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.[1] 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

[1] 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.[2] (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.*)

[2] 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 themself 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.[3] (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

[3] 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.[4] *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

[4] 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.[5] (*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.

[5] 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.[6] *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.

[6] 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.

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Respectfully submitted,

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