opposing a contentious motion to dismiss the New York representatives claims; conducting discovery (consisting of reviewing hundreds of thousands documents, conducting lay and expert witness depositions around the country, and conducting written discovery); successfully opposing a motion to exclude Plaintiffs' experts; successfully obtaining class certification of a liability class; and fully briefing a class certification motion relating to each of the statewide classes. Class Counsel has extensive experience in litigating class action cases, has a nationwide complex-litigation practice, and has dedicated resources to pursue this case. *See* Joint Decl., Ex. A.

As a result of these efforts, Plaintiffs and Class Counsel had a well-developed understanding of the strengths and weaknesses of their claims as they engaged in settlement negotiations and ultimately reached agreement on the substantive terms of the proposed Settlement.[6] Therefore, Class Representatives and Class Counsel submit that, at final approval, Rule 23(e)(2)(A) will be satisfied because they have adequately—indeed, zealously—represented and pursued the best interests of the proposed Settlement Class at each stage of the litigation.

2. Rule 23(e)(2)(B): The Settlement Was Negotiated At Arm's Length By Informed Counsel

In the Second Circuit, "[a] presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable

[6] Thus, the third *Grinnell* factor – whether Plaintiffs had a sufficient understanding of their case before negotiating the Settlement – is also satisfied. *Pearlstein v. BlackBerry Ltd.*, 2022 WL 4554858, at *4 (S.D.N.Y. Sept. 29, 2022) (internal quotations omitted).

counsel after meaningful discovery." *Wal-Mart Stores,*, 396 F.3d at 116; *see also In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 693.

As described above, *supra* §§ II-III, the negotiations culminating in this Settlement were intense, complex, conducted in good faith and at arms' length over a period of more than three and a half years by informed and experienced counsel. Class Counsel, armed with the knowledge gained they gained through discovery, and in consultation with their experts, were able to meaningfully assess the strengths and weaknesses of the Parties' respective positions.

Through more than five years of contentious litigation, the Parties engaged in extensive discovery, including written discovery, voluminous document productions, and depositions of Defendants' employees and twenty-one of the named Plaintiffs. Defendants produced (and Plaintiffs processed and reviewed) hundreds of thousands of documents containing over a million pages of documents related to the development and marketing of the RNPS, the Recall, safety incidents in the RNPS, and other disputed liability issues. *Id.* Further, the Parties exchanged reports of independent experts, conducted expert depositions, and briefed *Daubert* motions.

Additionally, both sides prepared several mediation statements setting forth their relevant positions and participated in mediations on three different occasions with experienced and qualified mediators, including the Hon. Margaret M. Morrow (Ret.), the former Chief Judge of the Central District of California, which "allowed them to further explore the claims and defenses." *Beckman v. KeyBank*, 293 F.R.D. 467, 475 (S.D.N.Y. 2013). The "participation of a former judicial officer as a mediator lends credibility to the negotiation process and supports the assertion that a settlement was reached without collusion and at arm's length." *Cymbalista*, 2021 WL 7906584, at *6 (E.D.N.Y. May 25, 2021) (citation omitted); *see also Jara*, 2018 WL 11225741, at *2 ("[a] settlement like this one, reached with the help of a third-party neutral, enjoys a presumption that

the settlement achieved meets the requirements of due process."); *Mikhlin v. Oasmia Pharm. AB*, No. 19-CV-4349 (NGG) (RER), 2021 WL 1259559, at *5 (E.D.N.Y. Jan. 6, 2021) ("Involvement by a mediator in settlement negotiations also supports a finding of procedural fairness").

Indeed, the Parties' first mediation with Christopher Ekman took place on September 10, 2020, nearly three-and-a-half years ago. Joint Decl. at ¶¶ 14-15, 27. The Parties suspended settlement negotiations and continued with litigation. On April 12, 2022, the Parties conducted a virtual mediation via Zoom with Ms. Jill R. Sperber. *Id.* at ¶¶ 19, 27. The Parties later conducted an in-person mediation for two days on March 27 and 28, 2023, with the Honorable Margaret Morrow, the former Chief Judge of the Central District of California,[7] and Mr. Ekman. *Id.* at ¶ 27. Following an impasse on several key terms of the Settlement, on July 2, 2024, the Parties conducted a fourth mediation via Zoom with the Honorable Margaret Morrow and Mr. Ekman**.** *Id.* at ¶ 29. The length and adversarial nature of litigation and settlement negotiation dispels any notion of that the Settlement was the product of collusion.

Here, both counsel for Plaintiffs and for Defendants are experienced in class action litigation, including cases involving defective products. Joint Decl., ¶¶ 39-51. Class Counsel's experience in similar matters, as well as the efforts made by counsel on both sides, confirms that "Plaintiffs obtained sufficient discovery to weigh the strengths and weaknesses of their claims and to accurately estimate the damages at issue." *Beckman*, 293 F.R.D. at 475. As such, Class Counsel are well-positioned to assess the benefits of the proposed Settlement balanced against the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses.

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[7] The Ninth Circuit has the most developed body of case law relating to consumer class actions among the Circuits and Judge Morrow is a leading contributor.

3. Rule 23(e)(2)(C)(i): The Relief Provided by the Proposed Settlement is Adequate

As described below, the proposed Settlement also satisfies the "substantive" factors of Rule 23(e)(2). Under Rule 23(e)(2)(c), a court's assessment of whether the relief provided in a proposed settlement is adequate takes 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). FED. R. CIV. P. 23(e)(2)(c)(i)-(iv).[8] A preliminary consideration of these factors shows that it is likely that Plaintiff will be able to satisfy this prong of Rule 23(e)(2) when seeking final approval.

Rule 23(e)(2)(C)(i) "subsumes several *Grinnell* factors … including: (i) the complexity, expense and likely duration of the litigation; (ii) the risks of establishing liability; (iii) the risks of establishing damages; and (iv) the risks of maintaining the class through the trial. *In re Payment Card I*, 330 F.R.D. at 36. The Settlement satisfies each of these *Grinnell* factors.

a. *Grinnell* Factor 1: The Complexity, Expense, And Likely Duration Of The Litigation Support Settlement

"[C]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *Pearlstein*, 2022 WL 4554858, at *3. As such, courts have consistently held that unless the proposed settlement is clearly inadequate, its acceptance and approval are preferable to the continuation of lengthy and expensive litigation with uncertain results. *TBK Partners, Ltd. v. Western Union Corp.*, 517 F. Supp. 380, 389 (S.D.N.Y. 1981), *aff'd,* 675 F.2d 456 (2d Cir. 1982).

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[8] Rule 23(e)(2)(C)(i) overlaps with *Grinnell* factors 1, 4-6, 7-9. which inform the inquiry and demonstrate that the Settlement is fair, reasonable, and adequate.

This case is complex as it is a multi-state MDL of class actions, a favorable resolution of which depends on obtaining certification of thirteen state classes, surviving motions for summary judgment, and numerous lengthy trials. While Plaintiffs obtained certification of a liability class of New York RNPS purchasers pursuant to Rule 23(c)(4), the next steps in the litigation would have included additional depositions, pretrial motions including contested motions for summary judgment, and a trial as to liability issues relating to the New York class. Further, the Plaintiff's motion for certification of the California class was scheduled for argument, but the parties would have had to engage in extensive class certification briefing for the several remaining statewide classes. Each of the foregoing would be costly and time-consuming for the Parties and the Court as well as create a risk that other statewide classes would not be certified and/or that the Class would recover nothing at all. *See McLaughlin v. IDT Energy*, 2018 WL 3642627, at *10 (E.D.N.Y. July 30, 2018) (finding the first *Grinnell* factor weighed in favor of settlement approval where "the parties would likely need to brief motions for class certification, summary judgment, and potentially proceed to trial"). Indeed, Defendants are represented by formidable defense counsel well-versed in class action litigation, which has vigorously opposed each class certification motion filed by Plaintiffs and would prepare a competent defense at trial. Moreover, "[e]ven assuming that plaintiffs were successful in defeating any pretrial motions filed by defendants, and were able to establish defendants' liability at trial, there is always the potential for an appeal, which would inevitably produce delay." *Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 55 (W.D.N.Y. 2018) (internal quotations omitted); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) ("Delay, not just at the trial stage but through post-trial motions and the appellate process, would cause Class Members to wait years for any recovery, further reducing its value."). Litigation has also been costly, which costs "will only escalate" if litigation continued.

See Simerlein v. Toyota Motor Corp., No. 3:17-CV-1091 (VAB), 2019 WL 2417404, at *19 (D. Conn. June 10, 2019).

The Settlement, on the other hand, permits a prompt and certain resolution of this action on terms that are fair, reasonable, and adequate to the Class without the additional risks of adverse judgment and further substantial expenses. *See Aramburu v. Healthcare Fin. Servs., Inc.*, No. 02-CV-6535 (MDG), 2009 WL 1086938, at *3 (E.D.N.Y. Apr. 22, 2009) ("[T]he settlement provides certain compensation to the class members now rather than awaiting an eventual resolution that would result in further expense without any definite benefit."). This result will be accomplished years earlier than if the case proceeded to judgment through trial and/or appeals and provides certainty whereas litigation does not and could result in defeat at class certification, summary judgment, at trial, or on appeal. This *Grinnell* factor weighs in favor of preliminary approval.

b. *Grinnell* Factors 4, 5, & 6: Plaintiffs Faced Significant Risks On The Merits

"Courts generally consider the fourth, fifth, and sixth *Grinnell* factors together." *Pearlstein*, 2022 WL 4554858, at *5 (internal quotations omitted). In weighing the risks of certifying a class and establishing liability and damages, "the Court is not required to decide the merits of the case, resolve unsettled legal questions, or to foresee with absolute certainty the outcome of the case." *Lowe v. NBT Bank, N.A.*, 2022 WL 4621433, at *8 (N.D.N.Y. Sept. 30, 2022). "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Flores v. CGI Inc.*, 2022 WL 13804077, at *7 (S.D.N.Y. Oct. 21, 2022) (internal quotations omitted).

Here, there is a multitude of risks in proceeding with litigation. While Plaintiffs and lead counsel "believe that they would prevail on their claims asserted against Defendant[s], they also recognize the risks and uncertainties inherent in pursuing the action through class certification,

summary judgment, trial, and appeal." *Lowe*, 2022 WL 4621433, at *8. In particular, Plaintiffs would face "[t]he risk of obtaining … class certification and maintaining [it] through trial." *Beckman*, 293 F.R.D. at 475. While the court certified a liability class relating to the New York class and the California class certification was fully briefed at the time of settlement, briefing relating to the other states remained and there was the risk that additional classes would not be certified. Also, "[e]ven assuming that the Court granted certification, there is always the risk of decertification after the close of discovery" such that the class recovers nothing at all. *Lowe*, 2022 WL 4621433, at *8; *see also Flores*, 2022 WL 13804077, at *8 ("The risks attendant to certifying a class and defending any decertification motion supports approval of the settlement."). Approval of the Settlement obviates the "[r]isk, expense, and delay" of further litigation, and these *Grinnell* factors thus support preliminary approval. *Lowe*, 2022 WL 4621433, at *8.

c. Grinnell Factors 7, 8 & 9: The Settlement Is Within The Range Of Reasonableness In Light Of The Attendant Risks Of Continued Litigation

The seventh, eighth, and ninth *Grinnell* factors—the ability of the Defendants to withstand a greater judgment, the range of reasonableness of the Settlement Fund given the best possible recovery and considering all the attendant risks of litigation—support preliminary approval. Despite the risk and meaningful barriers to recovery, described in detail above, this Settlement provides valuable monetary relief to the Settlement Class.

While Defendants could likely withstand a greater judgment, "this factor standing alone does not mean that the settlement is unfair." *Philemon v. Aries Capital Partners, Inc.*, 2019 WL 13224983, at *12 (E.D.N.Y. July 1, 2019); *In re Austrian and Ger. Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 178 n.9 (S.D.N.Y. 2000), *aff'd* 236 F.3d 78 (2d Cir. 2001). Thus, where, as here, a Settlement provides fair compensation to Settlement Class Members, that Defendants may be able to fund a bigger settlement is no impediment to approval. *See Frank v. Eastman Kodak Co.*, 228

F.R.D. 174, 186 (W.D.N.Y. 2005) (approving proposed settlement class notwithstanding that "a corporation the size of Kodak could survive a greater judgment").

