IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

LOGAN LANDES and JAMES GODDARD, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SONY MOBILE COMMUNICATIONS (U.S.A.), INC. and SONY ELECTRONICS, INC.,

Defendants.

Case No. 2:17-cv-2264-JFB-SIL

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

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Court-appointed Plaintiffs Logan Landes ("Landes") and James Goddard ("Goddard" and, collectively, "Plaintiffs") respectfully submit this Memorandum of Law in support of their Joint Motion for Final Approval of Settlement of the above-captioned class action (the "Action").[1] Plaintiffs move this Court for the entry of the [Proposed] Final Order Approving Class Action Settlement submitted herewith: (1) finally approving the proposed settlement (the "Settlement"); (2) certifying the Settlement Class for settlement purposes only; and (3) approving the Settlement Plan. On August 3, 2017, this Court granted preliminary approval of the Settlement (the "Preliminary Approval Order") and approved the Notice Program (the "Notice"), which was duly provided. Dkt Nos. 16-2, 23. As discussed below, the Settlement is fair, reasonable and adequate and warrants Court approval.

INTRODUCTION

Sony Electronics, Inc. ("Sony Electronics") provides audio and video electronics and information technology products for consumers and professionals. Its operations include research and development, engineering, sales, marketing, distribution, and customer service. Sony Mobile Communications (U.S.A.), Inc. ("Sony Mobile" and with Sony Electronics, "Sony" or "Defendants"), develops, manufactures, and sells mobile communications products. Sony claims that "[t]hrough its Xperia™ smartphone and tablet portfolio, Sony Mobile delivers the best of Sony technology…." Sony, a leader in the development and sale of consumer and professional electronics, prides itself that its "relentless pursuit of innovation, drives us to deliver ground-breaking new excitement and entertainment in ways that only Sony can."

In this Action, Plaintiffs asserted seven claims against Sony on behalf of a nationwide class, with a California subclass and an Illinois subclass, for violations under California's Consumer

[1] Unless otherwise stated, capitalized terms have the same meaning as set forth in the Settlement Agreement dated July 12, 2017, filed with the Court on July 14, 2017 (Dkt. No. 16-2).

Legal Remedies Act, Cal. Civil Code §§ 1750, et seq. ("CLRA"), California's False Advertising Law, Cal. Bus. & Prof. Code§§17500, et seq. ("FAL"), California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, et seq. ("UCL"), Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1, et seq. ("ICFA"), as well as claims of breach of express warranty, breach of implied warranty, and unjust enrichment. The Action pertains to the Defendants' allegedly deceptive advertising of its Mobile Devices as being "waterproof."

After extensive investigation and discovery and vigorous arm's-length negotiations, the parties were able to reach a settlement. The proposed Settlement provides for: (i) a warranty extension for Class Members where there is damage resulting from water intrusion, including where the applicable warranty has already expired; (ii) changes to Sony's packaging, labeling and advertising; and (iii) reimbursement of 50% of the MSRP for the affected Mobile Device to Class Members who previously submitted timely claims for water-related damage to their Mobile Device, which were denied by Defendants. Based on their evaluation of the facts and applicable law and their assessment of the substantial risk and expense of litigation, Plaintiffs and their counsel submit that the proposed Settlement is in the best interests of the Settlement Class and provides a meaningful recovery for Settlement Class members.

As discussed below, in light of Plaintiffs' and Class Counsel's informed assessment of: (i) the facts specific to this Action; (ii) the strengths and weaknesses of the Class' claims, and the defenses thereto, based on their extensive litigation and settlement efforts over the pendency of this Action; (iii) the absence of opposition to the Settlement; (iv) the considerable risks and delays associated with continued litigation; and (v) Class Counsel's considerable experience in similar class actions, Plaintiffs and Class Counsel firmly believe that the Settlement is eminently fair,

reasonable, and adequate. Accordingly, Plaintiffs respectfully request that the Court enter the [Proposed] Final Order Approving Class Action Settlement, submitted herewith.

STATEMENT OF FACTS

A. Procedural Background

This is a consumer fraud class action on behalf of the Settlement Class alleging violations under the CLRA, California's FAL, UCL, ICFA, as well as claims of breach of express warranty, breach of implied warranty, and unjust enrichment. Plaintiffs sought declaratory relief, compensatory damages, punitive damages, injunctive relief, attorneys' fees and costs, and other relief. Dkt. No. 1 ("Complaint"). On April 14, 2017, Plaintiffs filed this Action, on behalf of a nationwide class, alleging, *inter alia*, that the Sony Defendants deceptively advertised the Xperia line of smartphones and tablets as "waterproof." *Id.*

Pursuant to Section 1782 of the CLRA, Plaintiffs' Class Counsel was required to provide written notice to the Defendants of alleged violations of the CLRA as a prerequisite to commencing a lawsuit seeking damages for such violations. Accordingly, on January 13, 2016, prior to filing this Action, Plaintiffs sent the Defendants a demand letter pursuant to the CLRA, providing notice of potential claims against Sony related to the Mobile Devices. Kulesa Dec. ¶2.[2] Notably, one California court described the goal of the CLRA's notice requirements as follows: "The clear intent of the [CLRA] is to provide and facilitate precomplaint settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished." *Outboard Marine Corp. v. Super. Ct.*, 52 Cal. App. 3d 30, 41 (1975).

B. Pre-Filing Discovery and Settlement Negotiations

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[2] All references to "Kulesa Dec. ¶__" refer to paragraphs in the Declaration of Nancy A. Kulesa filed contemporaneously herewith.

