

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

CHARLES COPLEY, JASON EVANS,  
HUMBERTO GARCIA, LUZ ANGELINA  
GARCIA, JOAN MCDONALD, JOHN  
PETERSON, BETTY PRESSLEY, NATALIE  
ROBERTS, NORMAN SKARE, individually and as  
personal representative for BETTY SKARE,  
DAVID STONE, and KAYE WINK, individually  
and as next of kin of DONALD WINK, individually  
and on behalf of all others similarly situated,

Plaintiffs,

v.

BACTOLAC PHARMACEUTICAL, INC.;  
NATURMED, INC. d/b/a INSTITUTE FOR  
VIBRANT LIVING; and INDEPENDENT VITAL  
LIFE, LLC,

Defendants.

No.: 2:18-cv-00575-FB-PK

*Consolidated with*

No. 2:20-cv-01338-FB-PK

JEFFREY FARIS, ANTONIA HAMPTON, RAUL  
ROBLES, and KATHLEEN CANNON, Individually  
and on behalf of all others similarly situated,

Plaintiffs,

v.

BACTOLAC PHARMACEUTICAL, INC.;  
NATURMED, INC. d/b/a INSTITUTE FOR  
VIBRANT LIVING; and INDEPENDENT VITAL  
LIFE, LLC,

Defendants.

**DECLARATION OF JAMES J. BILSBORROW IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT,  
PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF  
NOTICE PLAN**

I, James J. Bilsborrow, declare and state as follows:

1. I am an attorney duly licensed to practice law in New York State and am a partner at the law firm Weitz & Luxenberg, P.C.. I am fully familiar with the facts and circumstances surrounding this action. I make this declaration in support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan.

## **I. THE LITIGATION**

2. The putative class action styled *Copley v. Bactolac Pharmaceutical, Inc. et al.*, No. 18-cv-00575-FB-PK, was filed on January 26, 2018, on behalf of a proposed nationwide class of consumers who purchased All Day Energy Greens (ADEG) on or after July 1, 2014 that were manufactured and/or blended by Defendant Bactolac Pharmaceutical, Inc. ("Bactolac") between January 1, 2014 and December 31, 2015. (*See* Dkt. 1.) The action was also brought on behalf of putative statewide purchaser classes from Virginia, Texas, South Carolina, Alabama, Missouri, Wisconsin, Illinois, and Kentucky. (*Id.*) Plaintiffs alleged that Bactolac manufactured and/or blended certain lots of ADEG using ingredients not identified on the product label and omitted certain ingredients required by the label. (*Id.*) Defendant NaturMed, Inc. ("NaturMed"), in turn, marketed and sold the ADEG products manufactured by Bactolac. (*Id.*) After NaturMed initiated a recall of certain lots of ADEG in 2016, it ultimately became insolvent, after which its assets—including the formula and intellectual property pertaining to ADEG—were obtained by Defendant Independent Vital Life, LLC ("IVL2"), an alleged mere continuation of NaturMed. (*Id.*)

3. Plaintiffs filed an amended complaint on July 13, 2018, alleging similar theories of harm. (Dkt. 57.) The amended complaint added Plaintiffs Jason Evans and Joan McDonald, pled violations of consumer protection statutes under California and Oregon law, and sought certification of putative statewide California and Oregon classes. (*Id.*)

4. On July 27, 2018, NaturMed answered the amended complaint and filed crossclaims against Bactolac, alleging contractual indemnity, breach of contract, fraud, breach of express warranty, breach of implied warranty, and negligence causes of action. (Dkt. 60.) IVL2 filed an answer to the amended complaint on August 10, 2018. (Dkt. 63.)

5. On August 13, 2018, the Parties appeared before Magistrate Judge Kuo for a case management conference. At that time, Judge Kuo ordered discovery to commence pursuant to a joint proposed scheduling order. (Dkt. 66.) On Plaintiffs' request, Judge Kuo also ordered the Parties to exchange discovery produced in a related personal injury action captioned *Mooneyham v. NaturMed, Inc.*, No. 3:17-cv-162-CSC (E.D. Ala.). (*Id.*) Following this conference, NaturMed and Bactolac served voluminous materials produced in the *Mooneyham* matter, in which the plaintiff alleged injuries caused by consumption of adulterated and/or misbranded ADEG.