The determination of "whether a settlement is reasonable does not involve the use of a 'mathematical equation yielding a particularized sum.'" *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (quoting *In re Austrian and Ger. Bank Holocaust Litig.*, 80 F. Supp. 164, 178 (S.D.N.Y. 2000)). The adequacy of the settlement amount must be judged not "in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *Rodriquez v. It's Just Lunch Int'l*, No. 07-CV-09227 (SN), 2020 WL 1030983, at *7 (S.D.N.Y. Mar. 2, 2020) (citation omitted).

The Court instead need only find that the settlement falls "within the 'range of reasonableness' required for judicial approval." *In re PaineWebber Ltd. Partnerships*, 171 F.R.D. 104, 131 (S.D.N.Y. 1997). The "range of reasonableness with respect to a settlement . . . recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to" completion. *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039, 93 S. Ct. 521, 34 L.Ed.2d 488 (1972); *see also Wal-Mart Stores*, 396 F.3d at 119.

Substantial monetary relief obtained in this Settlement is within this range of reasonableness notwithstanding the possibility the Settlement Class could recover a much greater amount at trial. *See, e.g., In re Currency Conversion Fee Antitrust Lit.*, 263 F.R.D. 110, 124 (S.D.N.Y. 2009) (finding monetary settlement representing approximately 9% of total overcharges alleged was reasonable), *aff'd sub nom.*, *Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. MDL 1775, 2009 WL 3077396, at *9 (E.D.N.Y. Sept. 25, 2009) (finding monetary settlement representing approximately 10.5%

of surcharges was reasonable). "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair." *Philemon*, 2019 WL 13224983, at *12; *Grinnell*, 495 F.2d at 455 n.2 ("[t]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery"). Rather, "[w]hen the proposed settlement provides a meaningful benefit to the class when considered against the obstacles to proving plaintiff's claims with respect to damages in particular, the agreement is reasonable." *Philemon*, 2019 WL 13224983, at *12. Moreover, when a settlement assures immediate payment of substantial amounts to Class Members and does not "sacrific[e] speculative payment of a hypothetically larger amount years down the road," the settlement is reasonable. *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 WL 782596, *5 (S.D.N.Y. Mar. 24, 2008).

Weighing the benefits of the $19 million Settlement here against the risks associated with proceeding in litigation and in collecting on any judgment, the Settlement is more than reasonable. "[T]here was significant dispute between the Parties about the proper measure of damages" in this case, and "Plaintiffs' damages theory . . . was subject to a serious challenge from Defendants' experts." *In re Currency Conversion Fee Antitrust Lit.*, 263 F.R.D. at 124. Indeed, in its June 2, 2022, order certifying a New York 23(c)(4) class, this Court left "open individual measures of damages," and noted damages "may be zero" or "may be the full price of the Sleeper." ECF 254 at 26–27. In light of that uncertain damages amount — which this Court noted would require at least several bellwether trials in New York alone, *id.* — the immediate monetary relief that the Settlement affords the Class is well within the "range of reasonableness." *Rodriquez*, 2020 WL 1030983, at *7.

4. Rule 23(e)(2)(C)(ii): The Effectiveness of the Proposed Method of Distributing Relief

The benefit distribution process is well-tailored for the convenience and benefit of Settlement Class Members. Settlement Class Members who no longer possess a RNPS need only submit a simple claim form online or by mail to receive significant monetary relief. SA, §§ III.B-C. "Requiring completion of a claims form is not onerous," especially where Class Members have "multiple options to do so." *Kaupelis v. Harbor Freight Tools USA Inc.*, 2022 WL 2288895, at *6 (C.D. Cal. Jan. 12, 2022); *see also In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, & Products Liability Litigation*, 2013 WL 3224585, at *18 (C.D. Cal. June 17, 2013) ("The requirement that class members download a claim form or request in writing a claim form, complete the form, and mail it back to the settlement administrator is not onerous."). In addition to submitting the claim form, Class Members with possession of a RNPS will have a simplified method of disabling the product to remove the RNPS from the market and provide photographic proof to the Settlement Administrator. *Id.* at II.38. This is a reasonable method of distributing relief to Class Members. *See Kaupelis*, 2022 WL 2288895, at *6 (finding distribution effective where "Class Members who still owned a Class Product could return them at any of Harbor Freight's nearly 1,200 stores" or "complete [a] claim form online"). Further, the claims process here gives Class Members the option to choose between digital payment and paper check payment options. SA, § III.D.1, ¶ 1. *See Shames v. Hertz Corp.*, 2012 WL 5392159, at *12 (S.D. Cal. Nov. 5, 2012) ("[T]he actual intent of the claims process is to allow class members the opportunity to choose between several payment options."). Lastly, Class Members may opt out of the Settlement if they do not wish to obtain the relief therein. SA, § V. The proposed notice and claims process in the Settlement Agreement are an effective method of distributing relief. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii).

5. Rule 23(e)(2)(C)(iii): The Proposed Attorneys' Fees, Costs and Class Representative Service Awards

In the Second Circuit, an award of attorneys' fees is based on "the total funds made available, whether claimed or not" because "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class." *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007). Here, Class Counsel has agreed to petition the Court for no more than $5,320,000. SA, § IX. This is 28% of the $19 million Settlement Fund that Class Counsel has made available, which is more than reasonable given the length of litigation and is typical in this Court. *See, e.g.*, *Knapp v. Badger Techs., Inc.*, No. 12-CV-6637 (CJS) (MWP), 2015 WL 3745303, at *6 (W.D.N.Y. June 15, 2015) ("In class settlement funds like this one, a one-third award of the settlement proceeds is considered typical and reasonable" in the Second Circuit); *Cates v. Trustees of Columbia Univ. in City of New York*, 2021 WL 4847890, at *7 (S.D.N.Y. Oct. 18, 2021) ("Courts in this District routinely approve fee awards of one-third of the common fund or more."); *Trinidad v. Pret a Manger (UDS) Ltd.*, 2014 WL 4670870, at *11 (S.D.N.Y. Sept. 19, 2014) (same); *Hernandez v. Uzzal Pizzeria, Inc.*, 2022 WL 1032522, at *1 (S.D.N.Y. Apr. 6, 2022) (same).

Plaintiffs will also apply for reimbursement of their reasonable litigation expenses in the amount of $825,000 and Class Representative Service Awards of $3,500 for each of the 21 Class Representatives who oversaw and actively participated in this litigation, including by sitting for depositions most of which took an entire day.

The planned requests are set forth in the Long Form Notice (SA, Ex. 4, Q. 21), the Settlement Agreement (SA, § IX), and other documents, all of which be on the Settlement Website if the Court grants this Motion.

6. Rule 23(e)(2)(C)(iv): There Is No Agreement Required to be Identified under Rule 23(e)(3)

This factor requires identification of "any agreement made in connection with the proposal." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 696. No such agreement exists other than the Settlement.

7. Rule 23(e)(2)(D): The Settlement Treats Settlement Class Members Equitably in Relation to Each Other

This Rule 23(e)(2) factor discusses "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." *In re Payment Card I*, 330 F.R.D. at 47.

Class action settlement benefits may be allocated by counsel in any reasonable or rational manner because 'allocation formulas . . . reflect the comparative strengths and values of different categories of the claim.' *In re Lloyd's Am. Tr. Fund Litig.*, No. 96 CIV.1262 RWS, 2002 WL 31663577, at *18 (S.D.N.Y. Nov. 26, 2002) (quoting *In re Nasdaq Market-Makers Antitrust Litig.,* 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000)). Indeed, a proposed distribution "formula need only have a reasonable rational basis, particularly if recommended by experienced and competent class counsel." *In re Payment Card I*, 330 F.R.D. at 40. New York courts are mindful that in "a large class action the apportionment of a settlement can never be tailored to the rights of each plaintiff with mathematical precision" and an allocation plan "need not be perfect." *In re LIBOR-Based Fin. Instrument Antitrust Litig.*, 327 F.R.D. 483, 496 (S.D.N.Y. 2018); *Cymbalista v. JPMorgan Chase Bank, N.A.,* No. 20 CV 456 (RPK)(LB), 2021 WL 7906584, at *7 (E.D.N.Y. May 25, 2021).

Generally, a settlement need not provide the exact same relief to every class member in order for a court to approve the settlement. *Yim v. Carey Limousine NY, Inc.,* No. 14-CV-5883

(WFK) (JO), 2016 WL 1389598, at *5 (E.D.N.Y. Apr. 7, 2016); *see also In re MetLife*, 689 F. Supp. 2d 297, 351 (E.D.N.Y. 2010) ("'[U]nless the court reviewing settlement finds . . . stark conflicts of interest . . . a settlement which contains class members who may recover different amounts is acceptable.") (internal quotations omitted); *In re Veeco Instruments Inc. Sec. Litig*, 05-MDL-165, 2007 WL 4115809, at *m13 (S.D.N.Y. Nov. 7, 2007) ("[T]here is no rule that settlements benefit all class members equally."). Indeed, courts in the Second Circuit have consistently approved class settlements in which the subclasses have recovered different amounts under the settlement. *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 237-42 (E.D.N.Y. 2010) (granting approval to settlement class in which different groups within the class received varying amounts of relief). "As with other aspects of settlement, the opinion of experienced and informed counsel on appropriate allocation is entitled to considerable weight." *In re Lloyd's*, 2002 WL 31663577, at *18 (internal quotations omitted).

Further, Rule 23(e)(2)'s equitable treatment requirement "is harmonious with, and promoted by . . . clear precedent that permits district courts to approve fair and appropriate incentive awards to class representatives." *Moses v. New York Times Company*, 79 F.4th 235, 253 (2d Cir. 2023); *see also Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 355 (1st Cir. 2022). Here, lead counsel will seek no more than $3,500 in incentive awards for each of the class representative, which account for their active involvement in the litigation, including responding to discovery and sitting for depositions, that resulted in a favorable settlement. Such an award is fair and does not put them at odds with other Class members. *See Godson v. Eltman, Eltman, & Cooper*, 328 F.R.D. 35, 60 (W.D.N.Y. 2018) (approving $10,000 incentive award to a class representative who had "been actively involved in the litigation of this case since its inception and has provided counsel with assistance") (citation omitted); *Jermyn v. Best Buy Stores, L.P.*, No. 08

CIV. 214 CM, 2012 WL 2505644, at *8 (S.D.N.Y. June 27, 2012) (finding the incentive award to be justified because the class representative "participated in discovery," was deposed, and, "[t]hroughout the long progress of this case, he stayed in contact with Class Counsel"); *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 245 (E.D.N.Y. 2010) (finding the incentive award to be justified where the class representative had "discussed with class counsel the pleadings, discovery demands, discovery responses, and memoranda of law on class certification[,] . . . was deposed, . . . [and] conferred with class counsel during the settlement negotiations.").

In sum, all the Rule 23(e) and *Grinnell* factors weigh in favor of approval, and the Court "will likely be able to . . . approve the proposal under Civil Rule 23(e)(2)." Fed. R. Civ. P. 23(e)(1)(B)(i). If objections arise after notice is issued to the Class, the Court may reevaluate its determination. Because the settlement on its face, is "fair, adequate, and reasonable, and not a product of collusion," the Court should grant preliminary approval. *See Frank*, 228 F.R.D. at 184 (quoting *Joel A. v. Giuliani,* 218 F.3d 132, 138-39 (2d Cir. 2000)).

C. The Court Will Likely Be Able To Certify The Class Pursuant To Rules 23(a) and 23(b)(3)

In assessing whether to authorize Notice to the proposed Settlement Class, courts consider whether the Plaintiff can demonstrate that the Court will likely be able to certify the class for judgment and settlement purposes. FED. R. CIV. P. 23(e)(1)(B)(ii). At this stage, the Court need only make a "preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632. Here, because Settlement Class Members will receive monetary relief under the Settlement, Plaintiff seeks certification under Rule 23(b)(3), which requires the court to find that "questions of law or fact common to class members predominate over any questions affecting

only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

"Conditional settlement class certification and appointment of class counsel have several practical purposes, including avoiding the costs of litigating class status while facilitating a global settlement, ensuring notification of all class members of the terms of the proposed settlement agreement, and setting the date and time of the final approval hearing." *Almonte v. Marina Ice Cream Corp.*, No. 1:16-CV-00660 (GBD), 2016 U.S. Dist. LEXIS 171033, at *5 (S.D.N.Y. Dec. 8, 2016). "Preliminary certification is appropriate [where, as here,] claims . . . would 'focus predominantly on common evidence.'" *In re U.S. Foodservice Inc. Pricing Litigation*, 729 F.3d 108, 125 (2d Cir. 2013).

As described below, the proposed Settlement Class here meets the requirements of both Rule 23(a) and Rule 23(b)(3) and should be conditionally certified for settlement purposes only.

