

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

ALESSANDRO BERNI, GIUSEPPE )	
SANTOCHIRICO, MASSIMO SIMIOLI, and )	
DOMENICO SALVATI, on behalf of themselves )	Case No. 1:16-cv-04196(ENV)(SLT)
and all others similarly situated, )	
)	<b>CLASS ACTION</b>
Plaintiffs, )	<b>SETTLEMENT AGREEMENT</b>
)	
v. )	
)	
BARILLA G. e R. FRATELLI, S.p.A., and )	
BARILLA AMERICA INC. d/b/a BARILLA )	
USA, )	
)	
Defendants. )	

This Class Action Settlement Agreement (the “Settlement Agreement”) is made and entered into by and between plaintiffs Alessandro Berni, Giuseppe Santochirico, Massimo Simioli, and Domenico Salvati, (“Plaintiffs”) on behalf of themselves and the settlement class defined herein in the above-captioned action (the “Action”), and Defendant, Barilla America Inc. d/b/a Barilla USA (“Barilla”) to settle and compromise this Litigation, and settle, resolve, and discharge the Released Claims, as defined below, according to the terms and conditions herein.

**RECITALS**

WHEREAS:

A. On or about August 30, 2016, plaintiffs filed their complaint in this Court seeking to remedy defendants’ alleged deceptive practice of selling under-filled products in violation of federal “slack-fill” regulations which gave rise to a claim under the New York General Business Law and for unjust enrichment on behalf of a nationwide class;

B. On or about December 5, 2016, plaintiffs filed an Amended Class Action Complaint (Docket No.26) (the “Complaint”);

C. Defendants moved to dismiss the Complaint on or about February 28, 2017 (Docket No. 36). The motion was *sub judice* at the time the parties reached the proposed settlement set forth herein;

D. From the onset of the litigation, the parties engaged in both formal and informal settlement negotiations under the auspices of Magistrate Judge Tiscione. In connection therewith and following the initial scheduling conference on February 27, 2017, Barilla provided documents and information to plaintiffs. The parties, after exchanging mediation statements and providing confidential statements to the Court, participated in three formal settlement conferences before Magistrate Judge Tiscione, including June 21, 2017, September 14, 2017 and November 16, 2017;

E. Defendants deny any wrongdoing whatsoever, and this Settlement Agreement shall in no event be construed or deemed to be evidence of or an admission or concession, on the part of any Defendants with respect to any claim of any fault or liability or wrongdoing or damage whatsoever, or any infirmity in the defenses that Defendants have asserted or would assert;

F. The Parties to this Settlement Agreement recognize that this Action has been filed by Plaintiffs and defended by Defendants in good faith, that the Action is being voluntarily settled, and that the terms of the Settlement are fair, reasonable and adequate. This Settlement Agreement shall not be construed or deemed to be a concession by Plaintiffs or any Settlement Class Member of any infirmity in the Claims asserted in this Action or any other action, or deemed to be evidence of any such infirmity;

G. Class Counsel have conducted an investigation, research, and consulted with an expert relating to the claims alleged in this Action. Class Counsel have analyzed the evidence adduced in connection with this Action and have researched the applicable law with respect to the

claims of the Plaintiffs and the Settlement Class against the Defendants and the possible defenses thereto;

H. Based upon the record in this case, Plaintiffs and Class Counsel have concluded that the terms and conditions of this Settlement Agreement are fair, reasonable and adequate to Plaintiffs and the Class, and are in their best interests, and Plaintiffs have agreed to settle the claims raised in this Action pursuant to the terms and provisions of this Settlement Agreement, after considering (a) the substantial benefits that Class Members will receive from settlement of this Action, (b) the attendant risks of litigation, and (c) the desirability of permitting the Settlement to be consummated as provided by the terms of this Settlement Agreement;

I. Based upon the facts and law relating to the matters alleged in the pleadings, plus the risks and uncertainties of continued litigation, Plaintiffs and Defendants have agreed to settle the claims asserted in the Action pursuant to the provisions of this Settlement Agreement;

NOW THEREFORE, subject to the final approval of the Court as required herein and by applicable law and rules, the Settling Parties hereby agree, in consideration of the mutual promises and covenants contained herein, and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, that any Released Claims against any Released Persons shall be settled, compromised and forever released upon the following terms and conditions.

### **TERMS AND CONDITIONS OF THE SETTLEMENT**

#### **1. DEFINITIONS**

As used herein, the following terms have the meanings set forth below.

