

**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

**NOTICE OF MOTION FOR  
PRELIMINARY APPROVAL OF  
CLASS SETTLEMENT,  
PRELIMINARY CERTIFICATION  
OF SETTLEMENT CLASS, AND  
APPROVAL OF NOTICE PLAN**

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.

**PLEASE TAKE NOTICE**, that upon the annexed Declaration of James J. Bilborrow in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan, together with Exhibit 1 through 2 annexed thereto, the Declaration of Bradley Madden Regarding Administration, together with

Exhibits A to B annexed thereto, and the accompanying Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan, and upon all of the pleadings and proceedings herein, Plaintiffs, by their undersigned attorneys, move this Court for entry of the proposed Preliminary Approval Order, attached hereto, which establishes the following:

- (1) Preliminary certification of the Settlement Class, as defined in the Settlement Agreement, for purposes of settlement, appointment of Plaintiffs as class representatives, and appointment of undersigned counsel as Class Counsel;
- (2) Preliminary Approval of the Settlement Agreement, attached to the Declaration of James J. Bilsborrow as Exhibit 1;
- (3) Approval of the Notice Plan;
- (4) Appointment of Postlethwaite & Netterville ("P&N") as Claims Administrator and a direction that the Notice Program be commenced;
- (5) Authority pursuant to N.Y. C.P.L.R. § 1207 for legal representatives of absent Settlement Class Members to sign Claim Forms and releases on behalf of the Settlement Class Members they represent;
- (6) A Final Approval Hearing to consider final approval of the Settlement and any application for attorneys' fees, litigation expenses, and Service Awards, to be held approximately 120 after entry of the Preliminary Approval Order.

Plaintiffs further request that the Court enter the following schedule of deadlines:

<b>Event</b>	<b>Date</b>
Deadline for the Settling Defendants to pay \$1,725,000 in cash into the Escrow Account	No later than 20 days from the date of entry of the Preliminary Approval Order
Deadline for Claims Administrator to commence the Notice Program	No later than 30 days from the date of entry of the Preliminary Approval Order
Commencement of the Enrollment Period	30 days from the date of the Preliminary Approval Order
Opt Out Deadline	60 days from the Notice Date

Objection Deadline	60 days from the Notice Date
Deadline for filing a Motion for Final Approval and any petition for an award of attorneys' fees, costs, and Service Awards	90 days from the Notice Date
Final Approval Hearing	_____ (approximately 120 days from the Notice Date, or when convenient for the Court)

Dated: January 10, 2022  
New York, New York

Respectfully submitted,

/s/ James J. Bilsborrow  
James J. Bilsborrow  
WEITZ & LUXENBERG, P.C.  
700 Broadway  
New York, New York 10003  
Tel: (212) 558-5500  
[jbilsborrow@weitzlux.com](mailto:jbilsborrow@weitzlux.com)

*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 10, 2022, a true and accurate copy of the foregoing Notice of Motion was filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ James J. Bilsborrow

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

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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. Bilsborrow

# EXHIBIT 1

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

CHARLES COPLEY, JASON EVANS,  
HUMBERTO GARCIA, LUZ ANGELINA  
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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.

**CLASS SETTLEMENT AGREEMENT AND RELEASE**

This Class Settlement Agreement and Release (the “Agreement”) is made and entered into as of the 22nd day of November, 2021, by, between and among Plaintiffs, on behalf of themselves and the Settlement Class Members, by and through Class Counsel, and the Settling Defendants, by and through their counsel of record in this Action. This Agreement is intended to fully, finally, and forever resolve, discharge, and settle the Released Claims (as defined herein) as against

Defendants, subject to the approval of the Court and the terms and conditions set forth in this Agreement.

### **RECITALS**

WHEREAS, Plaintiffs have asserted claims against the Defendants in this Action on behalf of several putative nationwide and statewide classes consisting of purchasers of one or more canisters of the dietary supplement product ADEG, which was manufactured by Bactolac and sold to consumers by NaturMed;

WHEREAS, Plaintiffs allege that 99 lots of ADEG manufactured in 2014 and 2015 contain ingredients not identified on the product label and omit certain ingredients required by the product formula, which caused the supplement product to be adulterated;

WHEREAS, Plaintiffs allege that the manufacture and sale of adulterated ADEG renders Bactolac and NaturMed liable under theories of breach of warranty, state consumer protection statutes, and under common law tort theories for monetary damages;

WHEREAS, Plaintiffs allege that IVL2 is a mere continuation of NaturMed and is liable for the wrongful acts committed by its predecessor;

WHEREAS, the Settling Defendants have denied and continue to deny Plaintiffs' allegations, and any alleged wrongdoing in connection with the manufacture and sale of ADEG; dispute the factual, legal, scientific, and other bases for Plaintiffs' claims and the appropriateness of certifying any putative class for litigation; and maintain that they have meritorious defenses to class certification and to the claims of liability and damages asserted by Plaintiffs; and

WHEREAS, after carefully considering the facts and applicable law and the risks, costs, delay, inconvenience, and uncertainty of continued and protracted litigation, and after engaging in extensive, arm's-length negotiations, with the assistance of a mediator, the Parties desire to settle the Action as to the Settling Defendants and the related claims of Plaintiffs and the Settlement Class on the terms and conditions stated herein, which Plaintiffs and Class Counsel believe are fair, reasonable, adequate, and beneficial to and in the best interests of the Settlement Class Members;

NOW THEREFORE, subject to approval by the Court pursuant to Federal Rule of Civil Procedure 23, the Parties hereby agree that, in consideration of the promises and mutual covenants set forth in this Agreement and upon occurrence of the Effective Date, the Action and the related claims of Plaintiffs and the Settlement Class shall be settled, compromised, dismissed on the merits and with prejudice, and released as to the Settling Defendants, and that NaturMed's Crossclaims shall be settled, compromised, dismissed on the merits and with prejudice, and released as to Bactolac, on the following terms and conditions:

#### **1. Definitions**

In addition to the terms defined at various points within this Agreement, the following defined terms shall apply throughout this Agreement:

- a. “**Action**” means the putative consolidated class action lawsuit captioned *Copley v. Bactolac Pharmaceutical, Inc. et al.*, No. 2:18-cv-575, currently pending in the Court, including the related lawsuit captioned *Faris v. Bactolac Pharmaceutical, Inc. et al.*, No. 1:20-cv-1338, also currently pending in the Court.
- b. “**ADEG**” means, for purposes of this Agreement only, the dietary supplement All Day Energy Greens and All Day Energy Greens Fruity, which was manufactured by Bactolac and sold to consumers by NaturMed.
- c. “**Agreement**” means the Class Settlement Agreement and Release between and among Plaintiffs, on behalf of themselves and the Settlement Class Members, and the Settling Defendants, and between NaturMed and Bactolac, including all exhibits and addenda thereto.
- d. “**Alternative Payment**” means the cash payment of \$5.00 that a Settlement Class Member may elect to receive in lieu of a Settlement Credit under the Agreement.
- e. “**Alternative Payment Fund**” means the total amount of monies available to pay Alternative Payments to eligible Settlement Class Members. The Alternative Payment Fund shall equal \$100,000.
- f. “**Bactolac**” means Bactolac Pharmaceutical, Inc.
- g. “**CAFA Notice**” means the notice to be disseminated to appropriate federal and state officials pursuant to the requirements of 28 U.S.C. § 1715(b) and in accordance with Section 9 of this Agreement.
- h. “**Claims Administrator**” means Postlethwaite & Netterville (“P&N”), the claims administrator for the Settlement Class. The Claims Administrator will be responsible for performing duties related to dissemination of Class Notice, administration of the Escrow Account, and administration of the Settlement Fund in accordance with this Agreement, as well as determining the eligibility of Settlement Class Members and providing Settlement Class Members with benefits under the Agreement. Class Counsel and Settling Defendants may, by agreement, substitute a different organization as Claims Administrator, subject to approval by the Court if the Court has previously entered the Preliminary Approval Order or Final Approval Order. In the absence of agreement, either Class Counsel or any Settling Defendant may move the Court to substitute a different organization as Claims Administrator, upon a showing that the responsibilities of the Claims Administrator have not been adequately executed by the incumbent.
- i. “**Claim Form**” means the form in substantially the same form as Exhibit B to this Agreement that must be completed by any Person seeking to receive benefits under the Agreement as a Settlement Class Member.
- j. “**Claimant**” means any Person who timely submits a Claim Form to the Claims Administrator.

- k. **“Class Counsel”** means:

James J. Bilsborrow  
**WEITZ & LUXENBERG, P.C.**  
700 Broadway  
New York, New York 10003

as counsel for Plaintiffs, and any other attorney or law firm that represents any of the Plaintiffs and seeks to receive any portion of the attorneys’ fees that may be awarded by the Court in connection with this Settlement.

- l. **“Class Notice”** means the notice of the Settlement that will be provided to prospective Settlement Class Members in accordance with Section 10 of this Agreement.
- m. **“Complaint”** collectively refers to the Amended Class Action Complaint filed at Docket No. 57 in Case No. 2:18-cv-00575-FB-PK and the Amended Class Action Complaint filed at Docket No. 27 in Case 2:20-cv-01338-JMA-ARL in United States District Court for the Eastern District of New York.
- n. **“Confidential Opt-Out Agreement”** means the agreement that must be executed by Plaintiffs and the Settling Defendants contemporaneously with the execution of this Agreement, which permits any Settling Defendant to withdraw from and terminate this Agreement if the number of Persons in the Settlement Class that validly exclude themselves pursuant to Section 11 exceeds the number agreed to by the Parties in the Confidential Opt-Out Agreement.
- o. **“Court”** means the United States District Court for the Eastern District of New York, the Honorable Frederic Block presiding.
- p. **“Crossclaims”** means all of the crossclaims that NaturMed alleges against Bactolac in the Action.
- q. **“Defendants”** means Bactolac, NaturMed, and IVL2.
- r. **“Effective Date”** means the date on which the last of the following has occurred: (1) twenty-one (21) days following the expiration of the deadline for appealing the Final Approval Order, if no timely appeal is filed; (2) if an appeal of the Final Approval Order is taken, the date upon which all appeals (including any requests for rehearing or other appellate review), as well as all further appeals therefrom (including all petitions for certiorari), have been finally resolved without the Final Approval Order having been materially changed, reversed, vacated, or otherwise overturned in whole or in part, such that no future appeal is possible, except that the Effective Date shall not be delayed by a modification of or appeal from those parts of the Final Order and Judgment that pertains to the Fee and Expense Award; or (3) such date as the Parties otherwise agree in writing.



- s. **“Enrollment Period”** means the period within which potential Settlement Class Members must submit a Claim Form so that the Claims Administrator may determine whether they are eligible to receive benefits under the Agreement. The Enrollment Period shall commence thirty (30) calendar days after Preliminary Approval and shall conclude one hundred (100) days from the Notice Date. Claim Forms postmarked on the date the Enrollment Period closes shall be deemed timely submitted so long as received by the Claims Administrator within ten (10) days thereof.
- t. **“Escrow Account”** means the account established and administered by the Claims Administrator, into which the Settlement Payment, will be deposited as set forth in Section 2(c).
- u. **“Excluded Persons”** means (i) any such Person who has timely and validly excluded himself, herself or themselves from the Settlement Class, in accordance with Section 11 of this 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 immediate 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.
- v. **“Execution Date”** means the date on which Class Counsel and the Settling Defendants execute this Agreement.
- w. **“Final Approval”** means the date that the Court enters the Final Approval Order.
- x. **“Final Approval Hearing”** means the hearing at which the Court will consider whether to give final approval to the Settlement and make such other rulings as are contemplated in the Final Approval Order, including determining the amount of attorneys’ fees and costs awarded to Class Counsel, any Settlement Administration Costs, and the amount of any Service Awards to the Plaintiffs.
- y. **“Final Approval Order”** means the Court’s order (a) granting final approval to the Settlement; (b) directing that the Agreement be implemented in accordance with its terms; (c) dismissing the Action as against each of the Settling Defendants with prejudice, and without costs; (d) determining pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay and directing entry of a final judgment as to the Settling Defendants; (e) ruling that each of the Releasing Parties has expressly, intentionally, fully, finally, and forever released, waived, compromised, settled, and discharged all Released Claims; (f) barring each of the Releasing Parties from asserting any of the Released Claims against any of the Released Parties; (g) finding that each of the Settling Defendants has complied with

and otherwise discharged its obligations under the Class Action Fairness Act, 28 U.S.C. § 1715(a); (h) awarding any attorneys' fees, costs, and expenses payable in connection with the Settlement or the Action; (i) finding that the Class Notice complied with Federal Rule of Civil Procedure 23 and the U.S. Constitution; and (j) reserving exclusive and continuing jurisdiction over the Settlement Fund and the interpretation, performance, implementation, administration, and enforcement of this Agreement and the Court's orders in the Action.

- z. **"IVL2"** means Independent Vital Life, LLC.
- aa. **"Long Form Notice"** means the long-form notice that shall be posted on the Settlement Website created by the Claims Administrator, as set forth in Section 10 of this Agreement. The Long Form Notice is attached hereto as Exhibit A to this Agreement.
- bb. **"NaturMed"** means NaturMed, Inc. d/b/a Institute for Vibrant Living.
- cc. **"NaturMed Recall"** means the March 2016 voluntary product recall of ADEG conducted by NaturMed with the knowledge of the Food and Drug Administration, in which customers were offered cash refunds or Replacement Product.
- dd. **"Net Settlement Fund"** means the portion of the Settlement Fund available for payment to the Settlement Class Members (in accordance with this Agreement) after the payment of any Settlement Administration Costs, attorneys' fees, any tax-related expenses, any Court-approved Service Award to the Plaintiffs, and other costs and expenses payable from the Settlement Fund.
- ee. **"Notice Date"** means the deadline set by the Court by which the Claims Administrator must send the Class Notice or, if the Court sets no such deadline, thirty (30) calendar days after Preliminary Approval.
- ff. **"Notice Program"** means the methods provided for in Section 10 of this Agreement for giving notice to potential Settlement Class Members.
- gg. **"Objection"** means a challenge to the Settlement asserted by a Settlement Class Member pursuant to Section 12 of this Agreement.
- hh. **"Objection Deadline"** means the deadline to submit an Objection set by the Court or, if the Court sets no such deadline, sixty (60) days after the Notice Date.
- ii. **"Opt Out"** means the choice of a Settlement Class Member to exclude himself, herself, or itself (in an individual or representative capacity, as appropriate) from the Settlement in accordance with Section 11 of this Agreement.
- jj. **"Opt Out Deadline"** means the deadline to Opt Out set by the Court or, if the Court sets no such deadline, sixty (60) days after the Notice Date.
- kk. **"Party"** means any one of the Plaintiffs or any one of Bactolac, NaturMed, and IVL2.

- ll. **“Parties”** means all of the Plaintiffs, on behalf of themselves and the Settlement Class Members, and all of Bactolac, NaturMed, and IVL2.
- mm. **“Person”** means a natural person, guardian, estate, legal representative, or their respective spouses, heirs, predecessors, successors, executors, administrators, representatives, or assigns.
- nn. **“Plaintiffs”** means any of Charles Copley, Jason Evans, Humberto Garcia, Luz Angelina Garcia, Joan McDonald, John Peterson, Natalie Roberts, Donald Skare, individually and as personal representative for Betty Skare, David Stone, Kaye Wink, individually and as next of kin of Donald Wink, Jeffrey Faris, Antonia Hampton, Raul Robles, and Kathleen Cannon.
- oo. **“Preliminary Approval”** means the date that the Court enters the Preliminary Approval Order.
- pp. **“Preliminary Approval Order”** means the Court’s order (i) granting preliminary approval to the Settlement; (ii) approving the Class Notice; (iii) finding that it will be likely to certify the Settlement Class under Federal Rule of Civil Procedure 23; (iv) appointing Plaintiffs as class representatives; (v) appointing Class Counsel to represent the Settlement Class; and (vi) setting the Opt Out Deadline, the Objection Deadline, the date and time for the Final Approval Hearing, and other appropriate deadlines; which order will be proposed in substantially the same form as Exhibit E and as agreed upon by the Parties.
- qq. **“Recalled Lots”** means the 99 lots included in the NaturMed Recall that are the subject of this Action. The lot numbers for the 99 Recalled Lots are set forth in Exhibit C.
- rr. **“Recalled Lots Customer List”** means the list of customers who, according to IVL2’s records, purchased one or more canisters of ADEG from the Recalled Lots, were mailed a recall letter by NaturMed in March 2016, and did not receive either a cash refund or Replacement Product in the NaturMed Recall.
- ss. **“Recalled Lots Refund List”** means the list of customers who, according to IVL2’s records, received cash refunds for a canister of ADEG purchased from the Recalled Lots.
- tt. **“Released Claims”** means any and all claims and damages (statutory, contract, tort, equitable, punitive, interest, or any other relief) that the Releasing Parties may have against the Released Parties, or that NaturMed may have against Bactolac, arising out of or related to the allegations in the Complaint or NaturMed’s Crossclaims. Without limiting the foregoing, the Released Claims include any and all claims that were, or that could have been, asserted in the Action or Crossclaims. The release shall extend to and include Defendants and their affiliates, subsidiaries, predecessors, successors, officers, directors, employees, insurers, and attorneys. The release also shall extend to and include all claims, demands, actions, causes of action, allegations, rights, obligations, costs, losses, and damages arising in whole or in part at any time from

January 1, 2014 through the Effective Date from or in connection with the acts or omissions of Defendants or any of the other Released Parties of any and every kind or nature, whether in law or in equity, whether in tort or contract, whether arising under common law, statute, or regulation, whether known or Unknown Claims, based upon the claims that were, or could have been, asserted in the Action or Crossclaims. “Released Claims” does not include claims relating to the enforcement of this Agreement.

- uu. **“Released Parties”** means Defendants and their insurers; their respective predecessors, successors, heirs, assignors, and assignees; and any past and present affiliates, directors, officers, employees, attorneys, agents, consultants, servants, stockholders, members, representatives, subsidiaries, and affiliates of the foregoing persons or entities.
- vv. **“Releasing Parties”** means Plaintiffs and the Settlement Class Members; their predecessors, successors, heirs, assignors, and assignees; and any past and present affiliates, officers, employees, attorneys, agents, consultants, servants, stockholders, members, representatives, subsidiaries, and affiliates of such persons or entities.
- ww. **“Replacement Product”** means any NaturMed product received in exchange for recalled ADEG during the NaturMed Recall.
- xx. **“Service Award”** means any Court-approved payment to Plaintiffs for serving as class representatives, which is in addition to any benefits due to Plaintiffs under this Agreement as members of the Settlement Class.
- yy. **“Settlement”** means the settlement and compromise reflected in this Agreement.
- zz. **“Settlement Administration Costs”** means the costs and fees of the Claims Administrator to effectuate the Notice Program and to determine the eligibility of potential Settlement Class Members and to administer the Settlement Class, as well as any cost associated with Opt Outs or Objectors.
- aaa. **“Settlement Class”** means 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.
- bbb. **“Settlement Class Member”** means a member of the Settlement Class who has not timely and validly excluded himself, herself, or itself (in an individual or representative capacity, as appropriate) from the Settlement Class, in accordance with Section 11 of this Agreement.
- ccc. **“Settlement Credit(s)”** means the \$10 credit that IVL2 will make available to each Settlement Class Member who timely submits a Claim Form and elects to receive this benefit.
- ddd. **“Settlement Fund”** means the common fund or account established pursuant to and approved by an order of the Court to resolve and satisfy the Released Claims as a

qualified settlement fund within the meaning of 26 C.F.R. § 1.468B-1(a) and (c), to receive the Total Settlement Payment, and to make payments authorized by this Agreement.

- eee. **“Settlement Website”** means the website that the Claims Administrator will establish as a means for Settlement Class Members to obtain notice of and information about the Settlement, through and including hyperlinked access to this Agreement, the Long Form Notice, the operative Complaint, Plaintiffs’ motion seeking Preliminary Approval, Preliminary Approval Order, Plaintiffs’ motion seeking Final Approval, the Final Approval Order, and the Claim Form and such other documents as the Parties agree to post or that the Court orders posted on the website. These documents shall remain on the Settlement Website for at least six months after Final Approval. The Settlement Website shall also include the capability for Settlement Class Members to file a Claim Form via online portal. The Settlement Website’s URL will be [www.NaturMedIVLSettlement.com](http://www.NaturMedIVLSettlement.com).
- fff. **“Settling Defendant”** means any one of Bactolac, NaturMed, and IVL2.
- ggg. **“Settling Defendants”** means Bactolac, NaturMed, and IVL2.
- hhh. **“Short Form Notice”** means the form of notice that shall be provided by mail to Settlement Class Members, as set forth in Section 10 of this Agreement. The Short Form Notice is attached hereto as Exhibit B.
- iii. **“Total Settlement Payment”** means the \$1,725,000 total cash payment that the Settling Defendants collectively are obligated to make under the terms of this Settlement in accordance with Section 2 of this Agreement.
- jjj. **“Total Settlement Value”** means the value of the Total Settlement Payment plus the value of the Settlement Credits made available to eligible Settlement Class Members.
- kkk. **“Unknown Claims”** means any Released Claims that any Plaintiff or any member of the Settlement Class does not know or suspect to exist in his, her or its favor at the time of the release, which, if known by him, her or it, might have affected his, her or its settlement with and release of the Released Parties, or might have affected his, her or its decision not to object to this settlement or seek exclusion from this settlement.

## 2. **Settlement Payment and Settlement Funds**

- a. Settlement Administration.
  - i. In connection with the motion for Preliminary Approval of the Settlement, Class Counsel has selected and shall propose P&N (whose qualifications are set forth in Exhibit A to the Declaration of Bradley Madden Regarding Administration, to be filed herewith) to serve as an independent, third-party Claims Administrator, to administer the Settlement Fund and the Notice Program. Settling Defendants do not object to Class Counsel’s proposal for the Claims Administrator.

b. Settlement Consideration.

- i. Within twenty (20) days of Preliminary Approval, Settling Defendants shall pay \$1,725,000 (one million seven hundred and twenty-five thousand dollars) in cash into the Escrow Account to create the Settlement Fund for the benefit of the Settlement Class Members and to pay Settlement Administration Costs prior to the Effective Date. Following the Effective Date, the Settlement Fund shall be used to fund Alternative Payments, as provided in Section 4; to pay any and all attorneys' fees and costs awarded to Class Counsel; to pay any Service Award to Plaintiffs; and to pay all remaining Settlement Administration Costs. All funds held by the Claims Administrator shall remain subject to the jurisdiction of the Court until distributed pursuant to this Agreement.
- ii. All costs of the Notice Program and of other Settlement Administration Costs shall be paid from the Settlement Fund. Prior to the Effective Date, any Settlement Administration Costs must be approved by Class Counsel before incurred.

c. Nature of the Settlement Payment and Settlement Funds.

- i. The Settlement Fund at all times is intended to be a "qualified settlement fund" within the meaning of United States Treasury Regulation § 1.468B-1, 26 C.F.R. § 1.468B-1 and shall be established pursuant to an order of the Court and will be subject to the continuing jurisdiction of the Court for the life of the Settlement Fund. Neither the Parties nor the General Administrator shall take a position in any filing or before any tax authority that is inconsistent with such treatment. Each Settling Defendant is a "transferor" within the meaning of United States Treasury Regulation § 1.468B-1(d)(1) to the Settlement Fund. The Claims Administrator shall be the "administrator" of the Settlement Fund within the meaning of United States Treasury Regulation § 1.468B-2(k)(3) and, as the administrator, the Claims Administrator shall: (a) timely make or join in any and all filings or elections necessary to make the Settlement Fund a qualified settlement fund at the earliest possible date (including, if requested by any Settling Defendant, a relation-back election within the meaning of United States Treasury Regulation § 1.468B-1(j)); (b) timely file all necessary or advisable tax returns, reports, or other documentation required to be filed by or with respect to the Settlement Fund; (c) timely pay any taxes (including any estimated taxes, and any interest or penalties) required to be paid by or with respect to the Settlement Fund; and (d) comply with any applicable information reporting or tax withholding requirements imposed by applicable law, in accordance with United States Treasury Regulation § 1.468B-2(l). Any such taxes, as well as all other costs incurred by the General Administrator in performing the obligations created by this subsection, shall be paid out of the Settlement Fund. Settling Defendants shall provide the Claims Administrator with the combined statement described in United States Treasury Regulation § 1.468B-3(e)(2)(ii).



3. **Class Enrollment and Eligibility**

a. Submission of Claims Form and Review.

- i. To become eligible to receive benefits pursuant to this Agreement, Claimants must submit a Claim Form to the Claims Administrator during the Enrollment Period. The Claims Administrator shall review the Claim Form and any supporting documentation and determine whether the Claimant is an eligible Settlement Class Member. A Claim Form postmarked after the Enrollment Period concludes will be rejected by the Claims Administrator as untimely, and the Claimant submitting such Claim Form cannot qualify to receive benefits pursuant to this Agreement.
- ii. The Claim Form shall be in substantially the same form as Exhibit B attached hereto. The Claim Form shall be available on the Settlement Website, which will also feature a portal to allow a Claim Form to be filed online. To become eligible to receive benefits pursuant to this Agreement, Claimants may be required to submit certain qualifying documentary support, as set forth below. The Claims Administrator shall be entitled to verify the identity of any Claimant and any information required by the Claim Form.
- iii. If the Claims Administrator determines that a Claimant has submitted insufficient proof of eligibility, the Claims Administrator will provide an opportunity for the Claimant to cure the submission to the extent practicable.
- iv. Settlement Credits provided to Settlement Class Members who demonstrate eligibility as determined by the Claims Administrator shall be transferred as set forth in Section 4. Alternative Payments to Settlement Class Members who demonstrate eligibility as determined by the Claims Administrator and this Agreement shall be paid from the Settlement Fund as set forth in Section 4. The Claims Administrator shall use reasonable efforts to complete transfer of all Settlement benefits due in accordance with this Agreement within 90 days of the Effective Date.

b. Eligibility Determination.

- i. On or before the filing of a motion for preliminary settlement approval, IVL2 will provide the Claims Administrator with the Recalled Lots Customer List, Recalled Lots Refund List, and a list of customers who received Replacement Product. The Claims Administrator shall determine Claimant eligibility exclusively by referencing these three lists except as set forth below.
- ii. During the Enrollment Period, Claimants shall complete a Claim Form, electing whether they choose to receive Settlement Credit or Alternative Payments. If a Claimant fails to make an election of Settlement Credit or an Alternative Payment on their Claim Form, the Claims Administrator shall award Settlement Credit.

- iii. If the Claims Administrator is able to identify a Claimant as an eligible Settlement Class Member by referencing the Recalled Lots Customer List, then no further efforts at verification are necessary and the Claimant shall be deemed eligible. If the Claims Administrator is unable to determine whether the Claimant is an eligible Settlement Class Member solely by referencing the Recalled Lots Customer List, then the Claim Administrator shall require some supporting information to verify the Claimant's eligibility. Such supporting information may include, *inter alia*, ADEG invoices or receipts, photographs of recalled ADEG canisters, proof of identity such as a driver's license, or any other documents or information the Claims Administrator deems sufficiently reliable to verify a Claimant's eligibility and identity. If the Claimant is not included on the Recalled Lots Customer List, the burden is on the Claimant to establish their eligibility.
- iv. After verifying that a Claimant is included on the Recalled Lots Customer List or, if the Claimant was not included on the Recalled Lots Customer List, that the Claimant is eligible to receive benefits under the Agreement, the Claims Administrator must determine whether that Claimant is identified on the Recalled Lots Refund List or on the list of customers receiving Replacement Product. If a Claimant is included on the Recalled Lots Refund List or the list of customers receiving Replacement Product, he or she is an Excluded Person. A Claimant may dispute that he or she is an Excluded Person if he or she (a) did not in fact receive a full refund for an ADEG canister purchased from the Recalled Lots, and/or (b) did not in fact receive Replacement Product in exchange for an ADEG canister purchased from the Recalled Lots, and (c) submits a statement to the Claims Administrator explaining that a full refund or Replacement Product was not received. If the Claimant submits such a statement to the Claims Administrator, he or she is eligible to receive a Settlement Credit, but not an Alternative Payment, under the Agreement. In the event it is ambiguous whether a Claimant is included on the Recalled Lots Refund List or the list of customers receiving Replacement Product, the Claims Administrator shall find the Claimant eligible.