1. The Rule 23(a) Requirements Are Satisfied

A class action must comply with the four prerequisites established in Rule 23(a): (1) numerosity of parties; (2) commonality of factual and legal issues; (3) typicality of claims; and (4) adequacy of representation. All four of these requirements are met by the proposed Settlement Class; thus, the Court should grant preliminary approval.

a. The Class Is Sufficiently Numerous

A presumption of numerosity attaches to classes of more than forty in the Second Circuit. *Consolidated Rail Corp. v. Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Lowe*, 2022 WL 4621433, at *4. This Court held that more than 100,000 RNPS units sold in New York was sufficient for numerosity. ECF 254 at 5. Here, the Settlement Class includes purchasers and owners of upwards of 4 million RNPS units that were sold nationwide, which likewise satisfies numerosity.

b. There Are Common Questions of Law and Fact

Commonality is satisfied where the claims of plaintiffs and class members "depend upon a common contention" that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Walmart v. Dukes*, 564 U.S. 338, 350 (2011). "Although the claims need not be identical, they must share common questions of fact or law." *Lowe*, 2022 WL 4621433, at *4. "Rule 23(a)(2) simply requires that there be issues whose resolution will affect all or a significant number of the putative class members." *Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 137 (2d Cir. 2015) (cleaned up). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Id.*

This Court held that commonality was satisfied with respect to the New York Class because, *inter alia*, the "Sleeper products are all very similar" and "the marketing information for all Sleepers is similar" such that there were common questions relating to consumer protection law claims. ECF 254 at 6. Further, there are "a range of common questions, including whether there was a [RNPS] defect; whether [Defendants] knew about the defect; whether the defect was material to reasonable consumers; whether [Defendants] breached an implied warranty; and the proper measure of damages." *Kaupelis v. Harbor Freight Tools USA, Inc.*, 2020 WL 5901116, at *7 (C.D. Cal. Sept. 23, 2020). These questions will generate "common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (emphasis in original). Thus, commonality is satisfied.

c. The Class Representatives' Claims Are Typical Of The Other Class Members

Typicality requires that "each class member's claim arises from the same course of events, and each class member makes similar legal arguments." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 182 (W.D.N.Y. 2005). "[T]he typicality requirement is not highly demanding" because the

claims need not be identical. *Allegra v. Luxottica Retail N. Am.*, 341 F.R.D. 373, 399 (E.D.N.Y. 2022) (citation omitted). As such, typicality "is usually met irrespective of minor variations in the fact patterns underlying individual claims" where "it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented." *Id.*

Here, the Settlement Class Representatives' claims are typical of the Settlement Class because all their claims arise out of the same course of conduct of Defendants: the marketing, manufacture, and sale of RNPS. Further, the Settlement Class Representatives assert legal arguments typical of the Settlement Class. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 182 (W.D.N.Y. 2005). Thus, typicality is satisfied.

d. The Proposed Class Representatives Will Continue To Fairly And Adequately Protect The Interests Of The Class

Class representatives are required to "fairly and adequately" represent a class, FED. R. CIV. P. 23(a)(4), which considers: (1) whether the plaintiff's interests are antagonistic to those of the other class members and (2) whether the plaintiff's attorneys are qualified, experienced, and able to conduct the litigation. *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009); *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 61 (2d Cir. 2000); *Lowe*, 2022 WL 4621433, at *5.

Here, "[t]he fact that [the class representative's] claims are typical of the class is strong evidence that their interests are not antagonistic to those of the class; the same strategies that will vindicate plaintiffs' claims will vindicate those of the class." *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 158 (S.D.N.Y. 2008). Otherwise, the named Plaintiffs and Class Counsel are adequate representatives under Rule 23(a)(4) for the same reasons as they were adequate under Rule 23(e)(2)(A). *See* Section IV.B.1., *supra.*

2. The Proposed Settlement Class Meets The Rule 23(b)(3) Requirements

Rule 23(b)(3) requires that common questions of law "predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Both predominance and superiority are met here.

a. Common Issues Of Law And Fact Predominate

Rule 23(b)(3)'s predominance requirement inquires as to "whether the common, aggregation-enabling, issues in the case are ***more prevalent or important*** than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quotations omitted, emphasis added). A class may be certified under Rule 23(b)(3) "even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.* Indeed, predominance is present "if the plaintiffs can show that ***some*** of the . . . questions can be answered with respect to the members of the class as a whole through generalized proof and that those common issues are more substantial than individual ones." *Kurtz v. Kimberly-Clark Corp.*, 414 F. Supp. 3d 317, 333 (E.D.N.Y. 2019) (citation omitted; emphasis in original); *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) ("Predominance is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof") (internal quotations omitted).[9]

Here, the answers to the overarching questions of liability regarding Defendants' marketing, manufacture, and sale of the RNPS predominate because they turn solely on

[9] *Kurtz* was later reversed in part, but only with respect to Rule 23(b)(2) findings. *See Kurtz v. Costco Wholesale Corp.*, 818 F. App'x 57, 63 (2d Cir. 2020).

Defendants' conduct. *See Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 81 (2d Cir. 2015). To be sure, courts have regularly found that deceptive and misleading marketing cases such as this one satisfy the predominance requirement. *See, e.g.*, *Hasemann v. Gerber Prod. Co.*, 331 F.R.D. 239, 266 (E.D.N.Y. 2019); *Kurtz*, 414 F. Supp. 3d at 333-34; *Belfiore v. Procter & Gamble Co.*, 311 F.R.D. 29, 70 (E.D.N.Y. 2015); *In re JUUL Labs, Inc., Mktg. Sales Pracs. & Prod. Liab. Litig.*, No. 19-MD-02913-WHO, 2022 WL 2343268, at *27 (N.D. Cal. June 28, 2022); *Guido v. L'Oreal, USA, Inc.*, 284 F.R.D. 468, 472 (C.D. Cal. 2012). Further, courts have found that predominance is satisfied in product defect cases like this one. *E.g.*, *Kaupelis*, 2020 WL 5901116, at *14; *In re Sony Vaio Computer Notebook Trackpad Litig.*, No. 09-CV-2109 (AJB) (MDD), 2013 WL 12116137, at *16 (S.D. Cal. Sept. 25, 2013); *In re Sony SXRD Rear Projection Television Class Action Litig.*, 2008 WL 1956267, at *13 (S.D.N.Y. May 1, 2008). Thus, predominance is clearly satisfied here for settlement purposes.

b. Class Treatment Is Superior

Rule 23(b)(3) authorizes class certification when "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," and lists four factors. Fed. R. Civ. P. 23(b)(3). In all, "Rule 23(b)(3) allows a class action to be maintained as long as the plaintiff establishes . . . the superiority of a class action *compared to* other methods" of adjudication. *Guzman v. VLM, Inc.*, No. 07-CV-1126 (JG) (RER), 2008 WL 597186, at 4 (E.D.N.Y. Mar. 2, 2008) (citations omitted, emphasis added).

Here, the Court has already held that the "superiority element is present" with respect to the New York class (ECF 254 at 32), and the Settlement Class is no different. Although Rule 23(b)(3) lists various superiority factors, the Court need not consider the manageability of a potential trial, because the Settlement, if approved, would obviate the need for a trial. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Nonetheless, the remainder of the factors

enumerated in Rule 23(b)(3) demonstrate this Court will likely be able to conclude at final approval that the superiority requirement is met. Settlement Class Members have not manifested an interest in individually controlling the prosecution given that the amount in controversy each individual Settlement Class Member suffered would likely not justify the high costs of individual suits. Undoubtedly, class certification is superior to thousands of costly individual lawsuits, which would impose unnecessary expense upon Settlement Class Members and the court system. Indeed, this Court found that the New York Class members had "little interest in individual control of separate actions to recover the cost of a product that sold for between $50 and $150 dollars" and "[c]oncentrating the litigation in a single court is more efficient." ECF 254 at 31. Thus, superiority is met here.

c. The Settlement Class is Ascertainable

The "modest threshold requirement" of ascertainability merely requires the Court "to consider whether a proposed class is defined using objective criteria" and "will only preclude certification if a proposed class definition is indeterminate in some fundamental way." *In re Petrobras Secs.*, 862 F.3d 250, 269 (2d Cir. 2017). Here, the Court held that "purchase or ownership of the Sleeper are objective criteria" that satisfy ascertainability. ECF 254 at 10. The proposed Settlement Class definition retains these objective criteria. Thus, ascertainability is satisfied.

In sum, the proposed Settlement Class should be certified.

V. PLAINTIFFS' COUNSEL SHOULD BE APPOINTED CLASS COUNSEL FOR THE PROPOSED CLASS PURSUANT TO RULE 23(g)

Rule 23(g) provides that "a court that certifies a class must appoint class counsel" taking into consideration their experience, knowledge, resources, and work on the case. Proposed Class Counsel are Demet Basar, James Eubank, and Paul Evans of Beasley, Allen, Crow, Methvin, Portis

& Miles, P.C. Law, each of whom has been recognized by both federal and state courts as being highly skilled and experienced in complex litigation, including successfully leading a multitude of consumer class actions concerning fraud, misrepresentation and unfair practices. See Joint Decl. at ¶¶ 39-50. Here, proposed Class Counsel investigated potential claims upon being contacted by aggrieved consumers, vigorously prosecuted this Action, negotiated the proposed Settlement, and obtained valuable relief for all proposed Settlement Class Members. As further reflected in their firm resumes, Proposed Class Counsel have substantial experience, individually and collectively, successfully prosecuting class actions and other complex litigation throughout the United States. *See* Joint Decl. at ¶¶ 39 – 50, Ex. A. Plaintiffs respectfully submit proposed Class Counsel satisfy the adequacy requirements of Rule 23(g) and should be appointed Class Counsel.

VI. THE COURT SHOULD AUTHORIZE NOTICE TO THE CLASS

Under Federal Rule of Civil Procedure 23(e), the "court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Notice of a proposed settlement must inform class members: (1) the nature of the pending litigation; (2) the general terms of the proposed settlement; (3) that complete information is available from the court files; and (4) that any class member may appear and be heard at the fairness hearing. NEWBURG ON CLASS ACTIONS § 8.32 (4th ed. 2002). The form of notice is "adequate if it may be understood by the average class member." *Id.* § 11.53. Under Rule 23(c)(2)(B), this Court must "direct to the members of the class the best notice practicable under the circumstances." *Windsor*, 521 U.S. at 617. "Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *In re Merrill Lynch & Coj., Inc. Research Reports Sec. Litig.*, 2007 WL 313474, at *8 (S.D.N.Y. Feb. 1, 2007); *see also*, *e.g.*, *Ortega v. Uber Techs.*, 2018 WL 4190799 (E.D.N.Y. May 4, 2018)

(approving a notice plan of notice by email, with notice by mail for class members whose emails are undeliverable, and ordering the parties to create a settlement website). The Notice Plan set forth in the Settlement meets these requirements and merits this Court's approval. SA, § IV.

The Settlement provides a robust Notice Plan that is well-designed to reach Class Members with clear, plainly stated information about their rights, options, and deadlines in connection with this Settlement. Plaintiffs respectfully submit that the Court should approve the Notice Plan and order dissemination of notice.

The Notice Plan set forth in the Settlement was designed by Kroll Notice Media Solutions ("Kroll Media"), a business unit of Kroll, and Kroll Media's Managing Director, Jeanne C. Finegan. Ms. Finegan has more than 30 years of relevant experience, and has been directly responsible for the design and implementation of hundreds of class action notice and administration programs, including some of the largest and most complex notice programs ever implemented in both the United States and Canada. *See* Finegan Decl. at ¶¶ 5-13. Plaintiffs respectfully request that the Court appoint Ms. Finegan of Kroll Media as Settlement Administrator.

The Settlement provides that the Notice will be provided by direct email and, if no email address is available, by U.S. Mail, proper postage prepaid, to all known Class Members, and also via the Settlement Website and a broad campaign of paid publication through print and online media, including targeted internet advertising through webpages, the Google search engine, and social networks. SA, Ex. 3. All of these avenues for notice have been approved by courts as satisfying due process. *See, e.g., Wal-Mart Stores*, 396 F.3d at 114 (approving notice sent via direct mail and publication); *Simerlein*, 2019 WL 2417404, at *27-30 (approving notice program

comprised of direct mail notice, publication notice, long form notice, settlement website, and social media campaign).

