UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MOLLY CRANE, Individually and on Behalf of All Other Persons Similarly Situated,

Plaintiff,

v.

SEXY HAIR CONCEPTS, LLC, and ULTA SALON COSMETICS & FRAGRANCE, INC.,

Defendants.

Case 1:17-cv-10300

MEMORANDUM IN SUPPORT OF PLAINTIFF'S ASSENTED-TO MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Edward F. Haber (BBO # 215620)
Patrick J. Vallely (BBQ # 663866)
SHAPIRO HABER & URMY LLP
Seaport East
Two Seaport Lane, Floor 6
Boston, MA 02210
(617) 439-3939 - Telephone
(617) 439-0134 - Facsimile
ehaber@shulaw.com
pvallely@shulaw.com

Kenneth D. Quat (BBO # 408640)
QUAT LAW OFFICES
929 Worcester Rd.
Framingham MA 01701
508-872-1261
ken@quatlaw.com

Plaintiff Molly Crane submits this memorandum in support of her motion for preliminary approval of the Settlement Agreement and Release attached to Plaintiff's motion as Exhibit A (the "Settlement"), which resolves all claims asserted in this litigation on behalf of a proposed nationwide class against defendants Sexy Hair Concepts, LLC ("SHC") and Ulta Beauty, Inc. *f/k/a* Ulta Salon Cosmetics & Fragrance, Inc. ("Ulta," and together with SHC, the "Defendants").

The Court should grant preliminary approval because the Settlement provides a fair, reasonable, and adequate recovery for the Class. Specifically, the Settlement requires SHC to pay a sum of $2.33 million, which will create a common fund to pay Claims made by Class Members and which will not be returned to SHC. The Settlement provides for substantial cash benefits to Class Members upon the submission of a simplified, one-page claim form. Moreover, more than 900,000 Class Members for whom an email address is available and approximately 75,000 Class Members for whom a physical address is available will receive direct notice by e-mail or regular mail. Direct notice by email will include a link for the Class Member to submit a claim form populated automatically with much of that Class Member's information. Direct notice by regular mail will include a unique claim code to allow Class Members to electronically submit a claim form populated automatically with much of that Class Member's information. The cash benefits provided by the Settlement, together with the provision of direct notice program and a simplified claims process, makes the Settlement highly favorable for Class Members.

As set forth below, the Settlement meets all the requirements necessary for preliminary approval. The Court should grant preliminary approval of the Settlement, certify the proposed Class for settlement purposes, and authorize the parties to move forward with class notice of the Settlement.

I. PROCEDURAL HISTORY

Plaintiff filed her initial Complaint on February 23, 2017, and filed her Amended Complaint on June 6, 2017. DE 7. Plaintiff alleges that she and other similarly situated customers incurred damage as a result of alleged misrepresentations regarding whether certain hair care products sold by SHC were "SULFATE-FREE" and "FREE OF…SALT." Plaintiff alleges that SHC violated M.G.L. c. 93A and was unjustly enriched as a result of these misrepresentations.

In response to the Amended Complaint, SHC denied that it violated the law and/or that anyone incurred damage. SHC asserted various affirmative defenses to Plaintiff's and the Class's claims. Before answering, SHC also moved to dismiss Plaintiff''s Amended Complaint, *see* DE 26, 27; the Court denied SHC's motion, *see* DE 46. After the Court denied SHC's motion to dismiss, the parties commenced discovery concerning Plaintiff's claims and SHC's defenses.

The Parties participated in arms'-length settlement negotiations including two mediation sessions with the Honorable John C. Cratsley, a mediator with JAMS, on May 30, 2018 and July 23, 2018, and the Parties subsequently agreed to a global resolution of all issues pertaining to the Action as set forth in this Settlement.