1.1 “CAFA Notice” means the notice of this Settlement to the appropriate federal and state officials in the United States, as provided by the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, and as further described in Paragraph 4.4.1

1.2 “Case Contribution Award” shall mean the monetary amount awarded by the Court to the Plaintiffs in recognition of Plaintiffs’ assistance in the prosecution of this Action, for which Class Counsel may seek an amount not exceeding \$1,500 per Plaintiff. Any such Case Contribution Award shall be paid, subject to the approval of the Court, as set forth in Section 7.3 below.

1.3 “Class” has the meaning set forth in Paragraph 6.1 of this Settlement Agreement.

1.4 “Class Action Administrator” means KCC Class Action Services, LLC a qualified third- party administrator and agent agreed to by the Parties and appointed by the Court in the Preliminary Approval Order to provide Notice to the Class.

1.5 “Class Counsel” means Harwood Feffer LLP and Sarraf Gentile LLP.

1.6 “Class Member” means any person who falls within the definition of Class set forth in Paragraph 6.1.

1.7 “Class Period” means July 28, 2010 through the date the Court enters its Preliminary Approval Order.

1.8 “Court” means the United States District Court for the Eastern District of New York.

1.9 “Defendant” means Barilla America Inc. d/b/a Barilla USA.

1.10 “Defense Counsel” means Defendant’s counsel of record.

1.11 “Effective Date” means the first date by which the Judgment entered pursuant to this Settlement Agreement becomes Final.

1.12 “Fairness Hearing” means the hearing that is to take place after entry of the Preliminary Approval Order and after Notice is distributed pursuant to the Notice Plan for purposes of determining (1) whether the terms and conditions of the Settlement Agreement are fair,

reasonable and adequate, and therefore the Settlement Agreement should be finally approved with entry of the Final Judgment and Order; and (2) whether judgment should be entered dismissing the Action with prejudice subject to the terms of the Settlement Agreement.

1.13 “Final” means, with respect to any judicial ruling or order, that: (1) if no appeal, motion for re-argument, motion for rehearing, petition for writ of certiorari, or other writ has been filed, the time has expired to file such an appeal, motion for re-argument, motion for rehearing, petition for writ of certiorari, or other writ; or (2) if an appeal, motion for re-argument, motion for rehearing, petition for a writ of certiorari, or other writ has been filed, the judicial ruling or order has been affirmed with no further right of review, or such appeal, motion, petition, or writ has been denied or dismissed with no further right of review. Any proceeding or order, or any appeal or petition for a writ of certiorari pertaining solely to any application for attorneys’ fees or expenses will not in any way delay or preclude the Judgment from becoming Final.

1.14 “Final Judgment and Order” means the order finally approving the terms of this Settlement Agreement and a separate judgment to be entered by the Court, pursuant to Rule 58 of the Federal Rules of Civil Procedure, dismissing the Action with prejudice.

1.15 “Notice” means a Notice substantially in the form of Exhibit B attached hereto (the “Notice”), to be disseminated in accordance with the Preliminary Approval Order, informing the Class of, among other things, the pendency of the Action, the material terms of the proposed Settlement and their options with respect thereto.

1.16 “Notice Plan” means the method of providing the Class with Notice of the Settlement, as approved by the Court.

1.17 “Parties” means the Plaintiffs and Defendant.

1.18 “Plaintiffs” means Alessandro Berni, Giuseppe Santochirico, Massimo Simioli,

and Domenico Salvati.

1.19 “Plaintiffs’ Counsel” means Class Counsel and Cea Fisher, P.C.

1.20 “Preliminary Approval Order” means an order, providing for, among other things, preliminary approval of the Settlement and dissemination of the Notice to the Class according to the Notice Plan.

1.21 “Products” means and includes:

(a) All pasta products sold or marketed by Barilla containing less than one pound (16 ounces) of pasta including but not limited to Specialty Pastas which include all Gluten Free, Whole Grain, ProteinPlus, and White Fiber products or products described as Better For You.

(b) Any new varieties of these specific product lines yet to be sold or marketed.

1.22 “Releases” mean the releases and waivers set forth in Section 5.3 of this Settlement Agreement.

1.23 “Released Claims” means all causes of action, claims, suits, debts, damages, judgments, liabilities, demands and controversies whatsoever—whether matured or unmatured, now known or unknown, liquidated or unliquidated, at law or in equity, whether before a local, state or federal court, or state or federal administrative agency, commission, arbitrator(s) or otherwise—that the class members now have or may have, and for all times up to and including the date of final approval of the settlement, for all claims that were asserted or could have been asserted in the Action relating to the amount of pasta contained in a package of pasta and the packaging of the Products.

1.24 “Released Persons” means Barilla America Inc. and all of its predecessors, successors, parents, subsidiaries, affiliates, assigns, agents, attorneys, and current and former directors, officers, and employees.

1.25 “Request for Exclusion” means a timely, written request from a Class Member who does not wish to participate in the Settlement to the Class Action Administrator, stating an intent to be “excluded from” or to “opt-out” of the Settlement.