A. Direct Notice

The Settlement Administrator will begin to send the Class Notice, substantially in the form attached to the Settlement Agreement as Exhibit 5, by email and, if no email addresses is available, by U.S. Mail, proper postage prepaid, to the current and former owners of RNPS, as identified by data to be forwarded to the Settlement Administrator by Defendants, Third Party Retailers, and through the Settlement Administrator's efforts. Before the Class Notices are mailed, the Settlement Administrator will process the information it receives from Defendants and Third-Party Retailers through the U.S. Postal Service's National Change of Address database.

The Direct Mail Notice advises recipients that a proposed class action settlement has been reached in an action concerning Fisher Price RNPS, informs them that they may be Class members, and briefly explains the Settlement terms and Settlement Class Members' options. It also sets forth the methods (i.e., via the Settlement Website or through request on a dedicated toll-free phone-line) by which recipients may obtain more information.

B. Settlement Website

The Settlement Administrator will also set up a settlement website that will provide access to the Long Form Notice (SA, Ex. 4), the Claim Form (SA, Ex. 6) and online submission portal, and other documents relevant to the Settlement. SA, Ex. 3. The Settlement Website will set forth all applicable deadlines and will provide information about the proper methods for filing a claim electronically or via the mail. *Id.* In addition, the Settlement Administrator will set up a toll-free 24-hour phone line through which consumers may request copies of the Long Form Notice, settlement-related information, and permit Settlement Class Members to leave voicemail messages and receive a callback from a live operator with knowledge of the Settlement Agreement. *Id.* The

URL address for the Settlement Website and the toll-free phone number will be provided on the published notices as well as the Direct Notices.

C. Paid Media Publication

The Settlement also provides for a comprehensive paid media outreach campaign to begin shortly after the Settlement is preliminarily approved. This paid media campaign spans online display, search, social media, and a press release to target potential Settlement Class Members in the United States and U.S. Territories. The Publication Notice will be published in both English and Spanish and is well-tailored to generate awareness among Settlement Class Members and what it means for them. SA, § IV.D.

The Notice Plan will also make extensive use of the internet. The Settlement Administrator will establish banner notifications on the internet, including within content related to *Family & Parenting* and *Parenting Babies and Toddlers*, and a social media program that will provide settlement-related information to Class Members and shall utilize additional internet-based efforts as agreed to by the Parties.

The Settlement Administrator will run online display ads across approximately 6,000 preselected websites and on social media platforms including Facebook, Instagram, and YouTube. *Id.* at 3-4. Ads will be targeted to those who have liked, followed, or interacted with relevant pages, accounts, videos or posts/tags, including *Parents*, *CafeMom*, *BellyBelly*, and more generally, *Fisher-Price*. Ads will be targeted to the followers of Instagram influencers who are parenting experts, mom influencers, infant sleep coaches, as well as numerous mothers of newborns groups, infant sleeping support groups, pediatricians, and others. *Id.*; *see also Simerlein*, 2019 WL 2417404, at *27-30; *Edwards v. Nat'l Milk Producers Fed'n*, No. 11-CV-04766 (JSW), 2017 U.S. Dist. LEXIS 145217, at *13 (N.D. Cal. June 26, 2017) (referencing approval of similar "extensive" internet campaign). These ads are device agnostic and will appear across desktop, laptop, tablet,

or mobile devices. Online banner notifications, display and social media ads will run in the United States and U.S. Territories in English and Spanish.

As a further targeting mechanism, the Notice Plan will also make use of Google Ads and key search terms. When an internet user runs a Google search that includes relevant keywords (e.g., *Fisher-Price*, *Fisher-Price Rock 'n Play sleeper*, *Fisher-Price Rock 'n Play recall*, *Fisher-Price Rock 'n Play settlement*, *Fisher-Price Rock 'n Play class action*, *Fisher-Price Rock 'n Play lawsuit*, *Fisher-Price Rock 'n Play risk*, *Fisher-Price Rock 'n Play deaths*, etc.), the results pages will include links to the Settlement Website. *Id.* The Notice Plan will use online banner advertisements on both computers and mobile devices which will allow users who believe they may be Class Members to click on a link that will take them to the Settlement Website. *Id.*

The paid media component of the Notice Plan will also include a bilingual (English and Spanish) press release issued over PR Newswire's U.S. 1 plus Hispanic Newslines, with additional targeting to parenting influencers and pediatricians. PR Newswire distributes to thousands of print and broadcast newsrooms, as well as websites, databases, and online services, including featured placement in the news sections of leading portals.

D. Contents Of The Long Form Notice

The Long Form Notice shall be in substantially the form of Exhibit 4 to the Settlement Agreement. It will be available on the Settlement Website and upon request by first-class mail. SA, § IV.E. It is clear and in plain language and addresses all requisite matters. It includes information such as: the case caption; a clear description of the nature of the Action; the definition of the Class; the general substance of the Class claims and issues; the main events in the litigation; a description of the Settlement; a statement of the Release; contact information for Class Counsel; the maximum amount of attorneys' fees and expenses and Class Representative Service awards that may be sought at final approval; the procedures and deadlines for opting out of the Settlement;

the procedures and deadlines for objecting to the Settlement; the potential binding effect of a final judgment on Class members; the fairness hearing date; and how to obtain additional information.

E. Class Action Fairness Act Notice

Consistent with the timeline specified in the Preliminary Approval Order, the Settlement Administrator shall send to each appropriate State and Federal official, the materials specified in 28 U.S.C. § 1715, and shall otherwise comply with its terms. The identities of such officials and the content of the materials shall be mutually agreeable to the Parties and in all respects comport with statutory obligations. Separate from the Settlement Payment, Defendants shall pay the Settlement Administrator the costs of providing CAFA Notice.

Taken as a whole, the Notice Plan exceeds all applicable standards.

VII. THE COURT SHOULD SET DEADLINES AND SCHEDULE A FAIRNESS HEARING

In connection with the preliminary approval, the Court must schedule the final approval hearing and set dates for other key events including mailing and publishing notice, objecting to the Settlement, requesting exclusion, and submitting papers in support of final approval. Plaintiffs propose the schedule set forth in the proposed Preliminary Approval Order (SA, Ex. 2), which schedule is also attached as Appendix A to this brief.

VIII. CONCLUSION

For all the above-stated reasons, Plaintiffs respectfully request that the Court: (1) preliminarily approve the Settlement and preliminarily certify the Class under Rule 23(e); (2) direct notice to the Class through the proposed Notice Plan; (3) appoint proposed Class Counsel to conduct the necessary steps in the Settlement approval process; (4) appoint the proposed Class Representatives for settlement purposes only; (5) appoint Jeanne C. Finnegan as Settlement Administrator; (6) issue related relief as appropriate, including a preliminary injunction pending

final approval of the proposed Settlement;[10] and (7) schedule the Final Approval Hearing and set related deadlines as further defined in the proposed Preliminary Approval Order filed herewith.

Respectfully submitted this day, July 24, 2024,

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[10] Pursuant to the "necessary in aid of" exception to the Anti-Injunction Act, 28 U.S.C. § 2283, and the All Writs Act, 28 U.S.C. § 1651(a), this Court may: (i) issue a preliminary injunction and stay all other actions, pending final approval by the Court; and (ii) issue a preliminary injunction enjoining potential Class Members, pending the Court's determination of whether the Settlement Agreement should be given final approval, from challenging in any action or proceeding any matter covered by this Settlement Agreement, except for proceedings in this Court to determine whether the Settlement Agreement will be given final approval. *See e.g., In re HSBC Bank, USA, N.A., Debit Card Overdraft Fee Litig.*, 99 F. Supp. 3d 288, 304 (E.D.N.Y. 2015); *In re Joint E. & S. Dist. Asbestos Litig.,* 134 F.R.D. 32, 36 (E.D.N.Y.1990).

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 24, 2024.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN RE: ROCK 'N PLAY SLEEPER MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION	MDL No. 1:19-md-2903 Hon. Geoffrey W. Crawford This Document Relates to: ALL CASES

<u>JOINT DECLARATION OF DEMET BASAR, JAMES B. EUBANK, AND PAUL W. EVANS IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL</u>

DEMET BASAR, JAMES B. EUBANK, AND PAUL W. EVANS hereby declare under penalty of perjury pursuant to U.S.C. §1746 as follows:

1. I, Demet Basar, duly licensed to practice law in the States of New York and New Jersey and in the Western District of New York, am a partner at the law firm of Beasley, Allen, Crow, Methvin, Portis & Miles, P.C ("Beasley Allen"), co-lead counsel and one of proposed Class Counsel in this Action.

2. I, James B. Eubank, duly licensed to practice law in the State of Alabama and admitted *pro hac* vice in this Action, am a partner at the law firm of Beasley, Allen, Crow, Methvin, Portis & Miles, P.C ("Beasley Allen"), co-lead counsel and one of proposed Class Counsel in this Action.

3. I, Paul W. Evans, duly licensed to practice law in the State of Alabama and admitted *pro hac* vice in this Action, am a partner at the law firm of Beasley, Allen, Crow, Methvin, Portis & Miles, P.C ("Beasley Allen"), co-lead counsel and one of proposed Class Counsel in this Action.

4. We respectfully submit this joint declaration in support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement (the "Motion"). We have personal knowledge of the matters pertaining to the Action and the proposed Settlement and are competent to testify with respect thereto.

5. We are pleased to submit for the Court's preliminary approval the proposed Settlement of this Action, as set forth in the Settlement Agreement.[1] The proposed Settlement, if approved, will confer valuable benefits on the proposed Settlement Class. As discussed herein, the

[1] Unless otherwise indicated, capitalized terms have the meanings given to them in the Settlement Agreement. See SA, § II.

Settlement was reached as the result of extensive arm's-length negotiations with the assistance of well-respected and experienced mediators after years of hard-fought litigation.

6. The Settlement is fair, reasonable and adequate, provides substantial benefits for the members of the proposed Settlement Class, and merits this Court's preliminary approval. The Settlement Agreement, together with its exhibits, was filed contemporaneously with the Motion and supporting documents.

I. BACKGROUND

7. On October 1, 2009, Fisher-Price and Mattel introduced the Fisher-Price Rock 'n Play Sleeper to the consumer market. Defendants sold—either directly or through retailers—approximately 4.7 million RNPS during the almost ten years the product was on the market. On April 12, 2019, after a Consumer Reports article reported the RNPS was tied to at least 32 infant deaths, Defendants and the Consumer Product Safety Commission jointly announced a voluntary Recall of the RNPS. The Recall announcement stated: "Infant fatalities have occurred in Rock 'n Play Sleepers, after the infants rolled from their back to their stomach or side while unrestrained, or under other circumstances," and warned "[c]onsumers should immediately stop using the product."

8. Consumers who purchased RNPS or received them as gifts filed sixteen class action lawsuits in federal courts across thirteen states. Plaintiffs in those cases uniformly alleged that Defendants' advertising and marketing of the RNPS was false and misleading, and that the Recall was deficient.

9. On August 1, 2019, the Judicial Panel on Multidistrict Litigation (JPML) transferred ten of the Constituent Actions to the Western District of New York for centralized proceedings before the Honorable Geoffrey W. Crawford, Chief Judge of the District of Vermont,

sitting in the Western District of New York as a visiting judge, under the caption *In re: Fisher-Price Rock 'n Play Sleeper Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2903. ECF 1. On August 14, 2019 and August 19, 2019, the JPML also transferred *Hanson v. Fisher-Price, Inc.*, C.A. No. 19-00204 (S.D. Iowa) and *Willis v. Fisher-Price, Inc., Willis v. Fisher-Price, Inc*., C.A. No. 19-00670 (M.D. Tenn.), to the WDNY, respectively. ECF 2, 5.

10. On September 20, 2019, the Court appointed lead counsel as well a plaintiffs' committee and liaison counsel in its Initial Case Management Order. ECF 12. Among other things, the Court also ruled that discovery would be bifurcated with discovery relating to class certification issues occurring first, followed by discovery on liability issues if a class was certified.

11. On October 28, 2019, Plaintiffs filed their Consolidated Amended Complaint asserting claims on behalf of twenty-three individuals and similarly situated class members who purchased an RNPS or received an RNPS as a gift between October 1, 2009 and April 12, 2019 for: (1) violations of numerous state law consumer protection statutes; (2) breach of express warranty; (3) breach of implied warranty; (4) negligence; (5) unjust enrichment; and, on behalf of a nationwide class, (6) a claim for violations of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq. (ECF 19.) Plaintiffs also alleged that the Recall was deficient and sought injunctive relief to improve the terms of the Recall, and for Defendants to engage in a "corrective advertising campaign" to alert consumers to the potential dangers of the RNPS. *Id.*

12. On December 12, 2019, Defendants filed an answer the Consolidated Amended Response denying in substantive part Plaintiffs' allegations. ECF 28.