6. On November 30, 2018, Bactolac filed a motion to dismiss some, but not all, of Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. 92.) Bactolac moved to dismiss all of Plaintiffs' claims except (i) violation of the Arizona Consumer Fraud Act; (ii) fraudulent concealment; and (iii) negligent misrepresentation. (*Id.*) Bactolac concurrently moved pursuant to Federal Rule of Civil Procedure 12(c) to dismiss NaturMed's crossclaims. (*Id.*) These motions were fully briefed by February 28, 2019. (*See* Dkt. 191.)

7. While the Parties were briefing Bactolac's motions to dismiss, they simultaneously commenced fact discovery. Over the course of the following eighteen months, the Parties exchanged several sets of written discovery, voluminous document productions, interrogatories, and requests for admission. Defendants deposed each of the class representative Plaintiffs, while Plaintiffs deposed ten current or former employees of Bactolac, one Bactolac corporate designee, five former NaturMed employees, and the current owner of IVL2. These depositions largely

occurred in-person and across the country, from California to Long Island. After the onset of the COVID-19 pandemic, however, the Parties agreed to conduct a handful of witness depositions via Zoom. Throughout the discovery process, the Parties provided regular status reports to Magistrate Judge Kuo.

8. In the course of discovery, Plaintiff Betty Pressley unfortunately passed away. Because she could not complete her discovery obligations, the parties agreed that she would withdraw from the case when the operative pleading was next amended. The operative complaint was not subsequently amended, however, before the Parties reached a settlement. Similarly, Plaintiff Norman Skare passed away in 2019, but was replaced in the Action by his son, Donald, who was appointed to represent the estate by a Wisconsin probate court and appeared as personal representative for Betty Skare.

9. On February 18, 2020, fact discovery closed in the *Copley* matter. Plaintiffs thereafter served two expert reports in support of class certification. On June 8, 2020, Bactolac served four expert reports in opposition to class certification and NaturMed served three expert reports in opposition to class certification. NaturMed also served two expert rebuttal reports on July 14, 2020.

10. On March 14, 2020, Plaintiffs Jeffrey Faris, Antonia Hampton, Raul Robles, and Kathleen Cannon commenced a class action suit in this Court on behalf of a putative nationwide class of consumers who purchased one or more canisters of ADEG from one of the 99 Recalled Lots, as well as New York, Florida, Arizona, and Washington statewide classes.<sup>1</sup> (*Faris v. Bactolac Pharmaceutical, Inc. et al.*, No. 1:20-cv-01338 (hereafter, “*Faris* matter”), Dkt. 1.)

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<sup>1</sup> Capitalized terms not otherwise defined in this Order have the definitions set forth in the Settlement Agreement.

Plaintiffs alleged violations of state consumer protection laws, as well as common law claims of fraudulent concealment, negligent misrepresentation, and unjust enrichment. (*Id.*) The allegations underlying the *Faris* complaint were substantially similar to those pled in *Copley*, except that the proposed class definition was modified to reflect information learned through the discovery process in the *Copley* matter. I served as counsel to both the *Copley* Plaintiffs and the *Faris* Plaintiffs.

11. On June 22, 2020, the *Faris* Plaintiffs filed an amended complaint, alleging substantially similar claims on behalf of putative nationwide and statewide classes. (*Id.*, Dkt. 27.) NaturMed filed an answer and crossclaims against Bactolac on June 25, 2020, while IVL2 filed an answer on the same date. (Dkts. 29, 31.) Bactolac did not file an answer but instead requested a pre-motion conference seeking leave for permission to file a motion to dismiss. (*Id.*, Dkt. 30.) On July 3, 2020, Plaintiffs filed a memorandum opposing Bactolac's request for a pre-motion conference. (*Id.*, Dkt. 33.)

12. On July 10, 2020, Plaintiffs filed a consent motion to consolidate the *Faris* matter with the *Copley* matter. (*Id.*, Dkt. 36.) Magistrate Judge Kuo conducted a hearing on the motion on July 13, 2020, after which she granted the consent motion and consolidated the two actions for pretrial proceedings. (*Id.*, Dkt. 40.)

13. On August 7 and August 12, 2020, Defendants deposed Plaintiffs' class certification experts in full-day depositions. Plaintiffs deposed two of Bactolac's experts in opposition to class certification on September 3 and September 10, 2020.

14. Plaintiffs moved for class certification on September 23, 2020. (Dkt. 170.) Plaintiffs sought certification of putative nationwide and statewide consumer classes defined as all persons nationwide, or in a particular state, who purchased one or more canisters of ADEG that were

manufactured as part of the Recalled Lots. (*Id.*) Each Defendant filed a brief opposing Plaintiffs' motion on October 27, 2020. (Dkts. 173, 175-76.) On December 7, 2020, Plaintiffs filed two separate reply briefs in support of their motion for class certification—one responding to arguments set forth by Bactolac and another responding to arguments set forth by NaturMed and IVL2. (Dkts. 177-78.)