After Plaintiffs sent the CLRA Demand, counsel for the Parties engaged in several meetings and telephonic discussions to discuss a potential resolution of the Class' claims. During the course of the Parties' extensive arm's length negotiations, Plaintiffs served discovery requests on the Sony Defendants. Kulesa Dec. ¶3. The Defendants produced over 11,000 documents, including documents related to the following topics that were included in Plaintiffs' discovery requests: (1) warranty documents, including complaints; (2) users guides and white papers for the Mobile Devices (3) product specifications; (4) package inserts; (5) Intellectual Property certifications and test results establishing the water-resistant capabilities of the Mobile Devices; (6) water resistance test instructions; (7) advertising and marketing pictures; (8) website advertising; (9) package artwork; (10) Profit and Loss Statements; and (11) Sales Charts. *Id*.

In December 2016, Plaintiffs' Class Counsel conducted an interview of the Director of Sony Customer Services for the Americas in order to assess the merits of Plaintiffs' claims and the Sony Defendants' defenses and valuation issues. *Id.* ¶4. Plaintiffs' Class Counsel also contacted the Director on two occasions to ask follow up questions regarding the warranty after the interview. Additionally, the parties engaged a highly-skilled class action mediator, Patrick A. Juneau, and participated in in-person meetings and telephonic conferences on several occasions during 2016 with Mr. Juneau.[3] The parties also attended an in-person mediation before Mr. Juneau on March 17, 2017. *Id.* ¶5. While this mediation was not successful on this date, the parties met subsequently, over a period of six months, to negotiate the terms of the settlement presently before the Court. *Id*. The parties then reviewed the terms of the settlement with Patrick A. Juneau.

[3] Partick A. Juneau has broad experience in numerous complex federal and state cases including, among others, in the "Deepwater Horizon" Multi-District Litigation. *See In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 Section J (E.D. La.).

The Parties' detailed and informed negotiations, which have taken place in conjunction with the informal discovery process, have been in progress for approximately one year. *Id.* ¶6. During this time, Plaintiffs' Counsel conducted a thorough review of the documents mentioned above and obtained an in-depth understanding of the strengths and weaknesses of their clients' respective positions. *Id.* ¶6. Plaintiffs' Counsel exercised due diligence to confirm the adequacy, reasonableness, and fairness of the Settlement and consulted a damages expert concerning potential damages related to the Plaintiffs' claims. *Id.* The Parties appreciate the costs and uncertainty attendant to any litigation, and have agreed to a proposed settlement agreement. Plaintiffs' Counsel agreed to settle the Action pursuant to the provisions of the Settlement, after considering, among other things: (i) the benefits to Plaintiffs and the Class under the terms of the Settlement; (ii) the uncertainty of being able to prevail at trial; (iii) the uncertainty relating to Defendants' defenses and the expense of motion practice in connection therewith; (iv) the attendant risks, difficulties, and delays inherent in litigation, especially in complex actions such as this; and (v) the desirability of consummating this Settlement promptly in order to provide substantive relief to Plaintiffs and the Class without unnecessary delay and expense. *Id.*

C. The Court Preliminarily Approved the Settlement and Notice Was Disseminated to the Class

With the fairness of the Settlement confirmed, Plaintiffs and Sony jointly moved for preliminary approval of the Settlement on July 14, 2017 (Dkt. No. 16), and this Court entered the Preliminary Approval Order on August 3, 2017 ("Preliminary Approval Order"). Dkt. No. 23. Pursuant to the Preliminary Approval Order, the Notice was mailed by Heffler Claims Group LLC ("Heffler"), a nationally-recognized claims administrator, to 1,351 names and addresses produced by Defendants as potential Class members and another 24 notices were emailed to Class Members for whom only an email address was identified. *See* Declaration of Jeanne C. Finegan, APR at ¶

12. Between August 17, 2017 and September 26, 2017, Heffler published a short-form notice in nationally circulated magazines and Newspapers, selected based on high coverage and index (*See id.*, at ¶16-19) as well as print ads, internet banner ads, and social media through Twitter, Facebook and Instagram. CAFA Notice was sent to the appropriate state and Federal officials and a press release was distributed via U.S. 1 Newsline in English and Spanish. The Notice plan also included a toll-free telephone number and a settlement website. *See id.,* at ¶11. The URL for the settlement website, which was prominently displayed in the publication notice, contains extensive information about the settlement including Court Orders, the Settlement Agreement and the Notice. *See id.,* at ¶ 31. The Notice Program reached over 92% of the target audience, with an average frequency of over 8 times. *Id.,* at ¶ 4.[4] As of the date of this filing, only one objection for the Settlement has been received. *See infra.*

ARGUMENT

A. The Benefits of the Proposed Settlement

Under the terms of the Settlement Agreement, the Defendants agreed to make substantial relief available to Class Members, including: (i) a warranty extension; (ii) changes to the Sony Defendants' packaging, labeling and advertising; and (iii) a reimbursement for Class Members. In return for the benefits provided in the Settlement Agreement, the Class will release and discharge the Defendants from any and all claims that were, could have been, or may be asserted in this Action, or that relate to the Mobile Devices.