II. THE SETTLEMENT

The Settlement's terms are detailed in the Settlement Agreement and Release, which Plaintiff attaches as Exhibit A to the motion. The proposed forms of notice, claim form, and proposed forms of orders (including a proposed order preliminarily approving the Settlement) are attached as Exhibits 1 through 7 to the Settlement. A summary of the Settlement's key terms follows:

A. *Definition of the Class*

The "Class" is defined in the Settlement as:

> All purchasers of any of the Subject Products as defined below during the period between November 19, 2002 through the Effective Date (defined below), excluding any purchases made for purposes of resale. Excluded from the Class are (i) those Class Members who have previously resolved their claims through return of product, settlement, or final judgment, (ii) all persons who are officers or directors of Defendant, and (iii) Judges of the Court.

B. ***Monetary Settlement Benefits***

Pursuant to the Settlement, SHC will pay $2.33 million into a common fund, which will be used to pay Claims submitted by Class Members. Settlement § II-A. Upon the submission of a valid claim form, Class Members may receive $6 for each purchase of one of the "Subject Products," which are the products that Plaintiff alleged contained misrepresentations on the product labels. *Id.* §§ II-C, II-D. Claimants presenting proof of purchase may submit a claim for as many products as they purchased; Claimants without proof of purchase will be limited to submitting a claim for two purchases. *Id.* In the event the Claims submitted do not exhaust the common fund, these cash benefits may be increased by a multiple of up to 2.0. *Id.* § II-K.

Although the cash benefits Class Members will receive are substantial given the price Class Members paid for the products (the Subject Products typically sold at retail for between $5 for a travel size and $15 per liter-sized bottle), additional features of the Settlement render it even more favorable to Class Members. Chief among those features is that Defendants have agreed to provide data concerning more than 900,000 known Class Members, which the Settlement Administrator will use to send personal notice. *Id.* § IV. Most of those Class Members will receive email notice or a unique claim code, which will permit the Class Members to click on a link in the email or enter the code that will bring them to an online claim form pre-populated with that class member's identifying information and purchases as reflected in the retail records. *Id.* Moreover, upon attestation that none of the claimed products were returned, the retail records will satisfy the proof of purchase requirement of the Settlement, meaning that such

customers may obtain the $6 per purchase cash settlement benefit for all purchases reflected in the retail records, without the need to submit any additional proof of purchase. *Id.* § II-C. In short, the Parties have designed the Settlement to ensure that substantial cash benefits are placed in the hands of Class Members.

C. *Class Release*

In exchange for the benefits conferred by the Settlement, all Class Members who do not opt out will be deemed to have released SHC and any retailer from whom the Class Member may have purchased the Subject Products from claims relating to the subject matter of this action. The detailed release language is set forth in Section VIII of the Settlement.

D. *Settlement Administration and Notice*

As noted, Defendants have agreed to provide records in their possession concerning the purchases of Subject Products for more than 900,000 Class Members, which the Settlement Administrator will use to provide personalized notice to such Class Members. *Id.* § IV. The Settlement Administrator will use national databases to update Class Member addresses where necessary to reasonably ensure Class Members receive the notice. *Id.* § IV-A. The proposed form of personal notice to known Class Members (attached to the Settlement as Exhibit 6) advises Class Members of their rights in connection with the Settlement.

In addition to this personalized notice, the Settlement Administrator has designed a media campaign that will reach additional Class Members to inform them about the Settlement. The campaign is designed to reach approximately 70% of likely Class Members. The campaign is described more fully in the declaration of Carla Peak, attached to the motion as Exhibit B.

Moreover, the Settlement Administrator will establish a settlement website that will provide additional information on the Settlement and this Action, including a long-form notice

providing additional detail concerning the Settlement and the Action, relevant pleadings from this Action, and contact information for Class Counsel. *Id.* §§ IV-D, IV-E, IV-F.

Defendants will comply (through the Settlement Administrator) with the obligation to give notice of the Settlement to federal and state governmental entities as required pursuant the Class Action Fairness Act, 28 U.S.C. § 1715.