#### 4. **Distribution of Class Member Benefits**

- a. For Claimants who elect to receive Settlement Credit, following the Effective Date, the Claims Administrator shall issue a credit to each Settlement Class Member in substantially the same form as Exhibit D. A Settlement Credit shall be redeemable for any available IVL2 product and shall be valid for three years from the Effective Date.
- b. For Claimants who elect to receive an Alternative Payment, each Settlement Class Member shall be entitled to a cash payment of \$5. If, however, the number of Claimants choosing to receive an Alternative Payment exceeds the Alternative Payment Fund, then each Settlement Class Member electing an Alternative Payment shall receive a pro rata share. If monies remain in the Alternative Payment Fund after payment of \$5 to each Settlement Class Member electing an Alternative Payment,



the excess will be distributed pro rata to all such Settlement Class Members. The Claims Administrator shall use good faith efforts to make payments under this provision within 90 days of the Effective Date.

**5. Attorneys' Fees, Costs, and Expenses**

- a. Class Counsels' Fees and Costs. Class Counsel's reasonable attorneys' fees and costs, as determined and approved by the Court, shall be paid from the Settlement Fund no later than twenty-eight (28) days after the Effective Date. Class Counsel may apply for an award of attorneys' fees up to one-third of the Total Settlement Value, and reimbursement of reasonable litigation costs of two hundred thousand two hundred and ten thousand and one hundred thirty-six dollars and thirty cents (\$210,136.30), to be approved by the Court. Settling Defendants agree not to oppose an application for attorneys' fees and costs in those amounts.
- b. Service Awards. Subject to Court approval, each Plaintiff shall be entitled to receive a Service Award of up to \$5,000 each for his or her role as a class representative. The Service Awards shall be paid from the Settlement Fund no later than twenty-eight (28) days from the Effective Date.
- c. Administrative Fees and Costs. Settlement Administration Costs shall be paid from the Settlement Fund within ten (10) days after invoicing to and written approval by Class Counsel. Absent exceptional circumstances, total Settlement Administration Costs shall not exceed \$325,000.
- d. Excess Funds. To the extent any monies remain in the Settlement Fund after payment of attorneys' fees and costs, Service Awards, and Settlement Administration Costs, such monies shall be added to the Alternative Payment Fund for distribution to those electing to receive an Alternative Payment.

**6. Dismissal, Release of Claims, and Related Provisions**

- a. Dismissal. In the motion for final approval of the Settlement, Plaintiffs, on behalf of themselves and the Settlement Class, shall request that the Final Approval Order dismiss the Action with prejudice as to the Settling Defendants and enter a final judgment as to them. NaturMed will request that the Final Approval Order also dismiss its Crossclaims with prejudice and it will file any other necessary papers ordered by the Court to effectuate dismissal with prejudice of the Crossclaims.
- b. Release. Upon the Effective Date, the Released Parties, individually and collectively, shall be fully, finally and forever released from the Released Claims of the Class Members and other Releasing Parties who are not excluded from the Settlement Class by virtue of a timely and properly submitted Opt Out request or other Court order, and such Releasing Parties shall be prohibited and enjoined from asserting or prosecuting any Released Claims against any Released Parties. Upon the Effective Date, Bactolac will also be fully, finally, and forever released from NaturMed's Crossclaims, and NaturMed shall be prohibited and enjoined from asserting or prosecuting any Released Claim against Bactolac.

Upon the Effective Date and for the consideration provided for herein, each and every Class Member who participates in the Settlement (a) agrees and covenants to the maximum extent permitted by law that, in addition to the foregoing release of the Released Claims, he or she shall not, at any time, directly or indirectly cooperate in the filing or prosecution of any suit or proceeding, in any forum based upon or related to any Released Claims against the Released Parties and (b) acknowledges that the foregoing covenant shall apply and have effect by virtue of this Agreement and by operation of the Judgment. Each Class Member who participates in the Settlement and Plaintiffs' Counsel further agree and acknowledge that the covenants not to sue provided for in this paragraph are made to inure to the benefit of, and are specifically enforceable by, each of the Released Parties. Notwithstanding any other provision of this Agreement, nothing in this Agreement shall limit or preclude the Releasing Parties' rights to enforce any provision of this Agreement.

Releasing Parties are aware of California Civil Code §1542 and they expressly waive and relinquish any rights or benefits potentially available to them under this statute. The Releasing Parties stipulate and agree that, upon the Effective Date, and by operation of the Judgment, Releasing Parties shall expressly waive the provisions, rights, and benefits of California Civil Code §1542 and any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to California Civil Code §1542, which provides:

**A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.**

Releasing Parties may hereafter discover facts in addition to or different from those which they now know or believe to be true with respect to the subject matter of the Released Claims, but Plaintiffs shall expressly settle and release and each Class Member, upon the Effective Date, shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever settled and released, any and all Released Claims, known or unknown, suspected or unsuspected, contingent or non-contingent, disclosed or undisclosed, matured or unmatured, whether or not concealed or hidden, which now exist, or heretofore have existed, upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts. Releasing Parties acknowledge that the foregoing waiver was separately bargained for and a key element of the settlement of which this release is a part.

- c. Dismissal: Upon the Effective Date, Plaintiffs and the Settlement Class (with Court approval) will move to dismiss all claims in the Action with prejudice. Also upon the Effective Date, NaturMed will move to dismiss all of its Crossclaims against Bactolac with prejudice. However, any continuing obligations arising from the Settlement

shall survive any partial or later complete dismissal of the Action until they are determined by the Court to have been fully performed, and the Court, along with any appellate court with power to review the Court's orders and rulings in the Action, will retain exclusive and continuing jurisdiction over this Action for purposes of enforcing this Settlement Agreement and any issues associated therewith.

- d. Deceased or Incompetent Absent Class Members: It is contemplated by the Parties that legal representatives of deceased or incompetent Settlement Class Members shall have authority to sign Claim Forms and releases on behalf of the Settlement Class Members they represent. Where a legal representative of a deceased or incompetent Settlement Class Member submits a Claim Form on that Settlement Class Member's behalf, that legal representative shall attest to their authority to act for the deceased or incompetent absent Settlement Class Member. With respect to incompetent Settlement Class Members identified during the claims process, Class Counsel shall apply for an Order from the Court providing authority for such legal representative to sign the Claim Form and release on behalf of the incompetent Settlement Class Member he or she represents. It is contemplated by the Parties that an Order from the Court finally approving the Settlement shall effectuate a settlement under N.Y. C.P.L.R. § 1207 for all absent incompetent Settlement Class Members.
- e. Exclusive Remedy: The relief provided for in this Agreement shall be the sole and exclusive remedy for all Releasing Parties with respect to any Released Claims, and the Released Parties shall not be subject to liability or expense of any kind with respect to any Released Claims other than as set forth in this Agreement.
- f. Covenant Not To Sue: Each of the Releasing Parties shall forever refrain from instituting, maintaining, prosecuting, or continuing any suit, action, arbitration, or proceeding against any of the Released Parties with respect to the Released Claims.

## 7. **Preliminary Approval**

- a. Upon execution of this Agreement by all Parties, Class Counsel shall promptly move the Court for a Preliminary Approval Order. The proposed Preliminary Approval Order shall be attached to the motion, or otherwise filed with the Court, and shall be in a form attached hereto as Exhibit E.
- b. The motion for Preliminary Approval shall, among other things, request that the Court: (1) preliminarily approve the terms of the Settlement as being within the range of fair, adequate, and reasonable; (2) find that it will be likely to certify the Settlement Class pursuant to Federal Rule of Civil Procedure 23, for settlement purposes only, appoint the Plaintiffs as class representatives, and appoint Class Counsel as counsel for the Settlement Class; (3) approve the Notice Program set forth herein and approve the form and content of the Class Notice; (4) approve the procedures set forth herein in Sections 11 and 12 for Settlement Class Members to Opt-Out or object to the Settlement; (5) provide the authority for legal representatives of absent or incompetent Settlement Class Members, to sign Claim Forms and releases on behalf of the Settlement Class Members they represent; (6) stay further proceedings against

Settling Defendants pending Final Approval of the Settlement; and (7) schedule a Final Approval Hearing for a time and date mutually convenient for the Court, Class Counsel, and counsel for Settling Defendants, at which the Court will conduct an inquiry into the fairness of the Settlement, determine whether it was made in good faith, and determine whether to approve the Settlement and Class Counsels' application for attorneys' fees and costs and for a Service Award to Plaintiffs.

- c. In Plaintiffs' motion seeking Preliminary Approval, Plaintiffs shall request that the Court approve the Short Form Notice and the Long Form Notice attached at Exhibits A and B and approve the Notice Program. The Court will ultimately determine and approve the content and form of the notice forms to be distributed to the Settlement Class Members.
- d. The Parties further agree that in Plaintiffs' motion seeking Preliminary Approval, Plaintiffs will request that the Court enter the following schedule governing the Settlement: (1) deadline for commencing Class Notice (the Notice Date): thirty (30) days from Preliminary Approval; (2) Opt-Out Deadline: sixty (60) days from the Notice Date; (3) Objection Deadline: sixty (60) days from the Notice Date; (4) deadline for filing motions for approval of Plaintiffs' Service Awards and attorneys' fees and costs awards: ninety (90) days from the Notice Date; (5) Final Approval Hearing: one-hundred twenty (120) days from the Notice Date, or as soon thereafter as is mutually convenient.

**8. Class Certification for Settlement Purposes**

- a. In the motion for preliminary approval of the Settlement, Plaintiffs shall propose certification of the Settlement Class, solely for purposes of the Settlement, pursuant to Federal Rules of Civil Procedure 23(b)(3) and 23(e), with Plaintiffs as the proposed class representatives, which the Settling Defendants will not oppose.
- b. If this Agreement is terminated or the Court (or an appellate court) declines to approve the Settlement as proposed by the Plaintiffs, the Settling Defendants shall retain all of the rights to oppose class certification (and assert all other arguments and defenses) that they had prior to execution of this Agreement.

**9. CAFA Notice**

- a. Within ten (10) days after Plaintiffs file the motion for preliminary approval of the Settlement, each Settling Defendant shall provide CAFA Notice to the appropriate officials of the United States, the State of New York, the other forty-nine states, and the territories. Settling Defendants shall bear the costs of such notice. The Parties will request the Court to set a Final Approval Hearing for a date not sooner than ninety (90) days after Defendants issue notice as contemplated by CAFA.
- b. When each Settling Defendant provides CAFA Notice in accordance with Section 9(a) of this Agreement, it shall provide copies of the CAFA Notice to Plaintiffs.

**10. Class Notice**

- a. Within thirty (30) days of Preliminary Approval, or by the time specified by the Court, the Claims Administrator shall commence the Notice Program, including by mailing the Short Form Notice, in such form as is approved by the Court, to all individuals identified in the Recalled Lots Customer List.
- b. The Claims Administrator shall maintain a Settlement Website containing the operative Complaint, this Agreement, the Short Form Notice and Long Form Notice, Plaintiffs' motion seeking Preliminary Approval, the Preliminary Approval Order, Plaintiffs' motion seeking Final Approval, the Final Approval Order, the Claim Form, an online portal to file Claim Forms, and such other documents as the Parties agree to post or that the Court orders posted. These documents shall remain on the Settlement Website for at least six months after Final Approval. The Settlement Website's URL will be NaturMedIVLSettlement.com.
- c. The Claims Administrator shall send the Short Form Notice Form with attached Claim Form by mail to any potential Settlement Class Member who requests a copy. It will be conclusively presumed that the intended recipients received the Short Form Notice if the Short Form Notice Form has not been returned to the Claims Administrator as undeliverable within fifteen (15) calendar days of mailing.
- d. The Parties may by mutual written consent make non-substantive changes to the Short Form Notice and Long Form Notice without Court approval after the Court's approval of these forms.
- e. A Spanish-language translation of the Long Form Notice and Short Form Notice shall be available on the Settlement Website and will be provided to Settlement Class Members who request it from the Claims Administrator.

**11. Opt Outs**

- a. A Settlement Class Member may Opt Out by submitting to the Claims Administrator a timely and valid request that complies with the Opt Out procedure described in the Class Notice. To be timely and valid, an Opt Out request must have a verified submission date on or before the Opt Out Deadline and must include (i) the full name, current address, and telephone number of the requestor; (ii) a statement of the facts that make the requestor a Settlement Class Member; (iii) a statement requesting exclusion from the Settlement Class; and (iv) the signature of the requestor.
- b. Any Settlement Class Member that submits a timely and valid Opt Out request shall not (i) be bound by any orders or judgments entered in the Action to implement and effectuate the Settlement and this Agreement; (ii) be entitled to any of the relief or other benefits provided under this Agreement; (iii) gain any rights by virtue of this Agreement; or (iv) be entitled to submit an Objection.
- c. Any Settlement Class Member that does not submit a timely and valid Opt Out request submits to the jurisdiction of the Court and shall be bound by the terms of

this Agreement and by all orders and judgments in the Action to implement and effectuate the Settlement and this Agreement.

- d. No “mass” or “class” Opt Out requests shall be valid, and no Settlement Class Member may submit an Opt Out request on behalf of any other Settlement Class Member.
- e. Any Settlement Class Member that submits an Opt Out request may revoke the request by submitting to the Claims Administrator a statement of revocation with a verified submission date no later than forty (40) days before the Final Approval Hearing; provided, however, that Class Counsel shall have discretion to extend this deadline on a case-by-case basis.
- f. As soon as practicable and no later than thirty (35) days before the Final Approval Hearing, the Claims Administrator shall furnish the Parties with a final list of all timely and valid Opt Out requests that have been submitted and not revoked.

## 12. **Objections**

- a. A Settlement Class Member may make an Objection by serving on the Parties a timely and valid statement of Objection that complies with the Objection procedure described in the Class Notice. Class Counsel shall file all such Objections with the Court at least twenty (20) days prior to the Final Approval Hearing.
- b. To be timely and valid, a statement of Objection must be postmarked or received on or before the Objection Deadline and must include (i) the full name, current address, and telephone number of the objector; (ii) a statement of the facts that make the objector a Settlement Class Member; (iii) a statement describing all of the objector’s challenges to this Agreement or the Settlement and the reasons for those challenges; (iv) all of the papers and evidence the objector intends to submit in support of those challenges; (v) a statement of whether the objector intends to appear at the Final Approval Hearing; (vi) the signature of the objector; (vii) a statement that the objector is willing to be deposed, upon request, on a mutually acceptable date at least ten (10) days before the Final Approval Hearing; (viii) the caption of each case in which the objector or counsel representing the objector has objected to a class action settlement within the preceding five years and a copy of all orders related to or ruling upon those objections; and (ix) all agreements that relate to the Objection, whether written or verbal, between or among the objector, counsel for the objector, and/or any other Person.
- c. No “mass” or “class” Objections shall be valid, and no Settlement Class Member may submit a statement of Objection on behalf of any other Settlement Class Member.
- d. Unless the Court orders otherwise, only those Settlement Class Members whose statements of Objection express an intention to appear at the Final Approval Hearing shall have the right to present their Objections orally at the Final Approval Hearing.



- e. Plaintiffs and the Settling Defendants shall have the right, but not the obligation, to respond to any timely filed objection no later than seven (7) days prior to the Final Approval Hearing. Any Party who wishes to respond shall file a copy of the written response with the Court, and shall serve a copy, by hand or overnight delivery, to the objecting Settlement Class Member (or his or her counsel) and by email to counsel for Plaintiffs and/or the Settling Defendants.
- f. A Settlement Class Member that does not submit a timely and valid Objection shall have waived, and shall be foreclosed from making, any challenge to this Agreement or the Settlement in the Action or any other proceeding.

**13. Final Approval and Entry of Final Judgment**

- a. The Parties shall jointly seek a Final Approval Order and entry of final judgment (“Judgment”) from the Court that:
  - i. Approves the Settlement Agreement in its entirety pursuant to Federal Rule of Civil Procedure 23(e) as fair, reasonable, and adequate;
  - ii. Certifies the Settlement Class, for settlement purposes only;
  - iii. Confirms appointment of the Claims Administrator;
  - iv. Confirms the appointment of Class Counsel;
  - v. Finds that the Class Notice has satisfied the requirements set forth in Federal Rule of Civil Procedure 23(c)(2)(B);
  - vi. Bars and enjoins each Settlement Class Member from commencing, asserting, and/or prosecuting any and all Released Claims against any Released Party;
  - vii. Dismisses with prejudice all claims in the operative Complaint asserted against Settling Defendants, without further costs, including claims for interest, penalties, costs, and attorneys’ fees;
  - viii. Enters final judgment as to the Settling Defendants and the claims against them in the Action pursuant to Federal Rule of Civil Procedure 54(b);
  - ix. Confirms that each of the Settling Defendants has complied with and otherwise discharged its obligations under the Class Action Fairness Act, 28 U.S.C. § 1715(a);
  - x. Confirms that it retains continuing jurisdiction over the Settlement Fund; and
  - xi. Expressly incorporates the terms of this Agreement and provides that the Court retains continuing and exclusive jurisdiction over the Parties, the Settlement Class Members, and this Agreement, to interpret, implement, administer and enforce the Agreement in accordance with its terms.

- b. The motion for Final Approval of this Settlement shall include a request that the Court enter the Final Approval Order and, if the Court grants Final Approval of the Settlement and incorporates the Agreement into the final judgment, that the Court shall dismiss Settling Defendants from this Action with prejudice, and enter final judgment as to them, subject to the Court's continuing jurisdiction to enforce the Agreement.

**14. Amendment of Agreement**

- a. Counsel for the Parties may agree to amend this Agreement for any reason at any time.
- b. Prior to entry of the Final Approval Order, this Agreement may be amended only by a writing executed by counsel for all Parties.
- c. After entry of the Final Approval Order, this Agreement may be amended only by a writing executed by all Parties and approved by the Court.

**15. Termination Rights and Effect of Termination**

- a. Any of the Parties may terminate this Agreement if any of the following events happen: (i) the Court declines to approve any part of the Settlement; (ii) the Court declines to approve or changes a material term of the requested Preliminary Approval Order or the requested Final Approval Order; (iii) an appellate court reverses, vacates, or otherwise overturns the Final Approval Order in whole or in part; (iv) another of the Parties materially breaches this Agreement before the Effective Date and fails to promptly cure the breach after receiving written notice of the breach; or (v) the Effective Date otherwise does not come to pass. For Settling Defendants to terminate the Agreement under this section, they must unanimously agree to terminate the Agreement in writing unless a Defendant has breached the Agreement under (iv), above, in which case the non-breaching Parties must unanimously agree to terminate the Agreement in writing.
- b. Any Defendant shall have the right to withdraw from and terminate this Agreement in its entirety if the number of Persons in the Settlement Class that validly Opt Out of this Settlement pursuant to Section 11 of this Agreement exceeds the number of opt-outs permitted in the Parties' Confidential Opt-Out Agreement, which is set forth in more detail in Section 17 below.
- c. In order to exercise a right to terminate this Agreement, a Party must deliver written notice of termination to counsel for all other Parties within ten (10) days after the later of the event creating the right to terminate or the Party learning of the event creating the right to terminate, unless that deadline is extended by written consent of counsel for all Parties.
- d. If a Party exercises a right to terminate this Agreement, (i) the Parties shall have thirty (30) days to resume settlement negotiations and determine if the Parties can reach an amended agreement, including without limitation with the assistance of a mediator; (ii) all deadlines under this Agreement shall be stayed for the duration of the



negotiations; (iii) the Parties shall jointly request a stay of all Court deadlines for the duration of the negotiations; and (iv) the Parties shall jointly advise the Court of the status of this Agreement or any amendment to this Agreement within seven (7) days after the conclusion of the thirty-day negotiation period.

- e. Unless the Parties agree otherwise in writing, thirty-one (31) days after a Party exercises a right to terminate this Agreement:
  - i. The Agreement shall become null and void and of no further force and effect.
  - ii. Any unused portion of the Settlement Fund shall be returned to the Settling Defendants on a pro rata basis.
  - iii. The Action shall resume as if the Parties never entered into the Agreement.
  - iv. The Parties shall be restored to their respective positions in the Action as of the Execution Date, with all of their respective legal claims and defenses preserved as they existed on that date.
  - v. The Parties shall jointly move to vacate any orders entered in connection with the Settlement.
  - vi. The Parties shall jointly move for the entry of a scheduling order establishing procedures and deadlines for, among other things, a class certification hearing.
  - vii. The Agreement and any negotiations, statements, term sheets, communications, or proceedings relating thereto, the Preliminary Approval Order, and the fact that the Parties agreed to the Agreement shall not be offered as an admission or concession by any of the Parties or Settlement Class Members or as evidentiary, impeachment, or other material available for use or subject to discovery in any suit, action, or proceeding (including this Action) before any civil or criminal court, administrative agency, arbitral body, or other tribunal. No Party shall be deemed to have waived any claims, objections, rights or defenses, or legal arguments or positions, including but not limited to, claims or objections to class certification, or claims or defenses on the merits. Each Party reserves the right to prosecute or defend this Action in the event that this Agreement does not become final and binding.
- f. If a Party breaches the Agreement after the Effective Date, none of the Parties may terminate the Agreement and any aggrieved Parties may seek relief only from the breaching Party. In no event shall any non-breaching Party have any liability arising out of or related to a breach of the Agreement by any other Party.

## 16. Confidentiality

- a. The Parties agree that the individual contributions made by each Settling Defendant to the Total Settlement Payment described in Section 2(b)(i) of this Agreement is confidential, and each Party agrees that they will not state, disclose, imply, or in any

way communicate to anyone any Settling Defendant's individual contribution to the Total Settlement Payment.

- b. While the Parties represent that this Agreement would not have been consummated absent this confidentiality provision, the Parties acknowledge that One Hundred Dollars (\$100.00) of the Total Settlement Payment represents consideration for the promises to maintain strict confidentiality of each Defendant's individual contribution to the Total Settlement Payment.
- c. The Parties acknowledge that the actual damages incurred for a violation of this confidentiality provision set forth in this Agreement would be impossible or very difficult to ascertain or prove with certainty. Therefore, the Parties agree that, in addition to reimbursing the non-breaching Party for all costs, including attorneys' fees, if any, incurred in establishing a breach of Section 16 of this Agreement, in the event of such breach, the non-violating or non-breaching Party shall be entitled to recover liquidated damages from the violating or breaching Party in the amount of Ten Thousand Dollars (\$10,000) for each violation thereof, and that each separate instance shall constitute a separate violation for purposes of calculating the damages incurred. The Parties further agree that the \$10,000 liquidated damages amount constitutes reasonable and just compensation for the harm that would be caused by any violation of Section 16; and, therefore, the Parties agree to accept this sum as liquidated damages, and not as a penalty, in the event of a violation of the confidentiality provision set forth in Section 16.
- d. Nothing herein prevents any Party from disclosing the Settling Defendants' individual contributions to the Total Settlement Payment to the extent required by law, court order, or subpoena. However, if any Party receives notice, or otherwise learns, of any attempt to compel disclosure of terms or information the disclosure of which is prohibited by this Section, that Party shall promptly, and in no event more than five (5) business days after learning of the attempt, provide to the other Parties, by email, notice of the attempt so that the other Parties have an adequate opportunity to oppose the disclosure. Notices to the Parties shall be sent to the Parties' attorneys listed in Section 17(p).

## 17. **Supplemental Agreements**

- a. In addition to the provisions contained in Section 15, each Defendant shall have the right, but not the obligation, in its sole discretion, to terminate this Agreement pursuant to the Confidential Opt-Out Agreement to be executed by Plaintiffs and the Settling Defendants contemporaneously with the execution of this Agreement. This Agreement shall not be fully executed or enforceable without Plaintiffs' and the Settling Defendants' execution of the Confidential Opt-Out Agreement. The Confidential Opt-Out Agreement shall not be submitted to the Court except in the event of a dispute thereunder, in which case the Parties shall seek to file it only under seal.

18. **Miscellaneous**

- a. Jurisdiction and Venue. The United States District Court for the Eastern District of New York shall retain jurisdiction over the Parties and Settlement Class Members to interpret, implement, administer, and enforce the terms of this Agreement and resolve any dispute regarding this Agreement, the Settlement, the Preliminary Approval Order, or the Final Approval Order. All proceedings related to this Agreement, the Settlement, the Preliminary Approval Order, or the Final Approval Order shall be initiated and maintained in the United States District Court for the Eastern District of New York.
- b. Governing Law. The Agreement shall be governed by and construed in accordance with the law of the State of New York without regard for choice-of-law or conflict-of-laws principles.
- c. All Reasonable Efforts. The Parties agree to cooperate with one another and use all reasonable efforts to support, promote, and obtain court approval and finality, and to exercise reasonable efforts to accomplish the terms and conditions of this Agreement.
- d. Voluntary Settlement: The Parties and their counsel agree that, in consideration of all the circumstances, and after significant, adversarial arm's-length settlement negotiations among counsel and with the assistance of a mediator, the proposed Settlement embodied in this Agreement is fair, reasonable, adequate, and in the best interests of the Settlement Classes, and was reached voluntarily after consultation with competent legal counsel.
- e. Binding Nature. This Agreement shall be binding upon and inure to the benefit of the Parties, the Settlement Class Members, and their respective agents, employees, representatives, heirs, executors, administrators, successors, and assigns.
- f. Failure of Plaintiff to be Appointed Class Representative. In the event that one or more Plaintiffs fails to secure Court approval to act as a class representative, the validity of this Agreement as to the remaining class representatives and the Settlement Classes shall be unaffected.
- g. Mistake. Each of the Parties to the Agreement has investigated the facts pertaining to it to the extent each Party deems necessary. In entering into this Agreement, each Party assumes the risk of mistake with respect to such facts. This Agreement is intended to be final and binding upon the Parties regardless of any claim of mistake.
- h. Finality. This Agreement is intended to be final and binding among the Parties, and is further intended to be a full and final accord and satisfaction between and among each of them. Each Settling Defendant and Plaintiff relies on the finality of this Agreement as a material factor inducing that Party's execution of this Agreement.
- i. Authorization to Settle. Each of the Parties has all necessary authority to enter into this Agreement, has authorized the execution and performance of this Agreement, and has authorized the Person signing this Agreement on its behalf to do so.