1. Warranty Extension

The Defendants have agreed that, upon the issuance of the Final Order and Final Judgment, they will extend the limited warranty for damage resulting from water intrusion: (a) by an

[4] For a more extensive description of the Notice Program, see the Declaration of Jeanne C. Finegan, APR submitted herewith.

additional 12 months for those Mobile Devices where the warranty is still in effect as of the date of the issuance of the Preliminary Approval Order ("Active Warranty Mobile Devices"); and (b) six months for those Mobile Devices that are out-of-warranty as of the date of the issuance of the Preliminary Approval Order ("Expired Warranty Mobile Devices"). Settlement Agreement III.A. For the Active Warranty Mobile Devices, the date for the extension of the warranty shall be measured from the purchase date. *Id*. For the Expired Warranty Mobile Devices, the date of the extension shall begin on the date of the issuance of the Final Order and Final Judgment and expire six months thereafter. *Id*. All other terms and conditions of the limited warranty, if still in effect, shall apply. *Id*. While Sony had no obligation to implement this relief until the occurrence of the Final Effective Date, Plaintiffs' Counsel understands that it was implemented on September 14, 2017.

2. Changes to Packaging, Labeling and Advertising

Pursuant to the Settlement Agreement, within 90 days of the issuance of the Preliminary Approval Order, for the Mobile Devices currently being sold by the Defendants or any newly-introduced models with IP 65/68 substantiation, the Defendants agreed to change their advertising and marketing intended for end users in the United States relating to "waterproof" or substantially identical terms to "water resistance" or its substantial and/or functional equivalent. Settlement Agreement III.B. The Defendants also agreed to notify their third party resellers regarding such advertising changes and the terms of this Settlement Agreement. *Id*. In the event that a reseller continues to use the phrase "waterproof" in its advertising or marketing, the Defendants shall not be responsible for such action or inaction. *Id*. In accordance with the terms of the Settlement Agreement, Defendants provided Plaintiffs' Class Counsel with advance copies of representative samples of advertising and marketing changes, which they reviewed and approved. *Id.*

3. Reimbursement of Claims

For Eligible Class Members who previously had timely claims for water-related damages denied by Sony for their in-warranty Mobile Devices, as identified in the Defendants' records, the Defendants shall issue a check in the amount of 50% of the at-issue MSRP for the applicable Mobile Device, as indicated in Exhibit 9 to the Settlement Agreement, to those Class Members who complete and timely return an In-Warranty Claim Form. Settlement Agreement III.C.1. The MSRP ranges from $249.99 to $679.99, depending upon the applicable Mobile Device. *Id.*

Class Members in this category were sent a notification letter along with an In-Database Claim Form. *Id.* The notification letter notified Class Members that they are on the list of persons who previously had submitted a water-related claim that was denied by Sony and that they are eligible for relief under this Settlement Agreement, provided they complete the applicable Claim Form and perform other minimal tasks in a timely manner. *Id.* The Claim Form required the Class Members to provide basic information, such as confirming or revising their physical address, in order to be sent the settlement relief check. *Id.* To date, 82 In-Database Claim Forms have been received.

B. Class Certification for Settlement Purposes is Appropriate

The Court's Preliminary Approval Order provisionally certified a class of:

> [A]ll persons, entities or organizations who, at any time as of or before the entry of this Order, purchased, own(ed), received as a gift or received as a customer service exchange the Mobile Devices manufactured, marketed, sold and/or distributed by Sony Mobile Communications (USA), Inc. in any of the fifty States, the District of Columbia, and Puerto Rico. Excluded from the Class are: (a) any persons or entities that purchased or acquired the Mobile Devices for commercial use or resale; (b) any claims aggregators; (c) any person who claims to be an assignee of rights associated with the Mobile Products; (d) Sony Mobile Communications (USA), Inc., their officers, directors and employees; their affiliates and affiliates' officers, directors and employees; their distributors and distributors'

> officers, directors and employees; (e) Plaintiffs' Class Counsel; (f) judicial officers and their immediate family members and associated court staff assigned to this case; and (g) person or entities who or which timely and properly exclude themselves from the Class.

Preliminary Approval Order, Dkt. No. 23 at 2.

Under Federal Rule of Civil Procedure 23, a class action may be maintained if all of the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). Rule 23(a) requires that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23(b)(3) requires the Court to find that: "[Q]uestions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In the Second Circuit, "Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" in evaluating class certification. *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 31 (E.D.N.Y. 2006) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997)).

On August 3, 2017, the Court provisionally certified the Settlement Class. Dkt. No. 23. The Court should now grant final certification because the Settlement Class meets all of the requirements of Rule 23(a) and Rule 23(b)(3).

1. The Requirements of Rule 23(a) Are Met

i. Numerosity

Numerosity is satisfied when the class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *In re Abbott Labs. Norvir Anti-Trust Litig.*, Nos. C 04-1511 CW, C 04-4203 CW, 2007 WL 1689899, at *6 (N.D. Cal. June 11, 2007) (Where "the exact

size of the class is unknown, but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied."). "[N]umerosity is presumed at a level of 40 members…" *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

Here, Plaintiffs easily satisfy numerosity as there are hundreds of estimated class members based upon the number of activated Mobile Devices. Although Plaintiffs do not yet know the exact size of the Class, the Mobile Devices are sold in major retail stores across the United States, including stores such as Verizon and T-Mobile, and major online retailers include Amazon.com. Kulesa Dec. ¶9. As of the date of filing, 293 total claims have been submitted thus far; therefore it can be reasonably inferred that there are hundreds of Class Members. Thus, the Class is sufficiently numerous such that joinder would be impracticable.

ii. Commonality

The commonality requirement tests "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Although the claims need not be identical, they must share common questions of fact or law. *Frank v. Eastman Kodak Co*., 228 F.R.D. 174, 181 (W.D.N.Y. 2005). There must be a "unifying thread" among the claims to warrant class certification. *Kamean v. Local 363, Int'l Bhd. of Teamsters*, 109 F.R.D. 391, 394 (S.D.N.Y. 1986). Courts construe the commonality requirement liberally. *Frank*, 228 F.R.D. at 181.