E. *Opt-Outs and Objections*

Any Class Member wishing to opt out of the Class can do so. To opt out, a Class Member must submit a request in writing to the Settlement Administrator by the date set forth in the Preliminary Approval Order (which is roughly two months after the completion of Class Notice). *Id.* § IX; Proposed Preliminary Approval Order ¶¶ 25, 32.[1]

Any Class Member wishing to object to any aspect of the Settlement, including Plaintiff's application for attorneys' fees, can do so. To object, a Class Member must file with the Court a notice of his or her written objection (by the same deadline as for opt-out requests). Settlement § X; Proposed Preliminary Approval Order ¶¶ 27, 32. Any objector must state the basis for his or her objection. Settlement § X. Objectors may appear in Court at the final approval hearing if they choose. *Id.*

III. ARGUMENT

A. *The Court Should Grant Preliminary Approval of the Settlement.*

"Settlement agreements enjoy great favor with the courts as a preferred alternative to costly, time-consuming litigation." *Fid. & Guar. Ins. Co. v. Star Equip Corp.*, 541 F.3d 1, 5 (1st Cir. 2008) (quotation omitted). While the proponent of a class action settlement must demonstrate that the settlement is fair, reasonable and adequate, usually "there is a presumption

[1] The Proposed Preliminary Approval Order is attached hereto as **Exhibit C.**

in favor of the settlement" where, as here, "discovery has been adequate and the parties have bargained at arm's length." *Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009) (quotation omitted).

Under Federal Rule of Civil Procedure 23(e), approval of a class action settlement is a two-step process: first, a "preliminary approval" order issues; and, second, after notice of the proposed settlement has been provided to the class and a hearing has been held to consider the fairness, reasonableness, and adequacy of the settlement, "final approval" is considered. *See* Manual for Complex Litigation § 13.14 (4th ed. 2004). At the preliminary approval stage, the Court "need not make a final determination regarding the fairness, reasonableness and adequateness of a proposed settlement; rather, the Court need only determine whether it falls within the range of possible approval." *In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. 125, 140 (D.P.R. 2010) (citing *Scott v. First Am. Title Ins. Co.*, No. 06-286, 2008 U.S. Dist. LEXIS 117205, at *3 (D.N.H. 2008)).

While the First Circuit has not specified a methodology for determining preliminary approval, courts in this circuit often look to four factors to determine whether a settlement should be presumed fair: "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Lupron(R) Mktg. & Sales Practices Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004) (quotation omitted); *In re Asacol Antitrust Litig.*, Civil Action No. 1:15-cv-12730 (DJC), 2017 U.S. Dist. LEXIS 158491, at *14 (D. Mass. Sep. 14, 2017) (quoting *Lupron*). The latter factor is reserved for final approval, because "the only practical way to ascertain the overall level of objection to the proposed settlement is for notice to go forward, and to see how many potential class members choose to opt out of the settlement

class or object to its terms at the Final Fairness Hearing." *In re M3 Power Razor Sys. Mktg. & Sales Practice Litig.*, 270 F.R.D. 45, 63 (D. Mass. 2010).

For the reasons set forth below, the Settlement more than meets the standard for preliminary approval.

First, the Settlement is the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues of this action. The parties engaged in a formal mediation before an experienced and respected mediator and retired judge, the Honorable John C. Cratsley. Vallely Decl. ¶ 4.[2] The first mediation session was unsuccessful, and only after a full second day of mediation were the Parties able to reach an agreement on the core terms of the Settlement. *Id.* Even after that, the Parties negotiated vigorously concerning additional terms of the Settlement, as reflected in the Parties' requests for additional time from the Court to complete their negotiations. *Id.* Class Counsel zealously represented their clients at mediation, procuring a substantial recovery for the Class and a settlement structure that will ensure that real, meaningful cash benefits will go to Class Members.