15. On October 26, 2020, Plaintiffs separately moved pursuant to Federal Rule of Civil Procedure 37 to strike certain testimony of Bactolac's expert Kendal Hirschi, Ph.D., as well as certain testimony of Plaintiffs' expert, Damon P. Little, Ph.D. (Dkt. 152.) This motion was fully briefed on November 16, 2020. (Dkts. 156-57.)

16. On November 23, 2020, Bactolac moved pursuant to Federal Rule of Evidence 702 to preclude the testimony of Plaintiffs' class certification experts, Damon P. Little, Ph.D. and Charles Cowan, Ph.D. (Dkts. 205, 211.) On the same date, NaturMed also moved to exclude Dr. Cowan, as well as one of Bactolac's experts, James Lassiter. (*See* Dkts. 184-85.) Plaintiffs also moved, on the same date, to exclude Mr. Lassiter, as well as another of Bactolac's experts, Kendal D. Hirschi, Ph.D. (Dkts. 189, 196.) On January 4, 2021, NaturMed withdrew its motion to exclude Plaintiffs' expert, Dr. Cowan. (Dkt. 184.) The remaining *Daubert* motions were fully briefed on January 4, 2021. (Dkts. 194, 201, 220-21.)

17. In April 2020, NaturMed sought permission for leave to file a partial motion for summary judgment on its crossclaim against Bactolac for contractual indemnity. (Dkt. 121.) The Court granted such permission after a pre-motion conference conducted on October 26, 2020. (Dkt. 151.) By agreement of the parties, NaturMed filed a motion for partial summary judgment on December 21, 2020. (Dkt. 228.) The motion was fully briefed on February 23, 2021. (Dkt. 233.)

18. On March 10, 2021, the Court ruled on Bactolac's motion for partial dismissal of the *Copley* complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. 234.) The Court granted Bactolac's motion to dismiss Plaintiffs' claims under New York General Business Law § 349, Section 17500 of California's Business and Professions Code, Missouri's implied warranty law, Virginia's Consumer Protection Act, Wisconsin's Deceptive Trade Act, and seeking unjust enrichment under state common law, but denied the motion in all other respects. (*Id.*) In the same order, the Court granted in part and denied in part Bactolac's motion pursuant to Federal Rule of Civil Procedure 12(c) for judgment on the pleadings. (*Id.*) The Court granted Bactolac's motion with regard to NaturMed's crossclaims for fraud and negligence but denied the motion with respect to the crossclaims for breach of contract, breach of express warranty, and breach of implied warranty. (*Id.*)

## **II. MEDIATION AND SETTLEMENT NEGOTIATIONS**

19. Following the Court's ruling on the Rule 12(b)(6) and 12(c) motions, it conducted a status conference and directed the Parties to consider participating in the Court's mediation program. The Parties thereafter conferred and consented to participate, ultimately agreeing to the appointment of Joseph DiBenedetto of JDB Mediation LLC as mediator. (*See* Dkt. 240.) Prior to the mediation, each party submitted a brief in support of its respective position, as well as a confidential letter for the mediator's eyes only. It is my understanding that the mediator also had a private conversation with counsel for all parties prior to the mediation.

20. During the course of the litigation, it became clear that the solvency and ability of certain Defendants to pay a judgment would be a pressing concern. Due to financial pressures purportedly caused by the 2016 recall and subsequent litigation, NaturMed essentially dissolved in 2017 and all or most of its employees either transferred to IVL2 or were terminated. IVL2, in

turn, is a small company that has never achieved the commercial success with ADEG that NaturMed achieved. I understood that both of these Defendants would be limited in their ability to pay a cash settlement. These concerns were discussed with the mediator prior to commencement of the mediation.

21. On July 9, 2020, the Parties engaged in a full-day mediation at arm's length before Mr. DiBenedetto. At the conclusion of the mediation, the Parties reached an agreement in principle to resolve the case on a classwide basis. The Parties then spent the next several months negotiating the detailed written Settlement Agreement and exhibits that are now before the Court.

### **III. THE PROPOSED SETTLEMENT**

22. The terms of the Settlement are set forth in the executed Settlement Agreement (“Settlement”), attached as Exhibit 1 to this Declaration, including Exhibits A-E to that Agreement. The Settlement would resolve all claims between Plaintiffs, the Settlement Class, Bactolac, NaturMed, and IVL2.