"In addition, all class members must 'have suffered the same injury.'" *Wal-Mart Store, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) (quoting *Falcon*, 457 U.S. at 157)). In the context of claims for false or deceptive advertising, there is essentially a single misrepresentation (i.e., that the subject products are effective for their advertised purposes) and a single injury (loss of money

for a product that did not work as represented). *See Delarosa v. Boiron, Inc*., 275 F.R.D. 582, 589 (C.D. Cal. 2011).

This Action involves numerous common issues, including: (a) whether Sony advertised or marketed the Mobile Devices in a way that was false, misleading and/or deceptive; (b) whether the Defendants advertised or marketed the Mobile Devices in a way that was an unfair business practice; (c) whether the Mobile Devices are waterproof; (d) whether the Mobile Devices are capable of operation underwater on an ordinary basis; (e) whether Sony breached warranties to Plaintiffs and the Class; (f) whether Defendants were unjustly enriched by their conduct; (g) whether Sony violated CLRA, FAL, UCL or the ICFA; (h) whether, as a result of Sony's alleged misrepresentations, Plaintiffs and other members of the Class suffered an ascertainable loss; and (i) whether Plaintiffs and the Class are entitled to recover restitution, injunctive relief and/or monetary relief as a result of the Defendants' alleged unlawful conduct. The Defendants made uniform representations regarding the Mobile Devices throughout the United States both directly to consumers and through a range of retailers both online and in retail outlets. Complaint ¶15. Class members therefore share a common alleged injury because they were all allegedly exposed to the same alleged misrepresentations related to each Mobile Device. *See Delarosa*, 275 F.R.D. at 589. Thus, this Action presents common questions of law or fact concerning the Defendants' alleged false or deceptive representations about the Mobile Devices, and a determination regarding these questions would resolve all claims "in one stroke." *Dukes*, 131 S.Ct. at 2551.

iii. Typicality

Typicality is satisfied "when each class member's claim rises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A*., 126 F.3d at 376 (internal quotation marks omitted). "Like the commonality

requirement, typicality does not require the representative party's claims to be identical to those of all class members." *Frank,* 228 F.R.D. at 182. "[M]inor variations in the fact patterns underlying individual claims" do not defeat typicality when the defendant directs "the same unlawful conduct" at the named plaintiffs and the class. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993).

Here, the Plaintiffs have claims typical to the Class and are members of the Class they seek to represent. Landes and Goddard allegedly sought out the Defendants' Mobile Devices based on alleged representations that the Mobile Devices were "waterproof," and suffered the same alleged injury in fact – loss of money in the amount of the purchase price – when the Mobile Devices allegedly did not perform as advertised. Plaintiffs and other members of the Class have been damaged by the Defendants' deceptive and unfair conduct in that they are persons in the United States who, within the relevant statute of limitations period, purchased the Mobile Devices and paid far more than they otherwise would have paid had the Sony Defendants not misrepresented the waterproof abilities of the Mobile Devices.

iv. Adequacy of Representation

Rule 23(a)(4) requires the class representative to "fairly and adequately protect the interests of the class." "The adequacy requirement exists to ensure that the named representatives will have an interest in vigorously pursuing the claims of the class, and … have no interests antagonistic to the interests of other class members." *Toure v. Cent. Parking Sys. of N.Y.*, No. 05 Civ. 5237, 2007 WL 2872455, at *7 (S.D.N.Y. Sept. 28, 2007) (internal quotation marks omitted); *see also Campos v. Goode*, No. 10 Civ. 224, 2010 WL 5508100, at *2 (S.D.N.Y. Nov. 29, 2010); *McMahon v. Olivier Cheng Catering & Events, LLC*, No. 08 Civ. 8713, 2010 WL 2399328, at *2 (S.D.N.Y. Mar. 3, 2010). "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Dziennik v. Sealift, Inc.*, No. 05 Civ. 4659, 2007 WL

1580080, at *6 (E.D.N.Y. May 29, 2007). Thus, the adequacy requirement is met if the Plaintiffs: (1) are represented by competent counsel who are qualified, experienced and generally able to conduct the litigation; and (2) do not have "interests antagonistic to those of the remainder of the class." *Rodolico v. Unisys Corp*., 199 F.R.D. 468, 477 (E.D.N.Y. 2001).

Here, Plaintiffs satisfy the adequacy requirement because there is no evidence that Plaintiffs and Class members' interests are at odds. *See Diaz v. E. Locating Serv., Inc*., No. 10 Civ. 4082, 2010 WL 5507912, at *3 (S.D.N.Y. Nov. 29, 2010) (finding adequacy requirement met where plaintiffs' interests were not antagonistic or at odds with those of class members); *deMunecas v. Bold Food, LLC*, No. 09 Civ. 440, 2010 WL 3322580, at *2 (S.D.N.Y. Aug. 23, 2010) (same).The Plaintiffs and the Class purchased the Mobile Devices, believing they were "waterproof" based upon the Defendants' alleged misrepresentations, and lost money as a result when the Mobile Devices did not perform as advertised.