***Second*,** Class Counsel took sufficient discovery in this action, and was therefore well-situated to assess the Settlement. On this point, it is worth noting, as Plaintiff argued in response to Defendants' motion to dismiss, that the core facts supporting Plaintiff's claim derived from the product labels themselves. Moreover, in order to intelligently discuss settlement, Plaintiff procured from Defendants before agreeing to mediation information concerning the volumes of sales of the Subject Products and other information concerning those sales (including wholesale and retail price information). *Id.* ¶ 5. Defendants also produced additional information to Plaintiff

[2] "Vallely Decl." refers to the Declaration of Patrick J. Vallely, attached to the motion as Exhibit D.

concerning Defendants' defenses, including the products' alleged compliance with the Federal Trade Commission's Green Guides, which permitted Plaintiff to consider fully the risks associated with pressing forward with her claims. *Id.* In whole, Class Counsel obtained the necessary information in order to fully evaluate the risks and benefits of the Action before negotiating the Settlement.

Third, Class Counsel are highly experienced litigators specializing in consumer class actions. The attorneys of record for Plaintiff together have dozens of years' experience litigating such actions. *See* Vallely Decl. ¶ 5 & Ex. 1 (firm resume for Class Counsel). Accordingly, they have the knowledge and understanding to competently evaluate the risks and the benefits of the proposed settlement. Based on this evaluation, Class Counsel strongly believe that the proposed settlement confers a significant benefit to Class Members. Vallely Decl. ¶¶ 5–6.

In addition to the above factors, the substance of the Settlement itself provides evidence of its fairness. Specifically, Class Members will receive a substantial cash settlement benefit, with or without proof of purchase (although the benefit will be limited to two products if the Class Member lacks proof of purchase). Moreover, in the event that the Claims submitted do not exhaust the fund created by the Settlement, the cash benefit to Class Members may be increased by a multiple of up to 2.0 to ensure that the proceeds of the Settlement go to Class Members.

Additionally, the claims process set forth in the Settlement is designed to ensure Class Members are the ultimate beneficiaries of the Settlement. The Parties negotiated a simplified, one-page Claim Form in order to encourage Class Members to submit claims. Moreover, more than 900,000 Class Members will receive personalized notice of the Settlement, the vast majority by email. Those Class Members receiving notice by email will be able to click on a button in the

email to go to an online Claim Form pre-populated with the Class Member's information, thus simplifying the claims process and encouraging claims.

In summary, Plaintiff and Class Counsel are confident in the strength of their case but are also pragmatic in their awareness of the various defenses available to Defendants and the risks inherent in continued litigation. The immediate, cash recovery provided by the Settlement provides an excellent result when considering the risks inherent in this litigation and the delay that would necessary occur from protracted litigation. Based on their experience as counsel in similar complex class actions, Class Counsel concludes the Settlement is outstanding, both given the complexity of the litigation and the significant risks and barriers that would have continued to loom in the absence of the Settlement.

B. ***The Court Should Approve the Class Notice***

"Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." Manual for Complex Lit. § 21.312 (internal quotations omitted). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950).

The proposed Class Notice satisfies all of these criteria. The Class Notice informs Class Members of the substantive terms of the Settlement. It advises Class Members of their options for opting out of or objecting to the Settlement, and how to obtain additional information about the Settlement. The Class Notice is presented in plain English to ensure Class Members read and understand the Class Notice. Settlement Exs. 4, 5, 6.

As part of the Settlement, Defendants will provide contact information for more than 900,000 Class Members, which will be used to send them personalized notice. Such personalized notice makes the notice program for this Settlement more vigorous than the typical consumer class action settlement, which often relies solely on publication notice. Moreover, to supplement the personalized notice and to reach additional Class Members, the Class Notice includes a media campaign designed by the Settlement Administrator to reach approximately 70% of Class Members, further amplifying the adequacy of Notice. Peak Decl. ¶¶ 13–24.

Both the personalized mailed notice and the publication notice will point Class Members to a Settlement website, which will provide yet further information concerning the Settlement and this Action, and will enable Class Members to contact Class Counsel or the Settlement Administrator should they have any questions. *Id.* §§ IV-D, IV-E, IV-F. Moreover, Class Members will have the additional option to obtain information about the Settlement through a toll-free number. *Id.* § IV-B

For these reasons, the Court should approve the Class Notice set forth in the Settlement, and the form of notice attached as Exhibits 4 through 6 to the Settlement.