23. The Settlement is a Federal Rule of Civil Procedure 23(b)(3) opt-out class defined as “all Persons in the United States who purchased one or more canisters of ADEG that were manufactured as part of the Recalled Lots, except for Excluded Persons.” (Settlement ¶ 1(aaa).)

24. “Excluded Persons” are defined as:

(i) any Person who has timely and validly excluded himself, herself or themselves from the Settlement Class, in accordance with Section 11 of th[e] Agreement, (ii) the Settling Defendants, any entity or division in which the Settling Defendants have a controlling interest, their legal representatives in this Action, and their officers, directors, assigns, and successors, (iii) the judge to whom this Action is assigned, any member of the judge's immediate family and the judge's staff, or any other judicial officer or judicial staff member assigned to this case, (iv) any Class Counsel, including their partners, members, and shareholders, and any family members of Class Counsel, (v) any State, including without limitation the United States, or any of its agencies, and (vi) any Person who purchased



one or more canisters of ADEG manufactured from a Recalled Lot and who previously received either (a) a full refund for his or her purchase, or (b) Replacement Product.

(*Id.* ¶ 1(u).)

25. The Settling Defendants have agreed to pay \$1.725 million in cash into a common Settlement Fund and IVL2 has agreed to make available to the Settlement Class a total of \$1,889,420 in Settlement Credits, meaning the Total Settlement Value is \$3,621,420. (*Id.* ¶ 2(b); *id.* ¶ 1(jjj).) The Settling Defendants will pay \$1.725 million into the Escrow Account to create the Settlement Fund within twenty days of Preliminary Approval. (*Id.* ¶ 2(b)(i).) Prior to the Effective Date, this Fund will be used to pay for the Notice Program and Settlement Administration Costs. (*Id.* ¶ 2(b)(ii).) If the Settlement becomes effective after Final Approval, the Settlement Fund shall be used to pay for Alternative Payments, attorneys' fees and costs, Service Awards to Plaintiffs, and continuing Settlement Administration Costs. (*Id.* ¶ 2(b)(i).) After the Effective Date, not a single dollar will revert to the Settling Defendants under any circumstances.

26. The Recalled Lots Customer List comprises all or almost all individuals who purchased at least one canister of ADEG from the Recalled Lots and did not receive either a cash refund during NaturMed's recall program or Replacement Product. (*Id.* ¶ 1(rr).) This list contains approximately 189,000 individuals, meaning the Settlement Class is comprised of at least approximately 189,000 class members. Some of the individuals identified in the Recalled Lots Customer List may be Excluded Persons because they received refunds or Replacement Product through NaturMed's March 2016 recall.

27. Each eligible Settlement Class Member will have the option to receive either \$10 in Settlement Credit redeemable for three years to purchase any IVL2 product, or a \$5 Alternative Payment from the Alternative Payment Fund. (*Id.* ¶ 4(a)-(b).)

28. The Settlement's provision of Settlement Credit aligns with the evidence discovered in the case. Multiple witnesses testified that NaturMed's customers were "incredibly faithful to the company," were purchasing ADEG for years, and continued to do so after NaturMed's product recall. (*See, e.g.*, J. White Tr. at 68:15-71:15; P. Heffernan Tr. at 273:20-274:19.) Accordingly, the evidence indicates that many Settlement Class Members may prefer to continue doing purchasing ADEG as it has been reformulated by IVL2, or another IVL2 supplement product, meaning Settlement Credit is a useful, worthwhile benefit in this case.

29. Those Settlement Class Members who no longer wish to do business with IVL2, however, may elect to receive a \$5 Alternative Payment from the \$100,000 Alternative Payment Fund. If the number of Claimants who elect to receive Alternative Payments exceeds the Alternative Payment Fund, each Settlement Class Member electing to receive an Alternative Payment will receive a pro rata share of the Fund. (Settlement ¶ 4(b).) If, however, monies remain in the Alternative Payment Fund after payment of \$5 to each Settlement Class Member electing this benefit, the excess will be distributed pro rata to all Settlement Class Members who selected this option. (*Id.*)

30. The evidence in the case showed that one canister of ADEG cost at most \$40, though customers often received discounts for purchasing multiple canisters at one time. (*See, e.g.*, C. Cowan Expert Rep. at 23.) Plaintiffs argued in their motion for class certification that class members should receive a full refund for purchases of ADEG from the Recalled Lots. (*See* Dkt. 171 at 18, 37-39, 41.) The compensation options offered by the Settlement provides Settlement Class Members with either 25% of the "full refund" value of one ADEG canister at full price (if they choose Settlement Credit) or 12.5% of the "full refund" value (if they choose an Alternative

Payment). These Settlement benefits options are reasonable in light of the compensation theory advanced by Plaintiffs in the litigation.