- j. Execution. This Agreement may be executed in counterparts, including via electronic signature, and shall be binding once all Parties have executed the Agreement. The Parties further agree that signatures provided by portable document format (PDF) or other electronic transmission shall have the same force and effect as original signatures.
- k. Dispute Resolution. The Parties will attempt to resolve any disputes regarding this Agreement in good faith. If unable to so resolve a dispute, the Parties will refer the matter to the United States District Court for the Eastern District of New York for resolution.
- l. No Liability. No Person shall have any claim against any Plaintiffs, Settlement Class Members, Class Counsel, Released Parties, counsel for the Settling Defendants, or the Claims Administrator based on actions that any Plaintiffs, Settlement Class Members, Class Counsel, Released Parties, counsel for Settling Defendants, or the Claims Administrator were required or permitted to take under this Agreement, the Preliminary Approval Order, or the Final Approval Order. No Person shall have any claim against any Released Parties or counsel for Settling Defendants related to administration of the Settlement. No Person shall have any claim against Plaintiffs, Class Counsel, or the Claims Administrator related to the administration of the Settlement (including making payments to Settlement Class Members), except for in the presence of proven willful misconduct.
- m. Entire Agreement. This Agreement and the Confidential Opt-Out Agreement constitute the entire agreement of the Parties with respect to the subject matter thereof, and they supersede all prior and contemporaneous oral and written agreements and discussions among them on that subject matter. The Settlement is not subject to any condition, representation, warranty, or inducement not expressly provided for herein, and there exist no collateral or oral agreements, promises, conditions, representations, warranties, or inducements among any of the Parties, Class Counsel, Settling Defendants, or counsel for the Settling Defendants relating to the subject matter of the Agreement and the Confidential Opt-Out Agreement that supersede or supplement the Agreement and the Confidential Opt-Out Agreement.
- n. Deadlines. If the last date for the performance of any action required or permitted by this Agreement falls on a Saturday, Sunday, or Court or public holiday, that action may be performed on the next business day as if it had been performed within the time period provided for performance of the action.
- o. Reasonable Extensions. Unless the Court orders otherwise, the Parties may agree in writing to any reasonable extensions of time to carry out any of the provisions of this Agreement.
- p. Notices. Any notice, demand, or other communication under this Agreement (other than the Class Notice) shall be in writing and shall be deemed duly given if it is addressed to the intended recipient as set forth below and personally delivered, sent by registered or certified mail (postage prepaid), sent by confirmed email, or delivered by reputable express overnight courier:

To Plaintiffs or Settlement Class Members:

James J. Bilborrow  
Weitz & Luxenberg, PC  
700 Broadway  
New York, New York 10003  
[jbilborrow@weitzlux.com](mailto:jbilborrow@weitzlux.com)

To Bactolac:

Matthew D. Kelly  
SEGAL MCCAMBRIDGE SINGER & MAHONEY, LTD.  
233 S. Wacker Dr., Suite 5500  
Chicago, IL 60606  
[mkelly@smsm.com](mailto:mkelly@smsm.com)

To NaturMed:

Sheila Carmody  
Courtney Henson  
Snell & Wilmer LLP  
One Arizona Center  
400 E. Van Buren St., Suite 1900  
Phoenix, AZ 85004-2202  
[scarmody@swlaw.com](mailto:scarmody@swlaw.com)  
[chenson@swlaw.com](mailto:chenson@swlaw.com)

To IVL2:

Anthony Austin  
Fennemore Craig, P.C.  
2394 East Camelback Road  
Suite 600  
Phoenix, AZ 85016  
[aaustin@fennemorelaw.com](mailto:aaustin@fennemorelaw.com)

Any notice required to be sent to the Claims Administrator shall be delivered to his, her, or its official business address.


- q. Waiver. The provisions of this Agreement may be waived only by written agreement signed by the waiving party. The waiver by any Party of any breach of this Agreement shall not be deemed to be or construed as a waiver of any other breach of this Agreement.
- r. Materiality of Exhibits. All of the Exhibits to the Settlement Agreement are material and integral parts hereof.

- s. Severability. The provisions of this Agreement are not severable, except as provided in the Agreement.
- t. Third-Party Beneficiaries. This Agreement does not create any third-party beneficiaries, except Settlement Class Members and the Released Parties other than the Settling Defendants, who are intended third-party beneficiaries.
- u. Force Majeure. The failure of any Party to perform any of its obligations hereunder shall not subject any Party to any liability or remedy for damages, or otherwise, where such failure is occasioned in whole or in part by Acts of God, fires, accidents, pandemics, other natural disasters, interruptions or delays in communications or transportation, labor disputes or shortages, shortages of material or supplies, governmental laws, rules or regulations of other governmental bodies or tribunals, acts or failures to act of any third parties, or any other similar or different circumstances or causes beyond the reasonable control of such Party.
- v. No Admission. Defendants expressly deny all allegations of wrongdoing or liability with respect to the claims and allegations in the Action and deny that the Action could have been properly maintained as a class action. It is expressly agreed that neither this Settlement, the Settlement Agreement and Release, any document referred to herein, nor any action taken to carry out the Settlement is, may be construed as, or may be used as, an admission by Defendants of any fault, wrongdoing or liability whatsoever with respect to the claims and allegations in the Action. By agreeing to settle the claims of the Settlement Class in the Action, Defendants do not admit that the Action could have been properly maintained as a contested class action and the Settlement Class does not admit any deficiency in the merits of their claims. Defendants assert they have valid defenses to Plaintiffs' and the Class Members' claims and are entering into the Settlement solely to compromise the disputed claims and avoid the risk and expense of continued litigation. Entering into or carrying out the Settlement Agreement and Release, and any negotiations or proceedings related thereto, is not, and shall not be construed as, or deemed to be evidence of, an admission or concession by any of the Parties to the Settlement Agreement and shall not be offered or received in evidence in any action or proceeding by or against any Party hereto in any court, administrative agency or other tribunal for any purpose whatsoever other than to enforce the provisions of the Settlement between Defendants and any Class Member(s), the provisions of the Settlement Agreement and Release, or the provisions of any related agreement, order, judgment or release.

[SIGNATURES ON NEXT PAGE]

**APPROVED AND AGREED TO:**

**Class Counsel**

  
By: James B. Bickman  
Date: 12/9/21

**Defendant Bactolac Pharmaceutical, Inc.**

\_\_\_\_\_  
By:  
Position:  
Date:

**Defendant NaturMed, Inc.**

\_\_\_\_\_  
By:  
Position:  
Date:

**Defendant Independent Vital Life LLC**

\_\_\_\_\_  
By:  
Position:  
Date:

**APPROVED AND AGREED TO:**

**Class Counsel**

\_\_\_\_\_  
By:  
Date:

**Defendant Bactolac Pharmaceutical, Inc.**

\_\_\_\_\_  
By: *P. M. Ready*  
Position: *Chief Executive Officer*  
Date: *11/22/2021*

**Defendant NaturMed, Inc.**

\_\_\_\_\_  
By:  
Position:  
Date:

**Defendant Independent Vital Life LLC**

\_\_\_\_\_  
By:  
Position:  
Date:



**APPROVED AND AGREED TO:**

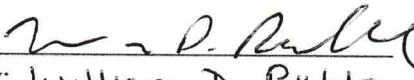
**Class Counsel**

\_\_\_\_\_  
By:  
Date:

**Defendant Bactolac Pharmaceutical, Inc.**

\_\_\_\_\_  
By:  
Position:  
Date:

**Defendant NaturMed, Inc.**

  
\_\_\_\_\_  
By: William D. Ruble  
Position: President (thru 4/15/17)  
Date: 11/22/2021

**Defendant Independent Vital Life LLC**

\_\_\_\_\_  
By:  
Position:  
Date:

**APPROVED AND AGREED TO:**

**Class Counsel**

\_\_\_\_\_  
By:  
Date:


**Defendant Bactolac Pharmaceutical, Inc.**

\_\_\_\_\_  
By:  
Position:  
Date:

**Defendant NaturMed, Inc.**

\_\_\_\_\_  
By:  
Position:  
Date:

**Defendant Independent Vital Life LLC**

  
\_\_\_\_\_  
By: **DON EGILE**  
Position: **MANAGER**  
Date: **11-30-21**

# EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

## If you purchased one or more canisters of All Day Energy Greens or All Day Energy Greens Fruity in 2014 or 2015, you could get benefits from a class action settlement.

*A federal court authorized this Notice. It is not a solicitation from a lawyer.*

- A Settlement has been reached with Bactolac Pharmaceutical, Inc. (“Bactolac”), NaturMed, Inc. (d/b/a Institute for Vibrant Living) (“NaturMed”), and Independent Vital Life, LLC (“IVL2”) in a class action lawsuit about the sale of certain voluntarily recalled lots of the dietary supplement All Day Energy Greens and All Day Energy Greens Fruity (collectively, “ADEG”) in 2014 and 2015.
- The Settlement includes all Persons in the United States who purchased one or more canisters of ADEG that were manufactured as part of the Recalled Lots.
- The Recalled Lots consists of 99 lots of ADEG manufactured in 2014 and 2015 that were included in the March 2016 voluntary product recall of ADEG conducted by NaturMed with the knowledge of the Food and Drug Administration. The list of Recalled Lots is available on the settlement’s website [NaturMedIVLSettlement.com](http://NaturMedIVLSettlement.com).
- Your legal rights are affected regardless of whether you act or don’t act. Read this notice carefully.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT	
<b>SUBMIT A CLAIM FORM</b>	This is the only way you can get a payment or other benefits from this Settlement.
<b>EXCLUDE YOURSELF FROM THE SETTLEMENT</b>	Do not get a payment or other settlement benefits. This is the only option that allows you to be part of any other lawsuit against the Released Parties, including the Settling Defendants, for the legal claims made in this lawsuit and released by the Settlement.
<b>OBJECT TO THE SETTLEMENT</b>	Write to the Court with reasons why you do not agree with the Settlement.
<b>GO TO THE FINAL APPROVAL HEARING</b>	You may ask the Court for permission for you or your attorney to speak about your objection at the Final Approval Hearing.
<b>DO NOTHING</b>	You will not get a payment or other benefits from this Settlement and you will give up certain legal rights.

- These rights and options—and the deadlines to exercise them—are explained in this Notice.
- The Court overseeing this case still has to decide whether to approve the Settlement.

### BASIC INFORMATION

#### 1. Why is this Notice being provided?

The Court directed that this Notice be provided because you have a right to know about a proposed settlement that has been reached in this class action lawsuit and about all of your options before the Court decides whether to grant final approval to the Settlement. This Notice explains the lawsuit, the Settlement, your legal rights, what benefits are available, who is eligible for them, and how to get them.

The Court in charge of this case is the United States District Court for the Eastern District of New York. There are two cases consolidated for pretrial proceedings, known as *Copley v. Bactolac Pharmaceutical, Inc. et al.*, No. 2:18-cv-00575-FB-PK, and *Faris v. Bactolac Pharmaceutical, Inc. et al.*, No. 1:20-cv-1338-FB-PK (the “Action”). U.S. District Court Judge Frederic Block is presiding over the Action. The people who filed the lawsuit are called Plaintiffs. The companies they sued, Bactolac, NaturMed, and IVL2, are called Defendants. This Settlement is between Plaintiffs and the Defendants.

#### 2. What is this lawsuit about?

Plaintiffs claim that 99 lots of ADEG manufactured in 2014 and 2015 by Bactolac and sold to consumers by NaturMed contained ingredients not identified on the product label and omitted certain ingredients required by the product formula, which caused the supplement to be adulterated. Plaintiffs allege that the manufacture and sale of adulterated ADEG renders Bactolac and NaturMed liable under theories of breach of warranty, state consumer protection statutes, and under common law tort theories for monetary damages. Plaintiffs further allege that IVL2 is a mere continuation of NaturMed and is liable for the wrongful acts committed by its predecessor.

The Defendants deny Plaintiffs’ allegations, and any alleged wrongdoing in connection with the manufacture and sale of ADEG, and dispute the factual, legal, scientific, and other bases for Plaintiffs’ claims.

QUESTIONS? CALL 1-\_\_\_\_-\_\_\_\_-\_\_\_\_ TOLL-FREE OR VISIT \_\_\_\_\_

**3. What is a class action?**

In a class action, one or more people called representative Plaintiffs (in this case, Charles Copley, Jason Evans, Humberto Garcia, Luz Angelina Garcia, Joan McDonald, John Peterson, Natalie Roberts, Norman Skare, individually and as personal representative for Betty Skare, David Stone, Kaye Wink, individually and as next of kin of Donald Wink, Jeffrey Faris, Antonia Hampton, Raul Robles, and Kathleen Cannon) sue on behalf of people who have similar claims. Together, all these people and the Persons that they represent are called Settlement Class Members. One Court resolves the issues for all Settlement Class Members, except for those who exclude themselves from the Settlement Classes.

**4. Why is there a Settlement?**

The Court did not decide in favor of the Plaintiffs or the Defendants. Instead, the Plaintiffs and Defendants agreed to a settlement. This way, they avoid the cost and burden of a trial and eligible Settlement Class Members can get benefits and more quickly. The class representative Plaintiffs and their attorneys ("Class Counsel") think the Settlement is best for all Settlement Class Members.

**WHO IS INCLUDED IN THE SETTLEMENT?****5. How do I know if I am part of the Settlement?**

You are part of the Settlement as a Settlement Class Member if you are a Person in the United States who purchased one or more canisters of ADEG that were manufactured as part of the Recalled Lots (unless you fall into one of the exclusions described in Section 6).

The Recalled Lots are 99 lots included in the March 2016 voluntary product recall of ADEG conducted by NaturMed with the knowledge of the Food and Drug Administration. The lot numbers for the Recalled Lots are set forth on the Settlement Website [www.NaturMedIVLSettlement.com](http://www.NaturMedIVLSettlement.com).

**6. Are there exceptions to being included in the Settlement?**

Yes. The Settlement does not include (i) any such Person who has timely and validly excluded himself, herself, or herself from the Settlement Class, in accordance with the Settlement's terms; (ii) the Defendants, any entity or division in which the 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 immediate 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 (a) a full refund for his or her purchase, or (b) Replacement Product.

**7. I am still not sure if I am included.**

If you are still not sure whether you are included, you can call 1-\_\_\_\_-\_\_\_\_-\_\_\_\_ or visit [www.NaturMedIVLSettlement.com](http://www.NaturMedIVLSettlement.com) for more information.

**THE SETTLEMENT BENEFITS—WHAT YOU GET IF YOU QUALIFY****8. What does the Settlement provide?**

The Defendants have agreed to pay \$1,725,000 into a Settlement Fund. Eligible Settlement Class Members will have the choice to claim a credit worth \$10.00 toward purchase of any IVL2 product, which will remain valid for three years, or \$5 cash. If, however, the number of claimants electing to receive the cash payment exceeds the \$100,000 Alternative Payment Fund, then each Settlement Class Member electing a cash payment shall receive a pro rata share. If monies remain in the Alternative Payment Fund after payment of \$5 to each Settlement Class Member electing a cash payment, the excess will be distributed pro rata to all such Settlement Class Members.

**HOW TO GET SETTLEMENT BENEFITS—SUBMITTING A CLAIM FORM****9. How do I get a Settlement Credit or Alternative Fund Payment?**

To qualify for a Settlement payment or receive a Settlement Credit, you must complete and submit a Claim Form by **Month \_\_, 2022**. You may submit a Claim Form by returning the form attached to the postcard you received in the mail notifying you of this Settlement, or you may use the online Claim Form available at [www.NaturMedIVLSettlement.com](http://www.NaturMedIVLSettlement.com). Claim Forms are also available by calling 1-\_\_\_\_-\_\_\_\_-\_\_\_\_ or by writing to \_\_\_\_\_ Settlement Administrator, P.O. Box \_\_\_\_\_, City, ST \_\_\_\_\_-\_\_\_\_.

**10. When will I get my payment or Settlement Credit?**



The Court will hold a Final Approval Hearing at \_\_:0 \_\_m. on Month \_\_, 2022 to decide whether to approve the Settlement. If the Court approves the Settlement, there may be appeals. It is always uncertain whether any appeals will be filed and, if so, how long it will take to resolve them. Settlement payments and credits will be distributed as soon as possible, if and when the Court grants final approval to the Settlement and after any appeals are resolved.

#### **11. What am I giving up to get a payment or credit and stay in the Settlement?**

Unless you exclude yourself, you are staying in the Settlement. If the Settlement is approved and becomes final, all of the Court's orders will apply to you and legally bind you. You won't be able to sue or be part of any other lawsuit against the Settling Defendants and the Released Parties (see next question) about the legal issues resolved by this Settlement. The rights you are giving up are called Released Claims.

#### **12. What are the Released Claims?**

If the Settlement is approved and becomes final, Settlement Class Members will have expressly, intentionally, voluntarily, and forever released, compromised, settled, and discharged all claims and damages (statutory, contract, tort, equitable, punitive, interest, or any other relief) that they, along with the Releasing Parties (meaning each Settlement Class Member's predecessors, successors, heirs, assignors, and assignees, and any past and present affiliates, directors, officers, employees, attorneys, agents, consultants, servants, stockholders, members, representatives, subsidiaries, and affiliates of such persons or entities) may have against the Released Parties (meaning Bactolac, NaturMed, and IVL2, and each Defendant's insurers; their respective predecessors, successors, heirs, assignors, and assignees; and any past and present affiliates, directors, officers, employees, attorneys, agents, consultants, servants, stockholders, members, representatives, subsidiaries, and affiliates of the foregoing entities) arising out of or related to the allegations in the Complaint. Without limiting the foregoing, the Released Claims include any and all claims that were, or that could have been, asserted in the Action. The release shall extend to and include Defendants and their affiliates, subsidiaries, predecessors, successors, officers, directors, employees, insurers, and attorneys. The release also shall extend to and include all claims, demands, actions, causes of action, allegations, rights, obligations, costs, losses, and damages arising in whole or in part at any time from January 1, 2014 through the Effective Date from or in connection with the acts or omissions of Defendants or any of the other Released Parties of any and every kind of nature, whether in law or in equity, whether in tort or contract, whether arising under common law, statute, or regulation, whether known or Unknown Claims, based upon the claims that were, or could have been, asserted in the Action. Released Claims are not those claims relating to the enforcement of the Settlement Agreement.

#### **THE LAWYERS REPRESENTING YOU**

#### **13. Do I have a lawyer in this case?**

Yes. The Court appointed James J. Bilsborrow of Weitz & Luxenberg, P.C. as "Class Counsel" to represent you and other Settlement Class Members. This lawyer and his firm is experienced in handling similar cases. You will not be charged for this lawyer. If you want to be represented by your own lawyer, you may hire one at your own expense.

#### **14. How will Class Counsel be paid?**

Class Counsel will ask the Court for an award of attorneys' fees of up to one-third of the Total Settlement Value (up to \$1,207,019), plus reimbursement of reasonable litigation costs. They will also ask the Court to approve \$5,000 service awards to be paid to each of the class representative Plaintiffs (a total payment of \$70,000). The Court may award less than these amounts. If approved, these fees, costs, and awards will be paid from the Settlement Fund before making cash payments or Settlement Credits available to Settlement Class Members.

#### **EXCLUDING YOURSELF FROM THE SETTLEMENT**

#### **15. How do I get out of the Settlement?**

To exclude yourself from the Settlement, you must send a letter by mail stating (1) you want to be excluded from *Copley v. Bactolac Pharmaceutical, Inc.*, No. 2:18-cv-00575 (E.D.N.Y.), (2) your full name, current address, and telephone number, (3) facts that prove you are a Settlement Class member, (4) a statement requesting exclusion from the Settlement Class, and (5) your signature. You must mail your exclusion request postmarked no later than **Month \_\_, 2022** to:

Settlement Administrator  
P.O. Box \_\_\_\_\_  
City, ST \_\_\_\_\_ - \_\_\_\_\_

The Defendants have the right to terminate the settlement if an undisclosed number of class members choose to exclude themselves from the Settlement. If this occurs, the Settlement will be terminated, and no class member will receive any benefits.

#### **16. If I exclude myself, can I still get a payment or other benefits from the Settlement?**

No. If you exclude yourself, you are telling the Court that you don't want to be part of the Settlement. You can only get a payment or Settlement Credits if you stay in the Settlement and submit a valid Claim Form.

**17. If I do not exclude myself, can I sue the Settling Defendants for the same thing later?**

No. If you stay in the Settlement (*i.e.*, do nothing or do not exclude yourself), you give up any right to separately sue any of the Released Parties, including the Defendants, for the claims made in this lawsuit and released by the Class Settlement Agreement.

**OBJECTING TO THE SETTLEMENT**

You can tell the Court that you do not agree with the Settlement or some part of it.

**18. How do I tell the Court that I do not agree with the Settlement?**

If you are a Settlement Class Member, you can object to the Settlement if you do not agree with it or a portion of it. You can give reasons why you think the Court should not approve it. The Court will consider your views. Your objection must include: (1) your full name, current address, and telephone number; (2) a statement of facts that indicate you are a Settlement Class Member; (3) a statement of your objections and the reasons for them; (4) copies of any papers and evidence you intend to submit to support your objection; (5) a statement indicating whether you plan appear at the Final Approval Hearing; (6) a statement indicating that you are willing to be deposed, upon request, on a mutually acceptable date at least 10 days before the Final Approval Hearing; (7) a list containing the case name, court, and docket number of any other class action settlements in which you or your counsel have filed an objection in the past five years, and a copy of all orders related to or ruling upon those objections; (8) all written and verbal agreements between you, your counsel or any other person related to your objection; and (9) your signature.

Your objection must be mailed to Class Counsel and Defense Counsel so it is postmarked no later than **Month \_\_, 2022**.

Class Counsel	Defense Counsel
James J. Bilsborrow Weitz & Luxenberg, P.C. 700 Broadway New York, New York 10003	Matthew Kelly Segal McCambridge Singer & Mahoney 233 S. Wacker Dr., Suite 550 Chicago, IL 60606  Sheila Carmody Courtney Henson Snell & Wilmer LLP One Arizona Center 400 E. Van Buren St., Suite 1900 Phoenix, AZ 85004-2202  Anthony Austin Fennemore Craig, P.C. 2394 East Camelback Rd. Suite 600 Phoenix, AZ 85016

**19. May I come to Court to speak about my objection?**

Yes. You or your attorney may request to speak at the Final Approval Hearing about your objection. To do so, you must include a statement in your objection indicating that you or your attorney intend to appear at the Final Approval Hearing.

**20. What is the difference between objecting to the Settlement and asking to be excluded from it?**

Objecting is simply telling the Court that you don't like something about the Settlement. You can object only if you remain in the Settlement Class (that is, do not exclude yourself). Excluding yourself is telling the Court that you don't want to be part of the Settlement. If you exclude yourself, you cannot object because the Settlement no longer affects you.

**THE COURT'S FINAL APPROVAL HEARING**

The Court will hold a hearing to decide whether to approve the Settlement. You may attend and you may ask to speak, but you don't have to.

**21. When and where will the Court decide whether to approve the Settlement?**

QUESTIONS? CALL 1-\_\_\_\_-\_\_\_\_-\_\_\_\_ TOLL-FREE OR VISIT WWW.NATURMEDIVLSETTLEMENT.COM

The Court will hold a Final Approval Hearing at \_\_:0 a.m. on Month \_\_, 202\_\_, at the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn NY 11201. At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. It will also consider whether to approve Class Counsel's request for an award of attorneys' fees and costs, as well as the class representative Plaintiffs' service awards. If there are objections, the Court will consider them. The Court may listen to people who have asked to speak at the hearing (see Question 19 above). After the hearing, the Court will decide whether to approve the settlement.

**22. Do I have to come to the hearing?**

No. Class Counsel will answer any questions the Court may have. However, you are welcome to come to the hearing at your own expense. If you send an objection, you do not have to come to court to talk about it. As long as you mailed your written objection on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not required that you do so.

**23. May I speak at the hearing?**

Yes. You may ask the Court for permission to speak at the Final Approval Hearing (see Question 19 above).

**IF YOU DO NOTHING**

**24. What happens if I do nothing at all?**

If you are Settlement Class Member and you do nothing, you will give up the rights explained in Question 8, including your right to start a lawsuit or be part of any other lawsuit against the Released Parties, including the Defendants, about the legal issues resolved by this Settlement. In addition, you will not receive a payment or credit from the Settlement.

**GETTING MORE INFORMATION**

**25. How do I get more information?**

This Notice summarizes the proposed Settlement. Complete details are provided in the Class Settlement Agreement. The Settlement Agreement and other documents are available at [www.NaturMedIVLSettlement.com](http://www.NaturMedIVLSettlement.com). Additional information is also available by calling 1-\_\_\_\_-\_\_\_\_-\_\_\_\_ or by writing to \_\_\_\_\_ Settlement Administrator, P.O. Box \_\_\_\_\_, City, ST \_\_\_\_\_-\_\_\_\_. Publicly-filed documents can also be obtained by visiting the office of the Clerk of the United States District Court for the Eastern District of New York or reviewing the Court's online docket.



# EXHIBIT B



Business Reply Mail Content

Postal Service: Do Not Mark or Cover Barcode

1-XXX-XXX-XXXX

www.SettlementWebsite.com

**What Are the Settlement Terms?** The Defendants have agreed to pay \$1,725,000 into a Settlement Fund. Eligible Settlement Class Members will have the choice to claim a credit worth \$10.00 toward purchase of any IVL2 product, which will remain valid for three years, or \$5 cash. If, however, the number of claimants electing to receive the cash payment exceeds the \$100,000 Alternative Payment Fund, then each Settlement Class Member electing a cash payment shall receive a pro rata share. If monies remain in the Alternative Payment Fund after payment of \$5 to each Settlement Class Member electing a cash payment, the excess will be distributed pro rata to all such Settlement Class Members.

**How Can I Get a Payment?** To qualify for a Settlement payment or receive a Settlement Credit, you must complete and submit a Claim Form by Month XX, 2022. You may submit a Claim Form by returning the form attached to the postcard you received in the mail notifying you of this Settlement, or you may use the online Claim Form available at [www.SettlementWebsite.com](http://www.SettlementWebsite.com). Claim Forms are also available by calling 1-XXX-XXX-XXXX or by writing to: *NaturMed/IVL Settlement Administrator*, P.O. Box XXXXX, Baton Rouge, LA 70821.

**Your Other Options.**

**Do Nothing:** If you do nothing, you will not get a payment or other benefits from this Settlement and you will give up certain legal rights allocated to Settlement Class Members.

**Opt-Out:** If you exclude yourself from the Settlement (opt-out), you will not get a payment or other settlement benefits. This is the only option that allows you to be part of any other lawsuit against the Released Parties, including the Settling Defendants, for the legal claims made in this lawsuit and released by the Settlement. You must mail your request for exclusion to the NaturMed/IVL Settlement Administrator **postmarked no later than Month XX, 2022.**

**Object:** You may also object to any part of this Settlement by writing to the Court with reasons why you do not agree with the Settlement. Detailed instructions on how to exclude yourself or object to the Settlement are available on the Settlement Website.

**Has the Court approved the Settlement?** No. The Court will hold a Fairness Hearing at XX:XX a.m./p.m. on Month XX, 2022, at the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, NY 11201. At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. It will also consider whether to approve Class Counsel's request for an award of attorneys' fees and costs, as well as the class representative Plaintiffs' service awards. If there are objections, the Court will consider them. The Court may listen to people who have asked to speak at the hearing. After the hearing, the Court will decide whether to approve the Settlement.

**How Do You Get More Information?** This notice is only a summary. To obtain a detailed information, find answers to common questions about the Settlement plus other information, including a copy of the Settlement Agreement, visit the Settlement Website.