1.26 “Settlement” means the settlement set forth in this Settlement Agreement.

1.27 “Settlement Agreement” means this agreement and its Exhibits, attached hereto and incorporated herein, including all subsequent amendments agreed to in writing by the Parties and any exhibits to such amendments.

1.28 “Settling Parties” means, collectively, Defendant, Plaintiffs, and all Class Members and Released Persons.

1.30 The plural of any defined term includes the singular, and the singular of any defined term includes the plural, as the case may be.

## **2. SETTLEMENT CONSIDERATION**

### **2.1 Injunctive Relief for Rule 23(b)(2) Class, With Opt-Out Provision.**

For purposes of compromise and this settlement only, Defendant acknowledges that the decision to modify the packaging labels is the result of this Action.

Defendant will provide the Class with injunctive relief by way of a label modification for the Products as set forth in this Settlement Agreement. Defendants will implement the following modifications as soon as practicable but no later than eighteen (18) months from the date that the Final Judgment Order becomes Final as set forth in paragraph 1.13 herein.4.2.2

2.1.1 Defendant will modify the package labels on its Specialty Pastas substantially consistent with the forms annexed hereto as Exhibit D, maintaining a minimum fill line and a disclaimer.

2.1.2 Nothing in this Settlement Agreement shall prevent Defendant from implementing

the Injunctive Relief prior to the Effective Date.

2.1.3 If Defendant fail to comply with its Injunctive Relief commitments under this section, then Class Counsel shall have the option to apply to the Court to enter an order against Barilla directing specific performance of its Injunctive Relief commitments and any damages or equitable relief as may be available for breach of its Injunctive Relief commitments under the Settlement, unless such failure to comply is cured within thirty (30) business days after Class Counsel informs Defense Counsel in writing of the failure comply. Plaintiffs acknowledge that there may be existing product in the retail stores over which this Settlement has no control and it shall not be a violation of this Settlement Agreement, any injunctive relief contemplated under this Settlement Agreement, or the Final Judgment Order for such products to remain in retail stores until such products are consumed.

2.2 Barilla shall make available funds not to exceed \$450,000.00 to pay for the Notice Program and any fees and expenses awarded to Class Counsel by the Court. This amount shall be the full and sole monetary obligation of Barilla in connection with the Settlement and under this Settlement Agreement. Except as provided in this Settlement Agreement, Plaintiffs, and Class Counsel shall bear their own costs and expenses in connection with the Settlement, the negotiation and documentation of this Settlement Agreement, and securing all necessary court orders and approvals with respect to the same.

**SUBMISSION OF THE SETTLEMENT TO THE COURT FOR REVIEW AND APPROVAL**

3.1 As soon as practicable, Class Counsel shall apply to the Court for entry of the Preliminary Approval Order, substantially in the form attached as Exhibit A. The Preliminary Approval Order shall, among other things:

(a) Approve the Notice, substantially in the form set forth at Exhibit B and the Notice Plan set forth in Exhibit C;

(b) Find that the requirements for provisional certification of the Class have been satisfied, appointing Plaintiffs as the representatives of the provisional Class and Class Counsel as counsel for the provisional Class, and preliminarily approving the Settlement as being within the range of reasonableness such that Notice should be provided pursuant to this Settlement Agreement;

(c) Schedule the Fairness Hearing on a date ordered by the Court, provided in the Preliminary Approval Order, and in compliance with applicable law, to determine whether the Settlement should be approved as fair, reasonable, and adequate, and to determine whether a Final Judgment and Order should be entered dismissing the Litigation with prejudice;

(d) Determine that the Notice and Notice Plan comply with all legal requirements, including the applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clauses), and any other applicable law;

(e) Direct that Notice shall be given to the Class;

(f) Provide that any objections by any Class Member to the certification of the Class and the proposed Settlement contained in this Settlement Agreement and/or the entry of the Final Judgment and Order, shall be heard and any papers submitted in support of said objections shall be considered by the Court at the Fairness Hearing only if, on or before the date(s) specified in the Notice and Preliminary Approval Order, such objector files with the Court a written objection and notice of the objector's intent to appear, and otherwise complies with the requirements in the Preliminary Approval Order;

(h) Establish dates by which the Parties shall file and serve all papers in support

of the application for final approval of the Settlement and/or in response to any valid and timely objections;

(i) Provide that all Class Members will be bound by the Final Judgment and Order dismissing the Litigation with prejudice unless such Class Members timely file a valid written Request for Exclusion in accordance with the Settlement Agreement and Notice;

(j) Provide that Class Members wishing to exclude themselves from the Settlement will have until the date specified in the Notice and the Preliminary Approval Order to submit a valid written Request for Exclusion to the Class Action Administrator; and

(k) Pending the Fairness Hearing, stay all proceedings in the Action, other than the proceedings necessary to carry out or enforce the terms and conditions of this Settlement Agreement and the Preliminary Approval Order.