13. Following the Consolidated Amended Complaint, the Parties engaged in extensive formal discovery directed as class certification issues, including written discovery, voluminous document productions, and depositions of Defendants' employees and twenty-one of the named

Plaintiffs. Defendants produced (and Plaintiffs possessed and reviewed) thousands of documents containing over a million pages of documents related to RNPS, including documents concerning the marketing of the RNPS and the Recall. Further, the Parties exchanged reports of independent experts, conducted expert depositions, and briefed motions relating to experts.

14. On or about March 27, 2020, Christopher Ekman of CooganEkman LLC was chosen as mediator to explore a potential settlement with the Parties, and, later, to facilitate and oversee any settlement discussions among the Parties.

15. On September 10, 2020, the Parties conducted a mediation with Mr. Ekman.

16. Then, the parties engaged in extensive discovery, including written discovery, and document production as well as depositions of Defendants' employees.

17. On February 8, 2021, Plaintiffs filed their Motion for Class Certification (ECF 125) and memorandum in support thereof (ECF 125-1) seeking, inter alia, to certify classes of Sleeper purchasers under various states' consumer protection statutes, implied warranty, and unjust enrichment. Defendants opposed the motion. Thereafter, Defendants deposed proposed class representatives for RNPS purchasers Alfaro (NY), Barton (AZ), Drover (PA), Flores (CA), Hanson (IA), Nowlin (AR), Kaden (CA), Pasternacki (CO), Huey (FL), Nadel (NY), Willis (TN), and Shaffer (WA) as well as proposed class representatives of RNPS owners Cuddy, Fieker, Mandley, Mulvey, Poppe, Simmonds, Jacoby, and Wray.

18. On February 25, 2022, a class certification hearing was held before Judge Crawford focused on the certification issues presented by the New York plaintiffs as a bellwether (ECF 217).

19. On April 12, 2022, the Parties conducted a virtual mediation via Zoom with Ms. Jill R. Sperber of Sperber Dispute Resolution. Prior to mediation, the Parties prepared detailed mediation statements addressing the facts, posture, liability, and damages in the case. After the

mediation, the Parties continued settlement communications amongst themselves and with Ms. Sperber.

20. On June 2, 2022, the Court certified a class of RNPS purchasers in New York pursuant to Rule 23(c)(4) of the Federal Civil Rules of Procedure as to liability issues (ECF 254; ECF 260). The Parties subsequently exchanged further voluminous written and document discovery in preparation of a trial relating to the New York liability class.

21. On June 16, 2022, Plaintiffs petitioned the Second Circuit Court of Appeal pursuant to Fed. R. Civ. P. 23(f) for leave to appeal the Court's denial of a Rule 23(b)(3) class in its certification order concerning the New York Class, which the Second Circuit denied on October 5, 2022 (ECF. 269).

22. After the certification of the New York liability class, discovery commenced on liability issues. Plaintiffs processed and reviewed, over 270,000 additional documents containing over a million pages of documents related to RNPS, including, among others, documents concerning the development of the RNPS, incidents in the RNPS, and other disputed liability issues.

23. On August 16, 2022, the Court directed the Parties to submit briefing as to whether a California consumer class should be certified (ECF 262). On October 21, 2022, Plaintiffs filed their Motion for Class Certification of the California Class (ECF 283) and memorandum in support thereof (ECF 284) seeking, inter alia, to certify a class of RNPS purchasers under California's consumer protection statutes, implied warranty, and unjust enrichment claims. Defendants opposed the motion.

24. On October 7, 2022, Defendants moved to dismiss the certified New York class for lack of standing of the named Plaintiff (ECF 271), which Plaintiffs opposed (ECF 284) and the Court denied on February 8, 2023 (ECF 286).

25. On December 1, 2022, the Court scheduled a trial for the New York liability class for the spring of 2024 (ECF 291).

26. On March 7, 2023, the Court set a hearing on Plaintiffs' Motion for Class Certification of the California Class for April 13, 2023, which was rescheduled for December 15, 2023 and later for February 23, 2024.

II. SETTLEMENT NEGOTIATIONS

27. Beginning in 2020, the Parties engaged in extensive negotiations, including a mediation over Zoom with Christopher Ekman, an experienced mediator selected by the Parties, on September 10, 2020; (2) a second mediation over Zoom with mediator Jill Sperber on April 12, 2022, which involved the exchange of numerous written settlement proposals; and (3) an in-person two-day mediation with the Hon. Margaret Morrow (Ret.) of Judicate West and Mr. Ekman on March 27 and 28, 2023. Prior to mediations, the Parties prepared detailed mediation statements addressing the facts, posture, liability, and damages in the case. After the two-day mediation, the Parties continued settlement communications amongst themselves as well as with Judge Morrow and Mr. Ekman.

28. On February 13, 2024, the Parties informed the Court that they had reached a settlement in principle to fully resolve this multi-district litigation (ECF 325).

29. Between February 13, 2024 and the filing of this Motion, the Parties continued to engage in good faith, arms' length negotiations regarding several key issues, including the Plan of Allocation for Settlement Funds, among other issues. As such, the Parties required additional time

to resolve these remaining issues, and, between April 11, 2024 and June 18, 2024, the Parties filed and the Court granted joint motions to extend Plaintiffs' deadline to file their Motion. ECF 331-342.

30. After reaching an impasse on several critical issues in the proposed Settlement, on July 2, 2024, the Parties engaged in full day Zoom mediation with the Hon. Margaret Morrow (Ret.) and Mr. Ekman, effectively resolving the remaining pivotal issues. Following the July 2, 2024 mediation, the Parties continued diligently working to finalize the Settlement Agreement, exhibits, the Motion, and supporting documents.

III. THE SETTLEMENT

31. The Settlement, which is the culmination of over five years of hard-fought litigation and three-and-a-half years of settlement efforts, including three mediations, accomplishes the twin goals of the litigation.

32. Under the Settlement, Defendants have agreed to pay $19 million in exchange for a full release of claims that were and could have been brought in this Action. This amount will be placed in a non-reversionary Settlement Fund, and will be used to compensate Settlement Class Members in different amounts depending on, among other things, (i) whether they participated in the Recall; (ii) currently own the product; (iii) purchased the product, and, if so, whether they have a Proof of Purchase; (iv) the date of purchase; and (v) for current owners who don't have a Proof of Purchase, the date of manufacture of the product. Settlement Payments range from the Purchase Price shown on the Proof of Purchase for current owners who purchased a product during the two years preceding the Recall, $50 or $40 for current owners depending on when their RNPS was purchased or manufactured, $35 or $25 for purchasers with Proof of Purchase who are not current owners depending on when their RNPS was purchased, and $10 for purchasers who are not current

owners, and lack Proof of Purchase, and for Recall Participants. *See* SA at § III; Motion at §§ III.B-D.

33. As part of the Settlement, Defendants will fund and Kroll Notice Media ("Kroll") will implement a comprehensive Notice Program designed to reach Class Members with clear, plainly stated information about their rights and options under the Settlement Agreement. This Notice Program is described in detail in the Settlement Agreement, the Declaration of Jeanne C. Finegan, APR, and the Notice Plan submitted contemporaneously herewith. *See* SA, § IV; SA, Exhibits 3, 7. The Notice Program set forth in the Settlement was designed by Kroll Notice Media Solutions ("Kroll Media"), a business unit of Kroll Settlement Administration LLC ("Kroll"), and Kroll Media's Managing Director, Jeanne C. Finegan. Ms. Finegan has more than 30 years of relevant experience, and has been directly responsible for the design and implementation of hundreds of class action notice and administration programs, including some of the largest and most complex notice programs ever implemented in both the United States and Canada. *See* Finegan Decl. at ¶¶ 1, 5-13.

34. It includes direct email and, if no email address is available, by U.S. Mail, proper postage prepaid, to all known Class Members. The Settlement Administrator will utilize Class Member information provided by Defendants and third-parties to effectuate Class notice. The Notice Program also includes a comprehensive Settlement Website and broad campaign of paid publication through print and online media, including targeted internet advertising through webpages, the Google search engine, and social networks that will provide settlement-related information to Class Members in substantially the manner provided in the Notice Plan attached here to Exhibit 3.

35. Defendants shall bear all reasonably and necessary Settlement Administration Expenses up to $250,000 incurred by the Settlement Administrator in connection with the implementation of this Settlement up until its termination. SA, § XII.D.8.

IV. ATTORNEYS' FEES, COSTS, AND CLASS SERVICE AWARDS

36. After the Parties reached agreement on the material terms of this Settlement, the Parties discussed the issue of reasonable attorneys' fees, litigation expenses and costs ("Fees and Expenses"), for which Class Counsel may apply to the Court.

37. The Parties agreed that Class Counsel may apply to the Court for Attorney Fees in an amount up to, but not exceeding, the total combined sum of $5,320,000.00 for all Class Counsel, collectively, and an amount up to, but not exceeding the total combined sum of $825,000.00 for all fees, costs, and expenses incurred.

38. Plaintiffs will seek reasonable Service Awards of up to, but not exceeding, $3,500.00 for each of the proposed Class Representatives. Defendants do not oppose Plaintiffs' request, to be made as part of the Fee and Expense Application.

V. QUALIFICATIONS OF PROPOSED CLASS COUNSEL

39. I, Demet Basar, am an experienced attorney with 30 years of complex litigation experience. My practice is primarily concentrated in complex class action and MDL litigation, including consumer protection, data breach and securities litigation on behalf of institutional and individual clients.

40. My experience in complex litigation includes having been appointed to lead counsel or to other leadership positions in several multi-district litigations including *In re Mutual Fund Investment Litigation*, MDL No. 1586 (D. Md.), which resulted in class and derivative settlements totaling over $300 million, and *In re J.P. Morgan Chase Securities Litigation*, MDL No. 1783

(N.D. Ill.), in which I secured "best practices" corporate governance reforms in a proxy violation class action against the major global bank. My other representations include *In re American Pharmaceutical Partners, Inc. Shareholder Litigation*, Consolidated C.A. No. 1823N (Del. Ch. Ct.) ($14.3 million settlement), *In re Loral Space & Communications Shareholders Securities Litigation*, 03-cv-8262 (SDNY); *Steed Finance LDC v. LASER Advisors*, No. 99-cv-4222 (SDNY), *In re AMBAC Financial Group, Inc.*, C.A. No. 3521 (Del. Ch. Ct.); *Simerlein et al. v. Toyota Motor Corporation et al.*, 3:17-CV-01021-VAB (D. Conn.), which resulted in a settlement providing quality class-wide relief valued at up to $40 million for the benefit of 1.3 million owners of Toyota Sienna minivans with sliding doors, including a ten-year warranty for covered parts and a free inspection as well as reimbursement for repairs; *Cheng, et al. v. Toyota Motor Corp*, et al., 1:20-cv-00629-WFK-JRC (E.D.N.Y.), which resulted in a settlement providing quality class-wide relief for the benefit of 4.9 million owners and lessees of Toyota vehicles equipped with Denso's low-pressure fuel pumps, including a 15-year warranty for covered parts, complimentary loaner vehicles and towing, as well as reimbursement for out-of-pocket repairs.

41. Separately, I currently serve as co-lead counsel in *In re Arc Airbag Inflators Product Liability Litigation*, Case No. 1:22-md-03051-ELR, MDL No. 3051 (N.D. Ga.).

42. I, James Eubank, am an experienced attorney with 16 years of litigation practice, including complex litigation and class actions. My practice is primarily concentrated in complex class action and MDL litigation, including consumer protection and securities litigation on behalf of institutional and individual clients.

43. My experience in complex litigation includes serving on the Executive Committee in *In Re: Robinhood Outage Litigation*, Case No. 3:20-cv-01626-JD (N.D. Ca.), which resulted in a $9.9 million classwide settlement. I have also been significantly involved in *In re: TelexFree*

Securities Litigation, Case No. 4:14-md-02566-TSH (D. Mass.), in which settlements were reached in 2023 with several defendants, resulting in $95.5 million in classwide relief for investors, as well as *Wood Mountain Fish LLC, et al., v. Mowi ASA (f/k/a Marine Harvest ASA), et al.*, Case No. 1:19-cv-22128-RS (S.D. Fla.), which resulted in a $33 million classwide settlement for the benefit of over 40,000 class members. I am currently involved in *In re Vanguard Chester Funds Litigation*, Case No. 2:22-cv-955-JFM (E.D. Pa.), which seeks to certify a nationwide class and several state subclasses of investors.