# EXHIBIT C

**Lot Numbers Recalled**

1. 1406027	7/10/14 (Copley Bacto 00001395)
2. 1406028	7/10/14 (Copley Bacto 00001417)
3. 1406029	7/22/14 (Copley Bacto 00001436)
4. 1406030	7/10/14 (Copley Bacto 00001456)
5. 1406326	7/25/14 (Copley Bacto 00001476)
6. 1406327	7/29/14 (Copley_Bacto_00010313)
7. 1406328	7/30/14 (Copley Bacto 00001496)
8. 1406329	8/5/14 (Copley Bacto 00001516)
9. 1406330	8/12/14 (Copley Bacto 00001536)
10. 1406331	8/12/14 (Copley Bacto 00001556)
11. 1406332	8/18/14 (Copley Bacto 00001576)
12. 1406333	8/18/14 (Copley Bacto 00001596)
13. 1406334	8/19/14 (Copley Bacto 00001616)
14. 1406335	8/19/14 (Copley_Bacto_00010333)
15. 1406336	8/26/14 (Copley Bacto 00001336)
16. 1406337	8/25/14 (Copley Bacto 00001656)
17. 1406338	8/25/14 (Copley Bacto 00001676)
18. 1406339	8/26/14 (Copley_Bacto_00010480)
19. 1406340	9/2/14 (Copley Bacto 00001695)
20. 1406341	9/2/14 (Copley Bacto 00001715)
21. 1406398	9/8/14 (Copley Bacto 00001735)
22. 1406399	9/10/14 (Copley Bacto 00001755)
23. 1406400	9/11/14 (Copley Bacto 00001774)
24. 1406401	10/10/14 (Copley Bacto 00001793)
25. 1406402	11/5/14 (Copley Bacto 00001812)
26. 1406403	11/5/14 (Copley Bacto 00001832)
27. 1412322	1/16/15 (Copley Bacto 00002660)
28. 1412323	1/16/15 (Copley Bacto 00002632)
29. 1412324	1/20/15 (Copley Bacto 00001938)
30. 1412325	1/21/15 (Copley Bacto 00002779)
31. 1412326	1/26/15 (Copley Bacto 00001211)
32. 1412327	2/3/15 (Copley Bacto 00001965)
33. 1412328	2/16/15(Copley Bacto 00002804)
34. 1412329	2/16/15 (Copley Bacto 00001992)
35. 1412330	2/18/15 (Copley Bacto 00002016)
36. 1412331	2/18/15 (Copley Bacto 00002043)
37. 1412406	3/2/15 (Copley Bacto 00002351)
38. 1412407	3/4/15 (Copley Bacto 00002377)
39. 1412408	3/24/15 (Copley_Bacto_00010527)
40. 1412409	3/30/15 (Copley Bacto 00002403)
41. 1412410	3/23/15 (Copley Bacto 00002430)
42. 1412411	3/30/15 (Copley Bacto 00002455)
43. 1412412	3/30/15 (Copley_Bacto_00010553)
44. 1412413	3/30/15 (Copley Bacto 00002479)

45. 1501255	4/13/15 (Copley Bacto 00002554)
46. 1501256	4/13/15 (Copley_Bacto_00010455)
47. 1501257	4/13/15 (Copley_Bacto_00010684)
48. 1501258	4/14/15 (Copley_Bacto_00010709)
49. 1505189	6/9/15 (Copley Bacto 00002505)
50. 1501259	5/1/15 (Copley_Bacto_00010734)
51. 1501260	5/1/15 (Copley Bacto 00002608)
52. 1501261	5/4/15 (Copley_Bacto_00010760)
53. 1501262	5/4/15 (Copley_Bacto_00010787)
54. 1501263	5/4/15 (Copley_Bacto_00010813)
55. 1501264	5/4/15 (Copley_Bacto_00010841)
56. 1501265	5/11/15 (Copley_Bacto_00010868)
57. 1501266	5/11/15 (Copley_Bacto_00010893)
58. 1505190	6/22/15 (Copley Bacto 00002530)
59. 1505191	6/22/15 (Copley Bacto 00002581)
60. 1405460	7/23/14 (Copley Bacto 00001236)
61. 1405461	7/21/14 (Copley Bacto 00001255)
62. 1405462	7/29/14 (Copley Bacto 00001275)
63. 1405463	7/31/14 (Copley Bacto 00001295)
64. 1405464	8/18/14 (Copley Bacto 00001315)
65. 1405465	8/18/14 (Copley Bacto 00001335)
66. 1405466	8/26/14 (Copley Bacto 00001355)
67. 1405467	8/19/14 (Copley Bacto 00001375)
68. 1407114	9/3/14 (Copley_Bacto_00010500)
69. 1407115	9/4/14 (Copley Bacto 00001852)
70. 1407116	9/4/14 (Copley Bacto 00001872)
71. 1407117	9/8/14 (Copley Bacto 00001892)
72. 1407118	10/28/14 (Copley Bacto 00001912)
73. 1407119	10/28/14 (Copley Bacto 00002685)
74. 1412332	1/5/15 (Copley Bacto 00002072)
75. 1412333	1/14/15 (Copley Bacto 00002101)
76. 1412337	1/30/15 (Copley Bacto 00002209)
77. 1412334	2/4/15 (Copley Bacto 00002128)
78. 1412335	2/10/15 (Copley Bacto 00002153)
79. 1412336	2/10/15 (Copley Bacto 00002181)
80. 1412338	3/10/15 (Copley Bacto 00002235)
81. 1412339	3/10/15 (Copley Bacto 00002262)
82. 1412340	3/10/15 (Copley Bacto 00002296)
83. 1412341	3/10/15 (Copley Bacto 00002324)
84. 1412415	3/24/15 (Copley_Bacto_00010578)
85. 1412416	4/6/15 (Copley_Bacto_00010606)
86. 1412417	4/6/15 (Copley_Bacto_00010353)
87. 1412418	4/6/15 (Copley_Bacto_00010379)
88. 1412419	4/6/15 (Copley_Bacto_00010407)
89. 1412420	4/6/15 (Copley_Bacto_00010632)
90. 1412421	4/6/15 (Copley_Bacto_00010433)

91. 1505180	<b>6/9/15 (Copley_Bacto_00010969)</b>
92. 1412422	<b>4/15/15 (Copley_Bacto_00010656)</b>
93. 1502434	<b>4/28/15 (Copley_Bacto_00010916)</b>
94. 1502435	<b>4/28/15 (Copley_Bacto_00010943)</b>
95. 1505181	<b>6/15/15 (Copley Bacto 00002754)</b>
96. 1505182	<b>6/15/15 (Copley_Bacto_00011010)</b>
97. 1505183	<b>6/15/15 (Copley_Bacto_00011035)</b>
98. 1505184	<b>6/15/15 (Copley Bacto 00002729)</b>
99. 1505185	<b>6/15/15 (Copley Bacto 00002705)</b>

# EXHIBIT D



## COUPON SAVINGS BUCKS

.....  
\$10 of any purchase

Independent Vital Life, LLC

Good for one use only. Expires \_\_\_\_\_

Call 1-800-218-1379

COUPON CODE · **RS10D**

[www.independentvitallife.com](http://www.independentvitallife.com)

# EXHIBIT E

**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.

**[PROPOSED] PRELIMINARY APPROVAL ORDER**

Plaintiffs Charles Copley, Jason Evans, Humberto Garcia, Luz Angelina Garcia, Joan McDonald, John Peterson, Natalie Roberts, Donald Skare, individually and as personal representative for Betty Skare, David Stone, Kaye Wink, individually and as next of kin of Donald

Wink, Jeffrey Faris, Antonia Hampton, Raul Robles, and Kathleen Cannon (hereafter, “Plaintiffs”), on behalf of themselves and the Settlement Class Members, and Defendants Bactolac Pharmaceutical, Inc., NaturMed, Inc., and Independent Vital Life, LLC (hereafter, “Settling Defendants”), by their respective counsel, have submitted a Settlement Agreement to this Court, and Plaintiffs have moved under Federal Rule of Civil Procedure 23(e) for an order: (1) preliminarily certifying the Settlement Class for purposes of settlement, and appointing Plaintiffs as class representatives and their counsel as Class Counsel; (2) preliminarily approving the Settlement; (3) approving the Notice Program; (4) appointing Postlethwaite & Netterville (“P&N”) as Claims Administrator and directing it to commence the Notice Program; (5) providing legal authority pursuant to N.Y. C.P.L.R. § 1207 for legal representatives of absent Settlement Class Members to sign Claim Forms and releases on behalf of the Settlement Class Members they represent; and (6) scheduling a Final Approval Hearing to consider final approval of the settlement and any application for attorneys’ fees, expenses, and Service Awards. The Court has considered the terms of the Settlement, the exhibits to the Settlement Agreement, the record of proceedings, and all papers and arguments submitted in support, and now finds that the motion should be, and hereby is, **GRANTED**.

**ACCORDINGLY, THE COURT FINDS AND ORDERS:**

1. This Court has jurisdiction over the subject matter of this lawsuit and jurisdiction over the Plaintiffs and Settling Defendants (the “Parties”) for purposes of the Settlement.
2. Capitalized terms not otherwise defined in this Order have the definitions set forth in the Settlement Agreement.

**SUMMARY OF THE LITIGATION AND SETTLEMENT**

3. On January 26, 2018, Plaintiffs filed a complaint on behalf of a putative nationwide class of consumers who purchased ADEG on or after July 1, 2014 that were manufactured and/or blended by Bactolac between January 1, 2014 and December 31, 2015, as well as putative statewide purchaser classes from Virginia, Texas, South Carolina, Alabama, Missouri, Wisconsin, Illinois, and Kentucky. Plaintiffs alleged violations of the Magnuson-Moss Warranty Act, state law consumer protection statutes, state law express and implied warranties, and common law theories of fraudulent concealment, negligent misrepresentation, and unjust enrichment. In addition to the Settling Defendants, Plaintiffs named two additional parties as defendants: HKW Capital Partners III, L.P., and William D. Ruble.

4. On July 13, 2018, Plaintiffs filed an amended complaint alleging similar theories of harm. The amended complaint added Plaintiffs Jason Evans and Joan McDonald, sought certification of putative statewide California and Oregon classes, and did not name HKW Capital Partners III, L.P. or William D. Ruble as defendants.

5. On July 27, 2018, Defendant NaturMed, Inc. (“NaturMed”) answered the amended complaint and filed crossclaims against Defendant Bactolac Pharmaceutical, Inc. (“Bactolac”), alleging contractual indemnity, breach of contract, fraud, breach of express warranty, breach of implied warranty, and negligence causes of action. Defendant Independent Vital Life, LLC (“IVL2”) filed an answer to the amended complaint on August 10, 2018. Bactolac did not file an answer to the amended complaint.

6. On August 13, 2018, the Parties appeared for a conference before Magistrate Judge Kuo. At that time, Judge Kuo ordered discovery to commence pursuant to a joint proposed scheduling order. 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.). Discovery commenced in earnest soon thereafter.

7. 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). In particular, Bactolac did not move to dismiss the following claims pled in the amended complaint: (i) violation of the Arizona Consumer Fraud Act; (ii) fraudulent concealment; and (iii) negligent misrepresentation. Bactolac also moved to dismiss NaturMed's crossclaims pursuant to Federal Rule of Civil Procedure 12(c). These motions were fully briefed by February 28, 2019.

8. Following the August 13, 2018 conference with the Court, the Parties engaged in significant discovery efforts, involving several sets of written discovery served by and on each party, voluminous document productions, regular status reports to Magistrate Judge Kuo, depositions of each Plaintiff as well as ten depositions of current or former Bactolac employees, one Rule 30(b)(6) deposition of Bactolac, five depositions of former NaturMed employees, and a deposition of the current owner of IVL2, for a total of 29 depositions. 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 also conducted several depositions remotely using Zoom.

9. On February 18, 2020, fact discovery closed in the *Copley* matter. Plaintiffs thereafter served two experts 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, 2021.

10. On March 12, 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 purchaser classes. Plaintiffs alleged violations of state consumer protection laws, as well as common law claims of fraudulent concealment, negligent misrepresentation, and unjust enrichment. The allegations underlying the *Faris* complaint were substantially similar to those pled in the *Copley* complaint.

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

12. On July 10, 2020, Plaintiffs filed a consent motion to consolidate the *Faris* matter with the *Copley* matter. After a hearing with Magistrate Judge Kuo on July 13, 2020, the Court granted the consent motion to consolidate and consolidated the *Copley* and *Faris* matters for pretrial proceedings.

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

14. On September 23, 2020, Plaintiffs moved for class certification in the consolidated proceeding. 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. Each of the Settling Defendants filed a brief opposing Plaintiffs' motion on October 27, 2020. 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.

15. On October 26, 2020, Plaintiffs also 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. This motion was fully briefed on November 16, 2020.

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. On the same date, NaturMed moved to exclude Dr. Cowan, as well as one of Bactolac's experts, James Lassiter. Plaintiffs also moved, on the same date, to exclude Mr. Lassiter, as well as Kendal D. Hirschi, Ph.D. On January 4, 2021, NaturMed withdrew its motion to exclude Plaintiffs' expert, Dr. Cowan. The remaining *Daubert* motions were fully briefed on January 4, 2021.

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

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) and motion for



judgment on the pleadings on NaturMed's crossclaims pursuant to Federal Rule of Civil Procedure 12(c). In particular, 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 Plaintiffs' common law unjust enrichment claims. The Court denied Bactolac's motion in all other respects, including its motion to strike Plaintiffs' request for punitive damages. In addition, the Court granted Bactolac's Rule 12(c) motion with respect 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.

19. On March 25, 2021, the Court conducted a status conference and directed the Parties to consider participating in the Court's mediation program. The parties thereafter consented to participate in the Court's mediation program and agreed to the appointment of Joseph DiBenedetto of JDB Mediation LLC as mediator.

20. On July 9, 2021, the Parties engaged in a full-day mediation at arms-length before Mr. DiBenedetto, at the conclusion of which the Parties reached an agreement in principle. They then spent the next several months negotiating the detailed written Settlement Agreement and exhibits that are now before the Court.

21. The Settlement provides, among other things, that as consideration for the release from Settlement Class Members, the Settling Defendants will pay \$1,725,000 in cash into a Settlement Fund and IVL2 will make available to the Settlement Class a total of \$1,889,420 in Settlement Credits. From the cash settlement, the Claims Administrator will create a \$100,000 Alternative Payment Fund. Each eligible Settlement Class Member will have the choice to receive

either a \$10 Settlement Credit redeemable for any IVL2 product for up to three years or a \$5 cash payment from the Alternative Payment Fund.

22. The Settlement also provides for postcard Notice to be mailed directly to customers who purchased one or more canisters of ADEG from the Recalled Lots. Settlement Class Members will have the option to either return the postcard (at no charge) to file a claim or to proceed to the Settlement Website to file a claim online.

### **PRELIMINARY APPROVAL**

23. Federal Rule of Civil Procedure 23(e) requires court approval of class action settlements. In general, the approval process involves three stages: (1) notice of the settlement to the class after “preliminary approval” by the Court; (2) an opportunity for class members to opt out of, or object to, the proposed settlement; and (3) a subsequent hearing at which the Court grants “final approval” upon finding that the settlement is “fair, reasonable, and adequate,” after which judgment is entered, class members receive the benefits of the settlement, and the settling defendants obtain a release from liability. Fed. R. Civ. P. 23(e)(1)-(2), (4)-(5).

24. In deciding whether to grant “preliminary approval” of a proposed settlement, the Court evaluates two issues: (1) whether “the court will likely be able to” grant final approval to the settlement as a “fair, reasonable, and adequate” compromise, such that it makes sense to give notice to the proposed class members; and (2) whether “the court will likely be able to” certify the classes for purposes of entering judgment on the settlement. Fed. R. Civ. P. 23(e)(1)(B).

#### **I. The Court will “likely be able to” grant final approval to the Settlement as “fair, reasonable, and adequate.”**

25. This Circuit has recognized a “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). The compromise of complex litigation is encouraged by the courts and reflects “that

judicial policy favors the settlement and compromise of class actions.” *Dover v. British Airways, PLC*, 323 F. Supp. 3d 338, 349 (E.D.N.Y. 2018) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005)). A “presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.” *Wal-Mart Stores*, 396 F.3d at 116 (quoting *Manual for Complex Litigation (Third)* § 30.42 (1995)).

26. Under Federal Rule of Civil Procedure 23(e)(2), as amended in December 2018, in considering whether a proposed settlement is “fair, reasonable, and adequate,” the Court considers whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm’s length;
- (C) the relief provided for the class is adequate, taking into account:
  - (i) the costs, risks, and delay of trial and appeal;
  - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
  - (iii) the terms of any proposed award of attorneys’ fees, including timing of payment; and
  - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

27. Under this standard, the Court finds that it will “likely be able to” grant final approval to the Settlement as “fair, reasonable, and adequate,” such that the Settlement, its terms

and conditions, including releases of the Released Parties, warrants preliminary approval and dissemination of notice to the Settlement Classes so that Settlement Class Members may express any objections to the Settlement or decide whether to opt out of the Settlement or participate in it. The Settlement appears at this preliminary approval stage to be procedurally fair, reasonable, and adequate in that the Plaintiffs and Class Counsel have adequately represented the Settlement Classes in litigating the merits of the dispute and in obtaining a Settlement of significant value through arm's-length negotiations between and among sophisticated counsel and under the auspices of a sophisticated mediator. Fed. R. Civ. P. 23(e)(2)(A)-(B).

28. Likewise, the Settlement appears at this preliminary approval stage to be substantively fair, reasonable, and adequate in that the relief provided is not insubstantial, particularly when taking into account the costs, risks, and delays of trial. Fed. R. Civ. P. 23(e)(2)(C). Here, Plaintiffs pursued a “full refund” theory of damages, the appropriateness of which Bactolac strongly contested. Assuming Plaintiffs prevailed on that theory, each class member would be eligible to seek, at most, \$40 per canister of ADEG purchased from the Recalled Lots. The resolution proposed here provides class members with either 25% of the “full refund” value (if they choose Settlement Credit) or 12.5% of the “full refund” value (if they choose an Alternative Fund Payment). These are reasonable settlement values given the uncertainty of continued, protracted litigation.

29. The proposed method of distributing relief to Settlement Class Members is relatively streamlined, requiring, for almost all Class Members, submission of a simple Claim Form with basic identification information that will permit them to be matched to a customer appearing on the Recalled Lots Customer List. For nearly all Settlement Class Members, this is all

they must do, meaning most will not need to undertake the burden of submitting supporting eligibility documentation. Fed. R. Civ. P. 23(e)(2)(C).

30. Attorneys' fees and case expenses will be paid only after Final Approval and only by approval of the Court, which will consider any request for fees in conjunction with Final Approval. Fed. R. Civ. P. 23(e)(2)(C). The Parties have represented that there is one agreement to be identified under Fed. R. Civ. P. 23(e)(3). *Id.*

31. Finally, the proposal treats Settlement Class Members equitably relative to one another. Each eligible Settlement Class Member will have the exact same options: to obtain Settlement Credit or an Alternative Fund Payment. Fed. R. Civ. P. 23(e)(2)(D).

**II. The Court will “likely be able to” certify the Settlement Class for purposes of entering judgment on the Settlement.**

32. In considering whether the Court will “likely be able to” certify the Settlement Class for purposes of entering judgment on the Settlement, the Court must determine whether the Settlement Class likely meets the requirements for class certification under Federal Rule of Civil Procedure 23(a) (numerosity, commonality, typicality, and adequacy) and any one of the subsections of Federal Rule of Civil Procedure 23(b), here subsection 23(b)(3).

33. The Court finds, for settlement purposes only, that the Settlement Class satisfies the requirements of Fed. R. Civ. P. 23(a)(1)-(4) and 23(b)(3) and that it will likely be able to certify the proposed Settlement Class, which is 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.”

34. Additionally, the Court finds, for purposes of settlement only, that the Settlement Class is ascertainable because it is defined by objective criteria, *In re Petrobas Secs. Litig.*, 862

F.3d 250, 257 (2d Cir. 2017), and that it will likely be able to appoint Plaintiffs' Counsel as Class Counsel under Federal Rule of Civil Procedure 23(g).

35. The Settlement Class, if certified in connection with Final Approval, shall be for settlement purposes only and without prejudice to the Parties in the event the Settlement is not finally approved by this Court or otherwise does not take effect.

36. Accordingly, for settlement purposes only, the Court appoints the following Plaintiffs as Class Representatives for the Settlement Class: Charles Copley, Jason Evans, Humberto Garcia, Luz Angelina Garcia, Joan McDonald, John Peterson, Natalie Roberts, Donald Skare, individually and as personal representative for Betty Skare, David Stone, Kaye Wink, individually and as next of kin of Donald Wink, Jeffrey Faris, Antonia Hampton, Raul Robles, and Kathleen Cannon.

37. The Court appoints, for settlement purposes only, James J. Bilsborrow as Class Counsel under Federal Rule of Civil Procedure 23(g)(3). Class Counsel is authorized to act on behalf of the Settlement Class with respect to all acts required by, or which may be given pursuant to, the Settlement or such other acts that are reasonably necessary to consummate the proposed Settlement set forth in the Settlement Agreement.

38. Having found that (1) "the court will likely be able to" grant final approval to the settlement as a "fair, reasonable, and adequate" compromise, so that it makes sense to give notice to the proposed class members; and (2) "the court will likely be able to" certify the Settlement Class for purposes of entering judgment on the Settlement, the Court hereby **GRANTS** preliminary approval to the Settlement.

#### **NOTICE TO THE SETTLEMENT CLASS**

39. Upon granting preliminary approval under Federal Rule of Civil Procedure 23(e)(1), the Court “must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.” Fed. R. Civ. P. 23(c)(2)(B).

40. The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

41. “There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.” *Wal-Mart Stores*, 396 F.3d at 114 (quotation omitted).

42. The Court finds that the Notice Program, including the Short Form Notice that will be mailed to each individual appearing on the Recalled Lots Customer List, the Long Form Notice,

and the particulars of the Notice Program described in the Declaration of Bradley Madden Regarding Administration, satisfy these requirements and Due Process and constitute “the best notice that is practicable under the circumstances.” The Court appoints P&N as Claims Administrator and directs that the Notice Program be implemented as set forth in the Settlement.

#### **SETTLEMENT OF CLAIMS OF INCOMPETENT AND DECEASED CLASS MEMBERS**

43. This Order provides authority pursuant to N.Y. C.P.L.R. § 1201 for legal representatives of absent incompetent or deceased Settlement Class Members to sign Claim Forms and releases on behalf of the Settlement Classes they represent. An Order from this Court finally approving the Settlement shall effectuate a settlement under N.Y. C.P.L.R. § 1207 for all absent incompetent Settlement Class Members.

44. The legal representatives of deceased absent Settlement Class Members shall have authority to sign Claim Forms and releases on behalf of the absent Settlement Class Members they represent.

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

45. A Settlement Class Member may request exclusion from the Settlement at any time prior to the Opt Out deadline, provided an opt-out notice is sent to the Claims Administrator in accordance with the procedures set forth in the Settlement Agreement. Any Settlement Class Member who elects to opt out of the Settlement shall not be entitled to receive any benefits conferred by the Settlement. Any Settlement Class Member who does not timely and validly request to opt out shall be bound by the terms of the Settlement, including the Release.

46. Objections to the Settlement, to the application for attorneys’ fees and costs, and/or to the Service Award must be served on the Parties in accordance with the Settlement. Class



Counsel and/or the Settling Defendants may conduct limited discovery on any objector or objector's counsel consistent with the Federal Rules of Civil Procedure.

47. Except for Settlement Class Members who have timely asserted an objection to the Settlement, all Settlement Class Members shall be deemed to have waived all objections and opposition to the fairness, reasonableness, and adequacy of the Settlement.

#### **MOTION FOR FINAL APPROVAL, FEES, EXPENSES, AND SERVICE AWARDS**

48. Plaintiffs shall file their Motion for Final Approval of the Settlement, as well as Class Counsel's application for attorneys' fees and costs, for a Service Award to the Plaintiffs, and for all Settlement Administration Costs, no later than ninety days from the Notice Date. At the Final Approval Hearing, the Court will hear argument on Plaintiffs' Motion for Final Approval of the Settlement and on Class Counsel's application for attorneys' fees and expenses, for the Service Award for the Plaintiffs, and for all Settlement Administration Costs.

#### **FINAL APPROVAL HEARING**

49. The Court will hold a Final Approval Hearing on \_\_\_\_\_, at \_\_\_\_\_ a.m./p.m., at the United States District Court for the Eastern District of New York, 225 Cadman Plaza E., Brooklyn, New York 11201, or by video conference or teleconference if determined by separate order, to assist the Court in determining whether to grant Final Approval to the Settlement, enter a Final Approval Order and Judgment, and grant any motions for fees, expenses, and the Service Award.

#### **OTHER PROVISIONS**

50. Class Counsel and counsel for the Settling Defendants are authorized to take, without further approval of the Court, all necessary and appropriate steps to implement the Settlement according to its terms, including implementing the Notice Program.

51. Pending determination whether the Settlement Agreement should be granted Final Approval, further proceedings against the Settling Defendants are stayed in this Action, other than proceedings necessary to carry out or enforce the terms of the Settlement.

52. The Settling Defendants shall serve the appropriate government officials with the notice required by 28 U.S.C. § 1715 within the time provided by statute.

53. Without further orders of the Court, the Parties may agree to make non-material modifications to the Settlement Agreement (including the exhibits thereto) in implementing the Settlement that are not inconsistent with this Preliminary Approval Order, including making minor changes to the Settlement Agreement, to the form or content of the Short Form and Long Form Notice, or to any other exhibits that the Parties jointly agree in writing are reasonable or necessary.

54. The Court shall retain jurisdiction over the Settlement Agreement and shall consider all further matters arising out of or connected with the Settlement.

### **SCHEDULE OF DEADLINES**

55. The Court sets the following deadlines:

<b>Event</b>	<b>Date</b>
Deadline for the Settling Defendants to pay \$1,725,000 in cash into the Escrow Account	No later than 20 days from the date of this Order
Deadline for Claims Administrator to commence the Notice Program	No later than 30 days from the date of this Order
Commencement of the Enrollment Period	30 days from the date of this Order
Opt Out Deadline	60 days from the Notice Date
Objection Deadline	60 days from the Notice Date
Deadline for filing a Motion for Final Approval and any petition for an award of attorneys' fees, costs, and Service Awards	90 days from the Notice Date

Final Approval Hearing	<hr/> (approximately 120 days from the Notice Date, or when convenient for the Court)
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**SO ORDERED.**

Date: \_\_\_\_\_

\_\_\_\_\_  
Hon. Frederic Block  
U.S. District Judge

# EXHIBIT 2

# WEITZ & LUXENBERG

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Based in New York City, Weitz & Luxenberg is one of the nation's leading plaintiffs' law firms specializing in complex litigation, mass torts, and consumer class actions. For more than 30 years, we have built upon our early successes, which began when founding partners Perry Weitz and Arthur Luxenberg teamed up to fight at the forefront of asbestos litigation in the late 1980s.

One of the firm's first court victories — a \$75 million verdict for clients exposed to asbestos while working at the Brooklyn Navy Yard — turned out to be a historic case that changed the landscape of asbestos litigation. Over the years, Weitz & Luxenberg's initial two-person team-to-beat has expanded dramatically along with our firm's reputation. We are fortunate to have access to top-flight resources and exceptional attorneys and support staff.

Besides its New York City headquarters, Weitz & Luxenberg has offices in Cherry Hill, New Jersey; Detroit, Michigan and Los Angeles, California with close to 100 attorneys and nearly 400 dedicated support staff.

We have played leading roles in national and local litigations representing individuals and municipalities involving asbestos, toxic herbicides, heavy metals, solvents, improperly marketed opioids and electronic cigarettes; defective medicines and medical devices, general negligence, among others claims.

One of our most rewarding successes was helping to secure a jury verdict of \$9 billion against Takeda Pharmaceuticals and Eli Lilly on behalf of a client who developed bladder cancer after taking the diabetes drug Actos. In addition, we have played a key role as court appointed lead counsel in negotiating multi-billion-dollar settlements with DePuy/Johnson & Johnson and also Stryker Orthopedics on behalf of clients who suffered severe medical complications after being implanted with defective hip metal on metal implants causing corrosion and release of cobalt and chromium. These separate settlements for substantial six figures per case benefited more than 10,000 plaintiffs.

Securing a just verdict or settlement on behalf of our clients comes first and foremost. However, we are always striving to bring about lasting change for the betterment of all. An example of this is our role in advocating to the U.S. Food & Drug Administration on behalf of women stricken by cancer due to the use of power morcellators in gynecological surgeries. Potentially due in part to this advocacy, the FDA issued updated

draft guidelines to better inform health care providers and their patients about the dangers of using these devices in gynecological surgeries.

Similarly, in November, 2019 year Ellen Relkin, head of the Drug and Medical Device Unit was invited to testify before the House Judiciary Committee along with two law professors and a defense lawyer on the topic of “*Examining the Use of “Snap” Removals to Circumvent the Forum Defendant Rule*” in efforts to support legislation to address this procedural loophole that deprives the ability to sue in state court.

See <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2279>

As leader in the legal fight against environmental polluters, Weitz & Luxenberg represented many clients harmed by the BP/Deepwater Horizon oil spill disaster in the Gulf of Mexico, the TVA coal ash sludge spill in Tennessee, industrial degreasers PCE/TCE in groundwater and indoor air, the gasoline additive MTBE in water supply wells, and PERC/PCE in coal float-sink test operations.

One of our greatest sources of pride continues to be our premier standing in the area of asbestos litigation. Since its inception in 1986, Weitz & Luxenberg has overseen more than 33,000 asbestos cases and continues to receive national recognition for its efforts. We have also ranked as the #1 firm in New York City for volume of mesothelioma case filings and #2 nationwide.