3.2 Following the entry of the Preliminary Approval Order, Notice shall be published in a manner directed and approved by the Court.

3.3 At the Fairness Hearing, the Parties shall seek to obtain from the Court the Final Judgment and Order in the form substantially similar to Exhibit E. The Final Judgment and Order shall, among other things:

(a) Finally approve this Settlement Agreement and the Settlement pursuant to Rule 23 of the Federal Rules of Civil Procedure;

(b) Certify the Class for purposes of settlement only;

(c) Find that the Notice and Notice Plan complied with all laws, including, but not limited to, the Due Process Clause of the United States Constitution;

(d) Incorporate the Releases set forth in this Settlement Agreement and make the Releases effective as of the date of the Effective Date;

(e) Issue the injunctive relief described in Section 2.1 of this Settlement Agreement;

(f) Authorize the Parties to implement the terms of the Settlement; and

(g) Retain exclusive jurisdiction over the Parties and anyone giving or receiving a release under the Settlement for all matters relating to the Settlement, including the administration, interpretation, effectuation or enforcement of the Settlement. The Parties and class members and their counsel submit to the jurisdiction of the Court for purposes of implementing and enforcing the Settlement.

#### **ADMINISTRATION AND NOTICE**

4.1 The Parties have worked together to create a cost-effective notice plan that complies with Rule 23 and due process and apprises class members of their rights to object to and/or opt out of the settlement. The proposed notice plan is attached hereto as Exhibit C.

#### **4.2 Appointment and Retention of Class Action Administrator**

4.2.1 The Class Action Administrator will facilitate the notice process by assisting the Parties in the implementation of the Notice Plan.

4.2.2 The Class Action Administrator shall be responsible for providing the Parties with assistance, as necessary, such as by preparing affidavits of work it has performed with respect to implementing the Notice Plan, and providing regular updates to the Parties' counsel.

4.2.3 The Class Action Administrator's fees, costs and expenses shall be paid from the \$450,000 detailed in Section 2.2. In the event the settlement is terminated or does not become final for any reason, Barilla shall be solely responsible for the Class Action Administrator's fees, costs and expenses.

#### **Class Settlement Website**

4.3.1 The Class Action Administrator will create and maintain a class settlement website (the “Class Settlement Website”), to be activated within seven (7) calendar days of entry of the Preliminary Approval Order. The Class Settlement Website will contain Settlement information and case-related documents such as this Settlement Agreement, the Preliminary Approval Order, the Notice, Class Counsel’s papers in support of final approval of the Settlement and their application for attorneys’ fees and expenses, and for case contribution awards to the Plaintiffs. In addition, the Class Settlement Website will include procedural information regarding the status of the Court-approval process, such as an announcement of the Fairness Hearing date, when the Final Judgment and Order has been entered, and when the Effective Date has been reached, including any appeal(s). Barilla shall have approval rights as to any content posted on the website.

4.3.2 The Class Settlement Website will terminate (be removed from the internet) and no longer be maintained by the Class Action Administrator on the later of: (a) 60 days after the Settlement becomes Final, or (b) the date on which the Settlement Agreement is terminated or otherwise not approved by a court.

#### **CAFA Notice**

4.4.1 Defendants, at their expense, shall serve notice of the Settlement Agreement that meets the requirements of CAFA, 28 U.S.C. § 1715, on the appropriate federal and state officials no later than ten (10) days following the filing of this Settlement Agreement with the Court.

4.4.2 Defendants will file a certification with the Court stating the date or dates on which the CAFA Notice was sent.

### **Notice Plan**

4.5.1 The Notice Plan, attached hereto as Exhibit C, shall conform to all applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clauses), and any other applicable law, and shall otherwise be in the manner and form agreed upon by the Parties and approved by the Court.

4.5.2 The Class Action Administrator shall commence providing Notice to the Class according to the Notice Plan as attached in Exhibit C, as ordered by the Court in its Preliminary Approval Order. No later than seven (7) calendar days before the Fairness Hearing, the Class Action Administrator shall file with the Court affidavits or declarations concerning implementation of the Notice Plan.

4.5.3 The Parties agree to the content of the Notice, substantially in the form attached to this Settlement Agreement as Exhibit B, and as approved by the Court.