Regarding qualifications of Plaintiffs' Class Counsel, the Court should analyze "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). Here, Plaintiffs' Class Counsel performed extensive work to date in successfully mediating and negotiating the Settlement Agreement. Plaintiffs' Class Counsel has numerous years' experience, and demonstrated success, in bringing the same types of false labeling claims at issue in this action. Plaintiffs agree that Plaintiffs' Class Counsel are competent, qualified, and will more than adequately protect the Class' interests. *See Reyes v. Buddha-Bar NYC*, No. 08-civ-02494 (DF), 2009 U.S. Dist. LEXIS 45277, at *7 (S.D.N.Y. May 28, 2009) (adequacy met where class counsel has "an established record of

competent and successful prosecution of large . . . class actions, and the attorneys working on the case are likewise competent and experienced in the area.") (internal quotation marks omitted).

v. Implied Requirement of Ascertainability

"The Court of Appeals for the 'Second Circuit has recognized a fifth pre-condition to class certification: the implied requirement of ascertainability.'" *Belfiore v. Procter & Gamble Co.,* 311 F.R.D. 29, 63 (E.D.N.Y. 2015) (quoting *In re Scotts EZ Seed Litig.,* 304 F.R.D. 397, 407 (S.D.N.Y. 2015). Recently, the Second Circuit clarified that "[t]he ascertainability doctrine that governs in this Circuit requires only that a class be defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras Securities,* 862 F.3d 250, 264 (2d Cir. 2017). "This modest threshold requirement will only preclude certification if a proposed class definition is indeterminate in some fundamental way." *Id.* at 269. The Circuit expressly "decline[d] to adopt a heightened ascertainability theory that requires a showing of administrative feasibility at the class certification stage." *Id.* at 265. Instead, this Circuit stated that "[a]scertainability does not directly concern itself with the plaintiffs' ability to offer *proof of membership* under a given class definition." *Id.* at 269.

The proposed class is comprised of individuals who purchased a Mobile Device. Given the nature of this action, it is apparent that members of the class could be ascertained by producing a receipt of purchase and/or members may still be in possession of their Mobile Device. Members will also be ascertained through Sony's records, including through records pertaining to warranty claims filed by class members with Sony. Lastly, class members can be established through the use of affidavits. *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.,* 317 F.R.D. 374, 399 (S.D.N.Y. Oct. 4, 2016); *Kurtz v. Kimberly Clark Corp.,* 2017 WL 1155398, at *45 (E.D.N.Y.

Mar. 27, 2017); *Belfiore,* 311 F.R.D. at 66. Accordingly, Class members will be obtained by application of "objective criteria," namely, whether the individual purchased a Mobile Device.

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

Rule 23(b)(3) requires that the common questions of law or fact "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). This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Satisfaction of Rule 23(a) "goes a long way toward satisfying the Rule 23(b)(3) requirement of commonality." *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986). For settlement purposes only, the Defendants do not object to a finding that the class should be certified under Rule 23(b)(3).

i. Predominance

Predominance requires that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole … predominate over those issues that are subject only to individualized proof." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001) (internal quotation marks omitted), *abrogated on other grounds by Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.)*, 471 F.3d 24 (2d Cir. 2006). The essential inquiry is whether "liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check*, 280 F.3d at 139. Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean v. City of N.Y.*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005).

Here, the Class will have to prove, for purposes of settlement, that the Mobile Devices' labeling, packaging and advertisements are false and deceptive before any remedy can be achieved,

demonstrating the common factual allegations and common legal theory. *See* CLRA, FAL, UCL, ICFA. These issues predominate over any factual or legal variations among the Class members. *See Clark v. Ecolab, Inc.*, 2009 U.S. Dist. LEXIS 108736, at *5 (S.D.N.Y. Nov. 17, 2009) (common factual allegations and common legal theory predominated over factual and legal variations among class members in wage and hour misclassification case). The only individualized issues pertain to the calculation of damages, and it is well-settled that individualized damages calculations do not defeat predominance. *See Frank*, 228 F.R.D. at 183 (collecting cases holding that calculation of damages in overtime litigation does not impact the predominance analysis). Thus, Plaintiffs satisfy Rule 23(b)(3).

ii. A Class Action Is a Superior Mechanism

Superiority analyzes whether "the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968). The settlement Class' certification is superior where individual claims are small or modest. *In re Frontier Ins. Grp., Inc. Sec. Litig.*, 172 F.R.D. 31, 49 (E.D.N.Y 1997). Rule 23(b)(3) sets forth a non-exclusive list of relevant factors, including whether individual class members wish to bring, or have already brought, individual actions; and the desirability of concentrating the litigation of the claims in the particular forum. Fed. R. Civ. P. 23(b)(3).

Here, class adjudication is superior because it will conserve judicial resources and is more efficient for Class members, particularly those who lack the resources to bring their claims individually. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998). Plaintiffs and Class members have limited financial resources with which to prosecute individual actions, and Class treatment in the settlement context will greatly conserve judicial resources and promote consistency and efficiency of adjudication. Indeed, since each Class member's claim, individually,

is of relatively low value (e.g., ranging from $250 to $340 per eligible claim), as a practical matter, absent the use of the settlement class action device, it would be too costly and inefficient for any individual plaintiff to finance a lawsuit asserting such claims through trial and appeal.