44. I, Paul W. Evans, am an experienced attorney with seven years of complex litigation experience. My practice is primarily concentrated in complex class action and MDL litigation, including consumer protection, insurance, and antitrust litigation on behalf of institutional and individual clients.

45. My experience in complex litigation includes having been appointed to co-lead counsel in *Farris v. U.S. Fin. Life Ins. Co.*, No. 1:17-CV-417 (S.D. Ohio), which resulted in a $28 million classwide settlement for the benefit of nearly 12,000 insurance policyholders. Further, I have been intimately involved in numerous other class actions, including *Dickman, et al. v. Banner Life Insurance Co., et al.*, Case No. 1:16-cv-00192-WMN (D. Md.), in which I was part of the team that obtained approval of a $38.2 million classwide settlement for the benefit of more than 10,750 insurance policyholders despite an objector appealing the final approval order. *See 1988 Tr. for Allen Child. Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513 (4th Cir. 2022) (clarifying the burden, for the first time in the Fourth Circuit, for when a class member objects to a settlement and upholding the settlement as fair, reasonable, and adequate).

46. These appointments reflect the confidence that other federal courts have expressed regarding our skills and professionalism in handling large and important multi-district and complex litigation. A copy of Beasley Allen's resume is attached as Exhibit A.

47. Proposed Class Counsel are well positioned to assess the benefits of the proposed Settlement and do hereby fully endorse it as fair, reasonable, and adequate.

48. Proposed Class Counsel carefully considered the risks and delays of prolonged and complex litigation if this case were to proceed to trial. Trial preparation would be lengthy, would likely involve extended pre-trial motion practice, further merits discovery, and would culminate in a multi-week, complex trial relating to the New York Class, with no prospect of recovering classwide damages. Further, given the Court's decision with respect to the New York class, obtaining certification of 23(b)(3) damages classes for the remaining state classes was uncertain. If the Court were to grant certification of other statewide classes, the Parties would then need to engage in extended trial preparation for lengthy trials for each state. However, Plaintiffs were fully prepared to advance with litigation if a settlement that was in the best interest of the Class Members could not be reached.

49. In agreeing to the proposed Settlement, Proposed Class Counsel judiciously balanced the strength of Class members' claims with the relevant litigation risks and concluded that the Settlement is an excellent result as it provides immediate and valuable benefits to Class Members. The costs and risks involved in continuing to litigate this case is far outweighed by the relief provided under the Settlement. Indeed, Proposed Class Counsel believe the Settlement is an outstanding result for the Settlement class that confers significant monetary relief that would not be available if there were a trial on the New York class and removes RNPS from the consumer market. Additionally, Proposed Class Counsel believes the Settlement benefits and terms are

comparable to or more beneficial other settlement in similar cases involving deceptive and misleading marketing of dangerous consumer products.

50. In all, Proposed Class Counsel believes the terms of Settlement are fair, reasonable, and adequate and provides meaningful and immediate relief to the proposed Settlement Class such that we respectfully request that the Court grant preliminary approval of the proposed Settlement in the Lawsuit and direct notice of the Settlement to the Class.

51. We declare under penalty of perjury that the foregoing is true and correct.

Dated: July 24, 2024

/s/ Demet Basar
Demet Basar

/s/ James B. Eubank
James B. Eubank

/s/ Paul W. Evans
Paul W. Evans

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beasley allen

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1979 - 2024

LAW FIRM

Since 1979, Beasley Allen has been committed to “helping those who need it most.” Our attorneys have helped thousands of clients get the justice they desperately needed and deserved.

About the Firm

ABOUT THE FIRM:

In 1979, Jere Locke Beasley, former Alabama lieutenant governor, decided to leave politics and return to law practice. He founded what is known today as Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., or the Beasley Allen Law Firm.

For more than four decades, our firm has been at the forefront of driving positive change, keeping in line with Jere's unwavering mission of "helping those who need it most." With 100 attorneys and hundreds of support staff, we handle complex litigation cases in state and federal courts across the U.S.

Helping those who need it most, since 1979

Our cases have been featured in major national media outlets such as Time Magazine, Business Week and Forbes. We've represented clients testifying before U.S. congressional committees and have garnered over $32 billion in verdicts and settlements. With a commitment to justice and a passion for helping those harmed by the actions of others, Beasley Allen has become a trusted and respected leader in the legal community.

Case History

CASE HISTORY:

Beasley Allen's highly qualified attorneys and staff work tirelessly for clients throughout the country. We have a proven track record of successfully representing plaintiffs and claimants in various areas, including Business Litigation, Class Actions, Consumer Protection, Employment Law, Insurance Litigation, Qui Tam Litigation, Mass Torts, Personal Injury, Products Liability and Toxic Torts.

Our team has extensive experience handling complex litigation, attorney general litigation, qui tam litigation, class-action lawsuits and multi-district litigation throughout the U.S., including district and federal courts.

Our team has extensive experience in handling complex litigation

We have played an integral role in consumer multi-district litigation in numerous cases, including those against Vioxx, BP, Toyota SUA, Blue Cross Blue Shield, VW, Chrysler Fiat and others. We have obtained billions in verdicts for our clients against some of this country's largest corporate wrongdoers, including AstraZeneca, GSK, Johnson & Johnson, Johnson & Johnson Consumer Companies, Inc., Imerys Talc America, Inc., Exxon and General Motors.

Top Result Summary

TOP RESULT SUMMARY:

Beasley Allen has a proven track record as lead or co-lead counsel in complex legal cases. We have achieved some of the largest verdicts and settlements in the country of their time in various categories. The firm has achieved successful client outcomes, resulting in numerous multi-million-dollar settlements and verdicts:

- Average wholesale price litigation verdict, **$30,200,000**, in State of Mississippi v. Sandoz, Inc., filed in the Chancery Court of Rankin County, Mississippi, Case No. 09-00480, Judge Thomas L. Zebert (Dee Miles as Co-Lead Counsel);

- Average wholesale price litigation verdict, **$30,262.052**, in State of Mississippi v. Watson Laboratories, Inc., et al., filed in the Chancery Court of Rankin County, Mississippi, Case Nos. 09-488, 09-487, and 09-455, Judge Thomas L. Zebert (Dee Miles as Co-Lead Counsel);

- Hormone Therapy Litigation Verdict, **$5,100,100**, in Okuda v. Wyeth Pharmaceuticals, Inc., filed in the United States District Court of Utah, Northern Division, Case No. 1:04-cv-00080-DN, Judge David Nuffer;

- Hormone Therapy Litigation Verdict, **$72,600,000**, in Elfont v. Wyeth Pharmaceuticals, Inc., et al., Mulderig v. Wyeth Pharmaceuticals, Inc., et al., Kalenkoski v. Wyeth Pharmaceuticals, Inc., et al., filed in the County of Philadelphia, Court of Common Pleas, Case Nos. July Term 2004, 00924, 00556, 00933, Judge Gary S. Glazer;

- Largest average wholesale price litigation verdict, **$215,000,000**, in State of Alabama v. AstraZeneca, filed in the Circuit Court of Montgomery County, Alabama, Case No. CV-05-219.10, Judge Charles Price (Dee Miles as Co-Lead Counsel);

- Largest predatory lending verdict in American history **$581,000,000**, in Barbara Carlisle v. Whirlpool, filed in the Circuit Court of Hale County, Alabama, Case No. CV-97-068, Judge Marvin Wiggins;

- Largest verdict against an oil company in American history, **$11,903,000,000**, in State of Alabama v. Exxon, filed in the Circuit Court of Montgomery County, Alabama, Case No. CV-99-2368, Judge Tracy S. McCooey;

- Second largest average wholesale price litigation verdict, **$114,000,000**, in State of Alabama v. GlaxoSmithKline - Novartis, filed in the Circuit Court of Montgomery County, Alabama, Case No. CV-05-219.52, Judge Charles Price (Dee Miles as Co-Lead Counsel);

TOP RESULT SUMMARY:

- Talcum Powder Litigation Verdict, **$55,000,000**, in Ristesund v. Johnson & Johnson, et al., filed in the Circuit Court of St. Louis City, Case No. 1422-CC03012-01, Judge Rex M. Burlison.

- Talcum Powder Litigation Verdict, **$72,000,000**, in Fox v. Johnson & Johnson, et al., filed in the Circuit Court of St. Louis City, Case No. 1422-CC03012-01, Judge Rex M. Burlison; and

- Third largest average wholesale price litigation verdict, **$78,000,000**, in State of Alabama v. Sandoz, Inc., filed in the Circuit Court of Montgomery County, Alabama, Case No. CV-05-219.65, Judge Charles Price (Dee Miles as Co-Lead Counsel);

- Tolbert v. Monsanto, private environmental settlement, **$750,000,000**, filed in the United States District Court for the Northern District of Alabama, Civil Action No. CV-01-1407PWG-S, Judge Paul W. Greene;

- Siqueiros v. General Motors, LLC, largest auto defect class action verdict, **$102,600,000**, filed in United States District Court for the Northern District of California, Civil Action No. 3:16 CV-07244-emc.

Lead / Co-Lead
MDL & Class Actions

LEAD / CO-LEAD MDL & CLASS ACTIONS:

Beasley Allen is one of the country's leading firms involved in complex civil litigation on behalf of claimants, having represented hundreds of thousands of people.

Attorneys from Beasley Allen have been selected by Federal Courts as lead counsel or co-lead counsel in the following complex multi-district and class actions litigations:

- **Cohen v. Subaru Corporation et al.**, United States District Court of New Jersey, Judge Joseph R. Rodriguez, Case No. 1:20-cv-08442-JHR (Dee Miles, Shareholder of Beasley Allen).

- **Hamid Bolooki et al., vs. Honda Motor Co. Ltd.et al.**, United States District Court, Central District of California, Judge Mark C. Scarsi, 2:22-cv-04252-MCS-SK (H. Clay Barnett, III, Principal of Beasley Allen);

- **In Re: American General Life and Accident Insurance Company Industrial Life Insurance Litigation**, United States District Court for the District of South Carolina, Judge Cameron McGowan Currie, MDL No. 11429; (Dee Miles, Shareholder of Beasley Allen);

- **In Re: ARC Airbag Inflators Products Liability Litigation**, United States District Court, Northern District of Georgia, Judge Eleanor L. Ross, 22-md-03051-ELR (Demet Basar, Principal of Beasley Allen);

- **In Re: Dollar General Corp. Fair Labor Standards Acts Litigation**, United States District Court for the Northern District of Alabama, Western Division, Judge U.W. Clemon, MDL No. 1635; (Dee Miles, Shareholder of Beasley Allen);

- **In Re: Johnson & Johnson Aerosol Sunscreen Marketing, Sales Practices and Products Liability Litigation**, United States District Court for the Southern District of Florida, Judge Raag Singhal, MDL No. 3015 (Andy Birchfield and David Byrne, both Shareholders of Beasley Allen);[5]

- **In Re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices, and Products Liability Litigation**, United States District Court for the District of New Jersey, Judge Freda L. Wolfson, MDL No. 2738 (Leigh O'Dell, Shareholder of Beasley Allen);

- **In Re: Reciprocal of America (ROA) Sales Practices Litigation**, United States District Court for the Western District of Tennessee, Judge J. Daniel Breen, MDL No. 1551; (Dee Miles and Jere Beasley, both Shareholders in Beasley Allen);

LEAD / CO-LEAD MDL & CLASS ACTIONS:

- **In Re: Rock 'N Play Sleeper Marketing, Sales Practices, and Products Liability Litigation**, United States District Court for the Western District of New York, Judge Geoffrey Crawford, MDL No. 1:19-mc-2903 (Demet Basar, Principal of Beasley Allen)

- **In Re: Social Media Cases**, JCCP No. 5255, Judge Carolyn Kuhl, Department SS12, Los Angeles Superior Court, Lead Case 22STCV21355 (Joseph VanZandt, Principal of Beasley Allen);

- **In Re: Vioxx Products Liability Litigation**, United States District Court for the Eastern District of Louisiana, Judge Eldon E. Fallon, MDL No. 1657; (Andy Birchfield, Shareholder of Beasley Allen);

- **In Re: Xarelto (Rivaroxaban) Products Liability Litigation**, District of Louisiana, Judge Eldon E. Fallon, Eastern MDL No. 2592;

- **Sharon Cheng, et al. v. Toyota Motor Corporation, et al.,** United States District Court, Eastern District of New York, Judge William F. Kuntz, II, 1:20-cv-00629-WFK-CLP (Dee Miles, Shareholder of Beasley Allen) [3];

- **Simerlein v. Toyota Motor Corporation et al.**, United States District Court District of Connecticut, Judge Victor A. Bolden, Case No. 3:17-cv-01091-VAB (Dee Miles, Shareholder of Beasley Allen);

- **The K's Inc. v. Westchester Surplus Lines Insurance Company**, United States District Court, Northern District of Georgia, Judge William M. Ray, II, 1:20-cv-1724-WMR (Dee Miles, Shareholder of Beasley Allen);

- **Tucker Oliver, et al. v. Honda Motor Company Limited, et al.**, United States District Court, Eastern District of Alabama, Judge Madeline Hughes Haikala, 5:20-cv-006666-MHH (Dee Miles, Shareholder of Beasley Allen) [4];

- **Weidman et al v. Ford Motor Company**, United States District Court of the Eastern District of Michigan, Judge Gershwin A. Drain, 2:18-cv-12719 (Dee Miles, Shareholder of Beasley Allen) [2].