4.5.4 The Class Action Administrator shall be responsible for receiving all Requests for Exclusion and shall promptly provide copies to Class Counsel. The Class Action Administrator shall also receive and maintain all other correspondence from any Class Member regarding the Settlement and promptly provide such correspondence to Class Counsel. No later than seven (7) calendar days before the Fairness Hearing, the Class Action Administrator shall provide to the Parties and file with the Court a list of those persons who have submitted a Request for Exclusion.

### **RELEASES AND DISMISSAL OF ACTION**

5.1 The Preliminary Approval Order shall include a dismissal without prejudice of Barilla G. e R. Fratelli, S.p.A. based on a lack of personal jurisdiction. The Final Judgment and Order shall confirm that the dismissal included in this paragraph is with prejudice.

5.2 Upon the Effective Date, the Plaintiffs and each of the Class Members will be deemed to have, and by operation of the Final Judgment and Order will have, fully, finally, and forever released, relinquished, and discharged the Released Persons from all Released Claims.

5.3 Upon the Effective Date, Defendant (on behalf of itself and the Released Persons) will be deemed to have, and by operation of the Final Judgment and Order will have, fully, finally, and forever released, relinquished, and discharged the Plaintiffs, the Class and Class Counsel and other counsel representing plaintiffs in the Action for all claims that were or could have been asserted relating to the institution, prosecution, or settlement of the Action.

5.4 After entering into this Settlement Agreement, the Settling Parties may discover facts other than, different from, or in addition to, those that they know or believe to be true with respect to the claims released by this Settlement, but they intend to release fully, finally and forever the claims released by this Settlement, and in furtherance of such intention, the releases will remain in effect notwithstanding the discovery or existence of any such additional or different facts. Plaintiffs (on behalf of themselves and the Class Members), through their counsel, and Defendants (on behalf of itself and the Released Persons) expressly, knowingly, and voluntarily waive the provisions of Section 1542 of the California Civil Code (and any similar State laws). California Civil Code § 1542 provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

5.5 The Parties acknowledge, and the Settling Parties by operation of law shall be deemed to have acknowledged, that the waiver of the provisions of Section 1542 of the California

Civil Code (and any similar State laws) with respect to the claims released by this Settlement was separately bargained for and was a key element of the Settlement.

5.6 The Court shall enter an order retaining exclusive jurisdiction over the Parties and anyone giving or receiving a release under the Settlement for all matters relating to the Settlement, including the administration, interpretation, effectuation or enforcement of the Settlement. The Settling Parties and their counsel submit to the jurisdiction of the Court for purposes of implementing and enforcing the Settlement. If any applications for relief are made, those applications shall be made to the Court.

5.7 Upon the Effective Date: (a) this Settlement shall be the exclusive remedy for any and all Released Claims of Plaintiffs and Class Members; and (b) Plaintiffs and Class Members stipulate to be and shall be permanently barred and enjoined by Court order from initiating, asserting, or prosecuting against the Released Persons in any federal or state court or tribunal any and all Released Claims.

#### **CLASS CERTIFICATION**

6.1 For purposes of settlement only, the Parties agree to seek provisional certification of the Class, pursuant to Federal Rule of Civil Procedure 23(b)(2). The Parties further agree that the Court should make preliminary findings and enter the Preliminary Approval Order (substantially in the form attached at Exhibit A granting provisional certification of the Class subject to the final findings and ratification in the Final Judgment and Order, and appointing the Plaintiffs as the representatives of the Class and Class Counsel as the counsel for the Class. For purposes of the provisional certification, the Class shall be defined as follows:

All consumers in the United States and all U.S. territories (including, but not limited to, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the other territories and possessions of

the United States), who purchased one or more of the Products from July 28, 2010 until the date of the preliminary approval of the settlement of this litigation. Excluded from the Class are persons who timely and properly exclude themselves from the Class as provided in the Settlement Agreement.

6.1.1 Defendants' agreement to provisional certification does not constitute an admission of wrongdoing, fault, liability, or damage of any kind to Plaintiffs or any of the provisional Class Members.

6.1.2 If this Settlement Agreement is terminated pursuant to its terms, disapproved by any court (including any appellate court), and/or not consummated for any reason, or the Effective Date for any reason does not occur, the order certifying the Class for purposes of effectuating the Settlement, and all preliminary and/or final findings regarding that class certification order, shall be automatically vacated upon notice of the same to the Court, the Action shall proceed as though the Class had never been certified pursuant to this Settlement Agreement and such findings had never been made, and the Action shall return to the procedural status on November 15, 2017, the day before the date the Parties agreed to the terms of the settlement. Neither party nor counsel shall refer to or invoke the vacated findings and/or order relating to class settlement or Rule 23 of the Federal Rules of Civil Procedure if this Settlement Agreement is not consummated and the case is later litigated and contested by Defendant under Rule 23 of the Federal Rules of Civil Procedure.