Because the claims are being certified for purposes of settlement, there are no issues with manageability, and resolution of many thousands of claims in one action is far superior to individual lawsuits and promotes consistency and efficiency of adjudication. Fed. R. Civ. P. 23(b)(3); *Amchem*, 521 U.S. at 620 ("Confronted 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."); *Frank*, 228 F.R.D. at 183 ("The court need not consider the [manageability] factor, however, when the class is being certified solely for the purpose of settlement.") Moreover, denying class certification on manageability grounds is "disfavored" and "should be the exception rather than the rule." *In re Visa Check*, 280 F.3d at 140; *Diaz*, 2010 WL 5507912, at *3; *Campos*, 2010 WL 5508100, at *2; *deMunecas*, 2010 WL 3322580, at *3. For these reasons, the superiority requirement is easily satisfied.

C. The Settlement is Fair, Reasonable, and Adequate and Should Be Granted Final Approval By the Court

Federal Rule of Civil Procedure 23(e) requires judicial approval of any class action settlement. The Second Circuit has long recognized "the strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (internal citations and quotations omitted); *see also* 4 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 11.41, at 87 (4th ed. 2002) ("Newberg") ("The compromise of complex litigation is encouraged by the courts and favored by public policy."). The decision of whether to approve a settlement is within the discretion of the trial court. *See In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368 (2d Cir. 1991); *Newman v. Stein*, 464

F.2d 689, 692 (2d Cir. 1972). In exercising its discretion, the trial court should be mindful of public policy strongly favoring the settlement of class action lawsuits. *In re Sumitomo Copper Litig*., 189 F.R.D. 274, 280 (S.D.N.Y. 1999); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 116 (2d Cir. 2005) (*quoting In re PaineWebber Ltd. P'ships Litig*., 147 F.3d 132, 138 (2d Cir.1998) (the Second Circuit Court of Appeals is "mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.")). Indeed, "absent evidence of fraud or overreaching, [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel." *Id.* (internal citations omitted). Thus, the standard for reviewing a proposed settlement of a class action in the Second Circuit, as in other circuits, is whether the proposed settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e); *Charron v. Wiener,* 731 F.3d 241 (2d Cir. 2013), *cert denied,* 134 S. Ct. 1941 (2014).

1. The Proposed Settlement is Procedurally Fair

The circumstances surrounding the Settlement support the finding that the Settlement is procedurally fair. Courts examining the procedural fairness of settlement do so "in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves." *In re Air Cargo Shipping Servs. Antitrust Litig.,* 2009 WL 3077396, at *6 (E.D.N.Y. Sept. 25, 2009) (internal quotations omitted).

The negotiations leading to the Settlement were conducted by highly qualified counsel, who respectively sought to obtain the best possible result for their clients. The Settlement, reached after approximately one year of litigation and arm's-length negotiations among the parties and their counsel, was informed by the exchange of significant information throughout the discovery and settlement process. Kulesa Dec. at ¶6. In such situations, courts, including the Second Circuit, adopt "an initial presumption of fairness when a proposed class settlement, which was negotiated

at arm's length by counsel for the class, is presented for approval." Newberg § 11:41; *see also McReynolds v. Richards-Cantave,* 588 F.3d 790, 803 (2d Cir. 2009) ("We have recognized a presumption of fairness, reasonableness, and adequacy as to the settlement where a class settlement [is] reached in arm's-length negotiations between experienced capable counsel after meaningful discovery. Such a presumption is consistent with the strong judicial policy in favor of settlements, particularly in the class action context.") (internal citations and quotations omitted).

D. The Proposed Settlement is Substantively Fair

In addition to being procedurally fair, the Settlement is also substantively fair, reasonable and adequate. The Second Circuit has identified nine factors to consider in deciding whether to approve a proposed settlement of a class action, known as the *Grinnell* factors. *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.,* 209 F.3d 43 (2d Cir. 2000). The *Grinnell* factors are as follows:

> (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, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In re Lehman Bros. Sec. & ERISA Litig., No. 08 CIV. 5523 LAK, 2012 WL 1920543, at *2 (S.D.N.Y. May 24, 2012) (applying the *Grinnell* factors to determine whether a settlement was substantively fair, reasonable, and adequate). "[N]ot every factor must weigh in favor of a settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 456 (S.D.N.Y. 2004);

see also In re Merrill Lynch & Co. Research Reports Sec. Litig., No. 02 MDL 1484(JFK), 2007 WL 4526593, at *10 (S.D.N.Y. Dec. 20, 2007).

Here, because the Settlement was negotiated at arm's-length by sophisticated counsel after protracted negotiation efforts, "a strong initial presumption of fairness attaches to the proposed settlement." *In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 465, 474 (S.D.N.Y. 1998); *McReynolds*, 588 F.3d at 803 (*quoting Wal-Mart*, 396 F.3d at 116). In addition, the Settlement more than satisfies each of the factors for approval articulated in *Grinnell*. Accordingly, it is the considered judgment of Plaintiffs and Class Counsel that the Settlement represents a fair, reasonable, and adequate resolution of the Action and warrants this Court's final approval. *In re Advanced Battery Techs. Sec. Litig.*, 298 F.R.D. 171, at *179 (S.D.N.Y. 2014) ("Courts accord great weight to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.").