31. Settlement Class Members may demonstrate their eligibility in a simple, straightforward manner by completing a Claim Form. (Settlement ¶ 3(a)(i)-(ii).) The Claim Form will be mailed to each individual on the Recalled Lots Customer List as part of the Short Form Notice. (*Id.* ¶ 10.) Potential Settlement Class Members will be able to complete the Claim Form by filling out basic identification information and returning the Form, postage for which will be prepaid. (*Id.* ¶ 3(a)(i)-(ii); *see also* Settlement, Ex. B.) The Claims Administrator will match the basic identification information provided by the Claimant with information on the Recalled Lots Customer List and, for the vast majority of Settlement Class Members, this will be sufficient to file an eligible claim. (Settlement ¶ 3(b).) If the Claims Administrator is unable to match a Claimant's information with information contained on the Recalled Lots Customer List, the Claims Administrator will provide the Claimant an opportunity to supplement their information before rejecting the claim. (*Id.* ¶ 3(a)(iii).) Potential Settlement Class Members will also have the option of proceeding to the Settlement Website to file a claim using an online portal. (*Id.* ¶ 3(a)(ii).)

32. In consideration for the Settlement benefits, all Settlement Class Members will be deemed to have released the Released Parties (including the Settling Defendants) from claims relating to the subject matter of the Action. (*Id.* ¶ 6.) Upon the Effective Date, NaturMed will also release Bactolac from the crossclaims asserted in the Action. (*Id.* ¶ 6(b).)

33. Proposed Class Counsel may request at final approval an award of attorneys' fees of up to one-third of the Total Settlement Value, or \$1,207,127, and reimbursement of reasonable litigation costs of \$210,136.30. (*Id.* ¶ 5(a).) The Settling Defendants have agreed not to oppose an application for attorneys' fees and costs in these amounts. (*Id.*)

34. Proposed Class Counsel will also request that each of the fourteen class representative Plaintiffs receive awards of \$5,000 for their service in responding to discovery and interrogatories, appearing for a deposition in this matter, working with Plaintiffs' counsel to appropriately prosecute this matter, and serving as representatives of class members throughout this case. (*Id.* ¶ 5(b).) The total of the proposed Service Awards will be \$70,000. Service Awards will be paid out of the Settlement Fund.

35. The Settlement Agreement incorporates a Supplemental Agreement that will not be publicly disclosed. (*See id.* ¶ 17(a).) This agreement establishes a threshold for opt outs that if exceeded provides the Settling Defendants an option to void the Settlement. The Parties jointly agreed that making this specific threshold number public could potentially encourage an organized effort to solicit opt outs in order to try and gain additional benefits for a small group of class members to the detriment of the majority of class members. I understand that the Settling Defendants also have entered a confidential agreement specifying the relative share of the Total Settlement Payment that will be contributed by each Settling Defendant.

36. The Settlement establishes a protocol for Settlement Class Members to either opt out of or object to the Settlement. A Settlement Class Member may opt out of the Settlement at any time prior to the Opt Out Deadline, which is proposed to be sixty calendar days after the Notice Date (or another date as ordered by the Court), provided the opt-out notice that must be transmitted to the Claims Administrator is postmarked no later than the Opt Out Deadline. (*See id.* ¶¶ 1(jj); 11(a).) The Settlement also provides a procedure for Settlement Class Members to object to the Settlement, to the application for attorneys' fees and costs, and/or to the Service Awards. (*Id.* ¶ 12.) Objections must be postmarked or received no later than the Objection Deadline, which is also sixty days after the Notice Date. (*Id.* ¶ 12(b).) Both the Opt Out Deadline and Objection

Deadline are clearly set forth in the Short-Form Notice, Long Form Notice, and will be set forth on the Settlement Website. (Settlement, Exs. A-B.)