## **PROCEDURES FOR OBJECTING TO OR REQUESTING EXCLUSION FROM**

### **6.2 Requests for Exclusion from the Class: Opt-Outs**

6.2.1 Any Class Member who does not wish to participate in the Settlement must submit a Request for Exclusion to the Class Action Administrator, stating an intent to be "excluded" from this Settlement. The written Request for Exclusion must be sent via first class

United States mail to the Class Action Administrator at the address set forth in the Notice and postmarked no later twenty-eight (28) calendar days before the date set for the Fairness Hearing. The Request for Exclusion must be personally signed by the Class Member and may only be on behalf of such signing Class Member. So-called “mass” or “class” opt-outs shall not be allowed. Members who “opt-out” will not release their claims pursuant to the Settlement Agreement. Members of the Class who fail to submit a valid and timely Request for Exclusion on or before the date specified in the Notice shall be bound by all terms of the Settlement Agreement and Final Judgment and Order. Every Request for Exclusion must contain his or her (a) full name, (b) current address, (c) a clear statement communicating that he or she elects to be excluded from the Class, does not wish to be a Class Member, and elects to be excluded from any judgment entered pursuant to the Settlement, (d) his or her signature, and (e) the case name and case number (*Berni v. Barilla S.p. A*, 16-cv-04196 (E.D.N.Y.)).

6.2.2 Any Class Member who requests exclusion from the Settlement does not have the right to object to the Settlement or any part thereof. If a Class Member submits both an objection and a written Request for Exclusion, he or she shall be deemed to have complied with the terms of this opt-out procedure, *i.e.*, the request for exclusion shall take precedence. His objection will be considered void and he shall not be bound by the Settlement Agreement if approved by the Court.

#### **Procedures for Objecting to the Settlement**

6.3.1 Class Members shall have the right to appear and show cause, if they have any reason why the terms of this Settlement Agreement should not be given final approval, subject to each of the sub-provisions contained in this Paragraph. Any objection to the Settlement, including any of its terms or provisions, must be:

- (a) in writing,
- (b) signed by the Class Member *and* any attorney representing the Class Member,
- (c) filed with the Court,
- (d) with copies served on Class Counsel and Defense Counsel, at the addresses set forth in the Notice, and
- (e) postmarked no later than twenty-eight (28) calendar days before the Fairness Hearing.

6.3.2 Class Members may object either on their own or through an attorney hired at their own expense.

6.3.3 If a Class Member hires an attorney to represent him or her at the Fairness Hearing, he or she must do so solely at his or her own expense. No Class Member represented by an attorney shall be deemed to have objected to the Settlement Agreement unless an objection *signed by* the Class Member is also filed with the Court and served upon Class Counsel and Defense Counsel, at the addresses set forth in the Notice no later than twenty-eight (28) calendar days before the Fairness Hearing.

6.3.4 Any objection regarding or related to the Settlement Agreement shall contain:

- (a) the objector's full name, address and telephone number;
- (b) the name, address, and telephone number of any attorney for the objector with respect to the objection;
- (c) the factual and legal grounds for the objection(s);
- (d) evidence of his or her membership in the Class, *i.e.*, a receipt for Product

purchase(s) or other verification under oath as to the approximate date(s) and location(s) of his or her purchase(s) of the Products;

(e) the objector's signature;

(f) the signature of the objector's counsel, if any;

(g) the case name and case number (*Berni v. Barilla S.p.A.*, 16-cv-04196 (E.D.N.Y.)); and

(h) a specific list of any other objections submitted by the objector, as well as by the objector's attorney, to any class action settlements submitted to any court in the United States in the previous five years. Any objection shall also contain information sufficient to identify and contact the objecting Class Member (or his or her attorney, if any).

6.3.5 Any objections not containing the required information and/or not submitted to the Court at least twenty-eight (28) calendar days before the Fairness Hearing will be deemed waived and will not be considered by the Court. If an objecting party chooses to appear at the hearing, that party must, in addition to filing his or her objection, file with the Court, at least twenty-eight (28) calendar days before the Fairness Hearing, a notice of intent to appear and that notice must list the name, address and telephone number of the attorney, if any, who will appear on behalf of that party.

6.4 Class Counsel and Defendants shall have the right, but not the obligation, to respond to any objection, by filing opposition papers no later than seven (7) calendar days before the Fairness Hearing, or on such other date as set forth in the Preliminary Approval Order, or any subsequent Court order(s) modifying the briefing schedule for the Fairness Hearing. The Party responding shall file a copy of the response with the Court and shall serve a copy to the objector (or counsel for the objector) to the extent the objector or their counsel do not receive notice of

electronic filing via the Court's ECF filing system.