C. *The Court Should Conditionally Certify the Proposed Class.*

When presented with a proposed class settlement, a court must determine whether the settlement class satisfies the requirements for class certification under Federal Rule of Civil Procedure 23. However, where a court is evaluating the certification in the context of a proposed settlement, questions regarding the manageability of the case for trial purposes are not considered. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would presented intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial.").

Here, Plaintiff proposes the following Class, the certification of which Defendants have assented to for purposes of this Settlement:

> All purchasers of any of the Subject Products as defined below during the period between November 19, 2002 through the Effective Date (defined below), excluding any purchases made for purposes of resale. Excluded from the Class are (i) those Class Members who have previously resolved their claims through return of product, settlement, or final judgment, (ii) all persons who are officers or directors of Defendant, and (iii) Judges of the Court.

As set forth below, the conditional certification of the Class is appropriate for purposes of settlement because all of the other requirements of Rule 23 have been met, and the proposed class representative, Molly Crane, meets all the requirements as discussed below.

1. The Class Satisfies Federal Rule of Civil Procedure 23(a)

Rule 23(a) enumerates four prerequisites for class certification, referred to as: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. In light of the Settlement, the Parties agree that each of these requirements is met.

a. Numerosity.

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a). The threshold to establish numerosity is low. *See Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, No. 05-CV-12024, 2008 U.S. Dist. LEXIS 6140, at *31 (D. Mass. Jan. 29, 2008). Here, SHC sold millions of Subject Products during the Class Period (as reflected by Defendants' agreement to provide information on over 900,000 Class Members to facilitate notice and claims administration). Moreover, it is difficult or inconvenient to join all members of the proposed Class. *See In re M3 Power Razor*, 270 F.R.D. at 54 (holding numerosity requirement "easily satisfied" where defendant sold over ten million razors and where "[n]o purchaser records were maintained, so there is no possibility of

locating, much less joining individually as plaintiffs, all of the potential class members."). Accordingly, the numerosity requirement is satisfied.

b. Commonality

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury…. Their claims must depend upon a common contention…. That common contention, moreover, must be of such a nature that it 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." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal citation omitted).

Commonality "requires only that resolution of the common questions affect all or a substantial number of the class members." *In re Lupron(R) Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) (citation and quotation omitted); *see also Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 325 (D. Mass. 1997) (noting that Rule 23 does not require that all class members share identical claims, but rather that claims be common, and not in conflict). "The threshold of 'commonality,' is not high." *In re Lupron(R)*, 228 F.R.D. at 88 (citation omitted).

Here, the common questions shared among Class Members include:

(a) Whether certain SHC products were sold with the labels sulfate-free and/or salt free;

(b) Whether the hair care products so labeled in fact contained sulfates and/or salt;

(c) Whether Defendants' conduct alleged in the Amended Complaint constituted unfair or deceptive acts or practices in the conduct of trade or commerce in violation of c. 93A, Section 2;

(d) Whether the members of the Class are entitled to damages for unjust enrichment; and

(e) The proper measure of damages.

Accordingly, the commonality requirement is satisfied here.

c. Typicality

"To establish typicality, the plaintiffs need only demonstrate that 'the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory.'" *In re M3 Power Razor*, 270 F.R.D. at 54-55 (citation omitted); *see also Swack v. Credit Suisse First Boston*, 230 F.R.D. 250, 260 (D. Mass. 2005) ("As with the commonality requirement, the typicality requirement does not mandate that the claims of the class representative be identical to those of the absent class members."). Factual distinctions between the Plaintiff's and Class Members' claims will not destroy typicality as long as the claims share the same essential characteristics. *Id.*; *see also In re Bank of Boston Corp. Sec. Litig.*, 762 F. Supp. 1525, 1532 (D. Mass. 1991).