1. Continued Litigation Would be Complex, Expensive and Protracted

"This factor captures the probable costs, in both time and money, of continued litigation." *Shapiro v. JPMorgan Chase & Co.*, 2014 U.S. Dist. LEXIS 37872, at *8 (S.D.N.Y. Mar. 21, 2014). Here, the litigation was complex and may have lasted for quite some time in the absence of settlement. The parties have engaged in extensive discovery, including written discovery, the production and review of over 11,000 documents, and depositions. As set forth above, the Settlement provides warranty extensions to all Class Members and a straightforward Claims Process for eligible Class Members to obtain reimbursement for prior warranty claims premised upon water-related damage that were previously and timely submitted to the Defendants and denied. Settlement Agreement III.A. All Class Members will benefit from Sony's changes in packaging, labeling and advertising related to "waterproof." Settlement Agreement III.B. If

Plaintiffs had continued with the litigation, they would have faced significant risks, including having to establish liability and damages at trial. Plaintiffs also recognize and have factored the expense and potential delay that may occur if the Action is brought to trial, including the possibility of appeals. *See In re China Sunergy Sec. Litig*., No. 07 CIV. 7895 DAB, 2011 WL 1899715, at *4 (S.D.N.Y. May 13, 2011) (analyzing *Grinnell* Factor One and concluding that "[h]ad the Parties not reached a settlement, discovery would have been protracted and expensive."). In addition, Plaintiffs considered the uncertain outcome and the risk of any litigation and, in particular, the challenges in conducting portions of the discovery in Japan. The recovery obtained in the face of the risk of a lesser or no recovery at all, strongly supports approval of the Settlement.

2. The Reaction of the Class to the Settlement Supports Final Approval of Settlement

The reaction of the Class to the Settlement is "considered perhaps 'the most significant factor to be weighed in considering its adequacy.'" *In re PaineWebber Pshps. Litig.,* 171 F.R.D. 104, at *126 (S.D.N.Y. 1997); *Yuzary v. HSBC Bank USA, N.A.,* No. 12civ3693 (PGG), 2013 WL 5492998, at *6 (S.D.N.Y. Oct. 2, 2013) ("The fact that the vast majority of class members neither objected nor opted out is a strong indication of fairness.").

To date, 293 total claims have been submitted by prospective members of the Settlement Class. Kulesa Dec. ¶10. Plaintiffs' Counsel has received one objection to the Settlement. Dkt. No. 26.[5] This positive reaction to the Settlement weighs heavily in favor of final approval and supports the "presumption of fairness." *See Hanlon v. Chrysler,* 150 F.3d 1011, 1027 (9th Cir. 1998) ("[T]he fact that overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness."); *Massiah v. MetroPlus*

[5] Counsel are working to address the objection and understand the circumstances relating to the objector's interaction with Sony. Class Counsel will report back to the Court on this issue.

Health Plan, Inc., No. 11-cv-05669 (BMC), 2012 U.S. Dist. LEXIS 166383, at *4 (E.D.N.Y. Nov. 16, 2012) ("The fact that the vast majority of class members neither objected nor opted out is a strong indication of fairness.") (internal quotations omitted).

3. Plaintiffs and Class Counsel Have Sufficient Information to Make an Informed Decision as to Settlement

In considering *Grinnell* Factor Three, the question "is whether the parties had adequate information about their claims. *In re Glob. Crossing Sec. & ERISA Litig*., 225 F.R.D. 436, 458 (S.D.N.Y. 2004). Formal discovery is not required and this Factor is "intended to assure the Court 'that counsel for plaintiffs have weighed their position based on a full consideration of the possibilities facing them.'" *Id.* (*quoting Klein ex rel. Ira v. PDG Remediation, Inc*., No. 95 CIV. 4954(DAB), 1999 WL 38179, at *3 (S.D.N.Y. Jan. 28, 1999)). As noted, *supra,* Plaintiffs through Class Counsel have: (1) researched and drafted a detailed complaint; (2) consulted with experts regarding the claims and potential damages in this Action; (3) propounded discovery requests (4) reviewed advertising, packaging and labeling materials; (5) conducted an interview with the Director of Sony Customer Services for the Americas; (6) sent a demand letter pursuant to the CLRA, providing notice of the potential claims; (7) engaged Patrick A. Juneau to serve as a mediator in the Action; and (68) reviewed over 11,000 nonpublic documents produced by the Defendants. The documents reviewed by Class Counsel include: (1) warranty documents, including complaints; (2) users guides and white papers for the Mobile Devices; (2) product specifications; (4) package inserts; (5) IP certifications and test results establishing the water-resistant capabilities of the Mobile Devices; (6) water resistance test instructions; (7) advertising and marketing pictures; (8) website advertising; (9) package artwork; (10) Profit and Loss Statements; and (11) Sales Charts. Kulesa Dec. ¶3. Thus, Plaintiffs have more than sufficient information to make an informed decision about this Action. *See In re China Sunergy Sec. Litig*,

2011 U.S. Dist. LEXIS 53007, at *4 (S.D.N.Y. May 13, 2011) (finding that Plaintiffs satisfied this Factor, although no formal discovery had taken place").

4. Plaintiffs Faced Significant Risk in Establishing Liability and Damages

Grinnell Factor Four is the "risks that plaintiffs would face in establishing liability if they had to try the Action on the merits." *Grinnell*, 495 F.2d at 463. The Court, in analyzing this factor, does not "adjudicate the disputed issues or decide unsettled questions; rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Glob. Crossing Sec. & ERISA Litig*., 225 F.R.D. at 459. Courts routinely approve settlements where plaintiffs would have faced significant legal and factual obstacles to establishing liability. *Thompson v. Metro. Life Ins. Co*., 216 F.R.D. 55, 63 (S.D.N.Y. 2003). In assessing the Settlement, the Court should balance the benefits afforded the Settlement Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463.