**ATTORNEYS' FEES AND EXPENSES AND CASE CONTRIBUTION AWARDS**

7.1 In accord with Rule 23(h) of the Federal Rules of Civil Procedure and relevant case law, Class Counsel shall make an application to the Court for an award of attorneys' fees, case contribution awards, and reimbursement of expenses (including notice costs) in an amount not to exceed \$450,000. Defendants shall not oppose or object to the application by Class Counsel for attorneys' fees in such amount so long as the total of all settlement costs and expenses, and attorneys' fees sought by Class Counsel does not exceed \$450,000, as this amount has been agreed to by the Parties after extensive negotiation. The Parties recognize that the Court shall have the final authority to award the amount of fees and expenses. The Parties represent that the agreed upon fees and expenses were mediated after agreement on substantive terms of the Settlement.

7.2 Upon the Final Order and Judgment becoming Final, any attorneys' fees and costs awarded to Class Counsel by the Court shall be paid by Barilla within 20 calendar days

7.3 Defendant will not oppose an application for awards to Plaintiffs of up to \$1,500 each with such amounts not being included within the \$450,000 cap. The Parties acknowledge the Court shall have the final authority to determine the amount of the awards up to these amounts in recognition of their service as plaintiffs in this action and the time expended by each of them.

7.4 Defendant is not obligated to (and will not be obligated to) compute, estimate, or pay any taxes on behalf of any Plaintiff, Class Counsel and other counsel representing plaintiffs, and/or the Class Action Administrator.

7.5 Defendant shall bear its own attorneys' fees and costs.

7.6 Class Counsel shall allocate the attorneys' fees amongst Plaintiffs' Counsel in a manner in which they in good faith believe reflects the contributions of such counsel to the

prosecution and settlement of the Litigation with Defendant. Defendant shall have no liability or obligation with respect to any attorneys' fees, costs or expenses other than Defendant's obligation to pay or cause to be paid the amounts set forth above in paragraph 7.1. Defendant shall have no liability or other responsibility for allocation of any such attorneys' fees or costs and expenses awarded.

**MOTION FOR FINAL JUDGMENT AND ORDER**

8.1 In accord with the Court's schedule for the Fairness Hearing, as set in the Preliminary Approval Order, Plaintiffs shall file a motion for final approval of the Settlement Agreement.

8.2 The Parties agree to the form and substance of the proposed Final Judgment and Order, attached hereto as Exhibit E to be lodged with the Court with the motion for final approval of the Settlement Agreement.

**CONDITIONS FOR EFFECTIVE DATE; EFFECT OF TERMINATION**

9.1 The Effective Date of this Settlement Agreement shall be the date the Judgment has become Final, as defined in Paragraph 1.13.

9.2 If this Settlement Agreement is not approved by the Court or the Settlement Agreement is terminated or fails to become effective in accordance with the terms of this Settlement Agreement, the Settling Parties will be restored to their respective positions in the Action on November 15, 2017. In such event, except with respect to the Class Action Administrator's fees, costs and expenses as provided in Section 4.2.3 herein, the terms and provisions of this Settlement Agreement will have no further force and effect with respect to the Settling Parties and will not be used in this Action or in any other proceeding for any purpose, and any Judgment or order entered by the Court in accordance with the terms of this Settlement Agreement will be treated as vacated. Similarly, any order certifying the Class for purposes of effectuating this Settlement Agreement, and all preliminary and/or final findings regarding that class certification order, shall be automatically vacated upon notice of the same to the Court, this Action shall proceed as though the Class had never been certified pursuant to this Settlement Agreement and such findings had never been made, and this Litigation shall return to the procedural status quo in accordance with this paragraph. Class Counsel and Defendants' Counsel shall not refer to or invoke the vacated findings and/or order relating to class settlement in the event this Settlement Agreement is not consummated and the Litigation is later litigated and contested by Defendants under Rule 23 of the Federal Rules of Civil Procedure.

9.3 Notwithstanding the foregoing, the Parties may mutually agree to waive any of the conditions of the Settlement Agreement, except Court approval, or revise the Settlement Agreement as appropriate.

### **MISCELLANEOUS PROVISIONS**

10.1 The Parties acknowledge that it is their intent to consummate this Settlement Agreement, and they agree to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Settlement Agreement and to exercise their best efforts to accomplish the foregoing terms and conditions of this Settlement Agreement.

10.2 The Parties intend the Settlement to be a final and complete resolution of all disputes between them with respect to the Action. The Settlement compromises claims that are contested and will not be deemed an admission by any Settling Party as to the merits of any claim or defense.