Typicality is met here for settlement purposes as the proposed class representative, Plaintiff Molly Crane, and the proposed Class assert the same claims, arising from the same course of conduct—substantially similar representations made across labels of the Subject Products. Specifically, Plaintiff Crane alleges that the labels for the Subject Products falsely stated that the products were free of sulfates and salts. It is Plaintiff's position that every Class Member was injured when he or she paid money to purchase the Subject Products. Under the claims alleged, the proposed class representative and the Class Members also seek the same relief for the same alleged wrongful conduct, i.e., the misrepresentation regarding the contents of the Subject Products. The proposed class representative's claims are the same as those of other Class Members. Therefore, the typicality requirement is met in connection with the proposed Settlement.

d. Adequacy of Representation.

Rule 23(a)(4) requires that the "proposed class representatives 'fairly and adequately protect the interests of the class.'" *In re M3 Power Razor*, 270 F.R.D. at 55 (quoting Rule 23(a)(4)). This is satisfied by a showing that "'the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation.'" *Id.* (quoting *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)).

Adequacy has been met in this case. First, the interests of Plaintiff and the Class Members are fully aligned and conflict free: Plaintiff and the other Class Members are "seeking redress from what is essentially the same injury," *In re M3 Power Razor*, 270 F.R.D. at 55, and there are no disabling conflicts of interest. Second, the proposed Class Counsel is qualified and experienced in class action litigation. See Vallely Decl. Ex. 1 (Shapiro Haber & Urmy LLP Firm Resume). Class Counsel have performed extensive work to date in identifying and investigating potential claims in the Action, and in evaluating and acquiring data through discovery from Defendants. Class Counsel successfully opposed Defendants' motion to dismiss, which raised a host of defenses to Plaintiff's claims. The net result these efforts is the successful negotiation the proposed Settlement.

2. <u>The Class Should Be Conditionally Certified Under Federal Rule of Civil Procedure 23(b)(3).</u>

"In addition to satisfying the four elements of Rule 23(a), plaintiffs must demonstrate that at least one subsection of Rule 23(b) applies." *In re M3 Power Razor*, 270 F.R.D. at 55. The proposed class representative seeks certification of a Settlement Class under Rule 23(b)(3). Certification under Rule 23(b)(3) is appropriate where "questions of law or fact common to class members predominate over any questions affecting only individual members, and [where] a class

action is superior to other available methods for fairly and efficiently adjudicating the controversy." Id. (quoting Fed. R. Civ. P. 23(b)(3)). "In adding 'predominance' and 'superiority' to the qualification-for-certification list, the Advisory Committee sought to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote…uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *In re Lupron(R)*, 228 F.R.D. at 92 (quoting *Amchem*, 521 U.S. at 615). "The superiority analysis dovetails with the predominance analysis." *Id.*

a. Common Questions Predominate.

The Rule 23(b)(3) predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623; *see also In re Lupron(R)*, 228 F.R.D. at 91. "Predominance is a test readily met in certain cases alleging consumer…fraud…." *Amchem*, 521 U.S. at 625. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." 7A Wright & Miller, Federal Practice & Procedure § 1778 (2d ed. 1986).

The predominance requirement is satisfied in connection with the proposed Settlement. As discussed above, Plaintiff alleges that the Class Members are entitled to the same legal remedies premised on the same alleged wrongdoing. The central issues for every claimant are substantially the same. Plaintiff Crane alleges that SHC's labels were false, and the falsity of labels of the Subject Products provides the core issue in this litigation. Under these circumstances, predominance under Rule 23(b)(3) is satisfied. *See In re M3 Power Razor*, 270 F.R.D. at 56 (finding predominance in consumer fraud case where "dominant common questions" included whether defendant's "advertising was false or misleading," whether

defendant's conduct "violated the statutory and/or common law causes of action delineated in the…Complaint," and whether the class members suffered damages as a result of the conduct).

b. A Class Action Is the Superior Method to Resolve this Controversy.