In the process of litigating negligent and sometimes reckless corporations and other entities, Weitz & Luxenberg’s specialized attorneys have helped secure approximately \$17 billion in verdicts and settlements for more than 55,000 clients across the United States, including individuals and their families, government bodies., and other entities in cases involving:

- Dangerous and Defective Drugs & Medical Devices
- Product Liability
- Personal Injury and Negligence
- Asbestos Exposure (Mesothelioma, Lung Cancer)
- Medical Malpractice
- Environmental and Toxic Pollution
- Consumer Fraud and Protection
- Antitrust Violations
- Securities Fraud and Shareholder Protection

Currently, we are the largest mass tort and personal injury litigation law firm in New York.

In 2017, Weitz & Luxenberg was designated as the National Law Firm of the Year by U.S. News & World Report and the peer-review publication Best Lawyers in the category of Mass Tort Litigation/Class Actions – Plaintiffs. The distinction was given as part of their “Best Law Firms Rankings,” which also gave Weitz & Luxenberg several regional honors. U.S. News & World Report continues to rank our firm among the best in its class.

In addition, all three of our partners have been named “Mass Torts Lawyer of the Year in New York” in U.S. News & World Report’s “Best Lawyers.” Super Lawyers Magazine has also designated many of our lawyers “Super Lawyers,” and the National Law Journal named us one of the “Elite Trial Law Firms in the United States.”

Weitz & Luxenberg was also ranked in the "AmLaw400" by The American Lawyer magazine — including us among the top 400 largest firms in the U.S.

Weitz & Luxenberg attorneys have been at the forefront and leading some of our country’s largest complex litigation in recent history including:

#### **Mass Tort and Class Action**

- *In Re: Stryker Rejuvenate Hip Stem and ABG II Modular Hip Stem Litigation* (plaintiff liaison and lead counsel for New Jersey Multi-County Litigation)
- *In Re: Stryker L Fit CoCr V40 Femoral Heads Hip Implant Litigation* (plaintiff liaison and lead counsel for New Jersey Multi-County Litigation)
- *In Re: National Prescription Opiate Litigation* (plaintiffs’ executive committee, in progress)
- *In Re: Proton-Pump Inhibitor Products Liability Litigation (No. II)*, (plaintiffs’ executive committee, in progress)
- *In Re: Ethicon, Inc., Power Morcellator Products Liability Litigation* (co-lead counsel)
- *In Re: JUUL Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation* (co-lead counsel, in progress)

#### **Consumer Protection**

- Volkswagen “Clean Diesel” Marketing (plaintiff steering committee for a \$327.5 million settlement)
- Wells Fargo Collateral Protection Insurance Litigation (plaintiffs’ executive committee)
- General Motors LLC Ignition Switch Litigation (plaintiffs’ liaison counsel)
- Excellus Blue Cross & Blue Shield data breach litigation, Western District of New York (co-lead counsel)

#### **Natural Resources and Environmental Damages**

- Roundup® Products Liability Litigation (co-lead counsel)
- Flint Water Class Action Litigation, Carthan v. Snyder (plaintiffs’ executive committee)

## **ASBESTOS LITIGATION**

Weitz & Luxenberg has long been at the vanguard of asbestos litigation. We attribute our continued success in this area to a \$75 million landmark victory dating back to 1991.

This \$75 million landmark Brooklyn Navy Yard verdict established Weitz & Luxenberg as a firm and a bedrock of asbestos litigation. Just a few years after our founding in 1986, Weitz & Luxenberg was firmly established as a leader in asbestos litigation with this \$75 million verdict in 1991. In this historic consolidated trial, Weitz & Luxenberg represented 36 shipbuilders exposed to asbestos at the Brooklyn Navy Yard in the 1940s and 50s. This victory changed the landscape of asbestos litigation. All at once, Weitz & Luxenberg Co-Founder Perry Weitz was a force in the asbestos bar, and New York was a center of asbestos litigation.

Since then, and throughout the more than 33,000 asbestos cases we have litigated, attorneys at Weitz & Luxenberg have committed ourselves to achieving what some may call a formidable track record. We try more asbestos cases than all other firms in New York combined. We have also ranked #1 in New York City for volume of mesothelioma case filings and #2 nationwide.

Today, the crowning achievement of our firm's well-rounded practice is that Weitz & Luxenberg has received national acclaim for our pioneering work in asbestos litigation. We owe much of our success to our Founding Partners—Perry Weitz, Arthur Luxenberg and Robert J. Gordon—who have all been named “Mass Torts Lawyer of the Year in New York” in U.S. News & World Report's “Best Lawyers.” Charles M. Ferguson, practice group chair of our Mesothelioma and Asbestos Litigation department, also received that accolade.

Mr. Weitz plays a leading role in New York State and national asbestos litigation. He is also the court-appointed liaison counsel for asbestos litigation in New York City, and the Eastern and Southern Districts of New York. As a pioneer of asbestos practice and frequent lecturer on the litigation, Mr. Weitz regularly serves as a chair for the Perrin Conferences annual asbestos litigation symposium. In addition, our lawyers hold leadership positions on the Trust Advisory Committees of several large asbestos bankruptcy trusts.

Some of our firm's other most notable wins include the following:

**\$190 Million Verdict**—This 2013 win was the largest verdict in New York history at that time for a consolidated asbestos case. Weitz & Luxenberg represented five former boiler company workers who were exposed to asbestos while on the job and later developed mesothelioma. The trial lasted just 11 weeks.

**\$104 Million Verdict**—Weitz & Luxenberg Partner Perry Weitz served as one of the main attorneys in the case, which involved approximately 100 men who had been exposed to asbestos while working at the Brooklyn Navy Yard years earlier.



**\$91 Million Win**—In this consolidated asbestos case, Weitz & Luxenberg Partner Robert Gordon achieved a \$91 million win on behalf of 45 former powerhouse workers, 28 of them were Weitz & Luxenberg clients. This victory helped open doors to recovery for thousands of families whose loved ones were victims of asbestos exposure.

**\$75 Million Verdict**—In 2017, a jury awarded \$75 million to our clients, a husband and wife, the largest single case verdict ever for Weitz & Luxenberg. The husband was exposed to asbestos for roughly 20 years while on the job as a mechanic, as well as through his hobby as a car enthusiast, which involved overhauling racecar engines. His wife assisted him at home, not knowing she was being exposed to potentially deadly asbestos dust. Ultimately, it was she who developed malignant peritoneal mesothelioma, a cancer of the abdominal lining.

**\$64.65 Million Verdict**—Weitz & Luxenberg achieved this victory in 2001 on behalf of four plaintiffs diagnosed with mesothelioma. Two clients worked at various New York construction sites, one as a former pipe coverer, the other as a carpenter. A third plaintiff was a former sheet metal worker at the Brooklyn Navy Yard. The fourth served as a former Coast Guard engineman; he developed the rarest form, peritoneal mesothelioma, a cancer of the lining of the abdomen. More than 20 makers of asbestos were sued.

**\$53 Million Verdict**—In one of the largest compensatory verdicts for a single plaintiff in the history of asbestos litigation, a jury awarded a mesothelioma victim and his family \$53 million. Our client had been exposed to asbestos as a brake mechanic at a gas station, as well as through the work he did in engine and boiler rooms while in the Coast Guard. The family successfully sued 36 companies.

### **DEFECTIVE DRUGS & MEDICAL DEVICES LITIGATION**

The Weitz & Luxenberg Drug and Medical Device Litigation unit is nationally recognized for its experience and knowledge in handling large, complex litigation involving multiple defendants and thousands of parties.

Over the years, this litigation unit has won billions of dollars on behalf of our clients. Much of our success can be credited to our practice group chair Ellen Relkin who has served on numerous Plaintiffs' Steering Committees and in other court-appointed leadership roles as well as her team of dedicated lawyers and support staff. She is certified by the New Jersey Supreme Court as a Certified Civil Trial Attorney. She has been elected as a "Super Lawyer" of New Jersey and New York including Top 50 Women Lawyers in NYC ("Best Lawyer) in New York, as well as AV rated by Martindale-Hubbell.

Ms. Relkin serves as Co-Lead counsel in the In Re: JUUL MDL, and also sits on the Executive Committee of the *Prescription Opiate* MDL, the *In Re: Invokana* MDL, *In Re: Stryker LFIT V 40 Femoral Head Products Liability* MDL and is co-lead counsel in the

DePuy ASR MDL Litigation. In that capacity she played a key role in negotiating the \$2.5 billion settlement for 8,000 victims of the failed hip implant. As Chair of the Plaintiffs' Steering Committee (PSC) and Liaison counsel in the New Jersey Multi-County *Stryker Rejuvenate/ABG II Hip Implant Litigation* she helped negotiate a \$1.5 billion settlement that was expanded by hundreds of millions of additional dollars to compensate more recently injured plaintiffs.

She was a member of the trial team in the landmark Vioxx case *McDarby v. Merck*, that obtained a \$13.5 million verdict and successfully defended the compensatory verdict on appeal before the New Jersey Appellate Division, 949 A.2d 2232008.

Ms. Relkin is an elected member of the American Law Institute, an invited Fellow of the American Bar Foundation and serves on the Board of Governors of the New Jersey Association for Justice, is a Past President of the Roscoe Pound Civil Justice Institute and chairs the *Amicus* Committee of the American Association for Justice. She also co-chairs the MDL Roundtable of the Emory Law School Institute for Complex Litigation.

### **ENVIRONMENTAL LITIGATION**

The Weitz & Luxenberg Environmental litigation unit is nationally recognized for its experience and knowledge of environmental toxic tort issues. A forerunner in the legal fight against environmental polluters, Weitz & Luxenberg has worked on behalf of thousands of clients harmed by hazardous chemicals and toxic waste leached into our groundwater and spewed into the air we breathe as well as into the vast oceans that support our health, livelihoods, and oceanic ecosystems.

We have fought for those harmed by:

- Oil spills, most ignominiously the BP/Deepwater Horizon oil spill disaster in the Gulf of Mexico.
- TVA coal ash sludge spill in Tennessee.
- PCE/TCE, industrial de-greasers contaminating groundwater and indoor air.
- MTBE, a gasoline additive poisoning water supply wells.
- PFOS and PFOA contaminating water supplies.
- PERC/PCE in coal float-sink test operations.

Environmental Practice Group Chair Robin Greenwald has spent three decades prosecuting environmental crimes and enforcing civil environmental laws; for close to two of those decades she was with the Department of Justice. With Robin Greenwald at the helm, our Environmental litigation unit has represented hundreds of water providers and has or is serving in positions of leadership on some of the largest environmental mass torts for the past 10-plus years. These include:

- *In re: Roundup Products Liability Litigation*, MDL 2741 (N.D. Cal.), Weitz & Luxenberg was one of three firms leading litigation against Monsanto Company

for injuries caused by its popular herbicide, Roundup®, for which the active ingredient is glyphosate. The lawsuit is brought by farmers, farmworkers, landscapers, and home users who used the product frequently and have been diagnosed with non-Hodgkin lymphoma. In June 2020, we reached a settlement with Monsanto.

- *In re: Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, MDL 1358 (SDNY), Weitz & Luxenberg represented more than 150 public water providers and state governments whose water supply wells were contaminated with the gasoline additive MTBE. In this litigation against the petroleum industry, Robin Greenwald served as the Liaison Counsel. After five years of litigation, the refiners paid over \$435,000,000 to remove existing contamination and to guarantee payment for future treatment of wells that later became contaminated with MTBE.
- The 2010 BP oil spill multidistrict litigation which settled civil claims against the company for a total of \$18.7 billion. Ms. Greenwald served on the Plaintiffs' Steering Committee where she was the lead negotiator on the Medical Benefits Class Action Settlement and one of the lead trial attorneys in the Phase Two trial in October 2013. At the time, it was the largest environmental settlement in the history of the U.S. and the largest ever civil settlement with a single entity by the Department of Justice.
- The consolidated action in Los Angeles, California, against Southern California Gas Company for causing the largest methane gas storage well blowout in United States history. Weitz & Luxenberg is co-chair of the Plaintiffs' Steering Committee overseeing litigation on behalf of more than 30,000 residents and businesses.
- Consolidated actions in Hoosick Falls, New York, and Petersburg, New York, for damages caused by PFOA contamination in municipal and private drinking water wells. Ms. Greenwald was appointed by the federal district court for the Northern District of New York as Co-Lead Interim Class Counsel representing a putative class of several thousand property owners and residents who have been exposed to PFOA.
- Consolidated action in the townships of Horsham and Warminster, Pennsylvania, for damages caused by PFOS in municipal and private drinking water wells.

### **Other Environmental Litigation**

- Bethpage Water District in New York lawsuit for cost recovery for contamination of drinking water wells with trichloroethylene (TCE) and radium from the Northrop Grumman Aerospace facility and the United States Navy operations in Bethpage.

- Suffolk County Water Authority in New York lawsuit for cost recovery for contamination of drinking water wells with perchloroethylene (PCE) contamination from dry cleaner operations in the county.
- City of Bethany, Oklahoma lawsuit for cost recovery for contamination of drinking water wells with perchloroethylene (PCE) and trichloroethylene (TCE) from the Rockwell Automation, Inc., and Gulfstream Aerospace Corporation facilities in Oklahoma City.
- *In re: Bates v. 3M Company, et al.*, Case No. 16-cv-4961-PBT (E.D. Pa), Weitz & Luxenberg is the court-appointed Interim Lead Counsel for a class action lawsuit against six companies that manufactured and sold aqueous firefighting foam (AFFF) containing PFOS and PFOA to the U.S. military, including two Pennsylvania Naval bases.
- *In re: Village Shores LLC v. Lockwood, Andrews & Newnam, P.C. et al.*, 5:16-cv-14498-JEL-APP (E.D. Mich.), Weitz & Luxenberg represented residents of Flint, Michigan, for the contamination of their drinking water with lead, Legionella, and other substances.
- *In re Alleged Environmental Contamination of Pompton Lakes MCL* Case No. 290 (N.J.), Weitz & Luxenberg represented residents and former residents in the vicinity of a former DuPont explosives plant in Pompton Lakes, N. J. For decades, DuPont disposed of chlorinated solvents in unlined lagoons and disposal sumps on its property. Those solvents, including trichloroethylene (TCE) and perchloroethylene (PCE), contaminated the groundwater below the site and migrated, producing the potential for vapor intrusion for hundreds of industry.
- *In re: Franco, et al. v. Coronet Industries, et al.*, Case no. 04-ca-002576 (Fla. 13th Dist. Ct.), the firm resolved the claims of more than 500 residents in Plant City, Florida, whose air and water was contaminated by a facility that defluorinated phosphate rock for use as an animal feed supplement. Plaintiffs resolved their claims against four of six prior owners of the facility for \$20 million.
- *In re: Auchard et al. v. Tennessee Valley Authority*, Case no. 3:09-cv-54 (W.D. Tenn.), In the December 2008 disaster in Kingston, Tennessee, a failure of the waste impoundment at TVA's fossil fuel plant caused the release of over one billion gallons of sludge over more than 300 acres. The residents and businesses of the Kingston community retained Weitz & Luxenberg to represent them to recover damages for the harm they suffered. We settled the case through mediation for \$28 million.
- *In re: Abicht, et al. v. Republic Services, Inc., et al.*, Case no. 2008 CT 10 0741 (Court of Common Pleas, Cuyahoga County, Ohio), Weitz and Luxenberg represented 800 landowners in the vicinity of a solid waste landfill in Stark

County, Ohio. A subsurface fire had raged for many years, caused by defendants mixing aluminum dross with leachate. Because of the fire, the landfill spewed overwhelming odors. Our Environmental team settled the suit for \$5.85 million.

- *In re: Avila, et al. v. CNH America LLC, et al.*, Case no. 4:04-CV-3384 (D. Neb.) and *Schwan, et al. v. Cargill, Inc., et al.*, Case no. 4:07-CV-3170 (D. Neb.), the firm represented residents of a community in Nebraska who were exposed to industrial degreasing chemicals, including perchloroethylene (PCE), DCE and DCA, that were dumped on and into the ground, and then migrated to the residents' private drinking water wells. The firm settled the cases for \$2.3 million.

### **CONSUMER PROTECTION LITIGATION**

For more than 30 years, Weitz & Luxenberg has been litigating consumer protection, fraud and product liability cases. Weitz & Luxenberg has worked at the forefront of national litigation aimed at obtaining justice for thousands of motorists and passengers killed or injured because of defective automotive equipment:

- **Volkswagen.** Weitz & Luxenberg was one of the first law firms to take legal action against Volkswagen for its consumer fraud debacle. Volkswagen programmed vehicles to override emissions tests, deceiving the public about vehicles that did not meet industry standards for noxious emissions. Along with other leading plaintiffs firms, we helped achieve a **\$14.7 billion settlement**.
- **General Motors.** GM recalled millions of vehicles because of the company's faulty ignition switch. These defective switches would unexpectedly rotate, turning the vehicle off while in motion
- **Takata.** The company's faulty airbags were installed in millions of vehicles nationwide. Defective airbags could potentially explode upon inflation, and many did. Some consumers were seriously injured, and other people even died from their injuries.

Other areas of consumer protection litigation include:

#### **Price Gouging**

Weitz & Luxenberg filed a class action complaint in U.S. federal district court for the District of New Jersey challenging the legality of the enormous price hikes for insulin instituted by Eli Lilly, Sanofi, and Novo Nordisk. In recent years, the price of insulin in the United States has skyrocketed, with annual per-patient spending increasing from \$231 to \$736 in a little more than a decade. The case is pending as we participate in discovery.

#### **Data Breaches**

Weitz & Luxenberg has taken legal action and obtained results for clients affected by these data breaches:

- **Premera Blue Cross.** Weitz & Luxenberg filed a class action lawsuit against Premera Blue Cross based in Seattle, Washington, on behalf of policyholders whose private information was compromised due to a huge, sustained hacking of Premera's computer systems. Up to 11 million Premera policyholders are subject to potential monumental future economic losses as a result.
- **Anthem Blue Cross Blue Shield.** Weitz & Luxenberg filed a class action lawsuit against Indianapolis-based Anthem Inc. after learning that the private information of 80 million Anthem customers was stolen in a colossal online data breach. Security professionals feared this breach could result in billions of dollars in losses to customers.
- **Excellus BlueCross BlueShield.** Robin L. Greenwald, head of Weitz & Luxenberg's Environmental, Toxic Tort & Consumer Protection litigation unit, served as interim co-lead counsel in the Excellus BlueCross BlueShield data breach class action lawsuit. This suit included at least 14 consolidated matters. The plaintiffs are among the 10+ million Excellus and Lifetime customers whose personal information was exposed in this massive data breach.

**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.

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.

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

Consolidated with

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

**DECLARATION OF BRADLEY MADDEN  
REGARDING ADMINISTRATION**



1 I, Bradley Madden, declare:

2 1. I am a Project Manager for Postlethwaite & Netterville, APAC (“P&N”), a full-service  
3 administration firm providing legal administration services. The following statements are based on my  
4 personal knowledge as well as information provided by other experienced P&N employees working under  
5 my supervision.

6 **EXPERIENCE**

7 2. P&N routinely develops and executes notice plans and administers a wide variety of class  
8 action and mass action settlements, with subject matters including, but not limited to, products liability,  
9 consumer, mass tort, antitrust, labor and employment, insurance, and healthcare. P&N team members have  
10 experience designing and implementing over 100 notice and settlement programs. Additional information  
11 about P&N can be found on our website at [www.pnclassaction.com](http://www.pnclassaction.com).

12 3. A sample of court opinions on the adequacy of our notice and Settlement Administration  
13 experience is included in P&N’s curriculum vitae as **Exhibit A**.

14 **OVERVIEW**

15 4. Based on our review of the Settlement Agreement, the proposed Class consists of:

16 **All Persons in the United States who purchased one or more canisters of ADEG**  
17 **that were manufactured as part of the Recalled Lots.**

18 **NOTICE TO THE CLASS**

19 5. The Settlement Agreement directs the Short Form Notice to be mailed to each Class Member.  
20 The Short Form Notice will be in the form of a double- sided postcard (“Postcard Notice”). It is P&N’s  
21 understanding that Defendant will provide a data set containing all Class Members’ names, addresses, and  
22 email (if known) who purchased one or more canisters of ADEG from the Recalled Lots and who were  
23 mailed a recall letter by NaturMed in March 2016.

24 6. P&N shall provide Postcard Notice to the Class Member address provided by Defendant.  
25 P&N will process the names and address through the National Change of Address (“NCOA”) database<sup>1</sup> and  
26 update as appropriate. If a Postcard Notice is returned with forwarding address information, P&N will re-

27 <sup>1</sup> The NCOA database is the official United States Postal Service technology product, which makes change of address  
28 information available to mailers to help reduce undeliverable mail pieces before mail enters the mail stream. This product is an  
effective tool to update address changes when a person has completed a change of address form with the post office.



1 mail the Postcard Notice to the forwarding address. For all Postcard Notices that are returned as  
2 undeliverable, P&N will use standard skip tracing devices to obtain forwarding address information and, if  
3 the skip tracing process yields a different forwarding address, P&N will re-mail the Postcard Notice to the  
4 address identified in the skip trace as soon as reasonably practicable after the receipt of the returned mail.  
5 After 30 days, an email reminder may be sent to all Class Members with a known email address who have  
6 not submitted a Claim Form.

## 7 **ADMINISTRATION AND PAYMENT OF CLAIMS**

### 8 **Settlement Website**

9 7. P&N will create and maintain a website dedicated to this Settlement. The website address  
10 will be included in the Postcard Notice. The Class Notice, along with other relevant documents, will be  
11 posted on the Settlement Website, so Class Members may review and download them. The Settlement  
12 Website will also include relevant dates, other case-related information, instructions for how to be excluded  
13 from the Class, how to file a claim to receive a Settlement Credit or Alternate Payment, and contact  
14 information for the Settlement Administrator.

### 15 **Dedicated Toll-Free Hotline**

16 8. A dedicated toll-free informational hotline will be available 24 hours per day, seven days per  
17 week. The hotline will utilize an interactive voice response (“IVR”) system where Class Members can obtain  
18 essential information regarding the Settlement and be provided responses to frequently asked questions.  
19 Class Members will also have the option to leave a voicemail and receive a call back from a call center  
20 representative.

### 21 **Requests for Exclusion**

22 9. Class Members wishing to exclude themselves may submit their request for exclusion by  
23 mail to a dedicated Post Office Box that P&N will maintain. P&N will monitor all mail delivered to that  
24 post office box and will track all exclusion requests received, which will be provided to the Parties.

### 25 **Claim Form**

26 10. The Postcard Notice mailed to Class Members will include a Claim Form that can be returned  
27 via Business Reply Mail at no cost to the Class Member. The postcard Notice will be substantially consistent  
28 with **Exhibit B**.

1 11. P&N will establish an electronic Claim Form available on the Settlement Website where  
2 Settlement Class Members may submit a claim. P&N will collect the information required by the Settlement  
3 Agreement to determine claim validity and issue credit/payment.

4 12. A PDF claim form will also be available for download on the Settlement Website for  
5 Settlement Class Members who prefer to submit a claim by mail.

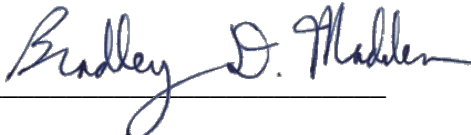
6 **Payment of Claims**

7 13. Class Members will have the option to select either a Settlement Credit or Alternate Payment  
8 as part of their Claim Form submission. Class Members who select a Settlement Credit will have the option  
9 of receiving the credit via physical mail or via email provided on the Claim Form submission. Class  
10 Members who select an Alternate Payment will have the option of receiving the payment via paper check  
11 or receiving an email to select a digital payment method.

12  
13  
14 **CERTIFICATION**

15 I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge  
16 and belief.

17 Executed this 19th day of November, 2021 in Baton Rouge, Louisiana.

18  
19  
20  
21   
22 Bradley Madden



**assurance – consulting – tax – technology**

**pncpa.com**

## Exhibit A: CV of P&N

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## Introduction

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Postlethwaite & Netterville, APAC, (P&N) offers technical experience and diverse resources that are unique to the class action settlement administration space.

**Experience:** Since 1999, P&N has successfully administered numerous class action settlements in state court and federal court (including multidistrict litigation). Our team has processed and reviewed claims and managed distributions for settlements involving billions of dollars in settlement funds.

**Breadth, Depth and Flexibility of Resources:** Our approach to settlement administration provides a dedicated core team that is able to draw upon numerous specialized resources across diverse service areas within our firm of over 400 employees as needs arise.

We leverage the knowledge and experience of professionals holding the following designations, among others:

- Juris Doctor (JD)
- Project Management Professional (PMP)
- Certified Public Accountant (CPA)
- Certified Internal Auditor (CIA)
- Certified Information Systems Auditor (CISA)
- Certified Fraud Examiner (CFE)
- Certified in Financial Forensics (CFF)
- Certified Information Systems Security Professional (CISSP)
- Certified Security Engineer (CSE)
- Certified Information Security Manager
- Certified in Risk and Information Systems Control

**Capabilities and Experience Rooted in Quality and Objectivity:** As a 65+ year old accounting and business advisory firm, objectivity, integrity, and quality have been the cornerstones of our sustained success. These principles drive our work product, our decision-making, and our interactions with clients and team members. ***Our teams are well-versed in the development of and adherence to stringent quality assurance and quality control standards across a variety of disciplines.***



## Notable Claims Administration Experience

Our team has significant claims administration experience, including the following notable project experience:

### In Re: Cathode Ray Tube (CRT) Antitrust Litigation (MDL 1917)

**Nature of Work:** In cooperation with our project partner, The Notice Company, Inc., P&N performs claims administration services for indirect purchaser class action settlements in this multidistrict litigation totaling over \$619,750,000 to date. The scope of P&N's services includes (1) custom website and database application development and maintenance, (2) claim data acquisition and management, (3) claims processing and validation, (4) claims deficiency and audit processing, (5) quality control and fraud, waste, and abuse monitoring, (6) custom reporting, (7) call center support and claimant communications, (8) claim allocation determination and distribution, and (9) project management services.

### In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico (MDL 2179)

**Nature of Work:** P&N was approved by the United States District Court for the Eastern District of Louisiana to process business economic loss and seafood harvester claims within the Deepwater Horizon Economic and Property Damages Settlement. P&N participated in determining over \$1 billion in eligible claims within the first six months of the program and approximately \$10 billion to date. P&N committed a significant multi-city team of 400+ accounting and finance professionals to the ongoing effort, providing claim eligibility review, economic damages calculations, and claimant communications for over 100,000 businesses and seafood harvesters with representation from 2,000+ law and accounting firms.

### In Re: Testosterone Replacement Therapy Products Liability Litigation (MDL 2545)

**Nature of Work:** P&N provides claims administration services related to custom technology development, project management, and attorney communications support. In coordination with the Court-appointed Special Master, Randi S. Ellis, P&N has developed secure, customized, web-based technology applications that are the framework for claim filing and document management efforts for over 130 participating law firms. Our claims platform also serves as both the central repository for personal injury claims adjudication and allocation functions of the Special Master.

"I have worked with P&N on multiple large settlement projects in my role as Special Master. We are currently working together to administer a mass tort settlement where their technology platform has been able to streamline the claims process and securely manage sensitive claimant data. They are always willing to brainstorm with me when I need assistance which is why they have become a trusted partner and my first call! "

*Randi Ellis, Court-Appointed Special Master*



## In Re: E.I. du Pont de Nemours and Company C8 Personal Injury Litigation (MDL 2433)

**Nature of Work:** P&N developed a secure, customized, web-based database application that served as the framework for claim filing and document management efforts for approximately 3,700 personal injury claims. In cooperation with the Special Master, Daniel J. Balhoff, P&N also provided project management services to facilitate the logistics of the claims process life cycle. Our claims database technology also served as both the central repository for claims determinations and allocation reporting to the Plaintiff Steering Committee and Lien Resolution Administrator.

"P&N was tasked with building out a user friendly settlement submission web-based platform, training the law firms on how it would be used, coordinating with the Special Master and Claims Administrator reviewers, exchanging information with the third party lien resolution group, and providing responsive updates and reporting to the litigation lead counsel and individual participating law firms. P&N did a phenomenal job in all respects.

Throughout the process, P&N provided personalized and immediately responsive service. Reporting was routinely updated and modified based upon new requests from lead counsel and the individual submitting firms were provided one-on-one service when needed. Based on my experiences with P&N, I would certainly recommend them and will actively seek to include project bids from them in any future resolution programs in which I have a part."