PEC / PSC

MDL & Class Actions

PEC / PSC MDL & CLASS ACTIONS:

Beasley Allen has been appointed to the Plaintiff's Executive Committee and/or Steering Committee in many complex litigations. All of these multidistrict litigations and class actions involved multiple claims against multiple defendants, which required excellent organization and leadership from our attorneys.

Beasley Allen has been appointed to leadership committees in the following MDL and class actions litigations:

- **In Re: Actos (Pioglitazone) Products Liability Litigation, United States District Court for the W**estern District of Louisiana, Judge Rebecca F. Doherty, MDL No. 2299;

- **In Re: American Medical Systems, Inc. Pelvic Repair Systems Products Liability Litigation**, United States District Court, Southern District of Ohio, Judge Joseph R. Goodwin, MDL No. 2325;

- **In Re: Androgel Products Liability Litigation**, United States District Court for the Northern District of Illinois, Judge Matthew F. Kennelly, MDL No. 2545;

- **In Re: Apple Inc. Device Performance Litigation**, United States District Court for the Northern District of California, Judge Edward J. Davila, MDL 2827;

- **In Re: Bextra/Celebrex, Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation**, United States District Court for the Northern District of California, Judge Charles R. Breyer, MDL No. 1699;

- **In Re: Biomet M2a Magnum Hip Implant Products Liability Litigation**, US District Court for the Northern District of Indiana, Judge Robert L. Miller, Jr., MDL No. 2391;

- **In Re: Blue Cross Blue Shield Antitrust Litigation**, United States District Court for the Northern District of Alabama, Judge R. David Proctor, MDL No. 2406;

- **In Re: Boston Scientific Corp. Pelvic Repair Systems Products Liability Litigation**, United States District Court, Southern District of West Virginia, Judge Joseph R. Goodwin, MDL No. 2326;

- **In Re: C.R. Bard, Inc. Pelvic Repair Systems Products Liability Litigation**, United States District Court, Charleston Division, Judge Joseph R. Goodwin, MDL No. 2187;

- **In Re: Camp Lejeune Water Litigation**, United States District Court for the Eastern District of North Carolina, Judge Robert B. Jones, Jr, Case No. 7:23-cv-897;

PEC / PSC MDL & CLASS ACTIONS:

- **In Re: Chrysler-Dodge-Jeep EcoDiesel Marketing, Sales Practices and Products Liability Litigation**, United States District Court for the Northern District of California, Judge Edward Chin, MDL No. 2777;

- **In Re: Coloplast Corp. Pelvic Repair Systems Products Liability Litigation, United States District Court, Charles-**ton Division, Judge Joseph R. Goodwin, MDL No. 2387;

- **In Re: Depuy Orthopaedics, Inc. ASR Hip Implant Products Liability Litigation**, United States District Court for the Northern District of Ohio, Judge David A. Katz, MDL No. 2197;

- **In Re: DePuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liability Litigation**, US District Court for the Northern District of Texas, Judge Ed Kinkeade, MDL No. 2244;

- **In Re: Ethicon, Inc. Pelvic Repair Systems Products Liability Litigation**, United States District Court, Charleston Division, Judge Joseph R. Goodwin, MDL No. 2327;

- **In Re: Fosamax (Alendronate Sodium) Products Liability Litigation** (No. II), United States District Court District of New Jersey, Judge Garrett E. Brown, Jr., MDL No. 2243;

- **In Re: Fosamax Products Liability Litigation**, United States District Court, Southern District of New York, Judge John F. Keenan, MDL No. 1789;

- **In Re: Fresenius Granuflo/Naturalyte Dialysate Products Liability Litigation**, United States District Court, District of Massachusetts, Judge Douglas P. Woodlock, MDL No. 2428;

- **In Re: Google Inc. Gmail Litigation**; United States District Court for the Northern District of California, San Jose Division, Judge Lucy H. Koh, MDL No. 2430;

- **In Re: Hair Relaxer Marketing, Sales Practices, And Products Liability Litigation**, United States District Court for the Northern District of Illinois, Judge Mary M. Royland, MDL No. 3060;

- **In Re: Invokana (Canagliflozin) Products Liability Litigation**, United States District Court District of New Jersey, Judge Lois H. Goodman, MDL No. 2750;

- **In Re: JUUL Labs, Inc. Marketing, Sales Practices & Products Liability Litigation**, United States District Court for the Northern District of California, Judge William H. Orrick, MDL 2913;

PEC / PSC MDL & CLASS ACTIONS:

▪ **In Re: Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation**, United States District Court for the District of South Carolina, Judge Richard M. Gergel, MDL No. 2502;

▪ **In Re: Mirena IUD Products Liability Litigation**, United States District Court, Southern District of New York, Judge Cathy Seibel, MDL No. 2434;

▪ **In Re: Motor Fuel Temperature Sales Practices Litigation, United States District Court for the** Middle District of Kansas, Judge Kathryn Vratil, MDL No. 1840;

▪ **In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico**, United States District Court of the Eastern District of Louisiana, Judge Carl J. Barbier, MDL No. 2179;

▪ **In Re: Paraquat Products Liability Litigation**, United States District Court for the Southern District of Illinois, Judge Nancy J. Rosenstengel, Case No. 3:21-md-03004-NJR:

▪ **In Re: Prempro Products Liability Litigation**, United States District Court, Eastern District of Arkansas, Western Division, Judge Billy Roy Wilson, MDL No. 1507;

▪ **In Re: Proton-Pump Inhibitor Products Liability Litigation**, United States District Court District of New Jersey, Judge Claire C. Cecchi, MDL No. 2789;

▪ **In Re: Robinhood Outage Litigation**, United States District Court for the Northern District of California, Judge James Donato, Case No. 20-cv-01626-JD;

▪ **In Re: Social Media Adolescent Addiction/Personal Injury Product Liability Litigation**, Civil Action No. 4:22-md-03047-YGR, MDL No. 3047;

▪ **In Re: Stryker Rejuvenate & ABG II Modular Hip Implant Litigation**, Superior Court of New Jersey Law Division: Bergen County, Judge Rachelle L. Harz, Case No. 296 Master Docket No. BER-L-936-13-MCL.

▪ **In Re: Takata Airbag Products Liability Litigation**, United States District Court for the Southern District of Florida, Judge Federico A. Moreno, MDL No. 2599, serving on a discovery committee responsible for two Auto Manufacturer's discovery[1];

▪ **In Re: Target Corporation Customer Data Security Breach Litigation**, United States District Court for the District of Minnesota, Judge Paul A. Magnuson, MDL No. 2522;

PEC / PSC MDL & CLASS ACTIONS:

- **In Re: The Home Depot, Inc., Customer Data Security Breach Litigation**, United States District Court for the Northern District of Georgia, Judge, Thomas W. Thrash, Jr., MDL No. 2583;

- **In Re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation**, United States District Court for the Central District of California, Judge James V. Selna, MDL No. 2151;

- **In Re: Vioxx Products Liability Litigation**, United States District Court for the Eastern District of Louisiana, Judge Eldon E. Fallon, MDL No. 1657;

- **In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation**; California Northern District (San Francisco), Hon. Charles R. Breyer, Case No. 3:15-md-02672-CRB;

- **In Re: Xarelto (Rivaroxaban) Products Liability Litigation**, District of Louisiana, Judge Eldon E. Fallon, Eastern MDL No. 2592;

- **In Re: Zantac (Ranitidine) Products Liability Litigation**, United States District Court for the Southern District of Florida, Judge Robin L. Rosenberg, MDL No. 2924;

- **In Re: ZF-TRW Airbag Control Units Products Liability Litigation**, United States District Court Central District of California, Judge John A. Kronstadt, MDL No. 2905;

- **In Re: Zoloft (Sertraline Hydrochloride) Products Liability Litigation**, United States District Court for the Eastern District of Pennsylvania, Judge Cynthia M. Rufe, MDL No. 2342;

Attorney General Litigation

ATTORNEY GENERAL LITIGATION:

Beasley Allen is a proven leader in Attorney General Litigation on a national level. We have provided legal representation to several states, including Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, South Carolina, Utah and West Virginia. The firm has also confidentially investigated matters for other attorneys general.

Our experience in these complex legal cases involves conducting thorough investigations to determine if litigation is necessary, providing counsel to the states on whether to pursue legal action, managing all aspects of litigation once it is filed, negotiating the Attorney General's claims during settlement discussions, and presenting the case in court before a judge and jury and even handling the case on appeal.

Our firm has recovered billions of dollars for multiple states

We have a track record of recovering billions of dollars for various states, with over $1.5 billion related to state funds. We specialize in representing states and attorneys general in various litigation cases, including cases related to Medicaid fraud, antitrust, consumer protection violations, false claims, fraud, unjust enrichment, false advertising, negligence, breach of contract, nuisance abatement and unfair and deceptive trade practices.

We have handled cases involving fraudulent pricing of prescription drugs on behalf of eight states with Average Wholesale Price issues, represented four states against McKesson Corporation for its fraudulent and unfair practices involving prescription drugs, represented two states in the Fresenius litigation case involving the medical device GranuFlo, and tackled the Unapproved Drugs litigations on behalf of two states concerning the states' reimbursement of drugs with fraudulently obtained Medicaid reimbursement approval status. Additionally, we have dealt with the Usual and Customary litigations regarding the false reporting of pharmacy price lists by the nation's largest chain pharmacies, the Actos litigation, and conducted many other investigations related to consumer protection issues, and states claims against opioid defendants, the manufacture, marketing, pricing, and sale of pharmaceuticals, pharmaceutical devices, and the general provision of goods and services in the healthcare industry.

ATTORNEY GENERAL LITIGATION:

Beasley Allen attorneys were lead counsel in the following Attorney General cases:

- **In Re: Alabama Medicaid Pharmaceutical Average Wholesale Price Litigation filed in the Circuit Court of Montgomery**, **Alabama**, Master Docket No. CV-2005-219, Judge Charles Price;

- **State of Alabama v. Purdue Pharma, LP, et al.**, Civil Action No. 03-CV-2019-901174, Circuit Court of Montgomery County, Alabama, Judge J.R. Gaines;

- **State of Alabama, ex. rel. Luther Strange, Attorney General v. BP, PLC., et al.**, MDL No. 2179, E.D. La., Judge Carl Barbier

- **State of Alabama, ex. rel. Troy King, Attorney General v. Transocean, Ltd., et al.**, Civil Action No. 2:10-cv-691-MHT-CSC, Middle District of Alabama, Northern Division, Judge Myron H. Thompson;

- **In Re: The Attorney General's Investigation, AGO Case No. AN2014103885, Alask**a Pay-for-Delay Antitrust Investigation;

- **State of Alaska v. Alpharma Branded Products Division, Inc., et al.**, Case No.: 3AN-06-12026, Superior Court for the State of Alaska, Third Judicial District at Anchorage, Judge William F. Morse;

- **State of Alaska v. McKesson Corporation and First DataBank, Inc.**, Case No. 3AN-10-11348-CI, Superior Court for the State of Alaska, Third Judicial Circuit of Anchorage, Judge Peter A. Michalski;

- **State of Georgia v. Purdue Pharma, et al.**, Civil Action No. 19-A-00060-2, Superior Court of Gwinnett County, Georgia, Judge Tracie H. Cason; and

- **State of Hawaii, ex rel. v. Abbott Laboratories, Inc., et al.**, Civil Action No. 06-1-0720-04, State of Hawaii, First Circuit, Judge Eden Elizabeth Hifo

- **State of Hawaii, ex rel. v. McKesson Corporation, et al.**, Civil Action No. 10-1-2411-11, State of Hawaii, First Circuit, Judge Gary W. B. Chang;