Rule 23(b)(3) sets forth the relevant factors for determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. These factors include: (i) the class members' interest in individually controlling separate actions; (ii) the extent and nature of any litigation concerning the controversy already begun by or against class members; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (iv) the likely difficulties in managing a class action. See Fed. R. Civ. P. 23(b)(3). In a case such as this, where there are numerous class members who each have relatively small claims, "a class action is the only feasible mechanism for resolving the dispute efficiently." *In re M3 Power Razor*, 270 F.R.D. at 56. "[I]n the absence of class certification, there would be nothing for an individual class member to control because a separate action would not be prosecuted." *Id.*

Application of the Rule 23(b)(3) "superiority" factors show that a class action is the preferred procedure for this Settlement. The damages at issue for each Class Member are not large. It is neither economically feasible, nor judicially efficient, for Class Members to pursue their claims against Defendants on an individual basis. *See Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (quotation and citation omitted). Additionally, the fact of settlement eliminates any potential difficulties in managing the trial of this Action as a class action. *Id.* at 620 (when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems…for the

proposal is that there be no trial"). Under the circumstances presented here, a class action is superior to any other mechanism for adjudicating the case. The requirements of Rule 23(b)(3) are satisfied in connection with the proposed Settlement.

D. *The Court Should Schedule a Final Approval Hearing*

The last step in the settlement approval process is a final approval hearing, at which the Court will hear any evidence or argument necessary to make its final evaluation of the Settlement. Proponents of the Settlement may explain the terms and conditions of the Settlement, and offer argument in support of final approval. The Court will determine at or after the final approval hearing whether the Settlement should be approved; whether to enter a final approval order under Rule 23(e); whether to approve Class Counsel's application for attorneys' fees and reimbursement of costs and expenses; and whether to approve a service award for Ms. Crane.

Plaintiff and Class Counsel request the Court schedule the final approval hearing for a date convenient for the Court but no sooner than 140 days following the date the Court grants preliminary approval of the Settlement (at least 140 days is necessary to provide sufficient time for the mailing of class notice, the opportunity for Class Members to opt out or object, and the opportunity for the Parties to respond to objections, if any, *see* Preliminary Approval Order ¶ 32).

IV. CONCLUSION

Based on the foregoing, Plaintiff and Class Counsel respectfully request the Court:

1. grant preliminary approval to the Settlement;
2. conditionally certify the Class as defined in this motion and the Settlement;
3. approve the method of notice set forth in the Settlement and the forms of notice attached as Exhibits 4, 5, and 6 to the Settlement;
4. approve and order the opt-out and objection procedures set forth in the Settlement;

5. stay this litigation pending final approval of the Settlement;

6. preliminarily bar and enjoin any Class Members from asserting, instituting, or prosecuting, directly or indirectly, any Released Claims in any court or other forum against any of the Released Parties.; and

7. schedule a final approval hearing no sooner than 140 days from the date the Court grants preliminary approval of the Settlement.

For the Court's convenience, Plaintiff and Class Counsel attach as Exhibit C to the motion a proposed order granting preliminary approval of the Settlement (this same proposed order is attached as Exhibit 2 to the Settlement).

Dated: October 19, 2018

Respectfully submitted,

/s/ Patrick J. Vallely

Edward F. Haver (BBO # 215620)
Patrick J. Vallely (BBO # 663866)
SHAPIRO HABER & URMY LLP
Seaport East
Two Seaport Lane, Floor 6
Boston, MA 02210
(617) 439-3939 – Telephone
(617) 439-0134 – Facsimile
ehaber@shulaw.com
pvallely@shulaw.com

Kenneth D. Quat (BBO # 408640)
QUAT LAW OFFICES
929 Worcester Rd.
Framingham MA 01701
508-872-1261
ken@quatlaw.com

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing pleading and its attachments was filed electronically through the Court's electronic filing system and that notice of this filing will be sent to all counsel of record in this matter by operation of the Court's ECF system.

Dated: October 19, 2018

/s/ Patrick J. Vallely
Patrick J. Vallely