*Jon C. Conlin, Plaintiffs' Co-Lead Counsel*

## In Re: FEMA Trailer Formaldehyde Products Liability Litigation (MDL 1873)

**Nature of Work:** P&N provided full scale notice and claims administration services for this multi-settlement MDL involving over \$45,000,000 in settlement funds. The scope of P&N's services includes (1) notice administration, (2) custom website and database application development and maintenance, (3) claim data acquisition and management, (4) claims processing and deficiency curing, (5) call center support and claimant communications, (6) claim allocation determination and distribution, and (7) quality control and project management services.

"In serving as a Court-appointed Special Master, I have worked with P&N's claims administration team on several occasions. I have always found them to be extremely attentive to detail, responsive, and committed to a high quality work product. Furthermore, they are proactive – once I tell them my goals, they come up with creative solutions to get there. The bottom line is that I can trust them to do the job right in a timely and efficient manner."

*Daniel J. Balhoff, Court-Appointed Special Master*



## P&N Claims Administration Experience

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### SAMPLE JUDICIAL COMMENTS

- ***Fabricant v. Amerisave Mortgage Corporation***, No. 19-cv-04659-AB-AS (C.D. Cal.) Judge Andre Birotte, Jr. on November 25, 2020:

*The Class Notice provided to the Settlement Class conforms with the requirements of Fed. Rule Civ. Proc. 23, the California and United States Constitutions, and any other applicable law, and constitutes the best notice practicable under the circumstances, by providing individual notice to all Settlement Class Members who could be identified through reasonable effort, and by providing due and adequate notice of the proceedings and of the matters set forth therein to the other Settlement Class Members. The notice fully satisfied the requirements of Due Process. No Settlement Class Members have objected to the terms of the Settlement.*

- ***Snyder, et al. v. U.S. Bank, N.A., et al.***, No. 1:16-CV-11675 (N.D. Ill), Judge Matthew F. Kennelly on June 18, 2020:

*The Court makes the following findings and conclusions regarding notice to the Settlement Class:*

*a. The Class Notice was disseminated to persons in the Settlement Class in accordance with the terms of the Settlement Agreement and the Class Notice and its dissemination were in compliance with the Court's Preliminary Approval Order; b. The Class Notice: (i) constituted the best practicable notice under the circumstances to potential Settlement Class Members, (ii) constituted notice that was reasonably calculated, under the circumstances, to apprise Settlement Class Members of the pendency of the Consolidated Litigation, their right to object or to exclude themselves from the proposed Settlement, and their right to appear at the Final Approval Hearing, (iii) was reasonable and constituted due, adequate, and sufficient individual notice to all persons entitled to be provided with notice, and (iv) complied fully with the requirements of Fed. R. Civ. P. 23, the United States Constitution, the Rules of this Court, and any other applicable law.*

- ***Edward Makaron et al. v. Enagic USA, Inc.***, 2:15-cv-05145 (C.D. Cal.), Judge Dean D. Pregerson on January 16, 2020:

*The Court makes the following findings and conclusions regarding notice to the Class:*

*a. The Class Notice was disseminated to persons in the Class in accordance with the terms of the Settlement Agreement and the Class Notice and its dissemination were in compliance with the Court's Preliminary Approval Order;*

*b. The Class Notice: (i) constituted the best practicable notice under the circumstances to potential Class Members, (ii) constituted notice that was reasonably calculated, under the circumstances, to apprise Class Members of the pendency of the Action, their right to object or to exclude themselves from the proposed Settlement, and their right to*





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*appear at the Final Approval Hearing, (iii) was reasonable and constituted due, adequate, and sufficient individual notice to all persons entitled to be provided with notice, and (iv) complied fully with the requirements of Fed. R. Civ. P. 23, the United States Constitution, the Rules of this Court, and any other applicable law.*

- **Kimberly Miller et al. v. P.S.C, Inc., d/b/a Puget Sound Collections**, 3:17-cv-05864 (W. D. Wash.), Judge Ronald B. Leighton on January 10, 2020:

*The Court finds that the notice given to Class Members pursuant to the terms of the Agreement fully and accurately informed Class Members of all material elements of the settlement and constituted valid, sufficient, and due notice to all Class Members. The notice fully complied with due process, Rule 23 of the Federal Rules of Civil Procedure, and all other applicable law.*

- **John Karpilovsky and Jimmie Criollo, Jr. et al v. All Web Leads, Inc.**, 1:17-cv-01307 (N.D. Ill), Judge Harry D. Leinenweber on August 8, 2019:

*The Court hereby finds and concludes that Class Notice was disseminated to members of the Settlement Class in accordance with the terms set forth in the Settlement Agreement and that Class Notice and its dissemination were in compliance with this Court's Preliminary Approval Order.*

*The Court further finds and concludes that the Class Notice and claims submission procedures set forth in the Settlement Agreement fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all Settlement Class Members who could be identified through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Class as contemplated in the Settlement and this Order.*

- **Paul Story v. Mammoth Mountain Ski Area, LLC**, No. 2:14-cv-02422 (E.D. Cal.), Judge John A. Mendez on March 13, 2018:

*The Court finds that the Settlement Administrator delivered the Class Notice to the Class following the procedures set forth in the Settlement Agreement; that the Class Notice and the procedures followed by the Settlement Administrator constituted the best notice practicable under the circumstances; and that the Class Notice and the procedures contemplated by the Settlement Agreement were in full compliance with the laws of the United States and the requirements of due process. These findings support final approval of the Settlement Agreement.*

- **John Burford, et al v. Cargill, Incorporated**, No. 05-0283 (W.D. La.), Judge S. Maurice Hicks, Jr. on November 8, 2012:

*Considering the aforementioned Declarations of Carpenter and Mire as well as the additional arguments made in the Joint Motion and during the Fairness Hearing, the*





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*Court finds that the notice procedures employed in this case satisfied all of the Rule 23 requirements and due process.*

- ***In RE: FEMA Trailer Formaldehyde Product Liability Litigation***, MDL No. 1873, (E.D La.), Judge Kurt D. Engelhardt on September 27, 2012:

*After completing the necessary rigorous analysis, including careful consideration of Mr. Henderson's Declaration and Mr. Balhoff's Declaration, along with the Declaration of Justin I. Woods, the Court finds that the first-class mail notice to the List of Potential Class Members (or to their attorneys, if known by the PSC), Publication Notice and distribution of the notice in accordance with the Settlement Notice Plan, the terms of the Settlement Agreement, and this Court's Preliminary Approval Order:*

*(a) constituted the best practicable notice to Class Members under the circumstances;*  
*(b) provided Class Members with adequate instructions and a variety of means to obtain information pertaining to their rights and obligations under the settlement so that a full opportunity has been afforded to Class Members and all other persons wishing to be heard;*

*(c) was reasonably calculated, under the circumstances, to apprise Class Members of: (i) the pendency of this proposed class action settlement, (ii) their right to exclude themselves from the Class and the proposed settlement, (iii) their right to object to any aspect of the proposed settlement (including final certification of the settlement class, the fairness, reasonableness or adequacy of the proposed settlement, the adequacy of representation by Plaintiffs or the PSC, and/or the award of attorneys' fees), (iv) their right to appear at the Fairness Hearing - either on their own or through counsel hired at their own expense - if they did not exclude themselves from the Class, and (v) the binding effect of the Preliminary Approval Order and Final Order and Judgment in this action, whether favorable or unfavorable, on all persons who do not timely request exclusion from the Class;*

*(d) was calculated to reach a large number of Class Members, and the prepared notice documents adequately informed Class Members of the class action, properly described their rights, and clearly conformed to the high standards for modern notice programs;*

*(e) focused on the effective communication of information about the class action. The notices prepared were couched in plain and easily understood language and were written and designed to the highest communication standards;*

*(f) afforded sufficient notice and time to Class Members to receive notice and decide whether to request exclusion or to object to the settlement.;*

*(g) was reasonable and constituted due, adequate, effective, and sufficient notice to all persons entitled to be provided with notice; and*

*(h) fully satisfied the requirements of the Federal Rules of Civil Procedure, the United States Constitution, including the Due Process Clause, and any other applicable law.*



## Class Action & Mass Tort Administration Experience

P&N provides end-to-end class action claims administration and notice services in connection with lawsuits and settlements programs pending in courts around the United States. Since 1999, P&N has processed billions of dollars in settlement claims, ranging in class size from a few hundred to hundreds of thousands. Our team successfully administers a wide variety of settlements, and our ability to innovate enables us to navigate the complexity of class settlements and legal notice programs.

### CASE EXPERIENCE

Our case experience includes the following:

- In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico (MDL 2179)
- In Re: Cathode Ray Tube (CRT) Antitrust Litigation (MDL 1917)\*
- In Re: Testosterone Replacement Therapy Products Liability Litigation (MDL 2545)<sup>†</sup>
- In Re: E.I. du Pont de Nemours and Company C8 Personal Injury Litigation (MDL 2433)<sup>†</sup>
- In Re: FEMA Trailer Formaldehyde Products Liability Litigation (MDL 1873)
- In Re: Chevron Refinery Fire Cases
- Story v. Mammoth Mountain Ski Area, LLC
- Sanchez et al v. Texas Brine, LLC et al.
- John Karpilovsky, et al. v. All Web Leads, Inc.
- Farruggio et al. v. g18 James Receiver, LLC et al.
- Hughes et al. v. AutoZone Parts Inc. et al.
- Howard, et al. v. Union Carbide Corporation
- Duhe, Jr., et al. v. Texaco, Inc., et al.
- Schexnayder Jr, et al. v. Entergy Louisiana, Inc., et al.
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- In Re: Cedarcrest Boron Trifluoride Release
- In Re: Kirby Inland Marine, LP (Brusly Barge)
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- Theodore Strong v. Numerica Credit Union
- Aaron Van Fleet, et al. v. Trion Worlds Inc.
- Wilmington Trust TCPA (Snyder, et al. v. U.S. Bank, N.A., et al.)
- Deutsche Bank National Trust TCPA (Snyder, et al. v. U.S. Bank, N.A., et al.)

\*Services provided in cooperation with The Notice Company, Inc.

<sup>†</sup>Services provided in cooperation with the Court-Appointed Special Master



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## Exhibit B: Claim Form

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QR Code  
to Claim  
Form

[www.NaturMedIVLSettlement.com/claimform](http://www.NaturMedIVLSettlement.com/claimform)

[illegible][illegible]

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☐ Digital Settlement Credit/Alternative Payment[illegible]

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Questions? Visit [www.NaturMedIVLSettlement.com](http://www.NaturMedIVLSettlement.com) or call 1-XXX-XXX-XXXX

Postal Service: Do Not Mark or Cover Barcode

1007

QR Code

ELECTRONIC SERVICE REQUESTED

P.O. Box XXXX  
Baton Rouge, LA 70821

NaturMed/IVL Settlement Administrator

Visit [www.NaturMediVLSettlement.com](http://www.NaturMediVLSettlement.com) or call 1-XXX-XXX-XXXX for more information.

**If you purchased one or more canisters of All Day Energy Greens Fruity in 2014 or 2015, you could get benefits from a class action settlement.**

A Settlement has been reached with Bactolac Pharmaceutical, Inc. ("Bactolac"), NaturMed, Inc. (d/b/a Institute for Vibrant Living) ("NaturMed"), and Independent Vital Life, LLC ("IVL2") in a class action lawsuit about the sale of certain recalled lots of the dietary supplement All Day Energy Greens and All Day Energy Greens Fruity (collectively, "ADEG") in 2014 and 2015.

**Who is included?** You are a Settlement Class Member if you are a Person in the United States who purchased one or more canisters of ADEG that were manufactured as part of the Recalled Lots (see Long Form Notice at [www.NaturMedIVLSettlement.com](http://www.NaturMedIVLSettlement.com) for details and exclusions). The Recalled Lots are 99 lots included in the March 2016 Voluntary product recall of ADEG conducted by NaturMed with the knowledge of the Food and Drug Administration. The lot numbers for the Recalled Lots are available on the Settlement Website.

Legal Notice about a Class Action Settlement

Business Reply Mail Content

Postal Service: Do Not Mark or Cover Barcode

1-XXX-XXX-XXXX

www.NaturMedIVLSettlement.com

**What Are the Settlement Terms?** The Defendants have agreed to pay \$1,725,000 into a Settlement Fund. Eligible Settlement Class Members will have the choice to claim a credit worth \$10.00 toward purchase of any IVL2 product, which will remain valid for three years, or \$5 cash. If, however, the number of claimants electing to receive the cash payment exceeds the \$100,000 Alternative Payment Fund, then each Settlement Class Member electing a cash payment shall receive a pro rata share. If monies remain in the Alternative Payment Fund after payment of \$5 to each Settlement Class Member electing a cash payment, the excess will be distributed pro rata to all such Settlement Class Members.

**How Can I Get a Payment?** To qualify for a Settlement payment or receive a Settlement Credit, you must complete and submit a Claim Form by Month XX, 2022. You may submit a Claim Form by returning the form attached to the postcard you received in the mail notifying you of this Settlement, or you may use the online Claim Form available at [www.NaturMedIVLSettlement.com](http://www.NaturMedIVLSettlement.com). Claim Forms are also available by calling 1-XXX-XXX-XXXX or by writing to: NaturMed/IVL Settlement Administrator, P.O. Box XXXXX, Baton Rouge, LA 70821.

**Do Nothing:** If you do nothing, you will not get a payment or other benefits from this Settlement and you will give up certain legal rights allocated to Settlement Class Members.

**Opt-Out:** If you exclude yourself from the Settlement (opt-out), you will not get a payment or other settlement benefits. This is the only option that allows you to be part of any other lawsuit against the Released Parties, including the Settling Defendants, for the legal claims made in this lawsuit and released by the Settlement. You must mail your request for exclusion to the NaturMed/IVL Settlement Administrator **postmarked no later than Month XX, 2022.**

**Object:** You may also object to any part of this Settlement by writing to the Court with reasons why you do not agree with the Settlement. Detailed instructions on how to exclude yourself or object to the Settlement are available on the Settlement Website.

**Has the Court Approved the Settlement?** No. The Court will hold a Fairness Hearing at XX:XX a.m./p.m. on Month XX, 2022, at the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, NY 11201. At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. It will also consider whether to approve Class Counsel's request for an award of attorneys' fees and costs, as well as the class representative Plaintiffs' service awards. If there are objections, the Court will consider them. The Court may listen to people who have asked to speak at the hearing. After the hearing, the Court will decide whether to approve the Settlement.

**How Do You Get More Information?** This notice is only a summary. To obtain a detailed information, find answers to common questions about the Settlement plus other information, including a copy of the Settlement Agreement, visit the Settlement Website.

**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.

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR  
PRELIMINARY APPROVAL OF CLASS SETTLEMENT, PRELIMINARY  
CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF NOTICE PLAN**

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## INTRODUCTION

Plaintiffs Charles Copley, Jason Evans, Humberto Garcia, Luz Angelina Garcia, Joan McDonald, John Peterson, Natalie Roberts, Donald Skare, individually and as personal representative for Betty Skare, David Stone, Kaye Wink, individually and as next of kin of Donald Wink, Jeffrey Faris, Antonia Hampton, Raul Robles, and Kathleen Cannon (collectively, “Plaintiffs”), move for preliminary approval of the Class Settlement Agreement and Release (“Settlement”), preliminary certification of the Settlement Class, and approval of the Notice Plan.<sup>1</sup> The proposed nationwide class Settlement will resolve all claims against Defendants Bactolac Pharmaceutical, Inc. (“Bactolac”), NaturMed, Inc. (“NaturMed”), and Independent Vital Life, LLC (“IVL2”) and, if approved, will provide significant relief for the Settlement Class—namely, a Total Cash Payment of \$1.725 million, as well as \$1,889,420 in Settlement Credits, for a Total Settlement Value of \$3,621,420. Each eligible Settlement Class Member—of which there may be approximately 190,000—will be entitled to receive either (i) \$10 in Settlement Credit redeemable for three years to purchase any IVL2 product, or (ii) a \$5 Alternative Payment. These Settlement benefits represent approximately 25% of each class member’s “full refund” damages (if Settlement Credit is selected) or 12.5% of each class member’s “full refund” damages (if an Alternative Payment is selected) for the purchase of one canister of ADEG. Accordingly, the Settlement provides benefits that are well within the range of reasonableness, especially given the attendant risks of continued litigation.

The Settlement was reached only after extensive discovery, motion practice, and a full day of mediation under a qualified, Court-appointed mediator. Further, the proposed resolution

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<sup>1</sup> Terms that are capitalized in this memorandum shall be defined as they are in the Settlement Agreement unless stated otherwise.

satisfies all Second Circuit Court of Appeals’ criteria for settlement approval, as well as the criteria set forth in Federal Rule of Civil Procedure 23(a) and (b)(3), meaning the Court will likely be able to grant final approval to the Settlement and certify the proposed Settlement Class following notice to the class and a fairness hearing. Accordingly, Plaintiffs respectfully request that the Court grant preliminary approval and order that Notice be distributed to the class.

### **BACKGROUND OF THE LITIGATION**

On January 26, 2018, Plaintiffs Charles Copley, Humberto Garcia, Luz Angelina Garcia, 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, filed a complaint on behalf of a putative nationwide class of consumers who purchased ADEG on or after July 1, 2014 that were manufactured and/or blended by Bactolac between January 1, 2014 and December 31, 2015, as well as putative statewide purchaser classes from Virginia, Texas, South Carolina, Alabama, Missouri, Wisconsin, Illinois, and Kentucky.<sup>2</sup> (Dkt. 1.) Plaintiffs alleged violations of the Magnuson-Moss Warranty Act, state law consumer protection statutes, state law express and implied warranties, and common law theories of fraudulent concealment, negligent misrepresentation, and unjust enrichment. (*Id.*) In addition to the Settling Defendants, Plaintiffs named two additional parties as defendants: HKW Capital Partners III, L.P., and William D. Ruble. (*Id.*)

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<sup>2</sup> Plaintiff Betty Pressley passed away in 2020 and is no longer part of the case. Plaintiff Norman Skare also passed away, but was replaced in the Action by his son, Donald Skare, as a personal representative for Betty Skare. (*See* 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 (hereafter, “Bilsborrow Decl.”) ¶ 8, filed concurrently herewith.)

Plaintiffs amended their 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, sought certification of putative statewide California and Oregon classes, and did not name HKW Capital Partners III, L.P. or William D. Ruble as defendants. (*Id.*) 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.) Bactolac did not file an answer to the amended complaint.

The Parties appeared for a conference before Magistrate Judge Kuo on August 13, 2018. At that time, Judge Kuo ordered discovery to commence pursuant to a joint proposed scheduling order. (Dkt. 66.) 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.*) Discovery commenced in earnest soon thereafter.

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.) In particular, Bactolac did not move to dismiss the following claims pled in the amended complaint: (i) violation of the Arizona Consumer Fraud Act; (ii) fraudulent concealment; and (iii) negligent misrepresentation. (*Id.*) Bactolac concurrently moved to dismiss NaturMed's crossclaims pursuant to Federal Rule of Civil Procedure 12(c). (*Id.*) These motions were fully briefed by February 28, 2019. (*See* Dkt. 91.)

Following the August 13, 2018 conference with the Court, the Parties engaged in significant discovery efforts, involving several sets of written discovery served by and on each party, voluminous document productions, regular status reports to Magistrate Judge Kuo,



depositions of each Plaintiff as well as ten depositions of current or former Bactolac employees, one Rule 30(b)(6) deposition of Bactolac, five depositions of former NaturMed employees, and a deposition of the current owner of IVL2, for a total of 30 depositions. (*See* Bilsborrow Decl. ¶ 7.) 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 also conducted several depositions remotely using Zoom. (*Id.*)

On February 18, 2020, fact discovery closed in the *Copley* matter. Plaintiffs thereafter served two experts reports in support of class certification. (*Id.* ¶ 9.) 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. (*Id.*) NaturMed also served two expert rebuttal reports on July 14, 2020. (*Id.*)

On March 12, 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 purchaser classes. (*Faris v. Bactolac Pharmaceutical, Inc. et al.*, No. 1:20-cv-01338 (hereafter, “*Faris* matter”), Dkt. 1.) 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 the *Copley* complaint. The *Faris* Plaintiffs filed an amended complaint on June 22, 2020, alleging substantially similar claims on behalf of putative nationwide and statewide classes. (*Id.*, Dkt. 27.) On June 25, 2020, NaturMed filed an answer and crossclaims against Bactolac. (*Id.*, Dkt. 29.) IVL2 filed an answer on the same date. (*Id.*, Dkt. 31.) Bactolac did not file an answer, but instead requested a pre-motion

conference seeking leave to file a motion to dismiss. (*Id.*, Dkt. 30.) On July 3, 2020, Plaintiffs filed a memorandum opposing Bactolac's request. (*Id.*, Dkt. 33.)

On July 10, 2020, Plaintiffs filed a consent motion to consolidate the *Faris* matter with the *Copley* matter. (*Id.*, Dkt. 36.) After a hearing with Magistrate Judge Kuo on July 13, 2020, the Court granted the consent motion to consolidate and consolidated the *Copley* and *Faris* matters for pretrial proceedings. (*Id.*, Dkt. 40.)

Defendants deposed Plaintiffs' class certification experts on August 7 and August 12, 2020. (Bilsborrow Decl. ¶ 13.) Plaintiffs deposed two of Bactolac's experts in opposition to class certification on September 3 and September 10, 2020. (*Id.*) On September 23, 2020, Plaintiffs moved for class certification in the consolidated proceeding. (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 of the Settling Defendants 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.)

On October 26, 2020, Plaintiffs also 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.)

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 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 Kendal D. Hirschi, Ph.D. (Dkt. 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.)

Eight months prior to completion of class certification and *Daubert* briefing, 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.)

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) and its motion for judgment on the pleadings on NaturMed's crossclaims pursuant to Federal Rule of Civil Procedure 12(c). (Dkt. 234.) On the Rule 12(b)(6) motion, 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 Plaintiffs' common law unjust enrichment claims. (*Id.*) The Court denied Bactolac's motion in all other respects, including its motion to strike Plaintiffs' request for punitive damages. (*Id.*) On the Rule 12(c) motion, the Court granted Bactolac's Rule 12(c) motion with respect 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.*)

### **MEDIATION AND SETTLEMENT NEGOTIATIONS**

On March 25, 2021, the Court conducted a status conference and directed the Parties to consider participating in the Court's mediation program. (Bilsborrow Decl. ¶ 19.) The Parties thereafter consented to participate in the Court's mediation program and agreed to the appointment of Joseph DiBenedetto of JDB Mediation LLC as mediator. (*Id.*; Dkt. 240.) On July 9, 2021, the Parties engaged in a full-day mediation at arm's length before Mr. DiBenedetto, at the conclusion of which the Parties reached an agreement in principle to resolve the case on a classwide basis. (Bilsborrow Decl. ¶ 21.) The Parties then spent the next several months negotiating the detailed written Settlement Agreement and exhibits that are now before the Court. (*Id.*)

At the time settlement was reached, the following motions were fully briefed and ripe for resolution: (i) Plaintiffs' motion for class certification; (ii) five total *Daubert* motions to strike experts in support of, or opposition to, class certification; (iii) Plaintiffs' motion to strike certain testimony under Federal Rule of Civil Procedure 37; and (iv) NaturMed's motion for partial summary judgment on its crossclaims against Bactolac.

### **SUMMARY OF THE PROPOSED SETTLEMENT TERMS**

The proposed Settlement provides for agreed certification of a nationwide settlement class, nationwide notice, and the opportunity for each eligible Settlement Class Member to receive either (i) Settlement Credit of \$10 redeemable within three years for any IVL2 product, or (ii) an Alternative Payment of \$5, subject to certain conditions set forth below.

The Settlement Class 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.” (Class Settlement Agreement and Release (hereafter, “Settlement”) ¶ 1(aaa), submitted herewith as Exhibit 1 to Bilsborrow Decl.) “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).)

#### **A. Benefits of the Settlement**

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. (Bilsborrow Decl. ¶ 25.) Within twenty days of Preliminary Approval, the Settling Defendants will pay \$1.725 million into the Escrow Account to create the Settlement Fund. (Settlement ¶ 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 obtains Final Approval and becomes effective, 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. (Bilsborrow Decl. ¶ 25.)

#### **B. Allocation of Settlement Benefits to Settlement Class Members**

Eligible Settlement Class Members 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. (Settlement ¶ 4(a)-(b).) Those who elect the former will receive a coupon, attached as Exhibit D to the Settlement. Providing Settlement Class Members with the option of a Settlement Credit aligns with the evidence in the case; multiple witnesses testified that many ADEG purchasers were longtime, loyal customers who purchased the product regularly before and even after the 2016 product recall. (Bilsborrow Decl. ¶ 28.) Accordingly, the evidence indicates that a number of Settlement Class Members may prefer to receive Settlement Credit to place toward their future purchases from IVL2, including purchases of ADEG, as it is currently reformulated. (*Id.*)

Those Settlement Class Members who no longer wish to do business with IVL2 may elect to receive a \$5 Alternative Payment from the \$100,000 Alternative Payment Fund.<sup>3</sup> (Settlement ¶ 4(b).) If the number of Claimants who elect to receive Alternative Payments exceeds the Alternative Payment Fund, then each Settlement Class Member choosing to receive an Alternative Payment will receive a pro rata share of the Fund. (*Id.*) If, however, monies remain in the Alternative Payment Fund after payment of \$5 to each Settlement Class Member electing this option, the excess will be distributed pro rata to all Settlement Class Members who selected to receive an Alternative Payment. (*Id.*)

The Settlement's options for Settlement Class Member compensation are reasonable in light of the compensation theory advanced by Plaintiffs in this Action. In particular, Plaintiffs pursued a "full refund" theory of damages. (*See* Dkt. 171 at 18, 37-39, 41.) Evidence in the case

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<sup>3</sup> The Alternative Payment Fund may exceed \$100,000. To the extent any monies remain in the Settlement Fund after payment of attorneys' fees and costs, Service Awards, and Settlement Administration Costs, such monies will be added to the Alternative Payment Fund. (Settlement ¶ 5(d).)

demonstrated that the cost of one canister of ADEG was at most \$40, but was often purchased in bulk by customers for a lesser amount. (Bilsborrow Decl. ¶ 30.) The compensation options offered by the Settlement provide class members with either 25% of the “full refund” value (if they choose Settlement Credit) or 12.5% of the “full refund” value (if they choose an Alternative Fund Payment). (*Id.*)

Settlement Class Members may demonstrate their eligibility to receive Settlement benefits by completing a simple Claim Form, a copy of which is attached hereto as Exhibit B to the Settlement Agreement. (Settlement ¶ 3(a)(i)-(ii).) A copy of the Claim Form will be mailed to each individual identified on the Recalled Lots Customer List, and potential Settlement Class Members will be able to submit a claim by returning the prepaid card attached to the Claim Form. (*Id.*; *id.* ¶ 10.) To demonstrate eligibility, the only information required by the Claim Form for nearly all Settlement Class Members is name and address. (Settlement, Ex. B; Settlement ¶ 3(b).) The Claims Administrator will then match the submitted information to information contained on the Recalled Lots Customer List. (*Id.* ¶ 3(b).) If the Claims Administrator determines that a Claimant has submitted insufficient proof of eligibility, then the Claims Administrator will provide the Claimant an opportunity to cure their submission. (*Id.* ¶ 3(a)(iii).) Potential Settlement Class Members will also have the option to complete a Claim Form by submitting a claim through an online portal on the Settlement Website. (*Id.* ¶ 3(a)(ii).)

### **C. Releases**

In consideration for the benefits provided by the Settlement, 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).)

#### **D. Notice Program**

The Settlement provides that Postlethwaite & Netterville (“P&N”) will serve as the Claims Administrator for the Settlement Class. (*Id.* ¶ 2(a)(i).) Among other duties, the Claims Administrator is responsible for disseminating Class Notice and overseeing the Notice Program. (*Id.* ¶ 1(h).) P&N is a leading class action notice and claims administrator and has successfully designed and administered more than 100 notice and settlement programs. (Declaration of Bradley Madden Regarding Administration (hereafter, “Madden Decl.”) ¶ 2 & Ex. A, submitted concurrently herewith.) The Settling Defendants do not object to the appointment of P&N as Claims Administrator. (Settlement ¶ 2(a)(i).)