#### **IV. THE NOTICE PROGRAM**

37. The Settlement provides that Postlethwaite & Netterville (“P&N”) will serve as the Claims Administrator for the Settlement Class and shall have responsibility for overseeing the Notice Program. (Settlement ¶ 2(a)(i).) P&N is a leading class action notice and claims administrator and has successfully designed and administered more than 100 notice and settlement programs. The Settling Defendants do not object to the appointment of P&N as Claims Administrator. (*Id.*)

38. The Claims Administrator and Plaintiffs’ counsel designed the Notice Program to provide the best practicable notice and take advantage of the information already within the Settling Defendants’ possession regarding the makeup of the Settlement Class. In particular, I understood that NaturMed compiled a customer list of all purchasers of ADEG canisters manufactured from the Recalled Lots so that it could conduct a product recall in March 2016. I further understood that this customer list—called the Recalled Lots Customer List—was now in the possession of IVL2. Thus, I understood that the Recalled Lots Customer List would allow direct mail notice to be sent to customer addresses as they existed in 2014-2015, when ADEG from the Recalled Lots was sold. During negotiation of the terms of the Agreement, IVL2 produced the Recalled Lots Customer List, which has been provided to the Claims Administrator. The Claims Administrator will use this list to provide direct mail notice to potential Settlement Class Members.

39. Each customer appearing on the Recalled Lots Customer List will be provided the Short Form Notice via direct mail. (*Id.* ¶ 10(a).) The Short Form Notice sets forth, among other things, a description of the litigation and the Settlement Class, a deadline for Settlement Class

Members to exclude themselves or object to the Settlement, and a link to the Settlement Website, where the Short and Long Form Notices will be reproduced along with other relevant case documents, including the Settlement Agreement. (Settlement, Ex. B.) The Long Form Notice provides more detail regarding the material terms of the Settlement, the nature of the Action, the Settlement's benefits, Plaintiffs' anticipated application for attorneys' fees and litigation costs, the Service Awards, and relevant deadlines to object, opt out, and file a claim for Settlement benefits. (Settlement, Ex. A.)

40. Plaintiffs respectfully request that the Court approve the proposed Long Form Notice and Short Form Notice, attached to the Settlement Agreement as Exhibits A and B. Plaintiffs also request that within thirty days of Preliminary Approval, or by the time specified by the Court, the Claims Administrator shall commence the Notice Program.

#### **V. PROPOSED CLASS COUNSEL AND THE CLASS REPRESENTATIVE PLAINTIFFS**

41. The Settlement in this Action provides meaningful relief to the Settlement Class Members and was made possible by the extensive experience, effort, and skill brought to bear by Plaintiffs' counsel and the class representative Plaintiffs.

42. Weitz & Luxenberg, P.C. ("Weitz") is an AV-rated law firm of approximately 80 attorneys and 300 support staff. For over 35 years, Weitz has represented individuals, groups, communities, and classes across the country to obtain redress for corporate wrongdoing. Of particular relevance here, Weitz has extensive experience in both class action litigation and in large, complex suits such as this one. Weitz's law firm resume is attached hereto as Exhibit 2.

43. I have significant experience in class action litigation and I am familiar with the legal and factual issues in this case. Prior to commencement of this Action in January 2018, I

investigated the matter and have been involved in every aspect of the litigation since that time. I respectfully submit that I am qualified to serve as Class Counsel.

44. For over three years and over the course of thousands of hours, I have prosecuted this case along with key members of Weitz. This effort has included overseeing every aspect of discovery, conducting or defending nearly 30 depositions, fully briefing an extensive and detailed motion for class certification, as well as multiple *Daubert* motions and a motion to strike. I also participated in the court-sponsored mediation program, leading settlement negotiations for the Plaintiffs. The proposed classwide resolution offers Settlement Class Members either 25% of a full refund (if Settlement Credit is chosen) or 12.5% of a full refund (if an Alternative Payment is chosen).

45. In addition to proposed Class Counsel's efforts, each of the class representative Plaintiffs provided integral assistance and positively contributed to this proposed Settlement. Each Plaintiff conferred with counsel during the case investigation, reviewed the operative pleading, participated in the discovery process by searching for relevant documents and photographs and responding to interrogatories and requests for admission, prepared for and sat for a deposition, and ultimately reviewed the Settlement terms with Plaintiffs' counsel. The class representative Plaintiffs are supportive of the proposed Settlement. Without Plaintiffs' active participation, the proposed Settlement would not have been possible.

46. In sum, based upon my experience in similar litigation and my familiarity with this case, the proposed Settlement is in the best interests of all members of the Settlement Class and this proposal warrants Preliminary Approval.

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

Dated: January 10, 2022

/s/ James J. Bilborrow