Prior to agreeing on the Settlement terms, the Court had not yet certified this case as a class action. If the Court certified a Class, the Defendants would likely have challenged the certification ruling pursuant to a Rule 23(f) petition, and subsequently could have moved to decertify, forcing another round of briefing. There is "no assurance of obtaining class certification through trial, because a court can re-evaluate the appropriateness of certification at anytime [sic] during the proceedings." *Bellifemine v. Sanofi-Aventis US, LLC,* 2010 WL 3119374, at *4 (S.D.N.Y. 2010); *In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 476 (S.D.N.Y. 1998) ("[I]f insurmountable management problems were to develop at any point, class certification can be revisited at any time.").

If Plaintiffs were able to successfully move for class certification, and subsequently avoid appellate review pursuant to a Rule 23(f) petition, and defeat the Defendants' attempts to decertify

the class, they would still bear the risk of proving the merits of the case. Class Counsel believes that ultimately the claims in this Action could have been proven, but not without clearing substantial hurdles in litigation. Although Class Counsel believes that evidence in the form of documents and deposition testimony would have allowed this Action to proceed to trial, the Parties in this Action would incur significant costs and expenses in litigating through the pre-trial stages. Moreover, if the Defendants chose to litigate this Action further, they would have had a litany of defenses to use in support of their theory of the case. [do we need more analysis? Or maybe we should refer to Defendants' brief for arguments we would have faced, which I see they included]

Grinnell Factor Five is "the risks of establishing damages." *Grinnell*, 495 F.2d at 463. Plaintiffs would have also faced great difficulty and substantial risk that they would have been unable to adequately prove damages. It is possible that in the unavoidable "battle of the experts" that a jury might disagree with the Class's expert, find the Defendants' expert more persuasive, or agree with the Class's expert but award a reduced amount of damages to the Class. *See Klein*, 1999 WL 38179, at *3 (although plaintiffs believe their claims have merit they acknowledge that "a trial would largely be a 'battle of the experts' concerning the extent of damages suffered by the class").

Accordingly, the proposed Settlement offers the Settlement Class a benefit that may no longer be available after a long and protracted litigation. The risk that Plaintiffs could recover far less or nothing in this Action is very real. If Plaintiffs were to proceed, the Defendants "could be expected to litigate the cases vigorously, forcing plaintiffs to overcome motions to dismiss and/or for summary judgment and to demonstrate that the putative classes could be certified for litigation purposes." *In re Glob. Crossing Sec. & ERISA Litig*., 225 F.R.D. at 456. The benefits of the proposed Settlement combined with the inherent risks of proceeding to trial "followed by years of

inevitable appeals….strongly favors the Settlement." *In re AOL Time Warner, Inc.*, 2006 WL 903236, at *9 (S.D.N.Y. Apr. 6, 2006).

5. There are Inherent Risks Associated with Maintaining Class Action Status Through Trial

Grinnell Factor Six requires the court to evaluate "the risks of maintaining the class action through the trial." *Grinnell*, 495 F.2d at 463. Class Counsel is confident that Plaintiffs are adequate class representatives more than capable of achieving and maintaining class status throughout trial. Nevertheless, as discussed above, the Defendants would likely have opposed class certification by arguing that individual questions preclude class certification and that a class is neither manageable or a superior way to handle Plaintiffs' claims. Even if the Plaintiffs had received class certification, the Defendants likely would have attempted to decertify the class at every step of the litigation including before trial, during trial, or on appeal. *See Bellifemine* 2010 WL 3119374, at *4; *In re NASDAQ Mkt–Makers Antitrust Litig.,* 187 F.R.D. at 476–77. The risk that Plaintiffs face in certifying and maintaining certification of the Action weighs in favor of approval of the Settlement.

6. The Ability of Defendants to Withstand Greater Judgment

Grinnell Factor Seven involves an inquiry into "the ability of the defendants to withstand a greater judgment." *Grinnell*, 495 F.2d at 463. Even if the Defendants were capable of withstanding a greater judgement, however, this factor alone would be insufficient to render the settlement unreasonable, especially here where the other *Grinnell* factors weigh heavily in favor of approval. *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 620 (S.D.N.Y. 2012) (although it was not certain whether defendants would be able to stand a greater judgement, "[i]n any event, a 'defendant's ability to withstand a greater judgement, standing alone, does not suggest that the settlement is unfair.'"); *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 178 (W.D.N.Y. 2011) (assigning "relatively little weight" to *Grinnell* Factor Seven and instead

focusing on "the judgment in light of plaintiffs' claims and the other factors that the Court has discussed.").

7. The Settlement Amount is in the Range of Reasonableness in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

Grinnell Factors Eight and Nine require the court to analyze the "range of reasonableness" of the settlement fund in light of the case and in light of all the risks associated with litigation. *Grinnell*, 495 F.2d at 463. Because a settlement provides certain and immediate recovery, courts often approve settlements even where the benefits obtained as a result of the settlement are less than those originally sought. As the Second Circuit stated in *Grinnell*, "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery." 495 F.2d at 455 n.2. Here, the size of the Settlement and the creativity of the Settlement Fund support final approval of the settlement. The Settlement Agreement is reasonable in this Action when considering the potential recovery. The Defendants agreed to the following: (i) warranty extension for the Mobile Devices, including those that are long expired; (ii) claims process whereby class members who have had a water related warranty claim rejected will receive up to 50% of the MSRP for their Mobile Devices; and (iii) change to Defendants' labeling and packaging to remove the use of the term "waterproof."

[I know we are out of pages but do we need a section on notice? Defendants have a lengthy one. Perhaps we can refer to that, although it seems like it's our burden]

CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request this Court grant final approval of the class action settlement.

DATED: October 13, 2017

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on October 13, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Nancy A. Kulesa
Nancy A. Kulesa