10.3 The Parties agree that the consideration provided to the Class and the other terms of the Settlement were negotiated at arm's-length, in good faith by the Parties, and reflect a settlement that was reached voluntarily, after consultation with competent legal counsel. The Action was filed in good faith, was not frivolous, and was in compliance with Rule 11 of the Federal Rules of Civil Procedure. This Settlement Agreement is entered into solely to eliminate the uncertainties, burdens and expenses of protracted litigation.

10.4 Neither this Settlement Agreement nor the Settlement, nor any act performed or document executed pursuant to or in furtherance of this Settlement Agreement or the Settlement is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any Released Claims, or of any wrongdoing or liability of Defendant or any other Released Person; or is or may be deemed to be or may be used as an admission of, or evidence of, any presumption, concession, or admission by a Party of the truth of any fact alleged by Plaintiffs or defense asserted by Defendant, or any fault or omission of Defendant or any other Released Person in any civil, criminal, or administrative proceeding in any court, administrative agency or other tribunal; or is

or may be deemed to be or may be offered or received by or against any Person as evidence of a presumption, concession, or admission with respect to a decision by any court regarding the certification of a class, or construed as an admission or concession by Plaintiffs, the Class or Defendant that the consideration to be given in this Settlement Agreement represents the relief that could or would have been obtained through trial in the Litigation.

10.5 Any party to this Litigation or any other Released Person may file this Settlement Agreement and/or the Judgment in any action that may be brought against it in order to support any defense or counterclaim, including without limitation those based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

10.6 All agreements made and orders entered during the course of the Action relating to the confidentiality of information will survive this Settlement Agreement.

10.7 Any and all Exhibits to this Settlement Agreement, which are identified in the Settlement Agreement and attached hereto, are material and integral parts hereof and are fully incorporated herein by this reference.

10.8 This Settlement Agreement may be amended or modified only by a written instrument signed by or on behalf of all Parties or their respective successors-in-interest.

10.9 This Settlement Agreement and any exhibits attached hereto constitute the entire agreement among the Parties, and no representations, warranties, or inducements have been made to any Party concerning this Settlement Agreement or its exhibits other than the representations, warranties, and covenants covered and memorialized in such documents. Except as otherwise provided herein, the Parties will bear their own respective costs.

10.10 Class Counsel, on behalf of the Class, is expressly authorized by the Plaintiffs to

take all appropriate action required or permitted to be taken by the Class pursuant to this Settlement Agreement to effectuate its terms, and is expressly authorized to enter into any modifications or amendments to this Settlement Agreement on behalf of the Class that Class Counsel deems appropriate.

10.11 Each counsel or other person executing this Settlement Agreement or any of its Exhibits on behalf of any Party hereby warrants that such person has the full authority to do so. Class Counsel warrants that they have full authority from Plaintiffs to do so for the individual releases on behalf of Plaintiffs.

10.12 This Settlement Agreement may be executed in one or more counterparts. All executed counterparts and each of them will be deemed to be one and the same instrument. A complete set of original counterparts will be filed with the Court.

10.13 This Settlement Agreement will be binding upon, and inure to the benefit of, the successors and assigns of the Settling Parties.

10.14 None of the Settling Parties, or their respective counsel, will be deemed the drafter of this Settlement Agreement or its exhibits for purposes of construing the provisions thereof. The language in all parts of this Settlement Agreement and its exhibits will be interpreted according to its fair meaning, and will not be interpreted for or against any of the Settling Parties as the drafter thereof.

IN WITNESS WHEREOF, the Parties have executed and caused this Agreement to be executed, dated as of April 25, 2018.

By: *Alessandro Berni*  
ALESSANDRO BERNI  
*Plaintiff*

By: \_\_\_\_\_  
BARILLA AMERICA, INC.  
*Defendant*

By: *Giuseppe Santochirico*  
GIUSEPPE SANTOCHIRICO  
*Plaintiff*

By: *Massimo Simioli*  
MASSIMO SIMIOLI  
*Plaintiff*

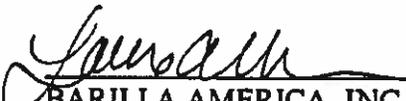
By: *Domenico Salvati*  
DOMENICO SALVATI  
*Plaintiff*

**IN WITNESS WHEREOF**, the Parties have executed and caused this Agreement to be executed, dated as of April \_\_, 2018.

By: \_\_\_\_\_  
ALESSANDRO BERNI  
*Plaintiff*

By:   
BARILLA AMERICA, INC.  
*Defendant*

By: \_\_\_\_\_  
GIUSEPPE SANTOCHIRICO  
*Plaintiff*

By:   
BARILLA AMERICA, INC.  
*Defendant*

By: \_\_\_\_\_  
MASSIMO SIMIOLI  
*Plaintiff*

By: \_\_\_\_\_  
DOMENICO SALVATI  
*Plaintiff*