Within thirty days of Preliminary Approval, or by the time otherwise specified by the Court, the Claims Administrator shall commence the Notice Program, including by mailing the Short Form Notice in such form as approved by the Court. (*Id.* ¶ 10(a).) The Claims Administrator is able to mail Notice directly to nearly all purchasers of the Recalled Lots because NaturMed previously recalled these lots in March 2016 and, in so doing, compiled a mailing list of nearly all customers who purchased at least one canister of ADEG from those lots. (Bilsborrow Decl. ¶ 38.) This mailing list—the Recalled Lots Customer List—was provided to the Claims Administrator and will be used to deliver the Short Form Notice via direct mail. (Settlement ¶ 3(b)(i); *id.* ¶ 10(a).) Accordingly, 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. (Bilsborrow Decl. ¶ 38.)

The Notice Program, including the Short Form Notice, was reasonably calculated to apprise Settlement Class Members of the material terms of the Settlement, a deadline to exclude



themselves or object to the Settlement, and the Settlement Website, where the Notice forms will be reproduced along with other relevant case documents, including the Long Form Notice and the Settlement Agreement. (Bilsborrow Decl. ¶ 38; Madden Decl. ¶ 7; Settlement ¶ 10(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, costs, and a Service Award, and relevant deadlines to object, opt out, and file claims for Settlement benefits. (Settlement, Ex. A; Bilsborrow Decl. ¶ 39.)

#### **E. Opt-Out Procedures**

A Settlement Class Member may opt out of the Settlement Class at any time prior to the Opt-Out Deadline, which is sixty days after the Notice Date (or such other date as ordered by the Court), provided the opt-out notice that must be sent to the Claims Administrator is postmarked no later than the Opt-Out Deadline. (Settlement ¶¶ 1(jj); 11(a).) Both the Short Form Notice and Long Form Notice clearly set forth the Opt-Out Deadline, and the Long Form Notice sets forth in detail the information a Settlement Class Member must provide in an opt-out notice. (*See* Settlement, Exs. A-B.)

#### **F. Objection Procedures**

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 Award. (*Id.* ¶ 12.) Objections must be submitted no later than the Objection Deadline, as specified in both the Short Form and Long Form Notice. (*Id.* ¶ 12(b); *id.*, Exs. A-B.) The Objection Deadline is sixty days after the Notice Date (or such other date as ordered by the Court). (*Id.* ¶ 1(hh).) If submitted by mail, an objection shall be deemed to have been submitted when postmarked. (*Id.* ¶ 12(b).)

#### **G. Attorneys' Fees, Costs, and Service Awards**

Attorneys' fees and costs, as determined and approved by the Court, are to be paid out of the Settlement Fund. (*Id.* ¶¶ 2(b)(i); 5(a).) The Settlement permits Plaintiffs' counsel to apply for an award of attorneys' fees up to one-third of the Total Settlement Value of \$3,621,420, and apply for reimbursement of reasonable litigation costs of \$210,136.30. (*Id.* ¶ 5(a).) The Settling Defendants agree not to oppose an application for attorneys' fees and litigation costs seeking these amounts. (*Id.*)

Subject to Court approval, the class representative Plaintiffs shall be entitled to receive a Service Award of up to \$5,000 for their role representing the Settlement Class in this case. (*Id.* ¶ 5(b).) In particular, Plaintiffs provided integral assistance that enabled Plaintiffs' counsel to successfully prosecute the Action and negotiate the Settlement, including (i) providing information on their case to Plaintiffs' counsel, (ii) searching for responsive documents and information, (iii) responding to discovery requests, (iv) preparing and sitting for a deposition, and (v) reviewing the Settlement documentation and providing relevant feedback. (Bilsborrow Decl. ¶ 45.)

#### **H. Proposed Schedule**

Plaintiffs respectfully request that the Court establish the following schedule after Preliminary Approval: (1) deadline for commencing Class Notice (the Notice Date): thirty days from Preliminary Approval; (2) Opt-Out deadline: sixty days from the Notice Date; (3) Objection deadline: sixty days from the Notice Date; (4) deadline for filing motions for approval of attorneys' fees, costs, and a Service Award: ninety days from the Notice Date; and (5) Final Approval Hearing: one-hundred twenty days from the Notice Date, or as soon thereafter as is mutually convenient for the Court and Parties. (Settlement ¶ 7(d).)

#### **ARGUMENT**

Rule 23(e) requires judicial approval of a class settlement. Fed. R. Civ. P. 23(e). Rule 23(e)(1)(B) directs a court to grant preliminary settlement approval and direct notice to the proposed class if the court “will likely be able to” grant final approval under Rule 23(e)(2) and “will likely be able to” certify a settlement class for purposes of entering judgment. Fed. R. Civ. P. 23(e)(1)(B).

In considering approval of a proposed settlement, courts are mindful of the “strong judicial policy in favor of settlements, particularly in the class action context.” *McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009). Given this policy, “[a]bsent fraud or collusion,” courts “should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.” *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 WL 2230177, at \*4 (S.D.N.Y. July 27, 2007). Moreover, “[c]ourts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere.” *Hadel v. Gaucho, LLC*, No. 15 Civ. 3706, 2016 WL 1060324, at \*2 (S.D.N.Y. Mar. 14, 2016) (collecting cases).

Here, the Court should grant preliminary approval because it “will likely be able to” both grant final approval to the Settlement as “fair, reasonable, and adequate” and certify the Settlement Class for purposes of entering judgment after notice and a final approval hearing.

**I. The Court “Will Likely Be Able To” Approve The Settlement As “Fair, Reasonable, And Adequate” Under Rule 23(e)(2).**

Rule 23(e)(2) sets out the factors a court must consider in determining whether a proposed class action settlement is “fair, reasonable, and adequate.” Those factors require the Court to consider whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm’s length;

(C) the relief provided for the class is adequate, taking into account:

- (i) the costs, risks, and delay of trial and appeal;
- (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
- (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and
- (iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

As the Advisory Committee’s note to the 2018 Rule 23 Amendment explains, subsections (A) and (B) focus on the “procedural” fairness of a settlement and subsections (C) and (D) focus on the “substantive” fairness of the settlement. Fed. R. Civ. P. 23(e)(2) advisory committee’s note to 2018 amendments. These factors are similar to the “procedural” and “substantive” factors the Second Circuit developed prior to the amendment.<sup>4</sup> *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013) (explaining that courts evaluate procedural and substantive fairness of a class settlement). The 2018 amendment, however, recognizes that “[t]he sheer number of factors” considered in various Circuits “can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).” Fed. R. Civ. P. 23(e)(2) advisory committee’s note to 2018 amendments. The 2018 amendment “therefore directs the parties to present the settlement to the

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<sup>4</sup> Prior to the 2018 rule amendment, courts in this Circuit determined whether a proposed class settlement was fair, reasonable, and adequate by analyzing several factors set forth in *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). These factors remain relevant to the Court’s review even after the 2018 rule amendment. *See In re Payment Card Interchange Fee & Merck Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019) (“The Court understands the new Rule 23(e) factors to add to, rather than displace, the *Grinnell* factors.”).

court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.” *Id.*

The proposed Settlement in this case is “fair, reasonable, and adequate” considering the relevant factors, and the Court should grant preliminary approval and direct notice to be distributed because the Court “will likely be able to” grant final approval to the Settlement.

**A. The Class Representatives and Plaintiffs’ Counsel Have Adequately Represented the Class.**

The class representative Plaintiffs and proposed Class Counsel have adequately represented the proposed Settlement Class. *See* Fed. R. Civ. P. 23(e)(2)(A). Proposed Class Counsel has extensive experience in class action litigation as well as consumer fraud matters. (Bilsborrow Decl. ¶ 42-43.) Here, proposed Class Counsel utilized his expertise to build a strong case that the Recalled Lots were adulterated and/or misbranded at the time they were manufactured. (*See id.* ¶ 44.) Proposed Class Counsel was able to develop evidence related to the liability of each Settling Defendant, the manner in which the Recalled Lots did not match the representations on the product label, and a range of damages attributable to Defendants’ collective misconduct. Without proposed Class Counsel’s persistence, expertise, and willingness to invest time and financial resources into this matter, the Settlement Class would have been left without legal recompense. (*See id.* ¶ 41.)

Proposed Class Counsel aggressively pursued discovery of relevant evidence, obtaining tens of thousands of pages of documents and electronic files through requests for production and interrogatories served on each Defendant. (*Id.* ¶ 44.) This material was then organized and systematically reviewed so that key documents and information could be utilized to build Plaintiffs’ case. (*Id.*) Proposed Class Counsel conducted nearly twenty depositions of current and

former employees of Defendants and defended thirteen depositions of Plaintiffs. (*Id.*) These efforts culminated in a proposed Settlement that will provide Settlement Class Members with either 25% of their potential “full refund” value (if a class member opts for Settlement Credit) or 12.5% of the “full refund” value (if they choose an Alternative Fund Payment). (*Id.* ¶ 30.) These benefits will be delivered classwide without the risk, expense, and uncertainty of further litigation.

Similarly, the efforts of the class representative Plaintiffs greatly contributed to the litigation’s success. Each Plaintiff timely responded to written discovery requests and searched for and produced relevant documents and other information. (*Id.* ¶ 45.) The class representative Plaintiffs also timely responded to alleged discovery deficiencies sent by Defendants, which required Plaintiffs to undertake additional time and effort to ensure discovery compliance, including conducting additional document searches and participating in multiple phone calls or in-person meetings with Plaintiffs’ counsel. (*Id.*) Each Plaintiff also sat for a deposition and was subjected to questioning by counsel for the Defendants. (*Id.*)

The class representative Plaintiffs and proposed Class Counsel “have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement.” *In re AOL Time Warner, Inc.*, No. 02 CIV. 5575 (SWK), 2006 WL 903236, at \*10 (S.D.N.Y. Apr. 6, 2006); *In re Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff’d*, 798 F.2d 35 (2d Cir. 1986) (approving settlement where “[d]iscovery is fairly advanced and the parties certainly have a clear view of the strengths and weaknesses of their cases”). Accordingly, the class representative Plaintiffs and proposed Class Counsel have adequately represented the Settlement Class. Fed. R. Civ. P. 23(e)(2)(A).

**B. The Settlement was Negotiated at Arm’s Length**

The proposed Settlement is the product of hard-fought, arm's-length negotiations overseen by an experienced court-appointed mediator, Joseph DiBenedetto. *See* Fed. R. Civ. P. 23(e)(2)(B). “To determine procedural fairness, courts examine the negotiating process leading up to the settlement.” *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012). “A ‘presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.’” *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting Manual for Complex Litig. (Third) § 30.42 (1995)). Moreover, in such circumstances, “great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.” *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. Mar. 20, 1997); *see also Clark v. Ecolab Inc.*, Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2010 WL 1948198, at \*4 (S.D.N.Y. May 11, 2010) (“In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation.”). Proposed Class Counsel, who has extensive experience litigating consumer class action cases in New York and across the country, is of the opinion that the Settlement is a fair, reasonable, and adequate result for the Settlement Class. (Bilsborrow Decl. ¶ 46.)

In sum, the Settlement was negotiated at arm's length and was procedurally fair. *See* Fed. R. Civ. P. 23 (e)(2)(B).

**C. The Relief Provided to the Settlement Class is Significant, Taking Into Account the Relevant Factors.**

In addition to the factors set forth in Rule 23(e), the Second Circuit has identified nine factors that may also be considered when assessing the substantive fairness of a proposed class settlement:

(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 trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

*Grinnell*, 495 F.2d at 463. In applying these factors, “not every factor must weigh in favor of [the] settlement, rather the court should consider the totality of these factors in light of the particular circumstances.” *Marroquin Alas v. Champlain Valley Specialty of N.Y., Inc.*, No. 5:15-cv-00441 (MAD/TWD), 2016 WL 3406111, at \*4 (N.D.N.Y. June 17, 2016) (internal quotations omitted). As applied here, both the Rule 23(e) and *Grinnell* factors weigh in favor of approval.

#### **1. The relief provided by the Settlement is significant.**

A central indicator of a settlement’s fairness is the significance of the relief it provides—here, the Total Settlement Value is \$3,621,420 to resolve this litigation on a classwide basis. (Bilsborrow Decl. ¶ 25.) Settlement Class Members who participate in the Settlement will receive either 25% of their potential “full refund” value (if a class member opts for Settlement Credit) or 12.5% of the “full refund” value (if they choose an Alternative Fund Payment). (*Id.* ¶ 30.) The proposed Settlement therefore provides significant relief well within the range of that which is reasonable. *See* Fed. R. Civ. P. 23(e)(2)(C); *see also* *Massiah v. MetroPlus Health Plan, Inc.*, No. 11-cv-05669, 2012 WL 5874655, at \*5 (E.D.N.Y. Nov. 20, 2012).

The Second Circuit has recognized that “[t]here 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.” *Grinnell*, 495 F.2d at 455 n.2. Consistent with that principle, courts often approve class settlements where the benefits represent “only a fraction of the potential recovery.” *See, e.g., In re Initial Public Offering Secs. Litig. (“In re IPO”),* 671 F. Supp. 2d 467,



483-85 (S.D.N.Y. 2009). In a recent decision, the Second Circuit upheld approval of a settlement that represented 6.1% of the class’s maximum potential damages. *In re Patriot Nat’l, Inc. Sec. Litig.*, 828 F. App’x 760, 762 (2d Cir. 2020). And in *In re IPO*, the court approved a settlement that provided only 2% of defendants’ maximum potential liability, observing that “the Second Circuit has held that . . . even a fraction of the potential recovery does not render a proposed settlement inadequate.” 671 F. Supp. 2d at 484; *see also In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 135 (S.D.N.Y. 2008) (approving settlement at 3% of estimated damages); *Hall v. Children’s Place Retail Stores, Inc.*, 669 F. Supp. 2d 399, 402 (S.D.N.Y. 2009) (same, 5 to 12% of maximum damages). “Moreover, the settlement amount must be judged ‘not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs’ case.’” *Baudin v. Resource Mktg. Corp., LLC*, No. 1:19-cv-386, 2020 WL 4732083, at \*9 (N.D.N.Y. Aug. 13, 2020) (quoting *Shapiro v. JPMorgan Chase & Co.*, Nos. 11 Civ. 8331 (CM) (MHD), 11 Civ. 7961 (CM), 2014 WL 1224666, at \*11 (S.D.N.Y. Mar. 24, 2014)).

The Total Settlement Value of \$3,621,420 provides significant classwide relief, especially in light of the Action’s complexity and the significant litigation barriers looming absent a negotiated resolution. The suit centers on the alleged adulteration and misbranding of the Recalled Lots, which Plaintiffs contend were deceptively marketed and sold to unwitting consumers. The proposed Settlement provides compensation—either in the form of cash or credit—to those consumers. Although Plaintiffs pursued a “full refund” theory of damages, seeking up to \$40 per canister of ADEG purchased from the Recalled Lots, there was a risk Plaintiffs would not prevail on such a theory; Bactolac argued, for example, that Plaintiffs should be precluded from seeking a full refund since many consumers purportedly received some benefit from consumption of the

product. (Dkt. 173 at 37-39.) Further, prior to the Parties’ mediation, Plaintiffs moved for class certification, which the Settling Defendants opposed by submitting three separate briefs. (Bilsborrow Decl. ¶ 14.) Bactolac also moved to exclude Plaintiffs’ class certification experts. (*Id.* ¶ 16.) The Court did not rule on these motions prior to the Parties’ resolution, but it is possible that some or all of the proposed classes would not have achieved certification or that one or more of Plaintiffs’ experts would be precluded from offering certain expert testimony, thus imperiling the viability of Plaintiffs’ sought-after classwide relief. The Settlement, in contrast, delivers such classwide relief.

Plaintiffs and proposed Class Counsel are confident that their case is strong, but they are also pragmatic in their appreciation for the Settling Defendants’ respective defenses and the risks inherent in continued litigation. This is a critical factor favoring settlement, as courts consider the prospect of legal and factual litigation obstacles as weighing in favor of settlement. *Massiah*, 2012 WL 5874655, at \*4 (“Litigation inherently involves risks.” (internal quotation omitted)). Here, a long road remained before Plaintiffs could reach a trial on the merits. Instead of the uncertainty of litigation, Settlement Class Members now have the option of obtaining up to 25% of the “full refund” Plaintiffs sought as their best-case damages scenario. The relief provided by the Settlement is therefore significant in light of the attendant risks of litigation and the best possible recovery at trial.

**2. The costs, risks, and delay of trial and appeal make the relief provided by the Settlement even more significant.**

The benefits provided by the Settlement are even more significant when considered against the substantial costs, risks, and delays of continued litigation. *See* Fed. R. Civ. P. 23(e)(2)(C)(i); *see also Grinnell*, 495 F.2d at 463 (identifying the “complexity, expense and likely duration of the litigation” as a factor for courts to consider). The relief provided by the Settlement is concrete,

guaranteed, and relatively immediate, while the results from continued litigation would be delayed at best and lower in value at worst. Further, the Settling Defendants are represented by sophisticated counsel with the resources to delay prosecution of the claims at every potential opportunity, through trial and potential appeals. There is little doubt that continued litigation against the Settling Defendants would likely span years and would be costly to the Parties and a tax on judicial resources. *See In re IPO*, 671 F. Supp. 2d at 481 (finding that the complexity, expense, and duration of continued litigation supports approval where, among other things, “motions would be filed raising every possible kind of pre-trial, trial and post-trial issue conceivable”). The substantial risk of continued litigation accordingly weighs in favor of approving the Settlement. *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004).

**3. The stage of proceedings and amount of discovery completed favor approval of the Settlement.**

The third *Grinnell* factor requires the court to assess the stage of the proceedings and amount of discovery completed. This assessment ensures that the parties have engaged in a reasonable investigation of the facts “such that counsel possessed a record sufficient to permit evaluation of the merits of Plaintiffs’ claims, the strengths of the defenses asserted by the Defendants, and the value of Plaintiffs’ causes of action for purposes of settlement.” *Christine Asia Co., Ltd. v. Yun Ma*, No. 1:15-md-02631, 2019 WL 5257534, at \*11 (S.D.N.Y. Oct. 16, 2019) (internal quotation omitted). Further, “[w]hile the parties need not have engaged in extensive discovery, a sufficient factual investigation must have been conducted to afford the Court the opportunity to ‘intelligently make . . . an appraisal of the Settlement.’” *Ferrick v. Spotify USA Inc.*, No. 16-cv-8412 (AJN), 2018 WL 2324076, at \*5 (S.D.N.Y. May 22, 2018) (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000)).

This *Grinnell* factor weighs in favor of preliminary approval. Plaintiffs' counsel devoted substantial time and resources investigating, litigating, and resolving this case. At the time the Parties reached a settlement, discovery was complete, the Parties had disclosed experts related to class certification, and Plaintiffs' motion for class certification was fully briefed. (Bilsborrow Decl. ¶¶ 9, 14.) As a result, the litigation was at a mature stage and Plaintiffs' counsel was able to discern the relative strengths and weaknesses of Plaintiffs' case. The stage of the proceedings and the amount of discovery completed thus favor preliminary approval of the proposed Settlement.

**4. The risks of maintaining the class action through trial, the risks of establishing liability, and the risks of establishing damages all favor preliminary approval of the Settlement.**

Whether the case would be tried as a class action is relevant to the Court's substantive fairness review. *See Grinnell*, 495 F.2d at 463. Here, Plaintiffs filed a motion for certification of nationwide and statewide classes, which each Defendant independently opposed. (Bilsborrow Decl. ¶ 14.) Because the Court did not rule on Plaintiffs' motion prior to negotiation of the Settlement, it is not known whether the Court would have granted certification to some or all of the proposed classes. Nonetheless, the difficulty of certifying and maintaining a class favors preliminary approval of the Settlement. *See, e.g., Guippone v. BH S&B Holdings LLC*, No. 09 Civ. 01029 (CM), 2016 WL 5811888, at \*7 (S.D.N.Y. Sept. 23, 2016). Similarly, the risks of establishing liability and damages also favor approval of the Settlement. *See Asare v. Change Grp. of N.Y., Inc.*, No. 12 Civ. 3371 (CM), 2013 WL 6144764, at \*11 (S.D.N.Y. Nov. 18, 2013) (explaining that although a case may be strong, if "settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome"). NaturMed's insolvency further tilts these *Grinnell* factors in favor of the proposed Settlement, as it is questionable whether NaturMed would have the ability to contribute financially to a verdict after trial. (Bilsborrow Decl.

¶ 20); *Guippone*, 2016 WL 5811888, at \*6 (explaining that a defendant’s insolvency creates greater risks for the plaintiffs in establishing liability, damages, and maintaining a certified class).

**5. The method of distributing relief to the Settlement Class is highly effective and the Settlement treats class members equitably relative to each other.**

The proposed Settlement will effectively and equitably distribute relief to the Settlement Class Members with minimal requirements imposed on class members to establish eligibility, a factor the Court must review under Fed. R. Civ. P. 23(e)(2)(C)(ii) and Fed. R. Civ. P. 23(e)(2)(D). A plan for allocating settlement proceeds, like the Settlement itself, should be approved if it is fair, reasonable, and adequate. *See, e.g., In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012). “Measuring the proposed relief may require evaluation of any proposed claims process.” Fed. R. Civ. P. 23(e) advisory committee’s note to 2018 amendments.

Settlement Class Members are treated equitably under the allocation terms of the proposed Settlement. Every Settlement Class Member may elect to obtain either \$10 in Settlement Credit or a \$5 Alternative Payment. (Settlement ¶ 4(a)-(b)); *see Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002) (“An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel”). To obtain one of these benefits, Settlement Class Members must only submit a simple Claim Form that, in most circumstances, requires only basic identifying information.<sup>5</sup> (*Id.* ¶ 3(a).) In this manner, the Settlement allocates benefits equitably, efficiently, and treats Settlement Class Members equitably relative to each other, thus satisfying Fed. R. Civ. P. 23(e)(2)(C)(ii).

**6. Attorneys’ fees will be paid only after Court approval and in an amount justified by the Settlement.**

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<sup>5</sup> Some Claimants may be required to submit qualifying documentary support if the Claims Administrator is unable to verify their eligibility using the Recalled Lots Customer List. (Settlement ¶ 3(a)(ii)-(iii).)

Rule 23(e)(2)(C)(iii) requires evaluation of the terms of any proposed attorneys' fees, including timing of payment. The Settlement provides that attorneys' fees will be paid from the Settlement Fund only after a separate application is made, Settlement Class Members have an opportunity to object, and the Court determines the appropriate amount. (Settlement ¶ 5(a).) Under the terms of the Settlement, the Settling Defendants will not object to a fee request of up to one-third of the Total Settlement Value. (*Id.*) While an application has yet to be made, the Long Form Notice explains that proposed Class Counsel may request up to one-third of the Total Settlement Value. (Settlement, Ex. A.) Accordingly, the Court should find that this factor will favor granting final approval and should reserve its full analysis for the final approval stage.<sup>6</sup> *See, e.g., Kirby v. FIC Restaurants, Inc.*, No. 5:19-CV-1306 (FJS/ML), 2020 WL 2770387, at \*5 (N.D.N.Y. May 28, 2020) (explaining that "it does not make sense for the Court to complete its analysis of the proposed attorneys' fees and costs, administrator fees, and the proposed service awards [at the preliminary approval stage], when none of those class and collective members have had an opportunity to be heard").

## **7. Disclosure of side agreements.**

Rule 23(e)(2)(C)(iv) requires the Court to consider any side agreements that must be disclosed. This is because side agreements can result in inequitable treatment of class members.

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<sup>6</sup> As will be set forth in more detail in Plaintiffs' application for attorneys' fees, a percentage-of-the-fund method of awarding attorneys' fees is appropriate here. The Second Circuit has explained why: "[t]he trend in this Circuit is toward the percentage method which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation[.]" *Wal-Mart Stores*, 396 F.3d at 121 (internal citations omitted). Indeed, "[t]his is consistent with the line of cases in which the Supreme Court held that in the case of a common fund, the fee awarded should be determined on a percentage-of-recovery basis." *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at \*15 (citing, *e.g., Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)).

Fed. R. Civ. P. 23(e) advisory committee's note to 2018 amendments. Here, there are two side agreements that require disclosure. The first involves the percentage of opt-outs compared to the percentage of eligible class members. Under the terms of this side agreement, whose existence is disclosed in the Settlement Agreement, if a significant percentage of eligible class members opt out of the Settlement, the Settling Defendants have the option to terminate the agreement. (Settlement ¶ 17(a); Bilsborrow Decl. ¶ 35.) This percentage was placed in a side agreement so as not to incentivize any counsel or group of individuals to attempt to coerce payments of greater benefits or fees by organizing an effort to opt out en masse. (Bilsborrow Decl. ¶ 35.) There is no cause to doubt the adequacy and fairness of the Settlement by putting this threshold percentage in a side agreement while at the same time alerting class members through the Long Form Notice that an unstated but significant percentage of potential class members must participate for the Settlement to proceed. (*See* Settlement, Ex. A.)

The second side agreement is an agreement among the Settling Defendants regarding each Defendant's responsibility to pay a percentage of the Total Settlement Payment. This agreement has no bearing on the fairness or adequacy of the Settlement with respect to the Settlement Class Members, as the Total Settlement Payment is clearly stated in the Settlement Agreement. (*Id.* ¶ 1(hhh).)

**8. The remaining *Grinnell* factors do not weigh against preliminary approval.**

The remaining *Grinnell* factors require the Court to assess the reaction of the class to the settlement and the ability of the defendants to withstand a greater judgment than they are paying to resolve the case. *Grinnell*, 495 F.2d at 463. Because Notice has not yet been distributed, the Settlement Class has not had an opportunity to register reactions to the Settlement and it is thus

more appropriate to reserve this factor for final approval. That said, the class representative Plaintiffs are supportive of the proposed Settlement. (Bilsborrow Decl. ¶ 45.)

Finally, it is likely that the Settling Defendants collectively could not withstand a greater judgment at trial than what they have agreed to provide through the Settlement. NaturMed is insolvent and IVL2 does not have the financial capacity to support a large financial outlay. (*Id.* ¶ 20.) Although Bactolac may be capable of incurring a greater financial judgment, “a defendant is not required to empty its coffers before a settlement can be found adequate.” *Shapiro*, 2014 WL 1224666, at \*11 (S.D.N.Y. Mar. 24, 2014). That perhaps one of three Settling Defendants has the means to withstand a greater judgment at trial “do[es] not ameliorate the force of the other *Grinnell* factors, which lead to the conclusion that the settlement is fair, reasonable and adequate.” *Id.*

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In sum, the Court will likely be able to grant final approval to the proposed Settlement because it is a fair, reasonable, and adequate compromise that treats Settlement Class Members equitably relative to each other and provides immediate benefits without the delay and cost of continuing litigation. Accordingly, the Court should grant preliminary approval to the proposed Settlement.

## **II. The Court Will “Likely Be Able To” Certify The Settlement Class For Purposes Of Entering Judgment On The Settlement.**

For settlement purposes, Plaintiffs respectfully request that the Court certify the Settlement Class. Plaintiffs move for certification of a nationwide settlement class under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2310, which the Court ruled “provides a federal cause of action for breach of warranty under state law” and was viably pled in this case. (Dkt. 234 at 4.) For purposes of this Settlement, the Settling Defendants do not oppose certification. Certification of the proposed Settlement Class will allow notice of the proposed Settlement to be distributed to



potential class members and inform them of the existence and terms of the proposed Settlement; of their right to be heard on the Settlement's fairness; and of their rights to opt out. *See* Manual for Complex Litig. §§ 21.632, 21.633. Certification is appropriate under Fed. R. Civ. P. 23(a) and (b)(3).