- **State of Kansas, ex rel. v. McKesson Corporation, et al.**, Case No. 10-CV-1491, Division 2, District Court of Wyandotte County, Kansas, Judge Constance Alvey;

- **In Re: Kansas Medicaid Pharmaceutical Average Wholesale Price Litigation** filed in the District Court of Wyandotte County, Kansas, Master Docket No. MV-2008-0668, Division 7, Judge George A. Groneman;

ATTORNEY GENERAL LITIGATION:

- **Commonwealth of Kentucky. v. Fresenius Medical Care Holdings, Inc., et al.**, Civil Action No. 16-CI-00946, Franklin Circuit Court, Div. 2, Judge Thomas D. Wingate;

- **State of Louisiana v. Abbott Laboratories, Inc., et al**, Suit No. 624,522, Sec. 26; Parish of East Baton Rouge, Judge Donald R. Johnson;

- **State of Louisiana v. Abbott Laboratories, Inc., et al.**, Docket No. 596164, Sec. 25, 19th Judicial District Court, Parish of East Baton Rouge, Judge Wilson Fields;

- **State of Louisiana v. McKesson Corporation**, Docket No. 597634, Sec. 25, 19th Judicial District Court, Parish of East Baton Rouge, Judge Wilson Fields;

- **State of Louisiana v. Pfizer, Inc., et al.**, Docket No. 625543, Sec. 24, 19th Judicial District Court, Parish of East Baton Rouge, Judge R. Michael Caldwell;

- **State of Louisiana, ex rel. v. Fresenius Medical Care Holdings, Inc., et al.**, Suit No. 631,586, Div. "D"; 19th JDC; Parish of East Baton Rouge, Judge Janice Clark;

- **State of Louisiana, et al. v. Molina Healthcare, Inc., et al.**, filed in 19th Judicial District Court, Parish of East Baton Rouge, Suit No. 631612, Judge Janice Clark;

- **State of Louisiana, et al. v. Takeda Pharmaceuticals America, Inc., et al.**, filed in 19th Judicial District Court, Parish of East Baton Rouge, Suit No. 637447, Judge R. Michael Caldwell;

- **State of Mississippi v. Actavis Pharma, Inc., et al.**, Civil Action No. 17-cv-000306, Hinds County Chancery Court, District 1, Judge Patricia D. Wise;

- **State of Mississippi v. Barr Laboratories, Inc., et al.**, Civil Action No. 17-cv-000304, Hinds County Chancery Court, District 1, Judge J. Dewayne Thomas;

- **State of Mississippi v. Camline, L.L.C. (f/k/a Pamlab, L.L.C.)**, Civil Action No. 17-cv-000307, Hinds County Chancery Court, District 1, Judge J. Dewayne Thomas;

- **State of Mississippi v. E. Claiborne Robins Company, Inc., et al.**, Civil Action No. 17-cv-000305, Hinds County Chancery Court, District 1, Judge Denise Owens;

- **State of Mississippi v. Endo Pharmaceuticals, Inc.**, Civil Action No. 17-cv-000309, Hinds County Chancery Court, District 1, Judge J. Dewayne Thomas;

- **State of Mississippi v. United Research Laboratories, Inc., et al.**, Civil Action No. 17-cv-000308, Hinds County Chancery Court, District 1, Judge Denise Owens;

▪ **State of Mississippi v. CVS Health Corporation, et al.**, DeSoto County, Third Chancery District, Trial Court No. 16-cv-01392, Judge Mitchell M. Lundy, Jr.;

▪ **In Re: Mississippi Medicaid Pharmaceutical** Average Wholesale Price Litigation filed in the Chancery Court of Rankin County, Mississippi, Master Docket No. 09-444, Judge W. Hollis McGehee;

▪ **State of Mississippi v. Fred's, Inc., et al.**, DeSoto County, Third Chancery District, Trial Court No. 16-cv-01389, Judge Mitchell M. Lundy, Jr.;

▪ **State of Mississippi v. Rite Aid Corporation, et al., DeSoto County, Third Chancery Distri**ct, Trial Court No. 16-cv-01390, Judge Percy L. Lynchard, Jr.;

▪ **State of Mississippi v. Walgreen Co., et al.**, DeSoto County, Third Chancery District, Trial Court No. 16-cv-01391, Judge Mitchell M. Lundy, Jr.;

▪ **State of South Carolina v. Abbott Laboratories, Inc., et al.**, In Re: South Carolina Pharmaceutical Pricing Litigation, Master Caption Number: 2006-CP-40-4394, State of South Carolina, County of Richland, Fifth Judicial Circuit, Judge J. Cordell Maddox, Jr.;

▪ **State of West Virginia v. Merck-Medco**, Civil Action No. 02-C-2944, Circuit Court of Kanawha County, West Virginia, Judge Jennifer F. Bailey;

▪ **State of Utah v. Abbott Laboratories, et al.**, filed in the Third Judicial District Court of Salt Lake City, Utah, Case No. 07-0915690, Judge Robert Hilder;

▪ **State of Utah v. Actavis US, et al.**, filed in Third Judicial District Court of Salt Lake City, Utah, Case No. 07-0913717, Judge Kate A. Toomey; and

▪ **State of Utah v. Apotex Corporation, et al.**, filed in the Third Judicial District Court of Salt Lake City, Utah, Case No. 08-0907678, Judge Tyrone E. Medley.

Practices: Class Actions

Beasley Allen is also a leader in complex class action litigation. We have successfully brought several class actions, some transferred to multidistrict litigation filed in federal and state courts.

Those cases include:

- **Ace Tree Surgery, Inc. v. Terex Corporation, et al.**, Case No. 1:16-cv-00775-SCJ D (N.D. Ga., filed July 22, 2015);
- **Coates v. MidFirst Bank**, 2:14-cv-01079 (N.D. Ala., certified July 29, 2015);
- **Danny Thomas, et al. v. Southern Pioneer Life Insurance Company**, No. CIV-2009-257JF, in the Circuit Court of Greene County, State of Arkansas;
- **Dickman, et al. v. Banner Life Insurance Company, et al.**, Case No. 1:16-cv-00192-WMN (D. Md., filed January 19, 2016);
- **Dolores Dillon v. MS Life Insurance Company n/k/a American Bankers Life Assurance Company of Florida**, No. 03-CV-2008-900291, in the Circuit Court of Montgomery County, Alabama;
- **Estrada v. Johnson & Johnson, et al.**, Case No. 2:14-cv-01051-TLN-KJN (E.D. Cal., filed April 28, 2014);
- **Gerrell Johnson v. Subaru of America, Inc. et al.**, Case No. 2:19-cv-05681-JAK-MAA (C.D. Cal., filed June 28, 2019); Thondukolam et al., vs. Corteva, Inc., et al., Case No. 4:19-cv-03857 (N.D. Cal., filed July 3, 2019);
- **In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation**, 3:15-md-02672 (N.D. Cal., settlements approved October 25, 2016, and May 17, 2017);
- **In Re: Apple Inc. Device Performance Litigation**, Case No. 5:18-md-02827-EJD (N.D. Cal., filed April 5, 2018);
- **In Re: ARC Airbag Inflators Products Liability Litigation**, 22-md-03051-ELR (N.D. Ga.). Beasley Allen's class action cases involve a variety of complex legal issues.
- **In Re: Domestic Airline Travel Antitrust Litigation**, Case No. 1:15-mc-01404-CKK (D.D.C., filed October 13, 2015);

- **In Re: Facebook, Inc., Consumer Privacy User Profile Litigation**; Case No. 5:18-md-02827-EJD (N.D. Cal., filed June 6, 2018);

- **In Re: German Automotive Manufacturers Antitrust Litigation**, Case No. 3:17-md-02796-CRB (N.D. Cal., filed October 5, 2017);

- **In Re: Polaris Marketing, Sales Practices, and Products Liability Litigation**, Case No. 0:18-cv-00939-WMW-DTS (D. Minn., filed April 5, 2018);

- **In Re: Takata Airbag Products Liability Litigation**, 1:15-md-02599 (S.D. Fla.).; Bolooki et al., vs. Honda Motor Co. Ltd. et al., 2:22-cv-04252-MCS-SK (C.D. Cal.).;

- **In Re: The Home Depot, Inc., Customer Data Security Breach Litigation**, Case No. Case 1:14-md-02583-TWT (N.D. Ga., filed November 13, 2014);

- **Intel Corp. CPU Marketing, Sales Practices and Products Liability Litigation, Case No. 3:18-md-02828 (D. Or., file**d April 5, 2018);

- **Jason Compton et al v. General Motors, LLC**, Case No. 1:19-cv-00033-MW-GRJ (N.D. Fla., filed February 21, 2019);

- **Simerlein v. Toyota Motor Corporation et al.**, Case No. 3:17-cv-01091-VAB (D. Conn., filed June 30, 2017);

- **Kerkorian et al v. Nissan North America, Inc.**, Case No. 18-cv-07815-DMR (N.D Cal., filed December 31, 2018);

- **Larry Clairday, et al. v. Tire Kingdom, Inc., et al.**, No. 2007-CV-020 (S.D. Ga.);

- **Lesley S. Rich, et al. v. William Penn Life Insurance Company of New York**, Case No. 1:17-cv-02026-GLR (D. Md., filed July 20, 2017);

- **Monteville Sloan, Jr. v. General Motors LLC**, Case No. 3:16-cv-07244-EMC (C.D. Cal., filed December19, 2016);

- **Scott Peckerar et al. v. General Motors, LLC**, Case No. 5:18-cv-02153-DMG-SP (C.D. Cal., filed December 9, 2018);

- **Sigfredo Rubio et al., vs. ZF-TRW Automotive Holdings Corp., et al.**, Case No. 2:19-cv-11295-LVP-RSW (E.D. Mich., filed May 3, 2019);

- **Vivian Farris, et al. v. U.S. Financial Life Insurance Company**, Case No. 1:17-cv-417 (S.D. Ohio, filed June 19, 2017);

- **Walls v. JP Morgan Chase Bank**, N.A., 3:11-cv-00673 (W.D. Ky., certified October 13, 2016);

- **Weidman, et al. v. Ford Motor Co.**, Case No. 2:18-cv-12719 (E.D. Mich., filed August 30, 2018);

- **William Don Cook v. Ford Motor Company**, Case No. 2:19-cv-00335-ECM-GMB (M.D. Ala., filed May 8, 2019);

- **Wimbreth Chism, et al. v. The Pantry, Inc.** d/b/a Kangaroo Express, No. 7:09-CV-02194-LSC (N.D. Ala.);

Qui Tam Litigation

QUI TAM LITIGATION:

Beasley Allen's qui tam cases involve various complex legal issues, such as violations of the Anti-Kickback Statute, Stark Law, Medicare/Medicaid fraud, military contractor fraud, abuse of Title IV funds, federal grant fraud and government contracting malfeasance.

Beasley Allen specializes in qui tam litigation. For example, our firm settled a significant qui tam case against U.S. Investigations Services, Inc. (USIS), a private government contractor, for $30 million in collaboration with the U.S. Department of Justice (DOJ). The case is United States ex rel. Blake Percival v. U.S. Investigations Services, Inc., Civil Action No. 2:11-cv-527-WKW, (M.D. Ala.).

Beasley Allen is also a leader in complex class action litigation.

In another case, Beasley Allen represented one of six whistleblowers responsible for a $39 million settlement in a False Claims Act case. The case, United States, et al., ex rel. Jada Bozeman v. Daiichi-Sankyo Company, Civil Action No. 14-cv-11606-FDS, alleged illegal kickbacks and off-label marketing against Daiichi-Sankyo Company, Ltd.

Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.

ATTORNEYS AT LAW

Firm Resource Summary

FIRM RESOURCE SUMMARY:

Beasley Allen's primary offices are located in Atlanta, Georgia; Mobile, Alabama; and Montgomery, Alabama, although our firm has attorneys and clients throughout the country. We have over one hundred attorneys nationwide and over double the amount of support staff. In addition to our litigation teams, Beasley Allen maintains a full-time information technology department and a marketing department, allowing our attorneys to present cases for our clients at hearings and trials with help from the latest technology. This keeps our firm at the forefront of multi-media and case management.

We advocate for better business practices, resulting in positive outcomes for clients and communities. This has led to significant benefits for Americans in the workplace, the automotive industry, healthcare, consumers and the use of daily products.

For more information on our cases, consumer safety topics and original interviews with our attorneys and clients, please visit our website, BeasleyAllen.com.