Certification under 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 Settlement Class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the Settlement Class; and (4) the representative parties will fairly and adequately protect the interests of the Settlement Class. Rule 23(b)(3) certification is appropriate if questions of law or fact common to the class members predominate over individual issues of law or fact, and if a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

**Numerosity.** To satisfy the numerosity requirement, the proposed class must be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). In the Second Circuit, there is a presumption that a putative class of 40 or more members satisfies the numerosity requirement. *Consol. Rail Corp. v. Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, the proposed Settlement Class consists of nearly 190,000 customers who purchased at least one canister from the Recalled Lots. (Bilsborrow Decl. ¶ 26.) Numerosity is thus easily satisfied.

**Commonality.** Rule 23(a)(2) requires that “there are questions of law or fact common to the class.” “Rule 23(a)(2)’s commonality prerequisite is satisfied if there is a common issue that ‘drive[s] the resolution of the litigation’ such that ‘determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.’” *Sykes v. Mel S. Harris & Assocs., LLC*, 780 F.3d 70, 84 (2d Cir. 2015) (quoting *Wal-Mart Stores, Inc. v. Dukes*,

564 U.S. 338, 349-50 (2011)). Commonality is easily satisfied here, as all class members assert the same injury, namely: all class members purchased a dietary supplement that they allege did not contain what it purported to contain and therefore did not comport with the claims on the product label. (*See* Dkt. 171 at 24-30.) Numerous questions of law and fact relate to the manner in which this common injury purportedly occurred, including each Defendant's alleged responsibility for these injuries.

**Typicality.** Under Rule 23(a)(3), a representative party must assert claims or defenses that are "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is satisfied when the class representative Plaintiffs' claims arise from the same course of events and rely on similar legal arguments as other class members' claims. *Brown v. Kelly*, 609 F.3d 467, 475 (2d Cir. 2010). Here, the class representative Plaintiffs' claims are coextensive with those of the absent Settlement Class Members because Plaintiffs, like all Settlement Class Members, purchased ADEG that was purportedly adulterated and/or misbranded from the Recalled Lots. (*See* Dkt. 171 at 30-31.) Accordingly, all class representative Plaintiffs and Settlement Class Members suffered the same injury and will benefit in a similar manner from the relief afforded by the Settlement.

**Adequacy.** Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "Adequacy is twofold: the proposed class representatives must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). The interests of the class representative Plaintiffs are identical to the interests of each Settlement Class Member and thus no conflicts exist. Plaintiffs seek to recover reimbursement damages for the wrongful conduct engaged in by Defendants and, as set forth above, the class representative Plaintiffs suffered the same injury that was allegedly suffered by

each member of the Settlement Class. (*See* Dkt. 171 at 31-32.) The class representative Plaintiffs have also participated actively in this case, adequately representing the class as a whole. (Bilsborrow Decl. ¶ 45.) Further, Plaintiffs are represented by qualified and competent counsel who has devoted time and resources to the successful prosecution of this case and has extensive experience litigating consumer class action lawsuits. (*Id.* ¶ 42-44.)

**Ascertainability.** The Second Circuit has recognized “an implied requirement of ascertainability in Rule 23, which demands that a class be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.” *In re Petrobas Sec.*, 862 F.3d 250, 257 (2d Cir. 2017) (internal quotation and quotation marks omitted). This is a “modest threshold requirement [that] will only preclude certification if a proposed class definition is indeterminate in some fundamental way.” *Id.* at 269. The Settlement Class is defined using objective criteria—namely, customers who purchased at least one canister of ADEG from the Recalled Lots. (Bilsborrow Decl. ¶ 26.) Accordingly, the proposed class is ascertainable.

**Predominance.** Certification of the Settlement Class is further warranted because the questions of law or fact common the Settlement Class predominate over any questions affecting only individual members. *See* Fed. R. Civ. P. 23(b)(3). In the Second Circuit, “[p]redominance is satisfied ‘if resolution of some of the legal or factual questions that qualify each class member’s case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject to individualized proof.’” *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (quoting *Catholic Healthcare W. v. U.S. Foodservice Inc.* (*In re U.S. Foodservice Pricing Litig.*), 729 F.3d 108, 118 (2d Cir. 2013)). In this manner, “predominance is a comparative standard; ‘Rule 23(b)(3) [] does *not* require a plaintiff seeking

class certification to prove that each element of her claim is susceptible to classwide proof. What the rule does require is that common questions *predominate* over any questions affecting only individual [class] members.” *In re Petrobas Sec.*, 862 F.3d at 268 (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 469 (2013)).

Predominance is satisfied in this proposed Settlement Class because the class representative Plaintiffs and Settlement Class Members would establish Settling Defendants’ liability through common proof applicable to each class member’s claim, including classwide exposure to the same or similar alleged material misrepresentations and/or uniform omissions of material information from the ADEG label. Courts in this Circuit have found that predominance is satisfied in such actions. *See, e.g., In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d at 118; *Hasemann v. Gerber Prods. Co.*, 331 F.R.D. 239, 273-75 (E.D.N.Y. 2019); *In re Amla Litig.*, 282 F. Supp. 3d 751, 759 (S.D.N.Y. 2017); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 409 (S.D.N.Y. 2015); *see also In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539, 558 (9th Cir. 2019) (explaining that consumer cases alleging plaintiffs were exposed to common misrepresentations or omissions present the “types of common issues, which turn on a common course of conduct by the defendant, [that] can establish predominance in nationwide class actions”).

**Superiority.** Rule 23(b)(3) also requires that a class action proceeding “is superior to other available means for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). “[C]lass actions are superior to individual trials ‘when the main objectives of Rule 23 are served,’ including ‘the efficient resolution of the claims or liabilities of many individuals in a single action, as well as the elimination of repetitious litigation and possibly inconsistent adjudications.’” *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1175 (JG)(VVP), 2014 WL 7882100, at \*64 (E.D.N.Y. Oct. 15, 2014) (quoting *D’Alauro v. GC Servs. Ltd. P’ship*, 168 F.R.D. 451,458

(E.D.N.Y. 1996)). The proposed Settlement Class will potentially resolve tens of thousands of claims in one action, which is far superior to individual lawsuits against one or more Settling Defendants.

In sum, the proposed Settlement Class meets each of the requirements of Rule 23(a) and (b)(3) and the Court will therefore likely be able to certify the Settlement Class at final approval. The Court should therefore grant preliminary certification so that Notice can be distributed to potential class members.

### **III. The Court Should Approve The Form Of Notice And Direct Notice To Be Sent To The Settlement Class.**

Once the Court has determined that preliminary approval is appropriate, it must direct notice to the proposed class that would be bound by the settlement. Fed. R. Civ. P. 23(e)(1). “The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness.” *Wal-Mart Stores*, 396 F.3d at 113 (citations omitted). The Court is given broad power over which procedures to use for providing notice so long as the procedures are consistent with the standards of reasonableness that the Constitution’s due process guarantees impose. *See Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986) (“[T]he district court has virtually complete discretion as to the manner of giving notice to class members.”). “When a class settlement is proposed, the court ‘must direct to class members the best notice that is practicable under the circumstances.’” *Vargas v. Capital One Fin. Advisors*, 559 F. App’x 22, 26 (2d Cir. 2014) (summary order) (quoting Fed. R. Civ. P. 23(c)(2)(B), (e)(1)). The notice must include: “(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusions; (vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).” Fed. R. Civ. P. 23(c)(2)(B).

Here, the proposed Short Form Notice, attached as Exhibit B to the Settlement, coupled with the Long Form Notice, attached as Exhibit A to the Settlement, the proposal to disseminate Notice by direct mail to individuals identified on the Recalled Lots Customer List, and the proposal to establish the Settlement Website featuring the Long Form Notice constitute the best notice practicable. The Long and Short Form Notice are written in plain language and provide the information required by Rule 23 and due process. The Court should approve the Notice Plan.

#### **IV. The Court Should Schedule A Final Approval Hearing.**

The last step in the Settlement approval process is a final approval hearing at which the Court will make its final evaluation of the Settlement. Plaintiffs respectfully request that the Court schedule the final approval hearing 120 days after entry of the Preliminary Approval Order.

#### **CONCLUSION**

The Settlement achieves a significant result in a complex litigation that will provide Settlement Class Members with monetary relief as a result of the alleged consumer harms identified in this case. This outcome took over three years of litigation, full briefing of class certification and *Daubert* motions, significant discovery and depositions, and a hard-fought mediation presided over by a Court-appointed mediator. The resulting Settlement is fair, adequate, and reasonable, and this Court should grant preliminary approval to the Settlement.

Dated: January 10, 2022  
New York, New York

Respectfully submitted,

/s/ James J. Bilsborrow  
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*Counsel for Plaintiffs*

**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.

**[PROPOSED] PRELIMINARY APPROVAL ORDER**

Plaintiffs Charles Copley, Jason Evans, Humberto Garcia, Luz Angelina Garcia, Joan McDonald, John Peterson, Natalie Roberts, Donald Skare, individually and as personal representative for Betty Skare, David Stone, Kaye Wink, individually and as next of kin of Donald



Wink, Jeffrey Faris, Antonia Hampton, Raul Robles, and Kathleen Cannon (hereafter, “Plaintiffs”), on behalf of themselves and the Settlement Class Members, and Defendants Bactolac Pharmaceutical, Inc., NaturMed, Inc., and Independent Vital Life, LLC (hereafter, “Settling Defendants”), by their respective counsel, have submitted a Settlement Agreement to this Court, and Plaintiffs have moved under Federal Rule of Civil Procedure 23(e) for an order: (1) preliminarily certifying the Settlement Class for purposes of settlement, and appointing Plaintiffs as class representatives and their counsel as Class Counsel; (2) preliminarily approving the Settlement; (3) approving the Notice Program; (4) appointing Postlethwaite & Netterville (“P&N”) as Claims Administrator and directing it to commence the Notice Program; (5) providing legal authority pursuant to N.Y. C.P.L.R. § 1207 for legal representatives of absent Settlement Class Members to sign Claim Forms and releases on behalf of the Settlement Class Members they represent; and (6) scheduling a Final Approval Hearing to consider final approval of the settlement and any application for attorneys’ fees, expenses, and Service Awards. The Court has considered the terms of the Settlement, the exhibits to the Settlement Agreement, the record of proceedings, and all papers and arguments submitted in support, and now finds that the motion should be, and hereby is, **GRANTED**.

**ACCORDINGLY, THE COURT FINDS AND ORDERS:**

1. This Court has jurisdiction over the subject matter of this lawsuit and jurisdiction over the Plaintiffs and Settling Defendants (the “Parties”) for purposes of the Settlement.
2. Capitalized terms not otherwise defined in this Order have the definitions set forth in the Settlement Agreement.

**SUMMARY OF THE LITIGATION AND SETTLEMENT**

3. On January 26, 2018, Plaintiffs filed a complaint on behalf of a putative nationwide class of consumers who purchased ADEG on or after July 1, 2014 that were manufactured and/or blended by Bactolac between January 1, 2014 and December 31, 2015, as well as putative statewide purchaser classes from Virginia, Texas, South Carolina, Alabama, Missouri, Wisconsin, Illinois, and Kentucky. Plaintiffs alleged violations of the Magnuson-Moss Warranty Act, state law consumer protection statutes, state law express and implied warranties, and common law theories of fraudulent concealment, negligent misrepresentation, and unjust enrichment. In addition to the Settling Defendants, Plaintiffs named two additional parties as defendants: HKW Capital Partners III, L.P., and William D. Ruble.

4. On July 13, 2018, Plaintiffs filed an amended complaint alleging similar theories of harm. The amended complaint added Plaintiffs Jason Evans and Joan McDonald, sought certification of putative statewide California and Oregon classes, and did not name HKW Capital Partners III, L.P. or William D. Ruble as defendants.

5. On July 27, 2018, Defendant NaturMed, Inc. (“NaturMed”) answered the amended complaint and filed crossclaims against Defendant Bactolac Pharmaceutical, Inc. (“Bactolac”), alleging contractual indemnity, breach of contract, fraud, breach of express warranty, breach of implied warranty, and negligence causes of action. Defendant Independent Vital Life, LLC (“IVL2”) filed an answer to the amended complaint on August 10, 2018. Bactolac did not file an answer to the amended complaint.

6. On August 13, 2018, the Parties appeared for a conference before Magistrate Judge Kuo. At that time, Judge Kuo ordered discovery to commence pursuant to a joint proposed scheduling order. 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.). Discovery commenced in earnest soon thereafter.

7. 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). In particular, Bactolac did not move to dismiss the following claims pled in the amended complaint: (i) violation of the Arizona Consumer Fraud Act; (ii) fraudulent concealment; and (iii) negligent misrepresentation. Bactolac also moved to dismiss NaturMed's crossclaims pursuant to Federal Rule of Civil Procedure 12(c). These motions were fully briefed by February 28, 2019.

8. Following the August 13, 2018 conference with the Court, the Parties engaged in significant discovery efforts, involving several sets of written discovery served by and on each party, voluminous document productions, regular status reports to Magistrate Judge Kuo, depositions of each Plaintiff as well as ten depositions of current or former Bactolac employees, one Rule 30(b)(6) deposition of Bactolac, five depositions of former NaturMed employees, and a deposition of the current owner of IVL2, for a total of 29 depositions. 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 also conducted several depositions remotely using Zoom.

9. On February 18, 2020, fact discovery closed in the *Copley* matter. Plaintiffs thereafter served two experts 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, 2021.

10. On March 12, 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 purchaser classes. Plaintiffs alleged violations of state consumer protection laws, as well as common law claims of fraudulent concealment, negligent misrepresentation, and unjust enrichment. The allegations underlying the *Faris* complaint were substantially similar to those pled in the *Copley* complaint.

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

12. On July 10, 2020, Plaintiffs filed a consent motion to consolidate the *Faris* matter with the *Copley* matter. After a hearing with Magistrate Judge Kuo on July 13, 2020, the Court granted the consent motion to consolidate and consolidated the *Copley* and *Faris* matters for pretrial proceedings.

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

14. On September 23, 2020, Plaintiffs moved for class certification in the consolidated proceeding. 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. Each of the Settling Defendants filed a brief opposing Plaintiffs' motion on October 27, 2020. 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.

15. On October 26, 2020, Plaintiffs also 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. This motion was fully briefed on November 16, 2020.

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. On the same date, NaturMed moved to exclude Dr. Cowan, as well as one of Bactolac's experts, James Lassiter. Plaintiffs also moved, on the same date, to exclude Mr. Lassiter, as well as Kendal D. Hirschi, Ph.D. On January 4, 2021, NaturMed withdrew its motion to exclude Plaintiffs' expert, Dr. Cowan. The remaining *Daubert* motions were fully briefed on January 4, 2021.

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

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) and motion for

judgment on the pleadings on NaturMed's crossclaims pursuant to Federal Rule of Civil Procedure 12(c). In particular, 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 Plaintiffs' common law unjust enrichment claims. The Court denied Bactolac's motion in all other respects, including its motion to strike Plaintiffs' request for punitive damages. In addition, the Court granted Bactolac's Rule 12(c) motion with respect 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.

19. On March 25, 2021, the Court conducted a status conference and directed the Parties to consider participating in the Court's mediation program. The parties thereafter consented to participate in the Court's mediation program and agreed to the appointment of Joseph DiBenedetto of JDB Mediation LLC as mediator.

20. On July 9, 2021, the Parties engaged in a full-day mediation at arms-length before Mr. DiBenedetto, at the conclusion of which the Parties reached an agreement in principle. They then spent the next several months negotiating the detailed written Settlement Agreement and exhibits that are now before the Court.

21. The Settlement provides, among other things, that as consideration for the release from Settlement Class Members, the Settling Defendants will pay \$1,725,000 in cash into a Settlement Fund and IVL2 will make available to the Settlement Class a total of \$1,889,420 in Settlement Credits. From the cash settlement, the Claims Administrator will create a \$100,000 Alternative Payment Fund. Each eligible Settlement Class Member will have the choice to receive

either a \$10 Settlement Credit redeemable for any IVL2 product for up to three years or a \$5 cash payment from the Alternative Payment Fund.

22. The Settlement also provides for postcard Notice to be mailed directly to customers who purchased one or more canisters of ADEG from the Recalled Lots. Settlement Class Members will have the option to either return the postcard (at no charge) to file a claim or to proceed to the Settlement Website to file a claim online.

### **PRELIMINARY APPROVAL**

23. Federal Rule of Civil Procedure 23(e) requires court approval of class action settlements. In general, the approval process involves three stages: (1) notice of the settlement to the class after “preliminary approval” by the Court; (2) an opportunity for class members to opt out of, or object to, the proposed settlement; and (3) a subsequent hearing at which the Court grants “final approval” upon finding that the settlement is “fair, reasonable, and adequate,” after which judgment is entered, class members receive the benefits of the settlement, and the settling defendants obtain a release from liability. Fed. R. Civ. P. 23(e)(1)-(2), (4)-(5).

24. In deciding whether to grant “preliminary approval” of a proposed settlement, the Court evaluates two issues: (1) whether “the court will likely be able to” grant final approval to the settlement as a “fair, reasonable, and adequate” compromise, such that it makes sense to give notice to the proposed class members; and (2) whether “the court will likely be able to” certify the classes for purposes of entering judgment on the settlement. Fed. R. Civ. P. 23(e)(1)(B).

#### **I. The Court will “likely be able to” grant final approval to the Settlement as “fair, reasonable, and adequate.”**

25. This Circuit has recognized a “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). The compromise of complex litigation is encouraged by the courts and reflects “that

judicial policy favors the settlement and compromise of class actions.” *Dover v. British Airways, PLC*, 323 F. Supp. 3d 338, 349 (E.D.N.Y. 2018) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005)). A “presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.” *Wal-Mart Stores*, 396 F.3d at 116 (quoting *Manual for Complex Litigation (Third)* § 30.42 (1995)).

26. Under Federal Rule of Civil Procedure 23(e)(2), as amended in December 2018, in considering whether a proposed settlement is “fair, reasonable, and adequate,” the Court considers whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm’s length;
- (C) the relief provided for the class is adequate, taking into account:
  - (i) the costs, risks, and delay of trial and appeal;
  - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
  - (iii) the terms of any proposed award of attorneys’ fees, including timing of payment; and
  - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

27. Under this standard, the Court finds that it will “likely be able to” grant final approval to the Settlement as “fair, reasonable, and adequate,” such that the Settlement, its terms



and conditions, including releases of the Released Parties, warrants preliminary approval and dissemination of notice to the Settlement Classes so that Settlement Class Members may express any objections to the Settlement or decide whether to opt out of the Settlement or participate in it. The Settlement appears at this preliminary approval stage to be procedurally fair, reasonable, and adequate in that the Plaintiffs and Class Counsel have adequately represented the Settlement Classes in litigating the merits of the dispute and in obtaining a Settlement of significant value through arm's-length negotiations between and among sophisticated counsel and under the auspices of a sophisticated mediator. Fed. R. Civ. P. 23(e)(2)(A)-(B).

28. Likewise, the Settlement appears at this preliminary approval stage to be substantively fair, reasonable, and adequate in that the relief provided is not insubstantial, particularly when taking into account the costs, risks, and delays of trial. Fed. R. Civ. P. 23(e)(2)(C). Here, Plaintiffs pursued a “full refund” theory of damages, the appropriateness of which Bactolac strongly contested. Assuming Plaintiffs prevailed on that theory, each class member would be eligible to seek, at most, \$40 per canister of ADEG purchased from the Recalled Lots. The resolution proposed here provides class members with either 25% of the “full refund” value (if they choose Settlement Credit) or 12.5% of the “full refund” value (if they choose an Alternative Fund Payment). These are reasonable settlement values given the uncertainty of continued, protracted litigation.

29. The proposed method of distributing relief to Settlement Class Members is relatively streamlined, requiring, for almost all Class Members, submission of a simple Claim Form with basic identification information that will permit them to be matched to a customer appearing on the Recalled Lots Customer List. For nearly all Settlement Class Members, this is all

they must do, meaning most will not need to undertake the burden of submitting supporting eligibility documentation. Fed. R. Civ. P. 23(e)(2)(C).

30. Attorneys' fees and case expenses will be paid only after Final Approval and only by approval of the Court, which will consider any request for fees in conjunction with Final Approval. Fed. R. Civ. P. 23(e)(2)(C). The Parties have represented that there is one agreement to be identified under Fed. R. Civ. P. 23(e)(3). *Id.*

31. Finally, the proposal treats Settlement Class Members equitably relative to one another. Each eligible Settlement Class Member will have the exact same options: to obtain Settlement Credit or an Alternative Fund Payment. Fed. R. Civ. P. 23(e)(2)(D).

**II. The Court will “likely be able to” certify the Settlement Class for purposes of entering judgment on the Settlement.**

32. In considering whether the Court will “likely be able to” certify the Settlement Class for purposes of entering judgment on the Settlement, the Court must determine whether the Settlement Class likely meets the requirements for class certification under Federal Rule of Civil Procedure 23(a) (numerosity, commonality, typicality, and adequacy) and any one of the subsections of Federal Rule of Civil Procedure 23(b), here subsection 23(b)(3).

33. The Court finds, for settlement purposes only, that the Settlement Class satisfies the requirements of Fed. R. Civ. P. 23(a)(1)-(4) and 23(b)(3) and that it will likely be able to certify the proposed Settlement Class, which is 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.”

34. Additionally, the Court finds, for purposes of settlement only, that the Settlement Class is ascertainable because it is defined by objective criteria, *In re Petrobas Secs. Litig.*, 862

F.3d 250, 257 (2d Cir. 2017), and that it will likely be able to appoint Plaintiffs' Counsel as Class Counsel under Federal Rule of Civil Procedure 23(g).

35. The Settlement Class, if certified in connection with Final Approval, shall be for settlement purposes only and without prejudice to the Parties in the event the Settlement is not finally approved by this Court or otherwise does not take effect.

36. Accordingly, for settlement purposes only, the Court appoints the following Plaintiffs as Class Representatives for the Settlement Class: Charles Copley, Jason Evans, Humberto Garcia, Luz Angelina Garcia, Joan McDonald, John Peterson, Natalie Roberts, Donald Skare, individually and as personal representative for Betty Skare, David Stone, Kaye Wink, individually and as next of kin of Donald Wink, Jeffrey Faris, Antonia Hampton, Raul Robles, and Kathleen Cannon.

37. The Court appoints, for settlement purposes only, James J. Bilsborrow as Class Counsel under Federal Rule of Civil Procedure 23(g)(3). Class Counsel is authorized to act on behalf of the Settlement Class with respect to all acts required by, or which may be given pursuant to, the Settlement or such other acts that are reasonably necessary to consummate the proposed Settlement set forth in the Settlement Agreement.

38. Having found that (1) "the court will likely be able to" grant final approval to the settlement as a "fair, reasonable, and adequate" compromise, so that it makes sense to give notice to the proposed class members; and (2) "the court will likely be able to" certify the Settlement Class for purposes of entering judgment on the Settlement, the Court hereby **GRANTS** preliminary approval to the Settlement.

#### **NOTICE TO THE SETTLEMENT CLASS**

39. Upon granting preliminary approval under Federal Rule of Civil Procedure 23(e)(1), the Court “must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.” Fed. R. Civ. P. 23(c)(2)(B).

40. The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

41. “There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.” *Wal-Mart Stores*, 396 F.3d at 114 (quotation omitted).

42. The Court finds that the Notice Program, including the Short Form Notice that will be mailed to each individual appearing on the Recalled Lots Customer List, the Long Form Notice,

and the particulars of the Notice Program described in the Declaration of Bradley Madden Regarding Administration, satisfy these requirements and Due Process and constitute “the best notice that is practicable under the circumstances.” The Court appoints P&N as Claims Administrator and directs that the Notice Program be implemented as set forth in the Settlement.

#### **SETTLEMENT OF CLAIMS OF INCOMPETENT AND DECEASED CLASS MEMBERS**

43. This Order provides authority pursuant to N.Y. C.P.L.R. § 1201 for legal representatives of absent incompetent or deceased Settlement Class Members to sign Claim Forms and releases on behalf of the Settlement Classes they represent. An Order from this Court finally approving the Settlement shall effectuate a settlement under N.Y. C.P.L.R. § 1207 for all absent incompetent Settlement Class Members.

44. The legal representatives of deceased absent Settlement Class Members shall have authority to sign Claim Forms and releases on behalf of the absent Settlement Class Members they represent.

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

45. A Settlement Class Member may request exclusion from the Settlement at any time prior to the Opt Out deadline, provided an opt-out notice is sent to the Claims Administrator in accordance with the procedures set forth in the Settlement Agreement. Any Settlement Class Member who elects to opt out of the Settlement shall not be entitled to receive any benefits conferred by the Settlement. Any Settlement Class Member who does not timely and validly request to opt out shall be bound by the terms of the Settlement, including the Release.

46. Objections to the Settlement, to the application for attorneys’ fees and costs, and/or to the Service Award must be served on the Parties in accordance with the Settlement. Class

Counsel and/or the Settling Defendants may conduct limited discovery on any objector or objector's counsel consistent with the Federal Rules of Civil Procedure.

47. Except for Settlement Class Members who have timely asserted an objection to the Settlement, all Settlement Class Members shall be deemed to have waived all objections and opposition to the fairness, reasonableness, and adequacy of the Settlement.

#### **MOTION FOR FINAL APPROVAL, FEES, EXPENSES, AND SERVICE AWARDS**

48. Plaintiffs shall file their Motion for Final Approval of the Settlement, as well as Class Counsel's application for attorneys' fees and costs, for a Service Award to the Plaintiffs, and for all Settlement Administration Costs, no later than ninety days from the Notice Date. At the Final Approval Hearing, the Court will hear argument on Plaintiffs' Motion for Final Approval of the Settlement and on Class Counsel's application for attorneys' fees and expenses, for the Service Award for the Plaintiffs, and for all Settlement Administration Costs.

#### **FINAL APPROVAL HEARING**

49. The Court will hold a Final Approval Hearing on \_\_\_\_\_, at \_\_\_\_\_ a.m./p.m., at the United States District Court for the Eastern District of New York, 225 Cadman Plaza E., Brooklyn, New York 11201, or by video conference or teleconference if determined by separate order, to assist the Court in determining whether to grant Final Approval to the Settlement, enter a Final Approval Order and Judgment, and grant any motions for fees, expenses, and the Service Award.

#### **OTHER PROVISIONS**

50. Class Counsel and counsel for the Settling Defendants are authorized to take, without further approval of the Court, all necessary and appropriate steps to implement the Settlement according to its terms, including implementing the Notice Program.

51. Pending determination whether the Settlement Agreement should be granted Final Approval, further proceedings against the Settling Defendants are stayed in this Action, other than proceedings necessary to carry out or enforce the terms of the Settlement.

52. The Settling Defendants shall serve the appropriate government officials with the notice required by 28 U.S.C. § 1715 within the time provided by statute.

53. Without further orders of the Court, the Parties may agree to make non-material modifications to the Settlement Agreement (including the exhibits thereto) in implementing the Settlement that are not inconsistent with this Preliminary Approval Order, including making minor changes to the Settlement Agreement, to the form or content of the Short Form and Long Form Notice, or to any other exhibits that the Parties jointly agree in writing are reasonable or necessary.

54. The Court shall retain jurisdiction over the Settlement Agreement and shall consider all further matters arising out of or connected with the Settlement.

### **SCHEDULE OF DEADLINES**

55. The Court sets the following deadlines:

<b>Event</b>	<b>Date</b>
Deadline for the Settling Defendants to pay \$1,725,000 in cash into the Escrow Account	No later than 20 days from the date of this Order
Deadline for Claims Administrator to commence the Notice Program	No later than 30 days from the date of this Order
Commencement of the Enrollment Period	30 days from the date of this Order
Opt Out Deadline	60 days from the Notice Date
Objection Deadline	60 days from the Notice Date
Deadline for filing a Motion for Final Approval and any petition for an award of attorneys' fees, costs, and Service Awards	90 days from the Notice Date

Final Approval Hearing	<hr/> (approximately 120 days from the Notice Date, or when convenient for the Court)
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**SO ORDERED.**

Date: \_\_\_\_\_

\_\_\_\_\_  
Hon. Frederic Block  
U.S. District Judge